MEMORANDUM FOR CLAIMANT

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

ACHYUTHA G.M. • DARSHAN PATANKAR • KUNAL GOPAL
ROHIN GOYAL • SURABHI SABOO • TEJAS RAO

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

$	US Dollar
¶	Paragraph
¶¶	Paragraphs
&	And
AC	Advisory Council
art	Article
CAM	Chamber of Arbitration of Milan
CEO	Chief Executive Officer
Chp.	Chapter
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl.	Clause
CLOUT	Case Law on UNCITRAL Texts
Co.	Company
CRCICA	Cairo Regional Centre for International Commercial Arbitration
DDP	Delivered Duty Paid
ed/ eds	Editor(s)
edn.	Edition
et. al.	And others
HKIAC	Hong Kong International Arbitration Centre
ibid	Ibidem
i.e.	That is

IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
INCOTERMS	International Commercial Terms
No.	Number
PCA	Permanent Court of Arbitration
p.	Page
pp.	Pages
SGHC	Singapore High Court
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT PICC	UNIDROIT Principles on International Commercial Contracts
US	United States
v.	Versus
WTO	World Trade Organisation

DEFINITIONS

Arbitration Agreement/ Arbitration Clause	Clause 15 of the Frozen Semen Sales Agreement which refers any disputes arising between the parties to arbitration administered by the HKIAC.
Choice of Law Clause	Clause 14 of the Frozen Semen Sales Agreement which states that the agreement would be governed by the Law of Mediterraneo, including CISG.
CLAIMANT	Phar Lap Allevamento, a company registered and located in Mediterraneo and it operates Mediterraneo's oldest and most renowned stud farms.
Hardship Clause	Clause 12 of the Frozen Semen Sales Agreement which exempts Phar Lap Allevamento from any liabilities for lost semen shipments or delays in delivery not within its control.
Ninjisky III	Phar Lap Allevamento's prized stallion whose semen Black Beauty Equestrian is interested in.
Parties	Phar Lap Allevamento and Black Beauty Equestrian who have entered into the Frozen Semen Sales Agreement.
RESPONDENT	Black Beauty Equestrian, operators of a stable based in Equatoriana and is popular for its broodmare lines.
Tribunal	A panel of arbitrators constituted by the HKIAC consisting of Ms. Wantha Davis, Dr. Francesca Dettorie and Prof. Calvin de Souza as the Presiding Arbitrator.

DRAMATIS PERSONAE

Chris Antley	Main negotiator for RESPONDENT
Greg Shoemaker	Responsible for RESPONDENT's racehorse breeding program, including all questions concerning Contract since 1 Nov 2017
Ian Bouckaert	Newly elected President of Mediterraneo
John Ferguson	Negotiator for CLAIMANT
Julian Krone	Negotiator for RESPONDENT
Julie Napravnik	Main negotiator for CLAIMANT

INDEX OF AUTHORITIES

Blair & Vidak Gojković	Cherie Blair & Ema Vidak Gojković WIKILEAKS AND BEYOND: DISCERNING AN INTERNATIONAL STANDARD FOR THE ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE ***in*** ICSID Review - Foreign Investment Law Journal, Volume 33, Issue 1 (2018) ***pp.*** 235-59	¶¶ 49, 52
Bonell, 2002	Michael Joachim Bonell THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS AND THE HARMONISATION OF INTERNATIONAL SALES LAW ***in*** Foundations and Perspectives of International Trade Law, L. Mistelis & M. Cremona (eds.) 2001 ***pp.*** 339-53	¶ 117
Born on Arbitration Agreements	Gary B. Born, THE LAW GOVERNING INTERNATIONAL ARBITRATION AGREEMENTS: AN INTERNATIONAL PERSPECTIVE ***in*** Singapore Academy of Law Journal, Volume 26 (2014) ***pp.*** 814-48	¶ 7

Born, 2014	Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION 2nd edn. 2014	¶¶ 8, 10, 24, 32
Brandner, 1999	Gert Brandner ADMISSIBILITY OF ANALOGY IN GAP-FILLING UNDER THE CISG ***in*** CISG Database (1999) ***available at:*** www.cisg.law.pace.edu/cisg/biblio/brandner.html	¶ 111
Bridge, 2007	Michael Bridge THE INTERNATIONAL SALE OF GOODS: LAW AND PRACTICE 2007	¶¶ 111, 113
Briggs, 2014	Adrian Briggs PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS 2014	¶ 8
Brunner, 2008	Christoph Brunner FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION FOR NON-PERFORMANCE IN INTERNATIONAL ARBITRATION ***in*** International Arbitration Law Library (2008)	¶¶ 32, 37, 87, 90, 93

Dicey, Morris & Collins, 2006	Lord Collins Of Mapesbury & Professor Jonathan Harris DICEY, MORRIS & COLLINS ON, TTHE CONFLICT OF LAWS 14th edn. 2006	¶¶ 7, 21
Dongdoo Choi, 2015	Dongdoo Choi CHOICE OF LAW RULES APPLICABLE FOR INTERNATIONAL ARBITRATION AGREEMENTS ***in*** Asian International Arbitration Journal, Volume 11, Issue 2 (2015) ***pp.*** 105–115	¶¶ 25, 26
Enderlein & Maskow, 1992	Fritz Enderlein & Dietrich Maskow INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS: COMMENTARY 1992	¶ 68
Ernest G. Lorenzen, 1921	Ernest G. Lorenzen, Ernest G. Lorenzen VALIDITY AND EFFECTS OF CONTRACTS IN THE CONFLICT OF LAWS ***in*** Yale Law Journal, Volume 30 (1921) ***pp.*** 565-80	¶¶ 22, 23

Farnsworth, 1987	E. Allan Farnsworth ARTICLE 8 IN BIANCA-BONELL COMMENTARY ON THE INTERNATIONAL SALES LAW ***available at:*** www.cisg.law.pace.edu/cisg/biblio/farnsworth-bb8.html	¶ 65
Ferrario, 2017	Pietro Ferrario THE ADAPTATION OF LONG-TERM GAS SALE AGREEMENTS BY ARBITRATORS ***in*** International Arbitration Law Library, Volume 41 (2017)	¶¶ 32, 37, 44
Fouchard Gaillard Goldman, 1999	Philippe Fouchard, Emmanuel Gaillard & Berthold Goldman FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 1999	¶¶ 8, 13, 28, 32
Fremuth-Wolf, 2012	Stefan Riegler, Alexander Petsche, Alice Fremuth-Wolf, Martin Platte & Christoph Liebscher ARBITRATION LAW OF AUSTRIA: PRACTICE AND PROCEDURE 2012	¶ 36

Garro, 2005	Alejandro M. Garro CISG-AC OPINION NO. 7: COMPARISON BETWEEN PROVISION OF THE CISG REGARDING EXEMPTION OF LIABILITY FOR DAMAGES (ART. 79) AND THE COUNTERPART PROVISIONS OF THE UNIDROIT PRINCIPLES (ART. 7.1.7) ***adopted in*** the 11th meeting in Wuhan, People's Republic of China, on 12 Oct 2007. ***available at:*** http://cisgw3.law.pace.edu/cisg/principles/uni79.html	¶ 87, 113
Harishankar KS, 2013	Harisankar K.S. INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA AND THE CHOICE OF LAW DETERMINATION ***in*** Journal of International Arbitration, Volume 30, Issue 6 (2013) ***pp***. 621-36	¶ 22
Huber and Mullis, 2007	Peter Huber and Alaister Mullis THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS 2007	¶¶ 65, 80, 90, 93

Jeffery P. Commission, 2007	Jeffery P. Commission PRECEDENT IN INVESTMENT TREATY ARBITRATION: A CITATION ANALYSIS OF A DEVELOPING JURISPRUDENCE Journal of International Arbitration, Volume 24 (2007)	¶ 58
Kahn, 1975	Ph. Kahn FORCE MAJEURE ET CONTRATS INTERNATIONAUX DE LONGUE DURÉE ***in*** Journal du droit international: Clunet (1975)	¶ 5
Kaufmann-Kohler, 2007	Gabrielle Kaufmann-Kohler ARBITRAL PRECEDENT: DREAM, NECESSITY, OR EXCUSE? ***in*** Arbitration International (UK), Volume 23, Issue 3 (2007) ***pp.*** 376-78	¶ 58
Kotuby Jr. & Sobota, 2017	Charles T. Kotuby Jr. & Luke A. Sobota GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS 2017	¶ 31

Lew, 1998	Julian D. M. Lew, THE LAW APPLICABLE TO THE FORM AND SUBSTANCE OF THE ARBITRATION CLAUSE IN IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, ICCA CONGRESS SERIES NO. 9 (PARIS 1998) Albert Jan van den Berg (ed.)	¶¶ 22, 23
Lew, Mistelis & Kröll, 2003	Julian D. M. Lew, Loukas A. Mistelis & Stefan Kröll COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 2003	¶¶ 7, 8, 37
Lindstrom, 2006	Niklas Lindstrom CHANGED CIRCUMSTANCES AND HARDSHIP IN THE INTERNATIONAL SALE OF GOODS ***in*** Nordic Journal of Commercial Law (2006) ***available at:*** https://www.cisg.law.pace.edu/cisg/biblio/lindstrom.html	¶¶ 90, 100, 102
McKendrick, 2012	Ewan McKendrick CONTRACT LAW: TEXT, CASES, AND MATERIALS 5th edn. 2012	¶ 5

O'Malley, 2012	Nathan D. O'Malley RULES OF EVIDENCE IN INTERNATIONAL ARBITRATION: AN ANNOTATED GUIDE 2012	¶¶ 48, 55
Peter, 1995	Wolfgang Peter ARBITRATION AND RENEGOTIATION OF INTERNATIONAL INVESTMENT AGREEMENTS 1995	¶ 5
Pietrowski, 2006	Robert Pietrowski EVIDENCE IN INTERNATIONAL ARBITRATION ***in*** Arbitration International, Volume 22, Issue 3 (2006) ***pp***. 373-410	¶ 49
Rivkin, 1993	David Rivkin, LEX MERCATORIA AND FORCE MAJEURE in: Transnational Rules in International Commercial Arbitration Gaillard (ed.) 1993	¶ 44
Russell, 1997	David St John Sutton; John Kendall & Judith GillJudith Gill RUSSELL ON ARBITRATION 21st edn. (1997)	¶ 7

Schifferl & Wong, 2015	Markus Schifferl & Venus Valentina Wong The Award and the Courts, Decisions of the Austrian Supreme Court on Arbitration in 2013 and 2014 ***in*** Austrian Yearbook on International Arbitration 2015, Christian Klausegger, Peter Klein, et al. (eds), ***pp.*** 335-64	¶ 10
Schlechtriem & Butler, 2009	Peter Schlechtriem & Petra Butler UN LAW ON INTERNATIONAL SALES 2009	¶¶ 90, 93, 100
Schwenzer, 2008	Ingeborg Schwenzer FORCE MAJEURE AND HARDSHIP IN INTERNATIONAL SALE CONTRACTS ***in*** Victoria University of Wellington Law Review, Volume 39, Issue 4 (2008) ***pp.*** 709-26 ***available at:*** https://core.ac.uk/download/pdf/18243147.pdf	¶¶ 87, 90

Tallon, 1987	Denis Tallon, ARTICLE 79 IN BIANCA-BONELL COMMENTARY ON THE INTERNATIONAL SALES LAW ***available at:*** https://www.cisg.law.pace.edu/cisg/biblio/tallon-bb79.html	¶ 100
Y Derains, ICC Buletin 1995	Yves Derains ICC ARBITRAL PROCESS: PART VIII. CHOICE OF LAW APPLICABLE TO THE CONTRACT AND INTERNATIONAL ARBITRATION in ICC International Court of Arbitration Bulletin 10, Volume 6 No. 1 (1995)	¶ 18
Yearbook Commercial Arbitration, 1983	Awards in Case No. 1310-0417-78 of 4 January 1980 in Yearbook Commercial Arbitration, Volume 8 Pieter Sanders (ed.) 1983	¶ 48
Zeller, 2005	Bruno Zeller DAMAGES UNDER THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 2005	¶ 102

INDEX OF AWARDS

Ad-Hoc Awards

CAM Awards

CRCICA Award

Cited as	Reference	Cited in
CRCICA Award No. 64/1995	An African tourism company v Another African tourism company CRCICA Award No. 64/1995 2 September 1996 ***refer to:*** https://www.trans-lex.org/250613	¶ 31

ICC Awards

Cited as	Reference	Cited in
Buyer P v. Seller A	Technical know-how buyer P v. Engineer/seller A, Final Award ICC Case No. 7626 of 1995 (Unpublished)	¶ 49
Chemical Fertilizer Case	Swiss Buyer v. Austrian Seller [Chemical Fertilizer case] ICC Case No. 8128 of 1995 ***available at:*** http://cisgw3.law.pace.edu/cases/958128i1.html	¶ 116

Cowhides Case	Yugoslavian Seller v. Italian Buyer [Cowhides case] ICC Case No. 7331 of 1994 CLOUT Case No. 303 ***available at:*** http://cisgw3.law.pace.edu/cases/947331i1.html	¶ 65
Dow Chemical v. Isover	Dow Chemical France et. al. v. Isover Saint Gobain, Interim Award ICC Case No. 4131 of 1982 IX YBCA 131 (1984) 23 Sept 1982 ***refer to:*** https://www.trans-lex.org/204131/_/icc-award-no-4131-yca-1984-at-131-et-seq-/	¶¶ 7, 58
ICC Award 1990/1972	ICC Award 1990of 1972 Clunet 1974 ***refer to:*** https://www.trans-lex.org/201990/_/icc-award-no-1990-clunet-1974-at-897-et-seq/	¶ 32

ICC Award 8694/1996	American Company v. Belgian Company ICC Case No. 8694 of 1996 124 Journal de Droit International (Clunet) (France) 1056 (1997) ***refer to:*** https://www.trans-lex.org/208694/_/icc-award-no-8694-clunet-1997-at-1056-et-seq/	¶ 13
ICC Case 12745/2010	ICC Case No. 12745 of 2010, Final Award XXXV Y.B. Comm. Arb. 40, (2010) ***refer to:*** http://cisgw3.law.pace.edu/cases/12745i1.html	¶ 36
ICC Case 14046/2010	ICC Case No. 14046 of 2010, Final Award XXXV Y.B. Comm. Arb. 241, 246 (2010) ***refer to:*** https://www.trans-lex.org/214046/_/icc-award-no-14046-yca-2010-241-et-seq/	¶ 36
ICC Case 5103/1988	ICC Case No. 5103 of 1988 (France) ***refer to:*** https://www.trans-lex.org/205103/_/icc-award-no-5103-clunet-1988-at-1206-et-seq/	¶ 13

ICC Case 6379/1990	ICC Case no. 6379 of 1990 XVII Yearbook Commercial Arbitration 212 (1992)	¶ 7
ICC Case No. 9994/2001	ICC Case No. 9994 of 2011 ***refer to:*** http://www.unilex.info/case.cfm?id=1062	¶ 44
ICC Partial Award in Case 12363/2003	ICC Case No. 12363/ACS, Partial Award 23 Dec 2003 24 ASA Bull. 462, 466 (2006)	¶ 36
Magnesium Case	ICC Case No. 8324 of 1995 [Magnesium Case] ***refer to:*** http://cisgw3.law.pace.edu/cases/958324i1.html	¶ 65

Iran-United States Claims Tribunal

Cited as	**Reference**	**Cited in**
CBA v. Iran	CBA Int'l Dev. Corp. v. Islamic Republic of Iran 21 IRAN-U.S. C.T.R. 29 June 1989 ***refer to:*** https://www.trans-lex.org/232300/_/iran-us-claims-tribunal-phillips-petroleum-co-iran-v-iran-et-al-21-iran-us-ctr-at-79-et-seq/	¶ 31

ICSID Awards

Cited as	**Reference**	Cited in
Amco Decision on Jurisdiction, 1983	Amco Asia Corporation and Others v. Republic of Indonesia, Decision on Jurisdiction ICSID Case No. ARB/81/1 25 Sept 1983 ***published in*** 1 ICSID Rep. 389 (1993)	¶ 8
Caratube v. Kazakhstan	Caratube International Oil Company & Mr Devincci Saleh Hourani v. Kazakhstan ICSID Case No. ARB/13/13 27 Sept 2017 ***available at:*** https://www.italaw.com/sites/default/files/case-documents/italaw9324.pdf	¶¶ 49, 52
ConocoPhillips v. Venezuela	ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela ICSID Case No. ARB/07/30	¶ 52
EDF v. Romania	EDF (Services) Limited v. Romania ICSID Case No. ARB/05/13 8 Oct 2013 ***available at:*** https://www.italaw.com/sites/default/files/case-documents/ita0267.pdf	¶ 49

Saipem S.p.A Award on Jurisdiction	Saipem S.p.A. v. The People's Republic of Bangladesh, Decision on Jurisdiction and Recommendation on Provisional Measures ICSID Case No. ARB/05/07 21 Mar 2007 ***available at:*** https://www.italaw.com/sites/default/files/case-documents/ita0733.pdf	¶ 58

Iran-United States Claims Tribunal

Cited as	Reference	Cited in
CBA v. Iran	CBA Int'l Dev. Corp. v. Islamic Republic of Iran 21 IRAN-U.S. C.T.R. 29 June 1989 ***refer to:*** https://www.trans-lex.org/232300/_/iran-us-claims-tribunal-phillips-petroleum-co-iran-v-iran-et-al-21-iran-us-ctr-at-79-et-seq/	¶ 31

PCA Awards

Cited as	Reference	Cited in
Yukos v. Russia	Yukos Universal Limited (Isle of Man) v. The Russian Federation UNCITRAL, PCA Case No. AA 227	¶ 52

INDEX OF CASES

Australia

Cited as	Reference	Cited in
Comandante Marine Corp Case (Australia)	Comandante Marine Corp v. Pan Australia Shipping Pty Ltd Federal Court of Australia 20 Dec 2006 [2006] FCAFC 192	¶¶ 12, 33
Walter Rau v. Cross Pac (Australia)	Walter Rau Neusser Oel und Fett AG v. Cross Pac. Trading Ltd. Federal Court of Australia 15 Aug 2005 [2005] FCA 1102	¶ 36

Austria

Cited as	Reference	Cited in
Conveyor band Case (Austria)	Conveyor Band Case Oberlandesgericht [Appellate Court] Linz 23 Mar 2005 ***refer to:*** http://cisgw3.law.pace.edu/cases/050323a3.html	¶ 82
Rolled Metal Sheets	Seller (Austria) v. Buyer (Germany) [Rolled Metal	¶ 116

Case (Austria)	Sheets case] Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft [Arbitral Tribunal - Vienna] 15 Jun 1994 SCH-4366 ***available at*:** cisgw3.law.pace.edu/cases/940615a3.html	
Judgment of 26 Aug 2008 (Austria)	Judgment of 26 August 2008 Austrian Oberster Gerichtshof 26 Aug 2008 XXXIV Y.B. Comm. Arb. 404, 405	¶ 36

Belgium

Cited as	**Reference**	**Cited in**
Scafom v. Lorraine (Belgium)	Scafom International BV v. Lorraine Tubes S.A.S Court of Cassation 19 Jun 2009 C.07.0289.N *(Belgium)* *available at:* http://cisgw3.law.pace.edu/cases/090619b1.html	¶¶ 87, 117

Canada

Cited as	Reference	Cited in
Dalimpex v. Janicki (Canada)	Dalimpex Ltd v. Janicki (Ontario Ct. App.) 30 May 2003 (2003) 64 O.R.3d 737	¶ 36

England

Cited as	Reference	Cited in
BCI Ltd. v. Papierwerke (Eng)	Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G House of Lords 5 Mar 1975 1975 AC 591	¶ 23
Cruz City Case (Eng)	Arsanovia Ltd. and others v. Cruz City 1 Mauritius Holdings, [2012] EWHC 3702 (Comm.) Queen's Bench Division (Commercial Court) (England)	¶ 7
Fiona Trust Case (Eng)	Fiona Trust & Holding Corp v. Privalov House of Lords 29 Jan 2007 [2007] UKHL 40 (England)	¶¶ 12, 36

Hamlyn v. Talisker (Eng)	Hamlyn & Co v Talisker Distillery House of Lords 10 May 1894 [1894] AC 202, 215	¶¶ 10, 13
Hussman Ltd. v. Almeen Co. (Eng)	Hussman (Europe) Ltd v Al Almeen Development and Trade Co Queen's Bench Division (Commercial) 19 Apr 2000 [2000] 2 Lloyd's Rep 83, para 1	¶ 18
Lincoln LIC v. Sun LIC (Eng)	The Lincoln National Life Insurance Co v. Sun Life Assurance Co. of Canada and others Court of Appeal 26 Feb 2004 (2004) All ER (D) 42	¶ 46
SODC v. British Gas Corp (Eng)	Superior Overseas Development Corporation v. British Gas Corporation Court of Appeal [1982] 1 Lloyd's Rep 262, 264, 265	¶ 5
Star Shipping v. China NFTTC (Eng)	Star Shipping A.S.v. China Nat. Foreign Trade Corp. Court of Appeal [1993] 2 Lloyd's Rep. 445	¶ 13

Sulamerica (Eng)	*Case*	Sulamerica v. Enesa Engenharia Court of Appeal 20 Mar 2012 (2012) ECWA Civ 638 ***refer* to:** https://www.trans-lex.org/311350/_/sulamerica-cia-nacional-de-seguros-sa-v-enesa-engenharia-sa-%5B2012%5D-ewca-civ-638/	¶¶ 7, 18, 21, 25, 26

France

Cited as		**Reference**	**Cited in**
Candy (France)	*Case*	Alain Veyron v. Ambrosio [Candy Case] Appellate Court Grenoble 26 Apr 1995 ***refer to:*** http://cisgw3.law.pace.edu/cases/950426f1.html	¶ 82
EDF v. Shell (France)	*Shell*	EDF v. Shell France 28 Sep 1976 JCP 1978.II.18810	¶ 44

Gaec v. Teso (France)	Gaec des Beauches v. Teso Ten Elsen Appellate Court Grenoble 23 Oct 1996 T 1038-05 (Sweden) available at: http://cisgw3.law.pace.edu/cases/961023f1.html	¶ 116
OIP v. Pyramide (France)	OIP v. Pyramide Paris Cour d'appel 11 Apr 1996 1996 Rev. arb. 467	¶ 32

Germany

Cited as	**Reference**	**Cited in**
Italian Company v. German Firm (Germany)	Company from Italy v. Firm from F.R. Germany Oberlandesgericht, Hamburg 22 Sep 1978 Yearbook V (1980) pp. 262-264 (Germany no. 20)	¶ 7
Judgment of 27 Feb 1970 (Germany)	Judgment of 27 Feb 1970 German Bundesgerichtshof 27 Feb 1970 6 Arb. Int'l 79 (Germany)	¶¶ 10, 36

Judgment of 24 Sept 1985 (Germany)	Judgment of 24 Sept 1985 Oberlandesgericht Frankfurt 24 Sep 1985 1986 NJW 2202, 2203	¶ 12

Scotland

Cited as	**Reference**	**Cited in**
Orkney v. Charles (Scotland)	Orkney Islands Council v. Charles Brand Ltd. Scottish Court of Session 24 Jan 2001 [2002] SLT 100, 102-03	¶ 32

Singapore

Cited as	**Reference**	**Cited in**
BCY v. BCZ (Singapore)	BCY v BCZ Singapore High Court 9 Nov 2016 [2016] SGHC 249	¶¶ 7, 17, 18, 21
BMO v. BMP (Singapore)	BMO v. BMP Singapore High Court 26 May 2017 [2017] SGHC 127	¶ 8

BQP v. BQQ (Singapore)	BQP v. BQQ Singapore High Court 14 Mar 2018 [2018] SGHC 55	¶¶ 48, 49
Larsen Oil v. Petroprod (Singapore)	Larsen Oil & Gas Pte Ltd v. Petroprod Ltd Singapore Court of Appeals 11 May 2011 [2011] SGCA 21	¶ 37
Sumito v. Antig (Singapore)	Tjong Very Sumito v. Antig Inv. Pte Ltd Singapore Court of. Appeals. 26 Aug 2009 [2009] SGCA 41	¶ 36

Sweden

Cited as	**Reference**	**Cited in**
Titan v. Alcatel (Sweden)	The Titan Corporation v. Alcatel CIT SA, Svea Court of Appeal 28 Feb 2005 T 1038-05 (Sweden)	¶ 49

Switzerland

Cited as	Reference	Cited in
Building Materials Case (Switzerland)	Italian Seller v. Swiss Buyer [Building materials Case] Canton Appellate Court Thurgau 12 Dec 2006 ***refer to:*** http://cisgw3.law.pace.edu/cases/061212s1.html	¶ 28
Fabrics Case (Switzerland)	Seller (Netherlands) v. Buyer (Switzerland) [Fabrics Case] District Court St. Gallen 3 Jul 1997 ***available at:*** http://cisgw3.law.pace.edu/cases/970703s1.html	¶ 80
Fruits and Vegetables Case (Switzerland)	Seller (Germany) v. Buyer (Switzerland) [Fruits and Vegetables case] Handelsgericht [Commercial Court] Aargau 26 Nov 2008 ***available at:*** http://cisgw3.law.pace.edu/cases/081126s1.html	¶¶ 28, 70, 73

N V Distrigas Case (Switzerland)	N.V. Belgische Scheepvaartmaatschappij-Compagnie Martime Belge, Anvers v. N.V. Distrigas, Bruxelles Swiss Federal Tribunal 19 Dec 2001	¶42

United States of America

Cited as	**Reference**	**Cited in**
ALCOA Case (US)	Aluminum Company of America (ALCOA) v. Essex Group, Inc. District Court for the Western Distrct of Pennsylvaia 7 Apr 1980 499 F. Supp. 53 (WD Penn. 1980)	¶ 32
Creation Ministries Int'l Case (US)	Genesis of Kentucky, Inc. v. Creation Ministries Int'l, 556 F.3d 459, 470 (6th Cir. 2009) (US)	¶ 37
Filanto v. Chilewich (US)	Filanto S.p.A. v. Chilewich International Corp. Federal District Court of New York 14 Apr 1992 92 Civ. 3253 (CLB) *available at:* https://cisgw3.law.pace.edu/cases/920414u1.html	¶ 80

Mastrobuono v. Shearson (US)	Mastrobuono v. Shearson Lehman Hutton Inc. Supreme Court of the United States 6 Mar 1995 514 U.S. 52 (1995)	¶ 10
Parsons-Jurden Case (US)	Management & Technical Consultants SA v. Parsons-Jurden International Corp. United States Court of Appeal, Ninth Circuit 8 July 1987 820 F.2d 1531, 1534-35 (9th Cir. 1987)	¶ 37
Pilots Association v. Trans States Airlines (US)	Airline Pilots Association International v. Trans States Airlines, LLC United States Court of Appeals (Eight Circuit) 5 Sept 2007 638 F.3d 572, 579 (8th Cir 2011)	¶ 46
Ryan v. Rhone Textile (US)	J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile S.A United States Court of Appeals, Fourth Circuit 13 Dec 1998 863 F.2d 315, 321 (4th Cir. 1988)	¶¶ 12, 33

INDEX OF REPORTS AND DOCUMENTS

Cited as	Reference	Cited in
CISG Official Records of Meetings, 1981	United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 Mar to 11 Apr 1980 OFFICIAL RECORDS, DOCUMENTS OF THE CONFERENCE AND SUMMARY RECORDS OF THE PLENARY MEETINGS AND OF THE MEETINGS OF THE MAIN COMMITTEE, 1981 ***available at:*** https://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred e.pdf	¶ 65
ICCA 1975	THE RESOLUTIONS OF THE FIFTH INTERNATIONAL ARBITRATION CONGRESS ON ARBITRATION ***organised by*** the International Council for Commercial Arbitration (ICCA), New Delhi 10 Jan 1975	¶ 32
INCOTERMS rules 2010	INCOTERMS Rules 2010 available at: https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/	¶ 72

INDEX OF LEGAL INSTRUMENTS

CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980 ***available at:*** https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf
HKIAC	Hong Kong International Arbitration Centre Rules, 2018 ***available at:*** http://hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/HKIAC%20Rules%20-26%20Sept%202018.pdf
IBA Rules	IBA Rules on Evidence on the Taking of Evidence in International Arbitration adopted in 2010 ***available at:*** https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC
UNCITRAL Model Law	United Nations Commission on International Trade Law with amendments as adopted in 2006 ***available at:*** https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf
UNIDROIT PICC	UNIDROIT Principles of Commercial Contracts, 1994 ***available at:*** https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf

STATEMENT OF FACTS

A. The Parties

CLAIMANT is a Company registered and located in Mediterraneo that operates Mediterraneo's oldest and most renowned stud farms. Further, it offers frozen semen of its champion stallions for artificial insemination.

RESPONDENT is based in Equatoriana and is popular for its broodmare lines. It has established a racehorse stable and acquired ten mares with an excellent racehorse pedigree.

B. List of Dates and Events

21 Mar 2017 RESPONDENT contacted CLAIMANT inquiring about the availability of 100 doses of Nijinsky III's frozen semen.

24 Mar 2017 CLAIMANT made an offer to RESPONDENT for 100 doses of frozen semen at $99,500 per dose subject to the condition that semen would not be resold without express written consent of CLAIMANT.

28 Mar 2017 RESPONDENT agreed to most of the terms of the offer, including application of Mediterranean Law to the Contract. Further, they requested for a DDP delivery.

31 Mar 2017 CLAIMANT informed RESPONDENT that because of past experiences with extremely expensive tests due to changes in unforeseeable health and safety requirements, it was only willing to accept a delivery DDP against a moderate price increase. CLAIMANT requested for transfer of certain risks to RESPONDENT and the inclusion of a hardship clause.

12 Apr 2017 Parties agreed that it should be the arbitrators' task to adapt the contract if they did not agree on an amendment. However, due to an accident, the two main negotiators were replaced for finalising the contract.

06 May 2017 Parties entered into the Contract containing the Hardship Clause, an acceptable Choice of Law Clause and a wide Arbitration Agreement. Parties agreed delivery in 3 shipments and payment in 2 instalments.

19 Dec 2017 The Equatorianan Government imposed 30 per cent tariff on selected products from Mediterraneo including on animal semen as a retaliatory measure against restrictions imposed by the Mediterranean Government.

20 Jan 2018 CLAIMANT intimated RESPONDENT that they were informed by the Customs Authorities that the newly imposed tariff were applicable to the present shipment which made the third shipment 30 per cent expensive. Accordingly, CLAIMANT initiated renegotiations for a price adjustment of the Contract with RESPONDENT.

21 Jan 2018 During the renegotiations, RESPONDENT urged CLAIMANT to authorize the final shipment as it was urgently needed in view of the impending breeding season. RESPONDENT gave a general impression that they agreed to bear the bulk of the burden imposed by the additional tariff.

23 Jan 2018 CLAIMANT delivered the remaining 50 doses of frozen semen based on RESPONDENT'S promise to find an agreement on the price.

12 Feb 2018 CLAIMANT discovered that RESPONDENT had breached the resale prohibition under the Contract. When CLAIMANT confronted RESPONDENT's CEO, she stopped negotiations and refused to pay any additional amount for the tariff.

02 Oct 2018 CLAIMANT received information that RESPONDENT itself had asked for an adaptation of the price in another HKIAC administered arbitration.

03 Oct 2018 RESPONDENT alleged that CLAIMANT procured the evidence illegally.

INTRODUCTION

1. ***Instable Pricing:*** The imposition of 30 per cent tariff by the Equatorianan Government was disastrous for CLAIMANT since the additional burden of the tariff made the transaction commercially unviable. Consequently, it requested for revision of price terms under the Contract. CLAIMANT delivered the doses as per the Contract on the promise that RESPONDENT would bear the burden of the additional tariff. RESPONDENT refused to pay additional tariff despite knowing the impact of the 30 per cent tariff on CLAIMANT's weak financial position. In this context, CLAIMANT initiated the present arbitration proceedings.

2. ***A Case of Foal Play:*** CLAIMANT submits that the Choice of Law Clause providing for Mediterranean Law governs the entire Contract, including the Arbitration Agreement. Mediterranean Law empowers the Tribunal to adapt the Contact in light of the Parties' intention. Alternatively, even if Danubian Law governs the Arbitration Agreement, the requirement of conferment of powers is met. Therefore, Tribunal has the power to adapt the Contract. Further RESPONDENT is estopped from challenging this Tribunal's power to adapt the Contract since RESPONDENT itself requested for adaptation of the contract in a previous arbitration proceeding on identical facts. (**Issue I**).

3. ***Straight from the horse's mouth:*** In the other arbitration proceedings administered by the HKIAC, the tribunal in a "Partial Interim Award" issued on 29 June 2018 confirmed its power to adapt the contract in accordance with RESPONDENT's request. CLAIMANT requests this Tribunal to admit evidence from the previous arbitration proceeding owing to its wide discretionary power. Further, the Tribunal should consider past consistent jurisprudence on this aspect (**Issue II**).

4. ***Horseship:*** The imposition of 30 per cent tariff results in hardship to CLAIMANT since the same is squarely covered under the express Hardship Clause of the Contract. Alternatively, the imposition of tariff results in hardship under art 79 of CISG. Art 79 governs situations of hardship and the required threshold under art 79 has been met. Consequently, the Tribunal must adapt the Contract along the lines of the hardship provision in UNIDROIT PICC. Therefore, CLAIMANT is entitled to a payment of $1,250,000 (**Issue III**).

ARGUMENTS ON PROCEDURE

I. THE TRIBUNAL HAS THE POWER TO ADAPT THE CONTRACT IRRESPECTIVE OF THE LAW GOVERNING THE ARBITRATION AGREEMENT

5. Parties entered into the Contract for the sale of 100 doses of Nijinsky III's frozen semen, which contains a Hardship Clause protecting CLAIMANT in cases of unforeseeable events. While force majeure clauses are intended to relieve the parties of their obligations upon occurrence of unforeseen circumstances, hardship clauses impose an obligation on both parties to renegotiate the contract under the principle of good faith [*Peter, 1995 at p.235; Kahn, 1975 at p.467; Beale, Bishop & Furmston, 2008 at p.493; McKendrick, 2012 at p.257; SODC v. British Gas Corp (Eng)*].

6. The Equatorianan Government imposed a 30 per cent tariff on agricultural products, including animal semen, which made the performance of the Contract onerous for CLAIMANT. While Parties attempted to renegotiate terms of price, they have been unable to reach mutual consensus. In this context, CLAIMANT seeks relief before this Tribunal. Parties differ on three broad questions: applicable law and jurisdictional scope, admissibility of evidence, and adaptation of the Contract. On the first procedural issue, CLAIMANT submits that:

A. Mediterranean Law governs the interpretation of the Arbitration Agreement empowering the Tribunal to adapt the Contract.

B. This conclusion would not differ should this Tribunal find that Danubian Law governs the Arbitration Agreement.

C. In any case, RESPONDENT is estopped from arguing that the Tribunal is not empowered to adapt the Contract.

A. MEDITERRANEAN LAW GOVERNS THE ARBITRATION AGREEMENT

7. Contracting parties ordinarily intend for the entire contract including the arbitration agreement to be governed by the same law [*Sulamerica (Eng) at p.11; Cruz City Case (Eng); BCY v. BCZ (Singapore); Born on Arbitration Agreements at ¶34*]. This gives rise to a general presumption favouring the law governing the underlying contract to also govern the arbitration agreement [*Russell, 1997 at ¶2-094; ICC Case 6379/1990; NOFOTA Award; Dicey, Morris & Collins, 2006 at p.539*]. The Tribunal must give effect to this presumption unless

RESPONDENT provides concrete evidence to a contrary intention [*Dow Chemical v. Isover; BCY v. BCZ (Singapore); Lew, Mistelis & Kröll, 2003 at p.126; Italian Company v. German firm (Germany)*]. In the present case, RESPONDENT provides no such evidence. CLAIMANT submits that:

(a) Parties made an implied choice to apply Mediterranean Law to the Arbitration Agreement.

(b) Alternatively, the Arbitration Agreement has its real and closest connection with the Mediterranean Law, which thus, should govern its interpretation.

(c) Consequently, the Tribunal has the power to adapt the Contract.

a. Parties made an implied choice to apply Mediterranean Law to the Arbitration Agreement

8. The Arbitration Agreement does not contain an express choice of law. Hence, to give effect to the intention of Parties, the Tribunal ought to look at the implied choice and determine the scope of the Arbitration Agreement [*BMO v. BMP (Singapore); Born, 2014 at p.489; Briggs, 2014 at ¶14.39*]. To gather such intention, the tribunal must rely upon words and acts of the parties, circumstances of the case, language used in the contract, as well as nature of the parties' relationship [*Fouchard Gaillard Goldman, 1999 at p.257 ¶477; Amco Decision on Jurisdiction, 1983; Lew, Mistelis & Kröll, 2003 at p.415*].

9. RESPONDENT incorrectly asserts that Parties inserted a narrow Hardship Clause and a restrictive Arbitration Agreement [*Answer to the Notice of Arbitration at p.30 ¶9*]. To the contrary, CLAIMANT contends that they agreed on an open-ended Hardship Clause and a broad Arbitration Agreement. CLAIMANT's primary submission is that these two factors indicate Parties' intention for the Arbitration Agreement to have a wide scope by applying Mediterranean Law **(i)**. Further, CLAIMANT submits that there are no circumstances which point to an implied choice of Danubian Law **(ii)**.

(i) Parties intended for the Arbitration Agreement to have a wide scope

10. The choice of law governing an arbitration agreement must give effect to the commercial purposes and intentions of the parties [*Born, 2014 at 544; Hamlyn v. Talisker (Eng); Mastrobuono v. Shearson (US)*]. As a matter of commercial prudence, contracting parties intend to resolve their disputes before a single forum, by agreeing upon dispute resolution clauses.

[*Fiona Trust Case (Eng) at ¶13; Schifferl & Wong, 2015; Judgment of 27 Feb 1970 (Germany)*]. However, RESPONDENT attempts to argue that Parties agreed to an uncommercial and impractical distribution of jurisdiction, without any explicit wording to that effect.

11. RESPONDENT contends that the Hardship Clause is drafted narrowly, merely containing circumstances amounting to 'hardship' but excluding recourse where a change in circumstances make the terms of the Contract more onerous for CLAIMANT [*Answer to the Notice of Arbitration at p.30 ¶9 & at p.32 ¶19*]. On this basis, RESPONDENT argues that this is not a dispute "arising out of the Contract".

12. This argument belies the Parties' intentions. The phrase 'arising out of the contract' is oft-used and has consistently been held to have a wide scope since it encompasses all disputes that are incidental to the contract, or require an investigation of the contract and its terms [*Comandante Marine Corp Case (Australia); Ryan v. Rhone Textile (US); Judgment of 24 Sept 1985 (Germany)*]. Hence, the scope of the Arbitration Agreement is wide and encompasses the Tribunal's power to adapt the Contract. Further, the Arbitration Agreement does not explicitly exclude any powers of the Tribunal. This is indicative of Parties' implied choice of Mediterranean Law, the only applicable law which would allow for such a broad interpretation.

13. Applying RESPONDENT'S interpretation would mean that, at best, this Tribunal would be able to provide an assessment of whether the introduction of tariff amount to hardship, while leaving Parties to seek relief for such hardship elsewhere. This would however, run contrary to the *effet utile* principle, which states that if two interpretations are possible, the one which renders the clause effective should be adopted [*Fouchard Gaillard Goldman, 1999 at ¶¶279-80; ICC Case 5103/1988; Star Shipping v. China NFTTC (Eng)*]. Interpretation of a contract must be based on this principle to ensure that no clause is rendered nugatory [*ICC Award 8694/1996; Kuwait v. AMINOL; Hamlyn v. Talisker (Eng)*].

14. Consequently, it is evident that Parties have deliberately left the question of this relief open-ended. This allows the Tribunal to decide recourse when 'hardship' occurs, which it is empowered to do under the wide Arbitration Agreement.

15. Applying Mediterranean Law will allow for intentions of Parties to be taken into consideration, which will make the Arbitration Agreement effective. Applying Danubian Law, however, would be contrary to the *effet utile* principle, as the parol evidence rule contained therein would blind the Tribunal to Parties' intentions.

(ii) No circumstances point to an implied choice of Danubian Law

16. Attempting to apply the doctrine of separability, RESPONDENT contends that the Choice of Law Clause in the Contract only has restricted application to obligation pertaining to 'Sale'. Consequently, RESPONDENT contends that the law of the seat, i.e., Danubian Law, should govern the Arbitration Agreement [*Answer to the Notice of Arbitration at p.31 ¶14*]. This argument is misplaced for at least two reasons.

17. *First*, the doctrine of separability has a limited purpose with no application to the facts at hand. Severability is critical to ensure that invalidity of the underlying contract does not, *ipso facto*, render the arbitration agreement invalid [*BCY v. BCZ (Singapore)*].

18. *Second*, it gives effect to the parties' intention to submit their disputes to arbitration [*ibid; Sulamerica Case (Eng)*]. Isolating the arbitration agreement, therefore, merely exists to give effect to this intention and does not envisage a blanket insulation of the arbitration agreement for all purposes [*Sulamerica Case (Eng); Y Derains, ICC Buletin 1995 at 16-17; Hussman Ltd. v. Almeen Co. (Eng) at ¶1*].

19. Neither of these two purposes is under consideration in the present case. Applying Mediterranean Law to the Arbitration Agreement ensures that all disputes arising out of this Contract are in fact decided by this Tribunal – giving effect to the Arbitration Agreement.

20. Moreover, a Danubian seat was only chosen to ensure a neutral seat, in line with CLAIMANT'S internal policy. In light of this, CLAIMANT submits that an application of Danubian Law would be inconsistent with Parties' intentions at the time of Contract formation. Thus, Mediterranean Law must be construed to be the Parties' implied choice.

b. Alternatively, the Arbitration Agreement has its real and closest connection to the Mediterranean Law

21. If neither the express choice or the implied choice point to a clear conclusion, the tribunal must apply the law which has real and close connection to the arbitration agreement [*Sulamerica Case (Eng); Dicey, Morris & Collins, 2006 at ¶16R-001; BCY v. BCZ (Singapore)*]. Due to its contractual and substantive nature, the Arbitration Agreement ought to have the same juridical location as the underlying Contract **(i)**. Further, the Arbitration Agreement is not invalidated under Mediterranean Law **(ii)**.

(i) The Arbitration Agreement has the same juridical location as the underlying Contract

22. The arbitration agreement is contractual and substantive in nature, as it creates rights and obligations upon both contracting parties. [*Lew, 1998 at 118; Ernest G. Lorenzen, 1921; Harishankar KS, 2013*]. These are twofold:

23. *First*, the arbitration agreement represents an obligation to submit future disputes to arbitration. This forms part of a substantive agreement. Since both come into existence at the same time, the former *prima facie* runs for the full duration of the substantive agreement, and survives for as long as any dispute remains unresolved. *Second*, are the bilateral contractual obligations, which arise when a party invokes the arbitration agreement to resolve a dispute [*Lew, 1998 at 118; Ernest G. Lorenzen, 1921; BCI Ltd. v. Papierwerke (UK)*].

24. Seeing that the arbitration agreement creates substantive, and not merely procedural rights and obligations, it must have the same juridical location as the underlying contract [*B. Goldman, 1968 at ¶59; Born, 2014 at p.517*]. Therefore, in the present case, the law governing the Arbitration Agreement is the same as the law of governing the underlying Contract, i.e., Mediteranneo Law.

(ii) The Arbitration Agreement is not invalidated under Mediterranean Law

25. An application of the real and close connection test requires the Tribunal to be satisfied that applying the law of the Contract would not invalidate the Arbitration Agreement. This proposition is best supported by the *Sulamerica Case,* where an insurance contract gave rise to a dispute. The contract was governed by Brazilian law, while the arbitration agreement provided London as the seat of arbitration. Much like the present case, the contract therein was silent on the law governing the arbitration agreement. Under Brazilian law, arbitration proceedings could be initiated only with the consent of the insurance company [*Sulamerica Case (Eng)*]. This factor was considered to be undermining and invalidating the arbitration agreement. Despite its final finding, the court held that in the absence of such a factor, the close connection test would not favour the law of the seat, but instead the law governing the contract [*Dongdoo Choi, 2015 at p.111; Swiss Decision of 21 March 1995*].

26. Since there is no question of invalidity under Mediterranean Law, the general presumption is not displaced [*Sulamerica Case (Eng) at ¶¶29-31; Dongdoo Choi, 2015 at p.111*]. In light of this

real and close connection, Mediterranean Law must be construed to be the law governing the Arbitration Agreement.

c. Consequently, the Tribunal has the power to adapt the Contract

27. As Mediterranean Law is the law governing the Arbitration Agreement, the Tribunal has the power to adapt the Contract if it finds hardship, without any conferral of powers [*UNIDROIT PICC art 6.2.3 read with art 1.11*]. This power arises on account of Parties' intention **(i)** and the synchronised competencies of courts and tribunals **(ii)**.

(i) The common intention of the Parties was that the Tribunal has the power to adapt the Contract

28. Contracts must be interpreted according to the common intention of parties at the time of entering into the contract [*UNIDROIT PICC art 4.1; Fruits and Vegetables Case (Switzerland); Building Materials Case (Switzerland); Fouchard Gaillard Goldman, 1999 at p.257* ¶*477*]. Prior negotiations between the Parties establish their common intention that the Tribunal ought to have the power to adapt the Contract [*UNIDROIT PICC art 4.3(a)*] **(1)**. This intent is further confirmed by reading the Contract as a whole **(2)**.

(1) Prior negotiations establish this common intention

29. RESPONDENT's expression of interest in placing further orders from CLAIMANT is indicative of Parties' intention to enter into a long-term mutually beneficial relationship [*Exhibit C2 at p.10*]. During negotiations, Parties agreed to have a mechanism to adapt the Contract in the event they could not agree on an amendment [*Exhibit C8 at p.17*].

30. CLAIMANT'S representative Ms. Napravnik was of the opinion that an express conferral of powers of adaptation was not necessary. RESPONDENT'S representative, Mr. Antley, left a note stating 'Connection of the hardship clause with the arbitration clause' which further clarifies RESPONDENT's intention [*Exhibit R3 at p.35*]. This note leads us to two conclusions. *First*, that Parties were determined to achieve resolution of any onerous conditions, by way of inserting a Hardship Clause. *Second*, and more conclusively, Parties by way of the Arbitration Agreement intended to empower the Tribunal to adapt the Contract.

(2) The intention to adapt the Contract can be gathered by reading the Contract as a whole

31. In order to give effect to a contract, all clauses contained therein must be read together [*CRCICA Award No. 64/1995; Kotuby Jr. & Sobota, 2017 at p.97; CBA v. Iran at pp.180-81*].

32. Since the Tribunal can only exercise powers within the scope of the Arbitration Agreement, it is essential to determine if the Arbitration Agreement contemplates a dispute pertaining to adaptation [*Fouchard Gaillard Goldman, 1999 at ¶41; ICC Award 1990/1972; Born, 2014 at 489*] The Arbitration Agreement allows the Tribunal to determine disputes 'arising out of' the Contract. The term 'dispute' is wide enough to include an issue of adaptation upon failure to renegotiate the price terms [*ALCOA Case (US); Brunner, 2008 at pp. 495-97*]. This is based on two premises: *First*, this term is broad enough to include mere differences of opinion or a disagreement on a point of fact, a conflict of legal views or interests between two parties that may be asserted in arbitral proceedings [*Berger, Vand. J. Transnat'l L., 2003, 1347; Ferrario, 2017; OIP v. Pyramide (France); Orkney v. Charles (Scotland); Born at p.1348*]. *Second*, the arbitrators would not be creating any new contractual rights or obligations but merely modifying the existing ones [*ICCA 1975; Ferrario, 2017 at p.146*].

33. The phrase 'arises out of' has a wide ambit encompassing not only those claims which arise directly from the contract but also those which have a close association with the contract, or are incidental to the contract, or which require the same investigation of the contract and its terms [*Comandante Marine Corp Case (Australia); Ryan v. Rhone Textile (US)*].

34. A dispute or claim concerning hardship arises directly out of the contract and is in relation to its performance [*UNIDROIT PICC art 6*]. The relief of adaptation directly relates to and arises from the claim of hardship as it requires the same investigation required to determine existence of hardship.

35. As a disagreement regarding whether the change in price terms amounts to hardship is a 'dispute' under the Arbitration Agreement, the Tribunal has the power to adapt the Contract.

36. Arbitration agreements are interpreted liberally to encompass all disputes arising out of the contract [*ICC Case 14046/2010; ICC Case 12745/2010 at ¶28; CAM Award 2310/2011*]. Such an interpretation finds its limits where certain disputes are either expressly excluded from the arbitration clause or there is good reason to conclude the contrary [*Fiona Trust Case*

(Eng); ICC Partial Award in Case 12363/2003; Fremuth-Wolf, 2012 at sec 581 ¶48]. Parties intended to have a wide Arbitration Clause in order to decide all disputes before a single forum [*Walter Rau v. Cross Pac (Australia); Judgment of 27 Feb 1970 (Germany)*]. Where two interpretations are possible, the one which entails the application of the Arbitration Clause to a certain dispute should be preferred [*Dalimpex v. Janicki (Canada); Judgment of 26 Aug 2008 (Austria); Sumito v. Antig (Singapore) at ¶24*]. Therefore, in order to give effect to the Arbitration Agreement, the Tribunal should endeavour to make a finding in favour of its power to adapt the Contract.

37. Excluding the power of the Tribunal to adapt the Contract would result in the Tribunal being empowered merely to determine the existence of hardship, but not provide a consequential remedy [*Brunner, 2008 at pp.495-97; Parsons-Jurden Case (US)*]. Parties' decision to avoid explicit language can only be construed as a clear indication of their intent to avoid any such absurdity [*Lew, Mistelis & Kröll, 2003 at ¶¶7-61, 7.62 & 7.66; Larsen Oil v. Petroprod (Singapore) at ¶19; Creation Ministries Int'l Case at p.470 (US)*]. The Tribunal, therefore, has the authority to adapt the Contract owing to a harmonious construction of the Arbitration Agreement and Hardship Clause.

(ii) Principle of Synchronised Competence recognizes equal powers of Courts and Tribunals

38. Under art 6.2.3 of UNIDROIT PICC, of which Mediterranean Contract Law is a verbatim adoption, courts can either terminate or adapt the contract as they deem fit. In light of the principle of synchronised competence, embodied within Mediterranean Contract Law, the Arbitral Tribunal has the same power to determine rights and remedies as courts [*UNIDROIT PICC art 1.11; Berger, Vand. J. Transnat'l L., 2003 at p.1375*].

39. In light of the fact that courts are empowered to adapt the contract in such circumstances, the Tribunal must find that it has the power to adapt. CLAIMANT asserts its principal position that this conclusion is arrived at since it is Mediterranean Law that governs the Arbitration Agreement.

B. IN THE ALTERNATIVE, EVEN IF DANUBIAN LAW GOVERNS THE ARBITRATION AGREEMENT, THIS TRIBUNAL HAS THE POWER TO ADAPT THE CONTRACT

40. Should this Tribunal find that Danubian Law governs the interpretation of the Arbitration Agreement, the Tribunal remains empowered to adapt the Contract. RESPONDENT relies upon the Danubian courts' interpretation of Danubian Arbitration Law, requiring express conferral for adaptation.

41. CLAIMANT submits that by employing a wide Arbitration Agreement and inserting a Hardship Clause in the Contract, Parties sufficiently conferred the power of adaptation upon the Tribunal. As elucidated in ¶¶ 12-14 of this Memorandum, Parties have intentionally left the question of recourse open-ended, so that the Tribunal may decide on the same. This power is further derived from the substantive law of Danubia **(a)**. Nevertheless, the Tribunal has the power of adaptation to ensure performance of the Contract in good faith **(b)**.

a. The power to adapt can be found in the substantive law of Danubia

42. The Danubian Arbitration Law, which governs the procedure of arbitration in Danubia, is silent on the power of an arbitral tribunal to adapt a contract [*Procedural Order No. 2 at ¶36*]. In such a scenario, the power to adapt must be derived from the substantive law of Danubia [*Swiss Federal Tribunal* in the *N.V. Distrigas case (Switzerland)*].

43. The Danubian Contract Law provides for the possibility of adaptation of contract by the tribunal when authorized. [*UNIDROIT PICC art 6.2.3 read with art 1.11; Procedural Order No. 2 at 45*]. As stated in ¶¶ 31-37 of this Memorandum, insertion of the Hardship Clause and wide Arbitration Agreement authorizes the Tribunal to adapt the Contract.

b. The Tribunal must adapt the contract to ensure its performance in good faith

44. Parties ought to act in good faith in performance of a contract [*UNIDROIT PICC art 1.7*]. This duty of observing good faith extends to the parties' obligation to adjust a contract in view of changed circumstances that arise after its execution and alter the balance between them [*ICC Case No. 9994/2001; Ferrario, 2017 at p.92*]. On being made aware of the applicability of increased tariff to the frozen semen, CLAIMANT put delivery of the third shipment on hold and immediately initiated re-negotiations of the price terms of the Contract in good faith. CLAIMANT authorized the delivery of the third shipment only on

RESPONDENT's request, which evidences Parties' intention to keep the Contract alive. The Tribunal's power to adapt the Contract emerges from such intention and expectation of the Parties to keep the contract alive. Although the Danubian Law makes no express reference on this aspect, the Tribunal ought to adapt the Contract in accordance with the principle of good faith [*EDF v. Shell (Franc)e; Rivkin, 1993 at p.182*]. Thus, even if this Tribunal was to find that Danubian Law governs the Arbitration Agreement, this Tribunal has the power to adapt the Contract.

C. RESPONDENT IS ESTOPPED FROM MAKING CONTRADICTORY LEGAL ASSERTIONS

45. On 29 June 2018, in an HKIAC administered arbitration, RESPONDENT argued in near identical circumstances, that the tribunal had the power to adapt the contract should there be a finding of hardship. Specifically, RESPONDENT contended that the tribunal had the power to adapt a contract due to change in circumstances. The tribunal agreed with this, issuing a Partial Interim Award. Now, RESPONDENT attempts to take a diametrically contrary stance. This is impermissible.

46. RESPONDENT is precluded from making contradictory legal assertions due to the doctrine of collateral estoppel. In Lincoln National Life Insurance Co. v. Sun Life Assurance Co. of Canada and others, the England & Wales Court of Appeal held that a claimant in an arbitration may be bound by findings of fact made against it in a prior arbitration brought against another party [*Lincoln LIC v. Sun LIC (Eng)*]. This jurisprudence exists outside of the UK as well [*Pilots Association v. Trans States Airlines (US)*]. Consequently, since RESPONDENT has successfully contested that a tribunal was empowered to adapt a contract in identical circumstances, it must be bound by the findings of that tribunal in the present case. RESPONDENT is therefore precluded from asserting that the Tribunal is not empowered to adapt the Contract.

47. **CONCLUSION TO ARGUMENT I:** CLAIMANT'S primary submission is that the Arbitration Agreement is governed by Mediterranean Law. However, even if Danubian Law was to apply, no interpretation of the Parties' intentions can lead to the conclusion that Arbitration Agreement excludes the power of adaptation. RESPONDENT is estopped from opposing these conclusions owing to its submissions and the tribunals' conclusion in an identical HKIAC administered arbitration.

II. CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM OTHER ARBITRATION PROCEEDINGS

48. RESPONDENT attempts to evade its obligations under estoppel, by asking the Tribunal to operate in a factual vacuum. It argues that the Tribunal must not admit facts relating to the previous arbitration in evidence owing to their belief that CLAIMANT has obtained the same illegally. However, CLAIMANT received this information without any illegality by merely hearing of these arbitration proceedings at the annual breeder fair. Arbitration proceedings generally employ a rule of free admissibility, that is, all evidence is admissible until otherwise proven [*IBA Rules art 9*]. In this context, CLAIMANT submits that:

A. The Tribunal has broad discretionary powers to determine the admissibility of evidence [*BQP v. BQQ (Singapore); Yearbook Commercial Arbitration, 1983 at p.166; O'Malley, 2012 at p.196*].

B. The Tribunal must exercise these broad powers to admit the Partial Interim Award

A. THE TRIBUNAL HAS BROAD POWERS TO DETERMINE ADMISSIBILITY OF EVIDENCE

49. Parties to an arbitration are generally free to submit any evidence to prove their case, with the tribunal generally evaluating this evidence once admitted. This principle finds affirmation in the IBA Rules on the Taking of Evidence in International Arbitration, which is often considered as soft law, supplementing institutional rules applicable to international commercial arbitrations [*Pietrowski, 2006 at p. 373; IBA Rules art 9*]. This position does not change under the HKIAC Rules, where the tribunal has the sole discretion and power to determine the admissibility, relevance, materiality and weight of evidence [*HKIAC Rules art 22; BQP v. BQQ (Singapore); Titan v. Alcatel (Sweden)*]. It is not bound by the strict rules of evidence provided under domestic laws, such as the parol evidence rule or rules on illegal evidence [*Buyer P v. Seller A; BQP v. BQQ (Singapore); Blair & Vidak Gojković at p.237*]. By excluding specific procedural rules of evidence from the Contract, Parties have not sought to qualify these powers in any way. These discretionary powers are also confirmed by art 19 of the UNCITRAL Model Law and previous decisions of international tribunals [*EDF v. Romania; Caratube v. Kazakhstan*].

50. This Tribunal, therefore, has a broad discretionary power to determine the admissibility of evidence from another arbitration proceeding.

B. THE TRIBUNAL MUST EXERCISE THESE BROAD POWERS TO ADMIT THE PARTIAL INTERIM AWARD

51. CLAIMANT submits that the Tribunal ought to admit the evidence because:

(a) Tribunals have consistently used and relied on such evidence, regardless of confidentiality obligations.

(b) The relevance, materiality and dispositive effect of the evidence in question militates against its exclusion.

a. Tribunals have consistently used and relied on such evidence, regardless of confidentiality obligations

52. In *Caratube v. Kazakhstan*, the claimant sought to rely on information published on a website after hacking into the Kazakhstan Government's computer system. The tribunal admitted leaked non-privileged information, although obtained as a result of an illegal act of hacking without the claimant's involvement [*Caratube v. Kazakhstan*]. Similarly, in *Yukos v. Russia*, the tribunal placed heavy reliance on confidential diplomatic cables from the US State Departments published by WikiLeaks, even though these disclosures were illegal under US law [*Yukos v. Russia*; *Blair & Vidak Gojković at p.247*]. Professor Georges Abi-Saab, in his dissent in *ConocoPhillips v. Venezuela*, emphasized the requirement to admit evidence obtained by Wikileaks cables, to seek truth and dispense justice. To borrow words from his decision, "*denying admissibility of the other arbitration would lead to a harsh blow on the dispensal of justice*", as relevant conduct of the respondent would not be considered by the tribunal [*ConocoPhillips v. Venezuela*].

53. In sum, with a handful of exceptions, the admissibility of leaked evidence is the established rule - supported by consistent line of decisions and a body of scholarly opinion.

54. Moreover, a common thread across these cases is that there was no wrongdoing by the party seeking to benefit from the evidence. In this light, CLAIMANT also points out that there is no suggestion by RESPONDENT, nor could there be, that CLAIMANT was involved in the disclosure of the documents. CLAIMANT gained knowledge of the award and the company in possession of the award, from a CEO of one of its customers, Mr. Velazquez,

at the annual breeder conference [*Procedural Order No. 2 at p.40 ¶60*]. In any event, CLAIMANT was not bound by the confidentiality rules under the HKIAC Rules, to restrict the use of such information or award, since such rules bind only parties to that arbitration [*HKIAC Rules art 45*]. That being the case, there is no legal impediment to the use of the evidence.

b. The relevance, materiality and dispositive effect of the evidence in question militates against its exclusion

55. Materiality and relevance are two characteristics relevant to the determination of introduction (either voluntary or ordered) of evidence. [*O'Malley, 2012 at p.54 ¶3.67*]. The evidence at hand meets both these requirements.

56. In the present case, not only is there a common question of law and fact, but one of the parties is also common. These circumstances only bolster CLAIMANT's argument to allow introduction of the evidences.

57. The exclusion of the evidence will disable the Tribunal from giving effect to both, the legitimate need to have deference to previous findings of law and also the legal consequences that would naturally arise where a party common to both proceedings, having benefited from one argument takes the diametrically opposite one.

58. Further, relevance lies in the newly inserted provision on Concurrent Proceedings in the 2018 HKIAC Rules [*HKIAC Rules art 30*]. This provision is intended to allow for sequencing of arbitrations to prevent contrary decisions on common questions of law or fact. This arises in a context where tribunals are increasingly cognisant of the ill-effects of inconsistent decision making, with one ICSID tribunal noting the requirement to adopt solutions established in a series of consistent decisions, to meet the legitimate expectations of those involved [*Saipem S.p.A Award on Jurisdiction; Kaufmann-Kohler, 2007 at pp.376-78*]. These legitimate expectations also exist in international commercial arbitrations, specifically where the facts are nearly identical. While CLAIMANT is cognizant of the fact that arbitral tribunals are not strictly bound by the principle of stare decisis, tribunals do often rely upon and cite previous awards [*Jeffery P. Commission, 2007 at pp. 149-50; Dow Chemical v. Isover*], seeking compelling reasons to depart from established solutions, which the RESPONDENT cannot offer.

59. Therefore, this Tribunal ought to admit the evidence in the absence of any wrongdoing by CLAIMANT to leak such information.

60. **CONCLUSION TO ARGUMENT II**: The Tribunal must exercise its wide discretion to admit the evidence, as it is relevant and material. Its exclusion would be a departure from the practice of previous tribunals. Moreover, its inadmissibility could lead to a conclusion that would be inequitable to CLAIMANT, considering that RESPONDENT will be allowed to benefit from taking opposite stances in similar factual circumstances.

ARGUMENTS ON MERITS

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

61. As contended above, the Arbitration Agreement, confers upon the Tribunal a wide discretionary power to adapt the Contract, to decide on the admissibility of evidence. The Tribunal must now check if the present case falls within the confines of the Hardship Clause, and other international principles governing Parties' relationship. Should this Tribunal arrive at a finding of 'hardship', it ought to adapt the Contract to provide adequate relief of $1,250,000 to CLAIMANT.

62. RESPONDENT contacted CLAIMANT inquiring about the availability of 100 doses of Nijinsky III's frozen semen for its newly started breeding programme [*Exhibit C1 at p.9*]. Upon RESPONDENT'S demand for DDP delivery, CLAIMANT accepted, subject to a moderate price increase and transfer of certain risks to RESPONDENT [*Exhibit C4 at p.12*].

63. On 20 Dec 2017, the Equatorianan Government announced 30 per cent tariff on all agricultural goods from Mediterraneo, including on animal semen [*Exhibit C6 at p.15*]. CLAIMANT submits:

A. The imposition of this tariff constitutes hardship under the Hardship Clause.

B. In the alternative, this tariff constitutes hardship under art 79 of CISG.

C. Consequently, the Tribunal should allow for a price adaptation of the Contract along the lines of the hardship provision in art 6.2.3 UNIDROIT PICC.

A. THE IMPOSITION OF TARIFF BY THE EQUATORIANAN GOVERNMENT CONSTITUTES HARDSHIP UNDER THE HARDSHIP CLAUSE

64. Clause 12 of the Contract provides for the Hardship Clause: "*Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third-party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous.*"

65. Art 8 of CISG is the governing provision for the interpretation of the contract and its contents [*Cowhides Case; Huber and Mullis, 2007 at p.12; Farnsworth, 1987 at pp.95-102; CISG Official Records of Meetings, 1981*]. To interpret the Hardship Clause, art 8(1) requires an

inquiry into a party's subjective intent as long as the other party was aware of that intent or could not have been unaware of such intent [*Magnesium Case*].

66. Parties intended that events in the nature of the present case of increased tariff should be covered under the Hardship Clause. This intention of Parties can be discerned from:

(a) negotiations between Parties;

(b) purpose of the Contract;

(c) words used in the Contract; and

(d) subsequent conduct of Parties confirming such intention.

a. Parties' negotiations indicate their intent to protect CLAIMANT from the burden of increased tariff

67. Art 8(3) of CISG provides that the negotiations between the parties must be considered in determining the intent of the parties.

68. When a party clearly expresses his intent through a lawful act, the counterparty cannot pretend to be unaware of such intent [*Enderlein & Maskow, 1992 at p.3*]. During negotiations, RESPONDENT requested for a DDP delivery mechanism. In the e-mail dated 31 Mar 2017, CLAIMANT accepted the request, but clearly expressed its intention to be protected from a change in delivery terms, specifically those which may result from changes in customs regulations or import restrictions [*Exhibit C4 at p.12*]. Therefore, RESPONDENT cannot claim to be unaware of CLAIMANT's intention to avoid risk arising out of customs regulations or import restrictions.

69. When the Hardship Clause is read with this intent, it is clear that the Hardship Clause was inserted to protect CLAIMANT from such risks. Consequently, the Hardship Clause must cover the 30 per cent tariff imposed by the Equatorianan Government. Therefore, RESPONDENT was aware of CLAIMANT'S subjective intentions and agreed to the same, cementing it as Parties' common intention.

b. Purpose of the DDP Delivery mechanism was not to burden CLAIMANT with risks of the increased tariff

70. The intent of parties can also be interpreted on the basis of the purpose of the term of the contract [*Fruits and Vegetables Case (Switzerland)*]. In the present case, on RESPONDENT'S

request, Parties inserted the DDP clause for delivery of the frozen semen on a DDP basis to benefit from CLAIMANT's experience in the industry.

71. In view of the impending breeding season and a temporary lifting of the ban on artificial insemination in Equatoriana, RESPONDENT needed the frozen semen to be delivered on an urgent basis. CLAIMANT had greater experience in the shipment of frozen semen, including the necessary export and import documentation. Further, CLAIMANT was also able to transport the frozen semen on more favourable commercial terms than RESPONDENT. A delivery on DDP basis provided RESPONDENT with a lower risk for damages to the frozen semen and a greater likelihood of a speedy and non-problematic compliance with export and import formalities [*Exhibit C4 at p.12*].

72. Ordinarily, in such a mechanism, the seller bears all costs and risks involved in bringing the goods to the place of destination [*INCOTERMS rules 2010*]. Looking at the purpose of the Contract, however, it is clear that the purpose of a DDP mechanism was to ensure the efficient and proper delivery of the frozen semen, and nothing more. Therefore, RESPONDENT cannot rely upon the existence of a DDP delivery mechanism to shift the burden of the tariff on CLAIMANT.

c. The words used in the Contract indicate that Parties intended for the Hardship Clause to cover the present case of increased tariff

73. To recognize the expressed intent, the words chosen by Parties as well as the context are of great relevance [*Fruits and Vegetables Case (Switzerland)*]. The Hardship Clause uses the phrasing *"comparable unforeseen events making the contract more onerous"* which covers the 30 per cent additional tariff declared on the frozen semen.

74. The tariff declared by the Equatorianan Government on frozen semen is 'comparable' to CLAIMANT's previous experience relating to additional imposition of health and safety requirements by the Danubian Government. The parallel between these events can be drawn out in at least two aspects.

75. *First,* both events were outside CLAIMANT's sphere of control. The additional health and safety requirements imposed by the Danubian Government were in the wake of a rare aggressive type of foot and mouth disease [*Procedural Order No. 2 at p.58 ¶21*]. Similarly, in the present case, the Equatorianan authorities announced the 30 per cent tariff on the frozen semen imported from Mediterraneo as a retaliatory measure against restrictions

imposed by Mediterreneo [*Exhibit C6 at p.15*]. Since CLAIMANT does not exercise any control over Government actions, both measures were outside CLAIMANT's sphere of control.

76. *Second,* the impact of the two events is comparable, as they both adversely impacted CLAIMANT's financial condition. The strict additional health and safety requirements imposed by the Danubian Government almost resulted in CLAIMANT's insolvency [*Procedural Order No. 2 at p.58 ¶21*], and required a restructuring plan to be implemented by CLAIMANT to stay in business [*Procedural Order No. 2 at p.59 ¶29*]. However, the additional burden imposed by the 30 per cent tariff is expected to endanger CLAIMANT's restructuring plan, further worsening its financial position [*Exhibit C7 at p.16*].

77. The declaration of the 30 per cent tariff imposed by the Equatorianan Government was unforeseeable, especially in view of the Government's track record. The Equatorianan Government had a reputation of resolving their trade disputes amicably, having resorted to a direct retaliatory measure only on one previous occasion [*Exhibit C6 at p.15*]. Further, the scope of applicability of the measure extending to frozen semen was also unforeseeable. Previously, tariffs had never been imposed on frozen semen [*Procedural Order No. 2 at p.58 ¶25*].

78. The 30 per cent tariff imposed on the frozen semen makes the performance of the Contract substantially more onerous for CLAIMANT. The financial health of CLAIMANT had been strained since the last few years. The prolongation of CLAIMANT's credit lines was premised on it being profitable in 2017 and 2018 [*Procedural Order No. 2 at p.58 ¶21*]. Instead of making the expected 5 per cent profit, it now makes a loss of 25 per cent on account of the additional burden of 30 per cent tariff imposed on the frozen semen by Equatorianan Authorities [*Procedural Order No. 2 at p.59 ¶31*]. Thus, shouldering the burden of the additional burden of the tariff not only destroys CLAIMANT's profit margin, but also endangers its existence. RESPONDENT was aware of such impact of the 30 per cent tariff on CLAIMANT's financial situation.

79. Therefore, the words used by Parties in the Contract are indicative of their intention to cover cases in the present nature of additional tariff within the ambit of the Hardship Clause.

d. The subsequent conduct of Parties indicates that RESPONDENT agreed to bear the additional costs due to the tariff

80. Art 8(3) of CISG provides that any subsequent conduct of the parties must be given due consideration in determining the intent of the parties. Subsequent conduct clarifies the intention of the parties at the time of making the contract [*Fabrics case (Switzerland); Filanto v. Chilewich (US); Huber and Mullis, 2007 at p.14*]. The subsequent conduct of RESPONDENT in authorizing and accepting delivery of the third shipment of the frozen semen is indicative of it agreeing to bear the additional costs due to the tariff.

81. On 19 Jan 2018, the Customs Authorities of Equatoriana informed CLAIMANT that the 30 per cent additional tariff was also payable on the frozen semen [*Procedural Order No. 2 at p.58 ¶26*]. CLAIMANT immediately put its delivery on hold, but initiated renegotiations with RESPONDENT in the face of these changed circumstances [*Exhibit C7 at p.16*]. During these renegotiations, RESPONDENT promised that a solution would be arrived at, urging CLAIMANT to authorize the shipment as planned [*Exhibit C7 at p.16*].

82. The acceptance of delivery of goods by the buyer, without objection, has previously been interpreted as agreeing to the seller's terms [*Conveyor band Case (Austria); Candy Case (France)*]. In the present case, the subsequent conduct of RESPONDENT in authorising and accepting the delivery of the frozen semen is indicative of them agreeing to bear the additional costs due to the tariff.

83. Therefore, CLAIMANT requests the Tribunal to hold that the imposition of 30 per cent tariff on frozen semen from Mediterraneo by the Equatorianan Government is covered by the Hardship Clause.

B. ALTERNATIVELY, THE IMPOSITION OF TARIFF BY THE EQUATORIANAN GOVERNMENT CONSTITUTES HARDSHIP UNDER ART 79 OF CISG

84. CLAIMANT requests this Tribunal to adapt the Contract in view of the 30 per cent tariff imposed on animal semen by the Equatorianan Government. Art 79 of CISG governs situations of hardship **(a)** and the present case of tariff imposed on animal semen by the Equatorianan Government has caused hardship to CLAIMANT under art 79 of CISG **(b).**

a. Art 79 of CISG governs situations of hardship

85. Art 79 of CISG exempts parties from performance if they can establish that the non-performance was due to an impediment beyond their control. To be covered by art 79, the impediments must be unforeseeable at the time of making the contract, and create consequences which cannot reasonably expected to be overcome by the parties.

86. CLAIMANT submits that art 79 governs situations of economic hardship. The term 'hardship' includes all situations in which a dramatic change of circumstances leads to a fundamental disruption of the contractual balance [*Azeredo Da Silveira, 2014 at pp.322-23 ¶488*].

87. Authors have viewed that art 79 covers the issues relating to hardship [*Schwenzer, 2008 at p.713; Brunner, 2008 at p.401*]. In *Scafom International BV v. Lorraine Tubes S.A.S*, the court interpreted the scope of art 79 to include cases of economic hardship under certain circumstances [*Scafom v. Lorraine (Belgium)*]. Further, the CISG Advisory Council has also supported this view by observing that a party which finds itself in a situation of hardship may resort to art 79 [*Garro, 2005 at ¶3.1*].

88. Therefore, art 79 of CISG governs situations of hardship.

b. The 30 per cent tariff imposed on animal semen has caused hardship to CLAIMANT under art 79 of CISG

89. The 30 per cent tariff imposed on animal semen by the Equatorianan Government fulfils the criteria to establish a situation of hardship under art 79: CLAIMANT faced an impediment beyond its control **(i)**; CLAIMANT could not have reasonably foreseen such an impediment and **(ii)**; CLAIMANT could not have reasonably overcome the impediment **(iii)**.

(i) CLAIMANT faced an impediment beyond its control

90. The term 'impediment' under art 79 includes any event that makes performance of the contract excessively more difficult [*Lindstrom, 2006; Schlechtriem & Butler, 2009 at p.203*]. In determining whether there exists an impediment, specifics of any explicit or implicit risk allocation between the parties and the financial condition of claimant must also be taken into account [*Azeredo Da Silveira, 2014 at p.347 ¶524; Schwenzer, 2008 at p.716; Brunner, 2008 at p.126 ¶438-39; Huber and Mullis, 2007 at p.259*]. In the present case, the declaration of the 30 per cent tariff on animal semen constitutes an impediment.

91. While negotiating the terms of delivery of the Contract, RESPONDENT had requested for a DDP delivery mechanism to profit from CLAIMANT's experience in transportation of frozen semen [*Exhibit C3 at p.11*]. CLAIMANT agreed to this mechanism only on the condition that it shall not bear any risks associated with a change in delivery terms, in particular, those associated with changes in customs regulation or import restrictions [*Exhibit C4 at p.12*]. Such a risk allocation between Parties is also reflected in the Contract [*Exhibit C5 at p.14 Cl.10,12 & 13*].

92. Moreover, the last two years have been financially difficult for CLAIMANT [*Exhibit C8 at p.17*]. CLAIMANT had agreed on a restructuring plan with its creditor to be able to stay in business [*Exhibit C8 at p.17 & Procedural Order No. 2 at p.59 ¶29*]. The prolongation of this plan was dependant on CLAIMANT being profitable in 2017 and 2018 [*Procedural Order No. 2 at p.59 ¶29*]. Bearing the burden of the additional tariff not only destroyed CLAIMANT's 5 per cent profit margin, but also endangered its restructuring plan [*Procedural Order No. 2 at p.59 ¶29*].

93. Further, the impediment is required to be outside CLAIMANT's sphere of control [*Schlechtriem & Butler, 2009 at p.201; Brunner, 2008 at p.120*]. Governmental measures affecting trade are outside a seller's control [*Huber and Mullis, 2007 at p.259*]. The Equatorianan Government declared additional tariff on animal semen as a retaliatory measure against trade restrictions imposed by Mediterraneo. Such a declaration was beyond CLAIMANT's sphere of control.

94. Hence, the declaration of 30 per cent tariff on animal semen from Mediterraneo by the Equatorianan Government constitutes an impediment under art 79. Further, this impediment was beyond CLAIMANT's control.

(ii) CLAIMANT could not reasonably have foreseen the impediment

95. Art 79(1) of CISG requires that the seller could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract. In the present case, Parties entered into the Contract on 6 May 2017.

96. Six months later, the newly elected President of the Mediterranean Government announced 25 per cent tariff on agricultural products from Equatoriana. As a retaliatory measure, the Equatorianan Government declared a 30 per cent tariff on all agricultural goods from Mediterraneo. This measure caught CLAIMANT by surprise for at least two reasons.

97. First, the Equatorianan Government had always been an ardent supporter of free trade, known for resolving their trade disputes amicably or via the WTO dispute resolution mechanism. They had resorted to a direct retaliatory measure only on one previous occasion [*Exhibit C6 at p.15*].

98. Second, the scope of the measure was also unforeseen. Previously, tariffs had never been imposed on frozen semen in either Equatoriana or Mediterraneo [*Procedural Order No. 2 at p.58 ¶25*].

99. Therefore, CLAIMANT could not have been expected to foresee the declaration of the 30 per cent tariff on animal semen by the Equatorianan Government at the time of conclusion of the Contract.

(iii) CLAIMANT could not reasonably have overcome the impediment

100. Art 79(1) of CISG requires the seller to make reasonable efforts to avoid and overcome the impediment and its consequences [*Schlechtriem & Butler, 2009 at p.202; Lindstrom, 2006*]. 'Avoid' means taking all necessary steps to prevent the occurrence of the impediment, while 'overcome' means taking all necessary steps to preclude consequences of the impediment [*Tallon, 1987 at p.572-595*].

101. CLAIMANT made all reasonable efforts to overcome the consequences of the 30 per cent tariff declaration. On 19 Jan 2018, the Customs Authorities of Equatoriana informed CLAIMANT that the 30 per cent tariff were applicable. On receiving this information, CLAIMANT took immediate steps to renegotiate with RESPONDENT to find a solution and overcome the impediment [*Exhibit C7 at p.16*]. CLAIMANT authorized the shipment only after RESPONDENT gave an assurance to arrive at a solution in this regard [*Exhibit C6 at p.15*].

102. Further, Parties are only required to take efforts within their reasonable economic limits and capabilities [*Lindstrom, 2006; Zeller, 2005 at p.116*]. It was not economically viable for CLAIMANT to shoulder the additional 30 per cent tariff. Bearing the burden of this tariff has endangered the restructuring plan that CLAIMANT had agreed with its creditor [*Procedural Order No. 2 at p.59 ¶29*].

103. Therefore, CLAIMANT could not reasonably have been expected to avoid and overcome the impediment and its consequences. Thus, the introduction of the tariff by the Equatorianan Government constitutes hardship under art 79 of CISG.

C. THE TRIBUNAL SHOULD ADAPT THE CONTRACT ALONG THE LINES OF THE HARDSHIP PROVISION IN ARTICLE 6.2.3 OF UNIDROIT PICC

104. The Tribunal should adapt the Contract to entitle CLAIMANT to a payment of $ 1,250,000 along the lines of the hardship provision in art 6.2.3 of UNIDROIT PICC.

(a) The hardship provision in art 6.2.3 of UNIDROIT PICC is applicable in the present case.

(b) Further, the criteria for adaptation under art 6.2.3 of UNIDROIT PICC are met.

a. The hardship provision in art 6.2.3 of UNIDROIT PICC is applicable in the present case:

105. First, the Tribunal must refer to the hardship provision in art 6.2.3 of UNIDROIT PICC if it makes a determination of hardship under the clause 12 of the Contract.

106. Second, if the Tribunal makes a determination of hardship under art 79 of CISG, it must fill the internal gap relating to available remedies under art 79 along the lines of art 6.2.3 of UNIDROIT PICC.

(i) If the Tribunal makes a determination of hardship under clause 12 of the Contract

107. The Contract is governed by Mediterranean Contract Law, which is a verbatim adoption of the UNIDROIT PICC.

108. Hence, if the Tribunal makes a determination of hardship as per the Hardship Clause contained in the Contract, the power of adaptation should be exercised along the lines of the hardship provision in art 6.2.3 of UNIDROIT PICC.

(ii) If the Tribunal makes a determination of hardship under art 79 of CISG

109. First, there exists an internal gap relating to remedies available in situations of hardship under art 79 of CISG **(1)**.

110. Second, the internal gap can be filled along the lines of the hardship provision article 6.2.3 of UNIDROIT PICC **(2)**.

(1) There exists an internal gap in art 79 of CISG

111. Art 7(2) of CISG provides that *"questions concerning matters governed by the convention, but which are not expressly settled under it are to be settled in conformity with general principles on which the convention is based or, in absence of such general principles, in conformity with law applicable by virtue of the rules of private international law."* These unsettled questions are referred to as internal gaps within the CISG [*Bridge, 2007 at p.535; Brandner, 1999*].

112. CLAIMANT contends that there exists an internal gap relating to remedies available in situations of hardship under art 79 of CISG. Although art 79 protects the seller from liability, it is silent on the effect of the impediment on the remainder of the contract.

113. The legislative history of art 79 clearly indicates that the drafters did not agree on the remedies in cases of hardship [*Azeredo Da Silveira, 2014 at p.333*]. Authors have also viewed that there is clearly an internal gap in the Convention with respect to remedies available to the party facing hardship [*Bridge, 2007 at 2.6; Garro, 2005 at ¶IV.15; Azeredo Da Silveira, 2014 at p.334*].

114. Therefore, CLAIMANT requests this Tribunal to find that there exists an internal gap within the CISG, on issues relating to remedies available to a party facing hardship.

(2) The internal gap under art 79 can be filled along the lines of the hardship provision in art 6.2.3 UNIDROIT PICC

115. Art 7(2) of CISG provides that the internal gaps must be filled in conformity with the general principles on which the CISG is based.

116. The UNIDROIT PICC can be used to fill the internal gaps existing within the CISG. The Preamble of UNIDROIT PICC provides that the principles may be used to interpret or supplement international uniform law instruments [*UNIDROIT PICC Preamble*]. These principles have been used to fill internal gaps within the CISG on several occasions [*Chemical Fertilizer Case; Gaec v. Teso (France); Rolled Metal Sheets Case (Austria)*].

117. Art 6.2.3 of UNIDROIT PICC provide for effects of hardship. Authors have opined that this provision can be used to fill the internal gap relating to remedies in cases of hardship under art 79 [*Bonell, 2002 at p.348*]. Further, in *Scafom International v. Lorraine Tubes S.A.S*, the court resorted to art 6.2.3 of UNIDROIT PICC to fill the internal gap existing in art 79 of CISG [*Scafom v. Lorraine (Belgium)*].

118. In the event this Tribunal holds that the UNIDROIT PICC do not constitute general principles on which the CISG is based, the internal gap under art 79 will be filled by virtue of rules of private international law. In such a situation, the Tribunal will arrive at the same solution since in the present case, the general contract law in both Equatoriana and Mediterraneo is a verbatim adoption of the UNIDROIT PICC.

119. Hence, the internal gap relating to remedies in cases of hardship under art 79 should be filled along the lines of the hardship provision in art 6.2.3 of UNIDROIT PICC. Alternatively, if rules of private international law are applied, art 6.2.3 of UNIDROIT PICC will still be applicable.

b. The criteria for adaptation under article 6.2.3 of the UNIDROIT PICC are met

120. In situations of hardship, art 6.2.3 of UNIDROIT PICC entitles the disadvantaged party to request renegotiations. On a failure to reach an agreement within a reasonable time, the court may if reasonable either, terminate or adapt the terms of the contract. First, the renegotiaions between Parties were unsuccessful **(i)**; the Tribunal should adapt the Contract entitling Claimant to a payment of $ 1,250,000 **(ii)**.

(i) Renegotiations between Parties were unsuccessful

121. Art 6.2.3 requires that the request for re-negotiations must be made as quickly as possible after the time at which the hardship is alleged to have occurred [*UNIDROIT PICC art 6.2.3*]. On 19 Jan 2018, the Customs Authorities of Equatoriana informed CLAIMANT that the additional 30 per cent tariff was required to be paid on the frozen semen as well. This e-mail was read by CLAIMANT's representative on 20 Jan 2018 [*Procedural Order No. 2 at p.58 ¶26*]. As soon as CLAIMANT received this information, CLAIMANT's representative took immediate steps to initiate renegotiations with RESPONDENT [*Exhibit C7 at p.16*].

122. Subsequently, the delivery of the shipment was authorised by CLAIMANT on RESPONDENT'S promise to arrive at a solution in view of the changed circumstances. RESPONDENT assured CLAIMANT that they were interested in a long-term relationship and further, that they had already initiated the payment of the second instalment [*Exhibit C7 at p.16*]. However, on 12 Feb 2018, RESPONDENT refused to pay any additional amount for the tariff and stopped all negotiations with CLAIMANT [*Exhibit C8 at p.17*].

(ii) The Tribunal should adapt the Contract entitling CLAIMANT to a payment of $ 1,250,000

123. In view of the unsuccessful renegotiations with RESPONDENT, CLAIMANT has approached this Tribunal to seek an adaptation of the Contract.

124. While deciding cases relating to hardship, courts seek to make a fair distribution of losses between parties [*UNIDROIT PICC art 6.2.3*]. Further, a remedy of adaptation is provided only when it is reasonable for the tribunal to do so [*UNIDROIT PICC art 6.2.3*]. In the present case, adapting the Contract to entitle CLAIMANT to a payment of $ 1,250,000 is a fair and reasonable distribution of losses between Parties for a number of reasons-

125. First, the UNIDROIT PICC require the parties to adhere to the principles of good faith and fair dealing, and duty of co-operation [*UNIDROIT PICC art 1.7 & art 5.1.3*]. The Contract stipulated that the frozen semen could not be sold to third parties without the express written consent of CLAIMANT [*Exhibit C2 at p.10*]. CLAIMANT discovered that RESPONDENT had breached this resale prohibition [*Exhibit C7 at p.16*]. Moreover, on being confronted with the discovery, RESPONDENT stopped the negotiations and refused to cooperate with CLAIMANT. Such conduct of RESPONDENT is not in consonance with their duty to observe good faith and fair dealing and duty to cooperate.

126. Second, the agreed risk allocation between Parties must be taken into account. CLAIMANT agreed to deliver the frozen semen on a DDP delivery basis only on the condition that it will not undertake any additional associated risks, in particular, risks relating to customs regulation or import restrictions [*Exhibit C4 at p.12*]. The terms of Contract also reflect such a risk allocation between the Parties [*Exhibit C5 at p.14 Cl.10,12 & 13*].

127. The strained financial health of CLAIMANT must be taken into account. Bearing the burden of the additional tariff will seriously endanger the restructuring plans that CLAIMANT has agreed with its creditors [*Procedural Order No.2 at p.59 ¶29*]. Further, the prolongation of the credit lines is dependent on CLAIMANT being profitable in 2017 and 2018. If CLAIMANT is required to pay the additional tariff, it will destroy CLAIMANT's 5 per cent profit margin, thus destroying the commercial basis of the transaction [*Exhibit C7 at p.16*]. On the other hand, RESPONDENT would not be financially endangered if it bore the additional 30 per cent tariff on the frozen semen.

128. Therefore, CLAIMANT requests this Tribunal to adapt the Contract, entitling it to a payment of $ 1,250,000 in view of the 30 per cent tariff imposed on frozen semen by the Equatorianan Government.

129. **CONCLUSION TO ARGUMENT III**: Declaration of the 30 per cent tariff constitutes a situation of hardship under Clause 12 of the Contract. In the alternative, the imposition of tariff fulfills the threshold under art 79 of CISG. Consequently, CLAIMANT is entitled to a payment of $ 1,250,000 in view of the hardship caused.

REQUEST FOR RELIEF

For the above reasons, CLAIMANT respectfully requests the Tribunal to find that:

i. The Tribunal has the jurisdiction and power under the Arbitration Agreement to adapt the Contract.

ii. The Tribunal must admit the evidence from the other arbitration proceedings, to which RESPONDENT is a party.

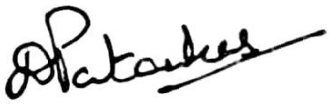
iii. CLAIMANT is entitled to payment of $ 1,250, 000 resulting from an adaptation of the price under Clause 12 of the Contract or alternatively, under art 79 of CISG.

6 December 2018
Counsels for CLAIMANT
Danubia

CERTIFICATE

We hereby confirm that this Memorandum has been written and prepared only by the undersigned persons.

ACHYUTHA G.M

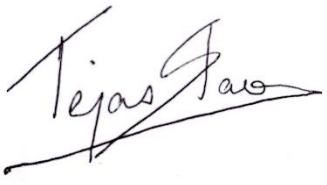


DARSHAN PATANKAR

. KUNAL GOPAL

ROHIN GOYAL

SURABHI SABOO



TEJAS RAO