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INTERNATIONAL COMMERCIAL ARBITRATION MOOT

March 31- April 7 2019

Hong Kong

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**

Kyoto, Japan

DOSHISHA UNIVERSITY

IFAN CHEN, HAYATO TOKUDA, HIROTO AYA, SYNTHIA JULIA BASTRON,
MASAKI KIRIKIHIRA, TAICHI ISOGAI, YUKI OKAMOTO

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TABLE OF ABBREVIATIONS

Art.	Article
CL Memo	Memorandum for CLAIMANT
i.e.	id est; that is (Latin)
ibid	ibidem; in the same place (Latin)
No.	Number
p./pp.	page/pages
para./paras.	paragraph/paragraphs
Proc. Ord.	Procedural Order
Record	The Problem
Sales Agreement	FROZEN SEMEN SALES AGREEMENT
The Rules (Vienna)/ The Rules (Hong Kong)	The Rules of Vis Moot/ The Rules of Vis East
v	versus

TABLE OF LEGAL TEXTS

CISG	United Nations Convention on Contracts for the International Sale of Goods

HKIAC Rules	Hong Kong International Arbitration Centre administered Arbitration Rules
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ULIS	Uniform Law on the International Sale of Goods
Uncitral Model Law	UNCITRAL MODEL LAW on international commercial Arbitraion 1985 with amendments as adopted in 2006
Unidroit Principles	UNIDROIT Principles of International Commercial Contracts 2016
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

CASES

Belgium

Bulbank case	*Bulgarian Foreign Trade Bank Ltd v Al Trade Finance Inc.*, Case No. T1881–99, Swedish Supreme Court, 27 October 2000, (2001) XXVI YBCA 291	*15*
Scafom	Belgium 19 June 2009 Court of Cassation[SC](Scafom International BV v. Lorraine Tubes S.A.S.)	*102*

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FirstLink v GT	F*irstlink Investment Corp Ltd v GT Payment Pte Ltd*, Singapore High Court 12 2014	32,33

Sweden

Matermaco v PPM Cranes	*Matermaco SA v PPM Cranes Inc.*, Brussels Tribunal de Commerce, 20 September 1999, (2000) XXV YBCA 673	*22*

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Sulamerica	Sulamérica Cia Nacional de Seguros S.A. et al. v. Enesa Engenharia S.A. et al., [2012], EWCA, Civ 638	17, 19, 24, 25 26, 27
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ABITRAL AWARDS

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COMMENTARIES AND OTHER PAPERS

Flechtner	Harry M. Flechtner, The Exemption Provisions of the Sales Convention, Including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court, Year Lix(2011) no.3 pp84-101	103
Glick/Venkatesan	Ian Glick and Niranjan Venkatesan, Chapter 9: Chossing the law Governing the Arbitration Agreement, in Neil Kaplan and Michael J. Moster (Eds), Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles, Kluwer Law International, 2018 15	27, 38
Huber	Prof. Dr. Peter Huber, Internationales Handelsrecht, Sellier, European Law Publishers, 2006	72
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Rimke	Joern Rimke, the Convention on Contracts for the International Sale of Goods, Kluwer, 1999-2000	97
Pilkov	Konstantin Pilkov,evidence in international arbitration criteria for admission and evaluation, 2016	53, 62

Petsche	Dr. Markus Petsche, Vindobona Journal of International Commercial Law & Arbitration, 2015	99
Reto	Reto Marghitola,*Document Production in International Arbitration,*Kluwer Law International, 2015	53, 58
Michael/Katie	Michael Hwang and Katie Chung, Defining the Indefinable:Practical Problems of Confidentiality in Arbitration , Journal of International Arbitration pp 609-645 ,2009	67

STATEMENTS OF FACTS

1. CLAIMANT, Phar Lap Allevamento (Phar Lap), is a company registered and located in Capital City, Mediterraneo, which operates Mediterraneo's oldest and most renown stud farm, covering all areas of the equestrian sport.

2. 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.

3. On 21 March 2017, CLAIMANT contacted RESPONDENT, and with email of 24 March 2017 CLAIMANT offered RESPONDENT 100 doses of Nijinsky's frozen semen. CLAIMANT and RESPONDENT both agreed on hardship clause and also on an acceptable choice of law and arbitration clause. However, before they were able to finalize the agreement, the two main negotiators were injured in an accident and were not able to finalize the sales agreement which was signed on 6 May 2017. In this agreement, both parties agreed the main contract is governed by the law of Mediterraneo, but in the arbitration clause, there is no choice of governing law. Furthermore, the seat of arbitration shall be Danubia.

4. CLAIMANT and RESPONDENT agreed on three shipments in total and CLAIMANT sent the first shipment (containing 25 doses) on 20 May 2017 and the second shipment (containing 25 doses) was made on 3 October 2017. However, two months before the last shipment was made, Mediterraneo's new President announced 25% tariffs on agricultural products. This was a total surprise for everyone. This announcement was not the end; a bigger surprise came after that, when Equatorian government imposed 30% tariffs on selected products from RESPONDENT including animal semen.

5. CLAIMANT and RESPONDENT started to negotiate immediately but RESPONDENT has made clear already during the contract negotiation that for its planning timely delivery was extremely important,and appeared to generally accept the need for a price increase. In light of above facts and taking into account that

RESPONDANT had created the impression of the general need for a price adaption, CLAIMANT delivered the remaining 50 doses on 30 January 2018 before RESPONDENT actually agreed on the new increased price of the semen.

6. In addition, through the proceedings of arbitration, CLAIMANT informed the Arbitral Tribunal that CLAIMANT received reliable information about another arbitration under the HKIAC-Rules which is demerit for RESPONDENT in this arbitration on 2 October 2018. Against CLAIMANT's allegation, RESPONDENT claimed that the submission of materials from other arbitration occurred in violation of contractual and statutory confidentiality obligations, so such evidence is clearly not admissable in this arbitration, 3 October 2018. Moreover, at same time, RESPONDENT claimed that the evidence CLAIMANT will submit would have been obtained by illegal means and should not be admitted in the arbitration, and this should apply irrespective of whether or not CLAIMANT had any involvement in obtaining the document or whether or not available elsewhere in the worldwide web, too.

SUMARRY OF ARGUMENTS

7. **ISSUE I**: The arbitration clause is governed by the law of Danubia, because [A] under the separability doctrine the governing law of the main contract does not extend to the arbitration agreement, and the law of the seat of arbitration is the law which governs the arbitration agreement. [a] CLAIMANT's understanding of the separability doctrine is not correct. [b] The law of the seat of the arbitration governs the arbitration agreement. Further, [B] even if the main contract and the arbitration agreement are not separate, the conclusion is the same. Moreover, [C] under the law of Danubia, the arbitral tribunal does not have the power to adapt the contract, and the conclusion is same even if the arbitration clause is governed by the law of Meditteraneo. [a] Under the law of Danubia, the arbitration agreement does not authorize the arbitral tribunal to adapt the contract. [b] The conclusion is same even if the arbitration clause is governed by the law of Meditteraneo

8. **ISSUE II**: CLAIMANT should not be entitled to submit the evidence. [A] The tribunal should exclude the Partial Interim Award as evidence, due to lack of sufficient relevance to the case or materiality to its outcome. [B] Even if the tribunal thinks the evidence has sufficient relevance to the case or materiality to its outcome, the evidence is under the protection of the other arbitration's confidentiality, and therefore the tribunal should still exclude the evidence based on IBA Rule 9(2)(b).

9. **ISSUE III**: CLAIMANT is not entitled to the payment of US$1,250,000 or any other amount resulting from an adaptation of the price. [A] CLAIMANT cannot rely on the clause 12 of the Sales Agreement to request the payment of US$1,250,000. [a] According to the Art.8 CISG, both parties agreed with the narrow hardship clause. [b] RESPONDENT did not violate the principle of good faith. [B] CLAIMANT cannot rely on the CISG, either. [a] Art.79 CISG itself does not stipulate the hardship. [b] Art.79 CISG cannot be supplemented by Art.6.2.2 UNIDROIT Principles through the application of Art.7(2) CISG.

Issue I. The arbitration clause is governed by the law of Danubia, under which the arbitral tribunal does not have the power to adapt the contract.

10. The arbitration agreement is governed by the law of Danubia, because under the separability doctrine the governing law of the main contract does not extend to the arbitration agreement, and the law of the seat of arbitration is the law which governs the arbitration agreement [A]. Further, even if the main contract and the arbitration agreement are not separate, the conclusion is the same [B]. Hence, under the law of Danubia, the arbitral tribunal does not have the power to adapt the contract, and the conclusion is same even if the arbitration clause is governed by the law of Meditteraneo [C].

A. The main contract and the arbitration agreement are separate, and the law of the seat is the governing law of the arbitration agreement.

11. CLAIMANT is underestimating the doctrine of separability, saying that "[s]eparability does not provide for a separate and distinct agreement in and of itself from the time the main contract is formed. In this sense, the arbitration agreement is separable, not separate [CL memo, para. 24]". However, this understanding of the separability doctrine is not correct [a], and the law of the seat of the arbitration governs the arbitration agreement [b].

a. The main contract and the arbitration agreement are separate.

12. As noted above, CLAIMANT's understanding of the separability doctrine is not appropriate. Quite the contrary, the main contract and the arbitration agreement must be treated separately, and therefore the arbitration agreement is not governed by the governing law of the main contract.

13. As for the doctrine of separability, a commentator correctly observes that " [i]t is part of the very alphabet of arbitration law' that an arbitration agreement, even if (as is usually the case) it is contained in an arbitration clause within the body of a larger contract, forms a separate and distinct agreement. Accordingly its validity, scope and interpretation falls to be considered separately from that of the main contract […] [Dicey/Morris/Collins, para. 16-011]". Further, the commentator also states that "[i]t follows from the autonomy of the arbitration agreement that the law applicable to it must be determined separately from that applicable to the main contract [ibid, para. 16-012]".

14. Judicial authorities also support this position. In the Bulbank case, in which the contract containing the arbitration clause expressed a choice of Austrian law as to the main contract, the Supreme Court of Sweden held that "no particular provision concerning the applicable law for the arbitration agreement itself was indicated [by the parties]. In such circumstances the issue of the validity of the arbitration clause should be determined in accordance with the law of the state in which the arbitration proceedings have taken place, that is to say, Swedish law". By stating that, "[t]he Supreme Court thus ignored the parties' choice of Austrian law to govern the

underlying contract, considering that the arbitration clause ought to be treated as a separate agreement subject to a separate law [Redfern/Hunter, para. 3.25]".

15. Following the view of these authorities, it can be said that the main contract and arbitration agreement are separate, and thus the interpretation of the latter is considered to be separate from that of the main contract.

b. The law of the seat is the governing law of the arbitration agreement.

16. The arbitration agreement is governed by the law of the seat, i.e., the law of Danubia, which is supported by the New York Convention [i]. Even if the arbitral tribunal considered that parties' choice of the governing law of the arbitration agreement in the sense of New York Convention included their implied choice, or, as CLAIMANT alleges, followed Sulamerica's three-stage test to identify the parties' implied choice, the governing law of the arbitration agreement remains the law of Danubia, because that is what the parties intended impliedly. [ii].

i. The New York Convention leads to the application of the law of Danubia to the arbitration agreement.

17. When determining the governing law of the arbitration agreement, CLAIMANT is underestimating or overlooking the importance of the New York Convention, which should be the basis for the determination of the governing law of the arbitration agreement.

18. In the present case, as CLAIMANT correctly points out, the parties have made no express choice for the governing law of the arbitration clause [CL memo, para. 7]. Further, none of the relevant black letter laws directly deals with the issue of the determination of the governing law of the arbitration agreement, when there is no express choice by the parties. In such situation, CLAIMANT is proposing to follow the Sulamerica's three-stage test [CL memo, para. 14]. However, the arbitral tribunal should first look at the New York Convention, because the relevant countries in the present case, i.e., Danubia, Mediterraneo and Equatoriana are all contracting states to

the New York Convention [The Rules (Vienna), para. 24/ The Rules (Hong Kong), para. 20].

19. Art. V(1)(a) of the New York Convention stipulates that the agreement under which the award is made must be valid "under the law to which the parties have subjected it", or, failing any indication thereon, "under the law of the country where the award was made", which "will be the law of the seat of the arbitration [Redfern/Hunter, para. 3.14]".

20. Although this is a provision relating to the enforcement of the arbitral award, it should be applied to the determination of the governing law of the arbitration agreement by analogy. This position is supported by an arbitral award. In Interim Award in ICC Case No. 6149, the tribunal reasoned that "[i]f […] the proper law of the three arbitration agreements could not necessarily be derived from the proper law of the three sales contracts themselves, the only other rule of conflicts of laws whose application would seem appropriate […] would be the application of the law where the arbitration takes place and where the award is rendered. This conclusion would be supported also by Art. V(1)(a) of the [New York Convention which the stipulates that the award must be valid under the law of the seat of arbitration, if the parties had not determined the governing law of the arbitration agreement in the contract]".

21. Further, judicial authorities also support this approach. In Matermaco v PPM Cranes, the law of the place of arbitration, Belgium, was applied to questions of arbitrability despite the fact that the laws of the State of Wisconsin had been chosen by the parties to apply to the underlying contract. In the Belgian case, the Brussels Tribunal de Commerce stated that "a consistent interpretation of the [New York] Convention require that the arbitrable nature of the dispute be determined, under the said Articles II and V, under the same law, that is, the *lex fori*. Hence it is according to Belgian law that the arbitrable nature of the present dispute must be determined".

22. In the present case, the parties did not choose the governing law of the arbitration agreement in the Sales Agreement [Record, pp. 13-14]. In other words, there is no express choice of law to which the parties subject the arbitration agreement. Thus, following the default rule of the Art. V (1)(a) of the New York Convention, the law of

the seat of arbitration, i.e., the law of Danubia, should govern the arbitration agreement.

ii. Choice of the seat of arbitration is the parties' implied choice for the governing law of the arbitration agreement.

23. Even if the arbitral tribunal considered that the choice of the governing law of the arbitration agreement in the sense of New York Convention includes an implicit choice, or, even if the arbitral tribunal, as CLAIMNT argues, followed Sulamerica's three-stage test to find the parties' implied intention instead of applying the New York Convention, the law of Danubia governs the arbitration agreement, because that is what the parties intended.

24. In determining the parties' implied intention as to the governing law of the arbitration agreement, CLAIMANT is relying on the Sulamerica's three-stage test, arguing that "'in the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate', which in this case is the law of [M]editerraneo [CL memo, para. 17]".

25. However, the position of Sulamerica that the governing law of the main contract is also likely to govern the arbitration agreement, with respect, is wrong. Hence, CLAIMANT's allegation that the "law governing the contract i.e. the law of mediterraneo is said to govern the arbitration agreement as well", is not correct.

26. As for the Sulamerica's position, in the words of a commentator, "it is respectfully submitted that the first position in Sulamerica - that an express choice of law for the [main] contract is likely to be an implied choice of law for the arbitration agreement - is wrong: on the contrary, the choice of seat is likely to be a choice of law for the arbitration agreement [Glick/Venkatesan, p. 146]", for the following three reasons.

27. First, "the considerations which justify treating a choice of seat as a choice of law for the arbitration agreement are not in any way undermined by the fact that the [main] contract contains an express choice-of-law clause. For example, the point made above

– that aspects of the arbitration agreement will be governed by the law of the seat in any event – holds good even if the proper law of the [main] contract is chosen expressly rather than impliedly. Certain aspects of an arbitration agreement in a [main] contract expressly governed by New York law will nevertheless be governed by English law if the parties choose to arbitrate in London. To return to the example given we gave above, if the arbitration agreement provides for arbitration in London and also that the parties will also bear their own costs of the arbitration in any event, the latter agreement may be invalid under the English Act even if it would have been valid under New York law, and the [main] contract is expressly governed by New York law. The parties are therefore not any less likely to have intended the entirety of the arbitration agreement to be governed by the same law, i.e. the law of the seat [ibid, 145]".

28. Second, "an ad hoc arbitration agreement – that is to say, a contract which contains nothing but an arbitration agreement – is likely to be governed by the law of the seat even if the disputes it submits to arbitration are disputes arising out of a pre-existing contract which contains an express choice-of-law clause. So if, for example, the parties in 2015 enter into a contract expressly governed by New York law but without any arbitration clause, and in 2017 enter into a separate self-contained agreement to submit all disputes arising out of the 2015 contract to arbitration in London, the 2017 contract would, we submit, almost certainly be found to be governed by English law, not New York law. But it would be very odd if the result is different merely because, instead of making the arbitration agreement at a different time (2017) or in a different document (i.e., as a self-contained contract) they happened to make it at the same time as they made the [main] contract. The choice of seat is a choice of law for the arbitration agreement in both cases and for the same reasons [ibid, p. 145]

29. Third, "in practice, the commercial purpose of choosing a neutral seat of arbitration, as parties often do, is generally to insulate the dispute resolution mechanism from the national law of either party. That may be the case even if, and indeed precisely because, the [main] contract containing the substantive commercial obligations of the parties are not governed by a neutral law. In C v. D, for example, Longmore LJ

observed that the Bermuda Form, which expressly provides that New York law is the [governing] law of the insurance policy but requires parties to arbitrate in London, emerged in the insurance market principally as a way of moving disputes out of the United States court system while ensuring that the substantive obligations of the insurer were governed by New York law. Against that background, it seems more likely that the parties would have intended disputes about their dispute resolution mechanism – e.g., the validity of the arbitration agreement or its construction – to also be governed by the law of the (neutral) seat [ibid, p. 145]".

30. Further, there are a number of authorities which are in favor of the law of the seat. In C v D and XL Insurance Ltd v Owens Corning, "the relevant court recognized that the choice of London as the seat of the arbitration implied a choice of English law as the law governing the arbitration agreement [Redfern/Hunter, p. 161]". Moreover, a commentator observes that "the choice of the seat is to be regarded as an implied choice of the law governing the contract [Dicey/Morris/Collins, para. 16-019]".

31. CLAIMANT admits that in the FirstLink v. GT the court held that the presumption is that the law of the seat should be the governing law of the arbitration agreement, rather than the parties' chosen substantive governing law [CL memo, para. 20]. Nevertheless, CLAIMANT disregards this decision, arguing that the position of the court in the FirstLink v. GT was disagreed later by the same Singapore High court in BCY v. BCZ.

32. However, as one commentator observes, "[w]hile the approach in Firstlink has since been disapproved in *BCY v. BCZ*, both decisions, and the subsequent decisions which follow the latter, are first-instance decisions of the Singapore High Court. Until the Singapore Court of Appeal has the opportunity to provide the final word on this issue, the binding position on this matter may be far from settled as disputes relating to the law governing an arbitration agreement appear to be rather uncommon in Singapore [Abraham/Amirudin/Chuen, p. 78]." Because, as the commentator states, the BCY v BCZ has not achieved the binding position, the position in FirstLink v GT should not be underestimated.

33. In the present case, although there was no express choice for the governing law of the arbitration agreement, the parties expressly chose Danubia as the seat of arbitration [Record, pp13-14].

34. It was CLAIMANT that proposed arbitration in Danubia, stating in its email that "[CLAIMANT] has an internal policy according to which consent to a contract […] providing for dispute resolution in the country of the counterparty requires special approval […]. It would, however, be possible to agree on arbitration in a neutral country [Record, p. 34]". It is apparent from this that the parties chose Danubia to insulate the dispute resolution mechanism from the national law of either party. Against this background, the parties would have intended dispute over dispute resolution mechanism to be governed also by the law of the neutral seat, i.e., the law of Danubia.

35. Hence, the arbitration agreement is governed by the law of Danubia.

B. Even if the main contract and the arbitration agreement are not separate, the conclusion does not change.

36. Even if the arbitral tribunal did not consider the arbitration agreement to be separate from the main contract, the law of Danubia governs the arbitration agreement, because the argument made above is still valid under the doctrine of dépeçage: the possibility that different parts of a single contract may be governed by different laws.

37. While dépeçage may be rare in practice, "that is only because there is usually no reason or commercial purpose for subjecting different parts of a single contract to different laws [Glick/Venkatesan, p. 140]". However, "where there is a good reason for choosing a different law for a particular part of a contract, it is wrong to begin with any presumption that the parties are unlikely to have intended to do so [ibid]".

38. As for the arbitration agreements, as noted above, there are good reasons for regarding the choice of seat as the governing law of the arbitration agreement. Indeed, a number of instances of dépeçage in the authorities both within and outside the context of arbitration agreements [ibid; e.g., Tamari v Rothfos, Re Helbert Wagg & Co].

39. Therefore, even if the main contract and the arbitration agreement are not separate, it is the law of Danubia that governs the arbitration agreement in the case at hand.

C. Under the law of Danubia, the arbitration agreement does not authorize the arbitral tribunal to adapt the contract, and the conclusion is same even if the arbitration clause is governed by the law of Meditteraneo.

40. From the above, the arbitration clause should be governed by the law of Danubia, and Respondent alleges that under which the arbitration agreement does not authorize the arbitral tribunal to adapt the contract [a] , and the conclusion is same even if the arbitration clause is governed by the law of Meditteraneo [b]. This is because there is no express empowerment for arbitrators to adapt the contract, and no hardship.

a. Under the law of Danubia, the arbitration agreement does not authorize the arbitral tribunal to adapt the contract

41. While Danubian Contract Law for international contracts is a largely verbatim adoption of the Unidroit Principles, it has an amendment in Article 6.2.3 (4)(b) that only if the court is authorized, it has the power to adapt the contract [Proc. Ord. No. 2, p. 61, para. 45]. The word 'court' in the same article includes an arbitral tribunal [Art. 1.11 of the Unidroit Principles]. Therefore, if there is no express conferral of powers to adapt the contracts, the arbitration agreement does notauthorize the arbitral tribunal to adapt the contract.

42. In the present case, there is no clause which gives a conferral of powers to adapt the contracts [Record pp.13-14]. Hence, the arbitration agreement doesn't authorize the arbitral tribunal to adapt the contract.

b. The conclusion is same even if the arbitration clause is governed by the law of Meditteraneo.

43. Even if the above Respondent's arguement would not be recognized and the arbitration clause is governed by the law of Meditteraneo, the conclusion is same.

44. Meditteraneo's contract law is a verbatim adoptation of the UNIDROIT Principles [PRO1, p. 52, para. 4]. Art. 6.2.3 of the UNIDROIT Principles stipulates that if the court finds hardship it may, if reasonable, adapt the contract with a view to restoring its equilibrium. The word 'court' in the same article includes an arbitral tribunal [Art. 1.11 of the UNIDROIT Principles].

45. On this point, as written in the substantial part, there is no hardship in the present case. Hence, Art. 6.2.3 of the UNIDROIT Principles could not be applied, and the arbitration agreement also doesn't authorize the arbitral tribunal to adapt the contract.

Issue II. CLAIMANT should not be entitled to submit the evidence.

46. The tribunal has discretion over the admission of evidence into the arbitral proceedings. According to HKIAC Rules Article 22.2 "[..]The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence". Furthermore, Article 22.3 states that "[..]At any time during the arbitration, the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome. The arbitral tribunal shall have the power to admit or exclude any documents, exhibits or other evidence".

47. In the case at hand, both parties have agreed to resolve any dispute which arises out of the contract under the HKIAC Rule [Record p.14]. However, as the Article mentioned above shows by lacking further description, there is no existing clear standard about how the tribunal has to determine the admissibility of evidence.

48. Therefore, the tribunal should apply IBA Rules to consider the admissibility of evidence. IBA Rules, since they are commonly used in arbitration, provide a clearer standard about the evidence rule.

49. According to IBA Rules, the tribunal should exclude the evidence ,in form of a Partial Interim Award, an arbitral proceeding to which RESPONDENT in our case has been in the position of the CLAIMANT[record p.60 para.39]. for the following reason. (A) the

tribunal should exclude the evidence due to lack of sufficient relevance to the case or materiality to its outcome. (B) Further, even if the tribunal think the evidence have sufficient relevance to the case or materiality to its outcome, the evidence is under the protection of the other arbitration's confidentiality, therefore the tribunal should still exclude the evidence IBA Rule 9.2.b.

[A] The tribunal should exclude the evidence due to lack of sufficient relevance to the case or materiality to its outcome.

50. According to IBA Rule 9.2.a "The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons[..](a) lack of sufficient relevance to the case or materiality to its outcome;". IThat means that in case the evidence lacks sufficient relevance to the case or materiality to its outcome, the tribunal should exclude that evidence.

51. RESPONDENT holds that the evidence, namely the Partial Interim Award, which CLAIMANT tries to submit to the arbitral proceeding should be excluded, because of its lack of sufficient relevance to the case.

52. As for the relevancy issue, one commentary observes that "Having that in mind we would tend to define the relevance of evidence in international arbitration as having a logical connection with what the evidence purports to prove in the case"[Pilkov p.148]. A different commentary also indicates that "The purpose of the requirement 'relevant to the case' is to exclude documents that do not relate to the case, such as document production requests that aim to search for new claims." [Reto p.50 para.1]

53. As outlined above, the key factor to analyze whether the evidence is relevant to the case at hand is to confirm that the evidence can prove the claim of the requesting party and it has a logical connection to the case.

54. The Partial Interim Award doesn't provide any new fact to the case at hand. It just proves that RESPONDENT in the current case, had a different position on a different arbitration. However, it is very natural for any party to be able to argue differently for a different arbitration in order to protect their best interest. The parties are furthermore free to argue afresh for each new case, since it usually constitutes different parties and a different underlying dispute.

55. Hence the Partial Interim Award, as requested evidence, lacks sufficient relevance to the case. The tribunal should exclude the Partial Interim Award as evidence in the case at hand.

56. However, even in the case that the Partial Interim Award is regarded as relevant to the case at hand, the tribunal should still exclude it as evidence, because it does not add materiality to the outcome of the case

57. Concerning the materiality, one commentary observes that "A document is material to the outcome of the case if it is needed to allow complete consideration of the factual issues from which legal conclusions are drawn" [Reto p.53 para.1]. Therefore, the criterion for material to the outcome are whether the evidence can provide the factual issue to prove the legal conclusions.

58. CLAIMANT tries to prove by submitting the Partial Interim Award as evidence, that the current dispute at hand and the arbitration referred to in the Partial Interim Award constitute two arbitration proceedings dealing with similar disputes. By providing similarity of the disputes, the CLAIMANT aims to convince the tribunal to adapt the Sales Agreement just like in the arbitration proceedings referred to in the Partial Interim Award. However, the two disputes are totally different. Comparing the case at hand with the other arbitration which rendered the Partial Interim Award, as mention above, there are huge different between these two arbitrations. Such as using different hardship clause, different percent of tariff, the tariff are imposed by different country, and different subject to the Sales Agreement.[record pp. 13-14 , p.60 para. 39]

59. As mentioned above, the factual issues between the current case at hand and the ones proven by the Partial Interim Award are very different. Therefore, it is reasonable to argue that the two arbitration proceedings have different legal conclusions, because of different factual issues. As a result, the Partial Interim Award should not be regarded as material to the outcome for the case at hand.

60. In conclusion, the tribunal should still exclude the Partial Interim Award as evidence.

[B] Even if the tribunal thinks the evidence has sufficient relevance to the case or materiality to its outcome, the evidence is under the protection of the other arbitration's confidentiality, and therefore the tribunal should still exclude the evidence based on IBA Rule 9(2)(b)

61. According to IBA Rules 9(2)(b) "[t]he Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons[..]legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable". Further , the commentary also indicated that "It is sufficient to say that privilege rules allow a person or party to refuse to disclose certain information , even though that information might be relevant and reliable"[Pilkov p.150].Therefore, If the Partial Interim Award are under production of some kind of legal impediment or privilege, the tribunal should still exclude the evidence or document.

62. The question arises whether the award's confidentiality can be seen as legal privilege or legal impediment under IBA Rule 9(2)(b).

63. The Partial Interim Award has been rendered from an arbitration proceeding, which was based on the HKIAC Arbitration Rules [Record p. 60 para. 39]. HKIAC Arbitration Rule 45.1 states that "[u]nless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to: [..](b) an award or Emergency Decision made in the arbitration". If there is no consent provided by the parties to the other arbitration, namely the one rendering the Partial Interim Award, the obtaining of that document stating the details of the Partial

Interim Award by CLAIMANT in this case should be regarded as breach of confidentiality of the other arbitration.

64. As mentioned above, RESPONDENT clearly objects to the use of the Partial Interim Award in the case at hand [record p.51] and never agreed to produce any document of the Partial Interim Award to CLAIMANT. Therefore, the obtaining of the Partial Interim Award by CLAIMANT states a breach of the confidentiality.

65. Moreover, the case at hand and the other arbitration, which produced the Partial Interim Award are both conducted under HKIAC Arbitration Rules. The arbitral tribunal in the case at hand has no reason to treat the HKIAC Rule's confidentiality protection as not applicable.

66. In line with the same argument, in an English case, Dolling-Baker v. Merrett, the English court also rejected the admission of evidence from arbitration. In Dolling-Bake v. Merrett, the plaintiff tried to obtain evidence of an award from arbitration to which the defendant was a party, but was ultimately rejected by the English court. The reasoning was the irrelevance of the evidence to the case.[Michael/Katie p.614] The judge also held that there exists an implied obligation of confidentiality arising out of the nature of arbitration itself.[Michael/Katie p. 614]In the case of Dolling-Baker v. Merrett, although IBA Rules were not applicable, the judge expressed similar reasoning to exclude the evidence because of the confidentiality of the evidence.

67. There is no doubt that if the evidence or a document are under legal privilege the evidence should be excluded from the arbitration. CLAIMANT also agreed on this point in CL memo [CL memo p. 19, para. 57].

68. Therefore, RESPONDENT held that the Partial Interim Award was under the protection of HKIAC Arbitration Rules which can been seen as legal impediment or privilege in the case at hand. The arbitral tribunal should exclude the Partial Interim Award from evidence.

ISSUE III. CLAIMANT is not entitled to the payment of US$1,250,000 or any other amount resulting from an adaptation of the price.

69. Contrary to CLAIMANT's arguments, RESPONDENT and CLAIMANT reached the conclusion of the Sales Agreement through the cooperative and sincere negotiations. With the reference to the previous e-mail communications and the short memo left by RESPONDENT's former negotiators, both parties "agreed on the inclusion of a narrow hardship reference into the force majeure clause and regulated some other risks directly in the contract" [Record, p. 35]. This agreement comes into the clause 12 of the Sales Agreement [Record, p. 14].

70. RESPONDENT submits: CLAIMANT cannot rely on the clause 12 of the Sales Agreement to request the payment of US$1,250,000 (A). CLAIMANT cannot rely on the CISG, either (B).

A. CLAIMANT cannot rely on the clause 12 of the Sales Agreement to request the payment of US$1,250,000

71. As is evident to the arbitral tribunal, both parties have different interpretations to the clause 12 of the Sales Agreement. Though CLAIMANT did not clarify what laws this tribunal shall apply to the interpretation of the contract, RESPONDENT submits the CISG is applicable, for Art.8 CISG covers the interpretation of the contract [Farnsworth, p. 97, para. 2.1; Huber, p.234]. According to this article, the interpretation of the clause 12 of the Sales Agreement shall be the understanding RESPONDENT attached to it.

72. RESPONDENT submits: According to Art.8 CISG, both parties agreed with the narrow hardship clause (a). Whilst CLAIMANT argues RESPONDENT violated the principle of good faith, RESPONDENT did not violate the principle of good faith (b).

a. According to Art.8 CISG, both parties agreed with the narrow hardship clause

i. Under Art.8(1) CISG

73. Art.8(1) CISG provides a subjective test. When one party shows the other party knew or could not have been unaware of what his statements or conducts meant to, his intention will prevail [Farnsworth, p. 98, para. 2.3]. In its application, statements and conducts of the parties shall be manifested in some fashion to be a basis on evaluating the acknowledgement of the other party [CLOUT case No. 911]. Where the arbitral tribunal cannot clearly find an explicit intention of the parties, the factors mentioned under Art.8(3) shall be considered [Enderlein, p. 63, para. 3.1].

74. In the present case, any facts clearly showing CLAIMANT's acknowledgement of RESPONDENT's intention are not available. However, CLAIMANT cannot contest that CLAIMANT was unaware of RESPONDENT's intention.

75. RESPONDENT told CLAIMANT the objections to the ICC-Hardship Clause suggested by Ms. Napravnik, the previous negotiator of CLAIMANT, due to its broadness for the purposes of this contract and the objectives pursued [Proc. Ord. No.2, p. 56, para. 12]. RESPONDENT also suggested the adoption of force majeure clause with the risks mentioned by Ms.Napravnik in her e-mail of 31 March 2017 [ibid].

76. A difference can be found on the remedy. While the ICC-Hardship Clause provides an adaptation of the contract, the force majeure clause suggested by RESPONDENT only provides an exemption. Considered in conjunction with RESPONDENT's objections to the broadness of the clause, a change in the remedy of the hardship/ force majeure situation means that RESPONDENT disagrees with an adaptation of the contract and limits the remedy more narrowly. Since CLAIMANT could not have been unaware of such a huge change in the remedy, CLAIMANT could not have been unaware of RESPONDENT's intention.

ii. Under Art.8(2) CISG

77. Even if Art.8(1) CISG did not clarify RESPONDENT's intention, Art.8(2) CISG would lead the arbitral tribunal to reach the same conclusion as applying Art.8(1) CISG.

78. Art.8(2) CISG provides an objective test. Its effect is that a more reasonable interpretation in the light of the kind of parties involved and their circumstances will prevail [Farnsworth, p. 99, para. 2.4]. A reasonable person under Art.8(2) CISG "requires the tribunal to hypothesize that [the] person is in the same circumstances as the other party with respect, for example, to knowledge of prior dealings and negotiations between the parties" [ibid]. When assuming such a reasonable person, due consideration is to be given to all relevant objective circumstances such as listed under Art.8(3) CISG.

79. In this case, a reasonable person in the same circumstances as CLAIMANT is a person who is a lawyer unfamiliar with international contracting [Record, p. 18], and does not have any knowledge about the contents of the negotiations and drafts previously taken. In addition, does this person not know the contents of the short discussion taken between the previous negotiators, because it was an oral discussion and any records were not available at that time. Since this reasonable person knew nothing about the negotiations of the Sales Agreement, all previous e-mail communications and other available materials shall be interpreted based on this reasonable person.

80. As already shown under Art.8(1) CISG, RESPONDENT objected to the ICC-Hardship clause suggested by CLAIMANT due to its broadness and indicated, instead, a force majeure clause with risks mentioned in the email of 31st March 2017. In the receipt of this suggestion, a reasonable person would firstly pay attentions to its difference from own suggestions.

81. ICC-Hardship Clause provides a general duty to perform contractual obligations even in the situations where events have rendered performance more onerous in the article 1. As its exceptions, in case a party succeeds in proving matters stipulated in the article 2(a) and (b), it allows such a party to negotiate alternative contractual terms in the article 2(b). Compared to RESPONDENT's indication, a reasonable person can find differences in a remedy and requirements of the hardship/ force majeure provision. At the same time, a reasonable person would conceive that these changes are not unreasonable because the changes were in line with a minimum condition CLAIMANT indicated in the e-mail of 31st March 2017 [Record, p12].

82. Therefore, a reasonable person in the same circumstances as CLAIMANT would understand the suggested clause in the meaning that RESPONDENT suggested a narrow hardship clause in respect of the remedy and the conditions.

83. Upon with this suggestion, RESPONDENT did not expressly disagree with it. A reasonable person in the same circumstances as RESPONDENT under Art.8(2) CISG would understand that CLAIMANT accepted RESPONDENT's suggestion.

84. Though CLAIMANT insists the general agreement between both parties, the arguments lack legal basis [CL Memo, 3.1.1]. CLAIMANT concludes that both parties agreed to include the hardship clause as a matter of course [CL Memo, para. 70]. However, this is not the case where both parties stand in the same page on the interpretation of the contract. Where the understanding of the Contract conflicts between the parties, the interpretation of the contract shall be in accordance with the applicable law to the case. The issue shall be resolved by the applicable law, the CISG. Therefore, the arbitral tribunal shall deny CLAIMANT arguments due to the lack of pointing out its legal basis.

85. Conclusively, the clause 12 of the Sales Agreement shall be understood in the meaning of RESPONDENT's interpretation in accordance with Art.8(1) and (2) CISG. As its result, CLAIMANT cannot rely on the clause 12 of the Sales Agreement to seek the payment of US$1,250,000 because the clause does not provide an adaptation.

b. RESPONDENT did not violate the principle of good faith

86. Although CLAIMANT argues that the mutual beneficial interest and the long term cooperation based on the principle of good faith makes the clause 12 of the Sales Agreement to cover not only the most prevalent risk of changes in the health and safety requirements but also other risks including additional tariffs, like the present [CL Memo, para. 95], RESPONDENT did not violate such a principle.

87. CLAIMANT insists that CLAIMANT paid 30% tariffs and authorized delivery even before an agreement on the details had been reached with relying on the RESPONDENT's promise [CL Memo, para. 73]. This is however, no more than to say RESPONDENT's jumping to the conclusion. Mr. shoemaker who communicated with

CLAIMANT at that time, clearly told CLAIMANT that according to his understanding of the Sales Agreement, all risks had to be borne by CLAIMANT with a mention in advance that he was not a lawyer [Record, p. 36]. Based on this communication, he merely told CLAIMANT 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" [ibid]. As submitted above, according to the understanding of the clause 12 of the Sales Agreement under Art.8 CISG, it does not provide for an increased price in the case of such a high additional tariff.

88. Nevertheless, CLAIMANT got the impression that RESPONDENT accepted to bear the additional costs due to the tariffs [Record, p. 18]. This misunderstanding may be caused due to lack of sharing the information as to the Sales Agreement in CLAIMANT. If Ms. Napravnik who was the previous negotiator confirmed what had been finally agreed between both parties, she would never misunderstand that the Sales Agreement provided neither an adaptation of the contract as the remedy for the hardship situations, nor, tariffs like the present case as conditions for the remedy. Therefore, the arbitral tribunal shall deny the mere argument which only shifts CLAIMANT's own misunderstanding to RESPONDENT.

89. CLAIMANT also asserts that CLAIMANT's financial difficulties obliges RESPONDENT to share the risk and burden caused by the imposition of 30 % tariffs based on the principle of good faith and fair dealing [CL Memo, paras. 81-82]. Certainly, RESPONDENT desires to maintain long-term and mutual relationship with CLAIMANT. However, RESPONDENT was only aware of unspecific rumors of CLAIMANT's financial difficulties. Further details were not known before the negotiations about the price adaptation [Proc. Ord. No.2, para. 22]. Accordingly, it is out of RESPONDENT's expectation that CLAIMANT was suffered from financial difficulties and the 30% tariffs would impact on CLAIMANT's financial situation. It was CLAIMANT who makes the present situation more onerous due to CLAIMANT's financial situations RESPONDENT did not acknowledge. Therefore, it would not violate the principle of good faith nor fair dealing even if RESPONDENT did not bear

the risk and the imposition of 30%, because it was outside of RESPONDENT's expectation.

90. CLAIMANT further points out the inconsistent behavior of RESPONDENT in respect with resale of doses and inconsistent contention with the previous communications [CL Memo, para. 91]. However, RESPONDENT has never acted inconsistently.

91. While CLAIMANT noted the prohibition of the resale without CLAIMANT's express written consent in the e-mail of 24 March 2017 [Record, p. 10], the Sales Agreement does not provide such express terms and conditions mentioned in the e-mail [Record, pp. 13-14]. In addition, using the term "others" instead of employing "the others", it seems for CLAIMANT to give concession to the use of the semen. Since the Sales Agreement does not oblige RESPONDENT not to resell the semen, nor to inform all use of the semen to CLAIMANT, RESPONDENT has not bleached the Sales Agreement. Accordingly, the same is true to the inconsistent behavior.

92. Though CLAIMANT further points out that RESPONDENT's contention is inconsistent with the previous intention, communication and the behavior expressed [CL Memo, para. 91], this is not true. RESPONDENT did not know that the previous negotiators had discussed on the financial dimension would be dependent on the discretion of the arbitrators until seeing the CLAIMANT's exhibit. Since both parties could not help concluding the Sales Agreement with available information at that time, the fact not contemplated in both parties at concluding the contract shall be rejected. Therefore, RESPONDENT has not acted inconsistently at this point.

93. As a conclusion on issue I, RESPONDENT requests the arbitral tribunal to find that the Contract does not entitle CLAIMANT to seek the payment of US$1,250,000.

B. CLAIMANT cannot rely on CISG either

94. CLAIMANT argues that Art.79 CISG itself or through the application of Art.7(2) CISG with the supplement of Art.6.2.2. UNIDROIT Principles entitles CLAIMANT to seek the remedy generally accepted under the hardship [CL Memo, para. 3.2]. This is, however, not acceptable. Art.79 CISG itself neither stipulates the hardship (a), nor can be

supplemented by Art.6.2.2 UNIDROIT Principles through the application of Art.7(2) CISG (b).

a.Art.79 CISG itself does not stipulate the hardship

95. Art.79(1) CISG provides that "[a] party is not liable for a failure to perform any of its obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences" Although CLAIMANT insists that the hardship is included into the wording "impediment", it is evident from its legislative history that Art.79(1) CISG was not legislated to cover the hardship situations.

96. Looking over the draft history of Art.79 CISG, the wording of Art.74 ULIS, the forerunner of the CISG, was revised. The term "circumstances" under Art.74 ULIS was replaced by the wording "impediments". This is because it was thought to make it too easy for the promisor to excuse his non-performance of the contract even in the situation where the performance had been more onerous than expected. This illustrates the intention to narrow the scope of the exemption and to introduce an objective and more certain criterion [Rimke, p. 222]

97. Furthermore, "[a] Norwegian proposal at the Vienna Conference was rejected because it was feared that the suggested amendment would introduce the doctrine of imprévision into the CISG. This fact also shows that the drafters of Article 79 intended to exclude from the scope of this provision cases where performance merely became more difficult" [ibid].

98. Although Advisory Council's opinion tries to find a way to read the hardship into the provision of Art.79 CISG, however, as far as exemption from liability is concerned, the opinion is incompatible with the traditional hardship remedies like renegotiation, adaptation, and contract termination/avoidance because such a remedy is not generally provided for by hardship rules or clauses [Petsche, p. 170].

99. Therefore, the hardship is outside of the scope of Art.79(1) CISG. Accordingly, there is no room for reading the hardship into the wording "impediment".

b.Art.79 CISG cannot be supplemented by Art.6.2.2 UNIDROIT Principles through the application of Art.7(2) CISG.

100. Even if, there would be room for considering the hardship under Art.79(1)CISG, Art.6.2.2 UNIDROIT Principles cannot apply through Art.7(2) CISG.

101. In the Belgian case, after citing Art.7(2) CISG, the court stated: "Thus, to fill the gaps in a uniform manner, adhesion should be sought with the general principles which govern the law of international trade. Under these principles, as incorporated inter alia in the Unidroit Principles of International Commercial Contracts, the party who invokes changed circumstances that fundamentally disturb the contractual balance is also entitled to claim the renegotiation of the contract "[Scafom].

102. However, this interpretation has some problems and criticisms. Harry M. Flechtner says "I admire the substance of the UNIDROIT Principles, as I have publicly declared in the past. But, as I have also publicly declared, I do not agree that they can be legitimately used to supplement the CISG. The Sales Convention -- which is actual law, and on the basis of whose actual text the Contracting States bound themselves to it -- specifies in Article 7(2) how it is to be supplemented when gaps in its coverage appear. The rule in Article 7(2) requires those applying the Convention to look within its provisions to determine *its* general principles, not to look outside the Convention to determine general international law principles, especially ones that, like the UNIDROIT Principles, are expressly based on sources beyond the CISG" [Flechtner, pp. 95-96].

103. Furthermore, Schlechtriem has expressed that he takes a liberal view on finding gaps in the Convention. He states that a gap could be found in the CISG concerning hardship and that the gap could be filled with the Convention's general principles. He argues that the principle of good faith and fair dealing then presumes that both parties try to adapt the contract to unpredictable and unforeseen changed circumstances. This argumentation contains, however, several problems. Firstly, Schlechtriem assumes that the principle of good faith and fair dealing is one of the principles that the Convention is based on, even though article 7(1), which expressly refers to good faith and fair dealing, only concerns the interpretation of the

Convention. Secondly, even if this principle were one that the Convention is based on, there is no indication that the principle would include an obligation for the parties to adapt the contract to changed circumstances. What this principle is regarded to contain is largely dependent on the interpreter and the interpreter's legal background [Lindström, para. 3.1]

104. In conclusion, Art.6.2.2 UNIDROIT Principles cannot apply through Art.7(2) CISG.

105. Conclusively, CLAIMANT cannot rely on the CISG either.

CERTIFICATE

We hereby confirm that this memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person who is not a member of this team.

24 January 2019

Signed by Ifan Chen *Ifan Chen*	Signed by Hayato Tokuda *Hayato Tokuda*
Signed by Hiroto Aya *Hiroto Aya*	SSigned by Synthia Julia Bastron *Synthia Julia Bastron*
Signed by Masaki Kirikihira *Masaki Kirikihira*	Signed by Taichi Isogai *Taichi Isogai*
Signed by Yuki Okamoto *Yuki Okamoto*	