SIXTEENTH ANNUAL WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

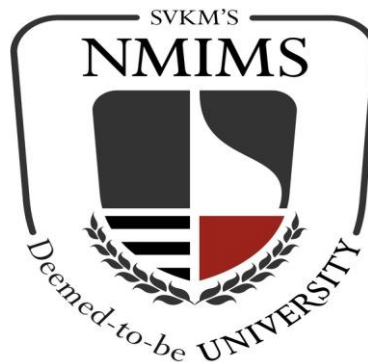
HONG KONG – MARCH 31-APRIL7,2019

PHAR LAP ALLEVAMENTO, *CLAIMANT*

V.

BLACK BEAUTY EQUESTRIAN, *RESPONDENT*

MEMORANDUM FOR CLAIMANT



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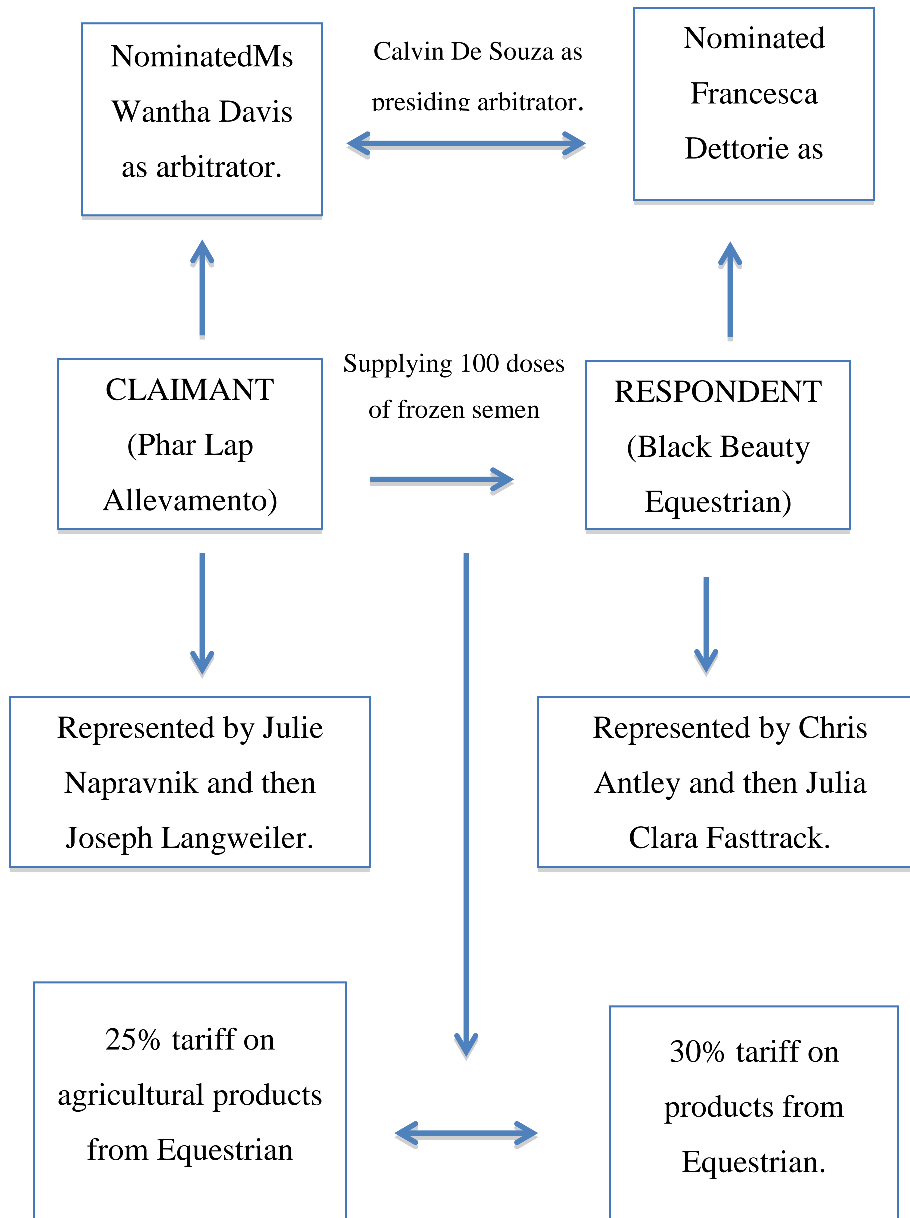
LIST OF ABBREVIATIONS

§/§§	Section(s)
%	Percentage
¶/¶¶	Paragraph(s)
&	And
%	Per cent
Art(s).	Article(s)
Ch.	Chapter
CISG	UN Convention on the International Sale of Goods, Vienna, 11 April 1980
Cl.	CLAIMANT
Co.	Company
Comm.	Commercial
Ed.	Edition
ED./Eds.	Editor(s)
eg.	Exempli gratia [for example]
Not.	Notice
Arb.	Arbitration
pg.	Page
No.	Number
v.	Versus
HKIAC	Hong Kong International Arbitration Centre

UNCITRAL	United Nations Convention on Contracts for International Sale of Goods
HK	Hong Kong
Ltd.	Limited
Co.	Company
Ans.	Answer
pt.	Point
UNIDROIT	International Institute for the Unification of Private Law
PECL	Principles of European Control Law 1998
USD	United States Dollar
%	Percentage
Ex.	Exhibit
ICAC	Independent Commission Against Corruption
ICC	International Criminal Court
Proc.	Procedural
Ord.	Order

STATEMENT OF FACTS



1) CLAIMANT is a company incorporated in Mediterraneo. CLAIMANT operates Mediterraneo's oldest and most renowned stud farm. In its racehorse section, the CLAIMANT provides stallions for breeding and it additionally offers frozen semen 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 organised 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 whether frozen semen of Nijinski III was available. The RESPONDENT asked the CLAIMANT for 100 doses of Nijinski III's frozen semen for artificial insemination.

3) Equatorian Govt. at the time had imposed serious restrictions on the transportation of all living animals. The government after 2 years then lifted the the ban on artificial insemination for racehorses.

4) Request for supply of 100 doses was a large number. The explanation given for the high number of doses was that under the relevant Equatorianan law, all doses acquired during the lifting of the ban could be used. The CLAIMANT considered their interests sufficiently protected by the consent requirement in the contract for any other use of Nijinski III's semen.

5) **24.3.2017** : In an email on this date , they further made it very clear that they would like to be informed about the use of every dose .They only saw this as a good opportunity to increase their revenue without any risks. In the same email, the CLAIMANT offered the RESPONDENT 100 doses of Nijinski III's frozen semen in accordance Mediterraneo Guidelines for Semen Production and Quality Standards.

6) The RESPONDENT only objected to the choice of law and the forum selection clause and it insisted on a delivery DDP. All other terms were agreed to by the RESPONDENT as is evident from the fact that no other objections were raised. The CLAIMANT made it very clear that it was only willing to accept the delivery DDP terms against a moderate price increase, transfer of certain risks to the RESPONDENT and the inclusion of a hardship clause to cover any additional risks taken.

7) **31.03.2017** : In an email on this date the CLAIMANT made it very clear that it would not associate itself to any risks related to changes in customs regulation or import restriction. The parties agreed not only on the hardship clause but also on an acceptable choice of law and arbitration clause. The sales agreement was to be governed by law of Medditerraneo.

8) The finalization of the contract took longer than anticipated as the two main negotiators, Ms. Napravnik & amp; Mr. Antley, met with an accident during negotiation process. It is clear from the witness statement of the representative of the CLAIMANT, Julie Napravnik that the two negotiaters had discussed and agreed that there should be in place a mechanism to adapt contracts in case of an unlikely event. They had to be replaced for the finalization of the contract. **6.5.2017:** On this date the contract was signed in an email.

9) **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, Equatorianan government imposed 30% tariff.

10) What was surprising was that in reaction to the above mentioned tariffs, the selected products from Mediterraneo which included horse semen, were included in the ambit of the tarriff imposed by the Equestrian Govt. This was an unexpected situation as Equatorianan Govt., which has always been an ardent supporter of free trade and also had always tried to resolve trade disputes amicably and had not relied on any retaliatory measures against trade restrictions.

11) The two parties immediately started negotiations regarding price adjustments and it was not difficult to gauge that the RESPONDENT appeared to accept the price increase.

12) 21.01.2018: In their phone call on this date, Mr Shoemaker said that he understood the CLAIMANTs concern and was sure that a solution could be found through negotiations. On this note, the CLAIMANT complied with its delivery obligation as the RESPONDENT had made it very clear that it kept timely delivery in high regard.

13) **23.01.2018:** CLAIMANT delivered the remaining 50 doses.

14) **31.07.2018:** Notice of arbitration was served by the CLAIMANT upon the RESPONDENT. In the RESPONDENTs Answer to the Notice of Arbitration 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.

15) **2.10.2018**: In an email on this date, the CLAIMANT explained to the members of the tribunal and the RESPONDENT that that it received reliable information at the annual breeder conference about another arbitration under the HKIAC-Rules that the RESPONDENT had themselves asked for an adaptation of the contract in another proceedings which very similar to that at hand.

INTRODUCTION TO MEMORANDUM

16) CLAIMANT makes this submission in accordance with the Procedural order number 1 of 5th October, 2018. The CLAIMANT is enduring grave losses as the RESPONDENT failed to fulfil its existing contractual obligations. The CLAIMANT's source of relief lies in the hands of this tribunal to adapt and decide the case in the CLAIMANT's favor. The CLAIMANT herein has put forth all the procedural and substantive factors for the just determination of the case by the tribunal. The following points highlight the major arguments that show that the CLAIMANT is the victim here and should be granted the remedies they seek.

17) Law of Mediterraneo is the most closely connected to the dispute in question and is also the implied choice of law by virtue of it being the law governing the contract. The RESPONDENT even invariably consented to Law of Mediterraneo being the law applicable to the arbitral proceedings. By reference to the three-stage test laid down in the Sulamerica case, Law of Mediterraneo should be declared as being the law applicable to the arbitral proceedings.

18) The Arbitral Tribunal has the right to rule on its own jurisdiction as dictated by the Kompetenz-Kompetenz principle. The tribunal has the power to hear the case and determine its jurisdiction over it. This right of the arbitral tribunal is also enumerated in the HKIAC and the CIETAC rules and is also shown to be present in the UNCITRAL.

19) The arbitration tribunal by virtue of the various apex court holdings across the world has the power to adapt the contract. The CLAIMANT is aware that there is no express provision for the same, but the hike in tariff has made the contract extremely onerous and thereby in these changed circumstances the Tribunal holds power to adapt in good faith.

20) The CLAIMANT should be entitled to submit every form of evidence before the tribunal because it is open to the Tribunal to accept it and proceed with the trial in the subject case where it was presented as evidence. It should also be entitled to submit evidence so as to promote the ends of justice and good conscious. The other arbitration is a direct evidence and its existence is under RESPONDENT'S control and has been deliberately kept away from the CLAIMANTS. The CLAIMANT should be entitled to submit the evidence even if it has possessed the information illegally. This is because it qualifies the often used 'Admissibility test'.

21) Further, the CLAIMANT humbly submits that the tribunal should shift the burden of proof to the RESPONDENTS if it does not admit the evidence, in the light of equity, justice and good conscience. The RESPONDENTS have already admitted that they are involved in another arbitration under the HKIAC 2013 Rules.

22) The newly imposed 30 per cent tariff caused great hardship to the CLAIMANT. Article 6.2.2 of The Principles on International Commercial Contracts defines hardship. Article 6.2.3 mentions the effects of hardship. The change in circumstances of the case perfectly fits the definition and effects of hardship. Hardship has also been recognized as an impediment under Article 79 of the CISG through landmark cases. When the CLAIMANT was informed about the newly imposed tariff, the representatives tried contacting the RESPONDENTs, in good faith, to maintain long term relationship with the RESPONDENTs.

23) The RESPONDENT is in breach of the contract by reselling the goods and not making the payment of additional remuneration under Article 54, 73, 77, 78 and 79 of CISG. The CLAIMANT is entitled to the damages including other damages that the CLAIMANT has suffered because of the inadequate performance by the RESPONDENT.

24) In the light of all the arguments presented above, The CLAIMANT Humbly submits to the tribunal to consider arguments with utmost scrutiny and to decide the case in the favor of the CLAIMANT.

ARGUMENTS ADVANCED

ISSUE 1 : THE ARBITRAL TRIBUNAL HAS THE JURSIDCITION AND POWERS TO ADAPT THE CONTRACT AND THE LAW APPLICABLE TO THE ARBITRAL PROCEEDINGS IS THE LAW OF MEDITERRANEO.

25) The CLAIMANT Humbly submits its contentions in a three-pronged manner. Firstly, it contends that the law applicable to the arbitral proceedings is the law of Mediterraneo. Secondly, the that the tribunal has the power to rule on its own jurisdiction by virtue of the principle of *Kompetenz-Kompetenz*. Thirdly, that the tribunal has powers to adapt the contract in dispute.

A. LAW APPLICABLE TO THE ARBITRAL PROCEEDINGS IS THE LAW OF MEDITERRANEO

26) The Parties agreed to arbitration proceedings in the neutral country of Danubia. *[Cl. Ex. no. 5, ¶15]*. The arbitration agreement arises out of this sales agreement *[Cl. Ex. no. 5]* and thus also implies the application of Law of Mediterraneo being applicable to the arbitral proceedings as the governing law of the arbitration.

I. According to HKIAC Rules 2018, Law governing the Contract to prevail

27) According to Article 36.3 of the Hong Kong International Arbitration Centre Rules of 2018, the arbitral tribunal in all cases of disputes in front of it shall decide those respective cases in accordance with the 'terms of the relevant contract'. Article 36.3 of the HKIAC Rules reads as follows:

28) *"In all cases, the arbitral tribunal shall decide the case in accordance with the terms of the relevant contract(s) and may take into account the usages of the trade applicable to the transaction(s)" [Art. 36.3, HKIAC*]

29) As seen above, the arbitral tribunal is to make use and refer to the terms of the relevant contract to decide the case in all matters present before it. In the present arbitration, the relevant contract between both the parties is the Sales Agreement [Cl. Ex. no. 5] that was signed between them. The sales agreement clearly mentions Law of Mediterraneo as the governing law of the contract [Sales agreement] and as Article 36.3 dictates, the tribunal is to decide the cases in accordance with the terms of the relevant contract between the parties, it is Humbly submitted that the tribunal consider Law of Mediterraneo as the law applicable to the arbitral proceedings by virtue of it being the law governing the sales agreement signed between the two parties. Thereby, clearly being a part of the terms of the relevant contract. *[Cl. Ex. no. 5, pt.14]*

30) This provision was also present in the 2013 HKIAC rules which dictated a similar instruction for the tribunal regarding applicable law. *[D. Justin]*

II. Mediterraneo is the most closely connected to the dispute.

31) With regard to the question of the applicability of law of the Arbitration Agreement, reference is made to the English Court of Appeal decision in *Sulamerica CIA Nacional de Seguros SA and others v. Enesa Egenharia SA and others ["the Sulamerica case"], [2012] 12.EWCA Civ 638]*. In the Sulamerica case, the Court of Appeal laid down a three-stage enquiry, whereby the applicable law of an 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 most real connection with the dispute between the parties. *[Dicey & Morris 32, 2006] [H. Ormsby]*

32) The tribunal should give effect to the parties' intentions unless doing so would be inconsistent with a mandatory law or the HKIAC rules. It is the common intention of the parties that the present dispute be governed by the law of Mediterraneo as it is also the law governing the underlying sales agreement between the parties *[Cl. Ex. no. 5, ¶ 14]*.

33) The RESPONDENT's intention is manifested in the terms of the Sales Agreement, which states, in the 'governing law' clause that the sales agreement between the RESPONDENT and CLAIMANT are to be governed by the law of Mediterraneo *[Cl. Ex. no. 5, ¶14]*. The governing law clause of the sales agreement should be construed broadly to include all dealings between the RESPONDENT and the CLAIMANT, including its employees, arising under the Sales Agreement.

34) 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.]* Although the RESPONDENT is domiciled in another country, Mediterraneo is the most closely connected to the dispute under arbitration for the reasonable reasons believed by the CLAIMANT.

35) There exists a contract between Phar Lap and Black Beauty, the Sales Agreement.*[Cl. Ex. no. 5]* Both parties to the contract have expressly agreed to law of Mediterraneo being the governing law of their contractual relationship. Therefore, it is Humbly submitted that for determination of rights and obligation arising out of the contract, the applicable law is the law of Mediterraneo. Where agreement may be governed by the legal system with which it has the closest connection. *[Fouchard 1998 p. 425]* the parties have not designated an applicable law, the existence and validity of the arbitration.

III. The law governing the contract is the implied choice of law.

36) Wherein the arbitration agreement forms a part of the main contract between the parties, the law that governs the contract is a strong indication of the intention of the governing or applicable law of the arbitration. The selection of a different arbitration seat than the governing law of the contract is not enough to rebut the starting presumption that the

governing law of the contract is a strong indicator of the applicable law of the arbitration. If the parties had intended otherwise then specific provision should have been made for a different law to apply. The *Sulamerica case* was reaffirmed by the Singapore court *[BCY v. BCZ [2016] SGHC 249]*

37) It was suggested that by the doctrine of separability, a different law than the law governing the contract was to apply to the arbitral proceedings The Court disregarded this stand and was of the opinion that the doctrine of separability serves the purpose of only making sure that the arbitration agreement clause of the contract (indicative the parties' choice of forum for any arising dispute of the contract) remains effective even if the underlying contract is found to be invalid. It does not mean that the arbitration clause is independent from the underlying contract. *[Art. 16, UNCITRAL]*

38) The venue or place of the arbitration seat is not in itself an implied choice of the law of the arbitration agreement. *[Sulamerica case]* The court did not accept Cruz City's (RESPONDENT's) contention that the choice of an English seat is tantamount to an implied choice of English law as that applicable to the arbitration agreement. *[Arsanovia case]*

39) The court was of the opinion that, although the choice of a place as the seat of the arbitration was a crucial factor, it was by itself is not at all enough to disregard the inference to be drawn from the express choice of a law to govern the substantive contract between the parties that includes the arbitration agreement as a clause in it, which Moore-Bick LJ referred to in *Sulamerica* as "a strong pointer" that the parties intended the same law to apply to the arbitration agreement.

40) 'In the ordinary way' the arbitration agreement's applicable law would be 'likely to follow the law of the substantive contract'. [*Black Clawson case*] Thus, as shown with the case laws cited above, it is Humbly submitted that Mediterraneo being the governing law of the substantive contract, should be held as to be the governing law of the arbitral proceedings. *[Abhinav B.]*

IV. Law of the seat of the arbitration is not always the governing law of the arbitral proceedings

41) In Hong Kong, the Court has not laid down a concrete rule that specifies the choice of law that applies to the arbitration agreement in the absence of an express provision thereto by the contracting parties. There is no doubt in as to say that the proper law of the substantive contract and the law of the seat of the arbitration may be different and that it is an acceptable fact that practical difficulties may arise when the lexarbitri is different from that of the seat of the arbitration. It was emphasized on the fact there is no rule wherein the lexarbitri must be the law of the seat of the arbitration. [*Klöckner Pentaplast Gmbh case]*

42) In the aforesaid case, *Klöckner Pentaplast Gmbh*, the court examined a number of decisions from different jurisdictions where it was held that "the law of the seat of the arbitration is the appropriate law to govern the parties' arbitration agreement" but stated that "the starting point must be the terms of the particular clause and the contract in question." And that the contract must be given preference over the seat unless proven otherwise.

43) In the light of these arguments, it is Humbly submitted that the Law of Mediterraneo should be declared to be the governing and applicable law to the arbitration by virtue of it being the law governing the contract which ultimately contains the arbitration agreement *[Cl. Ex. no. 5, ¶ 14]*

V. RESPONDENT invariably showed signs of acceptance to law of Mediterraneo being governing law.

44) The following arguments may be considered to show the RESPONDENT's intention to have accepted Law of Mediterraneo as the applicable law of the arbitration:

45) RESPONDENTs did not object to the applicable law of the arbitration being different from the court having jurisdiction over the same. *[Cl. Ex. no. 3]* The RESPONDENT's were aware of what the final contract entailed and were also aware of the final arbitration clause that made it to the final contract which was duly signed by representatives of both the parties. Even after being cognizant of this information, the RESPONDENTs 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 clause.

46) Mr. Julian Krone, who signed the Sales Agreement on behalf of the RESPONDENTs, admitted in his witness statement that the draft of the contract had already a provision in favour of arbitration in Danubia as a neutral country and also a choice of law clause in favour of Law of Mediterraneo. *[Resp. Ex. no. 3]*

B.THE ARBITRAL TRIBUNAL HAS THE RIGHT TO DETERMINE ITS OWN JURISDICTION BY VIRTUE OF THE PRINCIPLE OF *KOMPETENZ-KOMPETENZ*

47) The Tribunal is authorized to determine its own jurisdictional competence by the doctrine of Kompetenz-Kompetenz. As per this principle the tribunal is empowered to hear disputes relating to its jurisdiction. *[Born; N. Blackaby]*

I. This right of the arbitral tribunal is also enumerated in the UNCITRAL, HKIAC and CIETAC rules

48) Under UNCITRAL rules, if any choice of law is not made by the parties in arbitration agreement the arbitration tribunal shall apply the law determined by the conflict of laws which it considers applicable. *[Art. 28 (2), UNCITRAL Rules, 2010][Matti P.]*

49) The Hong Kong International Arbitration Centre Rules reads as follows:

"*The arbitral tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement." [Art. 19.1, HKIAC]*

"The arbitral tribunal shall have the power to determine the existence or validity of any contract of which an arbitration agreement forms a part." [Art. 19.2, HKIAC]

50) The China International Economic and Trade Arbitration Commission (CIETAC) rules say that where the prima facie evidence of the existence of a valid arbitration agreement exists, it may take a decision based on such evidence that it has jurisdiction over the arbitration matter and the arbitration shall commence. *[Art. 6.2, CIETAC]*

51) Even in the absence of choice, the court has to impute an intention or determine the proper law which the parties would have intended to govern their dispute *[Mount Albert Borough Council case]*. The expression "proper law of the contract includes the legal order governing the transaction according to the willing of the parties or, when the intention of the parties in this respect are nonexistent or cannot be derived from the surrounding circumstances to the legal order showing the closest and most real connection with the transaction".

52) Article 16 (1) is silent on the law that should be applied by the arbitral tribunal while ruling on objections to its jurisdiction. Furthermore, the Model Law does not contain any generally applicable conflict of laws rule concerning the arbitration agreement. *[UNCITRAL, 18th Session Comm.]*

C. **THE ARBITRAL TRIBUNAL HAS POWERS TO ADAPT THE CONTRACT**

53) This Arbitration Tribunal has power to adapt the contract;

54) Here it is impertinent to also to note that the Tribunal has the power to adapt the Contract. The RESPONDENT have stated that in relation to the hardship clause, the negotiations finally resulted in a very narrowly worded clause, which was then included into the existing force majeure clause and did not provide for any adaptation by the arbitral tribunal *[Ans. to Not. of Arb., ¶9, p 30]*. The RESPONDENT is correct till the extent that the arbitration clause does not expressly provide for adaptation of contract. But this does not negate or exclude such power. This was laid down by the Swiss Supreme Court that an arbitral tribunal seated in Switzerland would have both the jurisdiction and the power to fill gaps or to adapt a contract, even in the absence of an express authorization from the parties to do so *[Swiss case]*.

55) More specifically, in its decision the Supreme Court determined that:

a) The power to fill gaps or amend a contract is a matter of jurisdiction.

b) As such, an arbitral tribunal's decision to amend the parties' agreement can be challenged on the basis that the tribunal wrongly assumed jurisdiction.

c) As long as the arbitration agreement does not contain any express restrictions, it must be assumed that the parties intended to confer upon the tribunal an all-embracing jurisdiction, including the power to fill gaps and amend the contract.

56) Further, since the countries at hand follow common law it is important to look at the aspect of powers of adaptation from the English perspective as well. In English cases standard arbitration clauses were also considered to be sufficient to allow for the tribunal to supply the missing terms, however on a different conceptual basis *[Mamidol Greek]*. Even the drafters of the UNIDROIT Principles of International Commercial Contracts, for example, considered the adaptation of a contract to be the more suitable solution in international business than termination. *[Bonell J.]*

57) The Japanese Principle by Igarashi defines changed circumstances to mean "The rule states that when the circumstances releasing a legal act, creating a legal relation, change in an unforeseeable way after the accomplishment of the act and before expiry of its consequences, due to the influence of facts not attributable to the parties, with the result that the creation of legal consequences in the original sense, or their continuation, is to be considered as unreasonable in the light of the rule of equity and good faith, then such legal consequences are to be adapted in equity and good faith. *[Igarashi, K. Keiyaku]*

58) This good faith principle is also followed in the Turkish law *[Art. 138 of the Code of Obligations]* which holds that a change in circumstances may affect the performance of contractual obligations and applying *Pacta Sunt Servanda* could be against the principle of good faith .The increase in tariff by the Equatoriana government is definitely as per this definition a changed circumstance that will confer power on the tribunal to adapt the contract and if the tribunal does not adapt the contract in this circumstance, it will breach the principle of good faith.

59) German doctrine of *Störung der Ges- chäftsgrundlage* allows the interference with the foundation of the contract. It is also allowed under the German Section 313 of Bürgerliches Gesetzbuch which permits revision of contract to parties where there has been some sort of 'fundamental' change in circumstances. The notion of "fundamental" change of

circumstances is analogous to the notion of a "basic assumption" on which a contract is formed in the area of common law mistake and excuse. [*Restatement (second) of Contracts*]. Hence, the tribunal will have the power to adapt the contract.

ISSUE 2: THE CLAIMANT SHOULD BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS ON THE BASIS OF THE ASSUMPTION THAT THIS EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM

A. CLAIMANT BE ENTITLED TO SUBMIT EVERY FORM OF EVIDENCE BEFORE THE TRIBUNAL AS THE TRIBUNAL IS NOT RESTRICTED TO TAKE SUCH EVIDENCE.

60) The CLAIMANT humbly submits that arbitral tribunals frequently apply "international" principles to issues concerning the admissibility and weight of evidence. These principles are stipulated in numerous arbitration treaties, model rules and model laws, as well as in the rules of international institutions. One such rule is a tribunal's wide discretion to deal with evidence. The parties to an international arbitration are generally free to submit any evidence they wish to rely on in support of their case. Evaluating such evidence remains within the full discretion of arbitral tribunals. Consequently, an arbitral tribunal may admit and evaluate even such evidence as was obtained unlawfully-a freedom alien to many domestic courts. *[B. Cherie & G. Ema Vidak]*

61) This arbitration is in conformity with the 2018 HKIAC Administered Arbitration Rules. Rule 22.2 states that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence. It shall also include whether to apply strict rules of evidence and thus, it is not prevented from taking on record any evidence, irrespective of the assumption that such evidence is obtained through illegal methods.

62) Similarly, The Statute of the International Court of Justice (ICJ) is correspondingly cursory in the wording of Article 48, simply providing that the Court shall make all arrangements connected with the taking of evidence'. In principle, there are no highly formalised rules of procedure governing the submission and administration of evidence before the Court, nor are there any restrictions about the types of evidentiary materials that may be produced by parties appearing before it. In short, in deciding the cases submitted to it, the overarching objective of the ICJ is to obtain all relevant evidence pertaining to both facts and law that may assist it in ruling on issues of substance, as opposed to providing a judicial outcome grounded primarily on technical and/or procedural rationales. *[T. Peter & P. Vincent]*

63) The ICJ's predecessor institution, the Permanent Court of International Justice ('PCIJ'), had identified this as its dominant judicial philosophy as early as 1932 in the Free Zones of Upper Savoy and the District of Gex case. In that regard, it proclaimed that 'the decision of an international dispute of the present order should not mainly depend on a point of procedure'. [*Free Zones of Upper Savoy and the District of Gex case]*

64) The Swiss Memorial in the Interhandel case [*Interhandel Case]* averred that the liberal standard of admissibility established by the International Court of Justice meant that: The parties are to a large extent free to present the evidence they deem necessary and have the opportunity. [Memoire du Gouvernement de la Confederation Suisse, 1959]

65) Umpire Gutierrez-Otero, in his opinion in the Franqui Case *[Franqui Case (Spain v. Venez.]* before the Spanish-Venezuelan Mixed Claims Commission of 1903, quoted Merignhac *[A. Merignhac,]:* the arbitral tribunal shall remain free to employ, for the sake of enlightenment, all kinds of proof which it thinks necessary; and it will not be bound, in this respect, by any of the restrictions found in the positive laws, especially as regards the administration of the testimonial evidence. Documentary, testimonial, and real evidence has frequently been accepted for consideration even when irregularly presented. The general consensus of practitioners and commentators alike is that stricter rules of admissibility are wholly inappropriate for international arbitration or adjudication.*[R. Michael & Freedman E.]*

66) The Spanish Arbitrator, in his opinion in the Maximo Mora case *[Antonio M'aximo Mora (Spain v. United States)]*, before the United States-Spanish Mixed Claims Commission of 1871, expressed a common attitude:

"…The arbitrators hear and decide questions of law and fact alike. The arbitrators are competent to decide for themselves as to the amount of credibility to be given to any evidence, and are not in danger of being misled, as juries may be. This objection to the reception of newspapers to prove facts of general and public notoriety seems, so far as I can see, to grow out of a very technical, artificial, and varying rule in English and American tribunals, which excludes all evidence which can be labelled as hearsay".

67) The International Court of Justice evaluates the authenticity, reliability, and persuasiveness of the materials submitted by the parties. One possible reason for the Court's malleable approach, according to the ICJ's former Registrar, Eduardo Valencia Ospina, is the Court's perceived ability to "ascertain the weight and relevance of particular evidence due to the judges' qualifications and experience." [E. Valencia Ospina] The ICJ, therefore, permits the parties to submit many types of direct and circumstantial evidence. Because of this flexible approach, the ICJ has not found the need to articulate its evidence policy in many cases. *[M. Scharf & M. Day]*

68) A series of Indian judicial decisions have held that an evidence is admitted if it is 'relevant' though it was obtained improperly or illegally. The Bench headed by Justice B.S. Chauhan has stated that:

"It is a settled legal proposition that even if a document is procured by improper or illegal means, there is no bar to its admissibility if it is relevant and its genuineness is proved. If the evidence is admissible, it does not matter how it has been obtained," *[Naavi]*

69) Hence, when an evidence is presented which has been obtained illegally, it is open to the Court to accept it and proceed with the trial in the subject case where it was presented as evidence. At the same time a separate action may lie against the person who obtained the evidence in violation of some law.

B. CLAIMANT BE ENTITLED TO SUBMIT EVIDENCE TO PROMOTE THE ENDS OF JUSTICE AND GOOD CONSCIOUS.

70) The Rule in Parker's case, which admonishes States to yield all the information pertinent to the suit and under their control, is often an empty piety; even if the defendant-state were willing to inventory all the pertinent evidence it had, there is really no way a plaintiff- state can compel it to surrender evidence that may be indispensable to the prosecution of its case. *[Reisman*]

71) The most extreme statement of the international burden of disclosure is found in the Parker Claim before the United States-Mexican General Claims Commission in 1927. The commission held that the respondent government was under an obligation to lay before the Commission all evidence within its possession to establish the truth whatever it may be and proceeded to declare that: the parties before this Commission are sovereign nations who are in honour bound to make full disclosures of the facts in each case so far as such facts are within their knowledge or can reasonably be ascertained by them. *[William A. Parker (U.S.A.) V. United Mexican States]*. The Commission, therefore, will confidently rely upon each Agent to lay before it all of the facts that can reasonably be ascertained by him concerning each case no matter what their effects may be.

72) The question of the admissibility of evidence obtained by unlawful intervention was raised, in rather sharp fashion, in the merits phase of the Corfu Channel case. As the Court phrased it, the main defence of the United Kingdom was that, "the corpora delicti must be secured as quickly as possible, for fear they should be taken away, without leaving traces, by the authors of the minelaying or by the Albanian authorities." The justification for this defence rested on "a new and special application of the theory of intervention, by means of which the State intervening would secure possession of evidence in the territory of another State, in order to submit it to an international tribunal and thus facilitate its task.*" [Corfu Channel Case (UK v. Alb.)]*.

73) In oral argument, Sir Eric Beckett, representing the United Kingdom, characterized his nation's intervention theory stating that the United Kingdom had the right to sweep for the purposes of investigating the cause of the explosions under Saumarez and Volage in October, because (1) the United Kingdom wished to bring a claim before the Security Council, if

evidence was found to justify its suspicions and (2) the United Kingdom feared, and had good reason to fear, that if very speedy action was not taken that evidence would be made to disappear by the party guilty of this offence.

74) Nonetheless, the Court viewed those circumstances as extenuating to the point of virtually obliterating Britain's adjudged counter-delict. It declared "that the action of the British Navy constituted a violation of Albanian sovereignty" but more importantly, it admitted evidence concerning the mines that had been unlawfully swept by the United Kingdom. *[ibid]*

75) In terms of strictest construction, mines illegally swept in another's territorial waters are admissible to prove sole responsibility for their explosion and injury to others. For precedential purposes one may say that unlawfully gathered evidence may at least on the facts of the Corfu Channel case be deemed admissible. More broadly construed, the only practical interpretation of this aspect of the Corfu Channel judgment would seem to be that certain unlawful collections of evidence will be declared violations of international law, yet no sanction will be imposed on the gatherer, nor will the illegally gained evidence be deemed inadmissible.

76) Albania had eyewitness accounts of the ships' movements. The UK, on the other hand, did not have the ability to gather evidence to determine whether Albania knew of the mines in its territorial waters. This information was in the exclusive control of Albania. Therefore, the facts of exclusive control and availability of other evidence harmonize the Court's treatment of circumstantial evidence for Albania and the UK. The Court refuses in all circumstances to infer conclusions that contradict evidence of actual events, regardless of whether a party is producing all of its evidence on the subject. The Court will permit liberal reliance on circumstantial evidence so long as two conditions are met:

a) the direct evidence is under the exclusive control of the opposing party; and
b) the circumstantial evidence does not contradict any available direct evidence or accepted facts.
c) The CLAIMANT humbly submits that the above mentioned principle is extremely applicable in the case at hand because direct evidence of the existence of the other arbitration is under the exclusive control of the RESPONDENT and this

information has been purposely kept away from the CLAIMANT. *[Freedman & Reisman]*

C. CLAIMANT BE ENTITLED TO SUBMIT THE EVIDENCE FROM THE ARBITRATION PROCEEDINGS AS IT PASSES THE EVALUATIVE ADMISSIBILITY TEST FOR UNLAWFULLY OBTAINED EVIDENCE.

77) UNCITRAL Model Law Article 19 states that: (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

78) The tribunal deals with new evidence presented due to information available in WikiLeaks. This case concerned the expropriation of oil and gas assets by the Venezuelan government. Venezuela sent a letter to the tribunal contesting this decision, in which Venezuela requested a new hearing to address the ruling on lack of good faith. Specifically, the letter cited new evidence, obtained via WikiLeaks, including communications between diplomatic officials in the United States Embassy in Caracas and Conoco Phillips' executives discussing the Venezuelan government's offer to compensate the company for expropriation using market value standards instead of their previous offer of book value.*[Conoco Phillips case]*

79) In Conoco Phillips, Professor Georges Abi-Saab, however, published a strong dissent calling the ignorance of the WikiLeaks cables a 'travesty of justice' by stating: "However, with the revelations of the Wikileaks cables submitted to the Tribunal as annexes to the Respondent's letter of 8 September 2013… the ground or cause for reconsideration changes radically in dimension and importance." "…Here we have a full narrative of the negotiations, with a high degree of credibility, … It is a narrative that radically confutes the one reconstructed by the Majority, relying almost exclusively on the assertions of the Claimants throughout their pleadings that the Respondent did not budge from its initial offer." *[Adm. Emails]*

80) Hence, the CLAIMANT humbly submits that the evidence obtained illegally will not be automatically disqualified as inadmissible. Thus, this principle goes hand-in-hand with the wide discretion afforded to arbitration tribunals when handling evidence and also the case law suggests that there are three questions which play an important role informing how tribunals reach decisions on the admissibility of illegally obtained evidence:

81) Has the evidence been obtained unlawfully by a party who seeks to benefit from it?

82) The clean hands approach has been applied in many international cases and it seems reasonable in light of deterring overzealous litigants from pursuing unlawful means to obtain a procedural advantage. Moreover, allowing a party to rely on evidence which that party has procured unlawfully would run counter to the principle of ex turpi causa non orituractio [a right cannot stem from a wrong*]. [Iranian Hostages]*

83) If, however, a relevant document has found its way to the tribunal through the hands of a third ('disinterested') party, even if originally obtained through unlawful conduct, such evidence should be considered prima facie admissible. In terms of defining the 'disinterested party', the definition of the ICJ of a 'disinterested witness' seems instructive. It says 'One who is not a party to the proceedings and stands to gain or lose nothing from its outcome'. *[Nicargua case*]

84) In the present arbitration, it is undisputed that the evidence which the CLAIMANT wishes to submit to the tribunal is not directly related to the acts of the CLAIMANT but of a third party, with respect to this arbitration, who has breached the confidentiality or used illegal hacking. It must be borne in mind that the CLAIMANT is not involved in procuring the evidence using dubious ways and thus, it is clear that the question cannot be answered in positive. Rule of Proportionality plays an important role when a question arises while considering this first limb of the 'admissibility test', such as the nature of the allegedly unlawful activity. Naturally, not every technical breach of applicable rules should result in the exclusion of evidence.

85) The nature of the breach is particularly grave the court or the tribunal may show less tolerance or willingness to engage in any discussion on admissibility of evidence. *[Iranian Hostages]* However, if the party seeking benefit from unlawfully obtained evidence comes with clean

hands, as in the present arbitration, the evidence should likely pass the first threshold, and fall to be considered under the second and the third limb.

86) Does public interest favour rejecting the wrongfully disclosed document as inadmissible?

87) As the admissibility of evidence is largely a discretionary matter for tribunals, policy arguments will play a large role in shaping decisions. Tribunals should take into account public policy considerations, such as legal professional privilege, diplomatic immunity and inviolability.

88) Article 9(2)(f) of the IBA Rules on the Taking of Evidence in International Arbitration (2010) empowers the tribunals to 'exclude from evidence or production any Document' on the 'grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling […]'. The evidence in the present arbitration is a 'partial interim award' and thus, clearly not falling under Article 9(2)(f) of the abovementioned Rules.

89) The documents obtained unlawfully which are protected by legal privilege, would attract a strong presumption against admissibility. Certain types of privilege, notably attorney-client privilege, should be considered as protecting the document absolutely from being used in proceedings, even if it had been revealed by the wrongful conduct of a third party. *[Caratube v Kazakhstan]*

90) "The illegally obtained evidence may be admitted, even if the Tribunal must 'afford privileged documents the utmost protection". *[A. Ross]*

91) Does the interest of justice favour the admission of the wrongfully disclosed document?

92) It would be understandable if arbitrators tended towards dismissing illegally-obtained evidence so as not to encourage wrongdoing in the future, it would be a disappointing outcome if, in the end, this caused offence to basic notions of justice because important facts were discounted. There is certainly a tightrope to be walked when tribunals are invited to reach decisions based on all available evidence, which may include WikiLeaks-type documents and other illicitly-obtained evidence.*[Wiki-Leaks case*]

93) The legality of a decision to freeze assets is to be assessed in the light of the information available to the Council when the decision was adopted *[Fahed Mohamed Sakher Al Matri case]*

94) The Court found that Poland had violated the ECHR through its complicity in the CIA programme. Just as in El Masri, the Court made no particular mention of the use of WikiLeaks material in Mr Al-Nashiri's application. However, the Court also raised no objection to its use or suggested that the use of such evidence would be improper or should be excluded. *[B. Cherie & G. Ema Vidak] [El Masri v Macedonia]*

95) There will be occasions when simply ignoring evidence will not make for a just solution, and would lead to an award that is factually wrong in light of publicly available information. As Lord Hewart observed, 'it … is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.*[R v Sussex Justices]*

D. THE TRIBUNAL MAY AT LEAST SHIFT THE BURDEN OF PROOF TO THE RESPONDENT IF IT DOES NOT ADMIT THE EVIDENCE IN TOTO.

96) "There is no rule of law that can be invoked as binding a tribunal to exclude particular evidence. In practice tribunals have been unwilling to exclude evidence in reliance upon general rules or principles, drawn from the practice of other tribunals or from municipal law. Admission is a matter of right, and the burden is upon the party challenging any piece of evidence to show that the particular procedural law of the tribunal will be violated by a refusal to exclude it." *[D. Sandifer]*

97) "The International Court of Justice has construed the absence of restrictive rules in its Statute to mean that a party may generally produce any evidence as a matter of right, so long as it is produced within the time limits fixed by the Court. Evidence submitted after those time limits may only be admitted with the consent of the other party and subject to the sanction of the Court. In practice, while the Court has placed few restrictions upon the rights of the parties to produce whatever evidence they see fit, it has upon occasion exercised its discretionary authority to refuse to accept evidence offered" *[R Michael & Freedman E.]*

98) The Court was highly concerned with equality between the parties and could have achieved that equality by liberally construing the circumstantial evidence. *[Bosnia case]*

99) In International practice, as in the civil law, the burden is shifted; evidence offered within time limits established by the tribunal will normally be admitted unless the individual challenging its acceptance can show specific grounds for non-admissibility.The CLAIMANT submits that in the unlikely situation that the tribunal is of the opinion that the evidence from arbitration proceedings should not be admissible, the tribunal should, at least, shift the burden of proof on the RESPONDENTS as the tribunal is aware of the true facts and circumstances. The RESPONDENTS have already admitted that they are involved in another arbitration under the HKIAC 2013 Rules. *[Letter by Fasttrack dated 3rd Oct 2018]*

100) The tribunal should, in the interest of equity, justice and good conscious, shift the burden of proof on the RESPONDENT to prove that they are not asking for the adaptation of the price invoking an unforeseen change of circumstances. Also, if the RESPONDENT fails to relieve this burden by evidence, the tribunal should draw the conclusion that the truth is unfavorable to the RESPONDENT.

ISSUE 3 CLAIMANTIS ENTITLED TO THE PAYMENT OF USD 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE.

Here the CLAIMANT Humbly submits its reasons for being entitled to the payments sought from the RESPONDENT.

A. CLAIMANTIS ENTITLED TO THE PAYMENT OF USD 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT;

101) The Counsel Humbly submits that Phar Lap and Black Beauty entered into a Sales Agreement on 6 May, 2017 after negotiating the terms and conditions of the transaction for the sale of frozen semen. Clause 12 of the Sales Agreement throws light on the situations when the Seller who is the CLAIMANT in this case, would not be responsible for the consequences of changed circumstances. On a plain reading of Clause 12, it is apparent that the Seller shall not be responsible for *hardship* caused to it by unforeseen events making the contract more onerous. The imposition of 30 per cent tariff by the Equatorianian government caused great hardship to the CLAIMANT as they were not in the position to bear the additional cost. When the CLAIMANT received the information by the customs authorities that the newly imposed tariff of 30 per cent on agricultural products is applicable to the third shipment and it includes animal semen, the CLAIMANT contacted Mr. Shoemaker, in good faith, taking into consideration the long term business relationship.

1. Imposition of 30 per cent tariff caused considerable hardship to the CLAIMANT.

102) Pursuant to Article 6.2.2 of The Principles on International Commercial Contracts, which provides that there is hardship when the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance, a party receives has diminished. *[UNIDROIT, Rome]* Here, the cost of seller’s performance drastically increased due to the imposition of 30 per cent tariff because the negotiators could not forsee such imposition of tariff on animal semen. Hardship is a supervening change of circumstances which makes performance of contract excessively onerous or difficult for non-performing party, which is beyond control of that party and could not have been taken into account at the time of conclusion of contract and whose consequences could not have been avoided. *[M. Garro, Opinion No. 7]* The imposition of the 30 percent tariff changed the basis of the sales agreement as the cost of transaction increased excessively. It became extremely difficult for the CLAIMANT to make additional payment before the last shipment.

103) Article 6:111 of PECL 1999 (Change of Circumstances) contains provisions on hardship which largely resemble the hardship provisions of UNIDROIT Principles 2010. Article 6:111(1) PECL 1999 reflects the principle of *pacta sunt servanda*, by providing that the party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished *[Article 6:111(1)]*. The CLAIMANT fulfilled his obligation by shipping the last set of 50 doses to the RESPONDENT, even when performance became onerous. If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it. *[Article 6:111(2)]*

104) The change of circumstances must occur after the conclusion of contract, it must be such that the party could not have taken into account at the time of conclusion of contract, and the risk of change of circumstances must not be such that the party affected should be required to bear it. *[Article 6:111(2)]*. The introduction of new policy by the Equatorianian government changed the circumstances excessively but the CLAIMANT fulfilled its obligation in light of good faith and long term relationship with the RESPONDENT, on the faith and undertaking of Mr. Shoemakers during negotiations preceding the last shipment.

105) In cases of hardship, the changed circumstances must have occurred after the conclusion of the contract *[Stoll and Gruber]*. The CLAIMANT Humbly submits that imposition of 30 percent tariff happened after the Sales Agreement was signed.

106) German law doctrine of *Störung der Geschäftsgrundlage* interference with the foundation of the contract], is codified in Section 313 of the *Bürgerliches Gesetzbuch [BGB]*, which supports the principle of hardship. Section 313 of the BGB allows relief to a party where there has been a "fundamental" change in circumstances, which would render unfair the enforcement of the contract without the revision of the parties' obligations. BGB 313 not only codifies "hardship," but it also indicates that the preferred form of relief is adaptation or reformation of the contract. The essence of BGB Section 313 can be found in its title:Disturbance of foundation of transaction.BGB Section 313(1) states that if the circumstances which have

become the foundation of the contract have seriously altered after the conclusion of the contract and if the parties would not have concluded the contract, or would have concluded it with different content if they had foreseen this alteration, then adaptation of the contract can be demanded in so far as adherence to the unaltered contract cannot be expected of one party taking into consideration all the circumstances of the individual case and in particular the contractual or statutory division of risk. *[Hannes Rösler]*.

107) The Statute on the Modernisation of the Law of Obligations in 2001 finally codified the right to have the contract adapted to the changed circumstances in section 313 of BGB. *[Hannes Unberath]*

108) In cases of hardship, the changed circumstances must have occurred after the conclusion of the contract [*Stoll and Gruber*]. In the present case also, it is apparent that the hardship occurred after the conclusion of the sales agreement.

109) It is pertinent to say that, Clause 12 is supposed to cover not only the risk of changes in the health and safety requirements but also other risks including additional tariffs, like in the present case. The fact that such tariffs were not expressly included was because neither party had expected such measures at the time of entering into the agreement. The Government of Equatoriana had always been an ardent supporter of free trade, in particular in times like the present when the Prime Minister came from the Progressive Liberals. To the big surprise of everyone, the Equatorianian Government under a Prime Minister from the National Party, which is more critical to free trade, had taken retaliatory measures against trade restrictions imposed by Mediterraneo. Consequently, the hardship clause has to be interpreted as covering the present case also.

110) Moreover, the CLAIMANT has been making losses since 2014 primarily due to the high interest payments for the loan taken on to finance the new stables in 2013 and the costs for the restructuring measures. The restructuring plan which CLAIMANT had agreed with its creditors in 2014 provided that CLAIMANT would be profitable again from 2017 onwards. The automatic prolongation of the two main credit lines depended on being profitable in 2017 and 2018 respectively. With the additional revenues from the sale of the frozen semen

CLAIMANT had planned to make a profit in 2018 of 300.000 USD after 1,80.,000 USD in 2017. That plan would be extremely endangered if CLAIMANT had to bear the 12,50,000 USD. Negotiations of a new credit line will most likely be very difficult as one of the major creditors is by now the house bank of CLAIMANT's largest competitor who is interested in buying the dressage part of CLAIMANT. RESPONDENT had the knowledge of the impact of the 30% tariff on CLAIMANT's financial situation as the CLAIMANT had told the RESPONDENT during the negotiations. *[Proc. Ord. No 2]*

II. Promotion of good faith by the Claimant.

111) The principle of good faith is recognized as one of the general principles governing the law of international commerce, a principle of interpretation of CISG embodied in Article 7(1) CISG, but also as a concept and principle contained in various provisions of the CISG, *[Dulces Luisi v Seoul International]* as one of the general principles underlying the Convention and applicable to parties' conduct. *[Joseph Lookofsky]*

112) Article 7(1) of CISG mandates the promotion of observance of good faith in sales transactions, which is achieved, inter alia, by using the Convention's remedial scheme to deal with a hardship situation in different forms, including market fluctuations which are so severe that they should exempt the disadvantaged party from liability under Article 79 of CISG. The CLAIMANT in this case, tried to get in touch with the RESPONDENT, for discussing the price increase before the third shipment. Mr. Julie Napravnik informed Mr. Greg Shoemaker about the price increase and its repercussions on the transaction.

III. Hardship as an impediment under Article 79 of the CISG

113) It is unanimously accepted in court and arbitral decisions, as well as in scholarly writing, that Article 79 does indeed covers issues relating to hardship. *[Ingeborg Schwenzer,]*. It is also accepted by the CISG Advisory Council that a change of economic circumstances because of which the performance of contract becomes too expensive for the disadvantaged partycan be defined as impediment under Article 79(1) CISG. *[M. Garro, Opinion No. 7]*

114) CISG Advisory Councilopined that the language of Article 79(1) CISG is not exactly the language of impossibility and therefore, hardship situations which make performance

excessively onerous entitle the disadvantaged party to invoke the exemption from liability as provided by Article 79 CISG. Even though hardship is not a means to an excuse under Article 79 it still is within the scope of Article 79 and, therefore, precluded the use of CISG Article 4 that allows for recourse to domestic law in cases of validity. *[M. Garro, Opinion No. 7]*

115) The disadvantaged party who wants to invoke a hardship defense under Article 79 CISG must prove that the situation of changed economic circumstances is a hardship situation, which is severe enough to relieve the party of its duty to perform the obligation under a contract. Commentators have often mentioned a "limit of sacrifice" beyond which the disadvantaged party should not be any more expected to perform the contract. *[Peter Schlechtriem and Ingeborg Schwenzer]*.

116) Therefore, the principle of *pacta sunt servanda* must not be disregarded by accepting that the mere fact that performance of contract has becomemore expensive for the disadvantaged party is enough to exempt it from liability for damages under Article 79 CISG. *[Schwenzer]*. The party's hardship defense can only be accepted if the performance of contract has become excessively onerous or beyond the "limit of sacrifice", which is why the promisor should not be any more expected to perform its obligation. *[Schlechtriem and Schwenzer, Art. 79 (n 192).]*

117) The Belgian Supreme Court dealt with the issue of hardship in a case, where the parties had concluded an agreement for the sale of steel tubes. After the conclusion of the contract and before delivery, the price of steel unexpectedly rose by about seventy percent. First, the court decided whether the market price change was reasonably foreseeable. If so, then there could be no claim for hardship or recognition of the dramatic price increase as an impediment under Article 79. The court, instead, held that such a dramatic change of circumstances was not reasonably foreseeable at the time of the conclusion of the contract and that the nature of the price increase placed an undue burden of performance on the seller. However, the determination of undue burden was analyzed through the Civilian notion of contractual equilibrium; the equilibrium between the parties at the time of contract formation had been sufficiently altered to justify the recognition of a hardship.The second issue the court asked was whether such a hardship could be recognized as an impediment under Article 79. The

court structured an argument that the general principles of CISG Article 7, especially the duty of good faith supported the inclusion of hardship within the scope of Article 79. *[Scafom International case]*

118) The Swiss Supreme Court explains the requirements to sustain a claim of impediment: A party claiming an Article 79 impediment "must prove that the failure was due to an unpredictable and inevitable impediment, which lies outside its sphere of control.[*Egyptian cotton case*]

119) The RESPONDENT cannot be exempted under Article 79 of the CISG. There was no impediment for the failure of their obligation to pay for additional 30% tariff.

B. CLAIMANTIS ENTITLED TO THE PAYMENT OF USD 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER THE CISG.

I. The Convention on the International Sale of Goods (CISG) governs the merits of this dispute.

120) Pursuant to Art. (1)(a), the CISG applies to the contract executed by CLAIMANT and RESPONDENT on 6 May 2017, as both the lex arbitri (the law of Mediterraneo) and the countries of the respective headquarters of the parties to the present dispute, are party to the Convention [*Schlechtriem, p. 42; Mushroom case*]. Also, the seat of arbitration is Danubia, which has adopted the UNCITRAL Model Law *[App. Arb., ¶ 20, p. 7]*. Furthermore, the contract is within the scope of the application of the CISG and was breached by RESPONDENT.

II. RESPONDENT fundamentally breached its contract.

1. RESPONDENT breached the contract with CLAIMANT by failing to timely make the complete payment of the second installment.

121) RESPONDENT breached the contract by failing to pay the additional remuneration amount due to increased tariff rate by the government within the date specified in the

contract. The parties had an intention to include the hardhip clause in the contract. Under Art. 33(a) CISG, a seller must deliver goods by the date fixed by or determinable from the contract *[Art. 33(a) CISG; American Juice]*. In this case the CLAIMANT duly met its duties and obligation to deliver the third shipment. Under Art. 25 CISG, a breach is fundamental if it results in such detriment to the other party as to substantially deprive him of what he is entitled to expect under the contract *[Art. 8(2) CISG]*.

122) The contract between CLAIMANT and RESPONDENT unambiguously states that 21st January 2018 was the deadline for completion of the payment *[Cl. Ex. 5, pt. 7]*. Furthermore, according to Art. 8(2) CISG, the reasonable person standard should be used to interpret the conduct of the parties *[Art. 8(2) CISG; Lautenschlager, pp. 259-90]* withreagrds to the payment in the contract as whole.

123) RESPONDENT received its shipment duly on 11th March 2011 but failed to pay the additional price as agreed upon. *[Wt. St., ¶ 4, p. 36]*. RESPONDENT'S delay undoubtedly deprived CLAIMANT of its expectations. The detriment to CLAIMANT was substantial as it frustrated CLAIMANT'S larger goal of repayment of the creditors with the conditions imposed, of which RESPONDENT was aware *[Proc. Ord. 2, ¶ 11, p. 56]*.

124) Article 54 specifies that the buyer's obligation to pay the contract price extends beyond the abstraction of owing the money. This obligation also includes whatever steps and costs that are necessary to ensure that the payment is actually made. *[ICAC Award No. 123/1992 (RUS, 1995); Cl. Ex. 8, p. 18]*. Irrespective of a contrary agreement, "the buyer must bear the costs for measures necessary to enable him to pay the price." *[CISG Article 54] [H D Gabriel]*

125) Art. 54 involves compliance with legal formalities even if they are burdensome *[ICC Case No. 7197 of 1992]* and transcend their conventional import *[Enderlein/Maskow, p. 206]*. Regulations commanding such compliance include requirements of authorization from the buyer's country *[UNCITRAL Digest of Case Law, p. 282, ¶ 1; Secretariat Commentary on Art. 50]*. As Art. 54 does not specify compliance with the law of either the buyer's or seller's state, there is no real distinction between authorization from the buyer's and seller's country. The lack of an explicit mention may be accorded to the general understanding that the formalities for receiving

payment are significantly less elaborate than those for making payment *[Maskow in Bianca/ Bonell, p. 398, ¶ 2.7]*. Hence, RESPONDENT cannot attempt to escape liability on the grounds that the Regulation places an unfair burden on a private party.

126) The buyer's obligation under Art. 54 extends to bearing all costs necessary to ensure that the payment is made *[Art. ICAC7:112, PECL; Art. 6.1.11, UNIDROIT Principles' Award No. 123/1992 (RUS, 1995); Wine Case (GER, 1994); Computer Chip Case (GER, 1993); Adamfi Video v. Alkotók (HUN, 1992)]*. The only requirement is that the payment must be of an enabling nature *[Textiles Case]*; the nature or extent of the payments required are not considered. If a buyer fails to comply with the enabling steps, he would be in breach of his contractual obligation to pay *[Plantard, p. 184]*.

127) Article 73 (1) states that in the case of a contract for delivery of goods by installments, if the failure of one party to perform any of his obligations in respect of any installment constitutes a fundamental breach of contract with respect to that installment, the other party may declare the contract avoided with respect to that installment. *[CISG Art 73]*. The CLAIMANT actually fulfilled his performance and delivered the shipment, it is the RESPONDENT who has failed to pay the additional remuneration of the second installment, which depicts that there was a fundamental breach of contract.

2. The RESPONDENT breached the contract by reselling the goods.

128) The CLAIMANT clearly mentioned about the prohibition of resell and asked for the details of all the doses used, while the formation of the contract., The buyer agreed to provide with all the details with regards to the same. The RESPONDENT clearly breached the contract by breaching the resale prohibition specifically conveyed during the negotiations of the contract that it should be done with "express written consent". *[Cl. Ex. 2 ¶ 10] [Proc. Ord. 2, ¶ 16, p. 57]*

III.CLAIMANT is entitled to damages in the amount of USD 125,00,000 and the RESPONDENT should bear the cost of arbitration.

1. Pursuant to Art. 45(1)(b) CISG, if the seller fails to perform any of its obligations.

129) Under the contract, the buyer may claim damages as provided in Art. 74 and Art. 77 CISG *[Art. 45(1)(b) CISG].*, as compensation for the harm suffered as a consequence of the seller's breach *[Secretariat Commentary to Art. 45, ¶ 5; Will, p. 45; Enderlein/Maskow, ¶ 7; OGH 28 Apr. 2000 (aggrieved party may claim damages under Art. 74 even if it also could claim other remedies under Art. 75 or 76)]*.

130) The purpose of Art. 74 CISG is to place the aggrieved party in the same pecuniary position it would have been in had the breach not occurred and had the contract been properly performed *[Schlechtriem/Schwenzer 2005, p. 445; Secretariat Commentary to Art. 74, ¶ 3]*. Under Art. 74 CISG, CLAIMANT may recover damages of a "sum equal to the loss, including loss of profit, suffered … as a consequence of the breach" *[Art. 74 CISG; Delchi]*. Furthermore, Art. 74 limits damages recoverable to those that "do not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract," *[Gruber/Stoll, 2005, p. 765]*. The same limitation of foreseeability applies to incidental damages *[Art. 74 CISG]*. By including the words "foresaw or ought to have foreseen," CISG distinguishes damages which were actually contemplated from those that were merely foreseeable *[Murphey, p. 435-36]* thereby incorporating both a subjective test and an objective test *[Sutton, pp. 743-44]*. As commentator Knapp elaborates, whenever the non-breaching party alerts the breaching party to the possible consequences of breach in due time, the breaching party is considered to have known the facts and matters enabling it to foresee those consequences *[Knapp Art.74 ¶ 11-2.12]*. As mentioned earlier the RESPONDENT was aware of the fact that the CLAIMANT has to repay to its creditors.

2. CLAIMANT is entitled to the additional remuneration of USD 125,00,000 as he took utmost care to carry out the contract.

131) Art. 77 CISG has been interpreted as a statement of "public policy against waste," imposing a duty to mitigate losses and, according to commentator Vilus, a duty to cooperate in case of breach *[Opie, ¶ II; Vilus, ¶ 3]*. Under Art. 77 CISG, RESPONDENT bears the burden of proving that CLAIMANT did not reasonably mitigate its losses, a burden that

RESPONDENT has failed to meet. Rather, CLAIMANT clearly satisfied its duty to mitigate avoidable losses , as well as its duty to cooperate in good faith by taking "reasonable" measures to conclude the contract.Additionally, UNIDROIT Principles expressly provide that an "aggrieved party is entitled to recover any expense reasonably incurred in attempting to reduce the harm," which is implied in Art.77 CISG *[UNIDROIT Art. 7.4.8(2); Opie]* and the CLAIMANT took reasonable care before carrying out the contract.

3. The RESPONDANT should bear the cost of Arbitration.

132) The Tribunal should grant CLAIMANT's request for reimbursement of its Arbitration costs: As the CLAIMANT has a right to the reimbursement of its costs under the CISG and secondly, these costs should be allocated to RESPONDENT under Art. 37(2) Vienna Rules. RESPONDENT's non-payment and its reselling the goods leads tothe breach of contract.

133) The CISG applies to the reimbursement of Arbitration costs. CLAIMANT can demand reimbursement of its costs resulting from the arbitration proceeding and CLAIMANT can also demand reimbursement of the costs incurred in the defence against RESPONDENT's proceeding for non-liability.

IV.CLAIMANT is entitled to interest on the damages caused by RESPONDENT

134) According to Art. 78 CISG, CLAIMANT is entitled to interest on any sum that is in arrears, the damages caused by RESPONDENT. It is possible to claim interest on damages as Damages were in arrears since they originated. Secondly, CLAIMANT did not have to give any notice. Thirdly, Damages do not have to be liquidated in order to claim interest and finally the RESPONDENT resold the goods ahead and earned a greater amount of profit.

1.Interest can be claimed on damages.

135) Interest can be charged on damages *[Schlechtriem Kommentar-Bacher, Art. 78; Herber/Czerwenka, Art. 78; Achilles, Art. 78;]*. Art. 78 CISG states that a party is entitled to interest on any sum when it is in arrears. It is generally accepted that Art. 78 CISG applies to damages since a claim for damages is always a claim for a sum *[DC N.D. New York, U.S., 09.09.94 Delchi Carrier*

v. Rotorex, UNILEX E.1994-22; LG Landshut, Germany, 05.04.1995, UNILEX 1995-12, Schiedsgericht der Börse für Landwirtschaftliche Produkte in Wien, Austria, ZfRV 1998, pp. 211]. Here that sum is equal to the total lost profit unrightfully caused by RESPONDENT's breach of contract.

2.Damages were in arrears since they originated

136) Damages were caused by RESPONDENT's breach of contract. Damages are due from the very moment of the breach of contractual obligations *[Schlechtriem Kommentar-Bacher, Art. 78 at 14; Staudinger-Magnus, Art. 78 at 10; HonselL-Magnus, Art. 78 at 9]*. Therefore, interest is due from the moment RESPONDENT breached the contract.

3.CLAIMANTdid not have to give formal notice

137) CLAIMANT rightfully claims interest without giving separate notice before filing the statement of claim. Art. 78 CISG does not require any formal notice by the creditor before claiming interest *[Schlechtriem Kommentar-Bacher, Art. 78 at 17; Piltz, p. 280 §5 at 410]*.

4.CLAIMANTis entitled to interest on the damages.

138) Regardless whether the damages are liquidated or not. Art. 78 CISG applies to both liquidated and unliquidated sums. *[Schlechtriem Kommentar-Bacher, Art. 78; Witz/Salger/Lorenzwitz, Art. 78; Herber/Czerwenka, Art. 78]*. Hence, CLAIMANTis entitled to interest on the damages of USD125,00,000.

5.The RESPONDENT resold the goods to a third party

139) The RESPONDENT resold goods and earned a good amount of profit which was higher than the amount which the CLAIMANT was actually doing business on. It was clearly mentioned in the negotiations that details of the doses should be given and it should not further resell. Hence, the CLAIMANT is entitled to the profit earned by the RESPONDENT unrightfully caused by RESPONDENT's breach of contract. *[Proc. Ord. 2, ¶ 19, p. 57]*.

140) Hence, the CLAIMANT is entitled to all the damages including the additional remuneration as the RESPONDENT has breached the contract and has suffered damages.

REQUEST FOR RELIEF

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

1. Declare admissible all claims submitted by CLAIMANT;
2. The RESPONDENT be ordered to pay to Phar Lap Allevamento an additional. amount of US$ 1,250,000, which is 25 per cent of the price for the third delivery of Semen;
3. Find that RESPONDENT has breached its contract with, and therefore RESPONDENT is liable for full damages;
4. The RESPONDENT bears the costs of the Arbitration including legal fees.

(signed)

KRISH JAIN ANJALI DHOOT SHIVANI MISHRA

KATHAN SHUKLA KRITHIKA KATARIA