SIXTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

31st MARCH TO 7th APRIL 2019

MEMORANDUM FOR CLAIMANT

OF

KOBE UNIVERSITY SCHOOL OF LAW

On Behalf of:	**Against:**
Phar Lap Allevamento	**Black Beauty Equestrian**
Rue Frankel 1,	2 Seabiscuit Drive,
Capital City, Mediterraneo	Oceanside, Equatoriana
CLAIMANT	**RESPONDENT**

COUNSEL:

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LIST OF ABBREVIATIONS

¶ / ¶¶	paragraph / paragraphs
Ans. Not.	Answer to notice of Arbitration
Art. /Arts.	Article / Articles
C	Claimant
Claimant	Phar Lap Allevamento
the Contract	FROZEN SEMEN SALES AGREEMENT
Ex.	Exhibit
HKIAC	Hong Kong international Arbitration Centre
Not. Arb.	Notice of Arbitration
Ms. Napravnik	Ms. Julie Napravnik
Mr. Antley	Mr. Chris Antley
Mr.Krone	Mr. Julian Krone
Mr. Shoemaker	Mr. Greg Shoemaker
p. / pp.	page / pages
Proc. Ord.	Procedural Order
R	Respondent
Res. Arb.	Response to Notice of Arbitration
Respondent	Black Beauty Equestrian
Sec.	Section
the Parties	Claimant and Respondent

LIST OF RULES AND LAWS

CITED AS	FULL CITATION
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
HKIAC Rules 2018	2018 HKIAC Administered Arbitration Rules
HKIAC 2013 Rules	2013 HKIAC Administered Arbitration Rules
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
UNIDROIT	The UNIDROIT Principles of International Commercial Contracts (2010)
Hague Principle	Hague Principles on Choice of Law in International Commercial Contracts

INDEX OF ACADEMIC AUTHORITIES

Cited as	Full Citation	Cited on
Born	Gary B. Born International Commercial Arbitration, 2nd ed. Kluwer Law Intenaional (2014)	¶26
Bridge	M. G. Bridge The International Sale of Goods, 2nd ed. Oxford (2007)	¶68
HP Com.	https://www.hcch.net/en/instruments/conventions/full-text/?cid=135	¶2
HP of HKIAC	http://www.hkiac.org/arbitration/guidelines#IBA%20Rules%20on%20the%20Taking%20of%20Evidence%20in%20International%20Arbitration%20(2010)	¶28
IBA Com	Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration https://www.ibanet.org/Document/Default.aspx?DocumentUid=DD240932-0E08-40D4-9866-309A635487C0	¶26
Kofod	Rolf Kofod Hardship in International Sales CISG and the UNIDROIT Principles https://www.cisg.law.pace.edu/cisg/biblio/kofod.html	¶68
Maskow	Dietrich Maskow Hardship and Force majeure 40 Am.J.Comp.L. 1992, at 657 et seq.	¶75
McKendric	Stefan Vogenauer, Jan Kleinheisterkamp	¶¶64,65,75,

	Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC) Oxford (2009)	76,83,90,97, 99,101,103
NYU	Centre for Transnational Litigation, Arbitration, and Commercial Law Admissibility of Hacked Emails as Evidence in Arbitration (2018) https://blogs.law.nyu.edu/transnational/2018/05/admissibility-of-hacked-emails-as-evidence-in-arbitration/	¶¶36,37
Official Comment	UNIDROIT Principles Official Comment (2016) https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016	¶72,89
Redfern and Hunter	Redfern and Hunter on INTERNATIONAL ARBITRATION Student Version 6th ed. Oxford University Press (2015)	¶4,8
Vogenauer	Stefan Vogenauer, Jan Kleinheisterkamp Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC) Oxford (2009)	¶90
Yoshimasa	file:///C:/Users/user/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/nujlp_254_14%20(1).pdf	¶17

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Cited as	Full Citation	Cited on
	Austria	
RWE and Gazprom	Vienna-seated tribunal, Award of 27 June 2013	¶17
	Belgium	
Scafom International BV v. Lorraine Tubes S. A. S	Scafom International BV v. Lorraine Tubes S. A. S Court of Cassation of Belgium, Case No. C.07.0289.N, 19/06/2009	¶63,66
	England	
Bell v Lever Brothers	Bell v Lever Brothers 40 Am J Comp L 657, 662.	¶76
SulAmérica	SulAmérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others [2013] 1 WLR 102 ("SulAmérica") at [9] and [25]	¶¶4,5
	ICSID	
Case No.arb/13/13	Caratube International Oil Company and Mr Devincci Saleh Hourani v Kazakhstan (No. ARB/13/13)	¶38
	Singapore	
BMO v BMP	BMO v BMP IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE [2017] SGHC 127 Originating Summons No 501 of 2016("BMO v	¶¶4,5,14

	BMP")	
BCY v BCZ	BCY v BCZ [2016] SGHC 249	¶5
Dyna-Jet (HC)	Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd [2017] 3 SLR 267("Dyna-Jet (HC)"	¶5
FirstLink	FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others [2014] SGHCR 12	¶5

STATEMENT OF FACTS

PARTIES	
Claimant	Phar Lap Allevamento ("Phar Lap") is a company registered and located in Capital City, Mediterraneo [Not. Arb. ¶1].
Respondent	Black Beauty Equestrian ("Black Beauty") in Equatoriana is famous for its broodmare lines. It decided to establish a racehorse stable [Not. Arb. ¶4].
DATE	**EVENTS**
21 March 2017	Respondent contacted Claimant, asking to provide 100 doses of frozen semen [Ex. C1].
24 March 2017	Claimant replied Respondent and told the basis conditions of selling frozen semen [Ex. C2].
28 March 2017	Respondent required DDP delivery to Claimant. In addition, Respondent told Claimant that the applicable law and the jurisdiction should be Equatoriana [Ex.C3].
31 March 2017	Claimant accepted DDP and proposed an arbitration in Mediterraneo [Ex. C4].
10 April 2017	Respondent proposed Claimant to change the law of arbitration clause and the seat of arbitration to Equatoriana [Ex. R1].
11 April 2017	Claimant proposed to change the seat of arbitration to Dunubia. However, it was silent on the law of arbitration clause [Ex. R2].
12 April 2017	The two main negotiators representing each party, Ms. Napravnik and Mr. Antley were injured in an accident and they had to be replaced for the finalization of the contract which was signed on 6 May 2017 [Not. Arb. ¶8].

6 May 2017	The Parties signed the contract [Ex. C5].
20 May 2017	Claimant sent the first shipment of 25 doses [Not. Arb. ¶9].
3 October 2017	Claimant sent the second shipment of 25 doses [Not. Arb. ¶9].
November 2017	Iacn Bouckaert, who is Mediterraneo's newly elected President, announced 25 per cent tariffs on agricultural products from Equatoriana [Not. Arb. ¶9].
19 December 2017	The Government of Equatoriana announced to impose a tariff of 30 per cent upon all agricultral goods including frozen semen from Mediterraneo [Ex.C6].
20 January 2018	Claimant contacted Respondent to find a solution regarding the tariffs [Ex.C7].
23 January 2018	Claimant sent the third shipment of 50 doses before an agreement on the new price had been reached [Not. Arb. ¶13].
12 February 2018	Respondent's CEO refused to pay any additional amount for the tariffs [Ex. C8].
31 July 2018	HKIAC received the Notice of Arbitration from Claimant [Not. Arb. p.3].
24 August 2018	Respondent submitted its Answer to the Notice of Arbitration to HKIAC [Ans. Not. p.28].
2 October 2018	Claimant Submitted Evidence from Other Arbitration Proceedings [the Record. p.49].
3 October 2018	Respondent argued that the evidence had been obtained illegally [the Record. p.50].

SUMMARY OF ARGUMENT

ISSUE1: The Tribunal Has the Jurisdiction and the Powers Under the Arbitration Agreement to Adapt the Contract, Including the Law of Mediterraneo Governs the Arbitration Agreement and Its Interpretation

Under the principle of separability, the applicable law of arbitration agreement is separately designated from substantive law. Since the seat of arbitration is Danubia, Hague principle is applied. According to Hague principle, "expressed choice of the law" and "implied choice of the law" are should be regarded to determine the applicable law. Also, considering "a three-step test", the applicable law of arbitration is determined in accordance with three steps, "expressed choice of the law", "implied choice of the law" and "the law of the seat of arbitration". In this case, there are no designation about the applicable of arbitration agreements expressly. However, the Parties choose the law of Mediterraneo as "implied choice of the law". Then, under the law of Mediterraneo, it provides for a broad interpretation of the arbitration agreement. Therefore, the tribunal has the jurisdiction and the power of the adaptation of the Contract.

ISSUE2: Claimant Should Be Entitled to Submit Evidence from the Other Arbitration Proceedings

Claimant can submit evidence from the other arbitration proceedings. This is because the evidence it is relevant to the present case. Even if the evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of Respondent's computer system, Claimant can submit it. This is because the confidentiality agreement is not binding Claimant and Claimant was not involved in any hacking directly.

ISSUE3: Claimant Is Entitled to the Payment of USD 1,250,000 under Clause 12 of the Contract and CISG with Supplementation by UNIDROIT

Claimant is entitled to the payment of USD 1,250,000 as a result of the adaptation made by the tribunal because there is hardship under clause 12 of the Contract or under CISG with supplementation by UNIDROIT. The wording of clause 12 of the Contract is clear to understand that the tariffs suddenly imposed by the government of Equatoriana is to be "hardship". It is also said that UNIDROIT is applicable to this case to fill the "gap" of CISG. Under UNIDROIT, there is "hardship" in this case and so Claimant ask the tribunal to adapt the Contract with a view to restoring its equilibrium, which will make Respondent to pay USD 1,250,000.

ARGUMENT

ISSUE1: The Tribunal Has the Jurisdiction and the Powers Under the Arbitration Agreement to Adapt the Contract, Including the Law of Mediterraneo Governs the Arbitration Agreement and Its Interpretation

I. The Law of Mediterraneo Should Govern the Arbitration Agreement and Its Interpretation

A. The Principle of Separability Should Be Applied

1 The arbitration proceedings are conducted on the basis of HKIAC Rules 2018 [Proc. Ord. No.1 ¶II1]. Therefore, under Art. 19.2 of HKIAC Rules 2018, "[t]he arbitral tribunal shall have the power to determine the existence or validity of any contract of which an arbitration agreement forms a part. For the purposes of Article 19, an arbitration agreement which forms part of a contract, and which provides for arbitration under these rules, shall be treated as an agreement independent of the other terms of the contract". This is the principle of separability. Therefore, in this arbitral proceeding, the law that governs the arbitration agreement and its interpretation are separate from the governing law of the rest of the Contract.

B. Since the Seat of Arbitration Is Danubia, Hague Principles Should Be Applied

2 In this case, the seat of arbitration is Danubia. "The seat of arbitration shall be Vindobona, Danubia" [Ex. C5 ¶ 15]. The general conflict of laws rules for contracts in Danubia are Hague Principles [Proc. Ord. No.2 ¶43]. Therefore, according to the general principle of "lex fori", Hague Principles apply. Under Art. 4 of Hague Principles, the provision of "Express and tacit choice" states that, "A choice of law, or any modification of a choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances". "Article 4 provides that the parties may choose a law to govern their contract either expressly or tacitly" [HP Com,, 4.2]. "An agreement between the parties to confer jurisdiction on a specified arbitral

tribunal to resolve disputes under the contract is not the same as a choice of law" [HP Com, 4.12]. "The particular circumstances of the case may indicate the intention of the parties in respect of a choice of law. The conduct of the parties and other factors surrounding the conclusion of the contract may be particularly relevant" [HP Com, 4.13].

C. Under the Principle of Separability, the Applicable Law of Arbitration Agreement Is Separately Determined from Substantive Law.

3 In general, the arbitration is the product of party agreement as is the choice of laws that apply. Under the principle of separability, the parties may designate the governing law of the arbitration agreements to be separate from substantive law of the contract. Referring also to Hague Principles, to determines the governing law of the arbitration agreements, firstly, it is generally determined by the parties' agreement, considering the viewpoint of respecting the will of the Parties. If there is no express designation, secondly, it may be determined in accordance with "implied choice of the law" and thirdly, "the law of the seat of arbitration". This logic is also adopted in judicial decisions as "a three-step test" or "a three-stage enquiry".

D. Judicial Decisions Establish "A Three-Step Test" or "A Three-Stage Enquiry"

4 The English Court of Appeal stated "a three-step test" in the case of "SulAmérica" that test has the same purpose of Hague Principles. This supports that common ground exists whereby the governing law of an arbitration agreement is determined by a three-step test. [SulAmérica]. In that case, The English Court of Appeal stated, "[n]ormally, a three-stage enquiry is employed to determine the governing law of arbitration agreements: first, whether an express choice was made; second, in the absence of an express choice, whether an implied choice was made; and third, where parties had not made any choice, the proper law would be the law that the arbitration agreement has the closest and most real connection with" [SulAmérica]. That is, "(1) If the parties made an express choice of law to govern the arbitration agreement, that choice would be effective, regardless of the law applicable to the contract as a whole. (2) Where

the parties failed expressly to specify the law of the arbitration agreement, it was necessary to consider whether the parties had made an implied choice of the law. (3) Where it was not possible to establish the law of the arbitration agreement by implication, it was necessary to consider what would be the law with the 'closest and most real connection' with the arbitration agreement" [Redfern and Hunter, p.158]. Moreover, the High Court of the Republic of Singapore stated that if "there was an implied choice made by the parties, there is no need to proceed to the third stage of enquiry" [BMO v BMP].

E. Judicial Decisions Have Adopted "Implied Choice of the Law" Instead of "the Law of the Seat of Arbitration" in Many Cases on the Basis of the Three-Step Test

5 In the SulAmérica case stands for the proposition that there is a presumption that the substantive law of the contract also governs the arbitration clause by implied choice of governing law. On the other hand, FirstLink case took the position that the law of the chosen seat of arbitration is prevails, i.e. it has the 'closest and most real connection' with the arbitration agreement. However, both of those decisions have been recently considered by the Singapore Court. In those cases, the approach of the SulAmérica case prevailed. Steven Chong J, who was the Attorney-General of Singapore, considered the two competing approaches and preferred SulAmérica to FirstLink [BCY v BCZ] just as the Singapore Court preferred the approach of SulAmérica [Dyna-Jet (HC)]. Moreover, the Singapore Court again adopted the logic of SulAmérica and applied it to the facts of the case [BMO v BMP].

F. A "Three-Step Test" Should Be Adopted to This Case and "Implied Choice of the Law" Should Prevail Over "the Law of the Seat of Arbitration"

1. Considering "A Three-Step Test"

6 The "three-step test" is a logic that determines the law applicable to an arbitration agreement when there is no explicit choice of the law. This case is the exactly the case.

2. There Is No Express Choice of the Law That Governs the Arbitration Agreement

7 In clause 15 of the Contract, there are no designation about the applicable law of the arbitration agreement and thus, the next stage of the "three-step test" should be considered.

3. There Is an "Implied Choice of the Law" That Governs the Arbitration Agreement and Interpretation

a. The Arbitration Clause Should Be Generally Governed by the Same Law of the Main Contract

8 According to the clause 14 of the Contract, the law of Mediterraneo governs the Sales Agreement. On the other hand, in clause 15 of the Contract there is no designation about the applicable law of the arbitration agreement. If the parties do not expressly choose the applicable law of arbitration agreement, the arbitration clause is generally governed by the same law as the rest of the contract. Professor Lew states that, "There is a very strong presumption in favour of the law governing the substantive agreement which contains the arbitration clause also governing the arbitration agreement. This principle has been followed in many cases. This could even be implied as an agreement of the parties as to the law applicable to the arbitration clause" [Redfern and Hunter, p.158].

b. CISG Should Apply to Interpret the Procedural Issue of This Case

9 In Procedural Order No.1, the tribunal noted the application of CISG. "There is consistent jurisprudence in Mediterraneo that in sales contracts governed by the CISG, the later also applies to the conclusion and interpretation of the arbitration clause contained in such contracts" [Proc. Ord. No.1 ¶Ⅲ4]. Therefore, the Parties' action and intention should be interpreted according to CISG.

c. Under Article 8 of CISG, the Parties Had the Intention to Apply the Law of

Mediterraneo to the Arbitration Clause

10 When interpreting the choice of the governing law of the arbitration clause, Art. 8 of CISG suggests that the 'parties' intention should be regarded. According to Art. 8(1) and (2), the interpretation is in accordance with the parties' intention or the judgement of the reasonable person in the same circumstances. In determining the parties' intention or judgement of a reasonable person in the same circumstances, Art. 8(3) of CISG provides that all relevant circumstances should be considered.

11 In this case, Mr. Antley wrote down about what they should address in the next meeting with Ms. Napravnik. In his memo, he wrote "[c]larify in arbitration clause that neutral venue and applicable law" before he left the company following severe car accident. However, he was replaced because of severe car accident and Mr. Krone, new head of the legal department at Black Beauty Equestrian, continued to conclude the Contract.

12 As a result, Mr. Krone did not clearly write about the applicable arbitration law in the Contract [Ex. R3].

13 After the conclusion of the Contract, Mr. Krone had no statement to Claimant to designate of the applicable law of the arbitration agreement. Therefore, Mr. Krone accepted the intention to choose the applicable law of the arbitration impliedly. This means there was an implied choice that arbitration agreement and contract law would be the same meaning that both laws are governed the law of Mediterraneo. From the viewpoint of respecting the will of the Parties, the only law that the Parties explicitly agreed should be applied for the whole of the contract as the implied choice of the law.

4. It Is Not Necessary to Consider "the Law of the Seat of Arbitration" and So the Law of Danubia Is Not Applicable

14 If there is no express or implied choice of the law of the arbitration, one must consider the next step of the "three-step test" as to what law is the 'closest and most real connection' with

this arbitration agreement. However, according to the case of the High Court of the Republic of Singapore, if "there was an implied choice made by the parties, there is no need to proceed to the third stage of enquiry" [BMO v BMP]. In this case, proved in the above, "there was an implied choice made by the parties". Therefore, "there is no need to proceed to the third stage of enquiry", i.e. considering "the law of the seat of arbitration" and the "implied choice of the law" prevails over "the law of the seat of arbitration". Thus, there is no need to apply the law of Danubia to the arbitration clause.

G. Conclusion

15 The Parties failed to expressly to specify the law of the arbitration agreement. However, the Parties chose the law of Mediterraneo on the basis of "implied choice of the law". Therefore, the arbitration clause is governed by the law of Mediterraneo law, not the law of Danubia.

II. Under the Law of Mediterraneo, the Tribunal Has Jurisdiction and the Power of Adaptation

A. The Tribunal Has Authority to Judge on Its Own Jurisdiction

16 Under Art. 15 of the Contract, the Parties agreed that "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" [Ex. C5]. Therefore, under Art. 15 of the Contract, the Parties had agreed to give authority to the tribunal. Under Art. 19.1 of HKIAC Rules 2018, "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." Therefore, the tribunal has its discretion and whether a claim is proper or not are ultimately depends of the judgment of the tribunal.

B. In General, the Tribunal May Adapt a Contract

17 Recently, due to value the private autonomy of the Parties, it is becoming popular to admit for arbitrator to approve adaptation of contracts [Prof. YOSHIMASA of the Kyoto University]. For instance, in the case of RWE and Gazprom, a Vienna-seated tribunal modified a contractual price formula [RWE and Gazprom].

C. The Arbitration Law of Mediterraneo Provides for a Broad Interpretation of the Arbitration Agreement

18 The Parties have submitted the Contract after long discussions to the law of Mediterraneo which consequently also governs the interpretation of the arbitration agreement contained therein. "The Arbitration Law of Mediterraneo provides for a broad interpretation of arbitration agreements, irrespective of an allegedly narrow wording merely referring to "dispute(s) arising out of this contract"" [the Record p.7, ¶16]. Therefore, this admits giving authority to the tribunal and the power to adapt of the Contract.

D. Under Art. 8 of CISG, the Parties Had the Intention to Enable the Adaptation of the Contract

19 In the Procedural Order No.1, the tribunal admitted to use CISG to interpret the procedural issue. "There is consistent jurisprudence in Mediterraneo that in sales contracts governed by the CISG, the later also applies to the conclusion and interpretation of the arbitration clause contained in such contracts" [Proc. Ord. No.1 ¶Ⅲ4]. Therefore, it shall be interpreting the Parties' action and intention in accordance with CISG. When interpreting whether the Parties acknowledge of adaptation of the Contract, Art. 8 of CISG suggests that the parties' intention and all relevant circumstance should be regarded. In determining the judgement of a reasonable person in the same circumstances, Art. 8(3) of CISG provides that all relevant circumstances should be considered.

20 In this case, on the day of the car accident, Respondent's lawyer, Mr. Antley had explicitly

stated to Claimant's lawyer, Ms. Napravnik that the arbitrators should be able to adapt the Contract if the Parties should not be able to reach a solution. Claimant's Ms. Napravnik mentioned to Mr. Antley that the importance to have the mechanism to ensure an adaptation of the contract in case the Parties could not agree on an amendment. Responded to that, "Mr. Antley replied that in his view that it should probably be the task of the arbitrators to adapt the contract [emphasis added] if the Parties could not agree" and "Mr. Antley promised that he would come back with a proposal the next morning" [Ex. C8]. That means Respondent had the intention to accept the adaptation of the Contract in case it needed.

21 While the new contract negotiators did not explicitly stipulate about the adaptation in the Contract, this is only because they did not understand of the adaptation of the contract deeply at that time. A reasonable person in the same circumstances would understand that the intent of previous negotiators has not been destroyed in that situation. Therefore, the adaptation feature is comprised within the Contract.

22 In the other arbitration proceedings, Respondent claimed to admit the adaptation. "In that arbitration, RESPONDENT who is here vigorously denying any need to adapt the contract to a change of circumstance had itself asked for an adaptation of the price invoking an unforeseeable change of circumstances" [the Record, p.49]. Therefore, Respondent acknowledged the need to adapt the Contract in case it is needed.

E. Conclusion

23 Claimant agreed to give authority to the tribunal about the jurisdiction and the power of adaptation. Respondent also had the intention to give authority of the jurisdiction to the tribunal and to adapt the Contract in case it is needed. Thus, the tribunal has the power under the arbitration agreement to adapt the Contract.

ISSUE 2: Claimant Should Be Entitled to Submit Evidence from the Other Arbitration

Proceedings

I. The Tribunal Should Take into Account IBA Rules to Handle Evidence

A. There Are No Detailed in Provisions HKIAC Rules 2018 and Law of Meditterraneo

24 The Parties expressly agreed that this arbitration proceeding is done under HKIAC Rules 2018 [Ex. C1]. Thus, the evidences should be determined according to HKIAC Rules 2018.

25 Art. 22 of HKIAC Rules 2018 provide for "Evidence and Hearings". Under Art. 22.2 of HKIAC Rules 2018, "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence". However, they do not have clear criteria about for the handling evidences. Furthermore, there are no specific rules on evidence in particular how to deal with evidence in the arbitration laws of Meditterraneo, which govern this arbitration. The arbitration laws of Equatoriana and Danubia also do not have specific rules about dealing with evidence [Proc. Ord. No.2 ¶46]. Therefore, Claimant suggest that the tribunal should take into account IBA Rules when the tribunal deal with evidences.

B. The Tribunal Should Take into Account IBA Rules

1. IBA Rules Provide a Standard for the Treatment of Evidence

26 According to Foreword of IBA Rules, they are enacted by International Bar Association to provide an efficient, economical and fair process for the taking of evidence in international arbitration. "This principle informs all of the IBA Rules of Evidence" and "it is important for parties and arbitral tribunals to find methods to resolve their disputes in the most effective and least costly manner" by application of the IBA Rules [IBA Com, p.3]. They contain a number of significant provisions concerning evidence-taking [Born, p.1793]. In particular, Art. 9 of IBA Rules provide "Admissibility and Assessment of the Evidence" and stipulate clear criteria of taking evidence. As describe above, IBA Rules provide a standard for the treatment of

evidence. In many cases, tribunals will use them as guidelines for its decisions as they are finding increasing favor as guidelines for arbitral procedure [Born, pp.170,1794].

2. The Tribunal Can Rely on IBA Rules without the Parties' Agreement

27 In this case, the Parties do not agree with IBA Rules. However, the tribunal can rely on IBA Rules without the Parties' agreement. According to Art. 13.1 of HKIAC Rules 2018, the arbitral tribunal shall adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay or expense, having regard to the complexity of the issues, the amount in dispute and the effective use of technology, and provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case. Therefore, the tribunal should take into account IBA Rules, which adopted many arbitral proceedings.

28 Moreover, the HKIAC states in its homepage that "[t]he Rules are a resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration" [HP of HKIAC]. Thus, the tribunal should take into account IBA Rules, that HKIAC admits very effective, according to Art. 13.1 of HKIAC Rules 2018. Therefore, IBA Rules, while not having binding force of law because the Parties did not agree with using them, are applicable in this case.

II. Under IBA Rules Claimant Can Submit an Evidence from Other Aritration Proceedings

A. Background of This Issue

29 The evidence which Claimant submitted is other arbitration proceedings under the HKIAC Rules 2018 involving Respondent. In the said arbitration, Respondent has been negatively affected by the additional tariffs of 25%, and, hence, asked for an adaptation of the price invoking an unforeseeable change of circumstances.

B. Claimant Can Submit the Evidence If It Is Relevant to the Present Case

30 According to Art. 3.11 of IBA Rules, parties may submit to the Arbitral Tribunal and to the other parties any additional documents on which they intend to rely or which they believe have become relevant to the case. Thus, Claimant can submit the evidence from other arbitration proceedings where it is relevant to the present case.

III. Claimant Can Submit Evidence from Other Arbitration Proceedings Even If It Had Been Obtained through a Breach of a Confidentiality Agreement

31 Respondent submit that Art. 42 of HKIAC 2013 Rules, which provides for an express obligation to keep the proceedings confidential, is applied and Claimant obtained the evidence through a breach of a confidentiality agreement. However, the confidentiality agreement under Art. 42 of HKAIC 2013 Rules does not prohibit Claimant to submit the evidence.

32 Art. 42.1 of HKAIC 2013 Rules stipulate that "[u]nless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration agreement(s); or (b) an award made in the arbitration".

33 Under this article, Claimant is not bound by this confidentiality agreement because Claimant was not a party of the arbitration proceedings. This article is binding only Respondent and the other party in the other arbitration case. However, there is no such confidentiality agreement between Claimant and Respondent with respect to the intended evidence for submission from the other arbitration proceedings. The confidentiality agreement referred to by Respondent exists only between Respondent and the other party in the said arbitration proceedings. Claimant is not a party to the said arbitration proceedings and the contract therein, and, consequently, not bound with any applicable confidentiality agreement. Therefore, Claimant can submit evidence from other arbitration proceedings even if it had been obtained through a breach of a confidentiality agreement

IV. Arbitration Tribunal Can Admit as Evidence that Were Illegally Obtained

A. The Evidence Does Not Violate IBA Rules

34 Claimant submits Respondent's other arbitration proceedings as an evidence. On the other hand, Respondent submits that the evidence is not admissible because it was obtained through a breach of a confidentiality agreement or through an illegal hack of Respondent computer system. While Claimant does not know where the information came from, Claimant got that information from Mr. Kieron Velazques at the annual breeder conference.

35 Art. 9.2(g) of IBA Rules enables a tribunal to exclude evidence for considerations of fairness or equal treatment of the Parties. Art. 9.7 of IBA Rules also requires that parties conduct themselves in good faith in the taking of evidence. In this case, Claimant do not violate the fairness or equality of the Parties and do not conduct itself in bad faith in the taking of evidence.

36 Generally, hacked or leaked data would not be accepted by an international arbitral tribunal unless one of the parties were to issue a waiver. This considers only the case of a party coming into possession of information that was previously illegally obtained by another party [NYU]. In this case, Claimant learned about Respondent's other arbitral proceedings from Mr. Kieron Velazques at the annual breeder conference [Proc. Ord. No.2 ¶40]. Therefore, this theory does not apply in this case.

37 On the other hand, if the hacking or leaking had been perpetuated by Claimant directly, it would likely be considered a bad faith action subject to the logic of Art. 9.7 of IBA Rules [NYU]. However, in this case, Claimant learned about Respondent's other arbitral proceedings from Mr. Kieron Velazques at the annual breeder conference as above [Proc. Ord. No.2 ¶40].

38 In any event, the tribunal may admit may evidence from Claimant even if it was illegally obtained. ICSID Tribunal set out a principle that an arbitral tribunal can admit evidence data or documents that were illegally obtained, for instance by hacking a computer network. [case

No.arb/13/13].

39 From the above, the evidence Claimant's submits conforms with fairness and equality of the party even if it was obtained illegally, because Claimant was not involved in any hacking directly.

B. Respondent Failed in The Burden of Proof

40 Respondent submits that it is highly likely that it is not absolutely certain of its claim that Claimant sourced the information by illegal means. Respondent also claims that the pieces of evidence of Claimant came either from its two former employees who were recently terminated about three months ago for cause with immediate effect or through illegal hack of Respondent's computer system. Both of these allegations, however, are not substantiated by evidence, either directly or indirectly.

41 Art. 22.1 of HKIAC Rules 2018 stipulate that "[e]ach party shall have the burden of proving the facts relied on to support its claim or defense". Considering that the burden of proof on the fact relied on to support its claim lies on the part of Respondent pursuant to Art. 22.1 of HKIAC Rules 2018 and Respondent undoubtedly failed to present even a single proof thereto, its allegations should likewise fail.

V. Conclusion

42 In conclusion, Claimant should be entitled to submit the award from the other arbitration proceedings even if this evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of Respondent computer's system.

ISSUE3: Claimant is Entitled to the Payment of USD 1,250,000 under Clause 12 of the Contract and CISG with Supplementation by UNIDROIT

I. Introduction to Issue3

43 Claimant and Respondent started their relationship on 21 March 2017. On 28 March, Respondent required DDP delivery to Claimant. DDP stands for Delivered Duty Paid, which

is a delivery agreement whereby the seller assumes all of the responsibility, risk and cost associated with transporting goods until the buyer receives or transfers them at the destination port. The Parties also had difficulty in agreement of the hardship clause. It is a clause Claimant prepared in order to avoid any further conflict due to unforeseen events between the parties. At the time that still these difficulties were remaining, the party's negotiators had a car accident. They both got injured, therefore different person from each party finalized the Contract on 6 May 2017 with a complete agreement. On 23 November 2017, Mediterraneo, Claimant's country, raised the tariff by 25%. What was more surprising Equatoriana, Respondent's country, raised retaliatory tariff by 30%. Equatoriana was known for long as a strong supporter country of free trade. Based on these facts, Claimant submits following arguments.

II. As a Result of Interpreting Clause 12 of the Contract, Adaptation of the Contract Should be Admitted

A. Clause 12 of the Contract Must be Interpreted as Covering the Present Case

1. The Tariff is Applicable to "comparable unforeseen events making the contract more onerous" in Clause 12 of the Contract

44 Clause 12 of the Contract provides that "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" [Ex. C5].

45 Claimant submits that the fact that the Government of Equatroriana suddenly imposed a tariff of 30 percent upon all agricultural goods from Mediterraneo was "comparable unforeseen events making the contract more onerous" in clause 12 of the Contract because of following two reasons.

a. The Government of Equatoriana has been Promoted Free Trade for

Years

46 Equatoriana has always been one of the biggest supporters of the existing system of free trade [Ex. C6 ¶2]. According to Peak Business News published on 20 December 2017, Equatoriana has been known as a country which promotes free trade. In addition, Previous restrictions imposed by other countries affecting imports from Equatoriana have -with one exception- never resulted in direct retaliatory measures [Ex. C6 ¶2]. In other words, Equatoriana has been tolerant about the countries' restrictions.Therefore, it was beyond expectation for the Parties that the policy of Equatoriana would change 180 degrees.

b. Ambiguity of the Range of "agricultural good"

47 The Parties did not cross their mind that the frozen semen could be considered to be "agricultural good" so that tariffs would apply to it. It was difficult for even ministry and the customs authority to expect that.

48 Mr. Greg Shoemaker stated that "When I received Ms. Napravniks's email of 20 January 2018, I first inquired with the relevant ministry and the customs authority whether the tariffs on "animal products" also covered frozen semen used for artificial insemination in racehorse breeding. The took some time as also in the ministry the employees I spoke to first, were not certain whether frozen racehorse semen was covered under "animal products". Only later it was confirmed that "animal products" covered frozen race horse semen" [Ex. R4 ¶2].

c. Conclusion of Argument 1

49 Considering these circumstances, the tariffs suddenly imposed by the government of Equatoriana was "comparably unforeseen". Moreover, the tariffs increased the cost of shipment by 30 percent of the sales price [Ex. C7], which made "the Contract more onerous". Therefore, the tariffs must be "comparable unforeseen events making the contract more onerous" in Clause 12 of the Contract. Thus, Claimant is not responsible for the tariffs.

2. Clause 12 of the Contract Should be Interpreted in Accordance with Claimant's

Intention

50 Even if the tribunal does not take it reasonable to interpret clause 12 of the Contract by the wording, Claimant suggest to interpret the clause by the Parties' common intention and the understanding of a reasonable person under Art. 8 of CISG.

51 Art.8(1) of CISG stipulate that the statements made by the parties are to be interpreted according to thier common intention. Claimant submits that the Parties intended that Clause 12 of the Contract has to be interpreted as covering the case such as the present case. The intention was shown in this part "Seller shall not be responsible... for hardship, caused by... comparable unforeseen events making the contract more onerous." because the part of Italics is not template but additional made by the parties themselves [Proc. Ord. No.2 ¶3]. Below, this memorandum will show the circumstances how the Parties decide to include the clause 12 into the Contract.

52 According to Art. 8(3), in order to determine the intent of the parties, due consideration is to be given to all relevant circumstances of the case. Claimant submits that clause 12 was made to prevent Claimant from owing any further risks associated with changes in customs regulation or import restrictions, such as the very the tariffs suddenly imposed by the government of Equatorriana, following these circumstances.

a. The Process of Negotiation

53 Respondent first required a delivery on the basis of DDP [Ex. C3]. Claimant responded to the requirement that they will only accept the requirement with a special condition: Claimant should not take over any further risks associated with such a change in the delivery terms and a hardship clause should be included into the contact [Ex. C4]. In response to this suggestion by the Claimant, although Respondent responded to the email, they never mentioned about hardship clause because Respondent was more curious about drafting dispute resolution clause [Ex. R1]. Considering that Respondent never mentioned about hardship even after the Party's

agreement on the Contract, it is reasonable to think that Respondent did not disagree with Claimant's suggestion. In fact, Respondent did agree to insert hardship clause because it understood the intention of Claimant.

54 Since Respondent agreed to include hardship clause knowing Claimant's intention, hardship clause should be interpreted on the basis of Claimant's intention.

b. Claimant's Intension

55 The reason why Claimant suggested hardship clause was Claimant's experience of suffering from additional risks in the trade between farms in Danubia in 2014. At that time, an aggressive type of foot and mouth disease was discovered in Danubia which led to the imposition of very strict new health and safety test involving long quarantine time. Since Claimant and farmers did not discussed or even anticipated about such incident, Claimant had to charge for additional cost for the test. To make good use of Claimant's experience, Claimant suggested hardship clause to prevent any further occurrence of that kind. [Proc. Ord. No.2 ¶ 21]

c. Conclusion of argument 2

56 In conclusion, the parties intended that the adaption of clause 12 was supposed to cover unforseen risks by stating "for hardship, caused by... comparable unforeseen events making the contract more onerous."

57 If the Tribunal may consider there is no common intention of the Parties, according to Art. 8 (2) of CISG, a reasonable person of the same kind of Respondent would understand that Clause 12 is to be interpreted on the basis of Claimant's intention with the same reasons stated in the argument of a and b.

3. Conclusion of argument 1 and 2

58 Considering the wording of the clause 12 of the Contract and the intention of the Parties, Claimant is not responsible for the tariffs suddenly imposed by the government of Equatoriana.

B. Clause 12 of the Contract Admits Adaptation of the Contract

59 Clause 12 of the contract only states Claimant is not responsible for "hardship, caused by... comparable unforeseen events making the contract more onerous." However, Claimant maintains that the clause admits the adaptation of the contract because the Parties had the intention to do so.

60 In the negotiation, Ms. Napravnik, Claimant's lawyer, suggested to insert adaptation clause into the Contract and Mr. Antley, Respondent's negotiator, 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" [Ex. C8]. Although, the drafter of the contract is the different person from the negotiators, the intention should be taken into account because the head of the legal department of Respondent, Mr. Krone, who determined the wording of clause 12 of the Contract [Pros. Ord. No.2 ¶12] "was not involved in the detail negotiation" [Ex. R3 ¶1]. Since Ms. Napravnik and Mr. Antley mainly negotiated about clause 12 of the Contract, their intention must be respected. Their intention was to insert a clause which admits adaptation.

61 Therefore, clause 12 of the Contract should be interpreted to admit adaptation.

III. There is "hardship" under CISG with Supplementation by UNIDROIT

62 Even if tribunal does not admit adaptation under clause 12 of the Contract, Claimant submits that there is "hardship" under UNIDROIT and therefore, Claimant request the tribunal to adapt the Contract in accordance with Art. 6.2.2 and 6.2.3 of UNIDROIT.

A. UNIDROIT Should Apply to This Case

1. Art. 79(1) of CISG Does Not Cover All the Remedies

63 Under Art. 79(1) of CISG, "a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences". That means

"Changed circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and that are unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner, can, under circumstances, form an impediment in the sense of this provision of the treaty" [Scafom International BV v. Lorraine Tubes S. A. S].

64 However, Art. 79 (1) of CISG only states that a party is not liable for the failure to perform the obligation if the changed circumstances form impediment. "The fact that a party is 'not liable' in such a circumstance means that there is no liability in damages. But all other remedies are, in principle, left intact. No express provision is made in CISG for the possibility of judicial adaptation of the contract" [McKendrick, p.712].

2. "Hardship" rule should apply under Art. 7 (1) of CISG

65 Art. 7 (1) of CISG stipulates that "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". Considering the observance of good faith in international trade, Claimant submits that "hardship" rule should apply because the rule is for "a party that wishes to keep the contract alive" [McKendrick, p.713] even if there is impediment to perform it. In this case, Claimant wish to keep the Contract alive and therefore claimant requests the tribunal to adapt the contract.

3. The general principles which govern the the international trade should apply under Art. 7 (2) of CISG

66 Art. 7(2) of CISG states that "questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law". That means, "to fill the gaps in a uniform manner adhesion, should be sought with the general principles which govern the law of

international trade" [Scafom International BV v. Lorraine Tubes S. A. S]. Therefore, the remedies in this case should be determined in accordance with the general principles which govern the international trade.

4. UNIDROIT is the general principles which govern the international trade

67 Claimant submits that UNIDROIT is the general principles which govern the law of international trade.

68 There is support for the proposition that UNIDROIT can assist in the development of CISG. According to "The International Sale of Goods" [Bridge ¶¶11,40], UNIDROIT "may stimulate the search for unstated general principles in CISG. CISG and UNIDROIT "are results of the same ideologies and ambitions to create a uniform set of rules for the international trade" [Kofod].

69 In addition, UNIDROIT states in the preamble that it "may be used to interpret or supplement international uniform law instruments" and the preamble of CISG provides that the purpose of this convention is to establish "uniform rules which govern contracts for the international sale of goods". In other words, CISG is one of the "international uniform law instruments" stipulated in the preamble of UNIDROIT. Therefore, UNIDROIT may be applied as a supplement of CISG.

5. The law of Mediterraneo is a verbatim adoption of UNIDROIT

70 Even if the tribunal does not consider that UNIDROIT is not applicable under Art. 7(2) of CISG, Claimant maintains that the law of Mediterraneo applies to this case because clause 14 of the Contract clearly states that "This Sales Agreement shall be governed by the law of Mediterraneo". The general contract law Mediterraneo is a verbatim adoption of UNIDROIT [Proc. Ord. No.1, III 4]. Therefore, UNIDROIT has to be considered anyway.

B. "Hardship" in UNIDROIT Should Apply to This Case

71 Chapter 6 Section 2 of UNIDROIT stipulates about "hardship". Claimant submits that there

is "hardship" in this case under the article.

1. "Hardship" is an exception of the general rule of contract law

72 Art. 6.2.1 of UNIDROIT stipulates that "where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship". It is said that the purpose of this article is to confirm that "performance must be rendered as long as it is possible and regardless of the burden it may impose on the performing party [Official Comment, p.217]", regarding the binding character of the contract which is shown in Art. 1.3 of UNIDROIT. However, the principle of the binding character of the contract has an exception, which may result in hardship. "When supervening circumstances are such that they lead to a fundamental alteration of the equilibrium of the contract [Official Comment, p.217]," the situation would be an exceptional case of the binding character of contractual obligation.

2. The tariffs suddenly imposed by Equatorianian government satisfy the requirement of "hardship" under Art. 6.2.2 of UNIDROIT

73 There is hardship when the occurrence of events fundamentally alters the equilibrium of the contract because of the increase in the cost of a party's performance, and satisfies the requirements showed in Art. 6.2.2 of UNIDROIT (a)-(d). This memorandum below will show the tariffs satisfy all these requirements.

a. The tariffs suddenly imposed by Equatorianian government increased the cost of a party's performance

74 Art. 6.2.2 of UNIDROIT states that the alteration of the equilibrium of the contract should be caused either by the increase in the cost of performance to one of the contracting parties or the decrease in the value of the performance a party receives. In the present case, since the tariffs of 30 percent was newly imposed [Ex. C7], Claimant's cost of shipment has increased. Therefore, it is said that Claimant's cost of performance has increased.

b. The Alteration of the Equilibrium of the Contract Is Fundamental

75 Art. 6.2.2 of UNIDROIT requires that the alteration of the equilibrium of the contract should be fundamental. It is said that "an alteration amounting to 50 percent or more of the cost or the value of the performance is likely to amount to a "fundamental" alteration" [McKendric, p.719, Maskow]. There is no certain information of how much the cost of shipment was, however, it must be much less than the sales price regarding the profit of Claimant. Since the tariffs caused additional payment of $1,500,000, which is 30 percent of the sales price [Ex. C7], there is a possibility that the cost of shipment has increased by more than 50 percent.

76 Moreover, "in the famous case of Bell v Lever Brothers, the House of Lords held that a common mistake only suffices to set aside a contract where the mistake is 'fundamental' ... but divided three to two on the question whether the particular mistake ... was fundamental" [McKendric, p.719]. In other words, "whether or not an event can be described as "fundamental" very much depends on facts and circumstances of the particular case" [McKendric, p.719]. There are some situations that should be taken into account, which are Respondent's resale and the long-term relationship resulting in the imbalance of the Contract.

77 In this case, Respondent's resale is likely to give rise to severe imbalance of the contract. The increase of the cost of shipment made it impossible for Claimant to gain 5 percent, USD 500,000, profit which supposed to be ensured in the Contract [Proc. Ord. No.2 ¶31] and actually Claimant lost USD 750,000 by paying the tariffs [Proc. Ord. No.2 ¶29], while Respondent not only obtained 100 doses of frozen semen successfully but also sold 15 doses at a price that is 20 percent higher than they initially bought from Claimant [Proc. Ord. No.2 ¶ 20]. In this connection, Respondent resold them without Claimant's permission notwithstanding that Claimant told Respondent in the email of 24 March 2017 not to resale without "express written consent [Proc. Ord. No.2 ¶ 16]". Therefore, the equilibrium of the

Contract is imbalanced due to Respondent's resale.

78 Considering these circumstances, the alteration of the equilibrium of the Contract is fundamental.

c. The tariffs suddenly imposed by Equatorianian government satisfy the requirement of Art. 6.2.2 (a) of UNIDROIT

79 Art. 6.2.2 (a) of UNIDROIT provides a requirement of "hardship", that is, "the events occur … after the conclusion of the contract".

80 In the present case, the tariffs were imposed after the conclusion of the Contract. It has been concluded on 6 May 2017. This date is clearly written in the Contract [Ex. C5]. On 19 December 2017, the government of Equatoriana announced the tariffs by executive order and they took effect from 15 January 2018 [Proc. Ord. No.2 ¶ 25]. From these facts, there is no doubt that the tariffs were imposed after the conclusion of the Contract.

d. The tariffs suddenly imposed by Equatorianian government satisfy the requirement of Art. 6.2.2 (b) of UNIDROIT

81 Art. 6.2.2 (b) of UNIDROIT stipulates that "the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract".

82 As mentioned in ¶44 of this memorandum, Equatoriana promoted free trade at the time of conclusion of the Contract and so, it was very surprising for the disadvantaged party, Claimant, that Equatoriana imposes such tariffs in retaliation for Mediterraneo. Therefore, the tariffs could not reasonably have been taken into account by Claimant at the time of the conclusion of the contract

e. The tariffs suddenly imposed by Equatorianian government satisfy the requirement of Art. 6.2.2 (c) of UNIDROIT

83 According to Art. 6.2.2 (c) of UNIDROIT, the events has to be "beyond the control of the disadvantaged party". It is said that "the acts of rulers and governments are generally

beyond" the contracting parties' control [McKendric, p.721].

84 The tariffs are definitely imposed by Equatorianian government. Therefore, the tariffs are beyond the control of Claimant.

f. The tariffs suddenly imposed by Equatorianian government satisfy the requirement of Art. 6.2.2 (d) of UNIDROIT

85 Art. 6.2.2 (d) of UNIDROIT states that "the risk of the events was not assumed by the disadvantaged party".

86 As stated in ¶53 of this memorandum, Claimant did not take the risk of the tariffs. On 28 March 2017, Respondent requested Claimant to accept DDP condition. In response, Claimant accepted it with a qualification under which Claimant will not "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" [Ex. C4]. In the past case, Claimant has suffered from strict new health and safety requirements imposed by Danubia. That costed 40 percent of the sales price [Proc. Ord. No.2 ¶ 21]. Since Claimant did not want to be troubled with such unexpected impositions, it expressly showed Respondent the intention not to owe further responsibility. Therefore, the risk of the unexpected tariffs was not assumed by Claimant.

g. Conclusion of argument 2

87 Considering the argument from ¶74 to ¶86, the tariffs satisfy all the requirements of Art. 6.2.2 of UNIDROIT.

88 However, there are two more requirements that are not explicitly stated in the Article.

3. Hardship normally relevant to long-term contracts

89 Although the Art. 6.2.2 of UNIDROIT "does not expressly exclude the possibility of hardship being invoked in respect of other kinds of contract, hardship will normally be of relevance to long-term contracts [Official Comment, p.222]". In this case, Claimant and Respondent

entered into contract on the assumption that the relationship between them would last long-term [Ex. C3, 4]. Furthermore, Respondent emphasized on the phone-call on 21 January 2018 that their interest was a long-term relationship with Claimant [Ex. C8]. Therefore, although the Claimant's performance of the shipment is only three times, "hardship" applies to this case because there is possibility of future transaction under the same conditions.

4. The change in the equilibrium must relate to obligations that remain to be performed

90 It is said that the change in the equilibrium must relate to obligations that remain to be performed [McKendric, p.718]. This requirement is based on the "venire contra factum proprium" rule, that is, "no one may set himself in contradiction to his own previous conduct" [McKendric, p.718, Vogenauer, p.186]. In this case, however, the Parties recognized "hardship" would apply to the problem of the tariffs and recognized to discuss it after the shipment, which is not contradictory behavior.

91 Ms. Napravnik, the prime negotiator of Claimant, and Mr. Shoemaker, who was not involved in the negotiation, talked on the phone on 21 January 2018. Although Mr. Shoemaker did not have the authority to negotiate, he had to decide how to deal with the tariff in this case because Respondent management was not available [Ex. R4]. Respondent told Claimant that the shipment is urgent because they needed some of the frozen semen during the "breeding season" [Ex. R4]. Respondent also stated that "if the contract provides … we will certainly find an agreement on the price" [Ex. R4]. In light of Respondent's response on the phone, Claimant understood that how to deal with the tariffs would be determined after the shipment because the contract includes clause 12, that is, "hardship clause" [Ex. C8].

92 Therefore, since the Parties recognized to decide about the increased tariff after the shipment, the change in the equilibrium which occurred after the performance of the obligation shall not preclude the application of hardship provisions under Art. 6.2.2 of UNIDROIT.

C. Conclusion of Argument II

93 In conclusion, since UNIDROIT is applicable to this case as a supplement of CISG and the tariffs suddenly imposed by Equatorianian government satisfy all the requirements of Art. 6.2.2 of UNIDROIT, there is "hardship" in this case.

IV. The Tribunal Should Adapt the Contract and Order Respondent to Pay USD 1,250,000 under Clause 12 of the Contract and Art. 6.2.3 of UNIDROIT

A. The Tribunal Should Adapt the Contract under Clause 12 of the Contract

94 As Claimant submitted in part II of issue 3, the tribunal should adapt the Contract under clause 12 of the Contract.

1. As A Consequence of Adaptation, The Tribunal Should Order Respondent to Pay USD 1,250,000

95 As Claimant submitted in part III of ISSUE 3, USD 1,250,000 is a sum of USD 500,000 and USD 750,000. The former is profit which supposed to be ensured in the Contract. Claimant has set 5% of the payment as profit. The latter is lost when Claimant pays the tariffs. In other words, USD 1,250,000 is a minimum amount for Claimant to get profit as ensured in the contract. Therefore, USD 1,250,000 is reasonable amount of money and the tribunal should order Respondent to pay.

B. Even If the Tribunal Does Not Admit Adaptation under Clause 12 of the Contract, Claimant Is Entitled to Request Adaptation of the Contract under Art. 6.2.3 of UNIDROIT

96 Art. 6.2.3 of UNIDROIT stipulates that either party may resort to the court to request a termination or an adaptation of the contract. According to Art. 1.11 of UNIDROIT, "court" includes an arbitral tribunal. Therefore, either party may resort to the arbitral tribunal under Art. 6.2.3 of UNIDROIT.

1. The Situation in This Case Meets Requirements to Resort to the Tribunal

97 There are two requirements to resort to the tribunal. First, the Parties must have failed 'to reach agreement'. Second, the Parties must have failed to reach agreement 'within a reasonable time' [McKendric p.723]. In the present case, these requirements are satisfied.

a. The Parties Have Failed to Reach Agreement Because of Respondent's Unfaithful Behavior

98 After the announcement of the tariffs, the Parties immediately started negotiations regarding a price adjustment for the frozen semen on 20 January 2018 [Not. Arb. ¶12]. On 23 January 2018, Claimant sent the third shipment without an agreement regarding a price adjustment. There are two reasons why Claimant did not postpone the shipment. Firstly, Respondent urged Claimant to authorize the shipment as planned. Secondly, Respondent told Claimant that it was certain that a solution would be found through negotiation given the good relationship between the Parties and their interest in further business. Claimant had gotten the impression that Respondent accepted to bear the additional costs caused by the tariffs. They are the reasons why Claimant kindly accepted Respondent's request [Ex. C8]. However, Respondent suddenly changed its attitude in a meeting of 12 February 2018. In the meeting, Respondent's CEO told Claimant that it was no longer interested in a further cooperation with Claimant. In addition, she stopped the negotiations and refused to pay additional amount for the tariffs [Ex. C8]. These unfaithful behavior by Respondent lead the Parties to fail to reach agreement. Therefore, first requirement is satisfied.

b. The Parties could not reach agreement 'within a reasonable time'

99 What constitutes a reasonable time will depend upon the facts and circumstances of the case [McKendric, p.723]. In the present case, the Parties spent 24 days to negotiate. Considering the length of the contract, 24 days is not unreasonably short. Therefore, the requirements to resort to the tribunal are satisfied and Claimant is entitled to request adaptation.

c. Even If the Tribunal Does Not Find the Failure of the Negotiations, It Should Not Order Renegotiations Because of Its Fluitless

100 After the repture of negotiations in a meeting of February, Respondent never contacted Claimant to renegotiate solutions regarding the additional tariffs. Considering this fact and an attitude of Respondent's CEO in a meeting, it is clear that Respondent has no intention to renegotiate with Claimant. Therefore, to order the Parties to renegotiate is meaningless and waste of time. The tribunal should decide this dispute by itself.

C. The Tribunal Should Adapt the Contract and Order Respondent to Pay USD 1,250,000 Under Art. 6.2.3 (4) Of UNIDROIT

101 A tribunal can adapt the contract with a view to restoring its equilibrium under 6.2.3 (4) of UNIDROIT. The tribunal may only adapt the contract when it has found hardship and to adapt the contract is reasonable for it [McKendric, p.724].

1 The request of Claimant meets requirements.

a. Existence of hardship

102 As Claimant stated in part II of issue 3, there is a hardship under 6.2.2 of UNIDROIT.

b. To adapt the contract to order Respondent to pay USD 1,250,000 is reasonable

103 A tribunal can adapt the contract with a view to restoring its equilibrium under Art. 6.2.3 (4) of UNIDROIT. A tribunal will be able to have regard to a broad range of factors in adapting the contract [McKendric, p.724]. Therefore, Claimant submits that the tribunal should consider two factors to adapt the Contract. Firstly, a factor regards profits which the Parties get from the Contract. Secondly, financial situations of the Parties. Concerning the first factor, as Claimant submitted in part II and III of ISSUE 3, USD 1,250,000 is a minimum amount for Claimant to get profit as ensured in the contract. Therefore, not order Respondent to pay USD 1,250,000 remains serious imbalance between the Parties. Claimant not only cannot get profits but also suffer a loss. On the other hand, Respondent gained

some frozen semen and got monetary profit by reselling it. Respondent sold 15 doses to 10 different breeders. One of the breeders told Claimant that he had bought it for USD 120,000 [Proc. Ord. No.2 ¶20]. It is not clear that how much Respondent got profit by reselling. However, it is clear that Respondent got some additional profit by reselling.

104 As for the second factors, the financial situations of the Parties are completely different. 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 automatic prolongation of the two main credit lines depended on being profitable in 2017 and 2018 respectively. Claimant had planned to make a profit in 2018 of 300.000 USD after 180.000 USD in 2017. Therefore, that plan would be seriously endangered if Claimant had to bear USD 1.250.000 [Proc. Ord. No.2 ¶29]. On the contrary, Respondent would not be financially endangered if it bore the USD 1,250,000 [Proc. Ord. No.2 ¶30].

105 Considering these factors, if the tribunal neither adapt the contract nor order Respondent to pay USD 1,250,000, serious imbalance between the Parties will remain. It is against the equilibrium. Therefore, to adapt the contract to order Respondent to pay USD 1,250,000 is reasonable and the tribunal should do.

REQUEST FOR RELIEF

In light of the submissions made above, Claimant respectfully requests the Tribunal to find:

1 The Tribunal Has the Jurisdiction and the Power to Adapt the Contract under the Governing Arbitration Law of Mediterraneo

2 The Tribunal Should give Claimant the Authority to Submit Evidence from Other Arbitration Proceedings

3 There Are Circumstances Which Admits the Tribunal to Adapt the Contract in This Case

4 As the result of adaptation, Respondent should bear USD 1,250,000