Sixteenth Annual Willem C. Vis (East)
International Commercial Arbitration Moot Hong Kong

XIAMEN UNIVERSITY

MEMORANDUM FOR RESPONDNET

Black Beauty Equestrian	*v.*	**Phar Lap Allevamento**
2 Seabiscuit Drive		Rue Frankel 1
Oceanside		Capital City
Equatoriana		Mediterraneo
RESPONDENT		**CLAIMANT**

COUNSELS

LIAO XUEYU · HUANG YUEER · JIN TINGFENG · QIAO QIYA

BAO NINGZHEN · LIANG LIUXIAO · JIANG YI · LI LINGYU

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TABLE OF ABBREVIATIONS AND DEFINITIONS

%	per cent
$	United States Dollars
ANoA	RESPONDENT's Answer to the Notice of Arbitration
Art	Article
Arts	Articles
CISG	United Nations Convention on Contacts for the International Sale of Goods (1980)
CL. MEMO.	Memorandum for CLAIMANT
CLOUT	Case Law on UNCITRAL Texts
ed.	Edition
e.g.	*example gratia* (for example)
Exhibit C	CLAIMANT's Exhibit
Exhibit R	RESPONDENT's Exhibit
HKIAC	Hong Kong International Arbitration Center
2013 HKIAC Rules	Hong Kong International Arbitration Rules 2013
2018 HKIAC Rules	Hong Kong International Arbitration Rules 2018
2010 IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
ibid.	*ibidem* (in the same place)
ICC	The International Chamber of Commerce
infra	below
inter alia	among other things
Letter by Fasttrack	Mr. Fasttrack's letter of 3 October 2018
Letter by Langweiler	Mr. Langweiler's letter of 2 October 2018
lex arbitri	law of the seat of arbitration
Model Law	Law on International Commercial Arbitration with amendments (2006)
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)
No.	number/numbers

NoA	CLAIMANT's Notice of Arbitration
p.	Page
pp.	Pages
para.	Paragraph
paras.	Paragraphs
PO1	Procedural Order No. 1 of 5 October 2018
PO2	Procedural Order No. 2 of 2 November 2018
Sales Agreement	Frozen Semen Sales Agreement made on 6 May 2017
supra	Above
v.	*versus* (against)
UNCITRAL Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2010)

STATEMENT OF FACTS

Phar Lap Allevamento ("CLAIMANT") is a company operating stud farm in Mediterraneo and offers frozen semen for artificial insemination.
Black Beauty Equestrian ("RESPONDENT") is a company famous for its broodmare lines in Oceanside, Equatoriana, and intends to become one of the leading breeders for racehorses.

21 March 2017	Due to the cancellation of the ban on artificial insemination, RESPONDENT first contacted CLAIMANT, inquiring about the availability of Nijinsky III, CLAIMANT's most famous stallion for breeding programme. RESPONDENT asked CLAIMANT to provide it with 100 doses of semen.
24 March 2017	RESPONDENT received the letter showing the CLAIMANT's agreement to offer 100 doses of semen in accordance with the *Mediterraneo Guidelines for Semen Production and Quality Standards*.
28 March 2017	RESPONDENT replied to CLAIMANT, requiring about the adoption of DDP and further negotiations on Applicable Rules and Dispute Terms.
31 March 2017	CLAIMANT agreed with the DDP Delivery Terms. Besides, CLAIMANT requested to clarify the issues on the transfer of risks and jurisdictions.
10-11 April 2017	CLAIMANT and RESPONDENT **("Parties")** exchanged their views on arbitration clause, especially on neutral venue and applicable law.
12 April 2017	RESPONDENT made a list of issues for further negotiations following draft by Phar Lap of 11 April and short discussion with Napravnik this morning. The list indicates the rejection of the ICC hardship clause.

6 May 2017	The Parties concluded the contract.
19 December 2017	The Government of Equatoriana imposed a tariff of 30% upon all agricultural goods from Mediterraneo as a retaliation for the previous restriction imposed by Mediterraneo.
20 January 2018	CLAIMANT emailed to RESPONDENT seeking for a solution.
21 January 2018	Mr. Shoemaker called CLAIMANT and informed CLAIMANT that he was not involved in the negotiations and had no authority to allow the additional payment.
31 July 2018	Since no settlement could be reached about the price adaptation, CLAIMANT submitted its Notice of Arbitration **("NoA")** and appointed Ms. Wantha Davis as its arbitrator.
24 August 2018	RESPONDENT filed its Answer to the Notice of Arbitration **("ANoA")**, in which it appointed Dr. Francesca Dettorie as the second arbitrator in this arbitration.
14 September 2018	Prof. Calvin de Souza was designated as Presiding Arbitrator and the Arbitral Tribunal was constituted.
12 October 2018	CLAIMANT asked for the production of the relevant documents which were obtained by illicit means from the other arbitration.

INTRODUCTION

1. With regards to the procedural issues, this Tribunal has no jurisdiction to hear this matter. To be specific, it is *lex arbitri* that governs the arbitration agreement and its interpretation **(ISSUE 1.I)** and the Tribunal has no powers to adapt the contract **(ISSUE 1.II)**. As for the evidence-related issues, CLAIMANT is not entitled to submit the evidence from the other arbitral proceedings **(ISSUE 2)**. On the merits, CLAIMANT is not entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price neither under Clause 12 of the contract **(ISSUE 3)** nor CISG **(ISSUE 4)**.

ISSUE 1: THE TRIBUNAL DOES NOT HAVE JURISDICTION UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

2. CLAIMANT asserts that the applicable law of the arbitration clause should be the law of Mediterraneo and the Tribunal has the jurisdiction on the issue concerning the adaptation of the contract. However, RESPONDENT will demonstrate: first, The arbitration agreement and its interpretation are governed by the law of Danubia **(I)**; Second, The Tribunal has no jurisdiction over claims related to contract adaptation **(II).**

I. The arbitration agreement and its interpretation are governed by the law of Danubia

3. Contrary to CLAIMANT's ill-founded allegation, Clause 14 merely designates the applicable law for the main contract, and the arbitration agreement shall be governed by the law of Danubia. RESPONDENT will demonstrate that, the law of Mediterraneo cannot be extended to the arbitration agreement, *i.e.* Clause 15 **(A)**, and that *lex arbitri* is the proper law for Clause 15 pursuant to the conflict of law analysis **(B)**.

A. The designation of the law of Mediterraneo cannot be extended to the arbitration agreement, i.e. Clause 15

4. Both Parties give consent to the fact that the law of Mediterraneo is the governing law for the sales contract [*Exhibit C5*]. However, RESPONDENT strongly objects to CLAIMANT's erroneous argumentation that the law of Mediterraneo is applicable to the arbitration agreement. To clarify the proper law for the arbitration agreement, RESPONDENT contends that, Clause 14 shall be interpreted as only applicable to the main contract pursuant to Art. 8 CISG **(1)**. The universally recognized doctrine of separability prevents the law of Mediterraneo from being extended to the arbitration agreement **(2)**.

1. According to Art. 8 CISG, Clause 14 should be interpreted as merely govern the main contract

5. Clause 14 provides that the law of Mediterraneo including the CISG governs the Sales Agreement. Art. 8 CISG not only governs the interpretation of parties' unilateral acts but also the interpretation of the contracts [*Cowhides Case; Crudex Case, para. 9.3.4; Roland Case*]. Therefore, Clause 14 should be interpreted in accordance with Art. 8 CISG.

6. According to Art. 8(1) CISG, interpretation should give effect to both parties' intent [*Frozen Chicken Case; Building Material Case; Packaging Machine Case; Toluene Case*], and such intent should be true and genuine [*Digest CISG, p.55; Packaging Machine Case; Fruit and Vegetable Case; Tissue Machine Case; Tsonakis Case; CLOUT Case No. 607; CLOUT Case No. 617*]. Moreover, Art. 8(3) provides that parties' intent should be determined by considering all relevant circumstances including the negotiations [*Fashion Products Case; Fruit and Vegetables Case; Proforce Case*].
7. *In casu*, against CLAIMANT's incorrect analysis that record shows the intent for the law of Mediterraneo to apply [*CL. MEMO., P. 7, para. 23*], negotiation history clarifies Parties' real and genuine intent to isolate the law of Mediterraneo from the arbitration agreement.
8. After CLAIMANT prepared its first draft containing a forum selection clause in favor of the courts in Mediterraneo on 24 March 2017 [*Exhibit C2; PO2, p. 55, para.4*], RESPONDNET immediately rejected such choice in its counter email on 28 March 2017 [*Exhibit C3; PO2, p. 55, para. 4*]. RESPONDENT stressed in the counter email its desirability for the mutual benefit of both Parties. And pursuant to such purpose, applying the law of Mediterraneo while also allowing the courts of Mediterraneo to have jurisdiction would not be appropriate since it is clearly not fair for RESPONDENT. A practical solution proposed by RESPONDENT is that the application of law of Mediterraneo is only applicable if the courts of Equatoriana have jurisdiction [*Exhibit C3*]. This proposal reflects RESPONDENT's intense will to reach a balance between both Parties by allowing the law of Mediterraneo in which CLAIMANT isolated to govern the substantive aspect of the contract while leaving the aspects of dispute solution to be subject to the jurisdiction of Equatoriana. Arbitration agreement is duly related to dispute solution instead of the substantive relationship of the transaction. Naturally it is RESPONDENT's authentic intent to isolate arbitration agreement from the law governing the main contract.
9. Realizing the importance of stipulating the proper law for the arbitration clause and to articulate its true intent, RESPONDNET explicitly clarified in its first draft for the dispute resolution clause that the dominating law for the arbitration agreement is the law of Equatoriana based on the model clause suggested by HKIAC [*Exhibit R1*]. Moreover, Mr. Antley, who was RESPONDENT's sole negotiator on the Sales Agreement, listed the clarification of the applicable law of the arbitration clause in his note before the car accident, suggesting the applicable law for the arbitration agreement

was not settled and need further discussion [*Exhibit R3*]. This note is a convincing evidence to rebut CLAIMANT's unreasonable argument that RESPONDENT gave up the effort to include the choice of the law of Danubia into the arbitration clause. Furthermore, the note also supported that the law of the main contract cannot be extended to the arbitration agreement, and the proper law of agreement needs further conflict of law analysis [*CL. MEMO., p. 8, para. 28*].

10. Therefore, the negotiation history clearly revealed both Parties' genuine intent to isolate the law of the main contract from the arbitration clause.

2. The doctrine of separability prevents the law of Mediterraneo from extending to the arbitration agreement

11. The doctrine of separability means that the arbitration agreement is fundamentally independent from the substantive contract [*Born, p. 473; Blackaby et al., p. 159; Glick/Venkatesan, p. 136; Masser, p. 2773*]. One direct consequence of the doctrine of separability is that the matrix contract and the dispute solution clause can be subject to different laws [*Masser, p. 2773; Blackaby et al., p. 159; Glick/Venkatesan, p. 137; Born, p. 476; ICC Case No. 1507; ICC Case No. 6162; Hettinga Case; Nirma Case; Hydropower Plant Case; Peterson Farms Case; Owens Corning Case*]. Furthermore, there is a developing trend in international commercial arbitration to recognize the doctrine of separability's effect for choice of law purpose, which means that the principle can be invoked to prevent the choice of law for the main contract to be extended to the arbitration agreement [*Dicey/Morris, para. 16R-012; Gaillard/Goldman, p. 211; Born, p. 395; Briggs, pp. 85-97*]. The proper law for the arbitration agreement must be ascertained by performing a separate conflict of law analysis [*Born, p. 464*].

12. *In casu,* both the Mediterranean Arbitration Law and the Danuabian Arbitration Law acknowledge the doctrine of separability [*ANoA, para. 14*], which is a fact that CLAIMANT fails to recognize, by contending that both Parties exclude from the doctrine of separability when selecting the law of Mediterraneo [*CL. MEMO., p. 7, para, 25*]. Moreover, the arbitration clause does not specify its applicable law, and the choice of law clause is preceding the arbitration clause rather than contained therein [*Exhibit C5*]. Therefore, a conflict of law analysis is needed to ascertain the applicable law of the arbitration clause, without which the proper law chose for the main contract cannot be extended to the arbitration clause.

B. *Lex arbitri* is the proper law for Clause 15 pursuant to the conflict of law analysis

13. Opposite to CLAIMANT's statement that the arbitration clause should be governed by the substantive law [*CL. MEMO., p, 5, para. 20*], RESPONDENT submits that that *lex arbitri* governs the arbitration agreement.
14. Due to separability of the arbitration agreement from the main contract, its proper law must be examined by separate conflict of law analysis [*Born, p. 464*]. The three-step analysis is widely recognized in international commercial jurisprudence as a generally accepted approach of conflict of law analysis [*Dicey/Morris, para. 16R-001; Pryles, p.73; FirstLink Investments Case; BCY Case; Pacific Recreation Pte Case; Arsanovia Case; VSC Steel Case*]. The three-step test is composed of: (a) the parties' express choice; (b) the implied choice of the parties as gleaned from their intents at the time of contracting; or (c) the system of law with which the arbitration agreement has the closest and most real connection [*BCY Case; Sulamerica Case; Dicey/Morris, para. 16R-001; Pryles, p.73; FirstLink Investments Case; Pacific Recreation Pte Case; Arsanovia Case; VSC Steel Case*].
15. It is RESPONDENT's argumentation that the law of the seat, *i.e.* the law of Danubia is the proper law to govern the arbitration agreement under the three-step test because: the Parties did not make an express choice of law for Clause 15 **(1)**, but impliedly agreed that it should be governed by the law of Danubia **(2)**. Even if the Tribunal finds that the Parties did not impliedly choose the law of Danubia, the *lex arbitri*, as the law of closest connection, should be applied to Clause 15 **(3)**.

1. The Parties did not make an express choice of law for Clause 15

16. Express choice of law for the arbitration agreement should be articulated in the arbitration agreement [*Blackaby et al., p. 158; Glick/Venkatesan, p. 131; Born, p. 491; HK Model Clauses*]. Thus, a choice of law in the substantive contract without specifying the law for the arbitration clause cannot be regarded as an express choice of law for the arbitration agreement.
17. *In casu*, Clause 15 is the arbitration clause and it did not specify any applicable law to govern itself [*Exhibit C5*]. The choice of the law of Mediterraneo in Clause 14 cannot be extended to the arbitration agreement [*supra para. 12*]. Therefore, RESPONDENT agrees with CLAIMANT that there is no express choice of law for the arbitration agreement [*CL. MEMO., p. 5, para. 20*].

2. The Parties impliedly agreed that the arbitration clause should be governed by the law of Danubia

18. CLAIMANT argues that the substantive law for the main contract is implied to govern the arbitration agreement when lack of designated applicable law for the dispute solution clause [*CL. MEMO., p. 5, para. 20*]. However, RESPONDENT will demonstrate that the law of Danubia is implied to the arbitration agreement.

19. The implied intent of the parties should be ascertained considering other provisions of the contract. Many countries' private laws provide that the choice of law of a contract should be made in an express manner or be made implicitly by considering relevant provisions of the contract. [*Art. 16 Swiss Statute of Private International Law; Art. 187 Restatement (Second) of Conflict of Laws; Art. 1124 Civil Code of the Republic of Belarus*]. Specifically, the arbitration agreement is a strong indicator of parties' intent. Provisions providing dispute settlement seat between parties indicate the application of the law of the seat [*Toblerv Case*], since parties accept that the law of the seat relating to the conduct and supervision of arbitrations will apply to all aspects of arbitral proceedings, when choosing the arbitral seat. Naturally, arbitration agreement is also subject to the law of the seat [*FirstLink Investments Case*]. Furthermore, *Lex arbitri* is especially implied where parties choose an arbitral seat different from parties' mother states, especially when the law of the seat differs from the underlying law of the contract [*Born, p. 513; Gaillard/Goldman, pp. 211, 430; Dicey/Morris, para. 16-019; Trukhtanov, pp. 140-144; ICC Case No. 6162; ICC Case No. 1507; République de Guinée Équatoriale Case; A.I. Trade Finance Case; Arsanovia Case; Owens Corning Case; Karaha Bodas Case*].

20. *In casu*, Danubia is the law of the seat different from both Parties' mother states. By appointing Danubia as the arbitral seat, the Parties are willingly subject themselves to the law of Danubia relating to the conduct and supervision of their arbitration. Naturally the arbitration agreement, which is inseparable from the arbitration, is also subject to the law of Danubia. Therefore, CLAIMANT's conclusion that the application of the law of the seat running counter to party autonomy is obviously problematic [*CL. MEMO., p. 6, para. 21*].

21. CLAIMANT argued that the structure of the Sales Agreement demonstrates Parties' intent that the law of Mediterraneo governs both the main contract and the arbitration agreement [*CL. MENMO., p. 7. para.* 26]. However, the adjacency of the choice of law

clause and the arbitration clause cannot prove parties' intent to extend the choice of law for the main contract to the arbitration agreement [*Arsanovia Case*].

22. To conclude, both Parties implied the law of Danubia to govern the arbitration agreement when designating Danubia as the arbitral seat.

3. Even if the Tribunal finds that the Parties did not impliedly choose the law of Danubia, it still governs Clause 15 as law with the closest connection

23. Arbitration agreement generally has closer connection with the law of the seat instead of the substantive law [*Born, p. 518; Shwartz/Derains, p. 111; Lew, p. 107*]. Arbitration agreement has procedural character, and thus has closest connection with the law of the seat, since *lex arbitri* will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective [*Born, p. 512; Toblerv Case; Jörg Case; Owerri Commercial Case; ICC Case No. 5294; ICC Case No. 1507*]. This is particularly true in cases where the local law of one of the parties' home state governs the contractual relationship, but the arbitration agreement provided for arbitration in a neutral forum [*Born, p. 518; Arsanovia Case; Owens Corning Case*].

24. *In casu*, the arbitration agreement is considered to be a procedural contract instead of a sales agreement [*PO2, p. 60, para. 36*], and a procedural agreement has the closest connection with the law of the seat and thus shall be governed by the law of the seat [*supra para. 23*]. Moreover, the arbitral seat is located in Danubia, which is a neutral forum, while the choice of substantive law is in favor of CLAIMANT's home state, *i.e.* Mediterraneo [*Exhibit 5*]. Therefore, the arbitration agreement has the closest and real connection with the law of Danubia, comparing to the law of Mediterraneo, since it will govern the conduct and supervision of the arbitration.

25. To conclude, under the losest connection test, the law of Danubia is the proper law for the arbitration agreement.

II. The Tribunal has no jurisdiction over claims related to contract adaptation

26. CLAIMANT submits that the Tribunal may adapt the contract, relying on the drafting history of the contract and preceding communication, which are not admitted under Danubia law. According to Danubia law, only when granted by the wording of the contract expressly does the Tribunal has jurisdiction to adapt the contract, whereas there is no such wording in the Sales Agreement **(A).** Even though several exceptions to this rule exist, there is no such circumstance in this case as to trigger the exception **(B).**

A. The Sales Agreement does not grant the Tribunal jurisdiction to adapt the contract expressly

27. Danubia law adheres for the interpretation of contracts including arbitration agreements to the "four corners rule" [*ANoA, para. 13*], namely "parol evidence rule", to determine whether the contract grants the tribunal to adapt contracts. It is the rule that the evidence which is extrinsic to the writing will not be admitted to contradict or amend a written contract [*UCC Art. 2-202; UNIDROIT Art. 2.1.17*]. Since once the parties have reduced their agreement to a writing where they intend to contain the final and complete statement of their intent and agreement, then evidence of terms that would supplement or contradict it are not admissible [*Arthur L. Corbin, p. 573*].

28. Consistent with Danubia's law, when it comes to jurisdiction, many international arbitral awards only depended primarily upon the wording of the clause to interpret, by reasoning that "[*a*] *convention to arbitrate …… is to be construed in a way which leads to find out and to respect the common will of the parties*" [*Born, p. 1341; Amco Asia Case; ICC Case No. 7929; ICC Case No. 4145; ICC Case No. 6474*]. And the most reliable clues to true intent or will of the parties to a well prepared and negotiated contract are the wording and text in the contract [*Grant County Case; Metro East Case*]. Hence, the interpretation of the arbitration agreement must be limited to its intrinsic evidence which is found in the writing.

29. In this case, the question about whether Tribunal has the power to adapt the contract or not is not incorporated into the final draft of the contract at all. There is no express wording in the Sales Agreement that grants the Tribunal the power to adapt the contract. First, there is no such wording of "adapt" or "adaptation" in the text of the Sales Agreement [*Exhibit C 5*], with the appearance of which jurisdiction to adapt the contract can be definitely recognized. Second, there is no any other express authorizing statement with different expression. CLAIMANT stated that the request for adaptation is one of disputes "arises out of" the contract due to the hardship claim provided for in Clause 12 [*CL. MEMO., para. 33*]. However, "express" is an antonym of "implied" and means "clear", "unmistakably communicated" and most importantly "direct" [*Black's Dictionary, p. 1748*]. It means that Danubia law requires the authorization statement to be direct and clear enough, without further inference and interpretation. That's because the inference and interpretation themselves represents a risk of uncertainty and mistake and. The conclusion made by CLAIMANT that the Tribunal is expressly authorized to

adapt the contract [*CL. MEMO., para. 33*] is based on its own supposition. Hence, there is no express authorization statement in the Sales Agreement.

30. Furthermore, the wording of "arising out of" or "arising under" is generally regarded to have a narrow meaning so that the scope of arbitration agreement should be limited to only the disputes exactly incorporated in the contract [*Born, p. 1353; United Farmers Plant Food Case; Tracer Research Case; Seifert Case; Co-op Banking Case; Mercantile Bank Case; Codelfa Construction Case; Kern Land Case*]. Such narrow wording is adopted in the Clause 15 of Sales Agreement [*Exhibit C5*], which serves as a modifier of "any disputes" in the same clause, narrowing the scope of the arbitration agreement. Thus, the arbitration agreement should be interpreted narrowly without including "adaption" into the tribunal's jurisdiction.

31. In conclusion, based on the wording of the Sales Agreement, the Tribunal is not granted the power to adapt the contract.

B. There is no such circumstance in this case as to trigger the exceptions of the parol evidence rule

32. Parol evidence rule does not mean that the external evidence will not definitely be adopted in any event [*UNIDROIT Art. 2.1.17*]. In some cases, the extrinsic evidence is admissible, if the oral or external evidence: (1) has a particular meaning, which is used by custom or usage in particular trade, industry or region [*Hutton v. Warren*]; (2) is to show the contract is subject to a "condition precedent", *i.e.* the parties have made an agreement and have also a detailed contract that is not intended to be activated until an outside event occurs [*Pym v. Campbell*]; (3) is to show that the written contract is incomplete [*Van Den Esschert v. Chappell*]; (4) is to resolve an ambiguity in the contract; (5) is to show the contract is not legally binding, for instance, because of mistake or illegality; or (6) is to establish a collateral contract and so on.

33. However, none of the exceptional situations exists in this case, specifically the (3), (4) and (6) of the above-mentioned exceptions. First, the arbitration agreement between the Parties is complete and without ambiguity. Mr. Antley and Ms. Napravnik might had reached a consensus that they would add an adaptation clause afterwards [*Exhibit C8*], but the conversation between them did not result in any agreement on adaptation or form such a term in the Sales Agreement. And as Ms. Napravvnik herself stated in her witness statement, after the short conversation, Mr. Antley merely promised to propose a draft of the discussed adaptation clause the next morning [*Exhibit C8*]. It indicates

that their so-called "consent" of "adding an adaptation clause" is a mere discussion itself or a proposal for a further bargain for a term, where the alleged "adaptation clause" is with an uncertain, or even no, content. Hence, such discussion would not affect the contract's completeness and clearness.

34. Second, the Parties' discussion or even consent on the incorporation of an "adaptation clause" does not constitute a collateral contract between them, either. If there is a collateral contract, it means that at least one of the Parties would not have entered into this Agreement without an "adaptation clause". The existence of the "adaptation clause" does not serve as an inducement to the Sales Agreement.

35. To conclude, based on the wording of the Sales Agreement, the Tribunal has no jurisdiction to adapt the contract.

CONCLUSION ON ISSUE 1

36. To conclude, the choice of law clause, i.e. Clause 14 in the Sales Agreement cannot be extended to the arbitration agreement, i.e. Clause 15. And according to conflict of law analysis, the law of Danubia is the proper law for the arbitration agreement. Hence, governed by Danubia law, the Tribunal has no jurisdiction to adapt the contract.

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

37. Evidence plays a crucial role in the outcome of all cases. CLAIMANT seeks to submit as evidence the Partial Interim Award (hereinafter referred to as "the Award") rendered in another arbitration, in which RESPONDENT is a party [*Letter by Langweiler*]. However, RESPONDENT holds that the disputed evidence was obtained by illicit means and thus is inadmissible to the present arbitration **(I)**. Besides, the submission of the evidence is inconsistent with the confidentiality obligation **(II)**.

I. The unlawfully obtained evidence is inadmissible to the present arbitration

38. A first investigation has disclosed that the only source of the information could either be two former employees of RESPONDENT, who had the obligation to keep it confidential, or a hack of RESPONDENT's computer system [*PO1, p. 51*]. RESPONDENT will demonstrate that in the present dispute, CLAIMANT violated the "*clean hands*" doctrine to unlawfully obtain the evidence **(A)** and meanwhile, the interest of justice also could not justify favoring the admission of the wrongfully disclosed document **(B)**.

A. CLAIMANT unlawfully obtained the evidence in violation of "*clean hands*" doctrine

39. The "clean hands" approach has been applied in many international cases [*Iranian Hostages; Persia International Bank v. Council; Methanex v. US; EDF v. Romania*]. Pursuant to this theory, whether illegally or improperly obtained evidence will be thrown out of the tribunal is largely depended on who obtained it [*ICCA Sydney*]. RESPONDENT will demonstrate that CLAIMANT itself was involved in illegal procurement **(1)**. Besides, CLAIMANT was an "interested party" concerning the process of evidence taking **(2)**. Furthermore, due to the '*fruit of the poisonous tree*' doctrine, the Award with other documents is also inadmissible as evidence **(3)**. In any event, admitting the evidence will violate the basic principle of good faith in international arbitration **(4)**.

1. CLAIMANT took part in the evidence procurement by arranging to acquire it from a company

40. Usually, the "*clean hands*" doctrine supports that the evidence is inadmissible if the wrongdoing was conducted by the party seeking to benefit from the evidence [*Sullivan*]. In this regard, allowing a party to rely on evidence which that party has procured unlawfully would run counter to the principle of *ex turpi causa non oritur action* [*Blair/Ema, p. 256*].
41. CLAIMANT is not in possession of the Award yet. However, it has in the meantime arranged an opportunity to acquire it against payment of $1000 from a company [*PO2, p. 60, para. 41*]. In other words, CLAIMANT itself was taking part in the process of procuring the evidence.

2. Even though not originally involved, CLAIMANT was not a "disinterested party" concerning the process of evidence taking

42. International case law indicates that evidence could be considered *prima facie* admissible if the tribunal accesses to it through a third "disinterested party", even though the evidence was obtained originally illegally [*Blair/Ema, p. 256*]. To determine the scope of a "disinterested party", it is suggested that one who is not a party to the proceedings and stands to gain or loses nothing from its outcome may constitute such a "disinterested party" [*Nicaragua v. US*].
43. Obviously, *in casu*, CLAIMANT is an interested party rather than a disinterested party

concerning the evidence. CLAIMANT's intent to submit the documents is to strengthen its argument in this arbitration proceeding. Therefore, it is far from persuasive to treat CLAIMANT as a disinterested party submitting this evidence.

3. Due to the '*fruit of the poisonous tree*' doctrine, the Award with other documents is still inadmissible as evidence

44. The phrase "fruit of the poisonous tree" is usually used to refer to an exclusionary rule of evidence which, in some jurisdictions renders illegally obtained evidence inadmissible [*Nardone v. US; Boykin/Havalic, p. 35; Reisman/Freedman, p. 747*].

45. In the present case, no matter disclosed by two former employees of RESPONDENT, who had confidential obligation, or a hack of RESPONDENT's computer system, the method of gaining this evidence is without doubt illegal. Therefore, CLAIMANT's potential submission is excluded as per the 'fruit of the poisonous tree' doctrine. The Tribunal should, thus, exclude the evidence from the present proceedings.

4. The evidence is inadmissible because CLAIMNAT was in violation of good faith principle

46. Good faith is an omnipresent principle guiding all proceedings in international commercial arbitration, as well as governs legal relations in all of their aspects and content. [*Cremades, p.761; Methanex v. US; Inceysa v. Salvador*]. The term good faith has been embodied by several institutional rules or evidence rules, including Art. 9(7) 2010 IBA Rules [*Arts. 14.5, 32.2 LCIA; Art. 20.7 ICDR; Art. 34(3) ICSID*]. Though it is hard to define the accurate scope of good faith in arbitration proceeding, it is widely accepted that the basic equal treatment and procedural fairness shall be respected [*Methanex v. US; EDF v. Romania; Libananco v. Turkey*].

47. *In casu*, CLAIMANT arranged to acquire the evidence against payment of $ 1,000 from a company. That company has a doubtful reputation as to where it gets its information from and has refused to disclose its sources [*PO2, p. 60, para. 41*]. Obviously, since RESPONDENT has confirmed that there could only be two sources of disclosure of this information [*PO1, p. 51*], CLAIMANT would not be unaware of that gaining documents from that company may be illegal. At least, it can be seen as CLAIMANT's bad faith to conduct evidence taking, which offends basic principles of fairness required of all parties in every international arbitration.

B. CLAIMANT's submission of evidence cannot be justified by the interest of justice

48. When dealing with the issue of illegally obtained evidence, tribunals are supposed to find a balance between rejecting procedurally wrongdoing and finding the truth [*Blair/Ema, p. 258; ConocoPhilips v. Venezuela*]. In other words, if the evidence is relevant and material to an issue in the case which the tribunal is required to decide, its admissibility should be further analyzed with regard to the interests of the other parties to the arbitration who may have been victims of the unlawful conduct [*Boykin/Havalic, p. 35*]. RESPONDENT will demonstrate the submission of documents cannot be justified by the purpose of case justice, since the evidence is neither relevant to the case **(1)** nor material to the outcome **(2)**.

1. The evidence is not relevant to the case

49. Tribunals have the duty to determine the relevance of the evidence to the dispute. [*Laminoirs Case; Iron Ore Case; Art. 9.1 2010 IBA Rules; Art. 22.3 2018 HKIAC Rules*]. Commonly, the term "relevant to the case" denotes that the evidence produced by parties must be useful in establishing the truth of the factual allegations, on which the parties' legal conclusions are based [*Hilmar, p. 427; Pilkov, p.147; Marghitola, p. 51*].

50. In point of fact, compared to the present arbitration, the other arbitration did involve the same party, *i.e.* RESPONDENT, and also the seemingly similar issue of adapting price under tariff adjustment. However, these similarities are superficial and cannot justify that the disputed evidence from the other arbitration is useful in establishing the truth of the factual allegations. *Au Contraire*, the following differences on the crux of the two arbitral proceedings demonstrate that the two cases are totally and substantively distinct from each other. Thus, based on these differences, the attitudes or allegations RESPONDENT held in the previous arbitration cannot be used to add considerations of the factual allegations in the present case. Consequently, the disputed evidence from the previous arbitration cannot be considered as useful in the establishment of the truth of the factual allegations.

51. Firstly, although both previous and present case provide for delivery DDP, the meaning of the term DDP, in the present case, has been modified, solely indicating the transfer of shipment obligations to CLAIMANT, instead of transferring all risks to CLAIMANT [*Exhibit C8*]. Secondly, the clauses which have hardship wording in the

two cases differ. In the previous case, the parties explicitly incorporated ICC-Hardship clause [*PO2, p. 60, para. 39*], whereas in the present case, ICC-Hardship clause has been excluded by the parties and Clause 12 is not identified as ICC-Hardship clause. Thirdly, the previous case adopted Model HKIAC Clause with all additions [*PO2, p. 61, para. 39*]; while in the present case the Parties deleted an important provision: *"The law of this arbitration clause shall be….*" [*HKIAC Model Clause; Clause 15*]. This deletion arouses dispute between the Parties.

52. Accordingly, based on the stark and substantive discrepancies between the previous case and the present case, it is far from convincing to say that the disputed evidence from the other arbitration is sufficiently relevant to the present case.

2. The evidence is not material to the outcome

53. Even if the evidence is considered to be relevant to the case, it still has to meet the higher threshold that the evidence needs to be "material to the outcome" [*Marghitola, p. 49*]. Usually, when evidence is needed to allow complete consideration of the factual issues from which legal conclusions are drawn, it will be regarded as "material to the outcome" [*Marghitola, p. 49; Pilkov, p. 147*]. To identify the definition of this sentence and the term "factual issues" therein, it must be clarified that documents which are related to legal rather than factual issues, such as the excerpt of award or commentaries, are unable to allow the comprehensive consideration of the factual issues [*Marghitola, p. 52*]. Thus, these documents cannot be regarded as "material to the outcome".

54. *In casu*, the disputed evidence mainly pertains to the award from another arbitral proceeding and it embodies the legal issues rather than factual issues. Hence, the disputed evidence cannot be used to proffer the consideration of the factual issues. Thus, it fails to meet the standard of "being material to the outcome".

55. To conclude, the evidence CLAIMANT requested to submit has not fulfilled the two requirements: being relevant to the case and material to the outcome in this arbitration.

56. Based on the reasons above, the Tribunal should dismiss the illegally obtained evidence.

II. The submission of the disputed evidence shall be precluded by confidentiality

57. CLAIMANT alleges that the disputed evidence should not be excluded since it did not violate the confidentiality obligation [*CL. MEMO., p.15*]. On the contrary, RESPONDENT will demonstrate that the disclosure of the evidence is in violation of the inherent concept of confidentiality of the arbitration **(A)**, and the parties in the

former arbitration have expressly chosen their procedures to be confidential **(B)**. Furthermore, the disputed documents fall outside the ambit of the exceptions to the confidentiality **(C),** and the disclosure of such documents cannot be justified by the alleged transparency principle **(D)**.

A. The disclosure of the evidence is in violation of the inherent concept of confidentiality of arbitration

58. Confidentiality has always been regarded as a self-evident attribute in arbitration and was considered to be a fundamental and important advantage to arbitration [*Ligeti, p. 41; Mason, p. 246; Paul, p. 127*]. As an extension of privacy, confidentiality means the existence of the arbitration, the subject matter, the evidence, the documents prepared for and exchanged in the arbitration, and the arbitrator's awards and other decisions cannot be divulged to any third parties [*Mistelis, p. 213*]. In practice, arbitral awards are generally treated as confidential, unless the parties agree otherwise [*Ligeti, p. 21*]. Therefore, based on the inherent concept of confidentiality in arbitration proceedings, any disclosure of the arbitration documents, including the award, violates the implied obligations to keep the arbitration confidential [*Hassneh Case; Ali Shipping Case*].
59. *In casu*, CLAIMANT sought to rely on the Award from another arbitral proceeding as evidence. The two parties in the former proceeding did not reach any special agreement to permit their awards to be disclosed to non-parties. Thus, due to the implied concept of confidentiality in arbitration, the Tribunal should not admit the documents as evidence.

B. Parties in the previous arbitration had explicitly agreed the disputed evidence to be confidential

60. Even if confidentiality is not innate to arbitration, it is universally acknowledged that parties can expressly provide for confidentiality in their agreements [*Plowman Case; PANHANDLE Case*]. Usually, parties adopt the rules of an arbitration institution in their agreement in bid to incorporate confidentiality duties explicitly, or they devise their own confidentiality rules when concluding a confidentiality agreement [*Katalin, p. 16; Ileana/Julian, p. 9*]. Under either scenario, all relevant documents, as the objects of confidentiality obligations, are confidential and thus cannot be divulged to any third parties [*Mistelis, p. 213; United Parcel Service of America Inc. v. Government of Canada; Methanex v. US; Katalin, p. 3*].

61. *In casu*, the above two sources of express confidentiality obligations coexist. The first source of explicit confidentiality duties is Art. 42 2013 HKIAC Rules. Pursuant to Art. 42, two former employees of RESPONDENT, as witnesses to the previous arbitration, have obligations to keep arbitral awards and other relevant information secret [*Art. 42 2013 HKIAC Rules*]. The second source of express duties originates from confidentiality agreements to which the two employees were parties [*PO2, p. 61, para. 41*]. Under these confidentiality agreements, it was incumbent on the employees not to disclose any relevant information concerning the previous arbitration. Thus, based on these two sources of express obligation of confidentiality, it is undoubted that the Award and relevant submission from the previous arbitration are the objects of the express obligation of confidentiality duties. Hence, the disputed evidence is confidential and cannot be disclosed to any third parties, including the Tribunal.

C. The disputed evidence falls outside the purview of the exceptions to the confidentiality duties

62. Confidentiality is not and cannot be absolute [*Ileana/Julian, p. 49; Hassneh Case; Ali Shipping Case*]. It neither automatically attaches to all phases of the arbitral process, nor does it cover all materials created in an arbitration [*Ileana/Julian, p. 74*]. Rather, it is subject to various exceptions [*Katalin, p. 33*]. At present, there are four widely-accepted exceptions: (i) the consent of parties; (ii) a court order; (iii) a court authorization; and (iv) the reasonable need for the protection of the legitimate interests of an arbitrating party [*Katalin, p. 33; Ali Shipping Case*]. Under these exceptions, the confidential information can be disclosed.

63. Among these four exceptions, it is uncontroverted that only the last one is relevant to the present case. In the application of the last exception, there is a requirement of reasonable necessity [*Ali Shipping Case; Hwang/Katie, p. 612; Hassneh Case; Insurance Co Case*]. The standard "*reasonable necessity*" requires that when protecting the legitimate interests of an arbitrating party, the disclosure of the documents must be a necessary element, rather than a merely helpful element, in the establishment of the requesting party's defense or cause of action. And without such disclosure, the party requesting disclosure cannot establish its claims [*Ali Shipping Case*].

64. In the case at hand, the disputed evidence is of limited avail in helping CLAIMANT establish its claims. To establish its first and third submissions, CLAIMANT can resort to ways other than referring to the disputed evidence; for example, CLAIMANT can

look into the negotiation history between the Parties. As a matter of fact, CLAIMANT did so [*CL. MEMO., p.7*].

65. In light of the above, the evidence at issue is not reasonably necessary for the establishment of CLAIMNAT's claims. Thus, the disputed evidence falls outside of the scope of the exceptions to confidentiality.

D. The alleged transparency principle embodied in UNCITRAL Rules on Transparency could not justify the disclosure of confidential documents

66. CLAIMANT alleges that its submission shall be allowed pursuant to the bedrock principles of transparency, which is embodied in UNCITRAL Rules on Transparency [*CL. MEMO., p. 16, para. 55*]. However, RESPONDENT will demonstrate that UNCITRAL Rules on Transparency is not applicable to this arbitration.

67. The UNCITRAL Rules on Transparency provide a level of transparency and public accessibility to arbitrated disputes that previously did not exist [*Laurence/Rukia, pp. 59-76*]. However, Art. 1 of the UNCITRAL Rules on Transparency explicitly limits their application to investment treaty arbitrations only, unless agreed otherwise [*Art. 1 UNCITRAL Rules on Transparency*]. In fact, it is not desirable or feasible to directly apply the UNCITRAL Rules on Transparency to international commercial arbitration [*Poorooye/ Ronan, p. 310*].

68. In the present case, since the Parties had not agreed to arbitrate under the UNCITRAL Rules on Transparency, there is no doubt that the Rules are not applicable to this arbitration.

CONCLUSION ON ISSUE 2

69. CLAIMANT is not entitled to submit evidence from the other arbitration proceeding, since the evidence is obtained by illegal means and the submission of it violates confidentiality obligation.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 UNDER CLAUSE 12 OF THE CONTRACT

70. CLAIMANT's claim that the Clause 12 of the Sales Agreement is a hardship clause and provides an adaptation remedy is baseless [*CL. MEMO., p.19, para. 61*]. The Parties have never reached any agreement including a hardship clause. In fact, Clause 12 does not satisfy the requirements to form a hardship clause **(I)**. Every possible means

of interpreting Clause 12 would lead to the same result: Clause 12 does not cover the impediment of tariff increase **(II)** or provide an adaptation remedy for it **(III)**.

I. Clause 12 of the Sales Agreement is not a hardship clause and cannot justify CLAIMANT's claim

71. According to Clause 14 of the Sales Agreement, this contract is governed by the law of Mediterraneo, including CISG [*Exhibit C5*]. The general contract law of Mediterraneo is a verbatim adaption of UNIDROIT Principles [*PO2, p. 52*]. There is no model clause of "hardship clause" under Mediterranean law or CISG, but Art.6.2.3 UNIDROIT Principles prescribes the effects of hardship situations on the performance of the contract, and thus contractual terms with similar effects are usually referred to as "hardship clauses" [*Brunner, p. 391; Bernardini, p. 291; Ferrario, p.74*].

72. As is widely accepted and also pointed out by CLAIMANT, a hardship clause needs to fit two parts: the first part is the definition of applicable situations; the second part is that the provision of a chance to revise the contract [*CL. MEMO., p. 20, para. 64*]. And the parties are more possible to set up a hardship clause to deal with matters destroying the equilibrium in a long-term contract [*Brunner, p. 438; Ferrario, p. 71; Art.6.2.2 Comment UNIDROIT Principles*].

73. *In casu*, it is arbitrary and baseless for CLAIMANT to regard Clause 12 as a hardship clause. Based on the wording of Clause 12, it only confirms several situations of risks transfer in a DDP delivery. Further it uses the expression of "*Seller shall not be responsible for ...*". In any reasonable third person's perspective, it only provides an exemption of release to non-performance but a revision of contract [*Exhibit C5*]. Thus Clause 12 does not satisfy the requirements of a hardship clause. The inclusion of hardship wording does not mean to establish a hardship clause, but to clarify the specific situations of risks transfer by raising examples. When a particular event is explicitly agreed upon, it prevails over the hardship standard [*Brunner, p. 422*]. Besides, the Sales Agreement is not a long-term agreement but divided a single purchase into three shipments [*Exhibit C5*]. Clause 12 is not an implied hardship clause dealing with hardship impediments in a long-term relationship.

74. Furthermore, the Parties never reached a consensus of including a hardship clause in the contract. RESPONDENT has clearly showed its rejection on the ICC-Hardship clause [*Exhibit R3*]. Any argument based on a hardship clause is meaningless.

II. The Tariff increase does not constitute an impediment under Clause 12

75. Pursuant to Art. 8 CISG, contracts shall be first interpreted by ascertaining parties' intent, then resorting to "a more objective analysis" from a reasonable third person [*Digest CISG, p. 56; Minerals Case*]. In the case at hand, the Parties did not intend to settle tariff increase impediment under Clause 12 **(A)**. Having regard to a reasonable third person's perspective, it would draw the same conclusion **(B)**.

A. The Parties did not intend to address tariff increase impediment under Clause 12.

76. In the value of Art.8(1) CISG, interpretation of a contract should firstly give effect to both parties' intent. When an intent could be used in interpretation, it should be an intent "[*t*]*he other party knew or could not have been unaware what that intent was*" [*Art.8(1) CISG; Digest CISG, p. 55; MCC-Marble Case; Toluene Case; Packaging Machine Case*]. All relevant circumstances such as any previous negotiations shall be considered when determining the parties' intent [*Art.8(1), (3) CISG; Cowhides Case; Schlechtriem/Schwenzer, p. 150; Flechtner, p. 275; Honnold, p. 117; Building Material Case; Marzipan Case; Crudex Case; Roland Case*].

77. In the dispute at hand, it is true that the Parties intended to alleviate CLAIMANT of certain DDP delivery risks [*CL. MEMO., p. 23, para. 76*], but what the Parties agreed is only to transfer limited risks to RESPONDENT, rather than all risks. By refusing the ICC-Hardship clause [*Exhibit R3*], RESPONDENT rejected the proposal that all risks should be transferred. RESPONDENT's intent to narrow the applicable situations of Clause 12 is very clear. This opinion was clearly conveyed to CLAIMANT in further negotiation and accomplishment of the Sales Agreement [*Exhibit R3*]. CLAIMANT certainly knew this intent but it did not rebut it. Since CLAIMANT is well aware of RESPONDENT's intent to narrow the situation of risks to be transferred, the applicable situations of Clause 12 should be narrowed to the presented ones. And the remedy of which should be strictly narrowed, too.

B. From any reasonable third person's perspective, Clause 12 does not cover the situation of tariff adjustment

78. As the parties' subjective state of mind would be hard to detect, contract interpretation would also resort to "a more objective analysis" from a reasonable third person [*Art.8(2) CISG; Digest CISG, p. 56*]. Thus, the reasonable third person's understanding of

contract language and parties' conduct would be an objective standard to interpret a contract [*Digest CISG, p. 56*]. Some courts even found that when the contract language is clear, an objective understanding of literal meaning should prevail in interpretation of the contract. It excludes the in-depth psychological investigations of parties' intent [*Wood Case; Repair Machine Case; Crude Metal Case*]. And there are scholars holding the same opinion [*Rosengren, p. 3; Schlechtriem/Schwenzer, p. 154; Bonell, p. 13; Perillo, p. 11; W.Wall/Whalen, para. 4*]. And the interpretation should depend on the understanding of a reasonable third person and be in good faith, an unbalanced interpretation cannot get effective [*Rosengren, p. 4; Pan American Energy LLC v. Argentina; BP America Production Company v. Argentina*].

79. *In casu*, Clause 12 uses unambiguous wording to demonstrate specific risks transferred to RESPONDENT. Pursuant to Clause 12, in a changed DDP delivery, the risks born by RESPONDENT only include "*lost semen shipments*", "*delay in delivery*", "*hardship caused by additional health and safety requirements or comparable unforeseen events making the contract onerous*" [*Exhibit C5*]. Tariff increase does not fall within the first two scopes; it neither satisfies the elements in a hardship or a comparable situation.

80. In present case, Clause 12 is to address unforeseen impediment comparable to health and safety requirement [*Exhibit C5*]. In any reasonable person's perspective, "health and safety requirements" are quality requirements, and they have nothing in common with the tariff increase. Besides, one of the principles to interpret a contract is that the interpretation should give effect to all terms [*Art.4.5 UNIDROIT Principles; ICC case No. 8547*]. It is also applied in literal interpretation. In this case, from CLAIMANT'S perspective, the events which would destroy the commercial basis of the deal are considered to be the situations comparable to health and safety requirements [*CL. MEMO., p.21, para.67*]. However, by that interpretation, the impediment under Clause 12 would fundamentally destroy the commercial basis. It is contradictory to the wording in Clause 12, which only intends to address the matters "making the contract more onerous". Thus, taking the interpretation raised by CLAIMANT would make the latter terms useless. The events comparable to health and safety requirements should be narrowed to quality requirements influence business.

81. And the tariff increase situation in this case does not make the performance become more onerous. Whether the performance of contract becomes onerous should rely upon the circumstances [*Comment of Art.6.2.2 UNIDROIT Principles*]. The party who asks for remedy based on the imbalance of contract should provide evidence for it [*Heating*

Units Case]. Besides, in legal practice, courts have found that the 70% price increase in cost of performance would give rise to serious imbalance while a 30% price increase does not suffice [*Steel Tube Case; Ferrochrome Case*]. In this case, CLAIMANT does not provide evidence to prove that the contract becomes more onerous. From a reasonable third person's perspective, the Parties have adopted a DDP delivery, CLAIMANT would have foreseen that it should burden all the risks until delivery except for several situations, so this losing profit by tariff increase is part of the risks that associate with its commercial activities. Resorting to legal practice, as CLAIMANT holds that it would get a 25% lost in this performance, it is far more less than to make the contract become onerous. It does not constitute an impediment of Clause 12.

82. Furthermore, RESPONDENT has accepted an increased price with the changed DDP delivery. In any reasonable third person's perspective, taking a broad interpretation and affording the additional payment of tariff would be unbalanced to RESPONDENT.

C. Clause 12 does not provide for the remedy to adapt the price

83. The parties only have duty to enter into renegotiation in an appropriate starting point when there is a hardship clause, an adaptation clause, or a renegotiation clause [*Brunner, p. 422; Peter, pp. 231, 234; Korll, p. 426; Zeyad, p. 261*]. The starting points are matters agreed by the parties and stipulated in contract terms. Such a clause should be sufficiently determined or certain so that it gives rise to legally binding obligation of adaptation [*Beisteiner, p. 81; Kroll, p. 456*]. Therefore, when there is no such a clause, the parties do not have obligations to renegotiate and adapt the contract.

84. In present case, as has been demonstrated, Clause 12 is not a hardship clause [*supra, para. 72*], and does not provide for an adaptation remedy either. CLAIMANT's misinterpretation of Clause 12 would be misleading. The expression of "[s]*eller shall not be responsible for...*" in Clause 12 [*Exhibit C5*] clearly shows that the only purpose and effect of that clause is to provide an exemption remedy. It does not contemplate any possibility of varying the contract, including adapting the price, altering the delivery date and so on. It lacks certainty of binding obligation of renegotiation or adaptation, and thus could not be defined as an adaptation clause or a renegotiation clause. Though CLAIMANT raises that RESPONDENT created an impression for the need of adaptation [*CL. MEMO., p. 24, para. 78*], RESPONDENT's reply only intended to share their experience with arbitration in general but not to show its assent

to the proposal. If RESPONDENT had intended to include a hardship clause or an adaptation clause, it would have accepted CLAIMANT's proposal directly. As a result, this issue was put aside by the parties for later consideration, and it turns out that in the end the parties did not provide for adaptation or renegotiation under Clause 12. [*Exhibit C8*].

CONCLUSION ON ISSUE 3

85. Clause 12 does not cover tariff increase situation, nor does it provide an adaptation remedy for it. CLAIMANT is not entitled to the payment under that clause.

ISSUE 4: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 UNDER CISG

86. The CISG contains no specific provisions concerning hardship, therefore CLAIMANT could not ask for adaption under Art.79 CISG **(I)**. CLAIMANT argues that matters governed but not settled by the CISG could invoke Art.7(2) CISG to settle [*CL. MEMO., p. 28, para. 90*], however, Arts.6.2.2&6.2.3 UNIDROIT Principles cannot be used to supplement and interpret Art.79 CISG **(II)**, and the Tribunal could not apply UNIDROIT Principles to adapt the price **(III)**.

I.CLAIMANT has no right to ask for price adaption under Art.79 CISG

CLAIMANT could not rely on Art.79 CISG because it is derogated by Clause 12 of the contract **(A)**. Even if it is applicable, CLAIMANT's situation does not meet the requirements for Art.79 CISG **(B)**, and in any event, Art.79 CISG only provides remedy of exemption **(C)**.

A. The inclusion of Clause 12 constitutes the derogation in the sense of Art.6 CISG

87. Art.6 CISG authorizes parties to "[*e*]*xclude the application of this Convention or ... derogate from or vary the effect of any of its provisions*". And derogation is not subject to express limitation, which means that the parties can achieve to an implicit derogation agreement [*Gillette/Walt, p. 468*]. As for Art. 79 CISG, tribunals have found that it has the character of a "force majeure clause", and where a contract contained force majeure clause which covers a wider scope of risks, the provisions of the contract should prevail over Art.79 CISG [*Corn Case*]. It indicates that the similar provisions included in the contract could derogate from Art.79 CISG.

88. *In casu*, both Parties agreed on the inclusion of a narrow hardship reference into the

force majeure clause and regulated some other risks directly in the contract [*Exhibit C5, p. 14; Exhibit R3, p. 35*]. It specifies certain risks that are not included in Art.79 CISG but meanwhile plays a similar role as the provision does, therefore, it constitutes an implicit derogation.

B. The applicable requirements for Art.79 CISG are not met

89. Art.79 CISG clearly states its applicable situations, and there are several factors that need to be considered. The prerequisite for Art.79 CISG is non-performance situation and the failure to perform is due to an uncontrolled impediment that could not be expected to overcome. In the case at hand, CLAIMANT does not ask relief for impediment basing on a non-performance situation **(1)**, and the tariff also does not qualify as an impediment since it could reasonably be expected to overcome **(2)**.

1.Art.79 CISG should be invoked under non-performance situation

90. As a prerequisite, Art.79 CISG requires that a party's failure to perform is due to an impediment [*Digest CISG, p. 392*]. The meaning of the phrase "failure to perform" could be given its widest definition and as such non-performance could be total or partial, delayed or defective. Only if there is non-performance, would it be necessary to decide whether the non-performing party is liable or not for his non-performance. Hence, under a full-performance situation, there is no impediment relevant to this provision.

91. *In casu*, CLAIMANT has made the final shipment even before an agreement on the details had been reached [*Exhibit C8, p. 18*], since the obligation is fully performed, there is no space for CLAIAMNT to invoke Art.79 CISG.

2. The tariff change is not qualified as an impediment under Art.79 CISG

92. Even if CLAIMANT is entitled to invoke Art.79 CISG, the tariff change is not qualified as an impediment since it is expected to be overcome. Under Art.79 CISG, a qualifying impediment that is not reasonably overcome must be "[*a*]*n unmanageable risk or a totally exceptional event, such as economic impossibility or excessive onerousness*", which would make the performance extremely burdensome [*CLOUT Case No. 166; Klepac, p. 18; Schlechtriem/Schwenzer, p. 280*]. And a change in financial circumstances are supposed to be overcome [*Tomato concentrate Case; Digest CISG, p. 391*], especially in a commercial contract, a party is deemed to assume the cost

factors affecting the financial consequences of the contract [*Société Case*].

93. *In cusu*, CLAIMANT merely points out that it was financially difficult in the last two years and the tariff change exacerbated the its financial hardship [*CL. MEMO., p. 27, para. 85*], but the restructuring measures and a cut of the work force have made it possible to stay in business, and the later payment of the 30% additional tariff evidences that CLAIMANT has the financial ability to overcome the tariff change [*Exhibit C8, pp. 17, 18*].

C. Art.79 CISG only provides remedy of exemption

94. Even if the Tribunal finds that CLAIMANT's situation met the requirements for Art.79 CISG, it could not rely on this article to request contract adaption. RESPONDENT will demonstrate that there is no further relief other than exemption under Art.79 CISG. Pursuant to Art.79 CISG, it only specifies the circumstances in which a party is not liable for failing to perform its obligations, as well as the remedial consequences if the exemption from liability applies [*Digest CISG, p. 388*]. Parties may not be responsible for their non-performance in a situation of impediment, but they have no right to ask for further relief that falls outside the scope of exemption [*Mastromatteo/Landi, p. 32*]. Hence, under no circumstance could CLAIMANT invoke Art.79 CISG to ask for a contract adaption.

II. Art.6.2.2&6.2.3 UNIDROIT Principles cannot be used to interpret Art.79 CISG

95. Art.79 CISG deliberately left out hardship, which cannot be regarded as a gap governed by CISG and should not be filled with general principle under CISG **(A)**. Even if the absence of hardship constitutes the gap of CISG, Arts.6.2.2&6.2.3 UNIDROIT Principles cannot supplement such gap because UNIDROIT Principles does not constitute general principle under the Art.7(2) CISG **(B)**, and Arts.6.2.2&6.2.3 UNIDROIT Principles are different from Art.79 CISG **(C)**.

A. Art.79 CISG does not govern hardship

96. The CISG's silence is a deliberate omission with respect to all situations of hardship, including situations of excessive onerousness [*Nuova, p. 153*]. The prerequisite of Art.7(2) CISG requires questions concerning matters should be governed by this Convention. Therefore, it can be concluded that there is no gap under CISG or need to induce general principles to interpret it.

97. Firstly, CISG does not contain a special provision dealing with questions of hardship

[*Nova, p. 584; Lorenz, p. 6*]. Following the successive drafts preceding what finally became Art. 79 CISG, a proposal allowing a party to claim avoidance or adjustment of a contract whenever facing unexpected "excessive damages" was ultimately rejected [*Schwenzer, p. 709; Miettinen, p. 5; Garro, p. 17*]. Therefore, when weighing the drafting history of Art.79 CISG, it is clear that hardship is not regulated in this article [*Azerdo, pp. 333, 334*].

98. Second, the functional outcome of the provision's application indicates that hardship is in fact not covered by Art. 79 CISG, because there are no currently recorded decisions exempting a party from liability due to hardship using Art. 79 CISG [*Kuster/ Andersen, p. 3*]. CLAIMANT argues that the CISG Advisory Council addressed that a qualifying hardship under Art.79 CISG is governed by the CISG and may warrant further relief [*CL. MEMO., p. 28, para. 89; p. 26, para. 85*]. Contrary to this allegation, the CISG-AC concludes with a scholarly and theoretical extension of Art.79 CISG to resolve hypothetical situations that not yet addressed in published decisions. But it is not the scholars who shape the future of the CISG, but the judges and arbitrators who apply it [*Kuster/Andersen, p. 6*].

99. Furthermore, the CISG creates its own terminology with the word "impediment", in order to define the extent of the promisor's liability for non-performance and the requirements for exemption, aiming to bring uniformity to international business transactions [*Pilar, p. 9*]. Therefore, when there are some similar concepts that have been left out of the CISG, it cannot be seen that the CISG shows a gap to be filled by general principals such as good faith [*Schwenzer, p. 724*], otherwise it will lead to an even greater lack of consensus [*Miettinen, pp. 30, 31*].

100. In conclusion, Art.79 CISG does not regulate hardship situation.

B. UNIDROIT Principles does not constitute general principles under Art.7(2) CISG

101. Even if the Tribunal acknowledges the existence of gap, UNIDROIT Principles does not constitute general principles under Art.7(2) CISG.

102. Firstly, the UNIDROIT Principles were adopted in 1994, which is later in time than CISG in 1980. Therefore, they cannot be general principles "on which CISG is based on".

103. Secondly, CLAIMANT argues that both UNIDROIT Principles Arts.6.2.2–6.2.4 and CISG are based on the principle of *favor contractus*, and this principle supports its

claim of contract adaptation [*CL. MEMO., p. 29, para. 91*]. RESPONDENT agrees with CLAIMANT that *favor contractus* is indeed a general principle on which the CISG is based [Joachim*, p. 190; Magnus 1994, p. 126*]; but RESPONDENT disagrees with CLAIMANT's conclusion that such a principle would justify adaptation. According to *favor contractus*, avoidance of a contract should be a measure of last resort, which is embodied in several provisions of the CISG, such as Arts. 25, 34, 37, 47, 48, 49, 63, and 64 [*Rabello, p. 16; Joachim, p. 190*]. However, it does not mean that under all corresponding circumstances should the adaptation clause automatically generate without parties' mutual assent or legal basis from the CISG. Party autonomy is the primary source of rights and obligations under the CISG [*Digest CISG, p. 66*], the use of *favor contractus* should be based on the party autonomy and should not disobey the agreement of both parties. *In casu*, both parties did not reach an agreement on the adaptation of price, using the principle of *favor contractus* is contradictory to the party autonomy. Therefore, the Tribunal cannot adapt the price solely based on the principle of *favor contractus*. Moreover, the fact that Arts.6.2.2&6.2.3 UNIDROIT Principles also reflect the principle of *favor contractus* does not mean Arts.6.2.2&6.2.3 UNIDROIT Principles is general principle of CISG. The principle of *favor contractus* in Arts.6.2.2&6.2.3 UNIDROIT Principles reflects in that parties have the choice to renegotiate the adaptation when confronting hardship. The principle of *favor contractus* in Art.79 CISG reflects in that the contract continues to exist unless and until it is avoided by the aggrieved party [*Secretariat Commentary, pp. 1069-1070; Kröll etl., p.128; Heuzé, p. 430; Pichonnaz, p. 265; Ziegel, p. 417; Audit, p. 178; Enderlein/Maskow, p. 332*]. It can only conclude that with different ways of application, UNIDROIT Principles have similar principle with CISG.

104.In conclusion, UNIDROIT Principles is later in time than CISG, depriving the possibility that CISG is based on the UNIDROIT Principles. And having the same principle does mean UNIDROIT Principles is the general principle of CISG. Hence, UNIDROIT Principles does not constitute general principle under the Art.7(2) CISG.

C. Arts. 6.2.2 & 6.2.3 UNIDROIT Principles are different from Art.79 CISG

105.Arts.6.2.2&6.2.3 UNIDROIT Principles are different from Art.79 CISG, because Art.79 CISG is more like force majeure clause under the Art.7.1.1 UNIDROIT Principles.

106.Art.7.1.7 UNIDROIT Principles is named as force majeure. Both Art.79 CISG and

Art.7.1.7 UNIDROIT Principles require that the impediment beyond its control and that it could not reasonably be expected or to have avoided or overcome it, or its consequences. And the remedy under the Art.79 CISG and Art.7.1.7 UNIDROIT Principles is equally exemption. Hence, it can be easily concluded that Art.79 CISG is force majeure clause specified in Art.7.1.7 UNIDROIT Principles because they have the same constitutive requirement and legal consequence. And it is impossible for Art.79 CISG to be equal to hardship specified in Art.6.2.2 UNIDROIT Principles because UNIDROIT Principles are impossible to contain two uniform articles.

107.In conclusion, Arts.6.2.2&6.2.3 UNIDROIT Principles cannot be used to interpret the Art.79 CISG.

III. The Tribunal has no reason to adapt the price under the UNIDROIT Principles

108.Even if the Tribunal finds that UNIDROIT Principles could be introduced, the Tribunal have no reason to adapt the price under the UNIDROIT Principles, because the additional tariffs do not alter the equilibrium of the contract **(A)**, the risk of the additional tariffs was assumed by CLAIMANT **(B)**, and Parties have fulfilled all the obligation of the contract **(C)**.

A. The additional tariffs do not alter the equilibrium of the contract

109.Art.6.2.2 UNIDROIT Principles requires that only situations that fundamentally alter the equilibrium of contract can be regarded as hardship. Whether an alteration is "fundamental" in a given case will depend on the increase in the cost of performance or decrease in value of the performance received by one party [*Art.6.2.2(1) UNIDROIT Principles*]. What is required is that the disequilibrium is in the circumstances so great as to shock the conscience of a reasonable person [*UNIDROIT COMMENTARY 1994, p. 109*].

110.The equilibrium is established on the consensus of both parties. *In casu*, RESPONDENT choose CLAIMANT as business partner because of CLAIMANT's considerable experience with the use of artificial insemination [*Exhibit C1*]. Although RESPONDENT was aware of financial difficulties of CLAIMANT, RESPONDENT got the information from unspecific rumors and did not know clearly until the negotiation about the price adaptation [*PO2, para. 22*]. Therefore, solving the problem of financial difficulty is not part of the consideration of the contract. Instead, it is

CLAIMANT's internal affairs. And even if 30% cost of performance seriously deteriorated RESPONDEBT's business, from the perspective of a reasonable person, it is a commercial risk that RESPONDENT should have born. Undertaking the increased tariffs by CLAIMANT did not beyond the parties' consensus, thus did not alter the equilibrium of the contract.

111.As for the increase in the cost of performance, such increase shall be excessively onerous rather than generally onerous. Various parameters are needed to be considered to meet the "excessive onerousness" requirement, including the following: the cost increase in percentage [*Schwenzer, p. 716; Schlechtriem, p. 618*]; and the nature of the contract [*Azerdo, p. 348*]. The Official Comment on the UNIDROIT Principles (1994) states that an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a 'fundamental' alteration [*UNIDROIT COMMENTARY 1994, p. 109*]. In many cases, cost increases of 13%, 30%, 44% or 25-50% were held to be insufficient to amount to a fundamental alteration of the equilibrium of the contract as required by Art.6.2.2 UNIDROIT Principles [*ICC Case No.6281; Ferrochrome Case; Japan Shipping Case; ICC Case No. 2508; Publicker Industries Case*]. What's more, in theory, many commentators propose that the required alteration should be at least 100% [*Enderlein/Maskow, p. 332; Brunner, p. 332; Berger, p.233; Treitel, p.213*].

112.*In casu*, the additional tariffs increase the cost of performance of CLAIMANT by 30% [*Exhibit C6*], which does not meet the threshold either in practice or in theory. Consequently, the additional tariffs are not sufficient to alter the equilibrium of the contract.

B. The risk of the additional tariffs was assumed by CLAIMANT

113.Art.6.2.2(d) UNIDROIT Principles requires that the risk of the events was not assumed by the disadvantaged party [*Art.6.2.2(d) UNIDROIT Principles*]. It did not constitute a normal risk associated with the kind of contract under consideration or a risk that this party agreed to assume [*Carlsen Anja, p. 112*].

114.*In casu*, Parties have agreed on the delivery of DDP [*Exhibit C5*]. Though the Parties changed some risk allocation of DDP, it does not mean that CLAIMANT is free from all risks. CLAIMANT claimed that additional tariffs fall within the intended circumstances as a "comparable unforeseen event" in contrast with the additional health and safety requirements [*CL. MEMO., p. 21, para. 68*]. Under the DDP, the risks,

including possible tariff increase, should be borne by CLAIMANT before the delivery to RESPONSENT. Clause 12 of the contract precludes several risks but does not preclude additional tariffs [*supra para. 77*]. Hence, the risk of the additional tariffs was assumed by CLAIMANT.

115.In conclusion, the principle of "*Rebus sic stantibus*" is universally considered as being of strict and narrow interpretation, as a dangerous exception to the principle of sanctity of contracts [*Christoph, p. 417*]. Originating from the principle "*Rebus sic stantibus*", hardship provision is supplementary in nature, rather than principle. The Tribunal should treat the hardship in a more stringent way, especially when judging the onerousness. Because the additional tariffs are far from altering the equilibrium of the contract, and RESPONDENT shall have assumed the risk of additional tariffs, the Tribunal has no reason to adapt the contract price.

CONCLUSION ON ISSUE 4

116.Art.79 CISG is derogated by the inclusion of Clause 12 in the contract and thus inapplicable. Even if the Tribunal found that it is applicable, CLAIMANT is not entitled to remuneration since its claim was not based on a non-performance situation and the 30% tariff increase is not hard to overcome. UNIDROIT Principles, even if applicable, could not entitle CLAIMANT to adapt the contract, since the additional tariffs do not constitute a hardship situation.

PRAYER FOR RELIEF

In light of the above, RESPONDENT respectfully requests the Tribunal to find that:

1) The Tribunal lacks jurisdiction under the arbitration agreement to adapt the contract;

2) CLAIMANT is not entitled to submit evidence from the other arbitration proceeding;

3) CLAIMANT is not entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price under clause 12 of the contract;

4) CLAIMANT is not entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price under CISG.

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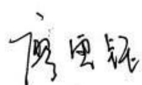
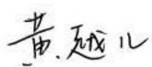
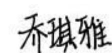
CERTIFICATE

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

Xiamen, 21 January 2019,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	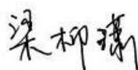	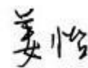	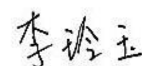
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