LAW SCHOOL OF SHENZHEN UNIVERSITY

SIXTEENTH ANNUAL

WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG

31ST MARCH TO 7TH APRIL, 2019

MEMORANDUM FOR RESPONDENT

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

COUNSEL FOR RESONDENT:

CHENYI LIU • CHUTING ZHUANG • DI ZHU • LIN MENG • MENGYU XU

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INDEX OF ABBREVIATIONS

&	And
¶/¶¶	paragraph/paragraphs
Art. /Arts.	Article /Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980
Cl. Ex.	Claimant's Exhibit
CLAIMANT	Phar Lap Allevamento
Contract	Frozen Seman Sales Agreement
ICJ	International Court of Justice
ITA	Institute of Transnational Arbitration
MfC	Memorandum for Claimant (NMIMS Kirit P. Mehta School of Law)
No.	Number
NOA	Notice of Arbitration
p. /pp.	page /pages
Parties	Claimant and Respondent
PO	Procedural Order
Resp. Ex.	Respondent’s Exhibit
RESPONDENT	Black Beauty Equestrian
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollars
Vol.	Volume

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CISG	United Nations Convention on Contracts for the International Sale of Goods
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch (German: German Code on the Conflict of Laws)
Hague Principles	The Hague Principles on Choice of Law in International Commercial Contracts
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
Model Law	UNCITRAL Model Law on International Commercial Arbitration with 2006 Amendments
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958
PECL	Principles of European Contract Law 1999
ULIS	Convention on Uniform Law for the International Sale of Goods
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 FACTS

The parties to this arbitration are Phar Lap Allevamento (hereinafter "CLAIMANT") and Black Beauty Equestrian (hereinafter "RESPONDENT"). CLAIMANT has operated the most renowned stud farm and additionally offered 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.
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.
28 March 2017	RESPONDENT objected to the choice of law and the forum selection clause and asked for delivery DDP
31 March 2017	CLAIMANT accepted DDP delivery in principle but asked to be relieved from all risks associated with such a delivery or at least to be protected against the risk of changing health and security requirements by a hardship clause. As for jurisdiction, CLAIMANT would be opt for arbitration in Mediterraneo.
10 April 2017	A clause that the arbitration agreement was governed by the law of Equatoriana and not by the law of the Contract was included in Mr. Antley's latest draft.
11 April 2017	CLAIMANT had changed the suggested place of arbitration into Danubia but had not objected to RESPONDENT's proposal
12 April 2017	Each parties representative Mr. Antley and Mr. Nparavnik were injured in a severe car accident. They both quitted the negotiations on the same day.

6 May 2017	The Parties finally entered into a <Forzen Semen Sales Agreement> ("Agreement") with the absence of initial negotiators.
20 May 2017	CLAIMANT sent the first shipment of 25 doses to RESPONDENT.
3 October 2017	CLAIMANT sent the second shipment of 25 doses to RESPONDENT.
19 Decemeber 2017	The Equatorianian government imposed a tariff of 30% upon all agricultural goods from Mediterraneo as the retaliation.
20 January 2018	CLAIMANT suggested to renegotiate with RESPONDENT about the newly imposed tariffs which made the shipment 30% more expensive.
23 January 2018	CLAIMANT delivered the remaining 50 doses before an agreement on the new price had been reached.
31 July 2018	CLAIMANT filed a Notice of Arbitration.
24 August 2018	RESPONDENT submitted the Response to Notice of Arbitration
2 October 2018	CLAIMANT informed the Tribunal that 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.
3 October 2018	RESPONDENT objected to CLAIMANT's allegation of the admission of evidence since it has been obtained has been obtained through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's computer system.

ARGUMENTS

ISSUE I: THE ARBITRAL TRIBUNAL LACKS JURISDICTION AND THE NECESSARY POWERS TO ADAPT THE CONTRACT.

1. Contrary to what CLAIMANT submits [*MfC, ¶25-56*], RESPONDENT asserts that the Tribunal has no power to adapt the Contract. CLAIMANT's statements are unfounded for the following reasons: First, the Tribunal has no final decision about the jurisdiction [A]. Second, the case does not meet the requirements of the law of Danubia, which is the governing law of arbitration agreement on a tribunal's power to adapt the Contract [B]. Third, the Tribunal's power to adapt the Contract without parties' authorization has not been recognized in international arbitration practice [C].

A. The Tribunal has no final decision in deciding whether it has the power/jurisdiction over the dispute.

2. The Arbitral Tribunal has the competence to make a ruling on the jurisdiction, but the ruling will be reviewed by the national court [1]. The arbitral award will be set aside or refused to enforce for exceeding the power [2].

1. Tribunal's award on jurisdiction ought to be reviewed by the national court.

3. CLAIMANT submits that based on the principle of competence-competence in accordance with Art. 16 (1) Danubian Arbitration Law, the Tribunal can rule on its own jurisdiction [*MfC, ¶11-12*]. RESPONDENT, however, contests the jurisdiction of the Tribunal to adjudicate the merits of the present dispute. The court has the power to ultimately determine whether the arbitral jurisdiction is valid, which is called concurrent control of the arbitral tribunal and the court. The procedure of concurrent control is followed in many countries and has been adopted in the Model Law [*Redfern,p.32*].The competence of the arbitral tribunal to rule on its own jurisdiction (i.e. power) is subject to court control, which is well established and set forth in Art. 16 (3) Danubian Arbitration Law. In other words, the arbitrator will have the power to rule on but not finally determine jurisdiction because the courts of law have the final word [*Sümer,p.63*].

2. The arbitral award could be invalid or unenforceable due to the Arbitral Tribunal's excess of power.

4. CLAIMANT erred in failing to hold there was a ground for setting aside the award or refusal to enforce to the extent it contained a decision on a matter beyond the scope of the submission to arbitration. The matter within the scope of the submission was, as expressed in the arbitration clause *"Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination"* [*Resp. Ex. 1*]. The Arbitral Tribunal has no power to adapt the Contract as discussed below. If an arbitrator acts outside his or her powers, this may provide grounds for the challenge of any award [*Speller, p.175*]. The arbitrator's award exceeds the scope of authority by deciding a matter not within the ambit of the arbitration clause will not be given effect by the court [*Born; p.466*]and will be set aside or forfeit the executory force.
5. The provision states in Art.34(2)(a) Danubian Aribitration Law and Art.5(1)(d) NY Convention that the award can be challenged on the basis that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.
6. Similarly, national courts will refuse to enforce foreign arbitral awards where the arbitral tribunal exceeded the scope of its jurisdiction [*NY Convention Articles V(1)(a),V(1)(c)*].The matter is within the scope of the result that it produces [*Born,p.475*]. If the tribunal is given broad powers to adapt contracts, the decision will forfeit the executory force [*Craig/Park/Paulsso, p.18*].

B. The law of Danubia governs the arbitration agreement.

7. CLAIMANT argues that the governing law of the arbitration agreement should be the law of Mediterraneo. However, such assertion constitutes a violation of the doctrine of separability [1]. Further, the Parties have never selected the law of Mediterraneo implicitly [2]. By contrast, the law of Danubia has the closest connection with the arbitration agreement [3] and as the law of arbitration seat, the law of Danubia should govern the arbitration agreement [4]. Finally, CLAIMANT applied Art. 36.3 of HKIAC Rules to this issue mistakenly [5].

1. CLAIMANT's allegation that the law of Mediterraneo governs the arbitration agreement violates separability presumption.

8. CLAIMANT misconceives the governing law of arbitration agreement is the law of Mediterraneo. It further raises the closest connection test in Art.36(3) HKIAC rules 2018, which is parties' implied choice of law, and RESPODENT's acception and the thought that the law of arbitral seat is not always the governing law of arbitration agreement to justify its allegation. During the whole process of arguments, CLAIMANT alleges extensively that the law of Mediterraneo is the only express choice of "governing law" of Contract, and the arbitration agreement is included in Contract, and then it shall govern the arbitration agreement [*MfC, ¶29, 32, 37, 43, 46*]. However, CLAIMANT's stance violates the prevailing doctrine, separability presumption, in international arbitration.
9. A frequently-cited arbitral award states the presumption as follows: "the arbitral clause is autonomous and juridically independent from the main contract in which it is contained" [*ICC Case No. 8938*]. Also, in a 1972 decision, the Paris Court of Appeals declared that "performance of the arbitration clause is not necessarily governed by the law governing the contract containing the said clause" [*Fouchard*, *p.212*]. Separability presumption postulates two separable agreements of differing characters, which can readily be governed by two different national (or other) legal regimes. That is, although the parties' underlying contract may be governed expressly by the laws of State A, the associated arbitration clause is not necessarily governed by State A's laws, and may instead be governed by the laws of State B or by principles of international law [*Born*, *p.475*].
10. In the present case, Parties just chose the law of Mediterraneo as the governing law of main Contract and they subsequently merely forgot to include a choice of law of arbitration agreement in the final version. To conclude, by virtue of separability presumption, it is unreasonable to consider the only express choice of law of Contract, the law of Mediterraneo, absolutely governs the arbitration agreement which is the main point of CLAIMANT hidden in different arguments. It will be mentioned infra.

2. The law of Mediterraneo is not the implied choice of governing law of the arbitration agreement.

11. CLAIMANT alleged that since the arbitration agreement is written into the whole Contract, the law that governs the main contract is a strong indication of the intention

of the governing law of the arbitration [*MfC, ¶36*]. However, this is an infringement of the doctrine of separability, which has been universally accepted in international arbitration practice [a]. Further, CLAIMANT failed to prove that the law governing the Contract is the implied choice [b].

a. Being part of the main contract does not mean that the law of main contract governs the arbitration agreement.

12. It has been expressly written into the Hague Principles that choice of law agreements should be distinguished from "arbitration clauses" (or agreements). While these clauses or agreements are often combined in practice with choice of law agreements, they serve different purposes [*Hague Principles Art.1.7*]. From this article, although arbitration agreement is included in the main contract, it is still a legally separated entity, and therefore it does not share the same governing law with the main contract naturally. Doctrine of Separability, which has been illustrated above, also suggests the same way.
13. CLAIMANT brought up its indication without using any reference to support its argument [*MfC, ¶36*], and therefore it should not be affirmed by the Tribunal.

b. CLAIMANT failed to establish its own argument because of its lack of reasoning.

14. CLAIMANT established its argument by asserting that the selection of the arbitration seat does not constitute an implied choice of governing law of the arbitration agreement [*MfC, ¶36, 38,39*]. CLAIMANT used three main cases to support its argument, that is Sulamerica case [i], Arsanovia case [ii] and Black Clawson case [iii]. Nevertheless, these cases could not contribute to the establishment of its argument.

i. CLAIMANT does not exclude other influential factors.

15. In Sulamerica case, the Court of Appeal finally decided the law of arbitration seat as the governing law of the arbitration agreement, which manifests that the law of the main contract is not the only option. A number of reasons led the court to determine the English law as the implied governing law, including that the choice of arbitral seat was London and the view that the parties could not have intended the arbitration agreement to operate the way it would have done under Brazilian law [*Ian，p.135*]. Accordingly, if CLAIMANT wants to argue that the law of the main contract is applicable to the arbitration agreement, it needs to prove that there is no additional factor that would affect the priority of the law of the main contract. However, this part of reasoning is missing in CLAIMANT's Memorandum. Therefore, CLAIMANT could not reasonably

conclude that the law of main contract should be applied preferentially in the case at hand if it failed to exclude other influential factors.

ii. The Parties showed no signs of acceptance of the law of main contract.

16. In Arsanovia case, the parties had expressly excluded specific statutory provisions of the Indian Arbitration Act. The natural inference was that they had understood and intended that otherwise that law would have applied [*Case Brief of Arsanovia case, ¶2*]. Consequently, the Parties in Arsanovia case had adopted the law of the main contract impliedly by their conducts. But such condition is missing in the present case. CLAIMANT alleged that RESPONDENT did not oppose or question the absence of any provision towards the fact that there was no expressed mention of applicable law in the arbitration agreement; therefore, it constitutes RESPONDENT's silence implied consent [*MfC, ¶45*]. However, silence does not mean consent. Ms. Julian Krone entered the negotiations after the car accident, and therefore was not aware of the Parties's divergent views towards the applicable law of arbitration agreement. As a result, CLAIMANT could not reasonably take silence as the acceptance of the law of the main contract to govern the arbitration agreement.

iii. The presumption in favor of the law of main contract has been abandoned.

17. Black-Clawson case was finally solved by Queen's Bench Divison（Commercial Court）before Mr. Justice Mustill. Quite contrary to what CLAIMANT alleged [*MfC, ¶40*], he said the governing law of the main contract and arbitration agreement are not always the same. And it is rarely, that the law governing the arbitration agreement is different from the lex fori [*Yearbook Commercial Arbitration2008, ¶58*]. In other words**,** it would be rare for the law of the (separable) arbitration agreement to be different from the law of the seat of the arbitration [*Yearbook Commercial Arbitration2008, ¶62*].
18. He expressed his views further in another case in 1993: "In the absence of an explicit choice or a strong pointer in the arbitration agreement to show the governing law, the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible." [*Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd, 357A-358A*].
19. In conclusion, adopting the law of the main contract is an infringement of the basic doctrine in international arbitration. And because of the distinction between the three

cases and the case at hand, CLAIMANT fails to prove that the law of the main contract should be the governing law of the arbitration agreement. Accordingly, the law of Mediterraneo is not the implied choice of law of the arbitration agreement.

3. Under closest connection test, the law of Danubia is the governing law of arbitration agreement.

20. In England, the Court of Appeal confirmed that the same choice-of-law rule applies to arbitration agreements: so the court must first ask whether the parties expressly or impliedly chose a law to govern the arbitration agreement (not the matrix contract) and, if not, apply the closest connection test [*Glick and Venkatesan, p.135*]. There is neither express choice nor implied choice between Parities, but according to the closest connection test, the law of Danubia is the governing law of arbitration agreement.
21. CLAIMANT alleges the law governing the underlying contract is also applied to the arbitration agreement [*MfC, ¶33, 35*]. RESPODENT resorts to sophistry that "the governing law" is applied to both main contract and arbitration agreement and it believes RESPODENT also agreed with it during the whole contracting process. Contrary to CLAIMANT's insinuation, RESPONDENT never confused the governing law of arbitration agreement with the one of main contract [*Resp. Ex R 1*] *and* CLAIMANT's argument is in significant tension with the basic premises of the separability presumption, which treated the Parties' underlying contract as distinct from the arbitration agreement [*Born; p.517*], which has been mentioned above.
22. RESPODENT strongly argues that the law of Danubia is the governing law of arbitration agreement under the closest connection test.
23. An exclusive focus on the law governing the underlying contract was also difficult to square with the fact that the Parties' chosen arbitral seat was often more closely connected to their arbitration agreement than the law they chose to govern their underlying contract. This was particularly true in cases where the local law of one of the Parties' home states governed a contractual relationship, but the arbitration agreement provided for arbitration in a neutral forum [*Born; p.518*] because the decision of the seat is precisely to disassociate the arbitration agreement from the host state.
24. When in an assumption, the Parties have an express choice that their agreement shall be governed by New York law and choose London as the seat of arbitration, which is very similar to the present case, Ian Glick and Niranjan Venkatesan support that the

governing law is decided by the seat of arbitration rather than the governing law of main contract because in practice, the commercial purpose of choosing a neutral seat of arbitration, as parties often do, is generally to insulate the dispute resolution mechanism from the national law of either party [*Glick and Venkatesan, p.145*].

25. Although not raised by this CLAIMANT, a CLAIMANT might have connected the law of Mediterraneo with many elements of the case at hand, such as the place of business of who performs the main obligation, the place of final negotiations and the signing of Contract. However, these elements just have good connection with the law applying for the substantive disputes but not procedural disputes. The only element which is associated with arbitration is the choice of arbitral seat by Parties, Danubia.
26. To conclude, CLAIMANT neglects the separability presumption and misconceives the governing law of main contract could also be applied to arbitration agreement. RESPODENT argues that the law of Danubia has closest connection for the reason that it is the requirement of neutrality and the choice of arbitral seat.

4. The law of the seat of the arbitration shall govern the arbitration agreement.

27. CLAIMANT has claimed that the arbitration clause should be governed by the Mediterraneo law [*MfC. ¶38-39*], because there is no implied choice to let the arbitration clause be governed by the law of Danubia and there is an expressed choice of the governing law of the merit. In order to substantiate its claim, CLAIMANT brings forward cases and alleges that condition of applying the lex arbitri to govern arbitration clause *"must be the terms of the particular clause and the contract in question"* [*MfC, ¶41-42*]. This condition is not the requirements set forth by international arbitration practice and scholarly opinions. RESPONDENT submits that the law applicable to the arbitration clause is the law of Danubia as it is the law of the place of arbitration.
28. It is generally accepted by scholars that in the absence of choice of law, the law of the place of arbitration governs the arbitration agreement [*Craig/Park/Paulsson,p.18; Fouchard, p.226; Born, p.77*]. Sebastiano Nessi stated that if the contract is silent, the power of the 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 [*Nessi*].
29. This doctrine has been accepted by arbitrators in a number of cases. ICC awards' arbitral tribunals took into consideration that the place of arbitration could be

interpreted as an indication of the will of the parties to let the law of the place of arbitration govern their contract [*ICC Award No.1803 (1972); ICC Award No.4392 (1983); ICC Award No.4472 (1984); ICC Case No. 4604 (1984); lCC Award No.5832 (1988)]*.

30. Therefore, RESPONDENT submits that the law applicable to the arbitration clause is the law of the place, Danubia, of arbitration, when lacking common intention of applicable law on arbitration clauses.

5. Art.36.3 of HKIAC rules is irrelevant to this issue.

31. CLAIMANT may misunderstand and use Art. 36.3 HKIAC rules incorrectly. This provision is about how tribunals should decide the substance of disputes. The reason is that "the usages of the trade" should be taken into account to decide the case, but it is as a source of substantive law in com
32. mercial arbitration [*Jaeger and Rezaeian, p.38*] and thus it just can be applied to the substance of disputes. However, the issue of jurisdiction is a procedural problem, and thus Art. 36.3 of HKIAC rules 2018 is irrelevant to this issue.
33. In addition, CLAIMANT alleges that Tribunal should decide case by virtue of contracts. However, based on separability presumption which has been mentioned above, the law of Mediterraneo is not the governing law of arbitration agreement on the Contract, so it is unreasonable to apply it.

C. There is no expressed authority for the Arbitral Tribunal to adapt the Contract.

34. Tribunal's powers to adapt the Contract must rely upon the Parties' s expressed or implied authorization. International arbitrators have the power to award the increased remuneration only if this remedy is provided by a party agreement, the law of the place of arbitration, and the law governing the substance of the dispute. CLAIMANT's argument of the power to adapt is flawed [1]. The prerequisites of the power to adapt the Contract are not met according to the law of Danubia [2]. Further, even if the Tribunal were to find the governing law should be the law of Mediterraneo, the Tribunal still does not have competence to adapt Contract since its power was not in accordance with the Parties' intention laid out in the arbitration agreement [3].

1. CLAIMANT's argument of the power to adapt the Contract is without stand.

35. CLAIMANT based on the Swiss law and case in order to substitute its claim, [*MfC, ¶54-55*] which is irrelevant to the present case. And even the Swiss arbitration law contains no such express provision. The Tribunal should not take its ruling into account.
36. CLAIMANT alleges that the Tribunal needs to look at the aspect of powers of adaptation from the English perspective [*MfC, ¶56*]. However, under the English doctrine of frustration, the courts have no power to modify contracts in light of supervening events [*Treitel, p.808*]. The place of arbitration in the common law system is more inclined to take a broad view of the arbitrators' power provided they originated in the common intention of the parties [*Fouchard, p.27*], but there is no common intention in the case at hand.
37. CLAIMANT also alleges that adaptation of the Contract will be a more suitable solution than termination [*MfC, ¶56*]. RESPONDENT admits this fact but does not consider it relevant to the case at hand. The Parties are no longer willing to continue the cooperation after the award. In such a case, no award in the world can serve as the starting point for a fruitful future cooperation [*Horn, Norbert, p.183*]. In the alternative, it will be more suitable to terminate the Contract than to adapt the Contract considering the contractual condition have changed unexpectedly.
38. Even if the Parties are willing to adapt the Contract instead of terminating it, the Arbitral Tribunal still does not have the power since the right to adapt the Contract belongs to the Parties. So when there is no expressed intention to confer the Arbitral Tribunal to adapt the Contract by the Parties, the Tribunal cannot do on its own to adapt the Contract. Overall, CLAIMANT mixed the substantial right and the procedure power so that made a wrong conclusion.

2. Under the law of Danubia arbitration, agreements have to be interpreted narrowly and in accordance with the parol evidence rule.

39. Even if the Tribunal accepted CLAIMANT's line of arguments and the requirements it sets forth [*MfC, ¶55*], the Tribunal still does not have the power to do so by interpreting the arbitration clause which stated that *"Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination"* [*Resp. Ex.1, p.33]* according to the law of Danubia. The adaption contract does not fall

under the scope of arbitration clause since the claim as alleged is "extrinsic" or not covered by the clause of the arbitration [a]. In any event, the arbitration clause in Contract to be interpreted under Mediterraneo or Danubia law, is not to be constructed as covering adaption contract [b].

a. The clause deals with arbitration solely of contracted contractual claims.

40. An arbitral tribunal may only validly determine those disputes that the Parties have agreed that it should determine [*Redfern, p.295*]. CLAIMANT cannot submit dispute to arbitration if the dispute is outside the scope of arbitration agreement.

41. Whether the dispute falling within the scope of the agreement to arbitrate should depend upon the wording of the agreement to arbitrate interpreted in the light of the applicable law [*Speller, p.163*]. As discussed above, the law of Danubia should govern the interpretation of the arbitration agreement. The law of Danubian is based on the same arbitration law of Model Law on International Commercial Arbitration with the 2006 amendments. According to Art. 28(3) the Danubian Arbitration Law, only if the parities have expressly authorized the arbitral tribunal to adapt the Contract can it have the power [*PO2 ¶14*]. Danubian law adheres for the interpretation of contracts including arbitration agreements to the "four corners rule", i.e. that the interpretation of the arbitration agreement is limited to its wording and no external evidence may be relied upon [*Answer to the Notice of Arbitration ¶16*]. The clause deals with arbitration solely of contracted contractual claims according to the Danubian law. However, the adaption contract does not fall under the arbitration clause since the claim as alleged is "extrinsic" or not covered by the clause of the arbitration. There is no implied or consensus to arbitrate the increased remuneration claims and there is no provision granting the tribunal the power to adapt the Contract.

b. The risk of the additional tariff cannot be interpreted as the matter connected with the Contract or the performance of the Contract.

42. CLAIMANT assumed that the arbitration agreement should be interpreted in a broad interpretation under the arbitration law of Mediterraneo [*Notice of Arbitration ¶16*]. The arbitrator's power to adapt Contract may flow directly from the arbitration agreement. However, the agreement contains no express clause allowing adaption contract. Despite broad interpretation, the Arbitral Tribunal should respect what the parties have agreed on and interpret the clause in terms of parties' intention when there is no implied or express choice. Institutional arbitration rules and national arbitration

statutes generally make it clear that an arbitral tribunal does not enjoy powers except where the parties have specifically agreed [*2012 ICC Rules Article 21(3); Born, p.105*].

43. In the present case, the risk of the additional tariff is not connected with the risk of the Contract as discussed below. The tribunal has no authority to award of consequential damages claim by reference to a contractual exclusion of such damages, that the arbitral tribunal had no authority to venture into a contractually excluded aspect [*Craig/Park/Paulsson, p.45*]. Further, the adaption of Contract does not concern "*the performance of any provision of the Agreement*". The only word in the arbitration clause could be interpreted as covering adaption contract claim is "performance". Performance is defined as obligation under the Contract. The words 'arising out of the contract' do not relate to increased remuneration claims. The increased remuneration claims alleged here do not concern the performance of any provision of the Contract/arbitration clause. The adaption contract does not allege a dispute over the performance of any provision of the Agreement.

3.The power to adapt the Contract without the authorization has not yet developed.

44. The wording of the arbitration agreement did not show any manifest intention of the Parties to confer power on Arbitral Tribunal to adapt the Contract[a]. Even in the capacity as amiable compositeurs, the arbitrator has no authority to adapt the Contract [b].

a. The scope of the Arbitral Tribunal's authority is determined by the Parties.

45. It is generally accepted that an arbitral tribunal has the power to change the terms of a contract if the arbitration agreement contains an express authorization [*Christoph Brunner, p.493*]. Arbitration is contractual in nature and consequently, the consent of the Parties is an essential prerequisite to arbitral proceedings [*Várady, p.85*]. The scope of the arbitral tribunal's authority is determined by the Parties [*Moss, p.1*]. In this case, Parties never consented to confer a power of adaptation on the arbitrators. So even if there is a hardship clause, only when there exists common intention of the Parties can the Arbitral Tribunal to adapt the Contract. Few arbitration laws contain provisions expressly addressing the arbitral tribunal's authority to adapt or supplement a contract [*Nessi*].

b. The Arbitral Tribunal cannot rely on the doctrine of amiable compositeurs to adapt the Contract.

46. CLAIMANT's argument of equity and good faith is not tenable in the present case [*MfC, ¶57-58*]. Arbitrators even when they are acting as amiable compositeurs tend not to intervene on the contract in case of hardship [*Ferrario, p.138*]. The award made in 1977 in ICC proceedings NO.2694 took this view [*Rubino-Sammartano, p.189*]. When acting as amiable compositeurs, arbitrators are generally reluctant to interpret clauses giving them powers to rule in equity as enabling them to adapt the contract [*Fouchard, p.26*]. Arbitral proceedings must be distinguished from all the other methods of preventing or resolving disputes. Some legal systems do not accept that arbitrators act as amiable compositeurs in the context of internal contractual relations, because they do so in order to regulate or harmonize the Parties' relationship rather than to apply the law [*David, p.174*].
47. In short, the arbitration clause does not provide the Tribunal with power to adapt the Contract.

CONCLUSION OF ISSUE I

48. RESPONDENT respectfully requests the Arbitral Tribunal to decline its jurisdiction to adapt the Contract due to the lack of authorization. Tribunal shall consider about its scope of jurisdiction/power prudently otherwise the award will face with invalidity or unenforceability. Though both Parties do not have express or implied choice of governing law of arbitration agreement, under closest connection test and international practice, the law of Danubia governs procedural issues. According to the Danubian Law, the Tribunal can't adapt the Contract in the case at hand. In addition, Parties does not make an agreement to authorize Tribunal to adapt Contract, therefore if Tribunal insists to adapt the Contract, the consequence will be that Tribunal exceeds its power.

ISSUE II. CLAIMANT SHOULD NOT BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS IF THIS EVIDENCE HAS BEEN OBTAINED THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM.

49. The evidence shall be excluded from this arbitration. RESPONDENT submits that it is justified to exclude the evidence based on confidentiality agreement in commercial arbitration[A]. Moreover, the evidence failed to satisfy the evaluative test regarding the evidence's admissibility [B]. Further, the argument to promote the ends of justice and the consideration of consistency of the award are not sufficient to admit the evidence [C].

A. It is justified to exclude the evidence based on confidentiality agreement.

50. Due to the confidentiality agreement in that interim award, RESPONDENT submits there are three reasons to exclude the evidence from the arbitration in this case. First, the UNCITRAL Rules on Transparency, which CLAIMANT alleged in email, is not applicable in this case [1]. Second, although CLAIMANT is not one of the parties of confidentiality agreement, there is also an implied obligation for CLAIMANT to perform this agreement [2]. Third, even assuming CLAIMANT owns no obligation under the confidentiality agreement, the importance of confidentiality shall also be highly emphasized while the Tribunal using discretion [3].

1. The UNCITRAL Rules on Transparency is not applicable in this case.

51. CLAIMANT's email indicated that UNCITRAL Rules on Transparency could be applied in this case to support the admissibility of this evidence [*Langweiler's Email, p.49,* ¶*3*]. However, it is RESPONDENT's position that the UNCITRAL Rules on Transparency was widely applicable under Investor Treaty arbitration for the reason

that ITA implicates the public interest in ways, which are not present within international commercial arbitration [*Laverde, p.105; Sabater, p.47*]. It is apparent that the principle of transparency could be applied under ITA arbitration since it is relevant to states and public interest and ITA will impact the citizens of the State as well as the State itself [*Fracassi, p.220*]. However, commercial arbitration only relates to the private contractual agreement, which could lead to the conclusion that there is no space for UNCITRAL Rules on Transparency to be applied here.

2. CLAIMANT has implied confidential obligation to perform the confidentiality agreement.

52. CLAIMANT may argues that CLAIMANT is not the party of the confidentiality agreement and would have no obligation to perform the confidentiality agreement. However, RESPONDENT submits that a person shall not disclose freely any information about the arbitration, any information learned through the arbitral proceedings and any award or decision rendered by the Arbitral Tribunal, even this person is a third party gaining access to information about the arbitration [*Brown, p.1014*].

53. Also, CLAIMANT may have contended that this evidence is relevant to this case, which shall be considered as an exception of confidentiality agreement's obligation. However, RESPONDENT humbly submits that however closely associated with each other the disputes in question may be, the concept of the private arbitration implicates that all the strangers shall be excluded from the conduct of the arbitration [*Eastern Sage Case, ¶379*]. Therefore, even though there is any relevance of fact of these two arbitral proceedings, due to the nature of confidentiality and the concept of private arbitration, this evidence shall also not be admitted.

3. Even assuming CLAIMANT is under no confidential obligation, the Tribunal shall also consider the importance of confidentiality when using discretion.

54. CLAIMANT's principal argument is that the Arbitral Tribunal owns wide discretion regarding the admissibility of the evidence [*MfC, p.14, ¶60*]. It is undeniable that the Tribunal owns broad discretion. However, CLAIMANT has no authority to certify that

wide discretion equals with the admissibility of the evidence in this case. RESPONDENT submits that confidentiality is the nature of the international commercial arbitration, which shall be under consideration [a]. Further, the circumstances here in this case did not satisfy the threshold to violate the nature of confidentiality [b].

a. Confidentiality is the nature of international commercial arbitration and shall be under the Tribunal's consideration.

55. RESPONDENT argues in this case that arbitration places the highest value upon confidentiality as a fundamental characteristic of international commercial arbitration [*Bond, pp.273-282*]. Therefore, from the perspective that confidentiality is the nature of the arbitration [*Ali Shipping case; Hassneh Insurance case; Esso Case*], the Tribunal shall consider the importance of confidentiality when using discretion.

b. The circumstances here did not satisfy the threshold to violate the nature-confidentiality.

56. CLAIMANT argues that ICJ's case permitted all the relevant evidence could justify the admissibility of the evidence and violate confidentiality agreement as an exception [*MfC, p.15, ¶62*]. However, it is RESPONDENT's position that confidentiality is one of the main advantages why parties tend to turn to arbitration instead of public judicial proceedings while entering into agreement in order to settle their disputes [*Fabian，p.4*]. It leads to the conclusion that judicial proceedings own different values and characteristics with international commercial arbitration. Therefore, ICJ's case is also not convincing enough to prove the admissibility of the evidence.

57. Moreover, the threshold to violate confidentiality agreement is the making of the award must therefore be a necessary element in the establishment of the party's legal rights against the stranger [*Insurance Co Case, p.276*]. However, in this case, the violation of the confidentiality agreement is not under a necessary situation or plays a necessity role.

58. Third, if violating the confidentiality agreement here, it means that this choice is not respected, arbitration will become less desirable, to the extent that arbitration loses its confidential nature and may lose one of its distinctive features and become more like

litigation [*Buys, p.121*].

59. Therefore, the importance of commercial arbitration shall be highly emphasized while the Tribunal using wide discretion.

B. The obtainment of this evidence through illegal hack means it failed to satisfy the evaluative test regarding the evidence's admissibility.

60. CLAIMANT contendeds that this evidence has passed the evaluative admissibility test and could be admitted in this case with two main arguments--- the application of clean hands doctrine and the relation of public interest. [*MfC, pp.20-21, ¶¶ 81-90*]. However, these two arguments are not established in this case. To address RESPONDENT's position more specifically, first, the clean hands doctrine is not applicable in this case [1]. Second, public interest has no relevance with this case [2].

1. The clean hands doctrine is not applicable in this case.

61. CLAIMANT argues that this evidence was not obtained by a party who seeks to benefit from it, which could apply clean hands principle to justify the admissibility of the evidence [*MfC, p.20, ¶81*]. However, this principle is not applicable in this case for two main arguments. First, the clean hands doctrine is not a general principle, which could not be used without threshold in arbitration [a]. Second, even assuming the clean hands doctrine is a general principle, the circumstance in this case does not satisfy the applicable elements of this doctrine [b].

a. It is not a general principle, thus could not be used without threshold.

62. To become a general principle of law, a principle must have "a certain level of recognition and consensus [*Yukos Case, ¶1359*]. In Yukos case, there is not a single majority decision by an international tribunal which has applied the clean hands doctrine to a dispute, which concludes that it operated as a bar to claims as a principle of international law [*Yukos Case, ¶1362*].

63. Also，in Al-Warraq case，due to the lack of relevant case law，it is difficult to determine clean hands doctrine's statues, then the standard of clean hands was not applied by the court [*Al-Warraq case, ¶647*]. Moreover, in Niko Resources case the judge expressed similar doubts that there is a question whether the clean hands doctrine could be applied as a principle and its precise content is ill defined [*Niko Resources case, ¶477*].

64. Therefore, the statues of clean hands doctrine are still controversial and could not be applied here when lacks both law and agreement.

b. Even assuming it is a general principle，the circumstance here does not satisfy the applicable elements of this doctrine.

65. There are two core requisites to decide whether the clean hands doctrine could be invoked.

66. The first requisite is the effect to public policy. In Molding Corp case, it has been suggested that in determining whether to apply the doctrine, the court should weigh the relative extent of each party's wrong upon the other and upon the public and make an equitable balance [*Molding Crop Case*]. Also, with the consideration of the purpose of the clean hands - to promote public policy and protect the integrity of the court, the effect of the court's decision on public policy should be an integral part of the balancing test for determining the application of the doctrine [*Wolff, p.568*]. However, in this case, the argument between CLAIMANT and RESPONDENT only relates to the private contractual agreement and has no effect on public policy, which could lead to the conclusion that this evidence does not satisfy the first requisite.

67. The second requisite is whether there is a continuous violation in the case. The doctrine may apply only if the applicant is seeking "protection against a continuance of that violation in the future' and not reparation for a past violation [*Niko Resources Case; Guyana Case*]. In this case, there is no continuous violation between the Parties, which could conclude that the second requisite is not satisfied as well.

68. Thus, the clean hands doctrine is not applicable here.

2. Public interest has no relevance here and the evidence is not under public domain.

69. CLAIMANT alleged that this evidence is in relation with public interest and since it has already been publicly available information, this evidence shall be considered as admissible [*MfC, P.22, ¶95*]

70. First, public interest means that real interest in the outcome, and perhaps the progress, of each arbitration, which the relevant public authority has a duty to satisfy [*Esso Case*]. In this case, however, the controversial issue in essence is two commercial parties'

private contractual argument, which would not affect any third party not involved in the Contract. Thus, the argument in this case has no relation with public interest.

71. Second, CLAIMANT argues that this information has already been in public domain, and cited the Wiki-leak's case to justify the evidence which is not admissible [*MfC, p22, ¶92*]. However, it is RESPONDENT's position that neither the information has already been in the public domain, nor the Wikileaks's case is convincing.

72. Information in the public domain is publicly accessible，which the parties acknowledge from external sources before[*Smeureanu, p.11*]. The evidence in this case is now only known by limited parties and people. And it could not be searched out on the Internet, which could lead to the conclusion that this information has not become publicly accessible information.

73. Also, Wiki-leaks case is not convincing. In Wiki-leaks case, all the information is exposed on the Internet and all people could get access to the information when log in，which is apparently different from the evidence in this case.

74. Moreover, the party in Wiki-leaks case involves with states. As Andrew Tuck argues that the very presence of a State changes the nature of the arbitration. Citizens and residents of the State have a legitimate interest in knowing how the government acts during the arbitration and in the outcome of the arbitration. [*Tuck, p.912*] Thus, if a state plays a role in this case, there may be necessitated changes in regulation or policy, and it may have significant budgetary repercussions for the public purse [*Fracassi, p.220*], which is also different from the circumstance in this case--- a private commercial argument.

C. The argument to promote the ends of justice and the consistency of the award is not sufficient to admit the evidence.

75. CLAIMANT argues that for good consciousness, as the need of consistency of the award and to promote the ends of justice, the evidence shall be admitted [*MfC, p.17, ¶70-76*]. However, RESPONDENT submits that the principle of good faith plays a more important role in international commercial arbitration [1] and consistency is not an essential factor to be considered in international commercial arbitration [2].

1. The principle of good faith plays a more important role in international commercial arbitration.

76. The principle of good faith constitutes a source of international law which must be taken into consideration in decisions of the ICJ and, in general, by the public and private protagonists of international law [*Cremades, pp.761-788*].

77. The principle refers to the duty based on an objective assessment of whether reasonable people, in the particular context, would consider the conduct as commercially unacceptable [*Yam Seng case*]. It would be infringed upon when illegally obtained evidence is used [*Cremades, pp.761-788*]. Presenting in this case, the evidence is obtained through an illegal hack, which leads to the violation of the principle of good faith.

78. Since this principle affects both the parties to the dispute as well as the arbitrators or arbitration institutions [*Julie, p.737*], in turn, arbitrators and arbitration institutions must fulfill their role in good faith, protecting the integrity of the proceeding [*Cremades, pp.761-788*]. Therefore, RESPONDENT submits that the Tribunal shall at least consider the significance of the principle of good faith in international commercial arbitration and deem the evidence as an inadmissible one.

2. Consistency is not an essential factor to consider in international commercial arbitration.

79. CLAIMANT may argue that consistency of the arbitral award is very important as to keep the arbitral award be more predictable and to keep the truth as the most crucial factor. However, RESPONDENT alleges that consistency and predictability are a mirage and that they are not essential to the development of international commercial arbitration [*Kohler, pp.375-376*], which leads to the conclusion that this argument may raise by CLAIMANT is also not sufficient enough to justify the evidence.

CONCLUSION OF ISSUE II

80. In a nutshell, because of the inapplicability of UNCITRAL Rules on Transparency and the nature-confidentiality of international commercial arbitration, the evidence shall be excluded. Moreover, this evidence obtained by illegal hack shall be excluded since the

clean hands doctrine is not applicable and the public interest is not under public domain. Due to the essentiality of the principle of good faith and a non-binding nature of consistency in international commercial arbitration, this evidence is not admissible.

ISSUE III CLAIMANT IS NOT ENTITLED TO ANY PAYMENT RESULTING FROM AN ADAPTATION OF THE PRICE

81. RESPONDENT submits that CLAIMANT's claim for an increased remuneration is completely baseless. Contract identifies the law of Mediterraneo and the CISG as the governing laws, which provides a firm basis that CLAIMANT is not entitled to any payment resulting from an adaptation of the price under clause 12 of Contract [A] or under the CISG [B].

A. CLAIMANT is not entitled to any payment from an adaptation of the price under clause 12 of Contract.

82. RESPONDENT respectfully requests the Tribunal to find that, contrary to CLAIMANT's submission, the additional tariff does not cause hardship in clause 12 of the contact [1]. Moreover, CLAIMANT does not act in good faith [2].

1. The additional tariff does not cause hardship in clause 12 of the Contract.

83. RESPONDENT submits that the additional tariffs should not be covered in clause 12. Firstly, it does not cause hardship under Article 6.2.2 UNIDROIT principles [a]. Secondly, it does not cause hardship under clause 12 of Contract since it does not fulfill the requirements of clause 12 [b]. Further, the regulations invoked by CLAIMANT are not reasonable [c].

a. It does not cause hardship under Article 6.2.2 UNIDROIT principles.

84. CLAIMANT asserts that it constitutes hardship under Article 6.2.2 UNIDROIT principles [*MfC, ¶102, p.24*]. However, pursuant to Article 6.2.2 UNIDROIT principles, hardship relevant only to performance not yet 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 that it receives as a consequence of a change in circumstances which occurs after such performance. [*Article 6.2.2 UNIDROIT principles, comment 4, p.221*]. In the present case, CLAIMANT performed the obligation of delivering all the goods and RESPONDENT payed all the frozen semen's price, thus, Contract was realized without dispute. Hence, CLAIMANT is not entitled to ask for adaptation after performing its delivery obligation [*Cl. Ex. No.8, p.18*]

b. It does not fulfill the requirements of clause 12 of Contract.

85. RESPONDENT submits that the narrowly worded clause is not applicable to the present tariff. 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, p.14*] Pursuant to clause 12, there are three requirements which should be fulfilled simultaneously to constitute hardship. RESPONDENT insists that all the three requirements have not been fulfilled in the case. First, it is not unforeseen [i]; second, it does not make the Contract more onerous [ii]. Third, it is not comparable with additional health and safety requirements [iii].

i. It is not unforeseen.

86. According to Lookofsky, the fulfilment of the unforeseeability element is the hardest one to prove, as virtually all potential impediments to performance are foreseeable to some extent [*Lookofsky, p.103*]. Stoll and Gruber pointed out, however, that since virtually all events are theoretically foreseeable it would be wrong to interpret foreseeability purely empirically. Instead, the question of foreseeability is one about what a party reasonably could foresee [*Stoll, Gruber, p.817*].

87. In light of this, the notion of unforeseeability ought to be understood in the following way: Should a party under conditions prevailing at the time of the conclusion of the contract and taking into account the trade usage within a particular branch have foreseen that an impediment exists or that an impediment will occur? Thus, in the

analysis of whether the event could be foreseen 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 [*Art.8 CISG*].

88. In the present case, CLAIMANT is a member of WTO, so it is not unrealistic that CLAIMANT could be awared that tariffs are a normal business risk. Besides, the country of CLAIMANT, Mediterraneo, had always tried to protect their farmers by tariffs on foreign agricultural products of a comparable size in the past. And President Bouckaert had appointed Ms. Cecil Frankel, one of the most ardent critics of free trade, as his "superminister" for agriculture, trade and economics on 5 May 2017 which was before the parties concluded the Contract. She had been an outspoken protectionist for years [*PO2, question 23, p.58*], so it is reasonable for CLAIMANT to foresee the tariff in its country. CLAIMANT asserted that the Government of Equatoriana had always been an ardent supporter of free trade [*MfC, ¶109, p.26*], so it could not foresee retaliatory taxation. However, the Government of Equatoriana had taken retaliatory measures against trade restrictions imposed by a third state [*NOA, ¶19, p.8; Cl. Ex. No. 6, p.15*]. Further, CLAIMANT operates Mediterraneo's oldest and most renown stud farm, which means it has rich experience in international trade. Therefore, it is unreasonable for CLAIMANT to claim to be unaware of the possibility of retaliatory taxation.

89. Hence, it is foreseeable that the Government of Equatoriana would take retaliatory taxation.

ii. It does not make the Contract more onerous.

90. To understand what is making the contract more onerous, it is reasonable to apply Article 6.2.2 UNIDROIT principles as a reference. According to Article 6.2.2 UNIDROIT principles, it requires fundamentally alteration of the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party received has diminished. Whether an alteration of the

equilibrium of the contract is fundamental or not in a given case will of course depend on the circumstances [*UNIDROIT Principles, Art. 6.2.2, comment 1, p.219*]. Generally, international practice is cautious in determining whether it fundamentally alters the equilibrium of the contract.

91. The 1994 edition of UNIDROIT Principles adopted a at least 50% general threshold test [*UNIDROIT Principles, Art. 6.2.2, comment 2 (1994), p.147*]. Due to criticism by some writers, the 2004 UNIDROIT Principles and later editions did not provide this general threshold test. Nevertheless, if the changed circumstances result in less than 50% decrease in value of the performance to be received or increase in the cost of performance, then the fundamental alteration of the equilibrium of the contract is not realized under Article 6.2.2. [*Maskow, p.662; Perillo, p.22; Jenkins, p.2028; Doudko, p.495*]

92. This is already supported by the international arbitration practice [*Doudko, p.496*], according to which cost increases of 13.6%, 30%, 44%, or 25% to 50% were not considered to be fundamental alterations of the equilibrium of the contracts. In the case Nouva Fucinati S.p.A v. Fondmetall Int'l A.B[*Ferrochrome Case*], though it was not concerned with the UNIDROIT Principles, the Tribunale Civile di Monza (Italy) decided that the price increased between the time of the conclusion of the contract and the time fixed for delivering the goods sold by approximately 30% did not amount to hardship.

93. In addition, even the percent exceeds fifty, the fundamental alteration of the contract will still be not achieved. In case Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listruik Negara [*Himpurna v Indonesia award*], 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.

94. In the present case, the tariff only increases 30% cost of CLAIMANT's performance, which is much far less than the proportion in the above case. Thus, the situation in this

case cannot be considered as fundamental alterations of the equilibrium of the contracts.

95. CLAIMANT asserts that its financial situation is bad and RESPONDENT knows that [*MfC, ¶110, pp.26-27*]. However, it is a general rule that the deterioration of a party's financial capacity falls within the sphere of control of this party and thus does not authorize this party to invoke the hardship exemption. Some contracts may be financially detrimental while others may be profitable. Thus, financial situation must be examined in an overall way [*Dalhuisen, p.110*].

96. Here, the bad financial situation is not caused by the additional tariff. On the contrary, it was caused by poor management of CLAIMANT. As a matter of fact, CLAIMANT had heavily invested in new stables in 2013, which made it have to pay the high interest for the loan taken on to finance the new stables in 2013 and the costs for the restructuring measures [*PO2, question 21, p.58*].

97. Besides, selling semen for racehorse breeding is not CLAIMANT's main business, CLAIMANT agreed to conclude the Contract because it would make CLAIMANT profitable without bearing the risks of the use of the semen. And CLAIMANT can still make profits from other business.

98. Further, the consequences of the additional tariffs can be avoided by CLAIMANT. In this case, the tariffs were announced on 19 December 2017 and it was reported by Peak Business News on 20 December 2017, but it would not take effect until 15 January 2018 [*PO2, question 25, p.58; Cl. Ex. No. 6, p.15*]. Thus, CLAIMANT could avoid the outcome of the additional tariffs by delivering the third semen before 15 January 2018. Hence, the losses can be avoided by CLAIMANT.

99. In the light of all above, the additional tariff does not fundamentally alter the equilibrium of the Contract.

iii. It is not comparable with additional health and safety requirements.

100. In the analysis of what is comparable with additional health and safety requirements, the objective standard should be applied in this case, taking into account and all relevant circumstances, practices, and usages should be taken into account [*Art.8, CISG*]. Here, RESPONDENT submits that the additional tariff is not comparable with

additional health and safety requirements.

101. First, the tariff was increased for a different reason. In view of the experiences gained from previous failure, CLAIMANT insisted on adding "additional health and safety requirements" in clause 12, in case under the aforesaid situation losses can be shifted by CLAIMANT, RESPONDENT understood the concern and made no objections. While the additional tariff in this case was originated from retaliatory measures which has nothing to do with health or safety considerations.

102. Second, the outcome between the additional tariff and additional health and safety requirements cannot be comparable. In the past experience of 2014, the overall price is 8 million USD and it increases 40 % cost of CLAIMANT's performance, which is 3,200,000 USD. Here, the overall price is only 5 million and it only increases 30% cost of CLAIMANT's performance, which is only 1,500,000 USD. Both the overall price and the increased cost of performance is much lower than the experience in 2014.

103. Therefore, it is not comparable with health and safety requirements, CLAIMANT shall not expand the interpretation of the "comparable" to shift the losses to RESPONDENT.

c. The regulations invoked by CLAIMANT is not applicable in this case

104. In CLAIMANT's memo, it invoked many domestic laws, including Article 6:111 of PECL 1999 [*MfC, ¶103-104, p.25*], the German doctrine of Wegfall der Geschäftsgrundlage which is codified in Section 313 of the EGBGB [*MfC, ¶106-107, pp.25-26*] and the Statute on the Modernisation of the Law of Obligations in 2001 in Germany [*MfC, ¶107, p.26*], to interpret the case. However, all of the above regulations are not applicable here since the parties choose the law of Mediterraneo and the CISG as the governing laws. Further, such interpretation will violate CISG's international character and the need to promote uniformity in its application and the observance of good faith in international trade [*Art. 7(1) CISG*].

105. Therefore, the regulations invoked by CLAIMANT is not applicable in this case.

2. CLAIMANT's conduct is not accordance with good faith

106. Pursuant to Art. 6.2.3 UNIDROIT principles, the conduct of both parties during the renegotiation process is subject to the general principle of good faith and fair dealing [*Article 1.7, UNIDROIT principles*]. Here, RESPONDENT submits that CLAIMANT's

conduct is not accordance with good faith. First, CLAIMANT's request for renegotiations is delayed [a]; second, CLAIMANT cannot invoke the exemption from Article 6.2.3(2) UNIDROIT principles [b]; third, CLAIMANT's request for adapting the price is an abuse of the remedy of hardship [c].

a. CLAIMANT did not fulfill its notification obligations in a timely manner

107. CLAIMANT insisted that it tried to get in touch with RESPONDENT for discussing the price increase before the third shipment and clearly informed RESPONDENT about the price increase and its repercussions on the transaction [*MfC, ¶112, p.27*]. Nevertheless, CLAIMANT did not fulfill its notification obligations in a timely manner. According to Art. 6.2.3(1) UNIDROIT principles, request for renegotiations should be without undue delay. Here, the tariffs were announced on 19 December 2017 by executive order [*PO2, question 25, p.58*]. And in the next day, the news was published in the Peak Business News [*Cl. Ex. No. 6, p.15*]. As soon as CLAIMANT read about this article, it should contact RESPONDENT. However, CLAIMANT did not contact RESPONDENT for clarification until one month later on 20 January 2018 [*Cl. Ex. No. 7, p.16*]. At this point, there were only 3 days left before the Contract delivery deadline which is on 23 January 2018.

108. In light of above, contrary to what CLAIMANT has asserted, CLAIMANT did not fulfill its notification obligations in a timely manner.

b. CLAIMANT cannot invoke the exemption from Article 6.2.3(2) UNIDROIT principles

109. Although the request for renegotiations does not in itself entitle CLAIMANT to withhold performance under Art. 6.2.3 (2) UNIDROIT principles, CLAIMANT can still ask for relief under 6.2.3(3) UNIDROIT principles. According to 6.2.3(3) UNIDROIT principles, it states that "upon failure to reach agreement within a reasonable time either party may resort to the court." Such a situation may arise either because the non-disadvantaged party completely ignored the request for renegotiations or because the renegotiations, although conducted by both parties in good faith, did not have a positive outcome.

110. Here, RESPONDENT never committed that it will bear the cost of the additional tariff,

thus, the renegotiations between the parties did not reach a positive outcome. Under this circumstance, if CLAIMANT really thought there is a hardship, CLAIMANT should resort to arbitration rather than deliver the third shipment. Therefore, CLAIMANT gave up its right to take legal remedies at the time it delivered the third shipment. Thus, it is unacceptable for RESPONDENT to pay for CLAIMANT's act of refusing taking relief measures.

c. CLAIMANT's request for adapting the price is abusing the remedy of hardship.

111. In this case, during the negotiation process between the parties of concluding the Contract, CLAIMANT had required increasing the semen's unit price on the grounds of the change of delivery terms [*Cl. Ex. No. 4, p.12*]. The final price is 100,000 USD per dose. However, the direct additional costs associated with transportation and DDP delivery per dose are only 200 USD [*PO2, question 8, p.56*]. This implied that CLAIMANT has taken the possible increase cost of the performance in the future into account. Further, it is very common to take responsibility for one's own profit and loss in international trade. Therefore, it is not reasonable for CLAIMANT to ask for increase the price again just due to CLAIMANT will suffer loss in this transaction. This is not only not conducive to the development of international trade, but also a waste of judicial resources.

112. In conclusion, CLAIMANT's request for adapting the price is abusing the remedy of hardship.

B. CLAIMANT is not entitled to any payment from an adaptation of the price under the CISG.

113. Although, the Contract is governed by the CISG, the circumstances of the case limit RESPONDENT's rights to invoke remedies, which is CLAIMANT may not invoke Art. 79 CISG to adapt the Contract [1]. Further, CLAIMANT is not entitled to any damages or compensations since RESPONDENT did not fundamentally breach the Contract [2].

1. CLAIMANT may not invoke Art. 79 CISG to adapt the Contract

114. RESPONDENT submits that the increased remuneration is not justified under Art. 79 CISG as firstly, the "impediment" in Art. 79 (1) CISG does not cover hardship [a]; secondly, even if it governs hardship, it applies in the situation of non-performing [b].

a. The "impediment" in Art. 79 (1) CISG does not cover hardship

115. Art.79 (1) did exonerate a party's duty of performance as long as the party proves particular conditions happened, one of which is "the failure was due to an impediment beyond his control". CLAIMANT proposed that the additional tariff should be considered as an "impediment", however, in RESPONDENT's point of view, hardship is not included into "impediment".

116. First, the drafting history of the Convention shows that Art. 79 CISG does not regulate hardship, which is a legitimate and valuable aid in the interpretation of the Convention's provisions. It reveals that Article 79 CISG is indeed a stricter version of its predecessor, Article 74 ULIS, which had been criticized for excusing non-performance too readily, such as where performance merely became more difficult [*Honnold, pp.534-537*]. In ULIS the word "circumstances" was used instead of "impediment". The reason why Art. 79 adopted "impediment" instead of "circumstances" is, as clear as in the *travaux préparatoires*, for the purpose of adopting a unitary conception of exemption with the intention of setting aside the theory of *rebus sic stantibus*, *imprévision*, or hardship theories based on "changed circumstances" [*Honnold, p.252*]. The Working Group of UNCITRAL considered but rejected a proposal allowing a party to claim avoidance or adjustment of a contract whenever facing unexpected "excessive damages" [*Honnold, p.350*].

117. Besides, the legislative history of Article 79 also indicates that a party cannot rely on the exemption merely on the ground that performance has become unforeseeably more difficult or unprofitable [*Rimke, p.223*]. The UNCITRAL debates show that the CISG drafters were opposed to allowing commercial or economic hardship as an excuse for non-performance and that this was the reason for adopting the requirement of an impediment as a precondition for relief in place of the more liberal ULIS test of a change of circumstances [*Honnold, pp.432.1-432.2*].

118. Further, many courts and scholars believe that the term "impediment" as contained in Article 79 does not extend so far as to encompass hardship. For instance, Slater argues that a glance at the text of Article 79 reveals that the term "hardship" is not expressly included in its language [*Slater, pp.253-254*]. According to Flambouras, the CISG does

not adopt the doctrine of *clausula rebus sic stantibus* (Latin for "things thus standing") and that events such as a sudden increase in the price of raw materials or a dramatic devaluation of currency will not allow the seller to avoid liability for non-delivery of the goods or to require renegotiation of the contract terms [*Flambouras 2001, p.277*].

119. Hence, the impediment in Art. 79 (1) CISG does not cover hardship.

b. Even if it governs hardship, it regulates the situation of non-performing

120. Art. 79 (1) CISG stating as "a party is not liable for a failure to perform any of his obligations …" has granted the non-performing party to immune from liabilities. The phrase "failure to perform" has explicitly pointed the premise of invoking, which is not yet rendered is not yet rendered.

121. CLAIMANT uses Scafom International BV v. Lorraine Tubes S.A.S case [*Scafom Case; MfC, ¶117,p.28*] to justify its argument, in the Scafom case, the hardship was occurred "after the conclusion of the contract and before delivery" meaning the contract is entirely not performed. However, in the present case, CLAIMANT had paid the additional tariffs and delivered the goods without delay, RESPONDENT had accepted the goods and duly paid for them. The Contract was realized, thus, CLAIMANT may not invoke exemption clauses for relief.

2. RESPONDENT did not fundamentally breach the Contract.

122. CLAIMANT asserts that RESPONDENT has breached Contract in two ways, one is failed to pay the additional remuneration of the second installment [*MfC, para. ¶127*], the other is that it violates the resale prohibition. On the contrary, RESPONDENT has always performed its duties in good faith, instead, CLAIMANT is the one who sleeps on the right. First of all, as a buyer, RESPONDENT has perfectly fulfilled its obligations under Art. 53, CISG [a], but made no warrant to pay the additional tariff [b]. As for the resale allegation, though CLAIMANT has mentioned the "re-sold prohibit" in the former emails, unfortunately it was not contained in the Contract, thus it is not a contractual obligation [c]; further, to regulate resale prohibition in the Contract violates the owner's right [d].

a. RESPONDENT duly met its duties and main obligations under the Contract.

123. Art. 53 CISG illustrates the main obligations of buyer are "paying the price for the

goods" and "take delivery of them". In the present case, first, RESPONDENT paid the price for the frozen semen without delay. The Parties agreed in the Contract that "the purchase price has to be paid in two instalments and the second instalment of 5,000,000 USD is due on 21 January 2018". [*Cl. Ex. NO.5, p14, ¶6*]. On 21 January 2018, Mr. Shoemaker made a phone call with CLAIMANT, in which Mr. Shoemaker reminded CLAIMANT of the delivery of the third shipment and told it that RESPONDENT "had already initiated the payment of the second installment. [*Cl. Ex. NO.8, p.18*]" Thus, RESPONDENT fulfilled its duty of paying the price for the frozen semen without delay. Second, RESPONDENT took the delivery on time.

124. In conclusion, RESPONDENT performed its duties and main obligations perfectly.

b. The Parties have reached no agreement on the additional tariff.

125. On the morning of 21 January 2018, the Parties had a phone call related to the delivery of the last shipment and the newly imposed tariffs. Contrary to CLAIMANT's insinuations [*MfC, para.123, p.30*], RESPONDENT also did not agree to any adaptation following CLAIMANT's request in January 2018. Mr. Shoemaker "never committed to any adaptation of the price and would also not have had the required authority to do so. [*Resp. Ex. No. 4, p.36, ¶4*]". His understanding of the Contract was that CLAIMANT had to bear the costs but that he would verify that with the persons involved in drafting. However, CLAIMANT wrongly interpreted the conversation. RESPONDENT did not make any promise that it would bear the additional cost. During the whole discussion, the Parties did not find a solution to the incident, let alone reach agreement on the additional payment of the tariffs.

126. In light of above, the Parties have not reached agreement on the additional tariff, thus, RESPONDENT has no obligation to pay the additional tariff.

c. The contractual document does not contain any resale prohibition.

127. During the negotiation of the Contract, although CLAIMANT has mentioned that RESPONDENT may not resell the frozen semen to third parties without CLAIMANT's express written consent [*Cl. Ex. No. 2, p.10, ¶3*], RESPONDENT did not respond to it in the following emails.

128. In clause 9 of the Contract, it stated as "*Buyer is responsible for compliance wi*

th registry requirements for the use of frozen semen and payment of any fees fo r the subsequent registration of foals conceived." Neither "resale prohibition" no r synonyms were expressed in the text. RESPONDENT has searched the Interne t and found some contract templates from other horse companies, in their templ ates, they have expressly agreed to terms like "It is prohibited to resell frozen s emen on principle." [*Lodbergen terms and conditions, Article. 4, https://dressurle istungszentrum.de/en/service/terms-conditions/agb.html*]

129. Besides, according to literal interpretations, "compliance with registry requirements for the use of frozen semen" have made no clear about the "registry requirements", all we can find is the registered information on three horses. To take a step back, if CLAIMANT holds "the semen is to be used for the following mares" thereby insists that RESPONDENT has breached the Contract, but where on earth did the Contract stipulates that **all** the purchased semen shall be used on the following mares? And what if one dose is enough to breed, would a reasonable person will waste the other 99 doses? Therefore, RESPONDENT submits that if the resale prohibition is not expressly stipulated in the Contract, RESPONDENT shall not undertake such obligations.

***d.* limiting resale rights is not accordance with the owner's right.**

130. In property law, owning something means the owner can enforce legal rights concerning it. It needs not take a property lawyer to identify the basic categories of rights that come with property ownership. If you own property, you have the right to do the following with it: Possess it; use it; exclude others from it and transfer it to someone else.

131. The right to resale is so fundamental and it may be challenged in court only when the right to resale is about copyrighted items. However, the United States Supreme Court decided a case that reinforced the right to re-sell something that you had lawfully bought even though it is about copyright items. In the case of Kirtsaeng v. John Wiley & Sons [*568 U.S. 519*], the Supreme Court decided that publishers cannot prevent the resale of books they produce overseas in U.S. markets, which reaffirmed that owners have resale rights.

132. In this case, it is just a sale of ordinary goods and RESPONDENT has taken the

ownership of the frozen semen by making the payment. Thus, the owner enjoys the right to resell them and the right should be legally protected. Not only is this right a basic attribute of private dominion over a thing, it's also important for society because the freedom to transfer is essential to wealth-producing market transactions.

133. The Owners' Rights Initiative, which represents a broad coalition of stakeholders who have an interest in protecting ownership rights around the world, also supports that the assurance that "if you bought it, you own it" is a fundamental right which is critical to commerce. Under the fundamental premise, the owner, here refers to RESPONDENT, has the right to sell, lend or even give away the frozen semen.

134. Hence, it is not reasonable to prevent the resale of the frozen semen considering the essence of the owner's right.

CONCLUSION OF ISSUE III

135. CLAIMANT is not entitled to any payment resulting from an adaptation of the price under clause 12 or under the CISG. The imposition of the tariff is not covered by clause 12 of Contract since it does not meet the requirements of clause 12. Besides, CLAIMANT does not act in good faith. Further, it is not reasonable to invoke Art.79 CISG as a remedy since it does not regulate hardship. Moreover, RESPONDENT did not fundamentally breach Contract as RESPONDENT has perfectly fulfilled its obligations of payment and "re-sold prohibit" is not a contractual obligation.

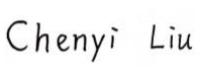
REQUEST FOR RELIEF

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

1. The Tribunal lacks jurisdiction and the necessary powers to adapt the contract.

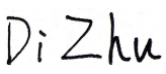
2. CLAIMANT is not entitled to submit evidence from the other arbitration proceedings if this evidence has been obtained through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's computer system.

3. CLAIMANT is not entitled to any payment resulting from an adaption of the price.



Chenyi Liu

Chuting Zhuang

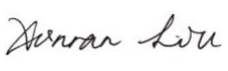


Di Zhu

Lin Meng

Mengyu Xu

Shiyi Huang



Xinran Liu

Xinyang Wu

Yue Gu

Zhuling Zheng