TWENTY SIXTH ANNUAL
WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT
HONG KONG, 31 MARCH - 07 APRIL 2019

NATIONAL UNIVERSITY OF MANAGEMENT

MEMORANDUM FOR CLAIMANT

CASE NO.: HKIAC/A18128

CLAIMANT		**RESPONDENT**
PHAR LAP ALLEVAMENTO	*v.*	BLACK BEAUTY EQUESTRIAN
RUE FRANKEL 1		2 SEABISCUIT DRIVE
CAPITAL CITY		OCEANSIDE
MEDITERRANEO		EQUATORIANA

COUNSELS

CHHUON WATANAK • HENG SOMPHOSPHEAK • LY TENG

PON CHANBOROMEY • SAU SAKDA

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INDEX OF ABBREVIATIONS

CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG-AC	CISG Advisory Council
Corp.	Corporation
DAL	Danubian Arbitration Law
e.g.	*exempli gratia* (for example)
Ed./Eds.	Editor/Editors
et al.	*et alii* (and others)
Exhibit C	Exhibit of CLAIMANT
Exhibit R	Exhibit of RESPONDENT
HKIAC	Hong Kong International Arbitration Center
IBA	International Bar Association
ICC	International Chamber of Commerce
LLP	Limited Liability Partnership
Ltd	Limited
MCL	Me Contract Law
Mr./Mrs./Ms.	Mister/Misses/Miss
No.	Number
NoA	Notice of Arbitration
NYC	New York Convention

p./pp.	Page/Pages
para./paras.	Paragraph/Paragraphs
PCA	Permanent Court of Arbitration
PO	Procedural order
Res. NoA	Response to the Notice of Arbitration
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules
UNIDROIT	*Institut International pour l'Unification du Droit Privé* (International Institute for the Unification of Private Law)
USD	United States Dollar
v.	versus

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Used Railroad Rails Case	Federal District Court, *Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG*, 6 July 2004, 03 C 1154 Available at: http://cisgw3.law.pace.edu/cases/040706u1.html Cited in para(s): 159

INDEX OF ARBITRAL AWARDS

ABBREVIATION	CITATION
Beijing Light Automobile Co. v. Connell	Stockholm Chamber of Commerce Arbitration, Beijing Light Automobile Co. v. Connell, 5 June 1998 Available at: http://cisgw3.law.pace.edu/cases/980605s5.html Cited in para(s): 130
Butter Case	Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 22 January 1997, 155/1996 Available at: http://cisgw3.law.pace.edu/cases/970122r1.html Cited in para(s): 145
Caratube v Kazakhstan	*Caratube International Oil Company LLP & Mr. Devincci Salab Hourani v Republic of* Kazakhstan, 2014, ICSID Case No. ARB/13/13 Cited in para(s): 59
Chinese Goods Case	Hamburg Arbitration, *Chinese goods case,* 21 March 1996 Available at: https://cisgw3.law.pace.edu/cases/960321g1.html Cited in para(s): 141
EDF Services Ltd v Romania	EDF (Services) Ltd v Romania , ICSID Case No. ARB/05/13 Cited in para(s): 56, 89, 95

ICC arbitral No. 11333	International Chamber of Commerce, *Machine case*, 2002, Case No. 11333, Available at: http://cisgw3.law.pace.edu/cases/021333i1.html Cited in para(s): 130
ICC Award No. 2291	International Chamber of Commerce, *Transporter (France) v. Enterprise (UK)*, Case No. 2291 Cited in para(s): 125
ICC Case No. 5082	ICC Case No. 5082 Cited in para(s): 88, 91, 93
Kılıç v Turkmenistan	Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan (2013), ICSID Case No. ARB/10/1. Cited in para(s): 59
Libananco Holdings v Turkey	Libananco holdings co. limited v Republic of Turkey (2008), ICSID Case No. ARB/06/8 Cited in para(s): 59
Magnesium Case	International Chamber of Commerce, *Magnesium case*, 1995, Case No. 8324, Available at: http://cisgw3.law.pace.edu/cases/958324i1.html Cited in para(s): 102

Methanex v USA	Methanex Corporation v United States of America (2005) Cited in para(s): 57, 95
Opic Karimum Corporation v Venezuela	Opic Karimum Corporation v the Bolivarian Republic of Venezuela (2011), ICSID Case No. ARB/10/14 Cited in para(s): 58, 59
PCA Case No. AA 227 (Yukos case)	Yukos Universal Limited (Isle of Man) v The Russian Federation (2014), PCA Case No. AA 227 Cited in para(s): 59

INDEX OF STATUES, RULES, AND TREATIES

AIAC Rules (2018)	Asian International Arbitration Rules, 2018
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna 11 April 1980
Danubian Arbitration Law	Verbatim Adoption of the UNCITRAL Model Law with the 2006 amendments
Hague Principles	Principles on Choice of Law in International Commercial Contracts
HKIAC Rules	Hong Kong International Arbitration Center, Administered arbitration rules, 2018
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
LAC Rules (2014)	Ljubljana Arbitration Rules
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules on International Commercial Arbitration (as revised in 2010), with new article 1, paragraph 4, as adopted in 2013
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts as adopted, 2016

STATEMENT OF FACTS

1. The present arbitration proceeding is between **Phar Lap Allevamento** (hereinafter referred to "**CLAIMANT**") and **Black Beauty Equestrian** (hereinafter referred to "**RESPONDENT**") [*NoA, pp.4-5, para. 1, 4*]. **CLAIMANT** and **RESPONDENT** are collectively referred to "**Parties**". CLAIMANT is represented by **Joseph Langweiler** [*Letter by Langweiler, p. 3*], while **RESPONDENT** is represented by **Julia Clara Fasttrack** [*Letter by Fasttrack, p. 28*].

2. CLAIMANT is the oldest and most renown stud farm in Mediterraneo [*NoA, p. 4, para.1*]. It also offers frozen semen of its champion stallions for artificial insemination [*NoA, p. 4, para.2*]. Meanwhile, RESPONDENT is company registered in Equatoriana, famous for its broodmares [*NoA, p. 5, para.4*].

3. On **21 March 2017**, RESPONDENT invited CLAIMANT to make an offer of 100 doses of frozen semen from Nijinsky III for its newly started breeding program [*Exhibit C1, p.9*]. Since then, Parties negotiated the terms and conditions to be included into their contract called "*Frozen Semen Sales Agreement*" [*Exhibit C 1, p. 9, Exhibit C 5, pp. 13-14*]. Finally, they concluded this *Frozen Semen Sales Agreement* on May 06, 2017 [*Exhibit C 5, pp. 13-14*].

Jurisdiction to Adapt the Price

4. On **24 March 2017**, CLAIMANT sent the standard form of *Frozen Semen Sales Agreement* to RESPONDENT [*Exhibit C 2, p. 10*]. After that, the Parties negotiated for modifying clause 15–the dispute resolution clause granting jurisdiction to state court–therein through emails [*PO2, p. 55, para. 4; Exhibit C 2, p. 10; Exhibit C 3, p. 11*]. When the parties agreed to resort to arbitration, RESPONDENT supplied arbitration agreement [*Exhibit C 4, p. 12; Exhibit R 1, p. 33*]. CLAIMANT excluded the governing law in that supplied arbitration agreement, and insisted that law governing Frozen Semen Sales Agreement remains law of Mediterraneo [*Exhibit R 2, p. 34*]. On 12 April 2017, the parties met and discussed empowering the arbitral tribunal to adapt the *Frozen Semen Sales Agreement* in case they cannot reach agreement [*Exhibit C 8, p. 17*].

Evidence Obtained from Another Arbitration Proceedings

5. RESPONDENT entered into contract with its customer in which Mr. Antley was the negotiator for RESPONDENT [*PO2, p. 60, para. 39*]. The arbitration agreement and the main contract are governed by law of Mediterraneo [*Ibid*]. The dispute arose because of the tariff imposition by President of Mediterraneo [*Ibid*]. The arbitration was conducted under

HKIAC Rules (2013) [*Letter by Fasttrack, p. 51*]. RESPONDENT's request for adaptation of the contract was justified in a "*partial interim award*" [*PO2, p. 60, para. 39*]. After learning that this award had been made available by an unknown company, CLAIMANT planned to buy the copy of that award [*PO2, p. 60-61, para. 41*].

Adaptation of Price under Clause 12 of Frozen Semen Sale Agreement

6. On **24 March 2017**, CLAIMANT sent the offer of 100 doses of frozen semen to RESPONDENT [*Exhibit C 2, p. 10*]. In that offer, CLAIMANT made clear that resell of that frozen is prohibited unless got express written consent from CLAIMANT. RESPONDENT, later, objected only on delivery term to DDP [*Exhibit C 3, p. 11*]. In response to RESPONDENT's proposal, CLAIMANT agreed to use the DDP delivery, emphasized it was not willing to bear additional risks to change the delivery term, in particular not those associated with changes in customs regulation or import restriction [*Exhibit C 4, p. 12*]. Finally, parties concluded the contract on 6 May 2017, Clause 12 provides that "*Seller 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*].

7. Out of the blue, right before the last shipment of the last 50 doses, the Government of Equatoriana imposed the new tariff of 30%, causing the price to be 30% higher [*Exhibit C 6, p. 15; PO2, p. 59, para. 29*].

Adaptation of Price Under CISG and Other Payments

8. After learning about the tariff imposition, CLAIMANT informed RESPONDENT about that such imposition affects CLAIMANT's delivery [*Exhibit C 7, p. 16*]. Notwithstanding this, RESPONDENT still urged CLAIMANT to authorize the shipment of the last 50 doses, as they needed those doses urgently [*Exhibit C 8, p. 18*]. Reply on this, CLAIMANT authorized delivery to RESPONDENT [*Exhibit C8, p.18*]. Contrary to what RESPONDENT promised CLAIMANT, no additional payment has been made to CLAIMANT [*Exhibit C8, p.18*]. On 12 February 2018, Parties had the meeting together, but the negotiation was not fruitful as RESPONDENT still refused to pay additional payments [*Exhibit C 8, p. 18*]. Moreover, not only does RESPONDENT did not pay the additional price, RESPONDENT further breached the contract as it has already resold 15 doses of frozen semen to other breeders [*PO2, p. 57, para. 20*].

SUMMARY OF ARGUMENT

9. **First Issue**: The arbitral tribunal has the power to adapt the *Frozen Semen Sales Agreement* under the arbitration agreement. First, parties had agreed to have arbitration agreement governed by MCL providing for broad interpretation; in particular, the arbitral tribunal shall interpret the arbitration agreement in light parties' common intention–either oral or written. Second, the language of the arbitration agreement sufficiently covers the adaptation of the *Frozen Semen Sales Agreement* because the parties' intention underlying the language of arbitration agreement is to have all disputes arising in their course of transaction arbitrated.

10. **Second Issue**: To prove that the arbitral tribunal has the power to adapt the contract, Claimant relies upon the partial interim award from another arbitration that Respondent was a party to. This evidence, however, is admissible regardless of the unlawful means through which it had been made available because Claimant did not take part in committing those unlawful acts. Moreover, the confidentiality affixed to it cannot be ground for exclusion because such confidentiality is not compelling, and it should not be prioritized over Claimant's right to be heard.

11. **Third Issue**: CLAIMANT is entitled to the payment of at least 1,250,000 USD, as the Parties did not have a common intention to exclude tariff imposition, and a reasonable person in CLAIMANT's position would also expected tariff imposition to be included within the scope of Clause 12 of the Frozen Semen Sale Agreement. Moreover, Clause 12 should be interpreted to include tariff imposition because (1) the contract shall be interpreted as a whole, and (2) based on the *contra proferentem* rule. Therefore, the tribunal is respectfully requested to order RESPONDENT to reimburse the CLAIMANT of the payment of at least 1,250,000 USD.

12. **Forth Issue**: Under the CISG, CLAIMANT is entitled to the payment of at least 1,250,000 USD. Although the CISG does not explicitly provide whether hardship shall be considered as an impediment. However, it does falls within the meaning of the CISG. Moreover, tariff imposition is a hardship, thus, tariff imposition is an impediment. Furthermore, CISG has a gap in providing remedy in case of hardship, therefore leading to the application of the UNIDROIT Principles. Furthermore, CLAIMANT is entitled to the right to renegotiate, and RESPONDENT breached it. Not only did RESPONDENT breached that right, but it also breached the resale prohibition thus entailing the right of CLAIMANT to claim an additional damage of 300,000 USD due to its breach.

ARGUMENTS

I. The Arbitral Tribunal Has the Power to Adapt the Contract

13. CLAIMANT submits that the arbitration agreement between the parties sufficiently empowers the arbitral tribunal to adapt the *Frozen Semen Sales Agreement*. This submission is supported by three main grounds. First, the law that governs the arbitration agreement is Mediterranean Contract Law (hereinafter referred to "MCL"), not the law of the arbitral seat which is Danubian Contract Law (hereinafter referred to "DCL") as alleged by RESPONDENT (**A**). Second, the interpretation of the arbitration agreement pursuant to MCL empowers the arbitral tribunal to adapt the contract (**B**). And finally, even in an unlikely event that DCL governs the interpretation of the arbitration agreement, still the interpretation thereof results in arbitral tribunal's power to adapt the contract (**C**).

A. MCL Governs the Arbitration Agreement

14. Danubian Arbitration Law (hereinafter referred to "DAL") is the adoption of UNCITRAL Model Law on International Commercial Arbitration [*PO1, p. 53, para. 4*]. Art. 36 of DAL provides that the interpretation of arbitration agreement must be made pursuant to the law chosen the parties [*DAL, Arts. 34(2)(a)(i), 36(1)(a)(i); Born (SAcLJ 2014), pp. 825-826, paras. 30-31*]. The parties' autonomy in this regard does not have to be express in order to be recognized; the implicit agreement is also sufficient [*DAL, Arts. 34(2)(a)(i), 36(1)(a)(i); Hague Principles, Art. 5; Born (SAcLJ 2014), pp. 825-826, paras. 30-31; Leong & Tan (SAcLJ 2018), pp. 71-72, paras. 2-4*].

15. In this case, MCL is applicable to the arbitration agreement because of two main reasons. First, parties' intention to have MCL as the law governing the arbitration agreement is found (**b**), under the approach of Principles on Choice of Law in International Commercial Contract (hereinafter called "Hague Principles") (**a**). Secondly, in any event the arbitral tribunal should disregard the application of DCL (**c**).

a. Hague Principles Should Be Considered to Determine the Law Applicable to the Arbitration Agreement

16. CLAIMANT respectfully submits that the arbitral tribunal should resort to Hague Principles to determine existence of the parties' intention to have ***MCL*** as the law applicable to the arbitration agreement (**i**). Additionally, the arbitral tribunal should not disregard Hague Principles merely on the ground that the Principles do not address the law governing the arbitration agreement (**ii**).

i. Hague Principles Assist the Arbitral Tribunal to Determine the Parties' Intention on the Law Governing to the Arbitration Agreement

17. The "*arbitration agreement*" is distinguished from the "*agreement on choice of law applicable to arbitration agreement*" [*DAL, Arts. 7, 34(2)(a)(i), 36(1)(a)(i)*]. Indeed, the latter governs the interpretation of the former [*DAL, Arts. 34(2)(a)(i), 36(1)(a)(i)*]. In this case, the parties are disputing on the "*agreement on choice of law applicable to arbitration agreement*" [*NoA, p. 7, para. 15; Res. NoA, p. 31, para. 13*]. In particular, the question stresses on which law governs the arbitration agreement between the parties [*NoA, p. 7, para. 15; Res. NoA, p. 31, para. 13*]. At the first stage, it is important to determine what rule governs the interpretation of the "*agreement on choice of law applicable to arbitration agreement*" because the parties discussed the choice of law applicable to arbitration agreement during their negotiation [*Exhibit C 3, p. 11; Exhibit R 1, p. 33; Exhibit R 2, p. 34*].

18. Art. 13.5 of Hong Kong International Arbitration Center Rules (hereinafter referred to "HKIAC Rules")–by which the parties had agreed to be bound–provides that arbitral tribunal must respect the parties' agreement and do everything ensure the fairness and efficiency of the arbitration [*HKIAC Rules, Art. 13.5; Exhibit C 5, p. 14, para. 15*]. While Art. 28 of DAL stipulates that the arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties [*DAL, Art. 28(1)*]. In case of no agreement, the arbitral tribunal shall apply the conflict of law rules [*DAL, Art. 28(2)*].

19. Hague Principles–as have been adopted by Equatoriana, Mediterraneo and Danubia–aim to assist the arbitral tribunal to determine the existence of the parties' agreement on the choice of law applicable to the arbitration [*Hague Principles, Commentary, pp. 23, 25, 27, paras. 1.5, 1.13, 1.14, 1.20(b); PO2, p. 61, para. 43*]. Therefore, the arbitral tribunal–by virtue of its discretion guaranteed under both HKIAC Rules and DAL–should resort to Hague Principles in order to protect and give effect to the parties' autonomy [*DAL, Art. 28(2); Born (2012), p. 39; Cheskin/Hertell; Celike, pp. 28-29; Bonython v Commonwealth of Australia; Heilman (YLJ), p. 625-626; Law v Garrett; Austrian Lloyd v Gresham Life*].

ii. Although Law Governing Arbitration Agreement Is One of the Excluded Factors, Hague Principles Should Not Be Disregarded

20. Art. 1.3(b) of Hague Principles points out that the Principles do not cover the issue regarding the law governing the arbitration agreement [*Hague Principles, Art. 1.3(b), p. 17*].

The reason underlying this exclusion is the lack of international consensus on whether the law governing the arbitration agreement is subject to parties' agreement [*Hague Principles, Commentary on Art. 1.3(b), p. 33, para. 1.24*].

21. This exclusion, however, merely expresses the neutral stance of Hague Principles on this point [*Ibid*]. Hague Principles clearly emphasize that this exclusion is not mandatory [*Ibid*]. The arbitral tribunal may flexibly apply Hague Principles in the jurisdiction where the law governing the arbitration agreement is subject to parties' agreement [*Ibid*].

22. In this case, there is consensus in Danubia, Mediterraneo and Equatoriana that law governing the arbitration agreement is subject to parties' agreement [*DAL, Arts. 34(2)(a)(i), 36(1)(a)(i); UNIDROIT Principles, Comments on Preambles, p. 3; PO1, p. 53, para. 4*]. Therefore, Hague Principles should not be disregarded when determining the existence of parties' intention to select the law governing their arbitration agreement.

b. Under Hague Principles, Parties Intend to Have Their Arbitration Agreement Governed By MCL

23. There are two main reasons justifying CLAIMANT' submission that the parties intended to have their arbitration agreement governed by MCL. First, MCL is the parties' implicit choice of law governing the arbitration agreement (**i**). Second, RESPONDENT could not have been unaware of CLAIMANT's intention to have the arbitration agreement governed by MCL (**ii**).

i. MCL Governs the Arbitration Agreement Because It Is the Parties' Implicit Choice of Law

24. A parties' choice of law applicable to the arbitration agreement "*may also be made tacitly*" [*Hague Principles, Art. 4; Hague Principles, Commentary on Art. 4, p. 44, para. 4.1*]. It neither has to be in writing, nor to be clearly expressed in order to be valid [*Hague Principles, Art. 5*]. The threshold of its formal validity is met when there is indication from which inference can be drawn that the parties intended to use a certain law to govern their arbitration agreement [*Hague Principles, Commentary on Art. 4, paras. 4.5-4.8*].

25. To discover the indication in question, it is important that the arbitral tribunal consider "*factors surrounding the conclusion of the contract*" [*Ibid, para. 4.13*]. One of the relevant factors that international arbitral tribunal have widely considered is the use of "*standard form*" because when a party acceded to the other party's standard form, inference can be drawn that it intended to have choice of law contained therein further applied to arbitration

agreement which is also part of that standard form [*Hague Principles, Commentary on Art. 4, p. 44, para. 4.9; Born (SAcLJ 2014), p. 827, para. 33; Born (KLI 2014,2nd ed.), p. 580*].

26. After the traffic accident, Mr. Antley–the negotiator for RESPONDENT–was replaced by Mr. Krone; while Mr. Napravnik–the negotiator for CLAIMANT–was replaced by Mr. Ferguson [*NoA, p. 5, para. 8; Exhibit C. 5, p. 14; Res. NoA, p. 30, para. 8; PO2, p. 55, para. 4*]. Since then, these two successors were responsible for finalizing the conclusion of the *Frozen Semen Sales Agreement* on behalf of RESPONDENT and CLAIMANT respectively [*Ibid*].

27. According to Mr. Krone's witness statement, what he understood at the conclusion of the contract was that the law of Mediterraneo–which governs the main contract–also applies to arbitration agreement because the drafts thereof clearly provides that the law of Mediterraneo governs the standard form of *Frozen Semen Sales Agreement* in which arbitration agreement is contained [*Exhibit R 3, p. 35*]. If he had understood otherwise, he would have negotiated with Mr. Ferguson to include the DAL to govern the arbitration agreement [*Ibid*].

28. The indication of Mr. Krone and Mr. Ferguson' understanding that the MCL also governs the arbitration agreement becomes clearer if one looks into the fact that Mr. Ferguson had no experience in international contract, while Mr. Krone had no details about the negotiation of the *Frozen Semen Sales Agreement* [*Exhibit C 8, p. 17; Exhibit R 3, p. 35*]. Hereby, there is high possibility that both of them understood that the law of Mediterraneo which governs the entire *Frozen Semen Sales Agreement* also governs the arbitration agreement as it is also a part thereof [*Exhibit C 5, p. 14, para. 15*; *Hill; Ashurst; Sul America v Enesa Engenharia; BCY v BCZ, C v D*].

29. Based on the above facts and legal aspects, CLAIMANT submits that there is strong indication from which inference can be drawn that–at the time of the conclusion of *Frozen Semen Sales Agreement*–the Mr. Krone and Mr. Ferguson intended to have the arbitration agreement governed by MCL Therefore, MCL governs the interpretation of the arbitration agreement.

ii. Alternatively, RESPONDENT Could Not Have Been Unaware That CLAIMANT Intended to Have the Arbitration Agreement Governed By MCL

30. Art. 6(1)(a) of Hague Principles emphasizes that "*the law purportedly chosen by the parties determines whether they have reached an agreement on the applicable law*" [*Hague Principles, Art. 6(1)(a); Hague Principles, Commentary on Art. 6(1)(a), p. 51, para. 6.5; Celike, p. 29; First Options v Kaplan*].

In the present case, the law that is purportedly chosen by the parties is MCL because during the negotiation parties discussed its application to the arbitration agreement [*Exhibit C 3, p. 11; Exhibit R 1, p. 33; Exhibit R 2, p. 34; PO2, p. 55, para. 4*]. Thus under the sense of Art. 6(1)(a) of Hague Principles, the question of whether the parties reached the agreement that MCL governs the arbitration agreement must be determined through MCL itself [*DAL, Art. 6(1)(a)*].

31. Mediterraneo adheres to the verbatim adoption of UNIDROIT Principles on International Commercial Contracts, so does Equatoriana [*PO1, p. 53, para. 4*]. According to Art. 4.2.1 thereof, the statement of a party must be interpreted according to his intention if his counter-party could not have been unaware of his intention [*MCL, Art. 4.2.1*].

32. Mr. Antley sent the draft arbitration agreement provided, *inter alia*, for arbitration in Equatoriana and the law governing the arbitration agreement is law of Equatoriana [*Exhibit R 1, p. 33*]. This draft, however, was revised by Ms. Napravnik [*Exhibit R 2, p. 34*]. Ms. Napravnik excluded–*inter alia*–the sentence that says "*The law of this arbitration clause shall be the law of Equatoriana*"; and she further insisted that her revision was on the basis that the *Frozen Semen Sales Agreement* is governed law of Mediterraneo [*Ibid; PO2, p. 61-62, para. 50*].

33. Mr. Antley–who was also the negotiator in the previous transaction between RESPONDENT and one of its customers–had agreed to have law of Mediterraneo governed both the underlying contract and the arbitration agreement therein [*PO2, p. 60, para. 39*]. By virtue of this circumstance, he should have known the consistent jurisprudence under the law of Mediterraneo that the law governing the underlying contract also governs the arbitration agreement [*PO1, p. 53, para. 4*].

34. At this point, Mr. Antley could not have been unaware that Ms. Napravnik intended to have the arbitration agreement governed by MCL when Mr. Napravnik excluded the choice of law governing the arbitration agreement, and emphasized that the law governing the *Frozen Semen Sales Agreement* remains the law of Mediterraneo [*Exhibit R 2, p. 34; MCL, Art. 4.2.1*].

c. In Any Event, The Arbitral Tribunal Should Disregard the Application of DCL

35. The arbitral tribunal should disregard DCL because the choice of Danubia as the arbitral seat does not suffice the implicit choice of law (**i**); and the principle of separability does not justify the application of DCL because the application of DCL undermines the parties' objective to have their disputes settled by arbitration (**ii**).

i. The Choice of Danubia As the Arbitral Seat Does Not Suffice the Implicit Choice of Law

36. The agreement on choice of arbitral seat may be taken into consideration to determine the parties' implicit choice of law [*Hague Principles, Commentary on Art. 4, p. 45, para. 4.11*]. Accordingly, RESPONDENT might rely upon *FirstLink* case to argue that the parties are presumed to have intention to have the arbitration agreement governed by DCL because the parties aimed for neutrality between them [*Ashurst; FirstLink v GT Payment*].

37. This allegation is unlikely to be true because parties' implicit choice of law cannot be said established by merely a presumption of intention [*Hague Principles, Commentary on Art. 4, p. 44, para. 4.6; Ashurst, p.2; BCY v BCY*]. Rather, there must be strong indication that the parties intended to have their arbitration agreement governed by a certain law [*Hague Principles, Commentary on Art. 4, p. 44, para. 4.6; Ashurst, p.2; BCY v BCY*].

38. In *BCY v BCY* case, the court disagreed with the approach of presumption taken in the *FirstLink* case. The court further provides that the stronger indication of parties' implicit choice of law is the law governing the contract because it is in line with the meeting of the minds and understandings between both parties [*BCY v BCZ, Ashurst, p.2; Hague Principles, Art. 4, 6; Hill; Born (SAcLJ 2014), para. 44*].

39. As the reflection to this case, the parties discussed the application of MCL to govern entire *Frozen Semen Sales Agreement* in which the arbitration is contained [*Exhibit C 3, p. 11; Exhibit R 1, p. 33; Exhibit R 2, p. 34; PO2, p. 55, para. 4*]. The reason why the parties resorted to arbitration in Danubia was not because they wanted DCL to be applicable to their arbitration agreement [*Exhibit C 4, p. 12; PO2, pp. 56-57, para. 14*]. Instead, the actual reason for choosing Danubia as the arbitral seat was because it was unacceptable for CLAIMANT–due to its internal policy–to have the counter-party's country as the arbitral seat [*Exhibit C 4, p. 12; Exhibit R 2, p. 34*].

ii. The Principle of Separability Does Not Justify the Application of DCL Because the Latter Undermines Objective to Arbitrate

40. Indeed, Art. 16 (1) of DAL clearly stipulates that the arbitration agreement is considered to be separate from the main contract in which it is contained [*DAL, Art. 16(1)*]. In its Response to Notice of Arbitration, RESPONDENT alleges that the law of Mediterraneo–which govern the *Frozen Semen Sales Agreement*–does not govern the arbitration agreement due to the principle of separability; therefore, the arbitration agreement is governed by DCL [*Res. NoA, p. 31, paras. 13-14*].

41. This allegation is not reliable because RESPONDENT–without giving effects to the purpose of the principle of separability–misinterpreted this Art. to justify its allegation that ***DCL*** governs the arbitration agreement [*Res. NoA, p. 31, paras. 13-14*]. The second and third sentences of Art. 16(1) clearly indicates the purpose of the principles; the invalidity of the underlying contract does not render the arbitration agreement therein invalid [*DAL, Art. 16 (1)*]. In particular, the principle merely aims to protect the arbitration agreement and harmonize the parties' objective to resolve their disputes by arbitration [*A/CN.9/264; UNCITRAL Digest Case, p. 76, para 6; Ashurst; BCY v. BCZ; Born (SAcLJ 2014), p. 820, para. 16; Born (KLI 2nd ed.), pp. 478-479; Caron & Kaplan, pp. 453-454*].

42. In contrast to its purpose, the application of principle of separability to the present case would render DCL applicable to arbitration agreement. Then, it would possibly jeopardize the parties' objective to have their disputes settled by arbitration because DCL provides that the arbitration agreement must be interpreted pursuant to four-corner rules where the unwritten parties' intention to have the contract adapted by the arbitral tribunal will be disregarded [*PO1, p. 52, para. II; Exhibit C 8, p. 17*].

43. More importantly, in a very unlikely event that the interpretation of arbitration agreement under DCL resulted in the lack of power to adapt the contract, it would leave the parties no choice, but to resort to state court which is very incompatible with the parties' intention to deviate from state court since the very beginning [*Exhibit C 3, p. 11; Exhibit C 4, p. 12*].

B. The Interpretation of Arbitration Agreement Under MCL Empowers the Arbitral Tribunal to Adapt the Contract

44. Art. 4.1 of MCL states that an agreement between the parties must be interpreted in light of their common intention [*MCL, Art. 4.1(1)*]. To this end, the arbitral tribunal must look into the negotiations prior the conclusion of that agreement in order to determine the parties' common intention underlying the language of their agreement [*MCL, Commentary on Art. 4.1(1), p. 137, para. 1*].

45. During the last meeting, Ms. Napravnik pointed out to Mr. Antley that it was necessary to have adaption mechanism included into contract. In response, Mr. Antley informed Ms. Napravnik that "*it should probably be the task of the arbitrators to adapt the contract*" [*Exhibit C8, p. 17*]. Thus, it is clear that parties' common intention underlying the arbitration agreement is to empower the arbitral tribunal power to adapt the contract.

46. Therefore, despite the language of the arbitration agreement does not clearly empower the arbitral tribunal to adapt the contract, the arbitral tribunal still has the power to do so

because the common intention of both parties is to grant such the power to the arbitral tribunal [*MCL, Art. 4.1(1); MCL, Commentary on Art. 4.1(1), p. 137, para. 1; Exhibit C 5, p. 14, para. 15*].

C. Even DCL Were to Govern the Arbitration Agreement, The Arbitral Tribunal Would Still Have Power to Adapt the Contract

47. In a very unlikely event that DCL governs the interpretation of the arbitration agreement, CLAIMANT submits that the arbitral tribunal's power to adapt the contract is still secured because the language of the arbitration agreement sufficiently confers such power (**a**); and the interpretation for contract adaptation by the arbitral tribunal should be preferred because the arbitration agreement supplied by RESPONDENT is not clear (**b**).

a. The Language of the Arbitration Agreement Sufficiently Empowers the Arbitral Tribunal to Adapt the Contract

48. Art. 4.1 of DCL states that the arbitration agreement shall be interpreted pursuant to the common intention of the parties [*DCL, Art. 4.1(1); PO2, p. 61, para. 45*]. To determine this common intention, the arbitral tribunal shall consider the language of that arbitration agreement [*PO2, p. 61, para. 45; DCL, Art. 4.3*]. Extrinsic evidences cannot be relied upon to supplement or contradict the existing language; however, they may be used to interpret that language [*PO2, p. 61, para. 45; DCL, Art. 2.1.17*].

49. In this case, the arbitration agreement reads "*Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof* s*hall be referred to and finally resolved by arbitration*" [*Exhibit C 5, p. 14, para. 15*]. The absence of the term "*adaptation*" does not mean that the parties did not have common intention empower the arbitral tribunal to adapt the contract.

50. The language of the present arbitration agreement reflects the parties' common intention to refer all of the disputes to arbitration because when the parties to commercial transaction include the terms "*[d]ispute arising out of the contract"* into their arbitration clause, it is their reasonable expectation that all disputes arising in the course of that particular transaction will be settled through arbitration, unless there is indication contradictory to such expectation [*Celike, pp. 41-42; Premium Nafta v Fili Shipping; Fillite (Runcorn) v Aqua-Lift; Harbor Assurance v Kansa General*].

51. This is also true in this case if one interprets the arbitration agreement in light of the prior statements between Mr. Antley and Ms. Napravnik [*PO2, p. 61, para. 45; DCL, Art. 2.1.17*].

Mr. Antley pointed out Ms. Napravnik that the arbitration agreement was largely based on the *HKIAC* model arbitration clause [*Exhibit R 1, p. 33*]. Given that the *HKIAC* model arbitration clause is meticulously drafted [*HKIAC Home Page, Model Clauses for Arbitration*], it can be inferred that Ms. Napravnik and Mr. Antley expected that the model clause would cover all disputes arising in the course of their transaction, including the adaptation of the contract.

b. Empowering the Tribunal to Adapt The Contract Should Be Preferred Because the Arbitration Agreement Supplied By RESPONDENT Is Unclear

52. Art. 4.6 of DCL provides that when the arbitration agreement is unclear, such agreement should be interpreted against party who supplied it [*DCL, Art. 6*]. When Mr. Antley supplied the arbitration agreement to Ms. Napravnik, he merely pointed out that the model clause had been narrowed down [*Exhibit R 1, p. 33*]. Mr. Antley failed to emphasize the objectives of narrowing it [*Ibid*]. Given that the Mr. Antley's statement is unclear, CLAIMANT submits that Ms. Napravnik could not have been aware of whether or not Mr. Antley intended to exclude the contract adaptation from the scope of the arbitration agreement.

53. Thus under the sense of Art. 4.6, RESPONDENT should not be allowed to rely upon this unclearness to argue that the arbitral tribunal has no power to adapt the contract under the narrowed HKIAC model arbitration clause. On the contrary, this agreement should be interpreted against RESPONDENT. In particular, it should be interpreted in light of common understanding between the two prior the conclusion of the arbitration agreement to empower the arbitral tribunal to adapt the contract.

II. CLAIMANT Is Entitled Use the Arbitral Award Obtained from Another Arbitration to Support Its Claims in The Present Arbitration

54. Each party to the arbitration has the burden of proffering evidences to support their claims and defenses respectively [*DAL, Art. 23(1); HKIAC Rules, Art. 22(1)*]. The arbitral tribunal has power to determine the admissibility of the evidence submitted, and eventually decide whether or not it should admit that evidence into the arbitration [*DAL, Art. 19(2); HKIAC Rules, Art.s 22(2), 22(3)*].

55. CLAIMANT relies upon the award (*hereinafter referred "evidence"*) obtained from another arbitration–to which RESPONDENT was a disputing party–to support its claim in the present arbitration [*Letter by Langweiler (02 October 2018), p. 50; PO2, p. 60, para. 39*]. Contrary to RESPONDENT's objection [*Letter by Fasttrack (03 October 2018), p. 51*], CLAIMANT is

entitled to use this evidence on the grounds that the unlawful means through which the evidence is obtained do not render it inadmissible because CLAIMANT did not participate in committing such unlawful acts (**A**); the confidentiality veil affixed to the evidence does not render the evidence inadmissible in the present arbitration (**B**); the admission of the evidence is indispensable for the compliance with the principle of fairness and equality (**C**).

A. The Evidence Is Still Admissible, Although It Had Been Obtained Through Unlawful Means Because CLAIMANT Did Not Participate in Committing Such Unlawful Acts

56. Neither HKIAC Rules nor DAL prohibits the arbitral tribunal from admitting the evidence obtained from unlawful means [*HKIAC Rules, Art. 22(2); DAL, Art. 19(2); Aceris Law*]. However, the arbitral tribunal has power to dismiss a particular evidence if the parties submitting it had undermined the principle of fairness and equality by conducting themselves in bad faith while obtaining the evidence in question [*DAL, Art. 18; HKIAC Rules, Art. 13(1); EDF Services Ltd v Romania; Nathan, p. 321, para. 9.118; IBA Rules, Arts. 9(2)(g), 9(7); IBA Rules Commentary, p. 25; Aceris Law*].

57. Bad faith has been known as acting in the way which viably offends or harms the other party unjustifiably [*Nathan, p. 222, para. 7.45*; *Translex, Principle No. I.1.1*]. Procedural bad faith has been considered in *Methanex case* in which the arbitral tribunal found that the party submitting the evidence was not in good faith by intentionally trespassing onto another person's office to seek for evidence [*Methanex v USA; John; Caron/Caplan, p. 580, para. 55; Nathan, p. 321*].

58. Unlike the *Methanex case*, CLAIMANT did not take part in hacking RESPONDENT's computer or breach of confidentiality in order to retrieve the evidence [*PO2, pp. 60-61, para. 41*]. The fact that CLAIMANT is trying to have possession over the evidence does not express any bad faith because CLAIMANT did not contribute or conspire with the one who actually committed the unlawful acts to retrieve the evidence [*Ibid*]. CLAIMANT just sought for that evidence only after learning that it had been made available by a company who promised to sell it to CLAIMANT [*PO2, pp. 60-61, paras. 40, 41; Opic Karimum Corporation v Venezuela*].

59. In addition, it should be recognized that the party submitting the unlawfully obtained evidence does not undermine the principle of procedural good faith if that party does not take part in committing such unlawful act [*Caratube v Kazakhstan; Libananco Holdings v Turkey; Opic Karimum Corporation v Venezuela; Kılıç v Turkmenistan; PCA Case No. AA 227 (Yukos Case); John*].

60. Given that CLAIMANT conducted itself in good faith by not taking part into the illegal hack of RESPONDENT's computer or the breach of confidentiality, thus pursuant to HKIAC Rules and DAL which do not prohibit the arbitral tribunal from admitting unlawfully obtained evidence, the evidence submitted by CLAIMANT is admissible and should be included into the present arbitration.

B. The Confidentiality Veil Affixed to The Evidence Does Not Render the Evidence Inadmissible in The Present Arbitration

61. "*Confidentiality should not be an obstacle, when parties wish to use an earlier award in later proceedings*" [*Noussia, p. 93; John Foster Emmott v Michael Wilson*]. Hereby, CLAIMANT submits that confidentiality veil affixed to the evidence does not render the evidence inadmissible under IBA Rules on the Taking of Evidence (hereinafter referred to "IBA Rules") (**a**). Moreover, the confidentiality provision under Art. 42 of HKIAC Rules (2013) does not extend to exclude the evidence that is material to the outcome of the case (**b**).

a. The Evidence is Admissible Under IBA Rules on the Taking of Evidence

62. When the right application of IBA Rules results in the decision to dismiss or admit a particular evidence, it is widely recognized that such decision is complying with the principle of due process [*Nathan p. 197, para. 7.10; IBA Rules Commentary, p. 3*]. Due to the absence of parties' agreement on the evidentiary rules, CLAIMANT requests the arbitral tribunal apply IBA Rules as it is the reflection of efficient evidentiary proceedings (**i**).

63. And under the substance of IBA Rules itself, CLAIMANT submits that the evidence is admissible because it does not fall within the any grounds justifying the dismissal–neither compelling confidentiality (**ii**), nor the legal impediments under Art. 9(2)(b) of IBA Rules (**iii**).

i. The Arbitral Tribunal Should Exercise the Power to Adopt IBA Rules Because IBA Rules Is Consistent with Due Process

64. Subject to a certain fundamental safeguards, party agreement is the priority which the arbitral tribunal shall respect [*DAL, Arts. 19(1), 34(2)(a)(iv); 36(1)(a)(iv)*]. However, if the absence of the agreement may place the arbitral proceedings at risk of inefficacy, it cannot be said that the arbitral tribunal the violates party agreement by just applying a certain rule to ensure the efficiency of that proceeding [*DAL, Art. 19(2)*]. This is because the arbitral tribunal has the power conduct the arbitration in the manner that it considers appropriate–

including the determination of admissibility of evidence–when the parties failed to agree on the procedure to be followed by it [*DAL, Art. 19(1), 19(2)*].

65. Given that the parties failed to agree on evidentiary rules to be applicable in their arbitration, the tribunal should exercise the power to adopt IBA Rules because these Rules are the reflection of the due process principles [*Nathan, p. 9*]. This is also consistent with the arbitral tribunal's duty to treat the parties with equality and fairness under Art. 18 of DAL [*DAL, Arts. 18, 19; Explanatory Note of DAL, p. 32*].

66. Additionally, IBA Rules has been used by many arbitral tribunals because the it is designed to be the effective evidentiary rules used in international arbitration [*IBA Rules, p. 2*]. Thus, adopting IBA Rules is an appropriate exercise of the arbitral tribunal's power under Art. 19 of DAL as it is in line with both the principle of equality and fairness, and international arbitration practices.

ii. The Confidentiality Veil Affixed to The Evidence Is Not Compelling Because It Is Not the RESPONDENT's Absolute Expectation

67. Art. 9(2)(e) of IBA Rules stipulates that the evidence shall be excluded from the arbitration if the confidentiality affixed thereto is compelling [*IBA Rules, Art. 9(2)(e)*]. To determine whether the such confidentiality is compelling enough to justify the exclusion, it is important that the arbitral tribunal considers the parties' expectation for the absolute confidentiality protection [*Commentary on Art. 9 of IBA Rules, p. 25, para. 3; Noussia, p. 99, para. 2; Group Health v BJC Health*].

68. Parties' expectation for having the arbitration conducted in the absolute confidentiality cannot be said established by just only agreeing to an arbitration rules in which confidentiality provision is contained [*Nathan, p. 302, para. 9.87*; *Noussia, p. 95, para. 3; United States v Panhandle*]. This is because it is general that institutional arbitration rules contain confidentiality provisions [*HKIAC Rules 2013, Art. 42; AIAC Rules (2018), Art. 16; LAC Rules (2014), Art. 50*].

69. For parties' expectation, it is an exercise of party autonomy to seek additional protection beyond those already existed in the arbitration rules [*DAL, Art. 18(1); Noussia, p. 94*]. The legal effects thereof prohibit any third party from relying upon the any materials obtained therefrom to oppose against any of that disputing parties; and the confidentiality is firmly protected [*Noussia, p. 104, para. 3; Associated Electric v European Reinsurance*].

70. In the previous arbitration between RESPONDENT and its counterparty, there is no indication that they had express confidentiality agreement or any evidences showing their intention to seek for additional protection for their confidentiality [*Letter by Fasttrack (03 October 2018), p. 51*]. Instead, they simply agreed to have their arbitration proceedings governed by HKIAC Rules (2013) whose Art. 42 obliges confidentiality duty merely upon the attendees [*Letter by Fasttrack (03 October 2018), p. 51*].

71. RESPONDENT might argue that its expectation for absolute confidentiality is found on two grounds. First, the contractual obligation of its employees–who were witnesses in the proceeding–to keep confidentiality [*PO2, pp. 61, para. 41*]. And second, the existence of anti-hacking system [*PO2, pp. 61, para. 41*].

72. These two grounds, however, do not reflect such expectation. Regarding the contractual obligation of confidentiality, the reason why it does not reflect RESPONDENT's intention to keep the information in the absolute confidentiality is the fact that imposing the duty of confidentiality on the only its witness is not sufficient because other attendees, such as expert or the counterparty's witnesses, may divulge such confidential information to public [*PO2, pp. 61, para. 41*]. For the existence of anti-hacking system, RESPONDENT used the outdated system [*PO2, pp. 61, para. 41*]. This clearly reflects that RESPONDENT had no absolute expectation, otherwise it would be more careful with its protecting system.

73. Contrary to RESPONDENT's allegation, in *Insurance Co. v Lloyd's Syndicate*, the court provided that any third parties–who obtained the confidential information from a particular arbitration to which they are not party–shall not disclose that confidentiality to prejudice the disputing parties to that arbitration [*Insurance Co. v Lloyd's Syndicate; Letter by Fasttrack (03 October 2018), p. 51*]. However, Court also provides that those third parties may use of such confidentiality to pursue or defend legal right [*Insurance Company v Lloyd's Syndicate; Hyundai Engineering v Active Building; Noussia, p. 79*].

74. The implied duty of confidentiality should not be prioritized over due process, including '*right to be heard*' which is closely associated with the presentation of material evidence [*DAL, Art. 18; Noussia, p. 94, para. 1; John Foster v Michael & Partners; Nathan, p. 196, para. 7.06, Tempo v Bertek*]. Thus, CLAIMANT submits that the evidence does not fall within the compelling ground under Art. 9(2)(e) of IBA Rules as RESPONDENT and its counterparty had no expectation for the absolute confidentiality. Therefore, the evidence should be admitted.

iii. The Evidence Does Not Fall Within Legal Impediment or Privilege Under Art. 9(2)(B) Of IBA Rules

75. Another ground upon which the arbitral tribunal may rely upon to dismiss a particular evidence is Art. 9(2)(b) of IBA Rules [*IBA Rules, Art. 9(2)(b)*]. This Art. provides that the evidence must be excluded if it falls within the legal impediment or privilege that the arbitral tribunal determines to be applicable [*IBA Rules, Art. 9(2)(b)*].

76. RESPONDENT might rely upon this Art. to assert that the evidence should be excluded because it falls within the scope of Art. 9(2)(b) of IBA Rules. This is unlikely to be succeeded because Art. 9(3) lists the exhaustive factors to be considered by the arbitral tribunal following the broad language of the Art. 9(2)(b) [*IBA Rules, Art. 9(3)*].

77. Under Art. 9(3) of IBA Rules, the evidence can be excluded as if it falls within the documents communicated for legal advice or settlement negotiation [*IBA Rules, Art. 9(3)*]. Very different from the fact of this case, CLAIMANT relies merely upon the award in the previous arbitration [*Letter by Langweiler (02 October 2018), p. 50; PO2, pp. 61, para. 41*]. This clearly does not fall within the documents of legal advice or settlement negotiations.

78. Therefore, the evidence cannot be excluded on the ground of Art. 9(2)(b) of IBA Rules because it does not fall within the factors listed thereunder.

b. Confidentiality Provision Under Art. 42 Of HKIAC Rules 2013 Does Not Extend to Exclude Material Evidence

79. Art. 42 of HKIAC Rules provides that the attendees of the proceedings shall not disclose the material they obtain from that proceedings to the outsiders [*HKIAC Rules 2013, Art. 42*]. This Art. imposes duty of confidentiality upon merely the attendees; however, it silences the legal consequences against the disclosed material when the disclosure does not fall within the provided exceptions [*HKIAC Rules 2013, Art. 42*].

80. Indeed, materials created in a particular arbitration proceeding may not be used in another arbitration that involves different parties [*Insurance Co. v Lloyd's Syndicate; Hyundai v Active Building; Ali Shipping v Shipyard; Noussia, pp. 79, 89*]. This does not mean that the arbitral tribunal must summarily dismiss the materials because arbitral tribunal has its own discretion to determine the admissibility of the evidence submitted before them [*DAL, Art. 19(2); HKIAC Rules, Art. 22(2); Caron/Caplan, pp. 571-572*].

81. Despite arbitration is confidential, it must be subject a certain boundary; it means that it should not be prioritized over other considerations regarding due process [*John Foster v*

Michael & Partners; Ali Shipping v Shipyard; Dolling v Merret; Noussia, pp. 86, 94]. Generally, when dealing with this issue, international arbitration tribunals considered the necessity of the evidence provided that such evidence is material to determine the right and obligation of parties under the arbitral award [*Hassneh v Stuart; Lincoln v. Sun Life; Noussia, pp. 80, 112; Caron/Caplan, p. 573*].

82. In *Lincoln v. Sun Life* case, the high court allowed the award of the first arbitration to be admitted into the second arbitration provided that such award is material to the outcome of the second arbitration although the latter involved different parties [*Lincoln v. Sun Life*]. More importantly, this decision case has been taken into consideration by many arbitral tribunals [*Noussia, p. 112*].

83. In this case, the evidence that CLAIMANT obtained from the previous arbitration is indeed material to the outcome of the arbitration. First, it is material to the conferral of power to the arbitral tribunal to adapt the contract [*PO2, p. 60, para. 39; MCL, Arts. 4.1, 4.3*]. Second, it is material to the justification for adaptation of the contract on the basis of hardship under 6.2.3 of MCL [*PO2, p. 60, para. 39; MCL, Art. 6.2.3(4)(b)*].

84. Therefore, by considering the materiality of the evidence and the limitation of the confidentiality, CLAIMANT asks the tribunal to exercise its discretion to interpret Art. 42 of HKIAC Rules (2013) as not to exclude the evidence that CLAIMANT submitted.

C. The Admission of Evidence Is Indispensable for The Compliance with The Principle of Fairness and Equality

85. Fairness and equality between the parties are the fundamental principle in international commercial arbitration from which the arbitral tribunal cannot derogate, otherwise arbitral award is in danger of being set aside [*DAL, Art. 18; DAL, Explanatory Notes, p. 32, para. 32*]. So when deciding any procedural matters, the arbitral tribunal shall ascertain that the decision does not violate this fundamental principle.

86. In evidentiary matters, the principle of equality and fairness is secured where "*each party must be afforded a reasonable opportunity to present his case—including his evidence—under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent*" [*Dombo v Netherland; Nathan, pp. 321-322, para. 9.116*]. Hereby, CLAIMANT submits that if the tribunal dismisses the evidence from the present arbitration, the arbitral tribunal will treat CLAIMANT unfairly and unequally (**a**). On the contrary, the admission of CLAIMANT's evidence does not cause any prejudice against RESPONDENT (**b**).

a. Dismissing CLAIMANT's Evidence Undermines Fairness and Equality Between the Parties

87. The principle of fairness and equality is closely associated with the right to submit the evidence to support the claims [*Trustees of Rotoaira Forest v Attorney-Genera; DAL, Digest Case, p. 98, para. 6*]. Thus the dismissal of the evidence does merely cause CLAIMANT to suffer the violation of its right to be heard (**i**), but also its right to be treated equally (**ii**).

i. Dismissing the Evidence Undermines Fairness Because CLAIMANT Is Unable to Present Its Case

88. Each party bears the burden to provide evidences to support their allegations [*DAL, Art. 23(1); HKIAC Rules, Art. 22(1)*]. As the supplementation, Art. 18 of DAL and 13 of HKIAC Rules further oblige the arbitral tribunal to grant the parties reasonable opportunity to present their evidences, except the situation when the evidence in question is inadmissible [*DAL, Art. 18; HKIAC Rules, Art. 13; IBA Rules, Art. 9; ICC Case No. 5082; Nathan, p. 325, para. 9.127*].

89. As above-proven, the evidence proffered by CLAIMANT is admissible because it does not fall within any exceptions justifying the exclusion. First, the ground to justify the exclusion of the unlawfully obtained evidence is the bad faith of the parties who submits the evidence [*EDF Services Ltd v Romania; Nathan, p. 321, para. 9.118; IBA Rules, Arts. 9(2)(g), 9(7); IBA Rules Commentary, p. 25; Aceris Law*]. On the contrary, CLAIMANT was not in bad faith in obtaining the evidence because it did not take part in committing the unlawful act [*PO2, paras. 40-41*]. And secondly, in light of the confidentiality veil, in order to be able to justify the exclusion of the evidence, the confidentiality ground must be compelling [*IBA Rules, Art. 9(2)(e)*]. However, the confidentiality ground affixed to the evidence in this case was not compelling because RESPONDENT does not have any clear intention to keep those materials confidential [*PO2, pp. 60-61, paras. 41, 42*].

90. Given that the evidence does not fall within any of the exceptions provided for the justification for exclusion, excluding the evidence from the arbitration is the clear violation of CLAIMANT's right to present its case. And eventually, it undermines the fairness between the parties.

ii. Dismissing the Evidence Undermines the Equality Between the Parties

91. In light of evidentiary matters, the heart of equal treatment between the parties is "*the application of the same standard to the parties, not the same result*" [*ICC Case No. 5082; Nathan, p. 325, para. 9.127*]. CLAIMANT submits that if the arbitral tribunal dismisses the evidence, it violates the equality between the parties.

92. According to Art. 42 of HKIAC Rules (2013), RESPONDENT has the right to use those the material documents in the previous arbitration against any third party [*HKIAC Rules 2013*, Art. 42; *Ali Shipping v Shipyard; Noussia, p. 89; Lincoln v. Sun Life; Noussia, p. 112*]. If the situation really fits, RESPONDENT may use those documents as the evidence to supports its defense against CLAIMANT as well.

93. Dismissal of the evidence results in the violation of "*application of the same standard to the parties*" because RESPONDENT can use a particular document as its evidence, but CLAIMANT is not allowed to do the same, even though the evidence proffered by CLAIMANT is admissible [[*ICC Case No. 5082; Nathan, p. 325, para. 9.127*].

b. Admitting the Evidence Does Not Undermine the Fairness And Equality Against RESPONDENT Because There Is No Prejudice Against RESPONDENT

94. Another matter that the arbitral tribunal might concern is whether the admission of CLAIMANT's evidence cause any prejudice against RESPONDENT [*Dombo v Netherland; Nathan, pp. 321-322, para. 9.116*]. In light of the fact of this case, the arbitral tribunal may consider two factors.

95. Firstly, the manner through which the evidence is obtained [*Methanex v USA; EDF Services Ltd v Romania*]. Indeed, procedural bad faith causes prejudice against the other parties [*Translex, Principle No. I.1.1*]. But it is not the case in the present arbitration because CLAIMANT was in good faith in obtaining the evidence [*PO2, pp. 60-61, para. 41*].

96. Secondly, the confidentiality veil of the evidence itself [*IBA Rules, Art. 9(2)(e)*]. Regarding the confidentiality veil, the evidence proffered in breach of confidentiality agreement does not render the other parties in bad faith [*Nathan, 322, para. 9.119*]. Moreover, the confidentiality affixed to the evidence does not fall within any compelling or prohibited grounds under IBA Rules which justify the exclusion of the evidence.

97. Therefore, the admission of the evidence should be confirmed because doing so does not prejudice RESPONDENT.

III. CLAIMANT Is Entitled to The Payment of At Least 1,250,000 USD Under Clause 12 of The Contract

98. Clause 12 of the Frozen Semen Sale Agreement provides that "*Seller shall not be responsible for […] for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*". Later, dispute occurred between the parties as the new 30% tariff was imposed by the government of Equatoriana. That imposition has made the last shipment of 50 doses to be more expensive. As there are only two parties in this contract and as clearly indicated, Seller is not the one who responsible for this event, therefore, Buyer.

99. Tariff imposition is hardship Under Clause 12 of the *Frozen Semen Sales Agreement* **(A)**; Clause 12 should be interpreted to include tariff imposition **(B)**; Parties intended incoterm DDP to cover only transportation fee **(C)**; therefore, CLAIMANT is entitled to the payment of at least US$ 1,250,000 **(D)**.

A. Tariff Imposition Is Hardship Under Clause 12 of the *Frozen Semen Sales Agreement*

100. Art. 8 CISG and UNIDROIT 4.1 provide rules on how to interpret statements, including the term of the contract [*Huber/Mullis, p.12; Ferrari/Flechtner/Brand, p.175;* Schlechtriem/Schwenzer*, Art. 8 para. 3; Textile Machine Case*]. First, such term shall be interpreted according to his intent where the other party knew or could not have been unaware what that intent was [*CISG, Art. 8(1); UNIDROIT Principle, Art.4.1(1)*]. In case it is not applicable, the standard of interpretation is the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances [*Huber/Mullis, p. 12-13; Ferrari/Flechtner/Brand, p. 181; CISG Digest, Art. 8*].

101. Here, Parties did not have common intention on the inclusion of a narrow hardship reference in Clause 12 **(a)**; and, a reasonable person in CLAIMANT's position would understand tariff imposition to be included under Clause 12 **(b)**.

a. Parties Did Not Have Common Intention on the Inclusion of a Narrow Hardship Reference in Clause 12

102. Art. 8(1) requires an inquiry into a party's subjective intent where the other party knew or could not have been unaware what that intent was [*Ceramic tiles case; Footwear Case, Tantalum*

Carbide Case; Marzipan Case; Roll of Rubber Case; Sunprojuice Case; Building materials case]. Parties cannot claim that their undeclared intention should prevail if the term of the contract are clear, and so to be given a literal meaning [*Machine for Repair of Bricks Case*]. Moreover, it also important that the statement or conduct was clear and easily understood by the other party [*Magnesium Case*].

103. The current Clause 12 was introduced by RESPONDENT, as it said the suggested ICC-hardship clause was too broad, thus RESPONDENT suggested the wording which was finally added to the force majeure clause in clause 12 [*PO2, p.56, para. 12*]. Because RESPONDENT did not tell CLAIMANT that it is a narrow term, only health and safety requirement is considered as hardship under Clause 12, CLAIMANT did not know or could not have been unaware what RESPONDENT's intention was.

104. Furthermore, Clause 12 is used with the term "comparable unforeseen events" [*Exhibit C5, Cl.12, p.14*]. It is clear and should be given a literal meaning that there is a hardship as long as there are any comparable unforeseen events to health and safety requirement making the contract more onerous.

b. A Reasonable Person in CLAIMANT's Position Would Understand Tariff Imposition to be Included Under Clause 12

105. In case the tribunal considers that the subjective interpretation is not applicable, the objective interpretation is still satisfied. The objective interpretation allows the courts to determine "a presumptive" or "normative" intent [*Fruit and Vegetables Case; Chemical Products Case; Textile Machine Case*]. Statements and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstance [*StencilMaster Case; Electro-erosion Machine Case; Health Care Products Case; Glass Bottles Case*].

106. Here, the series of events leading to the conclusion of Clause 12 indicates that the Parties' intention was to include tariff imposition. CLAIMANT, with its past experiences with the changes in customs health requirements, told RESPONDENT that it was not willing to any further risk associated with the in changes in customs regulation or import restrictions, thus insisted to have a hardship clause to address such events mentioned earlier [*Exhibit C4, p.12; Exhibit C8, p.17*]. CLAIMANT suggested the ICC Hardship Clause; however, it was considered to be too broad for RESPONDENT, thus, RESPONDENT suggested the narrow wording which was finally added to the force majeure clause in clause 12 in according with CLAIMANT's past experiences, which is the in changes in customs regulation or import

restrictions [*PO2, p.56, para.12; Exhibit C4, p.12; Exhibit R2, p.34*]. Too, the new tariff imposed by the Government of Equatoriania is both a customs regulation and import restrictions.

107. Furthermore, a reasonable person in Mr. John Ferguson's position would expected or understood Clause 12 to include tariff imposition. The wording of "comparable unforeseen events [to additional health and safety requirement] making the contract more onerous" in Clause 12 was introduced by RESPONDENT during the negotiation between Mr. John Ferguson and Mr. Julian Krone. However, Mr. John Ferguson, the successor from Mr. Julie Napravnik, was just a normal employee and has never been involved in any international contracting [*Exhibit C8, p.17*]. Those wording is clear enough to Mr. John Ferguson as well as any reasonable persons in his position that it does not indicate a narrow reference like Mr. Julie Napranvik mentioned in his witness statement [*Exhibit C8, p.17*]. Yet, it is a broad reference; as long as there is a comparable unforeseen event to additional health and safety requirement making the contract more onerous, CLAIMANT shall not be responsible, including tariff imposition [*Exhibit C5, p.14*].

108. Accordingly, Parties did not have a common intention on the inclusion of a narrow hardship reference in Clause 12 and a reasonable person in CLAIMANT's position would understand tariff imposition to be included under Clause 12. Therefore, tariff imposition is hardship under Clause 12 of the *Frozen Semen Sales Agreement*.

B. Under the UNIDROIT Principle, Clause 12 Should be Interpreted to Include Tariff Imposition

109. The UNIDROIT Principle, similar to CISG, requires the interpretation to be made first with the subjective intention, then objective intention [*UNIDRIOT Principle, Art. 4(1)*]. However, the UNIDROIT Principle has set two other references to contract interpretation [*UNIDROIT Principle, Art. 4.4 & 4.6*]:

a. the interpretation of the contract as a whole; and

b. the interpretation of the contract based on *contra proferentem* rule

110. First, the series of clauses contained in the contract indicates that parties' intention was meant for CLAIMANT to bear any risks, which includes Clause 12 as well [*Exhibit C5; p.13-14*]. The guarantees or warranties of fertilizing capacity, payment, foal guarantee, frozen semen registry requirements, tanks rental and handling fees, inspection, and insurance are all superseded for RESPONDENT to bear the risk [*Exhibit C5; p.14*].

111. Second, *contra proferentem* rule applies when there an unclear term [*UNIDROIT Principle, Art. 4.6, Comment*]. If the contract terms supplied by one party are unclear, that terms shall be interpreted against that party [*UNIDROIT Principle, Art. 4.6, Comment*]. Clause 12 was introduced by RESPONDENT, and it claims it is a narrow clause excluding the event of tariff imposition, therefore, based on the *contra proferentem* rule, the clause should be interpreted to include the event of tariff imposition.

112. Thus, according the UNIDROIT Principle, Clause 12 shall consider as a broad clause which also include the event of tariff imposition, too.

C. Parties Intended Incoterm DDP to Exclude Tariff Imposition

113. Parties do not dispute only Clause 12, but also the delivery term of DDP, too. Similar to earlier interpretation, regard must be taken to the parties' intention, whether the term DDP is meant for whom to bear the cost of tariff imposition, as long as the other party was aware or could not have been unaware of that intent [*CISG, Art. 8*]. Two factors are indicative;

a. the negotiations and conduct of parties prior to contract formation.
b. the subsequent conduct of the parties

114. To being with, DDP or Delivered Duty Paid means that the seller delivers the goods to the place of disposal of the buyer. The seller bears all the costs and risks involved in bringing the goods to the place of destination including all customs formalities. However, that does not apply in the case of parties agreed otherwise [*Minett, DDP*]. A modification or amendment of the Incoterm will imply a certain allocation of the costs and insurance [*Bensafi/Mack/Nassef/Simonnet, para. 3.1*]. That happens when parties indicate a provision that contradicts to the aspect of the chosen Incoterm. That contradiction is usually intended [*Bensafi/Mack/Nassef/Simonnet, para. 3.1*]. Therefore, the contradicting provisions should prevail [*Bensafi/Mack/Nassef/Simonnet, para. 3.1*]. In addition, according to professor Perillo, as to the nature of hardship, the mere fact that the contract contains a fixed price does not allocate that risk [*Arroyo, p.18; Perillo, p.24*].

115. In the case at hand, the use of DDP in Clause 8 of *Frozen Semen Sales Agreement* was not intended for CLAIMANT to bear the risks associated with tariff imposition, but only the transportation fee. After CLAIMANT sent its offer of 100 doses of frozen semen to RESPONDENT, RESPONDENT sent a counter-offer back to CLAIMANT seeking for the use of DDP [*Exhibit C3, p. 12*]. CLAIMANT, then, because of its past experience with the health and safety requirement, made clear to RESPONDENT that it would not liable with any risk

associated with changes in customs regulation or import restrictions, which appears to include the tariff imposition as well [*Exhibit C4, p.12; Exhibit C8, p.17*]. RESPONDENT, without any further discussions on the delivery term, concluded the contract with CLAIMANT [*Exhibit C5, p.14*].

116. RESPONDENT might argue that on its counter-offer email, it has clearly mentioned export and import documentation on the basis of DDP. However, in contrary, CLAIMANT has never had a great experience as mentioned [*Exhibit C3, p.11*]. As RESPONDENT has been aware by seeing CLAIMANT's General Condition, CLAIMANT only provides EXW delivery term, and not DDP [*PO2, para.9, p.56*]. Yet, in any cases, it was rejected by the later email as CLAIMANT was not willing to take over any risk [*Exhibit C4, p.12*]. Furthermore, RESPONDENT cannot argue that the fact CLAIMANT charged RESPONDENT on DDP delivery much higher than the actual cost would also allocate the risk to CLAIMANT regarding tariff imposition [*PO2, para.8, p.56*].

117. Second, RESPONDENT is now also facing the same situation as our case with its customer [*Letter by Joseph, p.49*]. Under the same DDP delivery term, as it affected by the unforeseen tariff of 25% imposed by the president of Mediterraneo, it also claims for price adaption [*Letter by Joseph, p.49; PO2, para. 39, p.60*]. That is totally contrary to what it is arguing that under DDP delivery term, Seller shall be the one who pay the tariff.

118. Based on the above, parties intended incoterm DDP to exclude tariff imposition.

D. CLAIMANT Is Entitle to The Payment Of At Least USD 1,250,000

119. Since Clause 12 did not explicitly provide the mechanism in case of having hardship, RESPONDENT argues that CLAIMANT cannot base on Clause 12 to claim for an adaption [*Exhibit C5, Cl. 12, p.14; Res. NoA, para. 19, p.32*]. However, unlike RESPONDENT has argued, Clause 12 of the Frozen Semen Sale Agreement does provide adaption mechanism **(a)**; therefore, under Clause 12, the tribunal should adapt the contract in favor of CLAIMANT to entitle the payment of at least 1,250,000 USD **(b)**.

a. Adaptation of Price is Provided Under Clause 12 of the Agreement

120. Hardship clause is a clause which enables contracting parties to adapt the contract in accordance to the changed circumstances [*Zaccaria, p.149; Rimke, p.227*]. The formation of the clause varies from one contract to another because it is essential to adapt it to the particular sector and the type of performance specified [*Zaccaria, p.150*]. Generally, the contracting parties specify the circumstances governing the operation of the clause and, in

the second part, they indicate what effects such circumstances will have on the agreement [*Zaccaria, p.150*].

121. Though the clause itself does not specify the mechanism in the case of hardship accured, but it requires the parties to commit themselves to the renegotiation of the contractual conditions and/or/then to the intervention of a third party to solve the problem, such as court or arbitration, rather than seek for termination [*Zaccaria, p.150 & 156; Fucci; p.34*].

122. The award in *CMS Gas v Argentina* is of particular, the arbitral tribunal asserts its own authority to adapts based on its nature of hardship clause [*CMS Award, para. 246; Fredrick; p.34*]. Similar to *Gaz de Bordeaux* case, "*since the parties have as yet been unable to reach an agreement through the process of contract renegotiation, compensation is to be fixed by a judge*" [*CMS Award*; *Gaz de Bordeaux case; Fucci; p.34*].

123. Though Clause 12 hardship clause did not explicitly provide any mechanisms, yet, like other hardship in its same kind, it does provide mechanisms [*Exhibit C5, Cl.12, p.14*]. In case hardship happens, parties shall first negotiate with each other. Moreover, arbitration shall be the one to adapt the contract if parties cannot reach such agreement. Since, RESPONDENT claims that no such adaptation was reached during the negotiation after the hardship happened, the arbitration shall be the one who adapt [*Res. NoA, para. 10, p.30*].

b. Under Clause 12, The Tribunal Should Adapt the Contract in Favor of CLAIMANT to Entitle the Payment Of At Least USD 1,250,000

124. Despite hardship clause provides adaption mechanism is to restore the original balance of the agreement, the need to preserve an economic balance among the reciprocal performance requirements, equity and good faith in case of having supervening circumstances [*Zaccaria, p. 155 & 161*].

125. The International Chamber of Commerce held the reciprocal performances are founded on a profit balance and that any subversion of this balance should lead to revision of the contract [*ICC Award No 2291*]. Thus, '*in most international contracts, the price is established on the basis of the circumstances existing when the agreement was reached and it will be revised according to the different events that occurred during the performance of the contract*' [*ICC Award No 2291; Zaccaria, p.161*].

126. CLAIMANT paid the 30% in tariff replying that it would later get the payment [*Exhibit C7, p.18*]. The tariff imposed by the government of Equatoriana has made the shipment 30% more expensive, destroys CLAIMANT's profit margin of 5%, and resulting in considerable hardship if it would not get the payment [*Exhibit C8, p.17; PO2, para. 31, p.59*]. Therefore,

the arbitral tribunal should adapt for CLAIMANT to entitle the payment of at least 25% or 1,250,000 USD.

IV. CLAIMANT Is Entitled to The Payment of USD 1,250,000 And Additional Amount of USD 300,000 Resulting from RESPONDENT's Breach of Contract

127. Since Clause 12 is a hardship clause, RESPONDENT claimed that parties have already agreed to derogate Art. 79 of the CISG on exemptions [*Res. NoA, p.32, para. 20*]. Thus, alleging that CLAIMANT cannot reply on Art. 79 of the CISG claiming for the price adaption and is not entitled to any payments. However, that is completely false since based on Art. 6 CISG, parties did not agree to derogate Art. 79 CISG **(A)**, pursuant to Art. 7(2) CISG, tariff imposition is an impediment **(B)**, RESPONDENT Breached the Duty to Renegotiation and Agreement **(C)**. Furthermore, CLAIMANT can entitle to the additional amount of 300,000 USD resulting from RESPONDENT's breach of contract **(C)**.

A. Pursuant to Art. 6 CISG, Parties Did Not Agree to Derogate Art. 79 CISG

128. Art. 6 CISG allows the parties to exclude the applicability of the convention or derogate from its provisions. Thus, the convention or such provisions will no longer applicable for the tribunal to consider. However, to do so, a clear, unequivocal and affirmative agreement of the parties must be included [*CISG Digest p.33, para. 2; Printed Goods Case; Tantalum Carbide Case; Gasoline Case*]. Parties, by agreement, can derogate any provisions of the CISG, unless the derogation clause was concluded with the narrowest of exceptions [*Flechtner, p.1*].

129. Taking a look back at the drafting history, the draft Convention provided that the parties may "agree to" exclude, derogate from or vary the Convention [*Graves, p.126; Alstine, p. 148*] This language of "agree to" was excluded from Arti. 6 CISG, because the drafters did not want to preclude implied exclusion [*Graves, p.126; Convention Incorporation Report, para 35, p.123*].

130. However, if the tribunal finds that such provisions can be impliedly derogated, in our case, there was still no implied agreement between the parties. The first and probably the most obvious indication of implied agreement is when there is a contractual clause or negotiations regarding a particular matter which contradict to the convention [*CISG Digest p.34, para. 16; ICC arbitral No. 11333; Beijing Light Automobile Co. v. Connell*].

131. *In casu*, none of the terms in Clause 12 clearly, unequivocally and affirmatively stated that Art. 79 CISG would be derogated, nor applicable [*Exhibit C5, para. 12*]. The clause was

concluded with the unnarrowed events "*caused by…comparable unforeseen events making the contract more onerous*", which left room for other possible events.

132. Furthermore, CLAIMANT has never agreed on or made any statements during the negotiation stages which contradicts Art. 79 of the CISG. None of the events addressed in Clause 12 are in contradiction with the CISG, instead they are in line with Art. 79 CISG. Missed flights, weather delays, failure of third party service, additional health and safety requirements or comparable events are all unforeseeable, uncontrollable, and unavoidable or incapable of being overcome [*Tomato Concentrate Case; Powdered Milk Case*].

133. The fact that CLAIMANT emailed to RESPONDENT on 31 March 2017 that it was not willing to take over further risks associated with such in the delivery terms does not contradict to Art. 79 CISG [*Exhibit C4, p. 12*].

134. On 12 April 2017, representatives from both CLAIMANT and RESPONDENT had a meeting [*Exhibit C4, p.12*]. CLAIMANT told RESPONDENT that it was important to have a mechanism which would ensure an adaption of the contract for unlikely events [*Exhibit C8, p.17*]. Thus, CLAIMANT suggested the ICC hardship clause, irrespective of the fact that from a legal point of view that was "*not necessary*" [*Exhibit C4, p.12; Exhibit C8, p.17*]. None of those negotiations are in contradiction with Art. 79 CISG because the ICC hardship cause was designed based on Art. 79 CISG [*ICC Clause, p.11*]. It was "*not necessary*" because the clause is already in line with Art. 79 CISG, and it will still be governed by Art. 79 CISG. Moreover, RESPONDENT noted that the ICC hardship clause suggested by CLAIMANT was too broad [*Exhibit R3, p. 35*]. However, such negotiations changing from ICC hardship clause to the existing hardship does not make any contradictions to Art. 79 CISG.

135. In light of the above, the parties did not agree to make any derogations to Art. 79 CISG because the existing clause was not concluded with the narrowest of exceptions nor the existing clause and negotiations between both parties contradict with Art. 79 of the CISG.

B. Pursuant to Art. 7(2) CISG, Tariff Imposition is an Impediment

136. Art. 79 CISG uses the term "impediment", however, it does not specifically define it. Yet, hardship is considered as impediment within the scope of art. 79 **(a)**; and tariff imposition is considered as hardship **(b)**.

a. Hardship Is Considered as Impediment within the scope of Art. 79

137. When the court or arbitral tribunal is faced with an issue of the term in the convention, based on Art. 7(2) CISG, it should first be resolved within the text of Convention, by

applying the general principles on which the CISG is based, and only in the absence of such principles can the court or arbitral tribunal resort to rules of private international law [*CISG, Art. 7(2)*].

138. The same question has been asked in *Scafom Case***.** The court structured an argument that based on the general principles of the CISG, especially the duty of good faith, and held that hardship falls within the scope of "impediment" under Art. 79 [*Scafom Case; DiMatteo, p.283*].

139. This interpretation has also been supported by many scholars, as it should be done in a broader way, in line with the CISG AC Opinion No.7, the term impediment includes "changes in circumstances" within the meaning of "impediment" and economic circumstances causing performance to be excessively onerous should also be included [*Kuster/Anderson, p.4; CISG AC-Opinion No. 7, para. 31; Lookofsky, p, 141; Rimke, p. 214*]. Owning to the fact that the use of the word "impediment" as a *force majeure* is unreasonable therefore "impediment" also includes hardship within its meaning [*Kuster/Anderson, p.4*].

b. Tariff Imposition Is Considered as Hardship

140. Hardship is an event of change in circumstances which makes performance of contract excessively onerous is beyond the control of the disadvantaged party and could not have been taken into account at the time of the conclusion of contract and whose consequences could not have been avoided [*CISG AC-Opinion No. 7, para. 3.1*]. Events such as economic catastrophes are usually referred to as hardship situations which change the balance or equilibrium of the parties' relationship [*Brunner, p. 391, Fucci, p.75*].

141. Any party who wants to claim hardship under Art. 79 CISG must prove that the situation of changed economic circumstances is a hardship situation. Scholars have often mentioned a "limit of sacrifice" or "excessively onerous" beyond which the disadvantaged party should not be any more expected to perform the contract or events fundamentally alters the equilibrium of the contract [*Fucci, p. 22; Schwenzer, p. 714; Schlechtriem/Schwenzer, Art. 79, p. 824; Chinese Goods Case*]. Based on the above, four criteria indicate hardship;

a. events which fundamentally alter the equilibrium of the contract;

b. beyond control of the disadvantaged party;

c. could not have been taken into account at the time of the conclusion of contract; and

d. could not have been avoided

142. In the present case, the event of 30% tariff imposition fulfills all the four criteria.

143. First, the event of tariff imposition fundamentally alters the equilibrium of the contract. The alternation in the equilibrium of the contract, generally, may happen in two ways; increase in cost of performance or decrease in value of the performance received by the other party [*UNIDROIT Principle, Art. 6.2.2, Comment 2(a), p. 214*]. That includes the event of the new introduction of new regulations requiring more expensive production procedures [*UNIDROIT Principle, Art. 6.2.2, Comment 2, p. 214; Brunner, p.391*].

144. The Supreme Court of Lithuania has ruled that the change in cost of performance of 30% to 40% due to the changed of circumstances is deemed as a fundamental alternation the equilibrium of the contract [*3K-3-265/2011*]. Similarly, an *ad hoc* arbitration also rendered an award that the alternation in cost of performance of about 35% is justified as hardship [*Icori Estero S.p.A v. Kuwait Foreign Trading Contracting & Investment Co; Fucci, p.129*]. Therefore, 30% tariff imposed by the government of Equatoriana fundamentally alters the equilibrium of the contract.

145. Second, the event of tariff imposition is beyond CLAIMANT's control. Where governmental regulations or the actions of governmental officials prevented a party's performance, it is considered as an impediment beyond the control of a party [*Butter Case*]. Simply put, the difficulties of performance by the debtor may not be the result of its own act or negligence [*Dawwas, p.11*]. Here, the tariff was imposed by the state of Equatoriana [*Exhibit C6, p.15*]. Meanwhile, CLAIMANT is just a commercial company registered in Mediterraneo [*NoA, p.4, para.1*]. It is impossible for a normally company to have power to influence another country's policy. Therefore, the event of tariff imposition by the government of Equatoriana is beyond the control of CLAIMANT.

146. Third, the event of tariff imposition could not reasonable have been taken into account by parties at the time of the conclusion of the contract. The events usually appear in economic catastrophes, wars, political tensions, or change of circumstances which the parties have not reasonably taken into account when concluding the contract [*Brunner, p.391*].

147. Tariff imposition happened due to the political tension between the state of Mediterraneo and Equatoriana. That 30 percent tariff imposition on animal products was a retaliation to 25% tariff imposed by the government of Mediterraneo [*NoA, p.6, para.9*]. Mediterraneo's newly elected president announced in his election program in January 2017, that a certain approach would be imposed to international trade [*Exhibit C6, p.15*]. However, tariff imposition was not mentioned in neither any strategy papers nor the election manifesto

[*NoA, p.6, para.9*]. This approach has also never been used in Mediterraneo [*PO2, p.58, para.23*].

148. Moreover, both CLAIMANT and RESPONDENT did not expect that frozen semen was also covered in animal products, and was really astonished by it [*NoA, para.11, p.6*]. CLAIMANT had been informed of it right before the final delivery of 50 doses by the customs officials of Equatoriana [*Exhibit C8, p.17*]. RESPONDENT, who conducts business in Equatoriana, also just found out when it was told by CLAIMANT. RESPONDENT even contacted the ministry to confirm it afterward [*Exhibit R4, p.36*].

149. Finally, CLAIMANT cannot overcome the event of tariff imposition. CLAIMANT has been put in difficult financial situation for the past two years and only managed to stay in business through extensive restructuring measures and worker layoff [*Exhibit C8,*]. Furthermore, the high interest payment of loans and costs of restructuring measures have taken a heavy toll on CLAIMANT's financial capability since 2014 [*PO2, para.29, p.59*]. Consequently, it is currently impossible for CLAIMANT to shoulder the additional 30% tariff.

150. On top of that, CLAIMANT could not reasonably be expected to overcome the consequence of bearing the tariff. With the additional revenues resulting from the sale, CLAIMANT which has been operating at a loss for several years would be generating a small profit for the first time since 2014 [*PO2, p.57, para. 15*]. This profit is necessary to ensure the automatic prolongation of the two main credit lines [*PO-2, p.59, para. 29*].

151. Bearing the cost of the 30% tariff means not only zero profit gain but also more loss on the CLAIMANT's side. This would lead to extra and unnecessary burden detrimental to CLAIMANT's currently dire financial situation.

152. Accordingly, since hardship falls within the word "impediment" under Art. 79 CISG, and tariff imposition is a hardship, therefore, tariff imposition is an impediment under Art. 79 CISG.

C. RESPONDENT Breached the Duty to Renegotiation and Agreement

153. The Belgian Supreme Court in *Scafom case* also held that, Art. 79 does not provide remedies in case of hardship, thus there is an internal gap in which must resort to Art. 7(2) CISG, which necessitates the use of private international law, the UNIDROIT Principle in particular [*Scafom Case*].

154. Art. 6.2.3(1) of the UNIDROIT Principle provides that, disadvantaged parties are entitled to demand renegotiation of the original terms of the contract with a view to adapting them to the changed circumstances [*UNIDROIT Principle, Art. 6.2.3(1); UNIDROIT Principle, Art. 6.2.3, Comment 1*]. For that reason, either one of these two scenarios must result in our case; RESPONDENT breached the duty to renegotiation **(a)**, or RESPONDENT breached the agreement resulted from the renegotiation **(b)**.

a. RESPONDENT Breached the Duty to Renegotiation

155. The duty to renegotiate is founded under the principle of good faith [*Veneziano, p.149*]. This not an obligation to reach any agreement but "*both parties must conduct the renegotiations in a constructive manner*", "*by refraining from any form of obstruction and by providing all the necessary information*", taking into account the duty of cooperation [*UNIDROIT Principle, Art. 5.1.3; Brunner, p. 485; Veneziano, p.148; Dawwas, p.16*]. Failure to conduct the renegotiations, the court or arbitral tribunal should give rise for damages in favor of the other party [*Veneziano, p.148; Dawwas, p.16; Brunner, p.483*]. When adapting the contract, the court may both increase or reduce the price [*UNIDROIT Principle, Art. 6.2.3, comment 7*]. On the other hand, if the creditor agrees to renegotiate, then he must negotiate in good faith and not break off negotiations in bad faith [*Lando, p.467; Dawwas, p.16; UNIDROIT Principle, Art. 2.1.15*].

156. Right after CLAIMANT had information regarding the new tariff imposed by the government of Equatoriana, CLAIMANT immediately contacted RESPONDENT [*Exhibit C7, p.16*]. Mr. Shoemaker, the person responsible for RESPONDENT's racehorse breeding program, responded to CLAIMANT that he had not been involved in the negotiations or the Sales Agreement and could not directly authorize any additional payment but saw our problem [*Exhibit C8, p. 18*]. He told CLAIMANT that he was certain that a solution would be found through negotiation given the good relationship between the parties and their interest in further business [*Exhibit C8, p. 18*].

157. However, that was just an attempt in bad faith to break off negotiation. CLAIMANT delivered the doses to RESPONDENT, because RESPONDENT had urged CLAIMANT to deliver the goods urgently because it needed those doses and promised CLAIMANT that further agreement on the price would be found [Exhibit C8, p.18]. Yet, contrary to what RESPONDENT told CLAIMANT, there were not any further negotiation between the parties [*Exhibit C8, p.18*]. The meeting on 12 February 2017 was not negotiation as after CLAIMANT's discovery of RESPONDENT'S breach of the resale prohibition, RESPONDENT halted the negotiation [*Exhibit C8, p.18*]. That is because RESPONDENT, from the beginning,

knew that CLAIMANT would not deliver if RESPONDENT were to reject the request outright, therefore, just made a promise and later on reneged on their words [*Exhibit R4, p.36*].

158. Hence, RESPONDENT breached the duty of renegotiation since it negotiated in bad faith and later, broke off the negotiation.

b. RESPONDENT Breached the Agreement Resulted from the Renegotiation

159. A contract may be modified by merely the agreement of the parties [*CISG, Art. 29; UNIDROIT Principle, Art. 3.2*]. No form requirements of agreement need be met [*Digest, Art. 29, para.6; Shoes Case; Dividing Wall Panels Case; Used Railroad Rails Case*]. To consider whether there is an agreement between the parties, regard must be taken to the formation of contract [*CISG Digest, Art. 29, para.4; Rare Wood Case; Corn Case; Summer Cloth Collection Case*]. There is a valid agreement when there is a valid offer and a valid acceptance [*CISG, Art. 23; Schlechtriem/Butler, para.69, p.65*]. However, since both parties have already agreed that there was a valid offer from CLAIMANT, only a valid acceptance by RESPONDENT is needed to address [*NoA, para.11-12, p.6; Res. NoA, para.10, p.30*].

160. A statement made by or other conduct of the offeree indicating assent to a modification is an acceptance [*CISG, Art. 18; Lambskin Coat Case; Terry Cloth Case; Plastic Chips Case*]. Acceptance may be made by an oral or written statement or by conduct [*CISG Digest, Art. 18, para.6; Jute Case; Tent Hall Structures Case; Sport Bar Assembly System Case*]. Buyer's acceptance of goods is considered as acceptance [*CISG Digest, Art. 18, para.6; Doors Case*].

161. Acts of agents without authority or exceeding its authority, may bind the principal and the third party to each other [*UNIDROIT Principle, Art. 2.2.4, comment 2*]. That happens when the act of the principal leads the third party reasonably to believe that the agent has authority to act on its behalf [*UNIDROIT Principle, Art. 2.2.4, comment 2*]. In addition, the principle cannot invoke against the third party the lack of authority of the agent and is therefore bound the act [*UNIDROIT Principle, Art. 2.2.4, comment 2*]. The third party only has to show that it was reasonable for it to believe that the person appears to represent the organization [*UNIDROIT Principle, Art. 2.2.4, comment 2*].

162. Mr. Shoemaker urged CLAIMANT to authorize the shipment as planned because it urgently needed it. He even emphasized their interest in a long-term relationship with CLAIMANT and told CLAIMANT about their plans to buy more doses from CLAIMANT [Exhibit C8, p.18].

163. Contrary to what RESPONDENT has claimed, Mr. Shoemaker has never clearly indicated that he could not authorize the adaptation of price. He only mentioned to CLAIMANT that he could not "directly" authorize the additional payment [*Exhibit C8, p.18*]. It appeared to CLAIMANT that he, even could not directly authorize, could indirectly authorize the additional payment. Based on that, CLAIMANT received the impression that RESPONDENT accepted its position of bearing the tariff additional costs due to the tariffs. Thus, CLAIMANT authorized delivery.

164. However, after the final shipment had been made, RESPONDENT breached that agreement. RESPONDENT halted the negotiations and refused to pay any additional amount for the tariff.

165. Therefore, in either one of these two scenarios must result in our case; RESPONDENT breached the duty to renegotiation or RESPONDENT breached the agreement resulted from the renegotiation, CLAIMANT is entitled to the additional amount of at least 1,250,000.

D. CLAIMANT Can Entitle to the Additional Amount of 300,000 USD Resulted from RESPONDENT's Breaching of Contract

166. Whether parties meant resale prohibition to be included in the contract or not, regard should be taken to parties' common intention, whether the other knew or could not have been unaware of that intention [*CISG, Art. 8(1); Used Rotary Printing Textile Machine Case*].

167. Under the CISG, strict liability does not require any fault of the breaching party, Sellers can claim damage if the Buyer breached the contract [*Art. 61(1)(b); Rostila, p.44*]. Based on Art. 74 of the CISG, not only can the injured party can claim damages from failure to perform but also disgorgement of damages as long as [*Schlechtriem/Schwenzer, Art. 74, p.1000-1002; CISG AC-Opinion No. 6, para. 1 & 9*].

168. In the email of 24 March 2017, CLAIMANT made clear the resale to third parties must require an "express written consent" from CLAIMANT [*PO2, para. 16, p.57*]. No objection has ever been made by RESPONDENT. Therefore, it is impossible that RESPONDENT did not know or could not have been aware of CLAIMANT's intention on resale prohibition.

169. As a result, RESPONDENT breached it. RESPONDENT resold it at the price of 120,000 USD per dose, and RESPONDENT has done 15 doses already [*PO2, para.20, p.57*]. With the profit margin of 20,000 USD per dose, RESPONDENT has made 300,000 USD from breaching the contract. Therefore, CLAIMANT can also entitle to the addition payment of 300,000 USD.

PRAYER FOR RELIEF

For the foregoing reasons, the Claimant respectfully requests the Tribunal to find that:

1. The arbitral tribunal has the power to adapt the contract
2. CLAIMANT is entitled use the arbitral award obtained from another arbitration to support its claims in the present arbitration
3. CLAIMANT Is Entitled to The Payment of US$1,250,000 And Other Amounts Resulting from An Adaptation of The Price Under Clause 12 of The Contract
4. CLAIMANT Is Entitled to The Payment of USD 1,250,000 And Additional Amount of USD 300,000 Resulting from RESPONDENT's Breach of Contract

Respectfully signed and submitted by counsel on 7 December 2017;

Signed
CHHUON Watanak

Signed
HENG Somphospheak

Signed
LY Teng

Signed
PON Chanbormey

Signed
SAU Sakda