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Willem C. Vis (East)

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Hong Kong

# MEMORANDUM FOR CLAIMANT

| ON BEHALF OF | AGAINST |
|---|---|
| Phar Lap Allevamento | Black Beauty Equestrian |
| Rue Frankel 1 | 2 Seabiscuit Drive |
| Capital City | Oceanside |
| Mediterraneo | Equatoriana |
| **CLAIMANT** | **RESPONDENT** |

**Kyoto, Japan**

## DOSHISHA UNIVERSITY

ANZU SHINOHARA, IFAN CHEN, HAYATO TOKUDA, HIROTO AYA, SYNTHIA JULIA BASTRO, MASAKI, KIRIKIHIRA, MAYU SAEDA, TAICHI ISOGAI, YUKI OKAMOTO

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TABLE OF ABBREVIATIONS

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|---|---|
| Art./Arts. | Article/Articles |
| chap. | Chapter |
| CL | CLAIMANT |
| Ed | Edition |
| et al. | et alia (Latin for “and others”) |

| | |
|---|---|
| EX. | EXHIBIT |
| HKIAC | Hong Kong International Arbitration Centre |
| IBA | International Bar Association |
| ibid | ibidem (Latin for “in the same place”) |
| i.e. | id est (Latin for “that is”) |
| No. | Number |
| p./pp. | page/pages |
| para. | paragraph |
| Record | The Problem |
| RES | RESPONDENT |
| Sales Agreement | FROZEN SEMEN SALES AGREEMENT |
| the other arbitration | the other arbitration which RESPONDENT is involved in and whose Partial Interim Award was rendered on 29 June 2018 |

| | |
|---|---|
| v | Versus |

Table of Legal Sources

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| CISG | United Nations Convention on Contracts for the International Sale of Goods |
| HKIAC Rules | Hong Kong International Arbitration Centre administered Arbitration Rules |
| IBA Rules | IBA Rules on the Taking of Evidence in International Arbitration |
| Uncitral Model Law | UNCITRAL MODEL LAW on international commercial Arbitraion 1985 with amendments as adopted in 2006 |
| Unidroit Principles | UNIDROIT Principles of International Commercial Contracts 2016 |
| NYC | New York Convention |

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| ICC Case No. 6840 | Final Award in ICC Case No. 6840 | 31 |
| ICC Case No. 6850 | Final Award in ICC Case no. 6850 | 31 |
| ICC Case No. 11869 | Award in ICC Case No. 11869 | 31 |
| Corfu Chanell | U.K. v. Alb., 1949 I.C.J. 4, 20 | 54 |
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## STATE OF FACTS

1. CLAIMANT, Phar Lap Allevamento (Phar Lap), is a company registered and located in Capital City, Mediterraneo, which operates Mediterraneo's oldest and most renown stud farm, covering all areas of the equestrian sport.

2. RESPONDENT, Black Beauty Equestrian (Black Beauty) in Oceanside, Equatoriana, is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions.

3. On 21 March 2017, CLAIMANT contacted RESPONDENT, and with email of 24 March 2017 CLAIMANT offered RESPONDENT 100 doses of Nijinsky's frozen semen. CLAIMANT and RESPONDENT both agreed on hardship clause and also on an acceptable choice of law and arbitration clause. However before they were able to finalize the agreement, the two main negotiators were injured in an accident and were not able to finalize the sales agreement which was signed on 6 May 2017. In this agreement, both parties agreed the main contract is governed by the law of Mediterraneo, but in the arbitration clause, there is no choice of governing law. Furthermore, the seat of arbitration shall be Danubia.

4. CLAIMANT and RESPONDENT agreed on three shipments in total and CLAIMANT sent the first shipment (containing 25 doses) on 20 May 2017 and the second shipment (containing 25 doses) was made on 3 October 2017. However, two months before the last shipment was made, Mediterraneo's new President announced 25% tariffs on agricultural products. This was a total surprise for everyone. This announcement was not the end; a bigger surprise came after that, when Equatorian government imposed 30% tariffs on selected products from RESPONDENT including animal semen.

5. CLAIMANT and RESPONDENT started to negotiate immediately but RESPONDENT has made clear already during the contract negotiation that for its planning timely delivery was extremely important, and appeared to generally accept the need for a price increase. In light of above facts and taking into account that RESPONDANT had created the impression of the general need for a price adaption, CLAIMANT delivered the remaining 50 doses on 30 January 2018 before RESPONDENT actually agreed on the new increased price of the semen.

6. In addition, through the proceedings of arbitration, CLAIMANT informed the Arbitral Tribunal that CLAIMANT received reliable information about another arbitration under the HKIAC-Rules which is demerit for RESPONDENT in this arbitration on 2 October 2018. Against CLAIMANT's allegation, RESPONDENT claimed that the submission of materials from other arbitration occurred in violation of contractual and statutory confidentiality obligations, so such evidence is clearly not admissable in this arbitration, 3 October 2018. Moreover, at same time, RESPONDENT claimed that the evidence CLAIMANT will submit would have been obtained by illegal means and should not be admitted in the arbitration, and this should apply irrespective of whether or not CLAIMANT had any involvement in obtaining the document or whether or not available elsewhere in the worldwide web, too.

## SUMMARY OF ARGUMENT

7. **Does the tribunal have the jurisdiction and/or the powers under the arbitration agreement to adapt the contract, which includes in particular the question of which law governs the arbitration agreement and its interpretation:** The arbitration agreement is governed by the law of Mediterraneo because

separability doctrine only works when the main contract is void or invalid. Further, the parties made an implied choice of the law of Mediterraneo as the governing law of the arbitration agreement. Under the law of Mediterraneo, the arbitral tribunal has the jurisdiction and the power to adapt to contract. [I]

8. **Should CLAIMANT be entitled to submit evidence from the other arbitration proceedings on the basis of the assumption that this evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's Computer system:** Even if the evidence was obtained illegally, CLIMANT should be entitled to submit the evidence through the three-step approach. [II]

9. **Is CLAIMANT entitled to the payment of US $ 1,250,000 or any other amount resulting from an adaptation of the price under clause 12 of the Contract:** The Clause 12 of the Contract includes the effect of the hardship clause or impose the tariff of 30 percent is included to "comparable unforeseen events". [III (i)]

10. **Is CLAIMANT entitled to the payment of US $1,250,000 or any other amount resulting from an adaptation of the price under the CISG:** supplementary interpreting the Art.79 CISG, CLAIMANT has the right to request the revision of the Contract. [III (ii)]

## Issue I. The arbitration clause is governed by the law of Mediterraneo, under which the arbitral tribunal has the jurisdiction and the power to adapt the contract.

11. Contrary to Respondent's allegations, (A) the arbitration clause is governed by Mediterraneo's law, (B) under which the arbitral tribunal has the jurisdiction and the power to adapt the contract.

**(A) Mediterraneo's law is the governing law of the arbitration clause.**

12. Contrary to Respondents allegations, the arbitration clause is governed by the law of Mediterraneo, because (a) the arbitration clause is not separate from the main contract, and thus governed by the same law which is applicable to the underlying Sales Agreement. This conclusion is reinforced because (b) the parties have made an implied choice of the law of Mediterraneo as the governing law of the arbitration clause.

**(a) The arbitration clause is not separate from the main contract.**

13. RESPONDENT argues that under the doctrine of separability, the arbitration agreement is legally separate from the container contract in which it is included, and that the choice of law clause of the Sales Agreement is merely determining the law applicable for the main contract [Record, p. 31].

14. However, RESPONDENT fails to understand separability doctrine correctly. Contrary to RESPONDENT's claim, the separability doctrine only applies when the main contract is void or invalid, and it should not be applied when determining the governing law of the arbitration agreement. Hence, an arbitration agreement should be treated only as one of the clauses in the main contract. Thus, the governing law of the Sales Agreement, i.e., the law of Mediterraneo, is applicable to the arbitration clause.

15. As RESPONDENT alleges, some authorities "have interpreted the doctrine of separability more widely [i.e., under the separability doctrine, the arbitration agreement is regarded as separate not only when the main contract is void or invalid, but also when determining the governing law of the arbitration agreement]; they argue […] that the reason why the arbitration agreement is not governed by the [governing] law of the [main] contract is that it is a distinct agreement *generally*

[emphasis original] [Glick/Venkatesan, p. 137]". However, with respect, this interpretation of the doctrine is inappropriate for the following reasons.

16. First, Art. 16(1) of the UNICITRAL Model Law, which RESPONDENT relies on [Record, p. 31, para. 14], "carefully limits the doctrine to disputes about validity" [Glick/Venkatesan, p. 137]. Art. 16(1) of the UNICITRAL Model Law stipulates that "the arbitral tribunal may rule on its jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. *For that purpose,* an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract […] [emphasis added]".

17. The second reason is that there is no clear reason for interpreting the separability doctrine as meaning that the arbitration agreement is a distinct agreement generally [i.e., not only when the main contract is void or invalid, but also when ascertaining the governing law of the arbitration agreement]. "The conceptual basis of the doctrine, even in the context of validity, is that the parties ordinarily intend to choose a tribunal to resolve all (and not merely some) disputes arising out of the relationship into which they have entered or purported to enter. But this has no bearing on governing law: the fact that the parties intend the arbitration agreement to be effective even if the [main] contract does not say nothing about whether they intend that agreement to be governed by the same law which governs the [main] contract [ibid, p. 138]".

18. Third, "although this has often been overlooked, the arbitration agreement is in fact *not* regarded as distinct from the matrix contract for all purposes even on the existing authorities. The clearest example of this is Ronly Holdings [emphasis original] [ibid, p. 138]". In this case, the contract provided that no variation to 'any clause of this agreement' would take effect unless reduced to writing. The claimant alleged that it was free for the parities to vary the arbitration agreement because it was distinct from the other clauses, and that the clause which requires variations to be in writing did not apply to the arbitration agreement. The court rejected this

argument, holding that "[i]n the present case, the question arises whether on proper construction of clause 18 the mutual intention of the parties was that the words 'any Clause of this Agreement' should include the Law and jurisdictions clause. *There is nothing in the intrinsic character of an arbitration agreement as having an attribute of separability which prevents it from being included in that phrase.* The fact that in substance it may have that attribute does not prevent it being aptly described as a 'Clause of this Agreement'. The phrase simply refers to any one of the clauses collected together in the document which all the parties have signed. The function of clause 18 in regulating the means of waiver or variation of the terms in that document is in no sense inconsistent with the separability principle: *it is simply a term which on its proper construction is overtly directed to all the clauses in the document, including the clause containing the agreement to arbitrate* [emphasis original]".

19. Further, another commentator observes that "[t]he autonomy of the arbitration clause and of the principal contract does not mean that they are totally independent one from the other, as evidenced by the fact that acceptance of the contract entails acceptance of the clause, without any other formality [Derains, para. 16-17]".

20. Also, the position that the separability doctrine is irrelevant in determining the governing law of the arbitration agreement is supported by some judicial authorities. In BCY v BCZ, the court held that "the doctrine of separability serves to give effect to the parties' expectation that their arbitration clause – embodying their chosen method of dispute resolution – remains effective even if the main contract is alleged or found to be invalid. It does not mean that the arbitration clause forms a distinct agreement from the time the main contract is formed. Resort need only be had to the doctrine of separability when the validity of the arbitration agreement itself is challenged. […] It is one thing to say that under the doctrine of separability, a party cannot avoid the obligation to submit a dispute to arbitration by merely denying the existence of the underlying contract; it is quite different to say

that because of this doctrine, parties intended to enter into an arbitration agreement independent of the underlying contract".

21. Therefore, the doctrine of separability is irrelevant in identifying the proper law of the arbitration agreement. "[W]hen the court is asked to determine the proper law of the arbitration agreement, it is in fact concerned with ascertaining the law which governs one clause of a single contract [Glick/Venkatesan, p. 139]".

22. Since an arbitration agreement is only one of the clauses in a single contract, "when there is an express or implied choice of law for the underlying contract, it is natural that the arbitration agreement is governed by the same law which governs the underlying contract [Takahashi, p. 265]".

23. In the case at hand, the arbitration agreement is contained in the Sales Agreement [Record, p. 14]. Since the arbitration agreement is only a part of the underlying Sales Agreement, the arbitration clause is governed by the same law which is applicable the Sales Agreement, ie the law of Mediterrane, contrary to RESPONDENT's allegation that "the reference in the choice of law clause directly preceding the arbitration clause that 'this Sales Agreement is governed by the law of Mediterraneo […] is merely determining the law applicable for the main contract, i.e. the 'Sales' part of it [Record, p. 31]".

**(b) The parties' implied choice of the law of Mediterraneo as the governing law of the arbitration clause leads to the same conclusion.**

24. The conclusion that the law of Mediterraneo governs the arbitration agreement is reinforced because the parties have had an implied intention that the [governing] law of the Sales Agreement would also govern the arbitration agreement.

25. The parties have agreed that any disputes arising out of the Sales Agreement should be resolved under HKIAC Rules [Record, p. 14]. However, HKIAC Rules has no provision concerning how to ascertain the governing law of the arbitration agreement. Hence, first it is necessary to determine the standard which the arbitral tribunal should apply in determining which law governs the arbitration agreement.

26. In this respect, Sulamérica's three-stage approach should be applied to the case at hand, because it is a "leading modern authority" [Glick/Venkatesan, p. 133]. In this case, an insurance policy expressly governed by Brazilian law provided for arbitration in London in accordance with the ARIAS Arbitration Rules. The issue was whether the arbitration agreement was governed by Brazilian law or by English law. The Court of Appeal established three stages to determine the applicable law to the arbitration clause: (1) the parties' express choice; (2) the implied choice of the parties as gleaned from their intentions at the time of contracting; (3) the system of law with which the arbitration agreement has the closest and most real connection [Sulamérica, para. 25]. The Court held that the fact that the insurance policy was expressly governed by Brazilian law was a 'strong pointer towards an implied choice of the law of Brazil as the proper law of that agreement'.

27. The Court of Appeal ruled that the law of Brazil did not apply after all. This was because there were two factors which suggested that it was not intended to be an implied choice of law for the arbitration agreement. The first factor was that the parties had chosen London as the seat of arbitration. The second, which the Court described as a 'powerful factor'[Sulamérica, para. 30], was a rule in Brazilian domestic law that an arbitration agreement cannot be invoked or enforced against the insured without its consent. In light of this rule, the Court of Appeal held that the express choice of the law of Brazil could not be considered to be the implied choice of law for the arbitration clause, because "there is a serious risk that a choice of Brazilian law would significantly undermine that agreement"[since one party can invoke arbitration agreement only with the consent of the other party].

28. "It follows from this that the Court of Appeal in Sulamérica did not regard the mere choice of a London seat as sufficient to displace the implied choice of Brazilian law for the arbitration agreement supposedly evidenced by the choice-of-law clause in the [main] contract: there was an additional factor- the effect that applying the Brazilian law would have had on the arbitration agreement [i.e., the effect that the parties cannot start arbitration proceedings without the consent of the other party]- which persuaded Moore-Blick LJ that the parties could not have intended to select that law as the proper law. It is therefore wrong to read Sulamérica, as some have done, as a case which establishes a presumption that, in a case where the matrix contract contains an express choice-of-law clause, the arbitration clause is nevertheless governed by the law of the seat and not by the proper law of the matrix contract: indeed, the presumption, if there is one, is the exact opposite" [Glick/Venkatesan, p. 135].

29. The judgement of Sulamérica has been confirmed in other cases. In Arsanovia, the contract was expressly governed by the law of India and contained an arbitration clause with the seat in London under LCIA Rules. In the case, the court held that the fact that the parties had expressly chosen Indian law was to be considered as 'a strong pointer to their intention about the law governing the arbitration agreement'. Contrary to Sulamérica, "there [was] no other indication other than choice of a London seat for arbitration". In the end, the court concluded that the arbitration agreement was governed by the law of India, because the mere choice of London as the seat of arbitration was not sufficient to displace the starting assumption that the parties had an intention that the arbitration agreement was governed by the governing law of the main contract, i.e. the law of India.

30. Sulamérica's decision was also confirmed by Singapore High Court. In BCY v BCZ, the court held that "[t]he foregoing review demonstrates that more cases appear to favour the Sulamérica approach. Though none of them are binding precedents, in my view, the approach in Sulamérica is to be preferred. Where the arbitration agreement is a clause forming part of a main contract, it is reasonable to

assume that the contracting parties intend their entire relationship to be governed by the same system of law. If the intention is otherwise, I do not think it is unreasonable to expect the parties to specifically provide for a different system of law to govern the arbitration agreement".

31. Also, a number of commentators [Bantekas, p. 2; Harisankar, p. 629; Lew, p. 143; Redfern/Hunter, p. 166], arbitral awards [ICC Case No. 11869; ICC Case No. 6840; ICC Case No. 6850; ICC Case No. 6379] and common law jurisdictions including Australia [Recyclers of Australia Pty Ltd] and India [Aastha Broadcasting Network; National Thermal Power Corp] support this approach.

32. There may be some criticism of this approach [Redfern/Hunter, p. 159; Born(SAcLJ), p. 832], favouring instead the law of the seat. With respect, however, neither of the criticism is satisfactory. BCY v BCZ has offered rebuttal to the criticism.

33. The first reason of the criticism is that this approach "disregards separability presumption" [Born(SAcLJ), p. 832]. However, as noted above, "[r]esort need only be had to the doctrine of separability when the validity of the arbitration agreement itself is challenged [BCY v BCZ, para. 60]".

34. The second reason is that the approach which favours the law of main contract disregards "the parties' intention to choose a neutral forum in which to resolve their disputes [Born(SAcLJ), p. 832]". It is true that the seat of arbitration is chosen based on a desire for a neutral forum. However, "the law of the seat governs *the procedure of the arbitration*; it does not necessarily follow that the seat's substantive law - *ie*, the law of contract which would govern the formation of an arbitration agreement- would be neutral [emphasis original] [BCY v BCZ, para. 63]".

35. The third reason of the criticism of the approach which is in favour of the law of the main contract is that this approach is "difficult to reconcile with the default choice-of-law provision of Art V(1)(a) of the New York Convention (and Arts 34 and 36 of the Model Law) which provides for the application of the law of the arbitral seat, absent contrary agreement of the parties"[Born(SAcLJ), p. 832]. However, "validity under the law of the seat only arises for consideration if there is no indication of the law the parties have 'subjected' the agreement to. The law that the parties have subjected the agreement to would include their implied choice. As Gary Born observes, Articles 34(2)(a)(i) and 36(1)(a)(i) aim at 'giving effect to any express or implied choice-of-law by the parties and, failing such agreement, prescribing a default rule, selecting the law of the arbitral seat' [Born, at. 526]. Therefore, "this argument only brings us back to the question of what the implied choice of law is and whether that should be the law of the main contract or the law of the seat [BCY v BCZ, para. 64]".

36. Thus, when the underlying contract has an express choice-of-law clause, it follows that the parties implicitly intend that the arbitration agreement is governed by the same law which is applicable to the underlying contract. And this is not displaced by a mere choice of a seat different from the governing law of the main contract.

37. In the case at hand, the Sales Agreement does not contain an express choice for the governing law for the arbitration clause [Record, pp. 13-14]. Thus, the arbitral tribunal should move to the second stage and ascertain the implied choice for the parties, following the three-stage approach established in Sulamérica.

38. Clause 14 of the Sales Agreement clearly states that "[t]his Sales Agreement shall be governed by the law of Mediterraneo […] [Record, p. 14]". Therefore, the parties are presumed so have intended that the arbitration agreement is governed by the same law, ie, the law of Medditerraneo. Although the Sales Agreement stipulates in clause 15 that "[t]he seat of arbitration shall be Vindobona, Danubia", there is no other factor which might lead to the application of Danubia's law to the

arbitration agreement. The mere choice of Danubia as the seat of arbitration is not sufficient to displace the starting assumption that the law Mediterraneo governs the arbitration agreement.

39. This is even more so, because the parties have chosen Danubia as a neutral country from the perspective of arbitral procedure. In the email to RESPONDENT, CLAIMANT said that "[CLAIMANT] would like to inform [RESPONDENT] that [CLAIMANT] has an internal policy according to which consent to a contract […] providing for dispute resolution in the country of the counterparty requires special approval by the creditors' committee, a board in which all financing banks are included. It would, however, be possible to agree on arbitration in a neutral country [Record, p. 34]" The creditors committee had declared that there was no need to seek approval for the consent to arbitration clauses, as long as the place of arbitration was a 'neutral country with a functioning judicial system' [Procedural Order No. 2, para. 14]. Danubia was considered to be such a country by the committee [ibid]. This was one of the reasons that CLAIMANT suggested Danubia as the seat of arbitration in the email of 11 April 2017 [ibid]. Moreover, "while [Ms. Napravnik, who was CLAIMANT's negotiator at that time] was not familiar with details of the Danubian Arbitration Law she knew that it was a largely verbatim adoption of the UNCITRAL Model Law like the arbitration laws of Mediterraneo and Equatoriana"[ibid]. It was in this context that CLAIMANT proposed to RESPONDENT an arbitration in a neutral country, ie Danubia, and RESPONDENT accepted this proposal. The parties have chosen Danubia to proceed the arbitration with the procedural law of the neutral country, ie Danubia. They did not intend to put the arbitration agreement under the substantive law of Danubia as a neutral country.

40. Therefore, the parties have implicitly chosen the law of Mediterraneo as the law which governs the arbitration agreement. Hence the arbitration agreement is governed by Mediterraneo's law.

**(B) Under the Mediterraneo's law, the arbitral tribunal has the jurisdiction and power to adapt the contract.**

41. Under Mediterraneo's law, the arbitral tribunal has the jurisdiction and power to adapt the contract. This is because (a) applying Mediterraneo's law, the arbitrators can interpret the arbitration agreement more broadly than applying Danubia's law, and (b) under Mediterraneo's law the arbitral tribunal has the jurisdiction and power to adapt the contract in the case at hand.

**(a) Applying Mediterraneo's law, the arbitrators can interpret the arbitration agreement more broadly than applying Danubia's law.**

42. Mediterraneo's contract law is a verbatim adoption of the UNIDROIT Principles [Procedural Order No. 1, p. 52, para. 4]. Art. 6.2.3 of the UNIDROIT Principles that if the court finds hardship it may, if reasonable, adapt the contract with a view to restoring its equilibrium. And the 'court' in the article includes an arbitral tribunal [Art. 1.11 of the UNIDROIT Principles].

43. On the other hand, while Danubia's Contract Law for international contracts is a largely verbatim adoption of the UNIDROIT Principles, it has an amendment in Article 6.2.3(4)(b) that only if the arbitral tribunal is authorized, it has the power to adapt the contract [Procedural Order No. 2, p. 61, para. 45].

44. Hence, by applying Mediterraneo's law, the arbitration agreement can be interpreted more broadly when applying Mediterraneo's law than when applying the law of Danubia.

**(b)Under Mediterraneo's law, the arbitral tribunal has the jurisdiction and the power to adapt the contract in the case at hand.**

45. As mentioned above, Mediterraneo's law provides that if the arbitral tribunal finds hardship it may, if reasonable, adapt the contract with a view to restoring its equilibrium [Art. 6.2.3 of the UNIDROIT Principles].

46. On this point, as written in the substantial part, there is hardship, the adaptation is reasonable and ma view to restoring its equilibrium.

47. Therefore, under the Mediterraneo's law, the arbitral tribunal has the jurisdiction and the power to adapt the contract.

**Issue II. Should CLAIMANT be entitled to submit evidence from the other arbitration proceedings on the basis of the assumption that this evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's Computer system**

48. No matter how the evidence has been obtained, the arbitral tribunal should allow CLAIMANT to submit it, applying the three-step approach which has been established through analysis of cases: (A) Has the evidence been obtained unlawfully by a party who seeks to benefit from it?; (B) Does the public interest favour rejecting the wrongfully disclosed documents as inadmissible?; (C) Does the interest of justice favour the admission of the wrongfully disclosed document? [Blair/Gojković, pp. 256-258]. Although the three-step approach has been established mainly thorough analysis of ICSID cases, this approach can be applied to the case at hand for the reasons written below.

49. In the case at hand, the parties have agreed to resolve any dispute which arises out of the contract under the HKIAC Rule [Record, p. 14]. Art. 22.2 of the HKIAC Rules stipulates that "[..]The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence".In HKIAC Rule Art 22.3 "[..]At any time during the arbitration,

the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome. The arbitral tribunal shall have the power to admit or exclude any documents, exhibits or other evidence." However, Article 22.2 is not clear enough about the standard that should be applied. In fact, not only the HKIAC Rules but also other principal institutional rules are silent about how evidence should be gathered and presented [IBA Commentary, p. 1; emphasis added]. Therefore, it is necessary for the arbitral tribunal to determine the standard of the admissibility of the evidence.

50. In the case at hand, the arbitral tribunal should use the three-step approach as the standard, because the purpose of each of the three steps is common between ICSID arbitration and commercial arbitration. According to the three-step approach, CLAIMANT should be entitled to submit the evidence irrespective of the way it had been obtained.

**(A) Has the evidence been obtained unlawfully by a party who seeks to benefit from it?**

51. This question refers to the clean hands principle, which has been applied in many international cases, such as Methanex vs USA. The principle does not allow the party to rely on evidence which was illegally obtained since it would run counter to the principle of "a right cannot stem from a wrong", because it would allow parties to obtain a procedural advantage through unlawful evidence.[Blair/Gojković, p. 256]

52. In Methanex vs USA, a Canadian company (Methanex) attempted to rely on documents which were obtained by going through the waste paper and rubbish containing confidential information of the company. Such illegal action was committed by the Methanex company.

53. Therefore, the Methanex vs USA case's tribunal excluded the documents which were illegally obtained by Methanex in such manner. The tribunal held that "[i]t would be wrong to allow Methanex to introduce this documentation into these proceedings in violation of its general duty of good faith and, moreover, that Methanex's conduct, committed during these arbitration proceedings, offended basic principles of justice and fairness required of all parties in every international arbitration."[Methanex vs USA p.59] This conclusion emphasizes the importance of good faith and the basic principle of justice and fairness in litigation.

54. As written above, the clean hands principle creates a balance between the discovery fact and the fairness of the parties. If the party illegally obtains evidence it might risk that the arbitral tribunal will exclude the evidence by referring to the clean hands doctrine. However, in Corfu Channel case, evidence which was illegally obtained by British Navy was still admitted by the tribunal. This fact indicates that the illegal acquisition of the evidence cannot be the major reasoning for excluding the evidence. It should measure if the party breaches the good faith principle and therefore if the fairness between both parties is affected.

55. In the case on hand, CLAIMANT heard about the other arbitration from Mr. Kieron Velazquez in the annual breeder conference [record p.60 para.40]. Deducing from the state of the fact in "Partial Interim Award", RESPONDENT used almost the same claim in the other arbitration, which concerned the same two countries and a similar situation regarding additional tariff.

56. Furthermore, in the rendered "Partial Interim Award" the arbitral tribunal has confirmed its power to adapt the contract should the tariff result in hardship for RESPONDENT under the law of Mediterraneo governing the arbitration agreement and ICC hardship clause.[record p.60 para.39] This situation corresponds to the same claim of CLAIMANT' in the case at hand.

57. Therefore, in order to obtain proof of the conclusion in the Partial Interim Award CLAIMANT arranged to get a copy of the award by the company introduced by Mr.Kieron Velazquez. CLAIMANT does not know how the company and whether or not it already obtained the copy of the award since there is no evidence showing how and if the company already got into the possession of the copy of the award.

58. In such circumstances, the clean hands principle requires that if the party obtains the evidence unlawfully for its own benefit and by their own conduct, the evidence should be excluded and not admitted into the procedure. However in this case, it still remains unclear how the evidence was obtained and therefore, cannot just be assumed to be illegally obtained. As a result, it would be unreasonable for the arbitral tribunal to refuse submission of this evidence

**(B) Does public interest favour rejecting the wrongfully disclosed document as inadmissible?**

59. This question can be applied to international commercial arbitration, where public interest includes the confidentiality of the abirtration procedure and arbitral awards rendered.

60. First, as for the 'public interest', "[t]ribunals should take into account public policy considerations, such as legal professional privilege, diplomatic immunity and inviolability"[Blair/Gojković, p. 257]. Also, "Article 9(2)(f) of the [IBA Rules] empowers the tribunals to 'exclude from evidence or production any Document' on the 'grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling […]'"[ibid, p. 257].

61. When the submitted evidence is against the public interest, "documents obtained unlawfully which are protected by legal privilege, would attract a strong presumption against admissibility. Certain types of privilege, notably attorney-client privilege, should be considered as protecting the document absolutely from being used in proceedings"[ibid, p. 257]. "The reason for such absolute protection lies in the need to ensure honest and transparent communication between the ~~an~~ attorney and his ~~a~~ client, confidentiality of which should not be threatened by wrongful acts of others"[ibid, p. 257].

62. Although the question about the public interest comes from analysis of ICSID cases, the interest protected by attorney-client privilege should also be protected in international commercial arbitration. Hence, the question about whether the public interest favour rejecting wrongfully disclosed documents inadmissible should be applicable to international commercial arbitration, too.

63. Then, 'public interest' includes the confidentiality for the following reason. If the confidentiality is not protected as public interest, the interest of confidentiality, which is one of the differences between arbitration as alternative dispute resolution and regular litigation such as civil procedure, is lost. The interest of confidentiality is one of the main reasons why companies which are concerned with the protection of its secret information opt for arbitration (as alternative dispute resolution) instead of regular civil procedure. In other words, the interest of confidentiality is one of the most important characteristics of arbitration, being worth protecting as public interest.

64. In the case at hand, the RESPONDENT argues that the Partial Interim Award is protected by the confidentiality, which is supported by the HKIAC Rules Art 45.1 (b)"Unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to: (b)an award or Emergency Decision made in the arbitration." This provision prevents any document or award being published and used.

65. Even though the evidence is protected by the HKIAC Rules Art. 45 (under the protection of public interest), public interest does not favour rejecting the evidence. This is because, (a) the confidentiality of other case's evidence does not bind the CLAIMANT (as not being a party of the other arbitration where the evidence is derived from); (b) because of the interest of justice for the case at hand , it would be an exception to the confidentiality.

**(a) The confidentiality of the evidence of another arbitration does not bind CLAIMANT.**

66. As HKIAC Article 45 mentions the confidentiality of the arbitration procedure and its documents, which stipulates that it only binds the tribunal and both parties who cannot publish any information related to the arbitration or its documents.

67. The common motivation for using arbitration is due to its privacy. In the case at hand, the confidentiality obligation should only bind the two parties and the tribunal in the other arbitration, not the CLAIMANT of this case. The confidentiality obligation from another arbitration case other than the CLAIMANT's case should not prevent the CLAIMANT to submit this evidence.

**(b) because of the interest of justice for the case at hand, it would be an exception to the confidentiality.**

68. In reference to civil litigation cases, such as English civil proceedings, it should be noted that there is no rule of law that evidence must be excluded because it has been obtained illegally and/or improperly [Colston, p.20 section England and Wales para.1]. The Civil Procedure Rules(CPR) stipulate that the court of England has the discretion to exclude evidence that would otherwise be admissible.[CPR r32.1(2)].

69. In the English civil case, Jones v University of Warwick, the claimant demanded tort damages for disability in her hand following an accident at work. However the defendant's insurance company arranged an enquiry agent to obtained a video as evidence through a hidden camera showing the claimant's ability using the hand which she has claimed to be disabled. This evidence was admitted by the court, concluding its admissibility because the evidence shows the artificial and undesirable of their claim, which is highly relevant in order to make a fair and just decision in the case.

70. "The review of the case law post the introduction of the CPR shows that the courts in England and Wales almost always consider that justice is better achieved by putting all relevant material before the judge. Reference to the Article [Colston, p.20 section England and Wales para.4]" This shows the court's consideration on admitting the evidence with focus on whether the party can present all the relevant material and facts or not.

71. Also in Teekay Tankers v STX, in proceedings in the English Commercial Court , Teekay referenced an arbitration award in which both parties, Teekay and STX have been involved, in order to support its claim against STX. The court admitted the award as evidence due to the disclosure of the award are the interest of justice

72. In Jones v University of Warwick case, Teekay Tankers v STX case, concerning civil proceedings the court should decide if the interest of justice favor the admission of illegally obtained evidence which constitute confidential documents/information. The same approach should apply to the arbitral tribunal since it is dealing with civil cases, therefore requiring them to follow the same approach in civil proceedings with regard to the admissibility of evidence. If there is an existing interest of justice, an exception to confidentiality should be made and the evidence should be admitted despite the fact of its illegality.

**(C) Does the interest of justice favour the admission of the wrongfully disclosed document?**

73. The question about the interest of justice can also be applied to international commercial arbitration. And the interest of justice favours the admission of the evidence in the case at hand.

74. As for the interest of justice, "[p]inciples such as the need to discharge the tribunal's function fairly and justly, and in a way that results in a manifestly right decision, as well as interests of procedural integrity and equality of arms, would all need to be weighed". [Blair/Gojković, p. 258] In the words of Libananco v Turkey case, "[n]or does the Tribunal doubt for a moment that, like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process".

75. The interest of justice should be protected not only in ICSID arbitrations but also in international commercial arbitrations. Hence, the approach concerning the interest of justice can be applicable to international commercial arbitrations. Libananco v Turkey case supports this application, saying "The Tribunal would express the principle as being that parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration, including investment arbitration, and to all parties". [Libananco v Turkey] Therefore, the question about the interest of justice is applicable to commercial arbitration. The Tribunal needs to compare the importance between the way to obtain the evidence and the relevance to the truth.

76. In the case on hand, the key point of both parties arguing is whether the circumstances fit to the hardship clause ,[record p,8 para. 20 / p.32 para. 19], CLAIMANT claim for there have the ICC hardship under the sales agreement.Even

thought if the tribunal think there is no ICC hardship under the sales agreement , The circumstance of the tariff imposed by the government are satisfies the requirements of CISG Art.79(1) and UNIDROIT Principles Art.6.2.2 and 6.2.3 . which make the tribunal to adapt the clause.

77. However, RESPONDENT claim that there is no ICC hardship under the sales agreements [record p.35] and the circumstance of the tariff are not fit as hardship under CISG Art 79(1)[record p.32 para.20]. This is inconsistency from the prior arbitration, The Partial Interim Award rendered that "in those proceedings on 29 June 2018 the arbitral tribunal had confirmed its power to adapt the contract should the tariff result in hardship for Respondent.(record p.60 para.39). Indicated that RESPONDENT claim that the tariff imposed by the government are fit to hardship under the Mediterranean Contract Law(UNIDROIT Principles) Art. 6.2.3.

78. Compared to the prior arbitration and the case in hand , Both tariff issue are imposed by the government the only difference are the country and the rate of the tariff .Further, in the prior arbitration the tariff rate are 25% less than this case's 30%. And RESPONDENT claim 25% tariff would fit the hardship in prior arbitration and claim 30% tariff are not fit the hardship in the case in hand.

79. As the state in para.67 and 68 , RESPONDENT claim significant difference between two case on the hardship issue , which the prior case's tariff are less than the case in hand. In conclusion the Partial Interim Award shows that RESPONDENT inconsistency claim on the two similar situation of tariff

80. Because the tariff issue would become the key concept of whether the tribunal should adapt the sales agreement , the Partial Interim Award shows highly relevance on this problem.Even though ,it is natural for RESPONDENT to use different claim in different arbitration, this evidence still present the prove of the circumstance are highly fit in to hardship..

81. Certainly, as the content of arbitration is in principle confidential, evidence on the content of arbitration seems to be illegal. However, this evidence is acquired only by a third party's illegal acts, and CLIMANT itself has not done illegal acts. Also, if a former employee leaked the evidence, an action for damage caused by the employee should be made to the employee, it is irrelevant to this arbitration. In addition, although RESPONDENT also points out the possibility of hacking, the reason is that RESPONDENT failed to update the firewall of its own computer, and responsibility is recognized in RESPONDENT. Hence, the way to get evidence is illegal, but the degree of illegal is minor.

**Issue III. CLAIMANT is entitled to the payment of US$1,250,000 resulting from an adaptation of the price.**

82. CLAIMANT and RESPONDENT concluding the contract (hereinafter "the Contract") which enables CLAIMANT to adapt the price of the contract when "hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" occurs under its Clause.12. In the present case, the extraordinary tariffs which both parties could not have expected in concluding the Contract was imposed. Without the adaptation of the price, the Contract lacks the equilibrium and making the Contract more onerous to the CLAIMANT. Therefore, according to Clause.12 of the Contract, CLAIMANT initiated the negotiation with the RESPONDENT. As both parties ended in not reaching the agreement on the adaptation, CLAIMANT took a recourse to the arbitration to ask the tribunal to adapt the price.

83. However, RESPONDENT denied having agreed with the Contract allowing CLAIMANT to adapt the price under Clause.12 of the Contract. In addition, RESPONDENT alleges that since the tariffs does not fall into the term stipulated in Clause.12, CLAIMANT is not exemplified either. These allegations are not

acceptable. CLAIMANT submits; (A) CLAIMANT has the right to negotiate with RESPONDENT to adapt the price under Clausen.12 of the Contract. (B) Even if the Tribunal dismissed the first claim, CLAIMANT was entitled to resort to the arbitration to adapt the Contract under Art.79 CISG.

**(A) CLAIMANT has the right to negotiate with RESPONDENT to adapt the price under Clause.12 of the Contract.**

84. Although, RESPONDENT argues that RESPONDENT neither agreed with CLAIMANT's exemption caused by other reasons specifically written in Clause.12 of the Contract, nor to allow CLAIMANT to adapt the price, these claims are not acceptable. When conflicting the interpretation of the Contracts, Art.8 CISG is the applicable provision [Huber, p. 235]. Applying this to the communications and negotiations between both parties [Art.8(3) CISG], Clause.12 of the Contract shall be interpreted as (1) it covers all circumstances that are "comparable unforeseen events" and "making the contract more onerous", and, as its remedy, which allows CLAIMANT to adapt the price.

(a) Clause.12 of the Contract covers all circumstances that fall into the term, "comparable unforeseen events" and "making the contract more onerous", and, as its remedy, which allows CLAIMANT to adapt the price.

85. It states in Art.8(1) CISG, "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", it is almost impossible to establish proof of the other's recognition. Only thing that could lead to establishing proof is to look into the circumstances that surrounds. But in any case, it is difficult to prove what the other is thinking inside of their heads; therefore, it is difficult to establish proof with Art.8(1) CISG. Thus, will consider applying Art.8(2) CISG.

86. In Art.8(2) CISG, the interpreting “reasonable person of the same kind as the other party would have had in the same circumstances” and the assumption of the “reasonable person is the key. Hence, if able to predict other's knowledge and recognition, include the knowledge which can be applied and recognition to the reasonable person when considering.

87. “The declarer can design his statement for special circumstances surrounding the addressee only if the declarer can reasonably expect that the addressee takes the 'special design' into account. The same is true in converse circumstances: the addressee can consider special circumstances surrounding the person of the declarer only if the declarer should reasonably have known that the addressee would do so. Otherwise, parties start to read uncertain or ambiguous meanings into the others' statements” [Lautenschlager, p. 264].

88. In present case, CLAIMANT claimed to include hardship clause in the contract first. It was in exchange to accept the DDP delivery [CL. EX. C4]. The hardship clause CLAIMANT suggested was ICC hardship clause. Mr. Antley was aware of the suggestion because in his memo, he stated that ICC hardship clause was too broad. The parties had agreed to include hardship clause whether it was ICC hardship clause or some other. Although, Mr. Antley didn't clearly agree but he didn't clearly show his opposition either. It only stated that it was too broad, so he was not against the idea of hardship clause but could have been against the ICC hardship clause itself. Unfortunately, Mr. Antley and Ms. Napravnik were involved in a severe car accident and was not in the condition to continue the negotiation. After the accident Julian Krone and Greg Shoemaker took their place to continue the negotiation. Mr. Antley was in a coma for 4 weeks and was not able to transfer information that wasn't written, however, Mr. Antley had a habit of keeping a memo and everything was on the memo. Hence, there is no way that RESPONDENT didn't know about inclusion of either ICC hardship clause or other hardship clause.

89. RESPONDENT might argue that because the parties' negotiators were not able to transfer "all" the information that the negotiations were all blank paged. Although, the hardship clause was not clearly written, the CLAIMANT interpreted clause 12 on the Contract as hardship clause because it stated in the clause 12 "neither for hardship, caused by additional health and safety requirements or comparable unforeseen event making the contract more onerous".

90. If a reasonable person were put in the same circumstance, the clause 12 in the contract shows either the ICC hardship clause or other hardship clause. The parties included the DDP delivery because RESPONDENT asked to and by including DDP delivery, more responsibilities are there for the CLAIMANT. It is natural to predict that CLAIMANT would raise the price or include new delivery terms. In the present case, CLAIMANT did raise the price and suggested to include hardship clause. As the negotiation between Mr. Antley and Ms. Napravnik went on a problem came up regarding the hardship clause. Mr. Antley argued ICC hardship clause was too broad, but he didn't 100 percent deny the idea. Negotiators were supposed to have a meeting the next morning but could not because of the unfortunate accident. From the reasonable person's point of view, Mr. Antley did not deny the ICC hardship clause so it's normal to predict that he wasn't going to deny it the next morning.

91. In the end, new negotiators were placed and accept the contract without the clear written hardship clause. However, the clause 12 in the contract doesn't include about the additional tariffs because health and safety are hardship clause. However, just because it doesn't state about the tariffs in the clause 12, it doesn't mean it shouldn't be included because health and safety were there as an example. Tariffs should be included to "comparable unforeseen events" because no one was able to predict the raise of the tariffs. No one was able to predict the raise of tariffs because "the retaliation as well as the size of the tariffs came as a big surprise even to informed circles" [CL. EX. C6].

92. In conclusion, according to Art.8(1)(2) CLAIMANT is not responsible for the unpredictable tariffs. Therefore, CLAIMANT has the right to ask RESPONDENT to pay the lost price and adapt the price.

**(B) Even if the Tribunal dismissed the first claim, CLAIMANT was entitled to resort to the arbitration to adapt the Contract under Art.79 CISG.**

93. Even though RESPONDENT alleges that CLAIMANT has no right to ask for an adaptation of the Contract under Art.79 CISG [Record p.32 para18], the Tribunal shall dismiss this claim. (1) Art.79 CISG covers hardship circumstances, which entitles a party the right to renegotiate and ask the adaptation to the court. According to Art.79 CISG, (2) it is the applicable provision to the present circumstance. (3) Under Art.79 CISG, CLAIMANT is entitled to resort to the arbitration to adapt the Contract.

(a) Art.79 CISG covers hardship circumstances, which entitles a party right to renegotiate and to ask the adaptation to the court.

94. Art.79(1) CISG stipulates that a party is exempted from his non-performance of the obligations if he proves that the non-performance was due to an impediment beyond his control and he could not reasonably be expected to have taken the impediment into account at the time of the conclusion. [Art.79(1) CISG]

95. However, we don't know whether Art.79(1) CISG is applicable to "hardship" like impediment because this provision is abstract and ambiguous. "Article 79 utilization of the neutral term "impediment" was intended to mask over the differences among the national excuse doctrines and may be best read as lying between the stricter and more liberal national excuse doctrines, which range between strict impossibility to mere hardship" [DiMatteo, p. 275]. "Hence, all

situations of hardship must be evaluated on the basis of Article 79 or be treated as a breach of contract" [Lindström, chap. IV].

96. There is a gap under Art.79(1) CISG, which is filled in through the UNIDROIT Principles. Although the hardship situations are in the sphere of the CISG, even Art.79 CISG providing changed circumstances does not explicitly stipulate the hardship situations. Accordingly, there is a gap under Art.79(1) CISG, which shall be resolved in accordance with Art.7 CISG.

97. We will see Art.7(2) CISG to interpret "impediment". Art.7(2) CISG stipulates that questions concerning matters governed by CISG which are not expressly settled in it are to be settled in conformity with the general principles on which it is based. This "general principles" include UNIDROIT Principles, so when circumstances meet the requirements of Art.6.2.2 or 6.2.3 UNIDROIT Principles they meet the requirements of Art.79(1) CISG.

98. Art.6.2.2 UNIDROIT Principles provides for definition of hardship, and Art.6.2.3 provides for effects of hardship such as renegotiation, adaptation. Considering CISG was established based on UNIDROIT Principles, since Art.6.2.3 UNIDROIT Principles provides for remedy when hardship comes out, Art.79(1) CISG also recognizes remedy when hardship happens.

99. This interpretation was adopted in the Belgian case. The court indicated that "an impediment" under Art.79 CISG may include the changed circumstance that had made a party's performance of the obligation difficult with taking the UNIDROIT Principles into account [Scafom International BV].

100. Therefore, Art.79(1) CISG is at least applicable to hardship which meets requirements of Art 6.2.2 UNIDROIT Principles.

101. When Art.79(1) CISG is applicable to hardship, the disadvantaged party is entitled to request renegotiation based on Art.6.2.3 (1). (3) UNIDROIT Principles [*see:* Art.6.2.3(3) UNIDROIT;Scafom International BV]. When the parties fail to reach agreement, either party may resort to the court to adapt the contract with a view to restoring its equilibrium based on Art.6.2.3(3). (4)(b) UNIDROIT Principles [*see:* Art.6.2.3(4)(b) UNIDROIT; Scafom International BV].

102. Consequently, Art.79 CISG covers hardship circumstances, which entitles a party right to renegotiate and to ask the adaptation to the court.

(b) Art.79 CISG is the applicable provision to the present circumstance.

(i) The parties didn't exclude the application of CISG by making Clause.12 of ontract.

103. Art.6 CISG stipulates that the parties may exclude the application of CISG. This exclusion means express exclusion and implicit exclusion [Art.6 CISG].

104. First, come to think of express exclusion, the parties can expressly exclude application of CISG through the incorporation of standard and contract terms containing a clause expressly excluding CISG [CISG Digest p. 33] In this case, however, the parties made Clause.12 of this contract but they didn't expressly stipulate that they exclude CISG in this contract, so they didn't expressly exclude the application of CISG.

105. Next, come to think of implicit exclusion, there are some precedents about implicit exclusion. Most court decisions and arbitral awards mainly reason that the Convention is part of the law of the Contracting State whose law the parties chose; and that the parties' choice remains meaningful because it identifies the national law to be used for filling gaps in the Convention. According to this line of decisions, the choice of the law of a Contracting State, if made without reference to

the domestic law of that State, does not exclude the Convention's applicability, not even where the law chosen is that of a State within a Federal State, at least not according to some courts. Of course, if the parties clearly chose the domestic law of a Contracting State, the Convention must be deemed excluded. [CISG Digest p. 34]

106. According to some courts, the Convention is implicitly excluded by the parties' choice of "the law of a contracting state insofar as it differs from the law of the national law of another Contracting State." [CISG Digest p. 34]

107. According to yet other courts, the Convention is excluded where the parties argued their case solely under the domestic law of the forum. [CISG Digest p. 34]

108. In this case, however, the parties didn't choose and refer to the domestic law of the Contracting State and didn't argue their case solely under the domestic law of the forum. Therefore, they didn't implicitly exclude CISG.

109. Consequently, the parties didn't exclude the application of CISG by making clause 12 of Contract.

(ii) Art.79 CISG is applicable to this case even if RESPONDENT claim that Art.79 CISG can't applicable to a party who has performed his obligation.

110. It is true that Art.79 CISG may not applicable to a party who has performed his obligation, but in this case CLAIMANT and RESPONDENT are regarded as reserving the application of Art.79 CISG. Art.8(1) stipulates that for the purpose of CISG 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(1) CISG] In this case, they immediately started negotiations regarding a price adjustment for the frozen semen[CL. EX. No. 7]. RESPONDENT had made clear already during the contract negotiation that for its

planning timely delivery was extremely important. At the same time RESPONDENT appeared to generally accept the need for a price increase [CL. EX. No. 8]. Then, RESPONDENT knew or could not have been unaware CLAIMANT's intent that CLAIMANT performed its obligation for RESPONDENT before requiring to adapt the contract. Therefore, they seemed to consent that CLAIMANT negotiate the adaptation of the contract after the performance of its obligation and they reserve the application of Art.79 CISG.

111. Consequently, Art.79 CISG is applicable to this case even if RESPONDENT claim that Art.79 CISG can't be applicable to a party who has performed his obligation.

(iii)This case satisfies the requirements of Art.79(1) and Art.6.2.2 UNIDROIT Principles.

112. As mentioned above, Art.79(1) CISG is at least applicable to hardship which meets requirements of Art 6.2.2 UNIDROIT Principles, so we will consider the requirements of Art.6.2.2 UNIDROIT Principles.

113. (1) there is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, (2) the events occur or become known to the disadvantaged party after the conclusion of the contract, (3) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract, (4)the events are beyond the control of the disadvantaged party, (5)the risk of the events was not assumed by the disadvantaged party.[UNIDROIT Principles p. 218]

114. Whether an alternation is "fundamental" in a given case will of course depend upon the circumstances. In practice a fundamental alternation in the equilibrium of the

contract may manifest itself in two different but related ways. They are increase in cost of performance and decrease in value of the performance received by one party. As to the former, the substantial increase in the cost may, for instance, be due to a dramatic rise in the price of the raw materials necessary for the production of the goods or the rendering of the services, or to the introduction of new safety regulations requiring far more expensive production procedures. [UNIDROIT Principles p.219] In this case, the Equatoriana government retailed by imposing 30 percent tariffs on selected products from Mediterraneo including on animal semen [Record p.6,para10], which caused CLAIMANT to pay additional US $ 1,250,000 and destroy its profit margin of 5 percent it expected. This circumstance is true of a dramatic rise in the price of the rendering of the goods, so the occurrence of this event fundamentally alters the equilibrium of the contract. Therefore, this case satisfies the requirement (1).

115. The parties concluded a frozen semen sales agreement on 6 May 2017[CL. EX.No. 5], and Equatorianian government-imposed 30 percent tariffs between the second shipment and the final shipment. This event occurred or became known to CLAIMANT after the conclusion of the contract. Therefore, this case satisfies the requirement (2) .

116. The Equatorianian government had always tried to resolve trade disputes amicably and had not relied on retaliatory measures against trade restrictions by other countries [CL. EX. No. 6], therefore, CLAIMANT and RESPONDENT were astonished to hear that frozen semen was listed in the schedule released by the Ministry of Agriculture of the products that fell under the new tariffs-regime and that this also applied to racehorse semen. Generally, racehorse breeding is categorized differently from pigs, sheep, or cattle [Record p.6, para11]. Considering this fact, this event could not reasonably have been taken into account by CLAIMANT. Therefore, this case satisfies the requirement (3).

117. The Equatoriana government-imposed 30 percent, so Respondent could not avoid this event, and this is beyond the control of CLAIMANT. Therefore, this case satisfies the requirement (4) .

118. The word "assumption" makes it clear that the risks need not have been taken over expressly, but that this may follow from the very nature of the contract. A party who enters into a speculative transaction is deemed to accept a certain degree of risk, even though it may not have been fully aware of that risk at the time it entered into the contract. In this case, CLAIMANT had made clear that it was not willing to bear all the other risks associated with the agreed change of the delivery terms and had insisted on the inclusion of the adaptation clause. RESPONDENT had consented to that [Record p. 7, para.19]. In addition to that, while they had agreed on a DDP delivery it had been clear to both Parties that CLAIMANT should not bear all risks associated with such a delivery but that the agreement on DDP delivery was primarily to ensure better transportation terms and swifter delivery due to CLAIMANT's experience in the shipment of frozen semen. That is also reflected in the contract [Record pp. 17-18]. Considering these facts, risks must not have been assumed by CLAIMANT and this transaction is not speculative. Therefore, this case satisfies the requirement (5).

119. Consequently, this case satisfies the requirements of Art.6.2.2 UNIDROIT Principles, so hardship is formed.

(c) Under Art.79 CISG, CLAIMANT is entitled to resort to the arbitration to adapt the Contract and the arbitration should adapt the contract.

120. As mentioned above, Art.79 CISG allows renegotiation, termination of the contract, or adaptation of it, based on Art.6.2.3 UNIDROIT Principles. According to Art.6.2.3 UNIDROIT Principles, in case of hardship the disadvantaged party is entitled to request renegotiation, but upon failure to reach agreement within a

reasonable time either party may resort to the court to adapt the contract, and if the court finds hardship it may, if reasonable, adapt the contract with a view to restoring its equilibrium. [UNIDROIT Principles p. 223] In this case, after the final shipment had been made, CLAIMANT discovered that RESPONDENT was breaching the resale prohibition under the contract and needed part of the doses shipped for commitments toward other parties. When confronted with CLAIMANT's discovery in a meeting of 12 February 2018 Ms. Kayla Espinoza, RESPONDENT's CEO, got very angry, aggressive and she stopped the negotiation and refused to pay any additional amount for the tariffs, so renegotiation was regarded as failure. [CL.EX.No. 8] Therefore, CLAIMANT may resort to the court to adapt the Contract. Furthermore, the court should reasonably restore contract's equilibrium because the fact that only CLAIMANT paid US$ 1,250,000 is not equal. According to Art.1.11 UNIDROIT Principles, the court includes the arbitration. [UNIDROIT Principles p. 29]

121. Consequently, under Art.79 CISG, CLAIMANT is entitled to resort to the arbitration to adapt the Contract and the arbitration should adapt the contract. Accordingly, CLAIMANT can get some money by adapting of the Contract.

# CERTIFICATE

We hereby confirm that this memorandum was written only by the 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 a member of this team.

7 December 2018

| | |
|---|---|
| Signed by Anzu Shinohara<br>*Anzu Shinohara* | Signed by Ifan Chen<br>*Ifan Chen* |
| Signed by Hayato Tokuda<br>*Hayato Tokuda* | Signed by Hiroto Aya<br>*Hiroto Aya* |
| Signed by Synthia Julia Bastro<br>*Synthia Julia Bastro* | Signed by Masaki Kirikihira<br>*Masaki Kirikihira* |
| Signed by Mayu Saeda<br>*Mayu Saeda* | Signed by Taichi Isogai<br>*Taichi Isogai* |
| Signed by Yuki Okamoto<br>*Yuki Okamoto* | |