APIIT LAW SCHOOL

MEMORANDUM FOR CLAIMANT

On behalf of:	Against:
Phar Lap Allevamento	**Black Beauty Equestrian**
Rue Frankel 1	2 Seabiscuit Drive
Capital City	Oceanside
Mediterraneo	Equitoriana
-CLAIMANT-	**-RESPONDENT-**

● NISHEL BOTEJU ●NITHMA FERNANDO ● SHAAMIL SHAKEER●VINUSHA FERNANDEZ

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TABLE OF ABBREVIATIONS

&	And
¶/¶¶	Paragraph
§/§§	Section/s
Sub§/sub§§	Sub section/s
HKIAC Rules	Hong Kong International Arbitration Centre Rules 2018
Art./Arts	Article/ Articles
CE	Claimant Exhibit
CISG	The United Nations Convention on Contracts for the International Sale of Goods 1980
Cl./Cls.	Clause/s
Ex.	Exhibit
GC	General Conditions
IBA Guidelines	IBA rules on the taking of evidence in International Arbitration 2010.
UNCITRAL Transparency rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
Ibid	Ibidem
Ltd.	Limited

Model Law	UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006)
No./Nos.	Number/s
NoA	Notice of Arbitration
ANoA	Answer to Notice of Arbitration
p./pp.	Page/s
PCA	Permanent Court of Arbitration
PO	Procedural Order
Pt./Pts.	Point/s
Q	Question
RE	Respondent Exhibit
Tribunal	The Arbitral Tribunal that consists of Ms. Wantha Davis, Dr. Frencesca Dettorie, Prof. Calvin de Souza
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
FSSA	Frozen Semen Sales Agreement

TABLE OF AUTHORITIES

STATUTES, INSTITUTIONAL RULES AND GUIDELINES

HKIAC rules	Hong Kong International Arbitration Centre Rules (2018)
CISG	UN Convention on International Sales of Goods 1980
MODEL LAW	UNCITRAL MODEL LAW on International Commercial Arbitration 1985
UNIDROIT PRINCIPLES	UNIDROIT Principles of International Commercial Contracts of 2016
IBA	IBA Rules on taking evidence in International Arbitration 2010

BOOKS

AUTHOR: Alan Redfern and Martin Hunter

Michael Noth	Arbitration in Switzerland The Practitioner's Guide (Second Edition) (ed. Jan 2018) AUTHOR: Michael Noth	52
Sicard-Mirabal and Derains	Introduction to Investor-State Arbitration AUTHOR: Sicard-Mirabal and Derains	39,71
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Pilkov	Evidence in International Arbitration: Criteria for Admission and Evaluation AUTHOR: Konstantin Pilkov	43
Brunner	Force Majeure and Hardship Under General Contract Principles: Exemption for Non-performance in International Arbitration AUTHOR: Christoph Brunner	107

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John Chopin	The ups and downs of breeding with a stallion AUTHOR:John Chopin AVAILABLE AT: https://www.westvets.com.au/wp-content/uploads/2017/09/breeding-with-a-stallion-1.pdf	117
Knapp	Article 77 AUTHOR: Victor Knapp AVAILABLE AT: https://www.cisg.law.pace.edu/cisg/biblio/knapp-bb77.html	116
Schlechtriem	Uniform Sales Law- THE UN-CONVENTION ON THE INTERNATIONAL SALES OF GOODS AUTHOR: Prof. Dr. Peter Schlechtriem AVAILABLE AT: http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem-79.html	102
Magnus	The Remedy of Avoidance of Contract Under CISG- General Remarks and Special Cases AUTHOR: Ulrich Magnus AVAILABLE AT: https://www.cisg.law.pace.edu/cisg/biblio/magnus2.html	107

STATEMENT OF FACTS

2017	
March	• RESPONDENT contacted the CLAIMANT for 100 doses of Nijinsky 3's semen [21st]. CLAIMANT made an offer to deliver 100 doses of semen in 3 installments [24th]. • RESPONDENT objected to the Choice of Law, the dispute resolution clause and insisted on DDP delivery terms, while accepting most of the other terms [28th]. • CLAIMANT agreed on the delivery terms with the conditions of an increase in price and an inclusion of a hardship clause. CLAMANT requested for arbitration in Mediterraneo [31st].
April	• RESPONDENT proposed the model arbitration clause under the HKIAC [10th]. • CLAIMANT accepted the clause amending the seat of arbitration and suggested the ICC hardship clause [11th], subsequently the final negotiations on the hardship clause, choice of law and the arbitration clause, the two main negotiators were severely injured in an accident when driving from the colt auction [12th].
May	• The contract was finalized [6th].
November	• President of Mediterraneo imposed a tariff of 25% on agricultural products from Equatoriana [23rd].
December	• The Equatorian government retaliated and imposed a tariff of 30% for selected products from Mediterraneo including race horse semen in response to the above restriction [19th]. • Article on the 30% Tariff was published [20th].
2018	
January	• The CLAIMANT contacted the RESPONDENT regarding the price for the remaining 50 doses [20th]. The RESPONDENT requested the doses due to

	the importance of timely delivery. (During the Telephone discussion between Mr. Shoemaker and Ms. Napravnik) [21st]. CLAIMANT delivered the doses before agreeing on a price [23rd].
February	・ The CLAIMANT contacted the RESPONDENT's CEO regarding the sale of semen to a third party, breaching the contract to which the RESPONDENT objected to [12th].
July	・ CLAIMANT submits the NoA and Nominates Ms. Wantha Davis as their arbitrator and a letter by HKIAC mentioning the Receipt of NOA by the CLAIMANT. [31st]
August	・ Ms. Wantha Davis declares her acceptance and impartiality [1st]. CLAIMANT agrees to rates of Ms. Wantha Davis and has completed payments to HKIAC [2nd]. ・ Witness statements by Julian Krone and Greg Shoemaker [22nd]. ・ RESPONDENT submits the Answer to the Notice of Arbitration and nominates Dr. Francesca Dettorie as the arbitrator [24th]. ・ Letter by HKIAC mentioning receipt of the ANOA while RESPONDENT agrees to the fees of the Arbitrator [25th] a letter by HKIAC requests to appoint a presiding Arbitrator [28th].
September	・ Arbitrator, Prof. Calvin de Souza was proposed as presiding arbitrator[14th]. Letters by HKIAC confirming the presiding arbitrator fee [17th] and confirming the constitution of the tribunal [18th]. the presiding arbitrator accepted the appointment [20th].
October	・ CLAIMANT receives information regarding another arbitration involving the RESPONDENT based on HKIAC [2nd]. ・ RESPONDENT objects to the above submission of the CLAIMANT [3rd] and parties have a telephone conference [4th].

ISSUE 1: THE TRIBUNAL HAS THE JURISDICTION TO ADAPT THE CONTRACT

1. The Arbitral Tribunal has jurisdiction to decide on this dispute ***[I]*** under the law governing the contract, i.e. the law of Mediterraneo, as well as *lex arbitri,* since the dispute has arisen from Clause 12 of the contract, and further, the hardship clause, i.e. Clause 12, in the contract allows the Tribunal to adapt the contract ***[II].***

I.THE TRIBUNAL HAS JURISDICTION TO DECIDE ON THE DISPUTE

2. The Tribunal has jurisdiction to decide upon this matter, according to the Law of Mediterraneo ***[A]***, which, governs both the contract as well as the arbitration agreement ***[a],*** and allows for a broad interpretation of the arbitration agreement ***[b]*** , the UNCITRAL Model Law ***[B]***, and because the parties never intended to restrict the arbitrability of disputes by their dispute resolution clause ***[C]***. In any event, due to the existence of Clause 12, i.e. the hardship clause, in the contract, out of which the dispute has arisen, even the law of Danubia, i.e. *lex arbitri* gives the Tribunal the jurisdiction to decide on the dispute at hand ***[D].***

A. THE TRIBUNAL HAS JURISDICTION UNDER THE LAW OF MEDITERRANEO

3. The arbitration agreement is governed by the law applicable to the FSSA ***[A]*** as the parties agreed upon the Law of Mediterraneo to be the Law governing the Contract ***[i]*** and the arbitration agreement is part and parcel of the contract and not a separate contract ***[ii]***. Alternatively, even if the Arbitration Agreement was a separate contract, due to the fact that the law governing the underlying the contract is the Law of Mediterraneo, the same shall apply to the Agreement to Arbitrate ***[iii]***.

a. the arbitration agreement is governed by the law governing the FSSA

i.The FSSA, i.e. the underlying Contract, is governed by the law of Mediterraneo.

4. Party autonomy stands a cornerstone principle in international arbitration. The agreement and choices of the parties are given highest regard ***[Redfern and Hunter p.365, p.187 ¶3.97]***. It is evident that both the Model law and New York Convention recognizes

the importance of party autonomy in international arbitration ***[Model Law Part 2 p.33 ¶36, Part 1 Art.19 (1); NYC Art.5(1)(a)].*** Parties may determine the laws and procedures applicable to their arbitration ***[Born p.84].*** This autonomy of the parties is an overriding authority in terms of determining the law applicable to a contrac*t* ***[Lew, Mistelis and Kroll ¶17-4].***

5. The FSSA is not contested by either party as a valid contract concluded between the parties. It is also accepted by both parties that the FSSA inclusive of all terms of the contract, is governed by the law of Mediterraneo.

6. This agreement was reached following the acceptance of the offer sent by the CLAIMANT to the RESPONDENT ***[CE2]*** upon the request of the RESPONDENT ***[CE1]***. Following further negotiations between the parties, it was agreed and included in the contract, i.e. Clause 14, that the FSSA be governed by the law of Mediterraneo ***[p.14 cl.15]***.

ii. The Agreement to Arbitrate is part and parcel of the FSSA and the principle of separability does not apply.

7. The principle of separability sets out the arbitration agreement between two parties as a separate agreement from the underlying main contract between parties for the purpose of a dispute being arbitrable in the event that the main contract is held to be void ***[Redfern and Hunter p.338 ¶5.101].***

8. In discussing the principle of separability, it is important to examine the background of the principle. The Leading case in the United Kingdom that affirms the principle of separability can be considered the ***Fioana trust case*** ***[Arbitration procedures and practice UK Q&A ¶12].*** A leading case in the United States in this regard, is the ***Prima Paint case***. A landmark case in France for this principle is the case of ***Gosset v. Carapelli*** ***[McGILL LAW JOURNAL Gravel and Peterson p.520]***. All these cases considered the validity of the arbitration agreement in instances where the validity of the underlying contract is challenged or held to be void. This has been the approach and basis of the principle of separability.

9. In this instance however, the said principle of separability is inapplicable, and the arbitration agreement should not be considered a separate contract and it is certainly not governed by a separate law as there is no question as to the validity of the contract, i.e. FSSA, between parties.

10. The HKIAC Rules and the Model Law address separability, respectively in Art. 19 and Art. 16. The Model Law, which is the arbitration law of Danubia and Mediterraneo ***[p.57 PO2 ¶14]***, emphasizes that the Tribunal may decide on the existence and validity of arbitration agreements and it is ***"For that purpose"*** that the arbitration agreement is treated as independent of the other terms of a contract. The clause further explains that the invalidity of the main contract does not *de facto* nullify the arbitration agreement ***[MODEL Law Art.16 (1)].*** This indicates that the separability of the arbitration agreement is concerned with its validity in events of invalidity of the main contract and not otherwise. This stands the focus of both the Model law and Art.19 of the HKIAC Rules. In this instance as there is no doubt as to the validity of the contract, the principle of separability will not apply.

11. Furthermore, according to the principle of separability, an arbitration agreement is **"*Separable"*** as opposed to ***"Separate".*** This distinction is critical as the arbitration agreements are not automatically presumed to be separate contracts governed by different set of laws than to the laws governing the underlying contract.

12. According to Gary Born, ***"the separability doctrine is more accurately termed the "separability presumption" [Born p.353],*** and the definition of separability is not synonymous with "independence" or "autonomy" ***[Born p.352]***. The Arbitration agreement is undoubtedly linked with the main contract and should not be presumed to be separate or independent but rather ***separable*** as circumstances require separation, i.e. when the underlying contract becomes invalid, and the intention of the parties direct towards separation.

13. Moreover, as per the principle of separability, the separation should only take place when there is a total challenge, as opposed to partial challenge of jurisdiction of the Arbitral Tribunal. ***[Redfern and Hunter p.338 ¶5.100]***. Therefore, given that the Respondent, has neither totally challenged the jurisdiction of the Tribunal nor presented a total challenge as to the validity of the FSSA, but only a partial challenge, as to the Tribunal's jurisdiction to adapt the contract, the principle of separability is not applicable.

iii. In any event the choice of law governing the Arbitration Agreement must be the Law of Mediterraneo.

14. The law applicable to the arbitration agreement is of relevance as matters subject to the applicable law includes matters of interpretation of the arbitration agreement and means of enforcing the arbitration agreement ***[Born p.489].*** Even when an arbitration agreement is a separate agreement, it does not automatically mean that a different law will govern the arbitration agreement.

15. It is a common occurrence that the law of the underlying contract extends to the arbitration agreement, especially in instances where the parties have expressly determined the choice of law in the underlying contract ***[Born pp.515, 516; Peterson Farms v C&M Farming; B v A],*** so that one system of law governs the entirety of the contract, inclusive of the arbitration agreement ***[Arsanovia Ltd v Cruz City]***

16. Moreover, it is important to consider pre-contractual negotiations between parties in order to further, determine/ confirm the intent of the parties in the choice of law, as party autonomy governs international arbitration. ***[Sulamerica v Enesa Engenharia]***

17. Relevant pre-contractual negotiations in regard to choice of law indicates that the parties did not overlook the importance of the law governing the arbitration agreement.

18. The CLAIMANT communicated to the Respondent of its inability to enter into a contract which is subjected to the laws of a different jurisdiction without the approval from creditors committee ***[RE2 p. 34],*** and hence was persistent on the arbitration agreement being subjected to the law of Mediterraneo. However, the CLAIMANT consented to the

option of selecting a neutral seat of arbitration with a functioning judicial system, for which the the Creditors' Committee had already granted approval in another instance ***[PO2 ¶14].***

19. Nevertheless, such consent of the CLAIMANT, at no point was intended to subject the arbitration agreement to the laws of such neutral seat of arbitration. Therefore, it is evident that not only the underlying Contract but also the arbitration agreement is governed by the Law of Mediterraneo.

b. The law of Mediterraneo allows for the Tribunal to hear this matter

20. The phrase "arising out of" that appears in arbitration clauses, is given a broader interpretation in other jurisdictions such as the UK Arbitration Act 1996, which is highly influenced by UNCITRAL Model Law ***[Arbitration guide IBA England & Wales p.5].***

21. Moreover, case law allows for broader interpretation of arbitration clauses in considering the arbitrability of disputes. As Lord Hoffman held in ***Fiona trust,*** if parties intended to restrict matters under the arbitration clause, they would expressly say so. Therefore, in the absence of such express exclusion or restriction, a presumption of arbitrability applies.

22. Further according to Lord Hope, parties need not trouble with the wording as "arising out of" or its variations unless expressly provided, an arbitration agreement is intended to cover all disputes to be resolved through arbitration. In addition, such broader interpretation has been allowed for in cases prior to the enactment of the UK Arbitration Act. ***[The Antonis P Lemos; Ethiopian Oilseeds and Pulses Export Corpn v Rio del Mar Foods Inc].***

23. Australian judgments on arbitrability of matters in contracts with dispute resolution clauses referring only to matters "arising out of contract", are also interpreted broadly ***[Francis Travel Marketing P/L v Virgin Atlantic Airways; Delaney and Lewis p.343]*** Arbitration agreements do not have to read "arising out of or relating to" for such interpretation. ***[Comandate Marine Corp v Pan Australia Shipping Pty Ltd; Luttrell***

ANZMarLaw][7]. Indian jurisdiction too follows a similar approach in the interpretation of arbitration agreements and provide for a broader interpretation. ***A.B.C. Laminart vs A.P. Agencies.***

24. Therefore, the phrase "arising out of "appearing in Clause 15 of the contract, which is governed by the Law of Mediterraneo, should be interpreted broadly, as has been done in many other jurisdictions, and thus, should be considered to capture disputes of this nature, granting the Arbitration Tribunal the jurisdiction to hear this matter.

B. MODEL LAW INTERPRETATIONS OF ARBITRATION AGREEMENTS RECOGNIZE THE JURISDICTION OF THE TRIBUNAL

25. General principles to the Model Law state that in the interpretation of the Model Law, its international character and uniformity of its application must be given due regard. Therefore, it is essential to consider the approach taken in interpreting the model law in order to ensure the uniformity of its application.

26. In terms of wording, model law allows for a broader interpretation of arbitration agreements ***[UNCITRAL DIGEST Art.7 p.28 ¶11; Re Carter et al. and McLaughlin et al.; United Mexican States v. Cargill].*** As seen in the case of ***United Mexican States v. Cargill,*** the restrictions of the wording of the dispute resolution clause was not a restriction in the arbitrability of the matter and Art.34 (2)(a)(iii) of the Model Law does not allow for the award to be set aside by further claims to lack of jurisdiction, it was also allowed for remuneration of damages for both losses suffered due to trade measures taken by state, as well as loss of profit suffered thereto.

C. PARTIES NEVER INTENDED TO LIMIT TRIBUNAL'S JURISDICTION BY THE PHRASING OF CLAUSE 14.

27. Parties never expressly agreed to limit arbitrability of disputes by using the words "arising out of". As stated by Lord Hope in ***Fiona Trust***, matters of wording are not to be dwelled upon, as limitations to arbitrability by the words "arising out of" in the absence of explicit expression of the same. Further, not even the RESPONDENT expressed their

intent to limit the jurisdiction of the Tribunal, at any stage of negotiations and the CLAIMANT did not and would not have agreed upon such restriction. This was merely a matter of wording as this was never a matter discussed in negotiations or the communications of the parties and cannot be interpreted as it would hinder the interests of both parties.

D. THE LAW OF DANUBIA ALLOWS THE TRIBUNAL TO DECIDE ON THE MATTER

28. Even if the Arbitration Agreement is given a narrow interpretation, under the *lex arbitri,* i.e. the Law of Danubia, the dispute is a matter "arising out of" the contract, as the matter falls within Clause 12 of the contract, i.e. the hardship clause.

29. The hardship clause, i.e. Clause 12, discusses hardship in terms of events *"caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous* ". It is evident that the unexpected tariff imposed by the Equitorian government was unforeseen and at the same time made the contract more onerous by destroying the commercial basis of the contract, falling within the situations covered under Clause 12 of the contract.

30. As the tariff and the losses suffered thereof, fall within the ambit of the hardship clause, the dispute becomes one that is "arising out of" the contract, and the Tribunal has the jurisdiction to resolve the dispute at hand.

II. THE TRIBUNAL HAS POWER TO ADAPT THE CONTRACT

A. TRIBUNALS HAVE POWER TO ADAPT CONTRACTS WHEN HARDSHIP CLAUSES ARE PART OF THE CONTRACT

31. Hardship describes a change in economic, financial, legal, or technological factors which causes serious adverse economic consequences to a contracting party, thereby rendering more difficult the performance of his contractual obligations and changing the balance of the equilibrium of the contract. ***[Legal Guide on Drawing up International Contracts for the Construction of Industrial Works]***

32. A hardship clause defines hardship and provides for renegotiation and adaptation the contract to the new situation created by the hardship faced. ***[Legal Guide on Drawing up International Contracts for the Construction of Industrial Works].***

33. Hardship allows for an additional ground for the discharge of a contract or for its adaptation to changed circumstances ***[Joseph M. Periilo].***

34. Further the hardship clause may provide for the renegotiation of the contract in a situation of Hardship. The parties may wish to decide whether the contract should obligate them only to participate in renegotiations with a view to adapting the contract or should obligate them to adapt the contract after renegotiations. The parties may at the time of entering into the contract, or subsequently, agree upon a conciliator who could assist them in an independent and impartial manner in their attempt to adapt the contract. If the contract obligates the parties to adapt the contract after renegotiations, it may be desirable to provide that, upon a failure by the parties to reach agreement on adaptation, the contract is to be adapted by a court, arbitral tribunal or referee. ***[Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works].***

35. Moreover, under the Law of Mediterraneo, i.e. the law governing the contract, a standard arbitration agreement, as seen in this instance, is sufficient to confer upon the Tribunal powers equivalent to that of courts, thereby allowing the tribunal the power to adapt the contract. ***[PO2 p.60 Q39].***

36. Therefore, the Arbitral tribunal does have the jurisdiction to hear this dispute and adapt the contract, i.e. FSSA, in view of the powers vested with it, by the parties, through the inclusion of a hardship clause in the contract, as further provided by the law of Mediterraneo, which necessarily provides for such adaptation.

ISSUE 2: THE CLAIMANT IS ENTITLED TO SUBMIT THE EVIDENCE OF THE CONCURRENT ARBITRATION.

I.THE EVIDENCE IS ADMISSIBLE ACCORDING TO THE APPLICABLE LAWS AND GUIDELINES

37. The Arbitral Tribunal must allow the submission of the evidence from the concurrent arbitration as [A]. the HKIAC rules 2018 and the UNCITRAL model law allow the submission of the evidence. [B]. The evidence was obtained in a legal manner.

A. The HKIAC rules 2018 and the UNCITRAL model law allow the submission of the Evidence.

38. The parties in the current arbitration have agreed to conduct the proceedings on the basis of the HKIAC 2018 rules ***[PO1 §2 Pt.2]***. The UNCITRAL model law as amended in 2006, too will be taken in to consideration as it is the Law of Mediterraneo and the *Lex Arbitri* of the arbitration. ***[PO1 §4]*** Art. 19 of the Model law gives the powers to the arbitral Tribunal to determine the admissibility, relevance, materiality and weight of the evidence. In addition to the above, Art. 22 of the HKIAC rules allow the Tribunal to determine whether or not to apply strict rules on evidence. Accordingly, [a]. The Tribunal must not apply strict rules on evidence [b]. The evidence in question is not inadmissible [c]. The Evidence is admissible as it is relevant, material and bears weight in the arbitration.

a. The Tribunal must not apply strict rules on evidence

39. When determining the above criteria, the Tribunal must not apply strict rules on evidence as by agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the [perceived] simplicity, informality, and expedition of arbitration without following exclusionary rules. ***[Born ¶ 442]. [Sicard-Mirabal and Derains]***

40. Accordingly, the admissibility and treatment of evidence in domestic court proceedings may differ from that of arbitral proceedings, where an arbitral tribunal may admit evidence that is otherwise inadmissible in litigation. ***[BQP v BQQ]***

41. Therefore, even in the present instance the Arbitral Tribunal must allow the submission of the evidence in question restraining from applying strict rules on the same.

b. The evidence in question is not inadmissible

42. The inadmissibility of evidence may serve as a ground for the evidence to be refused or in ordering the evidence to be produced or excluded at situations where it is already admitted. Such refusal can be of two types firstly, refusal or exclusion on purely procedural grounds such as, noncompliance with deadlines set out by the tribunal for the submission of evidence; which is not related to the issue at hand. Secondly exclusion on the grounds of inadmissibility.

43. Tribunals shall not consider evidence which is ruled to be irrelevant, immaterial and inadmissible. The discretion of the arbitrators in determining the admissibly is subjected to the limitations of Evidence obtained in a manner contrary to international public policy (testimony gained through torture); which will be inadmissible, Evidence protected by privilege or secret. ***[Pilkov]***

44. The evidence in question will not fall under any of the above limitations of admissibility as the current evidence became known to the CLAIMANT by a customer of the CLAIMANT at the annual breeder's conference which is not a breach of any international public policies. ***[PO2 p.60 Q40]*** and further the partial interim award on the arbitration is to be purchased from a company which provides information on the horse racing industry, which is accessible to the public. ***[PO2 p.60 Q41]***

45. Therefore, the limitations on admissibility will not apply to the present evidence and hence is not inadmissible. Further the evidence is relevant, material and has significant effect to the arbitration and must be submitted to the present arbitration.

c. The Evidence is admissible as it is relevant, material and bears weight in the arbitration.

46. When addressing the admissibility of the evidence as mentioned in the HKIAC rules its relevance should be taken into consideration. The notion of "relevance" refers to the

relevance of evidence to the case, i.e., whether the facts substantiated by the evidence in question relate to the object of the dispute *[Bassiri and Draye]*.

47. The facts of the evidence can be related to the present dispute as, they not only share similar facts but the same objective as well. In both arbitrations the objective is for a price adaption which was requested due to the imposition of a tariff from the buyer's country. *[PO2 p.60 Q39]* In particular the RESPONDENT has requested for a price adaption under a similar circumstance which is the imposition of an unforeseeable tariff of 25% *[PO2 p.60 Q39]* In the current arbitration it is the CLAIMANT who is seeking for a price adaptation due to the tariff of 30% resulting in an additional loss of 25%. In addition, both arbitrations are governed by the rules of HKIAC, matching the key facts of both arbitrations.

48. Secondly, the notion of materiality of evidence is considered to be similar to relevance. However, it sees to the importance and the effect of the evidence towards the case. Facts verified by certain evidence may be relevant, in that they relate to the subject matter in dispute, but may be immaterial, in that they do not affect the outcome of the case. *[Bassiri and Draye].*

49. The present evidence against the RESPONDENT would have a significant effect on the outcome of the arbitration as mentioned above, both cases are based on the same objective of a price adaption. *[§ 37]* It should be noted that in the other arbitration the RESPONDENT has requested for a price adaption for the tariff of 25% under the hardship clause and Art. 6.2.3 of the UNIDROIT principles same as the CLAIMANT in the current situation. *[PO2 p.60 Q39]*

50. In addition, in the current arbitration the RESPONDENT has challenged the jurisdiction of the arbitral Tribunal just as the buyer in the other arbitration. *[ANoA p. 31; PO2 p.60 Q 39]* In the partial interim award rendered it was held that a standard arbitration agreement is sufficient to grant an arbitral tribunal the same powers as a court and accordingly gives the arbitral tribunal the jurisdiction to adapt the contract *[PO2 p.60*

Q39] which goes contrary to the RESPONDENT's submission affecting the outcome of the present arbitration.

51. It is evident that the RESPONDENT is against the submission of the evidence as the above decision would affect the RESPONDENTs submission, negatively Therefore, the evidence not only has significant relevance but will have material effect on the outcome of the arbitration.

52. Thirdly, the weight of evidence refers to the evidentiary value of evidence, i.e., whether the evidence bears proof of the facts relied upon by a party. Here the Tribunal will determine the value that should be given to the evidence. ***[Bassiri and Draye]*** Consistency, contradictions, conclusiveness, clearness and preciseness of statements, etc. are considered by some arbitration rules when determining the weight of evidence. ***[Michael Noth]***

53. Considering that the evidence in question; the information necessary for the submission of the evidence was obtained from a former employee or the partial interim award itself ***[PO2 p. 60 Q39,40],*** and since the information is drafted by the Arbitral Tribunal ***[p.62]*** the information regarding the evidence must be valued as material evidence.

54. The Art. 9 of the IBA rules on taking evidence allows the arbitral Tribunal to admit and assess evidence on its admissibility, relevance, materiality and weight of evidence. As discussed above considering that the evidence is in accordance with the criteria mentioned in the IBA guidelines, which is a set of rules used in majority of arbitrations ***[Born ¶ 2212]*** there is no requirement to restrict the CLAIMANT from submitting the evidence.

55. Extrinsic evidence is admissible if it [goes] towards proof of what the parties, from an objective viewpoint, ultimately agreed upon', subject only to the limitation that the extrinsic evidence 'is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context" ***[Zurich Insurance]***

56. Considering that the evidence in question is not only relevant and material to the arbitration but also has significant effect and is readily available to the parties the CLAIMANT must be given the right to submit the current evidence.

II. THE EVIDENCE WAS OBTAINED IN A LEGAL MANNER

57. The RESPONDENT states that the evidence should not be admitted to the current arbitration as the evidence would have been obtained by illegal means, which is either through the former employees or by hacking the RESPONDENT's computer system which occurred three weeks ago ***[p.50].*** However, it should be noted that the information about the concurrent arbitration was obtained by a third party and the CLAIMANT did not have any direct involvement in it. ***[PO2 Q41 p.60]*** Therefore***,*** the CLAIMANT is not in breach of any confidentiality provisions with regard to the other arbitration***[A]***.

A. The CLAIMANT is not in breach of any confidentiality provisions with regard to the other arbitration.

58. Firstly, it should be noted that confidentiality provisions in the parties' arbitration agreement are binding only on the parties themselves, and not on third parties ***[Born 2789].*** Therefore, neither the company who is to provide the partial interim award, nor the CLAIMANT was bound by any obligations of confidentiality as the current situation is an exception for confidentiality under the HKIAC 2013***[a]*** The UNCITRAL rules on transparency allow the disclosure***[b]*** The information is currently in the public Domain***[c].***

a. The current situation is an exception to confidentiality under the HKIAC 2013

59. The RESPONDENT stated that the submission of such evidence would only occur violating contractual and statutory obligations under the HKIAC 2013 rules which govern the concurrent arbitration. The only agreement which deals with confidentiality in the arbitration is the HKIAC 2013 arbitration rules, which discusses confidentiality in Art. 42.

60. However, the current situation is considered to be an exception under Art. 42.3 which states, **"the provisions in Art. 42.1 do not prevent the publication, disclosure or communication of information referred to in Art. 42.1 by a party. (i) to protect or pursue a legal right or interest of the party"**.

61. Considering that the parties in the concurrent arbitration are facing a similar situation of price adaptation and is willing to join the current arbitration in their interest, ***[p. 49]*** such disclosure of evidence will not amount to a breach of confidentiality between the parties.

b. The UNCITRAL rules on transparency allow the disclosure.

62. The RESPONDENT opposed to the use of the transparency rules of UNCITRAL stating that the provisions of the applicable rules must exclude the use of it. ***[p.50 §2]*** However, the UNCITRAL rules on transparency must be taken into consideration as a guideline in order to see the standards followed in international agreements.

63. Art. 1.9 of the rules allow the application of the rules to other arbitrations which is not governed by the UNCITRAL arbitration rules. Art. 3 allows for a wide range of documents, including the award, to be mandatorily and automatically disclosed, and allows the Tribunal to decide on whether to order disclosure of other documents. ***[Laurence Boisson De Chazourne; Rukia Baruti Dames]***

64. Under the Rules, information and documents in the arbitration process are made public, subject to certain safeguards, However Each published case will include: the notice of arbitration, the response to the notice of arbitration, the statement of claim etc. ***[UNCITRAL website FAQ]*** which is sufficient for the submission.

65. Therefore, the publication of the evidence is in line with the prevailing rules on transparency as evident in the Transparency rules of UNCITRAL.

c. The information is currently in the public Domain.

66. International Rules refer to confidential information as information which is not, and has never been, in the public domain. ***[Cook and Garcia]***

67. It should be noted that the CLAIMANT arranged to purchase the partial interim Award from a company which provides intelligence on the horse racing industry***. [PO2 p.60 Q41]*** The information is currently available to the public through the same company and is also discussed in the record. ***[PO2]*** The information which is readily available in the above-mentioned sources are sufficient to be submitted as evidence in the current arbitration. The available evidence is sufficient to be submitted.

68. Further It should be noted that confidentiality will not be in issue as discussed in cases such as ***Caratube*** where the tribunal has accepted leaked information as evidence, on the basis that this information is now public, and thus no longer is privileged or confidential. ***[Caratube].*** The same approach should be applied to the present situation as the information used as evidence will now be available to the public and also as the decisions of HKIAC arbitration proceedings are readily accessible on their website and is in public domain.

69. Therefore, the evidence in hand is no longer privileged or confidential and must be allowed to be used in the present arbitration.

B. THERE IS NO EVIDENCE AS TO THE ILLEGALITY OF THE SOURCE

70. It should be noted that the source from which the company who provides information on the horse racing industry is uncertain, but the CLAIMANT has made arrangements to purchase the information from the company in a legal manner. Hence the source from which the CLAIMANT obtained the information is legal. However, [a]. Even if it was obtained through hacking it would still be admissible.

a. Even if it was obtained through hacking it would still be admissible.

71. Even if the evidence is obtained by an illegal means the CLAIMANT still could submit the evidence to the arbitral Tribunal. The Tribunal must allow the submission as it has a broad discretion in the area and due to the absence of any precise rules which restrict the submission of illegally obtained evidence. ***[Sicard-Mirabal and Derains ¶ 194]***

72. Even in the present instance there is no clear evidence as to the source of the information but even if it was suspected to be through an illegal hack the evidence would still be admissible. ***[Caratube]***

73. In recent cases tribunals have relied on information obtained WikiLeaks and has set out the principle that an arbitral tribunal have can admit evidence of data or documents that were illegally obtained, for an instance through hacking. ***[Yukos; Opic Karimum Corporation; Caratube]*** The situation in hand is similar to the situation in the ***Caratube*** *case* where the Kazakhstan government's computer network was hacked and consequently, the claimant obtained access and relied on thousands of confidential documents that were published following the hacking.

74. Therefore, even in the present instance if it was assumed that the company who provided intelligence in the industry did so by hacking the RESPONDENTs system, at present the parties have access to the information and must be relied on. Even if the information was obtained by hacking the evidence should still be admitted as the CLAIMANT did not play any active part in such illegal activity and obtained such information through legal means, and that it is publicly available as it has been allowed in previous situations and is material to the current arbitration.

75. Accordingly, the arbitral Tribunal must allow the submission of the evidence, as the submission of such evidence does not breach any laws or guidelines in the arbitration proceedings and in addition is relevant, material and has significant effect to the outcome of the arbitration.

ISSUE 3. THE CLAIMANT IS ENTITLED FOR THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF PRICE.

76. The CLAIMANT is entitled for the payment of tariff or any other amount resulting from an adaptation of price because it is entitled to such payment under clause 12 of the contract, i.e. the hardship clause*[I]*, which the RESPONDENT based its reassurance on the hardship clause included in the contract*[A].* Thus, it is apparent that the intention as well *[a]* as the agreement between the parties was to adapt the contract in situations of hardship such as *[b]* the current situation, i.e. the unexpected increase of price due to the tariff, which destroyed the commercial basis of the contract*[B]*. The CLAIMANT is also entitled to the payment under the CISG and UNIDROIT Principles *[II]* pursuant to Art. 79 of the CISG *[A]* and has dutifully mitigated its losses under Art. 77 of the CISG, especially considering *[B]* the nature of the semen*[a]*. CLAIMANT is also entitled to remedy under Principle 6.2.3 of the UNIDROIT principles*[C]*.

I. CLAIMANT IS ENTITLED TO RECEIVE PAYMENT UNDER CLAUSE 12 OF THE CONTRACT.

77. The tariff imposed by the Government of Equitoriana as a response to the tariff placed by the government of Mediterraneo was not something the parties expected to take place during the time period of the contract *[CE 1 p. 16]*. Apart from this it was unusual that horse semen which was normally categorized differently from pigs, sheep or cattle were included in the same category when the tariff was imposed by the government of Equitoriana *[NoA p.16 ¶11]*. However, both parties agreed to include a hardship clause, i.e. Clause 12 of the contract, in preparation for adaptation in situations that would fall under hardship.

A. RESPONDENT BASED ITS REASSURANCE ON THE HARDSHIP CLAUSE IN THE CONTRACT.

78. The CLAIMANT had requested for renegotiations as soon as the change in tariff was made known to it *[CE 7 p. 16].* It needs to be taken to consideration that the delivery was only made following the telephone conversation between Ms. Napravnik, employee of the CLAIMANT, and Mr. Shoemaker, an employee of the RESPONDENT who was in

to Ms. Napravnik as the person responsible for the racehorse breeding program including "all questions concerning the Frozen Semen Sales Agreement." ***[PO2 p.67 Q 32]***.

79. When faced with the possibility of non-delivery of the final installment, Mr. Shoemaker stated that ***"if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price" [RE 4 p.36]***. It is solely because of this reason that the CLAIMANT agreed to deliver the goods to the RESPONDENT as both parties were fully aware of the hardship clause penned into the contract under clause 12, which provided for adaptation in situations of hardship.

80. If the change in price was not agreed upon and the CLAIMANT would not have taken the risk of going bankrupt given its difficult financial situation at the time. RESPONDENT was also reasonably aware of the CLAIMANTs situation at the time of consenting to the adaptation of price. **"*RESPONDENT was aware of unspecific rumors in the market that CLAIMANT was still in financial difficulties and had been losing money over the last years." [PO2 p.65 ¶ 22]***

81. CLAIMANT also understood through the interest in contracting for future deliveries expressed by Mr. Shoemaker that matters related to the present delivery would be solved amicably upon discussion. Considering the interest of both parties for a long-term contractual relationship, and the provisions in the contract for the CLAIMANT to discharge the burden of unanticipated risks that the adaptation clause was the choice of the RESPONDENT as well ***[CE 8 p. 18]***.

82. These factors and the understanding that she had relied on the person who was officially in charge of the matter and specially his view that there would be a change in price if it was in the contract, which as both parties had previously agreed was, convinced Miss. Napravnik of a desirable outcome regarding the negotiation. It had been agreed that the 12th clause in the contract allowed for situations of hardship and in such instances, for the costs to be borne by the RESPONDENT. ***[RE 2 p.18 ¶ 34]***.

a. It was the intention of the parties to allow adaptation through clause 12 i.e. the hardship clause.

83. Art 4.1 of UNIDROIT Principles state that a contract should be interpreted according to the parties' intention and if not, according to the understanding of a reasonable man of the same kind.

84. The intention of both parties was to adapt the contract under new circumstances and that the hardship clause should include adaptation so as to address such subsequent changes ***[CE 4 p.12]***. It was the parties intention to include a hardship clause which allowed for adaptation when necessary as there had been discussion regarding the matter between the RESPONDENT and CLAIMANT. The RESPONDENT's representative Mr. Antley promised to make a draft of the proposal with an express reference to a hardship clause ***[CE 8 p.17]***.

85. The parties' intention plays an important role in a contract. If the parties have agreed to a certain term they are to abide by it even if it was a statement made and agreed upon during the pre-contractual statements ***[Swedish Company v Lithuanian Company case]***. Thereby the parties should abide by what had previously been agreed upon and this will make the CLAIMANT void of any responsibility towards the additional risk it had to bear.

b. The Hardship clause was agreed upon by both parties

86. A Hardship clause provides that either party may request that the contract be re-opened for discussion when execution of the contract presents an economic hardship brought about by unforeseen circumstances. "If, at any time before the agreed delivery of Product, there is a substantial change in demand, economic, technological or market conditions which has made or will make it unfair or unreasonable for either Party to perform its obligations under the Agreement, the affected Party shall request to hold a meeting in order to negotiate a fair adjustment of the terms and conditions of the Agreement." ***[Boregaard Indus., Ltd. v AMRI Rensselaer, Inc.]***

87. The clause found in the contract of the parties was agreed upon due to the change in the delivery terms made by the RESPONDENT ***[CE 4 p. 12]***. It was only the RESPONDENT who benefited by the change ***[CE 3 p. 11]***. It was clear to both parties during the time of negotiation that the change of the delivery terms to DDP was made so that the delivery to the RESPONDENT would be made swifter. This was due to the CLAIMANTs experience in shipment of frozen semen and import documentation and not in any circumstance to burden the CLAIMANT ***[CE 8 p.17].***

88. The CLAIMANT made it clear, giving due consideration to the pre-contractual negotiations between parties that the intention behind the incorporation of a hardship clause was to protect CLAIMANT from all unforeseeable risks associated with DPP delivery as parties had agreed that any circumstance which would result in a situation of hardship would allow an adaptation to the contract ***[CE 5 p. 14]***. The CLAIMANT insisted on a hardship clause especially with the intention of discharging risk of possible changes, especially those ***"associated with changes in customs regulation or import restrictions."*** CLAIMANT was specifically concerned with unforeseeable changes that may ***"destroy the commercial basis of the deal"***. In this instance the circumstance of unforeseen trade tariffs falls within the instances the CLAIMANT insisted on being covered by the hardship clause ***[CE 5 p. 14 ¶ 12]***.

89. The ICC Hardship clause put forward by the CLAIMANT read that

"A party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.

Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:

A. the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that

B. it could not reasonably have avoided or overcome the event or its consequences,

C. the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow for the consequences of the event.

*Where paragraph 2 of this Clause applies, but where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this Clause is entitled to termination of the contract" **[International Chamber of Commerce]***

90. According to the clause above, if situation results in changing of the equilibrium of the contract the parties are able to unilaterally request termination of the contracts or adaptation of their terms ***[Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems, Inc.]***.

91. However, the RESPONDENT made it clear that the ICC Hardship clause suggested by the CLAIMANT was too broad and narrowed the scope of the clause ***[PO2 p. 63 Q12]***.

92. Nevertheless, Clause 12, to which both the RESPONDENT and the CLAIMANT agreed to, and the ICC clause use similar wording and brings out a similar meaning which states that, in any unforeseeable event which would lead to making the contract onerous, it would be considered a situation of hardship.

93. According to the court of Cassation price fluctuations makes contracts more onerous ***[Stove Case]*** and in this situation the imposition of a 30% tariff would make the CLAIMANT seriously financially endangered ***[PO2 p.66 Q 29]***.

B. THE CURRENT SITUATION, I.E THE UNEXPECTED INCREASE OF TARIFF FALLS INTO THE AMBIT OF HARDSHIP.

94. According to 6.2.2 of the UNIDROIT Principles,

Hardship is where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party

95. In the present case the four requirements of hardship have been satisfied. Firstly, the increase in tariff was made known to the CLAIMANT after the contract was concluded and when it was about to authorize the last shipment of semen ***[CE 7 p. 16]***. Secondly such an event was not taken into account by the CLAIMANT as it was unusual for Mediterraneo to use such retaliatory measures ***[CE 6 p.15]***. Thirdly the events were completely beyond the CLAIMANTs control as they imposed by a higher authority, a government of a different state. Finally, the risk of the events was not assumed given the fact that the parties had already agreed on a hardship clause ***[CE 5 p.14]***.

96. In ***Boregaard Indus., Ltd. v AMRI Rensselaer, Inc,*** a situation of hardship would have to fulfill the following requirements,

" Either the "unforeseen circumstances" term in the first sentence applies only to the first sentence of the Hardship clause or one or more of the "hardships" on which the termination was based were in fact "unforeseen"; and One or more qualifying "hardships" made it unfair or unreasonable for seller to perform its obligations; and seller in good faith attempted to "negotiate a fair adjustment to the terms and conditions of the Agreement."

97. This criteria has been fulfilled by the CLAIMANT as firstly, it could not have foreseen an imposition of a 30% tariff by the Equitorian government due to its reputation of settling disputes amicably ***[CNoA p.6]***. Secondly, the situation of hardship made it unreasonable for the CLAIMANT to perform as an additional burden would be placed, given its difficult

financial situation. However, the decision to perform was based on RESPONDENT's reassurance during the renegotiation. ***[RE 4 p.36]***.

98. In the ***Bus Advertisements case*** the tribunal supremo held that in present times hardship clauses have a wider scope and that if the equilibrium of a contract was unbalanced then in such a situation as in the present case the parties are able to rely on a hardship clause and adapt the contract.

II. THE CLAIMANT IS ENTITLED TO US$ 1,250,000 UNDER THE CISG AND THE UNIDROIT PRINCIPLES.

A. THE CISG GOVERNS HARDSHIP PURSUANT TO ARTICLE 79.

99. Art. 79 states that

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

100. The legislative history of Art 79 shows that the term "impediment" required an objectively identifiable barrier to promisor's performance ***[R Goode]***.

101. Though the Article now provides a limited scope, the CLAIMANTs situation will prevail even under this narrow definition due to the circumstances CLAIMANT is faced with ***[CISG Advisory Council Opinion No. 7]***. Despite narrowing the definition of what an impediment is, the legislative history of the Article does not leave out hardship completely and does not state that situations of hardship are not categorized under "impediments".

102. One of the controversial points in the preliminary UNCITRAL discussions was whether economic difficulties - "unaffordability" - constitute a ground for exemption. In the end, the general view was that both physical and economic impossibility could exempt an obligor. It cannot be concluded, therefore, on the basis of the change in terminology from

"circumstances" in ULIS Art. 74(1) to "impediments" that an impediment in the sense of Art. 79(1) of the Convention is only an occurrence that absolutely bars performance, but - under very narrow conditions - impediment also includes "unaffordability" ***[Schlechtriem].***

103. The CISG Advisory Opinion no. 7 states, a change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("hardship"), may qualify as an "impediment" under Art. 79(1) [***Cl. 3.1]***. The language of Art. 79 does not equate the term "impediment" with an event that makes performance absolutely impossible. Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Art. 79 ***[Advisory Council Opinion No. 7 Cl. 3.1]***.

104. In the current case the performance was not absolutely impossible. The CLAIMANT was able to make a DDP delivery of the frozen semen to the RESPONDENT however the circumstances of the contract have substantially changed so that fulfilling the agreement would be economically detrimental taking also into account the CLAIMANTs current financial situation ***[CE 8 p. 17].*** Therefore, the CLAIMANT can rely on Art. 79 of the CISG in order to receive damages for the additional tariff which had to be borne in the very least.

105. Case law too supports the fact that economic hardship is governed under Art. 79 of the CISG. In the case of ***Scaform International case*** the change in market prices which affected the equilibrium of the contract and an impediment which was unforeseeable at the time of concluding the contract, placed an undue burden on the seller. Therefore, the situation of this case was considered one of hardship under the CISG.

106. In the ***Acoustic prosthetics case*** the court held that *"Wegfall der Geschaftsgrundlage";* the German equivalent of hardship, was covered by Art. 79 of the Convention. Therefore, since the court determined that hardship was covered by Art. 79, the issue was, in its opinion, settled in the Convention.

107. If the hardship imposes unreasonable obligations on the promisor, then the promisee should be obliged either to enter into negotiations to adapt the contract to the changed circumstances or to agree to the promisor's release from his obligation. ***[Magnus], [Brunner]***

108. In the present case, the CLAIMANT, duly informed the RESPONDENT of its inability to fulfill its contractual obligation, due to the fact that the hardship faced, made its obligations unreasonable and onerous to perform, in the absence of an increase of price, and conveyed its intention to either be released from its obligation under the hardship clause to continue to fulfill its obligations through adaptation of the contract. It is at this point, the RESPONDENT, expressly assured the CLAIMANT, that the price could be increased if the contract provides for it, and it was only based on this assurance, and as the contract Clause 12 provided for such increase/ adaptation, in hardship, that the CLAIMANT duly performed its obligation. Therefore, the RESPONDENT, must abide by its promise and pay the CLAIMANT, and the RESPONDENT's failure or refusal to fulfill its promise, amounts to breach of contract.

B. CLAIMANT IS ENTITLED TO REMEDY PURSUANT TO 6.2.3 OF THE UNIDROIT PRINCIPLES

109. The Art. states,

(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) If the court finds hardship it may, if reasonable,

(a) terminate the contract at a date and on terms to be fixed, or

(b) adapt the contract with a view to restoring its equilibrium.

110. Under UNIDROIT Principles Art.6.2.3, if there is hardship, the contract should be renegotiated; if renegotiations remain unsuccessful, the courts or arbitrators may, "if reasonable"; either terminate the contract on the terms they deem appropriate or adapt the contract to restore the balance.

111. On the occasion of a substantial increase in seller's costs due to the adoption of new safety regulations in buyer's country, Seller is entitled to request buyer to renegotiate the original contract price so as to adapt it to the changed circumstances ***[Illustration 3 UNIDROIT principles 6.2.3]***. The CLAIMANT requested for renegotiations. Ms. Napravnik and Mr. Shoemaker had a telephone conversation regarding the adaptation of the price as a result of the 30% tariff being imposed on horse semen ***[p.34]***. The claim for adaptation for the contract should be submitted without an unreasonable delay ***[Bank agreement case]***. The request was made immediately after the CLAIMANT was informed by the customs authorities that the newly imposed tariffs were applicable to the final shipment ***[CE 7 p. 16]***

112. As per the second clause the mere fact that there was a disadvantage for one party would not allow that party to stray from the terms of the contract ***[Marketing agreement case; Bank loan case; Airport pavement case]***. The CLAIMANT has performed its contractual obligations towards the RESPONDENT by shipping the final 50 doses of semen which the RESPONDENT requested.

113. The parties did come to an agreement that there would be an adaptation of price if the contract gave allowance for such an adaptation, as shown above in ¶ 84.

114. Even if the CLAIMANT's renegotiation failed the Tribunal could award an adaptation of price as the CLAIMANT has fulfilled the all requirements of hardship ***[Oil case]***.

C. THE CLAIMANT HAS FULFILLED ITS DUTY TO MITIGATE ITS LOSSES BY VIRTUE OF ARTICLE 77 OF THE CISG.

a. Nature of the semen.

115. Art. 77 states that,

"a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated. "

116. Appropriate measures are those aimed at lessening the loss as far as reasonably possible ***[Knapp]***

117. Unlike in the cases of ***Dutch seller v German buyer*** and ***The Frozen Shrimp case*** where the respective parties had breached its obligations to mitigate losses, the CLAIMANT had acted in a reasonable way that has mitigated its losses it would have otherwise incurred, as in the ***Jewellery caseneu***, considering the nature of the horse semen. Fresh semen should be used within a few hours. Chilled semen can last 24 to 72 hours depending on the stallion and the way it is processed. Generally, it should be used within 24 hours ***[John Chopin].***

118. If the CLAIMANT had not relied on Mr. Shoemaker who was the designated person appointed by the RESPONDENT regarding the matter, it would have incurred greater losses having to do away with 50 doses of frozen semen as it could not have contacted a substitute buyer within such a short period of time.

119. Therefore, the CLAIMANT is entitled for the payment of US$ 1,250,000 or any other amount resulting from an adaptation of price pursuant to clause 12 of the contract, CISG and UNIDROIT Principles.

PRAYER FOR RELIEF

In light of the above CLAIMANT requests the Arbitral Tribunal to

a. To declare that the Tribunal has the jurisdiction to hear and determine this matter

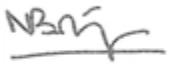
b. To declare that the Tribunal has the jurisdiction to adapt the contract

c. To allow the CLAIMANT to submit the evidence of the concurrent arbitration.

d. To Order the RESPONDENT to pay an additional amount of at least USD 1,250,000 which is 25% of the price for the third delivery of semen.

CERTIFICATION

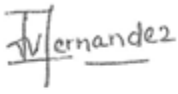
This is to confirm that this memorial was the creation of the undersigned.



Nishel Boteju

Shaamil Shakeer

Nithma Fernando



Vinusha Fernandez