Sixteenth Annual Willem C. Vis East International Commercial Arbitration Moot

UNIVERSITY OF MANDALAY

MEMORANDUM FOR RESPONDENT

ON BEHALF OF	AGAINST
BLACK BEAUTY EQUESTRIAN	PHAR LAP ALLEVAMENTO
2 SEABISCUIT DRIVE OCEANSIDE EQUATORIANA	RUE FRANKEL 1 CAPITAL CITY MEDITERRANEO

MYAT THINZAR KYAW . THINZAR THEINT.

MIN NYI KHANT. INGYING KHAING. NANG SAN AUNG

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INDEX OF ABBREVIATION

&	and
AC	Advisory Council
Aug	August
Art.	Article
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
CLOUT	Case Law on UNCITRAL Texts
Claimant's Memo	Memorandum for Claimant (Renmin University of China)
CEO	Chief Executive Officer
DDP	Delivery Duty Paid (incoterms)
Dec	December
Feb	February
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
IBA	International Bar Association
2010 IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
ICC	International Chamber of Commerce
i.e.	*id est* (that is)
ibid.	*ibidem* (in the same place)
Jan	January
Ltd	Limited

Mr.	Mister
Ms.	Miss
No.	Number
Nov	November
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
Oct	October
p./pp.	page / pages
para.(s)	paragraph(s)
%	per cent
PO1	First Procedural Order
PO2	Second Procedural Order
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006
UNDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2016
USD / US$	United States Dollar
v.	versus
WIPO	World Intellectual Property Organization
WIPO Arbitration Rules	World Intellectual Property Organization Arbitration Rules
WTO	World Trade Organization

INDEX OF AUTHORITIES

	pp. 426,427,446 Cited as: *Schwarz & Konrad*	
SMEUREANU, Ileano M.	Confidentiality in International Commercial Arbitration Cited as: *Smeureanu*	In para. 38
WAINCYMER, Jeffrey	Procedure and Evidence in International Arbitration; Part II: The Process of an Arbitration, Chapter 10: Approaches to Evidence and Fact Finding, 2012 p. 793 Cited as: *Waincymer*	In paras. 35, 44

INDEX OF CASES

Forestal Guarani S.A v. Doros Int'l, Inc, 613 F. 3d 395, 397 (3rd Cir. 1010) (ellipsis in original) United States District Court for the District of New Jersey 7 October 2008 Case No.: 03-4821 JAG Cited as*: Forestal Guarani, S.A. v. Daros International, Inc*.	In para. 72

INDEX OF ARBITRAL AWARDS

STATEMENT OF FACTS

1. The parties to this arbitration are Phar Lap Allevamento (the Claimant) and Black Beauty Equestrian (the Respondent). The Claimant is Mediterraneo's oldest and most renown stud farm, covering all areas of the equestrian sport. The Respondent is a famous stable of broodmare lines and racehorse in Equatoriana.

21 March 2017	The Respondent contacted the Claimant making an inquiry about the availability of Nijinsky III for the Respondent's new breeding programme. (Exhibit C1, p 9)
24 March 2017	The Claimant agreed to sell 100 doses of frozen semen in accordance with some conditions. (Exhibit C2, p 10)
28 March 2017	The Respondent objected to the choice of law and the forum selection clause and insisted a delivery on the basis of DDP. (Exhibit C3, p 11)
31 March 2017	The Claimant accepted DDP against a moderate price increase and the inclusion of a hardship clause. (Exhibit C4, p 12)
10 April 2017	The Respondent made a proposal of the arbitration clause. (Exhibit R1, p 33)
11 April 2017	The Claimant made changes to the arbitration clause about the seat of arbitration. (Exhibit R2, p 34)
12 April 2017	The two main negotiators from both sides were involved in a severe car accident while meeting for the further discussion of the contract. (Exhibit C8, p 17 and Exhibit R3, p 35)
6 May 2017	The final negotiations were made and the sale agreement had been signed. (Exhibit C5, pp. 13,14)
20 May 2017 & 3 Oct 2017	The first and second shipments were made. (Notice of arbitration, p 6)
23 Nov 2017	The newly elected President of Mediterraneo announced 25% tariff on agricultural products from Equatoriana. (Notice of arbitration, p 6)
19 Dec 2017	The Equatoriana Government retaliated by imposing 30% tariff on agricultural products from Mediterraneo including horse semen. (Exhibit C6, p 15)

20 Jan 2018	The Claimant informed the Respondent about the newly imposed tariff of 30% and requested for renegotiation of price. (Exhibit C7, p 16)
23 Jan 2018	The third shipment was made. (Notice of arbitration, p 6)
12 Feb 2018	The respondent refused to pay the additional payment caused by the imposed tariff of 30%. (Exhibit C8, p 18)
31 July 2018	The Claimant filed a Notice of Arbitration. (Notice of Arbitration, pp. 4-8)
24 Aug 2018	The Respondent submits the Answer to Notice of Arbitration. (Answer to Notice of Arbitration, pp. 29-32)

INTRODUCTION

2. The Respondent made an offer to the Claimant to buy 100 doses of frozen horse semen in order to build up its own racehorse breeding programme and the Claimant agreed to sell at a price of 99.500 USD per dose. Nevertheless, during the negotiation process, the Claimant increased the price to 1000 USD per dose. Even so, the Respondent did not renege on the offer made.
3. In the course of negotiation for the Contract, both the Claimant and the Respondent discussed the applicable law to the Arbitration Agreement, the inclusion of hardship clause and the mechanism to adapt the Contract when hardship occurred. Concerning the applicable law, the Respondent agreed to apply the Law of Mediterraneo if the courts of Equatoriana have jurisdiction. As the Claimant did not want the courts of Equatoriana to have jurisdiction, the Law of Mediterraneo was not agreed by the parties to be applicable to the Arbitration Agreement. At last, the Respondent requested to use the HKIAC Model Clause with some broad wordings narrowed down and the Claimant accepted such a clause by changing the seat of arbitration as Danubia without specifically mentioning the applicable law of the Arbitration Agreement. Therefore, the Claimant chose Danubia as the seat of arbitration not only because it is a neutral place but also because the Claimant wanted the Law of Danubia to be applicable to the Arbitration Agreement. (**Submission 1**)
4. Concerning adaptation of the Contract, the Claimant and the Respondent discussed it but never reached an agreement to confer the Arbitral Tribunal the power to adapt the Contract. What is more, the Claimant and the Respondent deliberately narrowed down the HKIAC Model Clause for the purpose of not including all the disputes arising out of or relating to the Contract. Since adaptation is one of such disputes, the Arbitral Tribunal has no jurisdiction under the Aritration Agreement to adapt the Contract. (**Submission 1**)
5. The Claimant wishes to submit the evidence from the other arbitral proceedings to which the Respondent is a party. In this case specifically, the Claimant is not entitled to submit the evidence because it is not only lacking sufficient relevancy and materiality but also its

prejudicial effect overweighs its probative value. Not only are the evidential documents protected by confidentiality, it is also illegally or unlawfully obtained at some point in violation of public policy regardless of whether the Claimant is directly involved in it or not. The Claimant should have requested for the lawful document production which is a common procedure of taking evidence from the other party in the arbitration proceedings. Instead, the Claimant arranged to obtain the illegally obtained evidence against payment. Thus, the Claimant is not entitled to submit evidence also on the grounds of breaching the duty of good faith in the taking of evidence. (**Submission 1**)

6. On 19th Dec 2017, 30% tariffs on selected products from Mediterraneo including animal semen were announced by executive order of the Equatorianian government [*PO2, p. 58, No. 25*]. It was before the last shipment of 50 doses of semen [*Exhibit C5, p. 14, clause 8*]. As a result, the Claimant had to shoulder that amount of tariff and it was impossible for them to pay immediately due to their financial difficulties [*Exhibit C8, p. 17, para. 6*]. However, the Claimant paid that amount and delivered all doses since the Respondent had paid all installments by performing his obligations of the Contract. Nevertheless the Claimant, in the case at hand, claimed for US$ 1,250,000 which is equivalent to 25% tariff and in order to get that amount back. It is obvious that they are trying to adapt the price of the Contract when the Contract had already been performed and the sale transaction had already ended. Thus, there is no doubt that the Claimant is not entitled to the payment of US$ 1,250,000 resulting from the adaptation of the price either under clause 12 of the contract or the CISG. (**Submission 3**)

ARGUMENT

SUBMISSION I: THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT.

7. The Claimant claimed in his Notice of Arbitration that the Arbitration Agreement and its interpretation were governed by the Law of Mediterraneo and that the claim to adapt the Contract was under the jurisdiction of the Arbitral Tribunal by interpreting the Arbitration Agreement. [*Notice of Arbitration, p.7, No. 15, 16*] Based on the claim made by the Claimant to adapt the Contract, the Respondent objects to the jurisdiction of the Arbitral Tribunal since the governing law of the Arbitration Agreement is the Law of Danubia and should the Law of Danubia not applicable to the Arbitration Agreement, the Law of Equatoriana applies **(A)** it is beyond the scope of the Arbitration Agreement to adapt the Contract.**(B)**

A. The Arbitration Agreement including its interpretation is governed by the Law of Danubia.

8. The law governing an arbitration agreement always has to be considered even where there is an applicable law clause as such clause usually refers only to the substantive issues in dispute and will not usually refer in terms to disputes that might arise in relation to the arbitration agreement itself.[*Redfern and Hunter,§ 3.10*] Although there is an express choice of law clause in the Contract [Exihibit C5, p.14, No. 14], no system of law is expressly recognized by both parties as the law applicable to the Arbitration Agreement. Therefore it is necessary to determine what the chosen applicable law is. In determining so, it is the Law of Danubia that governs the Arbitration Agreement and its interpretation since both parties implied to choose the Law of Danubia and even if it is not impliedly chosen, it is still applicable to the Arbitration Agreement **(I)** and the choice of the Law of Mediterraneo will be against the party autonomy to decide the governing law of the arbitration agreement **(II)**.

I. The Law of Danubia is impliedly chosen by both parties to govern the Arbitration Agreement and even if it is not, it is still the governing law of the Arbitration Agreement.

9. While in the course of negotiation, the Claimant and the Respondent had disagreement on three particular points which are (i) the seat of arbitration and the law governing the Arbitration Agreement, (ii) the broadness of ICC hardship clause and (iii) the connection of hardship clause with the Arbitration Agreement. Although the second point reached its common ground when restarted negotiation after the car accident of the main negotiators [*PO2, p.56, No.12*] the first and second points are still left open. Since both parties discussed on the law governing the Arbitration Agreement, it was their intention to choose a separate law governing the Arbitration Agreement than the Contract. Therefore the doctrine of separability applies and the law governing the Arbitration Agreement has to be different from that of the Contract **(a)**. The choice of the seat as Danubia which was proposed by the

Claimant and accepted by the Respondent impliedly recognized the Law of Danubia as the law applicable to the Arbitration Agreement in the absence of express choice of law of the Arbitration Agreement **(b)**. Even if the Law of Danubia was not impliedly chosen, it is still the law governing the Arbitration Agreement according to Art. 34 (2)(a)(i) and Art. 36 (1)(a)(i) of the Model Law as well as Art. V (1)(a) of the New York Convention **(c)**.

a. The law applicable to the Arbitration Agreement is different from that of the Contract based on the doctrine of separability.

10. Pursuant to Art. 16(1) of the Model Law, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. Such doctrine of separability is given effect by the parties' intentions enabling the parties' either negate or alter the separable status of the arbitration clause by agreement [*Born, §3.01*].
11. In the case at hand, both parties treated the Arbitration Agreement separate from the Contract as (i) during the negotiation process, both the Claimant and the Respondent discussed a separate applicable law of the dispute resolution clause (i.e., the Arbitration Agreement) [*Exhibit R1,p. 33, R2, p. 34*], (ii) the local Arbitration Laws of both parties provides the doctrine of separability and they neither negate nor alter it and (iii) the Arbitration Agreement was intentionally provided as the last term of the Contract [*Exhibit, C5, p.14*]. Therefore, the Arbitration Agreement has to be considered as a separate agreement with a different law applying to it.
12. Since the Contract is governed by the Law of Mediterraneo, the law applicable to the Arbitration Agreement is either the Law of Danubia or the Law of Equatoriana rather than the Law of Mediterraneo.

b. The choice of the seat as Danubia which was proposed by the Claimant and accepted by the Respondent impliedly recognized the Law of Danubia as the law applicable to the Arbitration Agreement in the absence of express choice of law of the Arbitration Agreement.

13. Although the Contract contains a choice of law for governing the sale part of it, no express choice was made in order to be applicable to the Arbitration Agreement. In the absence of express choice of law, it is to be considered whether there is an implied choice made by the parties. [*Sulamerica v. Enesa Engenharia*] In one arbitral award, it was found that "except in cases where the parties make an express choice concerning the law governing the arbitration agreement, the choice of the place of arbitration generally implies a choice of the application of the arbitration law of that place." [*Born, §4.04(A)*] and this view has been relied upon by many national courts, arbitral tribunals and scholars [*Ibid.*]. Furthermore, the choice of a place of arbitration in a particular country brings with it submission to the laws of that country, including any mandatory provisions of its law on arbitration [*Redfern and Hunter,§ 3.63*]
14. In the case at hand, it was the Claimant who proposed to choose Danubia as the seat of arbitration. Even though the only reason for selecting Danubia was due to its neutrality [*Exhibit R2, p. 34*], the Claimant had the intention to choose the Law of Danubia as an

applicable law to the Arbitration Agreement since the Claimant had the experience of delivering mares to Danubia [*PO2,p.58, No.21*]. When conducting business with a third party from Danubia, there is no doubt that the Claimant had the knowledge of the Law of Danubia. In such a situation, it is undeniable that the Claimant had an implied intention to apply the Law of Danubia to the Arbitration Agreement.

15. What is more, the choice of law other than the law of the seat of arbitration creates complication which international commercial arbitration does not aim for as the parties have to consult two different procedural laws when problems arise. Therefore, the choice of Danubia as a seat of arbitration implies the application of the Law of Danubia.

c. Even if the Law of Danubia was not impliedly chosen, it is still the law governing the Arbitration Agreement according to Art. 34 (2)(a)(i) and Art. 36 (1)(a)(i) of the Model Law as well as Art. V (1)(a) of the New York Convention.

16. Art. V(1)(a) of the New York Convention provides that enforcement may be refused where the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. Notwithstanding the fact that the New York Convention concerns post-award stage, there has been approaches in favour of applying the same criteria at the pre-award stage [*Lew, Mistelis, Kröll, §6-55*]. The application of the law of the seat prevents the potential refusal of arbitral award. This is also supported by Art. 34 (2)(a)(i) and Art. 36 (1)(a)(i) of the Model Law.
17. Thus, even if the Law of Danubia was not impliedly chosen, it is still the governing law of the Arbitration Agreement as it is the law of the seat of arbitration and there was no express choice of law of the Arbitration Agreement.

II. The choice of the Law of Mediterraneo will be against the party autonomy to decide the governing law of the Arbitration Agreement.

18. Ever since the early stages of negotiations relating to the applicable law of the Arbitration Agreement, the Respondent had rejected the Law of Mediterraneo as the governing of the Arbitration Agreement [*Exhibit C3, p. 11*]. Based on such a rejection, the Claimant proposed to the Respondent Danubia as the seat of arbitration intending to apply the Law of Danubia to the Arbitration Agreement [*Exhibit R2, p. 34*]
19. Hence, it will be against the will of both parties if the Law of Mediterraneo is to be regarded as the governing law of the Arbitration Agreement.
20. Concluding, the Law of Danubia governs the Arbitration Agreement including its interpretation as both parties impliedly chose it by selecting Danubia as the seat of arbitration. What is more, the Law of Danubia still applies to the Arbitration Agreement even if it was not impliedly chosen in accordance with Art. V(1)(a) of the New York Convention and Art. 34 (2)(a)(i) and Art.36 (1)(a)(i) of the Model Law. The allegation made by the Claimant that the Law of Mediterraneo governed the Arbitration Agreement by natural inference would be against the party autonomy to choose the governing law of the Arbitration Agreement.

B. Adaptation of the Contract is beyond the scope of the Arbitration Agreement.

21. It is the mandate of the arbitral tribunal to decide any or all of the disputes that come within the ambit of the arbitration agreement. Therefore, not going beyond the scope given by the arbitration agreement is crucial. [*Redfern & Hunter, §2.63*] In the case at hand, the claim of the Claimant to adapt the Contract is beyond the Contract as neither the Contract nor the Arbitration Agreement contains the term "adaptation" **(I)**, the Arbitral Tribunal does not meet the requirement to be authorized under the Danubian Contract Law in order to adapt the Contract **(II)** and there was an implied agreement between the parties to narrow down the broad wordings of the HKIAC Model Clause **(III)**.

I. Neither the Contract nor the Arbitration Agreement includes the word "adaptation".

22. During negotiations, the Claimant proposed to the Respondent to have a mechanism in order for the Contract to be adapted [*Exhibit C8, p.17*]. Nevertheless, the Claimant and the Respondent did not reach an agreement and planned to clarify [*Exhibit R3, p. 35*]. Where the parties have not agreed to submit any dispute to arbitration, they cannot required to submit as arbitration is a matter of contract [*Howsam v. Dean Witter Reynolds, Inc.*].
23. What is more, the Claimant did not claim for the inclusion of the adaptation clause before or at the conclusion of the Contract although the Claimant had access to the previous emails and was aware of the proposal made. [*PO2, p. 55, No. 5*] Owing to this, there is no express term regarding adaptation of the Contract either in the Contract nor the Arbitration Agreement. [*Exhibit C5, p. 13*] Since the adaptation of the Contract was a matter that the parties could not agree on, it could not be said that the parties had the common intention to confer the Arbitral Tribunal the power to adapt the Contract.

II. The Arbitral Tribunal is not authorized to adapt the Contract which is required by the Danubian Contract Law and the term "dispute arising out of contract" does not cover adaptation of the Contract.

24. Under Art. 6.2.3(4)(b) the Danubian Contract Law which is largely the verbatim of the UNIDROIT Principles, it is required that the Arbitral Tribunal to be authorized by the parties in order to adapt the Contract. Although the adaptation of the Contract is incidental to the hardship clause, the Arbitration Agreement is governed by the Law of Danubia and therefore adaptation cannot be done without the authorization made by the parties. In the case, the Claimant and the Respondent did not agree in the Contract to authorize the Arbitral Tribunal to adapt the Contract.
25. As the Arbitration Agreement has to be interpreted in accordance with four corners rule and the Contract does not contain the word "adaptation", the term "dispute arising out of the Contract" does not cover the adaptation of the Contract. In common law jurisdictions, narrower formulations are adopted not to cover all disputes arising out of a contractual relationship. [*Hi-Ferty Pty Ltd v. Kiukiang Maritime Carriers*] Danubia is a common law country and hence such narrower interpretation applies.

III. It is the intention of the parties to narrow down the broad wordings of the HKIAC Model Clause.

26. When discussing the dispute resolution clause, the Respondent proposed to use the HKIAC Model Clause which provides that "any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted". Since the clause is broadly formulated, the Respondent asked to narrowed down the clause in such a way that "any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or thereof shall be referred […] [*Exhibit C5, p. 14*]. The Claimant, when being asked, agreed to narrow down the Model Clause [*Exhibit R2, p. 34*]. Therefore, both parties agreed to set aside any dispute which are non-contractual or related to the Contract. As the adaptation of the Contract is not included in the Contract, it is non-contractual and thus not cover by the Arbitration Agreement.
27. The scope of an arbitration agreement is so much dependent on the interpretation of the words of the arbitration agreement and the intention of the parties, in light of the law that governs the agreement. [*Redfern & Hunter, §2.67*] As it is the intention of the parties to narrow down the scope, the Arbitration Agreement does not cover the adaptation of the Contract.
28. To summarize, it is beyond the scope of the Arbitration Agreement to adapt the Contract as the parties did not agree on how and where the adaptation clause was to be added. Moreover, during the negotiation process, both parties had deliberately narrowed down the broad wordings of the Model Clause in order not to cover non-contractual and related matter. Furthermore, no authorization was made by the parties for the purpose of conferring the Arbitral Tribunal the power of adaptation of the Contract.

Conclusion Of Submission 1

29. Since the parties has the intention to treat the Arbitration Agreement separate from the Contract, the law governing the Arbitration Agreement has to be considered even though there is an express of choice of law for the Contract. When so determining, the Law of Danubia is the applicable law as it is impliedly chosen by the parties as such by selecting the seat of arbitration as Danubia. Even if it is not impliedly chosen, it is still the governing law according to Art. V (1)(a) of the New York Convention and Art.34 (2)(a)(i) and Art.36 (1)(a)(i) of the Model Law. By interpreting the Arbitration Agreement in light of the Law of Danubia, the adapation of the Contract is not covered by the Arbitration Agreement due to the agreement made by the parties to narrow down the HKIAC Model Clause as well as the exclusion of adaptation clause in the Contract and the Arbitration Agreement. Therefore, the Arbitral Tribunal does not have the jurisdiction to adapt the Contract under the Arbitration Agreement.

SUBMISSION 2: THE CLAIMANT SHALL NOT BE ALLOWED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRAL PROCEEDINGS

30. In the case at hand, the Claimant desires to submit a copy of the **Partial Interim Award** and some other submissions from the other arbitral proceedings to which the Respondent is a party [*Mr. Langweiler's letter, p.49*]. These documents are protected by confidentiality under Article 42 of the HKIAC 2013 Rules [*Ms. Fasttrack's letter, p.50*]. Therefore, the Respondent respectfully requests the Arbitral Tribunal to find that the Claimant shall not be allowed to submit evidence because the evidence at issue is not only lacking sufficient relevancy and materiality but also overly prejudicial to the factual allegations that the Claimant makes **(A)**. It would result in breach of confidential obligation if the evidence is to be submitted **(B)**. Lastly, the evidence at issue is illegally obtained in violation of public policy **(C)**.

A. The evidence at issue is not only lacking sufficient relevancy and materiality but also overly prejudicial to the factual allegations that the Claimant makes.

31. As a part of the due process, parties to an arbitration are afforded with opportunity to present their case [*Schwarz & Konrad, pp.426, 427*]. However, a party is not entitled, in the guise of its right to be heard, to make factual assertions or produce evidence that is irrelevant or immaterial to the dispute [*ibid. p.446*]. It is also in accordance with Art. 9.2(a) of the IBA Rules, the provision of which excludes evidence which lacks sufficient relevancy to the case or materiality to its outcome. The evidence is not only lacking sufficient relevancy and materiality but also overly prejudicial because the evidence bears little relation to the issues in the present case **(I)**. The evidence is prejudicial and misleading by tending to suggest the arbitrators on an improper basis **(II).**

I. The evidence bears little relation to the issues in the present case.

32. The Claimant states that the evidence is prima facie relevant to the case at hand [*Claimant's Memo, p.16, para 50*]. "Prima facie" is a Latin word defined as "at first sight, on the face of it, presumably" [*Black's Law Dictionary*]. Thus, the Claimant is asserting the evidence at issue is presumably relevant by his own intuition. In fact, the evidence bears little relation to the issues in the present case if any reasonable person would go beyond just a first glance and carefully examines it. This is because different circumstances and different facts arise between the two proceedings **(a)** and these facts do not support the resolution of any of the issues in the present case **(b)**.

a. Different circumstances and different facts arise between the two proceedings.

33. The Claimant alleges that the Respondent and its counsel has been acting inconsistently between the two proceedings with the same case facts [*Claimant's Memo, p.15, para, 50*]. Contrary to this, different case facts have occurred in two different proceedings. The first stark difference between the two cases is the conclusion of the sale transaction and

contractual obligations by the parties. The most common way to discharge or end the contract is to fully perform the contractual duties by the parties [*Miller/ Jentz 2006, p.281*]. In the present case, both the Respondent and the Claimant has completed their contractual obligations, i.e., the Claimant has fulfilled the delivery duty and the Respondent has fulfilled the payment duty [*Exhibit C8, p.18*]. Thus, the sale process has ended; therefore, asking for adaptation of price is unreasonable in the present case. However, in the other arbitration, the Respondent has not completed his contractual obligation, i.e., he refused delivery of the mare and ask for the renegotiation of the price due to encountering a hardship [*PO2, No.39, p.60*]. Secondly, the contract underlying the other arbitration is governed undisputedly by Mediterranean Contract Law which empowers the Arbitral Tribunal to adapt the contract unlike the present case where choice of law issue arises [*ibid.*]. Thirdly, the contract underlying the other arbitration contained a broadly worded ICC Hardship Clause 2003 whereas in the present case, the Contract only contains a narrowly worded hardship clause [*ibid.*]. Besides the fact that the Respondent is represented by the same counsel, different circumstances have arisen that would inevitably lead to different results.

b. The evidence do not support the resolution of any of the issues in the present case.

34. The Claimant wishes to submit the evidence with the sole intention to prove the Respondent's and its counsel inconsistent behaviour. This alleged inconsistent behaviour is not only misleading but also has no bearing on the resolution of any of the issues in the present case. The fact that the Respondent has asked for the renegotiation of the price in the other arbitration proceeding with different case facts do not resolve the jurisdictional issue in the present case [*Issue 1*]. It also does not give any resolution to the question whether the Claimant is entitled of the adaptation of price [*Issue 3*] where the sale transaction has already concluded. It is the evidence of an immaterial fact which does not contribute in resolving the issues. Therefore, the evidence at issue bears little relation to the issues in the present case.

II. The evidence is prejudicial and misleading by tending to suggest the arbitrators on an improper basis.

35. Even if the Arbitral Tribunal finds the evidence slightly relevant, the evidence should be excluded on the grounds of unfair prejudice. Even though the arbitrators are not bound by rigid and restrictive formal rules of evidence, they have the discretional power to apply strict rules of evidence if necessary as stated in Art. 22.2 of the HKIAC Rules, "the arbitral tribunal shall determine the admissibility, relevance ….. including whether to apply strict rules of evidence." Although international arbitrations are not expected to follow common law exclusionary rules of evidence, evidence would usually be excluded based on general unreliability or higher prejudicial to probative value [*Waincymer, p.793*].
36. In the case at hand, the prejudicial effect of the evidence overweighs its probative value. The evidence is tending to create false impression on the Respondent's character which has nothing to do with the resolution of the issues in the present case. The evidence tends to discredit the Respondent's professional handling of business in the dispute underlying the

other arbitration. The evidence tends to misleadingly influence the arbitrators impression on the Respondent and therefore is prejudicial.

B. Breach of confidential obligation would result if the evidence is to be submitted.

37. Although the Claimant claims that neither the Tribunal nor the Claimant is obligated by the confidential obligaion [*Claimant's Memo, p.16,para.52*], the submission of the evidence would result in breach of confidential obligation since the evidential documents still retain the confiential nature **(I)** and also the Claimant is bound by the confidential obligation **(II)**.

I. The evidential documents still retain the confidetial nature.

38. In international commercial arbitration, WIPO Arbitration Rules contain the most comprehensive regualation of confidentiality [*Smeureanu*]. The award from other arbitral proceedings may only be disclosed to a third party only if it falls into public domain [*Art. 75(ii), WIPO Arbitration Rules*]. And also Art. 3(13) of IBA Rules establishes that any document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. Therefore, the idea of 'public domain' plays an important role in determining whether or not documents from another arbitral proceedings are admissible.
39. In the case at hand, the Cliamant desires to submit a copy of the **Partial Interim Award** and some other submissions from the other arbitral proceeding to which the Respondent is a party [*Mr. Langweiler's letter, p.49*]. The Claimant has arranged to get the **Partial Interim Award** from a company with a doubtful reputation against the payment of 1000 USD [*PO2, No. 41, p. 60,61*]. Documents or awards in arbitral proceedings are said to be in the public domain only after the result of an action before a national court or other competent authority. In this case, the other arbitral proceeding to which the Respondent is a party has appeared before neither a national court nor a competent authority. Moreover, the **Partial Interim Award** has not beem made available to the public by any means.
40. Another important factor of public domain is that the public or in another way many people, must easily have access to the documents. But in the case at hand, the documens are only obtainble by the payment of 1000 USD [*PO2, No. 41, p. 60,61*]. Therefore, it can be assumed that very few people are likely to have access to these documents. Even the Claimant still has not obtained the document [*PO2, No. 41, p. 60*].
41. Hence, the copy of **Partial Interim Award** that the Claimant desires to submit still reatins its confidential nature.

II. The Claimant is bound by the confidential obigation.

42. In Wee Shou Woon case [*Wee Shou Woon v HT S.R.L*], it was stated that "Merely making confidential information technically available to the public at large does not necessarily destroy its confidential character". And that the information still retains its confidential

status. In that case, it was also held that the confidential obligation extends to those who know or ought to have known that the information is fairly and reasonably regareded as confidential.

43. In the case at hand, the confiential documents that the Claimant trying to submit still has their confidential value although they are made available to the Claimant by a company of doubtful reputation [*PO2, No. 41, p. 60,61*]. Moreover, the Claimant knows or should have known that the **Partial Interim Award** and other submissions that the Claimant desires to submit is a confidential information from the other arbitral proceeding to which the Respondent is a party. Hence, the confidential obligation binds and extends to the Claimant.

C. The evidence at issue is illegally obtained in violation of public policy.

44. Public policy may also be a reason for excluding otherwise probative evidence, for example, privileged or confidential information, or illegally obtained evidence [*Waincymer, p.793*]. Any eventual award may also be set aside if "the award would be contrary to the public policy of that country." [*Art. V, New York Convention*]. Theft, cybercrime and breach of contractual obligations are "wrongs" and admitting the evidence would be in one way encouraging the wrongful acts which is against the public policy. Therefore, the Arbitral Tribunal, irrelevant of how liberal it may be, would be violating the public policy if the evidence is allowed to be admitted. The evidence at issue is illegally obtained because the confidential documents are illegally leaked without the Respondent's volition **(I)**. The Claimant also took some part by subsequently pursuing the illegal evidence **(II)**.

I. The confidential documents are illegally leaked without the Respondent's volition.

45. In the case at hand, it is indisputable that the confidential documents are illegally leaked. The cause of it can either be the breach of confidential obligation by the two former employees of the Respondent or the hack of the Respondent's outdated and insecure computer system [*P02, No. 42, p.61*]. These confidential documents are supposed to be only in the hands of the parties of the other arbitration with a strict obligation not to disclose any of the award or the arbitration itself [*Art. 42, HKIAC 2013 Rules*]. The mere fact that these documents are available in the company that the Claimant seeks to obtain is adequate proof that the confidential documents have been stolen or illegally leaked.

46. The Claimant argues that the documents are publicly available from "a normal and open company in horseracing industry." [*Claimant's Memo, p.19, para.61*]. Nevertheless, no "normal and open company" would hand over highly confidential documents belonging to someone else against payment. The said company has a doubtful reputation to where it gets its information and has also refused to disclose its sources in the present case [*PO2, No.41, p.61*]. This is the adequate proof that the said company is not reputable and creditable. Therefore, it is by no means possible that such company has acquired confidential documents lawfully.

II. The Claimant also took some part by subsequently pursuing the illegal evidence.

47. The Claimant contends not taking any part in obtaining the evidence illegally [*Claimant's Memo, p.18, para. 57*]. However, the Claimant did subsequently pursue the illegal evidence. The Claimant could have requested for the official and lawful document production if the documents are considered highly material to the outcome of the case in accordance with the most commonly used evidentiary rules in the international arbitration. [*Art. 3, IBA* Rules]. Instead, the Claimant has arranged to obtain the illegally obtained evidence against payment of 1000 USD from a company with a doubtful reputation [*PO2, No.41, p.60*].
48. In the case at hand, the Claimant also argues having no prior knowledge of such alleged illegality [*PO2, No. 58, p. 18*]. Contrary to this, the Claimant is still bound to know or ought to have known that the documents are highly confidential because the Claimant is also a party to the present case also governed by HKIAC 2018 Rules which contain confidentiality provision [*Art. 45, HKIAC 2018 Rules*]. The Claimant should have also known the possibility of illegality given the company's reputation and the incapability of Mr. Velazquez to officially receive the documents from the other party of the Respondent's other arbitration [*PO2, No.41, p. 60, 61*].
49. Evidently, the Claimant has breached the duty of good faith in the taking of evidence contrary to the provision of Preamble 3 of the IBA Rules which states, "The taking of evidence shall be conducted on the principles that each party shall act in good faith …" Thus, the cases that the Claimant cites such as the Yukos [*Yukos v. Russia*] and the Caratube cases [*Cartube & Devincci v. Kazakhstan*] cannot be referred to the present case. This is because in the aforementioned cases, the confidential and privileged documents are illegally leaked and obtained through WikiLeaks which is a multi-national (non-profit) organization which publishes secret information and news leaks. In both cases, the arbitral tribunals considered the documentations from the WikiLeaks because the documents were available in public domain. Nevertheless, in the case at hand, the documents are not in public domain and can be obtained only against payment. In the Methanex case [*Methanex v. USA*], however, the Tribunal held that it would be wrong for Methanex to introduce evidential materials obtained unlawfully and that the parties owed each other and the Tribunal a general duty of good faith and to respect the equality of arms between them. Thus, Methanex case is comparable to the present case because the Claimant has breached the duty to conduct in good faith in the taking of evidence by subsequently pursuing the illegally obtained evidence.
50. Therefore, the evidence should be rendered inadmissible on the grounds that it is illegally obtained in violation of public policy.

Conclusion of Submission 2

51. In light of the aforementioned reasons, the Claimant shall not be entitled to submit the evidence from the other arbitration since its prejudicial effect overweighs the probative value; breach of confidential obligation would result if the evidence is admitted; and the evidence is illegally obtained in violation of public policy.

SUBMISSION 3: THE CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 RESULTING FROM THE ADAPTATION OF THE PRICE EITHER UNDER CLAUSE 12 OF THE CONTRACT OR PURSUANT TO CISG.

52. On 6 May 2017, both parties concluded the Contract that the Claimant agreed to provide the Buyer with 100 doses of frozen semen from the stallion Nijinsky III in exchange for a non-refundable fee of US$ 100,000 per insemination dose [*Exhibit C5, p. 13*]. Clause 5 of the Contract provided that the Respondent specifically agrees and understands that no semen will be shipped until all fees have been paid. Under the Contract, the purchase price has to be paid in two installments by the Respondent and the Claimant will ship 3 installments DDP of 100 doses of frozen semen [*Exhibit C5, p. 14*]. By following the terms and conditions of the Contract, all fees have been paid and all installments have been shipped. In other words, the obligations of the Contract have been performed.
53. On 19th Dec 2017, 30% tariffs on selected products from Mediterraneo including on animal semen were announced by executive order of the Equatorianian government and took effect from 15 January 2018 onwards [*PO2, p. 58, No. 25*]. It was before the last shipment of 50 doses of semen [*Exhibit C5, p. 14, clause 8*]. As a result, the Claimant had to shoulder that amount of tariff and it was impossible for them to pay immediately due to their financial difficulties [*Exhibit C8, p. 17, para. 6*]. However the Claimant paid that amount.
54. Then, the Claimant, in the case at hand, claimed for US$ 1,250,000 which is equivalent to 25% tariff and in order to get that amount back, it is obvious that they are trying to adapt the price of the Contract since the Contract had already been performed. Thus, there is no doubt that the Claimant is not entitled to the payment of US$ 1,250,000 resulting from the adaptation of the price either under clause 12 of the contract (A) or the CISG (B).

A. Under clause 12 of the Contract, the Claimant is not entitled to the amount claimed

55. In the case at hand, the Claimant claims additional amount of US$ 1,250,000 which was caused by imposition of tariffs by stating that hardship clause which is inserted in clause 12 of the Contract provides an adaptation of the Contract. In fact the Claimant cannot claim that additional amount since imposition of tariffs does not amount to hardship under clause 12 of the Contract (I), moreover clause 12 of the Contract does not provide an adaptation of the Contract (II) and as a result, the Claimant is responsible to pay 30% tariffs under clause 12 of the Contract (III).

I. Imposition of tariffs does not amount to hardship under clause 12 of the contract.

56. ICC hardship clause suggested by the Claimant too broad is one of the issues of the list for further negotiations of the Respondent's lawyer *[Exhibit R3, p. 35]*. Unfortunately on 12 April 2017, lawyers from both sides were severely injured in an accident. Thus Mr. Julian Krone who is the head of the legal department at Black Beauty Equestrian and Mr. John Ferguson who is from the Claimant's side were replaced to finalize the Contract. Nevertheless they have access to the prior emails chain [*PO2, p. 55, No. 5*]. Thus by referring

to that list of issues for further negotiations and with reference to the risks mentioned by Ms. Napravnik in her email of 31st March 2017, in relation to the hardship clause, lawyers from both sides agreed on the inclusion of a narrow hardship reference into the force majeure clause and regulated some other risks directly in the Contract [*Exhibit R3, p. 35, para. 3*].. This is the reason behind inserting the hardship clause into clause 12 of the Contract. In relation to that clause, clause 12 of the Contract provides that "Seller shall not be responsible for (……..) neither for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous". Thus it can be seen that clause 12 of the Contract provides the nature of hardship specifically for the purposes of the Contract and the objectives pursued.

57. In *Germany v. Spain*, the court stated that, "article 8(1) of the CISG, in recognizing subjective criteria for interpretation, invites an inquiry as to the true intent of the parties, but excludes the use of in-depth psychological investigations. Therefore, if the terms of the contract are clear, they are to be given their literal meaning, so parties cannot later claim that their undeclared intentions should prevail" *[Spain 27 December 2007 Appellate Court Navarra]*. In the case at hand, hardship clause, arbitration clause, price, installments and other terms and conditions are specifically provided in the Contract. And according to the hierarchy of rules, the terms of the contract should be applied first. In *Belgium v. Germany*, the court stated that: according to the hierarchy of rules, the terms of the contract should be applied first, and then the CISG and finally Belgian general rule. Thus, the will of the parties (art. 8) and usages (art. 9) should only be applied if the contract does not contain a clear term, since the contract precludes the CISG in the hierarchy [*Belgium 24 April 2006 Appellate Court Antwer*].
58. Thus in the case at hand, for the purposes of the Contract and the objectives pursued, hardship only covers additional health and safety requirements or comparable unforeseen events making the contract more onerous excluding the situation of imposition of tariffs. Moreover, the Contract was signed by both parties in Mediterraneo on 6 May 2017 *[PO2, p. 56, No. 13]* by understanding and agreeing to abide by the terms and conditions as set forth in the Contract *[Exhibit C5, p. 14]*.
59. In the case at hand, imposition of tariffs was caused neither by additional health and safety requirements nor comparable unforeseen events making the contract more onerous. In fact, comparable unforeseen events mean comparable to the Claimant's past experiences which were unforeseeable additional health and safety requirements *[Exhibit C4, p. 12, para. 4]*. In 2014, the Claimant was nearly insolvent due to unforeseeable very strict new health and safety requirements for delivering three mares DDP to Danubia where foot and mouth disease was discovered in which the additional tests required and amounted to 40% of the sales price *[PO2, p. 58, No. 21]*.
60. Even if imposition of tariffs was caused by unforeseen events, it did not make the Contract more onerous. An onerous contract can represent a major financial burden for an organization. In the case at hand, the Claimant is facing financial difficulties not because by

paying 30% tariffs but because by paying 40% of the sales price for additional tests in the last two years *[PO2, p. 58, No. 21]*. And thus it does not concern with the Contract of this case.

61. Thus imposition of tariffs does not amount to hardship under clause 12 of the contract since that situation does not fall within the scope of the hardship clause under clause 12 of the Contract and clause 12 of is already specifically provided especially the hardship clause and does not need to take into account the intention of the parties which will be contrary to the Contract.

II. Moreover clause 12 of the Contract does not provide an adaptation of the Contract.

62. Clause 12 of the Contract provides force majeure clause which only includes hardship clause. And that hardship does not lead to an adaptation of the Contract since agreement on the adaptation of the Contract had not been reached under clause 12 (a) and furthermore imposition of tariffs does not lead to an adaptation of the Contract (b).

a. Agreement on the adaptation of the contract had not been reached under clause 12.

63. The Claimant's witness, Ms. Julie Napravnik said that both parties had the intention to adapt the Contract following a short discussion *[Exhibit C8, p. 17]*. Nevertheless in the note of Mr. Antley who is a lawyer from the Respondent's side, the fact which does concern an adaptation of the Contract is not included but it only mentioned about arbitration clause, hardship clause and connection of hardship clause with arbitration clause. Thus it can be concluded that Mr. Antley did not agree with the adaptation of the Contract. In fact Mr. Antley had the habit of writing down after each round of negotiations which issues were still open and what he had to address in the next round. He had done this also in the present case. After the car accident on 12 April 2017 his note was found in his negotiation file which he had apparently prepared after his short meeting with Ms. Napravnik *[Exhibit R3, p. 35]*. When comparing between the weight of documentary and testimonial evidence, there is no doubt that the former one has more probative value than the latter one.

b. Imposition of tariffs does not lead to an adaptation of the Contract

64. An adaptation of the Contract is an exemption of hardship (changed circumstances). In the case at hand, changed circumstance was imposition of 30% tariffs. In international commercial arbitration cases, a cost increase by 13%, 30%, 44% or 25-50% was considered insufficient to qualify as hardship and arbitrators have never granted relief merely because the costs of performance have increased by 50% or less compared to what had been agreed in the contract. And according to the general rule, 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. *[Daniel Girsberger/ Paulius Zapolskis]*In the case at hand, the Claimant's financial difficulty was caused by his own past fault and it has resulted in this case. If he did not face such financial difficulty, his financial capacity of 30% tariffs would

fall within his sphere of control. Thus the Claimant cannot invoke the hardship exemption and cannot claim for an adaptation of the Contract.

65. Thus according to the documentary evidence, it is clear that the Respondent was not agreed with an adaptation of the Contract. In addition the Claimant cannot rely on an exemption of hardship (changed circumstances) for an adaptation of the Contract.

III. As a result, the Claimant is responsible to pay 30% tariffs under clause 12 of the Contract.

66. The adaptation of the Contract cannot be claimed and as a result, the Claimant is responsible to pay 30% tariffs under clause 12 of the Contract since the Claimant is not exempt from his responsibility (a) and the Respondent does not have the responsibility to pay 30% tariffs (b).

a. The Claimant is not exempt from his responsibility under clause 12

67. The Respondent initiated for the Contract on a delivery on the basis of DDP [*Exhibit C3, p. 11, para. 2*]. Then the Claimant accepted for the Contract a delivery DDP but for additional costs associated with a DDP delivery, the Claimant asked for additional price by 1000 USD per dose [*Exhibit C4, p. 12, para. 3*]. DDP means delivered duty paid and the seller is responsible for arranging carriage and delivering the goods at the named place, cleared for import and all applicable taxes and duties paid. Nevertheless the Claimant wanted to be exempt from some responsibilities resulting from DDP. Thus, a hardship clause was inserted in the clause 12 of the Contract [*Exhibit C4, p. 12, para. 4*].
68. In fact under clause 12 of the Contract, the Claimant shall not be responsible for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous [*Exhibit C5, p. 14, No. 12*]. Unfortunately imposition of tariffs does not fall within the scope of the hardship clause. Thus as a result the Claimant has the responsibility to pay 30% tariffs following a DDP delivery and the Claimant also asked for additional price of 1000 USD for those tariffs. That is why he paid those tariffs and delivered doses.

b. The Respondent does not have the responsibility to pay 30% tariffs

69. According to the Contract, the purchase price has to be paid in two installments and 100 doses of frozen semen will be shipped in three installments DDP only after that all payment has been paid *[Exhibit C5, p. 14, No. 5, 6 and 8].* Since the Respondent has paid all installments, the Claimant delivered all doses of frozen semen.
70. The one who contacted the Claimant's lawyer is Mr. Greg Shoemaker, a veterinary. And he also informed that he is not a lawyer and had not been involved in the negotiations of the contract. He was only concerned about the delivery of last doses as soon as possible. And he never committed to any adaptation of the price and would also not have had the required authority to do so. He merely stated that if the Contract provides for an increased price in the case of such a high additional tariff they will certainly find an agreement on the price

[Exhibit R4, p. 36, para. 4]. In fact the Contract does not provide anything about an adaptation of the price and the Claimant's lawyer also knew about that since he was included in drafting the Contract. That is why he delivered doses on time according to obligations of the Contract.

71. Moreover, the Respondent does not concern with the financial difficulties of the Claimant. The Claimant has been making loses 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 *[PO2, p. 59, No. 29]*. And the payment of US$ 1,250,000 which he claims is only about 25% of tariffs although 30% tariffs were imposed. It is clear that the Claimant claims for that payment not because he is entitled to it but because he cannot bear that. In fact imposition of 30% tariffs is only for 50 doses and he has already got the profit for the former doses.

B. The Claimant is not entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price under the CISG.

72. The CISG "applies to the Contract of sale of goods between parties whose place of business are in different States... when the States are contracting States." [*Forestal Guarani, S.A. v. Daros International, Inc*]. In this case, it is undisputed between the Parties that Equatoriana and Mediterraneo are signatories to the CISG and the parties' places of business are in different contracting States, as is required by Art. 1(2) of the CISG. There is no doubt the CISG is applicable, however, in this case the CISG is silent because the principles of hardship should be interpreted in accordance with the clause 12 of the contract not with the CISG Art. 79 (**I**).

I. The principle of "Hardship" should be interpreted in accordance with the clause 12 of contract not with the CISG Art.79.

73. The hardship suffered by the Claimant as a result of the import tariffs should be interpreted in accordance with the clause 12 of the contract not with CISG Art. 79. This is because any problems of changed circumstances should be interpreted with the hardship provided in the contract (**a**) and also the Claimant cannot rely on the CISG Art. 79 for the adaptation of price (**b**).

a. Any problem of changed circumstances should be interpreted in accordance with the Hardship provided in the Contract.

74. In the case at hand, the Claimant in its email of 31 March 2017 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 [*Exhibit C4, p. 12*]. The first option was not acceptable for the Respondent who was not willing to pay a much higher price for receiving basically nothing. Thus, both parties concentrated in their following discussions on the inclusion of a hardship clause for any subsequence changes. Consequently, both parties agreed on the inclusion of a narrow hardship clause and regulated some other risks directly in the Contract**.**

75. By looking at the drafting history it is undisputed that any problem of changed circumstances should be interpreted in accordance with the Hardship provided in the contract. This is because both parties have agreed to include the special regulations in the Contract to address the problem of changed circumstances **(i)** and in a situation of "Hardship" the tribunal should exercise according to the

provision of the Clause 12 of the Contract **(ii)** and the Clause 12 of the Contract does not provide for the price adaptation **(iii).**

i. Both parties have agreed to include the special regulations in the contract to address the problem of changed circumstances.

76. In the email exchange of 31 March 2017, the Claimant insisted to include a hardship clause into the contract to address any subsequent changes. The Respondent agreed to the inclusion of the hardship clause as request by the Claimant. In fact, the Claimant increased the price by 1000 USD per does due to the additional cost associated with a DDP delivery cost which the Respondent has also accepted the increased price [*Exhibit C4, p. 12*].
77. Moreover, it was the decision of the Claimant to include the special regulations in the contract to address the problem of changed circumstances, therefore if the imposition of tariff is considered an onerous situation, it should be should be resolved by the hardship clause in the Contract.

ii. In a situation of "Hardship" the tribunal should exercise according to the provision of the Clause 12 of the contract.

78. The hardship situation resulting from the 30% tariff impositions should be exercised according to the provision of the Clause 12 of the Contract because there is no hardship clause in the text of the CISG. Even though the 30% tariff impositions constitute the principles of impediment in term of the CISG Art. 79(1), both parties are obligated to interpret the parties' agreements and intentions at the time of the conclusion of the contract. The consequences of an impediment in the sense of the CISG Art. 79(1) on such contractual agreement must first of all be determined by interpreting the agreement itself [*Brunner, Force Majeure, p.347*].
79. Since both parties have provided the special regulations in the Contract to address the problem of changed circumstances in case of hardship situation. This is why the subsequent changes resulting from the 30% tariff impositions should be exercised according to the provision of the Clause 12 of the Contract which both parties had agreed upon.

iii. The Clause 12 of the contract does not provide for the price adaptation.

80. The clause 12 of the contract states that "Seller shall not be responsible for lost semen shipments or delays in delivery not within control of the Seller neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." There is no specific provision for the price adaptation nor mention of tariff impositions under the Clause 12. Therefore, the Respondent is not responsible to negotiate the price adaptation resulting from the 30 % tariff imposition as claim by the Claimant.

b. The Claimant cannot rely on the CISG Art.79 for the adaptation of price.

81. As correctly states by the Claimant Memo [*Claimant's Memo, p.27, para.92*] the Claimant cannot rely on the CISG Art.79 for the adaptation of price. This is because Art. 79 only apply to the circumstances for a failure of performance under the obligations **(i)** and Art. 79 only exercise the right to claim damages on the failure of obligations **(ii)** and both the parties had already performed all its obligations under the contract thus, CISG is not applicable.

i. Art. 79 only apply to the circumstances for a failure of performance under the obligations.

82. According to the CISG Art. 79 (1) provides that a party is exempted from liability for damages only if the failure to perform is due, first, to an impediment beyond its control and second, that it could not

reasonably be expected to have considered at the time of the conclusion of the contract or third, to have avoided or overcome it or its consequences. Therefore, Art.79 does not regulate hardship and does not provide for the remedy requested by the Claimant, which is the increase of the contract price as considered appropriate by the Arbitral Tribunal.

83. In conclusion, Art.79 of the CISG excuses non-performance by the parties provided the conditions laid down therein are fulfilled. For the exemption under Art. 79 to apply, the event must be (i) beyond the party's control, and (ii) unforeseeable, and (iii) unavoidable. The exemption is applicable only as long as the impediment lasts and is restricted to the claim for damages. A party may also be excused from performance, if the failure to perform the obligations is caused due to an act of a third person. The Article also provides for the requirement of providing notice within "reasonable time" after the party who seeks this excuse becomes aware of the impediment and the failure to provide such notice will result in such party being liable for damages.

ii. Art.79 only exercise the right to claim damages on the failure of obligations.

84. According to the CISG Art. 79(5) provided that nothing in this article prevents either party from exercising any right other than to claim damages under this Convention. In interpreting the definition of Art. 79(5), this article regulates the preservation of remedies other than damages. The exemption only relates to the contractual obligation which has not been performed and does not affect the existence of the contract or other contractual duties.

85. In this case the Claimant is claiming for remedies which is the increased of the contract price due to the 30% imposition of the tariff. Thus, Art. 79 is not applicable.

iii. Both the parties have already performed all its obligations under the contract thus, CISG Art. 79 is not applicable.

86. In the case at hand, both parties had agreed on three shipments and the purchase price has to be paid in two instalments. The Claimant sent the first shipment of 25 doses on 20th May 2017; the second shipment of 25 doses on 3rd Oct 2017 and the third shipment of remaining 50 doses on 23 Jan 2018. The Respondent had made the payment according to the contract first instalment of US$ 5,000,000 on 18th May 2017and second instalment of US$ 5,000,000 on 21st Jan 2018. Thus, the parties have performed all its obligations under the contract and thus, the CISG Art. 79 is not applicable and silent in this circumstance.

II. The Arbitral Tribunal should not regulate the price adaptation under the CISG in case of changed circumstances in line with the UNIDROIT Principles.

87. The Arbitral Tribunal should not regulate the price adaptation under the CISG in case of changed circumstances in line with the UNIDROIT Principles because reliance on the UNIDROIT Principles for the adaptation of price in a "hardship" situation is not possible **(a)** the equilibrium of the Contract will be fundamentally altered for the Respondent if the tribunal allows the price adaptation pursuant to UNIDROIT Principles **(b)** and the Claimant claims for the increased price remuneration is completely baseless **(c)**.

a. Reliance on the UNIDROIT Principles for the adaptation of price in a "Hardship" situation is not possible.

88. It is not possible for the Respondent to rely on the UNIDROIT Principles for the adaptation of price in a "hardship" situation because any hardship situation should be interpreted under clause 12 of the Contract as agreed by the both parties.

89. According to the statement of the Claimant, reliance on the UNIDROIT Principles for the adaptation of price, due to the Convention, itself is lack of the explicit provision defining hardship scope, consequences or solutions, is not baseless. Before resorting to a UNIDROIT Principles, one must first examine whether the issue is or maybe solved by interpreting the parties' intentions under the CISG Art. 8 and those elements of their previous dealings that amount to established practices, Art. 9(1) [*Schwenzer*]
90. By observing the drafting history of the email exchange discussion, the parties concentrated on the inclusion of a hardship clause. Again, the Respondent considered the originally suggested ICC-hardship clause to be too board. Consequently, an approach was taken to regulate a number of possible risks directly and then merely add a narrowly hardship into the Contract. The narrowly worded clause is not applicable to the present impediment and does not provide for the request remedy i.e. adaptation by the Arbitral Tribunal. First of all, by including the force majeure and hardship clause into the Contract, the parties have provided for a special regulation of the problem of changed circumstances, have silent the application of the CISG and the UNIDROIT Principles.
91. The above analysis concludes that the Claimant argumentation on the application of the gap filling UNIDROIT Principles for the adaptation of price under the CISG Art. 7(2), is completely baseless [*Claimant's Memo, p. 29, para.102]* because both the CISG and the UNIDROIT Principles is ultimately silent and not applicable in this case. Both parties are bound by any usage to which they have agreed on between themselves before the conclusion of the Contract [*Indastrial Equipment Case*]. Thus, any hardship situation should be interpreted under clause 12 of the Contract as agreed by the both parties.

b. The equilibrium of the Contract will be fundamentally altered for the Respondent if the Arbitral Tribunal allows the price adaptation pursuant to UNIDROIT Principles.

92. The equilibrium of the Contract will be fundamentally altered for the Respondent if the tribunal allows the price adaptation pursuant to UNIDROIT Principles. This is because there will no benefit for the Respondent.
93. In the case at hand, both parties intended a mutual beneficial trade. The Claimant has calculated the price for the frozen semen and the profit margin on the basis of the general cost-calculation in the racehorse department before enter into the contract. The Respondent had paid all frees upon execution of the Contract.
94. The Respondent has nothing to do with the Claimant financial infrastructure. This is because the Claimant is primarily suffering bankruptcy not because of the 30% high tariff by the Equatorian Government but because the Claimant has been making losses since 2014 due to the high interest payments from the loan and costs for the restructuring for their own personal matters not mainly because of this 25 % imposition of tariff [*PO2, p. 59 No. 29*]. That's why the situation of the Claimant's financial lies within his own typical sphere of responsibility [*Chinese Goods Case*].
95. If the Arbitral Tribunal allows the price adaptation in favor of the Claimant under the CISG in line with UNIDROIT Principles Art. 6.2.3, there will be no contractual benefit and the equilibrium of the Contract will be altered for the Respondent. It must be noted that the tribunal should regulate the high tariff according to the clause 12 of the Contract included based on the both parties' agreement.

c. The Claimant claims for the increased price remuneration is completely baseless.

96. The Claimant claims for the increased price remuneration is completely baseless because the Respondent is not liable for the renegotiation of the contract requested by the Claimant **(i)** and the Frozen Sales Agreement is concluded **(ii)**

i. The Respondent is not liable for the renegotiation of the contract requested by the Claimant.

97. Indeed, during the call between Mr. Shoemaker and Ms. Napravnik on 21st Jan 2018, Ms. Napravnik clearly requested the adaptation of the price caused by the sudden imposition of the tariff [*Exhibit C8, p.17*] The Respondent had made its sincere its proposal according to the witness statement of Greg Shoemaker "only if the contract provides for the adaptation of price regarding the tariff impositions, we will certainly find agreement on the price" and he also said he has no authority to commit any decision to do so**.** [*Exhibit R4, p. 36*]

98. Based upon what discussed during the phone call, the Respondent never promised to agree nor gave the impression for the price adaptation. It is the Claimant, Ms. Napravnik, based upon the uncertain impression, taking their own risk by delivering the remaining 50 doses of last shipment, without the proper agreement on the price adaptation knowing that there is no adaptation of price concerning matters of high tariff in the Contract.

99. In a meeting of 12th Feb 2018, the Claimant and Ms. Kayla Espinoza, CEO of the Respondent, pursued a settlement concerning matters of high tariff, negotiation have little momentum as the Claimant serious accusation on bad faith and resale prohibition. Furthermore, the contractual document does not contain any resale prohibition. Whether and at what price the Respondent has sold doses to other breeders is for the following dispute completely irrelevant. The Claimant has not submitted any proof for its allegation that the Respondent resold the doses and made a 20% profit therefrom.

100. The Respondent also strongly object to the Claimant's baseless insinuation of bad faith and resale allegation. The Claimant mistakenly assumed that Mr. Shoemaker had given them a misdirecting promise and delivered the last shipment under that promise. It should be observed above that the Respondent did not agree to any adaptation following the request in Jan 2018 during the telephone conversation nor gave them the impression on the adaptation. Thus, the Respondent is not liable to for negotiation of the contract requested by the Claimant.

ii. The Frozen Sales Agreement is concluded.

101. On the basic of the conclusion, the Arbitral Tribunal shall not award the price adaptation because based on the assumption of the statement by the Mr. Shoemaker the Claimant had taking their own risk by delivering the last shipment without the proper agreement on the price adaption knowing that there is no adaptation of price concerning matters of high tariff in the contract. The Respondent shall not be liable for the 25% imposition of tariff just because the Claimant is facing the bankruptcy. The financial situation of the Claimant had nothing to do with the Respondent. In facts, it should be seen as both the Claimant and the Respondent had performed all due contractual obligations thereby the sale process had ended and the Contract had already concluded therefore the Claimant is not entitled to the price remuneration of US$1,250,000.

Conclusion of Submission 3

102. Since parties use DDP Delivery, the Claimant has to bear the risks and costs including tariffs. Nevertheless, there is exemption for the Claimant's responsibility. Unfortunately, imposition of tariffs does not fall within the scope of exemption and as a result, the Claimant has to bear those tariffs. And the Claimant paid that tariffs and delivered all doses of frozen semen since the Respondent paid all installments according to the contract. Now the Claimant claimed for those tariffs because it was impossible for him to shoulder those tariffs since he is facing financial difficulty. And it was the Claimant's own fault. In facts, it should be seen as both the Claimant and the Respondent had performed all due contractual obligations thereby the sale process had ended and the Contract had already concluded therefore the Claimant is not entitled to the price remuneration of US$1,250,000.

REQUEST FOR RELIEF

In light of the above submissions Counsel, on behalf of the Respondent, respectfully requests the Arbitral Tribunal to find that

1. The Arbitral Tribunal lacks jurisdiction under the arbitration agreement to adapt the contract;
2. The Claimant should not be allowed to submit evidence from the other arbitral proceedings;
3. The Claimant is not entitled to the payment of US$ 1,250,000 or any other amount as an adaptation of price neither under
   i. clause 12 of the contract or
   ii. the CISG.

CERTIFICATE

We hereby certify that this Memorandum was written only by the persons whose names are listed and signed below.

Mandalay, January 25, 2019

Myat Thinzar Kyaw

Thinzar Theint

Nang San Aung

Min Nyi Khant

Ingying Khaing