XXVI ANNUAL WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

Arbitral Proceedings HKIAC/A18128

CENTRO UNIVERSITARIO DE JOAO PESSOA (UNIPÊ)

MEMORANDUM FOR CLAIMANT

Phar Lap Allevamento (Mediterraneo)
(CLAIMANT)

Black Beauty Equestrian (Equatoriana)
(RESPONDEN)

MATHEUS MEIRELES – TAIRLA ARAGÃO – JESSYLA MELQUIADES – AQUILES CALOU – MELISSA CARVALHO – VINICIUS TRAJANO – EVELYN LOPES – JOÃO VICTOR – MANUELA ANDRADE – VINICIUS BORGES

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CAS	Court of Arbitration for Sport
CISG	United Nations Convention on Contracts for the International Sale of Goods
et seq./et seqq.	and the following
FIFA	Federation International Football Association
FSA	Framework and Sales Agreement
FSSA	Frozen Semen Sales Agreement
HKIAC	Hong Kong International Arbitration Centr
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
UNICITRAL	United Nations On International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

INDEX OF AUTHORITIES

Cattaui, Maria Livanos. ICC Publication No. 650. ICC PUBLISHING S.A. An affiliate of ICC: the world business organization 38 Cours Albert 1er 75008 Paris, France.
Cited as: Cattaui

Clerc, Thierry; **Daubner**, Stefan; **Legrand**, Fabienne; **Bembo**, Pietro; **Paulon**, Pierantonio; **Seck**, Papis; **Fiutowski,** Benedykt. Hardship provisions & hardship clauses in international business contracts. 2016.
Cited as: Clerc/Daubner/Legrand et. al.

Coatzee, Juana. INCOTERMS as a form of standardisation in international sales law: an analysis of the interplay between mercantile custom and substantive sales law with specific reference to the passing of risk. 2010.
Cited as: Coatzee

Deccache, Antonio Carlos Fernandes 'Cláusula de Arbitragem nos Contratos Internacionais', Atlas, 2015;
cited as: Deccache

DiMatteo, Larry A. The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings, 1997, Yale Journal of International Law
Cited as: DiMatteo

Edling, Matthew K. 'The Evidentiary Hurdles of Arbitration, PROOF, Selection of litigation', American Bar association, Summer 2010, v.18.
cited as: Edling

Ellingsen, Tore; **Johannesson,** Magnus; Is There a Hold-Up Problem? Tore Ellingsen and Magnus Johannesson The Scandinavian Journal of Economics Vol. 106, No. 3, Behavioral Economics (Sep., 2004), pp. 475-494 Published by: Wiley.
Cited as: Ellingsen/Johannesson.

Epstein, Wendy Netter. Facilitating Incomplete Contracts.
Cited as: Wendy Epstein.

Fouchard, Philippe**; Gaillard,** Emmanuel**; Savage**, John**.**	Fouchard Gaillard Goldman on International Commercial Arbitration (edited by Emmanuel Gaillard and John Savage), 1999, The Hague Cited as: Fouchard/Gaillard/Savage.
Fuller, Lon L.	Williston on Contracts. 1939. North Caroline Law Review, UNC School of Law. Cited as: Fuller.
Garro, Alejandro.	CISG AC Opinion No 7 Exemption of Liability for Damages Und er Article 79 of the CJSG (Rapporteur) 12 Oct 2007.
Hart, Oliver D**; Moore,** John.	"Incomplete Contracts and Renegotiation," Econometrica, Econometric Society, vol. 56(4), 1988. Cited as: Hart/Moore.
Horn, Noerbert.	Procedures of Contract Adaptation and Renegotiation in International Commerce, in: Horn (ed.), Adaptation and Renegotiation of Contracts in International Trade and Finance, Antwerp, Boston, London, Frankfurt a.M. 1985, at 173 et seq.; Cited as: Norbert Horn
Horn, Noerbert.	Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law, in: Horn (ed.), Adaptation and Renegotiation of Contracts in International Trade and Finance, Antwerp, Boston, London, Frankfurt a.M. 1985, at 15 et seq. Cited as: Horn
Hwang S.C., Michael and **Ch**ung, Katie	Defining the Indefinable: Practical Problems of Confidentiality in Arbitration, Journal of International Arbitration, 2009; cited as: 26 J. Int. Arb. 5
John, Brigitta	'Admissibility of Improperly Obtained Data as Evidence in International Arbitration Proceedings', Kluwer Arbitration Blog, November 2018. cited as: John

Knoll, Jocelyn L.; **Kappelman**, Ben D.; **Clappison** John T.	It must be done? Impossibility or Impracticability as na Excuse to Performance. 2014. American Bar Association. Forum on the Construction Industry. Cited as: Knoll/Kappelman/Clappison.
Kreindler, R.	'Corruption in international investment arbitration: jurisdiction and the unclean hands doctrine', in Hober, K., Magnusson, A. and Ohrstrom, M. (Eds.): *Between East and West: Essays in Honour of Ulf Franke*, 319, 2010. cited as: Kreindler
Kroll, S.; **Mistelis**, L.A.; **Viscasillas**, P. Perales; **Rogers** V.	International Arbitration and International Commercial Law: Synergy Convergence and Evolution, Wolters Kluwer Law & Business Cited as: Kroll/Mistelis/ Viscasillas/Rogers
Kubalczyk, Anna Magdalena	Evidentiary Rules in International Arbitration – A Comparative Analysis of Approaches and the Need for Regulation (Groningen Journal of International Law, vol 3(1): International Arbitration and Procedure), 2015; cited as: Kubalczyk
Lamm, C.	'Fraud and corruption in international arbitration', in Fernández- Ballesteros, M.A. and Arias, D. (Eds.): *Liber Amicorum Bernardo Cremades*, 2010.
Lew, Julian D. M.; **Mistelis**, Loukas A.; **Kröll**, Stefan Michael	'Comparative International Commercial Arbitration', Kluwer Law International B.V., 2003. cited as: Lew/Mistelis/Kroll
Lindström, Niklas.	"Changed Circumstances and Hardship in the International Sale of Goods" (2006) (Issue 1) Nordic Journal of Commercial Law 23-24. Cited as: Lindstrom.
Mackay, Evert Johannes P.; **Sztajn,** Rachel; **Rousseau,** Stpéphane.	Análise Econômica do direito, 2ª Edição. Cited as: Mackay/Sztajn/Rousseau.

Magnus, Ulrich. Ulrich Magnus in J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetzen und Nebengesetzen, Wiener UN-Kauji-echt (CJSG) (15 ed, Sellier, Berlin, 2006) Article 79 para 4
Cited as: Magnus.

Mankowski, Peter. Peter Mankowski in Karsten Schmidt (ed) Münchener Kommentar zum Handelsgesetzbuch (CH Beck, Munich, 2004) Article 79 ClSG pura 17., Schlechtriem, above n 20, para 289.
Cited as: Mankowski

Marghitola, Reto 'Document production in international arbitration', Ed. 2, 2017, pp. 93
cited as: Marghitola

Maskow, Dietrich Maskow, Dietrich, Hardship and Force Majeure, 40 Am.J.Comp.L. 1992, at 657 et seq.
Cited as: Dietrich Maskow

Maskow, Dietrich. Maskow, Dietrich, Beispiel für allgemeine vertragsrechtliche Regeln, in: Ak.St.Rwiss.DDR (ed.), Grundzüge einer wissenschaftlichen Konzeption des allgemeinen Teils der rechtlichen Regelung internationaler Wirtschaftsbeziehungen zwischen den Organisationen der Mitgliedsländer des RGW, Potsdam-Babelsberg 1986, at 38 et seq.
Cited as: Maskow.

Mayer, Pierre. Le principe de Bonne foi devant les arbitres du commerce international, in Etudes de Droit International en L'honneur de Pierre Lalive 543 (1993).
Cited as: Mayer

Mustill, Michael The New Lex Mercatoria: The First Twenty-five Years, Arb.Int'l 1988, at 86 et seq. (VII, §10)
Cited as: Mustill

Mustill, Michael. The New Lex Mercatoria: The First Twenty-five Years, Arb.Int'l 1988, at 86 et seq.
Cited as: Mustill.

Park, William W — Gaps and changed circumstances in energy contracts: the devil in the detail, Journal of World Energy Law & Business, Volume 8 (2015), Issue 2, at 89 et seq.
Cited as: Park

Paulsson, Jan — Arbitration in three dimensions, 60 ICLQ (2011)
Cited as: Paulsson

Perillo, Joseph. — Joseph Perillo "Force Majeure and Hardship Under the UNIDROIT Principles ofJnternational Commercial Contracts" (1996) 5 Tu! J lnt'l & Comp L 1, 9.
Cited as: Perillo.

Pilkov, Konstantin — 'Evidence in International Arbitration: Criteria for Admission and Evaluation', Chartered Institute of Arbitrators, 2014.
cited as: Pilkov

Posner, Eric; **Salama,** Bruno Meyerhof. — Análise Econômica do direito Contratual, 1ª Edição.
Cited as: Posner/Salama.

Ramberg, Jam. — ICC Guide to Incoterms 2010, Understanding and practical use, International Chamber of Commerce. 2011.
Cited as: Ramberg.

Reisman, W. Michael and **Freedman**, Eric E, — 'The Plaintiff 's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication', Faculty Scholarship Series. Paper 730, 1982
cited as: Reisman/Freedman

Reisman, W. Michael and **Freedman**, Eric E. — The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication, 1982;
cited as: Reisman/Freedman

Rivkin, David R. — Lex Mercatoria and Force majeure, in: Gaillard (ed.), Transnational Rules in International Commercial Arbitration (ICC Publ Nr. 480,4), Paris 1993, at 161 et seq.
Cited as: David Rivkin

Sákovics, József. The Hold Up problem. 2006.
Cited as: József Sákovics.

Schlaepfer, A. V., **Bärtsch**, P. 'A few reflections on the assessment of evidence by international arbitrators.' Int. Bus. Law J. 2 (3), 2010, pp.: 211–223.
cited as: Schlaepfer/Bartsch

Schlechtriem, Peter. Uniform Safes Law: The UN-Com,enfion on the International Sale of Goods (Manz, Vienna, 1986) 102;
Cited as: Schlechtriem.

Schlechtriem; Schwenzer. Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG), 4th Edition, Oxford
Cited as: Schlechtriem/Schwenzer

Schwenzer, Ingeborg. Schwenzer - Opinion 3.1 [CISG AC Opinion No 7]; Schwenzer in Schlechtriem and Schwenzer (eds), above n 18, Articlc 79 para 4;
Cited as: Schwenzer.

Sornarajah, M. International Commercial Arbitration, Singapore 1990
Cited as: Sornarajah.

Srinivasan, D.; **Pathak**, H.; **Panjwani**, P.; and **Varma**, P. Effect of bribery in international commercial arbitration. International Journal of Public Law and Policy, 2014
cited as: Srinivasan/Pathak/Panjwani/Varma

Stoll, Hans; **Gruber,** Gregor. Hans Stoll and C'reorg Gruber in Peter Schlechtriem and Ingeborg Schwenzer (eds) Commentary on the UN Convention on the International Safe ofGoods (2 English ed, Oxford Univcrsity Press, Oxford, 2005) Article 79 puras 10-24; 2005.
Cited as: Stoll/Schlechtriem/Schwenzer.

Strohbach, Heinz. Force majeure and hardship clauses in international commercial contracts and arbitration. In Jounal of International arbitration, Paris: ICC, Vol. 1, n. 1, 1984.
Cited as: Strohbach.

Sussman, Edna — Cyber Intrusion as the Guerrilla Tactic: Historical Challenges in an Age of Technology and Big Data, 2018; cited as: Sussman

Veeder, Van Vechten — Evidential Rules in International Commercial Arbitration: From the Tower of London to the New 1999 IBA Rules", 65 Arbitration 291 (1999) 292-3; cited as: Veeder

Vogenauer, Stefan . — Cases, Materials and Text on Contract Law: Ius Commune Casebooks for the Common Law of Europe, 2nd Edition, Bloomsbury
Cited as: Vogenauer.

INDEX OF ARBITRAL AWARDS

Arbitrazh Court of Novosibirsk region
Date: 12.12.2013
Award No. A45-6683/2013
Parties: Unknown
Cited as: Arbitrazh Court of Novosibirsk region, Award No. A45-6683/2013

INDEX OF JUDICIAL AWARDS

BULGARIA
Bulgarian Chamber of Commerce and industry
12 Feb 1998
CJSG-online Case No 436;
Bulgaria
Cited as: BTTP No. 436.

AUSTRIA
Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft [Arbitral Tribunal - Vienna]
SCH-4366
15 June 1994
Cited as: Rolled metal sheets case

ENGLAND
High Court of Justice
1978
Case Number: 554410
Cited as: Staffordshire Area Health Authority V. South Siaffordshire Waterworks Co

FRANCE
CA Grenoble [CA = Cour d'appel = Appeal Court]
15 May 1996
CISG-online Case No 371
Cited as: Thermo King v. Cigna Insurance Company of Europe SA-NV

Cour d'Appel de Colmar
12 June 2001
ClSG-online Case No 694.
Parties: Société Romay AG v. SARL Behr France
Cited as: Cour d'Appel de Colmar, case No 694

Cour de Cassation
09 october 1984
Pabalk Ticaret Limited Sirketi v. Norsolor;
Cited as: Pabalk Ticaret Limited Sirketi v. Norsolor;

ITALY
Tribunale Civile di Monza
29 Mar 1993
CISG-online Case No 102
Parties: Nuova Fucinati S.p.A. v. Fondmetall International A.B.
Cited as: Tribunale Civile di Monza, Case No 102

UNITED STATES OF AMERICA

Supreme Court of California
Mineral Park Land Co. v. Howard
1916.
Cited as: Mineral Park Land Co. v. Howard

Supreme Court of California
City of Vernon v. City of Los Angeles
1955.
Cited as: City of Vernon v. City of Los Angeles

Supreme Court of California
Kennedy v. Reece
1964
Cite as: Kennedy v. Reece

United States Court of Appeals for the Federal Circuit
United States v. Winstar Corp. et. al.
1995
Cited as: United States v. Winstar Corp.

STATEMENT OF FACTS

The parties to this arbitration are Phar Lap Allevamento (hereafter CLAIMANT) and Black Beauty Equestrian (hereafter RESPONDENT).

CLAIMANT: a company registered and located in Capital City, Mediterraneo. It operates Mediterraneo's oldest and most renown stud farm, covering all areas of the equestrian sport.

RESPONDENT: Oceanside, Equatoriana, is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions.

21 March 2017	Black Beauty (RESPONDENT) contacted Phar Lab (CLAIMANT) to buy Nijinsky III semen for its newly started breeding programme.
Not provided	As there was a temporary lifted the ban on artificial insemination in Equatoriana, CLAIAMANT found odd the high number of dosage ordered by RESPONDENT, but after a conversation through e-mail agreed on 3 different shipments for the 100 doses.
24 March 2017	CLAIMANT then made an offer by e-mail 100 doses costing $9,950.00 per dose. Respondent insisted on incoterm DDP (Delivered Duty Paid and objected to the choice of law and forum selection clause. Claimant accepted delivery DDP. However it would increase the value by $1,000.00 per dose and should be included a hardship clause.
12 April 2017	Due to an tragical accident that incurred to the two main negotiators in Danubia, Ms. Napravnik and Mr. Antley, the finalization of the agreement took longer than expected
06 of May 2017	They were replaced and the contract was finalized and signed. However, some of the information that was previously discussed between the first two negotiators were not included on the contract, such as the law that would govern the arbitration agreement.
20 May 2017	The first 25 doses were delivered.
03 October 2017	Second delivery was made.

November 2017 Ian Bouckaert, Mediterraneo's newly elected president, announced a 25% increase tariffs on agricultural products from Equatoriana.
It was not at any moment included on the strategy plans nor the election manifesto. In any way, it increased a great deal the costs to CLAIMANT that previously would only have a 5% profit, would suffer a loss of 25%.

Short period Equatorian Government retaliated by imposing 30% on selected products from Mediterraneo including on animal semen.

CLAIMANT knownin about the new increased tariff contacted RESPONDENT to discuss the adjustment of the price. However, RESPONDENT asked for the doses to be delivered upon schedule and made no reservation to the adjustment that should be made.

23 January 2018 Remaining 50 doses were delivered before an agreement upon the new price was made.

PROCEDURE

ISSUE 1) THE ARBITRATION AGREEMENT EMPOWERS THE ARBITRAL TRIBUNAL TO ADAPT THE CONTRACT

1. The arbitration agreement accorded between the parties in clause 15 of the Contract *[Claimant's Exhibit C5]* is governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sales of Good – CISG **(I)**, which empowers the Arbitral Tribunal to adapt the Contract **(II)**.

I. THE ARBITRAL TRIBUNAL MUST DECIDE THE LAW APPLICABLE TO THE ARBITRATION AGREEMENT

2. The parties decided to be bound by the HKIAC Administered Arbitration Rules, which, in its Art. 36, leaves to the parties the power to decide on the applicable law, that the arbitral tribunal shall use to decide the substance. However, in the case where the parties have not reached an agreement, the arbitral tribunal itself shall make the decision of which law shall be applicable.

3. RESPONDENT wrongfully alleges that the applicable law shall be the *lex arbitri*, the law of Danubia, in despite of CLAIMANT's allegations to apply the law of the Contract, the law of Mediterraneo.

4. According to Art. 28 (2) UNCITRAL Model Law, in the occasion where the choice of law is left to the arbitral tribunal, it shall do so in the basis of the conflict of law rules, that in the present case is the Hague Principles on Choice of Law in International Commercial Contracts *[Clarification 43]*.

5. Article 2(2) Hague Principles states the applicable law can either be the law applicable to the whole contract or to only part of it. The parties have not decided on a specif law to apply to the arbitration agreement, and, therefore the present discussion, which leaves the law applicable to the whole contract, in this case the law of Mediterraneo, to be the applicable law.

6. The *lex arbitri* deals with issues related to the arbitral proceeding, while the applicable law deals with aspects of validity and interpretation, and, as so, cannot be confused. *[Born, pp. 594–597; Paulsson, p. 291]*.

7. Still, in the international practice and doctrine, absent a choice of law by the parties the substantive law, must be the most closely connected to the formation of the agreement **(I.A)**.

I.A. THE APPLICABLE LAW MUST BE THE ONE MOST CLOSELY CONNECTED TO THE CONTRACT

8. The first drafters of the Contract payed special regard to the applicable law. However, due to the unfortunate events, they were not able to finish the discussion, and their substitutes leaved no answer to the problem on the arbitration agreement. But all those discussions resulted on a Contract that was finally agreed and signed on Mediterraneo *[Clarification 6]*.

9. Envisaging the international aspect of the arbitration, professor Lew recommends the application of the law of the state which the subject-matter of the proceedings is most closely connected *[Lew, pp. 436; Hyland, pp. 03]*.

10. A Contract is most closely connected with the law of the country where the party required to effect the characteristic performance, that it is not the party who pays but the party who performs in kind, has its habitual residence, seat or place of business. [*Hayward, pp. 284, 285; Art. 4(2) Rome Convention*].

11. The international practice also shares the understanding of applying the law most closely connected to the Contract. For example, in the *Sulamérica Cia Nacional de Seguros S.A. v Enesa Engelharia S.A.* the arbitral tribunal established a three-stage enquiry to determine the law governing the arbitration agreement, that later was regarded by many other arbitral cases, such as BCY v BCZ ("BCY"; [2017] 3 SLR 357) [FirstLink Investments Corp Ltd v GT Payment Pte Ltd ("Firstlink"; [2014] SGHCR 12 - Singapore High Court)].

12. This process basically consists in applying, respectively, (i) the express choice of law, (ii) an implied choice of law and finally (iii) to apply the law with the closest and most real connection with the contract.

13. This kind of approach is preferable despite a "procedural approach", under which arbitration agreements are regarded as procedural and therefore inevitable subject to the law of the *lex arbitri*, being more in line with the principle of party autonomy, a fundamental principle of international arbitral process *[Born, pp. 512–513]*.

14. When the parties make an express choice of law to govern the substantive contract it shows a strong indication of the intention of the parties' intention to apply that law to the agreement to arbitrate *[EWHC 481; EWHC 2737; Born/26 SAcLJ, p. 834]*.

15. In the *Arsanovia Ltd v Cruz City 1 Mauritius Holdings19* ("Arsanovia"; [2012] EWHC 3702 (Comm)) case, the Arbitral Tribunal decided that in the case that the parties reached an decision as to the "whole agreement" being governed by one system of law, it is natural to infer that those parties also intended to have al clauses, including the arbitration agreement, to be governed by that choice of law.

16. The wording "agreement" is very broad, covering both primary and secondary obligations, and, unless explicit stated by the parties, there is no reason to understand that they wanted to narrow its meaning. The clause itself is discussed within the rest of the contract, and not as a separate entity, being part of the so-called "agreement".

17. One case scenario that the parties have in mind when choosing different laws to the arbitration agreement and the substance, is that, if the contract is deemed invalid, there is the chance of they not having a law to apply to the arbitration agreement *[Petit/Edge, pp. 2]*. This

clearly is not the case at hand, and even so, the arbitral tribunal would be left with the decision on which law to apply as mentioned before.

18. Notwithstanding, both the Model Law and the New York Convention provides that the applicable law precedes the law of the seat, clearly differentiating both. Arts. 34 and 36 Model Law states that the seat law shall act as the default fallback provision for the applicable law.

19. No neutrality argument shall be argued, once to decide the substantive law, the parties discussed the issue, and still deemed the solution as appropriate.

20. Not even so, there is consistent jurisprudence in Mediterraneo that in sales contracts governed by the CISG, the later also applies to the conclusion and interpretation of the arbitration clause contained in such contracts *[Po1, para. 4]*.

21. In this sense, the law of Mediterraneo is the one that is most closely connected with the subject-matter, and the Agreement itself, while the *lex arbitri* has no connection at all with those aspects, especially because, as previously stated the law of the seat aims a different aspect of the arbitration, becoming clear that the Law of Mediterraneo is the one that shall be applicable by the Arbitral Tribunal.

II. THE LAW OF MEDITERRANEO EMPOWERS THE ARBITRAL TRIBUNAL TO ADAPT CONTRACTS

22. There is no doubt that the CISG is the applicable law, since it is the law of both Mediterraneo and Danubia. However, Mediterraneo have a verbatim adoption of the UNIDROIT Principles, which in is Art. 2.2.3 allows the Abitral Tribunal to adapt contracts, a provision that has been amended in the law of Danubia, to only allow so, in the case where the parties have expressly provided for so.

23. The CISG itself, despite not having an express provision, in Art. 79 presupposes that an arbitrator has the capacities of a judge, by the clear reasonable expectation [*Ishida pp. 51*].

24. The CISG provides for some remedies, comparable to adapt a contract, such as Article 79 CISG exempts a party from liability for damages when that party has failed to perform any of its obligations, including a seller's obligation to deliver conforming goods, or the remedy of price reduction, in article 50. In this sense, the CISG provides for the judge

to grant relief when there is any disturbance of the equilibrium or balance in the relation, whether by awarding a liability, or barring a performance claim. The CISG Advisory Council Opinion No. 7 admits that "a change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("hardship"), may qualify as an "impediment" under Article 79(1)", and, then, "in a situation of hardship under Article 79, the court or arbitral tribunal may provide further relief consistent with the CISG and the general principles on which it is based".

25. The parties included in the Agreement a hardship clause *[Claimant's Exhibit C5]*, aiming to safeguard CLAIMANT from any "unforeseen events making the contract more onerous", in view of the request of RESPONDENT to apply a DDP Incoterm. Article 6.2.3 UNIDROIT Principles also admits for the adaptation of the contract in view of hardship.

26. Even during the very first discussions of the Agreement, where the parties were also discussing an adaptation clause, Mr. Antley, RESPONDENT's responsible explicitly stated to Ms. Napravnik, CLAIMANT's responsible, that the arbitrators should have the power to adapt the contract in case the parties should not be able to reach a solution [*Claimant's Exhibit 8*], showing that RESPONDENT agreed to grant the power to the Arbitral Tribunal to adapt contracts, in the case that the law applicable should be one such as the law of Danubia that asks for the consent of the parties to grant such powers to the Tribunal.

27. As a matter of fact, in Austria, for example, the courts have expressly relied on the validation principle, stating that 'if the wording of the declaration of intent allows for two equally plausible interpretations, the interpretation which favors the validity of the arbitration agreement is to be preferred [*Austrian Oberster Gerichtshof, pp. 404 - 405*], which leads to the interpretation that the law that should regulate the arbitration agreement is the Mediterranean Law, since it allows the arbitral tribunal to adjust the contract, as well as the CISG.

28. Therefore, in the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate [*Moore-Bick/Hallett, pp. 1-6*]. This approach was confirmed in the subsequent case of Arsanovia Limited & others v Cruz City 1 Mauritius Holdings, in this case, a dispute arose out of a slum clearance programme in India which was subject to considerable delay. There was a suite of contracts in relation to the programme, the relevant shareholders' agreement being governed by Indian law and providing for LCIA arbitration in London. Andrew Smith J decided that the arbitration agreement was governed by Indian law, that being the law governing the main contract. He even suggested, obiter, that the

choice of the law of the main contract may be an express, rather than implied, choice of the law of the arbitration clause [*Nazzini, pp. 8*].

CONCLUSION OF THE FIRST ISSUE

29. The Arbitral Tribunal shall decide on which law is applicable to the interpretation of the arbitration agreement, because of the failure of the parties to do so. Therefore, the law of Mediterraneo, as decided on Clause 14 of the Agreement, shall be the one applicable, which empowers the Arbitral Tribunal to adapt the Contract, having RESPONDENT, in the negotiations, agreed with so.

ISSUE 2) THE ARBITRAL TRIBUNAL MUST ADMIT THE EVIDENCE PRESENT BY CLAIMANT

30. The Arbitral Tribunal shall accept the award from the other proceeding being discussed by RESPONDENT, once CLAIMANT have not acted in any illegal way to obtain the evidence.

31. CLAIMANT pleads to the arbitral tribunal to decide that it should be admissible since the exclusion of evidence is an exception to the general rule **(IV)**, the laws that are applicable to the arbitration north the tribunal to accept the evidence legally obtained **(III)**.

III. THE INTERNATIONAL PRACTICES LEADS FOR THE ACCEPTANCE OF EVIDENCE

32. The discretionary power of the tribunal to decide about the rules of taking evidence includes a lack of selection of any rules and the admissibility of certain types of evidence. The International Court of Justice has constructed the absence of restrictive rules in its Statute to mean that a party may generally produce any evidence as a matter of right, so long it is produced within the time limits fixed by the court [*Kubalczyk, p. 98*].

33. International tribunals have displayed little interest in excluding evidence. Documentary, testimonial, and real evidence has frequently been accepted for consideration even when irregularly presented. The general consensus of practitioners and commentators alike is that stricter rules of admissibility are wholly inappropriate for international arbitration or adjudication [*Reisman/Freedman, pp. 2*].

34. Arbitral Tribunals may seek from other sources to fundament their decisions. These sources may vary, they still have not the same power as the rules that govern the contract and the arbitration agreement. For instance, the rule that govern the procedure, the HKIAC procedural rules, regarding the taking of evidence **(III.A)** rules in favor of CLAIMANT. If this arbitral tribunal understands that the procedural rules lacks on specificity, the arbitral "soft laws" have yet to be considered as a source to be sought by this arbitral tribunal to find a reasonable solution **(III.B)**.

III.A. THE LAW OF MEDITERRANEO LEADS THE ARBITRAL TRIBUNAL FOR THE ACCEPTANCE OF EVIDENCES

35. RESPONDENT claims a violation of contractual and statutory confidentiality obligations, but international tribunals are not prone to exclude evidence based on confidentiality. Historically, at least in England, one of the main reasons for the development of arbitration is that the parties wanted more flexibility with respect to taking and presenting evidence. [*Veeder, p. 292-3*; *Lew, p. 554*]

36. The parties agreed on the Contract [*Clause 15, pp. 14*] that further arbitration would be ruled by the regulation of the Hong Kong International Arbitration Center - HKIAC. As regards the admissibility of evidences, HKIAC's regulation states that: "The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of evidence, including whether to apply strict rules of evidence" [*Article 22, 22.2, p. 29*].

37. In a similar case, between Symbion Power v Venco [*EWHC 348*], the Technology and Construction Court (TCC) denied an application by Symbion to set aside an arbitration award on the grounds of serious irregularity (under section 68 of the Arbitration Act 1996). Symbion claimed that it had argued, in the arbitration, that the tribunal was bound by findings in a prior award (in a related arbitration between Symbion and a third party).

38. The judge decided by saying that: "There is a strong public interest in the publication of judgments, including those concerned with arbitrations, because of the public interest in ensuring appropriate standards in the conduct of arbitrations. That has to be weighed against the parties' legitimate expectation that arbitral proceedings and awards will be confidential to the parties". And that nothing in the judgment would have the effect of disclosing anything of a confidential nature to others with whom Symbion might be in negotiations (Symbion having suggested that its negotiating position with others might be prejudiced in some general way).

39. Confidentiality in arbitration is not an absolute rule which will apply on a blanket basis. There are exceptions involved. While confidentiality will be preserved where it is appropriate to do so, there will be circumstances where the rule is overridden by other factors. These circumstances are in the power of the tribunal to be accepted or not. CLAIMANT is advancing an arguable assertion, put forward in good faith, that what happened in the other arbitration can be relied upon for the purpose of his assertions in this arbitration proceeding.

III.B. THE IBA GUIDELINES REINFORCES THE ACCEPTANCE OF EVIDENCE

40. The IBA Rules have successfully influenced the practice of international arbitration, as arbitral tribunals formed by members from different legal traditions have been applying them, be it on their own motion or at the request of the parties, regardless of an express choice for the IBA Rules in the terms of reference.

41. The IBA rules on taking of evidence article 9 (1) grants the tribunal the competence to rule on the admissibility, relevance, materiality and weight of evidence. Furthermore, article 9 (2) gives 7 reasons where the arbitral tribunal might exclude evidence, which are: (a) has not sufficient grounds for relevance and materiality; (b) if any of the parties that constitute an arbitral proceeding break privilege; (c) no express reason to produce such evidence; (d) if the document has been destructed and CLAIMANT went above and beyond to retrieve; (e) has a high economic value; (f) the evidence has been classified by the government; or (g) breaks the principles or fairness and equality.

42. Hence, CLAIMANT does not fit in any of these guidelines elaborated by the IBA, and so the request that RESPONDENT be obliged to submit evidence should be granted.

43. Furthermore, concerning that, the arbitration rules give broad authority to arbitrators on the consideration of evidence. For example, even the UNCITRAL Arbitration rules provides that once a party offers evidence to prove the facts it relies on, the court is required to "determine the admissibility, relevance, materiality, and weight of the evidence offered" [art. 27], which means there is wide recognition of the arbitral tribunals' discretion to admit any relevant evidence they deem to have probative value, as well as their power to reject evidence that is irrelevant or unsuitable to prove the facts it purports to prove. On the other hand, in international arbitration the parties are free to submit any evidence in order to prove the facts necessary to establish their cases [*Pilkov, pp. 2*]

44. The Hong Kong Arbitration Ordinance, s. 6B, allows the court to consolidate two or more arbitration proceedings in certain circumstances, e.g., a common question of law or fact arises in both or all of the arbitrations [*s. 6B(1)(a)*]. Other examples include the Singapore International Arbitration Centre Rules, [*SIAC Rules art. 39*] and the London Court of International Arbitration Rules [*LCIA Rules art. 22.1(viii*)], which allow joinder of third parties with their consent but not necessarily the consent of all the existing parties.

45. In conclusion, international "soft laws" stand with CLAIMANT and his request to submit evidence and upon the circumstances of the casa it is necessary for such evidence to be accepted and submitted.

IV. THE INTERNATIONAL PRACTICES LEADS FOR THE ACCEPTANCE OF EVIDENCE

46. The point is the admissibility of evidences is the general rule, since the concept of the general admissibility of relevant evidence is recognized in international arbitration. It was largely taken from the common law tradition, for example, the US evidence law with respect to admissibility establishes one seemingly simple rule: all relevant evidence is generally admissible, evidence which is not relevant is not admissible [*US Federal Rules of Evidence, pp. 402*].

47. As a matter of fact, a party seeking to challenge an award because a tribunal refused to admit evidence, and by doing so negatively affected the party's right to present the case, may succeed. However, it is far more difficult to convince a court that an arbitration tribunal

erred when it admitted the evidence but failed to properly evaluate its significance [*Pilkov, pp. 3*].

48. Especially, the body of transnational law developed thus far and the practice of arbitration tribunals indicate that arbitrators have a broad power to determine the admissibility of privileged or confidential evidence. The IBA and UNCITRAL Rules provide guidance, stating that tribunals should take into account any sensitivity, legal impediments or privilege inherent in the materials presented in favour of one of the parties. After all, tribunals in international law have traditionally been viewed as creatures of the consent of the litigants with only those powers the litigants have accorded them. Regardless of the legality or illegality of obtaining the evidence, a tribunal should analyse whether the proffered evidence violates the principles of due process in contravention of good faith, a party's equal right of defense and the transnational public order [*Edlin, pp. 5; Reisman/Freedman, pp. 16*].

49. Hence, the evidence brought by the plaintiff must be accepted, since it was obtained in good faith, and has great relevance to the procedure. Beyond that, there is no disrespect to due process nor parity of arms. On the contrary, the Claimant is experiencing financial problems, and Respondent knew that a 30% increase in fees would make it difficult for Claimant to recover financially [*Clarification 28*], so the exposed evidence allows the Claimant to stay in the same position as the Respondent was, in another arbitration.

50. In fact, if the documents have a high economic value, they may be excluded. [*Marghitola, pp. 93; Pilkov, CIArb, 2014; ICSID Case No. ARB/13/13*]. However, documents on this particular case don't have any economic value since they question the good faith of RESPONDENT on the intent to sell to third parties semen which was prohibit on e-mail conversations. [*Claimant's Exhibit 2*].

51. Besides that, the central issue of the Claimant's evidence is to clarify to the Court that both parties understand that the increasing tariffs to, at least, 25% ruled by the Mediterranean government is an unpredictable cause that entails contractual adaptation. More than that, what has been shown to the Court was the argumentation used by the Respondent in previous arbitration, not the confidentiality of both parties in that particular case, neither the whole documents of that arbitration, but only the award [*Clarification 39*].

52. Therefore, tribunals are guarded in their approach with respect to documents covered by attorney-client privilege, but as regards any other documents available in the public domain, a tribunal may be willing to admit such documents since ignoring them would

lead to an unreasonable conclusion, which could make the award subject to challenge [*John, pp.2*].

CONCLUSION OF SECOND ISSUE

53. The arbitration proceeding upon which the evidence was found is in the public knowledge. The evidence that was obtained may have been acquired by a breach of the confidentiality agreement or through a hack on the systems, that is worth knowing were not updated, and if RESPONDENT fells that their right has been violated that should pursue legal actions against the ones that are really responsible, CLAIMANT will buy the documents from a company that already possesses the documents, and there is nothing illegal on such matters. So, the evidence should be admissible and taken into account.

MERITS

ISSUE 3) THE ARBITRAL TRIBUNAL SHALL RESTORE THE FINANCIAL EQUILIBRIUM OF THE CONTRACT

54. The Equatorianan government imposed a 30% tariff upon all agricultural products imported from Mediterraneo, including the object of the contract - racehorce frozen semen -, what led to a severe contractual imbalance, that must be reestablished.

55. Both parties agreed, in the Sales Agreement, that CLAIMANT was supposed to provide a hundred doses of frozen semen, sent in three shipments, in exchange for a non-refundable fee of U$ 100,000 per insemination dose, what would leave a 5% margin of profit for CLAIMANT.

56. However, with the unpredicted imposition of the tariff, CLAIMANT not only lost its 5% margin of profit, but also had severe losses due to its payment, since it had to pay such tariff in order to send the 3rd shipment.

57. In this sense, it is correct to affirm that CLAIMANT is actually paying RESPONDENT to execute a contract in which he was supposed to profit. It is cristal clear that the contract must be adapted in order to restore its financial balance.

58. For that reason, **(IV)** it shall become clear that Clause 12 of the contract adds a hardship wording into the agreement, which perfectly encompasses the situation described in the present case. The contractual stipulation, which shall be interpreted in line with its economic rationality, is sufficient to protect CLAIMANT from the unforeseen event. In addition, even if it were to be found that the hardship clause does not cover the imposition of the tariffs **(VI)** the CISG also fully corroborates CLAIMANT'S requests.

IV. THE PARTIES CAN RELY ON THE HARDSHIP CLAUSE TO ADAPT THE CONTRACT

59. According to RESPONDENT, CLAIMANT has no right to ask for an adaptation of the contract, under the force majeure/hardship clause. However, (VI.A) its wording is broad enough to secure its adaptation.

60. Moreover, (VI.B) the economic rationality of the hardship clause flourishes precisely in face of unforeseen events, forbidding unexpected situations to cause uncalculated damages to one of the parties. The present case, in which the parties agreed on a DDP delivery, an economic analysis of the contract and of CLAIMANT'S obligations reveals that the financial balance of the agreement depended on a cautious risk allocation, including a sufficiently broad hardship clause. CLAIMANT, as a rational economic agent, was not willing to accept bearing a risk which was way beyond its control.

VI.A. THE HARDSHIP CLAUSE EXEMPT CLAIMANT FROM ANY UNPREDICTABLE COSTS

61. As stated, the hardship clause is broad enough to secure the contract adaptation. Not only that, the tariff's imposition falls within the scope of the hardship, and, therefore, CLAIMANT must not bear all the costs related to the contract.

62. It shall come to this Tribunal's attention that clause 12 was insert in the contract because the RESPONDENT insisted on a DDP-delivery, based on an *"urgency of the delivery and [CLAIMANT'S] much greater experience in the shipment of frozen semen" [Claimant's Exhibit C3]*.

63. According to the ICC INCOTERMS 2010, the *"seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities."*. In

this sense, it is naïve to assume that CLAIMANT would bear such risks without sharing it with the RESPONDENT through a hardship clause.

64. Actually, it is widely recommended that under D-terms *[Incoterms]* the seller should carefully consider the need to protect himself against non-fulfillment risks by adding a relief clause in the contract of sale *[Ramberg]*. It is even arguable that when an adaptation clause is not included in international contracts, its tacit existence should be inferred *[Sornarajah]*. This recommendation is also emphasized on the ICC Guidelines to Incoterms, whose model hardship clause was utilized a basis for the elaboration of the final contractual hardship clause.

65. In this sense, it is important to emphasize that the ICC model hardship clause was considered too broad by RESPONDENT *[Answer to Notice of Arbitration, §4]* and, accordingly, parties agreed upon the following words: *"Clause 12: Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous". [Claimant's Exhibit C5, FSA].*

66. The wording of this hardship clause, even though filled with vague and broad terms such as "comparable unforeseen events" and "more onerous", was considered narrow enough for RESPONDENT. As a matter of fact, the wording of this agreement, which is the primary source of an arbitral tribunal's jurisdiction *[Fouchard/Gaillard/Savage; Redfern/Hunter]*, suits perfectly into CLAIMANT'S situation.

67. There is, however, a forceful word which guarantees CLAIMANT'S covering from the unforeseen events. According to the Oxford Dictionary, "shall" is a modal verb formal or old-fashioned used to say that something certainly will or must happen, or that you are determined that something will happen, in juridical language it is widely used to express absolute certainty.

68. Moreover, clause 12 FSA was designed precisely to enable re-negotiation of the contract if the continued performance of one party's contractual duties has become excessively onerous due to an unforeseen event beyond the control of that party *[Cattaui; Clerc/Daubner/Legrand et. al.; Sornarajah; Strahhbach; Horn]*.

69. Besides, pursuant the theory of incomplete contracts, when drawing up a contract, it is very difficult to the parties to specify all possible unforeseen events which would make the contract more onerous *[Hart/Moore]*. It is more efficient, thus, when parties leave an open texture to its legal writings.

70. Actually, the wording of clause 12 of the contract, which was considered narrow enough by RESPONDENT, is actually quite broad, a situation which enforces the fact that, even if the parties did not want a too flexible hardship clause, still, they freely agreed on a very flexible one.

71. Three elements underline the unpredictability of this imposition: (i) the inclusion of animal semen in the list of products that fell under the new tariffs-regime; (ii) the fact that the Equatorianian government had always been a supporter of free trade; and (iii) Equatoriana had never imposed any retaliatory measures whatsoever.

72. First, neither of the parties could have predicted that frozen semen would be included in the list released by the Ministry of Agriculture of the products covered by this new-tariff regime. Not only that, the parties were also astonished by the fact that this imposition also applied to racehorse semen, since racehorse breeding is categorized differently from pigs, sheep, or cattle.

73. It is also important to emphasize the fact that the Equatorianian government has always been an ardently supporter of free trade. Consequently, neither parties could have seen this sort of retaliation coming. Actually, the retaliation itself was completely unpredictable and out of proportion, since previous restrictions imposed by other countries affecting its imports have never resulted in direct retaliatory measures. Also, Equatoriana have always tried to solve disputes amicably or by invoking World Trade Organization's dispute resolution mechanisms.

74. Thus, proved that the measure taken by Equatorianian authorities was completely unforeseen, the hardship clause shall protect CLAIMANT from the sudden and unexpected tariff imposition.

VI.B THE HARDSHIP CLAUSE LEADS TO AN ADAPTATION OF THE CONTRACTUAL PRICE UNDER UNFORSEAABLE CIRCUNSTANCES

75. As it shall become clear, **(VI.B.1)** it is economically impracticable to demand CLAIMANT to pay for the unforeseeable additional costs. Additionally, **(VI.B.2)** it would not be economically reasonable to anticipate such completely unexpected risk by increasing the contractual price. Moreover, (**VI.B.3)** since RESPONDENT has put CLAIMANT into a hold up situation, demanding it to pay for the damages it has caused is the only economical

reasonable solution on the present case. Otherwise, a situation of unjust enrichment would manifest.

VI.B.1 UNDER THE IMPRACTABILITY DOCTRINE THE CONTRACT IS NOT ECONOMIC BALANCED

76. Initially, it is important to visualize how financially imbalanced has become the contract after CLAIMANT, misled by RESPONDENT, sent the 3rd shipment, as exposed in the table below.

Normal execution of the contract							
Shipment Date	**Cost of production per dose**	**Price paid per dose**	**Profit per dose**	**Nº of doses**	**Total cost (thousands)**	**Total payment (thousands)**	**Total profit (thousands)**
20 May 2017	U$ 95,000 (estimated)	U$ 100,000	U$ 5,000	25	U$ 2,375	U$ 2,500	U$ 125
3 Oct 2017	U$ 95,000 (estimated)	U$ 100,000	U$ 5,000	25	U$ 2,375	U$ 2,500	U$ 125

Imbalanced execution of the contract							
Shipment Date	**Cost of production per dose**	**Price paid per dose**	**Loss per dose**	**Nº of doses**	**Total cost (thousands)**	**Total payment (thousands)**	**Total profit/loss (thousands)**
23 Jan 2018	U$ 125,000 (estimated)	U$ 100,000	U$ 25,000	50	U$ 6,250	U$ 5,000	U$ 1,250

77. According to table, CLAIMANT has made U$ 250,000 total profit during the execution of the contract, though has suffered losses that extend to the amount of U$ 1,250,000. This resulted on a total loss of U$ 1,000,000.

78. The contract is most definitely imbalanced. In another words, there is no economic equilibrium between the two sides *[William Park]*.

79. Demanding CLAIMANT to pay this unforeseen additional cost falls on the doctrine of impracticability. Even though performance is technically possible, it is commercially impracticable and thus excused *[Knoll/Kappelman/Clappison]*.

80. This doctrine is generally recognized *[Lon Fuller]* and it has been used on a wide variety of similar cases *[Mineral Park Land Co. v. Howard; City of Vernon v. City of Los Angeles; Kennedy v. Reece]*. It is applied whenever the impracticability of a party's performance must not be that party's fault, and the non-occurrence of the events causing the impracticability must have been a basic assumption of the contract *[Knoll/Kappelman/Clappison; David Rivkin pp. 112]*.

81. This is the exact situation as presented in this case. CLAIMANT had no control at all over the tariff increase imposed by Equatorianian government, and CLAIMANT'S exemption from this sort of risk was widely discussed before the signing of the contract, resulting on an unambiguous hardship clause. Thus, also for those reasons, CLAIMANT shall be considered exempted from the payment of the 30% tariff.

VI.B.2. THE CONTRACTUAL RISK ALLOCATION

82. It is important to realize that CLAIMANT has left open a margin of U$ 15,000 per dose for variable costs, an amount that could diminish the damage of any reasonable and predictable change in the circumstances *[Clarification 31]*. On the other hand, increasing the price per dose to prevent completely unexpected events, such as a 30% tariff imposition, would have left CLAIMANT'S proposal commercially uncompetitive.

83. It shall be logically and economically assumed that, if acts of god or hardship were ever to be considered as assumed risks, the contractual price would always be substantially higher than when ordinary DDP-delivery risks are taken into consideration. Moreover, according to the Incomplete Contract Doctrine, parties indeed choose to agree on an incomplete contract precisely because the transactional costs economically prevents them to describe every possible situation *[Posner/Salama]*.

84. On the actual specific scenario, CLAIMANT would never have accepted an increase of only U$ 500 on the contractual price for an assumption of such adventurous

responsibilities which were way beyond its control *[Claimant's Exhibit C5]*. This would contradict CLAIMANT'S cautious risks and costs allocation and also its experienced economical behavior towards the negotiation of the contract *[Claimant's Exhibit C3]*.

85. This shows that the subsequent onerousness of the contract was not caused by CLAIMANT'S failure to anticipate reasonable risks and include it into the contractual price, but rather it was caused by a severe hardship from which CLAIMANT could not foresee. Therefore, adapting the contract is the correct manner to maintain its economic rationality.

VI.B.3. HOLD UP SITUATION AND UNJUST ENRICHMENT

86. The hardship clause as stipulated into the contract manifests a typical example of incomplete clause *[Hart/ Moore]*. Since the applicability of this clause will always be analyzed ex post [Wendy Epstein], for its economic rationality to function a great degree of cooperation and good faith is demanded, especially after the contract has been concluded *[Norbert Horn; Mustill; ICC No. 836I; CC Award No. 5953]*.

87. CLAIMANT demonstrated its agreeability on several occasions, and accepting a DDP-delivery by increasing the contract in only U$ 500 was certainly an act of good will. CLAIMANT, indeed, is not naïve and it certainly was not willing to bear risks that were beyond its control. For this reason, CLAIMANT was completely transparent by clarifying the conditions on which the DDP-delivery would be accepted, and the hardship clause, agreed by both parties, was a non-negotiable one *[Claimant's Exhibit C4]*.

88. RESPONDENT, on the other hand, breached its contractual duty by reselling the frozen semen and by inducing CLAIMANT into a mistake, making it believe that RESPONDENT itself was willing to pay for the additional tariff imposition *[Claimant's Exhibit C8]*.

89. Moreover, RESPONDENT is causing tremendous economic inefficiency to the execution of the contract with its opportunistic behavior, as it is trying to profit more than it is due, taking advantage from CLAIMANT'S good faith *[Mackaay/Sztajn/Rousseau]*. In fact, once the 30% tariff was imposed, a reasonable solution would be discontinuing the contract, in face of its manifest onerousness *[Staffordshire Area Health Authority V. South Siaffordshire Waterworks Co]*. However, now that CLAIMANT has already delivered the goods, it has no bargaining power whatsoever to renegotiate the contract. Indeed, returning the goods,

another conceivable option, would also be economically inefficient, since the frozen semen would suffer, once again, a 25% tariff imposition *[Claimant's Statement of Facts, §9]*.

90. Henceforth, by refusing to cooperate, RESPONDENT has put CLAIMANT on a typical hold up situation *[József Sákovics]*, in which it has to choose between suffering the losses due to the tariff imposition or bearing the costs of an arbitration. This a severely reprehensible conduct, which leads to underinvestment and, as such, it should be rejected from the business scope *[Ellingsen/Johannenson]*.

91. Moreover, exempting RESPONDENT from sharing the costs of the tariff imposition would characterize unjust enrichment, a situation in which a party has unjustly retained a benefit conferred by the other without compensation *[Knoll/Kappelman/Clappison]*.

92. As a matter of fact, it is arguable that RESPONDENT has already unjustly made U$ 2,500,000 profit by reselling the frozen semen, breaching the contractual agreement. This amount would be sufficient for RESPONDENT to bear the additional U$ 1,250,000 in tariffs with no further financial concerns.

93. Thus, in that line, the contractual price shall be adapted, and CLAIMANT is entitled to the payment of, at least, U$ 1,250,000.

VII. THE CISG ENABLES AN ADAPTATION OF THE CONTRACT

94. Even if this arbitral tribunal were to consider that the wording of the hardship clause is not enough to determine its range of applicability, **the contract shall be adapted under the determinations provided by CISG.**

95. In this sense, it shall become clear that **(VII.A)** art. 79 CISG ensures the right to adapt the contract and **(VII.B)** cannot be derogated, in the sense of art. 6.

VII.A. APPLICABILITY OF ARTICLE 79 CISG

96. In order to illustrate the applicability of such article, it is important to first deconstruct RESPONDENT's allegations *[Answer to Notice of Arbitration, §21]* and display that **II.A.1)** art. 79 CISG does regulate hardship and **II.A.2)** also provides for the remedy requested by CLAIMANT, which is the adaptation of the contract. Thereafter, **II.A.3)** it

shall be demonstrated that the situation constitutes a hardship and shall be covered by art. 79 CISG, since it meets all the requirements for such application.

VII.A.1. ART. 79 CISG REGULATES HARDSHIP

97. RESPONDENT states that CLAIMANT cannot rely on such article because it does not regulate hardship *[Answer to Notice of Arbitration, §21]*. Indeed, in the wording of art 79 there is no mention of hardship, as it states that: *A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequence.*

98. However, this issue was addressed by CISG Advisory Council Opinion No. 7, that set forth that the change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous – such as hardship - **may qualify as an "impediment"** under Article 79(1), and, **therefore, a party that finds itself in that situation, may invoke hardship as an exemption from liability under Article 79.**

99. Many courts and arbitral decisions have corroborated with that interpretation, as it has been repeatedly decided, i.e., in the *Bulgarian Chamber of Commerce and industry, case No 436; the Thermo King v. Cigna Insurance Company of Europe S.A/NV, decided by the Cour d'Appel de Colmar, case No 694; Tribunale Civile di Monza, case No 102, as well as in scholarly writings [Schwenzer; Lindström; Garro]*.

100. In this sense, it is correct to presume that hardship situations can be found under the scope of art.79 CISG, as long as it is considered as an impediment *[Yasutoshi Ishida]*. To qualify as an impediment, for the purpose of art. 79, it has to be a *situation beyond the parties control* - which it was, since both CLAIMANT and RESPONDENT had no control whatsoever over the imposition of tariffs by the government, let alone over their size or upon which goods they were imposed -, that was *not reasonably expected at the time of the conclusion of the contract* – which was also the case, since no reasonable person could have expected that a government that had always been an ardent supporter of free trade, whose Prime Minister's came from the Progressive Liberals and that had never imposed retaliatory measures *[Claimant's Exhibit C6]* like this one, would, out of the sudden, impose such measure.

101. Therefore, the imposition of the 30% tariff over products imported from Equatoriana shall be considered an impediment and shall be covered by art. 79 CISG.

VII.A.2 ART. 79 CISG PROVIDES FOR THE REMEDY REQUESTED

102. RESPONDENT wrongfully alleges that the CISG does not provide for an adaptation of the contract under art. 79. However, it is in the Arbitral Tribunal's duty to adapt the contract *[Yasutoshi Ishida]* within the realm of the interpretation of the CISG under the command of Article 7(1), that requires from the interpreter, when applying the Convention, the promotion of uniformity in its application and the observance of good faith in international trade.

103. In this sense, a judge applying the CISG always rewrites or supplements a contract. For instance, art. 60 CISG states that *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*. Yet, in the Mung Bean Case, judged by China International Economic & Trade Arbitration Commission [CIETAC], the Tribunal decided that the buyer should have sent a ship to the loading place and also dispense it with an inspection not specified in the contract. The Arbitral Tribunal did no less than modify the contract.

104. In a decision of the *Schweizerischen Bundesgerichts [Bundesgericht [BGer] [Federal Supreme Court] July 3, 1997, 125 Entscheidungen des schweizerischen Bundesgerichts, BGE, I 96 (Switz.)]*, one of the parties denied the existence of a binding contract. However, the Swiss Court understood, according to the standard of Article 8(2), that party's conducts, for themselves, illustrated the existence of the contract, interpreting that the conclusion of the contract, the buyer's intention to be bound and the definite quantity of goods to be sold from the buyer's request to the seller to issue an invoice for goods already delivered. In this case, the Court declared the existence of a nonexistent contract, demonstrating that sometimes the Courts "writes" a contract.

105. In this way, considered the extensive powers granted to the judges by the CISG, it would not be a deviation from the Convention's language to adapt the contract based on art. 79(1), since it has been done based on other articles of the CISG, as observed.

106. Although art. 79 has no provision explicitly authorizing a judge to do so, the article itself presupposes such capacities of a judge, that can adapt the contract through the

interpretation of the reasonable expectation expressly incorporated in Article 79(1), after all, when detected an impediment that could cause a failure to perform or make the contract excessively onerous to one of the parties – which applies to this case, since CLAIMANT dealt with an unexpected skyrocketing tariff price beyond any control –, it is expected from the judge to adapt or modify the contract through the interpretation of what was reasonably expected by the parties, taking under consideration their intentions when the contract was signed.

107. Therefore, this contract must be adapted, since it was not reasonably expected by the CLAIMANT to bear with the costs of an unpredictable additional tariff imposition that interfered on the contract's financial equilibrium and culminated in losses for CLAIMANT, especially if considered the existence a hardship clause into the contract.

VII.A.3. APPLICATION OF ART. 79

108. Verified that art. 79 CISG regulates hardship and also provides for an adaptation of the contract, it shall be demonstrated that the present situation constitutes hardship and that the requirements for the application of the mentioned article are fulfilled.

109. To identify if a situation constitutes hardship *[Dietrich Maskow; United States v. Winstar Corp.]*, it is necessary to observe three criteria. First, the event must have occurred to the disadvantaged party **after the conclusion of the contract**; second, the party **could not have reasonably taken it into account by the time of the contract's signature**; and third, the event was **beyond party's control**.

110. The first criterion is clearly met, since the contract was signed on 6 May 2017 *[Claimant's Exhibit C5]* and started its execution on 20 May 2017 *[Notice of Arbitration, §9]*, when CLAIMANT sent the first shipment – out of three. On the other hand, the imposition of the 30% tariff upon all agricultural goods from Mediterraneo only happened whilst CLAIMANT was about to send the last shipment, on 20 January 2018, practically a year after the contract's signature.

111. Regarding the second criterion, it has already been proved that neither one of the parties could have taken under consideration such imposition when establishing the contractual price, especially if taken under consideration, once again, the fact that the contract was signed on 20 May 2017, and that it came as a retaliatory measure to the

imposition of the 25% tariff on agricultural products from Equatoriana *[Notice of Arbitration, §9]* , made by the newly elected president, Mr. Bouckaert, that only happened two months before the last shipment was due.

112. In this sense, by the time the parties signed the contract, it was impossible for both of them to foresee that the President of Mediterraneo would impose a 25% tariff during the contract's execution, and even less to assume that Equatoriana would retaliate, since previous restrictions imposed by other countries affecting imports from Equatoriana have never resulted in direct retaliatory measures *[Claimant's Exhibit 6]*.

113. At last, the third requirement was most definitely attended, as already demonstrated. Therefore, it is cristal clear that the present event constitutes a hardship situation and that art 79 CISG shall be applicable.

114. Albeit, in order to apply art. 79 CISG, Courts have been deciding *[Cour d'Appel de Lyon (France), 27 March 2014, Tribunal Supremo (Spain), 5 June 2014, Tribunal Supremo (Spain), 9 July 2014, Bulgarian Chamber of Commerce and Industry, 24 April 1996]* that it is necessary to prove cumulatively that: **i)** the breach of any contractual obligation is due to an impediment beyond reasonable control and independent of his will; **ii)** such impediment was not known nor could the debtor reasonably have been expected to take it into account at the time of the conclusion of the contract; and **iii)** it would be disproportionate to pretend that the obliged party hamper such impediment or act so as to overcome the effects.

115. All the mentioned requirements were attended in the present case, as most of them are very similar to the ones used to characterize hardship.

116. Thus, considered this a hardship situation and proved that art. 79 CISG regulates hardship, the Convention shall be applicable to the present case, especially if taken under consideration that all the requirements for its applicability has been fulfilled. Therefore, this Arbitral tribunal shall adapt the contract under art. 79 CISG.

VII.B. ARTICLE 79 CANNOT BE DEROGATED IN THE SENSE OF ARTICLE 6

117. According to RESPONDENT, the inclusion of a hardship clause provides a special regulation regarding unforeseen events, which derogates article 79 in the sense of article 6. As it will be demonstrated, RESPONDENT`s allegation shall not thrive.

118. Unlike to what was shown by RESPONDENT, the inclusion of a hardship clause into the contract do not excludes the application of article 79 and certainly do not constitutes a derogation in the wording of article 6.

119. Parties may **expressively** or **implicitly** derogate the CISG *[Schwenzer/Fountoulakis/Dimsey, 2012, p. 39]*. Therefore, in order to exclude its application - partially or entirely -, it is required from the parties to **expressively** choose a governing law other than the CISG. However, the scenario drawn in this particular case is the exact opposite, since Claimant and Respondent both agreed on the application of the law of Mediterraneo, **including the CISG**, as established in Clause 14 *[Agreement, p.14]*. For that reason, the CISG application cannot be disregarded, since there is no express provision in this sense.

120. As a matter of fact, in the present case, the parties cannot even consider the CISG **implicitly** derogated, because in order for that to happen, they would have to draft a very detailed regulation or indicate one, that would indirectly render the CISG either inapplicable or obsolete *[Mistelis, Loukas ,pp.102,103]*. Instead, there is a sufficiently broad hardship clause in the contract *[Claimant's Exhibit C5]*, when interpreted with clause 14 - that expressively declares CISG's applicability - only corroborates with the fact that the CISG not only should, but must be, in its integrity, applicable in the present case.

CONCLUSION OF THIRD ISSUE

121. It has been demonstrated that claimant shall not bear the additional costs caused by hardship. The wording of the hardship clause, which was even narrowed by respondent, is still to be considered broad enough to encompass the 30% tariff imposition, for its unpredictability. Moreover, considering the economic aspects of the agreement, the contract shall be adapted in order to preserve is practicability and financial balance. Furthermore, even if the hardship clause would not be considered applicable, still art. 79 CISG shall flourish to protect claimant from the unreasonable costs increase. At last, parties previous negotiations make in unambiguous claimant's intention to not accept bearing risks such as the one that occurred.

REQUESTS FOR RELIEF

For the above means, Counsel for CLAIMANT respectfully requests the Arbitral Tribunal to find that

(1) The Arbitral Tribunal should decide that the Law of Mediterraneo is the applicable law upon which the interpretation of the arbitration agreement and so the price can be adaptable under CISG and the Law of the agreement;

(2) The evidence legally obtained from a company should be admissible by this Arbitral Tribunal for further proof that CLAIMANT requests;

(3) The need for adaptation and RESPONDENT be entitled to pay $1,250,000.00 due to the unforeseen events that caused a great deal for CLAIMANT.