SIXTEENTH ANNUAL

WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG SAR

MEMORANDUM FOR RESPONDENT

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

COUNSEL FOR RESPONDENT:

• BINDA KUMARI THAPA • PREKSHYA NIROULA

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COACHES: ANUJ CHAND THAKURI • SAHADEV KHATRI

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LIST OF ABBRIVIATIONS

&	And
¶	Paragraph
Art.	Article
AC	Advisory Council
ARIAS	The Insurance and Reinsurance Arbitration Society
BGB	Bürgerliches Gesetzbuch
CISG	United Nations Convention on Contracts for the International Sales of Goods
Cmnt.	Comment
Corp.	Corporation
DAP	Delivered at Place
DDP	Delivery Duty Paid
Ed.	Edition
EWCA	England and Wales Court of Appeal
EWHC	High Court of England and Wales
Grp.	Group
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
ICJ	International Court of Justice
i.e,	That is
ICC	International Chamber of Commerce
Inc.	Incorporated Company
LLC	Limited Liability Company
Ltd.	Limited
p.	Page
PO1	Procedural Order No 1

PO2	Procedural Order No 2
UK	United Kingdom
ULIS	Uniform Law on the International Sales of Goods
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UNLV	University of Nevada, Las Vegas
UPICC	UNIDROIT Principle of International Commercial Contract 2016
v.	Versus
VAT	Value Added Tax
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume

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STATEMENT OF FACT

The parties to the arbitration are Phar Lap Allevamento (herein after "CLAIMANT") and Black Beauty Equestrian (herein after "RESPONDENT"). CLAIMANT, a company registered in capital city Mediterraneo which is renowned for stud farm and known for its breeding success regarding racehorses. The star among Phar Lap's stallions is Nijinsky III, which is one of the most successful racehorses ever. RESPONDENT, registered in Equatoriana is famous for its broodmare lines. Three years ago, RESPONDENT decided to establish a racehorse stable for which they requested for CLAIMANT for the Nijinsky III frozen semen for artificial insemination.

21 March 2017: RESPONDENT contacted CLAIMANT for the availability of Nijinsky III for its newly started breeding programme.

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.

28 March 2017: RESPONDENT showed the interest in a long-term cooperation with CLAIMANT.

12 April 2017: Ms. Napravnik and Mr. Antley were severely injured in an accident.

6 May 2017: Mr. John Ferguson and Ms. Julian Krone replaced Ms. Napravnik and Mr. Antley for the finalization of the contract and the conclusion of the Frozen Semen Sales Agreement.

15 June 2017: The witness statement of Julie Napravnik where she mentions about he oral agreement down with Mr Antley.

10 April 2018: Letter from RESPONDENT to CLAIMANT with the suggested arbitration clause.

11 April 2018: Reply from CLAIMANT to RESPONDENT where the suggested arbitration clause was changed.

22 August 2018: Mr. Greg Shoemaker confirmed that he never committed to any adaptation of the price and would also not have had the required authority to do so.

23 August 2018: Witness statement of Julian Krone including the Note from Mr Antley's negotiation file.

24 August 2018: RESPONDENT submitted Answer to the Notice of Arbitration to settle the disputes.

2 October 2018: CLAIMANT got informed about another arbitration under HKIAC rules during the preparation for the upcoming Case-Management Conference on October 4.

5 October 2018: Procedual Order No.1 is issued where both parties are requested to make their submission on the three issues viz:

a. Lack of jurisdiction of arbitral tribunal to adapt the contract.
b. CLAIMANT is not entitled to submit evidence.
c. CLAIMANT is not entitled to the payment under clause 12 of contract and under CISG.

2 November 2018: Procedural Order No .2 was issued in the arbitral proceedings.

SUMMARY OF ARGUMENT

The parties bounded by the four corner of the contract have not agreed upon any law to govern the arbitration agreement, also the law governing the contract itself does not governs the arbitration agreement under the doctrine of separability. Lex Arbitri applies, as a result the Danubian Contract Law applies which does not gives the arbitral tribunal the jurisdiction to adapt the contarct as the tribunal is not authorized [I].

RESPONDENT strongly objects to CLAIMANT's malicious, false and misleading allegation of contradictory behavior as well as to the announced submission of materials from the other arbitration. CLAIMANT states that it is not abided by the confidentiality obligation since it is not party to that arbitration, in response, the RESPONDENT argues that the CLAIMANT is obliged to the duty of the confidentiality in accordance to article 45 of HKIAC rule 2018 and the evidence submitted by CLAIMANT is inadmissible in line with the "doctrine of clean hand". Therefore, CLAIMANT has violated the duty of confidentiality submitting the evidence from another arbitration [II].

CLAIMANT has no right to claim for adaptation of contract just because there is inclusion of hardship clause under clause 12 of concluded agreement .RESPONDENT is not liable to pay additional payment under principle of Four Corner Rule and DDP delivery. Likewise, CLAIMANT cannot rely on CISG Art.79 and UNIDROIT Principles to get rid from paying additional payment [III]

ARGUMENTS

I. THE ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION TO ADAPT THE CONTRACT

1. In absence of specified applicable law to the arbitration clause, the Danubian law governs the clause as Lex Arbitri. The tribunal still has no jurisdiction/power to adapt the contract even under the Danubian law since the tribunal was not expressly authorized by the parties to do so. The arbitral tribunal does not have the jurisdiction to adapt the contract [A], the Clause 14 of the Sales Agreement does not govern the arbitration agreement [B], four corner rule applies [C], Danubian Contract Law does not allow arbitral tribunal to adapt the contract [D].

A. The Arbitral tribunal does not have the jurisdiction to adapt the contract

2. The arbitral tribunal does not have the jurisdiction to adapt the contract as only the written agreement is the applicable agreement [i].

i. Only the written contract is applicable

3. Any verbal agreement between the two negotiators according to Ms. Napravnik [CLAIMANT Exhibit C8,p.17, ¶ 3] cannot be taken as a binding agreement because, the agreement between the parties can only be recognized if the agreement is in writing [Art. 2 of New York Convention]. The reference to the communication means the delivery of a written communication from a source which provides a record of transmission [Art. 2.16 of HKIAC Rules 2018]. The intention of the parties cannot supersede the written agreement and since the mere verbal communication between the negotiators does not have a record of transmission it cannot be taken as the consent of the parties. Here, the CLAIMANT's claim that Mr. Antley had expressly agreed in an oral agreement with Ms. Napravnik to give the arbitral tribunal the jurisdiction to adapt the contract is not agreeable [Claimant Memorandum ,p.5 ¶ 6].
4. Also, Mr. Antley's note in the negotiation file [RESPONDENT Exhibit R3,p.35] makes it clear that the negotiations regarding the adaptation of contract had yet to be done. Thus, only the interactions between the two negotiators cannot be a source for providing the arbitral tribunal the jurisdiction to adapt the contract.

B. The Clause 14 of the Sales Agreement does not govern the arbitration agreement

5. The Clause 14 of the Sales Agreement does not governs the arbitration agreement because the doctrine of separability applies [i], the Law of Mediterraneo does not governs the arbitration agreement [ii], the Law of Equatoriana applies [iii], even if, the Law of Equatoriana is argued to be not applicable, the tribunal does not have the jurisdiction to adapt the contract under the law of seat [iv], Law of seat applies [v].

i. The doctrine of separability applies

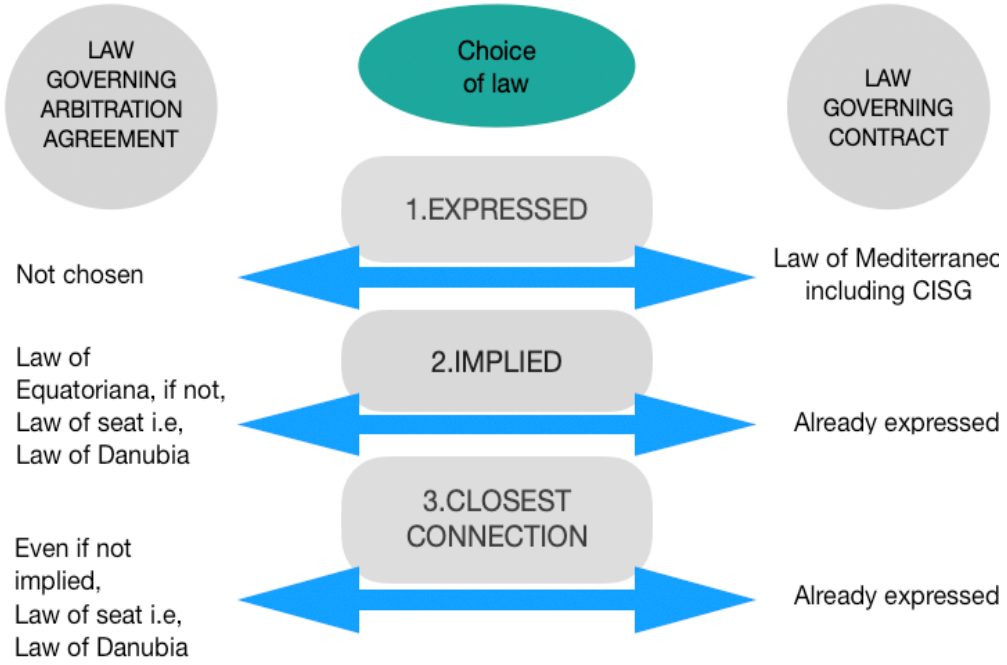
6. The arbitration agreement [Claimant Exhibit C5, p14, ¶15], presently, deals with submission of the disputes arising out of the contract to arbitration administered by HKIAC. The arbitration clause is treated separately and independent from the main contract according to the doctrine of separability [Adam Samuel, p.52, ¶ 5]. This means that as soon as the contract is concluded the arbitration agreement and the main contract is deemed to be different entities. The arbitration clause is autonomous and judicially independent from the main contract in which it is contained [Final Award in ICC Case No. 8938, XXIVa Y.B. Comm. Arb. 174, 176 (1999)].
7. Also, the arbitration agreement is also a subject to the different rules and choice of law rules than the party's underlying contract [New York Convention, Art. II, V (1)].
8. Presently, the arbitration clause [Sales Agreement, Clause 15] does not have the choice of law wording as the parties have not expressly agreed upon it. The choice of law wording is only in the preceding clause of the Sales Agreement which is for the contract and not for the arbitration agreement. The former states "this Sales Agreement shall be governed by the Law of Meditteraneo including CISG" [CLAIMANT Exhibit C5, p.14, ¶14]. The applicability of doctrine of separability is not limited to conditions where the existence of the contract is in question when the contract is argued to be null and void [Claimant Memorandum, p.9, ¶ 21] but it is applicable as soon as the contract is concluded. Therefore, the Law of Meditteraneo is not applicable to the arbitration agreement.

ii. The Law of Mediterraneo does not governs the arbitration agreement

9. A three-stage proper law doctrine is widely applicable in identifying the law governing the arbitration agreement [C v D (2007)]. According to it, first, the governing law is the one which is expressly chosen by the parties; second, if there is no express choice, then the governing law is the law impliedly chosen by the parties; and third, in the absence of both, the governing law

is the one of the system of law having the most real and substantial connection [Sulamerica Case (2012)].

Three Stage Test :



IN FIG: DEMONSTRATION OF THE THREE STAGE TEST

10. The parties are said to have expressly agreed to the governing law if they have mentioned about the choice of law in the contract itself [Voser p.2, ¶3]. Here, there is a lack of express choice as has also been conceded by the CLAIMANT [Claimant Memorandum,p.6, ¶ 9]. In the Frozen Semen Sales Agreement, the parties have only agreed to Law of Mediterraneo and CISG to govern the contract and not the arbitration agreement [CLAIMANT Exhibit C5, p.13]. As the doctrine of separability applies, Law of Mediterraneo does not governs the arbitration agreemrnt.
11. The witness statement by Julie Napravnik had still been uncertain about any type of indication by the RESPONDENT in order for any form of acceptance or specification of any laws as, the agreement between the two parties can only be taken when the agreement in in the form of writing and signed by both the parties.

12. Mr. Antley's note during the pre-negotiation shows, that he was unsure about the adaptation clause and written the same to discuss more on the issue. It also shows that both the parties had yet not fully discussed or negotiated about that particular aspect and the mere interactions between negotiators cannot be sufficient source for providing the arbitral tribunal the jurisdiction to hear the case and to adapt the contract [RESPONDENT's Exhibit R3,p.35, ¶ 2].
13. Further, Mr. Ferguson and Mr. Krone did not have any form of discussion in aspects relating to the Law applicable to the arbitration agreement and the choice of laws [PO2,p. 55, ¶ 6].
14. The negotiation letter sent by the RESPONDENT on 10th April 2017 contained no clear indication of the agreement on the governing law of the arbitration clause [RESPONDENT's Exhibit R1, p.33]. Also in its letter, the CLAIMANT have not shown any intention with regards to the law governing the arbitration clause. [RESPONDENT's Exhibit R2, p.34].

iii. The Law of Equatoriana applies

15. The parties are said to have implicitly agreed to the governing law when their words or conduct show their intentions and expectations [Vosser p.2, ¶ 3]. Here, the RESPONDENT in the mail on 10 April 2017 [RESPONDENT's Exhibit R1, p.33] had suggested the clause the law to govern the arbitration clause to be the Law of Equatoriana and the seat of arbitration to be Equatoriana, an verbatim adoption of the UNIDROIT Principle [PO1, p.53, ¶4]. To above, CLAIMANT, in the mail on 11 April 2017 [RESPONDENT's Exhibit R2, p.34] suggested a change in seat to Danubia but did not deny the law to govern the arbitration clause to be the Law of Equatoriana. Whereas, the CLAIMANT had never expressed a deliberate choice regarding the Law of Meditteraneo to be applicable to the arbitration clause.
16. UNIDROIT Principle, Article 6.2.3 4(b) posits that the adaptation of contract is possible for the view of restoring equilibrium only in the case of hardship. Absent hardship in the present case, no equilibrium needs to be met. Hence, the adaptation of contract is not possible.

iv. Even if, the Law of Equatoriana is argued to be inapplicable, the tribunal does not have the jurisdiction to adapt the contract under the law of seat

17. The arbitration agreement is a subject to the law of the seat [Moses, p.66 ¶ 2, Kroll p.197, ¶ 1]. And the arbitrability of a dispute is determined by the provision of the place of the arbitration [Consultant (France) v Egyptian Local Authority (1990)]. Law of Danubia, being law of the seat, applies to the arbitration agreement. The party had impliedly agreed to the Danubian law as the governing law of the arbitration clause. The CLAIMANT with the

expressed intention to make Danubia as the law of seat showed their implied intention that Danubian Law governs the Arbitration Clause [RESPONDENT's Exhibit R2, p.34].

18. Both the parties have agreed that the law governing the arbitration Clause shall be the law of seat i.e. the Danubian Law. And CLAIMANT did not expressly objected to the application of the law of seat to govern the arbitration clause. Also, according to Mr Krone, head of the legal department of RESPONDENT, he would have expressly agreed to the Law of Danubia as the governing law of arbitration agreement if he was well informed on time which is not merely an assumption as the CLAIMANT mentions [Claimant Memorandum, p. 4, ¶ 3].

v. Law of seat applies

19. Even if, the Law of Danubia is considered as not being impliedly choosen, the law of seat i.e, Danubia has the most real connection which can be proven through the 'closest connection test'. The closest connection standards are met either by the law of the seat or the law chosen to govern the parties' underlying contract alternatively. [Born (4) p.13, ¶ 10]. In the condition where the law governing the contract is one of the home county i.e. the law of Mediterraneo and the seat of arbitration is a neutral country i.e. Danubia [RESPONDET's Exhibit 3 p.35] the most real connection is said to be the law of the seat [Born 4 p.17, ¶8]. So, the Law of Danubia, being the law of the seat applies through the closest connection test. Also, the arbitration agreement is a subject to the law of the seat [Moses, p.66 ¶ 2, Kroll p.197, ¶1]. And the arbitrability of a dispute is determined by the provision of the place of the arbitration [Consultant (France) v Egyptian Local Authority(1990)]. Thus, the Law of Danubia applies to the arbitration agreement.

20. Also, despite changing the suggested seat of arbitration, CLAIMANT did not object to the proposal of the RESPONDENT that the law of the place of arbitration should govern the arbitration agreement [RESPONDENT's Exhibit R2, p.34]. The newly suggested neutral place of arbitration was acceptable for RESPONDENT. However, to avoid uncertaintities, the choice of law provision had to be changed. Therefore Mr. Antley had listed the choice of law governing the arbitration agreement as one of the points to be addressed in the final contract [RESPONDENT's Exhibit R3]. In absence of the expressly designated applicable law, the arbitration agreement is commonly governed by the Law of seat. In Sulamerica case, designating London as the seat of the arbitration meant that the arbitration was agreed to be held under ARIAS (UK) rules. [Sulamerica case (2012)]

21. The Contract Law of Danubia is a verbatim adoption of UNDROIT Principles [PO2 ,p.61, ¶ 45] and the Article 6.2.3 4(b) of the Danubian Contract Law grants the power to the arbitral tribunal to adapt the contract only "if authorized".
22. Therefore, the Law of Mediterraneo does not governs the arbitration agreement.

C. <u>The four corner rule applies</u>

23. The four corner rule states that a tribunal can interpret relying solely at what is written in the written contract itself [Contract UNLV,p.86, ¶ 2]. The language written within the four corner of the contract paper is given priority and is examined accordingly [Pursue v Perkins (1990)].
24. The aforementioned three step test reasonably argues that through implied choice and through the closest connection test, the Law of Danubia applies as the governing law. The applicable Danubian law, consequently, adheres for the interpretation of contracts including the arbitration agreement based on the four corner rule [Answer to the notice of arbitration, p. 32 ¶ 16]. As a result, Clause 14 of the Sales Agreement does not govern the arbitration agreement [i], the oral consensus between the parties cannot be taken as an agreement [ii].

i. Clause 14 of Sales Agreement does not govern the arbitration agreement

25. The parties to the contract have expressly stated in the Sales Agreement that, "The Sales Agreement is governed by the Law of Mediterraneo including CISG." [CLAIMANT's Exhibit, p.14, ¶14]. Nowhere has it been mentioned in the contract about the law governing the arbitration clause.
26. Since, it is already mentioned that the contract and the arbitration clause are different entity owing to the doctrine of seperability, they both are judicially independent from one other, the Law of Mediterraneo including CISG does not apply to the arbitration clause. Also, there is no literal statement in the Sales Agreement regarding the arbitration clause to be governed by the Law of Mediterraneo. The expressly agreed law of seat is explicit indication of the intention of the parties [Greenberg, ¶4.51]

ii. The claimed oral consensus between the parties cannot be taken as an agreement

27. The CLAIMANT has argued that the oral consensus between the negotiators gives the arbitral tribunal the power to adapt the contract [Claimant Memorandum,p.6, ¶ 11]. But, according to the four corner rule any discussions made or any talks undertaken before the signing of the contract is irrelevant if it is not expressed in wording of the contract itself.

28. Since, it is nowhere agreed by the parties to apply the Law of Mediterraneo and CISG to the arbitration clause, consistent with the four corner rule, the Law of Mediterraneo does not apply to the arbitration agreement. Consequently, Danubian law is applicable.

D. Danubian Contract Law does not allows arbitral tribunal to adapt of contract

29. The Lex Arbitri (Law of seat) which here is the Law of Danubia governs the interpretation of the Arbitration agreement which recognizes that the arbitrators can adapt contract only when an express empowerment is provided for it. There is no such form of expressed empowerment in the law. Glaringly, any authorization is missing from the pre negotiation also.

30. The Danubian Contract Law is largely the verbatim adoption of the UNDROIT Principles [PO2, p.61, ¶ 45] and the Article 6.2.3 4(b) of the Danubian Contract Law grants the power to the arbitral tribunal to adapt the contract only "if authorized".

31. RESPONDENT does not contest the inherent capacity of the tribunal to rule on its own jurisdiction i.e. *kompetenz-kompetenz*. In fact, the RESPONDENT recognizes the power of the tribunal to that effect. However, competence does not equate presence of jurisdiction. Just because the tribunal has the competence to hear a particular dispute, this does not, *ipso facto,* conslusively provides the arbitral tribunal with the jurisdiction to adapt the contract as mentioned in the memorandum of CLAIMANT [Claimant Memoranda, p.4,¶ 1]. Presence of such jurisdiction has to be proven before such competent tribunal. Any claims to conferring of jurisdiction based on competence alone would amount to a faulty interpretation. If such were the case, a hearing on dispute related to jurisdiction would have been inconsequential. But that is not so and RESPONDENT implores the tribunal to exercise its competence, in light accodance to the fact and find that the tribunal does not have jurisdiction to adapt the contract.

CONCLUSION OF ISSUE I

32. The RESPONDENT's claim that the arbitral tribunal does not have the jurisdiction to adapt the contract is reasonably substantiated in light of the applicability of the Lex Arbitri (Law of seat) i.e. the Law of Danubia. Accordingly, the tribunal does not have the jurisdiction to adapt the contract. Also, the doctrine of separability separates the entity of the arbitration clause and the contract and consequently, pursuant to the four corner rule, the Law of Mediterraneo does not governs the arbitration agreement.

II. CLAIMANT IS NOT ENTITLED TO SUBMIT THE EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS ON THE BASIS OF THE ASSUMPTION THAT THIS EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM

33. Confidentiality is perceived to be a key advantage of the international commercial arbitration and by agreeing to arbitrate under the HKIAC rule parties are bound to the express duty of the confidentiality [Commentary on HKIAC rule Art.42].

34. CLAIMANT is not entitled to submit the evidence from the other arbitration proceedings because CLAIMANT is bound by the duty of confidentiality under Article 45 of HKIAC Rule 2018 [A], third party is bound to the implied duty of confidentiality [B], the source of the obtained evidence is not legal and authentic [C], the obtained evidence is inadmissible under IBA rules [D], arbitration is the private dispute resolution process [E], RESPONDENT is entitled to recover damages resulting from the breach of confidentiality [F].

A. CLAIMANT is bound by the duty of confidentiality under Article 45 of HKIAC Rule 2018

35. No party or party representative may publish, disclose or communicate any information relating to the arbitration under the arbitration agreement [Art. 45 of HKIAC rule 2018]. CLAIMANT contends that it is under no obligation to maintain the confidentiality obligation but RESPONDENT argues that the CLAIMANT agreed to confidentiality by consenting to choose arbitration [i].

i. CLAIMANT agreed to confidentiality by consenting to choose arbitration

36. If any dispute arises out of the agreed contract, the parties agree to administer the arbitration under the HKIAC rule [Notice of Arbitration, p.6, ¶14, Claimant's Exhibit C5, p.14, ¶15].

37. It is inherent in the nature of arbitral proceedings that the utmost confidentiality should be maintained in resolving private disputes as both parties had agreed [Ana v. Oijeh, Emmanuel Gaillard]. In international arbitrations, "the mere fact that an arbitration is pending may be viewed as a secret" [Noussia 129; Hassneh Insurance v. Mew, Aiter v. Ojjeh].

38. Applying the principle to the case, the CLAIMANT disclosed the arbitration information [letter of Joseph Langweiler of 2nd October 2018] when the final award in the another arbitration proceeding was still pending [PO2, p.60 ¶39].
39. Colman, J. confirmed that every agreement to arbitrate contained an implied term of confidentiality binding the parties. Confidentiality is regarded as part of the arbitration: "through custom and usage, confidentiality has become an implied term of the arbitration agreement" [Hans Smit, Dollin –Baker v. Merrett (1990)].
40. Hence, agreeing to arbitrate under the HKIAC rule CLAIMANT is to abide by the duty of confidentiality. Thus, the act of the CLAIMANT is in contravention to the HKIAC rule 2018.

B. <u>Third party is bound to the implied duty of confidentiality</u>

41. CLAIMANT contends that the third party is not bound by the duty of confidentiality. In response, the RESPONDENT maintains that though there was no explicit duty of confidentiality and though the CLAIMANT is not a party to the subjudice arbitration, CLAIMANT has an implied duty of confidentiality.
42. RESPONDENT submits that by agreeing to arbitrate under the HKIAC Rules [Notice of Arbitration, p.6¶14, Claimant's Exhibit C5, p.14, ¶15], parties are bound by an express duty of the confidentiality contained in HKIAC rule [Commentary on HKIAC rule 2013, Aiter v. Ojjeh].
43. The arbitral tribunal propounded a principle of duty of confidentiality vis-à-vis the third party disclosing information relating to other arbitration proceedings [Beccara v Argentina]. In the case of Beccara, CLAIMANT'S allegations that RESPONDENT submitted confidential material from other arbitrations and the corresponding request to strike such material from the record was upheld by the tribunal. The tribunal found that while it is true that there is no general duty of confidentiality, this is not to be understood as a "carte blanche" entitling a Party to disclose as it deems fit any kind of information or documents issued or produced in the proceeding.
44. Both arbitrations are administered under the HKIAC rule [PO2, p.60, ¶39]. Therefore, as stated earlier, the duty of the confidentiality applies by the adoption of the HKIAC Rules [Commentary on HKIAC rule Art. 42].

45. However, even in the absence of an express confidentiality agreement, or a confidentiality provision in the procedural rules, one should not assume license to disclose details of the arbitration at will [Nathan D. O'Malley].
46. The tribunal noted that even in the absence of a strict rule of confidentiality, it may still order the parties to restrict their communications to third-parties in the interest of preventing the exacerbation of the dispute [ICSID tribunal in Amico Asia Corp v Republic of Indonesia].
47. Furthermore, even in absence of a strict rule on confidentiality in ICC Rules (1999), the tribunal considered the following: "In summary, the arbitrators are not able to find an explicit obligation to maintain confidentiality – but only an implied duty not to exacerbate the dispute''.
48. It shows that even if there is no agreed confidentiality duty, there exists an implied duty. Therefore, the third party is bound to the duty of the confidentiality because arbitration agreement gives rise to an implied duty of confidentiality [i].

i. Arbitration agreement gives rise to an implied duty of confidentiality

49. Arbitration agreement gives rise to an implied duty of confidentiality [Ali Shipping Corporation v Shipyard Trogir (1999), Associated Electric and Gas Insurance Ltd v The European Reinsurance Company of Zurich (2003)].
50. A confidentiality agreement may assume many forms including as part of the arbitration agreement [The UNCITRAL Arbitration Rules Commentary, L Trakman].
51. The Receiving Party receiving confidential information from the disclosing party, shall subsequently, disclose such information only to the Permitted Recipients, who are bound to the same level of confidentiality obligations as set forth by the Agreement [ICC Model Confidentiality Agreement Art. 3].
52. Implied duty is one of the most important considerations for parties choosing to arbitrate their disputes [Bühring-Uhle]. This implied duty prohibits disclosure of any evidence, communication, or information about arbitration proceedings [Noussia 40 ; Born2252].
53. The English Court of Appeal recently affirmed that implied confidentiality obligations prohibit the disclosure of any documents or evidence related to arbitral proceedings [John Forster Emmott v. Michael Wilson (2008)]. Such implied obligation has long been recognized [Born 2259; Noussia79; Dolling-Baker v. Merrett (1990); Hassneh Insurance v. Mew; Insurance v. Lloyd's Syndicate 1994; Ali Shipping v. Shipyard]. The duty to preserve it is implied from the mere existence of an agreement to arbitrate [Born, 2280; Bond, p. 273; Gaillard, p. 153].

54. All parties to international arbitrations are presumed to owe an implied duty of confidentiality [Born 2282; Dolling-Baker v. Merrett 1990; v. Michael Wilson (2008)]. Thus, even if the CLAIMANT is not bound by the express duty of the confidentiality it is liable for the breach of the implied duty of the confidentiality.

C. <u>The source of the obtained evidence is not legal and authentic</u>

55. CLAIMANT obtained the address of the company that promised to sell a copy of the award, without disclosing the source. The company has a doubtful reputation as to its information sources. [PO2, p.61 ¶41].

56. There is two possible sources of the information: either the illegal hack of the RESPONDENT'S computer system or from the former employees who had been witnesses in the other arbitration before they were fired on 6 July 2018 and had been under a contractual obligation to keep all information about the other arbitral proceedings confidential [PO2, p.61 ¶41].Therefore, the burden of proof is on the CLAIMANT to show the source of the obtained information is legal [i] and the source of the information is not legal and authentic because the doctrine of 'clean hands' applies [ii].

i. Burden of proof is on the CLAIMANT to show the source of the obtained information is legal

57. CLAIMANT states that it would like to inform the Arbitral Tribunal that it just received reliable information at the annual breeder conference about another arbitration under the HKIAC-Rules involving the RESPONDENT and one of its customers concerning the sale of a promising mare to Mediterraneo [letter of Joseph Langweiler on 2nd October 2018].

58. Article 22 of HKIAC Rule imposes upon the CLAIMANT the burden of proof to establish that source of the obtained evidence is legal. CLAIMANT presents information about the another proceedings but fails to establish the admissibility of the obtained evidence in relation to its legality.

59. Presently, the CLAIMANT has the burden to prove the authenticity of the obtained evidence [ICDR Rules, Art. 19(1); UNCITRAL Rules, Art. 24(10)]. Each party has the burden of proving the facts asserted to support its claim or defense, whether CLAIMANT or RESPONDENT [Commentary on HKIAC rule 2013 Art. 22; Middle East Cement v. Egypt, Tradex v. Albania].

ii. The doctrine of 'clean hands' applies

60. The doctrine of clean hands is applicable in the commercial arbitration [Report of the International Law Commission] because the 'clean hands' doctrine is a general principle of law recognized by civilized nations [a] and CLAIMANT's claim is inadmissible in light of the the doctrine of 'clean hands' [b].

a. The 'clean hands' doctrine is a general principle of law recognized by civilized nations

61. The 'clean hand doctirine' is the 'General principles of law recognized by nations' and are accepted as a subsidiary source of international law [Art. 38(1) (c), ICJ Statute, Shaw, p.98]. Such accepted principles are valid under international law[Cheng, p.406; Brownlie, p. 102].

62. The clean hands doctrine has been accepted as a 'general principle' and has been applied by various International courts and tribunals [Fitzmaurice, p.31; Cheng (1958), p.67; Zoller, p.16-17]. This doctrine, as recognized as general principle of law, applies [Niko Resources (Bangladesh) Ltd. v. Bangladesh and other (2013)].

b. CLAIMANT's claim is inadmissible in light of the the doctrine of 'clean hands'

63. The CLAIMANT breaching the duty of the confidentiality [letter by Joseph Langweiler 2nd October 2018] constitutes an improper conduct. Such improper conduct leads to his or her hands being "unclean'' meaning his claim will be barred [Dumberry].

64. The CLAIMANT obtained the information through the breach of the confidentiality [letter by Julia Clara Fasttrack, 3rd October, 2018].

65. In the Hesham Talaat award, it was held that the 'clean hands' barred a claim when founded upon an illegal or immoral act. [Ian Brownlie].

66. Since, CLAIMANT acted in breach of confidentiality amounting to unclean hands, the claim of admissibility of evidence is to be barred.

D. <u>The obtained evidence is inadmissible under IBA rule</u>

67. The IBA rules are only the guidelines in developing the arbitration proceedings [preamble on IBA rules] hence is not binding. Therefore, the CLAIMANT cannot rely on the IBA rules.

68. Even if the tribunal considers IBA rule, the Tribunal shall exclude the obtained evidence on the grounds of commercial or technical confidentiality breach [Art.9.2 of IBA Rules 2010]. Article 9.2 (e) allows a party to object to the admissibility or disclosure of evidence [NATHAN D. O'MALLEY]. According to Article 9.2 (b) of IBA Rules the tribunal shall exclude the evidence on the ground that the CLAIMANT has breached its confidentiality obligations beyond the ethical treatment of the arbitration proceedings.

E. <u>UNCITRAL Rules on Transparency does not apply</u>

69. The evidence is inadmissible because CLAIMANT is not entitled to submit the evidence based on the UNCITRAL Rules on Transparency [i],the admissibility is objected on ground of the disclosure without consent [ii], It is unreasonable to consider the consolidation of two arbitral proceedings [iii] and RESPONDENT argues that the obtained evidence is not relevant [iv].

i. **CLAIMANT cannot submit the evidence under UNCITRAL Rules on Transparency**

70. CLAIMANT argued that certain documents of the arbitral procedure shall be automatically publicized except information regarding business secrets or those protected under the treaty, any law or rules which could be prevented from disclosure under article 3 of UNCITRAL. However, UNCITRAL transparency rule is not applicable in the present arbitration.

40. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors [Preamble and Art. 1 of the UNCITRAL rule].

71. Furthermore, the UNCITRAL rules provide for the need to take account of the public interest involved in such arbitrations [Preamble of UNCITRAL rule].

72. However, the present case is solely a dispute between the private contracting parties with related private interest of the parties. CLAIMANT's interest in the contract stemmed from the opportunity to increase their revenues [Notice of arbitration,p.5¶6] while RESPONDENT wanted to establish a racehorse stable through Nijinsky III semen [Notice of arbitration, p5¶4]. The present dispute is neither initiated under the UNCITRAL rules, nor it involve the public interest. Therefore, the UNCITRAL rule on transparency is not applicable.

ii. The admissibility is objected on ground of the disclosure without consent

73. The arbitral tribunal shall have the power to admit or exclude any documents exhibits or other evidence [Commentary on HKIAC rule 2013 Art. 22.3].

74. It is expressly endorsed by the UNCITRAL Arbitration Rules, which provide that "the award may be made public only with the consent of both parties [Art. 34(5)].

75. Determining what may be considered a compelling commercial or technical reason for denying disclosure or the admissibility of a document is largely a question of fact [NATHAN D. O'MALLEY]. The fact shows the breach of the confidentiality as substantiated above [PO2, p.60-61 ¶ ¶ 41 ,42].

76. Except as the Parties expressly agree in writing or leave is given by the Tribunal, the Parties and the Tribunal undertake to keep confidential all information and the award.
77. Disclosure is permitted only with the other party's consent [Guide to WIPO Arbitration]. UNCITRAL ARBITRATION RULES Art. 32(5) states that "the award may be made public only with the consent of both parties". The French court held that without a specific legal obligation and consent, the disclosure of information violates the duty of confidentiality under the arbitration agreement [True North et Socidtd FCB International v. Bleusteinetal' (1999)].
78. In the present case, the CLAIMANT disclosed the content of the arbitration proceedings without the consent of RESPONDENT [PO2, p.60 ¶41, Joseph Langweiler letter, 2nd October 2018]. Furthermore, Claimant's breach of confidentiality is not excused by the "protection of rights" exception because of the inadmissibility of the obtained evidence.

iii. It is unreasonable to consider the consolidation of two arbitral proceedings

79. CLAIMANT states it is reasonable to consider the consolidation of two arbitral proceedings [CLAIMANT memo, p.17¶54]. In reply RESPONDENT submits the same as unreasonable because the HKIAC allows the consolidation of the arbitration when the parties agree to do so.
80. Party autonomy is a fundamental principle of arbitration. Thus, HKIAC will normally order consolidation where all parties to arbitrations so agree. Article 28.1(a) applies to cases in which all parties to all the relevant arbitration have consented expressly; usually evidenced in writing, or alternatively through oral agreement if there is sufficient evidence of agreement.
81. Futher, it is argued that even under the common question of law or fact consent of party is required to consolidate the arbitration [Commentary on HKIAC Rule Art. 28]. Since the CLAIMANT proposes for consolidation of the arbitration without the consent and reasonable ground, the consolidation of the arbitration cannot be effectuated.

iv. The obtained evidence is not relevant

82. 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, and they shall be used only in connection with the arbitration [IBA Rules Article 3(12) commentary]. Since the evidence is applicable only to the concerned arbitration, it is not relevant in present arbitration.
83. Confidentiality is concerned with information relating to the content of the proceedings, evidence and documents, hearings or the award [Expert Report of Dr. Julian D.M. Lewin

Esso/BHP v. Plowman (1995)]. Submission the content of the another proceeding and disclosure of the arbitral award violates the duty of confidentiality.

84. The duty of the confidentiality [IBA Rules Art. 3(12) commentary] applies also to the third parties who are so liable as substantiated in preceding arguments [GuWeixia].

85. Thus, for the foregoing, the obtained evidence is not relevant.

F. <u>Arbitration is the private dispute resolution process</u>

86. Arbitration is essentially a private process [Redfen-and-Hunter, kluwer]. The arbitral proceedings are confidential [Lionnet/Lionnet]. Privacy is a long-established hallmark of international commercial arbitration [UNCITRAL Arbitration RulesCommentary].

87. Documentary evidence containing trade secrets, technical, financial and commercial information has been consistently treated as confidential [Chemtura v Canada]. In Chemtura v Canada, the tribunal issued a procedural order covering documents it deemed to have contained sensitive information subject to business confidentiality. Hence, the arbitration proceedings shall not be disclosed because confidentiality is the essence and attraction of the arbitration [i].

i. Confidentiality is the essence and attraction of the arbitration

88. The confidentiality of both the proceedings and the award is, of course, one of the attractions of arbitration [Emmanuel Gaillard and John Savage]. Disclosure of confidential information threatens the integrity of the arbitration proceedings [Born 2282]. Hence, for disclosing the information, the CLAIMANT has violated the procedural integrity of the arbitration.

89. Transparency is disregared in favor of confidentiality as the wider publication may well undermine the document production process itself, as well as the overall arbitration procedure [Biwater Gauff v Tanzania]. This approach has been adopted in other arbitrations where tribunal s have imposed restrictions on the use and disclosure of documentary evidence outside of the arbitration [Beccara v Argentina].

90. Confidentiality is both an important element of and a benefit arising out of, international arbitration [Clyde Croft, Christopher Kee and Jeffrey Waincymer; Gary B. Born].Thus, CLAIMANT disclosing the confidential information of the RESPONDENTs is acting in contrary to the true essence of the arbitration.

G. <u>RESPONDENT is entitled to recover damages resulting from the breach of confidentiality</u>

91. If one party breaches the obligation of confidentiality then another party may bring a claim for damages in the arbitration for any loss suffered as a result of this breach, or search the interim relief from arbitral tribunal [Commentary on HKIAC rule 2013].

64. RESPONDENT is entitled to recover damages resulting from the breach of confidentiality because the tribunal has jurisdiction over the confidentiality issue [i] and a breach of a confidentiality obligation can give rise to a claim for damages [ii].

i. The Tribunal has jurisdiction over the confidentiality issue

92. In accordance with Article 23(2) HKIAC Rules 2018 the Tribunal is vested with the power to issue interim measures which it deems necessary for protective purposes, in particular, to take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself. The Tribunal is entitled to take steps to protect the integrity of the arbitration [Biwater Gauff v. Tanzania].

93. For these reasons RESPONDENT has filed a counterclaim requesting the Tribunal to acknowledge Claimant's liability for the breach of confidentiality as well as RESPONDENT'S respective right to recover any damages which may arise thereof.

ii. A breach of a confidentiality obligation can give rise to a claim for damages

94. If one party breaches the obligation of confidentiality, then the other party may seek damages or, seek interim relief from the arbitral tribunal [Commentary on HKIAC Rule 2013, Art. 42].

95. Associated sanction options include orders to stop (further) disclosures, damages [Leon E. Trackman; Christoph Müller, Hans Smit]. A breach of a procedural obligation can give rise to a claim for damages [Mantovani v.Carapelli; Aita v. Ojjeh 1986; Bleustein et al v. Société True North et Société FCB International 1999; A.I.Trade Finance v. Bulgarian Foreign Trade Bank].

96. The remedy for breach of confidentiality duty may include compensation based on the benefit received by the other party [Art. 2.1.16 of UNIDROIT Principles]. The breach of confidentiality implies first liability in damages and even if the injured party has not suffered any loss, it may be entitled to recover from the non-performing party the benefit the latter received by disclosing the information to third persons or by using it for its own purposes [Comment on UNIDROIT Principles].

97. The prerequisites do not need to be strictly fulfilled for the tribunal to grant interim measures, and one should avoid mechanically applying standards [Born, p.1993].In cases of breach of

confidentiality, an injunction against further disclosure is a generally available remedy [Brown, p.1016].

98. Therefore, applying the mentioned principles the RESPONDENT claim for the damages for breach of the confidentiality.

CONCLUSION OF ISSUE II

99. Claimant breached the confidentiality of the arbitral proceedings. Hence, the Tribunal is implored to order the Claimant to respect confidentiality of the proceedings and the award and to find the submitted evidences inadmissible.

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

100. CLAIMANT has presented incomplete facts. Any claim for an additional payment on the basis for an adaptation of the contract is not justifiable [Answer to the Notice of Arbitration, p. 29¶1]. CLAIMANT asserts Clause 12 of the main agreement: " Seller shall not be responsible for lost semen shipments or delays in delivery… neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [Claimant's Exhibit C5,p.14¶12]. CLAIMANT has claimed the compensation just because they believe that clause 12 of the contract covers the risk of additional amount. However, RESPONDENT is not liable for the payment resulted from a newly imposed tariff under clause 12 of the contract.

101. The concluded agreement is itself clear enough and under four corner rule it does not require any document or negotiation brief to justify any payment claim of CLAIMANT.

102. RESPONDENT is not obliged to pay additional payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price because an imposition of tariff by Equatoriana do not constitutes hardship [A], the actions of the RESPONDENT are consistent with the principle of Pacta Sunt Servanda [B], CLAIMANT needs to pay the additional tariff as goods are delivered through DDP delivery method [C], CLAIMANT is not entitled to the additional payment from RESPONDENT under the doctrine of commercial impracticability [D], duty to

act in good faith is not obligatory [E], CLAIMANT is not entitled to the additional payment under the principle of fair dealing [F], under four corner rule, the extrinsic evidence i.e negotiation brief is not relevant as the clause 12 of the contract is unambiguous and understandable [G], there is no written clause in concluded agreement mentioning that RESPONDENT shall be liable for risk even if risk satisfied the clause 12 of the contract [H], CLAIMANT should have taken precautions themselves on assumption of any kind of risk [I],in any case, RESPONDENT should not bear the risk of the ambiguity of the hardship clause pursuant to the Contra Proferentum rule [J].

A. <u>An imposition of tariff By Equatoriana does not constitutes Hardship</u>

103. Hardship states "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."[ICC HARDSHIP CLAUSE 2003, ¶1].

104. Additionally, hardship provides excuses to disadvantaged party from the performance of contract if there occurs events which satisfies the elements to constitute hardship i.e. (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party [Art. 6.2.2 of UNIDROIT Principles].

105. CLAIMANT insisted on including hardship clause in contract because of their past experiences in relation to the changes in custom health requirement [Notice of Arbitration, p.5¶7]. CLAIMANT were in situation to pay additional 40 percent of the sales price because of imposition of a new and very strict health and safety requirement [PO2,p.58¶21].This shows that CLAIMANT had assumed that similar kind of events might occur which would be burdensome while continuing the contract. Thus, CLAIMANT agreed to send the frozen semen to RESPONDENT only if there is inclusion of hardship clause in concluded agreement. Thus CLAIMANT does not have right to claim additional payment from RESPONDENT on the basis of; An imposition of tariff on frozen semen is not unforeseeable [i], Clause 12 of the contract does not prevail as no unforeseen event occurred [ii], the CLAIMANT cannot cannot resort to CISG [iii], CLAIMANT cannot resort to the UNIDROIT principles [iv], 25 percent increment in cost of performance is considered insufficient to qualify as hardship [v] .

i. **An imposition of tariff on frozen semen is not unforeseeable**

106. The tariff imposed by Equatoriana government on frozen semen does not amount to a hardship excuse for CLAIMANT because it insisted RESPONDENT to agree on hardship clause [a], Imposition of tariff is not unforeseen [b], Hardship clause inserted in contract itself justifies that CLAIMANT is aware of future events [c].

a. CLAIMANT insisted RESPONDENT to agree on hardship clause.

107. CLAIMANT agreed to deliver the frozen semen to RESPONDENT, if RESPONDENT agreed to include hardship clause in concluded agreement [Notice of Arbitration, p.3¶7]. CLAIMANT was very much aware that there may arise an event which can be burdensome for them as per the past experiences they had by paying additional 40% of the sales price just because of immediate imposed very strict new health and safety requirements [PO2,p.58¶21].

108. Furthermore even CLAIMANT had mentioned that they had experienced a heavy blow in 2014 due to unforeseeable additional health and safety requirements which increased the cost by up to 40%. It nearly resulted in the insolvency of CLAIMANT [PO2, p.58¶21]. Considering the awareness of CLAIMANT with regards to any potentially tense financial situation in the future, it can be shown that CLAIMANT is familiar with future risk.

b. Imposition of tariff is not unforeseen

109. CLAIMANT argued that sudden imposition of tariff by Equatoriana and inclusion of frozen semen under agricultural product was unexpected [Claimant Memorandum, p.27¶ 95]. The CLAIMANT was astonished to hear that frozen semen falls under the agricultural product [Notice of Arbitration, p.6 ¶11,PO2 ,p.58 ¶26]. CLAIMANT is responsible to bear additional amount resulting from sudden imposition of tariff as it was not unforeseen.

110. In case of Tandrin Aviation Holdings Ltd v Aero Toy Store LLC, the court affirmed the well-established position under English law that a change in economic or market circumstances, affecting the profitability of a contract or the ease with which the parties' obligations can be performed, is not to be regarded as a force majeure event [Tandrin Aviation Holdings Ltd v Aero Toy Store LLC (2010)].

111. The basic requirement for hardship and force majeure is same [United States v. Wegematic Corp. [2010]]. So, any event affecting the profitability of a contract or the ease with which the parties' obligations can be performed cannot be considered as hardship. Hence, CLAIMANT's claim invoking hardship is completely baseless.

c. Hardship clause inserted in contract itself justifies that CLAIMANT is aware of future events.

112. According to Professor Fontaine, the fact that a hardship clause has been inserted in the contract implies that the parties are aware of the risk of future events overthrowing the equitable balance of interests [Marcel Fontaine (1976)].

113. In the present case, CLAIMANT insisted RESPONDENT to include hardship clause in concluded agreement [Notice of Arbitration, p.3¶7]. This resulted in the inclusion of hardship [Claimant's Exhibit C5, p.14¶12] which suggest awareness of future events.

ii. Clause 12 of the contract does not prevail as no unforeseen event occurred.

114. As stated in concluded agreement that 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 [Claimant's Exhibit C5, p.14¶12]. But in this case, CLAIMANT could not justify that increment of 25 % tariff caused hardship because it was assumed before the conclusion of contract.

115. As mentioned above for any event to constitute hardship, that event should be unforeseen and not assumed by disadvantage party. However, CLAIMANT's action presently proves that it assumed the risk before the conclusion of contract.

116. As clause 12 of the contract does not satisfy the condition needed to constitute hardship, CLAIMANT cannot claim that the clause 12 of the concluded agreement covers the risk and thus transfers the responsibility to pay additional amount to RESPONDENT.

iii. The CLAIMANT cannot resort to CISG

117. The Frozen Semen Sales Agreement already consist the clause regarding the condition of force majeure and hardship [Claimant's Exhibit C5, p.14¶12]. Although the parties have agreed the CISG as governing law but the provision under the CISG can be derogated [Art.6 of CISG]. The CISG governs the manner of exclusion and its subsequent applicability can be altered by the will of the parties provided that will amounts to an agreement to exclude in accordance with the CISG [CISG Ac op.16, comment 2].

118. The most significant statement in Article 6 is that the parties may "vary the effect" of any of the Conventions provisions [John O Honold, p.77]. The principle of freedom of contract

enshrined in article 6 proceeds from the consensual nature of the contract of sale [Professor Jacob S. Ziegel, comment 1]. The parties are free to exclude or derogate from CISG (Art. 6 CISG) [Rechtbank van Koophandel, Hasselt case].

119. The drafters clearly acknowledged the Convention's non-mandatory nature and the central role that party autonomy plays in international commerce—specifically, in international sales [CISG digest, p. 33¶ 3]. Article 6 CISG provides for the principle of party autonomy in relation to the choice of law and the choice of substantive law and corresponds in that regard with that of most countries in that contractual freedom is also the CISG rule. [Peter Schlechtreim, petra butler, "UN law on international sales, p. 18¶ 19].

120. Parties can exclude the CISG by agreeing that specific issues arising under their contract be subject to provisions of a law different than the CISG [Franco Ferrari, Harry Flechtner, Ronald A. Brand (ED.), The Draft UNCITRAL Digest and Beyond: Case Analyis and Unresolved issues in the U.N. Sales Convention, p.130].

121. Although the sales agreement does not incorporate the explicit provision excuding article 79 CISG but by stating the condition on force majeure and hardship on sales agreement separately based on their consent, implicit exclusion may be located.

122. Implicit exclusions have been upheld [CISG AC op. 16, ¶3.1, Landgericht Stuttgart case]. By incorporating such statement in sales agreement itself, the party has derogated from article 79 of CISG.

a. Even if CISG is taken into consideration, it does not provide for the remedy requested by CLAIMANT

123. The only Article in the CISG that regulates changed circumstances is Article 79. Hence, all situations of hardship must be evaluated on the basis of Article 79 or be treated as a breach of contract. The CISG does not seem to have any provision that would allow a different solution than the one mentioned above [Niklas Lindström, Changed Circumstances and Hardship in the International Sale of Goods, Nordic Journal of Commercial Law (2006/1)]. The article 79 of CISG does not regulate hardship [aa]. The article 79 of CISG doesn't provide for the increment of the contract prize as requested by the CLAIMANT [ab].

aa. The Article 79 of CISG does not regulate hardship or changed circumstances as the one under consideration

124. The Article 79 of CISG does not regulate hardship and does not provide for the remedy requested by CLAIMANT i.e. the increase of the contract price as considered appropriate by the arbitral tribunal. Article 79(1) CISG has been very reluctant to allow hardship in case of fluctuations of prices [ICC Award. 26 Aug 1989, No 6281]. All decisions dealing with hardship under Article 79 concluded that even a price increase or decrease of more than 100 per cent would not suffice [Force Majeure and Hardship in International Sales Contracts, Ingeborg Schwenzer, p.716]. It follows, then, that the fluctuation of price because of Government of Equatoriana imposing a 30% tariff [Claimant Exhibit C6, p.15] would not suffice and allow hardship under Article 79 of CISG.

125. Article 79 of the CISG only provides an excuse where performance has become impossible [Flambouras, 277]. Here, the performance of CLAIMANT is not impossible rather the performance has been carried out as per the Sales Agreement [Claimant's Exhibit C8,p.17]. The significant drop in the market price of the purchased goods after the conclusion of the contract did not constitute a case of force majeure exempting the buyer for non-performance under Art. 79 CISG [Vital Berry Marketing NV v. Dira-Frost NV].

126. The CISG does not provide for hardship exemption. It is questionable whether it may be characterized as a general principle and relied on despite the absence of a contractual hardship clause [Brunner, p. 17]. Although advisory opinion no 7 stated change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("hardship"), may qualify as an "impediment" under Article 79(1) but it is not suitable condition based on the fact of the case. The CLAIMANT has past experience with unforeseeable additional health and safety requirements resulting in highly expensive tests [PO2, p.58¶21]. From this past experience of the CLAIMANT any similar future event should be in the knowledge of the CLAIMANT and should have been expected.

127. As an anomaly, the Court of Cassation interpreted the wording of Art. 79(1) CISG in a broad manner and argued that hardship was not implicitly excluded from its scope [Scafom Internationl BV vs Lorraine Tubes s.a.s.]. However, the same decision has been highly criticized. As per Flechtner, the drafting history of the Convention shows that hardship was

expressly rejected, as well as this decision was seen as a parochial bias of the Court against the interpretation of the Convention with regards to its international character, because it extends its scope [Flechtner, The exemptions provisions of the sales convention, including comments on "hardship" doctrine and the 19 June 2009 decision of the Belgian Cassation Court, Annals FLB-Belgrade Law Review, 2011, p.98]. The drafter of the CISG specifically dismissed a proposed provision on hardship where the drafters meant that parties should not be able to make claims of hardship to avoid damages or to have the contract modified by a court or an arbitration tribunal [UNCITRAL Yearbook 1977, Volume VIII, p.57].

ab. The article 79 of CISG doesn't provide for the additional amount of US$ 1250000 as requested by the CLAIMANT

128. The CLAIMANT, on the request of the Mr. Shoemaker, has already carried out the contractual work [Claimant's Exhibit C 8, p. 18]. The CISG provides the exemption for the non-performance of the contractual work on certain conditions [Art. 79 of CISG]. Article 79(5) is the obligor's exemption to pay damages due to the failure to perform; accordingly damage claims will have to be dismissed if Art. 79 is applicable. [Change of Circumstances under the CISG, p.16-17]. However there is no failure of performance as the performance has already been carried out [Claimant's Exhibit C8, p.17]. Further, Article 79 does not deal on the part of negotiation and adaptation of the contract in relation to the additional amount .
129. The legislative history of CISG is replete with evidence showing that the Principles' hardship provisions are contrary to the spirit of the Convention [Scott D. Slater p. 259]. It is a well-settled principle that additional costs of performance are not enough to invoke the protection of CISG Article 79(1) [Schiedsgericht der Handelskammer (GER); Case No. 1 U 143/95 and 410 O 21/95 (GER); Case No. 11/1996 (BUL); Unknown Parties (FRA); Vital Berry v. Rechtbank (BEL); Nuovo Fucinati v. Fondmetal Int'l (ITA)].Even if it includes the condition of hardship then there should be failure to perform from which the obligor shouldn't be able to carry the performance which is not the issue in the case at hand.
130. Despite the CLAIMANT's request for the negotiation or the adaptation of the contract based on hardship, the CISG article 79 cannot be invoked because it only provides excuses for the nonperformance while remaining silent regarding the negotiation and adaptation of contract for any additional price.

iv. CLAIMANT cannot resort to the UNIDROIT principles

131. There is no gap in Article 79 that needs to be filled [a]. Even if there is a lack of hardship provision under the CISG based on article 7(2) CLAIMANT cannot invoke UNIDROIT principles [b], even if UNIDROIT principles are applicable, then the condition mentioned under the provision are not fulfilled [c].

a. There is no gap in Article 79 that needs to be filled

132. The legislative history of the CISG reveals that the Working Group not only considered adding a hardship provision, but specifically rejected such an addition [Carlsen, 1998; Flambouras II, § 3; Rimke, § B2; Ziegel, § 1C]]. The Working Group rejected the hardship provision because of the problems associated with the Convention relating to a Uniform Law on the International Sale of Goods (ULIS)—the predecessor of the CISG—which allowed contracting parties to escape their contractual obligations too easily [Flambouras II, § 3; Rimke, § B2].

133. The Working Group's rejection of a hardship provision is a dispositive settlement of the hardship matter: the CISG does not allow performance to be excused for mere economic hardship [Flambouras, 278]. The CISG drafters were opposed to allowing commercial or economic hardship as an excuse for non-performance and that this was the reason for adopting the requirement of an impediment as a precondition for relief in place of the more liberal ULIS test of a change of circumstances [J. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention (2d ed. 1991), p. 432.1 432.2]. Thus, it is submitted that the UNIDROIT hardship provisions is not applicable in the present case.

b. Even if there is a lack of hardship provision under the CISG then based on article 7(2) CLAIMANT cannot invoke UNIDROIT principles

134. If Article 79 of CISG cannot be invoked during the condition of hardship, one may argue resorting to the UNIDROIT principles in order to fill the gap based on article 7(2) of CISG. However, UNIDROIT Principles are not the work of UNCITRAL but rather the work of the International Institute for the Unification of Private Law, a quite separate body and not a "United Nations agency" and, "in consequence, they cannot represent a formal source of law for the purpose of supplementing the Vienna Convention [J. Fawcett, J. Harris & M. Bridge, International Sale of Goods in the Conflict of Laws, 2005, p. 933]. UNIDROIT Principles should not be applied to a contract under the CISG, due to the fact that they are not "principles in which the Convention is based" [Lucia Carvalhal Sica, Part IV].

135. Although various articles of the UNIDROIT Principles may indeed reflect general principles underlying the Convention, those interpreting CISG should refrain from the temptation to use the Principles as a handbook of CISG general principles [p. 252, Scott D. Slater]. Article 7(2) CISG clearly refers to the general principles on which the CISG is based, Thus recourse to external principles, such as the UNIDROIT Principles appears to be excluded [p.170, Franco Ferrari and Harry Flechtner and Ronald A Brand (Ed.), European Law Publishers, "The Draft UNICITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention"].

c. Even if UNIDROIT principles are applicable, then the condition mentioned under the provision are not fulfilled

136. CLAIMANT argued that the imposition of tariff by Equatoriana is hardship because it satisfies all the elements needed to constitute hardship mentioned in article 6.2.2 of UNIDROIT Principles [Claimant Memorandum, p.24¶84]. But CLAIMANT could not prove that imposition of tariff as the risk of the events was not assumed by the disadvantaged party [Art. 6.2.2 of UPICC]. That is why RESPONDENT is under no liability to adapt the contract by paying additional amount.

137. Mediterraneo and Danubia are Contracting States of the CISG. The general contract laws of Equatoriana and Mediterraneo is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts [PO1, p.53 ¶ 4], UNIDROIT Principle (UPICC) applies as the law governing contract in the form of law of Mediterraneo [Claimant's Exhibit C5, p.14¶14]. Art. 6.2.2(d) of UPICC states that to constitute the hardship excuse, the risk of the events was not assumed by the disadvantaged party.

138. As in fact, CLAIMANT insisted RESPONDENT to include hardship clause in concluded agreement which gives hint that CLAIMANT had assumed the future risk. All CLAIMANT did was inform RESPONDENT that it would not bear the risk associated with the agreed delivery terms [Notice of Arbitration, p.7¶19].

139. As noted above, CLAIMANT could have reasonably taken into account the imposition of tariff by Equatoriana at the time of the conclusion of the contract. Thus failing to meet the requirements of UPICC Art. 6.2.2, the CLAIMANT cannot claim hardship.

140. CLAIMANT is unable to justify the imposition of tariff as unforeseen event resulting in hardship. Thus, they could not request for re-negotiation of price with RESPONDENT [Art. 6.2.3 (1) of UPICC, Section 313 of BGB].

v. 25 percent increment in cost of performance is considered insufficient to qualify as hardship.

141. In international commercial arbitration cases, a cost increase by 13%, 30%, 44% or 25-50% was considered insufficient to qualify as hardship [Christoph Brunner (2009)].

142. Prof. Schwenzer, the editor of the best known commentary of the 1980 United Nations Convention on Contracts for the International Sale of Goods, notes that even a 100% cost increase is usually insufficient to exempt the party from contractual obligations under Art. 79 of the 1980 Convention. [Schlechtriem & Schwenzer; Schwenzer, Professor Alejandro M. Garro].

143. Thus, CLAIMANT has no right to claim for re-negotiation as 25 percent increment in cost of performance is considered insufficient to qualify as hardship.

B. <u>The actions of the RESPONDENT are consistent with the Principle of Pacta Sunt Servanda</u>

144. CLAIMANT argues that parties to the contract shall be obliged to follow each clause of contract as rule of law under principle of pacta sunt servanda. This principle states, clauses of private contract are the law of contract which are binding upon the parties by the parties in good faith [Cmnt. on Art. 1.3 of UPICC, Josef L. Kunz, p.180-197, Article 26 of the VCLT].

145. Thus, RESPONDENT needs to perform in accordance of clause 12 of the concluded agreement by paying additional amount to CLAIMANT. However, as substantiated above, the imposition of new tariff does not constitute hardship and hence, the clause does not prevail in the way CLAIMANT claims.

146. Hence, RESPONDENT is under no obligation to perform as per CLAIMANT's claims vis-à-vis clause 12 of concluded agreement. Thus, RESPONDENT had performed according to concluded agreement by upholding this principle of pacta sunt servanda.

C. <u>CLAIMANT needs to pay the additional tariff as goods are delivered through DDP delivery method</u>

147. CLAIMANT contends that the intention of accepting DDP delivery term was primarily to ensure better transportation terms and swifter delivery due to CLAIMANT's experience in the

shipment of frozen semen and not to manage the risk related to DDP [Claimant Momorandum, p.30¶109]. Similarly, CLAIMANT also maintains the agreement on DDP shipment was just because RESPONDENT accepted to include hardship clause in concluded agreement. Despite this, CLAIMANT has no right to claim for additional payment from RESPONDENT.

148. CLAIMANT had agreed to incorporate DDP shipment. Under Section A2 of DDP, the seller bears the risk of both export and import and must do everything necessary to provide the buyer with the goods, including assuming the risk of import prohibitions [Jan Ramberg, p.150; Jan Ramberg, p.399, Incoterms® 2010 by ICC]. Additionally, it is mentioned in concluded agreement under clause 8 that Seller will ship 3 shipment of DDP of Nijinsky III's 100 doses of frozen semen [Claimant's Exhibit C 5, p.14¶8].

149. However, if the parties wish to exclude from the seller's obligations some of the costs payable upon import of the goods (such as value-added tax: VAT), this should be made clear by adding explicit wording to this effect in the contract of sale [Jan Ramberg, p. 150].

150. Since, there is no explicit wording stating seller will not be made responsible on some cost payable upon the import of the goods in concluded agreement, CLAIMANT is responsible for all charges related to import.

151. Similarly if, CLAIMANT wanted RESPONDENT to assume the risk of import prohibitions and other such restrictions, it could easily have suggested the contractual trade term be other, such as DAP (Delivered at Place). Under DAP, buyers are responsible for risks and costs associated with goods which includes import clearance once on board ship [Jan Ramberg, p. 137].

152. Further, on any conflict between the clauses of the contract, the courts has to enforce the earlier clause and disregard the later. [Williston on Contracts §32:15 at 507-10 (4th ed.)]

153. Relying on concluded agreement, it is clear that clause that mentions about delivery DDP preceds the one on hardship clause. As hardship clause is mentioned in clause 12 of the concluded agreement. This means that DDP clause will be enforced.

D. CLAIMANT is not entitled to the additional payment from RESPONDENT under the doctrine of commercial impracticability

154. CLAIMANT argued that because of sudden and unexpected event i.e. imposition of tariff, the performance has been made impossible or the cost of performance has significantly increased [Claimant Memorandum, p.25 ¶86]. CLAIMANT should be excused from paying

additional amount of 25% as tariff. Despite this, CLAIMANT is liable to pay additional amount under principle of commercial impracticability.

155. Doctrine of commercial impracticability refer to situation in which a seller is adversely affected by the occurrence of an unexpected circumstance because that occurrence either makes the performance impossible or significantly increases the cost of performance. It simply excuses someone from performing a contract [Eric S. Rein and Maria A. Diakoumakis, p.13].

156. In case of Maple Farms Inc. v. City School District, the court established three requirements before non-performance is justified on the ground of impracticability: "First, a contingency -- something unexpected must have occurred. Second, the risk of unexpected performance must not have been allocated either by agreement or by custom. Finally, occurrence of the contingency must have rendered performance commercially impracticable." [Transatlantic Financing Corp. v United States (1966)]. Moreover, the burden of proof as to each of the three requisite elements rests on the party making the claim [Eastern Air Lines, Inc. v. Gulf Oil Corp. (1975)] [Maple Farms Inc. v. City School District (1974)].

157. In the above case, one of the requirements is the 'risk of unexpected performance must not have been allocated either by agreement or by custom'. But in the present case, there is allocation of unexpected risk in the form of hardship clause under clause 12 of concluded agreement [Claimant's Exhibit C5, p.14¶12].

158. As the requirement established by court cannot be sufficed, there is no ground to claim additional payment under principle of impracticability.

E. <u>Duty to act in good faith is not obligatory</u>

159. CLAIMANT had argued that RESPONDENT needs to act in good faith by paying the additional amount to CLAIMANT under clause 12 [Claimant Memorandum, p.33¶120].

160. Generally good faith applies to the law of obligations , and not simply to contract law [§242 of the German Civil Code (BGB), Article 1175 of the Italian Civil Code, Article 288 of the Greek Civil Code; Article 762 of the Portuguese Civil Code].

161. For Lord Ackner, such a duty of good faith would be 'unworkable in practice.' In cases like Walford v Miles, the court denied any obligation to contract on good faith, despite that the parties expressly sought to deal on good faith [<u>Walford v Miles</u> (1999)].

162. Since, RESPONDENT is not obliged to pay additional amount because CLAIMANT could not prove that sudden tariff caused hardship, there is no need for RESPONDENT to act in good

faith. Even if there occurs hardship, RESPONDENT is in no compulsion to act in good faith as it is neither obligatory nor enforceable.

F. CLAIMANT is not entitled to additional payment under the principle of fair dealing

163. CLAIMANT had claimed the additional payment from RESPONDENT on the basis of fair dealing arguing that even though RESPONDENT bears all the tariffs, it would not be financially endangered. Adding to this, CLAIMANT argued that RESPONDENT would earn a profit of 300,000 USD by the breach of the resale prohibition while CLAIMANT acts in good faith all the time [Claimant Memorandum, p.34¶¶ 125,126].

164. UPICC Article 1.7 reads "Each party must act in accordance with good faith and fair dealing in international trade." In the pivotal case like Gerber v. Enter. Products Holdings, LLC, 67 A.3d 400, 418-19 (Del. 2013) in which the Delaware Supreme Court stated fair dealing as, "It is rather a commitment to deal "fairly" in the sense of consistently with the terms of the parties' agreement and its purpose."[Gerber v. Enter. Products Holdings (2013)].

165. CLAIMANT cannot argue that RESPODENT needs to bear all the additional payment just because RESPONDENT would not be financially endangered even if they bear it [PO2, p.59¶30]. Fair dealing in commercial contract is to act as per the terms mentioned in contract. Relying on term of contract, CLAIMANT is responsible for all the cost associated with sudden imposition of tariff as it could not be proven that clause 12 of the contract covers the risk.

166. Similarly, CLAIMANT cannot charge RESPONDENT by eluding to its earning through a profit of 300,000 USD out of breach of the resale prohibition. The concluded agreement does not have a resale prohibition clause in it. The concluded agreement only mentions that the semen is to be used for the specific mare [Claimant Exhibit C5, p.13].

167. Since contract does not restrict RESPONDENT to sell the frozen semen, RESPONDENT has the right to use the product in their own way as RESPONDENT had owned the good in legitimate way.

168. Similary, Lauren Perez of the American Free Trade Association, in a video on the Owner's Rights site said "if you buy it you own it. If you paid for it, it is yours. You shouldn't have to go ask permission of anybody to resell it."

169. Therefore,RESPONDENT had performed as per the terms of contract under principle of fair dealing.Thus CLAIMANT cannot claim that RESPONDENT is acting unfairly by receiving excessive profit as compared to CLAIMANT.

G. <u>As per the rule of four corner rule, the extrinsic evidence i.e. negotiation brief is not relevant as the clause 12 of the contract is unambiguous and understandable</u>

170. CLAIMANT argues that during negotiation RESPONDENT showed interest in bearing all other risks during continuation of contract [Claimant Memorandum, p.24¶82]. But the information outside the concluded agreement does not have any importance or validity in this case, as the contract adapts a four corner rule.

171. Four Corner Rule is defined as, "If the language of the contract provisions are found to be explicit and unambiguous, no additional evidence can be considered." [Frischhertz Elec. Co. .Inc. v. Housing Auth. of New Orleans (1988)].

172. Since clause 12 of concluded agreement is unambiguous, the information CLAIMANT had brought regarding intention of the parties does not have any validity.

173. In W.W.W. Assoc. v Giancontieri, for example, the New York Court of Appeals held that "when parties set down their agreement in a clear, complete document, . . . [e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing [W.W.W. Associates, Inc. v. Giancontieri (1990)].

174. RESPONDENT should act according to principle of four corner rule as the imposition of tariff does not represent hardship to act under clause 12 of contract. RESPONDENT is not accountable to pay additional payment.

H. <u>No written clause in concluded agreement provides the RESPONDENT with the liability to bear the risk if clause 12 of the contract is satisfied</u>

175. Contrary to CLAIMANT's allegations, RESPONDENT is not obliged to pay the additional amount. In fact, pursuant to the Frozen Semen Sales Agreement, RESPONDENT is only liable for tank rental and handling fees associated with the delivery of the semen from the storage facility and return of the shipping container [Claimant's Exhibit C5, p.14¶10].

176. Parties to the contract have explicitly mentioned about CLAIMANT's interest stating that seller shall not be responsible for hardship caused by unforeseen events [Claimant Exhibit C5, p.14¶12] in concluded agreement but not about who shall be taking the responsibility.

177. According to the well-established rule of contract interpretation, statements in a contract are to be interpreted in accordance with the understanding a reasonable business person would

have had under the same circumstances [Art. 8 CISG; Schmidt-Kessel in Schlechtriem / Schwenzer, Art. 8, ¶¶20, 25].

I. CLAIMANT should have taken precautions themselves if they had assumed any kind of risk

178. Even if the parties allocated the risk of the fluctuation of degree and the party allocated the risk had taken precautions to protect itself from that risk then it would have also protected itself against the fluctuation of kind [Larry A. Di Matteo & Bruce L. Rich (2006), p.300].

179. It has been shown that CLAIMANT had assumed that there might appear risk which may prove burdensome for further performance of contract. CLAIMANT could have taken precaution to protect itself from going into loss rather than relying on hardship.

180. Therefore, the claim asserted by CLAIMANT to pay additional amount from RESPONDENT is rather unsubstantiated. So, in present case, CLAIMANT is responsible for the payment of additional payment.

J. In any case, RESPONDENT should not bear the risk of the ambiguity of the hardship clause pursuant to the Contra Proferentem rule

181. CLAIMANT argues that if there occurs any confusion or question regarding wording of hardship clause enshrined in clause 12 of concluded agreement [Claimant Memorandum,p.29¶103], RESPONDENT should be made liable as the wording on agreement was suggested by RESPONDENT [PO2, p.56 ¶12]. However, CLAIMANT's assertion is untenable as the same does not apply to the case.

182. The contra proferentem rule essentially means that if the term of a contract is not properly phrased, the party who provides the wording of the term bears the risk arising from a lack of clarity in drafting and interpreting that term [Article 4.6 of UPICC]

183. But in the cases where the parties are represented by legal counsel this principle does not apply [Beanstalk Grp. v. AM Gen. Corp (2002)]. As in globalization era, most of companies perform contract after consulting an attorney [Elliott v. Pikeville Nat'l Bank & Trust Co (1939), Bee Bldg. Co. v. Peters Trust Co.(1921)].

184. Since it is well evidenced that parties in the proceedings are represented by their own negotiators i.e. CLAIMANT by Ms. Juile Napravnik and RESPONDENT by Mr.Chris Antley until severe car accident of 12 April 2017 [Claimant's Exhibit C8, p.17]. They had to be

replaced for the finalization of the contract which was signed on 6 May 2017 [Claimant's Exhibit C5, p.14].

185. Likewise, the facts provide that clauses 6 through 5 were not subsequently changed by Mr. John Ferguson and Mr. Julian Krone. Rather, they used the preexisting files and merely made the necessary changes and additions made by Ms. Juile Napravnik and Mr. Chris Antley [PO2,p.55¶6].

186. Hence, CLAIMANT cannot claim the additional amount from RESPONDENT as contra preferentum rule does not apply.

CONCLUSION OF ISSUE III

187. RESPONDENT is under no liability to act as per the demands of CLAIMANT. CLAIMANT had claimed the compensation based on clause 12 of the contract asserting that it covers the risk of additional amount. This, however, is not enough to make RESPONDENT liable. Since there is no presence of hardship in this case, CLAIMANT cannot ask for adaptation of contract under CISG and UNIDROIT Principles. Rather, consistent with the four corner rule and DDP delivery term, only the CLAIMANT is responsible for additional payment.

PRAYERS FOR RELIEF

In light of the above submissions,RESPONDENT respectfully requests that the Tribunal:

- Find that the tribunal doesnot have jurisdiction and/ or the powers under the arbitration agreement to adapt the contract, which includes in particular the question of which law governs the arbitration agreement and its interpretation.
- Find that the CLAIMANT should not be entitled to submit evidence from the other arbitration proceedings.
- Find that the RESPONDENT is not responsible for the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price.

Respectfully submitted,

Bhaktapur, January 24, 2019

Binda Thapa

Prekshya Niroula

Ranjeet Karki

Sophiya Kutu