SIXTEENTH ANNUAL

WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL

ARBITRATION MOOT

MARCH 31 – APRIL 7 2019

HONGKONG

MEMORANDUM FOR RESPONDENT

西安交通大學法学院

XI'AN JIAOTONG UNIVERSITY SCHOOL OF LAW

XIAN JIAOTONG UNIVERSITY SCHOOL OF LAW

ON BEHALF OF:	**AGAINST:**
BLACK BEAUTY EQUESTRIAN	PHAR LAP ALLEVAMENTO
2 SEABISCUIT DRIVE	RUE FRANKEL 1
OCEANSIDE	CAPITAL CITY
EQUATORIANA	MEDITERRANEO
RESPONDENT	**CLAIMANT**

YUAN MENG • JIANG XIANGYU • LIU YUXUAN • WANG YITONG

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AAA 1997	American Arbitration Association International Arbitration Rules
BGE	Entscheidungen des Bundesgerichts (decisions of the Swiss Federal Tribunal, official reporter)
BGH NJW	Bundesgerichtshof – German Federal Supreme Court, Neue Juristische Wochenschrift
Bundesgerichtshof	German Federal Supreme Court
CO	Swiss Code of Obligations (Code des obligations suisse, Schweizerisches Obligationenrecht)
Colum. L. Rev.	Columbia Law Review
Draft	Draft Common Frame of Reference, Article III - 1:110(2)
IBA rules of evidence	International Bar Association Rules of Evidence
ICC 1998	Rules of Arbitration of the International Chamber of Commerce
ICC Hardship Clause	ICC Hardship Clause 2003
LCIA RULES 1998	London Court of International Arbitration Rules

official records	Nations Conference on Contracts for the International Sale of Goods, Vienna, Mar. 10, 1980-Apr. 11, 1980, Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees at 86, 249-50 U.N. DOC. A/CONF.97/19 (1981)
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UNCITRAL 1976	Arbitration Rules of the United Nations Commission on International Trade Law1976
UNCITRAL Model Law 1985	Model Law on International Commercial Arbitration 1985
WIPO Arbitration Rules	World Intellectual Property Organization Arbitration Rules

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TABLE OF ABBREVIATIONS

&	and
Answer	Answer to the Notice of Arbitration
Art.	Article
CCIRF	Chamber of Commerce and Industry of the Russian Federation (Moscow)
CISG	United Nations Convention on Contracts for The International Sale of Goods
Co.	company
Contract	FROZEN SEMEN SALES AGREEMENT
ed.	edition
et al.	and others
Exhibit C	CLAIMANT's Exhibit
Exhibit R	RESPONDENT's Exhibit
ff.	and following
i.e.	id est (that is)
Ibid.	ibidem
ICC	International Chamber of Commence
Jan	January
Jul	July
Jun	June
Ltd	Limited
Mar	March
Mr.	Mister
Ms.	Miss
No	Number

Notice	Notice of Arbitration
Nov	November
p.	page
para.	paragragh
PO	Procedural Order
Sep	September
U.K.	United Kingdom
U.S.A	United States of America
UN	United Nations
UNCITRAL	United Nations Commission on International
UNIDROIT	International Institute for the Unification of Private Law
USD	US Dollars
v.	versus

STATEMENT OF FACTS

1 The parties to this arbitration are Phar Lap Allevamento (hereafter "CLAIMANT") and Black Beauty Equestrian (hereafter "RESPONDENT").

2 Claimant is a company operates the oldest and most renown stud farm in Mediterraneo.

3 RESPONDENT is a company that is famous for its broodmare lines in Equatoriana.

21 Mar 2017	RESPONDENT sends CLAIMANT an invitation to offer 100 doses of frozen semen from Nijinsky III.	Exhibit C1, p.9
24 Mar 2017	CLAIMANT accepts to offer frozen semen and added that purchase must base on law of Mediterraneo.	Exhibit C2, p.10
28 Mar 2017	RESPONDENT expressed the willing to cooperate and suggest reduction on price and delivery by DDP. RESPONDENT insists the courts of Equatoriana have jurisdictionthe if application of the Law of Mediterraneo.	Exhibit C3, p.11
31 Mar 2017	ClAIMANT accepted DDP and increased the price by 1,000 USD per dose. Also CLAIMANT proposed a hardship clause to avoid risks related to additional safety and health requirements. CLAIMANT rejected the jurisdiction of the courts in Equatoriana, opt for arbitration in Mediterraneo.	Exhibit C4, p.12

10 Apr 2017	RESPONDENT made a draft arbitration clause that was based on the model clause suggested by the HKIAC but narrow-worded, and proposed the seat of arbitration shall be Equatoriana, on the mean time, the law of this arbitration clause shall be the law of Equatoriana.	Exhibit R1, p.33
11 Apr 2017	CLAIMANT accepts to arbitrate under the HKIAC and suggests arbitration in Danubia on the premise that applicable law to Sales Agreement remains the law of Mediterraneo. CLAIMANT also advise to rely on ICC-Hardship clause.	Exhibit R2, p.34
12 Apr 2017	Car accident causes severe injuries to two main negotiators.	Notice of Arbitration, p.5
6 Jun 2017	CLAIMANT and RESPONDENT made the final sales contract.	Exhibit C5, p. 13,14

Nov 2017	Government of Mediterraneo announced 25 per cent tariffs on agricultural products from Equatoriana.	Notice of Arbitration, p. 6
20 Dec 2017	Equatoriana imposed a tariff of 30 per cent upon all agricultural goods from Mediterraneo.	Exhibit C6, p.15
20 Jan 2018	CLAIMANT contacted RESPONDENT to notify the situation and seek solution.	Exhibit C7, p.16
23 Jan 2018	CLAIMANT delivered the remaining 50 doses of semen	Notice of Arbitration, p.6
31 Jul 2018	CLAIMANT submits the enclosed Notice of Arbitration.	Notice of Arbitration, p.4
24 Aug 2018	RESPONDENT submits Answer to the Notice of Arbitration.	Answer, P.29

ARGUMENTS

ISSUE 1: UNDER THE ARBITRATION AGREEMENT, THE TRIBUNAL CAN NOT ADAPT THE CONTRACT.

I. DANUBIA LAW APPLIES TO THE ARBITRATION AGREEMENT, NOT MEDITERRANEAN

1.Under arbitration agreement, the law of Danubia shall apply, which recognizes that arbitrators may adapt contracts but requires an express empowerment for that.

A. The separability principle indicates that the arbitration agreement is not subordinate to the contract, that is the jurisdictional provisions of the contract shall not be applied, while the arbitration clause shall be applied separately.

4 The independence of the arbitration clause means that although the arbitration clause is a clause of the contract, they are two independent or separate contracts. The arbitration agreement is different from the contract as it not only deals with the obligations of one party to the contract towards the other party, but also is authorized by the parties to the third party, that is to authorize the arbitration tribunal or arbitrator to settle the disputes related to the main contract. And their main difference lies in the fact that the arbitration clause provides for the rights and obligations shared by both parties, and the violation of this clause does not directly lead to the issue of compensation for damages. It is the enforcement of the agreement they have reached to settle their dispute by arbitration (including the law of arbitration, the choice of place of arbitration).

5 CLAIMANT and RESPONDENT concluded an arbitration clause in which agreed to submit the disputes that might arise to arbitration for settlement, and to apply the law of the place of arbitration, that is the law of Danubia. It would be contrary to the consensus of the parties to apply the law of Mediterraneo and exclude the law of Danubia. And this kind of exclusion is the negation of the principle of autonomy.

6 The arbitration agreement is independent of the contract and shall not be invalidated, terminated, invalidated, altered or assigned by the contract. The independence of arbitration clause has theoretical and practical basis. The vast majority of countries largely recognize the independence of the arbitration clause. The arbitration clause is the source of the jurisdiction of the arbitration institution and the precondition of initiating the arbitration procedure.

B. International custom indicates that the arbitration agreement independent of the main contract.

7 In modern International Commercial Arbitration practice, recognition of the independence of arbitration clause has become the theoretical cornerstone of international arbitration.[*Gary B. Born*] At present, the separability principle has been generally accepted as a legal binding principle in arbitration legislation and practice in various aspects.

8 Some arbitration rules also provide for this, like Art. 21.2 UNCITRAL 1976, Art. 6.4 ICC 1998, Art. 23.1 LCLA 1998 and Art. 15.2 AAA 1997. The separability principle is clearly stipulated in the arbitration laws of some countries as a legal principle that must be observed (including Art. 7 British Arbitration Act 1996, Art. 3 Switzerland's Federal Code on Private International Law 1987, Art. 16.1 Russian Federal Code on International Commercial Arbitration 1993, Art. 1040.1 German Civil Procedure Law 1998, Art. 5.3 European Convention on International Commercial Arbitration of 1961 and Art. 16.1 UNCITRAL Model Law 1985).

9 The case that established the separability principle was in 1942 by a British court against Cheyman v. Darwins Ltd. In that case, the Court of Appeal noted that the arbitration clause could exist independently of the contract.[*Cheyman v. Darwins Ltd.*] In 1967, the judgment of the United States Supreme Court on Prima Paint co.v. Flood& Conklin manufactaring co. raised the independence of the arbitration clause to a new level.[*Prima Paint co.v. Flood& Conklin manufactaring co.*] The judgment of United Kingdom Court of Appeal against Habour Assurance co. v. Kansa General International Insurance Co shows that the British courts have fully recognized the

separability principle and confirmed the support of the judiciary for arbitration.[*Neil Kaplan*] The Supreme Court of France established the separability principle in Societe Gosset V. Societe Carapelli 1963. The Court held that in international arbitration, whether the arbitration agreement was expressed as a separate agreement or as part of the contract, except in exceptional circumstances, was completely independent. According to the interpretation of the French Supreme Court, the arbitration clause in an international contract is completely independent, even if the contract is invalid.[*Janet A. Rosen*] Judge Diplock of the House of Lords reconfirmed the separability principle in the Bremmer case in 1981. He pointed out that in the contract, arbitration clause strictly speaking is a separate contract subordinate to contract as a contract clause.[*Schmitov*] When the Supreme Court of Japan heard a case concerning arbitration, it pointed out that the validity of the arbitration agreement should be investigated independently from the contract. Unless the parties agree, the defects of the contract do not affect the validity of the arbitration agreement. The Swedish Court also stated its position of applying the separability principle in the case of Norscher Knitting Co., Ltd. v. Pell Persson Ltd.[*Norscher Knitting Co., Ltd. v. Pell Persson Ltd.*] Foster, J of the Federal Court of Australia, in the QH Tours Ltd and Another V. Design Man-agement (Aus) Pty Ltd and Another case of November 1991, noted that, in general, the arbitration clause was independent of the contract, and that is, if the parties authorize an arbitrator to determine the validity of the contract, the arbitrator may declare the contract null and void without prejudice to its jurisdiction.[*QH Tours Ltd andAnother V. Design Man-agement (Aus) Pty Ltd*]

10 All these illustrate that the separability principle has become a universal principle of law.

II. THE LAW OF DANUBIA SHALL BE APPLIED.

1. In accordance with the consensus and process of concluding the arbitration agreement, Danubian law is applied.

11 Although there is no explicit clause to regulate the applicable law to arbitration, national law must take its seat. According to Mann, an arbitration clause, as any other contract between private parties, cannot be suspended in the air, but must draw its authority from a national law provision. [*Mann*] It has been proved that arbitration agreement is independent from the whole contract, thus it cannot be taken for granted that Mediterraneo law also governs arbitration.

12 Recalling the process of concluding arbitration agreement, RESPONDENT's proposal had made clear its sincere wish for an arbitration agreement which was governed by the law of the place of arbitration and not by the law of the contract. Such a clause was actually included in Mr. Antley's latest draft of 10 April 2017 [*Exhibit R 1, p.33*]. While in CLAIMANT's reply, of 11 April 2017, CLAIMANT had changed the suggested place of arbitration but had not objected to our proposal that the law of the place of arbitration should govern the arbitration agreement, and that is the law of Danubia[*Exhibit R 2, p.34*].

13 CLAIMANT and RESPONDENT concluded an arbitration clause, agreed to submit the possible dispute to arbitration, and applied the law of the place of arbitration Danubia, which indicated the true meaning that both parties were unwilling to resolve the dispute by other means, and reflected the autonomy of the parties.

14 For the arbitration clause, RESPONDENT has claimed its perspective to avoid the jurisdiction of Mediterraneo [*Exhibit C 3, p. 11, para. 4*], then CLAIMANT suggested an eclectic method to arbitrate in a neutral Danubia [*Exhibit R 2, p. 34, para. 4*]. The intent of both parties is obviously to reach a neutral method that will not prefer any side, thus the law of Mediterraneo will under no circumstance be the law governing arbitration. On the contrary, Danubia has been confirmed as a neutral country to have jurisdiction on the deal, Danubian law is implicitly accepted by parties.

2. Lex arbitri has been generally accepted in the absence of law applied to arbitration.

15 It is generally accepted that in the absence of express law applied to arbitration, the law of arbitration seat is applied. [*Mann*] When parties only agree on applicable law to substance and seat of arbitration, leaving law governing arbitration, the behavior of parties to choose arbitration seat and appoint arbitrators shall be regarded to implicitly accept the law in seat of arbitration [*Societd O.C.P.C. v. la Societd KG. Wilhelm Diefenbacher*] In the same condition [*Exhibit C 5, p. 14, No. 15*], CLAIMANT and RESPONDENT should be regarded to recognize the law of Danubia as applicable law of arbitration.

III. AS PROCEDURUAL RULE, "FOUR CORNERS RULE" SHALL BE ENFORCED.

16 According to Art. 22.2 of HKIAC rules which parties has made it clear to apply in the arbitration [*Exhibit C 5, p. 14, No. 15*], the tribunal can decide whether a strict evidence rules should be applied. Thus, "four corners rule" can be applied in the arbitration.

17 Under no doubt, Danubian law governs the arbitration under the contract. "Four corners rule", which is part of Danubian procedural law, should naturally be applied in the arbitration.

18 Moreover, According to the territorial (or jurisdictional) approach to international arbitration, arbitration operates within the framework of a national legal order. Thus, although arbitrators are free to apply foreign substantive law, they are required to abide by local procedural law. [*Lew*] Parties choose to arbitrate in Danubian must respect the legal order in Danubia, thus obviously Danubian law should be applied to arbitration.

19 Even different to practice in some municipal rules, or it is disagreed by several tribunal, a case-by-case perspective is needed to analyze the application of parol rule.

IV. ADAPTATION HAS NEVER BEEN AUTHORIZED.

20 Under Danubian law, express empowerment is required, without it, adaptation by arbitrator is unavailable. [*Answer, p. 31, No. 13*] As Danubian law applies "four corner rules" and excludes external evidence, only empowerment in contract can be verified. However, in the contract, there is no reference to adaptation clause, thus tribunal is not entitled to adapt contract.

21 Claiming for adaptation based on hardship is baseless. A state have exclusive sovereign on its territory. [*Brierly*] Thus, the conduct of arbitrations between private parties, which compromise most international commercial arbitrations, is in principle always subject to the jurisdiction of the state where the arbitration takes place. To expressly entitle the power to adaptation is mandatory rules in Danubia, and out of the respect to sovereign of Danubia, "four corners rule" should be applied irrespective of the substantive law that applied to contract.

CONCLUSION FOR ISSUE 1

22 Arbitration agreement is considered to be independent from the main contract through both international custom and party autonomy, thus the law of Mediterraneo is not naturally applied to arbitration clause in the contract.

23 On the contrary, parties excluded the application of Mediterraneo law in arbitration. To make clear the intent, both parties have agreed to award Danubia to arbitrate on the contract. Furthermore, *lex arbitri* is a common practice when there is no agreement on arbitration law. Parol evidence and the the rule to authorize arbitrator the power to adapt contract implicitly, as the procedure rules, shall be applied in this sense.

24 Out of respect to sovereign of Danubia, mandatory rule should also apply, any provision against it can never bypass it. It is apparently no express empowerment in the contract, thus adaptation of contract goes beyond the jurisdiction of tribunal.

ISSUE 2: CLAIMANT IS NOT ENTITLED TO ANY PAYMENT.

I. ADDITIONAL TARIFFS DO NOT FALL INTO THE SCOPE OF CLAUSE 12 IN THE CONTRACT.

1. Clause 12 include a narrow hardship clause.

25 To illustrate the scope of hardship in clause 12, the process of making contract shall be considered.

A. CLAIMANT did not rejected all risks.

26 To illustrate the scope of hardship in clause 12, the process of making contract shall be considered. The intention of party should be taken into account when interpret contract, but unlike the view of CAIMANT that RESPONDENT has known CLAIMANT's intention of not bearing any risks, CLAIMANT did not deny the possibility to bear risks. After the delivery clause changed into DDP, CLAIMANT did express it did not want to bear all responsibilities arousing from delivery, however it is not a valid expression. CLAIMANT made a reservation to risks by suggesting at least an inclusion of hardship clause, which meant CLAIMANT accepted to risks that cannot be covered by hardship or force majeure clause.

27 To make it clear, CLAIMANT referred to the event happened in 2014 which improved their cost by 40% thus destroy the basis of deal. [*Exhibit C 4, p. 12, para. 5*] From it, CLAIMANT aimed to avoid the situation that make it onerous so much that damage the basis of deal, instead of only more onerous.

B. The intention of RESPONDENT is contradict to CLAIMANT, and CLAIMANT is bound to know it.

28 When it comes to the intention of RESPONDENT, RESPONDENT has known the intention of CAIMANT was to include a broad hardship clause, but RESPONDENT rejected it from the beginning. Mr. Antley wrote down his opinion to address in the next round, that "*ICC hardship clause suggested by claimant too broad*". In the subsequent negotiation, Ms. Krone got his intention and discussed with Mr. John Ferguson on a narrow hardship. RESPONDENT insisted on its perspective, and CLAIMANT had no reason to remain unknown to it. [*Exhibit R 3, p. 35, para. 2*]

C. Common intention has shown their agreement on a narrow hardship clause.

29 Actually, the interpretation of clause 12 is not supposed to have disputes. When concluded the contract, both parties agreed the inclusion of a narrow hardship reference. [*Exhibit R 3, p. 35, para. 4*] According to Art.4.1 of UNDROIT principles, contract shall be interpreted by common intention. Therefore a narrow hardship should be considered.

2. The scope of a narrow hardship clause excludes the additional tariffs.

30 Hardship clause needs to be interpreted strictly, thus clause mentioning specific changes must be interpreted as meaning that no other changes should be taken into account. [*Oil Price Case; Price Adaptation Case*]

31 According to the clause 12 of contract, only hardship that *caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous* will fall into the scope of hardship. From Art.8 (1) of CISG, intent of party should be considered to interpret contract. Both parties have known the additional health and safety requirements refer to the event in 2014, as CLAIMANT has expressly said. [*Exhibit C 4, p. 12, para. 5*].

32 Apart from additional health and safety requirements, the characteristics of the event in 2014 are supposed to be 40% more onerous compared to the sales price, and unforeseen when concluded the contract, furthermore, the result of the event was considered to damage the basis of deal. [*PO2, p. 58, No. 21*]

33 Obviously, retaliation does not belong to health and safety requirements. [*Exhibit C 6, p. 15, para. 1*] For the comparable events, extra tariffs have little similarities to the additional health and safety requirements. At least, additional tariffs only added 30% of the sales price [*Exhibit C 6, p. 15, para. 1*], much lower than the proportion. Therefore the additional tariffs were out of the scope of hardship in the contract.

II. IT IS REASONABLE TO BURDEN CLAIMANT WITH THE RISKS BELOW HARDSHIP.

1. Mere onerous is not sufficient for hardship.

34 In international commercial law, according to the principle of *pacta sunt servanda*, mere onerous cannot constitute hardship. [*Schlechtriem; Magnus; Maskow; Joseph; Audit; Vincent*] From many sources of legislation, Principles of European Contract Law, Article 6:111(2), Draft Common Frame of Reference, Article III - 1:110(2) and ICC Hardship Clause 2003 para. 2(a) all provide that hardship can only be found if the performance of the contract has become excessively onerous.

2. The obligations were acceptable to both parties when concluded the contract.

35 There is no particular figure for RESPONDENT's payment for DDP. An overall price of 100,000 per dose was agreed finally, it cannot deduce the payment for DDP was cut off to 500 USD, thus the price should not be the reason to relieve CLAIMANT's responsibilities. Even as CLAIMANT said, payment of 500 USD for delivery is still 2.5 times of the direct costs of transportation and delivery which are only 200 USD per dose, it is obviously not only for delivery but also for risks related. [*PO2, p. 56, No. 8*]

36 Apart from DDP, in clause 10 and 13 of the contract, RESPONDENT undertook all tank rental, handling fees and insurance during the delivery, which were in nature should be bore by CLAIMANT through DDP. [*PO2, p. 55, No. 3*]

3. Personal situation shall not influence the deal.

37 A deterioration of a party's financial situation is, in principle, that party's own problem and that party cannot therefore shift that risk to other parties. [*Roth*] To lower the hardship threshold is just exceptional situation that cannot be easily applied. CLAIMANT's difficult financial situation is not enough to result in financial ruins, thus cannot constitute hardship. CLAIMANT is still operating Mediterraneo's oldest and most renown stud farm as CLAIMANT said itself. [*Notice, p. 4, No. 2*] Although it makes loss these years, it still has the capacity to undertake the additional tariffs,

thus cannot transfer risks to RESPONDENT due to loss. [Fucci] The result of CLAIMANT's taking all tariffs obviously will not lead to its bankrupt or financial ruins, but simply add the possibilities to sell one of its departments. [*PO 2, p. 59, No. 29*] The ruins of one department cannot be considered as financial ruins of CLAIMANT. [*BGH NJW (1977): 2262, 2263*]

38 Moreover, if an assessment of the whole contractual context suggests that the debtor's financial ruin is due to a lack of managerial skills or resources, the debtor should not be entitled to lower the alteration threshold. Otherwise, parties without resources may be unjustly favoured. [*Brunner*] CLAIMANT began to make loss since 2014 due to its poor-managed expansion. [*PO 2, p. 59, No. 29*] RESPONDENT have no reason to take responsibility for CLAIMANT's poor management.

III. ART. 6.2.2 OF UNIDROIT PRINCIPLES CANNOT BE APPLIED TO INTERPRET CONTRACT.

39 Hardship clause in contract derogates the application of Art. 6.2.2 in UNIDROIT principles. According to Art. 1.5 of UNIDROIT Principles, parties can exclude and revise the principles. Through stipulating that hardship is *caused by additional safety and health requirements or comparable unforeseen events that makes contract more onerous*, and CLAIMANT is not responsible for such situations, Clause 12 in contract has established a hardship clause that is different from UNIDROIT Principles, thus Art 6.2.2 UNIDROIT Principles cannot replace party autonomy.

40 UNIDROIT Principles Art. 6.2.2 cannot be justified to regulate hardship through *lex mercatoria*. UNIDROIT Principles are a set of rules that are theoretically suited as a basis for future *lex mercatoria*, there is not at present any possibility of referring to Articles 6.2.2 as the equivalent of current trade usage in international practice. [*ICC 8873; ICC 9029*] Professor Bortolotti also argues that Art. 6.2.2 not only cannot correspond to present practice, but also leaves too much space for uncertainty and possible abuse, thus it is inappropriate to regard it as common practice. [*Bortolotti*]

41 Although in another arbitration, RESPONDENT claims for hardship upon UNIDROIT Principles, but situation should be analyzed on a case-by-case basis, after

all, the process of negotiation remains unknown. [*PO 2, No. 39*]

IV. CLAIMANT CANNOT CLAIM FOR ANY PAYMENT THROUGH ADAPTING CONTRACT.

42 There is no explicit adaptation clause in the contract, nor implicit one.

1. No explicit adaptation was inserted in the contract.

43 As adaptation clause has a great impact on interests of parties, it cannot be implicit. [*Kramer; Wiegand; Jäggi/Gauch; Farnsworth*] Obviously, the contract has no reference to adaptation. [*Exhibit C 5, p. 13, 14*]

2. Implicit adaptation clause does not make sense.

44 Even if adaptation clause can be implicit, it cannot satisfy the requirement to make a valid implicit adaptation.

A. Parties did not mean to insert an implicit adaptation clause to hardship clause.

45 CLAIMANT suggested hardship clause depending on ICC hardship clause, which does not provide the remedy of adaptation. When suggested on hardship clause, CLAIMANT expressed its preference to rely on ICC hardship clause. For the remedy of hardship, ICC hardship clause provides *where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this clause is entitled to termination of the contract*, which means to entitled the aggrieved party the right to terminate contract bilaterally when negotiation cannot solve the dispute. Apparently, ICC hardship clause does not include adaptation clause. CLAIMANT cannot be unaware of it since it is suggested by them, therefore it can be deduced that CLAIMANT did not mean to contain adaptation in hardship clause.

46 CLAIMANT regarded adaptation clause a separate part from hardship clause. CLAIMANT suggested to add an adaptation clause to contract during negotiation [*Exhibit C 8, p. 17, para. 4*], which means CLAIMANT did not think hardship clause itself provides adaptation.

B. Valid implicit adaptation clause was not established.

47 For a valid implied term, it requires that the contract includes a sufficiently specific and comprehensive indication as to how the parties would have dealt with a particular event. [*Kramer*] In particular, the mere consciousness of both parties that the deal might possibly not be implemented as envisaged does not turn the parties' mutual performance obligations into conditional ones. [*BGE 88 II 195, 203 (1962)*] Ms. Napravnik proposed a very general adaptation clause, and Mr. Antley just expressed an ambiguous attitude to it, [*Exhibit C 8, p. 17, para. 4*] thus it cannot constitute a binding clause. Furthermore, Mr. Antley did not expressly show he agreed Ms. Krone, which illustrated RESPONDENT's perspective. [*Exhibit R 3, p. 35, para. 3*]

CONCLUSION FOR ISSUE 2:

48 CLAIMANT cannot be provided payment from hardship clause in the contract through adaptation. Firstly, both parties have reached agreement on a narrow hardship clause, thus the additional tariffs cannot be covered by clause 12 of contract. Other elements such as the nature of the additional tariffs, the payment of delivery and financial ruins is not sufficient for hardship. Art. 6.2.2 of UNIDROIT principles was derogated due to the complete hardship clause made by parties. Applying Art. 6.2.2 to interpret hardship clause as supplementary source or *lex mercatoria* is also inappropriate.

49 Secondly, adaptation through contract is baseless. No adaptation clause was reached, and even if general adaptation was agreed, it is not a valid adaptation clause therefore cannot be enforced.

ISSUE 3: EVEN THROUGH CISG OR UNIDROITPRINCIPLES, TRIBUNAL IS NOT ENTITLED TO ADAPT CONTRACT.

I. CLAIMANT CANNOT APPLY CISG FOR REMEDIES.

1. Art. 79 of CISG cannot be applied to hardship in the contract.

A. Art. 79 of CISG does not regulate hardship.

50 Art. 79 in CISG has no reference to hardship, but only regulate impediment. [*Tallon*]

51 Through the process of drawing up CISG, the intention of drafter is to exclude hardship from Art. 79 of CISG.[*Tallon, Bianca& Bonell*] From the beginning of the preliminary sessions, lively discussion had arisen on the terminology to be used in Article 79 of the CISG as it was considered that the use of the generic term 'circumstances' might make it easy for the party claiming hardship to evade responsibility.[*Honnold; Bonell*] The discussion resulted, after various proposals had been presented by the delegates of the participating nations, in the use of the term 'impediment' and thus excluding any connection to changed circumstances and hardship. [*Stoll*]

52 In practice, Art. 79 of CISG is also confirmed not to regulate hardship, as impediment only release parties from impossible obligations from unforeseeable changed circumstance. [*Bonell; Socifti Romay AG v. SARL Behr France*]

B. Contract derogated Art. 79 of CISG.

53 Even if Art. 79 is regarded to regulate hardship, parties have already derogated the application of Art. 79 in CISG according to Art. 6 in CISG.

i. Derogation of CISG can be implicit.

54 During the process to draft CISG, "*the majority of delegations was . . . opposed to the proposal according to which a total or partial exclusion of the Convention* could only be made 'expressly.' " [*Official records, at 86, 249-50; Audit2; Pilts*] Consequently, the lack of express reference to the possibility of an implicit exclusion must not be regarded as precluding such possibility. In CISG Advisory Opinion No. 16, it has also been recognized that implicit derogation is possible to trigger exclusion.

ii. An implicit derogation is reached.

55 The precondition that applicable law is CISG or the law of a contracting state is obviously satisfied. [*Exhibit C 5, p. 14, No. 14; Bonnell*]

56 Implicit derogation is supposed to be clear. [*CISG Advisory Opinion No. 16; Bonnell; Cedar Petrochemical Inc. v. Dongho Honnong Chemical; S.A. A. t. v. N.V. B.*] CLAIMANT and RESPONDENT have clear common intention on it. By expressly suggesting an inclusion of hardship clause, [*Exhibit C 4, p. 12, para. 5*] and then advised on ICC hardship clause, CLAIMANT proposed to establish a hardship clause through party autonomy, Art. 79 of CISG was thus excluded. [*Exhibit R 2, p. 34, para. 4*] RESPONDENT agreed to negotiate on hardship clause, and after taking consideration of CLAIMANT's concern, they reached a specific hardship clause in contract. [*Exhibit R 3, p. 35, para. 5*]

57 Implicit derogation need to be different from the CISG provision. [*Borisova; Machine Case*] Parties intended to include a hardship clause that was closely related to additional health and safety requirements or comparable events. [*Exhibit R 3, p. 35, para. 5*] From another aspect, Art. 79 of CISG only stipulates a special pattern of changed circumstance, which is breaching contract out of impediment beyond control. [*Honnold; Brunner; Hanns; Wilhelm*] In comparison, hardship in clause 12 of contract only relieves seller from hardship out of particular risks and does not require the result of breaching the contract. Parties in actual established hardship clause that is inconsistent to CISG.

58 In conclusion, as CISG is applied to the contract, and parties through common intention, clearly expressed their desire to make a hardship clause adopted to the deal, a hardship clause that varies to Art. 79 of CISG is formed. In another word, hardship in clause 12 derogates the application of Art. 79 in CISG implicitly.

2. Even if Art. 79 can be applied to hardship in the contract, it cannot provide remedies.

A. The additional tariffs cannot be covered.

59 Article 79 of the CISG relieves a party from paying damages only if the breach of

contract was due to an impediment beyond its control. [*Ibid.*] However, the additional tariffs is not sufficient for an impediment. CLAIMANT actually assumed the additional tariffs and performed its obligation, thus does not satisfy the precondition of breaching contract.

60 Threshold of impediment did not meet. Although there is no concrete figure of benchmark, according to various cases, tribunals hold a reluctant or careful attitude to confirm impediment under CISG. [*Steel Bars Case; Nuova Fucinati v. Fondmetal; Joseph*] In general, even a price increase or decrease of more than 100 percent would not suffice. [*FeMo Alloy Case; Steel Rope Case; Frozen Rasberries Case; Polyurethane Foam Case 2001; Polyurethane Foam Case 2004*] CLAIMANT only encountered 30% tariffs increase which is far below the basic condition. Impediment cannot be confirmed without reaching threshold of impediment, whether it was unforeseen when conclude the contract. [*Stoll/Gruber; Honnold; Brunner*] Thereby, CLAIMANT is expected to overcome the additional tariffs.

B. CISG does not provide remedies other than exemption from liability for hardship.

61 Even if the additional tariffs is an impediment, CLAIMANT cannot get remedies except exemption from liability.

i. The only effect directly from IMPEDIMENT is to exempt CLAIMANT from liability.

62 From Art. 79 of CISG, "*a party is not liable for a failure to perform any of his obligations"* is all effect of impediment. Hardship, if falls into the scope of Art. 79 of CISG, can only get effects that have been provided for, thereby CLAIMANT cannot require adaptation from Art. 79 of CISG. [*Bonell*]

63 At least, adaptation is not explicitly included in CISG, thus should be regarded as impossible. [*Rimke*]

ii. Remedies for hardship cannot be deduced from Art. 7(1).

64 Art. 7(1) introduces a general principle of good faith, and it is inappropriate to be applied to an express decision. [*Tallon*] The principle of good faith must not be used

to bypass explicit provisions of the Convention particularly Article 79(5), which states the legal effects of the exemption. Furthermore, if it were to be regarded as the legal basis of the theory of *imprévision* in international sales, harmony would be jeopardised and the aim of the Convention, as stated in Article 7(1), would not be attained.[*Rimke*]

iii. Remedies for hardship cannot be deduced from Art. 7(2).

65 To introduce UNIDROIT Principles as general principles to supplement CISG is impossible. On the one hand, the history of Art. 79 rules out the assumption of the existence of a gap. Proposals brought forward during the drafting process of the CISG to make provision for those situations were expressly rejected. Moreover, the purpose of Article 79 is to set definite limits on the promisor's liability for breach of contract. Judges and arbitrators, therefore, cannot use the provisions on hardship of the UNIDROIT Principles to interpret or supplement the CISG. [*Rimke*]

66 On the other hand, CISG does not clarify which principles it bases. UNIDROIT Principles is made to be *better law*, it does not correspond to the present situation. [*Bortolott*,] UNIDROIT Principles does not regulate impediment, it is difficult to seek remedies from UNIDROIT Principles. Even if CISG Art. 79 is considered to regulate hardship, the definitions in Art. 79 of CISG and Art. 6.2.2 are different, thus remedies from UNIDROIT Principles cannot be applied to Art. 79 of CISG.

iv. Art. 50 of CISG cannot offer remedies for CLAIMANT.

67 Art. 50 is separate from any claim for damages, the buyer can still claim a price reduction for defects under those circumstances. [*Honnold*] CLAIMANT can claim for other damages on the basis of Art. 79(5), but not directly from hardship, that is to say, Art. 50 has no direct connection to impediment, it can only make effects when the conditions of Art. 50 are satisfied.

68 According to Art. 50, it expressly entitle the right of adapting contract to buyer, thus the right to reduce price is the bilateral right of RESPONDENT, which cannot be claimed by CLAIMANT. [*Schlechtriem*] RESPONDENT has never showed its preference to claim on price reduction, it is unreasonable for CLAIMANT to propose

adapt contract relying on Art. 50.

69 In practice, Art. 50 is only used to in the case that if the seller is exempted under Article 79 CISG from liability for damages, the buyer may reduce the purchase price under Article 50 CISG in case of non-conforming delivery. [*Flippe Christian v. Douet Sport Collections*]

C. There is no gap to be filled in CISG Art. 79, other recourses are not available to offer remedies.

70 The history of Article 79 excludes the possibility that there is an unstated hardship in the Convention. Article 79's purpose of establishing definite limits as to a promisor's responsibility for breach of contract also supports that. Resort to domestic laws is precluded by Article 7(2). If the domestic law applicable under conflicts rules were applied to fill a supposed gap, there would be a danger of the CISG's liability system "bursting." This is due to the fact that domestic legal systems differ greatly from each other in regard to rules of hardship or *imprévision*. [*Stoll; Rudolph*]

II. ART. 6.2.3 OF UNIDROIT PRINCIPLES CANNOT BE APPLIED.

1. Art. 6.2.3 of UNIDROIT principles has been excluded by parties.

71 Through Art. 1.5 of UNIDROIT Principles, parties can exclude or modify certain provisions. Since when parties negotiated on hardship clause, neither of them based on UNIDROIT Principles and the hardship clause in clause 12 is different from Art. 6.2.2 and Art. 6.2.3, thus a derogation of Art. 6.2.2 and Art. 6.2.3 should be confirmed. [*Exhibit C 5, p. 14, 15*]

2. As the remedies of hardship in Art. 6.2.2 of UNIDROIT principles, to apply Art. 6.2.3 without sufficing Art. 6.2.2 is baseless.

72 Art. 6.2.3 is the effect of Art. 6.2.2, which regulated hardship, the additional tariffs do not satisfy the conditions of Art. 6.2.2 thus cannot trigger the effect.

A. The event is foreseeable.

73 According to Art. 6.2.2 of UNIDROIT Principles, the event that causes hardship could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract. since“*almost everything that ever happens is in*

some sense foreseeable," only an event that is "*so outside the bounds of probability that reasonable parties would not provide for it" may lead to hardship.*" [*Bund; Joseph*]

74 For the additional tariffs, a reasonable would take it into consideration when drawed up contract. Government of Mediterraneo had shown its tendency to protectionist in April 2017, especially in agricultural department, one month before the contract was concluded. The attitude of Mediterraneo just triggered retaliation by the Government of Equatoriana. Moreover, Equatoriana have imposed retaliation to other countries before. [*Exhibit C 6, p. 15*] Any reasonable person, especially any international trade entity cannot be sensitive to the big changes, nor can ignore the possibility of retaliation by Equatoriana. Therefore, CLAIMANT accepted all risks that were not contained in contract, including the additional tariffs.

75 Moreover, in international transactions where it is generally much less likely that the parties have been unaware of the risk of a remote contingency or unable to formulate precisely. [*ICC 1512*] The award exemplifies the restrictiveness with which arbitrators tend to interpret hardship in long-term international contracts. Parties who engage in these types of agreement do so willingly, expecting gains of some sort and should be aware of the risks. [*Simon*]

B. The result does not fundamentally alter the equilibrium.

76 The Official Comment on the 1994 edition of the PICC provided some guidance as to when an alteration in the contractual equilibrium may be considered fundamental, suggesting "*the performances are capable of precise measurement in monetary terms, an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a 'fundamental' alteration.*" This sentence was deleted in 2004 and 2010 version, because an increase of 50% is suggested not sufficient for fundamental alteration. [*McKendrick*] That is to say, the increase cost of obligor should exceed 50% to meet the threshold of hardship. Thus the 30% additional tariffs cannot be regarded as "fundamental".

77 For resell, CLAIMANT does not put forward any evidence that RESPONDENT can

profit directly from the deal, which, from CLAIMANT's perspective, is used to prove the equilibrium was altered. [*Notice, p. 8, No. 20*] To claim RESPONDENT made profits through reselling is baseless. Even as CLAIMANT said, RESPONDENT resold 15 doses of semen with 20% profit, it cannot be deduced that all 15 doses semen sold by RESPONDENT belongs to the last instalment. Deal before hardship, if it is considered to be, have already completed, thus CLAIMANT cannot claim any profit from former deal fall into the result of hardship that altered the equilibrium.

78 Even if 15 doses semen all belongs to the last instalment, RESPONDENT can only earn 300,000 USD, accounting for mere 6% of sales price of 50 doses semen, the hypothetical profit still cannot constitute imbalance of interests.

C. CLAIMANT should assume the risks.

79 To take the risk can be made not only expressly, but also be derived from the nature of the contract (prospective transactions) or be otherwise implied. [*Maskow*] As CLAIMANT agreed on DDP, CLAIMANT is naturally supposed to undertake all responsibilities directly from DDP. It is common practice that the party domiciled in the country arranges export and import and security clearance. Thus the buyer must clear the goods for import and pay duty, VAT and other taxes and charges levied upon import of the goods, unless the parties by choosing DDP have explicitly placed that obligation on the seller. [*Ramber*g] DDP expressly includes taxation, and there is no agreement to explicitly transfer the risks to RESPONDENT, thus CLAIMANT should assume them. [*Exhibit C 5, p. 13, 14*]

CONCLUSION FOR ISSUE 3:

80 Relying on CISG or UNIDROIT Principles to adapt contract is unavailable. Art. 79 does not regulate hardship, thus cannot be applied. If hardship is include in Art. 79, hardship clause made through party autonomy has excluded it implicitly. Or, additional tariffs cannot meet the requirements of impediment, especially does not fit in the pattern of impediment and the additional tariffs are much lower than the threshold of impediment, thus does not fall into the scope of Art. 79 in CISG.

81 Even it is regarded as an impediment, CLAIMANT can only be exempted from liability for damage. General principle of good faith cannot be applied to decide express case, otherwise it may be abused. Thus applying Art. 7(1) of CISG and introducing good faith to adapt contract is inappropriate. Supplementary interpretation of UNIDROIT Principles Art. 6.2.3 based on Art. 7(2) of CISG is impossible. As Art. 79 is strict defined, that does not allow any supplement. Moreover, UNIDRPIT Principles are actually not accepted as lex mercatoria, and adaptation is not common practice, thus cannot be applied.

82 To seek recourse of UNIDROIT Principles is not practical. Complete hardship clause does not leave space for Art. 6.2.2, and the conditions of UNIDROIT Principles are also stricter when compared to the reality.

ISSUE 4: CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS.

I. CLAIMANT SHOULD NOT BE ENTITLED TO SUBMIT THE PARTIAL INTERIM AWARD.

1. The Tribunal shall not admit the Partial Interim Award in the interest of justice.

A. CLAIMANT have compromised the obligation to facilitate the fair and efficient conduct of the arbitration.

83 Evidence (Partial Interim Award) from the other arbitration proceedings obtained through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's Computer system had undermined the rights of the RESPONDENT, in this way had compromised the obligation to facilitate fair and justice.

84 The two witnesses had been under a contractual obligation under Article 42 HKIAC 2013 Rules to keep all information about the other arbitral proceedings confidential. However, they must had compromised the obligation if this evidence were obtained from them and this kind of compromision is both a breach of contract and a damage to the reputation of RESPONDENT.

85 Or, this evidence were obtained from a hack of RESPONDENT's Computer system which occurred three weeks ago and where the hackers managed to retrieve a considerable amount of data. The illegal behavior of hackers damages the rights of RESPONDENT, at the same time, a large amount of data retrieved has made RESPONDENT in the state of unequal information in this arbitration, even including a large number of commercial secrets.

86 Such submission is a breach of justice, which lead CLAIMANT to a breach of Article 13.5 HKIAC Rules, but not RESPONDENT.

87 CLAIMANT used all means and even illegal means, acquired the Partial Interim Award against payment of 1000 USD from a company which provides intelligence on the horse racing industry [*PO 2, p.41*] to obtain evidence beneficial to himself but illegal or unrelated to this arbitration, which not only infringed the rights of

RESPONDENT, but also increased the burden of examination on evidence by the arbitral tribunal and undermined the efficiency of the arbitration. Contrary to CLAIMANT, RESPONDENT employed the same Counsel for both the present proceedings and the other arbitration for an efficient arbitration, and it is RESPONDENT's right to choose its arbitration Counsel freely, also, there are no rules to limit such kind of freedom.

88 RESPONDENT strongly objects to CLAIMANT’s malicious, false and misleading allegation of contradictory behavior as well as to the announced submission of materials from the other arbitration.

B. The Partial Interim Award is not related to the current proceedings.

89 On certain procedural issues, the other arbitration is somewhat similar to this arbitration, that is a sale contract negotiated by the same person, Mr. Antley, and provided for delivery DDP. However, this kind of similarity can happen in almost all of the contracts signed by RESPONDENT. In fact, differences in the Hardship Clause, the choice of law clause and other contract clauses, and the seller’s refusal of the subject in reality make the two cases different from each other in essence.

90 In this arbitration, there is no choice of law clause in favor of Mediterranean law and the Model HKIAC-Arbitration Clause with all additions, that is the reason RESPONDENT believed the tribunal lacked jurisdiction to decide the case, not even to adapt the contract. Other than that, there is no doubt that tariff would not result in hardship for CLAIMANT, for there is no such agreement between CLAIMANT and RESPONDENT. Also, the so called factual allegation that need another arbitration to establish in itself is doubtful.

91 Moreover, according to the independence of arbitration, as a partial award, The Partial Interim Award may be changed by the award on the merits and may not affect the other arbitration, not even this arbitration.

2. The Tribunal shall not admit the Partial Interim Award in the view of confidentiality.

A. CLAIMANT obtained evidence in a manner contrary to the implied or contractual obligation of confidentiality of the arbitration.

92 The difference between arbitration and litigation is that arbitration can be regarded as a business involving law, and the legal service of an arbitrator is a commercial commodity. For commodities, individuality and characteristics are its vitality. Confidentiality is the inherent attribute of arbitration and the implied obligation of law or contract. If arbitration is no longer confidential, it will lose its traditional features and the function of supplementary litigation system. As consumers of legal services, it is in their interest to have more options. Parties who choose arbitration to settle disputes also believe that arbitration will maintain the private nature to protect their image and reputation. Confidentiality is considered as the chief advantage of arbitration.[*Philip Harris*]

93 OXFORD AMERICAN DICTIONARY 1980 defines private nature as a closed and non-public arbitration procedure. Black's Law Dictionary 2004 holds that confidentiality means two things. One is secrecy, the state in which certain information is restricted from spreading, and the other is trust given by one party to the other in a particular relationship, such as lawyers and customers, and a relationship between husband and wife.[*Bryan A. Garner*] Olivier Oakley-White (2003), quoting the definition of private nature in Black's Dictionary of Law, points out that private nature is a condition or state in which a person acts or decides not to be harassed or interfered with by the public.[*Olivier Oakley-White*] That is, private nature is the state in which the program is not disturbed by a third party. Yang Liangyi considered arbitration to be private and the award was the private property of both parties. Yang said the arbitration costs both parties' money and does not owe anything to the public at all. So it can close the door and not be allowed to listen to by others, and the subsequent award is only the private property of both parties.[*Yang Liangyi*]

94 The private nature of the arbitration proceedings allows the parties to settle their

disputes in private, and the facts and results of the dispute are protected from the media's comments, which is conducive to the maintenance of their business reputation. The confidentiality of the arbitration is an important reason for the choice of arbitration, even the most important reason and is of great significance to the parties to the arbitration.

95 Confidentiality is currently assessed as a general feature of international arbitration, and it is generally convenient for one or both parties in the arbitration proceedings. Arbitration may prevent the disclosure of allegations that one party may cause harm to the other, while complying with the duty of confidentiality equally binds third parties, such as expert witnesses, etc.[*Cindy G.Buys*]The confidentiality of arbitration is of particular value to the enterprise and the state, because it helps the enterprise to protect the trade secret, the state to safeguard national security reputation. The confidentiality of arbitration proceedings is also a positive factor in reducing tension between the parties.[*Christina Knahr and August Reinisch*]

96 This is the traditional practice of arbitration and is widely respected in various countries as well as in relevant legal documents and practices. The confidentiality of arbitration should be accepted a priori as a principle.

97 32 countries have imposed confidentiality obligations on arbitration (including Algeria, Australia, Belarus, Bermuda, Costa Rica, Croatia, Czech Republic, Egypt, El Salvador, France, Indonesia, Lithuania, Morocco, New Zealand, Nicaragua, Nigeria, Panama, Peru, Romania, Scotland, Slovenia, Spain, Taiwan, Uganda, United Arab Emirates, United States, Venezuela and Zambia.） Austria, Ecuador, Britain, Singapore and Venezuela have imposed implicit confidentiality obligations on the parties concerned.

98 UNCITRAL 1976 contain strict confidentiality clauses. Under this rule, the results of arbitration decisions and other documents related to arbitration are rarely made publicly available to the public, such rules can also be seen from Art. 25.4 and Art32.5 UNCITRAL 1976, Art.30.3 LCIA RULES, Art. 3.2 and Art. 6 ICC 1998 and Art. 77 WIPO Arbitration Rules.

99 These rules have been proven in a large number of cases as well. In case Aita v .Ojjeh 1986, a party appealed in a French court to set aside an arbitral award made in London. The Paris Court of Appeal ruled against the party that the appeal procedure violated the principle of confidentiality as it provoked public debate over the facts of the arbitration case, which should have been kept secret. The private nature of arbitration obliges the parties to ensure that private disputes are carefully resolved, as they have agreed. The ruling is the strictest claim to the implied duty of confidentiality, that is the right of the parties to seek judicial redress is invalid because it conflicts with the duty of confidentiality.[*Aita v.Ojjeh*] In this arbitration, RESPONDENT believe it is CLAIMANT that should be liable for a breach of the confidentiality obligation of arbitration and ask for the tribunal to issue a ban on further disclosure of information. In Dolling-Baker v Merrett case (1990), the Court of Appeal held that due to the private nature of the arbitration, there should be an implied duty of confidentiality to bind the parties to the arbitration, so the parties should keep the arbitration documents confidential.[*Dolling-Baker v.Merrett*] In Hassneh Insurance Co.of Israelv .Steuart J.Mew 1993, the court accepted the view that *confidentiality is an implied obligation of arbitration* in the Dolling-Baker case.[*Hassneh Insurance Co.of Israel v.Steuart J.Mew*] Coleman J. held that the witnesses' Statements should fall under the obligation of confidentiality as disclosure of these documents to a third party is tantamount to opening the door to the arbitration room to a third party. In Ali Shipping v .Shipyard' Tro-gir' 1997, the Court reemphasized the principle of Dolling Baker, the existence of an implied obligation of confidentiality in international commercial arbitration, confidentiality is an inherent requirement of the private nature of arbitration.[*Ali Shipping v.Shipyard' Trogir'*] In Associated Electric &Gas Insurance Services Ltd.(Aegis)v .European Reinsurance Company of Zurich (European Re) 2003, Aegis held that any reference would violate the general principle of private nature of arbitration and a serious breach of the confidentiality agreement between the two; second, citation constituted abuse of the procedure.[*Associated Electric &Gas Insurance Services Ltd v European Reinsurance Company of Zurich*]

B.RESPONDENT believed that the public interest claimed by the CLAIMANT did not exist in this arbitration.

100 What is public interest, existing rules, decrees or jurisprudence are far from fully and reasonably defining exceptions to the obligation of confidentiality, the answer that applies in all cases does not existent. [*FrancoisDessemontet*] WIPO rules adopt a method of balancing interests, when arbitration secrecy causes real damage to the more important public interest or imminent danger of harm, the duty of confidentiality should be subordinated to the more important public interest. It is emphasized here that damage to public interest must be real or imminent. While any arbitration case with a political background involves the public interest, once such cases are classified as exceptions to arbitration confidentiality, the privacy exception will lose its significance. For example, the Hong Kong Government and the Cross-Harbour Tunnel Company was submitted to arbitration over whether the tunnel could be allowed to increase its charges. If the controversial issues are reported to the public every day, it will affect the stock fluctuation of the tunnel company, thus affecting the tunnel project, which is detrimental to the public interest. [*Yang Liang yi*] Therefore, only when arbitration secrecy causes real damage to more important public interest or imminent danger of harm, the duty of confidentiality should be subordinated to the more important public interest. It is clear that tax changes in this case, or they say concerns about whether tax changes can be considered as hardship clauses are not something worth protecting in a way that undermines the confidentiality of arbitration.

101 At the same time, even when international arbitration cases involve acts or omissions by multinational corporations of public concern, such as environmental pollution, exploitation of workers and exploitation of child labour, disclosure of information should be prevented from being too broad, We should define the public interest strictly, limit the scope of public interest, and not completely abandon the confidentiality of arbitration.[*Buys C G.*]

102 Although sometimes the principle of confidentiality may even be considered a public

policy for arbitration.[*Yang Liangyi*]When it conflicts with other public interests, the principle of confidentiality can never be derogated. In order to weaken the conflict between individual and public interest, fair public interest can guarantee the confidentiality of arbitration in an orderly manner.

II. CLAIMANT IS NOT ENTITLED TO SUBMIT THE PARTIAL INTERIM AWARD OBTAINED THROUGH AN ILLEGAL WAY.

1.RESPONDENT's allegation of illegality is based on direct evidence.

A. RESPONDENT's inability to obtain more direct evidence of the illegal hack was caused by CLAIMANT, RESPONDENT ask CLAIMANT to state source of the evidence.

103 Just as the first investigation disclosed, it is clear that the way CLAIMANT used to get the information promised must be illegal, whether from the two former employees of RESPONDENT, or a hack of RESPONDENT's Computer system where the hackers managed to retrieve a considerable amount of data. In fact, CLAIMANT has in the meantime arranged an opportunity to acquire the Partial Interim Award against payment of 1000 USD from a company which provides intelligence on the horse racing industry and CLAIMANT was given the address of the company and was promised to get a copy of the award. However, the company has a doubtful reputation as to where it gets its information from and has refused to disclose its sources in the case at hand, which made it not clear whether the person who had provided the award to the company was the hacker or one of the former employees of RESPONDENT. RESPONDENT ask for prohibition of further disclosure, and ask CLAIMANT for a disclose of its sources.

B. Even if it is circumstantial evidence, it does not affect the admissibility of evidence.

104 The difference between direct evidence and indirect evidence mainly affects the power of proof, not the admissibility of evidence. In general, direct evidence is considered to be more provable than indirect evidence. Nevertheless, where direct evidence is not available and circumstantial evidence is the only means of proof,

circumstantial evidence will be accepted by the arbitral tribunal. In determining the evidentiary power of circumstantial evidence, the arbitral tribunal usually takes into account the reasons why direct evidence cannot be obtained.

105 In addition, in the field of international commercial arbitration, due to the particularity and complexity of arbitration cases, the arbitral tribunal does not obtain much direct evidence. Especially when the time and material cost of obtaining the original statement of witnesses is too high, the arbitral tribunal will adopt hearsay evidence with certain reliability on the economy of arbitration and the principle of efficiency and will not always exclude it. And this rule is reflected in a case of labor arbitration in Ohio, USA. In this case, the claimant applied to the court to set aside the arbitral award on the ground that the only evidence of the arbitral award was hearsay evidence. But in the end, the court rejected the claimant's claim and held that although hearsay evidence itself had defects in proof, it could not negate the evidentiary qualification of hearsay evidence. And the hearsay evidence comes from the rational understanding of the facts around us.[*Reguero v. Teacher Standards and Practices Com'n*]Although this typical case is a labor arbitration case, it is also instructive for international commercial arbitration. When faced with complex cases, in order to safeguard the economy and efficiency of arbitration, proper acceptance of hearsay evidence is conducive to international commercial arbitration.

2.CLAIMANT is not entitled to submit his evidence on Exclusionary Rule of Illegally Obtained Evidence.

106 Based on Exclusionary Rule of Illegally Obtained Evidence, the evidence illegally obtained should be excluded from the authentication procedure and deprived of its qualification to enter the authentication threshold. Evidence obtained in an illegal manner usually refers to evidence obtained in the course of obtaining evidence in violation of the legal rights of the accused, including searches, seizures, wiretaps, inquiries carried out without any legal authorization, physical evidence obtained as a result of an act of freezing.

3. In any event, the Tribunal should exercise its discretion to admit the Partial Interim Award.

107 The arbitral tribunal may, on the premise of the theory of the procedure, have a decision on the relevant evidentiary matters. Based on the flexibility and autonomy of the arbitration system and expertise of the arbitrators, arbitrators were given the right to make decisions on evidentiary matters. The arbitral tribunal has greater discretion in examining, evaluating and accepting any evidence relating to the dispute, which is conducive to the reasonable handling of the dispute and thus to the better protection of the legitimate rights and interests of the parties. In practice, in examining the relevance, admissibility, materiality and standard of proof of evidence, the arbitral tribunal, in addition to referring to the general rules of authentication of procedural evidence, the principles of fairness and reasonableness has become the soft criterion of its discretion to reflect the characteristics of its equality.[*David M. Walker*] At the same time, the arbitral tribunal should, in the economic and expeditious manner, resolve the dispute between the parties in order to ensure efficiency and fairness, while the international commercial arbitration evidence system is more effective in terms of equity and efficiency than the relevant litigation evidence system, the economic and rapid settlement of the value object of the dispute should be taken as the goal of the international commercial arbitration evidence system, and the efficiency should be regarded as its value orientation.

III. THERE IS NO SITUATION WHERE ADDITIONAL PARTY IS PERMITTED TO JOIN THE PROCEEDINGS.

108 The requirements in Article 27.1 HKIAC Rules are NOT satisfied and thus CLAIMANT is NOT entitled to the join of the Additional Party. There is no situation in Art. 27.1 HKIAC Rules that *prima facie, the additional party is bound by an arbitration agreement under these Rules giving rise to the arbitration.* And there is no need to merge or join, as the Partial Interim Award has already been made and an award on the merits will be made for the August 2019. Besides, the intervention of third parties may lead to the inefficiency of arbitration proceedings and increase the

burden and cost of the disputing parties.

109 At the same time, based on the privilege of trade secrets, RESPONDENT has the right to refuse or prevent the disclosure of commercial secrets in his possession. Art. 9.2.e of IBA rules of evidence 1996 provides evidence of what the arbitral tribunal considers to be commercial or technical confidentiality. Art. 20.7 ICC 1998 allows the arbitral tribunal to take measures to protect trade security and confidential information, and Art. 21.3 of the rules denying access to arbitration proceedings by other persons not in the arbitration proceedings, except with the permission of the arbitral tribunal and the parties.

CONCLUSION FOR ISSUE 4

110 Evidence obtained in a manner that violates contracts and confidentiality agreements is illegal, no matter it obtained through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's Computer system, and it should not be admitted.

111 The confidentiality of arbitration is absolute, and any kind of breach of confidentiality is detrimental to the rights and interests of RESPONDENT, and to the fairness and efficiency of arbitration.

Moreover, there is no basis for CLAIMANT to obtain disclosure of the Partial Interim Award under public interest or the participation of a third party in the proceedings, since there is no such public interest or a third party that need for disclosure in this arbitration.