SIXTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG, MARCH 31ST – APRIL 7TH 2019

ARIZONA STATE UNIVERSITY

MEMORANDUM FOR RESPONDENT

PHAR LAP ALLEVAMENTO v. BLACK BEAUTY EQUESTRIAN

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

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TABLE OF ABBREVIATIONS AND DEFINITIONS

&	and
A.N.Arb.	Answer to Notice of Arbitration
arguendo	for the sake of the argument
Art.	Article
Ch.	Chapter
CISG	United Nations Convention on Contracts for the International Sale International Sale of Goods
Cl. Memo.	Claimant's Memorandum
CLAIMANT	Phar Lap Allevamento
Co.	Company
DDP	Delivered Duty Paid
ed.	Edition
et al.	*et alii* (and others)
Ex.	Exhibit
Ex. C	CLAIMANT's Exhibit
Ex. R	RESPONDENT's Exhibit
HKAO	Hong Kong Arbitration Ordinance
HKIAC Rule	Hong Kong International Arbitration Centre Rules
HKLRD	Hong Kong Law Reports & Digest
IBA	International Bar Association
ICC	International Court of Arbitration
ICSID	International Centre for Settlement of Investment Disputes
Id.	*Idem*/Same
Int'l	International
Model Law	UNCITRAL Model Law
N.Arb.	Notice of Arbitration
No.	Number
¶/¶¶	Paragraph/Paragraphs
p./pp.	Page/Pages
PO-1	Procedural Order 1
PO-2	Procedural Order 2
RESPONDENT	Black Beauty Equestrian
SIAC	Singapore International Arbitration Centre
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollar
v.	versus (against)
WTO	World Trade Organization

STATEMENT OF FACTS

1. **Phar Lap Allevamento** (**"CLAIMANT"**) and **Black Beauty Equestrian** (**"RESPONDENT"**) are PARTIES to this arbitration. [*N.Arb., p. 4*]. CLAIMANT is a stud farm in Mediterraneo, which covers all areas of equestrian sport. RESPONDENT is a company in Equatoriana looking to establish a racehorse stable. [*N.Arb., pp. 4–5*].

2. On March 21, 2017, Mr. Antley of Black Beauty Equestrian contacted Ms. Napravnik of Phar Lap to inquire about the availability of frozen semen from Phar Lap's star horse for Black Beauty's new racehorse breeding program. [*N.Arb., pp. 4–5*].

3. On March 24, 2017, Ms. Napravnik made an initial offer to Black Beauty of 100 doses of frozen semen. [*N.Arb., p. 5*].

4. On April 12, 2017, the two principal negotiators, Ms. Napravnik and Mr. Antley, were severely injured in a car accident. This accident hindered negotiations. [*N.Arb., p. 5*].

5. On May 6, 2017, the two Parties signed the final contract. Phar Lap agreed to sell 100 insemination doses in three shipments for $100,000 (USD) per dose. [*N.Arb., pp. 5–6*].

6. In November 2017, after first two shipments were made, the new president of Mediterraneo announced a 25% tariff on agricultural products, including horse semen. [*N.Arb., p. 6*]. Equatorianian government responded with their own 30% tariff on products coming from Mediterraneo. [*N.Arb., p. 6*].

7. On January 20, 2018, Phar Lap sent a letter to Black Beauty to discuss the new tariff, which made the shipment 30% more expensive. [*Ex. C 7, p. 16*].

8. On January 21, 2018, Mr. Shoemaker and Ms. Napravnik spoke on the phone about the outstanding doses and payment of the additional 30% tariff. According to Ms. Napravnik, Mr. Shoemaker was certain that a solution would be found through negotiation. He urged her

to authorize the shipment as planned since Black Beauty needed the doses and had already initiated the payment. [*Ex. C 8, p. 17*].

9. On January 23, 2018, CLAIMANT made the last shipment before an agreement on the new price had been reached. [*N.Arb., p. 6*].

ARGUMENT

ISSUE 1: THIS TRIBUNAL LACKS JURISDICTION UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT FOR CLAIMS OF INCREASED REMUNERATION.

1. This Tribunal should not require RESPONDENT to pay CLAIMANT any additional amount because Danubian law governs the arbitration agreement and its interpretation. In absence of an express choice of law provision, CLAIMANT urges this Tribunal to apply Mediterraneo law to the arbitration agreement merely because the Parties agreed to Mediterraneo law in the Sales Contract. However, RESPONDENT respectfully requests this Tribunal to **(I)** give effect to the separability doctrine — provided for in the applicable arbitration rules — and to apply Danubian law to the arbitration agreement because: (A) negotiations reveal that the Parties intended for Danubian law to govern, and (B) Danubian law best gives effect to the Parties' intent to resolve disputes in a neutral forum with neutrally applied laws. If Danubian law governs the arbitration agreement, then **(II)** this Tribunal lacks the authority to modify the contract price because the Parties did not expressly confer powers to the arbitrators to adapt the contract for increased payment.

I. DANUBIAN LAW GOVERNS THE ARBITRATION AGREEMENT BECAUSE IT IS A SEPARATE AND INDEPENDENT AGREEMENT FROM THE SALES CONTRACT.

2. First, the separability doctrine frames this Tribunal's analysis of its jurisdiction under the arbitration agreement. The separability doctrine provides that "an arbitration agreement is considered separate and divisible from the contract in which it is contained". [*Moser & Bao, p. 187*]. The applicable arbitration rules incorporate the separability doctrine: "[f]or the purposes of Article 19, [determining the "jurisdiction of the arbitral tribunal,"] an arbitration agreement . . . *shall be treated as an agreement independent of the other terms of the contract*". (emphasis added) [*HKIAC Rule 19.2* (2018)].

3. Because the Parties are bound by agreement to arbitrate under the HKIAC Rules, including Article 19.2, this Tribunal must employ the separability doctrine in its jurisdictional analysis. Although the separability doctrine does not require that the governing law of the arbitration agreement be different from the law of the underlying contract, this Tribunal must first treat the arbitration agreement and Sales Contract independently to determine its jurisdiction. The fact that the Sales Contract is governed by Mediterraneo law does not affect this Tribunal's application of the separability doctrine.

4. Here, the jurisdiction of this Tribunal turns on which law the Parties intended to govern the arbitration agreement. Accordingly, this Tribunal must analyze the arbitration agreement and Sales Contract independently to determine the governing law of the arbitration agreement. And if the arbitration agreement and Sales Contract are to be treated independently, so too must their respective negotiations be analyzed separately. If the separability doctrine is properly applied, this Tribunal should find that Danubian law governs the arbitration agreement because: (A) negotiations relating to the arbitration agreement reveal the Parties intended for Danubian law to govern, and (B) Danubian law best gives effect to the Parties' intention to resolve disputes in a neutral forum with neutrally applied laws.

A. Negotiations relating to the arbitration agreement reveal the Parties intended for Danubian law to govern.

5. The development of the arbitration agreement throughout negotiations indicates that the Parties intended for Danubian law to govern the arbitration agreement. First, the arbitration agreement provides that "[t]he seat of arbitration shall be Equitoriana. [And] [t]he law of this arbitration clause shall be the law of Equitoriana". [*Ex. R 1, p. 33*]. Here, RESPONDENT proposed that the governing law of the arbitration agreement be the same law as the arbitration seat. In response, CLAIMANT did not reject the concept that the law of the arbitration seat should also govern the arbitration agreement—it merely rejected the location of the initial seat (Equitoriana). [*Ex. R 2, p. 34*]. Then, CLAIMANT proposed that Danubia be the seat of arbitration; not only because Danubia is a neutral country, but also because Danubia is "a neutral country *with a functioning judicial system*". (emphasis added) [*PO-2,*

pp. 56–57, § 14]. In fact, CLAIMANT's Creditors Committee declared that consent was not necessary to submit to arbitration in Danubia precisely because of Danubia's neutral arbitration law. [*PO-2, p. 57, § 14*]. Only changing the initial seat of arbitration to Danubia indicates CLAIMANT'S acceptance of RESPONDENT's proposal that the governing law of the arbitration agreement be the same law as the seat of arbitration. Therefore, in corroboration with the Creditors Committee's automatic approval of arbitration in Danubia, CLAIMANT intended for Danubian law to govern the arbitration agreement when CLAIMANT proposed that Danubia be the seat of arbitration.

6. Similarly, negotiations relating to the arbitration agreement indicate that RESPONDENT intended for Danubian law to govern. For example, on 12 April 2017, RESPONDENT wrote down a list of open issues for further negotiations, including "clarify in arbitration clause *that neutral* venue and applicable law." (emphasis added) [*Ex. R 3, p. 35*]. Had RESPONDENT wrote "clarify in arbitration clause *the* neutral venue and applicable law", the pending issue would have been a matter of identifying what is the neutral venue and applicable law. Instead, RESPONDENT is most concerned about clarifying the qualifiers "in [the] arbitration clause": *that* the venue and applicable law are *neutral*. It is unlikely that RESPONDENT would intend to arbitrate in a neutral country, only to be subject to a biased choice of law provision (Mediterraneo) that favors CLAIMANT. Therefore, in response to CLAIMANT's proposal that Danubia be the seat of arbitration, RESPONDENT's notes indicate that RESPONDENT intended for Danubian law to govern the arbitration agreement because Danubia is a neutral venue with neutrally applicable arbitration laws.

7. CLAIMANT urges this Tribunal to find that Mediterraneo governs the arbitration agreement because the Parties have always intended "to apply Mediterraneo law [to the arbitration agreement] . . . since the early phase of the negotiations up until the conclusion of the [c]ontract." [*Cl. Memo., p. 6, ¶ 14*]. However, this depiction of the Parties' intentions is false. First, as discussed above, RESPONDENT did not intend for Mediterraneo law to govern the arbitration agreement because it would negate the purpose of arbitrating in a neutral venue. Second, CLAIMANT did not intend for Mediterraneo law to govern the arbitration agreement because Danubia was a perfectly suitable governing arbitration law up until the conclusion of

the contract. CLAIMANT's proposal that Danubia be the seat of arbitration and its Creditors Committee's automatic approval of arbitration in Danubia signifies CLAIMANT's intention—even preference—for Danubian arbitration law. It was not until *after* the dispute arose that CLAIMANT represented that it intended a more favorable law toward its position to govern the arbitration agreement. In sum, neither party intended for Mediterraneo law to govern the arbitration agreement. Instead, the negotiations of the arbitration agreement reveal that the Parties intended for Danubian law to govern because of its neutral characteristics.

B. Danubian law best gives effect to the Parties' intent to resolve disputes in a neutral forum with neutrally applied laws.

8. Even if this Tribunal does not find an implied choice of law provision, this Tribunal should find that Danubian law governs the arbitration agreement. First, a party's agreement to arbitrate is the foundation stone of modern international arbitration. [*Redfern et al., p. 12*]. When entering into arbitration agreements, parties have an overriding intention to enter into an agreement that provides an efficient and neutral means of resolving disputes. [*Born 2014, p. 835* (2014)]. In the event that an arbitration agreement lacks an express choice of law provision, choosing a governing law that gives effect to the parties' intention to resolve disputes in a neutral forum with neutrally applied laws carries out the parties' agreement to arbitrate. [*Redfern et al., p. 14*].

9. In this case, Danubian law best gives effect to the Parties' intent to resolve disputes in a neutral forum with neutrally applied laws because Danubian arbitration law neither favors CLAIMANT nor RESPONDENT. Danubian arbitration law applies evenhandedly to both Parties because it is a verbatim adoption of the UNCITRAL Model Law—much like the arbitration laws of Mediterraneo and Equitoriana. [*PO-2, p. 57, § 14*]. Therefore, because Danubian law has neutrally applicable arbitration laws, choosing Danubian law as the governing law carries out the Parties' agreement to arbitrate.

10. Rather than adopting an approach that best gives effect to the Parties' intent, CLAIMANT urges this Tribunal to find that Mediterraneo law governs because it has the "closest

connection" to the arbitration agreement. [*Cl. Memo., pp. 7–8, ¶¶ 18–27*]. Although other tribunals have used the "closest connection test" to determine the choice of law of an arbitration agreement, this Tribunal is not required to follow the precedent of other tribunals. The *Kompetenz-Kompetenz* doctrine provides that international arbitral tribunals, such as this Tribunal, have the authority to consider and decide disputes concerning their own jurisdiction. [*Born 2009, p.* 853 (2009)]. Additionally, the *Kompetenz-Kompetenz* doctrine is incorporated in the applicable arbitration rules: "[t]he arbitral tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement". [*HKIAC Rule 19.1* (2018)]. In light of this Tribunal's competence to decide matters of its own jurisdiction, this Tribunal should not adopt the "closest connection test" because it often produces "arbitrary", "unpredictable and conflicting results" that are seldom the result of any principled basis. [*Born 2014, p. 832* (comparing cases that yielded opposite results using the same test)*; See also Sulamerica at* [¶ 52] (noting that the application of the "closest connection test" has not been consistent over the past twenty years)]. Instead, the better approach is to choose a governing law that best gives effect to the Parties' intent to resolve disputes in a neutral forum with neutrally applicable laws for the reasons described above.

II. UNDER DANUBIAN LAW, THE SCOPE OF THE ARBITRATION AGREEMENT DOES NOT EXTEND TO CLAIMS OF INCREASED REMUNERATION BECAUSE THE PARTIES DID NOT EXPRESSLY CONFER POWERS TO THE ARBITRATORS TO ADAPT THE CONTRACT.

11. If this Tribunal finds that Danubian law governs the arbitration agreement and its interpretation, the scope of the arbitration agreement will not include claims of increased remuneration. First, according to Danubian Contract Law, the "four corners" rule excludes all extraneous evidence to narrowly limit the interpretation of an arbitration agreement. [*PO-1, p. 51, § 2*]. Additionally, the CISG does not apply to the arbitration agreement's interpretation because Danubian law considers arbitration agreements as procedural contracts rather than sales contracts, due to the doctrine of separability. Therefore, CLAIMANT cannot introduce any evidence—extraneous or otherwise based on the CISG—that the Parties

allegedly contemplated that claims of increased remuneration fall within the scope of "any dispute arising out of this contract".

12. Second, Article 28(3) of the Danubian Arbitration Law allows for arbitral tribunals to adapt contracts, but requires an express conferral of powers. [*PO-2, p. 60, § 36*]. This requirement is also reflected in HKIAC Rule 36.2, which provides that "[t]he arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly agreed that the arbitral tribunal should do so". [*HKIAC Rule 36.2* (2018)]. In this case, being limited to the "four corners" of the arbitration agreement, the arbitrators lack an express conferral of powers to adapt the contract. Therefore, this Tribunal lacks the jurisdiction to adapt the contract for claims of increased remuneration.

ISSUE 2: THE TRIBUNAL SHOULD NOT ADMIT AS EVIDENCE THE INTERIM AWARD FROM RESPONDENT'S PREVIOUS ARBITRATION.

13. The tribunal should not admit evidence from RESPONDENT's previous unrelated arbitration. Knowledge of the alleged evidence was illegally distributed and obtained. It is, as of yet, not in CLAIMANT's possession. It is not relevant or material to this arbitration, as CLAIMANT asserts, because it does not bear on the issue in dispute and is not necessary or significant to the Arbitral Tribunal's determination of the issue. Relevance and materiality are important factors in determining admissibility of evidence as per the Hong Kong Rules. [*HKIAC Rule 22.3* (2018)]. It has no bearing on this case or this issue. The similarities are attenuated at best. Therefore, it should not be admitted into evidence.

I. RESPONDENT'S PREVIOUS ARBITRATION IS NOT SIMILAR TO THE CURRENT ARBITRATION.

14. The arbitration from which CLAIMANT would like to submit evidence is not similar to the current arbitration. There, a dispute had arisen regarding the export of a live horse. [*Letter by Tribunal, 50*]. Here the dispute is about the importation of semen. [*Letter by HKIAC, 19*]. These circumstances are not similar. The prior arbitration concerned a live animal that

needed to used immediately in order to maximize the length of its usefulness. Furthermore, the animal was being exported, thus facing a different tax scheme.

15. There are many contracts governed by the CISG. The mere fact that the CISG applies to both contracts is not enough to constitute similarity outright as CLAIMANT contends. Differences between contracts change the fundamentals of the contract. It is the smallest distinctions that can make the largest impact in differentiating contracts and determining the obligations of the parties. These impacts may be understood simply by looking to the issues that have arisen in this arbitration. Furthermore, "there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision." [*Redfern et al., p. 10*]. Regardless of any similarity, precedents in international arbitration do not control the outcomes of any arbitrations taking place thereafter. As a result, it does not control the decision of this Tribunal and is not material to their decision. The outcome is at the discretion of the Tribunal.

II. CONFIDENTIALITY REQUIREMENTS PROHIBIT ADMISSION OF THE INTERIM AWARD FROM RESPONDENT'S PREVIOUS ARBITRATION.

16. Parties have agreed to arbitrate under the newly adopted 2018 Rules of Arbitration, not the 2013 Arbitration. As such, CLAIMANT's reference to the 2013 Rules is misplaced. "Unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to: (a) The arbitration under the arbitration agreement; or (b) An award or Emergency Decision made in the arbitration." [*HKIAC Rule 45.1* (2018)]. The evidence here obtained was meant to be confidential and the HKIAC was violated when it was given to CLAIMANT. This information was, thus, illegally distributed, and, as a result, illegally obtained. This illegally obtained information should not be admitted. "Article 45.1 also applies to the arbitral tribunal, any emergency arbitrator, expert, witness, tribunal, secretary and HKIAC." [*HKIAC Rule 45.2* (2018)]. Thus, the Tribunal may not violate confidentiality without the consent of the Parties. RESPONDENT has not and will not consent to any such violation of confidentiality. The information requested is not available to

CLAIMANT, and the Tribunal would have to order the documents presented. This would violate the HKIAC rule that requires arbitrators not to violate confidentiality.

17. Additionally, *Sun Life Assurance Co.* determined that there was no reason that a third party should benefit from an award in an arbitration to which it was not a party. [*Sun Life Assurance Co.*] It considered arbitration to be a consensus process, and as such, other parties and matters from a different arbitration could not be connected to a different arbitration except as by consent. [*Id*.]. "Different arbitrations on closely inter-linked issues may as a result lead to different results, even where, as in the present case, the evidence before one tribunal is very largely the same as that before the other." [*Id*.]. The two arbitrations involve different issues. However, even if the Tribunal considers the issues to be at all similar, that does not require that the results of the arbitrations be the same. The evidence should not be admitted as it violates the ideals of privacy and consensus that arbitration embraces and the result of this arbitration need not depend on the result of an arbitration to which CLAIMANT was not a party.

18. In *Chu Chung Ming v. Lam Wai Dan*, the tribunal determined that confidentiality acted to prohibit admission of a documents from a previous mediation despite the fact that the same parties were party to the mediation and it concerned the same subject. [*Chu Chung Ming*]. The letter used in the previous mediation involving the same parties was not necessary for the fair disposal of the case in arbitration. [*Id*.]. The letter showed a request for inspection and the consequences of failure to install fire prevention equipment had been made clear. [*Id*.]. It was determined that the letter did not fall within any exception that would allow for its admission since the facts it contained and the reading of the letter was repetitive of other evidence already in existence. [*Id*.]. Factors contributing to this determination included similarity, public interest, bearing/materiality, and value. [*Id*.]. While the case was almost identical because it involved the same parties who were concerned with a similar issue taken up in mediation, there was no public interests overriding confidentiality that would permit admission of the evidence. [*Id*.]. Just as in that arbitration, here there are no public interests that would permit the admission of evidence. Statements made in the previous arbitration do not have bearing and were not material because they were two separate cases determining

two separate solutions. Finally, excluding the evidence would not have left the claimant in the *Chu Chung Ming* arbitration without evidence to support their position. Similarly, CLAIMANT here may support their position without violating confidentiality and bringing in evidence from an unrelated arbitration. Neither the documents in *Chu Chung Ming* nor this arbitration are or were contemporaneous to this arbitration.

19. Confidentiality in arbitration proceedings was expressly imposed in the Hong Kong Arbitration Ordinance (HKAO) and mandates the non-disclosure of any information that pertains to arbitral proceedings. [*Samuel* (2017)]. According to the Government of the Hong Kong Special Administration Region, Department of Justice,

> "The Ordinance also provides that unless otherwise agreed by the parties or under any exceptions as provided for in the Ordinance, no party may publish, disclose or communicate any information relating to arbitral proceedings and awards. The Ordinance adheres to the international practice that arbitral awards should only be made public with the consent of the parties concerned, having regard to the private and confidential nature of arbitration. This provision seeks to strike a proper balance between safeguarding the confidentiality in arbitration and the need for parties in the arbitral proceedings to protect or pursue their legal rights or for them to enforce or challenge an arbitral award."

20. In light of the importance that the HKAO places on confidentiality, the Tribunal should not admit evidence that violates confidentiality in this arbitration. Regardless of whether or not CLAIMANT wrongfully obtained the information, the fact that the information is still considered confidential governs and prevents admission.

III. THE ARBITRAL TRIBUNAL HAS THE DISCRETION TO ENFORCE CONFIDENTIALITY REQUIREMENTS WHERE EVIDENCE WAS OBTAINED IN VIOLATION OF SUCH.

21. The Tribunal has the discretion to determine admissibility of evidence according to [*HKIAC Rule 22.2* (2018)]. This discretion allows the Tribunal to enforce rules that otherwise may not have explicit consequences enumerated, such as rules regarding confidentiality. As CLAIMANT has stated, there are no consequences for the violation of confidentiality enumerated in the HKIAC rules. However, because the Tribunal has discretion in determining admissibility of evidence, it has the power to ensure that there is consequence, at least in small measure, for evidence obtained in violation of the confidentiality requirements of the HKIAC rules.

IV. ADMITTING INFORMATION FROM RESPONDENT'S PREVIOUS ARBITRATION DOES NOT FURTHER THE PRINCIPLES OF TRANSPARENCY AND IS A VIOLATION OF THE IBA RULES ON THE TAKING OF EVIDENCE.

22. CLAIMANT argues that transparency is important to the process of arbitration. [*Cl. Memo., p. 16*]. However, the basis for their argument, UNCITRAL Rules on Transparency in Treaty-Based Investor State Arbitrations, applies to investor state arbitrations, not commercial arbitrations between private entities. Furthermore, transparency often only comes into play after the final award has been rendered, allowing the public to see general themes, not the deliberations that brought them to the final decision. [*Redfern et al., p. 16*] Additionally, the identities of parties to an arbitration may be withheld from documents made public in respect to their privacy. As expounded before, one of the factors that make arbitration attractive is the aspect of confidentiality associated with the process. The award referenced here is an Interim Award. It is not the final outcome, nor has it been made public. Because neither the arbitration itself nor the results have been made public, it is especially prudent to protect Interim Awards that do not reflect the entirety of the situation or outcome.

23. The International Bar Association has released the IBA Rules on the Taking of Evidence, a document that is meant to assist in determining procedures regarding evidence in arbitrations.

These rules are to be adopted by the parties between whom an arbitration agreement has been made. As the Parties here have already agreed to the Hong Kong Rules and not to the IBA Rules on the Taking of Evidence, they are not applicable. Even if they are applicable, these rules state that the arbitral tribunal can deny any request for documents on the basis of "legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable". [*IBA Rules on Taking of Evidence, Art. 9(2)(b)* (2010)]. The confidentiality provisions of the Hong Kong Rules are applicable here. The privilege those rules provide for confidentiality was violated. As such, the evidence is not admissible and should not be admitted by the Tribunal.

24. CLAIMANT argues that the evidence is admissible because it is material to the arbitration. However, their analogy is not persuasive. In *Tidewater v. Venezuela*, documents were admitted as material regarding whether or not there was intent to arbitrate. [*Tidewater v. Venezuela*]. Intent to arbitrate and awards made in an arbitration are different. Intent to arbitrate is based on information that is relevant to whether or not an arbitration may even take place, evidence from a completely separate arbitration does not hold the same materiality as it is not conducive to something as substantial. At best, it may be considered persuasive in nature, but, it is not similar enough to merit a comparison, let alone materiality and relevance sufficient to admit it as evidence. Mr. Antley's intent may not be interpreted by looking to a completely separate arbitration. His intent is not manifested in the other arbitration; it is manifested in this arbitration.

V. ADMITTING ILLEGALLY OBTAINED EVIDENCE IS UNFAIR, UNJUST, UNETHICAL, AND A VIOLATION OF GOOD FAITH.

25. Evidence obtained in an illegal manner should not be admissible because it will only serve to further encourage the unfair, unjust, unethical and illegal capture of evidence. The CLAIMANT will violate good faith in obtaining evidence and the Tribunal will violate good faith in deeming such evidence admissible. "Duty to arbitrate in good faith is infringed upon… when illegally obtained evidence is used…" [*Cremades, p. 787*]. Mr. Cremades, a Chairman in the Faculty of Law, experienced at arbitral institutions including ICC, ICSID,

and others, explains that the Tribunal will violate good faith arbitration by allowing this evidence when it has been explicitly informed of the confidential nature of this information. One of the most important aspects of an arbitration is confidentiality. [*Gu*]. It is one of the most attractive aspects of proceeding with arbitration rather than admitting a conflict to the court system. [*Id.*]; [*Redfern et al., p. 10*; *see also Samuel*]. "The arbitrators have an obligation to observe a general duty of confidentiality, while the parties' obligations often depend on a confidentiality agreement." [*Poorooye et al., p. 279*]. The Tribunal's general duty of confidentiality makes the evidence requested inadmissible.

26. CLAIMANT has and continues to have opportunity to present its evidence and arguments. The only limit is that illegally obtained documents and information are not admissible as evidence. Contrary to CLAIMANT's argument that the arbitration will be unfair if they cannot admit this illegal evidence, the arbitration will be truly unfair if illegally obtained evidence is admitted. It is a violation not only of the HKIAC rules but of the fundamentals of confidentiality. [*HKIAC Rules 45.1, 45.2* (2018)].

27. RESPONDENT is under no obligation to prove its previous statements regarding that arbitration. [*Letter by Fasttrack, p. 51*]. There is not sufficient justification for RESPONDENT to consent to relieve the confidentiality requirements of its previous arbitration, and indeed RESPONDENT does not. The burden of proof regarding admissibility of the previous arbitration falls to CLAIMANT, not RESPONDENT, as CLAIMANT is attempting to include it as evidence. [*Redfern et al., p. 27*]. The evidence is not material or relevant to the case and is of no legal interest to the arbitrators or the outcome of the case. [*HKIAC Rule 22.3* (2018)]. RESPONDENT will not be pursuing any legal interest in violating the confidentiality of the previous arbitration.

28. In conclusion, as CLAIMANT has stated, the burden of proof falls to the party claiming admissibility and CLAIMANT has failed to show that this evidence is admissible. [*HKIAC Rule 22.1* (2018)]. The Tribunal should not admit any evidence pertaining to RESPONDENT's previous arbitration in this arbitration because it is a violation of good faith and

confidentiality, it is not sufficiently similar, and it is not relevant or material. For all of these reasons, the evidence should not be admitted.

ISSUE 3: PHAR LAP IS NOT ENTITLED TO REMUNERATION RESULTING FROM ADAPTATION UNDER CLAUSE 12 OF THE SALES AGREEMENT.

29. The Tribunal should not require RESPONDENT to pay any amount to CLAIMANT as a result of adaptation under Clause 12 of the Sales Agreement. The Sales Agreement clearly provides that "Seller will ship 3 instalments DDP of . . . frozen semen" [*Ex. C 5, p. 14 (emphasis in original)*]. Because DDP means Delivered Duty Paid, the Seller is solely responsible for all clearance requirements, including the cost of importation [*see Incoterms*]. The Parties have conditioned this requirement with a *force majeure*, or hardship clause, found in Clause 12 of the Sales Agreement. Clause 12 narrowly provides that "Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God *neither for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*". [*Ex. C 5, p. 14 (emphasis in original)*]. This clause does not apply to the present tariff **(I)** and—even if it did—does not provide the requested relief of adaptation of the contract **(II)**.

I. CLAUSE 12 OF THE SALES AGREEMENT DOES NOT APPLY TO THE PRESENT DISPUTE.

30. The Parties have agreed to add narrow hardship language to their *force majeure* clause; however, CLAIMANT seeks remuneration for a change of circumstance not contemplated by either the *force majeure* clause or the hardship language. Although the tariff raised the cost for CLAIMANT, even "[a]n unexpected and considerable rise in a supplier's costs or efforts cannot free him from his obligation" or entitle him to remuneration. [*Lando*].

31. When parties add a provision anticipating *force majeure* events, the parties rely much more on the terms of the agreement than on externally-imposed remedies because the predictive nature of the clause necessitates such an interpretation. [*Liu*]. CLAIMANT seeks to extend the

agreement beyond what both Parties contemplated and agreed upon, submitting that Clause 12 was specifically drafted as primary insurance against import regulations, but such a risk was not even mentioned in the wording of the clause. [*Cl. Memo., p. 20, ¶ 95*; *Ex. C 5, p. 14, ¶ 12*]. Clause 12 does not apply to the tariff because **(A)** the tariff was foreseeable, and **(B)** the tariff is not comparable to "additional health and safety requirements". [*Ex. C 5, p. 14*].

A. The tariff was foreseeable.

32. To invoke Clause 12 of the Sales Agreement, the CLAIMANT must prove that the tariff was not foreseeable. [*Ex. C 5, p. 14, ¶ 12*]. The Sales Agreement does not further define this foreseeability requirement; however, because the Sales Agreement is governed by the law of Mediterraneo and because "[t]he general contract law [of] Mediterraneo is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts", the Tribunal may rely on the UNIDROIT Principles' provide clarity. [*PO-1, ¶ III.4*]. The tariff cannot be used to invoke hardship if it "could reasonably have been taken into account by the disadvantaged party at the time the contract was concluded". [*UNIDROIT 6.2.2, Comment 3.b*]. Even an impediment as extreme as war does not meet the foreseeability requirement where the contract was made "notwithstanding the acute political tensions in the region". [*Id.*; *see also Perillo, p. 121 ("As to a contract made in 1914 to last 60 years, the outbreak of a war (or better, of a certain number of wars) was foreseeable. . . .")*].

33. Like the breakout of war in a region rife with political tensions, the trade war and its resultant tariffs, here, were foreseeable. Given the rhetoric used by the newly-elected President of Mediterraneo in January 2017, his appointment of an outspoken protectionist as Superminister of Agriculture, Trade and Economics on May 5, 2017, and the fact that Equatoriana had previously imposed a retaliatory tariff, the Parties could have foreseen the tariff at issue before Clause 12 was agreed upon. [*See Ex. C 6, p. 15*; *see also PO-2, ¶ 23*]. CLAIMANT posits that even if "CLAIMANT [were] aware of the possibility of Mediterraneo's protectionist approach towards foreign agricultural product, the extent of such approach was unclear". [*Cl. Memo., p. 20, ¶ 102*]. While the extent of Mediterraneo's protectionist approach may have been unclear, such an approach nonetheless posed a foreseeable risk of a

trade war. Because the Parties could have foreseen the impending trade war, the tariff at issue here was foreseeable.

B. The tariff is not "comparable" to "additional health and safety requirements".

34. Clause 12 requires an event to be "comparable" to "additional health and safety requirements" in order for the CLAIMANT to invoke its relief. [*Ex. C 5, p. 14*]. CLAIMANT attempts—without invoking CISG Article 8(3)—to broaden this requirement to any event "comparable to CLAIMANT's past experience"; however, this is an exaggeration of explicit contractual terms. [*Cl. Memo., p. 21, ¶ 99*]. Where the parties have no prior course of performance or dealing [*PO-2, ¶ 1*], the CLAIMANT's past experience is, at best, anecdotally illustrative. The Sales Agreement requires the triggering event to be comparable to additional health and safety concerns, not to CLAIMANT's past experience, as the CLAIMANT incorrectly suggests. [*Ex. C 5, p. 14, ¶ 12*].

35. Tariffs and additional health and safety requirements differ in both their reasons for imposition and their logistical outcomes. Tariffs are imposed to "give a price advantage to locally-produced goods over similar goods which are imported, and [to] raise revenues for governments" while health and safety requirements "protect human, animal or plant life or health, provided they do not discriminate or use this as disguised protectionism". [*WTO: Tariffs; see also WTO: Standards and safety*]. The definitions given by the World Trade Organization as well as their specific agreements dealing with health and safety requirements—the Sanitary and Phytosanitary Measures Agreement and the Technical Barriers to Trade Agreement—draw the distinction between tariffs and health and safety requirements.

36. CLAIMANT attempts a conclusory grouping of tariffs and additional health and safety requirements into "the category of import restrictions" before concluding "that the tariff imposition is a comparable event to CLAIMANT's past experience". [*Cl. Memo., p. 21, ¶ 99*]. The fact, alone, that both may raise CLAIMANT's cost of performance does not make them comparable to one another. Accepting such a comparison would mandate that events as

unrelated as inflation or even a loss of Nijinsky III's reproductive enthusiasm be deemed "comparable" events simply because they raise costs.

37. In conclusion, Clause 12 of the Sales Agreement does not apply to the present dispute because the tariff was foreseeable and not comparable to additional health and safety requirements.

II. CLAUSE 12 OF THE SALES AGREEMENT DOES NOT PROVIDE FOR ADAPTATION OF THE CONTRACT.

38. Both Parties understood and agreed that the hardship language was to be narrow before its inclusion. [*Ex. R 3, p. 35; see also PO-2, ¶ 12*]. It was never meant to be as broad as the ICC-hardship clause. [*PO-2, ¶ 12*]. The hardship language inserted into the *force majeure* clause provides only for the possible avoidance of performance where specific circumstances made performance impossible (under the *force majeure* clause) or more onerous (under the hardship language) **(A)**. Furthermore, because CLAIMANT performed under the contract, it is not entitled to renegotiations as a result of Clause 12 **(B)**.

A. Clause 12 is a *force majeure* clause expanded in its application to cover those events requested by Claimant; Clause 12 is not a standalone hardship clause.

39. The hardship language was inserted into the *force majeure* clause to expand the coverage under which CLAIMANT could avoid performance. CLAIMANT, in its Memorandum, assumes that RESPONDENT's intention in drafting "the modification of the clause was only meant to limit what would constitute as trigger events for hardship, and not to restrict the remedies afforded under Clause 12". [*Cl. Memo., p. 27, ¶ 136*]. This interpretation incorrectly attempts to replace the past intent of RESPONDENT with the current hope of the CLAIMANT—without justification. A better interpretation is that RESPONDENT sought only to lessen the severity of the triggering events of the *force majeure* clause "[w]ith reference to the risks mentioned by Ms. Napravnik in her email of 31 March 2017". [*PO-2, ¶ 12*]. This intent becomes clearer

upon examination of the drafting considerations proposed by Liu in *Remedies for Non-Performance: Perspectives from CISG, UNIDROIT Principles & PECL.*

40. A hardship clause should have two aspects: "the circumstances in which hardship exists" and a "descri[ption of] the consequences or effect of these circumstances on the parties to the contract". [*Liu*]. Here, the second aspect is conspicuously—and purposely—absent from Clause 12. The Parties left out this aspect because Clause 12 is simply a *force majeure* clause into which the Parties inserted hardship language. Generally, a *force majeure* clause excuses the promisor from damages where *force majeure* exists, but such a clause does not provide for contractual adaptation like a hardship clause may. [*Id.*]. It is commonly understood in international trade that "either the duty to discharge the obligation is suspended for the duration of the force majeure condition or the time of performance of the contract is extended for a specific period", usually upon notice/request of the promisor. [*Id.*]. In conclusion, because Clause 12 is a *force majeure* clause expanded in its application to cover those events requested by CLAIMANT—not a standalone hardship clause—CLAIMANT is not entitled to adaptation under this clause.

B. Because Claimant performed under the contract, it is not entitled to renegotiations as a result of Clause 12.

41. Had CLAIMANT withheld its performance and then demanded renegotiation, it could have invoked its rights under Clause 12; however, CLAIMANT precluded its requested relief by performing before requesting renegotiation. [*Steel tubes case*]. In the *Steel tubes case*, the price of steel rose approximately 70% after the conclusion of the contract but before delivery of the steel tubes to the buyer. [*Id.*]. The seller in that case withheld performance and requested renegotiations. [*Id.*]. When the buyer refused negotiations, the seller—still withholding performance—brought the case to arbitration. [*Id.*]. Because the 70% increase

created a serious imbalance and because seller had not yet performed, the tribunal ordered the buyer to enter renegotiations. [*Id.*].

42. Unlike the seller in the *Steel tubes case*, the CLAIMANT here experienced a mere 30% increase in costs and chose to perform under the contract. Assuming *arguendo* that the tariff was a covered event, Clause 12 would have allowed CLAIMANT to withhold performance until a tribunal could order renegotiations. [*See id.*]. By choosing to deliver the final shipment notwithstanding the claimed injustice, CLAIMANT bypassed its opportunity for relief based on Clause 12.

43. In a last-ditch effort, CLAIMANT attempts to create a duty to renegotiate the contract and place it upon RESPONDENT by claiming that "[t]he drafting history of Clause 12 shows no intent to preclude the duty to renegotiate". [*Cl. Memo., p. 28, ¶ 138*]. However, the lack of intent to preclude a duty which does not exist is not sufficient to create that duty. Clause 12 also shows no intent to preclude the imposition of other duties between the Parties such as fiduciary duties or a duty to rescue or a duty of disclosure, but such absence of intent to preclude does not create any of these duties. "In most legal systems, vis major or force majeure ends the contract. There is no room for modification of its terms, and no duty for the parties to renegotiate the contract with a view to such modification". [*Lando*].

44. In conclusion, the Tribunal should not require RESPONDENT to pay any amount to CLAIMANT as a result of adaptation under Clause 12 of the Sales Agreement because the clause does not apply to the present tariff and—even if it did—does not provide the requested relief of adaptation of the contract.

ISSUE 4: CLAIMANT IS NOT ENTITLED TO REMUNERATION IN THE AMOUNT OF US $1,250,000 UNDER CISG.

45. CLAIMANT submits in its memorandum that Art. 79 CISG should be resorted to when answering the question of contract adaptation in this case. CLAIMANT claims that Art. 79

CISG applies to this case because: (1) it is not derogated by the inclusion of Clause 12, and (2) it provides and permits adaptation of contract.

46. However, regardless of the issue of derogation and Art. 79 CISG's adaptation of contract provision, Art. 79 CISG is not an appropriate CISG article for this issue because this article only applies when either party does not perform.

I. ART. 79 CISG DOES NOT APPLY BECAUSE CLAIMANT PERFORMED ITS CONTRACTUAL OBLIGATIONS.

47. The plain language of Art. 79 CISG only explicitly includes nonperformance by a party. Art. 79(1) states that, "a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control . . ." [*CISG Art. 79(1)*]. This article applies when there is a "failure to perform". Art. 79 does not mention a situation where performance has already occurred and the performing party asks for recourse after. [*CISG Art. 79*].

48. In this case, both Parties performed. RESPONDENT paid for the semen and CLAIMANT delivered the semen. Julie Napravnik of Phar Lap Allevamento ". . . authorized delivery even before an agreement on the details has been reached". [*Ex. C 8, p. 18*]. RESPONDENT had to pay the purchase price in two installments – the first installment on May 18, 2017, and the second installment on January 21, 2018. [*Ex. C 5, p. 14, ¶ 6*]. There is no evidence that the payments have not been made.

49. While there have been cases where exemptions were granted after a seller's delivery, those cases involve seller's late delivery of goods or a buyer's late payment of the price. In the present case, all obligations in the initial contract were met, both by the seller and the buyer. [*Butter case*; *see also Art books case*].

50. CLAIMANT points to Art. 7 to submit that observance of good faith may be used to interpret Art. 79 in solving the question of hardship. However, Art. 79 cannot be interpreted in a way

that is different than the meaning of the article. Art. 79 says "failure to perform" and this phrase cannot be interpreted to apply when there was performance. CLAIMANT does not present support for an interpretation of Art. 79 that includes an adaptation of contract *after* the party performed.

51. The Buyer paid for the product, and the Seller delivered the product. Because there was no "failure to perform," Art. 79 CISG is an inappropriate provision for the adaptation of the contract in this case.

II. THERE IS NO MODIFICATION OR AMENDMENT OF THE CONTRACT THAT WOULD ENTITLE CLAIMANT TO ANY ADDITIONAL REMUNERATION.

52. There is no modification or amendment of the contract in this case. The telephone conversation between Julie Napravnik and Mr. Shoemaker before the shipment of the final delivery of the horse semen may seem like it constitutes a modification of the contract, but there was no specific agreement that the price will increase.

53. In the January 20, 2018 email from Ms. Napravnik and Mr. Shoemaker, Ms. Napravnik stated that the two Parties will "have to find a solution" with regards to the 30% increase in the cost of shipping through the tariff. [*Ex. C 7, p. 16*]. However, the two Parties did not reach any explicit agreement on how to deal with the increase in the cost of shipping. Failure to reach an agreement is an "inactivity," and "silence or inactivity does not in itself amount to acceptance". [*CISG Art. 18*].

54. In the *Plastic chips case*, the seller, realizing that production would be more costly, notified the buyer that the purchase price would be increased. The buyer ignored the notification. The Commercial Court in Zurich held that an agreement between the parties had been reached for the initial purchase. The seller's notification of the new price was an offer and the buyer had not expressed any explicit consent. The court looked to CISG Art. 18 and held that silence or inaction in itself does not constitute an acceptance. [*Plastic chips case*].

55. Similarly, RESPONDENT did not respond to CLAIMANT's notification of the price increase to cover 30% tariff. In her witness statement, Ms. Napravnik admitted that Mr. Shoemaker said he "could not directly authorize any additional payment." She also claimed that Mr. Shoemaker said, "a solution would be found through negotiation". [*Ex. C 8, p. 18*]. This statement is not an acceptance of an offer. Mr. Shoemaker's response was silent to the offer to increase the cost of shipment. For valid offer and acceptance of increased cost, both Parties must have explicitly agreed on a new price.

56. According to scholars Schlechtriem and Schwenzer, "the possibility that silence may indicate assent does not mean that an offeror can insert a term to that effect in the offer as a way of binding the offeree if he fails to reply to the offer". [*Schlechtriem et al., p. 323*]. Even if Ms. Napravnik "had gotten the impression that RESPONDENT accepted [her] position," this *indication of assent* does not mean that CLAIMANT can impose the payment of US $1,250,000 on the RESPONDENT.

III. CLAIMANT BEARS ALL RISK BEFORE DELIVERY OF THE GOODS.

57. The Sales Agreement provides that CLAIMANT will ship three installments of semen DDP. [*Ex. C 5, p. 14,* ¶ 8]. DDP places the cost and risk involved to the seller. [*Incoterms*]. Even if this provision was missing or disputed, CISG Art. 69 states that seller bares all risk on the goods before delivery of the goods.

58. Under Art. 69(2) of the CISG, "the risk passes [to the buyer] when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal . . .". [*CISG Art. 69*]. In this case, the tariff which increased the cost of the semen shipment was imposed before the goods were placed at the buyer's disposal. CLAIMANT retained, as the seller, all risks associated with the shipment before the delivery to RESPONDENT.

59. In *Bianca-Bonell Commentary on the International Sales Law*, scholar Barry Nicholas explains that goods are placed at the buyer's disposal when "the seller has done everything necessary to enable the buyer to take control of them." [*Nicholas*]. In this case, CLAIMANT

has not done everything necessary for RESPONDENT to take control of the semen. When CLAIMANT notified RESPONDENT of the increased cost due to the tariff, CLAIMANT was still "preparing the final shipment of 50 doses of frozen semen." [*Ex. C 7, p. 16*]. The facts of this case show that under CISG Art. 69, the risk on the goods, and the cost increase by the tariff, have not been passed to the buyer.

PRAYER FOR RELIEF

In light of the above, RESPONDENT respectfully requests the Tribunal to:

1) Not require adaptation of the contract for claims of increased remuneration;

2) Dismiss as evidence RESPONDENT's previous arbitration;

3) Find that Phar Lap is not entitled to $1,250,000 (USD) under Clause 12 of the Sales Agreement;

4) Find that Phar Lap is not entitled to $1,250,000 (USD) under the CISG Articles concerning contract modification and price.

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

TABLE OF AUTHORITIES

Commentary/Articles

Abbreviation	Citation	Cited in ¶
Born 2009	Gary Born *International Commercial Arbitration* Kluwer Law International, Vol. I (2009)	¶ 10
Born 2014	Gary Born *The Law Governing International Arbitration Agreements: An International Perspective* 26SAcLJ 814 (2014)	¶ 8, 10
Cremades	Bernardo M. Cremades *Good Faith in International Arbitrati*on American University Int'l Law Review 27 no. 4 761 , 787, (2012)	¶ 25
Gu	Weixia Gu *Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?* 15 Am. Rev. Int'l Arb. 607; University of Hong Kong Faculty of Law Research Paper No. 2015/026. (2005).	¶ 25
Lando	Ole Lando, *A Vision of a Future World Contract Law: Impact of European and UNIDROIT Contract Principles* Available at: https://www.cisg.law.pace.edu/cisg/biblio/lando3.html	¶ 30, 43
Liu	Chengwei Liu *Remedies for Non-Performance: Perspectives from CISG,* UNIDROIT Principles & PECL Available at: http://www.cisg.law.pace.edu/cisg/biblio/chengwei-79.html#21-3	¶ 31, 40
Moser & Bao	Michael J Moser and Chiann Bao *A Guide to the HKIAC Arbitration Rules* Oxford University Press, March 2, 2017	¶ 2

Nicholas	Barry Nicholas and Bianca-Bonell *Commentary on the International Sales Law, Giuffrè* Available at: https://www.cisg.law.pace.edu/cisg/biblio/nicholas-bb69.html	¶ 59
Perillo	Joseph M. Perillo *Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts* Available at: https://www.cisg.law.pace.edu/cisg/biblio/perillo3.html	¶ 21
Poorooye et al.	Avinash Poorooye and Ronan Feehily *Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance*, Harvard Neg. L. Rev. 22(2) 275, 279 (2017)	¶ 25
Redfern et al.	Alan Redfern and J. Martin Hunter *Redfern and Hunter on International Arbitration* Oxford University Press, 6th ed. (2015)	¶ 8, 15, 22, 25, 27
Samuel	Mayank Samuel *Confidentiality in International Commercial Arbitration: Bedrock or Window-Dressing?* NALSAR Univ. (Feb. 2017)	¶ 19, 25
Schlechtriem et al.	Schlechtriem & Schwenzer *Commentary on the UN Convention on the International Sale of Goods (CISG)* New York (2010)	¶ 56
WTO: Tariffs	*Tariffs*, WORLD TRADE ORGANIZATION, Available at; https://www.wto.org/english/tratop_e/tariffs_e/tariffs_e.htm	¶ 35
WTO: Standards and Safety	*Standards and safety*, WORLD TRADE ORGANIZATION, Available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm	¶ 35

TABLE OF ARBITRAL AWARDS

Arbitration Awards

Abbreviation	**Citation**	**Cited in ¶**
Chu Chung Ming	*Chu Chung Ming v. Lam Wai Dan*, 2012 4 HKLRD 897, 16 Aug. 2012.	¶ 18
Tidewater v. Venezuela	*Tidewater v. Venezuela*, ICSID Case No ARB/10/5, Dec. 2010.	¶ 24

TABLE OF COURT DECISIONS

Case Law ***Abbreviation***	**Citation**	**Cited in ¶**
Belgium		
Steel tubes case	*Scafom International BV v. Lorraine Tubes S.A.S.* Belgium 19 June 2009 Court of Cassation [Supreme Court] Available at: http://cisgw3.law.pace.edu/cases/090619b1.html	¶ 41, 42
England		
Sulamerica	*Sulamerica CIA Nacional de Seguros S.A. and Others v. Enesa Engenharia and Others*; 2012 EWCA Civ 638 16 May, 2012.	¶10
Russia		
Butter case	*Butter case* Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry 22 January 1997 Available at: http://cisgw3.law.pace.edu/cases/970122r1.html	¶ 49
United States		
Sun Life Assurance Co.	*Sun Life Assurance Co. of Canada and Others v. The Lincoln National Life Insurance Co*; CA 10 Dec. 2004.	¶ 17
Zurich		
Art books case	*Art books case* Commercial Court Zurich 10 February 1999 Available at: http://cisgw3.law.pace.edu/cases/990210s1.html	¶ 49
Plastic chips case	*Plastic chips case* Commercial Court Zurich 10 July 1996 Available at: http://cisgw3.law.pace.edu/cases/960710s1.html	¶ 54

STATUTES, RULES, TREATISES AND OTHER SOURCES

Abbreviation	**Citation**	**Cited in ¶**
CISG Art.	Convention on International Sales of Goods	¶ 47, 53, 58
HKIAC Rule	2018 Hong Kong International Centre Rules, http://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018_hkiac_rules.pdf	¶ 2, 10, 12, 13, 16, 21, 26, 27, 28
IBA Rules	IBA Guidelines on Conflicts of Interest in International Arbitration (2014).	¶ 23
IBA Rules on Taking of Evidence	IBA Rules on the Taking of Evidence in International Arbitration (2010).	¶ 23
Incoterms	Incoterms Rules, International Chamber of Commerce Available at: https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010	¶ 29, 57
UNIDROIT Art.	UNIDROIT Principles of International Law of Commercial Contracts (2010).	¶ 32

CERTIFICATE

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

18 January 2019,

ANDREW SOUKHOME

YOONHO JI

JAMES CROMLEY

NATASHA CAMPBELL