Sixteenth Annual

Willem C. Vis East International Commercial Arbitration Moot

MEMORANDUM FOR CLAIMANT

Case Number: HKIAC/A18128 – Phar Lap Allevamento v. Black Beauty Equestrian

On Behalf of	**Against**
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COUNSELS FOR CLAIMANT

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AISHWARYAA A♦ AISHWARYA R ♦ VINUDEEP R

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TABLE OF ABBREVIATIONS

¶ / ¶¶	Paragraph / paragraphs
Art.	Article
Arts.	Articles
AUS	Australia
BEL	Belgium
CE	CLAIMANT's exhibit
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
Co.	Corporation
e.g.	for example (exempli gratia)
Ed.	Edition
ed./eds.	Editor/Editor
et al.	and others (et alii/et aliae/et alia)
FRA	France
GBR	United Kingdom of Great Britain and Northern Ireland
GCC	General Conditions of Contract
i.e.	that is (id est)
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration (The Hague, The Netherlands)
ICSID	International Centre for Settlement of Investment Disputes (Washington, D.C., United States of America)
Inc.	Incorporated
IND	India
IRL	Ireland
Ltd.	Limited
No.	Number
NZL	New Zealand
NYC	New York Convention

p.	Page Number
PO No.1	Procedural Order Number. 1
PO No.2	Procedural Order Number. 2
q.	Question
RE	RESPONDENT's exhibit
SGP	Singapore
Standard Conditions	General Conditions of Contract/sale inclusive of the Codes of Conduct
SUI	Switzerland
UML	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1985
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules, 2010
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
USA/U.S.	United States of America
v.	Versus

INDEX OF LEGAL AUTHORITIES

CITED AS	FULL CITATION	CITED IN
Anna MagdelanaKubalcyzk	Anna Magdelana Kubalcyzk, Evidentiary Rules in Arbitration, 3 Grogningen Journal of International Law	¶ 70
Avinash Poorooye and Ronan Feehily	Confidentiality and Transparency in International Commercial Arbitration, 22 Har. Neg, L.R., 2017	¶ 70
Balthasar	Balthasar, Stephan International Commercial Arbitration: International Conventions, Country Reports and Comparative Analysis München : Beck ; Oxford : Hart ; Baden-Baden : Nomos (2016)	¶ 2
Bantekas	Bantekas, The Proper Law of the Arbitration Clause: A Challenge to the Prevailing Orthodoxy, 27 J. Int'l Arb. 1, 8 (2010)	¶ 25
Bernardini	Bernardini, 'Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Centre' ICCA Congress Series No. 9 (1999)	¶ 19
Blackaby	N. Blackaby et al. (eds.), Redfern and Hunter on International Arbitration ¶3.12 5th edition, (2009)	¶ 27
Bonell	Bonell, in Bianca/Bonell Commentary on the CISG, p. 81, n. 2.3.2.2 ad Article 7.	¶ 92

Bonnel	Bonnel, MJ, 'The UNIDROIT Principles of International Commercial Contracts: Why? What? How?' (1995) 69 Tulane Law Review 1121.	¶ 92
Born	Born, Gary B. International Commercial Arbitration Kluwer Law International, 3d ed. (2009)	¶ ¶ 3, 6, 7, 24,
Brunner	Brunner, Force Majeure and hardship under General Contract Principles, p. 214.	¶ 102
Butler	Butler, E Allison "Application of the CISG" in A Practical Guide to the CISG: Negotiations through Litigation Aspen Publishers (2007).	¶ ¶ 108, 120, 122
Carlsen	See Carlsen, Can the Hardship Provisions in the UNIDROIT Principles Be Applied When the CISG Is the Governing Law?, n. III.	¶ 101
Carvallhal Sica	Carvalhal Sica, Gap-Filling in the CISG, s. III.1.4; Audit, La vente internationale de marchandises, p. 51, n. 55.	¶ 122

Christoph Brunner	Christoph Brunner , Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration, International Arbitration Law Library, Volume 18 (Kluwer Law International; Kluwer Law International 2008) pp. 391 - 420).	¶ 104, 107
CISG- AC	In accord: CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, n. 27; Neumayer/Ming, Commentaire de la CVIM, p. 535, n. 14 ad Article 79.	¶ 116
Daele	Daele, Karel Challenge and Disqualification of Arbitrators in International Arbitration Kluwer Law International (2012)	¶ 11
Digest	UNCISG Digest	
Drago/Zoccollilo	Drago, Thomas J., Zoccolillo, Alan F., 'Be Explicit: Drafting Choice of Law Clauses in International Sale of Goods Contracts' The Metropolitan Corporate Counsel (2002).	¶ 108

Dulces Luisi	DulcesLuisi, SA de CV v. Seoul International Co. Ltd. y Seoulia Confectionery Co., Mexican Commission for the Protection of Foreign Trade, Mexico, Award of 30 November 1998, CISG-online 504.	¶ 122
Ferrari	Ferrari, Uniform Interpretation of the 1980 Uniform Sales Law, p. 225; Ferrari, General Principles and International Uniform Commercial Law Conventions, p. 174.	¶ 122
Ferrari	Ferrari, Defining the Sphere of Application of the 1994 "UNIDROIT Principles of International Commercial Contracts" (1995) 69 Tulane Law Review 1225.	¶ 92
Ferrari/Kroll	F. Ferrari & S. Kröll (eds.), Conflict of Laws in International Arbitration 19, 53 (2011)	¶ 19
Filanto	Filanto, SpA v. Chilewich Intern. Corp., 789 F. Supp. 1229 (SDNY 1992), CISG-online 45. ICC Award in Case n. 11849, 2003, CISG-online 1421.	¶ 122

Fouchard, 1979	P. FOUCHARD, L'adaptation des contrats a la conjuncture economique, (Adaptation of contracts to the financial situation) Rev. arb. 1979, 67	¶ 39
Fremuth	Fremuth-Wolf, in S. Riegler et al. (eds.), Arbitration Law of Austria: Practice and Procedure §581, ¶40 (2007)	¶ 28
Gaillard/Savage	Gaillard, Emmanuel & Savage, John Fouchard Gaillard Goldman on International Commercial Arbitration Kluwer Law International (1999)	¶ 10
Garro	Garro, A, The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG' (1995) 69 Tulane Law Review 1149.	¶ 92
HCCI	HCCI Award of 17 November 1995, CISG-online 250.	¶ 98
Herber	Herber, in Schlechtriem Commentary on the CISG, p. 67, n. 38 ad Article 7.	¶ 112
Holtzman/Neuhaus	Holtzman, Howard & Neuhaus, Joseph A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary Deventer: Kluwer in co-operation with the T. M. C. Asser Instituut (1989)	¶¶ 6, 9

Honnold	Honnold, Uniform Law for International Sales, p. 622, n. 427.1 ad Article 79 CISG; emphasis omitted.	¶ 117
Houtte	H. van HOUTTE, Changed circumstances and pactasuntservanda	¶ 39
ICC	Transnational Rules in International Commercial Arbitration, ICC Publication no. 480/4, 10	¶ 39
J.H. Boykin and M. Havalic	J.H. Boykin and M. Havalic, "Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration"	¶ 81
Jane Colston& Olga Bishof	Jane Colston, Olga Bischof, Cameron Moxley and Anna Grishchenkova, "The fruit from a poisoned tree-use of unlawfully obtained evidence"	¶ 80
Jolles and Traber 2013	Alexander Jolles, Sonja Stark-Traber, et al., 'Chapter 7: Confidentiality', in Elliott Geisinger and Nathalie Voser (eds), International Arbitration in Switzerland: A Handbook for Practitioners (Second Edition), 2nd edition (© Kluwer Law International; Kluwer Law International 2013) pp. 131 - 152	¶ 66
Julian	J. Lew (ed.), Contemporary Problems in International Arbitration 127 (1987)	¶ 24
Konstantin Pilkov	Konstantin Pilkov, Evidence in International Arbitration: Criteria for Admission and Evaluation. Arbitration" Kyiv National University of Trade and Economics Law Review, Issue 2, Volume 80, 2014, p. 147-156.	¶ 90

Konstantin Pilkov, 2014	Konstantin Pilkov, Evidence in International Arbitration: Criteria for Admission and Evaluation, (2014) 80 Arbitration, Issue 2.	¶ 48
Landolt	Landolt, Philip 'The Inconvenience of Principle: Separability and Kompetenz-Kompetenz' Journal of International Arbitration, Volume 30 Issue 5 (2013)	¶ 10
Leete	Leete, Burt A., 'Contract Formation under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code: Pitfalls for the Unwary' Temple International and Comparative Law Journal (1992).	¶ 108
Magnus	Magnus, General Principles of UN-Sales Law, n. 5.	¶ 114
Marc S. Friedman & Eric D. Wong	Marc S. Friedman&Eric D. Wong, *TKO'ing The UCC's "Knock-Out Rule"*, (1 December, 2018), http://ccbjournal.com/articles/10585/tkoing-uccs-knock-out-rule	¶ 121
Maskow	Maskow, Hardship and Force Majeure, p. 663; Bund, Force Majeure Clauses, p. 392.	¶ 100

McKendrick	McKendrick, in Vogenauer/Kleinheisterkamp PICC Commentary, p. 716, n. 4 ad Article 6.2.1	¶ 95
Mehren and Salomon, 2003	George M. Von Mehren and Claudia T. Salomon, "Submitting Evidence in an International Arbitration: The Common Lawyer's Guide" (2003) 20(3) Journal of International Arbitration 290.	¶ 50
Mercedeh Azerdo Da Silveira	Mercedeh Azerdo Da Silveira , Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation, (© Kluwer Law International; Kluwer Law International 2014) pp. 321 - 348.	¶ 97
Münchener	*Münchener Kommentar*, § 313 BGB para. 22.	¶ 113
Neumayer/Ming	Neumayer/Ming, Commentaire de la CVIM, p. 535, n. 14 ad Article 79.	¶ 116
Paulsson, 1984	J. PAULSSON, *L'adaptation du contrat*, (Adaptation of contracts) *Rev. arb.* 1984, 249.	¶ 39
Perillo	Perillo, Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts, pp. 118-119.	¶ 101

Perillo	Perillo, Hardship and its Impact on Contractual Obligations, p. 13.	¶ 106
Perillo	(Joseph M. Perillo, UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review, (1994) 63 FORDHAm L. REV. 281.	¶ 109
Redfern/Hunter	Blackaby, Nigel, Partasides, Constantine, et al. Redfern and Hunter on International Arbitration Oxford University Press 6h. ed. (2015)	¶¶ 2, 3, 4, 7, 9, 26, 32
Schlechtriem	Schlechtriem, Peter, 'Requirements of Application and Sphere of Applicability of the CISG' Victoria University of Wellington Law Review, Issue 4, 2005, p. 781-794.	¶ 108
Schlechtriem/Butler	Schlechtriem/Butler, UN Law on International Sales, p. 59, n. 60; Schlechtriem/Butler, UN Law on International Sales, p. 52, n. 48;	¶¶ 108, 120

Schlectriem/ Schwenzer	Schlectriem, Peter &Schwenzer, Ingeborg Commentary on the UN Convention on the International Sale of Goods (CISG) Oxford University Press (2010).	¶ 108
Schledchtriem/Witz	Schlechtriem/Witz, Convention de Vienne, p. 74, n. 101; Schlechtriem/Witz, Convention de Vienne, p. 63, n. 83.	¶ 120
Schmidt-Kessel	Schmidt-Kessel, in Schlechtriem/Schwenzer CISG Commentary, p. 186, n. 8 ad Article 9.	¶ 120
Schwenzer	Schwenzer, Force Majeure and hardship in International Sales Contracts, pp. 714-715.	¶ 102
Schwenzer/Fountoulakis	Schwenzer/Fountoulakis, International Sales Law, p. 91 ad Article 9 CISG.	¶ 120
Schwenzer/Fountoulakis	Schwenzer/Fountoulakis, International Sales Law, p. 93.	¶ 120
Schwenzer/Hachem	Schwenzer/Hachem, in Schlechtriem/Schwenzer CISG Commentary, p. 136, n. 32, fn. 106 ad Article 7.	¶ 122

Schwenzer/Hachem	Schwenzer/Hachem, in Schlechtriem/Schwenzer CISG Commentary, p. 22, n. 10 ad Articles 1-6; Felemegas, Article 7 and Uniform Interpretation, Chapter 4, 1.	¶ 122
Slater, 1998	Scott D. Slater, *Overcome by Hardship: The Inapplicability of The Unidroit Principles' Hardship Provisions to CISG*, 12 FLA. J. INT'L L.231, 259-60 (1998).	¶ 137
Smeureanu, 2011 Ch 3	Chapter 3: The Scope of the Duty to Maintain Confidentiality', in Ileana M. Smeureanu, Confidentiality in International Commercial Arbitration, International Arbitration Law Library, Volume 22 (© Kluwer Law International; Kluwer Law International 2011) pp. 27 – 131.	¶ 64
Southerington	Southerington, Impossibility of Performance and Other Excuses in International Trade, n. 2.4.	¶ 101
Trakman, 2002	L.E. Trakman, 'Confidentiality in International Commercial Arbitration', Arbitration International 18 (2002): 1.	¶ 55
Zagreb, 2009	Zagreb, Croatian Arbitration Yearbook, Vol. 16 (2009) pp. 1-376	¶ 66

LEGAL SOURCES AND MATERIALS

CISG/Convention	United Nations Convention on Contracts for the International Sale of Goods, Vienna April 11, 1980
HKIAC Rules	Hong Kong International Arbitration Centre Administered Arbitration Rules, 2018
IBA Rules	IBA Rules on the Taking of Evidence, London May 29, 2010
ICCA	Guide International Council for Commercial Arbitration's Guide to the Interpretation of the 1958 New York Convention, The Hague 2011
New Zealand Arbitration Act	New Zealand Arbitration Act of 1996 with amendments as adopted in 2007.
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York June 10, 1958
UML	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1985
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration of 1985 with amendments as adopted in 2006, Vienna June 21, 1985
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, 2016

INDEX OF CASES

CITED AS	FULL CITATION	CITED IN
AUSTRALIA		
Esso Australia Resources Ltd. v. Sidney James Plowman (AUS, 1995)	Esso Australia Resources Ltd. & Ors. v. The Honourable Sidney James Plowman, The Minister for Energy and Minerals & Ors High Court of Australia Case No. 95/014 Case Citation: [1995] HCA 19 April 7, 1995	¶ 56
The Commonwealth of Australia v. John Fairfax & Sons Ltd (AUS, 1980)	The Commonwealth of Australia v. John Fairfax & Sons Ltd High Court of Australia Case Citation: [1980] HCA 44 December 1, 1980	¶ 56
BELGIUM		
Scafom International BV v. Lorraine Tubes SAS(BEL, 1963)	Scafom International BV v. Lorraine Tubes SAS (Hof van Cassatie) Supreme Court of Belgium Case No. C.07.0289.N Available at : http://cisgw3.law.pace.edu/cases/090619b1.html 19 June 2009	¶ 124
FRANCE		
Bonaventure v. Society Pan African Export (FRA, 1995)	Bonaventure v. Society Pan African Export Courd'appel, Grenoble, France, Case No. 93/3275 Available at: http://cisgw3.law.pace.edu/cases/950222f1.html 22 February 1995	¶ 122
INDIA		
National Thermal Power	National Thermal Power Corporation v. Singer	¶ 27

Corporation v. Singer Company (IND, 1993)	Company Supreme Court of India Case Citation: 1993 AIR 998 May 7, 1992	
IRELAND		
AG v O'Brien (IRL, 1965)	Attorney Generalv. Gerald O'Brien& Patrick O'Brien Criminal Court of Appeal, Supreme Court, Case Citation: [1965] 1 I.R. 1965	¶ 86
NEW ZEALAND		
Television New Zealand Ltd. v. Langley Productions (NZL, 2000)	Television New Zealand Ltd. v. Langley Productions High Court Wellington, Case Citation: [2000] 2 NZLR 250 February 7, 2000	¶ 63
SINGAPORE		
International Coal Pte Ltd v. Kristle Trading Ltd & Anr (SGP, 2008)	International Coal Pte Ltd v. Kristle Trading Ltd & Anr High Court of Singapore, Case No. Suit 11/2005, 12/2005 Case Citation: [2008] SGHC 182 October 22, 2008	¶ 75
MyanmaYaung Chi Oo Co. Ltd. v. Win Win Nu (SGP, 2003)	MyanmaYaung Chi Oo Co. Ltd. v. Win Win Nu High Court of Singapore, Case No. 1357/2002, RA 115/2003) Case Citation: [2003] SGHC 124 June 6, 2003	¶ 75
SWITZERLAND		
SivassporKulübü v. UEFA (SUI, 2014)	SivassporKulübü v. UEFA, Court of Arbitration for Sport,	¶ 83

	Case No. 2014/A/3625 July 7, 2014	
UNITED KINGDOM OF GREAT BRITAIN		
Ali Shipping Corp (GBR, 1997)	Ali Shipping Corp. v. Shipyard Trogir, England and Wales Court of Appeal, Case Citation: [2014] 2 All ER 847 December 19, 1997	¶ 72
Arsanovia (GBR, 2012)	Arsanovia Ltd v. Cruz City Mauritius Holdings Queen's Bench Division, Commercial Court LCIA Case No. 111809 Case Citation: [2012] EWHC 3702 December 20, 2012	¶ 23
Dolling Baker v. Merret (GBR, 1990)	Dolling Baker v. Merret, England and Wales Court of Appeal, Case Citation: [1990] 1 W.L.R. 1205 March 21, 1990	¶ 59
Fiona v. Yuri (GBR, 2007)	Fiona Trust & Holding Corp v. Yuri Privalov English Court of Appeal (Civil Division) Case No. 2006 2353 A3 QBCMF Case Citation: [2007] EWCA Civ 20 January 24, 2007	¶ 4
Hassneh Insurance Co. of Israel & Ors v. Stewart J. Mew (GBR, 1993)	Hassneh Insurance Co. of Israel and Others v. Stewart J. Mew Queen's Bench Division, Commercial Court Case Citation: [1993] 2 Lloyd's Rep. 243 December 22, 1993	¶ 58
Helliwell v. Piggott-Sims (GBR, 1980)	Helliwell v. Piggott-Sims, Chancery Division, High Court of England, Case Citation: [1980] FSR 582. March 3, 1980.	¶ 84

Imerman v. Tchenguiz(GBR, 2010)	Imerman v. Tchenguiz, England and Wales Court of Appeal, Case Citation: [2010] EWCA Civ 908 July 29, 2010.	¶ 87
Jones v University of Warwick (GBR, 2003)	Jones v University of Warwick, England and Wales Court of Appeal (Civil Division), Case No. B3/2002/0668 Case Citation: [2003] EWCA Civ 151 February 4, 2003.	¶ 85
Kuruma v The Queen (GBR, 1955)	Kuruma v The Queen, English Court of Appeal, Case Citation: [1955] 1 All ER 236 December 8, 1954.	¶ 82
P v Q (GBR, 2017)	P v Q (Comm.), Queen's Bench Division, Commercial Court Case No. CL-2016-617 Case Citation: 2017 EWHC 194 (Comm) February 3, 2017.	¶ 86
R v. Sang (GBR, 1980)	R v. Sang, House of Lords, Case Citation: [1979] UKHL 3 July 25, 1979.	¶ 83
Sonatrach v. Ferrel (GBR, 2001)	Sonatrach Petroleum Corp. v. Ferrel Int'l Ltd Queen's Division Bench, Commercial Court, Case No. Case Citation: [2001] EWHC 481 (Comm) October 4, 2001	¶ 21
St Merryn Meat Limited v. Hawkins (GBR, 2001)	St Merryn Meat Limited v. Hawkins, Chancery Division, High Court of England, Case Citation: [2001] CPR 116. June 29, 2001.	¶ 89

Sulamérica(GBR, 2012)	Sulamérica Cia Nacional De Seguros S.A. v EnesaEngenharia Queen's Bench Division, Commercial Court Case No. A3/2012/0249 Case Citation: [2012] EWCA Civ 638 May 16, 2012	¶ 22
Teekay Tankers Ltd (GBR, 2017)	Teekay Tankers Ltd v. STX Offshore and Shipbuilding Co Ltd Queen's Bench Division, Commercial Court Case No. CL-2014-000271 Case Citation: [2017] EWHC 253 (Comm) February 15, 2017	¶ 74
United Kingdom v Albania(GBR, 1949)	United Kingdom v Albania International Court of Justice, Netherlands, Case No. ICJ GL No 1 Case Citation: [1949] ICJ Rep 4 December 15, 1949	¶ 89
Westwood Shipping Lines Inc. v. Universal (GBR, 2012)	Westwood Shipping Lines Inc. v. Universal Queen's Bench Division, Commercial Court Case Citation: MBH ([2012] EWHC 3837) December 11, 2012	¶ 73
UNITED STATES OF AMERICA		
Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (USA, 2002)	Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan Centre for Settlement of Investment Disputes, United States, ICSID Case No. ARB/13/13International May 27, 2002.	¶ 86
ConocoPhilipsPetrozuata BV v. Venezuela ICSID (USA, 2015)	ConocoPhilipsPetrozuata BV v. Venezuela International Centre for Settlement of Investment Disputes,United States	¶ 88

	ICSID Case No. ARB/07/30, J July 01, 2015.	
Gotham Holdings (USA, 2009)	Gotham Holdings et al. v. Health Grades, United States Court of Appeals,Seventh Circuit, Case No. 09-2377 Case Citation: 580 F.3d 664 (7th Cir. 2009) September 03, 2009	¶ 62
Islamic Republic Iran v. Cubic Defence System (USA, 1998)	Islamic Republic Iran v. Cubic Defence System United States District Court, SD California, ICC Award in Case no. 7365/FMS Case Citation: 29 F. Supp. 2d 1168 May 5, 1997	¶ 96
R v Leathem (USA,1861)	R v Leathem (1861), Court of Appeal, Seventh circuit, United States, 1861. Case Citation: (1861) 8 Cox CC 498	¶ 82
U.S. v. Panhandle Eastern Corp 9 (USA, 1988)	U.S. v. Panhandle Eastern Corp, United States District Court, D. Delaware Case No. Civ. A. No. 87-190-JLL Case Citation: 681 F. Supp. 229 (1988) February 23, 1988.	¶ 61
United States v. Wegematic Corp (USA, 1996)	United States v. Wegematic Corp United States Court of Appeals for the Second Circuit, Case Citation: 360 F.2d 674, 676 (2d Cir. 1966) 1966	¶ 105

STATEMENT OF FACTS

1. The CLAIMANT is Phar Lap Allevamento (Phar Lap), It is registered and located in capital city, Mediterraneo. Phar lap offers frozen semen of its champion stallion for artificial insemination. The star among Phar Lap's stallions is Nijinsky III. The RESPONDENT, Black Beauty Equestrian (Black Beauty) in Oceanside, Equatoriana, is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions.

2. On **21 March 2017** Black Beauty contacted Phar Lap, inquiring about the availability of Nijinsky III for its newly started breeding programme (CE No.1). Black Beauty was particularly interested whether frozen semen of Nijinsky III was available.

3. With email of **24 March 2017** Phar Lap offered Black Beauty 100 doses of Nijinsky III's frozen semen(CE No.2). RESPONDENT only objected to the choice of law and the forum selection clause and insisted on a delivery DDP (CE No.3). The transfer of certain risks to Black Beauty and the inclusion of a hardship clause to temper some of the additional risks taken (CE No.4).

4. In the end, the Parties agreed not only on the hardship clause but also on an acceptable choice of law and arbitration clause. Unfortunately, the two main negotiators, Ms. Napravnik and Mr. Antley, were severely injured in an accident when driving to a restaurant after the annual colt auction in Danubia on **12 April 2017**. They had to be replaced for the finalization of the contract which was signed on **6 May 2017** (CE No.5).

5. The Parties had agreed on three shipments (CE No.5). RESPONDENT sent the first shipment of 25 doses on **20 May 2017**; the second shipment of 25 doses on **3 October 2017**. Two months before the last shipment of 50 doses was due Mediterraneo's newly elected President, Ian Bouckaert, announced 25 per cent tariffs on agricultural products from Equatoriana. This sudden measure came as a complete surprise.In the present case, however, to the big surprise of everyone the Equatorianian government after a very short period of unsuccessful discussions retaliated by imposing 30 per cent tariffs on selected products from Mediterraneo including on animal semen (CE No.6).

6. CLAIMANT and RESPONDENT immediately started negotiations regarding a price adjustment for the frozen semen (CE No.7). RESPONDENT had made clear already during the contract negotiation that for its planning timely delivery was extremely important. At the same time RESPONDENT appeared to generally accept the need for a price increase (CE No.8). CLAIMANT complied with its delivery obligation and delivered the remaining 50 doses on 23 January 2018 before an agreement on the new price had been reached.

7. The arbitration clause and its interpretation are governed by the law of Mediterraneo and not, as RESPONDENT alleges, by the law of Danubia. Like in most other jurisdictions the Arbitration Law of Mediterraneo provides for a broad interpretation of arbitration agreements. Thus, the arbitration agreement clearly extends to a claim for an increased remuneration.

8. CLAIMANT is entitled to an increase of the purchase price of at least 25 per cent due to the higher costs following the imposition of the new tariffs. CLAIMANT had a profit margin of 5 per cent for the transaction and now makes a loss of 25 per cent due to the imposition of the new tariff of 30 per cent on the product by the Equatorianian authorities. The tariffs are imposed by RESPONDENT's home country and therefore are closer associated with RESPONDENT than with CLAIMANT.

9. CLAIMANT had made clear that it was not willing to bear all the other risks associated with the agreed change of the delivery terms and had insisted on the inclusion of the adaptation clause. RESPONDENT had consented to that. The adaptation clause was supposed 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.

10. Even if the Arbitral Tribunal should – against all expectations – come to the conclusion that the imposition of the tariffs is not covered by the adaptation clause, the price should be increased under the CISG. It has been recognized on several occasions that the CISG allows for a price adaptation in the case of changed circumstances along the lines of the hardship provision in Art. 6.2.3 UNIDROIT Principles. The requirements for such an adaptation are clearly met.

INTRODUCTION

I. The Arbitral Tribunal has the necessary power to decide on its own jurisdiction, as emanating from the principle of kompetez-kompetenz which finds place in the UML and HKIAC Rules. The law governing the arbitration agreement will be the Law of Meditteraneo, as the CLAIMANT had explicitly expressed his intention to not submit the contract to any foreign law. Further, even in case of non-determination from the express intention, the conflict of law rules can be invoked and the law of the contract can be concluded as the law governing the arbitration agreement. Since the law of mediterraneo accounts for broader interpretation, adaptation of the contract should be done by interpreting it accordingly. Therefore, the tribunal shall decide the law to be that of the law of the contract and to adapt the contract, facilitating the CLAIMANT to advance the claim for damages.

II. The evidence sought by the CLAIMANT to be submitted is relevant and material to the arbitral proceeding. As this evidence would consequential facts stated hereunder in the arguments, the evidence is relevant. Also, this evidence would also be adding weight to the consequences and outcomes of this present arbitral proceeding, it is material to the arbitral proceeding. Neither the CLAIMANT nor the Arbitrators shall be committing a breach of confidentiality by admitting the impugned evidence as they are not party to the confidentiality agreement. On the assumption that there was really a breach of confidentiality, it may be argued that such breach was committed only in the interests of justice and for the legitimate interests of the CLAIMANT. Also, on assumption that the evidence sought to be admitted was obtained by an illegal hack of the RESPONDENT'S computer system, several jurisdictions have allowed such information to be used as evidence if they would change the course of the proceeding if admitted.

III. The tribunal is respectfully requested to find that the CLAIMANT's are entitled to compensation of $1,250,000 on the adaptation of the contract since all the requirements for the hardship under clause 12 of the contract has been fulfilled. Furthermore it is respectfully submitted that the contract falls within the scope of CISG. On several occasions it has been recognized that the CISG allows for the price adaptation with respect to the changes in the situation along lines of hardship in accordance to article 6.2.3 of UNIDRIOT.

ARGUMENTS

I. THE ARBITRAL TRIBUNAL HAS THE POWER TO ADAPT THE CONTRACT

A. THE TRIBUNAL HAS THE COMPETENCE TO DECIDE ON ITS OWN JURISDICTION AND THE POWERS UNDER THE ARBITRATION AGREEMENT

1. The arbitration clause as contained in Frozen Semen Sales Agreement (the Contract) provides for dispute resolution with respect to any dispute arising out of the contract, including the existence, validity, interpretation, performance, breach or termination thereof, which shall be settled by arbitration in accordance with the HKIAC Administered Arbitration Rules. *(CE No.5, p.14).*Hence, the corollary of the same is that the Arbitral Tribunal, by the application of principle of Kompetenz - Kompetenz, exercise jurisdiction over matters arising out of such contract (1) in addition to exercising jurisdiction as conferred under the HKIAC Administered Arbitration Rules (2) and jurisdiction conferred by the UML with all states having adopted the same (3).

A.1 The Principle Of Kompetenz-Kompetenz Finds Recognition Under The HKIAC Administered Arbitration Rules

2. The wording of the arbitration clause is decisive for the arbitral tribunal's jurisdiction *(Balthasar ¶31 p.17).*Parties to an international commercial agreement are free to choose for themselves the law (or the legal rules) applicable to that agreement. The doctrine of party autonomy, has gained extensive acceptance in national systems of law *(Redfern/Hunter ¶3.97 p.187).* The arbitration Clause 15 states that, "Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by settled by arbitration in accordance with the HKIAC Administered Arbitration Rules…" *(CE No.5, p.14).* Therefore, the procedure governing any dispute has been referred to be settled by the application of the HKIAC Administered Arbitration Rules.

3. In general terms, the arbitral tribunal enjoys a very broad power to determine the appropriate procedure. Indeed, this is one of the defining features of arbitration as opposed to courts, in which a fixed procedure exists *(Redfern/Hunter ¶5.15 p.267).* The kompetenz-kompetenz doctrine provides, in general terms, that international arbitral tribunals have the power to consider and

decide disputes concerning their own jurisdiction. The doctrine is closely related to the allocation of competence to consider and decide jurisdictional disputes between arbitral tribunals and national courts. (Born, p.1048).

4. Most courts have adopted a general presumption that rational parties intend any dispute arising out of their relationship to be decided by the same tribunal, and correspondingly construe any arbitration clause in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction *[Fiona v. Yuri, (GBR, 2007)]*. The powers of an arbitral tribunal are those conferred upon it by the parties within the limits allowed by the applicable law, together with any additional powers that may be conferred automatically by operation of law *(Redfern/Hunter ¶5.06 p.306).*

5. As the Parties have agreed upon the application of the HKIAC Administered Arbitration Rules to govern the procedure of the arbitral proceedings, the Arbitral Tribunal is conferred the power by virtue of Article 19 of the HKIAC Administered Arbitration Rules, which provides "19.1 The arbitral tribunal may rules on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement; 19.2 The arbitral tribunal shall have the power to determine the existence or validity of any contract of which an arbitration agreement forms a part.. " (HKIAC Administered Arbitration Rules, Art. 19).

6. The first sentence of Article 19(1) states the principle of Kompetenz-Kompetenz: the arbitral tribunal has authority to "rule on its own jurisdiction" *(Born, p.853).* As noted by leading commentators, "The concept is important in practice because without it a party could stall the arbitration at any time merely by raising a jurisdictional objection that could then only be resolved in possibly lengthy court proceedings" *(Holtzman/Neuhaus, p.479).* The language of Article 19(1) was modelled virtually verbatim after Article 16(1) of the UNCITRAL Model Arbitration Law (Yearbook 1975).

A.2. THE PRINCIPLE OF KOMPETENZ-KOMPETENZ FINDS RECOGNITION UNDER THE UML

7. In the instant case, all contracting states have adopted the UML on International Commercial Arbitration with the 2006 amendments (PO 1, ¶4 p.52). Further, Mediterraneo Arbitration Law, a verbatim adaptation of the UML also recognizes the authority of the tribunal to decide on its

own powers and jurisdictions. In addition to the same, the HKIAC Rules viz. Art.19 procedurally borrows the principle from Art.16 of the UML. The concept that arbitration is governed by the law of the seat of the arbitration is well established in both the theory and practice of international arbitration *(Born, p.1531).* This concept has influenced the wording of international conventions from the 1923 Geneva Protocol to the NYC on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.*(Redfern/Hunter ¶3.53 p.171).*

8. Article 16 of the UML addresses three issues that may arise when the parties disagree as to whether their dispute ought to be resolved in arbitral or judicial proceedings. One is the separability principle, pursuant to which an arbitration clause forming part of a contract is to be treated as an independent, or separate, contract. Another issue is the arbitral tribunal's power to decide on its own jurisdiction to deal with the substantive claim in dispute, which is affirmed in Art. 16(1) and regulated in Arts. 16(2) and 16(3) of UML.

9. Once a seat of arbitration has been chosen, it brings with it its own law*(Redfern/Hunter ¶3.64 p.176).*Under the Model Law, the principle of Kompetenz-Kompetenz is said to be a mandatory one and the parties cannot, by agreement, remove the jurisdiction of the arbitral tribunal to rule on its own jurisdiction *(Holtzman/Neuhaus, p.480).* Hence, the Model law intended the tribunal to exercise jurisdiction in determining its scope or power under the arbitration agreement. Therefore, the procedure as provided under the relevant applicable law as chosen by the parties, i.e., the HKIAC Rules mandatorily provide for the arbitral tribunal to determine its own jurisdiction and/or the powers to adapt the contract.

A.3. KOMPETENZ-KOMPETENZ IS A RECOGNIZED PRINCIPLE IN THE PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION

10. More fundamentally, although the arbitrators' jurisdiction to rule on their own jurisdiction and powers is indeed one of the effects of the arbitration agreement, the basis of that power is neither the arbitration agreement itself, nor the principle of *pactasuntservanda* under which the arbitration agreement is binding *(Gaillard/Savage ¶658 p.399).* Kompetenz-Kompetenz, although it presents a number of variations, affirms that the arbitral tribunal has power to assess its own jurisdiction and powers. *(Landolt, p.511)*

11. As seen above, Arts. 19 and 16 of the HKIAC Administered Arbitration Rules and UML provide for the arbitration tribunal to determine the jurisdiction and the powers of the tribunal

under the arbitration agreement to adapt the contract and allowing tribunal to determine challenges to themselves is "an application of the Kompetenz-Kompetenz principle according to which each tribunal is entitled to decide matters concerning its own competence *(Daele, ¶4-002)*.

12. Therefore, the tribunal is competent to decide its own jurisdiction and powers to adapt the contract, and derives such authority to do so by virtue of the law as provided for under the HKIAC Administered Arbitration Rules and UML, which recognize the principle of Kompetenz-Kompetenz as applied in International Commercial Arbitration.

B. THE LAW GOVERNING THE ARBITRATION AGREEMENT IS THE LAW OF THE UNDERLYING CONTRACT

13. Thelaw governing the Arbitration Agreement is the chosen law of the underlying contract, as inferred from the corresponding communication between the parties which shows their intention to submit the arbitration agreement to the law governing the container contract. Further, the law governing arbitration agreement cannot be the law of the seat, as there is an express rejection of the same by the CLAIMANT (1). Even when the intention cannot be determined ipso facto, the application of conflict of laws rules concludes the law of the arbitration agreement to be that of the underlying contract (2).

B.1. LAW GOVERNING THE ARBITRATION AGREEMENT IS THE LAW OF THE CONTRACT AS INFERRED FROM THE INTENTION OF THE PARTIES

14. The arbitral clause in the Sale Agreement has been drafted by the RESPONDENT based largely on the model clause of the HKIAC *(RE No.1, p.33)*. The proposed arbitration clause had narrowed down the broad wording of the model clause and proposed the seat of arbitration to be Equatoriana. Similarly, it also included a reference to the law of the arbitration clause, which was proposed to be the law of Equatoriana, as a corollary meant the law of the seat to govern the arbitration clause *(RE No.1, p.33)*.

15. In the reply communication made by the CLAIMANT to the proposal on the arbitral clause, the CLAIMANT had objected to the seat of arbitration being the State of the RESPONDENT. The reason given by the CLAIMANT is pertinent to be noted. The Creditors Committee of the CLAIMANT does not allow for any contract to be submitted to a foreign law or for resolution of dispute in the country of the counterparty *(RE No.2, p.34)*. CLAIMANT is bound by the directions of the Creditors Committee, considering its situation of distress in the recent years.

16. CLAIMANT had objected to the seat and changed it to a neutral venue, which is Danubia. In the reply, CLAIMANT had also clearly mentioned the possibility to agree only on arbitration in a neutral country *(RE No.2, p.34)*. This per se shows that CLAIMANT did not agree to the law of the arbitration agreement to be the law of the seat as was proposed by the RESPONDENT. This non-acceptance is also clear from the requirement mandated by the Creditors Committee to submit the arbitration to a neutral venue and to not submit the contract to a foreign law, which was even followed in the recently concluded contract (PO. 2, ¶14 p.56). Thus, it is clear that the seat was changed to Danubia and the law governing the arbitration agreement to be the law of the underlying contract, which is the law of Mediterraneo.

a. Presumption of Separability does not affect the application of the substantive law of the contract to the arbitration agreement.

17. An international arbitration agreement is presumptively separable from the underlying contract with which it is associated. The separability doctrine does not mean that the law applicable to the arbitration clause is necessarily different from that applicable to the underlying contract (ICC Award of 1984). It instead means that differing laws may apply to the main contract and the arbitration agreement. The doctrine of separability serves the narrow purpose of ensuring that the arbitration clause (and therefore the parties' choice of forum for any dispute) remains effective even if the underlying contract is found to be invalid. It does not mean that the arbitration clause is always independent from the underlying contract (Swiss Federal Tribunal Award of 1997).

18. For the purposes of argument, even if the Tribunal decides that the CLAIMANT did not show sufficient intent to be bound by the substantive law of the contract, the RESPONDENT'S contention of seat's law would not govern the arbitration agreement as the Tribunal should nevertheless apply the knock out rule pursuant to the Good Faith Principle in Art. 8 of CISG and Art. 2.22 of the UNIDROIT Principles, on the jurisdictional approach under the UNCITRAL Model law. In such case, it will lead to the application of choice of laws of the parties to determine the law of the arbitration agreement.

B.2. Determination Of The Law Governing The Arbitration Agreement In Case Of Ambiguity Or Absence Of Express Mention

19. The multiplicity of choice-of-law rules potentially applicable to the arbitration agreement does not advance the purposes of the international arbitral process *(Bernardini, p.200)*. Different

national courts, arbitral tribunals and commentators have developed and applied a multiplicity of choice-of-law rules to the substantive validity and determination of law governing the international arbitration agreements, ranging from the law chosen by the parties to govern their underlying contract, to the law of the arbitral seat, to the law of the judicial enforcement forum, to the law of the state with the "closest connection" or "most significant relationship." *(Ferrari/Kroll ¶19 p.53)*

20. When the parties included a choice-of-law clause in their underlying contract, selecting the law governing that contract, a number of authorities held that the parties' choice-of-law clause extended – either expressly or impliedly – to the separable arbitration agreement. The draft of the American Law Institute's Restatement (Third) U.S. Law of International Commercial Arbitration tooprescribe a default rule for the law governing the international arbitration agreements requires application of the law selected by a general choice of law clause in the parties' underlying contract (§4-12).

21. This analysis was adopted with particular clarity in English judicial decisions, which repeatedly held that the law selected by the parties to govern their underlying contract was also ordinarily applicable to the associated arbitration agreement. Where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract.*[(Sonatrach Petroleum Corp. v. Ferrel Int'l Ltd., (GBR, 2001)]*.

22. The English Court of Appeal in *Sulamerica (GBR, 2012)*held that where parties have not expressly agreed on a governing law for their arbitration agreement, their choice of law for the main contract will be a 'strong indication' that they wished to adopt the same law for the arbitration agreement. The Court applied a rebuttable presumption that an express choice of law to govern the substantive contract would also apply to the arbitration clause.

23. This approach was followed in *Arsanovia (GBR, 2012)*also. The Court emphasised that the governing law of the main contract is a '***strong indicator'*** of the governing law of the arbitration agreement. In particular, where an arbitration agreement is a clause forming part of a main contract (as opposed to a free-standing agreement), it is reasonable to assume that the parties intend their entire relationship to be governed by the same system of law – if the intention was otherwise, it is not unreasonable to expect them to specifically provide so*[Arsanovia Ltd v. Cruz*

City Mauritius Holdings, (GBR, 2012)]. The parties here have not assented toa particular writing as the complete and accurate integration of that contract.

24. In general, Commentators have concluded that "there is a very strong presumption in favour of the law governing the substantive agreement which contains the arbitration clause also governing the arbitration agreement" itself *(Julian Lew, p.142)*. Tribunal has to apply the law which governs the Contract as a whole, as the arbitration clause is only one of many clauses appearing in the Contract, the most reasonable choice would be for the Tribunal to apply the same law consistently throughout *(Gary Born, p.476)*.

25. Since the arbitration clause is only one of many clauses in a contract, it would seem reasonable to assume that the law chosen by the parties to govern the contract will also govern the arbitration clause *(Bantekas¶1 p.8)*. It makes no commercial sense to assume that the party had intended that the law of the arbitral seat would also be extended to the presumptively separate arbitration agreement, if the consequence thereof was to invalidate that agreement or the claim.

26. If parties select a law governing their underlying contract which would give effect to their arbitration agreement, they cannot reasonably be assumed to have intended that law not to extend to their arbitration agreement where such a limitation would result in application of a law (that of the seat) which would invalidate their claim, and leave them facing all the uncertainties, expenses and other problems of international litigation that the arbitration agreement was meant to avoid.*(Redfern/Hunter ¶3 p.12)*.

27. An Indian Supreme Court decision adopted a similar approach: Where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract *[(National Thermal Power Corp. v Singer Co., (IND 1993)]*. Substantial commentary from both common law and civil law authorities supports these conclusions *(Blackaby in Redfurn/Hunter ¶3.12)*.

a. Application of the Validation principle under the New York Convention, to determine the validity in case of different interpretations

28. For the same reasons, Article V (1) (a) of the New York Convention is fully consistent with, and requires application of the validation principle. When Article V (1) (a) supports for

application of the "law to which the parties have subjected" their arbitration agreement, it permits an implied choice of law. In particular, Article V (1) (a) recognizes that parties ordinarily intend that the law governing their international arbitration agreement is the law that makes that agreement work and that will enforce it effectively. This conclusion is confirmed by the pro-enforcement objectives of the Convention and by Article II's rule of presumptive validity *(Fremuth Wolf ¶40 p.581).*

29. Some national courts have also expressly cited a validation principle in addressing challenges to the validity of international arbitration agreements. An Austrian judicial decision has reasoned, if the wording of the declaration of intent allows for two equally plausible interpretations, the interpretation which favours the validity of the arbitration agreement and its applicability to a certain dispute is to be preferred *(Austrian ObersterGerichtshof, 2005).*

30. Notably, this application of the validation principle is fully consistent with, and indeed mandated by, respect for the parties' autonomy and intentions. Application of the law that gives effect to the parties' arbitration agreement, rather than that selected by arbitrary and mechanical application of traditional choice-of-law formulae, is in fact the true effectuation of the parties' intentions, as required by Articles II and V(1)(a) of the Convention.

31. The arbitrator shall therefore decide in each case whether the parties intended that the same law should apply to the substance of the arbitration clause, bearing in mind that the provisions of the New York and Geneva Conventions referring to the law chosen by the parties appear to contemplate an express choice rather than a merely implied one *(Rey v. Lafferty, 990 F.2d 1379).*

b. Law of the arbitral seat shall not apply, as the reason for different seat selection does not have to do anything with the law of the arbitration agreement.

32. CLAIMANT requests the tribunal to not apply the law of the seat on the arbitration agreement as claimed by the RESPONDENT. The seat may be chosen because of its geographical convenience to the parties; or because it is a suitably neutral venue; or because of the high reputation of the arbitration services there; or for some other, equally valid reason *(Redfern/Hunter, pp.120-21),* none of which have anything to do with arbitration agreement itself.

33. Applying the law which governs the contract – namely, Mediterraneo law, as demonstrated below – to the arbitration agreement is the most reasonable approach for the Tribunal in the absence of any express choice of law made by the parties. The choice of a different seat from

that of the governing law is not, in itself, sufficient to display that starting presumption. If the parties had intended otherwise then specific provision should have been made for a different law to apply. Further, silence shall not be interpreted as acquiescence *(Halki Shipping Corp v. Sopex Oils Ltd)*.

34. The intention of the CLAIMANT herein is clear, as it opposed to submit to a foreign law. Even if the intention is not clear, application of the choice of law rules and the allied interpretation techniques lead us to conclude the law of the contract to govern the arbitration agreement, given its real and closest connection when compared to the law of the arbitral seat. Thus, the CLAIMANT requests the arbitral tribunal to apply the law governing the underlying contract i.e. the Law of Mediterraneo, to the arbitration agreement and therefore, decide the validity and interpretation by application of such law and not the law of the arbitral seat.

C. "HARDSHIP" IN PERFORMANCE OF CONTRACT

35. UNIDROIT Principles set forth general rules for international commercial contracts, though, in the present dispute, the parties have not explicitly agreed that their contract is to be governed by the said principles, it may perhaps be taken into consideration for the sake of reference. "Hardship" is defined under Article 6.2.2. of the UNIDROIT Principles of International Commercial Contracts.

36. It is submitted that announcement of 25 per cent tariffs on agricultural products from Equatoriana, by Mediterraneo's newly elected President, Ian Bouckaert, was a sudden measure and came as a complete surprise to the CLAIMANT. Mr Bouckaert had made it clear that he wanted to protect the Mediterranean agricultural sector; a 25per cent tariff had neither been part of any strategy papers released earlier by the new President nor of the election manifesto. Even more surprising was the reaction of the Equatorianian Government, which has always been an ardent supporter of free trade. The Equatorianian Government had always tried to resolve trade disputes amicably and had not relied on retaliatory measures against trade restrictions. It is to be noted that it is was big surprise to everyone when the Equatorianian government imposed 30 per cent tariffs on selected products from Mediterraneo including on animal semen. Therefore, it can safely be concluded that these events are to be considered as "hardship" as per the definition given under Article 6.2.2. of the UNIDROIT PICC. Due to this reason, the CLAIMANT was put in a very tough position and the hardship faced by the CLAIMANT must have been solved by way of adapting the contract, but it wasn't.

37. Article 6.2.3 provides for the effects of hardship. It authorizes the disadvantaged party to request renegotiation of the other party, and for the court to terminate the contract or adapt it with a view to restoring its equilibrium. Also, during the review of the Working Group "Sales" drafted in 1977 by United Nations Commission on International Trade, an article governing hardship situations was proposed. However, the Committed did not retain this proposal; therefore, it attests that CISG has no room for "hardship" cases. *(Slater, 1998, p. 259, 260).* Therefore, the position in CISG is ambiguous with regard to the part governing hardship.

C.1. CONTRACT SHOULD BE ADAPTED BY APPLICATION OF THE LAW OF MEDITTERANEO, WHICH PROVIDES FOR BROAD INTERPRETATION OF CONTRACT

38. From the perspective of conflict avoidance, different types of contract clauses can have an important impact on contract performance. While stabilization clauses reinforce the sanctity of contract principle, another group of clauses allow changes in contracts. The arbitrators' power to adapt an agreement depends on the provisions of the applicable law.

39. The contract adaptation procedure introduced by the International Chamber of Commerce *('Adaptation des contrats' (Adaptation of Contracts), International Chamber of Commerce, Paris, 1978, p. 326)* is one of the major contributions to the concept of adaptation of contract. It helps to solve problems whenever the parties have not provided for adaptation of contracts in their agreement. *(Houtte/ ICC/ Fouchard, 1979 p. 67/Paulsson, 1984 p. 249)*

40. It is a reaction to the imbalances in the contract which frequently come about through circumstances which were unforeseen, or unforeseeable, by the parties at the time they entered into the contract. The continuous depreciation of currencies, the increase in the prices of the commodities and other important international factors have meant that, in the last fifty years, parties have frequently found themselves having to live with a contract totally unadapted to changing circumstances. Such situations occur frequently. *(Sammartano/Huntington/2014 p. 48)*

41. *Telecolor International ICI v. Greyhound Financial & Leasing Corporation (1983) – In* 1978 an Italian and a Swiss Company a hire purchase contract for television cameras and recording equipment. The contract provided for twenty rental payment in dollars over several years. After making a few payments, the Italian company claimed that the worsening of the exchange rate between US dollars and Italian lira had produced an excessive imbalance and asked for recession of the contract. At the same time it ceased its rental payment. The Swiss Company opposed the Italian

Company's claim, arguing that in a hire purchase contract at the risks, including any deterioration of the exchange rate, are incumbent on the lessee, and that the worsening of the exchange rate was in any event neither unforeseeable nor extraordinary. The Court of Catania rejected the first argument of the lessor, holding that in a hire purchase contract the risk borne by the lessee are only those connected with the use of goods and not also the risk of deterioration of the exchange rate.

42. However, the Court accepted the lessor's second argument that, since the parties had negotiated payment in a foreign currency which had an exchange against other currencies notoriously influenced by political factors and by financial manoeuvres, variations in exchange rate had been accepted as a normal risk and were consequently foreseeable. The Court consequently rejected the lessee claim for rescission. The Court Appeal upheld its judgment.

43. The reaction to this situation from the legal point of view is represented by hardship clauses. However, these are frequently confined to placing the parties under an obligation to discuss and re-examine the situation, and to look for a solution. A more effective solution would try, in the absence of a friendly agreement between the parties, to have the imbalance redressed and the contract rebalanced by a third party. The instruction to a neutral third party may then be to issue a recommendation for adapting the contract or to adapt it itself. By adapting the contract, potential disputes can be avoided and the parties can achieve exactly what they have in mind under their original agreement by adjusting it to the new circumstances. However, even this important formula has not yet developed as well as it should as an instrument for peace.

44. Thus, by application of the law of the contract which provides for a wider interpretation of the contract, the contract should be adapted with effect to the existing change in circumstance.

II. CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDING

45. The CLAIMANT advances its arguments by relying on evidences (such as submissions and award) sought from the other arbitration proceeding of the RESPONDENT. It firstly argues in **(A)** that the evidence sought by the CLAIMANT is admissible in the current arbitration since it is relevant to the case, material to its outcome, and credible. **(B)** Establishes that admitting the evidences sought by CLAIMANT shall not amount to breach of confidentiality on the part of CLAIMANT, the arbitrators or the other party. **(C)**Is an arguendo argument. Assuming but not

conceding to the fact that it is a breach of confidentiality, the evidences would still be admissible for reasons substantiated. **(D)** Extends the earlier argument in (C) to say that even illegally obtained information would be admissible.

A. THE EVIDENCE SOUGHT BY CLAIMANT IS ADMISSIBLE

46. As mentioned in the letter from the Counsel for CLAIMANT to the Arbitral Tribunal dated 02.10.2018, the CLAIMANT learned about the other arbitration proceeding to which the RESPONDENT is a party. It is a similar dispute that arose due to tariff imposition as well.

47. The CLAIMANT relies on the submissions made by the RESPONDENT and the award in the other arbitral proceeding, as relevant and material evidence to the current arbitral proceeding. The RESPONDENT has made contradictory statements in the two arbitration proceedings. The only difference to the present case seems to be that in the other case RESPONDENT has been negatively affected by the tariffs.

48. There is wide recognition of the arbitral tribunals' discretion to admit any relevant evidence they deem to have probative value, and likewise in international arbitration the parties are free to submit any evidence in order to prove the facts necessary to establish their cases. *(Konstantin Pilkov, 2014)*

49. Therefore, the Tribunal should consider materials (submissions and award) to be obtained from the other arbitration proceedings as proper evidences in deciding this case. Otherwise, the Tribunal should direct the disclosure of information from the RESPONDENT itself or to enjoin to this case, the other party in the other arbitral proceedings. The justifications for the admissibility of these evidences shall be as given below:

50. The criterion of "relevance" is satisfied by the materials for them to be admissible. The term "relevant evidence" generally means evidence having a tendency to make the existence of any fact that is of consequence in the case more probable or less probable than it would be without the evidence. *(Mehren and Salomon, 2003 p. 290)* Here, the evidence is relevant because the RESPONDENT is advancing contradicting arguments in the two arbitral proceedings dealing with same set of facts and questions of law.

51. All relevant evidence is generally admissible; evidence which is not relevant is not admissible as we can infer from Article 22.2 of the HKIAC Rules and for instance, even as per the common

law tradition derived from the U.S. *(US Federal Rules of Evidence r.402.)* CLAIMANT feels that the partial award by another tribunal deciding an issue of similar facts has a bearing on this case. Thereby, the material contemplated by the Counsel for CLAIMANT satisfies the condition of prima-facie relevance.

52. The evidence also satisfies the criterion of materiality. Materiality is the weightage of the evidence and its connection to the outcome of the case. Firstly, the different submissions advanced by the RESPONDENT in the two arbitral proceedings despite them revolving around the same subject matter and secondly, the arbitral award in the other proceeding that dealt with similar questions of law is material to the outcome of this case.

53. The evidence is credible for admission. CLAIMANT believes that the award and submissions from the other arbitration promised to it shall be credible source of evidence and the same shall be testified by the learned tribunal. Otherwise, the Tribunal may order the disclosure of such documents from the RESPONDENT itself; thereby the materials would be duly authentic as a pre-condition for their use as evidences in current arbitral proceedings.

54. As per Article 22.3 of the HKIAC Rules, 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. And, it may admit or exclude such evidence. Therefore, after being satisfied with the conditions of relevance, materiality, and credibility, the Arbitral Tribunal should approve of the admissibility of them and decide the dispute in their pursuance thereof.

B. THERE IS NO BREACH OF CONFIDENTIALITY IN ADMITTING THE EVIDENCE

55. There is a widely recognized conception that people opt for arbitration over litigation in Courts due to the private and confidential nature of it. However, today it is generally known that the private nature of arbitration per se does not ensure confidentiality and that confidentiality cannot be strictly assumed in all jurisdictions *(Trakman, 2002 p.1)*.

56. For example, in the Australian jurisdiction, *Esso Australia Resources Ltd. v. Sidney James Plowman(AUS, 1995)* had Mason CJ relying on *The Commonwealth of Australia v. John Fairfax & Sons Ltd., (AUS, 1980)* and holding that whenever the information revealed in the context of arbitration concerned statutory authorities and public utilities, there existed a Presumption of

disclosure. Though the cases dealt with different issues, they stand out as examples wherein confidentiality needs were overridden for other causes.

57. Likewise, the CLAIMANT claims that confidentiality should not be applied in the strict sense and that a liberal approach be taken. Disclosure of information is sought from the other arbitration to the current arbitration proceeding. It would not amount to confidentiality breach because one party is the CLAIMANT who knows the information already through its regular client who was the only other party to that arbitration. Another party is the RESPONDENT who already knows the information by having been a party to that. When information is disclosed to another private tribunal when both the parties already know the information, it is not breach of confidentiality.

58. Outline submissions and other documents engendered in the course of the arbitration were generally confidential but could be disclosed for use in separate proceedings by one of the arbitrating parties against a third party, if necessary for disposing fairly of the cause or matter or for saving costs as held in the case of *Hassneh Insurance Co. of Israel and Others v. Stewart J. Mew(GBR, 1993).* This is exactly the scenario in the present case wherein the CLAIMANT is seeking disclosure of materials from the RESPONDENT'S other arbitration.

59. *Dolling Baker v. Merret (GBR, 1990)* held that disclosure and use of arbitral materials outside the frame of arbitration is permitted when necessary for the fair disposal of another case or to save costs. Here, disclosure of information from that arbitration which deals with the same subject matter and issues shall facilitate fair disposal of the case of CLAIMANT.

60. As per *Ali Shipping Corp. v. Shipyard Trogir, (GBR, 1997)* disclosure of materials could be allowed when reasonably necessary to defend the legitimate interests of the arbitrating parties (i.e., for the protection of an arbitrating party's rights vis-à-vis third parties, or in order to found a defence). This means that the other party opposing the RESPONDENT in that arbitral proceeding is right in seeking to enjoin as a party to the current arbitral proceeding along with the CLAIMANT and disclose information to found a defence for itself, and additionally for the CLAIMANT too.

61. The ruling of the court in *U.S. v. Panhandle Eastern Corp (USA, 1988)*accepted a request for disclosure of *"all documents […] including but not limited to, "relating to an arbitration between a subsidiary*

of one of the parties to the court proceedings and a third party." This is very similar to the type of disclosure sought by the CLAIMANT too.

62. In *Gotham Holdings et al. v. Health Grades, (USA, 2009)*it was noted very much in accordance with the contentions of the CLAIMANT that "contracts bind only parties" and "no one can 'agree' with someone else that strangers [who] resort to discovery will be cut off." Two parties in the arbitration were entitled to agree not to disclose arbitration documents in court proceedings, but that disclosure should be authorized at the request of a third party asserting a legal right of access.

63. In New Zealand, the landmark case of *Television New Zealand Ltd. v. Langley Productions (NZL, 2000)* was followed by a different 2007 amendment to New Zealand Arbitration Act, wherein under Section 14E, the HC may order disclosure if in the circumstances of the case, the private interest in preserving confidentiality is out-weighed by other considerations favouring disclosure, provided that the disclosure is not more than reasonably necessary.

64. Even under the WIPO Arbitration Rules, Article 73 which mandates the duty to confidentiality between arbitrating parties is not absolute. It creates room for disclosure in limited circumstances "to the extent necessary in connection with a court challenge to the arbitration or an action for enforcement of an award," *(Smeureanu, 2011 Ch.3, pp. 27-131).*

65. The need for confidentiality can be overridden by circumstances stated in the above cases and rules from all over the world. Nevertheless, it is very important to note in the current arbitral proceedings that the neither the Arbitrators nor the CLAIMANT shall commit a breach of confidentiality in admitting the evidence that the CLLAIMANT will eventually produce from the Company suggested by Mr Velazquez who belongs to the other party. (P.O. 2, ¶ 40). Because, the Arbitrators and the CLAIMANT will in no way be bound by any obligations of confidentiality arising from the other proceedings. Article 45 of HKIAC Rules mandates confidentiality only for parties and arbitral tribunals of the case, and not other parties or other tribunals.

66. Little is known about other courts' recognition of an obligation of confidentiality covering the existence of a pending arbitration. *(Zagreb, 2009)* It is widely acknowledged that the arbitrators' duty of confidentiality is founded upon the fiduciary relationship that exists between the arbitrators and the parties. *(Jolles and Traber 2013).*

67. The above point leads us to an inference that the arbitrators in the current arbitral proceeding between the CLAIMANT and RESPONDENT do not stand in a fiduciary relationship with the Other Party and even if they did, there would not be breach of confidentiality anyway, because the Other Party itself is voluntarily willing to disclose the materials and enjoin as a party to the current arbitral proceeding. The CLAIMANT would also not be committing a breach of confidentiality in obtaining and submitting the submissions made by the RESPONDENT in the other arbitral proceedings, because, the former is only making concerted efforts to get hold of the evidence at its disposal and mainly to discharge its burden under Article 22.1 of the HKIAC Rules of proving the facts relied on to support its claim. Also, CLAIMANT also does not fall within the scope of those who have a duty to confidentiality under Article 45 of HKIAC Rules.

68. The Counsel would finally like to propose that if the Arbitral Tribunal is nevertheless unsatisfied with the prospect of obtaining information from an authorized Company and presenting it as evidence, it may kindly direct the RESPONDENT to disclose the information by itself, or enjoin the Other Party as a party to the current proceedings to ensure the authenticity of the evidence.

C. EVEN A BREACH OF CONFIDENTIALITY DOES NOT IMPEDE THE ADMISSIBILITY OF AN EVIDENCE

69. We learnt about another arbitral proceeding involving the RESPONDENT in a similar issue and the source of the information is also known. However, the source from which the Partial Interim Award (the evidence sought by the CLAIMANT to be submitted is still unknown) *(P.O. No. 2, p. 60, 61, ¶ 40, 41)*. Hence, for the purposes of this Section C, it is assumed that the Partial Interim Award sought by the CLAIMANT is obtained through a breach of confidentiality agreement by the former employees of the RESPONDENT. It is contended herein that even if the evidence is obtained by such breach of confidentiality, it is admissible.

70. In international commercial disputes, Arbitration is often sought to be the mode of dispute resolution because of the confidentiality it promises to the parties. Evidences that help the parties advocate their cause are admitted by the tribunal. In most cases, the limits of admissibility are defined by the discretion of the tribunal *(AvinashPoorooye and RonánFeehily)*. Unless the parties have agreed to the contrary, evidence would not be excluded *(Anna MagdelanaKubalcyzk,)*.

71. There have been several calls for transparency in the international commercial arbitration. Some even call for publication of arbitral awards. *(Cindy G. Buys).* As stated earlier, parties prefer arbitration for the need of confidentiality, so that they may argue in private, without loss of reputation or adverse publicity. However, confidentiality is subject to certain exceptions. Confidentiality of arbitral proceedings is implied in the English jurisdiction, but the English Courts have taken certain deviations from this hard fast principle in certain cases as enumerated One such deviation is when such disclosure is needed in the interest of justice.

72. The judgement in *Ali Shipping Corporation v. Shipyard Trogir(GBR, 1997)*is one of the foremost cases that explain the exception of *interests of justice*. Potter LJ elucidates the exception of interests of justice by saying that if a more accurate assessment of the case can be achieved by the disclosure of confidential information, then the confidentiality of arbitral proceedings should not be an impediment.

73. The judgement in *Westwood Shipping Lines Inc. v. Universal MBH,(GBR, 2012)*was in the same line of discussion giving insight to the exception of interests of justice. The claimant could not have argued the case in the absence of evidence from the previous arbitration. The Court was of the opinion that the interests of justice required disclosure of information from the previous arbitration in this case. The Court felt that the claimant needed to rely on the details of a previous arbitration to a considerable extent and hence it decided that in such circumstances, it would not be appropriate for the Court to stifle the claimant's ability to bring to light the wrong doing of one of the parties.

74. The judgement in *Teekay Tankers Ltd v. STX Offshore and Shipbuilding Co Ltd (GBR, 2017)* is one of the most recent developments in the English Jurisprudence relating to the exception of interest of justice. Here, the claimant made reference to the arbitration awards and the reasoning of the arbitrators in an arbitration that happened before the present case. The respondent counterclaimed for breach of confidentiality. The Court held the counterclaim to have failed. The reasons that were given by the Court were that the disclosure made by the claimant in this case was in support of his arguments before the Court and also were helpful to the Court to know the information that was revealed or that was concluded from evidences in the previous arbitration proceeding.

75. This principle is also followed in the Singaporean jurisdiction. The judgement in *International Coal Pte Ltd v. Kristle Trading Ltd and another (SGP, 2008*) held that once arbitral awards are passed,

they become public and are not protected by confidentiality. In this case, the evidence sought to be admitted is a Partial Interim Award, which in any case would be deemed to be public according to the Singaporean Law. In fact, Singapore goes a step farther from England to state that the leave of the Court is not required to disclose information that was reasonably necessary for the protection of a party's legitimate interests. *[MyanmaYuang Chi Oo Co Ltd. v. Win Win Nu, (SGP, 2003)]*.

76. The discussions of these cases bring us to the position where *interests of justice* and *legitimate interests of the parties are* two widely accepted exceptions to breach of confidentiality. Hence, in case of a legitimate interest of the parties and in the interests of justice, information that is considered confidential or that which is bound by a confidentiality agreement may be disclosed. Therefore, the question that needs to be answered is whether there is a legitimate interest of the CLAIMANT that requires disclosure of the information and/or whether the interests of justice allow such disclosure in this case.

77. In the present case, evidence that is sought to be admitted being presumed to be obtained by a breach of confidentiality agreement would still be admissible because it falls under the exception of interests of justice and also that of legitimate interests of a party. The claim amount of $ 1,250,000/- is a legitimate claim of the CLAIMANT as would be in the further arguments established and also that the evidence sought to be admitted would prove of an inconsistent stance of the RESPONDENT, standing for payment of the claim amount in the other arbitration and against it in the present arbitration.

78. The evidence sought by the CLAIMANT to be admitted is in support of an arguable assertion and it is put forth with bona fide intentions so that what the RESPONDENT herein claimed in the other arbitrational proceeding is noted by the Tribunal. By this, justice would be rightly served to both parties. The admission of this evidence would prove the *mala fide* intentions of the RESPONDENT herein by bringing into light highly contradictory arguments that the RESPONDENT has made at different junctures, thereby leading us to believe that the RESPONDENT wants to blow hot and cold at the same time by choosing to argue the side of law that gives it the commercial benefit it desires without considering justice or equity that needs to be served to the other party. It is right that one looks for commercial benefit and that is the basis of a business. However, such commercial benefit cannot be derived by the RESPONDENT at the cost of an unearned and undeserved loss on the part of the CLAIMANT.

D. THERE IS NO ILLEGAL CONDUCT BY THE CLAIMANT AND EVEN IF THE AWARD OBTAINED BY THE COMPANY IS THROUGH HACKING OR ONE OF THE FORMER EMPLOYEES, THE EVIDENCE SHOULD BE ADMITTED.

79. CLAIMANT claims that one of CLAIMANT's regular customer's CEO, Mr Kieron Velazquez had informed the CLAIMANT about the other arbitral proceedings and made arrangements to get a copy of the partial interim award from a company which sold the award. Even if the company which sold the award by hacking or through one of the former employees they can submit the evidence which has been obtained through illegal means before the arbitral tribunal and the tribunal should admit the evidence by all means.*[P.O 2, q.no. 40 & 41, p.61]*

80. CLAIMANT relies on a general presumption followed by England that there is no rule in common law jurisdictions that evidence must be excluded because it has been obtained illegally and improperly. The England judiciary has made it clear that it is more concerned about vindicating the truth with the aid of relevant evidence, rather than excluding such evidence on the grounds that it has been improperly obtained. If it is relevant, it is likely to be admissible although the court will decide how much weight to give it in each case and can compel disclosure of all documents relating to the gathering of the evidence in the first place. In English Jurisprudence, illegally or improperly obtained evidence was not a category of evidence excluded from the operation of law, and was thus admissible, whatever its character (whether brought into existence by the illegality or not*).[Jane Colston& Olga Bischof, p. 20]*.

81. The CLAIMANT puts forth the argument that there is no reason that doctrine fruit of the poisonous tree should apply here because it is usually used to refer to an exclusionary rule of evidence which, in some common law jurisdictions (and notably in the USA) renders inadmissible evidence which has been obtained illegally. This doctrine has no application in English Courts. Traditionally, English judges have been prepared to eat the fruit, however poisonous the tree.*[James H. Boykin & Malik Havalic, p. 211]*

82. It should be observed that the general principle is that all relevant evidence is admissible. The arbitral tribunal should not be concerned with how the evidence was obtained. The starting point in any proceedings is that if the evidence is relevant it will ordinarily be admissible. The relevance of the evidence is discussed above in ¶ 51. Therefore, there is no rule of law that evidence must be excluded simply because it has been obtained illegally or improperly. *[Kuruma v*

The Queen, (GBR, 1955)] It does not matter if it was obtained illegally, it would still be admissible. *[R v Leathem, (USA,1861)]*.

83. As laid down in common law, even criminal courts do not have discretion to exclude evidence just because it has been improperly obtained. The underlying principle is that it is the function of the judge in a criminal trial to ensure that the trial is fair, not to exercise disciplinary powers in relation to the process of obtaining the evidence in question *[R v. Sang (GBR, 1980)]*.Even if evidence may not be admissible in civil or criminal state court, this does not automatically prevent arbitral tribunal from taking such evidence into account. *[SivassporKulübü v. UEFA, (SUI, 2014)]*.

84. It is also to be noted that illegally obtained evidence cannot be excluded which would otherwise be admissible evidence on the grounds that it was improperly or illegally obtained especially if the evidence is relevant and changes the course of the arbitral proceedings. *[Helliwell v. Piggott-Sims (GBR, 1980)]*.

85. In *[Jones v University of Warwick, (GBR, 2003)]*, the claimant claimed disability in her hand following an accident at work. An enquiry agent instructed by the defendant's insurers obtained access to her home by deception, posing as a market researcher, and filmed the claimant using a hidden camera. The film showed the claimant using her hand without the disability claimed. It was accepted that the enquiry agent had committed the tort of trespass, which the claimant argued was against her right to privacy under Article 8 of ECHR, and that the evidence should be excluded under CPR, r 32.1. The court disagreed, concluding that the evidence should be admitted as it would be artificial and undesirable for evidence that was relevant not to be before the trial judge.

86. In the present case broad discretion is given to the arbitral tribunal with respect to admitting evidence in international arbitration. In *[AG v O'Brien, (IRL, 1965)]*, It was held that the arbitral tribunal has discretion to decide whether or not to exclude illegally obtained evidence. It also adopted a discretionary approach to the issue saying that arbitral tribunal should not be reluctant to admit evidence obtained illegally; there is no rule per se to say that it must always be excluded. *[P v Q (GBR, 2017)]*The Arbitral tribunal should be given broad powers and it should admit as evidence, data or documents that were illegally obtained, for instance by hacking a computer network. In the case, the Kazakhstan government's computer network was hacked and, consequently, the claimants obtained access to and relied on thousands of confidential

documents that were published following the hacking. *[Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (USA, 2002)].*

87. The jurisdiction of the courts to restrain use of documents obtained in breach of confidence or in breach of Article 8 of ECHR is a potentially significant derogation from the principle that all relevant evidence can be admissible. Very often documents which have been obtained unlawfully will also have been obtained in breach of confidence or in such a way as to engage Article 8 of ECHR. The interrelation between the breach of confidence principle and the principle that even unlawfully obtained evidence is admissible was considered by the England & Wales Court of Appeal recently. *[Imerman v. Tchenguiz, (GBR, 2010)]* where it reiterated that evidence improperly obtained can still be used. It acknowledged that the law does not usually concern itself with how evidence is obtained when considering admissibility.

88. The judgment in *[Conoco Philips v. Venezuela, (USA, 2015)],* arbitral tribunal avoided the analysis of the leaked emails on procedural grounds and held that the evidence is inadmissible. However, Prof. Georges Abi-Saab, the dissenting opinion published a prominent dissent, wherein he stated that the evidence obtained through illegal means presented glaring evidence and ignoring its existence and relevance would lead to a travesty of justice.

89. It is to be noted that even an illegal act which constituted a criminal offence under the Interception of Communications Act 1985 and under Article 8 of the ECHR was accepted and it was held that the evidence obtained by an illegal act would be admissible (even if it had constituted a criminal offence) *[St Merryn Meat Limited v. Hawkins (GBR, 2001)].* Also, the evidence collected in breach of a State's territorial sovereignty was admitted by ICJ *[United Kingdom v Albania (GBR, 1949)].*

90. To conclude, evidence should be admitted in order to be considered by the arbitral tribunal, which will only then evaluate its probative value in light of the facts of the dispute. Evidence in principle should be admitted if it is relevant and material (although article 3.11 of the IBA Rules merely requires the party to believe in the relevance and materiality of the evidence), whereas in the present case it has been proved that if even if the evidence is illegal there is credibility on its reliability and authenticity which proves to be shown. *(Konstantin Pilkov)* In order to satisfy its burden of proof, a party has to offer any evidence which supports its case, taking into consideration the evidence as a whole, and for proving against the allegations made by the RESPONDENTS. Therefore, it is proved with plethora of established case laws and principles

that nothing prevents the tribunal from admitting evidence in spite of the company obtaining the award by hacking or through one of the former employees. CLAIMANTS can submit the evidence before the arbitral tribunal and the tribunal should admit the evidence by all means.

III.CLAIMANT IS ENTITLED TO THE PAYMENT OF US $1,250,000 RESULTING FROM ADAPTATION OF THE PRICE

A. THE CLAIMANT IS ENTITLED TO THE PAYMENT OF US $,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT

91.The clause 12 of the contract provides for a price adaptation in the case of changed circumstances along the lines of the hardship provision in Art. 6.2.3 UNIDROIT Principles.

92.The UNIDROIT Principles are used as means of interpreting and supplementing the CISG. It is used to fill the gaps left by the CISG *(Bridge ¶ 11.40 p. 538; Garro; Ferrari; Bonnel)*. Turning to actual practice, it is worth noting that courts and arbitral tribunals have so far generally taken an extremely favourable attitude to the UNIDROIT Principles as a means of interpreting and supplementing CISG.

93.The CLAIMANT does not contest the applicability of the UNIDROIT Principles because Contract Mediterraneo and Eqitoriano's general contract law is a verbatim adoption of the UNIDROIT Principles.

94.The clause 12 of the sale agreement is a hardship clause which provides for adaptation of contract on the application of UNIDROIT Principles since **(1)** it provides for adaptation of contract **(2)** Hardship Resulting in Dramatic change in circumstance **(3)** Satisfies the Threshold Test for Hardship **(4)** Fundamental Change in the Equilibrium of the Contract and **(5)** Moreover the risk allocation for DDP delivery vests on the RESPONDENT.

A.1.UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS PROVIDES FOR ADAPTATION OF CONTRACT

95.Under the PICC, a party that faces hardship may request renegotiation of the contract (Article 6.2.3(1) PICC) in derogation to the general principle of *pactasuntservanda* which means that the agreements must be kept. This elucidates the principle of good faith (Article 6.2.1 PICC). Article 6.2.1 stipulates that "[w]here the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following

provisions on hardship." This provision "acts as a reminder that the general duty is to perform and that relief is very much the exceptional case" *(McKendrick p. 716, n. 4 and Article 6.2.1)*

96. The covenant of good faith and fair dealing which is implied in each contract follows that in a case in which the circumstances to a contract undergo fundamental changes in an unforeseeable way, a party is precluded from invoking the binding effect of the contract. The idea that a change in circumstances may affect the binding force of a contract is known under the maxim *clausula rebus sic stantibus*: the contract remains binding provided that things remain unchanged. It is understood, however, that due to the fundamental principle of *pactasuntservanda* not any change of circumstances can be sufficient. Due to its exceptional character, its application is only justified if the change in circumstances was fundamental and unforeseeable."*[Islamic Republic of Iran, (USA, 1998)]*

97. Whether a party faces hardship can only be determined on a case-by-case basis considering, among other things, the cost increase or value loss in percentage, the counter-performance to be received by the obligor, its financial situation, and the specifics of a possible explicit or implicit risk allocation by the parties. *(Mercedeh Azerdo Da Silveira, pp. 321 - 348)*

98. Moreover the hardship claim as stipulated in the Article 6.2.2 of the UNIDROIT principles is also satisfied by the CLAIMANT. The events occurred before the third delivery which is the 23rd January 2018 which after the conclusion of the contract on the 6th may 2017.

99. This event of a tariff could not have been taken into account as horse semen is not usually an agricultural product and this came as a complete surprise. The retaliatory tariff measure of 30 percent is unexpected because Equitorriana has always been a free trade country. This clearly beyond the control of the CLAIMANT and so the risk of event was not assumed the party.

100. Therefore the Tribunal must find hardship to be reasonable and adapt the contract with a view to restoring its equilibrium *(Article 6.2.3(4) PICC)*. To adapt the contract, the ruling court must rely on the equilibrium decided by the parties at the time of the conclusion of the contract. *(Maskow, p. 663; Bund, p. 392.)*

A.2. HARDSHIP RESULTING IN DRAMATIC CHANGE IN CIRCUMSTANCE

101. The term "hardship" is typically used to characterize all situations in which a dramatic change in circumstances leads to a fundamental disruption of the contractual balance. Situations of hardship thus encompass situations in which performance has become radically more onerous or radically less profitable for a party often referred to as situations of commercial impracticability, as well as situations of frustration of purpose, a sub-category of situations of

decreased profitability. impossibility of performance is usually not required for a finding of hardship. *(Southerington)* What is critical, is that all provisions dealing with hardship, is that the distortion of the contractual equilibrium could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; that is, it did not constitute a normal risk associated with the kind of contract under consideration *(Carlsen)* or a risk that this party agreed to assume. The obligee's right to compel performance under the terms of the contract is called into question considering that the obligor which may well still be capable of performing the contract might not have consented to the contract had the surrounding conditions been – or had this party foreseen that they would become – radically different. *(Perillo)* Therefore, the Tribunal should find that the very intention for including the hardship clause was to address the price changes which could destroy the commercial basis of the contract. *(CE No.4).*

a. Threshold test for Hardship

102. In principle, the risk of increase in the cost of performance is to be borne by the obligor. A party faces hardship (or an economic impediment) if performance becomes excessively onerous (thus attaining the "reasonable limit of sacrifice" leading to a fundamental alteration of the contractual equilibrium), not merely more onerous than anticipated. *(Brunner, p. 214; Schwenzer, pp. 714-715.)*

103. The CLAIMANT has incurred an economic impediment wherein the performance of the contract wherein the dispatch of the 25 doses of semen after the imposition of the tariff has become excessively onerous. This satisfies the Threshold Test for Hardship and the Tribunal must allow for the adaptation of the Contract.

b. Fundamental Change in the Equilibrium of the Contract

104. The unforeseen supervening circumstances can distort the balance of performance and counter-performance, as well as their respective values, and thus fundamentally alter the equilibrium of the contract. One of the ways in which risk allocation may be made is when the economic risk of changed circumstances maybe apportioned between the parties. This is achieved by conferring the power to adapt (reform) the contract with a view to restoring its equilibrium on courts. Adaptation is generally a less stringent legal consequence than termination of the contract (on terms to be fixed), which is also a possible consequence. *(Christoph Brunner ,pp. 391 - 420)*

105. The main objective inquiry is whether the equilibrium of the contract has been fundamentally altered (required threshold test of the hardship exemption). The hardship exemption is therefore not only based on the central inquiry of whether, but also of 'how much risk the disadvantaged party assumed'. *[United States v. Wegematic Corp.,(USA, 1996)]* In hardship situations, it is typically a question of degree as to whether performance of the contract has become excessively onerous, and whether it is still reasonable to have the obligor (exclusively) carry the risk of changed circumstances. If compared to 'actual' force majeure cases, the issue of risk allocation in hardship situations requires a value judgment to a somewhat larger extent as to why the risk of the agreement should not be left with the party concerned (exception to the principle that the loss lies where it falls). *(Münchener Kommentar)*

106. In order to prevent the disappointment of expectations that the transaction aroused in one party, as the other had reason to know, the tribunals find and enforce promises that were not put into words, by interpretation when they can and by implication and construction when they must. When unforeseen contingencies occur, not provided for in the contract, the courts require performance as men who deal fairly and in good faith with each other would perform without a law suit. It is thus that unanticipated risks are fairly distributed and a party is prevented from making unreasonable gains at the expense of the other. This is not making a contract for the parties; it is declaring what the legal operation of their own contract shall be, in view of the actual course of events in accordance with those business mores known as good faith and fair dealing.*(Joseph M. Perillo)* Therefore in view of the fair dealing and good faith, the tribunal must find that the the equilibrium has been fundamentally sifted towards the side of the CLAIMANT which lead to the adaptation of the Contract.

c. Risk Allocation for DDP Delivery vests on the RESPONDENT

107. Moreover, the clause 8 of the Frozen Semen sales agreement provides for for shipment through DDP delivery. The DDP Delivery is not in its true form as many factors such as seller buyers insurance etc has not been contracted. There has been an unexpected increase in the tariff amount by the government of Mediterraneo which imposes additional costs as a way of hindrance. Therefore, to the extent that it is customary that the charter contract shifts the risk of additional costs caused by unexpected hindrances to the seller/shipper, these additional costs must be borne by the buyer as from the time of shipment. *(Christoph Brunner)* Therefore, the CLAIMANT is entitled for an adaptation of the contract arising from the clause 12 of the frozen semen sales agreement.

B.THE CLAIMANTIS ENTITLED TO THE PAYMENT OF US $250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER THE CISG.

108. The sphere of application of the CISG is determined in accordance with rules set out in article 1 to 6. CISG regulates the sales contract and its aspect of performance. In addition to this it means that if there is an established system or rule set between the parties the same is applicable. Though the application of CISG can be excluded pursuant to Art. 6 CISG, Commentators and Case Law have held that CISG applies to contracts even when there is no 'Choice of Law' clause or when there is silence between the parties on the 'Choice of Law.' Case Laws have held that the CISG warrants exclusion only when Parties explicitly exclude it. It is not said to be excluded merely because the Choice of Law clause provided for the Laws of a Contracting State to be applicable without mentioning the substantive law that would apply.*(Butler p. 8; Ajax Tool Works; American Mint; BP Oil International; Fashion Textiles Case; Magnesium Case; Schlechtriem/Butler, ¶ 15 p. 15; Surface protective film case; Drago/Zoccollilo p. 9; Leete, Ch. V; Saf, Ch. 5; Schlechtriem, Requirements of Application, p. 784; Schlechtriem/Schwenzer, Art. 6, ¶ 13-15)*

109. In the present case both the parties in the arbitration agreement is very much subjected to the CISG having been explicitly stated in the Clause 14 of the "Frozen Semen Sales Agreement. *(CE No.5)*.

110. Both the contracting parties are from the states of Mediterraneo&Equatoriana. It is conclusive that there is absolutely no dispute to the fact that the above two states and the state of Danubia are contracting states of the CISG. On this basis it is safe to establish that the CISG is the law governing the 'Contract'. With reference to the specific contractual clause it is evident that neither party has any issues with applying CISG.

B.1. THE "CONTRACT" FALLS WITHIN THE SCOPE OF THE CISG

111. In provision of Article 1(1) of the CISG has been satisfied as the nature of the contract is that of the sale of goods. Furthermore the two parties are from completely two different jurisdictions such as Mediterraneo &Equatoriana. There is absolutely no dispute that the two contracting parties have the place of business in the states which are contracting State to the CISG.

112. Article 14(1) of the United Nations Sales Convention defines an offer as a proposal for concluding a contract addressed to one or more specific persons, provided that it is sufficiently

definite and indicates the intention of the offeror to be bound in case of acceptance. Article 14(1) is intended to be specific about what constitutes an offer. All the requirements must be present in a proposal for concluding a contract.

113. In pursuance to Art. 19(1) of the Convention, if the offeree attempts to add or subtract anything from it, he is not accepting it but making a counter offer. In article 19(2) of the Convention this general rule is qualified in that a reply which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror, without undue delay, objects to the discrepancy. The Convention, in article 19(3) implies that if an element that is included in the acceptance adds new terms, modifies the terms of the offer or introduces any other type of limitation to the offer that substantially alters it, the contract will not be considered concluded. The response to the offer will be regarded as a counter-offer.

114. The CLAIMANT would show to the tribunal that the Sales Agreement has been validly concluded between the parties pursuant to the requirements under the CISG with conditions that have been mutually accepted in accordance to article 14 & 19 of CISG. It is important to note that the RESPONDENT has initiated this proposal in accordance to article 14(ex ante) specifically to the CLAIMANT and has clearly indicated intention to be bound in case there was an acceptance. Subsequently as mentioned earlier in article 19 of CISG, there were counter offers with modification and additional. Hence the fundamentals off the contract have been incorporated. These can be in the form of the latin maxim used in the law of contracts such as *essentialianegotii, naturalianegotii*&*accidentalianegotii*. *Essentialainegotii* clearly refers to the minimum content of the contract in order for the contract to be held effectively binding. In the present case the essential component of the contract includes the specifications of the horse semen (from stallion Nijinsky III), rate of the fee in exchange for the semen & the intention to enter in to a long term mutually beneficial relationship. The *Naturalainegotti* herein refers to the other parts of the contract which tend to flow, in the 'contract', the DDP provisions which have been articulated in the contract. The *accidentalainegotti* includes terms which have been included on tactical basis such as the modes of the payment, no guarantee/warranties with respect to the fertility capacity of the semen. The same has been concluded and that the parties have intended to be bound.

B.2. DUTY TO ISSUE NOTICE OF IMPEDIMENT AND ITS EFFECT ON THE ABILITY TO PERFORM HAS BEEN FULFILLED

115. CISG imposes a duty on the parties to give a notice in case of event of impediments to the other party in reasonable time as mentioned in Article 79(4). In the present case, prior to the imposition of the tariff on the agricultural products of Meditterraneo. The CLAIMANT satisfied the requirement to issue a notice to the RESPONDENT of the impediment and its effect on the CLAIMANT's performance and position.Giving reference to CE No.7, the CLAIMANT has clearly expressed its concerns as to the the difficulty they face in performing their obligation as per the contract. The CLAIMANT clearly states in reference to the 'preparing of the final shipment' that the custom's newly imposed tariff on the agricultural products clearly include horse semen. It was on thisthat the CLAIMANT has realised the commercial aspect of the contract has been defeated with rise in the cost of shipment; The CLAIMANT intended to find a solution to this situation.

a. Applicability of Article 79 of CISG in relation to hardship

116. Though the provisions of CISG are silent with respect to the situation of hardship, such silence can't be construed in a manner that there is no remedy available. Article 79 of CISG clearly offers remedy in situations of increased onerousness. Neumayer, Ming have suggested that it can't be inferred from this silence that no remedy is available to a party suffering from a significant loss of value consequent to a change in circumstances or, more importantly for the purposes of this work, that the only remedy available in situations of increased onerousness is the one offered under Article 79.*(CISG-AC , n. 27; Neumayer/Ming, p. 535)*

117. The very basic principles underlying Article 79 suggest that exemption from liability for damages should be granted only if a very extreme (bordering on complete) loss-of-value resulted from developments that were beyond the control of the party claiming relief. *(Honnold, p. 622).*

118. In the present dispute prior to the imposition of the tariff by the Equatorianiangovernment on selected products from Mediterraneo including animal semen, the CLAIMANT had notified the same to the RESPONDENT. As stated earlier, tariff on animal semen came as a complete surprise, clearly beyond the control of the CLAIMANT. The changes in circumstance made it highly unfavourable for the CLAIMANT. The imposition of the tariff on the shipments destroyed the profit margin of 5% for the CLAIMANT. This lead to a situation of causing "commercial impracticality" as the CLAIMANT'S performance has been rendered with extreme difficulty, constituting to a significant hardship. Despite this, the payment has been done when the CLAIMANT had an impression that the RESPONDENT would have accepted the position after Mr.Shoemaker had emphasised on RESPONDENT'S interest for a long time relationship.

b. Broad interpretation of Arbitration Laws of Mediterraneo as the established usage

119. The primary focus in not on impediment resulting in failure of the contractual obligation. Instead, the main focus is on situations in which the costs of performance have increased dramatically after the conclusion of the contract.

120. First and foremost, the agreement which has established usage between the two parties is a very much important deciding factor. In this context, the term 'usage' implies a line of conduct which is for a certain period of time adopted between the contracting parties. Such agreements established may be explicit or implicit (Art. 9 of CISG) *(Schwenzer/Fountoulakis, p. 91; Schlechtriem/Butler, p. 59, n. 60).* It is on the basis of this established agreement that the course of the conduct of the contract creates a justified expectation on the manner in which the party will proceed in the future. Hence with reference given to the intent in the CE No.3, there is a clear understanding that there was an acceptance that the law governing the contract would be Mediterraneo. *(Schmidt-Kessel, in Schlechtriem/Schwenzer, p. 186; Schlechtriem/Witz, p. 74; Schwenzer/Fountoulakis, p. 93).*

121. Despite the same being contradicted and disputed by the RESPONDENT, as mentioned earlier, the CLAIMANT has established that the system or the agreement being put in place is being governed by the Arbitration Law of Mediterraneo. The Arbitration Law of Mediterranean is binding on both the parties in the present case. With respect to the Arbitration Law of Mediterraneo, many similar other jurisdictions have incorporated a broad interpretation for the arbitration agreements, irrespective of narrow wordings and the parol evidence rule. On this basis it is submitted that there is absolutely no need to rely on the narrow interpretation as followed in Danubai. Hence the parol evidence rule is not appropriate in the said case. It is conclusive that the broad interpretation extends to 'increased remuneration'.

c. Broad interpretation of the general principles of the CISG in interpreting Hardship

122. In relation to the hardships of the CLAIMANT, considering that there is inadequacy in establishing a particular usage, such gap is addressed in accordance to the general principles by virtue of article 7(2) of CISG. Adaptation in case of hardship is derived from the five major principles general principles underlying CISG. The principle of good faith, reasonableness, general duty to cooperate, general duty to cooperate with the view to due performance of the contract &"favor contractus" underly the various provisions of the CISG, besides looking at the literal interpretation of the convention and the behaviour of the parties taken throughout the contractual dealings.*(Schlechtriem/Butler,p.52; Schlechtriem/Witz p.63; Schwenzer/Hachem, p.136;*

Schwenzer/Hachem, p.22,Filanto, CISG-online 45; "Bonaventure" v. Société Pan African Export (FRA 1995); DulcesLuisi, SA de CV v. Seoul International Co. Ltd. y Seoulia Confectionery Co., Carvalhal Sica, p.51; Ferrari, p. 225; Ferrari, p. 174.)

123. In the present case, the CLAIMANT hadenteredinto a long termcontractualrelationship with the RESPONDENT, with the intention of gaining a profit margin of 5%. Subsequent to the imposition of tariff on animalsemen, the equilibrium of the contracthasbeentotallydisrupted and destroys the very commercial basis of the contract. Despite such hardship, the CLAIMANT didnotfail to cooperate and hascomplied with the contractualobligations. Another general principleunderlying the CISG includes the parties duty to mitigate the loss by takingnecessarymeasures. In the present case despitethischange in the circumstance and increasingdifficulty, the CLAIMANT didnotfail to take the necessary measure to fullfilhiscontractualobligation. No suchmeasuresweretaken by the RESPONDENT in a way that the CLAIMANT'S losscouldhavebeenmitigated after giving an impressionthattheywouldfind a solution.

124. In the lines of the earlierparagraph, the Belgian Supreme Court relied on Article 7(2) to fill the CISG'sinternal gap regardingsituations of hardship in a 2009 decision. It concluded that a party facing a dramatic increase in the costs of performance is entitled to renegotiations. *(Scafom International BV, (BEL, 1963.)* The dispute involves a Dutch buyer opposing a French seller after having entered into several contracts for the sale of steel tubes to be used in the construction of scaffolds. These contracts contained no price adjustment clause. After the conclusion of the contracts, the price of steel rose unexpectedly by about 70 percent. The seller tried to renegotiate a higher contract price, but the buyer did not accept the new price. Inspite of the Court of First Instance acknowledging to the fact that there was a contractual imbalance the said court did not include the right to renegotiate. The Supreme Court hasoverruled the decision of the previousdecision by clearlystatingthat CISG alsodeals with situation of "force majeure" asanimpedentjustifying the exemptionat the same time itdoesnotimplicitlyexclude the relevance of hardship. In addition to that, the change in the circumstancesincreased the burden of performance of the contract in a disproportionatemannerforming an impediment in the sense of article 79(1).

125. In this case the CLAIMANT couldnotreasonableforsee the increasetariffrates of the horsesemen. Given the rise in the tariff of the agricultural products in thiscircumstance the CLAIMANT was selling in a muchlowervaluewhichdetroyed the commercial basis of the

contract. Thisimposed a difficultobligation on the CLAIMANT's part and therefore, he isentitled to the adaptation of the contract.

PRAYERS FOR RELIEF

Counsel, on behalf of CLAIMANT, respectfully requests the Arbitral Tribunal:

1) To order RESPONDENT to pay to Phar Lap Allevamento an additional amount of US$ 1,250,000 which is 25 per cent of the price for the third delivery of semen;

2) To order RESPONDENT to bear all the costs arising from this arbitration.

Respectfully submitted,

Capital City, 31 July 2018