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UNIVERSIDAD NACIONAL AUTONOMA DE MÉXICO

MEMORANDUM FOR RESPONDENT

CASE N° HKIAC/A18128-PHAR LAP ALLEVAMENTO V. BLACK BEAUTY EQUESTRIAN

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

COUNSEL FOR RESPONDENT

AILEEN WAGLEY /ANA VERNON/ FERNANDO DEL REY /

GUILLERMO MADRIGAL / PABLO RUEDA

TABLE OF CONTENTS

TABLE OF ABBREVATIONS AND DEFINITIONS

Arbitration agreement	The arbitration clause included in the Frozen Sales Agreement
CE No.	CLAIMANT's Exhibit No.
CLAIMANT	Phar Lap Allevamento
CLAIMANT'S Memorandum	Tamil Nadu University's Memorandum for CLAIMANT
Digest UML	Digest of Case Law on the Model Law on International Commercial Arbitration 2012
HKIAC	Hong Kong International Arbitration Center
HKIAC Rules 2013	Hong Kong International Arbitration Center 2013 Administered Arbitration Rules
HKIAC Rules 2018	Hong Kong International Arbitration Center 2018 Administered Arbitration Rules
HKIAC Suggested Clauses	HKIAC recommended language in model clauses to effectively incorporate HKIAC's Rules or Procedures
IBA	International Bar Association
ICC	International Commercial Chamber
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
LCIA	London Center of International Arbitration
RE No.	RESPONDENT Exhibit
RESPONDENT	Black Beauty Equestrian
RESPONDENT memorándum	Universidad Nacional Autónoma de México's memorandum as RESPONDENT
SA	Frozen Sales Agreement
The Problem	The problem provided by the Vis East Moot Foundation Limited for the Sixteenth Annual Willem C. Vis East International Commercial Arbitration Moot
UML	UNCITRAL Model
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration
UNIDROIT Principles	UNIDROIT Principles on International Commercial Contracts 2016
WTO	World Trade Organization established on 1 January 1995
WTO Members	Member States of the World Trade Organization

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Brunner	§83	Brunner, Christoph

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Daele	§93	Daele, Karel Challengue and Disqualification of Arbitrators in International Arbitration International Arbitration Law Library Volume 24
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Digest UML	§19 §24 §31 §37 §42	UNCITRAL 2012 DIGEST of Case Law on the Model Law on International Commercial Arbitration
DiMatteo	§61	DiMatteo A. Larry The CISG and the Presumption of Enforceability: Unintented Contractual Liability in International Business Dealings
Guido	§52	Guido, Alpha Party Autonomy and Freedom of Contract Today European Business Law Review vol. 21 no. 2 2010 Available at: *HeinOnline*, https://heinonline.org/HOL/P?h=hein.kluwer/eblr0021&i=136.]
Harmonized Code System	§ 75	Available at: http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/tools-to-assist-with-the-classification-in-the-hs/hs-online.aspx
Healthcare and Public Health Sector	§122	Available at: https://www.dhs.gov/cisa/healthcare-and-public-health-sector
HKIAC 100 Questions	§27	Hong Kong International Arbitration Center 100 Questions & Answers 2013

HKIAC Suggested Clauses	§7 §36	Available at: http://www.hkiac.org/arbitration/model-clauses
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Joe Lui	§98	HKIAC Introduces New Rules October 22, 2018 Kluwer Arbitration Blog Available at: http://0-arbitrationblog.kluwerarbitration.com.millenium.itesm.mx/2018/10/22/hkiac-new-rules/
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TABLE OF COURT DECISIONS

ENGLAND

Cited As	Paragraph	Full Citation
Star Shipping v. China Nat'l	§39	Star Shipping v.s China Nat'l Trade Trans Corp.

INDIA

Cited As	Paragraph	Full Citation
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Cited As	Paragraph	Full Citation
CLOUT case No. 229	§138	CLOUT Case No.229 Bundesgerichtshof, Germany 04.12.1996

RUSSIA

Cited As		Full Citation
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Cited As	Paragraph	Full Citation

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		United States, District Court 23.02.2009[s]

STATEMENT OF FACTS

1. Phar Lap Allevamento, Mediterraneo's most renown stud farm, is the CLAIMANT. Phar Lap provides studs for breeding to which breeders may have access to during breeding season or through artificial insemination. Phar Lap's breeds usually intend to engender high pedigree racehorses. Black Beauty Equestrian, located in Equatoriana, is RESPONDENT. It is well known for its broodmare lines.

2. RESPONDENT recently expanded its business to racehorses. Thus, it contacted CLAIMANT inquiring whether Nijinsky III's semen was available for artificial insemination taking advantage of Equatorianian government's decision of temporarily lifting the ban on artificial insemination on racehorses.

3. Via an email of 24 March 2017, CLAIMANT offered RESPONDENT 100 doses of Nijinsky III's frozen semen in accordance with the Mediterraneo Guidelines for Semen Production and Quality. RESPONDENT did not object to CLAIMANT's terms and conditions except for the choice of law, the forum selection clause and a delivery DDP which it strongly suggested. CLAIMANT accepted to absorb the DDP's responsibility as long as RESPONDENT accepted a price increase, which it did.

4. The Parties agreed on three shipments. The first two shipments contained 25 doses each and were to be delivered on May 20th and October 3rd, 2017. These were successfully delivered; however, two months before the last 50 doses were shipped a 25 per cent tariff was imposed by Mediterranean's government on agricultural products. In response, Equatorianian's government imposed another tariff of 30 per cent on some products including animal semen.

5. CLAIMANT shipped the last 50 doses on January 23, 2018 as accorded voluntarily even though no new agreement had been reached after the emerging events had taken place.

FIRST ISSUE: THE ARBITRAL TRIBUNAL LACKS THE POWER AND AUTHORITY TO ADAPT THE CONTRACT

6. According to the scope of the arbitration, it is clear that the parties never agreed to confer the power to the Arbitral Tribunal to adapt the contract. Furthermore, the law applicable to the seat of arbitration chosen by the parties does not grant the power to do so.

7. According to HKIAC (Hong Kong International Arbitration Centre) the model clause provide by it states as follows:

> *"Any dispute, controversy, difference or claim arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the notice of arbitration is submitted."* [HKIAC Suggested Clauses]

8. The arbitration agreement is different from the arbitration model clause since it excludes from its scope several words that have a significant influence in the interpretation of the arbitration agreement. As the agreement to arbitrate is the founding stone of international arbitration, it is important to adequate the wording of the arbitration agreement to fulfill the intention of the parties [Redfern and Hunter, pp.71-93].

9. In this way, RESPONDENT, having knowledge that the scope of arbitration limits the category of disputes or claims that will be subject to the agreement to arbitrate [Born, p.30], suggested a clause with precise terms and streamlined in its wording, thus, the scope of the arbitration, which is shown under the first draft sent to CLAIMANT via e-mail dated on April 10th 2017 (RE No.2, p.32).

10. CLAIMANT rejected the above-mentioned draft under the argument of an internal policy, stating, "it would, however, be possible to agree on arbitration in a neutral country". (RE No.2, p.33). Henceforth, the Frozen Sales Agreement states as follows: "*Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or*

termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre." [SA, 15]

11. Therefore, according to the arbitration agreement, the parties did not confer the power to adapt the contract to the Arbitral Tribunal, *ergo*, it should only deliberate on disputes derived within the agreement, without the possibility of going beyond this mandate. [Redfern and Hunter, p. 92]

12. Also, where a restricted language has been negotiated between the parties, it is understood that they intended to limit it scope of action. Likewise, a restricted language in the arbitration agreement constricts its interpretation to a very narrowed conclusion. Taking into account these arguments, it is clear that the arbitration clause in question does not apply to the present dispute, if not all, possible disputes between the parties in this case [TMT v. Royal Bank].

13. Consequently, the wording of the arbitration agreement is decisive for the jurisdiction of the Arbitral Tribunal [CLAIMANT'S Memorandum, §2], and as it is shown within the arbitration agreement, the power to adapt the contract falls out of the scope of arbitration.

A. KOMPETENZ -KOMPETENZ PRINCIPLE DOES NOT GRANT THE POSSIBILITY TO ADAPT THE CONTRACT

14. Under the Kompetenz-Kompetenz doctrine the Arbitral Tribunal possesses authority to decide on its own jurisdiction [Born, p. 56], nonetheless, CLAIMANT must distinguish the jurisdiction from the power to adapt the contract. [CLAIMANT'S Memorandum, §3].

15. RESPONDENT is only objecting the jurisdiction over the adaptation of the contract, not the jurisdiction in general terms, as suggested by CLAIMANT [CLAIMANT'S Memorandum, 3].

16. Furthermore, the Kompetenz-Kompetenz doctrine is only used when a party argues the lack of jurisdiction in general terms due to the non-existent, invalid or terminated arbitration agreement [Born, p.56], whereas in this case, the only allegation regarding the Arbitral Tribunal jurisdiction consists in its lack of power to adapt the contract.

17. In this way, the Arbitral Tribunal has the power to decide its own jurisdiction, thus, contrary to what CLAIMANT points out towards the power to adapt the contract regarding article 19

of the HKIAC Rules, the Arbitral Tribunal can only adapt the contract when there is an explicit or manifested consent.

B. THE UNCITRAL MODEL LAW DOES NOT AUTHORIZE THE ARBITRAL TRIBUNAL TO ADAPT THE CONTRACT

18. CLAIMANT alleges that article 19 (1) of the HKIAC rules is verbatim of article 16 (1) of the UNCITRAL Model Law on International Commercial Arbitration. This, however, is not true, as the Model law does not grant the Arbitral Tribunal the power to rule on the objections regarding the scope of the arbitration agreement.

19. Any issue, other than the existence of the validity of the arbitration agreement, depends on the interpretation given to the word "including" of the opening sentence of article 16 (1) [Digest UML, p. 77] thus the decision depends on the national law [Born, p. 456].

20. Furthermore, UNCITRAL considers that the power of the Arbitral Tribunal contained in article 16 (1) may not be valid in the states, in which the said powers weren't included in their legal systems [Official Records, p.151], hence each state may determine the extent of the powers of arbitrators and exclude or limit the principles contained in the paragraph mentioned above. [Official Records, p. 151].

21. Kompetenz-Kompetenz is a recognized principle for international commercial arbitration, also acknowledged by UNICTRAL Model Law, –as CLAIMANT pointed out–, which excludes the power to adapt the contract. The scope of the *lex arbitri*, which defines the extent of the powers of the arbitrators, [Redfern and Hunter, p.169] also includes such principle.

22. On the other hand, under Danubian Arbitration Law the power to adapt a contract differs. Article 28(3) contains a general standard to grant such powers to the Arbitral Tribunal, only when the parties expressly authorize the arbitral tribunals to adapt the contract. [PO2, §36]. Thus the principle of party autonomy applies only when the parties agree on the procedural issues [Born, 436]. In other words, an Arbitral Tribunal has only the powers granted by the parties, but only within the limits of the applicable law. Any power granted beyond the applicable law is invalid, even if it is contained in international or institutional rules of arbitration [Redfern and Hunter, p.307].

C. THE APPLICABLE LAW TO THE ARBITRATION AGREEMENT IS THE LAW OF DANUBIA

23. The principle of separability provides that an arbitration agreement, even though included in and related closely to an underlying commercial contract, is a separate and autonomous agreement [Born, p.56].

24. Furthermore, this principle is well-recognized by legislations, judicial decisions, and by leading institutional arbitration rules, just as it is recognized by article 16 (1) of the Danubian Arbitration Law; consequently, its wording should not prevent the application of the separability principle when a jurisdictional issue is brought before an Arbitral Tribunal [Digest UML, p.76], other than just only those alleged wrongly by CLAIMANT [CLAIMANT memo, p.17].

25. In this way, the significance of the separability principle is the potential application of substantive laws to the arbitration agreement and the underlying contract. Due to this, the law governing the main contract is not necessarily the same as the law governing the arbitration agreement [Born, p.55]. In the present case, regarding the discussion of the jurisdiction and applicable law, CLAIMANT suggested Mediterraneo as the applicable law only to the underlying contract and Danubia as the seat of arbitration [CE C4].

26. Therefore, this means that according to the principle of separability between the contract and the arbitration agreement, the law that applies will not necessarily be the same, thus, allowing the law governing the arbitration agreement to differ from the law of the contract [All Union v. JOC Oil]. As CLAIMANT stressed, it means that distinct laws may apply to the main contract and the arbitration agreement [CLAIMANT memo, p. 17].

D. THE PARTIES AGREED ON THE LAW FOR THIS ARBITRATION AGREEMENT BY ELECTING DANUBIA AS THE SEAT

27. The arbitral seat is the judicial location of the arbitration selected by the parties, which entails a number of significant legal consequences [Born, p.112]: (i) it determines the applicable law to the arbitral proceeding, the conduct of the arbitrators and in consequence, determines the exercise of supportive and supervisory powers over the arbitration; and (ii) it determines the place of the arbitration award for international enforcement purposes. [HKIAC 100 Questions].

28. In other words, the seat of arbitration provides the national legislation applicable to the arbitration, which governs both internal and external procedural issues in the arbitration. It also provides the law presumptively applicable to the substantive validity to the arbitration agreement. In sum, the national legislation constitutes the general tenor of the arbitral procedure [Born, p.111].

29. Virtually, in all cases, the procedural law of the arbitration is the law of the seat. It is well known that, usually by choosing the seat, the parties will simultaneously have chosen the procedural law or *lex arbitri* to govern the arbitral proceedings, endorsing the validity and efficiency structure of the procedural issues in the arbitration [Born, p.119].

A. THE SEAT OF ARBITRATION AND APPLICABLE LAW IS THE LAW OF DANUBIA

30. Danubian Arbitration Law is a verbatim adoption of the UNCITRAL Model Law, in which article 20 (1) MAL states:

> *"The parties are free to agree on the place of arbitration. In the case of absence or omission of such agreement, the place of arbitration shall be determined by the Arbitral Tribunal in regards to the circumstances of the case including the convenience of the parties."*

31. In this way, the choice of the parties regarding the place of arbitration may be agreed upon in the arbitration clause [Digest UML, p.103] just as CLAIMANT and RESPONDENT established after several drafts.

32. Firstly, RESPONDENT proposed a specific arbitration clause with its due distinction regarding the seat of arbitration as well as the law of the arbitration, stating as follows: "The seat of arbitration shall be Equatoriana", and "The law of this arbitration clause shall be the law of Equatoriana." (RE No.1, p.33).

33. From this, two specific statements can be brought: i) RESPONDENT proposed a draft with an explicit difference from the law of the seat of arbitration and the law of the arbitration clause and; ii) RESPONDENT suggested both procedural laws to be governed by Equatoriana to facilitate the arbitration procedure. However, CLAIMANT amended the draft and proposed the following: "The seat of arbitration shall be Danubia." And the "the law applicable to the Sales Agreement remains the law of Mediterraneo." [R Ex R2]

34. RESPONDENT, relying on good faith, accepted those terms, through the understanding that since there was no mention of the procedural law, it would virtually be the same one as the seat of arbitration, as it was suggested.

35. In addition, the application of distinct procedural laws would result in the mitigation of an effective and prompt resolution [Born, p.119]. Furthermore, an arbitration agreement in which the Arbitral Tribunal needs to restrict its conduct to two different procedural laws, which may contradict each other, goes against all-consented reasoning [Redfern and Hunter, p. 177].

36. Now, if CLAIMANT wanted to apply a different law to interpret the arbitration agreement, it should have maintained the draft proposed by RESPONDENT, limiting its modification to the selection of the law, substituting "Equatoriana" for "Mediterraneo" in the law of the arbitration clause, just as is suggested by the Hong Kong International Arbitration Center [HKIAC Suggested Clauses].

37. Therefore, where the parties have agreed on the place of arbitration, the tribunal is bound by the choice of the parties [Digest UML, p.103], thus that Arbitral Tribunal is bound to the place of arbitration chosen by the parties [Shine Satellite v. Jain Studios].

B. THE OMISSION OF AN EXPLICIT APPLICABLE LAW TO THE ARBITRATION AGREEMENT DOES NOT IMPLY THE ABSENCE OF ITS UNDERSTANDING

38. The seat of arbitration has a major practical importance in arbitration, as it concerns directly internal and external procedural issues such as: arbitrability, determination of the governing law, whether it corresponds to a substantive or procedural topic and the determination of the place in which the individual procedural acts are implemented or where the hearings will be held [Belohlavek, p.262-266].

39. Therefore, in international commercial arbitration, the place or seat of arbitration is always of paramount importance [Star Shippin v. China Nat'l Foreign], consequently, parties generally determine a seat of arbitration by its general reputation and recognition, followed by user perception of its formal legal infrastructure, the neutrality and impartiality of its legal system and the national arbitration law [Arbitration Survey 2018]. The same criteria was taken into account by the creditors committee to consider Danubia to be such a seat and the reason why

Ms. Napravink suggested it, as the place of arbitration knowing it was a verbatim of the UNCITRAL Model Law [PO2, §14].

40. Therefore, CLAIMANT cannot allege a misunderstanding regarding the place of arbitration preferred by its geographical convenience or one suitably neutral to conduct the hearings [CLAIMANT memo, §32]. If such distinction was not of due importance, the creditor committee and Ms. Napravink would have not taken the time to take care of those details.

41. Even if CLAIMANT tried to appoint Danubia simply as a geographical venue, where there is an express designation of seat of law and no designation of law governing the arbitration agreement, specifically with a distinct body of rules governing the arbitration or any other contrary to the significant indicia, the inexorable conclusion is that the seat of arbitration is the same as the venue [Sashoua v. Sharma].

42. Furthermore, the UNCITRAL MAL, article 20 in paragraph (2), clarifies that the place of arbitration is separate from the place or venues where hearings may be conducted [Digest UML, p.104]. Also, there is a distinction between the place of arbitration and the place where the tribunal carries on hearings, witnesses, experts or the parties namely the venue of hearing [Garuda v. Birgen]. In this way, CLAIMANT unsustainably alleges that the seat appointed by itself is due to elements that are objectively irrelevant to the present case [Clamant memorandum, §32].

C. THE SEAT OF ARBITRATION STANDS FOR MORE THAN A LOCATION

43. In addition, the New York Convention has not adhered the term “arbitral seat”; nonetheless, the convention expressly recognizes the importance of such concept, given the importance the law of the place of arbitration plays during an arbitration proceeding and the judicial oversight of it [Born, pp.1543-1545].

i. Under New York Convention, article V(1) (d), also ensures the enforcement of the award only if its in accordance with the place of the arbitration.

44. Article V (1) (a) of the Convention validates the agreement of the parties looking for the recognition of the award (as appointed by CLAIMANT). Furthermore, article V (1) (d) also carries out such purpose, as long as the award complies with the agreement of the parties and the law governing the procedure.

45. In this way, an award should be void when the arbitral procedure is not in accordance with the agreement of the parties [Polimaster v. RAE Systems] or if the procedure did not meet the terms with the law of the country where the arbitration took place [NY Guide, p. 193]. Furthermore, if the parties did not choose a law governing the arbitration agreement, the procedure must follow the law where the arbitration took place [Bermuda v. Caltex.].

46. This is in accordance with the New York convention criteria, where it affirms the importance of the concept of the seat, expressly recognizing and giving effect to the central role of the law and the judicial oversight of the seat.

47. Therefore, parties' choice concerning the seat have an importance influence regarding the future enforcement of the arbitral award in a particular state [Belohlavek, p.272] hence, a distinct procedural law would drastically change the course and outcome of the arbitral process. Consequently, the selection of the place of arbitration cannot be overestimated [Born, p.2052].

E. THE LAW OF DANUBIA ADHERED TO THE FOUR CORNERS RULE

48. The Danubian law adopted the UNIDROIT principles [PO2], stipulating two exceptions: i) the replacement of the interpretation rule in article 4.3 with the four corner rule, in reference to written contracts and; ii) the modification to the wording of Article 6.2.3 (4)(b), which establishes the cases in which arbitrators can adapt the contract.

A. THE REPLACEMENT OF THE INTERPRETATION RULE IN ARTICLE 4.3 WITH THE FOUR-CORNERS RULE, IN REFERENCE TO WRITTEN CONTRACTS

49. Under the Four Corners Rule the document is solely constituted by what is written in it without any aid from the knowledge of the circumstances under which itis made [Black's Law Dictionary] Therefore, if two parties enter into a written agreement, the arbitrators must ignore all statements or evidence that is external or not contemplated in the contract.

50. Also, the first exception established by the law of Danubia, under article 4.3 of the UNIDROIT Principles, states the relevant circumstances for interpreting a contract, which are the following: i) preliminary negotiations between parties; ii) practices established by the parties; iii) the conduct of the parties subsequent to the conclusion of the contract; iv) the

nature and purpose of the contract; v) the meaning commonly given to terms and expressions in the trade concerned and; vi) usages.

51. According to the first exception, there is an explicit exclusion regarding the circumstances surrounding the contract, hence, it can be inferred that there is also an explicit restriction contemplated for arbitrators in their extent of interpretation, meaning that the scope of analysis should only be determined by the wording of the document, therefore, allowing a broad interpretation would indisputably go against this law.

52. In addition, article 2.1.17 of the UNIDROIT Principles embodies the merger clause (citar), which reinforces the four corners rule. The object of this contract merger-clause provision is to reassure the parties, regarding their autonomy and sufficiency when negotiating a contract, voiding any doubts both on the documents exchanged between them or the behavior of each party in the course of the formation of the agreement. This merger clause also aims to exclude any authority (judicial or arbitral) which may be vested with the power of adjudicating upon them and altering its meaning or the equilibrium by modifying its content. It implies that the settlement of the parties corresponds only to what the contract reflects, and only to that may one refer to evaluate its performance. [Guido. p. 131-132.]

53. Ultimately, the merger clause blocks the possibility of uncertainty referring to external elements, such as statements or agreements, meaning that the exhaustiveness of the interpretation of the contract is detained within the contract itself, and since the contract lacks a written stipulation regarding the power given to the arbitrators to adapt the contract, they should not be able to do so.

54. Likewise, the fact that an amendment to the contract or a new obligation has been discussed is not enough, as CLAIMANT alleges [Case, 12], to be taken as part of the agreement. Only when an obligation is written in the agreement can its scope be constructed or interpreted in accordance with the expectations of the parties regarding a controversy [Charles v. Ukraine]. In other words, by applying a merger clause contained in the contract, the Arbitral Tribunal is not contradicting or supplementing evidence of prior statements or agreements in the contract. [ICC Award 16314].

B. UNDER DANUBIAN LAW THE ARBITRATORS CANNOT ADAPT THE CONTRACT

55. In regards to the second exception, article 6.2.3 (4)(b) of the UNIDROIT Principles mentions the power given to arbitrators to adapt the contract with a view to restoring its equilibrium, which is replaced with the wording "to adapt the contract" to the court only "if authorized".

56. Moreover, the arbitration clause is formulated as follows: "Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted".

57. To this matter, there is a clear and specific scope of action delegated to the arbitrators, which do not expressly state or even imply the power for adapting the contract. Therefore, in the present case, there is no possibility for arbitrators to adapt the contract.

58. In addition, in the common law system, the courts usually excuse themselves from performance of the contract; they have no power to adapt or adjust the contract terms in case of fundamental change of circumstances. It is clear that, in general terms, the Arbitral Tribunal cannot substitute, ignore o go beyond the will of the parties in order to modify a contract unless that right is conferred by the parties or under an express and particular situation marked by law [Al Faruque, p. 155 - 156].

59. In this sense, the arbitral tribunals cannot ignore that their powers are restricted. It is clear that an arbitral tribunal- constituted on the basis of an arbitration agreement between the parties, which contains their scope of action to the case could not, by any chance, modify or alter a contract or decide how a provision (for the determination of the economic equilibrium) must be applied. For that, the consent of both parties would be necessary. From the previous statement, it can be argued that an express consent is needed to provide the arbitrators with the power to adapt the contract regarding the modifications in its terms [Al Faruque, p. 155 - 156].

F. INTERPRETATION OF THE ARBITRATION CLAUSE IN THE CASE OF AMBIGUITY

60. Under article 4.6 of the UNIDROIT Principles, the Arbitral Tribunal can make an interpretation on an unclear contract term supplied by one of the parties, which will be

construed against the one who put them forward, meaning that the arbitrators must be oriented towards the interpretation which goes against the party who has inserted the ambiguous or disputed clause in the agreement [Coupar v. Velletta & Company]

61. This article refers to the contra proferentem principle, which, in essence, is the interpretation used "in the case of ambiguity when all other rules of construction fail, the doubt is removed by construing the document adversely to the drafter." [DiMatteo p. 118]

62. As mentioned previously (RESPONDENT memo §33), as shown within the facts, RESPONDENT proposed the following draft: “The seat of arbitration shall be Equatoriana. The law of this arbitration clause shall be the law of Equatoriana.”. However, CLAIMANT refused to the terms offered and successively stated: “The seat of arbitration shall be Danubia." (R.E. No.2, p.33).

63. In the present case, CLAIMANT states that the contract is written under broad terms, including the choice of the lex arbitri, however, the formation of the arbitration clause was set by CLAIMANT, which materialized in ambiguous terms.

64. Therefore, the reference should be interpreted against the drafter [Russia v. Sberbank], responsibility which, regarding the drafting of the seat of arbitration, was executed by CLAIMANT.

65. Likewise, it results in great relevance to mention article 1.8 of the UNIDROIT Principles, which establishes the following: “A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment”.

66. In this matter, CLAIMANT established the seat of arbitration, which is Vindobona, Danubia [RESPONDENT Exhibit 2], whereas RESPONDENT, relied on good faith and common practice of the virtual choice of the lex arbitri, considering it to be as the same of the seat of arbitration. Consequently, it is clear that CLAIMANT is acting contradictorily to what it stated on the contract.

67. In addition, the doctrine of estoppel is founded upon good faith and it is designed to prevent injustice by barring a party, under special circumstances, from taking a position contrary to his prior acts, admission, representation or silence. [American Bank v. Trinity Universal]

68. In other words, where CLAIMANT has by its words or conduct encouraged the actions of RESPONDENT, with the belief that a certain state of facts exists, and in consequence has acted upon such belief, CLAIMANT is not allowed to argue that a different state of facts existed at the time. [Amco v. Indonesia]

69. A peculiarity of the common law systems is that exclusionary rules restrict certain extrinsic evidence from being considered when interpreting a contract. According to the parol evidence rule, evidence is not allowed to contradict, modify, add to or subtract from the terms of a written contract.

70. Likewise, the parol evidence rule is thought to promote certainty for the contracting parties and reduce the costs of litigation by restricting the evidence available as a means of interpreting the contract. This rule has, however, long been subject to numerous exceptions which significantly limit its application. The content and the role played by the parol evidence rule and related exclusionary rules also varies considerably between common law jurisdictions. [Rosengren, p. 6].

71. The parol evidence rule and related exclusionary rules in their traditional form confine interpretation to the four corners of the contract and preclude any consideration of drafting history or other extrinsic evidence [Rosengren, p. 7].

SECOND ISSUE: THE EVIDENCE SUBMITTED BY CLAIMANT CONSTITUTES A BREACH OF CONFIDENTIALITY, AND IS THEREFORE INADMISSIBLE

72. On October 2nd, CLAIMANT made the Arbitral Tribunal aware that it received information at the annual breeder's conference regarding another arbitration in which RESPONDENT was part of. CLAIMANT states that the other arbitration is analogous to the present one and therefore the Arbitral Tribunal should consider it.

73. Additionally, CLAIMANT has promised to obtain the partial interim award and submit it as evidence in the present arbitration. CLAIMANT states that admitting the evidence does not constitute a breach in confidentiality. Nonetheless, it is of great importance to state that: i) the evidence submitted by CLAIMANT, which is taken out of context, lacks relevance; ii) there is a clear breach in the confidentiality terms between the parties and; iii) such evidence has been achieved by illegal means.

A. THE PARTIAL INTERIM AWARD AND THE INFORMATION SUBMITTED BY CLAIMANT LACKS RELEVANCE IN THE PRESENT CASE AND SHOULD THEREFORE NOT BE ADMITTED

74. CLAIMANT submitted the evidence because of its presumptive value, pursuant to the contradictory statements from RESPONDENT, alleging that the cases were practically the same, taking into account its laws and facts, whereas the only difference appeared to be that in the other case RESPONDENT has been negatively affected by the tariffs imposed [CLAIMANT memo §47]. Nevertheless, the partial interim award as well as the information submitted is taken out of context, since both arbitrations were conducted differently and in a different context.

A. THE SALES DIFFER REGARDING TO THE SITUATION OF THE PARTIES AND FACTUAL BACKGROUNDS

75. Mediterraneo had never tried to protect their farmers by imposing tariffs on foreign agricultural products; also, the tariff imposed had been announced only days before the entrance of the newly elected President, Mr. Bouckaert [PO2, §23]. The latter had in its election program announced a certain preference for a more protectionist international trade in relation to agricultural products. In this way, the sale of the mare was not failing within this prior classification "agricultural products" due to the mare is classified as a living animal 010121, according to the Harmonized Code System which is provided by the World Custom Organization and well recognized by the World Trade Organization members like the present parties for their commitments under this agreement.

76. Moreover, the sale of the mare was surprisingly affected by the tariff since it explicitly mentioned "living animals" as one of the goods covered [PO2, §24].

77. It was only after the imposition of tariffs that RESPONDENT expressed an inconformity with such clause (PO2, 39). This fact drastically changed the position of both parties involved in the arbitration. While the partial interim award in the other arbitration allowed the Arbitral Tribunal to modify the contract where the tariff resulted in hardship for RESPONDENT, the hardship clause in the present arbitration was negotiated before the arbitration took place to protect the interest of both parties [CLAIMANT's exhibit C8].

78. Therefore, the context in which the sale of the mare took place was noticeably different from the Frozen Semen Sales Agreement, since Mediterraneo has never protected his international trade till then [PO2, §25]

B. THE LEGAL GROUNDS WERE CLEARLY DIVERSE COMPARED WITH THE FROZEN SEMEN SALES AGREEMENT

79. Respondent requested an adaptation of the contract regarding the price, invoking an unforeseeable change of circumstances due to the contract, arguing that in the other proceeding adaptation was allowed.

80. In first instance, the contract had settled Mediterranean as their choice of law applicable to the underlying contract, the same as in this case. However, the HKIAC model clause draft was different since both the law of the seat of arbitration and the arbitration agreement were governed by the Mediterranean Arbitration Law, just as Respondent suggested in the cited drafts [Respondent memo §32].

81. In addition, in benefit of both parties, regarding the lack of requirement of an express conferral of power for arbitrators to adapt the contract under the Mediterranean Arbitration Law, there is consistent jurisprudence of the courts of Mediterraneo in the context of Art. 6.2.3 Paragraph 4 (b) Mediterranean Contract law for adaptation of contracts [PO2, §39];

82. However, the applicable law in the present case should be that of Danubia, which presents two issues: i) Danubian Contract Law, while very similar to the UNIDROIT Principles, differs from it, since it replaced article 4.3 of the UNIDROIT Principles with the four corners rule and; ii) additionally, article 6.2.3 (4)(b) has a different phrasing.

83. Moreover, the ICC Hardship Clause 2003 performs the hardship based on article 6.2.2 UPICC [Brunner, p. 397], which was adopted as a verbatim by the Mediterranean Contract Law.

84. This same ICC Hardship Clause was proposed by CLAIMANT, nonetheless, due to the different legal context as the Arbitration Law would be the Danubian Law as well as the seat of arbitration. RESPONDENT has also accepted and increased the price from the DDP delivery as it is explained forward.

85. In this way, RESPONDENT considered the ICC Hardship Clause to be too broad for the purposes of this contract and the objectives pursued.

86. Finally, with the risk mentioned by Ms Napravnik, in her email of 31 March 2017, the wording agreed for hardship by the parties was the added to the force majeure clause in clause 12 of the Frozen Semen Sales [PO2, §12].

87. Likewise, while the partial interim award may relate to a specific dispute in the present arbitration, namely the power of the Arbitral Tribunal to adapt the contract, its submission to the present arbitration is not relevant since the context of each arbitral procedure is substantially different. Furthermore, there is no contradicting statement from Respondent since they are different in facts and law.

B. EVIDENCE SHOULD NOT BE SUBMITTED BY THE REQUEST OF THE ARBITRAL TRIBUNAL

88. The evidence presented by CLAIMANT should not be submitted since it lacks relevance and materiality. Furthermore, (a) CLAIMANT's request for the production of documents should not be accepted by the Arbitral Tribunal and they should not request any further documents on the matter; (b) CLAIMANT's petition to enjoin the party of the other arbitration should not be taken into account by the Arbitral Tribunal since both cases are substantially different as proven by the lack of relevance of the evidence.

A. THE EVIDENCE SHOULD BE DEEMED IRRELEVANT IN THE PRESENT CASE

89. According to CLAIMANT, the Arbitral Tribunal under article 22.3 of the HKIAC 2018 Rules, is allowed to require a party produce the documents that determines to be relevant. Nonetheless, RESPONDENT can refused this disclosure since lacks of relevance and will be a breach of confidentiality [Waincymer, p.832] as it has shown above.

90. Furthermore, article 9 under IBA Rules on Taking Evidence (IBA Rules) establish the principles and the limitations on the admissible evidence by which the Arbitral Tribunal should only determines what evidence it should be properly consider [IBA Commentary, p.25].

91. An arbitral tribunal should exclude from evidence or the production of any document if it lacks sufficient relevance to the case or materiality to its outcome; a legal impediment would also would exclude a party to produce certain document [IBA RULES, art. 9.2 (a) (b)].

Accordingly, the present case is different from the other proceeding; therefore, it is clear that the evidence presented should be dismissed.

92. The limitations appointed under this article are important, they preserve the lines of distinction between rights of the parties and the authority of the arbitral tribunal [IBA Commentary, p. 25].

93. Therefore, the evidence should not be admitted as long as the Arbitral Tribunal has to look for a prima-facie relevance and not merely a possibility [Waincymer, p.858] as CLAIMANT intended. In other words, disclosure requires doubts beyond "will", "likely", "reasonable doubts" or "justifiable doubts" [Daele, p.28]. In consequence, the materiality alleged by CLAIMANT is dubious, since this document is required to contribute to the clarification of the case and it fails to do so, the information lacks the evidential value necessary [UNCITRAL DRAFT, p.17].

94. Documentary evidence is submitted under the assumption that arbitration should always be as quick as possible to solve disputes. If the relevance of the evidence is in dispute, solving the matter of its relevance, or lack thereof, would only increase the time needed to resolve upon its place in the arbitration as well as the costs of both parties. Hence, disclosure should be granted only as to items that are relevant and material. [CPR Protocol, §1(a)]

B. CLAIMANT'S REQUEST TO ENJOIN THE PARTY IN THE OTHER ARBITRATION SHOULD BE DISMISSED

95. CLAIMANT has promised the Arbitral Tribunal a copy of the Partial-Interim Award emitted by the Arbitral Tribunal in the other arbitration; however, should they not be able to get it, CLAIMANT is requesting that the party in the other arbitration enjoin the present arbitration so as to prove the similarities between them [Letter by Langweiler, 2 October 2018].

96. This, however, is not possible under the HKIAC 2018 Rules. According to article 27.1, the arbitration agreement has to expressly allow another party to enjoin the arbitration. This is not the case. The same article states that both parties have to agree on enjoining an additional party, agreement which never took place. Furthermore, this request does not meet the formal requirements stated in the HKIAC 2018 Rules.

97. Furthermore this type of proceedings have disadvantages: they favor one party at expense of the other; i.e. the right of each party to appoint an arbitrator, the expectations of the parties that their arbitral proceedings will be confidential, the increase of the same proceeding and the most important the potential delaying enforcement of party's rights which takes longer than a simple two party proceeding. [Born, 2568-2569]

98. In this way, the joinder of another party to the preset procedure would be contrary to HKIAC Rules 2018 where the new provisions added to the 2018 Administered Arbitration Rules intended to improve the procedural certainty and cost-efficiency of all arbitrations conducted under the HKIAC rules [Joe Liu].

C. THE ADMISSION OF THE EVIDENCE CONSTITUTES A BREACH IN THE CONFIDENTIALITY OF RESPONDENT

99. The principle of confidentiality is one of the many reasons for which parties agree upon an arbitral clause instead of solving their conflict in a judicial tribunal (Fortier). Though the confidentiality presumption is not absolute, most international tribunals, including the HKIAC 2013 and 2018 rules, agree on the same general rules and principles. According to (Citar) it is imperative that parties agree upon the confidentiality of the arbitration with each other as well as with third parties. Additionally, should one of the parties want to remove the confidentiality, it should be observed in the contract and should always respect the equality of each other.

A. ADMITTING THE EVIDENCE VIOLATES THE 2013 HKIAC RULES

100. Under article 42 of the 2013 HKIAC rules, unless both parties agree on the disclosure of certain facts, any information relating to an arbitration agreement shall remain confidential. Since the other arbitration was conducted under these rules, it is evident that the protection of the parties' confidentiality relies on these same rules. While there are certain exceptions under which the HKIAC may publish an award, none of them are met by CLAIMANT since: i) it does not protect a legal right or interest of the party, ii) it is not enforcing or challenging the award in question in legal proceedings before a court or any other judicial authority, iii) no government or international authority is requesting that this information be disclosed (Article 42.3).

B. THE EVIDENCE DOES NOT PROTECT A LEGAL RIGHT OR INTEREST OF THE PARTY

101. A legal right can be defined as the power a party acquires from the emission of an arbitral decision (Black's Law Dictionary). The Arbitral Tribunal of the other arbitration, at this time, has not yet emitted a decision in any direction and consequently has not granted the other party any powers whatsoever. Therefore, the party in the other arbitration cannot be defending any legal right or interest. Additionally, the 2013 HKIAC rules state that the evidence can be brought forward if it is enforcing or challenging an award before a court or another judicial authority; however, this exception applies exclusively to the parties involved in the other arbitration, and therefore CLAIMANT does not fall under this exception. Even if the party in the other arbitration wanted to challenge the award, they would not be able to since the definitive award will be emitted in August 2019 [PO2, 39]. The information can also be requested by another government or international authority that requires the disclosure of this information. This is also not the case.

C. THE ADMISSION OF THE EVIDENCE VIOLATES THE IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATIONS

102. Under article 9.1, it is the duty of the Arbitral Tribunal to determine the admissibility, relevance, materiality and weight of the evidence. Furthermore, the Arbitral Tribunal must exclude from evidence or production at the request of a Party in certain situations. One of these situations, index (a) of said article, is whether the evidence lacks sufficient relevance. As stated before [RESPONDENT memo §74] that is the case with the evidence presented by CLAIMANT. Its relevance has been discredited and the Tribunal should therefore, at the request of RESPONDENT, dismiss the evidence. Additionally, index (g) of the same article states that, under considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling the evidence can be dismissed. The procedural economy is tremendously affected should the Tribunal admit the evidence, since CLAIMANT is asking for the Party in the other arbitration to enjoin this one. This could greatly affect the pricing of the arbitration, as well as the time it takes to emit an award.

D. The admission of the evidence other international rules on confidentiality

103. Several different international rules on arbitration agree that confidentiality plays a key role in the resolution of a conflict. The 2014 London Rules of International Arbitration (LCIA) provide in Article 30 that all awards, as well as any documents disclosed in the arbitration shall remain confidential. Likewise, the 2016 Singapore International Arbitration Center states than all discussions and deliberations made by the tribunal are protected by confidentiality, as long as the parties do not agree under other terms. In the case of the evidence CLAIMANT is trying to bring forward, it is clear that there was no explicit desire on any side to disclose information about the arbitration, and should therefore remain confidential. The English Arbitration Act of 1996 even states an implied confidentiality in any arbitration. Additionally, the only exceptions to confidentiality according to this Act are a court order from any jurisdiction, the parties' consent to publicize said arbitration or that the arbitration is of public interest.

D. CLAIMANT could only obtain the evidence through illegal actions or through an illegal source

104. The evidence that CLAIMANT pretends to bring forward can only be obtained through the following means: i) through a breach in the contract of two former employees. ii) through Mr. Kieron Velazquez, a former employee of RESPONDENT or iii) through an illegal hack of RESPONDENT's computer system. In any of the three cases, the means of obtaining the evidence would be illegal and therefore inadmissible. The same nature of the evidence would render the evidence as useless in an international arbitration. Good faith is also a relevant matter regarding the obtaining of the evidence. Though both parties presume good faith, the way CLAIMANT obtained the evidence could indicate otherwise.

A. The evidence could have been obtained by a former employee

105. One of the sources from which CLAIMANT could obtain the partial award is from three of RESPONDENT's former employees. CLAIMANT states that one of them, Mr. Kieron Velazquez, is the source of the spoken information regarding the other arbitral proceeding. That is, Mr. Kieron Velazquez disclosed the existence of another arbitration to CLAIMANT at the international breeder's conference. Additionally, Mr. Velazquez promised CLAIMANT

a copy of the partial interim award (PO2), although he was not able to arrange it. Another possible source of the information are two former employees of RESPONDENT. These two employees are bound contractually to keep the information of RESPONDENT confidential and any breach in confidentiality should render the information illegal.

B. THE EVIDENCE COULD HAVE BEEN OBTAINED BY AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM

106. There was a breach in the computer system of RESPONDENT that led to the disclosure of a lot of its confidential information. This is another means from which the information could have been obtained illegally. Evidently, this hack to RESPONDENT's computer system is illegal and the information obtained cannot be used against it because of the nature of the information.

THIRD ISSUE: RESPONDENT IS NOT OBLIGED TO PAY THE ADDITIONAL AMOUNT OF US $1,250,000

107. CLAIMANT cannot request the refund of the additional amount paid, since the price increase per dose reached during the negotiations covers every transportation matter CLAIMANT is responsible for. Because of this, it is clear that the contractual equilibrium remains untouched, due to the fact that CLAIMANT has the workload of executing the pertinent acts to perfectly cover the transportation subject, but it is RESPONDENT who had the monetary burden on this same topic, and consequently, the price increase took place. Therefore, CLAIMANT is not empowered to ask for an adaptation of the contract since this is not contemplated in clause 15 the Frozen Semen Sales Agreement.

A. THE CONTRACT DOES NOT CONTEMPLATE A PRICE ADAPTATION

108. A contract is an agreement by which one person obligates himself to another to give, to do, or permit, or not to do something expressed or implied by such agreement [Black Law's Dictionary], thus binding for both parties who consented to all terms thereof.

109. Within the terms agreed, Clause 12 was created to cover any risks and the liability of the parties during the performance of the contract, foreseeing an increase in the expenses on the transaction or the loss of the product. From clause 9 to clause 12 the obligations and risks parties undertake are described. Every sales agreement involves risks and it is up to the

parties if they are willing to assume them. In this particular case, the risks and obligations were explained thoroughly and were accepted by the parties. The hazardous events might have affected one party or the other without any possibility of any of them knowing in advance, but they both still accepted that fact and signed.

A. CLAUSE 15 NARROWS DOWN THE ARBITRAL POWERS OVER THE CONTRACT, WHICH EXCUDES ADAPTATIONS

110. Clause 15's purpose is to narrow down the possibilities of what can be done when a controversy regarding the contract arises through the HKIAC Arbitration Rules, backing up the hardship clause contained in the sales agreement and baring the Arbitral Tribunal from adapting the contract; explicitly stating:

111. "Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted."

112. In this way, the agreement of both parties to empower a third person to decide the dispute and to be bound by its decision is an element inherent to arbitration for the adaptation of contracts, which is needs to be provided in a written form and must expressly mention the adaptation of the contracts as being submitted to arbitration [Stalev, p.202-205]

113. In other words, adaptation of the contract for the extra amount spent by CLAIMANT to be refunded cannot take place due to the intended narrowness of Clause 15.

114. Regarding the refund, CLAIMANT implicitly agreed that the contract had come to a successful end when it delivered the last shipment, based on clause 5, which states:

> "*All fees are payable upon execution of this Agreement. Buyer specifically agrees and understands that no semen will be shipped until all fees have been paid*."

115. Furthermore, both parties had knowledge of the tariff that emerged surprisingly before the last shipment was sent. However, CLAIMANT willingly shipped the last 50 doses, even though a new arrangement regarding this problem had not been reached. The quid of the argument is "no semen will be shipped until all fees have been paid"; which helps understand

that all fees that RESPONDENT should have covered, were indeed covered before CLAIMANT delivered the last shipment because CLAIMANT shipped the last doses as the agreement followed.

116. Summarizing, the parties resolute, in the Sales Agreement, that unless everything that needed to be paid had been paid, no shipment would take place. An unexpected tariff emerges in transportation subject, and before reaching out for RESPONDENT and negotiate voluntarily decided to send the doses, performing fully the agreement and, therefore, concluding with both parties obligations.

B. THE PRICE INCREASED AGREED DURING THE NEGOTIATIONS COVERED THE COSTS OF THE TRANSPORTATION

117. While the parties were negotiating the terms and conditions of the contract, they had first agreed that the price per dose would be 99.500 USD, but Respondent asked CLAIMANT to take care of the shipment procedures plus anything that transportation may encompass, due to its experience in this matter. At last, CLAIMANT agreed but increased the price per dose from 99.500 USD to 100,000 USD.

118. Given the fact that the arising tariff is being imposed on transportation area by Equatoriana, it should be absorbed by CLAIMANT since all fees regarding this matter were considered by CLAIMANT when adjusting the price.

i The tariff is not comparable to acts of God, health, or safety

119. Among CLAIMANT's obligations, everything regarding transportation and DDP is stated under the Contract. However, Clause 12 indicates constrained exceptions to this, consisting in: *i)* acts of God, *ii)* health and safety requirements; or *iii)* comparable unforeseen events making the contract more onerous. For so, it is important to differentiate the present situation from any of the previous stated.

120. An act of God is defined as "a natural event that causes loss. No human force is used and the event cannot be controlled." [Black Law's Dictionary] By mere definition the present situation cannot fall into this hypothesis since a tariff is a human imposition. As for health and safety, these two follow a sense of care towards the people of the country the product is being imported (particularly in the agricultural and livestock sector [Healthcare and Safety]).

For this reason, racehorse semen has never fallen in the same category as agricultural and livestock products; their aim is not remotely similar.

121. Due to this, it is obvious that the tariff imposed by Equatoriana's government is a retaliation tariff. The intention of a retaliation tariff is not to protect a society but to punish another government and make a political statement.

122. Finally, it can be concluded that the present case cannot be considered an act of God, health or safety requirements or comparable unforeseen event, and therefore cannot be considered an exception.

B. DDP AND HARDSHIP CLAUSES SHALL BE INTERPRETED INDEPENDENTLY

123. The parties agreed CLAIMANT would look after the transportation of the product and DDP due to its vast experience on the matter. Because of this, the contract was made more onerous; it went from 99.500 USD to 1000 USD per dose of which 200 USD per dose are associated with the transportation and DDP delivery. Furthermore, the risks CLAIMANT associates with this change in the delivery terms (health and safety requirements that CLAIMANT alleges might had increased the cost up to 40%) have nothing to do with the DDP since a hardship clause was created to contemplate and regulate them. Hence, these two contractual clauses shall not be interpreted as a one, but as two independent clauses since "any VAT or other taxes payable upon import are for the sellers account unless expressly agreed otherwise in the sales contract". [Incoterms 2010, p. 69]

C. CLAIMANT'S ADDITIONAL AMOUNT REQUESTED IS NOT DUE BY RESPONDENT UNDER CISG

124. CLAIMANT does not have the right to adapt the price or the contract under CISG nor under article 79 as its scope of application does not regulate hardship nor does it provides for the remedy requested.

A. ARTICLE 79 OF CISG IS NOT APPLICABLE TO THIS CONTROVERSY

125. Article 79 mentions an unforeseeable impediment beyond the control of the parties; this does not mean a difficulty, such as new tariffs. An impediment encloses "disabilities, or hindrances to the making of contracts, such as coverture, infancy, want of reason, etc." [Black Law's Dictionary]; and even though the new tariffs do make the transaction more

onerous it does not make it impossible, fact proved by the timely delivery and shipment of the product performed by CLAIMANT. Market fluctuations and any other cost that have an financial effect on a contract are concomitant risks of the trade [Digest CISG, p.377] and therefore the claim by the seller that the increase in the cost of the performance of the contract is an impediment is not adequate under this article [BTTP].

126. Even if the new tariffs could be considered as an impediment to comply with the obligations of CLAIMANT, article 79 only mentions that such party would not be held liable for the failure to perform its obligations contained in a contract, situation that never took place since both parties duly performed their respective obligations derived from the Contract; the financial difficulty that was overcome does not provide for an exemptions of liability. [The Problem, p.6]

127. Lastly, "the impediment is one that the party could not reasonably be expected to have taken into account at the time of the conclusion of the contract" [Digest CISG, p.373]; this however was foreseen as a possibility and a price increase was agreed as mentioned above. [Exhibit CE No. 4, p. 12].

i The requirements for a valid application of Article 79 CISG are not met by CLAIMANT

128. Article 79 only addresses the exceptions of liability in case of a non-fulfillment regarding an obligation contained in an agreement; which is not the topic in this dispute.

129. Nonetheless, if such case where to present itself, article 79 (1) states that "the party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt."

130. In this case, RESPONDENT, after receiving notice from CLAIMANT requesting a price adaptation due to the new tariffs, answered in reasonable time that "if the contract provided for an increased price in the case of such high additional tariff we will certainly find an agreement on the price", however RESPONDENT also mentioned that any negotiation or legal matter must be discussed with the legal department, which was not available momentarily and therefore RESPONDENT was unable to consent on any matter regarding the Contract (RE No.4, p. 36).

131. This implicates that, firstly RESPONDENT did not consent to anything not expressly stated in the contract, this is the price adaptation; and secondly it duly informed CLAIMANT its impediment to renegotiate or to confirm the obligation of CLAIMANT to deliver in the conditions previously agreed upon or not. Hence, CLAIMANT on its own accord decided to deliver the remaining 50 doses under the terms agreed in the Contract.

132. On the other hand, CLAIMANT only mentioned in its communication that the new tariffs applied to all animal products, including frozen semen for breeding of racehorses and thus increasing 30% the price of the operation and their intention of finding a solution to this issue, failing to mention its effect on its ability to perform, as required under article 79. RESPONDENT found out the extent and implications on CLAIMANT's financial situation only after the shipment and the commencement of this arbitration proceeding. Therefore the notice issued by CLAIMANT does not comply with the requirements expressly stated in article 79 rendering such notice invalid and the article unenforceable.

133. Considering that: (i) the new tariffs do not constitute an impediment to the obligations of CLAIMANT as increased onerousness of the costs of performance of a contract are inherent risks of sales of goods; (ii) CLAIMANT was able to perform its obligations and in spite of the answer for RESPONDENT decided to do so; (iii) article 79 of CISG is for cases when a party failed to comply with its obligations; (iv) and CLAIMANT did not mention it is notice of impediment that the tariffs would represent insolvency for it, only the need to find a solution for the 30% increase in the transaction, thus failing to comply with the requisites for the application of this exemption; article 79 is not applicable nor does it provide for a price adaptation.

B. THE HARDSHIP CLAUSE EXCLUDES THE APPLICATION OF CISG ARTICLE 79

134. As mentioned in [The Problem, p. 32], the negotiation and inclusion of a hardship clause in the Contract constitutes a derogation in terms of article 6 of CISG.

135. Article 6 of CISG states the following:

> *"The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."*

136. According to this article, the choice of derogating from or modifying a provision from CISG is possible when the parties express their will to do so, this is also supported by article 9 CISG.

137. A basic principle in international commercial arbitration is that of party autonomy, which comes to be defined as the guiding principle in determining the procedure to be followed in an international commercial arbitration. This principle has been recognized in both national and international arbitral institutions and organizations, without any opposition" [Redfern and Hunter, p. 315].

138. In addition, CISG supports the parties' autonomy as the primary source of rules for international sales [Digest CISG, p.33] therefore what is stated in as an agreement stands above any provision of the CISG. [CLOUT case No. 229].

139. Furthermore, the drafters of CISG acknowledged its non-mandatory nature and as such there are no limitations to the right of the parties to derogate from ay of its provisions. [Obergericht Kanton Bern].

140. Now, for the exclusion of certain provisions, as mentioned above, it is only necessary that the parties agree upon a different provision as one contained in CISG. In this case, the Parties agreed upon the risks and additional expenses that could arise during the sale [SA, Clause 12]; which means, that they considered the possibility of hardship and even agreed a price increase –payed and included in the Contract, not the one subject of this arbitration-, therefore eliminating the need to apply CISG for such matters.

C. A BROAD INTERPRETATION OF CISG DOES NOT PROVIDE FOR ANY ADDITIONAL PAYMENT OR AS AN ACCEPTANCE OF SUCH

141. As stated by CLAIMANT (CLAIMANT memorandum, §111-114) CISG is applicable to this Contract and it is a valid agreement as per CISG. The offer was made, negotiated and duly accepted; the goods were duly shipped and the Contract was performed to its totality.

142. However, the price adaptation is not valid, since it, by itself, could be understood as a separate agreement. When RESPONDENT was contacted by CLAIMANT in regard to a price adaptation (which was not mentioned as such) [.CE No.7, p.16], it can be understood as an offer [CISG art. 14 (1)], then RESPONDENT answered the following: "if the contract

provided for an increased price in the case of such high additional tariff we will certainly find an agreement on the price" and that the legal department, empowered to make such decisions, was currently not available.

143. Such answer cannot be considered as an acceptance because: (i) it clearly states a condition to the price increase, this condition is that only if the Contract provided for an increase to the price in the specific case of high additional tariffs RESPONDENT would negotiate the price, and (ii) that they are momentarily not in the position to answer; and "silence or inactivity does not in itself amount to acceptance" [CISG art. 18 (1)].

144. Furthermore, the intention of having a long lasting commercial relation does not imply an automatic acceptance to any condition or provision suggested, not does it imply that any of the parties are obliged to comply with the impossible, to adapt the agreement or to perform any other action just for a lasting commercial relation, it merely means that both parties are acting in good faith and do intend to do business in the future.

145. Moreover, and as correctly mentioned by CLAIMANT [CLAIMANT memo, §124], and as per CISG, the parties to a contract have the responsibility to mitigate loss or damages, and even though none of the parties are claiming damages, the appropriate measure to mitigate loss, if such measure was to be found applicable to this dispute, would be to allow a renegotiation [(art.7.2 - Belgian case: right to renegotiate)]. RESPONDENT never denied a renegotiation, thus complying with its obligation to mitigate loss and even went to the extent as to mention to CLAIMANT that it was currently not in a position to demand the strict performance of the Contract without commenting the current situation (the new tariffs and CLAIMANT's need to address such issue prior to the last shipment) to the legal department in charge of this commercial contract, this not only demonstrates the good faith from RESPONDENT and its desire to maintain a long term relationship, but also it willingness to mitigate or avoid any possible loss or damage.

146. Thus, considering that RESPONDENT conducted itself always in strict accordance with the provision of CISG, the contract and the principle of good faith and duly fulfilled its obligations; CISG does not provide for a contract adaptation due to increased onerous, as mentioned above [RESPONDENT memo, §127] and as stated in article 6.2.1 of the UNIDROIT Principles

the fact that the performance of the contract becomes more onerous for one of the parties does not suffice to assume that is hardship [Delta v. Infoenergy]; and complied with its obligation to mitigate damages, there is no condition to interpret any of the provisions contained in CISG as a obligation for RSPONDENT to incur in additional payments for a good already paid for and an already performed contract.

REQUEST FOR RELIEF

In light of the foregoing submissions, RESPONDENT respectfully requests the Arbitral Tribunal to:

1. Find that it lacks the necessary power and authority to adapt the Contract;
2. Find that RESPONDENT is not obliged to pay the amount of USD $1,250,000 requested by CLAIMANT nor any other than those expressly stated in the Contract.
3. Find that CLAIMANT should bear alone the costs of the arbitration..

Vindobona, Danubia, January 24, 2019.

Counsel for RESPONDENT

(signed)
AILEEN WAGLEY

(signed)
ANA VERNON

(signed)
FERNANDO DEL REY

(signed)
GUILLERMO MADRIGAL

(signed)
PABLO RUEDA

Certificate and Choice of Forum

To be attached to each Memorandum

I, Guillermo Madrigal , on behalf of the Team for (name of School) Universidad Nacional Autónoma de México (UNAM) hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

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

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

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

Or

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

☒ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for (School name) Universidad Nacional Autónoma de México (UNAM)

Name Guillermo Madrigal

Signature _____