

**SIXTEENTH ANNUAL WILLEM C. VIS (EAST) INTERNATIONAL
COMMERCIAL ARBITRATION MOOT
HONG KONG – MARCH 31-APRIL 7, 2019**

PHAR LAP ALLEVAMENTO, *CLAIMANT*

V.

BLACK BEAUTY EQUESTRIAN, *RESPONDENT*

MEMORANDUM FOR RESPONDENT



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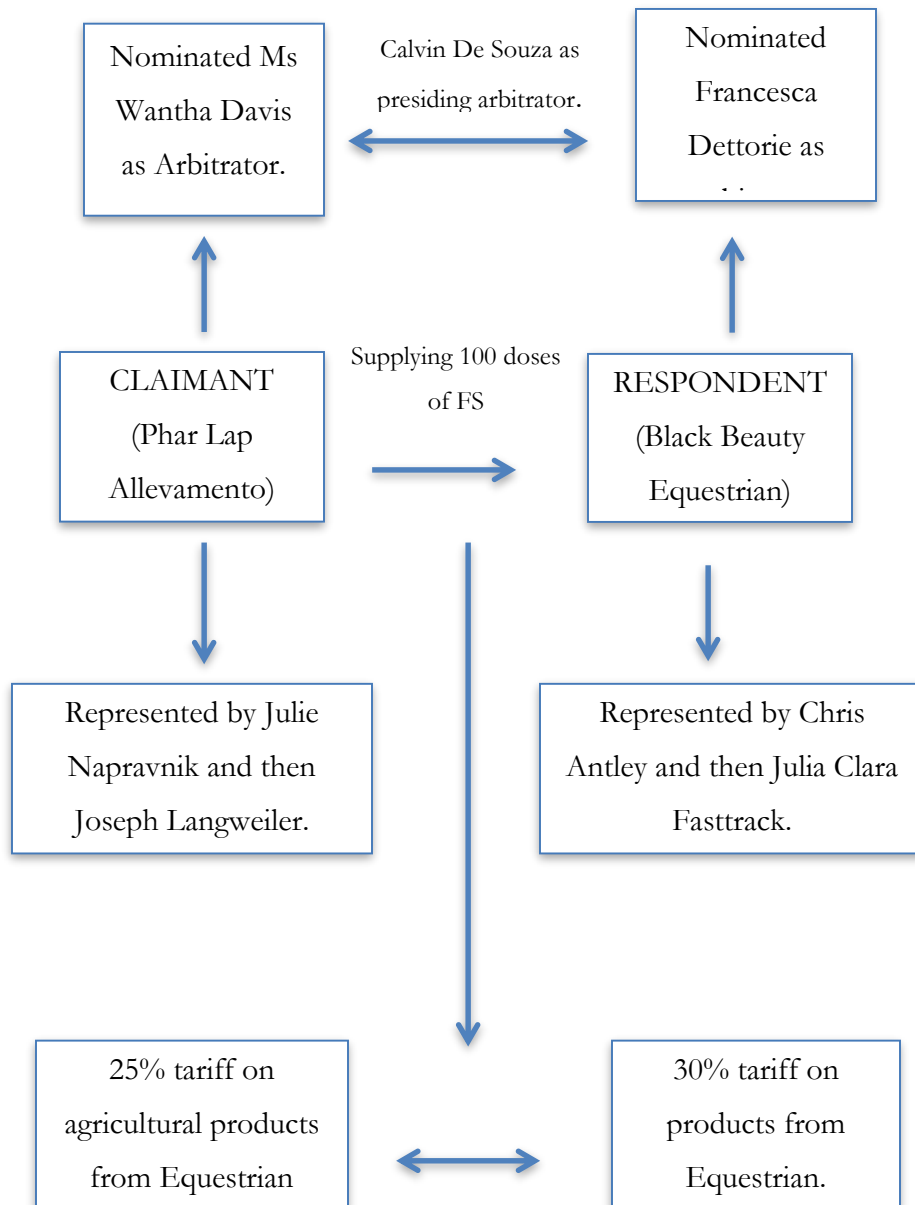
**LIST OF ABBREVIATIONS**

Abbreviations	Full Form
§/§§	Section(s)
%	Percentage
¶/¶¶	Paragraph(s)
&	And
%	Per cent
Ans.	Answer
Arb.	Arbitration
Art(s).	Article(s)
Ch.	Chapter
CISG	UN Convention on the International Sale of Goods, Vienna, 11 April 1980
Cl.	CLAIMANT
CLOUT	Case Laws on UNCITRAL Texts
Co.	Company
Comm.	Commercial
DDP	Delivery Duty Paid
Ed.	Edition
ED./Eds.	Editor(s)
eg.	Exempli gratia [for example]
Ex.	Exhibit
FS	Frozen Semen
FSSA	Frozen Semen Sales Agreement
IBA	International Bar Association
Ibid.	Ibidem [the same place]
ICC	International Chamber of Commerce
i.e.	Id est [that is]
INCOTERMS 2010	International Commercial Terms



Int'l	International
Intro.	Introduction
Memo	Memorandum
No.	Number
Not.	Notice
Ord.	Order
p.	Page Number
Para	Paragraph
Proc.	Procedural
SC	Supreme Court
Sec.	Section
UNCITRAL	United Nations Convention on Contracts for International Sale of Goods
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, 2010
v.	Versus
Vol.	Volume

STATEMENT OF FACTS



- 1) CLAIMANT is a company incorporated in Mediterraneo. In its racehorse section, the CLAIMANT provides stallions for breeding and it additionally offers FS of its champion stallions for artificial insemination. The star among the CLAIMANT's stallions is Nijinski III, which is one of the most successful racehorses ever. RESPONDENT is a company established under the laws of Equatoriana, which is famous for its broodmare.



- 2) **21.03.2017:** The RESPONDENT contacted the CLAIMANT for the availability of Nijinski III for its newly started breeding program. The RESPONDENT was particularly interested to know whether FS of Nijinski III was available. The RESPONDENT asked the CLAIMANT for 100 doses of Nijinski III's FS for artificial insemination.
- 3) Equatorian Government at the time had imposed serious restrictions on the transportation of all living animals. The government temporarily lifted the ban on artificial insemination for racehorses after 2 years of its imposition.
- 4) The RESPONDENT required a high number of doses as under the relevant Equatorianan law, all doses acquired during the lifting of the ban could be used.
- 5) **24.3.2017:** In an email on this date, the CLAIMANT offered the RESPONDENT 100 doses of Nijinsky III's FS in accordance Mediterraneo Guidelines for Semen Production and Quality Standards.
- 6) **28.03.2017:** The RESPONDENT only objected to the choice of law and the forum selection clause and it insisted on a delivery DDP. The parties finally agreed not only on hardship clause but also on an acceptable choice of law and arbitration clause. The hardship clause that was there finally in the contract was narrow and did not provide for adaptation by the Arbitral Tribunal.
- 7) **31.03.2017:** In an email on this date the CLAIMANT accepted delivery DDP but asked to be relieved from all the risks associated with such delivery. This was not acceptable for RESPONDENT and expressed their concern.
- 8) The ICC Hardship clause was considered too broad for the RESPONDENT and eventually they merely added a hardship wording to the existing force majeure clause.



- 9) **10.04.2017:** The RESPONDENT was clear that it wanted an arbitration agreement governed by the place of arbitration and not the law of the contract.
- 10) **11.04.2017:** The CLAIMANT suggested a new place of arbitration but did not object to the law of the seat of arbitration governing the arbitration agreement. This silence implied acceptance to the RESPONDENT's demands.
- 11) The finalization of the contract took longer than anticipated as the two main negotiators, Ms. Napravnik and Mr. Antley, met with an accident during negotiation process. The contract had to be finalized by employees on both sides who were not involved before and hence knew little of the earlier negotiations that had taken place. The RESPONDENT agreed that Mr. Krone found the note of Mr. Antley, but it was incomprehensible.
- 12) **6.5.2017:** On this date the contract was signed in an email.
- 13) **20.05.2017:** The Parties had agreed on 3 shipments. The CLAIMANT sent the first shipment of 25 doses on 20.05.2017; the second shipment of 25 doses on 3.10.2017. Two months prior to the last shipment of 50 doses, Equatorian government imposed 30% tariff.
- 14) In reaction to the abovementioned tariffs, the selected products from Mediterraneo, which included horse semen, were included in the ambit of the tariff imposed by the Equestrian government. The two parties immediately started negotiations regarding price adjustments.
- 15) **21.01.2018:** In their phone call on this date, Mr. Shoemaker said that he understood the CLAIMANT's concern and was sure that a solution could be found through negotiations. Mr Shoemaker was very clear that he had no authority to agree on an adaptation. Because of the circumstances and CLAIMANT's threat to stop delivery, he could not reject CLAIMANT's request outright.
- 16) **23.01.2018:** CLAIMANT delivered the remaining 50 doses.



- 17) **31.07.2018:** Notice of arbitration was served by the CLAIMANT upon the RESPONDENT. In the RESPONDENT's Answer to the Notice of Arbitration, they have clearly stated that the RESPONDENT has presented an incomplete summary of facts and left out some crucial information. The RESPONDENT claimed that the CLAIMANT had presented incomplete facts and that the Arbitration Tribunal lacks jurisdiction and that the contractual document does not contain any resale prohibition. There is no proof that the CLAIMANT has submitted to prove its allegation that the RESPONDENT resold the doses and made 20% profit there from.
- 18) **2.10.2018:** In an email on this date, the CLAIMANT received information at a conference about another arbitration that the RESPONDENT had asked for an adaptation of the contract in another proceedings which they claimed was similar to that at hand. But the RESPONDENT has objected to these baseless allegations and also argues that this is completely irrelevant to this arbitration dispute.
- 19) **04.10.2018:** The Arbitral Tribunal had a telephone conference and discussed the conduct of the proceedings and laid out the issues.



INTRODUCTION TO MEMORANDUM

- 20) RESPONDENT makes this submission in accordance with the Proc. Ord. no. 1 of 05.10.2018. The RESPONDENT's source of relief lies in the hands of this tribunal. The following points highlight the major arguments:
- 21) The RESPONDENT humbly submits that the arbitral proceedings are to be governed by the Law of Danubia as it was chosen by both parties with mutual consent to be the seat of the arbitration. Further, the tribunal does not have the jurisdiction to hear the present arbitration as the subject matter of the entire dispute between the two parties does not arise from the underlying contract. Moreover, by Danubian law, adaptation can not happen till express authorization is given. The contract provides for no such power to the tribunal.
- 22) The Arbitral Tribunal should not allow the CLAIMANT to submit the Partial Interim Award as evidence as it will result in the breach of confidentiality. The tribunal cannot order joinder of the third party to an arbitration proceeding as the third party is not governed by the arbitral agreement. The IBA Rules on Taking of Evidence in Int. Arb. stipulate a procedure for taking of evidence and these Rules also provides for requesting documents from the opposing party. Finally, evidence obtained by illegal means is against public policy.
- 23) Further, RESPONDENT submits there is no hardship caused to the CLAIMANT by the imposition of tariff as it was foreseeable. Alternatively, risk was assumed by CLAIMANT while executing the contract. The RESPONDENT also submits that the binding nature of the contract should be given paramount importance. The RESPONDENT states that the claimant cannot claim exemption under Art. 79.
- 24) RESPONDENT is not obligated to pay the additional cost of 1,250,000 as he fulfilled all its contractual obligation. The payment was also initiated before the shipment was delivered to the RESPONDENT. Hence, the CLAIMANT is not entitled to the additional costs and any other amount.



ARGUMENTS ADVANCED

ISSUE 1: THE TRIBUNAL DOES NOT HAVE THE JURISDICTION OR THE POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, WHICH INCLUDES IN PARTICULAR THE QUESTION OF WHICH LAW GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.

A. THE ARBITRAL PROCEEDINGS ARE GOVERNED BY THE LAW OF DANUBIA

- 25) The RESPONDENT humbly submits that the arbitral proceedings are to be governed by the Law of Danubia contrary to the CLAIMANT's contention that it should be the Law of Mediterraneo. The main reason for Law of Danubia being the applicable law to the arbitration is that Danubia was chosen by both parties with mutual consent to be the seat of the arbitration [*Cl. Ex. no.5*]. Furthermore, the doctrine of separability entails that the arbitration agreement must be treated as distinct and separate from the main contract in which it is contained.

I. Arbitration agreement to be treated Doctrine of separability

- 26) Arbitration clauses are generally considered "separable" or "severable" from the main contract, concluded by the parties [*G.Born*]
- 27) The other landmark decision was held on 17 October 2007, the House of Lords in Fiona Trust ruled the decision in support of the doctrine. The Lords upheld, unanimously, the Court of Appeal's ruling in a case concerning the scope and effect of arbitration clauses. Two major issues were observed:
- (i) the Lords underlined the ideas of separability principle and maintained arbitration clauses should "be construed liberally, without making fine semantic distinctions between disputes "arising out of", "arising under" or "in connection with" the contract".
 - (ii) the Lords defined "arbitration clauses are to be treated as "distinct agreements" from the main agreements and can only be invalidated on grounds



that relate to the arbitration clause itself". Moreover, even in cases where that contract has been concluded by fraud, misrepresentation or bribery, only arbitration tribunals have jurisdiction to consider the validity of that contract [*Fiona Trust case*]. The judgment in the Fiona Trust case is a further important affirmation that an arbitration clause is a separate contract

- 28) The RESPONDENT also submits that the arbitration agreement be treated as a distinct entity from the main contract and that it may be inferred that the substantive law of the contract may not necessarily be the governing law of the arbitral proceedings.
- 29) As also enshrined in HKIAC rules, the arbitration agreement will be treated as an agreement independent of other terms of the contract [*HKLAC Rules 2018*].
- 30) The above mentioned doctrine is also further enumerated in the UNICTRAL Rules and UNCITRAL Model Law on International Commercial Arbitration. The Model Law defines the doctrine in the following manner:

"Arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."
[*UNCITRAL Rules*]

II. Danubia is more closely connected to the Arbitration Agreement

- 31) The Court of Appeal laid down a three stage enquiry, whereby the applicable law of the arbitration agreement is determined by;
- a. The express choice of the parties; but in the absence thereof;
 - b. The implied choice of the parties; but in the absence thereof;
 - c. The law with the closest and the most real connection with the dispute between the parties (*Dicey & Morris 32, 2006*)(*H. Ormsby*) The Respondent submits that Danubia was both, the implied choice and was also more closely connected to the dispute than Law of Mediterraneo. [*Sulamérica case*]



- 32) The RESPONDENT puts forth that the tribunal shall give effect to the parties' intention unless doing so would be inconsistent with a mandatory law or the HKIAC Rules 2018. It is further submitted that it is the common intention of the parties that the present dispute be governed by the Law of Danubia as it is the law of the seat of the arbitral proceedings mutually consented by both the parties [*Cl. Ex. no.5*]. The appropriate law should be determined by reference to the jurisdiction that has the most significant relationship, or is most closely connected with the dispute [*G Born; Tetley W*].
- 33) The RESPONDENT further submits that it believes that Law of Danubia is more closely connected to the arbitration proceedings and the dispute at hand than as the CLAIMANT alleges, Law of Mediterraneo. The first reason for the RESPONDENT to believe so is that because the Law of Danubia is the law of the seat of the arbitration which was mutually agreed upon by both the parties [*Cl. Ex. no.5*].
- 34) As stated earlier, under the doctrine of separability as under the HKIAC Rules, an arbitration agreement will be treated as independent of the other terms of the contract. Hence, when the arbitration clause is looked at with the view of it being separate from the underlying contract, it is devoid of any express mention of governing law. But it is expressly mentioned by mutual consent of both parties that the seat of the arbitration shall be Danubia. Therefore, it should be a reasonable inference that the parties intended the law of the seat of the arbitration to have jurisdiction over the arbitral proceedings.
- 35) The Court held that the seat of the arbitration is more closely connected to the arbitration agreement in the question in that particular case. They opined that the choice of another jurisdiction as the seat of the arbitration suggests an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings [*Sulemarica Case*]. This suggests that the parties intended English law to govern all aspects of the arbitration agreement, including matters touching on the formal validity of the agreement and the jurisdiction of the arbitrators.



- 36) The RESPONDENT submits that the above mentioned line of argument flows in consonance to the present dispute before the court. The parties mutually agreed to the seat of the arbitration being Danubia thereby suggesting an acceptance that the law of Danubia shall have governance over the arbitral proceedings.
- 37) An agreement to arbitrate in London has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective [*Sulamerica case*].
- 38) If there are powerful factors pointing towards the seat of the arbitration being the applicable law, so shall be established as the closer connection to the arbitration in question [*Sulamerica case*]. The fact that the parties had chosen another country as the seat of arbitration, and therefore agreed that the arbitration law of that country would apply to the proceedings, indicated that they intended English law to govern all aspects of the arbitration agreement. The RESPONDENT, as contended above, further submits that so is the case of the present dispute. It is laid down that the seat of the arbitration to be the curial law of the arbitration. [*Atlas Power case*].
- 39) In the Court of Appeal case, the Court was of the opinion that :
“an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate, than with the place of the law of the underlying contract, in cases where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place” [*C vs. D Case*].
- 40) The law at the seat of the arbitration, i.e., the *lex arbitri* governs the arbitration [*Poudret, Besson, Sébastien; G. Born*].
- 41) The findings [*C vs. D case*] was echoed in the another case where it concluded that English law governed the arbitration, the law with which the arbitration agreement has its closest connection and also the most real connection was England because the seat of the arbitration was there [*Abuja International Hotels Case*]. The parties had recognised and



acknowledged the fact that the seat of the arbitration was in England when they signed the Terms of Reference. It followed as a matter of English law that the arbitration agreement was valid.

- 42) Mutual rights and obligations under the contract should be determined by reference to the domestic law of the country in which the arbitration takes place, since this is the law with which arbitrators sitting there may be supposed to be most familiar. [*Compagnie Tunisienne de Navigation SA case*]
- 43) Parties' freedom of choice must generally be respected, such that there is nothing inappropriate or unlawful about an underlying contract being expressly subject to the law of State A and the arbitration agreement being expressly subject to the law of State B, and larger contracts now often expressly provide for an entirely different law applicable to the arbitration agreement [*Tamil Nadu Electricity Board case*]. In another case, it was considered that the choice of seat was determinative of the proper law governing the arbitration clause [*XL Insurance Ltd*].
- 44) By virtue of all authorities mentioned above, The RESPONDENT submits that the applicable law to the arbitration agreement in the present case shall be the Law of Danubia as the parties mutually agreed to Danubia being the seat of the arbitration and thereby accepting the law prevalent in Danubia to have governance over the arbitral proceedings. [*Cl. Ex. no.5*].
- 45) The CLAIMANT's contention that Law of Mediterraneo shall govern the arbitration because it also governs the underlying contract and have said that the RESPONDENT cannot argue that Law of Danubia governs the main contract. [*Cl Memo, para 41*]. The RESPONDENT throws light and clarifies that the RESPONDENT is arguing that the Law of Danubia governs the arbitration agreement and not the main contract and as for Law of Mediterraneo, it may govern the main the contract but according to the doctrine of separability, the arbitration agreement is to be treated independent of the other terms of contract.



III. The CLAIMANT consented to the applicable law of the arbitral proceedings to be different from Law of Mediterraneo.

- 46) When the RESPONDENT sent the CLAIMANT a draft of their preferred arbitration clause of the contract, it specifically mentioned Law of Equatoriana to be the applicable law of the arbitral proceedings as one of the points under the suggested arbitration clause. (*Resp. Ex. no.1*)
- 47) When the CLAIMANT wrote back to this proposal, the CLAIMANT mentioned that they would largely accept the RESPONDENT's proposal with only one amendment and that was to the place of arbitration which then went on to be Danubia. [*Resp. Ex. no.2*]. The fact that the CLAIMANT did not oppose to the law of Equatoriana being the applicable law shows that the CLAIMANT was fine with the applicable law to be different than the Mediterraneo Law.

IV. The LCIA Rules also prefers Law of the seat of the arbitration as Applicable Law

- 48) Art. 16.4 of the LCIA rules mandates that the law applicable to the arbitration shall be the law applicable at the seat. This is to show that other arbitral forums also recognise the law of the seat of the arbitration agreement as being applicable over the law of the underlying contract [*LCIA Rules*].

B. THE TRIBUNAL LACKS THE JURISDICTION TO HEAR THIS MATTER

- 49) The RESPONDENT humbly submits that the tribunal does not have the jurisdiction to hear the present arbitration as the crux of the entire dispute between the two parties does not arise from the underlying contract but is rather a result of issues which were not related to the contract.
- 50) The RESPONDENT further submits that under the Danubian Law, which is the true applicable law to the arbitral proceedings, the Four Corners Rule shall be applied and be



relied upon. The rule says that the interpretation of the arbitration agreement is limited to its wording and no external evidence may be relied upon [*Ans to Not. Of Arb*] and that the reliance on the drafting history and preceding communication between the two parties may be excluded and hence even the tribunal's award arising from this arbitration shall not be enforceable contrary to the CLAIMANT's allegations [*Cl Memo para 53-57*].

- 51) The RESPONDENT objects to the jurisdiction of the tribunal based on the fact that the issue on which the present dispute was initiated upon, i.e., the payment of the additional tariffs, is an issue that does not stem out of the underlying contract the parties entered into and that contains the arbitration clause. When interpreted to its exact wording, the contract does not involve anything related to the payment of tariffs or taxes by applying the Four Corners Rule.
- 52) The RESPONDENT further submits that by agreeing to a DDP, it was the duty and obligation of the CLAIMANT to pay all the costs associated with the transportation of the goods and that the RESPONDENT's obligation under the underlying contract as just to pay the quoted price of the CLAIMANT which it has fulfil in all fairness and under good faith. [*Cl. Ex. no.5*].
- 53) The RESPONDENT puts forth that it is only challenging the jurisdiction of the arbitral tribunal to adapt the issue of the price and not its jurisdiction in general to interpret the contract which is conferred upon the tribunal by virtue of the principle of kompetenz-kompetenz.
- 54) The RESPONDENT humbly submits that the tribunal lacks the jurisdiction to hear the matter solely because the relief asked by the CLAIMANT is based on the adaptation of the price, an issue that does not arise from the underlying contract as it does not entail any provision or clause about the so mentioned price and hence, the agreement to arbitrate is not applicable to this dispute.



- 55) The RESPONDENT has acted in all fairness and has performed all its obligations in good faith and loyally by paying the quoted price by the CLAIMANT as the payment was already initiated [Cl. Ex. no.8] as was the contractual obligation of the RESPONDENT and the RESPONDENT's challenge to the jurisdiction of the tribunal stands irrespective contrary to the CLAIMANT's allegations. [Cl. Memo Issue I, B(ii)]
- 56) The RESPONDENT clarifies that it is no way challenging the composition of the tribunal and that its denial of challenging the same does not affect the RESPONDENT's challenge on the jurisdiction of the tribunal to adapt the price. In fact, the question regarding the composition of the tribunal is secondary to that of the jurisdiction, which is the essential question of law involved in the present dispute. [Cl. Memo issue I B(iii)]
- 57) The RESPONDENT puts forth that it has complied with all the norms of the HKIAC Rules 2018 and that all its claims have been made under this single arbitration contrary to the CLAIMANT's allegations in accordance of HKIAC Art. 19.4 sec. b [Cl. Memo para 6].
- 58) Contrary to the CLAIMANT's allegations, the RESPONDENT never expressly agreed for a need of a price increase when the CLAIMANT contacted Mr. Greg Shoemaker before sending out the last shipment. [Cl. Memo para 3].

C. THE ARBITRAL TRIBUNAL DOES NOT HAVE POWERS TO ADAPT THE CONTRACT

- 59) The Respondent humbly submits that the Tribunal does not have powers to adapt the contract. Firstly, the governing law i.e Danubian law does not allow for adaptation without authorization. Secondly, even if not for Danubian law, the mere tariff increase is not an economic impossibility where in the Tribunals should choose to adapt the contract.
- I. The Governing law of the contract disallows adaptation of contract**
- 60) The seat to the arbitration is Vindobona and the governing law is the Daubian law as understood by the previous submissions of the RESPONDENT. This law recognizes that



arbitrators may adapt contracts but requires an express authorization for that [*Proc. Ord.2 para 45*]. Such an express conferral of powers is, however, missing in the present contract. [*Ans to the Not of Arb, Para 13*].

- 61) Arbitrators powers come from the arbitration agreement and the underlying contract, the law applicable to the arbitration (*lex arbitri*) and the law applicable to the substance of the dispute (*lex causae*) [*K. P. Berger*]. If contractual authorization to adapt a contract is provided for expressly, then the principle of *Pacta Sunt Servanda* would not apply and the power will be vested with the arbitrators. Conversely, if no express or implied authorization has been given then arbitrators must look for legal authority in the applicable rules of law [*Julian B*].
- 62) The RESPONDENT further submits that by adapting a contract, the Tribunal is in essence creating new contractual obligations and hence these obligations can become binding only if the parties have agreed to it.
- 63) In the case at hand, there is no express provision as per the contract of the RESPONDENT with the CLAIMANT regarding adaptation of contract. Moreover, here the national law that is applicable is the Danubian law and hence no power to adapt vests with the arbitrators in this proceeding.
- 64) The converse of this argument also holds true. If the contract is silent on the powers of the Tribunal, Arbitral Tribunal to adjust the contract price or modify any other terms of the contract will usually have to be determined according to the law of the seat of the arbitration i.e the *lex arbitri* [*Nessi Sebastiano*].
- 65) Further, it is important to note that the parties had the chance to insert an adaptation clause. Merely discussing the need or consenting to having an arbitration clause is not binding [*Not Of Arb, Para 19*]. So even if the RESPONDENT'S representative has expressly stated earlier that the Arbitrators should adapt the contract, there is no mention of the same in the final contract [*Cl. Memo , para 36*]. Here, the RESPONDENT puts forth that the parties had ample



time to negotiate and the option of inserting the adaptation clause specially because the governing law of Danubia states that express authority is needed for an adaptation. But despite knowing this, the contract is silent on this aspect. The courts should not be allowed to intervene in a contract if the parties can protect themselves by the inclusion of force majeure or hardship clauses which contain mechanisms to adapt the contract to the change of circumstances [*RIBE, R. M.*].

II. This Tribunal does not have the power to adapt the price in this contract

- 66) The RESPONDENT herein humbly submits that even if Danubian law does not apply to this arbitration proceeding, this Tribunal will not have the power to do this price adaptation as requested by the CLAIMANT. There has been merely a change of tariff which increases the cost for the CLAIMANT but this does not amount to economic impossibility. In fact, neither the legislative history nor the language of the CISG indicates the existence of any general principle allowing renegotiation or judicial adaptation in the case of changed circumstances or economic impossibility [*Nuova Fucinati case*]. In fact, there is no specific provision that allows adaptation of contract in case of economic impossibility.
- 67) Tribunals are hesitant to adapt contracts. The power of arbitrators to modify the contract is not triggered very often. In fact, their stand is quite contrary to what the CLAIMANT has stated in their argument that contract adaption is relatively the main solution in domestic legal systems [*Cl. Memo Para 37*]. Even if arbitrators are granted the possibility to revise the contract by the applicable substantive law, they seem to be usually reluctant to use that power. However, if the Tribunal actually has the power to revise the contract and decides to do so, it also needs to examine the facts underlying the dispute between the parties in order to correctly apply the rules on contract modification [*Emmanuel Gaillard*].
- 68) Looking at national perspective both Britian and France have narrowed down the power of Tribunals to adapt the contract because as British jurisprudence puts it, the courts are not called upon to write the contract for the parties [*Horn*].



- 69) Even though arbitrators have certain flexibility to not provide with reasons for their decisions, even then they lack the legal power to adapt a contract as to the future cooperation of the parties.
- 70) As for France, French regulation, persists in the principle *Pacta Sunt Servanda*, based on the belief that a judge cannot measure the effect of his judgements on the national economies, therefore, he is not entitled to alter the contract [*Art. 1148, Art. 1134 Code Civil*]. This is argued keeping in mind that adaptation in essence alters the contract. They only have the duty to re-negotiate the contract in good faith and fair dealing.
- 71) The RESPONDENT submits that the parties cannot be relieved of their obligation merely because of change in economic circumstances which is merely just making the contract more onerous or changing price. The court is not endowed with any ‘general liberty’ to absolve a party from liability to perform his part of the contract merely because, on account of a contemplated turn of events, the performance of the contract may become onerous [*Alopi Parshad Case*].
- 72) Further the RESPONDENT would like to humbly submit that the CLAIMANT has relied on the Turkish Civil Code [*Cl. Memo, Para 34*] which is a country that follows civil law. All parties in this dispute are countries that follow common law.
- 73) Moreover, the Turkish Civil Code lays out three conditions that need to be fulfilled in order for the parties to adapt the contract [*Art. 138, TCO*]. The three conditions are as follows:
- The relevant situation or incident that gave rise to change of the contract equilibrium must not have already existed when the contract was concluded between the parties.
 - The occurred situation or incident must be unpredictable and unforeseen.
 - Due to changed circumstances, it must be against good faith to expect a party to fulfill its obligations.
- 74) The RESPONDENT expressly denies the fulfilment of these three conditions as it was not completely unpredictable when the CLAIMANT accepted delivery DDP that there might be



changes in the national laws for artificial insemination for racehorses as Equatorian government had only ‘temporarily’ lifted ban on artificial insemination for racehorses. *[Not. Of Arb, Para 5]*.

- 75) Conclusion: The Respondent submits that the governing law is Danubian law and that the tribunal lacks jurisdiction in this matter and also can not adapt the contract.

ISSUE 2: CLAIMANT SHOULD NOT BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS ON THE BASIS OF THE ASSUMPTION THAT THIS EVIDENCE HAD BEEN OBTAINED THROUGH A BREACH OF CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT’S COMPUTER SYSTEM.

- 76) The Respondent humbly submits that; Firstly, The arbitral tribunal would compromise confidentiality of the ongoing arbitration by either making the evidence from the other arbitration admissible or by joining the party from the other arbitration to the ongoing arbitration. Secondly, The CLAIMANT breaches the IBA Rules on Taking of Evidence in International Arbitration, 2010 by submitting evidence from the other arbitration proceedings. Thirdly, Allowing the CLAIMANT to submit evidence from the other arbitration proceedings will violate the public policy as it would be against the fundamental principles of justice/arbitration.

A. THE ARBITRAL TRIBUNAL WOULD COMPROMISE CONFIDENTIALITY OF THE ONGOING ARBITRATION BY EITHER MAKING THE EVIDENCE FROM THE OTHER ARBITRATION ADMISSIBLE OR BY JOINING THE PARTY FROM THE OTHER ARBITRATION TO THE ONGOING ARBITRATION.

- 77) Confidentiality is widely loaded as one of the major benefits of arbitration. It prevents on involved third parties intruding into the parties’ confidential information and impact upon the arbitral tribunal independence.



- 78) Confidentiality as attaching to arbitration agreement as a ‘necessary incident of a definable category of contractual relationship’ apart from issues of custom, usage or business efficacy, with limitations. The arbitral tribunal and the parties owe a General Duty of confidentiality to each other [*Ali Shipping Corporation Case*].
- 79) The CLAIMANT, however, cannot take advantage of the exceptions mentioned in this case as it is not a party to the arbitration and thus, not a party to the arbitration agreement and is not bound by the confidentiality of the same. CLAIMANT, being a third party to the arbitration, does not have any rights to break the confidentiality [*Cl. Memo para 65*].
- 80) Private character of hearing is described as something that is inherent in the subject matter of the agreement to submit disputes to arbitration rather than attribute the character to implied term. The efficacy of private arbitration as an expeditious and commercial attractive form of dispute resolution depends, at least in part, upon its private nature. Hence, the efficacy of private arbitration will be damaged, even defeated, if proceedings and documents in the arbitration are made public by the disclosure of documents relating to arbitration. If the hearing itself is private and confidential, then it would seem logical to regard documents created for the purpose of that hearing - such as witness statements, reports and awards - as equally private and confidential. Breaching this confidentiality would be almost equivalent to opening the door of arbitration room to the third party. [*Esso Australia Case*]
- 81) No disclosure or publication of the award can be done even after assuming it fulfils all the conditions mentioned therein, which the CLAIMANT does not, even under Art. 45 of the HKIAC Rules 2018 as the CLAIMANT is neither a ‘party’ nor a ‘party representative’ of the other arbitration [*Cl. Memo para 62*].
- 82) Given that arbitration is a private procedure, only the parties to the arbitration agreement and the representatives can attend any arbitration meeting or hearing. The public are excluded and have no right to attend hearing before an arbitral tribunal. Therefore, the party which CLAIMANT wishes to join to the ongoing arbitration cannot be allowed to do so even if the other arbitration is being conducted under the HKIAC Rules. [*Sundra Rajoo*] [*Cl. Memo para 67*]



- 83) The concept of private arbitrations derived simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is interested that stranger shall be excluded from the hearing and conduct of the arbitration and that neither the Tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonance with another dispute, however convenient that course may be to the party seeking it and however closely associated the disputes in question maybe. The only power which an arbitrator enjoys relate to the reference in which he has been appointed. They cannot be extended merely because a similar dispute exist which is capable of being and is referred separately to arbitration under a different agreement [*Oxford Shipping Case*].
- 84) The Arbitral Tribunal must not disregard the rule of evidence which are based on fundamental principles of justice and fair play. It must not adopt any means which are contrary to the principles of natural justice [*Sundra Rajoo*].

B. THE CLAIMANT BREACHES THE IBA RULES ON TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, 2010 BY SUBMITTING EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS.

- 85) The IBA Rules on the Taking of Evidence in Int'l Arbitration, 2010 is an int'l soft law instrument intended to provide parties and arbitrators with an efficient, economical and fair process for the taking of evidence in int'l arbitration. [*IBA Rules, Preamble*]
- 86) The Review Sub-committee revised the Preamble of the IBA Rules which now includes a requirement that each Party shall act 'in good faith' in the taking of evidence pursuant to the IBA Rules.
- 87) As per the Art. 1 of the IBA Rules, if both the IBA Rules of Evidence and the General Rules are silent on a particular issue, then the IBA Rules of Evidence instruct the Arbitral Tribunal to apply the general principles of the IBA Rules of Evidence, such as those set forth in the Preamble, to the greatest extent possible. Admitting evidence obtained through illegal means



would blatantly violate the fair process and thus, relying on Art. 1 alone, the tribunal must hold that such evidence inadmissible.

- 88) If the CLAIMANT wanted this Partial Interim Award to be on record, it should have put in a formal request as per the provisions of Art. 3.2 and Art. 3.3 of the IBA Rules rather than hacking into the computer system of the RESPONDENT.
- 89) There could be reasonable instances where the Arbitral Tribunal may be required under certain arbitral rules to establish the facts of the case by all appropriate means [*ICC Rules, Art. 20(1); LCLA Rules, Art. 22.1(c)*], it should be entitled to order a party to produce documents so far not introduced as evidence into the proceedings or to request any party to use its best efforts to take, or itself take, any step that it considers appropriate to obtain documents from any person or organization. However, all of these must be through official channels which follow due procedure. Ultimate oversight and control over this process should remain with the Arbitral Tribunal. The only reasonable exception to this is the presence in the country in question which is clearly not applicable in the case at hand. Especially, when the evidence concerned is not related to the transaction which concerns both the parties of this Arb.
- 90) Art. 9.1 of the IBA Rules states the general principle, also found in many institutional and ad hoc Arbitration Rules, that the Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence. The Arbitral Tribunal shall exercise its discretion in making such determinations, which are central to its role [*Commentary on the IBA Rules*]. According to this principle, the tribunal must consider that the CLAIMANT has committed a crime in order to gather evidence which is not even relevant as it does not even relate to the transaction or contract in question.
- 91) Assuming that the CLAIMANT had followed the procedure under Art. 3 which it has not, Art. 9.2 of the IBA Rules provides the limitations on admissible evidence. These limitations are important, for they preserve the lines of distinction between the rights of the parties and the authority of the Arbitral Tribunal. The provision states that the Arbitral Tribunal ‘shall’ exclude evidence meeting one of the specified exceptions, the arbitral tribunal must lean in



favour of excluding such evidence after determining that one of the specified criteria has been met.

- 92) Art. 9.2(a) states the simple proposition that the arbitral tribunal shall exclude evidence that is not sufficiently relevant to the case or material to its outcome. As explained in the preceding paragraph, the evidence which the CLAIMANT wants admissible is not relevant to the transaction in question [*Cl. Memo para 61*].
- 93) Art. 9.2(b) provides protection for documents and other evidence that may be covered by certain privileges, under the appropriate applicable law, such as the attorney-client privilege, professional secrecy or the without prejudice privilege. The Partial Interim Award clearly falls within the ambit of ‘professional secrecy’ as it is supposed to be confidential between the arbitrating parties.
- 94) Art.9.3(e) emphasises the need to maintain fairness and equality among the parties. The need to protect fairness and equality among the parties may arise when the approach to privilege prevailing in the parties' home jurisdictions differs. Admitting illegally obtained evidence can never be fair and equal to the RESPONDENT as it is a victim breach of privacy.
- 95) Art. 9.2(e) and (f) involve special and related concerns. The IBA Rules also recognise that some documents may be subject to such commercial or technical confidentiality concerns that they should not be required to be produced or introduced into evidence. A Partial Interim Award of an Arbitration to which the CLAIMANT is not a party would clearly fall under the ambit of this Art. and thus, should not be admitted as evidence. When an early draft of the IBA Rules of Evidence referred only to such confidentiality, certain international political organisations pointed out that ‘commercial and technical confidentiality’ might not include confidentiality within such organisations [*Commentary on the IBA Rules*]. Therefore, Art. 9.2(f) was added to put such special political or institutional sensitivity on an equal footing with commercial or technical confidentiality. In the case of both provisions, the arbitral tribunal retains the discretion to determine whether the considerations of confidentiality or sensitivity



are sufficient to warrant the exclusion from evidence or production of those documents or other evidence.

96) Finally, Art. 7 states that If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence [*Commentary on the IBA Rules*].

97) ‘Counter-action’ of the CLAIMANT [*Cl. Memo paras 73-75*] should be condemned by the arbitral tribunal and pursuant to Art. 7, costs should be imposed on the CLAIMANT as it failed to conduct itself in good faith in taking of evidence by illegally hacking into the computer system of the RESPONDENT. Also, it is pertinent to note that the FS Sale Agreement [*Cl. Ex 5*] does not have a clause which prohibits the resale of goods sold and thus, is not breaching the contract.

C. ALLOWING THE CLAIMANT TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS WILL VIOLATE THE PUBLIC POLICY AS IT WOULD BE AGAINST THE FUNDAMENTAL PRINCIPLES OF JUSTICE/ARBITRATION.

98) Admission of illegally obtained evidence is inconsistent with the principle of good faith that inheres in any arbitration agreement [*Methanex Case*].

99) Reliance on evidence obtained through illegal methods violates the principle of equality of the parties and denies the RESPONDENT the opportunity to fully present its case and rebut CLAIMANT’s evidence. Pursuant to Art. 25(6) of the UNCITRAL Arbitration Rules, the RESPONDENT thus respectfully requests that the Tribunal find such evidence to be inadmissible.

100) CLAIMANT’s submission of the Interim Partial Award illegally obtained contravenes fundamental notions of fairness [*Art.15(1), UNCITRAL*]. The RESPONDENT clarifies in its



letter to the Tribunal dated 3.10.2018 that the opposing party in that arbitration has authorized the RESPONDENT that the allegations of the CLAIMANT do not reflect the reality and are taken out of context. Nonetheless, this partial interim award which the CLAIMANT wishes to make admissible is obtained by illegal means and thus, should not be made admissible as evidence.

101) Art. 18 of the UNCITRAL Model Law has no bearing on the ongoing proceeding as the impartial tribunal has never been challenged on the grounds of discrimination of gender, ethnicity, disability, sexuality, disability, age, religious affiliation or the like [*Cl. Memo para 60*].

102) The admissibility of relevant evidence has been questioned because it was secured in a manner that the court deemed harmful to public order and that it did not wish to encourage [*Mapp case & Elkins case*]. However, in the case at hand, the evidence which the CLAIMANT wishes to admit is not relevant to the dispute.

103) A doctrine that extends the exclusionary rule to make evidence inadmissible in court if it was derived from evidence that was illegally obtained. As the metaphor suggests, if the evidential tree is tainted, so is its 'fruit' [*Silverthorne Case & Nardone Case*]. The doctrine has three exceptions as follows:

- If it was discovered from a source independent of the illegal activity;
- Its discovery was inevitable; and
- Or if there is attenuation between the illegal activity and the discovery of the evidence.

104) In the case at hand, the evidence which the CLAIMANT wishes the tribunal to take on record does not fall within any of the three abovementioned exceptions and thus, would fall under the ambit of the doctrine of the fruit of the poison tree [*Wex, Cornell Law*].

105) By appreciating such illegally obtained evidence, a contrary concern is that a party may be overzealous in gathering evidence. Retroactive validation of illegal seizures of evidence could encourage many more interventions into the privacy and social processes of opposing parties, many initially justified as good faith efforts to gather evidence. The result could then be more



conflict and frustration of the fundamental purposes of international adjudication. It is an emerging common law jurisprudence that evidence which was obtained by illegal methods was held to be inadmissible as it would violate public policy [*Goddard Case*].

106) Public policy includes ‘all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country’. In particular, a court could assess whether a tribunal:

- has applied a ‘judicial approach’, i.e. has not acted in an arbitrary manner;
- has acted in accordance with the principles of natural justice, including applying its mind to the relevant facts; and
- has avoided reaching a decision which is so perverse or irrational that no reasonable person would have arrived at it (adopting the *Wednesbury* principle from administrative law) [*ONGC Case*].

107) It is held by The Supreme Court of India that an Arbitral Award can be challenged if it is contrary to the fundamental policy of Indian Law, i.e. it is ‘arbitrary’ or ‘whimsical’, as opposed to being fair, reasonable and objective, or it contains a decision so irrational that no reasonable person would have arrived at it [*Associate Builders Case*].

108) An arbitral award is incompatible with public policy if it disregards the essential and broadly acknowledged values which, according to prevailing views in Switzerland, should be constitute the basis of any legal order. Procedural public policy is violated when some fundamental and generally recognized principles were violated, leading to an unbearable contradiction with the notion of justice, so that the decision is incompatible with the values recognized in a state of laws [*FC Nantes case & de Madrid case*].

109) The CLAIMANT cannot publish the arbitral award of the other arbitration under Art. 45.5 of the HKIAC Rules 2018 as the Article clearly states, and the same is accepted by the CLAIMANT [*Cl. Memo para 66*], that no parties to the arbitration should object such publication. However, the RESPONDENT via letter dated 03.10.2018 [*Prob p.51*] expressly objects any such publication.



110) The CLAIMANT argues that the assumption of illegal hack is too vague and such allegations must be proved by evidence [*Cl. Memo para 70*]. The RESPONDENT submits that the opposing party of the other arbitration has authorized the RESPONDENT to state that the allegations by the CLAIMANT do not reflect the reality and are taken out of context. The only source of information could be two former employees of RESPONDENT, whose contract had been terminated three months ago with immediate effect, or a hack of RESPONDENT's computer system where the hackers managed to retrieve a considerable amount of data. The CLAIMANT, by virtue of not being a party to the other arbitration, could not have access to the confidential Partial Interim Award by any legal means.

111) Conclusion: The Arbitral Tribunal should not allow the CLAIMANT to submit the Partial Interim Award as evidence which it has obtained through illegal hacking of the computer system of the RESPONDENT. Allowing the CLAIMANT to submit such evidence will result in a miscarriage of justice and equity and breach the confidentiality of the other arbitration which is one of the most fundamental and inherent virtues of arbitration which should not be compromised. The CLAIMANT did not follow the procedure as given in the IBA Rules and instead went on to hack the computer system of the RESPONDENT. Finally, evidence obtained by illegal means is against public policy.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO PAYMENT OF USD 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE.

112) The FSSA is a Fixed Price contract, which ensured that the CLAIMANT agreed to provide the buyer with 100 doses of FS in exchange for a non-refundable fee of USD 100,000 per insemination dose payable to the CLAIMANT in two instalments. The first shipment of 25 doses DDP, the second shipment of 25 doses DDP and the third and last shipment of 50 doses will be DDP as well [*Cl. Ex. 5 T&C 8*]. CLAIMANT and RESPONDENT agreed to the fixed rate for FS sale.



113)The Equatorianian government imposed 30 per cent tariff on several products from Mediterraneo including animal semen. [A] No hardship was caused to the CLAIMANT by imposing tariffs because: [I]There was no fundamental alteration of the equilibrium of the contract. The CLAIMANT was responsible for paying all the costs related the custom regulations. [II] The binding nature of the contract is the general rule. The contract must be respected even if the performance becomes difficult for the performing party, when there is no hardship caused to the performing party. [III] The CLAIMANT cannot rely on Art. 79 of the CISG because the CLAIMANT could have foreseen the tariff regime changing.

A. NO HARDSHIP IS CAUSED BY IMPOSITION OF TARIFF BY THE GOVERNMENT OF EQUATORIANA.

I. No fundamental alteration of the equilibrium of the contract.

114)It is important to note that, in case of changed circumstances it is the fundamental alteration of the equilibrium of the contract that is needed to be seen, to prove hardship. The UNIDROIT Art. 6.2.2 set forth that ‘there is hardship where the occurrence of events fundamentally alters the equilibrium of the contract’ [UNIDROIT].

115)A numeric expression of the contractual equilibrium alteration is a regular and useful tool to determine a hardship situation. If the performances are capable of precise measurement in monetary terms, an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a “fundamental” alteration. [(UNIDROIT), 1994, p. 147]. It is most likely that a cost/value alteration of less than 50% will not be considered as fundamental. However, this does not allow the conclusion that a cost/value alteration of more than 50% will be considered fundamental. [McKendrick]

116)The requirement of ‘fundamental alteration’ as established in the UNIDROIT Principles bears the risk of being abused [Kessedjian]. In international commercial arbitration cases, a cost increase by 13%, 30%, 44% or 25-50% was considered insufficient to qualify as hardship. [Brunner]



117) The economic crisis in Indonesia, which reached its peak in the years 1998-1999, resulted in a contraction of the Indonesian economy by approximately 15%, the loss of 5 million jobs, 80% loss of the value of the rupiah and an inflation rate exceeding 75%. However, this situation was held by both arbitral tribunals and commentators to be insufficiently extreme to qualify as hardship [*Himpurna California Energy Ltd. Case*]

a. Regulation of tariff could reasonably be taken into account by the CLAIMANT.

118) By close reading of the facts, it is well understood that Art. 6.2.2 (b) is applicable in the case at hand. It states that even if the change in circumstances occurs after the conclusion of the contract, it is clear that such circumstances cannot cause hardship if they could reasonably have been taken into account by the disadvantaged party at the time the contract was concluded.” [UNIDROIT].

119) RESPONDENT contends that the CLAIMANT could reasonably foresee the imposition of tariff. The Equatorianian Government had imposed serious restrictions on the transportation of all living animals due to severe problems with foot and mouth disease. The ban on artificial insemination for racehorses had been temporarily lifted [*Notice of Arb. para 5*]. So, parties ought to expect that there will be regulations which came in disguise of imposition of tariffs. Thus, it should have been foreseen by the CLAIMANT that the taxes will be imposed.

120) Besides, serious restrictions on the transportation the was to discourage transportation of the living animals and thereafter reduce the diseases to living animals. Lifting of ban and consequently imposing of tariffs meant that trade of animals is encouraged and at the same time health of living animals was also taken care of. Therefore, the intension of the government was to regulate the trade of animals which would happen only if the taxes were imposed to the tune of 30 per cent or more.



b. Risk was assumed by the CLAIMANT.

121) Art. 6.2.2(d) states that there can be no hardship if the disadvantaged party had assumed the risk of the change in circumstances. *[UNIDROIT]*. A reasonable understanding of the merits of the case, shows that the CLAIMANT agreed to bear all the costs and risks involved in delivering the goods to the destination and by that had an obligation to pay duty for both export and import and to carry out all customs formalities. *[Cl. Ex. C4]* Alternatively, it assumed the risk of the change of circumstances by agreeing to pay for DDP. *[INCOTERMS 2010]*.

c. Hardship is relevant only to performance not yet rendered.

122) Hardship can only be of relevance with respect to performances that still has to be rendered: once a party has performed, it is no longer entitled to invoke a substantial increase in the costs of its performance or a substantial decrease in the value of the performance it receives as a consequence of a change in circumstances which occurs after such performance. *[UNIDROIT]*.

123) The CLAIMANT sent the third shipment and paid the tariff. *[Cl. Ex. C8]*. By doing that, the CLAIMANT performed the obligation of sending the consignment. Hence, there was no performance pending and there cannot be any hardship.

II. Binding character of the contract.

124) The circumstances of the case invite the application of Art. 6.2.1 of the UNIDROIT, where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations *[UNIDROIT]*. Binding character of the contract is the general rule. This Art. makes it clear that as a consequence of the general principle of the binding character of the contract performance must be rendered as long as it is possible, regardless of the burden it may impose on the performing party.



125) In the present case, even if the CLAIMANT experienced heavy losses instead of the expected profits due to the payment of 30 per cent tariff for the third shipment, the terms of the contract must nevertheless be respected because it is established that no hardship was caused to the CLAIMANT. Having said that, the CLAIMANT is bound to perform its obligation of sending the third shipment.

III. The CLAIMANT's can't rely on the application of Art. 79 of the CISG

126) CISG Art. 79, only releases the non-performing party from his liability for damages. In the present case, there is no non-performance by the CLAIMANT, so they cannot take protection against liability under Art. 79 of the CISG. It is important to mention that Art. 79 of CISG talks about impediment and not hardship. Accordingly, impediments within the scope of CISG Art. 79 should include the following cases. [*Dionysios P. Flambouras*]

- Acts of God (*e.g.* earthquake, lightning, flood, fire, storm, crop failure, etc.)
- Events relating to social and/or political circumstances (*e.g.* war, revolution, riot, coup, strike, etc.)
- Legal impediments (*e.g.* seizure of the goods, embargo, prohibition of the transfer of foreign funds)
- The prohibition or restriction of foreign imports and/or exports, etc.)
- Other types of impediments (*e.g.* loss of the carrying vessel, theft, robbery or sabotage during storage or carriage, general strike, general power supply cut).

127) The case at hand does not fall under any of the above instances, as a result, the merits of the case does not qualify as impediment and therefore CLAIMANT is not facing any impediments. Consequently, CLAIMANT cannot take Art. 79 as a protection from liability. The CLAIMANT, by paying the tariffs and sending the consignment hence performed its part of the contract. Since, there was no failure of performance of the obligation on the part of CLAIMANT, they cannot apply Art.79 to the case.

128) The RESPONDENT submits that Art. 79 of CISG does not exempts the CLAIMANT from any liability that may arise out of payment of the increased price. It mentions about the



protection from liability for failure of performance of obligation by a party. In the case at hand, the RESPONDENT had no obligation to pay for the increased price of the shipment due to the acceptance of DDP by the Claimant. So, it never failed to perform any contractual obligation because there was no obligation on the Respondent as regards to the payment of the increased price, to begin with.

- 129) The RESPONDENT contends that Art. 81 cannot be applied to the case. Firstly, there is no avoidance of the contract from the RESPONDENT's side. The RESPONDENT fulfilled its obligation of making the payment for all the shipments according to the Contract. The RESPONDENT never avoided the contract. Secondly, applying Art. 81(2) is not appropriate because when the RESPONDENT proposed DDP delivery, the CLAIMANT accepted it and as a result increased the price by 1000 USD per dose. [Cl. Ex. C4] The RESPONDENT already paid the increased price for the 100 doses of FS through 3 instalments. [Cl. Ex. C8] So, now the CLAIMANT can not claim additional remuneration from the RESPONDENT.

B. BUYER FULFILLED ITS OBLIGATION TO PERFORM ITS CONTRACTUAL DUTY

- 130) Under the contract and the convention according to the contract between the parties, RESPONDENT performed all his contractual duty which could support the sustainability of the conclusion of the contract. RESPONDENT initiated the outstanding amount due according to the contract before the shipment was delivered as per the contract.
- 131) RESPONDENT's performance showed that he fundamentally fulfilled its contractual obligation according to the contract, (I) RESPONDENT initiated the payment before the final shipment was delivered and the buyer complied with the contractual formalities within the set deadlines.

I. RESPONDENT initiated the payment before the final shipment was delivered



- 132) The Third and the last shipment of 50 doses was supposed to be DDP on 23.01.2018. The second installment of the payment of US\$ 5,000,000 was already initiated before the shipment being delivered [*Cl. Ex. C4*]. RESPONDENT's payment initiation before the delivery of shipment of the third doses interpreted that RESPONDENT had the intention to fulfill the contract with the CLAIMANT.
- 133) Though it says that the RESPONDENT had an intention to make the payment and conclude the contract by duly complying with the deadlines mentioned in the contract.
- 134) Therefore, RESPONDENT was really aware of the clause of the final shipment of the FS of which the payment was made in advance before the third shipment was already delivered. Moreover, RESPONDENT was willing to make the payment of the third and the final shipment which according to the contractual terms fulfils RESPONDENT's obligation.
- 135) The buyer's obligation to take delivery of the goods and pay the contract price for the goods [*Art. 53 CISG*]. Under Art. 53 of the Convention, these obligations primarily include taking delivery of the goods and paying the contract price. Accordingly, the reported decisions have generally only mentioned the obligations set forth in Art. 53 in passing, and have only stated the obvious point that the buyer does in fact have the obligation to pay the price for the goods. [*H D Gabriel p. 273 para 4*]
- 136) The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made [*Art. 54 CISG*]. Art. 54 of the CISG makes reference to the buyer's compliance with the contractual requirements or formalities to enable payment to be made, UNIDROIT Principles Art. 6.1.7 provides assistance in clarifying and interpreting the Convention in two ways. First, it would provide a more predictable rule as to what is expected of the buyer when effecting payment, by taking into account the ordinary course of business at the place where payment is to be made. [*Alejandro Osuna-González*]



- 137) Art. 59 of CISG provides that: “the buyer must pay the price on the date fixed by or determinable from the contract or the CISG without the need for any request or compliance with any formality on the part of the seller.” [*Art. 59 CISG*]. This Article may be another source of contention in providing that payment is due without any request or compliance with any formality on the part of the seller [*Denis Tallon*]. So, the RESPONDENT initiates the payment without any failure before the shipment was delivered complying with the clauses mentioned in the contract.
- 138) Contrary to CLAIMANT’s insinuations RESPONDENT did also not agree to any adaptation following CLAIMANT’s request in January 2018. Quite to the contrary, Mr. Shoemaker made clear in his telephone conversation that his understanding of the contract was that CLAIMANT had to bear the cost but that he would verify that with the persons involved in drafting. He also pointed out that he had no authority to agree on an adaptation [*Res. Ex. 4*].
- 139) Art. 59 requires payment by the buyer without any affirmative action by the seller on the payment date. This provision was enacted to circumvent European legal systems that require a formal demand by the seller in order for payment to become due. [*H D Gabriel*]
- 140) Thus, Mr. Shoemaker wanted to ensure that the FS would be available as agreed to be able to comply with RESPONDENT’s contractual delivery obligations towards its customers. When Mr. Shoemaker received the information about the direct from Mr. Napravnik he immediately tried to verify information through two friends at the Ministry. After they had confirmed that semen was covered, he tried to reach members of the legal department. None were available. Thus, he discussed the strategy with his wife to ensure that the delivery could take place as agreed upon but he would not make any binding commitments. [*Proc. Ord. 2 para 34 pg. 59*].
- 141) Moreover, he said that that he had not been involved in the negotiations or the Sales agreement and could not directly authorize any additional payment [*Cl. Ex. C8*].



- 142) Conclusively through its concern RESPONDENT initiated the payment of the second instalment before the shipment was delivered and RESPONDENT is not obliged to pay the additional costs apart from the contractual obligation.

C. RESPONDENT IS NOT LIABLE TO PAY ANY ADDITIONAL COSTS

- 143) RESPONDENT paid the full purchase price in January 2018, CLAIMANT then unexpectedly demanded further payment. An amount had been added to the purchase price by the CLAIMANT, according to CLAIMANT, it should be reimbursed for the governmental levy [*Claimant, para 123*]. RESPONDENT, however, is not liable for the same. In the absence of the same in the agreement about the governmental levy, CLAIMANT must carry the levy under the CISG [A]. CLAIMANT to pay RESPONDENT is not liable for the arbitration costs and other additional costs.

I. The CLAIMANT must carry the levy under the CISG.

- 144) The claim that does not merely require the arbitrators to order payment on the basis of an interpretation of the contract but actually ask for adaptation. CLAIMANT is not claiming the original agreed contractual remuneration which has been undisputedly been paid by the RESPONDENT. Instead, CLAIMANT is seeking a remuneration which goes beyond that amount. [Ans. Nt. of Arb. pg 31 para 12]
- 145) CLAIMANT cannot rely on Art. 74 and Art. 79 of CISG. First of all, RESPONDENT fulfilled all its contractual obligation regarding the payment while meeting the deadlines on time. So, there is no other additional amount which is outstanding from the RESPONDENT's view.
- 146) Second, it was foreseeable from CLAIMANT's perspective that there might be some government regulation which might take place in future so they increased the DDP to US\$ 100. So, there is no such damage taking place which was unforeseen and the CLAIMANT was totally unaware of.



147) The CLAIMANT is not entitled any damages under Art. 74 and Art. 78 as the RESPONDENT did not breach contract and fulfilled all its contractual obligation, RESPONDENT is not even breaching the contract under Art. 61 and Art. 62 which the CLAIMANT is relying on. RESPONDENT made the payment on time.

II. CLAIMANT to pay RESPONDENT is not liable for the arbitration costs and other additional costs

148) Where the buyer has taken reasonable measures to mitigate the loss he can claim the resulting costs as part of his damages claim under Art. 45(1) lit. (b), 74 CISG. This is so even if the (reasonable) measures have not been successful [Huber Mullis].

149) The Tribunal should grant RESPONDENT's request for reimbursement of its Arbitration costs: as the respondent has a right to the reimbursement of its costs under the CISG and secondly, these costs should be allocated to RESPONDENT under Art. 34 HKIAC Rules 2018. It's the CLAIMANT who got the RESPONDENT in this Arbitration on Baseless insinuation of bad faith. [Ans. to Not. Of Arb.]

150) Conclusion: Hardship is not caused to the CLAIMANT by the imposition of tariffs by the Government of Equatoriana. The tariffs were imposed for protection of living animals and to regulate animal trade. It was CLAIMANT's part to include the foreseeable clause in the the contract. CLAIMANT cannot claim protection under Art. 79 of the CISG. CLAIMANT is simply blanketing their failure to foresee a reasonably foreseeable tariff increase as hardship or an unforeseeable phenomenon. RESPONDENT fulfilled all its contractual obligations and made the payment. So the RESPONDENT is not liable to pay any additional costs to the CLAIMANT.



REQUEST FOR RELIEF

For the above reasons, Counsel for RESPONDENT respectfully requests the Tribunal:

1. To dismiss the claim as inadmissible for a lack of jurisdiction and powers.
2. To reject the claim for additional remuneration in the amount US\$ 1,250,000 raised by the CLAIMANT.
3. To order CLAIMANT to pay RESPONDENT's costs incurred in this Arbitration including legal fees.

(signed)

ANJALI DHOOT

KATHAN SHUKLA

KRITHIKA KATARIA

KRISH JAIN

SHIVANI MISHRA