SIXTEENTH ANNUAL WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
2018-2019

MEMORANDUM FOR RESPONDENT

ROYAL UNIVERSITY OF LAW AND ECONOMICS

ON BEHALF OF:	AGAINST:
BLACK BEAUTY EQUESTRIAN	PHAR LAP ALLEVAMENTO
2 SEABISCUIT DRIVE	RUE FRANKEL 1
OCEANSIDE	CAPITAL CITY
EQUATORIANA	MEDITERRANEO
RESPONDENT	**CLAIMANT**

COUNSEL

CHAN SOWELL · HEANG NAYHEAK · POT SOKONG

SAMBO SREY NUCH · SARIN MEAS REAKSA · SENG SOKUNPISETH

SONG CHEAVEY · SUON SOKUN TEPY · THIV SEAVHORNG · TUON RAKSMEY

PHNOM PENH, CAMBODIA

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LIST OF ABBREVIATIONS

&	And
¶/¶¶	Paragraph/Paragraphs
%	Percent
Ans. Noc. Arb.	Answer to the Notice of Arbitration
Arb.	Arbitration
Art./Arts.	Article/Articles
CEO	Chief Executive Officer
Cl. Ex.	Claimant's Exhibit
Cl. Memo	Claimant's Memo
DDP	Delivered Duty Paid
Edition	ed.
Editor	Ed.
Editors	Eds.
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Mr.	Mister
Ms.	Miss
Noc. Arb	Notice of Arbitration
No.	Number
p./pp.	Page/Pages
PO 1	Procedural Order Number 1
PO 2	Procedural Order Number 2
Res. Ex.	Respondent's Exhibit
USD	United States Dollar
v.	Versus
Volume	Vol.

INDEX OF RULES AND LEGAL SOURCES

Cited as	Full citation
CISG	The United Nations Convention on Contracts for the International Sale of Goods (1980).
HKIAC Rules 2013	Hong Kong International Arbitration Centre Administered Arbitration Rules 2013.
HKIAC Rules 2018	Hong Kong International Arbitration Centre Administered Arbitration Rules 2018.
IBA Commentary	Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration (1999).
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration 2010.
INCOTERM 2010	International Commercial Terms 2010.
PECL	Principles of European Contract Law 2002.
UNCITRAL Digest on CISG	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016.
UNICITRAL Digest on MAL	UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 2012.
UNCITRAL Secretariat Guide	UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1985).
UNIDROIT Principles	UNIDROIT Principles on International Commercial Contracts (2016, ed).
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985) with Amendments as adopted in 2006.

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STATEMENT OF FACTS

The parties to this arbitration are **Phar Lap Allevamento** ("**CLAIMANT**") and **Black Beauty Equestrian** ("**RESPONDENT**"). Collectively, they are referred to as ("**THE PARTIES**").

CLAIMANT operates the oldest and most renowned stud farm in Mediterraneo and sells frozen semen of its champion stallion for artificial insemination, including Nijinsky III for artificial insemination and breeding success regarding racehorses.

RESPONDENT is well-known for its broodmare lines that have succeeded in world champion shows in Equatoriana.

21 March 2017 RESPONDENT requested CLAIMANT to sell 100 doses of Nijinsky III frozen semen.

24 March 2017 CLAIMANT sent the price (99.500 USD) per dose of frozen semen, the delivery term (to be picked up at CLAIMANT's premises), and the Standard Frozen Semen Sales Agreement.

28 March 2017 RESPONDENT agreed to most of CLAIMANT's terms in the offer except two major points: (1) the price and delivery terms and (2) applicable law and dispute resolution. RESPONDENT proposed DDP delivery term, application of Mediterranean law, and jurisdiction of Equatoriana courts.

31 March 2017 CLAIMANT accepted DDP delivery term, but increased the price per dose by 1000 USD. Due to CLAIMANT's experience with health and safety requirements associated with the changes of custom regulations, CLAIMANT suggested an inclusion of hardship clause at a minimum. CLAIMANT proposed an arbitration in Mediterraneo, but remained silent on the applicable law.

10 April 2017 RESPONDENT emailed a first draft for the dispute resolution clause, largely based on the HKIAC's model clause. The draft contained Equatoriana as the seat of arbitration and submitted the arbitration agreement law to the law of the seat.

11 April 2017 CLAIMANT responded that they were likely to accept RESPONDENT's proposal with an amendment to the seat of arbitration to Danubia. Yet, they did not reject on how the applicable law governing the arbitration agreement should be. CLAIMANT indicated Law of Mediterraneo to

govern the Sales Agreement and made a suggestion on the reliance of ICC-hardship clause dealing with the health and safety requirements.

12 April 2017 Both main negotiators met in the Annual Colt Auction in Danubia and discussed about the remaining issues. Unfortunately, after the discussion both main negotiators were seriously injured in a car accident.

06 May 2017 CLAIMANT's CEOs and RESPONDENT's head of legal department signed the Sales Agreement containing the DDP delivery term and risk allocation clauses (excuse of CLAIMANT's responsibilities under force majeure clause with an additional hardship provision). Parties also agreed on Mediterranean law, including CISG to govern the Sales Agreement, and that the seat of arbitration shall be Danubia. The performance of Sales Agreement went smoothly for the first two shipments.

15 November 2017 The newly elected president in CLAIMANT's country imposed a 25% tariff on agricultural products from RESPONDENT's country.

19 December 2017 After a short unsuccessful discussion with CLAIMANT's country, RESPONDENT's country announced the imposition of 30% tariffs on agricultural products as a direct retaliatory measure. The tariff would come into effect on 15 January 2018.

20 January 2018 CLAIMANT informed RESPONDENT about the inclusion of 30% tariffs on the frozen semen. CLAIMANT also asked to find a solution in order to authorize the shipment on 22 January 2018.

21 January 2018 Mr. Greg Shoemaker, who was responsible for the development of the racehorse-breeding program in RESPONDENT's company, responded to CLAIMANT's concern by stating, "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".

31 July 2018 CLAIMANT filed a Notice of Arbitration to HKIAC.

24 August 2018 RESPONDENT submitted an Answer to the Notice of Arbitration.

2 October 2018 CLAIMANT requested to submit the copy of Partial Interim Award and relevant submission to the Tribunal to prove that unforeseeable tariffs constitute a change in circumstances that requires contract adaptation.

3 October 2018 RESPONDENT strongly denied CLAIMANT's request as the evidence is illegally obtained either by a breach of confidentiality agreement or by a hack of RESPONDENT's computer system.

SUMMARY OF ARGUMENTS

1. **ISSUE A:** Danubian law governs the arbitration agreement and its interpretation because it is lex arbitri, and has the closest and most real connection to the agreement. Moreover, the doctrine of separability is applicable, and it differs the arbitration agreement from the main contract. Party's autonomy overrules any presumption and in any event, there is no implication of using the contract law to govern the arbitration agreement. Thus, the Arbitral Tribunal lacks jurisdiction and power to adapt the contract because of no express confer power to the Arbitral Tribunbal and the contract adaptation is not recognize in the lex arbitri. In addition, there is no wording or evidence proving about contract adaptation in the Arbitration Agreement. Furthermore, Clause 12 also does not consider as granting power to the Arbitral Tribunal to adapt the contract in this case.

2. **ISSUE B:** CLAIMANT is not entitled to submit the evidence from other arbitration proceedings on the assumption that the evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's Computer system on the ground that the CLAIMANT did not arbitrate in good faith, and the evidence should be excluded on the ground of irrelevance and immateriality. The evidence is confidential document and should not be disclosed when CLAIMANT governed by confidentiality obligation. In additional, the evidence shall be excluded on the ground of legal privilege.

3. **ISSUE C:** CLAIMANT is not entitled to the additional payment of Tariff neither under Clause 12 nor under CISG. On the ground that Clause 12 of Sales Agreement does not constitute Tariff as hardship. Clause 12 of Sales Agreement was narrowly worded since there is an additional hardship clause included into the force majorce clause. By interpreting Clause 12 on both subjective or objective interpretation of parties' intention, Tariff does not fall within the scope of Clause 12. Moreover, there is no risk allocation pointed to RESPONDENT because the contractual obligation has already ended. Likewise, CLAIMANT cannot claim remedy or any adaptation under CISG and not even under the gap filling of UNIDROIT principles. Therefore, the Sales Agreement should not be adapt and CLAIMANT is not entitled to any amount neither 1,500,000 USD nor 1,250,000 USD.

ARGUMENTS

ISSUE A

I. THE TRIBUNAL HAS NO JURISDICTION AND POWER TO ADAPT THE SALES AGREEMENT SINCE THE LAW OF DANUBIA GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION

4. This issue concerns a dispute between CLAIMANT and RESPONDENT regarding the jurisdiction and power to adapt the contract. Both parties entered into a Frozen Semen Sales Agreement as RESPONDENT was the buyer and CLAIMANT was the seller *[Cl. Ex. 5, p. 14]*. After many negotiations starting from 21 March 2017, the parties concluded their Sales Agreement on 5 May 2017 *[Ibid]*. There were three deliveries of the frozen semen with the first two conducted smoothly. The last shipment was to be on 23 January 2018, according to the Sales Agreement *[Ibid]*. However, CLAIMANT only contacted RESPONDENT and asked for a negotiation on price adaptation on 20 January 2018 due to the newly imposed 30% tariffs on agricultural products, including the frozen semen *[Cl. Ex. 7, p. 16]*. The tariff was imposed since 19 December 2017 *[Cl. Ex. 6, p. 15]*.
5. CLAIMANT argued that the Tribunal has jurisdiction and power to adapt the contract by claiming the law of Mediterraneo to govern the arbitration agreement and its interpretation *[Cl. Memo, p. 5, ⁋ 17]*. Yet, in the Sales Agreement, there is no express choice of law governing the arbitration agreement, and the parties agreed to settle disputes at the Hong Kong International Arbitration Centre (HKIAC) in Danubia *[Cl. Ex. 5, p. 14, Clause 15]*. The parties also agreed that the proceedings shall be conducted under Hong Kong Arbitration Rules 2018 *[PO 1, p. 52]*.
6. RESPONDENT respectfully requests the Tribunal to decide that the Danubian law governs the arbitration agreement and its interpretation **(A),** and the Tribunal neither have the jurisdiction nor the power under the arbitration agreement to adapt the contract **(B).**

A. DANUBIAN LAW GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION

7. CLAIMANT submitted that the parties have chosen the Mediterranean law to govern the arbitration agreement pursuant to Clause 14. In any event, the parties were presumptively intended to choose the contract law as the arbitration agreement law.

8. However, RESPONDENT requests the Tribunal to reject this submission and decide that Danubian law governs the arbitration agreement (Clause 15) and its interpretation. This is because Danubian law is *lex arbitri* and has the closest connection to the arbitration agreement **(1)**, the Doctrine of Separability is applicable which separates the Sales Agreement from the arbitration agreement **(2)**, RESPONDENT's autonomy overrides any presumption **(3)** and in any event, there is no common intention impliedly to choose Mediterranean law in the parties' negotiations **(4).**

1. Danubian law is lex arbitri and has the closest and most real connection to the arbitration agreement

9. CLAIMANT alleged that the law governing the Sales Agreement also governs the arbitration agreement in the absence of express choice of law *[Cl. Memo, p. 6, ¶ 21]*. However, through the past jurisprudence in dealing with the conflict of laws regarding arbitration agreement, there have been 15 decisions in favor of *lex arbitri*, but 13 decisions in favor of law of the contract *[Flannery, pp. 10, 11]*. It was until recently that a 'three-stage of enquiry' from *Sulamerica Case* is heavily relied on in determining the law governing the arbitration agreement. Under 'three-stage of enquiry', the court looks at whether there is an express choice, implied choice, or the closest and most real connection *[Sulamerica Case, ¶ 9]*.
10. In the present case, there is no express or implied choice of such law in the Sales Agreement *[Cl. Ex. 5, p. 14]*. CLAIMANT could have argued that the law of Mediterraneo had the closest and most real connection due to the final negotiation and conclusion of the Sales Agreement in Mediterraneo by the parties. However, practice shows that the law of the seat shall have the most real and closest connection to the arbitration agreement *[Sulamerica Case, ¶ 32; C Case, ¶ 26; Albon Case, ¶ 26; Gulf Agri Case, ¶ 31; Ashford, p. 26]*. When choose a State as the seat of arbitration, parties indirectly choose that State's law to govern the arbitration agreement *[Black Clawson Case, p. 456; Campagnie Case, pp. 604, 605; C Case, ¶ 43; FirstLink Case; Redfern & Hunter, ¶ 3.61; Poudret & Besson, ¶ 113]*. It would be rare for the law governing the arbitration agreement and the law of the seat to be different *[Ibid]*. Only if the parties have not chosen the place of arbitration will the law of contract have the closest and most real connection to the arbitration agreement *[C Case, ¶ 26]*.
11. In the present case, the parties chose Danubia as the seat of arbitration *[Cl. Ex. 5, p. 14]*. Clause 15 within the Sales Agreement constitutes the arbitration agreement, but the law governing the Sales Agreement is in Clause 14 *[Cl. Ex. 5, p. 14]*. Therefore, the law of

Danubia, being the *lex arbitri*, has the closest and most real connection to the arbitration agreement than the law of Mediterraneo.

2. The Sales Agreement is separated from the Arbitration Agreement according to the Doctrine of Separability

12. CLAIMANT alleged that Doctrine of Separability does not apply as this was not the case where the validity of the substantive part of the contract was in question *[Cl. Memo, p. 6, ¶ 21]*. Even when there is such a question, the doctrine is still applicable *[UNCITRAL Digest on MAL, p. 76, ¶ 5], regardless of* whether the place of arbitration is a neutral place *[UNCITRAL Digest on MAL, p. 76, ¶ 4; Comandate Case, ¶ 227; Siderurgica Case, ¶ 35]*. As both Danubia and Mediterraneo have adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments *[PO 1, p. 53, ¶ 4; PO 2, p. 57, ¶ 14]*, their arbitration laws recognize that the arbitration agreement shall be treated to be independent from the contract *[UNCITRAL Model Law, art. 16]*. The arbitration agreement embedded to the main agreement is considered to be separated from the contract itself *[Harbour Case, p. 44; Bagwell, p. 500]*. The arbitration agreement indicates the intention of the parties to submit their disputes to the arbitration *[Sulamerica Case, ¶ 26]*, so the purpose of the Doctrine of Separability is to give legal effect to that intention *[Ibid]*.
13. In the present case, since the parties intended to submit their dispute to the Tribunal, the Doctrine of Separability is applicable. One of its consequences is to separate the arbitration agreement from being governed by the law of the contract *[UNCITRAL Digest on MAL, p. 76, ¶ 6]*. Thus, the choice of law clause in the Sales Agreement governs only the sale part of the Sales Agreement not the arbitration agreement.

3. Party autonomy overrides the presumption that Mediterranean law is the law governing arbitration agreement

14. CLAIMANT raised that in the absence of an express choice of law governing the arbitration agreement, the parties were presumed to intend to use the law governing the substantive contract to also govern the arbitration agreement *[Cl. Memo, p. 6, ¶ 23]*. However, this presumption is not applicable in this case. Party autonomy is "the freedom of the parties to construct their contractual relationship in the way they see fit" *[Abdulhay, p. 159]*. Party autonomy is the key principle of arbitration *[Bay Hotel Case, ¶ 38; Born 2012, p. 70]*. Thus, party's autonomy overrides any assumption.
15. Having the autonomy, RESPONDENT showed the clear intention to submit the arbitration agreement to the law of the seat, law of Equatoriana, which is different from the law of the Sales Agreement, Law of Mediterraneo *[Res. Ex. 1, p. 33]*. In interpreting this intention,

Art. 8(1) of CISG states, *"... statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was"*. Art. 8(3) continues that to understand the intent of a party, *"relevant circumstances of the case including the negotiations..."* must be taken into consideration.

16. In this case, even if there is no express choice of law in the Sales Agreement, RESPONDENT made their intention known to CLAIMANT through its email during the negotiation process *[Res. Ex. 1, p. 33]*. CLAIMANT could not have been unaware of RESPONDENT's intention. Furthermore, CLAIMANT only objected to the place of arbitration and not on how the governing law of the arbitration agreement shall be the law of the seat *[Res. Ex. 2, p. 34]*. Thus, when CLAIMANT proposed the change of the arbitration seat from Equatoriana to Danubia, it means the law governing the arbitration agreement was changed from the law of Equatoriana to the law of Danubia as well. Consequently, as alleged by CLAIMANT, the presumption of intent to use substantive law as the law governing the arbitration agreement is not applicable as RESPONDENT's autonomy overrules.

4. In any event, parties' negotiations do not indicate any implied choice of the law governing the arbitration agreement

17. CLAIMANT argued that there was an implied choice as the parties' negotiations indicated the intention in favor of Mediterranean law as the law governing the arbitration agreement *[Cl. Memo, p. 8, ¶ 27]*. CLAIMANT stated that it is because the two negotiators, Mr. Antley and Ms. Napravnik, could have understood the different legal effects between Mediterranean and Danubian laws *[Cl. Memo., p. 9, ¶ 29]*. However, this is not the case. Even if Ms. Napravnik is a lawyer, she admitted that she is not familiar with the details of Danubian arbitration law, but only that it was an adoption of the UNCITRAL Model Law like Mediterranean law *[PO 2, p. 57, ¶ 14]*. Thus, she could not have known of the legal effects due to her own negligence.

18. According to CLAIMANT, Mr. Krone could not assert that he did not understand Mr. Antley's note *[Cl. Memo., p. 8, ¶ 27]*. Yet, Mr. Antley solely conducted the past negotiations, but it was impossible to get any input from him Clause 15 within the Sales Agreement *[Res. Ex. 3, p. 35]*. However, since both Mr. Krone and Mr. Ferguson had an access to the prior emails chain *[PO 2, p. 55, ¶ 5]*, they could have been aware of RESPONDENT's intention to choose the law of the seat as the arbitration agreement law *[Res. Ex. 1, p. 33]*. Because CLAIMANT did not object to RESPONDENT's intention in

the latter email *[Res. Ex. 2, p. 34],* it is reasonable to say that Mr. Krone truly misunderstood Mr. Antley's note and had no idea that the applicable law referred to the arbitration agreement law. Therefore, CLAIMANT's submission that there is an implied choice is inadmissible.

19. Overall, CLAIMANT's submissions that the arbitration agreement law is the same as the Sales Agreement law should not be admissible. In contrast, Danubian law, which is the law of the seat, governs the arbitration agreement and its interpretation.

B. THE ARBITRAL TRIBUNAL LACKS THE JURISDICTION AND POWER TO ADAPT THE CONTRACT UNDER THE ARBITRATION AGREEMENT

20. CLAIMANT raised that this Tribunal had the jurisdiction and power to adapt the agreement because a dispute falls within the scope of the arbitration agreement *[Cl. Memo. p. 9, ¶ 30]*. CLAIMANT also submitted that Tribunal has the power to adapt the Sales Agreement under Clause 12 and under the substantive law of the Sales Agreement *[Ibid]*.
21. However, RESPONDENT respectfully submits that the Arbitral Tribunal lacks jurisdiction and power to adapt the contract under the arbitration agreement under the law of Danubia **[1].** Moreover, the Arbitration Agreement does not cover contract adaptation **[2]** and Clause 12 does not confer power to adapt the contract to the Arbitral Tribunal **[3].**

1. The law of Danubia does not grant the Arbitral Tribunal jurisdiction and power to adapt the contract

22. RESPONDENT submits that according to the Danubian procedural law, the Arbitral Tribunal is required to have express consent of the parties to get conferral of power **[i].** In addition, the substantive law of Danubian does not recognize contract adaptation **[ii].**

i. The Arbitral Tribunal is required to have express consent of the parties to get conferral of power

23. Danubia has adopted UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments ("*hereinafter* Danubian Arbitration Law") *[PO. 1, p. 52]*. Art. 28(3) of Danubian Arbitration Law states "the Arbitral Tribunal shall decide *ex aequo bono* or *as amiable compositeur* only if the parties have expressly authorized it to do so". Moreover, there must be express consent from both parties in order to grant the power to the Arbitral Tribunal in order to decide *ex aequo bono* or *as amiable compositeur* under the Art. 28(3) of Danubian Arbitration Law *[Liberty Reinsurance Canada v. QBE Insurance and Reinsurance(Europe)Ltd. Case; Herboczkova, p. 2; PO. 2, p. 50, ¶36]*.

24. In commercial disputes, arbitral tribunals do not have an inherent power *[Latham &Watkins', p. 1]*. Most of the applicable arbitration rules do not grant express power to fill gaps in or to adapt contracts *[Chernick et. al., p. 241]*. Moreover, Arbitration do not have the authority, or any power to adapt, or fill the gap in the contract if both parties did not authorize *[Berger, p. 5]*. However, when both parties did not grant express power to adapt the contract, the arbitral tribunal usually determines their power depends under *lex arbitri [Jones, p. 911; Nessi]*.
25. *Lex arbitri* in this case is Danubian Arbitration Law *[Cl. Ex. 5, p. 14]*, which requires an express conferral of powers to the Arbitral Tribunal *[PO. 2, p. 60,* ¶36*]*. Moreover, RESPONDENT would not have entered into the Sales Agreement if it knows that the financial dimension had depended on arbitrators' discretion *[Ans. Noc. Arb., p. 32,* ¶ 19*]*. Thus, the Arbitral Tribunal does not get conferral power in this case as there is no express consent.

ii. The substantive law of Danubian does not recognize contract adaptation

26. The Arbitral Tribunal is competent to decide whether they have jurisdiction in accordance with Art. 19.1 of HKIAC Rules 2018. Under *"Four Corners Rule"* doctrine, outside evidence does not apply besides written contract to use to interpret intentions of the parties *[Krauss v. Utah State Dept. of Transp.]*.
27. RESPONDENT had expressed clearly that law governing the arbitration clause pursue by the seat of arbitration *[Res. Ex. 1, p. 33]*. Therefore, the applicable *lex arbitri* is Danubian Arbitration Law which is also a procedural law of the arbitration *[Born 2011, p. 692; Ferrari and Kröll, p. 396; Poudret & Besson,* ¶ *112]*.
28. Applying law of the lex arbitri is mandatory when the agreement does not state clearly about the law governing the arbitration agreement *[Moses]*. If the substantive law of the lex arbitri recognizes the contract adaptation, the place of arbitration also recognizes an arbitral tribunal's jurisdiction to adapt the contract *[Brunner 1, p. 494]*. However, Danubian Contract Law was not interpreted to authorize a contract adaptation according to four corners rule *[PO. 1, p. 51,* ¶ *II; Ans. Noc. Arb., p. 32,* ¶ *16]* that applies in, a common law country, Danubia *[PO. 2, p. 61,* ¶ *44]*. Thus, The Tribunal has no jurisdiction in this case as Danubian Contract Law does not recognize the contract adaptation.
29. CLAIMANT also stated that the HKIAC Model Clause conferred jurisdiction on a tribunal over "any dispute, controversy difference or claim arising out of or relating to this contract." *[Cl. Memo., p. 10,* ¶ *33]*. However, Clause 15 does not contain the words "controversy difference or claim" *[Cl. Ex. 5, p. 14]*. Moreover, RESPONDENT suggested the first draft

of the arbitration agreement, intentionally did not include the jurisdiction given to arbitration regarding disputes on non-contractual obligations by omitting phrases such as "relating to, dispute regarding non-contractual" that are interpreted broadly *[Julian Case]* and as empowerment for contract adaptation. Thus, the Arbitral Tribunal lacks jurisdiction to adapt the contract, according to arbitration agreement that expressly narrows the broad wording of HKIAC Model Clause.

2. The Arbitration Agreement does not cover contract adaptation

30. HKIAC model clause provides "Any dispute, controversy, difference or claim arising out of or relating to it …… regarding non-contractual obligations arising out of… the law of this arbitration clause shall be …." *[HKIAC Model Clause]*. This arbitration agreement was based on the suggested model clause by the HKIAC *[Res. Ex. 1, p. 33]*. But Clause 15 of the Sales Agreement contains "Any dispute arising out of this Sales Agreement, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to …… shall be conducted in English." *[Cl. Ex. 5, p. 14]*.
31. Non-contractual obligation is a situation where a party responsible for any loss that is not related to the performance of a contract *[Stu. G on a European Civil code, p. 28, ¶¶ 46, 69]*. In this case, RESPONDENT already paid the price of the frozen semen, and CLAIMANT also shipped the frozen semen *[Cl. Ex. 8, p. 18]*. Moreover, without *"non-contractual obligation"* in the arbitration agreement, CLAIMANT's claim for additional remuneration is not justified on the basis of an adaptation in this case. Therefore, there are no contractual disputes which the tribunal has jurisdiction over.
32. CLAIMANT may argue that Mediterranean Contract Law applies granting the power to an arbitral tribunal under Art. 6.2.3 (4)(b) *[PO. 2, p. 60, ¶ 39]*. In addition, Clause 15 is not a standard arbitration agreement because it has been omitted 3 phrases in HKIAC model clause *[Cl. Ex. 5, p. 14]*. First, Clause 15 does not contain the term "controversy, difference or claim". Second, it does not contain *"regarding non-contractual obligations arising out of"*. Third, no sentence that provides law governing the arbitration agreement. Therefore, clause 15 is different from the original HKIAC model clause, which does not grant the same powers as a court to the Arbitral Tribunal to adapt the contract.
33. Contrary to CLAIMANT allegation *[Cl. Memo., p. 9, ¶ 30]*, no wording contains contract adaptation in Arbitration Agreement based on narrow interpretation of Danubian Contract Law *[PO 1, p. 51, ¶2]*. In accordance with a narrow interpretation of arbitration agreement, the arbitration governs the issue which is under the scope of the clause that already existed *[Chelsea Family Pharmacy v. Medco Health Solutions, Inc.]*. Moreover, the arbitrator's

authority derives from the arbitration clause that expressly grants them the power *[ICSID's Journal, 421]*. Thus, Clause 12 does not contain any wording related to the Arbitral Tribunal's power to adapt the contract but it provides the remedies to terminate the contract instead *[Cl. Ex. 5, p. 14]*.

3. Clause 12 does not confer power to adapt the contract to the Arbitral Tribunal

34. CLAIMANT submitted that the common parties' intention was used to interpret the contract based on the parties' preliminary negotiations as well as the nature and purpose of the contract *[Cl. Memo., p. 11, ¶36]*.

35. Clause 12 of the Sales Agreement contains *"Sellers shall not be responsible for lost semen shipment….* acts of God *neither for hardship, caused by additional health and safety requirements…. making the contract more onerous"[Cl. Ex. 5, p. 14]*. Also, *"Four Corners Rule"* is a doctrine that outside evidence does not apply besides written contract, which is used to interpret intentions of the parties when the meaning is already clear *[Krauss v. Utah State Dept. of Transp.; Posner, p. 21-22; Becky Jo Hartell v. Roy Joseph Hartel Case]*. Danubia is a common law country *[PO. 2, p. 61, ¶44]*, applying parol evidence rule or four corners rule as the law of evidence *[Mayer, et al.]*.

36. Contrary to what CLAIMANT has argued, parties' preliminary negotiations *[Cl. Memo., p. 11, ¶36]* were dismissed under four corners rule doctrine. Even if CLAIMANT noted about Mr. Antley's statement that if the parties could not agree on the contract adaptation then it is the arbitrators' task *[Cl. Ex. 8, p. 17; Memo., p. 12, ¶37]*, but it did not reflect to RESPONDENT's intention which objected upon tribunal's discretion *[Res. Ex. 3, p. 35]*. The nature and purpose of the contract is in the application of the reasonableness test *[Commentary of UNIDROIT Principles, p. 141]*. But Four Corners Rule and Parol Evidence Rules dismiss nature and purpose of the contract because the Arbitration Agreement is clear and does not need extraneous evidence to support *[Anne Warkentine v. Salina PublicSchools; Unified School District No. 305 Case]*. On the other hand, no wording in Clause 12 of the Sales Agreement grants power to adapt the contract to the Arbitral Tribunal *[Cl. Ex. 5, p. 14]*. Thus, the extraneous evidence cannot be used to support Clause 12 as the meaning of the Sales Agreement is already clear.

37. Consequently, this Arbitral Tribunal does not have jurisdiction and power to adapt the contract under the Arbitration Agreement because Danubian Arbitration Law requires express consent from both parties in order to confer power to the Arbitral Tribunal. In addition, the Arbitration Agreement does not cover contract adaptation due to omitted wording, which provides narrow interpretation. In addition, Clause 12 of the Sales

Agreement does not constitute as conferral power to adapt the contract in accordance with Four Corners Rule Doctrine.

38. CONCLUSION FOR ISSUE A: Danubian Law governs the Arbitration Agreement and its interpretation because Danubian Law is the law of the seat and has the closest connection to the Arbitration Agreement. Moreover, the doctrine of separability separates the Arbitration Agreement from the Sales Agreement. Furthermore, the Arbitral Tribunal has neither the jurisdiction nor power to adapt the contract under the Arbitration Agreement since there is no express consent from both parties to confer the power to the Arbitral Tribunal. In addition, the Arbitration Agreement does not cover the contract adaptation and Danubian Contract Law does not recognize it. In accordance with narrow interpretation, Four Corners Rule Doctrine applies because the meaning of the Sales Agreement is already clear, so neither the Arbitration Agreement nor Clause 12 confers the power to adapt the contract.

ISSUE B

II. CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

39. CLAIMANT requested to submit the copy of award and relevant submission from other arbitration proceedings, which RESPONDENT was a party, in order to prove that the imposition of tariffs constituted to the adaptation of the contract *[Letter of Langweiler, p. 50]*. However, there is still an assumption that the award or relevant submission was obtained through a breach of confidentiality agreement or obtained from an illegal hack from RESPONDENT's computer system *[PO 2, pp. 60-61, ¶ 41]*.

40. CLAIMANT is not entitled to submit the documents from the other arbitration proceedings involving RESPONDENT and another party. On 2 October 2018, CLAIMANT expressed their intent to submit a copy of the award and relevant submissions to the Arbitral Tribunal *[Letter by Langweiler, p. 50]*. Contrary to CLAIMANT's allegation, RESPONDENT respectfully request this Tribunal to reject CLAIMANT's submission due to five grounds. First, the Tribunal should not take a permissive approach in relation to CLAIMANT's submission of the evidence **(A)**. Second, the illegal procurement of the evidence renders CLAIMANT in breach of its duty to arbitrate in good faith **(B)**. Nevertheless, the evidence should exclude on the ground of irrelevance and immateriality **(C)**. Lastly, the evidence should be excluded on the ground of confidentiality **(D)**.

A. THIS TRIBUNAL SHOULD NOT TAKE A PERMISSIVE APPROACH IN RELATION TO CLAIMANT'S SUBMISSION OF THE EVIDENCE

41. The arbitral tribunal has discretionary powers to determine the admissibility…of any evidence *[UNCITRAL Model Law 2002, Art. 19(2) and IBA Rules, Article 9(1)]*. Art. 22.2 of HKIAC Rules 2018 goes further by even grating the arbitral tribunal to apply strict rules of evidence. As CLAIMANT did not object the application of IBA Rules *[Cl. Memo., p. 15, ¶47*], RESPONDENT would like to request this Arbitral Tribunal to also consider the application of this IBA rules in supplement to the existing procedural rules. Art. 9(2) (g) of IBA Rules 2010 states *"the Arbitral Tribunal should exclude evidence any document related to fairness or equality of the Parties. Fairness means the equality of arms where a party should not place at a substantial disadvantage or should not cause its opponent to be in disadvantage in the preparation of their case" [O' Malley, pp. 321-322, ¶ 9.116 & 9.11]*. Concerning the fairness and equality of the party, evidence gathered by a party through illegal means will be excluded from an arbitral proceeding *[Ibid]*. The unlawfully attained evidence was announced inadmissible *[Methanex Award, p. 25]*.

42. CLAIMANT argued that the Arbitral Tribunal should take the permissive approach relating the evidence and should not apply strict rule of evidence *[Cl. Memo., p. 14, ¶46-48]*. However, a permissive approach is a permission of the parties and their selected arbitrators to execute their discretion with no or only limited discretions *[Tiensuu, p. 4, ¶ 2]*.

43. In the present case, the intelligent company has refused to disclose the source from which it has obtained the Partial Interim Award or RESPONDENT's submission from the other arbitral proceedings *[PO 2, p. 61, ¶41]*. CLAIMANT intended to submit the Partial Interim Award or RESPONDENT's submission to this Arbitral Tribunal after CLAIMANT has bought the Partial Interim Award or RESPONDENT's submission for 1,000 USD *[PO 2, p. 61, ¶41]*. In light of the nondisclosure of the source, the Partial Interim Award or RESPONDENT's submission can be assumed to have been hacked from RESPONDENT's computer system, since RESPONDENT had used outdated firewall, which had made it easy for the hacker to enter the system *[P.O2, p. 61, ¶42]* or the Partial Interim Award or RESPONDENT's submission can be assumed to have been taken by one of RESPONDENT's two former employees who had, prior their dismissal, served as witnesses in the other arbitral proceedings where they were obligated to keep all information confidential *[P.O2, p. 61, ¶42]*. As such, the Partial Interim Award or RESPONDENT's submission is unlawfully obtained. The permission of the admittance of such evidence by

this Arbitral Tribunal will breach the principle of fairness or the equality of arms. Therefore, this Arbitral Tribunal should declare the evidence inadmissible.

B. CLAIMANT BREACHED ITS DUTY TO ARBITRATE IN GOOD FAITH BY SUBMITTING THE ILLEGAL PROCUREMENT OF EVIDENCE

44. CLAIMANT claimed that it was not a party to the illegal procurement of the evidence and that it just entered the agreement with the intelligent company to purchase the evidence after the evidence had been obtained by the intelligent company *[P.O2, pp. 60, ¶41]*. As such, the illegal behavior by third parties does not cause CLAIMANT to breach the duty to arbitrate in good faith *[Cl. Memo, p. 16, ¶50]*.

45. However, Art. 2A (1) of Danubian Arbitration Law provides for the observance of good faith. Further, IBA Rules (2010), Preamble (3), stipulates, *"The taking of evidence shall be conducted on the principles that each Party shall act in good faith…"* Good faith refers to *"rectitude, honor; criterion of conduct to which the honest behavior of subjects of the law must adapt; in bilateral relations, behavior appropriate to the expectations of the other party" [Cremades, p. 768, ¶1].* It is particularly important that the parties are obliged to arbitrate in good faith *[Born 2009, p. 1012, ¶ 1]*. In fact, *"…an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration…" [Libananco Case, p. 37, ¶78]*. It implies also that acts or omissions must be covered by a cloak of good intentions and sincerity" *[Matthias, ¶ 517].* When the party submitting the evidence abuses the good-faith obligation…, the evidence may be excluded *[Waincymer, p. 828, ¶4]*. *"One party is not thereby enabled to reap the fruits of his own dishonest conduct by enriching himself at the expense of the other" [ICC Award No. 1110, ¶21]*.

46. In the present case, CLAIMANT will submit this Arbitral Tribunal the Partial Interim Award or RESPONDENT's submission from the other arbitral proceedings after CLAIMANT has managed to obtain the Partial Award or RESPONDENT's submission through the purchase of such evidence for 1,000 USD *[PO 2, pp. 60-61, ¶41]*. CLAIMANT's intended to procure the evidence indicates CLAIMANT's disloyal, dishonest and insincere behaviour for the purpose of deceiving RESPONDENT. The parties are obliged to arbitrate in good faith. Furthermore, the parties are under the duty to keep documents and information related to this Arbitral Proceedings confidential *[PO 2, p. 52, ¶2]*. CLAIMANT's intended behaviour will definitely delay the arbitral proceedings and, as such, violate the implied duty of to arbitrate in good faith. Further, CLAIMANT will

benefit the fruit of its dishonest as CLAIMANT entered into the agreement with the intelligent company to purchase the evidence *[PO 2, pp. 60-61, ¶21]* and intended to submit the evidence to this Arbitral Tribunal *[Letter by Langweiler, p. 50]*.

47. Therefore, CLAIMANT's illegal procurement of the evidence from the other arbitral proceedings causes CLAIMANT to abuse its obligation to arbitrate in good faith.

C. IRRELEVANCE OR IMMATERIALITY RENDER THE EVIDENCE INADMISSIBLE

48. CLAIMANT argued that the evidences that they obtained from the other arbitration proceedings were relevant and material to the outcome of the current issue that is arising between CLAIMANT and RESPONDENT *[Cl. Memo., p. 16, ¶53-55]*. However, such claims should be denied by the Arbitral Tribunal due to the ground of irrelevance and immateriality.

49. As stated in Art. 9.2 (a) of IBA Rules, the arbitral tribunal shall exclude evidence that is not sufficiently relevant to the case or material to its outcome.The evidence is considered as irrelevance if it is useless and not connected to the dispute *[Kessler, p. 427]*. Here, the information that obtained by CLAIMANT is irrelevant to the issue presented in the case. CLAIMANT submitted that this arbitration proceedings and other proceeding were relevant as it would suggest that the Equatoriana's retaliatory tariff constituted an unforeseeable changes of circumstance *[Cl. Memo, p. 17, ¶ 54]*. However, the current arbitration and the other arbitration proceeding are substantially different from each other. In *Watkins- Jonson Case*, after weighing the admissible of evidence, the tribunal found that the new evidence on the merit was irrelevant for the annulment process and therefore the documents that requested to submit by Claimant at the hearing shall consider as inadmissible and not relevant to the decision in the case *[Watkins- Jonson Case]*. In the present case, the reason that RESPONDENT successfully asked for an adaptation of the price in other arbitration proceedings due to the justification of the unforeseeable events happened beyond its control. Whereas, in the present case, CLAIMANT is not justified to ask for adaptation since the experience of imposition of the 25% tariff by Mediterranean government should give the awareness to the CLAIMANT. In addition, CLAIMANT failed to convince the Arbitral Tribunal of how the requested documents are relevant to the present case.

50. Immaterial evidence is the evidence that lack of sufficient information or not necessary to the outcome of the issue *[O' Malley, pp. 57-58]*. The arbitral tribunal may reject any evidences or documents if it is immaterial to the final award *[Ibid]*. In *Military Case*, the

Court of Netherland released the decision that the request to submit extra evidence was denied on the basis that the tribunal had issued a preliminary finding on the matters in relation to which the petitioning party sought to submit evidence. Therefore, the new evidence would not affect the final award *[Military Case]*. In the present case, CLAIMANT requested to submit the awards that RESPONDENT had with one of its customers concerning the sale of a promising mare to Mediterraneo *[PO 2, p. 50]*. However, there are distinctions between this arbitration with another arbitration proceeding. First, the other arbitration had a choice of law in favor of Mediterranean law and model HKIAC-Arbitration clause with all addition and contained with ICC hardship clause 2003 *[PO 2, p. 60, ¶ 39]*.

51. On the other hand, the applicable laws governing the arbitration agreement in this present case and its interpretation are still in dispute. In fact, the applicable laws governing the arbitration agreement and its interpretation should be Danubian Law as demonstrated in submission [A] in ¶¶ 7-19, *"The Law Of Danubia Governs The Arbitration Agreement And Its Interpretation"*. Since the two proceedings apply two different laws, it is not necessary to the outcome of the case. In addition, the award from the other arbitral proceedings which obtained by CLAIMANT is a partial interim award and not a final award. Thus, the partial interim award from the other proceeding is not reliable since it could be different from the final one. In addition, the Mediterranean law that governed the other arbitration proceedings contained an ICC Hardship Clause 2003 and Art. 6.2.3 of the Mediterranean Contract Law *[PO 2, p.60, ¶ 39]*. In contrast, the Danubian law of the present case adheres the Four Corners Rule in the interpretation of the contract.

52. To conclude, the evidence obtained by CLAIMANT is not relevant to the issue that arise between CLAIMANT and RESPONDENT and not material to the outcome of the case. Therefore, the Tribunal should exclude CLAIMANT's submission.

D. THE EVIDENCE SHOULD BE EXCLUDED ON THE GROUND OF CONFIDENTIALITY

53. After CLAIMANT requested to submit the copy of the Partial Interim Award, RESPONDENT raised the duty of confidentiality that stated under HKIAC Rules to express that CLAIMANT was bound by the confidentiality obligation *[Letter of Fasttrack, p. 50]*. CLAIMANT argued that the confidential matter would not lead to the inadmissibility of evidence *[Cl. Memo., p. 17, ¶56]*. However, CLAIMANT is not entitled to submit the evidence to the Arbitral Tribunal because CLAIMANT is bound by the duty of confidentiality **[1],** the Partial Interim Award which is the confidential document should not

be disclosed **[2],** also the Partial Interim Award and other relevant submission is considered as privilege document, which should be excluded from the submission [3].

1. CLAIMANT is bound by the Duty of Confidentiality

54. CLAIMANT argued that as a third party CLAIMANT was not bound by the duty of confidentiality of the award that stated in Art. 42(1) of HKIAC Rules 2013 *(Art. 45(1) of HKIAC Rules 2018) [Cl. Memo, p. 18, ¶57].* CLAIMANT is obliged to respect the nature of confidentiality of commercial arbitration since HKIAC Rules express the duty of confidentiality of the arbitration proceedings *[HKIAC Rules 2018, Art. 45].* Parties usually settle their dispute in the arbitration because of its nature of the private proceedings *[Blackaby & Partasides, p. 164, ¶ 2.164,].* Also, privacy and confidentiality of arbitral proceeding always go together *[Ghosh].* In fact, the privacy of arbitral proceeding is to maintain the confidentiality and prevent third parties from access the arbitration information *[Born 2009, pp 2612-2613].* The privacy of arbitral proceeding prevents third parties from accessing any kind of information of the proceedings and keeps third parties out of the dispute *[Ghosh; Lovinfosse, pp 13-14].*

55. Furthermore, the duty of confidentiality binds any person who acknowledges and accesses the confidential information *[Nahan, p. 271].* The confidentiality applies to keep things in secret and it applies to parties, arbitrators, witnesses, experts and third parties from gaining access to information in arbitral proceeding *[Fabian, pp.4-5; Alexander, p. 5].*

56. In *Glidepath BV v Thompson*, a third party requested to access and used the confidential document in arbitration proceeding with the purpose of submitting it in another arbitration *[Glidepath BV v Thompson, p. 3, ¶16].* The tribunal held that a stranger should not granted the requested unless parties consented or fall under the scope of interest of justice *[Ibid, pp 3-4, ¶16 & 25]*. In the present case, CLAIMANT requested to submit the partial interim award from the other proceeding without consent from RESPONDENT nor the other party to that arbitration *[Letter of Langweiler, p. 50].* Therefore, without consent from RESPONDENT and the other parties, CLAIMANT cannot request for the submission of such evidence. Also, confidentiality under Art. 45(1) of HKIAC Rules 2018 binds RESPONDENT and other parties including the two arbitral tribunals and HKIAC.

2. The Award is Still Considered as Confidential Document and Shall Not be Disclosed

57. CLAIMANT alleged that the award was no longer confidential because it had been disclosed to the company *[Cl. Memo. p. 18].* However, the award is still confidential even though it has been disclosed to a company that promised to sell the award to CLAIMANT.

The confidential document lost its confidential status only when it entered the public domain *[Williams]*. The tribunal authorized to admit the confidential document only when the confidential document entered the public domain or available in public *[Caratube Award, pp. 42-43, ¶150-156]*.

58. Unlike in some cases, the tribunal allowed party to submit as an evidence if the document was available to obtain on the website *[Caratube case, pp. 42-43, ¶150-156; Yukos award, p. 391, ¶1223]*. On the contrary, in the present case, the award is still considered as confidential document because it was not available on any website that CLAIMANT is able to access. However, CLAIMANT used 1000 USD to buy the award from a company *[PO 2, pp 61-62, ¶41]*. If the award is no longer confidential, then CLAIMANT would be able to access the award. However, CLAIMANT is not allowed to access the award because the award from other arbitration is still a confidential document.
59. Therefore, CLAIMANT is bound by the duty of confidentiality and the award, which is the confidential document, shall not be disclosed. Hence, CLAIMANT is not entitled to submit the evidence to the tribunal.

3. The Evidence is Inadmissible as it Contained the Privilege Information

60. CLAMANT raised Art. 9.2 (e) of IBA Rules dealings with the exclusion of evidence due to commercial or technically sensitive information *[Cl. Memo., p.18, ¶59]*. However, RESPONDENT does not dispute about this particular point as it is irrelevant to the case. On the other hand, what justifies the exclusion of this evidence under IBA Rules is the exclusion of evidence based on privilege information as stated in Art. 9.2 (b) of IBA Rules. Even if the evidence is relevant and reliable, the evidence that is contrary to the international public policy or protected by a privilege or trade secret is considered as inadmissible and shall not be allowed to introduce to the court *[Pikov, p. 150]*.
61. Art. 9.2 (b) of IBA Rules states that the evidence that covered by privilege shall be excluded *[IBA commentary, p. 25]*. Privilege means "*a legally recognized right withhold testimonial or documentary evidence from a legal proceeding including the right to prevent another from disclosing such information" [Satter, p. 9; Niemela, p.5]*. Privilege matters allow a person to refuse certain information even though it is relevant or reliable *[M. Mosk & Ginburg, p. 345]*. The evidence that subjects to a privilege shall be inadmissible in commercial arbitration *[Shaughnessy, p. 452]*.
62. The tribunal denied claimant's request for evidentiary production as the production of evidence would be burdensome since it was protected by privilege information *[Glamis*

Gold Case, ¶24]. And the tribunal decided to deny the evidence production *[Glamis Gold Award, ¶208]*. In several cases, the tribunals concluded that all privilege documents or information shall be excluded as evidence *[Libananco Case, p. 42, ¶1.1.6 & 1.1.7]*.

63. In the present case, CLAIMANT requested to submit the copy of award of another arbitral proceeding *[Letter by Langweiler, p. 50]*. The award that CLAIMANT requested consisted of privilege information because it contained the arbitrators' reasons, name of the parties, the commercial and trade secret of the parties. Therefore, the evidence shall be inadmissible on the ground of privilege information.
64. CONCLUSION FOR ISSUE B: CLAIMANT is not entitled to submit the evidence as this Arbitral Tribunal should apply strict evidence rules under HKIAC Rules 2018 and thereby justify the inapplicability of permissive approach. Also, CLAIMANT's action by submitting this evidence breach its duty to arbitrate in good faith. In fact, the Arbitral Tribunal should reject CLAIMANT's submission as the evidence is irrelevant and immaterial to the case and governed by the confidentiality obligation.

ISSUE C

III. CLAIMANT IS NOT ENTITLED TO THE ADDITIONAL PAYMENT OF THE TARIFF NEITHER UNDER CLAUSE 12 OF THE SALES AGREEMENT NOR CISG

65. During the conclusion of the Sales Agreement, CLAIMANT and RESPONDENT mutually included "*changes of health and safety regulation*" due to CLAIMANT's past experiences as a ground of an additional hardship clause within the scope of Clause 12 with a narrow interpretation *[Cl. Ex. 4, p. 12; PO 2, p. 59, ¶29]*. Consequently, the inclusion of hardship in Clause 12 serves as the derogation on Art. 79 of CISG. Moreover, after the conclusion of the Sales Agreement, the 25% tariff was imposed by CLAIMANT's government to RESPONDENT's country, Equatoriana *[Noc. Arb, p. 6, ¶ 9]*. Subsequently, the 30% tariff imposed back to CLAIMANT's country by RESPONDENT's government does not fall within the scope of Clause 12 or constitute hardship. RESPONDENT respectfully denies all the arguments made by CLAIMANT, and requests this Tribunal not to adapt the contract or award CLAIMANT with any payment.
66. CLAIMANT is not entitled to the payment of 1,500,000 USD under Clause 12 of Sales Agreement **(A)**. In addition, CLAIMANT is not entitled to the additional payment of 1,250,000 USD since the adaptation of the Sales Agreement is not applicable **(B).**

A. CLAIMANT IS NOT ENTITLED TO 1,500,000 USD UNDER CLAUSE 12 OF THE SALES AGREEMENT

67. CLAIMANT alleged that Tariff fell within the scope of Clause 12 of the Sales Agreement because the 30% tariff was an unforeseen event causing hardship which pointed out the risk allocation to RESPONDENT *[Cl. Memo., p. 21, ¶69]*. This submission was based on the interpretation of parties' intent under Art. 8(1), 8(2), 8(3) of CISG *[Cl. Memo., p. 21, ¶ 68]*. Because of the 30% tariff fell within the scope of Clause 12, CLAIMANT stressed that RESPONDENT breached such clause by not paying the additional Tariff *[Cl. Memo., p. 21, ¶ 67]*. However, RESPONDENT has different interpretation on the ground of Clause 12 of the Sales Agreement.

68. Clause 12 of the Sales Agreement is narrowly worded *[Ans. Noc. Arb., p.32, ¶19]* which means Tariff does not fall within the scope of Clause 12 **(1).** Moreover, CLAIMANT has raised that RESPONDENT has breached Clause 12 of the Agreement by not paying the Tariff *[Cl. Memo, p. 21, ¶ 67]*. However, because of the scope of Clause 12 did not include Tariff, there shall not be Sales Agreementual obligation pointed to RESPONDENT **(2).** Therefore, there is no risk of increasing cost allocated to RESPONDENT **(3).**

1. Tariff does not fall within the scope of Clause 12

69. Clause 12 of the Sales Agreement states that "*Seller shall not be responsible for lost semen shipments…or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" *[Cl. Ex. 5, p.14, Clause 12]*. While CLAIMANT interpreted Clause 12 to hold RESPONDENT liable for the payment of the 30% tariff, RESPONDENT has a different interpretation concerning this Clause.

70. Generally, when an agreement or a clause in the agreement is vague and open to different interpretations by parties, Art. 8 of CISG will govern the interpretation of parties' intention *[UNCITRAL Year Book 1978, p. 96]*. While Art. 8(1) of CISG deals with the subjective interpretation of parties' intention, Art. 8(2) of CISG governs the objective interpretation of parties' intent and is applicable when Art. 8(1) of CISG fails to govern *[Schlechtriem; Galston & Smit]*. In order to interpret parties' intent either under Art. 8(1) of CISG or Art. 8(2) of CISG, it is important to refer to Art. 8(3) of CISG.

71. RESPONDENT submits that the tariff does not fall within the scope of Clause 12 when applying the subjective interpretation under Art. 8(1) of CISG **(i)** or objective interpretation under Art. 8(2) of CISG **(ii)**.

i. Based on the subjective interpretation of parties' intention, Tariff does not fall within the scope of Clause 12

72. Art. 8(1) of CISG provides for a subjective test which depends on the actual common intention of the parties and that the statements and conducts of one party could be known or could not have been unware of by the other party *[Farnsworth; Magnesium Case]*. The actual intent of the parties can be determined by reviewing the words used in the contract *[Fabrics Case]*. Art. 8(3) of CISG allows the interpretation by making reference to the prior negotiation, or practice between the parties *[Chan]*.

73. In this case, both parties were experts and famous traders in the international transaction *[Noc. Arb., pp. 4&5, ¶¶. 1&4]*, meaning that both parties have been through numerous trade; therefore, both parties must have known or understood most of the International Commercial Terms specifically the DDP delivery term *[PO 2, p. 56, ¶ 10]*. In addition, CLAIMANT had experiences of selling three mares DDP *[PO 2, p. 58, ¶ 21],* and thus it should be considered that CLAIMANT had a clear knowledge about the DDP delivery terms. The term *"DDP"* refers to Delivered Duty Paid, which states that *"Seller is responsible for delivering the goods to the named place in the country of the buyer, and pays all costs in bringing the goods to the destination including import duties and taxes" [ICC INCOTERMs 2010]*. This term puts a maximum obligation to CLAIMANT (Seller) to bear all the import duties and taxes *[Ibid]*. The import duties and taxes here would also include the 30% tariff as it is the duties imposed by the government *[Resolution 71/313]*. Therefore, CLAIMANT could not have been unaware of such term included in the Sales Agreement.

74. In addition, both parties have not concluded any common intention on the question of whether tariff would be covered under Clause 12. The common intention between parties was established when "the wording was clear and unambiguous and furthermore the meaning given to the words corresponds with those a 'reasonable person' would attribute to those words" *[Zeller]*. As the main negotiators of the Sales Agreement were severely injured in a car accident on 12 April 2017 *[Noc. Arb., p. 5, ¶ 8],* Mr. Krone and Mr. Ferguson have been replaced to finalize the Sales Agreement. Both parties did not perform any subsequent conduct that could have led to a clarification to the previous negotiators' intention *[PO 2, p. 55, ¶7]*; therefore, the term in Clause 12 of the Sales Agreement does not show a clear intention of the inclusion of the word *"tariff"* into such Clause. In addition, Mr. Krone and Mr. Ferguson did agree on the narrow wording into the Clause 12 and other risks *[Res. Ex. 3, p.35]*. Should the parties had a clear intention, they both would have

included the word *"tariff"* into the contract *[Byrnes v Kendle case, ¶¶ 98 & 106]*. Thus, based on the subjective interpretation, the 30% tariff does not fall within the scope of Clause 12.

75. Although, CLAIMANT included the hardship provision into the *force majeure* clause, but it was limited only to a minimum application *[Cl. Ex. 4, p. 12]*. The phrase "*comparable unforeseen event"* in Clause 12 does not refer to all unforeseen circumstances; it should only be limited to the *"unforeseeable additional health and safety requirements"* as raised by CLAIMANT *[Cl. Ex. 4, p.12]*. CLAIMANT's intention of putting an additional hardship clause into Clause 12 was to only be excused from relevant events with regard to their past experiences caused by the additional health and safety requirement.

ii. Alternatively, based on the objective interpretation of parties' intention, Tariff does not fall within the scope of Clause 12

76. Art. 8(2) of CISG reflects the interpretation by a reasonable person in the same circumstances of the other party under the objective analysis of intent *[Schwenzer et al., p. 60; Magnesium Case; Treibacher Industries Case]*. The understanding of a reasonable person will also base on Art. 8(3) of CISG, including negotiations, established practices between the parties, usages, and any subsequent conducts of the parties *[Schlechtriem, p. 39]*.

77. In contrary to the allegation by CLAIMANT, *"the imposition of the Tariff was an unforeseen event encompassed under Clause 12" [Cl. Memo., p. 23, ¶75]*, the 30% tariff in this case is not considered as an unforeseen event since a reasonable business entity under the same circumstances would take into account that Clause 12 does not include Tariff as hardship. The phrase *"unforeseeable additional health and safety requirements"* as raised by CLAIMANT *[Cl. Ex. 4, p. 12]*, did not constitute to an *"unforeseen Tariff"*.

78. Moreover, a reasonable business entity of the same position in the same circumstances would understand that CLAIMANT agreed to be bound by DDP terms and conditions, which is to pay all of the costs in order for the goods to be delivered to RESPONDENT, when CLAIMANT accepted the DDP delivery term and increased the sales price to 1000 USD per doses *[Cl. Ex. 5, p. 14, Clause 8]*. Thus, this would also include the imposed tariff. The German Federal Court of Justice stated that *"the clause should be interpreted according to the recommendations of the International Chamber of Commerce in order to determine the system of obligations under the respective clause, even without any reference thereto, due to its common use in international trade" [Glass Fibre Cables Case]*. In this case, parties shall be bound by the DDP Incoterms 2010 since both parties agreed on including

the word DDP into the Sales Agreement *[Cl. Ex. 4, p. 12; Cl. Ex. 5, p. 14, Clause 8]*. It should be implied that CLAIMANT (Seller) should be responsible for any risks associated with the delivery itself. Hence, the 30% tariff is considered as the delivery cost of the goods to the destination of RESPONDENT.

79. Further, CLAIMANT's financial difficulty is not relevant in this case since it was merely the issue of CLAIMANT's personal interest. RESPONDENT did not cause CLAIMANT to face with the financial difficulty, but it was due to CLAIMANT's past experiences of the new strictly imposed health and safety requirement which resulted in 40% increase in performance *[PO 2, p. 58, ¶ 21]*. Moreover, before the negotiations about the price adaptation, RESPONDENT did not specifically know about CLAIMANT's financial difficulty *[PO 2. p. 58, ¶ 22]*. This would mean the situation of CLAIMANT's financial difficulty would not be taken into consideration.
80. In conclusion, the 30% tariff in this case does not fall within the scope of Clause 12 of the Sales Agreement on the ground of interpretation of both subjective and objective parties' intent.

2. RESPONDENT does not breach Clause 12 of the Sales Agreement

81. In CLAIMANT's arguments, CLAIMANT alleged that RESPONDENT had breached the Sales Agreement specifically Clause 12 because RESPONDENT did not pay the amount of the 30% tariff *[Cl. Memo, p. 21, ¶67]*. Nevertheless, in this present case, RESPONDENT did not breach Clause 12 since RESPONDENT had no obligation under this Clause.
82. Under Art. 25 of CISG, a breach of the Sales Agreement refers to the obligation arising out of such Agreement, which has not been fulfilled; however, should the performance has been completed, there will be no obligations under the Sales Agreement to be bound by *[McLaren & Bisacre]*.
83. Clause 5 of the Sales Agreement has stated that *"all fees are payable upon execution of this Agreement"* which means RESPONDENT has to pay all the fees agreed upon the Sales Agreement *[Cl. Ex. 5, p. 14, Clause 5]*. There will be no shipment unless RESPONDENT paid the first instalment of 5,000,000 USD and the second instalment of 5,000,000 USD *[Cl. Ex. 5, p. 14, Clause 6]*. RESPONDENT's obligation under this Sales Agreement was to pay the two instalments before the shipment of the frozen semen *[Cl. Ex. 5, p. 14, Clause 5]*. In this case, the contractual obligation had ended since RESPONDENT has fully paid the amount of the two instalments *[Cl. Ex. 8, p. 18]*. Therefore, there is no remedy or obligation left under this Sales Agreement for RESPONDENT to be responsible for.

84. As mentioned in ¶¶ 69-80, since the 30% tariff does not fall within the scope of Clause 12, there is no obligation for RESPONDENT to be responsible. Therefore, CLAIMANT could not use the breach of contractual obligation to claim for remuneration from RESPONDENT.

3. Clause 12 does not allocate the risks of all cost to RESPONDENT since the additional Tariff does not constitute hardship for CLAIMANT

85. RESPONDENT is not responsible for any payment of any additional cost arising from any events that does not fall under the scope of clause 12 of the Sales Agreement. This is to be considered from both subjective interpretation **(i)** and objective interpretation **(ii)** of Parties' intention under Clause 12.

i. Under subjective interpretation, RESPONDENT is not responsible for any additional cost arising that is not within the scope of Clause 12

86. Art. 8(1) of CISG reads *"For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was"*. Here, CLAIMANT claimed that CLAIMANT had expressly stated their concerns on the risks of changes and RESPONDENT could not have been unaware of its intention and of CLAIMANT's financial difficulty *[Cl. Memo. p. 24, ¶ 79,]*. However, during the pre-negotiation period, RESPONDENT had never made any acceptance to CLAIMANT's concerns on the risks of any other tariff imposition, but only replied to the dispute resolution clause *[Res. Ex. 1. P. 33]*. Further, the parties merely mentioned on their concerns of any irrelevant tariff besides the health and safety requirement because parties have never had any prior dealing with each other *[CISG, Art. 9 & Art. 18(1); PO 2. p. 55, ¶ 1]*. Subsequently, RESPONDENT had never made any conducts or agreements before and that would have constituted "silent means acceptance". Therefore, silence here could not have led to the acceptance as alleged by CLAIMANT *[CISG, Art. 18(1)]*.

87. Although, RESPONDENT did not negotiate further on the allocation of the risks in Clause 12, RESONDENT and CLAIMANT both agreed on the inclusion of the narrow reference of hardship into *force majeure* and directly incorporated other risks into the Sales Agreement *[Res. Ex. 3, p.35]*. Thus, CLAIMANT's unambiguous intention in Clause 12 should go against their own interpretation under the *contra proferentum* rule *[UNIDROIT Principles, Art. 4.6]*.

88. CLAIMANT claimed that parties' intention prevailed over the DDP delivery term *[Cl. Memo. p. 25, ¶ 81]*. However, RESPONDENT respectfully denied the claim since

CLAIMANT ought to have known the meaning and uses of the DDP delivery term when such term was incorporated into the Sales Agreement and would have contradicted with CLAIMANT's liabilities statement *[CISG, Art. 9; Paul v. Neuromed Case]*. Therefore, the common intention of risk allocation of parties has been clearly established through the Sales Agreement itself.

ii. In any event, RESPONDENT is not responsible to pay any additional cost arising that is not within the scope of clause 12 under objective interpretation

89. If the intention of Clause 12 was to be interpreted by objective intention of Art. 8(2) of CISG, Clause 12 itself only points for RESPONDENT to bear the risk only for any event arising that falls under the scope. However, CLAIMANT's financial difficulty had incurred before the Sales Agreement was concluded *[PO 2. p. 59, ¶ 29]* and were not resulted from the Sales Agreement made between the Parties. Thus, the additional Tariff itself does not amount to hardship and for that reason, it does not fall under the scope of clause 12 *[Fucci, p. 6]*.
90. Moreover, a reasonable person in the same position with the same circumstances would have understood that CLAIMANT's claimed of hardship causing by the Tariff as a *"comparable unforeseen events"* is unreasonable because the additional Tariff itself could not in itself be invoked as hardship arising out of the contract *[Edwinton v. Tsavliris (2007)]*
91. As Clause 12 is ambiguous, under the *contra proferentum* rule, the ambiguous statement should go against the intention of the party whom the statement was made *[UNIDROIT Principles, Art. 4.6]*. Therefore, the events causing hardship should not find in favor of CLAIMANT because CLAIMANT intended to include the additional provision. In *Bramall & Ogden v Sheffield City Council,* the statement made by Bramall on the liquidate damages for *"£20 per week for each unfinished dwelling"* was rather ambiguous. Since it does not shows whether the work was done as a whole or by each week, the *contra proferentum* applied *[Bramall & Ogden v. Sheffield City Council(1983)]*.
92. In light of the above circumstances, RESPONDENT should not bear the payment of USD 1,500,000 as alleged by CLAIMANT. Therefore, since CLAIMANT's hardship did not derive from the Sales Agreement, the 30% tariff does not fall within the scope of Clause 12 and does not allocate the risks to be borne by RESPONDENT.

B. CLAIMANT IS NOT ENTITLED TO THE AMOUNT OF USD 1,250,000 USD RESULTING FROM AN ADAPTATION OF THE SALES AGREEMENT

93. Since Tariff does not fall within the scope of Clause 12 of the Sales Agreement, CLAIMANT is not entitled to an adaptation of the Sales Agreement **(1).** Alternatively, under CISG, CLAIMANT is not entitled to the adaptation of the contract under CISG **(2).** Moreover, the gap filling of UNIDRIOT Principles will not govern this issue because the additional Tariff is not constituted as hardship under Art. 6.2.2 of UNIDRIOT principle **(3)**. Therefore, CLAIMANT is not entitled to the additional payment of the additional Tariff under Art. 6.2.2 and Art. 6.2.3 of UNIDRIOT principle **(4)** and under Clause 12 of the Sales Agreement **(5).**

1. Clause 12 does not entitle CLAIMANT to an adaptation of the Sales Agreement

94. CLAIMANT mentioned that the interpretations of subjective and objective intention of parties' in Clause 12 provided the adaptation of the Sales Agreement. Therefore, the Arbitral Tribunal has the residual power to adapt agreement *[Cl. Memo., p. 27, ¶¶ 88-89]*.

95. However, there is no wording expressing the contract adaptation in Clause 12. Moreover, Clause 12 cannot be interpreted as what CLAIMANT has raised because either subjective intent or objective intent of the parties ought to interpret Clause 12 as its exact wording in accordance with Four Corners Rule doctrine. This would imply that Clause 12 does not confer the power to adapt the contract which is already elaborated in **Issue A** ¶¶ 34-37. Also, the disadvantaged party cannot claim for any remuneration should the financial difficulty is resulted from their own poor management skill *[Girsberger & Zapolskis, p. 131]*.

96. Even if RESPONDENT was aware of CLAIMANT's financial difficulty, such argument cannot be raised in this case because it is not relevant in case of hardship provision in Clause 12. The financial difficulty occurred because of CLAIMANT's past experiences, not due to issue in the present case. Therefore, Clause 12 does not provide any power to the Tribunal to adapt the contract.

2. Alternatively, CLAIMANT is not entitled to an adaptation of the contract under CISG

97. Art. 6 of CISG allows for derogation or vary the effect from Art. 79 of CISG since there was an inclusion of an additional hardship clause and *force majeure* into the Clause 12 of Sales Agreement **(i)**. Alternatively, this particular circumstance is not governed by Art. 79 of CISG **(ii)**. The scope of Art. 79 only governs the circumstance referred to the *force*

majeure **(iii)**, and in this case, Tariff does not constitute as *force majeure* **(iv).** Therefore, the adaptation of the contract is not a remedy granted under Art. 79 of CISG **(v),** and thus CLAIMANT cannot request for the adaptation under this provision.

i. Article 6 of CISG allows RESPONDENT to derogate or vary the effect of Article 79 of CISG

98. CLAIMANT argued that in order to derogate or vary the effect of Art. 79 of CISG, parties' intention must be clear and that the provision included in the clause of Sales Agreement contradicted to the provision in CISG *[Cl. Memo, pp. 29-30, ¶ 97]*. RESPONDENT respectfully denied the submission because Advisory Council Opinion No. 17 had explained that it would constitute a derogation from the legal regime if the contract term directly excluded or limited the non-performing party's liability *[CISG-AC Opinion No. 17, p. 3, ¶1.1]*.

99. The situation in the present case is parallel to the *"Draft Formation Convention",* which stated that parties may opt out of CISG, *"appear from the negotiations, the offer or the reply…" [UNCITRAL Year Book 1978, p.32]*. Under the Clause 12 of Sales Agreement itself, it is undoubtedly a *force majeure* clause with an addition of hardship provision included *[Cl Memo, p.14, Clause 12]*. However, if we look at the negotiation process, RESPONDENT had proposed DDP delivery term to CLAIMANT *[Cl. Ex. 3, p. 11]*. Thereafter, CLAIMANT accepted the proposal but only requested to add an additional hardship clause only at a minimum application relating to subsequent changes to the health and safety requirement *[Cl. Ex. 4, p. 12]*. Thus, the minimum requirement would have been constituted as a limitation to CLAIMANT's itself. Thereof, this means that the present of Clause 12 itself would derogate art. 79 of CISG *[CISG-AC Opinion No. 17, p. 3, ¶1.1]*.

ii. This particular circumstance is not governed under Article 79 of CISG

100. Art.79 of CISG does not include the circumstance of hardship *[Carlsen, p.1]*. The term *"Impediment"* under Art. 79 of CISG has different meaning and interpretation from the term *"Hardship"* prescribed under Art. 6.2.2 of the UNIDROIT Principle.

101. Art. 79 of CISG uses the term *"Impediment"* to describe any events that is beyond the control of the party that have the obligation to perform the contractual obligation *[Flambouras]*. Moreover, the party cannot rely on the exemption on the grounds of the performance of their obligation has become unforeseeable and more difficult or unprofitable *[Ibid]*.

102. Hardship occurs when the performance of one of the parties becomes much more onerous and has a hard time to carry out the contractual obligation *[Flambouras]*. In order to invoke hardship, Art. 6.2.2 of the UNIDROIT Principles has set forth four fundamental elements: the circumstance needs to be out of the control of each party, the circumstance happens after both parties have concluded the contract, each parties cannot be reasonably taken into account about the change of circumstance and the circumstance makes it unreasonable for both parties to assume the onerous. *[Rimke 2]*. Especially, if the performance of the contract is possible to perform, but it causes the frustration to the performance, it does not fall within the scope of Art. 79 of CISG because such article only governs the events causing the impossibility of the performance *[Jenkins, p. 2028]*.

103. In conclusion, the change of circumstance under the Art. 79 of CISG is different from Art. 6.2.2 of the UNIDROIT Principle. Thus, such circumstance is not governed by Art.79 of CISG.

iii. Art. 79 of CISG only governs the circumstance concerning *force majeure*

104. CISG allows for an exemption from the contractual liabilities under Art. 79 of CISG when there is any change of circumstance and is unforeseeable by parties *[Ishida, p. 331]*. Such circumstance is known as an "Impediment" *[Ibid]*.

105. In *Nuova Fucinati Case*, the Italian Court stated that the hardship could not be used as a claim under the reason of an impediment. Plaintiff from Italy (Seller) and Defendant from Sweden (Buyer) entered into a contract of selling 1,000 tons of Ferrochrome. At the time that the Seller had to deliver the goods, the international market price unforeseeably increased affected the balance of the parties in the contract. The seller wanted to excuse their obligation in contract based on this impediment by using hardship. The Court decided that the change of market could not be the ground for the Seller to rely on hardship for an avoidance of the contract. Moreover, the circumstance regarding the market price is not regarded as a circumstance applicable for using hardship clause and Art. 79 of CISG could not be invoked *[Nuova Fucinati Case]*.

106. In our case, CLAIMANT submitted that the 25% tariff could not have been reasonably taken into account *[Cl. Memo., p.31, ¶104]* However, considering that the fluctuation of State's policy is a very common event occurring in the commercial industry. Thus, CLAIMANT could not have been unaware of such event since CLAIMANT even has had prior experience to the health and safety requirements. Consequently, the present case is

consistent to the foregoing case above. Therefore, CLAIMANT could not invoke Art. 79 as the 25% tariff does not encompass an impediment circumstance.

107. In conclusion, the *"Impediment"* and *"Hardship"* are contrary to what CLAIMANT has raised. Moreover, CLAIMANT's circumstance did not fall under the scope of "Impediment"; therefore, CLAIMANT cannot claim for the additional price of 1,250,000 USD from Art. 79 of CISG.

iv. Tariff does not constitute impediment

108. Whether a physical impossibility and a change of circumstance in an economy which can be the reason for an exemption is still considered as vague; however, an *"increased procurement and production costs do not constitute exempting impediments" [DiMatteo, p.23; Schlechtriem]*. In this case, there is an increased 30% tariff on the frozen semen after parties had concluded the Sales Agreement *[Cl. Ex. 7, p. 16]*. Therefore, the increase of tariff is the change of circumstance in economy; it does not constitute the impediment, which allows CLAIMANT to claim for the additional payment.

109. CLAIMANT raised that it could claim the damage under Art.79 of CISG *[Cl. Memo., p. 29, ¶ 96]*. Also, CLAIMANT raised that the change of circumstance can be considered as an "Impediment" *[Cl. Memo., p. 29, ¶ 95]*, and *"The word impediment encompasses situation of hardship" [Ibid]*. Conversely, Art. 79(3) reads *"the exemption provided by this article has effect for the period during which the impediment exists",* and the impediment is different from the *"Hardship"* as mentioned above in ¶100-103. Hence, CLAIMANT cannot raise tariff as the change of circumstance to claim for the remedy.

110. In conclusion, the change of circumstance in economy does not differ from the tariff, it cannot be considered as impediment and claim for the adaptation of the contract.

v. Art. 79 of CISG does not provide remuneration to an adaptation of the contract

111. CLAIMANT tried to interpret the hardship clause in order to request for an additional payment *[Cl. Memo, p. 24]*. However, CLAIMANT's situation is not the impediment. In this case, the request for adaptation the contract is not the remedy granted under Art.79 of CISG.

112. According to *Sunflower Seed Case*, A Greek Company [Buyer] and a Bulgarian company [Seller] entered into a contract for the sale of 3,000 tons of sunflower seeds. The Seller refused to perform the obligation because of the agreed quantity invoking changes in the market. The court made a decision that a change of circumstance was not the ground

under Art. 79 of CISG to entitle the Seller to release from the contractual obligation *[Sunflower seed case]*. In this case, CLAIMANT also had the problem in the changes of the circumstance after the additional 30% tariff, which constitutes commercial risk. Consequently, CLAIMANT shall be responsible under the contractual obligation.

113. As Art.79 of CISG only excuses party to a non-performance of the contractual obligation *[Flambouras]*, CLAIMANT cannot claim for the contract adaptation.

3. Even if UNIDROIT were to be used as gap filling in the CISG, the tariffs does not constituted hardship

114. By using Art. 6.2.2 and 6.2.3 of UNIDROIT Principles to supplement Art.79 of CISG, CLAIMANT argued that the 30% tariff constituted hardship, which its remedy could be claimed under Art. 6.2.3 of UNIDROIT Principles; however, it is flawed because the 30% tariff does not satisfy the elements of hardship in Art. 6.2.2 of UNIDROIT Principles *[Brunner 2, p. 485; Fucci, p. 9; Prestação De Contas Case]*. Consequently, because there is no existence of hardship as required in the provision of Art. 6.2.2 of UNIDROIT Principles, CLAIMANT cannot request for a contract adaptation under 6.2.3 of UNIDROIT Principles.

115. According to Art. 6.2.2 of UNIDROIT Principles, for an event to be considered as hardship, the subsequent tariff needs to be unforeseeable, beyond the disadvantaged party's control, assumes the risks to advantaged party and fundamentally alters the equilibrium of the contract. In response to CLAIMANT's argument, the 30% tariff does not satisfy the elements of hardship as required in UNIDROIT Principles because **(i)** CLAIMANT could not have been unaware of the tariff at the time of the conclusion of the contract; therefore, it is the foreseeable events, **(ii)** The 30% tariff does not fundamentally alter the equilibrium of the contract, **(iii)** The exemption from the 30% tariff is not beyond the CLAIMANT's control, **(iv)** Risk is assumed by CLAIMANT.

i. CLAIMANT could not have been unaware at the time of the conclusion of the contract; therefore, it is the foreseeable events

116. One of the elements constituting hardship is the foreseeability of the event. The event shall be "supervening not preexistent" *[Rafael Case]*. If disadvantaged parties had taken the event into account at the time of the conclusion of the contract, such party cannot invoke hardship *[Ibid]*. Also, if the parties are aware of the risk, it shall assume the risk to the disadvantaged party *[Churchill Falls Case]*. Contemporarily, trade war is a part of the current trade and economic policy of many countries, which business entity must be taken into account when doing business *[Kasynyuk & Koval]*.

117. The trade war is very common in modern commercial transaction. Even if CLAIMANT's governmental country had never imposed such tariff before, there were many countries imposing the tariff on agricultural products which CLAIMANT could not have been unaware of as a business entity involving in the sales of artificial insemination *[PO 2, p. 58, ¶23]*.

ii. The 30% tariff does not fundamentally alter the equilibrium of the contract

118. The occurrence of hardship shall be invoked when there are fundamental changes of circumstances or *"equilibrium of the contract"* as *"the cost of party's performance has increased or because the value of the performance a party receives has diminished" [UNIDROIT Principles, Art. 6.2.2]*. The cost of party's performance needs to be more than 50% increase to be considered as fundamental *[Carlsen, p. 4; Jenkins, p. 2028; Maskow, p. 662; Perillo, p. 127; Rimke 1, p. 239; Steel Bars Case, p. 101]*. Even if there is no exact wording, in Art. 6.2.2 of UNIDROIT Principles, it stated that the detriment costing more than 50% will be automatically considered as hardship, but the value of the performance rising less than 50% will not be constituted fundamental hardship *[Brunner 2, p. 427; Vogenauer, pp. 719-720]*. Similarly, the economic hardship amounting less than 50% is also regarded as too low *[Doudko, p. 495]*. With respect to international law, the increase in cost of performance should be resulted in 150% to 200% *[Schwenzer, pp. 710-711]*. In international commercial practice, the Belgium Court allowed the existence of hardship when the cost of Seller's performance had been increased by 70% *[Scafom v. Lorraine Tubes]*. Whereas, the Court rejected the rise of 30% in value of performance as the changes of circumstances *[Nuova Fucinati Case]*. Also, to avoid unjust situation, the arbitral tribunal needs to carefully observe whether the debtor's financial ruin is due to a lack of managment skills or resources, otherwise parties without resources may be unjustly favored *[Girsberger & Zapolskis, p. 131]*.

119. In the present case, CLAIMANT argued that the tariff was amounted to hardship *[Cl. Memo., pp. 32-33, ¶105]*. However, the additional tariff that CLAIMANT encountered was merely 30% *[Cl. Ex. 6, p. 15]*. The amount does not meet the requirement of the fundamental changes of circumstances. Furthermore, the 30% increase in performance resulted from the imposed tariff; therefore, it leads to economic hardship. However, as stated above, 30% rise in performance does not amount to hardship. It is unfavorable for RESPONDENT to be liable for tariff that they are not supposed to pay for. Hence, the tariff does not fundamentally alter the circumstances.

iii. The exemption from the 30% tariff is not beyond the CLAIMANT's control

120. Another element of hardship is required the event to be beyond disadvantaged party's control *[UNIDROIT Principles, Art. 6.2.2; El Paso Energy Case]*. In *Congimex Companhia Geral Case*, hardship existed when disadvantaged party failed to work out on last resort. In the case of import restriction, the disadvantaged party could have reasonably avoided the ban by shipping to the alternative port *[Macromex Case]*. In that case, the tribunal rejected the Seller's claim that the import restriction causing the event to be beyond the control; however, the tribunal stated that the deliver could be issued to a third country first, then the Buyer's country. Moreover, the Seller could have sold the goods to third party *[Treitel, pp. 289-290]*. Also, the disadvantaged party cannot simply use their adverse circumstances to claim for hardship when they have not exercised its best effort to overcome the alteration of circumstances *[Fucci, p. 33]*.

121. Here, RESPONDENT's government imposed sudden tariff against CLAIMANT' country only *[Noc. Arb., p. 6, ¶10]*. Even if CLAIMANT had no authority to prevent or to be exempted from the tariff, CLAIMANT could have issued the delivery to the third country after the awareness of the tariff as the tariff was imposed merely on Mediterraneo.

iv. Risk is assumed by CLAIMANT

122. Hardship shall not be invoked if the risk was assumed by disadvantaged party *[ICC Award No. 9029; Fucci, p.11]*. Also, if the event was foreseeable at the time of the conclusion of the agreements, risk of such an event must have been assumed by the disadvantaged party *[Prestação De Contas Case]*.

123. In the present case, CLAIMANT argued by using Clause 12 of the Sales Agreement as the remedy *[Cl. Ex. 4, p. 14, Clause 12]*. Contrary to the claim, Clause 12 only covers the risks on comparable unforeseen event, specifically *"additional health and safety requirement"*. Interpreting the Clause along with Art. 8(1) of CISG, there is no specific wordings or conducts stipulating that economic hardship such as tariff shall exempt CLAIMANT from being liable for. Also, Art. 8(2) and 8(3) of CISG did test on the view of reasonable person falling on the same circumstances. Furthermore, absent on an express allocation of risk clause, all risks shall be assigned to the supplier *[Hillman, p. 625]*.

124. During the negotiation, CLAIMANT was trying to emphasize their past hardship on the unforeseeable additional health and safety requirement; however, no business entity would have considered tariff into consideration as part of the provision *[Cl. Ex. 4, p. 12]*. Therefore,

parties included Clause 12 in the Sales Agreement without adding tariff as one of the conditions.

125. Moreover, as stated above ¶¶ 116-117, since the trade war is considered as foreseeable in this modern commercial transaction *[Kasynyuk & Koval]*, the tariff imposed by both countries should be viewed as a foreseen event and exclude RESPONDENT from the liability of the tariff.

126. Particularly, all the elements of hardship are required to be satisfied due to the wording *"and"* in the UNIDROIT Principles *[UNIDROIT Principles, Art. 6.2.2; Prestação De Contas Case; Fucci, p. 9]*. Also, hardship can be incurred only if all elements are met in the requirements *[Brunner 2, p. 485]*. Since Art. 6.2.2 of UNIDROIT Principles is not fulfilled; therefore, CLAIMANT cannot claim remedy of hardship under Art. 6.2.3 of UNIDROIT Principles.

4. CLAIMANT is not entitled to an adaptation of the contract under Art. 6.2.2 and 6.2.3 of UNIDROIT Principles

127. Responding to CLAIMANT's claim, even if UNIDROIT fill in the gap of Art. 79 of CISG, CLAIMANT could not be entitled to any payment of the tariff. According to Art. 6.2.3 of UNIDROIT Principles, *"In case of hardship"* which could be inferred that the provision can only be applied when there is an occurrence of the hardship in the case *[UNIDROIT Principles, Art. 6.2.3]*. Moreover, the mere fact that triggers the increase in the cost of performance does not allow disadvantaged party to seek for adaptation of the contract if the alteration of the equilibrium of the contract is not fundamental *[Brunner 2, p. 427; Vogenauer, pp. 719-720; Schwenzer, pp. 710-711]*. Furthermore, financial difficulties of the seller will not normally be considered as a fundamental change of the equilibrium of the contract *[Markesinis et al., p. 345]*.

128. In the present, as proven in ¶ *[hardship para. Number]*, the event of the tariff does not constitute hardship, which CLAIMANT is not entitled to the adaptation of the Sales Agreement. The 30% tariff was not unforeseeable, beyond the disadvantaged party's control, assume the risks to advantaged party and fundamentally alter the equilibrium of the contract. CLAIMANT, in this case, is liable for the tariff because the tariff does not constitute hardship; therefore, no remuneration under Art. 6.2.3 of UNIDROIT Principles can be claimed.

129. Also, renegotiation and contract adaptation under Art. 6.2.3 of UNIDROIT Principles can be claimed only if the tribunal found that the 30% tariff fulfills all element of hardship. Also, renegotiation and contract adaptation under Art. 6.2.3 of UNIDROIT Principles can

be claimed only if the tribunal found that the 30% tariff fulfills all element of hardship. In CLAIMANT's submission, CLAIMANT raised that under Art. 6.2.3 of UNIDROIT Principles, the contract can be adapt when there was a failing to renegotiate within a reasonable time *[Cl. Memo., pp. 32-33, ¶ 108-111]*. However, in this case as proved from ISSUE A [], the tribunal does not have the power to adapt the contract. Therefore, the failure to renegotiate in this present case would not lead to the adaptation of the contract, but it might deem to the termination of the contract.

5. The adaptation of the Agreement under Clause 12 and CISG does not entitle CLAIMANT to 1,250,000 USD

130. No adaptation of the contract should be granted because Clause 12 already included appropriate remuneration within the clause. Both CLAIMANT and RESPONDENT mutually agreed on including Clause 12 to protect CLAIMANT from their experiences. In commercial transaction, parties' autonomy prevails over rule *[Bonell, p. 229]*.

131. In the present case, parties already included Clause 12 with narrow interpretation concerning hardship, which RESPONDENT did protect the interest of CLAIMANT's interest *[Cl. Ex. 5, p. 14, Clause 12; Res. Ex. 3, p. 35]*. However, if RESPONDENT were to be liable for tariff, which did not fall within the scope of Clause 12 in the Sales Agreement, it would be very unfair for RESPONDENT. As a business entity, RESPONDENT would not want to liable for any losses when they already fulfilled all the obligations required under the Sales Agreement.

132. Also, contrary to CLAIMANT's allegation on Mr. Shoemaker, he did not make any false assurances or statement to CLAIMANT. CLAIMANT argued that they relied on Mr. Shoemaker *"knew that CLAIMANT would not deliver if he were to reject their request outright"* statement *[Cl. Memo., p. 35, ¶117]*. However, this were because CLAIMANT did have intention to withhold their performance as stated in Ms. Napravnik's email on 20 January 2018 by stating that *"put the shipment presently on hold" [Cl. Ex., p.16]*. Even without rejecting outright to Ms. Napravnik, Mr. Shoemaker expressly told her that he *"could not directly authorize any additional payment" [Cl. Ex. 8, p. 18]* and *"if the contract provides for an increased price in this case of such a high additional tariff we will certainly find an agreement on the price"*. CLAIMANT could not have been unaware of his clear intention that he had to authority to decide over the circumstance and the clear wording of his statement. Moreover, CLAIMANT made their own false interpretation on Mr. Shoemaker's articulate wordings and put a blame on RESPONDENT *[Cl. Memo., p. 35,*

¶*117]*. Additionally, despite the changes of circumstance, parties are not allowed to withhold their performance *[UNIDROIT Principles, Art. 6.2.1; ICC Award No. 10021]*.

133. CLAIMANT has no right to withhold their delivery of frozen semen. Even if Mr. Shoemaker did not urge CLAIMANT to deliver frozen semen as planned, CLAIMANT was still obligated to perform their obligation under Frozen Semen Sales Agreement. CLAIMANT could not have any rights to be exempted from the delivery obligation.

134. Consequently, CLAIMANT is not entitled to an adaptation of the contract because Tariff does not fall within the scope of Clause 12, which does not impose any contractual obligation on RESPONDENT. Also, when Clause 12 was added in the Sales Agreement, it already served as the interest of CLAIMANT; therefore, CLAIMANT cannot impose any other events resulted in loss to RESPONDENT. Additionally, no adaptation of the contract should be granted since there is no existence of hardship and 30% Tariff is too low to be considered as fundamental alteration of equilibrium of the contract *[Nuova Fucinati Case]*. Respectively, CLAIMANT is not entitled to any payment resulting from Clause 12 of the Sales Agreement or adaptation of the contract.

135. **CONCLUSION FOR ISSUE C:** Under Clause 12 and CISG, CLAIMANT is not entitled to the additional payment resulting from the increased of tariff neither 1,500,000 USD nor 1,250,000 USD. The interpretation under Art. 8 of CISG on both subjective and objective intent has shown that tariff would not be constituted as hardship, and therefore does not fall within the scope of Clause 12. Moreover, tariff does not consider to be hardship under the remedy of UNIDRIOT principle. Thus, CLAIMANT is not entitled to the additional payment of tariff.

REQUEST FOR RELIEF

In light of the above RESPONDENT requests the Arbitral Tribunal

a. To dismiss the claim of contract adaptation due to a lack of jurisdiction and power;
b. To reject CLAIMANT's submission of the evidence as it had been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's Computer system;
c. To reject the claim for additional remuneration as raised by CLAMANT as there is no contract adaptation;
d. To order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration

CERTIFICATE

Phnom Penh, Cambodia, 24 January 2019

We hereby confirm that this Memorandum was written only by persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person who is not the member of this team.

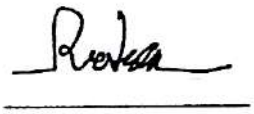
Respectfully submitted,

Chan Sowell

Heang Nayheak

Pot Sokong

Sambo Srey Nuch



Sarin Meas Reaksa

Seng Sokunpiseth

Song Cheavey

Suon Sokun Tepy

Thiv Seavhorng

Tuon Raksmey