Sixteenth Annual
Willem C. Vis (East)
International Commercial Arbitration Moot
HONGKONG 31 March - 7 April 2019

SHANGHAI LIXIN UNIVERSITY OF ACCOUNTING AND FINANCE (LEGALIN)

MEMORANDUM FOR CLAIMANT

ON BEHALF OF:	AGAINST:
Phar Lap Allevamento Rue Frankel 1 Capital City, Mediterraneo (CLAIMANT)	Black Beauty Equestrian 2 Seabiscuit Drive Ocean, Eauatoriana (RESPONDENT)

Xiang YuanTong • Liu YingXin • Zhang Yizi • Huang QingXin • Lv JiaBo • Gao YaDi • Wang JiaLu • Li ZiChang • Huang YiDan • Tan Hui • Qian ZeJia • Wei LeTian

---

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Leonardo Graffi	Remarks on Trade Usages and Business Practices in International Sales Law Available at: http://www.cisg.law.pace.edu/cisg/biblio/graffi1.html#iii	Para.101
Marcos A. Orellana	The Right of Access to Information and Investment Arbitration	Para.35
Martina Perzelova	Interpretation of the CISG: How to interpret and fill the gaps in the CISG so as to maintain requirements of uniformity, good faith and internationality as emphasized in the Article 7 of the CISG.	Para.112
Paul J. Powers	Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods Available at: http://www.cisg.law.pace.edu/cisg/biblio/powers.html	Para.113
Peter Nygh	Choice of Forum and Law in International Commercial Arbitration, Kluwer, 1997	Para.4
Philippe Leboulanger	The arbitration agreement: still autonomous, international council for commercial arbitration: international arbitration 2006: Back to Basics? London: Alphen ann den Rijn, Kluwer Law International, 2007	Para.8
Robert Sentner & Matthew McLaughlin	Expectations of Confidentiality in International Arbitration	Para.32
Rolf Kofod	Hardship in International Sales CISG and the UNIDROIT Principles Available at: http://www.cisg.law.pace.edu/cisg/biblio/kofod.html#iii	Para.82&86
Peter Schlechtriem & Ingeborg Schwenzer	Commentary on the UN Convention on the International Sales of Goods Oxford University Press 2016	Para53&57 &99&101

Schwenzer	Ingeborg Schwenzer, Force Majeure, And Hardship in International Sales Contracts Victoria University of Wellington Law Review	Para.59
Susan Leubuscher	The Privatization of Law: International Investment Agreements as Acts of Pretended Legislation, 3(2) Transnat'LDisp.Mgmt.	Para.35
The CISG Advisory Council	The International Sales Convention Advisory Council Opinion NO. 7 (Wuhan, People's Republic of China, on 12 October 2007) Available at: http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html	Para.83
WWitz/Salger/Lorenz/W Witz	International Einheitliches Kaufrecht: Praktiker-Kommentar und Vertragsgestaltung zum CISG Heigelberg Verlag Recht und Wirtschaft (2000)	Para.59

INDEX OF CASES

	Case No. 97-4250	
Time Warner Cable	ZVI Trading CORP. Employee' Money Purchase Pension Plan And Trust, and Barry Zonon v. Steven J. ROSS, N.J. Nicholas, Jr., Gerald M. Levin, Bert W. Wasserman, and Time Warner Inc. United States Court of Appeals, Second Circuit, 30 November 1993 Case No. 836, Docket 92–7816	Para.116
Caterpillar, Inc. v. Usinor Industeel	Caterpillar, INC., an Illinois corporation, and Caterpillar Mexico, S.A., a foreign corporation v. Usinor Industeel, a foreign corporation, Usinor Industeel (USA), Inc., a Pennsylvania corporation, and Leeco Steel Products, Inc., an Illinois corporation United States District Court, N.D. Illinois, Eastern Division, 30 March 2005 Case No. 04 C 2474	Para.116

INDEX OF AWARDS

ICC

INDEX OF LEGAL SOURCES

1. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980) United Nations Commission on International Trade Law (UNCITAL)
   Cited as: [CISG]
2. Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2016
   Cited as: [Case Law Digest]
3. The UNIDROIT Principles of International Commercial Contracts of 21 June1985 with amendments as adopted in 2010 International Institute for the Unification of Private Law (UNIDROIT）
   Cited as: [UNIDROIT Principles]
4. UNCITRAL Arbitration Rules(with new article 1, paragraph 4, as adopted in 2013)UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
   Cited as：[UNCITRAL Rules on Transparency]
5. 2018 HKIAC ADMINISTERED ARBITRATION RULES
   Cited as：[HKIAC 2018 rules]
6. IBA Rules on the Taking of Evidence in International Arbitration
   Cited as：[IBA rules]
7. International Chamber of Commerce Incoterms rules 2010, ICC Publication No. 715E, 2010 Edition
   Cited as: [INCOTERMS 2010]
8. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
   Cited as: [NY Convention]
9. UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
   Cited as: [Model Law]

INDEX OF ABBREVIATIONS

/	And
§	Section
ANoA	Answer to Notice of Arbitration
Art./Artt.	Article/Articles
CISG	United Nations Convention on the International Sale of Goods, Vienna, 11 April 1980
CISG-AC	CISG Advisory Council
Cl.	CLAIMANT
DDP	Duty delivery paid
ed.	Edition
et al.	Et alia (and others)
et seq	Et sequentes (and the following)
Ex.	Exhibit
ICC	International Chamber of Commerce
No.	Number
NoA	Notice of Arbitration
Op.	Opinion
Ord.	Order
p./pp.	page/pages
Pro.Ord.	Procedural Order
Re.	Respondent
Rev.	Review
Rn.	Randnummer
UNIDROIT	International Institute for the Unification of Private Law
U . S . A	United States of America
v.	Versus

STATEMENT OF FACTS

CLAIMANT： Phar Lap Allevamento (hereafter "CLAIMANT") is a Mediterranean company. It operates Mediteranneo's oldest and most renown stud farm, covering all areas of the equestrian sport.

RESPONDENT： Black Beauty Equestrian (hereafter "RESPONDENT") is an Equatorianan corporation which is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions.

On 21 March 2017, RESPONDENT contacted CLAIMANT, inquiring about the availability of Nijinsky III for its newly started breeding programme.

On 24 March 2017, CLAIMANT offered RESPONDENT 100 doses of Nijinsky III's frozen semen in accordance with the Mediterraneo Guidelines for Semen Production and Quality Standards with email and also made several requests for installments and no resale without express written consent.

On 28 March 2017, RESPONDENT responded with email that most of the terms are acceptable but they would insist for the contract on a delivery on the basis of DDP and the courts of Equestriana should have jurisdiction.

On 31 March 2017, CLAIMANT accepted DDP delivery in principle but with an attached request to be protected against the risk of changing health and security requirements by a hardship clause.

On 10 April 2017, RESPONDENT requested with email that the seat of arbitration shall be Equatoriana and the law of arbitration clause shall be the law of Equatoriana.

On 11 April 2017, in response of RESPONDENT's request, CLAIMANT forwarded suggested Danubia as the place of arbitration.

On 12 April 2017, two main negotiators Ms. Napravnik and Mr. Antley were severely injured in a car accident in Danubia.

On 6 May 2017, the signing of FROZEN SEMEN SALES AGREEMENT took place in Mediterraneo.

On 20 May 2017, CLAIMANT sent the first shipment of 25 doses.

On 3 October 2017, CLAIMANT sent the second shipment of 25 doses.

On 15 November 2017, the 25% tariffs imposed by the new president of Mediterraneo took effect.

On 19 December 2017, the new 30% tariffs were announced by the government of Equatoriana.

On 15 January 2018, the new tariffs for agricultural products took effect.

On 20 January 2018, CLAIMANT sent email to ask for negotiation in regard of the

newly imposed tariffs.

On 21 January 2018, the project negotiator of RESPONDENT called the negotiator of CLAIMANT, urging her to authorize the last shipment and promising that they would certainly find an agreement on the price.

On 23 January 2018, CLAIMANT delivered the third and last shipment of 50 doses.

On 2 February 2018, CLAIMANT had a talk with another breeder from Equatoriana and found out the RESPONDENT had resold the semen to other 10 different breeders with higher price.

On 12 February 2018, two parties had a meeting to solve the issue of adaptation at the senior management level. RESPONDENT's CEO was strongly against the additional request from CLAIMANT and stopped the negotiations, announcing that she was no longer interested in further cooperation with CLAIMANT.

On 2 October 2018，CLAIMANT sent an email to the Arbitral Tribunal on the information they received with regard to another arbitration which RESPONDENT was involved. CLAIMANT asserted that RESPONDENT had itself asked for an adaptation of the price invoking an unforeseeable change of circumstances in that arbitration, and asked for the relevant submission to the Arbitral Tribunal.

On 3 October 2018，RESPONDENT strongly objected to CLAIMANT's allegation and the announced submission of materials from the other arbitration. RESPONDENT argued that the evidence would have been obtained by illegal means, either through the leakage by two former employees of RESPONDENT or a hack of RESPONDENT's computer.

SUMMARY OF ARGUMENTS

ISSUE A: The Tribunal has the jurisdiction and the powers to adapt the Contract. Parties' autonomy shall be given priority in deciding the applicable law of arbitration agreement. In fact, the Parties reached a consensus on the application of the law of Mediterraneo governing the interpretation of the arbitration agreement without violating the doctrine of separability. Even if there is an absence of Parties' autonomy in deciding the applicable law of arbitration agreement, the law of Mediterraneo has the closest and most real connection with dispute. Thus, the Arbitration Clause should be interpreted under the law of Mediterraneo. Claimant and Respondent reached consensus on adapt contract by arbitrator, which is proved by each parties' evidence. The UNIDROIT Principles, which the Mediterraneo adopted, conferred the power to arbitration tribunal to adapt the contract, concerning the hardship clause.

ISSUE B: CLAMIANT is entitled to submit evidence from the other arbitration proceedings due to its legal procedure. The urge of expanding "Principles of transparency" to international commercial arbitration, which is based on the absence of a clear confidentiality provision in the current arbitration rules, endues the admissibility of the evidence. Meanwhile, Laws and rules give judges broad discretion in deciding the use of evidence.

ISSUEC (i):Under the subjective and objective test of interpretation ，clause 12 covers all unforeseen events making the contract more onerous, which include the present additional tariffs. Hence, this clause entitles CLAIMANT to adapt the contract as a legal remedy.

ISSUEC (ii): The increase tariff is the hardship situation indicated in 79(1) CISG. However, the 79(1) cannot directly provide the settlement for the CLAIMANT. Therefore, UNIDROIT Principles under 7（2）CISG should be invoked to provide the mechanism for CLAIMANT to request the adaptation of price. Furthermore, it's reasonable for CLAIMANT to claim the request with the general principles in the international trade under 7 CISG including the good faith and the promissory estoppel.

ARGUMENTS

I. THE TRIBUNAL HAS THE JURISDICTION AND THE POWERS UNDER THE ARIBTRATION AGREEMENT TO ADAPT THE CONTRACT.

1. CLAIMANT respectfully requests the tribunal to find that it has the jurisdiction and the powers under the arbitration agreement to adapt the contract. Both parties agree that any dispute arising out of this contract shall be referred to and finally resolved by arbitration administered by HKIAC under HKIAC Rules. Pursuant to Art.19 (1) HKIAC Rules providing that a tribunal "*may rule on its own jurisdiction*", the tribunal has jurisdiction to interpret whether adapting the contract lies in scope of the arbitration agreement.

2. What law governs the arbitration agreement is not specified in the arbitration agreement, but the law of Mediterraneo governing the main contract in light of clause 14 of sales agreement is undisputed between the Parties. Contrary to RESPONDENT's allegations, the law of Mediterraneo governing the main contract also apply to the arbitration agreement[A], under which the tribunal has jurisdiction to adapt the contract [B].

A. The law of Mediterraneo governing the main contract also apply to the arbitration agreement

3. Above all, Parties' autonomy shall be given priority in deciding the applicable law of arbitration agreement (1). During negotiation, the Parties reached a consensus on the application of the law of Mediterraneo which governs the interpretation of the arbitration agreement (2). Even if there is an absence of Parties' autonomy in deciding the applicable law of arbitration agreement, the law of Mediterraneo has the closest and most real connection (3). The tribunal has jurisdiction to adapt the contract under the law of Mediterraneo (4).

1. Parties' autonomy shall be given priority in deciding the applicable law of arbitration agreement

4. In the field of private international law, the right of parties to choose the

applicable law of the contract has been recognized almost all over the world. [*Peter Nygh, P.19*] In light of Art. V (1)(a) NY Convention and Art. 34(2)(a)(i) Model Law, the arbitration agreement can be not valid "*under the law to which the parties have subjected it*" or "*under the law of the country where the award was made*". Two types of applicable law become grounds for refusal to recognize and enforce the award.

5. These articles contain two conflict rules that determine the law applicable to arbitration agreements. Priority was given to the principle of Parties' autonomy. According to this principle, the parties have the freedom to choose the applicable law of arbitration agreement. The law of the place of arbitration shall be applied only if the parties fail to make express or implied choice of law applicable to the arbitration agreement.

2. The Parties reached a consensus on the application of the law of Mediterraneo which governs the interpretation of the arbitration agreement

6. Because the law of Mediterraneo governing the main contract may apply to the arbitration agreement without violating the doctrine of separability (1) and it is an implied choice of both parties to govern the arbitration agreement in the absence of the express choice (2), the implied choice of the Mediterraneo law derived from the express choice of law in the main contract shall be presumed to apply to the arbitration agreement (3).

(1) The law of Mediterraneo governing the main contract may apply to the arbitration agreement without violating the doctrine of separability

7. The CLAIMANT agree that Art. 16 of the arbitration law of Danubian and Mediterranean explicitly acknowledge the doctrine of separability. The CLAIMANT want to state that although the application of Mediterraneo law in main contract does not consequently lead to the same of Mediterraneo law rules in arbitration clause, as we will not advocate so, still the doctrine of separability cannot support the RESPONDENT's plea in Art.14[*ANoA*].

8. The main reason why they all support the doctrine of separability is that the arbitration clause has procedural nature. [*Philippe Leboulanger. PP.14*].In consistent jurisprudence in Danubia, arbitration clause is considered to be a procedural contract. [*Pro.Ord2. 36*]. Although the main contract is null and void, it can still be used as a remedy to solve substantive disputes, which determines

the procedural characteristics of arbitration clauses.

9. But on the other hand, the purpose of the arbitration agreement is to start the arbitration procedure and conclude before the arbitration procedure occurs. It is also a substantial agreement. The interpretation of the arbitration agreement follows the substantive law of the contract, so the view that the arbitration agreement is only regarded as a procedural contract should be corrected [*Emannual Gaillard & John Savage. PP.221*].The arbitration agreement is essentially a "contract arrangement". [*Clive M. Schmitthoff PP.674*]Therefore, arbitration agreement has dual procedural and substantive nature. The doctrine of separability is based on its procedural nature, rather than its substantive nature.

10. In this case, whether the arbitration tribunal has the right to adapt the contract is within the jurisdiction of the arbitration agreement, which is essentially to argue about the interpretation of the arbitration agreement. The parties dispute the substantive nature of the arbitration clause rather than the procedural nature of it. Therefore, Born proposed that "the arbitration agreement is closely connected to the main contract" is in line with the situation of this case [*BORN, pp. 352-353*]. This kind of idea also reflects on many international arbitration awards [*ICC Case No.3572; ICC Case No.6850*].

11. In conclusion, the applicable law of the main contract may be considered governing the arbitration agreement, without violating the doctrine of separability referred to by the respondent.

(2) The law of Mediterraneo is an implied choice of both parties to govern the arbitration agreement in the absence of the express choice

12. We must admit that the parties' current conundrum is mainly caused by a lack of explicit nomination of applicable law governing the arbitration agreement. [*Cl. Ex.5*]. It is also quite reasonable for both parties to debate for own interests, when the original consensus is now left to be clarified.

    Giving these conditions, the CLAIMANT now conjure the tribunal to ascertain following facts in favor of an implied choice of Mediterraneo law as the governing law of the arbitration agreement: the first is the note of Mr. Antley suggests both parties' acceptance that the law of Mediterraneo governs the arbitration agreement (a); the second factor is the tribunal should choose the Mediterraneo law that is conducive to the effectiveness of the arbitration

agreement (b).

a. The note of Mr. Antley suggests both parties' acceptance that the law of Mediterraneo governs the arbitration agreement

13. Under Art.7 Model law, arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes whether contractual or not, now according all testimony we have by now, Mr. Julian Krone and Mr. John Ferguson basically signed the Frozen Semen Sales Agreement within a month after the car accident, and that version of contract obviously failed to represent both parties' intentions and interests.

14. As the RESPONDENT has brought the note Mr. Chris Antley left on 12 April into consideration, the Phar Lap Allevamento is more than gladly to prove that an actual consensus on Mediterraneo arbitration clause was made between the parties, with evidence.

15. A reasonable person would have agreed that the frozen semen of Nijinsky III, an award-winning stallion, has its patentability and uniqueness as merchandise. The one and only provider, Phar Lap Allevamento, thus occupied an incomparable dominant position in the whole drafting procedure.

16. We acknowledged that due to Phar Lap Allevamento's internal policy, providing for dispute resolution in the country of the counterparty requires special approval by the creditors' committee [*Re. Ex. 2*]. Both parties have made their amendment to the original draft of arbitration clause, in order to facilitate the final transactions. However, the CLAIMANT's consent to the seat of arbitration to be Danubia, hereby shall not be interpreted as an implied choice of Danubian arbitration law.

b. The Danubian law is not conductive to the effectiveness of the arbitration agreement and cannot be the parties' implied choice

17. When the parties' choice of law was unclear, the judge considered whether a choice of law would significantly undermine that agreement at least a serious risk. [*SulAmérica case*] On that basis, arbitral tribunal presumes that the parties intend to apply the law that can make their arbitration agreement remain effective when drafting the contract[*ICC Case No.4145*；*ICC Case No. 4966*].
18. In this case, if the law of Danubian governs the arbitration agreement, there is a

high likelihood that the Tribunal should deny its jurisdiction to adapt the contract [*Pro.Ord.1*].But Mr. Antley and Mrs. Napravnik agreed that arbitrators should adapt the contract to solve the unlikely event that the Parties could not agree on an amendment[*Cl. Ex. 8*].So there was nothing to indicate that during negotiation the parties intended to choose the law which would significantly undermine the arbitration agreement. Consequently, the Mediterraneo law is both parties' implied choice.

(3).The implied choice of the Mediterraneo law derived from the express choice of law in the main contract shall be presumed to apply to the arbitration agreement

19. In the absence of an express agreement, the court considered first whether a governing law could be implied. An express choice of law governing the main contract is a strong indication of the parties' intention concerning the agreement to arbitrate [*SulAmérica case; ICC Case No. 6379*]. Because of the dreadful car accident on 12 April 2017 the original negotiation team was no longer available [*Cl.Ex.8*], the note that Clarifies the Mediterraneo law governing the arbitration agreement was ignored by the employees on both sides who had previously not been involved in the negotiation and the drafting of the contract.[*Pro.Ord.2*].

20. Taking into account the special circumstances that arise in the negotiation, the tribunal should recognized that parties implicitly chose law of Mediterraneo as the governing law of the arbitration agreement. In addition, the dispute arisen by the arbitration agreement's interpretation, so the law of Mediterraneo governing the main contract may apply to the arbitration agreement without violating the doctrine of separability.

21. In conclusion, the implied choice of the Mediterraneo law derived from the express choice of law in the main contract shall be presumed to apply to the arbitration agreement.

3. **Even if there is an absence of Parties' autonomy in deciding the applicable law of arbitration agreement, the law of Mediterraneo has the closest and most real connection with dispute.**

22. Firstly, the main contract is signed in and governed by Mediterraneo; the merchandise at issue is from Mediterraneo, abiding by the Mediterraneo Guidelines for Semen Production and Quality Standards; the very dispute occured

when a Mediterraneo firm was shipping the cargo but being charged extra tariff owing to the Mediterraneo government's policy veer.

23. The only positive aspect for the RESPONDENT is from [*Re.Ex.2*], in which Phar Lap Allevamento amend "the seat of arbitration shall be Danubia." If the RESPONDENT intends to use this clause as the CLAIMANT's insinuation of applied law choice, the background intent of such proposal shall be reintroduced.

B. The tribunal has jurisdiction to adapt the contract under the law of Mediterraneo

24. In Art.15 of the contract [*Cl. Ex. 5*], any dispute arising from the contract should be referred to and resolved by the arbitration tribunal. Due to the increased tariff in Equatoriana import policy, the previous contact has been affected, which resulted in the damage of claimant, therefore the adaption of contract is the dispute within the scope of the arbitration clause, which conferred the power to the arbitrator to adapt the contract.

25. Equatoriana, Mediterraneo and Danubia are all signatory countries in CISG. Therefore, It is not dispute that the Art. 8 and 11 of the CISG should be apply in the arbitration clause. According the Art. 8 of CISG, the intent of each party in statement and conduct should be interpreted in the condition that the opposite party know or should have known. Art.11 mentioned that the contract provisions should not limited to writing statement or any other writhing statement, any proof should be admissible, even though it is not covered in the writhing form.[*Art. 8 and 11 of CISG*].

26. In the witness statement of Julie Napravnik, Mr. Antley, the former representative of respondent, view that it is the task of arbitrator to adapt the contract, when the dispute arise [*Cl.Ex.8.*] In addition to that, in the "negotiation file" of Mr. Antley, we also found the note of "connection of hardship clause with arbitration clause [*Re.Ex.2*]. As we all known, hardship clause is a clause in a contract that is intended to cover cases in which unforeseen events occur that fundamentally alter the equilibrium of a contract resulting in an excessive burden being placed on one of the parties involved. As the evidence is proved by both parties, it is not doubt that the adapt contract clause is already agreed bilaterally, even though it is omitted in the contract.

27. Since the Mediterraneo contract law is a verbatim adoption of the UNIDROIT Principles on International Commercial Contract, according to the Art. 6.2.2, the increased tariff of Equatoriana, which is unreasonably expected and result in the disadvantage of Claimant, meet the definition of hardship. Therefore, by the Art. 6.2.3, the failure negotiation of the both parties could resort to the "court" to terminate the contract or adapt the contract. The court includes an arbitral tribunal in in UNIDROIT PRINCIPLES. [*Art.6.2.2, 6.2.3, 1.11 of UNIDROIT PRINCIPLES*].

CONCLUSION FOR PART I

28. In conclusion for this issue, Parties' autonomy which included the application of the law of Mediterraneo shall be given priority in deciding the applicable law of arbitration agreement. Even if there is an absence of Parties' autonomy in deciding the applicable law of arbitration agreement, the law of Mediterraneo has the closest and most real connection with dispute. The UNIDROIT Principles, which the Mediterraneo adopted, conferred the power to arbitration tribunal to adapt the contract, concerning the hardship clause.

II. CLAIMANT SHOULD BE ENTITLED TO SUBMIT EVIDENCE ASSUMED TO BE OBTAINED EITHER THROUGH A BREACH OF CONFIDENTIALITY AGREEMENT OR A HACK OF RESPONDENT'S COMPUTER SYSTEM

29. RESPOND argues that CLAIMANT's malicious, is false and misleading allegation of contradictory behavior as well as to the announced submission of materials from the other arbitration. Such submission could not be entitled. Contrary to RESPOND's assertion, CLAIMANT will demonstrate that Such a clear confidentiality provision does not exist in the applicable arbitration rules.（A） The evidence was obtained legally.（B）The Tribunal has the power to determine whether to apply strict evidence rules.（C）This arbitration could provide reasonable guidance for future trade between the two countries.（D）

A. Such a clear confidentiality provision does not exist in the applicable arbitration rules.

30. RESPONDENT argued that there is an express confidentiality provision existing in the applicable arbitration rules. However, CLAIMANT will demonstrate that: Respondent did not have a correct conception of the meaning of confidentiality (1); the express obligation to keep the proceedings confidential in Article

42,HKIAC 2013 Rules, is used to control the right of a third party.(2).

1. Respondent did not have a correct conception of the meaning of confidentiality.

31. Arbitration is private but not confidential. Arbitration is private in that it is a closed process, but it is not confidential because information revealed during the process may become public [*Amy J. Schmitz*]. Privacy refers to the right of a third party to participate in the arbitration proceedings [*Oxford American Dictionary 531*]. In contrast, confidentiality in arbitration refers to secrecy of information regarding or revealed through the arbitration process [*Oxford American Dictionary 133*].

32. As a vague and uncertain assumption introduced in 1976,UNCITRAL contained constricting confidentiality provisions, where awards and other materials or documents used in the arbitration proceeding could rarely be rendered public, not an established legal principle, such a clear confidentiality provision does not exist in the applicable arbitration rules, which means that information may become public unless the parties contractually require that this information remain confidential [*Robert Sentner and Matthew McLaughlin*].

2. The express obligation to keep the proceedings confidential in Article 42, HKIAC 2013 Rules, is used to control the right of a third party.

33. As Article 42.1 repeated, no party or party representative, which refers to the right of a third party to participate in the arbitration proceedings, such as experts, appointed arbitrators and so on, not the secrecy of information regarding or revealed through the arbitration process that CLAIMANT submitted.

B. The evidence was obtained legally

34. According to RESPONDENT, the evidence would have been obtained by illegal means and should not be admitted in the arbitration. On the contrary, CLAIMANT will show that the approach process of evidence is legal and the documents can be disclosed under principles of transparency: First, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration is based on the public interest (1). Second, principles of transparency should apply to commercial arbitration (2). Third, the conclusion that documents can be disclosed under "prevailing principles of transparency" can be drawn from such a derivation (3).

1. UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration is based on the public interest.

35. The 1990s and 2000s have witnessed a surge in the number of international investment agreements (IIAs). As a result, Investment arbitration plays an increasingly important role. Typically, a number of investment arbitrations have connection with the state due to the intense implication of the public interest. It has raised concerns about the adequacy of this dispute settlement mechanism to balance private rights against the public interest [*Susan Leubuscher]*. Therefore, the growing recognition of the right to access to information has to be considered [*Marcos A. Orellana*].

36. In this context, the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration was issued, which comprises a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-State arbitration.

2. Principles of transparency should apply to commercial arbitration.

37. In Dolling-Baker, the English Court of Appeal had set a precedent for allowing disclosure of materials if it is necessary for the fair disposal of justice, notwithstanding any implied obligation of confidentiality [*Dolling-Baker v Merrett*].

38. In Hassneh Insurance v Steuart J Mew, the English Commercial Court also broadened the legal basis for the implied duty of confidentiality. The court held that the privacy of arbitration was not the only consideration, instead concluded that aspects of custom and business efficacy are additional important factors that also should be considered, which means, the decision of the arbitral tribunal may vary depending on the existing business relationship between parties and according to specific circumstances in each case.

39. More notably, the Commercial Court identified circumstances under which the arbitral award could be disclosed absent the consent of the parties. These included instances where disclosure was judicially required for the protection of the parties' rights or when it was in the interest of justice. [*Hassneh, 2 Lloyd's Rep. at 249*]. Finally, the Commercial Court held that disclosure of any arbitral award is appropriate without party consent based on such a precondition: the disclosure

aims at either the protection of the party's rights or the interest of public. [*Christoph Henkel*]

40. Conclusions can be drawn from the above cases, since both UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and commercial arbitration are based on the same starting point of protecting the public interest transparency can be used as a means to develop commercial arbitration practice.

3. The conclusion that documents can be disclosed under "prevailing principles of transparency" can be drawn from such a derivation.

41. When it comes back to the sale of a promising mare to Mediterraneo that RESPONDENT had with one of its customers, there is also a public interest applicable.

42. Mediterraneo's sudden measure that 25 per cent tariffs on agricultural products came as a complete surprise [*Statement of facts, para 9*]. Vindictively, the government of Equatoriana imposed a tariff of 30 per cent, [*Cl Ex.5*], which broke the original balance of trade between the two countries. From the perspective of trade between the two countries, a new order is urgently needed. Exactly, the arbitration result on tariff rise provided by CLAIMANT provides a blueprint for the subsequent relevant arbitration. This could even extend to world trade. In a nutshell it is in line with the public interest.

43. Conclude from these, the principle of transparency can also be applied to this document for the purpose of satisfying the public interest.

C. The Tribunal has the power to determine whether to apply strict evidence rules.

44. The arbitral tribunal has appropriate discretion to determine that the evidence is lawful and valid. According to Art.22.2 of the HKIAC Rules, whether to apply strict evidence rules shall be determined by the arbitral tribunal, as well as the admissibility, relevance, materiality, and weight of the evidence.

45. Under the rules of IBA, although the parties do not agree to choose to use the IBA rules, according to article 4, paragraph 4, IBA can be completely applicable to the case, so there is no problem in the application.

46. Both parties do not agree on strict rules for the application of evidence, so the arbitrator can make a reasonable and fair judgment based on a wide range of discretion under the IBA rules and on the basis of the fact determination of the case.

47. Discretionary power under Art.19 of UNCITRAL Model LAW: international commercial arbitration lays more emphasis on the determination of facts and does not impose strict requirements and restrictions on the methods of evidence collection. Therefore, defects in the procedure of evidence collection do not affect the validity, application and final decision of the case.

D. This arbitration could provide reasonable guidance for future trade between the two countries

48. From the perspective of the public interests of the two countries, we find that the current situation is that the old trade balance is broken, and the new trade balance has not yet been formed due to the increase of retaliatory tariffs between the two countries, so it is necessary to establish a new trade balance and restore the trade order.

49. If the case can be decided in accordance with the result of the foregoing case, the purpose of "establishing a new balance" can be achieved -- that is, after the retaliatory tariff increase between the two countries, the buyer of the DDP trade term contract shall bear the increase of import tariff based on unpredictable government actions to achieve a new balance.

CONCLUSION FOR PART II

50. In general, CLAIMANT is entitled to submit evidence from the other arbitration proceedings because of its legal obtainment. The prevailing principle of transparency should apply here. Furthermore, the Tribunal has the power to determine whether to apply strict evidence rules.

III. CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTION OF THE PRICE UNDER THE CONTRACT.

51. RESPONDENT erroneously argues that CLAIMANT’s reliance on the hardship clause is not possible. In the RESPONDENT’s opinion, the narrowly worded

hardship clause is not applicable to the present impediment and does not provide for the adaptation by the Arbitral Tribunal.

52. Contrary to RESPONDENT's assertions, CLAIMANT will demonstrate that the present impediment, i.e. the additional tariffs applies to the hardship clause of the contract **(A)** and this clause provides for adaptation by the Arbitral Tribunal **(B)**.

A. The additional tariffs imposed by the Government of Equatoriana apply to the hardship clause of the contract.

53. The Parties' statements and conducts, as well as the contract provisions, should be interpreted according to the "intent where the other party knew or could not have been unaware what that intent was" under the subjective test of Art. 8(1) CISG [*Honnold/Flechtner, § 105*]. When such common intent is not discernible, the understanding of a reasonable third person of the same kind is determining under the objective test of Art. 8(2) CISG [*ICC Case No. 7331 (1994); Schlechtriem/Schwenzer I, Art. 8 §20*]. All relevant circumstances including negotiations, established practices between the Parties, usages and any subsequent conduct should be taken into consideration when using the subjective and objective tests [*Art. 8(3) CISG*].

54. Therefore, the additional tariff should apply to the hardship clause in the contract according to interpretation **(1)**. Although RESPONDENT and CLAIMANT agreed on a DDP-delivery, CLAIMANT should not bear all risks associated with such delivery **(2)**.

1. According to interpretation, the additional tariffs imposed by the Government of Equatoriana applied to the hardship clause of the contract.

55. The Parties set up the hardship clause in the contract to cover risks arising from all unforeseen events including the additional tariffs (1). Further, a reasonable third person should understand that the additional tariff should be included in the hardship clause (2). Moreover, to interpret the hardship clause, we can refer to the definition of hardship in UNIDROIT Principle (3).

(1). The intent of the Party is to make the hardship clause cover risks arising from all unforeseen events including the additional tariffs.

56. Pursuant to Art. 8(1) CISG, a contract shall be first interpreted according to the party's intent, where the other party knew or could not have been unaware what that intent was. Due consideration should be given to all relevant circumstances [*Art.*

8(3) CISG]. Firstly, The Parties' negotiations demonstrate that the ordinary intent is for CLAIMANT not to be responsible for hardship caused by all unforeseen events including additional tariffs in the case at hand **(a)**. Secondly, the fact that tariffs were not explicitly included in the contract does not vary the intent of the party **(b)**.

a. The Parties' negotiations demonstrate that CLAIMANT is not responsible for additional tariffs.

57. Due consideration should be given to the Parties' discussions during the negotiations. [*Schlechtriem/Schwenzer, Art. 8 para13; Farnsworth I, p. 96 paras.1.4; Albrecht, Art. 8 § 2; Marble case; Machinery case*]. CLAIMANT sent an e-mail to RESPONDENT stating that they were not "willing to take over any further risk associated with such a change in the delivery terms, in particular not those associated with the changes in customs regulation or import restriction" and insisted on including a hardship clause to cover such risks [*Cl. Ex. 4*]. CLAIMANT used clear wording and even used "in particular" to emphasize its intent not to be responsible for risks resulting from the changes in customs regulation or importation restrictions, and it is undisputed that these two categories cover tariffs. Moreover, RESPONDENT never objected to CLAIMANT's intent to include a hardship clause to prevent from the risks of varying customs regulation or import restriction [*Re. Ex. 3*]. Hence, the two Parties can be deemed to have reached a "meeting of minds" that the hardship clause covers risks arising from additional tariffs [*Schlechtriem/Schwenzer, Art. 8 §11; Case Law Digest p. 58 fn. 14; Franklins v. Metcash*].

b. The fact that tariffs were not explicitly included in the contract does not vary the intent of the party.

58. The fact that tariffs were not explicitly included in the contract does not vary the intent of the Parties. Given that the Government of Equatorianian had always been an ardent supporter of free trade and had always tried to solve the dispute amicably [*Cl. Ex. 6*], tariffs were not the concern of both Parties, so at the time of contracting no one expected such measures. Compared to this, from the experience of both parties, the change of health and safety requirements is a common risk and therefore the primary concern of both Parties which needs to be expressly included into the hardship clause [*Cl. Ex.4*]. Also, the employees who finalized the contract had previously not been involved in the negotiation and the drafting of the contract [*Cl. Ex.8; Re. Ex.3*]. Due to a lack of the required experience of the contractor, at the time of contracting, tariffs were not explicitly included in the contract. However,

this forgotten measure does not vary the "actual intent" of the parties [*CISG-AC 3para. 2.8*].

(2). In any event, a reasonable third person would have understood that the hardship clause covers the risk of additional tariffs.

59. If a party's subjective intent cannot be ascertained [*CISG Art 8(2); Farnsworth in Bianca-Bonell, 99*] or the parties' statement is not clear [*Case Law Digest p. 56 §10; Building materials case*], then the statement should be interpreted according to the understanding of a reasonable person 'of the same kind' under the same circumstances [*Schwenzer 26 Art. 14*]. Under the reasonable person standard of Art. 8(2) CISG, particular weight is attached to the wording of the contract [*CISG online Award §11; W Witz/Salger/Lorenz/W Witz, Art 8, para.11*] Clause 12 of the contract stated that "Seller shall not be responsible ... neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [Cl.Ex.5]. Interpreting the contract in a coolimmercially reasonable manner [*CISG Art. 8(2), 8(3); Chemical Products Case*], if the risk is caused by an event which firstly, is unforeseen; secondly, makes the contract more onerous, the risk shall not be assumed by CLAIMANT.

60. First and foremost, the act of the Equatoriana Government to impose a tariff of 30 % upon all agriculture goods from Mediterraneo is unforeseen. It was unforeseen that Mr Bouckaert put a tariff of 25% on the agricultural products from Equatoriana because it had never been part of any strategy papers released earlier by him nor the manifesto [*NoA.Para.9*]. In response to it, the Government of Equatoriana announced 30 % tariffs on selected products from Mediterraneo including animal semen, which is a big surprise to everyone, because Equatoriana had always been an ardent supporter of free trade and had always solved disputes amicably [*Cl. Ex. 6*]. Moreover, generally, racehorse semen was not covered under "animal products" [*Re. Ex 4*], it is also unforeseen for CLAIMANT and RESPONDENT that frozen semen was also affected by the addition tariffs.

61. Secondly, the additional tariffs imposed by the Equatorianian Government make the contract more onerous for CLAIMANT. The additional tariffs make the shipment 30% more expensive than anticipated, not only destroying the profit margin of 5% but also resulting in a significant loss of CLAIMANT [*Cl. Ex. 8*]. Given that CLAIMANT has been financially challenging in the last two years, it was impossible for CLAIMANT to shoulder the addition tariffs of 30% which needed to

be paid immediately [*Cl Ex 8*]. The contract is onerous because the commercial basis of the deal is destroyed [*Cl. Ex. 4*].

(3). The definition of hardship in UNIDROIT Principles can be regarded as a usage to interpret clause 12 of the contract

62. Art.8 instructs that due consideration be given to usage [*Art. 8(3) CISG*]. It is furthered by Art.9, which binds the parties to the usage which the parties knew or ought to have known [*Art. 9 CISG*]. Thus, usage supplements the terms of the contract and helps determine the parties' intent. The CLAIMANT will first demonstrate that the definition of hardship under UNIDROIT Principles should be applied as a usage to the interpretation of the contract **(a)** and then the additional tariffs are hardship according to the definition under the UNIDROIT Principles **(b)**.

a. The definition of hardship under Art 6.2.2 UNIDROIT Principles is an implied usage to both Parties.

63. The application of usage can be implied. Pursuant to Art.9, three elements should be met for the application of usage. The first objective element requires the usage to be widely known and be regularly observed, the second objective element requires the usage to be of international nature. The subject element requires the parties (at the time of contract formation) knew or ought to have known of the trade usage.

64. The general contract law of Equatoriana and Mediterraneo is a verbatim adoption of the UNIDROIT Principles on the International Commercial contract. It can be inferred that the definition of hardship under Art 6.2.2 UNIDROIT Principles is widely known to, and regularly observed by, parties to contracts of the type involved. Also, the UNIDROIT Principles are internationally accepted for it is built on comparative studies. Hence, the definition of hardship therein is of international nature. Thus, the objective requirements are met.

65. The subjective element of the supposed knowledge of the Parties can often be inferred from the objective element. The Sales Agreement is governed by the law of Mediterraneo [*Cl.Ex.5*], so both parties knew or ought to have known the definition of hardship under Art. 6.2.2 UNIDROIT Principles at the time of contract formation. Thus, the subjective requirements are met.

66. In conclusion, the definition of hardship [*Art 6.2.2 UNIDROIT Principles*] can be used as usage to interpret the word "hardship" in clause 12 of the contract.

b. According to the definition of hardship under the UNIDROIT Principles, the additional tariffs are a hardship.

67. Art.6.2.2 UNIDROIT Principles defines hardship as a situation where the occurrence of events fundamentally alters the equilibrium of the contract, provided that those events meet the requirements that are laid down in subparagraphs (a) to (d) [*UNIDROIT Principles comment*].

68. Depending on the facts and circumstances in the case at hand [*commentary UNIDROIT para. 6*], the additional tariffs imposed by the Government of Equatoriana substantially give a dramatic rise in the cost of performance. It results in a considerable loss for CLAIMANT [*Cl. Ex. 8*] and thus fundamentally changes the equilibrium of the contract.

69. For the first requirements laid down in Art.6.2.2 UNIDROIT Principles, the additional tariffs occur after the conclusion of the contract [*Cl.Ex.5*]. As stated above, both measures to impose tariffs taken by the Government of Equatoriana and Mediterraneo are unforeseeable. The changes occur so dramatically [*Commentary CISG 3 b*] that the present events could not reasonably have been taken into account by CLAIMANT and also beyond CLAIMANT's control.

70. In conclusion, the additional tariffs imposed by Equatoriana are hardship under the UNIDROIT Principles and therefore applied to Clause 12 of the contract.

2. While RESPONDENT and CLAIMANT agreed on a DDP-delivery, it had been clear that CLAIMANT should not bear all risks associated with such delivery.

71. Though RESPONDENT and CLAIMANT agreed on a DDP-delivery [*Cl. Ex. 5*], the DDP term in the contract does not share the same meaning as the DDP term in the Incoterms® rules. As stated clearly in the Incoterms® rules, if Parties want the Incoterms® 2010 rules to apply to the contact, words such as "DDP Equatoriana Port Incoterms® 2010" should be made clear in the contract [*Incoterms® 2010 rules introduction*]. Without such an explicit reference, it cannot be concluded that the DDP term in the contract obliges CLAIMANT to bear all the costs and risks involved in bringing the goods to the place of destination as in the context of Incoterms® 2010.

72. On the contrary, RESPONDENT insisted on DDP delivery because of "the urgency of the delivery and CLAIMANT much greater experience in the shipment of frozen semen including the necessary export and import documentation" [*Cl. Ex. 3*]. CLAIMANT also made it clear that it will not take over any further risks associated with changes in the delivery terms, in particular, not those associated with changes in customs regulation or import restrictions [*Cl. Ex. 4*]. The risks of changes in customs regulation or import restrictions, which include risks of additional tariffs are covered under the hardship clause and should not be assumed by CLAIMANT. Therefore, while CLAIMANT and RESPONDENT had agreed on the DDP-delivery, CLAIMANT does not burden the risks of additional tariffs arising from the changes in customs regulation or import restrictions.

B. Clause 12 provides for the remedy, i.e. adaptation by the Arbitral Tribunal.

73. RESPONDENT wrongly alleges that Clause 12 does not provide for remedy. In the following, it will be established that the real intent of the Parties is that clause 12 provides for adaptation by the Arbitral Tribunal **(1)**

1. It is the real intent of both parties that Clause 12 provides for the adaptation by the Arbitral Tribunal.

74. It can be inferred from the following facts that Clause 12 provides for the adaptation by the Arbitral Tribunal:

75. First, according to the witness statement of Julie Napravnik, CLAIMANT and RESPONDENT agreed to include an express reference into the hardship clause or arbitration clause to ensure that arbitrators can adapt the contract if the Parties could not agree on an amendment. [*Cl. Ex. 5*]. The note of Mr. Antley that he wanted to discuss "the connection of hardship clause with arbitration clause" with Ms Napravnik in the next round can also evidence this [*Re.Ex.3*].

76. Second, the reason why sale agreement did not include any express adaptation clause is that the employees on both sides who finalized the contract had not previously been involved in the negotiation and the drafting of the contract [*ANoA. para. 8*]. They admitted that they were not aware of intent of Mr. Antley and Ms. Napravnik [*Re. Ex. 3*].

77. Third, from a legal point of view, it is not necessary to include an express reference of adaptation clause into the hardship clause or the arbitration clause

78. CLAIMANT relied on RESPONDENT's promise to bear the additional cost and delivered the 50 doses before an agreement of price had been reached. RESPONDENT, however, refused to pay any additional amount for the tariffs and did not want to have further cooperation with CLAIMANT [*Cl. Ex. 8*]. Besides, RESPONDENT planned at the very beginning to resell a considerable amount of the 100 doses at an increased price to other breeders to whom CLAIMANT might not have sold directly [*Cl.Ex.8*]. It is undisputed that CLAIMANT's interest is severely affected by RESPONDENT's conduct. Therefore, according to the principle of good faith, CLAIMANT was entitled to the payment of the adaptation price under clause 12 of the contract.

CONCLUSION FOR PART III

79. The Parties agreed that the additional tariffs imposed by the Government of Equatoriana apply to the hardship clause of the contract and remedy, i.e. adaptation by the Arbitral Tribunal, should be provided. Under the subjective and objective test of interpretation, clause 12 covers all unforeseen events making the contract more onerous, which include the present additional tariffs. Though CLAIMANT agreed on the DDP-delivery, it had been clear that CLAIMANT should not bear all risks associated with such delivery. The context of the DDP-delivery term is not the same as the DDP term under the Incoterms rules. Moreover, it is the intent of the Parties that clause 12 provides for adaptation by the Arbitral Tribunal.

Ⅳ. CLAIMANT IS ENTITLED TO THE PAYMENTOF US$1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTION OF THE PRICE UNDER THE CISG.

80. Since the Parties, Equatoriana and Mediterraneo are both Contracting States of the CISG, according to CISG (1) (a), it is undisputable that the Convention applies to the contract of sales of goods between parties in the current case.

81. In the present case, it is CLAIMANT's position that the impediment under 79(1) CISG covers the economic hardship [A]. As CISG does not expressly mention hardship, UNIDROIT Principle can thus play a gap-filling role under Art.7 CISG, so the remedy of an impediment should be an adaptation of the price of the goods [B]. Moreover, the request of adaptation of the price is reasonable under general principle of CISG7[C].

A. The impediment under 79(1) CISG covers the economic hardship

82. As the CISG does not expressly mention hardship, in the opinion of many scholars, Article 79 is vague and imprecise, hence leaving room for a broad interpretation of its terminologies, such as "impediment". [*Rolf Kofod §3.1*]

83. A change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("hardship"), may qualify as an "impediment" under Article 79(1), the language of Article 79 does not expressly equate the term "impediment" with an event that makes performance absolutely impossible. Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79 [*CISG Advisory Council Opinion No 7, para. 3.1*].

84. Since hardship applies in cases where the performance of a party has not become impossible, but the grounds on which the contract was formed has changed dramatically and made the performance of a party onerous, so it fits in the scenario of impediment.

85. Under this circumstance, the economic hardship can be invoked as an exemption from liability, thus, the impediment under 79(1) CISG covers economic hardship.

B. The remedy of an impediment should be an adaptation of the price of the goods.

1. Principles in UNIDROIT should be invoked to play the gap-filling role according to CISG 7(2).

86. The word "gap" in this context means that a matter is governed but not expressly settled by the CISG, thereby leaving certain questions unresolved, the gap in Article79 CISG lies in there is no specific remedy in the situations of hardship [*Rolf Kofod §3.2.5*].

87. Pursuant to Article 7(2), “questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”

88. By virtue of this provision, in view of the narrow scope of Article 79 and the

uncertainties surrounding it, gaps in the CISG must first and foremost be filled by general principles on which the CISG is based.

89. If it is possible to determine that a provision of the CISG contains a gap and a certain issue is not expressly dealt with in the CISG, the UNIDROIT Principles can be expressed as a possible basis for supplementing this provision [*Joern Rimke p.237*].
90. In Schafom International BV v. Lorraine Tubes S.A.S, the seller faced a situation that the price of steel unforeseeably increased with 70% after the contract had been concluded. The Belgian Supreme Court resorted to the UNIDROIT Principles and concluded that the unforeseen increases in the price of steel "gave rise to a serious imbalance" of the contract [*Scafom International BV v. Lorraine Tubes S.A.S.*].

91. Furthermore, in this case, the general contract law Equatotiana and Mediterraneo is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts. Therefore, Principles in UNIDROIT can be invoked to play the gap-filling role according to CISG 7(2).

2. The increased tariff constitutes a hardship according to UNIDROIT Principles 6.2.2

(1). The event of tariff increase fundamentally alters the equilibrium of the contract.

92. According to the definition of "hardship" in UNIDROIT Principles 6.2.2, it follows that hardship may not be invoked unless the alteration of the equilibrium of the contract is fundamental. In the present case, CLAIMANT should have a profit margin of 5 per cent for the transaction but now makes a loss of 25 per cent due to the imposition of the new tariff of 30 per cent [*NoA.para.18*]. Furthermore, Considering that CLAMANT has been financially difficult for two years, so it was impossible for CLAIMANT to shoulder the additional 30% tariff which had to be paid immediately [*Cl.Ex.8*].So, as a result of tariff increase, the performance of CLAIMANT has become much more onerous and difficult that the cost of CLAIMANT's performance has increased and the value of CLAIMANT's performance has diminished, while the interest of RESPONDENT would not be adversely affected. Since the Parties did not share the cost of tariff increase, CLAIMANT had to bear the entire cost by itself. Therefore, the original contract equilibrium is tremendously disturbed.

(2). The event of tariff increase meets the requirements of "hardship" according to UNIDROIT Principles 6.2.2

93. As the occurrence of the increase tariff is consistent with the definition of hardship in the Principles, the additional criteria for an event to constitute hardship are:(1) the events occur or become known after the conclusion of the contract; (b) the evets could not reasonably have been taken into account by the disadvantaged party; (c) the events are beyond the control of the disadvantaged party; (d) the risks must not have been assumed by the disadvantaged party.

a. The CLAIMANT can demonstrate that "the events occur or become known to the disadvantaged party after the conclusion of the contract".

94. In the present case, it was clear that the FRZOEN SEMEN SALES AGREEMENT was concluded on 6 May 2017 [*Cl.Ex.5*], but the new tariff policy which brought surprise to everyone was proposed in January 2018.CLAIMANT was informed of the newly imposed tariffs on the morning of 20 January 2018[*Pro.Ord.2. para26*]. Therefore, it's apparent that the tariff increase occurred after the conclusion of the contract.

b. The CLAIMANT can demonstrate that "the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract."

95. First, Meditterraneo have hardly ever adopted the increase tariff to protect their farmers on the foreign agricultural goods [*Pro.Ord.2.para.21*]. Although the new president Mr. Bouckaert had announced that he wanted to protect the Mediterranrean agricultural sector, a 25 per cent tariff had neither been part of any strategy papers released earlier by the new President nor of the election manifesto [*NoA, para. 9*]. The real reason for increase tariff occurred was that the new president Mr. Bouckaert was influenced by the 'superminister' for agriculture who is an ardent critic of free trade after his successful election [*Pro.Ord2, para.23*].

96. Second, Equatoriana has always been one of the biggest supporters of the existing system of free trade, and the Equatorianian government had always tried to resolve trade disputes amicably and had not relied on retaliatory measures against trade restrictions by other countries [*Cl.Ex.2*].

97. Third, racehorse breeding is generally categorized differently from pigs, sheep, or cattle. It is a big surprise for the contracting parties that the new tariffs-regime on the agricultural products including the frozen semen [*NoA, para.11*]. It was until the

morning of 20 January 2018 that Ms. Napravnik knew that the tariffs applied to the frozen semen, but the sales agreement was concluded on 6 May 2017[*Pro.Ord.2.para.26*].

98. Therefore, for a reasonable person in the shoes of the CLAIMANT, under the actual circumstances at the time of the conclusion of the contract and considering trade practices, it could only be understood that the tariff increase was not reasonably foreseeable and could not reasonably be expected to have taken into account.

c. The CLAIMANT can demonstrate that "the events are beyond the control of the disadvantaged party."

99. In the case at hand, after newly elected President in Mediterraneo announced 25per cent tariffs on agricultural goods from Equatoriana, the Equatoriana government retaliated by imposing 30 per cent tariffs on selected products from Meditterrsneo including on animal semen. As tariff adjustment is implemented by the governments and can therefore be classified as state interventions. State interventions preventing performance generally lie outside of the parties' sphere of control [*Schlechtriem &Schwenzer p1683*], so the CLAIMANT had no power to control government's decision on tariff increase.

d. The CLAIMANT can demonstrate that "the risk of the events was not assumed by the disadvantaged party."

100. In the present case, RESPONDENT proposed to use DDP delivery given that CLAIMANT has much greater experience in the shipment of frozen semen including the necessary export and import documentation [*Cl.Ex.3*].CLAIMANT accepted the DDP delivery and stressed that it would not burden any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restriction [*Cl.Ex.4*].

101. In various countries abbreviations such as Fob, Cif, etc., do not always have the meaning ascribed to them by Incoterms, if the parties have not referred to INCOTERMS, they may have established a practice between them of giving a specific local interpretation to CIF clauses, which diverges from the international meaning of CIF under INCOTERMS [*Leonardo Graffi §4.1&4.2, Schlechtriem/Schwenzer, Art. 9 para.27*].

102. Likewise, in this case, the Parties' conduct can only lead to the conclusion that they

agreed to give a special interpretation to DDP clauses as well as modified the DDP to exempt CLAIMANT from any further risk associated with delivery terms.

3. According to Art.6.2.3 UNIDROIT, CLAIMANT is entitled to request renegotiation and contract adaptation by the tribunal.

103. UNIDROIT Principles set the standard for the disadvantaged party to seek for an adaptation: (a) the request shall be made without undue delay and shall indicate the grounds on which it is based; (b) the request for renegotiation does not in itself entitle the disadvantaged party to withhold performance; (c) Upon failure to reach agreement within a reasonable time either party may resort to the court; (d) If the court finds hardship it may, if reasonable, adapt the contract with a view to restoring its equilibrium.

104. In the current case, as the event of tariff increase constitutes hardship, under UNIDROIT Principles 6.2.3, if the hardship claim is justified, the other party is obligated to negotiate in good faith to adapt the contract to alleviate the burden.

105. First, Art.6.2.3 (1) provides the mechanism for the disadvantaged party to request renegotiations without due delay. In point of fact, after being told Equatoriana's newly imposed tariffs for agricultural products, CLAIMANT emailed Mr. Shoemaker immediately, and the email clearly stated that the imposed tariffs of 30% made this shipment 30% more expensive [*Cl. Ex. 7*].So the request CLAIMANT made was explicit enough. On January 21, they further discussed the issue and Mr. Shoemaker 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.4*]. Therefore, CLAMIANT had indicated the grounds on which it is based, and the request made by CLAIMANT was without "undue delay".

106. Additionally, Art.6.2.3 (2) indicates that the disadvantaged party should not withhold the performance. In this case, CLAIMANT believed that RESPONDENT accepted their position and agreed to bear the increased tariff. Due to their urgent need for the doses, CLAIMANT paid the 30% in tariffs and delivered the last doses relying on RESPONDENT's promise that a solution would be found and that they were interested in a long-term relationship. Thus, CLAIMANT can demonstrate that it had fully performed the contractual delivery obligation.

107. Furthermore, RESPONDENT's CEO stopped the negotiations and refused to pay

any additional amount for the tariffs, announcing that they were no longer interested in a further cooperation with CLAIMANT on 12 February 2018[*Cl. Ex. 8*]. So the parties failed to reach an agreement on the adaptation of the contract to the changed circumstances within a reasonable time.

108. Upon the failure to reach an agreement, para.(3) of 6.2.3 UNIDROIT authorizes either party to resort to the tribunal. The UNIDROIT PRINCIPLES provide the hardship for the parties to renegotiate the terms of the contract where equilibrium of the contract has been fundamentally altered [*Bridge*]. As the tariff increase is a scenario of hardship according to 6.2.2 UNIDROIT, it is reasonable for CLAIMANT to request an additional amount of US $1,250,000 which is 25 per cent of the price.

109. Based on the foregoing, the tribunal can adapt the contract with a view to restoring its equilibrium according to para (4) of this article.

C. The request of adaptation of the price is reasonable under general principle of CISG7.

110. Good faith has also been found to be a general principle of the Convention. Besides, estoppel is also one of the general principles upon which the Convention is based— specifically, a manifestation of the principle of good faith [*Case Law Digest p.43*].

111. Good faith is one of the general principles of the CISG, and applies not only to interpretative issues of the Convention but also to conduct of the parties during performance of the contract for sale [*Martina Perzelova para. 38*].

112. Article 1.7 of the UNIDROIT Principles requires parties to "act in accordance with good faith and fair dealing in international trade" and prohibits the parties from limiting or excluding the duty in their contracts. However, the UNIDROIT Principles are meant to be a culmination of international contract law and should assist one in interpreting the CISG. The UNIDROIT Principles, where they apply, also specifically extend the duty of good faith to pre-contractual negotiations and require parties to negotiate in good faith [*Paul J. Powers p.349*].

113. In the present case, firstly, CLAIMANT used clear wording in the letter accompanying its Offer which stating that the froze semen may not be re-sold to

third parties without their express written consent, RESPONDENT did not object to the request at that time. However, after the final shipment had been made, CLAIMANT found out that RESPONDENT acted contrary to it since they had sold 15 doses to 10 different breeders [*Pro.Ord.2.para.20*]. The fees charged for natural coverings by Nijinsky III are around 110,000 USD with a profit margin of 15% which is above the ordinary profit margin of 10% for other stallions [*Pro.Ord.2.para.19*]. In light of the huge amount RESPONDENT ordered, they were bound to gain enormous benefits from resale, so it is reasonable to deduce that RESPONDENT planned from the beginning to resell a considerable amount of the 100 doses to other breeders, and that intention can only be inferred as deliberate.

114. Secondly, CLAIMANT mentioned in the email that "Normally, we would not sell frozen semen of our racehorse stallions and definitely not such an amount of semen to a single breeder for obvious reason"[*Cl.Ex.2*]. Given the scarcity and superiority nature of racehorse semen, any reasonable business in the place of CLAIMANT would not allow it to be wide spread, so resale is bound to cause immense damage to the interest of CLAIMANT.

115. In view of the above, it's apparent that RESPONDENT didn't perform the duty of good faith to pre-contractual negotiations, but behaved in bad faith. Thus, CLAIMANT's request of adaptation of the price is reasonable under CISG 7(1) &1.7 UNIDROIT Principles.

116. Furthermore, from another perspective of CISG7， Promissory estoppel is also a general principle which the article of CISG does not clearly define. The US court held that it declined to extend the preemptive force of the CISG to this claim, because promissory estoppel is traditionally governed by state law [*Time Warner Cable*]. Besides, the US court also held that CISG utilize a "modified" version of American promissory estoppel which did not require foreseeability or detrimental reliance, so the CISG does not preempt the claim [*Caterpillar, Inc. v. UsinorIndusteel*].

117. In the case at hand, first, the RESPONDENT made a clear promise that a solution will be found after being informed of the additional 30% tariff. According to Art.8 (3) of the CISG, all relevant circumstances including the negotiations and subsequent conduct should be considered to determine the intent of a party. The

Respondent emphasized their interest in a long-term relationship and urgent demand on the unshipped doses [*Cl.Ex.8*].Thus, the promise could be under no circumstances interpreted as anything other than providing additional payment or fixing the contract price to overcome the tariff problem and continue to enforce the fixed contract.

118. Second, the CLAIMANT initiated the third shipment based on their reliance. The CLAIMANT was convinced that the RESPONDANT would find a solution given their interest in a long-term relationship [*Cl.Ex.8*]. Thus, the final shipment was initiated by Mrs. Julie Napravnik, based on his reasonable and foreseeable reliance on RESPENDANT's reliance.

119. Third, the injury was the extra 30% tariff paid by the CLAIMANT. It is a result of the reliance beyond his contract obligation. Thus, the RESPONDENT should be responsible to recognize the adaption of the contract under promissory estoppel.

120. In light of the above, CLAIMANT's request of adaptation of the price is reasonable under CISG7.

CONCLUSION FOR PART Ⅳ

121. CLAIMANT is entitled to the payment of US$1,250,000 or any other amount resulting from an adaptation of the price under the CISG. First, as the Parties explicitly chose to be bound by CISG, and the impediment under 79(1) CISG covers the economic hardship, the UNIDROIT Principles can supplement the gap of Art.79 CISG. Second, the remedy of an impediment should be an adaptation of the price of the goods. Third, the request of adaptation of the price is reasonable under general principle of CISG7.

REQUEST FOR RELIEF

CLAIMANT respectfully requests the Tribunal to find that:

1. The Tribunal has the jurisdiction and/or the power under the arbitration clause to adapt the contract;
2. CLAIMANT should be entitled to submit the evidence assumed to be obtained through a breach of confidentiality agreement or a hack of RESPONDENT's computer system;

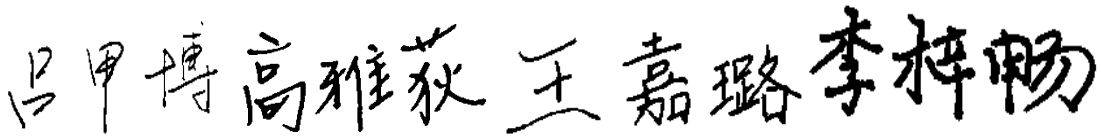
3. CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price under clause 12 of the contract;
4. Alternatively, CLAIMANT is entitled to the payment resulting from an adaptation of the price under the CISG.

CERTIFICATE

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

Shanghai LiXin University of Finance and Accounting & Legalin
6 December 2018

Xiang YuanTong Liu YingXin Zhang YiZi Huang QingXin



Lv JiaBo Gao YaDi Wang Jia Lu Li ZiChang

Huang YiDan Tan Hui Qian ZeJia Wei LeTian