North China University Of Science And Technology

SIXTEENTH ANNUAL

WILLEM C. VIS EAST

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG SAR

31st MARCH TO 7th APRIL 2019

MEMORANDUM FOR CLAIMANT

ON BEHALF OF:	**AGAINST:**
Phar Lap Allevamento	Black BeautyEquestrian
Rue Frankel 1	2 Seabiscuit Drive
Capital City	Oceanside
Mediterraneo	Equatoriana
CLAIMANT	**RESPONDENT**

COUNSEL FOR CLAIMANT:

LU Jing • YANG Zhuoqing • ZHOU Honglei

YANG Jingjing • ZHAO Dongxue • ZHANG Wei

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TABLE OF ABBREVIATIONS

ABBREVIATION	FULL CITAION
&	*And*
AR	Arbitration Rules
Art./Arts.	Article/Articles
ARMR.	Arbitration Rules Mediation Rules
CA	Courd Appel, Court of Appeals, France
Cl.	Claimant
cl.	clause
CISG	United National Convention on Contracts for the International Sale of Goods, Vienna 1980
Co.	Company
Ex./Exs.	Exhibit/Exhibits
GCIIA.	Guidelines on Conflicts of Interest in International Arbitration
GS.	General Standard
HKC	Hong Kong Cases
HKIAC	Hong Kong Court International Arbitration Centre Administered Arbitration Rules
IBA	IBA Guidelines on Conflicts of Interest in International Arbitration
Ltd.	limited
PICC	UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2016
para./ paras.	paragraph/paragraphs
p./pp.	page/pages
PECL	Principles of European Contract Law

Re.	Respondent
SCC	Stockholm Chamber of Commerce
UAR	UNCITRAL Arbitration Rules
UML	UNCITRAL Model Law
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Laws
USD	United States Dollar
v.	versus

INDEX OF LEGAL TEXTS

ABBREVIATION	FULLCITATION	CITED IN
CISG	United National Convention on Contracts for the International Sale of Goods, Vienna,1980	7, 8(3), 46, 50, 79 29
IBA	IBA Guidelines on Conflicts of Interest in International Arbitration	The Preamble 9.1 45.1 45.2 45.3
ICC-Hardship	International Chamber of Commerce Hardship clause 2003	ICC-Hardship Clause
HKIAC	Hong Kong Court International Arbitration Centre Administered Arbitration Rules,2013	45.1 45.2 45.3
PICC	UNIDROIT Principles Of International Commercial Contracts2016	6.2.2, 6.2.3
UAR	UNCITRAL Arbitration Rules	27(1) 34(2)
UML	UNCITRAL Model Law on International Commercial Arbitration, 1985	7.1 28.3
UNIDROIT	International Institute for the Unification of Private Laws	6(2)

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Blair/Gojkovic	Cherie Blair and Ema Vidak Gojkovic WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence	p.238p.239 p.241
Born	Gary Born International Commercial Arbitration, 2nd edition Ardsely/The Hague 2001	p.300 p.515-517 p.1701 p.2309
CARSTEN	Carsten Herresthal Research on the Principle of Hardship Clause, 2004	p.20
Collier/Lowe	John Collier and Vaughan Lowe The Settlement of Disputes in International Law, New York 1999	p.187
E.D.D. Tavender	E.D.D. Tavender Considerations of Fairness in the Context of International Commercial Arbitrations	p.511

Garro	Gap-Filling Role of the Unidroit Principles in International Sales Law: Some Comments on the Interplay Between the Principles andthe CISG Tulane Law Review, 1994	p.1152
LI WEI	LI WEI A Commentary on CISG, 2nd Edition	p.146
Ingeborg, Schwenzer	Force Majeure and Hardship in International Sales Contracts Victoria University of Wellington Law Review, 2009 cited as: Ingeborg	p.143
Melis/Werner	Melis and Werner Force Majeure and Hardship Clau ses in International Commercial C ontracts in View of the Practices o f the ICC Court of Arbitration, 1 J. Int'l Arb. 1984	p. 3
OED-online	Oxford English Dictionary, the definitive record of the English Language Available	Onerous unforeseen
PIETROWSKI	PIETROWSKI Evidence in International Arbitration	p.373 p.408

Sharon	Williams Sharon Exclusion of Illegally Obtained Evidence: A Comparison of English and American Law	p.9
UPICC Commentary	International Institute for the Unification of Private Law (UNIDROIT) Official Comments on Art.s of the 2010 UNIDROIT Principles Rome , 2010	p.220 p221 p219
YANG	YANG LIANGYI Daming International Business Rules of the Game: America Evidence Law, Law Press, 2002 edition	p.631

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Britain v. Albania	Britain v. Albania United Kingdom of Great Britain and Northern Ireland. v. Albania March 25, 1948 Case No. I.C.J. Reports 1948	https://advance.lexis.com/api/permalink/d94ad718-9d56-4322-8cb0-a9a76da722ef/?context=1000516
CoA	Canada Jardine Lloyd Thompson Canada Inc. v. SJO Catlin Court of Appeal of Albert 18 January 2006 CLOUT case 124	https://www.lexisnexis.com/lawschool/lsp/p/studenthome.aspx?lc=LawSchoolPortal/Signin
Forestal v. Daros	Forestal Guarani, S.A. v. Daros International, Inc.U.S. District Court of New Jersey 7 October 2008	https://advance.lexis.com/document/?pdmfid=1000516&crid=53185727-d64f-497e-a78a-4355a5f0425c

Gaec v. Teso	Gaec des Beauches V. Teso Ten Elsen Appellate Court Grenoble of France 23 October 1996 CLOUT case No. 205	https://advance.lexis.com/search?crid=c88dc4b1-17a6-4d3d-bc41-112346348121
Helliwell and Others v. PiggotSims Helliwell	Helliwell and Others v. PiggotSims Helliwell and Others. v. PiggotSims 1980, Case No. FSR 582	https://advance.lexis.com/api/permalink/75df1978-35fc-4de2-9a1d-13647f5a1cf3/?context=1000516
ICC Mar	ICC Parties not indicated March 1998 Case No.: 9029	https://www.lexisnexis.com/lawschool/lsp/p/studenthome.aspx?lc=LawSchoolPortal/Signin
LLC v. Ajamie	LLC v. Ajamie. Prudential Equity Group Feb. 27, 2008 Case No. 2008 WL510047	https://advance.lexis.com/api/permalink/b4d937e6-6be5-43b0-9516-150ba3d467b7/?context=1000516

Russia CCI	Tribunal of International Commercial Arbitration at the Russia Federation Chamber of Commerce and Industry Parties not indicated 5 November 2004 Case No.: 4/2004	https://advance.lexis.com/api/permalink/d89ad657-9d56-3578-8cb0-a9a76da722ef/?context=5161000
Scafom International BV	Scafom International BV v. Lorraine Tubes S.A.S Hof van Cassatie [Court of Cassation = Supreme Court] June 19, 2009, Case No. C.07.0289.N Lorraine Tubes S.A.S	https://advance.lexis.com/api/permalink/d94ad718-9d56-4322-8cb0-a9a76da722ef/?context=1000516
Williamson v. John D.	Williamson v. John D. Quinn Construction Corp	https://advance.lexis.com/api/permalink/d18ad794-9d56-2243-8cb0-a9a22da776ef/?context=1000453

SUMMARY OF FACTS

1. **Phar Lap Allevamento** (the CLAIMANT) is a company registered and located in Mediterraneo. It operates stud farm covering all areas of the equestrian sport and owns various kinds of horses, including its well-known racehorses, the most famous of which is called Nijinsky III.
2. **Black Beauty Equestrian** (the RESPONDENT) ,which is famous for its broodmare lines, decided to establish a racehorse stable three years ago. At the moment when RESPONDENT contacted CLAIMANT to ask for information about the availability of frozen semen, the Equatorianan Government had imposed serious restrictions on the transportation of all living animals.
3. At that time, CLAIMANT was told that RESPONDENT's investors were keen to commence a racehorse breeding programme taking advantage of the temporary lift of the ban on artificial insemination. The former did not question it with intention to increase revenues.
4. **On 21 March 2017**, Black Beauty contacted Phar Lap, inquiring about the availability of Nijinsky III for its newly started breeding programme (CLAIMANT’s Exhibit 1).
5. **On 24 March 2017**, CLAIMANT sent the offer by email. The RESPONDENT raised no objection except three terms: delivery, choice of law and the forum selection clause. In several communications, the Parties agreed on the hardship clause, choice of law and arbitration clause in the end. Unfortunately, the original negotiators of the Parties were severely injured in an accident, resulting in the their absence from the finalization of the contract (CLAIMANT’s Exhibit 2).
6. **On 28 March 2017**, RESPONDENT sent the email to CLAIMANT which objected to the choice of law and the forum selection clause and insisted on a delivery DDP (CLAIMANT’s Exhibit 3). **On 31 March 2017**, due to past experiences with extremely expensive tests due to changes in customs health6.requirements Phar Lap was only willing to accept a delivery DDP against a moderate price increase, the transfer of certain risks to

Black Beauty and the inclusion of a hardship clause to temper some of the additional risks taken (CLAIMANT's Exhibit 4).

7. **On 10 April 2017**, RESPONDENT's proposal had made clear its sincere wish for an arbitration agreement which was governed by the law of the place of arbitration and not by the law of the contract. Such a clause was actually included in Mr. Antley's latest draft (RESPONDENT's Exhibit 1).
8. **On 11 April 2017**, CLAIMANT in CLAIMANT's email had only changed the suggested place of arbitration and told the RESPONDENT "That offer is naturally on the condition that the law applicable to the Sales Agreement remain the law of Mediterraneo" (RESPONDENT's Exhibit 2).
9. **On 12 April 2017**, the finalization of the agreement took longer than planned as the two main negotiators, Ms. Napravnik and Mr. Antley, were severely injured in an accident when driving to a restaurant after the annual colt auction in Danubia. They had to be replaced for the finalization of the contract which was signed **on 6 May 2017** (CLAIMANT's Exhibit 5).
10. The Parties had agreed on three shipments (CLAIMANT's Exhibit 5). RESPONDENT sent the first shipment of 25 doses **on 20 May 2017**; the second shipment of 25 doses on 3 October and the last shipment of 50 doses **on 23 January 2018**. The RESPONDENT had agreed on split the money twice: first time to pay **on 18 May 2017**, second time to pay **on 21 January 2018**.
11. **In April 2017**, the new President of Mediterraneo was elected. **On 23 November 2017**, the tariff in Mediterraneo had been raised to 25 percent. **On 19 December 2017**, the Government of Equatoriana to impose a tariff of 30 per cent upon all agricultural goods from Mediterraneo as a retaliation for the previous restriction imposed by Mr. Bouckaert, the newly elected President of Mediterraneo (CLAIMANT's Exhibit 6).
12. **On 31 July 2018**, the CLAIMANT filed an application for Arbitration. And the RESPONDENT receipted the Notice of Arbitration.

SUMMARY OF ARGUMENT

I. THE TRIBUNAL HAS THE JURISDICTION AND POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, AND THE MEDITERRANEAN LAW GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.

13. First, CLAIMANT submits that the arbitration agreement and its interpretation shall be governed by the Mediterranean Law. If no contrary choice were made, the choice of law of the underlying contract indicates the parties' intention to submit all the clauses under the same law, which is evidenced by numerous practice.

14. Second, the parties have empowered the tribunal to adapt the contract under the Mediterranean law. Clause 15 can be explained to include the adaptation of the contract due to the words "any" and "including". Besides, the conversation between the two parties which is stated as Parol Evidence happened after the contract can be applied under the Mediterranean law.

15. Third, even if the court deems that that parties failed to reach an agreement concerning the price, the court has the power to adapt the contract when each party resorts to it. In accordance with Art.6 (2) UNIDROIT and the comment of this article, CLAIMANT has requested a renegotiation upon RESPONDENT and holds performance, the tribunal is entitled to determine and adapt the contract.

II. CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS ON THE BASIS OF ASSUMPTION THAT THIS EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF ACONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM.

16. First, a flexible rule of evidence can be applied under the circumstance that CLAIMANT is free to submit any evidence to prove their claims and a flexible rule of evidence can be applied for the sake of efficiency of the procedure of the arbitration.

17. Second, CLAIMANT can submit the evidence as the result of a violation of a confidentiality agreement claimed by RESPONDENT. Pursuant to Art. 45.1 and Art. 45.2 of HKIAC Rules, CLAIMANT is not on the list of which confidentiality obligation covers. Additionally, to protect or pursue a legal right or interest of the party, a party is eligible to disclose necessary information according to Art.45.3. (a)(i).

18. Third, CLAIMANT can submit the evidence coming from a suspiciously unlawful means claimed by RESPONDENT. The leak of information is not instructed by CLAIMANT, which is not proved by RESPONDENT. Even if CLAIMANT is involved, the evidence cannot be excluded considering its materiality to the outcome of the case.

III. THE CLAIMANT IS ENTITLED TO THE PAYMENT OF US$1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT AND CISG.

19. First, the CLAIMANT is entitled to the payment of US$1,250,000 or any other amount resulting from an adaptation of the price under Clause 12 of the contract. As is universally recognized, the hardship clause covers comparable unforeseen events and the adaptation of contract is supposed to be given priority.

20. Second, the CLAIMANT is entitled to the payment of US$1,250,000 or any other amount resulting from an adaptation of the price under the CISG. Lots of scholars and cases approved that the Art.79 CISG should be interpreted in a broad way. CLAIMANT is not responsible for the breach of contract, consequently, it is reasonable for CLAIMANT not to perform the obligations under the contract.

21. Third, The RESPONDENT is responsible for the adaptation of the contract and the payment should be US$1,250,000 under the principle of fairness. The behavior of RESPONDENT indicated that RESPONDENT had reached an agreement with CLAIMANT on modifying the contract in consideration of long-term operation. Even if the parties haven't agreed to adapt the price, the principle of fairness should be applied when it comes to allocating the burden under hardship clause, which is recognized in a great number of practices.

ARGUMENT ON THE PROCEEDINGS

I. THE TRIBUNAL HAS THE JURISDICTION AND POWERS UNDER THE ARBITRATION AGREEMENT, WHICH SHOULD BE GOVERNED BY MEDITERRANEO LAW, TO ADAPT THE CONTRACT.

22. CLAIMANT submits that the arbitration agreement and its interpretation shall be governed by the Mediterranean Law (A) and the Parties have empowered the tribunal to adapt the contract under the Mediterranean Law (B). Even if the court deems that the parties failed to reach an agreement among the price, the court has the power to adapt the contract when each party resorts to it (C).

A. THE ARBITRATION AGREEMENT AND ITS INTERPRETATION SHALL BE GOVERNED BY THE MEDITERRANEAN LAW.

1. Arbitration clause is part of the Sales Agreement

23. Although the separability of arbitration agreement is a widespread theory, it does not presumptively suggest the law of the arbitration agreement to be different from the contract [*Born, pp. 515-517*]. As a matter of fact, if no contrary choice were made, the choice of law of the underlying contract indicates the parties' intention to submit all the clauses under the same law. Such notion is evidenced by numerous practice, including several arbitrations [*Peterson Farm v. C&M farming*] [*Tonicstar v. American Home Assurance*] and various judicial decisions [*Born, pp. 515-517*].

24. Under the UNCTRAL MODEL LAW 7.1 " *An arbitration agreement may be in the form of an arbitration clause in a contract* " [*UML Art. 7.1*] The form of the arbitration clause is a legal shape. In this case, the arbitration clause was included in the whole contract.

25. In this case, both Parties have agreed to apply the Mediterranean law as the law of the Sales Agreement [*Cl. Ex. C5. Cl.14*]. "*This Sales Agreement shall be governed by the law of Mediterraneo*" The capital "S" and "A" express clearly is referred to the whole contract.

Clause 15 is nearly behind the clause 14, and there is no attaching items behind the clause 15. From the wording and the logic,we may well believe that there is consistency between the sales agreement and the arbitration agreement.

2. Both parties agreed to the application of the Mediterraneo law

26. In this case, both Parties have agreed to apply the Mediterranean law as the law of the Sales Agreement [*Cl. Ex. C5. cl.14*]. And no other choice was made specifically to govern the arbitration clause in the agreement. During the negotiation of the agreement, CLAIMANT has never proposed any other law as the law of the arbitration agreement, nor agreed to such proposal by RESPONDENT. The intent to choose the Danubian law to govern the arbitration agreement was never shown by RESPONDENT, letting alone being acknowledged by CLAIMANT. RESPONDENT only suggested to apply Equatorian law to the arbitration agreement [*Re. Ex. R1*], without clarifying that it's the law of the arbitration seat. CLAIMANT, by stressing the law governs the entire contract is the Mediterranean law, has refused RESPONDENT's proposal to apply Equatorian law [*Re. Ex. R2*]. Anyhow, RESPONDENT's intent that the arbitration agreement and the underlying contract should apply separate choices of law is not reflected in the final Sales Agreement. The contract only includes the choice of Mediterranean law as the law of the contract under Clause 14, which is right above the arbitration clause.

B. THE TRIBUNAL HAS THE JURISDICTION AND THE POWER TO ADAPT THE CONTRACT

27. We could conclude that the Tribunal has the jurisdiction of the adaptation of the contract from the literal construction of Clause 15 (1). And both parties expressly authorized the arbitral tribunal to adapt the contract (2).In addition, the conversation between the two parties which is stated as Parol Evidence happened after the contract can be applied under the Mediterranean law (3).

1. Both parties agreed in the contract let the arbitral tribunal to adapt the contract.

28. The clause 15 is an open provision as a result of the utilizing of the words "any" and "including" (a), as well as the case suggests that the arbitration clause contains such words can be interpreted broadly (b).

a. Clause 15 can be interpreted to include the adaptation of the contract literally under the Mediterranean law.

29. The tribunal's jurisdiction is not limited to what Clause 15 has listed according to the interpretation of the words claimed in the Clause. First of all, the word "Any" in the Merriam-Webster Dictionary, an authorized dictionary, means: used to indicate a person or thing that is not particular or specific. Therefore, the sentence pursuant to Clause 15 means that the aspects that enumerating under this clause not only encompass the following particular citations, but also other aspects equivalent to those parts associated with the contract. On top of that, the word "including" in the Merriam-Webster Dictionary means to have (someone or something) as part of a group or total, i.e. rather than indicate all the items that was under the jurisdiction of HKIAC.

30. The two words jointly demonstrate that the jurisdiction of HKIAC contains all the listing contents in the Clause 15 as well as those which are equivalent to them and related to them.The adaptation of a contract and termination of the contract are equivalent.Pursuant to Art.29 (1) CISG, "A contract may be modified or terminated by the mere agreement of the parties." the adaption and the termination of the contract are mentioned equally in an international contract law. Accordingly, the adaptation of the contract is equivalent to the aspects listed in Clause 15.To sum up, adaptation of the Sales Agreement shall be under the jurisdiction of HKIAC pursuant to the literal construction of Clause 15.

b. Similar adoption of an equivalent concept of the listing requirements has been made in formal arbitration.

31. When it comes to the standard clause of other arbitral institution, it is obvious that clause 15 is

not an exhaustive list.To illustrate, the sample arbitration clause of the LCIA is as followed: " *Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.* " Many arbitration cases demonstrate that LCIA regulates the breach and resolution of the contract which are not listed in the sample provision of LCIA, i.e. we cannot assume that the LCIA only wishes to regulate the three aspects of the contract included and refuses the others seeing that the sample arbitration of LCIA merely list those three concepts.

32. For example, in one case under the jurisdiction of LCIA, the court regulates the breach of the contract, while the two parties apply the sample of the arbitration clause which does not explicit the breach of the contract [*Arricano Real Estate PLC v. Stockman*].The unmentioned breach of the contract which is equivalent to the three aspects listed in the sample arbitration of LCIA can be regulated under the jurisdiction of LCIA, in turn, the unmentioned adaptation of the contract which is equivalent with the aspects listed in Clause 15 can be regulated under the jurisdiction of LCIA.

2. Both parties have expressly authorized the tribunal to adapt the contract

33. Under the UNCTRAL MODEL LAW 28(3): " The arbitral tribunal shall decide et bono or as amiable compositeur only the parties have expressly authorized it to do so ". [*UML Art.28(3)*] From the drafting history, "Mr. Antley replied that in his view that it should probably by the task of the arbitrators to adapt the contract if the parties could not agree". Mr. Antley is the official representative of the RESPONDENT and all his actions are attributable to the RESPONDENT. Although he is not the last party to the contract, but the two acts have consistency, are the actions of the RESPONDENT. We can clearly see that both parties have expressly authorized the tribunal to adapt the contract.

3. The Parol Evidence which witnesses the consent of the adaptation shall be applied under the Mediterranean Law.

34. The Parol Evidence could be cited to interpret the contract pursuant to the prospectus of the advisory council of CISG (a). Additionally, the Parol Evidence suggests that the two parties had made an agreement to adapt the contract (b).

a. The Parol Evidence can be cited as the adaptation of the contract.

35. Applying the Mediterranean law means the arbitration clause can be interpreted broadly. "Like in most other jurisdictions the Arbitration Law of Mediterraneo provides for a broad interpretation of arbitration agreements, irrespective of an allegedly narrow wording merely referring to "dispute(s) arising out of this contract".
36. The arbitration is governed by the CISG which included in the Mediterranean law [*Cl. Ex. C5 cl.14*]. According to the Advisory Council's third prospectus, the Parol Evidence rule is precluded, i.e. the Parol Evidence can be applied.

b. The Parol Evidence demonstrates that the two parties have consent to the adaptation of the contract.

37. According to Art.29 (1) CISG, "*A contract may be modified or terminated by the mere agreement of the parties*." The requisite of adapting the contract is that the consent of the parties need to be made.
38. The consent of the two parties is made. In the beginning, on 20 January, 2018, CLAIMANT contacted RESPONDENT by emailing that "*we will have to find a solution in that regard before we can start the shipment, which was supposed to go out on 22 January 2018*" [*Cl. Ex. C7*]. In that context, the solution is just a polite way of asking to increase the price and is not appropriate to have another explanation.
39. And the agent of RESPONDENT Greg Shoemaker said "*he was certain that a solution would be found through negotiation given the good relationship between the Parties and their interest in further business*." [*Cl. Ex. C8*] And Mr. Shoemaker wrote that "i*f the contract*

provides for an increased prize in the case of such a high additional tariff we will certainly find an agreement on the price." [*Re. Ex. R4*].

40. Now, under the circumstances of the high tariff, CLAIMANT reckons that the adaptation of the contract is permitted and agreed among the two parties. The use of the word "solution" which is the same as CLAIMANT stated in the letter, and the impression of RESPONDENT's reply assured CLAIMANT that the two parties will negotiate the adaptation of the price. Thus, CLAIMANT authorized the delivery of the third shipment based on the reliance that RESPONDENT will increase the price.

41. Consequently, CLAIMANT could safely conclude that the two parties had made the oral consent to adapt the contract. And, adapting the contract by oral means is not precluded under CISG.

C. EVEN IF THE COURT DEEMS THAT THE PARTIES FAILED TO REACH AN AGREEMENT AMONG THE PRICE, THE COURT HAS THE POWER TO ADAPT THE CONTRACT WHEN EACH PARTY RESORTS TO IT.

42. Pursuant to Art.6 (2) UNIDROIT [*Melis/Werner, p.3*] and the comment of this article, "if the court finds hardship it may, if reasonable, the court shall adapt the contract with a view to restoring its equilibrium." In accordance with this article, if CLAIMANT has requested a renegotiation upon the RESPONDENT (1) and holds performance when CLAIMANT requests the negotiation and constitutes the conditions to resort to the tribunal (2), the tribunal has the power to determine whether the fact belongs to hardship circumstances and if it is reasonable, in turn, the tribunal has the power to adapt the contract.

1. CLAIMANT has requested a renegotiation upon the RESPONDENT.

43. Pursuant to Art.6 (2) UNIDROIT [*Melis/Werner, p.3*] In the case of hardship the disadvantaged party is entitled to request renegotiations. When the tariffs of Equatoriana increased 30%, CLAIMANT had a loss of US$ 1,250,000. CLAIMANT is obviously the disadvantaged party and it sent a renegotiation requirement on 20 January, 2018 [*Cl. Ex.*

C7] (a), which was later accepted by the RESPONDENT (b).

a. CLAIMANT has requested renegotiation without delay.

44. The news of the increase of the tariff was on 20 December 2017 [*Cl. Ex. C6*]. And, within a month, CLAIMANT sent the request of renegotiation to the RESPONDENT immediately on 20 January 2018 after they received the message from the customs authorities that the tariff of 30% is applicable to the shipment [*Cl. Ex. C7*]. Thus, CLAIMANT did not postpone requesting the renegotiation.

b. CLAIMANT has set forth the grounds of the requirement, which was accepted by the RESPONDENT.

45. CLAIMANT has explicitly stated that the reason of the renegotiation was the increased 30% tariff of the third shipment and "that makes this shipment 30% more expensive." [*Cl. Ex. C7*] The RESPONDENT was not suspicious on the necessity of renegotiation andreplied that" if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price." [*Re. Ex. R4*]. The word "such" indicates that even the RESPONDENT defined this situation as an obvious rational ground. To fill up, according to Art.6 (2) UNIDROIT [Melis, p.3, comment 3], when the grounds of the renegotiation are very obvious, CLAIMANT even did not need to spell out in the request.

2. CLAIMANT holds performance when requesting the negotiation and constituting the conditions to resort to the court.

46. Two conditions need to be met before CLAIMANT is entitled to resort to court in the case of hardship, which referring to that CLAIMANT authorized delivery of the shipment as planned (a) and that CLAIMANT constitutes the conditions to resort to the court (b).

a. CLAIMANT authorized delivery of the shipment as planned.

47. On the basis of the faith that the RESPONDENT may bear the bulk of the additional costs due to the tariff increase and their long-term relationship that CLAIMANT sent the shipment on time which is conformed to the Sales Agreement [*Cl. Ex. C8*].

b. CLAIMANT constitutes the conditions to resort to the court.

48. Pursuant to Art.6 (2) UNIDROIT [*Melis, p.3, comment 6*], each party may resort to the court upon failure to reach an agreement. CLAIMANT was informed in the meeting of 12 February 2018 that the RESPONDENT was no longer interested in a further cooperation with CLAIMANT as well as the RESPONDENT stopped the negotiations. Additionally, the RESPONDENT refused to pay any additional amount for the tariffs [*Cl. Ex. C8*].
49. On the grounds that the negotiation ceased and didn't have a positive outcome, CLAIMANT has the right to resort to the court. And the court has the power to define the case and decide whether it is reasonable to adapt the contract.

CONCLUSION OF TNE FIRST ISSUE

50. The contract is governed by the law of Mediterraneo which can be concluded from the negotiation and the Sales Agreement between the Parties. The tribunal has been empowered to adapt the contract.

II. CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS ON THE BASIS OF ASSUMPTION THAT THIS EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM.

51. The evidence from the other arbitration proceedings on the basis of assumption that it had been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's computer system can be submitted by CLAIMANT. This issue is developed in these three aspects. First, a flexible rule of evidence can be applied (A). Second, CLAIMANT can submit the evidence as the result of a violation of a confidentiality agreement claimed by RESPONDENT (B). Third, CLAIMANT can submit the evidence coming from a suspiciously unlawful means claimed by RESPONDENT (C).

A. A FLEXIBLE RULE OF EVIDENCE CAN BE APPLIED.

52. The arbitration is characterized by the finality and the efficiency. Thus, the parties are free to submit evidence as much as they can (1). When the tribunal is evaluating the evidence, a flexible rule of evidence can be applied for the sake of efficiency (2).

1. CLAIMANT is free to submit any evidence.

53. Subject to the principle that arbitration should be conducted in an orderly and efficient manner that ensures equal treatment of the parties, the parties to an international arbitration are generally free to submit any evidence they wish in order to prove the facts necessary to establish their respective cases [*PIETROWSKI, p.373*]. Therefore, CLAIMANT has the right to submit the evidence as the result of a violation of a confidentiality agreement and coming from a suspiciously unlawful means claimed by RESPONDENT.

2. A flexible rule of evidence can be applied for the sake of efficiency of the procedure of the arbitration.

54. Pursuant to the Preamble of the IBA guide line, the rules are not intend to limit the flexibility of the evidence. Evaluating such evidence remains within the full discretion of arbitral tribunals [*Blair/Gojkovic, p.238*]. Nevertheless, the procedure of most international tribunals is characterized by an absence of restrictive rules governing the form, submission and admissibility of evidence [*PIETROWSKI, p.408*]. In the absence of such provisions, arbitral tribunals have the implied authority to resolve issues of admissibility, weight and relevance of the evidence [*Born, p.2309*]. Despite wide discretion when it comes to the treatment of evidence, tribunals rarely exclude evidence as inadmissible. The reason for this is that the flexible rule is applied by the arbitral tribunal in the arbitration, which means that the arbitral tribunal is not bound by the strict rules of evidence applicable in municipal courts and it generally admits all documents submitted by the parties as long as the evidence assists the tribunal in establishing the truth with respect to disputed facts [*PIETROWSKI, p.408*]. In theory and practice, the commercial arbitration rules are farless stringent rules of evidence [*LLC v. Ajamie; Williamson v. John D. Quinn Construction Corp*]. Arbitrators are freed from having to observe the strict rules of evidence under domestic legal regimes [*Born, p.1701*]. The French provisions applicable to international arbitration exclude the strict application of judicial procedural and evidential rules. Arbitral tribunals in international cases tend not to apply formal rules relating to the admissibility of evidence. In general, they will read or listen to whatever the parties wish to put forward, even over the objections of the other party. Also in the UK, there is no directly binding precedent that requires arbitration in accordance with the law of evidence [*Yang, p.627*].

55. The application of flexible rules of evidence in the international arbitration is because of the finality of the arbitration. Pursuant to the Art.34 (2) UNCITRAL Rules, all awards shall be made in writing and shall be final and binding on the parties. There is so little space for appeal or other remedies against the arbitral award, tribunals tend to allow

access to as much evidence as possible to help them reach just and well-supported decisions [*Blair/Gojkovic, p.239*]. In addition, in order to avoid complicated procedures and the law of evidence, the arbitral tribunals will apply flexible rules of evidence [*Yang, p.631*]. Thus, tribunals generally admit all documents submitted by the parties and admit any testimonial evidence offered by the parties. Moreover, arbitral tribunals may admit and evaluate even such evidence as was obtained unlawfully [*Blair/Gojkovic, p.241*].

56. Consequently, for the sake of the efficiency of the procedure of the arbitration and CLAIMANT's interest, a flexible rule of evidence can be applied.

B. CLAIMANT CAN SUBMIT THE EVIDENCE AS THE RESULT OF A VIOLATION OF A CONFIDENTIALITY AGREEMENT CLAIMED BY RESPONDENT.

57. For one thing, there is no legal basis for RESPONDENT to allege that CLAIMANT falls in the scope of confidentiality obligation of an irrelevant arbitration (1); for another, the evidence in question is in accordance with the requirements stated in Art.45.3. (a)(i) of HKIAC Rules (2).

1. CLAIMANT is not bound by the confidentiality obligation of another arbitration involved RESPONDENT.

58. When interpreting Art. 45.1 and Art. 45.2 of HKIAC Rules in its ordinary meaning, it is obvious that only certain people are bound by confidentiality obligation of a specific arbitration, namely both parties and their representatives, arbitral tribunal, any emergency arbitrator, expert, witness, tribunal secretary and HKIAC itself. There is no sign of a third-party who has no involvement in the arbitration during the whole process.

59. In the present case, CLAIMANT has never participated in the other arbitration concerned RESPONDENT. Clearly CLAIMANT is not on the list of which confidentiality obligation covers. From the procedure No. Order 2, CLAIMANT bought the information from a company, and the outdated firewall could not perfectly protect the RESPONDENT's

computer system.The information had been sent to public domain.Thus, CLAIMANT has no obligation to act in RESPONDENT's favor, not informing the tribunal of a highly contradictory position of RESPONDENT.

2. Additionally, CLAIMANT's submission of evidence is in accordance with the conditions regulated in the Art.45.3 (a)(i) of HKIAC Rules

60. On the one hand, Art.45 of HKIAC Rules concern conditions where confidentiality conflicts with a duty to disclose information about the arbitration. Their purpose is to resolve conflicts between the duty of confidentiality and the duty of disclosure irrespective of their origin in favor of the latter. This is particularly evidenced by Art.45.3. (a)(i). It states that Art. 45.1 does not prevent the disclosure of information referred to in Art. 45.1 by a party to protect or pursue a legal right or interest of the party. This means that a party is entitled to disclose the necessary information during a pending arbitration. RESPONDENT agreed to the HKIAC Rules, and thus also to these conditions to confidentiality.

61. On the other hand, the obligation of confidentiality is not absolute [*Collier/Lowe, p.187; Born, p.300*]. The disclosure of arbitration is one of the exceptions which aim to protect a legitimate interest of an arbitrating party [*Berger, p.290*]. If it had not been the evidence obtained from the other arbitration proceedings, CLAIMANT would not have been aware of the RESPONDENT's bad faith behaviors. Therefore, for the purpose of protecting its legal rights under the present case, it is necessary for CLAIMANT to submit evidence even from a slightly abrupt way.

C. CLAIMANT CAN SUBMIT THE EVIDENCE COMING FROM A SUSPICIOUSLY UNLAWFUL MEANS CLAIMED BY RESPONDENT.

62. The disclosure of information is not inspired by CLAIMANT. Therefore, the evidence cannot be excluded (1). Even if RESPONDENT manages to convince the tribunal that the assumptions are real, the evidence is not necessarily excluded (2).

1. The leak of information is not instructed by CLAIMANT

63. It is well-established in civil lawsuit, including international commercial arbitration as a common practice that "the party which asserts must prove". In the present case, RESPONDENT's requirement on exclusion of evidence detrimental to it is only based on guess that the evidence is either gained by a breaching of confidentiality or through an illegal heck. In both scenarios CLAIMANT has no instruction or involvement, that is to say, the information leak is not caused by CLAIMANT in the intention to achieve advantages. Claimant merely brings what has already been in the public awareness to the arbitration proceedings. Unless RESPONDENT takes on the burden of proof to prove otherwise, assumption is no substitute for truth.

2. Even if CLAIMANT is involved, the evidence cannot be excluded.

64. As is stated above, CLAIMANT is not involved in obtaining the related document by illegal means, and even if it is involved, the evidence should not be excluded considering the evidence's materiality to the outcome of this case. Not all illegally obtained evidence should be automatically excluded (a). The evidence from the other arbitration should not be excluded considering its materiality to the outcome of the case (b).

a. Not all illegally obtained evidence should be automatically excluded.

65. Due to the absence of clear rules on the exclusion of illegally obtained evidence in HKIAC Rules, there is no legal basis in this case that evidence obtained illegally shall be automatically disqualified as inadmissible. Strict exclusionary rule of illegally obtained evidence applies only to criminal cases, but not to civil cases. Actually, the rule of excluding illegal evidence originated in the United States. In 1914, the U.S. Supreme Court created the exclusionary rule of illegal evidence in criminal proceeding [*Sharon, p.9*]. And now in most nations, there exist specific standards to exclude illegally obtained evidence in criminal prosecution. But it is hard to find rules about the exclusion of unlawfully obtained evidence in civil controversies. The reason for this is that in criminal

suit, the main aim of exclusion of unlawfully obtained evidence is to protect citizens' basic rights and prevent the abuse of police power while in civil lawsuit, there is no worry about that.

66. Considering the difference between criminal cases and civil cases, the evidence obtained illegally can be admitted more flexibly in civil proceedings. For instance, in England where the judges have power of evaluating the admissibility of evidence and to exclude it, the court stated in the case Helliwell and Others v. Piggott-Sims, "I know that in criminal cases the judge may have discretion (...) but so far as civil cases are concerned, it seems to me that the judge has no discretion. The evidence is relevant and admissible. The judge cannot refuse it on the ground that it may have been unlawfully obtained in the beginning." [*Helliwell and Others v. PiggotSims*] This case manifests that the parties' right to be heard should be fully protected even if the evidence may be obtained unlawfully. Not only in the domestic court, but also in the International Court of Justice, the unlawfully obtained evidence was admitted.

67. Therefore, maybe we can hardly draw a conclusion that all illegally obtained evidence can be admitted in civil cases, but at least, we can definitely conclude that when judges or arbitrators decide whether or not to admit evidence obtained illegally, they should take the evidence's materiality to the outcome of the case and the interest of justice into consideration.

b. The evidence from the other arbitration should not be excluded considering its materiality to the outcome of the case.

68. In this case, the evidence from the other arbitration is relevant and material to the outcome of the arbitration because it proves the bad faith of RESPONDENT. This evidence directly manifests the inconsistencies of RESPONDENT in two similar arbitrations. In the other arbitration, RESPONDENT who is denying any need to adapt the contract to a change of circumstance had itself asked for an adaptation of the price invoking an unforeseeable change of circumstances. It is doubtless that if this evidence is

allowed to submit, the tribunal will be more certain that the price should be adapted. Therefore, the evidence is relevant and material to this case's result. Despite the defect of it, the evidence should also not be excluded considering the party's right to be heard and the interest of justice.Therefore, CLAIMANT can submit the evidence coming from a suspiciously unlawful means alleged by RESPONDENT.

CONCLUSION OF THE SECOND ISSUE

69. CLAIMANT is entitled to submit evidence from the other arbitration proceedings in the basis of assumption that this evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's computer system.

ARGUMENT ON THE MERITS

III. CLAIMANT IS ENTITLED TO THE PAYMENT OF US$1,250,000 RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT, EVEN IF NOT, CLAIMANT IS ENTITLED UNDER CISG.

71. CLAIMANT and RESPONDENT signed their contract named Frozen Semen Sales Agreement on 6 May 2017 in which the purchase price was to be paid in two instalments and 100 doses of frozen semen to be shipped in three instalments [*Cl. Ex. C5, p.14*]. The Sales Agreement also provided in clause 12 that seller shall not be responsible for lost semen shipments…or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous [*Cl. Ex. C5, p.14, para.12*]. In November 2017, Mediterraneo's newly elected President announced 25 per cent tariffs on agricultural products from Equatoriana. One month later, the Government of Equatoriana imposed a tariff of 30 per cent upon all agricultural goods from Mediterraneo, which was subsequently confirmed also covered frozen semen used for artificial insemination in horse breeding [*Cl. Ex. R4, p.36, para.2*]. CLAIMANT contacted RESPONDENT on 20 January 2018 to express that it was difficult for CLAIMANT to shoulder the additional 30 per cent tariffs which had to be paid immediately, right after being told the news when preparing for the final delivery of 50 doses of frozen semen. Given the impression of RESPONDENT had accepted CLAIMANT'S position and they should bear the bulk of the additional costs due to the tariffs from which they emphasized their interest in a long-term relationship with CLAIMANT and their plan to buy another 50 doses, CLAIMANT paid the 30 per cent in tariffs before an agreement on the details had been reached [*Cl. Ex. C8, p.17*].
72. RESPONDENT erroneously alleges that CLAIMANT'S claim for an increased remuneration is completely baseless. Conversely, the CLAIMANT is entitled to the payment of US$1,250,000 or any other amount resulting from an adaptation of the price under clause 12 of the contract (A). The CLAIMANT is entitled to the payment of

US$1,250,000 or any other amount resulting from an adaptation of the price under the CISG (B). The RESPONDANT is responsible for the adaptation of the contract and the payment should be US$1,250,000 under the principle of fairness (C).

A. CLAIMANT IS ENTITLED TO THE PAYMENT OF US$1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE CONTRACT UNDER CLAUSE 12 OF THE CONTRACT.

72. RESPONDENT may allege that the parties had reached an agreement of a delivery term of DDP, under incoterms 2010, delivered duty paid (hereinafter DDP) is a delivery agreement whereby the seller assumes all of the responsibility, risk and cost associated with transporting goods until the buyer receives or transfers them at the destination port. However, the parties had reached an exception of DDP by including clause 12 of the contract during the negotiation, and CLAIMANT had explicitly express the intent that clause 12 of the contract should be reliance on ICC-Hardship clause, RESPONDENT did not object to it. Hence, CLAIMANT should not bear the tariff imposition which is fall into the scope of ICC-Hardship clause (1). Even if the increased imposition of tariff is not full-fill the requirements of ICC-Hardship clause or ICC-Hardship clause should not be invoked, CLAIMANT believes that the additional tariffs is still indisputably suitable for the force majeure and hardship clause in clause 12 of the contract (2). Additionally, The disadvantaged party is entitled to seek remedies and the adaptation of contract should be given priority. (3)

1. Provisions in clause 12 of the contract refers to ICC-Hardship clause according to the common intention of the parties, the additional tariffs is applicable to the requirements of hardship under ICC-Hardship cause.

73. Art. 8 (3) of the CISG stipulates that negotiations can reflect the intent of parties [*Schwenzer p.143*]. The parties had established the common intention referred to ICC-Hardship clause, because of the relevant circumstances including preliminary

negotiations about the parties. After CLAIMANT'S proposal on including a hardship clause [*Cl. Ex. C4*] and relying on ICC-Hardship clause to interpret the hardship clause [*Re. Ex. R2*], RESPONDENT did not challenge the necessity of a hardship clause or the admissibility of the general provision in ICC-Hardship clause but merely concerned it covers too broadly [*Re. Ex. R3*], which exhibits that RESPONDENT had understood the scope and meaning of ICC-hardship clause [*CoA, 17 Feb 2006*]. Subsequently, by adding a restrictive wording to the general hardship in relation to ICC-Hardship clause,the parties had mutually agreed on provisions in ICC-Hardship clause with modified scope of hardship. Therefore, the preliminary negotiations between the parties prove that their common intention was to apply the ICC-Hardship clause to the Sales Agreement.

74. The increased imposition of tariffs constitute a hardship and satisfy the following three requirements of hardship under ICC-Hardship clause.

a. The last shipment of frozen semen is excessively onerous for CLAIMANT due to the additional tariffs beyond its reasonable control.

75. The word "onerous" means needing great effort and causing trouble or worry [*OED-online*]. In this transaction, CLAIMANT only got the profit margin for 5 per cent. The additional tariffs for the frozen semen were 30 per cent, which easily made the Parties lose the profit and suffer a lost which is five times profit in this transaction and destroyed the basis of the long-term relationship [*NOA, p.6*]. Thus, it become excessively onerous for CLAIMANT to perform the duty of delivery as the cost for its performance had substantially increased [*Schwenzer*].

76. The additional tariffs is totally beyond CLAIMANT'S reasonable control. The tariffs imposition can be seen as an act of government which has a compulsory power, the behavior of one government would more easily be deemed that one party cannot control the events if one party did not have the direct connection to the government [*Russia CCI; Rimpi Ltd v. Moscow*]. In this case, CLAIMANT has no connection with the government. Thus, the occurrence of the addition tariffs cannot be controlled by CLAIMANT.

b. CLAIMANT could not reasonably have been expected to have taken the increased tariff into account at the time of the conclusion of the Sales Agreement.

77. The imposition of tariff as a restriction of Equatoriana is totally beyond CLAIMANT'S expectation. The government of Equatoriana have always tried to solve disputes amicably, the retaliation as well as the size of the tariffs came as a big surprise even to informed circles. Additionally, Equatoriana has always been the biggest supporters of the existing system of the trade [*Cl. Ex. C6*].

78. Even if the imposition of tariffs can be taken into CLAIMANT'S consideration, the semen used in racehorse breeding were covered by " agricultural good" is still unforeseeable. Drastic changes which are entirely different from common circumstances is the main factor to identify the fact that one party could not reasonably have taken the occurrence of the event into account [*UPICC commentary p.220*]. In common circumstances, the frozen semen is more classified as product for sports instead of agricultural good, because the semen is used sports purposes instead of agricultural ones. Therefore, it did not cross the parties mind that the frozen semen could be considered to be an "agricultural good'' which the tariffs would apply to. Consequently, CLAIMANT could not reasonably have been expected to have taken the increased tariff into account at the time of the conclusion of the Sales Agreement.

c. CLAIMANT could not reasonably have avoided or overcome the increased tariff or its consequences.

79. Under the general principle of pacta sunt servanda, CLAIMANT had to pay the 30 per cent tariffs on its own, which was unavoidable due to the imposed tariffs by the Government of Equatoriana and its obligation to deliver on time, at the time of their last delivery. However, the consequence of the increased tariffs could not overcome by CLAIMANT. CLAIMANT had suffered a financial difficult for about three years[*Cl. Ex. C5*]. If CLAIMANT had to bear the payment of US$1,250,000, CLAIMANT's restructuring plan would be seriously endangered, however, RESPONDENT would not be

financially endangered if it bear the US$1,250,000. [*PO2. Q29,30. p.59*] Consequently, CLAIMANT could not reasonably have avoided or overcome the increased tariff or its consequences.

80. Consequently, the increased imposition of tariffs satisfy the requirements of hardship under ICC-Hardship clause.

2. Even if the additional tariffs is not satisfy the requirements of ICC-Hardship clause, the tariff is still fall into the scope of force majeure and hardship clause in cause 12 of the contract.

81. Clause 12 of the contract clearly stipulated that "seller shall not be responsible for or acts of God neither for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." [*Cl. Ex. C5, p.14*] The words between "act of god" and "hardship" is "neither for", which illustrated that the event satisfy one of them, the force majeure and hardship clause shall be applied and the seller shall not be responsible for the hardship event. The additional 30% tariffs satisfy the three following elements of hardship in clause 12.

a. The increased imposition of tariffs is comparable with additional health and safety requirements.

82. During the negotiation, CLAIMANT had explicitly express the intent that CLAIMANT is not willing to take over any further risks associated with such a change which is comparable with health and safety requirements [*Cl. Ex. C4*]. The reason why the present additional tariffs is comparable with the health and safety requirements is that both of them are act of government which suddenly imposed higher cost for CLAIMANT to deliver goods through the customs. Additionally, both of them result in CLAIMANT'S considerable profit lost and increased its expenses through the deal [*PO2. Q21. p.58*]. Therefore, The increased imposition of tariffs is comparable with additional health and safety requirements clause 12 mentioned.

b. The additional 30% tariffs is an unforeseen event.

83. The word "unforeseen" means that you "did" not expect to happen [*OED-online*], The retaliation of imposing 30 per cent tariff was unforeseen because when the contract was concluded the Parties had not considered the tariffs. At least, even if the retaliation could be foreseen, it was not reasonable to expect CLAIMANT to include race horse semen in agricultural products. According to Black's Law Dictionary, agriculture is the science or art of cultivating soil, harvesting crops, and raising livestock. And race horse semen used in Equestrian, which is used for sport, apparently should not be included in agricultural products.

84. As is stated previously, CLAIMANT could not reasonably to have taken the additional tariffs into account at the time of the conclusion of the contract, because CLAIMANT have no connection with government, and the government of Equatoriana have announced the decision neither been part of any strategy papers nor of the election manifesto by the new president. Above all, it was unreasonable for CLAIMANT to expect race horse semen would be included into agricultural products that the tariffs apply to when finalizing the contract.

c. The imposed tariffs is making CLAIMANT'S performance of the contract more onerous.

85. As is stated previously, CLAIMANT has a financial difficult for about three years. If the considerable payment is bore by CLAIMANT, its restructuring plan would be destroyed and CLAIMANT's financial situation would endangered and merely result in a bankruptcy. Consequently, the additional tariffs is making the performance of the contract more onerous.

3. The disadvantaged party is entitled to seek remedies and the adaptation of contract should be given priority under Art.6.2.3 of the PICC.

86. In case of hardship, the disadvantaged party is entitled to request renegotiations and supposed to submit valid grounds in time with a view to adapting to the changed circumstances in accordance with Art.6(2) of the PICC. It is universally recognized that people tend to adapt the contract when confronting with such comparable hardship around the world. Additionally, European principles of contract law clearly states that if the performance of a contract becomes excessively difficult due to changes in circumstances, the parties shall consult to amend the contract or terminate the contract. The termination of the contract shall be on the basis of the impossibility of contract adaptation. It serves as complementary and auxiliary in dispute [*CARSTEN, p.20*]
87. After the increase of tariffs, Claimant immediately initiated renegotiations on alternative terms to maintain the equilibrium of the contract [*Cl. Ex. C7; Re. Ex. R2 para.2*]. However, Respondent's CEO became aggressive in a meeting and thereafter unilaterally stopped the renegotiations [*Cl. Ex. C8*]. Thus, the renegotiations on reasonable alternative terms failed due to the non-cooperative attitude of Respondent while Claimant had engaged in good faith.
88. Considering all the above, CLAIMANT is entitled to seek the requested remedy to adapt the price of the contract.

B. CLAIMANT is entitled to the payment of US$1.250.000 or any other amount by the adaptation of the contract under CISG.

89. RESPONDENT asserts that CLAIMANT cannot rely on Art. 79 of the CISG, for the Parties have provided an exclusion which constitutes a derogation in the sense of the CISG, and Art. 79 of the CISG neither regulates hardship nor provides for the remedy requested by CLAIMANT. On the contrary, the parties did not derogate from Art. 79 of the CISG explicitly or implicitly by including the force majeure and hardship Clause into the Contract (1). Additionally, "an impediment beyond control"in Art. 79 of the CISG can

be interpreted as hardship (2). Even if the impediment in Art. 79 of the CISG can not be interpreted as hardship, under Art.7 of the CISG, the impediment can be interpreted as changed circumstances along the the hardship provision in Art. 6.2 of the PICC (3). What's more, adaptation of contractual price is available under the CISG (4).

1. The Parties Did Not Derogate from Art. 79 of the CISG Neither Explicitly Nor Implicitly.

90. Firstly, the Parties can expressly exclude application of the CISG [*Russia CCI*]. However, The Parties only explicitly expressed that"This Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG)" [*Cl. Ex. C5, p.14, para.14*]. Secondly, According to some court decisions and an arbitral award, CISG cannot be excluded implicitly [*Forestal v. Daros*]. And the intent of the Parties to exclude must be determined in accordance with Art. 8 of the CISG, *i.e. statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that event is*. Such intent should be clearly manifested, either at the time of conclusion of the contract or at any time thereafter. In the present case, consequently, RESPONDENT's allegation is devoid of adequate support.

2. The impediment in Art. 79 of the CISG can be interpreted as hardship.

91. Under Art.79 of the CISG, it is clear that something which makes the performance objectively impossible can constitute an impediment [*Schwenzer*]. Here, Equatorianian 30% tariff imposition on agricultural products can constitute impediment. The only Article in the CISG that regulates changed circumstances is Art.79. Focus on the evolution procedure of Art.79, the word "impediment" in it was substituted for the word "circumstances" in order to disallow the granting of an exemption merely because performance became more difficult or unprofitable. Also, in a 2001 Dutch case, the court further implied that even though hardship is not a means to an excuse under Art.79 it still was within the scope of Art.79 of the CISG. [*D21 Case*]

92. In the Scafom International BV v. Lorraine Tubes S.A.S case [*Scafom International BV v. Lorraine Tubes S.A.S*], the Belgian Supreme Court dealt with the issue of hardship. In this

case, the parties have made an agreement about the sale of steel tubes, after the conclusion, the price unexpectedly has been increasing up to 70%. When the court asked whether such a hardship could be recognized as an impediment under Art.79 of the CISG, the court held an argument that the general principles of Art.79 of the CISG, especially the duty of good faith supported the inclusion of hardship within the scope of Art.79 of the CISG. Therefore, the impediment can be interpreted as hardship.

93. Hardship can also be applied to Art.79 of the CISG in legislation history. Change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("hardship"), may qualify as an "impediment" under Art.79(1) of the CISG. The language of Art.79 of the CISG does not expressly equate the term "impediment" with an event that makes performance absolutely impossible. Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Art.79 of the CISG. There are always changes and risks in international trade. When the change is a normal business risk, then the parties should be responsible, however, when the extreme economic situation that the parties cannot foresee changes constitute "impediment", the party's claim about exemption from liability because of force majeure in a situation of hardship is often viewed as necessary.

94. In conclusion, the Art.79 of the CISG should be interpreted broad as hardship.

3. Even if the impediment can not be interpreted as hardship, under Art.7 of the CISG, the impediment can be interpreted as changed circumstances along the the hardship provision in Art. 6.2 of the PICC.

95. Art. 7(2) of the CISG states that the issues concerning matters governed by CISG which are not expressly settled in it can be settled in conformity with the law applicable by virtue of the rules of private international law. One court also referred to the UPICC in support of a solution reached on the basis of the CISG [*Gaec v. Teso*]. Therefore, CLAIMANT is entitled to claim an application of the PICC. Firstly, the general contract law Equatoriana

and Mediterraneo is a verbatim adoption of the UPICC [*PO 1, p.52, para.7*]. Secondly, PICC may serve as a means to interpret or supplement the CISG [*Garro, p.1152; para.3*]. CLAIMANT will demonstrate that the imposition of the increased tariffs meets the requirements of a hardship in Art.6.2.2 of the PICC.

a. The occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished.

96. The criterion that whether an alternation is fundamental or not should be a circumstance of deciding case-by-case [*PICC commentary p.219*]. In the present case, the Claimant has made the third shipment and now make a loss of 25% due to the imposition of the new tariff of 30% on the product by the Equatorianian authorities. The sudden appearance of the tariff during the performance of the contract has dramatically increased the burden of the Claimant, thus affected the equilibrium of interests between two parties.

b. The events occur or become known to the disadvantaged party after the conclusion of the contract.

97. The finalization of the contract which was signed on 6 May 2017. And Equatorianian government retaliated by imposing 30% tariffs in November 2017. So the event occurred to the Claimant after the conclusion of the contract.

c. The events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract.

98. As is stated previously, The tariff imposition is a big surprise to Claimant, because Equatorianian's government has always been an ardent supporter of free trade. But this time it acted totally the opposite, which is beyond Claimant' s expectation.

d. The events are beyond the control of the disadvantaged party.

99. As is stated previously, Equatorianian's tariff imposition involving Mediterraneo is a governmental act which the Claimant cannot control.

e. The risk of the events was not assumed by the disadvantaged party.

100. The increase of tariffs directly made the Claimant lose a 5% profits,and suffered a 25% loss. Therefore, the Claimant is the disadvantaged party and isn't liable for the risk of this events.. The nature of the contract determines the allocation of risks [*PICC commentary p. 221*]. The Incoterms usually stipulate the allocation of the risks of import and export. However, in this case the Parties negotiated the allocation of risks which derogated the validity of the DDP [*Cl. Ex. C4, p12; Cl. Ex. C5, p14*]. Art. 8 (1) and (3) of the CISG state that negotiations can interpret the intent of Parties in the contract. Thus, when concluding the contract, the Parties indicated that the risks must not be taken by CLAIMANT [*ICC Mar*]

101. Consequently, the additional tariffs constitute a hardship under Art.6.2.2 PICC.

4. Adaptation of contractual price is available under the CISG.

102. One of the main goals of CISG is to promote the global free trade. To stabilize and facilitate this international commerce, it is essential to make the best use of contracts, and only the fundamental breach can constitute the termination of the contract. Since contract has set up the equilibrium of interests between the parties, when the equilibrium of the contract is disturbed, it is the best way to adjust this balance by applying the adaptation of contract. This power of adaptation should not be excluded, merely because there is no provision in CISG.

103. There exists the implied adaptation of contract in CISG. Although there is no provision explicitly stipulating the adaptation of contract, CISG indeed has the implied adaptation of the contract.According to the Art. 46 of CISG, the content of contract could be changed by delivering the substitute goods or by providing with repair work. Besides, the adaptation

of the price is also available, according to Art. 50 of the CISG, the reduction of the price is also available when the seller has the breach of the performing.

104. Even if the arbitral tribunal draw a conclusion that adaptation of contractual price is not available under the CISG, CLAIMANT can also submit that adaptation of contractual price is available under Art.6.2.3 PICC which CLAIMANT just mentioned.

C. CLAIMANT is entitled to the payment of US$1,250,000 by the adaptation of the price under the principle of fairness.

105. To rack the tariff increases, parties entered into negotiation. In view of long-term cooperation, the parties agreed the adaption of the price (1). Even if the parties did not agree to adapt the price as RESPONDENT argues (though its allegation is not true), the principle of fairness should be applied when it comes to allocate the burden under hardship clause (2)

1. The parties agreed the adaption of the price.

106. Firstly, CLAIMANT had already emphasized that "please call me back as soon as possible. I have put the shipment presently on hold but can still authorize it until tomorrow evening, i.e. the 21st.", which may be deemed that CLAIMANT made an offer to RESPONDENT to adapt the price [*Cl. Ex. C7*].

107. Secondly, Mr. Shoemaker stated that "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price." [*Re. Ex. R4*]. Mr. Shoemaker is responsible for the development of the racehorse breeding program and CLAIMANT had delivered the third shipment on the basis of trust in the staff of RESPONDENT'S agreeing to adapt the price.

108. As is regulated in Art.29 of the CISG, a contract may be modified or terminated by the mere agreement of the parties. A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct

from asserting such a provision to the extent that the other party has relied on that conduct [*CISG Art.29*]. Practically, the oral proposal to modify the contract can be deemed as "his conduct from asserting" [*LI WEI, p.146*].

109. According to the facts of the case, the behavior of RESPONDENT indicated that RESPONDENT had reached agreement with CLAIMANT on modifying the contract. Therefore, the parties agreed the adaption of the price.

2. Even if the parties did not agree to adapt the price, the principle of fairness should be applied when it comes to allocate the burden under hardship clause.

110. CLAIMANT recognized that RESPONDENT resale the semen to 10 different breeders at a price that is 20 percent higher than they initially bought from the CLAIMANT [*PO2. Q20. p57*]. During the negotiation, CLAIMANT explicitly express the intent that RESPONDENT should not resale the frozen semen to third parties without an "express written consent" from CLAIMANT to be able to control the further use of semen [*Cl. Ex. C2*] Additionally, CLAIMANT added an express information requirements to the section defining the mares in the template of the contract [*Cl. Ex. C5*], which illustrates that the frozen semen should only can used on the certain meres.

111. Stud owners have a preference that the semen is used on meres with certain pedigree [*PO2. Q19. p57*]. As a consequence, CLAIMANT believes that RESPONDENT's act of reselling the semen to uncertain meres will strongly influence the success of offsprings and destroy the reputation of Nijinsky III. Therefore, RESPONDENT breach the general principle of fairness.

112. As E.D.D. Tavender said in his article, "tailoring special arbitration clauses to address the extent of fairness required in a given case or commercial relationship has special appeal. It helps parties strike a balance between the benefits of arbitration and the objectives of fairness obtainable through litigation." [*E.D.D. Tavender, p.511*]. It indicates that the principle of fairness should be utilized when it comes to the application of hardship clause.

CONCLUTION OF THE THIRD ISSUE

113. Firstly, The additional 30% tariffs constitute a hardship which is an exception of DDP, no matter under ICC-Hardship cause or the narrow-limited definition of hardship in clause 12 of the contract. Secondly, clause 12 of the contract and CISG provide the requested remedy to adapt the price of the contract. Thirdly, RESPONDENT resale the frozen semen to third parties breach the general principle of fairness.

REQUEST FOR RELIEF

On the basis of the above CLAIMANT requests the Arbitral Tribunal:

1. to order RESPONDENT to pay an additional amount of US$1,250,000 which is 25 per cent of the price for the third delivery of semen;
2. to declare that the arbitration agreement between CLAIMANT and RESPONDENT is governed by the law of Mediterraneo;
3. to declare that the evidence from the other arbitration proceedings that this evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT' s Computer system can be accepted by the Arbitral Tribunal;
4. to order RESPONDENT to bear the costs of the arbitration.

Certificate:

We, on behalf of the Team for North China University of Science and Technology hereby certify that the memorandum was written only by the persons whose names are listed below, and also signed this certificate. We also confirm that no person other than a student team member has participated in the writing of this Memorandum.