BERLIN PRE-MOOT

14 – 16 MARCH 2019

ARBITRATOR'S CASE FILE

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3.	The Problem Vis Moot 2018-2019 (including PO 2)
4.	Arbitrator's brief
5.	United Nations Convention on Contracts for the International Sale of Goods (CISG)
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Case Summary

This year's case is about an arbitration between the two companies Phar Lap Allevamento („Phar Lap") and Black Beauty Equestrian („Black Beauty"), who concluded a Sales Agreement. The claimant is Phar Lap, one of the oldest and most renowned stud farms in Mediterraneo. Part of its business is the sale of frozen horse semen of its best race horses for the purpose of artificial insemination. The respondent is Black Beauty, an Equatorianian company famous for its pedigree racehorse mares.

In March 2017, Black Beauty contacted Phar Lap to inquire about the availability of frozen semen of the prestigious racehorse Nijinsky III. Black Beauty further requested delivery "DDP", as Phar Lap was more experienced in shipping frozen horse semen. Phar Lap accepted this under the condition of a price increase, the assumption of certain risks by Black Beauty and the incorporation of a hardship clause. The latter is clause 12 of the Sales Agreement.

Lawyers from both companies negotiated the applicable law. Unfortunately, the initial negotiators were involved in a car accident before they were able to finalise the Sales Agreement. The conclusion of the contract was ultimately conducted by two other negotiators who agreed on the law of Mediterraneo as the applicable law to the Sales Agreement but did not insert a reference with regard to the applicable law to the Arbitration Agreement in Clause 15 of the Sales Agreement.

The Parties had agreed on delivery of 100 doses of frozen semen in three instalments. Before the last shipment, Phar Lap heard about the imposition of 30 % tariffs on agricultural goods by Equatoriana, which also applied to frozen horse semen. The imposition of tariffs was a political reaction to the newly elected president of Mediterraneo who had imposed 25 % tariffs on agricultural goods from Equatoriana. Mediterraneo has been an ardent supporter of free trade, which is why the imposition of protectionist tariffs came as a surprise to both parties.

In the expectation that an agreement on contract adaptation would later be reached, Phar Lap delivered the last shipment and payed the 30 % tariffs to clear the goods for import. However, an agreement was not reached. Phar Lap initiated arbitral proceedings and asks for a price adaptation based on the hardship clause after the parties' renegotiations on the price have failed.

The contract contains an arbitration clause but Black Beauty challenges the power of the tribunal to adapt the Sales Agreement. Phar Lap on the other hands requests the submission of illegally obtained evidence from another arbitration to which Black Beauty is a party to.

Guideline for Arbitrators• Berlin Premoot 2019

For updated information please visit our website www.hma-berlin,de

Location

Registration of the Berlin Premoot 2019 is situated in Room E25 at the Law Faculty of the Humboldt-Universität, Unter den Linden 9, 10117 Berlin.

The hearings will take place in the same building. On Friday, some hearings will take place at surrounding law firms.

The pairings of the teams and the exact allocation of the rooms will be announced in the week leading up to the moot. The tribunal compositions will be communicated at the same time, but may be subject to changes.

As the hearings start punctually, please be at the location 15 minutes in advance.

The Tribunal and the Parties

The Tribunal consists of three arbitrators: two “party-appointed” arbitrators and the presiding arbitrator

Please shortly introduce yourselves at the beginning of the session.

Each of the two parties is represented by two councels (team members, also called “Mooties”).

The Proceedings

Beginning

- Introduction of and by the Tribunal
- Introduction of the counsels
- Discussion of the conduct and structure of the proceedings (order in which the issues will be addressed by counsels, which party commences on which issue, time allocation, rebuttals)
- The Tribunal may determine the conduct and structure of the hearings on its own or take suggestions from counsels into account

Time-frame and allocation

- One argument lasts 1 hour. Including feedback, the session should last max. 1 ½ hours. Please ensure that this time frame is kept.
- Each counsel has 15 minutes to present his/her submissions. Accordingly, each party should have 30 minutes to present its case *including* rebuttal time.
- Time may be added, e.g. to compensate for time lost due to complex questions

- Please provide the teams with feedback directly after the hearing in order to help them to improve their presentations. This feedback should not exceed 5-10 minutes *per arbitrator*.

Course of proceedings – Example

One possible way to structure the argument would be as follows:

1. Respondent	Pleadings on procedural issues: **14 Minutes**	**2. Claimant**	Response on procedural issues: **14 minutes**
3. Respondent	Rebuttal on procedural issues: **1 minute**	**4. Claimant**	Surrebuttal on procedural issues: **1 minute**
5. Claimant	Pleadings on the merits of the case: **14 minutes**	**6. Respondent**	Response on the merits of the case: **14 minutes**
7. Claimant	Rebuttal on the merits: **1 minute**	**8. Respondent**	Surrebuttal on the merits of the case: **1 minute**
	Total: 30 minutes		**Total: 30 minutes**

Feedback

Please provide all counsels with a short feedback, focussing on:

- Content and legal arguments
- Language
- Body language
- Presentation
- Anything else that you think can be improved

The Premoot is a practice moot, so please do not hesitate to provide critical, yet constructive feedback. It is vital for all Mooties to identify weak points of the presentations in order to be well prepared for the final rounds in Hong Kong and Vienna.

Twenty Sixth Annual Willem C. Vis
International Commercial Arbitration Moot

THE PROBLEM

Vienna, Austria
October 2018 – April 2019

Oral Hearings
April 13 – 18, 2019

Organised by:
Association for the Organisation and Promotion of the
Willem C. Vis International Commercial Arbitration Moot

And

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

Oral Arguments
March 31 – April 7, 2019

Organised by:
Vis East Moot Foundation Limited

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Joseph Langweiler
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Mediterraneo
Tel (0) 146 9845; Telefax (0) 146 9850
Langweiler@lawyer.me

By email and courier
Ms. Sarah Grimmer
Hong Kong International Arbitration Centre
38th Floor Two Exchange Square
8 Connaught Place
Central
Hong Kong

31 July 2018

Dear Ms. Grimmer,

On behalf of my client, *Phar Lap Allevamento*, I hereby submit the enclosed Notice of Arbitration pursuant to Article 4 HKIAC-Rules. A copy of the Power of Attorney authorizing me to represent *Phar Lap Allevamento* in this arbitration is also enclosed.

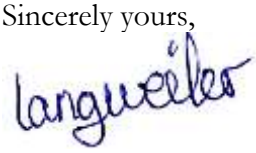
The notice has been served upon Respondent and the registration fee has been paid. The relevant confirmations for service and payment are attached.

The CLAIMANT requests outstanding contractual payments.

The contract giving rise to this arbitration provides that the seat of arbitration shall be Vindobona, Danubia, and that the arbitration shall be conducted in English. The arbitration agreement provides for three arbitrators. *Phar Lap Allevamento* hereby nominates Ms. Wantha Davis as its arbitrator.

The required documents are attached.

Sincerely yours,



Joseph Langweiler

cc. Black Beauty Equestrian

Attachments:
Statement of Claim with Exhibits
Power of Attorney (not reproduced)
CV of Ms. Wantha Davis (not reproduced)
Proof of Service upon Respondent – Courier delivery Report (not reproduced)
Proof of Payment of Registration Fee (not reproduced)

Joseph Langweiler
Advocate at the Court
75 Court Street
Capital City
Mediterraneo
Tel (0) 146 9845; Telefax (0) 146 9850
Langweiler@lawyer.me

Notice of Arbitration

(pursuant to Article 4 Hong Kong International Arbitration Rules 2013)

in the Arbitral Proceedings

Phar Lap Allevamento v. Black Beauty Equestrian

Phar Lap Allevamento
Rue Frankel 1
Capital City
Mediterraneo

- CLAIMANT-

Represented by Joseph Langweiler (75 Court Street, Capital City, Mediterraneo)

Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside
Equatoriana

- RESPONDENT-

STATEMENT OF FACTS

1. The CLAIMANT is Phar Lap Allevamento (Phar Lap), a company registered and located in Capital City, Mediterraneo. It operates Mediterraneo's oldest and most renown stud farm, covering all areas of the equestrian sport. It has 300 horses, including its own mare herd, offspring and stallion depot. Its teaching, research, and demonstration facility is a center of excellence offering training and professional development courses on horse care, breeding and riding/driving. Mediterraneo's horse-shoeing or farrier school is also based at Phar Lap.

2. In its racehorse section Phar Lap provides stallions for breeding English thoroughbreds and Anglo Arabs. Breeders have access to the studs throughout the breeding season from February to July for covering. In all other sections of horse sports, Phar Lap additionally offers frozen semen of its champion stallions for artificial insemination. Due to Phar Lap's unique storage technique the semen is long-living and of superior quality.

3. Phar Lap is particularly known for its breeding success regarding racehorses. The star among Phar Lap's stallions is Nijinsky III, which is one of the most successful racehorses

ever. It has won inter alia the Triple Crown of Danubia, the Equatorianian Oceanside Cup, and the Capital City Vase, Mediterraneo. Nijinsky III has also successfully sired a number of up-and-coming racehorses, such as Barbaro (winner of the Capital City Mile) and Rachel Alexandra (winner of the Equatorianian Grand National). This has made Nijinsky III one of the most sought-after stallions for breeding.

4. The RESPONDENT, Black Beauty Equestrian (Black Beauty) in Oceanside, Equatoriana, is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions. Three years ago, Black Beauty decided to establish a racehorse stable. It acquired ten mares with an excellent racehorse pedigree. Horse racing is extremely popular in Equatoriana and the growth rate of the connected business sector has in the last five years never been below 4 per cent per year.

5. On 21 March 2017 Black Beauty contacted Phar Lap, inquiring about the availability of Nijinsky III for its newly started breeding programme (Claimant's Exhibit 1). At that time, the Equatorianian Government had imposed serious restrictions on the transportation of all living animals due to severe problems with foot and mouth disease which already lasted for two years. As a reaction to that and driven by powerful interests in the Equatorianian racehorse breading industry the ban on artificial insemination for racehorses had been temporarily lifted. Due to the special situation in Equatoriana, Black Beauty was particularly interested whether frozen semen of Nijinsky III was available.

6. Phar Lap was told at the time that Black Beauty's investors were keen to see Black Beauty's racehorse breeding programme to commence as soon as possible taking advantage of the temporary lift of the ban on artificial insemination. The explanation given for the high number of doses requested was that under the relevant Equatorianian law all doses acquired during the lifting of the ban could be used. Phar Lap did not question that information at the time, since for them the contract was a good opportunity to increase their revenues without any major additional risk. Phar Lap considered their interests sufficiently protected by the consent requirement in the contract for any other use of Nijinsky III's semen. Therefore, the risk of the usability of the semen would lie with Black Beauty. Phar Lap only subsequently learned that Black Beauty's investors were one of the biggest supporters of a general lifting of the ban and probably from the beginning had the intention to sell a considerable amount of the doses, hoping to induce additional breeders to fight for a permanent lifting of the ban.

7. With email of 24 March 2017 Phar Lap offered Black Beauty 100 doses of Nijinsky III's frozen semen in accordance with the *Mediterraneo Guidelines for Semen Production and Quality Standards* (Claimant's Exhibit 2). Black Beauty had no problems with most of the terms of the offer. It only objected to the choice of law and the forum selection clause and insisted on a delivery DDP (Claimant's Exhibit 3). Due to past experiences with extremely expensive tests due to changes in customs health requirements Phar Lap was only willing to accept a delivery DDP against a moderate price increase, the transfer of certain risks to Black Beauty and the inclusion of a hardship clause to temper some of the additional risks taken (Claimant's Exhibit 4).

8. In the end, the Parties agreed not only on the hardship clause but also on an acceptable choice of law and arbitration clause. Unfortunately, the finalization of the agreement took longer than planned as the two main negotiators, Ms. Napravnik and Mr. Antley, were severely injured in an accident when driving to a restaurant after the annual colt auction in Danubia on 12 April 2017. They had to be replaced for the finalization of the contract which was signed on 6 May 2017 (Claimant's Exhibit 5).

9. The Parties had agreed on three shipments (Claimant's Exhibit 5). RESPONDENT sent the first shipment of 25 doses on 20 May 2017; the second shipment of 25 doses on 3 October 2017. Two months before the last shipment of 50 doses was due Mediterraneo's newly elected President, Ian Bouckaert, announced 25 per cent tariffs on agricultural products from Equatoriana. This sudden measure came as a complete surprise. While Mr. Bouckaert had made clear that he wanted to protect the Mediterranean agricultural sector, a 25 per cent tariff had neither been part of any strategy papers released earlier by the new President nor of the election manifesto.

10. Even more surprising was the reaction of the Equatorianian government, which has always been an ardent supporter of free trade. Consequently, the Equatorianian government had always tried to resolve trade disputes amicably and had not relied on retaliatory measures against trade restrictions by other countries (see Claimant's Exhibit 6). In the present case, however, to the big surprise of everyone the Equatorianian government after a very short period of unsuccessful discussions retaliated by imposing 30 per cent tariffs on selected products from Mediterraneo including on animal semen (Claimant's Exhibit 6).

11. CLAIMANT and RESPONDENT were astonished to hear that frozen semen was listed in the schedule released by the Ministry of Agriculture of the products that fell under the new tariffs-regime and that this also applied to racehorse semen. Generally, racehorse breeding is categorized differently from pigs, sheep, or cattle.

12. CLAIMANT and RESPONDENT immediately started negotiations regarding a price adjustment for the frozen semen (Claimant's Exhibit 7). RESPONDENT had made clear already during the contract negotiation that for its planning timely delivery was extremely important. At the same time RESPONDENT appeared to generally accept the need for a price increase (Claimant's Exhibit 8).

13. In light of the above facts and taking into account that RESPONDENT had created the impression of accepting the general need for a price adaptation, CLAIMANT complied with its delivery obligation and delivered the remaining 50 doses on 23 January 2018 before an agreement on the new price had been reached.

LEGAL EVALUATION

Jurisdiction

14. The Arbitral Tribunal has jurisdiction to hear the case. After long discussions, which involved the exchange of several drafts, the Parties agreed on the following arbitration clause

> ***"Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.***
>
> ***The seat of arbitration shall be Danubia.***
>
> ***The number of arbitrators shall be three. The arbitration proceedings shall be conducted in English."***

15. Contrary to RESPONDENT's allegations during the unsuccessful efforts to solve the dispute amicably the arbitration clause is valid and obviously also covers the claim raised. The arbitration clause and its interpretation are governed by the law of Mediterraneo and not, as RESPONDENT alleges, by the law of Danubia. Thus, it is irrelevant whether under the law of Danubia arbitration agreements have to be interpreted narrowly and in accordance with the parol evidence rule. The Parties have submitted the contract after long discussions to the law of Mediterraneo which consequently also governs the interpretation of the arbitration agreement contained therein.

16. Like in most other jurisdictions the Arbitration Law of Mediterraneo provides for a broad interpretation of arbitration agreements, irrespective of an allegedly narrow wording merely referring to "dispute(s) arising out of this contract". Thus, the arbitration agreement clearly extends to a claim for an increased remuneration. That is even more so, as in the present case during the first discussion of the adaptation clause RESPONDENT's Mr. Antley had explicitly stated to CLAIMANT's Ms. Napravnik that the arbitrators should adapt the contract in case the parties should not be able to reach a solution (Claimant's Exhibit 8). Due to their replacement following the severe car accident no express statement to that extent was either included in the adaptation clause or the arbitration agreement.

17. CLAIMANT nominates Ms. Wantha Davis, 14 Churchill Downs, Capital City, Mediterraneo for confirmation. She has already declared to CLAIMANT her willingness to act as an arbitrator and the absence of any connections which could affect her independence and impartiality. Your will find her CV enclosed and CLAIMANT would like to ask the HKIAC to take the necessary steps for the confirmation of Ms. Davis.

Contract

18. CLAIMANT is entitled to an increase of the purchase price of at least 25 per cent due to the higher costs following the imposition of the new tariffs. CLAIMANT had a profit margin of 5 per cent for the transaction and now makes a loss of 25 per cent due to the imposition of the new tariff of 30 per cent on the product by the Equatorianian authorities. While neither party is directly responsible for the tariffs they are imposed by RESPONDENT's home country and therefore are closer associated with RESPONDENT than with CLAIMANT. That CLAIMANT is at all affected by the tariffs is due to the changes in the delivery terms. The purpose of such changes, however, was not to burden CLAIMANT with all the risks associated with a DDP-delivery but to profit from CLAIMANT's experience in the transportation of frozen semen. In addition to the lower risk for damages to the semen, a greater likelihood of a speedy and non-problematic compliance with export and import formalities and the required paperwork, CLAIMANT was also able to make the transportation to commercially much more favorable terms than RESPONDENT.

19. The Parties intention is very well evidenced by the fact that in connection with a change in the delivery terms they included an adaptation clause into the contract. CLAIMANT had made clear that it was not willing to bear all the other risks associated with the agreed change of the delivery terms and had insisted on the inclusion of the adaptation clause. RESPONDENT had consented to that. The adaptation clause was supposed to cover not only the most prevalent risk of changes in the health and safety requirements but also other risks including additional tariffs, like the present. The fact that such tariffs were not explicitly included had to do with the fact that at the time of contracting no one expected such measures. The Government of Equatoriana had always been an ardent supporter of free trade, in particular in times like the present when the Prime Minister came from the Progressive Liberals. Only once an Equatorianian Government under a Prime Minister from the National Party, which is more critical to free trade, had taken retaliatory measures

against trade restrictions imposed by a third state. Consequently, the hardship clause has to be interpreted as covering also the present case.

20. Even if the Arbitral Tribunal should – against all expectations – come to the conclusion that the imposition of the tariffs is not covered by the adaptation clause, the price should be increased under the CISG. It has been recognized on several occasions that the CISG allows for a price adaptation in the case of changed circumstances along the lines of the hardship provision in Art. 6.2.3 UNIDROIT Principles. The requirements for such an adaptation, which can be deduced from the Art. 6.2.3 are clearly met. That applies a fortiori as – according to our information – RESPONDENT itself, after the imposition of the tariffs and in breach of its contractual requirements not to resell the semen has done so for 15 doses at a price which is 20 per cent above the price charged by CLAIMANT.

REQUEST:

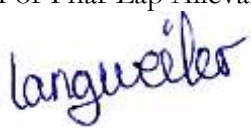
In light of the above CLAIMANT asks the Arbitral Tribunal for the following orders:

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

2) Black Beauty Equestrian bears the costs of the Arbitration.

Capital City, 31 July 2018

For Phar Lap Allevamento



Joseph Langweiler

From: **Black Beauty Equestrian <blackbeauty@blackbeauty.eq>**
Sent: 21 March 2017, 10:04 a.m.
To: Phar Lap Allevamento <PharLap@allevamento.me>
Re: Inquiry re Nijinsky III

Dear Ms. Napravnik,

I trust that you are doing well. As already indicated during our meeting at Equestrian World last year Black Beauty is building up its own racehorse breeding programme, with the intention to become one of the leading breeders for racehorses. You may have seen in the press that we have acquired over the last months a number of first class mares which due to their successful racing careers have a very promising pedigree for successful breeding.
We are now in the process of finding matching world class stallions. Naturally, your Nijinsky III is one of our first choices. You may also be aware that in Equatoriana the ban on artificial insemination for race horses has been lifted – at least temporarily. The latest foot and mouth disease crisis in Equatoriana with the resulting restrictions on the transportation of living animals had such a serious impact on the breeding of racehorses that artificial insemination is now officially permitted. While the permission is presently still temporary until the end December 2018 we are confident that it will become permanent.

Irrespective of whether our expectations will materialize, the present legal situation with its serious transportation restrictions makes natural coverage extremely difficult. At the same time the alleviation of the ban allows us to start our own breeding activities for racehorses by using frozen semen from world class foreign stallions from all over the world, without submitting our mares or the stallions to the stress of long distance travel.

Given your considerable experience with the use of artificial insemination in other areas of horse sports we hope that you will also be able to provide us with frozen semen from Nijinsky III for our purposes. Could I kindly ask you to provide me with an offer for 100 doses of frozen semen from Nijinsky III, including your terms and conditions.

Sincerely,

Chris Antley

Black **B**eauty **E**questrian
2 Seabiscuit Drive
Oceanside, Equatoriana
T: (0)214 669804
Email: blackbeauty@blackbeauty.eq

BlackBeautyEquestrian.com

From: **Phar Lap Allevamento <PharLap@allevamento.me>**
Sent: 24 March 2017, 11:23 a.m.
To: Black Beauty Equestrian <blackbeauty@blackbeauty.eq>
Re: Inquiry re Nijinsky III

Dear Mr. Antley,

Thank you very much for your email of 21 March 2017 and the interest in buying 100 doses of frozen semen from Nijinsky III. We have indeed seen the various reports about Black Beauty's impressive acquisitions of top class mares over the last few months. Therefore, we were not surprised when you contacted us enquiring about the availability of Nijinsky III for a coverage of the mares. Also according to our evaluation he would be a perfect match for some of your mares.

The sort of your request and its size the 100 doses, however, came as a surprise. Normally, we would not sell frozen semen of our racehorse stallions and definitely not such an amount of semen to a single breeder for obvious reasons.

In your case, taking into account Black Beauty's outstanding reputation in the area of dressage and showjumping and to show you our interest in entering into a long-term mutually beneficial relationship we are willing to make an exception from our general approach. Thus, we will, under certain conditions, supply you with the 100 doses requested. We note, and that should not come as a surprise to you, that the frozen semen will have to be provided in several instalments and may not be re-sold to third parties without our express written consent. Furthermore, we would like to be informed about the use of every dose.

The basic conditions would be as followed:
Price: 99.500 USD per dose; to be picked up at our premises.

The purchase would be based on the Standard Frozen Semen Sales Agreement taking into account the *Mediterraneo Guidelines for Semen Production and Quality Standards* and our general conditions which you can find on our webpages.

Sincerely,

Julie Napravnik

PHAR LAP ALLEVAMENTO
Rue Frankel 1
Capital City, Mediterraneo
P: (0)146 9346359

pharlapallevamento.com

From: **Black Beauty Equestrian <blackbeauty@blackbeauty.eq>**
Sent: 28 March 2017, 11:32 a.m.
To: Phar Lap Allevamento <PharLap@allevamento.me>
Re: Inquiry re Nijinsky III

Dear Ms. Napravnik,

Thank you very much for your offer and your willingness to accommodate our request despite its extraordinary nature and the number of doses needed. It has to do with the particular situation in Equatoriana and the fact that our investors have expressed a clear intention to become within a very short time one of the leading breeders for racehorses, first in Equatoriana but thereafter also beyond its boundaries. In light of that we are highly interested in a long-term cooperation with you, going clearly beyond this single purchase. That would naturally also involve natural coverage should other countries not follow the example of Equatoriana and lift the ban or the permission of artificial insemination or should the lifting of the ban expire or be revoked in Equatoriana.
Most of the terms of your offer are acceptable to us, including the general applicability of your general terms and conditions. The following points, however, are not acceptable and require additional direct negotiations:

Price and Delivery Terms:
In light of the size of the order we would have expected a better price, in particular as the possibility is largely on top of what fees could be earned with Nijinsky III through natural coverage. Furthermore, given the urgency of the delivery and your much greater experience in the shipment of frozen semen including the necessary export and import documentation we would insist for this contract on a delivery on the basis of DDP. That could be changed for future contracts, in particular if natural coverage is considered.

Applicable Law and Dispute Resolution:
Given the desirability of a long-term relationship for the mutual benefit of both parties we consider it not appropriate that your law applies and your courts have jurisdiction. We could accept the application of the Law of Mediterraneo if the courts of Equatoriana have jurisdiction.

Sincerely,

Chris Antley

Black **B**eauty **E**questrian
2 Seabiscuit Drive
Oceanside, Equatoriana
T: (0)214 669804
Email: blackbeauty@blackbeauty.eq

BlackBeautyEquestrian.com

From: **Phar Lap Allevamento <PharLap@allevamento.me>**
Sent: 31 March 2017, 08:42 a.m.
To: Black Beauty Equestrian <blackbeauty@blackbeauty.eq>
Re: Inquiry re Nijinsky III

Dear Mr. Antley,

Thank you very much for your email and the ensuing telephone conversation. We have discussed your request internally.

The price offered was already a very competitive price, taking into account the opportunity to increase Nijinsky's breeding potential, the size of your order and our interest in a long-term relationship.

After longer internal discussions we can accept for this contract a delivery DDP. Given the additional costs associated with a DDP delivery, we would need to increase the price by 1000 USD per dose.

Furthermore, we are not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions. As we both know from past experiences unforeseeable additional health and safety requirements may make highly expensive tests necessary which can increase the cost by up to 40% and thereby destroy the commercial basis of the deal. At minimum, a hardship clause should be included into the contract to address such subsequent changes.

It is, however, not acceptable that we submit to the jurisdiction of the courts in Equatoriana. A possible solution, if you cannot agree on the jurisdiction of the courts in Mediterraneo, would be to opt for arbitration in Mediterraneo.

My suggestion is to discuss these issues in a personal meeting or over the phone. We could meet in Vindobona in the second week of April, should you also attend the annual colt auction in Danubia on 12 April.

Sincerely,

Julie Napravnik

PHAR LAP ALLEVAMENTO
Rue Frankel 1
Capital City, Mediterraneo
P: (0)146 9346359

pharlapallevamento.com

FROZEN SEMEN SALES AGREEMENT

This Agreement is made this __*sixth*__ day of _*May 2017*_ by and between, Phar Lap Allevamento, Rue Frankel 1, Capital City, Mediterraneo, represented by *Julie Napravnik*, hereinafter referred to as 'SELLER'
and,

Black Beauty Equestrian, represented by Chris Antley
2 Seabiscuit Drive, Oceanside, Equatoriana,
PHONE: (0)214 669804
EMAIL: blackbeauty@blackbeauty.eq

hereinafter referred to as 'BUYER'.

Seller agrees to provide the Buyer with _*100 doses*_ of Frozen Semen from the stallion _*Nijinsky III, English Thoroughbred, born 21 January 2008, ME6799010*_ in exchange for a non-refundable fee of *US$ 100,000* per insemination dose, payable to Phar Lap Allevamento, Mediterraneo State Bank, Banking Plaza 24, Capital City, Mediterraneo, IBAN ME25050038299904.

The semen is to be used for the following mares: *(and others after information of the Seller)*

MARE INFORMATION:

1. *Registered name of mare*: Azeri — *Age*: 10
   Breed: English Thoroughbred — *Registry*: Danubia
   Registration #: DA3938400 — *Color*: black
   Sire: Secretariat — *Dam*: Genuine Risk
   Dam Sire: Snowbound
2. *Registered name of mare*: Ta Wee — *Age*: 8
   Breed: English Thoroughbred — *Registry*: Danubia
   Registration #: DA192837 — *Color*: brown
   Sire: Warrior — *Dam*: Rags to Riches
   Dam Sire: Big Ben
3. *Registered name of mare*: Zenyatta — *Age*: 8
   Breed: English Thoroughbred — *Registry*: Equatoriana
   Registration #: EQ564738 — *Color*: black
   Sire: Eclipse — *Dam*: Winning Colours
   Dam Sire: Brigadier Gerard

TERMS AND CONDITIONS:

1. A "dose" is defined as a single insemination unit (8 x 0.5ml straws) containing a minimum of 800 million total sperm, which upon thawing using the supplied thawing technique,

shows at minimum a 35% post-thaw progressive motility. The Seller will provide detailed thawing and handling instructions for the frozen semen doses provided.

2. Seller makes no guarantees or warranties, expressed or implied as to the fertilizing capacity of any semen provided under the terms of this Agreement.
3. Frozen semen from *Nijinsky III* : *Has* Has Not *Unknown* resulted in pregnancies.
4. The stallion *Nijinsky III* has been tested negative for: Equine herpesvirus-1 (EHV-1); Equine infectious anaemia virus (EIA); Equine viral arteritis (EVA); Leptospira spp; Taylorella spp. (contagious equine metritis, CEM) on *3 March 2017*.
5. All fees are payable upon execution of this Agreement. Buyer specifically agrees and understands that no semen will be shipped until all fees have been paid.
6. The purchase price has to be paid *in two instalments. The first instalment of US$ 5,000,000 is due on 18 May 2017, the second instalment of US$ 5,000,000 is due on 21 January 2018.*
7. There is no live foal guarantee.
8. Seller will ship *3 instalments DDP of Nijinsky III's 100 doses of frozen semen. The first shipment of 25 doses DDP will be on 20 May 2017; the second shipment of 25 doses will be DDP on 3 October 2017; the third and last shipment of 50 doses will be DDP on 23 January 2018.*
9. Buyer is responsible for compliance with registry requirements for the use of frozen semen and payment of any fees for the subsequent registration of foals conceived.
10. *Buyer is responsible for all tank rental and handling fees associated with delivery of the semen from the storage facility and return of the shipping container.*
11. *Once the shipment arrives it should be inspected immediately. Any claims regarding the integrity of the shipment must be filed within 24hrs of delivery.*
12. Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God *neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous.*
13. *The frozen semen is not insured during shipment. Insurance for the value of the semen can be purchased through FedEx. Buyer is responsible for additional insurance fees*.
14. This Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG).
15. *Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.*
    The seat of arbitration shall be Vindobona, Danubia.
    The number of arbitrators shall be three. The arbitration proceedings shall be conducted in English.
    The parties hereto understand and agree to abide by the terms and conditions as set forth in this Agreement:

Seller Signature:  Date: *6 May 2017*

Printed name: *John Ferguson*

Buyer Signature:  Date: *6 May 2017*

Printed name: *Julian Krone*

Peak Business News

At Home
World News
Business
Finance
Companies
Stock Exchange News
Corporate
Restructuring

20 DECEMBER 2017

The end of open markets?

AFTER YEARS of continuing growth the system of free trade has received a second serious blow by yesterday's announcement of the Government of Equatoriana to impose a tariff of 30 per cent upon all agricultural goods from Mediterraneo as a retaliation for the previous restriction imposed by Mr. Bouckaert, the newly elected President of Mediterraneo.

The retaliation as well as the size of the tariffs came as a big surprise even to informed circles. Equatoriana has always been one of the biggest supporters of the existing system of free trade. Previous restrictions imposed by other countries affecting imports from Equatoriana have - with one exception - never resulted in direct retaliatory measures. Instead, the various governments have always tried to solve disputes amicably or via invoking the relevant WTO dispute resolution mechanism. It can only be assumed that the hardliners in the Ministry of Economics have been able to convince the Prime Minister of the need to react strongly to the highly controversial measures by the newly elected President of Mediterraneo. The latter had already in its election program in January 2017 announced a certain preference for a more protectionist approach to international trade, in particular in relation to agricultural products. The measures then taken by him, shortly after his election in April 2017, however, surprised most analysts as they went beyond the worst expectations. In particular, in relation to the agricultural products reliance on an alleged threat to national security as a justification for the tariffs seems to be more a mockery of the system than a good faith effort to justify the controversial tariffs within the boundaries of the existing system. That may have also triggered the prompt and severe retaliation by the Government of Equatoriana.

It is, however, an even more serious blow to the present trading system as other governments have indicated comparable measures.

The first reaction of the Mediterranean President increased the fear that we are presently witnessing a complete unraveling of the international trading system.

From: **Phar Lap Allevamento <PharLap@allevamento.me>**
Sent: 20 January 2018, 9:03 a.m.
To: Black Beauty Equestrian <blackbeauty@blackbeauty.eq>
Re: Additional tariffs for shipment of 50 doses of semen Nijinsky III Urgent!!!
Priority: High

Dear Mr. Shoemaker,

In preparing the final shipment of 50 doses of frozen semen from Nijinsky III to you, I was just informed by the customs authorities that the newly imposed tariffs of 30% on agricultural products are applicable to the shipment. They include apparently all animal products, even if it is for the breeding of racehorses. That makes this shipment 30% more expensive!

You will understand that we will have to find a solution in that regard before we can start the shipment, which was supposed to go out on 22 January 2018.

I have unsuccessfully tried to call you and left a message on your voice mail. Please call me back as soon as possible. I have put the shipment presently on hold but can still authorize it until tomorrow evening, i.e. the 21st.

Sincerely,

Julie Napravnik

PHAR LAP ALLEVAMENTO
Rue Frankel 1
Capital City, Mediterraneo
P: (0)146 9346359

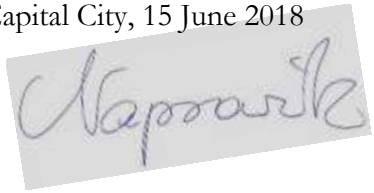
pharlapallevamento.com

Witness Statement of Julie Napravnik

I was born on 15 June 1974 and I have a law degree from the University of Mediterraneo. Since 1 January 2011, I work for Phar Lap Allevamento where I am one of two lawyers. My primary responsibility are our contractual relations to our suppliers and customers while all employment matters and internal legal questions are primarily handled by my colleague.
I have been the prime negotiator of the contract on CLAIMANT's side until 12 April 2017 when Mr. Antley, the responsible person on RESPONDENT's side, and myself were involved in a severe car accident on our way to a dinner. I was hospitalized for three months and the final negotiations of the contract were conducted by our CEO with the support of my colleague, Mr. John Ferguson, who has, however, no experience in international contracting.
On the day of the car accident, Mr. Antley and I had a short discussion upon our newest proposal for the dispute resolution clause and the hardship clause from the previous day. Unfortunately, due to other meetings on that day and Mr. Antley's belated arrival we could only shortly exchange views on what still had to be finalized and the various wishes but had not sufficient time to make any amendment to our standard contract beyond the already existing clauses 1 – 6 of the contract.
I mentioned to Mr. Antley that for us it was important to have a mechanism in place which would ensure an adaptation of the contract for the unlikely event that the Parties could not agree on an amendment. Mr. Antley replied that in his view that it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree. Since that had also been my preference and understanding of the existing provisions, I suggested to clarify that issue and to include an express reference into the hardship clause or the arbitration clause to avoid any doubts, irrespective of the fact that from a legal point of view that was not necessary. Mr. Antley promised that he would come back with a proposal the next morning. Due to the accident he never managed to do so. He was in a coma for four weeks and as far as I know has taken early retirement after having left the hospital at the beginning of this year.
In the end, our successors in finalizing the contract did not include such an express reference either in the arbitration agreement or the hardship clause they finally negotiated. I cannot say whether they merely forgot it or considered it not to be necessary in light of our tentative agreement on the issue.
In January 2018, when I prepared the final delivery of 50 doses I was told to my great surprise by the customs officials of Equatoriana that the newly imposed tariffs for agricultural products covered all animal products and therefore would also apply to semen used for artificial insemination in racehorse breading. That made the shipment 30% more expensive than anticipated, not only destroying our profit margin of 5% but resulting in considerable hardship.
The last two years have been financially difficult for CLAIMANT due to several reasons. Through extensive restructuring measures and a considerable cut of the work force CLAIMANT has been able to stay in business but it was impossible for us to shoulder this additional 30% tariff which had to be paid immediately. While we had agreed on a DDP delivery it had been clear to both Parties that CLAIMANT should not bear all risks associated with such a delivery but that the agreement on DDP delivery was primarily to ensure better transportation terms and

swifter delivery due to CLAIMANT's experience in the shipment of frozen semen. That is also reflected in the contract.
I told that to Mr. Shoemaker when he called me on the 21 January in the morning, following up on my email of the previous day. He said that he had not been involved in the negotiations or the Sales Agreement and could not directly authorize any additional payment but saw our problem. He was certain that a solution would be found through negotiation given the good relationship between the Parties and their interest in further business. He urged me to authorize the shipment as planned since Black Beauty needed the doses and had already initiated the payment of the second installment. He emphasized their interest in a long-term relationship with us and told me about their plans to buy also 50 doses from Empire's State, our second stallion of world reputation.
As I had gotten the impression that RESPONDENT accepted our position that they should bear the bulk of the additional costs due to the tariffs and needing the doses urgently. I authorized delivery even before an agreement on the details had been reached. We paid the 30% in tariffs relying on RESPONDENT's promise that a solution would be found and that they were interested in a long-term relationship.
After the final shipment had been made we discovered that RESPONDENT was actually breaching the resale prohibition under the contract and needed part of the doses shipped for commitments towards other parties. When confronted with our discovery in a meeting of 12 February 2018 Ms. Kayla Espinoza, RESPONDENT's CEO, got very angry and aggressive. She shouted that she was fed up with the permanent additional requests from Phar Lap which, in her view, had no basis in the contract and was no longer be interested in a further cooperation with Phar Lap. She stopped the negotiations and refused to pay any additional amount for the tariffs. With hindsight I have the impression that RESPONDENT planned from the beginning to re-sell a considerable amount of the 100 doses at an increased price to other breeders to whom we might not have sold directly. Beyond the generation of additional revenue that would have increased the number of breeders at least in Equatoriana who had an interest in completely abolishing the ban on artificial insemination.

Capital City, 15 June 2018



香港國際仲裁中心
Hong Kong International Arbitration Centre

31 July 2018

Joseph Langweiler
75 Court Street
Capital City
Mediterraneo
By fax: + 0 146 9850
By email: langweiler@lawyer.me & by courier

Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside
Equatoriana
By courier only

Dear Sirs/Mesdames,

Case No.: **HKIAC/A18128**
Claimant: **Phar Lap Allevamento (Mediterraneo)**
Respondent: **Black Beauty Equestrian (Equatoriana)**
Re: **Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017**

We refer to the captioned case and acknowledge receipt of a Notice of Arbitration dated 31 July 2018 and the documents included therewith (the "**Notice**"), on even date, from Claimant's counsel, Mr. Joseph Langweiler.

Commencement of Arbitration
We note that Claimant has commenced this arbitration under the 2013 HKIAC Administered Arbitration Rules (the "**Rules**") pursuant to Clause 15 of the Frozen Semen Sales Agreement dated 6 May 2017 (the "**Agreement**"), which provides:

> *"Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.*
>
> *The seat of arbitration shall be Vindobona, Danubia.*
>
> *The number of arbitrators shall be three. The arbitration proceedings shall be conducted in English."*

HKIAC will proceed to administer the captioned arbitration under the Rules. For the parties' information, the Rules are enclosed and can also be found at http://www.hkiac.org/images/stories/arbitration/2013_hkiac_rules.pdf.

Registration Fee
We confirm receipt, on 31 July 2018, of a bank transfer in the sum of HK$ 8,000 from Claimant's counsel, representing payment of the Registration Fee in accordance with Article 4.4 of the Rules.

WP/OB

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香港國際仲裁中心
Hong Kong International Arbitration Centre

Case No.: **HKIAC/A18128**
Claimant: **Phar Lap Allevamento (Mediterraneo)**
Respondent: **Black Beauty Equestrian (Equatoriana)**
Re: **Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017**

Documentary Verification of Service of the Notice
We note from Claimant's documentary verification, enclosed with its counsel's letter dated 31 July 2018, that Claimant successfully served copies of its Notice on Respondent by email and courier on 31 July 2018.

Answer to the Notice of Arbitration
Pursuant to Article 5.1 of the Rules, Respondent shall submit to HKIAC the Answer to the Notice of Arbitration (the "**Answer**") within **30 days** from the date on which Respondent received the Notice. Accordingly, Respondent shall submit the Answer **by 30 August 2018**.

Pursuant to Article 5.1(g) of the Rules, Respondent shall at that time confirm service of copies of the Answer and any exhibits included therewith on Claimant.

Constitution of the Arbitral Tribunal
We note that Clause 15 of the Agreement provides that *"[t]he number of arbitrators shall be three",* and that, pursuant to Article 8.1 of the Rules, Claimant has designated Ms. Wantha Davis of 14 Churchill Downs, Capital City, Mediterraneo as the first co-arbitrator in this case. We will invite Ms. Davis to complete a Declaration of Acceptance and Statement of Availability, Impartiality and Independence and provide us with her proposed hourly rate for this arbitration.

We invite Respondent to designate the second co-arbitrator in the Answer pursuant to Articles 5.1(f) and 8.1 of the Rules.

Method for Determining the Fees of the Arbitral Tribunal
Under Article 10 of the Rules, the fees and expenses of the arbitral tribunal shall be determined, at the option of the parties, either on (a) hourly rates in accordance with Schedule 2; or (b) in accordance with the schedule of fees based on the sum in dispute referred to in Schedule 3. In accordance with Article 10.1 of the Rules, the parties are invited to agree on the method for determining the fees of the arbitral tribunal **by 30 August 2018**.

If the parties fail to agree on the applicable method within the specified period, the arbitral tribunal's fees shall be calculated on the basis of hourly rates in accordance with the terms of Schedule 2 of the Rules. We refer the parties to the enclosed Note on the Method for Determining the Fees of the Arbitral Tribunal and the Practice Notes on Costs of Arbitration.

WP/OB

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Case No.: **HKIAC/A18128**
Claimant: **Phar Lap Allevamento (Mediterraneo)**
Respondent: **Black Beauty Equestrian (Equatoriana)**
Re: **Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017**

Case Number
We have assigned the reference number "**HKIAC/A18128**" for this arbitration. Please use this reference number in all communications throughout the arbitral proceedings. In particular, we request the parties to indicate the reference number in the subject line of all emails sent to HKIAC.

Initial Deposits
Pursuant to Article 40.1 of the Rules, we request payment of initial deposits as an advance for the arbitral tribunal's fees and expenses and HKIAC's Administrative Fees.

The initial deposit for the fees and expenses of the arbitral tribunal is **US$ 25,560**, which shall be shared equally by the parties. Accordingly, we request each party to deposit with HKIAC its share (i.e., **US$ 12,780 per party**) **by 14 August 2018**. Please make payment by bank transfer to the following account of HKIAC:

A/C Name:	Hong Kong International Arbitration Centre
A/C No:	1234-1234-002
Bank:	Hong Kong & Shanghai Banking Corporation 1 Queen's Road Central, Hong Kong
Swift Code:	HSBC HK HHH KH

The initial deposit for HKIAC's Administrative Fees is **US$ 10,673**, which shall be shared equally by each party. Accordingly, we request each party to deposit with HKIAC its share (i.e. **US$ 5,336.50 per party**) **by 14 August 2018**. Please make payment by bank transfer to the following account of HKIAC:

A/C Name:	Hong Kong International Arbitration Centre
A/C No:	1234-1234-001
Bank:	Hong Kong & Shanghai Banking Corporation 1 Queen's Road Central, Hong Kong
Swift Code:	HSBC HK HHH KH

Please identify the paying party and the HKIAC reference number "HKIAC/A18128" when making the payment and notify us with proof of remittance once payment is made. Please note that all bank charges are to be borne by the remitting party.

WP/OB

香港國際仲裁中心
Hong Kong International Arbitration Centre

Case No.: **HKIAC/A18128**
Claimant: **Phar Lap Allevamento (Mediterraneo)**
Respondent: **Black Beauty Equestrian (Equatoriana)**
Re: **Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017**

HKIAC Case Manager
Please note that the contact details of the HKIAC case manager in charge of the above-referenced matter are as follows:

Contact Person:	**Mr. Formula Wan, HKIAC Deputy Counsel**
Email:	arbitration@hkiac.org / fwan@hkiac.org
Tel:	+852 2912 2000
Fax:	+852 2524 2171

Email Communication
For the purposes of efficiency, we encourage the use of email communication whenever possible. Accordingly, we invite the parties to inform us whether they agree to communicate with HKIAC by email only in these proceedings.

Thank you for your attention.

Yours faithfully,

HKIAC

Hong Kong International Arbitration Centre

Encl. 2013 HKIAC Administered Arbitration Rules and 50 Questions & Answers
Note on Method for Determining the Fees of the Arbitral Tribunal
Practice Note on Costs of Arbitration (Based on Schedule 2 and Hourly Rates)
Practice Note on Costs of Arbitration (Based on Schedule 3 and the Sum in Dispute)

(not reproduced)

WP/OB

香港國際仲裁中心
Hong Kong International Arbitration Centre

1 August 2018

Joseph Langweiler
75 Court Street
Capital City
Mediterraneo
By fax: +0 146 9850
By email: langweiler@lawyer.me & by courier

Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside
Equatoriana
By courier only

Dear Sirs/Mesdames,

Case No.: **HKIAC/A18128**
Claimant: **Phar Lap Allevamento (Mediterraneo)**
Respondent: **Black Beauty Equestrian (Equatoriana)**
Re: **Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017**

We refer to the captioned case and our letter dated 31 July 2018.

We recall that, in the Notice of Arbitration dated 31 July 2018 (the "**Notice**"), Claimant designated Ms. Wantha Davis of 14 Churchill Downs, Capital City, Mediterraneo as the first co-arbitrator in this case. Further to Claimant's designation, we enclose copies of Ms. Davis's (i) Declaration of Acceptance and Statement of Availability, Impartiality and Independence and (ii) curriculum vitae, for the parties' reference.

Ms. Davis agrees to be bound by Schedule 2 of the 2013 HKIAC Administered Arbitration Rules (the "**Rules**") and her proposed hourly rate for this arbitration is US$ 380.

In accordance with Article 10.2 of the Rules, we kindly request that Claimant confirm whether it is agreeable to Ms. Davis's hourly rate **by 8 August 2018**.

Thank you for your attention.

Yours faithfully,

HKIAC

Hong Kong International Arbitration Centre

Encl. Ms. Davis's Declaration of Acceptance and Statement of Availability, Impartiality and Independence
Ms. Davis's curriculum vitae (not reproduced)

WP/OB

38/F Two Exchange Square 8 Connaught Place Hong Kong
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Case No. HKIAC/ A18128

ARBITRATOR'S DECLARATION OF ACCEPTANCE
AND STATEMENT OF AVAILABILITY, IMPARTIALITY AND INDEPENDENCE
(Please check the relevant box or boxes)

I, the undersigned,

Last Name: DAVIS First Name: WANTHA

NON-ACCEPTANCE:

☐ I hereby declare that **I decline** to serve as arbitrator in the subject case. (If you wish to state the reasons for checking this box, please do so using a separate sheet.)

ACCEPTANCE:

☑ I hereby declare that I accept to serve as arbitrator under the 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules (the "Rules") in the above-referenced case. In so declaring, I confirm that I have familiarized myself with the requirements of the Rules and that I am available to serve as an arbitrator in accordance with all of the requirements of the Rules. In particular, I confirm that my schedule is such that I will be able to devote sufficient time to deal with the above-referenced case in the ordinary course of its development in accordance with Article 13.5 of the Rules which provide for the fair and efficient conduct of the arbitration and that I know of no reason why any award would not be rendered within a reasonable period. I also acknowledge an ongoing duty incumbent on me throughout the arbitration, to disclose, without delay, any circumstances likely to give rise to justifiable doubts as to my impartiality or independence.

☑ I hereby declare that **I agree** to be bound by the method for determining the arbitral tribunal's fees applicable in accordance with Article 10.1 of the Rules.

IMPARTIALITY AND INDEPENDENCE

(If you accept to serve as arbitrator, please also check one of the following boxes. The choice of which box to check will be determined based on whether any circumstance or relationship—past or present, direct or indirect—with any of the parties or their counsel, third parties including any related entities or other representatives, whether financial, professional or of another kind, and whether the nature of any such circumstance or relationship is such that disclosure is called for pursuant to the criteria set out below. Any doubt should be resolved in favour of disclosure.)

☑ **I am impartial and independent** with respect to each of the parties and any third parties relevant for present purposes and intend to remain so. To the best of my knowledge, there are no facts or circumstances, past or present, which need to be disclosed because they are likely to give rise to justifiable doubts as to my impartiality or independence.

OR

☐ **I am impartial and independent** with respect to each of the parties and any third parties relevant for present purposes and intend to remain so; **however**, in consideration of Article 11 of the Rules, I call your attention to the following facts and circumstances which I hereafter disclose because they might be of such a nature as to give rise to justifiable doubts as to my impartiality or independence. (Please use a separate sheet.)

Signature: C.C. Davis Date: 1 August 2018

Joseph Langweiler
Advocate at the Court
75 Court Street
Capital City
Mediterraneo
Tel (0) 146 9845; Telefax (0) 146 9850
Langweiler@lawyer.me

By email and courier
Mr. Formula Wan
Hong Kong International Arbitration Centre
38th Floor Two Exchange Square
8 Connaught Place
Central
Hong Kong

2 August 2018

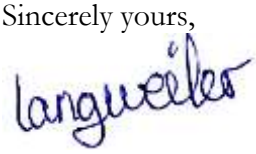
Dear Mr. Wan,

Thank you very much for your letter of 1 August. Giving the requested information, I can confirm the following:

1) CLAIMANT agrees to the proposed hourly rate for Ms. Davis of US$ 380;
2) CLAIMANT has paid its share of the initial deposits; and
3) CLAIMANT agrees to communicate with HKIAC by email only.

Furthermore, CLAIMANT proposes to determine the arbitral tribunal's fees in accordance with Schedule 2 of the Rules, i.e. on the basis of hourly rates.

Sincerely yours,



Joseph Langweiler

cc. Black Beauty Equestrian

香港國際仲裁中心
Hong Kong International Arbitration Centre

2 August 2018

Joseph Langweiler
By email: langweiler@lawyer.me only

Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside
Equatoriana
By courier only

Dear Sirs/Mesdames,

Case No.: **HKIAC/A18128**
Claimant: **Phar Lap Allevamento (Mediterraneo)**
Respondent: **Black Beauty Equestrian (Equatoriana)**
Re: **Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017**

We refer to the captioned case and our letter dated 1 August 2018. We also acknowledge receipt of Claimant's counsel's letter to HKIAC dated 2 August 2018, on even date, which was copied to Respondent.

Co-Arbitrator Designated by Claimant
We note that Claimant agrees to Ms. Davis's proposed hourly rate of US$ 380.

Pursuant to Article 9.1 of the 2013 HKIAC Administered Arbitration Rules (the "**Rules**"), all designations of an arbitrator are subject to confirmation by HKIAC, upon which the appointment shall become effective. Once the method for determining the fees and expenses of the arbitral tribunal has been determined in accordance with Article 10.1 of the Rules, we will proceed with the confirmation procedure under Article 9.2 of the Rules in respect of Claimant's designation of Ms. Davis.

Method for Determining the Fees of the Arbitral Tribunal
In accordance with Article 10.1 of the Rules, the parties are invited to agree on the method for determining the fees of the arbitral tribunal within **30 days** from the date on which Respondent received the Notice (i.e., **by 30 August 2018**).

Claimant has indicated that it prefers adopting the method for determining the fees of the arbitral tribunal according hourly rates in accordance with Schedule 2 of the Rules. If the parties fail to agree on the applicable method within the specified period, the arbitral tribunal's fees shall be calculated on the basis of hourly rate(s) in accordance with the terms of Schedule 2 of the Rules.

WP/OB

香港國際仲裁中心
Hong Kong International Arbitration Centre

Case No.: **HKIAC/A18128**

Claimant: **Phar Lap Allevamento (Mediterraneo)**
Respondent: **Black Beauty Equestrian (Equatoriana)**
Re: **Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017**

Initial Deposits
We acknowledge receipt of the sums of **US$ 12,780** and **US$ 5,336.50** from Claimant, representing payment of its share of the initial deposits for the arbitral tribunal's fees and expenses and HKIAC's Administrative Fees, respectively.

We look forward to receiving Respondent's share of the initial deposits for the arbitral tribunal's fees and expenses (i.e., **US$ 12,780**) and for HKIAC's Administrative Fees (i.e., **US$ 5,336.50**) **by 14 August 2018**.

Email Communication
For the purposes of efficiency, we encourage the use of email communication whenever possible. We note that Claimant has agreed to communicate with HKIAC by email only. We look forward to hearing from Respondent whether it agrees to the same.

Thank you for your attention.

Yours faithfully,

HKIAC

Hong Kong International Arbitration Centre

WP/OB

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www.hkiac.org

JULIA CLARA FASTTRACK
Advocate at the Court
14 Capital Boulevard
Oceanside
Equatoriana
Tel. (0) 214 77 32 Telefax (0) 214 77 33
fasttrack@host.eq

By email and courier
Mr. Formula Wan
Hong Kong International Arbitration Centre
38th Floor Two Exchange Square
8 Connaught Place
Central
Hong Kong

24 August 2018

Phar Lap Allevamento v. Black Beauty Equestrian
HKIAC/A18128

Dear Mr. Wan,

I hereby indicate that I represent RESPONDENT in the above referenced arbitral proceedings. A power of attorney is attached.

Please find enclosed RESPONDENT's Answer to the Notice of Arbitration, a copy of which has been send directly to CLAIMANT. Please note that:

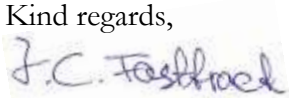
1) RESPONDENT has paid its share of the initial deposits;
2) RESPONDENT agrees to CLAIMANT's proposal to determine the tribunal's fees in accordance with schedule 2 of the Rules; and
3) RESPONDENT agrees to communicate with HKIAC by email only.

RESPONDENT nominates as its arbitrator

Dr. Francesca Dettorie, Circus Maximus Avenue 1, Derby, Equatoriana.

Could you please take the necessary steps for her confirmation.

Kind regards,



Julia Clara Fasttrack

cc. Joseph Langweiler

JULIA CLARA FASTTRACK
Advocate at the Court
14 Capital Boulevard
Oceanside
Equatoriana
Tel. (0) 214 77 32 Telefax (0) 214 77 33
fasttrack@host.eq

Answer to the Notice of Arbitration

(pursuant to Article 5 Hong Kong International Arbitration Rules 2013)

in the Arbitral Proceedings Case No HKIAC/A18128

Phar Lap Allevamento v. Black Beauty Equestrian

Phar Lap Allevamento
Rue Frankel 1
Capital City
Mediterraneo

- CLAIMANT-

Represented by Joseph Langweiler (75 Court Street, Capital City, Mediterraneo)

Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside
Equatoriana

- RESPONDENT-

Represented by Julia Clara Fasttrack (14 Capital Boulevard, Oceanside, Equatoriana)

INTRODUCTION

1. In its Notice of Arbitration, CLAIMANT presents an incomplete summary of the facts, omitting some important details of the last part of the contract negotiation just before the unfortunate accident of the two main negotiators. In addition, CLAIMANT draws completely wrong legal conclusions from the facts presented.

2. The Arbitral Tribunal lacks jurisdiction and the necessary powers for the claim raised. Furthermore, CLAIMANT's claim for an additional remuneration on the basis of an adaptation of the contract is not justified.

FACTS

3. CLAIMANT's description of the negotiation process has deliberately avoided a number of communications which will shed a completely different light on the case, one which shows that the claims are completely baseless.

4. As correctly stated by CLAIMANT, RESPONDENT had in its email of 28 March 2017 (Claimant's Exhibit 3) objected to the forum selection clause and asked for delivery DDP. CLAIMANT in its email of 31 March 2017 accepted DDP delivery in principle but asked to be relieved from all risks associated with such a delivery or at least to be protected against the risk of changing health and security requirements by a hardship clause (Claimant's Exhibit 4). The first option was not acceptable for RESPONDENT who was not willing to pay a much higher price for receiving basically nothing. Thus, the Parties concentrated in their following discussions on the inclusion of a hardship clause. Again, RESPONDENT considered the originally suggested ICC-hardship clause to be too broad. Consequently, an approach was taken to regulate a number of possible risks directly and then merely add a hardship wording to the existing force majeure clause.

5. In relation to the arbitration clause, RESPONDENT's proposal had made clear its sincere wish for an arbitration agreement which was governed by the law of the place of arbitration and not by the law of the contract. Such a clause was actually included in Mr. Antley's latest draft of 10 April 2017 (Respondent's Exhibit 1).

6. In its reply, of 11 April 2017, CLAIMANT had changed the suggested place of arbitration but had not objected to our proposal that the law of the place of arbitration should govern the arbitration agreement (Respondent's Exhibit 2).

7. The newly suggested neutral place of arbitration, which was acceptable for us, meant, however, that also the choice of law provision had to be changed, to avoid the uncertainties resulting from the absence of a choice. Thus Mr. Antley had listed the choice of law governing the arbitration agreement as one of the points to be addressed in the final contract (Respondent's Exhibit 3).

8. That the choice of law clause was not included into the Sales Agreement as finally agreed was merely due to an oversight resulting from the fact that because of the dreadful car accident on 12 April 2017 the original negotiation team was no longer available. Instead the contract had to be finalized by employees on both sides who had previously not been involved in the negotiation and the drafting of the contract. While Mr. Krone found the note of Mr. Antley he did not fully understand his reference to the law governing the arbitration agreement and to the hardship clause (Respondent's Exhibit 3).

9. In relation to the hardship clause, the negotiations finally resulted in a very narrowly worded clause, which was then included into the existing force majeure clause and did not provide for any adaptation by the arbitral tribunal (Respondent's Exhibit 3).

10. Contrary to CLAIMANT's insinuations RESPONDENT did also not agree to any adaptation following CLAIMANT's request in January 2018. Quite to the contrary, Mr. Shoemaker made clear in his telephone conversation that his understanding of the contract was that CLAIMANT had to bear the costs but that he would verify that with the persons involved in drafting. He also pointed out that he had no authority to agree on an adaptation (Respondent's Exhibit 4). Given RESPONDENT's interest in a delivery of the outstanding doses and CLAIMANT's threats to stop delivery it is obvious that Mr. Shoemaker could not reject CLAIMANT's request outright.

11. Furthermore, RESPONDENT strongly objects to CLAIMANT's baseless insinuations of bad faith and assumptions concerning the intentions of RESPONDENT's investors. The contractual document does not contain any resale prohibition. Whether and at what price RESPONDENT has sold doses to other breeders is for the following dispute completely irrelevant. CLAIMANT has not submitted any proof for its allegation that RESPONDENT resold the doses and made a 20% profit therefrom.

LEGAL

Lack of Jurisdiction

12. The Arbitral Tribunal lacks jurisdiction to decide the case. The claim raised does not merely require the arbitrators to order a payment on the basis of an interpretation of the contract but actually asks for its adaptation. CLAIMANT is not claiming the originally agreed contractual remuneration which has been undisputedly been paid by RESPONDENT. Instead, CLAIMANT is seeking a remuneration which goes beyond that amount and for which the arbitrators would have to adapt the contract.

13. The interpretation of the arbitration agreement is governed by the law of Danubia which recognizes that arbitrators may adapt contracts but requires an express empowerment for that. Such an express conferral of powers is, however, missing in the present contract. Quite to the contrary, RESPONDENT, when suggesting the arbitration clause explicitly reduced the broad wording of the Model Clause of the HKIAC by deleting any reference which could be interpreted as an empowerment for contract adaptation.

14. Contrary to CLAIMANT's allegations, RESPONDENT never agreed to have the arbitration agreement governed by the law of the contract. There is no express choice of such law in the arbitration clause nor is there any implied choice. Under Danubian law, as well as under all other potentially relevant arbitration laws the arbitration agreement is considered to be a legally separate agreement from the container contract in which it is included. That is clearly recognized by Article 16 of the Danubian Arbitration law as well as the identically worded Article 16 of the Mediterranean Arbitration Law which both explicitly acknowledge the doctrine of separability. Thus, the reference in the choice of law clause directly preceding the arbitration clause that "this Sales Agreement is governed by the law of Mediterraneo" (emphasis added) is merely determining the law applicable for the main contract, i.e. the "Sales" part of it. It does not refer to the following arbitration clause and can also not be interpreted as an implicit choice for the arbitration agreement.

15. That becomes even clearer if one, as CLAIMANT wants to do, looks at the drafting history of the arbitration clause. The first draft of the arbitration agreement actually contained an express choice of law provision for the arbitration clause. That choice provided for the application of the law of the place of arbitration, which was in that draft Equatoriana. It was subsequently merely forgotten to include that provision in the final version. But there was never any deliberate choice in favor of the law of Mediterraneo as the law governing the main contract. It is one of the distinguishing features of the selected institution that their model clause contains an explicit reference to the law governing the arbitration agreement.

16. Danubian law adheres for the interpretation of contracts including arbitration agreements to the "four corners rule", i.e. that the interpretation of the arbitration agreement is limited to its wording and no external evidence may be relied upon. In particular, reliance on the drafting history and preceding communication is excluded if the wording is clear.

17. In the present case, the arbitration agreement itself, which is to be treated as a separate contract for its interpretation under the four corners rules, contains no choice of law wording. Unlike in many other contracts the choice of law clause for the main contract, the sales agreement, is not contained in the arbitration clause. Instead, it is included in a separate clause preceding the arbitration agreement.

Substance

18. CLAIMANT's claim for an increased remuneration is completely baseless. CLAIMANT has no right to ask for an adaptation of the contract, neither under the force majeure/hardship clause nor under Art. 79 CISG.

19. Reliance on the hardship clause is not possible. The narrowly worded clause is not applicable to the present impediment and does not provide for the requested remedy, i.e. adaptation by the Arbitral Tribunal. RESPONDENT would have never entered into such a contract the financial dimension of which would be dependent on the discretion of the arbitrators.

20. CLAIMANT can also not rely on Art. 79 of the CISG. First of all, by including the force majeure and hardship clause into the contract the Parties have provided for a special regulation of the problem of changed circumstances excluding an application of Art. 79 CISG. It constitutes a derogation in the sense of Art. 6 CISG.

21. Second, Art. 79 CISG does not regulate hardship and does not provide for the remedy requested by CLAIMANT, which is the increase of the contract price as considered appropriate by the arbitral tribunal.

REQUESTS FOR RELIEF

22. In light of the above RESPONDENT requests the Arbitral Tribunal
    a. To dismiss the claim as inadmissible for a lack of jurisdiction and powers;
    b. To reject the claim for additional remuneration in the amount of US$ 1,250,000 raised by CLAIMANT;
    c. To order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.

Oceanside, 24 August 2018

For Black Beauty Equestrian

J.C. Fasttrack

Julia Clara Fasttrack

From: **Black Beauty Equestrian <blackbeauty@blackbeauty.eq>**
Sent: 10 April 2017, 4:37 p.m.
To: Phar Lap Allevamento <PharLap@allevamento.me>
Re: Inquiry re Nijinsky III

Dear Ms. Napravnik,

To speed up the negotiations on one of our last open points, we have prepared a first draft for the dispute resolution clause which we would consider appropriate in light of the fact that the Sales Agreement is governed by the law of Mediterraneo. Our draft is largely based on the model clause suggested by the HKIAC. The proposal has narrowed down and streamlined a little the fairly broad wording of the clause and provides for arbitration in Equatoriana and also submits the arbitration clause to the law of Equatoriana. It provides:

> ***"Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.***
> ***The seat of arbitration shall be Equatoriana.***
> ***The law of this arbitration clause shall be the law of Equatoriana.***
> ***The number of arbitrators shall be three.***
> ***The arbitration proceedings shall be conducted in English."***

Please let us know whether you have any objections to the clause.

Sincerely,

Chris Antley

Black **B**eauty **E**questrian
2 Seabiscuit Drive
Oceanside, Equatoriana
T: (0)214 669804
Email: blackbeauty@blackbeauty.eq

BlackBeautyEquestrian.com

From: **Phar Lap Allevamento <PharLap@allevamento.me>**
Sent: 11 April 2017, 11:23 a.m.
To: Black Beauty Equestrian <blackbeauty@blackbeauty.eq>
Re: Inquiry re Nijinsky III

Dear Mr Antley,

Thank you very much, for your proposal.

To avoid any further futile discussion on the issue I would like to inform you that Phar Lap has an internal policy according to which consent to a contract submitted to a foreign law or providing for dispute resolution in the country of the counterparty requires special approval by the creditors' committee, a board in which all financing banks are included. It would, however, be possible to agree on arbitration in a neutral country.

To accommodate your wish not to be submitted to the jurisdiction of the courts in Mediterraneo, and to arbitrate under the rules of the HKIAC we would largely accept your proposal with an amendment as to the place of arbitration, so that the clause would read in its relevant part:

> ***"Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.***
> ***The seat of arbitration shall be Danubia."***

That offer is naturally on the condition that the law applicable to the Sales Agreements remains the law of Mediterraneo.

Concerning the other open point, we would suggest reliance on the ICC-Hardship clause.

Sincerely,

Julie Napravnik

PHAR LAP ALLEVAMENTO
Rue Frankel 1
Capital City, Mediterraneo
P: (0)146 9346359

pharlapallevamento.com

RESPONDENT's EXHIBIT R 3

Witness Statement of Julian Krone

I am the head of the legal department at Black Beauty Equestrian, which is composed of four lawyers, one of which was Mr. Antley until he left the company following his severe car accident in April 2017. The negotiations for the Sales Agreement with Phar Lap Allevamento were conducted exclusively by Mr. Antley until 12 April 2017. While we discussed the main strategy, i.e. the need for DDP delivery and the non-acceptability of the courts of Mediterraneo I was not involved in the detailed negotiations nor did he report about them.
Mr. Antley had the habit of writing down after each round of negotiations which issues were still open and what he had to address in the next round. He had done this also in the present case. After the car accident on 12 April 2017 we found the following note of Mr. Antley in his "negotiation file", which he had apparently prepared after his short meeting with Ms. Napravnik in the morning of 12 April:

12 April 2017
List of issues for further negotiations following draft by Phar Lap of 11 April and short discussion with Napravnik this morning

- *Clarify in arbitration clause that neutral venue and applicable law*
- *ICC hardship clause suggested by Claimant too broad*
- *Connection of hardship clause with arbitration clause*

After it was clear that due to the graveness of their injuries it would not be possible to get any meaningful input from the two main negotiators within the short time available I took over the negotiations and managed to finalize them taking into account as much as possible the content of the note. It was, however, at the time not completely clear to me what Mr. Antley meant with points 1 and 3. The draft of the contract had already a provision in favor of arbitration in Danubia as a neutral country and also a choice of law clause in favor of the law of Mediterraneo. Had I known at the time that Mr. Antley was referring to the law applicable to the arbitration instead of the law applicable to the contract I would have definitively included an express reference to the law of Danubia into the arbitration agreement. Equally, I would have objected to transfer powers to the Arbitral Tribunal to increase the price upon its discretion.
In relation to the hardship clause my counterpart from the CLAIMANT's side, Mr. John Ferguson and myself agreed on the inclusion of a narrow hardship reference into the force majeure clause and regulated some other risks directly in the contract.

Oceanside, 23 August 2018

J. Krone

RESPONDENT's EXHIBIT R 4

Witness Statement of Greg Shoemaker

I was born on 9 June 1991 and am since 1 November 2017 responsible for the development of the racehorse breeding program which had until then been supervised by my colleague Chris Acatenengo. I am a veterinary by training and have an MBA from the University of Happy Valley. I have not been involved in the negotiation of the contract.

When I received Ms. Napravnik's email of 20 January 2018, I first inquired with the relevant ministry and the customs authority whether the tariffs on "animal products" also covered frozen semen used for artificial insemination in racehorse breeding. That took some time as also in the ministry the employees I spoke to first, were not certain whether frozen racehorse semen was covered under "animal products". Only later it was confirmed that "animal products" covered frozen race horse semen.

On the morning of 21 January 2018, I then called Ms. Napravnik to discuss the issue with her. My primary concern was to ensure that the remaining 50 doses were actually shipped, some of which were urgently needed given that start of the "breeding season".

During the discussion I told Ms. Napravnik several times that I was not a lawyer and had not been involved in the negotiations of the contract. Thus, I first had to confirm with my superiors whether there was an obligation by CLAIMANT to deliver at the conditions agreed upon or not. I also indicated that according to my understanding DDP meant that all risks had to be borne by Phar Lap but that I would try to clarify the legal situation with our legal department or the drafters of the Sales Agreement. I never committed to any adaptation of the price and would also not have had the required authority to do so. I merely stated that "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price." I actually read that sentence from a note prepared in anticipation of the discussion. I knew that CLAIMANT would not deliver if I were to reject their request outright. At the same time, I had no authority to consent to additional payments outside the contract without speaking to our management which was not available at the time. To avoid making any concessions which I could not keep my wife who is a lawyer, had written down the above quoted sentence for me and advised me to stick to it.

Oceanside, 22 August 2018

Greg Shoemaker

香港國際仲裁中心
Hong Kong International Arbitration Centre

24 August 2018

Joseph Langweiler
By email: langweiler@lawyer.me only

Julia Clara Fasttrack
By email: fasttrack@host.eq only

Dear Sirs/Mesdames,

Case No.: **HKIAC/A18128**
Claimant: **Phar Lap Allevamento (Mediterraneo)**
Respondent: **Black Beauty Equestrian (Equatoriana)**
Re: **Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017**

We refer to the captioned case and acknowledge receipt of Ms. Julia Clara Fasttrack's letter to HKIAC dated 24 August 2018, on even date.

Respondent's Legal Representative
We note Ms. Fasttrack's indication that she represents Respondent in the captioned arbitration. Going forward, HKIAC will address all communications for Respondent to Ms. Fasttrack only, unless and until notified otherwise.

Answer to the Notice of Arbitration
We also acknowledge receipt of Respondent's Answer to the Notice of Arbitration dated 24 August 2018 (the "**Answer**"), on even date. We note Respondent's confirmation that the Answer was served on Claimant's counsel in accordance with Article 5.1(g) of the 2013 HKIAC Administered Arbitration Rules (the "**Rules**").

Constitution of the Arbitral Tribunal
Respondent has designated Dr. Francesca Dettorie of Circus Maximus Avenue 1, Derby Equatoriana as the second co-arbitrator in this arbitration. Further to Respondent's designation, we enclose copies of Dr. Dettorie's (i) Declaration of Acceptance and Statement of Availability, Impartiality and Independence and (ii) curriculum vitae.

Dr. Dettorie agrees to be bound by Schedule 2 of the Rules. Her proposed hourly rate is US$ 380.

In accordance with Article 10.2 of the Rules, we kindly request that Respondent confirm whether it is agreeable to Dr. Dettorie's proposed hourly rate **by 31 August 2018**.

WP/OB

38/F Two Exchange Square 8 Connaught Place Hong Kong
香港中環交易廣場第二座38樓
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E 電郵 adr@hkiac.org
www.hkiac.org

香港國際仲裁中心
Hong Kong International Arbitration Centre

Case No.: **HKIAC/A18128**
Claimant: **Phar Lap Allevamento (Mediterraneo)**
Respondent: **Black Beauty Equestrian (Equatoriana)**
Re: **Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017**

Method for Determining the Fees of the Arbitral Tribunal
We note that the parties have agreed that the fees of the arbitral tribunal shall be calculated on the basis of hourly rates in accordance with the terms of Schedule 2 of the Rules.

Initial Deposits
We acknowledge receipt of the sums of **US$ 12,780** and **US$ 5,336,50** from Respondent, representing payment of its share of the initial deposits for the arbitral tribunal's fees and expenses and HKIAC's Administrative Fees, respectively.

Email Communication
We note that both parties have now indicated their agreement to communicate with HKIAC by email only in these proceedings.

Thank you for your attention.

Yours faithfully,

HKIAC

Hong Kong International Arbitration Centre

Encl. Dr. Dettorie's Declaration of Acceptance and Statement of Availability, Impartiality and Independence (not reproduced)
Dr. Dettorie's curriculum vitae (not reproduced)

WP/OB

JULIA CLARA FASTTRACK
Advocate at the Court
14 Capital Boulevard
Oceanside
Equatoriana
Tel. (0) 214 77 32 Telefax (0) 214 77 33
fasttrack@host.eq

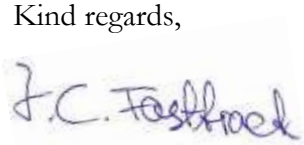
Via Email and Courier
Mr. Formula Wan
Hong Kong International Arbitration Centre
38th Floor Two Exchange Square
8 Connaught Place
Central
Hong Kong

25 August 2018

Dear Mr. Wan,

Thank you very much for your letter of 24 August 2018. Giving the requested information, I can confirm that RESPONDENT agrees to the proposed hourly rate of Dr. Dettorie of US$ 380.

Kind regards,



Julia Clara Fasttrack

cc. Joseph Langweiler

香港國際仲裁中心
Hong Kong International Arbitration Centre

28 August 2018

Ms. Wantha Davis
By email: wdavis@capitalcity.me only

Dr. Francesca Dettorie
By email: drfdettorie@derby.eq only

Dear Mesdames,

Case No.: **HKIAC/A18128**
Claimant: **Phar Lap Allevamento (Mediterraneo)**
Respondent: **Black Beauty Equestrian (Equatoriana)**
Re: **Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017**

We refer to the captioned case.

We wish to inform you that, on 27 August 2018, HKIAC confirmed your designations as co-arbitrators in this arbitration in accordance with Article 9 of the 2013 HKIAC Administered Arbitration Rules (the "**Rules**").

We now invite you to designate jointly the third and presiding arbitrator for this arbitration within 30 days in accordance with Article 8.1(c) of the Rules. Accordingly, we look forward to receiving your joint designation **by 27 September 2018**.

We draw your attention to Article 11.2 of the Rules, which provides as follows: *"[s]ubject to Article 11.3, as a general rule, where the parties to an arbitration under these Rules are of different nationalities, a sole arbitrator or the presiding arbitrator of an arbitral tribunal shall not have the same nationality as any party unless specifically agreed otherwise by all parties in writing"*. We understand that Claimant is incorporated in Mediterraneo and that Respondent is incorporated in Equatoriana.

Please also note that, as Schedule 2 of the Rules is applicable in this case, paragraphs 9.3 and 9.5 therein provide that an arbitrator's hourly rate shall not exceed US$ 830, unless expressly agreed in writing by all parties or if HKIAC so determines in exceptional circumstances.

Thank you for your attention.

Yours faithfully,

HKIAC

Hong Kong International Arbitration Centre

cc. Joseph Langweiler (By email: langweiler@lawyer.me only)
Julia Clara Fasttrack (By email: fasttrack@host.eq only)

WP/OB

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Ms. Wantha Davis
14 Churchill Downs
Capital City
Mediterraneo

By email and courier
Mr. Formula Wan
Hong Kong International Arbitration Centre
38th Floor Two Exchange Square
8 Connaught Place
Central
Hong Kong

14 September 2018

HKIAC/A18128: Phar Lap Allevamento v. Black Beauty Equestrian
Designation of Presiding Arbitrator pursuant to Article 8(1)(c) HKIAC-Rules 2013

Dear Mr. Wan,

In the above referenced arbitral proceedings, Dr. Dettorie and myself, in close cooperation with the Parties have agreed to designate the following person as Presiding Arbitrator:

Prof. Calvin de Souza
Happy Valley Road 79
1011 Vindobona
Danubia

Attached you will find his CV and Declaration of Acceptance and Statement of Availability, Impartiality and Independence. Could you please take the necessary steps for his confirmation?

Kind regards,

Wantha Davis

Attachment:
CV of Prof. Calvin de Souza (not reproduced)
Declaration of Acceptance and Statement of Availability, Impartiality and Independence (not reproduced)

香港國際仲裁中心
Hong Kong International Arbitration Centre

17 September 2018

Joseph Langweiler
By email: langweiler@lawyer.me only

Julia Clara Fasttrack
By email: fasttrack@host.eq only

Dear Sirs/Mesdames,

Case No.: **HKIAC/A18128**
Claimant: **Phar Lap Allevamento (Mediterraneo)**
Respondent: **Black Beauty Equestrian (Equatoriana)**
Re: **Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017**

We refer to the captioned case and our letter dated 28 August 2018 to the co-arbitrators.

We inform the parties that, in accordance with Article 8 of the 2013 HKIAC Administered Arbitration Rules (the "**Rules**"), on 15 September 2018, the co-arbitrators designated Prof. Calvin de Souza of Happy Valley Road 79, 1011 Vindobona, Danubia as the third and presiding arbitrator in respect of the captioned case. We hereby enclose copies of Prof. de Souza's: (i) Declaration of Acceptance and Statement of Availability, Impartiality and Independence; and (ii) curriculum vitae, for the parties' reference. Prof. de Souza agrees to be bound by the terms set out in Schedule 2 of the Rules and his proposed hourly rate is US$ 450.

Pursuant to Article 10.2 of the Rules, we kindly request that the parties confirm whether they are agreeable to Prof. de Souza's hourly rate **by 24 September 2018**. We also invite the parties to submit any other comments they may have in respect of the designation of Prof. de Souza as the third and presiding arbitrator **by the same deadline**.

Thank you for your attention.

Yours faithfully,

HKIAC

Hong Kong International Arbitration Centre

Encl. Prof. de Souza's Declaration of Acceptance and Statement of Availability, Impartiality and Independence (not reproduced)
Prof. de Souza's curriculum vitae (not reproduced)

cc. Ms. Wantha Davis (By email: wdavis@capitalcity.me only)
Dr. Francesca Dettorie (By email: drfdettorie@derby.eq only)

WP/OB

38/F Two Exchange Square 8 Connaught Place Hong Kong
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JULIA CLARA FASTTRACK
Advocate at the Court
14 Capital Boulevard
Oceanside
Equatoriana
Tel. (0) 214 77 32 Telefax (0) 214 77 33
fasttrack@host.eq

Via Email and Courier
Mr. Formula Wan
Hong Kong International Arbitration Centre
38th Floor Two Exchange Square
8 Connaught Place
Central
Hong Kong

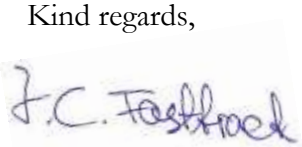
17 September 2018

Dear Mr. Wan,

Thank you very much for your email of 17 September. RESPONDENT hereby agrees to Prof. de Souza's hourly rate.

We have no further comments.

Kind regards,



Julia Clara Fasttrack

cc. Joseph Langweiler

Joseph Langweiler
Advocate at the Court
75 Court Street
Capital City
Mediterraneo
Tel (0) 146 9845; Telefax (0) 146 9850
Langweiler@lawyer.me

By email and courier
Mr. Formula Wan
Hong Kong International Arbitration Centre
38th Floor Two Exchange Square
8 Connaught Place
Central
Hong Kong

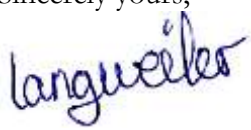
17 September 2018

Dear Mr. Wan,

It is with great pleasure that I confirm Claimant's agreement to Prof. de Souza's hourly rate.

At this stage of the proceedings, there are no further comments from our side.

Sincerely yours,



Joseph Langweiler

cc. Black Beauty Equestrian

香港國際仲裁中心
Hong Kong International Arbitration Centre

18 September 2018

Joseph Langweiler
By email: langweiler@lawyer.me only

Julia Clara Fasttrack
By email: fasttrack@host.eq only

Wantha Davis
By email: wdavis@capitalcity.me only

Francesca Dettorie
By email: drfdettorie@derby.eq only

Calvin de Souza
By email: caldesouza@happyvallye.da only

Dear Sirs/Mesdames,

Case No.: **HKIAC/A18128**
Claimant: **Phar Lap Allevamento (Mediterraneo)**
Respondent: **Black Beauty Equestrian (Equatoriana)**
Re: **Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017**

We refer to the captioned case and acknowledge receipt of the parties' respective letters to HKIAC dated 17 September 2018, on even date.

Constitution of the Arbitral Tribunal
We note that both parties are agreeable to Prof. de Souza's proposed hourly rate of US$ 450.

In accordance with Articles 9.1 and 9.2(a) of the 2013 HKIAC Administered Arbitration Rules (the "**Rules**"), HKIAC has confirmed the designation of Prof. de Souza as the third and presiding arbitrator in the captioned arbitration.

As the arbitral tribunal has now been constituted, HKIAC will transmit electronically the case file to the arbitrators by email today.

WP/OB

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香港中環交易廣場第二座38樓
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香港國際仲裁中心
Hong Kong International Arbitration Centre

Case No.: **HKIAC/A18128**
Claimant: **Phar Lap Allevamento (Mediterraneo)**
Respondent: **Black Beauty Equestrian (Equatoriana)**
Re: **Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017**

Fees and Expenses of the Arbitral Tribunal
Pursuant to Article 10.1 of the Rules, the arbitral tribunal's fees and expenses shall be determined in accordance with the terms of Schedule 2 of the Rules. Accordingly, the fees of the arbitral tribunal shall be calculated on the basis of hourly rates as follows:

Ms. Wantha Davis	US$ 380
Dr. Francesca Dettorie	US$ 380
Prof. Calvin de Souza	US$ 450

Guidelines on the payment of fees and accounting of expenses can be found in the Practice Note on Costs of Arbitration – Schedule 2 (the "**Practice Note**"), a copy of which is enclosed.

Deposits
In accordance with Article 40.1 of the Rules, we have requested each party to deposit with HKIAC an equal amount as an initial advance for the fees and costs of the arbitration. The parties have remitted a total of **US$ 25,560** and **US$ 12,780** as deposits for the fees and expenses of the arbitral tribunal and for HKIAC's Administrative Fees, respectively. We enclose an updated statement of account for the arbitral tribunal's and the parties' information.

HKIAC may direct interim payments to be paid out of such deposits to cover the arbitral tribunal's fees and expenses from time to time. Guidelines for the accounting of expenses can be found in paragraph 5 of the Practice Note.

We would like to inform the arbitral tribunal that supplementary deposits may be requested by HKIAC during the arbitration pursuant to Article 40.3 of the Rules.

Hearing Facilities
When the appropriate time comes, the parties are encouraged to consider using HKIAC's hearing facilities. They are equipped with state-of-the-art technology, can accommodate large groups, are centrally located in Hong Kong, and can be configured to suit the requirements of any hearing or meeting in this case. For more information about our facilities, please visit http://hkiac.org/our-services/facilities.

WP/OB

香港國際仲裁中心
Hong Kong International Arbitration Centre

Case No.: **HKIAC/A18128**
Claimant: **Phar Lap Allevamento (Mediterraneo)**
Respondent: **Black Beauty Equestrian (Equatoriana)**
Re: **Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017**

HKIAC's Guidelines on the Use of a Secretary to the Arbitral Tribunal
If the arbitral tribunal intends to appoint a tribunal secretary, we encourage the adoption of HKIAC's Guidelines on the Use of a Secretary to the Arbitral Tribunal (the "**Guidelines**") by the parties, which contain detailed provisions on the appointment, challenge, duties, and remuneration of tribunal secretaries. A copy of the Guidelines is enclosed.

In this respect, we note that members of the HKIAC Secretariat are available to act as tribunal secretary in this case. HKIAC's Secretariat is composed of qualified Counsel and Deputy Counsel, who are admitted to multiple jurisdictions, speak multiple languages and have experience in international commercial and investment arbitrations. To view profiles of the Secretariat's legal staff, please visit http://hkiac.org/about-us/secretariat.

To find out more about HKIAC's Tribunal Secretary's Service, please visit http://www.hkiac.org/arbitration/tribunal-secretaries/tribunal-secretary-service.

Case Number
We have assigned the reference number "HKIAC/A18128" for this arbitration. Please use this reference number in all communications throughout the arbitral proceedings. In particular, we request the parties and the arbitral tribunal to indicate the reference number in the subject line of all emails sent to HKIAC.

Thank you for your attention.

Yours faithfully,

HKIAC

Hong Kong International Arbitration Centre

Encl.: Practice Note on Costs of Arbitration – Schedule 2 (not reproduced)
HKIAC's Guidelines on the Use of a Secretary to the Arbitral Tribunal (not reproduced)

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Happy Valley Road 79
1011 Vindobona
Danubia

By email and courier
Joseph Langweiler
Advocate at the Court
75 Court Street
Capital City
Mediterraneo

Julia Clara Fasttrack
Advocate at the Court
14 Capital Boulevard
Oceanside
Equatoriana

20 September 2018

Arbitral Proceedings HKIAC/A18128

Phar Lap Allevamento v. Black Beauty Equestrian

Dear Colleagues,

First of all, I would like to thank you for the consent to my appointment.

The Arbitral Tribunal would like to discuss with you in a TelCo on 4 October 2018 the further conduct of the proceedings after having familiarized itself with the file.

Kind regards,

For the Arbitral Tribunal

Prof. Calvin de Souza
Presiding Arbitrator

cc. HKIAC

Joseph Langweiler
Advocate at the Court
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Capital City
Mediterraneo
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Langweiler@lawyer.me

Via Email
Calvin de Souza (caldesouza@happyvallye.da)
Wantha Davis (wdavis@capitalcity.me)
Francesca Dettorie (drfdettorie@derby.eq)

2 October 2018

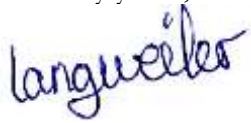
Dear Members of the Arbitral Tribunal,

The Arbitral Tribunal is without doubt well aware of the obvious inconsistencies in RESPONDENT's Answer to the Notice of Arbitration rejecting any "extraneous" evidence where it would be to its detriment but immediately thereafter relying upon such evidence where it is in its favor.

In preparation for the upcoming Case-Management-Conference on October 4, CLAIMANT would like to inform the Arbitral Tribunal that it just received reliable information at the annual breeder conference about another arbitration under the HKIAC-Rules which RESPONDENT had with one of its customers concerning the sale of a promising mare to Mediterraneo. That sale had been affected by the unforeseen tariff of 25% imposed by the president of Mediterraneo. In that arbitration, RESPONDENT who is here vigorously denying any need to adapt the contract to a change of circumstance had itself asked for an adaptation of the price invoking an unforeseeable change of circumstances. The only difference to the present case seems to be that in the other case RESPONDENT has been negatively affected by the tariffs. It is highly contradictory that in such case an additional tariff of 25% is sufficient to justify a request for adaptation while an even less predictable retaliatory tariff of 30% allegedly does not justify an adaptation when it is to RESPONDENT's detriment.

CLAIMANT has been promised a copy of the award and the relevant submission and will immediately submit them once they have been received. If need be, the other Party in that arbitration may also be joined to the proceedings as the proceedings have also been conducted under the HKIAC-Rules. That would be in line with the prevailing principles of transparency as now evidenced in the Transparency Rules of UNCITRAL.

Sincerely yours,



Joseph Langweiler

cc. HKIAC

JULIA CLARA FASTTRACK
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Via Email and Courier
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Wantha Davis (wdavis@capitalcity.me)
Francesca Dettorie (drfdettorie@derby.eq)

3 October 2018

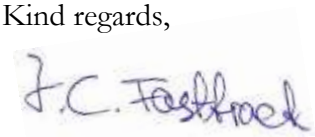
Dear Members of the Arbitral Tribunal,

RESPONDENT strongly objects to CLAIMANT's malicious, false and misleading allegation of contradictory behavior as well as to the announced submission of materials from the other arbitration. Such submission could only occur in violation of contractual and statutory confidentiality obligations. The only other arbitration in which RESPONDENT has been involved in, has been conducted also under the HKIAC 2013 Rules, which contain in Article 42 an express obligation to keep the proceedings confidential.

The existence of such an express confidentiality provision in the applicable arbitration rules should also exclude any argument that documents can be disclosed under "prevailing principles of transparency" or the UNCITRAL Rules on Transparency. They are clearly not applicable in the other arbitration nor in this arbitration.

RESPONDENT is furthermore authorized by the opponent in the other arbitral proceedings to state that the allegations by CLAIMANT do not reflect reality and are taken out of context.
A first investigation has disclosed that the only source of the information promised could either be two former employees of RESPONDENT, the contracts of which had been terminated three months ago for cause with immediate effect, or a hack of RESPONDENT's computer system which occurred three weeks ago and where the hackers managed to retrieve a considerable amount of data. In both cases the evidence would have been obtained by illegal means and should not be admitted in the arbitration. That should apply irrespective of whether or not CLAIMANT had any involvement in obtaining the document or whether they have been made available elsewhere in the worldwide web.

Kind regards,



Julia Clara Fasttrack

cc. HKIAC

PROCEDURAL ORDER NO 1
of 5 October 2018

in the Arbitral Proceedings HKIAC/A18128

Phar Lap Allevamento (Mediterraneo) v Black Beauty Equestrian (Equatoriana)

I. Following the receipt of the file from the HKIAC the Arbitral Tribunal held a telephone conference with both Parties on 4 October 2018 discussing the further conduct of the proceedings.

II. The Arbitral Tribunal takes note of the fact that in the telephone conference of 4 October 2018 both Parties agreed:

- to conduct the proceedings on the basis of the newest version of the Hong Kong Arbitration Rules, i.e. the HKIAC Rules 2018, which officially enter into force in November 2018, available at
  (
  http://hkiac.org/content/2018-hkiac-administered-arbitration-rules
- to reserve the final decision on costs for a separate cost award;
- that according to Danubian Contract Law, which contains the alleged "four corner rule" excluding all extraneous evidence for the interpretation of contacts and where arbitration agreements are interpreted narrowly, there is a high likelihood that the arbitration agreement would not be interpreted as authorizing a contract adaptation by the Arbitral Tribunal;
- that in case the Arbitral Tribunal should deny its jurisdiction to adapt the contract, it should indicate that to the parties so that RESPONDENT would reconsider whether or not to maintain its objection to the jurisdiction of the Arbitral Tribunal;
- that such a reconsideration would be based on the condition that all costs incurred for the jurisdiction phase is borne by CLAIMANT;
- that therefore both Parties should already in this phase of the proceedings submit pleadings on the merits of the claim, including the admissibility of the contested evidence.

III. In the light of these agreements and considerations the Arbitral Tribunal hereby makes the following orders:

1. In their next submissions and at the Oral Hearing in Vindobona (Hong Kong) the Parties are required to address the following issues:

   a. Does the tribunal have the jurisdiction and/or the powers under the arbitration agreement to adapt the contract, which includes in particular the question of which law governs the arbitration agreement and its interpretation;

b. Should CLAIMANT be entitled to submit evidence from the other arbitration proceedings on the basis of the assumption that this evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's Computer system;

c. Is CLAIMANT entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price
   i. under clause 12 of the contract
   ii. or under the CISG?

The Parties are free to decide in which order they address the various issues. **No further** questions going to the merits of the claims should be addressed.

2. For their submissions the following Procedural Timetable applies:

   a. CLAIMANT's Submission: no later than 6 December 2018
   b. RESPONDENT's Submission: no later than 24 January 2019

3. The submissions are to be made in accordance with the Rules of the Moot agreed upon at the telephone conference.

4. It is undisputed between the Parties that Equatoriana, Mediterraneo and Danubia are Contracting States of the CISG. The general contract law Equatoriana and Mediterraneo is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts. Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments.

   There is consistent jurisprudence in Mediterraneo that in sales contracts governed by the CISG, the later also applies to the conclusion and interpretation of the arbitration clause contained in such contracts.

5. In the event Parties need further information, Requests for Clarification must be made in accordance with para. 29 of the Moot Rules no later than 25 October 2018 via their online party (team) account. No team is allowed to submit more than ten questions.

6. For those institutions participating ONLY IN THE VIS EAST questions should be emailed to clarifications@vismoot.org. Where an institution is participating in both Hong Kong and Vienna, the Hong Kong team should submit its questions together with those of the team participating in Vienna via the latter's account on the Vis website.

Clarifications must be categorized as follows:

(1) Questions relating to the parties involved and their business.

(2) Questions relating to the negotiation, drafting and conclusion of the Arbitration Clause.
(3) Questions relating to the negotiation, drafting and conclusion of the Hardship Clause.
(4) Questions concerning the tariffs imposed by the President of Mediterraneo.
(5) Questions concerning the tariffs imposed by the Government of Equatoriana.
(6) Questions concerning the information/documents offered from the second arbitration proceedings.
(7) Questions relating to the applicable laws and rules to the case and in the countries concerned.
(8) Other questions.

IV. Both Parties are invited to attend the Oral Hearing scheduled for 13th – 18th April 2019 in Vindobona, Danubia (31st March – 7th April 2019 in Hong Kong). The details concerning the timing and the venue will be provided in due course.

Vindobona, 5 October 2018

For the Arbitral Tribunal

Prof. Calvin de Souza
Presiding Arbitrator

cc. HKIAC

PROCEDURAL ORDER NO 2
of 2 November 2018

in the Arbitral Proceedings HKIAC/A18128

Phar Lap Allevamento (Mediterraneo) v Black Beauty Equestrian (Equatoriana)

1. **Have the Parties ever conducted any business before?** No.

2. **Did the general conditions referred to in Exhibits C2 and C3 include any reference to adaptation and/or modification of contracts, and/or hardship or a prohibition to resell?** No.

3. **Why are there different fonts in the Frozen Semen Sales Agreement (Exhibit C 5)?** The present Frozen Semen Sales Agreement is based on a basic industry template from Mediterraneo. This template is used by Claimant in the other areas of equestrian sport where artificial insemination is allowed for the sale of frozen semen for the use on pre-identified mares in the current breeding session. The template leaves a number of blanks (e.g. parties/price etc.) or alternatives (e.g. clause 3 – Has/Has Not/Unknown) which have to be filled in by the parties, crossed out or underlined. All additions made by the parties are in italics or underlined.

4. **How have the Parties arrived at the final version of the Frozen Semen Sales Agreement?** The template with the first additions (e.g. seller, buyer, stallion, price) had been attached to the email of Ms. Napravnik of 24 March 2017 (Exhibit C 2). As frozen semen of Nijinsky III had never been used before, there was no information about any pregnancies based on the use of frozen semen but there had been pregnancies resulting from natural coverings, so that both alternatives were underlined. Until the accident, Mr. Antley and Ms. Napravnik had already agreed on clauses 1-5 and had made the necessary additions to the template. These clauses were subsequently not changed by Mr. Ferguson and Mr. Krone. They used the preexisting file and merely made the necessary changes and additions to clauses 6 – 15 to reflect their agreement. The original version sent by Ms. Napravnik contained as clause 15 a forum selection clause in favor of the courts in Mediterraneo, to which Respondent objected.

5. **Did the persons who finalized the contract have access to the prior emails chain?** Yes.

6. **Did Mr. Ferguson and Mr. Krone discuss the arbitration and choice of law clauses and, if so, what did they discuss?** No, they merely took the draft of the relevant parts contained in the email of 11 April 2017 (Exhibit R 2) and added the last two sentences containing the number of arbitrators and the language of arbitration as found in the email of 10 April 2017 (Exhibit R 1). They cannot remember with sufficient certainty why they did not also include the sentence concerning the law applicable to the arbitration agreement.

7. **Did Mr. Ferguson or Mr. Krone ever attempt to clarify what was in the note with either Napravnik or Antley?** No. In light of the limited importance attributed at the time of negotiation to the arbitration clause and the hardship clause and the medical conditions of the two former negotiators no efforts were made to contact them.

8. **How was the final contractual price of the semen determined?** It is the result of the negotiations involving also Claimant's request to modify the standard DDP delivery terms and including a hardship clause. Respondent was not willing to accept Claimant's original requests of 99,500 USD for the semen and an additional 1,000 USD for the change of the delivery terms. During the negotiation of the additional clauses there were no distinctions made between the additional costs for DDP delivery and the price for the goods. Instead a single price was discussed and finally an agreement was reached on the terms contained in the contract. While the removal of certain risks associated normally with a DDP delivery obligation had been used as an argument to lower the overall price, no particular figure can be attributed to it. On the basis of the contractual provisions as finally agreed, the direct additional costs associated with transportation and DDP delivery per dose are 200 USD.

9. **Where is the place of delivery according to the Claimant's general conditions?** They provide in their present version of 2016 for delivery EXW Capital City. Claimant, however, regularly offers to its customers to organize the delivery of the frozen semen with Phar Lap Transportation LLP. This previously was a division within the Claimant's own business, but it was sold to an outside investor in the course of the restructuring in 2016.

10. **Did the Parties agree on DDP, Seabiscuit Drive, Oceanside, Equatoriana as the place of delivery and INCOTERMS 2010 edition?** Yes.

11. **What is the reason behind the delivery and payment dates?** The "operational" breeding season for racehorses is from 15 February until 1 July to ensure that the foals are borne early in the year. Thoroughbreds race by age until they are three-years-old and any thoroughbred born in a particular year will turn one year old on the next 1 January. Respondent wanted to ensure that some of the semen could still be used for the breeding season 2017 and that the remainder was available for the beginning of breeding season 2018. At the time the Parties entered into negotiations there was no frozen semen from Nijinsky III as there was no market for it. At the same time the stallion was fully booked for natural coverings for the breeding season 2017. Thus, Claimant could only deliver 25 doses to be used within the breeding season 2017. Irrespective of that, Claimant wanted to split the revenues derived from the agreement equally between 2017 and 2018 to meet conditions imposed by its creditors. As from the beginning Respondent had planned to sell at least 25 doses per year to other breeders, it was willing to accommodate Claimant's wish to also deliver the second installment in 2017. For testing purposes, and an eventual reshipping to its own customers, Claimant needed the batch for 2018 before 1 February 2018.

12. **Was it common ground between the parties that Clause 12 of the Sales Agreement should be interpreted more narrowly than the ICC 2003 clause?** When restarting the negotiation Mr. Krone told Mr. Ferguson that the ICC-Hardship Clause suggested by Ms. Napravnik was considered by Respondent to be too broad for the purposes of this contract and the objectives pursued. With reference to the risks mentioned by Ms. Napravnik in her email of 31 March 2017 (Exhibit C 4) he suggested the wording which was finally added to the force majeure clause in clause 12.

13. **Where did the parties conclude the Frozen Semen Sales Agreement?** The final negotiations and the signing of the Agreement took place in Mediterraneo on 6 May 2017.

14. **Was Phar Lap's Creditors Committee consulted about the final sales agreement?** No. In the context of a different contract the Creditors Committee had declared that there was no need to seek approval for the consent to arbitration clauses, as long as the place of arbitration

was in a neutral country with a functioning judicial system. In that context, the Creditors Committee had considered Danubia to be such a country, which is one of the reasons that Ms. Napravnik in her email of 11 April 2017 suggested Danubia as the place of arbitration. Furthermore, while she was not familiar with details of the Danubian Arbitration Law she knew that it was a largely verbatim adoption of the UNCITRAL Model Law like the arbitration laws of Mediterraneo and Equatoriana.

15. **What are Claimant's previous policies on offering or refusing to offer frozen race horse semen?** Claimant had never before sold semen for racehorse breeding as there had been no previous requests. In the other areas of equine sport Claimant had regularly sold frozen semen but never more than 10 doses at a time to one breeder. In the present case, Claimant's primary concern was to increase its revenues due to its strained financial situation. With the additional revenues resulting from the sale, the racehorse section which has been operating at a loss for several years would have generated a small profit for the first time since 2014. As the number of doses was unusual, the issue was discussed internally. The general conclusion was, however, that the deal involved limited risks for Claimant as Respondent bore the risks of the use of the semen.

16. **Where there any safeguards taken to prevent the resale of doses?** To be able to control the further use of semen Ms. Napravnik had in her email of 24 March 2017 made the resale to third parties dependent on an "express written consent". Furthermore, as one assumed that at the time of contracting not all doses could be matched to named mares, Claimant added an express information requirement (in italics) to the section defining the mares in the template of the Frozen Semen Sales Agreement which had been attached to the email of 24 March 2017.

17. **Could the semen acquired during the lifting of ban be used even after imposition of the ban?** Yes, there was a clause in the order temporarily lifting the ban which allowed the use of acquired frozen semen until 1 July 2019. Furthermore, the offsprings resulting from such inseminations were guaranteed admission to all races in Equatoriana.

18. **Does the Respondent have a past history of reselling doses of frozen semen?** No.

19. **Would the price for the semen be higher for the buyers who intend to resell the goods?** There is no real market for the resale of frozen semen even in the other areas of equestrian sport where breeders rely extensively on frozen semen. In general, breeders only buy frozen semen for a specific mare. That is largely due to the fact, that stud owners have an interest in knowing for which mare the semen is used. The price which can be charged for frozen semen and natural coverings is strongly influenced by the success of offsprings. As a consequence stud owners have a preference that the semen is used on mares with a certain pedigree. The fees charged for natural coverings by Nijinsky III are around 110,000 USD with a profit margin of 15% which is above the ordinary profit margin of 10% for other stallions.

20. **Through what means did Claimant find out that the Respondent sold 15 doses at a price that is 20 percent higher than they initially bought from the Claimant?** Claimant was approached on 2 February 2018 by another breeder from Equatoriana which was enquiring about the prices of frozen semen from another stallion. During the conversation he told Claimant that he had been very happy with the Nijinski III semen which he had bought from Respondent for 120,000 USD. He knew that 15 doses had been sold to 10 different breeders, all of which had bought just one or two doses.

21. **What were the "past experiences…with unforeseeable additional health and safety requirements" resulting in "highly expensive tests" which Ms. Napravik mentioned in her email of 31 March 2017 (Exhibit C 4)?** In 2014 Claimant had sold three mares DDP Danubia to farms in Danubia for an overall price of 8 million USD. Shortly before the mares were delivered a rare aggressive type of foot and mouth disease was discovered in Danubia. While it was not affecting horses which often carried it, ultimately it killed a quarter of the cow population. As a consequence of the discovery, Danubia had immediately imposed very strict new health and safety requirements involving long quarantine time. In the case of the three mares the additional tests required and the long quarantine amounted to 40 % of the sales price. The case was widely reported in the press as it nearly resulted in the insolvency of Claimant. Claimant had heavily invested in new stables the year before and was dependent on the revenues from the sale for servicing its debts. It took Claimant some time to convince the Creditors Committee to authorize new loans which were only granted against firm commitments of restructuring with clear milestones.

22. **Was Respondent aware of Claimant´s financial difficulties?** Respondent was aware of unspecific rumors in the market that Claimant was still in financial difficulties and had been losing money over the last years. Further details were not known before the negotiations about the price adaptation.

23. **Have Mediterraneo or other countries imposed comparable tariffs before?** There have been few countries in the past which had tried to protect their farmers by tariffs on foreign agricultural products of a comparable size, but Mediterraneo was not one of them. The present tariff, which had been imposed by executive order effective from 15 November, being announced only days before, is extraordinary in several regards, i.e. the breadth of the goods and the countries covered, the amount and the speed with which it had been imposed. After his election on 25 April 2017 President Bouckaert had appointed Ms. Cecil Frankel, one of the most ardent critics of free trade, as his "superminister" for agriculture, trade and economics on 5 May 2017. She had been an outspoken protectionist for years, lamenting that the farmers of Mediterraneo were badly treated in other markets and advocation limiting the access of foreign agricultural products to the Mediterranean market.

24. **Was it the 25 % tariff imposed by President Bouckaert which led to the second arbitration mentioned by Claimant in its letter of 2 October 2018?** Yes. The tariff explicitly mentioned "living animals" as one of the goods covered.

25. **When did the government of Equatoriana announce the imposition of the tariffs and when did the tariffs actually come into effect?** The tariffs were announced on 19 December 2017 by executive order and took effect from 15 January 2018 onwards. Until 2018 there had been no tariffs imposed on agricultural goods (or horse semen) in either Equatoriana or Mediterraneo.

26. **Did the Parties read the newspaper article about the retaliatory tariffs in the Peak Business News?** Yes, they did. However it did not cross their mind that the frozen semen could be considered to be an "agricultural good" so that the tariffs would apply to it. Only when Ms Napravnik asked for customs clearance on 19 January 2018 was she told by email, which she only read in the morning of 20 January 2018, that the tariff applied to semen as well.

27. **Could the Claimant have been exempted from or obtained a reduction in the additional tariffs charged in the last shipping?** No.

28. **Does Respondent have knowledge of the impact of the 30% tariff on Claimant's financial situation?** Yes. Claimant told him during the negotiations.

29. **Is Claimant suffering bankruptcy or is it financially endangered by paying the 30% tariffs?** Claimant has been making losses since 2014 primarily due to the high interest payments for the loan taken on to finance the new stables in 2013 and the costs for the restructuring measures. The restructuring plan which Claimant had agreed with its creditors in 2014 provided that Claimant would be profitable again from 2017 onwards. The automatic prolongation of the two main credit lines depended on being profitable in 2017 and 2018 respectively. With the additional revenues from the sale of the frozen semen Claimant had planned to make a profit in 2018 of 300.000 USD after 180.000 USD in 2017. That plan would be seriously endangered if Claimant had to bear the 1.250.000 USD. Negotiations of a new credit line will most likely be very difficult as one of the major creditors is by now the house bank of Claimant's largest competitor who is interested in buying the dressage part of Claimant. Thus, the bank would probably make the sale a precondition for the entry into a new credit.

30. **Would Respondent be financially endangered if it bore the 1.250.000$?** No.

31. **How is Claimant's profit margin of 5% calculated?** Claimant has calculated the price for the frozen semen and the profit margin on the basis of the general cost-calculation in the racehorse department. Concerning the allocation of fixed costs and overheads one dose of frozen semen was treated the same as one natural covering, i.e. fixed costs of 80,000 USD were included into the calculation. In relation to the variable costs Claimant relied on its experience with frozen semen in the other areas of equestrian sport, where regularly frozen semen is sold. Claimant included variable costs of 15.000 USD per dose. On the basis of this calculation Claimant came to (fixed & variable) costs in the amount of 95,000 USD. The remaining 5,000 USD per dose are considered to be profit.

32. **Why did Ms. Napravnik contact Mr. Shoemaker instead of contacting Mr. Julian Krone or any of the Respondent's legal department personnel?** Mr. Shoemaker had been introduced to Ms. Napravnik in November 2017 as the person responsible for the racehorse breeding program including all questions concerning the Frozen Semen Sales Agreement. At the same time, she had been informed that Mr. Antley was out of hospital and in rehabilitation but would not return to work but seek early retirement by the beginning of 2018.

33. **Why did Respondent urgently need the January stock?** Respondent needed 6 doses for other customers each with deliver dates prior to 2nd February due to the start of the breeding season.

34. **Why did Mr. Shoemaker discuss the issue with his wife and not with member of the legal department?** Mr. Shoemaker has only been in charge of the racehorse breeding program since 1 November 2017 and knew about the great strategic importance attached to it by Respondent's investors. Thus, he wanted to ensure that the frozen semen would be available as agreed to be able to comply with Respondent's contractual delivery obligations towards its customers. When Mr. Shoemaker received the information about the tariff from Ms. Napravnik on Saturday morning he immediately tried to verify information through two friends at the Ministry. After they had confirmed that semen was covered he tried to reach members of the legal department. None were available: Thus, he discussed the strategy with his wife to ensure that the delivery could take place as agreed upon but he would not make any binding commitments.

35. **Who requested the meeting of 12 February 2018, for what purposes, and who was present?** The meeting took place in a hotel in Equatoriana upon Claimant's initiative who wanted to solve the issue of adaptation at the senior management level. It involved the CEO's of both parties and Ms. Napravnik and Mr. Shoemaker.

36. **Is there an express provision in the Danubian contract law that it should be applied to the arbitration agreement instead of the CISG?** No, but it is consistent jurisprudence in Danubia that due to the doctrine of separability the CISG does not apply to the arbitration agreement, as the latter is considered to be a procedural contract and not a sales agreement. Furthermore, the courts in Danubia are of the view that Art. 28(3) of the Danubian Arbitration Law (identical to Art. 28 (3) UNCITRAL Model Law) contains a general standard to be applied to the conferral of exceptional powers to the arbitral tribunal. Thus, while parties may authorize arbitral tribunals to adapt contracts, an express conferral of powers is required.

37. **Have any of the three arbitrators been involved in the Respondent's other HKIAC-arbitration?** No.

38. **Is Respondent represented in the other arbitration by the same counsel?** Yes.

39. **What was the dispute underlying the other arbitration and which were the laws applicable?** As can be deduced from the statement of facts in the "Partial Interim Award", the dispute concerned the sale of a mare by Respondent to a buyer in Mediterraneo. The contract, negotiated also by Mr. Antley, provided for delivery DDP Mediterraneo (INCOTERMS 2010), contained an ICC Hardship Clause 2003, a choice of law clause in favor of Mediterranean law and the Model HKIAC-Arbitration Clause with all additions. It provided for arbitration in front of three arbitrators under the HKIAC Arbitration Rules with a place of arbitration in Mediterraneo and declared the law of Mediterraneo to be applicable to the arbitration agreement. Following the imposition of the tariffs on agricultural products by the President of Mediterraneo, Respondent asked for a renegotiation of the price under the ICC Hardship Clause 2003 and Art. 6.2.3 of the Mediterranean Contract Law (UNIDROIT Principles) and refused delivery of the mare. In light of that refusal the buyer had challenged the powers of the arbitrator to adapt the contract under the hardship clause or Art. 6.2.3 para. 4b of the Mediterranean Contract Law. In a "Partial Interim Award" rendered in those proceedings on 29 June 2018 the arbitral tribunal had confirmed its power to adapt the contract should the tariff result in hardship for Respondent. That is in line with the consistent jurisprudence of the courts in Mediterraneo in the context of Art. 6.2.3 para 4b Mediterranean Contract Law. A standard arbitration agreement is considered to be sufficient to grant an arbitral tribunal the same powers as a court has under the provision. There is no case law in connection with the ICC hardship clause. An award on the merits has not yet been rendered but is expected for the August 2019.

40. **How did Claimant learn about the other arbitral proceedings?** At the annual breeder conference Claimant's CEO heard about that arbitration from Mr. Kieron Velazquez. He is the new CEO of one of Claimant's regular customers but until the 30 May 2018 had been working for the Mediterranean buyer in the other arbitration. He has not been involved in the arbitration as such but knew the main issues in dispute, i.e. that, due to the tariffs imposed, Respondent was only willing to deliver the mare once the price has been increased to reflect the tariff.

41. **Is Claimant in possession of the Partial Interim Award?** Not yet, but Claimant has in the meantime arranged an opportunity to acquire the "Partial Interim Award" against payment of

1000 USD from a company which provides intelligence on the horseracing industry. It had turned out that contrary to his assumption Mr. Velazquez could not organize from his former employer a copy of the Partial Interim Award or Respondent's submission in the case. He had, however, given Claimant the address of the company which had promised to sell Claimant a copy of the award. The company has a doubtful reputation as to where it gets its information from and has refused to disclose its sources in the case at hand. Thus, it is not clear whether the person who had provided the award to the company was the hacker or one of the former employees of Respondent. Both employees had been witnesses in the other arbitration before they were fired on 6 July 2018 and had been under a contractual obligation to keep all information about the other arbitral proceedings confidential.

42. **Was there any security gap in Respondent's computer system that the hackers exploited or could have exploited?** Yes. Respondent had used an outdated firewall to protect is computer system which had made it easy for the hackers to enter the system.

43. **What are the general conflict of laws rules for contracts in Danubia, Mediterraneo and Equatoriana?** They are a verbatim adoption of the Hague Principles on Choice of Law in International Commercial Contracts.

44. **What is the legal tradition of Danubia?** Danubia is a common law country.

45. **What are the provisions of Danubian Contract Law?** Danubian Contract Law for international contracts is a largely verbatim adoption of the UNIDROIT Principles on International Commercial Contracts with the two relevant exceptions. First, the interpretation rule in Art. 4.3 is replaced for written contracts by the four corners rule. In substance the four corners rule under Danubian law as applied by the Danubian courts has largely the same effects as a merger clause under Article 2.1.17 UNIDROIT Principles of International Commercial Contracts. Second, Article 6.2.3 (4)(b) is worded differently granting the power "to adapt the contract" to the court only "if authorized". There is no consistent case law as to the meaning of that addition.

46. **Are there any specific rules on evidence in particular how to deal with evidence obtained in breach of contractual obligations or by illicit means in the arbitration laws of Equatoriana, Mediterraneo, and Danubia?** No.

47. **Are Mediterraneo and Equatoriana part of the World Trade Organization?** Yes.

48. **Does Respondent object to the Tribunal's jurisdiction in general (e.g. also on contract interpretation) or only to its jurisdiction to adapt the price?** Only to the latter.

49. **The Arbitral Tribunal would like to make the following correction and clarifications to its Procedural Order 1**:
    a. The link to the 2018 HKIAC Rules in para. II, 1st bullet point should read: http://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018
    b. In para. II, 4th bullet point it should read "jurisdiction/power" instead of "jurisdiction"
    c. The reference in para. III 1 c ii to the CISG covers both alternatives of Art. 7 (2) CISG.
50. **Claimant would like to make the following corrections and clarifications to its submissions**:

a. In the Notice of arbitration para. 9 2nd sentence "RESPONDENT" should be replaced by "CLAIMANT"
b. In her witness statement (Exhibit C 8) Ms. Napravnik stated that "clauses 1 – 6" were already existing. The reference should be to "clauses 1 -5". The price and the payment modalities were part of the final discussions.
c. The reference by Ms. Napravnik in her email of 11 April 2017 (Exhibit R 2) to "Sales Agreements" is meant to be a reference to the "Frozen Semen Sales Agreement".

51. **Respondent would like to make the following corrections and clarifications to its submissions**:
    a. In his "negotiation file" Mr. Antley had the habit of referring to the other party as "Claimant". Thus, the reference in the note presented by Mr. Krone in his witness statement (Exhibit R 3) to "Claimant" is due to that habit and is not an indication of bad faith on the side of Mr. Antley.
    b. In para. 15 of the Answer to the Notice of Arbitration it should read "as the law governing the arbitration agreement" instead of "the main contract"

Vindobona, 2 November 2018

For the Arbitral Tribunal

Prof. Calvin de Souza
Presiding Arbitrator

Twenty Sixth Annual Willem C. Vis
International Commercial Arbitration Moot

ANALYSIS OF THE PROBLEM FOR USE OF THE ARBITRATORS

Vienna, Austria
October 2018 – April 2019

Oral Hearings
April 13 – 18, 2019

Organised by:
Association for the Organisation and Promotion of the
Willem C. Vis International Commercial Arbitration Moot

And

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

Oral Arguments
March 31 – April 7, 2019

Organised by:
Vis East Moot Foundation Limited

ANALYSIS OF THE PROBLEM
FOR USE OF THE ARBITRATORS

If you do not already have a copy of the Problem, it is available on the Vis Moot web site, https://vismoot.pace.edu/site/26th-vis-moot/the-problem. If you downloaded the Problem during October you will need to download the revised version issued at the beginning of November which includes Procedural Order No 2 (PO 2) and subsequent comments.

This analysis of the Problem is primarily designed for the use of arbitrators. Arbitrators who may be associated with a team in the Moot are ***strongly urged*** not to communicate any of the ideas contained in this analysis to their teams ***before*** the submission of the Memorandum for RESPONDENT.

The analysis will be sent to all teams after all Memoranda for RESPONDENT have been submitted. Many of the team coaches/professors participate as arbitrators in the Moot and therefore receive this analysis. It only seems fair that all teams should have the analysis of the Problem for the oral arguments. If the analysis contains ideas teams had not thought of before, the respective teams will still have to turn those ideas into convincing arguments to support the position they are taking. At the same time, the analysis is not intended to give away all possible arguments. For that reason, this analysis often does no more than merely flag the issue without mentioning the arguments for or against a certain position. It does not contain a full analysis of the problem.

All arbitrators should be aware that the legal analysis contained herein may not be the only way the Problem can be analyzed. It may not even be the best way that one or more of the issues can be analyzed. The number of issues that arise out of the fact situation makes it necessary for the teams to decide which of the issues they emphasize in their submissions and oral presentations. Arbitrators should keep in mind that the team's background might influence its approach to the Problem and its analysis. In addition, the decision may be influenced by the presentation a team has to respond to. Full credit should be given to those teams that present different, though fully appropriate, arguments and emphasize different issues.

In the oral hearings, in particular in the later rounds, arbitrators may inform the teams which issues they should primarily focus on in their presentation, if they want to discuss certain issues specifically. They should do so, if they want to make the in-depth discussion of a particular issue part of their evaluation.

THE FACTS

I. Parties and contractual history

CLAIMANT, Phar Lap Allevamento (Phar Lap), is a company registered and located in Capital City, Mediterraneo. It operates Mediterraneo's oldest and most renown stud farm, covering all areas of the equestrian sport. Phar Lap is particularly known for its breeding success regarding racehorses. The star among Phar Lap's stallions in the racehorse section is Nijinsky III. Nijinsky III is one of the most successful racehorses ever and has also successfully sired a number of up-and-coming racehorses. Both facts have made Nijinsky III one of the most sought-after stallions for breeding. Breeders have access to Nijinsky III and other studs throughout the breeding season from February to July for natural covering. In horseracing, most countries only allow for natural covering and prohibit artificial insemination. By contrast, in all other sections of horse sports artificial insemination is the norm and Phar Lap offers frozen semen of its champion stallions for artificial insemination. Due to Phar Lap's unique storage technique the semen is long-living and of superior quality.

The RESPONDENT, Black Beauty Equestrian (Black Beauty) is based in Oceanside, Equatoriana. It is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions. Three years ago, Black Beauty decided to establish a racehorse stable. It acquired ten mares with an excellent racehorse pedigree. Horse racing is extremely popular in Equatoriana and the growth rate of the connected business sector has in the last five years never been below four per cent per year.

On 21 March 2017 Black Beauty contacted Phar Lap, inquiring about the availability of Nijinsky III for its newly started breeding programme for racehorses (Claimant's Exhibit C 1). At that time, the Equatorianian Government had imposed serious restrictions on the transportation of all living animals due to severe problems with foot and mouth disease which already lasted for two years. As a reaction to that and driven by powerful interests in the Equatorianian racehorse breading industry, the ban on artificial insemination for racehorses had been temporarily lifted. Due to the special situation in Equatoriana, Black Beauty was particularly interested in obtaining 100 dozes of frozen semen of Nijinsky III.

Phar Lap was told at the time that Black Beauty's investors were keen to see Black Beauty's racehorse breeding programme to commence as soon as possible taking advantage of the temporary lift of the ban on artificial insemination. The explanation given for the high number of doses requested was that under the relevant Equatorianian law all doses acquired during the lifting of the ban could be used for later breeding.

Phar Lap did not question that information at the time. It was undergoing financial difficulties and saw the contract as a good opportunity to increase its revenues without any major additional risk. The risk of the usability of the semen would lie with Black Beauty. Phar Lap considered its own interest in regulating the use of the semen sufficiently protected by a

clause in the contract stating that the semen could be used for the insemination of a number of mares specifically listed "*and others after information of the seller*". Phar Lap interpreted that clause as a consent requirement for any further use of the semen. It only subsequently learned that Black Beauty's investors were one of the biggest supporters of a general lifting of the ban and probably from the beginning had the intention to sell a considerable amount of the doses, hoping to induce additional breeders to fight for a permanent lifting of the ban.

With email of 24 March 2017 Phar Lap offered Black Beauty 100 doses of Nijinsky III's frozen semen in accordance with the Standard Frozen Semen Sales Agreement and its General Conditions (Claimant's Exhibit C 2). Black Beauty had no problem with most of the terms of the offer. It objected, however, to the choice of law and the forum selection clause – both pointing to Mediteranneo – and insisted on a delivery DDP (Claimant's Exhibit C 3). Due to past experiences with extremely expensive tests due to changes in customs health requirements Phar Lap was only willing to accept a delivery DDP against a moderate price increase, the transfer of certain risks to Black Beauty and the inclusion of a hardship clause to temper some of the additional risks taken (Claimant's Exhibit C 4).

In the end, the Parties agreed not only on a modified "hardship clause", set out below, but also on an acceptable choice of law and arbitration clause. Unfortunately, the finalization of the agreement took longer than planned as the two main negotiators, Ms. Napravnik and Mr. Antley, were severely injured in an accident when driving to a restaurant after the annual colt auction in Danubia on 12 April 2017. They had to be replaced for the finalization of the contract by other employees who were not completely aware of the previous negotiations and the backgrounds of particular terms already agreed upon. The agreement (Claimant's Exhibit C 5) was finally signed on 6 May 2017 and provided for three shipments of 25, 25 and 50 doses, the last of which was to be made on 23 January 2018.

As provided for in the agreement RESPONDENT sent the first shipment of 25 doses on 20 May 2017 and the second shipment of 25 doses on 3 October 2017. On 15 November 2017, two months before the last shipment of 50 doses was due, Mediterraneo's newly elected President, Ian Bouckaert, announced 25% tariffs on agricultural products from Equatoriana. On 19 December 2017, after a very short period of unsuccessful discussions, the Equatorianian Government retaliated by imposing 30% tariffs on selected agricultural products from Mediterraneo, including animal semen, taking effect as of 15 January 2018 (Claimant's Exhibit C 6).

CLAIMANT's inhouse counsel, Ms. Napravik, when preparing the final shipment in January 2018, learned to her big surprise that the new tariffs regime for agricultural products also extended to the frozen racehorse semen. That made the third shipment 30% more expensive and would have destroyed CLAIMANT's profit margin, which – on the basis of the calculation presented in PO 2 (para. 31) – lay at 5% per dose. With email of 20 January 2018, Ms. Napravik immediately informed Mr. Shoemaker, the person responsible for the deal at RESPONDENT's side, that

shipment would only be authorized after a solution for the allocation of the tariffs had been found (Claimant's Exhibit C 7). The issue was discussed in a telephone call with Mr. Shoemaker on the following day. In the end, Ms. Napravik authorized the shipment though no final agreement on a price increase had been reached. She had the impression that Mr. Shoemaker generally accepted the need for a price increase but was unable to authorize the increase personally though he needed the semen urgently (Claimant's Exhibit C 8).

In subsequent negotiations no agreement on a price increase could be reached. Furthermore, CLAIMANT found out that RESPONDENT had actually resold at least 15 doses to other breeders at a 20% higher price without informing CLAIMANT or even asking for its consent. When confronted with that discovery in a meeting on 12 February 2018, the CEO of RESPONDENT terminated all negotiations about a price increase and refused to make any additional payments for the imposition of the new tariffs.

In summary, it is RESPONDENT's position that in light of the agreement on DDP delivery, the costs for the additional tariffs had to be borne by CLAIMANT. The newly imposed tariffs do neither meet the requirements of the narrowly worded hardship clause nor do they justify an adaptation under the CISG. CLAIMANT, by contrast, is of the view that taking into account the drafting history and the hardship clause the imposition of the additional tariffs led to a change of circumstances which give rise to a right for an increased price, either under the hardship clause or the CISG.

II. Initiation of arbitration and Statement of Relief

On 31 July 2018, CLAIMANT initiated the present arbitration proceedings, asking primarily for the payment of an additional amount of US$ 1,250,000 for parts of the additional tariffs of 30% for the third delivery of semen.

More specifically, CLAIMANT raises the following claims in the arbitration proceedings:

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

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

RESPONDENT requests the Arbitral Tribunal

a) To dismiss the claim as inadmissible for a lack of jurisdiction and powers;

b) To reject the claim for additional remuneration in the amount of US$ 1,250,000 raised by CLAIMANT;

c) To order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.

THE ISSUES

I. Overview

Following a telephone conference on 4 October 2018 in which the Parties agreed on some procedural issues, including the application of the new HKIAC-Rules 2018 to the arbitration, the Arbitral Tribunal has set forth the issues to be decided in the first part of the proceedings, and therefore at issue in the Moot, in Procedural Order No 1 (PO 1) para. III (1). It has ordered the Parties to address in their next submissions and at the Oral Hearing in Vindobona (Hong Kong) the following issues:

a) Does the tribunal have the jurisdiction and/or the powers under the arbitration agreement to adapt the contract, which includes in particular the question of which law governs the arbitration agreement and its interpretation;

b) Should CLAIMANT be entitled to submit evidence from the other arbitration proceedings on the basis of the assumption that this evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's Computer system;

c) Is CLAIMANT entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price
   i. under clause 12 of the contract
   ii. or under the CISG?

While the Parties are in principle free to select the order in which they address the various issues (PO 1 para. III (1) last sentence), it makes sense to start with the Arbitral Tribunal's general authority to adapt the contract followed by the other procedural question as to the admission of evidence. In relation to the merits, PO 1 states explicitly that beyond the two questions under c) no further questions referring to the merits of the claims should be addressed.

II. General considerations

More or less unforeseen changes of circumstances making performance of the contract more onerous for one of the parties are a common occurrence in international transactions. They give rise to a number of questions of procedural and/or substantive nature relating to the right of a party negatively affected by such changes to request an adaptation of the contract to the changed circumstances. The particularity of the present case is that the contract contains a badly drafted "hardship clause" and an arbitration clause which in describing its scope deviates from the broad and all-including wording of the HKIAC Model Clause. Both of them are part of an agreement which has been negotiated by two teams of negotiators and where the second team lacked important information as to the background and content of some of the already agreed upon clauses. That makes it difficult if not impossible to clearly discern what the Parties (or the drafters) intended with the particular clauses.

These problems and particularities are to different extents relevant for the "solution" of this case and will have to be addressed in one way or another in the written submissions or the oral pleadings. The two procedural issues are completely separate from each other. Obviously, only the first issue appears to relate directly to the question of contract adaptation, i.e. the powers of the arbitral tribunal to do so. In the past, the issue has given rise to considerable discussion, as – in adapting the contract – arbitrators go beyond their ordinary task which is to determine the existence of rights agreed upon between the parties. Instead, they may engage in a "creative" task of regulating the future relationship of the parties, i.e. a task that is normally reserved for the parties. In the present case, however, due to the particular set up and the information provided, the issue of the powers of an arbitrator to adapt a contract only provides the background against which the really relevant question has to be discussed, that of the law governing the arbitration agreement. It is an issue which had been at the heart of a number of high-profile cases during the last decade advocating often slightly different tests. By contrast, the two questions concerning the merits of the case relate to the core issues arising in the context of adaptation requests due to economic hardship created by a change of circumstance. In the end, it boils down to the question of how to allocate the risks which materialized through the imposition of the additional tariffs in light of the contractual provisions and the existing legal provisions, given the absence of an express hardship rule in the CISG.

The second procedural issue is part of the overall problem to what extent evidence obtained by illicit means can be relied upon in arbitration.

The broad topics to be discussed by the students are the following:

1. In relation to arbitration:
    a) What law applies to the arbitration agreement in light of the drafting history, the choice of Mediterranean law for the main contract and the selection of Vindobona, Danubia as the place of arbitration.
    b) Whether the Arbitral Tribunal can and should allow CLAIMANT to submit evidence which has been obtained in a questionable way, either because someone has breached confidentiality obligations or through an illegal hack of RESPONDENT's computer system

2. In relation to the CISG:
    a) Whether the badly drafted hardship addition to the force majeure clause that the "*Seller shall not be responsible … for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous"* covers the present case of increased shipping costs of 30% due to an additional tariff imposed as a retaliatory measure to a previous imposition of a tariff.

b) Whether in case the "hardship clause" does not cover the additional burden imposed through the tariff, the latter may justify an adaptation under the CISG or the otherwise applicable UNIDROIT Principles.

Unlike in previous years, the procedural and substantive problems of the present case can be completely separated from each other. Irrespective of that, the decision on the merits depends on the preliminary determination of the two procedural issues so that it makes no sense to start with the merits, even if no order was prescribed by the Arbitral Tribunal.

The following remarks are merely intended to highlight the legal issues arising from the Problem. They follow the order of the questions posed by the Tribunal. It is for the Arbitrators to evaluate whether the Parties have addressed the problems in a convincing and effective order in their written submission and to suggest an order for the oral hearings should the Parties not have agreed upon an order.

A common issue relating to questions of procedure as well as to questions of substance is that, due to changes in the negotiation teams, the final version of the relevant arbitration and hardship clauses is everything but perfect and may not reflect what was originally intended by the drafters. That raises questions as to whether the true intention was known to the other party and if not how a reasonable person with the knowledge of the parties would have understood the clauses. The file contains sufficient facts which may be used to support the various positions. The Frozen Semen Sales Agreement (Claimant's Exhibit C 5) itself is based on a basic industry template used in other areas of equestrian sports where artificial insemination is allowed. The Parties have amended that template where considered necessary and have filled the blanks by providing the required information, which explains the different fonts (PO 2 paras. 3-4).

III. The Tribunal's power to adapt the contract: Procedural Order No 1 para. III (1 a)

1. Background

CLAIMANT bases the arbitration and its request for contract adaptation on the following arbitration clause contained in para. 15 of the Frozen Semen Sales Agreement:

> *"Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.*
> *The seat of arbitration shall be Vindobona, Danubia.*
> *The number of arbitrators shall be three. The arbitration proceedings shall be conducted in English."*

The arbitration clause is the result of lengthy negotiations between the Parties as to the appropriate mode of dispute resolution. The first offer by CLAIMANT contained a forum selection clause in favor of the courts in Mediterraneo coupled with a choice of law clause in favor of the law of Mediterraneo. RESPONDENT suggested to maintain the choice of law clause but to provide for the jurisdiction of the courts in Equatoriana as it considered "*it not appropriate that your [Phar Lap's] law applies and your [Phar Lap's] courts have jurisdiction*" (Claimant's Exhibit C 3). In its reply of 31 March 2017 (Claimant's Exhibit C 4), CLAIMANT made clear that it would not submit to jurisdiction of the courts in Equatoriana but could accept arbitration in Mediterraneo. On 10 April 2017, RESPONDENT submitted a draft of an arbitration clause based on the HKIAC Model Clause, which had, however, been "*narrowed down and streamlined a little bit*" in relation to the situations covered (not mentioning "differences") (Respondent's Exhibit R 1). The clause provided as follows, containing an express choice of the law governing it as suggested in the HKIAC Model Clause (emphasis not in original document):

> "*Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.*
> *The seat of arbitration shall be Equatoriana.*
> *The law of this arbitration clause shall be the law of Equatoriana.*
> *The number of arbitrators shall be three.*
> *The arbitration proceedings shall be conducted in English.*"

On 11 April 2017, CLAIMANT replied informing RESPONDENT that according to internal guidelines for any submission of dispute resolution in the country of the counterparty special approval of the creditors' committee was required (Respondent's Exhibit R 2). To avoid the need for such an approval, CLAIMANT suggested to change the place of arbitration and amended the clause proposed by RESPONDENT stating the clause would read in its relevant part:

> "*Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration*

administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.
The seat of arbitration shall be Danubia."

This last draft had been discussed shortly at the meeting between CLAIMANT's Ms. Napravnik and RESPONDENT's Mr. Antley on the following day (12 April 2018) at the annual colt auction in Vindobona. Ms. Napravnik made clear that CLAIMANT wanted to have an adaptation mechanism in place in case the Parties could not agree on arbitration. As it was understood that the task should be performed by the arbitrators, Ms. Napravnik suggested clarifying that issue either in the arbitration clause or the hardship clause. Mr. Antley promised to come back with a proposal for the wording the next day, which did not happen due to his hospitalization following the car accident in the evening. The final version of the arbitration agreement was then agreed upon by the successors of Ms. Napravnik and Mr. Antley, Mr. John Ferguson and Mr. Julian Krone respectively. The final version of the arbitration clause is a collation of the last two drafts (Respondent's Exhibits R 1 and R 2). However, the two negotiators cannot remember with sufficient certainty why they did not include the sentences concerning the law applicable to the arbitration agreement (PO 2 para. 6). They had only access to the email exchange and a note made by Mr. Antley on 12 April following its discussion with Ms. Napravnik, which provided as follows:

"*12 April 2017*
List of issues for further negotiations following draft by Phar Lap of 11 April and short discussion with Napravnik this morning

- *Clarify in arbitration clause that neutral venue and applicable law*
- *ICC hardship clause suggested by Claimant too broad*
- *Connection of hardship clause with arbitration clause*"

Mr. Krone stated in his witness statement (Respondent's Exhibit R 3) that it "*was, however, at the time not completely clear to me what Mr. Antley meant with the points 1 and 3*". He had seen the mail providing for arbitration in Danubia and the choice of law in favor of Mediterranean law and was unaware that the reference in point 1 to the applicable law was to the law applicable to the arbitration agreement. He further stated that if he had understood the reference properly, he "*would have definitively included an express reference to the law of Danubia into the arbitration agreement*". In relation to point 3, Mr. Krone stated that he "*would have objected to transfer powers to the Arbitral Tribunal to increase the price upon its discretion*".

There is no statement from Mr. Ferguson as to his motivation in agreeing on the arbitration clause as it was finally included into the contract without any express reference to the law governing the arbitration agreement or the powers of the arbitral tribunal to adapt the contract.

2. The relevance of the law governing the arbitration agreement for the issue of contract adaptation

In general, the power to adapt a contract may arise from different sources. Conceptually, such power may either be conferred upon the tribunal by the arbitration agreement or by the applicable arbitration law or may even follow from doctrines of substantive law such as hardship, if they provide for an adaptation by the courts/arbitral tribunals as a final remedy. A proper understanding and presentation of the complex interplay of the various potential sources is one of the distinguishing factors in the present case.

In the case, the lex arbitri is the Danubian Arbitration Law which is a nearly verbatim adoption of the UNCITRAL Model Law (ML) and consequently contains no express provision on contract adaptation. The drafters of the Model Law discussed the express conferral of such power but opted against it, considering it to be one of the issues which should be left to the national legislator to add or not. In Danubia, no such power was included into the law, but the courts are of the view that the parties may grant such power to an arbitral tribunal. Such a conferral of power, however, requires an express agreement according to the Danubian jurisprudence. In this respect, the Danubian courts consider Art. 28(3) ML to contain a general principle that extraordinary powers require an express agreement (PO 2 para. 37).

Whether the arbitration agreement in combination with the hardship clause constitutes such an "express conferral" of powers depends, thus, to a considerable extent on its interpretation which in turn is governed by the law applicable to the arbitration agreement.

In the present case, the law applicable to the arbitration agreement may either be the law of Mediterraneo, as the law governing the main contract, or the law of Danubia, as the law of the place of arbitration. Both laws differ in two respects which may be crucial in the case.

Under the law of Mediterraneo, arbitration agreements are consistently interpreted to include the power to adapt a contract even if no special hardship clause is included into the contract, but a party relies on the hardship doctrine contained in Mediterranean contract law (Art. 6.2.3 UNIDROIT Principles) (PO 2 para. 40). Furthermore, their interpretation is governed by Art. 8 CISG (PO 1 para. 4), with the effect that all circumstances can be taken into account in interpreting the agreement. Therefore, the discussion between Ms. Napravnik and Mr. Antley on 12 April 2017 could – eventually – be taken into account in interpreting the wording of the arbitration agreement.

By contrast under Danubian law, arbitration agreements are interpreted narrowly and their interpretation is governed by the "four corner rule" excluding all extraneous evidence for the interpretation. Thus, the discussion on 12 April 2017 is irrelevant for the interpretation of the arbitration agreement. As a consequence of these two factors, there is a high likelihood that the arbitration agreement will be interpreted as not authorizing the arbitral tribunal to adapt the contract.

Conceptually, unless the Parties have chosen (expressly or impliedly) Mediterranean law to govern the arbitration agreement, Danubian law, as the law of the place of arbitration will most likely be applicable to the arbitration agreement. It can therefore be expected that most Claimants will try to argue that the choice of Mediterranean law for the main contract is – despite the doctrine of separability – at the same time at least an implicit choice of the same law also for the arbitration agreement. There is a number of recent cases from courts in important venues for arbitration which would support such a proposition as a general rule. The Respondents, by contrast, will either argue that the determination of the place of arbitration is at the same time at least an implicit choice of the law governing an arbitration agreement or at least an indication that the choice of the law governing the main contract should not be extended to the arbitration agreement. As there would be no choice then, the arbitration agreement would be governed by the law of the place of arbitration.

In light of the particularities of the case, some students may even try to argue for an express choice of either law. In the argumentation for either position the following factors may play a role:

- drafting history;
- deviation(s) from the HKIAC Model Clause;
- legal consequences of the choice;
- inclusion of hardship clause;
- conduct in the other HKIAC-arbitration.

While the determination of the applicable law is intended to be largely determinative for the issue, it is also possible to argue in a second step that the particularities of the case justify a deviation from the interpretation which could normally be expected under the particular law. The factors which may play a role in this context are largely the same. Additionally, the choice of Mediterranean law as the law governing the merits may become relevant. It is a verbatim adoption of the UNIDROIT Principles, including 6.2.3 (4)(b) which considers “judicial” contract adaptation to be a remedy. Thus, teams could try to argue that even if Danubian law governs the arbitration agreement, the choice of Mediterranean law for the merits constitutes an express conferral of adaptation powers to the arbitral tribunal.

IV. Admission of evidence: Procedural Order No 1 para. III (1 b)

1. Background

In its letter of 2 October 2018 CLAIMANT informed the Tribunal that it had become aware of another HKIAC-arbitration in which RESPONDENT was involved and which related to the effects of the newly imposed tariff regime upon contractual obligations. According to CLAIMANT's information, that arbitration concerned the sale of a mare by RESPONDENT to Mediterraneo. The respective sale had also been affected by the 25% tariff imposed by the President of Mediterraneo for the import of agricultural products. In the arbitration, RESPONDENT had argued that the imposition of the tariff constituted an unforeseen change of circumstance justifying a price increase. CLAIMANT had allegedly been promised a copy of the Partial Interim Award which it wanted to submit once received to support its case that the additional tariffs justified an adaptation of the contract.

On 3 October 2018, RESPONDENT objected to the admission of such evidence should it be submitted. It stated that the submission of the award would violate confidentiality obligations in the other arbitration. According to its investigations, the source of the information and the award could either be two former employees of RESPONDENT or a hack of RESPONDENT's computer system. As in both cases the award would be obtained by illegal means it should not be admitted.

CLAIMANT had learned about the other arbitration from Mr. Kieron Velazquez, a former employee of the buyer of the mare, who had since then become the CEO of one of CLAIMANT's regular customers. Mr. Velazquez had not been involved in the arbitration proceedings but knew about its existence. Contrary to its earlier assumption, Mr. Velazquez was not able to provide CLAIMANT with a copy of the award so that CLAIMANT at the time of PO 2 was still not in possession of the award. However, CLAIMANT had meantime obtained from Mr. Velazquez the address of a company which provides intelligence on the horseracing industry which had promised to organize the Partial Interim Award against payment of US$ 1000.
The company has a doubtful reputation as to where it gets its information from and has refused to disclose its sources in the case at hand. Thus, it is unclear whether the person who had provided the award to the company was the hacker or one of the former employees of RESPONDENT. Both employees had been witnesses in the other arbitration before they were fired on 6 July 2018 and had been under a contractual obligation to keep all information about the other arbitral proceedings confidential. RESPONDENT had used an outdated firewall to protect its computer system which had made it easy for the hackers to enter the system (PO 2 para. 42).

The statement of facts of the Partial Interim Award reveals that the contract was also negotiated by Mr. Antley, provided for delivery DDP Mediterraneo (INCOTERMS 2010), contained an ICC-hardship clause 2003, a choice of law clause in favor of Mediterranean law

and the HKIAC Model Clause with all additions, including the choice of Mediterranean law to govern the arbitration agreement. Following the imposition of the tariffs on agricultural products by the President of Mediterraneo, RESPONDENT asked for a renegotiation of the price under the ICC-hardship clause 2003 and Art. 6.2.3 of the Mediterranean Contract Law (UNIDROIT Principles) and refused delivery of the mare. In light of that refusal, the buyer had challenged the powers of the arbitrator to adapt the contract under the hardship clause or Art. 6.2.3 para. 4b of the Mediterranean Contract Law. In a Partial Interim Award rendered in those proceedings on 29 June 2018, the respective arbitral tribunal had confirmed its power to adapt the contract should the tariff result in hardship for RESPONDENT. That is in line with the consistent jurisprudence of the courts in Mediterraneo in the context of Art. 6.2.3 para. 4b Mediterranean Contract Law (UNIDROIT Principles). A standard arbitration agreement is considered to be sufficient to grant an arbitral tribunal the same powers as a court has under the provision. There is no case law in connection with the ICC-hardship clause. An award on the merits has not yet been rendered but is expected for August 2019.

2. Discussion

Pursuant to the applicable procedural rules the Tribunal has a wide discretion "to determine the admissibility …[of] evidence, including whether to apply strict rules of evidence" (HKIAC Rules Art. 22.1 – Art. 19 (2) ML). Neither the HKIAC-Rules nor the Model Law contain any express provision on how to deal with evidence submitted which may have been obtained by illicit means. Thus, the solution must be found in balancing the various general procedural principles which may be affected by the admission or rejection of evidence. Some teams may also discuss the issue under the heading of "privileged documents" and discuss whether any of the "generally accepted" privileges apply to the Partial Interim Award.

By refusing to admit the Partial Interim Award as evidence the Tribunal may infringe CLAIMANT's right to properly present its case. Whether that is actually the case also depends on whether one considers the findings in the Partial Interim Award to be of any relevance for CLAIMANT's case in the present arbitration. On the one hand, it shows that RESPONDENT considered already the 25% tariff to be a change of circumstance to justify an adaptation and that it considered adaptation a remedy available to the arbitrator under Mediterranean law. On the other hand, the contract contained a different and potentially broader hardship clause in form of the ICC-hardship clause which had been rejected by RESPONDENT in the case at hand.

By admitting the Partial Interim Award as evidence, the Tribunal may become an accomplice of a breach of a contractual confidentiality obligation which existed for the other arbitration pursuant to Art. 42 HKIAC-Rules 2013 which provides in its pertinent part:

> 42.1 Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to:
>
> (a) the arbitration under the arbitration agreement(s); or
>
> (b) an award made in the arbitration.

> 42.2 The provisions of Article 42.1 also apply to the arbitral tribunal, any Emergency Arbitrator appointed in accordance with Schedule 4, expert, witness, secretary of the arbitral tribunal and HKIAC.

At the same time, one may argue that the breach of the confidentiality obligation occurred in the release of the award to the company from which CLAIMANT wanted to acquire it. Once it had been acquired by the company it was in public domain. Furthermore, the company as an outsider to the other arbitration was under no confidentiality obligation pursuant to Art. 42 HKIAC-Rules 2013, so that its release of the Partial Interim Award was no a breach of any confidentiality obligation. The role of CLAIMANT in obtaining the evidence – which is described deliberately vague in the case – will play an important role in the discussion. It is clear that CLAIMANT did not itself hack RESPONDENT's computer system (which was prone to attack due to an outdated firewall (PO 2 para 43) but he may have taken a role which is broadly comparable to that of a receiver of stolen goods, by arranging "the opportunity to acquire the "Partial Interim Award" against payment of 1000 USD from a company which provides intelligence on the horseracing industry" (PO 2 para. 42), which had acquired the award either from the hacker or one of the employee's submitted to a confidentiality obligation.

Another principle which may be invoked by the teams against admitting the Partial Interim Award is that of procedural fairness (or good faith in arbitration) prohibiting the use of "tainted" evidence. To what extent such a principle exists and what its consequences are, is definitively open to discussion.

V. Adaptation under the "hardship clause": Procedural Order No 1 para. III (1 c i)

1. Background

Pursuant to Art. 8 of the Frozen Semen Sales Agreement CLAIMANT is required to ship the three installments "DDP", which the Parties understood to mean DDP to RESPONDENT's premises in Equatoriana (Claimant's Exhibit C 5; PO 2 para. 10). The determination of the place of delivery and the delimitations of obligations and risks associated with that had been one of the major points of discussion during the negotiations.

CLAIMANT's first offer of 24 March 2017 had provided for a price of US$ 99,500 per dose *"to be picked up at our premises*" (Claimant's Exhibit C 2) and was based on CLAIMANT's general conditions which provide for delivery EXW Capital City (PO 2 para. 9).

In its reply of 28 March 2017 (Claimant's Exhibit C 3) RESPONDENT asked for a change of the delivery terms stating as follows:

> "*Furthermore, given the urgency of the delivery and your much greater experience in the shipment of frozen semen including the necessary export and import documentation we would insist for this contract on a delivery on the basis of DDP. That could be changed for future contracts, in particular if natural coverage is considered."*

That request was in principle accepted by CLAIMANT in its email of 31 March 2017 (Claimant's Exhibit C 4) against a higher price to reflect the additional costs and with a certain caveat as to the risk allocation. The relevant part of the email reads as follows:

> *"After longer internal discussions we can accept for this contract a delivery DDP. Given the additional costs associated with a DDP delivery, we would need to increase the price by 1000 USD per dose.*
>
> *Furthermore, we are not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions. As we both know from past experiences unforeseeable additional health and safety requirements may make highly expensive tests necessary which can increase the cost by up to 40% and thereby destroy the commercial basis of the deal. At minimum, a hardship clause should be included into the contract to address such subsequent changes."*

The past experience referred to, was a sale of three mares to Danubia in 2014 by CLAIMANT which had been widely reported in the media as it nearly led to the insolvency of CLAIMANT (PO 2 para. 21). The sale which had been affected by very strict new health and safety requirements imposed by the Danubian government due to an aggressive type of foot and mouth disease. The additional tests and the costs for the long quarantine time consumed 40% of the sales price which CLAIMANT urgently needed at the time to finance previous investments.

The subsequent discussions on the issues first between Ms. Napravnik and Mr. Antley and then between Mr. Ferguson and Mr. Krone led to a number of modifications of the obligations normally associated with DDP-delivery under INCOTERMS 2010 and inclusion of a hardship provision into the Frozen Semen Sales Agreement. In her email of 11 April 2017 (Respondent's Exhibit R 2), Ms. Napravnik had suggested reliance on the ICC-hardship clause which Mr. Antley, according to his note, apparently considered to be "*too broad*". In the end Mr. Ferguson and Mr. Krone decided to include "*a narrow hardship reference into the force majeure clause*". Thus, Clause 12 of the Frozen Semen Sales agreement provides now:

> "Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God *neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous."*
>
> (The different fonts reflect the additions made to the standard force majeure clause.)

After CLAIMANT had performed the first two shipments as agreed, the third shipment in January 2018 was affected by the newly imposed tariff regime imposed by the Equatorianian authorities as a retaliation to the tariffs imposed by the new president of Mediterraneo on agricultural products. The new tariffs have made the shipment 30% more expensive for CLAIMANT.

With its claim in the arbitration, CLAIMANT wants to recover the major part of these additional costs either under the hardship clause or under a comparable hardship doctrine under the CISG.

2. Existence of hardship

A price increase under the "hardship clause" would require that

- The additional costs created by the 30% tariff constitute "*hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous"* and

- Contract adaptation is a remedy available under the clause which only provides that the "*Seller shall not be responsible"*.

Both questions have to be answered through an interpretation of the clause pursuant to Art. 8 CISG which provides as follows:

> (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
>
> (2) If the preceding paragraph is not applicable, 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 party would have had in the same circumstances.
>
> (3) 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 drafting history provides good arguments that both Parties either had the actual intention in the sense of Art. 8(1) CISG or a reasonable person pursuant to Art. 8(2) CISG would have understood their statements to mean that adaptation should be an available remedy despite the wording of the clause. CLAIMANT made clear from the beginning that it was not willing to bear certain risks and suggested the inclusion of the ICC-hardship clause. The later explicitly provides that the Parties should try to adapt the contract stating as follows:

> (1) A party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.
>
> (2) Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:
>
> > (a) the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that

(b) it could not reasonably have avoided or overcome the event or its consequences, the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow for the consequences of the event.

(3) Where paragraph 2 of this Clause applies, but where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this Clause is entitled to termination of the contract.

RESPONDENT had no problems with the inclusion of a hardship clause as such but merely with the width of the suggested clause, indicating that it also considered adaptation to be the primary remedy.

One could, however, also argue that the Parties finally did not include a separate hardship clause but merely added a hardship part to the existing force majeure clause.

In addition, the drafting history plays a major role in determining whether the price increase through the additional tariffs is covered by the clause or not. The wording of the hardship clause is both narrower (hardship caused by particular events) and broader (no requirement that it must be "excessively onerous") than that of the ICC-hardship clause. Both issues may play a role and may either be discussed separately or jointly.

Concerning the question whether an increase in costs of 30% constitutes "hardship" the following factor may be relevant for the discussion:

- Alleged profit margin of 5% per dose (PO 2 para. 32);
- CLAIMANT's problematic financial situation (PO 2 para. 30);
- RESPONDENT's behavior in the second arbitration – tariff of 25% used as ground to request adaptation under ICC-hardship clause (PO 2 para. 40);
- Profits made by RESPONDENT through the sale of dozes;
- Drafting history – purpose of the shift to DDP / limitations of the DDP obligations.

Concerning the origin of hardship, it is clear that the tariffs do not constitute "*additional health and safety requirements*". While CLAIMANT's past experience with such requirements triggered the inclusion of the hardship clause into the contract the parties did not limit the clause to such requirements but also included "*comparable unforeseen events making the contract more onerous*".

The determination whether the tariffs are "*comparable*" to additional health and safety requirements depends largely on whether one looks at their effect on the contract (making it more onerous) or the objectives pursued with them. Issues which may play a role in this context are

- The general purpose of hardship clauses;
- The other deviations from the DDP-delivery obligations;
- RESPONDENT's rejection of the ICC-hardship clause;

- RESPONDENT's behavior in the second arbitration.

In determining whether the tariffs were "*foreseeable*" the following facts may play a role

- The past behavior of the Mediterranean government (no tariffs of comparable breadth, PO 2 para. 23);
- The announcements of a more protectionist approach during the campaign;
- The past behavior of Equatorianian government (ardent free trade supporter / no retaliatory measures);
- WTO-obligations of both states;
- Whether "frozen racehourse semen" can easily be classified as an agricultural product;
- RESPONDENT's behavior in the second arbitration.

VI. Adaptation under the CISG: Procedural Order No 1 para. III (1 c ii)

1. Background

The only provision in the CISG which addresses directly the influence of a change of circumstance on the contractual obligations – at least for a specific case – is Art. 79. It provides in its first paragraph:

> (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

By contrast, there is no express provision for the general problem of allocating the risk of severe and unpredictable changes in circumstances which alter the contractual equilibrium fundamentally. There are different views as to the legal consequences of that silence. Some authors submit that the CISG excludes the concept of hardship. The majority of authors, including the CISG Advisory Council, reads a hardship concept into the CISG, which is also supported by some widely reported decisions from Belgium or France.

Differences exist, however, as to the correct conceptual way of doing it. Some authors want to apply Art. 79 directly interpreting the notion of "impediment" broadly, some submit that the Convention has a gap to be filled either by using Art. 79 by analogy or by relying on the hardship provision in Art. 6.2 UNIDROIT Principles. Then, these are either classified as "general principles on which [the CISG] is based" in the sense of Art. 7(2) Alt. 1 CISG or a codification of customs in the sense of Art. 9 CISG or they become relevant as part of the national law used to fill gaps under Art. 7(2) Alt. 2 CISG. (For a summary of the discussion see Atamer, Art. 79 paras. 78 et seq. in: Kröll/Mistelis/Perales Viscasillas, CISG, 2nd ed. 2018).

Art. 6.2. UNIDROIT Principles provides as follows:

6.2.1 (Contract to be observed)

Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

6.2.2 (Definition of Hardship)

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party.

6.2.3 (Effects of Hardship)

(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) If the court finds hardship it may, if reasonable,

(a) terminate the contract at a date and on terms to be fixed; or

(b) adapt the contract with a view to restoring its equilibrium.

In light of the absence of clear guidance about the requirements of hardship in the text of the CISG, it is highly likely that the teams which advocate the existence of a doctrine of hardship under the CISG will eventually discuss the concept of hardship in one way or another under the definition provided in the UNIDROIT Principles. Notwithstanding the fact, that it is important that the teams are aware of the dogmatic weaknesses of some of the approaches, the way in which Art. 6.2 UNIDROIT Principles becomes applicable is of limited importance for the outcome of the case. Thus, there may be teams which, in the interest of space and time, leave that issue open.

What has to be discussed, however, is the effect of the contractually agreed upon hardship provision in Clause 12 of the Frozen Semen Sales Agreement on the applicability of the doctrine of hardship as defined in the CISG.

2. Doctrine of hardship under the CISG

Pursuant to Art. 6 CISG the parties may "derogate from or vary the effect of any of its provisions". That raises the question to what extent Clause 12 constitutes either a derogation or a variation of the hardship doctrine found under the CISG. Reliance on the "statutory" hardship provisions only becomes necessary if an adaptation is not possible under the more specific contractual provisions, either because its requirements are not met or because adaptation is not a remedy available under the clause.

Consequently, any interpretation of Clause 12 as a comprehensive and conclusive regulation of the effects of changed circumstances on the contract would exclude any reliance on any CISG-hardship doctrine.

It is also possible to interpret Clause 12 as a mere modification of the statutory hardship doctrine for particular risks where it should be made easier for the seller to invoke hardship in return for its willingness to accept additional risks which are associated with delivery DDP Equatoriana. Last but not least, there may even be teams trying to argue that Clause 12 led to a general modification of the thresholds for the application of the hardship doctrine.

In determining whether an adaptation is possible under Art. 6.2 UNIDROIT Principles the questions which have to be discussed are:

- Did the tariff result in a fundamental alteration of the contractual equilibrium?
- Could CLAIMANT have taken them reasonably into account at the time of contracting?
- Did CLAIMANT by agreeing on delivery DDP took the risk of additional tariffs?

The facts which are relevant for that discussion are largely the same as in the discussion of "hardship" and "foreseeability" in the context of the hardship clause.

United Nations Convention on Contracts for the International Sale of Goods

UNITED NATIONS

1. United Nations Convention on Contracts for the International Sale of Goods

PREAMBLE

The States Parties to this Convention,

Bearing in mind the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

Have agreed as follows:

Part I. Sphere of application and general provisions

CHAPTER I. SPHERE OF APPLICATION

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 2

This Convention does not apply to sales:

(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

(b) by auction;

(c) on execution or otherwise by authority of law;

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels, hovercraft or aircraft;

(f) of electricity.

Article 3

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.

Article 5

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

CHAPTER II. GENERAL PROVISIONS

Article 7

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

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

Article 8

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, 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 party would have had in the same circumstances.

(3) 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.

Article 9

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 10

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

Article 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Article 12

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business

in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

Article 13

For the purposes of this Convention "writing" includes telegram and telex.

Part II. Formation of the contract

Article 14

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Article 15

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 16

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 17

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Article 18

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article 19

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Article 20

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

Article 21

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

Article 22

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article 23

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

Article 24

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee

when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

Part III. Sale of goods

CHAPTER I. GENERAL PROVISIONS

Article 25

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Article 26

A declaration of avoidance of the contract is effective only if made by notice to the other party.

Article 27

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

Article 28

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

Article 29

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

CHAPTER II. OBLIGATIONS OF THE SELLER

Article 30

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

Section I. Delivery of the goods and handing over of documents

Article 31

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place;

(c) in other cases—in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 32

(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

Article 33

The seller must deliver the goods:

(a) if a date is fixed by or determinable from the contract, on that date;

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) in any other case, within a reasonable time after the conclusion of the contract.

Article 34

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Section II. Conformity of the goods and third-party claims

Article 35

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs *(a)* to *(d)* of the preceding paragraph for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity.

Article 36

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Article 37

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Article 38

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination.

Article 39

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.

Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Article 41

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

Article 42

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

Article 43

(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

Article 44

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

Section III. Remedies for breach of contract by the seller

Article 45

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(a) exercise the rights provided in articles 46 to 52;

(b) claim damages as provided in articles 74 to 77.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

Article 46

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

Article 47

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 48

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses

advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

Article 49

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) in respect of any breach other than late delivery, within a reasonable time:

(i) after he knew or ought to have known of the breach;

(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

Article 50

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

Article 51

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Article 52

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

CHAPTER III. OBLIGATIONS OF THE BUYER

Article 53

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Section I. Payment of the price

Article 54

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

Article 55

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

Article 56

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

Article 57

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) at the seller's place of business; or

(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

Article 58

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the

contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

Article 59

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

Section II. Taking delivery

Article 60

The buyer's obligation to take delivery consists:

(a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and

(b) in taking over the goods.

Section III. Remedies for breach of contract by the buyer

Article 61

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

(a) exercise the rights provided in articles 62 to 65;

(b) claim damages as provided in articles 74 to 77.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

Article 62

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

Article 63

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 64

(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) in respect of any breach other than late performance by the buyer, within a reasonable time:

(i) after the seller knew or ought to have known of the breach; or

(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

Article 65

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

CHAPTER IV. PASSING OF RISK

Article 66

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 67

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

Article 68

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

Article 69

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

Article 70

If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

Section I. Anticipatory breach and instalment contracts

Article 71

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his creditworthiness; or

(b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

Article 72

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

Article 73

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Section II. Damages

Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 76

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 77

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

Section III. Interest

Article 78

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

Section IV. Exemptions

Article 79

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Article 80

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

Section V. Effects of avoidance

Article 81

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Article 82

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) The preceding paragraph does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or

(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

Article 83

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

Article 84

(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) if he must make restitution of the goods or part of them; or

(b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

Section VI. Preservation of the goods

Article 85

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 86

(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take

possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

Article 87

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 88

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

PART IV. FINAL PROVISIONS

Article 89

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

Article 90

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions

concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.

Article 91

(1) This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 92

(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

(2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

Article 93

(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 94

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

Article 95

Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)*(b)* of article 1 of this Convention.

Article 96

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

Article 97

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

Article 98

No reservations are permitted except those expressly authorized in this Convention.

Article 99

(1) This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

(3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(4) A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.

(5) A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(6) For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part

of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary coordination in this respect.

Article 100

(1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)*(a)* or the Contracting State referred to in subparagraph (1)*(b)* of article 1.

(2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)*(a)* or the Contracting State referred to in subparagraph (1)*(b)* of article 1.

Article 101

(1) A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Vienna, this day of eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

UNIDROIT
International Institute for the Unification of Private Law

UNIDROIT PRINCIPLES

OF INTERNATIONAL COMMERCIAL CONTRACTS

2016

UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016

PREAMBLE

(Purpose of the Principles)

These Principles set forth general rules for international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them.(*)

They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.

They may be applied when the parties have not chosen any law to govern their contract.

They may be used to interpret or supplement international uniform law instruments.

They may be used to interpret or supplement domestic law.

They may serve as a model for national and international legislators.

CHAPTER 1 — GENERAL PROVISIONS

ARTICLE 1.1

(Freedom of contract)

The parties are free to enter into a contract and to determine its content.

ARTICLE 1.2

(No form required)

Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses.

ARTICLE 1.3

(Binding character of contract)

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.

ARTICLE 1.4

(Mandatory rules)

Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.

ARTICLE 1.5

(Exclusion or modification by the parties)

The parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles.

(*) Parties wishing to provide that their agreement be governed by the Principles might use one of the *Model Clauses for the use of the UNIDROIT Principles of International Commercial Contracts* (see http://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses).

ARTICLE 1.6

(Interpretation and supplementation of the Principles)

(1) In the interpretation of these Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application.

(2) Issues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles.

ARTICLE 1.7

(Good faith and fair dealing)

(1) Each party must act in accordance with good faith and fair dealing in international trade.

(2) The parties may not exclude or limit this duty.

ARTICLE 1.8

(Inconsistent behaviour)

A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.

ARTICLE 1.9

(Usages and practices)

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.

ARTICLE 1.10

(Notice)

(1) Where notice is required it may be given by any means appropriate to the circumstances.

(2) A notice is effective when it reaches the person to whom it is given.

(3) For the purpose of paragraph (2) a notice "reaches" a person when given to that person orally or delivered at that person's place of business or mailing address.

(4) For the purpose of this Article "notice" includes a declaration, demand, request or any other communication of intention.

ARTICLE 1.11

(Definitions)

In these Principles

– "court" includes an arbitral tribunal;

– where a party has more than one place of business the relevant "place of business" is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

– "long-term contract" refers to a contract which is to be performed over a period of time and which normally involves, to a varying degree, complexity of the transaction and an ongoing relationship between the parties;

– "obligor" refers to the party who is to perform an obligation and "obligee" refers to the party who is entitled to performance of that obligation;

– "writing" means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.

ARTICLE 1.12
(Computation of time set by parties)

(1) Official holidays or non-business days occurring during a period set by parties for an act to be performed are included in calculating the period.

(2) However, if the last day of the period is an official holiday or a non-business day at the place of business of the party to perform the act, the period is extended until the first business day which follows, unless the circumstances indicate otherwise.

(3) The relevant time zone is that of the place of business of the party setting the time, unless the circumstances indicate otherwise.

CHAPTER 2 — FORMATION AND AUTHORITY OF AGENTS

SECTION 1: FORMATION

ARTICLE 2.1.1
(Manner of formation)

A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.

ARTICLE 2.1.2
(Definition of offer)

A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

ARTICLE 2.1.3
(Withdrawal of offer)

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

ARTICLE 2.1.4
(Revocation of offer)

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance.

(2) However, an offer cannot be revoked

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

ARTICLE 2.1.5
(Rejection of offer)

An offer is terminated when a rejection reaches the offeror.

ARTICLE 2.1.6
(Mode of acceptance)

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective when the indication of assent reaches the offeror.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by

performing an act without notice to the offeror, the acceptance is effective when the act is performed.

ARTICLE 2.1.7
(Time of acceptance)

An offer must be accepted within the time the offeror has fixed or, if no time is fixed, within a reasonable time having regard to the circumstances, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

ARTICLE 2.1.8
(Acceptance within a fixed period of time)

A period of acceptance fixed by the offeror begins to run from the time that the offer is dispatched. A time indicated in the offer is deemed to be the time of dispatch unless the circumstances indicate otherwise.

ARTICLE 2.1.9
(Late acceptance. Delay in transmission)

(1) A late acceptance is nevertheless effective as an acceptance if without undue delay the offeror so informs the offeree or gives notice to that effect.

(2) If a communication containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that it considers the offer as having lapsed.

ARTICLE 2.1.10
(Withdrawal of acceptance)

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

ARTICLE 2.1.11
(Modified acceptance)

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

ARTICLE 2.1.12
(Writings in confirmation)

If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional or different terms, such terms become part of the contract, unless they materially alter the contract or the recipient, without undue delay, objects to the discrepancy.

ARTICLE 2.1.13
(Conclusion of contract dependent on agreement on specific matters or in a particular form)

Where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters or in a particular form, no contract is concluded before agreement is reached on those matters or in that form.

ARTICLE 2.1.14
(Contract with terms deliberately left open)

(1) If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations or to be determined by one of the parties or by a third person does not prevent a contract from coming into existence.

(2) The existence of the contract is not affected by the fact that subsequently

(a) the parties reach no agreement on the term;

(b) the party who is to determine the term does not do so; or

(c) the third person does not determine the term,

provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties.

ARTICLE 2.1.15
(Negotiations in bad faith)

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.

(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

ARTICLE 2.1.16
(Duty of confidentiality)

Where information is given as confidential by one party in the course of negotiations, the other party is under a duty not to disclose that information or to use it improperly for its own purposes, whether or not a contract is subsequently concluded. Where appropriate, the remedy for breach of that duty may include compensation based on the benefit received by the other party.

ARTICLE 2.1.17
(Merger clauses)

A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.

ARTICLE 2.1.18
(Modification in a particular form)

A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct.

ARTICLE 2.1.19
(Contracting under standard terms)

(1) Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to Articles 2.1.20 - 2.1.22.

(2) Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.

ARTICLE 2.1.20
(Surprising terms)

(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.

(2) In determining whether a term is of such a character regard shall be had to its content, language and presentation.

ARTICLE 2.1.21
(Conflict between standard terms and non-standard terms)

In case of conflict between a standard term and a term which is not a standard term the latter prevails.

ARTICLE 2.1.22
(Battle of forms)

Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.

SECTION 2: AUTHORITY OF AGENTS

ARTICLE 2.2.1
(Scope of the Section)

(1) This Section governs the authority of a person ("the agent") to affect the legal relations of another person ("the principal") by or with respect to a contract with a third party, whether the agent acts in its own name or in that of the principal.

(2) It governs only the relations between the principal or the agent on the one hand, and the third party on the other.

(3) It does not govern an agent's authority conferred by law or the authority of an agent appointed by a public or judicial authority.

ARTICLE 2.2.2
(Establishment and scope of the authority of the agent)

(1) The principal's grant of authority to an agent may be express or implied.

(2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authority was granted.

ARTICLE 2.2.3
(Agency disclosed)

(1) Where an agent acts within the scope of its authority and the third party knew or ought to have known that the agent was acting as an agent, the acts of the agent shall directly affect the legal relations between the principal and the third party and no legal relation is created between the agent and the third party.

(2) However, the acts of the agent shall affect only the relations between the agent and the third party, where the agent with the consent of the principal undertakes to become the party to the contract.

ARTICLE 2.2.4
(Agency undisclosed)

(1) Where an agent acts within the scope of its authority and the third party neither knew nor ought to have known that the agent was acting as an agent, the acts of the agent shall affect only the relations between the agent and the third party.

(2) However, where such an agent, when contracting with the third party on behalf of a business, represents itself to be the owner of that business, the third party, upon discovery of the real owner of the business, may exercise also against the latter the rights it has against the agent.

ARTICLE 2.2.5
(Agent acting without or exceeding its authority)

(1) Where an agent acts without authority or exceeds its authority, its acts do not affect the legal relations between the principal and the third party.

(2) However, where the principal causes the third party reasonably to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.

ARTICLE 2.2.6
(Liability of agent acting without or exceeding its authority)

(1) An agent that acts without authority or exceeds its authority is, failing ratification by the principal, liable for damages that will place the third party in the same position as if the agent had acted with authority and not exceeded its authority.

(2) However, the agent is not liable if the third party knew or ought to have known that the agent had no authority or was exceeding its authority.

ARTICLE 2.2.7
(Conflict of interests)

(1) If a contract concluded by an agent involves the agent in a conflict of interests with the principal of which the third party knew or ought to have known, the principal may avoid the contract. The right to avoid is subject to Articles 3.2.9 and 3.2.11 to 3.2.15.

(2) However, the principal may not avoid the contract

(a) if the principal had consented to, or knew or ought to have known of, the agent's involvement in the conflict of interests; or

(b) if the agent had disclosed the conflict of interests to the principal and the latter had not objected within a reasonable time.

ARTICLE 2.2.8
(Sub-agency)

An agent has implied authority to appoint a sub-agent to perform acts which it is not reasonable to expect the agent to perform itself. The rules of this Section apply to the sub-agency.

ARTICLE 2.2.9
(Ratification)

(1) An act by an agent that acts without authority or exceeds its authority may be ratified by the principal. On ratification the act produces the same effects as if it had initially been carried out with authority.

(2) The third party may by notice to the principal specify a reasonable period of time for ratification. If the principal does not ratify within that period of time it can no longer do so.

(3) If, at the time of the agent's act, the third party neither knew nor ought to have known of the lack of authority, it may, at any time before ratification, by notice to the principal indicate its refusal to become bound by a ratification.

ARTICLE 2.2.10
(Termination of authority)

(1) Termination of authority is not effective in relation to the third party unless the third party knew or ought to have known of it.

(2) Notwithstanding the termination of its authority, an agent remains authorised to perform the acts that are necessary to prevent harm to the principal's interests.

CHAPTER 3 — VALIDITY

SECTION 1: GENERAL PROVISIONS

ARTICLE 3.1.1
(Matters not covered)

This Chapter does not deal with lack of capacity.

ARTICLE 3.1.2
(Validity of mere agreement)

A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement.

ARTICLE 3.1.3
(Initial impossibility)

(1) The mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract.

(2) The mere fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to which the contract relates does not affect the validity of the contract.

ARTICLE 3.1.4
(Mandatory character of the provisions)

The provisions on fraud, threat, gross disparity and illegality contained in this Chapter are mandatory.

SECTION 2: GROUNDS FOR AVOIDANCE

ARTICLE 3.2.1
(Definition of mistake)

Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded.

ARTICLE 3.2.2
(Relevant mistake)

(1) A party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and

(a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or

(b) the other party had not at the time of avoidance reasonably acted in reliance on the contract.

(2) However, a party may not avoid the contract if

(a) it was grossly negligent in committing the mistake; or

(b) the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party.

ARTICLE 3.2.3

(Error in expression or transmission)

An error occurring in the expression or transmission of a declaration is considered to be a mistake of the person from whom the declaration emanated.

ARTICLE 3.2.4

(Remedies for non-performance)

A party is not entitled to avoid the contract on the ground of mistake if the circumstances on which that party relies afford, or could have afforded, a remedy for non-performance.

ARTICLE 3.2.5

(Fraud)

A party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have disclosed.

ARTICLE 3.2.6

(Threat)

A party may avoid the contract when it has been led to conclude the contract by the other party's unjustified threat which, having regard to the circumstances, is so imminent and serious as to leave the first party no reasonable alternative. In particular, a threat is unjustified if the act or omission with which a party has been threatened is wrongful in itself, or it is wrongful to use it as a means to obtain the conclusion of the contract.

ARTICLE 3.2.7

(Gross disparity)

(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to

(a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and

(b) the nature and purpose of the contract.

(2) 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.

(3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. Article 3.2.10(2) applies accordingly.

ARTICLE 3.2.8
(Third persons)

(1) Where fraud, threat, gross disparity or a party's mistake is imputable to, or is known or ought to be known by, a third person for whose acts the other party is responsible, the contract may be avoided under the same conditions as if the behaviour or knowledge had been that of the party itself.

(2) Where fraud, threat or gross disparity is imputable to a third person for whose acts the other party is not responsible, the contract may be avoided if that party knew or ought to have known of the fraud, threat or disparity, or has not at the time of avoidance reasonably acted in reliance on the contract.

ARTICLE 3.2.9
(Confirmation)

If the party entitled to avoid the contract expressly or impliedly confirms the contract after the period of time for giving notice of avoidance has begun to run, avoidance of the contract is excluded.

ARTICLE 3.2.10
(Loss of right to avoid)

(1) If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and before that party has reasonably acted in reliance on a notice of avoidance.

(2) After such a declaration or performance the right to avoidance is lost and any earlier notice of avoidance is ineffective.

ARTICLE 3.2.11
(Notice of avoidance)

The right of a party to avoid the contract is exercised by notice to the other party.

ARTICLE 3.2.12
(Time limits)

(1) Notice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely.

(2) Where an individual term of the contract may be avoided by a party under Article 3.2.7, the period of time for giving notice of avoidance begins to run when that term is asserted by the other party.

ARTICLE 3.2.13
(Partial avoidance)

Where a ground of avoidance affects only individual terms of the contract, the effect of avoidance is limited to those terms unless, having regard to the circumstances, it is unreasonable to uphold the remaining contract.

ARTICLE 3.2.14
(Retroactive effect of avoidance)

Avoidance takes effect retroactively.

ARTICLE 3.2.15
(Restitution)

(1) On avoidance either party may claim restitution of whatever it has supplied under the contract, or the part of it avoided, provided that the party concurrently makes restitution of whatever it has received under the contract, or the part of it avoided.

(2) If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable.

(3) The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party.

(4) Compensation may be claimed for expenses reasonably required to preserve or maintain the performance received.

ARTICLE 3.2.16
(Damages)

Irrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for avoidance is liable for damages so as to put the other party in the same position in which it would have been if it had not concluded the contract.

ARTICLE 3.2.17
(Unilateral declarations)

The provisions of this Chapter apply with appropriate adaptations to any communication of intention addressed by one party to the other.

SECTION 3: ILLEGALITY

ARTICLE 3.3.1
(Contracts infringing mandatory rules)

(1) Where a contract infringes a mandatory rule, whether of national, international or supranational origin, applicable under Article 1.4 of these Principles, the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule.

(2) Where the mandatory rule does not expressly prescribe the effects of an infringement upon a contract, the parties have the right to exercise such remedies under the contract as in the circumstances are reasonable.

(3) In determining what is reasonable regard is to be had in particular to:

(a) the purpose of the rule which has been infringed;

(b) the category of persons for whose protection the rule exists;

(c) any sanction that may be imposed under the rule infringed;

(d) the seriousness of the infringement;

(e) whether one or both parties knew or ought to have known of the infringement;

(f) whether the performance of the contract necessitates the infringement; and

(g) the parties' reasonable expectations.

ARTICLE 3.3.2
(Restitution)

(1) Where there has been performance under a contract infringing a mandatory rule under Article 3.3.1, restitution may be granted where this would be reasonable in the circumstances.

(2) In determining what is reasonable, regard is to be had, with the appropriate adaptations, to the criteria referred to in Article 3.3.1(3).

(3) If restitution is granted, the rules set out in Article 3.2.15 apply with appropriate adaptations.

CHAPTER 4 — INTERPRETATION

ARTICLE 4.1
(Intention of the parties)

(1) A contract shall be interpreted according to the common intention of the parties.

(2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

ARTICLE 4.2
(Interpretation of statements and other conduct)

(1) The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.

(2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

ARTICLE 4.3
(Relevant circumstances)

In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including

(a) preliminary negotiations between the parties;
(b) practices which the parties have established between themselves;
(c) the conduct of the parties subsequent to the conclusion of the contract;
(d) the nature and purpose of the contract;
(e) the meaning commonly given to terms and expressions in the trade concerned;
(f) usages.

ARTICLE 4.4
(Reference to contract or statement as a whole)

Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear.

ARTICLE 4.5
(All terms to be given effect)

Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect.

ARTICLE 4.6
(Contra proferentem rule)

If contract terms supplied by one party are unclear, an interpretation against that party is preferred.

ARTICLE 4.7
(Linguistic discrepancies)

Where a contract is drawn up in two or more language versions which are equally authoritative there is, in case of discrepancy between the versions, a preference for the interpretation according to a version in which the contract was originally drawn up.

ARTICLE 4.8
(Supplying an omitted term)

(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied.

(2) In determining what is an appropriate term regard shall be had, among other factors, to

(a) the intention of the parties;
(b) the nature and purpose of the contract;
(c) good faith and fair dealing;
(d) reasonableness.

CHAPTER 5 — CONTENT AND THIRD PARTY RIGHTS

SECTION 1: CONTENT

ARTICLE 5.1.1
(Express and implied obligations)

The contractual obligations of the parties may be express or implied.

ARTICLE 5.1.2
(Implied obligations)

Implied obligations stem from

(a) the nature and purpose of the contract;
(b) practices established between the parties and usages;
(c) good faith and fair dealing;
(d) reasonableness.

ARTICLE 5.1.3
(Co-operation between the parties)

Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.

ARTICLE 5.1.4
(Duty to achieve a specific result.
Duty of best efforts)

(1) To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.

(2) To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.

ARTICLE 5.1.5
(Determination of kind of duty involved)

In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or a duty to achieve a specific result, regard shall be had, among other factors, to

(a) the way in which the obligation is expressed in the contract;
(b) the contractual price and other terms of the contract;
(c) the degree of risk normally involved in achieving the expected result;
(d) the ability of the other party to influence the performance of the obligation.

ARTICLE 5.1.6
(Determination of quality of performance)

Where the quality of performance is neither fixed by, nor determinable from, the contract a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances.

ARTICLE 5.1.7
(Price determination)

(1) Where a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price.

(2) Where the price is to be determined by one party and that determination is manifestly unreasonable, a reasonable price shall be substituted notwithstanding any contract term to the contrary.

(3) Where the price is to be fixed by one party or a third person, and that party or third person does not do so, the price shall be a reasonable price.

(4) Where the price is to be fixed by reference to factors which do not exist or have ceased to exist or to be accessible, the nearest equivalent factor shall be treated as a substitute.

ARTICLE 5.1.8
(Termination of a contract for an indefinite period)

A contract for an indefinite period may be terminated by either party by giving notice a reasonable time in advance. As to the effects of termination in general, and as to restitution, the provisions in Articles 7.3.5 and 7.3.7 apply.

ARTICLE 5.1.9
(Release by agreement)

(1) An obligee may release its right by agreement with the obligor.

(2) An offer to release a right gratuitously shall be deemed accepted if the obligor does not reject the offer without delay after having become aware of it.

SECTION 2: THIRD PARTY RIGHTS

ARTICLE 5.2.1
(Contracts in favour of third parties)

(1) The parties (the "promisor" and the "promisee") may confer by express or implied agreement a right on a third party (the "beneficiary").

(2) The existence and content of the beneficiary's right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement.

ARTICLE 5.2.2
(Third party identifiable)

The beneficiary must be identifiable with adequate certainty by the contract but need not be in existence at the time the contract is made.

ARTICLE 5.2.3
(Exclusion and limitation clauses)

The conferment of rights in the beneficiary includes the right to invoke a clause in the contract which excludes or limits the liability of the beneficiary.

ARTICLE 5.2.4
(Defences)

The promisor may assert against the beneficiary all defences which the promisor could assert against the promisee.

ARTICLE 5.2.5
(Revocation)

The parties may modify or revoke the rights conferred by the contract on the beneficiary until the beneficiary has accepted them or reasonably acted in reliance on them.

ARTICLE 5.2.6
(Renunciation)

The beneficiary may renounce a right conferred on it.

SECTION 3: CONDITIONS

ARTICLE 5.3.1
(Types of condition)

A contract or a contractual obligation may be made conditional upon the occurrence of a future uncertain event, so that the contract or the contractual obligation only takes effect if the event occurs (suspensive condition) or comes to an end if the event occurs (resolutive condition).

ARTICLE 5.3.2
(Effect of conditions)

Unless the parties otherwise agree:

(a) the relevant contract or contractual obligation takes effect upon fulfilment of a suspensive condition;

(b) the relevant contract or contractual obligation comes to an end upon fulfilment of a resolutive condition.

ARTICLE 5.3.3
(Interference with conditions)

(1) If fulfilment of a condition is prevented by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the non-fulfilment of the condition.

(2) If fulfilment of a condition is brought about by a party, contrary to the duty of good faith and fair dealing or the duty of co-operation, that party may not rely on the fulfilment of the condition.

ARTICLE 5.3.4
(Duty to preserve rights)

Pending fulfilment of a condition, a party may not, contrary to the duty to act in accordance with good faith and fair dealing, act so as to prejudice the other party's rights in case of fulfilment of the condition.

ARTICLE 5.3.5
(Restitution in case of fulfilment of a resolutive condition)

(1) On fulfilment of a resolutive condition, the rules on restitution set out in Articles 7.3.6 and 7.3.7 apply with appropriate adaptations.

(2) If the parties have agreed that the resolutive condition is to operate retroactively, the rules on restitution set out in Article 3.2.15 apply with appropriate adaptations.

CHAPTER 6 — PERFORMANCE

SECTION 1: PERFORMANCE IN GENERAL

ARTICLE 6.1.1
(Time of performance)

A party must perform its obligations:

(a) if a time is fixed by or determinable from the contract, at that time;

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the other party is to choose a time;

(c) in any other case, within a reasonable time after the conclusion of the contract.

ARTICLE 6.1.2
(Performance at one time or in instalments)

In cases under Article 6.1.1(b) or (c), a party must perform its obligations at one time if that performance can be rendered at one time and the circumstances do not indicate otherwise.

ARTICLE 6.1.3
(Partial performance)

(1) The obligee may reject an offer to perform in part at the time performance is due, whether or not such offer is coupled with an assurance as to the balance of the performance, unless the obligee has no legitimate interest in so doing.

(2) Additional expenses caused to the obligee by partial performance are to be borne by the obligor without prejudice to any other remedy.

ARTICLE 6.1.4
(Order of performance)

(1) To the extent that the performances of the parties can be rendered simultaneously, the parties are bound to render them simultaneously unless the circumstances indicate otherwise.

(2) To the extent that the performance of only one party requires a period of time, that party is bound to render its performance first, unless the circumstances indicate otherwise.

ARTICLE 6.1.5
(Earlier performance)

(1) The obligee may reject an earlier performance unless it has no legitimate interest in so doing.

(2) Acceptance by a party of an earlier performance does not affect the time for the performance of its own obligations if that time has been fixed irrespective of the performance of the other party's obligations.

(3) Additional expenses caused to the obligee by earlier performance are to be borne by the obligor, without prejudice to any other remedy.

ARTICLE 6.1.6
(Place of performance)

(1) If the place of performance is neither fixed by, nor determinable from, the contract, a party is to perform:

(a) a monetary obligation, at the obligee's place of business;
(b) any other obligation, at its own place of business.

(2) A party must bear any increase in the expenses incidental to performance which is caused by a change in its place of business subsequent to the conclusion of the contract.

ARTICLE 6.1.7
(Payment by cheque or other instrument)

(1) Payment may be made in any form used in the ordinary course of business at the place for payment.

(2) However, an obligee who accepts, either by virtue of paragraph (1) or voluntarily, a cheque, any other order to pay or a promise to pay, is presumed to do so only on condition that it will be honoured.

ARTICLE 6.1.8
(Payment by funds transfer)

(1) Unless the obligee has indicated a particular account, payment may be made by a transfer to any of the financial institutions in which the obligee has made it known that it has an account.

(2) In case of payment by a transfer the obligation of the obligor is discharged when the transfer to the obligee's financial institution becomes effective.

ARTICLE 6.1.9
(Currency of payment)

(1) If a monetary obligation is expressed in a currency other than that of the place for payment, it may be paid by the obligor in the currency of the place for payment unless

(a) that currency is not freely convertible; or
(b) the parties have agreed that payment should be made only in the currency in which the monetary obligation is expressed.

(2) If it is impossible for the obligor to make payment in the currency in which the monetary obligation is expressed, the obligee may require payment in the currency of the place for payment, even in the case referred to in paragraph (1)(b).

(3) Payment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due.

(4) However, if the obligor has not paid at the time when payment is due, the obligee may require payment according to the applicable rate of exchange prevailing either when payment is due or at the time of actual payment.

ARTICLE 6.1.10
(Currency not expressed)

Where a monetary obligation is not expressed in a particular currency, payment must be made in the currency of the place where payment is to be made.

ARTICLE 6.1.11
(Costs of performance)

Each party shall bear the costs of performance of its obligations.

ARTICLE 6.1.12
(Imputation of payments)

(1) An obligor owing several monetary obligations to the same obligee may specify at the time of payment the debt to which it intends the payment to be applied.

However, the payment discharges first any expenses, then interest due and finally the principal.

(2) If the obligor makes no such specification, the obligee may, within a reasonable time after payment, declare to the obligor the obligation to which it imputes the payment, provided that the obligation is due and undisputed.

(3) In the absence of imputation under paragraphs (1) or (2), payment is imputed to that obligation which satisfies one of the following criteria in the order indicated:

(a) an obligation which is due or which is the first to fall due;

(b) the obligation for which the obligee has least security;

(c) the obligation which is the most burdensome for the obligor;

(d) the obligation which has arisen first.

If none of the preceding criteria applies, payment is imputed to all the obligations proportionally.

ARTICLE 6.1.13
(Imputation of non-monetary obligations)

Article 6.1.12 applies with appropriate adaptations to the imputation of performance of non-monetary obligations.

ARTICLE 6.1.14
(Application for public permission)

Where the law of a State requires a public permission affecting the validity of the contract or its performance and neither that law nor the circumstances indicate otherwise

(a) if only one party has its place of business in that State, that party shall take the measures necessary to obtain the permission;

(b) in any other case the party whose performance requires permission shall take the necessary measures.

ARTICLE 6.1.15
(Procedure in applying for permission)

(1) The party required to take the measures necessary to obtain the permission shall do so without undue delay and shall bear any expenses incurred.

(2) That party shall whenever appropriate give the other party notice of the grant or refusal of such permission without undue delay.

ARTICLE 6.1.16
(Permission neither granted nor refused)

(1) If, notwithstanding the fact that the party responsible has taken all measures required, permission is neither granted nor refused within an agreed period or, where no period has been agreed, within a reasonable time from the conclusion of the contract, either party is entitled to terminate the contract.

(2) Where the permission affects some terms only, paragraph (1) does not apply if, having regard to the circumstances, it is reasonable to uphold the remaining contract even if the permission is refused.

ARTICLE 6.1.17
(Permission refused)

(1) The refusal of a permission affecting the validity of the contract renders the contract void. If the refusal affects the validity of some terms only, only such terms are void if, having regard to the circumstances, it is reasonable to uphold the remaining contract.

(2) Where the refusal of a permission renders the performance of the contract impossible in whole or in part, the rules on non-performance apply.

SECTION 2: HARDSHIP

ARTICLE 6.2.1
(Contract to be observed)

Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

ARTICLE 6.2.2
(Definition of hardship)

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party.

ARTICLE 6.2.3
(Effects of hardship)

(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) If the court finds hardship it may, if reasonable,

(a) terminate the contract at a date and on terms to be fixed, or

(b) adapt the contract with a view to restoring its equilibrium.

CHAPTER 7 — NON-PERFORMANCE

SECTION 1: NON-PERFORMANCE IN GENERAL

ARTICLE 7.1.1
(Non-performance defined)

Non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance.

ARTICLE 7.1.2
(Interference by the other party)

A party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event for which the first party bears the risk.

ARTICLE 7.1.3
(Withholding performance)

(1) Where the parties are to perform simultaneously, either party may withhold performance until the other party tenders its performance.

(2) Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed.

ARTICLE 7.1.4

(Cure by non-performing party)

(1) The non-performing party may, at its own expense, cure any non-performance, provided that

(a) without undue delay, it gives notice indicating the proposed manner and timing of the cure;

(b) cure is appropriate in the circumstances;

(c) the aggrieved party has no legitimate interest in refusing cure; and

(d) cure is effected promptly.

(2) The right to cure is not precluded by notice of termination.

(3) Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the non-performing party's performance are suspended until the time for cure has expired.

(4) The aggrieved party may withhold performance pending cure.

(5) Notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

ARTICLE 7.1.5

(Additional period for performance)

(1) In a case of non-performance the aggrieved party may by notice to the other party allow an additional period of time for performance.

(2) During the additional period the aggrieved party may withhold performance of its own reciprocal obligations and may claim damages but may not resort to any other remedy. If it receives notice from the other party that the latter will not perform within that period, or if upon expiry of that period due performance has not been made, the aggrieved party may resort to any of the remedies that may be available under this Chapter.

(3) Where in a case of delay in performance which is not fundamental the aggrieved party has given notice allowing an additional period of time of reasonable length, it may terminate the contract at the end of that period. If the additional period allowed is not of reasonable length it shall be extended to a reasonable length. The aggrieved party may in its notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate.

(4) Paragraph (3) does not apply where the obligation which has not been performed is only a minor part of the contractual obligation of the non-performing party.

ARTICLE 7.1.6

(Exemption clauses)

A clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract.

ARTICLE 7.1.7

(Force majeure)

(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.

(4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

SECTION 2: RIGHT TO PERFORMANCE

ARTICLE 7.2.1
(Performance of monetary obligation)

Where a party who is obliged to pay money does not do so, the other party may require payment.

ARTICLE 7.2.2
(Performance of non-monetary obligation)

Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless

(a) performance is impossible in law or in fact;

(b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;

(c) the party entitled to performance may reasonably obtain performance from another source;

(d) performance is of an exclusively personal character; or

(e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.

ARTICLE 7.2.3
(Repair and replacement of defective performance)

The right to performance includes in appropriate cases the right to require repair, replacement, or other cure of defective performance. The provisions of Articles 7.2.1 and 7.2.2 apply accordingly.

ARTICLE 7.2.4
(Judicial penalty)

(1) Where the court orders a party to perform, it may also direct that this party pay a penalty if it does not comply with the order.

(2) The penalty shall be paid to the aggrieved party unless mandatory provisions of the law of the forum provide otherwise. Payment of the penalty to the aggrieved party does not exclude any claim for damages.

ARTICLE 7.2.5
(Change of remedy)

(1) An aggrieved party who has required performance of a non-monetary obligation and who has not received performance within a period fixed or otherwise within a reasonable period of time may invoke any other remedy.

(2) Where the decision of a court for performance of a non-monetary obligation cannot be enforced, the aggrieved party may invoke any other remedy.

SECTION 3: TERMINATION

ARTICLE 7.3.1
(Right to terminate the contract)

(1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.

(2) In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether

(a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;

(b) strict compliance with the obligation which has not been performed is of essence under the contract;

(c) the non-performance is intentional or reckless;

(d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;

(e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.

(3) In the case of delay the aggrieved party may also terminate the contract if the other party fails to perform before the time allowed it under Article 7.1.5 has expired.

ARTICLE 7.3.2
(Notice of termination)

(1) The right of a party to terminate the contract is exercised by notice to the other party.

(2) If performance has been offered late or otherwise does not conform to the contract the aggrieved party will lose its right to terminate the contract unless it gives notice to the other party within a reasonable time after it has or ought to have become aware of the offer or of the non-conforming performance.

ARTICLE 7.3.3
(Anticipatory non-performance)

Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract.

ARTICLE 7.3.4
(Adequate assurance of due performance)

A party who reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance and may meanwhile withhold its own performance. Where this assurance is not provided within a reasonable time the party demanding it may terminate the contract.

ARTICLE 7.3.5
(Effects of termination in general)

(1) Termination of the contract releases both parties from their obligation to effect and to receive future performance.

(2) Termination does not preclude a claim for damages for non-performance.

(3) Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination.

ARTICLE 7.3.6
(Restitution with respect to contracts to be performed at one time)

(1) On termination of a contract to be performed at one time either party may claim restitution of whatever it has supplied under the contract, provided that such party concurrently makes restitution of whatever it has received under the contract.

(2) If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable.

(3) The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party.

(4) Compensation may be claimed for expenses reasonably required to preserve or maintain the performance received.

ARTICLE 7.3.7
(Restitution with respect to long-term contracts)

(1) On termination of a long-term contract restitution can only be claimed for the period after termination has taken effect, provided the contract is divisible.

(2) As far as restitution has to be made, the provisions of Article 7.3.6 apply.

SECTION 4: DAMAGES

ARTICLE 7.4.1
(Right to damages)

Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles.

ARTICLE 7.4.2
(Full compensation)

(1) The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.

(2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.

ARTICLE 7.4.3
(Certainty of harm)

(1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.

(2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence.

(3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.

ARTICLE 7.4.4
(Foreseeability of harm)

The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance.

ARTICLE 7.4.5

(Proof of harm in case of replacement transaction)

Where the aggrieved party has terminated the contract and has made a replacement transaction within a reasonable time and in a reasonable manner it may recover the difference between the contract price and the price of the replacement transaction as well as damages for any further harm.

ARTICLE 7.4.6

(Proof of harm by current price)

(1) Where the aggrieved party has terminated the contract and has not made a replacement transaction but there is a current price for the performance contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further harm.

(2) Current price is the price generally charged for goods delivered or services rendered in comparable circumstances at the place where the contract should have been performed or, if there is no current price at that place, the current price at such other place that appears reasonable to take as a reference.

ARTICLE 7.4.7

(Harm due in part to aggrieved party)

Where the harm is due in part to an act or omission of the aggrieved party or to another event for which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties.

ARTICLE 7.4.8

(Mitigation of harm)

(1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps.

(2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.

ARTICLE 7.4.9

(Interest for failure to pay money)

(1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused.

(2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.

(3) The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm.

ARTICLE 7.4.10

(Interest on damages)

Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues as from the time of non-performance.

ARTICLE 7.4.11
(Manner of monetary redress)

(1) Damages are to be paid in a lump sum. However, they may be payable in instalments where the nature of the harm makes this appropriate.

(2) Damages to be paid in instalments may be indexed.

ARTICLE 7.4.12
(Currency in which to assess damages)

Damages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the harm was suffered, whichever is more appropriate.

ARTICLE 7.4.13
(Agreed payment for non-performance)

(1) Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm.

(2) However, notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances.

CHAPTER 8 — SET-OFF

ARTICLE 8.1
(Conditions of set-off)

(1) Where two parties owe each other money or other performances of the same kind, either of them ("the first party") may set off its obligation against that of its obligee ("the other party") if at the time of set-off,

(a) the first party is entitled to perform its obligation;

(b) the other party's obligation is ascertained as to its existence and amount and performance is due.

(2) If the obligations of both parties arise from the same contract, the first party may also set off its obligation against an obligation of the other party which is not ascertained as to its existence or to its amount.

ARTICLE 8.2
(Foreign currency set-off)

Where the obligations are to pay money in different currencies, the right of set-off may be exercised, provided that both currencies are freely convertible and the parties have not agreed that the first party shall pay only in a specified currency.

ARTICLE 8.3
(Set-off by notice)

The right of set-off is exercised by notice to the other party.

ARTICLE 8.4
(Content of notice)

(1) The notice must specify the obligations to which it relates.

(2) If the notice does not specify the obligation against which set-off is exercised, the other party may, within a reasonable time, declare to the first party the obligation to which set-off relates. If no such declaration is made, the set-off will relate to all the obligations proportionally.

ARTICLE 8.5
(Effect of set-off)

(1) Set-off discharges the obligations.

(2) If obligations differ in amount, set-off discharges the obligations up to the amount of the lesser obligation.

(3) Set-off takes effect as from the time of notice.

CHAPTER 9 — ASSIGNMENT OF RIGHTS, TRANSFER OF OBLIGATIONS, ASSIGNMENT OF CONTRACTS

SECTION 1: ASSIGNMENT OF RIGHTS

ARTICLE 9.1.1
(Definitions)

"Assignment of a right" means the transfer by agreement from one person (the "assignor") to another person (the "assignee"), including transfer by way of security, of the assignor's right to payment of a monetary sum or other performance from a third person ("the obligor").

ARTICLE 9.1.2
(Exclusions)

This Section does not apply to transfers made under the special rules governing the transfers:

(a) of instruments such as negotiable instruments, documents of title or financial instruments, or

(b) of rights in the course of transferring a business.

ARTICLE 9.1.3
(Assignability of non-monetary rights)

A right to non-monetary performance may be assigned only if the assignment does not render the obligation significantly more burdensome.

ARTICLE 9.1.4
(Partial assignment)

(1) A right to the payment of a monetary sum may be assigned partially.

(2) A right to other performance may be assigned partially only if it is divisible, and the assignment does not render the obligation significantly more burdensome.

ARTICLE 9.1.5
(Future rights)

A future right is deemed to be transferred at the time of the agreement, provided the right, when it comes into existence, can be identified as the right to which the assignment relates.

ARTICLE 9.1.6
(Rights assigned without individual specification)

A number of rights may be assigned without individual specification, provided such rights can be identified as rights to which the assignment relates at the time of the assignment or when they come into existence.

ARTICLE 9.1.7
(Agreement between assignor and assignee sufficient)

(1) A right is assigned by mere agreement between the assignor and the assignee, without notice to the obligor.

(2) The consent of the obligor is not required unless the obligation in the circumstances is of an essentially personal character.

ARTICLE 9.1.8
(Obligor's additional costs)

The obligor has a right to be compensated by the assignor or the assignee for any additional costs caused by the assignment.

ARTICLE 9.1.9
(Non-assignment clauses)

(1) The assignment of a right to the payment of a monetary sum is effective notwithstanding an agreement between the assignor and the obligor limiting or prohibiting such an assignment. However, the assignor may be liable to the obligor for breach of contract.

(2) The assignment of a right to other performance is ineffective if it is contrary to an agreement between the assignor and the obligor limiting or prohibiting the assignment. Nevertheless, the assignment is effective if the assignee, at the time of the assignment, neither knew nor ought to have known of the agreement. The assignor may then be liable to the obligor for breach of contract.

ARTICLE 9.1.10
(Notice to the obligor)

(1) Until the obligor receives a notice of the assignment from either the assignor or the assignee, it is discharged by paying the assignor.

(2) After the obligor receives such a notice, it is discharged only by paying the assignee.

ARTICLE 9.1.11
(Successive assignments)

If the same right has been assigned by the same assignor to two or more successive assignees, the obligor is discharged by paying according to the order in which the notices were received.

ARTICLE 9.1.12
(Adequate proof of assignment)

(1) If notice of the assignment is given by the assignee, the obligor may request the assignee to provide within a reasonable time adequate proof that the assignment has been made.

(2) Until adequate proof is provided, the obligor may withhold payment.

(3) Unless adequate proof is provided, notice is not effective.

(4) Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.

ARTICLE 9.1.13
(Defences and rights of set-off)

(1) The obligor may assert against the assignee all defences that the obligor could assert against the assignor.

(2) The obligor may exercise against the assignee any right of set-off available to the obligor against the assignor up to the time notice of assignment was received.

ARTICLE 9.1.14
(Rights related to the right assigned)

The assignment of a right transfers to the assignee:

(a) all the assignor's rights to payment or other performance under the contract in respect of the right assigned, and

(b) all rights securing performance of the right assigned.

ARTICLE 9.1.15
(Undertakings of the assignor)

The assignor undertakes towards the assignee, except as otherwise disclosed to the assignee, that:

(a) the assigned right exists at the time of the assignment, unless the right is a future right;

(b) the assignor is entitled to assign the right;

(c) the right has not been previously assigned to another assignee, and it is free from any right or claim from a third party;

(d) the obligor does not have any defences;

(e) neither the obligor nor the assignor has given notice of set-off concerning the assigned right and will not give any such notice;

(f) the assignor will reimburse the assignee for any payment received from the obligor before notice of the assignment was given.

SECTION 2: TRANSFER OF OBLIGATIONS

ARTICLE 9.2.1
(Modes of transfer)

An obligation to pay money or render other performance may be transferred from one person (the "original obligor") to another person (the "new obligor") either

(a) by an agreement between the original obligor and the new obligor subject to Article 9.2.3, or

(b) by an agreement between the obligee and the new obligor, by which the new obligor assumes the obligation.

ARTICLE 9.2.2
(Exclusion)

This Section does not apply to transfers of obligations made under the special rules governing transfers of obligations in the course of transferring a business.

ARTICLE 9.2.3
(Requirement of obligee's consent to transfer)

The transfer of an obligation by an agreement between the original obligor and the new obligor requires the consent of the obligee.

ARTICLE 9.2.4
(Advance consent of obligee)

(1) The obligee may give its consent in advance.

(2) If the obligee has given its consent in advance, the transfer of the obligation becomes effective when a notice of the transfer is given to the obligee or when the obligee acknowledges it.

ARTICLE 9.2.5
(Discharge of original obligor)

(1) The obligee may discharge the original obligor.

(2) The obligee may also retain the original obligor as an obligor in case the new obligor does not perform properly.

(3) Otherwise the original obligor and the new obligor are jointly and severally liable.

ARTICLE 9.2.6
(Third party performance)

(1) Without the obligee's consent, the obligor may contract with another person that this person will perform the obligation in place of the obligor, unless the obligation in the circumstances has an essentially personal character.

(2) The obligee retains its claim against the obligor.

ARTICLE 9.2.7
(Defences and rights of set-off)

(1) The new obligor may assert against the obligee all defences which the original obligor could assert against the obligee.

(2) The new obligor may not exercise against the obligee any right of set-off available to the original obligor against the obligee.

ARTICLE 9.2.8
(Rights related to the obligation transferred)

(1) The obligee may assert against the new obligor all its rights to payment or other performance under the contract in respect of the obligation transferred.

(2) If the original obligor is discharged under Article 9.2.5(1), a security granted by any person other than the new obligor for the performance of the obligation is discharged, unless that other person agrees that it should continue to be available to the obligee.

(3) Discharge of the original obligor also extends to any security of the original obligor given to the obligee for the performance of the obligation, unless the security is over an asset which is transferred as part of a transaction between the original obligor and the new obligor.

SECTION 3: ASSIGNMENT OF CONTRACTS

ARTICLE 9.3.1
(Definitions)

"Assignment of a contract" means the transfer by agreement from one person (the "assignor") to another person (the "assignee") of the assignor's rights and obligations arising out of a contract with another person (the "other party").

ARTICLE 9.3.2
(Exclusion)

This Section does not apply to the assignment of contracts made under the special rules governing transfers of contracts in the course of transferring a business.

ARTICLE 9.3.3
(Requirement of consent of the other party)

The assignment of a contract requires the consent of the other party.

ARTICLE 9.3.4
(Advance consent of the other party)

(1) The other party may give its consent in advance.

(2) If the other party has given its consent in advance, the assignment of the contract becomes effective when a notice of the assignment is given to the other party or when the other party acknowledges it.

ARTICLE 9.3.5
(Discharge of the assignor)

(1) The other party may discharge the assignor.

(2) The other party may also retain the assignor as an obligor in case the assignee does not perform properly.

(3) Otherwise the assignor and the assignee are jointly and severally liable.

ARTICLE 9.3.6
(Defences and rights of set-off)

(1) To the extent that the assignment of a contract involves an assignment of rights, Article 9.1.13 applies accordingly.

(2) To the extent that the assignment of a contract involves a transfer of obligations, Article 9.2.7 applies accordingly.

ARTICLE 9.3.7
(Rights transferred with the contract)

(1) To the extent that the assignment of a contract involves an assignment of rights, Article 9.1.14 applies accordingly.

(2) To the extent that the assignment of a contract involves a transfer of obligations, Article 9.2.8 applies accordingly.

CHAPTER 10 — LIMITATION PERIODS

ARTICLE 10.1
(Scope of the Chapter)

(1) The exercise of rights governed by the Principles is barred by the expiration of a period of time, referred to as "limitation period", according to the rules of this Chapter.

(2) This Chapter does not govern the time within which one party is required under the Principles, as a condition for the acquisition or exercise of its right, to give notice to the other party or to perform any act other than the institution of legal proceedings.

ARTICLE 10.2
(Limitation periods)

(1) The general limitation period is three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee's right can be exercised.

(2) In any event, the maximum limitation period is ten years beginning on the day after the day the right can be exercised.

ARTICLE 10.3
(Modification of limitation periods by the parties)

(1) The parties may modify the limitation periods.

(2) However they may not

(a) shorten the general limitation period to less than one year;

(b) shorten the maximum limitation period to less than four years;

(c) extend the maximum limitation period to more than fifteen years.

ARTICLE 10.4

(New limitation period by acknowledgement)

(1) Where the obligor before the expiration of the general limitation period acknowledges the right of the obligee, a new general limitation period begins on the day after the day of the acknowledgement.

(2) The maximum limitation period does not begin to run again, but may be exceeded by the beginning of a new general limitation period under Article 10.2(1).

ARTICLE 10.5

(Suspension by judicial proceedings)

(1) The running of the limitation period is suspended

(a) when the obligee performs any act, by commencing judicial proceedings or in judicial proceedings already instituted, that is recognised by the law of the court as asserting the obligee's right against the obligor;

(b) in the case of the obligor's insolvency when the obligee has asserted its rights in the insolvency proceedings; or

(c) in the case of proceedings for dissolution of the entity which is the obligor when the obligee has asserted its rights in the dissolution proceedings.

(2) Suspension lasts until a final decision has been issued or until the proceedings have been otherwise terminated.

ARTICLE 10.6

(Suspension by arbitral proceedings)

(1) The running of the limitation period is suspended when the obligee performs any act, by commencing arbitral proceedings or in arbitral proceedings already instituted, that is recognised by the law of the arbitral tribunal as asserting the obligee's right against the obligor. In the absence of regulations for arbitral proceedings or provisions determining the exact date of the commencement of arbitral proceedings, the proceedings are deemed to commence on the date on which a request that the right in dispute should be adjudicated reaches the obligor.

(2) Suspension lasts until a binding decision has been issued or until the proceedings have been otherwise terminated.

ARTICLE 10.7

(Alternative dispute resolution)

The provisions of Articles 10.5 and 10.6 apply with appropriate modifications to other proceedings whereby the parties request a third person to assist them in their attempt to reach an amicable settlement of their dispute.

ARTICLE 10.8

(Suspension in case of force majeure, death or incapacity)

(1) Where the obligee has been prevented by an impediment that is beyond its control and that it could neither avoid nor overcome, from causing a limitation period to cease to run under the preceding Articles, the general limitation period is suspended so as not to expire before one year after the relevant impediment has ceased to exist.

(2) Where the impediment consists of the incapacity or death of the obligee or obligor, suspension ceases when a representative for the incapacitated or deceased party or its estate has been appointed or a successor has inherited the respective party's position. The additional one-year period under paragraph (1) applies accordingly.

ARTICLE 10.9

(Effects of expiration of limitation period)

(1) The expiration of the limitation period does not extinguish the right.

(2) For the expiration of the limitation period to have effect, the obligor must assert it as a defence.

(3) A right may still be relied on as a defence even though the expiration of the limitation period for that right has been asserted.

ARTICLE 10.10
(Right of set-off)

The obligee may exercise the right of set-off until the obligor has asserted the expiration of the limitation period.

ARTICLE 10.11
(Restitution)

Where there has been performance in order to discharge an obligation, there is no right of restitution merely because the limitation period has expired.

CHAPTER 11 — PLURALITY OF OBLIGORS AND OF OBLIGEES

SECTION 1: PLURALITY OF OBLIGORS

ARTICLE 11.1.1
(Definitions)

When several obligors are bound by the same obligation towards an obligee:

(a) the obligations are joint and several when each obligor is bound for the whole obligation;

(b) the obligations are separate when each obligor is bound only for its share.

ARTICLE 11.1.2
(Presumption of joint and several obligations)

When several obligors are bound by the same obligation towards an obligee, they are presumed to be jointly and severally bound, unless the circumstances indicate otherwise.

ARTICLE 11.1.3
(Obligee's rights against joint and several obligors)

When obligors are jointly and severally bound, the obligee may require performance from any one of them, until full performance has been received.

ARTICLE 11.1.4
(Availability of defences and rights of set-off)

A joint and several obligor against whom a claim is made by the obligee may assert all the defences and rights of set-off that are personal to it or that are common to all the co-obligors, but may not assert defences or rights of set-off that are personal to one or several of the other co-obligors.

ARTICLE 11.1.5
(Effect of performance or set-off)

Performance or set-off by a joint and several obligor or set-off by the obligee against one joint and several obligor discharges the other obligors in relation to the obligee to the extent of the performance or set-off.

ARTICLE 11.1.6
(Effect of release or settlement)

(1) Release of one joint and several obligor, or settlement with one joint and several obligor, discharges all the other obligors for the share of the released or settling obligor, unless the circumstances indicate otherwise.

(2) When the other obligors are discharged for the share of the released obligor, they no longer have a contributory claim against the released obligor under Article 11.1.10.

ARTICLE 11.1.7
(Effect of expiration or suspension of limitation period)

(1) Expiration of the limitation period of the obligee's rights against one joint and several obligor does not affect:

(a) the obligations to the obligee of the other joint and several obligors; or

(b) the rights of recourse between the joint and several obligors under Article 11.1.10.

(2) If the obligee initiates proceedings under Articles 10.5, 10.6 or 10.7 against one joint and several obligor, the running of the limitation period is also suspended against the other joint and several obligors.

ARTICLE 11.1.8
(Effect of judgment)

(1) A decision by a court as to the liability to the obligee of one joint and several obligor does not affect:

(a) the obligations to the obligee of the other joint and several obligors; or

(b) the rights of recourse between the joint and several obligors under Article 11.1.10.

(2) However, the other joint and several obligors may rely on such a decision, except if it was based on grounds personal to the obligor concerned. In such a case, the rights of recourse between the joint and several obligors under Article 11.1.10 are affected accordingly.

ARTICLE 11.1.9
(Apportionment among joint and several obligors)

As among themselves, joint and several obligors are bound in equal shares, unless the circumstances indicate otherwise.

ARTICLE 11.1.10
(Extent of contributory claim)

A joint and several obligor who has performed more than its share may claim the excess from any of the other obligors to the extent of each obligor's unperformed share.

ARTICLE 11.1.11
(Rights of the obligee)

(1) A joint and several obligor to whom Article 11.1.10 applies may also exercise the rights of the obligee, including all rights securing their performance, to recover the excess from all or any of the other obligors to the extent of each obligor's unperformed share.

(2) An obligee who has not received full performance retains its rights against the co-obligors to the extent of the unperformed part, with precedence over co-obligors exercising contributory claims.

ARTICLE 11.1.12
(Defences in contributory claims)

A joint and several obligor against whom a claim is made by the co-obligor who has performed the obligation:

(a) may raise any common defences and rights of set-off that were available to be asserted by the co-obligor against the obligee ;

(b) may assert defences which are personal to itself ;

(c) may not assert defences and rights of set-off which are personal to one or several of the other co-obligors.

ARTICLE 11.1.13
(Inability to recover)

If a joint and several obligor who has performed more than that obligor's share is unable, despite all reasonable efforts, to recover contribution from another joint and several obligor, the share of the others, including the one who has performed, is increased proportionally.

SECTION 2: PLURALITY OF OBLIGEES

ARTICLE 11.2.1
(Definitions)

When several obligees can claim performance of the same obligation from an obligor:

(a) the claims are separate when each obligee can only claim its share;

(b) the claims are joint and several when each obligee can claim the whole performance;

(c) the claims are joint when all obligees have to claim performance together.

ARTICLE 11.2.2
(Effects of joint and several claims)

Full performance of an obligation in favour of one of the joint and several obligees discharges the obligor towards the other obligees.

ARTICLE 11.2.3
(Availability of defences against joint and several obligees)

(1) The obligor may assert against any of the joint and several obligees all the defences and rights of set-off that are personal to its relationship to that obligee or that it can assert against all the co-obligees, but may not assert defences and rights of set-off that are personal to its relationship to one or several of the other co-obligees.

(2) The provisions of Articles 11.1.5, 11.1.6, 11.1.7 and 11.1.8 apply, with appropriate adaptations, to joint and several claims.

ARTICLE 11.2.4
(Allocation between joint and several obligees)

(1) As among themselves, joint and several obligees are entitled to equal shares, unless the circumstances indicate otherwise.

(2) An obligee who has received more than its share must transfer the excess to the other obligees to the extent of their respective shares.

2018

Administered Arbitration Rules

HKIAC 香港國際仲裁中心
Hong Kong International Arbitration Centre

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SECTION I. GENERAL RULES

Article 1 – Scope of Application

1.1 These Rules shall govern arbitrations where an arbitration agreement (whether entered into before or after a dispute has arisen) either: (a) provides for these Rules to apply; or (b) subject to Articles 1.3 and 1.4 below, provides for arbitration "administered by HKIAC" or words to similar effect.

1.2 By agreeing to arbitration in accordance with Article 1.1, the parties accept that the arbitration shall be administered by HKIAC.

1.3 Nothing in these Rules shall prevent parties to a dispute or arbitration agreement from naming HKIAC as appointing authority, or from requesting certain administrative services from HKIAC, without subjecting the arbitration to the provisions contained in these Rules. For the avoidance of doubt, these Rules shall not govern arbitrations where an arbitration agreement provides for arbitration under other rules, including other rules adopted by HKIAC from time to time.

1.4 Subject to Article 1.5, these Rules shall come into force on 1 November 2018 and, unless the parties have agreed otherwise, shall apply to all arbitrations falling within Article 1.1 in which the Notice of Arbitration is submitted on or after that date.

1.5 Unless otherwise agreed by the parties: (a) Article 43 and paragraphs 1(a) and 21 of Schedule 4 shall not apply if the arbitration agreement was concluded before the date on which these Rules came into force; and (b) Articles 23.1, 28, 29 and Schedule 4 shall not apply if the arbitration agreement was concluded before 1 November 2013.

Article 2 – Interpretation of Rules

2.1 HKIAC shall have the power to interpret all provisions of these Rules. The arbitral tribunal shall interpret the Rules insofar as they relate to its powers and duties hereunder. In the event of any inconsistency between such interpretation and any interpretation by HKIAC, the arbitral tribunal's interpretation shall prevail.

2.2 HKIAC has no obligation to give reasons for any decision it makes in respect of any arbitration commenced under these Rules. Unless otherwise determined by HKIAC, all decisions made by HKIAC under these Rules are final and, to the extent permitted by any applicable law, not subject to appeal.

2.3 Where the parties have designated an HKIAC body or person to perform a function that is delegated to HKIAC under the Rules, that function shall be performed by HKIAC.

2.4 References to "HKIAC" are to the Council of HKIAC or any other body or person designated by it to perform the functions referred to herein, or, where applicable, to the Secretary-General of HKIAC and other staff members of the Secretariat of HKIAC.

2.5 References to "Claimant" include one or more claimants.

2.6 References to "Respondent" include one or more respondents.

2.7 References to "additional party" include one or more additional parties and references to "party" or "parties" include Claimant, Respondent and/or an additional party.

2.8 References to the "arbitral tribunal" include one or more arbitrators. Except in Schedule 2, such references do not include an emergency arbitrator.

2.9 References to "witness" include one or more witnesses and references to "expert" include one or more experts.

2.10 References to "claim" or "counterclaim" include any claim or claims by any party against any other party. References to "defence" include any defence or defences by any party to any claim or counterclaim submitted by any other party, including any defence for the purpose of a set-off or cross-claim.

2.11 References to “arbitration agreement” include one or more arbitration agreements.

2.12 References to “language” include one or more languages.

2.13 References to "award" include, inter alia, an interim, interlocutory, partial or final award, save for any award made by an emergency arbitrator.

2.14 References to the "seat" of arbitration mean the place of arbitration as defined in Article 20.1 of the UNCITRAL Model Law on International Commercial Arbitration.

2.15 References to “written communications” include all notifications, proposals, pleadings, statements, documents, orders and awards that are produced, submitted or exchanged in the arbitration.

2.16 References to “communication” mean delivery, transmission or notification of a written communication by hand, registered post, courier service, facsimile, email or other means of telecommunication that provides a record of transmission.

2.17 These Rules include all Schedules attached thereto, as amended from time to time by HKIAC, in force on the date the Notice of Arbitration is submitted.

2.18 HKIAC may from time to time issue practice notes and guidelines to supplement, regulate and implement these Rules for the purpose of facilitating the administration of arbitrations governed by these Rules.

2.19 English is the original language of these Rules. In the event of any discrepancy or inconsistency between the English version and the version in any other language, the English version shall prevail.

Article 3 – Written Communications and Calculation of Time Limits

3.1 Any written communication pursuant to these Rules shall be deemed to be received by a party, arbitrator, emergency arbitrator or HKIAC if:

(a) communicated to the address, facsimile number and/or email address communicated by the addressee or its representative in the arbitration; or

(b) in the absence of (a), communicated to the address, facsimile number and/or email address specified in any applicable agreement between the parties; or

(c) in the absence of (a) and (b), communicated to any address, facsimile number and/or email address which the addressee holds out to the world at the time of such communication; or

(d) in the absence of (a), (b) and (c), communicated to any last known address, facsimile number and/or email address of the addressee; or

(e) uploaded to any secured online repository that the parties have agreed to use.

3.2 If, after reasonable efforts, communication cannot be effected in accordance with Article 3.1, a written communication is deemed to have been received if it is sent to the addressee's last-known address or facsimile number by means that provides a record of attempted communication.

3.3 Any written communication shall be deemed received on the earliest day when it is communicated pursuant to paragraph 3.1(a) to (d), uploaded pursuant to paragraph 3.1(e), or attempted to be communicated pursuant to Article 3.2. For this purpose, the date shall be determined according to the local time at the place of receiving such written communication or a notice of the upload pursuant to paragraph 3.1(e).

3.4 Where a written communication is being communicated to more than one party, or more than one arbitrator, such written communication shall be deemed received when it is communicated pursuant to Article 3.1(a) to (d), or attempted to be communicated pursuant to Article 3.2, to the last intended recipient, or when a notice that such written communication has been uploaded pursuant to Article 3.1(e) is communicated to the last intended recipient.

3.5 Time limits under these Rules shall begin to run on the day following the day when any written communication is received or deemed received. If the last day of the time limit is an official holiday or a non-business day at the place of receipt, the time limit shall be extended until the first business day which follows. Official holidays or non-business days occurring during the running of the time limit shall be included in calculating the time limit.

3.6 If the circumstances of the case so justify, HKIAC may amend the time limits provided for in these Rules, as well as any time limits that it has set, whether any such time limits have expired. HKIAC shall not amend any time limits agreed by the parties or set by the arbitral tribunal or emergency arbitrator unless the parties agree or the arbitral tribunal or emergency arbitrator directs otherwise.

SECTION II. COMMENCEMENT OF THE ARBITRATION

Article 4 – Notice of Arbitration

4.1 The party initiating arbitration (the "Claimant") shall communicate a Notice of Arbitration to HKIAC and the other party (the "Respondent").

4.2 An arbitration shall be deemed to commence on the date on which a copy of the Notice of Arbitration is received by HKIAC. For the avoidance of doubt, this date shall be determined in accordance with the provisions of Articles 3.1 to 3.5.

4.3 The Notice of Arbitration shall include the following:

(a) a request that the dispute be referred to arbitration;

(b) the names and (in so far as known) the addresses, telephone and facsimile numbers, and/or email addresses of the parties and of their representatives;

(c) a copy of the arbitration agreement(s) invoked;

(d) a copy of the contract(s) or other legal instrument(s) out of or in relation to which the dispute arises, or reference thereto;

(e) a description of the general nature of the claim and an indication of the amount involved, if any;

(f) the relief or remedy sought;

(g) a proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon;

(h) the Claimant's proposal and any comments regarding the designation of a sole arbitrator under Article 7, or the Claimant's designation of an arbitrator under Article 8;

(i) the existence of any funding agreement and the identity of any third party funder pursuant to Article 44; and

(j) confirmation that copies of the Notice of Arbitration and any supporting materials included with it have been or are being communicated simultaneously to the Respondent by one or more means of service to be identified in such confirmation.

4.4 The Notice of Arbitration shall be accompanied by payment to HKIAC of the Registration Fee as required by Schedule 1.

4.5 The Notice of Arbitration may include the Statement of Claim.

4.6 If the Notice of Arbitration does not comply with these Rules or if the Registration Fee is not paid, HKIAC may request the Claimant to remedy the defect within an appropriate time limit. If the Claimant complies with such directions within the applicable time limit, the arbitration shall be deemed to have commenced under Article 4.2 on the date the initial version was received by HKIAC. If the Claimant fails to comply, the arbitration shall be deemed not to have commenced under Article 4.2 without prejudice to the Claimant's right to submit the same claim at a later date in a subsequent Notice of Arbitration.

4.7 Where an amendment is made to the Notice of Arbitration prior to the constitution of the arbitral tribunal, HKIAC has discretion to determine whether and to what extent such amendment affects other time limits under the Rules.

4.8 The Claimant shall notify, and lodge documentary verification with, HKIAC of the date the Respondent receives the Notice of Arbitration and any supporting materials included with it.

Article 5 – Answer to the Notice of Arbitration

5.1 Within 30 days from receipt of the Notice of Arbitration, the Respondent shall communicate an Answer to the Notice of Arbitration to HKIAC and the Claimant. The Answer to the Notice of Arbitration shall include the following:

(a) the name, address, telephone and facsimile numbers, and/or email address of the Respondent and of its representatives (if different from the description contained in the Notice of Arbitration);

(b) any plea that an arbitral tribunal constituted under these Rules lacks jurisdiction;

(c) the Respondent's comments on the particulars set forth in the Notice of Arbitration, pursuant to Article 4.3(e);

(d) the Respondent's answer to the relief or remedy sought in the Notice of Arbitration, pursuant to Article 4.3(f);

(e) the Respondent's proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon;

(f) the Respondent's proposal and any comments regarding the designation of a sole arbitrator under Article 7 or the Respondent's designation of an arbitrator under Article 8;

(g) the existence of any funding agreement and the identity of any third party funder pursuant to Article 44; and

(h) confirmation that copies of the Answer to the Notice of Arbitration and any supporting materials included with it have been or are being communicated simultaneously to all other parties to the arbitration by one or more means of service to be identified in such confirmation.

5.2 The Answer to the Notice of Arbitration may also include the Statement of Defence, if the Notice of Arbitration contained the Statement of Claim.

5.3 Any counterclaim, set-off defence or cross-claim shall, to the extent possible, be raised with the Respondent's Answer to the Notice of Arbitration, which should include in relation to any such counterclaim, set-off defence or cross-claim:

(a) a copy of the contract(s) or other legal instrument(s) out of or in relation to which it arises, or reference thereto;

(b) a description of the general nature of the counterclaim, set-off defence and/or cross-claim, and an indication of the amount involved, if any; and

(c) the relief or remedy sought.

5.4 HKIAC shall transmit the case file to the arbitral tribunal as soon as it has been constituted, provided that any deposit requested by HKIAC has been paid, unless HKIAC determines otherwise.

SECTION III. THE ARBITRAL TRIBUNAL

Article 6 – Number of Arbitrators

6.1 If the parties have not agreed upon the number of arbitrators before the arbitration commences or within 30 days from the date the Notice of Arbitration is received by the Respondent, HKIAC shall decide whether the case shall be referred to a sole arbitrator or to three arbitrators, taking into account the circumstances of the case.

6.2 Where a case is conducted under an Expedited Procedure in accordance with Article 42, the provisions of Article 42.2(a) and (b) shall apply.

Article 7 – Appointment of a Sole Arbitrator

7.1 Unless the parties have agreed otherwise:

(a) where the parties have agreed before the arbitration commences that the dispute shall be referred to a sole arbitrator, they shall jointly designate the sole arbitrator within 30 days from the date the Notice of Arbitration was received by the Respondent.

(b) where the parties have agreed after the arbitration commences to refer the dispute to a sole arbitrator, they shall jointly designate the sole arbitrator within 15 days from the date of that agreement.

(c) where the parties have not agreed upon the number of arbitrators and HKIAC has decided that the dispute shall be referred to a sole arbitrator, the parties shall jointly designate the sole arbitrator within 15 days from the date HKIAC's decision was received by the last of them.

7.2 If the parties fail to designate the sole arbitrator within the applicable time limit, HKIAC shall appoint the sole arbitrator.

7.3 Where the parties have agreed on a different procedure for designating the sole arbitrator and such procedure does not result in a designation within a time limit agreed by the parties or set by HKIAC, HKIAC shall appoint the sole arbitrator.

Article 8 – Appointment of Three Arbitrators

8.1 Where a dispute between two parties is referred to three arbitrators, the arbitral tribunal shall be constituted as follows, unless the parties have agreed otherwise:

(a) where the parties have agreed before the arbitration commences that the dispute shall be referred to three arbitrators, each party shall designate in the Notice of Arbitration and the Answer to the Notice of Arbitration, respectively, one arbitrator. If either party fails to designate an arbitrator, HKIAC shall appoint the arbitrator.

(b) where the parties have agreed after the arbitration commences to refer the dispute to three arbitrators, the Claimant shall designate an arbitrator within 15 days from the date of that agreement, and the Respondent shall designate an arbitrator within 15 days from receiving notice of the Claimant's designation. If a party fails to designate an arbitrator, HKIAC shall appoint the arbitrator.

(c) where the parties have not agreed upon the number of arbitrators and HKIAC has decided that the dispute shall be referred to three arbitrators, the Claimant shall designate an arbitrator within 15 days from receipt of HKIAC's decision, and the Respondent shall designate an arbitrator within 15 days from receiving notice of the Claimant's designation. If a party fails to designate an arbitrator, HKIAC shall appoint the arbitrator.

(d) the two arbitrators so appointed shall designate a third arbitrator, who shall act as the presiding arbitrator. Failing such designation within 30 days from the confirmation or appointment of the second arbitrator, HKIAC shall appoint the presiding arbitrator.

8.2 Where there are more than two parties to the arbitration and the dispute is to be referred to three arbitrators, the arbitral tribunal shall be constituted as follows, unless the parties have agreed otherwise:

(a) the Claimant or group of Claimants shall designate an arbitrator and the Respondent or group of Respondents shall designate an arbitrator in accordance with the procedure in Article 8.1(a), (b) or (c), as applicable;

(b) if the parties have designated arbitrators in accordance with Article 8.2(a), the procedure in Article 8.1(d) shall apply to the designation of the presiding arbitrator;

(c) in the event of any failure to designate arbitrators under Article 8.2(a) or if the parties do not all agree that they represent two separate sides (as Claimant and Respondent respectively) for the purposes of designating arbitrators, HKIAC may appoint all members of the arbitral tribunal with or without regard to any party's designation.

8.3 Where the parties have agreed on a different procedure for designating three arbitrators and such procedure does not result in the designation of an arbitrator within a time limit agreed by the parties or set by HKIAC, HKIAC shall appoint the arbitrator.

Article 9 – Confirmation of the Arbitral Tribunal

9.1 All designations of any arbitrator, whether made by the parties or the arbitrators, are subject to confirmation by HKIAC, upon which the appointments shall become effective.

9.2 Where the parties have agreed that an arbitrator is to be appointed by one or more of the parties or by the arbitrators already confirmed or appointed, that agreement shall be deemed an agreement to designate an arbitrator under the Rules.

9.3 The designation of an arbitrator shall be confirmed taking into account any agreement by the parties as to an arbitrator's qualifications, any information provided under Article 11.4, and in accordance with Article 10.

Article 10 – Fees and Expenses of the Arbitral Tribunal

10.1 The fees and expenses of the arbitral tribunal shall be determined according to either:

(a) an hourly rate in accordance with Schedule 2; or

(b) the schedule of fees based on the sum in dispute in accordance with Schedule 3.

The parties shall agree the method for determining the fees and expenses of the arbitral tribunal, and shall inform HKIAC of the applicable method within 30 days of the date on which the Respondent receives the Notice of Arbitration. If the parties fail to agree on the applicable method, the arbitral tribunal's fees and expenses shall be determined in accordance with Schedule 2.

10.2 Where the fees of the arbitral tribunal are to be determined in accordance with Schedule 2,

(a) the applicable rate for each co-arbitrator shall be the rate agreed between that co-arbitrator and the designating party;

(b) the applicable rate for a sole or presiding arbitrator designated by the parties or the co-arbitrators, as applicable, shall be the rate agreed between that arbitrator and the parties,

subject to paragraphs 9.3 to 9.5 of Schedule 2. Where the rate of an arbitrator is not agreed in

accordance with Article 10.2(a) or (b), or where HKIAC appoints an arbitrator, HKIAC shall determine the rate of that arbitrator.

10.3 Where the fees of the arbitral tribunal are determined in accordance with Schedule 3, HKIAC shall fix the fees in accordance with that Schedule and the following rules:

(a) the fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitral tribunal and any secretary appointed under Article 13.4, and any other circumstances of the case, including, but not limited to, the discontinuation of the arbitration in case of settlement or for any other reason;

(b) where a case is referred to three arbitrators, HKIAC, at its discretion, shall have the right to increase the total fees up to a maximum which shall normally not exceed three times the fees of a sole arbitrator;

(c) the arbitral tribunal's fees may exceed the amounts calculated in accordance with Schedule 3 where, in the opinion of HKIAC, there are exceptional circumstances, which include, but are not be limited to, the parties conducting the arbitration in a manner not reasonably contemplated at the time when the arbitral tribunal was constituted.

Article 11 – Qualifications and Challenge of the Arbitral Tribunal

11.1 An arbitral tribunal confirmed under these Rules shall be and remain at all times impartial and independent of the parties.

11.2 Subject to Article 11.3, as a general rule, where the parties to an arbitration under these Rules are of different nationalities, a sole or presiding arbitrator shall not have the same nationality as any party unless specifically agreed otherwise by all parties.

11.3 Notwithstanding the general rule in Article 11.2, in

appropriate circumstances and provided that none of the parties objects within a time limit set by HKIAC, a sole or presiding arbitrator may be of the same nationality as any of the parties.

11.4 Before confirmation or appointment, a prospective arbitrator shall (a) sign a statement confirming his or her availability to decide the dispute and his or her impartiality and independence; and (b) disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, once confirmed or appointed and throughout the arbitration, shall disclose without delay any such circumstances to the parties unless they have already been informed by him or her of these circumstances.

11.5 No party or its representatives shall have any ex parte communication relating to the arbitration with any arbitrator, or with any candidate to be designated as arbitrator by a party, except to advise the candidate of the general nature of the dispute, to discuss the candidate's qualifications, availability, impartiality or independence, or to discuss the suitability of candidates for the designation of a third arbitrator where the parties or party-designated arbitrators are to designate that arbitrator. No party or its representatives shall have any ex parte communication relating to the arbitration with any candidate for the presiding arbitrator.

11.6 Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed by the parties, or if the arbitrator becomes de jure or de facto unable to perform his or her functions or for other reasons fails to act without undue delay. A party may challenge the arbitrator designated by it or in whose appointment it has participated only for reasons of which it becomes aware after the designation has been made.

11.7 A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after the confirmation or appointment of that arbitrator has been communicated to the challenging party or within 15 days after that party became aware of the circumstances mentioned in Article 11.6.

11.8 The notice of challenge shall be communicated to HKIAC, all other parties, the challenged arbitrator and any other members of the arbitral tribunal. The notice of challenge shall state the reasons for the challenge.

11.9 Unless the arbitrator being challenged resigns or the non-challenging party agrees to the challenge within 15 days from receiving the notice of challenge, HKIAC shall decide on the challenge. Pending the determination of the challenge, the arbitral tribunal (including the challenged arbitrator) may continue the arbitration.

11.10 If an arbitrator resigns or a party agrees to a challenge under Article 11.9, no acceptance of the validity of any ground referred to in Article 11.6 shall be implied.

Article 12 – Replacement of an Arbitrator

12.1 Subject to Articles 12.2, 27.13 and 28.8, where an arbitrator dies, has been successfully challenged, has been otherwise removed or has resigned, a substitute arbitrator shall be appointed pursuant to the rules that were applicable to the appointment of the arbitrator being replaced. These rules shall apply even if, during the process of appointing the arbitrator being replaced, a party had failed to exercise its right to designate or to participate in the appointment.

12.2 If, at the request of a party, HKIAC determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to designate a substitute arbitrator, HKIAC may, after giving an opportunity to the parties and the remaining arbitrators to express their views:

(a) appoint the substitute arbitrator; or

(b) authorise the other arbitrators to proceed with the arbitration and make any decision or award.

12.3 If an arbitrator is replaced, the arbitration shall resume at the stage where the arbitrator was replaced or ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

SECTION IV. CONDUCT OF ARBITRATION

Article 13 – General Provisions

13.1 Subject to these Rules, the arbitral tribunal shall adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay or expense, having regard to the complexity of the issues, the amount in dispute and the effective use of technology, and provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case.

13.2 At an early stage of the arbitration and in consultation with the parties, the arbitral tribunal shall prepare a provisional timetable for the arbitration, which shall be provided to the parties and HKIAC.

13.3 Subject to Article 11.5, all written communications between any party and the arbitral tribunal shall be communicated to all other parties and HKIAC.

13.4 The arbitral tribunal may, after consulting with the parties, appoint a secretary. The secretary shall remain at all times impartial and independent of the parties and shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence prior to his or her appointment. A secretary, once appointed and throughout the arbitration, shall disclose without delay any such circumstances to the parties unless they have already been informed by him or her of these circumstances.

13.5 The arbitral tribunal and the parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration.

13.6 The parties may be represented by persons of their choice, subject to Article 13.5. The names, addresses, telephone and facsimile numbers and/or email addresses of party representatives shall be communicated to all other parties, HKIAC, any emergency arbitrator, and the arbitral tribunal once constituted. The arbitral tribunal, emergency arbitrator or HKIAC may require proof of authority of any party representatives.

13.7 After the arbitral tribunal is constituted, any change or addition by a party to its legal representatives shall be communicated promptly to all other parties, the arbitral tribunal and HKIAC.

13.8 Where the parties agree to pursue other means of settling their dispute after the arbitration commences, HKIAC, the arbitral tribunal or emergency arbitrator may, at the request of any party, suspend the arbitration on such terms as it considers appropriate. The arbitration shall resume at the request of any party to HKIAC, the arbitral tribunal or emergency arbitrator.

13.9 In all matters not expressly provided for in these Rules, HKIAC, the arbitral tribunal, emergency arbitrator and the parties shall act in the spirit of these Rules.

13.10 The arbitral tribunal or emergency arbitrator shall make every reasonable effort to ensure that an award is valid.

Article 14 – Seat and Venue of the Arbitration

14.1 The parties may agree on the seat of arbitration. Where there is no agreement as to the seat, the seat of arbitration shall be Hong Kong, unless the arbitral tribunal determines, having regard to the circumstances of the case, that another seat is more appropriate.

14.2 Unless the parties have agreed otherwise, the arbitral tribunal may meet at any location outside of the seat of arbitration which it considers appropriate for consultation among its members, hearing witnesses, experts or the parties, or the inspection of goods, other property or documents. The arbitration shall nonetheless be treated for all purposes as an arbitration conducted at the seat.

Article 15 – Language

15.1 The arbitration shall be conducted in the language of the arbitration. Where the parties have not previously agreed on such language, any party shall communicate in English or Chinese prior to any determination by the arbitral tribunal under Article 15.2.

15.2 Subject to agreement by the parties, the arbitral tribunal shall, promptly after its constitution, determine the language of the arbitration. This determination shall apply to all written communications and the language to be used in any hearing.

15.3 The arbitral tribunal may order that any supporting materials submitted in their original language shall be accompanied by a translation, in whole or in part, into the language of the arbitration as agreed by the parties or determined by the arbitral tribunal.

Article 16 – Statement of Claim

16.1 Unless the Statement of Claim was contained in the Notice of Arbitration (or the Claimant elects to treat the Notice of Arbitration as the Statement of Claim), the Claimant shall communicate its Statement of Claim to all other parties and to the arbitral tribunal within a time limit to be determined by the arbitral tribunal.

16.2 The Statement of Claim shall include the following particulars:

(a) a statement of the facts supporting the claim;

(b) the points at issue;

(a) the legal arguments supporting the claim; and

(b) the relief or remedy sought.

16.3 The Claimant shall annex to its Statement of Claim all supporting materials on which it relies.

16.4 The arbitral tribunal may vary any of the requirements in Article 16 as it deems appropriate.

Article 17 – Statement of Defence

17.1 Unless the Statement of Defence was contained in the Answer to the Notice of Arbitration (or the Respondent elects to treat the Answer to the Notice of Arbitration as the Statement of Defence), the Respondent shall communicate its Statement of Defence to all other parties and to the arbitral tribunal within a time limit to be determined by the arbitral tribunal.

17.2 The Statement of Defence shall reply to the particulars of the Statement of Claim (set out in Article 16.2(a) to (c)). If the Respondent has raised an objection to the jurisdiction or to the proper constitution of the arbitral tribunal, the Statement of Defence shall contain the factual and legal basis of such objection.

17.3 Where there is a counterclaim, set-off defence or cross-claim, the Statement of Defence shall also include the following particulars:

(a) a statement of the facts supporting the counterclaim, set-off defence or cross-claim;

(b) the points at issue;

(c) the legal arguments supporting the counterclaim, set-off defence or cross-claim; and

(d) the relief or remedy sought.

17.4 The Respondent shall annex to its Statement of Defence all supporting materials on which it relies.

17.5 The arbitral tribunal may vary any of the requirements in Article 17 as it deems appropriate.

Article 18 – Amendments to the Claim or Defence

18.1 During the course of the arbitration, a party may amend or supplement its claim or defence, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the circumstances of the case. However, a claim or defence may not be amended in such a manner that the amended claim or defence falls outside the jurisdiction of the arbitral tribunal.

18.2 HKIAC may adjust its Administrative Fees and the arbitral tribunal's fees (where appropriate) if a party amends its claim or defence.

Article 19 – Jurisdiction of the Arbitral Tribunal

19.1 The arbitral tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement.

19.2 The arbitral tribunal shall have the power to determine the existence or validity of any contract of which an arbitration agreement forms a part. For the purposes of Article 19, an arbitration agreement which forms part of a contract, and which provides for arbitration under these Rules, shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not necessarily entail the invalidity of the arbitration agreement.

19.3 A plea that the arbitral tribunal does not have jurisdiction shall be raised if possible in the Answer to the Notice of Arbitration, and shall be raised no later than in the Statement of Defence, or, with respect to a counterclaim, in the Defence to the Counterclaim. A party is not precluded from raising such a plea by the fact that it has designated or appointed, or participated in the designation or appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitration. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

19.4 Subject to Article 19.5, if a question arises as to:

(a) the existence, validity or scope of the arbitration agreement; or

(b) whether all of the claims have been properly made in a single arbitration pursuant to Article 29; or

(c) the competence of HKIAC to administer an arbitration;

before the constitution of the arbitral tribunal, the arbitration shall proceed and any such question shall be decided by the arbitral tribunal once constituted.

19.5 The arbitration shall proceed only if and to the extent that HKIAC is satisfied, prima facie, that an arbitration agreement under the Rules may exist or the arbitration has been properly commenced under Article 29. Any question as to the jurisdiction of the arbitral tribunal shall be decided by the arbitral tribunal once constituted, pursuant to Article 19.1.

19.6 HKIAC's decision pursuant to Article 19.5 is without prejudice to the admissibility or merits of any party's claim or defence.

Article 20 – Further Written Statements

The arbitral tribunal shall decide which further written statements, if any, in addition to the Statement of Claim and the Statement of Defence, shall be required from the parties and shall set the time limits for communicating such statements.

Article 21 – Time Limits

21.1 The time limits set by the arbitral tribunal for the communication of written statements should not exceed 45 days, unless the arbitral tribunal considers otherwise.

21.2 The arbitral tribunal may, even in circumstances where the relevant time limit has expired, extend time limits where it concludes that an extension is justified.

Article 22 – Evidence and Hearings

22.1 Each party shall have the burden of proving the facts relied on to support its claim or defence.

22.2 The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence.

22.3 At any time during the arbitration, the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome. The arbitral tribunal shall have the power to admit or exclude any documents, exhibits or other evidence.

22.4 The arbitral tribunal shall decide whether to hold hearings for presenting evidence or for oral arguments, or whether the arbitration shall be conducted solely on the basis of documents and other materials. The arbitral tribunal shall hold such hearings at an appropriate stage of the arbitration, if so requested by a party or if it considers fit. In the event of a hearing, the arbitral tribunal shall give the parties adequate advance notice of the relevant date, time and place.

22.5 The arbitral tribunal may determine the manner in which a witness or expert is examined.

22.6 The arbitral tribunal may make directions for the translation of oral statements made at a hearing and for a record of the hearing if it deems that either is necessary in the circumstances of the case.

22.7 Hearings shall be held in private unless the parties agree otherwise. The arbitral tribunal may require any witness or expert to leave the hearing room at any time during the hearing.

Article 23 – Interim Measures of Protection and Emergency Relief

23.1 A party may apply for urgent interim or conservatory relief ("Emergency Relief") prior to the constitution of the arbitral tribunal pursuant to Schedule 4.

23.2 At the request of either party, the arbitral tribunal may order any interim measures it deems necessary or appropriate.

23.3 An interim measure, whether in the form of an order or award or in another form, is any temporary measure ordered by the arbitral tribunal at any time before it issues the award by which the dispute is finally decided, that a party, for example and without limitation:

(a) maintain or restore the status quo pending

determination of the dispute; or

(b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; or

(c) provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) preserve evidence that may be relevant and material to the resolution of the dispute.

23.4 When deciding a party's request for an interim measure under Article 23.2, the arbitral tribunal shall take into account the circumstances of the case. Relevant factors may include, but are not limited to:

(a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(a) there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

23.5 The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

23.6 The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

23.7 The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which an interim measure was requested or granted.

23.8 The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the arbitration.

23.9 A request for interim measures addressed by any party to a competent authority shall not be deemed incompatible with the arbitration agreement, or as a waiver thereof.

Article 24 – Security for Costs

The arbitral tribunal may make an order requiring a party to provide security for the costs of the arbitration.

Article 25 – Tribunal-Appointed Experts

25.1 To assist it in the assessment of evidence, the arbitral tribunal, after consulting with the parties, may appoint one or more experts. Such expert shall report to the arbitral tribunal, in writing, on specific issues to be determined by the arbitral tribunal. After consulting with the parties, the arbitral tribunal shall establish terms of reference for the expert, and shall communicate a copy of the expert's terms of reference to the parties and HKIAC.

25.2 The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

25.3 Upon receipt of the expert's report, the arbitral tribunal shall send a copy of the report to the parties who shall be given the opportunity to express their opinions on the report. The parties shall be entitled to examine any document on

which the expert has relied in his or her report.

25.4 At the request of either party, the expert, after delivering the report, shall attend a hearing at which the parties shall have the opportunity to be present and to examine the expert. At this hearing either party may present experts in order to testify on the points at issue. The provisions of Articles 22.2 to 22.7 shall be applicable to such proceedings.

25.5 The provisions of Article 11 shall apply by analogy to any expert appointed by the arbitral tribunal.

Article 26 – Default

26.1 If, within the time limit set by the arbitral tribunal, the Claimant has failed to communicate its written statement without showing sufficient cause for such failure, the arbitral tribunal may terminate the arbitration unless another party has brought a claim and wishes the arbitration to continue, in which case the tribunal may proceed with the arbitration in respect of the other party's claim.

26.2 If, within the time limit set by the arbitral tribunal, the Respondent has failed to communicate its written statement without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

26.3 If one of the parties, duly notified under these Rules, fails to present its case in accordance with these Rules including as directed by the arbitral tribunal, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration and make an award on the basis of the evidence before it.

Article 27 – Joinder of Additional Parties

27.1 The arbitral tribunal or, where the arbitral tribunal is not yet constituted, HKIAC shall have the power to allow an additional party to be joined to the arbitration provided that:

(a) prima facie, the additional party is bound by an arbitration agreement under these Rules giving rise to the arbitration, including any arbitration under Article 28 or 29; or

(b) all parties, including the additional party, expressly agree.

27.2 Any decision pursuant to Article 27.1 is without prejudice to the arbitral tribunal's power to decide any question as to its jurisdiction arising from such decision.

27.3 Any Request for Joinder shall be raised no later than in the Statement of Defence, except in exceptional circumstances.

27.4 Before the arbitral tribunal is constituted, a party wishing to join an additional party to the arbitration shall communicate a Request for Joinder to HKIAC, all other parties and any confirmed or appointed arbitrators.

27.5 After the arbitral tribunal is constituted, a party wishing to join an additional party to the arbitration shall communicate a Request for Joinder to the arbitral tribunal, HKIAC and all other parties.

27.6 The Request for Joinder shall include the following:

(a) the case reference of the existing arbitration;

(b) the names and addresses, telephone and facsimile numbers and/or email addresses, if known, of each of the parties, including the additional party, their representatives and any arbitrators who have been confirmed or appointed in the arbitration;

(c) a request that the additional party be joined to the arbitration;

(d) a copy of the contract(s) or other legal instrument(s) out of or in relation to which the request arises, or reference thereto;

(e) a statement of the facts supporting the request;

(f) the points at issue;

(g) the legal arguments supporting the request;

(h) any relief or remedy sought;

(i) the existence of any funding agreement and the identity of any third party funder pursuant to Article 44; and

(j) confirmation that copies of the Request for Joinder and any supporting materials included with it have been or are being communicated simultaneously to all other parties and any confirmed or appointed arbitrators, by one or more means of service to be identified in such confirmation.

27.7 Within 15 days of receiving the Request for Joinder, the additional party shall communicate an Answer to the Request for Joinder to HKIAC, all other parties and any confirmed or appointed arbitrators. The Answer to the Request for Joinder shall include the following:

(a) the name, address, telephone and facsimile numbers and/or email address of the additional party and its representatives (if different from the description contained in the Request for Joinder);

(b) any plea that the arbitral tribunal has been improperly constituted and/or lacks jurisdiction over the additional party;

(c) the additional party's comments on the particulars set forth in the Request for Joinder pursuant to Article 27.6(a) to (g);

(d) the additional party's answer to any relief or remedy sought in the Request for Joinder, pursuant to Article 27.6(h);

(e) details of any claims by the additional party against any other party to the arbitration;

(f) the existence of any funding agreement entered into by the additional party and the identity of any third party funder pursuant to Article 44; and

(g) confirmation that copies of the Answer to the Request for Joinder and any supporting materials included with it have been or are being communicated simultaneously to all other parties and any confirmed or appointed arbitrators, by one or more means of service to be identified in such confirmation.

27.8 HKIAC or the arbitral tribunal may vary any of the requirements in Article 27.6 and 27.7 as it deems appropriate.

27.9 An additional party wishing to be joined to the arbitration shall communicate a Request for Joinder to HKIAC, all other parties and any confirmed or appointed arbitrators. The provisions of Article 27.6 shall apply to such Request for Joinder.

27.10 Within 15 days of receiving a Request for Joinder, the parties shall communicate their comments on the Request for Joinder to HKIAC, all other parties and any confirmed or appointed arbitrators. Such comments may include (without limitation):

(a) any plea that the arbitral tribunal lacks jurisdiction over the additional party;

(h) comments on the particulars set forth in the Request for Joinder, pursuant to Article 27.6(a) to (g);

(b) answer to any relief or remedy sought in the Request for Joinder pursuant to Article 27.6(h);

(c) details of any claims against the additional party; and

(d) confirmation that copies of the comments have been or are being communicated simultaneously to all other parties and any confirmed or appointed arbitrators, by one or

more means of service to be identified in such confirmation.

27.11 Where an additional party is joined to the arbitration, the arbitration against that additional party shall be deemed to commence on the date on which HKIAC or the arbitral tribunal once constituted, received the Request for Joinder.

27.12 Where an additional party is joined to the arbitration, all parties to the arbitration shall be deemed to have waived their right to designate an arbitrator.

27.13 Where an additional party is joined to the arbitration before the arbitral tribunal is constituted, HKIAC may revoke any confirmation or appointment of an arbitrator, and shall appoint the arbitral tribunal with or without regard to any party's designation.

27.14 The revocation of the confirmation or appointment of an arbitrator pursuant to Article 27.13 is without prejudice to:

(a) the validity of any act done or order made by that arbitrator before his or her confirmation or appointment was revoked;

(b) his or her entitlement to be paid his or her fees and expenses subject to Schedule 2 or 3 as applicable; and

(c) the date when any claim or defence was raised for the purpose of applying any limitation bar or any similar rule or provision.

27.15 HKIAC may adjust its Administrative Fees and the arbitral tribunal's fees (where appropriate) after a Request for Joinder has been submitted.

Article 28 – Consolidation of Arbitrations

28.1 HKIAC shall have the power, at the request of a party and after consulting with the parties and any confirmed or appointed arbitrators, to consolidate two or more arbitrations pending under these Rules where:

(a) the parties agree to consolidate; or

(b) all of the claims in the arbitrations are made under the same arbitration agreement; or

(c) the claims are made under more than one arbitration agreement, a common question of law or fact arises in all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions and the arbitration agreements are compatible.

28.2 Any party wishing to consolidate two or more arbitrations pursuant to Article 28.1 shall communicate a Request for Consolidation to HKIAC, all other parties and any confirmed or appointed arbitrators.

28.3 The Request for Consolidation shall include the following:

(a) the case references of the arbitrations pending under the Rules requested to be consolidated, where applicable;

(d) the names and addresses, telephone and facsimile numbers and/or email addresses of each of the parties to the arbitrations, their representatives and any arbitrators who have been confirmed or appointed in the arbitrations;

(e) a request that the arbitrations be consolidated;

(f) a copy of the arbitration agreement giving rise to the arbitrations;

(g) a copy of the contract(s) or other legal instrument(s) out of or in relation to which the Request for Consolidation arises, or reference thereto;

(h) a description of the general nature of the claim and an indication of the amount involved, if any, in each of the arbitrations;

(i) a statement of the facts supporting the Request for Consolidation, including, where applicable, evidence of all parties' written consent to consolidate the arbitrations;

(j) the points at issue;

(k) the legal arguments supporting the Request for Consolidation;

(l) details of any applicable mandatory provision affecting consolidation of arbitrations;

(m) comments on the constitution of the arbitral tribunal if the Request for Consolidation is granted, including whether to preserve the appointment of any arbitrators already designated or confirmed; and

(n) confirmation that copies of the Request for Consolidation and any supporting materials included with it have been or are being communicated simultaneously to all other relevant parties and any confirmed or appointed arbitrators, by one or more means of service to be identified in such confirmation.

28.4 HKIAC may vary any of the requirements in Article 28.3 as it deems appropriate.

28.5 Where the non-requesting parties or any confirmed or appointed arbitrators are requested to provide comments on the Request for Consolidation, such comments may include (without limitation) the following particulars:

(a) comments on the particulars set forth in the Request for Consolidation pursuant to Articles 28.3(a) to (j);

(b) responses to the comments made in the Request for Consolidation pursuant to Article 28.3(k); and

(c) confirmation that copies of the comments have been or are being communicated simultaneously to all other relevant parties and any confirmed or appointed arbitrators, by one or more means of service to be identified in such confirmation.

28.6 Where HKIAC decides to consolidate two or more arbitrations, the arbitrations shall be consolidated into the arbitration that commenced first, unless all parties agree or HKIAC decides otherwise taking into account the circumstances of the case. HKIAC shall communicate such decision to all parties and to any confirmed or appointed arbitrators in all arbitrations.

28.7 The consolidation of two or more arbitrations is without prejudice to the validity of any act done or order made by a competent authority in support of the relevant arbitration before it was consolidated.

28.8 Where HKIAC decides to consolidate two or more arbitrations, the parties to all such arbitrations shall be deemed to have waived their right to designate an arbitrator, and HKIAC may revoke any confirmation or appointment of an arbitrator. HKIAC shall appoint the arbitral tribunal in respect of the consolidated proceedings with or without regard to any party's designation.

28.9 The revocation of the confirmation or appointment of an arbitrator pursuant to Article 28.8 is without prejudice to:

(a) the validity of any act done or order made by that arbitrator before his or her confirmation or appointment was revoked;

(b) his or her entitlement to be paid his or her fees and expenses subject to Schedule 2 or 3 as applicable; and

(c) the date when any claim or defence was raised for the purpose of applying any limitation bar or any similar rule or provision.

28.10 HKIAC may adjust its Administrative Fees and the arbitral tribunal's fees (where appropriate) after a Request for Consolidation has been submitted.

Article 29 – Single Arbitration under Multiple Contracts

Claims arising out of or in connection with more than one contract may be made in a single arbitration, provided that:

(a) a common question of law or fact arises under each arbitration agreement giving rise to the arbitration; and

(b) the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions; and

(c) the arbitration agreements under which those claims are made are compatible.

Article 30 – Concurrent Proceedings

30.1 The arbitral tribunal may, after consulting with the parties, conduct two or more arbitrations under the Rules at the same time, or one immediately after another, or suspend any of those arbitrations until after the determination of any other of them, where:

(a) the same arbitral tribunal is constituted in each arbitration; and

(b) a common question of law or fact arises in all the arbitrations.

30.2 HKIAC may adjust its Administrative Fees and the arbitral tribunal's fees (where appropriate) where the arbitrations are conducted pursuant to Article 30.1.

Article 31 – Closure of Proceedings

31.1 When it is satisfied that the parties have had a reasonable opportunity to present their case, whether in relation to the entire proceedings or a discrete phase of the proceedings, the arbitral tribunal shall declare the proceedings or the relevant phase of the proceedings closed. Thereafter, no further submissions or arguments

may be made, or evidence produced in respect of the entire proceedings or the discrete phase, as applicable, unless the arbitral tribunal reopens the proceedings or the relevant phase of the proceedings in accordance with Article 31.4.

31.2 Once the proceedings are declared closed, the arbitral tribunal shall inform HKIAC and the parties of the anticipated date by which an award will be communicated to the parties. The date of rendering the award shall be no later than three months from the date when the arbitral tribunal declares the entire proceedings or the relevant phase of the proceedings closed, as applicable. This time limit may be extended by agreement of the parties or, in appropriate circumstances, by HKIAC.

31.3 Article 31.2 shall not apply to any arbitration conducted pursuant to the Expedited Procedure under Article 42.

31.4 The arbitral tribunal may, if it considers it necessary, decide, on its own initiative or upon application of a party, to reopen the proceedings at any time before the award is made.

Article 32 – Waiver

32.1 A party that knows, or ought reasonably to know, that any provision of, or requirement arising under, these Rules (including the arbitration agreement) has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be deemed to have waived its right to object.

32.2 The parties waive any objection, on the basis of the use of any procedure under Articles 27, 28, 29, 30 or 43 and any decision made in respect of such procedure, to the validity and/or enforcement of any award made by the arbitral tribunal in the arbitration(s), in so far as such waiver can validly be made.

SECTION V. AWARDS, DECISIONS AND ORDERS OF THE ARBITRAL TRIBUNAL

Article 33 – Decisions

33.1 When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators. If there is no majority, the award shall be made by the presiding arbitrator alone.

33.2 With the prior agreement of all members of the arbitral tribunal, the presiding arbitrator may make procedural rulings alone.

Article 34 – Costs of the Arbitration

34.1 The arbitral tribunal shall determine the costs of the arbitration in one or more orders or awards. The term "costs of the arbitration" includes only:

(a) the fees of the arbitral tribunal, as determined in accordance with Article 10;

(b) the reasonable travel and other expenses incurred by the arbitral tribunal;

(c) the reasonable costs of expert advice and of other assistance required by the arbitral tribunal, including fees and expenses of any tribunal secretary;

(d) the reasonable costs for legal representation and other assistance, including fees and expenses of any witnesses and experts, if such costs were claimed during the arbitration; and

(e) the Registration Fee and Administrative Fees payable to HKIAC in accordance with Schedule 1, and any expenses payable to HKIAC.

34.2 With respect to the costs of legal representation and other assistance referred to in Article 34.1(d), the arbitral tribunal, taking into account the circumstances of the case, may direct that the recoverable costs of the arbitration, or any part of

the arbitration, shall be limited to a specified amount.

34.3 The arbitral tribunal may apportion all or part of the costs of the arbitration referred to in Article 34.1 between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

34.4 The arbitral tribunal may take into account any third party funding arrangement in determining all or part of the costs of the arbitration referred to in Article 34.1.

34.5 Where arbitrations are consolidated pursuant to Article 28, the arbitral tribunal in the consolidated arbitration shall determine the costs of the arbitration in accordance with Articles 34.2 to 34.4. Such costs include, but are not limited to, the fees of any arbitrator designated, confirmed or appointed and any other costs incurred in an arbitration that was subsequently consolidated into another arbitration.

34.6 When the arbitral tribunal issues an order for the termination of the arbitration or makes an award on agreed terms, it shall determine the costs of the arbitration referred to in Article 34.1 (to the extent not already determined) and may apportion all or part of such costs, in the text of that order or award.

Article 35 – Form and Effect of the Award

35.1 The arbitral tribunal may make a single award or separate awards regarding different issues at different times and in respect of all parties involved in the arbitration in the form of interim, interlocutory, partial or final awards. If appropriate, the arbitral tribunal may also issue interim awards on costs and any awards pursuant to Article 41.5.

35.2 Awards shall be made in writing and shall be final and binding on the parties and any person claiming

through or under any of the parties. The parties and any such person waive their rights to any form of recourse or defence in respect of the setting-aside, enforcement and execution of any award, in so far as such waiver can validly be made.

35.3 The parties undertake to comply without delay with any order or award made by the arbitral tribunal or any emergency arbitrator, including any order or award made in any proceedings under Articles 27, 28, 29, 30 or 43.

35.4 An award shall state the reasons upon which it is based unless the parties have agreed that no reasons are to be given.

35.5 An award shall be signed by the arbitral tribunal. It shall state the date on which it was made and the seat of arbitration as determined under Article 14 and shall be deemed to have been made at the seat of the arbitration. Where there are three arbitrators and any of them fails to sign, the award shall state the reason for the absence of the signature(s).

35.6 The arbitral tribunal shall communicate to HKIAC originals of the award signed by the arbitral tribunal. HKIAC shall affix its seal to the award and, subject to any lien, communicate it to the parties.

Article 36 – Applicable Law, Amiable Compositeur

36.1 The arbitral tribunal shall decide the substance of the dispute in accordance with the rules of law agreed upon by the parties. Any designation of the law or legal system of a given jurisdiction shall be construed, unless otherwise expressed, as directly referring to the substantive law of that jurisdiction and not to its conflict of laws rules. Failing such designation by the parties, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

36.2 The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly agreed that the arbitral tribunal should do so.

36.3 In all cases, the arbitral tribunal shall decide the case in accordance with the terms of the relevant contract(s) and may take into account the usages of the trade applicable to the transaction(s).

Article 37 – Settlement or Other Grounds for Termination

37.1 If, before the arbitral tribunal is constituted, a party wishes to terminate the arbitration, it shall communicate this to all other parties and HKIAC. HKIAC shall set a time limit for all other parties to indicate whether they agree to terminate the arbitration. If no other party objects within the time limit, HKIAC may terminate the arbitration. If any party objects to the termination of the arbitration, the arbitration shall proceed in accordance with the Rules.

37.2 If, after the arbitral tribunal is constituted and before the final award is made,

(a) the parties settle the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitration or, if requested by the parties and accepted by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

(b) continuing the arbitration becomes unnecessary or impossible for any reason not mentioned in Article 37.2(a), the arbitral tribunal shall issue an order for the termination of the arbitration. The arbitral tribunal shall issue such an order unless a party raises a justifiable objection, having been given a reasonable opportunity to comment upon the proposed course of action.

37.3 The arbitral tribunal shall communicate copies of the order to terminate the arbitration or of the arbitral award on agreed terms, signed by the arbitral tribunal, to HKIAC. Subject to any lien, HKIAC shall communicate the order for termination of the arbitration or the arbitral award on agreed terms to the parties. Where an arbitral award on agreed terms is made, the provisions of Articles 35.2, 35.3, 35.5 and 35.6 shall apply.

Article 38 – Correction of the Award

38.1 Within 30 days after receipt of the award, either party, with notice to all other parties, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may set a time limit, normally not exceeding 15 days, for all other parties to comment on such request.

38.2 The arbitral tribunal shall make any corrections it considers appropriate within 30 days after receipt of the request but may extend such time limit if necessary.

38.3 The arbitral tribunal may within 30 days after the date of the award make such corrections on its own initiative.

38.4 The arbitral tribunal has the power to make any further correction to the award which is necessitated by or consequential on (a) the interpretation of any point or part of the award under Article 39; or (b) the issue of any additional award under Article 40.

38.5 Such corrections shall be in writing, and the provisions of Articles 35.2 to 35.6 shall apply.

Article 39 – Interpretation of the Award

39.1 Within 30 days after receipt of the award, either party, with notice to all other parties, may request that the arbitral tribunal give an interpretation of the award. The arbitral tribunal may set a time limit, normally not exceeding 15 days, for all other parties to comment on such request.

39.2 Any interpretation considered appropriate by the arbitral tribunal shall be given in writing within 30 days after receipt of the request but the arbitral tribunal may extend such time limit if necessary.

39.3 The arbitral tribunal has the power to give any further interpretation of the award which is necessitated by or consequential on (a) the correction of any error in the award under Article 38; or (b) the issue of any additional award under Article 40.

39.4 Any interpretation given under Article 39 shall form part of the award and the provisions of Articles 35.2 to 35.6 shall apply.

Article 40 – Additional Award

40.1 Within 30 days after receipt of the award, either party, with notice to all other parties, may request the arbitral tribunal to make an additional award as to claims presented in the arbitration but omitted from the award. The arbitral tribunal may set a time limit, normally not exceeding 30 days, for all other parties to comment on such request.

40.2 If the arbitral tribunal considers the request for an additional award to be justified, it shall make the additional award within 60 days after receipt of the request but may extend such time limit if necessary.

40.3 The arbitral tribunal has the power to make an additional award which is necessitated by or consequential on (a) the correction of any error in the award under Article 38; or (b) the interpretation of any point or part of the award under Article 39.

40.4 When an additional award is made, the provisions of Articles 35.2 to 35.6 shall apply.

Article 41 – Deposits for Costs

41.1 As soon as practicable after receipt of the Notice of Arbitration by the Respondent, HKIAC shall, in principle, request the Claimant and the Respondent each to deposit with HKIAC an equal amount as an advance for the costs referred to in Article 34.1(a), (b), (c) and (e). HKIAC shall provide a copy of such request to the arbitral tribunal.

41.2 Where the Respondent submits a counterclaim or cross-claim, or it otherwise appears appropriate in the circumstances, HKIAC may request separate deposits.

41.3 During the course of the arbitration, HKIAC may request the parties to make supplementary deposits with HKIAC. HKIAC shall provide a copy of such request to the arbitral tribunal.

41.4 If the required deposits are not paid in full to HKIAC within 30 days after receipt of the request, HKIAC shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitration or continue with the arbitration on such basis and in respect of such claim or counterclaim as the arbitral tribunal considers fit.

41.5 If a party pays the required deposits on behalf of another party, the arbitral tribunal may, at the request of the paying party, make an award for reimbursement of the payment.

41.6 When releasing the final award, HKIAC shall render an account to the parties of the deposits received by HKIAC. Any unexpended balance shall be returned to the parties in the shares in which it was paid by the parties to HKIAC, or as otherwise instructed by the arbitral tribunal.

41.7 HKIAC shall place the deposits made by the parties in an account at a reputable licensed deposit-taking institution. In selecting the account, HKIAC shall have due regard to the possible need to make the deposited funds available immediately.

SECTION VI. OTHER PROVISIONS

Article 42 – Expedited Procedure

42.1 Prior to the constitution of the arbitral tribunal, a party may apply to HKIAC for the arbitration to be conducted in accordance with Article 42.2 where:

(a) the amount in dispute representing the aggregate of any claim and counterclaim (or any set-off defence or cross-claim) does not exceed the amount set by HKIAC, as stated on HKIAC's website on the date the Notice of Arbitration is submitted; or

(b) the parties so agree; or

(c) in cases of exceptional urgency.

42.2 When HKIAC, after considering the views of the parties, grants an application made pursuant to Article 42.1, the arbitral proceedings shall be conducted in accordance with an Expedited Procedure based upon the foregoing provisions of these Rules, subject to the following changes:

(a) the case shall be referred to a sole arbitrator, unless the arbitration agreement provides for three arbitrators;

(b) if the arbitration agreement provides for three arbitrators, HKIAC shall invite the parties to agree to refer the case to a sole arbitrator. If the parties do not agree, the case shall be referred to three arbitrators;

(c) HKIAC may shorten the time limits provided for in the Rules, as well as any time limits that it has set;

(d) after the submission of the Answer to the Notice of Arbitration, the parties shall in principle be entitled to submit one Statement of Claim and one Statement of Defence (and Counterclaim) and, where applicable, one Statement of Defence in reply to the Counterclaim;

(e) the arbitral tribunal shall decide the dispute on the basis of documentary evidence only, unless it decides that it is appropriate to hold one or more hearings;

(f) subject to any lien, the award shall be communicated to the parties within six months from the date when HKIAC transmitted the case file to the arbitral tribunal. In exceptional circumstances, HKIAC may extend this time limit;

(g) the arbitral tribunal may state the reasons upon which the award is based in summary form, unless the parties have agreed that no reasons are to be given.

42.3 Upon the request of any party and after consulting with the parties and any confirmed or appointed arbitrators, HKIAC may, having regard to any new circumstances that have arisen, decide that the Expedited Procedure under Article 42 shall no longer apply to the case. Unless HKIAC considers that it is appropriate to revoke the confirmation or appointment of any arbitrator, the arbitral tribunal shall remain in place.

Article 43 – Early Determination Procedure

43.1 The arbitral tribunal shall have the power, at the request of any party and after consulting with all other parties, to decide one or more points of law or fact by way of early determination procedure, on the basis that:

(a) such points of law or fact are manifestly without merit; or

(b) such points of law or fact are manifestly outside the arbitral tribunal's jurisdiction; or

(c) even if such points of law or fact are submitted by another party and are assumed to be correct, no award could be rendered in favour of that party.

43.2 Any party making a request for early determination procedure shall communicate the request to the arbitral tribunal, HKIAC and all other parties.

43.3 Any request for early determination procedure shall be made as promptly as possible after the relevant points of law or fact are submitted, unless the arbitral tribunal directs otherwise.

43.4 The request for early determination procedure shall include the following:

(a) a request for early determination of one or more points of law or fact and a description of such points;

(b) a statement of the facts and legal arguments supporting the request;

(c) a proposal of the form of early determination procedure to be adopted by the arbitral tribunal;

(d) comments on how the proposed form referred to in Article 43.4(c) would achieve the objectives stated in Articles 13.1 and 13.5; and

(e) confirmation that copies of the request and any supporting materials included with it have been or are being communicated simultaneously to all other parties by one or more means of service to be identified in such confirmation.

43.5 After providing all other parties with an opportunity to submit comments on the request, the arbitral tribunal shall issue a decision either dismissing the request or allowing the request to proceed by fixing the early determination procedure in the form it considers appropriate. The arbitral tribunal shall make such decision within 30 days from the date of filing the request. This time limit may be extended by agreement of the parties or, in appropriate circumstances, by HKIAC.

43.6 If the request is allowed to proceed, the arbitral tribunal shall make its order or award, which may be in summary form, on the relevant points of law or fact. The arbitral tribunal shall make such order or award within 60 days from the date of its decision to proceed. This time limit may be extended by agreement of the parties or, in appropriate circumstances, by HKIAC.

43.7 Pending the determination of the request, the arbitral tribunal may decide whether and to what extent the arbitration shall proceed.

Article 44 – Disclosure of Third Party Funding of Arbitration

44.1 If a funding agreement is made, the funded party shall communicate a written notice to all other parties, the arbitral tribunal, any emergency arbitrator and HKIAC of:

(a) the fact that a funding agreement has been made; and

(b) the identity of the third party funder.

44.2 The notice referred to in Article 44.1 must be communicated:

(a) in respect of a funding agreement made on or before the commencement of the arbitration, in the application for the appointment of an emergency arbitrator, the Notice of Arbitration, the Answer to the Notice of Arbitration, the Request for Joinder or the Answer to the Request for Joinder (as applicable); or

(b) in respect of a funding agreement made after the commencement of the arbitration, as soon as practicable after the funding agreement is made.

44.3 Any funded party shall disclose any changes to the information referred to in Article 44.1 that occur after the initial disclosure.

Article 45 – Confidentiality

45.1 Unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to:

(a) the arbitration under the arbitration agreement; or

(b) an award or Emergency Decision made in the arbitration.

45.2 Article 45.1 also applies to the arbitral tribunal, any emergency arbitrator, expert, witness, tribunal secretary and HKIAC.

45.3 Article 45.1 does not prevent the publication, disclosure or communication of information referred to in Article 45.1 by a party or party representative:

(a) (i) to protect or pursue a legal right or interest of the party; or

(ii) to enforce or challenge the award or Emergency Decision referred to in Article 45.1;

in legal proceedings before a court or other authority; or

(b) to any government body, regulatory body, court or tribunal where the party is obliged by law to make the publication, disclosure or communication; or

(c) to a professional or any other adviser of any of the parties, including any actual or potential witness or expert; or

(d) to any party or additional party and any confirmed or appointed arbitrator for the purposes of Articles 27, 28, 29 or 30; or

(e) to a person for the purposes of having, or seeking, third party funding of arbitration.

45.4 The deliberations of the arbitral tribunal are confidential.

45.5 HKIAC may publish any award, whether in its entirety or in the form of excerpts or a summary, only under the following conditions:

(a) all references to the parties' names and other identifying information are deleted; and

(b) no party objects to such publication within the time limit fixed for that purpose by HKIAC. In the case of an objection, the award shall not be published.

Article 46 – Exclusion of Liability

46.1 None of the Council members of HKIAC nor any body or person specifically designated by it to perform the functions in these Rules, nor the Secretary-General of HKIAC or other staff members of the Secretariat of HKIAC, the arbitral tribunal, any emergency arbitrator, tribunal-appointed expert or tribunal secretary shall be liable for any act or omission in connection with an arbitration conducted under these Rules, save where such act was done or omitted to be done dishonestly.

46.2 After the award has been made and the possibilities of correction, interpretation and additional awards referred to in Articles 38 to 40 have lapsed or been exhausted, neither HKIAC nor the arbitral tribunal, any emergency arbitrator, tribunal-appointed expert or tribunal secretary shall be under an obligation to make statements to any person about any matter concerning the arbitration, nor shall a party seek to make any of these persons a witness in any legal or other proceedings arising out of the arbitration.

SCHEDULE 1

REGISTRATION AND ADMINISTRATIVE FEES

(All amounts are in Hong Kong Dollars, hereinafter "HKD")

Effective 1 November 2018

1. Registration Fee

1.1 When submitting a Notice of Arbitration, the Claimant shall pay a Registration Fee in the amount set by HKIAC, as stated on HKIAC's website on the date the Notice of Arbitration is submitted.

1.2 If the Claimant fails to pay the Registration Fee, HKIAC shall not proceed with the arbitration subject to Article 4.6 of the Rules.

1.3 The Registration Fee is not refundable save in exceptional circumstances as determined by HKIAC in its sole discretion.

2. HKIAC's Administrative Fees

2.1 HKIAC's Administrative Fees shall be determined in accordance with the following table:

SUM IN DISPUTE (in HKD)		ADMINISTRATIVE FEES (in HKD)
Up to	400,000	19,800
From	400,001	19,800 + 1.300% of amt.
to	800,000	over 400,000
From	800,001	25,000 + 1.000% of amt.
to	4,000,000	over 800,000
From	4,000,001	57,000 + 0.545% of amt.
to	8,000,000	over 4,000,000
From	8,000,001	78,800 + 0.265% of amt.
to	16,000,000	over 8,000,000
From	16,000,001	100,000 + 0.200% of amt.
to	40,000,000	over 16,000,000
From	40,000,001	148,000 + 0.110% of amt.
to	80,000,000	over 40,000,000
From	80,000,001	192,000 + 0.071% of amt.
to	240,000,000	over 80,000,000
From	240,000,001	305,600 + 0.059% of amt.
to	400,000,000	over 240,000,000
Over	400,000,000	400,000

2.2 Claims and counterclaims are added for the determination of the amount in dispute. The same rule applies to any set-off defence or cross-claim, unless the arbitral tribunal, after consulting with the parties, concludes that such set-off defence or cross-claim will not require significant additional work.

2.3 An interest claim shall not be taken into account for the calculation of the amount in dispute, except where HKIAC determines that doing so would be appropriate.

2.4 Where there are alternative claims, only the principal claim shall be taken into account for the calculation of the amount in dispute, except where HKIAC considers it appropriate to take into account the amount of any alternative claim.

2.5 Pursuant to Articles 18.2, 27.15, 28.10 or 30.2 or where in the opinion of HKIAC there are exceptional circumstances, HKIAC may depart from the table in paragraph 2.1 when calculating its Administrative Fees.

2.6 If the amount in dispute is not quantified, HKIAC's Administrative Fees shall be fixed by HKIAC, taking into account the circumstances of the case.

2.7 Amounts in currencies other than Hong Kong Dollars shall be converted into Hong Kong Dollars at the rate of exchange published by HSBC Bank on the date the Notice of Arbitration is submitted or at the time any new claim, set-off defence, cross-claim or amendment to a claim or defence is filed.

2.8 The parties are jointly and severally liable for HKIAC's Administrative Fees.

SCHEDULE 2

ARBITRAL TRIBUNAL'S FEES,EXPENSES, TERMS AND CONDITIONS

Based on Hourly Rates
Effective 1 November 2018

1. Scope of Application and Interpretation

1.1 Subject to any variations agreed by all parties or changes HKIAC considers appropriate, this Schedule shall apply to arbitrations in which the arbitral tribunal's fees and expenses are to be determined in accordance with Article 10.1(a) of the Rules and to the appointment of an emergency arbitrator under Schedule 4.

1.2 HKIAC may interpret the terms of this Schedule as well as the scope of application of the Schedule as it considers appropriate.

1.3 This Schedule is supplemented by the Practice Note on Costs of Arbitration Based on Schedule 2 and Hourly Rates in force on the date the Notice of Arbitration is submitted.

2. Payments to Arbitral Tribunal

2.1 Payments to the arbitral tribunal shall generally be made by HKIAC from funds deposited by the parties in accordance with Article 41 of the Rules. HKIAC may direct the parties, in such proportions as it considers appropriate, to make one or more interim or final payments to the arbitral tribunal.

2.2 If insufficient funds are held at the time a payment is required, the invoice for the payment may be submitted to the parties for settlement by them direct.

2.3 Payments to the arbitral tribunal shall be made in Hong Kong Dollars unless the tribunal directs otherwise.

2.4 The parties are jointly and severally liable for the fees and expenses of an arbitrator, irrespective of which party appointed the arbitrator.

3. Arbitral Tribunal's Expenses

3.1 The arbitral tribunal shall be reimbursed for its reasonable expenses in accordance with the Practice Note referred to at paragraph 1.3.

3.2 The expenses of the arbitral tribunal shall not be included in the arbitral tribunal's fees charged by reference to hourly rates under paragraph 9 of this Schedule.

4. Administrative Expenses

The parties shall be responsible for expenses reasonably incurred and relating to administrative and support services engaged for the purposes of the arbitration, including, but not limited to, the cost of hearing rooms, interpreters and transcription services. Such expenses may be paid directly from the deposits referred to in Article 41 of the Rules as and when they are incurred.

5. Fees and Expenses Payable to Replaced Arbitrators

Where an arbitrator is replaced pursuant to Articles 12, 27, 28 or 42.3 of the Rules, HKIAC shall decide the amount of fees and expenses to be paid for the replaced arbitrator's services (if any), having taken into account the circumstances of the case, including, but not limited to, the applicable method for determining the arbitrator's fees, work done by the arbitrator in connection with the arbitration, and the complexity of the subject-matter.

6. Fees and Expenses of Tribunal Secretary

Where the arbitral tribunal appoints a secretary in accordance with Article 13.4 of the Rules, such secretary shall be remunerated at a rate which shall not exceed the rate set by HKIAC, as stated on HKIAC's website on the date the Notice of Arbitration is submitted. The

secretary's fees and expenses shall be charged separately. The arbitral tribunal shall determine the total fees and expenses of a secretary under Article 34.1(c) of the Rules.

7. Lien on Award

HKIAC and the arbitral tribunal shall have a lien over any awards issued by the tribunal to secure the payment of their outstanding fees and expenses, and may accordingly refuse to communicate any such awards to the parties until all such fees and expenses have been paid in full, whether jointly or by one or other of the parties.

8. Governing Law

The terms of this Schedule and any non-contractual obligation arising out of or in connection with them shall be governed by and construed in accordance with Hong Kong law.

9. Arbitral Tribunal's Fee Rates

9.1 An arbitrator shall be remunerated at an hourly rate for all work reasonably carried out in connection with the arbitration.

9.2 Subject to paragraphs 9.3 to 9.5 of this Schedule, the rate referred to in paragraph 9.1 is to be agreed in accordance with Article 10.2 of the Rules. An arbitrator shall agree upon fee rates in accordance with paragraph 9 of this Schedule prior to his or her confirmation or appointment by HKIAC.

9.3 An arbitrator's agreed hourly rate shall not exceed a rate set by HKIAC, as stated on HKIAC's website on the date the Notice of Arbitration is submitted.

9.4 Subject to paragraph 9.3, an arbitrator may review and increase his or her agreed hourly rate by no more than 10% on each anniversary of his or her confirmation or appointment.

9.5 Higher rates may be charged if expressly agreed by all parties to the arbitration or if HKIAC so determines in exceptional circumstances.

9.6 If an arbitrator is required to travel for the purposes of fulfilling obligations as an arbitrator, the arbitrator shall be entitled to charge and to be reimbursed for:

(a) time spent travelling but not working at a rate of 50% of the agreed hourly rate; or

(b) time spent working whilst travelling at the full agreed hourly rate.

10. Cancellation Fees

10.1 All hearings booked shall be paid for, subject to the following conditions:

(a) if a booking is cancelled at the request of the arbitral tribunal, it will not be charged;

(b) if a booking is cancelled at the request of any party less than 30 days before the first day booked it shall be paid at a daily rate of 75% of eight times the applicable hourly rate;

(c) if a booking is cancelled at the request of any party less than 60 days but more than 30 days before the first day booked it shall be paid at a daily rate of 50% of eight times the applicable hourly rate;

(d) if a booking is cancelled at the request of any party more than 60 days before the first day booked it will not be charged; and

(e) in all cases referred to above, if an arbitrator has spent time on the case during the day(s) booked, he or she shall be paid based on (i) the hourly rate pursuant to paragraph 9; or (ii) the cancellation fee pursuant to paragraph 10.1(b) to (d), whichever is higher.

10.2 Where hearing days are cancelled or postponed other than by agreement of all parties or request of the arbitral tribunal, this may be taken into account when considering any subsequent apportionment of costs.

SCHEDULE 3
ARBITAL TRIBUNAL'S FEES,EXPENSES, TERMS AND CONDITIONS
Based on Sum in Dispute
(All amounts are in Hong Kong Dollars, hereinafter "HKD")
Effective 1 November 2018

1. Scope of Application and Interpretation

1.1 Subject to paragraph 1.2 below and any variations agreed by all parties or changes HKIAC considers appropriate, this Schedule applies to arbitrations in which the arbitral tribunal's fees and expenses are to be determined in accordance with Article 10.1(b) of the Rules.

1.2 This Schedule shall not apply to the appointment of an emergency arbitrator under Schedule 4.

1.3 HKIAC may interpret the terms of this Schedule as well as the scope of application of the Schedule as it considers appropriate.

1.4 This Schedule is supplemented by the Practice Note on Costs of Arbitration Based on Schedule 3 and the Sum in Dispute in force on the date the Notice of Arbitration is submitted.

2. Payments to Arbitral Tribunal

2.1 Payments to the arbitral tribunal shall generally be made by HKIAC from funds deposited by the parties in accordance with Article 41 of the Rules. HKIAC may direct the parties, in such proportions as it considers appropriate, to make one or more interim or final payments to the arbitral tribunal.

2.2 If insufficient funds are held at the time a payment is required, the invoice for the payment may be submitted to the parties for settlement by them direct.

2.3 Payments to the arbitral tribunal shall be made in Hong Kong Dollars unless the tribunal directs otherwise.

2.4 The parties are jointly and severally liable for the fees and expenses of an arbitrator, irrespective of which party appointed the arbitrator.

3. Arbitral Tribunal's Expenses

3.1 The arbitral tribunal shall be reimbursed for its reasonable expenses in accordance with the Practice Note referred to at paragraph 1.4.

3.2 The expenses of the arbitral tribunal shall not be included in the determination of fees charged in accordance with paragraph 6 of this Schedule.

4. Administrative Expenses

The parties shall be responsible for expenses reasonably incurred and relating to administrative and support services engaged for the purposes of the arbitration, including, but not limited to, the cost of hearing rooms, interpreters and transcription services. Such expenses may be paid directly from the deposits referred to in Article 41 of the Rules as and when they are incurred.

5. Fees and Expenses Payable to Replaced Arbitrators

Where an arbitrator is replaced pursuant to Articles 12, 27, 28 or 42.3 of the Rules, HKIAC shall decide the amount of fees and expenses to be paid for the replaced arbitrator's services (if any), having taken into account the circumstances of the case, including, but not limited to, the applicable method for determining the arbitrator's fees, work done by the arbitrator in connection with the arbitration, and the complexity of the subject-matter.

6. Determination of Arbitral Tribunal's Fees

6.1 The arbitral tribunal's fees shall be calculated in accordance with the following table. The fees calculated in accordance with the table represent the maximum amount payable to one arbitrator.

SUM IN DISPUTE (in HKD)		ARBITRATOR'S FEES (in HKD)
Up to	400,000	11.000% of amount in dispute
From	400,001	44,000 + 10.000% of amt.
to	800,000	over 400,000
From	800,001	84,000 + 5.300% of amt.
to	4,000,000	over 800,000
From	4,000,001	253,600 + 3.780% of amt.
to	8,000,000	over 4,000,000
From	8,000,001	404,800 + 1.730% of amt.
to	16,000,000	over 8,000,000
From	16,000,001	543,200 + 1.060% of amt.
to	40,000,000	over 16,000,000
From	40,000,001	797,600 +0.440% of amt.
to	80,000,000	over 40,000,000
From	80,000,001	973,600 + 0.250% of amt.
to	240,000,000	over 80,000,000
From	240,000,001	1,373,600 + 0.228% of amt.
to	400,000,000	over 240,000,000
From	400,000,001	1,738,400 + 0.101% of amt.
to	600,000,000	over 400,000,000
From	600,000,001	1,940,000 + 0.067% of amt.
to	800,000,000	over 600,000,000
From	800,000,001	2,074,400 + 0.044% of amt.
to	4,000,000,000	over 800,000,000
Over	4,000,000,000	3,482,400 + 0.025% of amt. over 4,000,000,000 Maximum of 12,574,000

6.2 The arbitral tribunal's fees shall cover the activities of an arbitrator from the time of his or her confirmation or appointment until the last award.

6.3 Claims and counterclaims are added for the determination of the amount in dispute. The same rule applies to any set-off defence or cross-claim, unless the arbitral tribunal, after consulting with the parties, concludes that such set-off defence or cross-claim will not require significant additional work.

6.4 An interest claim shall not be taken into account for the calculation of the amount in dispute, except where HKIAC determines that doing so would be appropriate.

6.5 Where there are alternative claims, only the principal claim shall be taken into account for the calculation of the amount in dispute, except where HKIAC considers it appropriate to take into account the amount of any alternative claim.

6.6 Pursuant to Articles 10.3(c), 18.2, 27.15, 28.10 or 30.2 or in other exceptional circumstances, the arbitral tribunal's fees may exceed the amounts calculated in accordance with paragraph 6.1.

6.7 If the amount in dispute is not quantified, the arbitral tribunal's fees shall be fixed by HKIAC, taking into account the circumstances of the case.

7. Lien on Award

HKIAC and the arbitral tribunal shall have a lien over any awards issued by the tribunal to secure the payment of their outstanding fees and expenses, and may accordingly refuse to communicate any such awards to the parties until all such fees and expenses have been paid in full, whether jointly or by one or other of the parties.

8. Governing Law

The terms of this Schedule and any non-contractual obligation arising out of or in connection with it shall be governed by and construed in accordance with Hong Kong law.

SCHEDULE 4
EMERGENCY ARBITRATOR PROCEDURE

Effective 1 November 2018

1. A party requiring Emergency Relief may submit an application (the "Application") for the appointment of an emergency arbitrator to HKIAC (a) before, (b) concurrent with, or (c) following the filing of a Notice of Arbitration, but prior to the constitution of the arbitral tribunal.

2. The Application shall be submitted in accordance with any of the means specified in Articles 3.1 and 3.2 of the Rules. The Application shall include the following information:

   (a) the names and (in so far as known) the addresses, telephone and facsimile numbers and/or email addresses of the parties to the Application and of their representatives;

   (b) a description of the circumstances giving rise to the Application and of the underlying dispute referred to arbitration;

   (c) a statement of the Emergency Relief sought;

   (d) the reasons why the applicant needs the Emergency Relief on an urgent basis that cannot await the constitution of an arbitral tribunal;

   (e) the reasons why the applicant is entitled to such
   Emergency Relief;

   (f) any relevant agreement and, in particular, the arbitration agreement;

   (g) comments on the language, the seat of the Emergency Relief proceedings, and the applicable law;

   (h) confirmation of payment of the amount referred to in paragraph 5 of this Schedule (the “Application Deposit”);

   (i) the existence of any funding agreement and the identity of any third party funder pursuant to Article 44; and

(j) confirmation that copies of the Application and any supporting materials included with it have been or are being communicated simultaneously to all other parties to the arbitration by one or more means of service to be identified in such confirmation.

3. The Application may contain such other documents or information as the applicant considers appropriate or as may contribute to the efficient examination of the Application.

4. If HKIAC determines that it should accept the Application, HKIAC shall seek to appoint an emergency arbitrator within 24 hours after receipt of both the Application and the Application Deposit.

5. The Application Deposit is the amount set by HKIAC, as stated on HKIAC's website on the date the Application is submitted. The Application Deposit consists of HKIAC's emergency administrative fees and the emergency arbitrator's fees and expenses. The emergency arbitrator's fees shall be determined by reference to his or her hourly rate subject to the terms of Schedule 2 and shall not exceed the amount set by HKIAC, as stated on HKIAC's website on the date the Application is submitted unless the parties agree or HKIAC determines otherwise in exceptional circumstances. HKIAC may, at any time during the Emergency Relief proceedings, request additional deposits to cover any increase in the emergency arbitrator's fees or HKIAC's emergency administrative expenses, taking into account, inter alia, the nature of the case and the nature and amount of work performed by the emergency arbitrator and HKIAC. If the party which submitted the Application fails to pay the additional deposits within the time limit fixed by HKIAC, the Application shall be dismissed.

6. Once the emergency arbitrator has been appointed, HKIAC shall communicate the appointment to the parties to the Application and shall communicate the case file to the emergency arbitrator. Thereafter, the parties shall communicate with the emergency arbitrator directly, with a copy to all other parties to the Application and HKIAC. Any written communications from the emergency arbitrator to the parties shall also be copied to HKIAC.

7. Article 11 of the Rules shall apply to the emergency arbitrator, except that the time limits set out in Articles 11.7 and 11.9 are shortened to three days.

8. Where an emergency arbitrator dies, has been successfully challenged, has been otherwise removed, or has resigned, HKIAC shall seek to appoint a substitute emergency arbitrator within 24 hours. If an emergency arbitrator withdraws or a party agrees to terminate an emergency arbitrator's appointment under paragraph 8 of this Schedule, no acceptance of the validity of any ground referred to in Article 11.6 of the Rules shall be implied. If the emergency arbitrator is replaced, the Emergency Relief proceedings shall resume at the stage where the emergency arbitrator was replaced or ceased to perform his or her functions, unless the substitute emergency arbitrator decides otherwise.

9. If the parties have agreed on the seat of arbitration, such seat shall be the seat of the Emergency Relief proceedings. Where the parties have not agreed on the seat of arbitration, and without prejudice to the arbitral tribunal's determination of the seat of arbitration pursuant to Article 14.1 of the Rules, the seat of the Emergency Relief proceedings shall be Hong Kong.

10. Taking into account the urgency inherent in the Emergency Relief proceedings and ensuring that each party has a reasonable opportunity to be heard on the Application, the emergency arbitrator may conduct such proceedings in such a manner as the emergency arbitrator considers appropriate. The emergency arbitrator shall have the power to rule on objections that the emergency arbitrator has no jurisdiction, including any objections with respect to the existence, validity or scope of the arbitration clause or of the separate arbitration agreement, and shall resolve any disputes over the applicability of this Schedule.

11. Articles 23.2 to 23.8 shall apply, *mutatis mutandis*, to any Emergency Relief granted by the emergency arbitrator.

12. Any decision, order or award of the emergency arbitrator on the Application (the "Emergency Decision") shall be made within 14 days from the date on which HKIAC transmitted the case file to

the emergency arbitrator. This time limit may be extended by agreement of the parties or, in appropriate circumstances, by HKIAC.

13. The Emergency Decision may be made even if in the meantime the case file has been transmitted to the arbitral tribunal.

14. Any Emergency Decision shall:

(a) be made in writing;

(b) state the date when it was made and reasons upon which the Emergency Decision is based, which may be in summary form (including a determination on whether the emergency arbitrator has jurisdiction to grant the Emergency Relief); and

(a) be signed by the emergency arbitrator.

15. Any Emergency Decision may fix and apportion the costs of the Emergency Relief proceedings, subject always to the power of the arbitral tribunal to fix and apportion finally such costs in accordance with Article 34 of the Rules. The costs of the Emergency Relief proceedings include HKIAC's emergency administrative fees, the fees and expenses of the emergency arbitrator and any tribunal secretary, and the reasonable legal and other costs incurred by the parties for the Emergency Relief proceedings.

16. Any Emergency Decision shall have the same effect as an interim measure granted pursuant to Article 23 of the Rules and shall be binding on the parties when rendered.

17. Any Emergency Decision ceases to be binding:

(c) if the emergency arbitrator or the arbitral tribunal so decides;

(d) upon the arbitral tribunal rendering a final award, unless the arbitral tribunal expressly decides otherwise;

(e) the termination of the arbitration before the rendering of a final award; or

(f) if the arbitral tribunal is not constituted

within 90 days from the date of the Emergency Decision. This time limit may be extended by agreement of the parties or, in appropriate circumstances, by HKIAC.

18. Subject to paragraph 13 of this Schedule, the emergency arbitrator shall have no further power to act once the arbitral tribunal is constituted.

19. The emergency arbitrator may not act as arbitrator in any arbitration relating to the dispute that gave rise to the Application and in respect of which the emergency arbitrator has acted, unless otherwise agreed by the parties to the arbitration.

20. The Emergency Arbitrator Procedure is not intended to prevent any party from seeking urgent interim or conservatory measures from a competent authority at any time.

21. The Emergency Arbitrator Procedure shall be terminated if a Notice of Arbitration has not been submitted by the applicant to HKIAC within seven days of HKIAC's receipt of the Application, unless the emergency arbitrator extends this time limit.

22. Where the Emergency Arbitrator Procedure is terminated without an Emergency Decision, the emergency arbitrator may fix and apportion any costs of the Emergency Relief proceedings, subject to the power of the arbitral tribunal to fix and apportion finally such costs in accordance with Article 34 of the Rules.

UNCITRAL UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Model Law on International Commercial Arbitration

1985

With amendments as adopted in 2006

UNITED NATIONS

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40/72. Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law

The General Assembly,

Recognizing the value of arbitration as a method of settling disputes arising in international commercial relations,

Convinced that the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations,

Noting that the Model Law on International Commercial Arbitration[1] was adopted by the United Nations Commission on International Trade Law at its eighteenth session, after due deliberation and extensive consultation with arbitral institutions and individual experts on international commercial arbitration,

Convinced that the Model Law, together with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[2] and the Arbitration Rules of the United Nations Commission on International Trade Law[3] recommended by the General Assembly in its resolution 31/98 of 15 December 1976, significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

1. *Requests* the Secretary-General to transmit the text of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, together with the *travaux préparatoires* from the eighteenth session of the Commission, to Governments and to arbitral institutions and other interested bodies, such as chambers of commerce;

2. *Recommends* that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.

112th plenary meeting
11 December 1985

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[1] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I.

[2] United Nations, *Treaty Series*, vol. 330, No. 4739, p. 38.

[3] United Nations publication, Sales No. E.77.V.6.

[*on the report of the Sixth Committee (A/61/453)*]

61/33. Revised articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, and the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958

The General Assembly,

Recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations,

Recalling its resolution 40/72 of 11 December 1985 regarding the Model Law on International Commercial Arbitration,[1]

Recognizing the need for provisions in the Model Law to conform to current practices in international trade and modern means of contracting with regard to the form of the arbitration agreement and the granting of interim measures,

Believing that revised articles of the Model Law on the form of the arbitration agreement and interim measures reflecting those current practices will significantly enhance the operation of the Model Law,

Noting that the preparation of the revised articles of the Model Law on the form of the arbitration agreement and interim measures was the subject of due deliberation and extensive consultations with Governments and interested circles and would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes,

Believing that, in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,[2] is particularly timely,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the revised articles of its Model Law on International Commercial Arbitration on the form of the arbitration agreement and interim measures, the text of which is contained in annex I to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session,[3] and recommends that all States give favourable consideration to the enactment of the revised articles of the Model Law, or the revised Model Law on International Commercial Arbitration of the United Nations Commission on

[1] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I.

[2] United Nations, *Treaty Series*, vol. 330, No. 4739.

[3] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17).

International Trade Law, when they enact or revise their laws, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

2. *Also expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,[2] the text of which is contained in annex II to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session;[3]

3. *Requests* the Secretary-General to make all efforts to ensure that the revised articles of the Model Law and the recommendation become generally known and available.

64th plenary meeting
4 December 2006

Part One

UNCITRAL Model Law on International Commercial Arbitration

(United Nations documents A/40/17, annex I and A/61/17, annex I)

(As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006)

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application[1]

(1) This Law applies to international commercial[2] arbitration, subject to any agreement in force between this State and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(Article 1(2) has been amended by the Commission at its thirty-ninth session, in 2006)

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

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[1]Article headings are for reference purposes only and are not to be used for purposes of interpretation.

[2]The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

(b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(c) "court" means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25*(a)* and 32(2) *(a)*, refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 2 A. International origin and general principles

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 3. Receipt of written communications

(1) Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

Article 4. Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6. Court or other authority for certain functions of arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

CHAPTER II. ARBITRATION AGREEMENT

Option I

Article 7. Definition and form of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not

limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option II

Article 7. Definition of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be three.

Article 11. Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no

appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13. Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14. Failure or impossibility to act

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Article 15. Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the

matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS

(As adopted by the Commission at its thirty-ninth session, in 2006)

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 A. Conditions for granting interim measures

(1) The party requesting an interim measure under article 17(2)*(a)*, *(b)* and *(c)* shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)*(d)*, the requirements in paragraphs (1)*(a)* and *(b)* of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2. Preliminary orders

Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)*(a)*, is the harm likely to result from the order being granted or not.

Article 17 C. Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for

the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3. Provisions applicable to interim measures and preliminary orders

Article 17 D. Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 E. Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 F. Disclosure

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

Article 17 G. Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4. Recognition and enforcement of interim measures

Article 17 H. Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 I. Grounds for refusing recognition or enforcement[3]

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36(1)*(a)*(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36(1)*(b)*(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5. Court-ordered interim measures

Article 17 J. Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in

[3]The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 20. Place of arbitration

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Article 21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Article 22. Language

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23. Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Article 24. Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Article 25. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Article 27. Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence.

The court may execute the request within its competence and according to its rules on taking evidence.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 29. Decision-making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

Article 30. Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32. Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

Article 33. Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral

tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)*(a)* of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not

valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the

competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.[4]

(Article 35(2) has been amended by the Commission at its thirty-ninth session, in 2006)

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

[4]The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)*(a)*(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Part Two

Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006[1]

1. The UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the end of the eighteenth session of the Commission. The General Assembly, in its resolution 40/72 of 11 December 1985, recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice". The Model Law was amended by UNCITRAL on 7 July 2006, at the thirty-ninth session of the Commission (see below, paragraphs 4, 19, 20, 27, 29 and 53). The General Assembly, in its resolution 61/33 of 4 December 2006, recommended "that all States give favourable consideration to the enactment of the revised articles of the UNCITRAL Model Law on International Commercial Arbitration, or the revised UNCITRAL Model Law on International Commercial Arbitration, when they enact or revise their laws (…)".

2. The Model Law constitutes a sound basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world. Since its adoption by UNCITRAL, the Model Law has come to represent the accepted international legislative standard for a modern arbitration law and a significant number of jurisdictions have enacted arbitration legislation based on the Model Law.

3. The form of a model law was chosen as the vehicle for harmonization and modernization in view of the flexibility it gives to States in preparing new arbitration laws. Notwithstanding that flexibility, and in order to increase the likelihood of achieving a satisfactory degree of harmonization, States are encouraged to make

[1]This note was prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for informational purposes only; it is not an official commentary on the Model Law. A commentary prepared by the Secretariat on an early draft of the Model Law appears in document A/CN.9/264 (reproduced in UNCITRAL Yearbook, vol. XVI — 1985, United Nations publication, Sales No. E.87.V.4).

as few changes as possible when incorporating the Model Law into their legal systems. Efforts to minimize variation from the text adopted by UNCITRAL are also expected to increase the visibility of harmonization, thus enhancing the confidence of foreign parties, as the primary users of international arbitration, in the reliability of arbitration law in the enacting State.

4. The revision of the Model Law adopted in 2006 includes article 2 A, which is designed to facilitate interpretation by reference to internationally accepted principles and is aimed at promoting a uniform understanding of the Model Law. Other substantive amendments to the Model Law relate to the form of the arbitration agreement and to interim measures. The original 1985 version of the provision on the form of the arbitration agreement (article 7) was modelled on the language used in article II (2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("the New York Convention"). The revision of article 7 is intended to address evolving practice in international trade and technological developments. The extensive revision of article 17 on interim measures was considered necessary in light of the fact that such measures are increasingly relied upon in the practice of international commercial arbitration. The revision also includes an enforcement regime for such measures in recognition of the fact that the effectiveness of arbitration frequently depends upon the possibility of enforcing interim measures. The new provisions are contained in a new chapter of the Model Law on interim measures and preliminary orders (chapter IV A).

A. Background to the Model Law

5. The Model Law was developed to address considerable disparities in national laws on arbitration. The need for improvement and harmonization was based on findings that national laws were often particularly inappropriate for international cases.

1. Inadequacy of domestic laws

6. Recurrent inadequacies to be found in outdated national laws include provisions that equate the arbitral process with court litigation and fragmentary provisions that fail to address all relevant substantive law issues. Even most of those laws that appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind. While this approach is understandable in view of the fact that even today the bulk of cases governed by arbitration law would be of a purely domestic nature, the unfortunate consequence is that traditional local concepts are imposed on international cases and the needs of modern practice are often not met.

7. The expectations of the parties as expressed in a chosen set of arbitration rules or a "one-off" arbitration agreement may be frustrated, especially by mandatory provisions of applicable law. Unexpected and undesired restrictions found in national

laws may prevent the parties, for example, from submitting future disputes to arbitration, from selecting the arbitrator freely, or from having the arbitral proceedings conducted according to agreed rules of procedure and with no more court involvement than appropriate. Frustration may also ensue from non-mandatory provisions that may impose undesired requirements on unwary parties who may not think about the need to provide otherwise when drafting the arbitration agreement. Even the absence of any legislative provision may cause difficulties simply by leaving unanswered some of the many procedural issues relevant in arbitration and not always settled in the arbitration agreement. The Model Law is intended to reduce the risk of such possible frustration, difficulties or surprise.

2. Disparity between national laws

8. Problems stemming from inadequate arbitration laws or from the absence of specific legislation governing arbitration are aggravated by the fact that national laws differ widely. Such differences are a frequent source of concern in international arbitration, where at least one of the parties is, and often both parties are, confronted with foreign and unfamiliar provisions and procedures. Obtaining a full and precise account of the law applicable to the arbitration is, in such circumstances often expensive, impractical or impossible.

9. Uncertainty about the local law with the inherent risk of frustration may adversely affect the functioning of the arbitral process and also impact on the selection of the place of arbitration. Due to such uncertainty, a party may hesitate or refuse to agree to a place, which for practical reasons would otherwise be appropriate. The range of places of arbitration acceptable to parties is thus widened and the smooth functioning of the arbitral proceedings is enhanced where States adopt the Model Law, which is easily recognizable, meets the specific needs of international commercial arbitration and provides an international standard based on solutions acceptable to parties from different legal systems.

B. Salient features of the Model Law

1. Special procedural regime for international commercial arbitration

10. The principles and solutions adopted in the Model Law aim at reducing or eliminating the above-mentioned concerns and difficulties. As a response to the inadequacies and disparities of national laws, the Model Law presents a special legal regime tailored to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Law. While the Model Law was designed with international commercial arbitration in mind, it offers a set of basic rules that are not, in and of themselves, unsuitable to any other type of arbitration. States may thus consider extending their enactment of the Model Law to cover also domestic disputes, as a number of enacting States already have.

(a) Substantive and territorial scope of application

11. Article 1 defines the scope of application of the Model Law by reference to the notion of "international commercial arbitration". The Model Law defines an arbitration as international if "the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States" (article 1 (3)). The vast majority of situations commonly regarded as international will meet this criterion. In addition, article 1 (3) broadens the notion of internationality so that the Model Law also covers cases where the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated outside the State where the parties have their place of business, or cases where the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country. Article 1 thus recognizes extensively the freedom of the parties to submit a dispute to the legal regime established pursuant to the Model Law.

12. In respect of the term "commercial", the Model Law provides no strict definition. The footnote to article 1 (1) calls for "a wide interpretation" and offers an illustrative and open-ended list of relationships that might be described as commercial in nature, "whether contractual or not". The purpose of the footnote is to circumvent any technical difficulty that may arise, for example, in determining which transactions should be governed by a specific body of "commercial law" that may exist in some legal systems.

13. Another aspect of applicability is the territorial scope of application. The principle embodied in article 1 (2) is that the Model Law as enacted in a given State applies only if the place of arbitration is in the territory of that State. However, article 1 (2) also contains important exceptions to that principle, to the effect that certain articles apply, irrespective of whether the place of arbitration is in the enacting State or elsewhere (or, as the case may be, even before the place of arbitration is determined). These articles are the following: articles 8 (1) and 9, which deal with the recognition of arbitration agreements, including their compatibility with interim measures ordered by a court, article 17 J on court-ordered interim measures, articles 17 H and 17 I on the recognition and enforcement of interim measures ordered by an arbitral tribunal, and articles 35 and 36 on the recognition and enforcement of arbitral awards.

14. The territorial criterion governing most of the provisions of the Model Law was adopted for the sake of certainty and in view of the following facts. In most legal systems, the place of arbitration is the exclusive criterion for determining the applicability of national law and, where the national law allows parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties rarely make use of that possibility. Incidentally, enactment of the Model Law reduces any need for the parties to choose a "foreign" law, since the Model Law grants the parties wide freedom in shaping the rules of the arbitral proceedings. In addition to designating the law governing the arbitral procedure, the territorial criterion is of considerable practical importance in respect of articles 11, 13, 14, 16, 27 and 34, which entrust State courts at the place of

arbitration with functions of supervision and assistance to arbitration. It should be noted that the territorial criterion legally triggered by the parties' choice regarding the place of arbitration does not limit the arbitral tribunal's ability to meet at any place it considers appropriate for the conduct of the proceedings, as provided by article 20 (2).

(b) Delimitation of court assistance and supervision

15. Recent amendments to arbitration laws reveal a trend in favour of limiting and clearly defining court involvement in international commercial arbitration. This is justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process.

16. In this spirit, the Model Law envisages court involvement in the following instances. A first group comprises issues of appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions that should be entrusted, for the sake of centralization, specialization and efficiency, to a specially designated court or, with respect to articles 11, 13 and 14, possibly to another authority (for example, an arbitral institution or a chamber of commerce). A second group comprises issues of court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures (articles 8 and 9), court-ordered interim measures (article 17 J), and recognition and enforcement of interim measures (articles 17 H and 17 I) and of arbitral awards (articles 35 and 36).

17. Beyond the instances in these two groups, "no court shall intervene, in matters governed by this Law". Article 5 thus guarantees that all instances of possible court intervention are found in the piece of legislation enacting the Model Law, except for matters not regulated by it (for example, consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits). Protecting the arbitral process from unpredictable or disruptive court interference is essential to parties who choose arbitration (in particular foreign parties).

2. Arbitration agreement

18. Chapter II of the Model Law deals with the arbitration agreement, including its recognition by courts.

(a) Definition and form of arbitration agreement

19. The original 1985 version of the provision on the definition and form of arbitration agreement (article 7) closely followed article II (2) of the New York

Convention, which requires that an arbitration agreement be in writing. If the parties have agreed to arbitrate, but they entered into the arbitration agreement in a manner that does not meet the form requirement, any party may have grounds to object to the jurisdiction of the arbitral tribunal. It was pointed out by practitioners that, in a number of situations, the drafting of a written document was impossible or impractical. In such cases, where the willingness of the parties to arbitrate was not in question, the validity of the arbitration agreement should be recognized. For that reason, article 7 was amended in 2006 to better conform to international contract practices. In amending article 7, the Commission adopted two options, which reflect two different approaches on the question of definition and form of arbitration agreement. The first approach follows the detailed structure of the original 1985 text. It confirms the validity and effect of a commitment by the parties to submit to arbitration an existing dispute ("*compromis*") or a future dispute ("*clause compromissoire*"). It follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the "contents" of the agreement "in any form" as equivalent to traditional "writing". The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule is significant in that it no longer requires signatures of the parties or an exchange of messages between the parties. It modernizes the language referring to the use of electronic commerce by adopting wording inspired from the 1996 UNCITRAL Model Law on Electronic Commerce and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts. It covers the situation of "an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another". It also states that "the reference in a contract to any document" (for example, general conditions) "containing an arbitration clause constitutes an arbitration agreement in writing provided that the reference is such as to make that clause part of the contract". It thus clarifies that applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration agreement allegedly made "by reference". The second approach defines the arbitration agreement in a manner that omits any form requirement. No preference was expressed by the Commission in favour of either option I or II, both of which are offered for enacting States to consider, depending on their particular needs, and by reference to the legal context in which the Model Law is enacted, including the general contract law of the enacting State. Both options are intended to preserve the enforceability of arbitration agreements under the New York Convention.

20. In that respect, the Commission also adopted, at its thirty-ninth session in 2006, a "Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958" (A/61/17, Annex 2).[2] The General Assembly, in its resolution 61/33 of 4 December 2006 noted that "in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and

[2]Reproduced in Part Three hereafter.

Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, is particularly timely". The Recommendation was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards. The Recommendation encourages States to apply article II (2) of the New York Convention "recognizing that the circumstances described therein are not exhaustive". In addition, the Recommendation encourages States to adopt the revised article 7 of the Model Law. Both options of the revised article 7 establish a more favourable regime for the recognition and enforcement of arbitral awards than that provided under the New York Convention. By virtue of the "more favourable law provision" contained in article VII (1) of the New York Convention, the Recommendation clarifies that "any interested party" should be allowed "to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement".

(b) Arbitration agreement and the courts

21. Articles 8 and 9 deal with two important aspects of the complex relationship between the arbitration agreement and the resort to courts. Modelled on article II (3) of the New York Convention, article 8 (1) of the Model Law places any court under an obligation to refer the parties to arbitration if the court is seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request, which a party may make not later than when submitting its first statement on the substance of the dispute. This provision, where adopted by a State enacting the Model Law, is by its nature binding only on the courts of that State. However, since article 8 is not limited in scope to agreements providing for arbitration to take place in the enacting State, it promotes the universal recognition and effect of international commercial arbitration agreements.

22. Article 9 expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law (for example, pre-award attachments) are compatible with an arbitration agreement. That provision is ultimately addressed to the courts of any State, insofar as it establishes the compatibility between interim measures possibly issued by any court and an arbitration agreement, irrespective of the place of arbitration. Wherever a request for interim measures may be made to a court, it may not be relied upon, under the Model Law, as a waiver or an objection against the existence or effect of the arbitration agreement.

3. Composition of arbitral tribunal

23. Chapter III contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of an arbitrator. The chapter illustrates the

general approach taken by the Model Law in eliminating difficulties that arise from inappropriate or fragmentary laws or rules. First, the approach recognizes the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an ad hoc agreement, the procedure to be followed, subject to the fundamental requirements of fairness and justice. Secondly, where the parties have not exercised their freedom to lay down the rules of procedure or they have failed to cover a particular issue, the Model Law ensures, by providing a set of suppletive rules, that the arbitration may commence and proceed effectively until the dispute is resolved.

24. Where under any procedure, agreed upon by the parties or based upon the suppletive rules of the Model Law, difficulties arise in the process of appointment, challenge or termination of the mandate of an arbitrator, articles 11, 13 and 14 provide for assistance by courts or other competent authorities designated by the enacting State. In view of the urgency of matters relating to the composition of the arbitral tribunal or its ability to function, and in order to reduce the risk and effect of any dilatory tactics, short time-periods are set and decisions rendered by courts or other authorities on such matters are not appealable.

4. Jurisdiction of arbitral tribunal

(a) Competence to rule on own jurisdiction

25. Article 16 (1) adopts the two important (not yet generally recognized) principles of "*Kompetenz-Kompetenz*" and of separability or autonomy of the arbitration clause. "*Kompetenz-Kompetenz*" means that the arbitral tribunal may independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to a court. Separability means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract. As a consequence, a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Detailed provisions in paragraph (2) require that any objections relating to the arbitrators' jurisdiction be made at the earliest possible time.

26. The competence of the arbitral tribunal to rule on its own jurisdiction (i.e. on the foundation, content and extent of its mandate and power) is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16 (3) allows for immediate court control in order to avoid waste of time and money. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending before the court. In those cases where the arbitral tribunal decides to combine its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36.

(b) Power to order interim measures and preliminary orders

27. Chapter IV A on interim measures and preliminary orders was adopted by the Commission in 2006. It replaces article 17 of the original 1985 version of the Model Law. Section 1 provides a generic definition of interim measures and sets out the conditions for granting such measures. An important innovation of the revision lies in the establishment (in section 4) of a regime for the recognition and enforcement of interim measures, which was modelled, as appropriate, on the regime for the recognition and enforcement of arbitral awards under articles 35 and 36 of the Model Law.

28. Section 2 of chapter IV A deals with the application for, and conditions for the granting of, preliminary orders. Preliminary orders provide a means for preserving the status quo until the arbitral tribunal issues an interim measure adopting or modifying the preliminary order. Article 17 B (1) provides that "a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested". Article 17 B (2) permits an arbitral tribunal to grant a preliminary order if "it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure". Article 17 C contains carefully drafted safeguards for the party against whom the preliminary order is directed, such as prompt notification of the application for the preliminary order and of the preliminary order itself (if any), and an opportunity for that party to present its case "at the earliest practicable time". In any event, a preliminary order has a maximum duration of twenty days and, while binding on the parties, is not subject to court enforcement and does not constitute an award. The term "preliminary order" is used to emphasize its limited nature.

29. Section 3 sets out rules applicable to both preliminary orders and interim measures.

30. Section 5 includes article 17 J on interim measures ordered by courts in support of arbitration, and provides that "a court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of the enacting State, as it has in relation to proceedings in courts". That article has been added in 2006 to put it beyond any doubt that the existence of an arbitration agreement does not infringe on the powers of the competent court to issue interim measures and that the party to such an arbitration agreement is free to approach the court with a request to order interim measures.

5. Conduct of arbitral proceedings

31. Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings. Article 18, which sets out fundamental requirements of procedural justice, and article 19 on the rights and powers to determine the rules of procedure, express principles that are central to the Model Law.

(a) Fundamental procedural rights of a party

32. Article 18 embodies the principles that the parties shall be treated with equality and given a full opportunity of presenting their case. A number of provisions illustrate those principles. For example, article 24 (1) provides that, unless the parties have agreed that no oral hearings be held for the presentation of evidence or for oral argument, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. It should be noted that article 24 (1) deals only with the general entitlement of a party to oral hearings (as an alternative to proceedings conducted on the basis of documents and other materials) and not with the procedural aspects, such as the length, number or timing of hearings.

33. Another illustration of those principles relates to evidence by an expert appointed by the arbitral tribunal. Article 26 (2) requires the expert, after delivering his or her written or oral report, to participate in a hearing where the parties may put questions to the expert and present expert witnesses to testify on the points at issue, if such a hearing is requested by a party or deemed necessary by the arbitral tribunal. As another provision aimed at ensuring fairness, objectivity and impartiality, article 24 (3) provides that all statements, documents and other information supplied to the arbitral tribunal by one party shall be communicated to the other party, and that any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. In order to enable the parties to be present at any hearing and at any meeting of the arbitral tribunal for inspection purposes, they shall be given sufficient notice in advance (article 24 (2)).

(b) Determination of rules of procedure

34. Article 19 guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a few mandatory provisions on procedure, and empowers the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

35. Autonomy of the parties in determining the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional and possibly conflicting domestic concepts, thus obviating the earlier mentioned risk of frustration or surprise (see above, paras. 7 and 9). The supplementary discretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without being hindered by any restraint that may stem from traditional local law, including any domestic rule on evidence. Moreover, it provides grounds for displaying initiative in solving any procedural question not regulated in the arbitration agreement or the Model Law.

36. In addition to the general provisions of article 19, other provisions in the Model Law recognize party autonomy and, failing agreement, empower the arbitral tribunal to decide on certain matters. Examples of particular practical importance in international cases are article 20 on the place of arbitration and article 22 on the language to be used in the proceedings.

(c) Default of a party

37. The arbitral proceedings may be continued in the absence of a party, provided that due notice has been given. This applies, in particular, to the failure of the respondent to communicate its statement of defence (article 25 *(b)*). The arbitral tribunal may also continue the proceedings where a party fails to appear at a hearing or to produce documentary evidence without showing sufficient cause for the failure (article 25 *(c)*). However, if the claimant fails to submit its statement of claim, the arbitral tribunal is obliged to terminate the proceedings (article 25 *(a)*).

38. Provisions that empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance. As experience shows, it is not uncommon for one of the parties to have little interest in cooperating or expediting matters. Such provisions therefore provide international commercial arbitration its necessary effectiveness, within the limits of fundamental requirements of procedural justice.

6. Making of award and termination of proceedings

(a) Rules applicable to substance of dispute

39. Article 28 deals with the determination of the rules of law governing the substance of the dispute. Under paragraph (1), the arbitral tribunal decides the dispute in accordance with the rules of law chosen by the parties. This provision is significant in two respects. It grants the parties the freedom to choose the applicable substantive law, which is important where the national law does not clearly or fully recognize that right. In addition, by referring to the choice of "rules of law" instead of "law", the Model Law broadens the range of options available to the parties as regards the designation of the law applicable to the substance of the dispute. For example, parties may agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. Parties could also choose directly an instrument such as the United Nations Convention on Contracts for the International Sale of Goods as the body of substantive law governing the arbitration, without having to refer to the national law of any State party to that Convention. The power of the arbitral tribunal, on the other hand, follows more traditional lines. When the parties have not chosen the applicable law, the arbitral tribunal shall apply the law (i.e., the national law) determined by the conflict-of-laws rules that it considers applicable.

40. Article 28 (3) recognizes that the parties may authorize the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiables compositeur*. This type of arbitration (where the arbitral tribunal may decide the dispute on the basis of principles it believes to be just, without having to refer to any particular body of law) is currently not known or used in all legal systems. The Model Law does not intend to regulate this area. It simply calls the attention of the parties on the need to provide clarification in the arbitration agreement and specifically to empower the arbitral tribunal. However, paragraph (4) makes it clear that in all cases where the dispute relates to a contract (including arbitration *ex aequo et bono*) the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

(b) Making of award and other decisions

41. In its rules on the making of the award (articles 29-31), the Model Law focuses on the situation where the arbitral tribunal consists of more than one arbitrator. In such a situation, any award and other decision shall be made by a majority of the arbitrators, except on questions of procedure, which may be left to a presiding arbitrator. The majority principle applies also to the signing of the award, provided that the reason for any omitted signature is stated.

42. Article 31 (3) provides that the award shall state the place of arbitration and shall be deemed to have been made at that place. The effect of the deeming provision is to emphasize that the final making of the award constitutes a legal act, which in practice does not necessarily coincide with one factual event. For the same reason that the arbitral proceedings need not be carried out at the place designated as the legal "place of arbitration", the making of the award may be completed through deliberations held at various places, by telephone or correspondence. In addition, the award does not have to be signed by the arbitrators physically gathering at the same place.

43. The arbitral award must be in writing and state its date. It must also state the reasons on which it is based, unless the parties have agreed otherwise or the award is "on agreed terms" (i.e., an award that records the terms of an amicable settlement by the parties). It may be added that the Model Law neither requires nor prohibits "dissenting opinions".

7. Recourse against award

44. The disparity found in national laws as regards the types of recourse against an arbitral award available to the parties presents a major difficulty in harmonizing international arbitration legislation. Some outdated laws on arbitration, by establishing parallel regimes for recourse against arbitral awards or against court decisions, provide various types of recourse, various (and often long) time periods for exercising the recourse, and extensive lists of grounds on which recourse may be based.

That situation (of considerable concern to those involved in international commercial arbitration) is greatly improved by the Model Law, which provides uniform grounds upon which (and clear time periods within which) recourse against an arbitral award may be made.

(a) Application for setting aside as exclusive recourse

45. The first measure of improvement is to allow only one type of recourse, to the exclusion of any other recourse regulated in any procedural law of the State in question. Article 34 (1) provides that the sole recourse against an arbitral award is by application for setting aside, which must be made within three months of receipt of the award (article 34 (3)). In regulating "recourse" (i.e., the means through which a party may actively "attack" the award), article 34 does not preclude a party from seeking court control by way of defence in enforcement proceedings (articles 35 and 36). Article 34 is limited to action before a court (i.e., an organ of the judicial system of a State). However, a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades).

(b) Grounds for setting aside

46. As a further measure of improvement, the Model Law lists exhaustively the grounds on which an award may be set aside. This list essentially mirrors that contained in article 36 (1), which is taken from article V of the New York Convention. The grounds provided in article 34 (2) are set out in two categories. Grounds which are to be proven by one party are as follows: lack of capacity of the parties to conclude an arbitration agreement; lack of a valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case; the award deals with matters not covered by the submission to arbitration; the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, to the Model Law. Grounds that a court may consider of its own initiative are as follows: non-arbitrability of the subject-matter of the dispute or violation of public policy (which is to be understood as serious departures from fundamental notions of procedural justice).

47. The approach under which the grounds for setting aside an award under the Model Law parallel the grounds for refusing recognition and enforcement of the award under article V of the New York Convention is reminiscent of the approach taken in the European Convention on International Commercial Arbitration (Geneva, 1961). Under article IX of the latter Convention, the decision of a foreign court to set aside an award for a reason other than the ones listed in article V of the New York Convention does not constitute a ground for refusing enforcement. The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside.

48. Although the grounds for setting aside as set out in article 34 (2) are almost identical to those for refusing recognition or enforcement as set out in article 36 (1), a practical difference should be noted. An application for setting aside under article 34 (2) may only be made to a court in the State where the award was rendered whereas an application for enforcement might be made in a court in any State. For that reason, the grounds relating to public policy and non-arbitrability may vary in substance with the law applied by the court (in the State of setting aside or in the State of enforcement).

8. Recognition and enforcement of awards

49. The eighth and last chapter of the Model Law deals with the recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the New York Convention.

(a) Towards uniform treatment of all awards irrespective of country of origin

50. By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law distinguishes between "international" and "non-international" awards instead of relying on the traditional distinction between "foreign" and "domestic" awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration legally takes place. Consequently, the recognition and enforcement of "international" awards, whether "foreign" or "domestic", should be governed by the same provisions.

51. By modelling the recognition and enforcement rules on the relevant provisions of the New York Convention, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.

(b) Procedural conditions of recognition and enforcement

52. Under article 35 (1) any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35 (2) and of article 36 (the latter of which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.

53. The Model Law does not lay down procedural details of recognition and enforcement, which are left to national procedural laws and practices. The Model Law merely sets certain conditions for obtaining enforcement under article 35 (2). It was amended in 2006 to liberalize formal requirements and reflect the amendment made to article 7 on the form of the arbitration agreement. Presentation of a copy of the arbitration agreement is no longer required under article 35 (2).

(c) Grounds for refusing recognition or enforcement

54. Although the grounds on which recognition or enforcement may be refused under the Model Law are identical to those listed in article V of the New York Convention, the grounds listed in the Model Law are relevant not only to foreign awards but to all awards rendered in the sphere of application of the piece of legislation enacting the Model Law. Generally, it was deemed desirable to adopt, for the sake of harmony, the same approach and wording as this important Convention. However, the first ground on the list as contained in the New York Convention (which provides that recognition and enforcement may be refused if "the parties to the arbitration agreement were, under the law applicable to them, under some incapacity") was modified since it was viewed as containing an incomplete and potentially misleading conflict-of-laws rule.

Further information on the Model Law may be obtained from:

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Part Three

Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

Conscious of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

Recalling successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,[1] has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference "considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes",

Bearing in mind differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

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[1]United Nations, *Treaty Series*, vol. 330, No. 4739.

Taking into account article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

Considering the wide use of electronic commerce,

Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration,[2] as subsequently revised, particularly with respect to article 7,[3] the UNCITRAL Model Law on Electronic Commerce,[4] the UNCITRAL Model Law on Electronic Signatures[5] and the United Nations Convention on the Use of Electronic Communications in International Contracts,[6]

Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

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[2]*Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I, and United Nations publication, Sales No. E.95.V.18.

[3]Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), annex I.

[4]Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I, and United Nations publication, Sales No. E.99.V.4, which contains also an additional article 5 bis, adopted in 1998, and the accompanying Guide to Enactment.

[5]Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

[6]General Assembly resolution 60/21, annex.

UNCITRAL
UNITED NATIONS
COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Arbitration Rules

(with new article 1, paragraph 4, as adopted in 2013)

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

UNITED NATIONS

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

Article 1. Scope of application

Applicability of the Rules

1. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ("treaty")* concluded on or after 1 April 2014 unless the Parties to the treaty** have agreed otherwise.

2. In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1 April 2014, these Rules shall apply only when:

(a) The parties to an arbitration (the "disputing parties") agree to their application in respect of that arbitration; or

(b) The Parties to the treaty or, in the case of a multilateral treaty, the State of the claimant and the respondent State, have agreed after 1 April 2014 to their application.

Application of the Rules

3. In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty:

(a) The disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty;

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*For the purposes of the Rules on Transparency, a "treaty" shall be understood broadly as encompassing any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty.

**For the purposes of the Rules on Transparency, any reference to a "Party to the treaty" or a "State" includes, for example, a regional economic integration organization where it is a Party to the treaty.

(b) The arbitral tribunal shall have the power, besides its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case, after consultation with the disputing parties, if such adaptation is necessary to conduct the arbitration in a practical manner and is consistent with the transparency objective of these Rules.

Discretion and authority of the arbitral tribunal

4. Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account:

(a) The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and

(b) The disputing parties' interest in a fair and efficient resolution of their dispute.

5. These Rules shall not affect any authority that the arbitral tribunal may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third persons.

6. In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail.

Applicable instrument in case of conflict

7. Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is a conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail. Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail.

8. Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the disputing parties cannot derogate, that provision shall prevail.

Application in non-UNCITRAL arbitrations

9. These Rules are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings.

Article 2. Publication of information at the commencement of arbitral proceedings

Once the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to the repository referred to under article 8. Upon receipt of the notice of arbitration from the respondent, or upon receipt of the notice of arbitration and a record of its transmission to the respondent, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made.

Article 3. Publication of documents

1. Subject to article 7, the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.

2. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.

3. Subject to article 7, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 or 2 above. This may include, for example, making such documents available at a specified site.

4. The documents to be made available to the public pursuant to paragraphs 1 and 2 shall be communicated by the arbitral tribunal to the repository referred to under article 8 as soon as possible, subject to any relevant arrangements or time limits for the protection of confidential or protected information prescribed under article 7. The documents to be made available pursuant to paragraph 3 may be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, if applicable, in a redacted form in accordance with article 7. The repository shall make all documents available in a timely manner, in the form and in the language in which it receives them.

5. A person granted access to documents under paragraph 3 shall bear any administrative costs of making those documents available to that person, such as the costs of photocopying or shipping documents to that person, but not the costs of making those documents available to the public through the repository.

Article 4. Submission by a third person

1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty ("third person(s)"), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.

2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal:

(a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person);

(b) Disclose any connection, direct or indirect, which the third person has with any disputing party;

(c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 per cent of its overall operations annually);

(d) Describe the nature of the interest that the third person has in the arbitration; and

(e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.

3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:

(a) Whether the third person has a significant interest in the arbitral proceedings; and

(b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

4. The submission filed by the third person shall:

(a) Be dated and signed by the person filing the submission on behalf of the third person;

(b) Be concise, and in no case longer than as authorized by the arbitral tribunal;

(c) Set out a precise statement of the third person's position on issues; and

(d) Address only matters within the scope of the dispute.

5. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the third person.

Article 5. Submission by a non-disputing Party to the treaty

1. The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty.

2. The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the

scope of the dispute from a non-disputing Party to the treaty. In determining whether to allow such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3, and, for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.

3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.

4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

5. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty.

Article 6. Hearings

1. Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument ("hearings") shall be public.

2. Where there is a need to protect confidential information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.

3. The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate). However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.

Article 7. Exceptions to transparency

Confidential or protected information

1. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred

to in paragraphs 3 and 4, shall not be made available to the public pursuant to articles 2 to 6.

2. Confidential or protected information consists of:

(a) Confidential business information;

(b) Information that is protected against being made available to the public under the treaty;

(c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or

(d) Information the disclosure of which would impede law enforcement.

3. The arbitral tribunal, after consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, as appropriate:

(a) Time limits in which a disputing party, non-disputing Party to the treaty or third person shall give notice that it seeks protection for such information in documents;

(b) Procedures for the prompt designation and redaction of the particular confidential or protected information in such documents; and

(c) Procedures for holding hearings in private to the extent required by article 6, paragraph 2.

Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties.

4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party to the treaty or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.

5. Nothing in these Rules requires a respondent State to make available to the public information the disclosure of which it considers to be contrary to its essential security interests.

Integrity of the arbitral process

6. Information shall not be made available to the public pursuant to articles 2 to 6 where the information, if made available to the public, would jeopardize the integrity of the arbitral process as determined pursuant to paragraph 7.

7. The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardize the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for disputing parties or members of the arbitral tribunal, or in comparably exceptional circumstances.

Article 8. Repository of published information

The repository of published information under the Rules on Transparency shall be the Secretary-General of the United Nations or an institution named by UNCITRAL.

IBA Rules on the Taking of Evidence in International Arbitration

Adopted by a resolution of
the IBA Council
29 May 2010
International Bar Association

the global voice of
the legal profession®

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'[In addition to the institutional, ad hoc or other rules chosen by the parties,] [t]he parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence as current on the date of [this agreement/the commencement of the arbitration].'

In addition, parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, at the commencement of the arbitration, or at any time thereafter. They may also vary them or use them as guidelines in developing their own procedures.

The IBA Rules of Evidence were adopted by resolution of the IBA Council on 29 May 2010. The IBA Rules of Evidence are available in English, and translations in other languages are planned. Copies of the IBA Rules of Evidence may be ordered from the IBA, and the Rules are available to download at **http://tinyurl.com/iba-Arbitration-Guidelines.**

Guido S Tawil
Judith Gill, QC
Co-Chairs, Arbitration Committee
29 May 2010

The Rules

Preamble

1. These IBA Rules on the Taking of Evidence in International Arbitration are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions. They are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration.
2. Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration.
3. The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely.

Definitions

In the IBA Rules of Evidence:

'Arbitral Tribunal' means a sole arbitrator or a panel of arbitrators;

'Claimant' means the Party or Parties who commenced the arbitration and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties;

'Document' means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means;

'Evidentiary Hearing' means any hearing, whether or not held on consecutive days, at which the Arbitral Tribunal, whether in person, by teleconference, videoconference or other method, receives oral or other evidence;

'Expert Report' means a written statement by a Tribunal-Appointed Expert or a Party-Appointed Expert;

'General Rules' mean the institutional, ad hoc or other rules that apply to the conduct of the arbitration;

'IBA Rules of Evidence' or *'Rules'* means these IBA Rules on the Taking of Evidence in International Arbitration, as they may be revised or amended from time to time;

'Party' means a party to the arbitration;

'Party-Appointed Expert' means a person or organisation appointed by a Party in order to report on specific issues determined by the Party;

'Request to Produce' means a written request by a Party that another Party produce Documents;

'Respondent' means the Party or Parties against whom the Claimant made its claim, and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties, and includes a Respondent making a counter-claim;

'Tribunal-Appointed Expert' means a person or organisation appointed by the Arbitral Tribunal in order to report to it on specific issues determined by the Arbitral Tribunal; and

'Witness Statement' means a written statement of testimony by a witness of fact.

Article 1 Scope of Application

1. Whenever the Parties have agreed or the Arbitral Tribunal has determined to apply the IBA Rules of Evidence, the Rules shall govern the taking of evidence, except to the extent that any specific provision of them may be found to be in conflict with any mandatory provision of law determined to be applicable to the case by the Parties or by the Arbitral Tribunal.
2. Where the Parties have agreed to apply the IBA Rules of Evidence, they shall be deemed to have agreed, in the absence of a contrary indication, to the version as current on the date of such agreement.
3. In case of conflict between any provisions of the IBA Rules of Evidence and the General Rules, the Arbitral Tribunal shall apply the IBA Rules of

Evidence in the manner that it determines best in order to accomplish the purposes of both the General Rules and the IBA Rules of Evidence, unless the Parties agree to the contrary.

4. In the event of any dispute regarding the meaning of the IBA Rules of Evidence, the Arbitral Tribunal shall interpret them according to their purpose and in the manner most appropriate for the particular arbitration.
5. Insofar as the IBA Rules of Evidence and the General Rules are silent on any matter concerning the taking of evidence and the Parties have not agreed otherwise, the Arbitral Tribunal shall conduct the taking of evidence as it deems appropriate, in accordance with the general principles of the IBA Rules of Evidence.

Article 2 Consultation on Evidentiary Issues

1. The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.
2. The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including:
   (a) the preparation and submission of Witness Statements and Expert Reports;
   (b) the taking of oral testimony at any Evidentiary Hearing;
   (c) the requirements, procedure and format applicable to the production of Documents;
   (d) the level of confidentiality protection to be afforded to evidence in the arbitration; and
   (e) the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence.
3. The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues:
   (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or
   (b) for which a preliminary determination may be appropriate.

Article 3 Documents

1. Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party.
2. Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce.
3. A Request to Produce shall contain:
   (a) *(i)* a description of each requested Document sufficient to identify it, or
   (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
   (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
   (c) *(i)* a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and
   (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.
4. Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection.
5. If the Party to whom the Request to Produce is addressed has an objection to some or all of the

Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3.

6. Upon receipt of any such objection, the Arbitral Tribunal may invite the relevant Parties to consult with each other with a view to resolving the objection.
7. Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that *(i)* the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; *(ii)* none of the reasons for objection set forth in Article 9.2 applies; and *(iii)* the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.
8. In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.
9. If a Party wishes to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such

steps itself. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing, and the request shall contain the particulars set forth in Article 3.3, as applicable. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that *(i)* the Documents would be relevant to the case and material to its outcome, *(ii)* the requirements of Article 3.3, as applicable, have been satisfied and *(iii)* none of the reasons for objection set forth in Article 9.2 applies.

10. At any time before the arbitration is concluded, the Arbitral Tribunal may *(i)* request any Party to produce Documents, *(ii)* request any Party to use its best efforts to take or *(iii)* itself take, any step that it considers appropriate to obtain Documents from any person or organisation. A Party to whom such a request for Documents is addressed may object to the request for any of the reasons set forth in Article 9.2. In such cases, Article 3.4 to Article 3.8 shall apply correspondingly.
11. Within the time ordered by the Arbitral Tribunal, the Parties may submit to the Arbitral Tribunal and to the other Parties any additional Documents on which they intend to rely or which they believe have become relevant to the case and material to its outcome as a consequence of the issues raised in Documents, Witness Statements or Expert Reports submitted or produced, or in other submissions of the Parties.
12. With respect to the form of submission or production of Documents:
    (a) copies of Documents shall conform to the originals and, at the request of the Arbitral Tribunal, any original shall be presented for inspection;
    (b) Documents that a Party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients, unless the Parties agree otherwise or, in the absence of such agreement, the Arbitral Tribunal decides otherwise;

(c) a Party is not obligated to produce multiple copies of Documents which are essentially identical unless the Arbitral Tribunal decides otherwise; and

(d) translations of Documents shall be submitted together with the originals and marked as translations with the original language identified.

13. Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.
14. If the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal may, after consultation with the Parties, schedule the submission of Documents and Requests to Produce separately for each issue or phase.

Article 4 Witnesses of Fact

1. Within the time ordered by the Arbitral Tribunal, each Party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony.
2. Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.
3. It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.
4. The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties Witness Statements by each witness on whose testimony it intends to rely, except for

those witnesses whose testimony is sought pursuant to Articles 4.9 or 4.10. If Evidentiary Hearings are organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal or the Parties by agreement may schedule the submission of Witness Statements separately for each issue or phase.

5. Each Witness Statement shall contain:
   (a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be
   relevant to the dispute or to the contents of the statement;
   (b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;
   (c) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing;
   (d) an affirmation of the truth of the Witness Statement; and
   (e) the signature of the witness and its date and place.
6. If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.
7. If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by

that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

8. If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement.
9. If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the Arbitral Tribunal to take such steps itself. In the case of a request to the Arbitral Tribunal, the Party shall identify the intended witness, shall describe the subjects on which the witness's testimony is sought and shall state why such subjects are relevant to the case and material to its outcome. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that the testimony of that witness would be relevant to the case and material to its outcome.
10. At any time before the arbitration is concluded, the Arbitral Tribunal may order any Party to provide for, or to use its best efforts to provide for, the appearance for testimony at an Evidentiary Hearing of any person, including one whose testimony has not yet been offered. A Party to whom such a request is addressed may object for any of the reasons set forth in Article 9.2.

Article 5 Party-Appointed Experts

1. A Party may rely on a Party-Appointed Expert as a means of evidence on specific issues. Within the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report.
2. The Expert Report shall contain:
   (a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with

any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;

(b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;

(c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;

(d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;

(e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;

(f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;

(g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;

(h) the signature of the Party-Appointed Expert and its date and place; and

(i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.

3. If Expert Reports are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Expert Reports, including reports or statements from persons not previously identified as Party-Appointed Experts, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.

4. The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or

related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore.

5. If a Party-Appointed Expert whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Expert Report by that Party-Appointed Expert related to that Evidentiary Hearing unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.
6. If the appearance of a Party-Appointed Expert has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Expert Report.

Article 6 Tribunal-Appointed Experts

1. The Arbitral Tribunal, after consulting with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal. The Arbitral Tribunal shall establish the terms of reference for any Tribunal-Appointed Expert Report after consulting with the Parties. A copy of the final terms of reference shall be sent by the Arbitral Tribunal to the Parties.
2. The Tribunal-Appointed Expert shall, before accepting appointment, submit to the Arbitral Tribunal and to the Parties a description of his or her qualifications and a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal. Within the time ordered by the Arbitral Tribunal, the Parties shall inform the Arbitral Tribunal whether they have any objections as to the Tribunal-Appointed Expert's qualifications and independence. The Arbitral Tribunal shall decide promptly whether to accept any such objection. After the appointment of a Tribunal-Appointed Expert, a Party may object to the expert's qualifications or independence only if the objection is for reasons of which the Party becomes aware

after the appointment has been made. The Arbitral Tribunal shall decide promptly what, if any, action to take.

3. Subject to the provisions of Article 9.2, the Tribunal-Appointed Expert may request a Party to provide any information or to provide access to any Documents, goods, samples, property, machinery, systems, processes or site for inspection, to the extent relevant to the case and material to its outcome. The authority of a Tribunal-Appointed Expert to request such information or access shall be the same as the authority of the Arbitral Tribunal. The Parties and their representatives shall have the right to receive any such information and to attend any such inspection. Any disagreement between a Tribunal-Appointed Expert and a Party as to the relevance, materiality or appropriateness of such a request shall be decided by the Arbitral Tribunal, in the manner provided in Articles 3.5 through 3.8. The Tribunal-Appointed Expert shall record in the Expert Report any non-compliance by a Party with an appropriate request or decision by the Arbitral Tribunal and shall describe its effects on the determination of the specific issue.

4. The Tribunal-Appointed Expert shall report in writing to the Arbitral Tribunal in an Expert Report. The Expert Report shall contain:
   (a) the full name and address of the Tribunal-Appointed Expert, and a description of his or her background, qualifications, training and experience;
   (b) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
   (c) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Tribunal-Appointed Expert relies that have not already been submitted shall be provided;
   (d) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Tribunal-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;

(e) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;
(f) the signature of the Tribunal-Appointed Expert and its date and place; and
(g) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.

5. The Arbitral Tribunal shall send a copy of such Expert Report to the Parties. The Parties may examine any information, Documents, goods, samples, property, machinery, systems, processes or site for inspection that the Tribunal-Appointed Expert has examined and any correspondence between the Arbitral Tribunal and the Tribunal-Appointed Expert. Within the time ordered by the Arbitral Tribunal, any Party shall have the opportunity to respond to the Expert Report in a submission by the Party or through a Witness Statement or an Expert Report by a Party-Appointed Expert. The Arbitral Tribunal shall send the submission, Witness Statement or Expert Report to the Tribunal-Appointed Expert and to the other Parties.
6. At the request of a Party or of the Arbitral Tribunal, the Tribunal-Appointed Expert shall be present at an Evidentiary Hearing. The Arbitral Tribunal may question the Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert on issues raised in his or her Expert Report, the Parties' submissions or Witness Statement or the Expert Reports made by the Party-Appointed Experts pursuant to Article 6.5.
7. Any Expert Report made by a Tribunal-Appointed Expert and its conclusions shall be assessed by the Arbitral Tribunal with due regard to all circumstances of the case.
8. The fees and expenses of a Tribunal-Appointed Expert, to be funded in a manner determined by the Arbitral Tribunal, shall form part of the costs of the arbitration.

Article 7 Inspection

Subject to the provisions of Article 9.2, the Arbitral Tribunal may, at the request of a Party or on its own motion, inspect or require the inspection by a Tribunal-

Appointed Expert or a Party-Appointed Expert of any site, property, machinery or any other goods, samples, systems, processes or Documents, as it deems appropriate. The Arbitral Tribunal shall, in consultation with the Parties, determine the timing and arrangement for the inspection. The Parties and their representatives shall have the right to attend any such inspection.

Article 8 Evidentiary Hearing

1. Within the time ordered by the Arbitral Tribunal, each Party shall inform the Arbitral Tribunal and the other Parties of the witnesses whose appearance it requests. Each witness (which term includes, for the purposes of this Article, witnesses of fact and any experts) shall, subject to Article 8.2, appear for testimony at the Evidentiary Hearing if such person's appearance has been requested by any Party or by the Arbitral Tribunal. Each witness shall appear in person unless the Arbitral Tribunal allows the use of videoconference or similar technology with respect to a particular witness.
2. The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2. Questions to a witness during direct and re-direct testimony may not be unreasonably leading.
3. With respect to oral testimony at an Evidentiary Hearing:
   (a) the Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting the testimony of its witnesses;
   (b) following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;
   (c) thereafter, the Claimant shall ordinarily first

present the testimony of its Party-Appointed Experts, followed by the Respondent presenting the testimony of its Party-Appointed Experts. The Party who initially presented the Party-Appointed Expert shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;

(d) the Arbitral Tribunal may question a Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert, on issues raised in the Tribunal-Appointed Expert Report, in the Parties' submissions or in the Expert Reports made by the Party-Appointed Experts;

(e) if the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability and damages), the Parties may agree or the Arbitral Tribunal may order the scheduling of testimony separately for each issue or phase;

(f) the Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing);

(g) the Arbitral Tribunal may ask questions to a witness at any time.

4. A witness of fact providing testimony shall first affirm, in a manner determined appropriate by the Arbitral Tribunal, that he or she commits to tell the truth or, in the case of an expert witness, his or her genuine belief in the opinions to be expressed at the Evidentiary Hearing. If the witness has submitted a Witness Statement or an Expert Report, the witness shall confirm it. The Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness's direct testimony.

5. Subject to the provisions of Article 9.2, the Arbitral Tribunal may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant to the case and material to its outcome. Any witness called and

questioned by the Arbitral Tribunal may also be questioned by the Parties.

Article 9 Admissibility and Assessment of Evidence

1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.
2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:
   (a) lack of sufficient relevance to the case or materiality to its outcome;
   (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
   (c) unreasonable burden to produce the requested evidence;
   (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
   (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
   (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
   (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.
3. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:
   (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
   (b) any need to protect the confidentiality of a Document created or statement or oral

communication made in connection with and for the purpose of settlement negotiations;

(c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;

(d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and

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

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

5. If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.

6. 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.

7. 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.

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

Article 1. Scope of application

Applicability of the Rules

1. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ("treaty")* concluded on or after 1 April 2014 unless the Parties to the treaty** have agreed otherwise.

2. In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1 April 2014, these Rules shall apply only when:

(a) The parties to an arbitration (the "disputing parties") agree to their application in respect of that arbitration; or

(b) The Parties to the treaty or, in the case of a multilateral treaty, the State of the claimant and the respondent State, have agreed after 1 April 2014 to their application.

Application of the Rules

3. In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty:

(a) The disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty;

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*For the purposes of the Rules on Transparency, a "treaty" shall be understood broadly as encompassing any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty.

**For the purposes of the Rules on Transparency, any reference to a "Party to the treaty" or a "State" includes, for example, a regional economic integration organization where it is a Party to the treaty.

(b) The arbitral tribunal shall have the power, besides its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case, after consultation with the disputing parties, if such adaptation is necessary to conduct the arbitration in a practical manner and is consistent with the transparency objective of these Rules.

Discretion and authority of the arbitral tribunal

4. Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account:

(a) The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and

(b) The disputing parties' interest in a fair and efficient resolution of their dispute.

5. These Rules shall not affect any authority that the arbitral tribunal may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third persons.

6. In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail.

Applicable instrument in case of conflict

7. Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is a conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail. Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail.

8. Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the disputing parties cannot derogate, that provision shall prevail.

Application in non-UNCITRAL arbitrations

9. These Rules are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings.

Article 2. Publication of information at the commencement of arbitral proceedings

Once the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to the repository referred to under article 8. Upon receipt of the notice of arbitration from the respondent, or upon receipt of the notice of arbitration and a record of its transmission to the respondent, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made.

Article 3. Publication of documents

1. Subject to article 7, the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.

2. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.

3. Subject to article 7, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 or 2 above. This may include, for example, making such documents available at a specified site.

4. The documents to be made available to the public pursuant to paragraphs 1 and 2 shall be communicated by the arbitral tribunal to the repository referred to under article 8 as soon as possible, subject to any relevant arrangements or time limits for the protection of confidential or protected information prescribed under article 7. The documents to be made available pursuant to paragraph 3 may be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, if applicable, in a redacted form in accordance with article 7. The repository shall make all documents available in a timely manner, in the form and in the language in which it receives them.

5. A person granted access to documents under paragraph 3 shall bear any administrative costs of making those documents available to that person, such as the costs of photocopying or shipping documents to that person, but not the costs of making those documents available to the public through the repository.

Article 4. Submission by a third person

1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty ("third person(s)"), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.

2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal:

(a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person);

(b) Disclose any connection, direct or indirect, which the third person has with any disputing party;

(c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 per cent of its overall operations annually);

(d) Describe the nature of the interest that the third person has in the arbitration; and

(e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.

3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:

(a) Whether the third person has a significant interest in the arbitral proceedings; and

(b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

4. The submission filed by the third person shall:

(a) Be dated and signed by the person filing the submission on behalf of the third person;

(b) Be concise, and in no case longer than as authorized by the arbitral tribunal;

(c) Set out a precise statement of the third person's position on issues; and

(d) Address only matters within the scope of the dispute.

5. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the third person.

Article 5. Submission by a non-disputing Party to the treaty

1. The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty.

2. The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the

scope of the dispute from a non-disputing Party to the treaty. In determining whether to allow such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3, and, for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.

3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.

4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

5. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty.

Article 6. Hearings

1. Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument ("hearings") shall be public.

2. Where there is a need to protect confidential information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.

3. The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate). However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.

Article 7. Exceptions to transparency

Confidential or protected information

1. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred

to in paragraphs 3 and 4, shall not be made available to the public pursuant to articles 2 to 6.

2. Confidential or protected information consists of:

(a) Confidential business information;

(b) Information that is protected against being made available to the public under the treaty;

(c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or

(d) Information the disclosure of which would impede law enforcement.

3. The arbitral tribunal, after consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, as appropriate:

(a) Time limits in which a disputing party, non-disputing Party to the treaty or third person shall give notice that it seeks protection for such information in documents;

(b) Procedures for the prompt designation and redaction of the particular confidential or protected information in such documents; and

(c) Procedures for holding hearings in private to the extent required by article 6, paragraph 2.

Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties.

4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party to the treaty or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.

5. Nothing in these Rules requires a respondent State to make available to the public information the disclosure of which it considers to be contrary to its essential security interests.

Integrity of the arbitral process

6. Information shall not be made available to the public pursuant to articles 2 to 6 where the information, if made available to the public, would jeopardize the integrity of the arbitral process as determined pursuant to paragraph 7.

7. The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardize the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for disputing parties or members of the arbitral tribunal, or in comparably exceptional circumstances.

Article 8. Repository of published information

The repository of published information under the Rules on Transparency shall be the Secretary-General of the United Nations or an institution named by UNCITRAL.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

(New York, 1958)

UNITED NATIONS

Part one

UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION, NEW YORK, 20 MAY–10 JUNE 1958

Excerpts from the Final Act of the United Nations Conference on International Commercial Arbitration[1]

"1. The Economic and Social Council of the United Nations, by resolution 604 (XXI) adopted on 3 May 1956, decided to convene a Conference of Plenipotentiaries for the purpose of concluding a convention on the recognition and enforcement of foreign arbitral awards, and to consider other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes.

[…]

"12. The Economic and Social Council, by its resolution convening the Conference, requested it to conclude a convention on the basis of the draft convention prepared by the Committee on the Enforcement of International Arbitral Awards, taking into account the comments and suggestions made by Governments and non-governmental organizations, as well as the discussion at the twenty-first session of the Council.

"13. On the basis of the deliberations, as recorded in the reports of the working parties and in the records of the plenary meetings, the Conference prepared and opened for signature the Convention on the Recognition and Enforcement of Foreign Arbitral Awards which is annexed to this Final Act.

[…]

"16. In addition the Conference adopted, on the basis of proposals made by the Committee on Other Measures as recorded in its report, the following resolution:

[1]The full text of the Final Act of the United Nations Conference on International Commercial Arbitration (E/CONF.26/8Rev.1) is available at http://www.uncitral.org

"*The Conference*,

"*Believing* that, in addition to the convention on the recognition and enforcement of foreign arbitral awards just concluded, which would contribute to increasing the effectiveness of arbitration in the settlement of private law disputes, additional measures should be taken in this field,

"*Having considered* the able survey and analysis of possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes prepared by the Secretary-General (document E/CONF.26/6),

"*Having given particular attention* to the suggestions made therein for possible ways in which interested governmental and other organizations may make practical contributions to the more effective use of arbitration,

"*Expresses the following views* with respect to the principal matters dealt with in the note of the Secretary-General:

"1. It considers that wider diffusion of information on arbitration laws, practices and facilities contributes materially to progress in commercial arbitration; recognizes that work has already been done in this field by interested organizations,[2] and expresses the wish that such organizations, so far as they have not concluded them, continue their activities in this regard, with particular attention to coordinating their respective efforts;

"2. It recognizes the desirability of encouraging where necessary the establishment of new arbitration facilities and the improvement of existing facilities, particularly in some geographic regions and branches of trade; and believes that useful work may be done in this field by appropriate governmental and other organizations, which may be active in arbitration matters, due regard being given to the need to avoid duplication of effort and to concentrate upon those measures of greatest practical benefit to the regions and branches of trade concerned;

"3. It recognizes the value of technical assistance in the development of effective arbitral legislation and institutions; and suggests that interested Governments and other organizations endeavour to furnish such assistance, within the means available, to those seeking it;

"4. It recognizes that regional study groups, seminars or working parties may in appropriate circumstances have productive results; believes that consideration should be given to the advisability of the convening of

[2]For example, the Economic Commission for Europe and the Inter-American Council of Jurists.

such meetings by the appropriate regional commissions of the United Nations and other bodies, but regards it as important that any such action be taken with careful regard to avoiding duplication and assuring economy of effort and of resources;

"5. It considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes, notes the work already done in this field by various existing organizations,[3] and suggests that by way of supplementing the efforts of these bodies appropriate attention be given to defining suitable subject matter for model arbitration statutes and other appropriate measures for encouraging the development of such legislation;

"*Expresses the wish* that the United Nations, through its appropriate organs, take such steps as it deems feasible to encourage further study of measures for increasing the effectiveness of arbitration in the settlement of private law disputes through the facilities of existing regional bodies and non-governmental organizations and through such other institutions as may be established in the future;

"*Suggests* that any such steps be taken in a manner that will assure proper coordination of effort, avoidance of duplication and due observance of budgetary considerations;

"*Requests* that the Secretary-General submit this resolution to the appropriate organs of the United Nations."

[3]For example, the International Institute for the Unification of Private Law and the Inter-American Council of Jurists.

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) *(e)*, the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order

to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation

shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.