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International Commercial Arbitration Moot

31 March -7 April 2019, Hong Kong

MEMORANDUM FOR RESPONDENT

HKIAC/A18128

Phar Lap Allevamento v. Black Beauty Equestrian

ON BEHALF OF	AGAINST
Phar Lap Allevamento	Black Beauty Equestrian
Rue Frankel 1	2 Seabiscuit Drive
Capital city, Mediterraneo	Oceanside, Equatoriana
CLAIMANT	RESPONDENT

Yiying Tsai・Amiri Kitagawa・Shohei Takahashi・Yuki Hinomiya

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TABLE OF ABBREVIATIONS

ANoA	Answer to the Notice of Arbitration
Art(s).	Article(s)
C	CLAIMANT Exhibition
CISG	United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)
DAL	Danubian Arbitration Law
DDP	Delivered Duty Paid
e.g.	*exempli gratia*; for example (Latin)
EXW	*Ex Works*
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules 2018	HKIAC Administered Arbitration Rules 2018
IBA	International Bar Association
IBA Rules	International Bar Association Rules
Ibid.	In the same place (Latin)
ICC	International Chapter of Commerce
i.e.	*id est*; that is (Latin)
LbL	Letter by Langweiler
LbF	Letter by Fasttrack
NoA	Notice of Arbitration
No(s).	Number(s)

NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
para(s).	paragraph(s)
PO1	Procedural Order No.1
PO2	Procedural Order No.2
p(p).	page(s)
R	RESPONDENT Exhibition
supra	above
UK	United Kingdom
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2016
U.S	The United States
USD	United States Dollar
v.	versus (against)

TABLE OF AUTHORITIES

HKIAC MODEL CLAUSES	HKIAC Model Clauses Available at: http://www.hkiac.org/arbitration/model-clauses	23
ICC INTRODUCTORY NOTE	ICC Hardship Clause 2003 Introductory Note on the Application of the Clause (e), p. 17 ICC Publishing S.A.	27
ICC COMMENTS AND OBSERVATIONS 1985	Comments and observations on Hardship provisions, ICC (ed.), Force Majeure and Hardship, Paris 1985 (ICC Publ No. 421) Available at: https://www.trans-lex.org/700650/_/icc-force-majeure-and-hardship-paris-1985-/	28
JENNIFER M. BUND	Jennifer M. Bund Force majeure Clauses: Drafting Advice for the CISG Journal of Law and Commerce, Vol. 17, p. 381 (1998) Available at: http://cisgw3.law.pace.edu/cisg/biblio/bund.html	99
JOHN O. HONNOLD	John O. Honnold Excerpt from John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, 3rd edition. (1999) Available at: http://cisgw3.law.pace.edu/cisg/biblio/ho79.html	81

LOOKFOSKY	Joseph Lookofsky The 1980 United Nations Convention on Contracts for the International Sale of Goods *in* J. Herbots editor / R. Blanpain eds, International Encyclopaedia of Laws - Contracts, Suppl. 29 (December 2000) Available at: http://cisgw3.law.pace.edu/cisg/biblio/loo79.html#307	97
MICHAEL /CHIANN	Michael Moser / Chiann Bao A Guide to the HKIAC Arbitration Rules Oxford University Press, 2017	41
NIKLAS LINDSTRÖM	Niklas Lindström Changed Circumstances and Hardship in the International Sale of Goods Nordic Journal of Commercial Law, issue I (2006) Available at: http://cisgw3.law.pace.edu/cisg/biblio/lindstrom.html#ii	84
SWISS LOWER COURT	The Swedish Arbitration Act (SFS 1999:116) Section 48 Available at: https://sccinstitute.com/media/37089/the-swedish-arbitration-act.pdf	14

TABLE OF CASES AND AWARDS

SUMMARY OF FACTS

1 Phar Lap Allevamento (hereinafter "**CLAIMANT**") and Black Beauty Equestrian (hereinafter "**RESPONDENT**") are the parties to this arbitration (hereinafter "**Parties**"). The present dispute arises as a result of RESPONDENT's refusal to pay an additional payment in order to compensate CLAIMANT for the tariff imposed by Equatoriana on agricultural products from Mediterraneo.

2 On 21 March 2017, RESPONDENT contacted CLAIMANT about the availability of Nijinsky III. On 24 March 2017, CLAIMANT agreed to the request of 100 doses of Nijinsky III's frozen semen and suggested a forum choice in Mediterraneo and a choice of Mediterranian law. From 28 March 2017 to 31 March 2017, there were negotiations between the Parties on DDP (Delivery Duty Paid) delivery insisted by RESPONDENT and a hardship clause requested by CLAIMANT. On 12 April 2017, the negotiators of both Parties were injured in an accident (hereinafter "**Accident**") and had to be changed just before the final negotiation of the contract. On 6 May 2017, a contract (hereinafter "**Sales Agreement**") was concluded with the DDP delivery and hardship clause. They also agreed on arbitration administered by the Hong Kong International Arbitration Centre (hereinafter "**HKIAC**") with the seat in Danubia.

3 On 19 December 2017, due to the imposition of 25% tariffs on the products from Equatoriana by the newly elected president of Mediterraneo, the government of Equatoriana announced 30% tariffs on agricultural products (including animal semen) from Mediterraneo. This unexpected change came out just before the third shipment of frozen semen. On 20 January 2018, CLAIMANT immediately contacted RESPONDENT when it knew the new tariff rate and

requested for an additional amount. On 23 January 2018, the rest of 50 doses was delivered upon RESPONDENT's urgent demand. However, RESPONDENT refused to pay the additional amount. Because CLAIMANT is obliged to bear this burden under the DDP delivery term.

4 On 31 July 2018, CLAIMANT initiated this arbitration proceedings administered by the HKIAC before this arbitral tribunal (hereinafter "**Tribunal**").

LEGAL EVALUATION

SUMMARY OF ARGUMENTS

5 The Tribunal has neither jurisdiction nor power to adapt the Sales Agreement regardless of the law applicable to the arbitration agreement. If the Danubian law governs the arbitration agreement (*i.e.* Clause 15 of Sales Agreement) due to the separability of arbitration agreement from the underlying sales contract or as *lex arbitri*, the arbitration agreement as literally interpreted under the so-called four-corner rules of Danubian law does not grant the Tribunal any power to adjust the Sales Agreement. Even if the Danubian law applies to the arbitration agreement under Clause 14 of the Sales Agreement, the Parties intended to narrow down the scope of arbitration clause as well as of hardship clause (*i.e.* Clause 12 of the Sales Agreement) so that no adaptation of the Sales Agreement by the Tribunal is allowed. **[I.]**

6 The Tribunal should declare the evidence from an other arbitration proceeding as inadmissible, because it is in the breach of confidentiality. The Tribunal has the power to declare the evidence as inadmissible and to adopt the rules for determining the admissibility of an evidence, including the IBA Rules on the Taking of Evidence (hereinafter "**IBA Rules**") as international minimal standard. The evidence should be declared inadmissible, because it is irrelevant for the present proceeding, it was obtained in the breach of confidentiality and CLAIMANT's interest in using the evidence is trumped by third parties' interest in the protection of their confidentiality.

In this way, the Tribunal can prevent setting aside, or refusing of the recognition, of its award in the future for failing to do so. **[II.]**

7 CLAIMANT is not entitled to the payment of USD 1,250,000 under Clause 12 of the Sales Agreement, because CLAIMANT agreed on bearing the burden of any tariffs under the DDP delivery term and the 30% tariff imposed by Equatoriana does not satisfy the requirements on hardship under Clause 12. The imposed tariff is not excessively onerous, was foreseeable and could have been avoided or overcome by CLAIMANT. Furthermore, the scope of hardship in Clause 12 was intentionally narrowed down by the Parties so that the adaptation of the Sales Agreement, if any, is allowed only in exceptional cases, contrary to the present case. **[III.]**

CLAIMANT is not entitled to the additional payment of USD 1,250,000 resulting from the price adaptation under any provision of CISG either, because the Parties excluded it under Art. 6 of CISG by incorporating the hardship clause (*i.e.* Clause 12) into the Sales Agreement. Even if not, no adaptation of the Sales Agreement can be made under Art. 79 of CISG, because the burden caused by the imposed tariff does not satisfy the requirements thereof and no such exceptional remedy is justified thereunder in the present case. Moreover, neither good faith under Art. 7(1) of CISG nor any general principle upon which the CISG is based or the Danubian law under Art. 7(2) thereof can be applied in order to adapt the Sales Agreement. **[IV.]**

I. THE TRIBUNAL HAS NEITHER JURISDICTION NOR POWER TO ADAPT THE SALES AGREEMENT

8 The Tribunal has neither jurisdiction nor power to adopt the Sales Agreement, because the arbitration agreement (*i.e.* Clause 15 of the Sales Agreement) as interpreted pursuant to the Danubian law does not grant such jurisdiction or power to the Tribunal **(A)**. Even if the

Mediterranean law applies to the arbitration agreement, the Tribunal still is not empowered to adapt the Sales Agreement **(B)**.

A. The Tribunal has neither jurisdiction nor power to adapt the Sales Agreement under the arbitration agreement as interpreted pursuant to the Danubian law

9 Ignoring the principle of separability, CLAIMANT alleged to apply to the arbitration agreement the law governing the underlying contract and such approach is totally inappropriate and inadequate in the present case. Conversely, under the principle of separability, the law applicable to the arbitration agreement is the Danubian law **(1)**. Moreover, even *lex arbitri* requires to apply the Danubian law to the arbitration agreement, and not the Mediterranean law **(2)**. As the Danubian law allows only quite narrow interpretation of the arbitration agreement, the arbitration agreement does not provide the Tribunal with any jurisdiction or power to adapt the Sales Agreement **(3)**.

1. The law applicable to the arbitration agreement is Danubian law under the principle of separability

10 In the Sales Agreement the Parties agreed on the applicable law to the underlying contract, *i.e.* the sales contract itself, which is governed by the Mediterranean law. [*C5, p. 14*] Although the Sales Agreement contains no expressed clause stipulating the applicable law to the arbitration agreement, the arbitration agreement is to be governed by the Mediterranean law for several reasons.

11 In the early stages of negotiation, RESPONDENT clearly refused the application of Mediterranean law and the jurisdiction of Mediterranean courts. [*C3, p. 11*] Since the Parties reached an agreement that the underlying contracting, *i.e.* the sales contract, should be governed by Mediterranean law, it was clear to CLAIMANT that RESPONDENT would not agree on court proceedings or arbitration under the Mediterranean law simultaneously. CLAIMANT then

sent a mail to RESPONDENT that arbitration in a neutral country was acceptable. [*R2, p. 34*] A reasonable person in the position of RESPONDENT would have thought that CLAIMANT suggested arbitration in a neutral country with the applicable law of that country.

12 Moreover, in the cases where a contract does not include any express provision dealing with the law applicable to the arbitration agreement, the principle of separability applies. The separability presumption is one of the conceptual and practical cornerstones of international arbitration. [*Born, p. 350*] Pursuant to the principle of separability the decision on the governing law of the main contract does not affect the arbitration agreement, including the law applicable to the arbitration agreement, since the arbitration agreement is independent from the underlying contract. For instance, one U.S. court held that "the mutual promises to arbitrate form the *quid pro quo* of one another and constitute a separable and enforceable part of the agreement". [*Robert Lawrence*] Similarity, a UK court round that of the United Kingdom, "the […] characteristics of an arbitration agreement […] are in one sense independent of the underlying or substance contract [and] have often led to the characterization of an arbitration agreement as a 'separate contract.'" [*Westacre Invs*] Hence, the argument, which is put forward by the CLAIMANT that the negotiation of the entire contract was based on the Mediterranean law [*NoA, p. 7, para.15*] and thus the Mediterranean law should also apply to the arbitration agreement, is in the violation of the principle of separability.

13 In addition, the first draft proposed by RESPONDENT did include a governing law to the arbitration agreement which was the law of Equatoriana as the law of the seat of arbitration and was separate from the law governing the underlying contract. [*R1, p. 33*] Although CLAIMANT refused to agree on the seat of arbitration and provided another seat of arbitration, which was Danubia, it did not object to the law of the seat of arbitration as the applicable law to the arbitration agreement. Therefore, when CLAIMANT only stated in its mail that "the Sales Agreements remains the law of Mediterraneo" [*R2, p. 34*], this would have made a reasonable

person in the position of RESPONDENT think that the adjustment suggested by CLAIMANT was not made only with regard to the seat of arbitration, but also to the applicable law of arbitration agreement determined as the law of the seat of arbitration.

2. *Lex arbitri* also requires to apply Danubian law to the arbitration agreement, and not the Mediterranean law

14 Most civil law as well as common law jurisdictions apply the law of the seat of arbitration to arbitration agreements. It is deemed as more closely connected to an arbitration agreement than the law of the underlying contract. For instance, Section 48 of Swedish Arbitration Act provides that "[w]here the parties have not reached [a choice-of-law] agreement, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place". [*Swiss lower court*] Compared to the law governing the substantial issues, the law of the seat of arbitration is, no doubt, more related to the procedural issues. The application of the principle of *lex arbitri*, *i.e.* applying the law of the seat of arbitration, is thus obviously much more proper. An English appellate court therefore concluded that "an international arbitration agreement is 'more likely' to be governed by 'the law of the seat of arbitration than the law of the underlying contract,' because the arbitration agreement 'will normally have a closer and more real connection' with the place of the seat." [*C v. D*] In one arbitral decision, Swiss the law, as law of arbitral seat finally applied to the arbitration agreement, expressly refusing to apply the substantial law of the underlying contract. [*ICC Case No. 6162*] Besides, a number of arbitral awards have also applied the choice-of-law rules of the arbitral seat. [*ICC Case No. 6149; ICC Case No. 14046*]

15 In this case, the seat of arbitration is agreed to be Danubia [*C5, p. 14*] and there is no other choices of law in the Sales Agreement, except for the law governing the underlying contract, *i.e.* the sales contract. During negotiation an accident happened and interrupted Parties'

discussion on the clarification of this issue. [*R3, p. 35*] This caused that the Parties' intention was not reflected clearly enough in the final text of the Sales Agreement. In such a situation, a Japanese court found that "if the parties' will is unclear, we must presume, as it is the nature of arbitration agreements to provide for given procedures in a given place, that the parties intend that the law of the place where the arbitration proceedings are held will apply". [*Tokyo High Court*]

16 Consequently, based upon the principle of *lex arbitri*, the Danubian law should apply to the arbitration agreement.

3. Arbitration agreement as interpreted pursuant to the Danubian law does not provide the Tribunal with any jurisdiction or power to adapt the Sales Agreement

17 The Danubian law as applicable law to the arbitration agreement requires to rely on the text of arbitration agreement without taking into consideration any relevant circumstances which occurred during negotiation. This is expressed in its so-called four corner rule. [*II, PO1, p. 52; PO2, p. 61, para. 45*]

18 In the arbitration agreement (*i.e.* Clause 15 of the Sales Agreement), there is nothing where the Parties would agree on the power of Tribunal to adapt the contract. The text of the arbitration agreement itself did only allows the Tribunal to interpret the Sales Agreement, but does not mention any possibility of adapting the contract at all. As the four-corner rule in the Danubian law permits only narrow literal interpretation and does not allow considering any circumstances of negotiation, it is clear that the Tribunal has no power to adapt the Sales Agreement.

19 Moreover, according to Art. 6.2.3(4)(b) of Danubian Contract Law, power to adapt the contract is granted to the court only if it is authorized. [*PO2, p. 61, para. 45*] In the present case, there is nothing about any authorization of a court or the Tribunal either in the Sales Agreement or negotiation leading to its conclusion.

20 Consequently, the Tribunal has neither jurisdiction nor power to adapt the Sales Agreement under Clause 15 of Sales Agreement.

B. Tribunal has neither jurisdiction nor power to adapt the Sales Agreement, even if the Mediterranean Law applies to the arbitration agreement

21 Regardless of the law governing the arbitration agreement, the Parties agreed in the arbitration agreement on the limited jurisdiction and power of the Tribunal and thus the Tribunal is not empowered to adapt the Sales Agreement under the arbitration agreement **(1)**. Moreover, even if the adaptation of the Sales Agreement is only a matter of interpreting the underlying contract in the Sales Agreement, hardship clause (*i.e.* Clause 12 of the Sales Agreement) itself does not allow any adaptation of the Sales Agreement by the Tribunal in the present case **(2)**.

1. The narrow scope of the arbitration agreement does not allow any adaptation by the Tribunal

22 In Clause 15 of the Sales Agreement, the Parties agreed that "any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to […] HKIAC". [*C5, p. 14*] This demonstrates that Parties intended to limit the Tribunal's jurisdiction and power only to the interpretation of the Sales Agreement without being allowed to adapt the Sales Agreement.

23 The original draft of Clause 15 was based on HKIAC's model arbitration clause. [*R1, p. 33*] The model clause stipulates as follows: "Any dispute, controversy, difference or claim arising out of or relating to this contract, […] or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules". [*HKIAC Model Clauses*] Comparing the HKIAC model clauses with Clause 15 of the Sales Agreement, it is clear that the final text of Clause 15 does not contain wordings

such as “relating to” and “any dispute regarding non-contractual obligations arising out of or relating to”. The reason is that the Parties intended to narrow down the jurisdiction and power of the Tribunal. Accordingly, the Parties did not grant the Tribunal the jurisdiction or power to adapt the Sales Agreement, since it is not any dispute, which arises out of the Sales Agreement, *i.e.* any dispute on its interpretation, but it is a dispute about changing it.

2. The narrow scope of hardship clause does not allow the adaptation of the Sales Agreement by the Tribunal

24 Even if the decision on any adaptation of the Sales Agreement is the matter of interpretation of the underlying contract, especially of hardship clause (*i.e.* Clause 12 of the Sales Agreement), the narrow scope of this clause does not allow any adaptation of the Sales Agreement by the Tribunal.

25 Although CLAIMANT agreed on delivery under the DDP delivery term, it demanded an inclusion of the hardship clause into the Sales Agreement to prevent CLAIMANT from being responsible for changes in customs regulations or import restrictions. [*C4, p. 12*]

26 Initially, the Parties intended to rely upon the ICC Hardship Clause 2003. [*R2, p. 34*] However, RESPONDENT thought that the interpretation of the ICC Hardship Clause 2003 is too broad to be adopted in this particular sales contract. Finally, the Parties agreed on an adjusted version and inserted it into Clause 12. [*C4, p. 12; PO2, p. 56, para. 12*] This shows that both CLAIMANT and RESPONDENT had a particular agreement in mind and they were not willing to expend the scope of hardship clause. Conversely, they wanted to considerably limit it.

27 Besides, the ICC Hardship Clause 2003 does not allow any adaptation of the contract by an arbitral tribunal. Its main characteristic is contained in the fact that it is a model clause to be incorporated by parties who may find it easier to do so than to negotiate clauses on their own. The ICC Hardship Clause 2003 only allows renegotiation of a contract by the involved parties,

but does not expect any adaptation by a court or arbitral tribunal at all. The explanatory note to the ICC Hardship Clause 2003 clarifies it by stating that the clause "should encourage the parties to work out their own solutions through a general dispute resolution clause" and not with a specific resort to courts. [*ICC Introductory Note, p. 17*] Under this model clause, hardship thus results in a duty owed by both parties to take a seat at the negotiating table in order to come up with "alternative contractual terms which reasonably allow for the consequences of the event." [*Catherine Kessedjian, pp. 424-425*]

28 The elimination of the adaptation of a contract as remedy under the ICC Hardship Clause 2003 can be also observed by the comparison with its older version, *i.e.* the ICC Force Majeure Clause 1985, which expressly allowed adaptation by an arbitral tribunal. [*ICC Comments and observations on Hardship provisions 1985*] However, its most recent version is considerably restricted in this regard.

29 Accordingly, when the Parties in the present case intended to rely on the ICC Hardship Clause 2003, they did not want to empower the Tribunal to adapt the Sales Agreement in the case of any hardship. Moreover, they never discussed about any broadening of the ICC Hardship Clause 2003 in order to cover any adaptation of the contract by the Tribunal. Conversely, they were mainly expressly interested in narrowing down its scope even more and such restricted version was finally incorporated into Clause 12 of the Sales Agreement.

30 To conclude, even if the adaptation of the Sales Agreement is only a matter of interpreting the underlying contract in the Sales Agreement, hardship clause (*i.e.* Clause 12 of the Sales Agreement) itself does not allow any adaptation of the Sales Agreement by the Tribunal in the present case.

II. TRIBUNAL SHOULD DECLARE THE EVIDENCE FROM ANOTHER ARBITRATION PROCEEDING AS INADMISSIBLE

31 The Tribunal should declare the evidence from another arbitration proceeding as inadmissible, because the evidence was obtained in the breach of confidentiality. For doing so, the Tribunal has the power to declare the evidence as inadmissible **(A)**. As it also has the power to determine its procedural rules in this regard due to the lack of any agreement between the Parties in this regard, it should adopt the IBA Rules as international standard for taking evidence in arbitration proceedings **(B)**, and should declare the evidence as inadmissible under Art. 9.2 of IBA Rules **(C)**. Even if the IBA Rules are not adopted, the Tribunal should declare the evidence as inadmissible in order to prevent setting aside, or refusing of the recognition, of its award for failing to do so **(D)**.

A. Tribunal has the power to declare the evidence as inadmissible

32 The Tribunal has the power to determine its procedural rules on admissibility of evidence under Art. 22.2 of HKIAC Rules as well as Art. 19(2) of Danubian Arbitration Law (hereinafter "**DAL**"). In the present case, the Parties agreed that this arbitration proceedings will be conducted under the HKIAC Rules. [*Clause 15 of the Sales Agreement*] Although the HKIAC Rules do not expressly regulate the conditions under which a particular evidence can be admitted or declared inadmissible by the Tribunal, Art. 22.2 thereof clearly provides for that the Tribunal can decide on inadmissibility of evidence.

33 For doing so, the Tribunal has the power to determine its procedural rules on admissibility of evidence, if the Parties have not agreed on such rules. This is in line with Art. 19(2) of DAL which expressly grants to arbitral tribunals such power, *i.e.* the power to "conduct the arbitration in such manner as it considers appropriate". It includes the tribunal's "power to determine the admissibility, relevance, materiality and weight of any evidence".

34 Accordingly, as the Parties has not agreed on the procedural rules on admissibility of evidence in the present case, the Tribunal has the power to declare the evidence suggested by CLAIMANT as inadmissible as well as the power to determine its procedural rules in this regard under Art. 22.2 of HKIAC Rules and Art. 19(2) of DAL.

B. Tribunal should adopt the IBA Rules

35 The Tribunal should adopt the IBA Rules as international standard for taking evidence in arbitration proceedings. The IBA Rules are intended to present an international standard adopted by the International Bar Association (IBA) and to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between parties from different legal traditions, because they reflect procedures in use in many legal systems.

36 Although in the present case, the Parties have not agreed on the applicability of IBA Rules under Art. 1.1 thereof, the Tribunal can still decide on their applicability, because it has the power to determine its procedural rules on admissibility of evidence, if the Parties have not agreed on such rules. Under Art. 22.2 of HKIAC Rules and Art. 19(2) of DAL the Tribunal has the power to "conduct the arbitration in such manner as it considers appropriate", including the determination of "the admissibility, relevance, materiality and weight of any evidence".

37 The application of IBA Rules is thus consistent with the HKIAC Rules. Even if any conflict occurs between the IBA Rules and the HKIAC Rules, Art. 1.3 of IBA Rules requires the Tribunal to apply the IBA Rules "in the manner that it determines best in order to accomplish the purposes of both the [HKIAC Rules] and the IBA Rules […], unless the Parties agree to the contrary", what is not the case in this proceeding.

38 Consequently, the Tribunal should adopt the IBA Rules as international standard for taking evidence in arbitration proceedings.

C. Tribunal should declare the evidence from another arbitration proceeding as inadmissible under Art. 9.2 of IBA Rules

39 The Tribunal should declare the evidence from another arbitration proceeding as inadmissible under Art. 9.2(b) of IBA Rules, because the evidence was obtained in the breach of confidentiality required by Art. 45.1 of HKIAC Rules **(1)** and CLAIMANT's interest in using the evidence is trumped by the third party's interest in the protection of confidentiality **(2)**. Moreover, the Tribunal should declare that evidence as inadmissible even under Art. 9.2(a) of IBA Rules, because the evidence is irrelevant for the present proceeding **(3)**.

1. Evidence was obtained in the breach of confidentiality

40 The Tribunal should declare the evidence from another arbitration proceeding as inadmissible under Art. 9.2(b) of IBA Rules, because the evidence was obtained in the breach of confidentiality. Art. 9.2(b) of IBA Rules requires an arbitral tribunal "at the request of a Party or on its own motion [to] exclude from evidence or production any Document, statement, oral testimony or inspection for […] legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable".

41 In the present case, the evidence suggested by CLAIMANT originates from another arbitral proceeding which was also governed by the HKIAC Rules. [*PO2, p. 60, para. 39*] Under Art. 45.1(a) of HKIAC Rules, "[u]nless otherwise agreed by the parties, no party […] may public, disclose, communicate any information relating to […] the arbitration under the arbitration agreement". Even if the seat of the arbitration is in a jurisdiction where an implied duty of confidentiality is not recognized, parties can still ensure that the duty of confidentiality applies by adopting the HKIAC Rules. [*MICHAEL/CHIANN, p. 282*] Confidentiality is required for the reason that parties do not need to worry about disclosing confidential information, which may be disadvantageous for the business individuals during arbitral

proceedings. It is thus clear that the suggested evidence is confidential, and the protection of its confidentiality is an important value recognized by the HKIAC Rules which are also procedural rules in the present proceeding.

42 Moreover, the evidence suggested by CLAIMANT is not publicly available. CLAIMANT could not get access to that information about RESPONDENT's another arbitral proceeding without the breach of confidentiality. The possible ways of how CLAIMANT could obtain an access to this kind of confidential information are either through hacking into RESPONDENT's computer system or through RESPONDENT's former employees. A few months ago, such hacking into RESPONDENT's computer system, during which the hackers managed to retrieve a considerable amount of data, occurred. In addition, a few months earlier RESPONDENT terminated the contracts to two former employees and the mentioned hacking seems to be their work. [*LbF, p. 50*] Such kind of actions could even be defined as crimes or other types of illegal actions.

43 Consequently, the evidence suggested by CLAIMANT was obtained in the breach of confidentiality and therefore the Tribunal should declare the evidence from other arbitration proceedings as inadmissible under Art. 9.2(b) of IBA Rules.

2. CLAIMANT's interest in using the evidence is trumped by a third party's interest in the protection of confidentiality

44 Even if RESPONDENT wanted to agree with using the evidence suggested by CLAIMANT, the former would not be able to do so, because it owes the duty of confidentiality to the party, who was involved in that arbitral proceeding, under Art. 45.1 of HKIAC Rules. This issue is therefore not only the issue related to RESPONDENT, but also to that third party in question. RESPONDENT cannot agree under Art. 45.1 of HKIAC Rules with disclosing that information without getting any permission from the other involved party.

45 As the third party is not participating in this proceeding, it cannot directly protect its legitimate interest in confidentiality and the Tribunal should take into account its legitimate interest in the protection of confidentiality.

46 Moreover, the suggested evidence is completely unrelated to the present case and arbitral proceeding. In the best scenario, it could be used only as circumstantial evidence, and that is even highly doubtful. Furthermore, even in the case of dismissing the evidence, CLAIMANT can base its case upon other evidences, which are directly related to the present case and proceeding, and which are available to it. The evidence from the other arbitral proceeding is not the only evidence which can support CLAIMANT's claims.

47 Consequently, the legitimate interest of the third party in the protection of confidentiality trumps CLAIMANT's interest in using the evidence, especially when that evidence is completely unrelated to the present case, and thus the Tribunal should declare that evidence as inadmissible under Art. 9.2(b) of IBA Rules.

3. Evidence is irrelevant for the present proceeding

48 Even if the evidence suggested by CLAIMANT is not declared inadmissible under Art. 9.2(b) of IBA Rules, it should be declared inadmissible under Art. 9.2(a) thereof, because it is irrelevant for the present proceeding. Art. 9.2(a) of IBA Rules requires an arbitral tribunal "at the request of a Party or on its own motion [to] exclude from evidence or production any Document, statement, oral testimony or inspection for […] lack of sufficient relevance to the case or materiality to its outcome".

49 The reason of suggesting this evidence by CLAIMANT is to show that RESPONDENT has asked in another arbitral proceeding for the adaptation of a sales contract which was also affected by the same tariffs imposed by Equatoriana. However, that evidence is completely irrelevant to the present case. That case is based upon a contract that RESPONDENT concluded

with a third party without any material relationship with CLAIMANT or the Sales Agreement. Hence, there is neither direct nor indirect link between that case and the present one. Accordingly, as the awards in that case were decided upon the circumstances which were specific for the particular case, they lack sufficient relevance to the present case or materiality to its outcome.

50 The Tribunal should thus declare the evidence suggested by CLAIMANT as inadmissible Art. 9.2(a) of IBA Rules, because it is irrelevant for the present case.

D. Even if the IBA Rules are not adopted, the Tribunal should declare the evidence as inadmissible in order to prevent setting aside, or refusing of the recognition, of its award

51 If the evidence is not declared inadmissible regardless of procedural rules on admissibility of evidence, it can cause that the Tribunal's award can be set aside or its recognition in other countries can be refused for failing to do so. According to Art. 34(2)(ii) of DAL, an arbitral award may be set aside by the Danubian courts if the party making the application was "unable to present his case". Such inability can be caused by a procedural defect, which can prevent the equal treatment of parties and thus prevent the full opportunity of presenting his case by the affected party. Similarly, the courts in Mediterraneo or Equatoriana can refuse to recognize or enforce the Tribunal's award for the same reason.

52 Therefore, if the CLAIMANT is permitted to present the evidence in the breach of confidentiality, it can cause that RESPONDENT would not be able to properly and adequately present its case due to the bias toward RESPONDENT brought by using and relying on such evidence by the Tribunal. This can lead to the outcome that the Tribunal's award can be set aside in Danubia or its recognition in other countries can be refused, if the award is based on such illegal evidence and thus RESPONDENT could not enjoy the full opportunity of properly and adequately presenting its case.

III. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF USD 1,250,000 UNDER CLAUSE 12 OF THE SALES AGREEMENT

53 CLAIMANT is not entitled to the payment of USD 1,250,000 resulting from the adaptation of the purchase price under Clause 12 of the Sales Agreement, because CLAIMANT assumed the risk of any changes in tariffs under the DDP delivery term **(A)**, and the tariff imposed by Equatoriana does not amount to any hardship under the hardship clause (*i.e.* Clause 12 of the Sales Agreement) **(B)**. Even if the requirements of hardship set up in hardship clause are satisfied, no adaptation of the Sales Agreement is required under Clause 12 thereof **(C)**.

A. CLAIMANT assumed the risk of any changes in tariffs under the DDP delivery term

54 Clause 8 of the Sales Agreement requires that "Seller will ship 3 instalments DDP of Nijinsky III's 100 doses of frozen semen". [*C5, p. 14*] CLAIMANT thus assumed the risk of any changes in tariffs under this DDP delivery term, because under the DDP delivery term it undertook to bear all the costs of delivery, including any importation tariff in the country of delivery. The DDP delivery term means that the seller will accept all responsibilities such as transportation of goods, safety, tariffs, *etc.*, until the transaction is completed. In other words, by agreeing on the DDP delivery term, CLAIMANT assumed to bear the burden of such costs, including the risk of any possible changes in those costs in the future.

55 Given the urgency of the delivery and CLAIMANT's much greater experience in the shipment of frozen semen, including the necessary export and import documentation, RESPONDENT insisted for this transaction on the delivery on the basis of DDP delivery term. [*C3, p. 11*] The higher costs brought by the DDP delivery for CLAIMANT were also reflected in the increased price by USD 1,000 per dose. [*C4, p. 12, para. 3*] CLAIMANT was thus compensated for higher costs and risk of this transaction.

56 Therefore, by agreeing on the DDP delivery term, CLAIMANT assumed the risk for all the costs related to delivery, including any changes in tariffs related to the importation of the frozen semen into the country of delivery.

B. Tariff imposition by Equatoriana does not amount to hardship under Clause 12 of the Sales Agreement

57 To limit the extent of risks, which are covered by the DDP delivery term and are associated with such a change in the delivery term, in particular, those associated with changes in customs regulation or import restriction, CLAIMANT required to include a hardship clause into the Sales Agreement in order to cover unforeseeable hardship cases. [*C4, p. 12, para. 4*]

58 However, the 30% tariff imposed by Equatoriana does not amounts to any hardship under that hardship clause (*i.e.* Clause 12 of the Sales Agreement), which provides for that CLAIMANT "shall not be responsible […] for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous". [*C5, p. 4*] The reason is that the tariff in question does not present substantial difficulties for CLAIMANT **(1)**. Its imposition was foreseeable by a reasonable person in the position of CLAIMANT **(2)**. Moreover, CLAIMANT could have avoided or overcome the tariff imposition or its consequence in the present case **(*3*)**.

1. Tariff does not present substantial difficulties for CLAIMANT

59 In this transaction CLAIMANT agreed on the DDP delivery term and any change in tariffs is a normal risk to be borne by CLAIMANT as seller under that term. Contracts with the DDP delivery term generally assume such tariff changes [*Kuster, pp. 10-16*], and this transaction is not special in any way in this regard.

60 In addition, the increase in the delivery costs for CLAIMANT amounts only to 10% loss from the entire contract value, which is not so substantial. In other words, the loss of such size is a part of commercial risk normally borne in business transactions of this kind. This is confirmed by the way of how courts deal with similar cases. [*Maple Farms*] The 10% loss is thus not too onerous in similar transactions.

61 The fact that CLAIMANT is in a difficult financial situation should not be considered in this regard, since the cause of that situation is completely unrelated to the present transaction. It had occurred long time before this transaction was negotiated. [*PO2, p. 59, para. 29*] Claimant got into a bad financial situation already in 2014 due to its investment in new stables in 2013. [*ibid.*]

62 Consequently, the tariff affecting this transaction does not present the substantial difficulty making it too onerous for CLAIMANT.

2. Tariff imposition was foreseeable

63 CLAIMANT could foresee the tariff imposition in the present case for several reasons. First, Mediterranean president was elected before the conclusion of the Sales Agreement. During his election, he clearly expressed his intention of imposing tariffs on agricultural products imported from Equatoriana. [*C6, p. 15*] As Equatoriana had previously adopted retaliation measures in comparable situations, it was highly foreseeability for a reasonable person in the position of CLAIMANT that Equatoriana would have done so again in the present case. [*ibid.*]

64 Second, although the present Equatorianan government is open to free trade, retaliation measures are normal in trade disputes. Therefore, this fact even increased the foreseeability of such measures for CLAIMANT. CLAIMANT should then have considered the possibility of retaliatory tariffs in advance.

65 The tariff imposition was thus foreseeable for CLAIMANT in the present case.

3. CLAIMANT could have avoided or overcome the imposition of the tariff or its consequences

66 CLAIMANT could have adopted measures for avoiding or overcoming the imposition of the tariff or its consequences, since CLAIMANT learned about Equatorianan retaliation measure already on 20 December 2017. [*PO2, p. 58, para. 26*] However, CLAIMANT did nothing until 19 January 2018. [*C7, p. 16*] It did not even try to get any information on that measure, although frozen semen is clearly one of agricultural products.

67 As the tariff entered into force only on 15 January 2018 [*PO2, p. 58, para. 25*], CLAIMANT had enough time to adopt any measure to reduce the consequences of the tariff imposition, *e.g.* by early delivery of the third shipment before 15 January 2018. In additional, a reasonable person in the position of CLAIMANT would have tried to get more information as soon as possible in order to quickly adopt any prevention measure, but CLAIMANT did nothing. It just waited until the tariffs entered into force on 15 January 2018. In this respect, CLAIMANT has failed to try avoiding or overcoming any contractual imbalance caused by the retaliation tariff imposed by Equatoriana.

68 Moreover, the time period between 20 December 2017 and 15 January 2018 was sufficient for reducing the negative consequences of the tariffs. It is clear that CLAIMANT could get clarification of the applicability of tariffs on frozen semen within one day from custom authorities, as it is evident from the fact that CLAIMANT received such clarification so quickly, when it inquired with the custom authority on 19 January 2018 at the end. [*C7, p. 16; PO2, p. 58, para. 26*] Moreover, the delivery took no more than 2 days, since the third shipment was shipped on 22 January 2018 and delivered on 23 January 2018. [*NoA, p. 6, para. 13; C7, p. 16, para. 2*]

69 Accordingly, the time period between the announcement of tariffs and their entering into force was sufficient for CLAIMANT to take any prevention measure in order to reduce the negative consequences of the imposed tariffs. As CLAIMANT had the opportunity to improve the situation, it could have avoided or overcome the imposition of the tariff or its consequences.

C. Even if the requirements of hardship are satisfied, no adaptation of the Sales Agreement is required under its Clause 12

70 Even if the requirements of hardship set up in the hardship clause are satisfied, no adaptation of the Sales Agreement is required under its Clause 12 in the present case, because Clause 12 deals only with the liability for damages **(1)**. Furthermore, the ICC Hardship Clause 2003 upon which Clause 12 was drafted does not expect any adaptation of the contract **(2)**. Even if Clause 12 allows any adaptation, no adaptation of the Sales Agreement is justified in the present case **(3)**.

1. Clause 12 of the Sales Agreement deals only with the liability for damages

71 Clause 12 of the Sales Agreement defines its scope by stating that "[t]he Seller is not responsible for" individual cases of difficulties listed therein. [*C5, p. 14*] It is thus clear that this Clause deals with the cases where CLAIMANT's liability for damages is to be limited. Put it otherwise, if any damage occurs due to those facts enumerated in the Clause, CLAIMANT will not be responsible for it. However, the tariff imposed by Equatoriana has not caused any damage for which CLAIMANT should be responsible, it has only increased the delivery costs for CLAIMANT, since CLAIMANT undertook to deliver the goods under the DDP delivery term, under which the risk of any changes in tariffs is a normal part of the seller's risk, *i.e.* CLAIMANT's risk. Accordingly, the change in the tariff cannot be considered as un unusual case for which CLAIMANT's liability of damages should be limited, since no damage for which CLAIMANT should be held liable has ever occurred. In other words, the rise in the

delivery costs caused by the tariff imposition for CLAIMANT cannot be included amongst the damages covered by Clause 12 for which CLAIMANT is not responsible.

72 Moreover, Clause 12 of the Sales Agreement stipulates nothing about any adaptation of the Sales Agreement as remedy in the hardship cases. Although the Clause refers to hardship, no adaptation of the Sales Agreement is expressly or implicitly required thereby in order to reestablish the original balance of the transaction disturbed by the hardship.

73 Accordingly, Clause 12 of the Sales Agreement does not deal with any other cases than those where CLAIMANT has the liability for damages.

2. The ICC Hardship Clause 2003 does not expect any adaptation of the contract

74 During negotiation, CLAIMANT suggested reliance upon the ICC Hardship Clause 2003. [*R2, p. 34*] However, RESPONDENT considered the ICC Hardship Clause 2003 as too broad [*ANoA, p. 30, para. 4*], and thus the Parties agreed on narrowing down the scope of hardship clause.

75 In this regard, it should be pointed out that the ICC Hardship Clause 2003 does not allow any adaptation of the contract. It expects only two possible remedies, *i.e.* renegotiation and termination. [*ICC Force Majeure Clause 2003 and ICC Hardship Clause 2003, pp. 16-17*] In this regard, the ICC Hardship Clause 2003 considerably differs from the ICC Hardship Clause 1985, which offered four alternative options to contracting parties. The second alternative option of the ICC Hardship Clause 1985 was an adaptation of the contract. [*ICC Comments and observations on Hardship provisions 1985, para. 9*] In addition, in one ICC award the arbitrator held that the adaptation of the contract or exemption of liability cannot be enforced, unless they are specifically included in the contract between the parties. [*ICC Award No. 8873*] Therefore, the hardship clause (*i.e.* Clause 12 of the Sales Agreement) in the present case does not allow any adaptation of the Sales Agreement.

3. Even if Clause 12 allows an adaptation of the contract, no adaptation of the Sales Agreement is justified in the present case

76 Any adaptation of the contract in the hardship cases by a court or arbitral tribunal is usually justified only in extraordinary cases, since it is a significant interference into contractual relationship between private entities. The tariff imposed in the present case, including its rate, is not extraordinary. [*Louisiana; Ocean Tramp*] The 30% tariff imposed by Equatoriana is quite normal and neither surprising nor outrageous.

77 Clause 12 of the Sales Agreement expressly deals with regulatory changes. This was the main concern of CLAIMANT for incorporating this hardship clause into the Agreement, since changes in health and safety requirements could considerably increase the costs of the entire transaction. During negotiation CLAIMANT mentioned its previous negative experience with the case where the costs were increased by 40% due to the change in health regulation. [*C4, p. 12, para. 4*] In the present case, no health regulation is involved.

78 In addition, CLAIMANT has never expressed any interest in dealing with cases of changes in tariffs with regard to the hardship clause. Moreover, the increase in the costs of delivery caused by the tariff imposed by Equatoriana led only up to the 10% loss from the vale of entire transaction. Its burden is therefore within the limit of normal commercial risk under the DDP delivery term.

79 Accordingly, even if Clause 12 of the Sales Agreement allows an adaptation of the contract, no adaptation of the Sales Agreement is justified in the present case. CLAIMANT is thus not entitled to the payment of USD 1,250,000 under Clause 12 of the Sales Agreement.

IV. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF USD 1,250,000 UNDER ANY PROVISION OF CISG

80 CLAIMANT is not entitled to the payment of USD 1,250,000 under any provision of CISG, because the Parties derogated from the provisions of CISG under Art. 6 of CISG **(A).** Even if they did not do so, Art. 79 of CISG does not apply to the present case **(B)**. If it applies, the tariff imposed by Equatoriana does not satisfies the requirements of hardship thereunder **(C)**. Moreover, no adaptation of the Sales Agreement is required under Art. 79 of CISG **(D)**. Furthermore, no other provision of CISG allows any adaptation of the Sales Agreement in the present case **(E).**

A. Parties derogated from the provisions of CISG under Art. 6 of CISG

81 Art. 6 of CISG provides for that contractual parties may "derogate from or vary the effect of any of its provisions". It thus gives contractual arrangements between parties the overriding effect. In this way, parties can adapt a specific provision of CISG or alter its effect so that it fits to the needs and demands of their particular transaction. They can therefore adjust general legal rules, which are contained in the CISG and which scarcely provide clear and satisfactory answers to all the problems that can occur in any commercial transaction in the international trade, to a countless variety of circumstances and infinite gradations of difficulty and unpredictability. This is especially true in the cases of contracts concluded between private parties from different countries, because those contracts need to take into account diverse conditions and circumstances which can occur in the transactions of such kind. [*John O. Honnold*, *pp. 472-495, para. 424*]

82 In the present case, the Parties agreed on hardship clause, which was incorporated into Clause 12 of the Sales Agreement. This Clause stipulates that "Seller shall not be responsible for […] hardship, caused by additional health and safety requirements or comparable unforeseen events

making the contract more onerous". As Art. 79(1) of CISG also deals with hardship cases by providing for that "[a] party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences", the Parties, in this way, derogated from the provision under Art. 6 of CISG. They just designed their specific regime for dealing with hardship cases, which differs from the one provided for by the CISG. Especially, the requirements for hardship in Clause 12 of the Sales Agreement considerably differs from those contained in Art. 79(1) of CISG. Accordingly, as the Parties derogated from the provision of Art. 79 of CISG, CLAIMANT cannot be entitled to the payment of USD 1,250,000 under this provision, even if such remedy is allowed thereunder.

B. Art. 79 of CISG does not apply to the present case

83 Even if the Parties has not derogated from Art. 79 of CISG, this provision does not apply to the present case, because Art. 79 of CISG does not deal with hardship **(1)**, and regulates only cases where a party failed to perform **(2)**.

1. Art. 79 of CISG does not deal with hardship

84 The CISG does not contain rules that specifically deal with hardship cases, *i.e.* situations where the implementation of a contract by one party has become much more cumbersome and difficult as a result of fundamentally changed circumstances. Art. 79 of CISG only applies to the cases where a party is prevented from performing any of his obligations "due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences". This means that the "impediment" must make the performance impossible and not only more cumbersome or difficult. The fact that the performance is costlier than

originally expected by the obliged party does not amount to the impediment which prevent that party to perform the contract. This interpretation is also supported by case law dealing with the application of Art. 79 of CISG. [*Belgium 25 January 2005 Commercial Court Tongeren*] It is also advocated by commentators. [*Niklas Lindström, para. 4.1*]

85 The fact that Art. 79 of CISG does not deal with hardship cases can be also seen by its comparison with Art 6.2.2 of UNIDROIT Principles which defines the concept of hardship. Art 6.2.2 expressly refers to "the occurrence of events [which] fundamentally alters the equilibrium of the contract". The equilibrium of the contract can be altered "either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished". The concept of hardship is thus intended to solve the problem of such a radically changed situation. Contrary to the UNIDROIT Principles, Art. 79 of CISG only deals with an "impediment" which prevents the performance of a contract.

86 Consequently, Art. 79 of CISG does apply to the cases, where the performance of a contract has become only costlier for the obliged party, as it happened for CLAIMANT in the present case.

2. Art. 79 of CISG deals only with failures to perform

87 According to Art. 79(1) of CISG, "[a] party is not liable for a failure to perform any of his obligations" in the cases specified therein. It is clear from the text of this provision that it applies only to the cases where the obliged party has failed to perform the contract.

88 The present case is no case of any failure to perform. There is no question that CLAIMANT fulfilled its contractual obligation by completing all the three shipments. Although before the third shipment Equatoriana imposed the 30% tariff on agricultural products, including animal semen, from Mediterraneo and thus the performance became more burdensome and difficult for CLAIMANT, CLAIMANT could perform its obligation and actually did so. Even though CLAIMANT suffered disadvantage due to this retaliatory tariff, CLAIMANT did not default.

Accordingly, Art. 79 of CISG does not apply to the present case, because no failure to perform has occurred here.

C. The tariff imposed by Equatoriana does not satisfies the requirements of hardship under Art. 79 of CISG

89 Even if Art. 79 of CISG is applicable to the present case, the tariff imposed by Equatoriana does not satisfies the requirements of hardship thereunder, because the imposed tariff does not present any impediment for CLAIMANT to fulfill its obligations **(1)**, CLAIMANT should have foreseen the imposition of this retaliatory tariff **(2)** and could have avoided or overcome it or its consequences **(3)**.

1. The tariff does not present substantial difficulties for CLAIMANT

90 Only an impediment, which lies outside of the promisor's sphere of control and prevents the obliged person to perform the contract, can lead to the application of provisions contained in Art. 79 of CISG. The use of the term "impediment" ensures a narrow and objective understanding of the grounds for the application of these provisions. [*Niklas Lindström, para. 4.1*] Therefore, only objective circumstances that prevent performance, those external to the obliged person, can be considered as impediment within the meaning of Art. 79(1) of CISG. [*COMMENTARY, pp. 1136-1143*]

91 Since the tariff increase was carried out by the state, it can be said that it occurred beyond the control of CLAIMANT. However, the imposed tariff did not make CLAIMANT's delivery virtually impossible. In fact, CLAIMANT completed the third shipment, even though the tariff was raised.

92 Commentators often define the impediment required by Art. 79 of CISG as substantial difficulties or onerousness to perform the contract. [*Chengwei Liu, para. 4.2*] The tariff which

affected the third shipment did not amount even to this relaxed definition of impediment, since it hardly presented any substantial difficulty or onerousness for CLAIMANT. The burden presented by the tariff caused the 10% loss from the entire value of the transaction to CLAIMANT. The 10% loss is nothing unusual in business transactions and contractual parties have to bear this risk as ordinary commercial risk. Accordingly, the imposed tariff did not present any substantial difficulty or onerousness for CLAIMANT.

2. The imposition of hardship was foreseeable

93 The tariff imposed by Equatoriana in the present case also does not satisfy another requirement imposed by Art. 79 of CISG, which is foreseeability at the time of concluding the Sales Agreement. Art. 79 of CISG expressly stipulates that the obliged person "could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract".

94 In the present case, the Sales Agreement was signed on 6 May 2017. At that time, it was clear that there was a high probability of occurring a trade war in the form of imposing protectionist tariffs on agricultural products between Mediterraneo and Equatoriana. Mediterraneo's president, Ian Bouckaert, was elected on 25 April 2017. [*PO2, p. 25, para. 23*] His election program with preference for a more protectionist approach to international trade with agricultural products was announced already in January 2017. [*C6, p. 15*] Moreover, on 5 May 2017 the president appointed one of the most ardent critics of free trade as his superminister for agriculture, trade and economics. [*PO2, p. 25, para. 23*] Furthermore, although Equatoriana has always been one of the biggest supporters of free trade, it has retaliated against sanctions imposed by other countries in the past. [*C6, p. 15*] Therefore, CLAIMANT was able to foresee the retaliatory tariff imposed by Equatoriana before signing the Sales Agreement.

3. CLAIMANT could reasonably be expected to have avoided or overcome the imposition of the tariff or its consequences

95 The tariff imposed by Equatoriana in the present case also does not satisfy the requirement imposed by Art. 79 of CISG, which demands that the obliged person "could not reasonably be expected […] to have avoided or overcome [the impediment] or its consequences". Although the tariff entered into force on 15 January 2018, it had been announced already on 19 December 2017 and CLAIMANT had read about it on 20 December 2017. [*PO2, p. 58, paras. 25 and 26; C6, p. 15*] However, CLAIMANT did nothing for more than 26 days, *i.e.* until 19 January 2018, when it inquired with custom authorities for the first time in this regard. [*PO2, p. 58, para. 26*] Accordingly, CLAIMANT had an opportunity and enough time to adopt a prevention measure to avoid or overcome the imposed tariff or its consequences, *e.g.* by an early shipment, but it failed to do so. Therefore, the requirement of impossibility to avoid or overcome the impediment or its consequences as stipulated by Art. 79 of CISG is not satisfied in the present case.

D. No adaptation of the Sales Agreement is allowed under Art. 79 of CISG

96 Even if the hardship requirements are met, Art. 79 of CISG deals only with indemnification of damages **(1)**, and therefore does not allow the adaptation of the contract **(2)**.

1. Art. 79 of CISG deals only with the liability for damages

97 CLAIMANT cannot seek any adaptation of the Sales Agreement under Art. 79 of CISG, because the immunity provided thereby is limited to the liability for damages. The effect of Art. 79 is to exempt a party from liability for default due to the failure to perform the contract which is beyond the party's control, and not to adapt to the contract to reflect any price or cost fluctuations. Moreover, this exemption applies only with regards to damages. Commentators confirm this way of interpretation by pointing out that Art. 79(5) of CISG "makes it particularly

clear that […] an 'exemption' [under Art. 79 thereof] - if granted - is only an exemption from *liability*". [*Joseph Lookofsky, p. 166, para. 7*]

98 In the present case, no damages for which CLAIMANT would be liable has occurred due to the tariff imposed by Equatoriana. CLAIMANT requests RESPONDENT to pay an additional payment of USD 1,250,000 in order to cover its 25% loss suffered during the third shipment of frozen semen doses. This demand thus clearly aims at adapting the purchase price agreed in the Sales Agreement due to CLAIMANT's higher costs of shipment caused by the imposed tariff. [*NoA, p. 8, para. 20*] Accordingly, CLAIMANT's claim cannot be covered by any anticipated exemption from the liability for damages under Art. 79 of CISG. CLAIMANT is therefore not allowed to require any adaptation of the purchase price under Art. 79 of CISG, even if the requirements of hardship set up therein are met.

2. Even if Art. 79 of CISG allows the adaptation of a contract, no adaptation of the Sales Agreement is justified in the present case

99 CLAIMANT's demand to adapt the Sales Agreement is not justified, even if Art. 79 of CISG allows the adaptation of a contract. The reason is that the adaptation of a contract is an exceptional and harsh remedy due to its interference with contractual freedom of the parties. This remedy should be used only in the exceptional cases where there are no other less intrusive remedies. That is also the reason of why the adaptation of a contract by a court or arbitral tribunal is allowed after the failure of renegotiation of a contract between the parties and only as the last possible remedy to reestablish the original, substantially disturbed contractual balance. [*Jennifer M. Bund, pp. 391-392*]

100 In the present case, CLAIMANT has not even tried any less intrusive measure to prevent or avoid the application of imposed tariffs to the third shipment. [*supra, para. 95*] Moreover, the effect of imposed tariffs has not been so substantial that it would require the application of this

exceptional remedy. [*supra*, *paras. 90-92*] Therefore, even if the adaptation of a contract is allowed under Art. 79 of CISG, no adaptation of the Sales Agreement is justified in the present case.

E. No other provision of CISG allows any adaptation of the Sales Agreement in the present case

101 Even if Art. 79 of CISG itself does not allow the adaptation of a contract, such remedy is not required by any other provision of CISG either. First, good faith under Art. 7(1) of CISG does not require any adaptation of the Sales Agreement **(1)**. Second, no general principle upon which the CISG is based allows any adaptation of the Sales Agreement under Art. 7(2) of CISG **(2)**. Finally, there is no gap in the CISG which would require the application of Mediterranean law under Art. 7(2) of CISG to fill it **(3)**.

1. Good faith under Art. 7(1) of CISG does not require any adaptation of the Sales Agreement

102 There is a considerable diversity amongst countries worldwide with regard to dealing with hardship cases and allowing the adaptation of a contract as remedy. That is also the reason of why Art. 79 of CISG does not expressly allow any adaptation of a contract, because it was impossible to find agreement between countries with different legal traditions, which considerably differed in their approaches to the adaptation of a contract. As the situation has not changed significantly since adopting the CISG, it hard to argue that there is any good faith which would require such remedy in the cases of contracts for the international sale of goods.

103 Although the UNIDROIT Principles allow the adaptation of a contract, it should be pointed out that they can be applied only upon the agreement between contractual parties. Similarly, in ICC Award No. 8873, it was held that the adaptation of the contract, or exemption of liability cannot

be enforced unless specifically included in the contract between the parties [*David, p. 10-16*]. In the present case there has been no such agreement between the Parties.

104 Consequently, good faith under Art. 7(1) of CISG does not require any adaptation of the Sales Agreement without any specific agreement between the Parties which would allow the adaptation of the Sales Agreement by the Tribunal.

2. No general principle upon which the CISG is based requires any adaptation of the Sales Agreement under Art. 7(2) of CISG

105 The adaptation of the Sales Agreement cannot also be achieved by applying, under Art. 7(2) of CISG, any general principle upon which the CISG is based. With exception of Art. 52, no other provision in the CISG allows any increase in price. Moreover, Art. 52 of CISG only applies to fulfillments of excessive quantities which are accepted by buyers. The CISG therefore does not expect any increase in the purchase price without the agreement between the parties.

106 Similarly, Art. 44 of CISG allows another type of change in the price, but in that case only price reduction. Both provisions thus suggest that the CISG requires only minimal restoration of contractual balance and no price increase without any agreement between the parties. Accordingly, there is no general principle upon which the CISG is based and which application under Art. 7(2) of CISG would require the price increase against the will of any contractual party.

107 Consequently, the adaptation of the Sales Agreement is not required by any general principle upon which the CISG is based and which application would be allowed under Art. 7(2) of CISG.

3. There is no gap in the CISG which would require the application of Mediterranean law under Art. 7(2) of CISG

108 No adaptation of the Sales Agreement can also be achieved by applying the Mediterranean law under Art. 7(2) of CISG, because there is no gap with regard to hardship cases in the CISG which would need to be filled. Art. 79 of CISG expressly regulates the situations where an impediment beyond one party's control occurs and prevents that party to perform any of his obligations. As the CISG deals with such situation, there is no gap which would be necessary to be filled by applying the rules of "the law applicable by virtue of the rules of private international law" under Art. 7(2) thereof. Consequently, the Sales Agreement cannot be adapted in conformity with Mediterranean law under Art. 7(2) of CISG, because the matters of hardship cases are expressly settled by Art. 79 thereof.

REQUEST FOR RELIEF

109 In the light of the above, RESPONDENT respectfully requests the Tribunal to find that:

1) The Tribunal has neither jurisdiction nor power to adapt the Sales Agreement thereunder;

2) The evidence suggested by CLAIMANT is inadmissible for the breach of confidentiality;

3) CLAIMANT is not entitled to the additional payment in the amount of USD 1,250,000 resulting from any adaptation of the price

    a. under Clause 12 of the Sales Agreement; or

    b. under the CISG.

RESPONDENT reserves the right to amend its request for relief as may be required.

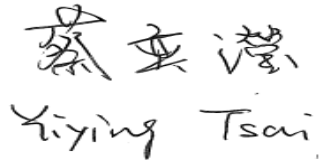
ALL OF WHICH IS RESPECTFULLY SUBMITTED ON 24 JANUARY 2019.

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate.

Sapporo, Japan

24 January 2019



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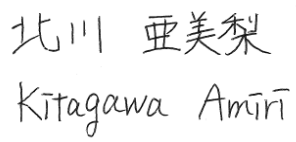

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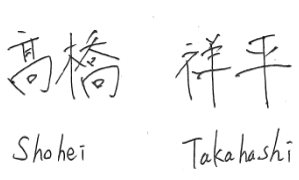

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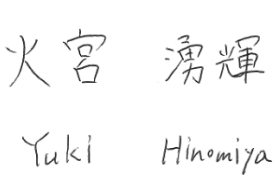

YUKI HINOMIYA