

**SIXTEENTH ANNUAL
WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT**

MEMORANDUM FOR RESPONDENT

On Behalf Of:

Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside, Equatoriana

RESPONDENT

Against:

Phar Lap Allevamento
Rue Frankel 1
Capital City, Mediterraneo

CLAIMANT



CHULALONGKORN UNIVERSITY

**INTOUCH SIRIWALLOP · NAPATSORN PUREETHIP · PHOCHARAPHOL YINGAMPHOL
SIRINNAREE ONGSAKUL**

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<i>HPCL</i>	Hague Principles on Choice of Law in International Commercial Contracts	¶¶26, 27
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<i>Ans.</i>	Answer
<i>Art.</i>	Article
<i>Arb.</i>	Arbitration
<i>CISG</i>	United Nations Convention on the International Sale of Goods
<i>Cl.</i>	Claimant
<i>Comm.</i>	Commentary
<i>Ex.</i>	Exhibit
<i>HKIAC</i>	Hong Kong International Arbitration Centre
<i>HPCL</i>	Hague Principles on Choice of Law in International Commercial Contracts
<i>IBA</i>	International Bar Association
<i>ICC</i>	International Chamber of Commerce
<i>ICDR</i>	International Centre for Dispute Resolution
<i>Incoterms</i>	ICC International Commercial Terms
<i>Ltr.</i>	Letter
<i>Memo.</i>	Memorandum
<i>Ord.</i>	Order
<i>Proc.</i>	Procedural
<i>Req.</i>	Request
<i>Resp.</i>	Respondent
<i>UNCITRAL</i>	United Nations Commission on International Trade Law
<i>UNIDROIT</i>	International Institute for the Unification of Private Law

SUMMARY OF FACTS

1. Respondent was building up its own racehorses breeding programme, with the intention to become a leading breeder for racehorses. On 21 March 2017, Respondent contacted Claimant for Nijinsky III's semen for the breeding since the ban on artificial insemination in Equatoriana was temporarily lifted. Respondent invited Claimant to make an offer for 100 doses of frozen semen of Nijinsky III, including its terms and conditions.
2. Claimant then replied on 24 March 2017 to Respondent, stating that Claimant does not normally sell frozen semen of its racehorses and not such an amount to a single breeder. However, Claimant decided to make an offer for 100 doses of frozen semen of Nijinsky III to Respondent under certain conditions. Such Claimant's decision was of taking Respondent's reputation for dressage and showjumping and to express Claimant's interest in entering into a long-term common beneficial relationship. The price was initially set at 99.50 USD per dose and the semen would be picked up at Claimant's premises.
3. Respondent replied in its email on 28 March 2017 that Respondent insisted for the contract in the basis of DDP. On 31 March 2017, Claimant accepted for the contract a delivery DDP and required that the price be increased by US\$ 1,000 per dose. Claimant stated that it had experienced unforeseeable additional health and safety requirements destroying the commercial basis of the deal. Claimant also required that hardship clause should be included in the contract.
4. On 28 March 2017, Respondent declined the earlier proposal suggested by Claimant on the matter of applicable law and dispute resolution. Respondent proposed that the application of the law of Mediterraneo is accepted on a condition that the courts of Equatoriana have jurisdiction. However, on 31 March 2017 Claimant disagreed to submit the jurisdiction to the courts in Equatoriana and proposed that the Parties shall opt for arbitration in Mediterraneo instead .
5. On 10 April 2017, Respondent made a negotiation providing that Equatoriana shall be the place of arbitration and the arbitration agreement shall submit to the law of Equatoriana. In response to Respondent's proposal on 11 April 2017, Claimant said to agree with most of the Respondent's terms with the only exception that the place of arbitration must be Danubia.
6. Upon brief discussion on 12 April 2017, Claimant's former contract negotiator suggested that there should be a clarification and incorporation into the arbitration agreement

regarding contract adaptation. Mr. Antley, Respondent's former contract negotiator, intended to come up with the new proposal in the next day but failed to do so due to the following car accident. Eventually, the contract was finalized without the inclusion of a contract adaptation clause. The hardship clause was also concluded by Clause 12 of the finalized written contract that Claimant shall not be responsible for lost semen shipments or delays in delivery not within the control of Claimant such as missed flights, weather delays, failure of third party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous.

7. The Equatorianian government, which had always been an ardent supporter of free trade, imposed 30 per cent tariffs on selected products from Mediterraneo including on animal semen. The measure was to retaliate the Mediterraneo government. During the moment when the new tariffs regulations were effective, Claimant had already shipped two instalments of the frozen semen to Respondent. Another final instalment was still awaited. As a consequence, Claimant and Respondent were impacted from the custom regulations of Equatoriana that the final shipment which Claimant was obliged to Respondent was 30 per cent more expensive.
8. Claimant immediately contacted Respondent on 20 January 2018 for a solution regarding the impact on the delivery. Mr. Shoemaker, responsible for Respondent's racehorse breeding programme, then demanded Claimant to authorize the final shipment, but also provided Claimant the fact that Mr. Shoemaker himself had not been involved in the negotiations of the contract. On 23 January 2018, Claimant authorized the final shipment.
9. On 2 October 2018, Claimant claimed to have received reliable information about another arbitration that Respondent had with one of its customers concerning the sale of a promising mare to Mediterraneo. Claimant requested to submit a copy of the Partial Interim Award from the other arbitration ("the Evidence") to the current proceedings. A first investigation has disclosed that the Evidence would have been obtained by illegal means, either through a breach of confidentiality or a hack of Respondent's computer system.

SUMMARY OF ARGUMENTS

PART 1: The Tribunal lacks jurisdiction and authority to adapt the contract where the law of arbitral seat governs the arbitration agreement

The arbitration clause is governed by a different law from the Sales Agreement due to the separability doctrine. The arbitration agreement does not contain any express choice of law. A reasonable person would not conclude that the arbitration agreement is governed by the law of Mediterraneo. The HPCL does not determine the law governing the arbitration agreement. Further, an express authorization to adapt the contract is absent from the arbitration agreement. The arbitrators' power to adapt the contract falls beyond the scope of arbitration agreement.

PART 2: The Tribunal shall not allow the submission of the Evidence from the other arbitration

The Evidence is confidential and shall not be disclosed. It could only be obtained through illegal means. Claimant was fully aware of such illegality but still chose to use the Evidence which is a violation to the duty of good faith. Therefore, the Evidence shall not be admissible. Moreover, the Tribunal shall not adopt the IBA Rules as Claimant asserted since the applicable laws already cover the taking of evidence. The Transparency Rules is also not applicable to the current proceedings. Although, Claimant based its arguments on the Production of Document, it is clearly a separate matter from the Admissibility of evidence which is the main issue, therefore, it is irrelevant. Furthermore, rejecting Claimant's submission will not affect Claimant's rights to be heard or present its case, nor will it affect the enforcement of the award. As a result, the Tribunal shall not allow the submission of the Evidence.

PART 3: Claimant is entitled to neither the payment of US\$ 1,250,000 nor any other amount resulting from an adaptation of the price

Since the contract is governed by CISG, the interpretation of the contract shall be in accordance with CISG. The imposition of tariffs by the Government of Equatoriana as a hardship was not incorporated into the contract. The DDP clause was included in the contract, making the risks associated with the delivery of the goods to be allocated within the sphere of Claimant's responsibility. In addition, Claimant shall not request for an adaptation to the contract by alleging any adaptation clause concluded between the Parties. Furthermore, the interpretation of the parties' intent under Art. 8 did not oblige Respondent to bear the tariff as alleged by Claimant. Claimant cannot invoke Art. 79 to claim for the payment as it did not meet the requirements provided under the article. Additionally, Claimant do not have the right to invoke UNIDROIT.

PART 1: THE TRIBUNAL LACKS JURISDICTION AND AUTHORITY TO ADAPT THE
CONTRACT WHERE THE LAW OF ARBITRAL SEAT GOVERNS THE ARBITRATION
AGREEMENT

1. Claimant asserted that the law governing the arbitration agreement is the law of Mediterraneo. Contrary to Claimant's assertion, Respondent has never agreed to have the arbitration clause governed by the law of Mediterraneo. The law of Mediterraneo thereby governs only the Sales Agreement **(I)**. Claimant also claimed that the Arbitral Tribunal has jurisdiction and authority to adapt the contract under the interpretation of the arbitration agreement. However, the arbitration clause does not contain any provision that authorizes contract adaptation by arbitrators. Governed by the law of the arbitral seat, the arbitration agreement shall be interpreted in accordance with the four corners rule **(II)**.

I. The law of Mediterraneo merely governs the Sales Agreement

2. The arbitration agreement is governed by the law of the place of arbitration, which is the law of Danubia. The law of Mediterraneo is merely applicable to the Sales Agreement due to the doctrine of separability **(A)**. Further, the arbitration agreement does not contain any express choice of law **(B)**. Importantly, a reasonable person would not conclude that the arbitration agreement is governed by the law of Mediterraneo **(C)**. In any case, the HPCL does not determine the choice of law for the arbitration clause **(D)**.

A. The arbitration agreement is a separate contract that should be governed by a different law from the Sales Agreement

3. The doctrine of separability, a general principle of international commercial arbitration, considers the arbitration agreement as a separate contract from the Sales Agreement [*Pourdret/Besson* 258; *Bernardini* 197]. Because of such separability, a different law from the express choice of law in the Sales Agreement shall govern the arbitration agreement [*Born I 2009* 413; *ICC 1507*]. That the law chosen to govern the Sales Agreement will not automatically extend to the arbitration clause is the effect of separability doctrine [*Vorobey* 138].

4. The law of Mediterraneo does not govern the arbitration agreement and its interpretation. Under the doctrine of separability, the law of Mediterraneo specified in a provision, preceding the arbitration clause, only governs the Sales Agreement. Therefore, considering that the arbitration clause is separate from the Sales Agreement, the law of Mediterraneo shall not automatically extend its application to the arbitration clause. The absence of the choice of law in the arbitration agreement evidently affirms that the arbitration clause is not governed by the law of Mediterraneo. Hence, the express choice of law in the Sales Agreement does not extend its application to the dispute resolution clause.

5. Moreover, the arbitration law of Danubia which is a verbatim adoption of the UNCITRAL Model Law also adopts the doctrine of separability [*Ans. to Notice of Arb.* ¶14]. Art. 16 of UNCITRAL Model Law states that “an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract” [*Art. 16 Model Law*]. Thus, as the arbitration agreement is independent from the Sales Agreement, the law of Mediterraneo contained in other provisions of the contract only governs the Sales Agreement.

B. The arbitration agreement does not contain any express choice of law

6. The general rule of contract law will apply to the interpretation of arbitration agreement. Hence, the contract law of Danubia shall be applicable to the interpretation of the arbitration agreement (1). Additionally, the interpretation of arbitration agreement is limited by the parol evidence rule (2). Where the arbitration agreement is strictly interpreted, the Arbitral Tribunal should find that there is no choice of law contained in the arbitration clause.

(1) The contract law of Danubia shall be applicable to the interpretation of the arbitration agreement

7. Contrary to Claimant’s assertion, the CISG may not be applied to interpret arbitration agreement [*Cl. Memo.* ¶4]. The arbitration agreement is governed by the Danubian law; therefore, the CISG is not applicable. Additionally, the courts of Danubia has consistently ruled that because of the separability doctrine the CISG is not applicable to the procedural contract as arbitration agreement [*Proc. Ord.* 2 ¶36].
8. Arbitration agreements have the characters of a contract [*Born I 2009* 1059]. The types of rules that are used to interpret all other contracts are equivalently applied to arbitration agreements [*Lew/ Mistelis/ Kröll* 150]. Since the arbitration agreement and its interpretation is governed by the law of Danubia, the interpretation of arbitration clause shall be submitted to the contract law of Danubia.
9. The contract law of Danubia is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts with two exceptions regarding Art. 4.3 and Art. 6.2.3 (4)(b) [*Proc. Ord.* 2 ¶45]. Initially, the norms of interpretation for written contract setting forth in Art. 4.3 is substituted with the four corners rule [*Id.*]. As held by the courts of Danubia, the four corners rule in Art. 4.3 regarding the interpretation of contract bears the same results as that of a merger clause in Art. 2.1.17 of the UNIDROIT Principles.
10. According to the UNIDROIT Principles, the use of prior statements and agreements to contradict or supplement a writing that contains a Merger Clause is barred. However, such statements and agreements may be used for the sole purposes of interpreting the contract [*Art. 2.1.17 UNIDROIT; UNIDROIT Comm. 2016* 65; *CISG Advisory Op. No. 3*]. Accordingly,

the arbitration clause shall not be contradicted or supplemented by previous statements and agreements made between the Parties.

11. Further, the wording in Art. 6.2.3 (4)(b) of the contract law of Danubia differs from the one stipulated in the UNIDROIT Principles in that the court may adapt the contract only if authorized [*Proc. Ord. 2 ¶45*].
12. The interpretation of arbitration clause therefore shall be subject to Art. 4 of the UNIDROIT Principles in determining the scope of arbitration agreement and the Parties' intent regarding the applicable law.

(2) The interpretation of arbitration agreement is limited by the parol evidence rule

13. The arbitration agreement and its interpretation is governed by the law of the place of arbitration [*ICC 5505; ICC 5730; ICC 6162*]. As the arbitration agreement is a form of contract, it shall be interpreted in accordance with the general principles of contract interpretation. In this case, the contract law of Danubia shall be applicable to the interpretation of the arbitration agreement.
14. According to the four corners rule under the Danubian contract law, the extrinsic evidence cannot be used to interpret contracts [*Proc. Ord. 1¶II*]. The evidence of statements of all kinds, oral or written, that are not contained in the written contract shall be classified as extrinsic evidence [*Farnsworth 272*]. Therefore, the interpretation of arbitration agreement shall exclude a reliance on all extraneous evidence.
15. Where the arbitration agreement itself is governed by the law of the arbitral seat, it shall be strictly interpreted. Hence, the Arbitral Tribunal should find that the law of Mediterraneo merely governs the Sales Agreement since the arbitration clause contains neither express nor implied choice of law. It cannot be inferred or concluded that the law governing the Sales Agreement will equally apply to the arbitration agreement when its choice of law is absent. On this ground, the choice of law specified above the arbitration clause is only applicable to the Sales Agreement.
16. Moreover, the oral or written evidence that is not incorporated into the arbitration agreement cannot be used to contradict or supplement the arbitration clause [*Art. 2.1.17 UNIDROIT*]. Therefore, where the choice of law is absent, the use of all extraneous evidence to contradict or implement the missing choice of law in arbitration agreement is prohibited.

C. Importantly, a reasonable person would not conclude that the arbitration agreement is governed by the law of Mediterraneo

17. The HKIAC Rules evidently affirmed that the arbitration agreement is separate from the Sales Agreement due to the doctrine of separability [*Art. 19.2 HKIAC Rules*]. Thus, the choice of law contained above the arbitration agreement governs only the Sales Agreement. Moreover, a reasonable person would not conclude that the arbitration agreement is governed by the law of Mediterraneo. The law of Mediterraneo therefore cannot be the law governing the arbitration clause.
18. The choice of law clause specified in provision 14 [*Cl. Ex. 5*] merely determines the law governing the Sales Agreement. Contrary to Claimant's allegation, Respondent has never agreed to accept the law of Mediterraneo as an applicable law for the arbitration clause [*Cl. Memo. ¶¶11-13*]. It is evident that under the interpretation of the Sales Agreement, the Parties' intention was in favor of the application of the law of Mediterraneo as the governing law of only the Sales Agreement.
19. The Sales Agreement shall be interpreted under the law of Mediterraneo which is a verbatim adoption of the UNIDROIT Principles. Art. 4.1(1) of the UNIDROIT Principles states that "a contract shall be interpreted according to the common intention of the parties" [*Art. 4.1(1) UNIDROIT*]. If the common intention of the parties cannot be established, an objective test will be applied to determine the meaning of the contract [*Perillo 1*].
20. An objective standard in Article 4.1(2) will be applied to solve the problem that stems from unclear contract terms [*Komarov 33*]. It provides that where the common intention of the parties cannot be found the contract shall be interpreted according to the meaning that a reasonable person of the same kind would give to it in the same circumstances [*Art. 4.1(2) UNIDROIT*]. The wording in choice of law thereby shall be determined in accordance with the reasonable person test in Art. 4.1(2).
21. In establishing the understanding of reasonable persons, regard shall be given to all the circumstances [*Art. 4.1(2), 4.3 UNIDROIT*]. Hence, the preliminary negotiations between the Parties regarding the choice of law clause shall be taken into account [*Art. 4.3(a) UNIDROIT*]
22. The previous negotiations referring to the choice of law indicated that the law of Mediterraneo did not govern the arbitration agreement. The email sent to Claimant explicitly stated that "the Sales Agreement is governed by the law of Mediterraneo" [*Resp. Ex. 1*]. Moreover, in the same email, Respondent evidently mentioned that the arbitration agreement were to be governed by the law of a place of arbitration, which at that time was Equatoriana

[*Id.*]. Hence, it was apparent that the Parties intended to have the arbitration clause governed by a different choice of law from the one that governs the Sales Agreement.

23. In response to Respondent's email, Claimant agreed to accept the proposal offered by Respondent with only a change in the place of arbitration. Significantly, Claimant emphasized that the law of Mediterraneo had to remain the law applicable to the sales contract [*Resp. Ex.* 2].
24. Considering these past negotiations, a reasonable person in the same circumstances as the Parties would come to a conclusion that the law of Mediterraneo contained in the choice of law clause only applies to the main contract, in exclusion of the arbitration agreement. Hence, it can be reasonably concluded from the Sales Agreement that the law of Mediterraneo does not govern the arbitration agreement.

D. The HPCL does not determine the law governing the arbitration agreement

25. Respondent agrees with Claimant upon the unquestionable fact that the law of Mediterraneo is applicable to the Sales Agreement. Nonetheless, the law of Mediterraneo does not equally apply to the arbitration agreement under the HPCL as argued by Claimant [*Cl. Memo.* ¶33, 35]. The HPCL evidently states that it simply deals with the choice of law applicable to the contract, and not the arbitration agreement or other procedural issues [*HPCL Comm.* 24].
26. According to Art. 9, the law of Mediterraneo only governs the Sales Agreement, in exclusion of the arbitration agreement. The provision merely states that the substantive law shall govern all aspects of the contract [*Ibid.* 64; *Art. 9 HPCL*]. There was no express provision in the HPCL requiring the arbitration clause to be governed by the same law that governs the Sales Agreement.
27. Furthermore, Art. 1(3) explicitly provides that the HPCL does not address the law governing the arbitration agreements [*Art. 1(3)(b) HPCL*]. The current dispute concerns the matter of choice of law applicable to the arbitration clause. Therefore, the HPCL shall not be applied to determine the law applicable to the arbitration agreement.

II. The arbitration agreement is interpreted in accordance with the four corners rule

28. The Arbitral Tribunal lacks jurisdiction and authority to adapt the contract under the interpretation of the arbitration agreement. An express authorization to adapt the contract is missing from the arbitration agreement **(A)**. The arbitrators may not adapt the contract because of such absence **(B)**. Moreover, the arbitrators' authority to adapt the contract falls beyond the scope of arbitration agreement **(C)**.

A. An express authorization to adapt the contract is absent from the arbitration agreement

29. An express conferral of powers from the Parties needs to be established for the Arbitral Tribunal to adapt the contract [*Proc. Ord.* 2¶36]. The wording in arbitration clause that “any dispute arising out of this contract” is sufficient to cover all possible disputes except for contract adaptation [*Craig/ Park/ Paulsson* 144]. In other words, the adaptation of contracts resides outside a decision-making power of arbitrators, and thus requires a specifically express authorization by the Parties [*Bernini* 421].
30. An explicit conferral of power to the Arbitral Tribunal in relation to the adjustment of contracts is missing from the arbitration agreement. There is no wording that could be interpreted as empowering the Arbitral Tribunal to adapt the contract. On this ground, the arbitrators may not adapt the contract due to the absence of express authorization by the Parties.
31. If the Parties have actually conferred a power of contract adaptation to arbitrators, the wording in arbitration clause should have been explicitly specified so. By way of example in ICC case no. 7544, the Parties authorized the arbitrators to adapt contract by clearly stated in the arbitration clause that “All disputes arising out of the contract including the change of the contract itself” [*ICC 7544*]. The decision rendered by arbitrators who adjusted the contract without authorization by the Parties constituted the procedural defects and grounds to set aside the award [*34 Sch 10/05 Case*].
32. The adaptation of contracts requires an express conferral of power to arbitrators. The arbitration agreement is a fundamental source of arbitrators’ power [*Berger* 8]. In order to adjust the contract, the Arbitral Tribunal shall refer its authority back to the arbitration agreement. Where such source of power is devoid of express authorization regarding contract adaptation, the Arbitral Tribunal thereby lacks the power to adapt the contract.

B. The Arbitral Tribunal may not adapt the contract, for it is not authorized by the Parties

33. The arbitration law of the arbitral seat also determines the arbitrators’ authority to adapt the contract [*Berger* 10]. However, the arbitration law of Danubia does not have any explicit provision regarding the arbitrator’s authority to adapt the contract. In this case, the substantive law of the seat of arbitration which contains the provision for contract adaptation by courts shall be the basis to determine the Arbitral Tribunal’s power to adjust the contract [*Ibid.* 10-11].

34. Art. 6.2.3 (4)(b) of the contract law of Danubia provides that the court may adapt the contract only if authorized [*Proc. Ord.* 2¶45]. Therefore, it is evident that contract adaptation requires the special conferral of powers.
35. According to courts of Danubia, Art. 28(3) of the UNCITRAL Model Law is considered to be the paradigm for the conferral of exceptional powers to the Arbitral Tribunal. Pursuant to Art. 28(3), the Arbitral Tribunal shall decide *ex aequo et bono* or as amiable compositeur only if the parties have expressly authorized it to do so [*Art. 28(3) Model Law*].
36. To decide *ex aequo et bono* means that the Arbitral Tribunal may decide the dispute based on principles it believes to be just without having to refer to any particular body of law [*UNCITRAL Digest 2012* 121-122]. However, the arbitrators must receive an explicit authorization by the Parties before it could decide the dispute as amiable compositeur [*Ibid.*].
37. As the substantive law requires the conferral of authorization for contract adaptation, Art. 28(3) UNCITRAL Model law shall be applied as the standard. Thus, contract adaptation by the arbitrators is conditional upon the Parties' express authorization. In this case, the Parties have never given the Arbitral Tribunal authority to adapt the contract. Therefore, whilst the Tribunal can determine its own jurisdiction [*Art. 19 HKIAC Rules; Cl. Memo.* ¶41], it should find that it lacks jurisdiction and authority to adjust the contract.

C. The arbitrators' authority to adapt the contract falls beyond the scope of arbitration agreement

38. The governing law of arbitration agreement determines the scope and interpretation of the arbitration clause [*Moser/ Bao* 48]. It has been consistently held that generally-applicable rules of contract construction also apply to the interpretation of international arbitration agreements [*Born I 2009* 1063].
39. The arbitration agreement is a contractual obligation which shall be interpreted in accordance with general principles of contract interpretation [*Haviland Case; ICC 2321*]. The arbitration agreement is governed by the law of place of arbitration. Hence, the interpretation of arbitration clause shall be governed by the contract law of Danubia.
40. The contract interpretation rule under the contract law of Danubia adopts the four corners rule which excludes the reliance on extraneous evidence. The courts of Danubia ruled that Art. 4.3 has the same effects as the merger clause in Art. 2.1.17 [*Proc. Ord.* 2¶45]. In this case, the prior statements or agreements cannot be used to contradict or supplement the arbitration clause [*Art. 2.1.17 UNIDROIT*].
41. The Parties are barred from relying on the extraneous evidence. Oral or written evidence of the negotiations or agreements related to the contractual subject matter which was not

incorporated into the written contract are categorized as extrinsic or parol evidence [*Farnsworth* 272; *CISG Advisory Op. No. 3*]. Hence, the previous negotiations between Respondent and Claimant are considered extrinsic evidence.

42. Pursuant to Art. 4.3 of the contract law of Danubia, the arbitration agreement shall not be contradicted or supplemented by the extrinsic evidence [*Art. 2.1.17 UNIDROIT*]. The interpretation of the arbitration clause excludes the reliance on evidence of the prior negotiations.
43. As the interpretation of arbitration clause prescribes the four corners rule, the reliance on evidence of negotiation is prohibited. Therefore, even though the prior negotiation between Mr. Antley and Ms. Napravnik referred to contract adaptation by arbitrators [*Cl. Ex. 8*], the Arbitral Tribunal is barred from relying on such negotiation. On this ground, the negotiation regarding contract adaptation cannot be used, as it would supplement the scope of arbitration agreement.
44. In a present case, there is no written provision in the arbitration agreement that authorizes the arbitrators to adapt the contract. As the arbitration agreement is strictly interpreted, the arbitrator's authority to adapt the contract is not included in the arbitration agreement. Thus, the Arbitral Tribunal lacks jurisdiction and authority to adapt the contract because contract adaptation is not within the scope of arbitration agreement.
45. Conclusively, the Arbitral Tribunal shall interpret the arbitration agreement strictly without the reliance on previous negotiations. The arbitration agreement cannot be interpreted as authorizing the Arbitral Tribunal to adapt the contract regardless. In particular, the Arbitral Tribunal is not authorized to adapt the contract, for such authority falls beyond the scope of arbitration agreement.

PART 2: THE TRIBUNAL SHALL NOT ALLOW THE SUBMISSION OF THE
EVIDENCE FROM THE OTHER ARBITRATION

46. Respondent has no objection regarding the Tribunal's authority in determining the admissibility of evidence. As it is evident in both the HKIAC Rules [*Art. 22.2 HKIAC Rules*], which is the rules that the Parties agreed upon [*Cl. Ex. 5*], and the Danubian Arbitration Law, which is the law of the seat of arbitration and is a verbatim adoption of the UNCITRAL Model Law [*Art. 19(2) Model Law*], that the Tribunal has the power to determine the admissibility of evidence in the current arbitration.
47. However, Respondent strongly objects to other claims by Claimant. Respondent shall demonstrate that the Evidence was illegally obtained and, therefore, should not be admitted

in the arbitration **(I)**. The Tribunal should not adopt the IBA Rules as suggested by Claimant **(II)**. Furthermore, the production of document that Claimant based their arguments upon is clearly a separate matter from the admissibility of evidence **(III)**. Although Claimant did not raise the issue of the application of UNCITRAL Rules on Transparency, Respondent shall illustrate that such rules are not applicable **(IV)**. Respondent shall also demonstrate that rejecting Claimant's request to submit the Evidence shall not violate Claimant's rights to be heard **(V)** and shall not affect the enforcement of the award **(VI)**. Lastly, Respondent shall demonstrate that there is absolutely no need for the Tribunal to consolidate both arbitrations **(VII)**.

I. The Evidence was obtained by illegal means and should not be admitted in the arbitration

48. Contrary to Claimant's argument, Claimant should not be entitled to present the Evidence as it was obtained through an illegal means, which Claimant was aware of and still did not act in good faith **(A)**. Furthermore, the Evidence which is a Partial Interim Award from the other arbitration [*Prod. Ord. 2 ¶39*] is under the protection of commercial confidentiality and HKIAC Rules **(B)**. Whether Claimant was involved in the illegal obtainment of the Evidence or not, the Evidence would still be inadmissible **(C)**.

A. Claimant was aware that the Evidence was illegally obtained and did not act in good faith

49. It can be reasonably concluded that Claimant was aware of the reputation of the company that Claimant contacted to purchase the Evidence. As Claimant is in the horseracing industry, Claimant must have undoubtedly been informed that the company has a questionable reputation as to where it obtains information [*Proc. Ord. 2 ¶40*]. Claimant also knows that the Evidence is a Partial Interim Award of another arbitration under HKIAC Rules [*Cl. Ltr. 2 Oct*] and therefore is confidential according to Art. 42 of HKIAC 2013 Rules and Art. 45 of HKIAC 2018 Rules. As a result, Claimant should have been aware that the Evidence or information relating to the Evidence was subject to confidentiality obligations [*Id.*].

50. Therefore, the company selling the Evidence obtained the Evidence from either Claimant's former employees or a hack of Respondent's computer system [*Resp. Ltr 3 Oct; Proc. Ord. 2 ¶40*]. In both cases, the Evidence would have been obtained by illegal means [*Id.*]. Despite having been aware, Claimant still chose to buy the Evidence from such an infamous company and disregard the injustice it would cause to Respondent. By submitting the illegally obtained evidence in the arbitration, Claimant did not act in good faith, which is a general

duty that parties owe to each other and to the tribunal to conduct themselves in good faith during the arbitral proceedings [*Methanex case*; *Libananco case*]. The use of an illegally obtained evidence is an infringement to the duty to arbitrate in good faith [*Bédard et al* 737], therefore, Claimant's attempt to use such evidence is a violation to the good faith duty. The action of Claimant also contradicted the duty pursuant to Art. 13.5 of HKIAC Rules to "do everything necessary to ensure the fair" conduct of the arbitration as by using the Evidence that was illegally obtained from Respondent against its will is clearly not fair to Respondent.

51. Even though Claimant is aware that the Evidence was illegally obtained, Claimant still chose to buy and submit it in the arbitration without considering the obligation to conduct itself in good faith and ensure the fair process of arbitration.

B. The Evidence is subjected to an express confidentiality obligation under HKIAC

Rules

52. Since the Evidence is a Partial Interim Award from another arbitration under HKIAC Rules [*Cl. Ltr. 2 Oct; Prod. Ord. 2 ¶39*], it is under the protection of an expressed obligation to be kept confidential pursuant to Art. 42 of HKIAC 2013 Rules and Art. 45 of HKIAC 2018 Rules.
53. If the Tribunal allows the Evidence to be presented in the current arbitration, the Tribunal will be encouraging the use of illegally obtained evidence and also overlooking the importance of confidentiality, which is one of the main advantages of international commercial arbitration [*Moser/Bao* 281]. This could affect the image and integrity of both the HKIAC institution and international commercial arbitration as a whole. If the evidence that was illegally obtained through a breach of confidentiality obligations of HKIAC Rules may still be presented in arbitration under HKIAC Rules, the significance of such confidentiality obligation will be lost. The trust in HKIAC to ensure that the arbitral proceedings are fair and just will also be negatively affected.

C. The degree of Claimant's involvement in the process of illegal obtainment does not affect the admissibility of the Evidence

54. Whether the illegal obtainment was conducted by a third party or by Claimant should not affect the admissibility of the evidence. Even when the illegal conduct was committed by a third party, it does not change the fact that Claimant did not conduct itself in good faith as it was aware of the illegal obtainment as well as the breach of confidentiality. Yet Claimant chose to buy such evidence and submit it to the arbitration [¶50].
55. The fact that Respondent's right to a fair arbitration will be greatly injured from allowing the Evidence to be presented also does not change, regardless of how the Evidence was

obtained. Accordingly, the Tribunal should evaluate “whether the proffered evidence violates the principles of due process in contravention of good faith” [Ireton 238]. Therefore, the Tribunal should not allow the admission of the Evidence.

II. The Tribunal shall not adopt the IBA Rules

56. The Tribunal should not apply the IBA Rules to the current proceedings as the parties did not agree to its application **(A)**. Even if the Tribunal were to apply the IBA Rules, the Evidence is still inadmissible **(B)**.

A. The Parties did not agree to the application of IBA Rules

57. The Tribunal may decide to apply the IBA Rules without the Parties consent. However, the Tribunal should firstly consider the Parties’ agreement in accordance with the principle of party autonomy [Born 2015 426-427].

58. In this case, the Parties already agreed to conduct the proceedings in accordance with HKIAC Rules [Cl. Ex. 5; Proc. Ord. 1 ¶II]. Therefore, there is no need for the Tribunal to adopt the IBA Rules as HKIAC Rules and the Model Law already covers the conduct on the taking of evidence [Art. 22 HKIAC Rules; Art. 18, 19 Model Law].

B. Even if the Tribunal were to adopt the IBA Rules, the Evidence is still inadmissible

59. In the event that the Tribunal determine the IBA Rules to be applicable to the current arbitration, the Evidence would still be inadmissible and should be excluded because the Evidence is not relevant to the case and immaterial to its outcome **(1)** and is confidential **(2)**. The evidence should be excluded especially on the grounds of fairness and equality of the parties **(3)**.

(1) The Evidence should be excluded as it lacks sufficient relevance to the case and materiality to its outcome

60. Claimant failed to demonstrate how the Evidence is relevant to the case and material to its outcome. Not once did Claimant explain how the Evidence would affect or have any impact on the Tribunal’s decision. Even though Respondent is a party in both arbitrations, the facts and circumstances were different. Furthermore, the laws governing the arbitration agreement are clearly different. In this case, the law of Danubia, as the law of the seat of arbitration, governs the arbitration agreement as well as its interpretation [¶8], while in the other arbitration the Mediterraneo Law was the governing law [Proc. Ord. 2 ¶39]. The sales and terms in the sale agreements are obviously different and other factors surrounding the cases are also different. Therefore, the Evidence should be excluded on the ground that it lacks sufficient relevance to the case and materiality to its outcome according to Art. 9.2(a) of the IBA Rules.

(2) The Evidence should be excluded on grounds of commercial or technical confidentiality

61. Not only that the Evidence is a Partial Interim Award which is confidential according to HKIAC Rules, but the Evidence could also contain other commercial details, such as business secret or know-how, concerning Respondent's business and the other party in the arbitration. By disclosing such information in the current arbitration, it could negatively affect not only Respondent, but also the other party in the other arbitration who is not a party to the current proceedings. Therefore, the Tribunal should also consider how admission and disclosure of the Evidence could affect the interests of third party [*Ashford* 165]. As a result, the Evidence should be excluded on grounds of commercial or technical confidentiality according to Art. 9.2(e) of the IBA Rules.

(3) The Evidence should be excluded on the grounds of fairness and equality of the parties

62. Allowing the admission of the illegally obtained evidence is unfair to Respondent. The Evidence is the Partial Interim Award that should have been kept confidential. However, it was obtained through either breach of confidentiality or a hack to be used against Respondent in the current proceedings. Therefore, it will greatly injure Respondent's right to a fair arbitration. As a result, the Evidence should be excluded on grounds of fairness and equality of the parties according to Art. 9.2(g) of the IBA Rules.

III. Admissibility of evidence is a separate matter from the production of documents which is irrelevant and should not be assessed in the current arbitration

63. Claimant based its arguments on the production of documents of the IBA Rules [*Cl. Memo.* ¶50, 56], trying to demonstrate that the Tribunal hold the power to order Claimant to produce the Evidence. If Claimant does not comply, the Tribunal could draw an adverse inference against Claimant.

64. However, Respondent would like to demonstrate that the production of document that Claimant referred to is a separate matter from the admissibility of illegally obtained evidence, which is the main issue in the current proceedings [*Proc. Ord.* 1]. The issue required to be addressed is whether or not Claimant is entitled to submit illegally obtained evidence [*Id.*] which is not related to whether the Tribunal has the power to order document production. According to Art. 3 of the IBA Rules that Claimant suggested, Claimant should have submitted a Request to Produce to the Tribunal. Nevertheless, Claimant chose to acquire the Evidence and submit it to the arbitration, instead of submitting a Request to Produce to the Tribunal asking Respondent to produce the Evidence. Therefore, there is no issue

concerning the production of document since there is no request from Claimant or order from the Tribunal to do so in the first place.

65. According to Art. 9.5 and 9.6 of the IBA Rules, if a party failed to produce document requested without a satisfactory explanation, the Tribunal could draw an adverse inference against that party. Therefore, adverse inference is not an issue that Claimant should be concerned about since Claimant is not obliged to produce the Evidence. On the other hand, if Claimant had submit a request for Respondent to produce the Evidence [*Art. 3.3 IBA Rules*], Respondent would be obliged to do so if it has the Evidence in its possession. Then Respondent would be the one in the position that should be concerned about adverse inference. However, Claimant never submit a Request to Produce and Claimant is not obliged to produce the Evidence. As a result, it is illogical for Claimant to claim document product as the basis for its entitlement to submit the Evidence as it is irrelevant and is a separate matter from the admissibility of the Evidence.

IV. The Transparency Rules of UNCITRAL does not apply to the current arbitration

66. Although Claimant did not raise the issue of the application of the Transparency Rules of UNCITRAL any further than what was mentioned in its counsel letter [*Cl. Ltr. 2 Oct*], Claimant could have argued that the Transparency Rules should be applied in the current arbitration which would allow the disclosure of the Evidence.

67. Respondent strongly objects to such claim. It is apparent from the name and the scope of application [*Art. 1 Transparency Rules*] of the Transparency Rules that it is clearly not applicable to the current arbitration nor in the other arbitration. Pursuant to Art. 1 of the Transparency Rules, The Transparency Rules “shall apply to investor-State arbitration”. That alone is sufficient for the conclusion that the Transparency Rules does not apply to this arbitration nor the other arbitration since both of the arbitrations are private international commercial arbitration without any State involved as a party. Thus, the Transparency Rules have no effect on the disclosure of the Evidence in this arbitration.

V. Claimant’s right to be heard or present its case will not be violated by the rejection of Claimant’s request to submit the Evidence

68. Claimant claimed that each party must be given equal opportunity to present its case [*Cl. Memo. ¶64*]. The rejection of Claimant’s submission of the Evidence does not indicate that the Tribunal discriminates against the Parties or violates Claimant’s rights to be heard or present its case. The Tribunal shall ensure ‘equal treatment of the parties’ [*Art. 13 HKIAC Rules; Art. 18 Model Law*], however that does not mean the identical treatment for both parties in the process of the arbitration as the circumstances of the case must also be taken

into account [*Born 2014* 2173-2174]. It is also generally accepted that the Tribunal does not have to hear all evidence in order to comply with the right to be heard [*Kaufmann-Kobler/Rigozzi* 281].

69. Therefore, Claimant's right to be heard or to present its case is not infringed if the submission of the Evidence is rejected. Given the circumstances of the case, the Evidence is not necessary for Claimant to present its case since it is not relevant to the case or material to its outcome [¶ 60]. Moreover, Claimant still has opportunity to present other evidence.

VI. The enforcement of the Award will not be affected by the rejection of Claimant's request to submit the Evidence

70. Contrary to Claimant's assertion, the right to a fair trial or due process is infringed upon only when the evidence that is material to the outcome of the case is denied [*Kaufmann-Kobler/Rigozzi* 281]. The Evidence that Claimant submitted is neither relevant nor material, and is not necessary for Claimant to present its case [¶ 60]. Hence, rejecting the submission of the Evidence does not injure Claimant's right to due process. Moreover, there is no risk that the Award will be unenforceable.

71. On the other hand, allowing the submission of the Evidence by Claimant may render the Award unenforceable as Respondent's right to due process and fair trial is violated since the Evidence was obtained illegally through either a breach of confidentiality or a hack against Respondent's will is used in the arbitration. The use of an illegally obtained evidence could contradict public policy of the enforcing country and cause the Award to be unenforceable [Art. V(2) *NY Convention*].

VII. The Tribunal shall not consolidate both arbitrations

72. Contrary to what Claimant asserted, there was no expressed statement demonstrating that Respondent does not want the consolidation of the two arbitration, as Respondent never intended to consolidate the arbitrations. It is unreasonable of Claimant to conclude that Respondent would agree to a consolidation simply due the lack of an explicit statement to the contrary [*Cl. Memo.* ¶61]. Furthermore, even with the request from Claimant to consolidate the two arbitrations, the requirements for consolidation are still not fulfilled [Art. 28.1 *HKLAC Rules*]. Pursuant to Art. 28 of the HKIAC Rules, consolidation of arbitrations is possible only when there is a request of a party and one of the following conditions is met: (a) the parties agree to it; or (b) claims in the arbitrations are made under the same arbitration agreement; or (c) even when the claims are made under different arbitration agreement the right to relief claim must arise out of the same or related transaction.

73. In this case, the parties never agree to consolidate the arbitrations. The claims in the arbitrations are made under different arbitration agreements and unrelated transactions. Hence, consolidation is not possible.
74. To conclude, the Tribunal should deny Claimant's submission of the Evidence as it was an illegally obtained evidence that Claimant was fully aware of. Nevertheless, Claimant still submit the Evidence and did not act in good faith as using illegally obtained evidence is an infringement to the duty of good faith. The Evidence is also not relevant or material to the case. The use of such evidence is also a violation to Respondent's due process right and dismissing the Evidence does not affect Claimant's rights to present its case of fair trial.

PART 3: CLAIMANT IS ENTITLED TO NEITHER THE PAYMENT OF
US\$ 1,250,000 NOR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION
OF THE PRICE

I. Claimant shall not be entitled to a payment of US\$ 1,250,000 under the contract.

75. Since the contract is governed by CISG, the interpretation of the contract shall be in accordance with CISG **(A)**. Between the Parties, there was no conclusion of the hardship clause to cover the imposition of tariffs by the Government of Equatoriana. Hence, Claimant shall not invoke any hardship clause under the contract to exempt its liability **(B)**. Moreover, the DDP clause was incorporated into the contract, making the risks associated with the delivery of the goods to be allocated within the sphere of Claimant's responsibility **(C)**. In addition, Claimant shall not request for an adaptation to the contract by alleging any adaptation clause concluded between the Parties **(D)**.

A. CISG is applicable to the contract concluded between the Parties.

76. Whereas "it is undisputed that the Parties that Equatoriana, Mediterraneo and Danubia are Contracting States of the CISG" [*Proc. Ord. 1*] and whereas the contract of sale of goods between the Parties is of international character by which the places of business of the Parties are in different Contracting States [*Cl. Ex. 5*], CISG is applicable to the agreement between the Parties pursuant to Art. 1(1)(a) of CISG [*Al Palazzo case, Mitias case*]. Consequently, the rights and obligations of the Parties arising from such contract shall be governed by CISG Pursuant to Art. 4.

B. Claimant shall not invoke the hardship clause in the contract to exempt its liability for the tariffs.

77. The Parties did not agree to the imposition of tariffs by the Government of Equatoriana as a hardship under the contract **(1)**. Such circumstances fall under none of the stipulated causes

for hardship **(2)**. Although Claimant exempted, under the contract, its liability caused by unforeseen events rendering the contract more onerous, the circumstances in which the Government of Equatoria unexpectedly imposed the tariffs shall be foreseen as an ordinary means of international trade **(3)**. Claimant shall not, therefore, allege any of the concluded contract to exempt its liability due to the imposed tariffs by the Government of Equatoria in order to claim for a payment of 1,250,000 USD.

(1) An imposition of tariffs by the Government of Equatoria was not concluded as an exemption for Claimant under the contract.

78. Although Claimant mentioned an incorporation of an exemption clause for hardship during the negotiation that “[Claimant is] not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions” [*Cl. Ex. 4*], it was not concluded as part of the contract. Such statement was merely a proposal which mentioned a consideration for a hardship to be concluded in the future. The proposal addressed by Claimant that “[a]t minimum, a hardship clause should be included into the contract to address such subsequent changes” did not declare any of Claimant’s intent to be bound in case of an acceptance pursuant to Art.14 of CISG [*Digest 2016 86*]. In addition, such proposal was not sufficiently definite to be deemed as an offer under Art.14 of CISG, rendering no legal effect to the contract [*Ibid.* 86-87]. Consequently, Claimant shall not legally claim a statement made during the negotiation to contractually bind the Parties.
79. Moreover, Claimant itself stated that the Parties merely “shortly exchange[d] views on what still had to be finalized” [*Cl. Ex. 8*]. Therefore, the proposal for the hardship clause was still in the negotiation process. It was not yet concluded as part of the contract.
80. Even if the contract would likely be interpreted by the conduct of the Parties pursuant to Art.8 of CISG, the statement that “[Claimant is] not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions” [*Cl. Ex. 4*] shall not be considered as a sufficient incorporation of the contract. Claimant merely referred to a conclusion of a hardship clause to be “included into the contract to address such subsequent changes” [*Cl. Ex. 4*] as a consideration for the future conclusion of the contract. Such Claimant’s intent was subjective by the way that Claimant did not explicitly address such intent as a proposal to be legally bound. By such representation by Claimant, Respondent could not reasonably have known through the objective interpretation that Claimant had an intention, at this stage, to be bound in case of an acceptance [*Packaging machine case*]. Furthermore, Claimant’s

conduct demonstrated no intent to be reasonably perceived by Respondent that Claimant intended to incorporate the imposition of tariffs into the hardship clause. Had a reasonable person received such statement addressed by Claimant, he would not have known, in the same way that Respondent did not know, that Claimant intended to be legally bound so [*Tomato concentrate case*]. Therefore, Respondent could not reasonably have been aware, throughout the process of negotiation, of such intent of Claimant.

(2) The imposition of tariffs by the Government of Equatoria shall not sufficiently constitute a hardship under Clause 12 of the contract which would entitle Claimant an exemption from its liability.

81. As a general rule, a party shall be exempted from its liability regarding the contract provided that the limitation of its liability clause is concluded as a part of the contract. The Parties should explicitly “delineate the legal consequences, including detailed provisions dealing with the effect of a force majeure event on the contractual duties” [*DiMatteo 2009* 68]. In the contract between the Parties, Claimant shall not be responsible for the circumstances explicitly stipulated in Clause 12 of the written contract which provides that “[Claimant] shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous” [*Cl. Ex. 5*]. It shall be implied that the imposition of tariffs by the Government of Equatoria did not fall under any of the hardship stipulated in the contract, rendering Claimant no exemption from its liability for the newly imposed tariffs regarding the delivery, for which Claimant is fully responsible.
82. Therefore, Claimant shall not invoke the hardship clause pursuant to Clause 12 of the written contract [*Cl. Ex. 5*] to exempt its liability for the imposed tariffs. Had Claimant wished to be exempted its liability by the hardship clause, Claimant should have agreed specifically by the sense which is comprehended by both Parties that Claimant will not be liable for the cost for tariffs.

(3) Even if the imposition of tariffs by the Government of Equatoria might be unexpected, the imposition of tariffs was objectively foreseeable.

83. Even if the abrupt imposition of tariffs by the Government of Equatoria may likely be considered as a “comparable unforeseen event making the contract more onerous” [*Cl. Ex. 5*], which shall constitute a hardship under Clause 12 of the contract, such imposition shall still be foreseeable as a normal means of international trade. Tariffs as a retaliatory measures, consequently resulting in an increased cost and price, shall be made possible under the

international market system [*DiMatteo 2015 296*; *Russian Tribunal 1994*]. The increase in price is “well within the customary margin[s],” rendering the imposition of tariffs foreseeable [*ICC 6281*; *Steel ropes case*]. The fact that the Government of Equatoriana had never been imposing “direct retaliatory measures” [*Cl. Ex. 6*] does not mean that the Government of Equatoriana would never impose tariffs in the future. Such circumstances shall be interpreted in accordance with “a purely objective approach” that an imposition of tariffs is an increase of price as well as a market condition [*Steel ropes case*; *DiMatteo 2015 302-303*]. Claimant as the buyer who was fully responsible for the delivery of artificial semen of Nijinsky III shall not repudiate its liability regarding the increased cost of delivery caused by the imposed tariffs, since the imposition of tariffs and the increase in price or cost are always predictable under the system of international trade.

84. Moreover, Claimant shall not repudiate that the imposition of tariffs was unforeseen as Claimant itself mentioned such circumstances which Claimant had experienced [*Cl. Ex. 4*]. During the negotiation for the future conclusion of the contract, Claimant stated that “[Claimant knew] from past experiences unforeseeable additional health and safety requirements may make highly expensive tests necessary which can increase the cost by up to 40% and thereby destroy the commercial basis of the deal,” so “[Claimant was] not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions” [*Cl. Ex. 4*]. The circumstances in which Claimant knowingly predicted customs regulation at the very first stage of the negotiation, but still did not incorporate the imposition of tariffs as a hardship under the contract, indicated that the risks associated with the delivery of the goods, including the imposition of tariffs by the Government of Equatoriana, was explicitly within Claimant’s sphere of control, and, therefore, was its allocated risks [*CIETAC Case*].

85. The imposition of tariffs by the Government of Equatoriana was, therefore, foreseeable within the sphere of control of Claimant. As a consequence, Claimant shall not repudiate its liability regarding the delivery which was affected by such imposition of tariffs.

C. Claimant shall not repudiate the contract by the DDP clause to exempt its liability for the tariffs.

86. The DDP clause governed the contract that Claimant shall be responsible for all the risks regarding the delivery **(1)**. The tariffs imposed by the Government of Equatoriana explicitly concerned the delivery for which Claimant was responsible under the contract **(2)**. Thus, Claimant shall not repudiate the DDP clause.

(1) The DDP clause governed the contract.

87. Although the DDP clause was not concluded in the written contract [*Cl. Ex. 5*], the clause was still considered as a part of the contract. Pursuant to Art. 11 of CISG, a contract needs not to be concluded in or evidenced by writing. Electronic couriers as conducts between the parties shall also provide evidence for the contract as another mean of the conclusion of the contract [*Propane case*]. Respondent made a clear offer to Claimant that “[Respondent] would insist for this contract on a delivery basis of DDP” [*Cl. Ex. 3*] and Claimant afterwards accepted such offer [*Cl. Ex. 4*]. Hence, the DDP clause was incorporated in the contract.

(2) Claimant’s liability for the newly imposed tariffs regarding the delivery was included by the conclusion of the DDP clause interpreted in accordance with Incoterms.

88. Since Incoterms is “a widely-observed usage for commercial terms,” it shall be qualified under Art.9(2) CISG to be applicable to the contract by the way in which Incoterms is widely known to international trade, and regularly observed by parties to contracts of the type involved in the particular trade concerned [*Folsom/Gordon/Spanogle 72*].

89. Whereas the DDP clause was concluded in and governed the contract, the interpretation and application of the DDP clause shall be in accordance with the Incoterms. Incoterms is often “expressly incorporated by a party of the parties to an international contract for the sale of goods” [*Ibid.*]. Given that there were no other circumstances during the negotiation between the Parties which would help interpreting the DDP of the contract, the DDP clause shall be implied in reference to Incoterms which is widely recognised as “part of international custom” [*Ibid.*].

90. Pursuant to Incoterms 2010, DDP means that “the seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities” [*Incoterms*]. Thus, Claimant as the seller of the contract shall be responsible for the tariffs as duties and customs formalities regarding importation of the goods.

91. Therefore, Claimant shall not repudiate its liability which bear a cost of the newly imposed tariffs by the Government of Equatoria. This is because the DDP clause incorporated in the contract shall be interpreted by the sense of regular observation widely known to international trade pursuant to Art.9(2) of CISG.

(3) Claimant’s liability for newly imposed tariffs regarding the delivery was included by the conclusion of the DDP clause interpreted in accordance with the conduct by which Claimant increased the price by 1,000 USD per dose.

92. The circumstances in which Claimant increased the price of the goods as a consideration for the acceptance for the DDP in this contract [*Cl. Ex. 4*] shall be interpreted in accordance with Art.8(2) of CISG, to the effect that Claimant took all the risk regarding the delivery. Pursuant to Art.8(2) of CISG, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. A normal practice in international trade was that price of goods shall be increased as a consideration for risks and responsibility which the seller would bear under the DDP clause. Hence, a reasonable person who practices international sales should know such practice. The circumstances in which Claimant increased the price of the goods by 1,000 USD per dose and explicitly accepted the DDP clause into the contract [*Cl. Ex. 4*] implied, from a viewpoint of a reasonable international trader that Claimant took all the responsibility regarding the delivery as represented by Claimant's such conduct.
93. It was apparent from the contract between the Parties that the risk regarding the delivery had been allocated to Claimant. Whereas Claimant explicitly accepted the full responsibility for the delivery [*Cl. Ex. 4*], the duty and obligation concerning the delivery lay within the sphere of control of Claimant as the seller [*DiMatteo 2015 287; Powdered milk case*]. Under a sphere of control analysis, the risk associated with the delivery was within Claimant's sphere of control and, therefore, was its allocated risk [*CIETAC Case*]. Claimant who had mentioned the customs regulation as an impediment could have, and should have, negotiated an expressed term into the contract to protect itself [*Ibid.*].
94. Even if Claimant had stated that it was not willing to take risk regarding the delivery [*Cl. Ex. 4*], Claimant shall still be liable for the tariffs imposed on the delivery. Claimant's statement that Claimant "[was] not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulations or import restrictions" [*Cl. Ex. 4*] was merely a proposal which would render no legal effect. Moreover, Claimant's conduct, represented by the way that Claimant increased the price of the goods by 1,000 USD per dose, must have been construed by the Parties to signify that Claimant would increasingly bear the risk and responsibility with regard to the delivery of the goods.
95. Therefore, Claimant shall not repudiate its liability on the newly imposed tariffs by the Government of Equatoria since its conduct in increasing the price of the goods shall be interpreted so pursuant to Art.8(2) of CISG and to normal practice of international sales.

D. Claimant shall not request an adaptation to the contract.

96. Since Mr. Shoemaker who spoke to Claimant had no authority to conclude the contract and since Claimant knew such fact, the representation of Mr. Shoemaker shall not be considered as that of Respondent, rendering no legal consequence between the Parties (1). Consequently, the adaptation clause shall not be deemed to be included into the contract (2). Claimant, therefore, shall not allege any adaptation clause to adapt the contract.

(1) Mr. Shoemaker had no authority to conclude the contract.

97. Although Mr. Shoemaker “urged [Ms. Napravnik] to authorize the [final] shipment as planned,” requiring that “a solution would be found through negotiation” [Cl. Ex. 8], such statement shall not be lawfully considered as a conclusion of the contract. Statement made by agency shall be legally binding, “[depending] upon the way the situation appears to the outside world, in the light of what is usual and reasonable to infer,” and “upon the apparent authority of the person with whom they are dealing” [Fridman 98]. Mr. Shoemaker explicitly stated to Claimant that “he had not been involved in the negotiations or the Sales Agreement and could not directly authorize any additional payment” [Cl. Ex. 8]. He further recalled Claimant that “[he] was not a lawyer and had not been involved in the negotiations of the contract” [Resp. Ex. 4]. Such circumstances sufficiently and reasonably implied that Claimant knew that Mr. Shoemaker had no authority to conclude the contract on behalf of Respondent.

98. Consequently, the conduct by which Mr. Shoemaker mentioned that “a solution would be found through negotiation” [Cl. Ex. 8] shall not be deemed as a representation of Respondent. Hence, the statement which Mr. Shoemaker made to demonstrate an attempt to find a solution shall not be incorporated in the contract.

(2) The adaptation clause was never included into the contract.

99. Since Mr. Shoemaker had no authority to conclude the contract, his statement regarding a future solution had no legal effect. Accordingly, the adaptation clause shall not be incorporated into the contract. Therefore, Claimant shall not allege any *clausa rebus sic stantibus* to request for an adaptation to the contract.

II. Claimant is not entitled to the payment of US\$ 1,250,000 under the CISG

A. The CISG does not oblige Respondent to bear the tariff

100. While the CISG is applicable to the contract (1), Art. 8 of the CISG did not provide any ground for Claimant to claim the payment (2). Additionally, the contract cannot be adopted by Art. 79 as wrongfully claimed by Claimant (3).

(1) The CISG is applicable to the contract

101. The CISG is applicable as a result of the agreement made between the parties in the sales contract **(a)**. Furthermore, there was no derogation of CISG in the sense of Art. 6 by the parties **(b)**. Thus, CISG is applicable to the contract.

(a) The parties agreed that CISG shall govern the sales contract

102. The CISG applies to contracts of sale of goods between the parties whose places of business are in different States [*Art. 1(1) CISG*]. In order to determine whether or not CISG govern the sales contract between Claimant and Respondent, Art. 1 of CISG must be taken into consideration.

103. Respondent agrees with Claimant that the CISG is applicable to this contract [*Cl. Memo.* ¶85, 87]. It is undisputed that Equatoriana and Mediterraneo, which Claimant and Respondent are situated in respectively, are Contracting States of the CISG [*Proc. Ord. 1*]. The contract of sale of goods between the parties is of international character as the place of business of the parties are in different Contracting States [*Cl. Ex. 5*]. As a result, CISG is applicable to this contract pursuant to Article 1 of CISG.

(b) There was no derogation of CISG in the sense of Art. 6

104. Claimant correctly pointed out that the parties may exclude the applicability of the convention pursuant to Art. 6 of CISG [*Cl. Memo.* ¶85].

105. However, there was no clear and affirmative agreement between the Claimant and Respondent to derogate the applicability of CISG in the sense of Article 6. [*Société case, Building materials case 2004, Bernards Case, Petroecuador case*]

106. Respondent also agrees with Claimant that Clause 12 of the sales contract [*Cl. Ex. 5*] is merely a clause governing specific events and is not a derogation of the effects of CISG by any means.

(2) Interpretation of the parties' intent under Art. 8 does not oblige Respondent to bear the tariff.

107. As correctly described by Claimant [*Cl. Memo.* ¶92], CISG allows the statements and other conducts to be interpreted using the standard of a reasonable person of the same kind as the other party would have had in the same circumstances [*Art. 8(2) CISG*].

108. Respondent also agrees that Art. 8(1) of CISG permits the interpretation of statements and other conduct of a party to be in accordance with his intent.

109. Contrary to Claimant's submission [*Cl. Memo.* ¶88-94], Article 8 does not oblige Respondent to pay the tariff. No statements were made by Respondent that can be interpreted as Respondent's agreement to bear the risk of tariffs, as wrongfully claimed by Claimant [*Cl. Memo.* ¶93].

110. Claimant and Respondent agreed to a delivery on a DDP basis [*Cl. Ex. 4*]. Even if it was not explicitly stated in the written contract [*Cl. Ex. 5*], the conclusion of contract need not to be evidenced in writing under the CISG, pursuant to Art. 11. Additionally, the email conversation between Claimant and Respondent regarding the basis of delivery [*Cl. Ex. 3, 4*] was sufficient to conclude the contract with delivery DDP [*Propane case*].
111. Since the delivery was on a DDP basis, Claimant, as the seller of this contract, shall be responsible for the newly imposed tariff, as the tariff is within the sphere of importation of goods.
112. Additionally, the telephone conversation made by Mr. Shoemaker did not conclude an agreement to any adaptation of the contract as claimed by Claimant. Mr. Shoemaker made absolutely clear that he had no authority to agree on an adaptation, and he did not agree to any adaptation [*Resp. Ex. 4*]. An interpretation pursuant to Art. 8 leads to the conclusion that Claimant was made aware of Mr. Shoemaker's intent.
113. Taken into account the standard of interpretation laid out in Art. 8(2), an ordinary business person would not jumped to a conclusion that the contract was adapt merely by a telephone conversation, where the other party explicitly said that he had no authority to do so.
114. To conclude, Art. 8 provides no base for Claimant's claim regarding the interpretation of Respondent's statements and other conduct.

(3) Art. 79 Does not oblige Respondent to bear the tariff

115. Claimant cannot invoke Art. 79 as claimed by the Claimant due to the fact that Claimant did not meet the requirements **(a)**. Additionally, the inclusion of *force majeure* clause in the sales contract derogate the effect of Art. 79 **(b)**.

(a) Claimant cannot invoke Art. 79 as Claimant did not meet the requirements

116. There was no impediment beyond control for Claimant to claim for exemption from liability under Art. 79 **(i)**. Furthermore, Claimant could reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract **(ii)**. Additionally, the allegation made by Claimant regarding the resale of semen is irrelevant **(iii)**.

(i) There was no impediment beyond control in the sense of Art. 79

117. Contrary to Claimant's submission [*Cl. Memo. ¶95-98*], the contract cannot be adopted by Article 79 as there was no impediment beyond control which Claimant can rely on.
118. Claimant invokes the rule of *rebus sic* [*Tallon 592*] to establish that a circumstance which makes the situation onerous and economically impossible can be considered an act of impediment. However, the rule does not apply to this case as the newly imposed tariff is not impossible for Claimant to bear, as Claimant had alleged [*Cl. Memo. ¶96*].

119. When Claimant was of the opinion that it met the requirements stated in Article 79(1) of the CISG, Claimant drew a wrong conclusion. While Respondent agrees that the imposition of the tariff may be seen as unforeseeable by the time of the conclusion of the contract, Claimant was able to overcome its consequence by paying the tariff and fulfilling its obligation to deliver the semen.
120. While there had been claims that a change in financial aspect of a contract regarding the cost of performance should be able to exempt a party from liability [*Tomato concentrate case*; *Iron molybdenum case*; *Chinese goods case*], the courts had made clear that the parties are deemed to assume the risk of market fluctuations.
121. Furthermore, retaliatory measure in international trade using tariff is always possible. The tariff may have increased the cost of performance, but it is a normal means in international trade [*DiMatteo 2015 296*; *Russian Tribunal 1994*].
122. Claimant claimed that the newly imposed tariff was an impediment beyond control in the sense of Art. 79. Claimant failed to provide a strong basis for the claim. There were decisions which found that governmental regulations constituted an impediment beyond control [*Russian Tribunal 1996*; *Coal case*]. However, none of these decisions involved a tariff for agricultural products. Additionally, the facts of those cases were not comparable to the present case.

(ii) Claimant could reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract

123. While negotiating for an increased price and a delivery DDP, Claimant claimed that it was aware from past experiences of unforeseeable additional health and safety requirements [*Cl. Ex. 4*]. This claim was made in the early stage of the negotiation. As a result, it is illogical for Claimant to assert that the impediment was unforeseen, since Claimant used its past experience as a leverage for the increased price during negotiation.
124. An ordinary business person with vast experience on international trade would not had blindly conclude a contract without predicting these so-called unforeseen impediment. Thus, it is logically unbelievable that Claimant did not see this impediment coming.

(iii) The allegation that Respondent resold the semen is irrelevant.

125. Contrary to Claimant's allegations [*Cl. Memo. ¶97*], Claimant had no evidence to prove that Respondent made a profit by selling the semen to a third party. Claimant's allegation is completely groundless and has nothing to do with the fact of this present case regarding the burden of the newly imposed tariff. Claimant's claim is therefore irrelevant.

126. As a result, Claimant has no ground to base its claim for Respondent to bear the tariff under Art. 79 [*Cl. Memo.* ¶98].

(b) The inclusion of the *force majeure* clause derogate the effect of Art. 79

127. Numerous decisions have been made regarding the derogation of the application of Art. 79 by the inclusion of *force majeure* clause in the contract [*Digest 2016 379*].

128. To illustrate, a court ruled that the inclusion of *force majeure* clause is sufficient to derogate Art. 79 of CISG by the effect of Art. 6 [*Iron molybdenum case*].

129. As pointed out by Claimant [*Cl. Memo.* ¶86], “the CISG can be excluded in the cases where the parties have agreed on terms that are incompatible with the convention” [*Building materials case 2006*]. The *force majeure* clause in the sales contract [*Cl. Ex. 5*] is different from the text of Art. 79 of CISG. Thus, they are not compatible.

130. Art. 79 set forth the conditions which a party is not liable for the failure to perform any of his obligations [*Comm. Draft Art. 65*]. On the contrary, the *force majeure* clause in the sales contract [*Cl. Ex. 5*] governs only the exemption from responsibility of the Seller only in the case of lost shipments and delays in delivery.

131. Additionally, Claimant cannot invoke the *force majeure* clause as Claimant had fulfilled its obligation and did not lose any shipments or deliver the shipment after the agreed time.

B. The UNIDROIT principle of *hardship* does not oblige Respondent to bear the tariff.

132. Contrary to the allegations made by Claimant, the UNIDROIT principle does not oblige Respondent to pay Claimant for the newly imposed tariff as the CISG does not allow for price adaptation under UNIDROIT **(1)**. Against all expectations, even if the tribunal finds that CISG allows for the adaptation of the price through UNIDROIT, Claimant cannot do so as the requirements under the principle was not fulfilled **(2)**.

(1) CISG does not allow for price adaptation under UNIDROIT

133. It had been deemed that the UNIDROIT principle cannot be used to completely overrun the effect of CISG [*Bonell 1*]. This is supported by [*Carlsen 1*] that in the cases where the UNIDROIT contradicts with CISG, the CISG prevails. In the present case, CISG already covered this issue by the provision of Art. 79 regarding impediment beyond control, which Claimant did not fulfill its requirements. Thus, there is no ground for Claimant to further invoke price adaptation under UNIDROIT.

134. It also had been deemed that the principle of *hardship* laid out in the UNIDROIT is unlikely to be used as a gap filler under Art. 7(2) of the CISG [*Ziegel 1*].

135. Since the *hardship* principle in the UNIDROIT is not deemed appropriate for filling the gap of CISG, price adaptation under UNIDROIT should not be allowed.

(2) Alternatively, Claimant cannot invoke UNIDROIT to adapt the price

136. There was no *hardship* in the meaning of Article 6.2.2 for Claimant to ask for an adaptation of the price **(a)**. Furthermore, UNIDROIT provides no right for Claimant to adapt the price following the renegotiation **(b)**.

(a) There was no *hardship* in the meaning of Article 6.2.2 of the UNIDROIT

137. Claimant did not provide any evidence or prove that the newly imposed tariff alter the equilibrium of the contract **(i)**. Apart from that, the burden of the tariff fell on Claimant due to the conclusion of the contract **(ii)**. As a result, the claim for the adaptation of the price made by Claimant is groundless **(iii)**.

(i) The tariff did not altered the equilibrium of the contract

138. Respondent correctly pointed out that in order for the principle of *hardship* to be invoked, there must be a fundamental alteration of the equilibrium of the contract [*Cl. Memo.* ¶102].

139. However, Claimant failed to prove that there was a fundamental alteration.

140. Additionally, Claimant assumed the risk of the tariff. Claimant agreed to the delivery on the basis of DDP [*Cl. Ex.* 3]. Any reasonable business person would have appreciated the risk involved in the delivery on the basis of DDP. Thus, Claimant was well aware of the risk and still agreed to the DDP.

141. Since there was no alteration of the equilibrium of the contract, there is no ground for Claimant to invoke the principle of *hardship* under UNIDROIT to adapt the price.

(ii) The sales contract provided that Claimant bears the burden of tariff

142. Claimant agreed to bear the burden of the tariff as a result of delivery DDP. Therefore, the tariff is Claimant's obligation in order to deliver the shipment. Claimant cannot simply shift the agreed burden to Respondent after the contract had been concluded a long time ago. Claimant should honor the contract and upheld the principle of *pacta sunt servanda*.

(iii) As a result, Claimant cannot adapt the price

143. Even though Claimant performed its obligation under the contract pursuant to Art. 6.2.1 after the performance become more onerous as alleged by Claimant, Claimant cannot simply adapt the price. Other requirements under the UNIDROIT principle must firstly be taken into consideration.

144. Since Claimant failed to prove that there was hardship, Claimant cannot invoke Art. 6.2.3 of UNIDROIT to adapt the price by requesting a renegotiation.

(b) Claimant has no right to adapt the price under the UNIDROIT principle

145. In order for a party to resort to the court for an adaptation of the contract or the termination of the contract, there must be a request for renegotiation, and that renegotiation must fail to reach an agreement [*Art. 6.2.3 UNIDROIT*]. Then, either party could resort to the court.
146. The telephone conversation on the morning of 21 January 2018 is not a negotiation regarding price adjustment, as wrongfully pointed out by Claimant [*Cl. Memo. ¶110*]. The conversation only covered whether or not Claimant will authorize the delivery in the wake of the newly imposed tariff. Respondent never agreed to any adjustment of the price nor any adaptation of the contract [*Resp. Ex. 4*].
147. Later on, there was a meeting between Claimant and Respondent on 12 February 2018. The result of the meeting did not provide any solution to both party. UNIDROIT Art. 6.2.3 provides the right to either party to resort to the court for an adaptation of the contract or the termination of the contract within reasonable time.
148. The failed meeting was on February, while Claimant only submitted the Notice of Arbitration at the end of July [*Notice of Arb.*]. It can be seen that a considerable amount of time had passed since the negotiation. The time for resorting to the court depends on the complexity of the case [*UNIDROIT Comm. 2016*]. Since this case involves only the payment of a new tariff, it should not take too long for a business person such as Claimant to resort to the court if it so wish to be remunerated of the amount.
149. If there were indeed a hardship, a reasonable business person would not have waited this long before acting. Over 5 months had passed since the day of the negotiation regarding the newly imposed tax [*Notice of Arb.*]. Whilst the UNIDROIT principle provides for the right to resort to the court [*Art. 6.2.3 UNIDROIT*], it did state that a party may resort to an arbitration. As a result, Claimant had no right to claim an adaptation of the price in this arbitration.
150. Accordingly, the allegation made by Claimant regarding the alleged resale of semen is irrelevant to the price adaptation under UNIDROIT [*Cl. Memo. ¶112*].

PROCEDURAL REQUESTS

Counsel, on behalf of Respondent, respectfully requests the Tribunal:

1. To decide that it lacks jurisdiction to determine the dispute and authority to adapt the contract;
2. To decide that the Evidence is inadmissible.

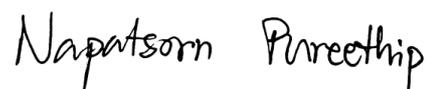
PRAYER FOR RELIEF

Counsel, on behalf of Respondent, respectfully requests the Tribunal to order that Claimant is not entitled to an amount of tariffs of 1,250,000 US\$.

(signed)



Intouch Siriwallop



Napatsorn Pureethip



Phocharaphol Yingamphol



Sirinnaree Ongsakul