TWENTY SIXTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR CLAIMANT

On behalf of:	**Against:**
Phar Lap Allevamento	Black Beauty Equestrian
Rue Frankel 1	2 Seabiscuit Drive
Capital City, Meditteraneo	Oceanside, Equatorianana
CLAIMANT	**RESPONDENT**

THOMAS MORE SCHOOL OF LAW

Counsel

Gianluca Rossi • Molly McLinden • Wei Wen Phang • Mary Nguyen • Liam Casey • George El-Mourani

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

Abbreviation	Name
Art.	Article
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980
Cl.	Claimant
DDP	Delivered Duty Paid
Ex.	Exhibit
HKIAC	Hong Kong International Arbitration Centre
HKIAC 2018 Rules	2018 HKIAC Administered Arbitration Rules
IBA Rules	IBA Rules of Taking on Evidence in International Arbitration
Para.	Paragraph
PO	Procedural Order
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Public Law
USD	United States Dollars

STATEMENT OF FACTS

CLAIMANT, Phar Lap Allevamento, is a Mediterranean company that operates a stud farm covering all aspects of equestrian sport and sells frozen semen of its championship stallions for artificial insemination. RESPONDENT, Black Beauty Equestrian, is an Equatorianan company, possessing world champion show jumping horses because of its broodmare line.

21 March 2017	RESPONDENT contacted CLAIMANT regarding the purchase of semen from CLAIMANT'S horse Nijinsky III for RESPONDENT's breeding programme
24 March 2017	CLAIMANT offered RESPONDENT 100 doses of Nijinsky III's frozen semen for an agreed amount of US $100,000 per dose pursuant to CLAIMANT's standards terms and conditions. Further negotiations took place between 24 March 2017 and 6 May 2017.
6 May 2017	CLAIMANT and RESPONDENT executed the Frozen Semen Sales Agreement (FSSA) and became bound to the terms and conditions of that agreement. The FSSA contained terms and conditions that, among other things, specified: • RESPONDENT was prohibited from reselling the frozen semen • The law of Meditteraneo applied to the FSSA and in the event of a dispute arising between the parties, the seat of arbitration would be Danubia. • Doses would be shipped in three instalments of 25, 25 and 50 doses to RESPONDENT Deliver Duty Paid (DDP) the last dose being due on 23 January 2018.

- RESPONDENT would transfer two separate payments, each worth US $5 million, the first payment being due on 18 May 2017, and the second due 21 January 2018.
- A hardship clause ensuring RESPONDENT shared the risks associated with DDP.

18 May 2017	RESPONDENT makes first payment to CLAIMANT pursuant to the FSSA.
20 May 2017	CLAIMANT ships first doses to RESPONDENT pursuant to the FSSA.
3 October 2017	CLAIMANT ships second doses to RESPONDENT pursuant to the FSSA.
19 December 2017	The Equatorianan Government imposes a 30% tariff on all agricultural products from Meditteraneo in response to Meditteraneo imposing a similar 25% tariff the previous month.
20 January 2018	CLAIMANT opens negotiations for price adaption of the FSSA with RESPONDENT over increased DDP cost of final batch of doses. Considering RESPONDENT's desire to have timely delivery of the third and final doses from CLAIMANT, RESPONDENT commenced negotiations on a price adaptation to meet the commercial needs required by CLAIMANT.
22 January 2018	CLAIMANT ships final doses to RESPONDENT pursuant to the FSSA and paying the newly imposed 30% tariff on the shipment.
2 February 2018	CLAIMANT is advised by a breeder from Equatoriana that RESPONDENT has on-sold doses to a third party in breach of a covenant in the FSSA.
12 February 2018	CLAIMANT and RESPONDENT Chief Executive Officers meet to negotiate, among other things, price adaptation and RESPONDENT states she is no longer interested in cooperating with CLAIMANT and will not pay the additional amounts covering the tariff.

31 July 2018	COMPLAINANT serves on RESPONDENT a Notice of Arbitration pursuant the FSSA and notifies the Hong Kong International Arbitration Centre (HKIAC) of same. On the same day the HKIAC acknowledges receipt of the Notice and sets in train arbitration to resolve the dispute.
24 August 2018	RESPONDENT serves on CLAIMANT and HKIAC an Answer to the Notice of Arbitration.
4 October 2018	CLAIMANT and RESPONDENT agree to oral hearings in Vindaboon in March/April 2019.

ARGUMENT

ISSUE 1: THE TRIBUNAL HAS JURISDICTION AND POWER TO ADAPT THE CONTRACT AS REQUESTED BY CLAIMANT.

I. The arbitration agreement is governed by Mediterraneo law.

A. The FSS Agreement contains an express choice of Meditteraneo law.

1. Pursuant to Clause 14 of the FSS, CLAIMANT and RESPONDENT agree that the FSS Agreement is to be governed by the law of Mediterraneo and the United Nations Convention on Contracts for the International Sale of Goods (1980) ('CISG'). [*Cl. Ex C5, p 14,* para. 14.].

2. Article 1 (a) of the CISG states that:

> This Convention applies to contracts of sale of goods between parties whose places of business are in different states when the states are Contracting States. Meditteraneo is a Contracting State to the CISG. [*PO 1, page 53,* para 4].

3. Clause 15 of the FSS Agreement provides that the chosen seat of Arbitration is to be Danubia and is to be administered by the Hong Kong International Arbitration Centre ('HKIAC') under the HKIAC Administered Arbitration Rules [*Cl Ex C5, p 14,* para 15].

4. Article 1.3 of the UNIDROIT Principles states that:

> A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles [*UNDROIT Principles Art 1.3*].

Therefore, the FSS Agreement is binding on CLAIMANT and RESPONDENT. Further, in the event of any dispute giving rise to arbitration, the law governing any such arbitration is the law of Mediterraneo. Finally, CLAIMANT and RESONDENT can only modify the terms of the FSS Agreement in accordance with Article 1.3 of the UNIDROIT Principles.

B. In the absence of a contrary intention, a contractual choice of law clause applies to all parts of a contract, including any arbitration agreement contained within the contract.

5. CLAIMANT and RESPONDENT expressed their intention in the FSS that the law of Mediterraneo is to be administered, with the seat of Arbitration to be Danubia [*Cl Ex C5, p 14*, para 15]. The differences of the seat of arbitration and the law to be administered was discussed in *Sulamerica's Case* where Lord Justice Moore-Bick at [25] established a three-stage test with regard to contractual choice of law in arbitration agreements;

1) If the parties made an express choice of law to govern the arbitration agreement, that choice would be effective, regardless of the law applicable to the contract as a whole;

2) If there is a failure of such an express statement, an implied choice of law between the parties then needs to be considered;

3) If implication of the law to be administered cannot be determined, the law that has the 'closest and most real connection' with the arbitration agreement is to be administered.

6. RESPONDENT'S acceptance of the arbitration agreement contained in the FSS displays a contractual choice of law that applies to all parts of the FSS. This satisfactorily meets the requirements of the first element of Lord Justice Moore-Bick's three stage approach. Therefore, the law of Mediterraneo is to be administered for the arbitration as provided by clause 14 and 15 of the contract between the parties [*Cl Ex C5, p 14*, para 15,16].

7. The decision by the English Court of the Appeal and the High Court of Singapore in the *BCY case* confirms that Mediterraneo Law governs the relationship between CLAIMANT and RESPONDENT. At [59] the Court concluded;

> Where the arbitration agreement is a clause forming part of a main contract, it is reasonable to assume that the contracting parties intend their entire relationship to be governed by the same system of law.

8. CLAIMANT has the closest and most real connection with the arbitration agreement. Pursuant to the *Habas case*, the court reaffirmed that the principles to determine the applicable law where there is an absence of

express or implied choice, the system of law with which the arbitration agreement has the "*closest and most real connection*" applies. The goods contained in the FSS is semen that is product of CLAIMANT who are highly experienced in horse training. RESPONDENT are beginners in this field who are relying on the CLAIMANT's supply.

9. Should the tribunal be unconvinced that there was an express choice of law by the parties, Article 4.1 of the UNIDROIT Principles support CLAIMANT position that commercial contracts shall be interpreted according to the common intentions of the parties. The Article states:

> A contract shall be interpreted according to the common intentions of the parties.

Article 4.1 suggests that it would be extremely difficult, once a dispute arises, to prove that a particular meaning which one of the parties claims to have been their common intention was in fact shared by the other party at the time of the conclusion of the contract. Therefore, the CLAIMANT submits that the language used in Clause 14 must be interpreted to its literal arbitral meaning and that it would be extremely difficult to show an intention that is not otherwise expressed in writing.

10. Pursuant to the *Fiona Trust case*, the court held that an arbitration clause should be construed in accordance with the presumption that the parties intended any dispute arising out of the relationship into which they had entered or purported to enter to be decided by the same tribunal, unless the language made it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. CLAIMANT affirms that RESPONDENT did not seek to challenge, change or otherwise mis-interpret the language used in Clause 14.

C. The conduct of the parties in the present case does not evidence an intention to depart from the express choice of Mediterraneo law by applying a different law to the arbitration agreement.

11. The FSS agreement signed by CLAIMANT and RESPONDENT expressed that the choice of law for the arbitration agreement shall be the law of Mediterraneo. This is conduct that suffices an intention for the choice of law to be administered as it is expressly reflected [*Cl Ex C5, p 14,* para 14];

12. CLAIMANT submits that in an email dated 27 March 2017 from RESPONENT representative, Mr. Antley, RESPONDENT admits to the CLAIMANT that the law of the arbitration agreement is that of Mediterraneo [*Cl Ex C3, p 11,* para 3].

13. CLAIMANT relies on Article 8.2 of the CISG which states:

> Statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other part would have had in the same circumstances.

CLAIMANT submits that a reasonable person of the same kind as the RESPONDENT would accept Mediterraneo Law as the applicable law in the same circumstances.

14. Pursuant to Article 8.3 of the CISG:

> In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

The statements during negotiations reveal the intentions of CLAIMANT and RESPONDENT that the express choice of law for the arbitration agreement is the law of Mediterraneo. Therefore, it can be inferred that there would not be an intention to deviate from this in the event of arbitration. RESPONDENT's statement, "*We could accept the application of the Law of Mediterraneo if the courts of Equatorianana jurisdiction have*" suffices an intention to be bound by the law Mediterraneo [Cl. Ex. C3].

D. The principle of severability does not, of itself, require an arbitration agreement to be governed by the law of the seat rather than the law of the main contract.

15. CLAIMANT submits that despite the operation of the principle of severability, the arbitration agreement is not independent from the main FSS. Liber Amicorum provided that, "the doctrine of severability is the reason why it is usually not open to the parties to allege that the arbitration agreement is invalid *merely because* the matrix contract is invalid" [*Kaplan and Moser, pp 136-137.*]

16. CLAIMANT submits that for the purposes of clarity between CLAIMANT and RESPONDENT, the law governing the arbitration agreement and the law governing the FSS must be Mediteranneo Law. The need for a consistent and uniform law is imperative because, "the arbitration clause is only one of many clauses in a contract, it might seem reasonable to assume that the law chosen by the parties to govern the contract will also govern the arbitration clause" [*Redfern and Hunter, at para 3.12 citing the Sulamerica case*].

17. CLAIMANT and RESPODENT have expressly chosen the law of Mediterraneo to govern the FSS, and it is expected that the RESPONDENT should adhere to the terms of FSS. Professor Lew argues that the authorities are clear in that the law that is agreed to govern the substantive agreement between CLAIMANT and RESPONDENT, is the law to also govern the arbitration clause of the agreement as it is the express choice of the parties [*Lew (1999), at 143*].

E. In the alternative, the principle of severability only leads to an arbitration agreement being governed by the law of the seat where that result is necessary to avoid invalidity of the arbitration agreement.

18. In the Alternative, should the principle of severability apply, the arbitration agreement would then be applicable to the law of the seat being Danubian law. This would invalidate the arbitration agreement by denying jurisdiction to the tribunal. Therefore, principle of severability does not lead to the arbitration agreement being governed by Danubian law.

19. Further, Bertrand Derains believes that although the arbitration clause may be severable from the contract, it does not necessarily mean that the two are completely independent of each other because by virtue of CLAIMANT and RESPONDENT executing the contract, they have thus expressly accepted clauses 14 and 15 forming part of that contract which states that the law of Mediterraneo is to be apply to the agreement between them *[Derains, at 16–17*].

II. Mediterraneo law permits and empowers Arbitral Tribunals to adapt contracts in the manner requested by CLAIMANT.

20. Mediterraneo law provides for a broad interpretation of arbitration agreements. It therefore allows the Arbitral Tribunal to exercise its power

to adapt the contract between CLAIMANT and RESPONDENT [*Notice of Arbitration* at 7]. Further, RESPONDENT's representative, Mr. Antley, explicitly stated to CLAIMANT's representative, Ms. Napravik, that the arbitrators should adapt the contract in case the parties should not be able to reach a solution [*Cl. Ex. C8*].

21. The general contract law of Mediterraneo is a verbatim adoption of the UNIDROIT Principles as well as the CISG [*PO 1*, para. 4]. RESPONDENT has not contested this in its Answer to Notice of Arbitration [*Answer to Notice of Arbitration* at 29-32]. Therefore, there is an implied acceptance between both parties the effect that the CISG and the UNIDROIT Principles have on the law of Mediterraneo, and thus the law applicable to this arbitration.

22. Given the facts stated in paragraph 26, the Arbitral Tribunal has the power to adapt the contract between CLAIMANT and RESPONDENT in the manner requested by CLAIMANT. Article 3.2.7 (2) of the UNIDROIT Principles states:

> Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing [*UNIDROIT Principles Art 3.2.7(2)*].

Therefore, the Arbitral Tribunal is empowered to adapt the contract in favour of CLAIMANT so that it accords with reasonable commercial standards of fair dealing between CLAIMANT and RESPONDENT. CLAIMANT submits that the Arbitral Tribunal should conclude that the imposition of tariffs is covered by the hardship clause in the contract, which adopts the power to adapt the contract [*Cl. Ex. C5*, para. 12]. In adapting the contract, CLAIMANT submits that it will not suffer an unreasonable commercial standard of fair dealing.

23. By virtue of the CISG and the UNIDROIT Principles applying to the arbitration, CLAIMANT submits that it has suffered hardship as a result of the effect of the Equatorianan tariff. Article 6.2.3 (4)(b) of the UNIDROIT Principles states:

> If the court finds hardship it may, if reasonable adapt the contract with a view to restoring its equilibrium [*UNIDROIT Principles Art 6.2.3 (4)(b)*].

CLAIMANT submits that the imposition of tariffs on the doses of semen sold to RESPONDENT creates a circumstance in which CLAIMANT suffers a commercial hardship. This is evidenced with a 25% loss in the transaction, in contrast to a 5% profit as originally anticipated prior to the imposition of the tariffs [*Notice of Arbitration*, para. 18].

24. Mediterraneo law empowers the Arbitral Tribunal to adapt the contract in the manner requested by CLAIMANT. Because of CLAIMANT's incurred hardship derived from the Equatorianan tariffs, it is reasonable that the Arbitral Tribunal adapts the contract to restore its equilibrium.

III. No mandatory provision of the Danubian Arbitration Law or the HKIAC Rules is inconsistent with the Tribunal having power and jurisdiction to adapt the contract as requested by Claimant.

25. The FSS Agreement between CLAIMANT and RESPONDENT is the primary source of the Arbitral Tribunal's authority. Clause 15 of the FSS Agreement provides that the chosen seat of Arbitration is to be Danubia and administered by the HKIAC under the HKIAC 2018 Rules [*Cl. Ex.* C5, para. 15]. Therefore, CLAIMANT submits that the HKIAC 2018 Rules apply to the arbitration.

26. CLAIMANT rejects any proposition that the governing law of the arbitration agreement is Danubian law (the *lex arbitri*). First, by virtue of the competence-competence principle, the Arbitral Tribunal has the power to decide its own jurisdiction [*Redfern and Hunter*, para. 5.105]. Secondly, it has been established that the Danubian Arbitration law is a verbatim adoption of the UNCITRAL Model Law [*PO 2*, para. 14]. Thirdly, as a result of this, the competence-competence principle is enshrined in the UNCITRAL Model Law in Article 23.1 where it states:

> The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement [*UNICTRAL Model Law Art 23.1*].

The Arbitral Tribunal's power to make such a ruling will be based on its primary source of authority, being the FSS Agreement between CLAIMANT and RESPONDENT. The FSS Agreement confirmed that the law governing the agreement is that of Mediterraneo [*Cl. Ex. C5*, para. 14]. Therefore, CLAIMANT submits that the Arbitral Tribunal can rule on Mediterraneo Law being the jurisdiction it is governed by. The principle of competence-competence and its reflection in the UNCITRAL Model Law, is also mirrored in the HKIAC Rules which govern the arbitration.

27. CLAIMANT submits that pursuant to Article 19.1 of the HKIAC 2018 Rules, the Arbitral Tribunal may, under these rules, rule on its own jurisdiction, 'including any objections with respect to existence, validity or scope of the arbitration agreement' [*HKIAC 2018 Rules Art 19.1*]. This 'empowers the arbitral tribunal to decide on any issues in relation to its jurisdiction' [*Moser and Bao*, para 9.131]. The ability of the Arbitral Tribunal to rule on its jurisdiction may be derived from the FSS Agreement where it was determined that the law of Mediterraneo will be applicable to any dispute arising between the parties [*Cl. Ex. C5*, para. 14]. This evidences that the jurisdiction of the Arbitral Tribunal is the law of Mediterraneo.

28. Section III of the HKIAC 2018 Rules refers to the composition of the Arbitral Tribunal. It provides that the Arbitral Tribunal is not excluded from adapting the contract [*HKIAC 2018 Rules Section III*]. This further empowers the Arbitral Tribunal to adapt the contract, in addition to the powers provided by the CISG and UNIDROIT Principles.

29. Further, Section IV of the HKIAC 2018 Rules provides for the Conduct of Arbitration [*HKIAC 2018 Rules Section IV*]. Article 13.1 empowers the Arbitral Tribunal to adopt suitable procedures for the conduct of the arbitration [*HKIAC 2018 Rules Art 13.1*]. CLAIMANT submits that a suitable procedure would be to adapt the contract as requested by CLAIMANT pursuant to the CISG and UNIDROIT Principles.

30. Finally, the HKIAC 2018 Rules do not preclude the Arbitral Tribunal from adapting the contract as requested by CLAIMANT. As it has been established that Mediterraneo law is the proper law of the FSS Agreement, the Arbitral Tribunal can give effect to the provisions of Mediterraneo law.

The Arbitral Tribunal can therefore adapt the contract pursuant to the HKIAC 2018 Rules, the CISG and the UNIDROIT Principles.

ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE OBTAINED FROM OTHER ARBITRATION PROCEEDINGS EVEN ON THE ASSUMPTION THAT THE EVIDENCE HAS BEEN OBTAINED AS A RESULT OF BREACH OF CONFIDENCE

I. International arbitral practice does recognise an exclusionary rule for improperly obtained evidence

31. The material which Claimant seeks to admit into evidence is material to the issues at arbitration, as it demonstrates Respondent's hypocritical business practices [*Letter by Langweiler 2 October 2018*], and acts as precedent for this Arbitral Tribunal to consider [*PO 2 para. 39*].

32. As Article 22.2 of the HKIAC 2018 Rules gives the Arbitral Tribunal discretion as to the admissibility of evidence, the Arbitral Tribunal should look to international opinion, commentary, legislation, and precedent to guide its decision.

33. CLAIMANT submits that the evidence which was potentially obtained illegally or in breach of a confidentiality agreement is crucial to the current proceedings and prove the contradictory nature of RESPONDENT and should, accordingly, be admitted.

A. International law does not recognise an exclusionary rule equivalent to "the fruit of the poisonous tree"

34. *Fruit of the poisonous tree'* is a term referring to a United States evidentiary doctrine precluding evidence which is obtained illegally and is in violation of the US 4th Amendment [J.H. Boykin and M. Havalic].

35. This notion of 'Fruit of the poisonous tree' is limited to criminal proceedings in the United States [*Townes Case*]. In the arbitration proceedings brought upon the Russian Federation by Yukos Majority Shareholders (*Yukos Shareholders Case*), the tribunal extensively relied upon evidence which was in fact obtained illegally. Thus proving that CLAIMANT must have the right to have the full opportunity to present

their case in line with Article 18 of the UNCITRAL Model Law (UNCITRAL Model Law).

36. The tribunal in *Yukos Shareholders Case* relied upon confidential diplomatic cables from the United States Department of State, which had evidently been published on Wikileaks. The reliance on this illegally obtained evidence resulted in a payout of damages to the amount of USD$50 Billion. To put this in context, this payout is forty thousand times more than the order CLAIMANT is asking the tribunal to order RESPONDENT to pay in compensation for the 30% tariff upon frozen racehorse semen.

B. Arbitral practice concerning the use of the Wikileaks cables negatives the existence of an exclusionary rule for improperly obtained evidence

37. The admissibility of Wikileaks cables before international tribunals is essential to highlight the importance of evidence being admitted into proceedings where that particular evidence will shed light and most definitely sway the decision of the tribunal or court.

38. The prosecution of the former Liberian President, Charles Taylor, the defence submitted documents which included leaked diplomatic cables. The prosecution submitted that these were both irrelevant and unlawful, however, the Court admitted this evidence on the basis that the Courts evidentiary rules did in-fact allow the admission of evidence if it were relevant and "reliability is susceptible of confirmation" [*Prosecutor's Case*].

C. Further, the use of the Wikileaks cables by international courts negatives the existence of an exclusionary rule for improperly obtained evidence in transnational legal systems

39. The European Court of Justice has expressly ruled in favour of a party seeking to introduce leaked cables.

40. In the *Persia International Case*, the applicants challenged the restrictive measures put in place and applied by the Islamist Republic of Iran.

41. Leaked Wikileak diplomatic cables were once again the turning point for this case, and suggested that the European member states were in fact pressured by the United States Government to adopt these restrictive measures

42. The European Council and Commission disputed these merits, however the ECJ did rule in favour of the applicant, and stated that, "*the prevailing principle of the European Union Law is the unfettered evaluation of evidence*". This once again links to Article 18 of the UNCITRAL Model Law, which explicitly states that a party shall be given full opportunity to present their case.

43. Further, the ECJ stated, "*in the present case, since the applicant was not involved in the disclosure of the diplomatic cables, the possibly unlawful nature of that disclosure cannot be held against it*".

D. The IBA Rules on the Taking of Evidence in International Arbitration do not support an exclusionary rule for improperly obtained evidence in international arbitration

44. Admissibility of evidence is a key factor that CLAIMANT is relying upon, and which is integral to the process of allowing for a fair arbitration. The evidence obtained by CLAIMANT against RESPONDENT is crucial to this arbitration. The IBA have a set of rules which govern the admissibility and assessment of evidence in arbitrations [*IBA Rules*].

45. Article 9 of the IBA Rules specifically govern the admissibility and assessment of evidence, and subsections 3e, 4, 6 & 7 highlight why the evidence obtained by CLAIMANT should be admitted.

46. Subsection 3(e) of the IBA Rules state the arbitral tribunal may take into account:

> The need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.

47. The admissibility of the evidence received by CLAIMANT will maintain the equality that they have in the arbitral tribunal so they have a fair trial, and can thus prove the contradictory behaviour of RESPONDENT in relation to tariffs and taxes in previous business dealings.

48. Subsection 4 of the IBA Rules states:

> The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.

49. The tribunal should make the necessary arrangements as is in their power to permit this evidence into the arbitral proceedings as it is integral to CLAIMANTs position within the business dealings.

50. Subsection 6 of the IBA Rules states:

> If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.

51. In line with subsection 6 of the IBA Rules, if the evidence of Respondent's inconsistent conduct in the other arbitration is not admitted into the current arbitral proceedings, then the prospective success of the CLAIMANT in these proceedings may be adversely affected.

52. Subsection 7 of the IBA Rules states:

> If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.

53. This subsection relates to good faith in relation to the taking of evidence. CLAIMANT submits that RESPONDENT is not acting in good faith with the statements on 3 October 2018, by Julia Fasttrack:

> … CLAIMANT's malicious, false and misleading allegation of contradictory behaviour as well as to the announced submission of materials from the other arbitration.

and

> … the allegations by CLAIMANT do not reflect reality…

54. These statements are not in good faith as the RESPONDENT has not specifically denied the 'allegations' due to the hard proof, and actual reality of their misconduct in previous business dealings. Instead, RESONDENT is claiming that CLAIMANT is spreading false information, which is

hardly the case as the evidence is from a previous arbitration held by this very arbitral tribunal.

55. Further, the lack of good faith is enough reason to allow CLAIMANT's evidence into the tribunal and will satisfy their right to have the full opportunity to present their case, which is in line with Article 18 of the UNCITRAL Model Law.

II. International arbitral practice supports the admissibility of the evidence on which Claimant wishes to rely

56. CLAIMANT submits that the information received and the award received by source is crucial to CLAIMANTS case and should be admitted. Further, since CLAIMANT was not involved in the previous arbitration with RESPONDENT, they do not carry or have an obligation to confidentiality regarding the previous arbitration.

57. At the Bergsten Lecture in Vienna in 2017, Cherie Blair QC proposed a two-step test for admissibility of illegally obtained evidence: (a) to consider whether the party that wishes to rely on it has "clean hands", and (b) to consider whether the documents are protected under public interest [*O'Sullivan, 2017*].

A. Claimant has maintained "clean hands" with regards to the obtaining of said evidence

58. Precedent exists as to the admissibility of illegally obtained evidence, demonstrating that illegally obtained evidence will be deemed admissible when the party seeking to rely on it has "clean hands" as opposed to not having "clean hands" [*Yukos Shareholders Case, Methanex case*]. The distinction between the two cases comes from the actions of the parties seeking to rely on the illegally obtained evidence: in the former case, the party was not involved in the illegal obtaining of the evidence, and instead sought to rely on WikiLeaks material published in the public domain. In contrast, the party seeking to rely on illegally obtained material in the latter case was directly involved in illegally obtaining it, and so was denied from admitting it into evidence.

59. The current scenario echoes the former case, where Claimant has maintained "clean hands" as it was not involved in any illegal conduct in obtaining the evidence. Claimant had merely learned of this evidence

through a business contact [*PO 2 para. 40*], and subsequently sought to obtain that which had already been published [*PO 2 para. 41*].

60. In the unlikely scenario that the Arbitral Tribunal finds Claimant not to have "clean hands", precedent exists for an Arbitral Tribunal to admit such illegally obtained evidence, with the caveat that it severely admonishes the party that had participated in the illegal obtaining of said evidence [*Corfu Channel case*].

B. The evidence does not breach the public interest consideration of confidentiality.

61. On the facts, it is unclear as to whether the evidence originated from a hack into Respondent's computer system, or from two former employees of Respondent [*PO2 para. 41*]. Thus, the Arbitral Tribunal should not apply Article 45.2 of the HKIAC 2018 Rules, as it is not open for the Arbitral Tribunal to infer or conclude as to the origins of this evidence.

62. As per Article 42 of the HKIAC 2013 Rules, which RESPONDENT referred to on their 3rd October email, CLAIMANT only owes a duty of confidentiality to the RESPONDENT in the current proceedings. Furthermore, as per the ECJ founding's in the *Persia International Bank* case, the possible unlawful nature involved with the collection of this crucial award received proves the contradictory nature of RESPONDENT.

C. If evidence originated from hack into Respondent's computer system

63. Article 45 of the HKIAC 2018 Rules does not prohibit a third party, not connected with the arbitration, from disclosing arbitral awards for confidentiality reasons [*HKIAC 2018 Rules Article 45*]. The hackers are thus not bound under any confidentiality restrictions from publishing, disclosing, or communicating any information relating to the arbitration, and can make it available to Claimant.

64. Further, third parties are not bound by confidentiality restrictions in arbitration agreements, which only bind the parties themselves [*Esso v Plowman case*]. They are thus free to disclose materials from arbitral proceedings should they not be bound by any confidentiality restrictions. Claimant can thus obtain and utilise materials from the other arbitration disclosed by the hackers, as they are not bound by confidentiality restrictions.

D. If evidence originated from Respondent's former employees

65. Should the evidence have originated from the Respondent's former employees, it is acknowledged that the material would be protected under confidentiality restrictions [*PO2 para. 41, HKIAC 2018 Rules Article 45.2*]. However, it is not open for the Arbitral Tribunal to so infer or conclude, as there is no evidence on the facts supporting such an inference or conclusion.

66. Further, considering the significant relevance of the material to current proceedings, the Arbitral Tribunal ought to have access to the material in their deliberations upon the current issues. This is in order to fulfil the Tribunal's duty of arriving at a coherent, logical decision that is fair to the interests of both parties, fully supported by documentation and evidence submitted by both parties [*de Barros 2013*].

ISSUE 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF $USD1.25MILLION AS A RESULT OF THE ADAPTION OF THE PRICE FOR THE THIRD DELIVERY

I. CLAIMANT is entitled to price adaptation under clause 12 of the FSS Agreement.

67. Clause 12 prima facie includes the imposition of tariffs as a hardship as it is an obvious risk of accepting the DDP term.

68. Mediterraneo law permits arbitrators to adapt the contract where hardship is satisfied. Claimant should be able to price adaptation to restore the equilibrium of the contract.

69. The price adaptation is a reasonable response to the unforeseen event of the tariffs. This is supported by pre and pro contractual conduct by both parties.

70. Claimant was induced to send the third shipment relying on Respondent's representations to renegotiate the terms of the contract due to the tariffs.

71. Claimant is not responsible for the tariffs and therefore entitled to the payment of $USD1.25 million for incurring those costs.

A. On the proper construction of clause 12 of the FSS Agreement, the imposition of tariffs by Equitoria was a "hardship" for which CLAIMANT was not responsible.

72. The imposition of tariffs is an obvious risk of DDP which was accepted in exchange for the hardship clause.

73. Statements and other relevant circumstances are considered when determining the effect of a contract and its terms [*CISG Advisory Council at 2.1*]. Art 8(1) in effect, provides that these statements are to be interpreted according to Claimant's intention where the intention was known by Respondent.

74. Respondent knew Claimant's intention to include the hardship clause was to alleviate the onerous burden of DDP [*Cl. Ex. C4*].

75. The imposition of tariffs is an increase in duty and therefore an obvious risk of DDP. Therefore, it is an obvious hardship included in clause 12.

76. Claimant is not responsible for the hardship of the imposition of tariffs by Equatoriana.

B. Mediterraneo law permits arbitrators to adapt a contract where a "hardship" clause is satisfied.

77. Art 6.2.3 of the UNIDROIT principles allows the Tribunal to, when reasonable, adapt the contract to restore the equilibrium between the parties if it finds hardship.

78. Courts consider the extent that a party has taken a risk and the extent that the other party may benefit from the performance of the contract. [*UNILEX*]

79. Claimant has taken the burden accepting the DDP terms in exchange for the inclusion of the hardship clause which would cover the imposition of tariffs. [*UNILEX*]

80. Respondent will not be financially endangered by being responsible for the tariffs. [*PO 2 at 30*] Claimant has not withheld performance of the contract and therefore Respondent has received the full benefit of the contract. [*Notice of Arbitration at 13*]

81. Claimant is entitled to price adaptation under Mediterraneo law to restore the equilibrium of the contract. [*Art 6.2.3 CISG*] [*Lorenz at 6.4*]

C. The adaptation sought by CLAIMANT is a reasonable response to the unforeseen "hardship" which CLAIMANT would otherwise suffer.

82. Courts have used Art 7 [CISG] to adapt the contract in cases where hardship is suffered.

83. The imposition of the tariffs is a change of circumstances that have made the performance of the contract excessively onerous. In these cases, Claimant and Respondent are bound to enter into negotiations to adapt the contract. [*Di Matteo*]

84. Mr Shoemaker's representation that a solution could be found through negotiations further supports that price adaptation is a reasonable response. [*Julie Napravnik's Witness Statement*]

85. Respondent's past agreement to include an express mechanism for contract adaptation supports that it is a reasonable response to the hardship clause being satisfied.

86. Respondent knew Claimant's intention to include the broader ICC Hardship clause which was rejected by Respondent.

87. Clause 12 is narrower than the ICC Hardship clause as there is no express mechanism to adapt the contract where agreement on an amendment could not be reached. [*Julie Napravnik's Witness Statement, Answer to Notice of Arbitration*].

88. Respondent had agreed to an adaptation clause and Mr. Antley had agreed to reply with a proposal which did not occur due to the accident. [*Julie Napravnik's Witness Statement*]

89. Price adaptation is a reasonable outcome which Respondent has supported through the pre-contractual and post-contractual conduct.

90. This *venire contra factum propium* principle embodies the concept of estoppel which is not dealt with under the CISG however several courts have said that this doctrine should be considered an established principle of good faith. [*UNCITRAL Digest at 43*]

91. Art. 8 [CISG] allows post-contractual conduct to be considered in applying this principle. Therefore, the telephone call between Ms Napravnik and Mr Shoemaker shortly after the announcement of the tariffs is relevant. Mr Shoemaker induced Ms Napravnik to send the third shipment through his representations about long term relationships and negotiations which

indicated that Respondent would be responsible to an extent for the tariffs. [*Julie Napravnik's Witness Statement*].

II. In the alternative, CLAIMANT is entitled to price adaptation under the CISG

92. CLAIMANT will suffer an extreme financial impediment if the contract is strictly applied on its current terms. The parties are governed by the CISG. The principle of good faith underpinning the CISG therefore applies to the contract [*CISG Advisory Council* at 3.2].

93. Art. 79 of the CISG provides that a party is not liable for a failure to perform an obligation under the contract due to an impediment beyond their control, that they could not have foreseen at the time of the conclusion of the contract.

94. CLAIMANT had no control over import tariffs imposed on its goods. CLAIMANT will establish the 30% tariff was unforeseen.

95. The tribunal should adapt the contact to restore the equilibrium and ensure CLAIMANT is not unduly burdened by the excessively onerous tariffs [*Brunner* at 214].

A. The criteria of Art 79 of the CISG applies to the contract between the parties.

96. Art 79 of the *CISG* is designed to protect parties in international commercial agreements from suffering unduly due to unexpected events arising beyond their control.

97. The principle of good faith, which governs the *CISG* requires the tribunal to read Art 79 in conjunction with Art 7 [*CISG Advisory Council* at 3.2].

98. The parties agreed to share the risk of the contract in good faith. Respondent is now denying this and requiring CLAIMANT to bear an extra 30% burden.

99. Through application of the CISG the tribunal should adapt the contract in order to ensure the governing principles of the CISG are upheld, and that the CLAIMANT does not suffer undue financial detriment.

B. The impediment suffered by the parties was beyond the control of the CLAIMANT

100. An 'impediment' is an objective standard to be met [*Schwenzer & Schlectriem* at 12], and is judged by the 'limit of sacrifice' that either party

can be expected to endure [*Garro* at 14]. CLAIMANT will be financially ruined if they are to bear the cost of the tariff [*PO 2* at 29]. The limit of sacrifice the CLAIMANT can be expected to bear is therefore exceeded.

101. Scholar Peter Schlectriem, points out that economic unaffordability constitutes an 'impediment' for the purposes of Art. 79 [*Jones & Schlectriem* at 102].

102. A reasonable third party would determine that an increase in costs of 30%, leading to the financial ruin of a party, would be considered an impediment in a commercial sense

103. The tariffs imposed on the CLAIMANT are an objective impediment for the purposes of Art 79 of the CISG.

C. The CLAIMANT could not have been reasonably expected to take the impediment into account, or to avoid its outcome.

104. State import tariffs are exonerating circumstances beyond the control of the obligor [*Brunner* at 206]. CLAIMANT had no influence over the Mediterraneo government's decision to impose tariffs on all agricultural goods.

105. It was common knowledge that the Mediterraneo government had an 'anti-tariff' policy. Various experts [*Cl. Ex. C6*] stated that the tariff was completely unexpected. If relevant experts in the field did not foresee the tariff being imposed, it is unreasonable to assume that even the most prudent of businesspeople would have foreseen the tariff being imposed.

106. The tariffs imposed by the government are not merely market price fluctuations that can be expected in the ordinary course of business [*Garro* at 14], they are extraordinary events that could not have been foreseen by a prudent businessperson [*Brunner*]. CLAIMANT therefore cannot have been expected to make provisions for the outcome of the tariff.

III. The UNIDROIT principles may be consulted in supplementing the CISG and in determining the appropriate remedy for hardship.

107. The CISG should be read in conjunction with the UNIDROIT Principles to avoid the unjust outcome of the CLAIMANT bearing the full burden of the 30% tariff.

108. Where the CISG is lacking regarding hardship, the UNIDROIT principles may supplement [*Steel Tubes Case*].

109. Courts have previously found that where the cost of one party's performance is significantly increased unexpectedly, a combination of the CISG and UNIDROIT principles may be applied even where the parties have not agreed to be bound by the UNIDROIT principles [*Steel Tubes Case*].

110. Pursuant to Art. 6.2.2 of the UNIDROIT principles, the CLAIMANT's cost of performance has been increased by external events and therefore the equilibrium of the contract has been fundamentally altered.

111. Pursuant to the UNIDROIT principles, the CLAIMANT is suffering from hardship.

112. Courts have previously found that the principle of good faith found in the CISG [Art. 7] applies to hardship suffered by a party and may be invoked as a means of adapting the contract to the needs of the parties where hardship is suffered [*Steel Tubes Case*].

113. CLAIMANT is entitled to request re-negotiation of the contract to restore the equilibrium and ensure neither party is unfairly disadvantaged [*Lorenz* at 6.4] through the actions of the Mediterraneo government.

IV. The parties have not derogated from the application of the CISG through the inclusion of the hardship clause.

114. The parties explicitly refer to their intention to have the CISG govern the terms of the Sales Agreement [*Cl. Ex. C5*]. No competing or contrary law is referred to in the hardship clause.

115. If parties wish to exclude the operation of the CISG, there must be an implicit intention to do so [*Waste Recycling Plant Case* at 42].

116. Where there is doubt as to the parties' intention to exclude the application of the CISG, the tribunal must err on the side of applying the CISG [*Waste Recycling Plant Case* at 42].

117. Therefore, the accusation by Respondent that the parties intended to have a 'special regulation' of issues arising out of changed circumstances [*Resp. Ex. R1*], which derogates the application of the CISG, is wholly unfounded and incorrect.

REQUEST FOR RELIEF

For the reasons stated above, Claimant respectfully requests that the Tribunal make the following orders:

(a) Black Beauty Equestrian is ordered to pay to Phar Lap Allevamento an additional amount of USD$1,250,000 which is 25 per cent of the price for the third delivery of semen; and

(b) Black Beauty Equestrian bears the costs of the Arbitration.

Signed:

Gianluca Rossi

Molly McLinden

Wei Wen Phang

Mary Nguyen

Liam Casey

George El-Mourani

TABLE OF AUTHORITIES, STATUTUES AND RULES

Abbreviation	Citation	Paragraph cited
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980	1, 2, 13, 14, 21, 23, 28, 29, 30, 81,82, 90, 91, 93, 96, 97, 99, 103, 107, 109, 112, 114, 115, 116 and 117
HKIAC 2013 Rules	HKIAC Administered Arbitration Rules, 2013	62
HKIAC 2018 Rules	HKIAC Administered Arbitration Rules, 2018	3, 25, 26, 27, 28, 29, 30, 32, 63 and 65
IBA Rules	IBA Rules on Taking of Evidence in International Arbitration	44, 45, 46, 48, 50, 51 and 52
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 1985	26, 35, 42 and 55
UNIDROIT Principles	UNIDROIT Principles on International Commercial Contracts, 2016	4, 9, 21, 22, 23, 28, 29, 30, 77, 107, 108, 109, 110 and 111

TABLE OF COMMENTARY

Abbreviation	Citation	Paragraph cited
Boykin and Havalic	J.H. Boykin, M. Havalic (2014), '*Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration'* Transnational Dispute Management, (Provisional Issue).	34
Brunner	Christoph Brunner, "Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration" Kluwer Law International (2008)	95, 104 and 106
CISG Advisory Council	CISG Advisory Council, 'Opinion No. 3: Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clauses and the CISG (2004) available at: https://iicl.law.pace.edu/cisg/scholarly-writings/cisg-advisory-council-opinion-no-3-parol-evidence-rule-plain-meaning-rule	73, 92 and 97
De Barros	Octavio Fragata Martins de Barros, "The Principle of Facticity: outline for a Theory of Evidence in Arbitration", 23 *J. Arb. Stud.* 77 (2013)	66
Di Matteo	Di Matteo, Larry *"Contractual Excuse Under the CISG: Impediment, Hardship and the Excuse Doctrines"* (2015) available at https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1351&context=pilr	83
Derains	Bertrand Derains, "The ICC arbitral process, Part VIII: Choice of law applicable to the contract and international arbitration" (2006) 6 *ICC International Court of Arbitration Bulletin,* 16.	19
Garro	Garro, Alejandro, "Comparison between provisions of the CISG regarding exemption of liability for damages (Art. 79) and the counterpart provisions of the UNIDROIT Principles (Art. 7.1.7)" (2005) available at <http://www.cisg.law.pace.edu/cisg/principles/uni79.html>	100 and 106
Jones & Schlectriem	Jones, Gareth H. & Schlechtriem, Peter, "Breach of Contract (Deficiencies in a Party's Performance)" in International Encyclopedia of Comparative Law, Vol. VII (Contracts in General), Chapter 15. Tübingen, (1999)	101

Kaplan and Moser	Neil Kaplan and Michael Moser, *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Wolters Kluwer Legal & Regulatory, USA, 2018).	15
Lew	Lew, The law applicable to the form and substance of the arbitration clause' (1999) 9 ICCA Congress Series	17
Lorenz	Lorenz & Partners, "Newsletter No. 119 – Comparison of commonly used Hardship and Force Majeure Clauses" (2017)	113
Moser and Bao	Michael J Moser and Chiann Bao, *A Guide to the HKIAC Arbitration Rules* (Oxford, Oxford University Press, 2017).	27
O'Sullivan	Nikki O'Sullivan, 31 August 2017, Thompson Reuters Blog, 'Lagging behind: is there a clear set of rules for the treatment of illegally obtained evidence in international arbitrations?' http://arbitrationblog.practicallaw.com/lagging-behind-is-there-a-clear-set-of-rules-for-the-treatment-of-illegally-obtained-evidence-in-international-arbitrations/, citing Cherie Blair QC's Bergsten Lecture in 2017, 'WikiLeaks and beyond: Admissibility of Improperly Obtained Evidence in International Arbitration'	57
Redfern and Hunter	Nigel Blackaby and Martin Hunter, *Redfern and Hunter on International Arbitration (Sixth Edition)* (Oxford, Oxford University Press, 2015)	16 and 26
Schwenzer & Schlectriem	Schwenzer, Ingeborg 'Provisions Common to the Obligation of the Seller and the Buyer" in "Schlectriem and Schwenzer: Commentary on the Convention on Contracts for the International Sale of Goods" Oxford University Press (2016)	100
UNCITRAL Digest	United Nations Commission on International Trade Law "UNCITRAL Digest of Case law on the United Nations Convention on Contracts for the International Sale of Goods" (2016)	90
UNILEX	UNILEX Official Commentaries on UNIDROIT Principles – commentary on "Hardship under Art 6.2.3" available at http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637	78 and 79

TABLE OF CASES AND ARBITRATION AWARDS

Abbreviation	Citation	Paragraph cited
BCY Case	*BCY v BCZ* [2016] SGHC 249	7
Corfu Channel Case	*Corfu Channel Case (United Kingdom v. Albania); Assessment of Compensation*, 15 XII 49, International Court of Justice (ICJ), 15 December 1949	60
Esso Case	*Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10	64
Fiona Trust Case	*Fiona Trust & Holding Corp & Ors v Privalov & Ors* [2007] 4 All ER 951 HL; [2008] 1 Lloyd's Rep 254	10
Habas Case	*Habas Sinai Ve Tibbi Gazlar Istihsal Andustrisi AS and VSC Steel Company Ltd* [2013] EWHC 4071	8
Methanex Case	*Methanex Corporation v. United States of America*, Award, ¶ 55 (NAFTA Ch. 11 Arb. Trib. 2005).	58
Persia International Case	*Persia International Bank v Council* Case No. T-493/10	40 and 62
Prosecutors Case	*Prosecutor v Taylor*, Case No. SCSL-03-01-T-1171	38
Steel Tubes Case	*Scafom International BV v. Lorraine Tubes S.A.S.*, Case No. C.07.0289. N BELGIUM 19 June 2009	109 and 112
Sulamerica Case	*Sulamerica CIA Nacional De Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638	5
Townes Case	*Townes v City of New York*, 176 F.3d 138, 148 (2d Cir. 1999)	35
Waste Recycling Plant Case	*Buyer (Italy) v Seller(Germany)*, Interim Award, ICC Case No. 9781, 2000	115 and 116
Yukos Shareholders Case	*Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227	35, 36 and 58