SIXTEENTH WILLEM C. VIS EAST
INTERNATIONAL COMMERCIAL ARBITRATION MOOT COURT
31 MARCH – 7 APRIL, 2019

Tsinghua University

--MEMORANDUM FOR CLAIMANT --

PHAR LAP ALLEVAMENTO	**BLACK BEAUTY EQUESTRIAN**
Rue Frankel 1	2 Seabiscuit Drive
Capital City Mediterraneo	Oceanside Equatoriana
RESPONDENT	**CLAIMANT**

Beijing, China

DAI Xingmao • GUAN Wenyue • SHAN Weijing
TAN Yanfei • Weißenbruch, Nina • XIONG Yurong

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Author	Opus	cited in para:
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INDEX OF COURT DECISIONS

Case (by country of origin)

Australia

Belarus

Belgium

17 February 2015
cited as: *CLOUT case 1501*

Germany

Tomato concentrate case **96, 98**
Oberlandesgericht Hamburg, Germany
4 July 1997
1 U 143/95 and 410 O 21/95
http://cisgw3.law.pace.edu/cases/970704g1.html
cited as: *Tomato concentrate case*

Yarn case **63**
Oberlandesgericht Frankfurt, Germany
30 August 2000
9 U 13/00
http://cisgw3.law.pace.edu/cases/000830g1.html

Surface protective film case **63**
Bundesgerichtshof, Germany
25 November 1998
VIII ZR 259/97
http://cisgw3.law.pace.edu/cases/981125g1.html
cited as: *Surface protective film case*

Stolen car case **88**
OLG Miinchen, Germany CISG-online 1686
5 March 2008
IHR 2008, 253
http://cisgw3.law.pace.edu/cases/080305g1.html

K Trading Company (Syria) v. Bayerischen Motoren Werke AG **60**
Bayerisches Oberstes Landesgericht [Higher Court of Appeal of Bavaria]
23 September 2004
Case No. 4Z Sch 005-04
cited as: *BMW Case*

Greece

Hong Kong

Netherlands

Spain

Singapore

Switzerland

INDEX OF ARBITRAL AWARDS

Award (by arbitral institution)

ICSID

INDEX OF STATUTES, RULES AND TREATIES

CISG	United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980
Danubian Arbitration Law	Verbatim Adoption of the UNCITRAL Model Law with the 2006 amendments
HKIAC Rules	HKIAC Administered Arbitration Rules 2018

IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ICC Hardship Clause	ICC Hardship Clause 2003
Incoterms	Incoterms® 2010 rules
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1985, with the 2006 amendments
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts, 2010

STATEMENT OF FACTS

1. Phar Lap Allevamento ("**CLAIMANT**") is a prestigious horse breeding company seated in Mediterraneo, well-known for its enormous scale and superior technology. **CLAIMANT** has successfully produced a star stallion called Nijinsky III. Black Beauty Equestrian ("**RESPONDENT**") is a broodmare breeding company seated in Equatoriana.
2. On **21 March 2017**, **RESPONDENT** contacted **CLAIMANT**, showing great interest to purchase 100 doses of frozen semen from Nijinsky III for **RESPONDENT**'s newly started breeding programme.
3. On **24 March 2017**, **CLAIMANT** offered **RESPONDENT** the 100 doses requested. **RESPONDENT** agreed with most terms in the offer, but (1) insisted on a delivery DDP, and (2) objected to Mediterranean law being applicable and Mediterranean courts having jurisdiction at the same.
4. In reply, (1) **CLAIMANT** agreed to the delivery DDP term, but proposed to add a hardship clause into the contract, so as to ensure that no risks of unforeseeable changes would be burdened on **CLAIMANT**. (2) **CLAIMANT** insisted that the Mediterranean courts should have jurisdiction.
5. On**10 April 2017**, **RESPONDENT** drafted and communicated an arbitration clause to **CLAIMANT**, in which **RESPONDENT** insisted that (1) the seat of arbitration shall be Equatoriana, and (2) the law of the arbitration clause shall be Equatorianian law.
6. In a reply on **11 April 2017**, (1) **CLAIMANT** changed the seat of arbitration to Danubia. (2) **CLAIMANT** insisted that the law of the Sales Agreements shall be Mediterranean law. (3) **CLAIMANT** suggest reliance on the ICC-Hardship clause.
7. On **12 April 2017**, the two main negotiators, Ms. Julie Napravnik from **CLAIMANT** and Mr. Chris Antley from **RESPONDENT** conducted a short negotiation. The parties agreed to include a hardship clause into the contract.
8. On **12 April 2017**, Ms. Napravnik and Mr. Antley were involved in a severe car accident and were seriously injured. The negotiations of the contract were thereafter conducted by new negotiators from both parties.
9. On **6 May 2017**, the Parties signed the Frozen Semen Sales Agreement ("contract"), which is agreed to be governed by Mediterranean law. The seat of arbitration is agreed to be Danubia. Clause 12 of the contract provides that **CLAIMANT** is not responsible for the hardship situation.
10. On **19 December 2017**, the Government of Equatoriana announced an imposition of 30 per cent tariff upon all agricultural goods from Mediterraneo as a retaliation. Previously in **April 2017,** Mediterrano's newly selected President announced a 25 per cent tariffs on agricultural products from Equatoriana.

11. In preparing the last shipment which should be delivered on **23 January 2018**, **CLAIMANT** was informed of the tariff increase. On **January 20 2018, CLAIMANT** urgently contacted **RESPONDENT** to find a solution as to the 30 per cent tariff. On **21 January 2018**, Mr. Greg Shoemaker from **RESPONDENT** called Ms. Napravnik, convinced her that **RESPONDENT** would pay the 30 per cent tariff, and urged **CLAIMANT** to deliver the doses.
12. On **23 January 2018**, **CLAIMANT** complied with its delivery obligation and delivered the remaining 50 doses of frozen semen.

SUMMARY OF THE ARGUMENT

13. The Tribunal is kindly requested to exercise the jurisdiction and/or the powers under the arbitration agreement to adapt the contract (**A**, *see below paras. 16-42*). The law of Mediterraneo shall apply to the interpretation of the arbitration agreement. There is consistent jurisprudence in Mediterraneo that CISG shall apply to sales contracts and the Tribunal has the jurisdiction and/or the powers under the arbitration agreement to adapt the contract pursuant to Art.8 CISG. Even if the arbitration agreement is governed by Danubia law, the Aribitral Tribunal is entitled to exercise adaptation as its integrated power and the adaptation shall be considered as an appropriate as well as effective remedy or relief.
14. In addition, the Tribunal is kindly requested to admit the evidence on the other arbitration proceedings, even if on the assumption that it was obtained illegally. (**B**, *see below paras. 43-61*). Tribunal is not obliged to exclude the evidence on the assumption that it was obtained illegally because the tribunal has the discretion to decide the admissibility of the evidence. In the present case, there is no interest violated either on the contractual nor statutory obligations or the public policy by the evidence CLAIMANT trying to submit and therefore, there is no need to exclude the evidence. On the contrary, the evidence shall be admitted to prohibit contradictory behavior and to achieve due process and fairness of this arbitration.
15. With respect to merits of the case, the Tribunal is kindly requested to find that CLAIMANT is entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price (**C**, *see below paras. 62-113*). Based on Clause 12 of the contract, Parties' intent to include an adaptation clause under hardship circumstances would be concluded under the CISG Art. 8. In the present case, retaliated tariff of Equatoriana falls into the category of the term 'hardship'. On the other hand, CLAIMANT is entitled to the payment under CISG. The hardship situation in this case falls into the category of 'impediment' governed by CISG Article 79. While the hardship situation is governed but not settled by Art.79 CISG, UNCITRAL Principle applies to fill the gap according to Article 7(2) of CISG, and the Tribunal may therefore adapt the price.

ARGUMENT ON THE ISSUES

ISSUE A: The Arbitral Tribunal Has the Jurisdiction and the Power to Adapt the Contract

16. The tribunal is kindly requested to find it has the jurisdiction and power to decide on the claims CLAIMANT is raising. CLAIMANT is claiming for an adaptation to the price as a consequence of changes in tariff, but not an alteration to the contractual relationship. Such adaptation to the price falls within the scope of the arbitration agreement .

17. In Clause 15 of the Sales Agreement, the parties have agreed to refer '[a]ny dispute arising out of this contract' to an arbitral tribunal. The scope of the arbitration agreement should be interpreted in accordance with the law of Mediterraneo (**I**). Under such interpretation, the adaptation to the contract falls within the subject matters scope of the arbitration agreement (**II**). In any circumstances, this Tribunal has the interim power to adapt the contract under Danubian Arbitration Law, which is the law applicable to the procedure of this arbitration (**III**).

I. The Law Applicable to the Arbitration Agreement Is the Law of Mediterraneo

18. To interpret an agreement between the parties, the preliminary issue is the applicable law. If a national law is to be applied, the interpretation of an international arbitration agreement should generally be subject to the law applicable to the existence and substantive validity of the agreement [*Born, p. 1398; Gaillard, p.255*]. There is no rule that the law of the seat must be applied to arbitration agreement [*Klöckner case*]. The law of arbitration agreement, as required in Article V(1)(a) of New York Convention and Article 34 and 36 of Danubian Arbitration Law, shall be the law agreed by the parties; failing such agreement, shall be the law of the country where the award is made. The first prong of Article V(1)(a) New York Convention applies equally to expressed and implied choice of law of arbitration agreement [*Born, p. 564; Nacimiento, p. 224; Rodopi case*].

19. In the present case, the parties chose the law of Mediterraneo as the law of arbitration agreement in compliance with New York Convention and Danubian Arbitration Law. The parties have agreed on the choice of law clause without excluding the arbitration clause. The choice of Mediterranean law can be applied to the arbitral clause and the application does not violate the separability doctrine (**1**). The law of Mediterranean, as the substantive law chosen by the parties, should be deemed as the implied choice of parties on the law of the arbitration agreement (**2**). Such conclusion on the implied choice of arbitration agreement complies with the parties' intention (**3**).

1. The Choice of Law Clause Applies to the Arbitration Agreement, Since It Is A Clause in the Sales Agreement

20. In the Sales Agreement, the parties agreed on the choice of law in Clause 14, applying to the Sales Agreement without excluding any clause in it. Clause 15, the arbitral clause, is covered by Clause 14 (**a**). The application of choice of law clause to the arbitration agreement does not violate the separability doctrine (**b**).

a. The Arbitration Clause is Covered by the Scope of Application of the Choice of Law Clause

21. The choice of law clause can be applied to the arbitration clause in the contract. If no particular choice is made as to the arbitration agreement, it will be presumed that the law governing the main contract applies to the arbitration clause as well [*Nacimiento; Born, p. 591; ICC Case No. 6752*]. As an ICC tribunal reasoned, 'irrespective of its separability, there are no indications that the parties in the present case wanted to submit the arbitration agreement to a different law than the main contract' [*ICC Case No. 11869*]. The general choice of law, without opposite statement, is considered to extended to the arbitration clause in the contract.

22. In the present case, the choice of law clause in the contract is Clause 14. It applies to 'the Sales Agreement', which is the title of the whole contract without excluding and clause in it [*Ex. C5, p. 14*]. There is no further indication on the law of arbitration agreement. Clause 15, the arbitral clause, is in the Sales Agreement and covered by the choice of law clause.

b. The Application of Choice of Law Clause to the Arbitration Agreement Does Not Violate the Separability Doctrine

23. RESPONDENT relied on separability doctrine to deny the application of choice of law clause [*AnNoA, p. 31, para. 14*]. However, such doctrine does not serve RESPONDENT's purpose. The separability doctrine only requires a separate conflict of law analysis, as CLAIMANT is submitting in this Memorandum, and does not prevent the parties to have a general choice of law governing the whole contract. On the contrary, to determine the governing law is not permissible to look at arbitration agreement in isolation, but the regard should be had to surrounding circumstances including the law of substantive contract [*Klöckner case*]. Further, in practice, most parties will not consider separability of arbitration clause, much less the possible application of different laws, when drafting the agreements [*Born, p. 590*].

24. In the present case, the when CLAIMANT proposed to include an arbitration clause, it had no indication that it had consider the issue of the separability of the arbitral clause not a separate law would apply to the arbitration clause [*Ex. C4, p. 12*]. CLAIMANT did not noticed the separable choice of law apply to arbitration clause inside the contract. This was well understood by the RESPONDENT, when it raised a separate choice of law clause [*Ex. R1, p. 33*] and agreed to delete

it in the final Sales Agreement [*Ex. C5, p. 14, Clause 15*]. The parties negotiation process showed the separability was not considered in the draft of the arbitration agreement, and does not prevent the parties to apply a general choice of law clause to the whole of their contractual relationship.

2. The Choice of Mediterranean Law Shall Be Deemed As the Law Impliedly Chosen by the Parties to Apply to the Arbitration Agreement

25. The choice of substantive law in the contract can also be deemed as the implied choice of the parties. To determine the implied choice of law of arbitration agreement, case law established that the starting point is the parties are assumed to have intended the whole of their relationship to be governed by the same system of law, and that the express choice of law governing the substantive contract would be a strong indication of parties' intentions in relation to the arbitration agreement [*SulAmerica case; Arsonovia case; BCY v. BCZ; Klöckner case*].

26. There are, indeed, cases apply the law of the seat to the arbitration agreement. However, the main reason to deviate from the substantive law chosen by the parties for the main contract, was to save the arbitration agreement, since the parties could not impliedly choose the law that would invalid the their agreement [*SulAmerica case; Firstlink case*]. It was clear that using the law of the seat is only an exception for the purpose to save the arbitration agreement.

27. In the present case, the law chosen by the parties to apply to the contract is the law of Mediterraneo. Without opposite statement, the choice is the strong indication that the parties agreed to have Mediterranean law apply to the arbitration agreement. There is no reason to disregard this strong indication of the application of the Mediterranean law, since it will not invalid the arbitration agreement. Therefore, the law chosen by the parities for the contract, Mediterranean law, is the implied choice of law of arbitration agreement.

3. The Parties Intended to Apply the Law of Mediterraneo With Consideration to the Draft History

28. When interpret the choice of law of the arbitration agreement in the contract, RESPONDENT resorted to the parties negotiation process and drafting history, without giving legal basis and in contradictory to its allegation that the surrounding circumstances cannot be considered in interpretation of the arbitration agreement [*AnNoA, p. 31, paras. 15-16*].

29. However, the negotiation process of the parties does not serve RESPONDENT' position. The intention of the parties, as shown in the draft history, was to have Mediterranean law apply to the arbitration agreement. The choice of law was agreed by the parties in the Email on 28th March [*Ex. C3, p. 11, para. 3*]. When CLAIMANT raised arbitration as the means of dispute resolution,

it had no indication that it had consider the issue of the separability of the arbitral clause not a separate law would apply to the arbitration clause [*Ex. C4, p. 12*]. This understanding of CLAIMANT was understood by RESPONDENT, as it specifically raised a separate law of arbitration agreement in Email on 10th April [*Ex. R1, p. 33*]. RESPONDENT was full aware that without a specific statement, the original choice of law would apply. In the final Sales Agreement, the separate choice of law of arbitration agreement was deleted. Therefore, parties intended to have the Mediterranean law apply to the arbitration agreement.

30. Further, business men want to have their disputes to be solved in one forum [*Fiona Trust case*]. In the case where an arbitration clause is capable of bearing two interpretations, the interpretation fairly provides for arbitration will apply [*Dalimpex case*]. In the present case, the parties all agreed to have arbitration as the only approach to solve their disputes, and specifically agreed to have adaptation be heard by the tribunal [*Ex. C8, p. 17, para. 4*]. To valid such intention of the parties, a broader rule to interpret the arbitration agreement shall apply.

31. In conclusion, the law of Mediterraneo is the law chosen by the parties to apply to the arbitration agreement.

II. Adaptation to the Contract Falls Within the Subject Matters Scope of the Arbitration Agreement

32. With Mediterranean law applies, the arbitration agreement is to be interpreted in accordance with Article 8 CISG [*PO No. 1, p. 53, para. 4*]. The interpretation of the contract and the intent of the parties, therefore, has to take the negotiation process into consideration [*Art 8.3 CISG*]. In the present case, first, the wording of Clause 15 was broad enough to include adaptation to the contract into the scope of subject matters (**1**). Second, the parties' intent, found in accordance with Article 8.1 CISG, was to include the adaptation to the contract into the arbitration agreement (**2**). Finally, from a reasonable person's perspective, in accordance with Article 8.2 CISG, the adaptation is included in the arbitration clause (**3**).

1. The Wording of the Arbitration Clause Includes the Adaptation to the Contract

33. The terms used in the arbitration clause included the adaptation to the contract into the scope of the subject matters. Unlike RESPONDENT alleged, the wording in the clause never exclude the adaptation [*AnNoA, p. 31, para. 13*]. As RESPONDENT submitted, the arbitration clause in the present case was modified from the HKIAC model clause, deleting several terms. However, the terms deleted never excluded the adaptation to the price based on a change to the tariff, which is a result of performance to the contract.

34. The subject matter scope of the HKIAC model clause reads, '[a]ny dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it'. The terms deleted were 'controversy, difference, or claim', 'relating to', and 'non-contractual obligations'.

35. First, deleting 'controversy, difference, or claim' does not change the scope of the arbitration agreement, since these formulations encompass any sort of disagreement, dispute, difference, or claim that may be asserted in arbitral proceedings [*Tjong case*]. Second, deleting the term 'relating to' has no effect on the scope of arbitration agreement either. 'Relating to' is defined in the Oxford Dictionary as 'have reference to, concern'; while 'arising out of' means 'occur as a result of'. Adaptation to the contract, which is requested as a result of performance of the contract, falls within the scope of 'arising out of' the contract. Third, adaptation to the contract, as the result of performance of the contract, is closely connected to the contract and does not fall within the term 'non-contractual obligation'. Therefore, the terms deleted in the arbitration agreement did not excluded the adaptation to the contract. Adaptation to the price, which is a 'dispute arising out of the contract' falls within the scope of subject matters of the arbitration agreement.

2. The Negotiation Process Shows the Parties Intended to Have the Arbitral Tribunal to Adapt the Contract

36. The intent of the parties to have adaptation included in the term is shown in the negotiation process, in accordance with Article 8.1 and 8.3 CISG. Such intention was shown in the discussion of the parties on 12 April. Ms. Napravnik, who was in charge of the contract for CLAIMANT, expressed her concern that, 'it was important to have a mechanism which would ensure and adaptation to the contract', and Mr. Antley, who was responsible for RESPONDENT, replied that the adaptation 'should probably be the task of the arbitrators' [*Ex. C8 , p. 17, para. 4*]. It is clear enough that both parties understood and agreed to have the adaptation decided by the Arbitral Tribunal.

3. A Reasonable Business Person Would Understand the Arbitration Agreement as Including the Adaptation to the Contract

37. Even if the intent of the parties was not clear enough, any reasonable person in the positions of the parties would understand the adaptation was included in the agreement, in accordance with Article 8.2 CISG. As well reasoned in the *Fiona Trust* case, the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, were likely to have intended any dispute arising out of the relationship into which they had entered or purported to

enter to be decided by the same tribunal [*Fiona Trust case*]. In the present case, both of the parties are business person, with experience in transactions. Parties were aware of the issue of adaptation to the contract. It is reasonable to believe the parties intended to resolve their dispute in a single forum.

38. To conclude, the arbitration agreement has included the adaptation to the contract into the scope of subject matters.

III. This Tribunal Has the Power to Adapt the Contract Under Danubian Arbitration Law

39. In any circumstances, Tribunal has the power to adapt the contract under Danubian Arbitration Law, which is the law applicable to the proceedings of this arbitration. The power of the tribunal not only from the agreement of the parties, but also the applicable arbitration law, in order to finally resolve the dispute between the parties [*Ma/Brock*].

40. The applicable arbitration law in the present case is Danubian Arbitration Law, which adopted the UNCITRAL Model law. In the draft history, the working group discussed the power on adaptation in detail. In the working group reports in 1983, it was recorded that, if a party claims 'a remedy or relief from the other party on the grounds of changed circumstances which have allegedly caused him undue hardship', which is precisely the case at hand, the adaptation of the contract to the changed circumstances would form an interim step in the process of making the final decision. 'For this type of adaptation, no special authorization by the parties is needed and no provision need be included in the model law' [*A/CN.9/WG.II/WP.44, para. 9*].

41. In the present case, the claim CLAIMANT raised is precisely the one described in the preceding paragraph. The changed tariff imposed by the government caused the undue hardship to CLAIMANT and CLAIMANT is requesting the change to the price thereof. Under Danubian Arbitration Law, the power to adapt the contract as such is impliedly granted as an interim step to final settle the dispute, which is the duty of an arbitral tribunal. Therefore, irrespective of the agreement between the parties, Tribunal has the power to adapt the contract.

IV. Conclusion

42. Therefore, the arbitration agreement shall be interpreted under the law of Mediterraneo, under which, the subject matter scope of the arbitration agreement includes the adaptation to the contract. This Tribunal thus has the jurisdiction over the claim on the adaptation to the price in the present case. In any case, Tribunal has the power to adapt the price as an interim step to finally settle the dispute.

Issue B: The Evidence on the Other Arbitration Proceedings Shall Be Admitted

43. This Tribunal is kindly requested to allow CLAIMANT to submit the evidence relating to the other arbitration proceeding. RESPONDENT argued that the Tribunal shall apply the rule that evidence obtained illegally shall be excluded. However, the Tribunal has the discretion not to apply a strict rule on exclusion of evidence, and the discretion to balance the interests and to decide on the admissibility of the evidence (**I**). The evidence at hand should not be excluded because no interest will be violated by the submission of the evidence (**II**). On the contrary, the evidence at hand should be allowed because CLAIMANT has the right to submit it under Danubian Arbitration Law. Admitting the evidence will protect the due process and fairness of this arbitration (**III**).

I. This Tribunal Is Not Obliged to Exclude the Evidence On the Assumption That It Was Obtained Illegally

44. RESPONDENT alleged the evidence was obtained by illegal means and relied upon the rule that the illegally obtained evidence should be excluded [*RESPONDENT's Email, p. 50, para. 3*]. However, the exclusionary evidence rule is not mandatory for Tribunal.

45. The Tribunal has discretion to decide on evidence rules. With seat in Danubia, the Danubian Arbitration Law shall apply to this arbitration [*DAL, Art 1.2*]. According to Article 19.2 Danubian Arbitration Law, the tribunal has 'the power to determine the admissibility […] of any evidence'. HKIAC Rules 2018 also provides in Article 22.2 that 'the arbitral tribunal shall determine the admissibility […] of the evidence, including whether to apply strict rules of evidence'. Both the arbitration law and the rules authorize Tribunal the discretion to consider the admissibility of evidence and the evidence rule. Rules such as those against hearsay, extrinsic evidence or illegally obtained evidence do not have application in an arbitration [*Hwang/Boo, p. 26*]. In practice, tribunals will admit almost any evidence submitted to them in support of parties' position, including even hearsay evidence, and retain significant discretion in the assessment of the evidence to establish the facts [*Lew/Mistelis/Kröll, p. 561, para. 22-29; Redfern/Hunter, para. 6-65; Sicard-Mirabal/Derains, p. 208; American Steamship Case*].

46. In the present case, RESPONDENT relies on the exclusionary rule for tainted evidence, which is an evidence rule developed from U. S. criminal procedure law and later applied in several jurisdictions [*Columbia Law Review, p. 168*]. However, the applicable rule of evidence admissibility falls in Tribunal's discretion. The exclusionary rule is not widely recognized and in most jurisdictions which has the exclusionary rule, it is only applicable in criminal cases. Even in jurisdictions allow the rule applies to civil cases, there is often an exception that the rule doesn't

apply in international arbitration [*Hwang/Boo, p. 32*]. Also IBA Rules on the Taking of Evidence in International Arbitration has no regulation regarding the means of obtaining the evidence [*Sicard-Mirabal/Derains, p. 208*]. In international arbitration, there is no precise rule that prevents the admission of illegally obtained evidence since the evidence rule shall be decided by each tribunal's discretion.

47. Therefore, in the present case, Tribunal is not obliged to exclude the evidence on the assumption that it was obtained illegally, and is kindly requested to consider the applicability of the evidence rule on its discretion.

II. There Is No Interest to Be Protected by Exclusion of the Evidence

48. Not a mechanic exclusionary rule of evidence but a careful balancing of the parties' mutual interests in a given case secures equal treatment [*Meyer No. 161; Berger, p. 606; FC Karpaty Case; FC Metalist Case*]. Instead of applying the exclusionary rule of illegally obtained evidence, the tribunal is kindly requested to find that there is no interest violated by the evidence CLAIMANT trying to submit and therefore, there is no need to exclude the evidence.

49. RESPONDENT alleged that CLAIMANT violated its confidentiality obligations and indicated that the public interest has been violated because of the assumed illegal means of obtaining the evidence [*RESPONDENT's Email, p. 50, para. 1, para. 3*]. However, firstly, CLAIMANT did not violate any obligation since it bears no confidentiality obligation to RESPONDENT, neither contractual nor statutory (**1**). Secondly, the public policy will not be violated if the tribunal admit the evidence (**2**).

1. CLAIMANT Bears Neither Contractual nor Statutory Obligation of Confidentiality to REPONDENT

50. Unlike RESPONDENT alleged in its email, CLAIMANT has not violated contractual or statutory confidentiality obligations [*RESPONDENT's Email, p. 50, para. 1*]. On the contrary, CLAIMANT does not have any confidentiality obligation to RESPONDENT.

51. There is no contractual obligation on confidentiality between the parties. The only contract that CLAIMANT and RESPONDENT entered into was the 'Sales Agreement' as submitted to the tribunal [*Ex. C5, pp. 13-14*]. The contract, including the arbitration clause, has no obligation related to confidentiality. If there is any contractual confidentiality obligation of the other arbitration, it should be in the contract between RESPONDENT and the counter party in that arbitration, which is not binding on CLAIMANT. RESPONDENT also relied upon the confidentiality clause in HKIAC Rules. However, the HKIAC Rules only provides prohibition to publish the arbitration

by the parties, party representatives, arbitrators, witnesses, and secretary [*Art. 45 HKIAC Rules*], but does not prohibit parties to use award from another arbitration. Therefore, it is groundless to argue that CLAIMANT assumes a contractual confidentiality obligation to RESPONDENT.

52. Further, the statute does not provide any confidentiality obligation that CLAIMANT shall assume. The Danubian Arbitration Law is entirely silent on the subject of the confidentiality of the international arbitral process and the drafters rejected even relatively narrow proposals to provide for the confidentiality of arbitral awards [*Born, p. 2784*]. RESPONDENT may also want to rely on IBA Rules on the Taking of Evidence in International Arbitration, which, however, is not binding between the parties without their explicit agreement. Even if Tribunal were to consider IBA Rules as guideline, there is no obligation of confidentiality mentioned in the IBA Rules. Article 9.2.e IBA Rules allows tribunal to exclude the evidence violates the parties' business or technical confidentiality, which is not the case since the evidence CLAIMANT wants to submit is only related to REPONDENT's position in arbitration without any mention to the business or technical confidentiality. The general rule of confidentiality in international arbitration is also subject to exception where the interests of justice require disclosure [*AAY Case; Hwang/Boo, p. 32*]. In the present case, there is no statute that imposes a confidentiality obligation on CLAIMANT, and the rule of confidentiality of arbitration cannot be invoked against CLAIMANT's submission, which is protected by Danubian Arbitration Law.

53. Therefore, CLAIMANT does not assume any contractual not statutory confidentiality obligation to RESPONDENT and certainly did not violate its obligations.

2. Admitting the Evidence Will Not Violate Any Legally Protected Public Interest

54. There is no legally protected public interest needs to be protected by exclusion of evidence. First, public interest will not be violated by using a previous arbitral award. As mentioned above, an arbitral award is not prohibited from using in a subsequent arbitration by Danubian Arbitration Law [*Born, p. 2784*]. On the contrary, it was held by a court that documents produced voluntarily in a private arbitration were not privileged from disclosure in subsequent public litigation between different parties [*Shearson Case*]. If documentary evidence adduced in a private arbitration can be disclosed in subsequent litigation, there seems no reason why the award cannot be adduced in another arbitration provided they are relevant [*Ma/Brock, p. 373, para. 13.099*]. Therefore, using an award to show the position of RESPONDENT in this arbitration, which is still in private domain, will not violate any legal protected interest.

55. RESPONDENT may also allege that the means used to obtain the evidence was illegal and violated the public order. However, even if established, the evidence obtained through hacking is

allowed to be used as evidence in arbitration [*Carabute case*]. In the present case, first, CLAIMANT did not hack the system, which was obviously not well protected, and did not asked any evidence from the former employee of RESPONDENT [*PO 2, para. 41*]. Second, even if it is established, that the evidence was obtained from a third party who violated its confidentiality obligation or conducted the illegal hack, the misconduct is to be regulated by national courts. Admission of the evidence is not to encourage the misconduct and does not violate the public order.

56. Therefore, neither contractual nor public interest will be violated if the evidence is admitted and thus the Tribunal does not have to exclude the evidence.

III. The Evidence Shall Be Admitted to Protect the Equality and Fairness

57. Admitting the evidence will not violate any private or public interest, on the contrary, will protect the due process and fairness of this arbitration. First, CLAIMANT is allowed by both the Danubian Arbitration Law and the HKIAC Rules to submit any evidence it considers relevant and material. Denying such submission may fail to fulfil the equality and due process requirement in Danubian Arbitration Law.

58. CLAIMANT shall be given a full opportunity of presenting the case and has the right to submit evidence under the requirement of due process Danubian Arbitration Law [*Art 18, Art 19 DAL*]. The general rule is that all relevant evidence would be admissible and a tribunal must have regard to all relevant and admissible evidence tendered by the parties, failing which the tribunal may be guilty of misconduct and the award may be remitted or se aside for misconduct [*Ma/Brock, p. 369, para. 13.083*]. The mandatory principles of arbitral due process take precedence over any ethical rules if the application of these ethical rules or standards would result in unfair conduct in the taking of evidence as an integral part of the arbitral proceedings [*Berger, p. 606*].

59. In the present case, CLAIMANT tries to submit the information about another arbitration it learned from the annual breeder conference, to prove RESPONDENT's position on the issue of hardship and the foreseeability of the tariffs imposed by the governments in this trade war, which is essential in the present case. The issue is relevant for CLAIMANT to present its case. Without violating legally protected interest, admitting the evidence follows the requirement of due process in Danubian Arbitration Law.

60. Further, it is shown in the evidence that RESPONDENT is taking contradictory positions, which is impliedly prohibited in the New York Convention [*BWM Case; China Nanhai Case; Born, p. 3693*]. RESPONDENT who is here denying any need to adapt the contract to a change of circumstance had itself asked for an adaptation of the price invoking an unforeseeable change of circumstances [*CLAIMANT's Email, p. 49, para. 2*]. RESPONDENT's behavior is thus highly contradictory. The

Therefore, Tribunal is kindly request to take such misconduct into consideration and admit the evidence there upon.

IV. Conclusion

61. Counsel for CLAIMANT submits that the Tribunal has discretion to decide the admissibility of the evidence without application of exclusionary rule, and that admission of the evidence relating to the other arbitration violates no interest, but protects the due process and fairness in this arbitration.

ISSUE C: CLAIMANT Is Entitled to the Payment of US$ 1,250,000 Resulting from an Adaptation of the Price

I. Clause 12 of the Sales Agreement is a Hardship Clause Which Provides Remedy for the Adaptation of Price

62. CLAIMANT is entitled to the payment of US$ 1,250,000 under clause 12 of the contract. Clause 12 of the contract, as a combination of *force majeure* clause and hardship clause, excludes CLAIMANT from responsibilities caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous [*Ex. C5, p. 13*]. As the parties are in contracting states of the CISG, CISG Article 8 shall be applied in the interpretation of contracts, determining the subjective and objective intent of contracting parties. RESPONDENT is obliged to pay US$1,250,000 because clause 12 provides remedy for the adaptation of price. The parties' intent to include a hardship clause could be concluded pursuant to the interpretation rules of CISG Article 8 (**1**); CLAIMANT is entitled to the payment of US$ 1,250,000 from RESPONDENT, as the hardship clause provides adaptation of price as a remedy (**2**); retaliated tariff of Equatoriana falls into the category of the hardship clause. The performance of shipping should not be interpreted as CLAIMANT's acceptance of paying the 30% tariff (**3**).

1. The Parties' Intent to Include a Hardship Clause Can Be Concluded from Clause 12 of the Contract under CISG Article 8

63. Whenever a party's statement or conduct relates to a matter governed by the Convention, the interpretative criteria set forth in Art.8 CISG are to be used [*Yarn case; Surface protective film case; Building materials case*].

64. Article 8 CISG regulates the interpretation of contracts by determining the subjective and objective intent of contracting parties. The subjective approach set forth in Art.8(1) CISG has to be resorted [*Franklins v. Metcash*] before the objective approach which is set forth in Art.8(2) CISG is resorted.

Taking a subjective approach, CLAIMANT explicitly insisted via email negotiations that a hardship clause should be included into the contract to address any further changes (**a**). Even if the subjective intent could not be found, the objective approach would lead to the inclusion of an adaptation clause (**b**).

a. Both parties intended to include a hardship clause into the contract.

65. Article 8 (1) should be primarily resorted to find the parties' 'subjective' and 'real' intent, 'even if the parties did not engage in any objectively ascertainable means of registering this intent' [*MCC v. Ceramica; CLOUT case No. 617*].

66. Firstly, if the terms of the contract are clear, they are to be given their literal meaning, so parties cannot later claim that their undeclared intentions should prevail [*Machine for repair of bricks case*]. The subjective intent of a party is irrelevant unless it is manifested in some fashion, as 'the intent that one party secretly had, is irrelevant' [*Office furniture case*].

67. Clause 12 of the contract clearly states that 'Seller shall not be responsible for [...] hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous' [*Ex. C5, p. 14*]. The clear wording of 'hardship' manifests that the parties intended to include a hardship clause in clause 12. Under clause 12 of the sales agreement, the two clauses, force majeure clause and hardship clause are incorporated.

68. Secondly, even if the RESPONDENT might argue that there is no clear literal meaning, the party cannot pretend to have insufficient knowledge of some intent if it knows the real intent. Factors mentioned in Article 8(3) of CISG would be of particular relevance in this context [*Fritz/Dietrich, p. 54*]. Pursuant to Article 8(3) CISG, in determining the intent of a party, due consideration is to be given to all relevant circumstances of the case including the negotiations and any subsequent conduct of the parties. In determining the meaning of some language, when the reply to a statement is formulated in the same language as the statement itself, it has to be assumed that the statement has been understood by the other party [*Fritz/Dietrich, p. 54*].

69. In this case, both parties knew the real intent of including the word 'hardship'. First, CLAIMANT had been insisting via email negotiations that 'a hardship clause should be included into the contract' to address any further changes, 'in particular not those associated with changes in customs regulation' [*Ex. C4, p. 12*]. CLAIMANT had also explicitly claimed in email that 'we would suggest reliance on the ICC-Hardship clause' [*ANA, p. 30, para. 4; Ex. R2, p. 34*]. Second, in response, RESPONDENT had understood and accepted the inclusion of a narrowed ICC-Hardship clause. RESPONDENT's lawyer Mr. Antley has clearly written down in his working note that 'ICC hardship clause suggested by CLAIMANT too broad' [*Ex. R3, p. 35*]. As

RESPONDENT's reply is formulated in the same language as CLAIMANT's proposal, both parties had agreed to include a hardship clause into the contract.

70. Therefore, the subjective intent to include a hardship clause into the contract has been met.

b. Even If the Subjective Intent Could Not Be Found, the Objective Approach Would Lead to the Inclusion of a Hardship Clause

71. Even if the subjective intent could not be found, Article 8 (2) CISG could be resorted to interpret a party's statements or conduct. Subject to the interpretation rules of Article 8(2) CISG, the parties' intent to adapt the contract for hardship could be determined using the reasonable person test.

72. Article 8(2) CISG considers the reaction of a reasonable person of the same kind, placed in RESPONDENT's shoes, under the same circumstances [*Electro-erosion machine case*]. Due consideration is to be given to all relevant objective circumstances of the case [*Fruit and vegetables case*]. In assessing reasonability, all relevant circumstance of the case are authorized by Article 8(3) CISG to be considered. These circumstances specifically include the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties [*ProForce v. Rugby; Fashion products case; ECEM v. Purolite*].

73. In this case, before the parties concluded the contract, the newly elected President of Mediterraneo had already announced in his election a preference for a more protectionist approach to international trade, in particular in relation to agricultural products [*Ex. C6, p. 15*]. RESPONDENT, as the buyer, needs to adopt a proper mechanism to mitigate risks in such circumstance. A reasonable person, in contracting such a sales agreement, shall be assumed to accept a hardship clause for its own benefit. Therefore, the 'reasonable person' test would lead to the inclusion of a hardship clause.

2. Clause 12 provides adaptation of price as a remedy to a hardship situation.

a. The Parties' Conduct After the Tariff Increase Displayed Their Intent to Adapt the Price When a Hardship Occurs.

74. Literally, Clause 12 only provides that 'seller shall not be responsible for' a hardship situation. However, such a legal consequence is not exclusive as to a hardship clause. What both parties did after they received notice of the tariff imposition clearly showed their intent that a price adaptation shall be triggered as a remedy when a hardship situation occurs. Immediately after CLAIMANT was informed of by the customs authorities that the newly imposed tariffs of 30% are applicable to the shipment, CLAIMANT sought a negotiation as to the 30% price increase by writing 'you will understand we will have to find a solution' in the e-mail [*Ex. C7, p. 16*]. The next day, the

parties conducted a telephone meeting to negotiate over the 30% price increase [*Ex. R4, p. 36*]. During the meeting, Mr. Greg Shoemaker from RESPONDENT promised that the RESPONDENT would shoulder the 30% price. Clearly knowing that CLAIMANT would not deliver the semen if no agreement could be reached on adaptation of price, Mr. Shoemaker stated that 'we will certainly find an agreement on the price' [*Ex. R4, p. 36*]. Besides, Mr. Shoemaker emphasized the RESPONDENT's interest in a long-term relationship with CLAIMANT. He even told CLAIMANT about RESPONDENT's plan to buy another 50 doses from CLAIMANT [*Ex. C8, p. 18*]. All the words above together left a strong impression on the CLAIMANT that RESPONDENT had accepted to bear the 30% additional costs due to the tariffs [*Ex. C8, p. 18*].

75. In conclusion, according to both parties' intent, the remedies of a hardship situation is not only seller's exemption of any liability, but also a re-negotiation to solve the problem of who should bear the liability and how. The parties' conduct after the hardship fully depicted such an intent.

76. RESPONDENT might argue that since both parties had agreed on a delivery DDP, CLAIMANT shall shoulder any risk related to delivery. However, the DDP clause in the contract has nothing to do with the problem of which party shall pay for the 30% tariff. First, according to the Incoterms Rules 2010, the seller is only obliged to pay any 'duty' for export and import and to carry out all customs formalities [*Incoterms*]. However, unexpected tariff increase in this case is not a existed duty but a sudden hardship. Thus, CLAIMANT as the seller did not need to pay for the 30% tariff under a delivery DDP. Second, the only reason both parties wanted to apply a delivery DDP in this transaction is to take advantage of CLAIMANT's great experience in shipment of frozen semen. When RESPONDENT first proposed to include a DDP delivery term into the contract, such an intent was clear enough. RESPONDENT wrote that, 'given the urgency of the delivery and your much greater experience in the shipment of frozen semen including the necessary export and import documentation', 'we would insist for this contract on a delivery on the basis of DDP' [*Ex. C3, p. 11*]. In response, CLAIMANT agreed with the DDP delivery term, while making explicitly clear that it would only accept such a delivery term on the condition that CLAIMANT would not take over any further risks associated with such a delivery change [*Ex. C4, p. 12*]. Therefore, the DDP term by no means imply that CLAIMANT is obliged to bear the 30% unforeseen price increase.

b. The ICC Hardship Clause, which the parties referred to, provides re-negotiation as a legal consequence for hardship.

77. The 'ICC Hardship Clause 2003', is intended to apply to any contract which incorporates it either expressly or by reference. It is anticipated that any reference in a contract to the 'ICC Hardship

Clause' shall, in the absence of evidence to the contrary, be deemed to be a reference to the 'ICC Hardship Clause 2003' [*ICC Hardship Clause*].

78. The ICC Hardship Clause 2003 provides that when a there is a hardship, the parties are bound to negotiate alternative contractual terms which reasonably allow for the consequences of the event [*ICC Hardship Clause*].

79. In this case, the parties explicitly mention the wordings including 'ICC-Hardship clause' [*Ex. R2, p. 34*] and 'ICC hardship clause' [*Ex. R3, p. 35*]. Therefore, the parties intended to apply ICC Hardship Clause 2003 in the contract. According to ICC Hardship Clause 2003, when the tariff increase situation occurred, the parties shall negotiate alternative contractual terms related to the price.

80. In conclusion, clause 12 of the contract provides price adaptation as a remedy for hardship. Such a remedy can be implied both through parties' conduct after the hardship situation and the parties' reference to ICC Hardship Clause 2003.

3. Retaliated Tariff of Equatoriana Falls into the Category of the Term 'Hardship' in Clause 12 of the Contract

81. An imbalance in the contract might constitute a case of hardship [*CLOUT case No. 1501*]. The Belgium Supreme Court ruled in 2009 that the price increase of steel can be regarded as an economic hardship [*Steel Tubes Case*].

82. In the present case, the dramatic increase of the 30 percent tariff would make too much burden to CLAIMANT to bear, thus it constitutes a hardship circumstance and releases CLAIMANT from taking the obligation.

83. Firstly, CLAIMANT relied on a temporarily lift of the living animals' transportation ban and a low tariff of the Equatorianian Government to reach the contract. The dramatic increase of the 30% tariff was much beyond CLAIMANT's expectation, especially taking into account RESPONDENT's belief in the opportunity to make this transaction [*Ex. C8, p. 18*]. CLAIMANT explicitly expressed the intent that RESPONDENT shall bear the increase of 25% of the price as soon as knowing the tariff increase [*Ex. C7, p. 16*]. The acceptance of goods shall be regarded as RESPONDENT's acceptance of Claimant's concerns.

84. Secondly, CLAIMANT would not only earn no profit, but also suffer significant loss due to the increase of the 30% tariff. CLAIMANT was supposed to have a profit margin of 5% for the transaction. Due to CLAIMANT's great experience in the transportation of frozen semen, it could lower the risk of damages to the semen, ensure a speedy and non-problematic compliance with

export and import formalities, and provide the paperwork as required, etc. [*NoA, p. 7*].

85. The performance of shipping should not be interpreted as CLAIMANT's acceptance of paying the 30% tariff as a contractual obligation. In order to perform the obligation in good faith, CLAIMANT paid the increased tariff first instead of postponing the shipment and waiting for a shift of policy [*NoA, p. 7*]. Thus, it is RESPONDENT who shall pay back this US$ 1,250,000 to CLAIMANT as a remedy.

II. CLAIMANT Is Entitled to the Payment under CISG

86. It would be likely to find that the hardship in the present case is an issue governed but not settled under Article 79 CISG because the 30% tariff falls into the category of "impediment" and unfairly altered the equilibrium of the contract while Article 79 itself cannot expressly provide suitable remedy for the aggrieved party (**1**). Therefore, through the gap-filling technique in Article 7(2) CISG (**2**), UNIDROIT Principle applies as a general principle governing hardship and the Tribunal may therefore adapt the price (**3**).

1. Hardship Is Governed but Not Settled under CISG Article 79

87. Under Article 79(1) CISG, exemption may be granted to a party that failed to perform its obligations as a result of an 'impediment'. An impediment may be defined as any occurrence that constitutes a barrier to the performance of an obligation in accordance with the contract and the applicable law. To satisfy the requirements of Article 79 CISG, CLAIMANT shall prove that the impediment was, beyond the defaulting party's control (**a**); not foreseeable at contract conclusion (**b**), and making performance so difficult that the defaulting party could not reasonably be expected to avoid or to surmount the consequences of the impediment (**c**) [*Schlechtriem/Schwenzer p. 1071*]. As to the first requirement, the tariff increase in the present case is undoubtedly beyond CLAIMANT's control.

a. The Retaliated 30% Tariff Imposed by RESPONDENT's Country Is Beyond CLAIMENT's Control

88. Impediment would be successfully established only when the objective circumstances, which prevent the fulfilment of the contractual obligations, that show no connection to the person of the seller, are present. It must be 'an unmanageable risk or a totally exceptional event, such as force majeure, economic impossibility or excessive onerousness' [*CLOUT case No. 166*]. It should not be any personal circumstance that prevents the seller from fulfilling its obligations [*Stolen car case*].

89. Government regulations were held as an impediment where the goods could not be imported into

the buyer's country because officials would not certify their safety [*Fruit and vegetable case*].

90. As a company registered and located in Mediterraneo, CLAIMANT could by no means control the trade sanction policy of Equatoriana.

b. The Imposed Tariff Is Unforeseeable at The Time of The Conclusion of Contracts

91. In order to qualify as an 'impediment', the change of circumstances ought not to have been reasonably foreseeable at the time of the conclusion of the contract [*Steel tube case; CLOUT case 104*].

92. Admittedly, changes in commercial transactions are generally foreseeable. As noted in the Secretariat Commentary, 'All potential impediments to the performance of a contract are foreseeable to one degree or another. Such impediments as wars, storms, fires, [...] have all occurred in the past and can be expected to occur again in the future' [*Secretariat Commentary, comment 5*]. Similarly, price fluctuations are a part of the normal business risk all buyers and sellers have to bear. However, this does not mean that any and all price fluctuations are foreseeable: there is a limit to which a party should have reasonably taken them into account, and this is where Article 79(1) CISG draws the line of exemption.

93. Foreseeability is judged against the background of an objective standard. According to Article 8(2) CISG, it is the reasonable person of the same kind in the position of the obligor, which has to be taken into account [*Schleichtreim/Schwenzer, p. 1076*]. In the present case, the 30 percent tariff imposition was by no means foreseeable to a reasonable person of the same kind in the position of CLAIMANT. First, RESPONDENT'S country, Equatoriana, has always been an ardent supporter of free trade [Ex. *C6, p. 15; NoA, p. 6*]. The Equatorianian government has always tried to resolve trade disputes amicably, especially in times, like the present, when the Prime Minister came from the Progressive Liberals. In fact, Equatoriana only took retaliatory measures once. That was during the time when the Equatorianian Government was under a Prime Minister from the National Party, which is rather critical to free trade [*Ex. C6, p. 15; NoA, p. 7*]. Second, the horse racing industry is extremely popular in Equatoriana. In Equatoriana, the growth rate of the connected business sector has in the last five years never been below 4 percent per year [*NoA, p. 5*]. More specifically, Equatoriana has just lifted the ban on artificial insemination for race horses. This permission was intended to recover serious losses in racehorse breeding caused by the latest foot and mouth disease crisis in Equatoriana. Although the permission was temporary, RESPONDENT told CLAIMANT that it confidently believed that this temporary permission would become permanent [*Ex. C1, p. 9*].

94. RESPONDENT might argue that the retaliation was triggered by Mediterraneo's tariff policy as

to Equatoriana. However, this policy came as a complete surprise to CLAIMANT as well. For years, the system of free trade has been on a steady and continuous growth [*Ex. C6, p. 15*]. Although Equatoriana's new President previously announced a certain preference for a more protectionist approach as to agriculture sector, 25 percent tariff had neither been part of any strategy papers released earlier by the new President nor of the election manifesto. [*Ex. C9, p. 6*] Most analysts regarded that the measures "went beyond the worst expectations" [*Ex. C6, p. 15*]. The measures are more likely to be some strategies as to national security put forward by the new President, rather than a normal adjustment as to tariff controversies [*Ex. C6, p. 15*].

95. In conclusion, the 30 percent tariff increase, unlike normal price fluctuations in commercial markets, is an unforeseeable government retaliation measure. The 25 percent tariff imposed by Equatoriana's newly selected President is a total surprise. So is the 30 percent tariff as a retaliation imposed by Mediterraneo, of which Prime Minister came from a liberal party which long embraced free trade.

96. Although some courts may consider the significant fluctuations of the market price as foreseeable aspects of international trade, and the losses they produce are part of the 'normal risk of commercial activities' [*Vital Berry Marketing v. Dira-Frost*] and the seller should bear the risk of market prices [*Tomato concentrate case; CLOUT case No. 480*].

97. However, in the present case, even if the market price ought to have been taken into consideration by both parties, the possibility of the dramatic and sudden change of the customary policy on semen should not have been reasonably taken into account when the contract was concluded.

c. Unavoidability of the Tariff and Its Consequences

98. An impediment is one that the party could not reasonably be expected to have avoided. If parties may be reasonably expected to have avoided or surmounted the impediments, and thus to have fulfilled their contractual obligations, no impediment would be found by the tribunal [*Vine wax case*]. An impediment may make the performance of the contract involve an extraordinary and disproportionate burden under the circumstances [*Steel tubes case*]. "Impossibility standard" is applied to decide whether the party is able to overcome the alleged impediment. [*Tomato concentrate case; Vital Berry Marketing v. Dira-Frost*]

99. In some cases, tribunals would consider whether it is still possible for the party to render a similar performance that amounts to a "commercially reasonable substitute." [*Macromex Srl. v. Globex International Inc.*]. This duty derives from the principle that a party is generally obliged to fulfill the contract if it is at all possible. The obligor should have such a right as long as the substitute does not differ substantially from the original obligation [*Commentary CISG, p. 1077*].

100. In the present case, it would be likely to find that CLAIMANT should not be reasonably expected to overcome the 30 percent tariff and its consequences.

101. Firstly, were the 30 percent tariff burdened on CLAIMANT, CLAIMANT would not only earn no profit, but also suffer significant loss. CLAIMANT was supposed to have a profit margin of 5 percent for the transaction. Due to CLAIMANT's great experience in the transportation of frozen semen, it could lower the risk of damages to the semen, ensure a speedy and non-problematic compliance with export and import formalities, and provide the paperwork as required, etc. To any diligent merchant in the same place, the unexpected 25 percent loss would be extraordinarily disproportionate to CLAIMANT'S contribution to the transaction.

102. Unlike the *tomato concentrate* Case, where the reduction of tomato supplies as well as their increased cost were impediments that seller could overcome because of the rise in the tomato market price [*Tomato concentrate case*], 30 percent tariff could not be overcome by CLAIMANT. CLAIMANT has suffered great difficulty in finance in the last two years [*Ex. C8, p. 17*]. It was impossible for CLAIMANT to shoulder the additional tariff, which equals US $ 1,500,000 and had to be paid immediately.

103. Secondly, there is no commercially reasonable substitute in this case. The only possible ways for CLAIMANT to overcome consequences of the tariff increase are: postpone the shipment, waiting for a shift of policy; or change the subject to foals, which are not animal products. However, both solutions would alternate substantially the original obligation, and are not legally permitted.

2. While the hardship situation is governed but not settled by Art.79 CISG, Art. 7(2) CISG promotes a technique to fill this gap

104. Article 79(5) leaves the possibility to resort to other proper remedies for the aggrieved party. Hardship in this case is governed by CISG but it does not expressly provide answers. Pursuant to Article 7(2) CISG, questions concerning matters governed by CISG which are not expressly settled in it are to be settled in conformity with the general principles or the applicable law.

3. UNIDROIT Principle applies to fill the gap according to Article 7(2) of CISG, and the Tribunal may therefore adapt the price

a. UNIDROIT Principles applies to fill the gap, either as general principles or as domestic law

105. The 'governed-but-not-settled' gap should be filled with the Convention's general principles first [*Second-hand tractor case*]. Several courts and tribunals held that, the UNIDROIT 'Principles are principles in the sense of article 7(2) CISG' [*ICC Case No. 9117; CME v. Bos Fishproducts*].

106. Even if the court denied UNIDROIT Principles as general principle to be incorporated in CISG, domestic law could be resorted [*Mineral water case; Macromex Srl. v. Globex International Inc.*]. In the present case, nevertheless, the general contract law Equatoriana and Mediterraneo is exactly a 'verbaum adoption' of the UNIDROIT Principles [*PO.1, p. 52, para. 4*]. Therefore, UNIDROIT Principles is legitimately a technique that serves to fill the gap of Article 79 CISG.

b. The Tribunal may adapt the price in restoring contract equilibrium

107. The legal consequences of economic hardship that fundamentally disturb the contractual balance include an obligation by the parties to renegotiate the contract [*Steel tube case*]. Such obligation derives from the general principle of good faith contained in UNIDROIT Principles [*Art. 1.7 UNIDROIT Principles*].

108. Upon failure to reach agreement in a reasonable time, either party may resort to the Tribunal [*Art. 6.2.3 UNIDROIT Principles*]. If the Tribunal finds hardship, it may adapt the contract with a view to restoring its equilibrium [*Art 6.2.4(b) UNIDROIT Principles*].

109. In the present case, CLAIMANT contacted RESPONDENT immediately after it was informed of the tariff increase. Then the parties negotiated a price adjustment for the frozen semen. During the negotiation, Mr. Greg Shoemaker from RESPONDENT stated that urged CLAIMANT to authorize the shipment as planned. Also, Mr. Shoemaker said, "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price." [*Ex. R4, p. 36*] The contract has provided that CLAIMANT shall not be responsible for any hardship, including the additional tariff in this case. Therefore, Mr. Shoemaker's words made Ms. Napravnik believe that RESPONDENT should bear the additional costs. However, later, RESPONDENT did not admit this negotiation result.

110. RESPONDENT might argue that Mr. Shoemaker was not a lawyer and had not been involved in the negotiations of the contract. [*Ex. R4, p. 36*] However, this does not mean Mr. Shoemaker was not authorized to commit to an agreement. It would make no sense that he called CLAIMANT simply to require that the remaining 50 doses were actually delivered. As a well-educated MBA, Mr. Shoemaker clearly knew that CLAIMANT would not deliver if he rejected to pay the additional tariff [*Ex. R4, p. 36*]. Even if Mr. Shoemaker was not authorized, he should have confirmed with his superior and replied CLAIMANT. However, there is no further response from RESPONDENT denying such an agreement.

111. Upon failure to reach agreement within a reasonable time, if the tribunal finds hardship, it may adapt the contract with a view to restoring its equilibrium. [*Article 6.2.3 UNIDROIT Principles*] The extra 30% tariff destroyed CLAIMANT's profit margin of 5% [*Ex. C8, p. 17*]. Moreover, due to

several reasons, CLAIMANT has been financially difficult for CLAIMANT. Even though CLAIMANT has conducted several extensive restructuring measures and cut a considerable work force, all those efforts only made CLAIMANT be able to stay in business, needless to say paying the additional 30% tariff immediately [*Ex. C8, p. 17*].

112. Article 6.2.2 of UNIDROIT Principles draws a parallel to the "impediment" in Article 79, as argued in section 1, the tariff may constitute as a hardship because the tariff is unforeseeable and beyond the control of CLAIMANT. Nor did CLAIMANT assume the risk of an unexpected tariff. In conclusion, CLAIMANT is entitled to claim an adaptation of price under 6.2.2 UNIDROIT Principles.

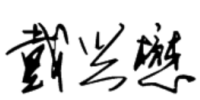
III. Conclusion

113. CLAIMANT submits that based on clause 12 of the contract, Parties' intent to include an adaptation clause under hardship circumstances would be concluded under the CISG Article 8. CLAIMANT is also entitled to the payment under Article 79 CISG. While the hardship situation is governed but not settled by Art.79 CISG, UNIDROIT Principle applies to fill the gap according to Article 7(2) of CISG, and the Tribunal may therefore adapt the price.

PRAYER FOR RELIEF

Counsel for CLAIMANT respectfully request the Tribunal:

- to exercise the jurisdiction and the powers under the arbitration agreement to adapt the contract;
- to admit the evidence on the other arbitration proceedings;
- to find that CLAIMANT is entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price.



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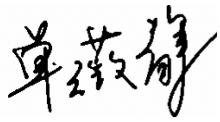

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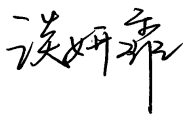

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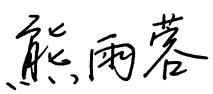

XIONG Yurong

Beijing, 6 December 2018