SIXTEENTH ANNUAL
WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
HONG KONG

On Behalf Of:	Against:
Black Beauty Equestrian	**Phar Lap Allevamento**
2 Seabiscuit Drive	Rue Frankel 1
Oceanside	Capital City
Equatoriana	Mediterraneo
RESPONDENT	**CLAIMANT**

DALIAN MARITIME UNIVERSITY

CHENG ZHU ZILEI LIN LINYU QIAO HUANJIA YAO
WEN JI XIAYI CHEN PIKUN ZHANG YINGYING TANG
JUNRU YANG MENGYING WANG BO ZHANG
YIMING LI ZHIYUN TU LINGZHI LIU LINGRUI LI

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Cited as	Sources
CISG	United Nations Convention on the International Sale of Goods
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
Model Law	UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments
NY Convention	The New York Convention, 1958
ULIS	The Uniform Law on International Sale of Goods
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
ICC Hardship Clause	International Chamber of Commerce Hardship Clause (2003)
HKIAC Rules 2013	2013 HKIAC Administered Arbitration Rules
European Convention	European Convention on International Commercial Arbitration of 1961
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TABLE OF ABBREVIATIONS

%	Percentage
Art.	Article
CISG	United Nations Convention on Contracts for the international Sale of Goods
Cl.	Claim(ant)
DOF	Disclosure of funder
DP	Declaration Prasad
Ex.	Exhibit
ed	Edition
et al.	et al (and others)
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ibid.	ibidem (in the same place)
IBA	International Bar Association
i.e.	id est (that is)
NOA	Notice of Arbitration
No(s).	Number(s)
para./ ¶/¶¶	Paragraph/ Paragraphs
PO2	Procedural Order No 2
p./pp.	Page/Pages
RAR	Refusal to Agree to Removal
Re.	Respondent
RoNoA	Response to the Notice of Arbitration
RSD	Refusal to Step Down
Problem	The problem
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollars
v.	Versus

STATEMENT OF FACTS

1. PHAR LAP ALLEVAMENTO("CLAIMANT") is a company located in Mediterraneo. It is committed to operate stud farm and famous for its breeding success regarding racehorse but has been making losses since 2014 primarily due to the high interest payments for the loan taken on to finance the new stables in 2013 and the costs for the restructuring measures.

2. BLACK BEAUTY EQUESTRAIN("RESPONDENT"), a company in Equatoriana, is known for its broodmare lines and decide to establish a racehorse stable.

3. 2017.3.21 RESPONDENT, after meeting CLAIMANT at Equestrian World last year, send to the latter an email inquiring about the availability of 100 doses of frozen semen from Nijinsky III for its newly started breeding program and Informing CLAIMANT the temporary permission of artificial insemination for race horse in Equatoriana.

4. 2017.3.24 CLAIMANT submitted the offer that CLAIMANT was willing to sell 100 doses in several installments, with a price of 995,00USD per dose and replied that the purchase would be based on the standard "FROZEN SEMEN SALES AGREEMENT" (hereinafter the Agreement) and informed RESPONDENT of the basic conditions.

5. 2017.3.28 RESPONDENT accepted most of the terms of CLAIMANT's offer, including the general applicability of CLAIMANT's general terms and condition but wonder to change price, delivery term, application of law and the court of jurisdiction.

6. RESPONDENT excepted a better price in light of the size of the and insisted on a delivery basis of DDP due to the urgency delivery and CLAIMANT's greater experience in the shipment of frozen semen.

7. 2017.3.31 CLAIMANT accepted a delivery DDP and increase the price to 1000USD per dose, in accordance with the additional costs associated with a DDP delivery. Meanwhile, CLAIMANT expressly stated that CLAIMANT were not willing to take over any further risks associated with such a change in the delivery terms and suggested to include a hardship clause to address such subsequent changes.

8. 2017.4.10 RESPONDENT send CLAIMANT a draft, based on the model clause suggested by the HKIAC, that streamlines the broad wording of the clause, provides for arbitration in Equatoriana and submits the arbitration clause to the law of Equatoriana.

9. 2017.4.11 CLAIMANT changed the seat of arbitration from Equatoriana to Danubia, informed RESPONDENT of its internal policy and suggested reliance on the ICC-Hardship clause when concerning the other point.

10. 2017.4.12 Ms. Napravnik, the negotiator of CLAIMANT, and Mr. Antley, the negotiator of RESPONDENT, had a short meeting in the morning, discussing upon the newest proposal for the dispute resolution clause and the hardship clause. Mr. Antley replied that it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree and promised that he would come back with a proposal the next morning. Then Ms. Napravnik and Mr. Antley, were severely injured in an accident when driving to a restaurant after the annual colt auction in Danubia.

11. 2017.5.6 CLAIMANT, represented by John Ferguson, and RESPONDENT, represented by Julian Krone, concluded a sale agreement. Mr. Krone suggested the wording which was finally added to the force majeure clause in clause 12 with reference to the risks mentioned by Ms. Napravnik in her email of 31 March 2017. Then they agreed on the inclusion of a narrow hardship reference into the force majeure clause and regulated some other risks directly in the contract.

12. 2017.12.20 Government of Equatorian, which has always been one of the biggest supporters of free trade, imposed a tariff of 30% on all agricultural goods from Mediterraneo as a retaliation for the previous restriction, 25% tariffs on agricultural products form Equatoriana, imposed by Mr. Bouckaert.

13. 2018.1.20 In preparing the final shipment of 50 doses of frozen semen from Nijinsky III to RESPONDENT, CLAIMANT was just informed by the customs authorities that the imposed tariffs of 30% on agricultural products are applicable to the shipment. Thus, CLAIMANT put the shipment presently on hold and had called RESPONDENT to find the solution urgently.

14. 2018.1.21 Mr. Shoemaker, who was responsible for the development of the racehorse breeding program of RESPONDENT, indicated that he would clarify the legal situation and a agreement on the price would be found if the contract provides for an increased price in the case of such a high additional tariff.

15. 2018.1.22 Ms. Napravnik authorized the shipment as planned.

16. 2018.7.6 Two former employees of RESPONDENT who had been witness in the other arbitration were fired.

17. 2018.7.13 CLAIMANT submitted its Notice of Arbitration.

18. 2018.8.24 RESPONDENT filed its response to the Notice of Arbitration.

19. 2018.10.2~3 CLAIMANT provided the arbitral tribunal with evidence, which was objected by RESPONEDNT, regarding another arbitration which RESPONDENT was involved. This evidence was sold by a company with bad reputation and the evidence was disclosed from employees or hackers.

SUMMARY OF ARGUMENT

ISSUE 1: THE TRIBUNAL DOES NOT HAVE THE JURISDICTION OR THE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT; AND THE LAW OF DANUBIA SHOULD GOVERN THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.

The Parties to the arbitral proceeding are bound by an arbitration agreement allowing them to initiate arbitration in accordance with the HKIAC Rules [*Cl. Ex. 5*]. This agreement additionally provides that the seat of arbitration shall be in Vindobona, Danubia, the arbitration law of which is a verbatim adoption of the Model Law. RESPONDENT insists that according to either the common intention of the Parties, or in the absence of such intention the closest connection doctrine and the stipulations of Model Law, the law of Danubia should govern the arbitration agreement; and under the law of Danubia, the tribunal does not have the jurisdiction or power to adapt the contract without the expressed empowerment from the Parties.

ISSUE 2: CLAIMANT SHOULD NOT BE ENTITLED TO SUBMIT EVIDENCE FROM THE PREVIOUS 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.

RESPONDENT submits that, the evidence cannot be submitted in accordance with Article 9.2(a) of the IBA Rules because it is irrelevant to the case and immaterial to its outcome. Even if the evidence is relevant and material, it should not appear in the present arbitration because of the confidentiality obligation and the lack of adverse evidence rule; therefore, its admission will constitute a compelling violation of the fairness and equality between the Parties required by Article 9.2(g) of the IBA Rules. Finally, the admission of evidence obtained through illegal methods will be contrary to the principle of good faith required in international commercial arbitration.

ISSUE 3：CLAIMANT IS NOT ENTITLED TO A PAYMENT OF US$ 1,250,000, RESULTING FROM AN ADAPTION OF THE PRICE UNDER CLAUSE 12.

After a long negotiation, RESPONDENT and CLAIMANT concluded the Agreement on 6th May, 2017, which included a hardship clause. The hardship clause prevents CLAIMANT from bearing partial risk under DDP in the present case**.** However, the additional tariff does not constitute a hardship. Even if hardship under Clause 12 governed the additional tariffs in the present case, there was no adaptation mechanism to adapt the contract under hardship in light of Article 8. Therefore, under delivery DDP, CLAIMANT should be responsible for the 30% additional tariff.

ISSUE 4: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF THE US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTION OF THE PRICE UNDER THE CISG.

In the present case, CLAIMANT is not entitled to the payment of US$ 1,250,000 or any other amount under the CISG. One, the price could not be adapted pursuant to the CISG directly. Two, the contract could not be adapted under Article 6.2 UNIDROIT Principles.

ISSUE 1: THE TRIBUNAL DOES NOT HAVE THE JURISDICTION OR THE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT; AND THE LAW OF DANUBIA SHOULD GOVERN THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.

1. The Parties to the arbitral proceeding are bound by an arbitration agreement allowing them to initiate arbitration in accordance with the HKIAC Rules [*Cl. Ex. 5*]. This agreement additionally provides that the seat of arbitration shall be in Vindobona, Danubia, the arbitration law of which is a verbatim adoption of the Model Law. RESPONDENT insists that according to either the common intention of the Parties, or in the absence of such intention the closest connection doctrine and the stipulations of Model Law, the law of Danubia should govern the arbitration agreement **(A)**; and under the law of Danubia, the tribunal does not have the jurisdiction or power to adapt the contract without the expressed empowerment from the Parties **(B)**.

A. According to either the common intention of the Parties, or in the absence of such intention, the closest connection doctrine and the stipulations of Model Law, the law of Danubia should govern the arbitration agreement.

2. The source of law between the main contract and the arbitration agreement could be different according to the doctrine of separability **(I)**. In this regard, RESPONDENT will demonstrate that it was the common intention of the Parties that the arbitration should be subject to the law of the seat of arbitration, i.e. the law of Danubia **(II)**. And even if there was no such common intention, the law of the seat of arbitration should still apply, pursuant to the closest connection doctrine and the stipulations of Model Law (**III**).

I According to the doctrine of separability, the source of law between the main contract and the arbitration agreement could be different.

3. The doctrine of separability is one of the general principles of international arbitration [*Gaillard/Fouchard, p. 198, ¶ 392; Born, p. 349*], and is adopted by the Model Law as well [*Article 16(1) Model Law*]. Article 16(1) of the Model Law stipulates that, "An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause." This doctrine recognizes the arbitration agreement in a main contract as a separate contract, independent and distinct from the main contract [*Kröll et al., p. 103, ¶¶ 6-9*]. One of the consequences of this doctrine is that the arbitration agreement may be governed by a separate law to the main contract [*Kröll et al., p. 106, ¶¶ 6-23; Gaillard/Fouchard, p. 209, ¶ 412; Born, p. 400*].
4. Although in the present case, the main contract is governed by the law of Mediterraneo, the arbitration agreement could be governed by a separate law, i.e., the law of Danubia in the present case, as is demonstrated below.

II It was the common intention of the Parties that the arbitration should be subject to the law of the seat of arbitration, i.e. the law of Danubia.

5. The principle of party autonomy is well recognized when it comes to laws governing arbitration agreements [*Article 34(2)(a)(i), Article 36(1)(a)(i) Model Law; Article 5 NY Convention; Blackaby et al., p. 186, ¶ 3.97;*

Born, Law and Practice, p. 560]. The principle of party autonomy states that it is for the parties to decide the relevant issues of the contract.

6. Since both the law of Mediterraneo and Danubia adopted the rules UNIDROIT Principles in general, the Parties have no dispute on applying UNIDROIT Principles for the interpretation of the arbitration agreement. Moreover, the UNIDROIT Principles are general principles for international commercial contracts [*Preamble, UNIDROIT Principles*]. In accordance with Article 4.1 UNIDROIT Principles, "A contract shall be interpreted according to the common intention of the parties."

7. In addition, the four corners rule under the law of Danubia, which has the same effects as a merger clause under the UNIDROIT Principles, does not prevent external evidence from being used for the interpretation of written contracts as long as it does not cause any contradiction or supplement [*Article 2.1.17 UNIDROIT Principles*]. In the present case, there is an arbitration agreement in the final version of the contract, and since the Parties have different understandings concerning the law governing the arbitration agreement, interpretation of it is necessary. By referring to the negotiation process, RESPONDENT would like to clarify the ambiguity concerning the law governing the arbitration agreement. This was an issue concerning the interpretation of the final written contract, and therefore does not constitute any contradiction or supplement.

8. RESPONDENT will demonstrate that, *in casu*, the law of Danubia is the Parties' choice of law, because RESPONDENT clearly expressed its intention that the arbitration agreement should be governed under the laws of the seat of arbitration **(1)**, and contrary to CLAIMANT's allegations, CLAIMANT never objected to the intention of RESPONDENT **(2)**.

1. RESPONDENT clearly expressed its intention that the arbitration agreement should be governed under the laws of the seat of arbitration.

9. Pursuant to Article 4.2 UNIDROIT Principles, the statements and other conduct of a party shall be interpreted according to its intention **(a)**; and failing to establish such intention, according to the understanding of a reasonable person in the same circumstances **(b)**.

a. The statements and other conduct of a party shall be interpreted according to its intention.

10. In the present case, in the first draft of the arbitration agreement, Mr. Antley chose Equatoriana as the seat of arbitration and the law of Equatoriana as the law of the arbitration agreement [*Re. Ex. 1*]. Hence he clearly manifested his intention that the law of the seat of arbitration should apply to the arbitration agreement. Furthermore, one of the distinguishing features of the HKIAC Model Clause is that it contains an explicit reference to the law governing the arbitration agreement. To be more specific, in HKIAC Model Clause, the law of the arbitration agreement (Hong Kong law) is the law of the seat of arbitration (Hong Kong). Therefore, it is unlikely that CLAIMANT remained unknown of RESPONDENT's intention.

b. <u>Failing to establish such intention, statements and other conduct of a party shall be interpreted according to the understanding of a reasonable person in the same circumstances.</u>

11. According to Article 4.2(2) UNIDROIT Principles, "If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances."
12. As discussed above, the preliminary negotiations of the contract clearly demonstrate the intention of RESPONDENT that the arbitration agreement should be subject to the law of the seat of arbitration. Reasonable person of the same kind in the same circumstances will undoubtedly reach the same conclusion.
13. In addition, it is general principle that an arbitration agreement is a separate part of the contract. Just because RESPONDENT accepted the choice of law clause in the contract, it does not mean that it intended the arbitration agreement to be also governed by the same law.
14. Furthermore, the terms of the contract are to be interpreted in the light of the whole contract in which they appear [*Article 4.4 UNIDROIT Principles*]. In the present case, instead of being stipulated in the same clause with the arbitration agreement, the choice of law provision is stipulated preceding the arbitration agreement. Applying the doctrine of separability as discussed above, it cannot be interpreted as a choice of the law governing the arbitration agreement.
15. Finally, some major international conventions stipulate that, in the absence of an agreement between the parties, arbitration agreements should be governed by the substantive laws of the arbitral seat [*Article V(1)(a) NY Convention; Article VI European Convention*], and particularly in more recent decades, a number of jurisdictions have also adopted the same method [*Born, p. 509*]. The growth and trajectory towards international adoption should be considered, and may even amount to usage in this trade sector.
16. As a result, a reasonable person in the same circumstances will also understand the statements and conduct of RESPONDENT as having chosen the law of the seat of arbitration as the governing law of the arbitration agreement.

2. <u>CLAIMANT never objected to the intention of RESPONDENT that the arbitration agreement should be governed by the law of the seat of arbitration.</u>

17. The statements and conduct of CLAIMANT should also be interpreted in accordance with Article 4.2 UNIDROIT Principles. RESPONDENT insists that, CLAIMANT neither objected to the intention of RESPONDENT nor demonstrated any intention to apply the law of the main contract to the arbitration agreement, either in the eyes of RESPONDENT or a reasonable third person.
18. First, as discussed above, both the nature of the arbitration agreement as a separate part of the contract and the consideration of the whole contract suggests that the choice of law clause in the contract would not inevitably determine the governing law of the arbitration agreement.
19. Second, CLAIMENT never objected to the intention of the Respondent to apply the law of Danubia. As evidenced in the e-mail dated 11 April 2017, where CLAIMANT replied, "We would largely accept your proposal with an amendment as to the place of arbitration." Accordingly, CLAIMANT explained reasons for changing the place of arbitration, without any reference to the law governing the arbitration agreement [*Re.*

Ex. 2]. Therefore, the word "amendment" refers only to the change in the place of arbitration, and by saying "an amendment", CLAIMANT indicated no intention to change the law governing the arbitration agreement. Although CLAIMANT stated that, "Consent to a contract submitted to a foreign law… requires special approval by the creditors' committee", a reasonable person will not understand the word "contact" as also referring to the arbitration agreement, because of the doctrine of separability discussed above. In this regard, CLAIMANT never objected to the intention of RESPONDENT.

20. Third, the final written contract, i.e. the Frozen Semen Sales Agreement, was based on a basic industry template from Mediterraneo and any addition of the contract was written in italics or underlined [*PO2 ¶ 3*]. Since Clause 14 – the choice of law clause – of the final written contract was a standard term, while Clause 15 – the arbitration agreement – was a nonstandard one, Clause 14 should prevail over Clause 14 [*Article 2.1.21 UNIDROIT Principles*]. Therefore, Clause 14 of the final written contract does not constitute an objection to the application of the law of Danubia to the arbitration agreement.

21. In view of the above, RESPONDENT clearly demonstrated its intention to apply the law of the seat of arbitration, while CLAIMANT neither objected to such intention nor showed an intention otherwise. As a result, there was common intention between the Parties to apply the law of the seat of arbitration to the arbitration agreement.

III Even if there was no such common intention, the law of the seat of arbitration should still apply pursuant to the closest connection doctrine and the stipulation of Model Law.

22. Even if the tribunal finds that there is no such common intention between the Parties, the law of the seat of arbitration should still apply either on the basis of the closest connection doctrine **(1)** or the Model Law **(2)**.

1. Based on the closest connection doctrine, the law of Danubia, i.e. the law of the seat of arbitration, should apply.

23. In the absence of agreement on the governing law of the arbitration agreement between the Parties, the closest connection doctrine should apply **(a).** *In casu*, the law of the seat of arbitration has the closest connection with the arbitration agreement **(b)**.

a. In the absence of agreement on the governing law of the arbitration agreement between the Parties, the closest connection doctrine should apply.

24. In the absence of agreements between the parties as to the governing law of the arbitration agreement, it is generally considered that the disputed agreement should be governed by the legal system with which it has the closest connection [*Gaillard/Fouchard, p. 222, ¶ 425*]. Authorities in a number of jurisdictions have turned to this "closest connection" doctrine [*Born, p. 518; Conflict of Laws* §§187-188]. For instance, §218 of the Conflict of Laws in the United States provides that the validity of an arbitration agreement, and the rights created thereby, are to be determined by applying the generally-applicable conflicts rules of §§187 and 188. In turn, §§187 and 188 give effect to the parties' contractual choice-of-law agreement or, failing such agreement, provides for application of the law of the state with the "most significant relationship" to the parties' contract [*Conflict of Laws* §§187-188].

25. In the case Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA, the Court suggested a three-stage enquiry which was well established under common law system. Accordingly, "The proper law of the

arbitration agreement is to be determined in accordance with the established common law rules for ascertaining the proper law of any contract. These require the court to recognize and give effect to the parties' choice of proper law, express or implied, failing which it is necessary to identify the system of law with which the contract has the closest and most real connection." [*Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA*] Since Danubia is a common law country, this method of determination is well advised for consideration [*PO2 ¶ 44*]. In addition, the Court of the case C v. D also held a similar opinion that, "if there is no express law of the arbitration agreement, the law with which that agreement has its closest and most real connection" shall be applied [*C v. D*].

b. ***In casu*, the law of the seat of arbitration has the closest connection with the arbitration agreement.**

26. When the local law of one of the parties' home states governed a contractual relationship, but the arbitration agreement provided for arbitration in a neutral forum, the parties' chosen arbitral seat was often more closely connected to their arbitration agreement [*Born, p. 518*; *C v. D*]. Such close connection comes from the fact that the law and courts of the place of arbitration will have authority and a supervisory role over the proceedings [*Kröll et al., p. 106, ¶¶ 6-23; Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA*], and the seat of arbitration is where the arbitration agreement is to be performed [*Gaillard/Fouchard, p. 225, ¶ 429*].

27. *In casu*, Danubia is the seat of arbitration. The arbitration agreement is performed here, and the law and courts of Danubia exercise the supporting and supervisory jurisdiction which is necessary to the arbitral procedure. In this regard, compared with the law of Mediterraneo, the law of Danubia has the closer connection with this arbitration agreement. As a result, in the absence of choice between the Parties, the arbitration agreement is governed by the law of Danubia.

2. Based on the Model Law, the law of Danubia, as the law of the seat of arbitration, should apply.

28. According to Model Law, in the lack of common intention, the governing law of the validity of the arbitration agreement should be the law of the seat of arbitration (**a**). Furthermore, considering the international practice and the indication of HKIAC Model Clause, such governing law should be equally applicable to the interpretation of the arbitration agreement (**b**). Therefore, the governing law of the interpretation of the arbitration agreement should be the law of the seat of arbitration, i.e., the law of Danubia.

a. According to the Model Law, in the lack of common intention, the governing law of the validity of the arbitration agreement should be the law of the seat of arbitration.

29. Although the Model Law does not directly deal with the law governing the validity of the agreement in this stage, Articles 34(2)(a)(i) and 36(1)(a)(i) specify that, for the purposes of setting aside, recognition and enforcement of an award, the law of the place where the award was made – i.e., the law of the place of arbitration – governs validity unless another law has been chosen by the parties [*Holtzmann/Neuhaus, p. 302*]. In fact, Article 8 of the Model Law parallels Article II of the New York Convention, and Article 34(2)(a)(i) and 36(1)(a)(i) of Model Law parallels Article V(1)(a) of the New York Convention

[*Holtzmann/Neuhaus, pp. 301&910; Born, p. 526*]. A similar analysis can therefore be made as when it comes to New York Convention.

30. Although one may argue that the absence of any choice-of-law rule for the arbitration agreement in Article 8 of the Model Law leaves courts and arbitral tribunals free to ignore Article 34(2)(a)(i) and 36(1)(a)(i), and apply different standards when deciding whether to recognize an arbitration agreement, such understanding contradicts the objective of predictability. To be more specific, an arbitration agreement may be found valid (or invalid) at one stage of a dispute, and then treated in the opposite manner at a later stage, which will result in delays, wasted expense and the possibilities of inconsistent decisions regarding the validity of the same arbitration agreement. Therefore, for the aim of predictability, the choice-of-law rules contained in Article 34(2)(a)(i) and 36(1)(a)(i) of Model Law should be equally applicable under Article 8 Model Law [*Born, p. 497; Holtzmann/Neuhaus, p. 302; Berg, pp. 126–128*].

b. Considering international practice and the indication of the HKIAC Model Clause, the governing law should be equally applicable to the interpretation of the arbitration agreement.

31. When the parties are not otherwise in agreement, possible options for the law governing construction of an arbitration agreement include: (a) the law of the state where judicial enforcement proceedings are pending; or (b) the law chosen by the parties to apply to, or the law otherwise applicable to the arbitration agreement [*Born, p. 1393*]. In the present case, the former option is not applicable. When it comes to the latter option, a number of other national courts have applied the law governing the substantive validity of the arbitration agreement to issues of interpretation [*Int'l Tank & Pipe SAK v. Kuwait Aviation Fuelling; Gatoil v. Nat'l Iranian Oil Co.*], other commentaries have also adopted the same approach [*Blackaby et al., p. 157, ¶ 3.12; Gaillard/Fouchard, p. 255, ¶ 475*].

32. Moreover, the note of the HKIAC Model Clause states that, "The law of the arbitration clause potentially governs matters including the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause and identities of the parties to the arbitration clause." It is indicated by this clause that the governing law of the interpretation of the arbitration agreement is the same as that governs its validity. Since the present arbitration agreement is modeled on the HKIAC Model Clause, it is important to take its indication into consideration. In this regard, the governing law of the interpretation and the validity of the arbitration agreement should be the same.

33. Therefore, telling from the stipulations of Model Law, the arbitration agreement and its interpretation should be governed by the law of the seat of arbitration.

34. In view of the above, even if the tribunal finds that there is no common intention between the Parties as to the governing law of the arbitration agreement, the law of the seat of arbitration, i.e. the law of Danubia should still apply, as a result of the closest connection doctrine and the stipulation of Model Law.

B. According to the law of Danubia, the arbitral tribunal does not have the jurisdiction or power to adapt the contract without the express empowerment from the Parties.

35. The adaption of contract requires an express empowerment under the law of Danubia. In the present case, however, the Parties did not expressly empower the tribunal to adapt the contract in the final written contract

(**I**). Moreover, CLAIMANT cannot refer to the preliminary negotiation to prove the existence of an empowerment for adaptation from the Parties (**II**).

I The Parties did not expressly empower the tribunal to adapt the contract in the final written contract.

36. The law of Danubia for international contracts is a largely verbatim adoption UNIDROIT Principles with two exceptions. One exception is that Article 6.2.3 (4)(b) is worded differently from the UNIDROIT Principles and grants the power "to adapt the contract" to the court only "if authorized" [*PO2 ¶ 45*]. And according to Article 1.11 UNIDROIT Principles, "In these Principles, 'court' includes an arbitral tribunal." In the present case, however, the Parties did not expressly empower the tribunal to adapt the contract.

37. First, there is no provision in the final written contract that directly states that the tribunal has the jurisdiction and power to adapt the contract. Second, neither does the arbitration agreement constitute an express empowerment, because it should be interpreted narrowly.

38. Model Clause of the HKIAC Rules stipulates that, "Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration…"; in contrast, according to the arbitration agreement at hand, "Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration…" [*Cl. Ex. 5*]

39. In comparison with the Model Clause of the HKIAC Rules, the wording "controversy, difference or claim" and "relating to" were deleted in the present arbitration agreement, together with "any dispute regarding non-contractual obligations". By reducing the broad wording of Model Clause of HKIAC Rules, RESPONDENT clearly expressed its intention to have a narrow arbitration agreement, and such intention was known to CLAIMANT [*Re. Ex. 1*]. In accordance, the arbitration agreement should be interpreted narrowly. Therefore, since only "dispute arising out of the contract" is subject to arbitration, and the adaptation of the contract goes beyond the contract itself, the tribunal has no jurisdiction or power to adapt the contract.

40. In this regard, in the final written contract, there is no express empowerment allowing the tribunal to adapt the contract.

II CLAIMANT cannot refer to the preliminary negotiation to prove the existence of an empowerment for adaptation by the Parties.

41. CLAIMANT referred to the negotiation process to prove the existence of an empowerment allowing the tribunal to adapt the contract [*NOA ¶ 16*]. However, such allegation is without legal basis. Mr. Antley and Ms. Napravnik never agreed to empower the arbitrators to adapt the contract (**1**), and even if the tribunal believes that they did so, such agreement should not be considered as a result of the four corners rule (**2**).

1. Mr. Antley and Ms. Napravnik never agreed to empower the arbitrators to adapt the contract.

42. According to the witness statement of Ms. Napravnik, during the first meeting with Mr. Antley, she mentioned the importance of a mechanism to ensure an adaptation of the contract when the Parties could not

agree on an amendment. In response, Mr. Antley replied that, "It should probably be the task of the arbitrators to adapt the contract if the Parties could not agree." Ms. Napravnik "suggested to clarify that issue and to include an express reference into the hardship clause or the arbitration clause, and Mr. Antley promised to come back with a proposal" [*Cl. Ex. 5*].

43. During the process of the negotiation, Mr. Antley never provided a clear promise to empower the tribunal for adaption. At most, for him, it was only "probably" the task of the arbitrators [*Cl. Ex. 8*]. Furthermore, he never agreed to the suggestion of Ms. Napravnik, and only agreed to provide a proposal, the content of which, due to the accident, can never be known. Therefore, the preliminary negotiation between Ms. Napravnik and Mr. Antley cannot be interpreted as an express empowerment for adaption.

44. As a result, Mr. Antley and Ms. Napravnik never agreed to empower the arbitrators to adapt the contract.

2. Even if the tribunal believes that Mr. Antley and Ms. Napravnik agreed to empower the arbitrators to adapt the contract, such agreement should not be considered as a result of the four corners rule.

45. In accordance with the four corners rule under the law of Danubia, in the present case, the preliminary negotiation cannot be used in support of empowerment because such use will contradict or at least supplement the final written contract (**a**). In addition, the present case does not fall into any other exceptions of the four corners rule (**b**).

a. The preliminary negotiation cannot be used in support of empowerment because such oral statements will contradict with or at least supplement the final written contract.

46. Generally, the four corners rule rests upon the principle that no testimony can be received to contradict, vary, add to, or subtract from the terms of a valid written instrument [*Urquico, p. 303, ¶ 4*]. Under the law of Danubia, the four corners rule has largely the same effects as a merger clause under Article 2.1.17 UNIDROIT Principles [*PO2 ¶ 45*]. According to Article 2.1.17 UNIDROIT Principles, "A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing."

47. To begin with, as discussed above, under the law of Danubia, the court or the tribunal has the power to adapt the contract only "if authorized" [*PO2 ¶ 45*], and in the present case, no such empowerment can be seen from the written contract. As a result, if the preliminary negotiation is used in support of an empowerment for adaptation, it will constitute a supplement of the final written contract, and is therefore against the law of Danubia.

48. Furthermore, by reducing the broad wording of the Model Clause of the HKIAC Rules [*Cl. Ex. 5; Re. Ex. 1; Re. Ex. 2*], both Parties intended to exclude the possibility of an empowerment for adaptation. In this regard, if the negotiation between Ms. Napravnik and Mr. Antley is interpreted as an empowerment, it will constitute a contradiction to the final written contract as well.

49. In addition, the successors of the negotiation never had the intention of an empowerment. In fact, Mr. Krone had never understood the meaning of the relevant message left by Mr. Antley [*Re. Ex. 3*]. The absence of any

relevant clauses in the final written contract concerning contract adaptation is a clear indication of the intention of the successors to make no such empowerment.

50. Therefore, the preliminary negotiation cannot be used in support of an express empowerment for adaptation from the Parties, because such interpretation contradicts or supplements the final written contract.

b. The present case does not fall within any exceptions of the four corners rule.

51. There are exceptions to the four corners rule, such as mistakes of facts caused by fraud or duress, null and void contract, ambiguity, and prior valid agreement [*Urquico, pp. 304-310*]. An ambiguity arises when the written documents are obviously incomplete on its face or are expressed in ambiguous language [*Corbin, p. 621, ¶ 2*].

52. Under the law of Danubia, the court or the tribunal can only adapt the contract when authorized [*PO2 ¶ 45*]. In the present case there is no such express empowerment in the final written contract. In this regard, the present contract is clear enough to indicate that the Parties did not agree on an empowerment for adaptation. The contract is complete, and the language is not ambiguous. Therefore, the present case does not fall into any exceptions of the four corners rule.

53. In view of the above, even if the tribunal believes that Mr. Antley and Ms. Napravnik agreed to empower the arbitrators to adapt the contract, such agreement should not be considered by the tribunal as a result of the four corners rule.

54. In conclusion, the arbitration agreement should be governed by the law of Danubia, and under the law of Danubia, the tribunal does not have the jurisdiction or power to adapt the contract, because of the lack of an express empowerment from the Parties.

ISSUE 2: CLAIMANT SHOULD NOT BE ENTITLED TO SUBMIT EVIDENCE FROM THE PREVIOUS 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.

55. RESPONDENT submits that, the evidence cannot be submitted in accordance with Article 9.2(a) of the IBA Rules because it is irrelevant to the case and immaterial to its outcome (**A**). Even if the evidence is relevant and material, it should not appear in the present arbitration because of the confidentiality obligation and the lack of adverse evidence rule; therefore, its admission will constitute a compelling violation of the fairness and equality between the Parties required by Article 9.2(g) of the IBA Rules (**B**). Finally, the admission of evidence obtained through illegal methods will be contrary to the principle of good faith required in international commercial arbitration (**C**).

A. The evidence cannot be submitted in accordance with Article 9.2(a) of the IBA Rules because it is irrelevant to the case and immaterial to its outcome.

56. *In casu*, the tribunal may apply IBA Rules to determine the standard of exclusions (**I**). Under the IBA Rules, the HKIAC Rules and the Model Law, evidence should satisfy the requirement of relevance and materiality. Since the evidence to be submitted by CLAIMANT is neither relevant to the present case (**II**) nor material to its outcome (**III**), it should be excluded.

I The tribunal may apply IBA Rules to determine the standard of exclusions.

57. When it comes to exclusion of evidence, both the HKIAC Rules and the Model Law provide no specific guidance, but instead leave the tribunal with broad discretion [*Article 22 HKIAC Rules; Article 19 Model Law*]. In this regard, the widely accepted IBA Rules may apply.

58. First, the IBA Rules are applicable in the present case. According to Article 22.2 of the HKIAC Rules, the arbitral tribunal shall determine "the admissibility, relevance, materiality and weight of evidence including whether to apply strict rules of evidence". In addition, as stated in the preamble of IBA Rules, the rules "are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration" and "Arbitral tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures." As a result, even in the lack of agreement between the Parties, the tribunal can still apply the IBA Rules.

59. Second, it is advisable to apply the IBA Rules here. In practice, IBA Rules are regarded as "an internationally applicable standard" or "best practices" [*Marghitola, p. 33; O'Malley, p. 6, ¶ 1.15; Born, p. 2363*] and are commonly adopted or referred to in HKIAC arbitration [*Moser/Bao, p. 272, ¶ 9.155*]. In A Guide to the HKIAC Arbitration Rules, the arbitral tribunal is suggested to use strict rules of evidence like IBA Rules for the following reason. First, the rules themselves have evolved based on years of judicial and legislative experience and expertise. They are rational and designed to achieve fairness. Second, the rules are

comprehensive and should cover most situations. They will therefore be a source of persuasive guidance to the tribunal.

60. Third, if the tribunal were to make decisions on evidential issues based on its own whims and without any rational basis, the parties may have legitimate grounds to feel aggrieved [*Moser/Bao, p. 272, ¶ 9.154*].

61. Therefore, it is reasonable for this tribunal to apply IBA Rules as guidance when it comes to standard of evidence exclusions.

II Since the evidence to be submitted by CLAIMANT is not relevant to the present case, it should be excluded.

62. Article 22.3 of the HKIAC Rules states that evidence to be produced should be "relevant to the case and material to its outcome". At the same time, Article 9.2(a) of the IBA Rules stipulates that the arbitral tribunal shall exclude evidence which is not sufficiently relevant to the case or material to its outcome [*IBA Commentary, p. 25*]. "Relevance" means that the document is useful to establish the truth of its factual allegations on which its legal conclusions are based [*Moser/Bao, p. 274, ¶ 9.161*].

63. In the present case, CLAIMANT is arguing for the application of the law of Mediterraneo on the arbitration agreement and the jurisdiction and power of tribunal to adapt the Sales Agreement [*NOA ¶ 15*]. Accordingly, CLAIMANT is supposed to prove the existence of an agreement between the Parties concerning the law governing the arbitration agreement, as well as an empowerment for adaptation. However, the evidence that CLAIMANT wants to submit, i.e. an award of a previous proceeding [*PO2 ¶ 41*], fails to help prove the facts of the case here.

64. First, different from CLAIMANT's allegations [*Problem, p. 50*], RESPONDENT did not make contradictory submissions in the two cases. In fact, RESPONDENT made different submissions simply because the two cases were completely different: the parties were not the same, and the cases were based on separate contracts, which resulted in different rights and obligations.

65. Second, regardless of the similarities, the award of the previous case does not help to establish any facts here. Just because RESPONDENT agreed to apply the law of Mediterraneo in the other case, it does not mean that the Parties here had the same agreement. Similarly, the agreement for adaptation by the tribunal in the other case proves nothing in the present one. In order to determine the applicable law of the arbitration clause and its jurisdiction, the tribunal must focus simply on the specific situations and intentions of the Parties here. In this regard, the facts and allegations in the other arbitration do not have any relevance with the case at hand.

66. As a result, the evidence to be submitted by CLAIMANT fails to help establish any factual allegations in the present case, therefore rendering it irrelevant and subject to exclusion.

III Since the evidence to be submitted by CLAIMANT is not material to the outcome of the present case, it should be excluded.

67. A document is material to the outcome of the case if it is needed to allow complete consideration of the factual issues from which legal conclusions are drawn [*Moser/Bao, p. 274, ¶ 9.161; Marghitola, p. 52; Waincymer, p. 858*].

68. Generally, the materiality requirement subsumes the relevance requirement. Stated differently, a document that is material to the outcome of the case is always relevant to the case [*Marghitola, p. 60; Born, p. 2362;*

Waincymer, p. 859]. Therefore, since the evidence to be submitted here fails to satisfy the requirement of relevance, it undoubtedly lacks materiality to the outcome of the present case, and should be excluded.

B. Even if the evidence is relevant and material, it should not appear in the present arbitration because of the confidentiality obligation and the lack of adverse evidence rule. Therefore, its admission will constitute a compelling violation of fairness and equality between the Parties required by Article 9.2(g) of the IBA Rules.

69. The award of the previous case is protected by the obligation of confidentiality under the HIKAC Rules 2013 and should not have been disclosed (**I**), and the adverse evidence rule is not established under the relevant rules here (**II**). As a result, normally, the award should not appear in the present arbitration. Therefore, the admission of it will constitute a compelling violation of fairness and equality between the Parties which are required by Article 9.2(g) of the IBA Rules (**III**).

I The award of the previous case is protected by the obligation of confidentiality under HIKAC Rules 2013 and should not have been disclosed.

70. Confidentiality in international commercial arbitration is highly valued and perceived to be a general principle of international commercial arbitration [*Esso Australia Resources Ltd. and others v. The Honarable Sidney James Ploman and others; Moser/Bao, pp. 385-386; Smeureanu, p. 14; Misra/Jordans, p. 1*]. Many rules of arbitral institutions stipulate the obligation of confidentiality, such as arbitral rules of International Court of Arbitration, United Nations Commission on International Trade Law and Arbitration Institute of the Stockholm Chamber of Commerce. In practice, contracting parties also usually agree on terms of confidentiality of arbitration.

71. When it comes to the relevant cases here, the previous arbitration is subject to the HKIAC Rules 2013, which have stipulations about confidential obligations. In Article 42(1)(2) of the HKIAC Rules 2013, the duty of confidentiality binds not only the parties, but also the arbitral tribunals, emergency arbitrators, expert witnesses, witnesses of fact, the secretaries of the arbitral tribunal and the HKIAC. By agreeing to arbitrate under HKIAC Rules, the above subjects are bound by an express duty of confidentiality contained in Article 42(1)(2) of the HKIAC Rules, and are thus prohibited from publishing, disclosing or communicating any information which is relevant to awards [*Moser/Bao, p. 386*].

72. Furthermore, the current case does not fall within the exceptions of the confidentiality obligation provided by the HKIAC Rules 2013. Although Article 42(3) of the HKIAC Rules 2013 provides situations where publication, disclosure or communication of the confidential information is allowed, these provisions apply only to the parties, rather than other people under the confidentiality obligation. It is not the case here [*PO2 ¶ 41*].

73. Therefore, in the present case, the previous award is protected by the confidentiality obligation and should not have been disclosed. As a result, under normal situations, it should not have been obtained by CLAIMNANT nor be known by the present tribunal.

II The adverse evidence rule is not established under the Model Law, the HKIAC Rules or the IBA Rules.

74. According to Article 22(1) of the HKIAC Rules, "Each party shall have the burden of proving the facts relied on to support its claim or defense." It does not require the presentation of all relevant evidence, and the parties are therefore not obliged to present evidence which is adverse to their own interests. Similarly, the adverse evidence rule is not established in the Model Law [*Article 19(2) Model Law*] and the IBA Rules as well [*Waincymer, p. 836*].

75. *In casu*, the evidence to be submitted by CLAIMANT may be adverse to the interest of RESPONDENT, and RESPONDENT is not obliged to present it to the tribunal. Had the evidence not been leaked and had CLAIMANT not obtained it through abnormal methods, it would not appear in the present arbitration.

III Since the previous award will not appear in the present arbitration under normal situations, the admission of it will constitute a compelling violation of fairness and equality between the Parties which are required by Article 9.2 (g) IBA Rules.

76. Article 9.2(g) of the IBA Rules stipulates that evidence can be excluded "when considerations of fairness and equality are compelling". Fairness in arbitration means that each party should enjoy a reasonable opportunity to present their evidence and arguments; and equality of arms requires that a party should neither be at a substantial disadvantage nor cause its opponent to be disadvantaged in the preparation of their case [*O'Malley, p. 319*]. A judicial definition of equality of arms may be taken from the jurisprudence of the European Court of Human Rights, where it has been held in relation to civil disputes, that "Each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent" [*Dombo Beheer BV v. The Netherlands*].

77. The IBA Rules also requires considerations of fairness and equality to be "compelling" in order to exclude problematic evidence. The term "compelling" indices that documents can only be excluded in serious cases [*Marghitola, p. 93; Waincymer, p. 868*].

78. In the case at hand, as discussed above, the evidence to be submitted is protected by the obligation of confidentiality, and the Parties are not obliged to submit adverse evidence. Therefore, under normal situations, CLAIMANT would not have had access to it, and had CLAIMANT not obtained the evidence through abnormal methods, the evidence would not have been available to the tribunal. The admission of such evidence will greatly benefit CLAIMANT while put RESPONDENT at a seriously disadvantage place. As a result, in accordance with Article 9.2(g) of the IBA Rules, CLAIMANT should not be entitled to submit such evidence.

C. The admission of evidence obtained through illegal methods will be contrary to the principle of good faith required in international commercial arbitration.

79. In the case that the evidence was obtained illegally through hacking, it should not be admitted, because the tribunal enjoys the discretion in deciding whether to accept illegally obtained evidence (**I**); and when a party fails to conduct itself in good faith in obtaining evidence, the evidence should be excluded (**II**).

I The tribunal enjoys the discretion in deciding whether to accept illegally obtained evidence.

80. As discussed above, under the HKIAC Rules, the arbitral tribunal enjoys broad discretion to "determine the admissibility, relevance, materiality, and weight of any evidence, including whether to apply strict rules of evidence" [*Article 22.2 HKIAC Rules; Moser/Bao, p. 272, ¶ 9.153*]. This provision is also in line with Article 19(2) of the Model Law and Article 9(1) of the IBA Rules.

81. Although illegally derived sources of evidence are not listed as a separate reason for exclusion under the applicable rules here, i.e. the Model Law, the HKIAC Rules and the IBA Rules, the tribunal still enjoys the discretion to exclude illegally obtained evidence. In light of the potential consequences such as incentivizing illegal activity for future arbitrations, it is strongly advised for the tribunal in the present case to exclude the evidence.

II When a party fails to conduct itself in good faith in the taking of evidence, the evidence should be excluded.

82. Article 9.7 of the IBA Rules provides that, "If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence." The "any other measures" stipulated in this provision includes exclusion of evidence [*O'Malley, p. 30, ¶ 3.13*]. Therefore, when the parties fail to act in good faith while obtaining evidence, the tribunal may exclude the evidence accordingly.

83. In fact, good faith is a central tenet of evidentiary procedure, as is stated in the preamble of the IBA Rules – "The taking of evidence shall be conducted on the principles that each Party shall act in good faith." [*Preamble, IBA Rules; O'Malley, p. 10, ¶ 1.25*] Dedication, diligence and celerity in the procedural phases as well as the sound management of the proceeding are obligations that derive from the good faith of the performance of arbitration commitments [*Cremades, p. 787*]. The duty to arbitrate in good faith is infringed upon when illegally obtained evidence is used [*Cremades, p. 787*]. In international arbitration practices, the ICSID tribunals usually exclude evidence obtained through illegal means, for violation of the principles of good faith and procedural fairness [*NAFTA/UNCITRAL (2005); ICSID Case No. ARB/05/13 (2009)*].

84. In the present case, the evidence is likely to have been obtained illegally through hacking. In addition, despite the doubtful source of the evidence, CLAIMANT bought it without doing any further research. In this regard, CLAIMANT has acted in bad faith in obtaining the evidence. In order to encourage good faith in international commercial arbitration, the tribunal should exclude the evidence.

85. In conclusion, assuming that the evidence had been obtained either through a breach of a confidentiality agreement or illegally through hacking, CLAIMANT should not be entitled to submit the evidence.

ISSUE 3：CLAIMANT IS NOT ENTITLED TO A PAYMENT OF US$ 1,250,000, RESULTING FROM AN ADAPTION OF THE PRICE UNDER CLAUSE 12.

86. After a long negotiation, RESPONDENT and CLAIMANT concluded the Agreement on 6th May, 2017, which included a hardship clause. The hardship clause prevents CLAIMANT from bearing partial risk under DDP in the present case **(A).** However, the additional tariff does not constitute a hardship **(B)**. Even if hardship under Clause 12 governed the additional tariffs in the present case, there was no adaptation mechanism to adapt the contract under hardship in light of Article 8 **(C)**. Therefore, under delivery DDP, CLAIMANT should be responsible for the 30% additional tariff **(D)**.

A. The clause prevents CLAIMANT from bearing partial risk under DDP in present case.

87. During the drafting negotiation, the delivery term was at first EXW. However, *given the urgency of the delivery and CLAIMANT's much greater experience in the shipment of frozen semen including the necessary export and import documentation* [*Cl. Ex. 3*], RESPONDENT suggested a delivery DDP which CLAIMANT had accepted. It's incontrovertible that when RESPONDENT suggested adding a change of delivery DDP, CLAIMANT had expressed the unwillingness to undertake further risks under DDP. However, RESPONDENT did not agree outright. Finally, two ways were used to solve the problem of risks under DDP.

88. One was an extra payment of 300 USD for the risks under the delivery DDP. With the change of DDP, the direct additional costs associated with it are 200 USD per dose. However, the final increase of price was 500 USD per dose [*PO2 ¶ 8*]. The reason for the margin of 300 USD was the payment by RESPONDENT for the further risks with a change of delivery DDP.

89. The Second solution was an inclusion of a hardship into the force majeure clause. As stipulated in Clause 12, "seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God neither for hardship, caused by additional health and safe requirements or comparable unforeseen events making the contract more onerous" [*Cl. Ex. 5*]. In this context, CLAIMANT would be exempted for its non-performance whenever there's a hardship, which was the result of negotiation after the change of delivery DDP. It also helped solved the problems of risks under DDP.

B. In present case, the additional 30% tariff does not constitute hardship under Clause 12.

90. The present case has failed to reach the three requirements of comparable, unforeseen, and more onerous, to constitute hardship as stipulated in Clause 12 of the Agreement.

91. First, 30% additional tariff in the present case was not comparable with risks under health and safety requirements under Article 8(1) CISG **(I)**. Second, the tariff imposed by Equatoriana is foreseeable by CLAIMANT under Article 8(2) CISG **(II)**. Third, the additional tariffs did not make the contract more onerous **(III)**.

I First, 30% additional tariff in the present case was not comparable with risks under health and safety requirements under Article 8(1) CISG.

92. The 30% additional tariff in the present case was not caused by health and safety requirements or any other measure of the same nature, and is therefore not comparable.

93. According to the wording of Clause 12 of the Agreement, hardship should be events *caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous.* Concerning the past experience of CLAIMANT, CLAIMANT had sold three mares DDP Danubia to farms in Danubia in 2014. Shortly before the mares were delivered a rare aggressive type of foot and mouth disease was discovered in Danubia. In the case of the three mares the additional tests required and the long quarantine amounted to 40 % of the sales price [*PO2 ¶ 21*]. Thus, CLAIMANT suffered a severe loss from the additional tests caused by strict health and safety requirements resulting from the foot and mouth disease. In the present case, there was also a latest foot and mouth disease crisis in Equatoriana. Under delivery DDP, CLAIMANT was extremely likely to suffer the same loss as demonstrated in the past. Therefore, considering there may be other different expression of health and safety requirements, such as sanitary and phytosanitary measures, CLAIMANT and RESPONDET agreed on the definition of hardship to include "additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Cl. Ex. 5*], particularly adopted the wording of comparable.

94. Applied to the present case, the 30% additional tariff is not comparable under the Agreement, because the standard to determine whether an event was comparable or not is determined by whether or not the restriction was because of health and safety requirements, including any other measure of the same nature in different wording.

II Second, the tariff imposed by Equatoriana is foreseeable by CLAIMANT under Article 8(2) CISG.

95. Where it is impossible to use the subjective intent standard in Article 8(1) to interpret a party's statements or conducts, one must resort to "a more objective analysis" as provided for by Article8(2) [*UNCITRAL Digest 2016, Art. 8, ¶ 11*]. Article 8(2) governs that if the preceding paragraph is not applicable, other conduct and statements made by a party are to be interpreted according to the understanding that a reasonable third person of the same kind as the opposing party would have had in the same circumstance.

96. In present case, there are no negotiations, practices, or any subsequent conducts between the parties to establish party intent for the foreseeability analysis. However, the occurrence of 30% tariffs in the present case was foreseeable in eyes of a reasonable third person.

97. In fact, previous restrictions imposed by other countries affecting imports from Equatoriana have never resulted in direct retaliatory measures [*Cl. Ex. 6*]. However, it did not rightly prove the non-foreseeability of the additional tariff imposed by Equatoriana in present case. First, there was one exception that Equatoriana had taken direct retaliatory measures against trade restrictions imposed by a third state [*NOA ¶ 19*]. Second, the newly elected President of Mediterraneo had already in its election program in January 2017 announced a certain preference for a more protectionist approach to international trade, and in particular in relation to agricultural products. After his election on 25 April 2017 President Bouckaert had appointed Ms. Cecil

Frankel, one of the most ardent critics of free trade, as his "superminister" for agriculture, trade and economics on 5 May 2017. *She had been an outspoken protectionist for years, lamenting that the farmers of Mediterraneo were badly treated in other markets and advocation limiting the access of foreign agricultural products to the Mediterraneo market* [*PO2 ¶ 23*]. It was therefore, foreseeable for Mediterraneo to impose tariff which, in the neutral media perspective, may have triggered the prompt and severe retaliation by the Government of Equatoriana [*Cl. Ex. 6*]. In other words, considering the past experience of Equatoriana, and in the eyes of a reasonable third person, it was foreseeable that Equatoriana would impose retaliatory tariff on Medditerraneo. Additionally, the hardliners in the Ministry of Economics of Equatoriana would hopefully be able to convince the Prime Minister of the need to react strongly to the highly controversial measures [*Cl. Ex. 6*]. Thus, it's not surprising that Equatoriana would take retaliation.

98. Furthermore, in the present case, the tariffs imposed by Equatoriana are specifically aimed at animal products. According to Central Product Classification (CPC) Version 2.1 by the United Nations, semen from animals is a kind of reproductive materials of animals. It was additionally foreseeable for the semen of a racehorse to be considered an animal product, and therefore subject to taxation.

99. In conclusion, CLAIMANT should have foreseen the imposition of 30% additional tariff by Equatoriana in the present case.

III Third, the additional tariffs did not make the contract more onerous under Article 8(2) CISG.

100. As Professor Schwenzer stated in Force Majeure and Hardship in International Sales Contracts, hardship can only be found if the performance of the contract has become excessively onerous or, in other words, if the equilibrium of the contract has been fundamentally altered [*Schwenzer, p.714*]. In an international market, assuming the risk for higher fluctuations than usually occur on domestic markets. Thus, the margin certainly has to be set at a higher point. A 150-200 per cent margin seems to be advisable [*Schwenzer, p.717*].

101. Additionally, Professor Christoph Brunner stated in his Force Majeure and Hardship under General Contract Principles, the starting point for the determination of a threshold percentage to constitute hardship should be the finding that increases in cost of performance and decreases of value of the performance received from the other party basically involve mirror situations. Since both common law systems, includingin particular English and major civil law systems, recognize an exemption due to frustration of purpose, an alteration in the region of a 80%-100% decrease in the value received, or a corresponding increase in the cost of performance of the same order of magnitude (excluding any profit margin) or of about 100-125% (including a typical profit margin, see below) may therefore be seen as a general point of reference for the hardship test under general contract principles. This thumbnail rule is generally in line with the percentages proposed by the case law and legal commentators under civil and common law systems, as well as by the CISG referred above.

102. In the present case, the 30% additional tariff imposed by Equatoriana resulted in a 25% loss for CLAIMANT whose profit margin was 5% in this business and apparently fell far below the objective standard suggested by not only Professor Schwenzer and Professor Brunner. Therefore, there is no doubt a 30% additional tariff did not make the contract more onerous.

C. Even if hardship under Clause 12 governed the additional tariffs in the present case, there was no adaptation mechanism to adapt the contract under hardship in light of Article 8 CISG.

103. Hardship was included into the contract after a long negotiation between the Parties. The relief of hardship was provided in Clause 12 which was an exemption of seller **(I)** and no agreement of an adaptation mechanism for hardship was reached between Parties **(II)**.

I The relief of hardship was provided in Clause 12 which was an exemption of the seller.

104. Pursuant to Article 8(1), statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. In the present case, Clause 12 stipulated that seller shall not be responsible for hardship caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous [*Cl. Ex. 5*]. In other words, in Parties' intent, whenever there's a hardship barring the performance of CLAIMANT, CLAIMANT would not be liable for its non-performance.

II No agreement of an adaptation mechanism for hardship was reached between Parties.

105. In the present case, during the drafting negotiation of the Agreement, a sudden and severe car accident involving the former negotiators resulted in a change of the negotiator [*Cl. Ex. 8*]. However, neither the former negotiators, Mr. Chris Antely and Ms. Julie Napravnik, nor the successors, Mr. Julian Krone and Mr. John Ferguson, had reached an agreement of an adaptation mechanism.

106. Firstly, no agreement of an adaptation mechanism was reached between successors. Apparently, there was no clear expression for contract adaptation in the contract. Moreover, Mr. Krone knew nothing about such mechanism. Even though he had access to the prior email chain [*PO2 ¶ 5*], the adaptation mechanism was only mentioned in the face-to-face discussion between Ms. Napravnik and Mr. Antley [*Cl. Ex. 8*], shortly before the car accident. Therefore, no adaptation mechanism was agreed.

107. Secondly, Mr. Antley, the former negotiator of RESPONDENT, did not agree to incorporate an adaptation mechanism into the contract. When Ms. Napravnik suggested adding an adaptation mechanism into the contract for the unlikely event that the Parties could not agree on an amendment, Mr. Antley did not agree but replied "it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree" [*Cl. Ex. 8*]. Even though he promised to come back with a proposal next morning, he still considered it as an open point in his note which indicated that his attitude of an adaptation mechanism was negative unless unclear [*Re. Ex. 3*].

108. Thirdly, because of Mr. Antley's belated arrival, the Parties could only shortly exchange views on what still had to be finalized and the various wishes but had not sufficient time to make any amendment to the standard contract beyond the already existing clauses 1 – 6 of the contract [*Cl. Ex. 8*]. It indicated that Ms. Napravnik had also admitted that no adaptation mechanism was finally agreed by the Parties. Therefore, no agreement of an adaptation mechanism for hardship was reached between Parties.

D. Under delivery DDP, CLAIMANT should be responsible for the 30% additional tariff.

109. As defined by International Chamber of Commerce (ICC), Delivery Duty Paid (DDP), means that the seller is responsible for all the costs and risks in associated with bringing the goods to the place of destination. In addition, the seller and also has an obligation to clear the goods not only for export but also for import for both import and export, or pay any associated duty for both export and import duties, and to carry but also to carry out all other customs formalities [*Incoterms rules 2010*].

110. In the present case, DDP term was expressly written in Clause 8 of the Sales Agreement: *Seller will ship 3 installments DDP of Nijinsky III's 100 doses of frozen semen* [*Cl. Ex. 5*]. During the drafting negotiation, CLAIMANT indicated that CLAIMANT was "not willing to take over any further risks associated with such a change in the delivery terms in particular not those associated with changes in customs regulation or import restrictions" [*Cl. Ex. 4*]. According to the explanation in ISSUE 3 Part A, two ways were used to settle the problem of risks of DDP. One is an extra payment of $300 per dose. Another is an inclusion of hardship, which regulated risks under health and safety requirements. The second way is clear that CLAIMANT can be exempted for no-performance under hardship, which constituted a derogation of CLAIMANT's obligations under the terms of the DDP. However, as discussed in ISSUE 3 Part B above, the present situation was not covered by hardship because the additional tariffs did not meet the three requirements under the hardship in Clause 12. Therefore, CLAIMANT is obligated to pay the 30% additional tariff under DDP term.

111. Even if the additional tariff constitutes a hardship, CLAIMANT cannot claim to adapt the price. According to the statement in ISSUE 3 Part C above, CLAIMANT is not liable for its non-performance in the event of a hardship. Nevertheless, in this case, CLAIMANT had already paid for the 30% additional tariff, which is tantamount to that CLAIMANT had gave up the right to claim exemption, so CLAIMANT could no longer claim to adapt the price.

112. To sum up, according to delivery DDP, it is CLAIMANT's duty to pay for the 30% tariff in the present case, stated differently, an extra payment by RESPONDENT is baseless.

113. All in all, hardship in Clause 12 did not contained additional tariff which could free CLAIMANT from responsibility. It's CLAIMANT's duty to undertake the 30% additional tariff in present case under delivery DDP. Even if present case was included in hardship, there's no adaptation mechanism to adapt the contract as CLAIMANT requested. Hence, CLAIMNAT is not entitled to an adaptation of price under Clause 12, let alone a payment of US$1,250,000.

ISSUE 4: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF THE US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTION OF THE PRICE UNDER THE CISG.

114. In the present case, CLAIMANT is not entitled to the payment of US$ 1,250,000 or any other amount under the CISG. One, the price could not be adapted pursuant to the CISG directly **(A)**. Two, the contract could not be adapted under Article 6.2 UNIDROIT Principles **(B)**.

A. The price cannot be adapted directly under CISG.

115. The additional tariffs are not governed by Article 79 CISG **(I)**. Even if Article 79 CISG is applicable in the present case, the remedy of price adaptation is not provided therein **(II)**.

I The newly imposed tariffs shall not be governed by Article 79 CISG.

116. CLAIMANT has asserted that the CISG allows for a price adaptation in the case of changed circumstances along the lines of the hardship provision found in Article 6.2.3 UNIDROIT Principles. However, as stipulated in Article 79(1) CISG, "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 or overcome it or its consequences". The "impediment" provided in Article 79 does not include hardship **(1)**. Even if Article 79 indeed covers issues relating to hardship, the additional tariffs didn't fulfill the requirements set forth in Article 79 **(2)**. Although the additional tariffs fell within the scope of Article 79, the Parties' agreement could oust the operation of Article 79 CISG **(3)**.

1. The "impediment" provided in Article 79 CISG does not include hardship.

117. When looking into the Legislative History of the Convention from 1977 to 1980, the Committee considered a proposal that the following provision be added after Article 50 (i.e. the prototype of Article 79), "If, as a result of special events which occurred after the conclusion of the contract and which could not have been foreseen by the Parties, the performance of its stipulations results in excessive difficulties or threatens either party with considerable damage, any party so affected has a right to claim an adequate amendment of the contract or its termination." In support of this proposal it was stated that some changes can result in excessive difficulties (i.e. hardship) for one of the Parties as to allow any party to renegotiate the conditions of the contract or call for its termination under the Convention. Such a provision would thus prevent one party from benefiting from windfall gains. However, the Committee did not retain this proposal eventually [*UNCITRAL Yearbook VIII (1977), A/32/17, pp 25-64*]. Since the proposal had been dismissed, it could be deduced that there was some type of consensus among the members of the Working Group against the doctrine of "hardship". There is also ample support for the proposition that the Convention does not favor an easy exemption from nonperformance and that the notion of "impediment" under Article 79 points to an insurmountable obstacle that is unrelated to the more flexible notions of hardship, impracticability, frustration, or the like [*AC-OP7 ¶ 28*]. So the term "impediment" as contained in Article 79 does not extend so far as to encompass hardship.

2. Even if hardship constitutes an impediment under Article 79 CISG, the additional tariffs could not fulfill the conditions for application of Article 79.

118. Even if the "impediment" contained in Article 79 does extend to encompass hardship, the additional tariffs failed to meet the conditions for impediment under Article 79 (1) **(a)**. In addition, Article 79 is not applicable since CLAIMANT has actually performed its obligation under the contract **(b)**.

a. The newly imposed tariffs didn't meet all the requirements for impediment under Article 79 (1) CISG.

119. Under Article 79 (1), there are four general requirements for an "impediment", they are, (i) impediment beyond control; (ii) unforeseeability of the impediment; (iii) unavoidability of the impediment and of its consequences; and (iv) impediment and its consequence couldn't be overcome.

120. As for the first and third requirements, the imposed tariff was an act of government which was out of control of CLAIMANT and cannot be avoided. Nonetheless, for the second requirement, as is mentioned in ISSUE 3 Part B II above, the tariff imposed by Mediterraneo was foreseeable in present case.

121. In addition, for the last requirement, CLAIMANT was able to overcome the consequence of additional tariffs. As Professor Schwenzer stated, under Article 79 CISG, to determine whether or not the consequence of an impediment can be overcome depends ultimately on whether or not the "limit of sacrifice" has been exceeded. Such a determination must be considered on a case-by-case basis. In the present case, the additional 30% tariff [*Cl. Ex. 7*], does not constitute an economic impossibility, because in comparison with the highly expensive tests that increased overall cost by 40% from past experiences [*Cl. Ex. 4*], the newly imposed tariff is much lower. Thus, the limit of sacrifice was not exceeded.

b. Article 79 CISG is not applicable since CLAIMANT has actually performed the obligation.

122. The additional tariff was imposed on 19 December, 2017 [*Cl. Ex. 6*] before the shipment date of last installment on 23 January, 2018 as is formulated in the contract [*Cl. Ex. 5*]. Though the accurate date when the last installment was delivered was unknown, it's clear that CLAIMANT has authorized the delivery before an agreement on the details has been reached [*Cl. Ex. 8*].

123. From perspective of Professor Schwenzer, the exemption is possible in any case where one of the Parties has or has not properly performed one of his contractual duties. One of the prerequisite to the application of Article 79 is one of the Parties failing to perform any of its obligations. Since CLAIMANT has performed the contractual obligations completely, it was not entitled to resort to the Article 79.

3. Even if the additional tariffs fell within the scope of Article 79, the Parties' agreement could oust the operation of Article 79.

124. According to Professor Schwenzer's point of view, the Parties may agree expressly or impliedly to derogate from Article 79 and may instead themselves regulate in whole or in part the requirements for and consequences of the exemption. As CLAIMANT stated in the e-mail, it has once experienced unforeseeable additional health and safety requirements, which could increase the cost by 40% due to the highly expensive tests, and thereby destroy the commercial basis of the deal [*Cl. Ex. 4*]. Having taken the unfortunate experience into account, the Parties agreed on a very narrowly worded hardship clause, "neither for hardship,

caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous [*Cl. Ex. 5*]" which was included into the existing force majeure clause.

125. Since Article 6 CISG allows for derogation or variance from the CISG and the provisions of the contract should prevail over Article 79 (1) [*CISG Case no. 1405 (2012)*], such an agreement, reflected in Clause 12 of the Agreement, on the scope of hardship can oust the operation of Article 79 (1) CISG.

II Even if Article 79 CISG is applicable in the present case, the remedy of price adaptation is not provided from Article 79 (5) CISG.

126. Although Article 79 CISG could govern the case at hand, the remedy of price adaptation is still not available under Article 79 (5) CISG. Since the text of Article 79 (5) is abstract, an interpretation could be made under Article 7 (1) CISG. However, the principle of good faith buried in Article 7 (1) could not be stretched to find a balance of the performances under Article 79 (5) **(1)**. Even if a "gap" exists under Article 79, it cannot be supplemented by the UNIDROIT Principles, as asserted by CLAIMANT, under Article 7 (2) CISG **(2)**.

1. The principle of good faith buried in Article 7 (1) CISG could not be stretched to find a balance of the performances under Article 79 (5).

127. Under Article 7(1) CISG, the principle of good faith is observed when interpreting the provisions CISG. However, there is no indication that the principle of good faith would include an obligation for the Parties to adapt the contract to changed circumstances. What this principle is regarded to contain is largely dependent on the interpreter and the interpreter's legal background. The duty to renegotiate in good faith due to changed circumstances is found in numerous Civilian national laws, the UNIDROIT Principles, and the Principles of European Contract Law. In contrast, the common law does not recognize the exemption of hardship nor the duty to renegotiate.

128. Since making an autonomous interpretation, as required under Article 7 needs to consider the international character CISG and the importance of uniformity of application [*DiMatteo, p. 284*], the CISG shall be interpreted neutrally and internationally, so no remedy of price adaptation could be interpreted from Article 79 (5) CISG merely in a civil law perspective.

2. Even if a gap exists in Article 79 CISG, the UNIDROIT Principles couldn't be used to fill this gap in Article 79 (5) CISG pursuant to the Article 7 (2) CISG.

129. Article 7(2) CISG provides that questions concerning matters governed by CISG which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. As Professor Schwenzer stated, the basic concept underlying the gap-filling rule is simple and provides for a two-step procedure. The first step is to fill the gap by means of the general principles on which the CISG is based on. These gaps are usually referred to as "internal gaps". When this first step fails, due recourse is to be had to domestic rules determined by the conflict rules of the forum. Such gaps are usually referred to as "external gaps".

130. Even if a "gap" exists in Article 79 (5) CISG, the UNIDROIT Principles couldn't be used as general principles on which the Convention is based on, to fill the internal gap of Article 79 (5) CISG **(a)**. Nor could

the UNIDROIT Principles be applied as private international law to fill the external gap of Article 79 (5) CISG according to Article 7 (2) CISG **(b)**.

a. Under Article 7 (2) CISG, the UNIDROIT Principles could not be resorted as general principles on which the CISG is based on, to fill the internal gap in Article 79 (5) CISG.

131. As is stipulated in Article 7 (2) CISG, *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*. The general principles of the Convention and the general principles governing the law of international trade are two quite different things. Referring to the Commentary on the CISG, commentators recite long lists of general principles and their sources. The general principles on which the Convention is based are derived from the text CISG itself, and the general principles governing the law of international trade could be found in many sources outside the Convention, including domestic laws to the extent they have been applied to international sales or any other international transaction. The rule in Article 7 (2) requires those applying the Convention to look within its provisions to determine its general principles, not to look outside the Convention to determine general international law principles, especially ones that, like the UNIDROIT Principles, are expressly based on sources beyond the CISG [*Flechtner, p. 95*]. Thus, even if there is an internal gap in the Article 79 (5), the UNIDROIT Principles could not be used as general principles in the Article 7 (2) CISG on which the CISG is based.

b. Under the Article 7 (2) CISG, the UNIDROIT Principles couldn't be used easily as the rules of private international law to fill the external gap of Article 79 (5) CISG.

132. According to Article 7 (2) CISG, in the absence of general principles on which the Convention is based, *questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the law applicable by virtue of the rules of private international law.*

133. According to the Commentary on the UN Convention on the International Sale of Goods, recourse to domestic law is only an *ultima ratio*, i.e. a last resort. In particular, the possibility offered by Article 7 (2) must not be interpreted, let alone, be used as an easy path around the difficult task to determine general principles CISG. As Professor Harry M. Flechtner comments on the 19 June 2009 Decision of the Belgian Cassation Court, if tribunals find a "gap" in the Convention every time familiar domestic law approaches do not appear in the Convention (even where those courts admit the Convention actually addresses the situation), there is little hope that the Convention can achieve its goal of creating a uniform international sales law [*Flechtner, p. 99*]. In other words, Article 7 (2) CISG does not favor an easy approach to domestic law.

134. To avoid the possibility of interpretation of the Convention would break down along regional lines -- which non-uniform regional interpretations would develop, the Convention should be relatively independent from the domestic law. So under the Article 7 (2) CISG, the UNIDROIT Principles couldn't be easily resorted as the rules of private international law to fill the external gap of Article 79 (5) CISG.

B. Even if the UNIDROIT Principles could be applied under Article 9 CISG, the Agreement could not be adapted pursuant to Article 6.2 UNIDROIT Principles.

135. By virtue of Article 9 (2), Parties to an international sales contract may be bound by a trade usage even in the absence of an affirmative agreement thereto, provided the Parties "knew or ought to have known" of the usage and the usage is one that, in international trade, "is widely known to, and regularly observed by, Parties to contracts of the type involved in the particular trade concerned." And therefore Article 6.2 UNIDROIT Principles constitutes the "usage" mentioned in Article 9 (2) CISG.

136. Though Article 6.2 UNIDROIT Principles provides a mechanism of hardship to empower the tribunal to adapt the contract to restore equilibrium, CLAIMANT did not have access to this remedy in the present case. The Parties had incorporated a special regulation of hardship into the contract, which equals to a derogation of Article 6.2 UNIDROIT Principles (**I**). Even if Article 6.2 UNIDROIT Principles was applicable, additional tariff in the present case could not constitute a case of hardship under Article 6.2.2 UNIDROIT Principles（**II**）to invoke this mechanism to pursue remedy it provides under Article 6.2.3 UNIDROIT Principles. Due to the failure of constituting hardship in Article 6.2.2 UNIDROIT Principles, CLAIMANT was not entitled to the payment by adapting the contract under Article 6.2.3(4) (b) UNIDROIT Principles (**III**).

I The Parties had provided for a special regulation of hardship derogating the application of Article 6.2 UNIDROIT Principles.

137. In Cause 12 of the contract, CLAIMANT and RESPONDENT had made it clear that the Seller shall not be responsible for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous [*Cl. Ex, 5*], which formed a very narrowly worded clause. By including the hardship clause into the contract, the Parties had provided for a special regulation of the problem of changed circumstances excluding an application of Article 6.2.2 UNIDROIT Principles, which constitutes a derogation in the sense of Article 1.5 UNIDROIT Principles. As the rules laid down in the UNIDROIT Principles are in general of a non-mandatory character, the Parties may in each individual case either simply exclude their application in whole or in part or modify their content so as to adapt them to the specific needs of the kind of transaction involved [*Official Comment, p. 13, ¶ 1*]. Where contracting Parties make their own provision about hardship event, then it is likely that the term which the Parties have agreed will oust the operation of Section 6.2 UNIDROIT Principles [*Mckenrick, p.713, ¶ 8*].

138. Moreover, in a case a tribunal noted that the Parties, on the basis of the principle of freedom of contract, were entitled to agree upon situations not contemplated by the applicable law and establish less stringent criteria for the existence of hardship under their contract. And the tribunal stated that "once the hardship clause is inserted in the contract, it must be observed in deference to party autonomy and the constitutional principle of free initiative [*Ad hoc Arbitration, 21 December 2005(Brazil)*]." Therefore, since CLAIMANT and RESPONDENT had included a narrowly worded hardship clause in the contract, the Parties' agreement and autonomy should be respected and Article 6.2 was derogated.

II Even if Article 6.2 UNIDROIT Principles was applicable, additional tariffs in the present case do not constitute a case of hardship under Article 6.2.2 UNIDROIT Principles.

139. The definition of hardship can be broken down into two elements. The first consists of the opening lines of Article 6.2.2, in particular, the phrase "fundamentally alters the equilibrium of the contract." The second consists of the four matters [*Article 6.2(a)-(d) UNIDROIT Principles*]. All four matters must have been identified to decide whether an event falls within the scope of hardship in these provisions and they are not optional extras [*Mckenrick, p.717, ¶ 1*]. In the present case, additional tariffs do not meet all of these requirements to constitute hardship. Reasons are as follow. Its occurrence did not alter the equilibrium of the contract (**1**), and it could have been taken into account by CLAIMANT when the contract was concluded (**2**). Furthermore, this risk should have been assumed by CLAIMANT (**3**).

1. The occurrence of additional tariffs did not fundamentally alter the equilibrium of the contract [*Article 6.2.2 UNIDROIT Principles*].

140. To give rise to an acknowledgement of hardship, the occurrence of an event must fundamentally alter the equilibrium of the contract. And the key point is to decide the requirement that what alteration of the equilibrium of the contract is "fundamental". Compared with other words that could have been used, such as "material" or "substantial", "fundamental" seems to impose a higher threshold than these alternatives [*Mckenrick, p. 718, ¶ 5*]. While whether or not an event can be described as "fundamental" very much depends on the facts and circumstances of the particular case, authors and institutes have set up certain thresholds to 'fundamental' alteration.

141. The Official Comment to the 1994 edition UNIDROIT Principles viewed an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a "fundamental" alteration, but the sentence was dropped in later versions because the figure of 50% was too low. Therefore, it could be inferred that any alteration which amounts to less than 50% of the cost or the value of the performance will not suffice [*Mckenrick, p. 719, ¶ 8*]. In all likelihood the threshold will be set at a higher level.

142. In the present case, the Equatoriana government imposed 30 per cent tariffs on selected products from Mediterraneo including animal semen [*Cl. Ex. 7*], a figure well below the requirement of a fundamental alteration to the equilibrium of the contract. Therefore, since the new tariff of 30 per cent on the product did not fundamentally alter the equilibrium of the contract, CLAIMANT ought to perform the last shipment in accordance with the Sales Agreement and CLAIMANT was not eligible to invoke the remedial mechanism provided by the hardship clause.

2. The increase in tariffs could reasonably have been taken into account by CLAIMANT at the time of the conclusion of the Agreement under Article 6.2.2(b) UNIDROIT Principles.

143. Even if the change in circumstances occurs after the conclusion of the Agreement, sub-paragraph(b) of Article 6.2.2 UNIDROIT Principles makes it clear that such circumstances cannot cause hardship if they could reasonably have been taken into account by the disadvantaged party at the time the contract was concluded [*Official Comment, p.220, ¶ 3. b*]. Additional tariffs, as discussed in ISSUE 3, Part B above, was foreseeable and therefore does not constitute hardship under Article 6.2.2(b).

3. The risks associated with the tariff should have been assumed by CLAIMANT pursuant to Article 6.2.2(d) UNIDROIT Principles.

144. In accordance with Article 6.2.2(d) UNIDROIT Principles, a party cannot invoke hardship where the risk of the event has been assumed by the disadvantaged party. The assumption of risk need not have been express, it can be inferred from the circumstances or from the nature of the contract [*Mckenrick, p. 721, ¶ 15]*. In the present case, CLAIMANT's assumption of risks could be inferred from DDP terms used in the Agreement. According to the Agreement concluded by the Parties, Seller will ship 3 installments DDP of Nijinsky III's 100 doses of frozen semen [*Cl. Ex. 5*]. In a DDP delivery, the seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities [*INCOTERMS 2010, p.36*]. Additionally, just as stated in ISSUE 3 Part A, RESPONDENT never accepted CLAIMANT's proposal that the risk of tariff increase should be transferred to RESPONDENT. Therefore, it could be inferred that CLAIMANT should have assumed the risk of additional tariff before the conclusion of the contract, and had no right to invoke hardship.

III Due to the failure of constituting hardship in Article 6.2.2 UNIDROIT Principles, CLAIMANT was not entitled to the payment by adapting the contract under Article 6.2.3(4) (b) UNIDROIT Principles.

145. A tribunal may only terminate or adapt the contract when it has found hardship and it is reasonable for it to resort to these remedies [*McKendrick, p.724, ¶ 8*]. As additional tariffs did not meet the prerequisites of hardship under Article 6.2.2 UNIDROIT Principles, it impossible to "find hardship" in the present case and therefore there was no room for the Arbitral Tribunal to adapt the contract accordingly. Therefore, reliance on invoking hardship and the remedy of adapting the contract is baseless, and CLAIMANT is not entitled to the payment of US$ 1,250,000 under Article 6.2 UNIDROIT Principles.

146. In conclusion, CLAIMANT is not entitled to the payment of US$ 1,250,000 because the hardship in Clause 12 does not provide for the requested remedy, i.e. adaptation by the Arbitral Tribunal, and reliance on remedies under Article 79 CISG and Article 6.2 UNIDROIT Principles.

REQUEST FOR RELIFE

In light of the above RESPONDENT requests the Arbitral Tribunal：

1. To dismiss the claim as inadmissible for a lack of jurisdiction and powers;

2. To reject the claim for additional remuneration in the amount of US$ 1,250,000 raised by CLAIMANT;

3. To order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.