SIXTEENTH ANNUAL

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

HONG KONG, MARCH 31ST – APRIL 7TH 2019

UNIVERSITY OF YANGON

MEMORANDUM FOR CLAIMANT

Phar Lap Allevamento	v.	Black Beauty Equestrian
Claimant		Respondent
Rue Frankel		2 Seabiscuit Drive
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Medoterraneo		Equatoriana

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TABLE OF ABBREVATIONS AND DEFINITIONS

¶/¶¶	Paragraph / paragraphs
%	Percentage
Art. /Artt.	Article / Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
CISG-AC	CISG Advisory Council
CISG Digest	Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods
DDP	Delivered Duty Paid
et seq	*et sequentes* (and the following)
Exb. C	Claimant's Exhibit
Exb. R	Respondent's Exhibit
HKIAC Rules	Hong Kong International Arbitration Centre Administered Arbitration Rules (2018)

Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts
ICC	International Commercial Code
ICC Rules	Rules of Arbitration of the ICC (2012)
Infra	Below
Mr. Antley	Former Negotiator of Respondent
Mr. Krone	Replaced Negotiator of Respondent
Ms. Napravnik	Former Negotiator of Claimant
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
NY Convention	New York Convention
No.	Number/Numbers
NoA	Claimant's Notice of Arbitration
p. / pp.	Page/ Pages
para.	paragraph

PO1	Procedural Order No. 1 of 5 October 2018
PO2	Procedural Order No. 2 of 2 November 2018
RNoA	Respondent's Answer to Notice of Arbitration of 24 August 2018
supra	Above
Translex Principles	Translex Principles on Transnational Law
ULF	Uniform Law on the Formation of Contracts for the International Sale of Goods
ULIS	Uniform Law for the International Sale of Goods
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT Principles	Principles of International Commercial Contracts
US	United States of America
U.S.D	United States Dollars
v.	versus (against)

STATEMENT OF FACTS

The parties in these proceedings are Phar Lap Allevamento ("**Claimant**") and Black Beauty Equestrian ("**Respondent**") (collectively the "**Parties**"). Claimant is a company registered in Mediterraneo and is known for its successful breeding of racehorses. It also offers for sale the frozen semen of its stallions for artificial insemination, including the semen of Nijinsky III, one of the most sought-after stallions for breeding. Respondent is a company registered in Equatoriana is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions. It established a racehorse stable three years ago.

21 March 2017 Respondent first contacted Claimant to buy the frozen semen of Nijinsky III for Respondent's newly established breeding program.

24 March 2017 Claimant offered Respondent 100 doses of Nijinsky III's frozen semen in accordance with the *Mediterraneo Guidelines for Semen Production and Quality Standards* under the conditions of which the frozen semen will have to be provided in several installments and may not be resold to third parties without Claimant's express written consent.

28 March 2017 Respondent accepted most of the terms of the offer but objected to the choice of law and the forum selection and insisted on DDP terms.

31 March 2017 Claimant accepted a delivery DDP conditioned upon (1) a moderate price increase; and (2) the transfer of customs risks to Respondent highlighting its previous experience in this regard. For this purpose, the Parties included a hardship on the Sales Agreement.

12 April 2017 The Chief negotiators for Claimant and Respondent were involved in a severe car accident on their way to a dinner after discussing the hardship clause and the applicable choice of law for the arbitration clause.

6 May 2017 Claimant and Respondent signed the Sales Agreement.

20 May 2017 and 3 October 2017	Claimant sent the first and second shipments corresponding to 25 doses each of Nijinsky III's frozen semen.
19 December 2017	Equatoriana suddenly imposed a 30% tariff on all agricultural goods coming from Mediterraneo.
20 January 2018	Claimant mailed Respondent about 30% tariffs on the agricultural products including the frozen semen which makes this shipment 30% more expensive and immediately started negotiations regarding a price adjustment for the frozen semen before sending the last shipment.
21 January 2018	Respondent called Claimant to discuss the issue and told his primary concern was to ensure that the remaining 50 doses which were urgently needed given that start of the breeding season. Respondent had already initiated the payment of the second installment.
23 January 2018	Claimant had gotten the impression of the Respondent accepted its position and sent the last shipment of 50 doses.
12 February 2018	Respondent's CEO stopped the negotiations and refused to pay any additional amount for the tariffs.

INTRODUCTION

Claimant and Respondent entered into the Sales Agreement covering 100 doses of Nijinsky III's frozen semen for artificial insemination. In this regard, the Parties agreed that a price of US$100,000 per insemination dose was reasonable based on the circumstances during the negotiations *[p. 14, Exb. C5].* The Parties further agreed that the semen will be delivered in three shipments of 25, 25, and 50 doses respectively.

Two months before the third and final shipment could be made by Claimant, however, the Government of Equatoriana imposed 30% tariffs on agricultural products from Mediterraneo, including animal semen *[p. 15, Exb. C6].* Claimant accordingly called Respondent to discuss the price of Nijinsky III's semen upon which Respondent led Claimant to believe that the price will be adjusted following Claimant's delivery. After such delivery, however, and to this day, Claimant's calls for price adjustment remain

unheeded. Claimant now comes before this Tribunal to rightfully request that its right to such price adjustment be enforced. This Tribunal cannot and should not allow Respondent to unjustly enrich itself at the expense of Claimant.

ARGUMENTS

ISSUE 1: THE TRIBUNAL HAS THE JURISDICTION TO ADAPT THE CONTRACT UNDER THE ARBITRATION AGREEMENT

1. The Parties to these arbitral proceedings are bound by the arbitration agreement concluded on 6 May 2017 which permits them to initiate arbitration under the Hong Kong International Arbitration Centre Administered Arbitration Rules (HKIAC Rules) *[p. 14, Exb. C5, Clause 15]*. As it will be established by Claimant in these submissions, the Parties' arbitration agreement empowers the Tribunal to adapt the Sales Agreement because (I) the law of Mediterraneo governs the arbitration agreement; (II) the Parties included a hardship clause in the Sales Agreement with the intention to empower the Tribunal to adapt the same under certain circumstances; and (III) adapting the Sales Agreement is not outside the scope of the arbitration clause under Article V(1)(c) of the New York Convention.
2. Claimant would like to stress that Respondent's allegation that the Tribunal lacks jurisdiction to adapt the Sales Agreement *[p. 29, RNoA, ¶2]* because the arbitration agreement is governed by the law of Danubia (and not the law of Mediterraneo) is specious and simply does not have any basis in law and in the facts of this case *[p. 7, NoA, ¶15]*.

I. **THE LAW OF MEDITERRANEO GOVERNS THE ARBITRATION AGREEMENT**

3. Contrary to Respondent's claims, the law of Mediterraneo governs the arbitration agreement because the Parties intended the law of Mediterraneo to apply (A); in the absence of an express choice of law to govern the arbitration agreement, the law of the Sales Agreement shall nonetheless apply (B).
4. The doctrine of separability in this respect would not imperil the Parties' choice of the law of Mediterraneo to govern the entire Sales Agreement (including the arbitration agreement) (C). In any event, even assuming that the doctrine of separability leads to

the arbitration agreement being subject to a different choice of law than the Sales Agreement, the law applicable to the arbitration agreement is the law of Mediterraneo (D).

A. THE PARTIES INTENDED THE LAW OF MEDITERRANEO TO APPLY

5. The parties' intention to apply the law of Mediterraneo as the law governing the arbitration agreement is clear through their negotiation process. The tribunal should consider negotiation processes because in Mediterraneo, in sales contracts governed by the CISG, the latter also applies to the conclusion and interpretation of the arbitration clause contained in such contracts *[p. 52, para. 4 of PO1]*. Thus, in the present case, Article 8 of the CISG can be applied to interpret the choice of law governing the arbitration agreement.

B. IN THE ABSENCE OF AN EXPRESS CHOICE OF LAW TO GOVERN THE ARBITRATION AGREEMENT, THE LAW OF THE SALES AGREEMENT APPLIES

6. The Sales Agreement expressly provides that the law of Mediterraneo, including the CISG, is the law governing the whole Sales Agreement *[p. 14, Exb. C5, Clause 14]*. The Parties did not include any other choice of law clause concerning the arbitration agreement *[pp. 13&14, Exb. C5]*. According to Professor Lew, there is a strong presumption that the governing law of the main agreement in which the arbitration clause forms a part also governs the arbitration agreement, and such choice of law can even be implied as the agreement of the parties as to the law applicable to arbitration clause. Similarly, in ***Sulamérica v Enesa***, the English Court of Appeal accepted that "where the parties had not made an express choice of law, it was fair to start from the assumption that, in the absence of any contrary indication, the parties intended the whole of their relationship to be governed by the same system of law.
7. In the case at hand, the parties have chosen the law of Mediterraneo to be the governing law of the agreement which contains the arbitration clause and there is no other indication as to the law governing separately to the said clause.
8. The law chosen by the parties shall apply to all aspects of the Agreement. Article 9 of the Hague Principles states that – the law chosen by the parties shall govern all

aspects of the contract between the parties including interpretation; rights and obligations arising from the contract; performance and the consequences of non-performance, [...]. In the case at hand, Clause 14 of the Agreement states that – "This Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG) *[p. 14, Exb. C4, Clause 14]."* It is the only choice of law clause included in the whole agreement and thus it shall be applied to interpretation, performance and consequences of non-performance including other aspects of the contract.

9. Since the arbitration clause is only one of many clauses in a contract, it might seem reasonable to assume that the law chosen by the parties to govern the contract will also govern the arbitration agreement *[Redfern & Hunter, ¶3.12]*. In the present case as well, the arbitration clause is one of the many clauses in the agreement and therefore, the same law applies.

C. THE DOCTRINE OF SEPARABILITY DOES NOT IMPERIL THE PARTIES' CHOICE OF MEDITERRANEAN LAW TO GOVERN THE ENTIRE CONTRACT

10. The doctrine of separability does not lead to a different choice of law for the arbitration agreement between the parties. Article 16(1) of UNCITRAL Model Law states "a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause." This means that the arbitral tribunal's jurisdiction will only be affected where the defect causing the invalidity of the main contract necessarily extends, by its very nature, to the arbitration clause *[Working Group Report (1985)]*.
11. Furthermore, Art. 19.2 of HKIAC Rules that "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", merely means that the arbitration agreement is to be treated as independent agreement. It does not mean a separate law must be applied as a separate agreement. The doctrine of separability does not mean that the law applicable to the arbitration clause is necessarily different from that applicable to the underlying contract. It instead means

that differing laws may apply the main contract and the arbitration agreement *[Born I, p. 476]*. Furthermore, in the words of the English Court of Appeal in ***Sonatrach v. Ferrell***, "where the substantive contract contains an express choice of law clause but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract *[**Sonatrach v. Ferrell; Svenska v. Lithuania**]*." Similarly in the present case, as there is express choice of substantive law (the law of Mediterraneo) to govern the main contract but not about the governing law of the arbitration agreement, the law of Mediterraneo will govern the arbitration clause *[p. 14, Exb. C5]*.

12. Moreover, in ***ICC Case No.11869***, the tribunal decided that "Irrespective of its separability, there are no indications that the parties in the present case wanted to submit the arbitration agreement to the different law."

D. EVEN IF THE DOCTRINE OF SEPARABILITY LEADS TO THE ARBITRATION AGREEMENT'S BEING SUBJECT TO A DIFFERENT CHOICE OF LAW THAN THE SALES AGREEMENT, THE LAW APPLICABLE TO THE ARBITRATION AGREEMENT IS THE LAW OF MEDITERRANEO

13. Respondent contends that the arbitration agreement is considered to be a legally separate agreement from the container contract in which it is included *[p. 31, RNoA, ¶14]*. However, Claimant will contend that: A conflict of laws analysis under the applicable conflict of law rules, the Hague Principles *[p. 61, para. 43 of PO2]*, leads to the application of the law of Mediterraneo (1). The choice of Danubia as the seat of arbitration is not equivalent to a choice of applicable law (2).

1. A private international law analysis under the applicable choice of law rules leads to the application of the law of Mediterraneo.

14. The intention of the parties is to be taken into account in deciding which law governs a contract in cases where there is no express choice of law clause. In deciding the parties' intention, the circumstances of the case such as the conduct of the parties and other factors surrounding the conclusion of the contract as well as the context of the related contract can be taken into account *[Commentary of Hague Principles, ¶4.13]*.

15. The first point is that – Ms. Napravnik had suggested that Danubia to be the seat of arbitration based on the fact that it being the neutral country *[p. 56, para. 14 of PO2]*. Moreover, the Respondent had never mentioned about its intention to use Danubian Law throughout the negotiation. In the last negotiation, the former lawyers of both parties have discussed the arbitration clause and according to the notes of Mr. Antley, they have clarified in arbitration clause as in the neutral venue and applicable law but did not mention anything about using Danubian Law as the applicable law of the arbitration clause *[p. 35, Exb. R3]*.
16. Secondly, the parties have clearly chosen the law of Mediterraneo to be the governing law of the Sales Agreement. According to the Commentary of Hague Principles, a choice of law is found to appear clearly from the provisions of the contract only when the inference drawn from those provisions, that the parties intended to choose a certain law, is strong *[Commentary of Hague Principles, ¶4.8]*. Therefore, in the absence of the express choice of law in the arbitration agreement, the interpretation shall be according to the law expressly chosen in the main agreement.
17. Third, where the contract is in a standard form which is generally used in the context of a particular system of law, this may indicate that the parties intended the contract to be governed by that law, even though there is no express statement to this effect *[Commentary of Hague Principles, ¶4.9]*. The standard form of the agreement used in this case is based on the Standard Frozen Semen Sales agreement taking into account the Mediterraneo Guidelines for Semen Production and Quality Standards *[p. 10, Exb. C2]*. Therefore, it clearly shows that the parties have intended to use the Mediterranean Law for the interpretation.

2. The choice of Danubia as the seat of arbitration is not equivalent to a choice of law.

18. The choice of the seat is not the choice of the applicable law. Under the tacit choice of law principle as provided by Art. 4 of Hague Principles, which law applies is to be observed by the circumstances of the case where there is no express choice of law. As there is no expressly chosen law only for the arbitration agreement, the intention of

the parties shall be observed from the circumstances of the case. In the present case, the parties have clearly chosen the Law of Mediterraneo to be the governing law of the agreement. It shows that the parties have in fact intended to use the Meditarranean Law for the interpretation of the arbitration clause.

19. Being the seat of the arbitration clause is not enough to be the governing law of the arbitration agreement *[**Arsanovia v. Cruz City**]*. In the absence of an express choice of law, the circumstances of the case shall be taken into account to decide which law governs and in this case, the Danubian Law does not govern. The first point is that the parties never intended to use the Danubian Law as the governing law of the arbitration agreement. The seat was merely chosen because it is the neutral place, which have functioning judicial system. Ms. Napravnik has not observed the legal system of the place, as she has no intention to use it as the governing law of the arbitration agreement *[p. 56, para. 14 of PO2]*. The same is true when the contract contains terminology characteristic of a particular legal system or references to national provisions that make it clear that the parties were thinking in terms of, and intended to subject their contract to, that law *[Commentary of Hague Principles, ¶4.10]*.
20. Again the agreement is also governed by the CISG. However, under Danubian Law, the CISG is excluded from the interpretation of the arbitration agreement and the adaptation is not allowed without the express consent of the parties. It is entirely contrary from the intention of the parties. Therefore, the choice of Danubia as the seat of arbitration is not equivalent to a choice of applicable law.

II. THE APPLICATION OF MEDITERRANEAN LAW PERMITS THE PARTIES TO RELY ON PAROLE EVIDENCE TO DETERMINE THEIR INTENTIONS WHEN EXECUTING THE ARBITRATION AGREEMENT UNDER CISG ART. 8

21. Parole evidence rule is a rule that preserves the genuinity or integrity of a written document *[LawTeacher website]*. Explaining the parole evidence rule and its exceptions to the rule of Parole Evidence Rule has not been incorporated into the CISG. The CISG governs the role and weight to be ascribed to contractual writing

[CISG-AC 3]. According to Art. 11 of CISG, a party may seek to prove that a statement has become a term of the contract by any means, including by the statements of witnesses. It is also stated under Art. 8 of CISG, which concerns with the interpretation of the contract that all relevant circumstances of the case, including the negotiations, any course of conduct or performance between the parties, any relevant usages, and subsequent conduct of the parties are to be considered in determining intent of the party.

22. In ***MCC-Marble*** case, MCC-Marble sought to introduce evidence from the parties' negotiations to prove that the agreement did not include the pre-printed terms. The trial court applied the Parole Evidence Rule and granted summary judgment for the seller. The Eleventh Circuit reversed, holding that the Parole Evidence Rule does not apply when a contract is governed by the CISG. Moreover, in ***ECEM v. Purolite*** case and ***Fercus v. Palazzo*** case, the court similarly decided that evidence of negotiations or agreements was allowed to submit to determine the intention of the parties.
23. It is also stated under the Mediterranean Contract Law that a contract shall be interpreted according to the common intention of the parties through their conduct and the statements *[Art. 4.1 and 4.2 of the UNIDROIT Principles].* The regarding circumstances in determining one's intention are also clarified in the law which include (a) preliminary negotiations between the parties; (b) practices which the parties have established between themselves; (c) the conduct of the parties subsequent to the conclusion of the contract; (d) the nature and purpose of the contract; (e) the meaning commonly given to terms and expressions in the trade concerned; (f) usages *[Art. 4.3 of the UNIDROIT Principles].* Therefore, parole evidence is clearly allowed under the Law of Mediterraneo Law.

A. THE PARTIES INCLUDED THE HARDSHIP CLAUSE IN THE CONTRACT WITH THE INTENTION TO EMPOWER THE TRIBUNAL TO ADAPT THE CONTRACT IN CERTAIN CIRCUMSTANCES.

24. Adaptation means the restoration of equilibrium which has been affected during the cause of hardship *[Art. 6.2.3 of the UNIDROIT Principles]*. In the present case, the

parties have intended to include the adaptation clause and they have discussed about the link between the hardship clause and the adaptation clause.

25. The intention of the parties to include the adaptation clause is clear in the present case. The Claimant has suggested the ICC Hardship clause which has broad meaning in order to cover its definition of hardship *[p. 34, Exb. R2]*. According to the witness statement of Ms. Napravnik , her and Mr. Antley had a brief negotiation about the adaptation clause and Mr. Antley promised that he would come back with a proposal next morning *[p. 17, Exb. C8]*. This is supported by the witness statement of Mr. Krone who mentioned about the short notes of Mr. Antley *[p. 35, Exb. R3]*. The series of negotiations between the parties concerning the hardship and the adaptation clause clearly indicate that the parties have consented to add the adaptation clause in the agreement.
26. Comment on para. (1) of Art. 4.1 of the UNIDROIT Principles lays down the principle that in determining the meaning to be attached to the terms of a contract, preference is to be given to the common intention the parties. In this regard, it is clear in the case that the parties have common intention to include the adaptation clause judging by the series of negotiation upon its interpretation and connection with the arbitration. And such inclusion of hardship clause empowers early within the discretion of the tribunal to adapt the contract to restore the equilibrium which has been affected on account of the hardship suffered. Although the adaptation clause was not included expressly in the agreement, the inclusion of hardship clause implies the intention of the parties to adapt the contract in the face of hardship.
27. As the Parties expressly mentioned in the sales agreement to solve any dispute arising out of contract by arbitration *[p. 14, Exb. C5, Clause 15],* Claimant will argue that the wording "any dispute arising out of" includes “adaptation” (1) and that the HKIAC Rules grant the tribunal board discretion and authority to adapt the contract (2).

1. The language “any dispute arising out of” includes “adaptation”.

28. In the Sales Agreement, it is expressly mentioned in clause 12 that “Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of

the Seller … neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." Thus, one can assume that 'hardship' is a contractual dispute.

29. Arbitration agreement without an express limitation should in general be interpreted to cover all claims in connection with a contract, irrespective of whether they are claims in contract, in tort or of statutory nature *[Lew, Mistelis & Kroll, p. 153]*. Various authorities have interpreted the "all disputes" or "any dispute" formulae broadly, usually concluding that they extend to all disputes having any plausible factual or legal relation to the parties' agreement or dealings. It was held in ***Mgmt & Tech. v. Parsons-Jurden Int'l Corp***., that an agreement to arbitrate 'any dispute' without strong limiting or excepting language immediately following it logically includes not only the dispute, but the consequences naturally flowing from it – here, the amount of additional compensation.

30. "Arising out of" is a broader formulation than "arising under." In the case of ***Sweet Dreams v. Dial-A-Mattress*** any dispute between contracting parties that is in any way connected with their contract could be said to 'arise out of' their agreement and thus be subject to arbitration under a provision employing this language.

2. The HKIAC Rules grant the Tribunal broad discretion and authority to adapt the contract.

31. Adaptation of the contract is within the discretion of the arbitral tribunal. To determine the scope of arbitration agreement, the tribunal has to interpret the agreement and consider the intention of the parties *[Lew, Mistelis & Kroll, p. 150]*. In ***Mitsubishi Motors Corp. case***, the Supreme Court stated "[……]any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or defense to arbitrability." In the case at hand, the parties have agreed to include the hardship clause and have also discussed upon the connection of hardship clause with the arbitration clause *[p. 17, Exb. C8; p. 35, Exb.*

R3]. This can lead to the conclusion that the parties are clearly intended to connect "hardship" and "arbitration".

32. On 12th April, 2017,when the parties discussed about the adaptation of the contract to include in the sales agreement, Mr. Antley replied that" in his view, adaptation of the contract should be the task of the arbitrators if the parties could not agree" *[p. 17, Exb. C8].* This clearly shows the Respondent's intention to arbitrate the dispute concerning the adaptation of the contract.
33. The adaptation clause does not necessarily need to be included in the contract. According to Art. 19.1 of HKIAC Rules, the tribunal has been conferred wide jurisdiction to determine the dispute including any objections with respect to the existence, validity or scope of the arbitration agreement. Under unforeseeable imposition of tariffs, the tribunal shall act to recover the loss of the Claimant. Therefore, in the present case, the tribunal is entitled to adapt the contract as a remedy of hardship. Furthermore, in CLOUT Case No. 778, although the Respondent challenged the jurisdiction of the tribunal alleging that the arbitration agreement did not determine the matters to be referred to arbitration, the tribunal held that it had jurisdiction to settle the dispute. This shows that the matter of dispute did not include in the arbitration agreement cannot preclude the wide jurisdiction of the arbitral tribunal.
34. Pursuant to Art. 19.4(a) of HKIAC Rules, if a question arises as to the existence, validity or scope of the arbitration agreement before the constitution of the arbitral tribunal, the arbitration shall proceed and any such question shall be decided by the arbitral tribunal once constituted. In the present case, the adaptation of the contract is a question concerning the scope of the arbitration agreement, this Art. proves the competence of the tribunal to determine the dispute.
35. Furthermore, Art. 19.5 of HKIAC Rules also confirms the wide discretion of the tribunal by stating that "[..] Any question as to the jurisdiction of the arbitral tribunal shall be decided by the arbitral tribunal once constituted, pursuant to Art. 19.1". As Respondent questioned the jurisdiction of the tribunal for lack of express conferral

power concerning the adaptation of the contract *[p. 31, RNoA, ¶¶ 12&13]*, that question is to be decided before the tribunal under Art. 19.5 of HKIAC Rules.

36. The jurisdiction of the tribunal is to be determined due to the hybrid character of arbitration, the will of the parties as expressed in the arbitration agreement and the law applicable to the arbitration agreement *[Lew, Mistelis & Kroll, p. 331].* In the case at hand, the parties intention to adapt the contract under an unforeseeable event can be found through the negotiation process between them *[p. 17, Exb. C8].*

III. ADAPTATION IS NOT OUTSIDE THE SCOPE OF THE ARBITRATION CLAUSE UNDER THE NEW YORK CONVENTION, ART. V(1)(C).

37. Respondent cannot deny the enforcement of the tribunal's award on the grounds of Art. V(1)(c) of New York Convention if the tribunal order him to pay additional amount of the payment to the Claimant. According to Art. V(1)(c) of the New York Convention, recognition and enforcement of the award may be refused when it contains decisions on matters beyond the scope of submission to arbitration. However, the inclusion of hardship clause and the parties' intention to use it as the remedy for the hardship suffered lead to the conclusion that the adaptation is within the scope of arbitration.

38. Evidence of consent has been found in the parties' conduct in performing the contract. In situations where a party does not sign the contract or return a written confirmation, but nevertheless performs its obligations, many courts have held that such conduct amounts to a tacit acceptance of the terms of the contract, including the arbitration agreement ***[Metropolitan Steel v. Macsteel].*** The agreement of the parties to give wide discretionary power and authority to the arbitrators to adapt the contract amounts to a tacit acceptance of the terms of the contract.

39. The award for the additional payment is not beyond the scope of the submission to arbitration because the parties' consent to arbitrate any dispute arising out of that contract satisfying the requirements of Art. II of the New York Convention. The hardship clause and the adaptation of the contract is within the scope of the of the parties' conduct which amount to the tacit acceptance satisfying the requirements of

Art. II of the New York Convention. Since the adaptation of the contract is not outside the scope of arbitration clause thus Respondent can't invoke Art. V(1)(c) to deny the tribunal's award.

ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PORRCEEDINGS

40. Respondent has been concurrently conducting another arbitration under HKIAC Rules which also came out because of the immediate imposition of tariffs by the Mediterranean Government *[p. 49, C's email to tribunal; p. 60, para. 39 of PO2]*. Contrary to Respondent's allegation *[p. 50, R's email to tribunal],* Claimant is entitled to submit the said evidence because the HKIAC Rules empower the tribunal to admit any evidence that is relevant to the case and material to its outcome (I), and the source of the evidence in question does not affect its relevance or materiality (II).

I. **ARTICLE 22 OF THE HKIAC RULES EMPOWERS THE TRIBUNAL TO ADMIT ANY EVIDENCE THAT IS RELEVANT TO THE CASE AND MATERIAL TO ITS OUTCOME**

41. The said evidence is admissible under HKIAC Rules. As the parties agreed to arbitrate under HKIAC Rules *[p. 14, Exb. C5, Clause 15],* the tribunal has been conferred power to determine the admissibility, relevance, and materiality and weight of evidence, including whether to apply strict rules of evidence under Art. 22.2 of HKIAC Rules. The tribunal is not bound by rules of evidence *[Caron/ Caplan, p. 572;* ***Generica Limited case****].* Moreover, the arbitral tribunal may allow a party to produce relevant documents or other evidence [Art. 22.3 of HKIAC Rules], there are a lot of similarities between the Respondent's other arbitration and the present arbitration. In both cases, the dispute arises from the immediate imposition of tariffs and the relief sought is to adapt the contract. Therefore, the tribunal should allow the said evidence as material and relevant.

42. HKIAC Rules which is the governing rules of the present arbitration proceedings state in its Art. 22(2) that the tribunal has power to decide the admissibility, relevance and materiality of the evidence. Therefore, Claimant will contend that the evidence is

relevant to the parties' intentions when they executed the sales agreement (A), and the evidence is material to the outcome of the case (B).

A. THE EVIDENCE IS RELEVANT TO THE PARTIES' INTENTIONS

43. The term "relevant evidence" in common law generally means "evidence having a tendency to make the existence of any fact that is of consequence in the case more probable or less probable than it would be without the evidence" *[Pilkov, p. 148]*. Moreover, probative facts are data that have the effect of proving an issue or other information. Probative facts establish the existence of other facts. They are admissible as evidence and aid the court in the final resolution of a disputed issue *[West's Encyclopedia]*.

44. The facts and circumstances of Respondent's other arbitration are almost identical to the present case. In the said arbitration, the dispute concerned the sale of a mare by Respondent to a buyer in Mediterraneo, and the contract included DDP delivery, ICC Hardship Clause 2003, a choice of law clause in favor of Mediterranean law and the Model HKIAC-Arbitration Clause providing for arbitration in front of three arbitrators under the HKIAC Arbitration Rules *[p. 60, para. 39 of PO2]*. Similarly, in the present case, the dispute concerned the sale of frozen semen under the contract providing DDP, hardship clause, a choice of law clause in favor of Mediterranean law and the arbitration clause drafted based on HKIAC Model clause. Moreover, in both cases, the parties suffering the loss contend that the immediate imposition of tariffs is an unforeseeable event under Art. 6.2.2 of Mediterranean Contract Law (UNIDROIT Principles) and thus they are entitled to adapt the contract and renegotiate the price under Art. 6.2.3 of Mediterranean Contract Law *[p. 60, para. 39 of PO2]*. Therefore, Claimant is entitled to submit the said evidence as relevant evidence to the present case.

B. THE EVIDENCE IS MATERIAL TO THE OUTCOME OF THE CASE.

45. "Materiality is a dependent category: after the admission of one piece of evidence each subsequent piece of evidence concerning the same fact becomes less material or no more material to the case *[Pilkov, p. 149]."* As the tribunal has not been provided with

the evidence of other arbitration proceeding, the said evidence is sufficient enough to prove its materiality to the outcome of the case.

46. The said evidence can affect the outcome of the present case. Respondent's Partial Interim Award in which the tribunal confirmed its power to adapt the contract under the unforeseeable, immediate imposition of tariffs in the said arbitration is important to persuade the tribunal to grant adaptation of the contacrt in the present case. In international arbitration practice, the materiality criterion is considered mostly in relation to its connection to the outcome of the case, whereas relevance concerns the general relationship between evidence and the case *[Pilkov, p. 149]*. In the present case, Respondent who had itself asked for an adaptation of the price to a change of circumstance in other arbitration is denying any need to adapt the contract in the present case *[p. 49, C's email to tribunal]*. Therefore, by submitting that evidence, the tribunal may consider that confirmation of its jurisdiction to adapt the contract is not injustice in the present case and it may reason the decision of the other arbitration.

II. THE SOURCE OF THE EVIDENCE IN QUESTION DOES NOT AFFECT ITS RELEVANCE OR MATERIALITY.

47. Claimant is merely trying to collect relevant and material evidence for the claim. According to Art. 13.1 of HKIAC Rules stating "[…]such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case." which is similarly provided in Art. 18 of UNCITRAL Model Law, equal treatment and full opportunity to present one's case are fundamental mandatory principles in international commercial arbitration *[Soh Beng Tee v. Fairmount; Trustees of Rotoaria Forest case]*. In this regard, Claimant is acquiring the said evidence (Partial Interim Award of other arbitration) from a company addressed by Mr. Velazquez and how the company obtained that evidence does not concern with Claimant *[p. 61, para. 41 of PO2]*.

48. Even if the said evidence is obtained from one of Respondent's employees *[p. 50, R's email to tribunal]*, he is entitled to disclose it under Art. 45.3(a)(i) of HKIAC Rules and Art. 3(13) of IBA Rules. Although both employees of Respondent had been under

confidentiality obligation (Art. 45.2 of HKIAC Rules) since both were witnesses in the said arbitration *[p. 61, para. 41 of PO2],* they can be exempted from liability under Art 45.3 of HKIAC Rules. They have to disclose the said evidence to protect Claimant's legal right to adapt the contract.

49. Furthermore, Art 3(1) of IBA Rules allows the parties to submit to the tribunal "all documents available to it on which it relies, including public Documents and those in the public domain". In ***Caratube International Oil Company case***, the tribunal decided in favor of Claimant to produce non-privileged leaked documents which were publicly available from Wikileaks page though the page publishes secret information, new leaks and classified media from anonymous source. In this regard, in the present case, the said evidence is obtained from a company which provides intelligence on the horseracing industry either from a hacker or from one of the former Respondent's employees, it can be assumed that the evidence has already been in public *[p. 61, para. 41 of PO2].*

A. ADMITTING THE EVIDENCE DOES NOT VIOLATE THE RESPONDENT'S INTEREST IN CONFIDENTIALITY IN THESE PROCEEDINGS.

50. As Claimant is not a party to the said arbitration, confidentiality obligation under Artt. 45.1 and 45.2 of HKIAC Rules do not address to Claimant. Claimant's CEO heard about that arbitration at the annual breeder conference from Mr. Kieron Velazquez *[p. 60, para. 40 of PO2].* Since Mr. Velazquez had not been involved in that arbitration, he is also not bound by confidentiality of that arbitration according Artt. 45.1 and 45.2 of HKIAC Rules.

51. Furthermore, any confidentiality provisions in the parties' arbitration agreement are binding only on the parties themselves and not on third parties including witnesses *[Born II, p. 2789;* ***Esso Australia case; Lawrence v. Household****]*. Therefore, Respondent should not allege that Claimant obtained that evidence in violation of contractual and statutory confidentiality obligations *[p. 50, R's email to tribunal].*

52. According to Art. 45.3(a)(i) of HKIAC Rules, a party may disclose the arbitration and/or the award or emergency decision to protect or pursue a legal right or interest

of the party. Moreover, although the Hong Kong Arbitration Ordinance (HKAO) expressly imposed confidentiality in arbitration proceedings from 2011, mandatory legal disclosures, disclosure necessary for enforcing a right and disclosure in course of challenging the arbitral award are the three exceptions *[Samuel].*

53. In ***Westwood Shipping Lines case***, Flaux J allowed to use documents previously disclosed in arbitration, concluding that disclosure was reasonably necessary to protect Claimants' legitimate interests. Again, in the case of ***John Emmott v. Wilson***, it was decided that in this case, without being informed of the London arbitration, there was a danger the foreign courts would be misled and disclosure was therefore required in the interests of justice. The court of appeal also dismissed the appeal. In this regard, in the present case, the said evidence in which the tribunal confirmed its jurisdiction to adapt the contract *[p. 60, para. 39 of PO2]* is material to protect Claimant's legal right to adapt the contract and admitting that evidence does not violate Respondent's interest in confidentiality in these proceedings.

B. CLAIMANT'S RIGHT TO DUE PROCESS MUST BE UPHELD

54. Claimant may challenge the award under New York Convention if the evidence was not allowed in the present case. Pursuant to Art. V(1)(b) of the New York Convention in order to recognize and enforce the award, Claimant must have an opportunity to present its case and provide all of the relevant and material evidence to the Tribunal. Parties should have been provided with an opportunity to present their case *[Fouchard/ Gaillard/ Goldman].*

55. In ***Iran Aircrafts v. Avco Corp.*** case, the Second Circuit of the US recognized that the New York Convention strongly encourages enforcement but refused to enforce the award because the arbitrators, by committing an egregious procedural error, had denied Avco the ability to present its case.' As this Comment will demonstrate, the New York Convention provides limited defenses to the enforcement of arbitration awards. One such defense is activated when a party is "unable to present his case *[The New York Convention, infra Appendix, Art. V, ¶(1)(b)]".*

56. The Tribunal shall not prevent the Claimant from providing the crucial evidence which is important to persuade the tribunal that adaptation is possible under its jurisdiction and relevant because of the similarities between two cases.

ISSUE 3: THE CLAIMANT IS ENTITLED TO THE ADDITIONAL PAYMENT IN THE AMOUNT OF USD $1.250 MILLION.

I. THE PARTIES INTENDED TO MODIFY THE DDP DELIVERY TERMS SO THAT CLAIMANT COULD NOT BEAR THE RISKS ASSOCIATED WITH UNAVOIADABLE AND UNFORESEEABLE TARIFFS

57. The Claimant and Respondent agreed upon the DDP delivery but as the Claimant was not willing to take all the risks associated with custom regulations and import restrictions, they made a discussion to include the hardship clause into the contract and the intent of the parties can be interpreted under Art8 of CISG **(A).** As the parties has been concentrated in a discussion about including the hardship wordings into the contract the Respondent could not have been aware about that intent **(B).** The parties modified the DDP incoterm in accord with incoterm 2010 rules by adding the hardship wordings into the agreement since the Claimant did not want to bear all the risks upon delivery **(C).**

A. THE PARTIES' ORIGINAL INTENT WAS THAT THE RESPONDENT WOULD BE RESPONSIBLE FOR IMPORT COSTS

58. The Claimant and the Respondent concentrated in discussion upon the inclusion of the hardship clause before the conclusion of the contract and the parties intended to include the changes in customs regulations or import restrictions when they drafted the hardship clause into the contract *[p. 12, Exb. C4]*. Art. 8 can be used to address the intention of the parties for interpreting hardship and other content related to matters governed by CISG**.** Whereas Art. 7 addresses interpretation of and gap- filling for the Convention itself, Art.8 is concerned with the interpretation of statements and other conduct of the parties—provided that the statements or conduct relate to a matter governed by the Convention *[Digest CISG].*

59. The Convention requires that the interpretation takes account of the contract as a whole. Individual clauses must be considered as an integral part of the contract and are to be interpreted in their context rather than in isolation. The principle of good faith serves as a guideline for the *interpretation [Schwenzer, supra, Art. 8 CISG note 29 et seq; Obergericht [Appellate Court] des Kantons Thurgau (12 December 2016)].*
60. With an email of 24 March 2017, Claimant offered certain conditions to supply Respondent with 100 doses of Nijinsky III's frozen semen *[p. 10, Exb. C2]*. Respondent had no problems with most of the terms of the offer but insisted on a delivery DDP *[p. 11, Exb. C3]*. Both Claimant and Respondent accepted for the contract a delivery DDP *[p. 12, Exb. C4]*.
61. The Claimant in his email of 31st March 2017 accepted DDP delivery in principle but he was not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions and he asked to be relieved from all risks associated with such delivery as he suffered the hardship due to the increment of the cost in 2014. Also, the Claimant suggested to include the hardship clause into the contract to address such consequent changes *[p. 12, Exb. C4]*.
62. The Claimant and the Respondent made discussions on the inclusion of a hardship clause. Again, Respondent considered the originally suggested ICC-hardship clause 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 *[p. 30, RNoA, para. 4]*.
63. Both Claimant and Respondent not only had clear intention to include the hardship clause before they reach the Frozen Semen Sales Agreement but also they included the phrase "hardship" under clause 12 of the Sales Agreement. In clause 12 of the contract Claimant and Respondent included the phrase, "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 *[p. 14, Exb. C5, Clause 12]."*

64. Therefore, the hardship clause has to be interpreted as covering not only the most prevalent risk of changes in the health and safety requirements but also other risks including additional tariffs, like the present case. It is clear that the Parties intention to include hardship clause into the Agreement is very well evidenced by the fact that in connection with a change in the delivery terms.

B. RESPONDENT KNEW OR COULD NOT HAVE BEEN AWARE OF THE FOREGOING INTENT

65. As the Claimant and the Respondent concentrated on a discussion upon the inclusion of hardship into the agreement the Respondent cannot unaware about the intent of including the hardship into the agreement.

66. With an email of 28 March 2017, the Respondent offered the Claimant to make the contract on the basis of DDP *[p. 11, Exb. C3]*. But as the Claimant was not willing to take all the risks associated with a change in delivery term such as changes in customs regulation or import restrictions, he suggested including the hardship wordings into the agreement *[p. 12, Exb. C4]*.

67. Not only the parties intended to include the "hardship" wordings into the contract, they also include the "hardship" wordings under clause 12 of the agreement stated that "Seller shall not be responsible for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous *[p. 14, Exb. C5]."*

68. Therefore, Respondent has been known or aware of the intention to include the hardship wordings into the agreement.

C. THE PARTIES ARE PERMITTED TO MODIFY THE DDP TERMS WITHIN THEIR CONTRACT

69. The Parties accepted DDP delivery principle but they modified some facts under clause 8 and clause 12 of the Agreement. Normally, in DDP the seller has to bear all the risks [Incoterms 2010, p. 69] but in the case the parties modified the DDP incoterm under agreement. When the parties modify it in their contract, the provisions in the contract which contradict the Incoterms prevail *[ACC]*.

70. In general, DDP incoterm represents maximum obligation of the seller. DDP means that the seller bears all the costs and risks involved in bringing the goods to the place of destination to pay any duty for both export and import and to carry out all customs formalities but Incoterms do not provide a complete regulation of international sales contracts. Issues such as customary operations of carriers, payment of the price, or transfer of ownership do not fall under the scope of Incoterms. When parties modify Incoterms in their contract, the provisions in the contract which contradict the Incoterms prevail *[ACC]*.
71. In this case, Claimant and Respondent agreed that Respondent would bear several risks associated with shipment in contradiction with the DDP Incoterm definitions. The Claimant accepted Respondent's offer to insist the Agreement on a basic of delivery DDP. Although the Claimant accepted the DDP delivery he was not willing to take any further risks associated with changes in custom regulation or import restrictions as he had an experience of unforeseeable additional health and safety requirements and suggested to include the hardship into the agreement for such changes *[p. 12, Exb. C4]*.
72. Although the parties agreed to do the delivery DDP under clause 8 of the agreement, they modified the facts of DDP incoterm under clause 12 of the agreement stated that "Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous *[p. 14, Exb. C5]."*
73. Therefore, the parties modified the DDP terms within their agreement in accord with incoterm 2010.

II. EVEN IF CLAIMANT WAS TO BEAR THE RISKS ASSOCIATED WITH THE DDP TERMS, THE UNAVOIDABLE AND UNFORESEEN TARIFFS AMOUNTED TO A HARDSHIP UNDER CLAUSE 12 OF THE AGREEMENT

74. The Claimant and Respondent had an obvious intention to include the hardship clause before the conclusion of the contract and the imposition of new tariffs that the

Claimant encountered amounts to the comparable unforeseen event which was provided under the clause 12 of the Sales Agreement **(A)**. The Respondent knew or could not have been unaware that 30% tariffs amounts to hardship **(B).**

A. THE 30% TARIFF IS A HARDSHIP AS INTENDED BY THE PARTIES UNDER CLAUSE 12 OF THE AGREEMENT

75. The parties included the hardship wordings into the Agreement on 6th May 2017 *[p. 14, Exb. C5,]* and the imposition of tariff was on 19th December 2017 *[p. 15, Exb. C6]* so the imposition of tariff was after the Sale agreement concluded. **(1)**As the Government of Equatoriana was always been the supporter of free trade the sudden increment of tariff is unforeseeable **(2)** and unavoidable **(3).**

1. The 30% tariff was imposed after the Sales Agreement was concluded

76. The Claimant and the Respondent concluded the Sales Agreement on 6th May 2017 *[p. 13, Exb. C5]* .the imposition of tariffs by the Equatorianian Government is on 19th December 2017 which can be seen in the article which was written on 20th December 2017which was stated that "AFTER YEARS of continuing growth the system of free trade has received a second serious blow by yesterday's announcement of the Government of Equatoriana to impose a tariff of 30 per cent upon all agricultural goods from Mediterraneo as a retaliation for the previous restriction imposed by Mr. Bouckaert, the newly elected President of Mediterraneo *[p. 15, Exb. C6]."*

2. The 30% tariff was unforeseeable.

77. The sudden imposition of 30% tariff by the Equatorianian Government who has always been one of the biggest supporters of the existing system of free trade is a big surprise to everyone and the Equatorianian Government had always tried to resolve trade disputes amicably and had not relied on retaliatory measures against trade restrictions by other countries. Even more surprising was the frozen semen was listed in the schedule released by the Ministry of Agriculture of the products that fell under the new tariffs-regime and that this also applied to racehorse semen *[p. 15, Exb. C6].*

3. The 30% tariff was unavoidable.

78. The tariffs was imposed when the Claimant was about to make the last shipment of the semen. And in order to make the last shipment before the due date the Claimant had to pay the imposed tariff price by the Equatorianian Government. Also, when the Claimant make known to the Respondent that the tariff was imposed Mr. Shoe maker urged him to authorize the shipment as planned since Black Beauty needed the doses urgently and had already initiated the payment of the second installment. He emphasized their interest in a long-term relationship with us and told me about their plans to buy also 50 doses from Empire's State, our second stallion of world reputation *[p. 18, Exb. C8]*. Therefore, the 30% imposition of tariff was unavoidable and the Claimant had no choice but to bear all the risks.

B. RESPONDENT KNEW OR COULD NOT HAVE BEEN UNAWARE THAT THE 30% TARIFFS AMOUNTS TO A HARDSHIP UNDER THE SALES AGREEMENT

79. The parties concentrated on a discussion upon the inclusion of hardship wordings into the contract and they also included that under clause 12 of the Sale agreements.

80. The Respondent also encountered the same things like the Claimant in the past. The Respondent accepted to sell three mares to the buyer from Mediterraneo and made a delivery on a basic of DDP. There was also the imposition of the tariffs on agricultural products by the President of Mediterraneo, and due to that Respondent asked for a renegotiation of the price under the ICC Hardship Clause 2003 and Art. 6.2.3 of the Mediterranean Contract Law *(UNIDROIT Principles)* and refused delivery of the mare *[p. 60, PO2]*.

81. So comparing to the experiences of the Respondent in the past, the Respondent knew or could not have been unaware that 30% tariff amounts to the hardship under Sale agreement.

III. CLAUSE 12 OF THE AGREEMENT DOES NOT PREVENT THE APPLICATION OF CISG ART. 79

82. The parties agreed CISG to govern the agreement *[p. 14, Exb. C5]* and that means all parts of CISG govern the whole agreement. In the nature of Art.6, the parties must

make a clear agreement to exclude a part from CISG but there is no such agreement in present case **(A)** and clause 12 of the agreement allows for adaptation **(B).**

A. UNDER ARTICLE 6 OF THE CISG, THE PARTIES MAY DEROGATE FROM AND SUPPLEMENT THE PROVISIONS OF THE CISG

83. Respondent said the Claimant cannot rely on CISG but the parties included hardship clause into the contract but there is no special regulation for the exclusion of applying Art.79 CISG and it does not constitute the derogation under Art.6 of CISG *[p. 32, RNoA, Clause 20].*

84. In the Sale agreement, it is stated that "This Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG) *[p. 14, Exb. C5, Clause 14]."*

85. Although the contract is governed by the CISG, the parties can invoke Art.6 when they want to exclude the convention or derogate its provision *[SCHWENZER, p. 115].*

86. The application of Art. 6 to Part III of the CISG are relatively straightforward. Having concluded a contract, the parties may further agree that such contract will not be governed by some or all of the provisions of the CISG addressing *[Jack M. Graves].*

87. The general principle of party autonomy manifest in Art. 6 enable parties to exclude the applicability of the CISG in whole or part. The intent of the parties to exclude must be determined in accordance with Art. 8 CISG. Such intent should be clearly manifested, whether at the time of conclusion of the contract or at any time thereafter. This standard also applies to exclusions during legal proceedings *[CISG-AC 16].*

88. The exclusion of the CISG requires mutual agreement. The absence of such agreement is sometimes labeled as 'negative requirement' for the applicability of the Convention *[SCHWENZER, p. 105].* However, there were no such intent of the parties in the conclusion of the contract, the application of Art. 6 of CISG explored narrowly and Claimant can rely on Art. 79 of CISG.

B. CLAUSE 12 OF THE AGREEMENT SUPPLEMENTS AND DOES NOT DEROGATE FROM ANY PROVISIONS OF THE CISG THAT ALLOW FOR ADAPTATION

89. The Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG) *[p. 14, Exb. C5, Clause 14]*.

90. The word hardship under Clause 12 of the Agreement can be used as a supplement for adaptation according to any articles under CISG as there is no special expressed agreement upon excluding Artt. upon CISG.

IV. THE TRIBUNAL SHOULD ADAPT THE CONTRACT AND AWARD CLAIMANT US$1.250 MILLION UNDER THE CISG

91. When the Claimant ask the tribunal for adaptation, and as there is no proper interpretation of hardship under CISG, the Claimant can invoke Art7 (2) of CISG as a gap-filler between UNIDROIT Principles and CISG **(A).** The new imposition of tariffs forms an impediment in the sense of provision under Art.79 (1) CISG and this Art. provides implied authority to adapt the contract **(B).** The hardship clause under the agreement implies that adaptation is possible but there is no express adaptation clause. As Art.7 (2) CISG provides internal gap to the provisions of the CISG, the Claimant can invoke Art. 50 CISG as general principle for adaptation **(C).** As The Claimant needs the tribunal to adapt the contract and award Claimant $1.250 million, Claimant can rely on Art. 28 for specific performance under CISG in this case **(D).** The Claimant had done all of his obligations required performance as a seller and has the right to ask for additional price under Art.62 CISG **(E).**

A. THE AGREEMENT MUST BE INTERPRETED IN ACCORDANCE WITH CISG ARTICLE 7(2)

92. Both of the parties' countries, Equatoriana and Mediterraneo are contracting states of CISG and their general contract law is verbatim adoption of UNIDROIT Principles *[p. 52, PO1, Clause 4]*. The UNIDROIT Principles are the expression of general principles behind CISG which contains an expression of hardship clause to adapt the contract. The interpretation of Art. 7(2) provides as a gap-filler between CISG Art. 79 and UNIDROIT Principles Artt. 6.2.2 and 6.2.3.

93. As CISG and the UNIDROIT Principles lay down rules on international commercial contracts and have a strong resemblance in their subject matters. The UNIDROIT

Principles are interesting in relation to the CISG Art. 79, because the former contain an express hardship clause. And also the UNIDROIT PRINCIPLES may be able to provide a suitable solution for adaption of the contract to hardship issues under the CISG. Therefore, hardship may in some situations constitute an impediment in the meaning of Art. 79. This can be seen as a gap in the CISG that may or may not be filled by Artt. 6.2.2 and 6.2.3 in the UNIDROIT Principles. In this context "gap" means that a matter is governed but not expressly settled by the CISG, thereby leaving certain questions unresolved. This method of "gap filling" is sanctioned in the CISG itself, Art. 7 *[Rolf Kofod]*.

94. Art. 7 CISG lets the UNIDROIT Principles act as an instrument of interpretation. Under Art. 7(2) CISG; "Questions concerning matters governed by this Convention which are not expressly settled in conformity with general principles on which it is based or, in the absence of such principles, in conformity. The problem of hardship could thus be regulated by rules of domestic law if there was a gap in the CISG regarding the promisor's invocation of radically changed circumstances, making its performance more onerous.

B. ARTICLE 79 OF THE CISG PROVIDES A RULE WHICH EXPRESSLY ALLOWS FOR ADAPTATION

95. The imposition of 30% tariffs on selected products from Mediterraneo including animal semen amounts to the impediment *[p. 6, NoA, Clause 10]*. The Claimant suffered comparable unforeseen event provided under clause 12 of the agreement and the clarification of hardship under Art.79 CISG. The interpretation of the exemption clause of Art. 79 revolves around the fundamental concept that the performance of the contract is prevented by an impediment which cannot be controlled by the party.

96. The party is exempted under Art. 79 if the failure to perform is due to (a) an impediment which is beyond his control, (b) unforeseeable, and (c) unavoidable in the sense that the party could not reasonably be expected to avoid or overcome the impediment or its consequences. The interpretation of the exemption clause of Art. 79 revolves around the fundamental concept that the performance of the contract is

prevented by an impediment which cannot be controlled by the party *[COMMENTARY ON CISG]*.

97. According to the interpretation of impediment described in ***[Watches case]*** a decision has used language suggesting that an "impediment" must be "an unmanageable risk or a totally exceptional event, such as force majeure, economic impossibility or excessive onerousness".

98. Art. 79 CISG itself presupposes capacities of a judge that a judge can adapt a contract through the interpretation of the reasonable expectation expressly incorporated in Art. 79(1). Whether a party could reasonably be expected to overcome an impediment, in other words, whether a "reasonable person" could expect a party to overcome an impediment, is ultimately determined by a judge presiding over the case. By this capacity of an umpire of reasonableness, a judge can adapt a contract by ordering a solution reasonably expected to be taken.

99. Therefore, the sudden increase in 30 per cent tariffs on selected products from Mediterraneo including on animal semen by Equatorianian Government is changed circumstances that were not reasonably foreseeable at the time of the conclusion of the agreement. This situation forms an impediment in the sense of provision under Art. 79 (1) CISG. And therefore, the Claimant can invoke Art. 79 CISG to make adaptation within the realm of interpretation of the CISG.

C. ARTICLE 50 CISG ALLOWS FOR PRICE ADJUSTMENT

100. The new imposition made by the Government of Equatoriana is the changed circumstance which makes the Agreement more onerous. One of the "general principles" that "changed circumstances" are linked to a "right to renegotiation" comes from Art. 50 of the CISG which provides the price adjustment.

101. As Art. 7(2) CISG provides internal gap filler in inconformity with the Convention's general principles, so as to ensure uniformity in the application of the Convention, the Claimant can invoke Art. 50 as general principles. In *[Scafom Int'l v. Lorraine Tubes]* buyer, and seller, had concluded an agreement for the sale of steel tubes. After the conclusion of the contract and before delivery, the price of steel unexpectedly rose by

about 70%. The Court of Cassation held that pursuant to Art. 7(2) CISG, gaps had to be filled on the basis of the general principles underlying the Convention and, pursuant to the general principles upon which the Convention is based, a party invoking a change in circumstances fundamentally disrupting the contractual equilibrium, had the right to request re-negotiation of the contract.

102. Art. 50 CISG provides the buyer for the remedy of price reduction when the seller has delivered goods that do not conform with the contract. However, the remedy is not available to the buyer if he has refused the seller remedies any failure to perform his obligations under Art. 37 or 48. This concept of price reduction as a remedy for the Buyer can be extended as a general principle within the CISG to provide a remedy for the Seller as well – in our case, the Claimant renegotiating the price based on the changed circumstances of the contract.

103. When Equatorianian Government announced new imposition of tariffs, the Claimant made known to the seller that new imposition made the shipment 30% more expensive and requested the Respondent to find a solution for this changed circumstance *[p. 16, Exb. C7]*.

104. On 21 January 2018, Mr. Shoemaker called and urged the Claimant to authorize the shipment as planned since the Respondent needed the doses and had already initiated the payment of the second installment. The Claimant authorized delivery even before an agreement on the details had been reached and paid the 30% in tariffs relying on Respondent's promise that a solution would be found and that they were interested in a long-term relationship. However, the Respondent's CEO stopped the negotiations and refused to pay any additional amount for the tariffs in a meeting of 12 February 2018 *[p. 18, Exb. C8]*.

105. In conclusion, adaptation of the contract already exists general principles within the CISG through Art. 7 and Art. 50. And then, the Claimant can invoke Art. 50 as a general principle for contract adaptation by using Art. 7 as an internal gap filler.

D. ARTICLE 28 CISG ALLOWS FOR SPECIFIC PERFORMANCE

106. The Claimant requires the tribunal to order the Respondent to pay additional price as a specific performance. And then, Claimant can rely on Art. 28 which can be used to grant the tribunal to the availability of such performance under CISG in this case.

107. The Art. constitutes a compromise between legal systems that deal differently with the right of a party to claim specific performance of the contract. According to Art. 28, a court is not obliged to grant specific performance under the Convention if it would not do so for similar sales contracts under its domestic law. "Specific performance" means requiring the other party to perform its obligations under the contract through court action [Artt. 46 and 62] *[Digest CISG]*.

108. For example, the seller may obtain an order requiring the buyer to pay. Art. 62 CISG gives the seller the right to require performance by the buyer of all of his obligations. This includes the obligation to pay the price. The seller's right to require performance is restricted by Art. 28 CISG, pursuant to which a court is not bound to give judgment for specific performance unless it would do so under its own law in respect of similar contracts of sale not governed by the CISG. Art. 148 of the Swiss Law of Obligations provides for the independent right of the seller to require the contract price. In contrast to the Common Law, the seller can claim payment independently from claims for damages. Thus, the restriction under Art. 28 CISG can be disregarded in the case at hand *[**Watches case**]*.

109. Therefore, the Claimant can rely on Art. 28 CISG, pursuant to which a court has the right to order the Respondent to pay additional price as specific performance.

E. ARTICLE 62 PROVIDES THAT THE CLAIMANT IS ENTITLED TO REQUEST AND RECEIVE THE PURCHASE PRICE FROM THE RESPONDENT

110. The Claimant made the finale shipment and had done all his obligations of the seller based on the impression that the REDPONDENT accepted to bear the bulks of the additional costs due to the tariff.

111. As Art. 61(1) (a) summarizes the seller may exercise the rights provided in Art.62 to 65, Claimant can rely on his right under Art. 62. Just as to Art. 62, the seller may

require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

112. Art 62 entitles the seller to require the buyer to perform its obligations, of which the obligation to pay the price is the most important in practice. Any obligation, including the obligation to pay the price can be enforced by court action if the requested court can enter into judgment for specific performance, Art. 28. This means that courts which would not enter into a judgment for specific performance under their national law may refuse such request. This should not create problems in the most common case, i.e. where the seller, having delivered the goods, claims payment from the buyer *[Commentary on CISG]*.

113. Under Art. 62, a seller is deprived of the right to require the buyer to perform its obligations if it has "resorted to a remedy which is inconsistent" with requiring performance. But the Claimant had done all his obligations which is consistent with requiring performance.

114. On 24 March 2017, Claimant offered Respondent 100 doses of Nijinsky III's frozen semen in accordance with the Mediterraneo Guidelines for Semen Production and Quality Standards. Both parties accepted a delivery DDP for the Sales Agreement. But as the Claimant is not willing to take over any further risks those associated with changes in customs regulation or import restrictions *[p. 12, Exb. C4]*. Finally, they added a hardship wording to the clause 12 of the Sales Agreement *[p. 14, Exb. C5]*.

115. In January 2018, when the Claimant prepared the final delivery of 50 doses, he was informed by the customs officials of Equatoriana that the newly imposed tariffs for agricultural products covered all animal products including semen used for artificial insemination in racehorse breading. That made the shipment 30% more expensive than anticipated, not only destroying the profit margin of 5% but resulting in considerable hardship *[p. 17, Exb. C8]*. On 20 January 2018, Claimant mailed Respondent to find a solution in regard of new imposition of tariffs before they start the final shipment on 22 January 2018 *[p. 16, Exb. C7]*.

116. On the 21 January in the morning, Mr. Shoemaker called and urged the Claimant to authorize the shipment as planned since Black Beauty needed the doses and had already initiated the payment of the second installment. As the Claimant had gotten the impression that Respondent accepted that they should bear the bulk of the additional costs due to the tariffs and needing the doses urgently. The Claimant authorized delivery even before an agreement on the details had been reached and paid the 30% in tariffs relying on Respondent's promise that a solution would be found and that they were interested in a long-term relationship *[p. 18, Exb. C8]*.

117. In a meeting of 12 February 2018, Respondent's CEO, shouted that she was fed up with the permanent additional requests from the Claimant and was no longer be interested in a further cooperation with Claimant. She stopped the negotiations and refused to pay any additional amount for the tariffs *[p. 18, Exb. C8]*.

118. In conclusion, Claimant performed his obligations as seller by delivering the frozen semen and therefore, the Claimant can invoke Art. 62 which enables the seller to require buyer to pay price.

V. ORDERING PAYMENT OF THE ADAPTED PRICE IS NOT CONTRARY TO PUBLIC POLICY UNDER THE NEW YORK CONVENTION

119. The recognition or enforcement of this award for the additional price is not contrary to the public policy under Art. V(2)(b) of the New York convention. This Art. stated that

120. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

121. The judgment issued by the Supreme Court of Switzerland in the case of ***S.P.A v. S.R.L*** appealed to the Federal Tribunal, seeking the annulment of the award as inconsistent with and contrary to public policy. In the Court's view, material public policy – encompasses the essential and broadly recognized values, according to prevailing opinions in Switzerland, which should be the founding stones of any legal order, the prohibition of abuse of rights, the rule of good faith, etc. The Court held that competition laws merely embody one possible model of economic system among many and that accordingly, they do not qualify as fundamental rules, which should necessarily be part of any legal order. Thus, their violation – alleged or proved – in arbitration award issued in Switzerland is not contrary to public policy and it will not constitute ground for annulment of the award by Swiss courts.

122. Although specific jurisdictions outline public policy in diverse way, case law has a tendency to refer to a public policy basic for refusing recognition and enforcement of an award beneath Art. V (2)(b) of the NY convention whilst the center values of a legal system had been deviated from. For the exceptional nature of a public policy is a wellbeing valve to be utilized in those remarkable conditions when it would be impossible for a lawful framework to recognize an award and authorize it without deserting the specific fundaments on which it is based *[NY Convention Guide].*

123. On the basis of the above, the Claimant must be allowed to claim the additional price as specific performance. And also this award would be enforceable as it is not contrary to the public policy under the Art. V(2)(b) NY Convention.

VI. EVEN IF THE CISG DOES NOT SETTLE THE QUESTION OF ADAPTATION, IT MUST BE SETTLED IN CONFORMITY WITH THE APPLICABLE LAW, WHICH IS THE UNIDROIT PRINCIPLES

124. As Art. 79 CISG does not contain a clear descriptive definition of hardship, Art. 6.2.2 of UNIDROIT Principles can be utilized as an interpretative aid to express the general principles behind CISG **(1).** In a situation of hardship, Art. 6.2.3 of the UNIDROIT Principles mandate renegotiation between the parties to adapt the

contract to the new circumstances. The effects of hardship (Art. 6.2.3) have both procedural and substantive law aspects. Under UNIDRIOT Principles Art. 6.2.3, (**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 **(2).**

1. **CLAIMANT SUFFERED HARDSHIP UNDER ARTICLE 6.2.2 OF THE UNIDROIT PRINCIPLES**

125. The CISG and the UNIDROIT Principles both lay down rules on international commercial contracts and have a strong resemblance in their subject matters. The UNIDROIT Principles are interesting in relation to the CISG Art. 79, because the former contain an express hardship clause. The sudden increase of tariff rates amount to Hardship as defined under Art. 6.2.2 of UNIDROIT Principles.

126. 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.

127. The announcement to impose the tariffs of 30% upon the animal semen made by the Government of Mediterraneo created the hardship during the Claimant's performance of the Agreement *[p. 15, Exb. C6]*.

128. The unforeseen event occurred after the conclusion of the contract; i.e. the newly imposition of tariffs for agricultural products covered all animal products including semen used for artificial insemination in racehorse breading by the announcement of the Government of Equatoriana happened after the formation of the Agreement before the last shipment *[p. 15, Exb. C6]* .Therefore, the unforeseen and unexpected event happened during the pendency of the contractual obligation undertaken, in the contract.

1. The imposition was unforseeable

129. The announcement of Government of Equatoriana that additional tariffs of 30 percent upon all agricultural goods from Mediterraneo as retaliation for the previous restriction imposed by Mr. Bouckaert, the newly elected President of Mediterraneo

were not explicitly included had to do with the fact that at the time of contracting both Claimant and Respondent expected such measures. The retaliation as well as the size of the tariffs came as a big surprise as Equatoriana has always been one of the biggest supporters of the existing system of free trade *[p. 15, Exb. C6]*.

2. The imposition was unavoidable

130. The event which causes hardship was not arisen or occurred by the Claimant. Hardship was caused by the Government of Equatoriana who imposed a tariff of 30 per cent upon all agricultural goods from Mediterraneo. It means that the event which causes hardship was beyond the control of Claimant.

131. The seller 's obligation to deliver the buyer 440 tons of processed food product in periodic shipments was unable to continue due to the drought and a diminution in supply of needed raw materials. The buyer failed to pay the price and claimed for less half of the repacking costs. As to this dispute, the seller was validly entitled to suspend deliveries applied with CISG Art. 71(1)(a) and force majeure. The Local Chamber of Commerce states that the changes of climate condition were beyond the seller's control prevented it from fulfilling its obligations under the contract. It is finally decided in this case that the buyer was not justified in its non-payment of purchase price of 90 tons of product which were delivered. The arbitral tribunal decided that the claimant was entitled to claim the payment by defendant of the principal amount of the purchase price of 90 tons minus 50% of repacking costs, delay interest must be calculated on the basis of this sum *[Processed food product case]*.

2. **CLAIMANT CAN INVOKE ARTICLE 6.2.3 OF THE UNIDROIT PRINCIPLES**

132. When the Government of Equatoriana announced the imposition of new tariffs the Claimant immediately reported about this dispute to the Respondent *[p. 16, Exb. C7]*. On 21st January 2018, Mr. Shoemaker asked the Claimant to authorize the shipment as planned since the Respondent needed the doses urgently and had already initiated the payment of the second installment. As the Claimant has gotten the impression that the Respondent accepted to pay the additional costs due to tariffs, he paid all the tariffs on behalf of the Respondent. On 12 February 2018, Respondent CEO stopped

the negotiation and refused to pay any additional amount to the tariffs *[p. 18, Exb. C8]*. As the Claimant failed to renegotiate with Respondent, Claimant may invoke Art 6.2.3 of UNIDROIT Principles to the court for adaptation.

133. In conclusion, as there is the hardship event which fundamentally alters the original contractual equilibrium that satisfies with certain conditions, mentioned in Art. 6.2.2 of the UNIDROIT Principles, the contract can be adapted by the court. The court may also direct the parties to resume negotiations to reach an agreement adapting the contract or confirm the terms of the contract as originally agreed.

PRAYER FOR RELIEF

In light of the above, Claimant respectfully requests the tribunal to find that:

1) This Tribunal has jurisdiction to hear the case;

2) Claimant is entitled to an increase of the purchase price; 3) Respondent should pay Claimant an additional amount of

2) US$1,250,000 which is 25% of the purchase price for the third

3) delivery of the semen; and

4) Respondent bear the cost of arbitration.

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