

INSTITUTE OF LAW, NIRMA UNIVERSITY



CASE NO. HKIAC/A18128

MEMORANDUM FOR CLAIMANT

On behalf of:

**PHAR LAP ALLEVAMENTO**

CLAIMANT

Rue Frankel 1

Capital City, Mediterraneo

Against:

**BLACK BEAUTY EQUESTRIAN**

RESPONDENT

2 Seabiscuit Drive

Oceanside, Equatoriana

Apeksha Joshi • Nitya Jain • Riya Jain • Tanuj Agarwal

Ahmedabad, Gujarat



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&	And
¶/para.	Paragraph
AAA	American Arbitration Association
AC Op.	Advisory Council Opinion
Ans.	Answer
Art.	Article
BCCI	Bulgarian Chamber of Commerce and Industry
Cf.	Confer
Cir.	Circuit
CISG	Convention on International Sale of Goods
Civ.	Civil
Cl.	Clause
Co.	Company
DDP	Delivery Duty Paid
Ed/Eds.	Editor/Editors
et al.	et alia
Exh.	Exhibit
EXW	Ex-Works
Fd.	Federal



HKIAC	Hong Kong International Arbitration Centre
i.e.	Id est
IBA	International Bar Association
IBA Guidelines	IBA Guidelines on Conflict of Interest in International Arbitration
Ibid	Ibidem
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute of Resolution
ICSID	International Centre for Settlement of Investment Disputes
LCIA	London Court for International Arbitration
Ltd.	Limited
Model Law	UNCITRAL Model Law
N/A	Not Available
No.	Number
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
P.	Page
PO	Procedural Order
Pvt.	Private
RF CCI	Russian Federation Chamber of Commerce and Industry

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SAcLJ	The Singapore Academy of Law Journal
Supp.	Supplement
UCCI	Ukraine Chamber of Commerce and Industry
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollar
v.	Versus
Vol.	Volume





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*RF CCI 22/1/1997*

Parties Name: Unpublished

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Award 155/1996

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*UCCI 23/1/2012*

Parties Name: Unpublished

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**TREATIES, CONVENTIONS AND LEGAL TEXTS**

<i>AAA Rules</i>	Commercial Arbitration Rules and Mediation Procedures  October 1, 2013
<i>CISG</i>	United Nations Convention on Contracts for the International Sale of Goods,  Vienna, Treaty Series  April 11, 1980
<i>HKIAC Rules</i>	2018 HKIAC Administered Arbitration Rules  November 1, 2018
<i>IBA Rules</i>	IBA Rules on the Taking of Evidence in International Arbitration  May 29, 2010
<i>ICDR Rules</i>	International Centre for Dispute Resolution International Arbitration Rules  June 1, 2014
<i>LCIA Rules</i>	London Court of International Arbitration Rules  October 1, 2014



*ICC Hardship Cl.*

ICC Hardship Clause

February, 2013

*NYC*

Convention on the Recognition and  
Enforcement of Foreign Arbitral Awards

June 10, 1958

*UNCITRAL Model Law*

UNCITRAL Model Law on International  
Commercial Arbitration

December 4, 2006

*UNIDROIT Principles*

UNIDROIT Principles of International  
Commercial Contracts

May, 2016



## STATEMENT OF FACTS

The Parties to the arbitration are *Phar Lap Allevamento* (hereafter “CLAIMANT”) and *Black Beauty Equestrian* (hereafter “RESPONDENT”).

CLAIMANT is an operator of stud farm registered and location Capital City, Mediterraneo.

RESPONDENT is well-known for its broodmare lines located in Oceanside, Equatoriana.

- |                       |   |   |
|-----------------------|---|---|
| <b>21 March, 2017</b> | RESPONDENT inquired about the availability of 100 doses of frozen semen of Nijinsky III.  | <i>Exh. C1, p. 9</i>                        |
| <b>24 March, 2017</b> | CLAIMANT offered RESPONDENT 100 doses of Nijinsky III’s semen taking into account CLAIMANT’s general conditions   | <i>Exh. C2, p. 10</i>                       |
| <b>28 March, 2017</b> | RESPONDENT accepted the offer and most of the general terms but objected to the choice of law and further proposes DDP delivery.  | <i>Exh. C3, p. 11, ¶ 3, 4</i>               |
| <b>31 March, 2017</b> | DDP delivery was accepted by CLAIMANT even when for all previous transaction delivery EXW delivery was used by the CLAIMANT.  | <i>Exh. C4, p. 12, ¶ 3; PO2, p. 56, ¶ 9</i> |
| <b>10 April, 2017</b> | RESPONDENT proposes seat of arbitration to be Equatoriana but CLAIMANT denies it and proposes the seat to be Danubia.   | <i>Exh. R1, p. 33; Exh. R2, p. 34</i>       |
| <b>12 April, 2017</b> | The agreement on insertion of the word hardship, arbitration and choice of law clauses was done but not fully included into the contract due to the accident of two main negotiators. | <i>NoA, p. 5, ¶ 8</i>                       |
| <b>6 May, 2017</b>    | Finalization of negotiations and signing of contract in Mediterraneo.   | <i>PO 2, p. 56, ¶ 13</i>                    |
| <b>15 Nov., 2017</b>  | Imposition of 30% tariffs by Equatoriana on all agricultural products from Mediterraneo.  | <i>Exh. C 6, p. 15</i>                      |
| <b>23 Jan., 2018</b>  | CLAIMANT authorized delivery of last shipment in good faith even before reaching to an agreeable price.   | <i>Exh. C 8, p. 18, ¶ 3</i>                 |

## STATEMENT OF FACTS



- 12 February, 2018** RESPONDENT stopped negotiations and refused to pay any additional amount for the tariff. *Exh. C 8, p. 18, ¶ 4*
- 2 February, 2018** CLAIMANT came to know about the breach of contract by RESPONDENT due to the resale without consent. *PO 2, p. 57, ¶ 20*
- 2 October, 2018** CLAIMANT informed arbitral tribunal about another arbitration where RESPONDENT asks for a price adaptation due to additional tariff of 25%. *Letter by Langweiler, p. 50*
- 3 October, 2018** RESPONDENT alleged that the information with the CLAIMANT was given either by hackers or previous employees. *Letter by Fasttrack, p. 51*
- 5 October, 2018** Procedural Order 1 was released by the Tribunal. *PO 1, p. 52*
- 2 November, 2018** Procedural Order 2 was released by the Tribunal. *PO 2, p. 55*



## INTRODUCTION

1. Each betrayal begins with trust. It is quite disheartening to see how RESPONDENT's greed for meagre profits can supersede the trust of long term relationship with the CLAIMANT. RESPONDENT unjustly uses the terms of the contract to his advantage and tries imposes the risk of import tariffs on CLAIMANT. More so, RESPONDENT deliberately abstains from arbitral proceedings by challenging the Tribunal's power to adapt the contract. RESPONDENT contented that the arbitration agreement should be governed by the law of Danubia which gives narrow interpretation to the Arbitration Agreement through "four corner rule", thereby takes away the Tribunal's power to adapt the contract. However, the Parties' impliedly agreed that the Arbitration Agreement should be governed by the law of Mediterraneo which gives broad interpretation to the present Arbitration Agreement, thereby provides the Tribunal with the power to adapt the contract **[Issue 1]**.
2. In the other arbitral proceedings under HKIAC, RESPONDENT claims for an adaptation of contract due to 25% increase in tariffs on agricultural products from Equatoriana, imposed by government of Mediterraneo. CLAIMANT proposes to admit the partial interim award and relevant submission of the other arbitral proceedings as it shows RESPONDENT's contradictory behavior. However, RESPONDENT objected to the same by contending that such evidence could only be obtained by illegal means, and thus makes it inadmissible. Conversely, the evidence is admissible since it is relevant to the case and material to the outcome of the case. Moreover, the admission of evidence is necessary to meet the ends of justice **[Issue 2]**.
3. RESPONDENT contends that CLAIMANT has no right to ask for an adaptation of the contract, neither under the force majeure/hardship clause nor under Art. 79 CISG. Imposition of increased import tariffs distorted the contractual equilibrium of the contract as a result of which CLAIMANT suffered hardship. CLAIMANT submits that the price can be adapted under Clause 12 of the sales agreement due to its broad interpretation and it does provide for remedy of adaptation. In a situation when the Tribunal may not deem fit to adapt the price under Clause 12 then the price can be adapted under Art. 79 CISG as hardship is governed under CISG and there is no derogation in the sense of Art. 6 CISG. The Arbitral Tribunal should therefore adapt the price **[Issue 3]**.





## ARGUMENTS ON PROCEDURE

### FIRST ISSUE: THE TRIBUNAL HAS THE JURISDICTION AND/OR THE POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

1. Parties concluded the contract on May 6<sup>th</sup>, 2017 under which CLAIMANT was obliged to deliver 100 doses of its stallion racehorse Nijinsky III's semen (hereafter as "frozen semen") to RESPONDENT in three installments [*Exh. C 5, p. 14, Cl. 8*]. After the delivery of the first two installments of the frozen semen, the Mediterranean government imposed 25% tariffs on agricultural products from Equatoriana [*Exh. C6, p. 15*]. In retaliation, the Equatorianian government imposed 30% tariffs on all agricultural goods from Mediterraneo including animal semen [*Exh. C 6, p. 15*]. Nevertheless, CLAIMANT delivered remaining 50 doses under an impression of price adjustment by RESPONDENT. However, soon after, RESPONDENT refused to adjust the price [*Exh. C 8, p. 18*].
2. Consequently, CLAIMANT initiated arbitral proceedings for an increased remuneration. RESPONDENT impedes the arbitration proceedings by challenging the Tribunal's power to adapt the contract [*Ans. to NoA, p. 32, ¶ 22 (a)*]. Pursuant to this, RESPONDENT contends that the governing law of Arbitration Agreement (hereafter "Governing Law") shall be law of Danubia under which there is high likelihood that the arbitrators would not have the power to adapt the contract [*PO 1, p. 52, Cl. II, ¶ 3*].
3. However CLAIMANT submits that, the Arbitration Agreement is governed by law of Mediterraneo which provides for a broad interpretation of the Arbitration Clause. Such broad interpretation of the Arbitration Clause shall extend to the claim of increased remuneration, and hence empowers Tribunal to adapt the contract. Accordingly, the Arbitration Agreement is governed by law of Mediterraneo **[I]** and not by the law of Danubia **[II]**. Moreover, the Arbitration Agreement extends to the claim for an increased remuneration **[III]**.

#### **I. The Arbitration Agreement is governed by Law of Mediterraneo**

4. The law of Mediterraneo is the governing law. There is no express reference of the governing law in the Arbitration Clause. [*Exh. C 5, p. 14, Cl. 15*]. In absence of such express reference, the governing law shall be determined by an implied choice of parties and in case there is no implied choice, the law having the closest connection with Arbitration Agreement shall be the governing law [*Sulamérica v. Enesa, p. 4, ¶ 9*]. In the present case, the Parties have impliedly chosen the law of Mediterraneo to govern the Arbitration Agreement **[A]**. Even if there is no implied choice of law between the Parties, the law of Mediterraneo has the closest connection with the Arbitration Agreement **[B]**.



A. Parties have impliedly chosen the law of Mediterraneo to govern the Arbitration Agreement

5. The law of Mediterraneo is the implied choice of the governing law. While determining this implied choice, it should be the presumptive position that the law governing the arbitration agreement follows the law governing the substantive contract and not the law of the seat of arbitration [*BCY v. BCZ*, p. 13, ¶ 32; *Arsanovia v. Cruz City*, p. 12, para 43].
6. On RESPONDENT's objection to such presumption, CLAIMANT submits that implied choice of law is determined by the parties' intention that is derived not only within the four corners of contract, but also from the circumstances of the case [*Edward*, p. 277]. Additionally, the law which gives effect to arbitration shall be the parties' implied choice of law [*Victor & Hong*, p. 26]. In the present case, the Parties intended to make law of Mediterraneo the governing law of the Arbitration Agreement [i]. Moreover, the law of Mediterraneo gives effect to Parties' presumed intention to arbitrate [ii].

*i. The Parties intended to make law of Mediterraneo as the law governing the Arbitration Agreement*

7. Parties intended that the law of Mediterraneo should be the law governing the Arbitration Agreement. The Sales Agreement shall be interpreted according to the UN Convention on the International Sale of Goods (hereafter "CISG") as both the States are contracting states [*Art. 1(1)(b) CISG ; PO 1, p. 53, Cl. 3, ¶ 4*]. The intention of the parties is derived pursuant to Art. 8(1) CISG. At the time of conclusion of the contract, it can be presumed that parties wanted their disputes to be resolved effectively and amicably, which might not be the case once a dispute actually arises. Therefore, the intention of the parties at the time of entering into the arbitration agreement, is considered determinative [*Honnold I, p. 171; Gaillard & Savage, p. 257; Waincymer, p. 140*].
8. In the present case, Parties intended to exclude any law other than the law of Mediterraneo to govern Arbitration Agreement[a]. Furthermore, RESPONDENT also intended the governing law to be the law of Mediterraneo [b].

*a. The Parties' intended to exclude any law other than the law of Mediterraneo to govern the Arbitration Agreement*

9. The Parties intention was to exclude the application of any law other than the law of Mediterraneo to govern the Arbitration Agreement. CLAIMANT during negotiations notified RESPONDENT that it would be futile to discuss the submission of the Contract to a foreign



law. [*Exh. R 2, p. 34*]. The contract referred here is the Arbitration Agreement and not sales agreement as the law of sales agreement was undisputedly agreed between the Parties in earlier negotiations [*Exh. R 1, p. 33*]. Therefore, CLAIMANT had a clear intention that the governing law should only be the law of Mediterraneo and not the law of Danubia which is a foreign law.

10. Primarily, CLAIMANT suggested for arbitration in Mediterraneo as a possible solution for not accepting the jurisdiction of the courts in Equatoriana [*Exh. C 4, p. 12*]. The draft proposed by the RESPONDENT only constituted a possible change to the CLAIMANT's aforementioned suggestion [*Exh. R 1, p. 33*]. However, CLAIMANT rejected a change in the law governing the arbitration to Equatoriana by excluding any foreign law as a governing law, but agreed to the change of the seat [*Exh. R 2, p. 34*]. Eventually, RESPONDENT incorporated the congruent Arbitration Clause [*Exh. C 5, p. 14, Cl. 15*]. Also, the new negotiators even after having access to the prior email chains [*PO 2, p. 55, ¶ 5*], did not object to the choice of law clause [*PO 2, p. 55, ¶ 6*]. This implies that RESPONDENT consented to the governing law proposed by the CLAIMANT.

11. Furthermore, RESPONDENT contends that CLAIMANT has not objected to its proposal that the law of place of arbitration should govern the Arbitration Agreement [*Ans. to NoA, ¶ 6*]. To the contrary, CLAIMANT had in fact objected to it by explicitly stating that further discussion to submit the Arbitration Agreement to any foreign law would be futile [*Exh. R 2, p. 34*]. Conclusively, both the Parties intended to exclude any law other than law of Mediterraneo to govern the Arbitration Agreement.

*b. RESPONDENT intended the governing law to be the law of Mediterraneo*

12. RESPONDENT also had the intention that the law of Mediterraneo should be the governing law. RESPONDENT during negotiations proposed the law of Equatoriana as the governing law [*Exh. R 1, p. 33*]. The general contract law of Mediterraneo and Equatoriana is uniform as both the countries have adopted verbatim of the UNIDROIT Principles on International Commercial Contracts (hereafter "UNIDROIT") [*PO 1, p. 53, Cl. III, ¶ 4*]. Thereby, RESPONDENT also had a clear intention to be governed by similar verbatim *i.e.* law of Mediterraneo and not the law of Danubia which is not similar to the law of Equatoriana.

*ii. The law of Mediterraneo gives effect to Parties' presumed intention to arbitrate*

13. The law of Mediterraneo gives effect to Parties' intention to arbitrate. Parties intend the application of such law which will give effect to their agreement to arbitrate in case of all disputes [*Born (26 SAcLJ), p. 5; Nazzini, p. 20*]. The interpretation of arbitration agreements



should give effect to the parties' intention to submit their disputes to arbitration as sole remedy [ICC 2011, p. 57; *Rhone v. Achille*, ¶ 21].

14. In the present case, the Parties included a hardship clause in the Contract [*Exh. C 5, p 13, Cl. 12*]. The general remedy of a hardship clause is contract adaptation [UNDRUIT Art. 6.2.3 (4)(b)]. In order to adapt the contract, the present Arbitration Agreement is to be interpreted broadly. Unlike the law of Danubia which interprets the arbitration agreement narrowly and may not authorize the Tribunal to adapt the contract [*PO No. 1, p. 52, Cl. II, ¶ 3*], the law of Mediterraneo furnishes a broad interpretation to arbitration agreements [*NoA, p. 7, ¶ 16*]. The arbitration of the present dispute will only be possible if the law of Mediterraneo governs the Arbitration Agreement. Therefore, the law of Mediterraneo gives effect to Parties' presumed intention to arbitrate.

B. In any case, the law of Mediterraneo has the closest connection to the Arbitration Agreement

15. The law of Mediterraneo has the closest connection to the Arbitration Agreement. The closest connection principle can be used to determine the applicable law of an arbitration agreement [*Yifei, p. 79*]. The test of closest connection shall broadly include the place where the contract was concluded and the place of performance of contract [*Lilydale v. Meyn Canada, p. 6, ¶ 11; Cheshire, p. 190*]. In the present case, the concluding negotiations and signing of the agreement took place in Mediterraneo on 6<sup>th</sup> May, 2017 [*PO 2, p. 56, ¶ 13*]. The place of performance of contract was majorly Mediterraneo. The frozen semen was operated and stored in Mediterraneo since the CLAIMANT is located in Mediterraneo [*NoA, p. 4, ¶ 1*]. Also, the frozen semen was exported from Mediterraneo. However, Danubia had no connection to the place of performance of the contract. Therefore, the law of Mediterraneo is the governing law.

**II. The arbitration agreement is not governed by law of Danubia**

16. The law of Danubia is not the governing law of the Arbitration Agreement. RESPONDENT in its reply to the Notice of Arbitration submitted that because of doctrine of separability, the Arbitration Agreement is considered to be a legally separate agreement from the main contract [*Ans to NoA, p. 31, ¶ 14*]. Thus, law of the main contract shall not govern the Arbitration Clause. On the contrary, CLAIMANT submits that the doctrine of separability is not applicable to choice of law analysis under Art. 16 (1) of the Danubian Arbitration law [A]. Furthermore, the law of Danubia will render Arbitration Agreement void and unenforceable [B].



A. The doctrine of separability is not applicable to a choice of law analysis under Art. 16 (1) of the Danubian Arbitration law

17. The doctrine of separability does not extend to a choice of law analysis. Pursuant to Art. 16 (1) of the Danubian Arbitration law which is a verbatim adoption of the UNCITRAL Model Law, the arbitral tribunal may rule on its own jurisdiction and for that purpose the arbitration clause shall be treated independent to the other terms of the contract. Therefore, even if the tribunal declares that the contract is null and void, it shall not entail the invalidity of the arbitration clause and provides competence to tribunal to rule on its jurisdiction [*UNCITRAL Model Law, Art. 16 (1)*].
18. In the present case, the Tribunal has jurisdiction in general and RESPONDENT objects only to the Tribunal's power to adapt the contract [*PO 2, p. 61, ¶ 48*]. Contrary to RESPONDENT's claim, the purpose of doctrine of separability is not to determine the governing law but to provide jurisdiction to the Tribunal in case of invalidity of main contract. Therefore, the doctrine of separability cannot be invoked in the present case. As a result, the Arbitration Agreement cannot be treated separately from the main contract for the purpose of choice of law.

B. The law of Danubia would render the Arbitration Agreement void and unenforceable

19. The law of Danubia would render the Arbitration Agreement null and void. Art. V(1)(a) New York Convention (hereafter "NYC") states that if the parties to the contract were under some incapacity as per the law applicable to them, the Arbitration Agreement would be null and void. The capacity of a corporation to enter into a contract is governed primarily by its constitution and the law of its place of incorporation [*Redfern, Hunter, Blackaby & Partasides, Ch. 2, p. 4*].
20. CLAIMANT requires a special approval by the creditor's committee in order to submit their contracts to a foreign law [*Exh. R 2, p. 34*]. This signifies that Claimant had no capacity to enter into a contract submitted to law other than Mediterraneo. Accordingly, if the law of Danubia was agreed to be the governing law, the Arbitration Agreement will be rendered void. Therefore, the Arbitration Agreement is not governed by the Law of Danubia.

**III. The Arbitration Agreement extends to the claim for an increased remuneration, conferring the power of contract adaptation upon the tribunal**

21. The interpretation of the Arbitration Agreement extends to the claim for an increased remuneration. The law of Mediterraneo provides for broad interpretation of Arbitration



Agreement under the CISG [PO 1, p. 53, Cl. III, ¶ 4]. Such broad interpretation includes a claim for an increased remuneration regardless of narrow wording referring to “*dispute(s) arising out of this contract*” and consequently provides the Tribunal the power to adapt the contract. The Tribunal has the power of contract adaptation, since the Parties’ agreed to provide such power [A], the Arbitration Clause provides power to the Tribunal to adapt the contract [B] and applicable substantive and procedural law give power of contract adaptation to the Tribunal [C].

A. The Parties agreed to provide the Tribunal with the power to adapt the contract

22. Parties agreed to provide Tribunal with the power of contract adaptation under the Arbitration Agreement. The Parties’ intention is derived by interpreting the arbitration agreement under the CISG [PO 1, p. 53, Cl. III, ¶ 4]. Pursuant to Art. 8(1) CISG, the statements and other conduct of the parties are to be interpreted in line with the intent of the parties. Further, Art. 8(2) CISG the statements and other conduct of a party are to be interpreted according to the understanding of a reasonable person. Accordingly, an interpretation of Arbitration Clause through Art. 8 (1) CISG shows that the Parties intended to provide the Tribunal with the power to adapt the contract [i]. Moreover, under Art. 8 (2) CISG, a reasonable person would also conclude that the Parties agreed to provide the Tribunal with the power to adapt the contract [ii].

*i. The joint reading of Art. 8(1) and Art. 8(3) derive Parties’ intention to provide the Tribunal with the power to adapt the contract*

23. The Parties agreed to provide the Tribunal with the power of contract adaptation. Pursuant to Art. 8 (3) CISG, due consideration is to be given to all relevant circumstances of the case, including negotiations while determining intent of the parties. During the negotiations, RESPONDENT’s negotiator Mr. Antly stated to CLAIMANT’s negotiator Ms. Napravnik that it should be the task of the arbitrator to adapt the contract in case the Parties were unable to reach on a solution [Exb. C 8, p. 17]. This signifies that both the Parties intended to provide the Tribunal with the power to adapt the contract.

*ii. A reasonable person would also have concluded that Parties agreed to provide the Tribunal with the power to adapt the contract*

24. In the alternative, a reasonable person in terms of Art. 8(2) and 8(3) of the CISG would have come to the conclusion that the Parties agreed to provide the Tribunal with a power to adapt the contract. The parties generally intend that all disputes are to be decided by the same tribunal since they selected arbitration as a one stop shop [Fiona Trust v. Privalov, p. 8, ¶ 27]. Else, it



would destroy the core purpose of arbitration *i.e.* one stop remedy and would also defeat the pro-arbitration approach. In the present case, the Parties have chosen arbitration as the one and the only stop to resolve any dispute between them [*Exh. C 5, p. 14, ¶ 15*]. A reasonable person in place of RESPONDENT would have concluded that the Arbitration Agreement provides the power to the Tribunal to adjudicate over any dispute including the claim for an increased remuneration in the absence of any other remedy.

25. Further, Parties inserted a hardship clause in the contract [*Exh. C 5, p. 14, ¶ 12*]. The law of the sales agreement *i.e.* the law of Mediterraneo provides for adaptation as one of the remedies in case of a hardship [*UNIDROIT Art. 6.2.3 (4)(b)*]. Thereby, any reasonable person in terms of Art. 8 (2) CISG would have concluded that the Parties agreed to give the Tribunal the power of contract adaptation.

B. The Arbitration Clause provides power to the Tribunal for contract adaptation

26. The wording of the Arbitration Clause entitles the Tribunal with the power of contract adaptation. The arbitration clause which binds the parties to settle “all or any” disputes through arbitration should be interpreted broadly [*Mastrobuono v. Shearson, p. 61; Born, p. 1347*]. The broad interpretation of “any” dispute also includes claims for an adaptation of contract and that makes it contractual claim.
27. RESPONDENT submitted that it had explicitly reduced the broad wording of HKIAC Model Clause to take away the Tribunal’s power of contract adaptation [*Ans. to No.4, p. 31, ¶ 13*] by excluding the word “non- contractual”. However, the mere exclusion of the word “non-contractual” only excludes tortious or statutory claims [*Born, p. 1351; Redfern, Hunter, Blackaby & Partasides, Ch. 2, p. 9*]. The claim of increased remuneration is a contractual claim and not a tortious or statutory claim. Therefore, the Arbitration Agreement is broad enough to provide the Tribunal the power to adapt the contract.

C. The applicable substantive and procedural law also confers the power of contract adaptation to the Tribunal

28. The Tribunal’s power to adapt the contract can also be derived from applicable substantive and procedural law [*Berger, p. 2*]. In the present case, Parties agreed for the law of Mediterraneo as the substantive law [*Exh. C5, p. 14, Cl. 14*] and law of Danubia as the procedural law [*Exh. C5, p. 14, Cl. 15*]. Accordingly, the law of Mediterraneo provides for an adaptation of the contract [i]. Moreover, the Danubian Arbitration law also confers power of contract adaptation to the Tribunal [ii].





*i. The law of Mediterraneo provides for adaptation of contract*

29. The law of Mediterraneo provides for adaptation of contract. As per Art. 6.2.3 (4)(b) of law of Mediterraneo which is the verbatim of UNIDROIT Principles, the tribunal may adapt the contract to resort its equilibrium in case of hardship. In the present case, Parties mutually inserted hardship clause in contract [*Exh. C5, p. 14, Cl. 12*]. Correspondingly, the law of Mediterraneo provides power to the Tribunal to adapt the contract in case of hardship.

*ii. The Danubian Arbitration law also confers power of contract adaptation to the Tribunal*

30. The law of Danubia confers power to the Tribunal to adapt the contract. The extensive jurisdiction for arbitral tribunals provide that the term ‘dispute’ should be interpreted in a broad way, including the power to adapt contracts when the need arises [*Berger, p. 2*]. Moreover, if the hardship concept is to be accepted as a general principle of substantive law, the resulting procedural power of tribunals should also be generally accepted. [*Brunner, p. 496-97*].

31. Pursuant to this, the law of Danubia provides the Tribunal with the power to adapt the contract since the term “dispute” under Art. 7 of Danubian Arbitration law clearly extents to the claim for an increased remuneration [a]. Furthermore, the substantive law of Danubia also recognizes the concept hardship [b].

*a. The term “dispute” under Art. 7(1) of Danubian Arbitration clearly extends to the claim for an increased remuneration*

32. The term “dispute” under Art. 7(1) of Danubian Arbitration law shall be interpreted broadly. Pursuant to Art. 7 Danubian Arbitration law, the parties agree to submit to arbitration all or certain disputes which have arisen between them. The term “disputes” encompasses any kind of dispute, difference, disagreement, or claim that may be asserted in arbitral proceedings [*Tjong v. Antig Inv, ¶ 50*] and covers all circumstances where one party demands something and other party refuses to provide it [*Born, p. 1348*].

33. In the present case, CLAIMANT requested the arbitral tribunal to accept the claim for an increased remuneration to recover loss arising out of hardship [*NoA, Req. 1, Pg. 9*]. Contrary to this, RESPONDENT requested the arbitral tribunal to deny such claim [*Ans. to NoA, Para 22 (b), Pg. 32*]. Accordingly, there arises a “dispute” between the parties pertaining to the claim for an additional remuneration. Therefore, the term “disputes” clearly extents to the claim rose in the present case *i.e.* increased remuneration and provides arbitral tribunal with the power to adjudicate over such claims.





*b. The substantive law of Danubia recognizes the concept of hardship*

34. The contract law of Danubia recognizes the concept of hardship under Art. 6.2.2 UNIDROIT. The tribunal may adapt the contract only if it is authorized by the parties [*PO 2, p. 61, ¶ 45*]. As already proved above in ¶ 22-25, the Parties intended to authorize the Tribunal to adapt the contract in case of hardship. Accordingly, the substantive law of Danubia provides the Tribunal with the power to adapt the contract. Since the substantive law of Danubia gives such power to arbitral Tribunal, the resulting procedural law of Danubia shall also empower the Tribunal to adapt the contract. The Arbitration Agreement extends to the claim for an increased remuneration, conferring the power of contract adaptation upon the tribunal.

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**CONCLUSION OF ISSUE I**

The Arbitration Agreement shall be governed by law of Mediterraneo and not by the law of Danubia. The law of Mediterraneo provides a broad interpretation to the narrowly worded Arbitration Clause. Due to such broad interpretation, the Arbitration Agreement extends to the claim of increased remuneration, and hence gives power to the Tribunal to adapt the contract.

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**SECOND ISSUE: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER  
ARBITRATION PROCEEDINGS**

35. CLAIMANT's CEO came to know about the other arbitral proceeding under HKIAC Rules [PO 2, p. 60, ¶ 40] in which RESPONDENT claims for an adaptation of contract due to 25% increase in tariffs by government of Mediterraneo [Letter by Langweiler, p. 50]. The RESPONDENT took the same position as that of CLAIMANT in the present Arbitration: RESPONDENT being the seller who was imposed to tariffs, wanted its buyer to pay for the tariffs. CLAIMANT arranged an opportunity to obtain partial interim award of that proceeding and now seeks to present it as an evidence [PO 2, Pg. 61, ¶ 41]. RESPONDENT contends that such evidence is illegal and thereby inadmissible [Letter by Fasttrack, p. 51].
36. Contrary to this, CLAIMANT submits that it is entitled to submit evidence from the other arbitration proceedings, even if it had been obtained through illegal means. The Tribunal has the power to consider evidence obtained by illegal means, under the *lex arbitri* and the applicable rules [I]. Further, the evidence obtained by CLAIMANT is authentic [II] and that the illegality of the source of evidence does not render it inadmissible [III] and that, ignoring the evidence would lead to travesty of justice [IV]. The tribunal can disclose the evidence in the current proceedings, even after the presence of an express confidentiality provision [V].
- I. Under the applicable rules and the *lex arbitri*, the Tribunal has the power to consider evidence, even if it was obtained through illegal means**

37. Arbitral Tribunal has the power to consider evidence, even if it was obtained through illegal means. The taking and presentation of evidence should be analyzed pursuant to the applicable institutional rules and the *lex arbitri* [Born (Cases and Materials), p. 768]. Parties designated the law of Danubia as *lex arbitri* and the Hong Kong International Arbitration Rules (hereafter "HKIAC Rules") as applicable rules to arbitration [Exh. C 5, p. 14, Cl. 15].
38. The law of Danubia, which is a verbatim adoption of the UNCITRAL Model Law, confers power to the tribunal to determine the admissibility, relevance, materiality and weight of evidence [UNCITRAL Model Law, Art. 19 (2)]. Further, pursuant to Art. 22.2 of HKIAC Rules, the tribunal is not bound by any strict rules of evidence and enjoys broad discretion to govern the admissibility, relevance, materiality, and weight of any evidence [Moser & Bao, ¶ 9.153; Ma & Brock, ¶ 15.081–15.109]. Furthermore, many institutional rules and scholars favor that generally international arbitration do not adhere to any strict rules of evidence and gives such broad discretion to tribunal [Redfern, Hunter, Blackaby & Partasides (Law and Practice), p. 296; Born,



*p. 2310; Art. 9 (1) IBA; Art. 20 (6) ICDR Rules; Rule 22.1 (vi) of LCIA Rules; Rule 34 (a) AAA Rules].*

39. Accordingly, tribunal has a broad discretion to admit all evidence in order to facilitate Parties' Right to be heard, and then consider its credibility, weight and value [*Sussman, p. 512*]. In the present case, CLAIMANT's submission of evidence obtained through illegal means is in line with the wide discretion provided by Law of Danubia and HKIAC Rules. Thus, the Tribunal should provide an opportunity to CLAIMANT to fully present its case.

## **II. The evidence obtained by CLAIMANT is authentic**

40. The evidence though obtained through illegal means is authentic. The authenticity of the evidence can be determined by the modern interpretation of "best evidence rule" which requires that the terms of a document be proven by production of the document itself or certified copies of the same [*Giannelli, p. 511*]. The company from which the CLAIMANT obtained the evidence might have acquired it through illegal means. However the present evidence is still authentic since the CLAIMANT has promised to produce Primary evidence i.e. Partial interim award and relevant submissions. The authenticity of such evidence is undisputable as it is a copy of original documents of the other proceedings.

## **III. Illegality of the source of evidence does not make it inadmissible**

41. The evidence obtained through illegal means does not make evidence inadmissible [*Peiri, p. 29*]. Uncovering the truth outweigh the unlawfulness in which submitted evidence was obtained [*ICSID 27/9/17, ¶ 166*]. CLAIMANT is entitled to submit the evidence obtained through illegal means since CLAIMANT has clean hands [A]. Moreover, the evidence is relevant to the case and material to its outcome [B]. Last, the principles of transparency permit the admission of confidential information as evidence [C].

### **A. CLAIMANT has clean hands**

42. CLAIMANT has not committed any illegal act. If a person is not involved in the disclosure of the evidence through illegal means, the possibly unlawful nature of that disclosure cannot be held against him and stress is to be made to clean hands of party seeking to introduce the evidence [*Persia International Bank v. Council, ¶ 17*]. Also, the extensive prior disclosure of illegally obtained evidence means that the further disclosure effected by its use in the proceedings is not damaging [*R v. Secretary of the State for Foreign and Commonwealth Affairs, p. 58; ICSID 27/9/17, ¶ 166*].



43. In the present case, CLAIMANT is to obtain the partial interim award from a company which offers intelligence on the horseracing industry [PO 2, p. 61, ¶ 41]. Notably, CLAIMANT itself has not indulged in any illegal activity for obtaining the evidence. Neither has CLAIMANT hacked into RESPONDENT'S computer system and nor has obtained the information through two former employees of the Company. Thereby, the illegitimate nature of disclosure cannot be held against CLAIMANT.
44. Additionally, such information is now accessible to public and dissemination cannot be limited. Consequently, further disclosure of illegal evidence by CLAIMANT by way of using it as evidence in arbitral proceedings shall only facilitate the proceeding. Therefore, further disclosure of evidence in the proceedings is not damaging and can be admitted to meet the ends of justice.

B. The evidence is relevant to the case and material to its outcome

45. The evidence obtained through illegal means can be admitted, if it is relevant to the case and material to its outcome [*Teekay Tankers v. STX Offshore*, p. 101]. Art. 22.3 of HKIAC Rules requires parties to produce evidence that are 'relevant to the case and material to its outcome' [*Moser & Bao*, ¶ 9.160]. Also, IBA Rules also contemplates the same [*Art. 3(7) of IBA Rules*]. In the present case, the Tribunal should admit the evidence as it is relevant to the case [i] and it is material to the outcome of the case [ii].

i. *The evidence is relevant to the case*

46. In determining a request for evidence, the tribunal considers whether the evidence is relevant to the case [*O'Malley*, p. 54]. Relevant evidence is admissible even though it is obtained through illegal means [*Elias v. Pasmor*]. It includes evidence that is reasonably necessary for a party in order to discharge its burden of proof [*O'Malley*, p. 54]. A tribunal also allows submission of evidence, if the requesting party shows that the evidence is likely to be relevant [*ICSID 8/2/13*, p. 66], either in the support, contradiction, or weakening of an important contention of fact in the proceeding [*Glenn*, p. 30; *Hamilton*, p. 63]. The tribunal decides on the basis of prima facie relevance of the evidence, having regard to the factual allegations made by the parties [*Hamilton*, p. 63].
47. In the present case, CLAIMANT relies on a copy of the award and the relevant submissions of another arbitration proceedings under HKIAC Rules in which RESPONDENT is involved [*Letter by Langweiler*, p. 49]. In the other arbitral proceedings, RESPONDENT being the seller, claims for an adaptation of contract on 25% increase in tariff [*Letter by Langweiler*, p. 50]. CLAIMANT uses



such information to show that RESPONDENT'S contradictory behavior in circumstances similar to the present case.

48. RESPONDENT may argue that there are different circumstances in both the cases. The arbitration agreement in other proceedings contains Model HKIAC Arbitration Clause with all additions, choice of governing law as law of Mediterraneo and ICC Hardship Clause 2003 [PO 2, p. 60, ¶ 39]. However, the present arbitration agreement contains the same HKIAC Model Clause only with the exclusion of term “non-contractual”. As already stated in ¶ 27, such exclusion does not affect the arbitrator's power to adapt the contract. Also, the governing law chosen by the parties was the Law of Mediterraneo [Issue 1, I]. Furthermore, the present hardship clause also suits the objectives and purposes of the Parties [PO 2, p. 56, ¶ 12], thus the non-addition of ICC Hardship Clause does not differentiate the proceedings.
49. Subsequently, RESPONDENT in the other arbitration proceedings demands for an adaption of contract but contradicts the same in the present case when it is negatively affected. Therefore, to determine the actual intent of RESPONDENT, the evidence is relevant to the present case.

*ii. The evidence is material to the outcome of the case*

50. The evidence is material to the outcome of the case. The term materiality means that the tribunal must deem it necessary that the evidence is needed as an element to allow complete consideration whether a factual allegation is true or not [Marghitola, p. 52] and whether the evidence will assist it in determining the final outcome of the case [ICSID, 8/2/13, p. 67; UNCITRAL 8/6/2009, p. 14]. In dealing with such requests, the tribunal takes into account the likely [UNCITRAL 8/6/2009] or prima facie materiality of evidence [Draye & Bassiri, p. 303].
51. The outcome of the present case pertains to the adaptation of contract due to unforeseen imposition of 30% tariffs by government of Equatoriana. Tribunal has to determine the parties' intention in order to reach to its decision, RESPONDENT has acted in bad faith as it is contending different claims in similar circumstances. This implies that RESPONDENT is willfully hindering the arbitral proceedings.
52. The admission of such evidence assists the Tribunal to reach its outcome in a time efficient manner without any hindrances as it signifies that both parties intended to provide tribunal to adapt the contract. Therefore, the present evidence is admissible as it is material to the outcome of the case.



C. The principles of transparency permit the admission of confidential information as evidence

53. In situations where maintaining a shroud of confidentiality over proceedings and documentation harms the legitimacy of the process, the veil of confidentiality should be lifted. The principles of transparency permit the admission of otherwise confidential information as the present evidence is necessary and exclusive [i] Moreover, transparency would promote the Predictability and Consistency of Arbitral Proceedings [ii].

*i. The present evidence is necessary and exclusive*

54. The present evidence is necessary and exclusive. The tribunal balances whether the value of the disclosure sought is more important than its potential for prejudice [*Reuben*, p. 1294]. The admission of materials can be compelled by, first, indicating a significant necessity for the evidence, and second, showing an inability to acquire such evidence without undue hardship [*Henkel*, p. 1062–63; *Hickman v. Taylor*].

55. In the present case, there is a substantial need for the documents of the other proceedings to be produced in the present arbitral proceedings as the evidence is relevant to the case and material to its outcome [II (B)]. The disclosure of the submissions of the Respondent is necessary to unveil the contradictory behavior of the Respondent. Also, the Partial interim award is essential to establish that the Tribunal is empowered to adapt the contract when situation as in the present case arise. Further, CLAIMANT is unable to obtain such information by any other means than the company, as by no means would RESPONDENT admit such information. Therefore, the exclusivity of the source of evidence and necessity of the evidence should allow its admission albeit it being confidential.

*ii. Transparency would promote the Predictability and Consistency of Arbitral Proceedings*

56. Higher consistency and better predictability in arbitral jurisprudence may be attained by creating a precedential pool [*Poorooye & Feebily*, p. 39]. Although arbitral awards are exclusively binding only on the parties involved, a compendium of authorities readily available could have persuasive value in considerably similar cases [*Carmody*, p. 172]. The arbitral awards would certainly deliver a high degree of predictability and contribute to arbitral jurisprudence [*Reuben (Constitutional Gravity)*, p. 1085].

57. In the other arbitral proceedings, RESPONDENT is negatively affected by the 25% import tariffs imposed by government of Mediterraneo and demands for an adaptation of contract [*Letter by*



*Langweiler, p. 49*]. Since the factual and legal circumstances of other arbitral proceedings are similar to the case at hand, the award and relevant submissions of other proceedings can be used in the present case to promote uniformity in arbitral jurisprudence. Hence, the confidentiality of other proceedings can be compromised to promote consistency in present arbitral decision making.

#### IV. Ignoring the evidence would lead to a travesty of justice

58. The admissibility of the present evidence is necessary for ensuring Justice. The principles of due process include a party's right to equal treatment and an opportunity to be heard, which is also a fundamental rule in the taking of evidence [*O' Malley, p. 4; Blair & Gojkovic', p. 24*]. This right to be heard embraces each party's right to put forward evidence on relevant facts [*X. v. Federation A.; Fracassi, p. 9*]. Dismissal of evidence which is material to the outcome of the case impairs the parties' procedural right to a fair representation [*X. v. Y., 4A; ICSID 5/5/14, ¶ 20-21*].
59. Professor Georges Abi-Saab in *ConocoPhillips v Venezuela* described the majority decision as a 'travesty of justice' [*ICSID 5/5/14, ¶ 67*], wherein the Tribunal refused to admit illegally obtained evidence. He stated there are some instances where ignoring the evidence will not make a just solution [*Blair & Gojkovic', p. 24*]. Further, Confidentiality can be undermined in the interest of justice where the party puts forward arguable assertion that could be relied upon in proceedings for the purpose to prove its assertion [*Teekay Tankers v STX, p. 66*].
60. Further, as per Art. V(1)(b) NYC, the enforcement of award may be refused if the party is unable to present his case. The tribunal has an obligation to render an enforceable final award by observing certain minimum procedural standards, and lack of due process and violation of the party's right to be heard, may lead to an unenforceable award [*Redfern, Hunter, Blackaby & Partasides at 588*].
61. Accordingly, CLAIMANT exercises its right to be heard by proposing the evidence. Also, a violation of CLAIMANT's right to be heard may lead to the unenforceability of the arbitral award and eventual miscarriage of justice. Therefore, the admissibility of the present evidence is necessary for ensuring justice.





**V. The Tribunal can disclose the evidence in the current proceedings, even after the presence of an express confidentiality provision**

62. Respondent contended that a express confidentiality provision under HKIAC Rules excludes the possibility of disclosure of the documents in the present proceedings [*Letter by Fasttrack*, p. 51]. Conversely CLAIMANT submits that such disclosure is permitted.
63. In the absence of specific rules or guidelines on evidence taking in the *lex arbitri* or the institutional rules, resort is taken to the IBA Rules on the Taking of Evidence [hereafter IBA Rules]. These Guidelines are not binding but provide international best practice [*IBA Commentary*, p. 4]. Art. 3.13 IBA Rules provide that “*Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal*”. Precisely, confidentiality requirement does not apply to documents that are already in the public domain or are made public by the parties prior to production in the arbitration.
64. In the present case, either due the illegal hack or the revelation by the two former employees of the company, information of the other proceeding is now available with company that deals with the intelligence information on horseracing [*PO 2*, p. 61, ¶ 41]. Accordingly, the documents of the other proceeding are now accessible to anyone who pays USD 1000. The information thereby has public dissemination and its access cannot be limited. Thereby, pursuant to Art 3.13 of the IBA Rules, against the confidentiality provisions, the documents can be disclosed by the Tribunal as they are already in public domain.
65. Similar situation arose in the Bible case, one of the cases where information that had been improperly disclosed and hosted by WikiLeaks. The plaintiff obtained the evidence through WikiLeaks disclosure websites and argued for its admission in the proceedings. The tribunal held that the evidence is admissible as the information is already in public domain. The court also stressed upon the probative value of the evidence [*Bible v. United Student Aid Funds*]. Likewise, in the present case, further disclosure of illegal evidence by CLAIMANT by way of using it as evidence in arbitral proceedings shall not damage the interest of confidentiality of the Respondent. The evidence is also relevant to the case and material to its outcome [Issue 2, III (B)]. Therefore, CLAIMANT is entitled to submit evidence from the other arbitration proceedings.





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**CONCLUSION OF ISSUE II**

The Tribunal has power to consider evidence obtained by illegal means under law of Danubia and HKIAC rules. Illegality of evidence does not make it inadmissible since CLAIMANT has submitted an evidence which is relevant to the case and material to its outcome. Thereby, the present evidence is essential for ensuring justice& due process in arbitration. Further, if the Tribunal may not admit the present evidence, CLAIMANT proposes joinder under Art. 27.1(a) HKIAC Rules.

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## ARGUMENTS ON MERITS

## THIRD ISSUE: CLAIMANT IS ENTITLED TO THE PAYMENT OF USD 1,250,000 OR ANY OTHER AMOUNT

66. CLAIMANT is entitled to the payment of USD 1,250,000. The government of Mediterraneo imposed tariffs of 25% on agricultural products from Equatoriana [Exh. C 6, p. 15]. As a retaliatory measure, Equatorianian government imposed 30% tariffs on selected products including animal semen from Mediterraneo [Exh. C 6, p. 15]. Due to imposition of such unexpected tariffs CLAIMANT suffered a loss of 30% along with considerable hardship [Exh. C 8, p. 17]. Also, the Parties not only shared cordial relations but were also interested in long term business relationship [Exh. C 2, p. 10]. However, on CLAIMANT's effort to negotiate and adapt the contract, RESPONDENT refused to pay any amount for such hardship [Exh. C 8, p. 18].

67. Conversely, CLAIMANT is entitled to the payment of additional import tariffs or any other costs under Clause 12 of the Sales Agreement [I]. Further, even if imposition of tariffs is not covered by the hardship clause, the price should be increased under CISG [II].

**I. CLAIMANT is entitled to the payment of USD 1,250,000 under Clause 12 of the Sales Agreement**

68. CLAIMANT is entitled to the payment of USD 1,250,000 under Clause 12 of the sales agreement which contains the hardship clause [Exh. C 5, p. 14]. Hardship under a contract can be defined as change in circumstances beyond the control of parties which causes substantial alteration in the economic equilibrium of the contract [UNIDROIT Art. 6.2.2]. In the present case, imposition of import tariff distorted the economic equilibrium of the contract. Therefore, CLAIMANT is not bound to bear the cost of changed import tariffs since the DDP delivery was not intended to shift the obligation of import tariff to CLAIMANT. [A]. *Second*, the Hardship Clause includes the situation of increased import tariffs [B]. *Last*, a remedy of price adaptation can be claimed under the Hardship Clause [C].

A. CLAIMANT is not bound to bear the cost of changed import tariffs since DDP delivery was not intended to shift the obligation of import tariff to CLAIMANT

69. CLAIMANT has no obligation for payment of import tariff under DDP. In the DDP Delivery, the seller is responsible to bear all the cost and risks involved in bringing the goods to the place of destination and to carry out all customs formalities [Incoterms 2010, p. 65]. However, in the present case, when clause 8 and clause 12 of sales agreement are read in consonance [Exh. C5,



*Pg. 14*], it can be inferred that the degree of risk associated with DDP is reduced substantially because of presence of a hardship clause.

70. Moreover, Pursuant to Art. 8(1) CISG, statements made by a party are to be interpreted according to its intent where the other party could not have been unaware of what the intent was. Initially, CLAIMANT was clear in its intention of not taking any responsibility or risk whatsoever. He clearly stated in the negotiations that the frozen semen should be “*picked up at our premises*” [*Exh. C 2, p. 10*] but eventually due to the constraints of the RESPONDENT, CLAIMANT accepted DDP delivery
71. Notably, it was RESPONDENT who suggested DDP delivery for two main reasons. *First*, CLAIMANT had much greater experience in the shipment of frozen semen. *Second*, RESPONDENT sought an urgent delivery [*Exh. C 3, p. 11*]. Thereby, CLAIMANT accepted the DDP delivery merely for these purposes and excluded the risk associated with changes in custom regulation or import restriction [*Exh. C 4, p. 12*]. Therefore, DDP Delivery was not intended to shift the obligation of import tariffs to CLAIMANT.

B. The Hardship Clause includes the situation of increased import tariffs

72. The Hardship Clause includes the situation of increased import tariffs. Imposition of 30% tariff amounts to hardship [i]. An interpretation of the Hardship Clause also supports the inclusion of the situation of increased import tariffs. [ii]

*i. Imposition of 30% tariff amounts to hardship*

73. Imposition of 30% tariff amounts to hardship. Hardship clauses should be interpreted in the light of the hardship exemption under general contract principles, unless the terms of the clause or the circumstances suggest that a different approach should be adopted. The normal standard for a hardship exemption is “excessively onerous” [*Brunner, p. 99, ch. 1*] However, in case of a contractual hardship clause, it should be carefully analyzed whether the definition of hardship, especially the applicable threshold test, is the same, or whether the interpretation of the terms of the clause do suggest a somewhat less stringent test [*Brunner, p. 102, ch. 1*]. In such cases, particular hardship clause will completely replace the hardship standard.
74. In the present case, the parties agreed for a lower threshold test by including the term “more onerous” instead of “excessively onerous” [*Exh. C 5, p. 14, Cl. 12*]. This can be seen as an indication that parties wanted that a liberal standard should apply. Hence, 30% tariff amounts to hardship.



*ii. An Interpretation of the Hardship Clause also supports the inclusion of increased import tariffs*

75. The situation of increased import tariffs fall under the ambit of Hardship Clause by its interpretation. The Hardship Clause is not limited to an exhaustive list of situations [a]. Specific Reference of tariffs is not required under the Hardship Clause [b]. The rejection of ICC Hardship clause by Parties does not affect the interpretation of the present Hardship Clause [c].

*a. The Hardship Clause is not restricted only to risk associated with Health and Safety requirements*

76. The Hardship clause does not provide an exhaustive list of events governed by it [Draetta, p. 17]. It provides a broad category under which all the desirable events would fall. The parties are not always able to assess what may happen during performance of a long-term contract and, in any case, may not have the patience or time to evaluate all the eventualities while drawing up the contract [Zaccaria, p. 28].

77. In the present case, the wording of the hardship clause is very broad as it encompasses all aspects of conceivable hardship. The term "*comparable unforeseen events making the contract more onerous*" [Exh. C 5, p. 14, Cl. 12] must be considered in the broadest sense of the word. Health and safety requirements as indicated are only in general terms, so as to widen its application to include as many comparable cases as possible [Zaccaria, p. 16]. Hence, the hardship clause is not restricted to risks associated with Health and safety requirements only.

*b. A Specific Reference of tariffs is not required under the Hardship Clause*

78. A specific reference of import tariffs was not mandatory under the hardship clause. Parties cannot foresee if or when any event could occur and what degree of impact it could have on the equilibrium between the parties. It is for this very reason parties choose to insert such hardship clause [CISG- AC Opinion No. 7, ¶ 38]. In view of the risk that this standard of unpredictability might restrict the application of the hardship clause, the parties require to include the events that are 'against the will of the parties' or 'beyond the sphere of control' of the disadvantaged party [Fontaine, p. 76].

79. Accordingly in the present case, a specific reference of import tariffs is not required under the hardship clause. It is not reasonable to expect from CLAIMANT to take into account the imposition of such tariff at the time of the conclusion of the contract. The imposition of tariffs could not have been predicted as Equatoriana has always been one of the biggest supporters



of free trade [*Exh. C 6, p. 15*]. In addition, Equatorianian government always tried to resolve trade disputes amicably and had not relied on retaliatory measures against trade restrictions by other countries [*Exh. C 6, p. 15*].

80. Moreover, it could not have been foreseen by CLAIMANT that frozen semen would be considered as an “agricultural good” and would fall within the realm of tariff [*PO2, p. 58, ¶ 26*]. Therefore, specific reference to import tariffs was not necessary under the hardship clause.

*c. The Rejection of the ICC Hardship clause by the parties does not affect the interpretation of the present Hardship Clause*

81. RESPONDENT rejected the ICC hardship clause 2003 due to its broad coverage [*PO 2, p. 56, ¶ 12*]. On the contrary, it accepted to add a hardship wording to the existing force majeure clause [*PO 2, p. 56, ¶ 12*]. The ICC hardship clause 2003 contains all types of risk irrespective of any particular situation. RESPONDENT accepted the hardship clause because it wanted to include only those risks as mentioned by CLAIMANT i.e. health and safety requirements and other comparable unforeseeable events. These particular risks are included as it was in line with the objectives and purposes of the CLAIMANT [*PO 2, p. 56, ¶ 12*]. Moreover, ICC hardship clause suggest that a hardship will be incurred when the performance become excessively onerous [*ICC Hardship Cl., ¶ 2*].

82. In the present case, the wording of the hardship clause had been reduced to “more onerous” that signifies that the standard had been reduced and broad coverage sought [*Exh. C 5, p. 14, Cl. 12*]. Therefore, the inclusion of import tariffs under the hardship clause is according to the purpose and objective sought.

C. The Remedy of price adaptation can be claimed under the Hardship Clause

83. The Remedy of price adaptation can be claimed under the Hardship Clause. Parties intended for an adaptation of the contract **[i]**. The intent of the parties can be implied due to the inclusion of the Hardship Clause **[ii]**.

*i. Parties intended for adaptation of the contract*

84. Parties intended to adapt the contract in case of hardship. Pursuant to Art. 8 (3) CISG, the intent of the parties can be determined by subsequent conduct of the parties. An agent’s apparent authority binds the principal if a three-part test is satisfied. *First*, the principal consensually or knowingly acquiesced in the agent's exercise of authority; *second*, relying on the actions of the principal and agent, the third party reasonably concluded that the party was an



agent of the principal; *last*, the third party reasonably and detrimentally relied on the agent's apparent authority [*Sphere Drake v. Am. Gen. Life Ins.*, p. 10]

85. In the present case, Mr. Shoemaker was the person made responsible for the racehorse breeding program [PO 2, p. 59, ¶ 32]. Ms. Napravnik was introduced to Mr. Shoemaker to solve all questions regarding sale of frozen semen [PO2, p. 59, ¶ 32]. Also, CLAIMANT authorized the shipment only by relying on the promise made by Mr. Shoemaker to adapt the price so as to foster long term relationship with CLAIMANT [*Exh. C 8*, p. 18, ¶ 3]. Thus, it can be inferred that Mr. Shoemaker is the agent of Black Beauty as the three part test mentioned above is satisfied.
86. This is significant of the fact that the Parties wanted adaptation of the contract as they intended to maintain a long-term relationship. Therefore, parties had an intention for adaptation of contract as a remedy of hardship. Furthermore, CLAIMANT's negotiator Ms. Napravnik had a meeting with RESPONDENT's CEO regarding the payment of additional amount for the tariffs [*Exh. C 8*, p. 18]. Although the negotiations between the parties failed, the fact that the parties agreed to negotiate on the price implies that parties had an intention of price adaptation of contract.

*ii. The intent of the parties can be implied from the presence of a Hardship Clause*

87. There is an implied intention of the parties to adapt the contract as they inserted a hardship clause into the contract [*Exh. C 5*, p. 14, Cl. 12]. The insertion of a hardship clause is an explicit demonstration that the contracting parties are willing to undertake revision of the contract, if unpredicted circumstances make performance of the contract onerous for either of the parties [*Rimke*, p. 4]. Moreover, the Parties chose the law of Mediterraneo, which is the verbatim of UNIDROIT Principles, to govern the sales agreement. Art. 6.2.3 (4) (b) of the law of Mediterraneo provides for an adaptation as a remedy in case of hardship. Therefore, it indicates that parties had the intention of price adaptation, when choosing their substantive law.

**II. CLAIMANT is entitled to the payment of USD 1,250,000 under CISG**

88. CLAIMANT is entitled to the payment of USD 1,250, 000 under the CISG. The parties mutually agreed that the Contract shall be governed by CISG [*Exh. C 5*, p. 14, Cl. 14]. Notably, RESPONDENT contends that CLAIMANT cannot seek remedy for adaptation of the contract under Art.79 CISG. [*Ans. to NoA*, p. 32, ¶ 18]. On the contrary, CLAIMANT submits that the Hardship Clause does not exclude the application of Art. 79. CISG **[A]**. CLAIMANT has



suffered hardship as a result of imposition of new tariffs [B]. The remedy of adaptation is provided under the CISG [C].

A. The hardship clause does not exclude the application of art. 79 CISG

89. The inclusion of a Hardship Clause in the contract does not lead to the exclusion of Art. 79 CISG. Force majeure clauses or other clauses about possible difficulties with fulfilling the contract should not be seen as superseding to Art. 79 CISG [*Flechtner, Brand & Walter, p. 393; UNCITRAL Digest, Art. 79, p. 390*]. Furthermore, the inclusion of hardship clause does not constitute derogation under Art. 6 CISG [i] and Art.79 CISG do not supplement a Hardship Clause [ii].

*i. The Inclusion of a hardship clause does not constitute derogation under Art. 6 CISG*

90. Pursuant to Art. 6 CISG, “*the parties may exclude the application of the Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions*”. The party wanting to derogate from a specific provision of the CISG should disclose the derogation to the other party and expressly state in the contract the intent to derogate from that specific CISG provision. [*DiMatteo, Dhooge, Greene, Maurer & Pagnattaro, p. 144*]. Their intention must be express and clear [*UCCI 23/1/2012, p. 2*]. Art. 79 CISG would not be applicable only if it were sufficiently evident and certain that the parties did not want CISG to apply [*UNCITRAL Digest, Art. 6 of the CISG, p. 33*]. Further, the tribunal in a case held that the parties do not merely pre-empt Art. 79 by agreeing to the contractual provision. [*CLOUT 28/2/1997, p. 11*].

91. In the underlying contract, parties did not expressly exclude the application of the CISG. The inclusion of a hardship clause was only to address the subsequent changes and to temper some of the additional risks taken [*Exh. C4, p. 12*]. Such an inclusion does nowhere provide concrete evidence that the parties intended to reject the application of Art. 79, CISG. Also, no such intent is disclosed in the negotiations and the Sales Agreement between the Parties.

92. Additionally, Pursuant to Art. 1(1)(b) of the CISG, the choice to apply the law of a Contracting State leads directly to the application of the CISG, and the exclusion of any of the Articles of the CISG cannot be inferred when Art. 1 CISG is applied in connection with Art. 6 of the CISG [*Caemmerer & Schlechtriem, p. 321*]. Hence, parties nowhere intended to exclude the application of Art. 79 CISG.





*ii. The Hardship clause, in the present case, supplements Art. 79 CISG*

93. The provision of Art. 79 CISG can supplement the hardship clause. Hardship clause always consist of two main parts. The first part of the clause defines the hypothesis when the clause applies while the second part deals with the effects of hardship [*Honnold II, p. 546*]. In the present case, hardship clause only provides for situations which could be deemed to be hardship but does not provide for effects of hardship i.e., what happens whenever the hypothesis is realized. Therefore, hardship clause must be used in tandem with Art. 79 CISG. Thus, the parties cannot have intended to exclude Art. 79 CISG, since it supplements for the effects of the hardship.

B. CLAIMANT has suffered hardship as a result of the imposition of new tariffs by the RESPONDENT

94. A change of circumstances in form of imposition of tariffs made the performance of the contract too expensive for CLAIMANT and has eventually caused hardship [*Exb. C 8, p. 17*]. In pursuance of the same, CLAIMANT submits that the situation of Hardship falls within the purview of the CISG [i] and the present situation amounts to Hardship [ii].

*i. Situations of hardship fall within the purview of the CISG*

95. The situation of hardship falls within the ambit of the CISG. *Hardship* refers to the performance of the disadvantaged party having become much more burdensome, but not impossible [*Schwenzer, p. 66*]. This situation, however, is not regulated under exact terms in CISG. In lieu of the same, CLAIMANT submits that Hardship is governed but not settled under the CISG [a]. There exists a pre supposition of gap due to non-settlement [b].

*a. Hardship is governed though not settled under Article 79 of CISG*

96. Hardship is governed by Article 79 but the CISG does not regulate in exact terms how cases of changed circumstances have to be decided upon [*Scafom International v. Lorraine, p. 5*]. Hardship is governed under Art. 79 because of two main reasons. *First*, impediment as defined under Art. 79 CISG includes hardship. A change of circumstances due to which the performance of a contract becomes too expensive for the disadvantaged party comes within the ambit of impediment under Art 79(1) CISG [*CISG- AC Opinion No. 7, ¶ 24*]. Art.79 CISG should be interpreted as including a hardship situation within the scope of definition of the term impediment [*Schroeter, p. 125*]. The term “impediment” in Art. 79 CISG does not only deal with the case where performance became impossible but also in exceptional circumstances in which the performance became much more burdensome [*Schlechtriem & Schwenzler, p. 187*].





97. Governmental actions—such as custom restrictions, trade sanctions or an embargo—appear to be favored as impediments [BCCI 24/4/1996; ICC 1992; RF CCI 22/1/1997; RF CCI 16/3/1995]. Also, the wording of Art. 79 CISG is sufficiently flexible and should be understood in the broadest sense, encompassing any change of circumstances after the conclusion of the contract as well as a gross disparity of the value of performances already existing at the time of conclusion of the contract [*Schwenzer I*, p. 719]. Therefore, hardship comes within the purview of impediment.
98. *Second*, preparatory work also does not favor the exclusion of hardship. Art. 79 CISG is not conclusive enough to warrant a conclusion that the hardship problem was meant to be excluded or included within its scope [*CISG- AC Opinion No. 7*, ¶ 27]. Further, hardship is not expressly excluded under Art. 4 of the CISG, thus being an issue left unsettled in the CISG [*Ferrari*, p. 3; *CISG- AC Opinion No. 7*, ¶ 31]. Furthermore, while the remedy of exemption under Art. 79 CISG appears unsuited to situations of decreased profitability, one cannot infer from the CISG's legislative and drafting history that a party facing an unexpected loss of value due to an unforeseeable change in circumstances is not entitled to any relief [*Silveira*, p. 5]. Therefore, the legislative and the drafting history of the CISG also do not envisage the idea of an exclusion of hardship.
- b. There exists a pre-supposition of gap due to non-settlement*
99. There exists a gap relating to situations of supervening events not leading to impossibility of performance under the convention. The Doctrine of Hardship can be invoked at any time during the life span of the contract when the economic equilibrium of the contract tilts heavily against any party, even when there is no breach. [*Melis*, p. 213]. However, Art. 79 CISG does not regulate situations when there is no breach and performance has already been rendered.
100. When CISG contains no such provision although the matter at hand lies within its scope, the regulatory gap needs to be filled. Gap filling is an instrument of developing CISG and adjusting it to new needs [*Schwenzer I*, p. 13]. Pursuant to Article 7(2) CISG, such gaps or questions should be settled "in conformity with the general principles on which CISG is based.
101. The Doctrine of hardship is supported by the general principles of the CISG. Pursuant to Art. 7 (2) CISG, internal gap is a "matter governed but not expressly settled by the CISG". Hardship constitutes an internal gap [*Scafom International v. Lorraine*] and to fill the gaps in the CISG resort must be made to its general principles.
102. The principle of good faith, as stated in Art. 7(1) CISG, can be used as gap filler. In the event of a subsequent unforeseeable impediment to performance as a result of a material change in



economic conditions, there must be a "limit of sacrifice" [*Fontaine*, p. 7]. Beyond this, in view of the severe economic disadvantages involved, the promisor can no longer be expected to perform the contract [*Bianca & Bonell*, p. 576; *Honsell*, p. 986; *Ziegler*, p. 218; *Keil*, p. 33; *Schlechtriem & Schwenzler*, p. 602]. Some authors base this result on Article 79 CISG in connection with Article 7(1) CISG [*Id.*]. Therefore, doctrine of hardship is supported by general principles of CISG.

103. Additionally, The UNIDROIT Principles can be used as gap filler. It is suggested that a court may refer to the UNIDROIT Principles when the CISG does not resolve the issue as this is deemed preferable than resorting to domestic law [*Scafom International v. Lorraine*]. The UNIDROIT Principles is an international restatement, where its articles are supportive of the intent of the CISG, it can be logical to seek to apply the UNIDROIT Principles as guidelines or gap filler when interpreting provisions of the CISG [*Bonell*, p. 145]. Since the CISG is silent on hardship, the relevant provisions contained in the UNIDROIT Principles could be used to supplement the CISG on this.

*ii. The present situation amounts to hardship*

104. CLAIMANT has suffered hardship as a result of the imposition of import tariffs by the government of Equatoria [Exh. C 8, p. 17]. This has led to alteration in the equilibrium of the contract. [a.] The present situation also satisfies the conditions required for claiming hardship [b.]

*a. The present situation has led to alteration in the equilibrium of the contract*

105. Pursuant to Article 6.2.2, UNIDROIT Principles, an event of hardship is one that “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” [*Girsberger & Zapolskis*, p. 126]. Whether an alteration is ‘fundamental’ in a given case will of course depend upon the circumstances.” In the present case, there is fundamental alteration in the equilibrium of the contract because of three main reasons.

106. *First*, the increased tariffs have resulted in CLAIMANT increased cost of performance. There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract as cost of a party's performance has increased. [Art. 6.2.2 UNIDROIT]. Whether an alteration is “fundamental” in a given case will of course depend upon the circumstances’ [*Brunner*, p. 427]. In order to determine whether the threshold is reached, it is suggested to compare the actually expected costs with the estimated objective costs after the occurrence of the supervening event [*Brunner*, p. 433].



107. In the present case, the cost of performance increased as the imposition of 30 % tariffs on selected products from Mediterraneo made the shipment 30% more expensive than anticipated, destroying the profit margin of 5% and consequently leading to 25% loss for the transaction [Exh. C8, p.17]. Therefore, the increased import tariffs led to increase in CLAIMANT’S cost of performance.
108. *Second*, RESPONDENT may argue that 25% loss is insufficient to amount to a fundamental alteration of the equilibrium of the contract as required by the hardship exemption. However, the essential criterion in this situation is the fact that performing the contract in its unaltered form would result in a financial ruin and possible bankruptcy of the debtor. [Brunner, p. 427] Notably, supervening events beyond the sphere of risk and control of the obligor resulting in an alteration of somewhat less than 100% may arguably also constitute hardship, in a case in which the obligor's financial (lasting) ruin is impending and it must fully perform the contract.[Brunner, p. 435]
109. In the present case, CLAIMANT has been making losses since 2013. CLAIMANT has entered into restructuring plan with its creditors with the hope that he will be able to make profit in 2018 of 300,000 USD after 180,000 USD in 2017 [PO 2, p. 59, ¶ 29]. However, this plan would be seriously endangered if CLAIMANT had to bear the 1,250,000 USD. Consequently, this will bring the CLAIMANT on the verge of bankruptcy.
110. *Last*, the increased costs has also frustrated the ultimate purpose of the contract. The value of the performance a party receives is diminished when the purpose of the transaction is frustrated [Rimke, p. 184–185]. Frustration of purpose is when the event, instead of making one’s own performance more burdensome, makes the other party’s performance nearly worthless [Farnsworth, p. 25] and substantially frustrates the relevant party's ‘principal purpose’ [Id].
111. In the present case, one of the objectives of CLAIMANT was to make profit in 2018 of 300,000 USD after 180,000 USD in 2017 with the additional revenues from the sale of the frozen semen. However, if CLAIMANT would have to bear the 1,250,000 USD, a radically different situation from the one agreed upon will come into being [Davis Contractors Ltd v. Fareham, p. 729] which will render the performance of CLAIMANT worthless.
- b. The present situation also satisfies the conditions required for claiming hardship*
112. The present situation satisfies the conditions required for claiming hardship because of three main reasons. *First*, CLAIMANT could have not in any circumstance foreseen the imposition of such tariffs by the government of Equatoriana [Exh. C 4, p. 12]. When determining the



foreseeability in a case of force majeure, the judge or arbitrator should neither refer to an excessively concerned “pessimist who foresees all sorts of disasters” nor to a “resolute optimist who never anticipates the least misfortune” [*Schlechtriem & Schwenzler, p. 608*].

113. Applying this standard to the case at hand, it may be inferred that CLAIMANT could not have had reasonably been expected to have taken the imposition of such tariff into account at the time when the contract was concluded. Never before had there been imposition of tariffs as Equatoriana has always been one of the biggest supporters of free trade [*Exh. C 6, p. 15*].
114. In addition, Equatorianian government had always tried to resolve trade disputes amicably and had not relied on retaliatory measures against trade restrictions by other countries [*Exh. C 6, p. 15*]. Also, it could at any given cost not have been foreseen by CLAIMANT that frozen semen could be considered to be an “agricultural good” so that the tariffs would apply to it. Therefore, such a dramatic change of circumstances was not reasonably foreseeable at the time of the conclusion of the contract
115. *Second*, the Equatorianian governmental measure of imposition of 30% tariffs on selected products from Mediterraneo arose outside CLAIMANT’S sphere of control. CLAIMANT, being a company registered in Mediterraneo had no influence upon the Equatoriana government.
116. Moreover, CLAIMANT’S sphere of control covered risks that are typically attributed to a seller of goods in international trade [*Enderlin & Maskow, p. 423; Caemmerer & Schlechtriem, p. 345*]. Examples given by legal authorities show that this includes only normal business risks [*Ryffel, p. 90; Magnus, p. 256; Kranz, p. 197*]. On the contrary, it would place an overly heavy burden on the seller, if he even had to bear the risk of governmental measures affecting the domestic market of the sold goods [*Id.*]. Consequently, governmental measure of imposition of 30% tariffs did not fall within CLAIMANT’S sphere of control.
117. *Last*, the risk of increased tariffs was not assumed by CLAIMANT. It specifically mentioned that they are not willing to take any risks associated with such a change in the delivery terms, in particular those associated with changes in customs regulation or import restrictions. RESPONDENT may invoke the DDP clause contained in the Sales agreement to establish that CLAIMANT bore the responsibility; risk and cost associated with transporting goods until the buyer receives or transfers them at the destination port [*Incoterms 2010, p. 58*].
118. However, when we read INCOTERMS, governing the instant clause in consonance with clause 12 of the sales agreement, one may reasonably conclude that seller has discharged itself from all the liabilities arising out of “comparable unforeseen events” [*Exh. C 5, p. 14, Cl. 12*]. Therefore, risk of import tariffs was not assumed by CLAIMANT.



C. Remedy of Adaptation can be claimed under CISG

119. Art. 79 CISG allows for adaptation or modification of contracts [*Ishida*, p. 360]. The remedy of price reduction in Art. 50 CISG shows an adjustment of the contract to reflect a disturbed balance between performance on one side and obligation on the other side [*Schlechtriem & Schwenzler*, p. 386]. An adaptation of the Contract falls within the category of remedies envisaged under “relief specially tailored for hardship” as under the CISG. [*Schwenzler II*, p. 723. 37]
120. Moreover, in situations of extreme unforeseeable inflation, the contract can be reformed by courts on the ground of the principle of good faith and fair dealing. Good faith has been defined as fairness, reasonable standards of fair conduct, honesty [*IFTIME*, p. 1]. In a case [*Dulces Luisi v. Seoul International*] while analyzing the Buyer's breach, the court referred to Article 7's CISG good faith principle and determined that it is a general principle that binds the parties to act in good faith throughout their contractual relations
121. In the present case, RESPONDENT had urged CLAIMANT to deliver the doses and assured that the terms of the contract would be re-negotiated after the observance of the delivery [*Exh. C 8*, p. 18]. Thus, CLAIMANT with the intent to maintain a long term relationship and on relying upon RESPONDENT's assurance that the terms of the contract would be re-negotiated delivered the doses to the RESPONDENT [*Exh. C 8*, p. 18].
122. After the delivery a meeting was organized to re-negotiate the terms of the contract [*Exh. C 8*, p. 18]. The CEO of the RESPONDENT Company instructed that they are not interested in any further cooperation and negotiation pertaining to the contract [*Exh. C 8*, p. 18]. Therefore if CLAIMANT is made to bear the amount USD 1,250,000 it will be against the principle of good faith and fair dealing.
123. Additionally, in virtue of values of fairness and equity, in cases of contractual imbalance, adaptation of the terms of the contract should be possible and considered as an adequate solution under the CISG [*Arnyo*, p. 45]. Therefore, remedy for Price adaptation is provided under CISG.

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**CONCLUSION OF ISSUE III**

CLAIMANT is entitled for price adaptation according to clause 12 of the Sales Agreement. Imposition of import tariff distorted the economic equilibrium of the contract as a result of which CLAIMANT suffered hardship. If Arbitral tribunal comes to a conclusion that the imposition of import tariffs is not covered by the adaptation clause, the price should be increased under CISG as it allows for a price adaptation in the case of changed circumstance along the lines of hardship.

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**REQUEST FOR RELIEF**

In response to the Tribunal's Procedural Orders, Counsel makes the above submissions on behalf of CLAIMANT. For the reasons stated in this Memorandum, Counsel respectfully requests the Arbitral Tribunal to find that:

1. The Tribunal has the jurisdiction and/ or the powers under the Arbitration Agreement to adapt the contract. [**First Issue**].
2. CLAIMANT is entitled to submit evidence from the other arbitration proceedings [**Second Issue**].
3. Imposition of import tariff on frozen semen amounts to hardship under Clause 12 as well as under CISG [**Third Issue**].

On these grounds the Arbitral Tribunal is respectfully requested to order RESPONDENT to pay an additional amount of USD 1,250,000 which is 25 % of the price for the third delivery of semen in accordance with Art. 79 CISG, as well as RESPONDENT bears the cost of the Arbitration.

COUNSELS FOR CLAIMANT

6 DECEMBER 2018



**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 that is not a member of this team.

Our university is competing in both the Vis East Moot and the Vienna Vis Moot. We are submitting two separately prepared, different Memoranda.

APEKSHA JOSHI

NITYA JAIN

RIYA JAIN

TANUJ AGARWAL





**Certificate and Choice of Forum**  
To be attached to each Memorandum

I Ms. Nitya Jain, on behalf of the Team for Institute of Law, Nirma University hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

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

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

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

Or

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

Vis East Moot in Hong Kong, or

Vienna Vis Moot

Authorised Representative of the Team for Institute of Law, Nirma University

Name: Ms. Nitya Jain

Signature: