Sixteenth Annual Willem C. Vis (East)
International Commercial Arbitration Moot Hong Kong

XIAMEN UNIVERSITY

MEMORANDUM FOR CLAIMANT

Phar Lap Allevamento	*v.*	**Black Beauty Equestrian**
Rue Frankel 1		2 Seabiscuit Drive
Capital City		Oceanside
Mediterraneo		Equatoriana
CLAIMANT		**RESPONDENT**

COUNSELS

LIAO XUEYU · HUANG YUEER · JIN TINGFENG · QIAO QIYA

BAO NINGZHEN · LIANG LIUXIAO · JIANG YI · LI LINGYU

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS AND DEFINITIONS.....iv
STATEMENT OF FACTS.....1
INTRODUCTION 2
ISSUE 1: THE TRIBUNAL HAS JURISDICTION UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT.....1
I. The arbitration agreement and its interpretation are governed by the law of Mediterraneo, including CISG 1
A. Both Parties explicitly chose the law of Mediterraneo to be the applicable law for the arbitration agreement.....2
1. Both Parties intended Clause 14 to govern the entire Sales Agreement 2
2. A reasonable third person would have interpreted Clause 14 to be applicable to the Sales Agreement as a whole 3
B. Alternatively, both Parties implied the Mediterranean law, including CISG to be applicable to the arbitration agreement 4
1. Clause 14 is a strong indicator of its implied application to the arbitration agreement 4
2. Meanwhile, the silence of Clause 15 on the applicable law for the arbitration agreement implies the application of the law of Mediterraneo including CISG 5
C. *In casu*, the doctrine of separability cannot justify preferring *lex arbitri* as the law governing the arbitration agreement 6
1. The doctrine of separability shall not be referred to, since it does not address choice-of-law issues.....6
2. Even if the doctrine of separability may affect the applicable law of the arbitration agreement, the present dispute is not consistent with the premises 7
II. The Tribunal has jurisdiction to adapt the contract 7
A. The consistent jurisprudence in Mediterraneo supports a broad interpretation of the scope of the arbitration agreement.....8
B. The Arbitration agreement should be interpreted as covering the adaptation of the contract under Art. 8 CISG 8

CONCLUSION ON ISSUE 1 10

ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDING 10

I. 2018 HKIAC Rules and Model Law shall be applied in determining evidence issues 10

II. According to Art. 22.3 2018 HKIAC Rules, the evidence is relevant to the case and material to the outcome 11

A. The evidence is relevant to the case 11

B. The evidence is material to the outcome 12

III. The alleged illegally obtained evidence is admissible 12

A. The submission of evidence does not violate the "*clean hands*" doctrine 13

1. CLAIMANT itself was not involved in any alleged illegal process ... 13

2. In any event, it lacks sufficient grounds for the Tribunal to dismiss the evidence 14

B. The alleged confidentiality obligations do not affect the admissibility of the disputed documents 14

1. In the present case, disputed documents submitted by CLAIMANT fall within the scope of confidential information, rather than privilege 15

2. CLAIMANT has no statutory or contractual confidentiality duties in the previous arbitration 15

3. The transparency tendency in international commercial arbitration supports the submission of the disputed evidence 16

IV. In any event, the evidence shall not be precluded from the arbitration.. 17

CONCLUSION ON ISSUE 2 17

Issue 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 UNDER CLAUSE 12 OF CONTRACT 17

I. Clause 12 of the Sales Agreement provides adaptation as a relief for CLAIMANT under certain hardship circumstances, including the unforeseen increase of tariff 18

A. In the present dispute, an unforeseen tariff increase constitutes "comparable unforeseen events" contained therein 18

1. The Parties' intent was to include an unforeseen tariff increase situation in Clause 12 of the contract 18

2. A reasonable third person would understand hardship situations incorporate tariff changes 19

B. Clause 12 does provide an adaptation remedy for apparent unfairness caused by tariff increase 20

II. In any event, RESPONDENT is obliged to pay the extra costs due to the promissory estoppel principle. 20

A. Mr. Shoemaker has the proper authority to perform the business acts 20

B. Mr. Shoemaker had made a clear promise to bear the bulk of additional costs 21

C. CLAIMANT has relied on the promise made by RESPONDENT in good faith 21

CONCLUSION ON ISSUE 3 22

ISSUE 4: CLAIMANT IS ENTITLED TO THE PAYMENT of US$1,250,000 UNDER CISG 22

I. CLAIMANT is entitled to the payment under Art. 79 CISG 22

A. Art. 79 CISG is applicable because it is not derogated 22

B. CLAIMANT is entitled to the payment under Art. 79 CISG 23

1. The tariff change constitutes an impediment under Art. 79 CISG 23

2. CLAIMANT is entitled to adapt the contract price based on proper interpretation of Art. 79 CISG 24

a. Art. 79 should be interpreted as allowing for contract adaptation according to the principle of good faith 25

b. Art. 79 CISG should be interpreted as allowing for adaptation based on CISG's legislative feature of making a contract alive 26

II. Even if the Art. 79 CISG is not applicable, the adaptation of the price is available under applicable rules contemplated by Art. 7(2) and Art. 9(2) CISG 26

A. UNIDROIT Principles can supplement the gap in CISG under Art. 7(2) CISG or Art. 9(2) CISG 27

B. The additional tariff constitutes hardship under Art. 6.2.2 UNIDROIT Principles 27

1. The occurrence of additional tariffs fundamentally alters the equilibrium of the contract 27

2. The additional tariffs satisfy other requirements of hardship 28

C. CLAIMANT is entitled to adapt the contract under Art. 6.2.3 UNIDROIT Principles 29

CONCLUSION ON ISSUE 4 29

PRAYER FOR RELIEF 31

TABLE OF AUTHORITIES XXXII

TABLE OF ARBITRAL AWARDS XLIII

TABLE OF COURT DECISIONS XLVIII

OTHER SOURCES LXI

CERTIFICATE LXII

TABLE OF ABBREVIATIONS AND DEFINITIONS

%	per cent
$	United States Dollars
ANoA	RESPONDENT's Answer to the Notice of Arbitration
Art	Article
Arts	Articles
CISG	United Nations Convention on Contacts for the International Sale of Goods (1980)
CLOUT	Case Law on UNCITRAL Texts
ed.	Edition
e.g.	*example gratia* (for example)
Exhibit C	CLAIMANT's Exhibit
Exhibit R	RESPONDENT's Exhibit
HKIAC	Hong Kong International Arbitration Center
2013 HKIAC Rules	Hong Kong International Arbitration Rules 2013
2018 HKIAC Rules	Hong Kong International Arbitration Rules 2018
2010 IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
ibid.	*ibidem* (in the same place)
ICC	The International Chamber of Commerce
infra	below
inter alia	among other things
Letter by Fasttrack	Mr. Fasttrack's letter of 3 October 2018
Letter by Langweiler	Mr. Langweiler's letter of 2 October 2018
lex arbitri	law of the seat of arbitration
Model Law	UNCITRAL Model Law on International Commercial Arbitration with amendments (2006)
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)
No.	number/numbers
NoA	CLAIMANT's Notice of Arbitration

p.	Page
pp.	Pages
para.	Paragraph
paras.	Paragraphs
PO1	Procedural Order No. 1 of 5 October 2018
PO2	Procedural Order No. 2 of 2 November 2018
Sales Agreement	Frozen Semen Sales Agreement made on 6 May 2017
supra	Above
v.	*versus* (against)
UNCITRAL Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2010)

STATEMENT OF FACTS

Phar Lap Allevamento ("CLAIMANT") is a company operating stud farm in Mediterraneo. Besides many sections of horse sports, CLAIMANT additionally offers frozen semen of its champion stallions for artificial insemination.

Black Beauty Equestrian ("RESPONDENT") is a company famous for its broodmare lines in Oceanside, Equatoriana.

21 March 2017	RESPONDENT first contacted CLAIMANT, inquiring about the availability of Nijinsky III, CLAIMANT's most famous stallion for breeding programme. RESPONDENT asked CLAIMANT to provide it with 100 doses of semen, including CLAIMANT's terms and conditions.
24 March 2017	CLAIMANT, being impressed with RESPONDENT's willingness, sent to the letter agreeing to offer 100 doses in accordance with the *Mediterraneo Guidelines for Semen Production and Quality Standards*.
28 March 2017	RESPONDENT replied to CLAIMANIT, requiring about further negotiations on Price and Delivery Terms and Applicable Rules and Dispute Terms.
31 March 2017	CLAIMANT agreed with the DDP Delivery Terms for better transportation, on the basis of not taking over any further risks. Besides, CLAIMANT requested to add a hardship clause into the contract.
10-11 April 2017	CLAIMANT and RESPONDENT **("Parties")** exchanged their views on arbitration clause, especially on neutral venue and applicable law.
6 May 2017	The Parties concluded the contract.

19 December 2017	The Government of Equatoriana imposed a tariff of 30% upon all agricultural goods from Mediterraneo as a retaliation for the previous restriction imposed by Mediterraneo. The astonishing adjustment of tariffs made the final shipment 30% more expensive.
20 January 2018	CLAIMANT emailed to RESPONDENT seeking for a solution.
21 January 2018	RESPONDENT called CLAIMANT with an emphasis of the Parties' interest in a long-term business relationship. Casting an impression to bear the additional costs, RESPONDENT urged CLAIMANT to finish the final shipment.
31 July 2018	Since no settlement could be reached about the price adaptation, CLAIMANT submitted its Notice of Arbitration **("NoA")** and appointed Ms. Wantha Davis as its arbitrator.
24 August 2018	RESPONDENT filed its Answer to the Notice of Arbitration **("ANoA")**, in which it appointed Dr. Francesca Dettorie as the second arbitrator in this arbitration.
14 September 2018	Prof. Calvin de Souza was designated as Presiding Arbitrator and the Arbitral Tribunal was constituted.

INTRODUCTION

1 With regards to the procedural issues, this Tribunal has jurisdiction to hear this matter. To be specific, it is the law of the main contract that governs the arbitration agreement and its interpretation **(ISSUE 1.I)** and the Tribunal has the powers to adapt the contract **(ISSUE 1.II)**. As for the evidence-related issues, CLAIMANT is entitled to submit the evidence from the other arbitration proceedings. In any event, there are no applicable rules precluding CLAIMANT from submitting the evidence **(ISSUE 2)**. On the merits, CLAIMANT is entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price both under Clause 12 of the contract **(ISSUE 3)** and CISG **(ISSUE 4)**.

ISSUE 1: THE TRIBUNAL HAS JURISDICTION UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

2 RESPONDENT asserts that the applicable law of the arbitration clause should be the law of Danubia and the Tribunal does not have the jurisdiction on the issue concerning the adaptation of the contract. However, CLAIMANT will demonstrate: first, the Sales Agreement is bound by the law of Mediterraneo, including CISG, which is stipulated clearly in the choice of law clause, *i.e.* Clause 14 of the contract **(I)**; second, the Tribunal has the powers to adapt the contract **(II)**.

I. The arbitration agreement and its interpretation are governed by the law of Mediterraneo, including CISG

3 RESPONDENT alleges that the arbitration agreement should be governed by the law of the seat of arbitration, *i.e.* the law of Danubia [*ANoA, paras. 5,13*]. However, CLAIMANT will demonstrate that the law governing the arbitration agreement shall be the law of Mediterraneo, including CISG.

4 Arbitration agreements are fundamentally contractual and consequently governed by the choice of law principles for contracts, especially the doctrine of autonomy [*Born, p. 560*]. Therefore, the applicable law for the arbitration agreement shall be examined by a three-step test which prioritizes the parties' choice: (a) the parties' express choice; (b) the implied choice of the parties as gleaned from their intents at the time of contracting; or (c) the system of law with which the arbitration agreement has the closest and most real connection [*BCY Case; Sulamerica Case; Dicey/Morris, para. 16R-001*]. If the parties to the dispute have made a proper choice of law, expressly or impliedly, there is no need to apply the third step, *i.e.* the closest and most real connection test [*Sulamerica Case; Arsanovia Case; Kuwait Insurance Case; Glick/Venkatesan, p. 133; Goldman, p. 199; Dicey/Morris, para. 16R-001*].

5 In the case at hand, both Parties explicitly chose the law of Mediterraneo, including CISG to govern the arbitration agreement **(A).** Alternatively, both Parties implied the law of Mediterraneo, including CISG to be applicable to the arbitration agreement **(B).** Moreover, the doctrine of separability could not justify preferring the law of the seat as the applicable law to the arbitration agreement **(C).**

A. Both Parties explicitly chose the law of Mediterraneo to be the applicable law for the arbitration agreement

6 Clause 14 of the Sales Agreement constitutes an explicit choice of the law of Mediterraneo, including CISG, providing that "[*s*]*ales agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG)*" [*Exhibit C5*]. CLAIMANT contends that the "Sales Agreement" contained therein refers to the "FROZEN SALES AGREEMENT" as a whole, and thus the express choice of the law of Mediterraneo naturally covers the arbitration agreement, which is listed as Clause 15 of the Sales Agreement. The interpretation is in consistence with Art. 8 CISG, since both Parties intended Clause 14 to govern the entire Sales Agreement **(1),** and a reasonable third person would have interpreted Clause 14 to be applicable to the Sales Agreement as a whole **(2).**

1. Both Parties intended Clause 14 to govern the entire Sales Agreement

7 Clause 14 provides that the law of Mediterraneo including CISG governs the Sales Agreement, and thus its interpretation shall also be governed by Art. 8 CISG. Art. 8 CISG not only governs the interpretation of parties' unilateral acts but also the interpretation of the contracts [*ICC Case No. 7331; Crudex Case; Roland Case*]. Therefore, Art. 8 CISG is binding on the interpretation of Clause 14.

8 According to Art. 8(1) CISG, interpretation should give effect to both parties' intent [*CLOUT Case No. 317; CLOUT Case No. 932; Roland Case; Toluene Case; Packaging Machine Case*], and Art. 8(3) provides that such intent should be determined by considering all relevant circumstances including the negotiations [*ICC Case No.11849; Fruit and vegetables Case; Proforce Case*].

9 *In casu*, the negotiations between CLAIMANT and RESPONDENT support interpreting Clause 14 as a choice of law clause for the whole Sales Agreement.

10 Firstly, the drafting process of the contract indicates the Parties' intent to apply the law of Mediterraneo to the entire Sales Agreement. CLAIMANT deleted the choice of the law of Equatoriana proposed by RESPONDENT from the arbitration agreement, unambiguously restating that it refused to apply the foreign law [*Exhibit R2*]. Moreover, CLAIMANT emphasized that the law of Mediterraneo should be the governing law for the Sales Agreement including the arbitration agreement, by illustrating in its response email to RESPONDENT that "[*t*]*hat offer is naturally on*

the condition that the law applicable to the Sales Agreements remains the law of Mediterraneo" [*Exhibit R2*]. RESPONDENT did not raise any objections towards the deletion of the choice of the law of Equatoriana from the arbitration agreement. And this last draft was kept unchanged in the final Sales Agreement [*Exhibit C5*]. Although the arbitration agreement of the finalized Sales Agreement also stipulated the numbers of the arbitrators and the language for the arbitration proceeding, the rest of the content was identical to the last draft provided by CLAIMANT. Naturally, RESPONDENT also gave consent to apply the law of Mediterraneo to the arbitration agreement [*Exhibit C5; Exhibit R2*].

11 Secondly, the Witness Statement from Julian Krone, who represented RESPONDENT and finalized the Sales Agreement, also shows RESPONDENT's intent to adopt the law of Mediterraneo, including CISG to the arbitration agreement [*Exhibit R3*]. In the Statement, he confirmed that he also considered the law of Mediterraneo as the governing law when finalizing the contract. He stated that "[*h*]*ad I known at the time that Mr. Antley was referring to the law applicable to the arbitration instead of the law applicable to the contract I would have definitively included an express reference to the law of Danubia into the arbitration agreement*" [*Exhibit R3*], which proves that he was in belief that the law of Mediterraneo governs the Sales Agreement as a whole.

2. A reasonable third person would have interpreted Clause 14 to be applicable to the Sales Agreement as a whole

12 Even if it is not possible to use the subjective intent standard in Art. 8(1) to interpret Clause 14, a more objective analysis provided by Art. 8(2) will demonstrate that a reasonable third person would interpret Clause 14 to be applicable to the entire "Sales Agreement".

13 If parties intended the arbitration agreement to be exempted from parties' express choice of law and to be governed by the law of the seat, they would have stipulated clearly in the arbitration agreement that, *"*[*t*]*he arbitration agreement is governed by the law of the seat*", as a reasonable third person would have done [*Kraken Case; Born, p. 491; CLOUT Case No. 404*]. It is reasonable to interpret the choice of law clause to govern the whole Sales Agreement, including the arbitration agreement if there is no specific choice of law for the arbitration agreement [*Born, pp. 522-523; Blackaby et al., p. 158*].

14 Judicial awards also support that a reasonable third person would interpret Clause 14 to govern the Sales Agreement as an entirety. In *BCY Case* and *Arsanovia Case,* the choice of law clauses of both cases formed part of a substantive commercial contract, and provided only one express choice of law for the "agreement". The court in the *Arsanovia Case* held that, when a choice of law clause stipulates that the "agreement" is to be governed by one country's system of law (just like Clause 14 *in casu*), it would be reasonable to interpret such express choice of law for the agreement as a whole, including the arbitration agreement [*Arsanovia Case, p. 11*]. Likewise, the court in *BCY Case* held that, it is reasonable to assume that the contracting parties intend the express choice of law to govern and determine the construction of all the clauses in the agreement which they signed, including the arbitration agreement [*BCY Case*].

15 *In casu,* the choice of law clause, *i.e.* Clause 14 contains no specific choice of law for the arbitration agreement, and it is highly similar to the choice of law clauses in *Arsanovia Case* and *BCY Case,* providing an express governing law for the "agreement" as a whole. Therefore, the same conclusion can be drawn that express choice of the law of Mediterraneo also governs the arbitration agreement.

B. Alternatively, both Parties implied the Mediterranean law, including CISG to be applicable to the arbitration agreement

16 Even if the Tribunal were to find that the "Sales Agreement" in Clause 14 did not cover the arbitration agreement and the Parties did not expressly choose the law of Mediterraneo as its applicable law, CLAIMANT would still submit that the general choice of law can also be implied to govern the arbitration agreement. In the present Sales Agreement, the general choice of law clause, *i.e.* Clause 14 is a strong indicator of its implied application to the arbitration agreement **(1),** and the silence on the applicable law in the arbitration clause, *i.e.* Clause 15 also suggests the application of the law of Mediterraneo **(2).**

1. Clause 14 is a strong indicator of its implied application to the arbitration agreement

17 The general choice of law clause refers to the circumstances where international commercial contracts frequently contain choice-of-law clauses which apply to the main contract generally, without specific reference to the arbitration clause associated with that contract [*Born, p. 491*].

18 As argued by many influential commentators, the law chosen by the parties to govern the contract is also implied to govern the arbitration clause, since the arbitration clause is only one of many clauses in a contract [*Born, pp. 591-594; Blackaby et al., p. 158; Collins, p. 127; Goldman, para. 59*].

19 International arbitral jurisprudence also supports that the general choice of law for the main contract also governs the arbitral agreement [*ICC Case No.11869; ICC Case No. 9987; ICC Case No. 10044*]. As one of the arbitral tribunals concluded that, "[*i*]*n the absence of any contrary express agreement, the proper law of the arbitration agreement shall be the same as that which is applicable to the main contract.*" [*ICC Case No. 9987*].

20 There is also consistent national jurisprudence of different states applying the general law of the main contract to the arbitration agreement [*Krauss Maffei Case; Sonatrach Petroleum Case*; *Raw Coffee Case*]. In one case decided by the English High Court, the court held that "[*w*]*here the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract.*" [*Sonatrach Petroleum Case*]. Same jurisprudence can also be found in Germany and Italy [*Raw Coffee Case; Krauss Maffei Case*]. As one German court concluded that, the law applicable to the disputed legal relationship shall be applied to the arbitration agreement where no choice of law has been made specifically for the arbitration agreement [*Raw Coffee Case*].

21 *In casu*, Clause 14 of the present Sales Agreement is a typical general choice of law clause choosing the law of Mediterraneo for the main contract, without ascertaining the specific applicable law to the arbitration agreement [*Exhibit C5*]. Therefore, as a general choice of law, Clause 14 constitutes an implication to apply the law of Mediterraneo including CISG to the arbitration agreement.

2. Meanwhile, the silence of Clause 15 on the applicable law for the arbitration agreement implies the application of the law of Mediterraneo including CISG

22 If the parties make an express choice of law for the main contract and remain silent on the applicable law for the arbitration agreement, the proper presumption will be that the law governing the main contract is implied to govern the arbitration agreement [*BCY Case; Arsanovia Case; Balfour Beatty Case*].

23 *In casu*, the arbitration agreement is based on the HKIAC model clause [*Exhibit R1*], which contains the specific choice of law for the arbitration agreement. However, this choice was deleted and did not appear in the finalized Sales Agreement [*Exhibit C5*]. Instead, the finalized arbitration agreement remains silent on its applicable law [*Exhibit C5*]. Naturally, it can be seen as an implication of the law of Mediterraneo to the arbitration agreement.

C. *In casu*, the doctrine of separability cannot justify preferring *lex arbitri* as the law governing the arbitration agreement

24 RESPONDENT alleges that doctrine of separability justifies applying the law of Danubia to the arbitration agreement [*ANoA, para. 14*]. However, the doctrine of separability shall not be applied to this case since it does not address choice-of-law issues **(1)**. Even if the doctrine of separability may affect the applicable law of the arbitration agreement, the present dispute is not consistent with the premises **(2).**

1. The doctrine of separability shall not be referred to, since it does not address choice-of-law issues

25 The doctrine of separability means to treat the arbitration agreement as a "distinct agreement" when the validity of the arbitration agreement is challenged [*Glick/ Venkatesan, p. 132*]. Art. 16(1) of Model Law carefully limits the doctrine to disputes about validity: "[*t*]*he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract...*" Thus, the doctrine of separability serves to give effect to parties' expectation that their arbitration clause will survive even if the main agreement falls away, for example due to alleged or actual invalidity [*BCY Case*]. It does not treat the arbitration agreement as a separate contract for the purpose of choice of law [*Glick/ Venkatesan, p. 132*]. Resorting to the doctrine of separability is only necessary when the validity of the arbitration agreement itself is challenged [*BCY Case*].

26 *In casu*, neither party challenges the validity of the main contract or the arbitration agreement, and therefore the doctrine of separability shall not be applied.

2. Even if the doctrine of separability may affect the applicable law of the arbitration agreement, the present dispute is not consistent with the premises

27 Even if the doctrine of separability might influence the governing law of the arbitration agreement, it does not mean that the law applicable to the arbitration clause is necessarily different from that applicable to the underlying contract [*Born, p. 476*]. Only under the following premises would it be necessary to revoke the doctrine of separability to apply different laws to the main contract and the arbitration agreement: the parties intend to adopt different laws or the general choice of law would invalidate the arbitration agreement.

28 Firstly, party autonomy allows the parties to select a specific governing law to the arbitration agreement which is different from the applicable law of the main contract, and thus the applicable laws are separable between the main contract and the arbitration agreement [*Born, p. 560*].

29 Secondly, the doctrine of separability shall be applied and prevent the parties' choice-of-law clause from being extended to the arbitration agreement and invalidating it, when the choice of law for the main contract would invalidate the arbitration agreement [*Born, p. 592*]. Jurisprudence also shows that the doctrine of separability would be given effect to alter parties' general choice of law when the general choice of law would render the arbitration agreement without effect [*BCY Case; ICC Case No.6850; ICC Case No. 6379; ICC Case No. 3572*].

30 *In casu*, the Parties did not select other laws instead of the law of Mediterraneo to govern the arbitration agreement [*Exhibit C5*]. Moreover, neither Party challenges the validity of the main contract or the arbitration agreement. Therefore, the doctrine of separability cannot be invoked to justify preferring the *lex arbitri* other than the general choice of law, *i.e.* the law of Mediterraneo, including CISG.

II. The Tribunal has jurisdiction to adapt the contract

31 RESPONDENT repeatedly emphasizes its objection to transfer powers to tribunals to adapt the contract after arising of the disputes. However, CLAIMANT submits that the Parties have included adaptation of the contract into the scope of the arbitration agreement. First, a broad interpretation in favor of a single dispute settlement proceeding is supported by the Law of Mediterraneo **(A)**. Second, the arbitration agreement should be interpreted as covering the adaptation of the contract under Art. 8 CISG **(B)**.

A. The consistent jurisprudence in Mediterraneo supports a broad interpretation of the scope of the arbitration agreement

32 The Arbitration Law of Mediterraneo provides for a broad interpretation of arbitration agreements [*NoA, p. 7, para. 16*], which is widely recognized by the jurisprudence of courts all over the world. This broad interpretation is based on the presumption that every rational businessperson acts economically in good faith [*Fiona Trust; Sonatrach v. K.C.A; Oberlandesgericht Hamburg, XV Y.B. Comm. Arb. 455, 464*]. Thus, a single centralized dispute settlement forum, namely "one-stop" dispute resolution, should be presumptively preferred by any sound businessmen, if there is no distinct contrary agreement [*Born, p. 1319*]. In other words, if the parties wish to have some issues of their contract decided by one tribunal and the others decided by another, they must show their intentions expressly. Otherwise, they will be taken to have agreed on a single tribunal for the resolution of all such disputes [*Fiona Trust*].

33 In light of above, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration ("pro-arbitration" rule of interpretation). So as to avoid multiple proceedings, the arbitration agreement should also be interpreted expansively applying to all related claims, regardless of whether or not they are written in the contracts [*Keating Case; Mitsubishi Motors; United Steelworkers; 30(4) ASA Bull*]. In international matters where the legal certainty should be promoted, "one-stop" dispute resolution is particularly desired.

34 In this case, there is no express agreement between RESPONDENT and CLAIMANT that different issues concerning the contract would be settled before separate tribunals or courts. And the wording of "[*a*]*ny dispute arising out of this contract*" in the arbitration agreement should be interpreted expansively and in favor of arbitration.

35 To conclude, the broad interpretation approach under the law of Mediterraneo supports the Tribunal's jurisdiction over the contract adaptation.

B. The Arbitration agreement should be interpreted as covering the adaptation of the contract under Art. 8 CISG

36 Ascertaining the genuine intent of the parties is of the paramount importance among general principles of the interpretation of contracts to construe the scope of an arbitration clause [*Born, p. 1400*]. The parties' intentions at the time entering into this contract were tested, and their consent to let arbitrators to adapt the contract is clear.

37 To determine the parties' intent, the circumstances of the parties' arbitration agreement must be taken into consideration. Under Art. 8 CISG, when the intent is obscure, all relevant--objective--circumstances of the contract should be interpreted according to the understanding of a reasonable person [*CLOUT Case No. 1034; CLOUT Case No. 851; CLOUT Case No. 777*].

38 The exact wording chosen by the parties is particular relevance [*Digest CISG, p. 56*]. Based on the wording, arbitration agreements are generally divided into two types: "narrow" and "broad". Arbitration agreements with the wording of (1) "any" or "all" disputes, (2) "relating to" or "in connection with", or (3) "arising from" are generally accepted to have a broader meaning [*Fiona Trust; Bechtel Case; Forwood Case; Farhat Trading Case; Fahem Case; Ulysses Case*]. And the wording of "arising out of" or "arising under" was thought to be narrow and has the same meaning, limited to claims based on the parties' contract. However, recent decisions have suggested that "arising out of" is broader and extends further to all disputes, which have any plausible factual or legal relations to the parties' agreement or dealings [*Sheehan Case*].

39 In the case at hand, the arbitration agreement begins with "[*a*]*ny dispute arising out of this contract*". According to this sentence, it is natural for a reasonable person to regard it as an arbitration agreement covering the adaptation of the contract in their usage of the wording of "any" disputes and "arising out of".

40 Also, the arbitration agreement between the Parties is based on the model clause offered by the HKIAC, though with some words abridged. The intent of the model clause is to apply itself expansively to all disputes relating to a contract. Hence, even if RESPONDENT deleted the wording of "relating to" in its proposal, the other wording of "any" disputes and "arising out of" in the model clause is still adopted [*Exhibit C5*]. Hence in the eyes of a reasonable person, the adoption of the HKIAC model clause strongly indicates that the arbitration agreement has a broad meaning, and that the intent of the Parties to empower arbitrators to adapt their contract is quite clear.

41 Under Art. 8(3) CISG, other relevant circumstances such as negotiation should also be considered. In this case, the Parties had ever considered the issue of further adaptation: Ms. Napravink and Mr. Antley discussed whether or not to include an adaptation clause face-to-face on 12 April 2017 [*Exhibit C8*]. Once Mr. Antley promised a proposal, the Parties came into a consensus to include the clause. Also, Mr. Antley's "negotiation

note" implies that both Parties have agreed on its incorporation, or the issue of the incorporation of an adaptation clause should have been written on it [*Exhibit R3*]. And according to Mr. Julian's statement, as a reasonable person initially involved in finalization of the contract, he made the same conclusion [*Exhibit R3*].

42 In view of above, relevant circumstances of the arbitration agreement indicate the Parties' consent to include the adaptation of the contract into the scope of arbitration agreement.

CONCLUSION ON ISSUE 1

43 In conclusion, the Parties have chosen the law of the Mediterraneo, including CISG to govern the Sales Agreement including the arbitration agreement, explicitly or implicitly. Hence, the arbitration agreement should be interpreted expansively and the Tribunal has jurisdiction to adapt the contract.

ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDING

44 Evidence plays a crucial role in the outcome of all cases. During the dispute, CLAIMANT received a reliable information about another resemble arbitration and has been promised a copy of the award and the relevant submission, which in CLAIMANT's view, constitute an important evidence [*Letter by Langweiler*]. CLAIMANT will first illustrate what laws shall govern the evidence-related issues **(I)** and why the documents constitute evidence in this arbitration **(II)**. Then, CLAIMANT will demonstrate that the presumed illegally obtained evidence can be accepted by the Tribunal **(III)** and in any event, CLAIMANT should not be precluded from submitting this evidence **(IV)**.

I. 2018 HKIAC Rules and Model Law shall be applied in determining evidence issues

45 Generally, evidence is categorized as a procedural issue and is governed by the law applicable to the arbitration proceeding [*Lew et al., p. 559*]. The Parties agreed to arbitrate under the 2018 HKIAC Rules [*Exhibit C5*]. Therefore, the specific rules therein concerning evidence, especially Art. 22, shall be relied on when dealing with evidence-related issues. Meanwhile, party autonomy and flexibility are limited by public policy considerations and the mandatory rules at the place of arbitration, if any [*Schewebel/Lahne, p. 219*]. Thus, as the law of the seat, Model Law shall be applied in the same vein.

46 Consistent with *lex arbitri*, in the circumstance where the arbitration rules chosen by the parties are not specific on a particular procedural issue, arbitral tribunals may "[*c*]*onduct the arbitration in such manner as it considers appropriate*" [*Art. 19(2) Model Law*]. In this case, with regards to evidence-related issues not clearly dealt with by 2018 HKIAC Rules and Model Law, the Tribunal has the discretion to refer to 2010 IBA Rules as supplement. Intending to provide an efficient, economical and fair process for the taking of the evidence and fill in the gaps in procedural framework rules with respect to evidence [*Preamble 2010 IBA Rules*], the Rules have become the common and accepted form of procedural guidelines for evidence taking in international arbitration [*Mirabal/Derains, p. 196*] and can be seen as the "best practice" to supplement the arbitration proceedings [*Tao, p. 605*]. In practice, this view has gradually gained wide acceptance and has been adopted in several other international arbitration cases [*RosInvestCo Case; ICC Case No. 14082*; *LCIA Case No. UN 5699*].

II. According to Art. 22.3 2018 HKIAC Rules, the evidence is relevant to the case and material to the outcome

47 Pursuant to Art. 22.3 2018 HKIAC Rules, the prerequisite for the evidence is "to be relevant to the case and material to its outcome". In other words, the arbitral tribunal needs to be convinced of these two separate key requirements [*Tao, p. 605*]. In the case, the documents CLAIMANT intends to submit are both relevant to the case **(A)** and material to the outcome **(B)**.

A. The evidence is relevant to the case

48 Tribunals have the duty to determine the relevance of the evidence to the dispute. [*Laminoirs Case; Iron Ore Case; Art. 9.1 2010 IBA Rules*]. To determine the margin of relevance, tribunals prefer to take a low "*prima facie*" standard, which can be equated with that of "likelihood" [*Hamilton, p. 63; Hanotiau, p. 117*]. More specifically, such "likelihood" standard only requires that the content of the requested documents has a connection to procedural or substantive allegations made by either party [*Tao, p. 605*]. Remarkably, in considering the term "relevant to the case", more attention should be paid from the parties' perspectives, since the tribunal only needs to decide whether the requesting party can use the requested document to present its case [*Lew/Marghitola, p. 54*].

49 In point of fact, RESPONDENT in the former arbitration had itself asked for the adaptation of the price due to the tariff adjustments [*Letter by Langweiler*]. However,

it vigorously denied the need to change the price in the present arbitration [*Letter by Langweiler*]. The similar factual backgrounds and the same party involved (RESPONDENT) made that arbitration decision have a "*prima facie*" connection with the present dispute. From CLAIMANT's perspective, the evidence could be used to at least justify RESPONDENT's genuine intent that the tariff adjustment can lead to the adaptation of the price. Therefore, it is far from persuasive to say that the award and other submissions in the other proceeding are extraneous to the present arbitration.

B. The evidence is material to the outcome

50 In the same vein, the documents in question must serve to support one party's allegations or to disprove those of the other [*Brower/Sharpe, p. 611; Raeschke, p. 641*]. Referring to 2010 IBA Rules, merely somehow related to one of the issues in dispute, the document is not sufficient to be seen as a complete evidence [*Ashford, n. 3-33*]. In most circumstances, a document is material when it is necessary in aiding the consideration of a legal issue by the tribunal [*Kaufmamn/Philippe, p. 13; Lew/Marghitola, p. 54*]. Being material to the case, it does not mean that the case cannot be won without this evidence, but that the case cannot be presented optimally or completely without it [*Waincymer, p. 859*].

51 *In casu*, the reasoning of RESPONDENT's argument in that arbitration and the award decided by that tribunal are of great necessity for this Tribunal to draw the legal conclusion. The main issue in this dispute can be summarized to "whether unforeseen tariff adjustments could result in price adaptations." It is not unsurprising that both Parties here hold different views to this question. To deal with this issue, the Tribunal is supposed to dig into the Parties' contract and their negotiation history to find how on earth both Parties agreed. RESPONDENT in that case was in the same position as CLAIMANT in this dispute. RESPONDENT's attitude towards this question can be clearly seen from the former arbitration, which aids the Tribunal's consideration on this issue.

52 In light of above, the evidence CLAIMANT requested to submit has fulfilled the two requirements under 2018 HKIAC Rules: relevant to the case and material to the outcome in this arbitration.

III. The alleged illegally obtained evidence is admissible

53 Usually, common law system insists that evidence obtained in illegal or improper

means is inadmissible in a court of law. However, this standard does not apply to international arbitration [*Mirabal/Derains, p. 208*]. Generally, if the parties agree to enter into international arbitration, they aim to avoid the cumbersome and time-consuming process which characterizes the judicial law of evidence. Therefore, the concept of "illegally obtained evidence", which origins from domestic litigation proceedings, shall be casted on less importance [*Saleh, p. 144*]. Furthermore, in international commercial arbitration, as a glaring evidence, simply ignoring it because of the ambiguous concept of "illegally obtained evidence", would lead to a travesty of justice [*ConocoPhilips v. Venezuela*].

54 In the present case, RESPONDENT alleged that the evidence had been obtained by illegal means and thus should not be admitted in the arbitration [*Letter by Fasttrack*]. In CLAIMANT's view, such simple presumption cannot influence the evidence's admissibility since CLAIMANT did not violate the "*clean hands*" doctrine **(A)** and the confidentiality obligations **(B)**.

A. The submission of evidence does not violate the "*clean hands*" doctrine

55 RESPONDENT was in strong opposition to this evidence, based on the presumption that CLAIMANT gained it in an illegal way. However, CLAIMANT will demonstrate that it just gained the evidence in a commercial way, without taking part in any illegal activities **(1)**; and in any event, it lacks sufficient grounds for the Tribunal to dismiss the evidence **(2)**.

1. CLAIMANT itself was not involved in any alleged illegal process

56 The "*clean hands*" doctrine has been widely adopted in international arbitration to determine the treatment of illegally obtained evidence. Pursuant to this theory, whether illegally or improperly obtained evidence will be thrown out of the tribunal is largely depended on who obtained it [*ICCA Sydney*]. Usually, the "*clean hands*" doctrine supports that the evidence is inadmissible if the wrongdoing was conducted by the party seeking to benefit from the evidence [*Sullivan*]. That means a party who relies on illegally obtained evidence already existed, gained by others (like *WikiLeaks*), but did not play any part in procuring the evidence itself, may still find the evidence admissible [*Sullivan*]. This theory is supported in several Investor-State disputes, where the tribunals allowed the admittance of and reliance on certain evidence that was either hacked from government computer systems or through *Wikileaks*, and published on a

public website [*CIOCL & DSH v. Kazakhstan; RosInvestCo Case*].

57 The present case clearly showed that the evidence was disclosed either by two former employees of RESPONDENT, or through a hacking-activity [*Letter by Fasttrack*]. Obviously, CLAIMANT was not involved in either original process of taking this evidence. What CLAIMANT participated was just trying to gain the documents in a commercial way from another company. Thus, the "*clean hands*" doctrine supports the submission of the evidence by CLAIMANT.

2. In any event, it lacks sufficient grounds for the Tribunal to dismiss the evidence

58 RESPONDENT may invoke the "*fruit of the poisonous tree*" doctrine to justify the refusal of the evidence. Different from "*clean hands*" doctrine, this theory highlights that information acquired through illegal sources is inadmissible, regardless of who obtained it [*Boykin/Havalic, p. 35; Reisman/Freedman, p. 747; Nardone v. US*]. Nevertheless, originating from US criminal law, this definition is controversial and could not be transferred to international commercial arbitration directly [*Germany Case XII ZR 210/04*]. In practice, even if the party seizes the evidence by itself in a controversial method, it does not necessarily lead to the exclusion of the evidence [*Football Case; PLC*]. Instead, tribunals or courts can still admit the evidence in the consideration of pursuing the truth, on a case-by-case basis. [*Football Case; Swiss Case 5P.308/1999; Corfu Channel*].

59 Therefore, *in casu*, even though CLAIMANT got the evidence from a company which has a doubtful reputation as to where it gets its information from and has refused to disclose its sources, RESPONDENT still lacks enough grounds to persuade the Tribunal to reject this evidence.

B. The alleged confidentiality obligations do not affect the admissibility of the disputed documents

60 As a vital virtue of arbitration, confidentiality is provided in many institutional arbitration rules [*Rule 35 2012 SIAC Rules; Art. 36 CAMCA Rules; Art. 46 2010 SCC Rules*] or national laws [*Art. 1467 French Code of Civil Procedure; Art. 5(1) Norway Arbitration Act*], or incorporated into the contract at the parties' autonomy [*Born, p.2787*]. RESPONDENT alleged that the submission of the disputed documents could only occur in violation of contractual and statutory confidentiality obligations [*Letter by Fasttrack*].

61 CLAIMANT will demonstrate that, disputed documents submitted by CLAIMANT fall within the scope of confidential information, rather than privilege **(1),** that CLAIMANT has no statutory or contractual confidentiality duties with regard to documents produced in the previous arbitration **(2)**, and that in any event, the submission is consistent with transparency principle, which has become the current trend in international commercial arbitration **(3)**.

1. In the present case, disputed documents submitted by CLAIMANT fall within the scope of confidential information, rather than privilege

62 Confidentiality and privilege are two terms of close connection. It is easy to obscure the scope of confidentiality and privilege [*Zacharias/Fred, p. 72*]. Nonetheless, privilege is commonly considered to include professional privilege, self-incrimination privilege, family testimony privilege, government information privilege and so on. However, it does not extend to the awards and any materials submitted in the course of proceedings [*Diana, pp. 68-69*]. Besides, privilege means that third parties need to obtain the consent of the parties among whom exists such privilege, while confidentiality refers to a relative legal obligation [*Prudential Assurance Company Case*]. Consequently, confidential information only restricts the parties from disclosure, whereas privileged information further prevents any third party from disclosure [*Bell Case; Molina Case*].

63 Considering the facts in the present case, the dispute at issue is solely with regard to the production of the award and materials submitted in the previous arbitration [*Letter by Langweiler*]. As a result, the disputed documents fall within the scope of confidential documents rather than privileged documents. Thus, the disputed documents can be submitted by third parties who are not bound by confidentiality duties.

2. CLAIMANT has no statutory or contractual confidentiality duties in the previous arbitration

64 Confidentiality obligations can arise from statutes or contracts [*Despina/Mathieu, p. 317*]. In the present case, as the *lex arbitri*, Model Law shall be applied to the present arbitration proceedings [*PO1, p. 52, para. 4*]. Generally, procedural issues include how to conduct the arbitral proceedings, for example, confidentially or not [*Born, p. 1599*]. Granted that Model Law lacks such provisions on confidentiality issues [*Boorberg et al., p. 235*], there are no statutory confidentiality duties imposed on CLAIMANT.

65 Apart from being restricted by the statutory duties, parties are also bound by such duties

if they have set forth the confidentiality obligation in their arbitration agreements [*Henderson, p. 898; Ileana/Julian, p. 9*]. In this regard, contractual character of this confidentiality obligation cannot be overshadowed. As a kind of contractual duties, it must be subject to the principle of relativity of contracts, which requires that only the parties to the confidentiality agreement shall be bound by such duty [*Despina/Mathieu, p. 317*].

66 In the previous arbitration, confidentiality duties originate either from the agreement reached by RESPONDENT with its former employees [*PO2, p. 61, para. 41*] or from 2013 HKIAC Rules as the arbitration rules chose by the Parties [*Letter by Fasttrack*]. Obviously, CLAIMANT is not a party in neither agreement. Hence, CLAIMANT has no contractual confidentiality duties not to use documents from that arbitration.

67 In light of above, CLAIMANT has no statutory or contractual confidentiality duties, and can submit the disputed evidence as a third party [*supra para. 64*]

3. The transparency tendency in international commercial arbitration supports the submission of the disputed evidence

68 Adding to the legitimacy of arbitration as well as reducing the possible inequalities created by opacity [*Poorooye/Ronan, pp. 306-308*], the principle of transparency has a genuine precedential value in international commercial arbitration, which is also seen as a marked and inevitable tendency in investor-state arbitration [*Biwater Gauff (Tanzania) Ltd Case*]. With the arrival of UNCITRAL Rules on Transparency, greater transparency was wildly called for in international commercial arbitration [*Poorooye/Ronan, p. 309*].

69 Generally, the term "transparency" is an information-centric concept that relies on openness and access to information, including the disclosure of documents or other materials, open hearing and public access [*Poorooye/Ronan, p. 282; Carmody, p. 96*]. In other words, transparency can be enhanced by disclosures of documents related to the arbitration [*Poorooye/Ronan, p. 305*].

70 *In casu*, CLAIMANT requested to submit the award and relevant documents from another arbitration proceeding. As a typical kind of document disclosure, the submission shall be allowed under the transparency principle. Besides, under the circumstance where two resemble proceedings were conducted under the same arbitration institution, keeping a former reasoned award out of the reach of the present Arbitral Tribunal not only deprives the valuable intellectual resources but also omits

important reasoning from arbitral jurisprudence [*Poorooye/Ronan, p. 303*], which is also not in line with the current transparency trend in international commercial arbitration.

71 Based on the illustrations above, evidence presumed obtained by illegal means should still be admitted in the arbitration.

IV. In any event, the evidence shall not be precluded from the arbitration.

72 Even if the evidence CLAIMANT proposed to submit does have some flaws as RESPONDENT alleged, the Tribunal still has the power to accept it.

73 On one hand, it is explicit that the arbitration rules grant the arbitral tribunal, rather than the parties, the discretion to determine the admissibility of the evidence [*Art. 22.2 2018 HKIAC Rules*]. On the other hand, in practice, the tribunals generally will allow whatever the parties wish to put forward, on the evaluation of the weight to be given to the evidence [*Lew et al., p. 565; Sandifer, p. 203; Steamship v. Thai; Hyundai Case*]. As a practical matter, it is in tribunal's control of evidence-taking and disclosure in international commercial arbitration, as opposed to the parties [*Born, p. 485*].

74 Therefore, CLAIMANT concluded that even if the evidence has some factual or legal flaws, RESPONDENT cannot prevent CLAIMANT from submitting it to the Tribunal.

CONCLUSION ON ISSUE 2

75 CLAIMANT is entitled to submit evidence from the other arbitration proceedings, since the evidence is relevant to the case and material to the outcome, as well as admissible in the case. In any event, there are no applicable rules that preclude CLAIMANT from submitting the evidence.

Issue 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 UNDER CLAUSE 12 OF CONTRACT

76 RESPONDENT erroneously argues that the contract does not empower CLAIMANT to ask for increased remuneration due to the tariff increase [*ANoA, p. 32, para. 18*]. However, CLAIMANT submits that it is entitled to claim for the remuneration because the additional tariffs constitute hardship under Clause 12 of the contract, thus entailing an adaptation of the contract price **(I)**. Besides, pursuant to the doctrine of estoppel, RESPONDENT should be bound by the promise made by Mr. Shoemaker, which enables CLAIMANT to claim for remuneration (**II**).

I. Clause 12 of the Sales Agreement provides adaptation as a relief for CLAIMANT under certain hardship circumstances, including the unforeseen increase of tariff

77 Clause 12 provides that "[*s*]*eller shall not be responsible for...hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*". In the present dispute, an unforeseen tariff increase constitutes "comparable unforeseen events" contained therein **(A)**. Furthermore, such events entitle Parties to adapt the contract in order to go back to equilibrium of the contract **(B)**.

A. In the present dispute, an unforeseen tariff increase constitutes "comparable unforeseen events" contained therein

78 Pursuant to Art. 8 CISG, contracts shall be first interpreted by ascertaining parties' intent, then resorting to "*a more objective analysis*" from a reasonable third person [*Digest CISG, p. 56; Minerals Case*]. In the case at hand, the Parties' intent was to include an unforeseen tariff increase situation in Clause 12 of the contract **(1)**. Furthermore, a reasonable third person would certainly draw the same conclusion **(2)**.

1. The Parties' intent was to include an unforeseen tariff increase situation in Clause 12 of the contract

79 According to Art. 8(1) CISG, interpretation of the contract should give effect to both parties' intent. And according to Art. 8(3), all relevant circumstances such as any previous negotiations shall be considered, when determining parties' intent [*Art. 8(1), (3) CISG; ICC Case No. 7331; Crudex Case; Roland Case; Schlechtriem/Schwenzer, p. 150; Flechtner, p. 275; Honnold, p. 117; Building Material Case; Marzipan Case*]. Negotiation history supports that the tariff increase falls within the scope of "*comparable unforeseen events*" in Clause 12.

80 CLAIMANT had made it clear to RESPONDENT that the purpose of including the hardship clause is to eliminate possible risks of "[*c*]*hanges in customs regulation or import restrictions*" [*Exhibit C4*]. Furthermore, to illustrate clearly its intent, CLAIMANT raised an example of "[*u*]*nforeseeable additional health and safety requirements*", which "[*d*]*estroy the commercial basis of the deal*" [*Exhibit C4*]. RESPONDENT was well aware of such intent and consented to the inclusion of a hardship clause [*ANoA, para. 4*]. Therefore, the "comparable unforeseen events" referred in Clause 12 should be interpreted in the purpose of preventing risks brought by the customs regulation or import restrictions. Moreover, such "comparable" event

should be both "unforeseeable" and to the same extent as "destroy the commercial basis of the deal".

81 In the dispute at hand, the tariff increase falls within the scope of customs regulation since it was imposed by the customs authorities [*Exhibit C7; Exhibit R4*]. And it was unforeseeable for both Parties, since they were unaware and could not have been aware of such regulation when entering into the Sales Agreement [*NoA, paras. 9-11; Exhibit 6; Exhibit C7; Exhibit C8*]. Moreover, the tariff had reached the extent of "destroying the commercial basis of the deal", since it not only destroyed the marginal profits of 5% for the transaction, but also made CLAIMANT suffer a loss of 25% [*NoA, p. 18; Exhibit C7; Exhibit C8*]. Consequently, the tariff increase in the present case falls within the circumstances of hardship by satisfying the conditions of "comparable unforeseen events" in Clause 12.

2. A reasonable third person would understand hardship situations incorporate tariff changes

82 Pursuant to Art. 8(2), (3) CISG, if the parties' intent is obscure, the contract should be interpreted in a reasonable person's view [*Fruit and Vegetables Case*].

83 A reasonable third person would draw a conclusion from the wording of Clause 12 that tariff is an event included in hardship. The terms of "hardship" is globally recognized to cover any unforeseen events, which fundamentally alter the equilibrium of the contract [*Koch, p. 611*]. In the eyes of a reasonable person, tariff is an important cause of hardship. Reference to such a standard term in the contract without any express limitations should be firstly interpreted to have the original meaning [*Schlechtriem/Schwenzer, p. 163*]. In present case, the Parties did not express any other intent of the interpretation of the hardship wording. Thus, it should cover all unforeseen events altering the equilibrium of contract, including tariff increase.

84 Furthermore, in the other arbitration proceeding, RESPONDENT, when faced with the unforeseeable tariff of 25%, had asked for an adaptation of the price invoking an ICC Hardship Clause contained in the underlying contract [*Letter by Langweiler; PO2, p. 60, para. 39*]. That case is quite similar to the present case. A reasonable third person could therefore conclude that RESPONDENT would also identify unforeseen tariff increase as the hardship situation of Clause 12.

85 In light of above, the hardship wording in Clause 12 covers an unforeseen tariff increase situation.

B. Clause 12 does provide an adaptation remedy for apparent unfairness caused by tariff increase

86 As mentioned above, the Parties had incorporated a hardship clause in the Clause 12 of Sales Agreement, which provides for an adaptation remedy. In addition, when CLAIMANT requested that an adaptation remedy should be ensured, Mr. Antley, RESPONDENT's negotiator, replied that "[*i*]*t should be the task of the arbitrators to adapt the contract if the Parties could not agree*" [*Exhibit C8*]. It demonstrates that RESPONDENT also gave a previous consent to an adaptation remedy in case of hardship situation.

87 What's more, Art. 7 CISG which contains a good faith principle requires that both Parties perform in a reasonable way as anticipated [*Digest CISG, p. 43*]. It is often demonstrated by "reasonableness" or "fair dealing" [*Koneru, p. 140*], and further confirmed by the "changed circumstances and right to renegotiation" principle [*Digest CISG, p. 45*]. The unforeseen price increase gave rise to a serious imbalance which rendered the further performance under unchanged conditions exceptionally detrimental for CLAIMANT, thus the Parties are required to renegotiate the contract in good faith. Hence, RESPONDENT should pay the recovery by taking the price adaptation, since CLAIMANT had undertaken the payment which it should not have to burden, which is unfair.

II. In any event, RESPONDENT is obliged to pay the extra costs due to the promissory estoppel principle.

88 Even if Clause 12 does not explicitly provide for a remedy, RESPONDENT still has the duty to pay the additional tariff fees. CLAIMANT will demonstrate that according to promissory estoppel principle, Mr. Shoemaker has the proper authority to perform the acts **(A)** and Mr. Shoemaker had made a clear representation to reach an adaptation agreement **(B)**. Since CLAIMANT has a reliance on the promise **(C)**, RESPONDENT thus shall take the duty of the extra payment resulted from the tariff adjustments.

A. Mr. Shoemaker has the proper authority to perform the business acts

89 Mr. Shoemaker had been introduced to CLAIMANT as the person responsible for the program including all matters concerning the Frozen Semen Sales Agreement in November 2017 [*PO2, p. 59, para. 32*]. Naturally, in CLAIMANT's view, Mr. Shoemaker is the agent of RESPONDENT, who has the proper authority to handle all the business matters concerning the contract [*Art. 2.2.2 UNIDROIT Principles*].

RESPONDENT may put forward that it is not within Mr. Shoemaker's authority to adapt the contract price. However, no matter exceeding or totally without authority, his acts do not affect the legal relations between the Parties in the case [*Art. 2.2.5 UNIDROIT Principles*]. In other words, CLAIMANT reasonably believes that Mr. Shoemaker has the authority to do so.

B. Mr. Shoemaker had made a clear promise to bear the bulk of additional costs

90 A statement or promise must be clear to give rise to an estoppel [*Keegan Case; Folens Case*]. Alternatively, estoppel would not arise if the representation or promise is unclear or ambiguous [*High Trees Case; Folens Case*]. Furthermore, to determine whether such a promise exists, the tribunal shall consider it from the promisee's perspective that whether the promisee reasonably believes that the promiser has the intention to do so [*Tool Metal Case*].

91 In the present case, CLAIMANT immediately contacted RESPONDENT and asked for an adaptation of price [*Exhibit C8*]. By repeatedly highlighting the good relationship between both Parties and the interest in further business and urging for the final shipment, Mr. Shoemaker promised that he was certain that a solution would be found [*Exhibit C8; Exhibit R4*]. In CLAIMANT's view, Mr. Shoemaker has showed it clearly that RESPONDENT accepted CLAIMANT's position that they should bear the bulk of the additional costs due to the tariffs.

C. CLAIMANT has relied on the promise made by RESPONDENT in good faith

92 Reliance means dependence or trust by a person, especially when combined with action based on that dependence [*Black's Law*]. Estoppel is grounded on a need for good faith dealing, but mere inconsistency does not necessarily imply a lack of good faith [*Fitzmacurice, p. 209; Alan Case*]. To determine whether estoppel would arise, the reliance requirement performs an independent function [*Megan, p. 1781*].

93 The Parties had a telephone contact after the tariff changed. After a long negotiation, Mrs. Julie, representative of CLAIMANT, finally authorized the delivery of the final shipment and paid the 30% in tariffs relying on RESPONDENT's promise that a solution would be found and that they were interested in a long-term relationship [*Exhibit C8*]. Apparently, such acts were made in reliance on Mr. Shoemaker's promise. In other words, if RESPONDENT did not cast a strong impression on CLAIMANT that it will bear the additional costs, CLAIMANT would not agree with the final shipment.

94 Based on the analysis above, it is CLAIMANT's conclusion that even if Clause 12 of the contract cannot serve as an explicit legal basis for the remuneration, CLAIMANT is still entitled to the payment according to the promissory estoppel principle.

CONCLUSION ON ISSUE 3

95 CLAIMANT is entitled to the payment under the Clause 12 of the contract. In any event, such relief can be achieved pursuant to the promissory estoppel principle.

ISSUE 4: CLAIMANT IS ENTITLED TO THE PAYMENT of US$1,250,000 UNDER CISG

96 According to Clause 14 of the contract between CLAIMANT and RESPONDENT, both Parties have agreed that the law applicable to the contract is the law of Mediterraneo, including CISG [*Exhibit C4*]. Should the Tribunal find that CLAIMANT lacks contractual basis to claim for the remuneration, CLAIMANT submits that it is entitled to the payment under CISG, since Art. 79 CISG allows for the adaptation of the contract in case of an impediment **(I)**. Alternatively, the price adaption is also available under applicable rules contemplated by Art. 7(2) and Art. 9(2) CISG **(II)**.

I. CLAIMANT is entitled to the payment under Art. 79 CISG

97 RESPONDENT argues that CLAIMANT cannot rely on Art. 79 CISG to claim for an increased remuneration, since it had been derogated, or it does not provide for CLAIMANT's requested remedy [*ANoA, paras. 20-21*]. However, CLAIMANT will demonstrate that Art. 79 CISG is not derogated **(A)** and CLAIMANT can claim for an increased remuneration according to Art. 79 CISG **(B)**.

A. Art. 79 CISG is applicable because it is not derogated

98 Although Art. 6 CISG gives the parties the right to "*derogate from or vary the effect of its provisions*", CLAIMANT and RESPONDENT did not reach an agreement to derogate from Art. 79 CISG.

99 Firstly, derogation is subject to express limitations [*Digest CISG, p. 33*]. If the parties intended to derogate from any provisions of CISG, "[*t*]*hey would have to express this in a sufficiently precise manner*" [*Lee, pp. 306-307; Empresa Case*]. However, *in casu*, there's no explicit derogation of any provision of CISG in the Sales Agreement. And Clause 14 of the contract states that both Parties agree to have this contract governed by CISG, which undoubtedly includes Art. 79 thereof [*Exhibit C5*].

100 Secondly, both Parties have no intent to derogate from Art. 79 CISG. According to Art.

8(1) CISG, in interpreting the contract, regard must primarily be paid to the perceptible intent of both parties [*Switzerland, P 2004 152; Austria, 6 R 160/052; Schwenzer/Fountoulakis, p. 59*]. Therefore, another determining factor of derogation from the provision is the intention of the parties at the moment of concluding the contract [*William, p. 48; Orthotec Case*].

101 *In casu*, on one hand, CLAIMANT has no intent to derogate from Art. 79 CISG. In the negotiation of the contract, CLAIMANT's sole intent to include the Clause 12 is to temper the additional risks caused by the change in the delivery terms [*Exhibit C3; NoA, p. 7*], which was also clearly emphasized in the email to RESPONDENT on 31 March 2017 [*Exhibit C4; supra para. 78*]. Clause 12 particularly specifies certain risks which are not explicitly stipulated in Art. 79 CISG, so Clause 12 is a supplement to or an elaboration of Art. 79 CISG, rather than derogation of that provision.

102 On the other hand, RESPONDENT did not indicate any intent to preclude Art. 79 CISG, either. As one of the provisions common to the obligations of both parties, Art. 79 CISG may be invoked not only by the seller, but also by the buyer. Clause 12 begins with "[*s*]*eller shall…*", so it only refines the seller's part of Art. 79, leaving the buyer's part untouched. In the negotiation, RESPONDENT did not have the intent and the reason to exclude Art. 79 by Clause 12, for otherwise the exemption which it could have under Art. 79 would have been deprived.

103 In light of above, both Parties had no intent to derogate from Art. 79 when they concluded the contract, so Art. 79 CISG is applicable.

B. CLAIMANT is entitled to the payment under Art. 79 CISG

104 CLAIMANT's situation fulfilled all the criteria under Art. 79 CISG and the tariff change constitutes an impediment **(1)**. Moreover, this impediment allows a remedy of price adaptation in sense of CISG's legislative goal **(2)**.

1. The tariff change constitutes an impediment under Art. 79 CISG

105 Pursuant to Art. 79(1) CISG, three requirements have to be fulfilled before a party could invoke the exemption: first, the impediment shall be beyond the control of the party claiming exemption; second, the party could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract; third, the party could not reasonably be expected to avoid or overcome the impediment [*Digest CISG, p. 387*].

106 *In casu*, the above requirements are all met. Firstly, the tariff change is beyond the control of CLAIMANT. "Acts of rulers and governments" is a kind of uncontrolled situations [*McKendrick, p. 721; Société Romay AG Case; Scafom International BV Case; Vital Berry Marketing Case*]. Considering that the additional tariffs were imposed by Mediterraneo, as a commercial company, CLAIMANT could not control or influence the circumstance.

107 Secondly, the tariff change could not be taken into account by CLAIMANT at the time of the finalization of the Agreement. In fact, only an event that is "[*s*]*o outside the bounds of probability that reasonable parties would not provide for it*" may lead to impediment [*Perillo, pp. 128-129; Bund, p. 391; No.41/602 Case; No.5011-18 Case*]. *In casu*, the 25% tariff announced by the newly elected president of Mediterraneo was completely unexpected, because it had neither been part of strategy papers released earlier before nor of the election manifesto [*NoA, p. 6, para. 9*]. And Mediterraneo in the past had never tried to protect their farmers by tariffs on foreign agricultural products [*PO2, para. 23*]. Equatoriana's previous governments always solved the dispute amicably and seldom took direct retaliatory measures, so the 30% tariff came as a surprise even to informed circles [*Exhibit C6*]. What's more, even RESPONDENT could not confirm the range of the additional tariffs imposed by its homeland at the time of the notice from CLAIMANT [*Exhibit R4, para. 2*], not to mention the chance for CLAIMANT to foresee the additional tariffs. Had CLAIMANT foreseen that the circumstances would change so radically, CLAIMANT would not have entered into the contract with RESPONDENT.

108 Thirdly, CLAIMANT could not reasonably be expected to avoid or overcome the additional tariffs when concluding the contract. CLAIMANT was financially difficult in the last two years. The extensive restructuring measures and a considerable cut of the workforce made it barely stay in business [*Exhibit C8*]. And Claimant's primary concern to conclude the contract was to increase its revenues due to its strained financial situation [*PO2, para. 15*]. To bear the increased tariff and meanwhile follow the original price will not only destroy CLAIMANT's margin but also made its financial situation worse off.

2. CLAIMANT is entitled to adapt the contract price based on proper interpretation of Art. 79 CISG

109 The present impediment is caused by the changed tariff. Though Art. 79 CISG left open

the issue of judicial adjustment or revision of contracts in cases of impediment like hardship, it can be interpreted in a manner which promotes the observance of good faith in international trade **(a)**, and CISG's legislative feature of making a contract alive also supports the requested remedy **(b)**.

a. Art. 79 should be interpreted as allowing for contract adaptation according to the principle of good faith

110 Art. 79(1) CISG specifies the circumstances in which the party enjoys exemption, but when it comes to impediment like hardship, there is no further explanation for relief other than exemption. [*Digest CISG, p. 389; Azerdo, p. 332; Neumayer/Ming, p. 535*]. However, one should not infer from it that no remedy other than exemption is available to a party suffering from an increased onerousness consequent to the impediment. Pursuant to Art. 7(1) CISG, in the interpretation of CISG, due consideration is necessary for the observance of good faith [*Art. 7(1) CISG*].

111 A proposition underlying CISG Advisory Council's Opinion on Art. 79 states: "[*i*]*n a situation of hardship under Article 79, the court or arbitral tribunal may provide further relief consistent with CISG and the general principles on which it is based.*" The further relief can be seen in the principle of good faith under Art. 7(1) CISG [*Brunner, p. 218*]. Since Art. 79 CISG establishes its own autonomous definition of impediments, it actually bridges various similar legal doctrines such as force majeure, hardship, impossibility and impracticability [*Brandon, p. 6*]. What's more, in the perspective of changed circumstances, the party who invokes changed circumstances that fundamentally disturb the contractual balance is entitled to claim the renegotiation of the contract [*Scafom International BV Case; Invicta Industrie Case; Schiedsgericht Case; SCH-4366 Case; ICC Case No. 8817; ICC Case No. 12097*]. Therefore, in a situation of hardship, the "*further relief*" can be interpreted as relief specially tailored to hardship, such as renegotiation or contract adjustment [*Lookofsky, p. 162; Garro, p. 15*].

112 *In casu*, CLAIMANT contends that the unexpected tariff totally changed the circumstances at the time of the conclusion of the contract. Though CLAIMANT would have had the chance to be exempted from the obligation of the third shipment, considering RESPONDENT's interest, their long-term relationship and RESPONDENT's promise of a satisfactory solution, CLAIMANT still chose to perform the "obligation" as planned and paid the 30% tariff [*Exhibit C8*]. Given the

fact that the shipment had already been fulfilled in good faith, making the exemption meaningless now, it is reasonable and necessary for CLAIMANT to claim for the price adaption.

b. Art. 79 CISG should be interpreted as allowing for adaptation based on CISG's legislative feature of making a contract alive

113 The most defining feature of the system of remedies in CISG is that it aims at keeping the contract alive as long as possible [*Huber, p. 152; Huber/Bach, pp. 585-586*]. This legislative aim is achieved by stipulating provisions to restore the balance upon the occurrence of unforeseen events [*Ferrario, p. 72*]. Art. 79 CISG is obviously such a provision that embodies the feature of making the contract alive. Besides, a remedy milder than exemption ought to be available to a party facing a dramatic increase in the costs of performance [*Azerdo, p. 335*]. From the perspective of RESPONDENT, contract adaption is a milder legal consequence in comparison to CLAIMANT's excuse, which may lead to the termination of contract [*Brunner, p. 218*].

114 On one hand, if CLAIMANT claims for exemption for non-performance, the contract may be terminated, despite the fact that RESPONDENT had initiated the payment of the installment. Considering that the "breading season" had started and the last shipment was urgently in need, RESPONDENT would suffer from a much greater loss than the amount of 25% additional tariff [*Exhibit C8; Exhibit R4*]. In this situation, the contract's purpose is frustrated and both Parties suffer from greater loss.

115 On the other hand, if CLAIMANT fully performs the contract in a situation of tariff change, the renegotiation of price adaptation is reasonable for the sake of both Parties' benefit. RESPONDENT's racehorse breeding program would successfully work as planned, and CLAIMANT would mitigate the loss. In fact, CLAIMANT did perform the third shipment, for the purpose of fulfilling the contract purpose and minimizing the loss.

116 In conclusion, Art. 79 CISG contains the legislative intent of making the contract alive as possible, which indicates that an adaption of the price is a more suitable remedy than exemption for both Parties.

II. Even if the Art. 79 CISG is not applicable, the adaptation of the price is available under applicable rules contemplated by Art. 7(2) and Art. 9(2) CISG

117 CLAIMANT did not base its claim of a price adaptation solely on Art. 79 CISG, but also Art. 7(2) and Art. 9(2) CISG [*NoA, p. 8, para. 20*]. Art. 7(2) CISG and Art. 9(2)

CISG provide for the application of general principles, domestic laws or international trade usages to fill the gap **(A)**, and thus the adaptation was allowed under UNIDROIT principles **(B)**.

A. UNIDROIT Principles can supplement the gap in CISG under Art. 7(2) CISG or Art. 9(2) CISG

118 Firstly, questions governed by CISG but not expressly settled in it, which some courts considered to be "internal gaps" [*Garro, p. 379; Digest CISG, p. 43*], are to be settled, without resorting to domestic law, but rather in conformity with the convention's general principles, or the rules of private international law, so as to ensure uniformity in the application of CISG [*Art. 7(2) CISG; Michael, pp. 115-116; Digest CISG, p. 43*]. Therefore, under Art. 7(2) CISG, the UNIDROIT Principles could be served as private international law to fill the gaps in a uniform manner [*Scafom International BV Case*].

119 Secondly, considering the requirements of Art. 9(2) CISG, the UNIDROIT principles provisions on hardship could be considered as "trade usages" in sense of this article [*Magnus, p. 1; Schlechtriem/Butler, p. 203; Schlechtriem/Witz, p. 255; Brunner, p. 219; McKendrick, p. 712*]. In the absence of agreement or established usage or practice, businessmen in both countries will usually adopt the UNIDROIT principle, because the general contract law of Equatoriana and Mediterraneo is a verbatim adoption of the UNIDROIT principles [*PO1, p.52, para.4*].

120 In consideration of above, the application of UNIDROIT principles can be deduced from CISG to settle the question concerning the additional tariff which is not explicitly settled in CISG.

B. The additional tariff constitutes hardship under Art. 6.2.2 UNIDROIT Principles

121 The additional tariff is a kind of hardship because the occurrence of additional tariffs fundamentally alters the equilibrium of the contract **(1)** and the additional tariffs satisfy other requirements of hardship listed under Art. 6.2.2 UNIDROIT Principles **(2)**.

1. The occurrence of additional tariffs fundamentally alters the equilibrium of the contract

122 Only those situations that fundamentally altered the equilibrium of the contract can be regarded as hardship. Whether an alteration is "fundamental" in a given case will depend on the increase in the cost of performance or decrease in value of the performance received by one party [*Art. 6.2.2(1) UNIDROIT Principles*]. As for the

increase in the cost of performance, such increase shall be excessively onerous rather than generally onerous. Various parameters are needed to be considered to meet the "excessive onerousness" requirement, including the following: the cost increase in percentage; the value of the counter-performance to be received by the obligor; the obligor's financial situation [*Schwenzer, p. 716; Schlechtriem, p. 618*]; and the nature of the contract, in particular whether it is a long-term installment contract [*Azerdo, p. 348*].

123 *In casu*, the contract is a long-term installment contract [*Exhibit C8*]. Before the imposition of the new tariff of 30% on the product by the Equatorianian authorities, CLAIMANT was expected to have a profit margin of 5% for the transaction [*NoA, p. 7, para. 18*]. And RESPONDENT got the 100 doses of Nijinsky III's frozen semen to build up its own racehorse breeding program [*Exhibit C1; Exhibit C5*]. However, after the imposition of the new tariff, CLAIMANT suffered a loss of 25% [*NoA, p. 7, para. 18*], which aggravates its financial difficulty [*PO2, p. 59, para. 29*]. Nevertheless, RESPONDENT still got the same frozen semen as agreed under the contract [*Exhibit C8*]. In such a case, CLAIMANT, whose performance became excessively onerous, lost all the value in this trade and RESPONDENT was unaffected. Consequently, the equilibrium of the contractual obligation was fundamentally altered considering above elements.

2. The additional tariffs satisfy other requirements of hardship

124 Firstly, hardship requires that the events occur or become known to the disadvantaged party after the conclusion of the contract [*Art. 6.2.2(a) UNIDROIT Principles*]. *In casu*, the additional tariff was announced on 19 December 2017 [*Exhibit C6*] after the finalization of the contract on 6 May 2017 [*Exhibit C5*]. Secondly, pursuant to Art. 6.2.2(b) UNIDROIT Principles, the additional tariff could not reasonably have been taken into account by CLAIMANT at the time of finalization of the contract [*supra para*. 109]. Thirdly, pursuant to Art. 6.2.2(c) UNIDROIT Principles, the additional tariff is beyond the control of CLAIMANT [*supra para. 108*]. Fourthly, it is also required that the risk of the events was not assumed by the disadvantaged party [*Art. 6.2.2(d) UNIDROIT Principles*], in other words, it did not constitute a normal risk associated with the kind of contract under consideration or a risk that this party agreed to assume [*Carlsen Anja*]. *In casu*, additional tariffs are not a normal risk associated with the Sales Agreement [*supra para. 78*].

125 In conclusion, CLAIMANT has the reason to ascribe the additional tariffs into a kind of hardship pursuant to Art. 6.2.2 UNIDROIT Principles.

C. CLAIMANT is entitled to adapt the contract under Art. 6.2.3 UNIDROIT Principles

126 When confronting hardship, the disadvantaged party is entitled to renegotiate the adaptation of the contract within a reasonable time [*Art. 6.2.3(1) UNIDROIT Principles; ICC Case No. 9994; Scafom Case; Suez et al. v. The Argentine Republic*]. Moreover, renegotiations require both parties must conduct the renegotiations in a constructive manner, in particular by refraining from any form of obstruction and by providing all the necessary information [*UNIDROIT Principles, p. 225*].

127 Once the renegotiation fails, either party can resort to the court [*Art. 6.2.3(3) UNIDROIT Principles*]. If the court finds hardship, it may adapt the contract with a view to restore its equilibrium [*Art. 6.2.3(4)(b) UNIDROIT Principles; Maskow, p. 663; Bund, p. 392; Art. 6.2.3(4)(b) UNIDROIT Principles; Ghezzi Case; No.333 Case; UAB Case*].

128 *In casu*, soon after being informed of the imposition of the additional tariffs, CLAIMANT notified RESPONDENT of this situation on 20 January 2018 and requested RESPONDENT to renegotiate without undue delay [*Exhibit C7*]. Pursuant to Art. 6.2.3(2) UNIDROIT Principles, CLAIMANT fulfilled its obligation under the contract with the principle of good faith [*Exhibit C8*]. Therefore, CLAIMANT could request for renegotiation of price.

129 In addition, even if the renegotiation, after the full-performance of CLAIMANT, concentrating on the adaptation of price finally failed [*Exhibit C8*], it does not deprive the right of CLAIMANT to claim to the tribunal for price adaptation on 15 June 2018 [*NoA, p. 18*], and the request is within a reasonable time.

130 Therefore, the Tribunal totally has the right to adapt the contract according to the disequilibrium situation that has been manifestly justified above [*supra para. 124*].

131 In light of above, CLAIMANT is reasonably entitled to remedy resulting from claim for price adaptation based on the hardship.

CONCLUSION ON ISSUE 4

132 CLAIMANT is entitled to the payment with the application of Art. 79 CISG and

UNIDROIT Principles, which provide suitable remedy for the case.

PRAYER FOR RELIEF

In light of the above, CLAIMANT respectfully requests the Tribunal to find that:

1) The Tribunal has jurisdiction under the arbitration agreement to adapt the contract;

2) CLAIMANT is entitled to submit evidence from the other arbitration proceeding;

3) CLAIMANT is entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price under clause 12 of the contract;

4) CLAIMANT is entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price under CISG.

TABLE OF AUTHORITIES

Cited as	**Reference**
Ashford	Peter Ashford, The IBA Rules on the Taking of Evidence in International Arbitration: A Guide, Cambridge University Press (2013), n. 3-33 Cited in: para. 50
Azerdo	Mercedeh Azerdo Da Silveira, Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation, Kluwer Law International, 2014, p. 323, 348 Cited in: paras. 111, 114, 123
Black's Law	Bryan A. Garner, Black's Law Dictionary, Thomson Reuters (2004), p. 1178 Cited in: para. 93
Blackaby et al.	Nigel Blackaby, Constantine Partasides QC, Alan Redfern, Martin Hunter, Redfern and Hunter on International Arbitration, Fifth Edition (2009), p. 158, para. 3.12 Cited in: paras. 13, 18
Boorberg et al.	Boorberg, Stuttgart et al., Guide to International and National Arbitration, p. 235 Cited in: para. 64
Born	Gary B. Born, International Commercial Arbitration, Second Edition, Kluwer Law International (2014), pp. 476, 485, 491, 522-523, 560, 591-594, 1319, 1400, 1599, 2787 Cited in: paras. 4, 13, 17, 18, 27, 28, 32, 36, 64

Boykin/Havalic Boykin H. James, Havalic Malik, Fruits of the Poisonous Tree: The Admissibility of Unla,fully Obtained Evidence in International Arbitration, in: 5 Transnational Dispute Management (2015), p. 35

Cited in: para. 58

Brandon Brandon Nagy, Unreliable Excuses: How do Differing Persuasive Interpretations of CISG Article 79 Affect its Goal of Harmony? New York International Law Review, March 2013, p. 6

Cited in: para. 113

Brower/Sharpe Charles N. Brower, Jeremy K. Sharpe, Determining the Extent of Discovery and Dealing with Requests for Discovery: Perspectives from the Common Law, The Leading Arbitrators' Guide to International Arbitration (Lawrence W. Newman & Richard D. Hill eds., 3d ed., 2014), p. 611

Cited in: para. 50

Brunner Christoph Brunner, Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration, International Arbitration Law Library, Jan 2008, pp. 218- 219

Cited in: para. 113, 115, 121

Bund Bund Jennifer M., Force Majeure Clauses: Drafting Advice for CISG Practitioner, Journal of Law and Commerce 1997-1998 , pp. 391-392.

Cited in: paras. 109, 128, 129

Carlsen Anja Can the Hardship Provisions in the UNIDROIT Principles Be Applied When CISG Is the Governing Law?, 1998

Available at: http://www.cisg.law.pace.edu/cisg/biblio/carlsen.html

Cited in: para. 125

Carmody Matthew Carmody, Overturning the Presumption of Confidentiality: Should the UNCITRAL Rules on Transparency be applied to International Commercial Arbitration?, 19 International TRADE & BUS. L. REV. 96, 2016, p. 96

Cited in: para. 69

Collins Lawrence Collins, The Law Governing the Agreement and Procedure in International Arbitration in England, J. Lew (ed.), Contemporary Problems in International Arbitration (1987), p.127.

Cited in: para. 18

Despina/Mathieu Despina Mavromati, Mathieu Reeb, The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials, Kluwer Law International (2015), p. 317

Cited in: paras. 64, 65

Dicey/Morris Albert Venn Dicey, John Humphrey Carlisle Morris, Lawrence Collins, Dicey, Morris & Collins on the Conflict of Laws, Fifteenth Edition (2012), para. 16R-001.

Cited in: paras. 4, 50

Digest CISG UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, United Nations (2012), pp. 39, 56, 387, 392-393

Cited in: paras. 38, 79, 88, 100, 106, 111, 119

Diana Diana Kuitkowski, The Law Applicable to Privilege Claims in International Arbitration, Journal of International Arbitration, Volume 32 Issue 1, pp. 68-69

Cited in: para. 62

Flechtner

Harry M. Flechtner, The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parol Evidence Rule, Journal of Law and Commerce (1999), pp.259-287

Available at:
http://www.cisg.law.pace.edu/cisg/biblio/flechtner1.html#dis

Cited in: para. 80

Garro I

Alejandro M. Garro, CISG Advisory Council Opinion No. 7 1. Exemption of Liability for Damages Under Article 79 of CISG, Nordic Journal of Commercial Law, 2008, p. 15

Cited in: para. 113

Garro II

Garro Alejandro M., Force Majeure and CISG Article 79: Competing Approaches and Some Drafting Advice, New York (Oxford University Press) 2008, p. 379

Cited in: para. 120

Glick/Venkatesan

Ian Glick, Niranjan Venkatesan, Choosing the Law Governing the Arbitration Agreement, in Neil Kaplan and Michael J. Moser (eds), Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles (2018), p. 133.

Cited in: paras. 4, 25

Goldman

B. Goldman, Arbitrage (droit international privé), in P. Francescakis (ed.), Encyclopédie Dalloz – Droit International (1968), paras. 59, 199.

Cited in: paras. 4, 18

Hamilton Virginia Hamilton, Document Production in ICC Arbitration, The ICC International Court of Arbitration Bulletin (2006), p. 63

Cited in: para. 48

Hanotiau Bernard Hanotiau, Document Production in International Arbitration : a Tentative Definition of "Best Practices", The ICC International Court of Arbitration Bulletin (2006), p. 117

Cited in: para. 48

Henderson Henderson Alastair, Lex Arbitri, Procedural Law and the Seat of Arbitration, Singapore Academy of Law Journal, vol. 26, No. Special (2014), p. 898

Cited in: para. 65

Honnold Honnold John O,Uniform Law for International Sales under the 1980 United Nations Convention, Third Edition, Kluwer Law International (1999) p.117 p. 229, 355

Available at:
http://www.cisg.law.pace.edu/cisg/biblio/honnold.html

Cited in: para. 81

Huber/Bach Peter Huber, Ivo Bach, International Arbitration and International Commercial Law: Synergy, Convergence and Evolution, Kluwer Law International, Jan 2011, pp. 585-586

Cited in: para. 115

Huber Peter Huber, Typically German - Two Contentious German Contributions to CISG Uniform Sales Law, Belgrade Law Review, 2011, p. 152

Cited in: para. 115

Ileana / Julian

Ileana M. Smeureanu, Julian D. M. Lew, Confidentiality in International Commercial Arbitration, Kluwer Law International (2001), p. 9

Cited in: para. 65

Kaufmamn / Philippe

Gabrielle Kaufmamn-Kohler, Philippe Bartsch, Discovery in International Arbitration: How much is too much? German Arbitration Journal (2004), p. 13

Cited in: para. 50

Koch

Robert Koch, International Arbitration and International Commercial Law: Synergy, In Kroll, Mistelis, Viscasillas, et al. (eds), Convergence and Evolution ,Kluwer Law International 2011) pp. 597 - 612

Cited in: para. 85

Lee

Justin P. Lee, Lessons from Cuba: Case Commentary on Exemption from Damages and the Right to Interest under CISG, Journal of International Arbitration, 2016, pp. 306-307

Cited in: para. 101

Lew et al.

Julian D. M. Lew, Loukas Mistelis, Stefan Kröll, Comparative International Commercial Arbitration, Kluwer Law International (2003), pp. 559, 565

Cited in: paras. 45, 73

Lew / Marghitola

Julian D. M. Lew, Reto Marghitola, Document Production in International Arbitration, Kluwer Law International (2015), p. 54

Cited in: paras. 48, 50

Lookofsky Joseph Lookofsky, Not Running Wild with CISG, Journal of Law and Commerce, 2011, p. 162

Cited in: para. 113

Magnus Magnus Ulrich, Force Majeure and CISG, in Šarčević/Voken (eds), The International Sale of Goods Revisited, The Hague etc. (Kluwer Law International) 2001, p. 1

Cited in: para. 120

Maskow Maskow Dietrich, Hardship and Force Majeure, American Journal of Comparative Law 1992, p. 663

Cited in: para. 129

McKendrick Vogenauer/Kleinheisterkamp
PICC Commentary, p. 712

Cited in: para. 120

Megan Megan L. Wanger, Jurisdiction by Estoppel in the International Court of Justice, California Law Review, Vol. 74, Issue 5 (1986), p. 1781

Cited in: para. 48

Michael Michael Joachim Bonell, CISG and the Unidroit Principles of International Commercial Contracts: Two Complementary Instruments, Wuhan University International Law Review, 06.02.2009, pp.115-116

Cited in: para. 119

Mirabal / Derains Sicard-Mirabal and Derains, Introduction to Investor-State Arbitration, pp. 196, 208

Available at: http://www.kluwerarbitration.com/document/KLI-KA-Sicard-Mirabal-2018-Ch08

Cited in: paras. 46, 53

Neumayer / Ming Neumayer Karl H. , Ming Catherine, Convention de Vienne sur les contrats de vente internationale de marchandises, Commentaire, Lausanne (Cedidac), 1993, p. 535

Cited in: para. 112

Perillo Perillo Joseph M., Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts, *in* Contratación internacional – Comentarios a los Principios sobre los Contratos Commerciales Internacionales del Unidroit, México 1998, pp. 128-129

Cited in: para. 109

Poorooy / Ronan Avinash Poorooy, Ronan Feehily, Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance, Harvard Negotiation Law Review Vol. 22, No. 2, Spring 2017, pp. 282, 305-308

Cited in: paras. 68, 69, 70

Raeschke Hilmar Raeschke-Kessler, The Production of Documents in International Arbitration – a Commentary on Art. 3 of the New IBA-Rules of Evidence, Law of International Business and Dispute Settlement in the 21st Century (Robert Briner et al. eds., Carl Heymanns 2001), p. 641

Cited in: para. 50

Reisman/Freedman Reisman W. Michael, Freedman E. Eric, The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication in: 76(4) American Journal of International Law (1982), pp. 737-753

Cited in: para. 58

Tao Jingzhou Tao, Documents Production in Chinese International Arbitration Proceedings, International Arbitration 2006: Back to Basics? (Albert van den Berg (ed.)2007), p. 605

Cited in: paras. 46, 47, 48

Saleh Samir A. Saleh, Reflections on admissibility of evidence: Interrelation between domestic law and international arbitration, Arbitration International (1999), p. 144

Cited in: para. 53

Sandifer Durward Sandifer, Evidence before International Tribunals, University of Virginia Press (1975), p. 203

Cited in: para. 73

Schewebel/Lahne Schwebel, S. M., Lahne, S. G., Public Policy and Arbitral Procedure, Comparative Arbitration Practice and Public Policy in Arbitration-ICCA Congress Series no.3 (1986), pp. 205–225

Cited in: para. 45

Schlechtriem Schlechtriem Peter, Commentary on the UN Convention on the International Sale of Goods (CISG), Oxford (Clarendon Press) 1998, p. 618

Cited in: para. 123

Schlechtriem/Butler Schlechtriem Peter, Bulter Petra
UN Law on International Sales – The UN Convention on the International Sale of Goods, Berlin (Springer) 2009, p. 203

Cited in: para. 120

Schlechtriem/Schwenzer SCHLECHTRIEM Peter, SCHWENZER Ingeborg, Commentary on the UN Convention on the International Sale of Goods (CISG), Oxford University Press (2016), pp. 150, 163

Cited in: paras. 81, 85

Schlechtriem Peter/Witz Claude Convention de Vienne sur les contrats de vente internationale de marchandises, Paris (Dalloz) 2008, p. 255

Cited in: para. 120

Schwenzer /Fountoulakis Ingeborg Schwenzer, Christiana Fountoulakis, International Sales Law, Routledge-Cavendish, 2007, p. 59

Cited in: 102

Schwenzer Schwenzer Ingeborg, Force Majeure and Hardship in International Sales Contracts, VictoriaUniversity of Wellington Law Review 2008, p. 716

Cited: para. 123

Waincymer Jeffrey Waincymer, Procedure and Evidence in International Arbitration, Kluwer Law International (2012), p. 859

Cited in: para. 50

William William P. Johnson, Understanding Exclusion of CISG:A New Paradigm of Determining Party Intent, Buffalo Law Review, August 28, 2010, p. 48

Cited in: para. 102

Zacharias/Fred Zacharias, Fred C, Harmonizing Privilege and Confidentiality, South Texas Law Review vol. 41, No. 1 Winter 1999, p. 72

Cited in: para. 62

TABLE OF ARBITRAL AWARDS

Cited as	**Reference**
	AD HOC ARBITRATION
Austria, 6 R 160/05	Austria Oberlandesgericht Linz 23 January 2006 6 R 160/05z Cited in: para. 102
	AMERICAN ARBITRATION ASSOCIATION
Steamship v. Thai	AAA Case No. 1310-0417-78 American Steamship Company v Thai Transportation Enterprise Awards of 4 January 1980 Cited in: para. 73
	AUSTRIA VIENNA ARBITRATION
SCH-4366 Case	15 June 1994 Case No. SCH-4366 Cited in: para. 113
	CUBAN COURT OF INTERNATIONAL COMMERCIAL ARBITRATION
Empresa case	Cuban Court of International Commercial Arbitration Empresa Italiana v. Empresa Mixta 12 December 2014 Laudo No. 21/2014 Cited in: para. 100

INTERNATIONAL CHAMBER OF COMMERCE

Cowhides Case	ICC Case No. 7331 of 1994 Seller (Yugoslavia) v. Buyer (Italy) Cited in: para. 7
Delivery Case	ICC Case No. 11869 of 2011 Assignee of buyer (Republic of Korea) Respondent: Seller (Australia) v. Seller (Australia), p. 53. Cited in: para. 19
Distributor Case	ICC Case No. 6850 of 1992 Manufacturer Y SA v. Distributor X GmbH. Cited in: para. 29
Exclusive Distributor Case	ICC Case No. 6379 of 1990 Principal v. Distributor Cited in: para. 29
Fashion products case	ICC Case no. 11849 of 2003 United States' buyer v. Italian seller Cited in: para. 8
Minerals case	ICC Case No.8324 Magnesium case 1995 Cited in: para. 79

Oil and Gas Case	ICC Case No. 3572 Deutsche Schachtbau- und Tiefbohrgesellschaft mbH (DST) et al. v. The Government of the State of R'as Al Khaimah (UAE), The R'as Al Khaimah Oil Company (Rakoil) (UAE), 1982 Cited in: para. 29
Real Estate Case	ICC Case No. 9987 Dallah Real Estate & Tourism Holding Corporation v. Ministry of Religious Affairs, Government of Pakistan, p. 349 2001 Cited in: para. 19
ICC Case No. 10044 of 2001	Unpublished ICC No. 14082 Procedural Order No. 1 Cited in: para. 19
ICC Case No. 14082	Unpublished ICC No. 14082 Procedural Order No. 1 Cited in: para. 46
ICC Case No. 8817	Unpublished ICC Case No. 8817 December 1997 Cited in: para. 113
ICC Case No.9117	Unpublished ICC Case No.9117 March 1998 Cited in: para. 121

ICC Case No. 9994	Unpublished ICC Case No. 9994 December 2001 Cited in: para. 128

INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES

Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania	ICSID Case No. ARB/05/22, Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania 29 September 2006 Procedural Order No. 3 Cited in: para. 68
CIOCL & DSH v. Kazakhstan	ICSID Case No. ARB/13/13 Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan 27 September 2017 Cited in: para. 55
ConocoPhilips v. Venezuela	ICSID Case No. ARB/07/30 ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, Dissenting Opinion of Georges Abi-Sab 3 September 2013 Cited in: para. 52
Suez et al. v. The Argentine Republic	ICSID Case No ARB/03/19 Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic 12 May 2008 Cited in: para. 128

LCIA Case No. UN 5699	Unpublished LCIA Case No. UN 5699 Procedural Order No. 1 Cited in: para. 47

THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

RosInvestCo Case	SCC Case No.079/2005 RosInvestCo UK Ltd. v. The Russian Federation Available at: https://www.italaw.com/sites/default/files/case-documents/ita0719.pdf Cited in: paras. 47, 57

SCHIEDSGERICHT BERLIN ARBITRATION

Schiedsgericht Case	Schiedsgericht Berlin 1990 Case No. SG 126/90 Cited in: para. 113

TABLE OF COURT DECISIONS

Cited as	**Reference**
	ARGENTINA
Ghezzi case	Cámara de Apelaciones en lo Civil y Comercial de La Matanza, sala II(CCivyComLaMatanza)(SalaII) Ghezzi y Salvini, Adelina E. y otro c. Suárez, Eduardo R. y otro 28 February 2006 Cited in: para. 129
	FINLAND
Crudex Case	HO Helsinki (HO = Hoviokeus / hovrätt = Appellate Court) Crudex Chemicals Oy v. Landmark Chemicals S.A. 31 May 2004 Case No. S 01/269, para. 9.3.4 Cited in: para. 7
	FRANCE
Farhat Trading Case	French Cour de cassation civ. 1e, Judgment Société Farhat Trading Co. v. Société Daewoo 6 March 1996 1997 Rev. arb. 69 Cited in: para. 38
Invicta Industrie Case	Cour de Cassation Dupiré Invicta industrie (D21) v. Gabo 17 February 2015 Case No. 12-29.550 13-18.956 13-20.230 Cited in: para. 113

Scafom International BV case	Cour de Cassation Dupiré Invicta industrie (D21) v. Gabo 19 June 2009 Case No. C.07.0289.N Cited in: para. 108
SociétéRomay AG Case	French Appellate Court Colmar SociétéRomay AG v. SARL Behr France 12 June 2001 Case No. 1 A 199800359 Cited in: para. 108

GERMANY

Bathroom Case/CLOUT Case No. 404	Federal Court of Justice of Germany Not indicated v. Not indicated 14 September 2000 CLOUT Case No. 404 Cited in: para.13
Frozen chicken Case/ CLOUT Case No. 317	OLG Karlsruhe (OLG = Oberlandesgericht = Provincial Court of Appeal) French seller v. German buyer 20 November 1992 Case No. 15 U 29/92 Cited in: para. 8
Germany Case XII ZR 210/04	German Federal Court of Justice Case No. XII ZR 210/04 Available at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py Cited in: para. 59

Oberlandesgericht Hamburg, XV Y.B. Comm. Arb. 455, 464	Oberlandesgericht Hamburg Judgment of 17 February 1989 XV Y.B. Comm. Arb. 455, 464 Cited in: para. 33
Raw Coffee Case	Hanseatisches Oberlandesgericht (Court of Appeal), Hamburg Buyer (Poland) v. Seller (Poland) 24 January 2003 Case No. 11 Sch 06/01 p. 510 Cited in: para. 20

INTERNATIONAL COURT OF JUSTICE

Corfu Channel	International Court of Justice United Kingdom of Great Britain and Northern Ireland v. Albania 9 April 1949 Cited in: para. 58

IRELAND

Folens Case	Folens v. Minister for Education 1984 Case No. ILRM 265 Cited in: para. 92

ITALY

Krauss Maffei Case	Corte di Cassazione, Sezioni Unite (Supreme Court, Plenary Session) Krauss Maffei Verfahrenstechnik GmbH v. Bristol Myers Squibb 10 March 2000 Case No. 58/SU p. 817 Cited in: para. 20

LITHUANIA

UAB Case	Supreme Court of Lithuania UAB 13 November 2013 Case No. 3K-3-256/2011 Cited in: para. 129

NEW ZEALAND

Bell Case	New Zealand Supreme Court Bell v. University of Auckland 1969 Case No. N.Z.LR. 1029 Cited in: para. 62

SINGAPORE

BCY Case	The High Court of The Republic of Singapore BCY v BCZ 9 November 2016, Case No. [2016] SGHC 249 pp. 14, 25-26, 29 Cited in: paras. 4, 14, 22, 25, 29

SPAIN

CLOUT case No. 851	Audiencia Provincial de Madrid sección 14ª 20 February 2007 Cited in: para. 37
CLOUT case No. 1034	Audiencia Provincial de Cáceres, Spain 14 July 2010 available at: http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg/sespan84.htm Cited in: para. 38

SWITZERLAND

CLOUT Case No. 932	Obergericht [Appellate Court] des Kantons Thurgau Italian plaintiff v. Swiss defendant 12 December 2006 ZBR.2006.26. Cited in: para. 8
Football Case	Swiss Federal Supreme Court 27 March 2014 Case No. 4A_362/2013 and 4A_448/2013 Cited in: para. 59
Fruit and vegetables Case	Handelsgericht (Commercial Court) Aargau Seller(Germany) v. Buyer (Switzerland) 26 November 2008 Case No. HOR.2006.79 / AC / tv. Cited in: para. 8
Packaging Machine Case	Appellationsgericht (Appellate Court) Basel-Stadt

Spanish buyer v. Swiss seller
26 September 2008
Case No. 16/2007/MEM/chi

Cited in: para. 8

Roland Case

Bundesgericht (= BGer = Federal Supreme Court)
Roland Schmidt GmbH v. Textil-Werke Blumenegg AG
22 December 2000
Case No. 4C.296/2000/rnd

Cited in: para. 7, 8

Sheehan Case

Sheehan v. Centex Homes,
2011 WL 1100031, at *8 (D. Haw.)
2011

Cited in: para. 38

Sonatrach v. K.C.A

Swiss Federal Tribunal
Sonatrach v. K.C.A. Drilling Ltd
15 March 1990
1990 Rev. arb. 921

Cited in: para. 33

Swiss, 30(4) ASA Bull

Swiss Federal Tribunal Judgment
6 August 2012
30(4) ASA Bull

Cited: para. 33

Swiss Case 5P.308/1999	Swiss Federal Court 17 February 2000 Case No. 5P.308/1999 Cited in: para. 59
1 Switzerland P 2004 152 Case	Zivilgericht [Civil Court] Basel-Stadt 8 November 2006 P 2004 152 Cited: para. 102

UNITED KINGDOM

Alan Case	High Court of Justice WJ Alan & Co. Ltd v. El Nasr Export & Import Co. 1972 Case No. 2 QB 189 Cited in: para. 94
Arsanovia Case	High Court of England and Wales, Queen's Bench Division (Commercial Court) Arsanovia Limited and others v. Cruz City 1 Mauritius Holdings 20 December 2012 Case No. 2012 Folio 1047 pp. 5, 10-11. Cited in: paras. 4, 14, 22
Balfour Beatty Case	House of Lords Channel Group v. Balfour Beatty Limited 21 January 1993 Case No. [1993] Adj.L.R. 01/21. Cited in: para. 22

Fahem Case

English High Court
Fahem & Corporation v. Mareb Yemen Instituetion Corporation
1997
2 Lloyd's Rep. 738 (QB)

Cited in: para. 38

Folens Case

England High Court
Folens v. Minister for Education
1984
Case No. ILRM 265

Cited in: 91

Forwood Case

English High Court
Forwood & Co. v. Watney
1880 LJQB 447 (QB)

Cited in: para. 38

Fiona Trust

House of Lords
Fiona Trust & Holding Corp. v. Privalov
24 January 2007
Case No. [2007] UKHL 40

Cited in: paras. 32, 38

High Trees Case

King's Bench Division
Central London Property Trust Ltd v. High Trees House Ltd.
18 July 1946
Case No. KB 130

Cited in: para. 92

Hyundai Case	Lloyd K/S A/S Bill Biakh v. Hyundai Corp Case No. [1988] 1 Lloyd's Law Reports 187 22-44 Cited in: para. 74
Keegan Case	England High court Keegan v. Comhairle Chontae Atha Cliath 3 December 1981 Cited in: para. 92
Kuwait Insurance Case	House of Lords Amin Rasheed Shipping Corporation v. Kuwait Insurance Corporation 7 July 1983 Case No. [1984] 1 AC 50, p. 61 Cited in: para. 4
Proforce Case	Court of Appeal (Civil Division) Proforce Recruit Limited v. The Rugby Group Limited 17 February 2006 Case No. 2006 EWCA Civ 69 para. 25 Cited in: para. 8
Prudential Assurance Company case	Prudential Assurance Co. v. Fountain Page Ltd 1991 case No. 1 W.L.R. 756 Cited in: para. 63

Sonatrach Petroleum Case	English High Court Sonatrach Petroleum Corporation (BVI) v. Ferrell International Limited 2002 Case No. 1 All ER p. 627 Cited in: para. 20
Sulamerica Case	Court of Appeal of England and Wales Sulamerica v. Enesa Engenharia 16 May 2012 Case No. A3/2012/0249 paras. 9, 25 Cited in: para. 4
ToolMetal Case	House of Lords ToolMetal Mfg Co Ltd v. Tungsten Electric Co Ltd 16 June 1955 Case No. 2 All ER Cited in: para. 92
Ulysses Case	English High Court Ulysses Compania Naviera SA v. Huntingdon Petroleum Service The Ermoupolis 1990 1 Lloyd's Rep. 160, 164 (QB) Cited in: para. 38

UNITED STATES

Bechtel Case	United States Second Circuit Court Bechtel Do Brasil Construcoes LTDA v. UEG Araucaria LTDA 2011 638 F.3d 150 Cited: para. 38
CLOUT case No. 777	U.S. Court of Appeals (11th Circuit) 12 September 2006 Cited: para. 37
Iron Ore Case	United States District Court, New York Iron Ore Company of Canada v. Argonaut Shipping, Inc. p. 173 Cited in: para. 49
Kraken Case	United States Bankruptcy Court, S.D. New York, Poughkeepsie Division In re SALANDER O'REILLY GALLERIES Debtor 18 July 2011 Case No. 453 B.R. 106 (2011) Cited in: para. 13
Laminoirs Case	United States District Court, N. D. Georgia, Newnan Division Laminoirs-Trefileries-Cableries de Lens, S.A. (LTCL) v. Southwire Co 18 January 1980 Cited in: para. 49

Nardone v. US	US Supreme Court Nardone v. United States 11 December 1939 Case No. 308 U.S. 338 Cited in: para. 59
Mitsubishi Motors	United States Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. Case No. 473 U.S. 614 Cited: para. 33
Molina case	California District Court Molina v. Lexmark International, Incorporation, 30 July 2008 Case No. U.S. Dist. Lexis 83014 Cited in: para. 62
Sheehan Case	Sheehan v. Centex Homes Case No. 2011 WL 1100031 at *8 (D. Haw.) Cited in: para. 39
Southland Corp. v. Keating	United States Southland Corp. v. Keating Case No. 465 U.S. 1 (1984) Cited in: para. 33
Toluene Case	U.S. District Court, Southern District of New York, Hanwha Corporation v. Cedar Petrochemicals Incorporated 18 January 2011 Case No. 09 Civ. 10559 (AKH) Cited in: para. 8

United Steelworkers	United Steelworkers of Am. v. Warrior & Gulf Navigation Co. Case No. 363 U.S. Cited: para. 33
Orthotec Case	California Appellate Court [2d District] Orthotec, LLC v. Eurosurgical, S.A.. 27 June 2007 Case No. B179387, B189213 Cited in: para. 102

UKRAINE

Lease Contract Case	Kyiv Commercial Court of Appeal Not indicated v. Not indicated 02 February 2010 Case No. 41/602 Available at: http://www.unilex.info/case.cfm?id=1702 Cited in: para. 109
Easement Contract Case	Kyiv Commercial Court of Appeal Not indicated v. Not indicated 24 May 2012 Case No. 5011-18/3397-2012 Available at: http://www.unilex.info/case.cfm?id=1727 Cited in: para. 109

OTHER SOURCES

Cited as	**Reference**
ICCA Sydney	ICCA Sydney: Hot Topics: Belt Road Initiative, IBA Guidelines on Party Presentation, IBA Rules of Evidence, ICCA Sydney 2018, Parallel Proceedings, Permanent Court of Arbitration, 18 April 2018 Available at: http://arbitrationblog.kluwerarbitration.com/2018/04/18/icca-sydney-hot-topics-new-voices/. Cited in: para. 56
PLC	Illegally Obtained Evidence May be Admissible in Application for Remedy, by PLC Dispute Resolution Cited in: para. 58
Sullivan	Nikki O'Sullivan, Lagging Behind: Is There A Clear Set of Rules for the Treatment of Illegally Obtained Evidence in International Arbitration?, 31 August 2017 Available at: http://arbitrationblog.practicallaw.com/lagging-behind-is-there-a-clear-set-of-rules-for-the-treatment-of-illegally-obtained-evidence-in-international-arbitration/ Cited in: para. 56
Carlsen Anja	Carlsen Anja, Can the Hardship Provisions in the UNIDROIT Principles Be Applied When CISG Is the Governing Law?, 1998 Available at: http://www.cisg.law.pace.edu/cisg/biblio/carlsen.html Cited in: para. 126

CERTIFICATE

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

Xiamen, 2 December 2018,

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