SIXTEENTH ANNUAL WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT, 2019

MARCH 31 – APRIL 7, 2019

HONG KONG

MEMORANDUM FOR CLAIMANT

HKIAC Arbitration Proceedings No.HKIAC / A18128

CHENNAI DR.AMBEDKAR GOVERNMENT LAW COLLEGE PATTARAIPERUMPUDUR.

ON BEHALF OF:	AGAINST:
PHAR LAP ALLEVAMENTO	BLACK BEAUTY EQUESTRIAN
RUE FRANKEL 1	2 SEABISCUIT DRIVE
CAPITAL CITY	OCEANSIDE
MEDITERRANEO	EQUATORIANA
-CLAIMANT-	-RESPONDENT-

S. SRIKA • MD JAFFAR SADIQ • HAMSAVENI GUNASEKARAN

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INDEX OF ABBREVIATIONS

ABBREVIATIONS	EXPANSION
¶	Paragraph Number
Art.	Article
CC	Cour de Cassation
CISG	United Nations Convention on International Sale of Goods
Com.	Commentary
DAL	Danubian Arbitration Law
ed./ eds.	Editor (or edition) / editors
GCC	General Conditions of Contract
HKIAC	Hong kong International Arbitration Rules
IBA Guidelines	International Bar Association Guidelines on conflict of Interest in International Arbitration
Ibid.	Ibidem ; " in the same place "
i.e.	*id est* ; " that is"
ICC	International Chamber of Commerce
ICC Rules	Arbitration Rules of the International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
Ltd.	Limited
LCIA	London Court of International Arbitration

Mr	Mister
Ms	Miss
No.	Number
NoA	CLAIMANT'S Notice of Arbitration
pg.	Page
PCA	Permanent Court of Arbitration
PECL	Principles of European Contract Law
PO1	Tribunal's Procedural Order No.1 dated 5 October 2018
PO2	Tribunal's Procedural Order No.2 dated 2 November 2018
RNoA	RESPONDENT's Response to the Notice of Arbitration
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
Swiss Rules	Arbitration Rules and Laws – Swiss Chambers' Arbitration Institution
UCC	Uniform Commercial Code
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with 2006 amendments.
UNICTRAL Rules	UNCITRAL Arbitration Rules (2010)
UNIDROIT	International Institute for the Unification of Private Law
v.	*Versus*
Vol.	Volume

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BOOKS , JOURNALS AND ARTICLES

CITED AS	CITATION
ATAMER	Yesim M.Atamer Et Al.,UN Convention On Contracts For The International Sale Of Goods (CISG) ¶ 16, At 1061.
CISG Advisory Council Opinion No. 7	CISG-Ac Opinion No. 7, Exemption Of Liability For Damages Under Article 79 Of The CISG, Rapporteur: Professor Alejandro M. Garro, Columbia University School Of Law, New York, N.Y., USA. Adopted By The CISG-Ac At Its 11th Meeting In Wuhan, People's Republic Of China, On 12 October 2007.
DMC	DICEY, MORRIS & COLLINS, The Conflict Of Laws, *14TH ED.*
EISENBERG	MELVIN EISENBERG, Impossibility, Impracticability, And Frustration,1J.Legal Analysis 207, 214 (2009)
GARY BORN	GARY BORN, International Arbitration Cases And Materials, (Aspen Publishers 2011).
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MARGARET	Principles and Practice of International Commercial Arbitration Margaret L. Mose
KONSTANTIN 2014	Evidence in International Arbitration : Criteria for Admission and Evaluation , 2014 *Konstantin* Pilkov
MAURO	International Arbitration – Law and Practice Mauro Rubino – Sammartano 2nd Edition 'Kluwer Law International'
P SCHLECHTRIEM	Stoll in P SCHLECHTRIEM, Commentary On the UN Convention On The International Sale Of Goods (G Thomas (Trans)) (London: Oxford University Press, 1998) 618; P Schlechtriem, Good Faith In German Law And In International Uniform Laws.
TRANSCRIPT , FLECHTNER	Transcript Of A Workshop On The Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse For Hardship, Avoidance, *Nachfrist*, Contract Interpretation, Parol Evidence, Analogical Application, And Much More. *Transcribed And Edited By Harry M. Flechtner*
G ALPA , 1996	*G Alpa* , UNIDROIT (1996) I *Contratto Impresa*/Europa, 331

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CITED AS	SOURCE	CITED IN PARA
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HKIAC Rules	Hong kong International Arbitration Rules 2018	2 , 3 , 14 , 39 , 47 , 48 , 49 , 50
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with 2006 amendments.	3 , 46
UNCITRAL Rules	UNCITRAL Rules on Transparency in Treaty-Based Investor – State Arbitration 2014	3 , 46
UNIDROIT	UNIDROIT Principles of International Commercial Contracts, 2010	3 , 12 , 41 , 97 , 98 , 99, 100 , 109 , 113 , 114 , 115 , 116

CASES CITED

CITED AS	SOURCE	CITED IN PARA
BCY v. BCZ	BCY v BCZ *[2016] SGHC 249,*	18 , 21
Black Case	Black Clawson International Ltd v . Papierwerke Waldhof-Aschaffenburg AG *[1982] 2 at page 456, col. 1:*	25
Caratube International v. Kazakhstan	Caratube International Oil Company LLP v. The Republic of Kazakhstan, ICSID Case No. ARB/08/12	56
Conoco Philips Case	Conoco phillips Gulf Of Paria BV v.The Bolivarian Republic Of Venezuela ICSID Case No. ARB/07/30	53
FirstLink v. GT	FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others *[2014] SGHCR 12*	20 , 21
ICC 2291 of 1975	ICC Award No 2291 of 1975 *Clunet*, 1976, 989. 144 ICC Award No.3267 of 1984 *YCA*, 1987, 87. 145 ICC Award No 4761 of 1987 Jarvin and Derains, *Collection of ICC Awards* (1986–90), 519.	123
ICC Award No 4761	ICC Award No. 4761, Clunet 1987, at 1012 et seq	124

STATEMENT OF FACTS

The Parties to this arbitration are Phar Lap Allevamento [CLAIMANT] and Black Beauty Equestrian [RESPONDENT] .

BRIEF ON PHARLAP ALLEVAMENTO

Phar Lap Allevamento (Phar Lap), a company registered and located in Capital City, Mediterraneo and operates in its most renown stud farm, covering all areas of the equestrian sport. Phar Lap provides stallions for breeding English thoroughbreds and Anglo Arabs . Phar Lap additionally offers frozen semen of its champion stallions for artificial insemination. Due to Phar Lap's unique storage technique the semen is long-living and of superior quality. The star among Phar Lap's stallions is Nijinsky III, which is one of the most successful racehorses that has won champions and the most sought after stallions for breeding

BRIEF ON BLACK BEAUTY EQUESTRIAN :

Black Beauty Equestrian (Black Beauty) , the RESPONDENT , is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions in Equitoriana.

BRIEF ON THE EVENTS :

- On 21 March 2017 the RESPONDENT wrote a mail to the CLAIMANT inquiring about the availability of Nijinsky III for its newly started breeding programme.
- On 24 March 2017, the CLAIMANT offered RESPONDENT 100 doses of Nijinsky III's frozen semen in accordance with the Mediterraneo Guidelines for Semen Production and Quality Standards.
- The Parties agreed on three shipments , the first of 25 doses on 20 May 2017, the second of 25 doses on 3 October 2017 and the third shipment of 50 doses to be delivered on 23 January 2018.
- On 20th of December 2017 , The Government of Equatoriana , an ardent supporter of free trade , imposed 30% tariff on selected products from Mediterraneo including on animal semen.
- The negotiations for price adjustment commenced and on the impression created for the likelihood of acceptance by the RESPONDENT , the CLAIMANT delivered the remaining 50 doses on 23rd January 2018.
- Owing to the Failure in the negotiations for price adaptation, the dispute is referred to the arbitration tribunal with its seat at Danubia as agreed upon by the parties.

SUMMARY OF ARGUMENTS

1. **DOES THE TRIBUNAL HAVE THE JURISDICTION AND/OR THE POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, WHICH INCLUDES IN PARTICULAR THE QUESTION OF WHICH LAW GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION .**

The Parties agreed to submit any dispute arising out of the contract to be referred to the arbitration tribunal administered by the HKIAC Administered Arbitration rules. The arbitration tribunal derives its jurisdiction pursuant to Article 19 of the HKIAC Rules 2018. As per Clause 14 of the sales agreement , the parties have agreed to the governing law of contract to be the law of Mediterraneo. Upon reliance on various judgements , the governing law of the main contract is a "*strong indicator*" of the governing law of the arbitration agreement. Thereby , the Law of Mediterraneo governing the main contract tends to be the governing law of arbitration agreement. The arbitration law of Mediterraneo provides for a broad interpretation of arbitration agreement extending to the claim for adaptation . The other arbitration proceedings governed by the HKIAC rules dealing with the similar dispute arising out of the similar circumstances of increase in tariffs during the same period with the law of mediterraneo governing the arbitration agreement had confirmed its power to adapt the contract as the tariff created hardship for the party. Therefore , the tribunal have the jurisdiction and/ or powers under the arbitration agreement to adapt the contract with law of Mediterraneo governing the arbitration agreement and its interpretation.

2. **SHOULD CLAIMANT BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS ON THE BASIS OF THE ASSUMPTION THAT THIS EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM**

It is the discretion of the arbitration tribunal in determining the admittance of the evidence pursuant to Article 22 of the HKIAC rules 2018. The CLAIMANT had not

violated the confidentiality provisions enshrined in Article 45 of the HKIAC rules 2018 in the obtainment of the stipulated information to be submitted to the tribunal. The established international procedures and rules emphasizes on the admissibility of the evidence based on the legal professional privilege attached to it and the relevancy it attaches to the proceedings to be tried. In the case at hand , the evidence from the partial interim award of the other arbitration proceedings is highly relevant to the extent , that the dispute involved in it , is of similar nature , circumstances , rules and the law employed . The relevant submission of the evidence based on the prevailing principles of transparency envisaged in the transparency rules of UNCITRAL and the proof that the same is neither obtained through breach of confidentiality nor by illegal hacking of the RESPONDENT computer system is a sufficient ground for the arbitration tribunal to admit the same.

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

I. UNDER CLAUSE 12 OF THE CONTRACT

II. OR UNDER THE CISG COVERING BOTH ALTERNATIVES OF ART. 7(2)

There is a general agreement between the parties which is reflected in the clause 12 of the Frozen semen sales agreement that seller shall not be responsible *neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous.* In the case at hand , the tariffs imposed on agricultural goods including frozen semen , by the government of equatoriana , thereby increasing the sellers' cost of performance by 30% causing serious hardship , *is highly unpredictable , as* Equatoriana had always been an ardent supporter of the existing system of free trade. The hardship causing the change in the circumstances , thereby altering the balance of the contractual agreement shall be qualified as an impediment under Article 79(1) of CISG and hence it automatically paves the way for the price adaptation both under clause 12 of the contract and Article 7(2) of CISG supplemented by the Articles 6.2.2 and 6.2.3 of UNIDROIT Principles of International Commercial Contracts .

ARGUMENTS ADVANCED

ARGUMENTS ON PROCEDURAL ISSUES :

[ISSUE 1]

DOES THE TRIBUNAL HAVE THE JURISDICTION AND/OR THE POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, WHICH INCLUDES IN PARTICULAR THE QUESTION OF WHICH LAW GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION

[1.1] JURISDICTION / POWERS OF THE ARBITRATION TRIBUNAL

1. The CLAIMANT submits that , the RESPONDENT did not object to the Tribunal Jurisdiction in general including the contract interpretation *(Q.48, PO No.2, pg. 61)*.

2. It is very evident that , the RESPONDENT had based its draft on the model clause suggested by HKIAC . The clause in the draft proposed by the RESPONDENT reads as follows , " *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 the 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.(RESPONDENT Exhibit R 1, pg.33).*

3. Article 19 of the HKIAC Rules 2018 dealing with the jurisdiction of the arbitration tribunal reads as follows :

> *19.1 The arbitral tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement.*
>
> *19.2 The arbitral tribunal shall have the power to determine the existence or validity of any contract of which an arbitration agreement forms a part. For the purposes of Article 19, an arbitration agreement which forms part of a contract, and which provides for arbitration under these Rules, shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not necessarily entail the invalidity of the arbitration agreement.*

4. From bare perusal of the aforementioned provision , it is very clear that the arbitration tribunal does have the jurisdiction and power to decide on the applicability of the law governing the arbitration agreement and therefore its interpretation .

[1.2] APPLICABILITY OF LAW :

[1.2.1] INTENTION OF THE PARTIES :

5. The amended draft model clause putforth by the CLAIMANT in response to the version of the RESPONDENT states 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. The seat of arbitration shall be Danubia.* ." Further , it is significant to note that , there is also an express mention specifying , *the offer is naturally on the condition that the law applicable to the sales agreement remains the law of mediterraneo (RESPONDENT Exhibit R 2, pg. 34).*

6. It is re-asserted by clause 14 of the Frozen Semen Sales Agreement which reads as follows ,

> *"This Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG)" (CLAIMANT Exhibit C 5, pg. 14).*

7. The CLAIMANT contends that , when there is no explicit mention of the choice of law to the arbitration clause in the agreement , the RESPONDENT's contention of applying the Danubian law to interpret the contract including the arbitration agreement based on four corners rule is baseless.

8. It is to be noted that , the CLAIMANT, in the desirability of a long-term relationship and for the mutual benefit of both parties , *had agreed to the offer of frozen semen only in accordance with the Mediterraneo Guidelines for Semen Production and Quality Standards* and the RESPONDENT specifically accepted to the applicability of the law of Mediterraneo , though not the jurisdiction of the courts of Mediterraneo. *(CLAIMANT Exhibit C 3, pg. 11).*

9. It is very evident that , the negotiations of the sales agreement were conducted exclusively by Mr.Antley and the main strategies discussed were the need for DDP delivery and the non acceptability of the courts of mediterraneo (RESPONDENT Exhibit R 3, pg. 35) and not about the issue of the applicability of law per se.

10. It is clear beyond doubt that , the draft of the contract already had a provision in favor of arbitration in Danubia as a neutral country and also a choice of law clause in favor of the law of Mediterraneo which is expressly accepted in the witness statement of Julian krone *(RESPONDENT Exhibit R 3, pg. 35).*

11. Further it is emphasized that the final negotiations and the signing of the Agreement took place in Mediterraneo on 6 May 2017 and not in the home country of RESPONDENT (*Q.13, PO No.2, pg. 56).*

12. It is to be worth noting that , Danubian Contract Law for international contracts is largely a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts. Thereby , all the three countries mentioned in the contract i.e Mediterraneo, Equatoriana , Danubia , all had adopted the UNIDROIT Principles on International Commercial Contracts as the Law governing the Contracts .(*Q.45, PO No.2, pg. 61).*

[1.2.2] FIRST LINK – SULAMERICA APPROACH :

13. It is submitted that , Article 8 of CISG dealing with the intention of the parties reads as follows,

> *(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.*
>
> *(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.*
>
> *(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.*

14. *In re* with the afore mentioned provision of HKIAC , it is affirmed that , "It has long been recognised , that in principle , the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole, but it is probably fair to start from the assumption that, in the absence of any indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law. It is common for parties to make an express choice of law to govern their contract, but unusual for them to make an express choice

of the law to govern any arbitration agreement contained within it; and where they have not done so, the natural inference is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate.*[Sulamerica Case]*

15. Further , the court also summarized and set out the *three stage test* to determine the law governing the Arbitration Agreement which includes (i) whether the parties expressly chose the law of the arbitration agreement; (ii) whether the parties made an implied choice of the arbitration agreement; and (iii) in the absence of express or implied choice, the system of law with which the arbitration agreement has the "closest and most real connection". [*Ibid.*]

16. In this connection , the court of appeal held that , the starting point is to acknowledge that there are potentially three different systems of law applicable to a contract which contains an arbitration clause:

1. First, the law governing the parties' obligations under the contract (i.e. the substantive law).
2. Second, the law of the place where the parties have decided the arbitration shall have its seat (sometimes termed the 'curial law'). The curial law is relevant to determining the matters such as the procedure to be followed in the arbitration (to the extent an overriding set of arbitral rules has not also been chosen) and the powers and identity of the national court which has jurisdiction to supervise and support the arbitral process.
3. Finally, and perhaps less often considered, there is the law governing the arbitration clause itself. This is the law which deals with, for example, the formal requirements for the validity of the clause. Crucially, it need not necessarily be the same as either of the substantive law or the curial law. As the court noted, this flows from the separable nature of an arbitration clause which, where necessary, stands on its own to bind the parties to their chosen method of dispute resolution, even where their dispute is as to the very existence or validity of the containing contract.

17. Further , in light of this, the Court of Appeal accepted that, "*in the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate*". *[Ibid.]*which in this case is the law of mediterraneo.

18. The Court in *[BCY v. BCZ]* confirmed that , the correct position stated in [*Sulamerica Case*] is that , in the absence of any indication to the contrary, parties are assumed to have intended the whole of their relationship to be governed by the same system of law, and the natural inference is that the proper law of the main contract should also govern the arbitration agreement. While seat choice could be a mitigating factor, it would be insufficient in and of itself to negate this presumption.

19. Further emphasised that , the governing law of the main contract is a "*strong indicator*" of the governing law of the arbitration agreement. In particular, where an arbitration agreement is a clause forming part of a main contract as opposed to a free-standing agreement. *[Ibid.]*

20. The Court in . *[FirstLink v. GT]* marks a different approach to that taken in the previous first instance case in Singapore , in which it held that , the presumption is that the law of the seat should be the governing law of the arbitration agreement, rather than the parties' chosen substantive governing law.

21. The Court in *[BCY v. BCZ] disagree*d *... that in [FirstLink v. GT] it represents the law in Singapore* ". It considered that , the departure in that case from *[Sulamerica Case]* was "*strictly unnecessary*", and highlighted that , while the law of a chosen seat may be neutral from a *procedural* perspective, it does not necessarily follow that it is neutral from a *substantive* perspective, i.e. when determining the formation of an arbitration agreement. The Court found that the approach in *Sulamérica* was supported by authority and "*is, in any event, preferable as a matter of principle*".

22. In light of the aforementioned verdicts , it is very clear in the case concerned , that law governing the contract i.e the law of mediterraneo is said to govern the arbitration agreement as well.

[1.2.3] DOCTRINE OF SEPARABILITY :

23. The Court while considering the relevance of the doctrine of separability, and whether the principle (i.e. that an arbitration agreement is separable from the main agreement) could justify preferring the law of the *seat* as the law governing the arbitration agreement , held that the purpose of separability is to give effect to parties' expectation , that their arbitration clause will survive even if the main agreement falls away, due to alleged or actual invalidity.

24. Further held that , Separability does not provide for a separate and distinct agreement in and of itself from the time the main contract is formed. In this sense , the arbitration agreement is separa*ble*, not separate.

25. In *[Black Case]* , it is reiterated that , "In the ordinary way, this proper law of the arbitration agreement would be likely to follow the law of the substantive contract."

26. In *[Sonatrach v Ferrell]* it is held that , "Where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract."

27. It is to be noted that , in the law chosen by the parties , If there is an express choice of law to govern the arbitration agreement, that choice will be effective, irrespective of the law applicable to the contract as a whole. If there is an express choice of law to govern the contract as a whole, the arbitration agreement will also normally be governed by that law: this is so whether or not the seat of the arbitration is stipulated, and irrespective of the place of the seat *[DMC]*.

28. Professor Eisenberg , rightly pointed out that , "unspecified terms are usually determined on the basis of what the contracting parties probably would have agreed to if they had addressed the relevant issue." *[Eisenberg, , pg. 214.]* . Thereby , considering the previous communication , negotiation history and the general agreement of the parties, it can very well be inferred about the parties submission to the law of mediterraneo as the governing law.

[1.3] TRIBUNAL HAD JURISDICTION TO ADAPT THE CONTRACT :

29. It is submitted that , the clause 14 of the Frozen semen sales agreement reads as ""***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*** **(***CLAIMANT Exhibit C 5, pg. 14).*

[1.3.1] BROAD INTERPRETATION OF LAW OF MEDITERRANEO :

30. It is very clear , *In re* with the facts that , the parties of the contract , reached a consensus in the law governing the arbitration agreement which is the law of the mediterraneo .

31. It is worth noting that , the the Arbitration Law of Mediterraneo provides for a broad interpretation of arbitration agreements, irrespective of an allegedly narrow wording merely referring to "dispute(s) arising out of this contract". Thus, the arbitration agreement clearly extends to a claim for an increased remuneration.*(Para 16 , pg. 7).*

[1.3.2] PRIMARY NEGOTIATORS AGREEMENT ON ADAPTATION OF CONTRACTS :

32. It is contended by Mr. Julian krone , in his witness statement that , " it was not completely clear with respect to the points 1 and 3 in Mr. Antley' note , at the time of finalizing the negotiations" . Further stated , " Had I known at the time that Mr.Antley was referring to the law applicable to the arbitration instead of the law applicable to

the contract , I would have definitely included an express reference to the Law of Danubia in to the Arbitration agreement" *(RESPONDENT Exhibit R 3, pg. 35).*

33. In throwing light on the above statement of Julian Krone , it is clearly a negligence on the part of the RESPONDENT for which CLAIMANT cannot be held responsible .

34. It is to be noted that , after Mr.Antley , the prime negotiator left the company following the severe car accident in April 2017 . Mr.Julian Krone , the head of the legal department took over the negotiations and manged to finalize the contract with his counterpart on the CLAIMANT's side. (*RESPONDENT Exhibit R 3, pg. 35)*.

35. In the meanwhile , in November 2017 , Mr.shoemaker who is not a lawyer *(RESPONDENT Exhibit R 4, pg. 36)* is introduced to Ms.Napravnik (Prime Negotiator on the CLAIMANT side) as a person responsible for racehorse breeding program including all questions concerning the Frozen Semen Sales Agreement *(Q.32, PO No.2, pg. 59).* There seems to be a lack of efforts and due care is not taken from the RESPONDENT side at the final stages of the negotiation , the burden of which cannot be placed on the CLAIMANT.

36. It is to be noted that , though Mr. Julian Krone contends in witness statement that he was not involved in the negotiations , thereby there exist a lack of understanding on the issues to be discussed in the negotiation . His contention seems to be irrelevant , taking the fact in to consideration that the persons who finalized the contract did have access to the prior emails chain *(Q.5, PO No.2, pg. 55).*

37. *In re* to the inference from the later stage of negotiations, in the present case , the emphasis needs to be laid on the the first discussion of the adaptation clause where , RESPONDENT's prime negotiator Mr. Antley had explicitly stated to CLAIMANT's prime negotiator Ms. Napravnik that , ***the arbitrators should adapt the contract in case the parties are not able to reach a solution*** *(CLAIMANT's Exhibit C 8 , pg.17).*

38. Therefore it is very evident that , the prime negotiator of the contract on RESPONDENT's side had expressed his view that , ***it is the task of arbitrators to***

ensure an adaptation of contracts for the unlikely event , in case of parties not agreeing on an amendment price *(CLAIMANT Exhibit C 8, pg. 17)*and therefore there is a tentative agreement between the parties on the issue of adaptation of contracts.

[1.3.3] ADAPTATION OF CONTRACT IN SIMILAR PROCEEDINGS :

39. It is deduced from the statement of facts in the "Partial Interim Award" of the other arbitration proceedings , administered by the HKIAC Arbitration Rules , which the CLAIMANT relies upon to strengthen the claim in the case at hand. It is to be noted that the place of arbitration is Mediterraneo and the law governing the arbitration agreement is the law of mediterraneo *(Q.32, PO No.2, pg. 59).*

40. It is submitted that , the dispute is concerned with the sale of a mare by the RESPONDENT to a buyer in Mediterraneo. It is to be noted that , the contract in dispute in the other arbitration proceedings is also negotiated by Mr. Antley who is a prime negotiator in the case at hand , and it provided for delivery DDP Mediterraneo.*[Ibid.]*

41. It is to be noted that , the dispute arises following the imposition of the tariffs on agricultural products by the President of Mediterraneo. The RESPONDENT asked for a renegotiation of the price under the ICC Hardship Clause 2003 and Art. 6.2.3 of the Mediterranean Contract Law *(UNIDROIT Principles)* and refused delivery of the mare. Though the buyer had challenged the powers of the arbitrator to adapt the contract under the hardship clause or Art. 6.2.3 para.4b of the Mediterranean Contract Law , the arbitral tribunal , in the "Partial Interim Award" had confirmed its power to adapt the contract , should the tariff result in hardship for RESPONDENT. This is in line with the consistent jurisprudence of the courts in Mediterraneo in the context of Art. 6.2.3 para 4b of the Mediterranean Contract Law.*[Ibid.]*

42. Taking in to consideration , the other arbitration proceedings , governed by the same rules , dealing with the similar dispute , arising out of similar circumstances , during the same period , with the same law governing the law of arbitration agreement , as in

the case at hand , it could very well be inferred that , the arbitration tribunal has absolute jurisdiction and powers for the adaption of the contract.

[1.3.4] POWER TO ADAPT CONTRACTS WITHOUT EXPRESS AUTHORIZATION :

43. Having said , the Swiss Supreme Court held that , an arbitral tribunal seated in Switzerland would have both the jurisdiction and the power to fill gaps or to adapt a contract, even in the absence of an express authorisation from the parties to do so [*SWISS 2001*]. More specifically, in its decision the Supreme Court determined that:

- The power to fill gaps or amend a contract is a matter of jurisdiction.
- As such, an arbitral tribunal's decision to amend the parties' agreement can be challenged on the basis that the tribunal wrongly assumed jurisdiction.
- ***As long as the arbitration agreement does not contain any express restrictions, it must be assumed that the parties intended to confer upon the tribunal , an all-embracing jurisdiction, including the power to fill gaps and amend the contract.***

44. Further observed that , Swiss substantive law provides Swiss courts with the power to adapt or supplement contract in certain specific circumstances. For instance, Swiss law acknowledges that , sometimes a change of the circumstances prevailing at the time of entering into the contract may be so radical that it substantially alters the equilibrium of such a contract. The Swiss Supreme Court therefore ruled that a change in the circumstances surrounding a contract may be a ground for modification or even termination of the contract, if the change results in a blatant and excessive disproportion of the respective obligations of the parties (*clausula rebus sic stantibus* doctrine).

Conclusion : *In light of the above submissions , the CLAIMANT therefore submits that , the Arbitration tribunal does have the jurisdiction to decide the governing law and therefore the arbitration agreement is governed by the law of Mediterraneo and hence the tribunal has the jurisdiction and power to adapt the contract.*

[ISSUE 2]

SHOULD CLAIMANT BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS ON THE BASIS OF THE ASSUMPTION THAT THIS EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM

[2.1] ADMITTANCE OF EVIDENCE PURSUANT TO ARTICLES :

45. It is to be noted that , there exist no specific rules in particular to deal with evidence obtained in breach of contractual obligations or by illicit means in the arbitration laws of Equatoriana, Mediterraneo, and Danubia . (*Q.46, PO No.2, pg. 61).*

46. It is noteworthy to submit that , the arbitration laws of all three countries mentioned in the contract i.e Mediterraneo , Equatoriana and Danubia , is a largely verbatim adoption of the UNCITRAL Model Law (*Q.14, PO No.2, pg. 57).*

47. In light of this , Clause 14 of the Frozen semen sales agreement clearly states 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* (*CLAIMANT Exhibit C 5, pg. 14*).

48. Therefore , it is the discretion of the Tribunal in determining the admittance of the evidence in pursuant to Article 22 of HKIAC rules 2018.

49. Article 22 of HKIAC Rules 2018 dealing with *Evidence and Hearings* reads as follows :

22.1 Each party shall have the burden of proving the facts relied on to support its claim or defence.

22.2 The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence.

[2.2] BREACH OF CONFIDENTIALITY :

50. Article 45 of the HKIAC Rules 2018 dealing with the Confidentiality proceedings reads as follows :

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

45.2 Article 45.1 also applies to the arbitral tribunal, any emergency arbitrator, expert, witness, tribunal secretary and HKIAC.

45.3 Article 45.1 does not prevent the publication, disclosure or communication of information referred to in Article 45.1 by a party or party representative:

(i) to protect or pursue a legal right or interest of the party; or
(ii) to enforce or challenge the award or Emergency Decision referred to in Article 45.1;
in legal proceedings before a court or other authority; or

(b) to any government body, regulatory body, court or tribunal where the party is obliged by law to make the publication, disclosure or communication; or

(c) to a professional or any other adviser of any of the parties, including any actual or potential witness or expert; or

(d) to any party or additional party and any confirmed or appointed arbitrator for the purposes of Articles 27, 28, 29 or 30; or

(e) to a person for the purposes of having, or seeking, third party funding of arbitration.

45.4 The deliberations of the arbitral tribunal are confidential.

45.5 HKIAC may publish any award, whether in its entirety or in the form of excerpts or a summary, only under the following conditions:

(a) all references to the parties' names and other identifying information are deleted; and

(b) no party objects to such publication within the time limit fixed for that purpose by HKIAC. In the case of an objection, the award shall not be published.

51. It is contended that , the CLAIMANT had learnt about the other arbitral proceedings at the annual breeder conference through Mr. Kieron Velazquez , who is the new CEO of one of the CLAIMANT's regular customers . Thereby the main issues in dispute of other arbitration proceedings is known to the CLAIMANT, i.e. due to the tariffs imposed, RESPONDENT was willing to deliver the mare only if the price gets increased to reflect the raised tariff *(Q.40, PO No.2, pg. 60).* Therefore it is very clear that, there is no breach of confidentiality in the obtainment of the information by the CLAIMANT .

[2.2.1]DISCRETION OF THE ARBITRATION TRIBUNAL :

52. It is to be noted , however , that even where the parties have spoken to the issue, in practice the arbitral tribunal will have substantial discretion to control the process of evidence taking. *[Gary Born , pg. 768].*

53. In *[Conoco Philips Case]* , it is held that , for clear and necessary reasons, no ground for disqualification can be derived from the fact that , a ruling is adverse to the challenging party. As the Chairman of the proceedings has observed , the mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality or independence, as required . If it were otherwise, proceedings could continuously be interrupted by the unsuccessful party, prolonging the arbitral process.

54. It is submitted that , On the Question of Evidentary dilemma in the admissibility of the information obtained through illegal private or privileged means , the traditional approach under most countries' domestic rules would hold such communications inadmissible. However, the question is clear in international arbitration, where the tribunal is not bound by the national law, but has the final authority over admitting evidence *[Jessica 2015 , pg. 1].*

55. Further , the arbitral tribunal basically stated that documents protected by legal professional privilege cannot be admitted as evidence, but others could be.

56. To substantiate , Caratube International Oil Company and American-national Devincci Salah Hourani, who were suing Kazakhstan over the alleged seizure of their oil exploration and production rights, wanted leaked documents that were now publicly available due to the WikiLeaks page to be considered by the tribunal as evidence. . The ICSID tribunal is 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 *[Caratube International v. Kazakhstan]* .

57. Therefore it is clear from the verdict that , even if the information is obtained through illegal means , provided it is not a document of legal professional privilege , the arbitration tribunal could very well admit the evidence on such other factors as it deems appropriate.

58. It was held that , a witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that , they are based on evidence obtained from unlawful search and seizure *[US v. Calandra]*.

[2.2.2] RELEVANCY OF THE EVIDENCE :

59. The English Law summarizes that , " provided the evidence is relevant, it will be admitted, though this is subject to a discretion of the judge to exclude evidence obtained unlawfully of its admission would operate unfairly against the accused. Relevant factors in this regard will include the position of the accused, the nature of the investigation, and the seriousness of the charge. In almost all cases where evidence is obtained unlawfully, it appears that this discretion will not be exercised, and it is submitted that the evidence will not be excluded for possible unlawfulness" *[C.P.Walker , Pg. 190,191]*.

60. The weight of the evidence depends on its credibility (i.e., its reliability and authenticity to show what it is offered to prove *[Konstantin 2014]*. In the case at hand, the evidence could very well be inferred from the Partial Interim Award of the other arbitration proceedings which in itself gives credibility to the evidence .

61. The common law position is that , all evidence which is relevant to the fact in issue is admissible, and it does not matter how the same was procured. It is quoted that , "*It matters not how you get it, if you steal it even, it would be admissible in evidence" [R v. Leatham]*.

62. The *locus classicus* on this point , *when it is a question of the admissibility of evidence, strictly it is not whether the method by which it was obtained is tortuous but*

excusable, but whether what has been obtained is relevant to the issue being tried. [Karuma v. R]

63. It is further held that *," the test to be applied in considering whether the evidence is admissible is, whether it is relevant to the matters in issue. If it is, then it is admissible and the court is not concerned with how the evidence was obtained." [Lloyd v. Mostyn ; Kuruma v. The Queen].*

64. Therefore , The mere fact that evidence is obtained in an irregular fashion does not of itself prevent that evidence from being relevant and acceptable to the Court. *[Jeffrey v. Black]* .

65. In re with the above judgements , it could be inferred that the evidence obtained from other arbitration proceedings which is governed by the same rules , dealing with the similar dispute , arising out of similar circumstances , during the same period , with the same law governing the law of arbitration agreement , as in the case at hand , is beyond reasonable doubt that such evidence is relavant , credible and acceptable.

[2.3] HACK OF COMPUTER SYSTEM

[2.3.1] NEGLIGENCE ON THE PART OF THE RESPONDENT

66. Further , the contention of the RESPONDENT that the computer system is hacked and the hackers managed to retrieve a considerable amount of data (Para 3 , Pg. 50) is a mere negligence on the part of the RESPONDENT , as it used an outdated firewall to protect its computer system , thereby leaving the security gap paving the way for the hackers to exploit the computer system (*Q.42, PO No.2, pg. 61).*

Conclusion : *In light of the above submissions , the CLAIMANT therefore submits that , the Arbitration Tribunal may consider the relevancy of the evidence obtained by the CLAIMANT , thereby admitting the same to serve the ends of justice.*

ARGUMENTS ON MERITS:

ISSUE 3

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

I. UNDER CLAUSE 12 OF THE CONTRACT

II. OR UNDER THE CISG COVERING BOTH ALTERNATIVES OF ART. 7(2)

3.1 ADAPTATION PURSUANT TO CLAUSE 12 OF THE CONTRACT

[3.1.1] GENERAL AGREEMENT BETWEEN THE PARTIES

[3.1.2] PRINCIPLES OF GOOD FAITH

[3.1.3] INCONSISTENT BEHAVIOUR

3.2 ADAPTATION PURSUANT TO CISG

[3.2.1] ALTERNATIVES IN ARTICLE 7(2)

[3.2.2] SUPPLEMENTING PRINCIPLES OF HARDSHIP

[3.2.3] IMPEDIMENT IN ARTICLE 79

[3.1] ADAPTATION PURSUANT TO CLAUSE 12 OF THE CONTRACT

67. As per Clause 12 of the Frozen semen sales agreement , It is agreed between the parties 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" (CLAIMANT Exhibit C 5, pg. 14).*

[3.1.1] GENERAL AGREEMENT BETWEEN THE PARTIES

68. The agreement on DDP delivery was primarily to ensure better transportation terms and swifter delivery due to CLAIMANT's experience in the shipment of frozen semen (CLAIMANT Exhibit C 3, pg. 11) and it had been clearly agreed that all the risks associated with such a delivery cannot be borne by the CLAIMANT *(CLAIMANT Exhibit C 5, pg. 13).*

69. Further , the express intent of the CLAIMANT not willing to take over any further risks associated with change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions is clearly mentioned. Further , it is reinstated by the CLAIMANT from the past experiences that , any unforeseeable additional health and safety requirements may make highly expensive tests necessary which can increase the cost by up to 40% and thereby destroy the commercial basis of the deal which is considered the very foundation by both the parties of the commercial contract. *(CLAIMANT Exhibit C 4, pg. 12).*

70. In the light of the above submission , both the parties concentrated on the inclusion of hardship clause *(RNoA ,Para 4 , pg. 30)* and had agreed to make such inclusion into the contract to address such unforeseeable and subsequent changes. *(CLAIMANT Exhibit C 5, pg. 12)*

71. As the ICC – Hardship Clause is considered too broad , it is agreed by the RESPONDENT to include the risks mentioned by the Ms.Napravink *(CLAIMANT Exhibit C 4, pg. 12)*, to be added to the force majeure clause in clause 12 of the Frozen Semen Sales Agreement (*Q.12, PO No.2, pg. 56).*

[3.1.2] PRINCIPLES OF GOOD FAITH :

72. It is very evident by the express mention of the RESPONDENT that , the negotiator had not been fully involved in the negotiations or the sales agreement and hence could not directly authorize any additional payment , but could understand the problems involved. Therefore , clearly stated that , *if the contract provides for an increased price in the case of such a high additional tariff , then they will certainly find an agreement on the price (RESPONDENT Exhibit R 4, pg. 36).*

73. The CLAIMANT relying on the RESPONDENT's promise that , a solution would be found and emphasizing on the long term relationship , paid 30% tariff and authorized delivery even before an agreement on the details had been reached. *(CLAIMANT Exhibit C 8, pg. 18).*

74. It is to be noted that , the CLAIMANT had never sold more than 10 doses at a time to one breeder. *(Q.15, PO No.2, pg.57).* The request of the RESPONDENT for the size the 100 doses and the practice of not selling such a huge amount of frozen semen of racehorse stallions to a single breedor though clearly expressed by the CLAIMANT, an exception from the general approach is made considering the the express intention of the RESPONDENT to enter in to a long-term mutually beneficial relationship. *(CLAIMANT Exhibit C 2, pg. 10).*

75. The interest of the investors to become leading breeders for racehorses within very short time and the intention of the RESPONDENT's interest in a long term cooperation going beyond this single purchase is clearly expressed *(CLAIMANT Exhibit C 3, pg. 11)* relying upon which the CLAIMANT acted on the principles of good faith as emphasized in Art.1.7 of the UNIDROIT Principles .

76. It is to be considered that , the CLAIMANT company is in a stressed financial state since 2014, though it could reap profits out of the sale to RESPONDENT as the deal clearly gave security to the CLAIMANT involving only limited risks as the RESPONDENT bore the risks of the use of the semen. *(Q.15, PO No.2, pg. 57).*

77. It is to be noted that , by fixing the place of delivery as EXW Capital City and not the Phar Lap Transportation LLP which was sold to an outside investor in the course of the restructuring in 2016 .*(Q.9, PO No.2, pg. 56)* , It is clearly evident that the company had been going through the restructuring process and further put to severe hardship due to the tariffs imposition.

78. It is submitted that , the CLAIMANT's restructuring plan is made based on the profitability in 2017 and 2018 , which would be seriously endangered due to the loss that it had to bear on the unforseen additional tariffs imposed by the government of equatoriana *(Q.29, PO No.2, pg. 59)* and with no doubt it financially endangers the CLAIMANT to a much greater extent than the reasonable anticipation.

79. It is further reiterated that the negotiations of any new credit lines owing to the financial distress, would even lead to the sale of the particular business operations of

the CLAIMANT thus causing serious impediment in its commercial aspects*(Q.29, PO No.2, pg. 59)*

80. It had been very clearly expressed that , the CLAIMANT could not have been exempted from or obtained a reduction in the additional tariffs charged in the last shipping *(Q.27, PO No.2, pg. 58)* thus leaving no other possible options to be worked upon.

81. It is very well evident that , the RESPONDENT though after knowing the CLAIMANT's financial difficulties *(Q.22, PO No.2, pg. 58)* , and the impact of 30% tariff on CLAIMANT's financial situation (*Q.28, PO No.2, pg. 59)* , the RESPONDENT was not willing to share the burden in accordance to the principles of good faith and fair dealing.

82. It is to be noted that , in every way , considering the intention and behaviour previously expressed emphasizing on mutual beneficial interest, it is dutiful for the RESPONDENT to share the risk and burden caused by the imposition of 30 % tariffs by the government of equitoriana , as in no way , it is going to financially endanger the RESPONDENT as in the case of the CLAIMANT who is undergoing restructuring process *(Q.30, PO No.2, pg. 59)* .

[3.1.3] INCONSISTENT BEHAVIOUR :

83. It is to be understood that , The "operational" breeding season for racehorses is from 15 February until 1 July to ensure that , the foals are borne early in the year . *(Q.11, PO No.2, pg. 56)* Thereby , it can be inferred from the terms of the contract that CLAIMANT could only deliver 25 doses to be used within the breeding season 2017 *(CLAIMANT Exhibit C 5, pg. 14).*

84. It is asserted that , the RESPONDENT had planned to re-sell a considerable amount of doses *(CLAIMANT Exhibit C 8, pg. 17)* seems to be true from the willingness of the RESPONDENT to accommodate CLAIMANT's wish to deliver the second installment in 2017 *(Q.11, PO No.2, pg. 56)* , 3 months after the operational breeding season got over *(CLAIMANT Exhibit C 5, pg. 14*) only with the plan to sell at least 25 doses per year to other breeders (*Q.11, PO No.2, pg. 56)*

85. The RESPONDENT urged the January stock only because of the reason that it needs 6 doses for other customers each with deliver dates prior to 2nd February due to the start of the breeding season. *(Q.33, PO No.2, pg. 59).*

86. Further , it had come to the knowledge of the CLAIMANT , when approached for enquiring prices of frozen semen , by another breeder from Equatoriana , that 15 doses of frozen semen had been sold by the RESPONDENT to 10 different breeders. (*Q.20, PO No.2, pg. 57)*

87. Therefore , the intention of the RESPONDENT is very clear that , they need the frozen semen only to comply with the RESPONDENT's contractual delivery obligations towards its customers *(Q.34, PO No.2, pg. 59)*. which they have totally ignored to mention during the negotiation.

88. In the light of the above mentioned facts , the contention of the CLAIMANT that from the beginning , the RESPONDENT had planned to re-sell a considerable amount of 100 doses at an increased price to other breeders to whom the CLAIMANT might not have sold directly seems to be true *(CLAIMANT Exhibit C 8, pg. 18).*

89. It is to be noted that , the RESPONDENT had accepted the general applicability of the general terms and conditions of the offer and does not object *(CLAIMANT Exhibit C3, pg. 11)* to the condition that, he frozen semen may not be sold to third parties without the written consent and the use of every dose be informed *(CLAIMANT Exhibit C 2, pg. 10),* the terms which RESPONDENT did not comply upon .

90. Further, it is to be noted that , at the time of contracting , not all doses could be matched to named mares as CLAIMANT added an express information requirement to the section defining the mares in the template of the Frozen Semen Sales Agreement *(CLAIMANT Exhibit C 5, pg. 13)*. As per the Frozen Semen Sales agreement , the Semen is to be used to the specific mares and others only after the information of the seller. It clearly shows that , the RESPONDENT having agreed to all the 'usage of semen' terms during the contract , finally did not comply with it acting detrimentally to the interest of the CLAIMANT.

91. Further , the primary concern of the RESPONDENT is for the speedy delivery of frozen semen irrespective of the high price that it incurs owing to the DDP delivery . Despite the consent given by the RESPONDENT for such a high price considering the expertise of the CLAIMANT , the contention of the RESPONDENT that it would have never entered in to such a contract where the financial dimension would be dependent on the discretion of the arbitrators *(Para 19 , pg. 32)* is contradictory to its previous intention , communication and the behaviour expressed.

92. It is expressly stated by the RESPONDENT that , the primary concern was to ensure that , the remaining 50 doses were actually shipped, some of which were urgently needed given the start of the "breeding season" and therefore giving a reasonable impression of the price remuneration , with the view that , if the request of the CLAIMANT for the adaptation of price is rejected outrightly , then CLAIMANT would not deliver the remaining doses *(RESPONDENT Exhibit R 4, pg. 36).* This shows the ill intention and the Inconsistent behaviour of the RESPONDENT to defraud the CLAIMANT.

93. Among the parties , it is the CLAIMANT who is affected due to the changes in the delivery terms owing to the tariffs imposed by the RESPONDENT's home country and therefore the claim is for an increase of the purchase price of at least 25 percent , deducting the profit margin of 5 percent from the overall 30% tariff imposed on the product , thereby the remuneration sought by the CLAIMANT is just to mitigate the loss of 25 percent *(NoA , Para 18 , pg . 7).*

94. It is to be noted that , though the CLAIMANT acted in principles of good faith and fair dealing , it is evident from the actions that the RESPONDENT from the beginning had the ill intention and exhibited Incosistent behaviour deviating from the terms and conditions agreed upon.

95. Thereby , the adaptation clause agreed upon by the parties in the mutual beneficial interest and the long term cooperation , was supposed to cover not only the most prevalent risk of changes in the health and safety requirements but also other risks including additional tariffs, like the present.

[3.2] ADAPTATION PURSUANT TO CISG :

[3.2.1] ALTERNATIVES IN ARTICLE 7(2) :

96. Article 7 of CISG reads as follows ,

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

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

97. On bare perusal of the afore mentioned provision, it is worth considering the *[Scaform case]* , the Belgian Supreme Court overturned the earlier decision of the Commercial Court Tongeren in dealing with economic hardship. In this case, the parties had concluded an agreement for the sale of steel tubes. After the conclusion of the contract and before delivery, the price of steel unexpectedly rose by about 70%. The seller tried to renegotiate a higher contract price, but the buyer refused flat-out and insisted on delivery of the goods at the price agreed upon. The decision of the Court of First Instance was overturned by the Court of Appeal in Antwerpen. That court decided that the issue regarding economic hardship was not dealt with by the CISG and applied French domestic law in allowing the seller's counterclaim for an amount based on a higher price. The Supreme Court rejected the application of the French domestic law, holding that there was a gap in the CISG to be filled by general principles of international trade. In a tersely reasoned decision the court came to the following conclusions:

a) Thus, to fill the gaps in a uniform manner adhesion should be sought with the general principles which govern the law of international trade.

b) Under these principles, as incorporated inter alia in the UNIDROIT Principles of International Commercial Contracts, the party who invokes changed circumstances that fundamentally disturb the contractual balance, is also entitled to claim the renegotiation of the contract.

c) The judgement finds that:

a) Buyer concluded with SA Exma, the predecessor of Seller, a number of contracts of sale for the delivery of steel tubes.

b) After the contracts had been concluded, the price of steel unforeseeably increased with 70%.

c) There was no clause in the contracts for price adaptation.

d) The judges on appeal found that these unforeseen increases in the price gave rise to a serious imbalance which rendered the further performance of the contracts under changed conditions exceptionally detrimental for Seller.

e) The judgment could on the basis of these findings, without violation of the statutory provisions indicated in the plea, decide that Buyer must renegotiate the contractual conditions."

98. *In re* with the *[Scaform Case]* , it is expressed that UNIDROIT Principles to be used to fill the gaps in the CISG to ensure the contractual balance in view of the changed circumstances.

99. Throwing light in the preamble of UNIDROIT Principles , it reads as follows ,*These Principles set forth general rules for international commercial contracts….They shall be applied when the parties have agreed that their contract be governed by them.(*)…**They may be used to interpret or supplement international uniform law instruments.***

[3.2.2] SUPPLEMENTING PRINCIPLES OF HARDSHIP

100. Article 6.2.2 of the UNIDROIT Principles dealing with the Hardship reads 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.

101. It had been very clearly expressed that , the imposition of tariff of 30 percent upon all agricultural goods from Mediterraneo by the Government of Equatoriana is a big surprise even to the informed circles owing to the fact that Equatoriana had always been a biggest supporters of the existing system of free trade. *(CLAIMANT Exhibit C6, pg. 15).*

102. It is stated that , there have been few countries in the past which had tried to protect their farmers by tariffs on foreign agricultural products of a comparable size, but Mediterraneo was not one among them*(Q.23, PO No.2, pg. 58).* The point to be noted here is that , until 2018 there had been no tariffs imposed on agricultural goods(or horse semen) in either Equatoriana or Mediterraneo. *(Q.25, PO No.2, pg. 58)* which makes the circumstances unforeseen and unpredictable thereby causing hardship to CLAIMANT.

103. It is to be stated that , the tariffs imposed by the government of Equatoriana were imposed on 19th of December 2017 and it came in to effect on 15th of January 2018 (*Q.25, PO No.2, pg. 58).* Though it had been published in the peak business news regarding the retaliatory measures on 20th of December 2017 *(CLAIMANTT Exhibit C6, pg. 15),* it is to be noted that , the CLAIMANT is not aware of the fact that frozen semen also comes under the realm of agricultural goods for which the retaliatory tariffs imposed by government of equatoriana would apply *(Q.26, PO No.2, pg. 58).*

104. It is only after the enquiry with the custom clearance on 19th of January 2018 ,it is communicated through email which was read by the CLAIMANT in the morning of 20th January 2018 , it had come to the knowledge of the CLAIMANT that tariff applies to semen as well *(Q.25, PO No.2, pg. 58).*

105. Thereby , 30 % imposition of tariff covering all animal products including the semen used for artificial insemination in racehorse breeding made the shipment 30% more expensive thereby not only destroying the profit margin of 5% but also resulting in considerable hardship *(CLAIMANT Exhibit C 8, pg. 17).*

106. The fact that such tariffs were not explicitly included had to do with the fact that at the time of contracting no one expected such measures. The Government of Equatoriana had always been an ardent supporter of free trade, in particular in times like the present ,when the Prime Minister came from the Progressive Liberals *(NoA, Para 19, pg. 7).*

107. It is to be noted that , the other arbitration proceedings mentioned by the CLAIMANT is resulted out of the 25% tariff imposed by the Mediterraneo where it clearly mentioned "living animals" as one of the goods covered.*(Q.24, PO No.2, pg. 58).* Further, the RESPONDENT being negatively affected by the tariffs had itself claimed for an adaption of the price in the arbitration proceedings invoking an unforeseeable change of circumstances. *(Para 2 ,pg. 49).*

108. The contention of the RESPONDENT in other proceedings is highly contradictory that in such case an additional tariff of 25% is sufficient to justify a request for adaptation while an even less predictable retaliatory tariff of 30% allegedly does not justify an adaptation when it is to RESPONDENT's detriment. *(Para 2 ,pg. 49).*

109. Further , considering the Effects of Hardship reads as per *Article 6.2.3 of UNIDROIT* Principles which reads as follows :

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

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

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

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

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

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

110. It is to be noted that , after it had come to the knowledge that , the imposition of tariff applies to animal products including the breeding of horses which indeed makes the

shipment 30% expensive , the CLAIMANT had taken reasonable efforts for fair re-negotiation of the price *(CLAIMANT Exhibit C 7, pg. 16)* and the meeting to solve the issue of adaptation at the senior management level is initiated by the CLAIMANT and it took place in a hotel in Equatoriana involving the CEO's of both parties and Ms. Napravnik and Mr. Shoemaker (*Q.35, PO No.2, pg.60).*

111. Professor Eisenberg has advanced a test called the "bounded-risk test," under which "a promisor should be entitled to judicial relief if as a result of a dramatic and unexpected rise in costs, performance would result in a financial loss significantly greater than the risk of loss that the parties would reasonably have expected the promisor to have undertaken."*[Eisenberg, pg. 234]*

112. The sixth chapter, which deals with the *performance* of the contract, starts the section on hardship by stressing the principle whereby each party is bound to perform its obligations even if these have become excessively onerous. However, although sacrosanct, this obligation is not absolute. The principle cannot be applied in situations where circumstances have substantially altered the balance of the contractual agreement. This emphasizes the exceptional nature of hardship, defined as a provision 'to correct' the *pacta sunt servanda* principle. *[G Alpa , 2996]*

113. If the parties are unable to reach an agreement within a reasonable time, the third sub-paragraph of Article 6.2.3 of the UNIDROIT Principles rules that either party may resort to the court or to an arbitrator who, after verifying the existence of a hardship situation, will decide whether it is *reasonable* to terminate the contract or to adapt it in order to restore the original balance

114. This purpose is also reinforced by Article 6.3 of the Principles of European Contract Law that has marked affinities with Articles 6.2.2 and 6.2.3 of the UNIDROIT Principles.

115. As in the UNIDROIT Principles, under Article 6.3, failure to reach an agreement results, *extrema ratio*, in the intervention by a judge who must decide whether to terminate the contract or modify it. In the latter case, the comment to these Principles argues that there is a limit to the judge's power of adaptation, whereby some clauses can be modified but not to the extent of rewriting the whole contract..This means that

the adaptation must not consist of the imposition of a new contract but merely of some form of restoration of the original balance. If this is not possible, the only solution is for the judge to terminate the contract. *[European Contract Law]*

116. This was a case decided by the arbitral court of Berlin in 1992 and it concerned a contract for the supply of machinery to a financial company based in the German Democratic Republic from a company based in Eastern Europe.With the unification of Germany and the consequent opening of markets to the West, the machinery lost its value for the German importer, who invoked *hardship* for a substantial change in circumstances in comparison with the original contractual conditions. The arbitral court of Berlin decided in favour of the German importer and, to support its decision, expressly referred to Articles 6.2.2 and 6.2.3 of the UNIDROIT Principles. According to the arbitral court , the principle whereby a substantial alteration in the contractual balance can lead to termination or adaptation of the contract is gaining progressively greater acceptance in international commercial trade

[3.2.3] IMPEDIMENT IN ARTICLE 79 :

117. Article 79 (1) CISG reads as , *" 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".*

118. In light of the change of circumstances , *[CISG Advisory Council Opinion No.7]*
Art. 3.1 and 3.2 reads as follows :

> *3.1 A change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("hardship"), may qualify as an "impediment" under Article 79(1). The language of Article 79 does not expressly equate the term "impediment" with an event that makes performance absolutely impossible. Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79.*

3.2 In a situation of hardship under Article 79, the court or arbitral tribunal may provide further relief consistent with the CISG and the general principles on which it is based.

119. Under a variety of legal doctrines, most of which can be traced back to the doctrine of *rebus sic stantibus* developed by the Roman *preaetor*, unforeseeable and extraordinary change of circumstances rendering a contractual obligation extremely burdensome though not absolutely impossible, may entail the avoidance or even the revision or "adaptation" of the contract or one of its clauses. *[Ibid].*

120. Professor Atamer is also standing on the premise that , Article 79 admits a specific performance claim but considers a claim for an "economically irrational behavior" as an exception, insisting that " Whenever there is a blatant disproportion between the changed costs of performance and the interest of the buyer in receiving performance in kind , the seller ought to have the right to refuse a performance claim. What has to be done is a cost-benefit analysis. Each time one comes to the result that a claim for specific performancewould be vexatious, the seller should have a defense." *[ATAMER, 1068].*

121. The American *doctrine of commercial impracticability* was first proposed in the case of [*Mineral Park]* , the defendant had reached an agreement to haul gravel and earth from the CLAIMANT's land to the site of construction of a bridge. However, at a certain stage, work had to be stopped because the rest of the earth and gravel was underwater and could only be removed at a far greater cost (10 times) than the sum agreed upon in the contract. The judges ruled in favour of the defendant, judging that ***'a thing is impossible in legal contemplation when it is not practicable, and a thing is impracticable when it can only be done at an excessive and unreasonable cost'***.

122. Indeed, Professor Schlechtriem considers that , there must be a limit to the sacrifice required, beyond which, performance of the contract by the disadvantaged party could not be expected to be carried out, in view of the substantial economic imbalance that has developed. In extreme cases, in which an *unreasonable* increase in costs of performance has occurred, the disadvantaged party should be entitled to ask to be

released from the obligations incurred by the contract or to ask for its renegotiation to adapt to the changed circumstances. This conclusion is based on the principle of good faith, whose observance in international trade is stressed as being important in Art.7(1) of the Convention. *[P Schlechtriem]*.

123. In *[ICC Award No 2291]*, it was held on the basis of the *lex mercatoria* that t,he reciprocal performances are founded on a profit balance and that any subversion of this balance should lead to revision of the contract. Thus, 'in most international contracts, the price is established on the basis of the circumstances existing when the agreement was reached and it will be revised according to the different events that occurred during the performance of the contract'. *[ICC 2291 of 1975]*.

124. Similarly, in *[ICC Award No 4761]*, it was decided that insistence on performance of the contractual obligations regardless of changed circumstances is contrary to the principle of good faith, if the economic basis has substantially altered. In this case , the arbitrators referred to Article 657, comma 4 of the Libyan Civil Code (the law applicable to the case in question) and ruled that the refusal by one of the parties to undertake negotiations to revise the contract, despite having admitted that the price needed to be changed, was contrary to the principle of good faith

125. This is clearly confirmed in the *[ICC Award No 1512]*, in which it was stated that international practitioners would apply the *concept of changed circumstances* as an excuse for non-performance 'where compelling reasons justify it, having regard not only to the fundamental character of the changes, but also to the particular type of the contract involved, to the requirements of fairness and equity and to all circumstances of the case'

Conclusion : *In the light of the above submissions , the CLAIMANT therefore submits that , the CLAIMANT is entitled to the payment of US $ 1,250,000/- or any other amount from the adaptation of the price under clause 12 of the contract or under CISG along the lines of Hardship as per Art. 6.2.3 of the UNIDROIT principles with respect to the changed circumstances .*

REQUEST FOR RELIEF

In light of the reasons stated above , CLAIMANT respectfully requests the Arbitral Tribunal for the following orders:

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

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

On behalf of CLAIMANT , Phar Lap Allevamento LTD.