16TH ANNUAL WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

-MEMORANDUM FOR CLAIMANT-

CASE NO: HKIAC/A18128

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The parties to this Arbitration are:

Phar Lap Allevamento (CLAIMANT), located in Mediterraneo. It operates Mediterraneo's most renowned3 stud farm, which covers all areas of equestrian sport. It also has a teaching, research and demonstration facility. However, it has been facing financial difficulties since 2014.

Black Beauty Equestrian (RESPONDENT), located in Equatoriana. It is famous for its broodmare lines. Three years ago, it established a racehorse stable, and it was to commence its racehorse breeding program that Black Beauty contacted Phar Lap.

- **21st March 2017** – RESPONDENT contacted CLAIMANT expressing interest in the purchase of the frozen semen of Nijinsky III. It requested an offer for 100 doses of frozen semen.

- **24th March 2017** – CLAIMANT, despite noting the unusual nature and size of the offer, makes an offer in the interest of a long-term relationship between parties. It makes an offer of $99,500 per dose, with EXW delivery terms.

- **28th March 2017** – RESPONDENT requested a lowering of the price per dose, as well as a change in delivery terms to DDP Incoterms, keeping in mind CLAIMANT'S greater experience in the shipment of frozen semen, including with necessary export and import documentation. In addition, RESPONDENT objected to the also to both the jurisdiction of Mediterranean courts and the application of Mediterranean law simultaneously.

- **31st March 2017** – CLAIMANT agreed to DDP delivery terms on the conditions that (1) there is a price increase of $1000, (2) CLAIMANT does not take on any further risks associated with the change in terms, and (3) a hardship clause is included in the contract. CLAIMANT also proposed arbitration in Mediterraneo.

- **12th April 2017** – The parties' primary negotiators met with an accident and are hospitalized. Negotiations were taken over by different employees of the parties' respective companies.

- **6th May 2017** – The Frozen Semen Sales Agreement was concluded between the parties. It was for the sale and purchase of 100 doses of frozen semen from Nijinsky III. It was to be shipped over three instalments, with the last one in January 2018. The final price per dose was $100,000. Clause 15 provided for arbitration seated in Danubia but deliberately excluded a reference to

the proper law of the arbitration agreement as the parties intended that the law of the Matrix Contract would govern their arbitration agreement**.**

- **November 2017** – The Mediterranean government imposed a 25% tariff on agricultural products from Equatoriana.

- **19th December 2017** – The Equatorianian government imposed a 30% retaliatory tariff on all agricultural goods from Mediterraneo.

- **20th January 2018** – CLAIMANT realized that the 30% retaliatory tariff imposed by the Equatorianian government affects its shipment of the last 50 doses of frozen semen, and informed RESPONDENT of the same. The tariff not only cut into CLAIMANT'S profit margin, but further plunged it into losses.

- **21st January 2018** – RESPONDENT assured CLAIMANT that a solution to the increased cost of performance could be found by the parties through negotiation. CLAIMANT acted upon this assurance in good faith and delivered the shipment, bearing the costs of the additional tariffs itself.

- **12th February 2018** – The parties met to negotiate a solution to the retaliatory tariffs imposed. RESPONDENT terminated the negotiations and refused to cooperate with CLAIMANT.

- **31st July 2018 –** CLAIMANT initiated arbitration for the adaptation of the contract in light of unforeseeable changes to the contractual equilibrium.

- **2nd October 2018** – CLAIMANT informed the tribunal of another arbitration under the HKIAC Rules where the Respondent claimed the relief of adaptation because of the 25% tariff imposed by the Mediterranean government. CLAIMANT sought the tribunal's permission to introduce the award and submissions in those proceedings as evidence due to the strikingly similar facts.

SUMMARY OF ARGUMENTS

The Arbitral Tribunal ordinarily has both the Jurisdiction and the Power to adapt the contract for changed circumstances. More so in the present case, where the primary relief claimed hinges on an interpretation of the matrix agreement and the hardship clause therein! In any event, the scope of the arbitration clause and the power of the tribunal were both expanded for the specific contingency that is before the Tribunal, by the oral agreement concluded between parties during negotiations. The tribunal must consider this oral agreement as a binding part of the FSSA as the parties chose the law of Mediterraneo to apply, and thereby deliberately excluded the application of the Danubian four-corners rule **(1)**.

The contested evidence is relevant to the case and material to the outcome. CLAIMANT was not directly engaged in the activity of illegally obtained the evidence. Hence CLAIMANT'S hands are clean and due to the unavailability of alternate evidence, the arbitral tribunal should exercise the broad secretion available to it and admit the contested evidence **(2)**.

CLAIMANT had never taken on the risk of the retaliatory tariff. It had only paid the amount before delivery in good faith and upon RESPONDENT'S assurances that a renegotiation will be conducted. As such, CLAIMANT can invoke the hardship clause in the FSSA. The appropriate remedy under Cl 12 of the FSSA is adaptation and therefore CLAIMANT is entitled to $1,250,000 **(3)**.

Art. 79 of the CISG is applicable to the determination of hardship despite the insertion of Cl. 12. The retaliatory tariff, being an unforeseeable event, rendered the performance of the FSSA excessively onerous, qualifying as an impediment under Art. 79 of the CISG, and disrupts the contractual equilibrium. The appropriate remedy to restore the contractual equilibrium is adaptation and therefore Claimant is entitled to $1,250,000 **(4)**.

ARGUMENTS ADVANCED

ISSUE 1: THIS ARBITRAL TRIBUNAL HAS THE JURISDICTION AND POWER TO ADAPT THE CONTRACTUAL PRICE UNDER CHANGED CIRCUMSTANCES

1. The tariffs imposed by the Equatorianian government threaten the existence of CLAIMANT. Fortunately, the parties conferred the Tribunal with the jurisdiction **(I)** and power **(II)** to adapt the FSSA and the claim should hence be admitted before this Tribunal. The Arbitral Tribunal must decide on its jurisdiction and power to adapt the contract under changed circumstances in accordance with the *kompetenz-kompetenz* rule [*4P.114/2001; Art. 19, HKIAC Rules; Art. 16, DAL*].

I. CL 15 OF THE FSSA CONFERS THE TRIBUNAL WITH JURISDICTION TO ADAPT THE CONTRACTUAL PRICE IN CHANGED CIRCUMSTANCES

2. The Arbitral Tribunal is conferred with the jurisdiction to adapt the contract by the express language contained in Cl 15 of the FSSA **(A)**. In any case, the oral agreement reached between the parties expands the scope of Cl 15 of the FSSA to include adaptation for changed circumstances **(B)**. The Tribunal must therefore find that it has jurisdiction to adapt the contract in light of the unforeseen retaliatory tariffs.

A. The express language of Cl 15 of the FSSA confers the arbitral tribunal with the jurisdiction to adapt the price

3. The intention of the parties determines the scope of the arbitration clause, and specifically whether it includes adaptation [*Strohbach, p, 485; Born, p. 1318; Insigma Tech v Alstom Tech, ¶¶30, 33*]. CLAIMANT submits that the parties fully intended for the arbitration clause in Cl 15 of the FSSA to include adaptation as a failsafe where the parties may have failed to successfully renegotiate terms **(i)**. Further, the modifications to the HKIAC Model Arbitration Clause do not exclude adaptation from the scope of the arbitration clause **(ii)**.

i] The Parties intended for Cl 15 of the FSSA to include adaptation within its scope

4. The following circumstances demonstrate that the parties had envisaged that adaptation –in the specific context of changed circumstances— would fall within the scope of the arbitration agreement:

5. *First*, the primary claim before the tribunal is a question of *interpretation of the contract that contains the arbitration agreement*. Naturally, this claim falls within the scope of the arbitration agreement. In RESPONDENT's own words, the primary claim is the following question: "***if the contract provides for*** *an increased price in the case of such a high additional tariff…"* [*Resp Ex R4, p. 36*]. Thus Respondent

recognises that the claim for adaptation is one that is purely a question of interpretation of the contract. It is preposterous for RESPONDENT to now suggest that the Tribunal lacks jurisdiction to interpret the contract containing the arbitration agreement.

6. *Second,* adaptation ordinarily falls within the scope of the arbitration clause unless expressly excluded by the parties [*Frick, p. 198*]. This is in consonance with the understanding of the parties that there was no requirement for express language to this effect [*Cl Ex C8, p. 17*]. Moreover, the FSSA does not contain an express exclusion of adaptation from the scope of the agreement. *Au contraire*, the parties replaced the ICC Hardship Clause 2003 with Art. 12 as it presently stands [*ICC Hardship Clause; PO2, ¶12*]. Thereby, the parties deleted the only clause which excluded the remedy of adaptation in favour of a less restrictive clause, thereby permitting that such relief be granted where appropriate.

7. *Third*, the present contract is a long-term instalment contract, and there is a presumption in favour of adaptation in such contracts to preserve the contractual equilibrium and the commercial relationship of the parties [Infra ¶ 118; *Frick, p. 193*].

8. *Fourth,* the scope of the arbitration clause must be determined along with the force majeure and hardship clauses contained in the FSSA [*Cl Ex C5, p. 14, Cl 12*]. These clauses are regarded as 'adaptation' clauses and are understood to be typically linked with arbitration [*Frick, p. 171; Horn, p. 190*]. The very incorporation of a hardship clause is understood as authorising the tribunal to adapt the contract. Moreover, this presumption is strengthened where a contract includes both a force majeure and hardship clause, as is the case presently [*Horn, p. 190; ICC Case No. 1990; Frick, p. 178*]. This interpretation must be preferred by the Tribunal to give effect to the parties' intentions behind including these clauses.

ii] *The Parties' Modifications to the HKIAC Model Clause does not exclude adaptation from the scope of the arbitration agreement*

9. RESPONDENT has argued that the parties deliberately precluded adaptation by their modifications to the HKIAC Model Clause to explicitly reduce its broad wording *"by deleting any reference which could be interpreted as an empowerment for contract adaptation"* [*Ans to NoA, p. 31, ¶ 13*]. The only phrases excluded were (i) "*controversy, difference or claim*" after dispute; (ii) disputes *"relating to"* this contract in the same breath; and (iii) "*as any dispute regarding non-contractual obligations arising out of or relating to it*" [*HKIAC Model Clause*]. CLAIMANT submits that these modifications do not exclude adaptation from the scope of the arbitration clause.

10. *First*, the Tribunal must interpret the clause through the lens that commercial parties similarly placed as the parties to the contract would. Commercial parties are unlikely to be concerned with

the subtleties and variations contained in the language of the clause [Miles/Goh, p. 387; *Fiona Trust v. Privalov*; *SEI Adhavan v. Jinneng*]. Instead, a clause such as Cl 15 is to be interpreted purposively as commercial parties would. The purpose behind the inclusion of an arbitration clause is a commitment to resolve all disputes by arbitration and the tribunal must give effect to this purpose by preferring a broad interpretation of the scope of the arbitration clause. Additionally, commercial parties must be presumed to prefer a broad interpretation of the scope of the arbitration agreement [*Poudret/Besson, ¶ 304; Steingruber, ¶ 7.38*]

11. *Second,* in any case notwithstanding the exclusion of 'controvers[ies], difference[s] or claim[s],' an issue of adaptation before an arbitral tribunal is classified as a 'dispute' and therefore falls within the scope of Cl 15 of the FSSA [*Berger-2, p. 2*]. Therefore, this tribunal should be satisfied that the clause is phrased broadly enough to cover adaptation.

12. *Third*, RESPONDENT may argue that adaptation, even if classified a dispute is one that is '*in relation to'* the contract and not one arising out of the contract; or even as a '*non-contractual*' claim and is therefore specifically excluded by these modifications. CLAIMANT submits that the relief sought under Cl 12 of the FSSA, requires nothing more than an interpretation of the contract and would thus be a wholly contractual dispute [*Supra ¶ 6*]. Moreover, the claim is similar to the determination of money or damages due to CLAIMANT, which would ordinarily be determined by the Tribunal as a claim incidental to the contract [*Steingruber, ¶ 7.08*].

13. *Fourth*, it may be argued that parties must use clear and express wording to entrust an arbitral tribunal with the 'task' of adaptation [*Steingruber, ¶ 7.11; Kröll, pp. 104-165*]. Here it is submitted that there is *first*, no such requirement; and *second*, that the inclusion of a force majeure and hardship clause within the contract satisfy this requirement [*Supra ¶ 9*].

B. Cl 15 must be interpreted along with oral agreement during negotiations which expand its scope to include negotiations

14. Even if the Tribunal finds that a plain construction of the arbitration clause does not render adaptation within its scope; the oral agreement between the contract negotiators enables the Tribunal to adapt the contract [*Cl Ex C8, p. 16*]. RESPONDENT argues that Danubian law applies to the arbitration agreement and relies on the 'four corners rule' therein to exclude such an agreement from the Tribunal's consideration while construing the scope of the arbitration clause.

15. CLAIMANT submits that the four corners rule does not apply as parties chose the law of Mediterraneo – and not Danubia– to govern the arbitration agreement **(i).** In the absence of a choice of law by the parties, the tribunal would be called upon to apply the validation principle to lead it to apply the law of Mediterraneo **(ii)**. Further, the doctrine of Separability does not lend

credence to the application of a separate law to the arbitration agreement **(iii).** Therefore the scope of the arbitration clause must be interpreted as expanded by the oral agreement between the parties **(iv).** In any case, even if Danubian law were applied, the four corners rule is presently inapplicable and the tribunal must interpret the clause along with the oral agreement during negotiations **(v)**.

i] The parties chose the law of Mediterraneo to govern Art. 15 of the FSSA

16. Parties may choose the law governing he arbitration agreement expressly or impliedly [*Sulamerica*; *L. Collins et. al., ¶16-001*]. Subject to contrary intention being expressed by the parties, a choice of law to govern the matrix contract creates the presumption that the parties intended for it to govern every clause in the contract including the arbitration agreement [*Redfern/Hunter, ¶ 3.12*]. This presumption is further not disturbed by the specification of the seat alone [*Arsanovia; Glick/Niranjan, pp. 135-136*]. CLAIMANT therefore submits that the Tribunal begin this enquiry with the presumption that the parties intended for the arbitration agreement to be governed by the same law as the matrix contract.

17. CLAIMANT submits that the parties' choice of Mediterranean law is in fact an express choice as to the law governing the arbitration agreement that was consciously made by the parties. The note to HKIAC Model Clause indicates that a stipulation of the choice of within the arbitration agreement is marked as *optional* [*HKIAC Model Clause*]. CLAIMANT submits that the parties chose not to do so, because such a specification had already been made in Cl 14 of the FSSA. The conclusion that Mediterranean law was intended to govern the arbitration agreement is reached for the following two reasons:

18. *First*, because there is consistent jurisprudence in Mediterraneo that in sales contracts governed by the CISG, the same applies to the conclusion and interpretation of the arbitration clause contained in such contracts [*PO 1, p. 53*].

19. *Second,* RESPONDENT must have been aware of this position, having previously entered into sales contracts governed by Mediterranean law [*PO 2, ¶ 39; Art. 1, CISG*]. In any case, RESPONDENT'S ignorance of the law is not an excuse! This explains why CLAIMANT excluded any reference to the law governing the arbitration agreement from the draft proposed by RESPONDENT. Moreover, the arbitration clause accepted on the condition that the applicable law would *remain* the law of Mediterraneo [*Resp Ex R2, p. 34*].

20. *Third,* the choice was Mediterranean law as applicable to the entire FSSA was the result of a compromise between parties. RESPONDENT initially proposed the arbitration clause with Equatoriana as the seat and the law of Equatoriana as the law governing the arbitration agreement [*Resp Ex R1, p. 33*]. CLAIMANT while accepting the clause deliberately rejected all references to Equatoriana because CLAIMANT's Creditor Committee readily approved only those contracts that

made applied Mediterranean law [*Resp Ex R2, p. 34*] The only leeway afforded to CLAIMANT pertained to provisions for arbitration in neutral countries [*PO2, ¶ 14*]. Therefore, CLAIMANT accepted arbitration in Danubia *provided* that the applicable law *remained* the law of Mediterraneo. This compromise also had RESPONDENT'S best interests in mind, where RESPONDENT had objected to both jurisdiction of courts in Mediterraneo and the application of Mediterranean law simultaneously [*Cl Ex C3, p. 11*].

21. Even if this tribunal does not find express choice in favour of Mediterranean law, the facts presently warrant a finding that there has at least been an implied choice in favour of Mediterranean law [*Arsanovia*]. This approach to revert to an implicit choice of law in the absence of a finding of an express choice of law is widely accepted by scholars, both common law and civil law traditions alike and arbitral tribunals [*Mustill/Boyd, p. 63; Petrochilos, p. 33; Peterson Farms; Svenska Petroleum v. Lithuania ¶¶ 76-77; Nat'l Thermal Power Corp. v. Singer Co.*]. Furthermore, contrary to RESPONDENT's insistence that the parties intended to apply Danubian Law to the arbitration agreement, CLAIMANT submits that neither party contemplated the application of Danubian law at any point.

ii] *Failing a choice of law, the tribunal must apply the validation principle to apply Mediterranean law to the arbitration agreement*

22. If the Tribunal finds that the parties failed to make a choice of law governing the arbitration agreement either expressly or impliedly, it falls upon the arbitral tribunal to determine the law governing the arbitration agreement [*Sulamerica*]. In making this decision, the tribunal may apply any of the conflict of law rules it deems appropriate [*Frick*, p. 48] including the '*closest and most real connection test*' [*Lew/Mistelis/Kröll*, *¶ 6-60; FGG, ¶¶425; ICC Case No. 4367*]. The same test has led to the preference of the substantive law of the contract to govern the arbitration agreement as the 'ordinary and natural meaning' of the parties choice of substantive law [*Arsanovia*].

23. CLAIMANT submits that notwithstanding which rule it chooses to apply to make this decision, the tribunal must prefer the law that renders the parties commitment to arbitration as valid [*Fiona Trust v. Privalov*]. This is because where parties have committed have their disputes resolved by arbitration, and validly consented to the same, this commitment must be given effect to as far as practicable.

24. Should the tribunal however find that there is an equally compelling connection with the seat Danubia, and Mediterraneo, the arbitral tribunal should take guidance from the principle of validation [*Pearson, p. 115*] CLAIMANT submits that this pro-validation enquiry would lead the tribunal to prefer Mediterranean over Danubian law. The Tribunal would in doing so, allow for an

expansive interpretation of the scope of the arbitration clause – and give effect to the parties' commitment to resolve their disputes through arbitration.

25. This finding would also be justified by the general principle that a tribunal must strive to give an expansive reading to the scope of the arbitration clause, so long as the clause itself is valid [*Steingruber,* ¶ *7.38*]. Cl 15 of the FSSA would fulfil the form requirements for arbitration agreements under both Danubian and Mediterranean law. CLAIMANT therefore submits that the tribunal should prefer the law which would give an expansive understanding to the scope of the arbitration clause.

iii] The Rule of Separability does not entail that a different law must apply to the arbitration clause

26. RESPONDENT may rely on the rule of separability of the arbitration agreement to argue that it must be governed by a separate law from the matrix contract [*PO2,* ¶ *36*]. CLAIMANT would respond to this claim in a two-fold manner.

27. RESPONDENT conveniently mistakes *'separability'* for *'separateness'*. Pursuant to the principle of separability, the arbitration clause and matrix contract may (rather than should) be governed by two separate laws [*ICC Case No. 4367; ICC Case No. 6162*]. In fact, case law shows that despite the possibility of separability of the arbitration agreement and the matrix contract, tribunals have often found the same law govern both instruments [*ICC Case No. 6850; ICC Case No. 6752; ICC Case No. 6379*].

iv] The Tribunal therefore must determine the scope of the arbitration clause while applying Mediterranean law

28. The Tribunal is bound to apply the law chosen by the parties to govern the arbitration agreement. Given that the present contract is an international sales contract, the chosen Mediterranean law requires that the tribunal apply the CISG to the formation and interpretation of the arbitration agreement [*PO1, p. 53*]. CLAIMANT therefore requests the tribunal to interpret the scope of the arbitration agreement without applying the four corners rules, as provided under the CISG.

29. Where the four corners rule would prevent the consideration of pre-contractual negotiations in interpreting contracts, the CISG expressly allows for it [*Art. 8(3), CISG*]. Therefore, where the parties unequivocally intended to include express language into the agreement to permit adaptation by the Arbitral Tribunal but were prevented from doing so, the CISG would allow for the agreement to be interpreted in consonance with this intention [*Art. 8(1), CISG; Cl Ex C8, p. 17*]. Thus, an interpretation under the CISG would include adaptation within the scope of arbitration, notwithstanding the absence of written language to this effect.

30. The FSSA is to be interpreted in line with the intention attributed to it by the primary negotiators. The parties clearly intended for the intentions of the primary negotiators to govern their relationship as they specified that CLAIMANT was represented by Ms. Napravnik and RESPONDENT by Mr. Antley in the FSSA [*Cl Ex C5, p. 13*]. Moreover, the ultimate signatories on behalf of the parties *did not deviate* from the intention that had been expressed by Ms. Napravnik and Mr. Antley. Admittedly, in the context of the relationship between the hardship and force majeure clause, neither Mr. Krone nor Mr. Ferguson considered or discussed the language of the contract in detail. Instead, they mechanically signed the agreement to finalise it and hasten the contractual relationship [*PO2, ¶ 6*].

31. Additionally, it has been observed that undocumented oral evidence may also be relied on to expand the scope of the arbitration agreement [*Southwinds Express v. Texas*]. Similarly, Ms. Napravnik and Mr. Antley had reached an oral agreement that adaptation must be performed by the arbitral tribunal where the parties fail to renegotiate favourable terms upon an event triggering the hardship clause [*Cl Ex C8, p. 17*]. Therefore, it must be understood that the parties intended for the scope of the arbitration agreement should be expanded to allow the arbitral tribunal to adapt the contract.

v] *Even if Danubian Law were to apply, the four corners rule is inapplicable*

32. Danubia has amended the provisions of the UNIDROIT Principles to include the four corners rule of contract interpretation [*PO2, ¶ 45*]. Had Danubian Law been made applicable to the agreement, the rule would *ordinarily* have applied. CLAIMANT submits that these circumstances are however, *not ordinary*.

33. For the Four Corners rule to apply the contract must be *completely integrated* in its written form [*Farnsworth-2, p. 273; Linzer, p. 806; CISG AC 3, ¶ 1.2.5*]. Where elements of the agreement are not reduced to writing, there are no 'four corners' to interpret, and so this rule cannot apply.

34. An examination of the pre-contractual negotiations will reveal that a crucial aspect of the negotiations – pertaining to the adaptation of the contract by the arbitral tribunal – was not integrated into the written agreement. Therefore the four corners rule does not apply. Parol evidence has been used to prove elements of the agreement that are not reduced to writing [*Hulse v. Juillard Fancy Foods Co.*; *Schwartz v. Shapiro*]. The Tribunal may therefore rely on parol evidence in the present case.

35. Consequently, even if Danubian law were applied to interpret the scope of the arbitration agreement, the oral agreement between parties will be considered to confer jurisdiction upon the Arbitral Tribunal to adapt the contract.

II. THE ARBITRAL TRIBUNAL HAS THE POWER TO ADAPT THE CONTRACTUAL PRICE UNDER CHANGED CIRCUMSTANCES

36. The Arbitral Tribunal is also called upon to decide on its power to adapt the price of the FSSA. The power of the tribunal for adaptation is to be determined by the *lex arbitri* i.e. DAL [*Berger, pp. 7-8*]. Courts in Danubia have understood Art. 28(3) of the *DAL* as containing a general standard to be applied to the conferral of exceptional powers to the arbitral tribunal including its power to adapt contract [*Art. 28(3) DAL; PO2, ¶ 36*]. Art. 28(3), stipulates an express authorisation for the exercise of a power to adapt.

37. CLAIMANT submits that there is no special requirement of authorisation for the nature of adaptation sought by the parties **(A)** Even if a requirement for express authorisation were to be read under Art. 28(3), CLAIMANT submits that the same has been met **(B)**.

A. The Tribunal has an inherent power and does not require authorisation for the nature of adaptation sought

38. DAL is a near-verbatim adoption of the Model Law [*PO2, ¶ 45*]. Significantly, although there was a proposal to include a specific Article that empowered arbitrators to fill gaps in contracts, the proposal did not fructify [*Holtzmann/Neuhaus, p. 1116; Secretariat Note-I, ¶ 57*].

39. The UNCITRAL Secretariat clearly distinguished between the powers of arbitrators to adapt contracts 'as an independent objective of the proceedings' as opposed to the power to adapt the contract under changed circumstances [*Draft Secretariat Note-III, ¶ 4–32, pp. 1129–34*]. In the latter case, no special authorisation by the parties is required as this is an inherent part of deciding the legal dispute and consequently an inherent power of the tribunal [Holtzmann/Neuhaus, pg. 1116].

40. Consequently, CLAIMANT submits that the tribunal requires no special authorisation in the present case as the claim before it is either one of changed circumstances or of contractual interpretation, both of which fall within the inherent power of the tribunal.

B. Even if there is a requirement for express authorisation under Art. 28(3), it is met by the oral agreement between the parties

41. If the tribunal finds, that Danubia requires authorization for all forms of adaptation; such '*express authorization'* was provided by the parties. This authorisation may be found in the oral agreement reached between the primary negotiators of each party that "*it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree"* on adaptation. They further intended to

include express language in either the hardship or adaptation clause to this effect [*Cl Ex C8, p. 17*]. Although their efforts were foiled by the accident, the oral agreement between parties satisfies the requirement of express authorisation for the following reasons:

42. *First*, the word 'express' used here is to be understood as opposed to 'implied' and not as opposed to 'oral'. If Art. 28(3) was intended to preclude oral agreements then the language used ought to have been 'written' and not 'express'. This is supported by the Model Law's distinction between a 'writing' requirement and its requirement for 'express' authorization, with the former being the higher threshold to satisfy [*Art. 7, DAL; Art. 28(3), DAL; State v. Denny; ICC Case No. 5754*].

43. *Second,* the Model Law is flexible enough to accommodate authorisation by an oral agreement. DAL even adopts an extremely flexible writing requirement for the formal validity of arbitration agreements. If DAL adopts Option-II of Art. 7 in fact there is no writing requirement contained in it whatsoever. Alternatively, assuming DAL adopts Option-I, the same is understood to be satisfied even by oral agreements provided such agreement is recorded in some form [*Art. 7(3), Model Law; Cordero Moss, p. 55*]. Where a stricter written requirement may be satisfied orally, this tribunal should strongly consider allowing for the satisfaction of an express authorisation requirement orally.

44. *Third,* the Tribunals power to adapt is to be placed on an equal footing with national courts in Danubia based on the concept of 'synchronised competencies' [*Sanders, p. 70; Brower, p. 18; 4P.114/2001*]. Courts in Danubia may adapt contracts if 'authorised' to do so by the parties [*Art. 6.2.3. (4b), DCL*]

45. Consequently, CLAIMANT submits that the tribunal should not be bound by a stricter threshold and that express authorization under DAL and 'authorization' of the courts in DCL must be interpreted in the same light.

46. *Fourth,* the applicable law chosen by the parties to govern the contract and the arbitration agreement dispenses with a writing requirement [*Art. 11, CISG*]. This is one of the most significant features of the CISG. Therefore, even if CISG is found inapplicable in this specific context to authorise a tribunal's power, the parties adoption of the CISG indicates an intention that business persons such as the parties intended to dispense with strict writing requirements in their contractual dealings. Commercial parties could not reasonably have intended for separate form requirements to govern different aspects of the agreement.

47. Therefore, this tribunal is requested to find that the requirement of express authorisation of the tribunal's power is met by the oral agreement reached between the representatives of the parties and evidenced by Ms. Napravnik's witness statement [Cl. Ex. C8, pg. 17].

ISSUE 2: THE EVIDENCE FROM THE OTHER ARBITRATION IS NOT BARRED UNDER THE APPLICABLE LAW

48. CLAIMANT received information from Mr. Kieron Velazquez, the CEO of one of Claimant's close customers, that RESPONDENT was involved in a separate arbitration under the HKIAC Rules where it had claimed adaptation of the contract. RESPONDENT's claim for adaptation stems from the imposition of the unforeseen tariff of 25% (as opposed to a similar tariff of 30% in the present claim) in a contract that is similarly for the sale of goods. CLAIMANT has managed to procure the award and the relevant submissions and seeks to produce these documents as evidence before the tribunal [*PO2, ¶ 41*].

49. RESPONDENT has however objected to the admission of this evidence on the basis that it was illegally obtained. Even assuming that is the case, CLAIMANT therefore submits that it is entitled to disclose this contested evidence for the following reasons. *First,* the Arbitral Tribunal has broad discretionary powers to admit all evidence it chooses as the tribunal is not bound by strict evidentiary rules **(I)**. *Second*, the interest of disclosure outweighs the harm caused by the admission of the evidence **(II).** *Third*, the evidence is relevant to the dispute in the instant arbitration **(III).** *Fourth*, the evidence is material to the outcome of the dispute in the instant arbitration **(IV)**.

I. THE ARBITRAL TRIBUNAL HAS BROAD DISCRETIONARY POWERS TO ADMIT ALL EVIDENCE

50. The Tribunal is vested with the *absolute power* to determine the admissibility, relevance, materiality and weight of evidence under both the HKIAC Rules and DAL. [*Article 22, HKIAC Rules; Art. 19, Model Law; Municipal Corporation of Delhi v Jagan Nath Ashok Kumar*]. It follows that the tribunal has broad discretion to determine issues pertaining to evidence under these provisions [*Marghitola, p. 22; Von Saucken, p. 205; Tweeddale & Tweeddale, n. 9.23; Caron/Caplan/ Pellonpää, p. 621.*].

51. Additionally, tribunals are not bound by strict rules of evidence especially in a commercial context where tribunals are creatures of consent [*Sandifer, pp. 189-190; Born, p. 2310; Alford, p. 81*]. Resultantly, there are relaxed evidentiary thresholds in commercial arbitration proceedings and strict rules of evidence do not ordinarily apply.

52. Presently, the parties consciously chose not to apply strict evidentiary rules to these proceedings, having chosen not to apply the IBA Rules on the Taking of Evidence [*Cl Ex. C5, p. 13; IBA Rules*]. The parties have tailor-made the agreement to suit their needs, and it is the choice expressed by the parties that this tribunal should give effect to [*Bovis Lend Lease Pty Ltd v Jay-Tech Marine and*

Projects Pte Ltd, ¶ *18*].Therefore, the IBA Rules and its standards should not be understood as anything more than non-binding guidelines unless specifically opted for by the parties.

53. The Tribunal's wide discretion coupled with relaxed evidentiary standards invites a presumption in favour of the admissibility of every document that is produced— allowing the arbitral tribunal the power to rule on the veracity, weight, relevance or persuasiveness of documents produced before it [*Waincymer, p. 856; Pilkov, p. 147*]. Therefore every piece of evidence that is relevant to the arbitration is deemed to be admissible unless otherwise prohibited by law or by agreement of the parties [*Pietrowski, R. 373-410; Pilkov, p. 148*]. CLAIMANT submits that in the absence of any exclusionary rule in the present case, the claimant is entitled to submit the contested evidence.

54. CLAIMANT submits that the admission of evidence is a matter of right. It is therefore RESPONDENT's burden to show that a refusal to exclude contested evidence will violate provisions of the procedural law [*Sandifer, p. 189-190; Rosenne/Ronen, p. 557*]. Moreover, if the arbitration agreement does not contain a specific provision for the exclusion of evidence, there exists no rule of law that can exclude the evidence from being submitted before the arbitral tribunal [*Sandifer, pp. 189-190*]. Failing the RESPONDENT's ability to discharge the burden set out above, the Tribunal must exercise its broad powers to admit the contested evidence in the interest of a full and fair opportunity for Claimant to present its case [*Sussman, p. 52*1].

55. Additionally, this Tribunal must bear in mind the final and binding nature of the arbitral award coupled with the limited grounds of its challenge under DAL. In light of this it is imperative that the evidence be admitted in order to ensure a fair hearing to CLAIMANT [*Art. 34, DAL; Art. 35.2, HKIAC Rules; Art. V, NYC*].

II. THE EVIDENCE IS CRUCIAL MUST BE DISCLOSED SINCE THE INTEREST OF DISCLOSURE OUTWEIGHS THE HARM CAUSED BY ITS ADMISSION

56. CLAIMANT seeks the admission of the evidence from the other arbitration to secure a full and fair opportunity to present its case before the tribunal [*Sussman, p. 52*1]. The Arbitral Tribunal must admit evidence that is deemed to be crucial. Evidence is understood as crucial when there is no alternate evidence to prove a critical element of the claim, thereby justifying the interest of disclosure [*Boykin/Havalic, p. 18*]. The following reasons establish the interest of disclosure presently:

57. *First*, the evidence from the other arbitration is crucial to the present proceedings because it demonstrates that RESPONDENT believed that an additional tariff of 25% imposed by the President of Mediterraneo (as opposed to the 30% placed on CLAIMANT) justified the satisfaction of hardship. *Second*, it further establishes how the hardship hence caused sufficiently justifies the adaptation of a contract, even in a contract that adopts the ICC Hardship Clause 2003, which precludes the remedy of hardship. *Third*, the tariff imposed by the Mediterranean President was arguably more foreseeable –a similar tariff having been introduced once previously and with Mediterraneo having a declared protectionist policy– than the tariff imposed by Equatoriana that now directly affects the CLAIMANT [*Cl Ex C7, p. 17*; *Cl Ex C6, p. 16*]. The admission of this evidence would assist the Tribunal in determining the conditions for the satisfaction of a hardship clause – it is therefore crucial to CLAIMANT's case.

58. CLAIMANT submits that the harm that may be caused to RESPONDENT by the admission of this evidence is outweighed by the interest of disclosure. The tribunal must note that while RESPONDENT is in a financially sound position to bear the burden of the tariff, the incidence of the tariff on CLAIMANT might threaten its existence by upsetting the restructuring plan and push its most valuable assets into sale [*PO2, ¶ 30; PO2, ¶ 29*].

59. The evidence should be allowed since it has a sufficient degree of probative value to override any prejudicial effect that might be caused due to the admission of such evidence. In such cases where the facts are strikingly similar, the evidence becomes of utmost relevance and disallowing the same would '*defy common sense.*' [*ICC Case No. 5754*].

60. It is relevant to compare the *Methanex v. United States* arbitration, where the tribunal took the view that the illegally obtained evidence was inadmissible [*Methanex v USA, ¶55*]. This view was taken because the evidence was obtained directly by, and only marginally significant to CLAIMANT's case therein. It was also observed that the claims could be proved of CLAIMANT there while the same facts were proved by alternate evidence. CLAIMANT submits that the present circumstances and the nature of evidence preclude any of the reasons in *Methanex* from applying.

61. *First*, CLAIMANT did not obtain the contested evidence directly. Instead, by RESPONDENT's own admission, it was obtained by third parties [*PO2, ¶ 41*]. The *second* and *third* elements tie in together. The evidence is both relevant and material to CLAIMANT'S case for adaptation. There is no better or alternate evidence to establish why the present circumstances warrant adaptation of the contract – as this is to be determined circumstantially and this evidence sought to be introduced is the only evidence that the claimant may submit to demonstrate this. CLAIMANT therefore submits that this

contested evidence is central to the outcome of the claim and should therefore be admitted, notwithstanding whether it was illegally obtained.

62. CLAIMANT acknowledges that the broad powers of the tribunal are subject to two general conditions: (i) evidence cannot be obtained in a manner that is contrary to international public policy; and (ii) evidence may be protected by privilege or secret [*Geisinger/Ducret, p. 114*]. Each condition pertains to a separate allegation of illegality in obtaining the evidence.

63. CLAIMANT submits that neither of the two conditions was violated at present. *First,* the contested evidence was available on the internet owing to a hack of RESPONDENT's computer systems. This hack was made convenient by RESPONDENT's own outdated systems but was not conducted by CLAIMANT [*PO2, ¶¶ 41, 42, pp. 61, 62*]. Consequently, the information sought to be introduced was secured from the public domain. CLAIMANT submits that where the evidence is freely available on the internet, then there is no justified reason for its exclusion from these proceedings [*Bible v. United Student Aid Funds*]. Moreover, this manner of obtaining evidence cannot possibly be said to violate the norms of international public policy.

64. *Second*, RESPONDENT cites the confidentiality of these documents as a reason to bar their introduction before this tribunal. CLAIMANT submits that these documents were procured from the public domain. Further, any obligations of confidentiality are binding only upon RESPONDENT's former employees. RESPONDENT's only remedy therein is to initiate a suit against these employees and not against CLAIMANT itself.

65. CLAIMANT therefore submits that the tribunal must admit the evidence sought to be introduced. In any case, CLAIMANT will also subsequently prove the relevance and materiality of the evidence to the outcome of this case, to provide the tribunal with further reason to introduce this evidence.

III. THE EVIDENCE IS RELEVANT TO THE CASE IN THE PRESENT ARBITRATION

66. Art. 22 of the HKIAC Rules stipulate that the evidence that a party wishes to submit should be relevant to the case [*Art.22, HKIAC Rules*]. Relevance of means it would have a logical connection with what the evidence purports to prove in the case [*Pilkov, p. 148*]. The standard of proof required for a party to convince the tribunal of the relevance of the requested document is that the evidence is *likely* to be relevant [*Tidewater v. Venezuela; Hanotiau, p. 117; Glamis Gold v United States of America*].

67. The relevance of a document is determined from it likeliness to prove the facts from which legal conclusions can be made [*Kaufmann-Kohler/Bartsch, p. 18*]. CLAIMANT submits that evidence from the other arbitration is likely to be relevant to the present case as the circumstances and legal

questions involved were similar. Since the other arbitration wherein RESPONDENT was a party was based on similar facts, it will aid the tribunal in consideration of the legal issue in dispute. Danubia being a common law country, it must construe all evidence, including evidence that is adverse to the parties' case to be adverse as the goal of the proceedings is ultimately truth-seeking [*PO2, ¶ 62; Waincymer, p. 830; de Boisséson, p. 101*]. CLAIMANT submits that the evidence in question would therefore admit this evidence as it satisfies the threshold for relevance providing factual clarity to the case.

IV. THE EVIDENCE IS MATERIAL TO THE OUTCOME OF THE DISPUTE IN THE INSTANCE ARBITRATION.

68. Art. 22 of the HKIAC Rules allow for the admission of evidence that is material to the outcome of the arbitration [*Art. 22, HKIAC Rules*]. Materiality is the capacity to enable is the Arbitral Tribunal to completely consider whether a factual allegation is true or not by presenting an optimal picture of the case [*Waincymer, p. 859; Brower, p. 319*]. The tribunal need only be satisfied that the assertion being made by the requesting party is reasonable or *prima facie* valid – without imposing a high burden of submitting absolutely correct evidence [*Waincymer, p. 859*]

69. CLAIMANT submits that these requirements are presently met. CLAIMANT has presently requested for the relief of adaptation in light of the unexpected incidence of Equatorianian tariffs. The evidence sought, deals with a near identical situation, and its admission would help present the tribunal with a clearer understanding of facts by demonstrating (i) an unforeseeable change in circumstances; (ii) the circumstances warranting adaptation and (iii) the threshold of tariffs warranting adaptation.

70. The contested evidence *revealed the "candid" and "unguarded" views* of RESPONDENT regarding the main contention of the case [*Hulley Enterprises v. Russia, ¶¶ 1185 – 86*]. Thereby making it crucial to CLAIMANT'S case. CLAIMANT should be allowed to submit the contested evidence from the other arbitration as it pertains to the adaptation of the contract due to an unforeseeable change of circumstance and the same contention is raised by CLAIMANT in the present case.

ISSUE 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF $1,250,000 AS A RESULT OF ADAPTATION OF THE PRICE UNDER CL 12 OF THE FSSA

71. In November 2017, the government of Mediterraneo imposed a 25% tariff on goods imported from Equatoriana [*Cl Ex C6, p. 15*]. In retaliation, the government of Equatoriana imposed a 30% tariff on goods imported into Equatoriana from Mediterraneo [*Cl Ex C6, p. 15*].

72. The tariffs increased the cost of CLAIMANT'S performance by 30% [*Cl Ex C7, p. 16*]. CLAIMANT had already been facing financial difficulties since 2014 [*PO2, ¶ 29*]. It was absolutely essential for it to make a profit in 2018, or else it would not be able to obtain a new credit line [*PO2, ¶ 29*]. Shouldering the burden of the tariffs would not only affect the 5% profit margin, but also bring about a 25% loss, making the performance of the contract excessively onerous on CLAIMANT.

73. CLAIMANT could have postponed the performance of its obligations until the contract had been renegotiated with the increased costs in consideration. However, CLAIMANT performed its obligations in good faith and upon inducement by RESPONDENT. RESPONDENT now refuses to pay the additional $1,250,000 that CLAIMANT bore in its delivery of the final shipment. CLAIMANT submits that it did not take on the risk of the additional tariffs **(I)**. Further, the requirements of Cl 12 of the FSSA are met in this case **(II)**. The Tribunal should adapt the FSSA under Cl 12 **(III)**.

I. CLAIMANT DID NOT TAKE ON THE RISK OF THE ADDITIONAL TARIFFS

74. To invoke hardship under a contract, the party must not have assumed the risk of the event [*Brunner p. 399; Vine Wax Case; Iron Molybdenum Case*]. CLAIMANT submits that it did not assume the risk of the additional tariffs. The applicable delivery terms in the FSSA are DDP Incoterms [*Cl Ex C5, p. 14*]. CLAIMANT submits that the delivery terms in the FSSA is not a standard Incoterm, but rather one that parties have modified. Since parties enjoy the freedom of amending trade terms, including the Incoterms, the allotment of obligations and risks of parties is a matter of contract interpretation [*Schwenzer/Hachem/Kee, Art. 8, ¶ 29.27; Johnson, p. 417; Morissey/Graves, p. 148; Incoterms, p. 9*].

75. The risks before the change in delivery terms was borne by RESPONDENT. The only way the risk can be placed on CLAIMANT is if the change in delivery terms transferred the risk. CLAIMANT submits that the parties modified the standard DDP terms such that the risk of the increased tariffs was not transferred. Therefore, CLAIMANT was not obliged to pay the additional $1,250,000 for the last shipment under the FSSA.

76. CLAIMANT submits that an interpretation under Art. 8(1) of the CISG shows that CLAIMANT did not bear the risk of the additional tariffs **(A)**. The parties' intention to transfer the risks is further emphasized by Art. 8(2) of the CISG **(B)**.

A. An interpretation under Art. 8(1) of the CISG shows that CLAIMANT did not bear the risk of the additional tariffs

77. Art. 8(1) of the CISG is used to interpret the contract with regards to the subjective intent of parties [*Lookofsky,* ¶ *84*]. Art. 8(1) of the CISG states that statements and conduct of a party must be construed in terms of their intent where the other party knew or could not have been unaware of such intent [*Art. 8(1), CISG; Huber/Mullis, p. 12*]. CLAIMANT submits that RESPONDENT could not have been unaware of CLAIMANT'S intent to relieve itself of the risk of the additional tariffs.

78. While interpreting the contract under the CISG, consideration must be given to all relevant circumstances [*Art. 8(3), CISG; Schlechtriem/Schwenzer, Art. 8,* ¶ *12; Staudinger/Magnus, Art. 8,* ¶ *2*]. This includes negotiations, communication and circumstances of the formation of the contract [*Schlechtriem/Schwenzer, Art. 8,* ¶ *31*]. Therefore, the communication between parties before the delivery term was adopted must be taken into account while determining the intent of the parties.

79. CLAIMANT had initially informed RESPONDENT that the frozen semen would have to be picked up at CLAIMANT'S premises, suggesting an EXW Incoterms delivery [*Cl Ex C2, p. 10; PO2,* ¶ *9*]. However, RESPONDENT insisted on a change in delivery terms to DDP Incoterms, citing the urgency of the delivery and CLAIMANT'S greater experience in the shipment of frozen semen, particularly in, "*the necessary export and import documentation*" [*Cl Ex C3, p. 11*]. Thus, RESPONDENT informed CLAIMANT that it did not intend to burden CLAIMANT with the DDP risks, but to benefit from CLAIMANT's vast experience in the transportation of frozen semen. Pursuant to Art. 8(1), the stated subjective intent of Respondent was to use the DDP term not to transfer risks to Claimant, but to avail of Claimant's expertise in delivery and documentation.

80. Mindful of RESPONDENT'S subjective intent, CLAIMANT then expressly clarified for good measure that it was unwilling to take on any of the extra risks associated with DDP Incoterms [*Cl Ex C4, p. 12*]. Claimant stated that it was "*not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions*" [*Cl Ex C4, p. 12*]. Thus, Claimant manifested its subjective intent not to assume risk through this statement to Respondent. When a party unequivocally expresses their intent through a statement, the other party cannot pretend to be unaware of such intent [*Enderlein/Maskow,* ¶ *3.1*]. RESPONDENT thus cannot pretend to be unaware of CLAIMANT'S intent not to assume risk.

81. To summarise: RESPONDENT did not propose the DDP Incoterm with the intention of transferring risk to CLAIMANT. Similarly, CLAIMANT clarified that it would not be assuming any

risk in agreeing to "DDP". Thus, pursuant to the parties' common subjective intention, when CLAIMANT accepted this term, it accepted the letters "DDP", but not the risks attached with the DDP Incoterm. In other words, CLAIMANT accepted the delivery and documentation obligations that come with the DDP Incoterm, and nothing more.

82. In fact, RESPONDENT even announced its knowledge of CLAIMANT'S subjective intention in a communication that is on record for the tribunal! During the negotiations, RESPONDENT'S personnel suggested the wording of a hardship clause "*with reference to the risks mentioned by [CLAIMANT] in its email of 31 March 2017*" [*PO2, ¶ 12*]. Clearly, RESPONDENT'S negotiator refers to CLAIMANT'S unwillingness to accept the risks under the DDP Incoterm, an unwillingness that CLAIMANT had indeed expressed in its email pf 31 March 2017.

83. The parties' subjective intent therefore indicated that CLAIMANT did not bear any risks under the DDP term. Consequently, the risks of the additional tariffs remained upon RESPONDENT.

B. The parties' intention to transfer the risks is further emphasized by Art. 8(2) of the CISG

84. In the event that the subjective intent cannot be determined objective intent under 8(2) applies. Since the subjective intention of the parties in this case has been clearly established, it is unnecessary to establish their objective intention. In any case, CLAIMANT submits that the objective intention of the parties further emphasises that CLAIMANT did not bear the risk of the tariff.

85. The standard for interpretation under Art. 8(2) of the CISG is the understanding that a reasonable person of the same kind as the other party would have in the same circumstances [*Huber/Mullis, p. 13; Ferrari/Flechtner/Brand, p. 181*]. The standard set is therefore of a reasonable party in RESPONDENT'S shoes [*Huber/Mullis, p. 13; Schlechtriem/Schwenzer, Art. 8, ¶ 19*].

86. CLAIMANT had been brought to near insolvency by a previous bad experience with DDP Incoterms [*PO2, ¶ 21*]. In that case, CLAIMANT was to deliver three mares DDP to a farm in Danubia [*PO2, ¶ 21*]. However, after an outbreak of a foot-and-mouth disease, the Danubian government imposed additional health and safety requirements, that increased CLAIMANT'S costs by 40% [*PO2, ¶ 21*]. The additional costs nearly caused CLAIMANT'S insolvency, since it was dependent on the profit from that sale to service its debts [*PO2, ¶ 21*].

87. RESPONDENT was in fact aware of CLAIMANT'S past experience [*PO2, ¶ 22*]. Further, it was aware of the ongoing financial difficulties that CLAIMANT is still facing as a result of that experience [*PO2, ¶ 22*]. When RESPONDENT requested a change in delivery terms from EXW to DDP Incoterms,

CLAIMANT even referred to the past experience and unequivocally refused to take on any additional risks associated with a change in delivery terms [*Cl Ex C4, p. 18*].

88. A reasonable person in RESPONDENT'S shoes would have known that the risks associated with DDP Incoterms would be unacceptable to CLAIMANT. Given CLAIMANT'S current financial situation, and especially given that they resulted from a bad experience with DDP delivery terms, CLAIMANT would never have accepted the risks associated with the term. Therefore, CLAIMANT'S acceptance of the DDP delivery terms was solely with respect to delivery and documentation, and not the risk, which remained with RESPONDENT.

II. FURTHER, THE REQUIREMENTS OF CL 12 OF THE FSSA ARE MET IN THIS CASE

89. CLAIMANT submits that the imposition of the tariffs is covered by Cl 12 of the FSSA. Cl 12 states that, "*Seller shall not be responsible… for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Cl Ex C5, p. 14, Cl 12*].

90. There are three requirements to invoke Cl 12, and CLAIMANT submits that they are all fulfilled. The imposition of the tariffs is comparable to health and safety requirements **(A)**, it was an unforeseen event **(B)**, it made the performance of the contract more onerous **(C)**.

A. The imposition of tariffs is comparable to the imposition of additional health and safety requirements

91. The retaliatory tariffs imposed by the Equatorianian government are comparable to additional health and safety requirements. Tariffs as well as health and safety requirements are protectionist measures aimed at making international trade more onerous [*Salvatore, p. 125; Saunders, p. 155*]. Both of them are imposed by the government, and have the effect of curbing imports into a country by making it more expensive [*Salvatore, p. 132*]. They are therefore comparable, being import restrictions.

92. In the negotiations, CLAIMANT said it would not bear the risk of import restrictions [*Cl Ex C4, p. 12*]. This regulatory is precisely the risk that CLAIMANT was unwilling to bear: it is an import restriction. Given that the hardship clause was designed for the sole purpose of apportioning risk in this manner, the regulatory tariff is naturally covered under the hardship clause. The language of the hardship clause emphatically supports this position. The retaliatory tariffs are therefore 'comparable' to additional health and safety requirements in the sense used in Cl 12 of the FSSA.

B. The introduction of the new tariffs was an unforeseen event

93. CLAIMANT submits that the imposition of the tariffs was unforeseen by the parties at the time of the finalization of the contract. An unforeseen event is an event that is so unlikely to occur that neither party could have foreseen it [*Trimarchi, p. 65; Perillo, p. 122; Brunner, p. 158*].

94. The event at hand is a 30% retaliatory tariff imposed by the Equatorianian government on animal products, including horse semen [*Cl Ex C6, p. 15*]. The relevant time to test foreseeability was at the time of contract formation [*Madeirense Do Brasil, S.A. v. Stulman-Emrick Lumber Co; Brunner, p. 158*]. CLAIMANT submits that this event was extremely unlikely to occur when parties were negotiating the FSSA.

95. The Equatorianian government has always been an ardent supporter of free trade [*Cl Ex C6, p. 15*]. In fact, in most previous instances where restrictions imposed by a country affected imports from Equatoriana, the government has made efforts to settle the dispute amicably, or has requested WTO intervention [*Cl Ex C6, p. 15*].

96. The Equatorianian government had, once in the past, and under very different circumstances, imposed a retaliatory tariff [*Cl Ex C6, p. 15*]. The Prime Minister at the time had been a member of the National Party, a party that is critical of free trade and supports protectionist measures [*NoA, p. 7, ¶ 19*]. In the present scenario, the Prime Minister comes from the Progressive Liberals, a party which is an ardent supporter of free trade [*NoA, p. 7, ¶ 19*]. The Progressive Liberals have never imposed a retaliatory tariff in the past, thereby making the chances of the event occurring extremely remote during the formation of the FSSA. The parties therefore felt no need to specifically allocate the risks of such an event.

97. The imposition of the tariffs was therefore extremely unlikely at the time of the drafting of the FSSA. Neither party could have foreseen either the tariff, or its size. It is therefore an unforeseen event, covered by Cl 12 of the FSSA.

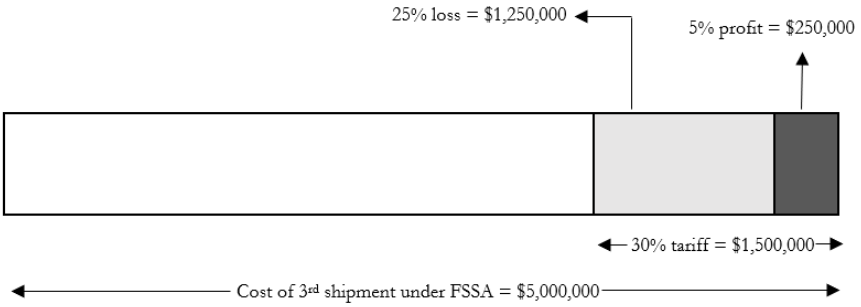
C. The imposition of the tariffs made the performance of the contract more onerous

98. In the case of a contractual hardship clause, it should be analysed whether the threshold of hardship is the same as in general contract principles, or whether the interpretation of the clause suggests a less stringent test [*Brunner, p. 515*]. If the words used are 'excessively onerous', the standards will normally be the same, i.e., a high threshold [*Brunner, p. 515*]. On the other hand, if the hardship clause only uses the words 'more burdensome', or 'harmful', as opposed to 'excessively burdensome', it indicates a more relaxed standard [*Brunner, p. 515; Fontaine/de Ly pp.*

497-98 and 507]. Cl 12 of the FSSA uses the words "*more onerous*" [*Cl Ex C5, p. 14*]. CLAIMANT submits that the conscious choice of the parties to use these words suggest a lower threshold of hardship.

99. An analysis of the negotiations pertaining to the clause further indicates a reduced threshold of hardship. When requesting that a hardship clause be included, CLAIMANT mentioned, "*unforeseeable… requirements… which can increase the cost by up to 40% and thereby destroy the commercial basis of the deal*" [*Cl Ex C4, p. 12*]. The wording of the hardship clause was suggested keeping in mind the risks mentioned by CLAIMANT [*PO2, ¶ 12*]. Therefore, it is evident that the parties intended that the clause have a lower threshold for a hardship claim.

100. Finally, it is submitted that the threshold for hardship should be lowered since CLAIMANT would face financial ruin if it were forced to take on the costs of the retaliatory tariff. CLAIMANT has been making losses since 2014, and has used a restructuring plan to receive a credit line [*PO2, ¶ 29*]. As part of the plan, it is absolutely imperative for CLAIMANT to make a profit in 2018 [*PO2, ¶ 29*]. Failure to do so would mean CLAIMANT would have to sell a part of its business to a rival company [*PO2, ¶ 29*]. CLAIMANT'S existence as a company would be threatened if it were to shoulder the burden of the additional tariffs. Not only would it lose its profit margin, it would also face a 25% loss on the shipment as well as financial ruin, and RESPONDENT was aware of this [*NoA, p. 7, ¶ 18*].



101. If the performance of its contractual obligation after the hardship event has occurred would result in the financial ruin of a party, the threshold for hardship is lowered [*Brunner, p. 437; Jones/Schlechtriem, p. 138, ¶ 220; Berger, ¶ 24-63, 24-67; Farnsworth, p. 610; Alimenta v. Gibbs Nathaniel; Zweigert/Kötz, p. 553*]. It would run counter to the sense of justice for RESPONDENT to exclusively benefit from CLAIMANT'S performance of its contractual obligations while CLAIMANT itself is brought to the borders of financial ruin [*Brunner, p. 437*].

102. The above factors lower the threshold to trigger hardship. Therefore, the additional costs faced by CLAIMANT meet the threshold required by Cl 12 of the FSSA. Since all the requirements to invoke Cl 12 are met, CLAIMANT may invoke Cl 12 to seek a remedy.

III. THE TRIBUNAL SHOULD ADAPT THE FSSA UNDER CL 12

103. CLAIMANT submits that it is entitled to $1,250,000 by virtue of adaptation under Cl 12 of the FSSA. CLAIMANT is entitled to invoke hardship under Cl 12 [*supra* ¶¶*89-102*]. As soon as CLAIMANT learned of the imposition of the tariffs, it approached RESPONDENT for renegotiations [*Cl Ex C8, p. 18*]. CLAIMANT initiated a meeting for renegotiations involving the CEOs of both parties, Ms. Napravnik and Mr. Shoemaker [*PO2, ¶ 35*]. However, RESPONDENT'S CEO stopped negotiations and refused to pay the additional amount for the tariffs that it owed CLAIMANT [*Cl Ex C8, p. 18*].

104. When a party refuses to continue renegotiations, the other party may approach the court or arbitral tribunal, seeking adaptation, termination or specific performance of the contract [*Brunner, pp. 488-9; Frick, p. 180*]. CLAIMANT, relying on RESPONDENT'S promises to renegotiate the FSSA, performed its obligations in good faith [*Cl Ex C8, p. 18*]. Further, RESPONDENT has paid the amount originally agreed upon by the parties in the FSSA [*Cl Ex C8, p. 18*]. Termination and specific performance of the contract are not possible in this case.

105. Further, at the time of the drafting of the FSSA, the parties intended to have a long-term relationship [*Cl Ex C3, p. 11; Cl Ex C4, p. 12*]. Hardship clauses facilitate such a long-term relationship by allowing adaptation to changed circumstances [*Draetta, ¶ 6.5; Frick, p. 178*]. The termination of a contract will also affect the relationship between the parties [*Frick, p. 182*]. Therefore, the hardship clause negotiated by parties contemplated adaptation, rather than termination. Lastly, the inclusion of a hardship clause itself implies adaptation as a remedy, even if not explicitly stated [*Draetta-2, p. 115*].

106. RESPONDENT may not argue that CLAIMANT lost its right to remedy by performance. CLAIMANT raised concerns regarding the hardship with RESPONDENT as soon as it learned of the tariffs and before its performance [*Cl Ex C8, p. 17*]. It was only after RESPONDENT promised to renegotiate the contract that CLAIMANT shipped the semen, relying on RESPONDENT'S promise [*Cl Ex C8, p. 18*].

107. Therefore, the appropriate remedy under Cl 12 of the FSSA is adaptation. As a result of the tariffs, CLAIMANT lost its profit margin and is facing a 25% loss. If CLAIMANT undergoes losses, it may result in its financial ruin [*PO2, ¶ 29*]. While the additional tariffs cost $1,500,000, CLAIMANT is

willing to forgo its $250,000 profit in good faith, despite its current financial position. However, it is crucial for CLAIMANT to retrieve $1,250,000 that it paid only upon RESPONDENT'S assurances of a negotiation for the amount. Therefore, the Tribunal must adapt the FSSA to award CLAIMANT $1,250,000.

ISSUE 4: IN ANY CASE, CLAIMANT IS ENTITLED TO THE PAYMENT OF $1,250,000 AS A RESULT OF ADAPTATION OF THE PRICE UNDER THE CISG

108. The retaliatory tariff imposed by Equatoriana would increase the cost of delivery by 30%, due to which CLAIMANT's profit margin would reduce by 25%, resulting in a loss on the transaction. Despite the adverse change in circumstances, CLAIMANT proceeded to authorise the shipment solely based on RESPONDENT's promise to renegotiate the FSSA [*Resp Ex R4, p. 36*].

109. This performance disrupted the contractual equilibrium, as the benefits from the FSSA accrued disproportionately to the parties. While respondent obtained the horse semen in time for the breeding season, CLAIMANT was left reeling with a potentially destructive loss, given its precarious financial situation. Furthermore, the loss was solely caused by a risk that claimant was induced to bear, despite having expressly refused to do so during the pre-contractual negotiations.

110. CLAIMANT submits that, therefore, the FSSA must be adapted to increase the price, if not under Cl 12, under the CISG on three grounds- First, the parties have not derogated from the CISG through Cl 12 of the FSSA **(I).** Second, the tariff qualified as an impediment under the CISG **(II)**. Third, since the impediment disrupted the contractual equilibrium, the FSSA must be adapted **(III)**.

I. THE PARTIES HAVE NOT DEROGATED FROM THE CISG WITH RESPECT TO HARDSHIP

111. RESPONDENT may seek to argue that the inclusion of Cl12 in the FSSA was a special regulation of the consequences of changed circumstances and constitutes a derogation from the CISG under Art. 6 [*Ans. to NoA, p. 32, ¶. 20*]. CLAIMANT submits that Cl 12 cannot be a derogation from the CISG with respect to changed circumstances on two grounds.

112. First, the mere presence of a hardship clause does not oust Art. 79 of the CISG. It has been held that a contractual provision providing for changed circumstances does not indicate a pre-emption of Art. 79 [*Iron Molybdenum Case*]. Therefore, both the contractual provision and Art. 79 have to be construed in tandem.

113. Second, even if this is not the case, the CISG will be applicable as Cl 12 is not intended to be an exhaustive provision but an illustrative provision, as any event that is comparable and unforeseen to the additional health and safety requirements can be brought under the scope of the clause [*Iron Molybdenum Case; Case No. 123/1992*]. Since the parties have not provided for every single

impediment that may arise, the CISG may be used to determine impediments that are not expressly provided by the clause.

II. CLAIMANT WAS EXEMPTED FROM PERFORMANCE UNDER THE CISG AS THE TARIFF QUALIFIED AS AN IMPEDIMENT

114. The exemption in Art. 79 can be availed by CLAIMANT on the following grounds- First, the tariff would qualify as an impediment under the CISG **(A)**. Second, it would lie outside CLAIMANT'S control **(B)**. Third, the parties could not have taken the tariff into consideration at the time of the conclusion of the FSSA **(C)**. Fourth, CLAIMANT could not have overcome the consequences of the tariff **(D)**.

A. The retaliatory tariff would qualify as an impediment under Art. 79(1)

115. CLAIMANT submits that the retaliatory tariff would qualify as an impediment under Art. 79(1). Any event that was not reasonably foreseeable at the time of conclusion of the contract and which renders the performance of the contract onerous would qualify as an impediment under Art. 79 [*Lorraine Tubes S.A.S Case*]. Moreover, government interventions similar to the retaliatory tariff such as trade bans, exchange controls and import restrictions qualify as impediments [*Secretariat Commentary, Art. 65, No. 5; Staudinger/Magnus, Art. 79, ¶ 28*].

116. There exists no numeric threshold for when such a government intervention would be onerous on a party and is a factual enquiry to be made on a case to case basis [*Schwenzer, p. 716*]. CLAIMANT submits that the 30% increase in costs of delivery due to the retaliatory tariff would cross the threshold for hardship under Art. 79.

117. One of the factors to be considered while determining whether the performance of a contractual obligation has become onerous, is the length of the contract [*Brunner, p. 438-441, Schwenzer p. 716*]. A long-term installment contract is considered to be vulnerable to changes in economic circumstances and therefore, the threshold for hardship is lowered [*Brunner, p. 435*].

118. The FSSA was a contract of longer duration, as per the practice prevalent in the racehorse breeding sector [*Moss*]. Contracts for the trade of semen typically entail performance over a few days, rather than over the course of a year, as in this case [*Moss*]. Additionally, the quantities contracted for are much smaller in the racehorse sector and are delivered predominantly in a single installment [*Moss*]. In this case, the FSSA once again proved to be divergent as CLAIMANT had agreed to deliver 100 doses, a significantly higher quantity, which required to be delivered in installments.

119. Therefore, the FSSA between the parties in the present case would be vulnerable to changes in economic circumstances, as it was concluded for a significantly longer period and for a higher

quantity than most contracts in the racehorse breeding sector. As a result, given these circumstances, the threshold for determining hardship must be lowered.

120. Another factor to be taken into consideration while determining the threshold for hardship is the financial situation of the obligor [*Brunner, p. 164*]. CLAIMANT had been facing financial difficulties for the last two years as the racehorse section had been operating at a loss for several years [*Cl Ex C8, p. 17*]. CLAIMANT was only able to stay in business after extensive restructuring measures and a substantial reduction of the work force [*Cl Ex C8, p. 17*].

121. Where the obligor's financial ruin is impending, the threshold for determining hardship must be lowered [*Brunner, p. 164*, *Himpurna Award, ¶ 191*]. Financial ruin is determined by whether the contract in question represented a sizeable part of its revenues [*Brunner, p. 435*]. The FSSA represented the only avenue through which CLAIMANT could have generated a small profit for the first time since 2014 and formed a substantial part of CLAIMANT's revenues for this year [*PO2, ¶ 15*].

122. Furthermore, CLAIMANT after bearing the retaliatory tariffs would find it difficult to negotiate a new line of credit and would have to sell its dressage section to obtain finance [*PO2, ¶ 29*]. Therefore, the existence of one of CLAIMANT's important sections was threatened. Bearing the cost of the retaliatory tariff would worsen CLAIMANT's already endangered financial position, making imminent the risk of financial ruin.

123. As a result, since the 30% increase in cost of performance threatened the existence of CLAIMANT, it would cross the threshold for constituting hardship.

B. The retaliatory tariff was beyond CLAIMANT'S control

124. CLAIMANT submits that the retaliatory tariff was beyond its control. An impediment is beyond the control of a party where it lies outside its sphere of responsibility [*Flambouras, p. 266*]. In accordance with this principle, events such as changes in political circumstances, and import restrictions are not within a party's sphere of responsibility and are therefore considered to lie outside a party's control [*Flambouras, p. 267; Failure to Open Letter of Credit and Penalty Clause Case*]. On the other hand, circumstances and events within the promisor's sphere of responsibility such as failure of suppliers, personally and machinery do not exempt the promisor from performing the contract [*Schlectreim/Schwenzer, Art. 79, ¶12, Stolen Car Case*].

125. The retaliatory tariff was not within CLAIMANT's sphere of responsibility for two reasons. First, it was not internal to CLAIMANT as it was a state- imposed measure taken with larger political considerations. CLAIMANT being a private entity, would have no control over such measures [*Cl Ex C6, p. 15*]. Therefore, by its very nature as a government measure, such an impediment would be outside CLAIMANT's sphere of responsibility. Second, even a possibility of control over the

imposition of the tariff would be ruled out as it was imposed by a foreign state in relation to CLAIMANT. CLAIMANT, being an entity based in Mediterraneo, even if it could control and foresee a state measure, would only be able do so with respect to measures taken by Mediterraneo [*Machines Case*]. CLAIMANT would have no control over measures taken by Equatoriana [*Cl Ex C6, p. 15*]. As a result, CLAIMANT would be exempted from performance under Art. 79 as the tariff lay outside its control.

C. The tariff could not have been taken into account at the time of conclusion of the FSSA

126. CLAIMANT submits that the tariff could not be foreseen at the time of the conclusion of the FSSA. A party is entitled to the exemption under Art. 79 only where the impediment could not have been reasonably foreseen at the time of the conclusion of the contract [*Schlectreim/Schwenzer, Art. 79, ¶ 14*].

127. The test to determine reasonable foreseeability, is whether a reasonable person in the shoes of the promisor, under the actual circumstances at the time of the conclusion of the contract ought to have foreseen the impediment's initial or subsequent existence [*Tallon, Art. 79, n. 2.6.3; Staudinger/Magnus, Art. 79, ¶. 32*].

128. CLAIMANT submits that both the imposition and the particulars of the retaliatory tariff could not have been reasonably foreseeable at the time of the conclusion of the FSSA. At the time of concluding the FSSA, Equatoriana had been an ardent supporter of free trade [*Cl Ex C6, p. 15*]. In the past, where there was a trade dispute, the normal course of action was for the Equatorianian Government to amicably resolve such dispute [*Cl Ex C6, p. 15*].

129. It had rarely relied on retaliatory measures where there was a trade restriction by another country [*Cl Ex C6, p. 15*]. Therefore, this sudden change in position by Mediterraneo came as a "*surprise*" to even the informed circles who had been regularly following international trade developments [*Cl Ex C6, p. 15*]. As a result, a reasonable person in the shoes of CLAIMANT, who did not form a part of these informed circles, could not have anticipated the imposition of a tariff.

130. Even if the action of the Equatorianian Government was foreseeable, this particular tariff was reasonably unforeseeable in two ways. First, it was imposed on agricultural goods, on which there had been no trade restrictions, including customs duty by either Mediterraneo or Equatoriana [*PO2, ¶ 25*]. A reasonable person engaged in the same business as CLAIMANT, having never incurred customs duties previously, could not have anticipated the retaliatory tariff.

131. Second, racehorse products, for the purposes of import, were always treated as a separate category from other animals, such as pigs, sheep or cattle [*NoA, p. 6, ¶ 11*]. This was, therefore the first

time they had been grouped together, widening the breadth of the tariff [*NoA, p. 6, ¶ 11*]. Therefore, given that the longstanding practice was to treat racehorses as a separate category of animals for the purposes of import, a reasonable person engaged in the trade of racehorse products could not have anticipated the wide breadth of the retaliatory tariff.

D. The tariff could not be overcome by CLAIMANT

132. An unforeseeable impediment exempts the claiming party only if it can be proved that the impediment or its consequences could not have been avoided by taking reasonable measures [*Flambouras, p. 271, Schlectreim/Schwenzer, Art. 79, ¶ 15*]. The claiming party must consider alternative possibilities for performing the contract [*Flambouras, p. 271*]. Whether or not a party could overcome the impediment by rendering a substitute performance must be determined on a case to case basis, keeping in mind the facts and circumstances [*Magnus, p. 257*].

133. The nature of the goods forming the subject of the contract is one factor used to determine whether a substitute performance was possible [*CISG AC 7, Comment 13; Huber/Mullis,p. 261*]. In a sale of generic goods, the threshold for unavoidability is higher given the easy availability of substitute goods [*Huber/Mullis, p. 262*]. Therefore, the claiming party cannot avail of an exemption due to the ease of alternative performance even where such performance entails higher costs [*Huber/Mullis, p. 262*]. CLAIMANT submits that the tariff and its consequences could not be overcome as frozen racehorse semen was not a generic good. Frozen horserace semen, which was the subject of the FSSA in this case, is not a generic good. The nature of a good is determined by its contractual description [*Flechtner, p. 8*]. Generic goods are identified by a description that more than one specific item might satisfy, such as a particular model of a computer [*Flechtner,p. 8*]. However, where the goods are identified by a unique description that can be fulfilled only by a single item, such goods are known as individual goods, such as a particular model of a computer identified by a specific serial number [*Flechtner, p. 8*].

134. In this case, the description in the FSSA could not have been of a generic good, as it could only be fulfilled by a single item. The FSSA was specifically entered into between parties keeping in mind the successful track record that Nijinsky III enjoyed [*Cl Ex C1, p. 9*]. Nijinsky III was one of the most successful racehorses of its times and had won the Triple Crown of Danubia, Equatorianian Oceanside Cup and the Capital City Vase [*NoA, p. 5, ¶ 3*].

135. It was also known to have sired other famous racehorses such as Barbaro and Rachel Alexandra [*NoA, p. 5, ¶ 3*]. Given Nijinsky III's reputation, RESPONDENT, wanting to develop its own racehorse stable, had approached CLAIMANT inquiring about the availability of Nijinsky III's semen [*NoA, p. 5, ¶ 3*]. Therefore, RESPONDENT after a careful consideration of Nijinsky III's

prior success and pedigree had specifically contracted for Nijinsky III's semen and not horse semen in general.

136. Pursuant to this intention, the FSSA specifies that the semen supplied by CLAIMANT can only be derived from Nijinsky III [*Cl Ex C5, p.13*]. Therefore, only a single item would cater to this description. To adhere to the FSSA, CLAIMANT would have to source the semen from Nijinsky III and no other racehorse. If CLAIMANT were to attempt a substitute performance by sourcing the semen from another horse, it would defeat the very basis of the FSSA, which was to acquire the semen of a specific, successful horse, i.e. Nijinsky III, which had sired other successful racehorses previously. As the option of a substitute performance was not available to CLAIMANT, the tariff was unavoidable and had to be borne in order to complete the performance of the FSSA.

III. THE FSSA MUST BE ADAPTED TO RESTORE CONTRACTUAL EQUILIBRIUM

137. CLAIMANT, after confirming that the tariff was made applicable to frozen horse semen, attempted to contact RESPONDENT to inform them about this change in circumstance and to initiate renegotiations of the FSSA to account for the increased costs [*Cl Ex C7, p. 14*]. After several unsuccessful attempts, RESPONDENT finally responded to CLAIMANT's communication one day before the date of delivery [*Cl Ex C7, p. 14*]. Mr. Shoemaker, on behalf of the RESPONDENT, assured CLAIMANT that renegotiations would be initiated once the delivery was completed by CLAIMANT [*Cl Ex R4, p. 36*]. Despite the delayed communication, CLAIMANT, in good faith and in accordance with RESPONDENT's request for timely delivery, authorized the shipment, without further delay.

138. Once performance was completed, RESPONDENT reneged on its assurance and stopped all negotiations for an increase in price. Since the negotiations between the parties have failed, the Tribunal must adapt the FSSA under the CISG.

139. CLAIMANT submits that there is a gap in the CISG with respect to remedies available to a disadvantaged party in a situation of hardship [*Lorraine Tubes SAS Case, ¶ 65*, *Schwenzer, p. 724 Klepac, p. 31*]. While adaptation is governed by the CISG, it is not expressly settled within the CISG.

140. As per Art. 4 of the CISG, for a matter to be governed by the CISG, it must pertain to the rights and obligations of the parties and must not pertain to the validity of the contract [*Art. 4, CISG*]. The remedy claimed in this case, adaptation, is a matter governed by the CISG, as it pertains to the rights and obligations of the parties [*Schwenzer, p. 724*]. Despite being governed by the CISG, there is no specific provision regarding adaptation [*Schwenzer, p. 724*]. Therefore, the CISG does not expressly provide for adaptation. Such issues are referred to as internal gaps

[*Schlechtriem/Schwenzer, Art. 7,* ¶ *27*]. An internal gap must be resolved using the general principles underlying the CISG, failing which, using the applicable domestic law arrived at through the rules of private international law [*Art. 7(2), CISG*].

141. CLAIMANT submits that the Tribunal must adapt the FSSA on two grounds: First, the general principles underlying the CISG support the remedy of adaptation. Keeping these general principles in mind, the Tribunal can adapt the FSSA under Art. 79(5) **(I)**. Even in the absence of such principles, the FSSA can be adapted by the Tribunal under the applicable domestic law arrived at using the rules of private international law **(II)**.

I. The Tribunal can adapt the FSSA under the general principles of the CISG

142. One of the underlying principles of the CISG is the principle of good faith [*Enderlein/Maskow, p. 56; Bianca/Bonell, pp. 80 and 85*]. In the event of an unforeseeable impediment, these principles require the parties to a contract, to attempt renegotiations and adapt the contract [*Flechtner, p. 236*]. CLAIMANT made attempts to renegotiate the FSSA after the imposition of the tariff by duly notifying RESPONDENT [*Cl Ex C7*, *p. 14*]. While RESPONDENT initially agreed to renegotiate the FSSA, it changed its position immediately after CLAIMANT performed the FSSA [*Cl Ex C7*, *pg. 14*]. Once a party has admitted to the need for a change in a contract price, a subsequent refusal has been held to be contrary to the principle of good faith [*ICC Case No 4761*]. Therefore, the subsequent change in the position of RESPONDENT, violates the principle of good faith under the CISG. Refusal by a party to renegotiate the contract in the face of an impediment must be construed by the Tribunal to that party's disadvantage [*Brunner, p. 483, Fucci, p. 30*]. Therefore, given that RESPONDENT refused to renegotiate the FSSA despite the imposition of the tariff, the FSSA must be adapted to account for the increase in costs for CLAIMANT.

143. Additionally, a general principle allowing adaptation by the Tribunal in situations of changed circumstances can be found in Art. 50 of the CISG [*Schlectriem, p. 236*]. Art. 50, provides for a price reduction where there is non-conformity in performance. Such non-conformity causes an imbalance in contractual obligations, and the price reduction is sought to amend this imbalance [*Ishida, p. 379*]. Price reduction is therefore a form of adaptation to "*adjust the disturbed balance of performances*" [*Schlectreim, p. 236*]. In this case, given the imbalance in benefit derived from the FSSA, the Tribunal should adapt the FSSA under Art. 79(5), which bars a party from seeking damages, while allowing for alternative remedies such as adaptation [*CISG AC 7, p. 40; Schlectreim, p. 237*].

II. In any case, the FSSA may be adapted under the applicable domestic law

144. Where general principles underlying the CISG cannot be ascertained, the gap must be resolved using the applicable domestic law, arrived at using the rules of private international law [*Schlechtriem/Schwenzer, Art. 7, ¶ 27*]. In this case, the rules of private international law applicable are the Hague Principles on Choice of Law in International Commercial Contracts [*PO2, ¶. 43*]. Under the Hague Principles, a contract is governed by the law chosen by the parties [*Article 2, Hague Principles on Choice of Law in International Commercial Contracts*]. In this case, the parties have clearly chosen the law of Mediterraneo to govern the FSSA [*Cl Ex C5, p. 14, ¶ 14*]. Therefore, the applicable domestic law to resolve the gap is Mediterranean Law, which is a verbatim adoption of the UPICC [*PO1, ¶ 4*].

145. Under the Mediterranean Contract Law, in the event of hardship, the disadvantaged party is entitled to request for renegotiation of the contract [*Art. 6.2.3 (1), UPICC; Vogenauer, p. 819*]. While there is no express obligation for the other party to enter into the renegotiation, there is a general principle of good faith and a duty to cooperate, under Art. 1.7. [*Vogenauer, p. 820*]. In the instant case, RESPONDENT promised to renegotiate, but reneged on this promise once CLAIMANT had delivered the last batch of frozen horse semen [*Cl Ex C8, p 18*]. Therefore, RESPONDENT's conduct was not in line with good faith and the duty to cooperate.

146. If the parties fail to reach an agreement within a reasonable period of time, either party may approach the court or tribunal to adapt the contract [*Vogenauer, p. 820*]. The tribunal may adapt the contract in a hardship situation keeping in mind the allocation of the risk between the parties and the disruption in contractual equilibrium [*Vogenauer, p. 821]*. In this case, the risk of bearing the tariff was not on CLAIMANT and was on RESPONDENT [*Supra ¶¶ 74-89*]. Additionally, the tariff had disrupted the contractual equilibrium, as CLAIMANT had to bear the tariff, despite expressly stating that it would not bear costs of a similar nature [*Cl Ex C-4, p 12*]. Furthermore, it was an unanticipated development and could not be overcome by CLAIMANT [*Cl Ex C6, p. 15*]. Due to this disruption in contractual equilibrium, the FSSA must be adapted by the Tribunal under the Mediterranean Contract Law.

REQUEST FOR RELIEF

CLAIMANT respectfully requests the Tribunal to find that:

a. It has the jurisdiction and power under the arbitration agreement to adapt the contract;

b. CLAIMANT should be allowed to submit evidence from the other arbitration proceedings even if such evidence was produced illegally;

c. CLAIMANT is entitled to the payment of $1,250,000 from an adaptation of the price

   i] Under Clause 12 of the contract and

   ii] Under the CISG.

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¶	Paragraph
¶¶	Paragraphs
Ans. to NoA	Answer to Notice of Arbitration
Art.	Article
BG	Bundesgericht
CISG	United Nations Convention on the International Sale of Goods
Cl Ex	CLAIMANT'S Exhibit
CLOUT	Case Law on UNCITRAL Texts
Co.	Company
DAL	Danubian Arbitration Law
DCL	Danubian Contract Law
etc.	Et cetera
FSSA	Frozen Semen Sales Agreement
ICC	International Chamber of Commerce Court of Arbitration Paris
ICSID	International Centre for Settlement of Investment Disputes
Ltd.	Limited
Model Law	UNCITRAL Model Law on International Commercial Arbitration
no.	Number
NoA	Notice of Arbitration
NYC	New York Convention
p.	Page

PECL	Principles of European Contract Law
PO	Procedural Order
pp.	Pages
Resp. Ex.	RESPONDENT'S Exhibit
S.	Section
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UPICC	UNIDROIT Principles on the Interpretation of Commercial Contracts
v.	Versus

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2.	Incoterms 2010	*Incoterms*
3.	New York Convention	*NYC*
4.	Principles of European Contract Law	*PECL*
5.	UNCITRAL Model Law	*Model Law*
6.	UNIDROIT Principles	*UPICC*
7.	United Nations Convention on Contracts for the International Sale of Goods	*CISG*

Certificate and Choice of Forum

To be attached to each Memorandum

I, Aditi Ramakrishnan, on behalf of the Team for NALSAR University of Law, India 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.

☑ Our School is competing in both Vis East Moot and Vienna Vis Moot.

☑ We are submitting two separately prepared, different Memoranda to Vis East Moot and to Vienna Vis Moot.

Or

☐ We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considered for an Award in (check one box)

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for NALSAR University of Law, India

Name: Aditi Ramakrishnan

Signature Aditi