KATHMANDU SCHOOL OF LAW

SIXTEENTH ANNUAL

WILLIAM C. VIS (EAST)

INTERNATIONAL COMMERICIAL ARBITRATION MOOT

HONGKONG SAR

MEMORANDUM FOR CLAIMANT

ON BEHALF OF

Phar Lap Allevamento

Rue Frankel 1

Capital City

Mediterraneo

AGAINST

Black Beauty Equestrian

2 Seabiscuit Drive

Oceanside

Equatoriana

COUNSEL FOR CLAIMANT:

• BINDA KUMARI THAPA• PREKSHYA NIROULA

•RANJEET KARKI • SOPHIYA KUTU

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LIST OF ABBREVIATIONS

AC	Advisory Council
AGCC	Austrian General Civil Code
A.L.R	American Law Report
APR.	April
Art.	Article
BGB	Bürgerliches Gesetzbuch
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nation Convention on Contracts for the International Sale of Goods
Civ	Civilization
Co.	Company
Corp.	Corporation
CPR	Conflict Prevention and Resolution
DCFR	Draft of a Common Frame of Reference
DDP	Delivery Duty Paid

Ed.	Edition
EWCA	England and Wales Court of Appeal
EWHC	High Court of England and Wales
HKAO	Hong Kong's Arbitrations Ordinance
HKCFAR	Hong Kong Court of Final Appeal Report
HKIAC	Hong Kong International Arbitration Center
ICC	International Chamber of Commerce (Paris, France)
ICDR	International Centre for Dispute Resolution
LTD.	Limited
Para.	Paragraph
PECL	Principle of European Contract Law
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
PPIAF	Public Private Infrastructure Advisory Facility
SCR	Supreme Court Reports
TCO	Turkish Code of Obligations
UKHL	United Kingdom House of Lords Decisions

UCC	Uniform Commercial Court
UNICITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USA/ U.S.	United States of America
VAT	Value Added Tax
VCLT	Vienna Convention on the Law of Treaties
VOL.	Volume
WIPO	World Intellectual Property Organization
WLR	Weekly Law Reports
ZGB	Schweizerisches Zivilgesetzbuch

BOOKS AND ARTICLES

Barry Nicholos	Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods, Published in Galston & Smit ed., International Sales: The United Nations Convention on Contracts for the International Sale of Goods, Matthew Bender (1984), p. 5-10 Cited as: Nicholos in ¶ 97
Christoph Brunner	Force Majeure and Hardship Under General Contract Principles: Exemption of Non-Performance in International Arbitration (Kluwer Law International, The Hague, 2009), p.480-481 Cited as: Brunner in ¶ 73
Carolina Arroyo,	Change of Circumstances under the CISG, A thesis submitted to the Bucerius/WHU Master of Law and Business Program in partial fulfillment of the requirements for the award of the Master of Law and Business ("MLB") Degree, 2012, p. 22 Cited as: Arroyo in ¶ 102
Commentary on WIPO arbitration rules	Commentary on WIPO arbitration rules art. 77.1 Cited as: Commentary on WIPO arbitration rules in ¶ 55
Denis Tallon	Commentary on the International Sales Law, Giuffrè: Milan (1987), p. 579

	Cited as: Tallon
Dr. M.T, Rafiei	Law of Contract, 2003, p. 161 Cited as: Dr. Rafiei in ¶ 108
Emilia Onyema	International Commercial Arbitration and the Arbitrator's Contract , 2010 , p.17 Cited as: Emilia in ¶ 6
Eric S.Rein and Maria A.Diakoumakis	The Practicability of the Commercial Impracticability Defense BY Eric S.Rein and Maria Diakoumakis ,pg.13 Cited as: Eric S.Rein and Maria A. Diakoumakis in ¶ 82
Frederick R. Fucci	Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts Practical Considerations in International Infrastructure Investment and Finance Available at : https://files.arnoldporter.com/hardship_excuse_article.pdf [Accessed on 29 November 2018] Cited as : Frederick R. Fucci in ¶ 92
Fouchard, Gaillard, Goldman	Fouchard, Gaillard, Goldman on International Commercial Arbitration.p. 694,para 1268

	Cited as: Fouchard, Gaillard, Goldman in ¶ 46
General Terms and Conditions of Smit Contract	General Terms and Conditions of Smit Contract,p.11 Available at: https://www.smit.ee/pdf/SMIT_general_terms_ver%202.0.pdf, [Accessed on 30 Novemeber 2018] Cited as : General Terms and Conditions of Smit Contract in ¶ 93
International Centre for Settlement of Investment Disputes (ICSID)	Foreign Investment Law Journal , Vol. 13, No. 2 , 1998 , p.415 Cited as : Bernardini
Ingeborg Schwenzer ,Pascal Hachem,Christopher Kee	Global Sales and Contract Law , first published 2012, para. 3.19 Cited as: Ingeborg/ Pascal/ Christopher in ¶ 98
Jean- Francois Poudret/ Sebastien Besson	Comparative Law of International Arbitration, second edition, 2007, para. 679 Cited as: Poudret/Besson
John Felemegas	An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law"2007, p.3 Cited as: Felemegas in ¶ 104
John O. Honnold	Uniform Law for International Sales under the 1980 United Nations Convention, 3rd ed. (1999), p. 484 Cited as: Honnold

in ¶ 103

Josef L. Kunz — Josef L. Kunz. The Meaning and the Range of the Norm Pacta Sunt Servanda The American Journal of International Law Vol. 39, No. 2 (Apr., 1945), pp. 180-197
Cited as: Josef L. Kunz
in ¶ 84

Kluwer Law International 2012 — Kluwer Arbitration Document information Publication, Bibliographic reference, 'Part II: The Process of an Arbitration, Chapter 10: Approaches to Evidence and Fact Finding', in Jeffrey Waincymer, Procedure and Evidence in International Arbitration, (© Kluwer Law International; Kluwer Law International 2012) pp. 743 -824].
Cited as: Kluwer Law International 2012
in ¶ 62

Kyriaki Noussia — Kyriaki Noussia Confidentiality in International Commercial Arbitration A Comparative Analysis of the Position under English, US, German and French Law. P. 19-36
Cited as: Kyriaki Noussia
in ¶ 59

Lisa Barbara Beisteiner — Adjusting Contract in Arbitration , Available on: http://roadmap2014.schoenherr.eu/adjusting-contracts-arbitration/
Cited as : Lisa
in ¶ 36 , ¶ 40

Liu Guoqing	A comparative study of the doctrine of estoppel : A civilian contractarian Approach in china Liu Guoqing , p. 9 Cited as: Liu Guoqing in ¶ 60
Manal Bensafi , Rontavian Mack	Associate Corparate Councel , Incoterm : Too Simple Available at : https://www.acc.com/legalresources/quickcounsel/incoterms-too-simple.cfm?makepdf [Accessed on 26 November 2018] Cited as : Manal Bensafi , Rontavian Mack in ¶ 89
Margaret L. Moses	The Principles and Practices of International Commercial Arbitration , 2018 , p.17 Cited as : Moses in ¶ 2,46
Matti S. Kurkela , Santtu Turunen	Due Process in International Commercial Arbitration , 2010, p. 17 Cited as : Matti , Santtu in ¶ 5 , ¶ 12
Margaret L.Moses	The-Principles-and-Practice-of-International-Commercial-Arbitration by Margaret L.Moses Cited as: Margaret L.Moses
M. Domke	[M. Domke, Law and Practice of Commercial Arbitration 272, 274 (1968)]. Cited as: M. Domke

	in ¶ 52
Nathan D. O'Malley	Rules of evidence in International Arbitration an Annotated Guide by Nathan D. O'Malley, p. 87. Cited as: Nathan D. O'Malley in ¶ 49,58
Niklas Lindström	Changed Circumstances and Hardship in the International Sale of Goods, Reproduced with permission of Nordic Journal of Commercial Law (2006/1), para IV(1) Cited as:Niklas, in ¶ 99
Orit Gan	[St. John's Law Review Volume 89 Number 1 Volume 89, Spring 2015, Number 1 Article 3 November 2015 The Justice Element of Promissory Estoppel Orit Gan]. P. 63 Vited as: Orit Gan in ¶ 61
Peter J. Mazzacano	Nordic Journal of Commercial Law, issue 2011 # 2, p. 3 Cited as: Mazzacano in ¶ 110
Peter Schlechtriem/ Petra Butler	UN Law on International Sales, 1st Editon, Springer-Verlag Berlin Heidelberg 2009, p. 50, 54 Cited as: Schlechtriem/Petra in ¶ 98, ¶ 105
Peter Schlechtriem/ Petra Butler	Law on International Sales, 1st Editon, Springer-Verlag Berlin Heidelberg 2009, p. 5

	Cited as: Schlechtriem/Petra
Redfern Alan/ Hunter Martin	International Arbitration, 5th edition, 2009, para 3.97, 1.92 Cited as: redfern/hunter in ¶ 94, ¶ 112,
Redfen Alan/ Hunter Martim	Redfen and Hunter , Wolters Kluwer , 2009 Cited as : Redfen and Hunter in ¶ 37
Redfern et al.	Cf. A. Redfern et.al .Law and Practice of International Arbitration ¶ 8- 75 (4th ed. 2004)]. Cited as: Cf. A. Redfern et .al. in ¶ 49,52
Schlechtriem Peter	Journal of Law and Commerce, 1998-1999, p. 236, 54 cited as: Schlechtriem in ¶ 97, ¶ 106, ¶ 105
Shani Salama	Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, An Inter-American Application, Reproduced with permission of the author and 28 University of Miami Inter-American Law Review (Fall 2006), p. 231, Cited as: Salama in ¶ 105
The Public-Private Infrastructure Advisory Facility (PPIAF)	Toolkit for Public-Private Partnership in Roads and Highways , p. 106 Cited as : PPIAF in ¶ 1

United Nation Commission on International Trade Law	UNCITRAL Digest of Case Law on the United Nation Convention on Contracts for the International Sale of Goods, 2016, P. 375 Cited as: UNICITRAL digest in ¶ 101
Univ. Prof. Dr. Peter Schlechtriem	Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods, Published by Manz, Vienna: 1986, p.101 ited as: Schlechtriem in ¶ 97
Wehberg Hans	The American Journal of International Law , Vol. 53 , No. 4 , 1959 Cited as : Wehberg in ¶ 15
Zheng Sophia Tang	Jurisdiction and Arbitration Agreement on International Commercial Law , 2014 , p.67 Cited as : Zheng Sophia Tang in ¶ 24
1999 IBA Working Party1 & 2010 IBA Rules of Evidence Review Subcommittee2	Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration* Cited as: IBA Rules on the Taking of Evidence in International Arbitration in ¶ 51,56,57

CASES

Ali Shipping Corporation v. Shipyard Trogir	Ali Shipping Corporation v. Shipyard Trogir [1997] EWCA Civ 3054 (19th December, 1997 Cited as: Ali Shipping Corporation v. Shipyard Trogir in ¶ 55
Associated Electric & Gas Insurance Services Limited v. The European Reinsurance Company of Zurich	DMC/SandT/03/06 Associated Electric and Gas Insurance Services Limited v European Reinsurance Company of Zurich English Privy Council: Lords Bingham, Hobhouse, Hoffmann and Millett and Sir Christopher Staughton: 29 January 2003 Cited as: Associated Electric & Gas Insurance Services Limited v. The European Reinsurance Company of Zurich in ¶ 51
Australia Resources Ltd v. The Honourable Sidney James Plowman	Esso Australia Resources Ltd and others v the Honourable Sidney James Plowman and others (1995) 128 ALR 391 7 April 1995 Cited as: Australia Resources Ltd v. The Honourable Sidney James Plowman in ¶ 55
BR. v. UAB (2006)	B. R. v. UAB, Sauluva“, 2006, No. 3K-3-296

	Cited as: BR .v. UAB , 2006 in ¶ 70
C v D[2007] EWCA Civ 1282	C v D, [2007] EWCA Civ 1282 Royal Courts of Justice Strand, London, WC2A 2LL Date: 05/12/2007 Available on :https://www.trans-lex.org/311360/_/c-v-d-%5B2007%5D-ewca-civ-1282/ Cited as : C v D[2007] EWCA Civ 1282 in ¶ 31
Emmott v. Michael Wilson & Partners Ltd	Emmott v. Michael Wilson & Partners Ltd., (2008) EWCA (Civ) 184 (K.B.)] Cited as: Emmott v. Michael Wilson & Partners Ltd in ¶ 58
Gateway Realty Ltd. V. Arton Holding Ltd (1991)	Gateway Realty Ltd. v. Arton Holdings (1991), 106 N.S.R.(2d) 180 (TD);288 A.P.R. 180 cited as: Kelly J.in Gateway Realty Ltd. V. Arton Holding Ltd (1991) in ¶ 74
Hassneh Insurance Co of Israel v. Stuart J Mew	Hassneh Insurance Co of Israel v. Stuart J Mew [1993] 2 Lloyd's Rep. 243] Cited as: Hassneh Insurance Co of Israel v. Stuart J Mew in ¶ 58

Marble Holding Limited v Yatin Development Limited(2008)	Marble Holding Limited v Yatin Development Limited [2008] 11 HKCFAR 222, §20 Cited as: Marble Holding Limited v Yatin Development Limited [2008] in ¶ 79
Millennium Holdings v. Glidden (2013)	Millennium Holdings v. Glidden ,41 Misc.3d 1231(A), 981 N.Y.S.2d 636 (N.Y. Co. 2013) Cited as: Millennium Holdings v. Glidden (2013) in ¶ 84
Mineral Park Land Company. v . Howard (1916)	Mineral Park Land Company v PA. Howard, 172 Cal 289 (1916), 293. Cited as: Mineral Park Land Company.v. Howard (1916) in ¶ 71
Scafom Internationl BV vs Lorraine Tubes s.a.s	Scafom International BV v Lorraine Tubes S.A.S. Belgium, 19 June 2009 Court of Cassation Supreme Court Available at: http://cisgw3.law.pace.edu/cases/090619b1.html Cited as : Scafom Internationl BV v Lorraine Tubes s.a.s in ¶ 98,68
Sulamerica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A[2012]	Sulamerica Cia Nacional De Seguros S.A. v. Enesa Engenharia S.A[2012] EWCA Civ 638 Royal Courts of Justice

	Strand, London, WC2A 2LL Date: 16 May 2012 Available on :https://www.trans-lex.org/311350/_/sulamerica-cia-nacional-de-seguros-sa-v-enesa-engenharia-sa-%5B2012%5D-ewca-civ-638/ Cited as : SULAMERICA CIA NACIONAL DE SEGUROS S.A. v. ENESA ENGENHARIA S.A. [2012] EWCA Civ 638 in ¶ 32
Haveg Corp. v. Guyer,	Haveg Corp. v. Guyer, 226 A.2d 231, 236–37 Cited as: Haveg Corp. v. Guyer in ¶ 61
ICC Award No 2291 (1975)	ICC Award No 2291 of 1975,Clunet,1976,989 Cited as: Clunet in ¶ 108
ICC Award No 8873 (1997)	ICC Award No. 8873 of 1997 Cited as: ICC Award No 8873 (1997) in ¶ 69
ICC Court of Arbitration, Case No. 9117	ICC Arbitration Case No. 9117, March 1998 available at: http://cisgw3.law.pace.edu/cases/989117i1.html Cited as : ICC Arbitration Case No. 9117, March 1998 in ¶ 105
Kiely v. St. Germain	(Del. 1967 Kiely v. St. Germain, 670 P.2d 764, 767 (Colo. 1983)]. Cited as: Kiely v. St. Germain in ¶ 61

Korea (claimant) V Czechoslovakia (respondent)	ICC award No. 7645, SELLER'S COUNTRY: Korea (claimant) BUYER'S COUNTRY: Czechoslovakia (respondent) 1995 Cited as: Korea (claimant) Czechoslovakia (respondent) in ¶ 46
Litton Bionetics Inc. v. Glen Constr. Co	Litton Bionetics Inc. v. Glen Constr. Co., Inc., 437 A.2d 208 (Md. 1981);]. Cited as: Litton Bionetics Inc. v. Glen Constr. Co
Middle East Cement v. Egypt	Middle East Cement v. Egypt, Award, 12 April 2002, Cited as: Middle East Cement v. Egypt In ¶ 46
Paradine. v. Jane (1647)	Paradine. v. Jane (1647) 82 Eng.Rep.897 (KB) in ¶ 91
Parker vs South Eastern Railway co.	Parker vs South Eastern Railway co..(1877), Court of Appeal of England and Wales, United Kingdom Cited as: Parker vs South Eastern Railway co. in ¶ 107
Teekay Tankers v STX	Teekay Tankers v STX O&S [2017] EWHC 253 (Comm) Cited as: Teekay Tankers v STX in ¶ 55,62
Tradex. v. Albania	

	Tradex. v. Albania, Award, 29 April 1999, paras. 73–75 Cited as: Tradex v. Albania in ¶ 46
Wallace v United Grain Growers ltd. (1997)	Wallace v United Grain Growers ltd (c.o.b Public Press) (1997) 3 S.C.R 701 at ¶ 98 Cited as : Wallace v United Grain Growers ltd (1997) in ¶ 73

STATEMENT OF FACT

The parties to the arbitration are Phar Lap Allevamento (herein after "CLAIMANT") and Black Beauty Equestrian (herein after "RESPONDENT"). CLAIMANT, a company registered in capital city Mediterraneo which is renowned for stud farm and 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. RESPONDENT, registered in Equatoriana is famous for its broodmare lines. Three years ago, RESPONDENT decided to establish a racehorse stable for which they requested for CLAIMANT for the Nijinsky III frozen semen for artificial insemination.

21 March 2017: RESPONDENT contacted CLAIMANT for the availability of Nijinsky III for its newly started breeding programme.

24 March 2017: CLAIMANT offered RESPONDENT 100 doses of Nijinsky III's frozen semen in accordance with the Mediterraneo Guidelines for Semen Production and Quality Standards.

28 March 2017: RESPONDENT showed the interest in a long-term cooperation with CLAIMANT.

31 March 2017: CLAIMANT only accepted DDP delivery term against moderate price, the transfer of certain risks to Black Beauty and inclusion of a hardship clause to temper some of the additional risk taken.

12 April 2017: Ms. Napravnik and Mr. Antley were severely injured in an accident.

6 May 2017: Mr. John Ferguson and Ms. Julian Krone replaced Ms. Napravnik and Mr. Antley for the finalization of the contract.

20 May 2017: CLAIMANT sent the first shipment of 25 doses.

3 October 2017: CLAIMANT sent the second shipment of 25 doses.

19 December 2017: The tariff were announced on 19 December 2017 by executive order of Equatoriana.

15 January 2018: From when tariff came into effect imposed by Equatoriana.

20 Jan 2018: CLAIMANT got informed about the newly imposition of tariff of 30 % on agricultural products are applicable to the shipment by custom authorities of Equatoriana.

21 Jan 2018: Mr. Shoemaker (RESPONDENT) called CLAIMANT, there CLAIMANT informed them about imposition of tariff on frozen semen.

12 Feb 2018: CLAIMANT confronted that RESPONDENT had actually breached the contract by re –selling the frozen semen which was prohibited.

31 July 2018: CLAIMANT submitted Notice of Arbitration to settle the disputes.

24 Aug 2018: RESPONDENT submitted Answer to the Notice of Arbitration.

2 Feb 2018: CLAIMANT find out that the RESPONDENT had re-sell the frozen semen by another breeder from Equatoriana.

2 Oct 2018: CLAIMANT got informed about another arbitration under HKIAC rules which RESPONDENT had with one of its customer concerning the sale of the promising mare to Mediterraneo during the preparation for the upcoming Case-Management Conference on October 4.

5 Oct 2018: Procedural Order No.1 is issued where both parties are requested to make their submission on the three issue viz:

a) The adaptation of contract by arbitral tribunal,
b) CLAIMANT entitlement to submit evidence,
c) CLAIMANT entitlement to the payment under clause 12 of contract or under CISG.

2 Nov 2018: Procedural Order No. 2 was issued in the arbitral proceedings.

SUMMARY OF ARGUMENT

During the delivery of the last 50 doses of Nijinsky III's frozen semen the tariff rates in both the countries increase which leads to loss to the CLAIMANT .The arbitral tribunal has the jurisdiction to adapt a contract either when there is a change in conditions like legislative and regulatory changes or economic changes or can be adapt from the changes resulting from modification required by the contracting authority. Here, the CLAIMANT suffers from economic changes due to the increase in tariff rate which results in loss, also, under the principle of good faith, the tribunal has jurisdiction to adapt the contract [A].

CLAIMANT received the information from Mr. Kieron Velazquez who had been working for the Mediterranean buyer in the other arbitration. CLAIMANT is not liable for the breach of confidentiality for the evidence obtained from the third person in line with the ICC Model Confidentiality Agreement. The CLAIMANT is under no obligation to maintain the confidentiality to arbitration proceedings to which it is not a party which is in consistent with the commentary on HKIAC rule article 42. The CLAIMANT should be entitled to submit the evidence from the other arbitration proceedings according to the exceptions provided for confidentiality in pursuant to the HKIAC rules. The obtained evidence is reasonable in line with the principle of the “reasonable necessity” [B].

RESPONDENT had given their consent regarding the inclusion of hardship clause in contract when they insisted the CLAIMANT to agree on DDP delivery term. This shows DDP delivery term existed just because there is inclusion of hardship clause in clause 12 of contract .CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount from RESPONDENT as it is clearly embodied in contract. The doctrine of hardship provides revision of price if there occurs unforeseen events making the performance onerous. Similarly, Contract is superior to any other rules. Hence RESPONDENT must compensate as per the clause i.e. law of contract as per principle of “Pacta Sunt Servanda” [C, I].However, even if the imposition of the tariff is not covered under the clause 12 of contract then the CLAIMANT is entitled to pay the additional amount based on Article 79 of CISG along the line of Article 6.2.3 of UNIDROIT principle which allows for the exemption during the condition of hardship i.e. adaptation of the contract to restore the equilibrium of the contract simultaneously [C,II].

ARGUMENTS

A.THE TRIBUNAL HAS JURISDICTION AND THE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, WHICH INCLUDES IN PARTICULAR THE QUESTION OF WHICH LAW GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATIONS.

1. The arbitral tribunal has the jurisdiction to adapt a contract either when there is a change in conditions like legislative and regulatory changes or economic changes or can be adapted from the changes resulting from modification required by the contracting authority. [PPIAF , p. 106 , Bernardini] Here, the arbitral tribunal has jurisdiction to adapt the contract because according to the HKIAC Rules, the arbitral tribunal has the power to apply the rule of law which is agreed upon by the parties.[a] , The principle of good faith allows for adaptation of contract [b] , The RESPONDENT is not working in accordance with good faith. [c], The Article 8 of CISG makes the negotiation prior sales agreement binding. [d] ,The law governing the contract and the law governing the arbitration clause is CISG and the law of Mediterraneo [e] ,Even if, the doctrine of separability is argued to be applicable , then as well the tribunal has jurisdiction to adapt the contract. [f], The decision of an arbitrator is binding [g].

a. According to the HKIAC Rules, the arbitral tribunal has the power to apply the rule of law which is agreed upon by the parties.

2. According to the Clause 15 of the Sales Agreement done in 6 May 2017 the parties have agreed upon the dispute arising out of the contract to be administered by the HKIAC under the HKIAC Administered Arbitration Rules. [CLAIMANT's Exhibit C5] The parties have power to select the rules which governs the procedure, the location of the arbitration, the language of the arbitration, the law governing the arbitration and the decision makers that a party may choose to settle their disputes [Moses, p. 17]. So , according to HKIAC Administered Arbitration Rule the arbitral tribunal has jurisdiction to hear the case [a] , the rule of law governing the contract is CISG and Law of Mediterraneo [b] , the broad interpretation of law of Mediterraneo gives the arbitral tribunal jurisdiction to adapt the contract [c] .

i. **Arbitral tribunal has jurisdiction to hear the case.**

3. According to the Sales Agreement concluded in 6 May 2017 [CLAIMANT Exhibit C 5] in the Clause 14 , it is mentioned that the sales agreement is governed by the law of Mediterraneo , including the CISG. The Clause 15 of the Sales Agreement says, 'the issues arising out of this contract … shall be referred to and finally resolved by arbitration administered by the HKIAC…the seat of arbitration shall be Vindobona , Danubia …', Danubia , the country of arbitration has adopted UNCITRAL Model law on International Commercial Arbitration (Model Law) .

4.According to Article 7(1) of the Model Law, "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…" Here, the parties have strictly restricted in the clause and does not give space for the case to be transferred to a third party.

5. An arbitration is based on the agreement of the party which means that the arbitration agreement is governed by the freedom of contract, where the parties give the mandate in concrete to the arbitrators to settle the dispute. [Matti , Santtu , p.25]. It provides the arbitral tribunal jurisdiction to hear this case.

ii. **The rule of law governing the contract is CISG and Law of Mediterraneo.**

6. For the reason to achieve the purpose of the conclusion of the contract, the parties must agree to the law applicable to it [Emilia] .According to the clause 15 of the Sales Agreement the parties our parties have chosen arbitration to be administered by HKIAC.

7. The HKIAC Rules 2018, Article 36 contains about the Applicable law. The Article 36.1 says, "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 constructed, unless otherwise expressed as directly referring to the substantive law of the jurisdiction and not to its conflicting law rules. Failing such designation by the parties, the arbitral tribunal shall apply the rule of law which it determines to be appropriate."

8. In our case, the parties have agreed upon the law to govern the sales agreement to be the law of Mediterraneo including CISG in the clause 14 of the Sales Agreement [CLAIMANT Exhibit C 5].

iii. **The broad interpretation of law of Mediterraneo gives arbitral tribunal jurisdiction to adapt the contract.**

9. Regarding the law of Mediterraneo, in the Notice of Arbitration set by the CLAIMANT [Notice if Arbitration, p.7 ¶ 16] it has mentioned that the law of Mediterraneo provides for a broad interpretation of the arbitration agreement and not merely about the 'dispute(s) arising out this contract' . So, the arbitration agreement has clearly extended to the claim of increasing remuneration according to which the tribunal has jurisdiction to adapt the contract.

b. The principle of good faith allows for adaptation of contract.

10.The principle of good faith according to the Article 7(1) of CISG [i] , Article 1.7 of UNIDROIT Principle bounds parties to work under good faith even in absence of special provisions [ii] , Pacta sunt servanda obliges party to work under good faith [c].

i. **The good faith principle, Article 7(1) of CISG.**

11. Even though CISG in itself does not include any wording for the adaptation of the contract by the arbitral tribunal, in its Article 7, which contains about general principles to be adopted even in the absence of provisions regarding the application of CISG, it has mentioned about the main principles to focus on. In the Article 7(1), it focuses on three basic general principles. The three basic general principles are: the international character, the aim of promoting uniformity and the promotion of good faith in international trade.

12. The Arbitration agreement imposes a general obligation of good faith on both the parties. Arbitration is based on a contract on procedure, and all contracts are subject to the duty of good faith [Matti , Santtu , p. 68].

13. Although there is no explicit provision within the contract, according to the applicable law which is CISG's Article 7(1), the most important international principle in international commercial relationship which is applicable to our case is the principle of good faith.

ii. **Article 1.7 of UNIDROIT Principle bounds parties to work under good faith even in absence of special provisions.**

14. Under the UNIDROIT Principle 2016 for which CISG is an important role model, Article 1.7 talks about Good faith and fair dealing. According to Article 1.7(1), each party must act in accordance with good faith and fair dealing in international trade. According to the comment of this article even in the absence of a special provisions regarding good faith, the parties must act in accordance with good faith throughout the life of the contract including the negotiation process.

iii. **Pacta sunt servanda obliges party to work under good faith.**

15.The pacta sunt servanda rule demands that every party to a treaty is expected to observe its treaty obligations in good faith and have the intention to honor their responsibilities; which means proper enforcement of the treaties is expected of a signatory state. In basic international law, pacta sunt servanda is a principle which says that the contract signed between the parties must be fulfilled in a good faith , translated as agreement must be kept [Wehberg].

16.According to the witness statement of Ms Julie Napravnik who is the claimant's negotiator [CLAIMANT Exhibit C 8] when she tried to discuss with Mr. Chris Antley, respondent's negotiator, about the mechanism they should have had placed to ensure an adaptation of the contract in case of occurrence of an unlikely event , Mr. Antley, being a negotiator who is a well informed and a skilled person said that it should be the task of the arbitrators to adapt the contract if the parties could not agree. Which shows that although it is not mentioned in the contract itself , it is clear according to the Claimant's Exhibit c8 that the parties had discussed prior in the drafting history during the negotiation as well , they explored the possibility and had the meeting of mind in it whereby there could have been adaptation of contract. So, the RESPONDENT cannot deny that the arbitral tribunal does not have the jurisdiction to adapt the contract.

c. RESPONDENT is not working in accordance with good faith.

i. **Prior to the contract, RESPONDENT's negotiator had mentioned about the tribunal's power to adapt the contract.**

17. Prior to the contract, during the negotiation, when Ms. Napravnik tried to talk on the issue of contract adaptation with Mr. Antley, he mentioned that the arbitration tribunal has the jurisdiction to adapt the contract Mr. Chris Antley, the respondent's negotiator himself mentioned about the power of arbitral tribunal to adapt the contract [CLAIMANT Exhibit C 8].

ii. The interest of Mr Antley regarding adaptation of contract through his notes.

18.The negotiation file of Mr Antley makes it clear about his interest in carrying out the adaptation clause. [Respondent's Exhibit R 3] The RESPONDENT could not have been unaware about the interest of Mr Antley about the adaptation of contract as they had the access to the notes from the negotiation file of Mr. Antley in which he mentioned about it .

iii. The RESPONDENT did not take the witness statement of Mr. Antley, even after his recovery.

19. Even if, the RESPONDENT claim that merely the note in the negotiation file of Mr. Antley was not reasonable for them to be aware about his interest on adaptation of contract they should have taken the witness statement of Mr. Antley after his recovery like the witness statement of Ms Julie Napravnik .

20.Thus, these issues makes it clear that the RESPONDENT is not working under good faith .

d. The Article 8 of CISG makes the negotiation prior sales agreement binding .

21. According to the Article 8(1) of CISG, the statement made by any other conduct of the party is to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. According to the Article 8(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.

22. Hence, since Mr. Antley, the respondent's negotiator, a well-informed person, in discussion with Ms. Napravnik prior to the sales agreement had clearly made the negotiation about the power of the arbitral tribunal to adapt the contract, the adaption of contract is possible.

e. The law governing the contract and the law governing the arbitration clause is CISG and the law of Mediterraneo.

23.The law governing the contract and the law governing the arbitration clause is CISG and the law of Mediterraneo as the doctrine of separability is not applicable [a] , the law governing the

contract and the law governing the arbitration agreement are same [b] , Article 7(1) of CISG makes parties act under good faith [c] .

i. **The doctrine of separability is not applicable.**

24.There might raise a question regarding the existence and validity of the contract when a party argues that the alleged contract is terminated, repudiated, invalid or not concluded , which are the conditions where the doctrine of separability comes into force . [Zheng Sophia Tang]

25.The doctrine of separability is a principle which comes in force when the existence of the contract is under question, but in this case the existence of the contract is not under question and none of the party alleges that the contract is either terminated , repudiated , invalid neither not concluded .So, in this case , the doctrine of separability is not applicable.

ii. The law governing contract and the law governing the arbitration agreement are same.

26.Since, the doctrine of separability is not applicable in this case , it is necessarily unreasonable to argue that the law governing the contract and the law governing the arbitration agreement are different .So, the principle of separability is not applicable in light of the present facts, the assertions made by the respondents that a different set of laws should be applicable in relation to arbitration clause does not hold any ground. Instead, it is submitted that, as with the contract, the law applicable to the arbitration clause is CISG and Law of Mediterraneo.

iii. Article 7(1) of CISG makes parties act according to good faith.

27.Since CISG is applicable under the Article 7(1) of CISG , it has listed the general principles to be adapted among which good faith is one of the major principle which is important in our case and both the parties have come to a meeting if mind during the negotiation as well , so , the adaptation of contract is possible.

f. Even if, the doctrine of separability is argued to be applicable, then as well the tribunal has jurisdiction to adapt the contract.

28.The RESPONDENT might come up claiming that the doctrine of separability is applicable , then as well the tribunal has jurisdiction to adapt the contract under gap filling according to Article 7(2) of CISG [a] , Article 2A of Danubian Law as the reminiscence of Article 7 of CISG [b] .

i. Gap filling according to Article 7(2) of CISG

29.Even if, the doctrine of separability is held to be applicable thereby excluding the usage of CISG and Law of Mediterraneo which are the applicable laws of the contract, according to the Article 7(2) of the CISG which talks about gap filling, in the principle derived from the first part it is clearly mentioned that the agreement made by the party is given the priority over the other law applicable in this contract.

30.Even so, since the contract no where mentions about the adaptation of the contract , according to the gap filling principle , the law of the seat , which is the law of Danubia has to be applied to fill the gap . [CLAIMANT Exhibit c5 , Frozen Semen Sales Agreement , Clause 15]

31.Also, in the case of C v D [2007] EWCA Civ 1282 the Court of Appeal Royal Courts of Justice Strand, London came close to take the view that, in the absence of an express choice by the parties of the law applicable to the arbitration clause, the law of the seat should govern questions of material validity [https://www.trans-lex.org/311360/_/c-v-d-%5B2007%5D-ewca-civ-1282/].

32. In the case of Sul America v Enesa Engenharia [2012] EWCA Civ 638 the court accepted that, there is a rebuttable presumption that, if the parties expressly agree on the law to govern the matrix contract, the same law applies to the arbitration clause. As the parties had not chosen a governing law, the arbitration clause was governed by the law of the country with which it was most closely connected – i.e., English law, the law of the seat. In our case the rules as agreed by the parties and in case when no such reference has been made, it is the rule of the seat Lex loci arbriti that may be used to fill the gap as left undecided , which in our case is law of Danubia.

ii. Article 2A of Danubian Law as the reminiscence of Article 7 of CISG.

33. In doing so, article 2A of the Danubia law says , '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.' The text in the provision is reminiscence of Article 7 of CISG. Applying the understanding borrowed from the same, it is the contention of the CLAIMANT that owing to the applicable principle of good faith, the tribunal assumes jurisdiction over the adaptation of Contract .

34. Hence, the principle of good faith applies regardless, whether the principle of separability applies or does not applies which means whether the CISG applies to the contract only to the arbitration agreement and the contract both .

g. The decision of an arbitrator is binding.

35. Arbitrator is equal to a state court judge [a].

36. Rulemaking cannot inherently be excluded from the judicial functions exercised by judges. Analyzing the powers of the state court judges, we can see that they also enjoy certain rule making power. [AGCC], Arbitrator, who is as equal to the judge in matters to the business law issues enjoys at least the same decision making competences as a state court judges , which is known as the principle of synchronized competences. [Lisa] According to the witness statement of Ms. Julie Napravnik who is the claimant's negotiator [CLAIMANT Exhibit C8 ,Para. 4] when she tried to discuss with Mr Chris Antley, respondent's negotiator, about the mechanism they should have had placed to ensure an adaptation of the contract in case of occurrence of an unlikely event , Mr. Antley, being a negotiator who is a well informed and a skilled person said that it should be the task of the arbitrators to adapt the contract if the parties could not agree.

37.Also, the final decision of the arbitral tribunal is binding and not merely a recommendation which the parties are free to accept or reject as they please. [Redfen and Hunter, ¶ 1.92] Which makes the party obliged to do as per the tribunal's award.

38.Hence, since Mr. Antley, a well informed negotiator mentioned about the arbitrator's power to adapt the contract and as the decision made by the arbitral tribunal are binding , the arbitral tribunal has the jurisdiction to adapt the contract .

i. Arbitrator as equal to a state court judge.

39. Rulemaking cannot inherently be excluded from the judicial functions exercised by judges. Analyzing the powers of the state court judges, we can see that they also enjoy certain rule making power. [AGCC]

40. Arbitrator, who is as equal to the judge in matters to the business law issues enjoys at least the same decision making competences as a state court judges, which is known as the principle of synchronized competences. [Lisa]

41. Hence, It is because of the above mentioned reasons the arbitral tribunal has power to adapt the contract.

B. CLAIMANT IS ENTITLED TO SUBMIT THE EVIDENCE FROM THE OTHER ARBITRATION.

42. RESPONDENT allege the CLAIMANT with the breach of confidentiality and the illegal hack of RESPONDENT'S computer system [letter of Julia Clara Fast track, 3rd October 2018]. The CLAIMANT is entitled to submit the evidence from another arbitration because CLAIMANT is under no obligation to maintain confidentiality relating to arbitration proceedings to which it is not a party [a], The Obtained evidence is not through an illegal hack of RESPONDENT's computer system as evidenced from source of the obtained information [b], Even if the Phar Lap Allevamento is party to that subjudice arbitration, the evidence obtained is lawful in character because the duty of confidentiality is not absolute [c], the obtained evidence by the CLAIMANT is relevance evidence hence is legal and admissible [d], The obtained evidence is admissible under the "reasonable necessity" principle [e], The doctrine of estoppels is applicable [f] and the RESPONDENT act in contrary to good faith [g].

a. CLAIMANT is under no obligation to maintain confidentiality relating to arbitration proceedings to which it is not a party.

43. Phar Lap Allevamento is not party to another arbitration under the HKIAC-Rules which RESPONDENT had with one of its customers concerning the sale of a promising mare to Mediterraneo [2nd October 2018, letter by Joseph]. The CLAIMANT is entitled to submit the evidence from another arbitration under Article 42 of HKIAC rule 2013 [i], the burden of proof lies with the party asserting a fact, whether it is the CLAIMANT or the RESPONDENT [ii].

i) Article 42 of HKIAC rule 2013 applies.

44. The subjudice arbitration proceeding is conducted under the HKIAC rules [Joseph Langweiler letter, 2nd October 2018] to which CLAIMANT is not party. The extent of confidentiality in an arbitration proceeding depends upon the applicable laws as well as the parties agreement

[Commentary on HKIAC rule, Article 42], relating this provision, CLAIMANT is not a party to that arbitration proceedings neither have ever entered into the agreement to maintain the duty of confidentiality. The duty of confidentiality as enshrined in Article 42 of the HKIAC rule is applied only to the parties of the arbitration proceeding [Commentary on HKIAC rule]. Hence, CLAIMANT is not under the obligation to the duty of confidentiality.

ii) The burden of proof lies with the party asserting a fact, whether it is the CLAIMANT or the RESPONDENT.

45. Article 22 of HKIAC Rule abides the respondent with the burden of proof to establish the breach of confidentiality. RESPONDENT alleges CLAIMANT for breaching the confidentiality agreement [Letter by fast track, 3rd October 2018, p.50]. However, the RESPONDENT fails to prove the allegations beyond the reasonable doubt since it has only assumptions that the CLAIMANT has breach the confidentiality agreement without considering the fact that the CLAIMANT is not even a party to that particular arbitration proceedings [Letter of Joseph Langweiler, 2nd October, 2018] whereby the information is extract from. Each party has the burden of proving the facts relied upon to support its claim or defense [Commentary on HKIAC rule 2013 Article 22]. On this situation the RESPONDENT itself has the burden to proof the allegations [ICDR Rules, art. 19(1); UNCITRAL Rules, art. 24(10)].

46. The burden of proof lies with the party asserting a fact, whether it is the CLAIMANT or the RESPONDENT [Middle East Cement v. Egypt, Tradex v. Albania].The party which is claiming breach of contract and damages caused by the breach of the other party holds the burden of proof to establish that breach [Margaret L. Moses, Korea (claimant) Czechoslovakia (respondent)]. Relating the case, since RESPONDENT is alleging the CLAIMANT with the breach of the confidentiality agreement, it holds the burden of proof to show the ground that CLAIMANT has in fact breach the confidentiality. Burden of proof is on the party seeking to rely on a ground for setting aside an award, such as a breach of due process [Fouchard, Gaillard, Goldman]. RESPONDENT is not clearly able to shows that the CLAIMANT has breach the confidentiality agreement.

b. In accordance to source of information, the obtained evidence is not through an illegal hack of RESPONDENTS computer system.

47. As alleged by the RESPONDENT that the CLAIMANT has acquired the evidence from; either two former employees of RESPONDENT or a hack of RESPONDENT's computer system which occurred three weeks ago [letter by Julia Clara fast-track, 3rd October 2018]. The RESPONDENT fails to prove both of the allegations i.e. the CLAIMANT neither obtained the information from the illegal hack of the computer system nor obtained through breach of the confidentiality. Therefore, the CLAIMANT does not breach the confidentiality because obtained evidence is received from the third person [i] and the information obtained from the third person is legally and principally valid [ii].

i) The obtained evidence is received from the third person.

48. The allegations is not true because the CLAIMANT did not obtain the evidence through breach, 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 customer but until the 30 May 2018 had been working for the Mediterranean buyer in the other arbitration [PO2, p.60 ¶ 40]. Therefore, the source shows that the information is not obtained from the breach of the confidentiality and the illegal hack of the RESPONDENT'S computer system.

ii) The information obtained from the third person is legally and principally valid.

49. "The real meaning of confidentiality compared with judicial proceedings, is instead obviously that the proceedings are not public, i.e. that the public does not have any right of insight by being in attendance at the hearings or having access to documents in the matter." [Nathan D. O'Malley]. However, the CLAIMANT neither attends the hearing nor gets access to the documents intentionally [PO2,p.60 ¶ 40]. Concerning the question whether an arbitration award in one arbitration could be relied upon by the winning party in another arbitration under same agreement, Privy Council in Aegis v. European Re, held that despite an express confidentiality agreement, the party in one arbitration can rely upon the award in another arbitration [Redfen-and-Hunter.pdf]. The information obtained from the third party is lawful and therefore is not a breach of the confidentiality [ICC Model Confidentiality Agreement 4c].

c. Even if the CLAIMANT is party to that subjudice arbitration, the evidence obtained is lawful in character because the duty of confidentiality is not absolute.

50. CLAIMANT is under no obligation to maintain the confidentiality because it is not party to that arbitration. However, even if CLAIMANT is party to another arbitration, the confidentiality

could be breach under the exceptions provided for the confidentiality. The confidentiality can be breached legally in pursuant to Article 42 of HKIAC rule, confidentiality can be breach under exceptional circumstances [i], the common question of law in both arbitrations provides a ground for the consolidation of the arbitration [ii] and Arbitration proceedings between two parties have potentially collateral effects on third parties [iii], CLAIMANT is entitled to submit the evidence from the other arbitration proceedings in pursuant to UNCITRAL [iv] and even if the RESPONDENT contends that the arbitration is a private arrangement and confidentiality is essence of arbitration, it is not necessarily confidential [v].

i) In pursuant to article 42 of HKIAC rule, confidentiality can be breach under exceptional circumstances.

51. The duty of confidentiality related to arbitral proceedings is not absolute. Duty of confidentiality does not prevent a party from instituting legal proceedings to protect its legal rights or interest. Reconciliation between the duty of the confidentiality and the need for the disclosure of the information in certain exceptional cases need to be considered (Commentary on HKIAC rules 2013, article 42). Disclosure is required of a party to fulfill a legal duty, protect or pursue a legal right [IBA Rules on the Taking of Evidence in International Arbitration]. Disclosure is for a proper purpose or, the "fair disposal of the action" [Associated Electric & Gas Insurance Services Limited v. The European Reinsurance Company of Zurich].

ii) The common question of law in both arbitrations provides a ground for the consolidation of the arbitration.

52. Consolidation is a procedural mechanism, by which two or more pending arbitrations are merged into a single arbitration and heard by a single tribunal to avoid the inconsistent awards. Article 28 of HKIAC Rules 2013 provides for the consolidation of the arbitration if both proceedings invoke the common question of law. The evidence from the another arbitration proceedings on which the CLAIMANT is not party is admissible because if common question of law exist then the arbitration can be consolidated (Commentary on Article 28 of HKIAC Rules 2013) which automatically let the third party to engage in the arbitration proceedings. In the given two arbitration proceedings the common question of law is discussed (letter by Langweiler, 2nd October 2018 p.49). Consolidation was ordered to avoid the possibility of conflicting awards [M. Domke].

iii) Arbitration proceedings between two parties have potentially collateral effects on third parties.

53. Arbitration proceedings between two parties may potentially have collateral effects on third parties and hence when this occurs it is reasonable to argue that third parties should be given the right to protect their interests "significant" albeit "indirect" effect upon third parties, for example, in the case where one person is liable with another who is a party to the arbitration. If an award is given against one of the parties it will then be at least of persuasive significance against the other person [Cf. A. REDFERN ET AL.]. Court may order consolidation of arbitration proceedings where the issues are substantially the same and if no substantial right is prejudiced. Court may order consolidation of arbitration proceedings where the issues are substantially the same and if no substantial right is prejudiced. [Litton Bionetics Inc. v. Glen Constr. Co.,].

iv) The CLAIMANT is entitled to submit the evidence from the other arbitration proceedings in pursuant to UNCITRAL.

54. According to the exceptions provided for the confidentiality in article Art 34 (5) of UNCITRAL Arbitration Rules and the Hong Kong Arbitration Ordinance (HKAO Cap 609) CLAIMANT is entitled to submit the evidence from the another arbitration proceedings. According to Mr. Justice Coleman it is sufficiently necessary to disclose an arbitration award … if the right in question can be enforced or protected by the disclosure of the award. If a more accurate assessment of the case can be achieved by the disclosure of confidential information, then the confidentiality of arbitral proceedings should not be an impediment [Ali Shipping Corporation .v. Shipyard Trogir]. Confidentiality can be ceases for the establishment of the party's legal right [Commentary on WIPO arbitration rules].

v) Even if the RESPONDENT contends confidentiality is essence of arbitration, it is not necessarily confidential.

55. Arbitration is a private arrangement, it was not necessarily confidential. Hence arbitration is not absolute [Ali Shipping Corporation v. Shipyard Trogir, Australia Resources Ltd v. The Honourable Sidney James Plowman]. A party who enters into an arbitration agreement is not taken merely on that account to have contracted to keep absolutely confidential all documents produced and information disclosed to that party by another party in the arbitration therefore the confidentiality is not absolute [Esso and others v. Plowman, Teekay Tankers. v. STX]. Relating the fact, the obtained evidence for the tribunal is crucial in the sense the evidence obviously shows

the mala fide intention of the respondent i.e. it accepts the adaptation of price for its own benefit, whereas it rejects the same rule when it came for the establishment of the next party's right [Letter by Joseph Langweiler, 2nd October 2018, pg. 49].

d. The obtained evidence by the CLAIMANT is relevance evidence, hence is legal and admissible.

56. The obtained evidence is relevance in the sense it shows the relationship between the case and the evidence. The evidence shows that the RESPONDENT is in fact not against the adaptation of the contract but seeking for own profit (Letter by Mr Langweiler, 2nd October 2018 pg.49). The relevance evidence in the arbitration proceedings is admissible [Article 9.2(a) of the IBA Rules on the Taking of Evidence in International Arbitration 2010, Commentary on HKIAC rules article 22]. Thus to establish the truth of its factual allegations on which legal conclusions is based and to decide whether a factual allegations is true or not obtained evidence is admissible. Even if the RESPONDENT contends that IBA Rules on Taking of Evidence is not applicable it is widely accepted as the guidelines [i].

i) Even if the RESPONDENT contends that IBA Rules on Taking of Evidence is not applicable it is widely accepted as the guidelines.

57. IBA Rules on the Taking of Evidence in International Arbitration 2010 COMMENTARY provides that the Parties and arbitral tribunals may adopt the IBA Rules of Evidence in whole or in part may use them as guidelines and "designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration". Therefore, the IBA Rules on Taking of the Evidence is applicable in this arbitration proceedings though the parties have not agreed upon. Hence, the evidence is relevance under the IBA rules.

e. The obtained evidence is admissible under the principle of "REASONABLE NECESSITY."

58. The term "reasonably necessary" covers only the case where the right in question cannot be enforced or protected unless the award and reasons are disclosed to a stranger to the arbitration and where the making of an award is a necessary element in the establishment of the party's legal rights against a stranger [Hassneh Insurance Co of Israel v. Stuart J Mew]. The same principle is followed by Insurance Co v Lloyd's Syndicate. Materiality and relevance stand for determining

the reasonable necessity of the disclosure evidence [Nathand D. O'Malley]. Disclosure was said to be in the interests of justice and reasonably necessary to enable to protect his legitimate rights [Emmott v. Michael Wilson & Partners Ltd.,]**.** Arbitral awards are protected by the implied duty to observe confidentiality unless the disclosure is characterized as reasonably necessary [Kyriaki Noussia].

f. The doctrine of estoppels is applicable.

59. In the another existing 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 [Letter by Mr. Langweiler , 2nd October 2018, p. 49, PO2 ,p.60 ¶ 40]. Denying any need to adapt the contract to a change of circumstances contends the RESPONDENT in line with the doctrine of estoppels. This shows that the RESPONDENT accepted the adaptation of the price in another existing arbitration and rejected the same rule in this arbitration. RESPONDENT is having a rule that applies in one arbitration one way and another way to another arbitration which is not legitimate.

i) No one can aprobate and reprobate at the same time.

60. How can one reject the same issue in one particular situation and accept the same in another situation? Thus, the moral principle "no one can aprobate and reprobate at the same time" under doctrine of estoppels avoids the respondent to do so. It applies to many situations where no contractual consideration is required or given but detrimental reliance is involved [Liu Guoqing]. Interests of justice required disclosure where the claimant had made out an arguable case of unlawful conduct [Westwood Shipping Lines Inc. v Universal Schiffahrtsgesellschaft MBH]. Relating the fact, RESPONDENT where it would be to its detriment reject adaptation of the price but immediately thereafter rely upon the same matter where it is in its favor.

ii) The RESPONDENT acts in contrary to its own promise making itself obliged under the promissory estoppels.

61.Mr. Antley viewed that it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree. RESPONDENT 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 [CLAIMANT's EXHIBIT C 8]. Here, the respondent to be contended under the doctrine of promissory estoppels. The doctrine of promissory estoppels encourages fair dealing in business

relationships and discourages conduct which unreasonably causes foreseeable economic loss because of action or inaction induced by a specific promise [Haveg Corp. v. Guyer, Kiely v. St. Germain,]. Promissory estoppels is applicable to avoid the injustice by the enforcement of the promise [Orit Gan]. Since the promissory estoppels apply for the distributive justice, the award is here to be sought as per the necessity.

g. RESPONDENT act in contrary to the doctrine of good faith.

62. By denying to adapt the contract and alleging obtained evidence as breach of confidentiality the RESPONDENT act in contrary to good faith. CLAIMANT had a profit margin of 5 % for the transaction and now makes a loss of 25 % due to the imposition of the new tariff of 30 % on the product by the Equatorianian authorities [Notice of Arbitration, p.7¶ 18,]. CLAIMANT is financially endangered [PO2, 2nd November 11, 2018, ¶ 29]. RESPONDANT does not have to bear the loss by bearing the requested amount [PO2, 2nd November 11, 2018, ¶ 30]. Despite knowing the impact of increased 30 % tariff on claimant financial situation [PO2, p.59 ¶ 28], RESPONDANT in the present case is vigorously denying any need to adapt the contract to a change of circumstance. Participants in the arbitration shall act in good faith [Article 9 of CIETAC Rules, Article 75 (b) of WIPO Rules]. Relevant mandatory due process norms include the entitlement to an adequate opportunity to present the party's case, the right to equal treatment and more contentiously, good faith disclosure obligations [Kluwer LawInternational 2012]. Disclosure fell within the "interests of justice" and could be used in situations including where wrongdoing was being cloaked in confidentiality, and where inconsistent arguments were being run in different forums [Teekay Tankers .v. STX]. The disclosure shall be allowed for the good cause if it suffices the right of the party [United States v Panhandle Eastern Corp].

Hence, because of the argument submitted and the authority cited above the CLAIMANT is entitle to submit the evidence from the other arbitration proceeding which is in accordance with the prevailing laws and the principles.

C. CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE

63. RESPONDENT intention is very well evidenced by the fact that in connection with a change in the delivery terms they included an adaptation clvvause into the contract [Notice of Arbitration, p. 7 ¶19].In fact, it is evidenced that CLAIMANT was not willing to bear the risk associated with delivery term during performance of contract. But the CLAIMANT who had kept the profit margin of 5 % made the losses of 25 % due to imposition of tariff on frozen semen by RESPONDENT country. Hence, CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount under clause 12 of the contract (i), under the CISG (ii).

i) UNDER CLAUSE 12 OF THE CONTRACT.

64. CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price under Clause 12 of the contract. As Clause 12 of Contract states , " 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."[CLAIMANT's Exhibit C5, FROZEN SEMEN SALES AGREEMENT]. The hardship clause in contract is unambiguous and understandable by any reasonable person hence do not require any rule to adapt the contract. In international trade, contract is concluded after meeting of mind and itself is enough to decide on any issue.

RESPONDENT need to adapt the contract and pay additional amount to CLAIMANT on the basis of Doctrine of Hardship[a],Principle of Good faith[b] ,Principle of Interpretation[c], Principle of Commercial Impracticability[d] ,Principle of Pacta Sunt Servanda [e], Delivery Duty Paid (DDP)[f], Default Rule [g].

a. Adaptation of price under the doctrine of hardship.

65. The fact evidenced that, parties have agreed on DDP delivery terms along with the inclusion of hardship clause in the contract. Parties never thought that there is possibility of imposition of tariff on frozen semen [Notice of Arbitration, p.6 ¶10 ¶9, PO2, p.58 ¶ 23]. Even the parties were astonished to hear that frozen semen falls under the agricultural product. [Notice of Arbitration, p.6 ¶11, PO2 ,p.58 ¶26].CLAIMANT had kept the profit margin of 5 percent but due to unforeseen tariff of 30 percent by RESPONDENT home country, now makes a loss of 25 percent [Notice of Arbitration, p 7 ¶18]. Therefore, CLAIMANT is entitled to the payment of US$ 1,250,000 or any

other amount under the doctrine of hardship on the basis of ;CLAIMANT losses justifies there is hardship under UNIDROIT Principles on International Commercial Contracts [i],CLAIMANT have right to do re-negotiation of price as hardship is proven [ii],Claimant have right to demand Revision of price[iii].

i) CLAIMANT losses justifies there is hardship under UNIDROIT Principles on International Commercial Contracts.

66. The fact shows that the Danubian Contract Law for international contracts is a largely verbatim adoption of the UNIDROIT Principles on International Commercial Contracts [PO2, p.62 ¶45]. The UNIDROIT Principles, in Article 6.2.2 provides that 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 receive has diminished.

67. The fact clearly satisfies the condition mentioned in Article 6.2.2 sub-paragraphs (a) to (d) i.e. (a) The events occur 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 6.2.2 of UNIDROIT Principles] .Therefore there is presence of hardship in this fact.

(ii) CLAIMANT have right to do re-negotiation of price as hardship is proven.

68. As contract has to be renegotiated if an event occurs which fundamentally alters the present contract and places an excessive burden on one of the party's performance making the adherence to the contract unreasonable [Art 6.2.3 (1) of UNIDROIT Principle ,p.223, Scafom Int'l BV v. Tubes s.a.s, Case No. C.07.0289.N, Art 7:101: of REVISED PECL, § 313(1) BGB of German Law 1874, Art. 1195 of the French Civil code, Art 1198 of the Argentine Civil .Code, Articles Ill- l: 110 (3) (d) of the DCFR 2008]. Re -Negotiation refers here to the adaptation of the contract, according to the circumstances created.

69. ICC Award No 8873, rules that the obligation to adapt the contract through the intervention of a third party applies only to exceptional circumstances, and cannot be enforced unless by inclusion

in the contract of a clause minutely detailing the circumstances that could justify a hardship situation and the entailing consequences [ICC Award No 8873 of 1997].

iii) CLAIMANT have right to demand Revision of price.

70. In the case B. R. v. UAB, parties should have the right to demand a revision of the price of the contract if for reasons beyond his control the actual price of the work has increased by more than fifteen percent.[B. R. v. UAB ,Sauluva",(2006)]

71.Thus, if we connect the above cases, rules and award with the fact , CLAIMANT have right to claim on adaptation of price .As the price of work has been increased due to sudden imposition of tariff by RESPONDENT home country on frozen semen after the conclusion of contract. This shows there is fundamental alteration in the equilibrium of the contract showing hardship [Notice of Arbitration, p.7 ¶18, Mineral Park Land Company v PA. Howard, (1916)]

Hence, CLAIMANT is entitle to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price under doctrine of hardship.

b. Adaptation of price under principle of good faith.

72. Parties to the fact have shown their interest in long-term mutually beneficial relationship [Claimant Exhibit C 2, p.10, Claimant Exhibit C 3, p.11] .RESPONDENT had contacted CLAIMANT first for the inquiry about the availability of Nijinsky III for its newly started breeding program [Claimant Exhibit C 1, Notice of Arbitration, p.5 ¶ 5] .CLAIMANT also agreed to send the frozen semen of Nijinsky III as it was good opportunity to increase their revenues without any major additional risk. Hence both parties entered into contract.

73. Each party must act in accordance with good faith and fair dealing in international trade [Article 1.7 (1) UNIDROIT, Art 1 Part 1 §1-304 of The US Uniform Commercial Obligation Code (2012), Art 1 Part 2 §1-203 of The US Uniform Commercial Obligation Code (2012) , §205 of the Restatement (Second) of Contracts (1981),Article 26 of the VCLT, §242 of the German BGB, Wallace v. United Grain Growers Ltd.(1997), Art. 2.(1)of Civil Code of Switzerland) (ZGB)].This provision implies that parties to the contract should fulfill the legitimate expectations of other party .Relying on this, re-negotiation process are subject to the principle of good faith[

Article 7:101 of REVISED PECL, Article 1.7191 and 5.3192 of the UNIDROIT Principles, Brunner (2009), p.480-481].

74. The case, Kelly J. in Gateway Realty Ltd. v. Arton Holdings Ltd. offered a more generic definition "The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith. This standard is breached when a party acts in a bad faith manner in the performance of its rights and obligations under the contract."[Gateway Realty v. Arton Holdings (1991)] .

75. Relating the case and rules to fact, RESPONDENT need to fulfill the legitimate expectation of CLAIMANT by paying additional amount in good faith. Hence, CLAIMANT is entitle to the payment of 1,250,000 or any other amount resulting from an adaptation of the principle of Good faith.

c. Adaptation of price under principle of interpretation.

76. RESPONDENT had given their consent for the inclusion of hardship clause in contract [Notice of Arbitration, p.7 ¶19] codified in clause 12 of contract .As it is evidenced in the fact that in connection with a change in the delivery terms they included an adaptation clause into the contract [Notice of Arbitration, p.7 ¶ 19].

77. Clause 12 of contract, clearly states that Seller shall not be responsible for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract onerous.

78. If the contract is clear and not ambiguous, the judge does not have to construct it, he only has to apply it [Article 4 of Law on Commercial Contract,p.5].

79. The court must always give effect to the language of the contract, especially when the words are unambiguous and commercially sensible. Mortimer NPJ in Marble Holding Limited v Yatin Development Limited, where he stated that "if the words used are free of ambiguity and devoid of commercial absurdity their natural and ordinary meaning will apply unless the relevant surrounding circumstances demonstrate otherwise [Marble Holding Limited v Yatin Development Limited (2008)].

80. Clause 12 of the contract has understandably mentioned that Seller is not liable for the hardship caused due to unforeseen events. As in fact, CLAIMANT suffered loss of 25% because of unforeseen events i.e. imposition of tariff. Hence as per rules, CLAIMANT has right to claim on compensation for the loss made due to imposition of tariff by RESPONDENT home country.

d. Adaptation of price under principle of commercial impracticability.

81. Relying upon fact, CLAIMANT is adversely affected by the occurrence of an unexpected circumstance i.e. sudden imposition of tariff on frozen semen. That results on the increment of cost of performance as CLAIMANT were compelled to pay additional 25 percent as a tariff on frozen semen in spite of making 5 percent profit [Notice of Arbitration, p.7 ¶18].

82. Doctrine of commercial impracticability refer to situation in which a seller is adversely affected by the occurrence of an unexpected circumstance because that occurrence either makes the performance impossible or significantly increases the cost of performance. It simply excuses someone from performing a contract [Eric S. Rein and Maria A. Diakoumakis, p.13].

83. CLAIMANT as per the fact suffered losses which was not predicted, unexpected imposition of tariff make the cost of performance 25 % more expensive in third delivery. Similarly if we look back to economic condition of CLAIMANT, it had suffered loss since 2014 and nearly underwent insolvency [PO2, p.58 ¶21]. Thus as per Doctrine of Commercial impracticability, CLAIMANT should be excuse on the payment of additional payment of US$ 1,250,000 by paying compensation from RESPONDENT.

e. Adaptation of price under principle of pacta sunt servanda.

84. The principle Pacta sunt servanda, the Latin word is applied in Civil law and International law which help to keep the contract for long time. This principle states, clauses of private contract are the law of contract which are binding upon the parties by the parties in good faith [Cmnt. on Art 1.3 of UNIDROIT, Josef L. Kunz, p.180-197, Article 26 of the VCLT, Millennium Holdings v. Glidden, (2013)].Parties not performing as per the clause results breach of contract. Hence, this

principle shows that RESPONDENT need to perform as accordance to the contract clauses which consist the hardship clause, if not there results breach of contract giving rise to monetary damages.

85. Relying in fact, it is clear that CLAIMANT is making losses since 2014 and had nearly underwent insolvency in past. CLAIMANT accepted the offer of RESPONDENT only because it was a good chance to increase the revenue of its company [Notice of Arbitration, p.5 ¶ 6].But instead of making 5% profit, CLAIMANT came to have loss of 25% which nearly made the company broke [Notice of Arbitration, p.18 ¶ 18].For CLAIMANT, getting compensation of loss of 25% for the non-performance by the RESPONDENT is not enough to maintain the economic equilibrium of its company. Rather, CLAIMANT also needs the money which was assured by the contract as a profit. Because the aggrieved party is entitled to compensation in respect not only of loss which it has suffered, but also of any gain of which it has been deprived as a consequence of the non-performance [Cmnt. on Art.7.4.2 of UNIDROIT, Article 74 of CISG].

f. Adaptation of price under delivery duty paid (DDP).

86. RESPONDENT 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 [Notice of Arbitration, p.7 ¶ 19].As the fact shows that CLAIMANT were not interested in accepting DDP delivery term due to past experiences with extremely expensive test of 40 % of sales price due to changes in customs health requirement .CLAIMANT only accepted the DDP delivery terms against moderate price and as a result of inclusion of adaptation clause which was supposed to cover not only prevalent risk of changes in health and safety requirement but also other risks including additional tariff ,like present.[Notice of Arbitration ,p.7 ¶19 ,PO2 ,p.58 ¶ 21].Likewise, DDP delivery term was primarily accepted 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 [Claimant Exhibit C 8, p.17-18].

87. DDP delivery term represents the maximum obligation for the seller. Any VAT or other taxes payable upon import are for the seller's account unless expressly agreed otherwise in the sale contract [Incoterms® 2010 by ICC)]. Hence, DDP existed due to presence of Hardship clause in contract that is accepted by RESPONDENT.

88. RESPONDENT may contend that CLAIMANT is liable to pay all additional cost as the DDP delivery term is used. Despite this, CLAIMANT is not entitled to pay tariff as CLAIMANT accepted the DDP delivery term only when RESPONDENT agreed to include adaptation clause in clause 12 of contract which clearly states seller is not liable for any unforeseen events.

89. Similarly, a modification or amendment of the Incoterm used in the contract will imply a certain allocation of the costs and insurance. When parties stipulate a provision that contradicts, with an aspect of the chosen Incoterm, that contradiction is usually intended. Therefore, the contradicting provisions should prevail [Manal Bensafi,Rontavian Mack ¶ 3.1].

90. FROZEN SALES AGREEMENT consist both incoterm (DDP) and hardship clause which totally differ from each other. DDP imposes maximum obligation to seller whereas hardship clause gives excuse to seller from additional risk. So, there results the contradiction between the two chosen Incoterm and contractual clause .Thus contracting clause i.e. hardship clause does prevail and RESPONDENT need to perform in accordance to clause 12 of contract.

Hence, CLAIMANT is entitled to the payment of US$ 1,250,000 resulting from adaptation of price .The fact evidenced that DDP existed just because there is presence of hardship clause in contract. As hardship clause gives rise to adaptation of price, CLAIMANT has right to claim on additional amount.

g. Adaptation of price under default rule.

91. The Principle of default rule determine parties contractual obligation in the absence of evidence of their intent. In short, default rule means that the contract can overrides the rule of law. The party by his own contract creates a duty or charge upon himself, he is bound to make it good [Paradine v. Jane (1647)].Likewise parties in contract under clause 12 had agreed that seller is not responsible for any other additional cost. So, CLAIMANT has right to claim the full amount of US$ 1,250,000.

92. Even if there is no hardship clause embodied in contract, the parties can go for further revision of price of contract. As if a contract is silent on hardship, the question is answered by reference to the law of the agreement [Frederick F. Fucci] .In this case Mediterranean law and CISG is the reference to the law of agreement.

93. Likewise, if there occurs conflicts between the document of the contract, the conflict shall be resolved by giving first priority to the contract than other documents of contract [General Terms and Condition of Smit Contract,p.11]. Hence , CLAIMANT is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price .As contract is supreme than other document and law, RESPONDENT must perform in accordance to the clause 12 of contract by adapting the contracting and paying 1,250,000 or any other amount to CLAIMANT.

C. CLAIMANT is entitled to the payment of US $1,250,000 or any other amount resulting from an adaptation of the price

(II) Under the CISG.

a. The parties choose the CISG to govern their sales agreement.

94. According to the principle of party autonomy, the parties to an international commercial contract are free to choose the law applicable to their contract [Art. 2(1) Hague Principles on Choice of Law; Poudret/Besson, ¶ 679]. Both international convention and the model rules on international commercial arbitration confirms that the parties are free to choose for themselves the law applicable to their contract, for example Article 35 of UNICITRAL Arbitration Rule, 2014 and article 21 of ICC rule, 2017 and article 42 of the Washington convention 1965. [Redfern/Hunter,¶3.97].Also,CISG applies to contracts of sale of goods between parties whose places of business are in different States [CISG Article 1]. Although the CISG can be excluded pursuant to article 6 but for such intent, it should be clearly manifested whether at the time of conclusion of the contract or at any time thereafter [CISG AC Op. 16, rule 3].

95. In the present case, the parties specified in Clause 14 of the Frozen Semen Sales Agreement that the sales agreement shall be governed by law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods(CISG) [CLAIMANT's Exhibit C 5, p. 14]. Therefore based on the interest of the parties that is mention over the contract explicitly the provision under the CISG can be invoked.

b. The condition of hardship as an exemption is within the ambit of Article 79 of CISG.

96. The drafting history of CISG article 79 provides that the party under hardship can claim exemption from liability [i]. The CISG article 79 can be interpreted in a broad manner to incorporate hardship condition and can exempt under it [ii]. The CLAIMANT is entitle to invoke Article 79 during the condition of hardship for the exemption of non-performance [iii]

i. The drafting history of CISG Article 79 provides that the party under hardship can claim exemption from liability.

97. For an exemption to be granted, the non-performance of the contract must be due to an "impediment". "Professor Schlechtriem who argued that "at the time of the drafting of the convention, the hardship problem was regarded as covered by Article 79" [Schlechtriem, p.236]. The language of Article 79 does not expressly equate the term "impediment" with an event that makes performance absolutely impossible. A party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79 [CISG AC Op. 7, 2007, rule 3.1]. Article 74(1) ULIS used the word "circumstances." "By adopting the word "impediment" the Vienna Conference's aim was at emphasizing the objective nature of the hindrance rather than its personal aspect [Talon, P. 579]. If the impediment is extraneous to the activity of the defaulting party, i.e., if it is not under his control, it produces exempting effect. Exemption is permitted when the impediment to performance is beyond the obligor's control [Schlechtriem, p. 101]. When the performance is beyond the obligor's control then it denotes the objective nature of hindrances,
the drafter wants to ousted the personal aspect of such as seller's liability to escape for defective performance, and in particular defects of quality, by pleading that they were beyond his control and that he could not have been expected to take them into account [Nicholas, p.5-10]. Therefore the drafting history of Article 79 doesn't limit the word "impediment" so that the party under the hardship cannot claim exemption from liability. Therefore, the situation of hardship is incorporated under the term impediment and the party can claim exemption under Article 79 of CISG.

ii. The CISG Article 79 can be interpreted in a broad manner to incorporate hardship condition during the changed circumstances.

98. The CISG does not cover all questions relating to sales transactions as no legislator is blessed with perfect foresight [Ingeborg/ Pascal/ Christopher, ¶3.19; Schlechtriem/Petra, p. 50]. RESPONDENT asserts that Art. 79 CISG does not regulate hardship [Answer to the Notice of Arbitration, p. 32]. Although in the absence of an explicit hardship provision it is of great importance to find an answer to the question whether Article 79 governs hardship, as the other alternative seems to be full liability for the party suffering hardship. The Court of Cassation interpreted the wording of Art. 79(1) CISG in a broad manner and argued that hardship was not implicitly excluded from its scope [Scafom Internationl BV v Lorraine Tubes s.a.s.]. Article 79

contains several wordings that leave room for interpretation or require an evaluation of reasonableness. The only Article in the CISG that regulates changed circumstances is Article 79.

99. Hence, all situations of hardship must be evaluated on the basis of Article 79 or be treated as a breach of contract [Niklas para IV(1)]. A change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("hardship"), may qualify as an "impediment" under Article 79(1) [AC Op. 7, rule 3.1]. The hardship situation shall be interpreted within the four corners of the CISG because if not so then the question relating to the condition of hardship may be evaluated on the basis of domestic rules and the rule may lead to a great diversity based on the relative domestic doctrines.

iii. The CLAIMANT is entitle to invoke Article 79 during the condition of hardship for the exemption of non performance.

100. The prerequisite to an exemption under Article 79(1) is fulfilled based on the situation of the CLAIMANT [aa] ,The change of circumstances was not foreseen by the CLAIMANT [ab].

aa. The prerequisite to an exemption under Article 79(1) is fulfilled based on the situation of the CLAIMANT.

101. As a prerequisite to an exemption, Article 79(1) requires that a party's failure to perform be due to an "impediment" that meets certain additional requirements (e. g., that it was beyond the control of the party, that the party could not reasonably be expected to have taken it into account at the time of the conclusion of the contract, etc...) [UNICITRAL Digest, p. 375]. The government of Equatoriana to impose a tariff of 30% on all agricultural goods including on animal semen was a retaliation measure taken against the government of Mediterraneo although Equatoriana being one of the biggest supporter of free trade who always tried to solve dispute amicably regarding the trade [Claimant's exhibit 6, p.15]. The action of government was beyond the control of the CLAIMANT that denotes beyond obliger's control. Also, the tariff came as a big surprise despite of government of Equatoriana dealing the trade dispute amicably so it could not have been taken into account at the time of the conclusion of the contract which denotes unforseeability.

ab. The change of circumstances was not foreseen by the CLAIMANT.

102. The foreseeability of the impediment has to be measured under the "reasonable person" exam which is based on the idea that if the impediment had been foreseeable at the time of conclusion,

the party concerned would have done something to prevent it [Arroyo, p.22]. However the sudden measure came as a surprise where at first the imposition of tariff by the Mediterraneo came as a big surprise when there was a newly elected president who impose tariff that was not been part of any strategy papers nor election manifesto [Notice of arbitration, ¶ 9, p.6] also the retaliatory measure taken by Equatoriana by imposing the tariff [Claimant's exhibit 6] cannot be foresee by the CLAIMANT during the conclusion of the contract and no prevention can be taken based on the astonished activity by the government.

103. This activity results the economic burden to the CLAIMANT by maintaining disequilibrium of the contract where the CLAIMANT has to pay more amount then what was included during the conclusion of the contract. However, the language of Article 79(1) seems to leave room for exemptions based on economic dislocations that provide an "impediment" to performance comparable to non-economic barriers that excuse failure of performance. [Honnold, p. 484].

c. Although the CISG incorporates the hardship condition based on the article 79 but due to the lack of explicit provision relating to the effect of hardship it should be interpreted and supplemented along with UNIDROIT principle

104. The UNIDROIT principle is able to interpret and supplement the CISG [i], RESPONDENT fails to renegotiate with the CLAIMANT based on article 6.2.3 of UNIDROIT principle [ii]

[i] The UNIDROIT principle is able to interpret and supplement the CISG.

The preamble of the UNIDROIT Principles establishes that they "may be used to interpret or supplement international uniform law instruments" [Preamble of UNIDROIT principle] The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG)

Represents the most recent attempt to unify or harmonize international sales law [Felemegas, p. 3].

105. The UNIDROIT Principles deal with issues which the drafters of the CISG did not address explicitly [Schlechtriem /Petra, p. 54].UNIDROIT Principles are particularly well suited to fill gaps in the CISG, because they set forth general principles of international commercial contracts and their application would further CISG Article 7(1) by helping unify international contract law i.e. based on the autonomous interpretation ie not in the light of domestic law.[Salama, p.231] also the UNIDROIT principle are said to reflect a world-wide consensus in most of the basic matters of contract law [ICC Court of Arbitration, Case No. 9117].

[ii] RESPONDENT fails to renegotiate with the CLAIMANT based on Article 6.2.3 of UNIDROIT principle.

106. "In case of hardship the disadvantaged party is entitled to request renegotiations for the consequences of the changed circumstances within a reasonable time. [UNIDROIT principle, Article 6.2.3; ICC Hardship Clause 2003, ¶ (2) (b)]. The RESPONDENT even underlying other arbitration asked for a renegotiation of the price under Article 6.2.3 of UNIDROIT principle [PO2 No. 39] Although in the present case if the Although, in the present case if the UNIDROIT principle is ousted then one can regard as there will be the gap regarding the effect of hardship condition that may be fulfilled by the Article 7(2) of the CISG. The gap could be filled by invoking the general principles of the Convention, and those general principles include good faith and fair dealing, and this requires that both parties try to adapt the contract in the event of unforeseeable developments.[Schlechtriem, p. 236]

107. The Julie Napravnik from the CLAIMANT side has rovided the imposition of tariff and the hardship due to which the CLAIMANT couldn't perform their task to the RESPONDENT and the loses of 25% although however the performance was carried by CLAIMANT when the RESPONDENT urged to do so by stating that solution would be found through negotiation and CLAIMANT by bearing additional payment perform the activities [Claimant's exhibit C8, p. 18]. A person may be bound by an exemption clause in a standard form document, even though subjectively ignorant of its content, if the party seeking to rely on the clause has done what was reasonably sufficient in the circumstances to bring it to the other party's notice [Parker v South Eastern Railway co.]. Therefore, the CLAIMANT have provided the reasonably sufficient notice to the RESPONDENT regarding the additional payment and their hardship by giving the notice to the RESPONDENT representative. Also, the representative of RESPONDENT i.e. Mr. Shoemaker had been introduced as the person responsible for the racehorse breeding program including all questions concerning the frozen semen sales agreement [PO2 no. 32]. Although the notice was provided within a reasonable time regarding the hardship of the CLAIMANT during the negotiation time the RESPONDENT's CEO got very angry and aggressive and refused to pay any additional amount for the tariffs [Claimant's exhibit 6].

d. RESPONDENT fails to adapt the contract as the continuation of the contract for long term needs to be adapted during the condition of hardship

108. There is necessity of adaptation to changing conditions during the performance of long term contracts which primarily aims at to continuation of contractual relationship [Dr. Rafiei, p. 161]. Although the RESPONDENT asserted that they wanted the long term co-operation with CLAIMANT [Claimant's Exhibit C3, p.11] but despite knowing of the hardship condition due to the changed circumstances the negotiation was stopped by the RESPONDENT and refuse to the additional payment [Claimant's Exhibit C8, p.18] results that the RESPONDENT were not interested to adapt the price as per the changed circumstances. Principle of adaptation of the contracts constitutes an exception to the general principle of contract law i.e. pacta sunt servanda (promises must be kept).When there is a condition of hardship due to the change circumstances the contract should be adopted. Article 138 of the Turkish Code of Obligations ("TCO") regulates the adaption of the contracts in the event of hardship. In the most international contracts,the price is established on the basis of the circumstances existing when the agreement was reached and it will be revised according to the different events that occurred during the performance of the contract[ICC Award No 2291 of 1975 Clunet].

e. The CLAIMANT has worked under the good faith rather the intention of the RESPONDENT acts seems to be under the bad faith.

109**.** The CLAIMANT authorizes for the third shipment paying additional amount results to work under good faith[i]. The RESPONDENT to disagree the negotiation although stating to solve the condition of hardship through the negotiation initially seems to act under bad faith [ii].

i. The CLAIMANT authorizes for the third shipment paying additional amount results to work under good faith.

110. As per the Article 79 of CISG although the condition for exemption has been made and allowed under the condition of hardship but due to the RESPONDENT'S representative promise to find the solution through the negotiation, the performance was carried out by paying the additional amount by CLAIMANT [Claimants exhibit C8, p.18; PO2 No.28]. The action of the CLAIMANT seems to be under a good faith over here. Good faith and the hardship exemption have a close relationship; "good faith is implicit in the doctrine of excuse for non-performance, as it requires the parties to do, not what has been exactly promised, but rather that which is fair and reasonable under the circumstances"[Mazzcano, p. 3].

ii. The RESPONDENT to disagree the negotiation although stating to solve the condition of hardship through the negotiation initially seems to act under bad faith.

111. The CLAIMANT find out that the RESPONDENT sold 15 doses at a price that is 20 percent higher than they initially bought from the CLAIMANT [PO2 No.20]. The RESPONDENT were only able to sell the frozen semen for other purposes after providing the information to the seller as per the contract [Claimant's Exhibit C5]. However the resale of the frozen semen without the information to the seller infers that the RESPONDENT wants to induce additional breeders to fight for a permanent lifting of the ban rather than having the long term cooperation with the CLAIMANT. Although the CLAIMANT requested for the negotiation in the case of hardship within a reasonable time [UNIDROIT principle, article 6.2.3] but the representative of the RESPONDENT who states that the solution would be found through negotiation and later at the negotiation the RESPONDENT'S CEO getting angry regarding the additional payment despite of asserting that a RESPONDENT wants to involve with CLAIMANT in long term cooperation and knowing the financial condition of the CLAIMANT [PO2 No.22] seems like the RESPONDENT didn't intend to reach in agreement rather they only wanted the additional breeder to fight for permanent lifting of the ban that can be inferred from the resale of the frozen without the information to the seller. This intention regards the bad faith; a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party. [UNIDROIT, Article 2.1.5,]

f. The CLAIMANT is entitled to the payment of US$ 1,250,000 in order to maintain the equilibrium of the contract

112. Although the CLAIMANT has been exempted under the Article 79 of CISG for the non-performance during the condition of hardship but on request of RESPONDENT to solve the problem through negotiation, the CLAIMANT performed the task but later the RESPONDENT fails to negotiate the contract. However, the RESPONDENT denies paying the additional amount and the parties fails to adapt the contract. If the parties couldn't themselves adapt the contract during the condition of hardship then if the court finds hardship it may adapt the contract with a view to restoring its equilibrium [UNIDROIT principle, Article 6.2.3 ¶ 4 (b)]. A standard arbitration agreement is considered to be sufficient to grant an arbitral tribunal same power as court [PO2, p.60 ¶ 39]. Similar to the court the award provided by the arbitral tribunal will be a binding

decision and not a recommendation that the parties are free to accept or reject as they please [Redfern/ Hunter, ¶ 1.92]. Since the CLAIMANT has been making losses since 2014 primarily due to the high interest payment for the loan taken and the CLAIMANT had agreed with its creditors that would be profitable again from 2017 onwards and additional revenues from the sale of the frozen semen CLAIMANT had planned to make a profit therefore the plan would seriously endangered if CLAIMANT had to bear the additional cost i.e. US$1,250,000 [PO2 No.29, p. 59]. So for the fair dealing and maintain the equilibrium of the contract the CLAIMANT is entitled to the additional amount. While the RESPONDENT will not be financially endangered if it bore the cost US$ 1,250,000 [PO2 No. 30, p. 59].

g. CLAIMANT is also entitled to the unauthorized profit made by RESPONDENT along with the additional payment which now becomes US$ 1,550,000

113. CLAIMANT (herein is "Phar Lap Company") is known for its breeding success regarding racehorses among which Nijinsky III was star of Phar Lap [Notice of Arbitration, p.4]. CLAIMANT who had been in losses since 2014 and had nearly resulted in the insolvency [PO2, No. 29] agreed to supply 100 doses of frozen semen as it was good opportunity for CLAIMANT to increase its revenue [Notice of Arbitration, p.5].CLAIMANT also believed that their interest regarding to protect the semen for other use had been protected by the RESPONDENT. As the both parties showed their interest in maintaining the long term cooperation [Claimant Exhibit C 2, p.10, Claimant Exhibit C 3, p.11]. RESPONDENT also agrees to inform the seller for the other use of the frozen semen within the four corner of the sales agreement [Claimant's Exhibit C5, p.13]. Each party must act in accordance with good faith and fair dealing in international trade [UNIDROIT principle, Art. 1.71(1)]. These results, the parties to fulfill the legitimate expectation of each other in good faith.

114. However the resale of the frozen semen has been done by gaining 20% profit on 15 doses by the RESPONDENT [PO2 No. 20]. Re-selling the product to other buyer by RESPONDENT, shows there is breach of standard of good faith and the violation of the contract itself. The fact disclose that RESPONDENT had re-sold the 15 dose earning 20% profit [PO2 , p.57¶ 20]. So, CLAIMANT can claim 20 % of US$ 1,500,000 i.e. US$ 3, 00,000. The total calculation is done below.

Total number of dose of semen	100
Total number of shipment	3
Number of installment to pay	2
Price of per dose	US$ 100,000
Number of doses that had been resold	15 dose
Price of 15 dose	US$ 1,500,000
Profit % earned by re-sold of 15 doses of frozen semen	20 %
Amount earned by re-sold of 15 doses of frozen semen	US$ 3,00,000
Compensation for CLAIMANT	US$ 1,250,000
Total Amount claim by CLAIMANT= Compensation + Profit	US$ 1,550,000

Figure: Table showing the payment that CLIAMANT is entitled.

PRAYERS FOR RELIEF

In light of the above submissions, CLAIMANT respectfully requests that the Tribunal:

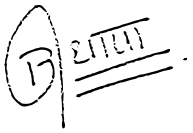
- Find that the tribunal have jurisdiction and/ or the powers under the arbitration agreement to adapt the contract, which includes in particular the question of which law governs the arbitration agreement and its interpretation.

- Find that the CLAIMANT should be entitled to submit evidence from the other arbitration proceedings.

- Find that the CLAIMANT should be entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price under clause 12 of contract (I) or under the CISG (II).

Respectfully submitted,

Bhaktapur, December 6, 2018



Binda Thapa

Prekshya Niroula

Ranjeet Karki

Sophiya Kutu