16TH ANNUAL WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONGKONG

MARCH 31- APRIL 7, 2019

MEMORANDUM FOR CLAIMANT

CASE NO.: HKIAC/A18128

THE WEST BENGAL NATIONAL UNIVERSITY OF JURIDICAL SCIENCES

KOLKATA | INDIA

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

KAIRA PINHEIRO | SHREYAS SHRIDHAR | SAURAV RAJURKAR | VISHAKHA KADAM

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Gerechtshof Den Haag, ***22 April 2014***	22 April 2014 Gerechtshof Den Haag = The Hague [Appellate Court] Feinb�ckerei Otten GmbH & Co. Kg and HDI-Gerling Industrie Versicherung AG v. Rhumveld Winter & Konijn B.V. *in para* ¶106.
Glamis Gold v U.S.	8 June 2009 Glamis Gold Ltd. v. United States Of America International Centre For Settlement Of Investment Disputes *in para* ¶¶31, 43.
Habas Sinai v VSC Steel Co Ltd	2013 Habas Sinai Ve Tibbi Gazlar Istihsal Andustrisi AS and VSC Steel Company Ltd EWHC 4071. *in para* ¶¶5, 10.

ICC Case No. 11869/2011

2011

Arbitral Award in ICC Case No. 11869

Seller v buyer

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in para ¶6.

ICC Case No. 16655/2011

2011

ICC Case No. 16655 In 2011

Reported In: International Journal Of Arab Arbitration, Volume 4 (2012), Issue 2

in para ¶¶31.

ICC Case No. 4145/1984

1984

ICC Case No 4145 of 1984

ICC International court of Abritration.

in para ¶16.

ICC Case No. 5103/1988	1988 ICC Case No. 5103 of 1988 ICC International Court Of Arbitration. *in para* ¶¶16.
ICC Case No. 6162/1995	1995 ICC case No 6162 in collection of ICC Arbitral awards 1991-1995 *in para* ¶10.
ICC Case No. 6363/1992	1992 ICC Award No. 6363, YCA 1992 Claiamant v. Defendant *in para* ¶41.
ICC Case No. 7920/1998	1998 Partial Award in ICC Case No. 7290 of 1998 CLAIMANT(Spain) v. Defendant(Italy) Place of arbitration: Geneva, Switzerland *in para* ¶6.

ICC Case No. 8611/1997	23 January 1997 Industrial Equipment Case Court of Arbitration of the International Chmaber of Commerce CASE NUMBER; 8611/HV/JK *in para* ¶100.
ICC Case No. 9187/1999	June 1999 Coke Case Court Of Arbitration Of The International Chamber Of Commerce CASE NUMBER: 9187 Of June 1999 *in para* ¶¶75, 82, 85.
JSC Zestafoni v Ronly Holdings	16 February 2004 JSC Zestafoni G Nikoladze Ferralloy Plant v Ronly Holdings Ltd (2004) [2004] 2 Lloyds Rep 335; [2004] EWHC 245 (Comm) *in para* ¶*13.*

Kılıç v Turkmenistan	2010 Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan ICSID Case No. ARB/10/1 *in para* ¶50.
Libananco Holdings v Turkey	May 22, 2013 Libananco Holdings Co. Limited v. Republic of Turkey ICSID Case No. ARB/06/8 *in para* ¶50.
MCC-Marble v Ceramica Nuova	29 June 1998 MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino S.p.A. United States [Federal Court] 97-4250. *in para* ¶59.
Methanex v United States of America	1999 Methanex Corporation v. United States of America

	International Centre for Settlement of Investment Disputes *in para* ¶50.
Noble Ventures v Romani	12October2005 Noble Ventures Inc. v. Romania International Centre For Settlement Of Investment Disputes ICSID Case No. Arb/01/11 *in para* ¶31.
Nuova Fucinati v Fondmetal	14 January 1993 Nuova Fucinati S.p.A. v. Fondmetall International A.B.fertili Tribunale Civile [District Court] di Monza Case Number: R.G. 4267/88 *in para* ¶60.
OGH, 18 June 1997	18 June 1997 Shoes case Oberster Gerichtshof [Supreme Court] *in para* ¶59.

Opic Karimum Corporation v Venezuela	May 5, 2011 Opic Karimum corporation v. The Bolivarian Republic Of Venezuela ICSID Case No. Arb/10/14 *in para* ¶50.
Railroad Development v Guatemala;	15October 2008 Railroad Development Co. v. Republic Of Guatemala International Centre For Settlement Of Investment Disputes ICSID Case No. Arb/07/23 *in para* ¶31.
Ricketts v Pennsylvania R. Co.	January 10, 1946. Ricketts v. Pennsylvania R. Co. Circuit Court of Appeals 153 F.2d 757 (2d Cir. 1946) *in para* ¶¶82, 85.

Sonatrach Petroleum Corp v Ferrell International Ltd	4th October 2001 Sonatrach Petroleum Corporation (BVI) v Ferrell International Ltd Arbitration, Practice & Procedure Law Reports EWHC 481 APP.L.R. 10/04 *in para* ¶6.
Sulamerica v Enesa	16 May 2012 Sulamerica Cia Nacional De Seguros S.A. V. ENesa Engenharia S.A. [2012] EWCA Civ 638 Queen's Bench Division (Commercial Court) Para 26 *in para* ¶¶5, 6, 10, 13.
Supermicro Computer v Digitechnic	30 January 2001 Supermicro Computer Inc. v. Digitechnic, S.A. and Carri Systems, d/b/a Digitechnic U.S. District Court, Northern District of California, San Francisco Division *in para* ¶59.

Svenska Petroleum Exploration AB v Lithuania	13th November 2006 Svenska Petroleum Exploration AB v Lithuania [2006] APP.L.R. 11/13 *in para* ¶6.
The Commonwealth of Australia v John Fairfax	1 December 1980 Commonwealth v. John Fairfax And Sons Ltd [1980] HCA 44 *in para* ¶48.
The Moorcock Case	1889 The Moorcock: CA 1889 (1889) 14 PD 64, [1886-90] All ER 530, (1889) 5 TLR 316, (1870) LR 5 *in para* ¶63.
Thunderbird Gaming v United Mexican States	January 26, 2006 International Thunderbird Gaming Corporation v. The United Mexican States

	The Arbitral Tribunal constituted under Chapter Eleven of the North American Free Trade Agreement. Separate Opinion of Thomas Wälde. *in para* ¶43.
Transmission Corporation v GMR Vemagiri	16 February, 2018 Transmission Corporation of Andhra Pradesh v. GMR Vemagiri Power Generation Ltd The Supreme Court of India *in para* ¶63.
Tribunal de Commerce de Besançon,19 January 1998	19 January 1998 Flippe Christian v. Douet Sport Collections Tribunal de commerce [District Court] de Besançon Case Number: 97 009265 *in para* ¶84.
VIAC Award No.5243 (AUT, 2013)	2013 VIAC Case No. 5243 Of 2013 Reported In: Selected Arbitral Awards, Volume 1 (2015) *in para* ¶31.

LIST OF ABBREVIATIONS

§	Section
¶	Paragraph
$	United States Dollar
&	And
AC	Advisory Council
Agreement	The 'Frozen Sales Agreement' formed between the PARTIES
Ans.	Answer
Art.	*Art.*
CEO	Chief Executive Officer
CISG	United Nations Convention on Contracts for the International Sale of Goods,1980
CISG A.C.	CISG Advisory Council
CLAIMANT	Phar Lap Allevamento
CLOUT	Case Law on UNCITRAL Texts
Co.	Company
Corp.	Corporation
Comm.	Commercial
Contract	The 'Frozen Semen Sales Agreement' formed between the Parties
DDP	Delivered Duty Paid
ed./ eds.	Editor(s)

e.g.	for example
et al.	and others
etc.	et cetera
et seqq.	and the following ones
Ex. C	Exhibit of CLAIMANT
Ex. R	Exhibit of RESPONDENT
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
ICSID	International Centre for Settlement of Investment Disputes
ICC	International Chamber of Commerce
ICC clause	ICC-Hardship Clause, 2003
ICC Rules 2012	International Chamber of Commerce Rules of Arbitration, 2012
INCOTERMS 2010	International Commercial Terms, 2010
inter alia	Among other things
Int'l	International
J.	Journal
i.e.	that is
LCIA	London Court of International Arbitration
lex arbitri	Law of the place where the arbitration is to take place
lex fori	Substantive Law governing the arbitral dispute

Ltd	Limited
Mr.	Mister
Ms.	Miss
Ltd.	Limited
No.	Number
NoA	Notice of Arbitration
NYC	Convention on the Recognition and Enforcement of Arbitral Awards, 1956 (New York Convention)
Ors.	Others
p.	Page(s)
PARTIES	CLAIMANT & RESPONDENT
pari materia	Must be construed together
PCA	Permanent Court of Arbitration
PECL	The Principle of European Contract Law, 2002
PICC	UNIDROIT Principles on International Commercial Contracts
prima facie	On first appearance
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
Pub.	Publication
Rep.	Report

RESPONDENT	Black Beauty Equestrian
Rev.	Review
SCC Rules 2010	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, 2010
status quo	Existing state
Supp.	Supplement
Swiss Rules 2012	Swiss Rules of International Arbitration, 2012
SZIER	Swiss Review of International & European Law
The problem	The moot problem of the sixteenth Willem C. Vis (East) Commercial Arbitration Moot Competition
Tribunal	The Tribunal seated in Danubia constituted by the Parties to resolve the present dispute
UN/U.N.	United Nations
UNIDROIT	Institut International pour L'Unification du Droit Prive (International Institute for the Unification of Private Law
UNCITRAL	United Nations Convention on Contracts for the International Sale of Goods
UNCITRAL Model	UNCITRAL Model Law on International Commercial Arbitration Law 1985 with 2006 amendments
UNCITRAL Rules	UNCITRAL Arbitration Rules, 2010
U.S.	United States of America
USD	United States Dollar

v	versus (against)
vis-à-vis	In relation to/ counterpart
viz	specifically

STATEMENT OF FACTS

The parties to this arbitration are Phar Lap Allevamento [*Phar Lap* or "**CLAIMANT**"] and Black Beauty Equestrian [*Black Beauty* or "**RESPONDENT**"; together the "**PARTIES**"]. CLAIMANT is one of the oldest and renowned stud farm in Mediterraneo covering all areas of the equestrian sport. RESPONDENT is famous for its broodmare lines, incorporated in Oceanside, Equatoriana.

21 Mar 2017	RESPONDENT sends CLAIMANT an offer of 100 doses of frozen semen of Nijinsky III, star stallion of *Phar Lap*.	*Ex. C1, p.9*
24 Mar 2017	CLAIMANT accepts the offer along with its terms and conditions.	*Ex. C2, p.10*
28 Mar 2017	RESPONDENT agreed to the general terms of sale, however requested negotiation for the price and delivery terms and applicable law for dispute resolution clause.	*Ex. C3, p.11*
31 Mar 2017	CLAIMANT accepted a delivery DDP but only when price of the doses are increased and risks are offset by a hardship clause. It suggested arbitration in Mediterraneo as dispute resolution mechanism.	*Ex. C4, p.12*
10 April 2017	RESPONDENT suggested a narrowed version of arbitration clause, where the seat and law applicable to the arbitration clause was Equatoriana.	*Ex. R1, p.33*
11 April 2017	CLAIMANT rejected any discussion on the contract being submitted to foreign law or for dispute resolution in country of the counter party, since it would require approval from the creditors committee. However, CLAIMANT was agreeable to the place of arbitration as Danubia.	*Ex. R2, p.34*
6 May 2017	The PARTIES formulated the Frozen Semen Sales Agreement ('Agreement' or 'Contract'). It was signed by Mr. Ferguson and Mr. Krone who were the new set of negotiators, replacing Ms. Napravnik and Mr. Antley respectively.	*Ex. C5, p13*

19 Dec 2017	Government of Equatoriana retaliated by imposing 30% tariffs on selected products from Mediterraneo which included animal semen.	*Ex. C6, p.15*
20-21 Jan 2018	PARTIES engaged in negotiations for the adjustment of price for the frozen semen to offset the increase in tariffs.	*Ex. C8, p.18*
23 Jan 2018	CLAIMANT completed the delivery of the last shipment of 50 doses based on the promise of a solution made by RESPONDENT.	*Ex. C8, p.18*
12 Feb 2018	RESPONDENT'S CEO was aggressive and refused to pay any additional amount for the tariffs incurred by CLAIMANT.	*Ex. C8, p.18*
31 July 2018	CLAIMANT filed a Notice of Arbitration claiming that *first*, the Tribunal has the power to adapt the contract based on the law governing the arbitration agreement in the Contract, *second*, it should be allowed to submit evidence from another arbitration proceeding and *third*, it is entitled to a payment of US$ 1,25,000 resulting from an adaptation of the price under clause 12 of the Contract and under the CISG.	*Notice of Arbitration, p.4*
24 Aug 2018	RESPONDENT submits the Answer to Notice of Arbitration rebutting the claims of CLAIMANT on legal as well as substantive grounds.	*Answer to the Notice of Arbitration. p. 29*
2 Oct 2018	CLAIMANT informed the Tribunal about another arbitration proceedings where RESPONDENT had itself asked for adaptation of price invoking hardship .CLAIMANT seeks to introduce evidence from the other arbitral proceedings	*Letter by Langweiler, p.49*
3 Oct 2018	RESPONDENT disputes admissibility of evidence. RESPONDENT contends that submission of this evidence will be in breach of confidentiality agreement. Further, RESPONDENT alleges illegality of evidence and contends that such evidence is not admissible.	*Letter by Fasttrack, p.50*

INTRODUCTION

In times when an industry is growing rapidly, every stakeholder wants a slice of the cake. RESPONDENT was no different. Looking to develop its own market base of racehorses and to become an industry leader in Equatoriana, RESPONDENT approached CLAIMANT with a request to procure 100 doses of Nijinsky III's semen. Even though the size of order was extraordinarily large, CLAIMANT relied on RESPONDENT's reputation and intention of a long term relationship and agreed to enter into the Frozen Semen Sales Agreement. However, this reliance was misplaced since at the sight of first hardship *viz* imposition of tariffs by Government of Equatoriana, it became evident that RESPONDENT was not interested in satisfying its contractual obligations.

Although RESPONDENT assured a solution to CLAIMANT's increased hardship, however it conveniently reneged on this assurance. Instead, RESPONDENT reacted aggressively to CLAIMANT's legitimate request leaving CLAIMANT high and dry. In fact, RESPONDENT blindsided CLAIMANT and was reselling the frozen semen in contravention to the express prohibition in the Sales Agreement. In a precarious financial position and without any assistance from RESPONDENT, CLAIMANT was left with no remedy but to approach this tribunal for determination of its rights.

To mitigate their losses and remedy the hardship, CLAIMANT seeks adaptation of the price. Contrary to RESPONDENT's assertions, CLAIMANT establishes that law governing the arbitration clause is Law of Mediterraneo which provides for broad interpretation of the arbitration agreement. Consequently, CLAIMANT establishes the power of tribunal to adapt the contract without an express empowerment. (**I)**

On establishing that Law of Mediterraneo is applicable to the arbitration clause, in order to maintain consistency of jurisprudence, CLAIMANT seeks to submit evidence from a previous arbitration in which RESPONDENT was a party and took a contradictory position from the present arbitration. Despite its alleged illegality, tribunal should admit the evidence in light of its highly persuasive value. (**II)**

CLAIMANT's dutiful performance of its contractual obligations has left them in a dire situation. Through RESPONDENT's assurance of adaptation, CLAIMANT went ahead with its performance in spite of the hardship only to be later denied of any remuneration. To mitigate their losses and remedy the hardship, CLAIMANT now seeks an adaptation of the price both under the hardship clause of the contract as well as the CISG (**III & IV**).

ARGUMENTS

ARGUMENTS ON PROCEDURAL ISSUES

I. THE ARBITRATION AGREEMENT EMPOWERS THE TRIBUNAL TO ADAPT THE CONTRACT.

1. Post the announcement of the imposition of high tariffs on animal semen, the contractual obligations of CLAIMANT vis-à-vis RESPONDENT became extremely onerous. Accordingly, CLAIMANT immediately initiated negotiations with RESPONDENT seeking price adjustment for the frozen semen [*NoA*, p.6]. To CLAIMANT's dismay, RESPONDENT refused to pay any additional amount for the increased tariffs, leading to a failure of renegotiations between the Parties [*Ex. C8*, p.18]. Thereafter, CLAIMANT initiated arbitration proceedings in the Tribunal in order to claim an increased remuneration.

2. RESPONDENT contends that CLAIMANT is unjustified in seeking increased remuneration as it requires adaptation of the contract [*Ans. NoA, p.31*]. According to RESPONDENT, the Tribunal does not have power to adapt the contract [*Ans. NoA, p.31*]. In fact, RESPONDENT argues that the arbitration agreement is governed by Danubian law which recognizes the power of Tribunal to adapt the contract only if it is expressly mentioned [*Ans. NoA, p.31*]. However, as established below, RESPONDENT'S contentions are fallacious.

3. CLAIMANT contends that the arbitral Tribunal has power to adapt the contract since the law governing the arbitration agreement is the law of Mediterraneo which allows for a broad interpretation of the arbitration clause **(A)**. Accordingly, based on the broad interpretation of the arbitration agreement, it extends to a claim for an increased remuneration **(B)**.

A. Law of Mediterraneo is the law governing the arbitration agreement and it provides for a broad interpretation of the arbitration clause.

4. In the present case, the PARTIES have not agreed on an express choice of law to govern the arbitration agreement. Thus, CLAIMANT contends that in the absence of an express choice of law, the law of Mediterraneo is the implied choice of law of the PARTIES **(1)**. Additionally, there are no contrary intentions to show that the PARTIES intended otherwise **(2)**. Furthermore, in addressing the contentions raised by RESPONDENT, CLAIMANT argues that the arbitration agreement is not separate from the main contract **(3)**.

1. In the absence of an express choice, the law of Mediterraneo is the implied choice governing the arbitration agreement.

5. In order to determine the law applicable to the arbitration agreement, the Court in *Sulamerica v Enesa,* laid down the following test to determine the applicable law to the arbitration agreement, *first*, the Court must give effect to the express intention of the parties. *Second*, in the absence of an express choice-of-law clause, the implied choice of law should be assessed by taking into consideration the intention of the parties and *third*, based on the system of law with which the arbitration agreement has most real and close connection [*Sulamerica v Enesa,* ¶25]. Although this test was laid down by English Courts, it has been internationally accepted to determine the applicable law of the arbitration agreement [SUTTON/GILL/GEARING, *p.91*; *BCY v BCZ*; *Habas Sinai v VSC Steel*].

6. In the absence of an express choice of law in an arbitration agreement, the substantive law of contract is the implied choice applicable to the arbitration agreement [*Lew*, *p.114-145*; *ICC Case No. 7920/1998*; *ICC Case No. 11869/2011*; *Sonatrach Petroleum Corp v Ferrell International Ltd, p.32*; *Sulamerica v Enesa*; *Svenska Petroleum Exploration v Lithuania, p.76*]. The natural inference of the word "agreement" in a choice of law clause is that the parties intend the choice of law to govern all aspects of the agreement signed by them including the arbitration agreement [*Born*, *p.814; Arsanovia v Cruz City Mauritius Holdings, p.22; BCY v BCZ, p.25*].

7. In the present case, the PARTIES have not included an express choice of law in the arbitration clause. Right from the beginning of contractual negotiations, CLAIMANT had made clear its intentions to be governed by the Law of Mediterraneo. RESPONDENT, in its email on 10th April 2017, proposed Equatoriana as the seat and law governing the arbitration agreement [*Ex. R1, p.34*]. However, in its response on 11th April 2017, CLAIMANT expressly rejected this proposal and noted that any discussion on this issue would be "futile" [*Ex. R2, p.34*]. CLAIMANT informed RESPONDENT that as per its internal policy, a contract could not be submitted to foreign law or dispute resolution in the country of the counterparty unless the creditors' committee gave special approval [*Ex. R2, p.34*]. CLAIMANT'S reference to the term "contract" in the statement "contract submitted to foreign law", was generic in nature and included the arbitration clause within its ambit [*Ex. R2, p.34*]. This conclusion is further supported by the language of the rest of the letter. CLAIMANT, after considering RESPONDENT'S proposal, proposed an amended arbitration clause excluding the statement concerning applicable law [*Ex. R2, p.34*]. In fact, CLAIMANT noted that the "offer is naturally on the condition that the law applicable to the Sales Agreements remains the law of Mediterraneo" [*Ex. R2, p.34*].

8. Additionally, the PARTIES negotiated and signed the agreement in Mediterraneo after considering the *Mediterraneo Guidelines for Semen Production and Quality Standards* [*Ex. C2, p.10*].

Furthermore, the payment of the sale was also to be made in Mediterraneo. Accordingly, the bulk of contractual obligations was going to be performed in Mediterraneo.

9. In conclusion, the aforementioned facts highlight that the implied choice of law is the law of Mediterraneo.

2. By choosing the seat of arbitration as Danubia, PARTIES have not displaced the implied choice of Mediterraneo Law.

10. The conclusion of substantive law governing the arbitration agreement might be displaced "by the terms of the agreement itself or the consequences or its effectiveness of choosing the proper law of the substantive contract" [*Sulamerica v Enesa,* ¶26]. Although the law of the seat is different from the proper law of the contract, this by itself is not sufficient to displace the indication that the substantive law of the contract governs the arbitration agreement [*Arsanovia v Cruz City*; *BCY v BCZ*; *Habas Sinai v VSC Steel Coy*]. In most cases, Courts have chosen the seat of arbitration as the law applicable to the arbitration agreement, to either uphold its validity or to give effect to parties' intentions. In *Sulamerica v Enesa*, the choice of seat was upheld as the governing law precisely because the choice of substantive law would have rendered the arbitration agreement invalid [*Sulamerica v Enesa*]. Further, in *ICC Case No. 6162* the tribunal decided that the law of seat i.e. Swiss Law would be applicable over the substantive law i.e. Egyptian law since the latter would have rendered the arbitration agreement void [*ICC Case No. 6162/1995*]. Again, in the *Abuja International Hotels v Meridien SAS*, the substantive law of the contract viz the Nigerian law was rejected, and law of the seat was given preference only on the grounds of validity of the arbitration agreement [*Abuja International Hotels v Meridien SAS*]. Thus, cases where seat has found precedence over the substantive law typically dealt with validity of the arbitration agreement. In other cases, Courts have relied on substantive law.

11. Here, the PARTIES have chosen Danubia merely as the seat of arbitration. There is no express or implied reference in the Sales Agreement indicating that parties intended Danubia to be the governing law of arbitration agreement. Further, the 'pro-validity' approach is not of any relevance in this case since the question concerning validity of the arbitration agreement does not arise.

12. In conclusion, the choice of seat in the arbitration agreement is not sufficient to displace the implied choice of the PARTIES.

3. Arbitration clause is not separate from the Sales Agreement.

13. RESPONDENT'S contention to treat the arbitration as separate from the main contract for all purposes is untenable and falls foul of the true purport of the doctrine of separability. Art. 16(1)

of the UNCITRAL Model Law states that, "*The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.*" (emphasis added) [*UNCITRAL Model Law, Art. 16(1)*]. The provision categorically uses the phrase "for that purpose", thus referring exclusively to the Tribunal's power to rule on its jurisdiction [*UNCITRAL Model Law, Art. 16; Venkatesan/Glick in* KAPLAN/MOSER/PRYLES*, p. 137*]. The aim of the doctrine of separability is to sustain the validity of the arbitration agreement when the jurisdiction of the Tribunal is challenged [MILES/GOH, *p.388;* BRIGGS, ¶14.37] Accordingly, the separability doctrine does not insulate the arbitration agreement from the substantive contract for all purposes [*JSC Zestafoni v Ronly* Holdings; *Sulamerica v Enesa*].

14. In the present case, the *lex arbitri* is the law of Danubia which has adopted the UNCITRAL Model Law [*PO1, p.52*]. Accordingly, the doctrine of separability applies exclusively to situations when jurisdiction of the Tribunal is challenged.

B. The arbitration agreement extends to a claim for increased remuneration.

15. RESPONDENT argues that the arbitration agreement does not confer power on the arbitrators to adapt the contract. However, based on the law of Mediterraneo, CLAIMANT submits that the arbitration agreement encompasses a claim for increased remuneration and thus provides for adaptation of contract.

16. Proper construction of the terms of arbitration agreement forms the basis of determining the jurisdiction and powers of the arbitral tribunal [*Brasserie du Pêcheur v Germany; ICC Case No. 5103/1988; ICC Case No. 4145/1984*]. The law applicable to the arbitration agreement governs the validity, effect and interpretation of the arbitration agreement [BORN I, *p.1398*; DICEY/MORRIS, *p.*591; REDFERN ET AL.*, p.137, 237*].

17. In the current case, the interpretation of the arbitration agreement will be governed by the Law of Mediterraneo which allows for a broad interpretation of the arbitration clause [*Issue I(A)*]. Further, in a sales contract governed by the CISG, the latter is applicable for the purpose of conclusion and interpretation of arbitration clause [*PO1,* ¶4]. Thus, CISG will govern the interpretation of the arbitration agreement.

18. The arbitration agreement between the PARTIES refers to the "dispute(s) arising out of this contract" [*Ex. C5, p.14*]. This clause is alleged to have a narrow wording and would restrict the scope of the arbitration agreement [*NoA, p.7*]. However, CLAIMANT submits that the clause will not affect Tribunal's power to adapt the contract since both the PARTIES intended for the

arbitration agreement to apply to disputes involving adaptation of contract. **(1)**. Even if RESPONDENT was unaware of CLAIMANT's intention, a reasonable person would understand that the Tribunal has power to adapt the contract **(2)**.

1. RESPONDENT was not unaware that CLAIMANT intended to confer power to adapt the contract on the Arbitral Tribunal.

19. As per Art. 8(1) CISG, the statements made by a party "are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was" [*CISG, Art. 8(1)*].

20. In the short discussion between the PARTIES on the day of accident, the primary negotiators had agreed on the power of the Tribunal to adapt the contract. On the suggestion made by Ms. Napravnik to set up a mechanism for contractual adaptation, Mr. Antley replied saying that it was for the arbitrators to adapt the contract if PARTIES could not agree on amendment [*Ex. C8, p.17*]. Although the failure of Parties to amend the contract was unlikely, the negotiators still thought it to be worthwhile to include an express reference clarifying the issue [*Ex. C8, p.17*]. This is evidenced by Mr. Antley's agreement to Ms. Napravnik's suggestion of clarifying the issue by an express reference [*Ex. C8, p.17*]. Both the PARTIES were in agreement that the Tribunal had power to adapt the contract. The only minor consideration was the need for an express inclusion of this power in the contract. In order to satisfy this requirement, Mr. Antley promised to give a proposal clarifying the Tribunal's power to adapt [*Ex. C8, p.17*]. However, this promise could not be fulfilled due to the accident [*Ex. C8, p.17*]. Nonetheless, Mr. Antley was in the habit of writing down open issues after every round of negotiation [*Ex. R3, p.35*]. Mr. Antley's note in his negotiation file highlights his intention to propose an express reference to power of the Tribunal to adapt the contract. The third point in the note referred to the "connection of hardship clause with arbitration clause" [*Ex. R3, p.35*]. A hardship clause can only be linked to an arbitration clause when the issue concerns either determination of hardship or the remedies associated with such hardship. In light of the discussion between the two negotiators about an express reference to tribunal's power to adapt it is only reasonable to conclude that the third point in Mr. Antley's note dealt with the proposal of adaptation agreed to by the PARTIES.

21. It is very clear that, the PARTIES wanted an express adaptation clause in their Sales Agreement. It was only due to the exigencies of the situation that they could not include an express clause empowering the Tribunal to adapt the contract. Consequently, RESPONDENT intends to take undue advantage of the unfortunate situation by denying the power of the Tribunal to adapt the contract.

22. Hence, RESPONDENT was not only aware of CLAIMANT's intention to grant the power of adaptation, but it even shared the same intention. In conclusion, the arbitration agreement grants power of adaptation to the arbitral tribunal.

2. Even if RESPONDENT is unaware of CLAIMANT's intention, a reasonable person would understand that the tribunal has power to adapt the contract

23. If the Tribunal does not agree that the circumstances meet the high threshold of Art. 8(1), Art. 8(2) can be referred to for understanding of the intention of the parties. As per Art. 8(2), a party's statement should be "interpreted in accordance with the understanding of a reasonable person of the same kind as the other party would have been in the same circumstances." While determining the interpretation that a reasonable man would give, due regard should be given to all relevant circumstances [*CISG, Art. 8(3)*].

24. In the email sent on 31st March 2017, Ms. Napravnik had mentioned that CLAIMANT had suffered extensively due to unforeseeable changes in the past [*Ex. C4, p.12*]. These unforeseeable changes such as additional health and safety requirement brought CLAIMANT to its knees, nearly rendering it bankrupt [*PO2,* ¶21]. Even now, after consistently suffering losses since 2014, CLAIMANT is standing on the edge of the cliff with profits from the Sales Agreement as its last hope to acquire a new line of credit [*PO2,* ¶29]. Accordingly, CLAIMANT had no other option but to seek adaptation of contract in the face of hardship. CLAIMANT's understanding of tribunal's power to adapt was clear. According to CLAIMANT, there was no legal requirement to expressly include the adaptation clause [*Ex. C8, p.17*]. Nonetheless, Ms. Napravnik suggested to clarify the Tribunal's power to adapt the contract by including an express reference. This is suggestive of CLAIMANT's desperate attempts to secure their financial safety in the best possible manner. These statements, understood in light of CLAIMANT's precarious financial position, distinctively highlight CLAIMANT's intention to adapt the contract.

25. Thus, for any reasonable person in RESPONDENT's position, it is sufficiently clear that CLAIMANT was not in an appropriate position to perform the contract and also sustain financial stability at the same time. Consequently, the Tribunal's assistance in adapting the contract was a necessary pre-requisite for the contract.

26. Conclusion to Issue 1: The implied choice of law governing the arbitration agreement is the Law of Mediterraneo. Accordingly, the Arbitration Law of Mediterraneo *viz* CISG provides for a broad interpretation of arbitration agreement. Finally, based on interaction between the PARTIES, both the PARTIES agreed that tribunal has the power to

adapt the contract if PARTIES cannot agree on an amendment. Thus, the Tribunal has power to adapt the contract.

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

27. At the annual breeder conference, CLAIMANT was made aware of another arbitration proceedings in which RESPONDENT was involved [*Letter by Langweiler, p.49*]. It came as a surprise to CLAIMANT that RESPONDENT was arguing in favour of the Tribunal's power to adapt the contract in the face of hardship *viz* a 25% increase in cost [*Letter by Langweiler, p.49*]. However, RESPONDENT's position in the present arbitration is completely contradictory to its position in the previous arbitration. RESPONDENT conveniently changed its position knowing well that the tables have turned and now RESPONDENT would be under an obligation to safeguard CLAIMANT's interests. Thus, RESPONDENT vigorously denies CLAIMANT's legitimate demand for a similar adaptation of contract due to hardship even when CLAIMANT is facing a 30% increase in cost.

28. Knowing the possible adverse effects of the "Partial Interim Award" on the present arbitral proceedings, RESPONDENT attempts to render the evidence inadmissible by arguing illegality of evidence. CLAIMANT disputes the contention of RESPONDENT for the following reasons: The Tribunal has wide discretionary power to admit evidence **(A)**. Further, the evidence sought to be presented is relevant and material to the outcome of dispute **(B)** and it is not barred by RESPONDENT's unfounded allegations of breach of confidentiality and apparent illegality **(C)**. Finally, by not admitting the evidence, CLAIMANT's right to be heard and the fair treatment principle will be violated **(D)**.

A. The tribunal has wide discretionary power to admit evidence and can refer to the IBA Rules for taking Evidence.

29. The Tribunal has wide discretionary powers to determine the admissibility of evidence [WAINCYMER, *p.792*]. The power of the Tribunal to determine the admissibility of evidence is based on the parties' agreement, the institutional rules governing the arbitration and the *lex arbitri* [BERGER/KELLERHALS, ¶13; BÖCKSTIEGEL, *p.2*; BORN I*, p.59*; MARGHITOLA, *p.20*; SCHÄFER/VERBIST/IMHOOS, *p.10*].

30. In the present case, the parties have chosen Danubia as the seat of arbitration and the HKIAC Rules to administer the arbitral proceedings [*Ex. C5, p.14*]. Danubia has adopted the UNCITRAL Model Law which empowers the Tribunal to determine the admissibility of evidence as per the agreement between the PARTIES [*UNCITRAL Model Law, Art. 19(2)*]. The PARTIES have not included any reference to specific rules of evidence in the arbitration clause. However, PARTIES

intended the HKIAC Rules to govern all aspects of the arbitration proceedings including the rules of evidence.

31. Art. 22 of the HKIAC Rules allows the tribunal complete discretion to determine the admissibility of evidence. As per the HKIAC Rules, the Tribunal can admit the evidence if it is relevant and material to the outcome of the arbitration [*HKIAC Rules 2018, Art. 22.3*]. This criterion of admission is identical to the criteria mentioned under the IBA Rules for Taking Evidence [*IBA Rules, Art. 3(3)(b)*]. The IBA Rules provide for an internationally accepted standards of taking evidence [BORN I, *p.2347*; *El-Ahdab/Bouchenaki*, *p.98*; KREINDLER, *p.157*; MARGHITOLA, *p.34*; REDFERN ET AL., ¶6.95; WELSER/DE BERTI, *p.80*] and are widely recognized [BORN I, *p.2348*; Hill, *p.9*; MARGHITOLA, *p.33*; MÜLLER, *p.78*; VEEDER, *p.321*]. Since the IBA Rules represent international best practices, arbitral tribunals frequently consult these rules as reference in spite of there being no explicit agreement or reference to them in the arbitration agreement [*Glamis Gold v U.S.*; *ICC Case No. 16655*/2011; *Noble Ventures v Romania*; *Railroad Development v Guatemala*; *VIAC Award No. 5243 (AUT, 2013)*].

32. Therefore, since the IBA Rules are in *pari materia* with the HKIAC Rules, this Arbitral Tribunal can refer to the cases interpreting the criteria for admission of evidence under the IBA Rules.

B. The evidence in the other arbitral tribunal is relevant and material to the outcome of the present arbitration.

33. RESPONDENT contends that CLAIMANT's allegations are malicious, false and misleading. To the contrary, CLAIMANT will establish that RESPONDENT's arguments are baseless and the evidence from the other arbitral proceeding is admissible in the present arbitration. Accordingly, RESPONDENT's contradictory position will be demonstrated.

34. Art. 3.3(b) of the IBA Rules states that a request to produce documents should contain "a statement as to how the documents are relevant to the case and material to its outcome". Relevancy of a document relates to the power of the document to influence the substance or conduct of the case [WAINCYMER, *p.859*]. Materiality of a document relates to the link between the claims made by the party vis-à-vis the matters sought to be established by the document *[Hamilton*, *p.70*; *UNCITRAL Draft Guidelines, p.17*]. Hence, for a document to be material and relevant, it should be necessary for a complete consideration of the facts of the case [MARGHITOLA, *p.52*; RAESCHKE-KESSLER, *p.427*; WAINCYMER, *p.858, 859*].

35. CLAIMANT argues that the present arbitration has identical facts to the other arbitration proceeding **(1)**. Accordingly, the Partial Interim Award has persuasive value and the tribunal should not depart from the award in order to support consistency in jurisprudence **(2)**.

1. The facts in the two arbitral proceedings are identical with a lower threshold of hardship in the present arbitration.

36. CLAIMANT contends that the present arbitral proceeding has identical facts to the prior arbitration between the PARTIES. In the prior arbitration, RESPONDENT was at the receiving end of the 25% additional tariffs imposed by Mediterraneo [*PO2,* ¶39]. Consequently, RESPONDENT was arguing in favour of the Tribunal's power to adapt the contract under the Law of Mediterraneo [*PO2,* ¶39]. Recognising the hardship faced by RESPONDENT (CLAIMANT in the previous proceeding), the previous arbitral tribunal confirmed its power to adapt the contract under the Law of Mediterraneo [*PO2,* ¶39]. Comparing the aforementioned factual matrix to the present case, it is evident that the two proceedings are identical. *First*, PARTIES in the present arbitration are in the exact same position as the parties in the previous arbitration with the same applicable law *viz* the Law of Mediterraneo. The Mediterraneo Contract Law is a verbatim adoption of the UNIDROIT Principles [*PO1,* ¶4], which empower the Tribunal to adapt the contract [*PICC, Art. 6.2.3*, ¶4b].

37. *Second*, the hardship caused to CLAIMANT is greater in the present case, as compared to the hardship caused to RESPONDENT, in the prior arbitration. The 30% tariff imposed by Equatoriana is more burdensome by 5% [*NoA, p.6*]. Moreover, Equatoriana's imposition of tariff was greatly more unforeseeable than the tariffs imposed by Mediterraneo. Mr. Bouckaert, President of Mediterraneo, had at least given some indication of protective measures for the agricultural sector [*NoA, p.6*]. Contrary to this, Equatoriana's imposition of retaliatory tariffs caught CLAIMANT on the wrong foot. Equatoriana, being one of the strongest proponents of free trade, almost never resorted to restrictive measures. Thus, CLAIMANT could never have predicted such a retaliatory tariff.

38. *Third*, the threshold of hardship to be satisfied in the present proceedings is much lower as compared to the other arbitral proceedings. In the Sales Agreement, PARTIES decided the "more onerous" threshold to trigger hardship. However, in the previous arbitration, the contract included the ICC Hardship Clause, 2003 which has an "excessively onerous" threshold. This is significantly higher than the "more onerous" threshold. Accordingly, it is relatively easier for CLAIMANT to establish that the threshold of hardship is satisfied.

39. In conclusion, the present arbitration has identical facts, greater hardship and a lower threshold of hardship to be satisfied. Accordingly, the Partial Interim Award will be relevant for the present Tribunal to contrast the extent of hardship arising in the backdrop of an exactly similar factual matrix.

2. Partial Interim Award has a persuasive value and to maintain consistency of jurisprudence, Tribunal should not depart from it.

40. CLAIMANT argues that the Partial Interim Award is crucial to influence the substance of the case and has a material bearing on the outcome of the present proceedings. In order to substantiate its claim, CLAIMANT will establish that the Partial Interim Award has persuasive value **(a)**. Consequently, the Tribunal should not depart from the awards to maintain consistency of jurisprudence **(b)**.

a) Partial Interim Award is relevant and material to the present arbitration proceedings.

41. Prior arbitral awards are significant and hold persuasive authority in the practice of commercial arbitration [BORN I, *p.3823*]. Prior arbitral awards deciding on a certain issue have an important bearing on that issue if it arises in subsequent arbitration [BORN I, *p.3824*; *ICC Case No. 6363/1992*]. Arbitrators bear in mind the prior awards and findings in a similar dispute as it provides helpful analysis of the common factual background to the present dispute [BORN I, *p.3824*]. Awards laying down principles of substantive commercial law are often given effect in subsequent arbitration [BORN I, *p.3825*].

42. As has been proved previously, the facts of the present dispute are identical to the previous arbitration [*Issue II(B)(1)*]. Further, the legal issue to be determined is also the same *viz* "power of the tribunal to adapt the contract under the Law of Mediterraneo" [*Issue II(B)(1)*]. In the prior arbitration, the tribunal confirmed its power of to adapt the contract under Art. 6.2.3 (4b) of the Mediterraneo Contract Law. Accordingly, to determine the same legal issue in the present arbitration, Tribunal should bear in mind the principles of substantive commercial law that were given reference to in the previous arbitration proceeding. Therefore, for the Tribunal to follow the principles of substantive commercial law, the award in the prior proceeding is relevant and material to the present proceedings.

b) The Tribunal should not depart from the Partial Interim Award as it represents consistent jurisprudence in Mediterraneo.

43. Although it is admitted that awards rendered in arbitration are case specific, this cannot be construed to mean that arbitration takes place in a vacuum. No matter how case specific, these awards have systemic implications which must still be considered. The Tribunal's awareness of

such systemic implication ensures consistency in jurisprudence [*Glamis Gold v U.S.*; *Thunderbird Gaming v United Mexican States*]. In a bid to ensure consistency in jurisprudence, tribunals rely on previous awards as precedent, especially when the circumstances of the dispute are similar [BROWER-BRUESCHKE, *p.651-654*; GAILLARD, *p.217*; *Thunderbird Gaming v United Mexican States*]. Although not bound by established principles, the Tribunal cannot act in complete disregard to established principles [*Thunderbird Gaming v United Mexican States*].

44. In the previous arbitration, the legal issue before the prior Tribunal was the "power of arbitral tribunal to adapt the contract under the Law of Mediterraneo". The Tribunal, on the basis of consistent jurisprudence in Mediterraneo, confirmed the tribunal's power to adapt the contract under *Art.* 6.2.3(4)(b) of the Mediterraneo Contract Law. The present Tribunal should follow this consistent jurisprudence and should give due consideration to the previous Tribunal's award [*PO2,* ¶45]. By not admitting the Partial Interim Award, the Tribunal will effectively deny recognition to established principles applicable to similar set of facts. Consequently, this will have a material bearing on the consistency of jurisprudence since the legal issue again becomes open to interpretation. Hence, this may lead to contradictory awards on the same legal matter.

C. The admission of evidence from other arbitral proceedings is not barred by confidentiality or illegality.

45. RESPONDENT disputes the admissibility of the evidence in the other arbitral proceedings arguing that the evidence was obtained through illegal means. RESPONDENT contends that the only possible source of CLAIMANT's information could be RESPONDENT's employees or the hack of its computer system.

46. In international arbitration, the Tribunal tends to admit the evidence presented by a party unless the counterparty can establish grounds for non-admissibility [*Damaska*]. Admission is a matter of right, and the burden of establishing that the procedural law of the Tribunal will be violated by admitting the evidence is on the party challenging admission [SANDIFER, *p.176*]. Accordingly, the burden to show inadmissibility of present evidence is on RESPONDENT.

47. CLAIMANT contends that RESPONDENT has not discharged its burden since, *first*, CLAIMANT has not breached confidentiality of the previous arbitration agreement **(1)** and *second*, the claims of illegality does not affect admissibility of evidence **(2)**.

1. CLAIMANT has not breached confidentiality of previous arbitration.

48. Information that is available in public domain cannot be protected by confidentiality [SMEUREANU, *p.112*]. Information is considered to be in public domain if the parties are able to acquire information from external sources [SMEUREANU, *p.112*; *The Commonwealth of Australia v John*

Fairfax]. Although HKIAC Rules do not specifically provision this public domain exception, the exception is widely recognized by many arbitral institutions such as the WIPO Rules, IBA Rules, SIAC Rules, LCIA Rules and the Swiss Rules [*IBA, Rules 3.13*; *LCIA, Art. 30*; *SIAC, Art. 35*; *WIPO, Art. 74*]. Thus, the public domain exception to confidentiality is an internationally accepted standard which should be adhered to by this Tribunal.

49. In the present case, CLAIMANT intends to admit a Partial Interim Award' of the previous arbitration as evidence in the present proceedings. This information about the interim award was initially confidential in nature. However, the information was leaked. RESPONDENT alleges that the only source of the leak was on account of a previous employee or the hack of their computer system [*Letter by Fasttrack, p.50*]. Subsequent to the leak, a company providing intelligence on the horse-racing industry, acquired the award and was selling it against payment of a sum [*PO2,* ¶41]. Accordingly, after the leak, the information had entered the public domain. CLAIMANT, like any other interested individual, was merely a subscriber to this information which was already accessible to any member of the public upon payment of a price. Since CLAIMANT acquired this information when it was already in public domain, CLAIMANT could not have breached the confidentiality agreement of the previous arbitration.

2. Illegal hack of RESPONDENT's computer system does not affect admissibility of evidence.

50. An arbitral tribunal is not precluded from admitting evidence which may have been stolen or otherwise obtained unlawfully [*John*]. Tribunals have consistently decided in favour of admitting evidence available in public domain despite it being obtained through illegal means [*Caratube International Oil v The Republic of Kazakhstan*; *Kılıç v Turkmenistan*; *Opic Karimum v Venezuela*]. Denying admissibility of evidence, even though illegally obtained, would lead to travesty of justice [*Conoco Philips v Venezuela*]. The basic principles of fairness are violated only if the party adducing evidence is involved in the wrongdoing [*Libananco Holdings v Turkey*; *Methanex v United States of America*; *Opic Karimum Corporation v Venezuela*].

51. In the present case, RESPONDENT alleges that the source of the information leak was through its previous employees or through the illegal hack of its computer system [*Letter by Fasttrack, p.50*]. Even if one assumes that RESPONDENT's allegations are true, the Tribunal has powers to admit the evidence obtained illegally. At the outset, CLAIMANT had no involvement in the leak of the information [*PO2,* ¶41]. On the contrary, CLAIMANT was merely subscribing to this information which was already present in the public domain. In the absence of any wrongdoing on part of CLAIMANT, the evidence obtained illegally can be admitted. In determining the question

of admissibility, the tribunal should consider that the evidence is available in public domain. Accordingly, not admitting the evidence would be unjust and unreasonable and would act against the interest of CLAIMANT.

D. Non-admission of evidence will violate mandatory procedural rules.

52. CLAIMANT submits that by not admitting the evidence from the other arbitration, the Tribunal will deny CLAIMANT a full opportunity to present its case and a right of fair treatment.

53. In determining admissibility, Tribunal must give due consideration to the mandatory procedural rules which include the right of equal treatment and adequate opportunity for presentation of one's case [RAESCHKE-KESSLER, *p.428*]. An essential element of opportunity to present a case is the freedom enjoyed by the parties to take evidence [*Duarib v Jallais*; *Netal*]. In order to treat parties equally, the principle of fair treatment demands that both parties are given appropriate opportunity to present its case [SCHWARZ/KONRAD, ¶20-017; *Dombo Beheer v The Netherlands*].

54. In the instant case, the admission of evidence is material for CLAIMANT to establish the Tribunal's power to adapt the contract under Law of Mediterraneo. The previous award by the prior Tribunal was rendered only after taking into consideration the consistent jurisprudence in Mediterraneo concerning a tribunal's power to adapt contracts [*PO2,* ¶39; *PICC, Art. 6.2.3,* ¶4b]. Even in the present arbitral proceedings, as has been established previously, Law of Mediterraneo is the applicable law to the arbitration agreement [*Issue I(A)*] Accordingly, for the present Tribunal to render an award consistent with jurisprudence in Mediterraneo, the Tribunal should consider the previous arbitration award. Especially, when the factual matrix in the two proceedings are identical and the legal issue is also the same [*Issue II(B)(1)*]. Non-admission of the evidence will result in turning a blind eye towards established principles and would be highly disadvantageous to CLAIMANT. It would be egregious to not admit evidence which can significantly dent RESPONDENT's contention simply based on the allegation of illegality of evidence.

55. In conclusion, the Tribunal should not deny admission of the evidence as it would unfairly treat CLAIMANT and would substantially affect CLAIMANT's opportunity to present its case.

56. Conclusion to Issue 2: The evidence from the prior arbitration is admissible in the present proceedings. CLAIMANT has not breached confidentiality of previous arbitration since the information of the prior arbitration was available in the public domain. In addition to this, the alleged illegality of evidence does not bar its admissibility in the

present proceedings. Lastly, by not admitting the illegal evidence, Tribunal will breach CLAIMANT's right to be heard and the right to full opportunity to present its case.

ARGUMENTS ON SUBSTANTIVE ISSUES

III. CLAIMANT IS ENTITLED TO THE PAYMENT OF US$ 1,250,000 RESULTING FROM AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT.

57. On the morning of 21st January 2018, CLAIMANT was unexpectedly informed of the imposition of tariffs on frozen semen by Equatoriana which resulted in an unanticipated hike of 30% to the estimated original cost of the delivery [*NoA, p.6*; *Ex. C7, p.16*]. CLAIMANT immediately informed RESPONDENT of such a change and sought a response from it regarding the impending last shipment [*Ex. C7, p.16*]. RESPONDENT, who expressed concern for CLAIMANT's precarious position, assured CLAIMANT of engaging in negotiations to find an amicable solution to the unfortunate problem [*Ex. C7, p.16*; *Ex. R4, p.36*]. Relying on the express promise of an amicable solution and the emphasis on urgency by RESPONDENT, CLAIMANT dispatched the last shipment [*Ex. C8, p.18*]. CLAIMANT even undertook the burden of paying the high tariffs in spite its vulnerable economic position [*PO2,* ¶29; *Ex. C8, p.17*]. Despite all the best efforts made by CLAIMANT, RESPONDENT brazenly withdrew its assurances. RESPONDENT not only denied owing CLAIMANT any remuneration but also refused to engage in the negotiations initiated by CLAIMANT [*Ex. C8, p.18*].

58. CLAIMANT argues that the hardship clause must be broadly construed in order to include the present impediment [*Ex. R2, p.34*]. Specifically, RESPONDENT must be compelled to repay the additional tariff to CLAIMANT in accordance with clause 12 of the Agreement [*Ex. R2, p.34*]. However, RESPONDENT refuses to acknowledge the hardship borne by CLAIMANT by contending that the hardship clause is narrowly worded and further declines to adapt the price payable under the agreement. In the following contentions, CLAIMANT urges the Tribunal to recognise that the interpretation of the hardship clause of the contract is inclusive of the present impediment, both subjectively **(A)** as well as objectively **(B)**.

A. Subjective interpretation of the hardship clause under Art. 8(1) CISG demonstrates intention of the PARTIES to include the imposition of tariffs.

59. The parties' intent can be gathered through the aid of Art. 8(1) CISG [*CISG, Art. 8(1)*; KRÖLL/MISTELIS/VISCASSILAS, *p.142*; STAUDINGER/MAGNUS, ¶7; SCHLECHTRIEM/SCHWENZER, *p.144*; *Gyula Eörsi, Chapter 2, p.1-36*; *Secretariat Commentary*]. Art. 8(1) specifies the definition of 'statement' as being any expression known to the other party

[KRÖLL/MISTELIS/VISCASSILAS, *p.146*; SCHLECHTRIEM/SCHWENZER,*p.151*; *OGH, 18 June 1997*]. Further, the actual intent is gathered on the basis of the fact and evidence of the circumstances [KRÖLL/MISTELIS/VISCASSILAS, *p.143*; *BGer*; *MCC-Marble v Ceramica Nuova*; *Supermicro Computer v Digitechnic*]. In the present case, subjective intention of the PARTIES can be gathered from contractual negotiations and subsequent conduct **(1)** as well as the DDP delivery risk allocation **(2)**.

1. The subjective intention of the PARTIES can be gathered from contractual negotiations and subsequent conduct.

60. The relevant circumstances to be considered under Art. 8(3) CISG include the negotiations between the parties, subsequent conduct as well as the usual meaning of the words used [STAUDINGER/MAGNUS, ¶16, 36; *American Mint LLC v GOSoftware*; *Céramique Culinaire v Musgrave Ltd*; *Cour d'appel de Paris, 6 November 2001*; *Nuova Fucinati v Fondmetal*]. CLAIMANT had on a previous occasion already suffered severe losses in the course of meeting health and safety requirements [*PO2,* ¶21]. CLAIMANT has also never received a request for such an unprecedented order of frozen semen from a single breeder [*Ex. C2, p.10*]. In such a scenario, CLAIMANT wanted to protect itself from certain risks especially in light of its precarious financial circumstances [*PO2,* ¶29]. Consequently, CLAIMANT'S stance was made unequivocally clear by Ms. Napravnik in her email dated 31st March 2017 that it was not willing to undertake a risk which could include changes in customs regulation or import restrictions [*Ex. C4, p.12*]. Hence, the distinguishable will of CLAIMANT with respect to the hardship clause is clear and can be reasonably concluded.

61. CLAIMANT contends that the parties had agreed in connection with an alteration in the delivery terms that the Agreement should include an adaptation clause [*Ex. C8, p.17*]. Ms. Napravnik and Mr. Antley both agreed that there should be either an express or an implied reference to the hardship clause which covers comparable risks of tariff and custom regulations [*Ex. C3, p.11*; *Ex. C4, p.12*]. Government of Equatoriana while being a consistent supporter of free trade, went ahead and imposed a large tariff increase in the form of retaliation [*NoA, p.6*]. Such an event was not anticipated by any stretch of imagination by the PARTIES [*NoA, p.6*; *Ex. C8, p.17*]. Additionally, since neither of the PARTIES expected a tariff war to break out between the Governments, they didn't see the point of an express reference. Nonetheless, an implied reference to comparable risks of tariff and custom regulations in the hardship clause can be ascertained from the prior chain of emails during the process of drafting the contract [*Ex. C4, p.12*; *PO2,* ¶12].

62. The latest negotiators, *viz* Mr. Ferguson and Mr. Krone had access to the prior chain of emails during the process of drafting and negotiating the contract [*PO2,* ¶5]. They also had

tentative knowledge of the intention of the parties while drafting clauses 6-15 of the Agreement [*PO2*, ¶4]. Specifically, they relied on the email of Ms. Napravnik, dated 31st March 2017 to draft the wordings added to the original *force majeure* clause [*PO2,* ¶12]. RESPONDENT considered the ICC-Hardship clause suggested by CLAIMANT to be too broad [*PO2,* ¶12; *Ex. R3, p.35*]. RESPONDENT can further contend that it specifically opted for a narrow clause when it had the option of agreeing to the ICC-Hardship clause [*Ex. R2, p.34*]. However, CLAIMANT contends that the PARTIES mutually opted for a narrow clause but addressed other risks directly in the contract [*Ex. R3, p.35*]. This was done so as to allocate risks ensuing from the DDP delivery obligation separately to either of the PARTIES [*Ex. C4, p.12*]. It is thus imperative for this Tribunal to conclude that the PARTIES' intention was sufficiently clear to include within the ambit of "comparable unforeseen events" the risk flowing from additional tariffs.

63. The objective of CISG is to protect and preserve the contract. [KRÖLL/MISTELIS/VISCASSILAS, *p.148*; SCHLECHTRIEM/SCHWENZER, *p.149*]. CISG favours the perpetuation of a contract whenever possible (*favour contractus*), having regard to the international character of the agreement and the expenses involved therein [*AAA, 23 October 2007*; *Bundesgerichtshof, (2006*); *CLOUT Case No. 428*; *CLOUT Case No. 747*]. This is also well supported by the theory of "business efficacy" as developed in common law tradition [*The Moorcock Case*; *Transmission Corporation v GMR Vemagiri*].

64. The term "comparable unforeseen events" should be understood as inclusive of the risk of additional tariffs. The original intention between the PARTIES was always to cover risks derived from an alteration in tariffs and the correspondence between the parties is sufficient evidence of the same. The Tribunal should use subjective intention of the PARTIES so as to give effect to the contract in light of the parties' intention as well as the principle of party autonomy. Accordingly, the Tribunal should identify the obligation of RESPONDENT to reimburse CLAIMANT.

2. The PARTIES did not intend to burden CLAIMANT with all the risks.

65. CLAIMANT contends that it was common ground between the PARTIES that DDP delivery would not entail transfer of all the risks that are generally borne by the seller. Mr. Shoemaker did indicate that to his understanding DDP meant that all the risks were associated with the seller and he would confirm the same [*Ex. R4, p.36*]. However, since he was not a lawyer and was not involved in the negotiation process and most likely has limited knowledge of the very specific circumstances under which CLAIMANT agreed to the DDP delivery [*Ex. R4, p.36*]. The communications between Ms. Napravnik and Mr. Antley, the original negotiators for their

respective PARTIES, clearly expressed the need to address risk allocation with respect to the DDP delivery terms [*Ex. C4, p.12*].

66. CLAIMANT expressly excluded the risk associated with changes in customs regulation or import restriction [*Ex. C4, p.12*]. The intention of RESPONDENT was to benefit from the experience of CLAIMANT in the transportation of frozen semen, which in itself is a very delicate process. For instance, exposure of frozen semen to room temperature cannot be more than a few seconds [*Loomis*]. RESPONDENT emphasised the urgency of getting the shipments on time and it made commercial sense for both the parties to let CLAIMANT undertake transportation on account of experience [*Ex. C3, p.11*]. The benefits that accrued to RESPONDENT included a lower risk of damage to the semen, speedy compliance with export and import formalities and in general commercially favourable terms which was a win-win for both PARTIES [*Ex. C3, p.11*]. It would now be very contradictory for RESPONDENT to claim that the hardship associated with the tariffs-regime is the responsibility of the seller.

67. RESPONDENT seeks to hide behind the veil of the INCOTERMS 2010 edition [*PO2,* ¶10]. The DDP obligation, defined therein specifies that the seller has to bear all the costs and risks involved till the goods are delivered and clear the goods for import, export and pay the corresponding duty [*ICC INCOTERMS Rules, 2010*]. However, it is argued that under a CISG contract, the intention of the parties as envisaged under the terms of DDP would prevail over the general implication of the INCOTERMS [COETZEE, *p.17*; *Schroeter in* SCHLECHTRIEM, *p.420*; SCHLECHTRIEM/SCHWENZER, *p.741*; *Fertilizer Corp. of America v P.S. International*].

68. Moreover, at the time of the conclusion of the contract, CLAIMANT had originally asked for US$ 100,500 per dose of the frozen semen [*PO2,* ¶8]. However, RESPONDENT argued for a distribution of DDP delivery risks for a lower price and consequently reduced the final price to US$ 100,000 per dose [*Ans. NoA, p.30*]. This is evidence of the intention of the PARTIES to allocate the risk between themselves with respect to change in delivery terms, and not to further unfairly overburden CLAIMANT.

69. In light of the aforesaid, such a risk is the responsibility of the buyer given the hardship caused to the seller. Hence, CLAIMANT contends that the Tribunal should read clause 12 to include custom tariffs and adapt the price accordingly.

B. Objective interpretation of the hardship clause under Art. 8(2) CISG likewise justifies the claim of CLAIMANT.

70. Even if the Tribunal does not find merit with the 'subjective intent theory' CLAIMANT'S position is validated by the 'objective intent theory' as provided under Art. 8(2) CISG. Art. 8(2)

CISG provides for an interpretation "according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances" [*CISG, Art. 8(2)*]. The meaning of the statement is to be construed as to what a reasonable person in the same shoes as the recipient of the statement would understand it as [*ATB, 1995*; *CLOUT Case No.* 106; *CLOUT Case No. 166*; *CLOUT Case No. 189*; *CLOUT Case No. 215*; *CLOUT Case No. 308*].

71. CLAIMANT has been in a financially vulnerable position for the past two years, including at the time of the conclusion of the contract. CLAIMANT has restructured its business and cut down its work force considerably to be able to retain its business position [*Ex. C8, p.17*]. It has been running on losses since 2014 and the extension of its credit line was solely contingent upon the mitigation of its debts [*PO2,* ¶29]. In order to stay fiscally secure, CLAIMANT is heavily reliant on the revenues generated by the present sale of frozen semen [*PO2,* ¶21]. Further, its objective of negotiating a new credit line was extinguished due to the hardship borne in delivery, especially since one of its major creditors is now the house bank of CLAIMANT's rival businesses making the sale of *Phar Lap's* dressage part a prerequisite for effectuating the new credit [*PO2,* ¶29]. It must be noted that RESPONDENT was aware about CLAIMANT's financial difficulties at the time of entering into the contract [*PO2,* ¶22]. Any commercially prudent person, in the shoes of RESPONDENT, would understand that the intention of CLAIMANT would be to seriously avoid any risks of additional tariffs. In light of this knowledge, it would have been clear to RESPONDENT that CLAIMANT would never have consented to a hardship clause that subjects it to a high risk of financial detriment. If RESPONDENT'S position on the hardship clause would stand then CLAIMANT would be left hapless and perhaps even be vulnerable to bankruptcy [*PO2,* ¶29]. From an objective standpoint, the contract would not possibly envisage the disruption of the contractual equilibrium in such extreme fashion.

72. The change in delivery terms makes the contract 'more onerous' for CLAIMANT. CLAIMANT was shocked and staggered by the change in tariff as is clearly evident from the email dated 20th January 2018 sent by Ms. Napravnik. The email was classified as 'urgent' in the subject thread and indicated with a 'high' priority in contrast to the previous emails sent by CLAIMANT [*Ex. C7, p.16*]. Despite its precarious position, CLAIMANT was persuaded to deliver solely on the impression that RESPONDENT would bear the risks [*Ex. C8, p.18*]. Any other reasonable person in the shoes of RESPONDENT will also recognise that such a drastic change in the contractual equilibrium would make the contract more onerous for CLAIMANT.

73. RESPONDENT, aware of CLAIMANT's financial troubles [*PO2,* ¶22], responded that the PARTIES would find a solution to this particular impediment [*Ex. C8, p.18*]. Being completely

reliant upon RESPONDENT's promise CLAIMANT went ahead and paid the tariffs. Such reliance provisioned by RESPONDENT is an instance of subsequent conduct as it created the impression that RESPONDENT accepted the need for price adaptation [*NoA, p.6*]. Any reasonable person in the place of CLAIMANT, would construe that RESPONDENT's assurance as indicating an original intention for the custom tariffs to be a part of the hardship clause at the time of contractual formation.

74. The sudden denial of repayment leaves CLAIMANT in a complete financial predicament that is difficult for it to resolve. It would only make commercial sense for RESPONDENT to share the extreme onerousness.

75. The Tribunal should be guided by the principle of good faith when identifying objective intent of the parties [*Neto et al.*; *UNCITRAL Digest*; *ATG (1996)*; *ICC Case No. 9187/1999*; *CLOUT Case No. 166*; *CLOUT Case No. 251*]. Here, RESPONDENT could dispute that the risk entailed from additional health and safety requirements is not comparable to a change in tariffs. However, CLAIMANT contends that it is definitely comparable because a reasonable person would look at the economic aspect of the two risks which are up to 40% in the former and 30% in the latter in relation to the cost. While the class of risk is differing, the standard or threshold within the two classes are comparable.

76. Furthermore, in relation to RESPONDENT's previous arbitration, it is clear that RESPONDENT has conveniently opposed adaptation to favour its position [*Letter by HKIAC, p.49*; *PO2*, ¶39]. While in the previous proceeding, RESPONDENT favoured adaptation [*Letter by HKIAC, p.49*; *PO2,* ¶39]. Therefore, the present defence by RESPONDENT does not align with the principle of good faith.

77. In summary, any reasonable person in the shoes of RESPONDENT would understand the grave situation in which CLAIMANT finds itself and construe the repayment the additional tariffs. CLAIMANT has even forfeited its 5% profit margin with the intention of being as reasonable as possible. In light of the aforesaid, an objective lens would entail that the words "comparable unforeseen events" should be interpreted to cover the additional tariff which has substantially disturbed the contractual equilibrium.

Conclusion to Issue 3: The CLAIMANT urges the Tribunal to gather the subjective as well as the objective intention of the PARTIES with the aid of Art. 8 CISG. The PARTIES never wanted to burden CLAIMANT with the risk of additional tariffs. The clause 12 of the Agreement should be read to include the risk entailed from the additional tariffs.

Consequently, the Tribunal should direct RESPONDENT to pay US$ 1,250,000 resulting from an adaptation of the price under the contract.

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

78. CLAIMANT here seeks remuneration for the hardship it was forced to bear in the course of delivering the last shipment. CLAIMANT argues that their right to remuneration lies within the CISG. RESPONDENT disputes that CLAIMANT cannot rely on Art. 79 CISG since the parties have already provisioned a substitute to Art. 79 through clause 12 [*Ans. NoA, p.32*]. Further, it is CLAIMANT'S contention that Art. 79 neither regulates the circumstances of hardship nor does it provide the remedy requested by CLAIMANT [*Ans. NoA, p.32*]. However, RESPONDENT is incorrect on both counts.

79. CLAIMANT contends that Art. 79 CISG is applicable since there was no derogation envisaged by the parties as evidenced by its intent **[A]**. Further, it also contends that Art. 79 regulates the circumstances of hardship along with providing the remedy requested by CLAIMANT **[B]**. CLAIMANT further contends that, remuneration for the consequences of hardship can be given by this Tribunal under Art. 79 **[C]**.

A. CLAIMANT has not contracted out of Art. 79.

80. RESPONDENT contends that the Art. 79 would be inapplicable as clause 12 eclipses its relevance [*Ans. NoA, p.32*]. However, as per Art. 6 the intent to derogate from a particular provision of the CISG must be clear and real [KRÖLL/MISTELIS/VISCASILLAS, *p.104*]. CLAIMANT argues that the intention to implicitly derogate was neither real nor clear.

81. Art. 6 was never meant to be an easy escape from the CISG's applicability [*Koneru*; *Leete*; *Schlechtriem*]. Further, the drafters of the Convention preferred to hold on to an opting-out mechanism as opposed to an opting-in one [*Alstine; Convention Incorporation Report*; *Witz*]. Therefore, to prove derogation, the definite intent of the parties should be ascertained through Art. 8 CISG [GUTTERIDGE, *p.75, 82*; SCHLECHTRIEM/SCHWENZER, *p.114*]. CLAIMANT contends that neither test derived from Art. 8 is sufficiently fulfilled in order to show implicit derogation. *First*, CLAIMANT did not have the subjective intent **[1]**. *Second*, CLAIMANT did not have the objective intent either **[2]**.

1. CLAIMANT did not have the subjective intent to derogate.

82. As per Art. 8(1) CISG, the subjective intent of the parties is derived from the statement-maker's will and the awareness of such will by the other party [KRÖLL/MISTELIS/VISCASILLAS, *p.145*; *Ricketts v Pennsylvania R. Co.*]. The subjective intent is always a question of fact [*ICC Case No. 9187/1999*; KRÖLL/MISTELIS/VISCASILLAS*, p.144*].

83. The determination of CLAIMANT's subjective intent must be guided by the surrounding circumstances in which clause 12 of Agreement was drafted. CLAIMANT was one of the most experienced and renowned stud farms in Mediterraneo [*NoA, p.4*]. CLAIMANT undertook a varied amount of activities on its farm therefore it is safe to assume that it is well-versed with the horse industry [*NoA, p.4*]. At the time of entering into the contract, CLAIMANT was in a financially unstable position and was not in a position to pay back their creditors or generate new lines of credit [*PO2,* ¶29]. The situation was further exacerbated for CLAIMANT in light of having suffered terribly under a previous contract where an unforeseeable situation had distorted the commercial balance of the contract [*Ex. C4, p.12*]. More specifically, it had to bear a 40% increase in price on account of having to conduct tests in order to meet the health and safety requirements [*Ex. C4, p.12*]. Hence, CLAIMANT had only entered into the contract with RESPONDENT, despite its reservations, in order to finally generate revenue and disentangle itself from their financial mess [*PO2,* ¶15]. Further, RESPONDENT was also aware of the financial position of CLAIMANT and its intention [*PO2,* ¶22]. Further, while discussing the hardship clause, CLAIMANT had made clear to RESPONDENT that it would like a broad hardship clause [*Ex. R2, p.34*; *Ex. C4, p.12*]. CLAIMANT only later agreed to a narrow clause due to Mr. Ferguson's inexperience in international contracting [*Ex. C8, p.17*]. He did not understand the risks in depth and was liable to have been swayed by Mr. Krone, RESPONDENT's legal head who also knew the main strategy of RESPONDENT [*Ex. R3, p.35*].

84. It must be noted that the hardship regulation under Art. 79 is broader than clause 12 and encompasses wide circumstances of hardship as opposed to comparable unforeseen events. The text of Art. 79 specifies the failure of "any obligation" by either party [*CISG, Art. 79*] while clause 12 of the agreement is limited to a certain extent. For instance, Art. 79 would also regulate the failure to deliver conforming goods [AUDIT, *p.173*; ZELLER, *p.168-169*; *Flambouras*; *Tribunal de Commerce de Besançon, 19 January 1998*] while clause 12 was not intended to cover such ground. Hence, it becomes highly improbable that CLAIMANT would have had the subjective intent of opting-out of Art. 79 CISG by substituting it with a contractual clause and thereby removing itself from the protection of the CISG.

2. CLAIMANT did not have the objective intent to opt out.

85. If the Tribunal is unsatisfied with the ascertainment of the subjective intent of the parties, it can resort to applying the objective intent of the parties as espoused in Art. 8(2) CISG. The ascertainment of objective intent by the Tribunal should be gathered through the statement and conduct of the parties while being guided by the principle of good faith [KRÖLL/MISTELIS/VISCASILLAS, *p.144,150,151*; *ATG, (1996)*; *SZIER, (1999)*; *ICC Case No. 9187/1999*]. Statements and conduct of parties must be interpreted through the lens of a reasonable person [KRÖLL/MISTELIS/VISCASILLAS, *p.145*; Ricketts *v Pennsylvania R. Co.*].

86. During the pre-contractual negotiations, Ms. Napravnik had intimated to RESPONDENT the intention of including a broad hardship clause [*Ex. C4, p.12*]. CLAIMANT, post the accident of Ms. Napravnik, had been forced to replace the prime negotiator of the contract with Mr. Ferguson, a colleague who had no experience in international contracting and was only involved with the internal matters of the company [*Ex. C8, p.17*]. During the drafting of clauses 6-15 of the contract, Mr. Ferguson agreed to a narrowly worded clause because he assumed that the express clause enshrined in clause 14 of the contract would be enough to extend protection against unforeseen risks. Hence, viewing the circumstances through a reasonable man perspective, it becomes clear that even if RESPONDENT had wanted an implicit derogation from Art. 79 CISG, Mr. Ferguson, could not have known the CISG in great detail. Therefore, it could never have been inferred from RESPONDENT's conduct or during the drafting of the hardship clause itself.

87. In summary, it is clear that CLAIMANT had no intention to derogate from Art. 79 CISG.

B. Art. 79 regulates hardship as well as provides for the remedy requested by CLAIMANT.

88. CLAIMANT, due to the imposition of tariffs was unable to deliver the last shipment at the contractually agreed upon price by the PARTIES [*Ex. C8, p.18*]. Hence, CLAIMANT argues that the non-performance of its obligation to deliver frozen semen at an agreed contractual price should be subject to the exemption under Art. 79 CISG and consequently seeks an adaptation of the sales agreement.

89. However, RESPONDENT asserts that Art. 79 does not regulate circumstances of hardship [*Ans. NoA, p.32*]. Contrary to RESPONDENT'S assertion, several scholars have opined that the concept of hardship is supported by the text of Art. 79, especially the word 'impediment', and are in favour of interpreting the provision this way [BRUNNER, *p.213*; HERBER/CZERWENKA; HONNOLD/FLECHTNER, *p.627*; KEIL, *p.188*; SCHLECHTRIEM/SCHWENZER, *p.1142*]. This opinion is shared by the CISG Advisory Council as well [*CISG-AC No. 7*].

90. Opponents to this particular understanding of Art. 79 usually cite the replacement of the word 'circumstances' in the initial draft with the word 'impediment' to be suggestive of narrow construction [*CISG-AC No. 7*]. However, this particular background cannot be the sole reason for the exclusion of changed circumstances disallowing the disadvantaged party to seek relief [HONNOLD/FLECHTNER, *p.484-485*; *CISG-AC No. 7*]. Referring to the drafting history of the CISG does not mean that a certain provision's interpretation must be set in stone. It must be adapted in accordance with international changes through dynamic interpretation [*Klepac*]. Presently, the concept of changed circumstances has been recognised in Italy, Germany, Spain, Poland, Slovenia, Croatia, Netherlands, Austria, Greece, Portugal, France, Estonia [CLIVE/BAR, *p.707-710*]. In addition, the UNIDROIT Principles also governs circumstances of hardship [*PICC, Art. 6.2.2*]. This is indicative of the legitimacy of recognising changed circumstances to be excessively onerous.

91. Further, there are contentions that the exclusion of hardship circumstances from the CISG also demonstrates a solution that is highly suitable to the CISG's goal of achieving uniform interpretation [*Petsche*]. However, this is a fallacious argument. In fact, the solution of reading in hardship into the term impediment would ensure a higher degree of uniform interpretation due to the similar reasoning that would be followed by Tribunals [*Tallon*, *p.592*; *Klepac*; *Rimke*]. The objective of uniform application of the CISG is deemed to be defeated if certain issues were left to domestic law [FELEMEGAS, *p.11*; SCHLECHTRIEM/SCHWENZER, *p.1142*]. Therefore, interpreting impediment to be inclusive of hardship furthers the CISG's objectives.

92. The requisites for hardship can be derived by way of analogy from Art. 79(1) as both the concepts of impossibility and hardship are intended to resolve parallel problems [KRÖLL/MISTELIS/VISCASILLAS, *p.1089*]. A party seeking exemption must establish that there existed an impediment that hindered conforming performance [LOOKOFSKY, *p.139*]. Further, that it was beyond its control, unforeseeable and unavoidable [HONNOLD/FLECHTNER, *p.*613; LOOKOFSKY, *p.139*; *Bundesgerichtshof, 24 March 1999*]. In the following, CLAIMANT contends that: *first*, the prerequisite of an impediment that hindered performance is fulfilled. *Second*, the requirement of control is fulfilled. *Third*, the impediment was unforeseeable and *fourth*, the impediment could not have been avoided by CLAIMANT.

93. In the current case, the impediment relates to the imposition of tariffs on frozen semen making the goods 30% more expensive from its original selling price [*Ex. C7, p.16*]. Such a circumstance led to CLAIMANT having to deliver the frozen semen at a price higher than what was

contractually agreed by both parties [*Ex. C5, p.14*; *Ex. C8, p.18*]. Hence, the impediment disallowed CLAIMANT from performing in accordance with the contract.

94. The imposition of tariffs was a risk clearly beyond CLAIMANT's control. *Phar Lap* is a company based in and registered in Mediterraneo and hence has absolutely no scope to influence decisions such as imposition of tariffs upon agricultural trade [*NoA, p.4*]. This is a quintessential example of State intervention and hence is generally recognised to be beyond the control of contracting parties. Therefore, there was no scope of control by CLAIMANT in this regard.

95. As regards the foreseeability, there is no reasonable manner in which CLAIMANT could have predicted such an economic constraint. Equatoriana imposed a retaliatory 30% tariff on select animal products [*NoA, p.6*]. Presently, the Equatorianian government has consistently been a proponent of free trade among countries [*NoA, p.7*]. Consequently, retaliatory measures from such a government was unanticipated even to the informed circles of Equatoriana [*Ex. C6, p.15*]. In fact, both PARTIES were astonished that the tariffs were applicable to the racehorse semen, a category that is usually understood to be distinct from other sorts of animal breeding [*NoA, p.6*]. Hence, the burden of tariffs was a completely unforeseen event not just by CLAIMANT but also by RESPONDENT.

96. Furthermore, there was no reasonable way through which CLAIMANT could have avoided the contract. It is noteworthy that in situations of impediment, a seller, in order to avoid the impediment, may procure substitutable goods from another source for the buyer in order to avoid the particular hardship [KRÖLL/MISTELIS/VISCASILLAS, *p.68*]. However, in the present case, due to the goods being highly specific and whose specificity constituted the essence of the contract, Nijinsky III's frozen sperm could not have been substituted [*Ex. C1, p.9*]. Hence, the tariffs were unavoidable.

97. In the current case, RESPONDENT further contends that Art. 79 does not provide for the remedy requested by CLAIMANT [*Ans. NoA, p.32*]. As a remedy for hardship, CLAIMANT has contended that adaptation of the contract is the most commercially practical solution. This remedy flows from Art. 79(5) CISG itself. It can be supposed to allow for the possibility of this Tribunal to adapt the terms of the contract in altered circumstances [BRUNNER, *p.366*; HERBER/CZERWENKA, *p.*654; HONNOLD/FLECHTNER, *p.642*; SCHLECHTRIEM/SCHWENZER, *p.1151*; *Garro*].

98. In conclusion, Art. 79 can be interpreted to include within it situations of hardships and its remedy *viz* adaptation.

C. If the Tribunal believes there is a gap within the CISG, CLAIMANT is entitled to an increased remuneration through a gap-filling mechanism.

99. Art. 7(2) CISG suggests that a particular gap may be filled by rules of private international law [*CISG, Art. 7(2)*]. It must be noted that a gap must be resolved through general principles underlying the CISG before domestic law can be resorted to [*CISG, Art. 7(2)*]. In the following, CLAIMANT argues that the principle of good faith underlying CISG must be used to resolve the gap **[1]**. However, if the Tribunal is unsatisfied, it can resort to domestic law provisions in order to fill the gap **[2]**.

1. The principle of good faith can be used to resolve the gap in Art. 79.

100. It is widely acknowledged that the principle of good faith acts as a regulator of conduct for parties in course of performance [SCHLECHTRIEM/SCHWENZER, *p.135*; *Magnus*; *Keily*; *Kritzer*; *Cour d'appel, 22 February 1995; ICC Case No. 8611/1997*]. It imposes upon parties the duty to act honestly and fairly [*Powers*]. Specifically, each party is expected to respect the counterparty's interests [FRANCO/EVA-MARIA ET AL, *p.438*; KRÖLL/MISTELIS/VISCASILLAS, *p.121*; SCHLECHTRIEM/BUTLER, *p.52*]. Further, the general principle of good faith is of relevance vis-à-vis the gap-filling mechanism espoused in Art. 7(2) [KRÖLL/MISTELIS/VISCASILLAS, *p.136*; SCHLECHTRIEM/SCHWENZER, *p134*; *Felemegas*]. Moreover, good faith is recognised to act as the basis for an exemption under Art. 79 [*Ishida*; *Rimke*].

101. CLAIMANT, as soon as it was informed that the agricultural tariffs were inclusive of the frozen semen immediately contacted RESPONDENT intimating it of the news [*Ex. C7, p.16*]. RESPONDENT assured CLAIMANT to go ahead with the delivery anyway [*Ex. R4, p.36*]. Further, RESPONDENT promised CLAIMANT that it would reach an agreement in accordance with the contract [*Ex. R4, p.36*; *Ex. C7, p.16*]. Along with this, RESPONDENT also emphasised that it was interested in a long-term relationship as well as additional business with CLAIMANT [*Ex. C8, p.18*].

102. However, during negotiations RESPONDENT reacted aggressively and refused CLAIMANT any remuneration for the hardship borne [*Ex. C8, p.18*]. RESPONDENT, acting in bad faith, refused to honour its promise and stated that it is not interested in further cooperation with CLAIMANT [*Ex. C8, p.18*]. In light of such non-cooperation by RESPONDENT, it is evident that the business relationship between CLAIMANT and RESPONDENT is so filled with acrimony that there is no scope for future negotiations.

103. To add insult to injury, RESPONDENT not only declined to co-operate with CLAIMANT but also sought to generate additional profit through reselling CLAIMANT's frozen semen without CLAIMANT's knowledge or consent. Such conduct by RESPONDENT not only damages CLAIMANT's

business significantly but is a clear and indisputable indication of bad faith on the part of RESPONDENT.

104. In light of the above contentions, CLAIMANT urges the Tribunal to exempt it for breach of contract and further adapt the contract in CLAIMANT's favour. Further, it is established in the previous contention, adaptation is already recognised to be one of the possible remedies under Art. 79(5) CISG. Hence, a Tribunal may undertake provisioning an exemption based in good faith [*Ishida*; *Rimke*] and further adapt the contract as a remedy for the hardship that a party is forced to bear. In the present case, the only commercially practical solution would be an adaptation of the price in order to make up for the hardship that was beyond CLAIMANT's control.

105. Therefore, CLAIMANT argues that the Tribunal must adapt the contract in the present circumstances of hardship in order to fill the gap within the Convention and further exempt CLAIMANT for breach of contract.

2. The gap may be resolved by resorting to Mediterraneo's domestic law.

106. In order to resolve the gap, Art. 7(2) CISG must be referred to. It suggests that a particular gap may be filled either through the principles underlying the Convention or rules of private international law [*CISG, Art. 7(2)*]. Further, domestic law may be resorted to in order to resolve the gap [KRÖLL/MISTELIS/VISCASILLAS, *p.135*; SCHLECHTRIEM/SCHWENZER, *p.1146*; *Gerechtshof Den Haag, 22 April 2014*]. Mediterraneo's contract law is a verbatim adoption of the UNDROIT Principles [*PO1,* ¶4]. Art. 6.2.3 of the UNDROIT Principles seeks to fill the internal gap by provisioning a solution of adaptation in changed circumstances [*PICC, Art. 6.2.3*]. In the following, CLAIMANT contends that the requisites for adaptation laid down in Art. 6.2.3 have been met **[a]**. Further, CLAIMANT argues that RESPONDENT must bear the complete risk of hardship **[b]**.

a) The requisites for adaptation in Art. 6.2.3 have been met.

107. Art. 6.2.3. of the UNIDROIT Principles provisions for the legal effects of hardship. As per Art. 6.2.3, CLAIMANT is "entitled to request renegotiations" of the contract [*PICC, Art. 6.2.3*; VOGENAUER/KLEINHEISTERKAMP, *p.719*]. Any failure to conclude successful renegotiations allows either party to plead before the court [*PICC, Art. 6.2.3*]. Further, here CLAIMANT is not only entitled to seek renegotiations but is entitled to be cooperated with by RESPONDENT, a duty which is based on the principles of good faith [*PICC, Art. 1.7*] and cooperation [*PICC, Art. 5.3*] that underlie the UNIDROIT Principles [VOGENAUER/KLEINHEISTERKAMP, *p.719*; *Kessedjian*]. Furthermore, the term "court" must be understood as referring to the dispute resolution apparatus that was contractually agreed by both parties [*Kessedjian*]. If hardship is declared to exist in the

circumstances the Tribunal has to decide to either terminate or adapt the contract [*PICC, Art. 6.2.3(4)*]. While termination is a viable option, it is the less commercially helpful option of the two remedies. Where termination would deprive both parties of the incredible benefits of the contract [*CISG, Art. 81(2)*; *Jafarzadeh*], an adaptation in favour of CLAIMANT would still be beneficial to *Black Beauty* as opposed to a situation without the advantages of the Sales Agreement. Further, the Tribunal is more likely to resort to adaptation as opposed to a complete termination of the agreement with the objective of restoring equilibrium [VOGENAUER/KLEINHEISTERKAMP*, p.723-724*].

108. In a meeting on 12th February 2018, in which renegotiations were taking place, Ms. Spinoza, RESPONDENT's CEO refused to cooperate or even endure the completion of the meeting [*Ex. C8, p.18*]. Moreover, she turned aggressive and angry when confronted with recently discovered information and clearly stated that she was no longer interested in further cooperation with CLAIMANT [*Ex. C8, p.18*]. In cases of a categorical denial of the other party to continue renegotiations, the disadvantaged party may at once resort to the Court [BERGER, *p.1, 13*; BRUNNER*, p.488*]. Further, if the other party has blatantly refused to cooperate without providing legitimate reasons, the endeavour made by CLAIMANT to begin renegotiations is said to fulfil the requisite of renegotiations [BERGER, *p.1, 13*; BRUNNER*, p.488*].

b) RESPONDENT must bear the complete risk of hardship.

109. CLAIMANT contends that in order to determine who must bear the risk of such an event causing increased onerousness, one may look towards the principle of the superior risk bearer [POSNER/ROSENFIELD*, p.90*]. Where it is not clear to whom the risk has been allocated, such a principle may serve as an 'aid in interpretation' [BRUNNER, *p.143*; POSNER/ROSENFIELD*, p.90*]. The superior risk bearer is usually the party that is better able to insure the risk [*Jenkins*]. Further, this principle remains applicable to circumstances of hardship [POSNER/ROSENFIELD, *p.100*].

110. CLAIMANT has been undergoing a tough time financially, as evidenced by the need to undertake restructuring measures and letting go of a considerable amount of work force [*Ex. C8, p.17; PO2,* ¶15]. Moreover, this difficulty can be seen reflected in the agreement with RESPONDENT, where CLAIMANT has agreed to sell an extraordinary amount of 100 doses for the first time [*PO2,* ¶15] at great risk of narrowing the gene pool and devaluing Nijinsky III's stud fee. It has done so even when it possesses its own mere herd [*NoA, p.5*]. Further, RESPONDENT is in a perfectly good position to undertake the insurance of the unforeseen risk [*PO2,* ¶30]. In recent years, it has sought to build its own racehorse breeding programme, acquired world class mares and is now in the process of finding matching world class stallions [*Ex. C1, p.9*]. Therefore, it is

clear that RESPONDENT is the superior risk bearer and must be allocated the risk attached to the imposition of tariffs.

111. While RESPONDENT is much more capable of bearing the burden of the high tariffs, this Tribunal is bound to prefer an allocation of losses through fair distribution to both parties [*IIUPL, p.265*]. However, it must be noted that RESPONDENT without CLAIMANT's knowledge resold at least 15 of CLAIMANT's semen doses to other breeders at a price that was 20% above the original amount [*NoA, p.8*; *PO2,* ¶20]. CLAIMANT has already made clear both during negotiations [*Ex. C2, p.10*] and in the contract itself [*Ex. C5, p.13*; *PO2,* ¶16] that reselling doses would be in violation of its express prohibition. Despite such clear intention, RESPONDENT resold Nijinsky III's semen to 10 different breeders and accrued profit at the expense of CLAIMANT's business. It should be emphasised that not only is Nijinsky III a highly successful horse, but its progeny is successful as well [*NoA, p.5*]. RESPONDENT's conduct in distributing the semen for its profit is extremely detrimental and indicative of RESPONDENT's bad faith in light of CLAIMANT's already worsening financial circumstance along with RESPONDENT's awareness of it [*PO2,* ¶22]. In light of such evidence at hand, CLAIMANT urges this Tribunal to adapt the contract completely in its favour as opposed to undertaking a distribution of risks.

112. Hence, this Arbitral Tribunal must adapt the contract favourably to CLAIMANT in order to remunerate it in light of clause 12 of the contract as well as the CISG.

Conclusion to Issue 4: CLAIMANT has not derogated from Art. 79 CISG since there was no clear and real intention to do so. Further, Art. 79 CISG regulates hardship as well as provides for the remedy requested by CLAIMANT. Alternatively, if the Tribunal believes there is a gap within the CISG with respect to hardship, it may fill the gap based on the principle of good faith or under Mediterraneo's domestic contract law, a verbatim adoption of the UNIDROIT Principles. Consequently, the Tribunal can adapt the contract to pay CLAIMANT its remuneration.

REQUEST FOR RELIEF

In light of the foregoing submissions, CLAIMANT respectfully request the Tribunal to find that:

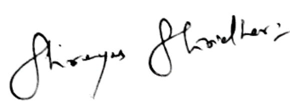
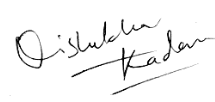
I. The Tribunal has the jurisdiction and/or the powers under the arbitration agreement to adapt the contract (**Issue 1**).

II. CLAIMANT is entitled to submit evidence from the other arbitration proceedings (**Issue 2**).

III. CLAIMANT is entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price under clause 12 of the Contract (**Issue 3**).

IV. Alternatively, CLAIMANT is entitled to the payment under the CISG (**Issue 4**).

Respectfully signed and submitted by counsel on 6th December 2018

KAIRA PINHEIRO | SHREYAS SHRIDHAR | SAURAV RAJURKAR | VISHAKHA KADAM

Certificate and Choice of Forum

To be attached to each Memorandum

I SAURAV RAJURKAR, on behalf of the Team for (name of School) WEST BENGAL NATIONAL UNIVERSITY OF JURIDICAL SCIENCES hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

☐ Our School will be participating only in the Vis East Moot and is not competing in the Vienna Vis Moot.

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☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for (School name) WEST BENGAL NATIONAL UNIVERSITY OF JURIDICAL SCIENCES

Name SAURAV RAJURKAR

Signature