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31 MARCH - 7 APRIL 2019

MEMORANDUM FOR RESPONDENT

UNIVERSITY OF CINCINNATI COLLEGE OF LAW

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&	And
¶	Paragraph
HKIAC Rules	HKIAC Administered Arbitration Rules
Cl. Ex.	CLAIMANT'S Exhibit
Claim. Mem.	CLAIMANT'S Memorandum
Sales Agreement	Sales Agreement
ibid.	*ibidem* (in the same place)
No.	Number
p.	Page
ICC	International Chamber of Commerce in Paris, France
PO No.__	Procedural Order Number __
Res. Ans.	RESPONDENT'S Answer to Request for Arbitration
Res. Ex.	RESPONDENT'S Exhibit
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
St. of Claim	Statement of Claim (CLAIMANT'S Request for Arbitration)
St. of Def.	RESPONDENT'S Statement of Defense (Answer to Request for Arbitration)

INTRODUCTION

1. While CLAIMANT addresses the issue of the admissibility of RESPONDENT's partial award at the end of the CLAIMANT's Memorandum, RESPONDENT believes that the admissibility issue of evidence is a threshold procedural issue that must be addressed by the Tribunal before any substantive issues are discussed. Accordingly, the argument section of this RESPONDENT's Memorandum's will begin by showing that the Tribunal must not admit RESPONDENT's confidential partial award as evidence in this case.
2. Further, CLAIMANT's Statement of Facts does not provide a clear picture of the transpired events during the course of the negotiations. CLAIMANT omits many of the key facts that the Tribunal must consider to reach a correct decision. Therefore, RESPONDENT is adding its Counter Statement of Facts in order to provide the Tribunal with a more complete description of the relevant facts important in this case.

COUNTER STATEMENT OF FACTS

3. The RESPONDENT is Black Beauty Equestrian (Black Beauty) of Oceanside, Equatoriana. Black Beauty, which has for many years been famous for its broodmare lines, has recently established a racehorse stable. [St. of Claim, ¶4]
4. The CLAIMANT is Phar Lap Allevamento (Phar Lap), a company that operates a stud farm and a farrier school located in Capital City, Mediterraneo. In addition to providing studs to breeders around the world, Phar Lap also offers for sale the frozen semen of its champion stallions for artificial insemination. [St. of Claim, ¶ 1- 3]
5. On 21 March 2017, Black Beauty contacted Phar Lap, inquiring about the availability of CLAIMANT's renowned stud Nijinsky III for RESPONDENT's new breeding program. At the time, the government of Equatoriana had prohibited the transportation of living animals into the country, which prevented Black Beauty from naturally breeding its broodmares with Phar Lap's stallions. [Cl. Ex. C1]
6. Equitoriana had also temporarily lifted in prohibition on artificial insemination for racehorses in Equatoriana. As a result, Black Beauty became interested in purchasing frozen semen and inquiring on whether frozen semen from Nijinsky III for 100 doses could be available. [Cl. Ex. C1]
7. RESPONDENT further explained that its request for such a high number of doses was due to the fact that the temporary lifting of the ban on importing frozen semen for artificial insemination

might end at any time but that all doses acquired while the ban was lifted could be used. [Cl Ex. C1]

8. In response to the request from RESPONDENT's Chris Antley to CLAIMANT's Julie Naprovnik, Ms. Naprovnik sent Mr. Antley an email on 24 March 2017 offering to sell RESPONDENT 100 doses of Nijinsky III's frozen semen for the price of US$99,000 per dose according to the Mediterraneo Guidelines for Semen Production and Quality Standards based on the CLAIMANT's Standard Frozen Sales Agreement. [Cl. Ex. C2]
9. On 28 March 2017, Mr. Antley responded by insisting on delivery on the basis of DDP with the applicable law being that of Mediterraneo provided that Equatoriana courts have jurisdiction for any disputes. [Cl. Ex. C3]
10. CLAIMANT agreed to DDP delivery terms in exchange for an increase of the price per dose to US$100,000 plus adding the language of Clause 12 to the contract. [Cl. Ex. C1; Cl. Ex.. C5; & Cl. Ex. C8]
11. The parties also agreed that "any dispute arising out of this contract" would be arbitrated according the Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules. Significantly, the Sales Agreement's arbitration clause, Clause 15, omitted the words "or related to" that ordinarily are included in the arbitration clause. [Re. Ex. R1; Cl. Ex. C5, Cl15; Cl. Ex. C8]
12. On 12 April 2017, Ms. Napravnik and Mr. Antley met in person to complete the final terms of the Sales Agreement, but the negotiators never finalized an agreement because both negotiators were involved in a serious auto accident on their way to dinner that evening and were unable to participate in finalizing the Sales Agreement. In fact, Mr. Antley was in a coma for four weeks. [Cl. Ex. C8; Re. Ex. R3; Cl. Ex. C5]
13. As a result of Ms. Napravnik's and Mr. Antley's injuries, Julian Krone for RESPONDENT and John Ferguson for CLAIMANT completed the contract and respectively signed the Sales Agreement on 6 May 2017. [Cl. Ex. C8; Re. Ex. R3; Cl. Ex. C5]
14. Neither Ms. Napravnik nor Mr. Antley were able to provide any meaningful input to Mr. Ferguson or Ms. Krone for completion of the Sales Agreement, although both did have access to the emails and negotiation notes that had been previously exchanged between Ms. Napravnik and Mr. Antley in March and April 2017. [Cl. Ex. C8; Re. Ex. R3]
15. One of Mr. Antley's negotiation notes, which was reviewed by Ms. Krone, had three bullet points stating that there needed to be clarification of the arbitration clause regarding a neutral

venue and applicable law, that the ICC hardship clause was too broad and that the hardship clause needed connection with the arbitration clause. However, the meaning of Mr. Antley's notes was not completely clear to Ms. Krone, especially as to the first and third points. In the end, Ms., Krone and Mr. Ferguson agreed to include a narrow hardship reference into the force majeure clause and dealt with other risks directly in the contract. [Re. Ex. R3]

16. Under the contract as executed, there were to be three shipments of frozen semen: 25 on 20 May 2017, another 25 on 3 October 2017 and the remaining 50 doses on 23 January 2018. The US$10 million price for the 100 doses was to be paid in two installments of US$ 5 million each on 18 May 2017 and 21 January 2018. [Cl. Ex. C5]
17. RESPONDENT made the first payment in a timely manner, and CLAIMANT delivered the first two shipments of 25 does each on time. [Cl. Ex. C8]
18. Prior to the third shipment, Equatoriana imposed a 30 percent tariff against Mediterraneo' s agricultural products on 20 December 2017. [Cl. Ex. C6] The Equatoriana tariff went into effect on 15 January 2018. [PO. NO.2, ¶25]
19. Upon finding out that the tariff would be imposed on its then upcoming shipment, Ms. Napravnik emailed RESPONDENT's Greg Shoemaker on 20 January 2018 to advise him that CLAIMANT would not be shipping the last 50 doses on 22 January 2018 unless a solution was found to adapt the price so as to cover the additional costs that would be incurred by CLAIMANT as a result of the tariffs. [Cl. Ex. C7]
20. In response to Ms. Napravnik' s email, Mr. Shoemaker phoned Ms. Napravnik on the morning of 21 January 2018 to inquire when the last 50 doses would be shipped, some of which was urgently needed given the start of the "breeding season." Although the evidence as to what was actually said by Mr. Shoemaker and Ms. Napravnik is conflicting, Ms. Napravnik made clear that CLAIMANT would not ship unless RESPONDENT agreed that it would negotiate an adaptation to the price for the last 50 doses in good faith. [Cl. Ex. C8; Re. Ex. R4]
21. As reflected in his notes regarding the conversation, Mr. Shoemaker read to Ms. Napravnik verbatim the following sentence that he had written down prior to the call: "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on price" (emphasis added). However, because he had no authority to amend the contract agreement, Mr. Shoemaker wanted to avoid making any commitment about increasing the price. [Re. Ex. R4]

22. After hearing from Mr. Shoemaker, Ms. Napravnik authorized making the shipment of the last 50 doses that evening. [Cl. Ex. C8]
23. On 2 February 2018, CLAIMANT had heard that RESPONDENT had sold at least 15 of the Nijinski III's semen doses to other breeders at a price of US$120,000 each (or 20 percent higher than the price CLAIMANT had received under the Sales Agreement). [Cl. Ex. C8; PO. No.2, ¶20]
24. On 12 February 2018, the parties met unsuccessfully to address whether there should be an adaptation of the price. [Cl. Ex. 8; PO. No.2, ¶20]
25. Thereafter, on 31 July 2018, CLAIMANT commenced this arbitration, seeking an award for US$1,250,000, or a 25 percent adaptation of the price for the third delivery of semen. [Notice of Arbitration; Langweiler Transmittal of 31 July 2018; HKIAC Acknowledgement of 31 July 2018]
26. During the course of the arbitration proceedings on 2 October 2018, CLAIMANT's lawyer, Joseph Langweiler, informed the Arbitral Tribunal that CLAIMANT had received confidential information about another arbitration before the HKIAC involving RESPONDENT and that CLAIMANT sought to present evidence regarding that proceeding notwithstanding the HKIAC's rule on confidentiality. RESPONDENT immediately objected to use of such evidence on the basis it would violate confidentiality obligations. RESPONDENT further objected on grounds that the evidence from the other arbitration had been obtained by illegal means, either stolen by from former employees or by an Internet hack. [Langweiler Letter to Tribunal of 2 October 2018; PO. No.2, ¶39-42]

SUMMARY OF ARGUMENT

1. RESPONDENT entered into a contract with CLAIMANT for the sale of frozen semen. During the negotiations, CLAIMANT agreed to inclusion of the DDP incoterm, agreeing thereby to be responsible for payment of all costs incurred for import duties and tariffs as well as all other import changes.
2. Now, CLAIMANT is wrongfully demanding an adaptation of the sale price due to a tariff increase for which CLAIMANT accepted full responsibility by having agreed to the DDP intercom.
3. As set forth in the Tribunal's Procedural Order No.1 [PO 1], there are three issues addressed in this memorandum.

ISSUE I - THE TRIBUNAL MUST DENY CLAIMANT'S REQUEST TO SUBMIT RESPONDENT'S PARTIAL AWARD AS EVIDENCE BECAUSE CLAIMANT OBTAINED THE AWARD BY IMPROPER MEANS, AND BECAUSE THE AWARD LACKS BOTH RELEVANCE AND MATERIALITY IN THIS CASE.

4. CLAIMANT's request to submit RESPONDENT's partial award as evidence should be denied because CLAIMANT's obtaining of confidential information from another case was wrongful and in violation of HKIAC rules on fair conduct. In order to uphold the integrity of HKIAC arbitrations, the Tribunal should prevent CLAIMANT from submitting the evidence.

5. In addition, the Tribunal should look to the IBA Evidence Rules, Article 9.2, which requires the Tribunal to exclude any evidence that would create unfairness for any party, or that lacks relevance or materiality.

6. Furthermore, the RESPONDENT's partial award is not relevant to the matter at hand. The evidence does not prove any fact from which legal conclusions can be drawn.

7. CLAIMANT also violated its obligation of fairness and good faith by arranging to purchase the award from a disreputable third-party.

8. As a result, the Tribunal must deny CLAIMANT's request to submit the partial award from the other arbitration case as evidence in the case.

ISSUE II - THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THE CASE AND SHOULD APPLY DANUBIAN LAW IN ITS APPLICATION OF THE PRINCIPLES GOVERNING THE CONTRACT.

9. The Arbitral Tribunal does not have jurisdiction to hear the case because the arbitration clause, clause 15 must be interpreted according to Danubian Law.

10. The final draft of the contract did not contain an express choice of law provision regarding the arbitration clause. As a result, Danubian law, which is the lex arbitri, must be applied.

11. Under Danubian law, Arbitrators, may adapt a contract only if they are expressly empowered to do so. Under the current contract, there is no express empowerment for the arbitrators to adopt the contract.

12. Therefore, because Danubian law applies, the Arbitral Tribunal does not have jurisdiction to hear CLAIMANT's claim for adaptation of the contract and increase the price for the last 50 doses of semen.

ISSUE III- CLAIMANT IS NOT ENTITLED TO AN ADAPTATION OF THE PRICE DUE TO IT UNDER BOTH CLAUSE 12 OF THE PARTIES' CONTRACT AND THE CISG AS SUPPLEMENTED BY CHAPTER 6, SEC. 2 (THE HARDSHIP CLAUSE) OF THE UNIDROIT PRINCIPLES.

A. CLAIMANT is not entitled to relief of the under clause 12 of the parties' contract because it is not a hardship clause and even if it was, a tariff was reasonably foreseeable.

13. During their negotiations, the parties agreed that the method of shipping would be according to the DDP intercom. The Sales Agreement also included a limited hardship provision, clause 12, which absolved CLAIMANT only as to imposition of "additional health of health and safety requirements," of the like, but not tariffs. The clause clearly does not entitle CLAIMANT to an adaptation of the price following the imposition of the 30 percent tariff on the last 50 doses of frozen semen.

14. The Application of CISG Art. 8(1) and 8(2), shows that tariffs are not comparable to health and safety requirements. In addition, the true meaning of DDP means that CLAIMANT accepted all additional responsibility associated with DDP.

15. Moreover, the imposition of the 30 percent tariff by Equatoriania on the frozen semen did not create a hardship for CLAIMANT within the meaning of Clause 12. By agreeing to the DDP incoterm in the Sales Agreement, CLAIMANT accepted the risk of any additional tariffs and thus cannot be considered to be a hardship entitling CLAIMANT to an adaptation of the price under clause 12.

B. Alternatively, the CLAIMANT is not entitled to an adaptation of the price due it under the CISG.

16. CLAIMANT is also not entitled to an adaptation of the price under the CISG.

17. CLAIMANT asserts that they are entitled to an adaptation of the price under the CISG because they suffered a hardship due to the imposed tariffs. The drafters of the CISG deliberately excluded any general hardship clause from the convention. Therefore, CLAIMANT cannot seek relief under Article 79 of the CISG.

18. Moreover, Article 79 of the CISG does not apply because CLAIMANT actually did fully perform by delivering the final 50 doses and therefore did not fail to perform as is required to trigger Article 79.

19. Where the CISG does not provide relief, the CLAIMANT contends that the UNIDROIT Principles Art. 6.2.3 should apply to fill a "gap" under the CISG. However, the UNIDROIT Principles do not afford CLAIMANT any relief because the CISG specifically excluded a general hardship provision and therefore the Unidroit Principles cannot be applied to fill a non-existent gap. The Principles also require that the hardship be unforeseeable, however, tariffs are a general risk of international business transactions and, therefore, may not be deemed to be unforeseeable.

20. As a result, CLAIMANT is not entitled to an adaptation of the price under the CISG.

ARGUMENT

ISSUE ONE: THE TRIBUNAL MUST EXCLUDE THE CONFIDENTIAL PRIOR AWARD FROM EVIDENCE BECAUSE CLAIMANT WRONGFULLY OBTAINED THE AWARD, ADMITTING THE AWARD WOULD DESTROY FUTURE PARTIES' TRUST IN THE CONFIDENTIALITY OF HKIAC ARBITRATIONS, AND THE AWARD IS NOT RELEVANT TO RESOLVING THIS ARBITRATION.

1. Whether by an illegal hacking or a breach of confidentiality, the confidential partial award from a separate HKIAC arbitration was improperly taken from RESPONDENT and ended up in the possession of a disreputable intelligence firm. [Email 3 Oct 2018; PO NO. 2, ¶41]. CLAIMANT seeks the Tribunal's imprimatur for its purchase of such evidence from the disreputable firm that is seeking to sell it. [PO NO. 2, ¶41]. The Tribunal should not give this arrangement between CLAIMANT and the intelligence firm its blessing by allowing the admission of an improperly obtained, confidential award of the RESPONDENT'S.

2. The Tribunal has the authority to determine the admissibility of evidence including whether to adopt strict rules of evidence under the HKIAC rules and Danubian Arbitration Law. [HKIAC Art. 22.2; UNCITRAL Art. 19(2)]. RESPONDENT agrees with CLAIMANT that the Tribunal should follow the IBA Rules on the Taking of Evidence (hereinafter "IBA Evidence Rules") [Claim. Mem. ¶88]; contrary to CLAIMANT's assertions, however, the IBA Evidence Rules lead to exclusion of the Award.

3. The Tribunal should refuse to admit the partial award into evidence on the grounds that: (1) CLAIMANT violated its obligations of fairness and good faith to RESPONDENT when it arranged for the purchase of RESPONDENT'S confidential partial award from a disreputable intelligence company; (2) the award is protected by the confidentiality provisions of the 2013 HKIAC Rules and the Tribunal should exclude its admission based on its obligation to conduct this arbitration in the spirit of the HKIAC rules; (3) the award is immaterial and irrelevant to any fact that would further a legal conclusion; and (4) the award cannot be submitted through the process of HKIAC Art. 28 Consolidation.

   a. **CLAIMANT wrongfully obtained confidential information in violation of the HKIAC's rules on fair conduct and the Tribunal should refuse to admit it into evidence to protect the integrity of this arbitration and HKIAC arbitrations generally.**

4. The Tribunal should exclude the partial award from admission because CLAIMANT wrongfully obtained RESPONDENT'S confidential information in violation of their obligation to ensure the fair conduct of the arbitration under HKIAC Art. 13.5 and general principles of good faith described in preamble 3 of the IBA Evidence Rules. When confidential information is obtained through wrongful means, the tribunal must not allow the admission of the evidence based on the general principles of "basic procedural fairness, respect for confidentiality and legal privilege." [*Libananco* at 36]. The IBA evidence rules reflects this obligation by requiring the Tribunal to exclude evidence on request of a party if it finds a compelling consideration of fairness at stake. [IBA Rules Art. 9.2(g)].

5. CLAIMANT is incorrect in arguing that it committed no wrongdoing in its pursuit of the partial award because it was not itself engaged in any illegal hacking or breaches of confidentiality in obtaining the evidence. [Claim. Mem. ¶92]. It is not necessary for the Tribunal to find that the party seeking admission of evidence illegally took the evidence in order to exclude it from evidence; it is enough that the party seeking admission has acted unfairly and in bad faith in the evidence's obtainment. [*Libananco* at 37]. The Tribunal has the inherent jurisdiction to ensure that this obligation to arbitrate fairly and in good faith is kept by the parties. [*Id.*].
6. CLAIMANT acted unfairly and in bad faith when it arranged for the purchase of RESPONDENT'S confidential partial award from a disreputable intelligence company. [PO NO.2 ¶41]. CLAIMANT is now seeking a determination from this Tribunal that this evidence, obtained through improper means by either an illegal hack or a breach of confidentiality, can be admitted in this case. [Email 3 October 2018]. CLAIMANT is unfairly seeking to advantage itself by knowingly and willingly abetting in the intelligence company's wrongful behavior in selling confidential information obtained illegally or improperly from RESPONDENT by an unknown third party by agreeing to purchase the partial award.
7. The Tribunal should find the consideration compelling based on its own inherent interest in upholding the integrity of HKIAC arbitrations. If the Tribunal were to allow the admission of the partial award, it would essentially be providing permission to CLAIMANT to purchase the award and therefore incentivize the intelligence company to improperly obtain more confidential HKIAC awards to sell to parties in other HKIAC arbitrations. On the other hand, not allowing the award into evidence would likely lead CLAIMANT to abandon its plan to purchase the award and disincentivize the improper obtainment of HKIAC awards. Since preventing CLAIMANT from

unfairly purchasing RESPONDENT'S confidential partial award would likely prevent other unfair practices in future HKIAC arbitrations, the Tribunal should exclude the admission of the partial award through IBA Evidence Rule 9.2(g).

i. *The "Wikileaks" arbitrations are not relevant to the facts at hand because RESPONDENT 's award is not available to the public*

8. CLAIMANT'S citation of Wikileaks cases are irrelevant to this arbitration because the partial award in this case is not publicly available. In *Caratube v. Kazakhstan* and *Hulley Enterprises v. the Russian Federation* (hereinafter referred to as the "Wikileaks Cases"), the arbitral tribunals admitted evidence that had been illegally hacked and posted onto the website "Wikileaks" for public view. [Claim. Mem. ¶93; *Caratube*; *Hulley*]. In both Wikileaks cases, the arbitral tribunal admitted evidence that had been obtained illegally and then posted publicly on the Wikileaks website. The reasoning in both cases was that the tribunal needed to be able to consider publicly available information. In this arbitration, however, the prior award is not publicly available and therefore the Wikileaks cases' reasoning does not apply.
9. The partial award cannot be admitted based on the precedence of the Wikileaks cases because the award is not publicly available. The reasoning that the award is essentially publicly available, since the intelligence company it is receiving it from would likely sell the award to any interested party, is deeply flawed. [Claim. Mem. ¶93]. A company withholding a document until payment is received is definitionally not making a document publicly available. Moreover, it is unlikely there is a market for the prior award other than an adversary in an arbitration against RESPONDENT, i.e. a market of one, that being CLAIMANT. Since the award is not publicly available and there is no real market for the prior award, the Wikileaks cases are irrelevant and the award should not be admitted based on its initial illegal taking.

b. <u>This Tribunal should exclude the evidence as all HKIAC arbitrators have individually agreed to conduct the arbitration consistent with the spirit of the rules, which made the prior arbitration confidential.</u>

10. Since RESPONDENT 's arbitration with the unknown third party was carried out through the 2013 HKICA rules, RESPONDENT 's partial award is protected by the confidentiality rules of the 2013 HKIAC rules. [Email 3 Oct. 2018]. According to Art. 42.1, parties to the 2013 HKIAC arbitration are prohibited from publicizing, disclosing, or communicating any award made through the arbitration. [Art. 42.1 HKIAC 2013]. The rules extend this confidentiality obligation to the Tribunal and HKIAC as well. [Art. 42.2 HKIAC 2013].

11. While the 2013 HKIAC rules do not specifically provide that the confidentiality of the award precludes its admission by a third party in an unrelated HKIAC arbitration, it is certainly implicit and consistent with the rules that the confidentiality should preclude its admission. According to Art. 13.7 of the 2013 HKIAC rules, "in all matters not expressly provided for in these rules, HKIAC the arbitral tribunal and the parties shall act in the spirit of these rules." [Art. 13.7 HKIAC 2013]. The tribunal in the current arbitration is also bound to act in the spirit of the HKIAC rules through an identical provision in the 2018 HKIAC rules. [Art. 13.9 HKIAC].
12. Since the award is protected by the 2013 HKIAC rule's confidentiality provisions, this tribunal should maintain the spirit of the HKIAC Rules and uphold the confidentiality of the prior arbitration by excluding the wrongfully-obtained confidential prior award from evidence.
13. Further, Art. 9.2(e) of the IBA evidence rules states that the tribunal shall exclude any confidential evidence from admission if it finds that confidentiality to be "compelling." [Art. 9.2(e) IBA Evidence Rules]. Notably, the language of Art.9.2(e) suggests that confidentiality is "compelling" if the arbitral tribunal finds that it is in its discretion.
14. Since the 2013 HKIAC rules binds parties to an HKIAC arbitration to the confidentiality of the award, this Tribunal should find that the spirit of the 2013 HKIAC awards would preclude the admission of the award in an arbitration administered by HKIAC. Furthermore, the current Tribunal is also bound to act in the spirit of the HKIAC rules and therefore should not disregard the confidentiality of HKIAC awards.
15. Based on this reasoning, the tribunal should find that the confidentiality of the partial award is compelling and exclude it from admission based on Ar. 9.2(e) of the IBA Evidence Rules.

    i. *The GATT Treaty is irrelevant to international commercial arbitrations and therefore does not weaken Arbitral confidentiality.*

16. CLAIMANT argues that the confidentiality of 2013 HKIAC rules is not compelling because Mediterraneo and Equatoriana's membership in the World Trade Organization (hereinafter "WTO") binds them to Art. X of the General Agreement on Tariffs and Trade (hereinafter "GATT"). [Claim. Mem. ¶102]. Art. X of GATT requires the publication of judicial decisions which concern tariffs put in place by a contracting member. [Art. X(1) GATT].
17. With no supporting references, CLAIMANT argues that the "intention behind Art. X GATT" makes it relevant to the current arbitration even though an arbitration award is not a judicial decision. [Claim. Mem. ¶103]. CLAIMANT goes on to argue that, since Art. X GATT requires

publication of the partial award its confidentiality is not compelling, and it can be admitted. [Id. at ¶103].

18. This argument is baseless since the text of Art. X specifically only applies to judicial decisions and there are no authorities that CLAIMANT can point to that state that Art. X applies to arbitration decisions. Furthermore, there is strong reason to doubt that Art. X of GATT applies to arbitral awards since it is reasonable to assume that the drafters of the treaty would have explicitly stated that arbitral awards are subject to publication since the confidentiality of arbitral awards is a major aspect of international commercial arbitration.

c. <u>Even supposing that the award is admissible regardless of its previous illegal taking or confidentiality, the Tribunal should deny its admission because CLAIMANT has failed to demonstrate its relevance to the case at hand.</u>

19. CLAIMANT argues that the Tribunal would be violating its right to a full opportunity to be heard under Art. 18 of the UNCITRAL Model Law if the partial award was not admitted as evidence. [Claim. Mem. ¶95]. However, the right to be heard only extends to issues that are relevant and material to the resolution of the dispute. [*Soh Beng Tee & Co.* at 118]. Evidence is irrelevant if it is unlikely "to prove facts from which legal conclusions are drawn." [Kubalcuk P. 103]. Since CLAIMANT fails to point to any fact proven by the award that would lead to a legal conclusion, the award is irrelevant and should not be admitted.

20. CLAIMANT argues that the evidence is relevant because it allegedly demonstrates inconsistency in RESPONDENT 's position on the adaptability of the contract price due to unforeseen hardship. [Claim. Mem. 96]. CLAIMANT argues that this inconsistency should lead to a dismissal of RESPONDENT 's argument. [Id.]. However, CLAIMANT does not point to any mechanism in the applicable arbitration rules or law that would allow the tribunal to dismiss RESPONDENT'S argument. As no specific claim is being furthered by any evidence showing inconsistency by RESPONDENT in this second arbitration, there is no fact being proven by the partial award that would make it relevant.

21. CLAIMANT alternatively contends that the award is relevant and material because the award represents a precedential decision that would support its case for the adaptability of the contract price. [Claim. Mem. ¶98]. However, the purported precedential value of the prior award does not make it relevant and does not prove any fact bearing on the outcome of this case – at most the award is simply another authority, but an authority that comes at the cost of a violation of either the HKIAC confidentiality rules or with the law itself in the case of an illegal hack.

d. <u>RESPONDENT'S arbitration and the current arbitration cannot be consolidated through Art. 28 HKIAC because the rights to relief claimed in the two arbitrations do not arise out of the same transaction or a series of related transactions.</u>

22. The final way CLAIMANT seeks to have the award submitted into evidence is through the process of arbitral consolidation described in HKIAC Art. 28.1. [Claim. Mem. ¶ 104]. Since confidential evidence from one arbitral proceeding may be presented within a consolidated proceeding, CLAIMANT argues that the partial award should be admitted as a part of a consolidation of the current arbitration and RESPONDENT'S second arbitration with the unknown third party. [Id.].
23. This argument fails because the required elements for Art. 28 Consolidation are not present in the current case. Under HKIAC Art. 28.1(c), the CLAIMANT must show that: (1) a common question of law or fact arises in all of the arbitrations; (2) the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions; and (3) the arbitration agreements are compatible.
24. The consolidation would fail on the second element because the transactions at issue in the two arbitrations are neither the same nor part of a series of related transactions. In RESPONDENT'S arbitration, the contract at issue was for the sale of a mare [Email 2 Oct] while the contract at issue in the current arbitration was for the sale of several installments of horse semen. [Cl. Ex. C5]. These transactions are for two different goods and are between different parties. Therefore, they are not the same nor part of a series of related transactions.
25. CLAIMANT argues that the "series of related transactions" element is met based on the "high probability" that the mare from RESPONDENT's transaction was born from Nijinsky III's sperm. [Claim. Mem. ¶105]. CLAIMANT'S only evidence that the mare is born from Nijinsky III's sperm is that the mare RESPONDENT sold was born a year after RESPONDENT received the sperm. [Id.].
26. CLAIMANT'S reasoning is flawed because it extrapolates too much from the single fact that the mare RESPONDENT sold is old enough to possibly be related to Nijinsky. There is simply no solid evidence to support CLAIMANT'S assumption of the mare's parentage.
27. Since the transaction at issue in RESPONDENT's arbitration is not part of a series of related transactions with the transaction at issue in the current arbitration, CLAIMANT cannot unilaterally seek the consolidation of the two arbitrations. Since the two arbitrations cannot be consolidated, CLAIMANT cannot seek the admission of the award into evidence through the consolidation.
28. Finally, there is every indication that both parties to the other arbitration would strenuously object to a consolidation.

ISSUE TWO: THE PARTIES CHOSE TWO DIFFERENT LAWS TO APPLY TO THE AGREEMENT, ONE GOVERNING THE ARBITRATION PROVISION AND ONE GOVERNING THE MAIN CONTRACT, WHICH IS SUPPORTED BY THE PLAIN LANGUAGE OF THE AGREEMENT AND THE INTENT OF THE PARTIES.

a. The parties' agreement on two different choice of law provisions is consistent with the doctrine of separability and there is no compelling reason for the Tribunal to avoid applying this doctrine.

29. The Arbitral Tribunal lacks jurisdiction to hear the case, because the law of Danubia governs their agreement to arbitrate, which requires an express grant of power to the Tribunal for it to grant the only relief CLAIMANT seeks in this arbitration – adaptation of the contract price for the last 50 doses of semen. Because the parties did not include such an express grant of power to this tribunal, it lacks the power to adapt the contract.

30. CLAIMANT explicitly reduced the broad wording of the Model Clause of the HKIAC by deleting any reference which could be interpreted as an empowerment for contract adaptation. The parties did not include an express choice of law provision with regard to Clause 15, their agreement to arbitrate. Under Danubian law, the arbitration agreement is legally separate from the container contract, the Sales Agreement in this case. Danubian law applies here because the doctrine of separability is recognized under Article 17 of the Model Law and should be applied in this matter. The arbitration agreement is incorporated into a contract in the form of an arbitration clause, but it does not change the fact that it is still viewed as a separate contract. Since the arbitration clause is the foundation on which the arbitration itself is grounded, it is important that it should be recognized for having this separate existence.

31. Contrary to CLAIMANT'S assertion that the *lex loci arbitri* defines the Tribunal's decision on contract adaptation, the contract and arbitration agreement are separate. Under Article 7 of the Arbitration Act 1996, it is noted that, "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement." Likewise, the LCIA Rules (Art. 23.1) hold that, " …an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the

Arbitral Tribunal that such other agreement is non-existent of ineffective shall not entail ipso jure the non-existence, invalidity or ineffectiveness of the arbitration clause."

32. ICC rules confirm the autonomy of the arbitration agreement, both where it is assumed that the main contract is void and where it is assumed to be non-existent. The arbitrator should only refuse jurisdiction if they find that the arbitration agreement itself is either void or nonexistent. The revision of the ICC Rules in 1998 reinforces the approach that the goal of the Court's prima facie review being now only established whether "an arbitration agreement under the Rules may exist".
33. The application of "separability doctrine," or more accurately, the "separability presumption," is by its very nature essential to an international arbitration agreement. [*Gary Born,* p. 352]. Because an international arbitration agreement is almost invariably treated as presumptively "separable" from the commercial contract within which it is found. [*IBID*].
34. In *Prima Paint Co. v. Flood & Conklin Manufacturing Corp.*, 388 U.S. 395 (1967), the United States Supreme Court established what has become known as the "separability principle" in contracts with arbitration clauses. The arbitration clause has an irrelated, supportive function for the contract. [*IBID*]. The arbitration agreement should presumptively be "separated" from the underlying contract, for various purposes. [*IBID*]. The doctrine of separability in this case means that Clause 15, the arbitration agreement, should be interpreted under the *lex loci arbitri,* or the law of Danubia.
35. For the reasons stated above in this section, the Tribunal does not have jurisdiction to hear the case and under Danubian law, Danubia should be the place of arbitration, which means they must choose to have their arbitration clause interpreted under Danubian law.
36. Contrary to CLAIMANT'S arguments, (1) a uniform interpretation of the entire contract due to the application of one law is not necessary, and the doctrine of *lex arbitri* should govern the Arbitration Agreement as for the Arbitration Agreement was separated from the contract, (2) the doctrine of *lex loci arbitri* should also govern the Arbitration Agreement encompassing the interpretation of the separable arbitration clause within the proceedings as the dispute of the applicable law refers to a fundamental procedural guarantees and thus the law of Danubian applies, and (3) The negotiation history of the parties also shows that the parties intended Danubian law to apply the arbitration agreement.

    i. *A uniform interpretation of the entire contract due to the application of one law is NOT necessary.*

37. Arbitration is deemed to be faithful to the parties' intentions. [*See, e.g.*, *Judgment of 21 March 1995,* XXII Y.B. Comm. Arb. 800, 803 (Swiss Federal Tribunal) (1997) ("arbitration agreement and the main contract *can be* subject to different laws") (emphasis added)].
38. Since Arbitration is faithful to the parties' intentions, differing law *may* apply to the main contract and the arbitration agreement and a uniform interpretation of the entire contract due to the application of one law is not necessary, which is contrary to the argument addressed by CLAIMANT.
39. "It must be pointed out that the law of the seat or place where the arbitration is held, is normally the law to govern that arbitration." [*Union of India v. McDonnell Douglas Corpn.*]. "*The territorial link between the place of arbitration and the law governing that arbitration is well established in the international instruments,. ., the New York Convention of 1958 and the Uncitral Model Law of 1985."* [*IBID*].
40. Additionally, to quote Redfern and Hunter: "[T]he procedural law is that of the place of the arbitration and, to the extent that it contains mandatory provisions, is binding on the parties whether they like it or not. It may well be that the *lex arbitri* will govern with a very free rein, but it will govern nonetheless." [Redfern/Hunter (2009) sec. 3.50].
41. It is also significant that Clause 14, which says that the "Sales Agreement shall be governed by the law of Mediterraneo" refers only to the Sales Agreement and does not say "this entire agreement" or even "the agreement." This is a strong indication that Clause 15, the Arbitration Agreement, was to be interpreted separately from the Sales Agreement and the contract.
42. Therefore, due to the parties agreed with the seat of Danubian and the doctrine of *lex arbitri* should apply, the law of Danubian should apply to the Arbitration Agreement.

> *ii. The doctrine of lex loci arbitri should also govern the Arbitration Agreement encompassing the interpretation of the separable arbitration clause within the proceedings since the dispute refers to the applicable law to the Arbitration Agreement is a fundamental procedural guarantee and thus the law of Danubian applies.*

43. The *lex loci arbitri* not only applies to procedures that apply to court's supervision of the arbitral proceedings, but also encompasses the interpretation of the separable arbitration clause within the proceedings notwithstanding the choice of law within the provisions.
44. According to the localization theory, the law of the seat of arbitration (*lex loci arbitri*) also becomes the *lex arbitri* and usually determines the following issues which are classified under the *lex arbitri* (apart from other areas, which could also be covered by the *lex arbitri*), including: the formal validity of the arbitration agreement; fundamental procedural guarantees; the auxiliary and supervisory roles of the court; and, etc. [Alexandra J. Belohlavek, *Seat of Arbitration and supporting and supervising,*

2015]. Moreover, it also determines the arbitrability of the dispute as well as the jurisdiction of courts (state courts) to execute their supporting and controlling role over all and any arbitrations seated in the place (seat) of arbitration. [*IBID*].

45. The dispute refers to the applicable law the Arbitration Agreement is a fundamental procedural guarantee. If the CLAIMANT agrees with the doctrine of *lex loci arbitri* is applicable on one issue, which is the auxiliary and supervisory roles of the court, CLAIMANT should also allow the *lex loci arbitri* be applicable to other issues.
46. Therefore, *lex loci arbitri* is applicable to the Arbitration Agreement regarding which law is applicable to the Arbitration Agreement.

> *iii. The negotiation history of the parties also shows that the parties intended Danubian law to the arbitration agreement.*

47. RESPONDENT proposed in negotiations that the place of arbitration be governed by the location of arbitration and not by the law of the contract. Such a clause was actually included in Mr. Antley's latest draft of 10 April 2017. [Re. Ex. R1].
48. In its reply, of 11 April 2017, CLAIMANT had changed the suggested place of arbitration to Danubia but did not make any objections to RESPONDENT's proposal that the law of the place of arbitration should govern the Arbitration Agreement [Re. Ex. R2].
49. CLAIMANT's newly suggested neutral place of arbitration, which was acceptable for RESPONDENT, meant, however, that also the choice of law provision had to be changed, to avoid the uncertainties resulting from the absence of a choice. Thus, Mr. Antley had listed the choice of law governing the arbitration agreement as one of the points to be addressed in the final contract. [Re. Ex. 3].
50. That the choice of law clause was not included into the final version of the parties' agreement was due to an oversight of Mr. Ferguson and Ms. Krone, the two who substituted to finish the agreement after the accident involving Mr. Antley and Ms. Naprovnik. However, the RESPONDENT had the intent, which also known, or should have known, by the CLAIMANT, that the arbitration agreement should be governed by the law of the place of arbitration and not by the law of the contract. [Re. Ex. 1, 2].
51. Additionally, the first draft of Arbitration Agreement contained an express choice of law provision for the arbitration clause, which provided for the application of law of the place of arbitration, which was Equatoriana in the draft. [RESPONDENT'S Exhibit 1]. There was NEVER any deliberate choice of law in favor of Mediterraneo to govern the main contract.

ISSUE THREE: CLAIMANT IS NOT ENTITLED TO AN ADAPTATION OF THE PRICE DUE TO IT UNDER BOTH CLAUSE 12 OF THE PARTIES' CONTRACT AND THE CISG AS SUPPLEMENTED BY CHAPTER 6, SEC. 2 (THE HARDSHIP CLAUSE) OF THE UNIDROIT PRINCIPLES.

52. Clause 12 of the Frozen Semen Sales Agreement does not encompass a hardship clause. (A). The tariffs imposed by the Equatorianian government do not constitute a case of hardship because the tariffs were foreseeable, and CLAIMANT accepted responsibility for them when they agreed to DDP. (B). Clause 12 does not grant an adaptation of the price of $1,250,000 or alternatively any other amount. (C). The Drafters of the CISG Specifically excluded the concept of hardship, but even if there is a gap the tariffs would not be considered a hardship under the UNIDROIT principles. (D).

a. Clause 12 of the Frozen Semen Sales Agreement does not encompass a hardship clause.

53. CLAIMANT mischaracterizes Clause 12 of the FSSA by assuming the clause includes a hardship clause. Instead, the clause should be interpreted as a force majeure clause with merely hardship wording.

54. CLAIMANT over-generalizes the phrase "Seller shall not be responsible…for hardship" by ignoring the qualifying language that the hardship of the "unforeseen events" be comparable to additional health and safety requirements. The retaliatory tariffs are not comparable to any additional health and safety requirements, especially considering the tariffs are political retaliation that pose no health or safety risk. Additionally, CLAIMANT agreed to DDP incoterms and, as such, is responsible for the cost of shipment of the product including any tariffs.

i. *CLAIMANT erroneously uses prior contract negotiations as evidence of an implied hardship clause.*

55. The "four corners" doctrine dictates that the contract itself serve as the tool of interpretation. CLAIMANT uses Art. 8(3) of the CISG to argue that initial negotiations about the inclusion of a possible hardship clause qualify as "subsequent conduct." Yet, the mere suggestion of a hardship clause before the final draft of the contract is not "subsequent conduct" as defined by the CISG. The conduct of proposing a hardship clause occurred before the contract was formed, thus it was not subsequent. Art. 8(3) may still apply to illustrate that prior negotiations actually included a hardship clause, but it was later deleted [Re. Ex. R2]. Contrary to CLAIMANT'S assertion, the subsequent conduct of the negotiators to refrain from including an ICC-Hardship clause proves the parties' subjective intent to not have a hardship clause interpreted into the contract.

ii. *Alternatively, if a hardship clause has been created, the retaliatory tariffs do not trigger the hardship clause.*

56. Clause 12 is interpreted through the law of contracts, and the CISG helps interpret parties' intent when the intent is unclear. Article 7(2) of the CISG states, "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law". The general principles relevant to this matter can be found in the UNIDROIT Principles.

57. Under the UNIDROIT Principles, Article 6.2.2 stipulates four elements that must be met before "hardship" can be determined. One of the elements is that "the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract" [UNIDROIT Art. 6.2.2(b)].

58. Tariffs are common within the arena of international trade and, as a result, tariffs are not unforeseen events. Thus if CLAIMANT was particularly concerned with the existence of future tariffs, CLAIMANT could have included such language within the italicized (customized) section of the FSSA.

59. In fact, "an approach was taken to regulate a number of possible risks directly and then merely add a hardship wording to the existing force majeure clause" [St. of Def., ¶30]. Since tariffs were not included in the final draft of the FSSA, CLAIMANT gave up its right to argue that the tariffs would be considered hardship.

b. **<u>When interpreted, the tariffs imposed by the Equatorianian government do not constitute a case of hardship.</u>**

i. *The tariffs imposed by the Equatorianian government were foreseeable.*

60. In any business dealings, tariffs are foreseeable. "Foreseeability is what one might objectively and reasonably expect, not merely what might conceivably occur." [Salopek v. Friedman]

61. CLAIMANT operates the oldest and most renown stud farm in Mediterraneo. The parties negotiated the DDP incoterm because of CLAIMANT's exporting experience. [Cl. Ex. C3]. Therefore, CLAIMANT is very accustomed to changes in business due to tariffs and duties imposed by the government or trade wars between countries. CLAIMANT knew that both governments could impose tariffs at any time during the course of dealings.

62. CLAIMANT was aware of the commercial realities of exports. CLAIMANT cannot claim that the tariffs constituted a case of hardship for them because they were foreseeable.

ii. *CLAIMANT agreed to DDP, thus accepting responsibility additional risks that were associated with the method of shipping.*

1. A subjective interpretation of Clause 12 under CISG 8(1) compels the conclusion that CLAIMANT knew that by accepting DDP delivery as the method of shipment, they were responsible for all additional risks that were associated with DDP.

63. A subjective interpretation allows the parties statements to be interpreted as evidence of intent to determine whether the parties "knew or could have not been unaware what the intent was." [CISG Art. 8].

64. In the 28 March 2017 email to CLAIMANT, RESPONDENT requested that the semen be delivered on the basis of DDP delivery. [Cl. Ex. C3] DDP means:

> Delivered duty paid is a delivery agreement whereby the seller assumes all of the responsibility, risk and cost associated with transporting goods until the buyer receives or transfers them at the destination port. This includes paying for shipping costs, export and import duties, insurance and any other expenses incurred during shipping to an agreed-upon location in the buyer's country. [Will Kenton, 2018].

65. As defined, CLAIMANT knew that by accepting DDP delivery as the method for shipment, CLAIMANT was responsible for the shipment of the semen, including all additional costs during the delivery period.

66. Therefore, CLAIMANT cannot claim that they did not know or were not aware that they were responsible for any additional costs that came about as a result of the DDP shipping method.

2. An objective interpretation of Clause 12 under CISG 8(2) indicates that no reasonable person of the same kind of business will find that "health and safety requirements" are comparable to tariffs.

67. Under the objective standard of reasonableness under CISG Art. 8(2), the statements and acts of the other party must be interpreted as "the reasonable person of the same kind as the other party would have had in the same circumstances." The standard applied is of "the reasonable in the same type of business as the CLAIMANT." [Ibid].

68. The contract is not more onerous on CLAIMANT because when RESPONDENT requested DDP delivery, there was additional consideration for the shipping method.

69. In CLAIMANT'S 31 March 2017 email, CLAIMANT wrote, "After longer internal discussions we can accept for this contract a delivery DDP. Given the additional costs associated with a DDP delivery, we would need to increase the price by 1000 USD per dose." [Cl. Ex. C4]. CLAIMANT was well aware that accepting DDP as the shipping method meant that they would be responsible for all the risks and costs associated with the method of delivery.

70. CLAIMANT knew the risks associated with DDP delivery and requested a price increase as a result. CLAIMANT specifically listed the additional risks they were not willing to take responsibility for stating, "furthermore, we are not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions." CLAIMANT knew that tariffs were a possibility. However, CLAIMANT also knew that tariffs are included in the additional risks that they accepted when they accepted DDP delivery.
71. It would be unrealistic to conclude that RESPONDENT agreed to a price increase for DDP shipping, only to agree to assume any additional risks that were involved with the method of shipping. CLAIMANT has been compensated for the additional costs that came about as a result of the tariffs imposed by the Equatorianian government.
72. Any reasonable person would find that DDP means what it says and CLAIMANT received extra considerations in exchange for agreeing to DDP terms.

iii. *Under the Frozen Semen Sales Agreement, "health and safety requirements" cannot be interpreted to be equivalent to tariffs.*

73. It is clear that "health and safety requirements" are not comparable to tariffs. The interpretation will show that they are not analogous Per CISG Art. 8(2), under the objective interpretations of the Frozen Semen Sales Agreement.

1. A subjective interpretation under CISG Art. 8(1) shows that because both negotiators were not able to participate in the creation of the final signed contract, the evidence of subjective intent from their pre-accident exchanges cannot be used to determine the meaning of the contract's actual language.

74. Under a subjective interpretation, the parties statements are interpreted to determine whether they knew or could have not been unaware what the intent was. Ms. Napravnik and Mr. Antley, the two original negotiators had no intent because they were still in the process of negotiating.
75. On 12 April 2017, the primary negotiators for both parties, Ms. Napravnik and Mr. Antley were both involved in a serious accident that left them hospitalized for months. Due to the accident, both negotiators had to be replaced prior to the conclusion on the contract [Cl. Ex. C8] As a result, the pre-accident exchanges between Mr. Antley and Ms. Napravnik cannot be used to determine the meaning of the contracts actual language.
76. The contract must be looked at from the intent of the representatives, Mr. Ferguson and Ms. Krone who signed the contract.

2. An objective interpretation of Clause 12 under CISG 8(2) indicates that no reasonable person of the same kind of business will find that "health and safety requirements" are comparable to tariffs.

77. Tariff is defined as "a schedule of duties imposed by a government on imported or in some countries exported goods." [Merriam-Webster]. Health and safety on the other hand is defined as "the laws, rules, and principles that are intended to keep people safe from injury."

78. Tariffs are typically imposed by governments to regulate goods, to raise revenue, protect national, and typically to protect against foreign competition. Health and safety on the other hand is typically to prevent harm or injury. This is evidenced in the tariffs imposed by the Equatoriania government. The tariffs imposed by Equatoriania was intended to protect national security. [Cl. Ex. C6]

79. National security and health and safety are not related. Therefore, it is irrational to conclude that tariffs are comparable to health and safety.

80. Clause 12 of the Frozen Semen Sales Agreement reads, "seller shall not be responsible for lost semen shipments or delays in delivery … for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." The clause clearly states that CLAIMANT will be responsible for additional health and safety requirements.

81. Therefore, because tariffs and health and safety requirements are not comparable, CLAIMANT is not entitled to an adaptation of the price due it under clause 12 of the Frozen Semen Sales Agreement.

c. Clause 12 does not grant an adaptation of the price of 1,250,000 or alternatively any other amount.

82. Nowhere in Clause 12 is there language that provides for an adaptation of the contract in the case of hardship.

i. *CLAIMANT argues that adaptation of the price is inferred from Clause 12's phrasing, yet this clause only identifies instances where the CLAIMANT exempts responsibility for lost shipments or delays in delivery.*

83. The language used in Clause 12 instead ought to be interpreted as a force majeure clause, wherein the CLAIMANT could have justified non-performance (withholding its final shipment) for the reasons stated in Clause 12. Since CLAIMANT has already delivered the final shipment, Clause 12 does not apply to CLAIMANT'S demand for a price adaptation.

84. The subjective intent of the initial negotiators is indeterminant, thus the statements or conduct of each party ought to be interpreted under a "reasonable person" standard according to Article 8(2) of the CISG. There is simply not enough evidence to show that the subsequent negotiators implicitly understood a suggested incorporation of a hardship clause. In fact, the record is silent

about Mr. Ferguson as he took over negotiations for CLAIMANT after Ms. Napravnik's accident. Perhaps CLAIMANT did not want to include his witness statement for various reasons, but regardless a reasonable person would struggle to follow CLAIMANT'S argument.

ii. *CLAIMANT reaches beyond the scope of the contract to force a price adaptation.*

85. CLAIMANT'S argues that RESPONDENT'S initial negotiator, Mr. Antley, behaved in a manner that alluded to an inclusion of a price adaptation. In fact, Mr. Antley's time as the negotiator was interrupted due to the auto accident, and, as a result, he did not finalize the contract. Instead, the final draft of the contract, which was negotiated with the help of Mr. Antley's notes, includes no indication of a price adaptation. This suggests the parties were content with a final draft that did not include a price adaptation clause.

86. If CLAIMANT wanted the language included in the final draft, it could have proposed the change. CLAIMANT also suggests that by simply keeping the arbitration clause and force majeure clause unchanged somehow illustrates that RESPONDENT wanted a hardship clause to cause an adaptation of the contract. CLAIMANT fails to recognize that CLAIMANT'S subjective intention to incorporate a price adaptation into Clause 12 does not suffice as evidence of RESPONDENT'S acceptance of such an implication.

87. As for CLAIMANT'S contention that Mr. Shoemaker's conversation with CLAIMANT'S Ms. Napravnik grants a contract adaptation, CLAIMANT erroneously considers Mr. Shoemaker as an agent of RESPONDENT. To be sure, Mr. Shoemaker was not an agent of RESPONDENT and did not have authority to suggest a contract adaptation. Rather, Mr. Shoemaker never committed to any adaptation of the price. He simply stated, "*if* the contract provides for an increased price…we will certainly find an agreement on the price" (emphasis added) [Res. Ex. 4, 36]. Mr. Shoemaker was unaware of the stipulations of the contract and he had no authority to alter the terms of the agreement because he was not acting as an agent of RESPONDENT.

88. CLAIMANT is familiar with international business practices, and DDP Incoterms are no exception. By accepting to DDP terms, CLAIMANT assumed responsibility to deliver the goods and assumed the risk of having to pay tariffs, which are common obstacles in international business. In fact, RESPONDENT paid additional consideration so that CLAIMANT would deliver DDP. Not only does RESPONDENT have no obligation to pay CLAIMANT "in the amount that they exceed CLAIMANT'S profit margin for the third shipment," but RESPONDENT has no obligation to pay CLAIMANT any additional money [Claim. Mem., ¶ 56, 20]. The shipments have been sent and the agreed price has been paid.

d. <u>The Drafters of the CISG Specifically excluded the concept of hardship, but even if there is a gap the tariffs would not be considered a hardship under the UNIDROIT principles</u>

89. A change of circumstances that could reasonably have been taken into account [A], not making performance of the contract entirely impossible, may not qualify as an "impediment" under Article 79(1). The language of the provision also requires "non-performance" for exemption from contractual obligations[B]. The lack of hardship under Article 79 does not present an internal gap under Article 7(2) as it was intentionally left out by the drafters of the CISG[C]. Moreover, a party claiming hardship under Art 6.2.3. of the UNIDROIT Principles must also satisfy the "unforeseeability" requirement and further that the changed circumstances were extremely onerous[D].

i. *Hardship was deliberately excluded by the drafters of the CISG and is, therefore, not an internal gap.*

90. CLAIMANT concedes that the drafters of the CISG rejected a proposal that would have applied Art. 79 (1) in cases of economic circumstances [Claim. Mem. ¶63]. Based on the legislative history, which is an important element in determining the intent of the drafters, the issue of hardship is not covered by the CISG. [Kroll/Mistelis/Perales Viscasillas (eds) p. 1088]

91. This drafting history, specifically considered what recourse a seller who had performed on a contract would have in circumstances of economic hardship and accepted that a narrow interpretation of Art. 79 should be adopted. This narrow interpretation excludes cases of hardship from the exemption in Art 79. That is to say, nothing short of "impossibility" suffices to exempt a party from liability for failure to perform. *Ibid*; Rimke, *Force Majeure and Hardship,* p. 218-219.

92. Based off of the drafters' narrow interpretation, there is no gap to be filled in Article 79(1). The CISG does not include a hardship clause because the drafters did not want such a clause to be included. [Rimke, *Force Majeure and Hardship,* p. 219]

93. Article 79(3) also states that non-performance is excused for as long as the impediment exists, which furthers the argument that the exemption can only prevail where a party has failed to perform.

94. Incorporating a hardship doctrine in the suggested manner also might well undermine the uniformity that is a primary goal of the CISG. [Hans Stoll & Georg Gruber, ¶ 32, in Schlechtriem & Schwenzer, CISG Commentary (2nd English ed. 2005).]

ii. *Even if the UNIDROIT principles were to apply, CLAIMANT still does not meet the requirements of the provision.*

95. CLAIMANT asserts that because Art.6.2.3 of the UNIDROIT principle have been adopted as the common law of Mediterranneao, then alternatively they would apply to the transaction ex. [Claim. Mem. ¶ 64].

96. However, even if the UNIDROIT principles were deemed applicable, CLAIMANT'S case still falls short of their requirements and CLAIMANT cannot invoke them for relief.

97. The UNIDROIT Principles require that the hardship be unforeseeable. (Art. 7.4.4). For reasons previously stated, the tariff, like that imposed here, was certainly not unforeseeable.

98. Further the distinctive feature of hardship itself, however, is not merely the standard that triggers the doctrine; but requires that adjudicators are satisfied with economic dislocations provided they are sufficiently extreme. The situation of hardship brings about a question of measure on what exactly is "extremely onerous". Kroll/Mistelis/Perales Viscasillas (eds) p. 1090, ¶81, 82. That is, the economic imbalance required to invoke hardship, must actually be extreme, otherwise a court has not business intervening. [John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th Ed p. 628, 629.]

99. Under the facts here, CLAIMANT was paid an additional USD 500.00 in exchange for adding the DDP incoterm.

100. As a general principle, the amount of consideration is irrelevant. Once a requirement for a bargained for consideration, "[i]t matters not to what extent the promisor is benefited or how little the promisee may give for the promise." [Sager v. Basham]

101. The contractual equilibrium must have been fundamentally altered so that performance would be extremely onerous for one of the parties. Therefore, the question of degree must also be assessed. [Honnold, supra p. 629, 630]

102. The UNIDROIT PICC 1994 stated in their official commentary to Art. 6.2.2 (at p.155 German version) that an increase of 50% or more of original expenses has to be judged as fundamental change. Further, Schwenzer is of the view that adjudicators must not to grant exemption in international contract until a threshold of 150-200% has been exceeded. [Schwenzer, FS Bucher, p.723 (731); Schwenzer, *Force Majeure and Hardship in International Sales Contracts*; 39 Victoria University of Wellington Law Review (2008) 709 (717).]

103. In *Cour d'appel de Colmar*, the parties had entered into a contract for the sale and purchase of air-conditioning systems for trucks. The court stated that a 30% increase in the price of goods between the time of the conclusion of the contract and the time fixed for delivery is no reason for exemption. In this case, the increase in tariffs increased the cost of the transaction by 30%.

iii. *Tariffs are a general risk of international business transactions and, therefore, should reasonably have been taken into account*

104. CLAIMANT assumes the risk for the increased tariff under the stipulated contractual incoterm.

105. CLAIMANT argues that the change in tariffs was not reasonably foreseeable. ex. [Claim. Mem. ¶ 37]. This argument must fail. In international sale, the risk of a state action intervening in the performance process is relatively high.

106. It is true that the impediment was beyond the control of the CLAIMANT, however, it is not enough that an impediment hindering the obligor to perform occurs outside his sphere of control. In addition to this, Article 79(1) requires that the exogenous impediment must not have been foreseen or foreseeable at the time of contract conclusion. [Kroll/Mistelis/Perales Viscasillas (eds) p. 1091.]

107. The convention presupposes that a party may be regarded as having taken the risk of occurrence of a certain event if that risk would have been appreciated by a reasonable person engaged in the type of business in question and have been externalized. [Honnold, *Supra* p. 632]

108. CLAIMANT is a sophisticated merchant in the particular trade and has dealt with cross border transactions numerously. The parties agreed on delivery DDP on that very basis. That is, CLAIMANT is accustomed to the trade and is aware of the risks that accompany cross border transactions.

109. Indeed, when the parties agreed on the incoterm, CLAIMANT increased the price of transaction on account of the added costs and risk that accompanies delivery DDP. ex. [Claim. Ex. C2 & C3] . It is surprising now that CLAIMANT claims not have accepted such risk.

110. Foreseeability is part of risk allocation in the contract and in international sales the risk of a state action intervening in the performance process is relatively high. [Kroll/Mistelis/Perales Viscasillas (eds) p. 1092.]

111. Further, if at the time of contracting the seller had to be aware of the risk threatening it, it is assumed that this would be reflected itself in the terms of the contract, either by provisions limiting liability or by a higher or lower price.

112. In ICC Arbitration Case No. 7197 of 1992, S (Austria) and B (Bulgaria) agreed that B's payment, for goods to be provided by S, would be based on a documentary credit to be opened by B before a specified date. B failed to open the credit within the specified period or an additional period granted by S. S brought arbitration proceedings for performance and damages. B claimed exemption (Art.79) on the ground that the Bulgarian government had ordered suspension of

foreign debts. The tribunal rejected B's claim for exemption; the suspension of credits had occurred before the making of the contract. Moreover, B could have foreseen the difficulties resulting from the government's action.

113. Similarly, tariffs are a general and widely known risk of the WTO multilateral trading system and the Tribunal should find that CLAIMANT could have foreseen the possibility for the imposition of a tariff or other government action that could increase the cost of the transaction and covered its risk accordingly – a risk that it expressly assumed by accepting the DDP incoterm.

114. International trade comes with many risks and each party bears the burden of their respective risks. In ICC Award No. 8486, a Dutch manufacturer and a Turkish buyer contracted for the sale of a manufacturing plant. Due to exchange rate fluctuations, there was a significant drop in the price of the product on the Turkish market. The buyer argued that he be exempted of liability due to hardship. The tribunal stated that "in international commerce, one must rather assume in principle that the parties take the risk of performing and carrying out the contract upon themselves, unless a different allocation of risk is expressly provided for in the contract." RESPONDENT asserts that CLAIMANT assumed the risk for tariffs when it accepted delivery under the incoterm DDP.

115. Under DDP, the seller bears the risk of and costs of delivery, including taxes. [ICC Incoterms, 2010]. It assumed that parties familiar with the term DDP, know that tariffs are a general risk of international business.

116. In fact, when the parties agreed on the incoterm, CLAIMANT increased the price of transaction on account of the added costs and risk that accompanies delivery DDP. It is surprising now that CLAIMANT claims not have accepted such risk.

117. In CISG AC Opinion No.7, the panel noted that there were "not many cases dealing with situations of hardship in which courts have found it fair to provide relief, and [particularly that] no cases were found at the time this opinion [was] drafted in which a court has provided well-grounded reasons explaining why a change in circumstances was unpredictable or why one type of relief was more appropriate than others."

118. At the date of the CISG AC Opinion No.7, there were no reported decisions whereby a court exempted a party from liability on the ground of hardship. Although the panel noted that this state of affairs is not inconsistent with the admission, by a majority of legal commentators, that a fair legal system should admit some flexibility within the general principle of *pacta sunt servanda* to account for a genuine situation of hardship, the panel also noted that "the question to

be raised then is what type of factual scenario may be proposed for an exceptionally "hard" case of hardship that would merit relief."

119. RESPONDENT therefore reiterates that it is a question of measure and that the circumstances causing hardship must then be "exceptional" in order to justify relief for hardship.

iv. *Article 79 only provides relief in the case that a party fails to perform its obligation under the contract due to an impediment beyond its control*

120. Even if hardship is governed by the CISG, the language of Art. 79 states that it is only applicable to a party that fails to perform and, therefore, the standard for exemption due to an impediment under Article 79 must as a practical matter be "impossibility".

121. The mere fact that the supervening event preventing performance was not caused by any fault of the obligor is not sufficient to rescue him. The criterion is an objective one, taking only into account the nature of the impediment.

122. CLAIMANT cites multiple commentaries that include hardship within the parameters of Article 79(1). However, in each of these commentaries, the provision is only referenced in regard to a party's nonperformance of an obligation under the contract. In particular, Honnold, Commentary, Art. 79, para. 432.2à, cited by CLAIMANT, is not relevant, as it covers loss in transit. Ex [Claim. Mem. ¶ 61].

123. In the case at hand, CLAIMANT performed its obligation of the contract and was clearly not impeded.

v. *There is no established international trade usage for adaptation of contracts*

124. CLAIMANT argues that there is an established trade usage of adaptation of contracts in cases of hardship. This proposition is unsupported by meaning authority. To be binding upon a party, a trade usage must be sufficiently general so that the parties could be said to have contracted with reference to it.

125. RESPONDENT denies that such trade usage exists as tribunals have mostly been unwilling to grant relief under Art.79 based on the reasoning that the provision does not cover hardship for many reasons.

126. As an academic topic hardship under the CISG is essentially moot and in that there is no authority on its inclusion under Art. 79 indicating that adaptation of contracts under Art. 79 has a trade usage.

vi. *CLAIMANT is not entitled to adaptation of the contract based on the good faith principle under Article 7(1)*

127. CLAIMANT finally argues that Article 7(1) provides an avenue for contract adaptation based on good faith. Ex [Claim. Mem. ¶ 67, 69, 70] RESPONDENT, in response insists on its rights under the contract also be assessedin good faith. Both parties desired the transaction to be beneficial to them and insisting that RESPONDENT should absorb the effect of the increase in tariffs causes hardship on the part of the RESPONDENT.

128. In any case, Article 7(1) only proclaims an up-to-date legal policy in harmony with the exigencies of world trade which postulates that "no recourse to national law should be admitted in interpretation so as to promote regard to the international character of the convention." [Gyula Eörsi, *International Sales: The United Nations Convention on Contracts for the International Sale of Goods, Matthew Bender (1984), Ch2, pages 2-1 to 2-36*.] Article 7(1) deals only with the interpretation of the Convention and is not aimed at regulating the conduct of the parties which is dealt with in Article 8.

REQUEST FOR RELIEF

For the above reasons, Respondent respectfully requests that the Tribunal enter its final award dismissing all of the Claimant's claims in their entirety and also awarding Respondent all its costs incurred in the arbitration from Claimant, including all of its legal costs and expenses.

Specifically, Respondent requests the following:

1. That the Tribunal find that it has no jurisdiction under Danubian law to grant an adaptation of the price due Claimant for the final shipment of 50 doses of semen under parties' contract;
2. In the event the Tribunal finds that it has jurisdiction to decide this case on its merits, that Claimant request for the purported evidence of a partial award issued in another arbitration proceeding be receive in evidence in this case be denied; and
3. That the Tribunal decide that neither Clause 12 of the parties' agreement nor the CISG allows adaptation of the price in any amount as sought by Claimant in this arbitration.

Respectfully submitted,

Ian M. McManus

On Behalf of Black Beauty Equestrian

For himself and for: Kennedy Womack, Adarquah-Yiadom, Fengming Jin, Kitso Malthape, Ronnie Kenley, and Caleb Williamson

University of Cincinnati College of Law Vis Moot Team

24 January 2019

Certificate and Choice of Forum

To be attached to each Memorandum

I, John B. Pinney, on behalf of the Team for the UNIVERSITY OF CINCINNATI, COLLEGE OF LAW

hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

☒ Our School will be participating only in the Vis East Moot and is not competing in the Vienna Vis Moot.

☐ Our School is competing in both Vis East Moot and Vienna Vis Moot.

☐ We are submitting two separately prepared, different Memoranda to Vis East Moot and to Vienna Vis Moot.

Or

☐ We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considered for an Award in (check one box)

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for University of Cincinnati College of Law

Name: John B. Pinney

Signature _____