TWENTY-SIXTH ANNUAL WILLEM C.
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

SEINAN
GAKUIN UNIVERSITY

# MEMORANDUM FOR CLAIMANT

**ON BEHALF OF**

Phar Lap Allevamento
Rue Frankel 1
Capital City, Mediterraneo
CLAIMANT

**AGAINST**

Black Beauty Equestrian
2 Seabiscuit Drive
Oceanside, Equatoriana
RESPONDENT


**SEINAN GAKUIN UNIVERSITY**

Fusamura Yukiyo , Hayashi Momoko , Imamura Mari , Inoue Yusaku , Matsubara Yujiro
Matsuda Saya , Matsumoto Ayaka , Matsumura Merumo , Mine Shiori
Morimoto Yuka , Morishita Kureha , Murakami Sato , Nakahara Moe , Nakahara Moe
Nakahashi Kyo , Nishida Mizuki , Noritomi Reiran , Okura Koyuki
Shibasaki Kazuma , Shinozaki Aya , Takeuchi Risa , Teramachi Kazuma
Yasukawa Yuri , Yokoyama Kaito , Yotsugi Yusuke

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# TABLE OF ABBREVIATION

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|---|---|
| §/§§ | Section/sections |

| | |
|---|---|
| ¶ | Paragraph |
| & | And |
| CLAIMANT. | CLAIMANT |
| Res. | RESPONDENT |
| Art.,Arts. | Article/Articles |
| No. | Number |
| p. | Page |
| PO | Procedural Order |
| EX. | Exhibit |
| Mr/Ms | Mister/Miss |
| CEO | Chief Executive Officer |
| Record | The problem |
| Transparency Rules of UNCITRAL | The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration |
| USD | United States Dollar |
| DDP | Delivered Duty Paid |
| VAT | Value Added Tax |
| BBE | Black Beauty Equestrian |
| LAAA | The Law applicable to the arbitration agreement |

# TABLE OF AUTHORITY

## Rules

| | |
|---|---|
| HKIAC Rules | 2018 HKIAC Administered Arbitration Rules |
| CISG | Convention on Contracts for the international Sale of Goods |
| Transparency Rules of | The UNCITRAL Rules on Transparency in Treaty-based Investor-State |

| | | |
|---|---|---|
| UNCITRAL | Arbitration | |
| UNIDROIT | UNIDROIT Principles 2016 | |

## Scholarly Works and Articles

| | | |
|---|---|---|
| Schwenzer | COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) | 170, 171, 192 222, 230, 234 |
| Nigel | Redfern and Hunter on International arbitration Student Version | 52, 61, 64 |
| CECK | UN Convention on Contracts for the International Sale of Goods | 49 |
| Pilkov | Evidence in International Arbitration: Criteria for Admission and Evaluation. Arbitration. – 2014. – Vol. 80. – Issue 2 2014 | 80, 81, 82, 83 |
| Born | International Commercial Arbitration Volume 2 | 30, 34, 40, 60, 67, 93, 111 |
| Helena ŻAKOWSKA–HENZLER | Scientific Journal WSFiP | 120 |
| LEGAL PROFESSIONAL PRIVILEGE AN OVERVIEW | LEGAL PROFESSIONAL PRIVILEGE AN OVERVIEW | 157,158 |
| Nakamura | Confidentiality obligation in international arbitration | 95 |

## Judicial Decisions

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| *BCY v BCZ [2016] SGHC 249* | *Provincial Court of Navarre,Provincial Court of Navarre,http://wwwncitralrg/clout/clout/data/esp/clout_case_547_leg-1759tml* | 38 |
| *Abram Landau Real Estate v. Benove* | *Abram Landau Real Estate v. Benove, 123 F.3d 69 (2d Cir. 1997)* | 56 |

## Arbitral Awards



## Others

# STATEMENT OF FACTS

1. **The parties** to this arbitration are **Phar Lap Allevamento** (hereafter **"CLAIMANT"**) & **Black Beauty Equestrian** (hereafter **"RESPONDENT"**)

2. CLAIMANT is a company operating stud farm in Mediterraneo covering all areas of the equestrian sports. It also provides stallions for breeding, one of the most sought-after stallions is Nijinsky Ⅲ, and offers frozen semen of its champion stallions for artificial insemination.

3. RESPONDENT is in Equatriana and famous for broodmare lines for a number of world champion show jumpers and international dressage champions. It also acquired ten mares with an excellent racehorse pedigree.

**<2017>**

4. **On 21 March,** RESPONDENT contacted CLAIMANT to ask the availability of Nijinsky Ⅲ for its breeding program. At that time, in Equatriana, the ban on artificial insemination for race horses has been temporarily lifted due to the restrictions on the transportation of living animals because of a disease.

5. **On 24 March,** CLAIMANT offered RESPONDENT 100 doses of Nijinsky Ⅲ's frozen semen in accordance with *the Mediterraneo Guideline for Semen Production and Quality Standards* in its email.

6. **On 28 March,** RESPONDENT accepted most of the terms which CLAIMANT suggested, but requested the delivery on the basis of DDP and told it could accept the application of the Law of Mediterraneo if the courts of Equatriana have jurisdiction.

7. **On 31 March,** CLAIMANT requested to increase the price by 1,000 USD per dose due to the acception of DDP and suggested to opt for arbitration in Mediterraneo if RESPONDENT cannot agree on the jurisdiction of courts of Mediterraneo.

8. **On 10 April,** RESPONDENT requested the seat of arbitration shall be Equatriana and the law of the arbitration clause shall be the law of Equatriana.

9. **On 11 April,** CLAIMANT requested the seat of arbitration shall be Danubia.

10. **On 12 April,** Two main negotiators got a car accident and they were severely injured and some issue for the contract had been remained.

11. **On 6 May,** The parties signed the finalization of the contract and made Frozen Semen Sales Agreement.

12. **On 20 May,** CLAIMANT sent the first shipment of 25 doses.

13. **On 3 October,** CLAIMANT sent the second shipment of 25 doses.

**14.** **In November,** Ian Bouckaert, newly president in Mediterraneo, announced 25% tariffs on agricultural products from Equatriana.

**15.** **On 19 December,** Equatrianian government announced imposing 30% tariffs on selected products from Mediterraneo including animal semen.

**<2018>**

**16.** **On 20 January,** the parties started negotiations regarding a price adjustment for the frozen semen due to the 30% tariffs.

**17.** **On 21 January,** Mr. Shoemaker had called CLAIMANT to ask to send the remaining frozen semen.

**18.** **On 23 January,** CLAIMANT sent the final shipment of 50 doses.

**19.** **On 12 February,** Kayla Espinoza, the CEO of RESPONDENT, did not admit CLAIMANT's additional order that request them to pay additional fee of tariffs.

**20.** **On 15 June,** Ms. Napravnik, CLAIMANT's representative, submitted the Witness Statement. And CLAIMANT mentioned that RESPONDENT breached the contract which stated to prohibit the resale the frozen semen.

**21.** **On 2 October,** CLAIMANT, in its email, mentioned that in another arbitration under the HKIAC Rules RESPONDENT had asked for an adaptation of the price for sale due to additional tariffs.

**22.** **On 3 October,** RESPONDENT insisted that CLAIMANT's former evidence was obtained by illegal means and should not be admitted in the arbitration.

**23.** **On 4 October,** the parties decided the conduct of the proceedings for the arbitration.

# SUMMARY OF ARGUMENTS

**24.** The arbitral tribunal has the jurisdiction and the power as to the adaptation of the contract based on the law of Mediterraneo. Even if Danubian law is applicable, the arbitral tribunal has the jurisdiction as to the adaptation of the contract based on the validation principle. CLAIMANT should be entitled to submit this evidence even if it purportedly is obtained through a breach of a confidentiality agreement or through an illegal hack. Firstly, CLAIMANT is not bound by the confidentiality agreement on both employment contract and an arbitration. Even if CLAIMANT is bound by the confidentiality agreement, it should be entitled to submit the evidence which has the admissibility on Art.7 of Transparency Rules of UNCITRAL. Secondly, even the

evidence purportedly obtained by the hack has the admissibility because Czus" in the clause. Therefore, CLAIMANT shall not be responsible for hardship i, the payment of the tariff. However, in the present case, CLAIMANT paid the tariff and had a one-sided burden. Based on good faith principles, RESPONDENT should bear the tariff US$ 1,500,000.

**25.** CLAIMANT is entitled to the payment of US$1,250,000 under the CISG if they were not entitled to the payment under the contract.

**26.** Even if the present case were not governed by CISG, CLAIMANT is entitled to the payment of US$1,250,000 under the UNIDROIT.

# ARGUMENT TO THE PROCEDURAL ISSUES

## Ⅰ. The arbitral tribunal has the jurisdiction and the power as to the adaptation of the contract based on the law of Mediterraneo.

### A. The law applicable to the arbitration agreement is the Arbitration law of Mediterraneo based on the law applicable to the contract.

**29.** Firstly, the law applicable to the arbitration agreement is written as LAAA.

**30.** In the present case, there is a dispute whether the arbitral tribunal has the jurisdiction and the power as to the adaptation of the contract. This issue shall be resolved by the interpretation of the arbitration clause. Thus, LAAA must be determined to interpret the wording of the arbitration clause. "Many (but not all) jurisdictions apply the same law to the interpretation of an arbitration agreement as to its formation and substance validity. " [Born p. 635]. Therefore,LAAA applies to the judgement of the validity of the arbitration clause and the interpretation of the wording of the arbitration clause.

**31.** The parties may agree on LAAA in the contract. However,if the parties did not agree on LAAA, there is an issue how to determine it.

**32.** In the present case, the parties did not provide LAAA in the contract [*EX. C.5 p. 14*]. It means that the parties did not agree on LAAA. Therefore, there is not LAAA to judge the validity of the arbitration clause and the interpretation of the wording of the arbitration clause. Therefore,in the first place,it is an issue whether the arbitration can be acted under HKIAC Rules. However, the parties agreed on the application of HKIAC Rules 2018 in the telephone conference of 4 October 2018 [*PO.1 p.51 ¶. Ⅱ*] and the parties do not object to the tribunal's jurisdiction in general [*PO.2 p.61 ¶.48*]. Therefore, this arbitration is conducted in accordance with HKIAC Rules.

**33.** Thereby, HKIAC Rules 2018 should be applicable to decide on LAAA. However, HKIAC Rules 2018 does not have a provision for the decision of LAAA. Therefore, based on the Lex Fori the law of Danubia is applicable to the issue. Danubia adopts the UNCITRAL model law. However, the UNCITRAL model law also does not

provide the decision of LAAA. Therefore, the decision should be depend on the interpretation.

**34.** "Assuming that the parties have not otherwise agreed, possible options for the law governing construction of an arbitration clause include:(a) the law of the state where judicial enforcement proceedings are pending; or (b) the law chosen by the parties to apply to, or the law otherwise applicable to, the arbitration agreement"[*Born p.1394*]. "A number of other national courts have applied the law governing the substantive validity of the arbitration agreement to issues of interpretation, typically without detailed discussion. Under Swiss law, the construction of international arbitration agreements is subject to the law governing the substantive validity of the agreement. Courts in other jurisdictions have adopted the same approach" [*Born p.1397*].

**35.** In the present case, the law chosen by the parties is the law of Mediterraneo because the parties agreed that "This sales agreement shall be governed by the law of Mediterraneo" [*EX. C.5 p.14*]. CLAIMANT argues that LAAA is based on the law chosen by the parties, the law applicable to the contract. The law chosen by the parties was the law of Mediteraneo in this contract [*Record p.14 clause 14*] [*EX. C.5*].

**36.** CLAIMANT argues that the decision of LAAA should be based on the law applicable to the contract. In the present case, the law applicable to the contract is Mediterraneo law based on the parties' agreement. Thereby, LAAA is the law of Mediterraneo. It will be described in detail below.

**37.** The law applicable to the contract is the most untroubling and applies frequently. Also, the arbitration clause is a just part of the contract. Therefore, it is reasonable to reconcile LAAA and the law applicable to the contract. Thereby, LAAA is based on the law applicable to the contract.

**38.** Also, BCY v BCZ [2016] SGHC 249 was a dispute in which the effectiveness of the arbitration agreement was contested and there was no explicit agreement on the LAAA. The court judged that the law applicable to the contract will be a "strong indicator" in determining the LAAA. If the arbitration agreement is part of the main contract, it is reasonable to assume that the parties had the intention of disciplining the whole relationship by the same law. Moreover, it is reasonable to assume that the parties are willing to discipline the whole relationship by the same law. So that, the court judged that the law applicable to the contract is the LAAA.

**39.** In the present case, the parties have not made a clear agreement and the clause 15 such as arbitration agreement is part of the contract. So that, the law applicable to the contract is a strong indicator in determining the LAAA. Therefore, the law applicable to the contract should be the LAAA.

**40.** In addition, RESPONDENT's allege that based on the separability doctrine LAAA is not based on the law applicable to the contract is baseless [*Record p.31 ¶.14*]. "The separability doctrine does not mean that the law applicable to the arbitration clause is necessarily different from that applicable to the underlying contract. In many case such as ICC Case No. 6850,ICC Case No. 6752, and ICC Case No. 6379 the same law governs both the arbitration agreement and underlying contract" [*Born p.476*].

**41.** In the present case, CLAIMANT said that wanted to make LAAA the same as the law applicable to the contract. CLAIMANT has never said it wants to be separate. Also, is not separated in the contract because it does not write about separation. From the above,LAAA is based on the law applicable to the contract.

**42.** In conclusion, whether the arbitral tribunal has the jurisdiction and the power as to the adaptation of the contract is decided by the Arbitration law of Mediterraneo.

## B. Under the Arbitration law of Mediterraneo the arbitral tribunal has the jurisdiction as to the adaptation of the contract.

### 1. A CLAIMANT claim for an adaptation contract is included scope of application of FROZEN SEMEN SALES AGREEMENT clause15.

**43.** CLAIMANT argue that adaptation of the contract is included in arbitration clause. From the above, it is due to the intention that the adaptation contract of the party by CISG is included in the scope of clause 15 of FROZEN SEMEN SALES AGREEMENT. For the above reason, CLAIMANT interprets by Mediterranea law that adaptation contracts are included in the scope of FROZEN SEMEN SALES AGREEMENT clause 15. It will be described in detail below.

#### a. In accordance with CISG, a CLAIMANT claim for an increased remuneration is included scope of application of FROZEN SEMEN SALES AGREEMENT clause 15.

**44.** Interpretation of arbitration agreement shall be judged by LAAA. LAAA is law of Mediterraneo. It is applicable to the conclusions and interpretation of arbitration clauses contained in sales agreement governed by CISG. As shown by FROZEN SEMEN SALES AGREEMENT clause 14. Therefore, the interpretation of arbitration clause should be judged by CISG.

**45.** Art.8 CISG is a provision applied to interpret the intent of the parties related to the process of establishing the contract, the performance of the contract, and the intention of the parties concerning the performance of the contract. "Art.8 CISG also has a function in supplementing "incomplete" contract. " [*Schwenzer p.150*] Therefore, Art.8 (1) and (2) CISG apply to judgment.

**46.** Art.8 (1) CISG provides that “For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. "The parties in FROZEN SEMEN SALES AGREEMENT are CLAIMANT and RESPONDENT.

**47.** The parties recognized that when a situation arises that seems that the parties cannot agree with amendment, there is a task for arbitrators to do adaptation of the contract. Moreover, the parties also recognized that there is no need to specify this mechanism in the arbitration clause [*EX. C.8 p.17*]. In addition, Mr. Antley left memos about doubts on the part concerned in considering the contract of FROZEN SEMEN SALES AGREEMENT in his negotiation note [*EX. R.3 p.35*]. However, since there was

nothing concerning the adaptation of the contract in the memo, Mr. Antley could judge that there was no objection to the adaptation of the contract.

**48.** This fact is applied to Art.8 (1) CISG. Therefore, the party's intention that if the parties could not agree on an amendment, to make adaptation of the contract a task of the arbitrator and it is no need to explicitly agree on it is apply. So that, the meaning of adaptation of the contract is to be resolved by arbitration, in other words, adaptation of the contract is the scope of clause 15.

**49.** RESPONDENT claimed in document that previous negotiator Mr. Antley's intention was not handed over to later negotiator Ms. Krone. However,"The idea of distinguishing the will of the issuer obliges the interpreter to consider exterior acts. "[*CECK p.152*] in the present case, previous negotiator Mr. Antley had agreed to adaptation of the contract, and later negotiator Ms. Krone did not mention denial about thathis should be regarded as an exterior act of agreeing as a corporation of RESPONDENT. Therefore,even if the negotiator of the contract has changed due to the accident, since the parties did not give an opinion on the change of the contract for the adaptation of the contract thereafter, the intention is not changed.

**50.** For the above reasons, the intention that adaptation of the contract is included in the scope of clause 15 is applied according to Article 8 (1).

**51.** The adaptation of the contract is scope of application in clause 15 by Art.8 (2) CISG even if the above-mentioned fact does not apply to Art.8 (1) CISG. Art.8 (2) CISG provides that "If the preceding paragraph is not applicable, statements made by 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 circumstances. "

**52.** From clause 15 of FROZEN SEMEN SALES AGREEMENT, adaptation of contract is included in clause 15. This fact applies to Article 8 (2). Because,"It is important to ensure that the wording adopted in an arbitration agreement is adequate to fulfil the intentions of the parties. " [*Nigel p.93*]. Adaptation of contract is scope of application in clause 15 if clause 15 is recognized as a broad arbitration clause. In addition, this fact apply to Art.8 (2).

**53.** Comprehensive arbitration clause is arbitration clause which all dispute relating to the contract should be solved by arbitral tribunalhether a comprehensive arbitration clause or not should be interpreted by the words of the arbitration clause.

**54.** The wording of "relating to the contract" in arbitration clause is regarded as comprehensive arbitration clausen the present case, There is no this words in clause 15 of FROZEN SEMEN SALES AGREEMENTowever, the wording in clause 15 "including the existence, validity, interpretation, performance, breach or termination thereof" is concrete example relevant to this contract. For that reason,this wording has similar meaning to" relating to this contract".

**55.** Thus, clause 15 can be regarded as a comprehensive arbitration clause from the phrase "including the existence, validity, interpretation, performance, breach or termination" although there is no wording of "relating to this contract" in clause 15.

**56.** The case Abram Landau Real Estate v. Benove prove that “Contract Arbitrator shall have the power to decide all differences arising between the parties to this agreement as to interpretation, application or performance of any part of this agreement. " is recognized as a broad arbitral clause while it doesn’t include “relating to contract”

**57.** Consequently, the wording of FROZEN SEMEN SALES AGREEMENT clause 15 is regarded as a broad arbitration clause and adaptation of contract is scope of application in clause 15 This fact falls under Art.8 (2) CISG.

**58.** From the above, this case is applied to Art.8 (1) and (2) CISG. From this, in case the parties do not agree with an increased remuneration by hardship as increase in tax, the party's intention that the tribunal have the powers to adopt the contract is applicable.

**b. The tenor of FROZEN SEMEN SALES AGREEMENT clause15 is sentences of expansive arbitration.**

**59.** For the above reasons, price changes are included within the scope of clause 15. According to No. 48 of PO. 2, RESPONDENT has agreed on the general jurisdiction included in clause 15, and opposes the jurisdiction of changing only the price. Because RESPONDENT thinks that price changes are not within the scope of clause 15. As explained above, the scope of clause 15 includes price change. Therefore, from clause 15, the arbitral tribunal has jurisdiction over price change.

**60.** “The competence-competence doctrine provides, in general terms, arbitral tribunals have the power to consider and decide disputes concerning their own jurisdiction. "[*Born p.1047*]. Thereby, in the present case the arbitral tribunal is able to judge the own jurisdiction.

## 2. The arbitral tribunal has the jurisdiction as to the adaptation of the contract because of clause15 of the sales agreement is expansive arbitration clause.

**61.** The arbitral tribunal has power over adaptation of the contract. "The powers of an arbitral tribunal are those conferred upon it by the parties within the limits allowed by the applicable law, together with any additional powers that may be conferred automatically by operation of law. "[*Nigel p.306]* ”A direct conferment of powers tasks takes place when the parties agree expressly upon the arbitrators to exercise, possibly by setting them out in the terms of appointment or a submission agreement. "[Nigel p. 307]”An arbitration agreement confers a mandate upon an arbitral tribunal to decide any and all of the disputes that come within the ambit of that agreements. ” [*Nigel p.92*]

**62.** In the present case, FROZEN SEMEN SALES AGREEMENT's clause 15 wording "Any dispute arising out of this contract ~" is a broad arbitration clause. Furthermore, the arbitral tribunal has jurisdiction to adapt the contract. Consequently there is an

arbitration agreement between the parties; therefore they entrusted the direct arbitration authority to the arbitrator at FROZEN SEMEN SALES AGREEMENT. Also, arbitration agreement to adapt the contract is effective by LAAA; it is the law of Mediterraneo. From this fact, it is said that he parties are entrusting indirect authority to the arbitral tribunal. Therefore, the arbitral tribunal has authority over hearings and arbitral awards.

**63.** From the above, the parties entrust the arbitrator with the authority in arbitration proceedings; thus the arbitral tribunal has the power to judge the adaptation of the contract.

## C. The arbitral tribunal has the power to judge the adaptation of the contract.

**64.** The arbitral tribunal has power over adaptation of the contract. "The powers of an arbitral tribunal are those conferred upon it by the parties within the limits allowed by the applicable law, together with any additional powers that may be conferred automatically by operation of law. "[*Nigel p.306*] ”A direct conferment of powers tasks takes place when the parties agree expressly upon the arbitrators to exercise, possibly by setting them out in the terms of appointment or a submission agreement. "[*Nigel p.307*]”An arbitration agreement confers a mandate upon an arbitral tribunal to decide any and all of the disputes that come within the ambit of that agreements. ” [*Nigel p.92*]

**65.** In the present case, FROZEN SEMEN SALES AGREEMENT's clause 15 wording "Any dispute arising out of this contract ~" is a broad arbitration clause. Furthermore, the arbitral tribunal has jurisdiction to adapt the contract. Consequently there is an arbitration agreement between the parties; therefore they entrusted the direct arbitration authority to the arbitrator at FROZEN SEMEN SALES AGREEMENT. Also, arbitration agreement to adapt the contract is effective by LAAA; it is the law of Mediterraneo. From this fact, it is said that he parties are entrusting indirect authority to the arbitral tribunal. Therefore, the arbitral tribunal has authority over hearings and arbitral awards.

**66.** From the above, the parties entrust the arbitrator with the authority in arbitration proceedings; thus the arbitral tribunal has the power to judge the adaptation of the contract.

### D. Even if Danubian law is applicable, the arbitral tribunal has the jurisdiction based on the validation principle.

**67.** In the event that the applicable law acknowledges the validity of the arbitration agreement, even if other laws do not acknowledge its validity, its effect should be accepted.( "validation principle " [*Born p.497*])

**68.** In the present case, the laws which apply to the decision of LAAA are the law of Mediterraneo and the law of Danubia. Under the law of Mediterraneo the arbitration clause is valid and extends the adaptation of the contract. To the contrary, under the law of Danubia the arbitration clause is not valid and extends the adaptation of the contract. If ether the law of Mediterraneo or Danubia permits the validity of the arbitration clause and the extension to the adaptation of the contract, LAAA is the law which permits them.

**69.** In the present case, under the law of Mediterraneo, the arbitration agreement is effective and adaptation of the contract is included in the arbitration agreement. Therefore, according to this principle, the law of Mediterraneo is applied. From the above, in the present case, it is settled by the law of Mediterraneo, and the arbitral tribunal has jurisdiction and power about adaptation of the contract.

**70.** In conclusion, the arbitral tribunal has the jurisdiction and the power as to the adaptation of the contract based on the law of Mediterraneo.

**71.** Even if Danubian law is applicable, the arbitral tribunal has the jurisdiction as to the adaptation of the contract.

## Ⅱ. CLAIMANT should be entitled to submit the evidence of another arbitration.

**72.** In another arbitration, RESPONDENT is the party and asked for an adaptation of the price of goods because of an additional tariffs. It is the same as CLAIMANT in the present arbitration and that is the reason CLAIMANT should submits the information as an evidence *[Record p. 51 ¶.2]*.

**73.** CLAIMANT obtain the information from a company which provides intelligence on the horseracing industry because Mr. Velazquez could not organize from his former employer a copy of the Partial Interim Award or Respondent's submission in the case [*PO2 p.51 ¶.41*]

**74.** Moreover, RESPONDENT claims that there is a possibility that the only source of the information either be two former employees of RESPONDENT or a hack of RESPONDENT's computer system by the company's hacker [*Record p.51 ¶.3*].

**75.** Thus, the main issue is whether the evidence has an admissibility.

**76.** The disclosure of evidence is one of the arbitral proceedings and the arbitral tribunal has the right to judge about admissibility of evidence.

**77.** If both parties agreed with disclosure of evidence under arbitral clause, the proceeding of arbitration is followed under the agreement. However, in present case, both parties did not agree with disclosure of evidence. Thus, the arbitral tribunal should judges about admissibility of evidence.

**78.** In the present case, the arbitral tribunal is authorized the right of judge about admissibility of evidence and whether to apply strict rules of evidence under HKIAC Art. 22-2. Therefore, the arbitral tribunal has authority to judge about admissibility of the evidence.

**79.** The term "admissibility" refers to "admissibility *sensu lato*" and consists of relevance, materiality and admissibility *sensu stricto.*

**80.** Thus, an evidence is admissible *sensu lato* if the following criteria of relevance, materiality and admissibility *sensu stricto* are met [*Pilkov p.148*].

**81.** The term "relevant evidence" in common law generally means evidence having a tendency to make the existence of any fact that is of consequence in the case more probable or less probable than it would be without the evidence. In international commercial arbitration, these criteria are separated, as the majority of arbitration rules empower arbitrators to decide on relevance and materiality. And relevance concerns the general relationship between evidence and the case [*Pilkov p.149*].

**82.** In international arbitration practice the materiality criterion is considered mostly in relation to its connection to the outcome of the case. Materiality is ultimately connected with the sufficiency of evidence: after the tribunal is provided with sufficient evidence any other relevant evidence of the same fact is no more material to the outcome of the case [Pilkov p149].

**83.** The admissibility criterion functions through rules of exclusion which are based either on the assumption that a trier-of-fact may attach undue weight to particular types of evidence or on the belief that certain values or interests need to be protected. When arbitration rules and arbitration laws refer to "admissibility" as the specific criterion of evidence they use it mostly in the specific narrow sense [Pilkov p150].

**84.** In contrast to relevance and materiality, admissibility sensu stricto is a purely legal criterion which decides whether the evidence is admitted or not under the practice or rules.

**85.** The evidence is the Partial Interim Award in another arbitration which resembles this case. The award has a possibility that CLAIMANT wins the arbitration. Thus, the evidence is just related to this case and the outcome. From these facts, it is natural that the evidence has relevance and materiality.

**86.** Therefore, in the following, the evidence has the admissibility *sensu stricto* on the basis of the above.

## A. CLAIMANT is entitled to submit the evidence even if it was obtained through a breach of confidentiality agreement.

**87.** RESPONDENT claims that there is a possibility that the evidence had been obtained through a breach of a confidentiality agreement by RESPONDENT's two former employees. Under the other arbitration, RESPONDENT is the party. Thus, the two employees are borne obligation of confidentiality agreement both under employment contract and under the arbitration between the parties there.

**88.** From these facts, it matters that whether CLAIMANT is also bound by those obligation or not. CLAIMANT should be entitled to submit the evidence which purportedly former employees leaked against confidentiality agreement.

### 1. CLAIMANT should be entitled to submit the evidence because CLAIMANT is not bound by the confidentiality agreement RESPONDENT's former employees bear.

**89.** In present arbitration, there are two matters. Firstly, whether or not CLAIMANT is bound by confidentiality agreement which two former employees bear. Secondly, whether CLAIMANT should be entitled to submit the evidence that purportedly former employees leaked against confidentiality obligations.

#### a. CLAIMANT is not bound by the confidentiality agreement of employment contract.

**90.** Only the contracting parties are bound by confidentiality agreement because of relativity of credit.

**91.** The employment agreement was signed between BBE and two former employees [Record p. 51 ¶.3]. Accordingly, the contracting party of the employment agreement are BBE and two former employees.

**92.** From this fact, CLAIMANT is not bound by confidentiality agreement on the employment contract.

#### b. CLAIMANT is not bound by Confidentiality agreement in the arbitration clause under the other arbitration.

**93.** Confidentiality agreement on an arbitration binds the parties who agreed arbitration clause. Also, confidentiality agreement under other arbitration does not bind nonparties [Born p. 2808]. In another arbitration, the agreed parties of the arbitration clause are BBE and Mediterranean buyer.

**94.** Therefore, CLAIMANT is not the party under confidentiality agreement on the other arbitration because CLAIMANT did not agree with arbitration clause under the other arbitration.

**c. Based on the above result, CLAIMANT should be entitled to submit the evidence because CLAIMANT is not bound by confidentiality agreement on employment and on an arbitration which two former employees bear.**

## 2. Even if CLAIMANT is bound by the confidentiality agreement which RESPONDENT's former employees bear, it should be entitled to submit the evidence under Transparency Rules of UNCITRAL and HKIAC Rules.

**95.** It is the undisputed fact that the interested parties are targets of confidentiality agreement, however, the scope of application to related persons has to be concerned. It is advisable that this rationality should be judged on a case-by-case basis by the parties [Nakamura p. 61]. If it applies to this case, it is not impossible that CLAIMANT can be bound by the agreement. In such case, the admissibility sense stricto has to be concerned in addition to relevance and materiality. Thus, the evidence should be permitted the admissibility sensu stricto in the following.

### a. The evidence have an admissibility for submission on Art.7 of Transparency Rules of UNCITRAL.

**96.** HKIAC Rules 2018 is applied in the present arbitration. The reason is that both parties agreed to apply HKIAC Rules [Proc No. 1 ¶2].

**97.** The tribunal shall determine the admissibility including whether to apply strict rules of evidence on Art. 22.2 of HKIAC Rules. However, there is no specific rules about evidences. In this arbitration, the tribunal should refers to Transparency Rules of UNCITRAL for the reason as follows.

**98.** Traditionally, confidentiality is one of the merits of an arbitration for the parties and it is a concept which is opposed to transparency [Ministry of Economy p. 62].

**99.** However, UNCITRAL adopted Transparency Rules which puts an importance on transparency and it also added contents about transparency into Art.1.4 of Arbitration Rules in 2013.

**100.** "Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international relations and the wide use of arbitration for the settlement of treaty-based investor-State disputes……ecognizing the need for provisions on transparency in the settlement of such treaty-based investor-State disputes to take account of the public interest involved in such arbitrations, Believing that rules on transparency in treaty-based investor-State arbitration would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes, increase transparency and accountability and promote good governance, ….. adopted the Rules on Transparency in Treaty-based Investor-State Arbitration 2 and amended the Arbitration Rules as revised in 2010 to include, in a new Art. 1, ¶ 4, a reference to the Rules on Transparency…" [General Assembly of UN p1, p2]

**101.** In this point, Transparency Rules of UNCITRAL shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors on Art. 1.1.

**102.** Certainly, this arbitration is not Treaty-based Investor-State Arbitration and is commercial arbitration. However, transparency should be attached importance in this arbitration as following reasons.

**103.** Firstly, considering that UNCITRAL has attached importance to transparency and has adapted the rules encouraging disclosure of information in an arbitration, transparency should be also considered seriously in the commercial arbitration.

**104.** Secondly, the purpose of the adoption of Transparency Rules is that in Investor-State arbitration the profit of parties affects their nations.

**105.** Transparency Rules of UNCITRAL was established for the purpose of being able to find out public concerns [*UNCITRAL FAQ*].

**106.** It is the same as the present case on the point of public concerns.

**107.** In the present case, Respondent's benefit is public benefit in this sales agreement because horse racing is extremely popular in Equatriana [*Record p5 ¶. 4*] .

**108.** Thus, the contents of the present arbitration can be public concerns and the reference of Transparency Rules to this case meets purpose of its establishment.

**109.** Thirdly, one of the merit of publication is that the information about the precedential arbitration can be a model for the similar future disputes and arbitrations.

**110.** "…in some specialized market sectors, institutional rules provide for the publication of arbitral awards …. purpose of such publication is to provide precedential authority and guidance for future disputes [*Born p. 206*]. "

**111.** The merit is the same as this case on the point of that CLAIMANT can refer to the award of another arbitration because CLAIMANT requests an adaptation of the price and similarly RESPONDENT did in another arbitration.

**112.** In addition, Transparency Rules of UNCITRAL is the newest rule as a law which stipulates about transparency. The tribunal should make accurate judgment based on the newest rule.

**113.** From the above, Transparency Rules of UNCITRAL should be referred to in the present case.

**114.** After all, the evidence should be judged under Transparency Rules as follows.

**115.** Art. 7 of Transparency Rules prescribe information that should be kept secret and protected. If it falls under this provision, that information is an exception to the Transparency and it is deemed not to be disclosed. Consequently, unless this Article is

applicable, the evidence has admissibility of evidence and it is possible to submit by CLAIMANT.

**116.** If the evidence does not meet Art.7.2, it is exception of confidentiality information.

**117.** Art.7.2 consists of the follows.
(a) Confidential business information;
(b) Information that is protected against being made available to the public under the treaty;
(c) Information that is protected against being made available to the public, in the case of the information of the RESPONDENT State, under the law of the RESPONDENT State, and in the case of other disclosure of such information; or
(d) Information the disclosure of which would impede law enforcement.

**(a). The evidence does not constitute "confidential business information. "**

**118.** Confidential business information refers to business secret.

**119.** The business secret means the information a company keeps secret and uses exclusively.

**120.** As a consequence, a company can achieve some development and make some economic profit. *[Helena ŻAKOWSKA–HENZLER p62 ¶.1]*

**121.** In the present case, success for RESPONDENT is some technical development for race horse breeding. The information of the other arbitration is not the information which lead up to such a success by keeping it secret and using it exclusively. Therefore, the information of the other arbitration is not the business secret. Thus, it is not confidential business information.

**(b). The evidence does not constitute "information that is protected against being made available to the public under the treaty.**

**122.** The term "treaty" shall be understood broadly as encompassing any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty on Art.1 of Transparency Rules of UNCITRAL.

**123.** There is no treaty in this case to protect the other arbitral information.

**124.** Therefore, the information does not be protected information by treaty and has an admissibility.

**(c). The evidence does not constitute "information that is protected against being made available to the public, in the case of the information of the RESPONDENT State, under the law of the RESPONDENT State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information. "**

**125.** In this case, "any law or rules determined by the arbitral tribunal" in the above article means HKIAC Rules and the reason is arbitration rules in this case is HKIAC Rules.

**126.** Thus, Transparency Rules of UNCITRAL Art.7.2(c) stipulates that the information protected under HKIAC Rules must not be disclosed. This evidence is not protected under HKIAC Rules.

**127.** According to Art.45.1 HKIAC Rules, the party must not disclose any information related to the arbitration under the arbitration agreement or an award etc, if there is no agreement to do that.

**128.** However, exceptional items are defined in Art.45.3 HKIAC Rules.

**129.** According to Art.45.3 (d) HKIAC Rules, if a party or party representative have purposes of Art. 27, 28, 29 or 30, they can disclose or communicate about information related to the arbitration to any party and additional party etc.

**130.** Thus, in case "a party" is defined as the other party in another arbitration and "any party" is defined as CLAIMANT, the disclosure of the information is admissible to CLAIMANT as follows.

**131.** CLAIMANT is going to get the other Party to join to the proceeding. [*Record p. 51 ¶.3*]

**132.** Joinder of Additional Parties prescribed on Art.27 HKIAC Rules.

**133.** According to Art.27, "The arbitral tribunal or, where the arbitral tribunal is not yet constituted, HKIAC Rules shall have the power to allow an additional party to be joined to the arbitration provided that:(a) prima facie, the additional party is bound by an arbitration agreement under these Rules giving rise to the arbitration, including any arbitration under Art. 28 or 29; or(b) all parties, including the additional party, expressly agree. "

**134.** In this case, it is clear that the other Party in another arbitration is bound by HKIAC Rules [PO2 p. 60 ¶.5]. Therefore, it meets Art. 27.1(a) HKIAC Rules.

**135.** Thus, we can define "a party" as the other Party and "any party" as CLAIMANT in Art.45.3 (d).

**136.** Moreover, the proceeding to get the other Party to join in this arbitration makes progress and the other party communicates about information of the other arbitration to CLAIMANT for the purposes of Art. 27 [Record p. 50 ¶.3].

**137.** Thus, this case meets Art.45.3 (d) HKIAC Rules.

**138.** Therefore, the information of the other arbitration is not protected by HKIAC Rules.

**(d)he evidence does not constitute "information the disclosure of which would impede law enforcement. "**

**139.** This case has no relation with law enforcement.

**140.** Thus, even if the evidence is disclosed, there is no impediment to law enforcement.

**141.** From the above, the evidence has the admissibility *sensu stricto.*

## B. CLAIMANT is entitled to submit the evidence even if it was obtained through an illegal hack of RESPONDENT's Computer system.

**142.** The evidence CLAIMANT got is purportedly the evidence which may have been obtained by a hack of RESPONDENT's computer system. In this point, the matter is whether CLAIMANT can submit the evidence illegally acquired.

### 1. CLAIMANT can submit the evidence without strictly concerning about the admissibility for submission.

**143.** In general, all relevant evidence are admissible in arbitration, except as otherwise provided by mandatory rules, or by agreement of the parties [Pilkov p. 148].

**144.** CLAIMANT obtained the evidence from the company which sold it for 1000 USD because Mr. Velazquez could not organize from his former employer a copy of the Partial Interim Award or Respondent's submission in the case [PO2. p. 51 ¶.41].

**145.** However, it is natural mentality for the party that CLAIMANT tries to buy the evidence which has the potential to win the arbitration and to get USD 1,250,000 or more over [*PO2. 51 ¶.41*].

**146.** The company has refused to disclose its sources in the present case at hand and CLAIMANT has no connection with the hack and even more, there is no way that CLAIMANT know the means of acquisition of the evidence [*PO2. 51 ¶.41*].

**147.** Thus, the evidence is relevant because the means of acquisition should not be concerned.

**148.** In addition, the evidence naturally has the relevance and materiality on the begging and there is no mandatory rules and agreements of the parties in this case [*PO2. 51 ¶.41*].

**149.** Therefore, the evidence has relevance as to the means of acquisition and not against any mandatory rules and agreement of the parties.

**2. Even if the admissibility of evidence has to be concerned, CLAIMANT has the right to submit the evidence because it has an admissibility for submission.**

**150.** The admissibility *sense stricto* usually should be made decision by arbitration rules or arbitration law of all nationalities.

**151.** However, there is no specific rules about illegal evidence in HKIAC Rules and the arbitration law [*PO2. 61 ¶.46*].

**152.** The following is the reason that the evidence satisfy the admissibility by the case.

**153.** There are two requirements for admissibility of evidence obtained by illegal hacking.

**154.** Firstly, being recognized availability of public. Secondly, the evidence is not protected by legal professional privilege *[Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan]*.

**a. In case it is easy to obtain the information, it is recognized that there is availability for the public.**

**155.** The information which has an availability of the public should be an admissible evidence.

**156.** In the present case, RESPONDENT had used an outdated firewall to protect is computer system which had made it easy for hackers to enter there *[PO2. p. 62 ¶.42]*. Therefore, it is able to be recognized that there is availability for the public. The information has not to be protected by legal professional privilege.

**157.** Legal professional privilege is to protect communications between a lawyer and a client; for the purposes of obtaining or giving legal advice or assistance *[LEGAL PROFESSIONAL PRIVILEGE AN OVERVIEW p. 2]*.

**158.** There are two types of communications which attract legal professional privilege. Firstly, communications between lawyer and client for the dominant purpose of obtaining legal advice. Secondly, communications between lawyer and client for the dominant purpose of use in relation to litigation either in existence or within reasonable contemplation *[LEGAL PROFESSIONAL PRIVILEGE AN OVERVIEW p. 2]*.

**159.** The issue of this case is that there is a possibility that a company hacked RESPONDENT's computer system and got information about the other arbitration. However, the information is not related to lawyer and client. Thus, this evidence is not protected by legal professional privilege.

**160.** The evidence satisfy admissibility of evidence in a narrow sense. In addition, the relevance and materiality are met from the beginning.

**161.** Therefore, the evidence satisfy all requirement and tolerance of evidence *sense lato*.

**162.** From the above, CLAIMANT should be entitled to submit the evidence from another arbitration proceedings even if it is assumed that the evidence had been obtained through an illegal hack of RESPONDENT's Computer system.

**163.** In conclusion, CLAIMANT should be entitled to submit the evidence of another arbitration.

# ARGUMENT TO THE SUBSTANTIVE ISSUES

## Ⅲ. CLAIMANT is able to insist the payment of the tariff to RESPONDENT.

### A. According to clause 12 of the contract, CLAIMANT should get UD$ 1,500,000 from RESPONDENT.

**164.** In the present case, to make success trade between CLAIMANT and RESPONDENT, CLAIMANT paid the tariff which was supposed to bear RESPONDENT. Thereby, CLAIMANT able to offer RESPONDENT to pay at least US$ 1,250,000 based on clause 12.

#### 1. It is agreed in the contract the seller shall not be responsible for hardship, therefore the tariff imposed by Equatoriana is for the RESPONDENT account.

**165.** Generally, accepting DDP-delivery, the seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to pay any duty for both export and import and carry out all customs formalities. Any VAT or other taxes payable upon import are for the seller's account unless expressly agreed otherwise in the sale contract *[Ramberg p. 149]*.

**166.** It should be interpreted conversely that any VAT or other taxes payable upon import are not for the seller's account if only expressly agreed otherwise in the sale contract.

**167.** In respect to what CLAIMANT should not be responsible for, clause 12 in the contract provides. Therefore, CLAIMANT does not have any responsibility to pay the tariff if the case that Equatoriana imposed the tariff falls under clause 12.

#### 2. According to CISG Article 8 (1), it is equivalent to "comparable unforeseen events making the contract more onerous" in clause 12 that Equatoriana imposed 30% tariffs.

**168.** The reason is that, there is a difference between CLAIMANT and RESPONDENT on the intent in relation to clause 12 of the contract.

**169.** Art.8 (1) CISG requires the clarification of the intent of the parties insofar as it has not been objectively expressed in statement content *[schwenzer p. 150]*. There is not clear agreement over the tariff in the contract. Thereby the issue interpreted by Art.8 CISG.

**170.** The particular subject matter for interpretation are statements leading to the formation of a contract *[schwenzer p. 144]*. The subjective intent of a party must be manifested in some way for being recognizable *[Kröll p. 150]*.

**171.** Pursuant to Art.8 (1) CISG, "statements made by and other conduct of a party" is clause12 in this issue. AND the requirement is fulfilled if only there is a fact CLAIMANT delivered its intent to RESPONDENT with some means.

**172.** CLAIMANT delivered the intent that CLAIMANT is not willing to take over any further risks associated with such a change in the delivery terms *[EX. C.4. p. 12]*. And RESPONDENT knew CLAIMANT wanted to avoid the situation that CLAIMANT had to bear excessively high costs by a govern regulation such as the past experience *[EX. C.4. p12]*

**a. CLAIMANT never agreed to bear the tariff. It is "comparable" to additional health and safety requirements.**

**173.** In the previous case, as a consequence of the discovery of a rare aggressive type of foot and mouth disease, Danubia had immediately imposed very strict new health and safety requirements involving long quarantine time. In the case of the three mares the additional tests required, and the long quarantine amounted to 40 % of the sales price *[EX. C.4. p12] [PO. 2. p. 58. ¶.21]*. It nearly resulted in the insolvency of CLAIMANT.

**174.** CLAIMANT wanted to avoid the damage by an urgent govern regulation after concluding the contract by any means from the past experience. That is the reason why CLAIMANT directly added by wording it into clause 12 in the contract even when CLAIMANT accepted to make it narrower than ICC-hardship clause as respondent asked. Thereby the health and safety requirement imply the past experience.

**175.** It is common between past experience and the present case. In the present case, the tariff imposed by Equatorrian government is also a govern regulation after the conclusion of the contract. Moreover, both cases have regulated by government. Therefore, the present case is "comparable" to the past experience.

**b. It is "unforeseen events" that Equatoriana imposed 30% tariff**

**i. It was impossible to expect the imposition of the tariff for CLAIMANT**

**176.** On 6 May 2017, the contract was conducted. The tariff imposed for "agricultural goods" was announced on 19 December 2017 by executive order and took effect from 15 January 2018 onwards *[EX. C.6 p. 15] [PO. 2. p. 58 ¶.25]*. The third shipment of 50 doses was on 21 January 2018. Therefore 20 January 2018, CLAIMANT asked

**177.** Respondent to call CLAIMANT back to talk about a solution in that regard *[EX. C.7 p. 16]*. The next day, RESPONDENT urged CLAIMANT to authorize the last shipment as planned since RESPONDENT needed the doses and had already initiated the payment of the second installment *[EX. C.8 p. 18]*.

**178.** Moreover, RESPONDENT emphasized its interest in a long-term relationship although RESPONDENT have knowledge of the impact of the 30% tariff on CLAIMANT's financial situation that CLAIMANT suffering bankruptcy because CLAIMANT told that to RESPONDENT during the negotiations *[EX. C.8 p. 18] [PO. 2. p. 59 ¶.28-29]*. Thereby, CLAIMANT had gotten the impression that RESPONDENT accepted CLAIMANT's position that RESPONDENT should bear the bulk of additional costs.

**179.** It is also the fact that there was about 1 month until executive order and took effect. However, the first announcement was just announced imposed for "agriculture", so it was unforeseeable that semen of racehorse was also included "agriculture".

**180.** Moreover, CLAIMANT couldn't exempt from or obtain a reduction in the additional tariff charged in the last shipment *[PO. 2. p. 58. ¶.27]*.

**ⅱ. CLAIMANT could not predict that Equatriana which is a keen supporter of Free Trade would impose tariffs**

**181.** Although Mr. Bouckaert announced that he would take a protectionist approach to international trade in particular agricultural products when he participated in Mediterraneo's presidential election in January 2017, his tariffs measures far exceeded the worst situation most analysts had anticipated *[EX. C.6 p. 15 ¶.4]*. In addition, the economic minister of Mediterraneo was convinced that Mediterraneo's prime minister had to strongly consider tariffs imposed by the president of Mediterraneo, and this taxation is threat to the present trading system and efforts to justify the tariff system on the present trading system so far.

**182.** From above the fact that even the fact that the Mediterraneo imposed the tariff is unforeseeable event.

**183.** For that, Equatorianian government imposed the tariffs on agricultural products as retaliation. However, it is unforeseeable because the Equatorianian government, which has always been an ardent supporter of free trade, in particular in times like the present when the Prime Minister came from the Progressive Liberals *[Record. p. 7 ¶.19] [EX. C.6 p. 15 ¶.2]*.

**184.** Consequently, the Equatorianian government had always tried to resolve trade disputes amicably and had not relied on retaliatory measures against trade restrictions by other countries *[EX. C.6 p. 15]*. However, in the present case, Equatoriana imposed the tariff as a retaliation. So, it is impossible to expect that Equatorianian government imposed the tariffs on agricultural products as retaliation.

**185.** Moreover, it is also the fact that until 2018 there had been no tariffs imposed on agricultural goods or horse semen in Equatoriana *[PO. 2. p. 58 ¶.25]*.

**186.** Consequently, the event i.e. imposed the tariff has to be interpreted as an unforeseen event.

**c. It makes the contract more onerous that CLAIMANT bears the tariff.**

**187.** Onerous situation means that the party bears the additional payment of money. The reason is the CLAIMANT's bad experience. clause 12 were included in the contract based on the fact that government's additional requirements increased the cost of goods by up to 40%. In the present case, CLAIMANT paid the additional new tariff. Therefore, the tariff makes the contract more onerous.

**188.** And CLAIMANT's bad experience was widely reported in the press *[PO. 2. p. 58, ¶.21]*. In addition, CLAIMANT told to RESPONDENT about bad experience. Therefore, RESPONDENT was aware of CLAIMANT's intention.

**189.** In conclusion, CLAIMANT has no obligation to pay the additional tariff because the tariff come under the hardship.

**3. Even if we could not interpret contract by Article 8 (1) of the CISG, it is equivalent to "comparable unforeseen events making the contract more onerous" in clause 12 that Equatoriana imposed 30% tariffs in accordance with Art.8(2)(3) CISG.**

**190.** Art. 8(2) CISG provides "If the preceding paragraph is not applicable, statements made by 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 circumstances".

**191.** In determining the hypothetical understanding of a reasonable person, consideration must also be given circumstances named in Article 8(3) *[schwenzer p. 153 ¶.21]*. Art.8 (3) CISG provides that" The circumstances of the case include the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties. "

**192.** In the present case, additional payments are applied to hardship clause in clause 12. The reason is that additional payments in this time are applied to "comparable unforeseen events making the contract more onerous"

**a. It is "comparable" to additional health and safety requirements.**

**193.** Health and requirements in this contract and additional tariffs requirements in this time are comparable. These have two similarities. Both requirements are a govern regulation after the conclusion and regulated by government. This fact is objectivization. Therefore, both requirements are comparable.

**b. It is "unforeseen events" that Equatoriana imposed 30% tariffs.**

**194.** When Mr. Shoemaker asked for whether the tariff on animal products also covered frozen race horse semen, the employees in the ministry were not certain whether frozen racehorse semen was covered under "animal products" *[EX. R.4 p. 36 ¶.2]*.

**195.** Therefore, nobody could foresee that "frozen race horse semen" would be contained "agricultural goods" that object to additional payments. From the above, additional

payments contain "frozen race horse semen" is unthinkable for reasonable person of the same even people of the country never so much as knew.

**c. It makes the contract more onerous that CLAIMANT bears the payments.**

**196.** Onerous means situation that the party bear additional financial burden when conclusion of contract. The reason is that clause 12 is incorporated in contract based on CLAIMANT's experience due to financial added burden.

**197.** In the present case, additional payments making the contract more onerous resulted from CLAIMANT bear additional payments. And RESPONDENT knew this fact. Bad experience got newspaper coverage. In addition, CLAIMANT told RESPONDENT that CLAIMANT's intention referred to this content. Anyone can browse newspaper. This newspaper is business news therefore others in the same trade might well read this newspaper.

**198.** From the above, even if additional payments are applied to "comparable unforeseen events making the contract more onerous. " The reason that CLAIMANT don't have a duty.

## 4. RESPONDENT should bear the tariff of 30% based on good faith principle.

**199.** CLAIMANT bears an excessively one-sided cost in the situation it would be very unfair. Based on good faith principles, the unfairness should be made fair and RESPONDENT should compensate for CLAIMANT's loss.

**200.** CISG Art. 7(1) obligation of good faith is an interpretive principle and the effect of the interpretive principle on the contracting parties' behavior *[Gillette=Walt p. 132 ¶.1]*. Notwithstanding Art.7 (1) CISG, good faith principle is not only an interpretation of CISG but also a general principle which bases CISG *[Kato,Ryotaro p. 41-42]*. Moreover, good faith principle is emphasized in a case as below. In relation to the CISG, the court referred to the principle of good faith, pointing out that the Convention ascribed considerable importance to that principle *[clout Case 547]*.

**201.** Therefore, good faith principle is very important concept for CISG. Conducts of the parties could be interpreted in accordance with good faith and an unfair situation should be made fair in accordance with it.

**202.** In the case, considering conducts of both CLAIMANT and RESPONDENT, CLAIMANT excessively has a burden.

**203.** CLAIMANT explicitly told "we are not willing to take over any further risks associated with such a change in the delivery term, in particular not those associated with changes in customs regulation or import restriction". *[EX. C.4 p. 12 ¶.4]*. The fact says that CLAIMANT accepted DDP but did not want to bear responsibility for customs regulation and import restriction. Therefore, CLAIMANT explicitly delivered the intent and should not be responsible for the additional tariff according to the

understanding that a reasonable person of the same kind would have had in the circumstances.

**204.** However, CLAIMANT paid the tariff, delivered the goods and completed the trade. The reason was that RESPONDENT hoped to build a long-term relationship with CLAIMANT, told RESPONDENT would find a solution of it and urged CLAIMANT to ship as planned after Equatoriana government imposed the 30 % tariff to frozen racehorse semen as well *[EX. C.8 p. 18 ¶.2]*. Only CLAIMANT bears the one-sided burden although RESPONDENT told as above.

**205.** The unfair situation as above should be made fair by the payment of RESPONDENT according to good faith. Therefore, RESPONDENT has the obligation to pay for that.

**206.** CLAIMANT delivered the last shipment of frozen semen with the intent that CLAIMANT would just temporarily pay the because of RESPONDENT's suggestive attitude that RESPONDENT would pay for it after the CLAIMANT's payment although CLAIMANT had already told in clause 12 that CLAIMANT would not be responsible for additional costs such as additional tariff.

**207.** However, RESPONDENT told CLAIMANT should bear the responsibility of the payment of the tariff when CLAIMANT requested RESPONDENT to pay for it after the last shipment. It is contrary to good faith principles.

**208.** First of all, it can be said that the both parties require contractual fairness. However, the requirement of contractual fairness has not achieved due to RESPONDENT's conduct. RESPONDENT made contrary conducts to the meaning of the contract. Therefore, RESPONDENT is in breach of the contract.

**209.** Therefore, RESPONDENT should bear the cost for the tariff arises from RESPONDENT's breach of the contract in accordance with good faith principle.

### 5. CLAIMANT claim damages of the tariff to RESPONDENT based on demolished the good faith principle of the contract.

**210.** For the above reasons, RESPONDENT do not perform his obligation of the payment under 12 clauses of the contract. Therefore, CLAIMANT should claim damages according to Art.61 (1)(b) CISG.

**211.** Pursuant to Art.61 (1)(b) CISG, "If the buyer fails to perform any of his obligations under the contract, the seller may: (b) claim damages as provided in articles 74 to 77. "

**212.** The sentence of Art.61 "any of his obligations under the contract" is defined very broadly. The reason is that "many contractual obligations may in fact fall under the obligation to pay and the obligation to take delivery as these obligations are defined very broadly as including the taking of any step necessary to enable payment and delivery *[Kröll p. 827]*. " Since the payment of tariff is the necessary step to enable payment and delivery, the payment of tariff falls under "any of his obligations under the contract" in Art.61 (1) CISG.

**213.** In the present case, RESPONDENT do not perform his obligation of the payment under 12 clauses of the contract (1). Therefore, CLAIMANT should claim damages for the payment of tariff borne by CLAIMANT to RESPONDENT (b) as provided in Art.74 CISG.

### 6. CLAIMANT should get 1,500,000 USD from CLAIMANT.

**214.** The limits of the damage is 1,500,000 USD i.e. 5,000,000 USD (the fee of the third shipment of 50 does) × 0.3 (the 30%tariffs), according to "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. " on Art.74. CISG.

**215.** CLAIMANT was supposed to have 1,500,000 USD from the third transaction.

**216.** CLAIMANT is entitled to the payment of 1,500,000 USD under the 12 of the contracts because CLAIMANT just temporary paid the tariff which was supposed to be paid by RESPONDENT.

**217.** The contract has clause 12 which is the hardship clause. Therefore, when the new tariff imposition correspond clause 12, CLAIMANT is exemption from responsibility which pay the additional tariff. In the present case, the imposition of the new tariff correspond clause 12, RESPONDENT must pay 1,500,000 USD to CLAIMANT.

### 7. CLAIMANT should get at least 1,250,000 USD from RESPONDENT.

**218.** However, RESPONDENT is directly not responsible for the imposition of the new tariffs. And CLAIMANT make much of the good faith. At first, CLAIMANT was supposed to have a profit margin of 250,000 USD i.e. 50,000,000 USD (the fee of third shipment of 50 doses) × 0.05 (the 5% profit margin) [*PO. 2 p. 59 ¶.31]*. Therefore, CLAIMANT may be able to concede the payment of 5**%** and intent at least 1,250,000 USD.

**219.** In Conclusion, CLAIMANT is able to insist able the payment of tariff 1,500,000 USD at least 1,250,00 USD to RESPONDENT.

## B. CLAIMANT is entitled to the payment of US$1,250,000 under the CISG.

### 1. CLAIMANT is entitled to payment US$1,250,000 under the Art.62 CISG.

#### a. RESPONDENT is obliged to pay 1,250,000$ under the Art.60 CISG.

**220.** According to the Art.60 CISG, "The buyer's obligation to take delivery consists: (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery".

**221.** Even without an express or implied term of the contract, the buyer is obliged to inform the seller of any specific circumstances in the buyer's country in accordance with the general obligation to cooperate and inform. *[Schwenzer p. 894. ¶.9]*

**222.** In this case, CLAIMANT send an email to RESPONDENT in order to find a solution about additional tariff. On the other hand RESPONDENT accepted CLAIMANT's position that RESPONDENT bear the bulk of the additional costs. [*Record p. 18 ¶.3]*

**223.** CLAIMANT considered that RESPONDENT was obliged the additional costs due to the tariffs.

**224.** Additionally, CLAIMANT has made the shipment expecting that RESPONDENT should pay such costs considering a long term relationship.

**225.** Also, CLAIMANT expected a long term relationship with RESPONDENT.

**226.** CLAIMANT expected that RESPONDENT have cooperation obligation concerning the cost of the shipment. Therefore RESPONDENT breach the obligation not to do the act expected reasonably.

#### b. CLAIMANT is entitled to require RESPONDENT to perform the obligation under Art.62 CISG.

**227.** According to Art.62 CISG, CLAIMANT is entitled to request the performance of obligation. In this case RESPONDENT did not perform the obligation to enable CLAIMANT to make the third shipment under Art.60 CISG. Therefore, CLAIMANT is entitled to require RESPONDENT to perform the obligation of payment of US$1,250,000.

### 2. Under Art.79 CISG, CLAIMANT argues US$1,250,000.

#### a. CLAIMANT is not responsible for shipping frozen semen under Art.79 CISG.

**228.** Considering application to Art.79 CISG, it is necessary to prove the impediments' transcendence of control, impossibility of expectation and unexpectancy to avoid or overcome it or its consequences.

**229.** Firstly, the tariffs imposition by Equatoriana's government is beyond CLAIMANT's control. The introduction of the term 'impediment' should ensure a narrow and objective understanding of the grounds for exemption. *[Schwenzer p. 1133 ¶ .12]* The act of a tariffs imposition is a national action. Thus, it can be regarded as an objective obstacle beyond CLAIMANT control.

**230.** Secondly, the tariffs imposition by Equatorian government have never been expected to have taken them into account at the time of conclusion of the contract.

**231.** As retaliatory measure for the unexpectable customs policy of Mediterranean president, Equatoriana's government decided the imposing 30% tariffs on selected products from Mediterraneo. Through these facts, it is impossible to consider the tariffs imposition by Equatorian government at the time of conclusion of the contract.

**232.** Thirdly, it is not reasonably expected for CLAIMANT to have avoided of overcome the tariffs imposition by Equatorianian government or its consequences.

**233.** The extent and nature of the efforts which can be expected of the promisor to overcome the impediment or its consequences in particular cases must, here again, primarily be determined by means of the contractual allocation of risks. [*Schwenzer p1135, ¶.15]* CLAIMANT informed that CLAIMANT is not responsible for the risk associated with change in customs regulation or import restriction at the time of conclusion of the contract. [*EX. C.4 p.12*] Therefore, it could not be expected for CLAIMANT.

**234.** Finally, there is Causal relationship between the tariffs imposition by Equatorian government and the shipment of the frozen semen.

**235.** Therefore, CLAIMANT is not responsible for shipping Frozen semen under Art.79 CISG.

**b. CLAIMANT is entitled to the payment of US$ 1,250,000 under the fair and equitable principles.**

**3. Even if CLAIMANT can not be entitled to the payment of tariffs under CISG, CLAIMANT can be entitled to the payment under UNIDROIT.**

**a. Sudden imposition of the tariffs is applied to the definition of hardship under Art. 6.2.2 UNIDROIT.**

**236.** The events must fulfill all four of the matters under Art.6.2.2 UNIDROIT.

**237.** First "the event occur or become known to the disadvantaged party after the conclusion of the contracts. " [*PO. 2, p 57 ¶20*] In this case, the imposition of tariffs by the Equatoriana government was made after the conclusion of the contract.

**238.** Furthermore, "the event are beyond the control of the disadvantaged party"

**239.** In this case, there had been no tariffs imposed on agriculture goods in Equatriana. *[ PO. 2 p.58 ¶.25]* Also, Equatoriana's government ever haven't imposed tariffs as retaliatory measures. *[EX. C.6 p. 15 ¶.2]*

**240.** The tariffs imposition by Equatoriana's government as retaliatory measures could not considered reasonably in the point of conclusion of the contracts.

**241.** Also, "the events are beyond the control of the disadvantaged party"

**242.** In this case, the event of tariff imposition by Equatriana's government are beyond the control of CLAIMANT is disadvantaged party.

**243.** Finally, "the risk of the events was not assumed by the disadvantaged party"

**244.** The assumption of risk need not have been express, it can be inferred from the nature of the contract. [*Vogenauer p.818,¶15]*

**245.** In this case, CLAIMANT the adaptation clause was supposed to cover risks including additional tariffs like the present. *[Record p.7 ¶19]*

**246.** Therefore RESPONDENT also expected about the adaptation of contract including additional tariffs, CLAIMANT has no additional tariff risk in the point of the contract.

**247.** In this case where the contract equilibrium is altered is a case where the cost required for performance is increased. This case, as the customs duty tariffs suddenly become RESPONDENT′s government measures, the cost of fulfillment has increased, which is the case of altering the equilibrium. It is important that this is a serious change.

**248.** Also, the difficulty will lie in satisfying the requirement that the alteration of the equilibrium of the contract was fundamental. [*Vogenauer p.815 ¶5]*

**249.** Whether or not an event can be described as fundamental very much depends on the facts and circumstances of the particular case. *[Vogenauer p.816 ¶7]*

**250.** The two years have been financially difficult for CLAIMANT. *[EX. C.8 p.17]*

**251.** Since CLAIMANT had been debts ,it was impossible for CLAIMANT to shoulder this additional 30**%** tariff which had to be paid immediately .

**252.** Negotiations of a new credit line will most likely be very difficult as one of the major creditors is by now the house bank of CLAIMANT's largest competitor who is interested in buying the dressage part of CLAIMANT.

**253.** CLAIMANT has much more loss than the point of contract, but RESPONDENT gets profit. *[PO. 2 p. 57 ¶. 20]* Furthermore , it is necessary that performance has not been done. In this case, although CLAIMANT was supposed to have been impossible, it is said that it is not fulfilled because it only shipped frozen semen for RESPONDENT, it corresponds to a hardship.

**b. Under Art. 6.2.3 UNIDROIT hardship effect, CLAIMANT claims US$ 1.250.000.**

**i. CLAIMANT is entitled to request renegotiations under Art. 6.2.3 UNIDROIT.**

**254.** Firstly, it is necessary that it is not unreasonably delayed.

**255.** CLAIMANT was telling RESPONDENT via e-mail that it would like to talk about solutions before starting transportation. Therefore CLAIMANT has no undue delay.

**256.** Secondly, "the other contracting party should be given sufficient information to be able to decide whether or not the disadvantaged party is entitled to make the request. " [*Vogenauer p. 820 ¶3*] In this case CLAIMANT is a disadvantaged party suffered losses. Therefore CLAIMANT is entitled to request renegotiations under Art.6.2.3 UNIDROIT.

**ii. Even if the parties are not good at the adaptation of the contract, CLAIMANT is entitled to pay US$1.250.000 under Art.6.2.3 (4) (b) UNIDROIT.**

**257.** It imposes a responsibility on a party not to occasion detriment to another party by acting inconsistently with an understanding concerning their contractual relationship which it has caused that other party to have and upon which that other party has reasonably acted in reliance. [*Vogenauer p.89 ¶.136*]

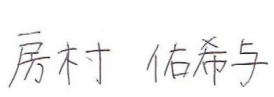
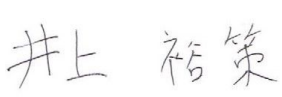
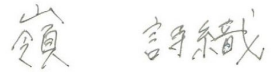
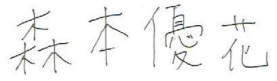
**258.** In the present case, since CLAIMANT believes that RESPONDENT will pay for the amount it took to ship, RESPONDENT has to allocate the loss for CLAIMANT without causing loss, RESPONDENT should pay US$ 1.250.000.

**259.** In conclusion, CLAIMANT is entitled to the payment of US$1,250,000 under the CISG.

# REQUEST FOR RELIEF

- The arbitral tribunal has the jurisdiction and the power as to the adaptation of the contract based on the law of Mediterraneo.(a)
- CLAIMANT should be entitled to submit the evidence of another arbitration.(b)
- CLAIMANT is able to insist the payment of the tariff to RESPONDENT under clause 12 of the contract and under the CISG.(c)

# CERTIFICATE

| | | | |
|---|---|---|---|
| **Fusamura Yukiyo** | **Hayashi Momoko** | **Imamura Mari** | **Inoue Yusaku** |
|  |  |  |  |
| **Matsubara Yujiro** | **Matsuda Saya** | **Matsumoto Ayaka** | **Matsumura Merumo** |
|  |  |  |  |
| **Mine Shiori** | **Morimoto Yuka** | **Morishita Kureha** | **Murakami Sato** |
|  |  |  |  |
| **Nakahara Moe** | **Nakahara Moe** | **Nakahashi Kyo** | **Nishida Mizuki** |
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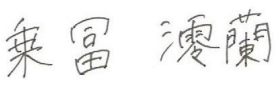
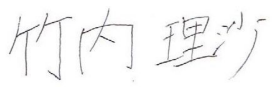
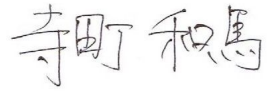
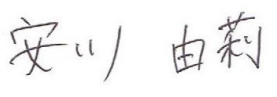
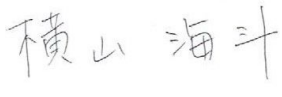
| **Noritomi Reiran** | **Okura Koyuki** | **Shibasaki Kazuma** | **Shinozaki Aya** |
|  |  |  |  |
| **Takeuchi Risa** | **Teramachi Kazuma** | **Yasukawa Yuri** | **Yokoyama Kaito** |
|  |  |  |  |
| **Yotsugi Yusuke** | | | |
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