SIXTEENTH ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
HONG KONG, MARCH-APRIL 3-17, 2019
In the matter of arbitration under the
Hong Kong International Arbitration Centre ("HKIAC")
Case No. HKIAC/A18128

PONTIFICAL CATHOLIC UNIVERSITY OF SÃO PAULO
FACULTY OF LAW

MEMORANDUM FOR RESPONDENT

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

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Isabela Porto • Julia Martins • Laís Falco • Luiza Toscano • Marianna Fleury •
Muriel Correa • Pedro Costa • Salo Scherkerkewitz • Roberta Bitencourt • Victoria
Zago
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A. Clause 12 Does Not Cover Situations Of Hardship Such As The Changes In Tariffs Imposed By Equatoriana

1. Clause 12 Of the Sales Agreement Provides for A Narrow Application Regarding Situations of Hardship and Does Not Cover the Change of Tariffs

2. Interpretation of Parties’ intent shows that Parties wished to apply Clause 12 in a restrictive manner and not to confer powers to the Tribunal to adapt the Sales Agreement

   2.1. The delivery terms contributes to ascertain Parties intentions

3. Even if the Parties’ intentions cannot be ascertained, a reasonable person would understand that Clause 12 does not encompass matters of hardship related to the imposition of tariffs

B. The elements of hardship considered by Clause 12 have not been met

   a. The Imposition Of A 30% Tariff By The Government Of Equatoriana Was Foreseeable

   b. The Tariff Is Not Comparable To “Additional Health And Safety Requirement”

III. UNITED NATIONS CONVENTION ON CONTRACT FOR THE INTERNATIONAL SALE OF GOODS (“CISG”) IS THE APPLICABLE LAW TO THIS CASE.

   A. Cisg Article 79 Does Not Apply To This Case

   B. Even If Art. 79 Cisg Would Encompass Situations Of Hardship, The Requirements Supposedly Established By This Provision Have Not Been Met.

IV. A GAP FILLING TECHNIQUE WOULD NOT PROVIDE FOR ADAPTATION OF THE SALES AGREEMENT

   A. Even If The Tribunal Understands That The Unidroit Could Be Applicable Its Provisions Were Not Met In The Present Case.

   1. The Claimant’s Circumstances Do Not Met the Requirements For Hardship Under Article 6.2.2 Of The Unidroit

   2. Since Claimant’s Circumstances Do Not Meet the Unidroit Requirements For Hardship, The Tribunal Should Not Adapt The Contract

V. THE POST-CONTRACTUAL BEHAVIOUR OF RESPONDENT DOES NOT AMOUNT TO AN AGREEMENT OF SALES AGREEMENT ADAPTATION

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REQUEST FOR RELIEF
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<p>|$/$|$§$ | Section/Sections of this Memorandum |
|---|---|
|1/11 | Paragraph/Paragraphs |
|&amp; | And |
|% | Per cent |
|ANoA | RESPONDENT’s Answer to the Notice of Arbitration |
|Arbitral Tribunal/ Tribunal | Panel consisting of Dr. Francesca Dettore, Ms. Wantha Davis and Prof. Calvin de Souza (President) |
|Art./Arts. | Article /Articles |
|CLAIMANT | Phar Lap Allevamento |
|DAL | Danubian Arbitration Law |
|DRC | Dispute Resolution Clause |
|e.g. | <em>Exempli gratia</em>; for example |
|ed. | Editor/Editors/Edition |
|Etc. | <em>Et cetera</em>, “and so on” |
|Ex. | Exhibit |
|FS | Frozen semen |
|Hardship Clause | Clause 12 of the Sales Agreement |
|IBA Guidelines | IBA Guidelines on Conflict of Interest in International Arbitration |
|Ibid | <em>Ibidem</em>, “in the same place” |</p>
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<thead>
<tr>
<th>Abbreviation</th>
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<td>ICC</td>
<td>International Chamber of Commerce</td>
</tr>
<tr>
<td>ICC Guidance Note</td>
<td>International Chamber of Commerce Guidance Note</td>
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<tr>
<td>ICSID</td>
<td>The International Centre for Settlement of Investment Disputes</td>
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<tr>
<td>Inc.</td>
<td>Incorporated</td>
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<tr>
<td>LCIA</td>
<td>London Court of International Arbitration</td>
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<tr>
<td>Lex arbitri</td>
<td>The procedural law of the seat of arbitration, e.g. the place where the arbitration will take place</td>
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<td>MfC</td>
<td>Memorandum for Claimant submitted by the University of Arizona</td>
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<td>Miss</td>
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<td>Nijinksy III</td>
<td>Claimant's stallion Njinksy III, as per the Sales Agreement</td>
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<td>Phar Lap Allevamento &amp; Black Beauty Equestrian</td>
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Party

CLAIMANT or RESPONDENT

PCA

Permanent Court of Arbitration

PER

Parole Evidence Rule

PO1

Procedural Order Number 1

PO2

Procedural Order Number 2

Presiding Arbitrator

Prof. Calvin de Souza

RESPONDENT

Black Beauty Equestrian

Sales Agreement

Frozen Semen Sales Agreement entered into by and between CLAIMANT and RESPONDENT on 6 May 2017

UNCITRAL

United Nations Commission on International Trade Law

UNCITRAL Notes

UNCITRAL Notes on Organizing Arbitral Proceedings

UNCITRAL Rules


UNIDROIT Principles

UNIDROIT Principles of International Commercial Contracts 2010

USD

United States Dollar

v

Versus; against

Vol

Volume
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<td>AMATO, A.</td>
<td><em>Present-day stress field and active tectonics in southern peninsular Italy</em></td>
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<td>MONTOINE P.</td>
<td></td>
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</tr>
<tr>
<td>ANDRÉ, Oliver P.</td>
<td><em>CyberInsecurity: A New Protocol to Counter Cyberattacks in International Arbitration</em></td>
<td>51</td>
<td>of the Memorandum [cited as: ANDRÉ/ELUL/PETROVAS]</td>
</tr>
<tr>
<td>ELUL, Hagit M.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>PETROVAS, Pavlos</td>
<td></td>
<td></td>
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<tr>
<td>LANDOLT, Phillip</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>BOER, Th. M. de.</td>
<td><em>Choice of Law in Arbitration Proceedings</em></td>
<td>29</td>
<td>of the Memorandum [cited as: BOER]</td>
</tr>
<tr>
<td></td>
<td><em>In: Collected Courses of The Hague Academy of International Law, Vol. 375</em></td>
<td></td>
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<td></td>
<td><em>The Hague Academy of International Law</em></td>
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<tr>
<td>BORN, Gary B.</td>
<td>International Commercial Arbitration</td>
<td>§§ 4, 14, 26, 27, 29, 36, 50, 51, 59 of the Memorandum [cited as: BORN I]</td>
<td></td>
</tr>
<tr>
<td>BORN, Gary B.</td>
<td>International Commercial Arbitration: Commentary and Materials</td>
<td>§§ 13, 24 of the Memorandum [cited as: BORN II]</td>
<td></td>
</tr>
<tr>
<td>BRAGHETTA, Adriana.</td>
<td>A importância da sede da Arbitragem</td>
<td>§ 25 of the Memorandum [cited as: BRAGHETTA]</td>
<td></td>
</tr>
<tr>
<td>BROCHES, Aron.</td>
<td>Commentary on the UNCITRAL Model Law on international Commercial Arbitration</td>
<td>§ 59 of the Memorandum [cited as: BROCHES]</td>
<td></td>
</tr>
<tr>
<td>BRUNNER, Christoph.</td>
<td>Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration</td>
<td>§§ 84, 88, 103 of the Memorandum [cited as: BRUNNER]</td>
<td></td>
</tr>
</tbody>
</table>
CALDER, Simon

*Italy Earthquakes: Why the Country Gets So Many Of Them, And How To Survive One*

Independent

2017

Available at:

CATTAUI, MARIA Livanos.

*Incoterms 2000*

Referred to in: § 88 of the Memorandum

[cited as: CATTAUI]

CHATILLON, Stéphane.

*Le Contrat International*

Fourth Ed., Magnard-Vuibert

2011

Referred to in: § 76 of the Memorandum

[cited as: CHATILLON]
<table>
<thead>
<tr>
<th>Author(s)</th>
<th>Title</th>
<th>Referred to in:</th>
<th>Source</th>
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<td></td>
<td></td>
</tr>
<tr>
<td>COLSTON, Jane.</td>
<td></td>
<td>§§ 48, 51, 53 of the Memorandum</td>
<td></td>
</tr>
<tr>
<td>BISCHOF, Olga.</td>
<td>The fruit from a poisoned tree – use of unlawfully obtained evidence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MOXLEY, Cameron.</td>
<td>Brown Rudnick 2017</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GRISHCHENKOVA, Anna.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>COSAR, Utku.</td>
<td>Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Assumptions</td>
<td>§ 43 of the Memorandum</td>
<td>[cited as: COSAR]</td>
</tr>
<tr>
<td></td>
<td>Kluwer Law International 2015</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CRAIG, Laurence.</td>
<td>International Chamber of Commerce Arbitration</td>
<td>§ 14 of the Memorandum</td>
<td>[cited as: CRAIG/PARK/PAULSSON]</td>
</tr>
<tr>
<td>PAULSSON, Jan.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Referred to in: §§ 90, 98, 111, 128 of the Memorandum [cited as: DA SILVEIRA]


Referred to in: §§ 92, 93, 113 of the Memorandum [cited as: DI MATTEO ET AL.]


Referred to in: §§ 40, 42, 45 of the Memorandum [cited as: DUMBERRY]
ELCIN, Mert.


Dissertation.com Ed., Boca Raton

2010

Referred to in: § 72 of the Memorandum [cited as: ELCIN]

FERRARIO, Pietro.

The Adaptation of Long-Term Gas Sale Agreements by Arbitrators

Vol. 41, International Arbitration Law Library

2017

Referred to in: §§ 90, 92, 118 of the Memorandum [cited as: FERRARIO]

FOUCHARD, Philippe

Où va l’Arbitrage International?

McGill Law Journal

1989

Referred to in: § 13 of the Memorandum [cited as: FOUCHARD]

GAILLARD, Emmanuel.

Fouchard Gaillard Goldman on International Commercial Arbitration

Kluwer Law International

1999

Referred to in: §§ 12, 26 of the Memorandum [cited as: GAILLARD/SAVAGE]

GARDNER, Andrew.

Protectionism ‘on the rise’

Politico

2014

Referred to in: § 103 of the Memorandum [cited as: GARDNER]

Ref: [§ 90, 128 of the Memorandum (cited as: GHERSI)]


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Available at: http://www.cisg.law.pace.edu/cisg/biblio/honnold.html
<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
<th>Referred to in:</th>
<th>Cited as:</th>
</tr>
</thead>
<tbody>
<tr>
<td>HUBER, Peter.</td>
<td>The CISG: A New Textbook for Students and Practitioners</td>
<td>§§ 77, 136</td>
<td>HUBER/MULLIS</td>
</tr>
<tr>
<td>MULLIS, Alastair.</td>
<td>European Law Publishers</td>
<td>§ of the Memorandum</td>
<td></td>
</tr>
<tr>
<td>HWANG, Michael.</td>
<td>Corruption in Arbitration - Law and Reality</td>
<td>§§ 36, 51</td>
<td>HWANG/LIM</td>
</tr>
<tr>
<td>LIM, Kevin</td>
<td>2013</td>
<td>§ of the Memorandum</td>
<td></td>
</tr>
<tr>
<td>JONES, Doug</td>
<td>Commercial Arbitration in Australia</td>
<td>§§24, 27</td>
<td>JONES</td>
</tr>
<tr>
<td></td>
<td>Lawbook Co (Thomson Reuters)</td>
<td>§ of the Memorandum</td>
<td></td>
</tr>
<tr>
<td>KARRER, Pierre A.</td>
<td>The Law Applicable to the Arbitration Agreement – A Civilian discusses Switzerland’s Arbitration Law and glances across the Channel</td>
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<td>KARRER</td>
</tr>
<tr>
<td></td>
<td>Singapore Academy of Law Journal</td>
<td>§ of the Memorandum</td>
<td></td>
</tr>
<tr>
<td>RIGOZZI, Antonio.</td>
<td>2011</td>
<td>§ of the Memorandum</td>
<td></td>
</tr>
<tr>
<td>KIRK, Ashley</td>
<td>Mapped: Protectionism is on the rise as US and EU implement thousands of restrictive trade measures</td>
<td>§ 103</td>
<td>KIRK</td>
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<tr>
<td></td>
<td>The Telegraph</td>
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<td></td>
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</tbody>
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LAWSON, David.  
*Advance Waivers on Future Conflicts of Interest: Financial Self-Interest Muscling a Principle*  
In: Yearbook of International Arbitration and ADR Vol. 5, Zurich/Vienna/Graz  
2017  
[referred to in: § 72 of the Memorandum [cited as: LAWSON]]

LEW, Julian D.M.  
*Comparative International Commercial Arbitration*  
[cited as: LEW]

MISTELIS, Loukas A.  
KRÖLL, Stefan Michael.  
*Comparative International Commercial Arbitration*  
Kluwer Law International  
2003  
[cited as: LEW/MISTELIS/KROLL]

LOOKOSKY, Joseph.  
*Understanding the CISG* Wolters Kluwer Law & Business  
Fifth Ed., Wolters Kluwer  
2008  
[referred to in: §§ 76, 77, 92, 93 of the Memorandum [cited as: LOOKOSKY]]

MCILWRATH, Michael.  
*International Arbitration and Mediation: A Practical Guide*  
Kluwer Law International  
2010  
[cited as: MCILWRATH/SAVAGE]

SAVAGE, John.  
*International Sales Law & Arbitration*  
Kluwer Law International  
2008  
[cited as: MORRISSEY]
NACIMIENTO, Patricia.
KROLL, Stefan Michael.
BOCKSTIEGEL, Karl-Heinz

NYGH, Peter.

OBEID, Ziad.

Arbitration in Germany: The Model Law in Practice
Kluwer Law International
2015

Autonomy in International Contracts
Oxford University Press
1999

Resolving Construction Disputes in Times of Crisis: The Theory of Exceptional Circumstances
In: ZIADÉ, Nassib. BCDR International Arbitration Review, vol 4
Kluwer Law International
2017

Referred to in: §43 of the Memorandum
[cited as: NACIMIENTO/KROLL/BOCKSTIEGEL]

Referred to in: § 72 of the Memorandum
[cited as: NYGH]

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<td>ORTEGA, Domingo. ZAMBRANA, Rodriguez-Antolin.</td>
<td><em>Principios de Derecho Global</em>; Navarra 2006</td>
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<td>ORTIZ, Ricardo Calvillo</td>
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PAULSSON, Jan.  
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Kluwer Law International  
2008  

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PETROCHILOS, Georgios  

UNCITRAL Arbitration  
Kluwer Law International  
2017  

Referred to in: § 58 of the Memorandum  
[cited as: PAULSSON/PETROCHILOS]  

PETROCHILOS, Georgios.  

Procedural Law in International Arbitration  
Oxford University Press Inc  
2004  

Referred to in: § 25 of the Memorandum  
[cited as: PETROCHILOS]  

In: Oxford Private International Law Series
PILKOV, Konstantin
Evidence in International Arbitration: Criteria for Admission and Evaluation
2014
Available at: https://www.researchgate.net/publication/308405085_Evidence_in_International_Arbitration_Criteria_for_Admission_and_Evaluation
Referred to in: § 52 of the Memorandum [cited as: PILKOV]

PITLER, Robert M.
The Fruit of the Poisonous Tree Revisited and Shepardized
1968
Referred to in: §§ 48, 53 of the Memorandum [cited as: PITLER]

POUDRET, Jean-François.
Comparative Law of International Arbitration, 2nd edition, Schulthess
2007
Referred to in: § 26 of the Memorandum [cited as: POUDRET/BESSON]

REDFERN, Alan.
Redfern and Hunter on International Arbitration
Sixth Ed., Oxford University Press
2015
Referred to in: §§ 4, 12, 24, 25, 26, 27, 50, 72, 74 of the Memorandum [cited as: REDFERN/HUNTER]

ROPOPO, Enzo.
O Contrato Alemdina
Ed., Coimbra
2009
Referred to in: §§ 90, 128 of the Memorandum [cited as: ROPPO]
SAMUELSON, Kate  
*Why Italy Is So Prone to Earthquakes*

Time  
2016

Available at:  

SCHLECHTREIM, Peter.  
2.1 Interpretation of Party Statements and Conduct  
2009

SCHLECHTREIM, Peter.  
*UNIFORM SALES LAW - THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS*

Referred to in: §§ 76, 136 of the Memorandum  
[cited as: SCHLECHTREIM/BUTLER]

SCHLECHTREIM, Peter. SCHWENZER, Ingeborg.  
Commentary on the UN Convention on the International Sales of Goods (CISG)  
Oxford University Press  
2016

Referred to in: §§ 76, 77, 78, 92, 120 of the Memorandum  
[cited as: SCHLECHTREIM/SCHWENZER]

SCHULZE, Reiner.  
*New Features in Contract Law* Walter de Gruyter  
2007

Referred to in: §§ 72 of the Memorandum  
[cited as: SCHULZE]
**SCHWENZER, Ingeborg.**  
*Force majeure and hardship in international sales contracts*

Referred to in: §§ 90, 128 of the Memorandum  
[cited as: SCHWENZER]

Available at:  

**SMEUREANU, Ileana.**  
Confidentiality in International Commercial Arbitration  
International Arbitration Law Library, Vol. 22  
Kluwer Law International  
2011

Referred to in: § 43 of the Memorandum  
[cited as: SMEUREANU]

**SORNARAJAH, Muthucumaraswamy.**  
*The Settlement of Foreign Investment Disputes*  
Kluwer Law International 2000

Referred to in: § 72 of the Memorandum  
[cited as: SORNARAJAH]

**The Economist**  
*In America, a political coalition in favour of protectionism may be emerging*  
The Economist  
2018

Referred to in: § 103 of the Memorandum  
[cited as: THE ECONOMIST]

**VARADY, Tibor.**  
International Commercial Arbitration - A Transnational Perspective  
6th edition  
American Casebook Series  
2015

Referred to in: § 13 of the Memorandum  
[cited as: VARADY/BARCELO/KROLL/MEHREN]
VOGENAUER/KLEIN

Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)
Oxford University Press

Referring to in: § 126, 127, 128, 129 the Memorandum [cited as: VOGENAER/KLEIN]

WISEMAN, M.

The Derivative Imperative: An Analysis of Derivative Evidence in Canada
in: Criminal Law Quarterly 435 1997

Referring to in: § 52 of the Memorandum [cited as: WISEMAN]
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UNITED STATES OF AMERICA

ICSID Additional Facility
Washington D.C.

Waste Management, Inc. v United States of America
Case No ARB(AF)/00/3
2004

Referred to in: § 43 of the Memorandum [cited as: Waste Management]
STATEMENT OF FACTS

RESPONDENT  
Black Beauty Equestrian, a racehorse stable located in Equatoriana famous for its broodmare lines that have resulted in a number of world champions in show jumping and dressage.

CLAIMANT  
Phar Lap Allevamento, a traditional and renowned stud farm from Mediterraneo. It is particularly known for its breeding success regarding racehorses.

21 March 2017  
RESPONDENT reached out to CLAIMANT demonstrating its interest in purchasing 100 doses of FS from Nijinsky. RESPONDENT informed its interest in building up its own racehorse stables, as well as the momentary lift on the ban on artificial insemination for racehorses [Ex. C1, p.9].

24 March 2017  
CLAIMANT replied to RESPONDENT’s inquiry and presented the preliminary price per dose along with its standard conditions of sale. The number of doses requested by RESPONDENT came as a surprise to CLAIMANT, considering that CLAIMANT did not have an established practice of selling FS at such a great amount for a single breeder. However, due to RESPONDENT’s outstanding reputation in the field and CLAIMANT’s interest on establishing a long-term relationship, it agreed to make an exception from its general approach. CLAIMANT informed that the FS would have to be provided in several instalments [Ex. C2, p.10].

28 March 2017  
RESPONDENT requested a DDP delivery because CLAIMANT was more experienced in the shipment of FS [Ex. C3, p.11].

31 March 2017  
CLAIMANT accepted the DDP delivery upon a USD 1,000 price increase per dose and the inclusion of a Hardship Clause in the Sales Agreement [Ex. C4, p.12].

11 April 2017  
CLAIMANT suggested that the best way to resolve any dispute would be through arbitration seated in a neutral country.
Thus, in order to accommodate RESPONDENT’s wish to arbitrate under the Rules of HKIAC and to avoid the jurisdictions of the Courts of Mediterraneo, CLAIMANT agreed on amending the DRC regarding the place of the arbitration. Furthermore, CLAIMANT stated that Mediterranean Law must be applied to the Sales Agreement and suggested reliance on the ICC-Hardship Clause [Ex. R2, p.34].

12 April 2017
The Parties’ two main negotiators suffered a car accident in Danubia and had to be replaced for the closing of the Sales Agreement [Ex. R3, p.35; Ex. R4, p.36].

06 May 2017
The Parties agreed upon the terms and concluded the Sales Agreement providing for the sale of 100 doses of FS from the stallion Nijinski III, to be delivered in three installments, for the price of USD 100,000 per dose [Ex. C5, p.13-14]. The Sales Agreement contained a Hardship Clause that exempted CLAIMANT’s liability from specific unforeseeable events.

20 May 2017
CLAIMANT sent, respectively, the first and second shipments – each containing 25 doses of Nijinsky III’s FS [NoA, p.6].

23 November 2017
The President of Mediterraneo announced an imposition of a 25% tariff on agricultural products imported from Equatoriana.

29 December 2017
As a retaliatory measure, the Government of Equatoriana imposed a 30% tariff upon all agricultural goods imported from Mediterraneo, including racehorse FS [NoA, p.6].

20 January 2018
Two days before shipping the final installment, CLAIMANT notified RESPONDENT that the tariffs for the import of FS had increased by 30% and requested an additional payment [Ex. C7, p.16].

21 January 2018
RESPONDENT telephoned CLAIMANT, but it never agreed to negotiate the terms of the additional payment [Ex. C8, p.18; Ex. R4, p.36].
**23 January 2018**  
CLAIMANT sent the third and last shipment of 50 doses of Nijinsky III's FS [Ex. C8, p.18].

**12 February 2018**  
CLAIMANT confronted RESPONDENT’s CEO, who was not the one who negotiated the agreement. As a consequence, it would not authorize additional payment.

**31 July 2018**  
CLAIMANT filed its Notice of Arbitration [NoA, pp.4-8], pursuant to Art. 4 of the HKIAC-Rules, requesting the adaptation of the Sales Agreement in the amount of USD 1,250,000.00 to be paid by RESPONDENT. CLAIMANT nominated Ms. Wantha Davis as its designated arbitrator.

**24 August 2018**  
RESPONDENT filed its Answer to Notice of Arbitration [ANoA, pp.29-32] contesting the Tribunal’s powers and jurisdiction to adapt the Sales Agreement and subsequently, the payment requested by CLAIMANT. RESPONDENT appointed Dr. Francesca Dettorie as its designated arbitrator.

**2 October 2018**  
CLAIMANT requested the Arbitral Tribunal to allow the submission of a confidential document from another arbitration in which RESPONDENT is a party that it obtained through a breach of confidentiality or an illegal hacking.
SUMMARY OF ARGUMENTS

ISSUE 1  THE LAW OF DANUBIA SHOULD BE APPLICABLE TO THE DRC

1. Although CLAIMANT argued that the Parties had expressly and impliedly showed their intentions regarding the choice of the Mediterranean Law to govern the DRC, RESPONDENT will demonstrate that there was no express choice of law and that there was an implied choice of the Danubian Law to rule the DRC. Secondly, RESPONDENT will defend that even if the intention of the Parties were to be disregarded by this Tribunal, the Law of Danubia has the closest and most real connection with the DRC. As a consequence, the Tribunal does not have powers and jurisdiction to adapt the Sales Agreement.

ISSUE 2  CLAIMANT IS NOT ENTITLED TO SUBMIT THE DOCUMENTS FROM ANOTHER ARBITRATION

2. RESPONDENT shall demonstrate that the confidential documents that CLAIMANT wants to present shall not be admitted by this Tribunal since they were illegally obtained either by a breach of confidentiality or by illegal hacking. Moreover, those documents clearly hinder the balance and the fairness of the procedure and, as a result, risk rendering the award unenforceable.

ISSUE 3  CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF USD 1,250,000 AS THE SALES AGREEMENT MUST NOT BE ADAPTED

3. Contrary to CLAIMANT’s allegations, RESPONDENT will demonstrate that the Sales Agreement should not be adapted. The Arbitral Tribunal should firstly consider that Clause 12 does not encompass change of tariffs as hardship. Even if it covered hardship matters, the requirements for it were not fulfilled. The Tribunal shall also consider that it is uncontroversial between the Parties that the CISG is the law applicable to the present case and that art. 79 does not encompass hardship provisions. Despite CLAIMANT’s allegations that UNIDROIT should be used to complement CISG in cases of hardship, RESPONDENT will demonstrate that there is no gap to be filled through art. 7(2). The Tribunal shall also consider that even if the UNIDROIT were applicable, the standards set by its articles were not met.
ARGUMENTS ON JURISDICTION

APPLICABLE LAW AND INTERPRETATION

4. In the DRC, while the Parties agreed to have an arbitration administered by the HKIAC and governed by HKIAC Rules, they have not expressly agreed on the Law applicable to the DRC itself. They did, however, designate Danubia as the seat of the arbitration [Ex. C5, p.14, ¶15]. It is the general understanding that the determination of the seat triggers the application of the arbitration law of the seat as lex arbitri, in account to the juridical nexus between the arbitration and that given legal system [Model Law, art. 1(2); KAUFMANN-KOHLER/RIGOZZI, pp.60-62, 66; BORN I, p.499; McILWRATH/SAVAGE, pp.20, 23; REDFERN/HUNTER, ¶¶3.15/3.53; Sulamérica v. Enesa]. Therefore, this Tribunal shall apply the law of Danubia, which is a verbatim adoption of the Model Law with the 2006 amendments [PO1, p.53, ¶4], to govern this arbitration.

5. The contractual law of Danubia, a verbatim adoption of the UNIDROIT Principles with two relevant exceptions regarding arts. 4.3 and 6.2.3(4)(b) [PO2, p.61, ¶45], should also be applicable to this arbitration, governing the DRC. As will be demonstrated below, the intention of the Parties during the negotiations was to apply the Law of Danubia when designated this country as the seat of arbitration.

6. The Parties’ countries are signatories of the CISG [PO1, 53]. Thus, the direct application rule proceeds [Art. 1.1(a) CISG]. This is also clear by Parties’ intention [Ex. C5, p.14, ¶15], ensuing its applicability to the present case.

7. Considering the facts exposed above, any interpretation of the Sales Agreement and of the DRC should be in accordance with the principles and provisions set out by the abovementioned laws.

ISSUE 1: THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION AND POWERS TO ADAPT THE SALES AGREEMENT

8. Under the Law of Mediterraneo, which is a verbatim adoption of the UNIDROIT Principles, all relevant circumstances shall be regarded in order for the arbitration agreements to be consistently interpreted. By contrast the Law of Danubia, which has its interpretation governed by the so-called “four corners rule”, limits the interpretation of the DRC to its wording excluding consideration to the Parties drafting history and previous negotiations, supporting a narrow interpretation of the DRC.
9. In light of above mentioned, according to CLAIMANT, the DRC would be governed by the Law of Mediterraneo [McC, ¶3] and, as a consequence, the Tribunal would have powers and jurisdiction to adapt the Sales Agreement, in accordance with art. 6.2.3 of Mediterraneene Contractual Law [NoA, p.7, ¶16].

10. However, if the Danubian Law applies, the Arbitral Tribunal would have no powers as disposed in art. 6.2.3 of UNIDROIT Principles, which only grants powers to the Tribunal to adapt a contract if authorized. Although RESPONDENT fully agrees on the Tribunal’s competence to decide about its own jurisdiction, RESPONDENT will demonstrate that (I) the Law of Danubia is the one that governs the DRC and consequently, and (II) the Tribunal does not have powers and jurisdiction to adapt the Sales Agreement.

THE LAW OF DANUBIA GOVERNS THE DRC AND ITS INTERPRETATION

11. According to CLAIMANT, since the Law of Mediterraneo was chosen to govern the Sales Agreement [Ex. C5, p.14, ¶12] and was the only rule of law agreed upon by the Parties, its applicability should be extended to the DRC [McC, ¶7].

12. Nevertheless, the law governing the Sales Agreement should not be extended to the DRC, following the rational of the Doctrine of Separability. According to the said doctrine, the arbitration clause is fully independent and armor-clad from the main contract where it is contained, in order to preserve the arbitral institute and its effectiveness [REDFERN/HUNTER, p.104, ¶2.101; LEW/MISTELIS/KROLL, p.102, ¶6-9; GAILLARD/SAVAGE p.198, ¶389].

13. Contrary to CLAIMANT’s allegations [McC, ¶9], the independence of the arbitration clause to the main contract is not limited to cases where the validity of it is being questioned [BORN II, pp.55-56; FOUCARD, p.435; VARADY/BARCELO/KROLL/MHREN, p.48, ¶5.04; DOW CASE; ICC CASE 5505; GARUDA V. BIRGEN].

14. Although the Doctrine of Separability may be used in view of validity objections, the majority of the scholars and decisions of arbitral tribunals support that the substantive law governing the contract does not extend to the arbitration clause contained in it. [CRAIG/PARK/PAULSSON, ¶5.04, BORN I, p.350, ¶3.01, BLANKE/LANDOLT, p.1827, ¶49-071; HECHT V. BUISMAN'S; KHOMS V. DALICO; SHASHOUA V. SHARMA; NAVIERA V. SEGUROS DEL PERU].

15. The Tribunal should also recognize the autonomy of the DRC in light of the Parties’ choice of having the HKIAC Arbitration Rules applied to the present arbitration. As
correctly pointed by CLAIMANT [MfC, ¶9], the HKIAC Rules mention the importance of the Doctrine of Separability [Article 19.2 HKIAC 2018 Rules].

16. In this sense, RESPONDENT will demonstrate that Parties implicitly chose to have the Law of Danubia governing the DRC (A). In the unlikely event this Tribunal finds Parties’ implied choice was not clear enough, which leads the Tribunal to the conclusion that (B) the Law of Danubia is the most appropriate law to govern the DRC, due to its most real and closest connection to the DRC.

A. THE PARTIES IMPLICITLY CHOSE THE LAW OF DANUBIA TO GOVERN THE DRC

17. As the provision regarding the law applicable to the DRC was excluded by CLAIMANT during the negotiations [Ex. R2, p.34], there is no express choice about its governing law. However, the Parties did expressly agree on Danubia as the seat of arbitration.

18. Exercising their autonomy of having the DRC governed by the law of the seat of arbitration, the Parties did not provide a different law that would be applicable to it. Based on the allegation that CLAIMANT’s internal policy does not accept the application of its counterparties’ country law to dispute resolution, the Law of Equatoriana was excluded from the DRC [MfC, ¶8]. However, CLAIMANT did not elect, nor suggest any other applicable law, but merely added a provision selecting Danubia as the seat of arbitration [Ex. R2, p.34].

19. In fact, if the Tribunal takes the Parties’ negotiations into consideration, as requested by CLAIMANT [MfC, ¶18], it will conclude that their intention was to have the Law of Danubia govern the DRC.

20. First of all, the Parties decided to use the HKIAC Model Clause [Ex. R1, p.33], but made substantial amendments to the clause’s standard form. The Parties limited the powers and jurisdiction conferred to this Arbitral Tribunal by reducing the wording of the clause from “Any dispute, controversy, difference or claim arising out of or relating to this contract” to “Any dispute arising out of this contract”. In this sense, it is a fair assessment to say that the Parties intended to reduce and limit the Arbitral Tribunal’s powers, regarding the possibility of amending the Sales Agreement, although it was requested by CLAIMANT [MfC, ¶17].

21. Secondly, the Parties omitted the model clause provision that provided that “any dispute regarding non-contractual obligations arising out of or relating to it” should be finally resolved through arbitration [HKIAC Model Clause]. This deliberate omission
clarifies the intention of the Parties on limiting the interpretation of the DRC and applying the Law of Danubia, once such Law defends a narrow interpretation of a DRC, limited to its wording [RNoA, p.32, ¶16].

22. In view of all the elements mentioned above, this Tribunal shall understand that the choice of Danubia as the seat of arbitration also means, implicitly, that the substantive Law of such State was chosen to govern the DRC.

B. The Law of Danubia is the most appropriate Law to govern the DRC

23. Even if the Tribunal does not consider that the Parties have impliedly chosen the Law of Danubia, Respondent will demonstrate that the Law of Danubia has the most real and closest connection to the DRC and should be the one applied to it. Art. 36.1 of the HKIAC Rules provides that in the absence of choice of the Parties, the Tribunal shall apply the rules of law it deems appropriate.

24. There is a very strong connection between the arbitration and its seat, based on the localization theory, that provides that the seat of an arbitration governs the practical steps of the proceeding [Redfern/Hunter, p.171; Born II, pp.55-56; Jones, p.912; ICC Case No. 6527; Vessel v. S. Company; A. Franchisor v. S. A. Franchisee].

25. The courts of the seat of arbitration are allowed to govern the establishment of the tribunal, the evidence production and give curial support, by granting interim reliefs or exercising a supervisory authority over the arbitration, for example [Braghetta, p.23; Petrochilos, p.22; Redfern/Hunter, p.165,184; Shashoua v Sharma; Naviera Seguros Del Peru; ICC Case no. 8938].

26. In this sense, the importance of the seat has been understood by innumerous Courts [ICC Case No. 6527; Panamanian Vessel v. Soviet Company; A.F. v. S.A. Franchisee, FirstLink v. GTPayment], especially when parties have not provided an applicable law to the arbitration agreement [Gaillard/Savage p.226; Redfern/Hunter, p.157; Poudre/Besson, ¶112; Born I, p.512; Coal Case; Smith Case; ICC Case no. 6162].

27. Furthermore, the law of the seat has an indisputable level of connection to an arbitration agreement and, consequently, the courts of the seat of arbitration are allowed not to recognize awards that are not in accordance with the law of the seat [Karrer, p.860-862; Chong, p.83; Born I, ¶11.03; Jones, p.912; India Vs. McDonnell; Bhatia v. Bulk; Sumitomo Case].
28. In international arbitration, the arbitral seat is the juridical center of gravity, which significance is recognized by the NY Convention and the DAL [ART. V (1)(a); FirstLink Investments Corp Ltd v. GTPayment Pte Ltd]. To this end, it is commonly accepted that in the absence of an express choice of the law applicable to the arbitration clause, the law of the seat of arbitration will govern the arbitration agreement.

29. Moreover, there is consistent jurisprudence in Danubia that the CISG does not apply to arbitration agreements, because it is considered a procedural contract [P02 ¶36]. In addition, according to such doctrine, the Law of Mediterraneo applies only to the Sales Agreement [BOER, p.75; BORN I, p.578].

30. Thus, when analyzing the law with the closest and most real connection to the DRC, the Tribunal shall understand that, contrary to CLAIMANT’s allegations, the Law of Danubia, which is the seat of arbitration, was elected to govern the DRC.

31. In this sense, there is knowledge that the Law of Danubia requires an express empowerment of the Arbitral Tribunal to allow the adaptation of the Sales Agreement, due to changes on article 6.2.3 of the UNIDROIT Principles, which was the basis of Danubian Contractual Law [RNoA ¶13]. Such empowerment was not given. Therefore, the Arbitral Tribunal lacks powers and jurisdiction to adapt the Sales Agreement.

**CONCLUSION TO ISSUE 1: THE LAW OF DANUBIA SHALL BE APPLIED BY THE ARBITRAL TRIBUNAL TO GOVERN THE DRC**

32. In conclusion, there was no express choice to the law governing the DRC. The Parties implicitly chose the Law of Danubia. First, it is the seat of the arbitration and, in the absence of choice between the Parties, Danubian Law should be applied to the DRC. Second, previous negotiations between the Parties show that they intended to limit the powers of the Arbitral Tribunal in accordance with the provisions of the Law of Danubia.

33. Considering what was previous exposed, it is a fair assessment to say that the law with the closest and most real connection to the DRC is the of the seat of the arbitration.

34. Therefore, since the Law of Danubia is applicable to the DRC, this Arbitral Tribunal lacks jurisdiction and powers to adapt the Sales Agreement.

**ISSUE 2: CLAIMANT IS NOT ENTITLED TO SUBMIT THE DOCUMENTS FROM RESPONDENT'S OTHER ARBITRATION PROCEEDING**
35. CLAIMANT wants to submit confidential documents from another arbitration in which RESPONDENT is a party. CLAIMANT learned about the existence of such proceedings by chance but decided to hire an intelligence company to obtain confidential documents [Letter by Langweiler, p.50; PO2, ¶41]. In this scenario, it became clear that CLAIMANT hired the said company to do the dirty job in order to have an undue advantage.

36. RESPONDENT recognizes the Arbitral Tribunal’s powers regarding the admissibility of evidence provided for in the applicable Law and Rules [Art. 19.2 DAL; Art. 22.2 HKIAC 2018 Rules]. In addition to that, the IBA Guidelines on the Taking of Evidence, a soft law well recognized in the field of arbitration, also grants the same powers to the Tribunal [Art. 9.1 IBA Guidelines on Taking Evidence]. However, it does not mean that every evidence shall be accepted [BORN I, p.3457, 2014; HWANG AND LIM, p.67, 2012; Chorzow Case; Libananco v. Turkey, ICSID Case No. ARB/06/8].

37. In any case, the documents submitted shall not be accepted since (I) they were illegally obtained and CLAIMANT has unclean hands; (II) illegal documents are inadmissible; (III) the IBA Guidelines support the exclusion of the documents; and (IV) the other arbitration does not involve a comparable issue with the present proceedings.

I. CLAIMANT HAS UNECLEAN HANDS BECAUSE IT WAS INVOLVED IN THE OBTAINMENT OF EVIDENCE

38. CLAIMANT defends that it acted in good faith to obtain the award of the other arbitration, it defends that it has clean hands since the breach of confidentiality and the illegal hacking was not carried out by CLAIMANT [MfC, ¶28].

39. The arguments presented by CLAIMANT does not represent the reality of the facts. CLAIMANT hired a company with a doubtful reputation to obtain confidential documents [PO2, ¶41, p.61], a conduct that, by itself, shows CLAIMANT lack of good faith [OLIVIER, ELUL & PETROVAS, p.2; ORTIZ, ¶7; PO2, 41, p.60-61; MORRISSEY, pp.641-642].

40. In this context, it is clear that CLAIMANT cannot pretend that it did not know or could not have been unaware that an illegal activity would be performed by the company. The facts evidence precisely that CLAIMANT consciously participated or, at least, stimulated an illegal activity performed by the company hired, which shows that CLAIMANT does not have its hands clean [ICSID Case No: ARB/03/24; DUMBERRY, p.231-232].
41. Following this idea, it does not matter if the documents were obtained by (A) breach of confidentiality or (B) illegal hacking since, either way, they were illegally obtained.

A. THE BREACH OF CONFIDENTIALITY CAUSES THE ILLEGALITY OF THE EVIDENCE

42. RESPONDENT's former employees were bound by a contractual duty of confidentiality [PO2, ¶41, p.61; Art.45, HKIAC Rules]. Although this duty is not extended to CLAIMANT, it does not mean that the documents should be accepted by this Arbitral Tribunal, since CLAIMANT illegally obtained those documents [PO1,1(b), p.53], which is a cause for non-admissibility [DUMBERRY, pp.232-234].

43. The breach of confidentiality made by RESPONDENT's former employees makes the documents inadmissible, because of the mean employed in its obtainment. Despite being informed by chance of the existence of the other arbitral proceeding [PO2, ¶41, p.61], CLAIMANT violated the confidentiality of a document that belongs to RESPONDENT in order to have an undue advantage, which violates the equality in the arbitral procedure contained on Art. 18 of the Danubian Arbitration Law [SMEUREANU, pp.171-172; NACIMIENTO/KROLL/BOCKSTIEGEL/STIEGEL, p.975; COSAR, p.545]. In arbitration, the confidentiality of the documents is not absolute [S.D. Myers; Mondev; ADF; Loewen; Waste Management; Esso v. Plowman]. However, even not being considered absolute, it may not be mitigated to allow illegally obtained evidence. Those cases are emblematic in the field of arbitration and cannot be disregarded [SMEUREANU, pp.173-174].

44. The referred breach was not spontaneous, but rather caused by the company that CLAIMANT hired to obtain classified information [PO2, ¶41, p.61], which shows perfectly the connection between the breach and the illegality.

45. Arbitral tribunals do not accept contaminated documents that are fruit of breaches of confidentiality agreements [DUMBERRY, pp.89/93/100].

46. Moreover, an important aspect of confidentiality in international arbitration is ensuring the privacy of the proceeding as a whole. This includes the decision-making process, since each arbitration may be regarded as a legal microsystem of its own [Ali Shipping; Dolling-Baker v Merret; Insurance Co. v Lloyd's Syndicate]. In this sense, arbitrations ought to be regarded as confidential and private, insofar as they do not interfere with one another.

47. Besides that, CLAIMANT is trying to use not just documents that were obtained by breach of confidentiality, but that were held in private domain. Arbitral Tribunals have
accepted documents that were obtained by breach of confidentiality. However, those documents were in public domain, which is not the situation of the documents discussed in the case at hand [ConocoPhillips. V Venezuela; Caratube v Kazakhstan].

B. THE ILLEGAL HACKING CAUSES THE ILLEGALITY OF THE EVIDENCE

48. The illegal hacking makes the award of the other arbitration completely inadmissible. Evidence is contaminated, qualifying as a fruit of the poisonous tree. This doctrine states that if the means employed in obtaining the evidence are illegal, the evidence itself becomes illegal and inadmissible as well [Pitler, p.1; Colston/Bischof/Moxley/Grishchenkova, p.21.; Weeks v U.S.; STF, HC 103.325 MC; ITC Film v Video Exchange; Methanex v U.S; Utah v. Strieff; Silverthorne v U.Ss; AEK v National Basketball; MfR, II].

49. Claimant contributed to the illegal hacking, since it hired a company with a doubtful reputation to obtain the award [PO2, 41, p.60-61]. By committing this unlawfulness, it tainted the admissibility of the documents, which should not be accepted by this Tribunal.

50. Furthermore, it is clear that a violation of confidentiality inherent in documents violates most countries public policies [Redfern/Hunter, p.655]. This is justified since confidentiality is regarded as an inherent and fundamental principle of arbitration proceedings in jurisdictions such as England, Singapore, New Zealand, Hong Kong, Peru, Romania and Spain [Born I, p.2786]. In this sense, the award may be rendered unenforceable [Art. 34(2)(b)(ii) Danubian Arbitration Law].

II. ILLEGAL EVIDENCE IS INADMISSIBLE

51. It is broadly accepted that illegally obtained evidence causes its inadmissibility [Born I, p.3457, 2014; Hwang/Lim, p.67; Chorzow Case; Libananco v. Turkey, ICSID Case No. ARB/06/8; Ortiz, ¶6; Colston/Bischof/Moxley/Grishchenkova, p.21; STF, HC 103.325 MC; ITC Film v Video Exchange; Methanex v U.S; Utah v. Strieff; Silverthorne v U.S; Olivier, André/elul/Petrovas, pp.1-2].

52. The evidence’s source is a fundamental issue related to its admissibility. In particular, because the truthfulness of the information cannot be properly asserted [Wiseman, p.491; Pilkov, p.153]. It may even tip the scales of a trial, which would cause a great injustice [Wiseman I, p.491].
53. The documents are illegal and inadmissible, since they were obtained through illegal means [MfR, I.A.3-II.]. Thus, the “fruit of the poisonous tree” doctrine applies. In other words, if the obtainment “tree” was illegal, the evidence “fruit” is illegal as well [Pitler, p.1; Colston/Bischof/Moxley/Grishchenkova, p.21.; Weeks v U.S.; STF, HC 103.325 MC; ITC Film v Video Exchange; Methanex v U.S.; Utah v. Strieff; Silverthorne v U.S.; AEK v National Basketball].

54. In conclusion, the illegal evidence such as the documents should not be admitted by the Tribunal.

III. THE IBA GUIDELINES SUPPORT THE INADMISSIBILITY OF THE DOCUMENTS.

55. The IBA Guidelines on Taking evidence, used by Claimant to support its argument [MfC, ¶¶30-32], is a soft law, which means that its applicability in this case is non-binding. The Parties agreed on the Laws and Rules that they want to govern this arbitral proceeding in their Sales Agreement [Ex. C5], and they did not include the said soft law.

56. Although the IBA Guidelines are not of mandatory application in this procedure, even if they were it just benefits Respondent, since the Guidelines provides that the taking of evidence shall be conducted on the principles that each Party shall act in good faith [IBA Rules on Taking of Evidence, Preamble (3) (2010)]. As it was already discussed above, Claimant acted in bad faith since it provoked an illegal conduct by hiring a company with bad reputation to obtain a confidential document [PO2, 41, p.60-61; Fashion Products Case, ICC Case no. 11849].

57. In this scenario, the IBA Guidelines preamble starts to show grounds for non-admissibility of Claimant’s evidence by providing an efficient, economical and fair process for the taking of evidence in international arbitrations. However, it does not stop at the beginning, in its Art. 9.2(g), it is stated that considerations of procedural economic, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling are grounds for non-admissibility.

58. In the present case, the acceptance of the referred documents would cause an unfair advantage to Claimant, since it had access to confidential information regarding Respondent. Moreover, Respondent did not have access to confidential information regarding Claimant. This admissibility would hinder the balance and the equality of the procedure [Paulsson/Petrochilos, pp.547-548]. This is a matter of due process, which
is well recognized in the rules agreed by the Parties [UNCITRAL Model Law, Art. 18; HKIAC Rules, Art. 13.1].

59. Furthermore, it is important to emphasize that the lack of due process is also a cause for non-enforceability of arbitral awards [BORN I, p.2123; PAULSSON/BOSMAN, pp.90-92]. Although arbitration is not under any mandatory due process requirements, they continue to exist [BORN I, pp.2149; BROCHES pp.90-92].

60. Therefore, it is clear that even if this Arbitral Tribunal decides to apply the IBA Guidelines, it just shows more reasons not to accept the evidences in question.

IV. THE OTHER ARBITRATION DOES NOT INVOLVE A COMPARABLE ISSUE WITH THIS ARBITRATION

61. CLAIMANT alleges RESPONDENT is presenting contradictory arguments to another arbitration involving similar issues [Mfc, ¶22]. However, this does not proceed.

62. The proceedings had different applicable laws. In the previous arbitration the Law of Mediterraneo was expressly applicable to the proceeding and the DRC [PO2, 39.]. It grants the Arbitral Tribunal the powers to adapt a contract without an express authorization [NoA, ¶16]. In opposition, the Law of Danubia, applicable to the present arbitration requires such an express conferral of powers [ANoa, ¶13]. Besides, the other proceedings included a contract with a 2003 ICC Hardship Clause [PO2, 39.], most definitely determining for an adaptation of the price [OBEID, p.201; ICC Publication No. 650; ICC Case no. 9812; ICC Case no. 13504].

CONCLUSION TO ISSUE 2: THE DOCUMENTS SHALL BE DISREGARDED BY THIS TRIBUNAL

63. Therefore, considering the evidence was obtained either by an illegal hacking or by a breach of confidentiality, the evidence was illegally obtained.

64. The illegal mean of obtainment is cause for dismissal. The unfair advantage that CLAIMANT will have will violate the due process, since the admissibility of the said document would legitimate an undue advantage to CLAIMANT; and, as a consequence, it could be cause for the non-enforceability of the arbitral award.

65. In order to conclude, it is reasonable to dismiss the documents that CLAIMANT obtained illegally, because it is in accordance with the Rules agreed by the parties, the Danubian Law and the gap filling IBA Guidelines, raised by CLAIMANT.
ARGUMENTS ON THE MERITS

ISSUE 3: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF USD 1,250,000 AS THE SALES AGREEMENT MUST NOT BE ADAPTED

66. First and most importantly, the Arbitral Tribunal cannot provide for an adaptation of the Sales Agreement as CLAIMANT alleges [MfC, p.15, ¶38], since it lacks the powers and jurisdiction to do so, considering that the Law of Danubia applies to the DRC [MfR, §§ 12-17].

67. Even if the Arbitral Tribunal understands that it has the powers and jurisdiction to analyze the adaptation of the Sales Agreement, it is fundamental to keep in mind that Parties agreed on a narrowly worded Hardship Clause to remedy unforeseeable changes in circumstances in which the delivery could not be performed as well as to exclude CLAIMANT’s liability in certain and specific situations.

68. In the unlikely event that the Tribunal understands that the Law of Mediterraneo is the one applicable to the DRC, the Arbitral Tribunal still does not have powers nor the jurisdiction to adapt the price of the Sales Agreement. For this reason, the adaptation of the Sales Agreements price in the amount of USD 1,250,000 should not be provided for. This is so because: first, (I) Clause 12 of the Sales Agreement does not predict for an adaptation of the Sales Agreement; second, (II) the CISG does not encompass the adaptation of the price of the Sales Agreement; and third (III) the UNIDROIT Principles are not applicable to the present case.

I. THE ARBITRAL TRIBUNAL SHOULD NOT ADAPT THE SALES AGREEMENT UNDER CLAUSE 12

69. CLAIMANT states that Clause 12 allows the Arbitral Tribunal to adapt the Sales Agreement, since such clause allegedly covers changes of tariffs. CLAIMANT also makes groundless allegations that the necessary circumstances for adaptation have been fulfilled [MfC, p.15, ¶40]. Contrary to this assessment, RESPONDENT will demonstrate that CLAIMANT is not entitled to receive USD 1,250,000 as a result of the adaptation of the Sales Agreement, under Clause 12. In this sense, RESPONDENT will demonstrate that the Sales Agreement does not provide for the adaptation of its price, since (A) Clause 12 does not cover the changes of tariffs and, (B) and even if it does, the elements of hardship considered by Clause 12 have not been met.
A. Clause 12 Does Not Cover Situations Of Hardship Such As The Changes In Tariffs Imposed By Equatoriana

70. Albeit the Parties agreed to exempt Claimant of some risks associated with a DDP-delivery by the inclusion of Clause 12 [MfC, p.15, ¶ 40], this provision was narrowly drafted and only operates in specific situations. The adaptation of the Sales Agreement is not encompassed by such clause, considering that: (1) Clause 12 of the Sales Agreement provides for a narrow and specific application regarding situations of hardship, (2) effectively conveying the Parties' intentions. Alternatively, (3) if the Tribunal understands that the Parties' intentions cannot be ascertained, a reasonable person would understand that Clause 12 does not provide for an adaptation of the Sales Agreement in the way requested by Claimant.

1. Clause 12 Of the Sales Agreement Provides for A Narrow Application Regarding Situations of Hardship and Does Not Cover the Change of Tariffs

71. Respondent will demonstrate that Clause 12 does not fit into the broad sense of a hardship clause as presented by Claimant, which, according to it, would be a preventive mechanism against modifying circumstances that can fundamentally tip the scales of the contractual balance [MfC, p.19, ¶51]. Claimant takes disconnected bits and pieces of information to assemble twisted arguments which do not, by themselves, provide for the adaptation of the Sales Agreement.

72. To better understand the scope and application of Clause 12, the Tribunal should take into account the principle of party autonomy when analyzing the drafting history of such clause. This principle is the backbone of international arbitration. As such, it was incorporated in a multitude of legislations around the world, including national laws, international arbitral institutions statutes and international agreements such as the New York Convention and the Model Law [REDJERN/HUNTER, p.364, ¶6.08]. It provides that parties have the freedom to agree on provisions best suited for their interest, upon drafting a contract [UNIDROIT PRINCIPLES, ART. 1.1; TRANSLEX-PRINCIPLES, NO. IV.1.1; BORN, ¶1.02F; ELCIN, p.1; FABGEMI, P.228; HOLTZMANN/NEUHAUS, p.565; LAWSON, p.69; NYGH, p.1; ORTEGA/ZAMBRANA, p.68, ¶65; SCHULZE, pp.6-7; SORNARAJAH, pp.241-242].

73. In the present case, the Parties exercised their autonomy by including in the wording of the force majeure clause a device that exempts Claimant's liability in very strict cases. The wording of Clause 12 is clear, and states that “Seller shall not be responsible for [...] acts of God neither for hardship, caused by additional health and safety
requirements (emphasis added) or comparable unforeseen events making the contract more onerous.” [Ex. C5, p.14, ¶12]. The Parties negotiated and consented to the inclusion of Clause 12 within the terms of the Sales Agreement to cover matters of force majeure and of hardship merely in certain particular cases (emphasis added) [Ex. C5, p.14, ¶12], which clearly do not include situations such as the change of tariffs.

Furthermore, the protection conferred upon parties which opt for the inclusion of a narrow understanding of a clause that covers situations of hardship in a contract explicitly reflects such principle of party autonomy, which must be followed to the highest degree possible [BORN, p.2455; LYNCH, pp.35, 37, 49; WAINCIMER, p.643]. Adopting a position contrary to the will of the parties, and therefore, to such freedom, would challenge the fundamental principles of contract law [BORN, pp.426-427; REDFERN/HUNTER, p.365; REDFERN, p.315; RUBINS, p.10].

Thus, it is clear that the hardship wording within Clause 12 must be interpreted in a narrow manner, as to enforce the explicit purpose of the inclusion of such a clause within the Sales Agreement.

2. Interpretation of Parties’ intent shows that Parties wished to apply Clause 12 in a restrictive manner and not to confer powers to the Tribunal to adapt the Sales Agreement

If the Tribunal understands that the wording of Clause 12 is unclear and offers the remote possibility of a broad application to matters of hardship, the Arbitral Tribunal must consider the substantive applicable law to the Sales Agreement, which is the CISG [Ex. C5, p.14, ¶14]. The Tribunal should interpret Parties’ intentions taking into account Art. 8(1) CISG [CHATILLON, p.220; HONNOLD/FLECHTNER, ¶105; LOOKOFSKY, pp.42-43; SCHLECHTREIM/BUTLER, p.55; SCHLECHTRIEM/SCHWENZER, Art. 8 ¶11; ___ v. Pastificio Della Mamma S.A.; Agricultural Products Case; Fashion Products Case; Magnesium Case; McC-Marble Ceramic Center v. Ceramic Nuova d’Agostino; Proforce Recruit Ltd v Rugby Group Ltd; Surface protective film Case; TETA case; Yarn Case].

Pursuant to the abovementioned article, party’s declaration must be interpreted regarding its intent and the other party awareness of that intent. Hence, it can be asserted that imputable awareness is the applicable pattern to assess parties’ intention, in view of the assertion “could not have been unaware” [HUBER/MULLIS, p.12; LAUTENSCHLAGER, p.260; LOOKOFSKY, pp.42-43; SCHLECHTRIEM/SCHWENZER, Art. 8, ¶17].
78. According to case law, Art. 8(1) CISG allows a substantial examination of the Parties’ subjective intent as well, even if the Parties did not objectively register such intent [Hanwha Corporation v. Cedar Petrochemicals; Fruit and Vegetables Case]. Additionally, where both parties have conveyed their intention to the other, they are understood to have reached a ‘meeting of minds’ [CISG DIGEST, p.58; SCHLECHTRIEM/SCHWENZER, ART. 8 ¶11; Franklins v. Metcash].

79. Furthermore, in assessing parties’ intentions, Art. 8(3) CISG determines that all relevant circumstances of the case, such as established practices and usages between the parties as well as the negotiations, must be taken into account. Hence, this Tribunal must consider the Parties’ unambiguously declared intentions when interpreting the purpose and scope of the Clause 12.

80. In the present case, the history of the negotiations between the Parties demonstrates that RESPONDENT insisted on the inclusion of a DDP-delivery term in the Sales Agreement [Ex. C3, p.11, ¶2]. That is so for two reasons. First, the delivery was urgent given the fact that there was a breeding season which must be respected. And second, CLAIMANT has much more experience in shipping such a delicate, fragile and expensive product as frozen semen [Ex. C3, p.11, ¶2]. The DDP-delivery was such a crucial element for RESPONDENT that it accepted to pay an additional USD 200 per dose [PO2, p.56, ¶8].

81. It is important to mention that RESPONDENT explicitly stated that the ICC-Hardship Clause suggested by CLAIMANT was too broad, considering the purposes of this contract and the objectives pursued [Ex. R3, p.35; PO2, p.52]. The final wording of Clause 12 was cemented in the subsequent negotiations [PO2, p.56, ¶12; Ex. C4, p.14, ¶12]. Mr. Antley made it known to CLAIMANT once more that the purpose behind the Clause 12 was merely an addition to the existing force majeure clause [ANO, p.30, ¶4; Ex. R3, p.35].

82. CLAIMANT did not object to the final result [Ex. C4, p.12]. In this sense, it did not oppose to RESPONDENT’s intention of a narrow application of Clause 12. Ergo, it is evident that Clause 12 shall be interpreted narrowly.

83. Furthermore, CLAIMANT demonstrated that its intent with the proposal of Clause 12 was to protect itself from a past experience with animal product delivery [Ex. C4, p.12, ¶4]. The fact is that in 2014, CLAIMANT had sold three mares to Danubia and, shortly after, a disease spread, killing a quarter of the cow population. For this reason, Danubia’s government imposed a new and strict health and safety requirement,
including new tests and a long quarantine [Ex.C4, p.12, ¶4; P02, p.58, ¶21]. CLAIMANT had to bear by itself the high costs that originated from the situation above, which almost resulted in its insolvency. Thus, the hardship provision within Clause 12 aimed to protect CLAIMANT only in the case of health and safety requirements [P02, p.58, ¶21].

84. Moreover, it is generally admitted that in a DDP-delivery the seller bears all the risks, including risks associated with export and import clearance of the goods, as well as any transit of the goods [BRUNNER, p.180, ¶3, INCOTERMS 2010, p.69, ¶¶2-3].

85. In light of that, it is clear that RESPONDENT manifested, from the very beginning of the negotiations, its intentions regarding the scope of the DDP-delivery and the application of Clause 12 in a clear and straightforward manner. In fact, it expressly demonstrated its unwillingness to continue the purchase, more than once, if the DDP was not included [Ex. C3, p.11; Ex. R3, p.35]. On the other hand, during the negotiation of the terms of delivery and of Clause 12, CLAIMANT raised issues regarding risks of health and safety requirements [Ex. C4, p.12]. Therefore, whilst CLAIMANT knew and could not have been unaware of RESPONDENT’s intentions regarding the DDP-delivery, Clause 12, and the Sales Agreement, RESPONDENT relied upon the impression that CLAIMANT wanted to be protected solely from health and safety requirements.

86. All things considered, it is possible to understand, taking into account the Parties’ declared and implicit intentions regarding Clause 12 that the Arbitral Tribunal does not have powers to adapt the Sales Agreement. Thus the Tribunal cannot alter the price of the Sales Agreement in light of situations related to the imposition of tariffs.

2.1. The delivery terms contributes to ascertain Parties intentions

87. During the celebration of the Sales Agreement, the Parties deliberately agreed upon a DDP delivery. This means that, by choosing this kind of delivery, it was implied that all terms settled by the ICC were to be followed.

88. To better understand such matter, it is important to clarify that the abbreviation DDP is an incoterm, created by the ICC with the intention of harmonizing duties for parties involved in international sales. The creators of the Incoterms decided to divide these terms in different groups according to the responsibilities assumed during the negotiation. The so-called D group sets that the seller is responsible for the arrival of the goods at the agreed place or point of destination, and with that must bear all the
risks and costs in bringing the goods thereto [BRUNNER, p.180, ¶3; MOYES FILHO ET AL., pp.96-104; CATTANI, p.147, pp.249-253; GRANZIERA, pp.147-153; GOULART, pp.67-91]. The risks involved in this operation were, therefore, allocated to CLAIMANT.

89. The 30% tariff increase, as will be further explained by RESPONDENT [Mr. §§ 97-103], being a foreseeable and inherent risk to this contract, covered by the grounds of the DDP, must be borne exclusively by CLAIMANT.

90. Besides the DDP delivery, the Parties also agreed on a risk premium. During the negotiation of the terms of the Sales Agreement, CLAIMANT, which is an expert in the shipment of frozen semen [Ex. C8, p.16; PO2. p.56, ¶8], willingly accepted to receive a $200 increase per dose. Ergo, demanding payment by RESPONDENT for the additional tariffs would fundamentally alter the equilibrium of the contract [DA SILVEIRA, p.323, ¶2; FERRARIO, pp.71-72; GHERSI, p.319, ¶5, p.320, ¶4, p.322, ¶4; ROPPO, p.253, ¶¶ 2-3; SCHWENZER, pp.714-715], considering that RESPONDENT paid a supplementary amount in order to exonerate itself from these type of responsibilities.

91. In line of this argument, by including the DDP delivery, the Parties had the intention to attribute to CLAIMANT the responsibility to deliver and bear the risks associated with it, and consequently, the Arbitral Tribunal should not adapt the Sales Agreement.

3. Even if the Parties’ intentions cannot be ascertained, a reasonable person would understand that Clause 12 does not encompass matters of hardship related to the imposition of tariffs

92. Art. 8(2) CISG should be applied if the Tribunal understands that the Parties’ objective intentions, regarding the narrow application of the hardship provision within Clause 12 was unclear, or that CLAIMANT could not have known RESPONDENT’s intention. In this scenario, the Tribunal must consider the understanding that a reasonable person of the same kind and in the same circumstances would have had to interpret the Parties’ intention [Art. 8(2) CISG; Art. 4.1(2) ECL; SÆNGER IN: FERRARIO ET AL., Art. 8(2); HANSALAYA, p.35; ICC 11880; SCHLENTRIEM/SCHWENZER, Art. 8, ¶¶55-56; DiMATTEO ET. AL., pp.345-346; LOOKOFSKY, p.251].

93. The principle of reasonability is inherent throughout CISG’s numerous arts, either objectively or subjectively [Art. 8(2) CISG; DiMATTEO ET. AL., pp.345, 346; LOOKOFSKY; DA
SILVA, p.352]. In light of such important principle, it can be understood that neither RESPONDENT nor any reasonable person in this position would have the aim to provide such a broad application to a clause. considering was inserted a DDP delivery, as well as chosen the Law of Danubia to govern the DRC.

94. In brief, even if the Parties’ intention regarding adaptation of the Sales Agreement is not evident, a reasonable person would understand that Clause 12 does not cover matters of hardship related to the imposition of tariffs.

B. THE ELEMENTS OF HARDSHIP CONSIDERED BY CLAUSE 12 HAVE NOT BEEN MET

95. As already demonstrated by RESPONDENT, the occurrences that bestowed the delivery of the FS originated a situation for CLAIMANT that falls outside the scope of Clause 12. For this reason, the Arbitral Tribunal does not have powers to adapt the Sales Agreement since such clause provides for a narrow application.

96. In the unlikely event that the Tribunal understands that Clause 12 does cover situations such as a tariff increase, RESPONDENT will demonstrate that the requirements imposed by such clause have not been met, since (a) the imposition of a 30% tariff increase was foreseeable; and (b) the tariff is not comparable to “additional health and safety requirement”.

a. The Imposition Of A 30% Tariff By The Government Of Equatoriana Was Foreseeable

97. CLAIMANT makes allegations that the tariff imposition was an unforeseen event because one journal, the Peak Business News, considered the retaliation unlikely [MfC. p.16, ¶41]. However, due notice must be given to the fact that the newly elected president of Mediterraneo, President Bouckaert, had appointed Ms. Cecil Frankel as his head minister of agriculture, trade and economics months before the tariff increase. Ms. Frankel is one of the “most ardent critics of free trade” constantly outspoken about her understanding that farmers on Mediterraneo were being ill-treated and advocating for protectionism [Po2, p.58, ¶23].

98. The high tariffs imposed by the Governments of both countries constitute a common danger in such contracts, [DA SILVEIRA, p.323, ¶2]. This is so because it is a retaliatory measure common in international trade and politics. For instance, just last year alone, 2018, there has been various famous trade wars, that being China, Mexico, EU, Canada and India against the US regarding tariffs on aluminum and other metals.
99. Even if retaliations are not common in Equatoriana [Ex. C6, p.15], it is reasonable to expect a 30% increase in import tariffs in animal products. In order to sustain this argument, Respondent purports to cross-reference the data made available by two respectable entities: the World Trade Organization, which provides data about the tariffs of animal products similar to the ones applied by Equatoriana's Government [Ex. C6, p.15], and the Heritage Foundation, a respectable advocate for the free market that reports a yearly ranking on economic freedom.

100. Within the countries analyzed on the International Trade and Market Access Data, it can be observed that in animal trade and tariffs even the most free-market countries have a high imposition. Norway, for example, has a 126.71% tariff, and Iceland has a 91, 78% tariff, and if considering bound tariffs the numbers are extremely higher, having only 32 out of 136 countries with a tariff imposition lower than 25%.

101. This implies that the retaliation by Equatoriana and the imposition by Mediterraneo are not an exception and could, in fact, have been be easily foreseen by the Parties.

102. Undoubtedly, both parties were displeased by the tariff increase, but considering it an unforeseeable event is equivalent to considering an earthquake in Italy unforeseeable, it is not as common as in Japan, but it is definitely not unforeseeable. [Samuelson; Calder; Amato/Montone].

103. There were also signs in the Mediterraneo foreign police [PO2 p.58 ¶23], following a world tendency regarding a rise in protectionism [The Economist; Kirk; Gardner]. To consider it impossible (emphasis added) for any reasonable person to have predicted or at least anticipated the tariff imposition is illogical. This means that the tariff imposition and retaliation were not an unforeseeable event, going beyond the assumed risks [Brunner, p.156, ¶818] giving Claimant no right to have an adaptation of the contract price.

    b. The Tariff Is Not Comparable To “Additional Health And Safety Requirement”

104. The imposed tariff by the Government of Equatoriana of 30% in agricultural products was a direct retaliatory measure against the Government of Mediterraneo [Ex. C6, p.15]. The health and safety requirements inserted in the Sales Agreement [Ex C5, p.14, ¶12] is in relation to a previous transaction that Claimant made with another party in his country in 2014 [PO2, p.58, ¶21]. In that situation Claimant sold 3 mares and
shortly after a disease spread though Danubia killing most of its cow population, hence, strict impositions were applied resulting in a new and very strict health and safety requirements, eventually almost resulting in the insolvency of CLAIMANT.

105. Therefore, it is clear that CLAIMANT wanted to protect himself from a past experience regarding safety and health provisions, not the tariff increase, because Danubia “imposed very strict new health and safety requirements involving long quarantine time” [PO2, p.58, ¶21] following the disease outbreak and costing CLAIMANT 40% of the sales price. In conclusion, the imposed tariffs are not comparable to additional health and safety concerns.

106. Having established that the 30% tariff increase cannot be considered as health and safety requirement, it cannot be considered as a comparable unforeseen event, once, as it was previously demonstrated [MfR, §§ 97-103], was indeed predictable, or at least expected.

III. UNITED NATIONS CONVENTION ON CONTRACT FOR THE INTERNATIONAL SALE OF GOODS (“CISG”) IS THE APPLICABLE LAW TO THIS CASE AND IT DOES NOT ALLOW THE ADAPTATION OF THE CONTRACT

107. Even though CLAIMANT disregards the CISG and proceeds to analyze the present through the UNIDROIT [MfC. p.18, ¶48], it is undisputed between the parties that the CISG is the applicable law of the present case [MfC, p.23, ¶60]. Therefore, it should be analyzed though its articles. The applicability and scope of the UNIDROIT will be further discussed by RESPONDENT [MfR, §§ 125-131].

108. Hence, the issues of the present case must be considered within the scope of the CISG, and even so, when analyzing its articles the original Sales Agreement must not be adapted and CLAIMANT cannot receive USD 1,250,000.

109. RESPONDENT requests this Tribunal to find that the Sales Agreement should not be adapted in terms of the applicable law to the substantive issues. Under the CISG, the Sales Agreement should not be adapted because (A) Art. 79 do not provide for situations of hardship, as agreed by CLAIMANT and consequently (B) does not provide for adaptation of the Sales Agreement as a possible remedy.

A. CISG ARTICLE 79 DOES NOT APPLY TO THIS CASE

110. It is undisputed between the Parties that art. 79 of the CISG is not applicable since the abovementioned article refers to fail to perform, which did not happen [MfC, p.24,
¶61. Claimant also sustains that the scope of application of Art. 79 is limited to any case where one of the Parties has not properly performed contractual duties [PO2, p.24, ¶61].

111. Moreover, article 79 is not also applicable because it governs exclusively matters of force majeure and not hardship. As a matter of fact, courts have ruled against relief, under Art. 79 CISG, for the sellers which claim that the abovementioned article encompass matters of hardship [Nuova Fucinati S.p.A. v Fondmetall International A.B.]. Legal scholars have also concluded that Art. 79 CISG does exclude the possibility of economic hardship as an impediment that may exempt a party's failure to perform [Da Silveira, pp.329-330].

112. Finally, all the facts exposed by Respondent clarify that the CISG does not provide for the adaptation of the Sales Agreement by Art. 79. As the Sales Agreement is governed by the CISG, Claimant is not entitled to reimbursement for the amount it paid [Drago/Esq/Zoccolillo, ¶5] for the tariffs imposed on animal products [NoA, p.6, ¶¶ 9-10].

B. Even if Art. 79 CISG Would Encompass Situations Of Hardship, The Requirements Supposedly Established By This Provision Have Not Been Met.

113. In light of the above, the four requirements referred to in Article 79 must be taken into account in case the Tribunal determines that such an article actually includes hardship. First: (i) there must be an obstacle beyond the control of the promisor's control, (ii) that is not foreseeable at the time the contract was concluded, (iii) unreasonable to be overcome, and (iv) the reason for this non-fulfillment of the contractual obligations of this party [DiMatteo, pp.18-19; DiMatteo et al., pp.424-425; Nicholas, ¶5.01; Tallon, p.577, ¶ 2.3; Ziegel, ¶2].

114. In the present case, not all the requirements of Art. 79 CISG were accomplished. Although (i) there is a clear obstacle which falls beyond the control of Claimant, (ii) such an event was not unpredictable at the time the purchase contract was concluded, once the new president stated it in the election campaign, and whereas such a measure was adopted by the same country on another occasion. Moreover, the introduction of additional tariffs was not (iii) impossible be overcome, as Claimant managed to deliver the FS, and (iv) Claimant was able to bear the burden of paying the additional tariffs since the payment had already been done.
115. In view of the facts set out above it becomes clear that the requirements set by Art. 79 of the CISG and needed for its application in emergency situations were not fulfilled.

IV. A GAP FILLING TECHNIQUE WOULD NOT PROVIDE FOR ADAPTATION OF THE SALES AGREEMENT

116. Claimant’s alleges that, once Art. 79 is not applicable to the present case, the UNIDROIT Principles are to be used as a gap filler, through the application of Art. 7(2) of the CISG [MfC, p.18, ¶41]. However, as it will be further demonstrated by Respondent, there is no gap to be filled, in the sense of article 7(2), and, therefore the UNIDROIT Principles are not applicable.

117. No convention is capable of having an exhaustive set of rules. For this reason, legislators provides for gap filling mechanisms. In the CISG, Art. 7(2) is the one that deals with the matter of gap filling.

118. It is important to notice that there is more than one kind of gap. There are internal gaps (lacune praetor legem), which are matters that are governed by the Convention but not expressly resolved by it and external gaps (lacune intra legem), which are matters that are outside the scope of the Convention. Only internal gaps attend to the purpose of gap filling, since external gaps were intentionally excluded from the Convention [Terashima/Venosa/Gagliardi, pp.103-104, ¶2; Ferrario, p.161, ¶2; Andersen].

119. It is uncontroversial between the Parties that the CISG is silent on matters of hardship [MfC, p.18, ¶47]. A Convention’s intentional silence on a matter constitutes an external gap and, therefore, is not contemplated by the mechanism of gap filling.

120. In case the Tribunal understands that the CISG does govern matters of hardship, resort to its general principles should be made, once it is the first step to settle a matter in conformity with the Convention [CISG, 7(2); Schwenzer/Fountoulakis/Dimsey, p.52, ¶A, Flambouras, p.287, ¶C; Ferrario, p.161, ¶2].

121. Within the CISG’s general principles there is no ground for contract adaptation. The CISG’s terminology and its legislative history do not demonstrate a permission for adaptation. Besides that, it is possible to extract from CISG’s provisions [arts. 19(2) and 21(2)] the principle of pacta sunt servanda, that values the immutability of the contract
[Terashima/Venosa/Gagliardi, p.110, ¶1; Flambouras, p.288, ¶C]. Thus, the hardship gap cannot be filled by CISG's general principles.

122. The second step to fill in the alleged existing gap is to rely on the rules of private international law, which is the contractual law of the forum state. Hence, due notice should be given to the fact that, in the present case, the applicable law is Danubia's [MFR, §§ 12-17; Schwenzer/Fountoulakis/Dimsey, p.52, ¶A; Bridge, p.930, ¶16.44; PO2, p.61, ¶45].

123. The contractual law of Danubia is a verbatim adoption of the UNIDROIT Principles with two relevant exceptions regarding Arts. 4.3 and 6.2.3(4)(b). The wording of art. 6.2.3(4)(b) of Danubia's law [PO2, p.61, ¶45] is different from the UNIDROIT, since in the former a Tribunal only has the power to adapt a contract if the Parties have authorized it. There is no reference in this proceeding to an authorization regarding adaptation of the contract. In fact, Clause 15 of the Sales Agreement sets an exhaustive list of powers granted to the Arbitral Tribunal, which does not include the power to adapt [Ex.C5, p.14, ¶15].

124. All things considered, even if this Tribunal understands that there is a gap regarding hardship in the CISG, the requirements set by art. 7(2) CISG would not lead to the adaptation of the contract.

A. Even If The Tribunal Understands That The UNIDROIT Could Be Applicable, Its Provisions Were Not Met In The Present Case.

125. Claimant insists on the application of the UNIDROIT [MfC, p.19, ¶51], although Arts. 6.2.2 and 6.2.3 UNIDROIT deal with the matter of hardship, Claimant's allegations do not meet the provisions required to invoke it and its consequences. Art. 6.2.2 provides that the equilibrium of the contract must be disrupted, the event must be unforeseeable and supervening, the risk must not be assumed by the party and beyond the party's control. Considering the requirements abovementioned were not fulfilled, the Arbitral Tribunal should not adapt the Sales Agreement.

1. The Claimant's Circumstances Do Not Met the Requirements For Hardship Under Article 6.2.2 Of The UNIDROIT

126. It is vital to reinforce that the provisions within art. 6.2.2 are not optional, and, therefore, for the application of this article all the requirements stated in its subtopics must be complied with [Vogenauer/Klein, p.717, ¶1].

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127. The equilibrium of the contract has not been disrupted. A disruption has to be a fundamental one, meaning, that it imposes a higher threshold than the alternatives. According to the 1994 digest of the UNIDROIT Principles [VOGENAUER/KLEIN, p.718, ¶8], a fundamental alteration would be 50% or more of the contractual price, and it was criticized that a 50% alteration was not high enough.

128. Therefore, a 12.5% increase in the contractual price is not a fundamental alteration, and it is not sufficient to be considered a disruption to the equilibrium of the contract [VOGENAUER/KLEIN, pp.718-719, ¶ 5-6]. Also, since RESPONDENT paid more for the DDP delivery, allowing additional payment by RESPONDENT could also alter the equilibrium of the contract, since the Sales Agreement equilibrium takes under consideration the 200 USD paid for each dose delivered [DA SILVEIRA, p.323; GHERSI, p.319, ¶5, p.320, ¶4, p.322, ¶4; ROPPO, p.253, ¶¶2-3; SCHWENZER, pp.714-715].

129. The change in the contractual equilibrium must be to obligations that were not yet preformed, meaning, that a party cannot claim hardship for a ‘work that has already been done’ [VOGENAUER/KLEIN, pp.718-719, ¶4]. In this sense, the present case is not applicable, once CLAIMANT did deliver the product and willingly paid for the tariff.

130. As it was previously mentioned [MfR, §§ 97-103], the tariff imposition by Equatoriana was not unforeseeable, ergo, the provision displayed for the hardship requirements by UNIDROIT were also not attended. Likewise, when the aggrieved party assumed the risk in matter to the case they cannot claim hardship nor the application of art. 6.2.2. The risk was assumed by CLAIMANT, when he agreed with the DDP delivery [MfR, §§ 87-91]. Hence, CLAIMANT cannot invoke hardship.

131. Even though the event was, indeed, supervening and beyond CLAIMANT’s control, the other requirements, as stated above, were not met, entailing that the material event was not hardship within the UNIDROIT qualifications. Therefore, the Arbitral Tribunal cannot apply the UNIDROIT Principles to the present case.

2. Since Claimant’s Circumstances Do Not Meet the Unidroit Requirements For Hardship, The Tribunal Should Not Adapt The Contract

132. As it was explained above, the present situation does not encompass hardship in the UNIDROIT. Even if the tribunal understands that the situation does constitute hardship, the Sales Agreement still cannot be adapted. That is so because the provision in art. 6.2.3 UNIDROIT are also not fulfilled by CLAIMANT. Art. 6.2.3 provides that (a) the
disadvantaged party must request renegotiation within timely manner (b) upon failure to reach an agreement parties can resort to the court.

133. Notwithstanding that Claimant indeed made a request for renegotiation, it was not in a timely manner. Claimant has breached cooperation duties when it failed to notify Respondent within a reasonable time period from the imposition of the new tariff. Even with the Peak Business News reported, on 20 December 2017, the newly imposed tariff by the Government of Equatoriana [Ex. C6, p.15], Claimant conveniently expressed its concerns about such event only 2 days before the final shipment [Ex. C7, p.16], practically an entire month after the newspapers’ report. Claimant actively knew the importance of not delaying the delivery, giving Respondent a little over 24 hours to authorize the shipment. Therefore, even though Claimant did make a request to adapt the contract, it deliberately waited, disrespecting the same article that Claimant invokes to use in the case.

134. Even though, is undisputed that the Parties did not reach an agreement and therefore, through the UNIDROIT understanding, they can resort to the Arbitral Tribunal, it must be considered the facts laid above, regarding that it was not hardship because not all the preconditions established on art. 6.2.2 were fulfilled and not all the provisions within art. 6.2.3 of the UNIDROIT were met as well. Hence, the Arbitral Tribunal, when analyzing the present case should not render Claimant USD 1,250,000, and the Sales Agreement must not be adapted.

V. THE POST-CONTRACTUAL BEHAVIOUR OF RESPONDENT DOES NOT AMOUNT TO AN AGREEMENT OF SALES AGREEMENT ADAPTATION.

135. The telephone conversation between Mr. Shoemaker and Ms. Napravnik on January 21, 2018 cannot be considered an oral agreement to a modification of the price, and even if it could be considered as so, Mr. Shoemaker did not agree nor said he would adapt or modify the contract price. Claimant made an assumption when he thought that the price would be adapted.

136. According to CISG Art. 18(1), silence does not in itself amount to an acceptance [ENDERLEIN/MASKOW, pp.82, 83; HUBER/MULLIS, pp.84, 84; SCHLECHTRIEM/BUTLER, pp.75, 76; SCHWENZER/MOHS, p.241], in order not to damage someone that was taken by a surprise action [FARNWORTH pp.3-7, §2.3, 3.03; SCHLECHTRIEM, p.1, §1]. Therefore, Ms. Napravnick, delivered the last 50 doses by her choice, once she could not talk to the
representative of RESPONDENT and, considered, wrongly, that the silence of the other part was an acceptance [Ex. R4, p.36] accepting as fact the conversation with Mrs., Shoemaker. Hence, there is plenty of evidence to agree with the fact that Ms. Napravnick took her action based on a flawed hypothesis and, consequently, the effect cannot fall on RESPONDENT.

137. Even with the interpretation under Article 8 of the CISG regarding parties’ intentions as previously mentioned [MrR, §§ 78-79] RESPONDENT never agreed to the price adaptation. Indeed CLAIMANT made an offer to modify the price after the tariff imposition, but it cannot be argued that RESPONDENT accepted this offer by conduct.

138. CLAIMANT stated in the e-mail sent by Ms. Napravik on 20 January 2018 [Ex. C, p.16] a strong inclination that the Parties would find a solution to the issue of the increased tariffs. Furthermore, during telephone conversations Mr. Shoemaker stated that he could not confirm for a fact that the price would be adapted [Ex. R4, p.36]. Parties’ intentions were clear in the sense that RESPONDENT’s representative emphasized that he lacked the authority to authorize an increase in the price of the Sales Agreement, whereas CLAIMANT’s representative supported the impression that Parties’ would come to an amicable solution, together. Thus, CLAIMANT made an unfounded supposition that Mr. Shoemaker had authorized shipment of the goods upon an increase in the price whereas, in fact, it never did. Therefore, even with silence on the matter from RESPONDENT’s part, CLAIMANT nevertheless delivered the product on its own risk and will.

139. In this case, CLAIMANT and RESPONDENT are both engaged in horse breeding programs and commercial transactions in mares and horse semen. Both Parties are engaged in the same type of business, so their interaction should be interpreted according to the understanding of a reasonable business person in this industry. Mr. Shoemaker, as stated by himself to Claimant, had no authority on the matter whatsoever and, even if he did, an agreed upon solution has never been reached.

140. Considering that the e-mail and telephone communications between CLAIMANT and RESPONDENT was not an oral agreement to the modification of the Sales Agreement, RESPONDENT cannot be faulted for CLAIMANT’s assumptions and impositions. Thus, it can only be concluded that CLAIMANT is not entitled to the payment of $1,250,000 (USD) or any other amount resulting from an adaptation of the price of the Sales Agreement.
CONCLUSION TO ISSUE 3: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF USD 1,250,000 AS THE SALES AGREEMENT MUST NOT BE ADAPTED

141. Despite all CLAIMANT’s allegation that the Sales Agreement should be adapted, in line with the arguments sustained above regarding (I) the Sales Agreement, (II) the Parties intention, (III) the CISG, and the UNIDROIT, do not lead to the adaptation.

142. In conclusion, it is clear that the Clause 12 does not encompass the adaptations in case of tariff increase, considering the wording of the Clause itself and the Parties intention during the negotiation. Furthermore, the CISG does not provide the adaptation, as well as the UNIDROIT Principles.
REQUEST FOR RELIEF

Counsel, on behalf of RESPONDENT, respectfully requests the Tribunal:

1. To determine itself without jurisdiction and powers to adapt the Sales Agreement;
2. To deny the documents from the other arbitral proceeding;
3. To deny CLAIMANT’s claims in the amount of USD 1,250,000;
4. To order CLAIMANT to bear all the costs arising from this arbitration.

Respectfully submitted,

São Paulo, January 24, 2019.

Caio Casagrande • Caio Marra • Caio Ramos • David Martins • Guilherme Schaffer •
Isabela Porto • Julia Martins • Laís Falco • Luiza Toscano • Marianna Fleury •
Muriel Correa • Pedro Costa • Salo Scherkerkewitz • Roberta Bitencourt • Victoria
Zago