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WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

11 TO 18 APRIL 2019

MEMORANDUM FOR CLAIMANT

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

BENGALURU

धर्मो रक्षति रक्षितः

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

COUNSEL

• SATYAJIT BOSE • SRINIVAS NC • VRISHANK SINGHANIA

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LIST OF ABBREVIATIONS

%	per cent
$	Dollar
&	And
§/§§	Paragraph(s)
AC	Appeal Cases
All E.R.	All England Reports
Art.	Article
BG	Schweizerisches Bundesgericht (Federal Supreme Court of Switzerland)
BV	besloten vennootschap (Private Company)
BVI	British Virgin Islands
CA	Cour d'appel (French Court of Appeal)/Court of Appeal
CAM	Centre de Arbitraje de México
cf.	Confer
Cir.	Circuit
CISG	The United Nations Convention on Contracts for the International Sale of Goods
CISG-AC Op.	CISG Advisory Council Opinion
Cl. Ex. No.	CLAIMANT'S Exhibit Number

CLOUT	Case Law on UNCITRAL Texts
Co.	Company
Comm	Commercial
DC	District Court
DDP	Delivery Duty Paid
Ed(s).	Editor/s
ed.	Edition
et al.	et alii (and following)
EWHC	High Court of Justice
f./ff.	folio (on the next page/s)
GmbH	Gesellschaft mit beschränkter Haftung (Private Limited Co.)
HG	Handelsgericht (Swiss Commercial Court)
HKIAC	Hong Kong International Arbitration Centre
i.e.	that is
ibid	ibidem
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
id.	idem

Incoterms	International Commercial Terms
Intl.	International
Lloyd's Rep	Lloyd's Law Reports
Ltd.	Limited
Mr.	Mister
MünchKomm BGB	Münchener Kommentar zum Bürgerlichen Gesetzbuch
NCL	Norwegian Cruise Lines
NIOC	National Iranian Oil Corporation
No.	Number
NY Convention	New York Convention
ObLG	Oberlandesgericht (Austrian Regional Appellate Court)
OGH	Oberster Gerichtshof (The Austrian Supreme Court of Justice)
OLG	Oberlandesgericht (German Regional Court of Appeal)
p(p).	page(s)
P.O. 1	Procedural Order Number One
P.O. 2	Procedural Order 2
Rb	Arrondissementsrechtbank (Dutch District Court)
Resp. Ex. No.	RESPONDENT'S Exhibit Number

RNoA	Response to Notice of Arbitration
S.a.r.l.	société à responsabilité limitée (Private Limited Co.)
S.A.S	Société par actions simplifiée (Unlisted Public Co.)
S.p.A	Società per Azioni (Public Limited Co. by Shares)
Sdn. Bhd	Sendirian Berhad (Private Limited Co.)
SGHC	Singapore High Court
Supra	see above
TC	Tribunal Cantonal (Swiss Regional Appellate Court)
UN	United Nations
UNCITRAL	The United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
UNIDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts
v.	Versus
VAT	Value Added Tax
VSC	Vulcan Steel Company
WLR	Weekly Law Reports

STATEMENT OF FACTS

Phar Lap Allevamento [hereinafter '**CLAIMANT**'] and Black Beauty Equestrian [hereinafter '**RESPONDENT**'] are the '**PARTIES**' to this arbitration.

CLAIMANT is a company located in Mediterraneo, whose operations cover multiple areas of equestrian sport. In particular, CLAIMANT operates a racehorse breeding programme for English thoroughbreds and Anglo-Arabs, also selling the frozen semen of its' distinguished stallions. Njinsky III is one of CLAIMANT'S most successful racehorses, having won numerous accolades.

RESPONDENT is a company in Oceanside, Equitoriana, that is renowned for its broodmare lines. Recently, RESPONDENT decided to acquire ten mares, in order to enter the rapidly expanding Equitorianian racehorse industry.

21 March 2017 RESPONDENT initiated contact with CLAIMANT by asking for a quotation for 100 doses of Njinsky III's semen. RESPONDENT also mentioned that the Equitorianian Government had temporarily lifted a ban on artificial insemination for racehorses.

24 March 2017 CLAIMANT responded with an offer of 99.500 USD per dose of Njinsky III's semen, subject to certain terms and conditions. CLAIMANT would provide the semen in installments and express consent would be required for re-sale.

28 March 2017 RESPONDENT accepted the terms of CLAIMANT'S offer, with two notable objections. RESPONDENT requested that the contract be on the basis of DDP, due to the CLAIMANT'S expertise in the transportation of frozen semen. Moreover, RESPONDENT objected to both the law and courts of Mediterraneo having jurisdiction.

31 March 2017 CLAIMANT accepted a DDP Delivery for the contract, subject to an increase in price by 100 USD per dose and the inclusion of a hardship clause. Additionally, arbitration in Mediterraneo was suggested.

10 April 2017 RESPONDENT had drafted an arbitration clause, which was a narrower version of the HKIAC Model Clause. It provided for arbitration under the aegis of the HKIAC, with the seat of the arbitration and the governing law being Equitoriana.

11 April 2017	CLAIMANT stated that it could not subject a contract to a foreign law or provide for arbitration in the jurisdiction of the counter-party without the consent of the Creditors' Committee. Rather, CLAIMANT suggested that Danubia should be the seat of the arbitration and recommended the use of the ICC Hardship clause.
12 April 2017	Ms. Napravnik and Mr. Antley met in Vindobona, wherein they agreed that the arbitrators should have the power to adapt the contract, irrespective of express authorization.
6 May 2017	The parties concluded the Frozen Semen Sales Agreement [hereinafter 'Sales Agreement'] which contained a hardship clause [hereinafter 'Clause 12'] and an arbitration clause providing for arbitration in Vindobona, with Mediterranean law and CISG governing the contract.
19 December 2017	The Equitorianian Government imposed a 30% tariff on all agricultural goods, including semen used for artificial breeding. This tariff was imposed in response to the imposition of tariffs by the Mediterranean Government.
20 January 2018	CLAIMANT contacted RESPONDENT, asking for a solution before the final shipment was dispatched. This was because the tariff would lead to an unsustainable 25% loss for CLAIMANT.
21 January 2018	Mr. Shoemaker assured Ms. Napravnik that a solution would be achieved through negotiation. Moreover, he emphasized the urgency of the delivery and asked Ms. Napravnik to authorize the shipment.
12 February 2018	Request for adaptation was rejected by RESPONDENT's CEO.
31 July 2018	CLAIMANT submitted its' Notice of Arbitration
24 August 2018	RESPONDENT submitted its' response to the Notice of Arbitration.
2 October 2018	CLAIMANT informed the Tribunal that it had received information that the RESPONDENT was seeking adaptation in a different arbitration administered by the HKIAC.
3 October 2018	RESPONDENT objected to the admissibility of this information. It stated that such information was obtained illegally, either by a hack of its computer systems, or by a breach of a confidentiality agreement.

SUMMARY OF ARGUMENTS

CLAIMANT and RESPONDENT entered into an agreement for the sale of horse semen. This contract was crucial for CLAIMANT as it had been in a financially precarious position over the last few years. Subsequently, Equatoriana imposed a completely unexpected 30% tariff on the import of horse semen. CLAIMANT had always been clear that it would not accept such risks associated with the delivery of the semen. Yet, in good-faith, it delivered the doses of semen because RESPONDENT needed them urgently and was assured that a solution would be arrived at. The costs that CLAIMANT bore were so substantial that it would have to sell a part of its business, if made to abide by the original contractual terms. Given that the fundamental equilibrium of the contract had now been altered, CLAIMANT attempted to negotiate, albeit unsuccessfully, with RESPONDENT to adapt the price. CLAIMANT, therefore, requests the Tribunal to restore the contractual equilibrium, which is justified as per clause 12 of the Sales Agreement and also, under the CISG. **(Issue III)**

After the negotiations proved unsuccessful, CLAIMANT had approached this Tribunal to adapt the contract. However, RESPONDENT has challenged the power of this Tribunal to do so. When Mr. Antley and Ms. Napravnik had met in Vindobona, it was agreed that the Tribunal should have the power to adapt the contract, if the parties failed to reach an agreement. However, this was not reflected in the Sales Agreement, because the negotiators were subsequently incapacitated. RESPONDENT contends that since Danubian law governs the arbitration clause, the parole evidence is applicable. CLAIMANT, however, rejects this submission, as the law of the underlying contract i.e., Mediterranean law, extends to the arbitration clause, either as an express or as an implied choice. Thus, the parol evidence rule is inapplicable. **(Issue I)**

In the present case, RESPONDENT who deny the need to adapt the contract, themselves sought adaptation in another proceeding. This was in light of the tariffs imposed by the Equatorianan and Mediterranean Governments. Moreover, when CLAIMANT sought to submit material that evidenced this contradictory stance, RESPONDENT objected to its admissibility on the grounds that it had been obtained illegally. CLAIMANT, however, submits that the Tribunal does have the power to admit this evidence, even if it has been illegally obtained. Additionally, the Tribunal *should* admit this evidence because in the present case, the interest in accurate fact-finding outweighs any potential infringement of the RESPONDENT'S procedural rights. **(Issue II)**

ARGUMENTS

[1] THE TRIBUNAL HAS THE POWER TO ADAPT THE CONTRACT

1. Clause 15 of the Sales Agreement compels both parties to refer *'any dispute arising out of this contract'* to HKIAC administered arbitration [*Cl. Ex. 5*]. RESPONDENT has asserted that this Tribunal does not have the power to adapt the contract, based on two erroneous propositions. First, the governing law of the arbitration clause is Danubian law i.e. the law of the seat. Second, the adaptation claim is not within the scope of the arbitration clause, as Danubian law adheres to the '*four corners rule*' of contractual interpretation [*RNoA ¶ 16*].

2. CLAIMANT respectfully requests this Tribunal to reject these challenges on the following grounds, *first*, the interpretation of the arbitration clause is governed by Mediterranean law [**1.1**], and *second*, the adaptation claim falls within the scope of the arbitration clause [**1.2**].

[1.1] THE INTERPRETATION OF THE ARBITRATION CLAUSE IS GOVERNED BY MEDITERRANEAN LAW

3. Any dispute regarding the scope of an arbitration clause is governed by its' proper law, which is distinct from the law governing the conduct of arbitration proceedings [*Redfern/Hunter p. 167; Bernardini 1999 p. 199; Bantekas p. 5*]. While determining the governing law of the arbitration clause, international tribunals are not bound by the conflict-of-law rules of the seat, as they do not have a *lex fori* [*Redfern/Hunter p. 222; De Ly in Ferrari/Kroll p.6*]. Therefore, the governing law may be determined by this Tribunal using such rules as it deems fit [*Goldman 1979 p. 491; Mayer p. 247*]. CLAIMANT submits that the principle of party autonomy must be given primacy while determining the proper law [*Art. V(1)(a) NY Convention; Bermann p. 137; Blessing 1999 p. 171*]. This is due to the parties' will, whether express or implied, which forms the foundation of an arbitration clause [*Pilich p. 238; Born p. 560; Redfern/Hunter p. 18*]. If the intentions of the parties cannot be determined, this Tribunal should then objectively determine the law with the closest connection to the arbitration clause [*Fouchard/Gaillard/Goldman p. 222; Born p. 518; Case No. 4367 (ICC); Abuja v. Meridien ¶ 22*].

4. CLAIMANT submits that the arbitration clause is governed by Mediterranean law for three reasons, *first*, the express choice of law in the Sales Agreement extends to the arbitration clause [**1.1.1**], *second*, the parties have implicitly chosen Mediterranean law [**1.1.2**], *third*, Mediterranean law has the closest connection with the arbitration clause [**1.1.3**].

[1.1.1] The Express Choice of Mediterranean Law Extends to the Arbitration Clause

5. Clause 14 of the Sales Agreement contains a choice of law clause, under which Mediterranean Law and the CISG have been chosen to govern the contract. RESPONDENT contends that the arbitration clause is '*legally separate'* from the Sales Agreement under Art. 16(1) of the Danubian Arbitration Law [*RNoA ∫ 15*]. While it is recognised that the arbitration clause is presumptively separable from the container contract, CLAIMANT contests the application of this presumption in the present case.

6. CLAIMANT submits that the doctrine of separability is inapplicable because, *first*, the existence or validity of the Sales Agreement has not been challenged [**1.1.1.1**], *second*, the 'Sales' Agreement includes the arbitration clause [**1.1.1.2**] and *third*, the parties did not intend to separate the arbitration clause from the Sales Agreement [**1.1.1.3**].

[1.1.1.1] The Existence or Validity of the Sales Agreement has not been Challenged

7. Art. 16(1) of the Danubian Arbitration Law is a verbatim adoption of Art. 16(1) of the UNCITRAL Model Law [*PO1 ∫ 4*]. Under Art. 16(1), the arbitration clause is treated as an agreement '*independent of the other terms of the contract*', if the validity or existence of the main contract has been challenged.

8. However, this does not insulate the arbitration clause from other substantive provisions of the contract [*Sulamerica v. Enesa p. 114*]. Art. 16(1) makes use of the phrase '*for that purpose'*, which limits the separability presumption to cases where the validity or existence of the contract has been challenged [*Glick/Niranjan p. 137; Choi 2016 p. 122*]. For the purposes of determining the governing law, the arbitration clause is a part of the Sales Agreement, and will be governed by the choice of law clause contained therein [*Primrose p. 143; Derains p. 16; Union of India v. McDonnell ∫ 48; Klockner v. Advance Technology ∫ 26*].

9. In the instant case, RESPONDENT has not challenged the validity or existence of the Sales Agreement. On the contrary, RESPONDENT has merely argued that certain powers fall outside the scope of the arbitration clause [*PO 2 ∫48*]. Therefore, clause 15 cannot be *'legally separate'* from the Sales Agreement under Art. 16(1), since it goes beyond its statutory scope.

[1.1.1.2] The 'Sales' Agreement Includes the Arbitration Clause

10. RESPONDENT has differentiated between the 'Sales' Agreement and clause 15 in order to separate the arbitration clause from the substantive provisions of the contract [*RNoA ¶14*]. This amounts to classifying the obligations imposed by the arbitration clause as being distinct and procedural in nature, as opposed to the substantive provisions of the contract [*Sojuznefteexport v. JOC Oil; Cristina v. Del Drago; Institute de droit Resolution; Mann p. 162*].

11. CLAIMANT submits that such a classification would be an inaccurate depiction of the juridical nature of an arbitration clause. Arbitration clauses are neither procedural nor substantive, but '*have a hybrid nature, comprising both procedural and contractual elements*' [*Berger 2007 p. 302; Sauser-Hall p.469; Surville p. 634; Lew/Mistelis/Kroll p.80*]. While the primary purpose of an arbitration clause is resolution of disputes, it remains a private contract by which parties forego judicial dispute resolution [*Samuel p. 39; Fouchard ¶ 18*]. Therefore, the arbitration clause is a product of the will of the parties to resolve their disputes through an alternate private mechanism. This, therefore, cannot be characterised as merely procedural [*Onyema p. 24*] and hence, the 'Sales' Agreement should not be separated from the arbitration clause.

[1.1.1.3] The Parties did not Intend to Separate the Arbitration Clause

12. CLAIMANT acknowledges that the arbitration clause may be separated from the Sales Agreement, if the intention of the parties had been to do so [*Choi 2016 p. 122; Born 352; BG 27 Feb 1970; Peterson Farms v. C & M Farming p. 609*]. This Tribunal should, therefore, differentiate between an arbitration clause that is concluded in a separate document (i.e. freestanding arbitration agreement) and an arbitration clause in a contract [*Sulamerica v. Enesa p. 114*; *BCY v. BCZ ¶ 66; Born p. 490*].

13. The presumption that the parties intended to separate the arbitration clause from the contract is only applicable when they are concluded separately [*Trukhtanov p. 142*]. In such circumstances, the governing law of the contract would not extend to the arbitration clause. However, if the parties include the arbitration clause within the container contract, it cannot be presumed that the parties intended to separate the agreement [*Ibid*].

14. The negotiation history of the arbitration clause provides no indication that the parties intended its separation. In the instant case, the parties did not conclude the arbitration clause separately from the substantive provisions of the contract. On the contrary, the negotiations for the arbitration clause took place in tandem with those for the Sales Agreement [*Resp. Ex. 1*]. Thus,

CLAIMANT submits that clause 15 was not intended to be interpreted separately, under a different governing law. Hence, Mediterranean law will govern the arbitration clause.

[1.1.2] THE PARTIES HAVE IMPLICITLY CHOSEN MEDITERRANEAN LAW

15. In the absence of an express choice by the parties, the Tribunal must determine whether the parties made an implied choice in favour of any national law [*Art. V(1)(a) NY Convention; Dicey and Morris p. 829; XL Insurance v Owens Corning p. 506*].
16. CLAIMANT submits that the parties have made an implied choice in favour of Mediterranean law for the following reasons, *first*, the governing law of the Sales Agreement is an implied choice to govern the arbitration clause [**1.1.2.1**] and *second*, in any event, an implied choice in favour of the seat cannot be concluded [**1.1.2.2**].

[1.1.2.1] The Governing Law of the Sales Agreement is an Implied Choice of Law to Govern the Arbitration clause

17. When the underlying contract contains an express choice of law, the law of the contract is an implied choice of law for the arbitration clause. This is unless there are additional factors which displace such a presumption [*Born p. 476; Sonatrach v. Ferrell § 32; Mustill/Boyd p. 63; Jarvin p.* 52; *Goldman 1968 § 57; Arsanovia v. Cruz City p. 1042; Case No. 6752 (ICC)*]. Accordingly, Mediterranean law will govern the arbitration clause. CLAIMANT therefore submits that the governing law of the contract is an implied choice because, *first*, reasonable commercial parties would have chosen the law of the contract [**1.1.2.1.1**] and *second*, Art. V(1)(a) of the New York Convention is inapplicable [**1.1.2.1.2**].

[*1.1.2.1.1*] *Reasonable Commercial Parties Would Choose the Law of the Contract*

18. Accordingly, if the arbitration clause has been included in the contract, it is presumed that the parties intended all clauses in the contract to be governed by the same law [*Lew § 136; Redfern/Hunter p.125; Fouchard/Gaillard/Goldman p. 223; Case No. 10044 (ICC)*]. This standard operates on the presumption that rational commercial parties are generally unaware of the presumptive separability of the arbitration clause, and would choose one uniform system of law to govern the entire agreement [*Choi 2016 p. 122; Born 582; Owerri v. Dielle p.706; Lew/Mistelis/Kroll p. 107; Born p. 444*]. Therefore, if the governing law of the arbitration clause has not been specified, commercial reasonability would dictate that the law of the contract is an implied choice.

[*1.1.2.1.2*] *Art. V(1)(a) of the New York Convention is Inapplicable*

19. Art. V(1)(a) of the New York Convention is inapplicable to assert that the law of the seat governs the arbitration clause [*FirstLink v. GT Payment ∫ 15*]. Admittedly, it has often been held that Art. V(1)(a) provides an implied choice of law in favour of the seat, in the absence of an express choice. [Case No. 6149 (ICC)]. Such an assertion is premised on applying post-award conflict of law provisions to the enforcement stage by analogy [*Born p. 496; Nacimiento in Kronke/Nacimiento/Dirk/Port p.225*].

20. However, Art. V(1)(a) cannot be applied in the instant case. *First*, the relevant rules governing the enforcement of the arbitration clause are contained within Art. II, while Art. V(1)(a) can only be invoked for the enforcement of the arbitral award. [*Choi 2016 p. 126; Bernardini 1999 p. 200; Lindo v. NCL (Bahamas)*]. *Second*, Art. V(1)(a) does not provide any standard for determining the implied intention of the parties [*BCY v. BCZ ∫ 64*]. It simply states that '*failing any indication'* whatsoever of the governing law, the law of the seat must be applied. Therefore, Art. V(1)(a) does not provide for an implied choice in favour of the seat.

[1.1.2.2] An Implied Choice in Favour of the Law of the Seat Cannot be Concluded

21. Certain jurisdictions have held that in the absence of an express choice, the parties have made an implied choice in favour of the law of the seat [*Hamlyn v. Talisker ∫ 208; Case No. 1507 (ICC); Rocco v. Federal Commerce and Navigation p. 465*]. However, this presumption may be displaced by the actions of parties which indicate otherwise [*Glick/Niranjan p. 146*].

22. CLAIMANT submits that the parties did not implicitly choose the law of the seat as, *first*, the exclusion of the choice of law clause was deliberate [**1.1.2.2.1**] and *second*, the assent of the Creditors' Committee had not been obtained [**1.1.2.2.2**].

[*1.1.2.2.1*] *The Exclusion of the Choice of Law in the HKIAC Arbitration Clause was Deliberate*

23. RESPONDENT has relied on the choice of Equitorianan law in the suggested arbitration clause as an indication of the implied choice of the parties [*RNoA ∫15*]. In support of this proposition, RESPONDENT has stated that one of the defining features of an HKIAC Arbitration clause is the explicit reference to its' governing law [*RNoA ∫15*].

24. CLAIMANT submits that the exclusion of the choice of law must be interpreted as an '*implicit negative choice'* against the law of the seat. In certain cases, the Tribunal is required to interpret the negative stipulations that parties have implicitly applied to their agreements [*Blessing 1997 p. 44; NIOC* v. *Sapphire p. 172; Case No. 7139 (ICC)*]. In particular, the Tribunal is required to determine whether the absence of a specific choice of law was made to exclude the application of the law of the seat.

25. By explicitly removing the choice of law, CLAIMANT had deliberately rejected the law of the seat. If CLAIMANT had intended the law of the seat to apply, it would have been specified in the arbitration clause, as was done in the initial agreement drafted by RESPONDENT [*Resp. Ex. 1*]. In the instant case, this Tribunal should interpret the absence of a specific choice of law as a negative choice exercised by CLAIMANT against the law of the seat.

[*1.1.2.2.2*] *The Assent of the Creditors' Committee had not been Obtained*

26. RESPONDENT had drafted the initial arbitration clause, wherein the seat of the arbitration and governing law were both Equitoriana [*Resp. Ex. 1*]. In response to this, CLAIMANT communicated that special approval of the Creditors' Committee would be needed to provide for dispute resolution in the country of the counter-party or if the contract was being subjected to a foreign law [*Resp. Ex. 2*].

27. If the parties had intended to choose Danubian law, CLAIMANT would have had to obtain the approval of the Creditors' Committee. In the instant case, CLAIMANT had not obtained the consent of the Creditors' Committee before signing this contract [*PO2 ∫*14]. In the absence of the same, CLAIMANT would not have submitted the arbitration clause to Danubian law.

[1.1.3] MEDITERRANEAN LAW HAS THE CLOSEST CONNECTION WITH THE ARBITRATION CLAUSE

28. If this Tribunal is unable to ascertain the express or implied intention of the parties, the '*closest and most real connection'* test should be used to determine the proper law of the arbitration clause [*Dicey and Morris p. 829; Restatement ∫ 218; Sonatrach v. Ferrell ∫ 32; Choi 2015 p.110*]. As per this test, the Tribunal objectively evaluates which law has the closest connection to the arbitration clause [*Lew/Mistelis/Kroll 118; Born p.479; Fouchard/Gaillard/Goldman p. 222*].

29. CLAIMANT submits that Mediterranean law has the closest connection with the arbitration clause because, *first*, the law of the seat has no connection with the arbitration **[1.1.3.1]**and *second*, the interpretation of the arbitration clause has the closest connection with Mediterranean law **[1.1.3.2]**.

[1.1.3.1] The Law of the Seat has No Connection with the Arbitration

30. The seat has often been held as the '*centre of gravity'* in international arbitration, which has been interpreted as a significant connection with the arbitration [*Redfern/Hunter §3.51; Bharat Aluminium v. Kaiser Aluminium p. § 72*]. This perspective is based on two flawed assumptions regarding the supervisory role of the law of the seat in conducting arbitration and the judicial enforcement of the award in the seat. [*Paulsson 1981 p. 361*].

31. The relevance of the law of the seat has reduced greatly in light of de-localisation of international arbitration [*Toope p.19; Paulsson 1983 p. 53*]. While arbitration can never be completely detached from municipal law, the source of the tribunal's authority lies in the arbitration clause, which is private in nature [*Lalive p. 99*]. Therefore, the parties can circumvent the application of the law of the seat by choosing specialised institutional arbitration rules [*Art. V(1)(d) NY Convention; Gotaverken Arendal v. Libyan Maritime Transport Company p. 555*]. Moreover, the Tribunal does not have a *lex fori* and thus, it is not under any obligation to apply the conflict-rules of the forum [*Goldman p. 491; Mayer p. 247; Redfern/Hunter p. 122*]. Lastly, the choice of seat is often made to ensure neutral proceedings, which has no connection with the specific rights and obligations that the parties intended to create [*Redfern/Hunter p. 166*]. Therefore, the seat of arbitration has no connection with the arbitral proceedings.

32. Furthermore, Art. 1(1) of the New York Convention recognises that the enforcement of a valid arbitral award may take place in any contracting state, irrespective of the seat of arbitration. For example, an award rendered in Paris is not French in nature and is enforceable by any other contracting party of the New York Convention [*Hook p. 175*]. Therefore, the significance of the seat in enforcement of the award is also minimal.

33. In the instant case, CLAIMANT had suggested Danubia as the seat of arbitration for its neutrality and functional judicial system [*PO2 § 14*]. Therefore, the intention underlying the choice of seat was to ensure efficiency of arbitral proceedings, without intending to limit the scope of obligations that the parties had agreed upon. Furthermore, the parties have also agreed on the application of

the HKIAC Arbitration Rules [*Cl. Ex. 5*] which deliberately detaches the arbitration from the procedural laws of Danubia. Therefore, Danubian law has no connection with the arbitration.

[1.1.3.2] The Interpretation of the Arbitration Clause has the Closest Connection with Mediterranean Law

34. In the absence of a significant connection with the law of the seat, the underlying contract has the most significant relationship with the arbitration clause [*Case No. 9987 (ICC)*]. The contract embodies the mutual obligations that the parties have taken upon themselves, one of which is the commitment to resort to arbitration. Therefore, the arbitration clause is inherently linked to the underlying contract, which satisfies the '*closest and most real connection*' test.

35. In the instant case, there exists a close connection between Mediterraneo and the Sales Agreement. CLAIMANT is registered and located in Mediterraneo [*PO1 ∫1*]. Moreover, the law governing the contract is Mediterranean law [*Clause 15 FSSA*], and hence, Mediterranean law is the most closely connected to the arbitration clause. Therefore, Mediterranean law governs the interpretation of the arbitration clause.

[1.2] THE ADAPTATION CLAIM FALLS WITHIN THE SCOPE OF THE ARBITRATION CLAUSE

36. Under Mediterranean law, it has consistently been held that the CISG is applicable to the interpretation of arbitration clauses [*PO1 ∫4*]. Under Art. 8 CISG, the intention of the parties is established in two ways: objective intent under Art. 8(2) and subjective intent under Art. 8(1) [*Schmidt-Kessel in Schlechtriem/Schwenzer ∫ 11*].

37. RESPONDENT has submitted that the adaptation claim does not fall within the powers granted to the Tribunal as the wording of the clause had been specifically narrowed down [*RNoA ∫13*]. CLAIMANT submits that this Tribunal has the power to adapt the contract for the following reasons, *first*, the adaptation claim falls within the scope of '*any dispute arising out of*' **[1.2.1]** and *second*, the subjective intent of the parties was to empower the Tribunal to adapt the contract **[1.2.2]**.

[1.2.1] <u>The Adaptation Claim Falls Within the Scope of 'any dispute arising out of this contract'</u>

38. RESPONDENT had suggested that the parties use the HKIAC Model Arbitration Clause, albeit after being narrowed down [*Resp. Ex. 1*]. CLAIMANT submits that even though the arbitration clause

had been narrowed down, it still authorises the Tribunal to adapt the contract for the following reasons, *first*, differences regarding adaptation fall within '*any dispute'* **[1.2.1.1]**, *second*, the adaptation claim arises out of the Sales Agreement **[1.2.1.2]**and *third*, RESPONDENT must bear the risk of any ambiguity in the drafting of the arbitration clause **[1.2.1.3]**.

[1.2.1.1] Differences Regarding Adaptation Fall Within 'any dispute'

39. RESPONDENT stated that while the Tribunal is authorised to resolve disputes, that cannot be extended to include the power of adaptation [*RNoA ¶12*]. It may be contended that the powers of a tribunal are confined to adjudication of pre-existing contractual rights and liabilities, without intervening in the substance of the contract [*Beisteiner p. 84; Paulsson 1984 p. 252 Bernardini 1998 p. 421; Fasching p. 2168*].

40. That the word *'dispute'* must be interpreted broadly to include disputes related to whether the terms of the contract should be adjusted or not [*Berger 2001 p.2; Brunner p. 496; David p. 411; Rummel ¶ 901*]. This is particularly important in contracts where parties have long term relationships, which may be subject to unforeseen changes [*Ferrario p. 145; Pörnbacher/Ducker/Baur p. 289; Kroll 2004 p. 453*]. When such an event occurs, the scope of the arbitration clause must be interpreted in light of the long-term nature of the contract [*Ferrario p. 146; Berger 2001 p. 13*]. In such cases, the paramount consideration before the Tribunal is the preservation of the pre-existing contract [*Willheim p. 19*]. While CLAIMANT recognises that the arbitration clause may be interpreted narrowly in other cases, it must be given a wide and expansive interpretation in light of the circumstances surrounding the Sales Agreement [*Craig/Park/Paulsson p. 112; Case No. 5754 (ICC)*]. By providing for resolution of disputes arising out of the contract, it logically follows that this Tribunal should adjudicate on whether adaptation of the Sales Agreement is justified.

41. In the instant case, CLAIMANT had agreed to deliver the semen to RESPONDENT over a period of 8 months [*Cl. Ex. 5*]. Furthermore, the parties had recognised the potential for a prosperous long-term relationship, which might extend to the purchase of semen from Empire State, another stallion [*Cl. Ex. 8*]. The Sales Agreement was a long-term contract, which merits expansive interpretation of the arbitration clause. Therefore, the arbitration clause should encompass disputes regarding adaptation of the Sales Agreement.

[1.2.1.2] The Adaptation Claim Arises out of the Sales Agreement

42. RESPONDENT stated that the adaptation claim falls outside the legal jurisdiction of this Tribunal as the CLAIMANT is not seeking the agreed contractual remuneration [*RNoA ¶12*]. RESPONDENT submitted that the adaptation claim goes beyond the pre-existing obligations that the parties have established, which is why it cannot be a dispute '*arising out of this contract.*' [*RNoA ¶12*].
43. CLAIMANT submits that the adaptation claim arises out of the Sales Agreement as, *first*, adaptation of the contract does not create fresh rights and liabilities **[1.2.1.2.1]**, *second*, price adaptation arises out of the hardship clause **[1.2.1.2.1]**.

[*1.2.1.2.1*] *The Adaptation of the Contract does not Create Fresh Rights and Liabilities*

44. Adaptation merely modifies the rights and liabilities that parties have already created for themselves [*Ferrario p. 146*]. The basic obligations that the parties have created at the time of formation of the contract are not being subjected to modification by the Tribunal [*Fouchard/Gaillard/Goldman p. 447*]. CLAIMANT is still obligated to sell the product and receive a certain sum as remuneration for the same. Adaptation merely reshapes these obligations to ensure that neither party is unduly disadvantaged by changed circumstances.

45. In the instant case, CLAIMANT has already fulfilled its' obligation to transport the semen to RESPONDENT [*Cl. Ex. 8*]. Moreover, this Tribunal would merely modify the price that RESPONDENT would pay in return. Accordingly, CLAIMANT submits that this Tribunal is not creating new obligations for the parties, but merely alters pre-existing contractual relations to account for unforeseen circumstances.

[*1.2.1.2.2*] *Price Adaptation Arises out of the Hardship Clause*

46. The adaptation claim is based on the hardship provision that the parties had incorporated in the original Sales Agreement, which satisfies the threshold of '*arising out of this contract.*' By incorporating a hardship provision in the Sales Agreement, the parties had provided for adaptation in light of changed circumstances. The hardship provision had been introduced in the contract such that CLAIMANT does not assume all risks associated with delivery of the semen [*Cl. Ex. 4*]. This had explicitly been mentioned by Ms. Napravnik in her e-mail to Mr. Antley on 31st March 2017, where the CLAIMANT refused to take on any further risks associated with the delivery [*Cl. Ex. 4*].

47. Furthermore, even if the intention of the parties cannot be discerned, the introduction of a hardship clause is an objective ground for the adaptation claim. By introducing clause 12, the parties had '*explicitly demonstrated*' their intention to provide for adaptation in case of unforeseen circumstances [*Zaccaria p. 135*]. Therefore, CLAIMANT submits that the adaptation claim arises out of clause 12 of the Sales Agreement, satisfying the threshold set by the arbitration clause.

[1.2.1.3] Respondent Must Bear the Risk of any Ambiguity in the Contract

48. Under Art. 8(2), one of the tools used in carrying out an objective interpretation of the contract is the *contra proferentem* rule [*Schmidt-Kessel in Schlectriem/Schwenzer § 49; Witz in Witz/Salger/Lorenz § 15; Magnus in Staudinger, Art.8 §18*]. Under this rule, the party that has drafted a specific term of the contract must bear responsibility for any ambiguity in the contract [*Baldus p. 119*]. While primarily applied in standard form contracts, this rule has also been applied when one party has drafted certain provisions of the contract [*Schmidt-Kessel in Schlechtriem/Schwenzer § 49*].

49. RESPONDENT had drafted the modified HKIAC arbitration clause [*Resp. Ex. 1*]. However, the wording of the arbitration clause was still ambiguous, as RESPONDENT never explicitly addressed the exclusion of adaptation from the arbitration clause. Furthermore, given that he had access to prior emails between the parties as well as Mr. Antley's negotiation file, Mr. Krone never clarified RESPONDENT'S position on adaptation after Mr. Antley's retirement [*Resp. Ex. 3*]. CLAIMANT, therefore, submits that on application of the *contra proferentem* rule, adaptation will fall within the scope of the arbitration clause.

[1.2.2] THE SUBJECTIVE INTENT OF THE PARTIES WAS TO PERMIT ADAPTATION BY THE TRIBUNAL

50. Art. 8(1) CISG lays down the standard to determine the intent of the parties while entering into an agreement. Namely, the party must have known or could not '*have been unaware*' of the intention of the other party at the time of contract formation [*HG-Aargau 5 Feb 2008*]. In the instant case, CLAIMANT submits that the RESPONDENT was aware of the Tribunal's power to adapt the contract. Additionally, Mr. Antley's negotiation file connects the arbitration clause with the hardship clause.

51. Mr. Antley and Ms. Napravnik had agreed to discuss the details of the arbitration clause in Vindobona, during the annual colt auction [*Cl. Ex. 4*]. During their conversation, both negotiators recognised the need for a mechanism to adapt the contract in case the parties were unable to do so [*Cl. Ex. 8*]. Mr. Antley had explicitly recognised that the Tribunal should adapt the contract if

the parties were unable to reach an agreement [*Cl. Ex. 8*], which Ms. Napravnik agreed with. Therefore, both RESPONDENT and CLAIMANT agreed to permit intervention by the arbitrators if negotiations were unsuccessful.

52. After the unfortunate accident suffered by Mr. Antley, Mr. Julian Krone concluded the contract on behalf of the CLAIMANT [*Cl. Ex. 5*]. Mr. Krone had found the negotiation file which Mr. Antley used [*Resp. Ex. 3*]. The last point in the negotiation file explicitly contemplates connecting the hardship provision with the powers of the Tribunal [*Resp. Ex. 3*]. Given that he had access to this file, Mr. Krone could not have been unaware that the parties had intended for the Tribunal to adapt the contract in light of changed circumstances. Hence, CLAIMANT submits that the arbitration clause must be interpreted in a manner which empowers the tribunal to adapt the contract.

CONCLUSION

Mediterranean law governs the arbitration clause and hence, the arbitration clause must be interpreted broadly, in light of the intention of the parties and circumstances surrounding the contract. Thus, this Tribunal must reject RESPONDENT'S claim that it does not have the power to adapt the contract.

2. CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDING

53. On 2nd October 2018, CLAIMANT sent an e-mail to the members of the Tribunal, stating that it had obtained information about another arbitration proceeding, to which the RESPONDENT is a party. This proceeding between RESPONDENT and their client involved the sale of a mare, that was affected by the 25% tariff imposed by the president of Mediterraneo. In these other proceedings, RESPONDENT, who denied the need to adapt the contract in the current proceedings, had sought adaptation of the contract. CLAIMANT then expressed its desire to submit the award from the other proceeding to highlight this inconsistent stance of RESPONDENT [*Letter by Langweiler, 2nd October 2018*].

54. RESPONDENT then objected to CLAIMANT's application to submit the award from the other proceeding as evidence, in a mail to the Tribunal dated 3rd October 2018. The grounds for this objection were twofold. First, it was stated that the award was confidential, and the RESPONDENT

could not be compelled to produce it. Second, it was stated that the award had been obtained illegally, either through a hack of the RESPONDENT s computer system or through a breach of a confidentiality agreement. RESPONDENT went on to contend that in either case, because the evidence was obtained illegally, it should not be admitted in the arbitration [*Letter by Fasttrack*, *3rd October 2018*].

55. Even if it is assumed that the evidence has been obtained illegally, CLAIMANT is still entitled to submit such evidence in the current proceedings. This is because, *first*, the Tribunal can determine whether a party is entitled to submit evidence [**2.1**], *second*, in the present case, the Tribunal can, and should admit the illegally obtained evidence [**2.2**], *third,* The IBA Rules do not bar the admissibility of the evidence in the present instance [**2.3**] and *fourth*, RESPONDENT's confidentiality obligation does not amount to grounds to exclude the evidence [**2.4**].

[2.1] THE TRIBUNAL HAS THE POWER TO DETERMINE THE ENTITLEMENT OF PARTIES TO SUBMIT EVIDENCE

56. Questions of evidence that arise before the Tribunal are procedural in nature and are hence governed by the procedural rules applicable before the Tribunal. Therefore, the entitlement of parties to submit evidence is also governed by the applicable procedural rules [*Redfern/Hunter ∫ 6.01*]. Additionally, this implies that the Tribunal is not bound by the rules of evidence applicable before the national courts of the seat of the Tribunal [*Born p. 2147*].

57. The applicable procedural rules are therefore the *lex arbitri*, i.e., the law governing the arbitration itself or the law of the seat of arbitration, and the institutional rules chosen by the parties [*Poudret/Besson p. 643*]. In the present case, the *lex arbitri* is Danubian Law, which is a verbatim adoption of the UNCITRAL Model Law [*PO1 ∫4*]. The institutional rules that have been chosen by the parties are the Hong Kong International Arbitration Centre Rules, 2018 [*Cl. Ex. 5*].

58. Art. 19(2) of the Model Law provides that the parties are free to choose a set of rules to govern the proceedings. Even in the absence of such choice, the Tribunal has the power to "determine the admissibility, relevance, materiality and weight of any evidence". *Lex Arbitri* therefore allows the Tribunal to rule on questions of evidence as it deems fit. In the present case, the parties have chosen the HKIAC Rules to govern the arbitral proceedings. Art. 22.2 of the rules states that the tribunal shall determine questions of admissibility materiality and relevance of evidence. Thus, the

chosen procedural rules also allow the tribunal to rule upon the entitlement of parties to submit evidence in the proceedings.

59. Thus, the tribunal is not bound by any strict rules of evidence but can make its own determination regarding the entitlement of the claimant to submit the partial award in the current instance.

[2.2] CLAIMANT IS ENTITLED TO SUBMIT THE EVIDENCE, EVEN IF IT HAS BEEN OBTAINED ILLEGALLY

60. In an e-mail sent to the members of the Tribunal, RESPONDENT stated that the material from the other arbitration has been obtained illegally, either by a computer hack, or through a breach of a confidentiality agreement. RESPONDENT further contends that such material cannot be admitted in the current proceeding by virtue of the fact that it has been obtained illegally [*Letter by Fasttrack*, *3rd October 2018*].

61. It has been established that the Tribunal has the power to rule upon issues of admissibility of evidence. CLAIMANT therefore submits that the Tribunal can, and should, admit the illegally obtained evidence for three reasons, *first*, international tribunals adopt a liberal approach to admitting evidence [**2.2.1**], *second*, allowing the admission of illegally obtained evidence satisfies the policy goals of international arbitration [**2.2.2**] and *third*, not allowing the submission of the evidence infringes upon CLAIMANT's right to be heard [**2.2.3**].

[2.2.1] International Tribunals Adopt a Liberal Approach to the Admission of Evidence

62. The general practice of international tribunals is to allow the parties the greatest freedom in presenting evidence. Tribunals generally allow the parties to rely on and submit evidence without imposing restrictions on the use or submission of such evidence [*Waincymer p. 793*; *Born p. 2310*]. In the absence of a specific ground of exclusion of evidence agreed to by the parties, international tribunals are unwilling to exclude evidence [*Reisman/Freedman p. 739*]. Admission of evidence is the norm, and it can only be displaced if the party challenging the evidence can prove that the procedural law of the tribunal will be violated if included [*Sandifer p. 189*]. Therefore, strict rules of evidence that apply before national courts seldom apply to arbitral proceedings. This is because these rules of evidence arose out of the needs presented by domestic legal systems and as such, are entirely unsuitable in the context of international arbitration [*Waincymer p. 793*].

63. In this vein, CLAIMANT's submissions are twofold, *first*, the rules of evidence governing the admissibility of evidence before national courts are inapplicable to international arbitrations [**2.2.1.1**], and *second*, rules excluding illegally obtained evidence cannot be extended to arbitral proceedings [**2.2.1.2**].

[2.2.1.1] Rules of Admissibility are Inapplicable in International Arbitration

64. CLAIMANT submits that the rules governing the admissibility of evidence in proceedings before a domestic court are entirely inapplicable in the context of this arbitration. The rules of admissibility arose out of the practice of jury trials in common law and in Anglo-American proceedings [*Reisman/Freedman p. 740*]. The rationale behind these rules is that jurors are ordinary people with no legal training, and hence cannot assess the intrinsic and relative value of evidence. Therefore, these rules sought to minimize the effect of placing any potentially prejudicial evidence before the jurors. By minimising such an effect, the procedural rights of the parties were sought to be protected [*Waincymer p. 793*; *Born p. 2310*].

65. However, these concerns are not applicable in the context of this arbitration. In an arbitral proceeding, the members of the tribunal are highly trained in the legal profession and are very competent jurists. Due to this, the members of the tribunal will know how to weigh evidence and determine its relative and intrinsic value. Therefore, there is no risk associated with placing potentially prejudicial evidence before the tribunal, as it has the competence to take the prejudicial nature of the evidence into account while rendering a decision [*Sandifer p. 182*].

[2.2.1.2] The Rule that Excludes Illegally Obtained Evidence Cannot be Extended to Arbitration

66. CLAIMANT submits that the rule barring the admissibility of illegally obtained evidence is entirely unsuited to the present arbitration. This rule arose out of common law and sought to protect a party from attempts by the other to adduce evidence obtained by infringing upon the former's procedural rights [*Reisman/Freedman p. 745*].

67. However, this rule exclusively applies in criminal proceedings and not civil proceedings. This is because in a criminal proceeding, the opposing party is the State, which has the backing of the entirety of the machinery of the State [*Halsbury's Laws vol. 17 §12*]. Therefore, in criminal proceedings, one party, i.e., the state is vastly more powerful than the other, i.e., the defendant.

Therefore, such rules are necessary in this context to serve as safeguards to prevent any abuse of such power [*Thirlway p. 630*].

68. However, this rule is unsuitable in the context of the current proceedings (as well as in civil proceedings) because neither of the parties wield any such power over the other. In arbitral proceedings, both parties are businesses, corporations or any other such entity and are hence on an equal footing. Neither of the parties is so much more powerful than the other that the inclusion of procedural safeguards is necessary power [*Thirlway p. 630*].

69. Therefore, for the purposes of this arbitration, rules of admissibility, and specifically the rule barring the admissibility of illegally obtained evidence are entirely unsuitable. Thus, in the present instance, the Tribunal should adopt a similar liberal policy and allow CLAIMANT to submit the material from the other arbitration as evidence, even if it has been obtained illegally.

[2.2.2] The Admission of Illegally Obtained Evidence Satisfies the Policy Goals of International Arbitration

70. It has been established that international tribunals adopt a very liberal approach to the admissibility of evidence in the arbitral proceeding. This liberal approach is highlighted by the outlook of tribunals on the issue of illegally obtained evidence in recent proceedings before the Court of Arbitration for Sport and in notable investor-state arbitrations. The Tribunals in these cases sought to balance the fundamental goal of arbitration, i.e. arriving at an understanding of what actually happened, or "truth-seeking", against other policy goals such as protecting client-attorney privilege etc [*Blair/Gojkovic p. 257*]. In these arbitrations, the Tribunals were consistently of the view that there is no reason to exclude illegally obtained evidence, unless there was a violation of international public policy [*O'Sullivan*, *Blair/Gojkovic p. 257*].

71. CLAIMANT therefore submits that *first*, Tribunals apply the balancing test to determine the admissibility of illegally obtained evidence [**2.2.2.1**] and *second*, applying the balancing test, the Tribunal should admit the material from the other arbitration [**2.2.2.2**].

[2.2.2.1] Tribunals Adopt the Balancing Test to Ascertain the Admissibility of Illegally Obtained Evidence

72. In recent arbitral proceedings dealing with illegally obtained evidence, Tribunals have tended to apply a 'balancing test' to determine the admissibility of the evidence. The most significant of these

arbitrations is *Caratube* v. *Kazakhstan*, wherein Caratube filed for arbitration claiming that the Ministry of Energy of Kazakhstan had expropriated its investment. In support of these claims, *Caratube* sought to rely on confidential documents that were uploaded on WikiLeaks, subsequent to a hack of the Kazakh Government's IT systems [*Caratube v. Kazakhstan (ICSID)*]. While Kazakhstan objected, the Tribunal allowed the admission of all non-privileged leaked documents. The Tribunal, while balancing policy considerations, allowed the illegally obtained, confidential documents to be admitted, giving more weight to the goal of accurate fact finding. However, the Tribunal ruled that in the case of privileged documents, the goal of fact-finding was not sufficient to displace the policy goal of upholding legal privilege [*Blair/Gojkovic p. 253*].

73. This line of reasoning was also followed by the tribunals in Awards rendered by the Court of Arbitration for Sport, which consistently admitted illegally obtained evidence. These Tribunals ruled that the interest in arriving at the truth outweighed any infringement of the procedural right of the defendant, unless any fundamental policy goal was infringed by doing so [*Valverde v. CONI (CAS)*; *Amos Adamu v. FIFA (CAS)*; *FC Metalist v. UEFA (CAS)*].

74. Admittedly, tribunals have also ruled against the admissibility of illegally obtained evidence, such as the tribunals in *Libanco*, *EDF Services* or *Methanex*. However, in all of these cases, the tribunals applied the balancing test to determine the admissibility of the illegally obtained evidence presented. None of these cases placed a bar on admissibility of evidence merely because it was obtained illegally. In all three arbitrations, evidence was excluded because the party that sought to submit the evidence, had themselves obtained it illegally. The tribunals relied on the good faith principle which is fundamental to international public policy, to bar the admissibility of such evidence [*Libanco v. Turkey (ICSID)*; *EDF v. Romania (ICSID)*; *Methanex v. USA (NAFTA)*].

[2.2.2.2] Applying the Balancing Test, the Tribunal Should Admit the Evidence

75. From the practice of tribunals, it can be inferred that evidence is not excluded simply because it is obtained illegally. Instead, tribunals apply a balancing test, weighing out the interest of accurate fact finding against public policy goals, and if the former is given more weight, the evidence will be admitted.

76. However, tribunals have held that public policy goals such as the good faith principle, or the protection of privileged information outweigh the interest in fact finding [*Caratube v. Kazakhstan (ICSID)*; *Libanco v. Turkey (ICSID)*]. This is because the principle of good faith is considered

inherent to arbitral proceedings and legal privilege is given absolute protection. This protection arises out of the pressing need to ensure transparent and honest communication between an attorney and a client. This is not possible to attain if these communications are not kept confidential at all costs [*Waincymer p. 809*].

77. From the practice of tribunals such as *Caratube* or *Libanco*, it can be seen that tribunals distinguish between public policy goals. The tribunals in these cases ruled that privilege or good faith was a policy goal that could not be infringed but did not extend such treatment to confidentiality. This is highlighted by the tribunal in *Caratube* making confidential information admissible as evidence but excluding any privileged information [*Caratube v. Kazakhstan (ICSID)*]. Therefore, there exists a standard higher than that of confidentiality for excluding evidence from the arbitration.

78. In the current proceedings, CLAIMANT wishes to submit the evidence to demonstrate that the tariff imposed is a legitimate ground for adaptation of the contract [*Letter by Langweiler, 2nd October 2018*]. Therefore, the evidence that is sought to be admitted is highly material to the outcome of the proceedings. This implies that the evidence should be admitted as it is crucial to this tribunal's objective of accurate fact finding.

79. Additionally, there are no public policy goals that are being infringed by admitting this evidence. Unlike *Libanco* or *Methanex*, CLAIMANT had no involvement in the illegal means by which the evidence was obtained but is merely procuring the evidence from a third party [*PO2 ∫41*]. Moreover, the material that is sought to be submitted is not protected by privilege, or of such a nature where admitting it into evidence will cause a violation of international public policy. It is not sufficient to constitute such a breach of public policy merely because it is confidential in nature and hence, the tribunal should admit the evidence.

[2.2.3] Not Allowing the Submission of the Evidence Violates CLAIMANT's Right to be Heard

80. The principle of *audi alteram partem* states that both parties to a proceeding must be given a chance to be heard before a decision is made. This principle of natural justice forms an integral part of the requirement of due process in any adjudicatory proceeding, including those before a Tribunal [*Lew/Mistelis/Kroll ∫ 21-18*]. Moreover, this principle can be extended to provide the parties with the full opportunity to present their case, in the absence of which, their right to be heard can be said to be affected [*Mehren/Salomon p. 290*].

81. Not allowing evidence to be submitted is a clear infringement upon the opportunity of the parties to present their case to the fullest extent. Moreover, this can be construed to be a violation of the right of the parties to be heard in the proceeding [*Waincymer p. 793*]. In light of this violation, the award that is rendered by the Tribunal is susceptible to challenge as due process has not been followed. This is reflected in Art. V(1)(b) of the New York Convention that states that recognition of an award can be refused if the party "was otherwise unable to present his case".

82. Therefore, in the present case, the Tribunal should allow CLAIMANT to submit the illegally obtained evidence in the interest of adhering to due process. Moreover, the goal of the Tribunal in this case (and in every other case) is to render an enforceable award [*Redfern/Hunter § 1.101*]. Not allowing CLAIMANT to submit the evidence casts a serious doubt over the enforceability of the award before national courts, even under the New York Convention.

[2.3] THE IBA RULES PERMIT THE ADMISSION OF THE EVIDENCE

83. It may be contended by RESPONDENT that on the application of the IBA Rules, the Tribunal should not admit the evidence. However, CLAIMANT submits that the IBA Rules do not apply in the current proceedings and even if the IBA Rules are applied, this Tribunal can admit the evidence.

84. The IBA Rules do not apply in the present case because the parties never consented to the application of the IBA rules. The Tribunal is not bound to apply other rules of evidence apart from the HKIAC Rules i.e., the institutional rules explicitly chosen by the parties. Nothing in the HKIAC Rules or *lex arbitri*, i.e., UNCITRAL Model Law mandate the Tribunal to apply the IBA Rules in the current proceeding.

85. Moreover, even if the IBA rules are held to apply, they allow the admissibility of the evidence in the current instance. Art. 9 of the IBA Rules that set out the criteria for admissibility of evidence, state that the Tribunal can exclude evidence if it is privileged, or declared confidential by a state or public institution or are part of settlement negotiations etc. Even in cases of confidentiality imposed by a state, institution or by virtue of the material containing technical information, the Tribunal is required to be satisfied that these are sufficient concerns to make it inadmissible. However, confidentiality alone as a ground for inadmissibility is conspicuous in its absence. This

further indicates the intention of the IBA Rules to only exclude evidence whose admission breaches larger policy considerations, such as privilege.

86. The IBA Rules, therefore, follow the practice of Tribunals requiring a larger public policy concern than confidentiality for excluding evidence [*supra §§ 75-79*; *IBA Rules Review Subcommittee p. 25f.*]. Hence, the IBA Rules do not bar the admissibility of the evidence.

[2.4] RESPONDENT'S CONFIDENTIALITY OBLIGATION IS NOT GROUNDS FOR EXCLUDING THE EVIDENCE

87. In the e-mail dated 3rd October 2018, RESPONDENT objected to the submission of material from the other arbitration on the grounds of confidentiality. RESPONDENT went on to rely on Art. 42 of the 2013 Rules to state that it imposed an obligation of confidentiality on the parties and hence disclosure could not be ordered [*Letter by Fasttrack*, *3rd October 2018*].

88. RESPONDENT may contend that the obligation of confidentiality imposed by Art. 42 must go on to preclude any submission of such material as evidence. It may be further contended that the material CLAIMANT seeks to submit is also precluded from being admissible.

89. However, RESPONDENT's obligation under Art. 42 does not preclude the submission of evidence by CLAIMANT. This obligation under Art. 42 extends only to the parties to the arbitration. [*Moser/Bao § 12.31*]. It does not extend to an external third party and hence, such an obligation does not exist as against the CLAIMANT [*Born p. 2108*]. Therefore, it cannot be contended that CLAIMANT must be barred from submitting such evidence. Furthermore, simply because material is confidential does not mean it is excluded from evidence [*supra §§ 75-79*]. Hence, RESPONDENT's obligation under Art. 42 does not preclude the submission of the evidence.

CONCLUSION

This Tribunal should admit the material obtained from the other arbitration, even if such material was obtained illegally. This is because the Tribunal has the power to do so and allowing the admission of the evidence does not infringe upon any policy goals of international arbitration.

[3] CLAIMANT IS ENTITLED TO PAYMENT OF 1,250,000 USD RESULTING FROM AN ADAPTATION OF THE PRICE

90. In an unexpected and sudden move, the Equatoranaian Government imposed a 30% tariff on agricultural goods, including racehorse semen from Mediterraneo. CLAIMANT notified RESPONDENT that it would be unable to bear the additional costs. However, it delivered the doses as per schedule, based on RESPONDENT'S representation that it urgently needed the doses of semen and that a solution would be arrived at. Later, CLAIMANT found out that RESPONDENT had re-sold some of the doses of semen to other breeders at a profit. This was a clear breach of the Sales Agreement. When confronted with this, RESPONDENT cut-off all negotiations on price adaptation.

91. Thus, CLAIMANT respectfully requests the Tribunal to restore the contractual equilibrium by ordering RESPONDENT to pay 1,250,000 USD. Such a claim is justified, *first*, under clause 12 of the Sales Agreement **[3.1]** and *second*, in any case, under the framework of the CISG **[3.2]**.

[3.1] ADAPTATION IS JUSTIFIED UNDER CLAUSE 12 OF THE SALES AGREEMENT

92. The Parties envisioned the possibility of a change in circumstances and thus, included a *force majeure* and hardship clause in the Sales Agreement [*Clause 12 FSSA*]. CLAIMANT is entitled to the payment of 1,250,000 USD resulting from an adaption of the price under the Sales Agreement because, *first*, the imposition of tariffs is within the scope of the hardship clause **[3.1.1]**, *second*, the imposition of such a high tariff rate amounts to hardship **[3.1.2]** and *third*, price adaptation is a remedy available under clause 12 of the Sales Agreement **[3.1.3].**

[3.1.1] <u>The Imposition of Tariffs is Within the Scope of the Hardship Clause</u>

93. The Equatoranian Government imposed a 30% tariff on the import of racehorse semen from Mediterraneo. This fundamentally altered the nature of the relationship between the two parties. Therefore, it is clear from an interpretation of the hardship clause as per Art. 8 CISG that the imposition of tariffs is within its scope **[3.1.1.1]**. In any case, the hardship clause should be constructed *contra proferentem* against RESPONDENT **[3.1.1.2.]**

[3.1.1.1] Interpretation of the Hardship Clause as per Art. 8 CISG

94. Art. 8 CISG lays down the rules to interpret any statement or conduct of a party. It also applies to the interpretation of the contract itself [*Secretariat Commentary CISG Art. 7 §2; Schmidt-Kessel in Schlechtriem/Schwenzer p. 146, §1; OLG Dresden 27 Dec 1999; HG Aargau 5 Feb 2008; Ferrari 2004*

p.175]. Art. 8(1) CISG lays down a subjective test to determine the real intent of a party. However, if the real intent cannot be discerned, then Art. 8(2) CISG, provides for an objective test for its determination. For the purposes of both Art. 8(1) and Art. 8(2), all relevant circumstances such as negotiations between the parties and subsequent conduct must be considered [*Art. 8.3 CISG*]. An interpretation of the hardship clause as per Art. 8(1) CISG **[3.1.1.1.1]** or as per Art. 8(2) CISG **[3.1.1.1.2]** reveals that the imposition of tariffs is within the scope of the hardship clause.

[*3.1.1.1.1*] *The Real Intention of the Parties was to Include the Imposition of the Tariffs within Clause 12*

95. Art. 8(1) CISG lays down a subjective test to interpret a contract based on the real intent of a party '*where the other party knew or could not have been unaware what that intent was*'. The negotiations between the Parties clearly establishes that they intended for impediments such as the imposition of tariffs, to be included within the scope of Clause 12.

96. As per the Sales Agreement, CLAIMANT had agreed to a DDP. Admittedly, in a typical DDP arrangement, as per the Incoterms® 2010, the seller would bear all risks and costs until delivery at the agreed place [*Ramberg 149f.*]. However, in the present case, CLAIMANT did not accept all of these risks and the parties' understanding supplants the usual meaning of trade terms [*BG 11 Dec 1996*].

97. CLAIMANT made it clear in its email dated 31 March 2017, that it was not willing to take risks related to a change in the delivery terms, such as '*changes in customs regulation or import restrictions*' [*Cl. Ex. 4*]. The hardship clause was drafted based on the risks intimated in the afore-mentioned email [*PO 2 ∫12*]. This includes customs regulations or import restrictions such as the imposition of tariffs [*Goode pp. 98,186*]. Furthermore, DDP was agreed upon not to transfer all risks, but because CLAIMANT had '*much greater experience in the shipment of frozen semen'* [*Cl. Ex. 3*].

98. Thus, the RESPONDENT knew or, at the very least could not have been unaware that CLAIMANT intended for changes in customs regulations such as tariffs to be included in the hardship clause.

[*3.1.1.1.2*] *On Application of the Objective Test, the Imposition of Tariffs is Included within Clause 12*

99. Art. 8(2) CISG provides for the interpretation of the contract based on the understanding of a reasonable person in the same circumstances. Under Art. 8(2), importance is given to the usual meaning of the words used by the parties [*OLG Dresden, 27 Dec 1999; HG Zürich, 24 Oct 2003; Magnus in Staudinger Art. 8 ∫ 24*].

100. While the hardship clause in the Sales Agreement, specifically mentions "*additional health and safety requirements*", it also contains the phrase - *'or comparable unforeseen events'* [*Cl. Ex. 5, Clause 12 FSSA*]. CLAIMANT submits that additional health and safety requirements are comparable to the imposition of tariffs, considering that both of these are a fundamental part of customs regulations. Moreover, CLAIMANT had made clear that it would not accept risks related to changes in customs regulations [*Cl. Ex. 4*]. Thus, even to a reasonable third person it would have been clear that the hardship clause included imposition of high tariff rates.

[3.1.1.2] Clause 12 Should be Constructed *contra proferentem* Against RESPONDENT

101. Even if this Tribunal finds that the hardship clause is ambiguous, it should include tariffs within the scope of the hardship clause as per the *contra proferentem* rule. According to the *contra proferentem* rule, the party that supplied the formulation of a certain term must bear the risk of the terms' ambiguity [*Schmidt-Kessel in Schlechtriem/Schwenzer Art. 8 §49; Zuppi in Kröll/Mistelis/Viscsillas, Art. 8 §24; Bernstein/Lookofsky p.131*]. This rule is applicable under the framework of the CISG [*CISG-AC Op. No. 13; Honnold/Fletchner p. 158 §107.1; OLG Stuttgart 31 March 2008*].

102. The wording of the hardship clause was supplied by Mr. Krone on behalf of RESPONDENT [*PO2 §12*]. Thus, the ambiguity in clause 12 must be resolved against the RESPONDENT, leading to the inclusion of tariffs within the hardship clause.

[3.1.2] <u>The Imposition of Tariffs Amounts to Hardship</u>

103. The high additional tariffs imposed unexpectedly and suddenly by the Equatoranian Government destroyed the commercial basis of the contract and led to a situation of hardship. Since Clause 12 does not lay down all the conditions for hardship, the conditions required shall be interpreted in accordance with general standards [*Fontaine/de Ly p. 440-43; Brunner p.387*]. The imposition of tariffs satisfies the conditions required for hardship because, *first*, it meets the threshold required **(3.1.2.1)**, *second*, it happened after the conclusion of the contract **(3.1.2.2)**, *third*, it was not reasonably foreseeable **(3.1.2.3)**, *fourth*, it was beyond CLAIMANT'S control **(3.1.2.4)** and *fifth*, its risk was not assumed by CLAIMANT **(3.1.2.5)**.

[3.1.2.1] The Imposition of the Tariffs meets the Required Threshold for Hardship

104. The imposition of the tariffs meets the threshold for hardship required under Clause 12 **(3.1.2.1.1)**. In any event, it meets the threshold required under general contract principles **(3.1.2.1.2).**

[*3.1.2.1.1*] *The Imposition of Tariffs meets the Threshold for Hardship Required under Clause 12*

105. As per clause 12, hardship would occur if the contract became "*more onerous"*. This is a far lower standard than that required under general contract principles [*Maskow p.662; Bund p.394*; *Fontaine/de Ly p. 497f.; Brunner p.214*]. Thus, under Clause 12, CLAIMANT has to satisfy a lower threshold to claim adaptation in cases of hardship.

106. CLAIMANT has been facing financial difficulties for the last few years due to no fault of its own. These financial difficulties were caused in relation to a previous sale, during which the Danubian Government had suddenly imposed certain policies. This nearly resulted in CLAIMANT'S insolvency [*PO2 ∫21*]. CLAIMANT was in such a dire situation that it was willing to sell 100 doses of semen to RESPONDENT even though it never sold more than 10 doses to one breeder [*PO2 ∫15*]. Further, it only took a profit margin of 5%, as compared to the usual profit margin of 15% that it takes for natural coverings by Nijinsky III [*PO2 ∫∫19,31; Cl. Ex. 8*]. It would be impossible for CLAIMANT to shoulder additional costs of 30% due to the increase in the tariffs. If it were made to shoulder the entire additional cost, it would have to sell a part of its company [*PO2 ∫29*].

107. Even RESPONDENT accepted that the *"high additional tariffs"* [*Resp. Ex. 4*] posed a problem for CLAIMANT. CLAIMANT shipped the doses of semen only because Mr. Shoemaker guaranteed that a solution would be found. Thus, performance of the contract has in fact, become *more onerous* for CLAIMANT.

[*3.1.2.1.2*] *The Imposition of the Tariffs meets the Threshold Required under General Contract Principles*

108. The threshold required for hardship under general contract principles is that there must be a fundamental alteration in the equilibrium of the contract [*Case No. 8486(ICC); Art. 6.2.2 UPICC*]. This threshold can be defined in terms of commercial reasonability [*Secretariat Commentary CISG Art. 65 ¶10; Miettinen p.35*]. It is the limit beyond which a party cannot be reasonably expected to perform its obligations [*Ishida p.372; Routamo/Ramberg p.219; Lando p.299; Gomard/ Rechnagel p. 223*].

109. The change in equilibrium that is required depends on the facts and circumstances of that case [*Lookofsky 2005 p.440; UPICC Commentary, Art. 6.2.2 §1*]. A smaller alteration in the contractual equilibrium would be sufficient when the disadvantaged party would face financial ruin if the original terms of the contract were enforced [*Brunner pp. 435-438; Schwenzer 2008 p.716*] CLAIMANT is facing significant financial difficulties and will have to sell a part of its company if the original terms of the contract are enforced [*supra §106; PO2 §29; Cl. Ex. 8*].

110. Furthermore, RESPONDENT re-sold 15 doses at a 20% mark-up [*PO2 §20*]. This was an act in bad faith and a breach of the contract. CLAIMANT had made it clear both in the negotiations [*Cl. Ex. 2*] and in the contract [*Cl. Ex. 5*], that the doses of semen could not be re-sold without CLAIMANT'S '*express written consent*' [*PO2 §16*]. On one hand, RESPONDENT has made a significant and unjust profit, while on the other hand CLAIMANT would have to sacrifice part of its business. Both of these scenarios should not have happened as per the original contract. There has been a fundamental alteration in the contractual equilibrium and it would be unreasonable to expect CLAIMANT to abide by the original contractual terms. Thus, there is a need to adapt the price to restore the contractual equilibrium.

[3.1.2.2] The Tariffs were Imposed after the Conclusion of the Contract

111. The Sales Agreement was concluded on 6 May 2017 [*Cl. Ex. 5; Cl. No §8*]. However, the 30% tariffs were announced by the Equatoranian Government on 19 December 2017 and became effective from 15 January 2018 [*Cl. Ex. 6; PO2 §25*]. Thus, the tariffs were imposed after the conclusion of the contract.

[3.1.2.3] The Imposition of the Tariffs was not Reasonably Foreseeable

112. An impediment is foreseeable if a reasonable person in the same circumstances as the promisor ought to have foreseen the impediment [*Zeller p. 157f.; Flambouras p.271; Raw Materials v. Manfred Forberich*]. In the present case, CLAIMANT submits that it could not have foreseen the imposition of the tariffs at the time the contract was concluded.

113. The tariffs imposed by Meditteraneo came as a complete surprise. The President of Meditteraneo had never indicated either in his election manifesto or strategy papers that he intended to impose a 25% tariff on agricultural products [*Cl. Notice §9; Cl. Ex. 6; PO2 §23*]. Equatoriana preferred settling disputes amicably or by invoking the WTO mechanisms [*Cl. Ex. 6; NoA §10*]. However, in this case, in a completely unexpected decision, the Equatoranian Government retaliated by

imposing a 30% tariff on agricultural goods from Mediterraneo. Furthermore, neither the CLAIMANT nor even the RESPONDENT were aware that horse semen was covered under the tariffs because racehorse semen was generally treated differently from agricultural products. Even the customs authorities were confused regarding this [*NoA §11; Cl. Ex. 8; Resp. Ex. 4; PO2 §26*]. Thus, it is clear that the imposition of tariffs on racehorse semen was completely unforeseeable.

[3.1.2.4] The Imposition of Tariffs was Beyond CLAIMANT'S Control

114. To invoke hardship, the impediment must be beyond the disadvantaged party's sphere of control [*Dawwas p.10*]. In the present case, this condition is satisfied because CLAIMANT does not have any control over the Equatornian Government's decision to impose tariffs. The imposition of tariffs is solely an action of the State and a private corporation cannot be said to exercise any measure of control whatsoever, over such decisions [*Case No. VB 96074 10 Dec 1996; Atamer in Kroll/Mistelis/Viscasillas Art.79 §73*].

[3.1.2.5] The Risk was not Assumed by CLAIMANT

115. If the risk of an event has been assumed by a party, it cannot invoke hardship arising from that event [*CAM Award 30 Nov 2006; Brencius v. Ukio*]. In the present case, CLAIMANT assumed no such risk. In its communication with RESPONDENT it unequivocally rejects the assumption of any risk, whatsoever, related to a change in customs regulations. [*Cl. Ex. 4; supra §97.*].

[3.1.3] Price Adaptation is a Remedy Available under Clause 12

116. RESPONDENT contends that Clause 12 does not provide for the remedy of price adaptation. This is however, completely contrary to the representation that RESPONDENT itself had made to CLAIMANT. Mr. Antley and Ms. Napravnik both agreed that the remedy of adaptation would be allowed [*Cl. Ex. 8; supra §§46-47*]. Moreover, the entire purpose of a hardship clause, is to provide for a mechanism to adapt the contract, when there has been a fundamental change in the circumstances [*supra §§50-52*]. Thus, the remedy of price adaptation is available under Clause 12.

CONCLUSION

The imposition of tariffs by the Equatoranian Government is a circumstance that comes within the scope of Clause 12 FSA. It also satisfies all the conditions required for hardship. Furthermore, price adaptation is a remedy that is available under Clause 12 FSA. Thus, CLAIMANT is entitled to a payment of 1,250,000 USD arising from adaptation of price under Clause 12 FSA.

[3.2] IN ANY EVENT, PRICE ADAPTATION IS JUSTIFIED UNDER THE CISG

117. CLAIMANT is entitled to the payment of 1,250,000 USD resulting from an adaptation of the price, even under the CISG. This is because, *first*, the inclusion of a *force majeure* and hardship clause does not result in exclusion of the CISG on matters pertaining to hardship **[3.2.1]**, *second*, CISG allows for price adaptation in cases of hardship **[3.2.2]**

[3.2.1] The Parties have not Excluded Application of the CISG on Issues of Hardship

118. RESPONDENT contends that the CLAIMANT cannot rely on Art. 79 CISG for its claim as the inclusion of a hardship clause amounts to a derogation from that provision [*RNoA ¶20*]. Admittedly, Art. 6 CISG, which is an embodiment of the principle of party autonomy, allows parties to exclude or derogate from the CISG or any of its provisions [*Schlechtriem 1986 p. 34; Gül p. 80; Mistelis in Kroll/Mistelis/Viscasillas Art. 6 ¶8; Premier Steel v. Oscam; OGH 21 March 2000*]. However, in the present case there has been no derogation because there was no clear intention of the parties to do so.

119. Even though implied exclusions are recognized [*SA Ch v. Deutschland GmbH; OGH 2 Apr 2009; Case No. 11333 (ICC); OLG Dresden 27 Dec 1999*], these exclusions must be clear, unambiguous and real [*Mistelis in Kroll/Mistelis/Viscasillas Art. 6 ¶20; ObLG 23 Jan 2006; TC Jura 3 Nov 2004; BP Intl v. Empresa*]. This is particularly so for total derogation or exclusion because a low threshold in such cases could undermine the international and uniform character of the CISG [*Mistelis in Kroll/Mistelis/Viscasillas Art.6 ¶23; Ferrari in Schlechtriem/Schwenzer (Ger) Art. 6 ¶30; Lorenz in Witz/Salger/Lorenz Art. 6 ¶¶17-20*]. In the absence of a clear intention to exclude Art. 79 CISG, it would still be applicable [*OLG Hamburg 28 Feb 1997*].

120. In the present case, Clause 12 merely aimed at regulating some risks directly through the contract [*Resp. Ex. 3*]. Thus, neither the contractual provisions nor the negotiations show that the parties had a clear and unambiguous intention (express or implied) to exclude the application of Art. 79 CISG.

[3.2.2] The CISG Allows for Price Adaptation in Cases of Hardship

121. CLAIMANT submits that the CISG allows for price adaptation in cases of hardship. This is because *first*, hardship is governed by Art. 79 CISG **[3.2.2.1]** and *second*, even if it is found that hardship

does not come within the scope of Art. 79 CISG, it would still be governed by the CISG through gap-filling **[3.2.2.2]**.

[3.2.2.1] Art. 79 CISG Governs Cases of Hardship

122. Art. 79 (1) CISG provides that a party is not liable if its failure to perform was due to an impediment beyond its control and it could not have overcome its consequences. This provision governs cases of hardship. This is because, *first*, hardship has not been excluded from the scope of Art. 79 **[3.2.2.1.1]** and *second*, hardship qualifies as an "impediment" under Art. 79(1) CISG **[3.2.2.1.2]**.

[3.2.2.1.1] Hardship has not been Excluded from the Scope of Art. 79

123. The *travaux preparatoires* of the CISG does not lead to the conclusion that the intention of the drafters was to exclude hardship [*Atamer in Kroll/Mistelis/Viscasillas §78; CISG-AC Op. No. 7 §§28-30*]. Admittedly, a Norwegian proposal to add hardship to Art. 79(3) CISG was rejected by the First Committee at its 27th meeting [*Honnold 1989*]. However, many delegates supported the proposal and even many of those who rejected it did not have a problem with its rationale [*Silveira §503-505*]. It is more likely that a hardship provision was not incorporated because of disagreement over the appropriate language than because there was an intention to exclude the doctrine altogether [*Bund p.393; Garro p.1156*].

[3.2.2.1.2] Hardship Qualifies as an "impediment" under Art. 79(1) CISG

124. Art. 79(1) CISG has a broad scope. It uses flexible terms such as '*impediment*' and '*exemptions*.' It does not resort to the usage of national law concepts such as frustration, *wegfall der geschftsrundlage,* impossibility and *imprevision* and thus remains terminologically neutral [*Andersen p.94; Kruisinga p.130; Brunner p.111*]. Thus, the phrase "*an impediment beyond his control*" in Art. 79(1) CISG must be interpreted autonomously [*Art. 7.1 CISG; Fletchner 2011 p.8*; *Aksoy p.108; Tallon in Bianca/Bonell Art. 79 §3.1.2*].

125. This "*impediment*" in Art. 79(1) CISG covers a spectrum of supervening events, ranging from strict excuse doctrines such as physical impossibility on one end and liberal excuse doctrines such as impracticability on the other [*Mazzacano p.52; Honnold/Fletchner §432 p.483; DiMatteo p.275*]. Thus, it is not necessary that Art. 79(1) CISG can only be invoked in circumstances of impossibility. It is widely accepted that economic unaffordability and cases of hardship are subsumed under the

term '*impediment'* [*Scafom v. Lorraine Tubes; Schwenzer in Schlechtriem/Schwenzer p.1142; CISG-AC Op. No. 7 §3.1; Jones/Schlechtriem §217 p.136; Bernardini 1997 p.207; Strohbach in Enderlein/Maskow Art. 79 §6.3; Neumayer/Ming Art. 79 §14; Rimke p. 223-226; Pichonnaz § 1769 ff., 1836; Weber p. 173-74; Bernstein/Lookofsky §6-19 p. 152; Lüderitz/Dettmeier in Soergel Art. 79 §13; Brunner Art. 79 §23 ff*]

126. Art. 79(5) CISG is also a broad provision that allows for all remedies except damages. It can be relied upon to allow a tribunal or a court to adapt the terms of the contract so that the parties' can reasonably overcome the impediment and perform their obligations [*CISG-AC Op. No. 7 §40; Ishida p.372*]. Thus, hardship and the remedy of adaptation are both covered under Art. 79 CISG.

127. In the present case, the imposition of tariffs, would be included as an impediment under Art. 79(1) CISG. It satisfies all the conditions required. It meets the threshold of hardship, was unforeseeable and beyond CLAIMANT'S control. Thus, price adaptation would be justified under Art. 79 CISG.

[3.2.2.2] Even if there is a Gap, the CISG Governs Hardship

128. Even if the Tribunal finds that hardship does not come within the scope of Art. 79 CISG or any other provision, the CISG would still govern cases of hardship. An external gap or a *lacunae intra legem* includes those issues which have been intentionally excluded from the scope of the CISG [*Viscasillas in Kroll/Mistelis/Viscasillas Art. 7 §1*]. Hardship has not been excluded from the CISG [*supra §122*] and is thus a *lacuna praetor legem* or an internal gap.

129. Once a gap has been identified, it has to be resolved in accordance with Art. 7(2), in three ways [*Viscasillas in Kroll/Mistelis/Viscasillas Art. 7 §57*], *first*, application of provisions of the CISG by analogy **[3.2.2.2.1]**, *second*, usage of the PICC **[3.2.2.2.2]**, and *third*, as the *ultima ratio*, recourse to applicable national law **[3.2.2.2.4]**.

[*3.2.2.2.1*] *Application of Provisions of the CISG by Analogy*

130. The principle behind using analogies for gap-filling is that the *ratio legis* of a certain provision also applies to cases that the wording of that provision does not include [*Brandner 38fn.*]. Analogies with Art. 79 CISG and Art. 50 CISG can be used to establish that hardship and adaptation are covered under the CISG

131. *First,* Art. 79 CISG can be used analogously to justify adaptation of the contract [*Atamer in Kroll/Mistelis/Viscasillas §§80f*]. The *ratio legis* of Art. 79 CISG is to account for a fundamental

change in circumstances. Similar to the concept of hardship, it is based on the doctrine of *clausula rebus sic stantibus* [*Mazzacano p.1-3*]. Thus, the requirements of hardship can be deduced from Art. 79(1) and threshold required would be based on the "reasonable expectation" test [*supra §108*]. Moreover, Art. 79(5) could be used to justify the remedy of adaptation of contract [*supra §125*]. In the present case, the conditions required under Art. 79 CISG, which would analogously apply, have been satisfied, and thus adaptation would be justified [*supra §§ 127*].

132. *Second,* Art. 50 CISG can also be used analogously to justify price adaptation. This provision allows for a reduction of price when the seller delivers non-conforming goods. The *ratio legis* of this provision is that the buyer can retain the non-conforming goods and ask for a reduction in price so as to bring the contract back into equilibrium [*Gartner p.59; Huber §472*]. Similarly, the tribunal can adapt the contract and bring the contract back to equilibrium in cases of hardship [*Fletchner 1999 p. 237*]. There has been an alteration of the contractual equilibrium in the present case. Thus, the tribunal would have the power to adapt the price so as to restore the equilibrium.

[*3.2.2.2.3*] *Gap-filling using the PICC*

133. The PICC can be used to interpret and supplement international uniform law instruments such as the CISG [*Preamble PICC*]. The usage of the PICC is challenged because the CISG pre-dates it and it is contended that they reflect different principles [*Ferrari 1998 p.169*]. However, there are certain fundamental principles upon which the CISG and PICC are both based and the PICC merely restates those principles [*Basedow 136f.; Case No. 8817 (ICC); DC Galanta 15 Dec 2006*].

134. The PICC are not used as general principles in themselves. Instead, they are used as elaborations on the principles on which the CISG is based [*Michaels in Vogenauer/Kleinheisterkamp Preamble I §102*; *Koch in Felemegas p.124*]. Thus, if a provision of the PICC reflects a general principle in the CISG [*Bonell 2000 p.97*] and clarifies the rules pertaining to an issue that falls within the scope of the CISG, it can be used for the purposes of gap-filling [*Rimke p.236; Bridge p.82; Sica p.21; Bonell 1996 p.35-36*].

135. The principle of good-faith is a general principle of both the CISG and the PICC. It applies not only in international trade as mentioned in Art. 7(1) CISG, but also extends to the contractual relationship of the parties [*Schwenzer/Hachem in Schlechtriem/Schwenzer p. 126; Troy; OLG Naumburg 13 Feb 2013; Rb Zwolle 5 March 1997; Secretariat Commentary CISG Art. 6 §3f; Keily p. 23; Bonaventure v. Société Pan African Export*]. It would be contrary to the principle of good faith to abuse a right so

that one party gains whereas the other party is ruined [*Brunner p.394; Case No. 7365 (ICC)*]. When there is a fundamental alteration in the equilibrium of the contract, a party cannot insist on performance as per the original conditions of the contract and it is obliged to attempt to re-negotiate to adapt the contract [*Fletchner 1999 p.236; Fontaine/de Ly p.517*; *Veneziano p.147; Pirozzi p.211; CISG-AC Op. No. 7 §40; Huber, in MünchKomm BGB Art. 79 §21; Magnus in Staudinger Art. 79 §24; Uribe, 274f.*]

136. Art. 6.2.3 PICC, which lays down a duty of re-negotiation in cases of hardship, is thus, a reflection of the principle of good-faith that is also found in the CISG. [*Veneziano p. 147; McKendrick in Vogenauer/Kleinheisterkamp Art. 6.2.3 §1*]. Art. 6.2.2 PICC lays down the conditions required for hardship. Both of these provisions clarify the rules pertaining to hardship and adaptation. Thus, they can be used to supplement the CISG on the issue of hardship [*Southerington §4.1; Liu §21.2.1; Perillo p.9; Bund p.392; Pirozzi p.216f.; Dupiré v. Gabo*].

137. In the present case, the imposition of the tariffs satisfies the conditions required for hardship under Art. 6.2.2 PICC. *First*, it met the required threshold [*supra §§ 108-110*], *second*, it happened after the conclusion of the contract [*supra § 111*], *third*, it was not reasonably foreseeable [*supra §§ 112f*] *fourth*, it was beyond CLAIMANT'S control [*supra §114*] and *fifth*, its risk was not assumed by Claimant [*supra § 115*]. Thus, price adaptation is justified under Art. 6.2.3 PICC.

[*3.2.2.2.4*] *Recourse to the Applicable National Law*

138. As the *ultima ratio*, Art. 7(2) CISG provides that if general principles cannot be used to fill the gap, then the issue can be settled '*in conformity with the law applicable by virtue of the rules of private international law.'* The applicable national law would be the law governing the contract and in turn the law governing the contract would be the law chosen by the parties [*Briggs §11.06; North/Fawcett p. 451ff.; Clarkson/Hill p. 203f.*]. Clause 14 specifies that the law of Mediterraneo shall govern the Sales Agreement [*Cl. Ex. 5*]. The contract law of Mediterraneo is a verbatim adoption of the PICC. Art. 6.2.2 and Art. 6.2.3 PICC would apply and as per these provisions adaptation is justified in the present case [*supra §137*].

CONCLUSION

The remedy of price adaptation in cases of hardship is allowed under the CISG and even under Mediterranean law. The unforeseeable imposition of tariffs by the Equatorania satisfies all the conditions required for hardship. Thus, CLAIMANT is entitled to payment of 1,250,000 USD under the CISG.

PRAYER FOR RELIEF

In light of the above submissions, counsel for Claimant respectfully requests the Tribunal to find that:

(1) The Tribunal has the power to adapt the contract

(2) Claimant is entitled to submit evidence from the other arbitration proceedings

(3) Claimant is entitled to the payment of 1,250,000 USD resulting from an adaptation of the price

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CERTIFICATE

Bangalore, 6 December 2018

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

Vrishank Singhania

Srinivas NC

Satyajit Bose