INSTITUTO TECNOLÓGICO AUTÓNOMO DE MÉXICO

CASE HKIAC/A18128

MEMORANDUM FOR RESPONDENT

FOR AN INTERNATIONAL COMMERCIAL ARBITRATION BETWEEN

PHAR LAP AVELLAMENTO

CLAIMANT

Vs

BLACK BEAUTY EQUESTRIAN

RESPONDENT

UNDER THE HONG KONG INTERNATIONAL ARBITRATION CENTRE ADMINISTERED

ARBITRATION RULES 2018

23 JANUARY 2019

Yvette Seferian Dauguet – Julieta Bejar Luna – Julián Farías Gutiérrez – Hernando Félix Villagrán – Oscar Andrés Figueroa Díaz

TABLE OF CONTENTS

TABLE OF ABREVIATIONS

ABREVIATION	MEANING
DDP	Delivery Duty Paid
HKIAC	Hong Kong International Arbitration Centre
CISG	United Nations Convention on Contracts for the International Sale of Goods
UNIDROIT	International Institute for the Unification of Private Law
THPCL	The Hague Principles on Choice of Law
UNCITRAL	United Nations Commission on International Trade Law
Model Law	United Nations Commission on International Trade Law Model Law
IBA	International Bar Association
ICJ	International Court of Justice
INCOTERM	International Commercial terms
ICC	International Chamber of Commerce
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
ICC Rules	Rules of Arbitration of the ICC (2012)
EU	European Union
AGREEMENT	The FROZEN SEMEN SALES AGREEMENT
Tribunal	The Arbitral Tribunal
P.O.	Procedural order
EXHIBIT R	EXHIBIT RESPONDENT
EXHIBIT C	EXHIBIT CLAIMANT
CLAIMANT	Phar Lap Allevamento
RESPONDENT	Black Beauty
Parties	Phar Lap Allevamento and Black Beauty
USD	United States Dollar
%	Percentage
&	And
supra.	Mention above

§	Section
¶	Paragraph
ibid	Ibidem (in the same place)
Art./Artt.	Article/Articles
v.	Versus
p./pp.	Page/pages
e.g.	Exempli gratia (example given)
ed.	Edition
No.	Number
Sec.	Section
Ch.	Chapter
lex arbitri	law of the seat of arbitration
a contrario sensu	In the opposite sense or meaning
Respondent Exhibit	Res. Ex.
Claimant Exhibit	Cl. Ex.
Answer to the Notice of Arbitration	Answer
Notice of Arbitration	Notice

INDEX OF AUTHORITIES

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INDEX OF CASES

STATEMENT OF FACTS

1. CLAIMANT, Phar Lap Allevamento (Phar Lap), is a company registered and incorporated under the laws of Mediterraneo, which operates stud farms covering all areas of equestrian sport. In its racehorse section Phar Lap provides stallions for breeding English thoroughbreds and Anglo Arabs. Additionally, CLAIMANT offers frozen semen of its champion stallions for artificial insemination.
2. RESPONDENT, Black Beauty Equestrian (Black Beauty) is a company registered and incorporated to the laws of Equatoriana, which is famous for its broodmare lines that have resulted in a number of world champion jumpers and international dressage champions.
3. On 21 March 2017 RESPONDENT contacted CLAIMANT, inquiring about the availability of Nijinsky III, one of Phar Lap's most successful racehorses, for its breeding programme. Since at that time, the Equatorian Government had imposed serious restrictions on the transportation of living animals, Black Beauty was particularly interested in frozen semen of Nijinsky III. On 24 March 2017 CLAIMANT offered RESPONDENT 100 doses of Nijinsky III's frozen semen. In the negotiation of the contract, RESPONDENT had no problems with most of the terms of the offer, although it objected the choice of law, the forum selection and insisted on a delivery DDP. CLAIMANT replied that it was only willing to accept a delivery DDP with the inclusion of a hardship clause to temper some of the additional risks taken. The finalization of the agreement took longer than planned as the two main negotiators were severely injured in an accident.
4. On 6 May 2017 CLAIMANT and RESPONDENT signed a sales agreement (AGREEMENT) that consisted in three shipments. CLAIMANT sent the first shipment of 25 doses on 20 May 2017 and the second shipment of 25 doses on 3 October 2017. The Two months before the last shipment of 50 doses, the Equatorian government announced a 30 per cent tariffs on animal semen from Mediterraneo in retaliation to a 25 per cent tariff imposed by the President of Mediterraneo. CLAIMANT contacted RESPONDENT to start negotiations regarding a price adjustment for the frozen semen. RESPONDENT had made clear that due to its breeding plan it was extremely important timely delivery of the last shipment. CLAIMANT complied with its delivery obligation claiming that they took into account that RESPONDENT had "given" the impression of accepting a need for a price adaptation. CLAIMANT complied with the delivery of the remaining 50 doses on 23 January 2018 before an agreement on the new price.
5. CLAIMANT referred this dispute to the Hong Kong International Arbitration Centre (HKIAC) based on the arbitral clause contained in the AGREEMENT on 31 July 2018. CLAIMANT seeks a total of $1,250,000,USD resulting from the 30 per cent price surcharge on the last 50 doses of frozen semen due to the tariff imposition by the government of Equatoriana. On the Answer to

the Notice of Arbitration of 24 August 2018, RESPONDENT claims that the Tribunal lacks jurisdiction regarding this specific dispute because it asks for an adaptation of the contract. Further, RESPONDENT claims that the increased remuneration has no basis on the hardship clause nor under the CISG.

6. On 2 October 2018 CLAIMANT sent a letter to the Tribunal in which claims to have reliable information about another arbitration agreement in which RESPONDENT had been affected by the 25 per cent tariff imposed by the government of Mediterraneo. RESPONDENT alleges that CLAIMANT should not entitled to submit evidence from the other arbitration proceedings on the basis of the assumption that it has been obtained either through a breach of confidentiality agreement or through an illegal hack to RESPONDENT.

I. THE TRIBUNAL DOES NOT HAVE THE JURISDICTION AND POWERS UNDER THE ARBITRATION AGREEMENT, WHICH SHOULD BE GOVERNED BY DANUBIAN LAW, TO ADAPT THE CONTRACT

7. According to *Kompetenz- Kompetenz* principle an arbitral tribunal has the authority to determine its own jurisdiction [Redfern and Hunter, p. 340]. This principle is reaffirmed in Article 8 (1) UNCINTRAL [UNCINTRAL, Art. 8(1)]and Article II of the NY Convention [NY Convention, Article II]. The applicability of this principle is, however, limited by the parties' agreement and its validity. In addition, the parties selected the HKIAC Rules to be applicable to the case at hand. Article 19 of the HKIAC Rules states that "*[t]he arbitral tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement*" [HKIAC Rules Art. 19(1)]. Therefore, this tribunal has, *prima facie*, the powers and authority to rule on its own jurisdiction.

8. RESPONDENT submits that the arbitration agreement and its interpretation shall be governed by Danubian Law (A) and the Tribunal does not have the jurisdiction and powers to adapt the contract (B).

A. THE ARBITRATION AGREEMENT AND ITS INTERPRETATION SHOULD BE GOVERNED BY DANUBIAN LAW

9. In order to assess why the Tribunal should find that the parties chose the law of Danubia as the law governing the arbitration agreement, it will be addressed that the parties failed to express it in the first place. Second, that the Mediterraneo's law cannot be the governing law of the arbitration agreement. And, finally, Danubian law is the one that has "the closest connection" to the case.

10. The principle of party autonomy applies to the law governing the seat of arbitration, the law governing the interpretation of the contract and also to the law governing the arbitration agreement [Fouchard, Gaillard and Goldman, p. 797]. In this regard, generally speaking, it is common for the parties' autonomy to decide which law applies to each.

11. The principle of party autonomy converges with the principle "of separability or autonomy of the arbitration clause" [UNCINTRAL, p. 30]. Under this principle, it is established that the arbitration agreement is to be treated as an agreement independent of the other terms of the contract. Hence, the omission of the governing law of the arbitral clause does not imply,

as CLAIMANT alleges, that all clauses should be under the same law contract [CLAIMANT'S MEMO, paragraph 23].

12. Contrary to what CLAIMANT is claiming, both Parties did not have an agreement to apply, as the governing law, the Mediterranean law to the arbitration agreement. RESPONDENT had proposed for the governing law and the seat of arbitration the country of Equatoriana [Re. Ex. R1]. Nevertheless, CLAIMANT did not counter-proposed Mediterranean law. They merely expressed that the governing law for the sales contract had to be Mediterranean. What Claimant did change from the proposal was the seat of arbitration to Danubian law. [Re. Ex. R2]

13. There is no express choice for the governing law of the arbitration agreement. Neither does the evidence provide any indication that the intentions of the parties was to submit the arbitration agreement to Mediterranean law. If anything can be interpreted from the previously mentioned emails is that Danubian law was proposed as the governing law in question by CLAIMANT. CLAIMANT proposed Danubia because they wanted a "neutral country", but that the sales agreement had to be under the Mediterranean law. It is clear that the issues were divided between procedurals and substance related. Mediterranean law was agreed for the substance and Danubia for the procedural issues of the arbitration.

14. "the principal choice- in the absence of any express or implied choice by the parties- lies between the law of the seat of the arbitration and the law that governs the contract as a whole" [REDFERN AND HUNTER, P.158]. Nevertheless, the law indicates that the best choice is the seat of arbitration. The New York Convention illustrates this point by stipulating, under the provisions related to enforcement, that the award must be valid "under the law to which the parties have subjected it", or "under the law of the country where the award was made " (which will be the law of the seat of arbitration).

15. The option of a clause instead of a different contract for the arbitration agreement is of a practical nature, not an indication of the parties intentions. The argument from CLAIMANT that the form of the arbitration clause is only a legal shape has no basis. In order to interpret the form of the arbitration agreement as an indication of the parties intentions there should be no other relevant circumstances to evaluate. In this case such circumstances do exist (the emails exchanged between the parties).Therefore, the fact that the parties opted for a clause as the form of the arbitration agreement, does not indicate that the will of the parties was to submit it to the same law as the whole sales agreement.

16. The separability of an arbitration clause opens the way for the possibility that it may be governed by a different law form that which governs the main agreement [REDFERN AND HUNTER, p. 159]. Choosing the seat of arbitration for the governing law of the arbitration agreement is adopted by the London Court of International Arbitration (LCIA) Rules, which provide at Article 16(4) that: the law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of the law and such agreement is not prohibited by the law applicable at the arbitral seat. Such approach is evidenced by numerous cases [Sulamérica Cia Nacional de seguros SA v Enesa Engenharia SA] [Matermaco v PPM Cranes]. In this case, there was no agreement between the parties in writing on the application of other laws or rules. Hence, the applicable law for the arbitration agreement is the same as the seat of arbitration: Danubia.

17. The English Court of Appeal held that the law of the arbitration agreement was to be determined by the application of the "three- stage enquiry": (1) If the parties made an express choice of law to govern the arbitration agreement, that choice would be effective, regardless of the law applicable to the contract as a whole; (2) Where the parties failed expressly to specify the law of the arbitration agreement, it was necessary to consider whether the parties had made an implied choice; (3) and Where it was not possible to establish the law of the arbitration agreement by implication, it was necessary to consider what would be the law with the "closest and most real connection" with the arbitration agreement. Applying this analysis to this case, as it was in Sulamérica Cia Nacional de seguros SA v Enesa Engenharia SA, allows to demonstrate why the governing law of the arbitration agreement should be Danubia.

18. In the first criteria there is an appreciation for party's autonomy, for if there was an express choice of the law, that choice must be respected. In the case at hand there was no express choice for the governing law of the arbitration agreement. There was a proposal by RESPONDENT [Re. Ex. R1], and a counter- proposal by CLAIMANT disregarding the governing law of the arbitral clause [Re. Ex. R2],. In the final draft there is no mention as to what law apply to the arbitration agreement [Cl. Ex. C5]. Thus, first criteria held by the English Court of Appeal does not apply to this case.

19. If the first criteria does not apply, the governing law of the arbitration agreement may be determined by considering it an "implied choice". In the Brazilian case it was determined that the choice of London as the seat of arbitration entailed acceptance by the parties that English law would apply to the conduct and supervision of the arbitration. There is no

reason why this Tribunal should decide any differently in this case. If the parties hose Danubia as the lex arbiter, then there is acceptance that Danubian law applies to the conduct and supervision of the arbitration. Furthermore, in another case [XL Insurance Ltd v Owens Corning] it was also determined that the seat of arbitration is an implied choice as the law governing the arbitration agreement.

20. Even if the Tribunal finds that there is no sufficient evidence to determine an implied choice, turning to the third stage of the enquiry, Danubia prevails as the governing law of the arbitration agreement. The English Court found that the arbitration agreement had its closest and most real connection with the law of the place where the arbitration was to be held. Applying the lex arbiter would be to exercise the supporting and supervisory jurisdiction necessary to ensure the effectiveness of the arbitral procedure.

21. There is a third way to find the most adequate law for the arbitration agreement. The french way: to determine exclusively by reference to the parties' discernible common intentions. In this case there was no agreement on the applicable law to the arbitration agreement, but there is a discernible common intention. Both parties agreed that the applicable law should be a neutral law [Cl. Ex. C3] [Cl. Ex. C4]. Mediterranean law is not neutral for Phar Lap is a Mediterranean company. If the arbitral clause must be a separate law from the contract (Brussels Court) and governed by a neutral law, between Mediterraneo and Danubia, the most suitable law is the latter.

B. THE TRIBUNAL DOES NOT HAVE THE JURISDICTION AND POWERS TO ADAPT THE CONTRACT

22. In order to determine if this Tribunal has the jurisdiction and powers to adapt the contract, the arbitration clause requires interpretation. This interpretation must be according to the governing law of the arbitral clause. As RESPONDENT has argued above, Danubia is the governing law of the arbitration agreement. Danubian law stipulates in favor of a strict interpretation of the arbitration agreement, following the "four corner rule". This means that the interpretation is going to be limited to it´s wording and no other external evidence should be relied upon. [Answer to the notice of arbitration, p 32]. If the jurisdiction and powers are to be interpreted from the arbitration agreement, and this should follow a strict interpretation, then the jurisdiction and powers of this Tribunal should be limited to it´s wording.

23. The arbitration clause, does not expressly confer powers of adaptation to this Tribunal [Cl. Ex. C5]. Because the Tribunal should limit the interpretation of the arbitral clause to its wording, it cannot determine that it has power and jurisdiction to adapt the contract.

24. CLAIMANT argues that the definitions of "any" and "including" are broad enough to imply that an adaptation of the contract is included in the arbitration agreement. This argument has no basis according to the following statements. First, the fact that an arbitral clause uses broad wording such as "any" and "including" does not mean that the parties intended to include adaptation as one of the Tribunal's powers. If anything, they were just following the ICC recommendation to use broad wording in the arbitration agreement. Second, the model clauses proposed are not mandatory and they can be modified by the parties' will. The samples are examples, they are based not copied. As the evidence proves, the arbitration clause was "largely based" [Re. Ex. R1] on the model clauses proposed by UNCINTRAL. If the parties wanted to allow this Tribunal to adapt the contract, they would have copied the model clause just as it is. The fact that they left out specific wording about adaptation, implies that the parties did not intend to confer adaptation powers to this Tribunal.

25. The argument from CLAIMANT that "we cannot assume that the LCIA only wishes to regulate existence, validity and termination" [CLAIMANT'S MEMO, paragraph 31] also has no basis. First, because the model clauses that the parties based their arbitral clause are not from the LCIA. Therefore, their interpretation of their model clauses doesn't even apply to this case. Second, it is not about what the LCIA "wishes to regulate" [ClAIMANT'S MEMO, paragraph 31], it is about what the parties wish to regulate. To interpret the arbitral clause according to what the Court "wishes to regulate" is to go against the principle of party's autonomy, and thus against one of the most important pillars of arbitration.

26. Furthermore, the arbitrator should not go beyond the arbitration agreement's mandate [REDFERN AND HUNTER, p 92]. If he does so, there is a risk that his award will be refused recognition and enforcement under the provisions of the New York Convention. Article V(1)(c) provides that recognition and enforcement may be refused "If the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or if it contains decisions on matters beyond the scope of the submission to arbitration…". The Model Law contains an almost identical provision to the effect that an award may be set aside by the competent court, as well as refused recognition and enforcement (model law, article 34(2)(iii) and 36(i)(a)(iii)).

27. Contrary to what CLAIMANT states, parties have not expressly authorized this Tribunal to adapt the contract. [Cl. Ex. C5]. Their argument supporting that this Tribunal shall decide et bono or as amiable compositeur [CLAIMANT'S MEMO, paragraph 33] cannot stand. The UNCINTRAL Model law article 28(3) states that the Tribunal may decide this way only if the parties have expressly authorized it to do so. Parties have not expressly authorized this Tribunal to decide like this in this matter. It seems rather ironic that CLAIMANT is defending a broad interpretation of the tribunal's powers, based on a strict interpretation that requires expressed conferral of powers.

28. CLAIMANT states that pursuant to Article 29(1) of the CISG the two parties have consented to the adaptation of the contract. Nevertheless the CISG clearly states its own sphere of application [CISG, PART 1] and nowhere does it state that the scope of an arbitration agreement should be governed by its provisions. It is in fact a convention on CONTRACTS for the international SALE of GOODS. According to the "separability principle", there is no reason for the CISG to govern the interpretation of the arbitration agreements. Even if this Tribunal deems that the CISG should apply, the convention itself excludes this particular matter. Article 4(a) states that it is not concerned with the validity of the contract or any of its PROVISIONS or of any usage.

29. Arguendo that the CISG does apply to the determination of the arbitration clause by this Tribunal, contrary to what CLAIMANT argues, there was no consent on the adaptation of the contract by the parties. CLAIMANT alleges that according to the emails provided, they "could safely conclude that the two parties had made an oral consent to adapt the contract" [CLAIMANT'S MEMO, paragraph 41]. According to the same evidence suggested by CLAIMANT, it is actually safe to conclude that there was no consent on the adaptation of the contract. First, in Julie Napravnik's testimony she clearly states that she "had gotten the impression" [Cl. Ex. C8] that RESPONDENT had accepted their position. Second, Greg Shoemaker remarked that he merely stated that "if the contract provides for an increased price in the case such a high additional tariff we will certainly find an agreement on the price" [Re. Ex. R4]. This illustrates how it was not "safely to conclude" that there was consent on the adaptation of the price. According to the statement of Mr Shoemaker, which Mrs. Napravnik got her impression, there is a condition to be complied in order for "the solution" to be found. Such condition was for the solution to be provided in the contract. The increase on the price is not provided on the contract [Cl. Ex. C5], the condition is not complied, therefore it was not "safe to conclude". If Mrs. Napravnik got the impression that there

would be an increase on the price it is on her, for RESPONDENT never promised it straightforwardly.

C. THE TRIBUNAL MAY BE AT RISK OF AN UNENFORCEABLE AWARD

30. The arbitration rules are an extension of the arbitration agreement [art. 28 (1) model law]. The Tribunal has the duty to expedite an enforceable award. The obligation of the Tribunal to expedite an enforceable award means a careful analysis of the procedure. This means that this should be analyzed in light of The New York Convention. An award may be refused on the grounds of Article V of The New York Convention. In this particular case, if the Tribunal decides to adapt the contract it risks to expedite an unenforceable award based on two provisions: Article V.1 (c) and (d).

31. First, an award may be refused because the Tribunal has gone beyond it's mandate. "If it contains decisions on matters beyond the scope of the submission to arbitration". it confers the case where the arbitration agreement may be valid as such, but the arbitrator has given decisions which are not contemplated by or not falling within the scope of the arbitration agreement and the question submitted to him by the parties [Albert Jan van den Berg, p 312]. In this case, as it was stated above, adaptation is not within the jurisdiction and powers of this tribunal. Therefore to adapt the contract is to go beyond it's mandate which is determined by the arbitration agreement, or in any case by the governing law of the arbitration agreement.

32. Second, this Tribunal also risks to expedite an unenforceable award on the grounds of Article V.1 (d) of The New York Convention. It states that an award may be refused on the grounds that "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place".

33. In the first part of this provision it states that the arbitral procedure should be in accordance with the agreement. The agreement is governed by Danubian law, and thus this Tribunal does not have the power to adapt the contract, based on previous interpretation. To adapt is to change the terms on the contract. To change the terms of the contract is to go against the agreement does not stipulate any powers of adaptation. To violate the arbitration agreement is to violate the arbitration procedure according to Article 28(4) of the Model Law: "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction".

34. On the second part of the proviso it states that it is grounds for refusal if it was not in accordance with the law of the country where the arbitration took place. Even if the court does not accept Danubia as the governing law of the arbitration agreement, it is still the seat of arbitration. The procedural law of Danubia should be respected as the parties consented to it, and to interpret the arbitration agreement broadly would go against it. Not respecting Procedural Danubian law is to disregard the Tribunal's own duty to do an enforceable award, and thus it is ground for a refusal.

35. There are two reasons under which this Tribunal risks to expedite an unenforceable award if it decides to adapt the contract. A refusal of an award is never convenient for any party, or the arbitrators themselves. Even if the Tribunal chooses to adapt the contract, a refusal of the award would mean that CLAIMANT would not get the payment he is claiming. Therefore, not only it is an obligation to comply with, but also to disregard it would be of unpractical and inconvenient results for both parties.

36. For all the reasons mentioned above, This tribunal does not have the jurisdiction and power to adapt the contract, for the governing law of the arbitration agreement is Danubia. Furthermore, adapting the contract would put at stake the enforcement of the award.

II. CLAIMANT SHOULD NOT BE ENTITLED TO SUMBIT EVIDECE FROM THE OTHER ARBITRATION PROCEEDINGS UNDER THE ASSUMPTION THAT IT WAS OBTAINED ILLEGALLY

37. CLAIMANT divided their arguments into three main claims transcribed directly from CLAIMANT's memorandum [see paragraph 51. Of the Claimant memorandum];

    (i) A flexible rule of evidence can be applied
    (ii) CLAIMANT can submit evidence that was produced as a result from a violation of a confidentiality agreement as claimed by RESPONDENT
    (iii) CLAIMANT can submit evidence coming from an unlawful source as claimed by RESPONDENT

38. Although the three arguments above are the three main arguments presented by CLAIMANT, RESPONDENT will be addressing other issues additionally mentioned by CLAIMANT, RESPONDENT will also address relevant issues that were not mentioned by CLAIMANT.

39. RESPONDENT respectfully asks the Arbitral Tribunal to dismiss CLAIMANT's request to admit into the arbitration procedure, the confidential documents presented by CLAIMANT.

40. CLAIMANT argues that international commercial arbitration is mainly characterized by efficiency. Though efficiency is one of the many reasons why international commercial partners decide to include an arbitration clause, there are far more relevant advantages that influence the decision to include said clause [The American Review of International Arbitration, 2013/ Vol 24. No. 4. Article "Obtaining and Submitting Evidence in International Arbitration in the United States" *Claudia T. Solomon and Sandra Friedrich*]. Among the advantages that international commercial arbitration offers are confidentiality, privacy, fairness, and discretion.

41. Confidentiality has traditionally been considered to be one of the most important benefits of arbitration [REDFERN AND HUNTER, pg. 124]. When referring to efficiency in international commercial arbitration, it should be understood as efficiency derived from the lack of closed judicial procedural formulas. Efficiency as understood in international

commercial arbitration is in no way enhanced by the admission of illegally obtained evidence, this issue will be further explained [see paragraph …].

42. The classical position in international commercial arbitration regarding confidentiality, has been recognized by the courts as an "implied duty of confidentiality as the natural extension of the undoubted privacy of the hearing in an international commercial arbitration" [REDFERN AND HUNTER, pg. 124]. In Hassneh Insurance Company of Israel v Stuart J. Mew [*Hassneh Insurance Company of Israel v Stuart J. Mew*] Justice Colman stated that "[t]he requirement of privacy must in principle extend to documents which are created for the purpose of that hearing" providing as an example the transcript of a hearing. The documents that CLAIMANT wishes to admit to this Arbitral Tribunal fall within the documents protected by confidentiality in arbitration procedures.

43. Using efficiency as their main argument for the admissibility of illegally obtained evidence, mistakenly leads CLAIMANT to believe that applying a "flexible rule of evidence" implies the admissibility of said evidence.

44. In *John Forster Emmott v Wilson & Partners Ltd.* Justice Laurence Collins held that by analyzing case law of the last 20 years, the English courts, being one of the richest courts in relation to jurisprudence of international arbitration, "[t]here is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes from the evidence has been given by any witness in the arbitration. *The obligation is not limited to commercially confidential information in the traditional sense". [John Forster Emmott v Wilson & Partners Ltd*].

A. CLAIMANT MISTAKENLY BELIEVES THAT THE ADMISSION OF THIS PIECE OF ILLEGALLY OBTAINED EVIDENCE WILL ADD TO THE EFFICIENCY OF THIS ARBITRAL PROCEDURE

45. CLAIMANT correctly states that finality is one of the main characteristics of an arbitral award [CLAIMANT'S MEMO, paragraph 52]. The finality of an arbitration award does not prevent it from being challenged through annulment. The New York Convention is the international instrument that is almost always included in arbitration clauses, if the New York

convention is exceptionally not included in an arbitration clause, another comparable international instrument will be included [International Commercial Arbitration Volume 1, *Gary Born*. Page. 1680].

46. It is important to bear in mind that national courts are competent to annul an arbitration award [International Commercial Arbitration Volume 1, *Gary Born*. Page. 1680]. RESPONDENT urges both the Arbitral Tribunal and CLAIMANT to recognize the danger that admitting illegally obtained evidence would present to this arbitral procedure. If the procedure is based on illegally obtained evidence, that is not justified in any way by CLAIMANT, the entire procedure is at risk of being annulled by national courts due to the illegality of the evidence obtained.

47. By identifying the illegality of the evidence in question, RESPONDENT wishes to recognize for the benefits of both CLAIMANT and the Arbitral Tribunal of the high risks of annulment. Admitting illegally obtained evidence into this arbitration procedure would potentially jeopardize the entire procedure. The admission of illegally obtained evidence would be contrary to the principles of law, and consequently to public interest. Annulment of the arbitral award would be contrary to efficiency, and to both of the party's interests.

B. A FLEXIBLE RULE OF EVIDENCE DOES NOT IMPLY THE ADMISSION OF ILLEGALLY OBTAINED EVIDENCE. CLAIMANT SHOULD NOT BE ENTITLED TO SUBMIT EVIDENCE OBTAINED THROUGH A BREACH OF CONFIDENTIALITY OR AN ILLEGAL HACK

48. CLAIMANT wrongly applies the concept of a flexible rule of evidence. Flexibility in international commercial arbitration refers to the Arbitral Tribunal's discretion regarding admissibility of evidence. This means that the Arbitral Tribunal has flexibility to decide upon the weight, materiality and admissibility of the evidence. Flexibility in this context therefore does not imply that the legal standard for obtaining evidence is flexible, CLAIMANT mistakenly believes that flexibility also refers to the origins of the evidence.

49. Allowing CLAIMANT to submit illegally obtained evidence would misinterpret the objective of flexibility in international commercial arbitration. If flexibility regarding the admission of evidence referred to a lower legal standard, allowing for illegally obtained evidence to enter

the arbitration proceedings, the incentives to include an arbitration clause would be counterproductive for the international commercial arbitration sphere. Another of the benefits for the parties that include an arbitration clause, is the certainty that both parties are interested in a neutral environment. Including an arbitration clause in a contract, is often understood as sign of good faith between the parties. Allowing illegally obtained evidence to be admitted into the arbitration proceedings, would set a dangerous precedent in international commercial arbitration.

50. The benefits of including an arbitration clause into a business agreement should not be contrary to law. Allowing for a lower, or inexistent threshold in relation to evidence admissibility would create incentives for the parties to incur in illegal practices, to produce evidence that they know will be admitted.

51. CLAIMANT mistakenly believes that lowering the threshold regarding the admissibility of illegally obtained evidence is within arbitral discretion. Arbitral discretion when discussing evidence refers to the power to decide which evidence should be admitted or not. The procedural requirements regarding admissibility of evidence remain unmodified. Parties of an arbitration procedure should never ask for the legal framework in International Commercial Arbitration to be sacrificed in order to admit illegally obtained evidence. The claim or attempt on behalf of a party to admit illegally obtained evidence into the arbitration procedure is in itself an act contrary to law.

52. If CLAIMANT's arguments were to be thought of as valid enough to lower the threshold in order to admit illegally obtained evidence, the evidence in question would still have to be weighed by the Arbitral Tribunal. The Arbitral Tribunal should then find that the evidence in question has no impact whatsoever on CLAIMANT's arguments, or in the final result of the arbitration procedure.

53. As seen in Letter by Langweiler [see Letter by Langweiler dated October 2, 2018] the illegally obtained evidence in question refers to another arbitration procedure to which RESPONDENT is party. CLAIMANT failed to mention within their arguments the reason behind the importance of said piece of evidence. The evidence in question only proves that RESPONDENT follows a different legal strategy when acting as CLAIMANT than when acting as RESPODENT. CLAIMANT states in [paragraph 59. Of the Claimant

memorandum] that RESPONDENT's behavior in both arbitration procedures proves to be contradictory, allegedly leading to RESPONDENT's bad faith. In International Commercial Arbitration, there is no connection between bad faith and contradictory behavior, particularly between completely separate procedures.

54. CLAIMANT failed to provide arguments in relation to both weight and materiality of the evidence in question. The only argument provided to support the relevance to the outcome of the case regarding this particular piece of evidence, was that CLAIMANT believed RESPONDENT to be behaving inconsistently.

55. RESPONDENT would also like to address some of the few cases in international commercial arbitration where illegally obtained evidence was admitted by the Arbitral Tribunal. In *Persia International Bank v Council* [**Case T-493/10 *Persia International Bank v Council* ECLI:EU:T:2013:398**] the court admitted illegally obtained evidence. The present case is different from the aforementioned case due to two main aspects.

56. In *Persia International Bank v Council,* the court took into consideration that the party wishing to admit the illegally obtained evidence did not incur themselves in illegal activities to obtain said evidence. In the present case, RESPONDENT wishes to communicate to the Arbitral Tribunal that CLAIMANT never denied that the evidence was obtained illegally, and that they did not incur in illegal practices to obtain it. The court also took into consideration upon deciding the admissibility of the illegally obtained evidence, the relevance, weight and materiality to the outcome of the case that the evidence provided. In *Persia International Bank v Council,* the court recognized that the evidence in question had enormous weight and was material to the outcome of the case. RESPONDENT believes that the Arbitral Tribunal should deem the evidence inadmissible, even if the illegality of its origins were not sufficient to discard it, due to the lack of weight and materiality related to the outcome of the case at hand.

57. One of the arguments presented by CLAIMANT [CLAIMANT'S MEMO, paragraph 58] states that even if the evidence was obtained illegally through a breach of confidentiality, CLAIMANT was not bound by said confidentiality agreement and is therefore except from the consequences. RESPONDENT argues that even if the confidentiality agreement was not

binding form CLAIMANT, it still does not change the confidential status of the documents obtained through said breach.

58. In relation to the claim made by CLAIMANT [CLAIMANT'S MEMO, paragraph 59] regarding the illegal hack by which the evidence was allegedly obtained, CLAIMANT stated mistakenly that the hack was related to RESPONDENT's outdated firewall. The security level provided by encryption of RESPONDENT's data is not related in any way to the private and confidential status of the documents within the database. If the firewall failed to protect the documents, the fact of their confidentiality and the illegality of the actions taken to obtain them remains untouched. If the documents were obtained through an illegal hack, regardless of the role that CLAIMANT played to obtain them, the documents are still protected confidentially and therefore by law. CLAIMANT also stated [CLAIMANT'S MEMO, paragraph 59] that CLAIMANT payed a "company" for the documents. Seeing that the documents due to their confidential status were not legal objects of commerce, CLAIMANT would be infringing the law by soliciting and paying for them in the first place.

C. THE EVIDENCE OBTAINED THROUGH A BREACH OF CONFIDENTIALITY, OR AN ILLEGAL HACK MUST NOT BE ADMITTED INTO THE ARBITRATION PROCEDURE

59. The concept of confidentiality has incited debate in the International Commercial Arbitration scenario. Confidentiality (as detailed above) is often understood as the treatment given to the documents produced by an arbitration procedure. Even if confidentiality was thought to be non- essential to an arbitration procedure, under the HKIAC Rules, any arbitration procedure is by definition confidential. This is stated expressly in article 45.1 of the HKAIC Rules. "Confidentiality, (45.1) Unless otherwise agreed by the parties no party or party representative may publish, disclose or communicate any information relating to; (a) the arbitration agreement; or (b) an award or Emergency Decision made in the arbitration."

60. CLAIMANT misused the article aforementioned, although correctly stating that the exceptions regarding confidentiality enlisted in Article 45.3 allow for confidential documents to be submitted to an arbitration procedure by the parties involved. CLAIMANT's misuse of the article lies within the subject allowed to disclose confidential documents, only the parties or party representatives of an arbitration procedure are allowed to disclose confidential documents. The evidence that CLAIMANT is trying to submit to this arbitration procedure,

consist in confidential documents of an arbitration procedure to which CLAIMANT is not a part, and is there excluded from disclosing said documents under Article 45.3.

61. RESPONDENT would also like the Arbitral Tribunal to be aware of a misrepresentation of the facts in the memorandum presented by CLAIMANT. In paragraph 59 CLAIMANT states that CLAIMANT "bought" the information (referring to the evidence in question), when this was never stated in the facts. Even if this were to be true, illegally obtained evidence are not objects of commerce and can therefore not be subject to legal transactions or business arrangements.

62. In paragraph 59 of CLAIMANT's memorandum CLAIMANT also mistakenly states that the RESPONDENT's firewall did not protect the information trying to be presented as evidence to this tribunal. Even if the firewall was outdated as stated by CLAIMANT, the fact remains that the information was illegally obtained through an illegal hack. CLAIMANT also mentions that because of the violation made to that firewall, the information became of public domain, a clear mistake and misrepresentation of the facts. If the information was of a confidential nature as explained above [see paragraph …] and protected by a firewall or by a confidential agreement, the information being presented here as evidence is clearly not of public domain.

63. To conclude, the evidence being presented by CLAIMANT is contrary to the basic principles of law, endangering the finality of the arbitral award resulting from this arbitration procedure. CLAIMANT has also failed to deny the illegal origins of the evidence in question and has also failed to deny their role in the illegal activities that produced the evidence. Relevance, weight and materiality of the evidence in question has been proved to be non-existent by RESPONDENT.

64. RESPONDENT respectfully asks the Arbitral Tribunal to dismiss CLAIMANT's request to admit into the arbitration procedure, the confidential documents presented by CLAIMANT.

III. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US $1,250,000 OR ANY OTHER AMOUNT.

65. The Arbitral tribunal does not have jurisdiction to adapt the contract. As stated in paragraph 22 and 23, as foreseen by Danubian Law, an Arbitral tribunal can adapt the contract only if expressly agreed by the parties. In the present case, however, the parties did not expressly agree to give the Arbitral tribunal such powers. Therefore, it lacks jurisdiction to adapt the contract and, thus, the CLAIMANT is not entitled to the payment of US $1,250,000 or any other amount resulting from an adaptation of the price neither from an interpretation under clause 12 of the AGREEMENT (A), nor under the CISG (B). Furthermore, the principle of fairness alleged by CLAIMANT as a reason for which they would be entitled to receive any payment has no legal basis as the present arbitration is not an *ad-hoc* arbitration. Therefore, CLAIMANT cannot appeal to such principle in order to receive any payment (C).

A. CLAIMANT IS NOT ENTITLED TO ANY PAYMENT FROM AN INTERPRETATION OF THE AGREEMENT AND ITS OBLIGATIONS

66. Even if the arbitral tribunal were to find that it does have jurisdiction to adapt the contract, all duties and obligations relating to the AGREEMENT have already been fulfilled. There is no reason of why RESPONDENT should pay an additional US $1,250,000 from the agreed upon price (1). Parties had previously agreed upon an inflated price in order for the CLAIMANT to be responsible for all costs relating to the delivery of the goods. The foregoing can be proven by the DDP INCOTERM agreed by the parties (2). Furthermore, notwithstanding that Clause 12 constitutes a hardship clause, its interpretation must be narrow and thus within its scope the present increase in tariffs is not contemplated. Therefore, RESPONDENT does not have an obligation to pay back the amount of the tariffs already paid by CLAIMANT (3) since they constitute an obligation on CLAIMANT's behalf.

i. Obligations agreed by the parties under the AGREEMENT

67. CLAIMANT agreed to provide RESPONDENT with 100 doses of Frozen Semen from Nijinsky III "in exchange for a non-refundable fee of US $100,000 per insemination dose" **[Cl. Ex. C5].** On the one hand, RESPONDENT agreed to pay the whole price in two

instalments of US $5,000,000, being the first due on the 18th May 2017 and the second one on the 21st January 2018 **[Agreement, Clause 6]**. On the other hand, CLAIMANT agreed to ship and deliver the 100 doses in 3 instalments DDP: the first one consisting of 25 doses on the 20th May 2017; the second one consisting of 25 doses on the 3rd October 2017; and the last one of 50 doses on the 23rd January 2018 **[Agreement, Clause 8].**

68. RESPONDENT already paid the agreed price [**Answer, ¶ 12]**, and CLAIMANT already delivered the goods [Cl. Ex. C8]. Therefore, since all obligations have been fulfilled, the AGREEMENT has already come to its natural conclusion. There is no reason that justifies that RESPONDENT should be obligated to pay an additional US $1,250,000 or any other amount resulting from an adaptation of the price. To this extent, CLAIMANT is not claiming the originally agreed contractual remuneration, but rather "is seeking a remuneration which goes beyond that amount" [**Answer, ¶ 12]**.

69. RESPONDENT should not be considered responsible for the payment of US $1,250,00 or any other amount resulting from an adaptation of the price under clause 12 of the contract, since it has already been terminated and all obligations have been fulfilled

ii. The scope of a DDP INCOTERM agreed by the parties

70. According to the AGREEMENT, the applicable INCOTERM was DDP, which means that the seller is responsible for (i) delivering the goods to the named place in the country of the buyer, as well as (ii) for paying all costs in bringing the goods to the destination, including import duties and taxes [**Agreement, Clause 8**]. Considering that the objective of INCOTERMS is to establish a set of international rules for international trade in order to reduce any sort of misinterpretation regarding all the obligations vis-à-vis the costs and risks involving the delivery of the goods (tariffs, transportation, risks associated with the delivery, etc.), parties usually agree on an INCOTERM applicable to the contract in order to establish the obligations each party needs to bear. [**Afi, p. 3**].

71. In this sense, the first letter of an INCOTERM indicates the transmission of the risk and, in concordance, INCOTERMS that start with the letter D indicate that the seller is responsible to bear all the risks and costs associated with the goods until they are actually in the possession of the buyer, and the price of the goods reflects so accordingly [**Afi, p. 6**]. Thus, if

the parties agreed on DDP, then it is not plausible for CLAIMANT not to be aware of the expenses that it would have to incur in order to comply with its obligation of delivering the goods.

iii. Clause 12 of the AGREEMENT: Hardship clause and its scope.

72. Even if Clause 12 of the AGREEMENT constitutes a hardship clause, the Arbitral Tribunal must interpret and derive its consequences restrictively, since that will constitute a more accurate construction of the parties' intentions at the time of the conclusion of the AGREEMENT. Therefore, retaliatory tariffs are excluded from its scope (a) and a proper interpretation of said clause only leads to the conclusion that this particular case does not constitute hardship (b).

a. The scope of Clause 12 of the AGREEMENT

73. Even if the events in this case had been considered beforehand, the tariff imposed by the government of Equatoriana to all animal products from Mediterraneo, including animal semen, is neither included within the scope of Clause 12 of the AGREEMENT nor covered by the natural coverage negotiated. On one hand, Clause 12 only exonerates CLAIMANT from being responsible for lost semen shipments or delays in delivery not within its control and from hardship caused by additional health and safety requirements. As stated by CLAIMANT, "*from past experiences unforeseeable additional health and safety requirements make highly expensive tests necessary*" [**Cl. Ex C4**]. That is the reason why CLAIMANT insisted in the inclusion of a hardship clause and to include those unforeseeable additional health and safety requirements that could arise [**Cl. Ex C4**]. However, in the present case, not a single health and safety requirement arose. The retaliatory tariffs imposed by the government of Equatoriana constitute only an economic measure to upset the imbalance created by other tariffs set by the government of Mediterraneo, but the spirit of said levies has nothing to do with issues related to health or safety in the country that imposed them. Therefore, from the wording of Clause 12, the tariffs and, more importantly, the tariffs imposed by retaliation are excluded from its scope.

74. Additionally, Clause 12 is strictly related to the natural coverage concept contemplated in the negotiations. Although the temporally ban was expected to become permanent, there was still

a chance for such to be revoked. Such situation is one of the reasons why parties contemplated a natural coverage and thus a hardship or force majeure clause. However, in the present case, the ban has not been revoked. To be precise, there was only a tariff imposition as retaliation for different tariffs imposed on goods coming from Equatoriana [Cl. Ex C6]. Therefore, such tariff was not contemplated during negotiations and is definitely not covered within the scope of Clause 12. On the contrary, the tariff imposition by the government of Mediterraneo on agricultural products from Equatoriana [**Notice, ¶ 9]**and the retaliation from the government of Equatoriana on animal products, including animal seen, was unforeseen by both CLAIMANT and RESPONDENT and it was also not within their control.

b. <u>The present case does not constitute hardship</u>

75. Although it is true that Clause 12 of the AGREEMENT was introduced as a hardship clause to govern the AGREEMENT, in which CLAIMANT would not be responsible for hardship caused by any unforeseen event that would make the contract more onerous, the present case does not constitute a case of hardship. This is mainly because in order for hardship to exist there is the need for an event that "*fundamentally alters the equilibrium of the contract*" [**UNIDROIT, Article 6.2.2, p. 218**]. In other words, Hardship "*may not be invoked unless the alteration of the equilibrium of the contract is fundamental*" [**UNIDROIT, Article 6.2.2, p. 218.]**

76. Article 6.2.2 of the UNIDROIT principles offers a definition of hardship that requires a fundamental alteration of the equilibrium of the contract if the events that caused it meet certain requirements. RESPONDENT agreed to buy 100 doses of Frozen Semen from the stallion Nijinsky III of CLAIMANT at the price of US $100,000 per dose. Thus, the total price paid by RESPONDENT and consequently the total profit of CLAIMANT amounted to US $10,000,000. From that point of view, the 30% tariff imposition by RESPONDENT'S country on animal semen imported from Mediterraneo amounted to a total of US $1,250,000, which only represents 12.5% percent of the CLAIMANT's total profit from the AGREEMENT. Hence, there is not a fundamental alteration of the equilibrium of the contract. For an alteration of the equilibrium of a contract to be fundamental, the event has to meet the requirements "*laid down in subparagraphs (a) to (d)*" [**UNIDROIT, Article 6.2.2, p. 218**] of Article 6.2.2 of the UNIDROIT principles and it also needs to be an alteration in a way that there is a "*substantial increase in the cost for one party of performing its obligation*" or a

"*substantial decrease in the value of the performance received by one party*" [**UNIDROIT, Article 6.2.2, p. 219**].

77. As it can be seen in the negotiation between CLAIMANT and RESPONDENT, RESPONDENT told CLAIMANT about the several restrictions that animal products as well as the semen had [**Cl. Ex. C1**] and CLAIMANT actually acknowledged that circumstance [Notice**, ¶ 5]**. This is also illustrated by the fact that the government of Equatoriana actually banned any importation of racehorse semen to Equatoriana and the negotiations took place when there was a temporary lift of the ban. Therefore, CLAIMANT was well aware of the risks that the import of racehorse semen would have. That is one of the main reasons of why CLAIMANT decided to sell the semen on that specific price, as if it had not been the case, the price would have been cheaper as it was a commercial agreement with a long term view, which is reflected in the amount of doses that CLAIMANT agreed to sell though not used to it [**Cl. Ex. C4**].

78. In concordance with paragraph 77, the disadvantaged party (CLAIMANT) was well aware of the potential risks and possible restrictions that could arise at the time of the conclusion of the contract. This can be illustrated by CLAIMANT's EXHIBIT C1, whereas RESPONDENT clearly told CLAIMANT that the lift of the ban was temporary [**Cl. Ex. C1**]. Thus, CLAIMANT was not only aware of the risk associated, but it actually assumed such risks by inflating the price as stated in paragraphs 76 and 77.

79. CLAIMANT could try to argue that the tariff imposition and the tariff retaliation are beyond its control. However, both parties are part of the WTO and the first tariff imposed on agricultural products coming from Equatoriana by the elected government of Mediterraneo is prohibited under the WTO provisions and, more specifically, under Art. XX of the GATT. Art. XX of the GATT establishes the general exceptions for "disguised restriction[s] on international trade" [Analytical Index of the GATT, Article XX, p. 562]. In this regard, for a tariff imposition to be justified, it has to meet the criteria and the requirements laid out by Art. XX of the GATT. In specific, the tariff must comply with a two-tier test, whereby the tariff meets one of the exceptions set by subparagraphs (a) to (j) and –once it has been proved that– it has to be in compliance with the chapeau. However, if the tariff does not fall

within the scope of one of the exceptions set by subparagraphs (a) to (j), then there is no need to examine the consistency with the chapeau of GATT [Mavroidis, p. 325].

80. In the present case, the tariff imposed by the government of Mediterraneo does not fall within the scope of any of subparagraphs (a) to (j) of Art. XX of the GATT. This is mainly because the measure was very restrictive and discriminatory, as it was only imposed to agricultural products coming from Equatoriana. Notwithstanding, even if CLAIMANT were to argue that the tariff was justified under subparagraph (b) as it was "necessary to protect human, animal or plan life or health" [Analytical Index of the GATT, Article XX, p. 562], this measure fails to comply with the chapeau as Mediterraneo acted in a discriminatory way. As the Appellate Body of the WTO has explained, there are three conditions to be met in a cumulatively manner for a measure to be chapeau-consistent: no arbitrary discrimination between countries where the same conditions prevail; no unjustifiable discrimination between countries; and no restriction on international trade [Mavroidis, p. 355-356]. In this regard, Mediterraneo's measure was not only restrictive on international trade but also discriminatory to Equatoriana.

81. It was on CLAIMANT's best interest to disagree with such restrictive measure as it constituted a discriminatory measure to a country with who he was involved in commercial transactions. Therefore, CLAIMANT did not only acted in a diligent manner, but also accepted the consequences by agreeing with such tariff imposed by his government. In this regard, CLAIMANT could have known that such tariff could lead to a war tariff and in retaliation on different and undetermined and unpredictable goods and amounts.

82. In addition, even beyond the control of the party under hardship or *force majeure* refers to an event caused by nature. A tariff, however, is not caused by nature, but actually is due by an administrative or governmental decision. Therefore, it can be deduced that such event was not out of CLAIMANT's hands since it is not included within *force majeure* or an unexpected event caused by nature.

83. Also, this argument can only be invoked when performance becomes impossible to achieve, which is not the case. In fact, CLAIMANT actually performed its obligations by delivering the product on time. Thus, CLAIMANT cannot argue impossibility to perform.

c. The risk of the events was not assumed by the disadvantaged party

84. In correlation with all the aforementioned, CLAIMANT assumed the risk of the events, as part of the DDP agreement. Not only by inflating the final price of each dose, but also by not being diligent regarding the tariff imposition by their government without a reason.

d. A substantial increase in the cost for one party of performing its obligation and a substantial decrease in the value of the performance received by one party

85. As the commentary of the UNIDROIT principles states it, when hardship is alleged, subparagraph (a) to (d) are not the only factors to take into account. When analyzing hardship, there is a need to examine whether or not there is a **substantial increase** for one party in the cost of performing his obligations and also a **substantial decrease** in the value of the performance received by one party. In the present case, as it has been argued, CLAIMANT inflated the price and by doing so they received a profit of US $10,000,000, whereas they only had to incur in the tariff on animal semen which amounted US $1,250,000. It is a fact that the tariff only represents 12.5% percent of the CLAIMANT's total profit from the AGREEMENT. Therefore, there is neither a substantial increase in the cost of performance nor a substantial decrease in the value received by performing. This argument is also sustained by the fact they CLAIMANT actually performed and fulfilled his obligations under the AGREEMENT and under the CISG.

86. Therefore, even if the Arbitral Tribunal were to find that it had the power to adjust the contract, a proper interpretation of the AGREEMENT can only lead the Arbitral Tribunal to the conclusion that RESPONDENT is under the no obligation to pay the amount of US $1,250,000 to CLAIMANT or any other amount resulting from an adaptation of the price.

B. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US $1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER THE CISG

87. Even if the Arbitral Tribunal were to hold that it does have powers to adjust the AGREEMENT, it must find that under the CISG, CLAIMANT has no right to collect US **$1,250,000** or any other amount resulting from the adaptation of the price. The obligations

foreseen in the CISG for each of the parties are clearly determined (1) and its interpretation in no manner gives right the seller the right to collect additional amounts for situations as the ones happening in this case; moreover, this Arbitral Tribunal must find that RESPONDENT's argument regarding the applicability of article 79 CISG must be dismissed (2).

i. Buyer's and Seller's obligations under the CISG

88. The CISG does not define what constitutes a "*sale of goods*", it does, however, detail a series of obligations relating to the sale of goods, for both the seller (i) and buyer(ii). As previously stated, it is RESPONDENT's position, as demonstrated in paragraphs 67 to 69, that the contract has been naturally terminated as all of its obligations have been fulfilled.

a. Obligations of the Seller

89. Article 30 states that the seller is obliged to (i) deliver the goods, (ii) hand over the documents relating to the goods and (iii) transfer the property of the goods to the buyer [**CISG, Art. 30**]. It is also possible to add substantial obligations to those already mentioned by referring to standardized terms such as INCOTERMS, as was the case in this relationship, as already mentioned in paragraph [*], by agreeing to DDP, CLAIMANT's obligations were clear for both parties under the AGREEMENT. It is RESPONDENT's contention that all of these obligations have been fulfilled by CLAIMANT, for which it can be said that the AGREEMENT and any duty derived from it has been concluded. The goods have been delivered, their property has been transferred, all documentation relating to them is in RESPONDENT's possession and all duties derived from the importation of the goods into Equatoriana have been already been covered as foreseen by CLAIMANT at the time of the conclusion of the AGREEMENT [**Cl. Ex. C5**].

b. Obligations of the Buyer

90. On the other hand, under article 53 CISG the buyer has to (i) pay the agreed upon price for the goods and (ii) take delivery of the goods as it has been established in the contract or cooperate in general with the completion of the contract [**CISG, Art. 53**]. As mentioned above in paragraph [*], substantial obligations to those already mentioned can be added by

referring to standardized terms such as INCOTERMS, therefore by agreeing to DDP, RESPONDENT's obligations were also clear for both parties under the AGREEMENT and in this particular case RESPONDENT's obligation was not to interfere with delivery, provide any documents or information necessary to allow the seller to duly import the goods and, more importantly, this INCOTERM had a direct impact on the price, since it included all the duties that could have been foreseen by the seller at the time of the conclusion of the AGREEMENT.

91. Therefore, RESPONDENT's contention stands firm in the sense that it has already paid the inflated price of US $100,000 for each of the 100 doses of frozen semen delivered and by doing so it has fulfilled its obligations under the AGREEMENT. As such, the contract has come to a natural conclusion, and any other alleged obligation that arises has no legal basis within the scope of the CISG obligations relating to the sale of goods.

ii. Art. 79 of the CISG: "impediment requirement".

92. In its memorandum, paragraphs 89 to 94, CLAIMANT argues that there is an impediment to perform and that Article 79 should be interpreted as hardship. It is RESPONDENT's position that the Arbitral Tribunal must dismiss such argument, since it misconstrues article 79 CISG.

93. Article 79 CISG relates to the degree as to which a party is liable in any given case that they fail to perform an obligation on their behalf. CLAIMANT argues that the "impediment" mentioned in such article, related to the 30% tariff imposed by the Government of Danubia, is enough grounds to alter the price and increase the onerousness of the contract for RESPONDENT.

94. Past decisions by arbitral tribunals have defined "*impediment*" as "*an unmanageable risk or a totally exceptional event*" [CLOUT case no. 140]. A prohibition on exports by the seller's country for a seller who has failed to deliver the goods could also be considered as an impediment within the scope of article 79 CISG, but only if the impediment is unforeseeable when the contract was concluded [Bulgarian Chamber of Commerce and Industry]. As shown in CLAIMANT's EXHIBIT C1, RESPONDENT informed CLAIMANT on the "*serious transportation restrictions*" that made natural coverage extremely difficult, so even if the 30% tariff was not

yet imposed by the completion of the contract, it cannot be said that it was unforeseeable, thus, not an impediment within the definition of article 79 CISG. Moreover, a prohibition on exports is not to be equated to a retaliatory tariff, since the purpose of said levy does not impede, as it did not in this case, the import of the goods. According to the facts of the case CLAIMANT had no problem in importing and delivering the goods, therefore the premise of article 79 CISG is not met, since the so-called-impediment did not have the effect of preventing CLAIMANT from fulfilling its obligations under the AGREEMENT.

95. In addition, as article 79 constitutes an exemption for the general principle of *pacta sund servandae* (the obligations within a contract need to be fulfilled), the party invoking the impossibility to perform will have the burden of the proof of such impediment [Alejandro Osuna, 270]. In this sense, CLAIMANT has not provided any proof for such impossibility. On the contrary, CLAIMANT has provided proof of being able to comply with its obligations of delivering the goods, and thus the tariff retaliation did not constitute an impediment of performing as CLAIMANT did actually perform. As the drafting history of such provision demonstrates, a party cannot invoke such provision if performing its obligations just became more difficult [Alejandro Osuna, 270]. Hence, even though CLAIMANT argues that Art. 79 results applicable to the present case, it does not as CLAIMANT has fulfilled his obligations under the AGREEMENT.

96. Even if an impediment within the meaning of article 79 CISG could be interpreted as hardship as CLAIMANT suggests, the 30% tariff imposed by Equatoriana's Government does not fit the definition of impediment within the scope of article 79 CISG, as it was not entirely unforeseeable.

C. THE PRINCIPLE OF FAIRNESS IS NOT APPLICABLE IN THIS CASE

97. CAUSE 15 of the AGREEMENT states that the parties agreed to arbitration administered by the Hong Kong International Arbitration Centre under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted. As stated before, there is no legal basis for the principle of fairness to be considered as a valid argument in front of an arbitral tribunal, given that it is not under the scope of the HKIAC rules of arbitration, the CISG, or the UNIDROIT principles. Given that this arbitration is not an *ad-hoc* arbitration, the principle of fairness invoked by CLAIMANT as a reason for the payment

of the amount requested is not applicable. "*Ad hoc* arbitrations are not conducted under the auspices or supervision of an arbitral institution" [**Gary B. Born, p. 12**]. That is the main reason of why *ad-hoc* arbitrations are under the own rules that parties agree upon the arbitration. As this is not the case, there is no legal grounds for such principle to be admitted as valid, as the institutional rules and the applicable law does not contemplate it, thus resulting in its non-applicability.

98. However, even if it were to be determined that the principle of fairness can be applied, under it RESPONDENT would be the party affected. CLAIMANT inflated the price of each dose by US $10,000, which multiplied each dose sold (100) represents an extra profit of US $1,000,000. Thus, if RESPONDED were to pay CLAIMANT the total amount of US $1,250,000 there would be a violation of the principle of fairness. In any case, if we were to be consistent, CLAIMANT would only be entitled to the payment of US $250,000 which is the difference of the extra profit minus the total tariff paid by CLAIMANT.

IV. REQUEST FOR RELIEF

In the light of the above reasons, Counsel for RESPONDENT respectfully requests the Tribunal to find that

1. This Tribunal does not have jurisdiction and powers under the arbitration agreement to adapt the contract.
2. CLAIMANT is not entitled to submit evidence from the other arbitration proceedings.
3. CLAIMANT is not entitled to the payment of US $1,250,000 or any other amount resulting from the adaptation of price
4. CLAIMANT is responsible to cover all costs resulting from the arbitration proceedings

CERTIFICATE

We hereby certify that no other person than a student team member appearing on the registration and the cover page has participated in the writing of this memorandum

(Signed)

Julieta Bejar Luna

(Signed)

Hernando Felix Villagran

(Signed)

Oscar Andres Figueroa Diaz

(Signed)

Julián Farías Gutiérrez

(Signed)

Yvette Seferian Dauguet