Shenzhen University Law School

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WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG
31ST MARCH TO 7TH APRIL, 2019

MEMORANDUM FOR CLAIMANT

ON BEHALF OF:	**AGAINST:**
Phar Lap Allevamento Rue Frankel 1 Capital City Mediterraneo	Black Beauty Equestrian 2 Seabiscuit Drive Oceanside Equatoriana
CLAIMANT	**RESPONDENT**

COUNSEL FOR CLAIMANT:

CHENYI LIU • CHUTING ZHUANG • DI ZHU • LIN MENG • MENGYU XU
SHIYI HUANG • XINYANG WU • XINRAN LIU • YUE GU • ZHULING ZHENG

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INDEX OF ABBREVIATIONS

&	And
¶	Paragraph
Art. /Arts.	Article /Articles
ANA	Answer to the Notice of Arbitration
CIETAC	China International and Economic Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980
CISG-AC	Advisory Council for the Convention on Contracts for the International Sale of Goods
Cl. Ex.	Claimant's Exhibit
CLAIMANT	Phar Lap Allevamento
Co.	Corporation
Contract	Frozen Seman Sales Agreement
DDP	Delivered Duty Paid
Doc	Document
e.g	exempli gratia
Et al.	Et alii / et alia (and others)
etc.	et cetera
HKIAC	Hong Kong International Arbitration Centre
i.e.	id est
IBA	International Bar Association
IBA Rules	2010 IBA Rules on the Taking of Evidence in International Arbitration
ICC	International Chamber of Commerce
No.	Number
NOA	Notice of Arbitration
Ord.	Order

Parties	Claimant and Respondent
p. /pp.	page /pages
PO	Procedural Order
Pro.	Procedure
Resp. Ex.	Respondent's Exhibit
RESPONDENT	Black Beauty Equestrian
SoC	Statement of Claim
SoD	Statement of Defence
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
Vol.	Volume

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Cited as	Source
Arbitration Rules	UNCITRAL Arbitration Rules
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG Digest	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016 Edition
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch (German: German Code on the Conflict of Laws
Federal Rules of Evidence	2018 Federal Rules of Evidence
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration 2010
Model Clause	Model UNCITRAL Arbitration Clause
Model Law	UNCITRAL Model Law on International Commercial Arbitration with 2006 Amendments
Model Law Digest	2012 Digest of Case Law on the Model Law on International Commercial Arbitration
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958
PILA	Private International Law Act
UNCITRAL Rules	United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (as revised in 2010), 15 December 1976
UNCITRAL Rules on Transparency	the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
UNIDROIT Principles	UNIDROIT Principles for International Commercial Contracts

STATEMENT OF FACT

The parties to this arbitration are Phar Lap Allevamento (hereinafter "CLAIMANT") and Black Beauty Equestrian (hereinafter "RESPONDENT"). CLAIMANT has operated the most renown stud farm and additionally offers high-quality frozen semen of racehorses in Mediterraneo. RESPONDENT, famous for its broodmare, intended to establish a racehorse stable with several mares with excellent racehorse pedigree in Equatoriana.

21 March 2017	RESPONDENT contacted CLAIMANT, inquiring about the availability of Nijinsky III for its newly started breeding programme. Respondent asked Claimant to provide 100 doses frozen semen from Ninjinsky III.	*Exhibit 1*
24 March 2017	CLAIMANT agreed to offer RESPONDENT 100 doses of Nijinsky III's frozen semen in accordance with the Mediterraneo Guidelines for Semen Production and Quality Standards. The frozen semen will have to be provided in several instalments and may not be resold to third parties without written consent. Besides, Claimant need to be informed about the use of every dose. Moreover, the Claimant charge 99,500 dollars for each dose and respondent needs to pick up at Claimant's premises.	*Exhibit 2*
28 March 2017	RESPONDENT objected to the choice of law and the forum selection clause and asked for delivery DDP	*Exhibit 3*
31 March 2017	Claimant would accept DDP term, but on the premise of price increased by 1000 USD per dose and included a hardship clause. As for jurisdiction, Claimant would be opt for arbitration in Mediterraneo.	*Exhibit 4*
12 April 2017	Each parties representative Mr. Antley and Mr. Nparavnik were	*Exibith 8*

	injured in a severe car accident. They both quitted the negotiations on the same day. On the same day Mr. Naparavnik and Mr. Antley had reach an verbal agreement that to add an adaptation clause into the Agreement, Mr. Antley promised to provide a proposal the next morning.	
6 May 2017	The Parties finally entered into a <Forzen Semen Sales Agreement> ("Agreement") with the absence of initial negotiators.	*Exhibit 5*
20 May 2017	Claimant sent the first shipment of 25 doses to Respondent.	*Exhibit 5*
3 October 2017	Claimant sent the second shipment of 25 doses to Respondent.	*Exhibit 5*
19 December 2017	The Equatorianian government imposed a tariff of 30% upon all agricultural goods from Mediterraneo as the retaliation.	*PO2,question 25*
20 January 2018	Claimant suggested to renegotiate with Respondent about the newly imposed tariffs which made the shipment 30% more expensive.	*Exhibit 7*
21 January 2018	Respondent provided CLAIMANT a verbal promise that solutions would be found through negotiation given the good relationship and further businesses.	*Exhibit 8*
22 January 2018	Claimant sent the third shipment of 50 doses to Respondent and paid the 30% tariffs.	*Exhibit 8*
12 February 2018	After the final shipment, Claimant discovered that Respondent actually breaching the resale prohibition, Respondent's CEO stopped the renegotiation and refused to pay any additional amount for the tariffs.	*Exhibit 8*
31 July 2018	CLAIMANT files a Notice of Arbitration.	*Notice of*

		Arbitration, P3
24 August 2018	RESPONDENT submits the Response to Notice of Arbitration	*Answer to the Notice of Arbitration, P29*
2 October 2018	CLAIMANT informed the Tribunal that the CLAIMANT was informed that RESPONDENT was undertaking an arbitration with another party based on similar facts and sincerely submitted the Tribunal shall admit relevant information as evidence.	*The problem, p. 49*
3 October 2018	RESPONDENT objected to CLAIMANT's allegation of the admission of evidence.	*The problem, p. 49*

ARGUMENT

I. THE ARBITRAL TRIBUNAL HAS THE JURISDICTION TO DECIDE THE DISPUTES

1. It is a fundamental principle of arbitration law that arbitrator has the power to rule on their own jurisdiction, which is the corollary of the principle of the autonomy of the arbitration agreement [*Gaillard,* p.258]. The competence-competence doctrine provides that international arbitral tribunals have the power to consider and decide disputes concerning their own jurisdiction [*Born, Chapter7,* p.1047].

2. The Tribunal has the jurisdiction to adapt the contract under the arbitration agreement. According to the Contract, 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 [*Cl. Ex., No.5 ¶19*]. Looking back the drafting process of the Contract, CLAIMANT submits that the Parties have expressly delegated the Arbitral Tribunal to adapt the contract [A]. And the Arbitral Tribunal has the jurisdiction in accordance with the governing law of the arbitration agreement both under the law of Mediterraneo and the Danubian Arbitration Law [B].

A. The Parties have granted the Arbitral Tribunal adaptation right

3. The Arbitral Tribunal should decide Parties' intention based on Julie Napravnik's statement [*Cl. Ex. C8*]. Parties have expressly agreed on adjusting the Contract and granted Arbitral Tribunal the power to adapt the contract.

4. Mr. Antley's note only stated "clarify in arbitration clause that neutral venue and applicable law" as a gist [*Resp. Ex. No.3*]. We could not infer to a specific law just based on the denotation, as varied with different interpretation methods, it can be interpreted as any law or regulations. The best way to understand Mr. Antley's note is to look for the context through the meeting on 12 April 2017.

5. Julian Krone, head of the legal department at RESPONDENT, was not involved into any of the negotiations before Mr. Antley had a car accident. She lacked the information about the real

situation happened during the drafting process and just made assumptions on her own will [*Resp. Ex. No.3*]. Besides, in Julian Krone's witness statement, she referred to neither Mr. Antley's specific statement nor the reasonableness of the way that she interpreted the note, her omissions do not make it possible to verify her sources, methods and the content of the information she reports, which makes her allegations unverifiable by the Arbitral Tribunal [*Getma International v. Republic of Guinea*].

6. By contrast, Julie Napravnik, as the main negotiator on CLAIMANT's side, was involved with all aspects of the negotiations, [*Cl. Ex. No.8*] her statement was stemmed from her direct communication with Mr. Antley which is more convincible than Julian Krone's assumptions. During the meeting on 12 April 2017, Julie Napravnik clarified that she had mentioned to Mr. Antley that a mechanism was needed to "ensure an adaptation of the contract for the unlikely event that the Parties could not agree on an amendment" [*Cl. Ex. No.8*]. Mr. Antley has agreed to the proposal as well as added that "it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree" [*Cl. Ex. No.8*]. Since Mr. Antley expressed his intention explicitly, the Parties have actually reached an agreement to adapt the contract by the Tribunal if they could not agree on an amendment when facing disputes.

7. In conclusion, as Mr. Antley's note needs to be explained into a specific context, Julian Krone's statement should not be adopted for it could not provide any accurate details. The Arbitral Tribunal should accept Julie Napravnik's statement to confirm the Parties' express agreement.

B. The Arbitral Tribunal has the jurisdiction to adapt the Contract pursuant to the governing law of the arbitration agreement

8. The governing law of the arbitration agreement should be the law of Mediterraneo[1]. Even if the Arbitral Tribunal decides that Mediterranean law is not applicable to the arbitration agreement, the Arbitral Tribunal also has the jurisdiction in accordance with the Danubian Arbitration Law [2].

1. The Arbitral tribunal has the jurisdiction to adapt the contract pursuant to the law of Mediterraneo

9. The general accepted approach is that the governing law of an arbitration agreement is to be determined in accordance with a three-step test: the parties' express choice; the implied choice of the parties as gleaned from their intentions at the time of contracting; or the system of law with which the arbitration agreement had the closest and most real connection [*Boo, p89*]. The Parties didn't make an express choice of governing law, thus, their implied choice of law, the law of

Mediterraneo shall govern the arbitration agreement [a]. Even if the law of Mediterraneo is not considered as the Parties' implied choice, it still should be the governing law according to the "closest connection" standard [b]. Further, choosing the law of Mediterraneo is not against to the doctrine of separability[c].

a. The Parties have implicitly selected the law of Mediterraneo to govern the arbitration agreement

10. When considering the governing law of the arbitration agreement, full respect has to be given to the real intent of the parties rather than the people who signed the agreement [*Laboratorios Grossman, S.A. v. Forest Laboratories, Inc. (U.S.); Mangistaumunaigaz Oil Production Assoc. v. United World Trade Inc. (GB); ICC Court of Arbitration, 6709/1991 (Fr); 1434/1975 (Fr)*], also, according to a general principle, contracts must be interpreted in good faith, thus consideration should be given to the intention of both parties [*Svenska Petroleum Exploration AB (Sweden) v. Government of the Republic of Lithuania*]

11. The Parties have reached an oral consensus during the negotiation to grant the Arbitral Tribunal the power to adapt the contract in case the Parties could not agree on an amendment after disputes arose, after the negotiation, no objections were brought up by RESPONDENT and the negotiators on their sides signed the Contract, as a consequence, CLAIMANT reasonably concludes that RESPONDENT has agreed to allow the Arbitral Tribunal to adapt the contract if the Parties failed to reach an agreement. Such reasonable expectation should be protected because if CLAIMANT had known that no adaptations could be made to the Contract, it would have priced the products differently to counteract the risks that might occur in the future.

12. The letter from RESPONDENT on 10 April 2017 suggested that, RESPONDENT wrote two separated sentences, i.e. "The seat of arbitration shall be Equatoriana" and "The law of this arbitration agreement shall be the law of Equatoriana" [*Resp. Ex. No.1*], which manifests that RESPONDENT held the view that lex arbitri could not govern the arbitration agreement naturally, it needs to be clarified respectively. RESPONDENT's present claim is quite contradicted to its former conduct, but what RESPONDENT previously has done suggested that it would not naturally take the law of Danuabia as the governing law. Therefore, it clearly shows that choosing the law of Danuabia as the governing law of the arbitration agreement is not the intention of both Parties.

13. Moreover, quite contrary to what RESPONDENT has alleged, when there is only one express choice of law in the whole contract, applying the chosen law to both the underlying contract and the arbitration is widely accepted by academic authorities and practices of courts and arbitral

tribunals. Some hold that an express or implied choice of the law of the arbitration agreement emerges from an express choice of law for the main contract [*Woh Hup (Pte) Ltd v. Property Development Ltd; Lew, pp.142-144*]. Some hold that if the underlying contract contains the arbitration agreement, we could conclude a strong presumption that the implied governing law of the arbitration agreement is in favor of the law governing the underlying contract [*Hanotiau p.394; Lew pp.142-144; Blackaby, Nigel p.158; Sonatrach Petroleum Corp (BVI) v. Ferrell International Ltd; Black Clawson International Ltd v. Papierwerke Waldhof-Aschaffenberg AG*]. English Court of Appeal once concluded that parties intend the express choice of law to govern both the main contract as well as the arbitration agreement and consider it as a 'natural inference' [*Sulamérica CIA de Seguros v. Enesa Engenharia SA*]. Therefore, since there is only one express choice of law in the whole Contract and the Contract contains the arbitration agreement, the Tribunal should find that the law of Mediterraneo is the implied governing law of the arbitration agreement.

14. In conclusion, although RESPONDENT does not admit its intention to grant the Tribunal the power to adapt the contract, its conducts suggest that RESPONDENT clearly knows that the Arbitral Tribunal should have the jurisdiction and the governing law is the law of Mediterraneo, which constitutes an implied choice of law between the Parties.

b. The law of Mediterraneo has the "closest connection" to the disputes rather than the law of Danubia

15. In the absence of a choice of law by the Parties, a number of jurisdictions now apply some variation of a "most significant relation" or "closest connection" standard in selecting the law governing an international arbitration agreement. Under these standards, courts and arbitral tribunals generally look for a law as the most decisive connecting factors for international arbitration agreements. For instance, in ICC Case No. 7319, the sole arbitrator observes that more factors point to Ireland and not to France, such as the place of performance of the substantive obligations of the Agreement, thus the sole arbitrator considered that the country has the closest connection is Ireland, rather than France [*ICC case, No. 7319*]. Federal Court of Justice of Germany once concluded where there is no express choice of a governing law, Art. 27 et seq. EGBGB old version, which are still applicable here, lead to the application of the law of the main agreement, with which the arbitration agreement generally has the closest connection in the sense of Art. 28(1) EGBGB old version. [*First and Second German Investors v. Brokerage house X*]. In addition, in Art. 187(1) PILA it is provided that, absent a choice of law made by the parties, the case shall be decided "according to the rules of law with which the case has the

closest connection" [*Blessing, p409*].

i. The law of Mediterraneo should be the governing law of arbitration agreement under the closest connection test

16. The closest connection test provides an objective criterion, leaving no room for purely subjective considerations such as the hypothetical will of the parties. The closest connection between the case and the applicable rules of law is a factual criterion.

17. As Peter Burckhardt and Raphael F. Meier concluded: The place where the contract is performed is considered an important connecting factor. This especially holds true for the main obligations under the contract, i.e., the non–monetary obligations for which payment is due. Another connecting factor is considered to be the place of business or habitual residence of the parties, especially of the party which performs the main obligation [*Burckhardt/Meier, p222*]. The characteristic performance is seen as the most important element establishing the closest connection to the relevant law. The criteria carefully established over the decades by the Swiss Federal Supreme Court were condensed in the new Swiss PILA, in force as of 1 January 1989, which is said to be one of the most remarkable pieces of legislation; many other jurisdiction areas have taken inspiration from the carefully created Swiss solution [*Blessing, p409*].

18. CLAIMANT is the party who held the main obligations, the non-monetary one, under Contract. Firstly, the place of performing the main obligations, acquisition of semen, is Mediterraneo. Secondly, the principal place of business of the CLAIMANT is also Mediterraneo. Thirdly, the final negotiations and the signing of contract took place on 6 May 2017 [*PO 2, p.56*]. To conclude, there are cogent arguments to support that the law of Mediterraneo is the governing law of arbitration agreement.

ii. The law of the seat of arbitration, Danubia, has very little connection with the case

19. The use of this connecting factor in the absence of a choice by the parties is based on a philosophy which differs considerably from that of the resolutions of the Institute of International Law in 1957 and 1959, which treated the seat of the arbitration as a mandatory connecting factor. Here, the seat of the arbitration is used for its value as a connecting factor. However, the value of the seat as a connecting factor is still relatively low. The Parties chose Danubia as the seat of arbitration for reasons of geographical convenience or neutrality without

deeply considering whether it is their agreement of governing law of arbitration agreement or not. Further, in the absence of a choice by Parties, the choice is made by the arbitral institution or by the arbitrators themselves, the seat's value as a connecting factor is even weaker, if the goal is to identify the legal system to which the parties intended to subject their agreement [*Fouchard/Gaillard/Goldman, p34*].

20. In conclusion, when there is no express or implied choice of governing law of arbitration agreement, it should be the system of law with which the arbitration agreement had the closest and most real connection. Danubian Arbitration Law nearly does not have any relationship with parties' autonomy or jus cogens which can limit the jurisdiction of the Arbitral Tribunal. Thus, choosing the law of Danuabia as the governing law is unreasonable. By contrast, The law of Mediterraneo should be the governing law as it has the closest connection with this case.

c. Choosing the law of Mediterraneo is not against to the doctrine of separability

21. RESPONDENT may argue that the arbitration agreement is naturally separated from the contract, however, Art.16 (1) Model Law stipulates that separability means the arbitral tribunal may rule on its own jurisdiction, and for that purpose, an arbitration agreement shall be treated as an agreement independent of the other terms of the contract. Therefore, a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration agreement [*Model Law, Art.16(1)]*. As we can see from this article, the doctrine of separability is applied to the arbitration agreement when the validity of the main contract is under challenge, which is obviously not relevant to the case at hand. It does not deny a party's right to apply just one law to the contract as a whole.

22. Furthermore, the autonomy of the arbitration agreement and of the principal contract does not mean that they are totally independent one from another, as evidenced by the fact that acceptance of the contract entails acceptance of the clause, without any other formality [*Derain, pp.16-17*]. As a consequence, the doctrine of separability doesn't mean that the law governing the arbitration agreement must be different from the law governing the main contract.

2. Even if the law of Mediterraneo is not applicable, the Arbitral Tribunal still has the jurisdiction to adapt the contract under the Law of Danubia

23. Even if the Tribunal decides that Mediterranean law is not applicable to the arbitration agreement, Danubian Arbitration Law should be preferentially used to interpret the arbitration agreement instead of Danubian Contract Law [a]. Art.28(3) of Danubian Arbitration Law is not

relevant to the case at hand [b]. In addition, Danubian Arbitration Law allows the Arbitral Tribunal to adapt the contract [c]. Governed by the four corners rule leaves the scope of arbitration unaffected [d].

a. Danubian Contract Law should not be used to interpret the arbitration agreement

24. Even if the law of Mediterraneo is not applicable to the arbitration agreement, the Arbitral Tribunal should not use Danubian Contract Law to interpret the clause. Therefore, the alleged "four corners rule" is not applicable to the contract.

25. Since the arbitration agreement has been strictly considered to be a legally separate agreement from the Contract in which it is included, it should be interpreted by its own interpretation methods first. In other words, Danubian Contract Law should only be used to interpret the substantive part of the contract when there is a law governing the arbitration agreement. Consequently, we should treat them respectively. As both Parties have known and agreed, Danubia has adopted the Model Law [*PO 1 p.53 ¶6*]. Therefore, the Arbitral Tribunal should interpret the arbitration agreement according to the interpretation methods provided by the Danubian Arbitration Law.

26. Secondly, it is consistent jurisprudence in Danubia that due to the doctrine of separability the CISG does not apply to the arbitration agreement, as the latter is considered as a procedural contract and not as a sales agreement [*PO 2, p.36*]. By the same logic, as a substantive law, Danubian Contract Law should not be applied to the arbitration agreement but could only be used in the "Sales" part of the contract.

27. Thirdly, such a practice has also been confirmed by written provisions. The NY Convention does assume that international arbitration agreements are separable from the underlying contract, and therefore substantive rules should only apply to the substantive part of the contract [*Born, Chapter 3 p.355*]. For instance, some authorities have concluded that *NY Convention* Article II (2)'s definition of what constitutes an "agreement in writing" is exclusive. In other words, the requirement of the written form according to Article II of the New York Convention is to be interpreted independently, without the assistance of a national law [*Van den Berg, p803*]. Article 16 of Danubian Arbitration Law recognizes the separability presumption even more explicitly than the New York Convention. It does so by stating that "an arbitration agreement shall be treated as an agreement independent of the other terms of the contract" [*Model Law, Art.16*]. This provision goes beyond the New York Convention by declaring an affirmative legal rule requiring that arbitration agreements should be treated as separable from the parties' underlying

contract rather than merely assuming that the parties have intended such a result [*Born, Chapter 3 p.376*]. As a result, we should use provisions specially designed for arbitration to interpret the arbitration agreement.

28. In conclusion, Danubian Contract Law should not apply to the arbitration agreement, and therefore the "four corners rule" is not binding the arbitration agreement.

b. Art.28(3) of Danubian Arbitration Law is not relevant to the case at hand

29. Courts in Danubia are of the view that Art. 28(3) of the Danubian Arbitration Law (identical to Art. 28(3) of Model Law) contains a general standard to be applied to the conferral of exceptional powers to the arbitral tribunal, that is, while parties may authorize Arbitral Tribunals to adapt contracts, an express conferral of powers is required [*PO2 p.60 ¶36*]. However, Art. 28(3) of Danubian Arbitration Law is not applicable to the case at hand.

30. There are no connections between Art. 28(3) of Danubian Arbitration Law and the necessity of an explicit authorization. Article 28 (3) requires that parties expressly authorize the arbitral tribunal to decide a case ex aequo et bono or as amiable compositeur [*Model Law Digest*, *p*34]. In arbitrations of this type, the arbitral tribunal may decide the dispute on the basis of principles it believes to be just, without having to refer to any particular body of law [*Model Law Digest, p34*]. However, the Arbitral Tribunal does not determine the dispute only on the basis of ex aequo et bono or as amiable compositeur but according to the facts and specific legal rules. Julie Napravnik, a direct witness of the meeting on 10 April 2017, has reproduced the facts at that time honestly and accurately. The Parties have agreed consistently that the law of Mediterranean and CISG govern the underlying contract. The Arbitral Tribunal can refer to facts and express choice-of-law while determining the disputes. Therefore, Art.28(3) of Danubian Arbitration Law is not relevant to this case. The Arbitral Tribunal is capable of adapting the contract pursuant to Danubian Arbitration Law.

c. Danubian Arbitration Law allows the Arbitral Tribunal to adapt the contract

31. Pursuant to Art.2(1) of Danubian Arbitration Law, the Arbitral Tribunal should use the general principles on which this Law is based to settle the questions related to the matters governed by this Law, when those matters are not expressly settled by the Law.

32. The most fundamental principle of the Model Law is to recognize the freedom of the parties; it allows parties to freely submit their disputes to arbitration and to tailor the "rules of the game" to their specific needs. The interest of the parties to freely determine the procedure to be followed

is fully protected under the Model Law [*Zhang, Yulin, pp.87-124*]. In a word, it is accepted by Danubian Arbitration Law that the Party Autonomy is the fundamental principle in international arbitration. Therefore, according to Danubian Arbitration Law, whether the Arbitral Tribunal could adapt the contract or not should be decided on the basis of the Parties' intention. CLAIMANT has clearly clarified the Parties' intention in the aforesaid. It suggests that both the express and implied choice of the Parties' are in favor of an adaptation of the contract. As a result, pursuant to Danubian Arbitration Law, the Arbitral Tribunal has the jurisdiction to adapt the contract.

d. It is still reasonable to adapt the contract under the four corners rule.

33. RESPONDENT argues that the tribunal lacks the authority to decide the case and asserts that the remuneration has been undisputedly been paid. However, even if the Arbitral Tribunal decides that the four corners rule should be applied，its power to adapt the contract is still unaffected. The claim on paying the additional amount of the tariffs should be considered as the dispute arising out of the Contract since it is the performance of the Contract.

34. The arbitration agreement provides that "any dispute arising out of the contract including …interpretation…performance". Under the arbitration agreement, the Parities encompass all claims arising out of the contract and list some type of disputes including performance, interpretation and so on.

35. According to the four corners rule, in determining the admissibility of the claims brought by the Parties to arbitration tribunals, the arbitral tribunal should interpret the arbitration clause in literally. Article 2.1.17 UNIDROIT Principles which has the same effect as the four corners rules allows the arbitral to interpret the arbitral clause in writing by prior statements and agreements. [*PO2, p. 45*] It is evident from the Contract and the negotiating history that the Parties have determined that the increased remuneration claim is flowed from the Contract and intended to refer the dispute of it to arbitration. "So long as the parties to the relevant contracts are the same, and the contracts all relate to a single project, courts have generally been willing to hold that an arbitration clause in one agreement extends to related agreements" [*Born, Chapter 9 pp.1371-1372*]. An arbitration agreement in a contract usually also covers disputes relating to amendments and supplements which only modify the contract, e.g., by changing the price… [*Relden, p62*]. The Arbitral Tribunal's holding also applies to the case at hand. The additional tariff dispute has been construed to be covered into the related arbitration agreement.

36. There is an expressly authority towards the dispute of remuneration. Irrespective of which law the Parties would like to apply to the arbitration agreement, the dispute of the additional tariff which is sufficiently related to the Contract that has been included in the arbitration agreement expressly to be settled by arbitration. Consequently, it is reasonable for the Arbitral Tribunal to settle this dispute. Hence, the jurisdiction of the Arbitral Tribunal cannot be declined on the ground that the remuneration has been undisputedly been paid by RESPONDENT. In any case, the governing law of arbitration law has no impact on the Arbitral Tribunal's power. In conclusion, the Arbitral Tribunal has the jurisdiction to adjudicate the present dispute connected with the contract.

CONCLUSION OF ISSUE I

37. CLAIMANT respectfully requests the Arbitral Tribunal to decide that it has jurisdiction to hear the claim and adapt the contract. The dispute should be settled by the Arbitral Tribunal as the Parties validly agreed to resolve any disputes arising out of the contract by arbitration and the Arbitral Tribunal has jurisdiction to adapt the contract either by virtue of the law of Mediterraneo or Danubian Arbitration Law.

II. CLAIMANT SHOULD BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS EVEN THIS EVIDENCE WAS OBTAINED THROUGH A BREACH OF CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLGEAL HACK OF RESPONDENT'S COMPUTER SYSTEM

38. RESPONDENT challenged the evidence submitted by CLIMANT was from other arbitration proceedings [*Letter by Langweiler, p. 49, ¶. 3*] by arguing that this evidence was an inapplicable evidence due to confidentiality agreement as well as was illegal obtained from RESPONDENT's computer system. [*Ms Fasttrack' Email, p. 50, ¶. 3*]. CLAIMANT respectfully requests the Arbitral Tribunal to reject RESPONDENT's challenge for four reasons as followed: as a preliminary matter, the Arbitral Tribunal has a wide discretion to determine the acceptance of

evidence [A]; secondly, the evidence satisfies the standard to be admitted under IBA Rules [B]; Thirdly, the confidential agreement could not exclude the evidence from submitting in this case [C]; and at last, the hacked evidence does not meet the exclusion criteria [D]. Therefore, the Arbitral Tribunal should allow this evidence to be submitted.

A. The Arbitral Tribunal has wide discretion to determine the acceptance of evidence

39. As the HKIAC rules governs the arbitral proceedings [*PO 1, p. 2],* pursuant to Art.22 of the HKIAC rules that the arbitral tribunal owns the power to admit or exclude any doc and evidence. And it is also codified with similar language in Art. 19 of the MODEL Law on International Commercial Arbitration, which has been adopted by Danubia, the seat of the arbitration. [*NOA, p.6, ¶14*]

40. Moreover, due to the liberal evidentiary standard, the international tribunals usually allow the Parties the greatest freedom in presenting evidence [*RALSTON, p. 379]*.

41. Therefore, in this case, unlike what RESPONDENT alleged that this evidence should not be submitted without any reason, the Arbitral Tribunal shall reconsider it seriously and use the discretion to rule on its own decision.

B. The evidence meets the standard of relevance and materiality under IBA Rules

42. The IBA Rules is applicable in this case for it has been widely used by international arbitral tribunals as a guide even when not binding upon them [*Railroad v. Guatemala*]，serving as supplement to the applicable arbitration rules [*Born, Gary B.1, p.342*].

43. Art.9 (1) IBA Rules grants the Arbitral Tribunal discretion to "determine the admissibility, relevance, materiality and weight of evidence". As to the relevance and materiality of evidence, the evidence satisfies the standard of admitting it.

44. Definition of "relevance of evidence" and "materiality of evidence" in Federal Rules of Evidence could serve as a reference since there is no any definition of "relevance of evidence" and "materiality of evidence" in IBA Rules. Goldwasser summarized that relevance is the sum of materiality and Probativeness. Materiality relates to whether the evidence is offered upon a matter properly in issue. Probativeness requires that evidence must logically tend to prove the

proposition for which it is offered, which is a matter of sense, logic, and experience [*Goldwasser, p.1*].

45. As to materiality in this case, these two arbitral proceedings both involve a seller's claim about an additional payment following the imposition of the tariffs in transactions of racehorses' breeding [*Pro. Ord. 1, ¶.39*]. Thus, the evidence is offered for the issue of additional payment.

46. Regarding probativeness in this case, the Arbitral Tribunal in the former arbitral proceedings supported the seller's claim in the issue of additional payment [*Pro. Ord. 1, ¶.39*]. Thus, the former arbitration proceeding may provide some information helpful to support sellers' claims in the same circumstances. Consequently, the evidence may tend to support CLAIMANT's claim for the additional payment.

47. For being martial and probative, the evidence has relevance and therefore satisfies the standard of relevance and materiality under the IBA Rules.

C. It is unjustified to exclude the evidence based on the confidential agreement

48. RESPONDENT alleges that the documents from the other arbitration proceeding should be confidential is untenable. [*Letter by Fasttrack, p50, ¶. 1*]. However, Arbitral Tribunal should accept the evidence from the other arbitral proceedings because CLAIMANT is not bound by the confidentiality obligation [1]. Even if CLAIMANT should keep the document confidential, the satisfaction of consolidation and the trend to apply the UNCITRAL Rules on Transparency under international commercial arbitration shall be under tribunal's consideration [2]. Moreover, in any case, this evidence shall be allowed to submit due to principle of estoppel and the consistency of the award [3].

1. CLAIMANT has no obligation to perform the confidential agreement

49. Confidentiality means "the non-disclosure relationship among the arbitration participants" [*Gu Weixia, ¶608*], which is the very nature of the arbitration that parties by signing a confidentiality agreement, accept a mutual duty binding them from disclosing any information [*Fábián, p. 6*]. In general, the contract binds only the parties. For a third party, the agreement would affect its rights only with their consent [*Iberia case, ¶¶665-666*]. Therefore, such confidentiality of arbitration is constrained by the inability to compel third party to respect it [*MÜLLER, C., p.*

277]. Similar viewpoint is reconfirmed in Gotham Holdings case [*Gotham Holdings v. Health Grades, ¶¶664-665*], where the judge stated that a third party may obtain the materials in a prior proceeding even if the arbitration is covered by a confidentiality agreement since it is not bounded by the agreement. Though information required from confidentiality must be respected, participants' preference for secrecy does not create a legal bar for a third party to disclosure [*Baxter International, Inc. v. Abbott Laboratories,* ¶¶554*; United States v. Foster,* ¶852].

50. With regard to this case, RESPONDENT alleged that the existence of confidentiality agreement between RESPONDENT and outsider could bar CLAIMANT from submitting the evidence. However, due to the fact that confidentiality agreement does not bind non-parties to the agreement [*Schmitz, p.1221*], CLAIMANT was not bound by the agreement and thus with no obligation to abide by the agreement, the accusation of CLAIMANT's breach on the agreement is invalid.

As a result, whereas CLAIMANT is not bound by the confidentiality agreement, it is justified to submit the evidence from the other arbitral proceedings.

2. Even if CLAIMANT is under confidential obligation, the Arbitral Tribunal should take the UNCITRAL Rules on Transparency and the consolidation into consideration

51. Even if CLAIMANT should keep the document confidential, in that case, the UNCITRAL rules on Transparency shall be applied [a]. Also, the circumstance in this case satisfies the requirements of consolidation, which provides a space for evidence to be accepted [b].

a. CLAIMANT is entitled to submit the evidence based on the UNCITRAL Rules on Transparency

52. Since the UNCITRAL Rules on Transparency now has been used in a vast amount of commercial arbitrations as well as a prevailing principle on transparency [*Levander S., pp. 524-530*], commentators have also called for widening the scope of the UNCITRAL Rules on Transparency to cover international commercial arbitration [*Argen,pp.207-208*]. CLAIMANT states that the UNCITRAL Rules on Transparency is also applicable in this case.

53. Art. 3 of the UNCITRAL Rules on Transparency clearly sets forth that certain documents of the

arbitral procedure shall be automatically publicized except for the information regarding business secrets or being protected under the treaty, any law or rules could be prevented from disclosure. Obviously, the evidence does not belong to any category of them, making it admissible for the Arbitral Tribunal.

b. It is reasonable to consider the consolidation of two arbitral proceedings

54. As the two arbitral proceedings meet the standard of consolidation under Art. 28 of HKIAC rules on Transparency, that would leave no space for confidentiality agreement. And the consolidation of multi-contract arbitral proceedings under the aforesaid article, requires neither the consent of the parties in their arbitration agreements nor that the signatories to the various agreements be the same parties, as long as the HKIAC determines that 'a common question of law or fact arises' in the multiple arbitrations and the relief claimed in the arbitrations 'are in respect of the same transaction or series of transactions' and the arbitration agreements are 'compatible', the HKIAC shall have the power to consolidate the proceedings [*Howes and Stowell,p. 4*].

55. The wording of "a common question of law or fact" means that at least one common question of law or fact exists in all of the arbitrations to be consolidated [*Alpha Building v. Best Partner*]. Also, the interpretation regarding the "same series of transactions" means that whether the contracts were concluded for the same overall purpose or whether the contracts are of the same type. [*Moser, Bao, p. 323*]. And the "compatible agreement" means that the law, which governs the arbitration agreement shall be the determinant factor.

56. Present in this case, both arbitral proceedings facing the same question regarding how to deal with this unforeseen increasing tariff, and both regard the affection of unforeseen tariff and both belong to the transaction of racehorses' breeding [*Letter by Langweiler, p49, ¶. 2*], which could lead to the conclusion that they own the same overall purpose to deal with the "tariff's dilemma" under the same type contract as sales contract with the same background, the retaliation tariff time in Mediterraneo [*Cl. Ex. No 6, p. 15*]. At last, from Letter by Langweiler (2 October 2018), the two arbitral proceedings are both governed by HKIAC Rules and there is no other evidence which presents the incompatible.

57. As stated above, all the requirements under Art. 28 of HKIAC Rules on Transparency have been

fulfilled that these two arbitral proceedings need to be consolidated. Even if regarding the cost of re-composition of the tribunal due to the efficiency, it at least could leave a space for this evidence to be admitted in this arbitral proceeding.

3. In any case, the evidence is permissible due to the consistency of the award and the principle of estoppel

58. As Lara Pair stated, there was an argument that the risk of inconsistent or contradictory awards in and of itself diminishes the confidence of the international community in arbitration as an effective means of dispute resolution, as it may result in unjust or inequitable solutions [*Pair, p. 2*]. Also, at present, commercial arbitration is also increasingly demanding more openness, predictability and certainty regarding the arbitral process and its players" [*Cossgrove, Hosking, p. 2*].

59. Though the precise wording of predictability and consistency in arbitration is absent, the approach used in international commercial arbitration is similar to that found in many civil law countries, where judges routinely follow the decisions of higher level courts, even if the principle of precedent does not apply, so as to promote predictability and consistency [*Cruz, p.70*]. The willingness of international arbitrators to consider and in many cases follow the reasoning reflected in previous awards can be traced directly to the need for predictability and consistency in international commercial arbitration [*ICC case, No. 4131*].

60. Moreover, the principle of estoppel refers to the general doctrine that an earlier and final adjudication by a court or arbitral tribunal is conclusive in subsequent proceedings involving the same subject matter or relief, the same legal grounds and the same parties [*Dely, Sheppard, p.2, ¶4*]. And in an ad hoc international arbitration seated in Ontario, Canada, a well-experienced tribunal was asked to exclude evidence, which had been submitted in a previous arbitration involving different parties. The theory under which the docs were presented to the ad hoc tribunal was, again, one of issue estoppel. Because of the admitted relevance of the information (the objecting party had earlier admitted the relevance of the evidence) and also because the question of issue estoppel was predicated on whether the previous arbitral tribunal's ruling was of any effect, the tribunal admitted the evidence to the record even though the other proceedings had been

covered by a confidentiality agreement [*Telesat Canada v Boeing Satellite Systems, Pro. Ord No. 3(e)*]

61. Here in this case, the consideration stated above regarding the issue of estoppel and the confidence from Parties to Arbitral Tribunal should not be ignored. RESPONDENT in the other relevant arbitration under same arbitration rules alleged the contract should be adapted due to the change of tariff and holds an opposite position under the arbitration at hand [*Letter by Langweiler, p. 49, ¶.2*]. Such behavior not only violates the issue of estoppel, if Arbitral Tribunal upholds RESPONDENT's allegation, it would also violate the confidence to international community.

62. Hence, with the consideration of the issue of estoppel and the consistency of Arbitral Tribunal, this evidence should be entitled to submit even there is a confidentiality agreement.

D. The hacked evidence does not satisfy the exclusion standard

63. RESPONDENT alleges that the evidence has been obtained through illegal method and should not be admitted in the arbitration. [*Letter by Fasttrack, p.50, ¶. 3*]. However, the mere fact of hack is not enough to exclude an email or any other form of the digital evidence and only 11% of the arbitrators excluded evidence that would not be admissible [*Sussman. p. 521]*. In the case at hand, the evidence through an illegal hack of RESPONDENT's computer system could not be precluded for two reasons: firstly, it does not satisfy the exclusion standard [1]. Secondly, even if this evidence was illegally gathered, it is still permissible considering the significance and the dilemma [2].

64. Due to the two reasons stated above, this evidence did not reach the threshold to exclude it and therefore the RESPONDENT's allegation should be overruled.

1. The evidence does not satisfy the standard of exclusion

65. Regarding the standard whether to exclude an illegal obtained evidence, this evidence could not be excluded either under two-step test standards.

66. The "two-step test" standards proposed by Cherie Blair QC means firstly, the evidence follows the "clean hands" doctrine that CLAIMANT did not gain any unfair advantage from this evidence. And secondly, this evidence did not fulfill the standard of excluding it, ie. The *Cheire Blair QC, two-step test*. The clean hands doctrine is applicable in this case for the reasons that it

has been accepted as a general principle in international law [*UN Doc. A/60/10*] and has been applied by various courts and arbitral tribunals [*Fitzmaurice p. 54; Cheng Bin, p. 67; Zoller Elisabeth pp. 16-17; Plama v. Bulgaria, p.142; Yukos v. The Russian Federation, p. 1358*].

67. Here in this case, the main purpose for CLAIMANT to submit this evidence is to receive a fair result in the arbitration when facing this unforeseen tariff [*Letter by Langweiler, p. 49, ¶. 3*], which could not be treated as an unfair advantage purpose. Concluding, under the clean hands doctrine, it lacks legal basis to exclude the hack evidence from CLAIMANT.

2. Even if this evidence was illegally obtained, it is still permissible considering the significance and the dilemma

68. From the perspective of CLAIMANT's dilemma, which means that if evidence cannot be gathered immediately, though unlawfully, the entire suit will be frustrated [*U.S. v. Iran, 1980 ICJ REP. 1*]. The only way that the claimant could establish its claim would be a type of international discovery through self-help. In this case, if CLAIMANT did not use any hack method to obtain this evidence, then it is hard for CLAIMANT to persuade the Arbitral Tribunal regarding the tariff' s issue.

69. Moreover, some tribunals exclude the illegal obtained evidence with the note that the core reason is that evidence is with "marginal significance", thus at that circumstance when comparing it with the principle of good faith, it is unconvincing to admit the evidence into arbitration [*Methanex Corporation v. United States of America, Award, Ch.11*]. However, here in this case, the "tariff's issue" is the core argument during the whole arbitral proceedings which shoulders a crucial role, which shall be considered seriously.

70. In conclusion, since balancing the interests does not require abandonment of truth taking as an aspiration [*Park, p.695*], when balancing the interest between the principle of good faith and the materially of the facts, the two reasons above shall be under consideration.

CONCLUSION OF ISSUE II

71. In a nutshell, due to the IBA Rules and no obligation for a third party to respect the confidential agreement, added with the principle of estoppel, the confidentiality agreement has no binding

force, which leads to the conclusion that the evidence from other arbitral proceedings could be submitted. Moreover, since the evidence under arbitral proceeding's review does not satisfy the threshold of excluding it from IBA Rule as well as the "two-step test", the hacked evidence from RESPONDENT's computer should also be allowed to submit.

III: CLAIMANT IS ENTITILED TO THE PAYMENT OF 1,250,000 USD WHICH IS 25% OF THE PRICE OF THE THIRD DELIVERY OF SEMEN RESULTING FROM AN ADAPTATION OF THE PRICE

72. RESPONDENT asserts that CLAIMANT's claim for an increased remuneration is completely baseless [*ANA, ¶18*], but this is not in the case. Contract identifies the law of Mediterraneo and the CISG as the governing laws, which provides a firm basis that CLAIMANT is entitled to the payment of 1,250,000 USD resulting from an adaptation of the price under clause 12 of the contract. Here, CLAIMANT submits that clause 12 of the contract covers the risk of additional tariffs in the present case [A]. Thus, CLAIMANT is entitled to resort the Arbitral Tribunal to adapt the price pursuant to Art. 6.2.3 UNIDROIT Principles [B]. The amount of adaption should be 1,250,000 USD [C].

A. The imposition of the additional tariffs causes hardship in clause 12 of Contract

73. CLAIMANT submits that the additional tariffs should be covered in clause 12. Firstly, it is in accordance with Parties intention under Article 8 CISG [1]. Secondly, it is further proved under Art. 6.2.2 UNIDROIT Principles pursuant to Art. 7(2) CISG [2]. Alternatively, absent clear and unambiguous language, the provision has to be interpreted under contra preferentem [3].

1. It is in accordance with Parties' intention under Article 8 CISG

74. Since the Parties agree that the CISG governs their Contract Art.8 CISG guides the interpretation of Contact, which means that the hardship clause includes the additional tariffs, taking into account all relevant circumstances, practices, and usages [*Art. 8(3), CISG*]. Arts. 8(1) and 8(2)

set forth two hierarchical criteria. Here, CLAIMANT submits that RESPONDENT could not have been unaware of CLAIMANT's intention of covering the risk of additional tariffs into the hardship clause [a]. If subjective intent cannot be determined, a reasonable person would interpret the additional tariffs are included in clause 12 under Art. 8（2）CISG [b].

a. CLAIMANT explicitly expressed its intention under Art. 8(1) CISG

75. Pursuant to Art. 8 CISG, a party's intent should be interpreted according to his intent where the other party knew or could not have been unaware what that intent was [*Art. 8(1), CISG*], and should take into account all relevant circumstances, practices, and usages [*Art. 8(3), CISG*]. This is exactly the circumstance in this case. Here, since CLAIMANT had clearly expressed its intention during the conclusion of Contract, RESPONDENT could not have been unaware of CLAIMANT's intention was to cover the risk of additional tariffs into clause 12.

76. Firstly, CLAIMANT is deeply affected by the tariffs due to the changes of delivery terms. The purpose of such changes, however, was not to burden CLAIMANT with all the risks associated with the DDP-delivery but to profit from CLAIMANT's experience in the transportation of frozen semen. RESPONDENT proposed the changes in the delivery term so it is impossible for RESPONDENT to be unaware of the purpose of the DDP-delivery term [*Cl. Ex. No 3, p.11*].

77. Secondly, CLAIMANT's intention is very well evidenced by the fact that in connection with a change in the delivery terms CLAIMANT proposed to include an adaptation clause into Contract due to the change of delivery terms [*Cl. Ex. No.4, p12*] and RESPODENT agreed. In the email sent to RESPONDENT by CLAIMANT on 31 March 2017, CLAIMANT made clear that it "was not willing to take over any further risks associated with the agreed change of the delivery terms, in particular not those associated with changes in customs regulation or import restrictions [*Cl. Ex. No.4, p12*]." There is no doubt that tariff is one of the import restrictions. Besides, since CLAIMANT has used "any further risks" in the email, it is evident that the adaption clause was supposed to cover not only the most prevalent risk of changes in the health and safety requirements but also other risks including additional tariffs, like the present.

78. Moreover, CLAIMANT had experienced a heavy blow in 2014 due to unforeseeable additional health and safety requirements which increased the cost by up to 40%. It nearly resulted in the

insolvency of CLAIMANT. Considering RESPONDENT knows the tense financial situation of CLAIMANT, [*Cl. Ex. No.4, p12; PO2, question 21-22, p.58*], it is further proved that CLAIMANT cannot experience a similar blow again and thus Respondent obviously knows that it leads to severe hardship for the CLAIMANT to unreasonably bear the risk of additional tariffs.

79. Consequently, since CLAIMANT has explicitly expressed its intentions and RESPONDENT hasn't objected any of them, covering the risk of additional tariffs is in accordance with the Parties' intention.

b. If subjective intent cannot be determined, a reasonable person would interpret the additional tariffs are included in clause 12 of Contract under Art. 8 (2)CISG

80. RESPONDENT alleges that the narrowly worded clause is not applicable to the present impediment [ANA, ¶19]. However, CLAIMANT submits that clause 12 covers the risk of additional tariff since firstly, it is obvious form the wording of clause 12; secondly, RESPONDENT's interpretation would frustrate the purpose of clause 12.

81. In the first instance, under the reasonable person standard of CISG Art. 8(2), special weight is attached to the usual meaning of the words used by the parties [*Schwenzer p.163*]. Clause 12 states 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." [*Cl. Ex. No. 5, ¶ 14*]. The wording of this article expressly shows that the risks are not just limited on the list of specified events but could be an unlisted event if the invoking party proves that it could not reasonably have avoided or overcome the effects of the unlisted events. It is therefore legitimate for a reasonable person in RESPONDENT's shoes to understand the risks in clause 12 could be an unlisted event. According to Clause 12, There are three requirements to constitute "hardship". Firstly, it is "comparable" with additional health and safety requirements. The risk in the present case can be mentioned in the same breath with the risk of changing health and security requirements since they both belong to an act of the Government which out of their control. And they both make the contract more onerous. Secondly, it is an "unforeseen events".

RESPONDENT listed the latter in Contract because it has experienced such a hardship in 2014, which nearly resulted in the insolvency of CLAIMANT. However, no reasonable person could foresee the additional tariff at the time of contracting since the Government of Equatoriana had always been an ardent supporter of free trade, in particular in times like the present when the Prime Minister came from the Progressive Liberals. If CLAIMANT could foresee the possibility of charging tariff, there is no doubt that this kind of risk will be included in the terms. Thirdly, it makes Contract "more onerous". CLAIMANT had a profit margin of 5 per cent for the transaction and now makes a loss of 25 per cent due to the imposition of the new tariff of 30 per cent on the product by the Equatorianian authorities. Therefore, in the case at hand, the wording of clause 12 expressly gives CLAIMANT the right to claim the payment.

82. In addition, the purpose of incorporating hardship clause is to prevent CLAIMANT from taking on various risks arising from changes in delivery terms [*Cl. Ex. No 4, p.12*]. REPONDENTS's interpretation of clause 12 frustrates this purpose. In 2014 CLAIMANT had experience a heavy loss which nearly caused the insolvency of CLAIMANT. Therefore, CLAIMANT insisted to incorporate a hardship clause to address such similar subsequent changes. RESPONDENT may argue that the final contractual price of the semen is lower than originally proposed by CLAIMANT, which should be considered to the removal of certain risks associated normally with a DDP delivery obligation. This is baseless. Firstly, no particular figure can be attributed to it. Secondly, even though certain risks could be removed, the risk of additional tariff is not one of them.

83. In conclusion, a reasonable person would interpret the tariffs should be covered in clause 12.

2. It is further proved under Art. 6.2.2 UNIDROIT Principles pursuant to Art. 7(2) CISG

84. According to Art. 7 (2), gaps in the Convention should be filled, if possible, without resorting to domestic law, but rather in conformity with the Convention's general principles [*CISG Digest, p.43, ¶10; Preamble UNIDROIT Principles*]. Thus, it is reasonable to apply Art. 6.2.2 UNIDROIT Principles since it regulates some requirements to constitute hardship. Here, CLAIMANT proves that all conditions of Art. 6.2.2 UNIDROIT Principles are fulfilled: firstly,

the occurrence of the additional tariffs fundamentally alters the equilibrium of the contract [a], which is the most important one; secondly, the event occurs or becomes known to CLAIMANT after the conclusion of the contract [b]; thirdly, the event could not reasonably have been taken into account at the time of the conclusion of the contract [c]; fourthly, it is beyond the control of the CLAIMANT [d]; and finally, the risk of the tariffs is not assumed by CLAIMANT [e].

a. It fundamentally alters the equilibrium of the contract

85. Whether an alteration is "fundamental" in a given case will of course depend upon the circumstances. The reason of the alteration of the original contractual equilibrium does not matter [McKendrick, p.718], whether it is a change in law, outbreak of war or revolution, earthquake, flooding, exceptional weather conditions, breakdown of economic systems, etc. It is not advisable to establish a universal and mathematically precise alteration threshold since each case has its specialty.

86. It is supported by case law. In an ad hoc arbitration case reported by R. Fucci, in 1985, an Italian construction company conclude a contract with the government of Kuwait for the construction of a new Kuwaiti embassy in Algeria. The currency of payment was U.S. dollar. Two of the three arbitrators accepted a depreciation in the value of the U.S. dollar with respect to the Italian lira of about 35% as a changed circumstance justifying compensation to the contractor when its costs were incurred largely in Italian lire, while one arbitrator dissented, by stating that the depreciation was not extreme enough to allow adjustments. In another case, the Belgian Supreme Court, in 2009, confirmed hardship in case of a 70% steel price increase [*Scafom International case*]. Yet, under Italian law, an arbitral decision held that a 14% devaluation of the English pound sterling was a sufficient ground for the adaptation of a contract [*EISELEN*]. Thus, it is not reasonable to use a mathematically precise alteration threshold.

87. In practice, a fundamental alteration in the equilibrium of the contract may manifest itself in two ways, which are increase in cost of performance and decrease in value of the performance received by one party [*Comment 2 of Art. 6.2.2, UNIDROIT Principles, p.218-219*]. In the present case, it's the first situation.

88. When analyzing the case, regard should be given to the circumstances surrounding the contract,

including but not limited to its duration and purpose, the level of risk assumption, as well as the experience, economic status and financial capabilities of the parties. In some exceptional cases, especially when the debtor is a small company and loses a major part of its income due to changed circumstances, a more flexible approach towards alteration threshold may be justified. The essential criterion in this situation is the fact that performing the contract in its unaltered form would result in a financial ruin and possible bankruptcy of the debtor [*Brunner. C, p. 435−437*].

89. Here, CLAIMANT would be supposed to have a profit margin of 5% from the transaction, i.e. 5,000 USD per dose and 500,000 USD for 100 doses. However, because of the imposition of 30% tariffs on frozen semen, CLAIMANT has to pay the additional 1,500,000 USD for the final shipment. CLAIMANT supposed to earn 250,000 USD from the last 50 doses of frozen semen; nevertheless, it suffered a loss of 1,250,000 USD to pay the tariffs, which is 5 times as much as it should have earned. Therefore, the drastic rise in the tariffs enormously increased the cost of CLAIMANT's performance.

90. Besides, the tariffs have put CLAIMANT into financial crisis. CLAIMANT has been making losses since 2014 primarily due to the high interest payments for the loan taken on to finance the new stables in 2013 and the costs for the restructuring measures. The restructuring plan which CLAIMANT had agreed with its creditors in 2014 provided that CLAIMANT would be profitable again from 2017 onwards. With the additional revenues from the sale of the frozen semen CLAIMANT had planned to make a profit in 2018 of 300,000 USD after 180,000 USD in 2017. That plan would be seriously endangered if CLAIMANT had to bear the 1,250,000 USD [*PO2, Question 29*].

91. Therefore, in the case at hand, if CLAIMANT had to bear the imposition of tariff, the consequence would definitely alter the equilibrium of Contract for CLAIMANT, which would be a critical strike to CLAIMANT.

b. It occurs after the conclusion of the contract

92. The additional tariffs occurred and became known to CLAIMANT after the conclusion of Contract as Contract was signed on 6 May 2017 while the tariffs were announced on 19

December 2017 [*Cl. Ex. No5, p14; PO2, Question 25*].

c. It could not have been taken into account at the time of contracting

93. In the analysis of whether the event could have been taken into account at the time of the conclusion of the contract can only be made by a court or arbitral tribunal on a case-by-case basis. The key to understand the purpose of foreseeability is not whether the particular event could have occurred in theory, but rather whether a reasonable businessperson in the same situation of the promisor at the time of contracting has anticipated the occurrence of the particular event.

94. In the present case, the retaliation as well as the size of the tariffs came as a big surprise even to informed circles. As a matter of fact, Equatoriana has always been one of the biggest supporters of the existing system of free trade. Even if other countries have adopted tariff measures to affect the imports of Equatoriana, Equatoriana almost never took direct retaliatory measures [*Cl. Ex. No6, p.15*]. The only exception is because of the ruling party-a Prime Minister from the National Party-which is more critical to free trade. Here, the Prime Minister comes from the Progressive Liberals, which is an ardent supporter of free trade [*NOA ¶19, p7*]. Thus, a reasonable person in CLAIMANT's shoes could not have foreseen the retaliation as well as the size of the tariffs at the time of the conclusion of Contract.

95. Besides, no tariffs have been imposed on agricultural goods in Equatoriana until 2018. The present tariff is extraordinary because usually the frozen semen could not be considered as "agricultural good". Here, even though CLAIMANT has read the report about the retaliation measures, it is not sure that the tariffs would apply to semen until Ms Napravnik asked for customs clearance on 19 January 2018 *[PO2, Question 25,26 p.58*].

96. As proven above, CLAIMANT could not have reasonably foreseen that the tariffs also applied to semen. Therefore, the imposition of tariffs is unforeseeable within the meaning of Clause 12.

d. It is beyond the control of CLAIMANT

97. Beyond control means that the hardship event impeding performance must be external to the party invoking it; the debtor may not rely on self-induced hardship [*Doudko, p. 497*]. That is to say, the difficulties of performance by the debtor may not be the result of its own act or

negligence [*Roesler, p. 485*]. Here, CLAIMANT is not responsible for the tariffs since they are imposed by RESPONDENT's home country. Further, it is widely accepted in the jurisprudence that beyond the control of a debtor is regularly not only natural catastrophes, but also governmental interference in international commercial relations such as an export ban [*Bianca/Bonell, p. 583; Stoll in Schlechtriem, p. 610; Matray, p. 94; Kritzer at p.506; Heilmann at p.630; Coal case; Steel ropes case; Czarnikow Ltd. v. Rolimpex*]. There are also numerous supportive awards. It is a constant practice of ICC arbitrators to grant force majeure defenses in cases involving governmental interference [*ICC Case No. 9978*]. Besides, in the final award of 1999, an ad hoc Tribunal, relied on the Böckstiegel's opinion that "… normally acts of public authority by the state have to be accepted as an excusing case of force majeure …" [*Himpurna vs. PLN*]. Additionally, in an arbitration proceeding involving an export ban for coal, the tribunal found that a prohibition on export implemented by the seller's State constituted an impediment beyond the control of the seller [*Case 56/1995*].

98. In light of all above, the requirements are certainly met since the imposition of new tariffs was act of Equatoriana Government and thus clearly beyond the control of CLAIMANT.

e. It is not assumed by CLAIMANT

99. As far as the fourth condition is concerned, there can be no hardship if the debtor has assumed the risk of the change in the circumstances. The word "assumption" makes it clear that the risks need not have been taken over expressly, but that this may follow from the very nature of the contract. A party who enters into a speculative transaction is deemed to accept a certain degree of risk, even though it may not have been fully aware of that risk at the time it entered into the contract [*Comment 3.d of Art. 6.2.2. UNIDROIT Principles, p221*]

100. Thus, as contracts to sell shares of stock on the stock exchange [*Perillo, p. 14*] or insurance contracts [*Gordley*] are aleatory in nature (i.e. depending on chance or contingency), the debtor may not be relieved even if unexpected and unforeseeable events disrupted the market [*Brunner. C*].

101. Here, it is an ordinary contract for the sale of goods instead of an speculative contract. Further, the DDP delivery terms in this case is a modified one which transfers all the risks to

RESPONDENT. Therefore, it is not assumed by CLAIMANT.

102. In the light of above, the additional tariffs constitute hardship in clause 12.

3. In any case, RESPONDENT should bear the risk of the ambiguity of the hardship clause pursuant to the contra preferentem rule

103. In any case, RESPONDENT has to bear the risk of the ambiguity of the hardship clause, as it suggested the exact wording. CLAIMANT requests the Arbitral Tribunal to use the "contra proferentem rule" in Art. 4.6 UNIDROIT Principles as the wording in clause 12 is at least not clear. Art. 4.6 UNIDROIT Principles states that "If the contract terms supplied by one party are unclear, an interpretation against that party is preferred". The contra proferentem rule essentially means that if the term of a contract is not properly phrased, the party who provides the wording of the term bears the risk arising from a lack of clarity in drafting and interpreting that term [*Ad hoc Arbitration, Buenos Aires; CRIOHSA vs. JOAO FORTES; Aduanas v. Comercio Paraguayo; Deutsches Sportsschiedsgericht, 12/17/09; District Court Frankfurt aM, 12/15/11; Société Harper Robinson v. Société internationale; ICC case, No. 8261; ICC case, No. 108.2011; Vogenhauer/Kleinheisterkamp, p. 527, ¶2*].

104. RESPONDENT suggested the exact wording of the hardship clause [*PO2, Question 12*]. As demonstrated above, the wording of the hardship clause is at best ambiguous. RESPONDENT, as the proposer, should bear the risk of this ambiguity. Thus, an interpretation contra proferentem leads to the conclusion that the hardship clause covers the risk of additional tariffs.

B. CLAIMANT is entitled to adapt the price under Art. 6.2.3 UNIDROIT Principles

105. Since the contractual term itself does not deal with the consequences of the hardship event (e.g. a clause providing for automatic indexation of the price if certain events occur) [*Comment 1 of Art. 6.2.3 UNIDROIT Principles, p.223*], it is reasonable to apply Art. 6.2.3 UNIDROIT Principles to adapt the contract. Here, CLAIMANT exhausted the right to negotiate [1]; since the Parties failed to reach agreement within reasonable time; thus, CLAIMANT is entitled to resort the Arbitral Tribunal to adapt the price pursuant to Art. 6.2.3(4) UNIDROIT Principles [2].

1. CLAIMANT has exhausted the right to negotiate

106. CLAIMANT submits that firstly, the requirements to negotiate are fulfilled [a]; secondly, CLAIMANT exercised the right in accordance with Art. 6.2.3 (2) UNIDROIT Principles [b]; thirdly, the Parties failed to reach an agreement within reasonable time [c].

a. CLAIMANT exercised the right under Art. 6.2.3 (1) UNIDROIT Principles

107. Pursuant to Art. 6.2.3 (1) UNIDROIT Principles, "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." Both requirements are fulfilled.

108. Firstly, CLAIMANT request renegotiation without undue delay as once CLAIMANT was sure about the tariff policy in Equatoriana, it informed RESPONDENT immediately by email to find a solution. RESPONDENT may contend that the tariffs had already announced on 19 December 2017, but CLAIMANT did not send the email until 20 January 2018. It is baseless as CLAIMANT read the newspaper article about the retaliatory tariffs in the Peak Business News on 20 December 2017 though, it did not cross its mind that the frozen semen could be considered as an "agricultural good" so that the tariffs would apply to it. Only when Ms Napravnik asked for customs clearance on 19 January 2018 was she told by email, which she only read in the morning of 20 January 2018, that the tariffs applied to semen as well [*PO2, Question 26, p.58*]. Further, the disadvantaged party, here, refers to CLAIMANT, does not lose its right to request renegotiation simply because it does not fail to act without undue delay [*Comments of Art. 6.2.3 UNIDROIT Principles, ¶2*]. Thus, the request was made without undue delay.

109. Secondly, CLAIMANT fulfills its duty to indicate the grounds on which the request for renegotiations is based. As mentioned above, the circumstances in the present case cause "hardship" for CLAIMANT. Moreover, RESPONDENT had already known CLAIMANT's financial situation and while the Parties had agreed on a DDP delivery it had been clear to both Parties that CLAIMANT should not bear all risks associated with such a delivery term but that Contract on DDP delivery was primarily to ensure better transportation terms and swifter delivery due to CLAIMANT's experience in the shipment of frozen semen [*Cl. Ex. No8,*

p.17-18].

b. The request for renegotiation does not in itself entitle CLAIMANT to withhold performance

110. The second paragraph of Art. 6.2.3 UNIDROIT Principles explicitly states that the request for renegotiation does not, in itself, entitle the debtor to withhold performance [*Art. 6.2.3(2) UNIDROIT Principles*]. This is also supported by case law: an arbitral tribunal rejected a defendant's argument that his liability for non-performance was excluded on the ground of hardship, stating that even if the events were to be considered as a case of hardship, the effect would not be the exclusion of the defendant's liability for its non-performance, but only the right to ask for renegotiation of the distributorship agreement with a view to adapt it to the changed circumstances [*El Niño Case*].

111. This should not be applied in this case since CLAIMANT delivered the goods within the negotiation process.

c. The Parties failed to reach agreement

112. Since RESPONDENT refused to adapt the price, the negotiation failed. Hence, CLAIMANT exhausted the right to negotiate properly.

2. CLAIMANT is entitled to resort the Arbitral Tribunal to adapt the price pursuant to Art. 6.2.3(4) UNIDROIT Principles

113. Pursuant to paragraph (4) Art. 6.2.3 UNIDROIT Principles, there are two different ways to react. The first possibility is to terminate the contract. However, in this case, it is meaningless to terminate the Contract because CLAIMANT has fulfilled its obligations. Thus, CLAIMANT is entitled to adapt Contract with a view of restoring its equilibrium under paragraph (4)(b) Art. 6.2.3. The term "court" should be understood to mean the dispute resolution mechanism agreed upon by the parties to the contract [*Kessedjian, p. 422, p. 87*] which, here, is the Arbitral Tribunal.

114. Adapting the contract is for the purpose to make a fair distribution of the losses between the Parties. Usually, it involves a price adaptation.

C. CLAIMANT requests the payment of 1,250,000 USD resulting from the adaption

115. The amount of adaption should be analyzed case by case. For instance, the adaptation has to consider the extent to which one of the parties has taken a risk and the extent to which the party entitled to receive a performance may still benefit from that performance [Comment 7 of Art. 6.2.3 UNIDROIT Principles, p. 226].

116. Here, CLAIMANT submits that the amount of adaption should be 1,250,000 USD based on principles of good faith [1] and fair dealing [2].

1. The amount is reasonable under the principle of good faith

117. CLAIMANT requests the Arbitral Tribunal to consider the doctrine of good faith as firstly, it is an internationally recognized principle[a]; secondly, RESPONDENT'S conduct violates the principle of good faith[b].

a. It is an internationally recognized principle

118. Although nothing is said in Art. 6.2.3 to that effect, both the request for renegotiation by CLAMAINT and the conduct of both parties during the renegotiation process are subject to the general principle of good faith [*Article 1.7 UNIDROIT Principles]* and to the duty of cooperation *[Article 5.1.3 UNIDROIT Principles*]. Thus, once the request has been made, both parties must conduct the renegotiation in a constructive manner [*Comments of Art. 6.2.3 UNIDROIT Principles, p.225*]. And it "is always evaluated by reference not to the internal standards of various national legal systems but to the standards of international business practice" [*ICC No 9029*].

119. It can be further proved in Raw Material Case. In 2001, the ICC International Court of Arbitration decided that when, after a certain period of time, the CLAIMANT considerably increased the price of the raw material due to the more stringent conditions imposed upon the claimant by a governmental agency, the good faith principle imposes upon the parties the duty to seek out an adaptation of their agreement to the new circumstances which may have occurred after its execution in order to ensure that its performance does not cause the ruin of one of the parties [*Dawwas, p334, ¶1; Raw Material Case, ¶98*].

b. RESPONDENT's conduct violates the principle of good faith

120. In this case, RESPONDENT does not act in good faith.

121. Firstly, once the disadvantaged party, here, refers to CLAIMANT, claims the existence of a hardship situation, the other party cannot simply dismiss this claim [*Brunner. C, p.485*]. If the disadvantaged party's claim for hardship has a legitimate basis, refusal to renegotiate by the other party (RESPONDENT) can later be construed by the court or arbitral tribunal to his disadvantage [*Brunner. C, p.483; Fucci, p. 30*]. Here, RESPONDENT refused to renegotiate the price or other solutions [*Cl. Ex. No.8 p. 18; Resp. Ex. No.4, p. 36, ¶4*]. Therefore, RESPONDENT should bear the negative consequences.

122. Secondly, RESPONDENT was in breach of the resale prohibition [*PO2, question 20, p.57*]. RESPONDENT contends that the contractual document does not contain any resale prohibition [*ANA, ¶11, p31*]. However, Ms. Napravnik had in her email of 24 March 2017 made the resale to third parties depending on an "express written consent" and RESPONDENT never objected it [*Cl. Ex. No.3, p. 11; PO2, question 16, p.57*]. Further, the Parties clearly stated information requirement of mares (in italics) which the semen is to be used for in Contract [*PO2, question 16, p.57*]. Thus, the semen will not be used for the mares the partied agreed once RESPONDENT resells them to others. Therefore, CLAIMANT is entitled to request compensation for its lost profits under Article 74 CISG. However, CLAIMANT did not choose to do so. On the contrary, CLAIMANT delivered the goods [*Art. 6.2.3(2) UNIDROIT Principles*] and paid the tariffs in advance, regardless of its own bad financial situation out of RESPONDENT's promise to adapt the price [*Resp. Ex. No.4, p. 36, ¶4*] and long-term cooperation.

123. In conclusion, the payment is reasonable under the principle of good faith.

2. The payment of 1,250,000 USD is in accordance with the principle of fair dealing

124. When deciding the adaption amount, it should be examined whether and how the supervening events burdened the counter-performance, i.e. not only the debtor's but also the creditor's situation should be assessed [*Uribe, p. 202−203*]. Here, considering both parties' situations, it is permissible to request the payment of 1,250,000 USD.

125. Firstly, even though RESPONDENT bears all the tariffs, it would not be financially endangered

[*PO 2, question 30, p.59*]; rather, CLAIMANT would because of its bad financial situation.

126. Secondly, RESPONDENT earns a profit of 300,000 USD by the breach of the resale prohibition while CLAIMANT acts in good faith all the time. While CISG doctrine and cases contain little discussion of the question of disgorgement of wrongfully gained profits [*Schmidt-Ahrendts, p. 90*], the principles underlying the CISG support the notion that a party should not be permitted to keep gains which is not rightfully possessed. "Article 84 obligates the Parties to return all benefits of possession (profits and advantages of use)" [*Schlectriem, p.106*]. Besides, commentators agree that a breaching party must not be permitted to benefit from its wrongdoing. Schwenzer emphasizes that "the general idea that a breach of contract must not pay has to be upheld under CISG" [*Schwenzer, p. 1017*].

127. In light of what CLAIMANT discussed before and considering the additional tariffs are not directly caused by both Parties, CLAIMANT would like to give up their profits of 250,000 USD that should have been obtained in the third delivery of semen. Thus, CLAIMANT is entitled to request the payment of 1,250,000 USD which is 25% of the price of the third delivery of semen.

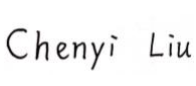
CONCLUSION OF ISSUE III

128. CLAIMANT is entitled to demand the payment of 1,250,000 USD resulting from an adaptation of the price. The imposition of the tariffs is covered by clause 12 since it is in accordance with the Parties' intention and the requirements for hardship are fulfilled under Art. 6.2.2 UNIDROIT Principles. Thus, CLAIMANT is entitled to demand the adaptation of price under Art. 6.2.3 UNIDROIT Principles. It is reasonable to request 1,250,000 USD from the adaptation based on good faith and fair dealing.

REQUEST FOR RELIEF

For the above reasons, CLAIMANT respectfully requests the Tribunal to find that:

1. The Tribunal has the jurisdiction and the powers under the arbitration agreement to adapt the contract.
2. CLAIMANT is entitled to submit evidence from the other arbitration proceedings even though there exist some irregularities.
3. CLAIMANT is entitled to the payment of 1,250,000 USD which is 25% of the price of the third delivery of semen resulting from an adaption of the price.



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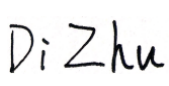

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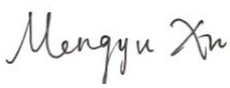

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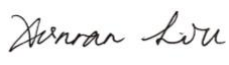

Xinran Liu

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