MEMORANDUM FOR CLAIMANT

ON BEHALF OF

Phar Lap Allevamento

Rue Frankel 1

Capital City

Mediterraneo

CLAIMANT

AGAINST

Black Beauty Equestrian

2 Seabiscuit Drive

Oceanside

Equatoriana

RESPONDENT

Institut de Droit des Affaires Internationales (IDAI)

Cairo University

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TABLE OF ABBREVIATIONS

Abbreviation	**Original word**
&	And
Adv. Op.	Advisory Opinion
Art./Arts.	Article(s)
CISG	United Nations Convention on Contracts for the International Sale of Goods
CLAIMANT	Phar Lap Allevamento
Cl. Ex.	Claimant's Exhibit
CLOUT	Case Law on UNCITRAL texts
ed.	Edition
e.g.	For example
G.S.	General Standard
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	Hong Kong Arbitration Rules 2018
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration
Ltd.	Limited
Mr	Mister
Mrs	Missus
No.	Number
para/paras	Paragraph(s)
p./pp.	Page(s)
PO.	Procedural Order
RESPONDENT	Black Beauty Equestrian
Res. Ex.	Respondent's Exhibit
UNCITRAL Rules	UNCITRAL Arbitration Rules (as revised in 2010)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2010)

STATEMENT OF FACTS:

The parties to this arbitration are Phar Lap Allevamento ("CLAIMANT") and Black Beauty Equestrian ("RESPONDENT").

CLAIMANT is a company in Capital City, Mediterraneo which operates stud farms, has horses and offers frozen semen of its champion stallions for artificial insemination.

RESPONDENT established a racehorse stable and started a breeding programme using semen bought from CLAIMANT.

On 21 March 2017 RESPONDENT contacted CLAIMANT, inquiring about the availability of Nijinsky III (CLAIMANT's most famous stallion) for its newly started breeding programme.

With email of 24 March 2017, CLAIMANT offered RESPONDENT 100 doses of Nijinsky III's frozen semen . RESPONDENT had no problems with most of the terms of the offer, but objected to the choice of law and the forum selection clause and insisted on a delivery DDP. CLAIMANT accepted a delivery DDP against a moderate price increase, the transfer of certain risks to RESPONDENT and the inclusion of a hardship clause to temper some of the additional risks taken. On 12 April 2017, the two main negotiators were severely injured in an accident so the finalization of the agreement took longer than planned.

On 6 May 2017, the Sales Agreement was signed. The parties agreed on three shipments.

On 20 May 2017 and 3 October 2017, the first two shipments were delivered.

Two months before the last shipment, Mediterraneo's newly elected President, announced 25 per cent tariffs on agricultural products from Equatoriana. Consequently, the Equatorianian government retaliated by imposing 30 per cent tariffs on animal semen from Mediterraneo.

On 20 January 2018, CLAIMANT and RESPONDENT started negotiations regarding a price adjustment for the frozen semen. RESPONDENT had made clear during the contract negotiation

that for its planning timely delivery was extremely important. And RESPONDENT appeared to generally accept the need for a price increase.

On 23 January 2018, CLAIMANT complied with its delivery obligation and delivered the third shipment (50 doses) before an agreement on the new price had been reached.

On 31 July 2018, CLAIMANT commenced arbitration.

On 24 August 2018, RESPONDENT submitted its answer to notice of arbitration.

ISSUE 1: The arbitral tribunal has the jurisdiction and the powers under the arbitration agreement to adapt the contract, since the Law of Mediterraneo governs the arbitration agreement and its interpretation.

I. The Arbitral Tribunal has the jurisdiction under the arbitration agreement to adapt the contract:

The arbitral tribunal has jurisdiction to adapt the contract under the arbitration agreement since the latter and its interpretation are governed by the Law of Mediterraneo and not the law of Danubia (A), which proves that the arbitration agreement covers the claim raised by CLAIMANT (B).

A. The arbitration agreement and its interpretation are governed by the Law of Mediterraneo:

1. The Law of Mediterraneo governs the arbitration agreement and its interpretation:

Pursuant to article 36 of the HKIAC: "*The arbitral tribunal shall decide the substance of the dispute in accordance with the rules of law agreed upon by the parties. (…) Failing such designation by the parties, the arbitral tribunal shall apply the rules of law which it determines to be appropriate*."

Applying this to the case in hand and unlike what RESPONDENT claims, the parties did not agree in their final arbitration agreement that the applicable law shall be the Danubian Law. The arbitration clause only stipulates that any dispute shall be resolved by arbitration administered by the HKIAC under its rules, but does not provide that the Danubian law shall govern the arbitration agreement or its interpretation.

However, it has been agreed by the parties that the arbitration agreement be governed by the Law of Mediterraneo as it is the law of the contract: RESPONDENT in an email of 27th March 2017, during negotiations, explicitly showed that it accepts the application of the law of Mediterraneo [*CLAIMANT'S EXHIBIT 3*]. And unlike what RESPONDENT claims, CLAIMANT did not accept the proposal made by RESPONDENT that the arbitration agreement be governed by the law of the place of arbitration, which is the law of Danubia: the email sent by CLAIMANT on the 11th of April 2017 shows no sign of acceptation by CLAIMANT. [*RESPONDENT'S EXHIBIT 2*].

Consequently, the arbitration clause and its interpretation are not governed by the law of Danubia, however they are governed by the Law of Mediterraneo as it is the law of the contract : both parties

agreed after long negotiations on the Law of Mediterraneo as the law governing the contract, hence CLAIMANT asks from the arbitral tribunal to extend this application to the arbitration agreement and its interpretation

2. The arbitration agreement should not be interpreted narrowly:

Since the Danubian Law is not applicable on the arbitration agreement nor on its interpretation, the rule which provides that arbitration agreement should be interpreted narrowly and in accordance with the parole evidence rule is not applicable to the case in hand.

As already proved, the interpretation of the arbitration agreement should be done according to the Law of Mediterraneo which on the contrary provides for a broad interpretation of the arbitration agreement. Consequently, the arbitration agreement clearly covers the claims raised for an increased remuneration.

B. The arbitration agreement covers the claim raised for an increased remuneration

1. The arbitration agreement gives the arbitral tribunal the power to decide on the claim raised by CLAIMANT:

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

This arbitration clause clearly gives competence to the arbitral tribunal to decide any dispute arising out of the contract between the parties, and more specifically on the interpretation, the performance and the breach of the contract. Hence, the claim raised by CLAIMANT for an increased remuneration resulting for the circumstances that have affected the contract clearly falls under the jurisdiction of the arbitral tribunal. This is justified by the fact that the parties adopted an arbitration clause that encompasses any dispute that results from the contract. Thus, since the claim raised by CLAIMANT is the result of an increased tax on frozen semen which is the object of the contract between the parties, this obviously results from the performance of the contract which is expressly and specifically stipulated by the arbitration agreement.

Consequently, the arbitration clause clearly gives the arbitral tribunal the power to decide on the claim raised by CLAIMANT regarding the increased remuneration.

2. The arbitral tribunal should adapt the contract in respect to the arbitration agreement:

According to article 13 of the HKIAC: "*Subject to these Rules, the arbitral tribunal shall adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay or expense, having regard to the complexity of the issues, the amount in dispute and the effective use of technology*"

Since the arbitration agreement gives the arbitral tribunal the competence to decide on any dispute resulting from the contract, and since as already established, the claim raised by CLAIMANT arises directly from the contract, the arbitral tribunal should adapt the contract in order not to violate the arbitration agreement. In addition it is in the arbitral tribunal's power, according to article 13 of the HKIAC, to adopt the suitable procedures for the conduct of the arbitration. Hence, it is necessary that the tribunal adapts the contract since it would most definitely avoid unnecessary delay and expenses on both parties.

In addition, it is important to point out that RESPONDENT's negotiator, Mr Antley had explicitly stated to CLAIMANT's negotiator Ms Napravnik, that it would be the arbitrator's task to adapt the contract if necessary, in case the parties could not agree to reach a certain solution. However this has not been subject to an express provision due to the accident that had occurred to both negotiators. This is clearly confirmed in Ms Napravnik's witness statement :

"I mentioned to Mr. Antley that for us it was important to have a mechanism in place which would ensure an adaptation of the contract for the unlikely event that the Parties could not agree on an amendment. Mr. Antley replied that in his view that it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree." [*CLAIMANT'S EXHIBIT 8*]

Consequently, since it is clear that both parties intended to give the arbitral tribunal the power to adapt the contract, CLAIMANT urges the arbitral tribunal to do so.

II. The Arbitral Tribunal has jurisdiction and power under the applicable rules to adapt the contract:

Since that the Mediterraneo law must governed the arbitration agreement and not the Danubian law as RESPONDENT alleged, then the arbitral tribunal has jurisdiction and the power under the

Unidroit principles (A) and the HKIAC arbitration rules (B) to adapt the contract due to the unforeseeable economic circumstances.

A. The arbitral tribunal has power to adapt the contract under the Unidroit Principles:

The Unidroit Principles seek to establish rules that are common to most of the existing legal systems and also offer the best solutions to the specific needs of international trade. The concept of *better rules* was adopted, featuring innovative solutions better suited to the requirements of the international market. This was possible since the Principles are not binding in nature; therefore they will be applied in practice by reason of their persuasive value only.

1. Definition of a hardship Clause:

According to scholars: "As arbitrators fulfil functions similar to judges, they must, as a rule, observe the law which is applicable to the contract according to conflict of law rules." *[**Norbert Horn**]*. Which means that the arbitrators are the alternatives of the judges therefore the arbitration proceedings is an alternative way to resolve the dispute as the courts, thus the arbitrators fulfill functions similar to the judges in the national courts. *[Babatunde Osadare]*

Pursuant Article 6.2.3(1) of the Unidroit Principles, it states that: "In case of hardship the disadvantaged party is entitled to request renegotiations" also in the same article paragraph 4: "If the court finds hardship it may, if reasonable, adapt the contract with a view to restoring its equilibrium." Since that the arbitral tribunal is similar in its rights to the courts, therefore the arbitral tribunal has the right in case of any hardship to adapt the contract."
Furthermore, the idea that the arbitration is a suitable means for the adaptation of contracts, is put forward by a leading scholar, René David, as the general reporter to the international congress of comparative law in Budapest, 1978, where this problem was a main subject. David advocates a broad and flexible concept of arbitration comprising both the procedural and contractual types and bound more by some procedural rules and not so much by strict rules of substantive law, thus enabling the arbitrator to adapt the contract under changed circumstances to the future needs of cooperation.

Article 6.2.2 of the Unidroit Principles defines the hardship as a situation where the occurrence of events fundamentally alters the equilibrium of the contract, provided that those events meet the requirements which are laid down in subparagraphs (a) to (d), as per example the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; and the risk of the events was not assumed by the disadvantaged party." Which means that one of the requirements in this article to qualify a hardship is that the change in circumstances could reasonably have been taken into account by the disadvantaged party at the time the contract was concluded. Sometimes the change in circumstances is gradual, but the final result of those gradual changes may constitute a case of hardship. If the change began before the contract was concluded, hardship will not arise unless the pace of change increases dramatically during the life of the contract. Moreover, the fundamental alteration in the equilibrium of the contract could be at a time when performance has been only partially rendered, hardship can be of relevance only to the parts of the performance still to be rendered and not all the performance. *[Zaccaria, Elena]*

In the present case, CLAIMANT makes clear to RESPONDENT that it has no intention to bear all the risks of this contractual agreement and it states that in its email with RESPONDENT on the 31th March 2017: "we are not willing to take over any further risks associated with such a change in the delivery terms" *[Exhibit C4, P.12 of the record]*. Moreover in the 12th clause in the sales agreement, it states that: "seller shall be not responsible […] of acts of God neither for hardship caused by unforeseen events making the contract more onerous." *[Exhibit C5. P.14, Para 12]*.
However, the imposed tariff of 30% on selected items which includes the animal semen, must be included in the hardship clause as they increase CLAIMANT's costs also these tariffs was not expected before the conclusion of the contract, "even more surprising was the reaction of the Equatorianian government, which has always been an ardent supporter of free trade." *[Statement of facts, P.6, Para10]*.
Since that the conditions of article 6.2.2 and 6.2.3 of the Unidroit Principles are met, the arbitral tribunal has the power and jurisdiction to adapt the contract due to the hardship.

2. The necessity for adaptation in a long-term contract:

In the present case, the parties intend to have a long-term cooperation: "in light of that we are highly interested in a long-term cooperation with you, going clearly beyond this single purchase." *[Exhibit C3, P.11]*

Which means that RESPONDENT has the intention to have a long-term cooperation with CLAIMANT and not only a single purchase contract.

However, it very common in a long-term contract that the circumstances may change due to imposition of tariff, inflation…or any economic circumstances, which lead the parties to adapt the contract regarding the new situations instead of terminating the contract. Therefore, it is in the interests of both parties to keep the contract alive even when unforeseen circumstances have altered the economic equilibrium, in situations of hardship. This can be achieved through forms of adaptation to prevent termination of a contract on which the parties have already spent considerable time and money, and which was intended to be advantageous for both of them. Which is the case because CALIAMANT had already delivered two shipments and the tariff had occurred on the third one.

Although the imposition of the tariff of 30%, CLAIMANT delivered the third shipment because it knows the importance of timing to RESPONDENT also it was promised that a solution will be found so it will not bear all the risks.

i.The acceptance of DDP delivery was conditioned by the hardship clause:

CLAIMANT made it clear to RESPONDENT that it accepted the DDP delivery method in condition that it will not bear all the risks: "we are not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions […] at minimum, a hardship clause should be included into the contract to address such subsequent changes." *[Exhibit C4, P.12 of the record]*.

Moreover CLAIMANT alleged that: "Phar Lap was only willing to accept a delivery DDP against a moderate price increase, the transfer of certain risks to Black beauty and the inclusion of a hardship clause to temper some of the additional risks taken. *[Statement of facts, P.5, Para 7 of the record]*. RESPONDENT accepted this hardship clause and to apply the DDP delivery method with these conditions. Therefore the arbitral tribunal has jurisdiction and the power to adapt the contract regarding the price due the hardship circumstances.

B. The arbitral tribunal has jurisdiction and power to adapt the contract under the HKIA arbitration rules:

Pursuant the arbitration clause *[P.6, Para 14 of the record]*, "[…] arbitration administered by the Hong Kong International Arbitration Center (HKIAC) under the HKIAC administered arbitration rules in force when the notice of arbitration is submitted." Which means that the parties agreed that the arbitration could be governed by the HKAIC arbitration rules.

1. The competence-competence principle:

According to Article 36 of the HKIAC rules**,** it states that: "the arbitral tribunal shall decide the substance of the dispute in accordance with the rules of law agreed upon by the parties [...], failing such designation by the parties, the arbitral tribunal shall apply the rules of law which it determines to be appropriate."

In the present case, the parties did not agree expressly on the applicable law to the case, thus the arbitral tribunal has power under this article to decide which law is applicable, if so then to adapt the contract or not.

Pursuant Article 19(1) and 19(2) of the same applicable rules: "19.1 the arbitral tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement."

19.2 "The arbitral tribunal shall have the power to determine the existence or validity of any contract of which an arbitration agreement forms a part."

Which means that the arbitral tribunal has the main power to rule on its own jurisdiction any objections regarding the validity and even the existence of the arbitration agreement. It has also the power to interpretation of the arbitration clause and the contract according to article 2 of the HKIAC rules: "In the event of any inconsistency between such interpretation and any interpretation by HKIAC, the arbitral tribunal's interpretation shall prevail." This power of the arbitral tribunal is based on the principle of Competence-Competence. The "competence-competence" principle empowers an arbitration tribunal to rule on its jurisdiction *[AMOKURA KAWHARU]*. There are two main principles that provide a platform for the tribunal to deal with disputes over arbitral jurisdiction. The

first is "competence-competence" which confers on the tribunal jurisdiction to rule on its jurisdiction when the validity or scope of the agreement to arbitrate is in doubt. Competence-competence is widely codified into national arbitration laws and institutional rules. As a consequence of the tribunal having power to rule on its jurisdiction, neither the parties nor the tribunal is required to ask a court to resolve jurisdiction questions. The second principle is separability, which treats the arbitration clause as an autonomous agreement that survives the invalidity or termination of the main underlying contract. The independent existence of the arbitration agreement maintains the tribunal's jurisdiction to render a valid award even if that award finds the underlying contract to be invalid for some reason.

It means that the arbitral tribunal has the power under the Competence-Competence principle to rule on its own jurisdiction the scope of the power of the arbitration agreement, thus the arbitral tribunal has power to adapt the contract pursuant the hardship clause to avoid CLAIMANT'S enforceable loss.

2. An exception to the express will of adaptation by the parties:

In the present case, CLAIMANT wants the arbitral tribunal to adapt the contract regarding the price after the new economic circumstances. However RESPONDENT alleged that the arbitral tribunal has no power to adapt the contract because an express will of the parties must be written in the agreement which is not the case.

Yet, arbitrators frequently adapt contracts to meet the needs and intentions of disputing parties, and by doing so, they contribute to the rule of law. Which means that the arbitral tribunal has power to adapt the contract.

Regarding the allegation of RESPONDENT that the parties did not agree or even expressly state that the arbitral tribunal has the power to adapt the contract, a scholar of Kluwer states that: "Our comfort level with arbitrators acting in this manner is reflected in the express hardship or re-negotiation clauses which have become a common feature of modern contracts that establish complex and long-term arrangements. *[*Kluwer *Arbitration Blog]*.

In the present case, CLAIMANT made it clear to RESPONDENT that it is not willing to bear all the costs nor the risks that's why in the mail between them, it states that: "At minimum, a hardship clause should be included into the contract to address such subsequent changes" *[CLAIMANT'S C4, P.12, Para 4]*. So according to the Kluwer's scholar the arbitral tribunal has power to adapt the contract under the hardship clause.

Moreover after the accident of the two negotiators of CLAIMNAT and RESPONDENT, their replacements did not ever attempt to clarify what was in the note of Mr.Antley concerning the hardship clause: "the limited importance attributed at the time of negotiation to the arbitration clause and hardship clause…" *[PO2, P.55, Para7]*.

Furthermore, RDESPONDENT in another arbitration that took place in the same time of the present one, asked the tribunal to renegotiate the price under the ICC hardship clause and Article 6.2.3. Of the Mediterranean contract law (UNIDROIT principles) and the latter confirmed its power to adapt the contract while stating that: "A standard arbitration agreement is considered to be sufficient to grant an arbitral tribunal the same powers as ac court has under the provision." *[PO2, P.60, Para39]*. A fortiori, CLAIMANT has the right to ask the arbitral tribunal to adapt the price in the contract due to the change of circumstances as RESPONDENT did in the above-mentioned arbitration.

In addition, in some cases interpretative tools such as the non-aleatory character of long-term contracts, the need to preserve an economic balance among the reciprocal performance requirements, equity and good faith have acted in favor of adaptation of the contract. Thus, in this case, only an arbitrator can grant relief or modify the terms of the contract whenever he or she feels it fair to restore the balance between the parties, having been altered by a change in circumstances. This is confirmed in the case involving the *Société européenne d'études et d'entreprises* and the former Yugoslav Government, in which the arbitrators, acting as amiables compositeurs, despite the lack of explicit adaptation clauses, granted relief because of the depreciation of the Yugoslav dinar. The arbitrators held that the contract stipulated between the parties was not at all aleatory because, at the moment the agreement was reached, the intention of the parties was clearly to stipulate economically equivalent prestations. Thus, as a consequence of this statement, it was held that:

…as regards an international contract concluded without speculative intention, it ought to be admitted, as it has been judged, that the devaluation guarantee was meant by the parties, save express Convention; furthermore it would be contrary to good faith, that the Government of a State, who has ordered and received services would refuse to pay the actual value and should intend to derive a profit from the considerable devaluation of the payment currency. *[*Zaccarria, Elena]

Hence, the arbitral tribunal has the power to adapt the contract under the Unidroit Principles and the competence-competence principle mentioned in the HKIAC arbitration rules.

ISSUE 2: CLAIMANT is entitled to submit evidence from the other arbitration proceedings on the basis of the assumption that this evidence had been obtained either through a breach of confidentiality agreement or through an illegal hack of RESPONDENT's computer system

CLAIMANT has discovered at the annual breeder conference that RESPONDENT has been involved in an arbitration with one of its buyers in Mediterraneo regarding the tariffs imposed (25% on agricultural products in Equatoriana), RESPONDENT demanded an increase of prices as a condition to deliver the mare [*PO2, paras. 39-40, p.60*].

CLAIMANT, after this discovery, sent an email to the Arbitral Tribunal as well as RESPONDENT informing them of that it obtained reliable information concerning the other arbitration under the HKIAC rules [*p.50*]. In its email, CLAIMANT also promised to submit a copy of the award that confirmed the Arbitral Tribunal's power to adapt the contract should the tariff result in hardship for RESPONDENT [*PO2, para. 39, p. 60*]. This award would reinforce CLAIMANT's position as in an arbitration under the HKIAC rules, regarding the power of the tribunal to adapt the contract in case of an increase in tariffs, the Tribunal in this case, should adopt the same position.

Therefore, CLAIMANT requests the Tribunal to admit the evidence of the other arbitration proceedings **(I)** even if it was obtained through a breach of confidentiality agreement or an illegal hack of RESPONDENT's computer system **(II)**.

I. CLAIMANT is entitled to submit evidence of other arbitration proceedings

In any dispute resolution mechanism, the parties must be allowed to produce evidence that supports their case, according to the principle of equal treatment of the parties. Therefore, the non-admissibility of the evidence obtained by CLAIMANT would constitute a violation of CLAIMANT's right to be heard and to present its case **(A)**, on the other hand, this evidence must be submitted according to the concept of general admissibility of relevant evidence **(B)**.

A. The non-admissibility of the evidence would constitute a violation of CLAIMANT's right to be heard and to present its case

There is a fundamental right that is widely recognized which is the right to each party in an arbitration procedure to present its case. To this right, we can also add the right to be heard, as when a party is

presenting its case, it is being heard. This principle is also admitted by the HKIAC rules in its Art. 13.1, providing that the procedures implemented by the arbitral tribunal must "ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case."

However, such opportunity to present their case must be accompanied with the right of each party to submit their evidence. In accordance to art. 13.1 of the HKIAC rules, "*each party shall have the burden of proving the facts relied on to support its claim or defense*", therefore, the parties are free to submit any evidence in order to prove the facts necessary to establish their case [*Pilkov, p. 147*]. On the other hand, this does not mean that the parties must be in "*an identical procedural situation, it is sufficient that a party is given a reasonable opportunity to argue and bring evidence*" [*Kurkela/ Turunen, p. 190*]. Therefore, if the Tribunal decided to not admit the evidence obtained by CLAIMANT it will be denying it such opportunity that is essential in international arbitration. CLAIMANT is not only entitled to submit the evidence on the basis of its right to present its case but also on the basis of the concept of general admissibility of relevant evidence.

B. CLAIMANT is entitled to submit the evidence under the concept of general admissibility of relevant evidence

The Swiss Memorial in the Interhandel case stated that the liberal standard of admissibility established by the Court meant that "*the parties are, to a large extent, free to submit evidence that they deem necessary and appropriate*" [*Mémoire du Gouvernement de la Confédération Suisse*]. Furthermore, Arbitrators normally permit the parties to prevent evidence, including the introduction of material of questionable relevance [*Mehren/GM/Salomon, p. 288*], therefore we can note that there is a general concept of admitting evidence whether this evidence is material or not to the case. In light of this, we must differentiate between the meaning of "admissibility" and "appreciation of evidence" **(1)**, to determine the power of the Tribunal regarding the admissibility and appreciation of evidence **(2)**. However, parties can only submit evidence that is relevant to the case **(3)**.

1. *"Admissibility of evidence" is not synonymous to "appreciation of evidence"*

We have to strictly differentiate between the term "admissibility of evidence" and "appreciation of evidence", as these two terms are totally different. Generally, the concept of deciding to "admit" or "exclude" evidence gives the broad meaning to the term "admissibility" [*Pilkov, p. 148*]. On the other hand, "appreciation of evidence" is a process that begins after the evidence had been submitted, this includes the evaluation and assessment of evidence in deciding the case. It is thus for the parties to

submit the evidence and for the Tribunal to evaluate it by considering its credibility, weight and value [*Sussman, p.521*].

Furthermore, we must note that if an evidence is admitted in an arbitration proceeding, that does not mean automatically, that it will be taken into consideration when giving the award as the Arbitral Tribunal can admit the evidence and then decide not to give it any weight. Therefore, if RESPONDENT is afraid that the admissibility of this evidence might be a reason for the Arbitral Tribunal to decide in favor of CLAIMANT, it is not the case as even if admitted, the Tribunal can decide to disregard it as it has the discretionary power to do so.

2. *The discretionary power of the Tribunal regarding the admissibility and the determination of the weight of the evidence*

The Arbitral Tribunal has, pursuant to Art 22.2 of the HKIAC rules, the right to "*determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence*." However, this provision is not mandatory in the case where the parties have agreed to exclude the admissibility of certain documents as evidence. In this case, the arbitral tribunal should abide by that choice [*Holtzmann/Neuhaus, p.566*] as the principle of party autonomy must prevail. This being said, the parties in the dispute have not made such exclusion of the obtained evidence. Even though RESPONDENT is claiming the applicability of the "four corners rule" and stating that "*no external evidence may be relied upon*" [*ANA, para. 16, p. 32*], this does not apply on the submission of the evidence obtained by CLAIMANT. As this rule is only applicable regarding the interpretation of the contract as well as the arbitration clause, however, the evidence that CLAIMANT is trying to submit does not concern the contract but shows the inconsistencies in respondent behavior [*p. 50*].

Therefore, in the absence of provisions with a specific ground of exclusion in the arbitral agreement, "*there is no rule of law that can be invoked as binding a tribunal to exclude particular evidence*" [*Sandifer, pp. 189-190*]. On the other hand, the HKIAC rules do not require the exclusion of categories of evidence and when determining the admissibility of evidence, generally the arbitrators admit the submission of any type of evidence as in a survey results demonstrated that only 11% of arbitrators excluded evidence that would not be admissible under national evidentiary standards more than 75% of the time [*Sussman, p.521*]. As a consequence of this discretionary power, the Tribunal should admit the submission of the contested evidence even if it was unlawful, as the Tribunal admitted, in the Corfu Channel case,

evidence concerning the mines that had been unlawfully swept by the United Kingdom [*Corfu Channel Case*].

The fact that arbitral tribunals have the widest discretion in the admission of evidence comes from the fact that the arbitrators are competent to decide for themselves as to the amount of credibility to be given to any evidence, and are not in danger of being misled [*Sandifer, pp. 182-183*]. We can conclude that evidence is admitted sensu lato if the criteria of relevance and materiality are met.

3. *The evidence is relevant and material to the outcome of the case*

The concept of general admissibility of evidence is conditioned by the relevance of the submitted evidence. Relevance is defined in international arbitration "*as having a logical connection with what the evidence purports to prove in the case*" [*Pilkov, p.148*]. On the other hand, materiality is considered in relation to its connection to the outcome of the case. Therefore, the scholar Hascher provides that only relevant facts need to be established and the arbitral tribunal may refuse to admit irrelevant evidence [*Hascher, p.115*].

In this case, the evidence from the other arbitration proceedings must be submitted as it is relevant and material to the outcome of the case. As this evidence proves the inconsistencies in RESPONDENT behavior where in this case it refused the adaptation of the contract and the increase of the price, but thereafter initiated arbitration proceedings with one of its customers to demand the adaptation of the price due to the unforeseen tariff of 25% [*p.50*]. If RESPONDENT could not endure an additional 25% tariff, it is by analogy that CLAIMANT must not endure the additional 30% tariff and must demand the adaptation of the price as RESPONDENT did. Therefore, if this evidence is admitted, it will make CLAIMANT's case.

II. CLAIMANT is entitled to submit evidence from the other arbitration proceedings even if it had been obtained through a breach of confidentiality agreement or an illegal hack of RESPONDENT's Computer system

The tribunal as it has the discretionary power in admitting and determining the weight of the evidence, it is free to use all types of evidence that it deems necessary, and it does not abide to any restrictions encountered in positive law [*Meringnhac, pp. 269-270*] that includes the inadmissibility of illegally obtained evidence. Therefore, "*an exclusion of evidence by the ICJ based upon the way it was secured would be unrealistic. The Court must get its evidence when and by whatever means it can obtain it*" [*Alford, p.81*]. Regarding

the above, the evidence is admissible even if it was obtained through an illegal hack of RESPONDENT's Computer system **(A)** or whether it was obtained through a breach of confidentiality agreement **(B)**, as long as CLAIMANT did not participate in the procurement of the unlawful evidence **(C)**.

A. The admissibility of the evidence obtained through an illegal hack of RESPONDENT's Computer system

RESPONDENT is claiming that the contested evidence could have been obtained through an illegal hack of its Computer system and "*the hackers managed to retrieve a considerable amount of data*" [*p.51*]. First of all, it is not certain that the evidence concerning the other arbitration was part of the retrieved data. On the other hand, RESPONDENT used an outdated firewall to protect its computer system [*PO2, para. 42, p.61*], therefore, it must have foreseen such hack, therefore, it cannot rely afterwards on the fact that this evidence was retrieved through the hacking and meanwhile, RESPONDENT did not make any efforts in protecting its computer system, which is contradictory.

However, if we admitted that the evidence was retrieved through the illegal hack, this does not prevent the admissibility of the evidence. As in many cases, tribunals have accepted the admissibility of evidence obtained through hacking especially concerning Wikileaks. In the Caratube case, the ICSID tribunal may be said to have set out a principle that an arbitral tribunal can admit as evidence data or documents that were illegally obtained, for instance by hacking a computer network. In the case, the Kazakhstan government's computer network was hacked and, consequently, the claimants obtained access to and relied on thousands of confidential documents that were published following the hacking [*Caratube case*]. The tribunal admitted the evidence mainly on the basis that this information is now public and thus is no longer privileged nor confidential, therefor; a tribunal may be willing to admit documents in the public domain seeing that ignoring them would only lead to an unreasonable conclusion, which could make the award subject to challenge. In the case where the contested evidence was obtained from the worldwide web as pointed out by RESPONDENT [*p. 51*], it should be admissible as it is no longer confidential and is in the public domain.

Furthermore, in a dissent published by Prof. Georges Abi-Saab in the Conoco Philips v. Venezuela case, stated that the Wikileaks cables presented glaring evidence and ignoring its existence and relevance would lead to a travesty of justice [*Conoco case*]. Therefore, CLAIMANT is entitled to submit the contested evidence.

B. The admissibility of the evidence does not violate the confidentiality agreement

Art 45 HKIAC explicitly provides that "*Unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration agreement; or (b) an award or Emergency Decision made in the arbitration*." This article is invoked by RESPONDENT to obtain the inadmissibility of the evidence [*p.51*]. However, the obligation to keep proceedings confidential does not apply where disclosure is reasonably necessary for the protection of the legitimate interests of an arbitrating party [*Ali Shipping v. Shipyard Trogir*]. In this case, the submission of the Partial Interim Award is necessary for the protection of CLAIMANT's legitimate interests in obtaining the reimbursement of the amount paid due to an additional 30% tariff.

On the other hand, if RESPONDENT is claiming that this evidence may have come from two of his former employees that had been under contractual obligation to keep all information about the other arbitral proceedings confidential [*PO2, para 41, p.61*], it does not make the evidence inadmissible. First of all, it is not clear that this confidentiality obligation would continue after the contract termination of these employees. Therefore, this evidence is not protected by contractual and statutory confidentiality obligations. Second of all, the tribunal "*will carefully consider any claims of privilege and confidentiality […] the tribunal is to take into consideration the interest of both parties and the need to safeguard confidential documents*" [*Kubalczyk, p.17*]. therefore, it is in the discretionary power of the tribunal to determine the admissibility of such information even if it was covered by a confidentiality agreement.

C. CLAIMANT did not participate in the procurement of the unlawful evidence

The tribunal should take into consideration that CLAIMANT did not participate in the procurement of the unlawful evidence. It only became aware of it at the annual breeder conference where CLAIMANT's CEO heard about the arbitration from the CEO of one of his customers [*PO2, para. 40, p.60*]. furthermore, CLAIMANT is not in possession of the Partial Interim Award and will acquire it from a company which provides intelligence on the horseracing industry [*PO2, para. 41, pp. 60-61*]. That being said, tribunals have tended to take the approach "*that if a party seeking to introduce the evidence participated in the unlawful activity that led to its disclosure, the evidence is inadmissible on the basis that a party should not be permitted to profit from its own misconduct*" [*O'Sullivan*]. Therefore, the evidence should be admitted.

In light of the above, CLAIMANT requests the tribunal to admit the evidence from the other arbitration to enable CLAIMANT to make its case, because if the tribunal decided on the inadmissibility of the evidence, it would constitute a violation of CLAIMANT's right to be heard.

Issue 3 (i): 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 :

While CLAIMANT and RESPONDENT were negotiating the terms of the contract, RESPONDENT asked CLAIMANT to change the delivery terms into DDP delivery, which was accepted by CLAIMANT on one condition, to insert a hardship clause in the contract in order to secure itself against any additional fees due to unforeseeable changes, CLAIMANT explained that the reason behind this request is that he had a previous experience where he was forced to pay additional fees that destroyed the commercial basis of the deal and endangered its financial situation [*ExhC4 P:12*].

CLAIMANT suggested to add the ICC hardship clause, but RESPONDENT though that it was too broad and that the wording should be narrower [*ExhC8 P: 17*], and that in case the parties could not agree on an amendment of the price of the contract, the adaptation should be then the task of the arbitrators. During the negotiations, the negotiators from both sides had an accident and couldn't finalize the contract, and two other negotiators took place. RESPONDENT's negotiator did not understand what his precedent's intention was [*ExhR3 P: 35*].

After delivering two shipments, Mediterraneo's "RESPONDENT's country" newly elected president decided to impose a 25% tariff on agricultural products coming from Equatoriana "CLAIMANT's country". CLAIMANT decided to stop delivering any shipments to RESPONDENT and sent him a letter acknowledging him of the matter. The latter told CLAIMANT to proceed the delivery and that if "The contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price" [*ExhR4 P: 36*], which was a maneuver from RESPONDENT's negotiator who admitted saying so only to convince CLAIMANT to complete the delivery [*ResNoa No.10 P: 30*].

After the delivery of the shipment, RESPONDENT refused to pay the additional 30% paid by CLAIMANT and stated that the latter has no right to be reimbursed, not under article 79 of the CISG, nor under the hardship clause.

Such allegation is completely wrong, the existence of the hardship clause, even if it doesn't mention the adaptation of the price, gives the right to CLAIMANT to be reimbursed (I) and the existence of

such clause in the contract does not constitute a derogation from the CISG according to article 6 as alleged by RESPONDENT (II).

I. CLAIMANT's right to be reimbursed according to the hardship clause.

Even if the hardship clause inserted in the contract does not clearly mention the adaptation of the contract, CLAIMANT still have the right to be reimbursed for the additional fees paid, because CLAIMANT's intention was clear from the beginning, and RESPONDENT knew that intention and consented to it, which is crucial according to article 8 of the CISG (A), and that RESPONDENT Cannot be exempted from paying CLAIMANT due to the ignorance of its negotiator as claimed (B) and will be obliged to pay according to the good faith principle mentioned in article 7 if the CISG (C).

A. CLAIMANT's right to be reimbursed according to article 8 of the CISG and to the "*Pacta Sunt Servanda*" principle.

Hardship clauses organize the revision of the contract whenever a change of circumstances significantly modifies the economy of the contract. They apply to situations of changed circumstances in which the parties intend not to dissolve the contract but to continue it. Sometimes, the parties are compelled by economic circumstances to consider the continuation rather than the dissolution of their contract, in spite of changed circumstances [*Rimke*].

According to article 6.2.2 of the UNIDROIT principles, hardship is defined as follows: "*There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and d) the risk of the events was not assumed by the disadvantaged party.*"

When CLAIMANT and RESPONDENT were negotiating the contract, CLAIMANT accepted to change the delivery terms into DDP on one condition, to insert a hardship clause in the contract. CLAIMANT made it clear that its request was the reason of previous experience where he was obliged to pay additional fees and that he does not wish to take such risk again [*ExhC4 P:12*]. In its previous E-mail, RESPONDENT confirmed that the permission will become permanent and that there will be no extra tariffs added [*ExhC1 P: 9*], which constitutes a hardship according to the abovementioned

article of the UNIDROIT because this raise of tariffs was unforeseeable, after the conclusion of the contract and beyond CLAIMANT's control (The disadvantaged party).

Also, the abovementioned circumstances matches the definition of hardship as mentioned in the hardship clause in the contract [*ExhC5 P: 14*] which was signed and approved by both parties, and should then respect it and perform it in good faith (*Pacta Sunt Servanda*)

The "Pacta Sunt Servanda" is a Latin word that means "Agreement must be kept", it provides the idea that all contracts should be executed with all its provisions in a good faith [*Rabels Zeitschrift*] [*Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*]. CLAIMANT and RESPONDENT agreed on that contract with all its provisions, including the hardship clause which states the following "*neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*". The clause expressly states that CLAIMANT should not be responsible for any events making the contract more onerous, which includes of course additional tariffs added by RESPONDENT's country. The concept of hardship, however, is mainly directed at the adaptation of the contract [*Rimke*], which gives the right to CLAIMANT to renegotiate the terms of the contract.

Also, pursuant to article 8 of the CISG, "*For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties*"

Accordingly, contracts should be interpreted according to the parties' intentions. CLAIMANT's intention was clear, the hardship clause was inserted to prevent any additional fees to be added to CLAIMANT [*ExhC4 P: 12*], and was also clearly stated in Julie Napravnik's statement [*ExhC8 P: 17*] that she told Mr. Antley (RESPONDENT's negotiator) of CLAIMANT's will to insert such clause to prevent any loss, and that the latter told her that in case there is any variation of the price, there will be an adaptation of the contract, it was also confirmed by Mr. Shoemaker [*ExhR4 P:36*]. Also, RESPONDENT stated in its answer to the notice of arbitration that it knew why CLAIMANT wanted to add such clause [*p: 30*], then RESPONDENT was fully aware of all the circumstances, and logically, the hardship clause would mean that CLAIMANT should be reimbursed in case of any additional fees.

In case that the parties fail to reach agreement on the adaptation of the contract to the changed circumstances within a reasonable time, Article 6.2.3 (3) authorizes either party to resort to the court so the contract could be adapted by the arbitrators.

B. RESPONDENT's negotiator's misunderstanding cannot deprive CLAIMANT from its right to be reimbursed.

RESPONDENT stated in its answer to notice of arbitration [*P:30*], as a way of defense, that the negotiator that replaced Mr. Antley after the accident did not fully understand the hardship clause before agreeing on inserting it into the contract, which was also demonstrated by the negotiator himself in [*ExhR3 P:35*], and therefore CLAIMANT is not entitled for any reimbursement as it is not mentioned in the hardship clause and the negotiator did not understand CLAIMANT's intention.

The civil law maxim invoked in 1950 "*Nemo auditur propriam suam turpitudinem allegans*" or "Nobody is heard recounting his own turpitude", means that if a party made a mistake, it should bear its consequences and not the other party.

RESPONDENT's negotiator's misunderstanding of the note left by Mr. Antley, and its misunderstanding of CLAIMANT's intention when inserting the hardship clause should only be RESPONDENT's fault and not CLAIMANT's [*ExhR3 P:35*]. CLAIMANT's intention was clear and all his doubts on the existence of any additional fees were known by Mr. Antley, who tried to solve these doubts by assuring that there will be no additional tariffs added by the government [*ExhC1 P:9*], and that in case of such addition, there will be an adaptation of the contract [*ExhC8 P:17*].

C. The principle of good faith.

In addition to the previously said, RESPONDENT dealt in this contract with CLAIMANT in bad faith, which was clear in Mr. Shoemaker's statement [*ExhR4 P:36*], who confessed that, during the negotiations, he told CLAIMANT that "If the contract provides for an increased price in the case of such high additional tariff we will certainly find an agreement on the price" only to encourage CLAIMANT to begin the execution of the contract, because he knew that if he would've rejected CLAIMANT's request, the latter would not execute the contract, which is a maneuver that frauded CLAIMANT. Also, the fact that RESPONDENT confirmed to CLAIMANT that there will be no additional tariffs while the new elected president and its superminister of agriculture were known as

ardent critics of free trade [*Po2 No.23 P:58*], RESPONDENT should have told CLAIMANT of such information.

Pursuant to article 7(1) of the CISG, "*In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*" The parties should, in any contract, have good faith in dealing with the other party, by making everything clear and not use any maneuvers to fraud the other party. In the present case, RESPONDENT frauded CLAIMANT by convincing him many time that there will be an adaptation of the contract in case of any additional fees, which is not the truth.

It was also mentioned by [*Rimke*] that a party can be exempted from any additional fees if it was dealing with good faith "*Another approach to the problem of an extreme and onerous change in circumstances is to base exemption in those cases on the principle of good faith, as stated in Article 7(1) CISG. This approach is taken mainly by German commentators who refer to cases of imprévision or great difficulty to perform as (economic impossibility)*" which is the case of CLAIMANT but not RESPONDENT's.

II. The inclusion of the hardship clause derived from a consensual agreement of both parties to temper the potential or recurrent risks:

Due to past experiences, CLAIMANT didn't want to assume any potential risks [ClexH c 5]. Knowing that when entering this agreement RESPONDENT assured that the ban lifting will not be temporarily and CLAIMANT entered the contract in good faith. In the end of the negotiations the parties agreed on the hardship clause [Claimant's EXHIBIT 5].However a surprising governmental measure appears from RESPONDENT'S home country and bringing higher costs and surprising unforeseeable requirements.

CLAIMANT is entitled to an increase of the purchase price of at least 25 per cent due to the higher costs following the imposition of the new tariffs. That CLAIMANT is affected by the effects of the change of delivery method the DDP method and by all means the contractual agreement doesn't oblige CLAIMANT to be burdened by the risks associated with a DDP delivery. Therefore the inclusion of the hardship clause was a clear will for an adaptation of the risks that may occur (A).On another hand the requirements for the adaptation are clearly met and can be deduced from article 6.2.3 of the UNIDROIT provisions.(B)

A. CLAIMANT's entitlement to compensation of the higher costs due to the sudden tariffs increase:

RESPPONDENT assured CLAIMANT many times during their communications that the ban lifting shall not be temporary and that is confident that it will be permanent [ClExh C 1]CLAIMANT agreed to the DDP delivery but with a condition to increase the due price in order to meet the higher costs of the demanded request. However, when the changes occurred, there wasn't any immediate response from RESPONDENT'S side to the problem. Neither any quick request to negotiate with CLAIMANT's in order to adapt the contract to a new price. The request for renegotiations must be made as quickly as possible after the time at which hardship is alleged to have occurred [PARA (1)]. The precise time for requesting renegotiations will depend upon the circumstances of the case: it may, for instance, be longer when the change in circumstances takes place gradually [3(b) on Article 6.2.2].The disadvantaged party does not lose its right to request renegotiations simply because it fails to act without undue delay. The delay in making the request may however affect the finding as to whether hardship actually existed and, if so, its consequences for the contract.[UNIDROIT, illustration of article 6.2.3]

CLAIMANT clearly stated during the contractual negotiations that it will not bear any consequences or more specifically risks that may take over with the changes of the delivery terms. More specifically, CLAIMANT didn't advance any promise or guarantee of the coverage of these risks. Moreover, CLAIMANT expressly stated that any risks in particular those associated with the importation regulations or any changes in the customs it shall not bear it. [ClExh C4]

RESPONDENT did not show by the time of the contractual negotiations any refusal or opposition to apply to CLAIMANT's general terms and conditions. In particular provision at article 12 of the agreement clearly states the existence and applicability of a hardship clause. The negotiators of RESPONDENT'S side didn't show or succeed to contractually show any opposition to the hardship clause. Therefore any denial of its existence or contractual power cannot be validly invoked. The intervention of the accident causing the supervising negotiator to be absent cannot be considered as a sufficient cause to disregard the clause. The clause even if narrowly included in the contract, still constitutes a fully composed provision in favor of CLAIMANT.

Furthermore, even if the accident and the changes in the health requirements and the ban are all surprising events, they weren't totally unforeseeable by RESPONDNET. CLAIMANT chose to

subsequently disregard any doubt of RESPONDENT'S confirmations of the ban lifting. However a posteriori to the increase of the tariffs by 30 %, CLAIMANT tried several times to reach RESPPONDENT in order to reach a certain adaptation of the agreement to the circumstances. [ClExh C7]

Eventhough, RESPONDENT did not agree to any amendment or even try to reach one, CLAIMANT respected the most prior agreement in the contract which is the shipment on time of the products without any delay. CLAIMANT acted with good faith till the very end, and according to the witness statement " CLAIMANT only agreed on the DDP delivery to ensure a better transportation terms and swifter delivery due to its experience" [ClExh C8].Furthermore, CLAIMANT acted in pure good faith relying on RESPONDENT'S promise. Although nothing is said in this Article to that effect, both the request for renegotiations by the disadvantaged party and the conduct of both parties during the renegotiation process are subject to the general principle of good faith and fair dealing [Article 1.7] and to the duty of co-operation [Article 5.1.3]. Thus the disadvantaged party must honestly believe that a case of hardship actually exists and not request renegotiations as a purely tactical manoeuvre. Similarly, once the request has been made, both parties must conduct the renegotiations in a constructive manner, in particular by refraining from any form of obstruction and by providing all the necessary information.

On another hand, CLAIMANT agreed to make the delivery with the 30% tariffs increase due to the confirmation and promise from RESPONDENT'S representative's side that an agreement and a solution shall be found and that RESPONDENT is interested in "long- term relationship". Therefore leaving CLAIMANT that acted in good faith make the DDP delivery. However RESPONDENT from its side was very uncooperative "aggressive" and instantently refused to pay CLAIMANT any of its requests.

Since hardship consists in a fundamental alteration of the equilibrium of the contract, paragraph (1) of this Article in the first instance entitles the disadvantaged party to request the other party to enter into renegotiation of the original terms of the contract with a view to adapting them to the changed circumstances.

A request for renegotiations is not admissible where the contract itself already incorporates a clause providing for the automatic adaptation of the contract (e.g. a clause providing for automatic indexation of the price if certain events occur).

B. The hardship clause is applicable regarding the UNIDROIT provision article 6.2.3: remedy for the coverage of unforeseeable changes:

Even though, RESPONDENT advances that the hardship clause shall not be applicable, the UNIDROIT provision states that the hardship clause must be applied if both parties did agree to include it and they should consequently admit if it will be regulated by them or by the arbitral tribunal. Contrary to RESPONDENT'S allegations, CLAIMANT did not make threats that it will stop delivering, CLAIMANT made the delivery on time but claimed compensations based on the hardship clause agreed by RESPONENT on January 2018 adapting the contract to the risks.

The hardship clause suggested by CLAIMANT didn't meet any clear refusal back at the time, RESPONDENT had certain concerns about it and request for certain clarifications regarding the clause. As clearly stated in the witness statement [RexH R3], RESPONDENT'S negotiator wrote that this clause is an open issue that he will address in the next discussion but not a mere refusal of the clause. Also the second witness stated that the adaptation of the price shall be induced even though the clause constitutes a current debate, the agreement on the adaptation of the price was above all circumstances anticipated in the discussions and in the agreement [RexH R 4]

On another hand, RESPONDENT which is 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 in another case involving one of its customers also about the increase of the tariffs.[P 50 of the record].The only difference to the present case is that RESPONDENT'S was at CLAIMANT'S position and was the party affected negatively due to the change of circumstances.

CLAIMANT cannot be considered in this present case as obliged to assume the consequences and for the same circumstances RESPONDNET is invoking that it shall not assume the consequences. It is source of contradiction and judicial insecurity to consider that in one case the additional tariff of 25% is sufficient to justify a request for adaptation, however a higher increase of tariffs which is of 30% cannot be sufficient to consider CLAIMANT's reference to the adaptation clause valid. RESPONDENT knew CLAIMANT'S financial difficulties in the market during the negotiations and therefore knew the impact of the 30% tariffs increase on CLAIMANT's business. [PO2, PARA 28, P 59]

Also from the factual prospect, RESPONDENT won't be endangered if it bears the requested payments, RESPONDENT should be obliged to pay because first of all the unforeseeable event came

up due to a surprising governmental decision of its home country. Furthermore, RESPONDENT agreed to the adaptation clause that granted the power for the arbitral tribunal to adapt the contract. [PO2 PARA 45 P61]

Pursuant to article 6.2.3 4b of the UNIDROIT principles, the presence of an arbitration agreement is sufficient to grant an arbitral tribunal the power of a court under the same provisions. Therefore, the arbitral tribunal has power to adapt the contract and to consider the tariff result in hardship of RESPONDENT.[PO2 PARA 39 P 60].

Pursuant to article 6.2.3 of the UNIDROIT rules "upon failure to reach agreement within a reasonable time ether party may resort to court" [3], also if the court finds hardship it may if reasonable 4A:"terminate the contract", or it may " adapt the contract with a view in restoring its equilibrium". This possibility for the arbitral tribunal to grant a decision of adapting the contract was seen in a case opposing French and Spanish parties [case number 9994, ICC 2001].The contract was governed by French law. In deciding in favor of Claimant, the Arbitral Tribunal, after stating that "French law requires from each party to perform the agreement in good faith [Article 1134(2)-1134(3) - of the French civil code) [and] good faith imposes upon the parties the duty to seek out an adaptation of their agreement to the new circumstances which may have occurred after its execution in order to ensure that its performance does not cause, especially when the contract at stake is a long-term agreement, the ruin of one of the parties", pointed out that "this principle is also prevailing in international commercial law [UNIDROIT Principles Articles 6.2.2 and 6.2.3]".

This possibility would be for a court to adapt the contract with a view to restoring its equilibrium [PARA 4 B]. In so doing the court will seek to make a fair distribution of the losses between the parties. This may or may not, depending on the nature of the hardship, involve a price adaptation. However, if it does, the adaptation will not necessarily reflect in full the loss entailed by the change in circumstances, since the court will, for instance, have to consider the extent to which one of the parties has taken a risk and the extent to which the party entitled to receive a performance may still benefit from that performance. CLAIMANT clearly performed its obligations as best as it can regardless of the circumstances and the prominent attitude from RESPONDENT's side, CLAIMANT delivered a full dose as requested in the contract. As mentioned in PO2, CLAIMANT didn't fail to fill its obligations even though the tariffs increase severally impacted its financial situation afterwards without any immediate compensation.

Even though CLAIMANT should be covered by the adaptation clause, RESPONDENT fortiori didn't respect a basic provision of the agreement which is that it shall not resell the semen to any third party without CLAIMANT's knowledge nor consent. Furthermore, RESPONDENT breached this part of the agreement and opted for a price 20 per cent above the price given by CLAIMANT.

In conclusion, the disadvantaged party which is CLAIMANT cannot lose its right to request the advanced amount due to the unforeseeable increase of tariffs. This right is guaranteed by the hardship clause agreed upon during the consecutive negotiations and never changed or denied back at the time. Also CLAIMANT is entitled to the requested payment because it fully respected its obligations without any delay, and cannot bear the consequence of its good faith. RESPONDENT is obliged to pay because it didn't cooperate in order to reach negotiation, adaptation of the contract when the changes occurred.

Issue 3 (ii): Claimant is entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price under the CISG:

I. The effect of hardship is applicable according to article 79 of CISG

Under article 79 of CISG the notion of hardship falls within a grey area of the convention. When a notion under CISG is left due to its legislative history to the interpretation of scholars and ultimately the control of the judge, this interpretation must according to article 7 achieve uniformity due to its international character and must be in conformity with the law that it is governing the contract.

Since the UNIDROIT principles are the law designated in the current case whether it is the law of the seat or the law of the contract they both adopted in verbatim the UNIDROIT principles. Therefore the application of article 79 shall be in conformity with the principles set with Article 6.2.3 of the UNIDROIT principles governing the effects of hardship.

This article states firstly that in case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay (A) and shall indicate the grounds on which it is based (B).

A. CLAIMANT requested renegotiations without undue delay

In the present case, CLAIMANT sent an email to RESPONDENT on the 20th of January 2017 to inform it about the customs authorities that the newly imposed tariffs of 30% on agricultural products which will apply to the third and final shipment CLAIMANT was preparing.[CLAIMANT's exhibit C7, p.16, para 1].

CLAIMANT made it crystal clear that the current new situation "will make the shipment 30% more expensive".

The call for renegotiations was without undue delay, since CLAIMANT asked for customs clearance on 19 January 2018 to ask if semen is considered as "agricultural goods" and therefore the tariff applied to the shipment. The next morning of 20 January 2018 CLAIMANT was informed that the tariff applied to semen so it directly sent the email to RESPONDENT on the same day.

B. CLAIMANT indicated the grounds on which the renegotiations are based

In its email sent without undue delay, CLAIMANT expressly indicated the ground on which its call for renegotiations are founded [CLAIMANT's exhibit C7, p.16, para 1].

CLAIMANT transmitted the full and detailed information it received from the customs authorities with the percentage of the imposed tariffs (30%) and that all agricultural and animal products are applicable to the shipment, even for the breeding of racehorses. That makes this shipment 30% more expensive.

CLAIMANT also showed good faith, cooperation and professionalism by inviting RESPONDENT to help in finding a solution and by putting the shipment on hold until RESPONDENT authorise it up until the next day.

II. RESPONDENT stopped the negotiations and breached the contract

RESPONDENT was adamant through its representative that "an agreement on the price" would be found. CLAIMANT after being reassured by RESPONDENT and desiring to maintain a good relationship with RESPONDENT performed his obligations duly. RESPONDENT misused CLAIMANT's good intentions and did not respect his duty to renegotiate the price (A) and even violated the clear agreement between both parties about the prohibition of resale of semen (B)

A. RESPONDENT did not respect its promise to renegotiate

According to the witness statement of CLAIMANT's lawyer, during her phone call with RESPONDENT, it gave the impression that it accepted CLAIMANT's position that they should bear the bulk of the additional costs due to the tariffs and needing the doses urgently. [CLAIMANT's exhibit C8, p.18, para 1&2].

CLAIMANT authorized delivery even before an agreement on the details had been reached. CLAIMANT 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.

Nevertheless, RESPONDENT received the final shipment with the old price, leaving CLAIMANT to bear the cost of the new tariffs on its own regardless its promise to renegotiate. A promise based upon which CLAIMANT delivered the last shipment.

RESPONDENT mislead CLAIMANT in its letter.

On the other hand, CLAIMANT put into consideration RESPONDENT's need for the delivery and respected the date of delivery. [PO2, p. 56, para11].

B. RESPONDENT breached the resale prohibition clause

After the final shipment had been made CLAIMANT discovered that RESPONDENT was actually breaching the resale prohibition under the contract and needed part of the doses shipped for commitments towards other parties. [PO2, p.57, para 20].

When confronted a meeting of 12 February 2018, RESPONDENT's CEO, got very angry and aggressive. She shouted that she was fed up with the additional requests and was no longer being interested in a further cooperation with CLAIMANT. She stopped the negotiations and refused to pay any additional amount for the tariffs.

Pursuant to article 6.2.3 of the UNIROIT principles, upon failure to reach agreement within a reasonable time either party may resort to the court, or in the current case, arbitration.

And the court has the power to adapt the contract with a view to restoring its equilibrium that has occurred due to the unforeseen governmental action.

III. The tariffs in question constitutes an impediment under article 79 of the CISG

In the sales agreement, clause 14 provided that the contract shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG) [CLAIMANT's exhibit C5, p.14, clause 14].

Pursuant to article 79 of the CISG, party is not liable for a failure to perform any of its obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

A. The governmental imposition of tariffs were beyond CLAIMANT's control and were not reasonably expected

Two months before the last shipment, Mediterraneo's newly elected President, announced 25 per cent tariffs on agricultural products from Equatoriana. Consequently, the Equatorianian government retaliated by imposing 30 per cent tariffs on animal semen from Mediterraneo. [CLAIMANT's exhibit C8, p.15, para 2&4].

In January 2018, when CLAIMANT was preparing the final delivery of 50 doses it was suprised by the customs officials of Equatoriana that the newly imposed tariffs for agricultural products covered all animal products and therefore would also apply to semen used for artificial insemination in racehorse breading. That made the shipment 30% more expensive than anticipated, not only destroying our profit margin of 5% but resulting in considerable hardship.

Governmental actions—such as custom restrictions, trade sanctions, or an embargo—appear to be favored as impediments.

In the Coal Case (Ukraine v. Bulgaria), a force majeure situation is caused by circumstances that occur after the conclusion of the contract as a result of unforeseen and unpreventable events with

extraordinary character. In that case, the impediment was The Governmental prohibition for coal export and the Decrees of the Ukraine Government for export restrictions of coal.

Because Article 79 of the CISG does not define "impediment" as an event that renders performance absolutely impossible, an impediment may be represented by "a totally unexpected event that makes performance excessively difficult."

Therefore, the tariffs in the present case shall be qualified as "impediments" from the CISG's perspective.

The UNIDROIT Principles set forth that 'there is hardship where the occurrence of events fundamentally alters the equilibrium of the contract'12. Conversely, PECL do not use the terms 'hardship' or 'equilibrium of the contract' but rather set forth that in order to invoke the exemption of changed circumstances, the performance must become 'excessively onerous' (Article 6.111(2) of the PECL.)

Hence, hardship may not be invoked unless the alteration of the equilibrium of the contract is fundamental.

B. The excessively onerous performance creates a fundamental alteration of the contractual equilibrium

On the other end of the spectrum, in an *ad hoc* arbitration case reported by R. Fucci, the tribunal acting under the UNCITRAL Arbitration Rules considered a contract entered into by an Italian construction company in 1985 with the government of Kuwait for the construction of a new Kuwaiti embassy in Algeria. The currency of payment was U.S. dollars. Two of the three arbitrators accepted depreciation in the value of the U.S. dollar with respect to the Italian lira of about 35% as a changed circumstance justifying compensation to the contractor when its costs were incurred largely in Italian lire.

In the current case, an excessively onerous performance –which constitutes a fundamental alteration of the contractual equilibrium-, occurred due to increased costs in monetary terms, due to government's new tariffs.

C. CLAIMANT is financially endangered by bearing the 30% tariffs on its own

As alternative criteria that may determine hardship situation, in some exceptional cases, especially when the debtor loses a major part of its income due to changed circumstances, a more flexible approach towards alteration threshold may be justified.
According to Brunner, the essential criterion in this situation is the fact that performing the contract in its unaltered form would result in a financial ruin and possible bankruptcy of the debtor.

According the PO2 CLAIMANT has been making losses since 2014 primarily due to the high interest payments for the loan taken on to finance the new stables in 2013 and the costs for the restructuring measures. The restructuring plan which CLAIMANT had agreed with its creditors in 2014 provided that CLAIMANT would be profitable again from 2017 onwards.

The automatic prolongation of the two main credit lines depended on being profitable in 2017 and 2018 respectively. With the additional revenues from the sale of the frozen semen CLAIMANT had planned to make a profit in 2018 of 300.000 USD after 180.000 USD in 2017. That plan would be seriously endangered if CLAIMANT had to bear the 1.250.000 USD.

Negotiations of a new credit line will most likely be very difficult as one of the major creditors is by now the house bank of CLAIMANT's largest competitor who is interested in buying the dressage part of CLAIMANT. Thus, the bank would probably make the sale a precondition for the entry into a new credit. [PO2, p. 59, para 29].

Hence, CLAIMANT is financially endangered by paying the 30% tariffs on its own and might suffer bankruptcy in the future.

Conclusion:

To conclude, CLAIMANT is respectfully requesting the Arbitral Tribunal to order RESPONDENT to pay to CLAIMANT an additional amount of US$ 1,250,000 which is 25 per cent of the price for the third delivery of semen, as well as to order RESPONDENT to bear the costs of Arbitration.