North China University Of Science And Technology

SIXTEENTH ANNUAL

WILLEM C. VIS EAST

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG SAR

31st MARCH TO 7th APRIL 2019

MEMORANDUM FOR RESPONDENT

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

COUNSEL FOR RESPONDENT:

LU Jing • YANG Zhuoqing • ZHOU Honglei

YANG Jingjing • ZHAO Dongxue • ZHANG Wei

TABLE OF CONTENTS

SIXTEENTH ANNUAL.....I
TABLE OF CONTENTS..... I
TABLE OF ABBREVIATIONS..... V
INDEX OF LEGAL TEXTS..... VII
INDEX OF AUTHORITIES.....IX
INDEX OF CASES.....XIII
SUMMARY OF FACTS..... 1
SUMMARY OF ARGUMENT.....3
ARGUMENT ON THE PROCEEDINGS..... 4
I. THE TRIBUNAL LACKS THE JURISDICTION AND THE POWER TO ADAPT THE CONTRACT AS THE LAW OF DANUBIA GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.....4
A. THE ARBITRATION AGREEMENT AND ITS INTERPRETATION GOVERNS BY THE LAW OF DANUBIA RATHER THAN THE LAW OF MEDITERRANEO..... 4
1. The law of Mediterraneo is not governing the arbitration agreement because the arbitration clause of Sales Agreement is a legal separate agreement from the container contract.....5
a. The arbitration clause can be governed by law different from the main contract based on separability doctrine.....5
b. According to HKIAC rules, the arbitration clause of Sales Agreement is a legal separate agreement from the container contract.....5
2. Clause 14 "this Sales Agreement is governed by the law of Mediterraneo" is merely determining the law applicable for the "Sales" part of it..... 6
3. The law of the place of the arbitration is governing the arbitration agreement and its interpretation..... 7
a. The choice of seat different from Country of main contract law serves as an indication.....7
b. The parties have implied chosen the seat law as governing law of the arbitration clause during the negotiation process.....8
i. RESPONDENT clearly expressed the intention to submit the

Arbitration Clause to the law of the seat during the negotiation, which CLAIMANT knew and could not have been unaware.....9

ii. Even without the preceding situation, a reasonable person of the same kind in the same circumstances would recognize that the law of Danubia is finally chosen by the Parties..... 10

c. Under the European convention on International Commercial Arbitration, the law applicable is the Danubiean law..... 11

B. THE TRIBUNAL LACKS THE JURISDICTION AND THE POWER TO ADAPT THE CONTRACT UNDER THE LAW OF DANUBIA..... 11

1. This tribunal lacks the jurisdiction according to the arbitration agreement.....12

a. The term "arising out of" shall be interpreted narrowly..... 12

b. The term "all disputes" shall be interpreted narrowly..... 12

c. The tribunal lacks the jurisdiction to change the Sales Agreement that has been fulfilled..... 13

2. The interpretation of the arbitration agreement is governed by the law of Danubia which requires an express empowerment for the arbitrators to adapt the contract..... 14

3. Even if the Arbitral Tribunal has jurisdiction, it does not have the powers to adapt the contract.....15

II. CLAIMANT SHOULDN'T BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDING ON THE BASIS OF THE ASSUMPTION THAT THIS EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTERM..... 16

A. CLAIMANT IS NOT ENTITLED TO SUBMIT THE EVIDENCE TO ARBITRAL TRIBUNAL.....16

1. The evidence obtained by CLAIMANT breached the confidentiality..... 16

a. The evidence shall not be submitted for the reason of legal impediment under the HKIAC Rules.....17

b. The evidence shall not be submitted as a result of litigation privilege.....17

c. The evidence shall not be submitted on grounds of commercial and technical confidentiality.....18

2. The contested evidence is not relevant and material to this case.....20

3. The UNCITRAL Transparency Rules does not apply to this arbitration and cannot prove legal basis for CLAIMANT' s allegation.....20

B. THE EVIDENCE SHALL BE EXCLUDED BY THE TRIBUNAL BECAUSE IT IS ILLEGAL OBTAINED.....21

1. The evidence obtained through a hack of RESPONDENT' s computer system.....21

2. The evidence shall be excluded because it is highly privileged.....22

3. The evidence shall be excluded because CLAIMANT fails to prove the authenticity of illegal evidence.....22

ARGUMENT ON THE MERITS.....24

III. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF 1250000 USD UNDER CLAUSE 12 OF THE CONTRACT AND CISG.....24

A. CLAIMANT CANNOT BE EXEMPT FROM ITS RESPOONSIBILITY THROUGH CLAUSE 12.....24

1. Under a DDP-delivery, CLAIMANT should bear the risk of the tariff....24

2. Under clause 12, CLAIMANT is not exempt from the retaliatory tariff..26

3. RESPONENT never break the contract.....27

B. ALTERNATIVELY, CLAIMANT IS NOT ENTITLE TO THE PAYMENT OF 1,250,000 USD UNDER ART.79 CISG.....27

1. Pursuant to the basic principle of party autonomy, the force majeure and hardship clause of the contract takes precedence over Art. 79 CISG.....28

2. Art. 79 CISG does not provide for a price adaptation.....29

3. Under UNIDROIT Principles the requirements for hardship are not met..

.....29

a. The tariff did not fundamentally alter the contractual equilibrium between the Parties.....30

i. 30 percent increase in tariff does not amount to a fundamental alteration of contractual equilibrium.....30

ii. The percentage of cost increase is even lower if all three shipment in stalment are taken into account.....31

b. The risk of the event is ought to be assumed by CLAIMANT.....32

c. Under Art. 6.2.1 UNIDROIT principles CLAIMANT ought to conduct its obligation as contract stipulated.....32

REQUEST FOR RELIEF.....34

TABLE OF ABBREVIATIONS

ABBREVIATION	FULL CITAION
&	*And*
AR	Arbitration Rules
Art./Arts.	Article/Articles
ARMR.	Arbitration Rules Mediation Rules
A.N.A	Answer to the Notice of Arbitration
CA	Courd Appel, Court of Appeals, France
Cl.	Claimant
cl.	clause
CISG	United National Convention on Contracts for the International Sale of Goods, Vienna 1980
Co.	Company
Ex./Exs.	Exhibit/Exhibits
GCIIA.	Guidelines on Conflicts of Interest in International Arbitration
GS.	General Standard
HKC	Hong Kong Cases
HKIAC	Hong Kong Court International Arbitration Centre Administered Arbitration Rules
IBA	IBA Guidelines on Conflicts of Interest in International Arbitration
Ltd.	limited
NYC	New York Convention
PICC	UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016
para./ paras.	paragraph/paragraphs

p./pp.	page/pages
PECL	Principles of European Contract Law
Re.	Respondent
SCC	Stockholm Chamber of Commerce
UAR	UNCITRAL Arbitration Rules
UML	UNCITRAL Model Law
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Laws
USD	United States Dollar
v.	versus

INDEX OF LEGAL TEXTS

ABBREVIATION	FULLCITATION	CITED IN
CISG	United National Convention on Contracts for the International Sale of Goods, Vienna,1980	8.2 8.3 29.2 79
IBA	IBA Guidelines on Conflicts of Interest in International Arbitration	3(11) 9.2(b) 9(2)(a) 9(2)(e) 9(2)(f)
ICC-Hardship	International Chamber of Commerce Hardship clause 2003	hardship clause
HKIAC	Hong Kong Court International Arbitration Centre Administered Arbitration Rules,2013	19.2 45 45.1
NYC	New York Convention	5(1)(a)
PECL	Principles of European Contract Law	5:101(2) Comment B on Art 5:101
PICC	UNIDROIT Principles Of International Commercial Contracts 2016	Comment 1 on Art 4.1 4.2.2 6.2.1 6.2.2
Rules of Evidence	Federal Rules of Evidence (As amended through December 1, 2017)	901

Transparency Rules	The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2014	1(1)
UAA	the UK Arbitration Act of 1996 that the arbitral tribunal	30
UAR	UNCITRAL Arbitration Rules	21(2)
UML	UNCITRAL Model Law on International Commercial Arbitration, 1985	19.2 23.1

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Marghitola	Reto Marghitola Document Production in International Arbitration, International Arbitration Law Library, Volume 33 (© Kluwer Law International; Kluwer Law International 2015)	p.80 p.91
Phillips	F. Peter Phillips Drafting Dispute Management Clauses For Commercial Contracts, The Practical Lawyer, April 2009	p.56
Redfern/Hunter	Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter Redfern and Hunter on International Arbitration, 6th ed. Oxford University Press, 2015	p.13 p.92
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ACLU Case	American Civil Liberties Union and another v. Department of State United States District Court for the District of Columbia Civil Action No. 11-01072	https://advance.lexis.com/api/permalink/7e3b42aa-5b85-425e-ad80-a200ea30b0dd/?context=1000516
Astro case	Astro Vencedor Compania Naviera SA of Panama v. Mabanaft GmbH, The Damianos [1971] 2 All ER 1301	https://advance.lexis.com/api/permalink/018959dc-9a7f-43f4-ac52-8f8b75729e9d/?context=1000516
Chorzów Factory Case	Factory at Chorzów (Jurisdiction) International Court of Justice Judgment of 26 July 1927	https://advance.lexis.com/api/permalink/f3223956-6bf1-4771-8e39-41ea377d947f/?context=1000516
Dolling-Baker case	Dolling-Baker v. Merrett [1991] 2 All ER 891, 896 (English Ct. App.)	https://advance.lexis.com/api/permalink/82b98152-1fef-4b63-a291-4de441baf43c/?context=1000516
ECCC Case	ECCC Case 002 Extraordinary Chambers in the Courts of Cambodia(ECCC Case)	https://advance.lexis.com/api/permalink/08070cad-29db-4e30-bc45-ca03e50716be/?context=1000516

Fillite case	Fillite (Runcorn) Ltd v Aqua-Lift (1989) 26 Con LR 66, 76	https://advance.lexis.com/api/permalink/4b04fc45-369e-4ab9-80e8-e111ef4e350e/?context=1000516
Firstlink case	FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others Singapore High Court [2014] SGHCR 12 19 June 2014	https://advance.lexis.com/api/permalink/a523c857-a486-4f35-8c40-1048fa5a4084/?context=1000516
Hassneh case	Hassneh Ins. Co. of Israel v. Mew [1993] 2 Lloyd's Rep. 243, 247 (QB) (English High Ct.)	https://advance.lexis.com/api/permalink/cd6f4ea0-8771-4ab1-9a74-9160783a3ec5/?context=1000516
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Methanex	Methanex Corporation v United States of America, UNCITRAL, Final Award (3 August 2005)	https://advance.lexis.com/api/permalink/9ca950a8-8a9a-49d1-a178-a6abbe5f672e/?context=1000516
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Union of India case	Union of India v E B Aaby's Rederi A/S [1975] AC 797	https://advance.lexis.com/api/permalink/4a4be4c7-a44e-453c-ae09-9101325994a9/?context=1000516
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SUMMARY OF FACTS

1. RESPONDENT, Black Beauty Equestrian (Black Beauty) in Oceanside, Equatoriana, is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions.

2. CLAIMANT, Phar Lap Allevamento (Phar Lap), is a company registered and located in Capital City, Mediterraneo. It operates Mediterraneo's oldest and most renown stud farm, covering all areas of the equestrian sport. It has 300 horses, including its own mare herd, offspring and stallion depot.

3. **On 21 March 2017**, Black Beauty contacted Phar Lap, inquiring about the availability of Nijinsky III for its newly started breeding programme (CLAIMANT's Exhibit 1). With email of **24 March 2017** Phar Lap offered Black Beauty 100 doses of Nijinsky III's frozen semen in accordance with the Mediterraneo Guidelines for Semen Production and Quality Standards (CLAIMANT's Exhibit 2).

4. **On 28 March 2017** RESPONDENT sent the email to CLAIMANT which objected to the choice of law and the forum selection clause and insisted on a delivery DDP (CLAIMANT's Exhibit 3). **On 31 March 2017**, Due to past experiences with extremely expensive tests due to changes in customs health requirements Phar Lap was only willing to accept a delivery DDP against a moderate price increase, the transfer of certain risks to Black Beauty and the inclusion of a hardship clause to temper some of the additional risks be taken (CLAIMANT's Exhibit 4).

5. **On 10 April 2017**, RESPONDENT's proposal had made clear its sincere wish for an arbitration agreement which was governed by the law of the place of arbitration and not by the law of the contract. Such a clause was actually included in Mr. Antley's latest draft (RESPONDENT's Exhibit 1)

6. **On 11 April 2017**, CLAIMANT in his email had only changed the suggested place of arbitration and told the RESPONDENT "That offer is naturally on the condition that the law applicable to the Sales Agreement remains the law of Mediterraneo." (RESPONDENT's Exhibit 2).

7. **On 12 April 2017,** the finalization of the agreement took longer than planned as the two main negotiators, Ms. Napravnik and Mr. Antley, were severely injured in an accident when driving to a restaurant after the annual colt auction in Danubia . They had to be replaced for the finalization of the contract which was signed **on 6 May 2017** (CLAIMANT's Exhibit 5).

8. The Parties had agreed on three shipments (CLAIMANT's Exhibit 5). RESPONDENT sent the first shipment of 25 doses **on 20 May 2017**; the second shipment of 25 doses **on 3 October** and the last shipment of 50 doses **on 23 January 2018**.The RESPONDENT had agreed on split the money twice: first time to pay **on 18 May 2017**, second time to pay **on 21 January 2018**.

9. **In April 2017**, the new President of Mediterraneo was elected. **On 23 November 2017**, the tariff in Mediterraneo had been raised to 25 percent. **On 19 December 2017**, the Government of Equatoriana to impose a tariff of 30 per cent upon all agricultural goods from Mediterraneo as a retaliation for the previous restriction imposed by Mr. Bouckaert, the newly elected President of Mediterraneo. (CLAIMANT's Exhibit 6)

10. **On 31 July 2018**, the CLAIMANT filed an application for Arbitration. And the RESPONDENT receipt the Notice of Arbitration.

SUMMARY OF ARGUMENT

11. The Governing law of the Arbitration Clause is the law of Danubia, the law of seat because of the Parties' choice and the closest connection doctrine. Therefore, based on either the "four corners rule" doctrine provided by the law of Danubia or CISG, the Arbitration Clause shall be interpreted not to cover the adaptation claim and the Tribunal has no jurisdiction on this issue.

12. The contested evidence is not admissible before the Tribunal. The content of this evidence is about merits of another arbitration proceedings and highly privileged. This evidence is obtained unlawfully from RESPONDENT' s computer system. Further, this evidence is not relevant and material to the consequence of this case. CLAIMANT also fails to prove the authenticity of the illegal evidence.

13. The CLAIMANT is not entitled to the payment of US$1250000 or any amount resulting from an adaptation of the price under clause 12 of the contract and CISG. First, the CLAIMANT is not entitled to the payment of US$1250000 or any amount resulting from an adaptation of the price under clause 12 of the contract. Act of the God do not include the additional tariffs and should be interpreted narrowly. Even if Act of the God can be interpreted as force majeure. The force majeure was not supposed to cover the risks including additional tariffs like the present. Additionally, the additional tariffs are not suitable for the hardship clause covers comparable events. Second, The CLAIMANT is not entitled to the payment of US$1250000 or any other amount resulting from an adaptation of the price under the CISG. Art. 79 of CISG does not regular hardship and does not provide a remedy. The tariffs increasing also can not be governed by Art. 6.2.1 of PICC which include the definition of hardship. Consequently, the RESPONDENT is not responsible for the adaptation of the contract and the payment.

ARGUMENT ON THE PROCEEDINGS

I. THE TRIBUNAL LACKS THE JURISDICTION AND THE POWER TO ADAPT THE CONTRACT AS THE LAW OF DANUBIA GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION

14. Contrary to CLAIMANT' s allegations, RESPONDENT never agreed to have the arbitration agreement governed by the law of the contract. The arbitration clause of Sales Agreement is a legal separate agreement from the container contract. According to the HKIAC rules and the clause 15 of Sales Agreement, the arbitration agreement should be govern by the law of Danubia rather than the law of Mediterraneo (A). The interpretation of the arbitration agreement is governed by the Danubiean law which recognizes that arbitrators may adapt contracts but requires an express empowerment for that. Under the law of Danubia, the tribunal lacks the jurisdiction and the power to adapt the contract (B).

A. THE ARBITRATION AGREEMENT AND ITS INTERPRETATION IS GOVERNED BY THE LAW OF DANUBIA RATHER THAN THE LAW OF MEDITERRANEO

15. The intention of RESPONDENT that the arbitration clause is considered to be a legally separate agreement from the container contract in which it is included (1). The reference in the choice of law clause directly preceding the arbitration clause that "this Sales Agreement is governed by the law of Mediterraneo" (emphasis added) is merely determining the law applicable for the main contract, i.e. the "Sales" part of it. It does not refer to the following arbitration clause and can also not be interpreted as an implicit choice for the arbitration agreement (2). According to the drafting history, the law of the place of the arbitration is governing the arbitration agreement (3).

1. The law of Mediterraneo is not governing the arbitration agreement because the arbitration clause of Sales Agreement is a legal separate agreement from the container contract

a. The arbitration clause can be governed by law different from the main contract based on separability doctrine

16. Separability doctrine makes it possible for arbitration clause to be governed by law different from the main contract law. The separability doctrine, which indicates the independence of arbitration clause from the main contract, is well recognized in international arbitration [*UAR Art.21(2); NYC. Art.5(1)(a)*]. To satisfy the very purpose of separability doctrine, which is to make arbitration clause still valid in case of void main contract, the arbitration clause may be governed by law different from the main contract [*Born, p.476*]. In practice, the arbitration clause will be treated by arbitrators and judges as independent agreement to identify different governing laws. In this case, the arbitration clause is entirely possible to be governed by law different from law of main contract, departing from CLAIMANT' s main position.

b. According to HKIAC rules, the arbitration clause of Sales Agreement is a legal separate agreement from the container contract

17. The separability of the arbitration agreement is a broad theory, which indicates that the law of the arbitration agreement is different from the law of the contract. As a matter of fact, to hold that the Arbitration Agreement is a part of the Contract, the court must look beyond the four corners of the valid, fully executed Contract. Thus, the Contract indicates that the Arbitration Agreement is not part of the Contract, but rather, is a separate agreement between the parties. [*Pitchford v. Oakwood*] Based on Wang Keyu's "logical perspective of legal choice of International Commercial Arbitration Agreement", the arbitration clause and the law applicable to the division of basic contracts have been widely practiced by international arbitration institutions and national judiciaries. [*Wang*

Keyu's P5]

18. In this case, clause 15 of the Sales Agreement is the form of HKIAC Rules, which, under the template, has such an interpretation "*The law of the arbitration agreement potentially governs matters including the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration agreement and identities of the parties to the arbitration agreement. It does not replace the law governing the substantive contract.*" There is a similar rule in HKIAC Rules article 19.2 "*For the purposes of Article 19, an arbitration agreement which forms part of a contract, and which provides for arbitration under these Rules, shall be treated as an agreement independent of the other terms of the contract.*" [*HKIAC Art.19.2*] Therefore, clause 15 of Sales Agreement and the main contract should be regarded as two separate agreements. Clause 15 exists independently of the other provisions of the main contract. Clause 15 is not bound by clause 14 of the principal contract and may be governed by different laws from the main contract. There is no doubt that the main contract should be governed by the law of Mediterraneo. However, according to the content of arbitration agreement, the law of Danubia governs the arbitration agreement.

2. Clause 14 "this Sales Agreement is governed by the law of Mediterraneo" is merely determining the law applicable for the "Sales" part of it

19. In an email CLAIMANT sent to RESPONDENT on 11 April 2017, CLAIMANT mentioned "That offer is naturally on the condition that the law applicable to the Sales Agreements remains the law of Mediterraneo." [*Re.Ex.R2*] That is to say, the Sales Agreement is governing by the law of Mediterraneo. However, the arbitration clause and the Sales Agreement are two separate agreements. Therefore, the arbitration clause does not apply to the law of Mediterraneo. Furthermore, In Mr. Antley's note of 12 April 2017, he mentioned "Clarify in arbitration clause that neutral venue and applicable law". [*Re.Ex.R3*] It is clear that the law applicable to the arbitration clause has not been determined by the parties and is a matter for further negotiation, so the law of

Mediterraneo referred to the Sales Agreement applies only to the main contract and not to the arbitration agreement.

20. Contrary to CLAIMANT' s allegations, RESPONDENT never agreed to have the arbitration agreement governed by the law of the contract. There is no express choice of such law in the arbitration clause nor is there any implied choice. Under Danubian law, as well as under all other potentially relevant arbitration laws the arbitration agreement is considered to be a legally separate agreement from the container contract in which it is included. That is clearly recognized by Article 16 of the Danubian Arbitration law as well as the identically worded Article 16 of the Mediterranean Arbitration Law which both explicitly acknowledge the doctrine of separability. Thus, The reference in the choice of law clause directly preceding the arbitration clause that "this Sales Agreement is governed by the law of Mediterraneo" (emphasis added) is merely determining the law applicable for the main contract, i.e. the "Sales" part of it. It does not refer to the following arbitration clause and can also not be interpreted as an implicit choice for the arbitration agreement. Because the contract was fully executed and capable of standing on its own prior to any mention of the arbitration agreement, the two documents are separate. [*Pitchford v. Oakwood*] So the Clause 14"this Sales Agreement is governed by the law of Mediterraneo" is merely determining the law applicable for the "Sales" part of it", and Clause 15 of the contract is separated from the contract that has been performed before.

3. The law of the place of the arbitration is governing the arbitration agreement and its interpretation

a. The choice of seat different from Country of main contract law serves as an indication

21. Different from CLAIMANT's main contract presumption argument, RESPONDENT submits that the choice of law governing the main contract is not relevant in determining the governing law of arbitration clause, because they each regulate two entirely different legal relationships [*Firstlink case*]. Instead, the choice of seat different from country of main contract governing law is an indication that to make the arbitration clause governed

by the law of seat [*Sul América case*]. The choice of seat, which means the choice of law governing the arbitration proceeding, may presumably indicate the Parties' intention to extend it to govern more related issues of arbitration [*XL Insurance Case*].

22. Further, the arbitration clause will arise only when relationship in main contract breaks down, which means the law of main contract is of substantive controversy. Under such circumstances, based on the parties' desire for neutrality, the choice of seat is an indication to submit the arbitration clause to be governed by the law of seat [*Firstlink case*].
23. In this case, the Parties has agreed to choose Danubia, not the Mediterraneo, as the seat of arbitration, conveying a clear indication to separate the dispute resolution from the contract relationship [*Cl.Ex.C5*].
24. To conclude, without other contrary indication, the choice of seat, Danubia, a country different from that of main contract law, is an indication from the Parties to choose seat law to govern the arbitration clause.

b. The parties have implied chosen the seat law as governing law of the arbitration clause during the negotiation process

25. Looking back on the drafting history of the Sales Agreement the Arbitral Tribunal may draw the same conclusion that the law of Danubia shall govern the arbitration agreement. RESPONDENT expressed clear intention of applying the law of arbitration seat to govern the arbitration agreement and CLAIMANT's Ms. Napravnik had clear knowledge of it [*Re.Ex.R1 p.33*]. When further discussion should have been carried on, an unforeseen car accident led to the inability for negotiation of the Parties' representatives. However, as the representative of CLAIMANT on the issue of drafting the contract, Ms. Napravnik has never informed RESPONDENT the situation of the inconformity for the negotiation of the arbitration agreement after her recovery in July 2017.
26. In contrast to CLAIMANT's allegation, as a result of the doctrine of separability explicitly acknowledged by both Mediterraneo and Danubia, a lack of express choice on arbitration clause governing law does not naturally lead to the application of the law of the

Sales Agreemen. Contrarily, the Tribunal could find the Parties did actually choose Danubia law to govern the Arbitration Clause. CLAIMANT knew and could not have been unaware of the choice (i). Even a reasonable person could easily draw the same conclusion as well (ii).

i. RESPONDENT clearly expressed the intention to submit the Arbitration Clause to the law of the seat during the negotiation, which CLAIMANT knew and could not have been unaware

27. Contrary to CLAIMANT's assertion, the intention of RESPONDENT on choice of the seat law to govern the Arbitration Clause is determinable, which CLAIMANT can easily recognize and is consequently equivalent to a common intention of the Parties. If the intent of one party is determinable, according to the second alternative of Article 8(1) it is enough that the other party could not have been unaware of what the intent was, and thus, the unequivocal intent of a single party is equivalent to common intention [*PECL Art.5:101(2);PICC Art.4.2(2) ; TETA case*].

28. Both Mediterraneo and Danubia acknowledge the doctrine of separability, which the Arbitration Clause is considered to be a legally separate part from the container contract [*A.N.A*]. Therefore, at the first stage of the negotiation process, the Parties actually discussed the governing law of "sales" part of the contract. Namely, it was of no relevance to the choice of law on the Arbitration Clause as the Parties did not reach the stage for that choice. After the governing law of the Sales Agreement was settled as the law of Mediterraneo, RESPONDENT started the negotiation on the "midnight clause", namely, the Arbitration Clause [*Re.Ex.R1 p.33; Redfern and Hunter; Phillips, p.56*]. On 10 April 2017, RESPONDENT sent the first draft of the Arbitration Clause, particularly pointing out that the seat of arbitration shall be Equatoriana and also submitted the Arbitration Clause to the law of Equatoriana [*Re.Ex.R1 p.33*]. Namely, RESPONDENT expressly pointed out that the law of the seat shall govern the Arbitration Clause, which CLAIMANT could clearly receive this information. In the reply on 11 April 2017, CLAIMANT only rejected the seat of arbitration by explaining that they could not accept

the dispute resolution being progressed in Equatoriana and suggested to arbitrate in Danubia [*Re.Ex.R2 p.34*]. Apparently, CLAIMANT did not reject the suggestion of RESPONDENT to submit the Arbitration Clause to the seat law. On the other hand, the arrangement satisfied CLAIMANT' s requirements of not submitting the Sales Agreement to a foreign law and not conducting the arbitration proceeding in the country of the counter party. That was so clear that CLAIMANT could not have been unaware. Under those circumstances, as the intention of RESPONDENT was already determinable enough and without opposition, it shall be recognized that the Parties have reached an implied consent on the Arbitration Clause governing law.

ii. Even without the preceding situation, a reasonable person of the same kind in the same circumstances would recognize that the law of Danubia is finally chosen by the Parties

29. A reasonable person would recognize that the Parties finally reached an implied consent on the seat law to govern the Arbitration Clause. CISG is governed by the principle of reliance and is applied not only to the expressed declarations and communications, but also to the persuasive conduct exhibited before or after the conclusion of a contract [*Schlechtriem/Schwenzer p.7; TETA case*].

30. As the doctrine of separability is acknowledged by Mediterraneo, a reasonable person would naturally recognize that the discussion of the choice of law was for the Sales Agreement-the "sales" part of the contract. After RESPONDENT drafted an arbitration clause indicating the seat and the seat law as the Arbitration Clause governing law, CLAIMANT merely dissatisfied to arbitrate in RESPONDENT' s country and changed the seat to a neutral state. In this way, a reasonable person would naturally have reliance that CLAIMANT only wanted to change a place for arbitration but did not reject to submit the Arbitration Clause to the seat law. Thus, from the view of a reasonable person, the Parties have already chosen Danubia law as the Arbitration Clause governing law. Besides, even if the contract does not expressly list the governing law of the Arbitration Clause, it is of no damage to the consent and can be rightly understood. It is because the substantial

importance of the common intention of the Parties should not be overestimated, particularly in view of the difficulties in proving it. In addition, a consequence of the preference given to the common intention of the Parties is that a falsa demon stratio does not impair the contract [*PICC Comment 1 on Art 4.1 ; PECL Comment B on Art 5:101*]**.**

c. Under the European convention on International Commercial Arbitration, the law applicable is the Danubiean law

31. Although there lacks consent of the Parties to apply the law of Mediterraneo for the arbitration agreement, CLAIMANT alleges that the law of Mediterraneo, as the law governs the contract, shall be applied for the arbitration agreement [*NoA, p.7, para.15*]. Nevertheless, this argument has no legal basis. The law applicable to the scope and the effects of an arbitration clause does not necessarily coincide with the law applicable to the merits of the dispute [*Bagheri p.130*]. More specifically, Art. VI (2) of European Convention on International Commercial Arbitration (Geneva 1961) and Section 48 Swedish Arbitration Act of 1999 reveal that the law applicable to the arbitration agreement shall be the law of the seat without parties' consent, which is in line with the modern tendency in international arbitration [*Heuman p.120*]. In the present case, the law of Danubia, which is the law of the arbitration seat, should govern the arbitration agreement rather than the law of Mediterraneo. Thus, the law of Danubia should govern the arbitration agreement as the law of the seat of arbitration.

B. THE TRIBUNAL LACKS THE JURISDICTION AND THE POWER TO ADAPT THE CONTRACT UNDER THE LAW OF DANUBIA

32. Although the parties agreed to use the Arbitral Tribunal to settle the dispute, the Tribunal lacks jurisdiction to decide the case (1). The interpretation of the arbitration agreement is governed by the law of Danubia which recognizes that arbitrators may adapt contracts but requires an express empowerment for that (2). Even if the Arbitral Tribunal has jurisdiction, it does not have the power to adapt the contract (3).

1. This tribunal lacks the jurisdiction according to the arbitration agreement

33. Under "four corners rule", only the content with in the four corners of the contract can be referred to interpret the contract. The terms in the contract, therefore, play an important role forming the content of the contract. Judicial interpretation of particular formulae in previous cases were frequently referred to and relied on [*Astro case*].
34. The Arbitration Clause stated that "any dispute arising out of this contract" shall be submitted to arbitration [*Cl.Ex.C5*]. CLAIMANT submits that the terms shall be interpreted broadly without any legal basis. which shall not be adopted by the tribunal. Here, two terms contain narrow meanings: "arising out of" (a) and "all disputes" (b).

a. The term "arising out of" shall be interpreted narrowly

35. The term "arising out of" shall be interpreted narrowly. The scope of the term "arising out of" has been debated in English courts for a long time. A number of cases turn out to confirm the narrow meaning of the term "arising out of". Briefly, "out of a contract" was not wide enough to include disputes which did not concern obligations created by or incorporated in the contract [*Union of India case; Fillite case*].
36. Here, adaptation of the contract has never been a specific obligation of any Parties incorporated in the contract. Even the word "adapt" does not appear in the wording of the contract. Even in the hardship clause, which has the closest relation to adaptation as a remedy, such expression does not appear [*Cl.Ex.C5*]. It is hard for the Tribunal to adopt that adaptation of the contract has any concern with contractual obligations. Thus, whether to adapt the contract or not is not a dispute "arising out of" the contract and falls out of the scope of arbitration.

b. The term "all disputes" shall be interpreted narrowly

37. Once the term "arising out of" is interpreted narrowly, it shall be noticed that the scope of "all disputes" has been limited. Even though "all disputes" may contain broad meanings, the scope of its meaning is confined by the meaning contained in the term "arising out of",

since the latter modifies "all disputes". Thus, "all disputes" shall be interpreted narrowly corresponding with "arising out of".

c. The tribunal lacks the jurisdiction to change the Sales Agreement that has been fulfilled

38. The claim raised does not merely require the arbitrators to order a payment on the basis of an interpretation of the contract but actually asks for its adaptation. CLAIMANT is not claiming the originally agreed contractual remuneration which has been undisputedly been paid by RESPONDENT. Instead, CLAIMANT is seeking a remuneration which goes beyond that amount and for which the arbitrators would have to adapt the contract. The RESPONDENT and the CLAIMANT have clearly agreed on the price in the contract, and the previous contract for sale and purchase has been completed. [*Re.Ex.C5.p.13*]. RESPONDENT would have never entered into such a contract the financial dimension of which would be dependent on the discretion of the arbitrators.

Under the Art.29(2) of the CISG:

"*A contract in writing which contains a provision requiring any modification or termi nation by agreement to be in writing may not be otherwise modifed or terminated by a greement. However, a party may be precluded by his conduct from asserting such a pr ovision to the extent that the other party has relied on that conduct.*", [*CISG Art.29(2)*] this is the first cooperation between the CALIMANT and the RESPONDENT, so the change of the contract between the parties must be in writing. For reasons such as tariff increases, the long-term desire for cooperation between the two parties has been broken and, for these reasons, contractual changes must be made in writing. [*Re.Ex.C8. para.8*].

39. Lipschutz v. Gutwirth, the Court said: "*The spirit of the arbitration law being the fuller effectuation of contractual rights, the method for selecting arbitrators and the composition of the arbitral tribunal have been left to the contract of the parties*" Consistent with this case is to ensure the full implementation of the contract. In this case, the main contract part has been actually fulfilled. And neither party has given the arbitral

tribunal the right to change the contract. Therefore, the Arbitral Tribunal has no power to change the Sales Agreement that has been fulfilled. [*Lipschutz v. Gutwirth*]

2. The interpretation of the arbitration agreement is governed by the law of Danubia which requires an express empowerment for the arbitrators to adapt the contract

40. First, according to Clause 15 of the Sales Agreement, the RESPONDENT and the CLAIMANT agree to use the arbitral tribunal to settle the dispute which only contains the dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination. The change of contract content does not belong to the Arbitral Tribunal rights conferred by the parties. RESPONDENT would have never entered into such a contract the financial dimension of which would be dependent on the discretion of the arbitrators.

41. Second, the Arbitral Tribunal can only resolve the extra salary brought by the increase in tariffs, rather than the dispute over the change of contract terms. According to the witness statement: "*I had no authority to consent to additional payments outside the contract without speaking to our management which was not available at the time*.", it can be seen that what we have to solve is the price increase brought by tariffs. Rather than the contract itself, the price agreement is unreasonable, so there is no need to change the contract. [*Re.Ex.R4 para. 5*]

42. Third, under the PROCEDURAL ORDER NO 1: that according to Danubian Contract Law, which contains the alleged "four corners rule" excluding all extraneous evidence for the interpretation of contacts and where arbitration agreements are interpreted narrowly, there is a high likelihood that the arbitration agreement would not be interpreted as authorizing a contract adaptation by the Arbitral Tribunal. Therefore, the Arbitral Tribunal has only the power to resolve the disputes stipulated in Clause 15 without the power to change the contract. [*Cl.Ex.C8 cl.15*]

3. Even if the Arbitral Tribunal has jurisdiction, it does not have the powers to adapt the contract

43. Under the Art.19.2 of HKIAC Rules:

"The arbitral tribunal shall have the power to determine the existence or validity of any contract of which an arbitration agreement forms a part. For the purposes of Article 19, an arbitration agreement which forms part of a contract, and which provides for arbitration under these Rules, shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not necessarily entail the invalidity of the arbitration agreement" [*HKIAC Art.19.2*]

The Sales Agreement and the Arbitration Agreement are separate. The performance of the main contract shall not affect the performance of the Arbitration Agreement. Delivery of the goods has been completed and the main contract has been fulfilled, so the purpose of the contract has been fulfilled.

44. It is also stipulated in Article 30, paragraph 1, of the UK Arbitration Act of 1996 that the arbitral tribunal has the power to decide on the validity of its jurisdiction and the arbitration agreement: *"Unless otherwise agreed by the parties, the arbitral tribunal has the right to The jurisdiction of the following substantive issues is decided: whether there is a valid arbitration agreement (1); whether the composition of the arbitral tribunal is appropriate (2); and according to the arbitration agreement, which issues can be submitted to arbitration (3)."* [*UAA Art.30*] The arbitral tribunal was only competent to settle matters agreed upon in the arbitration agreement and could not resolve matters not agreed upon in the arbitration agreement.

CONCLUSION OF TNE FIRST ISSUE

45. The Governing law of the Arbitration Clause is the law of Danubia, the law of seat because of the Parties' choice and the closest connection doctrine. Based on the "Four corner rule" doctrine provided by the law of Danubia, interpreting the wordings of the Arbitration Clause, the adaptation claim is not covered and the Tribunal has no jurisdiction on this issue**.**

II. CLAIMANT SHOULDN'T BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDING ON THE BASIS OF THE ASSUMPTION THAT THIS EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTERM

46. In this case, CLAIMANT obtained the evidence through an illegal way which violated an obligation of confidentiality and hacked into RESPONDENT' s computer system. According to relevant laws, CLAIMANT is not entitled to submit the evidence to arbitral tribunal (A). What's more, The Evidence Shall Be Excluded by the Tribunal Because It Is Illegal Obtained (B).

A. CLAIMANT IS NOT ENTITLED TO SUBMIT THE EVIDENCE TO ARBITRAL TRIBUNAL

47. On the basis of the assumption that this evidence had been obtained either through a breach of confidentiality agreement or through an illegal hack of RESPONDENT' s computer system, CLAIMANT is not entitled to submit the evidence to arbitral tribunal. There are three reasons: The evidence obtained by CLAIMANT breached the confidentiality (1). The evidence obtained by CLAIMAT is not relevant and material to this case (2). The UNCITRAL transparency rules does not apply to this arbitration and cannot prove legal basis for CLAIMANT'S allegation (3).

1. The evidence obtained by CLAIMANT breached the confidentiality

48. CLAIMANT obtained the evidence through a breach of confidentiality. There are some legal provisions and principals relating to obligation of confidentiality. The evidence shall not be submitted for the reason of legal impediment under the HKIAC Rules (a). The evidence shall not be submitted as a result of litigation privilege (b). The evidence shall not be submitted on grounds of commercial and technical confidentiality (c).

a. The evidence shall not be submitted for the reason of legal impediment under the HKIAC Rules

49. On the contrary to CLAIMANT' s allegation that confidentiality obligation is not applicable to CLAIMANT, RESPONDENT submits that pursuant to confidentiality provision of the HKIAC Rules, the confidentiality for the whole arbitral proceedings shall constitute legal impediment and the evidence cannot be accepted [*HKIAC Art. 45.1*]. The Tribunal shall exclude from evidence for legal impediment [*IBA Rules Art. 9.2 (b)*]. Further, the confidentiality of the arbitration and the arbitral proceedings are said to be governed by the procedural law of the arbitration [*Born, p.2812*], which in this case the HKIAC Rules. If there exists a provision for confidentiality, a party cannot require to submit and use the confidential materials from another arbitration of the counter party [*ITT case*].

50. In this case, as the arbitral proceedings are programming under the HKIAC Rules, it shall be regarded that the procedural law of the arbitration is governed by the HKIAC Rules. While Article 45.1 of the HKIAC Rules expressly states the requirement of confidentiality for the whole arbitration, it shall be seen as the confidentiality provision incorporated into the Arbitration Clause, and it turns out to be a general obligation of arbitrations in HKIAC, strongly opposing to the assertion that the duty does not extend to CLAIMANT. Thus, the statutory confidentiality obligation of the HKIAC Rules shall be legal impediment which the Tribunal shall exclude from the evidence submitted by CLAIMANT.

b. The evidence shall not be submitted as a result of litigation privilege

51. From the view of privilege in dispute resolution, CLAIMANT' s evidence shall not be submitted to the Tribunal either and should be excluded because it violates the litigation privilege for confidential documents. The Tribunal shall exclude evidence for privilege [*IBA Rules Art.9.2(b)*]. Article 9.2(b) provides protection for documents and other evidence that may be covered by certain privileges and the working party felt that it was

important that such privileges be recognized in international arbitration [*Commentary on the IBA Rules, p.25*]. Further, privileges are seriously considered in HKIAC. For example, the litigation privilege adopted by the HKIAC protects from disclosure documents prepared in preparation for litigation and arbitration proceedings [*Hong Kong Arbitration FAQs*]. Similarly, the work product doctrine, its American counterpart, also strongly safeguards the confidentiality of materials unless strict test for disclosure is met [*Hickman case; Henkel, p.1094*]

52. In this case, the evidence which CLAIMANT alleged to submit includes award and relevant submissions of another arbitration. As these documents were prepared for the dominant purpose of being submitted to an arbitral proceeding [*Marghitola, p.80*], the submissions will definitely cover the confidential arguments and evidence of RESPONDENT, and thus falling within the scope for protection of confidential materials from disclosure under litigation and work product privilege. Namely, the evidence violating the privilege for protection of confidential working documents will be excluded and the Tribunal shall not consider these submissions

c. The evidence shall not be submitted on grounds of commercial and technical confidentiality

53. One of the main purposes of keeping the arbitration proceedings confidential is to protect the parties from exposing their trade secret to the public. RESPONDENT submits here that the contested evidence is collected from a breach of confidentiality, and the evidence shall not be submitted due to this breach. The issue at hand is already based on the assumption that CLAIMANT obtained the contested evidence from a breach of confidentiality. And in the case at hand it will be more convincing to clarify that CLAIMANT breached the essence of confidentiality.

54. The issue at hand is already based on the assumption that CLAIMANT obtained the contested evidence from a breach of confidentiality. And in the case at hand it will be more convincing to clarify that CLAIMANT breached the confidentiality from the view

of commercial trade secrets.

55. The core and the main benefit of confidentiality is creating a private space for both parties to discuss their financial circumstances as well as proprietary know-hows without discussion from outsiders [*Nigel Blackaby et al; Boog/Menz, p.111; Denton/Heaton, p.120; Russell case*].

56. In the present case, CLAIMANT' s submission of the contested evidence indeed results in a discussion in this proceeding at hand which concerns the other one. Although such discussion will probably not be disclosed to the vast public, it will definitely disturb the parties in the other proceeding. Once the parties realize that their conduct in the arbitration has been disclosed, they will tend to be less positive when settling the dispute and pushing forward the proceeding in case their business privilege gets exposed. This rule is particularly true in the present case since in both proceedings the parties deal with business concerning horse breeding.

57. Thus, the submission of CLAIMANT constitutes a breach of confidentiality.

58. While the evidence which CLAIMANT wants to submit breaches confidentiality, the evidence shall not be allowed to submit. The Tribunal shall exclude the evidence on grounds of commercial and technical confidentiality [*IBA Rules Art.9.2(e)*]. The privacy of arbitral hearings shall naturally extend to the confidentiality of hearing transcripts and other aspects of the arbitral process [*Hassneh case*]. Similarly, the documents concerning commercial confidentiality which had been prepared by one of the parties in the context of a previous arbitration with a third party shall not be disclosed [*Dolling-Baker case*].

59. Particularly in this case, commercial and technical confidentiality are met. Firstly, there are limited number of persons knowing the information, namely the participants of that arbitration. Secondly, there is objective value of keeping the information secret because a trade secret is often treasured and has a high economic value [*Marghitola, p.91*]. Thirdly, RESPONDENT has the subjective intent or the efforts to do so as the Parties in dispute are competitors. In such situations, the fear MEMORANDUM FOR RESPONDENT that the opposing party gains a competitive advantage by learning trade

secrets can be a dominant factor in the party's considerations on document production [*Gaillard/Savage, p.1265*]. Thus, CLAIMANT is not entitled to submit and the Tribunal shall exclude the evidence due to commercial and technical confidentiality.

2. The contested evidence is not relevant and material to this case

60. The contested evidence shall be excluded because it is not relevant to the merits in this case. In International Arbitration, the Parties are required to submit evidence relevant and material to the case [*IBA Rules, Article 3(11), 9(2)(a)*]. Materiality requires evidence to have some logical connection with the facts of consequence or the issues [*Black's Law Dictionary, p.638*]. Evidence will be excluded when it is only of marginal evidential significance in supporting the Parties' argument which cannot influence the result of this case [*Methanex Case*].

61. In this case, the contested evidence is about RESPONDENT's positions in the other arbitration proceedings. RESPONDENT's different positions are based on different legal relationships in two contracts.

62. In conclusion, the evidence is not material to the consequence in present case and shall be excluded

3. The UNCITRAL Transparency Rules does not apply to this arbitration and cannot prove legal basis for CLAIMANT' s allegation

63. In contrast to CLAIMANT' s allegation, the UNCITRAL Transparency Rules governs Investor-state arbitration and thus is not applicable to commercial arbitration. Article 1(1) sets out clear conditions to the automatic application of the Transparency Rules [*Gehring/Scherer, p.41*], which apply only to"investor-State arbitration initiated ... pursuant to a treaty providing for the protection of investments or investors" [*Transparency Rules Art.1(1)*]. In this case, the Parties are commercial-based entities having equal status in law [*N.A, p.4.5*], which means their relationship is in no way like an investor and a state. Thus, there lack grounds for the application of the Transparency

Rules. RESPONDENT does not have obligation to make (if any) disclosure pursuant to the requirements of the Transparency Rules as it does not extend to international commercial arbitration.

B. THE EVIDENCE SHALL BE EXCLUDED BY THE TRIBUNAL BECAUSE IT IS ILLEGAL OBTAINED

64. As mentioned above, the evidence obtained by CLAIMANT violated the obligation of confidentiality. And it is not entirely relevant and material to this present case. Meanwhile, transparency rules does not also apply to this arbitration and cannot prove legal basis for CLAIMANT' s allegation. Accordingly, the evidence shall be excluded by the tribunal because it is illegal obtained. Firstly, the evidence obtained through a hack of RESPONDENT' s computer system (1). Secondly, the evidence shall be excluded because it is highly privileged (2). Thirdly, the evidence shall be excluded because CLAIMANT fails to prove the authenticity of illegal evidence (3).

1. The evidence obtained through a hack of RESPONDENT' s computer system

65. As it is stipulated in plenty of laws of evidence, if the evidence is obtained by an internet hack, then it shall be considered as an illegal material. It states that the evidence shall be excluded if CLAIMANT was involved in illegal means. In the present case, CLAIMANT obtained the evidence by hacking into the computer system of SEPONDENT. It is clear that the way obtaining evidence could be proved CLAIMANT' s participation. Firstly, the evidence is not in the public domain. It is just controlled by the particular hacker company, so it is forbidden to use. Secondly, CLAIMANT shouldn't buy the documentary information from the hacker company, even if CLAIMANT bought it, it should not be used in this case. It is not fair to RESPONDENT. Thirdly, if the arbitral tribunal allows CLAIMANT using the information of award from the other arbitration proceeding, which means that the tribunal encourage the use of evidence through an illegal way.

2. The evidence shall be excluded because it is highly privileged

66. The confidentiality of documents is a recognized ground for international tribunals to exclude evidence [*IBA Rules 9(2)(e), 9(2)(f)*]. In case of illegal evidence, international tribunals will exclude illegal evidence based on great importance to confidentiality and legal privilege [*Libananco Case*]. To be particular, the materials of settlement for one of the parties shall not be admissible [*Chorzów Factory Case]*. In a number of jurisdictions, confidentiality obligations are implied into international arbitration agreements as a matter of law [*Born, p.90*].
67. In this case, the other arbitration, which the contested evidence is mainly about, is highly privileged under HKIAC Procedure [*HKIAC Rules Art.45*].
68. Therefore, this illegal evidence shall be excluded based on the confidentiality character.

3. The evidence shall be excluded because CLAIMANT fails to prove the authenticity of illegal evidence

69. It is an essential requirement for evidence to be authentic and reliable for the Tribunal to determine the detailed fact [*Rules of Evidence, Art.901*]. It is a usual ground to exclude illegal evidence, because the wrongdoer cannot prove, from the origin of these documents, or receive the acknowledgement of the origin or owner of documents [*ACLU Case, p.10; ECCC Case, p.10*].
70. In this case, as Parties of the other position, RESPONDENT and its opponent share the common position that the contested evidence does not reflect the reality [*E-mail Oct.3*]. Failing to acquire the acknowledgement from the origin, CLAIMANT cannot prove the authenticity of the contested evidence, let alone the allegation of "only difference"between the two cases [*E-mail Oct.2*].

    In conclusion, in case of lack of authenticity, RESPONDENT recommends the Tribunal to exclude the contested evidence.

CONCLUSION OF THE SECOND ISSUE

71. The evidence raised by CLAIMANT in 2 October 2017 is inadmissible before the Tribunal, because it is not material to the case. Further, the disclosure of this evidence is in violation of confidentiality obligations. the evidence is obtained illegally, and for the interest of procedure fairness, this evidence shall be excluded.

ARGUMENT ON THE MERITS

III. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF 1250000 USD UNDER CLAUSE 12 OF THE CONTRACT AND CISG.

72. Claimant and respondent contracted for the sale and delivery of frozen semen from the stallion Nijinsky 3 and agreed on three shipments [*CE5 p.13*]. A month before the third shipment was due, the Equatorianian government announced 30 per cent tariffs on selected products from Mediterraneo, including racehorse semen [*CE6 p.15*]. The parties had negotiated before CLAIMANT delivered the remaining 50 doses on 23 January 2018 [*NoA p.6*] pursuant to its contractual obligation of risk assumption. Contrary to Claimant's allegation [*NoA p.6*], the increased tariff did not constitute a hardship and the risk assumption. Contrary to Claimant's responsibility due to DDP delivery. Thus, Claimant is not entitled to the payment under clause 12 of the contract (A). Alternatively, Claimant is not entitled to the payment under Art.79(1) CISG (B).

A. CLAIMANT CANNOT BE EXEMPT FROM ITS RESPOONSIBILITY THROUGH CLAUSE 12

73. The DDP-delivery poses the risk of import clearance on CLAIMANT. Thus, CLAIMANT is responsible for the sudden increase in tariff (1). Although CLAIAMNT has included a hardship clause to prevent itself from certain risks, the retaliatory tariff of 30 percent does not fall within the realm of hardship regulated under clause 12, thus CLAIMANT cannot exempt from the retaliatory tariff (2). RESPONENT never break the contract (3).

1. Under a DDP-delivery, CLAIMANT should bear the risk of the tariff

74. CLAIMANT is responsible for the risk of the tariff since the Parties consented to a DDP delivery. Under a DDP delivery, the seller has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all

customs formalities [*Incoterms p.36 para.2*]. This means that the seller is responsible for and assumes the risk for the export and import clearance of the goods [*Brunner p.131*]. In other words, the seller must bear the risks and costs incurred by an import or export prohibition ,additional taxes, and other similar government imposed requirements.

75. In its email of 28 March 2017, RESPONDENT had asked for DDP delivery [*CE3 p.11*].CLAIMANT responded on 31 March 2017 and accepted for this contract a DDP delivery and accordingly asked to increase the price by 1000 USD per dose associated with the additional costs of the DDP delivery [*CE4 p.12*]. Consequently, the Parties included the DDP term into the clause 8 of the contract when concluded the contract [*CE5, p.14*]. Thus, the Parties reached a consensus on the application of the DDP delivery.

76. In light of the DDP delivery, seller ought to pay where applicable, the costs of customs formalities necessary for export and import as well as duties, taxes and other charges payable upon export and import of the goods [*Incoterms p.38 para.4*]. In the case at hand,CLAIMANT was responsible for the tariff imposed by the Equatorianian government which is the“duties necessary for import”under DDP term.

77. Furthermore, if the Parties wish the buyer to bear all risks and costs of import clearance, the DAP rule should be used [*Incoterms p.36 para.6*]. If CLAIMANT was not willingly to takeover any risks in customs regulation or import restrictions, CLAIMANT should use DAP rule rather than DDP rule. Concerning the Parties final consensus of DDP delivery, the seller(CLAIMANT) must bear all risks of import clearance, i.e. the risk associated with the increase of tariff imposed by Equatorianian government.

78. Even though CLAIMANT included a hardship clause to protect itself against the risk of changing health and security requirements [*CE4 p.12; CE5 p.14; answer to NoA p.30*],CLAIMANT could not be exempted from the obligation to assume the risk for the export and import clearance of the goods under DDP delivery due to aforesaid circumstances, especially the circumstances specified in the hardship clause are not arose in the present case. Therefore,under a DDP delivery, CLAIMANT should bear the risk of the tariff.

2. Under clause 12, CLAIMANT is not exempt from the retaliatory tariff

79. CLAIMANT cannot be relieved from the retaliatory tariff under the interpretation of clause12 according to CLAIMANT's own intent that a reasonable person could have been aware.Should the Tribunal find that the Parties' intention is not subjectively determinable pursuant to Arts. 8(2)(3) CISG, CLAIMANT's intent should be interpreted according to a reasonable person standard. Due consideration should be given to Parties' negotiation.

80. In the case at hand, CLAIMANT proposed a hardship clause to address some changes which destroy the commercial basis of the deal. Under clause 12, CLAIMANT shall not be responsible for comparable unforeseen events that trigger hardship [*CE5 p.14*]. When determining the triggering standard, due consideration should be given to prior negotiation,especially the email of 31 March 2017 [*CE4 p.12*] to which the Parties referred when deciding the final wording of the Sales Agreement [*PO2 p.56 para.12*]. According to that email, the threshold of destroying the commercial basis and triggering the hardship is a price increase of 40 per cent, for CLAIMANT has defined unforeseeable requirements as "which can increase the cost by up to 40 per cent and thereby destroy the commercial basis of the deal" [*CE4 p.12*]. The word "thereby" indicates a causation between a price increase of 40 per cent and the destruction of contract basis. Under the pattern of prudence proportionate to the circumstances at hand [*Kröll et al, p.155*], a reasonable person would have been aware that a price increase of 40% should be considered when deciding whether a hardship has been triggered or not.

81. However, the retaliatory additional tariff imposed by Equatorianian authorities against Mediterraneo is insufficient to trigger hardship. This is because the additional tariff is only 30per cent [*CE6 p.15*], which is 10 per cent lower than the standard that CLAIMANT set up. What is more, the additional tariff only influenced the last shipment of frozen semen [*CE5 p.14*], the price of the first two shipments remained unchanged. The actual increase of the price is less than 40 per cent thus does not result in a destruction of commercial basis of the contract.Therefore, the retaliatory tariff does not constitute hardship under the interpretation of clause12 according to CLAIMANT's own intent, and CLAIMANT

cannot be exempt from its responsibility for bearing the risk of additional tariffs.

3. RESPONENT never break the contract.

82. CLAIMANT has not submitted any proof for its allegation that RESPONDENT resold the doses and made a 20% profit therefrom.[p31] All the words from the CLAMIANT is guesswork and assumptions.
83. According to the contract, it is never show up the ban of the resell. Even if RESPONDENT break the ban of the resell that sell the frozen semen to the third breeders, but the contract has never show up the ban. So RESPONDENT do not break a contract and never need to bear responsibility for breach of contract.
84. Even if the contract of the clause about the three mares can support the ban of the resell. RESPONDENT do not break the contract. Because the contract is a frozen semen sales agreement, the most important is the contract purpose and contract basis. A sale agreement is standard the sale with two parties. As for the buyer how the use the goods is not the seller's business. According to the relativity of contract, CLAIMANT has no power to decide the use of the goods and he also has no power to criticize RESPONDENT's behaviors of selling the frozen semen.
85. According to the clause of the contract about the use to three mares. This clause is not a important clause. It is just a statement to introduce the mares which will be used by the semen. The clause has no substantive normative significance. And if CLAIMANT want to prohibit the resell, he should clearly stated in the contract. Even if the email has the ban of the resell, but the contract is not reached a agreement. So RESPONDENT payment the goods and complete the obligation and never break the contract.

B. ALTERNATIVELY, CLAIMANT IS NOT ENTITLE TO THE PAYMENT OF 1,250,000 USD UNDER ART.79 CISG

86. CLAIMANT cannot support the payment for its increasing remuneration by relying on Art.79 CISG. Since the Parties have agreed on including hardship clause into the force

majeure clause and regulated some other risks directly, pursuant to the basic principle of party autonomy, the force majeure and hardship clause of the contract takes precedence over Art.79 CISG (1). Even if the hardship clause of the contract does not prevail, hardship is not regulated under Art. 79 CISG (2). Should the CLAIMANT argue through applying UNIDROIT Principles to fill the gap of CISG, however, in the case at hand, the requirements for hardship are not met (3). Therefore, CLAIMANT is not entitled to the payment of1,250,000 USD (4).

1. Pursuant to the basic principle of party autonomy, the force majeure and hardship clause of the contract takes precedence over Art. 79 CISG

87. By including the force majeure and hardship clause into the contract the Parties have provided for a special regulation of the problem of changed circumstances which take precedence over Art. 79 CISG. According to the basic principle of party autonomy, specific terms of the contract take precedence over principles of statutory or case law [*Brunner p.118 para.3*].Without violating mandatory regulations, specific contractual terms shall prior to other legal documents whatsoever in a specific case. In addition, the autonomy of the parties should take precedence over the exercising of any judicial discretion or the application of equity in international arbitration [*Albert p.391 para.4*]. Thus, in most cases, party autonomy has a preferentially applicable legal validity in judicial practice. The contractual terms, as a consequence of party autonomy, shall prevail under the circumstances of settling disputes.

88. In the email of 31 March 2017, CLAIMANT asked to include a hardship clause into the contract [*CE4 p.12 para.4*]. In consideration of CLAIMANT' s requirements,RESPONDENT and CLAIMANT conducted a negotiation and finally resulted in a very narrowly worded hardship clause, which was then included into the existing force majeure clause [*answer to NoA, p.30; Re.Ex.R3 p.35*]. In the end, the Parties reached a consensus [*NoA p.5*] and subsequently included the hardship clause into the contract [*CE4 p.14*]. In terms of hardship, the Parties provided for a more exhaustive

regulation in the light of party autonomy. Differentiated from established Convention provisions or rules of domestic law, the hardship clause of the contract elaborates more on the common intention of the Parties. When determining whether the changed circumstances in the present case triggered the hardship clause, special weight has to be given to the consequence of party autonomy, i.e. the hardship clause of the contract. In other words, under the premise of a more detailed term was included into the contract and fully respect the Parties' intent, the contractual hardship clause takes precedence over Art. 79 CISG.

2. Art. 79 CISG does not provide for a price adaptation

89. Even if clause 12 of the contract does not constitute a derogation of CISG, CLAIMANT' s request for a price increase under CISG is not possible because such an adaptation is not regulated under Art. 79 CISG.

90. Under Art. 79(1) CISG a party is exempt from liability if he proves that his failure to perform was due to an impediment that is uncontrollable, unforeseeable and unavoidable. Art. 79 CISG does not expressly allow for an adaptation of the contract and only provides for an exemption.Therefore, a price adjustment under CISG is baseless and should be regarded as impossible[*Tallon para.3.1; Kröll et al Art.79 para.86*].

91. CLAIMANT argued that the sales price should be increased under CISG because the Convention allows for such an adaptation [*NoA, p.8*]. However, the only remedy that CISG provides for is avoidance and a price adjustment is neither expressly regulated nor possible. Therefore, CLAIMANT' s request for a price adaptation is not justified.

3. Under UNIDROIT Principles the requirements for hardship are not met

92. Should the CLAIMANT argue that UNIDROIT Principles can fill the gap of CISG, however,in the case at hand, the requirements for hardship are not met. Under Art. 6.2.2 UNIDROIT Principles, neither did the imposed tariff fundamentally alter the contract equilibrium (a), nor did CLAIMANT relieve from assuming the risk of increasing tariff

(b). Additionally, without excessive onerous changes appeared, CLAIMANT ought to conduct its obligation because of the general principle pactasunt servanda (c). Thus, even pursuant to the alleged gap-filling principles, the present case does not constitute hardship as well.

a. The tariff did not fundamentally alter the contractual equilibrium between the Parties

93. The relatively low increase in tariff does not justify as hardship (i), especially when only one of the three shipment instalment was affected (ii).

i. 30 percent increase in tariff does not amount to a fundamental alteration of contractual equilibrium

94. The 30-per-cent additional tariff was not adequate to fundamentally disturb the contractual equilibrium between the Parties. Under Art. 6.2.2 UNIDROIT Principles hardship occurs when the cost of performance has increased considerably, which alters the contractual equilibrium between the Parties. The prevailing view suggests that generally an alteration of100 per cent is required for the hardship test. In standard situations where the neither of the parties has assumed the risk, hardship occurs when increases in cost of performance or decreases in the value of performance received amount to an alteration of 100 per cent, which make performance excessively more onerous to the obligor. This 'thumbnail rule' for hardship test is supported by CISG commentators, case laws and comparative law analysis [*Brunner, p.428 et seq.; Schlechtriem/Schwenzer, Art.79 para.31; "FeMo" alloy case; Steel ropes case;Société Romay AG v. SARL Behr France*]. Conversely, an increase of 50 per cent, for example,is hardly considered to be sufficient. The threshold test of 50 per cent suggested by the 1994edition of Official Comment of UNIDROIT Principles had been criticized and was deleted inthe 2004 edition. It also appears that no Arbitral Tribunal would have granted relief solely onthe grounds of an alteration of 50 per cent. Evidently, cost increases even lower than 50 percent were also insufficient to amount to a fundamental alteration of contractual equilibrium[*Brunner, p. 427-428; Steel bars case*].

95. CLAIMANT completed the third instalment and bore the additional tariff imposed by the

Equatorianian government [*NoA, p.6*]. Subsequently, CLAIMANT requested for an increase of sales price under CISG and argued that the requirements for such a price adaptation in the case of changed circumstances are met [*NoA, p.8*]. However, the 30-per-cent tariff does not render CLAIMANT's performance excessively onerous and therefore does not alter the equilibrium of the contract fundamentally. According to CLAIMANT, the profit margin for the horse semen was 5 per cent and the 30-per-cent new tariff incurred a 25-per-cent increase in cost of performance [*NoA, p.7*]. A loss of 25 per cent is much lower than the general benchmark supported by many legal systems and scholars, which is generally 100 per cent at least. Thus, the additional cost of performance does not amount a fundamental alteration of equilibrium under Art. 6.2.2 UNIDROIT Principles.

ii. The percentage of cost increase is even lower if all three shipment in stalment are taken into account

96. The additional cost of the tariff is even less convincing if all three of CLAIMANT' s performances are taken into account.

97. The point of reference for the calculation of equilibrium alteration must be the entire undertaking of the relevant party. If the obligor has agreed to several different performances under the contract and the changed circumstances do not affect all of these performances, the calculation of alteration must refer to both past and future performances as point of reference[*Brunner p.461 et seq; ICC Publ No.421 p.21*].

98. CLAIMANT completed the first and second shipment of 50 doses in total without any problem.The additional tariff was announced before the third shipment by the Equatoriana government and only affected the last 50 doses [*NoA, p.6*]. Using the sales price under the whole contract as a point of reference, the additional cost only amounts to 15 per cent of alteration, which is far less than the suggested yardstick. Therefore, the percentage of alteration is even less persuasive using the whole contract as a point of reference and does not amount to a fundamental alteration of equilibrium in the contract under UNIDROIT Principles.

b. The risk of the event is ought to be assumed by CLAIMANT

99. As argued above, under the DDP delivery term CLAIMANT should undertake all the risks. DDP means the seller assumes all of the responsibility, risk and cost associated with transporting goods until the buyer receives or transfers them at the destination port. This includes paying for shipping costs, export and import duties, insurance and any other expenses incurred during shipping to an agreed-upon location in the buyer's country. In the case at hand, RESPONDENT never contended to change the risk allocation, i.e., CLAIMANT is responsible for the imposed tariff under the agreed DDP delivery term. To sum up, as stipulated in the contract, there can be no hardship since CLAIMANT had assumed the risk of the change in circumstances.

c. Under Art. 6.2.1 UNIDROIT principles CLAIMANT ought to conduct its obligation as contract stipulated

100. Without composing of excessively onerous situation, CLAIMANT ought to conduct its obligation with no exemption. As provided by Art. 6.2.1 UNIDROIT Principles, even the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations. To illustrate, the general principle is that performance must be rendered as long as it is possible, regardless of the burden it may impose on the performing party [*O.C. on UNIDROIT Principles, Art. 6.2.1*]. In one case, for instance, the ICC Court of Arbitration held that a contract for the installation of a machine for the production of lump sugar had to be performed despite the financial difficulties caused by a sudden drop in the market demand. The arbitral tribunal stressed the exceptional character of hardship which required a fundamental alteration in the original contractual equilibrium, not a mere increase in the cost of performance as in the instant case [*ICC No. 8486*]. It acts as a reminder that relief is very much the exception and the general duty is to perform [*Vogenauer p.813 para.4*]

101. In the case at hand, since the tariff only raised 30 per cent, which undoubtedly did not make the situation excessively onerous. In other words, even if CLAIMANT experienced

heavy losses but not to the extent of substantially more onerous, the terms of the contract must be respected. In summary, according to Art. 6.2.1 UNIDROIT Principles, CLAIMANT is bound to perform its contractual duties, i.e. assuming the imposed tariff.

102. In conclusion, even applying UNIDROIT Principles for filling the gap, with merely 30 per cent tariff increased, requirements for hardship are far from sufficient.

CONCLUSION OF THE THIRD ISSUE

103. In a conclusion, it is not entitled to the payment of 1,250,000 USD either under clause 12 of the contract, or under CISG and UNIDROIT Principles.

REQUEST FOR RELIEF

In light of the above RESPONDENT requests the Arbitral Tribunal

a. To dismiss the claim as inadmissible for a lack of jurisdiction and powers;

b. To reject the claim for additional remuneration in the amount of US$ 1,250,000 raised by CLAIMANT;

c. To order CLAIMANT to pay RESPONDENT' s costs incurred in this arbitration.

Certificate:

We, on behalf of the Team for North China University of Science and Technology hereby certify that the memorandum was written only by the persons whose names are listed below, and also signed this certificate. We also confirm that no person other than a student team member has participated in the writing of this Memorandum.