



TWENTY-SIXTH ANNUAL WILLEM C.
INTERNATIONAL COMMERCIAL ARBITRATION MOOT



SEINAN
GAKUIN UNIVERSITY

MEMORANDUM FOR RESPONDENT

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

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REQUEST FOR RELIEF

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TABLE OF ABBREVIATION

§/§§	Section/sections
¶	Paragraph
&	And
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
GWU	The George Washington University Law School



TABLE OF AUTHORITY

Rules

HKIAC Rules	2018 HKIAC Administered Arbitration Rules	
CISG	Convention on Contracts for the international Sale of Goods	
Transparency Rules of UNCITRAL	The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration	
UNIDROIT	UNIDROIT Principles 2016	

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HKIAC	A GUIDE TO THE HKIAC ARBITRATION RULES MICHAEL MOSER CHIANN BAO	34, 62
Nakamura	An Introduction to International Commercial Arbitration	44
Bowett	Bowett, Estoppel before International Tribunals and Its relation to Acquiescence, 33 British Yearbook of International Law (BYIL) (1958)	112
Kröll	Stefan Kröll, Loukas Mistelis, Pilar Perales Viscasillas, UN Convention on Contracts for the International Sale of Goods (CISG) A Commentary, Second edition, C.H.BECK · HART · NOMOS(2018)	131
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Saida	Osamu SAIDA, Change of circumstances under the CISG, bulletins of the department of management in Atomi women's university (2017)	121
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SulAmerica	SulAmerica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A. [2012] 1 Lloyd's Rep 671 http://www.bailii.org/ew/cases/EWCA/Civ/2012/638.html	26, 30
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FirstLink	FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others [2014] SGHCR 12 http://www.newyorkconvention.org/11165/web/files/document/1/7/17749.pdf	28, 31
C v D	C v D [2007] EWCA Civ. 1282. http://www.bailii.org/ew/cases/EWCA/Civ/2007/1282.html	32
Malaysia	Malaysia Dairy Industries v. Dairex Holland, Arrondissementsrechtsbank 's-Hertogenbosch, Netherlands, Unilex, 2 October 1998	133
Belgian	In Scafom International BV v Lorraine Tubes SAS, Cour de cassation, the Belgian Supreme Court, 19 June 2009	142
Germany	Oberlandesgericht Hamburg, 28 Feb 1997, CISG-online 261.	124
Suez Canal	Tsakiroglou Co Ltd v Noble Thorl GmbH, the Suez Canal cases the English courts,	142

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Canfor	UNCITRAL, Canfor Corporation v. United States of America, Tembec Inc. et al. v. United States of America, Order of the Consolidation Tribunal, 7 Sept. 2005 Cited in GWU: ¶¶88, 94	112
Yukos Majority awards	UNCITRAL, Hulley Enterprises Limited (Cyprus) v. Russian Federation, PCA Case no. AA 226; Yukos et al v. Russian Federation, PCA Case no. AA 227; Veteran Petroleum Limited (Cyprus) v. Russian Federation, PCA Case no. AA 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009 Energy Charter Treaty 1994, 2080 U.N.T.S.95 Cited in GWU: ¶¶55,88,91	112



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Amco	ICSID Amco v. Republic of Indonesia, Decision on Jurisdiction, 25 Sept. 1983, ICSID Case no.ARB/81/1 Cited in GWU:¶88	112
Rumania	Globex International v. Macromex Srl, Unilex,12.12.2007, American Arbitration Association, No. 50181T 0036406, http://www.unilex.info/case.cfm?id=1346 .	128



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 Equatiana 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.

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4. **On 21 March**, RESPONDENT contacted CLAIMANT to ask the availability of Nijinsky III for its breeding program. At that time, in Equatiana, 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 Equatiana have jurisdiction.
7. **On 31 March**, CLAIMANT, in its reply, requested to increase the price by 1,000 USD per dose due to the acceptance 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, in its email, requested the seat of arbitration shall be Equatiana and the law of the arbitration clause shall be the law of Equatiana.
9. **On 11 April**, CLAIMANT, in its reply, 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. **In November**, Ian Bouckaert, newly president in Mediterraneo, announced 25% tariffs on agricultural products from Equatiana.
13. **On 19 December**, Equatiana government announced imposing 30% tariffs on selected products from Mediterraneo including animal semen.

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14. **On 20 January**, CLAIMANT sent email to RESPONDENT to inform the imposed tariff of 30% on agricultural goods including the frozen semen. And CLAIMANT asked RESPONDENT to call back as soon as possible.
15. **On 21 January**, Mr. Shoemaker had called to CLAIMANT. However, he couldn't clearly argue RESPONDENT'S position because he was not lawyer and involved in negotiation and Sales Agreement
16. **On 23 January**, CLAIMANT sent the final shipment of 50 doses.
17. **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.
18. **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.
19. **On 3 October**, RESPONDENT, in its reply, insisted that CLAIMANT's former evidence was obtained by illegal means and should not be admitted in the arbitration.
20. **On 4 October**, the parties decided the conduct of the proceedings for the arbitration.



SUMMARY OF ARGUMENTS

21. Whether or not the arbitral tribunal has jurisdiction and power about the adaptation of the contract is governed by the Danubian law by implicit consensus of LAAA. Under the Danubian law, the arbitral tribunal has no jurisdiction and power about the adaptation of the contract.
22. CLAIMANT can not submit the information about another arbitration as an evidence based on IBA rules on the taking of evidence in international arbitration. In this case, the tribunal attaches importance to confidentiality of the evidence by Article 45.1 of HKIAC Rules. In addition, the evidence had obtained through illegal hacking and should be exclude from this arbitration by exclusionary rules. Therefore, the evidence should be exclude based on 9.2.b of IBA rules.
23. CLAIMANT is not entitled to request the payment under clause 12 of the contract, CISG and UNIDROIT principle. In the present case, CLAIMANT have obligation to pay the increased money due to the additional tariff following DDP delivery terms. The reason is that the tariff is not applicable to any requirement of force majeure / hardship in the contract, CISG and UNIDROIT principle. Therefore, RESPONDENT does not have to make any payment.



ARGUMENT TO THE PROCEDURAL ISSUES

I . Under the Danubia law, the arbitral tribunal has no jurisdiction and power to judge about adaptation of the contract.

A. The arbitral tribunal can judge the presence or absence of own jurisdiction.

24. *“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].

B. Under the Danubia law, the arbitral tribunal has no jurisdiction and power about the adaptation of the contract.

1. The law applicable to the arbitration agreement is the Danubian law.

25. Regarding the adaptation of the contract, the question of whether the arbitral tribunal has jurisdiction and authority is resolved by the interpretation of the arbitration clause. Therefore, in order to interpret the arbitration clause, LAAA shall be established. However in the present case, the arbitration clause, Clause 15, does not provide the arbitration agreement method that both parties agreed. If LAAA is not selected, resolve by arbitration rules. If there is no mention in it, it is a general principle, and if there is no description in the general principle, judge LAAA by interpretation. With regard to arbitration proceedings, the parties agree to apply HKIAC Rules, so the arbitration will be conducted by HKIAC Rules [Record, p.14]. However, HKIAC does not have provisions on the applicable law of arbitration agreement. Therefore, based on the Lex fori the law of Danubia is applicable to the issue. Danubia adopts the UNCITRAL model law. However, the it also does not provide the decision of LAAA. Therefore, the decision should be depend on the interpretation.



26. If there is no provision as in the present case, “①The parties' express choice. ②The parties' implied choice in the absence of an express choice. ③Where the parties had not made any choice, the proper law would be the law which the arbitration agreement has its closest and most real connection with...it has been said on many occasions that in practice stage ②often merges into stage ③because identification of the system of law with which the agreement has its closest and most real connection is likely to be an important factor in deciding whether the parties have made an implied choice of proper law.” [Case, SulAmerica].

a. In the present case, the parties have no explicit agreement about the law applicable to the arbitration agreement.

27. The choice of law clause was not included into the Sales Agreement as finally agreed was merely due to an oversight resulting from the fact that because of the car accident. On 12 April 2017 the original negotiation team was no longer available. Instead the contract had to be finalized by employees on both sides who had previously not been involved in the negotiation and the drafting of the contract. While Mr. Krone found the note of Mr. Antley he did not fully understand his reference LAAA [EX, R3, p.35]. Therefore, we should consider the parties' implied choice in the absence an express choice.

b. There is an implied agreement as the law applicable to the arbitration agreement is Law of Danubia because the parties choiced Danubia as the seat of arbitration.

28. The court in FirstLink stated that the natural inference should be that parties would prefer the law of the seat to be LAAA, as opposed to the law of the substantive contract. ”the parties’ choice of seat denotes their intention to have the law of that seat recognise and enforce the arbitration agreement. Given that LAAA is most likely to be engaged in any jurisdictional dispute, it follows that the parties would be presumed that the law of the supervisory courts is the law which would apply.” “And Primacy is accorded to the neutral law selected by the parties to govern the proceedings of the dispute resolution.” [Case, FirstLink].



29. In the present case, RESPONDENT sent first draft about arbitration agreement to CLAIMANT. RESPONDENT wished to make law applicable to arbitration agreement same as the law of seat of arbitration [EX, R2, p.34]. The newly suggested neutral place of arbitration by CLAIMANT which was acceptable or us, meant, however, that also the choice of law provision had to be changed, to avoid the uncertainties resulting absence of a choice [EX, R3, p.35]. Therefore, parties have implied agreement to apply the LAAA same as the law of seat of arbitration.

c. Even if there is no implied consensus, the closest related and is the Danubian law.

30. “the choice of another country as the seat of the arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings...No doubt the arbitration agreement has a close and real connection with the contract of which it forms part, but its nature and purpose are very different...it has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective.” [Case, SulAmerica].
31. “It would be ‘rare’ for the proper law of the arbitration agreement to differ from the law of the seat, given that an arbitration agreement has a closer and a more real connection with the place where the parties have chosen to arbitrate rather than with the place of the law of the main contract.” [Case, FirstLink].
32. “The reason is that an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract in cases where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place.” [Case, C v D].
33. In the present case, both parties agreed to the seat of arbitration "Danubia". Therefore, LAAA is Danubian law because the closest and most real connection is clearly Danubia from the above. Also, CLAIMANT argue that Mediterraneo law is the closest



and most real connection, but arbitration agreement is related to not contract of law but the seat of arbitration. So, it is not Mediterraneo law. Thus, LAAA is Danubian law.

d. HKIAC does not apply in determining the applicable law for arbitration agreement.

34. As mentioned earlier, there are no regulations in HKIAC when the Arbitration Agreement Governing Law is not selected. However, CLAIMANT decides the arbitration agreement governing law with reference to HKIAC 36.1. However, *“It bears noting that article 36 deals with the governing law of the substantive issues of a dispute. this is to be distinguished from the law of the arbitration agreement , which generally governs the existence, scope, validity, interpretation, and enforceability of the arbitration agreement.”* [HKIAC, p.259].
35. Therefore, HKIAC 36.1 is not used in the decision of the applicable arbitration agreement law in the case where the parties like this case do not select LAAA, and the assertion of the applicable law which decides to use the law is not effective.

e. The implied consensus claimed by CLAIMANT is not valid.

36. CLAIMANT insists that of the law applicable to the contract the clause 14 is an implied agreement of LAAA. But that claim is not legitimate.
37. In the present case, the separability presumption is applied as a premise. The separability presumption is “the arbitration clause is autonomous and juridically independent from the main contract in which concluded...the separability presumption is of central significance in international commercial arbitration...the presumption is one of the foundations of the contemporary legal regime applicable to international arbitration agreements.” [Born, p.351]. “That is clearly recognized by Article 16 of the Danubian Arbitration law as well as the identically worded Article 16 of the Mediterranean Arbitration Law which both explicitly acknowledge the doctrine of separability.” [Record, p.31, ¶.14] [PO1, p53, ¶ 4] [PO2, p57, ¶14].
38. From the above, the contract laws of both parties' countries have provisions for procedural separation principles. Therefore, it is impossible that this principle does not



apply also in this case. Therefore, the principle of procedure separation applies in this case.

39. In the present case, CLAIMANT has specified the law applicable to the contract as a contract provision and claims that it is an implied agreement. However, the effectiveness of the contract clause and the arbitration agreement clause is different according to the procedure separation principle.
40. Therefore, the implied consensus claimed by CLAIMANT is not passed. On the contrary, the implied consensus of RESPONDENT is claimed on the basis of the selection of the arbitration provision of the arbitration clause, so it is not denied by the principle of procedure separation. Therefore, the implied consensus will be the Danubian law which is the law of seat of arbitration.

f. Validation principle does not apply.

41. CLAIMANT insists that LAAA is Mediterraneo law by adopting the Validation principle. However, *"there is little, if anything, to recommend applying two different substantive laws of contractual validity to the same arbitration agreement, with the choice of law rule and result varying depending on the point in time at which the issue is considered."* [Born, p.497].
42. Therefore, since it is not desirable to decide the applicable law taking into consideration the result of the application, the applicable law should not be determined by applying the Validation principle, RESPONDENT decides the applicable law in the manner described above, and the applicable law is Danubian law.

2. Under the Danubian law, the adaptation of the contract is not within the scope of the arbitration clause.

a. Since the model clause was deleted, the adaptation of the contract is not included in the scope of the arbitration clause.

43. The model clause of the arbitration clause can make an amendment by the parties. The original model clause of HKIAC is *"Any dispute, controversy, difference or claim*



arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof...submitted.”

44. RESPONDENT argue that in the arbitration clause of Article 15 of this Agreement, we have deleted the phrase "relating to" in the model clause. "The wording of 'relating to this contract' in arbitration clause is regarded as comprehensive arbitration clause. On the other hands, the word is not including which regarded as narrow arbitration clause. The scope of the narrow arbitration clause is limited to disputes concerning interpretation and performance of contracts." [Nakamura, p.36].
45. In the present case, it is clear that the wording of relating to have been explicitly excluded, and RESPONDENT has informed CLAIMANT the intention of explicitly deleted "relating to this contract" in [EX, R1, p.33], but there was no objection from the CLAIMANT about that.
46. Consequently, the wording of FROZEN SEMEN SALES AGREEMENT clause 15 is regarded as a narrow arbitration clause and adaptation of contract is not scope of application in clause 15.

b. Since the four corner rule is applied under Danubian law, the adaptation of the contract is not included in the scope of the arbitration clause.

47. Danubian law contain four corners rule, this rule exclude all extraneous evidence for the interpretation of contracts. Both parties agreed to use four corners rule if LAAA is Danubian law [PO1, p.51, ¶.5]. As mentioned above, LAAA is clearly Danubian law. The interpretation of this arbitration agreement can not rely on external evidence based on the four corner rule. Therefore, the content of the negotiation that the arbitrator has the task of adaptation of the contract [EX, C8, p.17] is excluded because this fact is not reflected in sales agreement. Therefore, the arbitral tribunal has no jurisdiction and power.

3. Even if the law applicable to the arbitration agreement is Mediterranean law, the adaptation of the contract will not apply.

48. CLAIMANT argues that RESPONDENT's [EX, C8, p.17] Mr. Antley shows the intention to adapt the contract price of the Sales Agreement. "Mr. Antley replied that in



his view that it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree." [EX, R3, p.35]. From this evidence possible to read the fact that adaptation of the contract is included in clause 15. However, the claim is not acceptable. Fundamentally, the parties are not agreed with LAAA. The intention of RESPONDENT was not agreed and Mr. Antley used the word "should probably" for adaptation of the contract and there was no intention of agreement. It was not the common intention of both parties CLAIMANT said. Therefore, because it is not intention and reflected in the contract.

49. Mr. Antley should not agreed to adaptation of the contract. RESPONDENT never agreed to adaptation of the contract. Moreover, it is not established even if it is subjectively seen because it is not written in the contract.
50. Even objectively it can not be said that both parties had the intention of agreement on adaptation of the contract. In the first place, since the contract is not written about adaptation of the contract, even if it is objectively judged, this time it can not be said that both parties have agreed and the contract can be changed.
51. In light of the above, even if to use law if the Mediterranean, the arbitral tribunal does not have a power and jurisdiction of the adapt of the contract.

C. The arbitral tribunal has no jurisdiction and power about adaptation of the contract.

52. Under the Danubian law, it is stipulated that an explicit agreement is required for entrusting the authority about the adaptation of the contract to the arbitral tribunal. However, as alleged to date, the parties have agreed only with the general jurisdiction agreement and entrustment of the matters stated in the contract. There is no explicit agreement on adaptation of the contract anywhere in the contract. Also, the RESPONDENT did not intend to include adaptation of the contract within the scope of clause 15. From the above, according to the Danubian law, the arbitral tribunal has no jurisdiction and power about the adaptation of the contract.



D. Conclusion

53. Whether or not the arbitral tribunal has jurisdiction and power about the adaptation of the contract is governed by the Danubian law by implicit consensus of LAAA. Under the Danubian law, the arbitral tribunal has no jurisdiction and power about the adaptation of the contract.

II. CLAIMANT can not submit the other arbitration award as the evidence.

54. The evidence which CLAIMANT obtained is the information about the other arbitration and they obtained it from one company. In addition, RESPONDENT is one of its parties. The source of information is RESPONDENT's former employee or a hack of RESPONDENT's computer system [PO2, p61, ¶.41].
55. The arbitral tribunal shall have the power to admit or exclude any evidence prescribed by the Art.22.2 of HKIAC Rules. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence [Moser & Bao p.191]. In addition, it shall have the power to decide which rules of evidence to apply then.

A. The arbitral tribunal should adapt IBA Rules on the Taking of Evidence in International Arbitration to judge the admissibility of the other arbitral award as the evidence.

56. Art.22.2 of HKIAC Rules provides that "The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence."
57. The arbitral tribunal should adapt IBA Rules on the Taking of Evidence in International Arbitration to judge the admissibility of the evidence. One expert said on Rules of evidence "If the tribunal were to make decisions on evidential issues based on its own whims and without any rational basis, the parties may have legitimate grounds to feel aggrieved, and possibly recourse" [Moser & Bao, p.191].



58. IBA Rules of Evidence are commonly adopted or referred to in HKIAC arbitration [Moser & Bao p.191]. One survey shows that the IBA Rules on the Taking of Evidence is the most relevant instrument for international arbitration *praxis*. Indeed, 12.7% of the respondents always apply or invoke these Rules and 60.3% do so regularly, while 22.2% have applied them occasionally and only 4.8% report having never applied them [Kluwer Arbitration Blog]. From this, it turns out that the IBA Rules on the Taking of Evidence is supported not only by HKIAC arbitration but also by other arbitrations. In addition, these Rules codify the procedures in use in many different legal systems and provide a useful framework for the arbitral tribunal to follow in assessing evidence [Moser & Bao p.191]. From the above, the arbitral tribunal should adapt IBA Rules on the Taking of Evidence in International Arbitration to judge the admissibility of the evidence.
59. IBA Rules of Evidence Art.9 provides that “The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:”.

1. Breach of a confidentiality agreement fall under a legal obstacle of law which the arbitration tribunal judged to apply in Article 9.2 (b) of IBA. Thus, the arbitral award must be excluded from the evidence.

60. First of all, confidentiality is perceived to be a key advantage of international arbitration [Moser & Bao, p.282]. “Confidentiality” is typically used to refer to the parties obligations not to disclose information concerning the arbitration to third parties [Born, p.2782]. Arbitration Rules commonly do not have substantive enactment relevant to confidentiality obligation in arbitration. However, HKIAC Rules have strict substantive enactment relevant to confidentiality obligation in arbitration [Moser & Bao, p.282]. For this reason, it can be said that HKIAC Rules is a provision that emphasizes confidentiality of arbitration in particular. Moreover, parties to commercial disputes involving sensitive commercial information or trade secrets could great benefit from the HKIAC Rules' provisions on confidentiality [Moser & Bao, p.282]. In the present case the other arbitration and the present arbitration are commercial arbitration and both of arbitration selected HKIAC Rules. From the above,



we can easily assume they expects “confidentiality of arbitration”. Also as a disadvantage of transparency are expensive, delayed arbitration, damaging confidentiality, weakening confidentiality [Delany & Magraw].

61. Thus, confidentiality should be emphasized rather than transparency. When a document falls under the legal impediment of the law that the arbitral tribunal will adopt, the arbitral tribunal must exclude it from the evidence by Art.9.2 (b) of the IBA Rules.
62. In this case, the law that the Arbitral Tribunal judges to apply is the HKIAC arbitration rule. HKIAC Article 45.1 (a) and (b) decide that unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to the arbitration under the arbitration agreement or an award made in the arbitration. Moreover, it also applies to the arbitral tribunal, any emergency arbitrator, witness and so on [HKIAC, Art.45.2].
63. However, in exceptional cases, if it falls under HKIAC 45.3 (a) to (e), it does not prevent the publication, disclosure or communication of information refer to in Article 45.1.
64. In other words, when it does not apply to all of (a) to (e), confidentiality should be, and to breach confidentiality should be applied by the arbitral tribunal prescribed by Article 9.2(b) and it can be said that it is a legal obstacle of the decree determined. And when it is a legal impediment, it must be excluded from the evidence and CLAIMANT could not submit this arbitration decision as evidence.
65. Hereafter, since it does not fall under Art.45.3 (a) to (e) of HKIAC Rules and the arbitral award must be kept confidential, it is asserted that it must fall under the Art.9.2 (b) of IBA and must be eliminated from the evidence.
66. At first, there is no agreement between another arbitration party about communicating information of the arbitration or the arbitral award with others. RESPONDENT’s former employees have obligation to keep all information about the other arbitral proceedings confidential [PO2, p61, ¶.41]. Thus, it should be kept a secret. In addition, they had been witness in the other arbitration before they were fired [PO2 p61, ¶.41]. Thus they are bound by confidentiality obligation. In present case, although they are bound by confidentiality obligation, they communicated information relating to the



other arbitration to the company which has a doubtful reputation [PO2, p.61, ¶.41].

This is contrary to Art 45.1 of HKIAC Rules. Thus, former employees of RESPONDENT can be said to be a breach of confidentiality obligation.

67. However, in exceptional cases, if it falls under Art.45.3 (a) to (e) of HKIAC Rules, it does not prevent the publication, disclosure or communication of information refer to in Art.45.1 of HKIAC Rules. The present case does not meet Art.45.3 (a) to (e) of HKIAC Rules is determined as follow as.
68. (a) Article 45.1 does not prevent the publication, disclosure or communication of information referred to in Article 45.1 by a party or party representative(i) to protect or pursue a legal right or interest of the parties or (ii) to enforce or challenge the award or Emergency Decision referred to in Article 45.1 in legal proceedings before a court or other authority. In present case, there is no legal proceedings before a court or other authority. Thus, the present case does not meet Art.45.3 (a) of HKIAC Rules.
69. (b) Article 45.1 does not prevent the publication, disclosure or communication of information referred to in Article 45.1 by a party or party representative to any government body, regulatory body, court or tribunal where the party is obliged by law to make the publication, disclosure or communication. In the present case, the parties are not obligated by law to make the publication, disclosure or communication. Thus the present case does not meet 45.3 (b) of HKIAC Rules.
70. (c) Article 45.1 does not prevent the publication, disclosure or communication of information referred to in Article 45.1 by a party or party representative to a professional or any other adviser of any of the parties, including any actual or potential witness or expert. In the present case, the parties does not plan to disclose the information to a professional etc. Thus, the present case does not meet 45.3(c) of HKIAC Rules.
71. (d) Article 45.1 does not prevent the publication, disclosure or communication of information referred to in Article 45.1 by a party or party representative to any party or additional party and any confirmed or appointed arbitrator for the purposes of Articles 27, 28, 29 or 30.
72. In the present case, RESPONDENT's former employees communicate the information of the other arbitration to the the company which has a doubtful reputation [PO2, p.61,



¶.41]. In addition, the company does not have relation to the present arbitration. On that account, it naturally can not be the additional party of the arbitration etc. Thus the present case does not meet 45.3 (d) of HKIAC Rules.

73. (e) Article 45.1 does not prevent the publication, disclosure or communication of information referred to a person for the purposes of having, or seeking, third party funding of arbitration. The present case does not have relation to third party funding. Thus it does not meet 45.3 (e) of HKIAC Rules.
74. In present case, it does not fall under Art.45.3 (a) to (e) of HKIAC Rules. Thus, it does not exception of confidentiality obligation. In other words, it should be kept a secret.
75. From the above, even if CLAIMANT is not directly related to this confidentiality obligation, this evidence falls under Art.9 (2) (b) of IBA. Thus, the arbitral tribunal should exclude the evidence.

2. The other arbitration award should be excluded from the evidence because of the involvement of the hacking.

76. IBA Article 9 paragraph 2 terms (b) provides The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons: legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.
77. There is no explicit definition on the ethical rules. Therefore, it depends on the interpretation of it.
78. RESPONDENT argues that the arbitral tribunal should adopt exclusionary rules which remove the evidence obtained in illegal means. The reason is to prevent private people from doing the illegal act in the future.
79. The illegal evidence is what obtained in antisocial means or in the way with human rights violations.
80. Another arbitration award was obtained in illegal hacking. Therefore, the award is the evidence obtained in antisocial means. In conclusion, CLAIMANT could not submit the award as an evidence based on exclusionary rules.



81. Indeed, there is a case that an evidence obtained by illegal hacking was considered to be admissible if it became public information.
82. Considering the matter, RESPONDENT did not expect the arbitral award would be public information even if RESPONDENT was using an outdated firewall. The reason is that the purpose RESPONDENT set a firewall was to protect from hacker. Therefore, the arbitral award obtained by illegal hacking is not to be admissible as an evidence unless the arbitral award is not public information.
83. In the present case, the award has the possibility to be obtained with illegal hacking, therefore admissibility of evidence should be denied in accordance with exclusionary rules. Thus, the arbitral award was obtained in an illegal way of hacking and is an illegal obtained evidence. It falls under legal impediment under ethical rules established by 9.2 of IBA rules on the taking of evidence in international arbitration and the arbitral award does not have admissibility as an evidence.

B. Claimant can not submit the arbitral award as an evidence.

84. To submit the award as an evidence, it is required to have admissibility as an evidence. In addition, the standard to determine whether it has admissibility or not is at the arbitral tribunal's discretion. And RESPONDENT argues the arbitral award does not have admissibility as an evidence in subject to IBA Rules on the taking of evidence in international arbitration.
85. Thus, the arbitral award corresponds to Art.9.2(b) of IBA Rules determined to approve by the arbitral tribunal, in addition, it comes under the ethical rules which the tribunal decided to approve, thus the arbitral award does not have admissibility of evidence. Therefore, CLAIMANT can not submit the arbitral award as an evidence.



ARGUMENT TO THE SUBSTANTIVE ISSUES

III. CLAIMANT is not entitled to require the payment of USD 1,250,000 under clause 12 of the contract, CISG and UNIDROIT principle. Therefore, RESPONDENT does not have to make any payment.

A. RESPONDENT does not have to make any payment to CLAIMANT under clause 12 of the contract.

1. CLAIMANT has to pay for the tariffs under terms of Delivered Duty Paid.

86. Under DDP delivery terms, main duties of sellers are to arrange transportation, deliver goods to its buyer at the particular place. Moreover, seller has responsibility for all costs and risks until they finish delivering it. CLAIMANT accepted for this contract a delivery DDP after longer international discussions [EX, C4, p.12] despite CLAIMANT's knowing DDP is the agreement including the seller's payment for tariffs. This time, CLAIMANT enters into the contract under DDP [EX, C5, p.14, ¶8], if there are no hardships or inconveniences, then DDP should be applied here.

2. Clause 12 of the contract does not cover the additional tariffs.

87. Clause 12 of the contract stipulates: "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." [EX, C5, p.14, ¶12]

88. CLAIMANT can not avoid from their performance under clause 12. Therefore, the cost increased due to the tariff should be paid by CLAIMANT conforming to the DDP terms.



89. Clause 12 is not Hardship-clause but force majeure clause. (Section a) And, it is not also unforeseen event in this clause. (Section b) CLAIMANT have to pay the money increased by the tariffs following DDP delivery terms. (Section c) The reason is that the tariffs do not allow the seller to avoid the responsibility under the contract.

a. The words under "Hardship" in the clause 12 of the contract prescribe exception for force majeure events.

90. Firstly, clause 12 of the contract refers to disclaimer for seller when the events of force majeure happen. As its basis, "Force majeure clauses are much more commonly aimed at qualifying the seller's obligation to deliver the goods than qualify the buyer's obligation to pay" [Ewan, p.21].

91. Furthermore, in fact it is specified in the contract that "'Seller' shall not be responsible ..." [EX, C5, p.14, ¶12]. The reasons stipulated in clause 12 which regulates the seller's immunity are requirements of force majeure. RESPONDENT added the words under "Hardship" to this force majeure clause as exception considering CLAIMANT's past experience.

92. As facts show us, Mr. Krone who had taken over the negotiation and finalization of the contract from Mr. Antley finally suggested clause 12 which he added the words as one excepted event for the force majeure events with reference to the risks mentioned by Ms. Napravnik in her email of 31 March 2017. And, both parties concluded the contract [PO2, p.56, ¶.12].

93. Clause 12 of the contract is a force majeure clause, according to the principle of homogeneous wording, basically only Examples listed in the contract are Disclaimers. Following that principle, it is clear that this tariff does not apply to the cases mentioned in clause 12. The point of discussion here is whether or not it applies to the unforeseen event added exceptionally.

b. The additional tariffs are not applicable to "unforeseen event" in clause 12 of the contract.

94. The tariffs are not applicable to the wording in clause 12. (section i) The tariffs became unforeseeable due to CLAIMANT's lack of action in DDP. (section ii)



i. “unforeseen event” in the clause 12 of the contract does not covers the additional tariff.

95. The reasons under wrap-up word in the force majeure clause are events that is similar to the specific enumeration events and narrowly limited. As its basis, “in practice it seems much more common to give a specific list of events, perhaps because this reduces the scope for argument that these particular events are not within the general ambit of the clause.” [Ewan, p.23]
96. Therefore, “unforeseen event” in the contract is considered to refer to what government measures concerning the quality of goods as well.

ii. The additional tariffs should not have been an unforeseen event, since CLAIMANT agrees with DDP delivery terms.

97. CLAIMANT argues “the parties did not expect the frozen semen would be treated as an ‘agricultural good’” [GWU, p.18, ¶.75].
98. This tariff imposed by the government of Equatoriana brought a great impact on society. [EX, C6, p.15] Furthermore, this event directly affect to commerce of the parties' countries. Therefore, the tariff was not the events that should be ignored by the parties.
99. As parties agree with DDP delivery terms, the seller must bear all the procedures, costs and dangers involved in transporting the goods. The obligation of the buyer is only the degree of assistance. When the tariff has occurred, it is naturally required for the seller to investigate the information about this tariff such as taxable goods. Therefore, CLAIMANT must have known the frozen semen is included in the agricultural goods subject to the tariff.
100. Contrary to their obligation, the price rise due to the additional tariff have become unforeseen events as a result that the obligation was not performed by CLAIMANT. Thus, CLAIMANT’s claim for unforeseen events is not valid.



c. Additional tariff does not fall under clause 12 in the contract. Therefore, CLAIMANT must pay tariffs under DDP delivery terms.

101. As mentioned above, clause 12 of the contract is not a hardship provision. It stipulates the seller's exemption of performance under force majeure. Furthermore, this tariff does not apply to that requirement. Therefore, CLAIMANT has no right to ask for an adaptation of the contract, under the force majeure clause. CLAIMANT's claim for an increased remuneration is completely baseless.
102. The contract does not provide disclaimer to parties because of the tariffs. CLAIMANT agreed DDP delivery in the contract. Therefore, it's natural that seller, CLAIMANT agreed DDP, pay money increased by additional tariffs.

d. Additional tariff does not fall under clause 12 of the contract. Therefore, CLAIMANT must pay tariffs under DDP delivery terms.

103. As mentioned above, clause 12 is not a hardship provision. It stipulates the seller's exemption from force majeure. Furthermore, this tariff does not apply to that requirement. Therefore, CLAIMANT has no right to ask for an adaptation of the contract, under the force majeure clause. CLAIMANT's claim for an increased remuneration is completely baseless.
104. The contract does not provide disclaimer to parties because of the tariffs. In addition, CLAIMANT agreed DDP delivery in the contract. Therefore, it's natural that seller, CLAIMANT agreed DDP, pay money increased by additional tariffs.

3. Even if CLAIMANT pay the tariff, the equilibrium of the contract would not be onerous. RESPONDENT did not act in bad faith.

105. As discussed above, in this case the tariff is not constitute hardship. In this point CLAIMANT may argue that even if the tariff not constitute hardship, this situation that CLAIMANT paid the tariff is unfair in the light of the good faith. However, there is no unfairness in this case because parties were agreed on DDP (Section 1) and RESPONDENT has no obligation to cooperate with paying the tariff (Section 2).



a. The party was agreed on DDP thereby there is no unfairness if CLAIMANT pay “the tariffs”

106. As argued above, it is clear that DDP is a delivery agreement that the seller assumes all the responsibility, risk and cost including taxes. If CLAIMANT had the intention of be not liable for the import custom, CLAIMANT could have suggested other types of delivery agreement such as DAP. Considering this fact, it is believed that the CLAIMANT was aware of the risks of using such type of delivery agreement.

107. In this point, CLAIMANT may argue that additional risk is excluded since CLAIMANT told as “not willing to take over further risks associated with ... the delivery terms.” [EX, p.12, ¶.4]. However, CLAIMANT merely said “at minimum, a hardship clause should be included into contract to address “such subsequent change.” It is clear that the “such subsequent change” imply the past experience of “unforeseeable additional health and safety requirement”. Finally in the contract at clause 12 of the contract, it is merely written only as “health and safety requirement.”

108. In the present case the tariff is not constitute “health and safety requirement”, thereby the tariff is not excluded the risk of DDP. So that, CLAIMANT have obligation to pay the tariff not RESPONDENT according to the contract. From above the fact, it is not unfair if CLAIMANT pay the tariff because CLAIMANT agreed on the delivery term not without the risk of the import custom.

b. RESPONDENT has no obligation to cooperate with CLAIMANT with paying the tariff.

109. Above the fact, it is clear that CLAIMANT have obligation to pay the tariff. In this point CLAIMANT may argue that RESPONDENT know about CLAIMANT’s financial difficulty so RESPONDENT should cooperate about the additional cost under Art. 5.1.3 UNIDROIT.

110. However, “The duty of co-operation must of course be confined within certain limits, so as not to upset the allocation of duties in the performance of the contract.” [UNIDROIT p.150]. Thereby the duty beyond the contract cannot reasonably expect since it will make “to upset the allocation of duties in the performance of the



contract.” Thus, in the present case, CLAIMANT cannot able to insist about corporate with CLAIMANT with paying the tariff.

111. Furthermore, “ International commercial contract is ” ... “ primarily tools used by the party to maximize their respective wealth.” The duty of cooperation cannot go as far as to force the parties to sacrifice...” [PICC Stefan Vogenauer, p.624] Therefore, RESPONDENT have no obligation to sacrifice myself to pay the tariff which is supposed to pay by CLAIMANT.

4. CLAIMANT’S claim about estoppel is not reasonable.

112. CLAIMANT argue that “clause 12 should still apply because CLAIMANT relied on RESPONDENT’S Mr. Shoemaker’s representation to its detriment” by proving that Mr. Shoemaker’s answer constructs estoppel [GWU, p.22&23, ¶.88~93]. However, the allegation isn’t reasonable. Estoppel can be claimed when there is;(i) a clear and unambiguous statement of fact; (ii) made voluntarily, unconditionally, and with authority; that (iii) induced reliance in good faith on the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement [Bowett]. Estoppel will effectively prevent the uninjured party from succeeding on an otherwise legal defense. Where one of the three Bowett prongs is lacking, estoppel theories have not succeeded [Case, Canfor; Yukos Majority awards; Kardassopoulos; Amco].

113. RESPONDENT did not make a statement clearly that RESPONDENT would renegotiate. On the morning of 21 January 2018, Mr. Shoemaker called Ms. Napravnik to tell her several times that he was not a lawyer and had not been involved in the negotiations of the contract [EX, C7, p.16, & EX, R4, p.36]. This his remark tells that Mr. Shoemaker couldn't be responsible with his remark and Shoemaker’s remark isn’t clearly RESPONDENT’S consideration. Furthermore Mr. Shoemaker just stated on the assumption that “ if the contract provides for an increased price in the case of such a high additional tariff.” Mr. Shoemaker didn’t understand whether the contract regulates about the present case or not. And Ms. Napravnik and Mr. Shoemaker didn’t discuss any word of abstract context, for example, which percentage of additional tariff is which is burden, how to solve, and the date and place to specifically discuss



the problem. Therefore, his state isn't clear because the contract wasn't clear established about the renegotiation and don't decide details.

114. RESPONDENT did not express the intention for renegotiation with "authority." Mr. Shoemaker had been supervised for RESPONDENT's racehorse breeding program by Chris Acatenengo before only 2 months and half from imposing the tariffs. [EX, R4, p.36]. CLAIMANT knew that because Mr. Shoemaker had been introduced to Ms. Napravnik in November 2017 [PO2, p.59, ¶.32]. Although he has responsibility to the racehorse breeding, he is amateur for it and newly appointed. Additionally, he was a veterinary. And to rely on his wife proves that Mr. Shoemaker almost doesn't have legal acknowledgement and he had no choice to consult his wife. In the present case, car accident made main negotiators change during negotiation. Even they had some issues which had not been solved yet, it has not been reasonably expected that Mr. Shoemaker have authority to solve those issues.

115. As previously discussed, at the present case, the tariff is not applicable in clause 12 of the contract because Mr. Shoemaker's answer is not worthy of estoppel. Thus, CLAIMANT's claim of estoppel is not reasonable, and RESPONDENT acted in good faith.

B. RESPONDENT does not have to pay the damages to CLAIMANT under CISG and UNIDROIT principle.

1. CLAIMANT is responsibility for the payment of the tariff.

Furthermore, CLAIMANT does not have the right to demand the damage.

a. The parties derogate from Article 79 CISG under Article 6 CISG.

116. The parties derogate from Art. 79 CISG under Art. 6 CISG Resulted from including force majeure clause and entering the contract, Art. 79 CISG is excluded under Art. 6 CISG [EX, C5, p.14].

117. Art. 6 CISG provides "The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions." In order to exclude the



application of CISG, it is necessary to have agreement to eliminate the application among the parties [Kubota, p.102]. And they can do not only explicit exclusion but also implicit exclusion. Furthermore, if we make a contract with contents different from CISG, that contract takes precedence. [Matsuoka, p.51].

118. Clause 12 of the contract provides for same problem with Art. 79 CISG. Thus, we derogate from Art. 79 CISG. Here, it is issue what problem clause 12 of the contract provides.

119. As stated in A.2.a, clause 12 of the contract is force majeure clause. Art. 79 CISG is additionally force majeure clause. That reason is that Art. 79 CISG is a clause that the party can escape liability for non-performance when a force majeure event occurs [Matsuoka, p.51]. Here, the parties agreed that CISG will be applied to this agreement in 14 clause of the contract, but force majeure clause is stipulated in 12 clause of one, and the parties have agreed to the agreement [EX, C5, p.13,14].

120. Therefore, the parties to the contract excluded implicitly Art. 79 CISG. Thus, the parties can't apply Art. 79 CISG to the conflict arising from this agreement. They should solve the conflict under clause 12 of the contract.

b. Even if CISG Article 79 can be applied to this Agreement, the tariff is not the requirement of CISG Article 79.

i. the tariff is not the requirement of Article 79 CISG.

121. Requirements of Art. 79 CISG are (i) parties could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract, (ii) non-fulfillment of a contract caused by an impediment is beyond his control, (iii) they could not reasonably be expected to have avoided or overcome it or its consequences [Saida, p45, ¶.1].

122. (i) **the possibility to expect the impediments.** Surely, in this case, it may be difficult for the parties (i) to expect the increased tariff at the time of the conclusion of the contract. However, (ii) and (iii) are not met.

123. (ii) **the absence of non-performance.** Art. 79 CISG requires that non-fulfillment of a contract caused by an impediment has arisen. The obligation of seller in CISG are



provided in Art. 30: to deliver the goods, hand over any documents relating to them and transfer the property in the goods. In other words, if party who argues escaping have not perform obligations in the above, Art. 79 CISG is applied. However, in the present case, CLAIMANT have completed the 3 deliveries of frozen semen and RESPONDENT have received the handing over [EX, C7, p.16]. In addition, it is natural that to hand over the documents and to transfer the property in the goods are also done from the above facts. Therefore, this requirement (ii) is not met because CLAIMANT have completely performed its own obligation.

124. **(iii) the possibility to overcome the impediments.** CLAIMANT had the possibility to overcome the increased tariff. Whether the debtor can be expected to overcome the impediments must be judged taken into account the border line to accept the hardship. As a border line for acceptance of hardship, rate of increased price can be mentioned [Terakawa, p.112, ¶.4]. For example, there is a leading case which judged the hardship by the increased price. In this leading case, the high court in Germany does not apply Art. 79 CISG even though the market price of iron molybdenum from China which was object had increased to 300%. The reason is the border line about field of trade which have high speculativeness should be raised [Case, Germany].
125. This leading case is the extreme case, however the rate of increased price from 150% to 200 % should be relevant as the border line to accept hardship considering person who may owe the risks by international market price [Terakawa, p111, ¶.2].
126. In the present case, probably the speculativeness of the frozen semen is high because this object is the thoroughbred in the future. In addition, the demand of horse rese is very high [EX, C1, p9]. Therefore, the border line to accept hardship should be raised. However, in this case, the rate of increased price is only 30% by the tariff. Therefore, this rate does not reach the border line.
127. In addition, if the increased cost does not exceed the appropriate criteria, the seller must rely on other suppliers or consider alternative possible means for transporting the objects [Terakawa, p112, ¶.4].
128. For example, it is mentioned that the suggestion to use the other place where party could receive the object is an alternative means [Case, Rumania]. In the present leading case, the arbitral tribunal said that the seller had the possibility to avoid the



impediment and did not have possibility of exemption because there was a possibility to receive the object through the third country.

129. From that point as well, in this case, which is only a price rise of 30%, CLAIMANT had to suggest alternative and effective means as described above for overcoming the risk. In addition, the impediment could be overcome through the third country because the tariff is retaliatory. However, it is not mentioned that CLAIMANT suggested the alternative means in the renegotiation [EX, R4, p36]. From the above, Claimant does not meet this requirement because Claimant did not require the effective means to avoid the risks though it had the obligation.

ii. Even if this tariff applies to the reason for exclusion under Article 79 clause 1 CISG, CLAIMANT fails to notify under Article 79 clause 4 CISG.

130. In general, a notice of impediment ensures receiver concerning about the contract. The notice on 20 January 2018 does not ensure RESPONDENT concerning about the contract. Thus, CLAIMANT should pay the tariff.

131. A notice of Art. 79 (4) CISG enable the receiver to deal with the damage caused by the discharge of non-performance, which is based on good faith under Art. 7 (1) CISG. That reason why the notice can decide if he wants to keep the contract or not and take remedial measures to mitigate his loss [Kröll, p.1077, ¶95]. In other words, reasonable time is a time which the receiver can make the above judgment.

132. CLAIMANT knew that the tariff corresponds to frozen semen from Nijinsky III on January 20th [EX, C7, p.16]. The next day, RESPONDENT and CLAIMANT discussed the contract at the telephone conference [EX, R4, p.36]. From the above, RESPONDENT had time to deliberate on the Agreement as a company from 9:03 20th until the morning of 21st. As a company organization it is difficult to deliberate and make decisions on contracts (indicated in the previous paragraph) in a day [EX, C7, p.16]. From the above, it can be said that CLAIMANT has not been able to notify RESPONDENT of the obstacle within a reasonable time to be able to deliberate on the contract from January 20 that he knew of the obstacle.

133. Also, CLAIMANT has not been notified within a reasonable time after the time it should have known. In Malaysia case, the seller could not rely on Art. 79 CISG



alleging that the Singaporean regulations were to be considered an impediment exempting the seller from performance, as the seller was well aware of such regulations and therefore took the risk of not being able to supply conforming goods [Case, Malaysia]. i.e. It is necessary for seller to know the regulation of buyer's country and to prepare for it. The reason is that the seller can deal with the impediment caused by that regulation if he knows import regulations of the recipient country.

134. As soon as CLAIMANT read the newspaper on December 20, 2017, the CLAIMANT had to confirm to the Equatoriana government whether the frozen semen is included in the agricultural products which are specified items of this tariff [EX, C6, p.16] [PO2, p.58, ¶.26]. The reason is that, as mentioned in the preceding paragraph, the seller needs to know about the import regulation of the partner country. However, the reason is that CLAIMANT neglected that confirmation, we could not secure time to deliberate reviewing the contract as shown in the previous paragraph. Therefore, CLAIMANT has not been notified within a reasonable time from the time it should have known.

135. In view of the above, it cannot be said that CLAIMANT's notice of the obstacle concerned has been made within a reasonable time when CLAIMANT ought to have known the obstacle, and CLAIMANT should oblige the payment of tariffs.

d. RESPONDENT did not act in bad faith.

i. RESPONDENT acted in good faith, however, CLAIMANT interprets Mr. Shoemaker's remark conveniently for CLAIMANT.

136. Ms. Napravnik said that she "had gotten the impression that RESPONDENT accepted our position" [EX, C8, p.17]. This evidence shows that CLAIMANT interprets Shoemaker's representation as good for themselves, that RESPONDENT promised to renegotiate and RESPONDENT bears tariffs. However, as Section A-4 discussed, this interpretation is wrong.

137. On 20 January 2018, CLAIMANT emailed RESPONDENT that the newly imposed tariffs of 30% on the agricultural products including the breeding of racehorses [EX, C7, p.16]. Though Mr. Shoemaker read the email, he told to Ms. Napravnik several times " he had not been involved in the negotiations of the contract and had no



authority to cope with it” [EX, R4, p.36]. From this, CLAIMANT should have known about his position because he told CLAIMANT. Also, he was a veterinary before his inauguration, and he told Ms. Napravnik that he was not lawyer [EX, R4, p36].

Therefore, it is hard to believe that he had legal expert knowledge. Under these situations, without his wife’s advice, he could not have made valid reply. In addition, Mr. Shoemaker became responsible for the development of the racehorse breeding program on 1 November 2017, only two and a half months ago from imposing tariffs. CLAIMANT knew it [PO2, p.59, ¶.32]. Therefore, although Mr. Shoemaker does not have enough authority to make decision about this problem, it is not reasonable to see Mr. Shoemaker’s words as RESPONDENT’s reliable intention.

138. Furthermore, Mr. Shoemaker merely stated that “ if the contract provides for an increased price in the case of such a high additional tariff, we will certainly find an agreement on the price.” [EX, R4, p.36] He just remarked the assumption. They did not discuss how to bear the tariffs to find an agreement on the price, schedule for renegotiation and even promise of next discussion. On the other hand, Ms. Napravnik only remarked “I had gotten the impression ~” [EX, C8, p.18], therefore, Ms. Napravnik interpreted his remarks conveniently for CLAIMANT. CLAIMANT claims that RESPONDENT misleads CLAIMANT to deliver [GWU, p.31, ¶.121]. However, it was just CLAIMANT’s self-approving interpretation. It follows that RESPONDENT did not act in bad faith.

ii. Even if RESPONDENT did resell the doses, it was not in bad faith.

139. CLAIMANT’s insinuation of resale is baseless Even though RESPONDENT resold 6 doses of frozen semen to other customer [PO2, p.59, ¶.33], this was not prohibited.

140. CLAIMANT argues that they said RESPONDENT may resell to third parties without CLAIMANT’s express written consent [EX, C2, p.10]. However, the contract did not contain a FROZEN SEMEN AGREEMENT or a clause about prohibition of resale, Thus, even if RESPONDENT resold frozen semen, there was no problem. Even if we interpret "the semen is to be used for the following mares: (and others after information of the seller)" as prohibiting resale, it does not clearly state resale as bad faith. If it had, RESPONDENT would not have resold therefore it was CLAIMANT's



fault. In addition, we did not actually have a negotiation about resell. From those facts, RESPONDENT can say CLAIMANT did not deeply consider resale.

2. Claimant cannot be entitled to pay the additional tariffs resulting from an adaptation of the price under UNIDROIT.

a. It can not be said the tariff cause hardship.

141. Hardship clause can only apply to the case have not been performed [Kluwer, p.179 ¶.1]. In the present case, Claimant had performed the Frozen semen and paid the additional tariffs therefore hardship clause under UNIDROIT 6.2.1 do not apply.

142. Additionally, UNIDROIT 6.2.1 requires “ Fundamental alteration of the equilibrium of the contract ” to apply this article. The fundamental alteration of the contract must be caused by two reasons First, ;(a) The increased cost of performance includes the cost of carriage increased. [Case, Suez Canal] In the present case the tariffs are necessary to custom clearance, so the tariffs include the cost of carriage. Second, (b) Reduction in the value of performance mainly includes the source of natural events, such as flooding, earthquake. This imposing tariff is not natural event. Therefore, the imposing tariffs are not caused by these. Also, it is most important whether it is fundamental or not. In case, the adaptation of the price did not admit an unforeseeable increase of 70 % in the price [Belgian]. Also, the figure of 50 % had been criticized on the grounds that on the low [Vogenauer, p.816 ¶7]. In the present case, it is difficult for Claimant to insist the “fundamental” which an increasing of 30 % in the price.

b. This event is not hardship based on UNIDROIT 6.2.2.

143. Based on UNIDROIT 6.2.2, hardship demand four requests. First, “known to the disadvantaged party after the conclusion of the contract”. (a) This event is caused after the conclusion of the contract. Second, “could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract” CLAIMANT agreed DDP. In generally DDP include custom duty. CLAIMANT could reasonably take into account the burden of tariffs at the time of the conclusion of the contract.



144. Third, “beyond the control of the disadvantaged party.” In the present case, the imposing tariffs is an act of government. It is beyond the control of the CLAIMANT. Forth, “ the risk of the event has not been assumed by the disadvantaged party.” CLAIMANT is considered the burden of risk when the parties are discussed about the contract which CLAIMANT accepted a DDP terms. However, the party’s renegotiation to raise the price associated with transportation and DDP terms. As a result, the price of the frozen semen raised per 500 dollar. It can be said that CLAIMANT took over the burden of risk as the price was raised [PO2, p.56, ¶.8]. Accordingly, the imposing tariffs do not fulfill four requirements to apply hardship based on UNIDROIT 6.2.2.

c. The act of Respondent is not an act causing loss to Claimant.

145. Therefore, it is not contrary to the faith law, CLAIMANT cannot claim an additional tariff. Unreasonable behavior is to let your opponent believe and do something and not do it. Respondent has already paid for it. I only requested to be sent for legitimate fulfillment and in time for breeding season. Respondent had not acted contrary to trust against Claimant. Therefore, the present case is not applied hardship clause. Therefore, Claimant can not entitle to the payment of USD1,250,000 for Respondent.



REQUEST FOR RELIEF

146. To dismiss the claim as inadmissible for a lack of jurisdiction and powers.

147. To reject the claim for additional remuneration in the amount of USD 1,250,000 raised by CLAIMANT.

148. To order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration



CERTIFICATE

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Hayashi Momoko

林 桃子

Imamura Mari

今村 菜里

Inoue Yusaku

井上 裕策

Matsubara Yujiro

松原 祐二郎

Matsuda Saya

松田 早矢

Matsumoto Ayaka

松本 恵佳

Matsumura Merumo

松村 明留桃

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