

**Twenty Sixth Annual Willem C. Vis  
International Commercial Arbitration Moot**

**MEMORANDUM FOR RESPONDENT**

**ON BEHALF OF**

Black Beauty Equestrian  
2 Seabiscuit Drive  
Oceanside  
Equatoriana

**RESPONDENT**

**AGAINST**

Phar Lap Allevamento  
Rue Frankel 1  
Capital City  
Mediterraneo

**CLAIMANT**



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## INDEX OF ABBREVIATIONS

<b>Art/s</b>	Article/ Articles
<b>CLAIMANT</b>	Phar Lap Allevamento
<b>ExhC</b>	CLAIMANT's Exhibit
<b>ExhR</b>	RESPONDENT's Exhibit
<b>StCl</b>	Statement of Claim
<b>Mr.</b>	Mister
<b>Ms.</b>	Miss
<b>No.</b>	Number
<b>NoA.</b>	Notice of Arbitration
<b>P./PP.</b>	Page/Pages
<b>Para/s</b>	Paragraph/Paragraphs
<b>Parties</b>	CLAIMANT and RESPONDENT
<b>PO 1/2</b>	Procedural Order 1/2
<b>Resp.NoA.</b>	Response to Notice of Arbitration
<b>RESPONDENT</b>	Black Beauty Equestrian
<b>USD</b>	United States Dollars
<b>V.</b>	Versus



## INDEX OF LEGAL SOURCES

<b>CISG</b>	The United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980
<b>CLOUT</b>	Case Law on UNCITRAL texts
<b>UNCITRAL Digest</b>	UNCITRAL Digest of Case law on The United Nations Convention on Contracts for the International Sale of Goods.
<b>IBA Rules</b>	International Bar Association's rules on Taking Evidence in International
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>INCOTERMS</b>	International Commercial Terms, 2010, <a href="https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/">https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/</a>
<b>ICC</b>	International Chamber of Commerce
<b>HKIAC Rules</b>	Hong Kong International Arbitration Center Administered Rules, 2018
<b>UNCITRAL rules</b>	United Nations Commission on International Trade Law
<b>UNIDROIT</b>	The UNIDROIT Principles of International Commercial Law



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## **STATEMENT OF FACTS**

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

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

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

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

With email of 24 March 2017, CLAIMANT offered RESPONDENT 100 doses of Nijinsky III’s frozen semen. RESPONDENT had no problems with most of the terms of the offer, but objected to the choice of law and the forum selection clause and insisted on a delivery DDP. CLAIMANT accepted a delivery DDP against a moderate price increase, the transfer of certain risks to RESPONDENT and the inclusion of a hardship clause to temper some of the additional risks taken.

With email of 28 March 2017, RESPONDENT objected to the forum selection clause and asked for delivery DDP. CLAIMANT in its email of 31 March 2017 accepted DDP delivery in principle but asked to be relieved from all risks associated with such a delivery or at least to be protected against the risk of changing health and security requirements by a hardship clause.

The first option was not acceptable for RESPONDENT who was not willing to pay a much higher price for receiving nothing.

Thus, the Parties concentrated in their following discussions on the inclusion of a hardship clause. However, RESPONDENT refused the suggested ICC-hardship clause and considered it to be too broad. Consequently, an approach was taken to regulate a number of possible risks directly and then merely add a hardship wording to the existing force majeure clause.

The negotiations finally resulted in a very narrowly worded clause, which was then included into the existing force majeure clause and did not provide for any adaptation by the arbitral tribunal.

On 10 April 2017, RESPONDENT sent a draft of the contract, and regarding the arbitration clause, RESPONDENT’s proposal had made clear its sincere wish for an arbitration agreement which was



governed by the law of the place of arbitration and not by the law of the contract; A proposal on which CLAIMANT did not object.

On 12 April 2017, the two main negotiators were severely injured in an accident so the finalization of the agreement took longer than planned.

On 6 May 2017, the Sales Agreement was signed. The parties agreed on three shipments. The fact that the choice of law clause was not included into the Sales Agreement as finally agreed was merely due to an oversight resulting from the negotiators' dreadful car accident.

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

On 25 April 2017, President Bouckaert had appointed Ms. Cecil Frankel, one of the most ardent critics of free trade, as his "superminister" for agriculture, trade and economics on 5 May 2017. She had been an outspoken protectionist for years, lamenting that the farmers of Mediterraneo were badly treated in other markets and limiting the access of foreign agricultural products to the Mediterranean market.

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

On 21 January 2018, CLAIMANT called RESPONDENT's responsible for the development of the racehorse breeding program on the telephone. The later made clear in his telephone conversation that his understanding of the contract was that CLAIMANT had to bear the costs. He also pointed out that he had no authority to agree on an adaptation of the price.

On 23 January 2018, CLAIMANT delivered the third shipment (50 doses).

On 31 July 2018, CLAIMANT commenced arbitration.

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



## ARGUMENTS

### **ISSUE 1: The Arbitral Tribunal has neither jurisdiction nor the power, under the Arbitration Agreement, to adapt the contract**

1. In order to adapt any contract, the Arbitral Tribunal needs to have the power and the jurisdiction to do so. However, since the Danubian law governs the Arbitration Agreement in the case in hand (I), the Arbitral Tribunal does not have the power nor the competence to adapt the contract (II).

#### **I) The Danubian law shall govern the Arbitration Agreement and its interpretation**

2. Contrary to CLAIMANT's allegations, Mediterranean law does not govern the Arbitration Agreement nor does it govern its interpretation **(A)**, however, the Danubian law shall directly govern the Arbitration Clause in the absence of an expressed choice of law in accordance with the "Seat theory" **(B)**.

#### **A. The Mediterranean law does not govern the Arbitration Agreement nor its interpretation**

3. The Mediterranean law does not govern the Arbitration Agreement nor its interpretation as there is no express nor implied choice made by the Parties to apply the Mediterranean law **(i)** Furthermore, the doctrine of Separability precludes the application of the Mediterranean law **(ii)**.

#### **i) There is no express nor implied choice of the Mediterranean law unlike CLAIMANT's allegations**

4. According to CLAIMANT's statement of claim [P4, i] "Mediterranean law shall directly govern the Arbitration Clause as derived from the implied choice contained in Clause 14 of the Contract". However, this allegation is false and misleading since the Arbitration Clause implicitly provides for the Danubian Law :
5. This is clearly showed throughout the drafting history of the Arbitration Clause: In the first draft of the Arbitration Clause, which was on the 10<sup>th</sup> of April 2017, there was an express choice of Law which was the Law of the place of arbitration i.e Equatoriana Law. The Arbitration Clause of this draft stated that: "*The law of this Arbitration Clause shall be the law of Equatoriana.*" [Exhibit R1].
6. However, due to the accident in which both parties' negotiators were included, this provision of the application of the law of Equatoriana was forgotten in the final version of the clause but was noted as a point to be discussed and finalized [Exhibit R3]



7. Comparing this to CLAIMANT's allegation that there is an implied choice of the Mediterranean law to govern the Arbitration Clause, there was not a single deliberation during the drafting of the clause that suggested or was in favor of the application of the Mediterranean law as the law governing the Arbitration Clause.
8. On the other hand, RESPONDENT from the very beginning, made it clear to CLAIMANT that the Arbitration Clause should not be governed by the law of the contract and suggested the law of the place of arbitration [*Exhibit R1*].
9. Hence, there is no implied choice of Mediterranean law. In fact, Respondent clearly objected to the application of said law to the Arbitration Agreement.
10. However, if the implied choice of law of the Parties is to be used to interpret the Arbitration Agreement, then their implied choice was to apply the law of Equatoriana, since this appeared numerously in their previous drafts. Claimant made no objections to this choice of law as proves his reply to the first draft. And the absence of such objection can be seen in CLAIMANT's reply to the first draft, on the 11<sup>th</sup> of April 2017 in which, CLAIMANT had only changed the suggested place of arbitration but had not objected to the proposal that the law of the place of arbitration should govern the Arbitration Agreement. [*Exhibit R2*]
11. That said, Claimant's allegation that the Mediterranean law is the implicit choice of the parties is baseless and misleading and shall fall.
12. In addition, RESPONDENT did not accept the application of Mediterranean law: Contrary to CLAIMANT's allegations, RESPONDENT never agreed to have the arbitration agreement governed by the law of the contract. As previously explained, RESPONDENT made it clear from the beginning of the negotiations that it wanted the arbitration clause to be governed by the law of the seat of arbitration since it wished for a neutral law.
13. Furthermore, CLAIMANT alleges that the signing of the contract by RESPONDENT translates a consent to the Law governing the arbitration clause, this allegation is misleading. In fact, the contract did not mention the application of the Mediterranean Law on the arbitration clause as it clearly stated that "*The seat of arbitration shall be Vindobona, Danubia.*" [*Exhibit C5*] And so RESPONDENT after already making it clear to CLAIMANT that it wanted to apply the Law of the seat, signed in good faith. Also, the doctrine of separability completely destroys CLAIMANT's argument that the Mediterranean Law governs the arbitration clause.

**ii) The Doctrine of Separability precludes the application of Mediterranean law**

14. Pursuant to **article 19** of the HKIAC rules "*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*".
15. Also, according to **article 16(1)** of the UNCITRAL Model Law : "*an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract*"



16. In addition, according to **article 16** of both the Danubian Arbitration law, and the Mediterranean arbitration law, the arbitration agreement is considered to be a legally independent and separate agreement from the contract in which it is included.
17. These articles set out the principle of Separability according to which the arbitration agreement should be considered as an independent agreement of the contract in which it is included. But also, it means that the law applicable to the Arbitration Agreement, should be determined separately and independently from the law governing the contract.
18. In fact, the ICC ruled that : “ *The **applicable law** to determine the scope and the effects of an arbitration clause providing for international arbitration, do not necessarily coincide with the law applicable to the merits of a dispute submitted to arbitration, Although, this law or these rules of law may in certain cases concern the merits of the dispute as well as the arbitration agreement, it is perfectly possible that in other cases, the latter, because of its autonomy is governed (...) by its own specific sources of Law distinct from those that govern the merits of the dispute*” [Dow chemical France et al. v. Isover Saint Goban, ICC award dated 23 September 1982].
19. This principle of separability proves that CLAIMANT’s argument that there is an implied choice of the Mediterranean law as it is the law of the contract, is baseless. In fact, it is clear that considering that the Mediterranean law is applicable on the Arbitration Agreement merely because it is the law of the contract, would be in violation of the principle of separability.
20. Consequently, the principle of separability utterly precludes that the law of the contract which is the Mediterranean law, be applicable to the Arbitration Agreement.
21. In addition, this principle proves that RESPONDENT’s acceptance of the contract cannot be construed as an acceptance of the law applicable on the Arbitration Agreement since they are two completely separate agreements.

**B. The “Seat theory” should be applied in the present proceeding:**

22. The Danubian law shall be applied to the arbitration agreement as it was the intention of the parties and in virtue of the seat theory **(i)**.

**i) The Danubian law should be applicable to the arbitration agreement as Danubia is the seat of the arbitration**

23. A single arbitration may give rise to a number of choice of law issues, therefore the potential complication arise out of the fact that not necessarily every aspect of the arbitration will be governed by the same law. In any arbitration there will be at least two categories of applicable law, the law governed the substance of the dispute and the procedural law governing the arbitration, the “lex arbitri.” Which means that it is not uncommon practice that the agreement in itself will be governed by one system of law and the arbitration agreement is governed by another system of law.



24. Jan Paulsson, distinguished the law applicable in arbitration, as the substantive law, and the law applicable to the arbitration, as the procedural law (*lex arbitri*). [*Henderson*]
25. It's commonly known that, in absence of such agreement between the parties on the applicable law on the arbitration agreement, the *lex arbitri*, will be the law of the seat of the arbitration, the place where the arbitration is conducted for legal purposes. [*Doug Jones*]
26. The Geneva protocol on arbitration clauses 1923 illustrated, in its article 2 that, the law of the law applicable to the arbitration agreement should be the law of the seat of the arbitration.
27. Moreover, courts in Singapore ruled that the law of the seat of arbitration is the appropriate one to govern the parties' arbitration agreement in the absence of an express provision. Per example if Singapore is selected the seat of arbitration it means that the Singapore Arbitration Act (AA) will apply to the arbitration.
28. Similarly, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention) specifies that, absent express agreement between the parties, the applicable law to the agreement should be the one where the award is made, i.e., the seat of the arbitration. [*Mark R. Cheskin and Hans H. Hertell, Miami*]. It's clear in its Article V: "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;" which means that if the parties did not agree on the law applicable to the arbitration agreement it has to be the law of the seat of arbitration.
29. Therefore, the seat of arbitration has essential practical importance in arbitration, and it directly determines a number of issues: arbitrability, determination of governing law, whether substantive, or (mainly) procedural, and annulment of the arbitral award or its recognition and enforcement etc. According to the doctrines, the seat of arbitration is the main factor determining arbitration, while denationalization of arbitration seems to be a myth widely remote from international reality. [*Seat of Arbitration and supporting and supervising function of courts*].
30. However, it happens frequently, that an agreement is sound but when parties reach the stage of selecting the applicable law they face a difficult situation. They come from different countries and therefore they are not acquainted with. As confirmed by the doctrine: "*the applicable law must be the law of the seat of the Arbitral Tribunal in accordance with the "seat theory", the will of parties is respected: they can freely choose the seat of arbitration and therefore indirectly select the applicable conflict of laws rule*". [*Singh & Associates*] which means that the parties do not make a direct choice to the applicable law to the agreement, however they are conscience of the seat of the arbitration, therefore the applicable *lex arbitri* flows from that.
31. In the present case, contrary to CLAIMANT's allegation, the applicable law to the arbitration agreement according to the seat theory is the Danubian law. RESPONDENT on the 10 April 2017, sent an email to CLAIMANT where it has prepared a first draft of the dispute resolution.



Furthermore, RESPONDENT makes it clear that the seat of arbitration has to be Equatoriana as well as the governing law of the arbitration agreement. [*Exhibit R1, P.33*].

**C.The theory of the “Closest connection” law does not preclude the application of Danubian law**

32. CLAIMANT alleged that the Mediterranean law has to be applicable in accordance of the “Closest connection” theory.
33. However, traditionally, the place of arbitration has been an important connecting factor to determine the law applicable to the arbitral procedure. [*Northwestern Journal of International Law & Business*;] which means that according to the theory of the closest connection, the law of the seat of the arbitration which is the Danubian law in the present case is the applicable law.
34. The seat of the arbitration denotes the legal identity of the arbitral proceedings. “The territoriality principle has been firmly placed into the UNCITRAL Model Law. Also known as the Jurisdiction theory, this principle has been used to explain the role of the courts at the seat of arbitration.” [*Sai Ramani Garimella*]
35. Based on the territoriality principle which leads to a close relationship between the place of arbitration and the procedural rules to be applied to international commercial arbitration, under the jurisdictional theory arbitrators are only allowed to choose the proper law of the contract in accordance with the procedural law chosen by the parties if there is any, and the *lex fori*.
36. As we stated before that the Arbitration can be governed by a law other than the substantive law, so the principle of territoriality means that the closest law applicable to the arbitration agreement must be the law of the seat of the arbitration which is Danubia in the present case.
37. As a scholar stated: “The effect of this theory is to allow arbitrators no greater freedom in the application of substantive law than judges have.” [*INTERNATIONAL ARBITRATION AGREEMENTS THEORIES.*]
38. Moreover, RESPONDENT’s proposal had made clear its sincere wish for an arbitration agreement which was governed by the law of the place of arbitration and not by the law of the contract, also CLAIMANT accepted this proposal in its reply on the 11 April 2017, the change was only in the place of arbitration but there was no objection on the applicable law on the arbitration agreement [Record, P.30, Para 5/6]

**II) The arbitral tribunal has no power to adapt the contract**

39. RESPONDENT submits that the arbitral tribunal has no jurisdiction to adapt the contract and order a payment as the applicable law to the arbitration agreement is the Danubian law, which does not empower, the arbitral tribunal to adapt the contract as there is no express empowerment also the interpretation of the contract must be in accordance with “the four corners rules”. (A).



**A. the Danubian law does not empower the arbitral tribunal to adapt the contract**

40. The Arbitral Tribunal does not have the power to adapt the contract as there is no express empowerment allowing it to do so (i). In addition, the parties did not authorize the arbitral tribunal to adapt the contract in their agreement(ii).

**i) The Arbitral Tribunal does not have an express empowerment allowing it to adapt the Contract**

41. As stated in the doctrines: “The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration. The parties have all the power to ask the arbitral tribunal to adapt or not the contract. A contract by default is subject to the will of the parties, in case of any issue the interpretation of the contract according to the parties will shall prevail.

Therefore, to adapt a contract there is a necessity of an express empowerment pursuant the uncitral rules (a), the Danubian law(b) and the unidroit principles(c).

**1. The necessity of an express empowerment to adapt the contract**

a) Under the Uncitral rules

42. Pursuant to Art. 28(3): “The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.”

This article contains a general standard to be applied to the conferral of exceptional powers to the arbitral tribunal. Thus, while parties may authorize arbitral tribunals to adapt contracts, an express conferral of powers is required, which is not the case. [P.O2, P.60, Para 36].

A doctrine states that, arbitrator’s powers are similar to judge’s powers, but it has been proposed that, under certain circumstances, arbitrators’ power can be wider than judges’ power. One of the clearest examples is that, if parties agree, arbitrators are generally allowed to decide cases ex aequo et bono—a power which is generally outside of the scope of the competence of State judges. [Kluwer arbitration blog;

b) Pursuant the Danubian law

43. As already demonstrated by RESPONDENT, the law of Danubia must govern the arbitration agreement, since CLAIMANT accepted Danubia to be the seat of arbitration and did not object on the governing law in its email of 11th of April.

In accordance with the Danubian law, the arbitrators may adapt contracts but requires an express empowerment for that. However in the present case, there is no reference to adaptation of the contract by the arbitral tribunal or modification of the contract or a hardship or a prohibition to



resell. [P.O2, P.55, Para 1].

Which shows that such empowerment is missing, therefore the arbitral tribunal has no power under the Danubian law to adapt the contract. [Record, P.31, Para 13]

c) In accordance with the Unidroit principles

44. Art. 6.2.3 (4) (b) of the Unidroit principles states that: “If the court finds hardship it may, if reasonable, (b) adapt the contract with a view to restoring its equilibrium.” The Danubian law is a verbatim adoption of the Unidroit principles on International commercial contracts with two relevant exceptions.

The most important exception is related to the above-mentioned article, where there is worded differently granting the power “to adapt the contract” only “if authorized” by the parties. Thus we return to the necessity of express empowerment or even a simple authorization by the parties to the arbitral tribunal to adapt the contract. [P.O. P.61, Para 45].

**ii) The Arbitral Tribunal was not authorized by the Parties to adapt to contract.**

45. The parties in their agreement did not once authorize the tribunal to adapt the contract: According to the Arbitration Clause agreed upon by both parties:

46. *“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”.*

47. In fact, the Danubian Law not only applies on the contract, but also on its interpretation. And regarding the interpretation of contracts, the Danubian law adheres to the “four corners rule”.

48. According to the four corners rule, the interpretation of the arbitration agreement is limited to its wording and no external evidence may be relied upon.

49. Applying this to the Arbitration Agreement, the parties did not once empower the Arbitral Tribunal to adapt the contract. The terms of the Arbitration Agreement are broad and do not give any jurisdiction to the Arbitral Tribunal as to **adapting** a contract.

50. Hence, since the Arbitration Agreement is interpreted narrowly and in a restrictive manner according to the four corners rule, this interpretation only leads to the non conferral of power to the Arbitral Tribunal to adapt the contract since the parties did not expressly provide for it in their agreement.

**ISSUE 2: CLAIMANT is not entitled to submit evidence from the other Arbitral Proceedings**



51. First of all, RESPONDENT would like to emphasize on CLAIMANT's conduct which is totally unacceptable and lacks good faith. CLAIMANT is trying to admit evidence that it is not yet in its possession to try to make its case. However, we must note that the procurement of this evidence and in the case of its admission would constitute a violation of RESPONDENT's confidentiality.
52. CLAIMANT, in the annual breeder conference, learned that RESPONDENT was involved in another arbitration under the HKIAC rules after there has been an increase in the prices with a 25% tariff [PO2, para. 40, p. 60].
53. CLAIMANT is requesting from the arbitral Tribunal to admit this partial interim award as evidence that can be relied on by the Tribunal. However, this evidence is totally irrelevant to the case in hand and should not be submitted. On the other hand, CLAIMANT is not yet in possession of the award as it is supposed to obtain it from a company which provides intelligence on the horse racing industry that is known to have a doubtful reputation as to where it gets its information from [PO2, para. 40 pp. 60-61].
54. Furthermore, the only possible way for this company to have obtained this evidence is by a breach of confidentiality of the arbitral proceedings from RESPONDENT's two former employees who have been witnesses [PO2, para. 40, p. 61], or through a hack of RESPONDENT's computer system where the hackers managed to retrieve a considerable amount of data [p. 51].
55. Therefore, RESPONDENT is asking the Arbitral Tribunal to refuse CLAIMANT's request as the Arbitral Tribunal does not have the power to admit the evidence **(I)**, and even if it had such power, this evidence should not be submitted as it is considered an illegal evidence because it was obtained whether through a breach of confidentiality **(II)** or a hack of RESPONDENT's computer system **(III)**.

### **I) The Tribunal does not have the power to admit the evidence**

56. The Arbitral Tribunal have in principle the discretionary powers to admit any evidence as well as its relevance and materiality according to the majority of rules and principles [*Art. 22.2 HKIAC Rules, Art. 19.2 UNCITRAL Rules*]. However, even with such discretionary power, Tribunals cannot admit evidence that is not relevant or material to the outcome of the case **(A)**. On the other hand, the Tribunal cannot grant CLAIMANT its request only on the basis that it would constitute a violation of CLAIMANT's right to equal treatment or to present its case **(B)**.

#### **A. The evidence is not relevant or material to the outcome of the case**

57. Any evidence that is admitted in the course of any arbitration proceedings must be relevant and material to the outcome of the case meaning that "*the content of the requested document needs to relate to*



*issues in the case, and the relationship between the documents and the issues must be set forth with sufficient specificity*” [Comm. IBA rules, p. 9]. In the case in hand, the evidence is neither relevant **(1)** nor material to the outcome of the case **(2)**.

### **1- The evidence is not relevant**

58. Relevance is defined in international arbitration “*as having a logical connection with what the evidence purports to prove in the case*” [Pilkov, p.148]. The evidence is not relevant to the present case as it does not have any logical connection with what it is trying to prove in the case and is not “*critical for the Tribunal in determining the outcome of the case*” [StCl, para. 42] as CLAIMANT is only requesting this evidence because it does not have any legal basis for its argument.

### **2- The evidence is not material**

59. Materiality is considered in relation to its connection to the outcome of the case [Hascher, p.115]. According to this definition or even then one mentioned in CLAIMANT’s statement of claim [para. 41], this evidence is not material as it does not have any influence on the party’s burden of proof or any relation with the outcome of the case. The fact that the conditions in which the Arbitral Tribunal confirmed its power to adapt the contract should the tariff result in hardship for RESPONDENT, are “*synonymous*” [StCl, para. 42] or “*somewhat similar*” [StCl, para. 48] to the case at hand does not mean that CLAIMANT can rely on this award as evidence.

60. On the other hand, even if the Arbitral Tribunal possesses wide discretion to “*determine the admissibility, relevance, materiality and weight of the evidence*” according to art. 22.2 HKIAC “, and that awards provide tribunals with precedential authority [StCl, para. 47], such awards are not binding to the arbitral tribunal especially when they are irrelevant and obtained illegally. We can add that “*arbitration differs from traditional jurisprudence in that arbitrators are not bound by previous decisions of an arbitral tribunal*” [Poorooye/Feehily, p. 306]. The Arbitral Tribunal Cannot rely on a confidential case as precedent. The Tribunal have also the right to not admit evidence that may be seen relevant to the case.

### **B. The exclusion of the Partial Interim Relief as evidence would not violate CLAIMANT’s right to equal treatment or to present its case**

61. CLAIMANT is also alleging that the Arbitral Tribunal has the power to admit the Partial Interim Award as evidence because refusing such request will violate CLAIMANT’s rights to equal treatment or to present its case, however this argument is completely misleading **(i)**, In the contrary, the admissibility of the Partial Interim Award would constitute a violation of RESPONDENT’s right to equal treatment **(ii)**.



**i) Refusing the admissibility of the partial interim relief does not violate CLAIMANT's rights to equal treatment or to present its case**

62. CLAIMANT in its Statement of Claim is claiming that the exclusion of the Partial Interim Award as evidence would be considered as a violation of the fundamental principles of “equal treatment” and the “reasonable opportunity to present its case” [*StCl, para. 44*], principles that are agreed upon under art 13.1 of HKIAC rules and many institutional rules. This means that “*parties are given the same status before a Tribunal*” [*StCl, para. 44*], however according to the doctrine that does not mean that the party should have access to illegally obtained evidence as both parties to the arbitration have to argue the matter on an even playing field [*O'Malley*].

63. Furthermore, in any arbitration proceeding the equality of treatment should be established regarding the arbitration in hand and that the parties to the arbitration have the same opportunities to present their case and to be heard. However, this does not mean that the Tribunal in question is bound to give the same award as in the Partial Interim award to which CLAIMANT is not a party. Therefore, if the Arbitral Tribunal would rule otherwise it would not amount to a violation of CLAIMANT's right to equal treatment [*StCl. para. 45*]. The principle of equal treatment only applies to the arbitration at hand.

**ii) The admissibility of the partial interim relief violates RESPONDENT's right to equal treatment**

64. On the other hand, the admission of such evidence would constitute a violation of RESPONDENT's right to equal treatment as like CLAIMANT affirmed it in its statement of claim that “*the core value of equal treatment guaranties that parties are given the same status before a tribunal*” [*StCl, para. 44*]. However, by granting CLAIMANT its request, RESPONDENT would not have the same status as CLAIMANT will be benefiting from illegally obtained evidence as it is noted that It would seem unfair if one of the parties benefited from having privilege and the other not [*Kubalczyk, p. 19*] which contradicts with the principle of fairness and good faith in international arbitration.

**II) CLAIMANT is not entitled to submit evidence from the Arbitral Proceedings obtained through a breach of confidentiality**

65. The disclosure of the Partial Interim Award could have only resulted from a hack in RESPONDENT's computer system or a breach of confidentiality by RESPONDENT's former



employees served as witnesses in the other arbitration and were under obligation to keep the arbitration confidential. We should note that confidentiality is a very important aspect of International commercial Arbitration **(A)**. Therefore, in the case where this disclosure resulted from the later then the partial interim award could not be submitted as evidence even if CLAIMANT did not participate in its procurement **(B)** and the submission of the evidence would constitute a breach of RESPONDENT's confidentiality **(C)**.

#### **A. The binding nature of confidentiality in International Commercial Arbitration**

66. Confidentiality in arbitration is an essential principal and right in any arbitration proceeding and it is widely viewed as one of the advantageous and helpful features of arbitration [UNCITRAL Notes, para. 31, p. 13]. It is also recognized by the majority of arbitration rules and law [Art. 45 HKIAC Rules, Art. 6 Appendix I of the ICC, Art. 34(5) UNCITRAL Rules].
67. 'Confidentiality' refers to non-disclosure of specific information in public [Samuel], it is also one of the primary reasons for arbitration being the preferred option for commercial dispute resolution. Therefore, if there were to be a breach of confidentiality, it would negate the whole purpose of arbitration. It would also contradict with RESPONDENT's legitimate expectations to keep the arbitration proceedings confidential as well as the awards.
68. The material scope of confidentiality could cover from the fact of the very existence of the arbitration, to the pleadings and memorials of the parties, the documents produced or other evidence such as witness statements or experts reports, the award and other arbitration decisions, as well as information contained in such filings [Meza-Salas]. We have to add that according to art. 45.1 of the HKIAC Rules, awards are covered by the obligation of confidentiality.

#### **B. CLAIMANT's non-involvement in the procurement of the evidence is not sufficient to admit the evidence**

69. Even if CLAIMANT did not participate in the procurement of the evidence and therefore did not breach any confidentiality agreement, it does not constitute sufficient grounds for the admissibility of the evidence. Although "awards are subject to disclosure if it is intended to pursue a legal right or interest" under art. 45.3(a)(1) [StCl, para 54], however this article states that such disclosure must be done by a party or a party representative as a first condition. In these case, the only party that can disclose the Partial Interim award is RESPONDENT.
70. And as a second condition, this disclosure must be intended to pursue a legal right or interest "of the party", i.e. the party disclosing the award (RESPONDENT). However, CLAIMANT is not a party to the other arbitration proceeding, therefore, it cannot rely on this article to admit the evidence. Also, the general principle, is that an award has no effect, whatever, upon nonparties to



the arbitration; it cannot confer rights, nor can it impose obligations, upon third parties [*Noussia*, p. 114].

71. On the other hand, it is generally recognized that arbitrators must take it is sufficient to say that privilege rules allow a person or party to refuse to disclose certain information, even though that information might be relevant and reliable [*Mosk/Ginsburg*, p. 345]. We can understand that even if the Tribunal found this evidence relevant to the case, its submission should not be allowed because it constitutes a violation of RESPONDENT's confidentiality.
72. Furthermore, according to art 9.2(b) of the IBA rules on taking of evidence that its application was acknowledged by CLAIMANT in its statement of claim [*StCl*, para. 40], provides that the Tribunal shall exclude evidence that has been obtained through a violation of "legal impediment or privilege under the legal or ethical rules". The disclosure of the partial Interim Award has been obtained through a violation of art. 45.1 of the HKIAC rules concerning the confidentiality of the arbitration proceedings as well as the arbitral awards. This article provides that "unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to [...] an award or Emergency Decision made in the arbitration".

### **C. The evidence's submission breaches contractual and confidential obligations**

73. Under art 45 of the HKIAC provides that an award made in an arbitration falls within the scope of confidentiality which applies to parties, parties' representatives, the arbitral tribunal, an emergency arbitrator, expert, witnesses, tribunal secretary and HKIAC.
74. Even if this confidentiality obligation is not applicable to CLAIMANT, however, it was obtained through a breach of confidentiality of the arbitration proceedings as it was noted that most probably such information could have only resulted from the breach of confidentiality of two of RESPONDENT's former employees who served as witnesses in the other arbitration proceedings [*PO2*, para. 41, p. 61]. Therefore, the obligation to keep the arbitration proceedings confidential is applicable to these two employees.
75. It has also been considered in many cases that the disclosure of award or documents created in the arbitration to a third party in subsequent arbitration or court proceedings is considered a breach of confidentiality [*Ali Shipping Corp. v. Shipyard Trogir; Insurance Co. v. Lloyd's Syndicate; Dolling-Baker v Merrett*].
76. Moreover, these employees did not only have an obligation to keep the arbitration proceedings confidential under art. 45.2 of HKIAC but also under contractual obligations to keep all information about the other arbitral proceedings confidential [*PO2*, para 41, p.61].
77. Therefore, the procurement of the evidence was due to a breach of confidentiality from the beginning, hence it cannot be admissible.



### **III) CLAIMANT is not entitled to submit evidence from the Other Arbitral Proceedings obtained through hacking**

78. RESPONDENT is claiming that the disclosure of the Partial Interim Award could have resulted due to a breach of RESPONDENT's computer system resulting in the fact that this evidence was illegally obtained therefore it cannot be admitted even if CLAIMANT did not participate in its procurement **(A)**, on the other hand, illegally obtained evidence should not be submitted in the arbitration **(B)**.

#### **A. CLAIMANT's non participation in the procurement of the illegal evidence does not constitute grounds for its admissibility**

79. RESPONDENT is aware that CLAIMANT did not participate in the obtaining of the PIA through hacking, however the fact that CLAIMANT is willing to pay \$1000 to get the evidence from a company that has a doubtful reputation to where it obtains its sources from [*PO2, para 41, p. 61*], only makes CLAIMANT involved in the procurement which is equivalent to having participated directly in the procurement of the illegal evidence.

80. On the other hand, In *Libananco v. Turkey* the tribunal expressed the principle that "parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with" and refused the submission of illegally obtained documents [*Libananco v. Turkey*].

81. Moreover, in *Methanex v. USA*, the tribunal decided that it would be wrong to allow Methanex to introduce documentation obtained illegally into these proceedings in violation of its general duty of good faith and, moreover, that Methanex's conduct, committed during these arbitration proceedings, offended basic principles of justice and fairness required of all parties in every international arbitration [*Methanex v. USA*]. Therefore, the submission of the illegally obtained evidence would constitute a violation of such principles.

#### **B. Illegally obtained evidence should not be admitted in the Arbitration**

82. Even if in some case, the Tribunal admitted evidence that was illegally obtained, it is only an exception as generally such disclosure is not possible if the evidence has been obtained illegally. The illegality of the evidence here is admitted by CLAIMANT [*StCl, para. 65*], therefore, it is not logical and against international principles of good faith for the Tribunal to grant CLAIMANT its request of admitting illegally obtained evidence that is deemed illegal by the parties.



83. Furthermore, the fact that the company that is willing to provide CLAIMANT with a copy of the PIA has a doubtful reputation and refused to disclose the sources [PO2, para 41, p. 61], only proves the illegality of the evidence that should be inadmissible.
84. On the other hand, CLAIMANT is claiming that the facts of the case in hand are similar to Wikileaks where the Tribunals have sometimes admitted the evidence obtained through Wikileaks. However, these situations are not similar as Wikileaks is made public, but the Partial Interim Award is not. Moreover, according to the Caratube case, the Tribunal accepted the leaked information as evidence, on the basis that this information is now public, and thus is no longer privileged or confidential [Caratube case]. Evidence that would have been considered inadmissible due to its privileged or confidential character is now admissible because it is considered to be public information.
85. We can add that this disclosure is not relevant to the case, therefore, it should not be accepted if the disclosure was not necessary to protect the defendant's interests [Insurance Company v Lloyd's Syndicate].

**ISSUE 3: CLAIMANT is not entitled to the payment of US\$ 1,250,000 or any other amount resulting from an adaptation of the price neither under clause 12 of the contract nor under the CISG**

**Issue 3 (a): CLAIMANT is not entitled to the payment of US\$ 1,250,000 or any other amount resulting from an adaptation of the price under clause 12 of the contract**

86. RESPONDENT is known for its broodmare lines. Three years ago, RESPONDENT decided to establish a racehorse stable. On 21 March 2017, RESPONDENT contacted CLAIMANT inquiring about the availability of Ninjisky III for its newly started breeding program. Both parties agreed on several contractual clauses, in relation to the hardship clause invoked by CLAIMANT, the negotiations resulted in narrowly including the clause that didn't represent any possibility for the adaptation of the contract. Furthermore, CLAIMANT is not entitled to any adaptation of the contract (I). On another hand, *a posteriori* to the negotiations and during the performance of the obligations many restrictions came up due to a new governmental act restricting the transportation of all living animals. However due to the high interest in this industry the ban has been lifted on artificial insemination temporarily. Moreover the tariffs increased due to a governmental act and CLAIMANT invoked that it should be considered as drastically changing the conditions of the contract. However RESPONDENT's intention was expressly clear during the negotiations and within the time of performance that it will not bear any risks of DDP delivery or any kind of risks associated with it. (II)



**I) CLAIMANT is not entitled to adapt the price of the contract**

**A. The hardship clause wording prevents CLAIMANT from adapting the contract**

**i) According to the force majeure clause (hardship clause), no adaptation of the contract should be made.**

87. The clause inserted by the parties in the contract did not mention that any adaptation of price should be made.

a- By the parties

88. Clause 12 of the agreement (The hardship clause) specified some cases in which CLAIMANT would be considered in hardship, but it did not mention the present case of additional tariff “neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous” [ExbC6 P:14].

89. Many doctrines, in similar cases, stated that the general attitude of arbitrators is to interpret the hardship clause very strictly. Therefore, a clause mentioning specific changes must be interpreted as meaning that no other changes should be taken into account [Zaccaria].

90. In [ExbC4 P:12], CLAIMANT mentioned that in a previous experience, he was forced to pay additional Health and safety requirements, and decided to add this specific situation in the hardship clause, which means that the hardship situation is limited to the mentioned circumstances in the clause.

91. In identical circumstances, many doctrines and the jurisprudence went to the same conclusion “No adaptation of the contract should be made if it is not expressly mentioned” like in the [ICC Award No. 2478 IN 1974, YCA 1978, at 222 et seq.]: “The circumstances that had occurred were not included in the hardship clause and therefore no adaptation of the contract was made.”, also in [Horn, Norbert, Procedures of Contract Adaptation and Renegotiation in International Commerce.], the duties of the parties to renegotiate in case of an adaptation problem, as discussed, can be established through an express adaptation clause.

92. Also, The stipulation of revision of a contract is only useful if it is followed by a sanction that deals with the situation in which no agreement can be reached. “A hardship clause without a sanction is hardly worth the paper on which it is written.” Schmitthoff [Rimke], in the present case, no revision of the contract or a sanction were inserted in the clause (two conditions were not met, the clause did not mention any sanction in case of disagreement, or revision in case of any alteration), “The duty to negotiate would gain importance only if breaching it were sanctioned” [Schwenzer]



93. So, According to [Rimke], in similar cases, the obligation to renegotiate has not been breached and the agreement will continue to stand in its original form because there wasn't a proper obligation from the beginning (fulfilling all of the above mentioned conditions).

**b- By the arbitral tribunal**

94. In order for the arbitral tribunal to be able to adapt the contract, it has to be also clearly mentioned in the hardship clause [Zaccaria; ICC Award No 8873] which is not our case [ExbC6 P:14], the clause did not refer to any intervention of the arbitral tribunal to adapt the contract in case of disagreement between the parties.

95. During the negotiations phase, CLAIMANT's negotiator Ms. Julie, claims that she agreed with Mr. Antley that *it should be the task of the arbitrators to adapt the contract if the parties could not agree* [ExbC8 P:17], then she added that the negotiators finalizing the contract forgot to add it, RESPONDENT shall not bear the mistake done by CLAIMANT's negotiator since it was the latter's will to insert such condition in the contract.

96. According to the [ICC Award No 8873], the rule is clear, *"the obligation to adapt the contract through the intervention of a third party applies only to exceptional circumstances, and cannot be enforced unless by inclusion in the contract of a clause minutely detailing the circumstances that could justify a hardship situation and the entailing consequences"*.

97. Such rule was also mentioned in many commentaries, [Zaccaria] in his commentary provides that if the parties fail to reach an agreement about the effective existence of a hardship situation, the clause itself must provide for intervention by a third party, or arbitrator, to decide the question

**ii) The four corners rule**

98. Pursuant to the four corners rule mentioned in [ResNo.A Para.16], *the interpretation of the arbitration agreement is limited to its wording and no external evidence may be relied upon. In particular, reliance on the drafting history and preceding communication is excluded if the wording is clear*

99. The hardship clause inserted in the agreement is clear, it mentions the cases where claimant should be considered in hardship and it does not include the "additional tariff" case or "the adaptation by the arbitrators", the clause enumerates some of the conditions like *"additional health and safety requirements"* and *"comparable unforeseen events"* and did not define the meaning of "unforeseen events"

100. According to the four corners rule, we can only rely on the drafting history and the parties negotiations if the wording is not clear, which is not our case because as previously demonstrated, the wording is clear, so CLAIMANT's will during the negotiations to insert an adaptation clause cannot be relied upon.



101. Pursuant to [Larry A. DiMatteo], if an event is considered as extraordinary, then it is nearly impossible to determine that it was anything other than unforeseeable, for example: a natural disaster or the rarest of Acts of God.
102. Also, it was stated in [Zaccaria]'s commentary that *“In these cases the general attitude of arbitrators is to interpret the hardship clause very strictly. Therefore, a clause mentioning specific changes must be interpreted as meaning that no other changes should be taken into account”*

**B. The contract cannot be adapted under the applicable law and rules.**

**i) Under the articles of the UNIDROIT principles.**

103. Article 6.2.2 provides that: *“There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party 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”*.
104. The above mentioned article contains the definition of hardship, and sets the criteria to classify an event as “Hardship”. Generally, it’s a situation *“where the occurrence of events fundamentally alters the equilibrium of the contract”*.
105. The article also sets another condition to consider hardship, *“the events occur or become known to the disadvantaged party after the conclusion of the contract”*, which was also not met in the present case because the election of the new president and its minister who is totally against the free trade came before the conclusion of the contract, CLAIMANT should’ve expected such tariffs [Po2 No.23 P:58].
106. The commentary on the previous article clarifies that: *“An alteration amounting to fifty percent (50%) or more of the cost, or the value of the performance, is likely to amount to a "fundamental" alteration”*[Rimke]. In the present case, CLAIMANT asserted that the alteration was only by 30%, which according to the above mentioned article, is not a fundamental alteration. [ExbC7 P:16]
107. Article 6.2.3 provides that: *“(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.*
108. This article states also the right of the disadvantaged party to request renegotiations, but in the commentary of the aforementioned article, it is provided that *“However, even in such a case renegotiation on account of hardship would not be precluded if the adaptation clause incorporated in the contract did*



*not contemplate the events giving rise to hardship*". In the hardship clause, two events only were mentioned and none of them included additional tariffs.

**ii) Article 79 of the CISG**

109. *"(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:*
110. *he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him. (3) The exemption provided by this article has effect for the period during which the impediment exists. (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt. (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention."*
111. Article 79 does not explicitly regulate the "Hardship" events, however, in some cases, the arbitrators applied it on hardship situation provided that the events were unforeseeable by the disadvantaged party [*Article 79*].
112. In the present case, the appointment of the newly elected president came before the conclusion of the contract, the latter also appointed Ms. Cecil Frankel, one of the most ardent critics of free trade. It was foreseeable then for CLAIMANT that a new tariff may be imposed [*Po2 No:23 p:58*]
113. An ICC arbitral tribunal, ruled that a 13% rise in the world market price of steel was neither sudden, substantial, nor unforeseeable, and would not exempt the seller from his obligation to perform under Article 79. [*ICC Arbitration Case No. 6281 of 26 August 1989 (Steel bars case)*]
114. The legislative history of Article 79 also indicates that a party cannot rely on the exemption merely on the ground that performance has become unforeseeably more difficult or unprofitable [*GUIDE TO ARTICLE 79 Comparison with Principles of European Contract Law (PECL)*]
115. Also, an Italian court made a firm stand *that hardship could not sustain a claim for impediment*. In that case, the seller argued that there was a remarkable rise in the international market price and it was unforeseeable to the point that it disturb the equilibrium of the contract between the corresponding performances and justified, at least, a price correction." The court stated that that the seller could not rely on hardship as a ground for avoidance, since Article 79 did not contemplate such a ground for an exemption [*Tribunale, 14 gennaio 1993, R.G. 4267/88, 1993 (It.)*]



## II) RESPONDENT's intention was clear during the negotiations

116. RESPONDENT intention was clear during the negotiations as it expressly refused any kind of further recognition of major risks. CLAIMANT's claim for an increased remuneration is completely baseless. CLAIMANT has no right to ask for an adaptation of the contract under the hardship clause. Any reliance on the hardship clause is impossible. First of all RESPONDENT couldn't reasonably agree to adapt the contract and make such a major change and on another hand the provisions in the contract should be prioritized first explaining the exclusion of the hardship clause and its provisions.

### A. RESPONDENT'S intent couldn't be reasonably to adapt the contract and make an increase of the price

117. According to article 8 of the CISG, in order to find the true meaning of a clause it should be interpreted in the subjective perception, intent of the parties during the negotiations, if not, then the interpretation of the clause should be made according to the understanding that a reasonable person of the same kind as the other party would have had in the same Circumstances. [*Article 8CISG*]

118. On another hand, the agreement upon a DDP delivery constitutes a phase of pre-contractual negotiations. The price of any extra costs is included already in the contract. In consequence any claim that an adaptation should take place or impose a new price is unreasonable. It is unreasonable for RESPONDENT to pay consequently for something already paid for at first place.

119. The article set forth a hierarchy for those criteria, if the terms of the contract are clear, they are to be given their literal meaning, so parties cannot later claim that their undeclared intentions should prevail. [*Commentary on article 8: CISG Digest*].

120. The contracts terms were clear, so they should be applied [*Case involving machine for repair of brick*]

121. Even if the terms of the contract are considered not clear enough, RESPONDENT's will during the negotiations was clear, Mr. Greg Shoemaker stated clearly that "In case of such a high additional tariff we will certainly find an agreement on the price", no obligatory adaptation of the contract was mentioned. [*ExbR4 P:36*], then according to the [*Fashion products case*], the contract should be interpreted accordingly.

122. In CLAIMANT's email on the 31 March 2017, it mentioned only its intention to include a hardship clause with no reference of what should be inserted in it [*ExbC4 P:12*], which is ambiguous and according to the [*Spacers for insulation glass case*] and the [*CSS Antenna, Inc. v. Amphenol-Tuchel Electronics, GMBH*] cases, "party which desires to contract only according to its



own standard terms and conditions requires an unambiguous declaration of that intent”. Also, during the negotiations there no distinction made between the price of the goods and the additional costs for DDP delivery. [Po2 para.8 p:56].

123. Under French law *agreements lawfully entered take the place of the law for those who have made them pacta sunt servanda*. It is a universal principle and it is the reason why agreements may be revoked only by mutual consent or for causes authorized by the law. When the contract is long term, the initial terms may change during the performance of the contract. The question is whether or not the parties should respect the initial obligations or if they have to alter the obligations and the responsibilities with this change. However the principle is clear the parties are obliged to fulfill the obligations even if the performance has become more onerous either due to the increased cost of performance or due to a diminishing value of the received performance.
124. On another hand, regarding CLAIMANT’s insinuations of RESPONDENT’s bad faith, the investors didn’t behave in a malicious manner; they sought a marketing strategy and a good way to enhance their position in the market. The contract itself doesn’t contain any resale prohibition and CLAIMANT doesn’t have any proof of such bad faith regarding article 7(1) [CISG].
125. It is valid to remember once again, that based on the principle of Pacta Sunt Servanda, contracts should not be modified without a strong reason, otherwise it would bring back the insecurity making agreements with different contract States. Keep in mind that contracts are elaborated according to the will and interest of both parties, and wanting to be excused of liability just because a lack of good faith.

#### **B. Article 6 CISG: The provision in the contract should be prioritized first.**

126. The CISG governing the contract explicitly states that that the provisions in the contract shall be prioritized first. However the regulation of a contract due to specific performance or major change in the circumstances may be ensured if some conditions occur in the provisions and also during the performance. Moreover, the absence of requirements for hardship to arise and the elasticity of the vocabulary in the contract constitute an exclusion of the hardship clause and its application.

##### **i) The absence of requirements for hardship to arise.**

127. The events could have been reasonably taken into account by CLAIMANT. Also the events were not beyond its control .The new restriction measures were foreseeable and were not onerous, they were possibly easily adaptable. Article 6.2.2 contains the definition of hardship. This definition has the form of a general description and states that hardship is a situation where the occurrence of events fundamentally alters the equilibrium of the contract. Whether an



alteration is "fundamental" will of course depend upon the circumstances in every case. However in the present case, the alteration of the contract was only an adaptation to the circumstances without manifested onerous disadvantage.

128. According to the procedural order number 2, RESPONDENT wasn't willing to accept CLAIMANT's requests for the change in the delivery terms. During the negotiations of the additional clauses there were no distinctions made between the additional costs for DDP and the price for the goods. Instead a single price was discussed and an agreement was reached based on the terms contained in the contract.
129. The circumstances in which hardship generally exists as usually set out in hardship clauses normally incorporate three elements. First, the circumstances must have arisen beyond the control of either party; self-induced hardship is irrelevant. Second, they must be of fundamental character. Third, they must be entirely unforeseeable.
130. Usually, hardship clauses provide for revision of the contract. Some clauses set out criteria for the revision of the contract. An example of such a clause is, "to restore the equilibrium between the parties as it was at the time of the conclusion of the contract." A more subjective approach would be, for example, "with fairness" or "equitable adjustment. [*according to the CISG database* ] In a case where no agreement between the parties can be reached, hardship clauses provide for sanctions. The stipulation of revision of a contract is only useful if it is followed by a sanction that deals with the situation in which no agreement can be reached. "A hardship clause without a sanction is hardly worth the paper on which it is written." Sanctions are usually the termination of the contract or adaptation of the contract by a third person. In the latter case, provision can be made for the intervention of an arbitrator, an expert, or even a court. However the existing hardship clause didn't provide any adaptation by the arbitral tribunal. [*Ex/bR3 P:35*]
131. Additionally, the commentary on Article 6.2.2 states that if the performances are capable of precise measurement in monetary terms, an alteration amounting to fifty percent (50%) or more of the cost, or the value of the performance, is likely to amount to a "fundamental" alteration. Article 6.2.2 further states that a "fundamental" alteration in the equilibrium of the contract may manifest itself in two ways either there is an increase in the cost of the disadvantaged party's performance, or a decrease in the value of what it has to receive. However the value of the doses didn't decrease and the calculated margin profit of 5% by CLAIMANT was not severely altered.

## ii) The elasticity of the vocabulary used in the contract and the purpose of the contract

132. This requires that Article 79 contain a gap with respect to situations of hardship. It has been shown that it cannot be determined with sufficient clarity how the issue of radically changed circumstances can be decided upon, on the basis of Article 79 and the CISG in general. Furthermore, the adaptation of the contract by the judge is not expressly allowed by the CISG, and must therefore be regarded as impossible. It is also clear that the CISG does not contain a specific provision dealing with hardship. [*Rimke*] The idea we have left from article 79 of CISG is



that the legislators were concerned in protecting one of the parties in case of difficult times, nevertheless not leaving clear the restrictions of its requirements.

133. Even if we can refer to some standard form, which we can find in the UNIDROIT principles, ICC rules, CMAP rules, or in the European Principle – Definition and model rules of European private law, it is highly recommended to be more accurate in the definition of the hardship events and how they will trigger the clause. It should be highly specific in the change in certain circumstances.
134. On another hand, nearly the majority of commenters consider the wording impediment as narrow and they believe that any severe market increase in the price of the goods must not constitute as reason for an excuse of the party or a reason to claim for restitution of the damages.
135. The parties can include a list of change in circumstances; this list can be limitative or not, but should state out clearly whether it is important to define legal circumstances, change of law, or political, financial, personal (intuitu personae), or technological change, and what kind of event could trigger the clause. However it is very important to define the consequences of the hardship clause: will parties proceed in renegotiation, intervention of the judges, state courts or arbitration? The hardship clause gap cannot be filled only if a radical and severe change occurs. [*English case law Taylor vs. Caldwell*]
136. Contrary to CLAIMANT's allegations, RESPONDENT did not agree to any adaptation following CLAIMANT's request in January 2018. RESPONDENT negotiator made clear in his telephone conversation that his understanding of the contract was that CLAIMANT has to bear the consequences and the costs.
137. The wording of impediment under article 79 of the CISG cannot be considered as precise its vague and mostly recognized by the doctrine as severely onerous. The fact that the price of the good increased 70% and that it turned the contract "extremely onerous" is not present in the case; the difference in the price range was enough to establish a "serious imbalance" and renegotiation was found to be necessary. [*Scafom International BV v. Lorraine Tubes S.A.S. Court of Cassation*]. However in the present case, the payment of 30% tariffs on the last shipment are not of extremely onerous nature.
138. CLAIMANT cannot possibly rely on the hardship clause in the contract to request such adaptation. During the negotiations and after the rehabilitation of RESPONDENT's negotiator after the accident, CLAIMANT had sufficient time and also the possibility to request further clarification or decide to incorporate the clause as a major condition. RESPONDENT didn't agree that the hardship clause could be considered as a condition for the resolution or a suspension of the contract.
139. Accordingly to some of the doctrine's opinion the risk of loss brought by an unforeseen frustrating event should be allocated to the "superior risk bearer". In the case [*Societe Romay AG v. SARL Behr France*], the court of Colmar reasoned that "significant drop in prices" are not unreasonable expected, especially when the buyer was considered "an experienced professional acting in the international market," should have addressed this possibility in the contract. An



award given by the Russian Federation "a change in market conditions cannot serve as an excuse for the buyer to avoid payment for the goods." For a German Tribunal, despite of the price of the good had become more expensive, the seller just wanted to stop delivery because he "only wanted to gain profit from the increased prices." To give one more case, we have a position of a Tribunal attesting that strikes are supposed to be considered a foreseeable risk.

140. Changes of market prices of goods most of the times have not been accepted as a possibility of an impediment within article 79 (1) CISG. In many cases such fluctuations of the market prices or the tariffs are considered as the French call it "un sous ensemble" of the normal risk in the commercial transactions.[ *Professor Alejandro M. Garro, CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG*].

141. In conclusion, RESPONDENT acted with good faith and it was upon CLAIMANT's responsibility to bear the costs of the DDP delivery and to try to reach RESPONDENT as its representative was still reachable at the time. And by any means, CLAIMANT can't rely on any impediment and can't be entitled to the amount requested before the Arbitral Tribunal.

**Issue 3 (b): CLAIMANT is not entitled to the payment of US\$ 1,250,000 or any other amount resulting from an adaptation of the price under the CISG**

**I) Claimant situation does not constitute a hardship under article 79 of CISG**

142. Claimant contends that in a situation of hardship an adaptation of price is a fair solution to the situation. But the governing rules of the contract which is the CISG excludes from its application the notion of hardship. Usually article 79 is used to relief a party from its liability when there is a situation of *force majeure*. Claimant is trying to unknot the tightly knit article 79 by stating that the CISG is limited in its conception regarding hardship therefore the notion of hardship must be borrowed from the UNIDROIT principles. But in fact article 79 is a self relying system that specifically excludes hardship **(A)**.

143. And even if the tribunal finds that article 79 does encompass the notion of hardship which Claimant did not address we would establish that the situation of Claimant does not meet the requirements of article 79 for its situation to be considered an impediment **(B)**.

**A. The notion of hardship is excluded from the scope of application of article 79**

144. Claimant Memorandum used the UNIDROIT principles directly without insisting on the notion of hardship in article 79, Claimant believes that article 79 is strictly finite and limited to *force majeure* and that in application of article 9 when the convention cannot be complemented by



the gap filling mechanism we must take into consideration international trade usages and in this case the UNIDROIT principles.

145. Respondent agrees with Claimant that article 79 is limited in its approach, but from its conception article 79 was made self reliant without any interpretation or addition from a domestic law. And its legislative history suggests that the notion of hardship was explicitly excluded from this article or at the very least strictly limited because the legislators did not want an ambiguous notion that could easily relieve a party from its liability especially against economic hardship **(i)**. Article 79 objective was to treat situation where there was a drastic change in circumstances that made performance impossible [Rimke] but not to account for situations where performance was merely burdensome. And this objective is still maintained today when article 79 is used in courts and arbitral tribunals**(ii)**.

**i) The legislative history of the CISG excludes the notion of hardship**

146. *“CISG does not reference the concept of force majeure nor the concept of hardship it tries to develop a system of its own. It tries to deal with the concept of changed circumstances”* [Rimke]. This was the main goal behind the conception of article 79. Claimant can not rely on the hypothesis that the CISG made it “impossible” for hardship to be contained in the convention so a look into international trade usages must be allowed.

147. The legislators of the CISG made the choice to make unique system that do not rely on any domestic law or trade usage.

**ii) Concurrent application of CISG and its evolution also excludes the notion of hardship.**

148. To this day no court have accepted the exemption of the party based on economic hardship as Claimants assertions entail.

149. A german court has refused strictly to use any type of complement to CISG in a case where economic hardship was brought up [LG Aachen, Germany, UNILEX, No. 43 0 136/92 (May 14, 1993)]

150. Also a similar solution was given by an Italian court regarding exemption for economic hardship.

151. This reasoning behind the notion of hardship shows that article 79 is strictly used only for situations of impossibility of performance and not economic hardship.

152. These refusals to exempt a party is a strict application of article 79 and this was the main objective of the legislators when they created article 79.

153. An increase of 30% does not constitute an impediment according to the objective of article 79 nor to the way it is applied today by arbitral tribunals and courts.



**B. Even if the tribunal finds that hardship is included under article 79 claimant's situation is not considered an impediment under the provisions of the article**

154. In Case the tribunal found that article 79 includes the notion of hardship in its application, than the Claimant's hardship situation subject to article 79 must meet the requirements laid down by the article for a possible exemption from liability. Claimant contention is that the hardship situation constitutes grounds for adaptation of the contract, but C failed to demonstrate how the increase in tariffs could amount to an impediment under article 79 **(i)**, Furthermore they failed to surmount the test of reasonable expectations, because C clearly reasonably expected such increases **(ii)**.

**i)The term impediment does not encompass the situation of claimant**

155. The term impediment when used in the CISG it was a hybrid notion, the legislators refused to rely on a one sided notion of *force majeure*, they used the notion of impediment as an autonomous system to reconcile between common and civil law notions of *force majeure* [Fritz Enderlein & Dietrich Maskow]. The important factor when it comes to this term is the risk assumed by a party. If Claimant assumed the risk DDP explicitly than any type of economic difficulty caused by such risk would not amount to an impediment under the explicit terms of the article **(a)**. Even if Claimant did not assume the risk explicitly it should be presumed from Claimant's actions and intentions that it did in fact assume it implicitly **(b)**.

a)The express allocation of risk by the parties on the burden of Claimant does not fall within the sphere of application of the term impediment.

156. When adding a DDP clause into the contract, the parties agreed agreed that any item relating to the terms of the DDP Claimant would assume it's risk. And since this does not relate to the hardship clause but to the application of article 79 of the CISG when there is a clear risk allocation term any situation regarding that risk does not fall within the notion of impediment because both parties explicitly agreed to allocate the risk of import fees as it can be seen in Claimant's letter to Respondent were it refused changes in "custom regulations or import restrictions" [C4] and than specified price increases due to health and safety requirements. So Claimant objections where very specific and did not relate to price increase due to the imposition of tariffs as it is not a custom regulation or a health and safety requirement.



b) Even with no allocation of risk it is presumed that Claimant assumed the risk given the nature of the tensions between both governments.

157. A German court accepted the implicit assumption of risk due to the nature of the trade between the two parties and therefore excluded the application of hardship where the price increased more than 300% [*Oberlandesgericht Hamburg, 28 Feb 1997, No 167, CISG-online 261*]. The judgement substantiated that for each trade there is a hardship threshold in the increase of price.
158. In Claimant's case it was a known fact that the ban was temporary and that its country initiated aggressive import restrictions on Equatoriana. The geopolitical situation during that time showed that multiple countries were heading towards a protectionist agenda and therefore retaliatory measures were taken by multiple countries [*ExbC6 P:14*]. It is well established that "*International trade transactions generally imply a greater element of uncertainty because they are subject to political and economic influences in foreign countries*" [Horn].
159. So an argument hardship based on an increase of tariffs that does not amount to more than 30% in an economic environment heading towards protectionism is nothing but a manoeuvre by Claimant to make Respondent help in his financial instability.
160. This is why also financial instability of Claimant is irrelevant to assessing the possible impediment caused by the imposition of tariffs [*Lookofsky & Flechtner*].

**ii) Claimant had reasonable expectations of such tariff.**

161. Also Claimant is contending that he could not have reasonably expected such increase in tariffs when it first agreed to conclude the contract. While this might be argued but Claimant in fact expected the worse which was the complete ban of its product because it was clearly communicated to Claimant that the removal of the ban on semen was a temporary event and it might be re-imposed. Therefore a ban would have ended any contractual relationship with Claimant affecting it even more financially [*ExbC1 P:9*].

**II) CLAIMANT is not entitled to claim an adjustment of the price**

162. Contrary to CLAIMANT's allegations, the adjustment of the price is not reachable, since the contract does not permit it **(A)** in its limited list **(B)**. Moreover, the CISG does not contain any provisions to this regard **(C)**.

**A. The contract does not provide adaptation of purchase price in the Hardship Clause**



163. The Parties concentrated in their discussions on the inclusion of a hardship clause. However, RESPONDENT refused the suggested ICC-hardship clause and considered it to be too broad [RESPONDENT's exhibit R 3, P.35].
164. The "ICC Hardship Clause 2003" is intended to apply to any contract which incorporates it either expressly or by reference. The clause states that:
165. A party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.
166. Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:
- a. a. the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that
  - b. b.it could not reasonably have avoided or overcome the event or its consequences,
  - c. the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow for the consequences of the event.
167. Where paragraph 2 of this Clause applies, but where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this Clause is entitled to termination of the contract.
168. In the instant case, RESPONDENT explicitly refused the inclusion of such clause, which must be interpreted as a refusal to admit any chances of negotiation of alternative contractual terms and adaptation of price under any circumstances.
169. Consequently, an approach was taken to regulate a number of possible risks directly and then merely add a hardship wording to the existing force majeure clause.
170. Therefore, it is common ground between the parties that Clause 12 of the Sales Agreement should be interpreted more narrowly than the ICC 2003 clause [PO 2, para 12, P. 56].
171. The negotiations finally resulted in a very narrowly worded clause, which was then included into the existing force majeure clause and did not provide for any adaptation by the arbitral tribunal [CLAIMANT's exhibit C 5, P.14, clause 12]

**B. Clause 12 of the Contract stipulates a limited list that does not include the adjustment of price**

172. Both parties agreed on the wording of clause 12 of their Sales Agreement. Therefore, it must be noted that in contrary to CLAIMANT's allegations, the clause does not provide -neither explicitly nor implicitly- any possibilities of price adaptation.



173. The clause contains a limited list of what should be regarded as a hardship. It stipulates 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’s exhibit C 5, clause 12, P.14]. This means that the intention of both parties was to exclude the adjustment of price from their contract.

### **C. The CISG does not contain any provisions on hardship and adaptation of contract**

174. CLAIMANT advocates themselves approve the fact that the CISG does not contain any specific provisions on hardship and adaptation of contracts.

175. Parties, in clause 14 of their Sales Agreement, agreed that it shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG) [CLAIMANT’s exhibit C 5, clause 14, P.14].

176. Nevertheless, CLAIMANT cannot rely on Art. 79 of the CISG, since the reference to the CISG on this matter constitutes a derogation in the sense of article 6 of the CISG [Answer to notice of Arbitration, para. 20, P.32].

177. As, by including the force majeure and hardship clause into the contract, the Parties have provided for a special regulation of the problem of changed circumstances excluding the application of the CISG in this regard.

178. Moreover, even if the UNIDROIT principles are applicable in the case in order to fill in the gaps of the CISG, the requirements set in it were not met.

### **III. Under the UNIDROIT principles, a hardship requires a fundamental alteration of the equilibrium of the contract**

179. In response to CLAIMANT’s allegations, the incapacity of the CISG to fill this gap would necessarily lead to the Parties referring to the UNIDROIT, as international trade usage, by virtue of art. 9(2) [Honnold, para 119, P.128]. Nevertheless, the UNIDROIT PRINCIPLES also does not entitle CLAIMANT for an adaptation of the purchase price.

### **A. The tariff imposed by the government of Equatoriana does not amount as hardship**

180. The UNIDROIT principles in section 2, govern the notion and the effects of hardship. However, under articles 6.2.1, 6.2.2 and 6.2.3, the facts of our case does not lead to be qualified as a hardship.



181. Firstly, CLAIMANT was under an obligation to perform the contract, even it became more onerous for it.

182. Secondly, the existence of a hardship is conditioned, pursuant to art. 6.2.2, to an alteration of 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. Such alteration shall be the result of events that could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract (b); and the risk of the events was not assumed by the disadvantaged party (d).

183. Meanwhile, conditions for hardship to arise were not met. Hence, CLAIMANT is not entitled to resort to court asking to adapt the contract.

**i) The tariff has increased the cost of performance; however CLAIMANT was capable to perform**

184. In its article 6.2.1, the UNIDROIT provides that where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations.

185. The performance must be rendered as long as it is possible and regardless of the burden it may impose on the performing party. In other words, even if a party experiences heavy losses instead of the expected profits or the performance has become meaningless for that party the terms of the contract must nevertheless be respected.

**ii) The performance haven't been excessively onerous for CLAIMANT, but rather a loss due to a normal risk of commercial activities**

186. CLAIMANT is not suffering bankruptcy and is not financially endangered by paying the 30% tariffs [PO 2, para. 29, P. 59]..

187. CLAIMANT has planned to be profitable so it can adjust its business plan for the year; however, the payment of the 30% tariffs is part of its business, since entering into commercial activities automatically leads to taking a risk to make profits or to suffer from losses, at each deal.

**B. The tariff imposed was foreseen and its risk was already allocated to CLAIMANT**

188. Even if the change in circumstances occurs after the conclusion of the contract, sub-paragraph (b) of Article 6.2.2 of the Unidroit principles makes it clear that such



189. Circumstances cannot cause hardship if they could reasonably have been taken into account by the disadvantaged party at the time the contract was concluded.
190. However, the foreseeability does not play a major role in case the risk allocation had been already clarified in the contract.
191. In the Egyptian cotton case, the court explains the requirements to sustain a claim of impediment: A party claiming an article 79 impediment “must prove that the failure was due to an unpredictable and inevitable impediment, which lies outside its sphere of control”. The concept of sphere of control acts as a surrogate for determining whether there was an express or implied allocation of risk. Thus, whether an event is foreseeable or unforeseeable is irrelevant if the court determines that the risk of the event had been allocated by the contract.

**i) Price fluctuations are foreseeable aspects of international trade**

192. In practice, courts and tribunals have routinely denied petitions for Article 79 exemption grounded in hardship stemming from changes in market prices: sellers’ failure to deliver the goods caused by an increase in cost [Tomato concentrate Case (France v. Germany)].
193. Moreover, Courts denied petitions on sellers’ failure to deliver the goods where the market price of the goods increased dramatically [Ferrochrome Case] and buyers’ refusal to accept delivery and pay the seller because of a dramatic decrease in the value of the goods being sold [Frozen Raspberries Case] . When denying such petitions, courts have generally commented that “a party is deemed to assume the risk of market fluctuations and other cost factors affecting the financial consequences of the contract.” [UNCITRAL Digest, para. 15, n. 63].

**ii) CLAIMANT had the possession of the semen when the government imposed the tariff**

194. In a 1996 Hungarian arbitration known as the Caviar Case, the seller and buyer each claimed that the other bore the risk of loss where an intervening trade embargo (taking effect after the seller’s delivery of caviar to the buyer and before the payment due date) caused the caviar to be destroyed by preventing the buyer from making payment to the seller and taking possession of the caviar [The Caviar Case].
195. Finding the CISG and the contract unclear on which party bore the risk of loss at that time, the Court of Arbitration determined that the seller’s national law (Yugoslav) governed the transaction and held that the title to ownership passed to the buyer at the moment the goods are taken over by the buyer. Because the risk of freight was borne by the buyer and because “the damage caused by force majeure has to be borne by the party where the risk is at the moment the force majeure occurs,” the Arbitration Court concluded that Article 79 did not exempt the buyer and awarded damages to the seller.



196. Note, however, that even where national risk of loss laws were not implicated, Article 79 has been interpreted to avoid upsetting the contractual allocation of risk, which could impact the risk of freight on the buyer.
197. Therefore, it is clear that in our case, CLAIMANT was in possession of the semen when the government imposed the tariffs. Then, CLAIMANT is not entitled to doubt the allocation of risk.

**VI) CLAIMANT assumes the risk from the tariff imposed by the government of Equatoriana**

198. CLAIMANT is not entitled to escape from its obligation to bear the cost of the tariffs **(A)**, since such risk is allocated to it by the DDP agreement **(B)**.

**A. CLAIMANT's claims contradicts with the risk allocated due to the Agreement's Delivery Terms**

199. CLAIMANT in its email of 31 March 2017 accepted DDP delivery in principle but asked to be relieved from all risks associated with such a delivery or at least to be protected against the risk of changing health and security requirements by a hardship clause [Claimant's Exhibit C4, para 3, P. 12].
200. The first option was not acceptable for RESPONDENT who was not willing to pay a much higher price for receiving basically nothing. Thus, the Parties concentrated in their following discussions on the inclusion of a hardship clause, an approach was taken to regulate a number of possible risks directly and then merely add a hardship wording to the existing force majeure clause.
201. Pursuant to clause 8 of the agreement, Seller will ship 3 instalments DDP of frozen semen. The delivered duty paid is a delivery agreement whereby the seller assumes all of the responsibilities, risk and cost associated with transporting goods until the buyer receive them. This includes paying for shipping costs, export and import duties, insurance and other expenses.
202. Therefore, we must conclude that both parties agreed on the allocation of risk.

**B. Parties agreed on "Delivered Duty Paid" terms**

203. The Parties agreed on DDP and INCOTERMS 2010 edition developed by the International Chamber of Commerce (ICC) [PO 2, para 10, P.56].
204. The incoterms rules of 2010 define the DDP as the method of delivery in which the seller is responsible for delivering the goods to the named place in the country of the buyer, and pays all costs in bringing the goods to the destination including import duties and taxes.



205. The DDP agreed upon puts the maximum obligation on the seller, to deliver the goods at destination at the seller's delivery obligation extended to the country of destination.

**i) The seller's obligations under DDP includes payment of any additional delivery cost**

206. Any VAT or other taxes payable upon import are for the seller's account unless expressly agreed otherwise in the sale contract.

207. According to Jan Ramberg in the ICC Guide to Incoterms 2010, the seller's obligations include the payment of any charges relating to the "internal" fiscal system in the country of import (such as VAT levied upon import or tariffs).

**ii) The buyer's obligations under DDP excludes payment of any additional delivery cost**

208. The risk of choosing DDP delivery method was accepted by CLAIMANT, and therefore, initially increased the price of the contract by 1000 USD per dose [Claimant's Exhibit C4, para 3, P. 12]; so RESPONDENT had already been paying CLAIMANT the cost of the risk of the DDP which CLAIMANT takes per dose.

209. Therefore, the buyer (RESPONDENT) in our case paid the price agreed in the contract of sale which took into consideration a counterpart to the additional risk the seller undertakes by the DDP method .

**C. The Incoterms rules emphasizes on the seller's obligation under DDP to bear all the costs and risks of delivery involved**

210. This term places the maximum obligations on the seller and minimum obligations on the buyer. No risk or responsibility is transferred to the buyer until delivery of the goods at the named place of destination.

211. The most important consideration for DDP terms is that the seller is responsible for clearing the goods through customs in the buyer's country, including both paying the duties and taxes, and obtaining the necessary authorizations and registrations from the authorities in that country.

212. To conclude, RESPONDENT respectfully asks the Tribunal to find that CLAIMANT is not entitled for remuneration of the purchase price through adaptation. Such adaptation is not provided under the Hardship Clause. Furthermore, the CISG does not apply on this matter due to the presence of a special regulation agreed upon by both parties. Moreover, the conditions set by the UNIDROIT principles to admit a hardship were not met, since such an increase in tariffs is a foreseen risk that must be borne by CLAIMANT (the seller) especially under a DDP delivery method.



## **REQUESTS FOR RELIEF**

In light of the above RESPONDENT requests the Arbitral Tribunal:

- a. To dismiss the claim as inadmissible for a lack of jurisdiction and powers;
- b. To refuse the admissibility of the Partial Interim Award as evidence;
- c. To reject the claim for additional remuneration in the amount of US\$ 1,250,000 raised by CLAIMANT under article 12 of the contract as well as the CISG.