PEKING UNIVERSITY
SCHOOL OF TRANSNATIONAL LAW

Sixteenth Annual
WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT
Hong Kong - 31st March to 7th April 2019

MEMORANDUM FOR RESPONDENT

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

COUNSEL

Jiang Ruiling | Zhang Han | Zhang Ziheng | Zheng Hanxi

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LIST OF ABBREVIATIONS AND DEFINITIONS

Cited as:	Full Citation
&	and
Arb.	Arbitration
Art.	Article
CISG	United Nation Convention on Contracts for the International Sale of Goods
CISG-AC Opinion	CISG Advisory Council Opinion
Cl. Ex.	Claimant's Exhibit
e.g.	*exempli gratia* (example given)
ed.	edition
et al.	*et alius* (and others)
HKIAC Rules	Hong Kong International Arbitration Center Administered Arbitration Rules
i.e.	*id est* (that is)
IBA Rules	International Bar Association Rules on Taking of Evidence in International Arbitration
ibid.	*ibidem* (in the same place)
ICC	International Chamber of Commerce
id.	*idem* (the same)
inter alia	among other things

Memo	Memorandum
NO.	Number
p.	page
para.	paragraph
paras	paragraphs
PO	Procedural Order
pp.	pages
Re. Ex.	Respondent's Exhibit
s.	section
U.S.	United States of America
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Laws	United Nations Commission on International Trade Law Model Laws
UNCITRAL Rules	United Nations Commission on International Trade Law Model Rules
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
US$	United States Dollar
v.	versus

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SUMMARY OF FACTS

1 **Phar Lap Allevamento** (**"CLAIMANT**) a Mediterranean company, sells semen. **Black Beauty Equestrian** (**"RESPONDENT"**), an Equestrian company, has broodmare lines and needs CLAIMANT's semen for business.

2 CLAIMANT's witness Julie Napravnik is Phar Lap's lawyers, and responsible for contractual relations to CLAIMANT's suppliers and customers.

3 RESPONDENT has Julian Krone and Greg Shoemaker as witnesses, who engaged in the negotiation of the contract.

4 In terms of substantive law, Equatoriana, Mediterraneo and Danubia are all Contracting States of the CISG; Equatoriana and Mediterraneo adopt verbatim the UNIDROIT Principles on International Commercial Contracts. In terms of procedure, Danubia adopts the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments.

21 March 2017	RESPONDENT contacted CLAIMANT for the availability of Nijinsky III for breeding. The Equatorianian government had imposed serious restrictions on the transportation of all living animals. The ban on artificial insemination for racehorses had been temporarily lifted.	*Cl. Ex. C2, p.9*
24 March 2017	CLAIMANT offered RESPONDENT 100 doses of frozen semen for 99,500 USD per dose.	*Cl. Ex. C2, p. 10*
28 March 2017	RESPONDENT objected to the applicable law and forum selection clause, and asked for delivery DDP and a better price.	*Cl. Ex. C3, p. 11*
31 March 2017	CLAIMANT accepted DDP delivery principle but requested to increase the price if DDP is adopted.	*Cl. Ex. C4, p. 12*

10 April 2017	RESPONDENT proposed that the arbitration agreement be governed by the law of Mediterraneo.	*Re. Ex. R1, p. 33*
11 April 2017	CLAIMANT changed the suggested place of arbitration in the reply but not objected to RESPONDENT's proposal that the law of the place of arbitration should govern the arbitration agreement.	*Re. Ex. R2, p. 34*
12 April 2017	Napravnik and Antley were severely injured in an accident. Until then, they had already agreed on clauses 1-5 of the Sales Agreement.	*Cl. Ex. C8, p. 17*
6 May 2017	The Sales Agreement (Agreement) was finalized, agreeing that the Sales Agreement be governed by the law of Mediterraneo (including CISG), that the seat of arbitration be Vindobona, Danubia. Clause 12 prescribes some situations where Seller shall not be responsible.	*Cl. Ex. C5, p. 13*
18 May 2017	The first instalment of US$ 5,000,000 was due.	*Cl. Ex. C5, p. 14*
20 May 2017	The first shipment of 25 doses was made.	*Cl. Ex. C5, p. 14*
3 October 2017	The second shipment of 25 doses was made.	*Cl. Ex. C5, p. 14*
15 November 2017	Mediterraneo announced 25 percent tariffs on agricultural products from Equatoriana.	*PO2, p.58, No. 23*
19 December 2017	Equatoriana announced a tariff on agricultural goods in retaliation, which took effect from 15 January 2018 onwards.	*PO2, p.58, No. 25*
20 December 2017	Peak Business News reported on Equatorianian tariff, describing that Mediterraneo's tariff policy triggered the prompt and severe retaliation by the Government of Equatoriana.	*Cl. Ex. C6, p. 15*
15 January 2018	Equatorianian tariff policy took effect.	*PO2, p.58, No. 25*

20 January 2018	Napravnik learned that the tariff also applied to semen. CLAIMANT asked for the solution for this tariff before start of the final shipment.	*PO2, p.58, No. 26*
21 January 2018	RESPONDENT made the second instalment of US$ 5,000,000. RESPONDENT stated that "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price." CLAIMANT authorized the shipment.	*Re. Ex. R4, p. 36*
23 January 2018	CLAIMANT made the third shipment of 50 doses.	*Cl. Ex. C5, p. 14*
4 October 2018	CLAIMANT informed the Arbitral Tribunal that it just received reliable information about another arbitration under the HKIAC Rules where RESPONDENT had with one of its customers concerning the sale of a promising mare to Mediterraneo.	*Commencement of Arbitration, p. 19*

SUMMARY OF ARGUMENTS

5 RESPONDENT entered into the contract in good faith with CLAIMANT, and demonstrated due respect and concern throughout the negotiation. Now the dispute arising out of an unexpected tariff sanction. For the following reasons, RESPONDENT here respectfully asks the Tribunal to find for it.

6 This Arbitral Tribunal has no jurisdiction and power to adapt the contract. The facts of this case have clearly demonstrated that the parties had no meeting of minds with respect to the law applicable to the arbitration agreement, and it is highly recommended that this Tribunal adheres to the choice-of-law rules prescribed by Art. V(1)(a) of New York Convention, that is, the law of the seat of arbitration should govern the interpretation of the arbitration agreement, and in this case, it is the Danubia law. Accordingly, this Arbitral Tribunal cannot adapt the contract without parties' express conferral of such power. **(ISSUE 1)**

7 CLAIMANT is trying to submit a copy of the award and relevant submission from a previous arbitration where RESPONDENT happened to be one of the parties. RESPONDENT will demonstrate that the evidence is inadmissible. The evidence has little probative value that it is irrelevant to the case and immaterial to the outcome of the case. The admission of the evidence would be in a conflict with the important principles of confidentiality and good faith in international arbitrations **(ISSUE 2)**.

8 CLAIMANT asserts US$ 1,250,000 compensation from RESPONDENT to cover the loss caused by the tariff imposition. This Arbitral Tribunal should not grant the request of CLAIMANT. One the one hand, CLAIMANT cannot assert the remedy based on clause 12 of the Agreement, because the tariff policy is not included in clause 12; second, even if the tariff policy is included in clause 12, there is no reason for CLAIMANT to get money from its delivery **(ISSUE 3(1))**.On the other hand, CLAIMANT is not entitled to the payment of US$ 1,250,000 based on Art. 79 CISG either. First, Art. 79 CISG does not cover hardship. Second, even if Art. 79 covers "hardship" in certain extreme occasions, tariff here does not meet the requirements of Art. 79. Lastly, clause 12 of the Agreement constitutes a derogation from Art. 79 CISG **(ISSUE 3(2))**.

ARGUMENTS

ISSUE 1: THIS ARBITRAL TRIBUNAL HAS NO JURISDICTION AND POWER TO ADAPT THE CONTRACT.

9 It is submitted by RESPONDENT that, the law governing the Parties' arbitration clause should be the law of Danubia, as a result of which, this Arbitral Tribunal is not entitled to adapt the Sales Agreement.

10 The core of CLAIMANT's argument is that the parties had a meeting of minds in the process of the negotiation that the law of Mediterraneo should govern the arbitration agreement, and in consequence, this Arbitral Tribunal is allowed to adapt the contract [*Claimant's Memo, para. 8*].

11 RESPONDENT respectfully requests this Arbitral Tribunal to reject CLAIMANT'S argument for the following reasons. The facts of this case have clearly demonstrated that the parties had no meeting of minds with respect to the law applicable to the arbitration agreement **(1)**, and accordingly, the determination of the law should be subjected to internationally agreed choice-of-law principles, which are reflected by the New York Convention Art. V(1)(a), the UNCIRTAL Model Law Art. 34(2)(a)(i), 36(1)(a)(i), and many cases and awards world-wide. All of these authoritative sources have led to a broadly accepted consensus that the applicable law to the interpretation of an arbitration agreement, absent the parties' choice, should be the law of the country where the award was made **(2)**.

1. There is no meeting of minds between the parties with respect to the law applicable to the arbitration agreement.

12 RESPONDENTT submits that, the parties in fact failed to reach a consensus on the law applicable to the arbitration agreement **(1.1)**, and CLAIMANT's interpretation of the parties mind is unilateral and departs from the reality which is demonstrated by the facts **(1.2)**.

1.1. The Parties did not agree on the law applicable to the arbitration agreement.

13 The Parties did not agree on the law applicable to the arbitration agreement. It is without any doubt that the foundation of an arbitration agreement is the parties' mutual assent. As CLAIMANT also pointed out, the importance of recognizing the parties' meeting of the minds is emphasized in the *travaux préparatoires* of the New York Convention and is echoed by

commentators on the subject [*Travaux Préparatoires; Wolff p. 128-32*]. "The only intent of the parties to a contract which is essential, is an intent to say the words and do the acts which constitute their manifestation of assent" [*Ray v. William G. Eurice & Bros., Inc.*].

14 In determining the parties' intent with respect to the arbitration agreement, this Tribunal may consider extrinsic evidence regardless of which countries' law governs the arbitration agreement. All three relevant jurisdictions have adopted the UNIDROIT Principles as their domestic contract law, with the only exception that Danubia has replaced Art. 4.3 with the so-called four-corners-rule and requires an express conferral of power to adapt under Art. 6.2.3 (4)(b) [*PO1, PO2*]. The four corners rule under Danubia's contract law operates with the same effects as a merger clause under Art. 2.1.17 of UNIDROIT Principles [*PO2*], which provides that, the terms of the agreement cannot be contradicted or supplemented by evidence of prior statements or agreements of the parties, but that "**such statements or agreements may be used to interpret the writing**" [*UNIDROIT Principles, Art. 2.1.17; see also, CISG Art. 8(3); EMPHASIS ADDED*].

15 Furthermore, as a result of sharing largely the rules of the UNIDROIT Principles, the rules governing the formation of an agreement are the same among the three relevant jurisdictions [*UNIDROIT Principles, chapter 2*]. Thus, in this case, the formation of the arbitration agreement and the process of reaching a mutual assent are governed by chapter 2 of the UNIDROIT Principles.

16 According to the said principles, the letter of 10 April 2017 constitutes an offer from the part of RESPONDENT [*PO1, p. 33; UNIDROIT Principles, Art. 2.1.11*]. However, on the day after, CLAIMANT proposed a new arbitration agreement with many deletions and alterations different from the one proposed by RESPONDENT [*PO1, p. 34*]. Apart from the classical mirror-image rule, the UNIDROIT Principles have allowed a varying acceptance providing that the change is not material [*UNIDROIT Principles, Art. 2.1.11(2)*]. In this case, it is the dispute resolution clause has been altered largely. CLAIMANT has deleted the applicable law clause, the number of arbitrators clause, and the language of arbitration clause [*PO1, p. 34*]. Such a great alteration without doubt constitutes a counter-offer [*UNIDROIT Principles, cmt. 2 of Art. 2.1.11(1), suggesting that, additional or different terms relating to the settlement of disputes will normally constitute a material modification of the offer; see also, CISG Art. 19(3), which expressly prescribes that the alteration of dispute resolution terms is material*].

17 RESPONDENT has not accepted the counter-offer at this stage, nor have the parties agreed on the terms of the arbitration agreement [*UNIDROIT Principles, Art. 2.1.6(1), prescribing that "silence or inactivity does not in itself amount to acceptance"*]. By deleting and altering the terms provided by RESPONDENT, CLAIMANT's proposed agreement demonstrated no intent to reach a mutual assent on the applicable law, since the provisions regarding the applicable law proposed by RESPONDENT was **deleted by CLAIMANT intentionally**. [*PO1, p. 34; EMPHASIS ADDED*].

18 The issue continues to be unresolved. According to Mr. Antley's notes after his negotiation with Ms. Napravnik on 12 April 2017, the terms to be determined at least include the applicable law to the arbitration agreement [*PO1, p 35*]. In fact, even when the parties concluded the Sales Agreement, the plain meaning of the words in the contract strongly suggest that the issue was still unresolved, because there was no mention of the applicable law in the arbitration agreement [*PO1, p.14*].

19 In short, there is no mutual assent between the parties on which law should govern the arbitration agreement.

1.2. CLAIMANT's assertion that the parties indeed had a meeting of minds relies on several unpersuasive grounds.

20 CLAIMANT's assertion that the parties indeed had a meeting of minds relies on several unpersuasive grounds.

21 First, CLAIMANT suggests that the hardship clause indicates the parties' intent to empower a tribunal to adapt the contract [*PO1, p. 14*], because it would "operate in tandem" with the arbitration clause [*CLAIMANT's Memo, para. 15*].

22 However, it is highly doubtful what the advantage of an "operation in tandem" exactly is. The primary goal of a hardship clause is assigning risks, and it would only affect the outcome of a case, that is, who bears the risk, but it would not and shall not interfere with how the dispute get resolved, because this is solely the function of the dispute resolution clause. In this case, aside from adaptation, under both Mediterranean and Danubian law, CLAIMANT has the option to construct its claim. For example, CLAIMANT could seek **termination of the Sales Agreement** and this Tribunal may order restitution while addressing the hardship clause to find who should bear the risk [*UNIDROIT Principles, Art. 6.2.3 (4)(a) and Art. 7.3.6; EMPHASIS ADDED*]. In doing so, the hardship clause "operates in tandem" with the

arbitration clause too. Accordingly, it is wrong on the part of CLAIMANT to imagine an implied meeting of minds from the hardship clause.

23 Second, CLAIMANT's argument relies heavily on its feeling that RESPONDENT wanted a long-term relationship, and the allowance of adaptation promotes that goal [*CLAIMANT's Memo, para, 18*]. However, CLIAMANT has intentionally omitted the language ensued in the letter of 28 March 2017 from RESPONDENT. The relevant paragraph reads as follows:

"Given the desirability of a long-term relationship for the mutual benefit of both parties ***we consider it not appropriate that your law applies and your courts have jurisdiction****"* [*PO1, p. 11; EMPHASIS ADDED*].

24 Reading the paragraph as a whole, a reasonable person in the same situation as CLAIMANT would understand that the real focus and intent of RESPONDENT is to emphasis that the law of Mediterraneo is not desirable. Accordingly, the language about "long-term relationship" is not important. Furthermore, if this Tribunal were to give effect to the language, the critical question is whether the allowance of adaptation promotes that goal. RESPONDENT's answer is that it doesn't. This is because, even if the contract is adapted and, not terminated, the relationship between the parties is hard to maintain as harmony as before the dispute arose. In this sense, CLAIMANT's argument is wrong.

25 To conclude, throughout the whole negotiation, there is simply no acceptance, and thus no mutual assent, on the issue of which law should govern the arbitration agreement. As a result of which, the determination of the applicable law should be subjected to internationally agreed choice-of-law principles.

2. The choice-of-law principles envisioned by the New York Convention and the UNCITRAL Model Law lead to the conclusion that the law of Danubia should govern the arbitration agreement.

26 The law of Danubia governs the arbitration agreement. The analysis of the choice of the law governing an international arbitration agreement begins with the separability presumption [*Born, p. 473*]. An arbitration agreement is presumptively separable from the underlying contract with which it is associated, and such presumption "postulates two separable agreements of differing characters", which can be governed by two different national legal regimes [*Born, p. 464*].

27 Such presumption is reflected in the New York Convention and expressly prescribed in the UNCITRAL Model Law [*UNCITRAL Model Law, Art. 16(1), prescribing that "an arbitration*

agreement…shall be treated as an agreement independent of…the contract"; New York Convention Art. II is generally understood as reflecting the separability presumption, as it incorporates specific legal rules that do not apply to the parties' underlying contract; see also, Born, p. 356]. Both of these two rules are binding in this case [*PO1, PO2*]. Accordingly, the arbitration agreement in this case deserves a separate and independent choice-of-law analysis.

28 However, due to the separability presumption, the law applicable to the arbitration agreement can be multiple. The issues governed by the applicable law vary from the formal and substantive validity, capacity of parties, formation and existence, arbitrability, and the issue in this case—interpretation. It is possible and actually existing that these issues are subjected to different choice-of-law analysis [*Born, pp. 487-490*].

29 Unfortunately, this multiplicity of choice-of-law rules does not advance the purposes of the international arbitral process [*Born, p.488*], and in fact has caused a lot of uncertainty due to the absence of a uniform criterion [*M. Bühler & T. Webster, pp. 78-79; Graffi, pp. 19, 53*].

30 Nonetheless, there is a consensus on the choice-of-law rules with respect to the existence and validity of an arbitration agreement. First, the law chosen should be a law which tends to validate an arbitration agreement so as to promote an international pro-arbitration regime [*New York Convention, Art. II, which is generally understood as mandating a liberal and extensive interpretation of arbitration agreement so as to give effect to the parties' intention to arbitrate; see Born, p. 1397-1399*]. Second, absent the parties' choice, in determining the validity of an arbitration agreement, the law of the country "where the award was made" should apply [*New York Convention, Art. V(1)(a); UNCIRTAL Model Law, Art. 34(2)(a)(i), 36(1)(a)(i); see, e.g., Rocco v. Federal Commerce and Navigation Ltd; Lanificio Walter Banci S.a.S. v. Bobbie Brooks Inc.; G. A. Pap-KG Holzgrosshandlung v. Ditta Giovanni G. Pecoraro; VOEST ALPINE v. Jiangsu Provincial Foreign Trade Corp.*]. And it is well-established in arbitral practice, as well as reflected in institutions' arbitral rules and in arbitration laws, that an award is made at the seat of arbitration [*See, e.g., Article 31(3) of the ICC Rules (2012), "The award shall be deemed to be made at the place of the arbitration and on the date stated therein"; Article 31(3) of the UNCITRAL Model Law, "The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place"*].

31 In order to avoid the uncertainty created by the multiplicity of choice-of-law rules, and to observe the goal of promoting international arbitration as envisioned by Art. II of the New

York Convention, it is highly recommended that this Tribunal adheres to the choice-of-law rules prescribed by Art. V(1)(a) of New York Convention, that is, the law of the seat of arbitration should govern the interpretation of the arbitration agreement, and in this case, it is the Danubia law [*see, e.g., 27 ASA Bulletin 762; B. Berger & F. Kellerhals, para. 414; S. Berti, para.. 23; Redfern and Hunter, para.. 3.12*].

32 CLAIMANT has also noticed the importance of the pro-arbitration goal envisioned by the New York Convention, and by relying on this, CLAIMANT argued that if this Tribunal were not able to adapt the contract, then it would be a frustration of said goal under the New York Convention [*Claimant's Memo, para. 20*]. However, this is totally a misunderstanding of the pro-arbitration requirement, and the goal of the New York Convention would not be affected by disallowing this Tribunal to adapt the contract.

33 Firstly, the pro-arbitration objectives require a court or a tribunal generally not to frustrate the parties' intent to arbitrate by giving validity to the relevant arbitration agreement. It does not necessarily require a tribunal to adapt a contract. This understanding is based on the presumption that rational businesspersons favor a centralized "one-stop" dispute resolution, and they do not desire their disputes to be resolved in multiple proceedings that impose costs, delays and risks of inconsistent results [*Born, p. 1319*].

34 Secondly, even if this Tribunal is not empowered to adapt the contract, the pro-arbitration objective is not frustrated because the dispute at hand can be resolved anyway. For example, CLAIMANT could seek a termination of the Sales Agreement and this Tribunal may order restitution while addressing the hardship clause to find who should bear the risk [*UNIDROIT Principles, Art. 6.2.3 (4)(a) and Art. 7.3.6*].

35 In conclusion, aligning with the choice-of-law principles set forth by the New York Convention, this Tribunal should find that the law of the seat of arbitration should govern the arbitration agreement, and in this case, it is the law of Danubia.

CONCLUSION OF ISSUE 1

To conclude, the facts of this case have clearly demonstrated that the parties had no meeting of minds with respect to the law applicable to the arbitration agreement, and it is highly recommended that this Tribunal adheres to the choice-of-law rules prescribed by Art.

V(1)(a) of New York Convention, that is, the law of the seat of arbitration should govern the interpretation of the arbitration agreement, and in this case, it is the Danubia law.

ISSUE 2: CLAIMANT SHOULD NOT BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

36 CLAIMANT requested the adoption of a copy of a Partial Interim Award (Award) and the relevant submission from another arbitration under the HKIAC Rules, where RESPONDENT had been negatively affected by the tariffs and asked for an adaptation of the contract [*PO1, p.49*]. The source of information could either be two former employees of RESPONDENT, or a hack of RESPONDENT's computer system. parties did not agree on an express confidentiality agreement [*PO1, p.50*].

37 RESPONDENT respectfully requests that this Arbitral Tribunal reject the submission of the Award and the relevant submissions from the prior arbitration because the evidence has little probative value **(1)** and would run afoul of standards concerning confidentiality and good faith **(2)**.

1. The probative value of the evidence is too little to create exception for admission.

38 The parties have submitted themselves to the arbitration administered by HKIAC, which commonly adopt or refer to IBA rules. Article 9.2(a) specifies that evidence lacking sufficient relevant to the case or materiality to its outcome should be excluded. Illegally obtained evidence, though to the discretion of the Tribunal, can only be admissible when it is both relevant to CLAIMANT's contention **(1.1.)** and material to the outcome of this contention **(1.2.)** [*Mirabal, p.208*].

1.1. The requested evidence is not relevant to establish that this Tribunal has the power to adapt the contract in this case.

39 The IBA Rules require that the requested document must be relevant to the case. In other words, the requesting party can use the requested document to support an important contention [*Marghitola/Lew, p.50*]. Additionally, a tribunal should look for prima facie relevance rather than possible relevance [*Waincymer, p.858*].

40 CLAIMANT cannot use the evidence to support its contention that this Tribunal has the power to adapt the Sales Agreement. The cases should be taken separately. It is a common sense in commerce that a businessman adopts different negotiation position and strategy in different

business transactions. To seek RESPONDENT's understanding and attitude towards the adaptation of the 6 May 2017 Sales Agreement between Phar Lap Allevamen and Black Beauty Equestrian in the transaction regarding frozen semen, the information of a different contract between different parties regarding different goods cannot help. Importantly, CLAIMANT is not in possession of the evidence yet, thus is only make a speculation that the evidence might be "possibly relevant".

41 Therefore, the argument and standpoint in a separate arbitral proceeding is irrelevant to the instant one and should not even be considered in the Tribunal's determination.

1.2. The requested evidence is not material to the outcome of this issue.

42 A document is material to the outcome of the case if it is needed to allow complete consideration of the factual issues from which legal conclusions are drawn [*Marghitola/Lew, p.53*]. In other words, factual rather than legal issues are under inquiry of materiality, excluding legally irrelevant allegations put forward for the only purpose of casting the other party in an unfavorable light [*id.*]. Materiality added as a further qualification to relevance, an evidence which fails to be relevant cannot be relevant [*Waincymer, p.859*].

43 Here, CLAIMANT is seeking to establish the fact that RESPONDENT shared CLAIMANT's intent that the Sales Agreement provided for adaptation, and the fact that CLAIMANT and RESPONDENT tacitly agreed that Mediterranean law govern the Arbitration Clause, in order to draw the legal conclusion that the Tribunal has the power to adapt the Sales Agreement [*PO1, p.49*]. It is true that the two cases have the same delivery DDP and Hardship Clause, choice of law for the substantial part of the Sales Agreement and choice of place of arbitration [*PO2, p.60*]. However, none of the facts which seem similar on the face reflects RESPONDENT's understanding of adaptation and cannot help to lineate the facts.

44 The difference in detailed negotiation processes should bear more weight in inquiries. The instant case is unique where the initial representatives had not been able to continue the discussion, so the inquiry into RESPONDENT's mind to adapt is heavily dependent on the negotiation history. As a matter of fact, RESPONDENT in the transaction had objected to the choice of law and made a proposal that the law of the place of arbitration should govern the arbitration agreement [*PO2, p.61; Res. Ex. R1*]. In the converse, CLAIMANT failed to show any valuable information as to the details in the other transaction's negotiation history. Thus, the facts of huge difference cannot be supportive of the legal conclusion sought.

45 The only effect, if not purpose, of introducing the information regarding the other arbitration would be creating an impression that RESPONDENT seems to had agreed with the idea of adaptation. As it would cast an "unfavorable light" on RESPONDENT, the entitlement to the submission of evidence would be under the suspicion of unequal treatment.

46 In conclusion, the requested evidence is neither relevant nor material and has little probative value.

2. Submission of the evidence undermines confidentiality and good faith.

47 CLAIMANT submits the evidence which not only is under the confidentiality, but also procured in a highly improper way. Such submission runs afoul of important arbitral principles of confidentiality **(2.1.)** and good faith **(2.2.)**.

2.1. The evidence is inadmissible due to breach of confidentiality.

48 Arbitral awards are generally under the protection of confidentiality. If the evidence was disclosed by a witness, he/she is in breach of confidentiality obligation **(2.1.1.)**. The admission of the unpublicized arbitral Award hurts the interest of confidentiality within **(2.1.2.)**.

2.1.1. The witness is bound by the obligation of confidentiality prescribed by the HKIAC Rules Article 45.

49 HKIAC Rules prescribe an obligation of confidentiality regarding arbitral awards and any relevant information, and impose the obligation on witnesses. Article 45.1 of HKIAC provides, "[u]nless otherwise agreed by the parties, no party or party representatives may publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration; or (2) an award or Emergency Decision made in the arbitration."

50 Party autonomy plays a central role with respect to confidentiality [De Ly/*Friedman/Brozolo, p.359*]. Most contractual confidentiality agreements take the form of provisions of institutional rules incorporated into the parties' arbitration clause [*Born, p.2790*]. Thus, as long as parties submit themselves to certain institutional rules, the confidentiality clause therein has a binding effect on the parties.

51 In the instant case, the two former employees suspected of disclosing the award and relevant information were witnesses in the other arbitration. Dictated by ethical duties of their profession or the contractual nature of their relationship with the parties, witnesses should be forced to sign undertakings regarding confidentiality of the arbitral proceeding [*Smeureanu/Lew, p.151*]. Accordingly, both witnesses before they were fired on 6 July 2018

had been under a contractual obligation with RESPONDENT to keep all information about the other arbitral proceedings confidential [*PO2, p.61*]. The former employees, thus, have a responsibility to maintain the tribunal's deliberations and the final award as confidential. However, the witnesses in the instant case blatantly disclosed the pertinent information without any consent. It is such an apparent breach of confidentiality that the very information must not be admitted as legitimate evidence.

2.1.2. The Award itself has an interest of confidentiality.

52 Arbitrations have a private nature of confidentiality, which aspires commercial parties to deal with their disputes without possible adverse impacts from bad publicity [*Waincymer, p.798*]. As an advantage of arbitration over court litigation, any vitiation of confidentiality will dissuade parties from alternative dispute settlement [*Smeureanu/Lew, p.82*].

53 According to Article 9.2(e) of IBA Rules, the Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection on grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling [*IBA Rules, p.19*]. When prescribing confidentiality as a reason for exclusion of evidence in a general way, Article 9.2(e) does not require extra requirement on the party bound by the confidentiality, implicating the idea that confidentiality itself is so important that any breach would trigger exclusion.

54 In the instant case, no matter in which way the Award was attained, the confidentiality of the award will be vitiated. As CLAIMANT now is not yet in possession of the Award, it is not publicized yet, thus still having an interest of confidentiality to protect [*PO2, p.60*]. By admitting the submission of the award, the Tribunal would breach the confidentiality of the award, violating a basic principle of international commercial arbitration. Whereas confidentiality is one major reason why disputes go to arbitration instead of courts, breach of confidentiality undermines the nature of arbitration and tarnishes the attraction of arbitration to disputes.

55 In conclusion, the Tribunal should reject the Award as evidence to protect the interest of confidentiality within.

2.2. The improper way through which RESPONDENT is going to obtain the evidence indicates a bad faith.

56 Clean hand doctrine is a widely accepted principle that a party should not be permitted to profit from its own misconduct [*Encyclopedia of Public Int'l Law*]. The idea is reflected in IBA rule

in the form of Good faith. Good faith appeared twice in IBA rules, in the preamble and the again in the final paragraph [*IBA Rules, pp.4,20*]. The symmetry in the placement suggests the importance of good faith in taking of evidence [*Martinez-Fraga*]. In evidence admission, if the party presenting that evidence can be said to be in breach of its good-faith obligations under the arbitration agreement, then there may be more justification for exclusion [*Waincymer, p.797*]. Concretely, if the party seeking to introduce unlawfully obtained evidence into proceedings has played any part in procuring that evidence, the evidence is inadmissible on the basis of clean hand doctrine [*O'Sullivan*]. Typically, opposing parties accuse the other side of violating the good faith requirement for making the process potentially lengthier, more expensive and inefficient [*Sanchez*].

57 Now it is far from fair to say that CLAIMANT did not participate in procuring the requested evidence. CLAIMANT actively sought to have contact with the company that claimed to have illegally obtained the evidence and offered to pay 1000 USD in exchange for the Award [*PO2, p.61*]. The Award is worthless to other companies except CLAIMANT. Without CLAIMANT's effort, the tainted evidence would not possibly have found a way to be presented to this Tribunal. In a broader sense, neither hacker will steal nor will the witness disclose the Award, without the pecuniary incentives created by buyers such as CLAIMANT.

58 Permitting the evidence to be admitted would "make the process potentially lengthier, more expensive and ineffective". Firstly, knowing that there is an interest of confidentiality, CLAIMANT nonetheless seek to submit the Award and other submissions. Secondly, the requested evidence is irrelevant to the case and immaterial to the resolution of the case. Taking the evidence into the arbitration would only cast an unfavorable light upon REPSONDENT. Most importantly, the whole application is premature. CLAIMANT is not in possession of the Award and other submissions and cannot possibly know the exact content. It is speculative of CLAIMANT to present the issue and claim that the evidence is relevant and material to the instant case. Therefore, the corollary would be that CLAIMANT submitted the evidence "in bad faith".

59 Accordingly, this Tribunal must not permit CLAIMANT to benefit from its tainted efforts of seeking evidence.

CONCLUSION OF ISSUE 2

The Award and relevant submission in the other proceeding is inadmissible as evidence because such evidence, if taken, would cause more harm than probative value brought.

The information in the prior arbitration is neither relevant to the case nor material to the outcome of the case. The submission of the evidence runs is in conflict with confidentiality and good faith.

ISSUE 3 (1): UNDER CLAUSE 12 OF THE SALES AGREEMENT, CLAIMANT IS NOT ENTITLED TO PAYMENT RESULTING FROM AN ADAPTATION OF THE CONTRACT PRICE

60 In order to analyze whether clause 12 of the Sales Agreement entitles CLAIMANT to the payment, according to *pacta sunt servanda*, the Agreement itself should be firstly analyzed.

61 To interpret a contract, according to Art. 8 CISG, the subjective test is firstly applied. If the Tribunal cannot interpret the parties' intent, then it should apply the objective test. When determining the intent, the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties can be considered.

1. The tariff policy is not included in clause 12.

1.1. Two Parties knew or could not have unaware that this tariff policy is not included in clause 12.

62 Firstly, the Parties agreed on the delivery DDP. "Delivery DDP" is a reference to the Incoterm "Delivered Duty Paid," which originally means that "the seller bears the costs and risks involved in the delivery of the goods, including tariffs" [*Incoterms Rules*]. However, the meaning of the Incoterms Rules can be changed by the parties to a contract. In this case, since the Parties have agreed on DDP, negotiating the meaning of DDP is very normal and undoubtedly logical. Therefore, if the Parties do not clearly state their change of the Incoterms Rules, it means applying the meaning of the Incoterms Rules. In this case, since there is no specific statement for the change, like pointing out that the costs and risks involved in the delivery will shift to RESPONDENT, it means that CLAIMANT bears these costs and risks, complying with the Incoterms Rules.

63 Furthermore, CLAIMANT argues that during the negotiations, the Parties only agreed on the shift of administrative responsibilities, excluding the financial burden. However, the specific statement of assigning administrative responsibilities to CLAIMANT is the reason for why choosing delivery DDP, which does not indicate changing the meaning of Incoterms Rules. Besides, the price of the Agreement implies that CLAIMANT bears the delivery risk. According to its e-mail of 31 March 2017, CLAIMANT states that the prerequisite for DDP delivery is increasing the price of frozen semen [*Cl. Ex. C4, p.12*]. Considering that the additional costs associated with the transportation and DDP delivery per dose are 200 USD [*PO2, p.56, No. 8*], while the final agreed price per dose is 1,000 USD [*Cl. Ex. C5, p.13*], the agreed price must include some risk borne by CLAIMANT. Moreover, CLAIMANT's e-mail of 31 March 2017 also asks to be relieved from all risks associated with DDP delivery or at least to be protected against the risk of changing health and security requirements by a hardship clause [*Answer to the Notice. Arb., p.30, para 4*]. RESPONDENT choose the second option, which means that CLAIMANT is not relieved from all risks [*id.*]. Since there is no specific statement which risk CLAIMANT does not need to bear, the risk allocation principle follows the traditional content of DDP.

64 Secondly, the Parties not only do not mention that this burden has shifted to RESPONDENT in clause 8, but also do not mention the tariff risks in clause 12. The Parties agreed on the inclusion of a narrow hardship reference into the force majeure clause and regulated some other risks directly in the contract [*Re. Ex. R3, p.35*]. Since clause 12 does not specifically mention anything like tariff, it means that they do not want to include the tariff imposition within clause 12. CLAIMANT argues that it stated in its e-mail of March 31, 2017, it would not bear any further risks, including "those associated with changes in customs regulation or import restrictions" [*Cl. Ex. C4, p.12*]. However, "changes in customs regulation or import restrictions" are restricted by CLAIMANT to "a comparable incident like a health and safety requirement". From the following analysis, it is proven that Equatoriana's tariff policy cannot be considered as such a comparable event [*id.*]. Therefore, since no specific statement points out the tariff policy, the Parties do not intend to put it within clause 12.

1.2. A reasonable person of the same kind as Respondent would have understood that the tariff policy is not included in clause 12.

65 From the joint intention, the parties agreed that the "seller shall not be responsible for … hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Cl. Ex. C5, p.14*]. Therefore, the tariff imposition is not

included in clause 12. Namely, it is not a comparable event like health and safety requirements. It is a foreseen event, or it does not make the Agreement more onerous. CLAIMANT cannot be entitled to the payment under clause 12. Besides, even if this tariff policy is included in clause 12, the Agreement only states that CLAIMANT is not responsible for lost semen shipments or delays in delivery, it does not mean that CLAIMANT can get money for the delivery.

1.2.1. The tariff policy is not a comparable event like health and safety requirements.

66 In its e-mail of 31 March 2017, CLAIMANT mentioned "health and safety requirements" [*PO2, p.58, No. 21*]. These additional requirements were imposed in 2014 [*id.*]. When there are no such requirements and a foot and mouth disease was discovered, a quarter of the cow population was killed [*id.*]. Since this case was widely reported in the press, both Parties knew why the Agreement specifically mentions it [*id.*].

67 However, in this case, as for the tariff policy, it is not like health and safety requirement, which cannot be considered as a comparable event. The tariff policy is not about health and safety, and it cannot kill a large amount of the cow population. And generally, racehorse breeding is categorized differently from pigs, sheep, or cattle [*Notice. Arb., p.6, para 11*]. Therefore, the tariff policy is not included in clause 12, which cannot be considered as a comparable event.

1.2.2. The tariff policy is a foreseen event by the parties.

68 Firstly, the retaliation of Equatoriana is foreseeable. Even if Equatoriana always supports the free trade, this does not mean that Equatoriana never executed retaliatory measures [*Cl. Ex. C6, p.15*]. Previous restrictions imposed by other countries affecting imports from Equatoriana have resulted in its direct retaliatory measures [*id*]. Besides, in this case, when signing the Agreement, Equatoriana has imposed serious restrictions on the transportation of all living animals due to severe problems with foot and mouth disease [*Notice. Arb., p.5, para 4*]. As a reaction to that and driven by powerful interests in the Equatorianian racehorse breading industry, the ban on artificial insemination for racehorses had been temporarily lifted [*id*]. In this way, Equatoriana imposing restrictions on artificial insemination for racehorses is a foreseeable event if this industry is not profitable as before [*id*]. Mediterraneo's measure is highly controversial. Even if the newly elected President of Mediterraneo has already announced his preference for a protectionist approach in the election program, his measures to agricultural products has gone beyond the worst expectation [*id*].

69 Besides, this article of the "Peak Business News" was announced on 20 December 2017. Therefore, it is unreasonable for CLAIMANT that it could not foresee the event as of January 2018. And in Mediterraneo, there had been no tariffs imposed on agricultural goods or horse semen until 2018 [*PO2, p.58, No. 26*]. Therefore, Mediterraneo's policy seems to be more a mockery of the system than a good faith effort to justify the controversial tariffs within the boundaries of the existing system [*Cl. Ex. C6, p.15*]. In this way, this strange policy triggers the prompt and severe retaliation by the Government of Equatoriana.

70 Secondly, it is equally clear that losses of future profits determined by the fluctuations of the market are objectively foreseeable [*ICSID Case No. ARB/06/2*]. In this case, like the fluctuations of the market, the tariff policy is not steady. There are many reasons for the government to adjust this policy. For example, the Equatorianian Government adjusted the regulation around 21 March 2017 and temporarily lifted the ban on artificial insemination for racehorses [*Notice. Arb., p.5, para 5*]. Even if there are some people who believe this lift would be permanent, if there is no official statement, no one can give a definite answer. CLAIMANT might argue that it is in financial difficulties and cannot afford a 30 percent tariff [*PO2, p.59, No. 29*]. However, it cannot be the reason to conclude whether the event is foreseeable or not. Even if no businessman wants to lose money, a reasonable businessman who has worked in this area for many years should foresee that the tariff policy and the tariff rate cannot be invariable. In this regard, the fluctuation of the tariff policy is objectively foreseeable.

1.2.3. The tariff policy does not make the contract more onerous.

71 The UNIDROIT Principles of International Commercial Contracts (the 'UNIDROIT Principles') have traditionally considered that a price alteration of 50% or more should be regarded as onerous [*Ziad Obeid, pp. 195-206*]. However, in this case, the tariff is 30 percent, instead of 50 percent [*Notice of Arbitration, p.6, para 10*]. Therefore, the size of this tariff does not make the contract twice more expensive, which is not enough to be considered as making the contract more onerous.

2. Even if the tariff policy is included in clause 12, there is no reason for CLAIMANT to get money from its delivery.

72 If there occurs an event which is included in clause 12, the consequence is that "seller shall not be responsible for lost semen shipments or delays in delivery" [*Cl. Ex. C5, p.14*]. Even if CLAIMANT can say that RESPONDENT is responsible for lost semen shipments or delays in

delivery, from clause 12, CLAIMANT cannot conclude that the tariff shall be paid by RESPONDENT. CLAIMANT can deny the delivery, but cannot get money from its delivery.

73 CLAIMANT argues that there is an agreed adaptation [*Notice. Arb., p.6, para 13*], however, there is no adaptation clause in the Agreement. Even if CLAIMANT is Mediterraneo's oldest and most renown stud farm, covering all areas of the equestrian sport [*Notice. Arb., p.4, para 1*], RESPONDENT's interest in a long-term relationship does not mean that the Agreement could be changed because of every market fluctuation.

74 Besides, after being informed of the tariff imposition on frozen semen, RESPODNENT just stated that "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price" [*Re. Ex., R4, p. 36*]. It did not agree with the adaptation.

75 In this way, considering CLAIMANT is in financial difficulties, it is reasonable to say that CLAIMANT just want to take chances. This is because in its e-mail of 20 January 2018, CLAIMANT states that if no solution for the 30 percent tariff is found, it would not start the shipment [*Cl. Ex. C7, p.16*]. And even if no agreed solution was found during the following day's discussion, CLAIMANT authorized the delivery [*Cl. Ex. C8, p.18*].

ISSUE 3 (2): CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 RESULTING FROM AN ADAPTION OF THE PRICE UNDER CISG ART. 79.

76 CLAIMANT claims US$ 1,250,000 compensation from RESPONDENT to cover the loss caused by the tariff imposition based on Art. 79 CISG. This arbitral tribunal should not grant the request under the CISG.

77 Art. 79(1) exempts a party from liability for damages when that party has failed to perform any obligation "*if they can establish that nonperformance was due to an 'impediment' beyond their control which they could not reasonably have been expected to take into account when the contract was made and which, or the consequences of which, they could not reasonably have been expected to avoid or overcome*" [*CISG-AC Opinion NO.7, para.1*].

78 The tariff imposition does not trigger Art. 79 CISG. *First*, Art. 79 CISG does not cover hardship situation **(1)**. *Second,* even if Art.79 CISG covers "hardship" in certain extreme situations, the tariff imposition does not meet the standards in Art. 79 CISG **(2)**. *Third,* the special regulation of changed circumstances by clause 12 of the Agreement constitutes a derogation in the sense of Art. 6 CISG, and excludes the application of Art. 79 CISG **(3)**.

1. Art. 79 CISG does not regulate hardship.

1.1 The drafters of CISG deliberately excluded the very doctrine of hardship.

79 According to the drafting history of the CISG, the hardship situation was deliberately omitted. Firstly, the Committee of the Whole I rejected a "proposed article on hardship" [*John O. Honnold I, pp. 349-350*]. Furthermore, the Vienna Conference rejected a Norwegian proposal to provide a permanent exemption under changed circumstances, and the drafters specifically stated their intent not to introduce the doctrine of *l'imprevision*—the French equivalent of hardship—into Art. 79 [*id.*]. Lastly, the very term "impediment" was substituted for the word "circumstances" in order to preclude Art. 79 CISG from providing a remedy where performance merely became more burdensome [*UNCITRAL YB 1974, p. 39, n. 108*]. In sum, the doctrine and concept of hardship was scrutinized during the drafting history and repeatedly excluded. Thus CISG does not cover the hardship situation.

1.2 Art. 79 CISG only deals with economic "impediment" in extreme occasions, and "hardship" cannot meet this high standard.

80 Art. 79 CISG applies under any occurrence that makes performance impossible in the traditional sense [*Mercedeh Azerdo Da Silveira, p. 477*]. An "impediment" in the sense of Art. 79(1) CISG is any occurrence that makes performance either impossible or so difficult to carry out that it may no longer reasonably be expected from the obligor [*Mercedeh Azerdo Da Silveira, p. 315*]. Several earlier decisions suggested that exemption under Art. 79 CISG requires satisfaction of "something akin to an 'impossibility' standard" [*Tomato concentrate case; Vital Berry; Iron molybdenum case; Nuova Fucinati; Shoes case*]. As for economic impediment, several court decisions have rejected the possibility that negative market developments constitute an impediment within Art. 79(1) CISG [*Mercedeh Azerdo Da Silveira, p. 315*]. In fact, only one Belgian court has ever granted renegotiation remedy to the seller based on extreme economic impediment [*Scafom International BV*].

81 Besides, even in the very few cases dealing with economic impediment, the standard is substantially high and mere "hardship" cannot reach the standard [*Mercedeh Azerdo Da Silveira p. 315*]. To constitute an impediment, an increase in the costs of performance must be such that the obligor could not reasonably be expected to overcome it as this would exceed the "ultimate limit of sacrifice" [*Schwenzer, p. 1076, para. 30*]. Performance must have become excessively onerous, not merely more onerous [*UNCITRAL YB 1974, p. 39; John O. Honnold II, p. 185*]. Furthermore, to justify an exemption from liability for non-performance, an

economic impediment must satisfy all the conditions of Art. 79 CISG [*Mercedeh Azerdo Da Silveira p. 316*].

82 In *Iron molybdenum case*, the market price for the goods tripled so the seller asked for an exemption, the court rejected the request, with the reasoning that "it was incumbent upon the seller to bear the risk of increasing market prices" [*Iron molybdenum case*]. In this case, the increase to the cost of performance is far lower than *Iron molybdenum case*, the tariff imposition was only 30 percent of the third shipment, however, even the dramatic increase as much as three times cannot trigger the exemption under Art. 79 CISG. Therefore, the standard for economical impediment is substantially high, and "hardship" is far below the standard.

1.3 Art. 4 CISG expressly excludes adaption based on hardship, because it is a contractual validity issue.

83 The termination or adjustment of a contract on grounds of hardship may be regarded by some domestic legal systems as a validity issue, rendering hardship—especially where the disadvantaged party still performs—a validity issue excluded from the CISG's scope [*CISG-AC Opinion 7, para.36*]. Thus the hardship issue is excluded from the scope of the application of the CISG by virtue of Art. 4 [*id.*].

84 Moreover, although the CISG found classifying hardship as a validity issue was "not convincing or persuasive," considering of the particular circumstances of this case, it is proper to characterize adaptation in the face of hardship as an external gap [*CISG-AC Opinion 7*]. CLAIMANT performed and then sought for an adaptation, rather than seeking excusal for non-performance, which is the remedy contemplated by Art. 79 CISG.

2. The tariff imposition does not satisfy the factors of Art. 79.

85 To trigger Art. 79 CISG, the event involved should result in the performance being excessively onerous, and it must satisfy all the conditions of Art. 79 CISG [*Mercedeh Azerdo Da Silveira, p. P479*]. The tariff in question, however, does not meet the requirements of Art. 79 CISG. First, the tariff imposition is not an "economic impediment" because it is not "excessively onerous" **(2.1)**. Second, the tariff imposition is not beyond the control of CLAIMANT **(2.2)**. Third, CLAIMANT could take the tariff imposition into account at the time of the conclusion of the contract **(2.3)**. Fourth, CLAIMANT could have avoided or overcome the impediment **(2.4)**.

2.1 The tariff imposition is not an "impediment" because it is not "excessively onerous."

86 A party is deemed to assume the risk of cost factors affecting the financial consequences of the contract, e.g. market fluctuations and so on [*Steel ropes case; ICC Case No. 1507; Iron molybdenum case*].

87 In *Scafom International BV*, the price of steel rose unexpectedly by about 70 percent and the seller therefore asked for a remedy from the court [*Scafom Internatioanl BV*]. The court reasoned that the unforeseen increase in the price gave rise to a "serious imbalance" which rendered the further performance "exceptionally detrimental" for the seller [*id*]. Thus, the court granted a renegotiation remedy [*id*].

88 Different from *Scafom International BV*, the newly occurred expense was substantially lower, to be specific, the tariff imposed merely constituted 30 percent of the third shipment price. If deducting the profits brought by the three shipments, the total loss CLAIMANT suffered amounted to 20% percent. Thus in this transaction, the tariff payment will not be "extremely detrimental" to CLAIMANT. Besides, the loss of this single transaction will not impact CLAIMANT heavily. The revenue of this year is not only depending on this transaction with RESPONDENT. The tariff just increased the risk to continue credit lines, but it will not ruin the credit lines. It will not make CLAIMANT go bankruptcy. Therefore, this tribunal should follow the reasoning of *Scafom Internatioanl BV* and found the tariff not onerous to CLAIMANT.

2.2 The tariff imposition is not beyond the control of CLAIMANT.

89 Art. 79 requires that the impediment is beyond the control of the party asserting the remedy [*2012 UNCITRAL Digest on Article 79 Case Law*]. A prohibition on exports by the seller's country may constitute an "impediment" for a seller who failed to deliver the full quantity of goods [*Coal case*]. In *RTICA*, a buyer failed to take delivery, where the goods could not be imported into the buyer's country because officials would not certify their safety, the court reasoned that the impediment was beyond the control of the buyer where governmental regulations or the actions of governmental officials prevented a party's performance [*RTICA, 22 Jan 1997*]

90 Different from *RTICA*, the tariff imposition regulation herein was not an absolute prohibition. First, CLAIMANT can export the semen as long as it pays the tariff, the difficulty was not as severe as the forbidden regulation in *RTICA*. Second, CLAIMANT even had the choice not to deliver the goods or deliver them earlier to avoid the tariff imposition. CLAIMANT had more

flexibility to successfully accomplish the transaction. The tribunal should follow the reasoning of *RTICA*, and find the difficulty to be within the control of CLAIMANT.

2.3 CLAIMANT could take the tariff imposition into account at the time of the conclusion of the contract (as discussed in Issue 3(1) 1.2.2).

2.4 CLAIMANT could avoid or overcome the tariff.

91 CISG Art. 79(1) additionally requires that the impediment involved should be to the extent that the party could not reasonably be expected to have avoided it [*2012 UNCITRAL Digest of Case Law*]. If there is a possibility to avoid the harm of it, the impediment can be overcome [*Milling equipment case*]. In the *Milling equipment case*, the seller argued that the delivered roller mills with high-power roller bearing were never produced by the firm M that it had ceased production already in 1976, so he claimed an exemption. The tribunal denied the exemption, with the reasoning that the seller can overcome it, because he was capable of supplying goods equipped with components not offered by the original manufacturer [*id.*].

92 Similar to the *Milling equipment case*, in this case, CLAIMANT can bypass the imposition of tariffs as well. First, CLAIMANT could have delivered the last shipment earlier to escape the tariff. In more detail, around one month before the last shipment, on 20 December 2018, through the news, CLAIMANT had knowledge of the Equatoriana government imposing a tariff of 30 percent on all agricultural goods from Mediterraneo. Thus CLAIMANT had the choice to prepare goods as soon as possible in case of any specific restrictions on semen [*Cl. Ex. C6. p. 15*]. Or, it can contact with RESPONDENT in time to work out a new solution. Second, it proves from the reality that the impediment can be overcome, because CLAIMANT has sent the delivery out, paid the tariff, and successfully performed the obligation [*Notice. Arb., p. 6*]. Therefore, the tariff regulation can be overcome.

3. The special regulation of changed circumstances by clause 12 constitutes a derogation in the sense of Art. 6 CISG, and excludes the application of Art. 79 CISG.

93 Under Art. 6 CISG, the parties may opt-out of the CISG in their contract: "[t]he parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions" [*CISG, art. 6*]. Even though the CISG is otherwise applicable to the Sales Agreement [*Cl. Ex. C5. p. 14*], the Tribunal must nevertheless determine whether the parties derogated from its provisions with respect to the adaptation for hardship [*Film Case; Bonaldo*]. The Parties derogate from a provision of the CISG where a contractual term

constitutes a deviation from, or is so incompatible with, the CISG [*2012 UNCITRAL Digest on Article 79 Case Law; Tree Case; ICC Award No. 11333*].

94 Here the clause 12 of the Agreement constitutes a derogation from Art. 79 CISG. "It may often be the case that where the parties have defined force majeure in the contract, they have in fact intended to derogate from Article 79" [*Djakhongir Saidov, pp. 55-56*]. "[W]here the contract provided for the list of force majeure circumstances, the tribunal did not recognize the events which were not included in the list as grounds for exemption from liability" [*ICAC, 17 Oct 1995*]. The tribunal seems to have the understanding that where the parties provide for a list of 'force majeure' events, such a list must be exhaustive [*id.*]. In *ICAC*, the tribunal denied a buyer's claim to exemption where the circumstances that the buyer argued constituted a *force majeure* were not found in an exhaustive listing of *force majeure* situations included in the parties' contract [*id.*]. The tribunal granted the award with mere reference to the contract provision, suggesting that the clear contract provision excluded the application of Art. 79 CISG [*id.*].

95 In this case, similar to *ICAC*, the list of exempting circumstances in clause 12 is exhaustive, thus it supersedes Art. 79 CISG. According to clause 12, the CLAIMANT is not responsible only for "lost semen shipments or delays in delivery" [*Cl. Ex. C5, p.14*]. Thus, the list of situations triggering exemption under Art. 79 CISG is exhaustive. Although the hardship causing the "lost and delays" is open with the language "comparable unforeseen events," the hardship is not within the list of the situation, instead, it is only a reason to cause the "lost and delays". Thus clause 12 constitutes a derogation of Art. 79 CISG.

CONCLUSION OF ISSUE 3 (1) & (2)

To conclude, CLAIMANT is not entitled to the payment of US$ 1,250,000 based on clause 12 of the Agreement or Art. 79 CISG. CLAIMANT cannot assert the remedy based on clause 12 of the Agreement, because the tariff policy is not included in clause 12; even if the tariff policy is included in clause 12, there is no reason for CLAIMANT to get money from its delivery. The tribunal should not grant the remedy based on Art. 79 CISG either. First, Art. 79 CISG does not cover hardship. Second, even if Art. 79 covers hardship in certain extreme occasions, tariff here does not meet the requirements of it. Lastly, Clause 12 constitutes a derogation from Art. 79 CISG.

REQUEST FOR RELIEF

In light of the foregoing submissions, RESPONDENT respectfully requests the Arbitral Tribunal

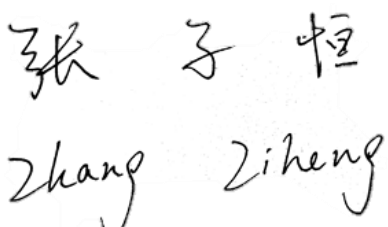
1. To dismiss the claim as inadmissible for a lack of jurisdiction and power to adapt the contract;
2. Not to entitle the CLAIMANT to submit evidence from the other arbitration proceeding;
3. To reject the claim for additional remuneration in the amount of US$ 1,250,000 raised by the CLAIMANT;
4. To order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.

CERTIFICATE

We hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Peking University School of Transnational Law, 23 January 2019

Jiang Ruiling



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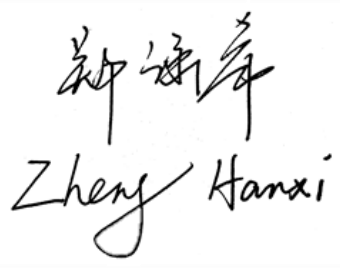

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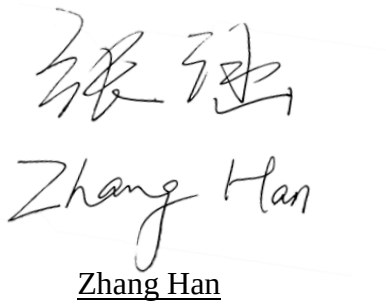

Zhang Han