SIXTEENTH ANNUAL WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR CLAIMANT

SRI LANKA LAW COLLEGE

COLOMBO, SRI LANKA

ON BEHALF OF:	**AGAINST:**
PHAR LAP ALLEVAMENTO	BLACK BEAUTY EQUESTRIAN
RUE FRANKEL 1	2 SEABISCUIT DRIVE
CAPITAL CITY	OCEANSIDE
MEDITERRANEO	EQUATORIANA
CLAIMANT	**RESPONDENT**

DAMITHU SURASENA | RAJINDA KANDEGEDARA

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STATEMENT OF FACTS

- The CLAIMANT (Phar Lap Allevamento) is a company registered and located in Capital City, Mediterraneo. It operates Mediterraneo's oldest and renowned stud farm, covering all areas of the equestrian sport.

- The RESPONDENT (Black Beauty Equestrian) in Oceanside, Equatoriana, is famous for its broodmare lines. Three years ago, Black Beauty decided to establish a racehorse stable.

- RESPONDENT approached CLAIMANT to purchase 100 doses of frozen semen of CLAIMANT's renowned stallion Nijinsky III, taking advantage of the status quo as the ban against artificial insemination was lifted in Equatoriana.

- Although CLAIMANT was surprised at the nature of the order, CLAIMANT agreed to provide the frozen semen to RESPONDENT on condition that the frozen semen sold to the RESPONDENT cannot be resold by the RESPONDENT unless permission from the CLAIMANT is obtained.

- RESPONDENT insisted that the contract is to follow a delivery DDP. Furthermore, RESPONDENT did not accept the contract to be subjected to the law and courts of Mediterraneo. However, RESPONDENT mentioned that RESPONDENT could accept the law of Mediterraneo if courts of Equatoriana had jurisdiction to hear the disputes.

- CLAIMANT accepted the delivery obligation of DDP. However, CLAIMANT requested that the price be increased by 1000 USD per dose. Furthermore, CLAIMANT informed

RESPONDENT that no more risks associated with the changed delivery terms will be borne by the CLAIMANT.

- CLAIMANT informed RESPONDENT about the need for a Hardship clause to be included in the contract. CLAIMANT while stating that the jurisdiction of courts of Equatoriana was unacceptable, expressed willingness to agree on arbitration in Mediterraneo.

- RESPONDENT agreed that the contract would be governed by the law of Mediterraneo. RESPONDENT proposed a draft Dispute Resolution Clause which provided that Equatoriana be the seat of the arbitration and Equatorian law govern the arbitration agreement.

- CLAIMANT informed RESPONDENT that according to CLAIMANT's internal policy, the Creditor's Committee's approval is mandatory if the contract is to be submitted to a foreign law or provides for dispute resolution in the country of counterparty. However, CLAIMANT agreed to arbitration in a neutral country.

- CLAIMANT mentioned that Danubia as the place of arbitration would be acceptable on the condition that the contract would be governed by the law of Mediterraneo. CLAIMANT further proposed to include ICC Hardship clause in the contract.

- Both CLAIMANT's and also RESPONDENT's negotiators who were carrying out the negotiations for the respective parties, were involved in a severe car accident and were hospitalized. Therefore the contract was finalized by other substitute representatives who were not familiar with the status quo of the negotiations done by their predecessors.

ISSUE 1 : THE TRIBUNAL HAS JURISDICTION UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

1. The Tribunal has jurisdiction under the arbitration agreement to adapt the contract since, the arbitration agreement is governed by the law of Mediterraneo **(A)**; the interpretation of the arbitration agreement under the law of Mediterraneo vests on the Tribunal the power to adapt the contract **(B)**.

A. The arbitration agreement is governed by the law of Mediterraneo

2. The RESPONDENT claims that the arbitration agreement is governed by the *Lex Arbitri* i.e law of Danubia ***[Ans. NoA, paras 5-8]***. A Dépeçage Choice of Law would result only out of two circumstances: either by virtue of the parties' agreement or by virtue of the default Choice of Law Rules ***[Born, pg1600]***. However, this claim is baseless as, the law of Mediterraneo applies to the arbitration agreement as the parties did not agree to have a separate law governing the arbitration agreement **(I)**; Parties agreed that the proper law of the contract would also govern the arbitration agreement **(II).**

I. The law of Mediterraneo applies to the arbitration agreement as the parties did not agree to subject the arbitration agreement to a separate law

3. RESPONDENT claims that the parties agreed on the law governing the arbitration agreement ***[Ans. NoA, para 8]***. For a Dépeçage Choice of Law to apply, there needs to be an agreement by the parties to that effect ***[Union of India v. McDonnell Douglas Corp]***. However, there is no proof of such an agreement to that effect. Therefore the law of Mediterraneo applies to the arbitration agreement since neither an express agreement **(a)** nor an implied agreement **(b)** by the parties to that effect existed; and in any case, the *lex fori* does not apply by default by virtue of such forum being selected **(c)**.

a. <u>There was no express agreement by the parties for Danubian law to govern the arbitration agreement</u>

4. RESPONDENT claims that parties agreed to the applicability of Danubian law to the arbitration agreement ***[Ans. NoA, para 8]***. A different Choice of Law would apply as such if the parties have agreed to it ***[Born, pg 1600]***. Such an agreement could be either expressed or implied ***[Union of India v. McDonnell Douglas Corp]***. In this case parties did not have an express agreement to that effect. The only express agreements pertaining to Choice of Laws were:

- To subject the Sales Agreement to the law of Mediterraneo including the United Nations Convention on Contracts for the International Sale of Goods (CISG) ***[CE C5, Clause 14]***
- To administer any arbitration proceedings under the HKIAC Rules ***[CE C5, Clause 15]***.Therefore, in the absence of any implied agreement to the contrary (this will be analyzed in the succeeding paragraph), it is the law of Mediterraneo including the CISG that govern the arbitration agreement, since the parties' have expressly agreed to it.

b. <u>There was no implied agreement by the parties for Danubian law to govern the arbitration agreement</u>

5. RESPONDENT claims that the parties agreed to apply the law of Danubia to the arbitration agreement ***[Ans. NoA, para 8]***. For a different Choice of Law to apply there needs to be an agreement by the parties ***[Union of India v. McDonnell Douglas Corp]***. However, there is neither an express agreement by the parties to that effect ***[Memo, para 4]*** nor an implied agreement. Since Danubia being the *lex fori* and is a contracting state to the CISG ***[PO1.III.4]*** statements made by and other conduct of the parties shall be interpreted according to their intent as per the CISG ***[CISG Art. 8(1), 8(2)]***. Although the RESPONDENT claims that they

intended to govern the arbitration agreement by the place of arbitration ***[Ans. NoA, para 5]***, the relevant circumstances do not point to an agreement to it. The e-mail correspondence as found in the exhibits produced by both CLAIMANT and RESPONDENT marked C 1- 4 ***[Rec. 09 – 12]*** and R 1-2 ***[Rec. 33-34]***, along with the witness statements R 3, R 4 ***[Rec. 35, 36]*** and C 8 ***[Rec. 17]*** do not point to such a fact. The RESPONDENT knew or could not have been unaware ***[CISG Art. 8(1)]*** of the consistent jurisprudence in Mediterraneo that in sales contracts governed by the CISG, the CISG itself also applies to the arbitration agreement ***[PO1.III.4]***. Furthermore, a reasonable person as the same kind of the RESPONDENT ***[CISG Art. 8(2)]*** who would have been aware of that fact since their legal department could not have overlooked it, being "consistent" jurisprudence. Therefore, it was impliedly agreed that the law of Mediterraneo would apply to the arbitration agreement as well.

c. <u>In any case, the *lex fori* does not apply by default by virtue of such forum being selected</u>

6. REPONDENT claims that the parties did not agree on the application of the law of Mediterraneo to apply to the arbitration agreement ***[Ans. NoA, para 14]***, and therefore the relevant circumstances show that Danubian law applies to it. However, there was neither an express ***[Memo A.I(a)]*** nor implied ***[Memo A.I(b)]*** agreement to that effect. Absent such an agreement, the *lex fori* does not enjoy a default position for it to apply by virtue of the selection of that particular forum, since the Tribunal imputes a choice of law to which the case has its closest connection ***[Tweeddale, para 6.66]***. In this case the parties have not agreed on a choice of law. Accordingly, the next step for the Tribunal would be to ascertain the legal system that has the closest and most real connection to the case.

II. <u>Parties agreed that the proper law of the contract would also govern the arbitration agreement</u>

7. RESPONDENT claims that parties did not agree to the application of the law of Mediterraneo to the arbitration agreement ***[Ans. NoA, para 14]***. However, there is an express agreement by the parties for the law of Mediterraneo as the proper law of the contract ***[CE C5, Clause 14]***. Usually the arbitration agreement follows the proper law of the contract as it often forms as part of the contract ***[Russell, para 2-088]***. Therefore parties have impliedly agreed that the proper law of the contract would also govern the arbitration agreement **(a)**; In any case the proper law of the contract applies by default to the arbitration agreement as well **(b)**.

a. <u>Parties impliedly agreed that the proper law of the contract would also govern the arbitration agreement</u>

8. Parties agreed on the law of Mediterraneo as the proper law of the contract ***[CE C5, Clause 14]*** and therefore it was implied that such proper law applies to the arbitration agreement as well. Statements and other conduct of the parties are to be interpreted according to their intent as per the CISG ***[Art. 8(1), 8(2)]*** since Danubia being the *lex fori* and a contracting state to the CISG ***[PO1.III.4]***. Parties were of the stance that inserting an express provision to vest the Tribunal with powers to adapt the contract was "not legally necessary" ***[CE C8]***. This implies that the parties never considered Danubian law to apply as under Danubian law an express provision to that effect would be mandatory ***[Ans. NoA, para 13]***. In such a situation it would only make sense for the parties to have agreed on the law of Mediterraneo as under that law arbitration agreements are interpreted broadly and brings such a claim within jurisdiction ***[NoA, para 16]***. Therefore parties have impliedly agreed that the proper law of the contract i.e the law of Mediterraneo would also govern the arbitration agreement.

b. <u>In any case the proper law of the contract applies by default to the arbitration agreement as well</u>

9. Parties agreed that the contract be governed by the law of Mediterraneo ***[CE C5, Clause 14]***. In contrast to Civil law jurisdictions, common law jurisdictions do not consider great extent of separation of the arbitration clause from the contract ***[Born, pg 352].*** Therefore, an arbitration agreement is separable only in certain circumstances **(i)**; an express choice of law clause is needed to derogate from an existing express choice of law clause **(ii)**.

i. An arbitration agreement is separable only in certain circumstances

10. RESPONDENT claims that the arbitration agreement was intended to be governed by ***[Ans. NoA, para 8]***. However parties intended to govern the arbitration agreement as well from the proper law of the contract ***[Born, pg 352]***.

ii. An express choice of law clause is needed to derogate from an existing express choice of law clause

11. Parties agreed to the law of Mediterraneo as proper law of contract ***[CE C5, Clause 14]***. Therefore, to subject the arbitration agreement to a different law, there would need an express agreement ***[Luxor ltd v Cooper]***. Since there is no express agreement to that effect, parties' agreement on proper law applies to the arbitration agreement as well.

B. The interpretation of the arbitration agreement under the law of Mediterraneo vests on the Tribunal the power to adapt the contract

12. Since it is evident that parties have agreed to cover the arbitration agreement as well from the proper law, the fact that the law of Mediterraneo follows a broad interpretation ***[NoA, Rec. 7]***, the arbitral tribunal could be vested with the powers to adapt the contract.

ISSUE 2 : SHOULD THE CLAIMANT BE ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS ON THE BASIS OF THE ASSUMPTION THAT THIS EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM

A. ARBITRAL TRIBUNAL HAS AUTHORITY TO RULE ON ADMISSIBILITY OF EVIDENCE

13. It has been undisputedly agreed by the CLAIMANT and the RESPONDENT in the Arbitration Agreement dated 06th May 2017 that any dispute arising out of the contract would be referred to and resolved by HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted ***[CE C5, Clause 15]***. Further the parties have agreed to conduct the proceedings on the basis of the newest version of the Hong Kong Arbitration Rules, i.e. the HKIAC Rules 2018, which officially enters into force in November 2018 during the telephone conversation had with the Arbitral Tribunal on 04th October 2018 ***[Procedural Order No. 01]***. Therefore it has been expressly agreed that the Procedural Law which governs the Arbitration would be the HKIAC Rules 2018.

14. Therefore the issue of admissibility of illegally obtained evidence either through a **Breach of a Confidentiality Agreement (A)** or **Through an Illegal Hack of Respondent's Computer System (B)** should be decided on the Procedural Rules of the Arbitration Agreement, namely the HKIAC Rules 2018.

B. ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE THOUGH A BREACH OF A CONFIDENTIALITY AGREEMENT

15. Confidentiality of an Arbitral Agreement administered under the HKIAC Rules 2018 is governed by Article 45 of the rules. Article 45.3 (a) (i) states 'Article 45.1 does not prevent the publication, disclosure or communication of information referred to in Article 45.1 by a party or by party representative to protect or pursue a legal right or interest of the party. This Article is applicable in this instance due to the fact that a similar condition has arisen

in a separate Arbitration proceeding as per the CLAIMANT'S letter to the Tribunal dated 02nd October 2018 ***[Rec. 49]***, where the RESPONDENT in this Arbitral proceeding had requested for an adaption of the price invoking unforeseeable change in circumstance. The facts in the other Arbitration proceeding is vice versa of this Arbitration proceeding, where the RESPONDENT is negatively affected. Due to the fact that the RESPONDENT is contradicting with its own arguments to benefit itself in bad faith it can be evidently stated that the disclosure of information with regard to the other Arbitral proceeding by the other Party concerned has been made to protect an interest of the party.

16. Present view on confidentiality of Arbitration Agreements is that it is not absolute. It is stated by Mason CJ; "Moreover, it has to be acknowledged that, for various reasons, complete confidentiality of the proceedings in an arbitration cannot be achieved. First it it common ground between the parties that no obligation of confidence attaches to witnesses who are therefore at liberty to disclose to third parties what they know of the proceedings" ***[Esso Australia Resources Ltd v Plowman, (1995) 183 Commonwealth Law Reports 10; (1995) 11Arbitration International (No 3), (1996) XXI Ybk Comm Arbn 137, 149]***.

17. Peter Gross QC, sitting as the Deputy Judge of the High Court, held that where there was a custom to refer to awards then this could amount to an agreement to permit disclosure ***[The Hamtun (owners) v The St John (owners), (1999) 1 All ER (Comm) 587]***. This refers to the fact that since there is a custom that awards of Arbitral Tribunals are capable of being referred to courts, which ipso facto permits parties to disclose facts of the Arbitral proceedings. Therefore it is said that express confidentiality agreements should be signed for absolute confidentiality.

18. Dr. Julian Lew has stated "although privacy may be perceived as an advantage of arbitration over national courts, there is no general binding rule that arbitration proceedings are private and confidential precluding the parties divulging details to third parties. The extent to which arbitration proceedings, the content, the nature of the dispute and all aspects of

the arbitration remain confidential is, in my view, a matter of agreement between the parties ***[Expert Report of Dr Julian Lew in Esso v Plowman (1995) 11 Arbitration International (No 3) 283]***. The mere disclosure of facts of an Arbitral proceeding cannot be regarded as a breach of confidentiality agreement.

19. Potter LJ had acknowledged that the confidentiality obligation was not absolute and that there were a number of exceptions to that obligation ***[Ali Shipping v Shipyard Trogir, (1998) 2 All ER 136]***. Thisfurther strengthens the argument that confidentiality related to arbitral proceedings are not deemed to apply on a blanket basis. It has exceptions to the general norm of confidentiality.

20. Further scholarly comments as below establish the fact that contemporary arbitral tribunals do not view confidentiality as absolute. Parties do not have an express obligation to adhere to confidentiality unless stated so expressly,

- Absolute confidentiality in arbitral proceedings would result in a paradox ***[Jan Paulsson and Nigel Rawding, 'The Trouble with Confidentiality' (1995) Arbitration International 303]***.

- It should no longer be presumed that arbitration proceedings will be confidential. The issue of confidentiality is procedural and therefore determined by the *lex arbitri* ***[Andrew Tweeddale and Keren Tweeddale, 'Arbitration of Commercial Disputes' (2005) International and English Law and Practice]***.

- If parties with for the arbitration to be confidential then they should include and express confidentiality agreement within the arbitration agreement.This can be achieved when the parties are drafting the arbitration agreement or can be achieved by reference to set of rules which specifically require confidentiality ***[J***

Paulsson and N Rawding, 'The Trouble with Confidentiality' (1995) 11 Arbitration International (No 3) 303 at 314-20].

- Legal advisers cannot now assume now that any court will hold that an arbitration agreement is confidential and, as recently noted, 'with respectto confidentiality in international commercial arbitrations, nothing should be taken for granted' ***[L Yves Fortier, 'The Occasionally Unwarranted Assumption of Confidentiality' (1999) 15 Arbitration International (No 2) 131 at 140]***.

C. ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE THOUGH A HACK OF THE RESPONDENT'S COMPUTER SYSTEM

21. Admissibility of Evidence of an Arbitral Agreement administered under the HKIAC Rules 2018 is governed by Article 22 (Evidence and Hearings) of the rules. Article 22.2 states 'The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence. Admissibility of evidence is generally seen as a procedural matter ***[Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, Comparative International Commercial Arbitration (The Hague: Kluwer Law International, 2003), 561]***.

22. In the arbitral context, it will usually be subject to broad discretionary rights of the tribunal. Numerous rules indicate that the tribunal shall determine the admissibility, relevance, materiality and weight of evidence ***[UNCITRAL Rules 2010 Art. 27(4); HKIAC Rules Art. 23.10; Swiss Rules 2012 Art. 24.2; SCC Rules Art. 26(1); IBA Rules on the Taking of Evidence in International Arbitration 2010 Art. 9.1]***.

23. The ICSID Tribunal may be said to have set out a principle that an arbitral tribunal can admit as evidence data or documents that were illegally obtained, for instance by hacking a computer network. In the case, the Kazakhstan government's computer network was hacked and, consequently, the claimants obtained access to and relied on thousands of

confidential documents that were published following the hacking ***[Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (ICSID Case No. ARB/13/13)]***.

24. Evidence which could not have been obtained legally by the British Government was admitted on the basis that the British Government did not have the opportunity to obtain valuable direct evidence legally ***[Corfu Channel, United Kingdom v Albania, Judgment, Merits, ICJ GL No 1, [1949] ICJ Rep 4, ICGJ 199 (ICJ 1949), 9th April 1949, International Court of Justice [ICJ]]***.

25. Further scholarly comments as below establish the fact that contemporary arbitral tribunals do not consider illegally obtained evidence to be prima facie inadmissible. It is now established that Arbitral Tribunals should look into the facts and relevancy of the evidence rather than try to establish the technicality on how it was obtained.

- The conclusion that can be drawn is that nothing prevents a Tribunal from admitting into evidence documents that may have been stolen or otherwise unlawfully obtained ***['Admissibility of Improperly Obtained Data as Evidence in International Arbitration Proceedings' by Brigitta John from Wolters Kluwer]***.

- The admissibility of evidence in international arbitration has long been a debated issue. A piece of evidence must be admitted in order to be considered by the arbitral tribunal, which will then evaluate its probative value in light of the facts of the dispute. Nothing prevents a tribunal from admitting into evidence documents that may have been stolen or otherwise unlawfully obtained ***[Konstantin Pilkov. Evidence in International Arbitration: Criteria for Admission and Evaluation. Arbitration. – 2014. – Vol. 80. – Issue 2 2014]***.

26. With reference to the case laws and scholar comments brought up in light of exceptions made on confidentiality on disclosing facts of other arbitral proceedings, the admissibility

of illegally obtained evidence and admittance of the above mentioned facts by an Arbitral Tribunal under the Rules of HKIAC 2018 it would be much meaningful to bring to this Tribunals notice that Claimant should be entitled to submit evidence from the other arbitral proceeding even on the basis of the assumption that this evidence has been obtained either through a breach of a confidentiality agreement of through an illegal hack of the Respondents computer system.

ISSUE 3 : IS CLAIMANT ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE

I. **UNDER CLAUSE 12 OF THE CONTRACT**

II. **OR UNDER THE CISG?**

27. It has been undisputed by the CLAIMANT and the RESPONDENT during Notice of Arbitration or during the Answer to the Notice of Arbitration dated 31st July 2018 and 24th August 2018 respectively that the law governing the Main Contract would be the Domestic Law of Mediterraneo. This has been stated in the Main Contract as "This Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG)" ***[CE C5, Clause 14]***.

28. Further considering the agreements between the parties and considerations the Arbitral Tribunal had made in the order; "It is undisputed between the Parties that Equatoriana, Mediterraneo and Danubia and Contracting States of the CISG. The general contract law Equatoriana and Mediterraneo is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts. Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments. There is consistent jurisprudence in Mediterraneo that in sales contracts governed by the CISG, the later also applies to the conclusion and interpretation of the arbitration clause contained in such contracts" ***[Procedural Order No. 01]***. It has been expressly agreed that the law governing the Main Contract would be the law of Mediterraneo and therefore it would be the UNIDROIT Principles that would apply for the Main Contract.

29. "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"* ***[CE C5, Clause 12 (Hardship Clause)]***.

30. "Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship" ***[Article 6.2.1, UPICC]***. "The principle of the binding character of the contract is not however an

absolute one. When supervening circumstances are such that they lead to a fundamental alteration of the equilibrium of the contract, they create an exceptional situation referred to in the Principles as "hardship" and dealt with in the following Articles of this Section" ***[Comment 2. Change in circumstances relevant only in exceptional cases, under Article 6.2.1 of UPICC]***.

31. "There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

a) the events occur or become known to the disadvantaged party after the conclusion of the contract;"

- At the time of the negotiation of the agreement between the parties no such tariff had been imposed by the government of Equatoriana. The contract had been concluded on 06th May 2017 ***[CE C5]***.

- The tariff had been imposed on the 19th December 2017 by the Equatoriana government ***[CE C6]***.

- The Claimant had been under the impression that the tariff would not be imposed on racehorse semen since it is generally categorized differently from pigs, sheep or cattle when referred to as Agricultural Goods ***[Notice of Arbitration, Clause 11]***.

- The Claimant was informed by the Customs Authorities on the 20th January 2018 the fact that semen used for artificial insemination in racehorse breeding is covered under the newly imposed tariffs on Agricultural Products since the tariff covered all animal products ***[CE C7 & CE C8]***.

b) "the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;"

- "The retaliation as well as the size of the tariffs came as a big surprise even to informed circles. Equatoriana has always been one of the biggest supporters of the existing system of free trade. Previous restrictions imposed by other countries affecting imports from Equatoriana have - with one exception - never resulted in direct retaliatory measures. Instead, the various governments have always tried to solve disputes amicably or via invoking the relevant WTO dispute resolution mechanism" ***[CE C6]***.

- The Claimant could not have foreseen the imposing of such tariff as retaliation by the Equatoriana Government due to two main factors; Firstly, since a 25% tariff imposed had neither been a part of any strategy papers released earlier by the new President of Mediterraneo nor of the election manifesto ***[Notice of Arbitration]***. Secondly since Equatoriana had been an ardent supporter of free trade and have never retaliated previously to such imposed tariffs ***[CE C6]***.

c) "the events are beyond the control of the disadvantaged party; and

d) the risk of the events was not assumed by the disadvantaged party" ***[Article 6.2.2 (Definition of Hardship), UPICC]***.

32. "(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based".

- The Claimant has requested to initiate renegotiation without undue delay on the 20th January 2018 as soon as it had been informed by the Customs Authorities of the imposing of the new tariff on the shipment ***[CE C7]***.

- The grounds on why renegotiations should be conducted has been clearly mentioned by the Claimant upon first instance of communication ***[CE C7]***.

"(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance".

- The Claimant had not withheld its performance. The shipment had been made upon clear indication by the Respondent that renegotiations had been started ***[CE C8]***.

"(3) Upon failure to reach agreement within a reasonable time either party may resort to the court".

- During renegotiation proceedings subsequent to the shipment the parties had failed to reach to an agreement due to the unfair dealing of the Respondent ***[CE C8]***.

"(4) If the court finds hardship it may, if reasonable,

(a) terminate the contract at a date and on terms to be fixed, or

(b) adapt the contract with a view to restoring its equilibrium" ***[Article 6.2.3 (Effects of Hardship), UPICC]***

33. "Although nothing is said in this Article to that effect, both the request for renegotiations by the disadvantaged party and the conduct of both parties during the renegotiation process are subject to the general principle of good faith and fair dealing (see Article 1.7) and to the duty of co-operation (see Article 5.1.3). Thus, the disadvantaged party must honestly believe that a case of hardship actually exists and not request renegotiations as a purely tactical maneuver. Similarly, once the request has been made, both parties must conduct the renegotiations in a constructive manner, in particular by refraining from any form of obstruction and by providing all

the necessary information" ***[5. Renegotiations in Good Faith (Page 225), under Article 6.2.3 of UPICC]***.

34. "(1) Each party must act in accordance with good faith and fair dealing in international

trade.

(2) The parties may not exclude or limit this duty" ***[Article 1.7 (Good faith and fair dealing), UPICC]***.

- The Respondent had not conducted the renegotiations in good faith, this is evident by the inducement made by Mr. Shoemaker during the telephone conversation he had with Ms. Napravnik on the 21st Janurary 2018. This can be confirmed by the statement made by Mr. Shoemaker on behalf of the Respondent.
- "My primary concern was to ensure that the remaining 50 doses were actually shipped" ***[RE R4]***, this shows that the Mr. Shoemaker had no intention of carrying out fair dealing in good faith, he had only been interested in obtaining the shipment rather than dealing in good faith.
- "I knew that Claimant would not deliver if I were to reject their request outright" ***[RE R4]***, this makes it clear that Mr. Shoemaker had not been interested in renegotiations at any point during the conversation. He had been acting in bad faith to induce the Claimant to authorize the shipment.
- Therefore, rather than trying to find a solution for the issue arisen, Mr. Shoemaker dealt unfairly and in bad faith seizing the opportunity at hand.

35. Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations ***[Article 5.1.3 (Co-operation between parties), UPICC]***.

- Further it is brought to the Arbitral Tribunals notice that Ms. Kayla Espinoza, Respondent's CEO has not co-operated with the Claimant upon initiation of renegotiations.

- "When confronted with our discovery in a meeting of 12 February 2018 Ms. Kayla Espinoza, RESPONDENT's CEO, got very angry and aggressive. She shouted that she was fed up with the permanent additional requests from Phar Lap which, in her view, had no basis in the contract and was no longer be interested in a further cooperation with Phar Lap. She stopped the negotiations and refused to pay any additional amount for the tariffs" ***[CE C8]***.

PRAYER FOR RELIEF

For the foregoing arguments, CLAIMANT respectfully submits to the Tribunal, while dismissing all contrary requests and submissions by the RESPONDENT,

TO DECLARE THAT:

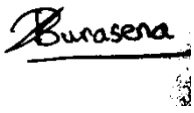
1. The Tribunal has jurisdiction to adapt the contract
2. Admit evidence Respondents other Arbitration
3. The Respondent is liable to pay the Claimant USD 1,250,000

TO ORDER THE RESPONDENT TO:

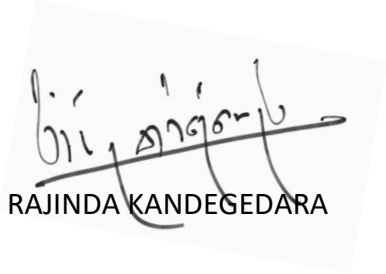
2. Pay the Claimant the amount of USD 1,250,000;
3. Bear the costs of the arbitration.

CERTIFICATION

We hereby confirm that this memorial was written with no reference to any previous memorials by the undersigned



DAMITHU SURASENA



RAJINDA KANDEGEDARA