SIXTEENTH ANNUAL WILLEM C. VIS EAST

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

INSTITUTO TECNOLÓGICO AUTÓNOMO DE MÉXICO

# CASE HKIAC/A18128

# MEMORANDUM FOR CLAIMANT

FOR AN INTERNATIONAL COMMERCIAL ARBITRATION BETWEEN

**PHAR LAP AVELLAMENTO**

CLAIMANT

**Vs**

**BLACK BEAUTY EQUESTRIAN**

RESPONDENT

UNDER THE HONG KONG INTERNATIONAL ARBITRATION CENTRE ADMINISTERED ARBITRATION RULES 2018

香港國際仲裁中心
Hong Kong International Arbitration Centre

6 DECEMBER 2018

Julieta Bejar Luna – Hernando Félix Villagrán – Oscar Andrés Figueroa Díaz

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| ABREVIATION | MEANING |
|---|---|
| DDP | Delivery Duty Paid |
| HKIAC | Hong Kong International Arbitration Centre |
| CISG | United Nations Convention on Contracts for the International Sale of Goods |
| UNIDROIT | International Institute for the Unification of Private Law |
| THPCL | The Hague Principles on Choice of Law |
| UNCITRAL | United Nations Commission on International Trade Law |
| Model Law | United Nations Commission on International Trade Law Model Law |
| IBA | International Bar Association |
| ICJ | International Court of Justice |
| INCOTERM | International Commercial terms |
| ICC | International Chamber of Commerce |
| NY Convention | Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 |
| ICC Rules | Rules of Arbitration of the ICC (2012) |
| EU | European Union |
| AGREEMENT | The FROZEN SEMEN SALES AGREEMENT |
| Tribunal | The Arbitral Tribunal |
| P.O. | Procedural order |
| EXHIBIT R | EXHIBIT RESPONDENT |
| EXHIBIT C | EXHIBIT COMPLAINANT |
| COMPLAINANT | Phar Lap Allevamento |
| RESPONDENT | Black Beauty |
| Parties | Phar Lap Allevamento and Black Beauty |
| USD | United States Dollar |
| % | Percentage |

| | |
|---|---|
| & | And |
| supra. | Mention above |
| § | Section |
| ¶ | Paragraph |
| ibid | Ibidem (in the same place) |
| Art./Artt. | Article/Articles |
| v. | Versus |
| p./pp. | Page/pages |
| e.g. | Exempli gratia (example given) |
| ed. | Edition |
| No. | Number |
| Sec. | Section |
| Ch. | Chapter |
| lex arbitri | law of the seat of arbitration |
| a contrario sensu | In the opposite sense or meaning |
| Respondent Exhibit | Res. Ex. |
| Claimant Exhibit | Cl. Ex. |
| Answer to the Notice of Arbitration | Answer |
| Notice of Arbitration | Notice |

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## STATEMENT OF FACTS

1. CLAIMANT, Phar Lap Allevamento (Phar Lap), is a company registered and incorporated under the laws of Mediterraneo, which operates stud farms covering all areas of equestrian sport. In its racehorse section Phar Lap provides stallions for breeding English thoroughbreds and Anglo Arabs. Additionally, CLAIMANT offers frozen semen of its champion stallions for artificial insemination.
2. RESPONDENT, Black Beauty Equestrian (Black Beauty) is a company registered and incorporated to the laws of Equatoriana, which is famous for its broodmare lines that have resulted in a number of world champion jumpers and international dressage champions.
3. On 21 March 2017 RESPONDENT contacted CLAIMANT, inquiring about the availability of Nijinsky III, one of Phar Lap's most successful racehorses, for its breeding programme. Since at that time, the Equatorian Government had imposed serious restrictions on the transportation of living animals, Black Beauty was particularly interested in frozen semen of Nijinsky III. On 24 March 2017 CLAIMANT offered RESPONDENT 100 doses of Nijinsky III's frozen semen. In the negotiation of the contract, RESPONDENT had no problems with most of the terms of the offer, although it objected the choice of law, the forum selection and insisted on a delivery DDP. CLAIMANT replied that it was only willing to accept a delivery DDP with the inclusion of a hardship clause to temper some of the additional risks taken. The finalization of the agreement took longer than planned as the two main negotiators were severely injured in an accident.
4. On 6 May 2017 CLAIMANT and RESPONDENT signed a sales agreement (AGREEMENT) that consisted in three shipments. CLAIMANT sent the first shipment of 25 doses on 20 May 2017 and the second shipment of 25 doses on 3 October 2017. The Two months before the last shipment of 50 doses, the Equatorian government announced a 30 per cent tariffs on animal semen from Mediterraneo in retaliation to a 25 per cent tariff imposed by the President of Mediterraneo. CLAIMANT contacted RESPONDENT to start negotiations regarding a price adjustment for the frozen semen. RESPONDENT had made clear that due to its breeding plan it was extremely important timely delivery of the last shipment. At the same time RESPONDENT appeared to generally accept the need for a price increase. CLAIMANT complied with its delivery obligation taking into account that RESPONDENT had created the impression of accepting a need for a price adaptation. CLAIMANT complied with the delivery of the remaining 50 doses on 23 January 2018 before an agreement on the new price.
5. CLAIMANT referred this dispute to the Hong Kong International Arbitration Centre (HKIAC) based on the arbitral clause contained in the AGREEMENT on 31 July 2018. CLAIMANT seeks a total of $1,250,000,USD resulting from the 30 per cent price surcharge on the last 50 doses of

frozen semen due to the tariff imposition by the government of Equatoriana. On the Answer to the Notice of Arbitration of 24 August 2018, RESPONDENT claims that the Tribunal lacks jurisdiction regarding this specific dispute because it asks for an adaptation of the contract. Further, RESPONDENT claims that the increased remuneration has no basis on the hardship clause nor under the CISG.

6. On 2 October 2018 CLAIMANT sent a letter to the Tribunal in which claims to have reliable information about another arbitration agreement in which RESPONDENT had been affected by the 25 per cent tariff imposed by the government of Mediterraneo. In that arbitration RESPONDENT asked itself for an adaptation of the price invoking an unforeseeable change of circumstances. CLAIMANT has been promised a copy of the award and the relevant submission and will submit them to the Tribunal once they have been received. RESPONDENT alleges that CLAIMANT should not entitled to submit evidence from the other arbitration proceedings on the basis of the assumption that it has been obtained either through a breach of confidentiality agreement or through an illegal hack to RESPONDENT.

## I. THIS TRIBUNAL HAS JURISDICTION TO HEAR THIS MATTER

1. According to *Kompetenz-Kompetenz* principle an arbitral tribunal has the authority to determine its own jurisdiction [Redfern and Hunter, p. 340]. This principle is reaffirmed in Article 8 (1) UNCITRAL [**UNCITRAL, Art. 8(1)**]and Article II of the NY Convention [NY Convention, Article II]. The applicability of this principle is, however, limited by the parties' agreement and its validity. In addition, the parties selected the HKIAC Rules to be applicable to the case at hand. Article 19 of the HKIAC Rules states that "*[t]he arbitral tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement*" [**HKIAC Rules Art. 19(1)**]. Therefore, this tribunal has, *prima facie*, the powers and authority to rule on its own jurisdiction.

2. On 6 May 2017, CLAIMANT and RESPONDENT signed the AGREEMENT in Mediterraneo, which included an arbitration clause [**Agreement, Clause 15**]. Since the validity and performance of the AGREEMENT is uncontested, the Tribunal's power to settle the dispute in question is also uncontested. In this regard, the AGREEMENT selected Danubia as the seat of arbitration, which adopted UNCITRAL [[**P.O.2, Q. 14**] as the arbitration law.

3. Although the parties choose Danubia as the seat of arbitration, they omitted to choose expressly the law governing the arbitration agreement. While CLAIMANT sustains that the law governing the arbitration agreement must be the law of Mediterraneo as it also the law governing the AGREEMENT [**Agreement, Clause 14**]], RESPONDENT alleges that it should be the law of Danubia.

4. From this general perspective, since the parties' general contract law is based on UNIDROIT Principles [**P.O. 1 § II, ¶ 4**], this instrument will be used in order to determine the applicable law to the arbitration agreement.

5. The parties are free to choose the law applicable to the contract as well as the law applicable to the arbitration agreement. In the AGREEMENT, however, there was no express choice as to which law should be the one applicable to the arbitration agreement. RESPONDENT alleges that the law chosen to be applicable to the interpretation of the AGREEMENT cannot be the one applicable to the arbitration agreement; rather, that the law of the seat of arbitration is also applicable to the arbitration agreement as stated in fact number 5 of RESPONDENT's Answer to the Notice of Arbitration. RESPONDENT claims that the Law of Danubia should be applicable to the arbitration agreement because RESPONDENT had proposed it in the negotiations and as it adheres to the "Four Corner Rule", which establishes that the contract cannot be adapted, but rather interpreted on its express wording. Contrary to RESPONDENT's

claim, the law governing the seat of arbitration cannot be considered as a tacit choice of law for the arbitration agreement. Therefore, the Danubian "Four Corner Rule" results non-applicable to this Tribunal and this Tribunal is not impeded to adapt the price paid due to the tariff imposition.

6. CLAIMANT respectfully requests this Tribunal to find that the law applicable to the arbitration agreement should be the law of Mediterraneo and not the law of Danubia. When there is no express choice of the law governing the arbitration agreement and both the law governing the seat of arbitration and the law governing the contract differ, the latter should also govern the arbitration agreement (A). This interpretation is followed by the CISG –which applies to the interpretation of the arbitration agreement base on Mediterranean jurisprudence– and the history of negotiations previous to the conclusion of the contract (B). Thus, in concordance with the law of Mediterraneo and CISG, this the Tribunal has the powers to adapt the price.

## A. THE GOVERNING LAW OF THE ARBITRATION AGREEMENT AND ITS INTERPRETATION SHOULD BE THE LAW OF MEDITERRANEO

7. When parties fail to decide the law applicable to an arbitration agreement, it is the duty of the Tribunal to determine the applicable law [**Fouchard, Gaillard, Goldman, p.879**]. In the case at hand, the Tribunal has jurisdiction over the AGREEMENT between CLAIMANT and RESPONDENT arising from the arbitration clause [**supra §2**]. In that regard, the Tribunal has the authority to determine the law applicable to the arbitration agreement.

8. In order to assess why the Tribunal should find that the parties chose the law of Mediterraneo as the law governing the arbitration agreement, it will be addressed that the parties omitted to include in the arbitral clause the express law governing the arbitration agreement in the first place (1). Second, that the law of Danubia cannot be the law governing the arbitration agreement (2). And, finally, that it was the parties' intention to choose the law of Mediterraneo as the law governing the arbitration agreement (3).

### i. The parties omitted to include an express choice of law governing the arbitration

9. The principle of party autonomy applies to the law governing the seat of arbitration, the law governing the interpretation of the contract and also to the law governing the arbitration agreement [**Fouchard, Gaillard and Goldman, p. 797**]. In this regard, generally speaking, it is common for the parties' autonomy to decide which law applies to each.

10. The principle of party autonomy converges with the principle "*of separability or autonomy of the arbitration clause*" [**UNCITRAL, p. 30**]. Under this principle, it is established that the arbitration agreement is to be treated as an agreement independent of the other terms of the contract [**Ibid**]. Hence, under the principle of separability, the law governing the interpretation of the contract is

not related to the law governing the seat of arbitration. In other words, the law applicable to the substance of the contract differs from the law applicable to the procedural aspects of the contract.

11. Under Clause 14 of the AGREEMENT, it is established that the law governing the interpretation of the contract should be the law of Mediterraneo, including CISG **Agreement, Clause 14**]. On the contrary, under Clause 15 of the AGREEMENT, it is established that the seat of arbitration shall be Danubia and that the arbitration should administered under the HKIAC rules [**Agreement, Clause 15**]. In this regard, it can be concluded that the law applicable to the substance of the AGREEMENT is the law of Mediterraneo, while the law applicable to the procedure of the arbitration is both the law of Danubia and the HKIAC rules. The parties, however, omitted to mention the law applicable to the arbitration agreement.

12. The final version of the arbitration clause did not include the express provision in which the parties select the law governing the arbitration agreement [**P.O.2, Q. 14**].. Since the beginning of the negotiation of the arbitral clause it was the parties' intent to expressly state their choice of law for the arbitration agreement. This has basis on RESPONDENT's EXHIBIT R1, in which the proposal for the dispute resolution clause included a choice of law for the law governing the arbitration agreement [**Res. Ex. R1**]. The fact that the final version of the contract did not include this provision is evidence that since the beginning of the negotiations it was the parties' will to deal with the issue of choice of law in relation with the arbitration agreement and that if the final version of the arbitration clause did not include this provision it was because the parties omitted to include it.

ii. The law of Danubia cannot be the law governing the arbitration agreement

13. According to Article 7 UNCITRAL, an arbitration agreement "is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them" under a legal relationship between them [**UNCITRAL, Art. 7**]. From this definition, it is deduced that the arbitration agreement refers to a procedural aspect of the contract and not to a substantial one. Notwithstanding, as it has been sustained in Sulamerica v. Enesa Egenharia and reaffirmed in Habas Sinai v Sometal, where parties have not expressly agreed upon a governing law for their arbitration agreement, the governing law will be determined by the implied choice or by the one with the closest and most real connection.

14. Generally the law of the seat of arbitration is also the law that governs the arbitration agreement. Nevertheless, in the case at hand the selection of Danubia as seat of arbitration cannot be construed as a selection for the law governing the arbitration agreement. The seat of arbitration is entailed to be a legal link that supervises the arbitration proceedings but it is not the selection of

the general contract law that frames the agreement to arbitrate. In the case ICC 5717 the Tribunal held that the choice of the seat of arbitration and language of arbitration do not constitute by itself an indication that the parties wanted to submit the validity of the arbitration agreement to the law of the seat of arbitration.

15. According to that case, where the contract does not include a choice regarding the governing law to the interpretation of the contract, then it is uncontested that the law governing the seat of arbitration will apply to both the interpretation of the contract and the arbitration agreement. However, the express selection of a law governing the interpretation of the contract is a strong indicator of the parties' intention for it to be the governing law to the arbitration agreement in the absence of any indication to the contrary. Thus, if there is not any factor that would lead to reject that the law governing the interpretation of the contract is the implied choice for governing the arbitration agreement, then the latter will be also governed by the law applicable to the interpretation of the contract.

16. From this perspective, as the law of Danubia (law governing the seat of arbitration) cannot be the one governing the arbitration agreement, then it is uncontested that the law governing the arbitration agreement should be the law of Mediterraneo (law governing the interpretation of the contract).

17. Contrary to what RESPONDENT alleges, the law of Danubia as the one applicable to the arbitration agreement cannot be deduced from the drafting history of the arbitration clause [**Answer, ¶ 15**]. Although it is true that during the negotiations the law of Equatoriana was to govern both the seat of arbitration and the arbitration agreement, it cannot be inferred that since Danubia was in the end the law governing the seat of arbitration it should also be the law governing the arbitration agreement. This conclusion also has support in the fact that the parties wanted to "ensure an adaptation of the contract for the unlikely event that the parties could not agree on an amendment" [**Cl. Ex. C8**]. Unlike the law of Mediterraneo, the law of Danubia does not allow for an adaptation of the contract unless there is an express conferral of powers. However, since there was an omission regarding the law governing the arbitration agreement, it is evident that there was an express conferral of powers as RESPONDENT states [**Answer, ¶ 13**].

18. RESPONDENT erroneously claims that the law of the seat of arbitration should be the law that governs the arbitration agreement when no express choice is found. As such, RESPONDENT sustains that the Tribunal lacks the powers and authority to adapt the price based on Danubian general contract law [**Supra ¶ 5**]. Danubian law states that the express writing within the contract embodies in a thorough way the terms on which the parties have agreed and thus it cannot be

contradicted or supplemented by evidence of prior statements or agreements. This argumentation by the RESPONDENT enters in contradiction with both RESPONDENT's and CLAIMANT's intentions, as they wanted to ensure an adaptation of the contract.

19. From this view, if the parties' intention was to give powers to the court to adapt the contract, and the law of Danubia only allows that with an express conferral, it is evident that the law of Danubia is not applicable to the arbitration of the agreement. On the contrary, the law of Mediterraneo should be the one governing the arbitration agreement as it allows the courts to adapt the contract without an express conferral.

iii. The law of Mediterraneo should be the law governing the arbitration agreement

20. As opposed to RESPONDENT's claims, the law applicable to the arbitration agreement should be the law of Mediterraneo. The AGREEMENT was concluded in Mediterraneo after negotiations based on the law of Mediterraneo [**P.O.2, Q. 13**]. And Mediterraneo general contract law is a *verbatim* adoption of UNIDROIT Principles [**Supra ¶ 4**], which can help determine the omission of the law applicable to the arbitration agreement.

21. Article 4 UNIDROIT states the general rules of interpretation of contracts. Article 4.8 deals with the issue related to supplying an omitted term in a contract. Article 4.8 of UNIDROIT Principles defines an omitted term as a provision that parties "*have not regulated in their contract at all*" [**Commentary to the UNIDROIT Principles 2016, p. 149**]. Article 4.8 states that "*when parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied*" [**UNIDROIT Principles 2016, Art. 4.8**]In determining what is the appropriate term that shall be supplied, the intention of the parties, the nature and purpose of the contract, good faith and fair dealing, and reasonableness are factors to be considered [**UNIDROIT Principles 2016, Art. 4.8**].

22. From a thorough interpretation of Article 4.8 of the UNIDROIT Principles, it can be concluded that where there is an omitted term within the contract, "*prior negotiations or any conduct subsequent to the conclusion of the contract*" can be a good indicator as to the intention of the parties regarding the omitted term [**Commentary to the UNIDROIT PRINCIPLES 2016, Art. 4.8, pp. 149-150**]. Hence, if the negotiations suggest a specific law applicable to the arbitration agreement, it can be inferred an implicit choice regarding its omission in the actual contract.

23. As stated in the previous section, prior negotiations of the sales contract included reference to the inclusion of a provision governing the arbitration agreement [**supra §10**]. Furthermore, as stated on Ms. Napravnik's witness statement, CLAIMANT's counsel in charge of the negotiation of the contract, the parties agreed on a mechanism that would ensure an adaptation of the contract in

case that parties could not agree on an amendment [**Cl. Ex C8**]. Claimant's Exhibit C8). Mr. Antley, RESPONDENT's counsel in charge of the negotiation of the contract, replied that it should be the task of the Tribunal to adapt the contract in case parties could not agree. Ms. Napravnik suggested to clarify the issue by an express reference to the adaptation powers of the Tribunal, although it was not necessary from a legal point of view. Additionally, Mr. Antley's notes extracted from his "*negotiation file*" suggest that it was RESPONDENT's intention to clarify in the arbitration clause the applicable law [**Res. Ex. R3**]. Due to the accident that Ms. Napravnik and Mr. Antley suffered this provision was not included in the final version of the arbitration agreement.

24. Therefore, the negotiating history of the arbitral clause can lead to determine that the law of Mediterraneo is the inferred law governing the arbitration agreement as it allows for a broad interpretation of the arbitration agreement and does not require an express conferral of powers for the arbitrators to adapt the contract. In this view, since it was the intention of the parties to grant to the Tribunal the powers to adapt the contract, the Law of Danubia could not be the choice of law for the arbitration agreement since it requires an express conferral of powers. As a result, the intention of the parties reveals that the law of Mediterraneo is the choice of law for the arbitration agreement. This view is further supported by the CISG, which is relevant to the case at hand as it is applicable to the interpretation of the arbitration agreement.

### B. THE CISG IS APPLICABLE TO THE INTERPRETATION OF THE ARBITRATION AGREEMENT AND IS RELEVANT FOR DETERMINING THE APPLICABILITY OF THE LAW OF MEDITERRANEO

25. From the negotiating history of the arbitral clause, CLAIMANT and RESPONDENT made clear that they wanted to agree on a mechanism that ensured adaptation powers to the Tribunal. Ms. Napravnik's assertion that it was not necessary to include an express provision to grant the arbitrators adaptation powers is the proof that the tacit choice of law was Mediterraneo and not Danubia. According to Mediterranean law, arbitration agreements are interpreted in a broad manner and do not require an express conferral of adaptation powers to the arbitrators [**P.O.2 ¶7, §16**]. In contrast, Danubian Arbitration Law requires an express conferral of exceptional powers to the Tribunal in order to adapt contracts as in Art. 28(3) of UNCITRAL Model Law. Since it was the intention of the parties to grant to the Tribunal the powers to adapt the contract, the Law of Danubia could not be the choice of law for the arbitration agreement since it required express conferral of powers. As a result, the intention of the parties reveals that the law of Mediterraneo is the choice of law for the arbitration agreement.

26. The problem with determining the applicable law to the arbitration clause is that there is no uniform law or jurisprudence. This becomes a problem because the arbitrator is left with a decision completely to his or her discretion, taking in consideration the circumstances of the case at hand. Therefore, the arbitrator may apply the CISG in order to determine the governing law of the arbitral clause. In this case the Parties established Mediterranean law for the substance of the contract and Danubia as the seat of arbitration, both lead to different results relating to the adaptation of the contract. The arbitrator in this case, because of the different results it may lead to otherwise, should opt to determine the applicable law for the arbitration clause based on the most uniform set of rules possible. Since the CISG sets uniform rules on the formation of a contract, it may be applied to this arbitration clause. There are another three reasons why the CISG applies to the arbitration clause in this case: all the concerning countries are contracting states to the CISG; the Parties consented to the contract as a whole including the arbitration clause; and, the application of article 11 of the CISG allows for the application of the arbitration agreement overall.

27. The first reason supports the CISG as a basis to determine the governing law of the arbitration clause because all the concerning countries are contracting states. The fact that the contracting parties come from different states and different legal traditions, it is fair for an arbitrator to opt for a law that represents common ground. No matter their legal differences, both parties have agreed and consented to the provisions in the CISG. As it is known, consent is a vital pillar in arbitration that should not be overpassed, which leads to the second reason the CISG is the optimal basis for the determination of the applicable law to the arbitration agreement in this case.

28. The second reason supports the CISG as a basis to determine the governing law of the arbitration clause because the Parties consented to the contract as a whole including the arbitration clause. The CISG does determine the consent of the sales contract, in general and in this case. "*In terms of the parties' consent, the arbitration clause is just another clause among many within the sales contract and the parties normally do not divide their consent as to the rules within one legal document*". The principle of separability applies to the effects of the contract and the arbitration clause, but the consent is not an effect that can be divided. If the sales contract is found invalid, the arbitration agreement may still be valid. If the parties consent to the contract as a whole, the consent applied to one clause will be no different. The consent and applicability of the CISG to the contract allows for the arbitrator to apply it to the arbitration agreement. This leads to the third reason why to apply the CISG to the arbitration agreement.

29. The third reason supports the CISG as a basis to determine the governing law of the arbitration clause because the application of article 11 of the CISG opens the door to the application of the

arbitration agreement overall. "*After all, the approach to apply Article 11 CISG to arbitration clauses aims to lessen the burden of the writing requirement still found in many arbitration laws*". If the CISG may apply for a requirement of the arbitral clause, there is no reason why this application should limit itself to one article.

### C. THE TRIBUNAL HAS THE POWERS TO ADAPT THE PRICE.

30. Since the governing law of the arbitration agreement is the law of Mediterraneo, which allows for a broader interpretation of the arbitral clause, CLAIMANT requests that the Tribunal find that it has enough jurisdiction to adapt the contract.

31. An arbitrator's jurisdictional power derives largely from the arbitral clause, the law governing the arbitration agreement and the institutional rules that the parties agreed [**Paulson et al, p.351**]. CLAIMANT respectfully asks this tribunal to find that, contrary to RESPONDENT's allegations, the arbitral tribunal has jurisdiction from: the arbitral clause contained in Art. 15 of the Contract, the law of Mediterraneo as governing law of the arbitration agreement and from the HKIAC rules parties agreed upon.

32. An arbitral tribunal may validly resolve those disputes that parties have agreed that it should resolve. The parties gave the tribunal the authority to decide disputes between them. The practice has granted the arbitral tribunal of international institutions to decide on its own jurisdiction [**Redfern and Hunter, ¶5.105**].

33. Furthermore, in the case at hand parties agreed to the application of the HKIAC Rules as it can be extracted from the arbitration agreement in the AGREEMENT. Article 19 of the HKIAC Rules states the following: "*the arbitral tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement*" [**HKIAC, Art. 19**].

34. As a result, the arbitral tribunal has the powers and the jurisdiction to decide over the scope of the arbitration agreement. This means that the arbitral tribunal has the jurisdiction based on the will of the parties to sustain that the applicable law to the arbitration agreement is the law of Mediterraneo and that there should be an adaptation to the hardship clause which grants CLAIMANT for an additional remuneration.

## II. CLAIMANT SHOULD BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDING

35. RESPONDENT wishes to prevent CLAIMANT from submitting evidence. After failing to establish fair grounds for the dismissal of the evidence in question (hereinafter referred to as "The

Evidence"), CLAIMANT argues that the Arbitral Tribunal (hereinafter referred to as "Tribunal" or as "Arbitral Tribunal" interchangeably) should admit the Evidence.

36. On 2 October 2018, CLAIMANT received reliable information at the annual breeder conference about another arbitration proceeding under the HKIAC Rules which RESPONDENT had with one of its customers concerning the sale of a promising mare to Mediterraneo (hereinafter the "Other Arbitration") **[P.O.2, Q. 39]**. The sale in question had been affected by an unforeseen tariff of 25% imposed by the president of Mediterraneo. In the Other Arbitration, RESPONDENT (acting as claimant) asked its counterpart for an adaptation of the price invoking an unforeseeable change of circumstances.

37. The facts of the present case and the Other Arbitration appear to be very similar. Seemingly, the only difference between these two cases is the part that RESPONDENT plays. In the Other Arbitration RESPONDENT was claiming the adaptation of the price because it had been negatively affected by the tariffs, in the present case RESPONDENT rejects the adaptation of the price because it was CLAIMANT who bore it. RESPONDENT's positions are highly contradictory which leads to believe that RESPONDENT'S opposition to the admission of evidence related to the Other Arbitration, is merely a disruptive tactic in an attempt to subvert the arbitral process. Therefore, RESPONDENT's efforts to undermine CLAIMANT's intentions to provide the Arbitral Tribunal with complete information should be denied through the admissibility of the Evidence.

38. Notwithstanding the above, as a matter of general custom in International Commercial Arbitration, the IBA Rules on the Taking of Evidence (from now on "IBA Rules") should be applicable to this dispute.

39. The broad scope and application of the IBA Rules, allow for an interpretation that applies to both parties. IBA Rules allow for Parties to find common ground, specifically when the Parties come from different legal traditions. According to Henry Blackaby the IBA Rules have become *"the international standard for an effective, pragmatic and relatively economical document production regime"* [**Salomon and Friedrich, p. 568**]. The UNCITRAL Rules on Transparency, applicable to the Sales Agreement subject to this arbitration, also allow insight on deciding upon admissibility of the evidence in question.

### A. THE RESPONDENT'S CLAIM RELATING TO THE ORIGINS OF THE EVIDENCE OBTAINED HAS NO BASIS

40. CLAIMANT's position is that RESPONDENT is merely opposing the admissibility of the evidence in question so that CLAIMANT bares the additional costs generated by the imposition

of tariffs. CLAIMANT should be entitled to submit evidence related to the Other Arbitration as CLAIMANT considers it to be material to the present case. RESPONDENT'S assertion relating to the illegal origins of the evidence has no basis.

i. **RESPONDENT should file evidence on the alleged illegality of the evidence**

41. RESPONDENT has yet to file evidence to substantiate its assertion. The burden of proof to sustain said assertion of illegality rests entirely on the RESPONDENT. Pursuant to HKAIC Rules, Article 22.1 and Article 27(1) of the UNCITRAL Rules, each party shall have the burden of proving the facts relied on to support his claim or defense. American Arbitration Association Rules ("AAA Rules") also determine that it is the party that opposes the admission of the evidence who bears the burden of proof that such evidence is inadmissible. The assertion made by RESPONDENT about the illegality of the origins of the evidence, is directly related to ethics. Void accusations of illegal behavior should not be taken lightly by the Arbitral Tribunal. If the assertions of illegal behavior have no basis, they should be immediately discarded by the Tribunal. Otherwise, the Tribunal would be undermining one of the most important principles in law: the presumption of innocence. Since accusations of illegality cannot be confirmed or based on suspicions, the Tribunal should discard the baseless accusations made by RESPONDENT. CLAIMANT will, for the time being, reserve its right to reply to the arguments and evidence filed by RESPONDENT. At this point, CLAIMANT maintains that there is not a scintilla of evidence to support RESPONDENT'S assertions.

**B. UNDER THE ASSUMPTION THAT THE EVIDENCE IN QUESTION WAS OBTAINED THROUGH A BREACH OF CONFIDENTIALITY OR AN ILLEGAL HACK, IT SHOULD STILL BE DEEMED ADMISSIBLE**

42. CLAIMANT now maintains that it is of utmost importance that the evidence of the Other Arbitration admitted by the Tribunal. Considering the Tribunal's discretion to determine the admissibility of evidence, CLAIMANT now alleges that even in the case that the evidence was obtained through a breach of confidentiality, or through an illegal hack, the evidence in question should be admitted as it is material to CLAIMANT's case.

43. In addition to the above, CLAIMANT did not participate in the alleged unlawful acts to obtain the evidence. CLAIMANT remains to be a *bona fide* participant in this arbitral procedure and in its contractual relationships. Thus, the Tribunal should admit the evidence in question under the assumption that it was obtained by CLAIMANT through legal means. Pursuant to article 3.11 of the IBA Rules, the Parties may submit to the Arbitral Tribunal and to the other Parties any additional documents on which they intend to rely or which they believe have become relevant to

the case and material to its outcome as a consequence of the issues raised in documents. CLAIMANT believes that the evidence in question is crucial for the outcome of this case.

i. **The relevance and weight of the evidence in question relates to RESPONDENT's contradictory behavior resulting in a considerable detriment for CLAIMANT**

44. The relevance and weight of the evidence related to the Other Arbitration is directly connected to the fact that CLAIMANT can argue and sustain a promissory estoppel argument. In this manner, CLAIMANT's position is that RESPONDENT is estopped from causing a significant detriment to CLAIMANT by not paying the unforeseen tariff.

45. In CLAIMANT'S Statement of Facts number 5 [**Notice, § I, ¶ 5**], CLAIMANT related how RESPONDENT stated its intention to engage in "*further business*" with CLAIMANT. RESPONDENT then proceeded to restate their interest in a long-term commercial relationship. This led CLAIMANT to believe that RESPONDENT would be acting in good faith during the negotiations and during the enforcement of the contract, particularly when Mr. Shoemaker expressed that CLAIMANT understood the need to renegotiate [**Res. Ex. R 4**] CLAIMANT understands that Mr. Shoemaker had power-in-fact. Mr. Shoemaker was trusted enough by RESPONDENT to make and receive calls with CLAIMANT, the Arbitral Tribunal should recognize the promises made by Mr. Shoemaker while speaking for RESPONDENT.

ii. **RESPONDENT's conduct during the negotiations and delivery process provoked a detriment to CLAIMANT. The intention of RESPONDENT can be limited by the terms of the contract and the circumstances of the parties and the proportionate expectations in the remedy granted.**

46. As stated in CLAIMANT'S Statement of Facts number 5, RESPONDENT contacted CLAIMANT to start negotiations over frozen semen from a racehorse mare. After multiple negotiations, the parties agreed upon three shipments of frozen semen. After the unforeseen imposed tariffs over the third and last shipment, CLAIMANT and RESPONDENT immediately started negotiations regarding a price adjustment for the frozen semen. On an Email sent by Mrs. Julie Napravik to Mr. Shoemaker on 20 January 2018 [**Cl. Ex. 7**], Mrs. Napravik informed CLAIMANT about the 30% tariff imposed (i.e. that the shipment would be 30% more expensive). In the subsequent phone call between Mr. Shoemaker and Mrs. Julie Napravik which took place on 21st of January 2018, Mr. Shoemaker made clear that for them, timely delivery was extremely important. At the same time Mr. Shoemaker appeared to accept the need for a price increase. In that same phone call, Mr. Shoemaker mentioned he had not been involved in the negotiations or

the Sales Agreement, and though he directly couldn't authorize any additional payment he understood CLAIMANT'S need to renegotiate.

47. Mr. Shoemaker urged to authorize the shipment as planned and he emphasized their interest in "a long-term relationship on the light that they were highly interested in a long-term cooperation with CLAIMANT going clearly beyond this single purchase" [**Cl. Ex. 3**]. In addition to the latter, Mr. Shoemaker explained the plan to buy other 50 doses of another stallion. Therefore, Mr. Julie Napravik authorized the delivery relying on RESPONDENT'S promise that a solution would be found, and that they accepted their position on the additional costs due to the tariffs [**Brown**].

48. The above facts area clear example of RESPONDENT conduct creating a promissory estoppel though representation. Promissory estoppel was created to accommodate promise in the realm of legally binding agreements. 1)The first element of promissory estoppel is that a promise be made and broke. 2)That promise must induce a change in the relative positions of the parties. 3)This element generally requires that the promisee must suffer a detriment or loss because of his reliance upon the promise.

49. CLAIMANT considers that Mr. Antley and Mr. Shoemaker implied a will to negotiate the price on behalf of the new tariffs, by using wording like the following "*if the contract provides for an increased price in the case of such a high additional tariff, we will certainly find an agreement on the price*" [**Res. Ex. R4**].

50. CLAIMANT's factual basis for the promissory estoppel is the fact that there were words said by RESPONDENT that made CLAIMANT accept to ship the product before renegotiating. As derived from CLAIMANT's EXHIBIT C 7, when CLAIMANT knew about the imposition of the tariffs it communicated to RESPONDENT that the Parties needed to renegotiate before the last delivery. However, this changed after RESPONDENT stated their will to renegotiate and manifested its acceptance to a would-be augment in price, and made present their will to pursue further business transactions. CLAIMANT's legal reliance on RESPONDENT's present intention made it change its position, perform the last shipment, and pay the newly imposed 30% tariff. It is conclusive that, due to RESPONDENT's refusal to issue further payment, CLAIMANT suffered a monetary detriment that ultimately destroyed its profit margin of 5% of the price and, furthermore, cost an additional 25% of the price. This may be considered as a considerable hardship.

51. The evidence from the Other Arbitration will assist CLAIMANT to evidence RESPONDENT's abusive commercial conduct. RESPONDENT ensured its commercial interests in full awareness that it would unlawfully affect CLAIMANT.

52. As seen in the Procedural Order Number 2, question number 16, CLAIMANT expressly made the sale to third parties of the product by RESPONDENT dependent on CLAIMANT's express consent. As evidenced in the case file [**P.O.2, Q. 20**], a third-party breeder confirmed that RESPONDENT sold doses to (at least) a third party, with an additional 20% increase in price.

53. CLAIMANT'S restriction of re-selling to third parties was clear and should be interpreted as a contractual term. Notwithstanding, RESPONDENT decided to ignore this fact and proceeded to resell to third parties with a profit. Regarding the dispute underlying the Other Arbitration, as seen in question number 39 of Procedural Order Number 2 [**P.O.2, Q. 39**], RESPONDENT conditioned the delivery to a renegotiation of the price, then refusing to deliver the mare promised to the Claimant party to that arbitration procedure.

54. In the present case, CLAIMANT conducted business in good faith and performed the contract as agreed relying on the fact that RESPONDENT would further agree on an adjustment of price due to the unforeseen tariffs imposed upon the product.

55. CLAIMANT requires the evidence from the Other Arbitration to be admitted supporting the fact that RESPONDENT has conducted commercial transactions contrary to the intent of the parties and undermining its *bona fide* obligations [**CISG, Art. 7**].

56. In conclusion RESPONDENT has not been able to prove the allegedly unlawfully obtained Evidence. Even if the origins of the evidence were obtained through the alleged means, it should still be deemed admissible by the Tribunal based on the relevance and weight it provides to support the fact that CLAIMANT is trying to prove.

iii. **If the evidence was unlawfully obtained through a breach of confidentiality or through an illegal hack**

57. The international custom regarding evidence admissibility tends to favor admitting evidence rather than excluding it. This tendency supports transparency, the equal right to be heard that the parties have, and most importantly to ensure that the decisions made by arbitral tribunals are based of correct and complete information.

58. Cherie Blair and Ema Vidak Gojkovic in [**Blair and Vidal Gojkovic**] elaborated a three-step test relating to the admissibility by Arbitral Tribunals of allegedly illegally obtained evidence. CLAIMANT believes that this test might offer an alternative for the Arbitral Tribunal to consider when deciding upon the admissibility of evidence. According to these authors, case law on the subject of admissibility of unlawfully procured evidence suggests that there are three questions which play an important role informing how tribunals reach decisions on the admissibility of

obtained evidence. The test consists in the Arbitral Tribunal answering the following questions: 1. Has the evidence been obtained unlawfully by a party who seeks to benefit from it? 2. Does public interest favor rejecting the wrongfully disclosed document as inadmissible? 3. Does the interest of justice favor the admission of the wrongfully disclosed document?

59. Has the evidence been obtained unlawfully by a party who seeks to benefit from it? The first step in this test has also been referred to as the "*clean hands doctrine*" [**Blair and Vidal Gojkovic**]. The authors refer to the role played by the Party intending to introduce the allegedly illegally obtained evidence. If the Party participated in illegal activities to obtain the evidence, the Arbitral Tribunal should in principle, deny the Party's the request to introduce said evidence. The latter wishes to prevent a Party to Profit through its own illegality.

60. Admissibility in the practice of the International Courts can provide insight in the weighing of evidence. In the case of *Iranian Hostages* [**Iranian Hostages (n26); Persia International Bank v Council (n 42), ¶ 95**] the Party incurred in illegal practices to benefit from the evidence obtained by them. The court determined the evidence was inadmissible, contrary to the results of *Persia International Bank v Council* [**Case T-493/10 *Persia International Bank v Council* ECLI:EU:T:2013:398**], where the court admitted the unlawfully obtained evidence. The only difference in the logic employed by the corresponding deciders to determine the admissibility of the evidence was the role that the offering parties played in obtaining the evidence. It should suffice to say that, in *Persia International Bank v Council*, the court admitted the evidence because Persia International Bank was not involved in the illegal practices that produced the evidence.

61. Other cases where similar criteria were employed are Methanex v United States [***Methanex Corporation v United States of America*, UNCITRAL, Final Award (3 August 2005**), **¶ 55**] in contrast with Yukos v Russia [**Yukos Universal Limited (Isle of Man) v The Russian Federation, PCA Case No. AA 227, Final Award (18 July 2014**)]. In Methanex v United States, the evidence was inadmissible under the criteria that parties should never benefit from their own illegal practices. Another fact that influenced the court to decide against admitting said evidence, was the fact that the evidence in question represented little importance in support of Methanex's case. In contrast, in Yukos v Russia the Court decided differently due to the fact that they took into account the "clean hands doctrine", where the Party was not involved in the illegal activities used to produce the evidence.

62. In *Caratube v Kazakhstan* [***Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No. ARB/08/12 (Caratube v Kazakhstan)**] unlawfully obtained evidence was also admitted, under the "*clean hands doctrine*". The evidence actually including

privileged documents, even after recognizing the importance of confidentiality of this type of documents. The court decided to admit the privileged documents and then proceeded to exclude them from public record. This is a clear example on how admitting evidence does not result contrary to confidentiality and the protection of privileged documents.

63. As discussed above, RESPONDENT has offered no evidence to substantiate its assertions regarding the illegal origin of the evidence related to the Other Arbitration. Even if RESPONDENT managed to produce evidence sustaining the alleged breach of confidentiality or an illegal hack, the evidence from the Other Arbitration should still be admitted by this Tribunal. Under the assumption that the evidence was obtained through a breach of confidentiality, it must be noted that CLAIMANT is not subject to the confidentiality agreement in question. CLAIMANT did not beach the agreement nor caused a third party to breach the agreement. Therefore, under the "*clean hands*" doctrine, the Tribunal should recognize that the breach of confidentiality did not involve CLAIMANT in any way, since it was obtained through a third "*disinterested*" party. CLAIMANT remains to be a bona fide acquirer of the evidence from the Other Arbitration.

64. In a case heard before the International Court of Justice ("**ICJ**"), *Military and Paramilitary Activities v. Nicaragua"* [***Nicaragua v United States of America* (Merits) (1986) ICJ Rep 392 ¶69**], the Court defined a third disinterested party as "*one who is not a party to the proceedings and stands to gain or lose nothing from its outcome*". CLAIMANT considers that, for the purposes of this case, the third party is in fact third disinterested party, since the party that supplied the evidence, has no an expectation to gain something from the present proceeding, since the other proceeding has concluded and has obtained the respective award. To conclude, since CLAIMANT did not participate in any illegal activity and would not profit from them, the Arbitral Tribunal must admit such evidence.

65. Does public interest favor rejecting the wrongfully disclosed document as inadmissible? Cherie Blair and Ema Vidak Gojkovic in [**Blair and Vidal Gojkovic**] sustain that the Arbitral Tribunal should balance different policy interests against the need to find the truth. CLAIMANT believes that due to the nature of the evidence in question public policy is not relevant to the case. The authors also attain to the IBA Rules where Arbitral Tribunals are expected to exclude from evidence any document on the grounds of special political or institutional sensitivity. CLAIMANT believes that the evidence in question is not of a sensitive nature, especially after taking into account the fact that the Other Arbitration has concluded.

66. Does the interest of justice favor the admission of the wrongfully disclosed document? This third question is related to the duty of the Arbitral Tribunal to ponder the related principles and interest which clash in the particular case. CLAIMANT urges the Arbitral Tribunal to consider that, in the present case, the exclusion of evidence may potentially have enormous impact on its right to be heard. Party Equality is also to be considered as one of the principles pondered by the Arbitral Tribunal. Both Parties in international commercial arbitration disputes should be allowed to file evidence with the Arbitral Tribunal.

67. If Arbitral Tribunals tend to determine as inadmissible evidence obtained unlawfully, that complies with the "*clean hands doctrine*", the outcome will very possibly counteract basic principles of justice. This could happen due to important facts were not supported by the evidence in question. These types of decisions may also result in decisions made by the Arbitral Tribunal being based on incomplete, due to the lack of information. CLAIMANT is entitled to request that the Arbitral Tribunal performs a "Request to Produce" regarding RESPONDENT'S participation in another arbitration proceeding

### C. CLAIMANT IS ENTITLED TO REQUEST THAT THE ARBITRAL TRIBUNAL PERFORMS A "REQUEST TO PRODUCE" REGARDING RESPONDENT'S PARTICIPATION IN ANOTHER ARBITRATION PROCEEDING.

68. CLAIMANT reaffirms to the Tribunal that there is no basis to support the assertions related to the illegal origins of the evidence made by RESPONDENT. Under the assumption that the origins of the evidence in question is confirmed to be obtained through illegal means, CLAIMANT is willing to withdraw the request to deem this piece of evidence admissible. However, CLAIMANT would immediately file with the Tribunal a request for RESPONDENT to produce the same documents, pursuant to Article 22.3 of the HKIAC Rules. Thus, the Tribunal would ultimately compel RESPONDENT to produce the documents relating to the Other Arbitration.

69. Article 3.9 of the IBA Rules also states that if a Party wishes to obtain the production of documents from a person or organization who is not a Party to the arbitration (the documents would be requested to the Claimant of the Other Arbitration), and from whom the Party cannot obtain the Documents on its own the Party may ask it to take whatever steps are legally available to obtain the requested Documents. The Arbitral Tribunal shall decide on this request as the Arbitral Tribunal considers appropriate if, in its discretion it determines that the Documents would be relevant to the case and material to its outcome.

70. Pursuant to Article 9.5 of the IBA Rules, "if a party fails without satisfactory explanation to produce any Document requested to which it fails to produce any Document ordered to be

produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be averse to the interest of that Party". If RESPONDENT does not comply with the production of Documents, in the event of being compelled by the Arbitral tribunal, RESPONDENT would be acting directly against orders of the Tribunal.

71. Any Arbitral Tribunal may and should adopt measures to avoid adverse evidentiary inferences against the party refusing to produce documents or whose efforts tend to suppress relevant evidence. In the same line, in the present case the Tribunal should consider that RESPONDENTS eventual non-production of evidence to be indirect evidence of the facts that CLAIMANT is trying to demonstrate.

72. Therefore, CLAIMANT is entitled to submit evidence from the other arbitration proceedings.

## III. CLAIMANT IS ENTITLED TO THE PAYMENT OF US $1,250,000 UNDER BOTH CLAUSE 12 OF THE AGREEMENT AND CISG

73. CLAIMANT is entitled to the payment of US $1,250,000, or any other amount resulting from the adaptation of the price, due to the fact that clause 12 of the FROZEN SEMEN SALES AGREEMENT (AGREEMENT) stipulates that any increase in price would run on RESPONDENT's charge. Hence, the lack of the aforesaid payment results in a breach of contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG).

### A. CLAUSE 12 OF THE AGREEMENT: THE HARDSHIP CLAUSE

74. "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."

#### i. Formation of the contract

75. Clause 12 of the AGREEMENT was incorporated into the contract due to the fact that, in previous negotiations, the RESPONDENT requested the delivery of the goods to be made under the Delivery Duty Paid (DDP) INCOTERM, as shown in CLAIMANT's EXHIBIT C3; term to which the CLAIMANT agreed to under the condition that a hardship clause be incorporated into the AGREEMENT and an increment in price, as shown in CLAIMANT's EXHIBIT C4. In support of the aforementioned, Article 14 §1 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) provides that a proposal is indication of intent to be bound by acceptance and by virtue of Article 8 ¶3, this intent may be established by all relevant circumstances, including statements or other conduct during negotiations.

76. As for the acceptance of the hardship clause, RESPONDENT's EXHIBIT R1 and R2 show a proposal and acceptance respectively, and though they did not address the hardship clause, they 1did accept to the increase in price, which was included in the same email in which the hardship clause was proposed; thus, the RESPONDENT could not have been unaware of the other party's intent. Article 8 ¶1 instructs courts to interpret the statements and other conduct of a party according to his intent as long as the other party knew, or could not have been unaware of that intent. As previously stated, the RESPONDENT could not have been unaware of the hardship clause, and as such, their intent to agree upon the CLAIMANT's offer to include said clause must be concluded.

ii. Interpretation of the contract

77. Under clause 12 of the TERMS AND CONDITIONS of the AGREEMENT, parties agreed that the CLAIMANT would not be responsible for hardship caused by any health and safety requirements or comparable unforeseen events that would make the contract more onerous. Before completing the third shipment of goods, Equatoriana's government imposed a 30% tariff on animal semen imported from Mediterraneo, which resulted in the contract being more onerous to the CLAIMANT. Hence, it is the RESPONDENT's responsibility to pay the increase in price resulting from the implementation of such tariff, as it could be considered as a health and safety regulation or in any case a similar unforeseen event, and as such, CLAIMANT cannot be considered responsible to cover the increase in the amount in costs.

## B. INCOTERM AGREED BY THE PARTIES MODIFIED BY THE HARDSHIP CLAUSE

### i. INCOTERM agreed by the Parties

78. Parties agreed upon the Delivery Duty Paid (DDP) INCOTERM, in which the seller is responsible for delivering the goods to the named place in the country of the buyer, as well as for paying all costs in bringing the goods to the destination, including import duties and taxes. In this sense, the seller is responsible for clearing the goods through customs in the buyer's country, including both paying the duties and taxes, and obtaining the necessary authorizations and registrations from the authorities in that country, though not being responsible for unloading.

79. From this perspective, under a DDP INCOTERM, the buyer bears the least responsibility as he is only responsible for the unloading, whilst the seller bears the most as it is responsible for any other circumstance involving the delivery. However, even though the Parties agreed upon a DDP INCOTERM, this does not prevent them from adjusting the responsibility that both Parties bear.

ii. UNIDROIT principles on hardship

80. As stated in the previous section, agreeing upon a DDP INCOTERM does not prevent the Parties to modify the extent of their respective responsibility under that specific INCOTERM. In this regard, the Parties agreed upon a hardship clause under clause 12 of the TERMS AND CONDITIONS of the FROZEN SEMEN SALES AGREEMENT shown as CLAIMANT´s EXHIBIT C 5.

81. Article 6.2.2 of the UNIDROIT principles defines hardship as a situation where the occurrence of events fundamentally alters the equilibrium of the contract, provided that those events meet the requirements laid down in subparagraphs (a) to (d). Whether an alteration can be considered as fundamental, two things have to be considered: increase in cost performance and decrease in value of the performance received by one party; after all no one contracts to lose profits. As for the increase in cost of performance, the tariff consisted in a 30% increase in costs for the CLAIMANT, which clearly constitutes a substantial increase in costs due to the introduction of new safety regulations. As for the decrease in value of the performance received by one party, the performance relates to the total loss of any value due to drastic changes in market conditions. A 30% tariff on imported goods should be considered as a substantial change in market conditions as it decreases the total value of the transaction for the CLAIMANT. Thus, both prerequisites for hardship are met, and it can be invoked for a renegotiation in price, or in this case, the payment of US $1,250,000 consisting in the increase in costs and loss of value that covers the 30% of the tariff by both the CLAIMANT and the RESPONDANT for it does not consist in a increase of revenue for the CLAIMANT.

### C. CISG BREACH OF CONTRACT

82. The RESPONDENT'S claim in the sense that the CLAIMANT cannot rely on Article 79 of the CISG and that including a hardship clause within the AGREEMENT would make the CISG rules non-applicable has no basis.

83. This is mainly because there is no point of comparison between Article 79 CISG and the hardship clause within the AGREEMENT (Clause 12). Although Article 79 CISG constitutes a hardship clause, in the sense that under a change of circumstances one party is exempted to fulfill their obligations, this clause results non-applicable to the CLAIMANT because bearing all the costs that could arise from subsequent change in the circumstances was not under CLAIMANT'S obligation.

84. Despite the fact that the AGREEMENT was agreed upon a DDP INCOTERM, whereas the seller is responsible for any circumstance revolving around the delivery –including the payment of all the duties, taxes, and costs in general–, the extent of the responsibilities under this DDP was

changed by the Parties. This circumstance is portrayed within the Clause 12 of the AGREEMENT, whereas the seller was exempt from the responsibility of fulfilling any additional requirements or comparable unforeseen events making the contract more onerous. Therefore, CLAIMANT is not alleging an exempt of their obligations, but rather a compliance of the RESPONDENT's obligations.

85. In concordance, the non-compliance of the RESPONDENT obligations, which in this case is to pay for the price of the goods in relation to the goods' price and the hardship clause, constitutes a breach of the Contract under Clause 12. Therefore, CLAIMANT is not only entitled to the payment from the mere interpretation of the AGREEMENT, but also under the CISG rules and, specifically, articles 53 and 61. The former stipulates the obligation of the buyer to pay the price, whereas the latter stipulates that the failure to perform any of the buyer's obligation entitles the seller to claim damages as provided in articles 74 to 77 of the CISG.

86. Therefore, the breach of the AGREEMENT in the present case allows the CLAIMANT to ask for damages under Article 74 CISG (1) and for those damages to be fully paid and not reduced under Article 77 CISG (2).

### i. **Claimant is entitled to receive compensation for damages under Article 74**

87. Article 74 CISG is precisely the article that lays out how to calculate the damages for every loss suffered as a consequence of a breach of contract and, at the same time, establishes the conditions in which the party in breach is liable for the loss. In this respect, it sets up three conditions in order for the party in breach to be liable for the amount of loss: a) the breach of the contract, b) a loss or detriment suffered, and c) the causality between the breach and the detriment. In addition to this, Article 74 CISG establishes the condition to consider and analyze the d) foreseeability of the loss and the e) exemptions laid out by Article 79 CISG.

#### a. **The breach of the contract by the Respondent**

88. RESPONDENT breached the contract by failing to fulfill his obligations under Clause 12 of the AGREEMENT. Under this clause, the RESPONDENT was the sole responsible to comply with any circumstance caused by additional health and safety requirements or unforeseen events that would make the contract more onerous. This interpretation is followed from the express wording of the clause –which constitutes the final expression of the Parties intention–, as it discharges the CLAIMANT to be responsible for any subsequent change on any circumstance that were to make the contract more onerous. Therefore, if the CLAIMANT paid for the total increase in tariffs on agricultural products, which included racehorse semen, though not being responsible for it and

the RESPONDENT does not want to restore and comply with that extra cost, the RESPONDENT is breaching the AGREEMENT by failing to fulfill his obligations.

**b. A loss or detriment suffered by the Claimant**

89. CLAIMANT was deprived from his expectations under the AGREEMENT. The price of each dose amounted a total of $100,000 USD per dose, where the total costs (fixed and variable) that the CLAIMANT had to incur into were of $95,000 USD. In this regard, the CLAIMANT only had a profit margin of 5%, which amounted to the remaining $5,000 USD per dose.

90. To this extent, not only did CLAIMANT was deprived from the profit margin of 5%, but also had to incur in an additional loss of 25% due to the increase in tariffs. Notwithstanding the Clause 12 of the AGREEMENT discharge him from having to bear any subsequent change that would make the AGREEMENT more onerous, the CLAIMANT bore the 30% increase in tariffs –which amounted to a total loss of $1,250,000 USD– in order to comply with his obligation of delivering the goods and in light of the good faith shown by the RESPONDENT to adapt the price.

c. The causality between the breach and the detriment

91. In concordance with the aforementioned, there is a strict correlation between the breach of the AGREEMENT and the detriment or loss of the CLAIMANT. By paying the 30% increase in tariffs, the CLAIMANT did not only lose his profit margin of 5%, but also increased his costs by 25%. In this respect, though not being obliged to, the CLAIMANT bear such increase on costs due to the good faith shown by the RESPONDENT and also in order to comply with his obligation to deliver the goods.

92. In addition, CLAIMANT requested the RESPONDENT to comply with his obligations under the AGREEMENT (Clause 12) and thus an adjustment on the price due to such increase on costs as Article 62 CISG states. Therefore, if the RESPONDENT failed to reach an agreement regarding the adjustment of the price and failed to perform his obligations under Clause 12 (Responsibility to bear any subsequent increase on costs), then the non-performance by the RESPONDENT caused the detriment of the CLAIMANT at stake.

d. Foreseeability of the loss by the party in breach and the non-limitation of the restitution

93. As vastly interpreted in the doctrine [**Bianca and Bonell, p. 541**], the CLAIMANT –the party claiming damages– is not in charge of proving that the Party in breach (RESPONDENT) really foresaw the loss, but rather that he was in a reasonable position to be aware and foresee a potential loss. In this regard, the RESPONDENT was well aware of the financial crisis of the CLAIMANT and that the AGREEMENT was meant to increase its revenues in order to be able to pay all his

debts. To be in a position to achieve that, the CLAIMANT made sure to bear the least risks involving any subsequent cost that would further undermine his financial situation, as in the past he had experience a similar situation that almost resulted in his insolvency. In 2014, CLAIMANT sold three mares to farms in Danubia under a DDP INCOTERM and as the government of Danubia imposed new stricter health and safety requirement after the conclusion of the contract, the CLAIMANT had to bear a 40% increase on costs which almost resulted in its insolvency. In spite of the case being widely reported, the CLAIMANT told the RESPONDENT during the negotiations that they were not willing to take any further risk associated with a subsequent change in costs due to their past experiences that could increase it up by 40% and destroy the commercial basis of the deal.

94. From the facts stated above, it can be deducted that the RESPONDENT was aware of a possible detriment of 40% if the CLAIMANT had to bear a similar cost as to the one in Danubia due to new state regulations. For that reason, in order not to destroy the commercial basis of the AGREEMENT, the DDP INCOTERM extent was changed in the sense that the RESPONDENT would have to bear any subsequent increase in the cost. Therefore, if the RESPONDENT was in a position where he foresaw a possible detriment of up to 40% on costs for the CLAIMANT and he even acknowledge that situation by agreeing to Clause 12 of the AGREEMENT, CLAIMANT is entitled to receive the payment for the 30% increase on costs that he had to bear. It cannot be argued that the amount of $1,250,000 USD (30% increase on costs) should be reduced, as the only limitation to its reduction is that the loss does not exceed the amount that the party in breach could have foreseen. Thus, since the RESPONDENT knew that the losses for the CLAIMANT could be up to 40%, then the actual loss of 30% should be covered by RESPONDENT.

95. Furthermore, it can be argued that the foreseeability of the potential loss needs to be confined to the extent of the terms of the contract; however, the foreseeability does not confine to a certain time of the formation of the contract. Instead, it has been acknowledged that such time frame can refer to both the negotiations and even after the conclusion of the contract. Hence, even if the party in breach could not have possibly foreseen those consequences in the formation of the contract, it is feasible that the party, after concluding the contract, had become aware of certain circumstances that would make a reasonable person able to foresee a possible detriment in the other party. Hence, even in the RESPONDENT were to argue that he was not aware of the potential loss during the formation of the contract, after its conclusion and upon the last delivery of the semen the RESPONDENT was told about the 30% increase in tariffs that the CLAIMANT had to bear in order to comply with the delivery, though not being responsible to bear such

increase. Respondent's Exhibit 4 clearly shows this circumstance. As stated on it, Mr. Shoemaker made sure that the tariff increase would apply to the frozen race horse semen –a fact that was confirmed to him by the customs authority upon consultation–, and he was aware that if he were to reject the price increase outright straight away, the CLAIMANT would not comply with the final delivery. This demonstrates that he acted willingly and, as a result, he told the CLAIMANT that they will certainly find an agreement on the price for that increase. Thus, his statement also proves RESPONDENT's lack of good faith and demonstrates that CLAIMANT is entitled to receive compensation and the payment of the damages in accordance with Article 74 under the CISG.

**e. <u>Article 79 CISG exemption result non-applicable to discharge the Respondent from bearing the extra costs and thus the increase in price</u>**

96. Article 79 CISG exempts the party in breach from paying damages if his non-compliance with his obligations was due to an impediment beyond his control that he could not have possibly been in a position to foresee and avoid it at the time of the conclusion of the contract, and neither to overcome it. This exemption, however, cannot be argued by the RESPONDENT as it results non-applicable to the present case, and if argued, he would have the burden of the proof.

97. As interpreted in UNCITRAL Digest of Case Law on the CISG, in order for a change in circumstances to be considered an impediment, such change ought not to have been reasonably foreseen (UNCITRAL Digest, p. 388). In concordance, if the RESPONDENT were to argue his exemption, the analysis should be focused on whether or not the party assumed the risk of the event that caused him not to comply with his obligations [**UNCITRAL Digest, p. 389**]. In this regard, as it has been argued, the RESPONDENT was well aware of the possible detriment for the CLAIMANT if he were not to bear an increase on costs due to new state regulations –this is also confirmed by the fact that CLAIMANT is going through a financial crisis, whereas the RESPONDENT is fully solvent. Such awareness led both Parties to agree on Clause 12 of the AGREEMENT and for the RESPONDENT to assume the risk of an increase on costs by obliging himself to bear any subsequent change in the costs if arisen.

ii. Claimant is entitled to receive full compensation as Article 77 CISG results non-applicable to reduce the amount of damages

98. Furthermore, Article 77 CISG is not applicable in the present case to reduce the total cost of damages. Under such provision, the RESPONDENT bears the burden of proof that the CLAIMANT did not take any reasonable measure to mitigate the loss. However, in the present case, apart from the RESPONDENT not alleging anything against it, from the facts of the case it is deducted that the CLAIMANT did take reasonable measures to mitigate the extent of the loss.

If the CLAIMANT had not paid the 30% of increase on the due to the new tariffs, the CLAIMANT would have entered in breach –as paying the tariffs was a condition to fulfill its obligations to deliver the last shipment of 50 semen doses. Therefore, by paying the tariff imposition, the CLAIMANT did not only mitigate the loss, but also prevent himself from breaching the contract and thus having to pay for damages.

99. For all the reasons mentioned above, CLAIMANT is entitled to the payment of US $1,250,000, or any other amount resulting from the adaptation of the price

## IV. REQUEST FOR RELIEF

In the light of the above reasons, Counsel for CLAIMANT respectfully requests the Tribunal to find that

1. This Tribunal has jurisdiction and powers under the arbitration agreement to adapt the contract.
2. CLAIMANT is entitled to submit evidence from the other arbitration proceedings.
3. CLAIMANT is entitled to the payment of US $1,250,000 or any other amount resulting from the adaptation of price
4. RESPONDANT is responsible to cover all costs resulting from the arbitration proceedings

**CERTIFICATE**

We hereby certify that no other person than a student team member appearing on the registration and the cover page has participated in the writing of this memorandum

(Signed)

Julieta Bejar Luna

(Signed)

Hernando Felix Villagran

(Signed)

Oscar Andres Figueroa Diaz