SIXTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT,

HONG KONG, MARCH 31ST – APRIL 7TH 2019

UNIVERSITY OF YANGON

MEMORANDUM FOR RESPONDENT

Phar Lap Allevamento	v.	Black Beauty Equestrian
Claimant		Respondent
Rue Frankel		2 Seabiscuit Drive
Capital City		Oceanside
Medoterraneo		Equatoriana

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TABLE OF ABBREVATIONS AND DEFINITIONS

¶/¶¶	Paragraph / paragraphs
%	Percentage
Art. /Artt.	Article / Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
CISG-AC	CISG Advisory Council
CISG Digest	Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods
DDP	Delivered Duty Paid
et al.	*et alii* (and others)
et seq	*et sequentes* (and the following)
Exb. C	Claimant's Exhibit
Exb. R	Respondent's Exhibit
FSSA	Frozen Semen Sales Agreement
HKIAC Rules	Hong Kong International Arbitration Centre Administered Arbitration Rules (2018)

Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
ICC	International Commercial Code
ICC Rules	Rules of Arbitration of the ICC (2012)
Infra	Below
Mr. Antley	Former Negotiator of Respondent
Ms. Napravnik	Former Negotiator of Claimant
Mr. Shoemaker	The responsible person for Respondent's racehorse breeding program
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
No.	Number/Numbers
NoA	Claimant's Notice of Arbitration
NYC	New York Convention
p. / pp.	Page/ Pages
para.	paragraph
PICC	Principles of International Commercial Contracts

PICC	UNIDROIT Principles
PO1	Procedural Order No. 1 of 5 October 2018
PO2	Procedural Order No. 2 of 2 November 2018
ANoA	Respondent's Answer to Notice of Arbitration of 24 August 2018
supra	Above
Translex Principles	Translex Principles on Transnational Law
ULF	Uniform Law on the Formation of Contracts for the International Sale of Goods
ULIS	Uniform Law for the International Sale of Goods
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT Principles	Principles of International Commercial Contracts
US	United States of America
U.S.D	United States Dollars
v.	versus (against)

STATEMENT OF FACTS

The parties in these proceedings are Phar Lap Allevamento ("**Claimant**") and Black Beauty Equestrian ("**Respondent**") (collectively the "**Parties**"). Claimant is a company registered in Mediterraneo and is known for its successful breeding of racehorses. It also offers for sale the frozen semen of its stallions for artificial insemination, including the semen of Nijinsky III, one of the most sought-after stallions for breeding. Respondent is a company registered in Equatoriana is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions. It established a racehorse stable three years ago.

21 March 2017 Respondent first contacted Claimant to buy the frozen semen of Nijinsky III for Respondent's newly established breeding program.

24 March 2017 Claimant offered Respondent 100 doses of Nijinsky III's frozen semen in accordance with the *Mediterraneo Guidelines for Semen Production and Quality Standards* under the conditions of which the frozen semen will have to be provided in several installments and may not be resold to third parties without Claimant's express written consent.

28 March 2017 Respondent accepted most of the terms of the offer but objected to the choice of law and the forum selection and insisted on DDP terms.

31 March 2017 Claimant accepted a delivery DDP conditioned upon (1) a moderate price increase; and (2) the transfer of customs risks to Respondent highlighting its previous experience in this regard. For this purpose, the Parties included a hardship on the FSSA.

10 April 2017 Respondent had suggested the draft of the arbitration clause in which the seat law of the arbitration governs the interpretation of the arbitration clause.

11 April 2017 Claimant altered the seat of the arbitration to Danubia, suggested reliance on the ICC Hardship clause and did not raise opposition to the idea of choosing a neutral law and seat for the arbitration.

12 April 2017 The Chief negotiators for Claimant and Respondent were involved in a severe car accident on their way to a dinner after discussing the hardship

	clause and the applicable choice of law for the arbitration clause. In the negotiation file of Mr. Antley, it was mentioned about the natural venue and applicable law.
6 May 2017	Claimant and Respondent signed the FSSA.
20 May 2017 and 3 October 2017	Claimant sent the first and second shipments corresponding to 25 doses each of Nijinsky III's frozen semen.
19 December 2017	Equatoriana suddenly imposed a 30% tariff on all agricultural goods coming from Mediterraneo.
20 January 2018	Claimant mailed Respondent about 30% tariffs on the agricultural products including the frozen semen which makes this shipment 30% more expensive and immediately started negotiations regarding a price adjustment for the frozen semen before sending the last shipment.
21 January 2018	Respondent (Mr. Shoemaker) called Claimant and said that he could not directly authorize any additional payment and stated that his primary concern was to ensure that the remaining 50 doses, which were urgently needed given that start of the breeding season, were delivered. Respondent had already initiated the payment of the second installment.
23 January 2018	Claimant sent the last shipment of 50 doses to comply its obligation.
12 February 2018	Claimant demanded payment in the amount of $1,250,000, and accused Respondent of breaching of resale prohibition. Claimant is not claiming the originally agreed contractual remuneration which has been undisputedly been paid by Respondent. Instead, Claimant is seeking a remuneration which goes beyond that amount.

Introduction

Claimant and Respondent entered into the FSSA covering 100 doses of Nijinsky III's frozen semen for artificial insemination. In this regard, the Parties agreed that a price of US$100,000 per insemination dose was reasonable based on the circumstances during the negotiations *[p.14, Exb. C5]*. The Parties further agreed that the semen will be delivered in three shipments of 25, 25, and 50 doses respectively. Due to the imposition of tariffs, Claimant claimed for an increased remuneration by adapting the contract. The Claimant has no right to ask

for adaptation of the agreement as the parties had never agreed to include the adaptation clause and the Claimant had not suffered hardship. As the Danubian law governs the arbitration agreement, the Tribunal lacks jurisdiction to adapt the contract **(ISSUE 1).** Subsequently, the Partial Interim Award of the other arbitration proceeding sought to be presented by Claimant should not be admitted **(ISSUE 2).** The additional import tariffs imposed by Equatoriana were not covered under Clause 12 of the agreement as the Claimant has to bear all the risks associated with DDP. Alternatively, imposition of tariffs is not impediment under Art.79 CISG and Claimant is not entitled to an US$1,250,000 due to the higher costs following the imposition of the new tariffs (**ISSUE 3).**

ISSUE 1: THE ARBITRAL TRIBUNAL LACKS JURISDICTION TO ADAPT THE CONTRACT UNDER THE ARBITRATION AGREEMENT.

I. The Law of Danubia governs the Arbitration Agreement.

1. The Law of Danubia shall be applied to the Arbitration Agreement for the fact that - the doctrine of separability requires the Tribunal considered the Arbitration Agreement and the underlying FSSA as separate agreements governed by different applicable laws. (A) The Hague Principles on Choice of Law lead to the application of the law of Danubia. (B) And even if the Sulmerica test applies, Danubian Law, as the seat of arbitration, has the closest and most real connection to the present case. (C)

A. The doctrine of separability requires that the Tribunal consider the Arbitration Agreement and the underlying FSSA as separate agreements governed by different applicable laws.

2. Under the Doctrine of Separability, the tribunal is required to consider the arbitration agreement and the sales agreement as separate agreements governed by different laws. In this case, the Respondent argues that - pursuant to the Doctrine of Separability, the seat of arbitration governs the arbitration agreement. (1) And Danubia being the Seat of Arbitration leads to the conclusion that it governs the arbitration agreement. (2)

1) Pursuant to the Doctrine of Separability, the seat of arbitration governs the arbitration agreement.

3. The arbitration agreement is separable from the underlying agreement. Under the New York Convention, both Art. II and V(1)(a) treat arbitration agreements as separable from the underlying contracts *[Schwebel, pp. 3-6]*. The arbitration agreement is independent of the underlying contract in the sense that its only function is to provide machinery to resolve disputes *[Westacre Inc. v. Jugoimport-SDPR Co.]*. And the arbitration agreements will often take the form of a clause in an underlying contract, which presupposes the existence of a separate agreement dealing with the subject of arbitration *[Born, p.375]*. Therefore, in the present case, contrary to the Claimant's submission that the same law shall apply to the arbitration agreement as it takes the form of a clause in the present case *[p.6, ¶11 of C's Memo]*, the arbitration clause has its own autonomy and can be separable.
4. The arbitration agreement has its own autonomy. Separability is also a consequence of the autonomy of the arbitration agreement, where the parties may agree for it to be governed by a different law to the main contract *[Lew et al., ¶6-23]*. The arbitral clause is autonomous and juridically independent from the main contract in which it is contained *[ICC Case No.8938]*. Moreover, as opposed to the Claimant's argument that the doctrine of separability is only concerned with the validity of the arbitration agreement *[p.10, ¶26 of C's Memo]*, the arbitration agreement is separable in any circumstances. Separability detaches the arbitral clause from the main contract not only as a matter of contract law but potentially also as a matter of applicable law *[Landolt]*. An arbitration agreement contained in a main contract is severable and has a life of its own and it confers jurisdiction on the arbitrator **even** to rule that the main contract is void ab initio *[Jack Tsen-Ta Lee]*. Therefore, it is clearly different from the Claimant's allegation.
5. Therefore, in the case before the tribunal now, observing the doctrine of separability means that the tribunal is restricted to examining only the text of the arbitration agreement itself to determine which law is applicable to the arbitration agreement. In *Sulamerica* case, although there is an expressed choice of law clause in the underlying agreement, the law of the seat applies to the case *[Sulamerica case]*. In that sense, the tribunal may not apply the choice of law clause included in the FSSA. And due to this effect, the tribunal may not look at Clause 12 of the contract for its authority to adapt the contract.

2) Danubia being the Seat of Arbitration leads to the conclusion that it governs the arbitration agreement.

6. The seat plays an important role in determining the applicable law of the Arbitration Agreement. As Danubia is the seat of arbitration, the Danubian Law shall apply to the arbitration agreement. In *FirstLink Investments v GT Payment,* the Court observed that: "The arbitral seat is the juridical centre of gravity which gives life and effect to an arbitration agreement, without which the seed of an agreement would not grow into a fully-fledged arbitration resulting in the fruit of an enforceable award." The concept that an arbitration is governed by the law of the place in which it is held, which is the 'seat' (or 'forum', or locus arbitri) of the arbitration, is well established in both the theory and practice of international arbitration *[Born, pp.1530–1531]*. The law of the seat is also recognized in the New York Convention Art.V(1)(a) by referring that 'the law of the country where the arbitration took place'. Therefore, in determining the applicable law to the arbitration agreement, the seat of arbitration must be taken into account which the Claimant failed to do so.
7. The choice of the seat also leads to the conclusion that the parties are expected to apply the law of the seat to their arbitration agreement and in that sense, the express choice of law clause has not been added. In *Dicey et al*., it is stated that if there is no express choice of law to govern either the contract as a whole or the arbitration agreement, but the parties have chosen the seat of arbitration, the contract will frequently be governed by the law of that country on the basis that the choice of the seat is to be regarded as an implied choice of the law governing the contract. In the present case, the seat is expressly chosen by the parties in the agreement, and there is no express choice of law clause. This indicates that the parties have not included such clause as they have already intended to use the law of the seat for the interpretation. This clearly contradicts the Claimant's allegation that the choice of law for the contract implies the intention to apply the same law to the arbitration agreement.
8. Therefore, Danubian Law applies to the arbitration agreement and the tribunal is subjected to the four corners rules under Danubian Law which exclude all extraneous evidence for the interpretation of contacts and where arbitration agreements are interpreted narrowly. (¶ *II)* In that sense, the tribunal cannot take into account the conversations about the signing of the contract or written evidence that is not part of the original written contract. And therefore, pursuant to the doctrine of separability and four corners rules, the tribunal shall only take into

account of what is written in the arbitration agreement and the intention of the parties is clearly indicated by choosing the seat that the Danubian Law shall govern the arbitration agreement.

B. The Hague Principles on Choice of Law lead to the application of the law of Danubia.

9. Claimant has incorrectly argued that the application of the Rome 1 Regulation leads to the application of Mediterranean law to the arbitration agreement *[p.9, ¶20 of C's Memo]*. In fact, the choice of law analysis in the present case shall be according to the Hague Principles on the Choice of Law as specified by the PO2, ¶43, which expressly states that the general conflicts of law rules for the contracts in Danubia, Mediterraneo and Equatoriana are the verbatim adoption of the Hague Principles. Some arbitrators apply the conflict rules of the state most closely associated with the dispute *[Lew et. al., ¶56]*. Under that analysis also, it is the Hague Principles which have the closet connection to all three countries included in this present case. Moreover, being the customary international law, the Hague Principles not only have more accountability value but also adopted by all the countries conflicted in the present case and since it is uniform among all three states conflicted in the present case, it is the most applicable here. Therefore, these principles shall apply in the present case.
10. As opposed to the Claimant's usage of the *Sulamerica* test in the present case, it is contrary to the Hague Principles. In the *Sulamerica* test, the three steps which include (1) Express Choice, (2) Implied Choice and (3) Most real and Closet Connection test are applied. Under Article 1(4) of the Hague Principles, it is clearly stated that the choice of law made by the parties does not require to have any connection with them. In that sense, contrary to the closet connection test urged by the Claimant, the parties are free to choose the law which has no obvious relation with them according to Hague Principles. Again, according to the principle of party autonomy, the parties are allowed to choose any law to rule their contract, even if not obviously related with *[Vischer/Planta, p.174, ¶¶174,175, footnote 30]*. Therefore, the *Sulamerica* test shall not be applied in the present case. And in that sense, under the Hague Principles, the parties have expressly chosen the Law of Danubia as the governing law of the Arbitration Agreement (1). The parties have also impliedly chosen the Law of Danubia (2).

1) The Parties have expressly chosen the Law of Danubia as the governing Law of the Arbitration Agreement.

11. The arbitration clause in the present case includes an expressed statement that - the Seat of Arbitration shall be Vindobona, Danubia. According to Article 4 of Hague Principles, the choice of law shall be made expressly or appear clearly from the provisions of the contract or the circumstances of the case. The intention appeared from the provisions of the contract and the circumstances of the case must be a real one and not presumed intention *[¶ 4.7 of Hague Principles]*. In the present case, the choice of Danubia as the seat of arbitration shows the express intention of the parties to use the Danubian law as the law governing the arbitration agreement *[p.14, Exb. C5, Clause 15]*. 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 be the proper law of the arbitration agreement *[FirstLink Investments v GT Payment]*. And in this case, the intention is clear.

12. Except in cases where the parties make an express choice concerning the law governing the arbitration agreement, the choice of the place of arbitration generally implies a choice of the application of the arbitration law of that place *[ICC Case No.7373]*. In the present case, except the choice of law clause in the FSSA *[p.15, Exb. C5, Clause 14]*, there is no other express choice of law clause. And as the doctrine of separability applies in the present case, the tribunal shall rely only on the fact that the seat has been expressly chosen in the arbitration agreement and it shall not be referred back to the clause 12 of the underlying agreement. The seat of arbitration, therefore, shall be treated as the only express choice of law and it shall be applied.

2) The parties have impliedly chosen the Law of Danubia.

13. The Danubian Law is the implied choice of law made by the parties. The choice can be made expressly or impliedly under Art. 4 of the Hague Principles. In order to make an implied choice, the intention of the parties must appear clearly from the circumstances of the case. *[Art. 4 of Hague Principles]*. The intention of the parties have been taken into account as an important factor for the choice of proper law in the absence of the expressed choice. In *Arsanovia v. Cruz City* case, the arbitration clause includes no express choice of law but includes the choice of London as the seat and Indian law as the governing law of main agreement. The tribunal held that since there was no contrary indication other than choice of

a London seat for arbitration and due to the wording of the arbitration agreement, it leads to the conclusion that the parties intended Indian law to govern it. Therefore, the intention is important in determining which law governs. The intention of the parties are indicated clearly upon the choice of the seat *[Fouchard, Gaillard, Goldman]*.

14. Moreover, the choice of the seat is not merely a geographical indication. When one says that London, Paris or Geneva is the place of arbitration, one does not refer solely to a geographical location. One means that the arbitration is conducted within the framework of the law of arbitration of England, France or Switzerland or, to use an English expression, under the curial law of the relevant country *[Redfern/Hunter, p.8]*. Therefore, in this present case, it can be concluded that the choice of seat by the parties is the implied intention, if not expressed, that the law of the seat shall apply to the Arbitration Agreement.

C. Alternatively, even if the Sulmerica test applies, Danubian Law, as the seat of arbitration, has the closest and most real connection to the present case.

15. Even if the Sulamerica test applies as Claimant insists, the Danubian law has the closest and most real connection to the arbitration agreement as the seat of the arbitration agreement, not the Mediterranean Law. The ordinary and natural meaning of choosing to arbitrate in a particular seat of arbitration is that the parties intended the agreement to arbitrate to be governed by the law of the seat *[Pryles, p.145]*. It was supported by the case of *Nat'l Thermal Power v. Singer Co. i*n which it is held that "Where…there is no express choice of the law governing the contract as a whole, or the arbitration agreement as such, a [rebuttable] presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement." Moreover, Cooke J. held at first instance in *Sulamerica C*ase that the arbitration agreement was governed by English law as it had its closest and most real connection to English law because of the seat of arbitration being in London. This approach was also reflected in a 1994 decision of the Tokyo High Court *[Tokyo Koto Saibansho Case]*. Again in *C v. D* it is reasoned that an international arbitration agreement is "more likely" to be governed by "the law of the seat of arbitration than the law of the underlying contract," because the arbitration agreement "will normally have a closer and more real connection" with the place of the seat. Thus, even if the *Sulamerica* test applies, the Danubian Law, as the law of the seat of the Arbitration, has the closest and most real connection with the arbitration agreement.

II. Danubian Law requires express conferment of the Tribunal power to adapt the contract.

16. Contrary to Claimant's submission, the Tribunal does not have inherent power to adapt the contract *[p.10-12, ¶¶27-31 of C's Memo]* as the interpretation of the arbitration agreement is governed by the law of Danubia which recognizes that arbitrators may adapt contracts but requires an express empowerment for that. A direct conferment of powers takes place when the parties agree expressly upon the powers that they wish the arbitrators to exercise, possibly by setting them out in the terms of appointment or a submission agreement *[Redfern/Hunter, p.307]*. In the arbitration agreement, however, the express conferment of adaptation the contract is not mentioned. Such an express conferral of powers is, however, missing in the present arbitration agreement *[p.31, ANoA, Clause 13]*. Under Art. 28(3) of Danubian Law (UNCITRAL Model law). The arbitral tribunal shall decide *ex aequo et bono* only if the parties have expressly authorized it to do so which means that the tribunal does not have the power to adapt the contract without the express conferment from the parties. Moreover, the Tribunal does not have inherent power to adapt the contract because firstly, the arbitration clause should be narrowly interpreted under the Danubian Law (A) and secondly, as the adaptation clause is beyond the scope of arbitration agreement (B).

A. The arbitration clause should be narrowly interpreted under the Danubian Law.

17. The arbitration clause should be narrowly interpreted under the Danubian law. The Danubian law contains the "four corners rule" for the interpretation of contracts including arbitration agreements. The four corner rule means that the interpretation of the arbitration agreement is limited to its wording and no external evidence may be relied upon, in particular, reliance on the drafting history and preceding communication *[p.32, ANoA, Clause 16]*. Thus the previous negotiations and facts cannot be relied upon pursuant to Art. 8 of CISG as Claimant alleges *[p.6-8,11, ¶¶12,16,17,30,31 of C's Memo]*. The arbitration clause should be narrowly interpreted as parole evidence is not allowed under the four corner rules of Danubian Contract Law *(1)* and as the CISG does not apply on the procedural matter *(2)*.

1. The Parole evidence is not allowed under the Danubian Contract Law.

18. Claimant cannot invoke previous negotiations between the parties under Danubian Law. The Danubian Contract Law for international contracts is a largely verbatim adoption of the

UNIDROIT Principles with the changes in the interpretation rule in Art. 4.3 which is replaced for written contracts by the four corners rule. The four corners rule under Danubian law has largely the same effects as a merger clause under Art. 2.1.17 UNIDROIT Principles *[p.61, PO2, Clause 45]*. Under Art 2.1.17 of UNDRIOT Principles "A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements". This Article indirectly confirms that in the presence of a merger clause, extrinsic evidence supplementing or contradicting a written contract is inadmissible. The presence of a merger clause in the FSSA displays the parties' understanding of the effect of Art. 2.1.17 of UNIDROIT Principles and the intention to subject the arbitration agreement to a jurisdiction that would exclude the extrinsic evidence. Thus, Claimant cannot invoke the Parole evidence under the four corner rules as the contractual facts are clear.

2. The CISG does not apply to the procedural matter.

19. Contrary to Claimant's allegation, Respondent argued that under the Danubian Law the CISG only apply to the substantive matter, not the procedural matter. The CISG has been described as "substantive" as opposed to "procedural" law *[Bernstein/Lookofsky]*. Therefore, in determining whether a matter is governed by the CISG, one possibility is to determine whether it is substantive or procedural. If the matter is deemed to be procedural rather than substantive, one can conclude that the matter is not one governed by the CISG *[McMahon]*.
20. The wording of the clause 14 of the FSSA clearly pointed out that the CISG only governs the FSSA (the substantive part) and not the arbitration agreement (the procedural part), consequently Art. 8 of the CISG cannot be used for the procedural matter. In the present case, the arbitration agreement itself, which is to be treated as a separate contract for its interpretation under the four corners rules, contains no choice of law wording. Although the Mediterranean law allows the CISG to apply to the arbitration clause the Mediterranean Law only governs the sales agreement not the arbitration clause. There is consistent jurisprudence in Danubia that due to the doctrine of separability, CISG does not apply to the arbitration agreement, as the latter is considered to be a procedural contract and not a sales agreement *[p.60, ¶36 of PO2]*. Under the Danubian Law, CISG does not necessarily need to extend to

the procedural matter. Hence, Claimant cannot rely upon art.8 of CISG because the CISG does not govern the arbitration agreement.

B. The adaptation clause is beyond the scope of Arbitration Agreement.

21. Contrary to Claimant's allegation, the tribunal lacks jurisdiction to decide the case. Claimant is not claiming the originally agreed contractual remuneration which has been undisputedly been paid by Respondent. Instead, Claimant is seeking a remuneration which goes beyond that amount and for which the arbitrators would have to adapt the contract *[p.31, ANoA, ¶12]*. The adaptation clause is clearly not within the scope of Arbitration Agreement consequently Respondent argued that the Tribunal does not have the jurisdiction to adapt the contract as the claim adapting the contract is not contemplated by the parties when they concluded the FSSA *(1) a*nd the award adapting the contract will exceeds the scope of the power granted by the parties to the Tribunal *(2)*.

1) There is no adaptation clause in the Sales Agreement.

22. The adaptation clause is not included in the underlying contract *[pp.14, 15, Exb. C5]* which is the express consent of the parties. "A tribunal cannot substitute itself for the parties in order to make good a missing segment of their contractual relations – or to modify a contract – unless that right is conferred upon it by law, or by the express consent of parties [*Kuwait v. American Oil Company]."* Explicit consent may be expressed in the arbitration clause *[ICC (Partial) Award No.7544]***.** It may also be included at some other place of the contract (such as the wording of an adaptation clause set out in the Model Exploration and Production Sharing Agreement of Qatar of 1994). As the adaptation is not expressly contemplated in the underlying contract or other place of the contract, the tribunal does not have the power to adapt the contract.

23. Moreover, the Tribunal does not have the jurisdiction to adapt the contract as the claim adapting the contract is not included in the FSSA. Article V(1)(c) of the New York convention applies in circumstances where the claim of one party is not included within the scope of the arbitration agreement *[Born, p.3547]*. Similarly, Article V(1)(c) applies to cases where "the arbitral award for instance, deals with a difference not contemplated by the arbitration agreement *[Zurich Bezirksgericht Case]***."** The adaptation clause is not contemplated when the parties concluded the FSSA *[p.14, Exb. C5, Clause 12]*. On top of

that, the word hardship is narrowly worded, the imposition of tariffs is not within the scope of the word hardship *[p.56, ¶16 of PO2]*. Cases in which Article V(1)(c) would potentially apply would include awards addressing contractual claims that were not included within the scope of an arbitration clause *[République Démocratique v. Thai Lao Lignite Co.]*, claims that arose under a separate contract which are statutory or non-contractual claims that were not included within the scope of an arbitration clause. The claim adapting the contract is not expressly included in the arbitration clause leads to the conclusion that the Tribunal lacks express conferral power to adapt the contract and consequently that award may be challenged pursuant to Art. V(1)(c) of New York Convention.

2) Any award adapting the contract will exceeds the scope of authority granted by the parties to the Tribunal.

24. It is noncontroversial that an award which exceeds the scope of authority granted by the parties to the arbitrators can be denied recognition *[Born, p. 3541]*. Under Article V(1)(c) of New York Convention, recognition of an award may be denied on the grounds that: "The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration." An arbitral tribunal has no authority to decide disputes that the parties have not agreed to arbitrate, and submitted to it, and its awards on such matters are subject to non-recognition. As the word 'hardship' is narrowly worded, the event of imposition of tariffs is not included within the meaning of hardship *[p.14, Exb. C5, Clause 12]*. The authority granted by the parties on the tribunal indicated in the wording of "any dispute arising out of contract" in the FSSA is clearly not contained the power to adapt the contract. According to one authority's evocative characterization, "[a]n arbitral tribunal is one of large and exclusive powers within its prescribed limits, but it is as impotent as a morning mist when it is outside these limits *[The French Company case]."* Most courts have also applied a presumption that the arbitrators acted within the scope of their authority under the parties' agreement *[Mgt & Tech. v. Parsons-Jurden Int'l Corp.; Parsons & Whittemore Case; Chevron Corp. v. Ecuador]***.** The Tribunal in the case at hand should also perform its power within the scope of authority under the parties' arbitration agreement.

25. The award adapting the contract may be challenged under Art. V(1)(c) of New York Convention on the grounds of excess of jurisdiction as the parties' arbitration agreement is

not expressly include about the adaptation of the contract. An excess of jurisdiction under Article V(1)(c) can arise in different ways. Art. V(1)(c) is also applicable where an award decided issues or claims that exceeded the scope of the arbitration agreement. The award adapting the contract is the overuse of Tribunal's jurisdiction in both of the above two ways. In *First Inv. Corp. v. Mawei Shipbuilding***,** it was held that "The content and effect of the award obviously went beyond the obligations of the respondent agreed under the Option Agreement. … Therefore, the arbitral award falls under the circumstances of Art. V(1)(c)." As one French decision put it *[Admart AG v. Birch Found., Inc.]* "the arbitrators can only arbitrate on what was asked to them." The tribunal lacks jurisdiction to adapt the contract since the award adapting the contract is beyond the authority of the tribunal which is expressly granted by the parties in the arbitration agreement and consequently that award would be challenged under Art. V(1)(c) of the New York Convention as the excess of jurisdiction matter.

Conclusion of Issue 1

Pursuant to the Doctrine of Separability, the tribunal is required to consider that the sales agreement and arbitration agreements are applied by different applicable laws. According to Article 4 of Hague Principles, the parties have expressly as well as impliedly chosen the Danubian Law to be the governing law of the Arbitration Agreement. Under the Danubian Law, the adaptation is impossible without express conferral power to the tribunal which is not the case here. Again according to the four corners rule, the parties are also not allowed to bring any evidences that do not form a part of the contract therefore, the tribunal has no jurisdiction to adapt the contract.

ISSUE 2: The arbitral tribunal shall not admit the evidence from other arbitral proceedings on the basis of the assumption that this evidence had been obtained illegally.

26. On 2nd October 2018, Claimant informed the tribunal to submit the Partial Interim Award of the Respondent's other arbitration proceedings in which the tribunal had confirmed its power to adapt the contract under the situation of unforeseeable hardship *[p.49, C's email to tribunal; p.60, ¶39 of PO2]*. Contrary to Claimant's argument, Respondent will demonstrate that first, the evidence is not admissible (I). Second, inadmissibility of the said evidence does not violate the Claimant's right to due process (II). Third, the Claimant's submission of the

said evidence from other arbitration proceedings is contrary to the principle of good faith (III).

I. The evidence is not admissible.

27. As parties agreed to conduct the present arbitral proceedings under HKIAC Administered Arbitration Rules 2018 *[p.51, ¶2 of PO1]*, the tribunal has the power to exclude the said evidence according to Art. 22.3 of HKIAC Rules. In an arbitral proceedings, the tribunal has been conferred wide discretionary power to resolve issues of admissibility, relevance, materiality and weight of the evidence *[Art. 22.2 of HKIAC Rules; Berger/Kellerhals, ¶1205; Cremades, p.49; Supreme Oil v. Abondolo]*. As Claimant submitted the said evidence as relevant evidence, Respondent has the right to prove it as it had been obtained illegally under Art. 22.1 of HKIAC Rules *[Redfern, pp.317, 321; Frederica Lincoln v. Iran; Antoine Biloune v. Ghana Inv. Ctr.]*. In this regard, in the present case, Claimant obtained the said evidence either from two former employees of Respondent or through illegal hacking *[p.61, ¶42 of PO2]*. This proves that Claimant could obtain the said evidence illegally. Thus, the tribunal should deem it as inadmissible evidence.
28. Contrary to Claimant's allegation in *¶33 of C's Memo*, Respondent will argue that the said evidence is inadmissible because firstly, the evidence was obtained through a breach of confidentiality obligation (A). Second, the said evidence is neither relevant nor material to its outcome (B). Third, the said evidence does not lead to a consistent arbitral solution on the issue of the adaptation of contract due to hardship (C).

A. The evidence was obtained through a breach of confidentiality obligation.

29. The said evidence is obtained by breach of confidentiality obligation. Generally, parties enter into arbitration agreements with expectations of confidentiality which has been regarded as one of the advantages of arbitration proceedings *[Russel v. Russel]*. As Respondent's other arbitration has been conducting under HKIAC 2013 Rules in which an express provision to keep the proceedings confidential is contained in its Art. 42 of HKIAC 2013 Rules *[p.50, R's email to tribunal]*, both parties including arbitrators and witnesses are bound by confidentiality obligation *[Schwarz/Konrad, ¶20-156]*.
30. The obligation to maintain confidentiality in other arbitration proceedings extends to Claimant. In order to disclose an award of arbitration, the consent of the parties is paramount

importance *[Webster/Bühler, pp.271-272; Smeureanu, pp.82-87]*. In *Dolling Baker* Case, the Court of Appeal granted the injunction from disclosing the documents applied by the first defendant considering that all documents used in the course of the arbitration including the award were confidential, except where the parties consented to reveal such materials to third parties. Moreover, in *Myanma Yaung Chi v. Win Win Nu* case, Justice Kan dismissed the appeal noting that when choosing to arbitrate rather than litigate their disputes, parties were more likely to believe that arbitrators were held in private and thus, decided to keep the parties' expectations that the proceedings are confidential. Therefore, in the present case, the tribunal should confirm confidentiality obligation because Claimant was not merely trying to request disclosure of the award of other arbitration proceedings, even using illegal means to disclose the said award.

31. The said evidence is a document which must be covered by commercial or technical confidentiality according to Art.9(2)(e) IBA Rules *[IBA Working Party, p.26]*. Technical confidentiality includes documents covered by confidentiality agreement with third parties *[O'Malley, n.9.84]***.** An arbitral tribunal should respect the principle of *pacta sunt servanda* even in relation to third parties and should not require that a party breaches an agreement with a third party *[Marghitola, p.94]*. In this regard, as Claimant contends in *¶38 of C's Memo*, it is true that the said evidence does not have high economic value. However, the said evidence is compelling on the ground that Respondent would incur significant damage in the event that the secret is divulged *[Marghitola, p.93]*. Therefore, if the tribunal admitted to submit the said award in the present case, the opposed party of Respondent's other arbitration would ask for compensation to the Respondent for breach of confidentiality obligation.

B. The evidence sought to be presented is neither relevant nor material to its outcome.

32. Although Claimant contends that it is entitled to submit the said evidence as relevant and material to the outcome according to Art. 22.3 of HKIAC Rules *[¶¶ 39-42 of C's Memo]*, the tribunal still has the power to exclude any evidence under that Art. 22.3. A similar provision is provided in Art. 9(2)(a) of IBA Rules, '*The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence […..] for lack of sufficient relevance to the case or materiality to its outcome.'* In this regard, the tribunal is entitled to exclude the said evidence on ground of lack of relevance and materiality to the outcome of the present case.

33. The circumstances of the Respondent's other arbitration is not relevant to the present case. "Contention" is a necessary criterion to determine the relevancy of the document *[Marghitola, p.50]***.** In the said arbitration, there included an ICC Hardship Clause 2003 and Model HKIAC-Arbitration Clause with all additions in their arbitration agreement which are broad enough to allow the adaptation of the contract under the situation of unforeseeable tariff-rise *[p.60, ¶39 of PO2]* and thus, the tribunal had confirmed its power to adapt the contract. However, in the present case, parties merely included a narrowly worded force majeure clause with the the word "hardship" and narrowly formulated HKIAC-Arbitration clause *[p.14, Exb. C5, ¶12]*. Therefore, in the present case, Claimant could not ask for adaptation of the contract under hardship clause or arbitration agreement as Respondent did in the other arbitration. In this regard, Claimant could not acquire the necessary contention to prove that the said award, in which tribunal had confirmed its power to adapt the contract, is relevant to the present case and thus, the tribunal should not accept the said evidence as relevant evidence.

34. The outcome of the present case would not be changed with or without the said evidence. A document is material to the outcome of the case if it is needed to allow complete consideration of the factual issues from which legal conclusions are drawn *[Marghitola, p.53]***.** However, in the present case, the same legal conclusion could not be drawn because the Respondent's other arbitration was decided on the basis of ICC Hardship Clause 2003 and Model HKIAC-Arbitration Clause with all additions, but in the present case, the tribunal has to decide according to narrowly worded force majeure clause and Model HKIAC-Arbitration Clause. Moreover, as the said evidence is an award of other arbitration, it can merely be used as a precedent to support Claimant's argument and it is not so paramount to be considered as a material document. Therefore, the said evidence could not change the outcome of the present case.

C. The said evidence does not lead to a consistent arbitral solution on the issue of the adaptation of contract due to hardship.

35. The tribunal does not have an obligation to provide the same decision with the other arbitration as it has broad discretion to make evidentiary decisions. The prior decision of an arbitral tribunal on a question of law has no precedential value *[Sheppard, pp. 219, 222; Kaufmann-Kohler, pp.357-372]*. Identical scenarios in different legal systems can

legitimately be decided differently because when any general rules and procedures are compromises, their application may be unfair to one or both parties in a particular case *[Waincymer, p.745]*. In this regard, the tribunal has no obligation to provide a consistent arbitral solution with the Respondent's other arbitration in the present case.

36. The principle of *res judicata* must not be applied in the present case. A prior award does not formally have *res judicata* effect although it could provide a helpful analysis on the common factual background *[ICC Case No.6363; ICC Case No.7061]*. As there is neither doctrine of precedent in international law nor hierarchy of tribunals, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals *[Société Générale v. Philippines; Corn Prods. v. Mexico]*. In this regard, Respondent is entitled to reject the adaptation of the contract in the present case although it asked for adaptation of the contract itself in other arbitration proceedings under the same condition of unforeseeable hardship.

II. Inadmissibility of the said evidence does not violate Claimant's right to due process.

37. Claimant contends that the said evidence must be admitted on the basis of full opportunity to present its case under Art. 13.5 of HKIAC Rules and Art. 18 of both Mediterranean Arbitration Law and Danubian Arbitration Law (UNCITRAL Model Law) *[p.17, ¶¶47- 49 of C's Memo]*. Then, the tribunal shall also give to the Respondent the opportunity to defense the said evidence in order to be consistent with the requirements of those Art. 13.5 and Art. 18 *[Société Fichtner v. Société Lksur; Rice Trading Ltd. v. Nidera BV]*. In this regard, it can be seen that admissibility of the said evidence does not concern with due process, but concerns with tribunal's discretion. Moreover, it is also not a ground to challenge the award under Art. V(1)(b) of New York Convention. Since the exclusion of evidence is not a violation of due process *[OLG Cologne case]*, the inadmissibility of the said evidence obtained by illegal means would not be a ground to challenge the award on the basis of violation of due process.

38. Inadmissibility of the said evidence does not violate Claimant's right to due process. Consideration of past arbitral decisions is related to due process, although the failure to consider the past decision cited by the parties will not necessarily constitute a ground for setting aside or annulling the arbitral award *[Bentolila, p.168]*. According to Waincymer, "although tribunals respect the parties' right to be heard, the right to a full opportunity to

present a case does not presumptively override a tribunal's power to determine admissibility of evidence *[Waincymer, p.793]*". Therefore, in the present case, the tribunal is not bound to admit the said evidence respecting Claimant's right to a full opportunity to present its case as a mandatory rule.

III. The Claimant's submission of the said evidence from other arbitration proceedings is contrary to the principle of good faith.

39. Contrary to Claimant's allegation that it is entitled to submit the evidence from other arbitral proceedings based on the principle of good faith *[p. 17, ¶¶ 50-52 of C's Memo]*, Respondent will argue that first, Claimant failed to conduct in good faith in taking the said evidence (A) and second, the admission of the said evidence would be contrary to public policy (B).

A. Claimant failed to conduct in good faith in taking the said evidence.

40. Claimant did not cooperate in good faith in getting access to information related to other arbitral proceedings. The principle of good faith is a fundamental aspect of the parties' arbitration agreement to cooperate in dispute settlement *[Born, p.1254; Peters, p.9]*. According to No. 3 of Preamble of IBA Rules, *"the taking of evidence shall be conducted on the principle that each party shall act in good faith [….]."* However, in the present case, Claimant was planning to buy the said award of Respondent's other arbitration from a company which has a doubtful reputation *[p. 61, ¶41 of PO2]* although Claimant could request the Respondent to produce the said award. According to Artt. 3(2) and 3(3) of IBA Rules Claimant can request not only to the tribunal but also to the Respondent to produce the said award of Respondent's other arbitration. Since Claimant did not request document production and tried to acquire it from an illegal source, Claimant failed to conduct in good faith.

41. Furthermore, Respondent has no obligation to disclose about its other arbitration. There is no obligation on parties to disclose all documents relevant to the parties' dispute *[Veeder, pp.57-60; Zuberbühler et al., 33]*. Moreover, any national law or institutional rules does not grant parties to international arbitrations an automatic right to demand documents to be disclosed by their counter-parties *[Born, pp.2325-42]*. Therefore, in the present case, Respondent is entitled to be silent about its other arbitration as far as Claimant does not request to disclose

it. Respondent has no responsibility to disclose about its other arbitration in order to escape from Claimant's allegation of bad faith.

B. The admission of the said evidence would be contrary to public policy of Equatoriana.

42. Admitting the illegally obtained evidence would be a violation of public policy. According to Art. 9(2)(b) of IBA Rules, the tribunal shall exclude from evidence for legal impediment or privilege under the legal or ethical rules determined by the arbitral tribunal to be applicable. In *Methanex v. USA*, the court held that Methanex was wrong to introduce evidence obtained illegally and had violated the basic principles of justice and fairness. Moreover, also in *Libananco Holdings v. Turkey* case, the tribunal weighted the importance of confidentiality and legal privilege and ordered the destruction and exclusion from evidence of all privileged and confidential communication. As good faith, due process and equal treatment between parties are mandatory rules that cannot be overridden by tribunal's discretion under Art. 18 of Equatorianan Law (UNCITRAL Model Law), admission of the illegally obtained evidence in the present case would be contrary to public policy of Equatoriana.

43. Admission of the said evidence would lead refusal to recognition or enforcement of the award on the ground of public policy exception under Art. V(2)(b) of New York Convention. Although there is no specific rules on evidence obtained in breach of contractual obligations or by illicit means in the arbitration law of Equatoriana *[p.61, ¶46 of PO2]*, an Equatorianan court may refuse to enforce the award because courts have recognized public policy as "a specific application of the more general doctrine that a court may refuse to enforce contracts that violate law or public policy even there is no statutory public policy basis in national jurisdiction *[United Paperworkers v. Misco; Hurd v. Hodge]*. Most jurisdictions recognize public policy as universal legal principles to be protected *[New York Convention Guide, ¶¶ 13-16]*. Thus, admitting the illegally obtained evidence would be a breach of international public policy because permitting the illegally obtained evidence which may potentially sway the arbitrators in their decision making is a dangerous precedent for commercial arbitration and would likely be at odds with public policy in Equatoriana, or any jurisdiction.

Conclusion of Issue 2

For the reasons that Claimant had obtained the said evidence through illegal means; Claimant failed to conduct in good faith in taking evidence; and the admission of the said evidence would be contrary to public policy, the arbitral tribunal should not allow the said Partial Interim Award of Respondent's other arbitration as relevant evidence.

ISSUE 3: THE CLAIMANT IS NOT ENTITLED TO ADDITIONAL PRICE OF US$ 1,250,000 UNDER THE AGREEMENT.

44. The parties entered into FSSA based on DDP and provided a non-refundable fee of US$100,000 per insemination dose. The Claimant submitted that he is entitled to the payment of US$1,250,000 resulting from an adaptation of the price due to the imposition of tariffs by the Equatoriana Governmment. Contrary to the Claimant's submission, the price should not be adapted in light of the tariffs as the inclusion of hardship wording under the FSSA does not cover such tariffs (I) and also under Art.79 CISG in any case due to the special regulation for hardship under the FSSA (II).

I. Respondent is not liable for US$ 1,250,000 which is 25 per cent of the price for the third delivery of semen under Clause 12 of the FSSA.

45. Claimant is not entitled to the payment of USD 1,250,000 as the Respondent did not agree to bear any risks associated with DDP and Clause 12 of the Agreement does not cover any imposition of new tariffs. Respondent is not liable for any adaptation price under Clause 12 of the FSSA as: Claimant cannot invoke hardship under Clause 12 of the Agreement [A], the prices should not be increased according to the reasonable interpretation of clause 12 in the Agreement [B], and Respondent has complied with its obligations under the Sales Agreement in good faith, consistent with the principle of *pacta sunt servanda* [C].

A. Claimant cannot invoke hardship under Clause 12 of the FSSA.

46. Clause 12 of the FSSA provides that the "Seller shall not be responsible for any hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous *[p.14, Exb. C5]*." Price must not be adapted under Clause 12 of the FSSA as: the narrow language of the hardship clause protects the Respondent against the

imposition of additional tariffs [1], the prices should not be increased according to the proper contextual interpretation of clause 12 in the FSSA [2] and as the last even if there is hardship, the Claimant cannot increase the price by the reason of hardship [3].

1) The narrow language of Hardship under the FSSA protects the Respondent from paying any amount in addition to the agreed price

47. Contrary to the Claimant's submission *[p.19, ¶58 of C's Memo]*, the narrow language of the hardship clause does not cover imposition of tariffs. Clause 12 of the FSSA narrowly mentioned that "Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller … neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." The parties don't have contrary intention to the hardship wordings as they agreed to mean the additional health and safety requirements only when they made the FSSA.
48. Principle *of ejusdem generis* describes that the word hardship must be recognized by its associated words and not by the other interpretations. This principle indicates that examples of hardship cited by parties in the clause 12 of the FSSA are only meant to the additional health and safety requirements.
49. Both parties agreed to DDP terms in the FSSA and so the Claimant has to bear all the risks associated with changes in DDP like additional tariffs in the present case. In general, DDP incoterm represents maximum obligation of the seller *[p.12, Exb. C4]*. DDP means that the seller bears all the costs and risks involved in bringing the goods to the place of destination to pay any duty for both export and import and to carry out all customs formalities but Incoterms do not provide a complete regulation of international sales contracts. Issues such as customary operations of carriers, payment of the price, or transfer of ownership do not fall under the scope of Incoterms.
50. The Claimant asked to be relieved from all the risks associated with changes in DDP but the Respondent patently rejected this option as he was not willing to pay a much higher price for receiving basically nothing. The Respondent rejected to add the ICC hardship clause as it was too broad and finally added the narrowly interpreted hardship wording into the existing force majeure clause *[p.31, ANoA, ¶4]*. The new impositions of tariffs are not comparable to additional health and safety requirements as hardship is narrowly interpreted. Also the import tariffs are not imposed by the custom authorities in a similar manner and similar intention as

health and safety requirements *[Customs]*. This indicate that import tariffs are not similar and comparable to additional health and safety requirements.

51. In conclusion, import tariffs are not "comparable" to additional health and safety requirements and were completely "foreseen", the tariffs are not covered within the narrow wording of Clause 12 of the Contract. Thus, the Respondent is not entitled to pay any adaption price which is not provided under the FSSA.

2) The contextual interpretation of the clause 12 does not indicate that the Claimant is protected against additional tariffs.

52. The parties agreed to add the narrowly interpreted hardship wordings into the FSSA and the contextual interpretation of Clause 12 does not cover the imposition of tariffs made by the Equatoriana government. Also in accord with the principle of *ejusdem generis,* the parties must rely only upon the expressed terms in the Clause 12 of the FSSA which indicates hardship only in the case of additional safe and healthy requirement or comparable unforeseen events which would make the contract more onerous.

53. When the Claimant asked to add the ICC hardship clause into the contract because it did not want to take all the risks dealing with delivery, the Respondent only accepted to add the narrowly interpreted hardship clause into the contract as ICC hardship clause was too broad *[p.12, Exb. C4]*. Under Clause 12 of the FSSA, it was stated that "Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous *[p.14, Exb. C5]*.

54. According to the principle of *ejusdem generis,* the general word or phrase will be interpreted to include only items of the same class as those listed and not to be contrasted as the widest extent but have to be interpreted as applying to things as those are specifically mentioned *[Black's Law Dictionary]*. In our case, the word "hardship" in the Clause 12 of the FSSA means to the additional health and safety requirements or comparable unforeseen events which would make the contract more onerous. Also when applying this principle, there is no contrary intention of the parties as they want to mean the term "hardship" amounts just to additional health and safety requirements and no other meanings. The imposition of the tariffs made by the Equatoriana government is neither the same nor similar as the meaning of additional health and safety requirements provided in the clause 12 of the FSSA.

55. The parties have to be relied only upon the written agreement and they are prevented from contradicting (or sometimes adding to) the terms of the written agreement by seeking the admission of evidence for circumstances outside the contract *[Global Commentary on the NYC]*. The parties agreed to add the narrowly interpreted hardship wordings in the agreement. According to four corners rule, Clause 12 of the FSSA is properly interpreted and the parties' negotiation before the conclusion need not to be considered. And also according to four corners rule, to restrict certain extrinsic evidence from being considered when interpreting a contract *[Jonas Rosengren]*.
56. Therefore, the 30% imposition of tariff does not amount to the hardship under the clause 12 of the FSSA. And the parties concluded the narrowly interpreted hardship wordings in this FSSAt which amounts only to the additional health and safety requirements which would made the contract more onerous. Also in accord with the principle of *ejusdem generis*, the term hardship must be interpreted in accord only with the expressed wordings in the FSSA.
57. The parties agreed to add the narrowly interpreted hardship wordings in an agreement. According to four corners rule, Clause 12 of the FSSA is properly interpreted and the parties' negotiation before the conclusion need not to be considered. Therefore, the 30% imposition of tariff does not amount to the hardship under this clause and the Claimant cannot ask to increase the price according to clause 12 of the FSSA.

    3) In any event, even if hardship can be invoked the Claimant still cannot increase the price under Clause 12 of the FSSA.

58. The parties agreed not to add the ICC hardship wordings as it was too broad and agreed to add only hardship wordings into the contract. And the term hardship in the clause 12 of the FSSA does not cover the imposition of tariffs made by the Government of Equatoriana.
59. With an email of 28 March 2017, the Respondent asked to make the shipment with delivery DDP *[p.11, Exb. C3]* And the Claimant asked to add the hardship wording in the FSSA as he did not want to take all the risks associated with a change in delivery terms *[p.12, Exb. C4]*. And when the parties concluded the FSSA they agreed to add only hardship wordings into the contract and not the ICC hardship clause which is too broad. Clause 12 of the FSSA stated that "Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" *[p.14,*

Exb. C5]. The term "hardship" in the Clause 12 of the FSSA amounts only to the additional health and safety requirements or comparable unforeseen events which would make the contract more onerous. The parties did not add any facts about the Custom changes or tariffs matters in the conclusion of the contract.

60. Therefore, even though the imposition of the tariffs made by the Government of Equatoriana amounts to the hardship, the Claimant cannot increase the price under Clause 12 of FSSA as there is no agreement in the contract about the hardship arising out of the imposition of tariffs.

B. The parties added hardship wording with their mutual agreement so that the principle of commercial sense cannot be applied.

61. Before the conclusion of the FSSA, the parties made a discussion upon adding the hardship clause into their agreement. When the Respondent asked the Claimant to make the delivery upon DDP process *[p.11, Exb. C3]*,the Claimant accepted it but wanted to add the hardship wordings into the contract *[p.12, Exb. C4]*. The parties agreed to add the hardship wordings in the Clause 12 of the FSSA which was stated that, "[…] hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous *[p.14, Exb. C5]."* As the parties made a discussion upon including the hardship wordings into the FSSA the principle of commercial common sense cannot be applied.

62. When Claimant suggested to make a delivery of the frozen semen on the basic of EXW delivery *[p.10, Exb. C2]*, the Respondent had no problem with most terms and conditions but insisted on a delivery DDP *[p.11, Exb. C3]*. DDP means that the seller delivers the goods when the goods are placed at the disposal of the buyer and the seller has to bear all the risks and costs involved in bringing the goods to the place of destination *[Incoterm 2010]*. And as the Claimant was not willing to take all the risks upon delivery he suggested to add ICC hardship clause into the contract *[p.12, Exb. C4]*. The Respondent did not want to use the ICC hardship clause as it was too broad and decided to add the narrowly interpreted hardship wordings into the contract.

63. In the present case, the additional imposed tariff of 30%does not alter the equilibrium of the contract. This is demonstrated by table below as mentioned in ¶77 of C's Memo,

CLAIMANT'S terms	Contractual terms before new tariffs	Contractual terms after new tariffs
Price per dose	US $100,000	US $100,000
Amount due on last shipment (Price x50)	US$5,000,000	US$5,000,000
Cost per dose	US$95,000 [P.O. 2, ¶31]	US$95,000 [P.O. 2, ¶31]
Cost of Shipment (inclusive of import tariffs)	US$4,750,000	US$6,250,000
Profit/Loss	US$250,000 = Profit	US$1,250,000= Loss

64. The above table indicates that the imposition of 30% tariff does not alter the equilibrium of the contract as if the changed circumstances result in less than 50% decrease in the value of the performance, the fundamental alternation of the equilibrium of the contract is not realized *[Maskow]*. In a 1996 arbitral award, the ICC International Court of Arbitration, Zürich, stressed that the exceptional nature of hardship requires a fundamental alteration in the original contractual equilibrium *[ICC Case No.8486]*. Not all alteration amounts to the hardship. The Official Comment on the UNIDROIT Principles, the 1994 edition, adopted a general threshold test. It states: "an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a 'fundamental' alteration *[PICC Commentary]*. Claimant had been in financial difficulties even before the conclusion of the contract it was clear that even if the Claimant shall be financially endangered at this time and not because of the additional tariff. Therefore, the interpretation of clause 12 of the agreement indicates that Claimant has to bear all the risks associated with DDP and he had to pay the additional payment of the tariff on behalf of the Respondent.
65. In Ex UCL v. Solarix Networks, the accounts receivable at the completion date were described in the parties' agreement as "Trade Debts". The arbitrator had set out an entirely

orthodox approach to contractual interpretation. Having found the matter amenable to appeal, the Court disagreed with arbitrator's interpretation. The Court held that the arbitrator had placed too great an emphasis on what he regarded to be commercial common sense. In doing so he had failed to give effect to the clear and natural meaning of words chosen by the parties when read in their full documentary context.

66. Thus, the additional tariff is not to be incorporated under Clause 12 of the FSSA and the parties cannot rely upon the principle of commercial common sense for the interpretation of hardship.

C. Respondent has complied with its obligations under the FSSA in good faith, consistent with the principle of *pacta sunt servanda*.

67. Respondent acted in good faith in carrying out all his obligations as buyer since from the contract was made to until the final payment of delivery of frozen semen. Based on the principle of *pacta sunt servanda*, contracts should not be modified without a strong reason, otherwise it would bring back the insecurity making agreements with different contract States. The Respondent contacted the Claimant in 2017, inquiring about the availability of Nijinsky III for its own race horse breeding programme. At that time, Claimant was told that Respondent's investors were keen to begin racehorse breeding programme as possible taking advantage of the temporary lift of the ban on artificial insemination in Equatoriana *[p.9, Exb. C1]*. Respondent clearly notified about temporary lift upon restriction and that it indicated that he acted in good faith.

68. Both parties agreed that frozen semen should be delivered on DDP basic by adding Clause 8 of the FSSA *[p.14, Exb. C5, ¶8]*. Respondent made sure that he was not willing to pay higher price for the risks associated with DDP and rejected ICC hardship clause [*p.30, ANoA, ¶4]*. And added a narrowly worded hardship under Clause 12 of the FSSA *[p.14, Exb. C5, ¶12]*. When the Claimant made the shipment of frozen semen, the Respondent took delivery and paid the purchase price in consistent with FSSA. On the other hand, Claimant while accepting the contract based on DDP, acted in bad faith in carrying out its obligations by claiming additional costs due to tariffs while Mr. Shoemaker told Ms. Napravnik that according to DDP, all risks had to be borne by the Claimant and never committed to any adaptation of the price *[p.36, Exb. R4, ¶62]*.

69. Lastly and unlike Claimant's argument, the principle of good faith within the CISG cannot create new remedies containing rights and obligations for the parties *[Zeller, p.237; Schwenzer/Hachem, ¶19]*. Based on Art. 7(1) CISG, good faith is a purely interpretive principle *[Disa Sim]*.

II. Claimant is not entitled to an additional sum of US$ 1,250,000 based on adaptation of price under the CISG.

70. The parties made a special regulation for hardship under Clause 12 of the FSSA and furthermore, there is no other provision for adaptation under the FSSA. Claimant has no right to ask for remedy of adaptation of the FSSA under CISG [A], and alternatively by virtue of application of general principles of the CISG and tools of interpretation under Art. 6.2.3 of the UNIDROIT Principles [B].

A. The CLAIMANT is not entitled to an additional sum of US$1,250,000 based on adaptation of the price under Art. 79 of the CISG.

71. Art.79 CISG provides that party "is not liable" for failing to perform its obligations, if the exemption from liability applies. In present case, parties provided a specific hardship clause in the FSSA and it shall amount to derogation from CISG and inapplicability of Art. 79 *[p. 32, ANoA, ¶20]*. The inclusion of the hardship clause constitutes derogation under Art.6 CISG and Art.79 cannot be applied to the present case [1], price must not be adapted under Art.79 CISG as the circumstances of the present case does not amount to the requirements of Art.79 [2]; and the remedy prayed by the Claimant is not within the scope of Art.79 CISG [3].

1) Clause 12 of the FSSA exclude the application of Art.79 CISG.

72. The parties added hardship wording into the FSSA as a special regulation for the problem of changed circumstances by excluding an application of Art.79 CISG *[p.32, ANoA, ¶20]*. Although the FSSA is governed by CISG *[p.14, Exb. C5, ¶14]*, the parties can invoke Art.6 "when the parties may find the CISG generally not suitable for their sales contract, they may not be satisfied by individual provisions of the Convention or with their default effect *[Schlechtriem/Schwenzer, p.115]."*

73. The principle of party autonomy expressed in Art. 6 CISG permits parties to agree to exclude its application in whole or part, at the time of or after the conclusion of the contract. The parties' intent to exclude must be determined in accordance with Art. 8 CISG. Such intent should be clearly manifested, whether at the time of conclusion of the contract or at any time thereafter *[CISG-AC 16]*. The application of Art. 6 to Part III of the CISG provides that "Having concluded a contract, the parties may further agree that such contract will not be governed by some or all of the provisions of the CISG addressing *[Jack M. Graves]."*
74. The Respondent rejected the Claimant's request to be relieved from the risk associated with DDP *[p.30, ANoA, ¶4]* and obviously rejected ICC hardship as it is too broad for the purposes of this contract and the objectives pursued *[p.56, ¶12 of PO2]*. Finally, parties agreed to add the hardship wording in Clause 12 as a special regulation for changed circumstance as there is no clear interpretation for hardship clause under CISG. It was clear from the parties' intention for inclusion of hardship at the time of contract that they explicitly made a special regulation for changed circumstances under the FSSA.
75. Thus, Clause 12 of the FSSA shall be constituted as an exclusion of Art.79 under the ambit of Art.6 of CISG and Art.79 of CISG is not applicable to the present case.

2) The new imposition of tariff does not fulfill the requirements of an impediment under Art.79 of the CISG.

76. The imposition of 30% tariffs on animal semen from Equatoriana does not amount to the impediment under Art.79 CISG. The party is exempted from his liability if the failure to perform is due to an "impediment" provided under Art.79 CISG. In the present case, the prerequisites for seeking an exemption under Art. 79 are not fulfilled as: the additional tariff did not make occasion of hardship for the Claimant[i]; it was foreseeable [ii]; and avoidable in the sense that the Claimant could reasonably be expected to avoid the impediment [iii].

i. The additional tariff did not cause hardship for Claimant under the Art 79 of CISG.

77. The imposition of 30% tariffs from Equatoriana did not cause hardship under Art.79 CISG. The party is exempted under Art. 79 if the failure to perform is due to (a) an impediment which is beyond his control, (b) unforeseeable, and (c) unavoidable in the sense that the party could not reasonably be expected to avoid or overcome the impediment or its consequences.

78. In *Chinese goods case*, an impediment was deemed to be "an unmanageable risk or totally exceptional event". But the court decided that the seller was not exempted for non-performance under Art. 79 CISG. As a rule, difficulties in delivery due to the seller's financial problems are not to be considered an impediment beyond the seller's control but belong to the seller's area of risk. This is similar to the present case as the Claimant had poor financial situation to deliver the semen.
79. The Claimant is in hardship situations for two years prior to entering into the contract. Claimant has been making losses since 2014 primarily due to the high interest payments for the loan taken on to finance the new stables in 2013 *[p.59, ¶29 of PO2]*. In the present case, Claimant entered into contract by taking a risk itself as his primary concern was to increase its revenues due to its strained financial situation. It is not easy for Claimant to sustain and extend its credit line from the creditors if he has to face another similar restriction like immediate imposition made by the Government in 2014. From the past experiences, additional tariffs were completely foreseeable at the time of contract conclusion.
80. Inspired by force majeure clauses, the provision requires to the foreseeability of the occasion being referred to and in today unsteady business world, it is the most difficult component to demonstrate, as by far most of events such as the ban, or additional tariffs, are foreseeable *[Lookofsky II]*. In *Scafom Int'l v. Lorraine Tubes*, unforeseen increases in the price which gave rise to a serious imbalance, considered as an "impediment" and exempt the obligor from liability to pay damages. In this case, the price of steel unexpectedly rose by about 70% after the conclusion of the contract and before delivery. The imposition made by the Equatorianian government is only 30% *[p.15, Exb. C6]* and in order to amount to the fundamental alternation of the equilibrium an alternation must be 50% or more than 50%. So, the 30% imposition of tariff does not alter the equilibrium of the contract and did not made hardship for the Claimant. The Claimant was only asking for adaptation due to his prior hardship and not because of the new imposition of tariffs.
81. Therefore, it was clear that Claimant ran a risk intentionally even though he suffered hardship from the past experiences. The newly imposition of tariffs is not the reason for the Claimant to be in hardship as he was already in poor financial situation before the FSSA.

ii. The Claimant could have reasonably foreseen the impediment at the time of the conclusion of the contract

82. The imposition of 30% tariff made by the Equatoriana Government was foreseeable due to the Respondent's notice and Claimant's past encounters. The promisor is exempted under Art.79 CISG if the failure to perform is due to an unforeseeability of the impediment *[Kröll et al.]*. But the promisor is responsible even for impediment which lies outside of his sphere of management if the impediment was foreseeable at the time of the conclusion of the contract and therefore, the promisor made no reservations regarding to it, the he ought to be understood to have assumed the risk that performance may be delayed or prevented by the impediment *[Bianca/Bonell]*. It is generally accepted that risk allocation analysis comes again into play, meaning that if an event is foreseeable at the time of contracting, the claiming party will be considered to have assumed the risk of it, unless it is stipulated otherwise in the contract *[Brunner, p.157]*.

83. In world business group action, every party shall be considered as a "professional" and so foresee a number of occurrences *[Kessedjian, p.418]*. The Respondent told Claimant about previous restrictions on transportation of all living and this ban only had been temporarily lifted *[p.9, Exb. C1]*. Due to this notice, the Claimant had already foreseen that the ban should be lifted whenever and made strict restrictions for animal insemination like additional tariffs in the present case later on.

84. Price and currency fluctuations are generally also foreseeable *[DiMatteo, pp.258-305]*. Impediments that are reasonably foreseeable at time of conclusion of a contract, the court opined that price variations are predictable as a result of commercial activities entail this risk, therefore exemption under force majeure clause does not apply *[Frozen Raspberries Case; Steel Ropes Case]*, especially if such trends are visible from experience *[Steel Bars Case]*. So the imposition of tariffs did not fall within any of these categories. In *Societe Romay AG v. SARL Behr France*, the court reasoned that "significant drop or increase in price" are reasonably expected, especially when the party was considered "an experienced professional acting in the international market."

85. In 2014, the Claimant had sold three mares to farms in Danubia with DDP delivery. Before the delivery, Danubian government immediately imposed strict health and safety requirements and the additional tests amounted to 40% of the sale price and it nearly resulted

in the insolvency of Claimant *[p.56, ¶12 of PO2]*. From this past experience, the Claimant had already known that any Government can make high expensive tests at any time.

86. Therefore, it was credibly likely for Claimant to have known or reasonably foreseen additional tariffs imposed by the Government of Equatoriana from the circumstances surrounding the contract negotiations for hardship or his past encounters with additional tests.

iii. Claimant could reasonably be expected to avoid the consequences of new imposition of tariffs

87. Claimant could reasonably be expected to avoid the additional tariffs of 30 percent upon all agricultural goods from Mediterraneo as retaliation for the previous restriction imposed by Mr. Bouckaert, the newly elected President of Mediterraneo.

88. "A change of circumstances that could not reasonably be expected to have been taken into account, may qualify as an "impediment" under Article 79(1). The promisor can be expected to overcome an impediment in order to perform the contract in the agreed manner, even when this incur greatly and even a loss resulting from the transaction *[*Heuzé, *pp. 277- 291]*. The parties must do everything in their capacity to prevent timely performance from being affected by the occurrence of an unforeseen event *[Kröll et al.]*.

89. The parties agreed to do 2 installments for the purchase price and understood that no semen will be shipped until all fees have been paid. Two months before the final shipment, the Government of Equatoriana imposed 30% tariffs on agricultural products from Mediterraneo, including animal semen *[p.15, Exb. C6]*. When Mr. Shoemaker called Ms. Napravnik, he clearly stated that he had no power in negotiating the FSSA and also indicated that all risks had to be borne by the Claimant in accord with DDP *[p.36, Exb. R4]*. It was indisputable that Respondent had made known to the Claimant that he did not agree to pay additional import tariffs from the time agreement was made and also when new imposition of tariffs was announced.

90. Therefore, it was obvious that the Claimant had the opportunity to avoid the consequences of the imposition by not delivering the frozen semen but he did it. Moreover, the Claimant could reasonably overcome the consequences of the additional tariffs by not entering into the contract from the beginning due to his financial difficulties at that time.

3) The adapted price is not within the scope of Art.79.

91. CLAIMANT seeks an additional payment of US$1,250,000 that is not provided in the Contract per se, it does not seek the remedy for adaptation price under Art.79 CISG. As the CISG does not contain a Hardship clause, and the prevailing opinion is that Art. 79 CISG does not cover hardship and therefore, renegotiation or adaptation of the contract is not an option. Further, CISG does not have provision that authorizes a judge to adapt the contract like UNIDROIT principles. Moreover, CISG does not adopt the Roman Doctrine of *rebus sic stantibus [Flambouras]*. The doctrine of *rebus sic santibus* may entail the adaptation of the contract if there is unforeseeable and extraordinary change of circumstances rendering a contractual obligation extremely burdensome. There are no general principles of the CISG from which a duty to renegotiate or a possibility to adapt the contract might derive *[CISG–AC 7]*. Even if some general principles could be found, divergent solutions would arise because the principles would not provide any clear guidance *[Lindström]*.

92. In *Langham-Hill INC v. Southern Fuels Company*, "The normal risk of a fixed-price contract is that the market price ca be modified. If it rises, the buyer gains at the expense of the; if it falls, as here, the seller gains at the expense of the buyer. The full purpose of a fixed-price contract is to portion risk in this way."

93. Thus, the Claimant is not entitled to additional payment of US$ 1,250,000 under CISG as the remedy of adaptation of the FSSA as the circumstances are not covered under Art.79 CISG. Additionally, there is no adaptation provision in the contract and no agreement that inclusion of hardship wording suggests that adaptation is possible.

B. Claimant cannot resort to the tribunal for adaptation under Art.6.2.3 of PICC.

94. The 30% imposition of tariff made by the Equatoriana government does not amount to the hardship interpretation under art 6.2.2 of the PICC (1).As the imposition of tariffs made by the Equatoriana government is not the hardship under PICC, the Claimant does not have the right to ask to the court for adaptation under Art 6.2.3 of the PICC (2).

1) Claimant cannot ask for adaptation by the application of general principles.

95. The general principles of the CISG are good faith and uniform application of the Convention *[CISG, Art. 7(1)]*. The principle of good faith between the parties will also be affected, as the parties expected the CISG to apply *[Bundesgerichthof Case]*. In accord with the rule of

pacta sunt servanda, contracts should not be modified without strong reason and must be elaborated according to the will of the parties *[Renatha Tarquinio]*.

96. In the present case, when the Claimant inquired about the DDP delivery *[p.14, ¶¶6, 8, Exb. C5]*, Respondent made sure that he was not willing to pay higher price for the risks associated with DDP and rejected interpretation of hardship under ICC *[p.30, ANOA, ¶4]*. Also when the Claimant made known to the Respondent about new tariffs imposed by the Government of Equatoriana, Mr. Shoemaker told Ms. Napravnik several times that he was not a lawyer and had not been involved in the negotiations of the contract. He also indicated that according to DDP, all risks had to be borne by the Claimant and never committed to any adaptation of the price *[p.36, Exb. R4, ¶62]*. When the Claimant made the last shipment of the semen, the Respondent had already purchased the price as expressed in the FSSA.
97. The imposition of tariff is just 30% and it does not alter the equilibrium of the contract. And there is no reason for the Respondent to bear the additional price for receiving basically nothing. Therefore, the Respondent had already done his obligations as expressed in the FSSA and acted in good faith. The Claimant has no right to ask the additional price of US$1,250,000 based on general principles.

2) The Claimant has no right to ask for the adaptation under Art 6.2.3 of PICC.

98. The imposition of tariff is just 30% and it does not alter the equilibrium of the contract. As it does not alter the equilibrium, the Claimant did not suffer hardship under Art. 6.2.2 of PICC (i). As there is no hardship, the Claimant has no right to ask for adaptation under Art. 6.2.3 of PICC (ii).

i. Claimant did not suffer hardship under the interpretation of hardship under Art.6.2.2 of the PICC.

99. The event which causes hardship was not arisen or occurred by the Claimant. Hardship was caused by the Government of Equatoriana who imposed a tariff of 30 per cent upon all agricultural goods from Mediterraneo *[p.15, Exb. C6]*. Whether an alternation of the equilibrium is fundamental or not will depend upon the case *[Lookofsky I]* and fundamental alternation of entail that normal economic risks cannot be taken as the hardship *[Maskow]*. The official comment on UNIDRIOT Principles stated that, "an alternation amounting to 50% or more of the cost or the value of the performance is likely to amount to a 'fundamental' alteration *[PICC Commentary]*." If the changed circumstances result in less

than fifty percent decrease in value of the performance to be received or less than fifty percent increase in the cost of performance, then the fundamental alteration of the equilibrium of the contract is not realized under Article 6.2.2 *[Maskow]*. In *Nuova v. Fondmetall*, the court held that seller cannot request dissolution according to which cost increases of thirteen point six percent, thirty percent, forty-four percent, or twenty-five to fifty percent were not considered to be fundamental alterations of the equilibrium of the contracts.

100. In our case, the imposition of tariff by the Government of Equatoriana is only 30% and it does not alter the equilibrium of the contract and also when we say about the equilibrium, we must also think by the side of the Respondent as he had to pay the additional price for the tariff and basically received nothing.

ii. As there is no hardship the Claimant has no right to ask for adaptation under Art.6.2.3 of PICC.

101. When the Government of Equatoriana announced the imposition of new tariffs the Claimant immediately reported about this dispute to the Respondent *[p.16, Exb. C7]*. When Mr. Shoe maker answered to the Respondent phone call, he was never committed to any adaptation of the price as there was no required authority to do so. He only 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 *[p.36, Exb. R4]*." And also when the parties concluded the FSSA on 6th May 2017, they did not include the adaptation clause in to the agreement *[p.13, Exb. C4]*. Art 6.2.3 4(b) of PICC stated "if the court finds hardship, it may, if reasonable, adapt the contract with a view to restoring its equilibrium."

102. In ICC Case No.9479, the arbitral tribunal rejected to terminate the contract as the issuing of the EEC Directive did not alter in any way the equilibrium of the FSSA among the parties. When there is no alternation of the equilibrium we cannot say that there is hardship. As there is no hardship event which fundamentally alters the original contractual equilibrium that satisfies with certain conditions, mentioned in Art. 6.2.2 of the UNIDROIT Principles, the Claimant cannot ask for adaptation by the court.

Conclusion of Issue 3

CLAIMANT's claim for an increased remuneration is completely baseless. Clause 12 of the FSSA was interpreted narrowly that it does not cover imposition of tariffs. Thus, CLAIMANT is not entitled to an additional sum of US$1,250,000 due to the imposition of the new tariffs under Clause 12 of the FSSA. Also Claimant cannot rely on Art. 79 CISG as parties have provided a special regulation for hardship clause and additional tariffs were completely foreseeable.

PRAYER FOR RELIEF

In light of the submissions above, Respondent respectfully requests the tribunal to find that:

1) This Tribunal has no jurisdiction to hear the case;
2) Claimant is not entitled to an increase of the purchase price;
3) Respondent is not liable for additional amount of US$1,250,000 resulting from an adaptation of the price under Clause 12 of the FSSA or CISG
4) Claimant bears the cost of arbitration.

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CERTIFICATE

We hereby certify that this Memorandum was written by the person whose names are listed below and who signed the certificate:

Yangon, 24 January 2019,

Respectfully submitted,

COUNSELS-

Nwe Mon Mon Oo

Suit Myat Htet

Thwe Thwe san

Zar Zar Lwin Htet

Shwe Yi Than Htike Win