SIXTEENTH ANNUAL WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

Hong Kong SAR

MARCH 31ST – APRIL 7TH, 2019

HANDONG INTERNATIONAL LAW SCHOOL

MEMORANDUM FOR CLAIMANT

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

COUNSEL:

SEONMIN KIM • KANGWOO LEE

SHARAD KUMAR SHARMA • YESOL MIN • GYUNGHEE KIM

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IBA Rules	IBA Rules on the Taking of Evidence in International Arbitraion Cited as: IBA Rules In paragraphs: 43, 45, 46, 47, 50
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LIST OF ABBREVIATIONS

%	Percent
&	And
Apr.	April
Art(s).	Article(s)
Aug.	August
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
Cl. Ex.	CLAIMANT's Exhibit
cmt.	Commentary
CONTRACT	Frozen Semen Sales Agreement
DDP	Delivery Duty Paid
Dec.	December
Feb.	February
HKIAC	Hong Kong International Arbitration Centre
i.e.	id est (that is)
IBA	International Bar Association
ibid.	ibidem (in the same place)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICSID	International Centre for Settlement of Investment Disputes
Jan.	January
Jul.	July
Mar.	March
Mr.	Mister
Ms.	Miss
NAFTA	North American Free Trade Agreement
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Awards (1958)
No.	Number

Oct.	October
p./pp.	page/pages
para.	paragraph(s)
PICC	UNIDROIT Principles on International Commercial Contracts
PO1	Procedural Order No.1
PO2	Procedural Order No.2
Tribunal	Arbitral Tribunal
UCC	Uniform Commercial Code
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
v.	Versus

STATEMENT OF FACTS

1. The Parties to this arbitration are Phar Lap Allevamento ("CLAIMANT") and Black Beauty Equestrian ("RESPONDENT"). CLAIMANT is a large sized racehorse farm business in Mediterraneo. RESPONDENT is a medium sized mare farm in Equatoriana.

24 Mar. 2017
Exhibit C2
CLAIMANT agreed to sell 100 doses of frozen semen of its champion stallion to RESPONDENT, in light of their interest in further business. CLAIMANT prohibited a resale of the items to third parties without its consent.

31 Mar. 2017
Exhibit C3; Exhibit C4
Given the urgency of the delivery and CLAIMANT's much greater experience in shipment, CLAIMANT agreed on a delivery DDP subject to the hardship clause, and refused to take over any future risks associated therewith.

12 Apr. 2017
Exhibit C8
CLAIMANT and RESPONDENT agreed that if the Parties could not agree, arbitrators should adapt the contract under the hardship clause and/or the arbitration clause.

6 May 2017
Exhibit C5
CLAIMANT and RESPONDENT entered into the Frozen Semen Sales Agreement (this Agreement). They agreed on three shipments.

20 May 2017; 3 Oct. 2017
Notice of Arbitration
CLAIMANT sent the first, and the second shipment of 25 doses respectively. The last delivery of 50 doses was scheduled for 22 Jan. 2018.

20 Dec. 2017
Exhibit C6
Equatoriana imposed 30% tariffs on frozen semen of racehorses from Mediterraneo, as political retaliation. Previously, it has never relied on retaliatory measures except once.

21 Jan. 2018
Exhibit C8
Assuring to find a solution through negotiation, RESPONDENT urged CLAIMANT to authorize the shipment as planned.

22 Jan. 2018
Exhibit C8
CLAIMANT authorized the final shipment and paid the 30% in tariffs, which more than offset its 5% profit margin, and aggravated its financial difficulties.

12 Feb. 2018
Exhibit C8

RESPONDENT breached the resale prohibition. When confronted, RESPONDENT stopped the negotiation, and refused to pay CLAIMANT for any additional tariffs.

30 May 2018
PO2 Para 40

CLAIMANT was informed by his regular customer, who worked for the opposing party of the other arbitration, that RESPONDENT was involved in the other arbitral proceedings, and trying to adapt the contract reflecting the tariff imposed.

31 Jul. 2018
Notice of Arbitration

CLAIMANT filed a Notice of Arbitration to HKIAC according to this Agreement, stating: "The governing law of this Agreement shall be *the law of Mediterraneo*. Any disputes arising out of this contract shall finally be solved by arbitration administered by *the Hong Kong International Arbitration Centre* (HKIAC). The seat of arbitration shall be *Vindobona, Danubia*"

24 Aug. 2018
Answer to Notice of Arbitration

RESPONDENT submitted the Response to Notice of Arbitration.

2 Oct. 2018
Letter by Langweiler

CLAIMANT noticed the Tribunal that CLAIMANT had been promised a copy of the award and the relevant submission and will submit those evidence once they have been received.

3 Oct. 2018
Letter by Fasttrack

RESPONDENT objected to the submission of materials from the other arbitration and alleged that the source of the information is an illegal hack or their former employees.

SUMMARY OF ARGUMENTS

2. Under the arbitration agreement which is governed by the law of Mediterraneo, the tribunal has the jurisdiction to adapt the contract. For the jurisdiction of adaptation, the competence-competence doctrine gives the power to tribunal to decide their jurisdiction. And both CLAIMANT and RESPONDENT had intended to give an authority to adapt the contract to tribunal. (**Issue I**)

3. CLAIMANT requests the Tribunal to permit its submission of evidence from the other arbitration proceedings, for it contains critical and important information that potentially changes the outcome of the proceedings. The information is regarding RESPONDENT's controversial behavior shown between the current proceedings and the other arbitration proceedings with a Mediterranean buyer, where RESPONDENT urges that it will deliver the mare only if the purchase price increases and reflects the imposed tariff. The inconsistency of its position concerning the same issue is directly related to RESPONDENT's bad faith in the arbitration. Thus, the Tribunal will be able to make a fair and informed decision only when, despite confidentiality and improper obtaining of the information, the Tribunal entitles CLAIMANT to submit the evidence either by the joinder of the other Party of the other arbitration or in camera proceedings. (**Issue II**)

4. CLAIMANT is entitled to the payment of the additional amount of payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price. The agreement on Delivery Duty Paid ("DDP") was contingent on inclusion of a hardship clause which relieved CLAIMANT from assuming all the liability in case of hardships listed in clause 12 of the contract. The increase by 30% price in the delivery makes the contract excessively onerous and amounts to hardship. In case of such hardship, the party is allowed for a price adaptation which was agreed by the RESPONDENTS. The CLAIMANT relied on the promise made by the RESPONDENT and thus under equitable remedy of promissory estoppel, CLAIMANT is entitled to such adjusted price. CLAIMANT has shown a good faith effort to fulfilling the contract unlike the RESPONDENT who fundamentally breached the contract under Article 25 of the CISG by selling the frozen semen at a higher price to others which was strictly forbidden by the contract. The substitute performance made by the CLAIMANT cannot be denied by the RESPONDENT and thus the Tribunal should find that RESPONDENT must honor the contract and pay the full contract price. (**Issue III**)

ARGUMENT

ISSUE I. THE TRIBUNAL HAS THE JURISDICTION TO ADAPT THE CONTRACT UNDER THE ARBITRATION AGREEMENT WHICH IS GOVERNED BY THE LAW OF MEDITERRANEO

5. Equatorianian government unexpectedly started to impose 30 percent tariffs on animal semen from Mediterraneo. [*Cl. Ex. 6, p. 15*]. CLAIMANT needs to modify the price of the product for which is the last shipment of 50 doses so that CLAIMANT would not make a loss. Art 19(1) HKIAC Arbitration Rules ("**HKIAC Rules**") broadly enumerates that the arbitral tribunal may rule with respect to the existence, validity or scope of the arbitration agreement. The Tribunal has the jurisdiction to adapt the contract under the arbitration (**A**). The arbitration agreement and its interpretation are governed by the law of Mediterraneo (**B**).

A. The Tribunal has the jurisdiction to adapt the contract under the arbitration

6. According to the competence-competence doctrine, the tribunal has the power to decide their jurisdiction (**1**). Since the arbitration agreement is valid and the claim raised is covered by the arbitration agreement (**2**).

1. The competence-competence doctrine gives the power to decide the tribunal's jurisdiction

7. The competence-competence doctrine provides that international arbitral tribunals have the power to consider and decide disputes concerning their own jurisdiction [*Born, p. 1047, para.3]*. 15. Article 19.1 HKIAC rules also recognize the competence-competence doctrine stating that "the arbitral tribunal may rule on its own jurisdiction…" Accordingly, the tribunal has the power to decide its own jurisdiction. If they decide that they have a jurisdiction to adapt the contract, they have power to adapt the contract.

2. The Parties had a mutual understanding to give the Tribunal a power to adapt the contract

8. Looking drafting history of the arbitration agreement, pursuant to witness statement of Julie Napravnik, who is a lawyer working for the CLAIMANT, RESPONDENT's Mr. Antley had explicitly stated to CLAIMANT's Ms. Napravnik that the arbitrators should adapt the contract where the parties could not be able to reach a solution [*Cl. Ex. 8, p. 17*].

Even though there is only finalizing contract which does not include such an express reference in the arbitration agreement since both negotiators had not enough time to make any amendment agreement, they confirmed both parties' intention to put the express reference into the hardship clause or the arbitration clause.

3. The Arbitration Agreement is valid and covers the claim raised

9. As both parties agrees to put the arbitration agreement in the sales agreement, the arbitration should be administered by the Hong Kong International Arbitration Center ("**HKIAC**") under the HKIAC Rules [*Cl. Ex. 5, p. 14*]. The Arbitrations agreement clearly indicates that any dispute arising out of this contract should be resolved by arbitration (**1**). RESPONDENT and CLAIMANT had intended to put the adaptation clause in sales agreement (**2**).

i. The phrase "*any dispute arising out of this contract*" expressly reveals that the Tribunal would have jurisdiction.

10. In the sales agreement, CLAIMANT and RESPONDENT put the arbitration agreement [*Cl. Ex. 5, p. 14*]. This arbitration agreement clearly express that the arbitral tribunal has the power to resolve the any dispute arising out of the sales agreement. It means that both parties agreed and intended to follow what the arbitration agreement says.

11. Various authorities have interpreted the "any disputes" formulae broadly, usually concluding that they extend to all disputes having any plausible factual or legal relation to the parties' agreement [*Born, p. 1091, para.3]*. In the arbitration agreement, some of subjects are listed, but this list is not limited. When it says "including", it impliedly means "not limited to". Since, the dispute of adapting the contract is also arising out of the sales agreement, it would be subject to be arbitrable dispute.

ii. The law of the Mediterraneo also interprets the phrase of "disputes arising out of this contract" as broad meaning

12. Following the law of Mediterraneo, the arbitration agreement should be interpreted broadly that can be extended to the claim for an increased remuneration, but RESPONDENT is arguing that the law of the arbitration agreement should be the law of the Danubia. Unlike the law of Danubian which requires an express empowerment of adapting the contract, the law of Mediterraneo does not require an express reference for that.

13. To conclude, the arbitration agreement itself indicates the arbitral tribunal has the power to adapt the contract. And both parties already agreed to give the jurisdiction to arbitral tribunal to adapt the contract.

B. The Arbitration Agreement and its interpretation are governed by the law of Mediterraneo.

14. The RESPONDENT has alleged that the interpretation of the arbitration agreement is governed by the law of Danubia which requires an express empowerment for adaptation of contract. Because such an express empowerment is missing in the present contract, the RESPONDENT, therefore, alleges that there is no ground that the tribunal has jurisdiction to adapt the contract. However, the arbitration clause is governed by the law of Mediterraneo, because there is no reason to apply the principle of separability to our arbitration clause. Secondly, the CLAIMANT did not agree that the law of the place of arbitration would govern the arbitration agreement.

1. According to the three-stage test, the law of Mediterraneo has been chosen as an implied law

15. The three-stage test is the test for determining which law would apply in arbitration. In England court, they established a three-stage test which ask three questions, (1) whether the parties have made an express choice of the governing of an arbitration agreement; (2) in absence of an express choice, whether the parties have made an implied choice; or (3) in the absence of an express or implied choice, which system of law has the closet and most real connection with the arbitration agreement [*SulAmérica*].

16. Since in the arbitration agreement there is no express choice of the governing of an arbitration agreement, second test would be applied whether an implied choice of the governing of an arbitration have been made by both parties. Following the reasoning of Moore-Bick J in *SulAmérica*, "in the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitration" [*SulAmérica, para. 26*]. There was also no contrary indication that the law of the contract, which is the law of the Mediterraneo, would not be the implied choice of the governing of an arbitration.

17. In Singapore High Court, Steven Chong J also held that "the presumption that the implied choice of law for the arbitration agreement is likely to be the same as the

expressly chosen law of the matrix contract is supported by the weight of authority and is preferable as a matter of principle: in a case involving an arbitration clause forming part of a wider substantive contract, it is reasonable to assume that the contracting parties intend their entire relationship to be governed by the same law" [*BCY*].

18. In *SulAmérica,* there was another factor should be considered when determining the governing law of the arbitration. If they choose the law of the contract as the law of the arbitration, the arbitration agreement itself would not valid. That is why the court decided the law of seat of arbitration would be the governing law of an arbitration which decision was favorable to arbitration [*SulAmérica, para. 29*].

19. Even though the second test would not be applied, the third test still would be applied. When determining which law is most closely connected with the agreement, the law of seat of arbitration is not big factor. Only because it has seat of arbitration, it does not mean and it is hard to say that the law of seat of arbitration would be the law of the arbitration or there is close connection with the agreement. The authors of a seminal text on English arbitration law described that "as a general rule, the law with the closest connection to the arbitration agreement was the law governing the contract, since the arbitration agreement was considered part of the substance of the underlying contract." [*Mustill,, 63*]

2. The doctrine of separability would not be considered where the contract itself is valid

20. Article 19.2 HKIAC rules states "an arbitration agreement which forms part of a contract, and which provides for arbitration under these Rules, shall be treated as an agreement independent of the other terms of the contract". The purpose of Article 19 is to protect the arbitration agreement under the invalid contract. Thus, any challenge to the main agreement does not affect the arbitration agreement. [*Cmt. to Trans-Lex Principle*] The principle of separability should be applied where the issue of validity of contract is made. In United States, Alabama courts have expressly limited the application of the separability doctrine to "voidable" contracts only.

21. Since not validity of contract issue here and the contract itself is valid without disputes, there is no ground to apply the doctrine of separability to our arbitration clause. Because the arbitration agreement is part of the contract, the arbitration agreement is, therefore, also governed by the law of Mediterraneo.

i. Even if the principle of separability would be applied, it does not mean that the law of contract and the law of the arbitration agreement should be different

22. The separability doctrine does not mean that the law applicable to the arbitration clause is necessarily different from that applicable to the underlying contract [*Born, p. 412, para.1]*. Some authorities have interpreted general choice of law clause as extending to "separable" arbitration provision contained within an underlying contract. In the words of one award "It is reasonable and natural … to submit the arbitration clause to the same law as the underlying contract" [*Final Award in ICC Case No. 6840*].

23. A number of judicial authorities from civil law jurisdiction reach similar conclusions. For example, according to one Dutch judicial decision, "parties, in general, would prefer – excluding special circumstances which do not arise in this case – to submit the validity of the arbitration clause to the same law to which they submitted the main agreement of which the arbitration clause forms a part." [*Owerri, at 706*].

24. In the words of a leading English commentary stated that "if there is an expert choice-of-law to govern the contract as a whole, the arbitration agreement will also normally be governed by that law; this is so whether or not the seat of arbitration is stipulated, and irrespective of the place of the seat" and "Since the arbitration clause is only one of many clauses in a contract, it would seem reasonable to assume that the law chosen by the parties to govern the contract will also govern the arbitration clause. If the parties expressly choose a particular law to govern their agreement, why should some other law - which the parties have not chosen- be applied to one of the clauses in the agreement, simply because it happens to be the arbitration clause?" [*Redfern, para.2-8*].

25. An Indian Supreme Court decision adapted a similar analysis that "whether the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract." [*National Thermal Power Corp*].

3. CLAIMANT Did Not Agree with Danubian Law As The Law Of The Place Of Arbitration

26. The RESPONDENT has alleged that when they made proposal for an arbitration agreement which was governed by the law of the place of arbitration and not by the law of the contract, the CLAIMANT had not objected to their proposal. [*Answer to the Notice of Arbitration, p. 31. No. 15*]. But it is not true. The CLAIMANT had objected their proposal by changing the suggested place of arbitration.

27. When CLAIMANT respond to the RESPONDENT's proposal, they deleted the governing law of the arbitration agreement. And they also clearly stated that "we would largely accept your proposal with an amendment." Once it is amended, it is hard to say that it was acceptance. The RESPONDENT's argument that because the CLAIMANT did not object the law of place of arbitration, that law governs the arbitration agreement is not supportive argument with sufficient evidence.

CONCLUSION OF ISSUE I

The tribunal has jurisdiction under the arbitration agreement to adapt the contract. First, the Arbitration Agreement is valid and obviously covers the claim raised. Following the law of Mediterraneo, the arbitration agreement should be interpreted broadly and extended to discussion of adaptation clause. Thus, the governing law of the arbitration agreement is the law of the Mediterraneo and it should include implied adaptation clause in the arbitration agreement. Second, the arbitration clause and its interpretation are governed by the law of Mediterraneo because first the principle of separability is not applied to our contract which is valid. Second the CLAIMANT did not agree on the law of place of arbitration which is the law of Danubia.

ISSUE II. CLAIMANT SHOULD BE ENTITLED TO SUBMIT EVIDENCE FROM OTHER ARBITRATION PROCEEDINGS, DESPITE THE FACT THAT IT COULD BE OBTAINED THROUGH A BREACH OF CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK

28. CLAIMANT requests the Tribunal to permit its submission of a copy of the award and the relevant submission from other arbitration proceedings, irrespective of the fact that the evidence could have been obtained either through a breach of confidentiality agreement or an illegal hack of RESPONDENT's Computer system [*Record, p. 50*; *PO1,*

p. 53 para. III.1.b]. Despite confidentiality or illegal obtain, the evidence contains critical and important information for the pursuit of truth, for the evidence potentially changes the outcome of the proceedings. (**A, B**)

29. Concerning the way to bring in the important evidence, CLAIMANT further desires the other Party of the other arbitration to join in the arbitration proceedings [*Record, p. 50*]. If such way is found unfeasible, at least, the documents alone should be submitted and if willing, by adopting in-camera proceedings solely to address this evidentiary issue. [*Id.*] That way, the Tribunal will be able to make a fair and informed decision and at the same time, prevent consequences of a breach of confidentiality. (**C**)

A. The necessity of the document in these proceedings overrides the institutional confidentiality obligation between the parties in the other arbitration proceedings.

30. Despite confidentiality, the Tribunal should allow the evidence to be presented in the current proceedings for the pursuit of truth. The grounds for such prayer are that the information about other arbitration proceedings is material to the outcome of the proceedings (**1**), and applicable Rules do permit such submission. (**2**) Gary B. Born explains in his book International Commercial Arbitration that "tribunals are acutely conscious of their obligation—under institutional rules, national law and the New York Convention—to afford each party the opportunity to present its case" [*Born, p. 2311*]. To pursue a fair and informed decision for the Tribunal, submission of the evidence from other arbitration proceedings is crucial.

1. Despite confidentiality, the Tribunal should entitle CLAIMANT to submit the evidence from other arbitration proceedings because it is so material that it changes the outcome of the proceedings.

31. The evidence is material to the case as a whole because it has the potential to reveal RESPONDENT's contradicting behavior with regards to the merits of the case—the adaptation of the sales price due to the unexpected increase of tariff [*Record, p. 50; Born, p.2362*]. The inconsistency in RESPONDENT's argument shows that the party is arguing in bad faith and is not speaking for the truth of the matter.

32. At the annual breeder conference, CLAIMANT's CEO learned about the other arbitration

proceedings from a reliable source, Mr. Kieron Velazquez, who was working for the Mediterranean buyer in the other arbitration and knew the main issues in dispute [*PO2, p. 60 para. 40*]. Regarding the other arbitration, where RESPONDENT sold a mare to a Mediterranean buyer, Mr. Velazquez told CLAIMANT that RESPONDENT was "only willing to deliver the mare once the price has been increased to reflect the tariff" [*Id.; Record, p. 50*]. However, in the current proceedings, RESPODNENT, as a buyer, is not willing to increase the price to reflect the imposed tariff, arguing that CLAIMANT has no legal ground to ask such adjustment [*Records, p. 32 para. 18*]. Those two arbitrations both have RESPONDENT as a party, and deal with the same issue and the same situation under the same HKIAC Rules, except for the fact that RESPONDENT is the one who opposes to the adjustment of the price in this arbitration. That inconsistency in RESPONDENT's argument in each arbitration arises a serious credibility problem of RESPONDENT to argue in good faith [*Dietz, Section 4*].

33. Also, what RESPONDENT argues in these arbitration proceedings is not only inconsistent with its position in the other arbitration proceedings, but also inconsistent with the promise that RESPONDENT made to CLIAMANT before CLIAMANT delivered the final shipment relying on their promises. Mr. Shoemaker, who is in charge of the racehorse breeding program from RESPONDENT urged Ms. Napravnik, a lawyer of CLAIMANT, to authorize the final shipment, assuring her by saying that regarding the increased burden of CLAIMANT due to imposed tariff, a solution will be found through negotiation, and they are interested in further businesses [*Records, p.18*]. This also shows that RESPONDENT is untruthful in this arbitration.

34. Moreover, the only reason why RESPONDENT is pursuing to enforce confidentiality agreement is the negative impact the evidence from other arbitration proceedings will give on their argument for refusing to enforce adaptation clause in this current proceedings, once the documents are submitted to the Tribunal. This violates the RESPONDENT's obligation "to participate in the [arbitration] hearing in good faith" [*Dietz, Section 4*]. For CLAIMANT to present its case and for the Tribunal to make a fair judgment, the evidence from other proceedings must come in and be reviewed by the Tribunal.

35. Because the inconsistency attacks directly to REPONDENT's credibility and truthfulness of its own argument, the evidence is so material that it can change the outcome of the

case, and thus, CLAIMANT must be able to present such evidence; otherwise, the Tribunal will not be able to make a fair and informed judgment, and CLAIMANT will miss the change to present its case completely [*Born, p. 2311; Born, p.2362*].

2. Such submission of evidence is permitted under applicable evidentiary rules: UNCITRAL Rules on Transparency, IBA Rules, and HKIAC Rules.

36. The submission of evidence should be permitted under prevailing principles of transparency in the UNCITRAL Rules on Transparency. Under the UNCITRAL Rules of Transparency, the evidence from an investor-state arbitration is open to the public and often published [*UNCITRAL Rules on Transparency, Sections 3, 7*]. Despite confidentiality agreement, the requested evidence should be admissible to the Tribunal because the documents are already to public documents under the UNCITRAL Rules on Transparency. Under article 3 of UNCITRAL Rules on Transparency, certain documents, including the award, shall be publicized and made available to the public, unless the documents fall into one of the exceptions provided in Article 7 of the Rule. These exceptions exist to protect confidential or protected information such as confidential business information.

37. Unless the evidence does not fall under the confidential and protected documents under Article 7 of the Rules, the documents from the arbitration are open to the public. Thus, evidence from other arbitration proceedings is available for CLAIMANT to submit to the Tribunal.

38. RESPONDENT argued in its letter on October 3, 2018, that the submission is not permitted because the other arbitral proceedings were expressly bound to confidentiality obligations under the previous version of HKIAC Rules of 2013 [*Records, p. 51*]. However, the UNCITRAL Rules on Transparency states that where there is a conflict between the Rules and the applicable arbitration rules, the Rules shall prevail [*UNCITRAL Rules on Transparency Section 1.7*]. Here, even though the other arbitration proceedings are under the institutional confidential obligation, the obligation does not negate the document's availability to the public because Transparency Rules prevail over HKIAC Rules.

39. Also, expectations of confidentiality are materially lower concerning arbitral awards [*Born, p.2820*]. One of the documents which CLAIMANT requests is the award from

other arbitral proceedings. The Privy Council has permitted disclosure of award, where award involved same issues raised in litigation [*Associated Electronic*].

40. Furthermore, Gary B. Born explains in his book of International Commercial Arbitration that "there may be circumstances where an agreement regarding confidentiality will be unenforceable on public policy or mandatory law grounds," giving the Scottish Arbitration Act as an example [*Born, p. 2789*]. The prevailing principles of transparency contains a public policy that the Rules create "a more predictable forum in which investors and states have equal access and can be held accountable by the public for unfair practices" and they "attempt to push arbitration towards a more transparent, open and accessible adjudicatory pathway" [*Kayla, p. 94, 105, 107*].

41. Thus, CLAIMANT should be permitted to submit the documents, for those documents are public documents under UNCITRAL Rules on Transparency where the principles of transparency overrides the confidentiality rights of the parties.

42. Under IBA Rules on the Taking of Evidence in International Arbitration, CLAIMANT can request RESPONDENT to produce the documents from other arbitration proceedings because the documents are material to the outcome of the proceedings [*IBA Rules 3.2*]. The Working Party reached agreement on principles governing document production. It recommends when the objection to the document production is not resolved by means of such consultation:

> "The arbitral tribunal shall order the production if it is convinced, first, that the issues that the requesting party wishes to prove are relevant to the case and material to its outcome; second, that none of the reasons for objection set forth in Article 9.2. applies; and, third, that the requirement of Article 3.3 have been satisfied" [*Cmt. on the IBA Rules, p. 8*].

Article 3.2 of IBA Rules states that "any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce." In the following clause, it provides requirements to constitute a Request to Produce. One of which is that a Request to Produce has to contain "a statement as to how the Documents requested are relevant to the case and material to its outcome" [*IBA Rules § 3.3(b)*]. The test for "relevant to the case" is always satisfied when "material to its outcome" is met [*Born, p. 2362*]. Thus, the materiality of the evidence will only be analyzed.

43. "Material to its outcome" means that the evidence is material to this case, and if it is only material to certain issues, the evidence does not satisfy the materiality test [*Born, p.2362*]. Here, because it has the potential to reveal the RESPONDENT's contradicting behavior regards to the merits of the case, which is the adaptation of the sales price due to the unexpected increase of tariff [*Record, p. 50*]. Thus, it is reasonable to find that the evidence is material enough to change the outcome of the whole case.

44. In addition, the IBA Rule provides lists of documents that shall be excluded from evidence in Article 9.2. Excluded documents include documents that lack sufficient relevance to the case or materiality to its outcome, require undue burden to produce, or has grounds of special political or institutional sensitivity. The requested evidence does not constitute any of the excluded documents. Here, the submission does not touch sensitive business privacy, as all CLAIMANT needs to prove is the RESPONDENT's contradicting argument in the other arbitration proceedings [*IBA Rules § 9.2*]. For that reason, confidentiality should be an obstacle from bringing in material evidence to the tribunal.

45. IBA Rules concern about the producing party's burden. In the commentary, the writers showed their concerns about document production that "[t]he Working Party and the Subcommittee did not want to open the door to 'fishing expeditions'" [*Cmt. on the IBA Rules, p. 9*]. However, the evidence by CLAIMANT is a copy of the award and the relevant submission [*Records, p. 50*]. And CLAIMANT has a specific purpose and reason for the request of the submission, which is to present RESPONDENT's argument in other arbitration proceedings on the enforcement of adaptation clause due to the imposed tariff. Thus, the evidence production will not be too broad or burdensome to a party.

46. Under HKIAC Arbitration Rules, the Tribunal shall require RESPONDENT to produce the evidence requested because the evidence is material to the outcome of the proceedings. According to Article 22 of HKIAC Arbitration Rules of 2018, the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be "relevant to the case and material to its outcome." IBA Rules have the same relevancy and materiality requirement for evidence. We can reasonably infer that if one satisfies IBA Rules test for materiality, then it is also likely to satisfy that of HKIAC Rules due to its identical wording. Because the materiality of the evidence is proven under the IBA Rule, the Tribunal should require

RESPONDENT to produce the requested documents, for the evidence also satisfies the test for "relevant to the case and material to its outcome" under HKIAC Rules.

47. Therefore, according to the applicable arbitration rules, the evidence should be admissible.

3. The Tribunal is the sole judge in deciding the materiality and admissibility of evidence in the arbitration, not bound by the strict law of evidence.

48. First of all, the admissibility of the evidence has to be solely decided by the Tribunal. Common law states, like Danubia, are recognizing the jurisdiction of the Tribunal in the issue of admitting the evidence. For example, the Seventh Circuit of United States Court of Appeals held that "arbitrators are not bound by the rules of evidence" [*Generica, at, 375*]. Also, the United Kingdom Supreme Court has declared that the arbitrators are "the sole judges of the evidence" [*Jivraj, para. 62*]. Moreover, where there is no agreement, national arbitration statutes and institutional rules almost universally permit the international arbitral tribunal to order the parties to the arbitration to disclose document and other materials as part of the evidence taking process [*Born, p. 2343*].

49. In addition, IBA Evidentiary Rule states that "[t]he Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence" [*IBA Rule § 9(1)*]. Similarly, HKIAC Rules Art. 22.2 states that "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence" [*HKIAC Rules § 22.2*]. CLAIMANT strongly believes that the Tribunal shall have the power to decide the admissibility, relevance, materiality of evidence, and the requested evidence is material to the outcome of the case under IBA Rules and HKIAC Rules.

50. RESPONDENT objects CLAIMANT's submission on the evidence of other arbitration proceedings for the reason that the confidentiality obligation in HKIAC 2013 Rules keeps the proceedings confidential [*Records, p. 51*]. However, the confidentiality obligations arising from an international arbitration agreement should not be regarded as absolute; rather, they are nuanced [*Born, p. 2818*]. Moreover, issues of confidentiality in international arbitration are generally for the arbitrators to decide [*Born, p. 2814*]. Even though the other arbitration proceedings are conducted under the HKIAC 2013 Rules, RESPONDENT cannot get absolute rights for confidentiality. By the Tribunal,

confidentiality can be overridden.

51. Therefore, the Tribunal, as a sole judge of evidence, should permit CLAIMANT to present the evidence because the evidence that proves the inconsistency of RESPONDENT's argument is critical for a fair and informed decision for the Tribunal.

B. The necessity of the document overrides improper obtaining without a party's responsibility for the illegal hacking.

52. The information obtained through an unlawful method can still be admissible to the Tribunal especially when there is no allegation to the requesting party [*Caratube International Oil Company, p. 42, para. 150*]. Moreover, the submission does not outweigh the importance of confidentiality and legal privilege and the obligation of all parties to arbitrate in good faith [*Libananco Holdings Co, pp. 39-40, 42*].

53. The evidence should still be admissible even if the evidence had been obtained through an illegal hack to RESPONDENT's Computer system. In a factually similar case, *Caratube Int'L Oil & Mr. Hourani v. Kazakhstan*, the ICSID tribunal held that the documents were admissible even though they were obtained from a hacked computer network [*Caratube Int'L Oil, p. 42, para. 150*]. In that case, the claimant sought to rely on the stolen documents that were published on a website after the Kazakhstan government's computer network was hacked [*Ibid.*]. Similarly, our case assumes that the information was found out through an illegal hacking of RESPONDENT's Computer system [*PO1, p. 53 para. III.1.b*]. Thus, even if it was obtained through an illegal hack, the evidence should be admissible.

54. RESPONDENT might argue that, in *Methanex v. U.S.A.,* the arbitral tribunal rejected the submission of illegally obtained documents. However, the Tribunal's rationale in Methanex was that the party who trespassed into the office and obtained the documents illegally violated a general duty to conduct themselves in good faith and had offended the principles of equal treatment and procedural fairness imposed by the UNCITRAL Rules. [*Methanex, part II, chapter 1, pp. 1, 26*]

55. Here, our case will be distinctive from *Methanex v. U.S.A.,* where there was undisputed fact that CLAIMANT directly obtained documents by trespassing the RESPONDENT's office. As said earlier, there is no indication that CLAIMANT is responsible for the

illegal hack. Thus, it is more likely that the documents can be submitted to the arbitral tribunal, for it is not our case that CLAIMANT conducted an illegal hack.

56. In addition, there was another arbitration where the tribunal weighed the importance of confidentiality and legal privilege and the obligation of all parties to arbitrate fairly and in good faith [*Libananco, pp. 39-40, 42*]. In that case, the respondent procured privileged and confidential e-mails exchanged between the claimant and its counsel and they sought to rely on those privileged documents [*Ibid.*]. Because the conversation between the claimant and its counsel was protected under lawyer-client privilege, the tribunal ordered the destruction and exclusion from evidence of all privileged and confidential communication [*Ibid.*].

57. Here, the evidence is the award and other relevant submissions from other arbitration proceedings and those are not privileged [*Record, p. 50*]. Further, confidentiality is not of importance in our case because the award would not contain any sensitive business information. In case the award contains any of sensitive information, one can censor them, for all CLAIMANT is a proof that RESPONDENT has shown contradicting behavior on the same adaptation issue. Further, there is no proof indicating that CLAIMANT did violate its obligation to arbitrate in good faith because this Tribunal does not determine whether CLAIMANT improperly procured the information.

58. If we compare the rights of the RESPONDENT to the confidentiality agreement and the substantial harm of the CLAIMANT when not being able to present the evidence, substantial harm which CLAIMANT will suffer for not having the evidence is much greater than the harm that RESPONDENT will have when the evidence is presented.

59. Therefore, CLAIMANT, who has no allegation of an illegal conduct, has a right to submit the evidence in good faith even if the information was obtained improperly..

C. The Tribunal should entitle CLAIMANT to present the evidence by either way of the joinder of additional parties or in-camera proceedings if the Tribunal wishes to preserve confidentiality agreement.

60. As for the method of bringing this important information of other arbitration proceedings into these proceedings for a fair and informed decision, CLAIMANT requests for joinder of the other Party, who is a party to the other arbitration proceedings, conducted under

the HKIAC-Rules [*Records, p.50*]. However, if the Tribunal finds it more appropriate, CLAIMANT suggests for camera proceedings where only the trusted Tribunal is entitled to review and value the evidence without any concern of the consequences of a breach of confidentiality.

61. For the reasons stated earlier, the evidence at issue is so important that CLAIMANT seek a way of the other Party from other arbitration proceedings to join the proceedings and present the information they have to the Tribunal. HKIAC Rules Article 27.1(a) read:

> "The arbitral tribunal or, where the arbitral tribunal is not yet constituted, HKIAC shall have the power to allow an additional party to be joined to the arbitration provided that: (a) prima facie, the additional party is bound by an arbitration agreement under these Rules giving rise to the arbitration, . . ."

62. Here, the other Party, a non-disputing party, can join the proceedings because the other Party is already bound by an arbitration agreement under HKIAC Rules, for the other arbitration proceedings with RESPONDENT are also conducted under the HKIAC Rules [*Records, p.50*].

63. Even if the Tribunal finds that the joinder of the other Party is not feasible, at least, CLAIMANT should be able to present the evidence in camera proceedings solely to address this evidentiary issue. By adopting camera proceedings, the Tribunal can examine the value of the important evidence without disclosing its contents to a party. That way, no Party's confidentiality right will be violated, and the Tribunal can prevent the consequences of a breach of confidentiality.

64. The Tribunal under HKIAC Rules can be trusted to handle this issue because these current proceeding and other arbitration proceedings are conducted under the same arbitration rules, have a consistency factor, and the same party RESPONDENT is involved in both proceedings.

65. Thus, the Tribunal should allow this critical information to be presented by the joinder of the other Party in other arbitration proceedings, or if more appropriate, in camera proceedings.

CONCLUSION OF ISSUE II

The Arbitral Tribunal should permit CLAIMANT to submit evidence from other arbitration proceedings for the reason that the evidence is essential for drawing the Tribunal into a fair and informed decision. The institutional confidentiality obligation between RESPONDANT and a third party does not override the necessity of the evidence. CLAIMANT is entitled to present the evidence by either way of the joinder of additional parties or in-camera proceedings in order to preserve confidentiality agreement.

ISSUE III. CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE.

66. The tribunal should find that the CLAIMANT is entitled to receive the additional payment of US$ 1,250,000 and any other costs of Arbitration from the RESPONDENTS. CLAIMANTS are entitled to this as a result of adaptation of price of the contract either under clause 12 of the CONTRACT between the parties or under CISG.

A. CLAIMANT agreed to the Delivery Duty Paid (“DDP”) in clause 8 of the Frozen Semen Sales Agreement only under the absolute assurance of a hardship clause which is clause 12.

67. The purpose of the DDP clause was to profit from the CLAIMANT’s experience in the transportation of frozen semen. The CLAIMANT was able to make the transportation commercially much more favorable to the RESPONDENT due to the specialized ability CLAIMANT had in terms of the handling and transportation of the frozen semen. A contract is concluded by an offer and an acceptance [*Kröll/Mistelis/Viscasillas/Ferrari, intro Art. 14-24, para. 4*]. This contract was never to executed with the intention to burden the CLAIMANT with all the risks associated with a DDP delivery. The communications between Mr. Antley and Ms. Napravnik from 28 March 2017 and 31 March 2007 show that it was utmost priority for the parties to come to agreement on this issue for the timely and effective delivery of the goods. [*Cl. Ex. C3, C4*].

68. CLAIMANT accepted the contract in its current form only if hardship clause was included in the contract. This was readily accepted by the RESPONDENTS. The

hardship clause (clause 12 of the CONTRACT) exempts the CLAIMANT from responsibility from a variety of unforeseen events which make the contract more onerous as the selling party.

69. Another strong evidence to determine the intention of the parties is the use of conspicuous terms in the contract itself. The use of italics and underlining in the font of the contract shows the particular importance parties placed in the contract. These are generally accepted norms in different legal systems in regard to contract law. In USA, for example, under the UCC, some contract provisions are required to be "conspicuous" because they are considered especially important. These include limitations on warranties and indemnification provisions. According to the UCC, 'conspicuous' with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following contrasting fonts from the surrounding fonts or they must be set off from surrounding text that call attention to the language. [*UCC §1-201(10)*]

70. Clause 12 of the CONTRACT clearly shows an italicization the font regarding the latter part of the clause, i.e. "neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." The use of such conspicuous terms shows that the parties did not want to bury this important clause amidst the large amount of text in a contract and it was a major part of the agreement.

B. RESPONDENT must pay the remainder of contract price, US$ 1,250,000 as part of equitable remedy of Promissory Estoppel because CLAIMANT had relied on the RESPONDENT's promise to their detriment.

1. CLAIMANT has acted in good faith based on the appearance of promise by RESPONDENT in furtherance of their contractual relationship.

71. A disadvantaged party cannot simply claim for a relief from performance citing the hardship clause when faced with adverse circumstances. It must be able to demonstrate that it has exercised its efforts to overcome the effects of the fortuitous events or risk having negative inferences drawn against it later. [*Fucci*]. Prof. Pierre Lalive, in an article dealing with the principle of good faith in the performance of contracts with state enterprises, cited that the general obligation to perform contracts in good faith requires

the disadvantaged party to "minimize" the damage that might result from its non-performance of the contract. [*Lalive*, 425, 449]. In spite of an increased tariff of 30% by the Equitorianian government, the CLAIMANT still agreed to deliver the goods. [*Witness Statement of Napravnik*, C8]. This was done in good faith because CLAIMANT was committed to fulfilling its obligation and was minimizing any advance consequence upon RESPONDENT for non-delivery. Such an action was done upon reliance on the RESPONDENT that the increased price would be adjusted in the contract.

72. There was already a contractual relationship as per the Frozen Semen Sales Agreement between the parties. When the CLAIMANT contacted the RESPONDENT regarding the increased tariff and the considerable hardship, the RESPONDENT made a representation which inferred to the payment of adjusted price under the contract.

2. CLAIMANT reasonably relied on the promise to adjust the contract price made by the RESPONDENT.

i. Mr. Shoemaker was the authorized person to authorize change of terms for the RESPONDENT.

73. Greg Shoemaker was the responsible person for the development of the racehorse breeding program. Normally, it is the person(s) taking part in negotiation and the authorized agents of a company who make representations for a company. However, under the emergency situation of the immediate need to mitigate hardship in order for a timely delivery, Mr. Shoemaker was the appropriate person to contact for the CLAIMANT as he was the person who was going to be the one who would be the first to be affected in case the delivery was stopped.

74. Furthermore, Mr. Shoemaker was the one who contacted the Equatorianian ministry and customs authority regarding the change in tariff rates on behalf of the RESPONDENT. He clearly held a position where he could represent the RESPONDENT. [*Witness Statement of Shoemaker, R4*]

ii. CLAIMANT relied on Mr. Shoemaker's representation and thus suffered inequitable detriment.

75. Mr. Shoemaker was contacted by the CLAIMANT not in a capacity to negotiate the contract but rather to inform that due to the change in tariff, there would not be the delivery of goods. It was Mr. Shoemaker who then called the CLAIMANT and

negotiated the timely delivery of the frozen semen [*Witness Statement of Shoemaker, R4*]. He knew that the CLAIMANT would not deliver if he rejected the request, so he made a promise stating that he was certain a solution would be found through negotiations give the good relationship between the Parties and their interest in further business making the CLAIMANT believe that there would be price adjustment as per the contract.

76. Courts are known to enforce promises that are not put into words by interpretation when a party had reason to know that another party had reasonably relied on such a promise. When unforeseen contingencies occur, not provided for in the contract, the courts require performance as parties who deal fairly and in good faith with each other would perform without a law suit. [*Corbin, Section 541, at 97 (1960)*]. The fact that Mr. Shoemaker's representation was not formally in the contract thus, is not important in ascertaining if it was a valid promise.

C. CLAIMANT will suffer significant hardship if the additional contract price is not paid in this transaction.

77. Hardship is occurrence of events that fundamentally alter cost of performance of a party's performance. [*UNIDROIT Principles, Art. 6.2.2*]. To qualify as hardship under the UNIDROIT Principles, such events must occur after the conclusion of CONTRACT and be reasonably unforeseen to the disadvantaged party. They should be beyond the control of the party and risks must not be assumed by the party. The event of increased tariff substantially increased the cost of performance for the CLAIMANT. These changes occurred after the delivery of the first two shipments of the semen as stipulated in the CONTRACT.

1. UNIDROIT Principles on International Commercial Contracts (hereafter UNIDROIT Principles) is the relevant authority in this issue regarding hardship.

78. Clause 12 of the Sales Agreement stipulates, "Seller shall not be responsible ... for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." In order to define the term "hardship" it is essential to look into the governing law of the contracts which is "UNIDROIT Principles on International Commercial Contracts (PICC)." PICC is relevant authority to this issue because Clause 14 of the Sales Agreement states, "This Sales Agreement shall be governed by the law of Mediterraneo." Both parties have voluntarily agreed upon to be

bound by the law of Mediterraneo and have become signatories, and accordingly Procedural Order No. 1 states, "The general contract law of ... Mediterraneo is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts."

2. The performance of the contract has become excessively onerous owing to fundamental alteration of the equilibrium of the contract.

79. Hardship can only be found if the performance of the contract has become excessively onerous. [*Perillo*]. The UNIDROIT Principles then establish the standard of hardship as a "fundamental" alteration of the equilibrium of the contract. The ICC, which is a highly recognized institution in area of commerce and business, has found that a contract affected by a change in economic circumstances must represent a significant portion of a company's revenues for performance to be considered "unbearable" or excessively onerous. [*ICC Award in Case No. 2508*].

80. According to Ad hoc Arbitration [*Brazil*], "following devaluation of the Brazilian currency, [Claimant and Respondent] reached an agreement whereby they shared the costs of such devaluation," indicating that it would be applicable to the hardship clause of the prior original contract. Nevertheless, Claimant made a claim, challenging the application of the agreement. There the Arbitral Tribunal concluded in favor of the application of the hardship clause under which parties should share "the costs arising from the devaluation of the domestic currency" and held that "the agreement had fulfilled the parties' intention to reestablish the equilibrium of the contract."

81. The exact threshold of how much change in payment amounts to party invoking hardship is a subjective matter. [*Schwener*]. Older version of the *Priniciples of International Commercial Contracts* suggested that an alteration amounting to 50 percent or more would likely amount to "fundamental" alteration. However, the second edition has removed such a high threshold and leaves it open for case by case analysis. Given the contract price amounting to millions of dollars in the case at hand, a change of 30 percent puts significant burden on the party. In the present case, it can put the RESPONDENT out of business.

82. At the conclusion of the CONTRACT, both parties didn't anticipate any risk of such events as the Equatorianian government in the past had never imposed such tariffs. The 30% tariff increase nullifies the profit margin of 5% of the CLAIMANT and in fact leads to a loss of 25% (i.e. $1,250,000).

83. In ascertaining whether any alteration amounts to hardship, primary consideration is to be given to the circumstances of the individual case. One of the most important aspect to consider is the profit margin in the respective trade sector. More importantly, in cases where the financial ruin of the obligor is imminent, the threshold for allowing hardship may be lowered. [*Brunner, p. 438-39*].

84. The last two years have been financially difficult for the CLAIMANT due to several reasons. Through extensive restructuring measures and a considerable reduction of the work force, CLAIMANT has stayed in business [*Witness statement of Napravnik, C8*]. It would be unbearable for the CLAIMANT to stay in business and shoulder 30% tariff which is to be paid immediately. This is considerable hardship, compared to the original equilibrium of the CONTRACT where the profit margin for the CLAIMANT was only 5%. The tribunal should find that this sudden hardship should be remedied.

D. There is an obligation on the part of RESPONDENT also to negotiate in good faith owing to the hardship.

85. If the claim for hardship has a legitimate basis, refusal to negotiate can be construed to that party's disadvantage. In a French domestic court, a contracting party was found liable for damages and interest on such monetary damages because it refused to allow a revision of the terms of a contract which led the other party to financial ruin. [*Cass*]. ICC has also found it to be abusive that a party not claiming hardship refuse to undertake any steps to arrive at an adaptation of the contract and insisted on performance as it was originally provided in the contract.

86. The Equatorianian government has always been an ardent supporter of free trade. It has not relied on retaliatory measures against trade restrictions by other countries except once in its entire history. [*Notice of Aritration, para 9*]. In a US court case, the court found that regulatory changes such as new regulations which dramatically increase seller's cost leading to a loss of millions of dollars while buyers stood to gain a windfall profit were an unforeseen supervening circumstance. [*Aluminum Company of America*]. In that case, the provided relief under the commercially impracticability doctrine which is used by US courts.

E. CLAIMANT is entitled to the payment of US$ 1,250,000 and other costs resulting from the adaptation of price under the Convention of International Sale of Goods (CISG) along the lines of the hardship provision of the

UNIDROIT Principles.

1. CISG includes change of circumstances which make performance excessively onerous under impediment in Article 79 of the Convention.

87. CISG states that "a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the CONTRACT or to have avoided or overcome it or its consequences." [*CISG Art. 79*].

88. In relation to Art. 79 in the UNCITRAL Digest explicitly interprets the term "impediment" in detail by referencing the Belgian decision: "The Belgian Court of Cassation [the Supreme Court of Belgium] has indicated that the "impediment" referred to in Article 79 (1) CISG may include changed circumstances that have made a party's performance a matter of economic hardship, even if performance has not been rendered literally impossible." [*UNCITRAL Digest, at 374*].

89. The prevailing modern view while dealing with CISG is that Article 79 should be interpreted as including a hardship situation within the scope of definition of the term "impediment." [*Garro*], if a buyer accepts the seller's offer to renegotiate the contract, the contract would be adapted to changed circumstances. But if the buyer refuses to do and seller refuses to deliver, due to excessive onerous nature of the performance, such a situation is encompassed by the term impediment under Article 79 of the availability of a Hardship Defense under CISG. How much exactly should be the threshold for a hardship situation to qualify as an impediment is not defined by the courts and differs on a case to case basis. However, as stated earlier, the CLAIMANT will not be able to resume operation of its business should the CLAIMANT have to bear all the cost of the increased tariff.

2. Additionally, Price adaptation stated in Article 79 of the CISG can be done along the lines of hardship provisions of UNIDROIT Principles.

90. CISG does not directly refer to any remedies for the disadvantaged party in a hardship situation. Courts have however, that this supposed gap must be filled by the application of UNIDROIT Principles as "general principles of international trade." [*Scafom*].

91. Article 79 itself only allows a party to be exempted from liability in case of

nonperformance. However, the good faith performance of an oppressive contract should not be made more cumbersome to a party. "Another possibility would be for a court to adapt the contract with a view to restoring its equilibrium. In so doing the court will seek to make a fair distribution of the losses between the parties. This may or may not, depending on the nature of the hardship, involve a price adaptation. However, if it does, the adaptation will not necessarily reflect in full the loss entailed by the change in circumstances, since the court will, for instance, have to consider the extent to which one of the parties has taken a risk and the extent to which the party entitled to receive a performance may still benefit from that performance." In other words, in case of such changes, both parties need to find a solution and only one party (CLAIMANT) must not assume all the liability.

92. "If a party who is required to overcome an impediment does so by furnishing a substitute performance, the other party could avoid the contract and thereby reject the substitute performance only if that substitute performance was so deficient in comparison with the performance stipulated in the contract that it constituted a fundamental breach of contract."[*Cmt. to Trans-Lex Principle]*]

93. Respondent has continually emphasized the importance of a timely delivery of the semen for its breeding program. A substitute performance of delivering the goods in time at a higher price by CLAIMANT to fulfil such requirements cannot be rejected by the RESPONDENTS as it is not a fundamental breach of contract, rather a good faith performance of the contract under the circumstances. The CLAIMANT thus should receive the additional amount as the RESPONDENTS cannot show any reason to not accept this substitute performance in its entirety.

3. Furthermore, RESPONDENT itself fundamentally breached the contract by selling 15 doses at a higher price to others.

94. A fundamental breach of contract is a "breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract."[*CISG, Art. 25*]

95. Article 1.7 (1) of PICC states, "Each party must act in accordance with good faith and fair dealing in international trade." Article 1.8 of PICC further stipulates, "A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment." RESPONDENT

acted in violation of good faith stated in Art. 1.7 (1) and CLAIMANT reasonably has acted in reliance to CLAIMANT's detriment in Art. 1.8. RESPONDENT first approached to CLAIMANT by showing their interest contrary to CLAIMANT's general sales practice. Nevertheless, CLAIMANT granted an exceptional favor to RESPONDENT.

96. In CLAIMANT's Exhibit C2, a letter from CLAIMANT shows, "Normally, we would not sell frozen semen of our racehorse stallions and definitely not such an amount of semen to a single breeder for obvious reasons. ... [W]e are willing to make an exception from our general approach." CLAIMANT explicitly stated his condition, "[T]he frozen semen ... may not be re-sold to third parties without our express written consent. Furthermore, we would like to be informed about the use of every dose." However, "CLAIMANT was approached on 2 February 2018 by another breeder from Equatoriana which was enquiring about the prices of frozen semen from another stallion." [*PO2, Para. 20*] "15 doses had been [re]sold to 10 different breeders" with 20 percent profit margin in violation of the condition set forth above. Witness Statement of Julie Napravnik also reveals, "After the final shipment had been made we discovered that RESPONDENT was actually breaching the resale prohibition under the contract." [*Id.*]

97. The basis of the sale agreement is the use of semen by the RESPONDENTS for use by them alone. This is clearly seen as the CONTRACT states that the semen is to be used for the listed mares. Any other use must be informed to the Seller. They certainly are not for the RESPONDENTS for resale at a higher price. The initial conversation between Mr. Antley and Ms. Napravnik clearly will establish this point as Ms. Napravnik explicitly mentions that "the semen may not be re-sold to third parties without our express written consent."

98. An important principle of equity is *Nullus commodum capere potest de injuria sua propria*, which means no man can take advantage of his own wrong. In this case, RESPONDENTS cannot seek to narrow the scope of the CONTRACT by not allowing the hardship clause to extend as far as to reimburse for the additional expenses incurred while breaching the very CONTRACT and receiving windfall by the breach of the stipulations of the contract.

F. The amount entitled to claim for CLAIMANT can rise up to US$ 1,300,000 reflecting the full 30 percent cost increase proportional to that of the tariffs.

99. CLAIMANT is entitled to claim US$ 1,250,000 or any other amount upto US$ 1,300,000

because, under Article of 7 of CISG, RESPONDENT should have taken into account the observance of good faith and have consistency in the application of relevant rules.

100. Article of 7 of CISG states as follows: "(1) In the interpretation of this Convention, regard is to be had to ... the need to promote uniformity in its application and the observance of good faith in international trade. (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based ..."

101. In *Takap B.V. v. EUROPLAY S.r.l*, seller Italian company and buyer Dutch company entered into contract where the buyer failed to make payments and was sued by the seller and where the interpretation of forum selection clause was at issue. There the court denied buyer's argument on the interpretation of certain terms related with the clause. It referred to Art. 7 of CISG and reasoned that buyer failed to prove that seller had knowledge of the buyer's standards terms incorporated into a contract.

102. Similarly, in our case, buyer RESPONDENT is acting before seller CLAIMANT contrary to what RESPONDENT really knows about the interpretation and application of relevant clause. In other words, contrary to what RESPONDENT is arguing here, RESPONDENT is inconsistent with the rationale by showing his favor for ICC Hardship Clause 2003 in the other arbitration he is involved in. There is clear inconsistency in his action and thus he fails to show the observance of good faith but rather reveals bad faith. In the other arbitration between RESPONDENT and a buyer, RESPONDENT is arguing in favor of ICC Hardship Clause 2003 - the same clause which was stated in Clause 12 of the Sales Agreement. According to the Procedural Order No. 2, the other arbitration RESPONDENT involves "the sale of a mare by RESPONDENT to a buyer in Mediterraneo." It is stated in paragraph 39 that "[t]he contract,...provided for delivery DDP Mediterraneo (INCOTERMS 2010), contained an ICC Hardship Clause 2003."

103. After tariff imposition on agricultural products by Mediterraneo, RESPONDENT refused to deliver the mare according to the contract but rather "asked for a renegotiation of the price under the ICC Hardship Clause 2003 and Art. 6.2.3 of the Mediterranean Contract Law (UNIDROIT Principles)." Although the buyer in Mediterraneo had made challenges, "[i]n a Partial Interim Award rendered in those proceedings on 29 June 2018 the arbitral tribunal had confirmed its power to adapt the contract should the tariff result in hardship for RESPONDENT." Moreover, in para. 40, it is expressed that "RESPONDENT was

only willing to deliver the mare once the price has been increased to reflect the tariff." In other words, RESPONDENT insists on securing RESPONDENT's profit margin of selling the male by burdening the buyer with the full amount of tariff. RESPONDENT should be consistent in the application of relevant rules by burdening himself with the same amount of tariffs imposed on CLAIMANT's goods.

CONCLUSION OF ISSUE III

Under Art. of 7 of CISG, RESPONDENT should have regard to the observance of good faith and CLAIMANT should be paid additional payment of at minimum US$ 1,250,000 (zero profit margin) up to US$ 1,300,000 (original 5 percent profit margin) resulting from an adaptation of the price.

REQUEST FOR RELIEF

In light of the submissions made above, Counsel for CLAIMANT respectfully requests the Tribunal to:

1) hear the case with proper jurisdiction by adapting the contract under the law of Mediterraneo;

2) permit CLAIMANT to submit evidence from other arbitration proceedings; and

3) grant CLAIMANT additional payment of at minimum US$ 1,250,000 up to US$ 1,300,000.

CERTIFICATE OF VERIFICATION

We hereby confirm that this Memorandum was written only by the persons who signed below. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

SEONMIN KIM

KANGWOO LEE

SHARAD KUMAR SHARMA

YESOL MIN

GYUNGHEE KIM