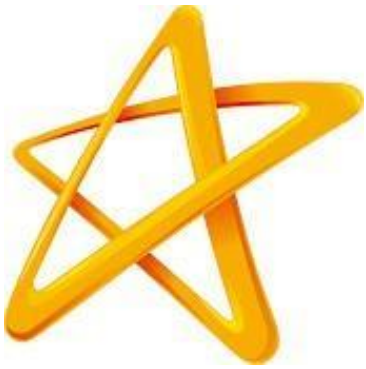
XXVI ANNUAL WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

Arbitral Proceedings HKIAC/A18128



CENTRO UNIVERSITARIO DE JOAO PESSOA (UNIPÊ)

MEMORANDUM FOR RESPONDENT

Phar Lap Allevamento (Mediterraneo)
(CLAIMANT)

Black Beauty Equestrian (Equatoriana)
(RESPONDENT)

MATHEUS MEIRELES – TAIRLA ARAGÃO – JESSYLA MELQUIADES – AQUILES CALOU – MELISSA CARVALHO – VINICIUS TRAJANO – EVELYN LOPES – JOÃO VICTOR – MANUELA ANDRADE – VINICIUS BORGES

To:
ARBITRAL TRIBUNAL

◊ Prof. Calvin de Souza
Happy Valley Road 79 1011 Vindobona Danubia
caldesouza@happyvallye.da

◊ Ms. Wantha Davis
14 Churchill Downs, Capital City, Mediterraneo
wdavis@capitalcity.me

◊ Dr. Francesca Dettorie
Circus Maximus Avenue 1, Derby Equatoriana
drfdettorie@derby.eq

C.c.:
RESPONDENT

◊ CHRIS
ANTLEY Black Beauty
Equestrian
2 Seabiscuit Drive Oceanside, Equatoriana T: (0)214 669804
blackbeauty@blackbeauty.eq

◊ JULIA CLARA
FASTTRACK Advocate at the Court
14 Capital Boulevard Oceanside Equatoriana
Tel. (0) 214 77 32 Telefax (0) 214 77 33
fasttrack@host.eq

HKIAC

◊ MR. FORMULA WAN
Hong Kong International Arbitration Centre
38th Floor Two Exchange Square 8 Connaught Place Central
Hong Kong

Ref.: Arbitral Proceedings HKIAC/A18128

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

CAS	Court of Arbitration for Sport
CISG	United Nations Convention on Contracts for the International Sale of Goods
et seq./et seqq.	and the following
FSA	Framework and Sales Agreement
FSSA	Frozen Semen Sales Agreement
HKIAC	Hong Kong International Arbitration Centr
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
UNCITRAL	United Nations On International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

INDEX OF AUTHORITIES

Schlechtriem, Peter. Excerpt from Uniform Sales Law: The Experience with Uniform Sales Laws in the Federal Republic of Germany, Juridisk Tidskrift (1991/91)

Toma, Elisa 'The principle of equality of arms – part of the right to a fair trial' cited as: Toma

Gordley, James. Impossibility and Changed and Unforeseen Circumstances, 52 American Journal of Comparative Law (2004)

Hellner, Jan. The Vienna Convention and Standard Form Contracts, in: Sarcevic & Volken ed., International Sale of Goods: Dubrovnik Lectures, Oceana (1986)

Jenkins, Sarah H. Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles - A Comparative Assessment, 72 Tulane Law Review (1998)

Kessedjian, Catherine. Competing Approaches to Force Majeure and Hardship, 25 International Review of Law and Economics (2005/3) 641-670; see also Joseph Lookofsky [Denmark, Commentary on Catherine Kessedjian's "Competing Approaches", 25 International Review of Law and Economics (2005/3)

Flechtner, Harry M. Issues Relating to Exemption (Force Majeure) under Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG), University of Pittsburgh Legal Studies Research Paper No. 2008-08. Material prepared for 4th edition of Honnold, Uniform International Sales under the United Nations Convention, Kluwer (2009)

Flechtner, Harry M. The Exemption Provisions of the Sales Convention, including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court, [papers from Uniform Sales Law: the CISG at its 30th Anniversary, a conference in memory of Albert H. Kritzer, 12-13

November 2010, Belgrade] The Annals of the Faculty of Law in Belgrade - Belgrade Law Review, Year LIX (2011).

Fucci, Frederick R. — Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts: Practical Considerations in International Infrastructure Investment and Finance, presentation at Spring Meeting (April 2006) American Bar Association, Section of International Law, 43 p.

DiMatteo, Larry A. — Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines.
Cited as: DiMatteo.

Lookofsky, Joseph. — Walking the Article 7(2) Tightrope Between CISG and Domestic Law, 25 Journal of Law and Commerce 87 (2005) (discussing Nuova Fucinati S.p.A. v. Fondmetall International A.B. and the applicability of domestic hardship rules to the CISG).

Stoll, Hans; **Gruber,** Georg. — Commentary on the UN Convention on the International Sale of Goods (CISG) Article 79, 819-22 (Oxford University Press, 2d ed. 2005) (discussing acts or omissions of a third party when the seller has no control over the choice of the supplier or its performance)

Kuster, David; **Andersen**, Camila Baasch. — Hardly Room for hardship – a functional review of article 79 of the CISG.

INDEX OF ARBITRAL AWARDS

ICC, London
Date: 2013
Award No. 4071
Parties: Habas vs VSC
Cited as: ICC No. 4071

INDEX OF JUDICIAL AWARDS

Singapore

High Court of Republic of Singapora
2016
No 502 of 2016
Cited as: BCY

High Court of Republic of Singapore
2016
No 539 of 2016
Cited as: Cassa Case

High Court of Republic of Singapora
2013
No 5657 of 2013
Cited as: FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others

High Court of Republic of Singapore
2015
No 75 of 2015
Cited as: Piallo Case

United States of America

Court of Appeals For The First District of Texas
2014
No. 01-12-00953-CV
Cited as: Davis v. Andrews

United Kingdom

Court of Appeal
2007
No 2007/1282
Cited as: C v D EWCA Civ 1282

Court of Appeal
2012
No A3/2012/0249
Cited as: Sulamerica case

Court of Appeal
2004
Unknown
Cited as: Peterson Farms Case

England and Wales High Court

2014

EWHC 2654

Cited as: Viscous Global Investments Ltd v Palladium Navigation Corporation

Italy

Nouva Fucinati S.p.A v. Fondmetall International A.B.

Germany

Iron Molybdenum Case
German Provincial Court of Appeal
Case no. 1 U 167/95
28 February 1997
Cited as: Iron Molybdenum Case

STATEMENT OF FACTS

The parties to this arbitration are Phar Lap Allevamento (hereafter CLAIMANT) and Black Beauty Equestrian (hereafter RESPONDENT).

CLAIMANT: a company registered and located in Capital City, Mediterraneo. It operates Mediterraneo's oldest and most renown stud farm, covering all areas of the equestrian sport.

RESPONDENT: Oceanside, Equatoriana, is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions.

21 March 2017 Black Beauty (RESPONDENT) contacted Phar Lab (CLAIMANT) to buy Nijinsky III semen for its newly started breeding programme.

Not provided As there was a temporary lifted the ban on artificial insemination in Equatoriana, CLAIAMANT found odd the high number of dosage ordered by RESPONDENT, but after a conversation through e-mail agreed on 3 different shipments for the 100 doses.

24 March 2017 CLAIMANT then made an offer by e-mail 100 doses costing $9,950.00 per dose.

Respondent insisted on incoterm DDP (Delivered Duty Paid and objected to the choice of law and forum selection clause.

Claimant accepted delivery DDP. However it would increase the value by $1,000.00 per dose and should be included a hardship clause.

12 April 2017 Due to an tragical accident that incurred to the two main negotiators in Danubia, Ms. Napravnik and Mr. Antley, the finalization of the agreement took longer than expected

06 of May 2017 They were replaced and the contract was finalized and signed. However, some of the information that was previously discussed between the first two negotiators were not included on the contract, such as the law that would govern the arbitration agreement.

20 May 2017 The first 25 doses were delivered.

03 October 2017 Second delivery was made.

November 2017 Ian Bouckaert, Mediterraneo's newly elected president, announced a 25% increase tariffs on agricultural products from Equatoriana.
It was not at any moment included on the strategy plans nor the election manifesto. In any way, it increased a great deal the costs to CLAIMANT that previously would only have a 5% profit, would

suffer a loss of 25%.

Short period Equatorian Government retaliated by imposing 30% on selected products from Mediterraneo including on animal semen.

CLAIMANT knownin about the new increased tariff contacted RESPONDENT to discuss the adjustment of the price. However, RESPONDENT asked for the doses to be delivered upon schedule and made no reservation to the adjustment that should be made.

23 January 2018 Remaining 50 doses were delivered before an agreement upon the new price was made.

PROCEDURE

ISSUE 1) THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION AND POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

A. Background

1. The Tribunal [hereafter Tribunal] is respectfully requested to find that it derives the necessary power and jurisdiction under the arbitration clause (contained within the Frozen Semen Sales Agreement) to hear Claimant's request for the following orders:

   a. Respondent is ordered to pay to Claimant an additional amount of US$ 1,250,000 which is 25 per cent of the price for the third delivery of semen;

   b. Respondent bears the costs of the Arbitration.

2. It will be demonstrated that this Tribunal does not have the necessary jurisdiction and powers to decide upon Claimant's request for relief. In particular it will be shown that:

   a. The correct Law governing the arbitration clause and its interpretation is Danubian Law;

   b. The Tribunal does not have the jurisdiction and powers to adapt the contract under Mediterranean Law;

3. The parties decided to be bound by the HKIAC Administered Arbitration Rules, which, in its Art. 36, leaves to the parties the power to decide on the applicable law, that the arbitral tribunal shall use to decide the substance. However, in the case where the parties have not reached an agreement, the arbitral tribunal itself shall make the decision of which law shall be applicable.

4. Claimant wrongly alleges that proper law of the arbitration agreement is the Mediterranean law

5. Respondent will demonstrated that the applicable law governing the arbitration agreement is the Danubian law and the arbitration clause should follow the law of the arbitration seat

B. Respondent's reliance on the doctrine of separability of the arbitration clause is taken by a well-established rule

6. Claimant attempted to disqualify the importance of the doctrine of separability of the arbitration clause to the main contract. Stating that this fact is not sufficient enough to infer that the law of the seat of arbitration is regarded as the implied law chosen by the parties to regulate the arbitration agreement [*Case, 7*].

7. The fact is, in this particular case, the law of the seat of the arbitration is the only law that is exposed in the arbitration clause, which means that all the arbitration procedure will be regulated by it, and due the separable nature of the arbitration clause, it is incontestably that the law most connected to the arbitration agreement is the Danubian Law [*Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Co Ltd*].

8. In addition, the seat is the juridical centre of gravity which gives life and effect to an arbitration agreement, which means that the arbitral seat is intricately linked with the arbitration process. It does necessarily follow that the parties would make the implied choice for the same law to govern the arbitration agreement [*C v D EWCA Civ 1282; Born, 526*].

9. Internationally, there are many rules that provide for the default application of the law of the seat of the arbitration to the arbitration agreement. Under Articles V of the New York Convention and Article 36 of the Model Law, the "law of the country where the award was made" applies, absent a choice of law by the parties. Also, article 16.4 of the LCIA Rules provides that the law applicable to the arbitration agreement is the law of the seat of the arbitration or under the Swedish law, when the parties failed to choose the applicable law, their arbitration agreement is governed by the law of the seat of the arbitration, provided that the parties have specified the seat in their agreement [*Pourmand, 2*].

10. In the case of *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others*, for example, the Singapore High Court stated that where no arbitration agreement law was chosen, the choice of the seat of the arbitration would be "*overwhelmingly significant*" and that would likely be the governing law of the arbitration agreement [*BCY at 10*], asserting that:

"...When commercial relationships break down and parties descend into the realm of dispute resolution, parties' desire for neutrality comes to the fore; the law governing the performance of substantive contractual obligations prior to the breakdown of the relationship takes a backseat at this moment (it would take the main role subsequently when the time comes to determine the merits of the dispute), and primacy is accorded to the neutral law selected by parties to govern the proceedings of dispute resolution…" [paragraph 13]

11. The High Court therefore ruled that in the absence of indications to the contrary, parties will have impliedly chosen the law of the seat as the proper law to govern the arbitration

agreement, in a direct competition between the chosen substantive law and the law of the chosen seat of arbitration. It determined that all things being equal, the mere fact of an express substantive law in the main contract would not in and of itself be sufficient to displace parties' intention to have the law of the seat as the proper law of the arbitration agreement [*Henderson, Waldek, Mills, 2*]

12. Ultimately, the Respondent's reliance on the doctrine of separability of the arbitration clause is effectual according the most traditional institutes in international commercial arbitration, of which has demonstrated that the law of the seat of the arbitration is the closest and real connected with the arbitration agreement.

C. The Sulamerica test confirms that the implied choice of the law governing the arbitration clause presumptively follows the law of the matrix contract unless there are indications to the contrary

13. In the Sulamerica case, which was the basis for other Arbitrator's decision, several Brazilian companies made claims under two insurance policies. The policies were stated to be governed by the Brazilian law, however, London was chosen as the seat of arbitration.

14. The English Court of Appeal's created the three-stage inquiry to determine the governing law of the arbitration agreement, namely – (i) the express choice of the parties; (ii) the implied choice in the absence of an express choice; and (iii) where the parties had not made any choice, the law in which the arbitration agreement had its closest and most real connection with.

15. However, even when Moore-Bick LJ, had conclude that the express choice of proper law governing the substantive contract would be a "strong indication of the parties' intentions in relation to the agreement to arbitrate", stated that this conclusion might be displaced by the terms of the arbitration agreement itself or the consequences for its effectiveness of choosing the proper law of the substantive contract [Sulamerica case, at 26].

16. Therefore, the facts of Sulamérica fell within the second scenario. Moore-Bick LJ found that the starting point that Brazilian law was the implied choice of law of the arbitration agreement was displaced for two reasons. The first was that London was chosen as the seat of the arbitration, which tended to suggest that parties intended for English law to govern all aspects of the arbitration agreement.

17. Taking this interpretation into account, Respondent also has two main reasons to show to this tribunal which will infer that the law of the seat of arbitration should be de governing law of the arbitration agreement, such as it occurred in the Sulamerica case.

18. Firstly, it is an incontrovertible fact that the place chosen to seat the arbitration was Danubia [*Case, 14*], which means, that both parties agreed that the Danubian law would be more appropriate to regulate the arbitration procedure because of its neutrality. This conclusion implies that the law that will regulate the arbitration agreement will also be that of Danubian given its proximity with both parties will [*Case, 35*].

19. Secondly, it is well known that the law of the Mediterranean cannot be seen as the implicit choice of the parties when even in the case there's an explicit refusal of the Respondent on that choice [*Clarification 4, 53*]. Thus, the law of the Mediterranean is not an explicit choice between the parties, nor it is the implicit one, since, Respondent, whenever possible, made it clear that this could not be the law of the arbitration clause.

20. Hence, if this court were to take as a basis what was decided in the Sulamérica case, it would come to the conclusion that Danubian law is the proper law of the arbitration agreement given its neutrality and also the fact that it is the closest and connected law with contract.

D. The choice of the Seat of Danubia is sufficient to override the implied choice of law of the parties

21. Respondent notes that in both different moments, the Claimant tried to dissuade the Respondent from accepting the law of the Mediterranean to regulate the arbitration agreement, at both times the law of the Mediterranean was vehemently denied by Respondent [*Case, 11, 33; Clarification 4*].

22. In fact, it is important to point out that if the choice of the law of the Mediterranean can not be given explicitly, nor can it be implicit in view of Respondent's express denial in adopting this law to govern the arbitration agreement.

23. However, the Danubian law had never been questioned during the whole negotiations as the correct Law to rule the arbitration agreement. As a matter of fact, either Claimant and Respondent were satisfied when chose the Danubia as the seat of the arbitration, due its neutral venue.

24. Thus, the correct Law governing the arbitration clause and its interpretation is Danubian law.

E. This Tribunal does not have powers to adapt the contract under Danubian Law

25. Respondent's position in questioning this Arbitral Tribunal the jurisdiction only to the amendments in the contract's price [*Clarification 48, 61*] not spreading, thus, its concerns about recognizing the whole jurisdiction of this Tribunal, since the parties had explicitly agreed in submitting the present contract to an arbitration clause, under the Danubian Law.

26. However, even if they Parties had given jurisdiction to this Arbitral Tribunal, did so in a limited way. That so because, when choosing the Danubian Law, they prevent the arbitrators of any adaptation of the contract, except if the parties had give express powers to the arbitrators to do so [*Clarification 45, 61*].

27. It occurs that according to Danubian Contract Law, which contains the alleged "four corner rule" excluding all extraneous evidence for the interpretation of contacts and where arbitration agreements are interpreted narrowly, there is a high likelihood that the

arbitration agreement would not be interpreted as authorizing a contract adaptation by the Arbitral Tribunal [*Case, 52*]

28. Being this the case, the arbitral tribunal does not have the power to interpret the contract using any source outside of the writing part of the contract, and its interpretation should be made from the contractual instrument as a whole and not isolating parts thereof [*Davis v. Andrews*].

29. The system of laws governing the arbitration agreement and the main contract may, indeed, differ without causing any other difficulty when it comes to the dispute. This understanding has been recently confirmed and applied by the English High Court on the Peterson Farms case in 2004. Their decision was based that the common intent of the parties was the language and seat that the arbitration would be held [*Peterson Farms Case*].

30. Applying that to the present case, it is without question that both of the parties, making no reservations, agreed upon the seat of the arbitration to be Danubia. And even being the law of the Mediterraneo governing the Sales agreement it does not provide for the extension of that provision to the arbitration agreement.

F. The Hague Principles seeks a neutral Law

31. It should be noted that Claimant, represented by its lawyer Julie Napravnik, was responsible for the choice of the seat of arbitration. Such decision was motivated due the neutrality of the Danubian Law and the, subsequent, approval of the that Law by the creditors of the company [*Case, 34*].

32. Thus, it is correct to assume that the seat of arbitration was chosen based on a desire for a neutral forum, and the law of the seat is different from the law governing the main agreement. Which means that not being the Law of the main contract a neutral one, the Law of the seat of arbitration is the most indicate to govern the arbitration agreement [*Viscous Global Investments Ltd v Palladium Navigation Corporation*].

33. The AR's preference, in the First Link case, for example, stated that " when a dispute arises between commercial parties, the natural inference is that primacy is to be accorded to the neutral law selected by parties to govern the proceedings of dispute resolution". [*Firstlink at [13]*] That neutral law, the AR found, would be the law of the seat.

34. In addition, a neutral zone as the seat of the arbitration was Danubia as expressively shown by Claimant since there were no objection by the creditor's committee it is argued that even Claimant wanted the neutral ground to be the seat [*Clarification 14, 56*].

35. Furthermore, the Hague Principles which is adopted by all three jurisdictions [*Clarification 43, 61*] provides for article 3 "The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules(...)".

36. If the parties have indeed and directly agreed on the seat of the arbitration to be Danubia and thus giving jurisdiction. On the contrary to what article 4 it provides for "An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law".

37. The expression in itself is used to emphasize that the act alone of conferring jurisdiction does provide for the choice of rule. However, the parties have agreed on the law of the seat to apply since they demonstrated that their intent was common and pointed for a neutral zone.

38. In conclusion, a neutral system of law would be the reasonable choice to be made since does not privilege any of the parties. Being this the case, the law of Danubia was clearly the neutral and common choice made from both parties.

CONCLUSION OF THE FIRST ISSUE

39. The Arbitral Tribunal shall decide on which law is applicable to the interpretation of the arbitration agreement, because of the failure of the parties to do so. Therefore, the law of Danubian, as decided on Clause 15 of the Agreement, shall be the one applicable, which does not empowers the Arbitral Tribunal to adapt the Contract, having Claimant, in the negotiations, agreed with so.

ISSUE 2) CLAIMANT IS NOT ENTITLED TO SUBMIT ILLEGALLY OBTAINED EVIDENCE

40. Approaching to the second issue discussed on this arbitral proceedings, Claimant requests this arbitral tribunal to allow the submission of a Partial Interim Award from another arbitral proceeding being conducted by this Chamber. Moreover, Respondent finds that if the arbitral tribunal grants the request from Claimant to submit evidence that has clearly been obtained by illegal means, would be an outrageous decision.

G. The Allowance of submission of this illegal evidence hurts the HKIAC Rules and Model Law

41. On the basis of the assumption that evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of Respondent's Computer system, Claimant should not be entitled to submit evidence from the other arbitration proceedings, because of the clear illegal aspect of the evidence.

42. Just as the relevance and materiality criteria, the adopted rule on Evidence entitles the arbitral tribunal with the powers to determine the admissibility of evidence as provided on Article 22.2 of HKIAC Rules.

43. In addition, the HKIAC Rules states in Article 42 an express obligation to keep the proceedings confidential, since the evidence obtained by Claimant was taken from other arbitration proceeding under the HKIAC Rules, the evidence was necessarily confidential.

44. Thus, it is widely recognized by scholars and arbitration practitioners that the discretion of arbitrators in determining admissibility is subject to whether the evidence were obtained in a manner that is contrary to international public policy or if is protected by a privilege or secret (such as professional privilege, trade secrets, governmental secrecy) [*Pilkov, p. 150*].

45. In the present case, it is already uncontroversial that the current material, that supposedly would proof Claimant's allegation, were either protected by a contractual obligation of confidentiality or obtained by an illegal hack, which clearly leads the arbitral tribunal to a decision recognizing its inadmissibility.

H. There's exist strict grounds for inadmissibility of the evidence based on either the evidentiary laws of the forum, Common law, the HKIAC rules or the IBA rules.

46. Parties have agreed that the Hong Kong International Arbitration Centre would be responsible to conduct the arbitration between them and that, without any reservations, the HKIAC rules would apply as procedural rule.

47. Hence, referencing to the Chamber rules on article 45.1 it states, "Unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration agreement; or (b) an award or Emergency Decision made in the arbitration."

48. It is crystal clear that the Chamber rules forbids the disclosure of "an award or Emergency Decision made in the arbitration". In fact, the Partial Interim award not being from the present arbitration proceedings the rule still applies, since it is one of the since confidentiality is one of the highest qualities and one of the main reasons why the parties renounce state jurisdiction.

49. On that note, the IBA Rules on Taking of Evidence also makes reference to the confidentiality that parties possess. Taking into account article 3.12 "All documents produced by a Party pursuant to the IBA Rules of Evidence (or by a non-Party pursuant to Article 3.8) shall be kept confidential by the Arbitral Tribunal and by the other Parties (…)".

50. In conclusion, Respondent is entitled to, regarding the evidence that Claimant seeks to submit, confidentiality of the Partial Interim Award since it should not have been placed in the possession of anyone in the first place. Moreover, it is necessary that this arbitral tribunal based on the provision both on the rule governing the procedure and the soft law mentioned by Claimant praise for the confidentiality of the award.

I. Claimant comes with "unclean hands"

51. Claimant has arranged an opportunity to acquire the evidence in question against payment of 1000 USD from a company that provides intelligence on the horseracing industry [*Clarification 41, 61*].

52. It occurs that the company has a doubtful reputation as to where it gets its information from and has refused to disclose its sources in the case at hand. Thus, it is not clear whether the person who had provided the award to the company was the hacker or one of the former employees of Respondent.

53. Thereof Claimant's assumption to have clean hands is completely unsustainable, once they went for a company that has a dubious reputation, knowing that it was a leaked information against the Respondent's permission which means they had dirty their hands seeking at all costs to disclose and bring to this Arbitral Tribunal information that is held confidential even under the rules that govern this arbitration agreement.

54. In fact, the doctrine of "clean hands" are assumed to have clean hands in law unless they have been dirtied by conduct in the legal proceedings or that connected to it [*Leigh Anenson, 44*].

55. Therefore, due Claimant's attitude, the evidence is question may be taken as anything but clean, which means that the "Clean Hands" dotrice does not bind this Arbitral Tribunal, since it is long-established practice that an equitable remedy should not be granted to an Claimant who does not come before the Tribunal with "clean hands" [*Ellis, 2*].

J. Illegal evidence violates the equality of arms

56. In terms of European law, equality of arms involves giving each part the reasonable possibility to present its cause, in those conditions that will not put this part in disadvantage against its opponent [*Toma, p. 2*].

57. Hence, the parts must have the possibility to present in an equal manner all the evidence they hold. As a consequence, any disparity in documents communication may be sanctioned in the name of this principle [*Nicolopoulos, 3*].

58. Therefore, it is logical to conclude that by admitting unlawful evidence this Arbitral Tribunal would take the risk of violating the principle of equality of arms, since the consideration of a confidential document, which has no relation to the present case, would place the Claimant in a position well above from Respondent.

CONCLUSION OF SECOND ISSUE

59. The evidence that have been acquired by a breach of the confidentiality agreement or through a hack on the systems will be buy from a company that has a dubious reputation and has only obtained the evidence due to violations of law. So, the evidence should not be admissible and taken into account.

ISSUE 3: TRIBUNAL SHOULD NOT FIND THAT CLAIMANT IS ENTITLED TO ADDITIONAL PAYMENT RESULTING FROM ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE SALES AGREEMENT AND THE CISG

K. THE TRIBUNAL SHOULD NOT CONCLUDE FROM CL. 12 OF THE SALES AGREEMENT THAT THE PARTIES AGREED THAT THE SELLER SHALL NOT BE RESPONSIBLE FOR ANY UNFORESEEN EVENT

60. Upon an examination of the wording of Cl. 12 of the FSSA, it must become clear to the Tribunal that the intention of the parties, when they drafted Clause 12, was to exempt Claimant from liability only in cases of hardship "caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Ex. C 5*].

61. Nevertheless, as Respondent will demonstrate, this was not a case of hardship caused by additional health and safety requirements, nor a comparable unforeseen event. In this sense, it is not possible to apply Cl. 12 to the present impediment, as the clause is narrowly worded and does not provide the requested remedy. In fact, as it will be demonstrated, both Respondent and Claimant agreed upon the fact that the hardship clause should be narrowed down, in order to restrict its range of application. As it will be demonstrated, the Tribunal should conclude that Claimant consented to the fact that the hardship clause would only cover for very specific events.

L. THE WORDING OF THE ICC HARDSHIP CLAUSE WAS INTENTIONALLY NARROWED, AND DUE WEIGHT SHOULD BE GIVEN TO THIS AGREED MODIFICATION

62. The hardship clause, as finally agreed by the parties, has a very narrow scope of application. When Claimant initially suggested the ICC hardship clause to be used as basis for clause 12 of the FSSA, Respondent immediately objected to such suggestion, as the first one was considered to be too broad for the purposes of the FSSA *[Answer to the Notice of Arbitration, para. 4]*. Thereof, Respondent suggested to narrow it down, in order to restrict its range of application.

63. In this manner, since such modification was explicitly agreed by both parties, Claimant cannot allege that the imposition of tariffs that happened in the present case falls within the scope of clause 12, and that is because this was neither a hardship, nor an unforeseen event. Such modification must be taken under consideration by this Tribunal, since it clearly demonstrates Respondent's intention to narrow the application of the hardship clause down.

64. According to the ICC Hardship Clause suggested by Claimant,

> *1. A party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.*
>
> *2. Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:*
>
> *a. the continued performance of its contractual duties has become excessively onerous* ***due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract;*** *and that*
>
> ***b.*** *it could not reasonably have avoided or overcome the event or its consequences, the parties are bound, within a reasonable time of the invocation of this Clause****, to negotiate alternative contractual terms which reasonably allow for the consequences of the event.***

65. According to the stated above, any unexpected event beyond the control of the parties would trigger the ICC-hardship clause, leading the parties to renegotiate alternative contractual terms in order to reestablish contract's balance.
66. On the other hand, clause 12 of the FSSA provides in a completely different way, and this is because when Respondent suggested narrowing it down, that meant that it was not **any** expected event that would fall within the scope of the clause, but only specific events, as the clause provides,

> *12. Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God* ***neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*** *[FSSA, Clause 12].*

67. In this sense, only events regarding additional health and safety requirements or comparable unforeseen events would fall within the scope of the clause. Claimant cannot broadly interpret "comparable unforeseen events" as any unforeseen event, because if that was the case, Respondent would have never objected to the use of the ICC-Hardship clause. Therefore, the present clause must be interpreted according to the will of both parties
68. Not only that, but the imposition of tariffs was a completely foreseeable event, since its announcement happened over a month before the third shipment was actually sent.
69. As it is perceivable, parties have agreed on an intentionally narrow hardship clause precisely to deviate from the broad and vague requisites under the ICC Model Clause. Due weight should be given to this modification when interpreting the applicability of

the hardship clause.

M. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM THE ADAPTATION OF THE CONTRACT PRICE UNDER THE MEDITERRANEAN CONTRACT LAW

70. First of all, it is important to stablish that the Mediterranean Contractual Law is a verbatim adoption of the UNIDROIT Principles *[Procedural Order nº1, para. 4]*. In this sense, Claimant alleges that, according to art. 6.2.2 of MCL, the imposition of tariffs that happened in this case constitutes a hardship situation and therefore this contract deserves to be adapted under art. 6.2.3 of the MCL.
71. However, according to art. 6.2.2 of the MCL, in order to constitute hardship, the event must meet 4 criteria:

> **(I)** it must occur after the conclusion of the contract;
>
> **(II)** it could not have been taken into account by Claimant at the time of the conclusion of the contract;
>
> **(III)** it must be beyond the control of the disadvantaged party; and
>
> **(IV)** the risk of the event must not have been assumed by the disadvantaged party.

72. As noted, the impediment must meet all of the mentioned criteria, and as Respondent will demonstrate, this is not what happened in the present case.
73. Regarding the first requirement (I) indeed the imposition happened after the conclusion of the contract.
74. However, when it comes to the second requirement (II), it is safe to say that Claimant was completely able to have taken the impediment into account at the time of the conclusion of the contract, and several facts corroborates that statement.
75. For instance, the newly elected President of Mediterraneo, that announced throughout his entire campaign preference for a more protectionist approach, appointed one of the most ardent critics of free trade as his "superminister" for agriculture, trade and economics a day prior to the signature of this contract.
76. It is important to emphasize that she had been an outspoken protectionist for years, advocating to limit the access of foreign agricultural products to the Mediterranean market *[Clarification nº 23]*
77. Therefore, considering this fact altogether with the history of retaliatory measures perpetrated by Equatoriana *[Claimant's Exhibit 6],* that has imposed retaliatory measures before, it does not take much to conclude that the government of Equatoriana would end

up retaliating the imposition of tariffs by the government of Mediterraneo.

78. In this sense, it becomes clear that Claimant could foresee the imposition of this tariff, especially if taken under consideration that Claimant was widely known for its experience in the transportation of goods and with export and import formalities *[Notice of Arbitration, para. 18]*.

79. Regarding the third requirement (III), this impediment was not, by all means, beyond Claimant's control. It was quite the contrary, since the government of Equatoriana announced the imposition of the tariffs on 19 December 2017, and it took effect from 15 January 2018 onwards *[Clarification nº 25]*.

80. In this sense, from the time Equatoriana's government announced the measure - 19th December 2017 - to the time it actually took effect - 15th January 2018 -, almost one month has passed by. A month where Claimant could to not only have warned Respondent about the tariff, since it was Claimant's obligation to bear with all the costs related to the delivery, considering that this was a DDP-delivery, but also could have tried to renegotiate the delivery date of the 3rd shipment, by anticipating it, for instance, in order to send it with no additional costs.

81. At last, the fourth requirement (IV) was also not met in the present case, since Claimant assumed all the risks involved in delivering the goods, as it was a DDP delivery *[FSSA, clause 8]*. A DDP is a delivery agreement whereby the seller bears all the costs and risks involved in bringing the goods to the place of destination. In fact, the direct additional costs associated with transportation and DDP delivery per dose were 200 USD. In order to cover additional risks associated with DDP terms, CLAIMANT demanded an additional payment of 1,000 USD, which were only reduced due to further bargaining and insistence by RESPONDENT. CLAIMANT was aware of the risks it was bearing, and it was already financially anticipating for it.

82. It is true that during the negotiations the parties reallocated the risks, by inserting a hardship clause into the contract. However, the inclusion of the hardship was strictly to exempt Claimant from liability in cases of hardship caused by unforeseeable events. All the situations that do not fall within the scope of clause 12, must be borne by Claimant, like this one.

N. CLAIMANT IS ALSO NOT ENTITLED TO ADDITIONAL PAYMENT RESULTING FROM AN ADAPTATION OF THE PRICE OF THE CONTRACT UNDER THE CISG

83. As Respondent will demonstrate, the CISG is not applicable to the present impediment because I) by including the hardship clause into the contract, art 79 was derogated, in the

sense of art. 6 and also because the CISG II) does not provide for hardship

N. I – THE HARDSHIP CLAUSE CONSTITUTES A DEROGATION OF ART. 79 IN THE SENSE OF ART. 6 OF THE CISG

84. According to article 6 of the Convention, the parties may exclude the Convention's application (totally or partially) or derogate from its provisions. In the present case, with the inclusion of a hardship clause into the contract, the parties have provided a special regulation regarding unforeseen events, which derogates article 79 in the sense of article 6.
85. In fact, in the cases *Asante Technologies v. PMC-Sierra* and *Delchi Carrier SpA v. Rotorex Corp,* the American Supreme Court decided that, because the parties chose the Californinan Commercial Code, they were implicitly derogating the CISG, since they chose a much more specific regulation to rule the contract. And this is exactly what happened in the present case, by choosing clause 12 to rule hardship, the parties implicitly derogated the CISG.

N.II – ARTICLE 79 OF THE CISG DOES NOT ALLOW FOR A PRICE ADAPTATION IN CASES OF HARDSHIP

86. First of all, it shall become clear to this Tribunal that there is a doctrinal controversy if art. 79 do or do not apply in cases of hardship [*DiMatteo; Gordley*]. Actually, when the parties wish to resort to hardship, it is necessary to refer to the UNIDROIT Principles as a supplement the Convention *[Perillo],* but not to the CISG itself.
87. It is noticeable that Article 79 is vague and imprecise and that it contains elastic words *[CISG Advisory Opinion nº 7],* that will certainly be read in the context of each system's view *[Kritzer]*. As a matter of fact, judges and arbitrators will often have a natural tendency to refer to similar concepts in his own law system *[Tallon]*.
88. Since there is so much dissent among scholars when it comes to stablish if art. 79 does or does not regulate hardship, it is necessary to resort to its applicability among the courts.
89. In this manner, it is interesting to emphasize that many courts have already rejected the possibility that negative market developments might constitute an impediment within the meaning of article 79 *[Fontaine]*. In fact, they have even established a threshold so high for exempting a party from liability under article 79, that it turned out that the concept of "impediment" became closely aligned with the concept of "impossibility". For that reason, upon until now, there has not been a single case where the Court has exempted a

party for liability under art. 79 *[Kuster & Andersen]*.

90. The leading case that suggest what may be understood as an impediment under the CISG is Nouva Fucinati S.p.A. v. Fondmetall International A.B., in which it was decided that a party is only excused under article 79 if performance is rendered impossible *[Lookofsky]*.
91. Accordingly, in the Iron Molybdenumcase, decided at the German Provincial Court of Appeal, the tribunal held that not even an increase of 300% in the contractual price would be sufficient to constitute an "impediment" under article 79 CISG.
92. The practical outcome of this interpretation is, although there is no doctrinary consent about the meaning of the word impediment and if art. 79 does or does not covers for hardship, article 79 CISG does not cover issues relating to hardship. Moreover, a party would only be excused as long as the performance had been made completely impossible. Consequently, in the present situation, CLAIMANT cannot be excused from performance only because of the increase of the tariffs.
93. In this sense, it is important to mention that, notwithstanding its substantial relevance, it is not scholarly opinion that define the interpretation of the CISG, but rather the decision making of judges and arbitrators. As follows, there has not been a single case in the whole history of the CISG of a party being exempted from liability under article 79 CISG.

CONCLUSION OF THIRD ISSUE

94. In this regard, it has become clear that Claimant is not entitled to any additional payment resulting from an adaptation of the contract, neither under clause 12, neither under the CISG, because as stablished, this is not a case of hardship under the description of the wording of clause 12. Therefore, the present situation does not fall within the scope of clause 12, let alone under the scope of art. 79 of the CISG, since it does not regulate hardship and there are no cases in jurisprudences where judges or arbitrators found a party exempted from liability under art. 79.

REQUEST FOR RELIEF

For the above means, Counsel for RESPONDENT respectfully requests the Arbitral Tribunal to find that:

(1) The Arbitral Tribunal should decide that the Law of Danubia is the applicable law upon which the interpretation of the arbitration agreement and the price can't be adaptable under the Law of the agreement since there is no express provision;

(2) The evidence illegally obtained from the company and its submission shall be vetoed by this Arbitral Tribunal given that it is also contrary to the provisions of this chamber procedural rules;

(3) There are no grounds for adaptation and RESPONDENT is not entitled to pay $1,250,000.00.