**SIXTEENTH ANNUAL**

**WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT**

**31 MARCH TO 7 APRIL 2019**

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# MEMORANDUM FOR RESPONDENT

**NATIONAL LAW UNIVERSITY, JODHPUR**

**ARBITRAL PROCEEDINGS- HKIAC-A18128**

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


**COUNSELS**

ABHINAV GUPTA | ADITYA SURESH | AMAN GUPTA

MAYURI MANWANI | SARTHAK SINGLA

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# LIST OF ABBREVIATIONS

| | |
|---|---|
| ¶(¶) | paragraph(s) |
| % | percent |
| § | section |
| ANoA | Answer to Notice of Arbitration, dated 24 August 2018 |
| Ans. | Answer |
| Apr. | April |
| Arg. | Arguments in this memorandum on behalf of Black Beauty Equestrian(RESPONDENT) |
| Art(t). | article(s) |
| BCCI | Bulgarian Chamber of Commerce and Industry |
| BGH | Bundesgerichtshof |
| BV | Bestolen Vennootschap met beperkte aansprakelijkheid |
| c. (small c) | Clause |
| CEO | Chief Executive Officer |
| Chap. | Chapter |
| CIETAC | China International Economic & Trade Arbitration Commission |
| Cir. | Circuit |
| Cl. | Claimant |
| Cl. Memo | Claimant Memorandum on behalf Phar Lap Allevamento(CLAIMANT) |

| | |
|---|---|
| CLOUT | Case Law on UNCITRAL Texts |
| corp. | Corporation |
| DAL | Danubian Arbitration Law |
| DDP | Delivered Duty Paid |
| e.g. | exepmli gratia |
| ed. | Edition |
| eds. | Editors |
| et al. | et alia/et aliae/et alii |
| et seq(q.) | et sequentes |
| etc. | et cetera |
| Exh. | Exhibit |
| FSSA | Frozen Semen Sales Agreement |
| HCCIA | Hungarian Chamber of Commerce and Industry Arbitration |
| HKIAC | Hong Kong International Arbitration Centre |
| i.e. | id est |
| IBA | International Bar Association |
| ICC | International Chamber of Commerce |
| ICSID | International Centre for Settlement of Investment Disputes |
| id. | ibidem |
| Judg. | Judgement |
| Letter Fasttrack | Letter by Julia Clara Fasttrack on 3 October 2018 |

| | |
|---|---|
| Letter Langweiler | Letter by Joseph Langweiler on 2 October 2018 |
| LG | Landgericht |
| ltd. | limited |
| MCPFT | Mexican Commission for the Protection of Foreign Trade |
| no. | Number |
| NoA | Notice of Arbitration dated 31 July 2018 |
| OGH | Austrian Oberster Gerichtshof |
| OLG | Oberlandesgericht |
| p(p). | page(s) |
| P.O. 1 | Procedural Order No. 1 of 5 October 2018 |
| P.O. 2 | Procedural Order No. 2 of 2 November 2018 |
| PCA | Permanent Court of Arbitration |
| PFTCC | Polish Foreign Trade Chamber of Commerce |
| PICC | UNIDROIT Principles of International Commercial Contracts |
| Res. | Respondent |
| req. | request |
| RFCCI | Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry |
| s.c. | sub clause |

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|---|---|
| Sulamerica Case | Sulamerica Cia Nacional De Seguros S.A. and others v. Enesa Engenharia S.A and others, [2012] EWCA Civ 638 (UK) |
| TF | Tribunal federal, Lausanne |
| UK | United Kingdom |
| UN | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNIDROIT | International Institute for the Unification of Private Law |
| USA | United States of America |
| v. | versus |
| Vis East Rules | The Rules, Sixteenth Annual Willem C. Vis (East) International Commercial Arbitration Moot |
| viz. | Namely |
| Vol. | Volume |
| VIAC | Vienna International Arbitration Centre |
| WTO | World Trade Organization |
| YBCA | Yearbook Commercial Arbitration |

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## STATEMENT OF FACTS

The PARTIES to this arbitration are **Phar Lap Allevamento** [*hereinafter* "CLAIMANT"], and **Black Beauty Equestrian** [*hereinafter* "RESPONDENT"] [Collectively "the PARTIES"].

**CLAIMANT** is based in Capital City, Mediterraneo. It is known for providing champion stallions for breeding purposes in the racehorse section. It additionally provides frozen semen for artificial insemination in other areas of equine sports.

**RESPONDENT** is based in Oceanside, Equatoriana. It is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions.

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| **21 March 2017** | RESPONDENT contacts CLAIMANT inquiring about the availability of Nijinsky III's semen for its newly-started racehorse breeding programme. Since Equatoriana had only temporarily lifted the ban on artificial insemination for racehorses, RESPONDENT invites an offer for 100 doses of Nijinsky III's frozen semen. |
| **24 March 2017** | CLAIMANT offers 100 doses of Nijinsky III's semen, at a price of US$ 99,500 per dose, delivery EXW Capital City, Mediterraneo. |
| **28 March 2017** | RESPONDENT insists on a delivery DDP, and also objects to the choice of law and forum selection clauses in CLAIMANT'S proposed contract. It conveys that it is not appropriate that Mediterranean law applies and Mediterranean courts have jurisdiction. |
| **31 March 2017** | CLAIMANT informs RESPONDENT that it would accept a delivery DDP against a price increase of US$ 1,000 per dose and transfer of certain risks to RESPONDENT, in particular those associated with change in delivery terms. It also proposes the inclusion of a hardship clause to address such subsequent changes. |
| **10 April 2017** | RESPONDENT sends a first draft of the arbitration clause to CLAIMANT. This clause designated Equatoriana as the seat of arbitration, and also designated Equatoriana as the law governing the arbitration clause. RESPONDENT further asks CLAIMANT to present its objections to the proposed clause. |
| **11 April 2017** | CLAIMANT informs RESPONDENT that its internal policy does not permit it to submit the contract to a foreign law, or provide for dispute resolution in the country of the counter-party. Accordingly, CLAIMANT |

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| | largely accepted our proposal, and sent its revised version of the clause, after incorporating its objections into the same. |
| **12 April 2017** | The PARTIES meet at Danubia to discuss the scope of the hardship and forum selection clauses. However, both the chief negotiators meet with an accident, and are replaced for further negotiations and finalization of the contract. |
| **6 May 2017** | The PARTIES sign the FSSA, wherein CLAIMANT agrees to provide 100 doses of Nijinsky III's frozen semen, at a price of US$ 100,000 per dose, to be delivered in three shipments delivery DDP. Clause 12 of the FSSA protects CLAIMANT against hardship; Clause 14 provides for the Sales Agreement to be governed by the law of Mediterraneo, and the CISG; Clause 15 provides dispute resolution by arbitration in Danubia, according to the HKIAC Rules. |
| **23 November 2017** | Mediterraneo imposes 25% tariffs on agricultural products from Equatoriana. |
| **19 December 2017** | Equatoriana retaliates by imposing 30% tariffs w.e.f. 15 January 2018, on agricultural products from Mediterraneo. |
| **20 January 2018** | CLAIMANT informs RESPONDENT that the additional tariffs have been imposed on the final shipment, increasing the cost of the same by 30%. CLAIMANT requests RESPONDENT to find a solution in this regard before the final shipment is made. |
| **21 January 2018** | RESPONDENT'S Mr. Shoemaker indicated to CLAIMANT their need for urgent delivery of the remaining 50 doses. Mr. Shoemaker further indicates that if the contract provides for increased price in case of hardship, an agreement in this regard can be found. |
| **12 February 2018** | RESPONDENT CEO refuses to pay the additional amount demanded by CLAIMANT, stating that it had no legal basis in the contract. |
| **31 July 2018** | Commencement of Arbitration. |
| **2 October 2018** | CLAIMANT informs the tribunal of certain information that it has obtained regarding RESPONDENT'S other arbitration proceedings, and seeks to submit this as evidence in the current proceedings. |
| **3 October 2018** | RESPONDENT objects to the inclusion of such illegally obtained evidence in the current proceedings. |

## ARGUMENTS ADVANCED

### I. THE ARBITRAL TRIBUNAL HAS NEITHER THE POWER NOR THE JURISDICTION TO ADAPT THE CONTRACT, UNDER THE ARBITRATION CLAUSE IN THE FSSA.

**1.** CLAIMANT has requested the Tribunal to adapt the FSSA on the basis of the arbitration clause, and has consequently requested a remedial price, beyond the price agreed upon by the PARTIES [*Cl. Memo.,* ¶*1*]. Admittedly, there is no law expressly specified as governing the arbitration clause [*Cl. Memo.,* ¶*2*]. However, RESPONDENT submits that the Tribunal cannot adapt the contract on the basis of this clause, as the interpretation of the arbitration clause is governed by Danubian law, which does not allow for adaptation by arbitrators in the absence of express empowerment to do the same **[A]**. In any case, the Tribunal does not have the power to adapt on the basis of this arbitration clause **[B]**.

#### A. THE INTERPRETATION OF THE ARBITRATION CLAUSE IN THE FSSA IS GOVERNED BY DANUBIAN LAW.

**2.** The substantive validity and interpretation of an arbitration agreement are closely interrelated, and hence the law governing the arbitration agreement governs both its validity and interpretation [*Schwenzer & Jaeger, p. 323*]. Since the question as to whether an arbitration clause covers the dispute between the parties is a question of interpretation, it requires ascertaining of the law governing such clause [*Dicey, ¶16-022; Lew, p. 127; Dalmia v. National Bank (UK)*].

**3.** CLAIMANT has erroneously relied on the choice-of-law clause in the FSSA to contend that Mediterranean law applies to the interpretation of the arbitration clause [*Cl. Memo.,* ¶*3 et seq.*]. On the contrary, RESPONDENT submits that *first,* the closest connection test cannot be applied to the present dispute **[1].** Accordingly, based on applicable choice-of-law rules, Danubian law applies to the interpretation of arbitration clause because of the doctrine of separability **[2]**. Additionally, the PARTIES' express choice of Danubia as the seat of arbitration, is an implied choice of Danubian law as governing the arbitration clause **[3]**. Alternatively, the default rule under the NYC and DAL necessitates the application of Danubian law to the arbitration clause **[4]**. In any case, the application of the closest connection test would entail that Danubian law govern the arbitration clause **[5]**.

##### 1. The closest connection test cannot be applied to the present dispute.

**4.** CLAIMANT has contended that Mediterranean law has the closest and most real connection with the dispute, and accordingly identifies certain connecting factors which support this assertion [*Cl. Memo.,* ¶¶*22, 23*]. However, CLAIMANT provides no legal basis for the application of the closest

connection test to the present dispute. This test is inconsistent with the choice-of-law rule under the NYC, which provides for a default choice-of-law applying the law of the seat to the arbitration clause, in the absence of express or implied choice [*NYC, art. V, c. 1, s.c. (a); Judg. Apr. 10, 1990 (South Korea), p. 570*]. Reference to the choice-of-law rule under the NYC must be made at the pre-award stage, when deciding issues pertaining to the arbitration agreement [*TF, 1995 (Switzerland), p. 804; see, Della Sanara v. Fallimento (Italy), ¶2; Kroll et. al., ¶6-55*].

**5.** Furthermore, the closest connection test inherently poses the problem of unpredictable and conflicting results [*Born II, ¶46*], as even with the application of the test, no one obvious connecting factor emerges from which the applicable law can be established [*Gaillard, p. 224*]. Additionally, the closest connection test ignores both, the parties' objectives and commercial expectations in entering into international arbitration agreements [*Born, p. 543*]. Therefore, in the interest of protecting the PARTIES' commercial objectives by application of explicitly applicable rules, the closest connection test cannot be applied. Accordingly, in the present case, as the PARTIES are from signatories to the NYC [*Vis East Rules, ¶20*], the choice-of-law rule under it must be applied when deciding on the issue pertaining to the interpretation of the arbitration clause.

### 2. The arbitration clause, being a separate procedural agreement, is governed by Danubian law.

**6.** CLAIMANT has asserted that Mediterranean law may apply to the arbitration agreement without violating the doctrine of separability [*Cl. Memo., ¶¶7 et seq.*]. However, RESPONDENT submits that according to the doctrine of separability, the arbitration clause is a separate procedural agreement **[a]**. Consequently, the law of the seat of arbitration i.e. Danubian law, applies to the arbitration clause **[b]**.

#### *a. The arbitration clause in the FSSA is a separate procedural agreement.*

**7.** The doctrine of separability presumes that the international arbitration agreement is separable from the underlying contract [*Born II, p. 818; Channel Tunnel v. Balfour Beatty (UK), pp. 303-304*]. This is because the arbitration clause is a procedural contract, and has an autonomous character different from that of the other clauses in the contract [*Judg. May 7, 1963 (PFTCC); Born, p. 360; VIAC SGH-5024 (2008), p. 352; Bühler & Webster, p. 78*]. Therefore, when CLAIMANT contends that the arbitration clause has a "*dual procedural and substantive nature*" [*Cl. Memo., ¶9*], it relies on an incomplete understanding of the doctrine of separability, as the doctrine treats the arbitration clause as a separate agreement, having *complete juridical autonomy* [*Gosset v. Carapelli (France); Redfern, p. 104*].

**8.** Furthermore, Arts. II and V(1)(a) of the NYC are based on the premise that arbitration agreements will ordinarily be separate agreements, and that these agreements will be subject to different choice-of-law rules than the parties' underlying contract [*Born, p. 357; JLM v. Stolt-Nielsen (USA)*]. Accordingly, the arbitration clause in the contract must be treated as an agreement within an agreement [*XL Insurance v. Owens (UK)*]. Since the NYC is applicable to the present dispute [*Vis East Rules, ¶20*], the Convention's principles, which espouse the doctrine of separability with respect to determination of choice-of-law, must be applied [*Paulsson, p. 68; Born, p. 512*].

**9.** Additionally, Art. 16 of the Model Law explicitly acknowledges the doctrine of separability, and necessitates that an arbitration clause be treated as its own autonomous agreement [*Explanatory Note, ¶25; BGH, 2008 (Germany)*]. Since both Mediterraneo and Danubia have largely verbatim adoptions of the Model Law which explicitly acknowledge the doctrine of separability under Article 16 [*NoA, ¶14; P.O. 1, III (¶4); P.O. 2, ¶14*], the arbitration clause in the FSSA must be treated as an autonomous procedural agreement.

#### *b. Danubian law governs the arbitration clause because of the doctrine of separability.*

**10.** Arbitration clauses being procedural contracts, are inevitably subject to the law of the seat [*Born, p. 512*]. Accordingly, the doctrine of separability provides that the choice of the country where the proceedings are to be held, act as an inference for the choice of law governing the arbitration clause [*Chinese Goods Case (HCCIA), ¶37; Judg. May 30, 1994 (Japan), p. 747*].

**11.** In the present case, PARTIES agreed to Danubia as the seat of the arbitration [*Res. Exh. 2*]. Accordingly, the arbitration clause was added without any subsequent changes [*P.O. 2, ¶6*] in spite of the subsequent negotiators having full access to the e-mails chain between CLAIMANT and RESPONDENT [*P.O. 2, ¶5*]. Therefore, a proper application of the doctrine of separability to the FSSA necessitates that the interpretation of the arbitration clause be governed by Danubian law.

### 3. There is an implied choice of Danubian law as the governing law for arbitration clause.

**12.** RESPONDENT agrees with CLAIMANT that there is no explicit designation made by PARTIES as to the law governing the arbitration clause [*Cl. Memo., ¶12*]. In the absence of such express designation, parties' inferred intentions must be looked into and an implied choice of law must be made out [*Cheshire, North & Fawcett, p. 701; Redfern, ¶3.201*]. This is further supported by the choice-of-law rules of the NYC, which give effect to *express and implied choice* [*Born, p. 499; NYC, art. V, c. 1, s.c. (a)*].

**13.** In the absence of an express choice of law, a presumption arises in favour of the law of the seat of arbitration as the implied choice of governing law for the arbitration clause [*NTPC v. Singer (India), ¶7; Citation Infowares v. Equinox (India), ¶15; Moser, p. 76; FirstLink v. GT Payment (Singapore), ¶16*]. Therefore, in the absence of express designation by the PARTIES, their express choice of Danubian law as the seat of the arbitration raises the presumption that Danubian law is the implied choice for the law governing the arbitration clause [*Cl. Exh. 5, ¶15*].

**14.** Additionally, CLAIMANT has contended that Mr. Antley's note suggests PARTIES' acceptance of Mediterranean law as governing the arbitration clause in the FSSA [*Cl. Memo., ¶¶13 et seq.*]. However, CLAIMANT has presented a distorted understanding of the PARTIES' intentions at the time of negotiations. At the outset, RESPONDENT indicated to CLAIMANT its unwillingness to have Mediterranean law as the governing law [*Cl. Exh. 3*]. Accordingly, RESPONDENT prepared a first draft which designated Equatoriana as the seat of the arbitration, and the law of Equatoriana as the governing law for the arbitration clause [*Res. Exh. 1*]. This implies that RESPONDENT intended the law of the seat of arbitration to be the law governing the arbitration clause [*id.*]. Even when CLAIMANT changed the seat of arbitration to Danubia, it specified that it "*largely accepted our proposal*" and that it had changed the arbitration clause "*only in its relevant part*" [*Res. Exh. 2*]. This indicated CLAIMANT'S acknowledgement and acceptance of RESPONDENT'S intention to have the law of the seat be the governing law of the arbitration clause.

**15.** Furthermore, RESPONDENT had indicated to CLAIMANT that 'Sales Agreement' in the email merely referred to the "Sales" part of the agreement and not the arbitration clause. This was done so, by incorporating a first draft of the arbitration clause designating Equatorianian law as the governing law for the clause, while simultaneously stating that "*the Sales Agreement is governed by the law of Mediterraneo*" [*Res. Exh. 1*]. Subsequently, when CLAIMANT reiterated that it wanted Mediterranean law to apply to the 'Sales Agreement', it understood that 'Sales Agreement' did not include the arbitration clause [*Res. Exh. 2*]. Based on this agreement between PARTIES as to the understanding of the term 'Sales Agreement', Mr. Antley's note on April 12 simply sought to "*clarify*" that there is a neutral venue and a neutral applicable law for the arbitration clause [*Res. Exh. 3*]. Consequently, PARTIES' inferred intentions over the course of negotiations, clearly indicate that an implied choice of Danubian law must be applied to the arbitration clause in the FSSA.

### 4. Alternatively, the default rules in the NYC and DAL necessitate the application of Danubian law to the arbitration clause.

**16.** Art. V(1)(a) of the NYC provides for a default choice of law rule according to which the arbitration agreement is governed by the law of the arbitral seat, absent contrary agreement of the

parties [*Born II, ¶45; Gaillard, p. 219*]. Accordingly, where a choice of law for the arbitration clause has not been expressly stipulated and cannot be inferred from the parties' intentions, the agreement stands to be governed by the law of the place of arbitration [*Owerri v. Dielle (Netherlands), p. 706; Isaac v. Moses (Netherlands), ¶10*]. In the present case, since the choice-of-law rules of the Convention apply to the arbitration clause [*Arg. ¶¶4, 5*], the default choice-of-law rule must apply.

**17.** Furthermore, a similar default choice-of-law rule is found under Art. 36(1)(a)(i) of the DAL, which is a verbatim adoption of the Model Law [*P.O. 1, III (¶4); P.O. 2, ¶14*]. This rule mirrors Art. V of the NYC [*Explanatory Note, ¶46; 2012 UNCITRAL Case Digest, p. 173*], and must be applied at the pre-award stage [*Kroll et. al., ¶6-55*]. Therefore, as CLAIMANT consciously chose the application of DAL with the knowledge that it was a largely verbatim adoption of the Model Law [*P.O. 2, ¶14*], this default choice-of-law of the arbitral seat must apply.

### 5. In any case, Danubian law has the closest and most real connection to the dispute.

**18.** CLAIMANT, who has contended that Mediterranean law has the closest connection to the dispute [*Cl. Memo., ¶¶22, 23*], has provided no reasoning as to why the factors it used to establish such a connection must be prioritized over other opposing factors. Accordingly, even if the test were applicable to the present dispute, proper application of the same would render Danubian law applicable to the present arbitration clause.

**19.** An arbitration clause is more closely connected with the country of the seat than any other country [*Dicey, ¶16-21; Abuja v. Meridien (UK)*], and where a choice of seat has been made, it is undoubtedly the most significant factor in the determination of the applicable law [*C v. D (UK); BFT Bank v. Al Trade (Sweden), p. 293; Gaillard, p. 225*]. In the *Sulamerica* case, the court illustrated the application of the closest connection test by noting that the choice of London as the seat of arbitration entailed acceptance by the parties that English law would apply to the conduct and supervision of the arbitration, which suggested that the parties intended English law to govern all aspects of the arbitration agreement [*Redfern, ¶3.23; Sulamerica v. Enesa (UK), ¶25*]. Therefore, in spite of Brazilian law governing the main contract, English law had the closest and most real connection to the dispute [*Sulamerica v. Enesa (UK), ¶26*].

**20.** In the present case, CLAIMANT has acknowledged that the choice of Danubia as the seat of arbitration must be positively acknowledged as a connecting factor [*Cl. Memo., ¶23*]. Therefore, this choice acts as a tacit designation for the law governing the arbitration clause [*Owerri v. Dielle (Netherlands); Moser, p. 77; see, Thai-Lao Lignite v. Laos (Malaysia)*]. Additionally, when CLAIMANT changed the choice of seat proposed by RESPONDENT from Equatoriana to Danubia [*Res. Exh. 2*], it was aware of the contents of the DAL, and was also aware that DAL would apply to the

conduct and supervision of the arbitration [*P.O. 2, ¶14*]. Therefore, by applying the court's reasoning in the *Sulamerica* case to the present dispute, the choice of Danubia as the seat of arbitration shows that Danubian law has the closest and most real connection to the dispute.

**21.** Therefore, upon analysis of PARTIES' intentions over the course of negotiations and the factors which are significantly connected to the dispute, Danubian law applies to the interpretation of the arbitration clause in the FSSA.

### B. THE TRIBUNAL DOES NOT HAVE THE POWER TO ADAPT THE CONTRACT ON THE BASIS OF THE ARBITRATION CLAUSE IN THE FSSA.

**22.** CLAIMANT has contended that Danubian law is not conducive to the effectiveness of the arbitration agreement as it would deny the arbitrators the power to adapt the contract [*Cl. Memo., ¶¶17-18*]. However, the PARTIES intended to restrict the scope of the arbitration clause and a choice of Mediterranean law would unjustly undermine this intention. Accordingly, RESPONDENT submits that there is no express empowerment to adapt the contract, and no inherent power to adapt can be given to the Tribunal **[1]**. Additionally, the arbitration clause does not provide the Tribunal with any power to adapt **[2].**

#### 1. The Tribunal has not been expressly empowered to adapt the FSSA.

**23.** The arbitration agreement determines which issues can be examined and decided by the arbitral tribunal [*Gaillard, p. 394*]. Accordingly, clear express wording should be used if parties want to entrust the arbitration tribunal with the task of gap filling and adaptation of the contract, especially since such task is of creative as opposed to judicial nature [*Kroll et. al., p. 170; Berger, p. 8*]. Therefore, in contending that Mediterranean law allows for adaptation [*Cl. Memo., ¶¶24 et seq.*], CLAIMANT has failed to acknowledge that there was no express empowerment given to the Tribunal under the arbitration clause [*Cl. Exh. 5, ¶15*].

**24.** Mere reference to arbitration in case of failure by the parties to agree on the terms of the revision is not sufficient to imply the power to adapt the contract by way of changing its terms [*Abdullah Al-Faruque, p. 155; JLM v. Stolt-Nielsen (USA), p. 684*]. Consequently, it has been held that the tribunal cannot fill gaps or modify contracts, in the absence of express consent of the parties [*Kuwait v. AMINOIL (Ad Hoc), ¶74; Sun Printing v. Remington Papers (USA), p. 471*]. Commentators reflect a similar view, in holding that an arbitral tribunal does not, in general, have power to create, or write, a contract between the parties [*Redfern, p. 524; Waincymer, p. 1056*].

**25.** In the present case, the arbitration clause in the FSSA does not expressly empower the Tribunal to adapt the contract. Moreover, PARTIES had exchanged drafts of the arbitration clause over the course of their negotiations and in doing so, clarified any open points of contention regarding the

clause [*Res. Exh. 1; Res. Exh. 2*]. At that point, CLAIMANT did not incorporate any wording suggesting the possibility of adaptation into the proposed clause [*Res. Exh. 2*]. Explicit consent could have been expressed in the arbitration clause by use of the phrase "*all disputes arising out of this contract including a change of the contract itself*" [*Beisteiner, p. 109*]. However no such choice was made by PARTIES, who directly incorporated the arbitration clause from the PARTIES' initial negotiations into the FSSA [*P.O. 2, ¶6*]. Therefore, in the absence of express empowerment in the arbitral clause, the Tribunal cannot adapt the FSSA.

**2. The arbitration clause in the FSSA does not provide the Tribunal with any power to adapt the contract.**

**26.** The arbitration clause in the FSSA covers "*any dispute arising out of the contract*" [*Cl. Exh. 5, ¶15*]. This clause as agreed to by both PARTIES makes significant changes to the HKIAC Model Clause, which refers to "*Any dispute, controversy, difference or claim arising out of or relating to this contract*", and "*any dispute regarding non-contractual obligations arising out of or relating to it*" [*HKIAC Model Clause*]. Although not contended by this CLAIMANT, a Claimant may contend that the arbitration clause in the FSSA is broad enough to allow for adaptation by the arbitrators. However, RESPONDENT submits that the significant changes made by the PARTIES to the Model Clause narrow down the clause such that it does not provide the Tribunal with any power to adapt.

**27.** The intended scope of a narrow arbitration clause is limited [*Louis v. Blystad (USA), p. 225*]. Accordingly, it has been noted that in case of a "narrow" arbitration clause, which defines a specific, limited category of disputes the parties intended to arbitrate, a court cannot call for arbitration of matters outside of the scope of the arbitration clause [*United Steelworkers v. Rohm (USA); Holtzmann & Donovan*]. Hence, where a contract referred to disputes "*arising out of the agreement*", it was held to have covered a very narrow scope of disputes i.e., only those relating to the interpretation and performance of the contract itself [*Michele Amoruso v. Fisheries Development (USA), p. 1080; Born III, p. 309; OGH, 2008 (Austria)*].

**28.** The "*arising out of*" language is subject to the same limited scope as "*arising under*" agreements, and has been held to evidence restrictive language and narrow scope [*Tracer Research v. National Environmental Services (USA), p. 1295; Texaco v. American Trading (USA), p. 1154; Born, p. 1353*]. Accordingly, rectification of the contract has been held to be a dispute not "*arising out of*" the contract [*Mir Brothers v. Atlantic Constructions (Australia); Judg. Sept. 4, 1987 (Belgium), ¶64; Kroll et. al., p. 152*].

**29.** In the present case, the PARTIES' arbitration clause is narrow, and only covers disputes which pertain directly to the interpretation or performance of the contract. Accordingly, adaptation of

the contract, which is a non-contractual issue not arising out of the contract itself, falls out of the intended scope of the arbitration clause in the FSSA.

**Conclusion to the First Issue**

When the PARTIES chose Danubia as the seat of the arbitration, an implied intent to choose Danubian law as governing the interpretation of the arbitration clause was understood. This is evident from the separability of the arbitration clause, and an analysis of intentions based on choice-of-law rules objectively applicable to both PARTIES. In any case, the arbitration clause denies the Tribunal a power to adapt, since there was no express empowerment or implied intent to sanction the exercise of such a power, and an accordingly narrow clause was inserted in the FSSA. Therefore, the Tribunal has neither the power nor the jurisdiction to adapt the FSSA, based on the arbitration clause.

## II. THE PARTIAL INTERIM AWARD (PIA) OBTAINED FROM THE OTHER ARBITRATION PROCEEDINGS IS NOT ADMISSIBLE AS EVIDENCE.

**30.** CLAIMANT has contended that the illegally obtained evidence from the earlier arbitration *viz.* Partial Interim Award (hereinafter "**PIA**"), containing information regarding RESPONDENT'S submissions on adaptability of the Contract, must be admitted in the present arbitral proceedings [*Cl. Memo.,* ¶¶*29 et seq.*]. However, RESPONDENT submits that since the PIA was obtained illegally, it is inadmissible as evidence in the present proceedings **[A]**. *Additionally,* the obligation to keep the proceedings confidential in other arbitration, bars the admission of the PIA in the present proceedings **[B].**

### A. PIA IS INADMISSIBLE AS EVIDENCE IN THE PRESENT PROCEEDINGS AS IT WAS OBTAINED ILLEGALLY.

**31.** HKIAC Rules 2018 are the governing institutional rules in the present arbitration proceedings [*P.O. 1, II*]. CLAIMANT has asserted that the Arbitral Tribunal has the power to determine the admissibility, relevance, materiality and weight of evidence [*Cl. Memo.,* ¶¶*44 et seq.; HKIAC Rules 2018, art. 22.2*]. However, this CLAIMANT has not established as to why in the present case, the Arbitral Tribunal in exercise of this discretion must admit an evidence that is obtained "illegally" [*Cl. Memo.,* ¶*44 et seq.*]. Although not argued by this CLAIMANT, a Claimant might argue that despite the fact that evidence was obtained illegally it is admissible. However, RESPONDENT submits that the PIA was obtained illegally **[1]**, and hence Tribunal must exercise its discretion and hold the

PIA as inadmissible **[2].** *Additionally,* the Tribunal must not admit the PIA because admitting such evidence would violate public policy and can hamper recognition of the award **[3]**.

### 1. The PIA was obtained through unlawful means.

**32.** According to RESPONDENT'S investigations, the PIA could have been obtained only through its computer system hack or from some of its employees whose contracts had been terminated recently [*Letter Fasttrack, ¶3; P.O. 2, ¶41*]. In the present dispute, had RESPONDENT fallen victim to a cyber-attack in which the hackers were able to obtain confidential information [*P.O. 2, ¶42*]. It must be noted that privileged and confidential information which is obtained through cyber-attacks is considered as unlawfully obtained [*Libananco Holdings v. Turkey (ICSID); Conocophilips v. Venezuela (ICSID)*]. Therefore, any information obtained by the hackers is unlawfully obtained.

**33.** Moreover, the only other way the PIA could have been obtained was through breach of confidentiality undertaking with the two former employees who were witnesses in the previous arbitration [*P.O. 2, ¶41; Letter Fasttrack, ¶3*]. It must be noted that information which is not in general knowledge is a protectable interest [*Neveux v. Webcraft Techs (USA); Home Gas Corp. v. Deblois Oil Co. (USA)*]. Further, an employee has a duty to safeguard the employer's information [*Rivendell Forest Products. v. Georgia-Pacific Corp. (USA); Standard Brands v. Zumpe (USA)*]. This duty continues even after the employment relationship ends [*Faccenda Chicken v. Fowler (UK); Diljeet Titus v. Mr. Alfred (India)*]. In the present dispute, the former employees were under a contractual obligation of confidentiality, and had knowledge about the other arbitration, only because they had deposed as witnesses during those proceedings [*P.O.2, ¶41*]. As a result, their knowledge cannot be considered 'general knowledge', and the information revealed by these employees was in clear violation of their contractual obligation. Accordingly, the PIA was obtained illegally.

### 2. Tribunal must exercise its discretion to hold that illegally obtained PIA is inadmissible.

**34.** This Arbitral Tribunal has wide discretion to decide on the admissibility of evidence [*HKIAC Rules 2018, art. 22.2*]. RESPONDENT submits that the Tribunal must in exercise of this discretion hold that the illegally obtained PIA is inadmissible. This is because obtaining evidence through illegal means is considered serious misconduct which can 'pollute the whole case', because the tribunal can be influenced in their perception of facts and application of law [*Walde (2010); Crawford & Reisman, p.1088*]. The Tribunal has a duty to ensure fair and efficient conduct of the arbitration proceedings [*HKIAC Rules 2018, art. 13.5*], and such serious misconduct in obtaining evidence goes against principle of equal treatment of parties [*DAL, art. 18; HKIAC Rules 2018, art. 13.1; Born, p. 2174*].

**35.** Accordingly, illegally obtained privileged and confidential information that cause prejudice to the affected party, must not be admitted [*Libananco Holdings v. Turkey (ICSID)*]. In this regard, it must be noted that various tribunals have held evidence to be unlawfully obtained, where one party obtained evidence by trespassing into the property of another [*Methanex v. USA (UNCITRAL)*]; or through an unauthorized interception of email-communication [*Libananco Holdings v. Turkey (ICSID)*]; or where an audio recording was obtained without the consent [*EDF v. Romania (ICSID)*]. It has been further observed that it would be wrong to allow parties to introduce unlawfully obtained documentation, because the evidence as it is in breach of duty to act in good faith [*id., Methanex v. USA (UNCITRAL); Libananco Holdings v. Turkey (ICSID); Prosecutor v. Salim (Lebanon)*].

**36.** Moreover, an illegally obtained evidence is inadmissible if the party did not approach the tribunal with clean hands [*Methanex v. USA (UNCITRAL); EDF v. Romania (ICSID)*]. This is because a party should not be allowed to benefit from its own wrongful conduct, and therefore the attempts made to gain access to the evidence becomes extremely relevant while determining admissibility [*Libananco Holdings v. Turkey (ICSID); Methanex v. USA (UNCITRAL)*]. In the present case, the company from which the copy of the PIA is sought to be obtained by CLAIMANT, has doubtful reputation regarding its sources [*P.O. 2, ¶41*]. However, CLAIMANT still engaged the company to obtain the PIA against the payment of $1000, who in turn obtained the award either from a hacker or from one of the former employees of the RESPONDENT [*id.*]. Since CLAIMANT breached its duty to act in good faith and did not approach the Tribunal with clean hands, it should not be allowed to submit the PIA.

### 3. Admission of illegally obtained evidence is against public policy and can hamper the recognition of the Arbitral award.

**37.** Admittedly, the Tribunal has the discretion to determine its own rules of evidence [*Cl. Memo., ¶44 et seq.; HKIAC Rules 2018, art. 22.2*]. However, such a discretion is not unfettered [*Phoenix Action v. Czech Republic (ICSID); Rolf & Boris, p. 332*], and hence it cannot admit evidence which is against the principles of public policy. Recognition and enforcement of an arbitral award may be refused if the award is contrary to the public policy [*DAL, art. 36, c. 1; NYC, art. V, c. 2, s.c. (b); Inter-American Convention, art. 5, c. 2, s.c. (b)*], and recognition of arbitral awards is frequently opposed on the basis of a tribunal's evidentiary rulings [*Born, p. 3522*].

**38.** Although public policy might be an uncertain legal concept [*Chen; Shwarz, 2008*], "international public policy" constitutes all that affects the essential principles of administration of justice or performance of contractual obligations [*Kersa v. Infancourtage (Luxembourg)*]. In this regard, evidence obtained through illegal means is inadmissible as it is considered as against the basic principle of

justice [*Nardone v. U.S. (USA)*]. Accordingly, the international public policy is not merely restricted to internal public policy of the country, and takes into account domestic as well as international principles [*Born, p. 3655*]. Use of documents in an arbitration proceeding, which are known to be illegally obtained would be a criminal offence contrary to international public policy [*Ross (2015); Colston (2017); Blair & Gojkovic, pp. 254, 257*].

**39.** As already established, the PIA was illegally obtained [*Arg., ¶32-33*], and hence its admission in the present proceedings is against international public policy.

### B. THE OBLIGATION TO KEEP THE PROCEEDINGS CONFIDENTIAL IN OTHER ARBITRATION, BARS THE ADMISSION OF THE PIA IN THE PRESENT PROCEEDINGS.

**40.** CLAIMANT has asserted that admission of evidence is necessary in the interest of justice, and because transparency is required in public interest [*Cl. Memo., ¶¶34 et seq.*]. However, the illegally obtained PIA cannot be admitted because there is an express obligation to keep the arbitral proceedings, and the award confidential under HKIAC Rules 2018 **[1]**. Moreover, contrary to CLAIMANT'S assertions, it is not necessary to admit the PIA in the interest of justice **[2]**. Further, it not necessary to admit the PIA in consideration of public interest as UNCITRAL Rules on Transparency are inapplicable in the present proceedings **[3]**. Additionally, Art. 9.2(e) IBA Rules also bars admission of the PIA as evidence **[4]**.

#### 1. There is an express obligation to keep the proceedings and the award confidential under the HKIAC Rules.

**41.** The other arbitration proceeding is being conducted under the HKIAC Rules 2013 [*P.O. 2, ¶39*]. Art. 42 of these Rules provides that any information relating to the arbitration or an award rendered in the arbitration shall not be published, disclosed or communicated by parties. [*HKIAC Rules 2013, art. 42.1*]. This obligation of confidentiality is also extended to the witnesses in the proceedings [*HKIAC Rules 2013, art. 42.2*], and was thus applicable on RESPONDENT'S employees who were witnesses in the other arbitration [*P.O. 2, ¶41*]. Additionally, RESPONDENT'S employees were under a contractual obligation to keep all the information regarding the arbitration proceedings confidential [*id.*]. Therefore, in case the PIA was obtained through RESPONDENT's former employees, such evidence must not be admitted on grounds of breach of confidentiality.

**42.** CLAIMANT has denied the confidentiality of the other arbitration proceedings, even though it has admitted that the arbitration proceedings are private in nature [*Cl. Memo. ¶31*]. However, confidentiality is a necessary corollary to the private nature of the arbitration, i.e. privacy itself entails the obligation not to disclose the materials generated during the course of arbitration. [*Born, p. 2782; Jolles, Traber & Cediel, p. 144; Hasseneh v. Mew (UK)*]. This is because privacy is concerned

with the rights of third parties to attend and participate in the arbitral proceedings, and such privacy of arbitral proceedings is incidental to the agreement to arbitrate [*Esso Australia v. Plowman (Australia); Redfern, p. 17*]. Moreover, if the obligation of confidentiality is not given effect, it beats the legitimate interest of the parties [*Young & Chapman, p. 29; Telesat v. Boeing (Canada)*]. Consequently, the duty to keep the award rendered in an arbitration confidential, flows from the private nature of the arbitration itself.

**43.** CLAIMANT has asserted that even if the information was obtained through breach of confidentiality, it can still be admitted, as the information may be disclosed unless the parties contractually provide for confidentiality [*Cl. Memo.*, ¶*32*]. However, since in the present case, the PARTIES chose to submit their dispute under HKIAC Rules which contain an express provision of confidentiality, they can be said to expressly consented to such a provision [*Born, p. 32; Radjai, p.1345*]. This confidentiality obligation in institutional rules applicable to the dispute, can be a form of contractual undertaking [*Born, p. 2790*]. Moreover, as held by the English Court of Appeal, confidentiality undertaking is implied by virtue of the agreement to arbitrate itself [*Ali Shipping v. Shipyard Trogir (UK) ; Insurance co. v. Lloyd's Syndicate (UK)*]. A similar stance on confidentiality obligations has been taken by courts in Singapore and Switzerland [*Radjai, p. 1345; AAY v. AAZ (Singapore)*]. Therefore, CLAIMANT'S argument regarding the inapplicability of the confidentiality obligation, for want of agreement between the parties, must be rejected.

**44.** Accordingly, the inherent confidential nature of the award, and the mandatory obligation to keep the PIA confidential under Art. 42 of HKIAC Rules 2018 precludes its admission as evidence in the present proceedings.

### 2. It is not necessary to admit the PIA as evidence *in the interest of justice*.

**45.** CLAIMANT has contended that even if there exists a duty to maintain confidentiality, disclosure can generally be allowed *in the interest of justice* [*Cl. Memo,* ¶*37 et seq.*]. However, CLAIMANT has not established as to why in the present proceedings, the Tribunal must admit the PIA as evidence in the interest of justice [*id.*]. RESPONDENT submits that the confidential information can be disclosed *in the interest of justice* only when accurate assessment of the case cannot be done without such disclosure [*Ali Shipping v. Shipyard Trogir (UK)*]. Moreover, courts have to weigh such interest against the commercial interest of protecting confidentiality [*Id; Telesat v. Boeing (Canada); Friedman & Brozolo, p. 364*].

**46.** In the present case, the PIA from the other arbitration, is neither necessary nor relevant to the resolution of this dispute because the FSSA between RESPONDENT and CLAIMANT can be materially distinguished from the contract underlying the previous arbitration. This is because, *first,* the question regarding the power of the Tribunal to adapt the contract involves determination

of the PARTIES' intention in this regard. Accordingly, the contract underlying the previous arbitration contained "*Model HKIAC Arbitration Clause*" with all additions, which grants power to the tribunal to hear a dispute "*arising out of or in relating to [the] contract*" [*cf. Arg., ¶26-29*]. Whereas, in the present case, the PARTIES negotiated and inserted narrowly-worded arbitration clause into the FSSA, which does not provide the tribunal with such power [*Cl. Exh. 5; Res. Exh. 1, 2*]. *Second*, the dispute in the present case, involves the question of determination of the applicable law to the arbitration clause [*Arg., ¶2*]. However, such applicable law was expressly provided in the arbitration clause underlying the previous arbitration [*P.O. 2, ¶39*]. *Third,* the contract underlying the previous arbitration contained an ICC-Hardship, which covered wide range of events qualifying as hardship [*P.O. 2, ¶39*]. However, in the present case, PARTIES negotiated and agreed on a narrowly worded hardship clause [*Arg.,¶73*].

**47.** In light of these aforementioned distinctions between the contract underlying the previous arbitration and the present FSSA, RESPONDENT'S stance in that arbitration does not reflect its intention in favour of adaptation, and is not necessary for accurate assessment of the present case.

**48.** Although not raised by this CLAIMANT, a Claimant might raise the argument that if the admission of the evidence is denied, it would amount to denial of full opportunity to present its case. Admittedly, parties must be given full opportunity to present their case [*Model Law, art. 18; Kroll et. al., pp. 525, 526*]. However, full opportunity does not mean that every request of evidence production must be granted [*Waincymer, p. 751*]. Parties have the right to be heard only on issues which are relevant and material to the resolution the dispute [*Art. 9.2(a), IBA Rules; Soh Beng v. Fairmount (Singapore)*]. Moreover, courts have rejected admission of documents and awards from other arbitration having attached underlying confidentiality undertaking unless the disclosure is required on grounds of strict necessity [*London & Leeds Estates v. Paribas (UK); Dolling-Baker v. Merrett(UK)*]. In this regard, "necessity" implies that the claim cannot be sufficiently established without the production of evidence under question [*Dolling-Baker v. Merrett (UK); Insurance co. v. Llyod's Syndicate (UK)*]. In the present case, as already established, there is an underlying confidentiality undertaking attached to the previous arbitration [*Arg., ¶41*]. Further, the PIA is neither relevant nor necessary to establish CLAIMANT's case [*Arg., ¶¶46, 47*], and hence there is no necessity to admit such evidence to sufficiently establish the claims raise by CLAIMANT. Therefore, CLAIMANT is not denied its full opportunity to present its case.

### 3. It not necessary to admit the PIA in consideration of public interest as UNCITRAL Rules on Transparency are inapplicable in the present proceedings.

**49.** CLAIMANT has erroneously argued that the PIA must be admitted as evidence in the present proceedings, based on UNCITRAL Rules on Transparency in Treaty-based Investor-State

Arbitration [*Cl. Memo.*, ¶¶*41 et seq*]. However, it must be noted that these Rules are applicable to Investor-State Arbitration [*UNCITRAL Transparency Rules, art. 1*], to bring transparency in disputes involving State as a party, because the outcome of such cases can affect public interests and public policies [*Poorooye & Feehily, p. 299*]. Whereas, international commercial arbitration involves private business parties catering to their private interests, and operating under the assumption of confidentiality [*id., p. 301; Feiciano, p. 6*]. Since the public interest aspect which calls for transparency in investor-state arbitration, is absent in international commercial disputes [*Hay, p. 219*], the UNCITRAL Rules on Transparency are inapplicable to such disputes. Accordingly, the UNCITRAL Rules on Transparency are inapplicable to the present dispute.

**50.** Even if the Tribunal rules that UNCITRAL Rules on Transparency are applicable to international commercial disputes involving public interest, RESPONDENT submits that there is no public interest involved in disclosure of PIA in the present case. In this regard, CLAIMANT'S assertions that the award from the previous arbitration provides a blueprint for subsequent arbitration involving similar disputes [*Cl. Memo.* ¶¶*42, 43*], are erroneous because the issue in the previous dispute materially differs from the issue in the present dispute [*Arg.*, ¶¶*46, 47*].

**51.** CLAIMANT has further alleged that the disclosure of PIA would form the basis of award in present arbitration and would provide a new trade balance for future cases concerning adaptation of price due to unforeseeable tariffs [*Cl Memo.*, ¶¶*48, 49*]. However, it must be noted that only the "partial interim" award has been rendered in the other arbitration which merely confirms the jurisdiction of the tribunal to adapt the contract that is consistent with the prevailing jurisprudence in Mediterraneo. [*P.O. 2,* ¶*39*]. It does not decide as to whether adaptation can be allowed as a result of increase in tariffs, and therefore, does not provide any reasonable guidance for similar disputes in future. Therefore, CLAIMANT'S argument regarding establishment of a new trade balance while providing the blueprint for subsequent relevant arbitration [*Cl. Memo.* ¶¶*42, 48, 49*], does not stand.

### 4. Art. 9.2(e) IBA Rules also bars admission of the PIA as evidence in the present proceedings.

**52.** The IBA Rules have been accepted as standard procedure on taking of evidence in international arbitration [*Kühner, p. 667; Railroad Development v. Guatemala (ICSID)*]. Art. 9.2 of these Rules provides for exclusion from production of any document as evidence on compelling grounds of commercial and technical confidentiality [*IBA Rules, art. 9.2(e)*]. In this respect, confidentiality undertaking with third parties is a common business practice and is considered to be commercial in nature [*O' Malley,* ¶*9.87*]. Accordingly, the Tribunal must respect the confidentiality agreement

entered into with third parties, and must not admit evidence resulting from breach of such confidentiality [*Marghitola, p. 94*].

**53.** In the present case, the witnesses in the previous arbitration were under a contractual undertaking to keep all information related to that arbitration confidential [*P.O. 2, ¶39*]. Additionally, the HKIAC Rules 2013 applicable in the other arbitration also extended such confidentiality obligation to the witnesses [*HKIAC Rules 2013, art. 42.2; Arg., ¶¶41*]. Consequently, contractual as well as statutory confidentiality obligations, create compelling grounds for the exclusion of the PIA as evidence in the present arbitral proceedings.

**Conclusion to the Second Issue**

The illegal source as well as the nature of the PIA bars its admissibility on grounds of procedural fairness and public policy violation. Further, since the PIA is not relevant to the present dispute, disclosure is not called for in the interest of justice. Consequently, CLAIMANT lacks sufficient grounds for admission of PIA from other arbitration and does not outweigh the compelling interests of protecting confidentiality. Therefore, the tribunal must exclude admission of evidence and ensure expedient resolution of the dispute.

## III. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 RESULTING FROM AN ADAPTATION OF THE PRICE.

**54.** RESPONDENT entered into the FSSA with CLAIMANT (hereinafter **"the Contract"**) to buy 100 doses of Nijinsky III's frozen semen, at the price of US$ 100,000 per dose [*Cl. Exh. 5*]. According to the Contract, PARTIES had agreed upon a DDP delivery, where the last shipment of 50 doses was due on 23 January 2018 [*Cl. Exh. 5, ¶8*]. The price for this shipment, US$ 5,000,000 was duly paid by RESPONDENT [*Cl. Exh. 8*]. However, CLAIMANT intends to claim an additional sum of US$ 1,250,000 from RESPONDENT, on account of import tariffs imposed on this shipment by Equatoriana. Contrary to CLAIMANT'S assertions, RESPONDENT submits that CLAIMANT is not entitled to an increase in purchase price, neither under Clause 12 of the Contract **[A]**, nor under the CISG **[B]**.

### A. CLAIMANT IS NOT ENTITLED TO AN INCREASE IN THE PURCHASE PRICE OF THE FINAL SHIPMENT UNDER CLAUSE 12 OF THE CONTRACT.

**55.** Since PARTIES had incorporated DDP delivery into the Contract, Seller was obliged to pay the customs tariffs, including any additional import tariffs **[1]**. *Moreover*, PARTIES did not transfer the risk of import tariffs to Buyer (RESPONDENT), and hence Clause 12 of the Contract cannot be

interpreted as protecting the Seller (CLAIMANT) from the same **[2]**. *Additionally*, CLAIMANT cannot claim that the import tariffs constituted hardship and warrant adaptation, by relying upon the definition of hardship under PICC **[3]**. *In any case,* Clause 12 of the Contract cannot be used to adapt the purchase price as it does not provide for adaptation as a remedy **[4]**.

### 1. CLAIMANT was obliged to pay the customs tariffs, including any additional import tariffs since PARTIES had incorporated DDP delivery into the Contract.

**56.** According to the INCOTERMS 2010 Rules, use of the term DDP (Delivered Duty Paid) in the contract shall mean that all arrangements and costs are to be borne by the seller, who shall bear all risks and costs of transportation, including all duties and tariffs, until the goods are received by the buyer [*INCOTERMS 2010 rules, p. 1-2*]. In the present case, Clause 8 of the Contract states that "*Seller will ship 3 instalments **DDP** of Nijinsky III's 100 doses of frozen semen. . . .;the third and last shipment of 50 doses will be **DDP** on 23 January 2018*". Even though Clause 8 specifically provides for DDP delivery of semen, CLAIMANT has argued that PARTIES did not agree upon DDP delivery in principle because words such as "*DDP Equatoriana Port Incoterms 2010*" were not made clear in the Contract [*Cl. Memo. ¶71*]. However, CLAIMANT'S assertions are irrelevant as the Arbitral Tribunal, by P.O. 2, ruled that PARTIES had agreed on "*DDP, Seabiscuit Drive, Oceanside, Equatoriana*" as the place of delivery according to the INCOTERMS 2010 edition [*P.O. 2, ¶10*]. Accordingly, for DDP delivery of last shipment, CLAIMANT (Seller) was responsible for all costs of transportation, duties and tariffs, including additional import tariffs [*INCOTERMS 2010 Rules, ¶1*].

**57.** Although not argued by this CLAIMANT, a Claimant might argue that the term "DDP delivery" should be interpreted *contra proferentem*, i.e. against RESPONDENT as the introducer of the term. According to this principle, the party that supplies a certain term or insists on including it in the contract, must bear the risks of its ambiguity [*Schwenzer (2010), p. 170; Honnold (1999), p. 107*]. However, the *contra proferentem* principle cannot be relied upon, if the other party directs its attention and subsequently accepts the supplied term [*Haraszti, p. 191; Sykes, p. 67-68*]. In the present case, CLAIMANT admits that it had longer internal discussions for adopting DDP delivery, after which it asked for an increased price of semen on account of additional import costs associated with DDP delivery [*Cl. Exh. 4*]. Accordingly, since CLAIMANT paid due attention to term DDP and even asked for an increased price due to its inclusion, the *contra proferentem* principle does not apply in this case.

**58.** A Claimant might have also argued that the use of the term 'DDP delivery' was miscalled and that PARTIES did not intend to bind themselves to DDP delivery. However, this assertion cannot be sustained because choosing an INCOTERM is not only a matter of deciding functions and

costs, but also about knowing whether the seller or the buyer will be at risk when difficulties arise [*Ramberg, p. 32*]. Moreover, it is widely accepted that INCOTERMS are international trade usages incorporated through Art. 9(2) of CISG [*St. Paul v Neuromed (USA); Chan Leng, p. 84*]. Therefore, while accepting DDP delivery, CLAIMANT is presumed to have known the risks and obligations associated with DDP delivery. Thus, CLAIMANT cannot assert that the term 'DDP delivery' was miscalled, and that PARTIES intended to deviate from the same.

**2. Clause 12 of the Contract cannot be interpreted as protecting the CLAIMANT (Seller) from imposition of additional import tariffs.**

**59.** CLAIMANT has argued that even though PARTIES agreed upon DDP delivery, they incorporated hardship clause in Clause 12 of the Contract to transfer certain risks to the Buyer (RESPONDENT) [*Cl. Memo. ¶72*]. Admittedly, PARTIES agreed on a hardship clause, however such clause (12) cannot be interpreted as covering additional tariffs as the express wording of the clause does not protect the Seller from these tariffs **[a]**. *Additionally,* the subjective intention of PARTIES indicates that Clause 12 of the Contract was not intended to cover import tariffs **[b]**. *Moreover*, an objective intention of PARTIES under Art. 8(2) CISG shall also indicate that Clause 12 of the Contract was not intended to cover these tariffs **[c]**.

***a. The express wording of the clause does not cover import tariffs.***

**60.** The CISG provides that while interpreting a contractual provision, regard must first be given to the parties' express agreement [*Schwenzer (2010), p. 156*]. Accordingly, if the terms of the contract are clear, they are to be given their literal meaning [*Machine for Repair of Bricks Case (Spain); Office Furniture Case (Switzerland)*]. CLAIMANT has erroneously asserted that PARTIES incorporated the hardship clause in the Contract to cover risks arising from **all** unforeseen events including the additional import tariffs [*Cl. Memo. ¶55*]. Contrary to CLAIMANT'S assertions [*id.*], Clause 12 expressly protects the Seller only from such events that **[i]** are "*comparable*" to additional health and safety requirements, **[ii]** are "*unforeseen*", and **[iii]** make the Contract "*more onerous*" [*Cl. Exh. 5, ¶12*]. RESPONDENT submits that the import tariffs imposed on last shipment, do not fall within this umbrella of events covered under Clause 12 of the Contract.

***i)*** *Import tariffs are not "comparable" to additional health and safety requirements.*

**61.** Generally, additional health and safety requirements are imposed by various countries at the time of importation in order to protect life and health of humans, plants and animals [*Import Regulations & Standards*]. For instance, when CLAIMANT was involved in a DDP Danubia contract, the Government of Danubia had imposed additional health and safety requirements, in order to

prevent the spread of foot and mouth disease that had then affected the cow population [*P.O.2, ¶21*]. However, the retaliatory tariffs imposed by Equatoriana are in response to Mediterraneo's tariffs, and are in the nature of purely economic sanctions against another country [*Cl. Exh. 6*]. Therefore, while additional health and safety requirements are meant for the protection of general public, import tariffs are merely economic in nature. Thus, import tariffs cannot be said to be "comparable" to additional health and safety requirements.

***ii)*** *Import tariffs were not "unforeseeable" at time of conclusion of Contract.*

**62.** An event is foreseeable if the parties have knowledge of the occurring changes, or if they could reasonably predict the changes in the future [*Brunner, p. 200*]. Accordingly, a party can claim exemption under hardship, only if it could not have been reasonably expected to take the impediment into account at the time of signing the contract [*Brunner, pp. 111-113; CISG, art. 79; DiMatteo, p.279*]. Thus, if an event could have been taken into account by the aggrieved party, but it did not incorporate a specific contract clause to deal with the same, it is assumed that the party has taken the risk [*Schwenzer (2009), p. 719*].

**63.** CLAIMANT has argued that it was unforeseeable that Mediterraneo's president Mr. Bouckaert may put a tariff of 25% on the agricultural products from Equatoriana, as it had neither been part of any strategy papers released earlier by him, nor was it part of his election manifesto [*Cl. Memo. ¶60*]. However, while making this argument, CLAIMANT has ignored the fact that Mr. Bouckaert had in its election program in January 2017, already announced a protectionist approach to international trade, particularly in relation to agricultural products [*Cl. Exh. 6*]. Moreover, shortly after his election in April, he appointed Ms. Cecil Frankel, one of the most ardent critics of free trade, as his "*superminister*" for agriculture, trade, and economics on 5 May 2017 [*P.O. 2, ¶23*]. Thus, PARTIES could have reasonably predicted before conclusion of the Contract, that Mediterraneo might impose trade tariffs on agricultural products.

**64.** Admittedly, being member of WTO, it is theoretically expected of Equatoriana to resolve its trade disputes amicably. However, it is seen that in the practical world, WTO members often impose unilateral measures in retaliation to other countries' measures [*Unilateral measures(METI)*]. Moreover, even Equatoriana had, once in the past imposed trade sanctions in response to restrictions imposed by other country affecting imports from Equatoriana [*Cl. Exh. 6*]. Thus, PARTIES could have reasonably foreseen that Equatoriana could retaliate with trade restrictions, in case Mediterraneo elects to impose certain restrictions.

**65.** CLAIMANT has further argued that racehorse semen is not generally covered under "animal products", and so PARTIES could not foresee that their Contract could be affected by tariffs imposed on agricultural products [*Cl. Memo. ¶60*]. However, contrary to CLAIMANT'S assertions,

it must be noted that agricultural products are specified in Annex 1, compliant with the Harmonized Commodity Description and Coding Systems [*World Tariff Profiles 2017*]. According to this classification, horse semen shall fall under HS Code 0511.99, which is a sub category under **Agricultural products** [*id.; Products of Animal Origin(WCO)*]. For instance, frozen semen is classified as an animal product, under the category of 'Agricultural products' in the Agreement on Concessions entered into between WTO members Iceland-Hong Kong [*Agreement on agriculture*]. Therefore, CLAIMANT could reasonably have been expected to know of the possible imposition of tariffs by Mediterraneo and Equatoriana on agricultural products which also includes horse semen. Despite this, it asked for protection against *only* additional health and safety requirements. Thereby, CLAIMANT is assumed to have undertaken the risk of import tariffs.

**66.** Although not argued by this CLAIMANT, a Claimant might argue that since both Mediterraneo and Equatoriana are members of WTO that aims to regulate tariffs, the imposition of tariffs by both the countries was unforeseeable. However, it must be noted that WTO does not preclude any member from imposing tariffs, instead the members themselves bind their tariff rates for all the products, in their respective Schedule of Concessions [*Types of Tariffs(World Bank)*]. Moreover, bound tariffs are not necessarily the rate that a WTO member applies in practice to other WTO members' products [*id.*]. In fact, members have the flexibility to increase their tariffs (applied tariffs) so long as they don't raise them above their bound levels [*id.*].

**67.** Moreover, in case of agricultural products, no WTO member (except for Hong Kong) has zero bound tariffs [*World Tariff Profiles 2017*], and even developed countries like United States and Canada have 300+ bound tariffs, and countries like Switzerland and Singapore have 1000+ bound tariffs [*id.*]. Similarly, here, even though neither Equatoriana nor Mediterraneo had applied any tariffs on agriculture products until January 2018 [*P.O. 2, ¶25*], it does not necessarily imply that their bound tariff was zero. Based on wide practice among WTO members to have high bound tariffs for agricultural products [*World Tariff Profiles 2017*], it can be assumed that both Mediterraneo and Equatoriana also had a legitimate window to impose certain tariffs on agricultural products. Thus, PARTIES could predict that Equatoriana can, at any time, impose certain tariffs on agricultural products, including horse semen, even though such tariffs were not imposed at the time of Contract conclusion.

***iii)*** *The import tariffs do not make the Contract "more onerous" for CLAIMANT.*

**68.** The mere fact that performance of the contract has been rendered more burdensome than could reasonably have been anticipated at the time of conclusion of the contract, does not exempt the obligor from performing the contract [*Rimke, pp. 197, 200; Schlechtriem, ¶291; Schwenzer (2009), p. 714*]. It is a widely accepted view that price fluctuations are foreseeable in international contracts,

and that even a 100% increase in the price of the goods is not sufficient to constitute hardship [*Schwenzer (2009), p. 716 Hot-rolled steel plates case (CIETAC); Steel ropes case (BCCI); Vital Berry v. Dira-Frost (Belgium); Société Romay v. SARL Behr I (France); Société Romay v. SARL Behr II (France)*]. It has even been suggested that the relevant threshold for hardship must be at least a 150-200% increase in the cost of goods [*Schwenzer (2009), p. 717*].

**69.** In the present case, the price of the final shipment has only increased by 30%, due to imposition of tariffs [*Cl. Exh. 7*]. Moreover, such an increase in the price due to imposition of tariffs was reasonably foreseeable by CLAIMANT [*Arg. ¶¶62-67*]. Such a minimal increase in the cost of shipment does not meet the high threshold level required for claiming hardship [*Arg. ¶68*]. However, CLAIMANT has asserted that it has been financially challenging for it for the last two years, and it was impossible to shoulder the additional tariffs of 30% [*Cl. Memo. ¶61*]. While RESPONDENT acknowledges CLAIMANT'S financial problems, it must be noted that these difficulties do not arise from the additional tariffs. In fact, CLAIMANT has been making losses ever since 2014, primarily due to high interest payments on loans and costs for restructuring measures [*P.O. 2, ¶29*]. Thus, the additional import tariffs cannot be said to make the Contract "*more onerous*" for CLAIMANT.

***b. The subjective intention of the PARTIES shall indicate that Clause 12 of the Contract was not intended to cover import tariffs.***

**70.** Despite the express language of Clause 12, CLAIMANT insists on an interpretation that includes imposition of import tariffs within its ambit, on the basis of PARTIES' intentions [*Cl. Memo. ¶55 et seq.*]. However, CLAIMANT'S assertions are not in consonance with the rules of contractual interpretation under CISG. In this regard, Art. 8(1) CISG provides that contractual provisions must be interpreted on the basis of subjective intention of the parties, where the statement or conduct of one party was known to the other party, or it could not have been unaware of what that intention was [*Schwenzer(2010), pp.154,156; Honnold(1999), p.116; Fruits and Vegetables Case (Switzerland)*].

**71.** RESPONDENT agrees with CLAIMANT that parties' negotiations should be considered in determining their subjective intention [*Cl. Memo. ¶57; Schwenzer(2010), p. 152; CISG, art. 8(3)*]. However, CLAIMANT has presented an incorrect picture of the negotiations by submitting that it sent an email to RESPONDENT in which it stated that, "it was not willing to assume *such risks* as those associated with changes in customs regulations or import restrictions" [*Cl. Memo. ¶57*]. In the aforesaid email, CLAIMANT merely made a general statement that it was not willing to take over any risks associated with customs regulation or import restrictions [*Cl. Exh.* 4]. This statement was followed by description of a specific kind of event, *viz.* additional health and safety

requirements, for which CLAIMANT asked that a hardship clause should be incorporated at minimum to address "*such subsequent changes*" [*id.*]. Therefore, CLAIMANT did not convey to RESPONDENT that it was not willing to undertake risks associated with import restrictions.

**72.** CLAIMANT has further alleged that RESPONDENT'S non-objection to include a hardship clause covering risks of customs regulation or import restriction, constituted "*meeting of minds*" in this end [*Cl. Memo. ¶57*]. However, it must be noted that for 'meeting of minds' under Art. 8(1) CISG, it is also important that the statement or conduct of one party was clear and easily understood by the other party [*Magnesium Case(ICC)*]. As already submitted, CLAIMANT'S intention to not take risks associated with customs regulation or import restrictions was not clear and unequivocal [*Arg. ¶71*], and thus it cannot constitute as 'meeting of minds' under Art. 8(1) CISG.

**73.** On the other hand, RESPONDENT'S counsel, Mr. Krone told CLAIMANT'S counsel, Mr. Ferguson that the ICC-Hardship clause suggested by CLAIMANT was "*too broad*" for the purposes of this contract [*P.O. 2, ¶12*]. In pursuance of this, PARTIES agreed to put only those risks in the hardship clause as were mentioned in CLAIMANT'S email, *viz.* the risk of additional health and safety requirements [*id.*]. Therefore, even the subjective intentions of the PARTIES indicate that Clause 12 of the Contract was narrowly drafted, and cannot be construed to cover the imposition of import tariffs on last shipment.

### *c. The objective intention of the PARTIES under Art. 8(2) CISG also indicates that Clause 12 of the Contract was not intended to cover import tariffs.*

**74.** If subjective intention of parties is not determinable, then as per Art. 8(2) CISG, statements or conduct of a party must be interpreted according to the standard of a hypothetical reasonable person of the same kind [*Schwenzer (2010), p.155; Honnold (1999), Art. 8, ¶107*]. An analysis under Art. 8(2) CISG primarily involves an enquiry into the intention of the parties taking into consideration parties' negotiations, interests, relevant circumstances and usages [*CISG art. 8(3); Schwenzer (2010), p.155*].

**75.** However, in the present case, CLAIMANT has not contended that PARTIES' intentions under Art. 8(2) CISG indicate that Clause 12 of the Contract covers imposition of tariffs made any argument under Art. 8(2) CISG, so as to contend that [*Cl. Memo. ¶59*]. Instead, CLAIMANT has asserted that the test under Art. 8(2) must be used to interpret Clause 12 objectively by looking at its express wording [*id.*]. For this argument, CLAIMANT has relied solely upon the *Chemical Products case* [*id.*]. However, even in that particular case, the tribunal used Art. 8(2) CISG to determine the intention of the parties by looking at the negotiations between the parties, and their business interests [*Chemical Products case, ¶A(II)(2)*]. Thus, by not submitting any arguments in relation to intention of PARTIES, CLAIMANT has erroneously applied the test under Art. 8(2) CISG. *In any case*, even if

Clause 12 is interpreted in a manner suggested by CLAIMANT, i.e., by looking at the express wording of the provision, RESPONDENT has already established that the express wording of Clause 12 does not cover imposition of import tariffs [*Arg. ¶60-69*].

**76.** Although not raised by this CLAIMANT, a Claimant might raise the argument that negotiations between PARTIES must be interpreted objectively as per Art. 8(2) CISG in order to determine the intention of PARTIES. Since it is always difficult to determine what parties had in their minds at the time of contract negotiation and conclusion, for practical reasons, the objective interpretation predominates the subjective interpretation [*Schwenzer (2010), p.155; Honnold (1999), art. 8, ¶107; Marble Ceramic v. Ceramica Nuova (USA)*]. However, the negotiations must be interpreted in a way in which a reasonable commercial person would construe them [*Mannai Investment v. Eagle Star (UK); Investment Comp. v. West Bromwich (UK)*]. Accordingly, CLAIMANT'S email dated 31 March 2017 [*Cl. Exh.* 4] must be interpreted from the standard of a reasonable commercial person. A reasonable commercial person in RESPONDENT'S place would construe the communication by CLAIMANT [*id.*], as indicating CLAIMANT'S intention to be protected against such subsequent changes as those associated with additional health and safety requirements only. Accordingly, only these words were specifically added to the hardship clause.

**77.** Moreover, it must be noted that the CISG embodies the principle of *favor contractus* i.e. favouring continuation of the contract whenever possible [*Cobalt Sulphate Case (Germany); Kroll, p. 152*]. An extension of this principle is the principle of 'commercial common sense', whereby contractual terms are construed in a commercial way, with sensitivity to business common sense [*Antaios Cia v. Salen (UK)*]. It is presumed that the parties did not intend to impose all the perils of the transaction on one side, and did not absolve one side of all the perils of the transaction [*The Moorcock (UK)*]. Thus, it is presumed that risks were equally distributed between the parties [*id.*].

**78.** In the present case, the Contract expressly imposes on the Buyer (RESPONDENT) *inter alia,* the risks as to the fertilizing capacity of semen [*Cl. Exh. 5, ¶2*], insurance of the shipment [*id., ¶13*], lost shipments or delays in delivery [*id., ¶12*], and payment of all tank rental and handling fees [*id., ¶10*]. Whereas, the Seller (CLAIMANT) was responsible for risks and obligations under DDP delivery but was still exempted from various risks expressly specified under the *force majeure* and hardship clause [*id., ¶12*]. Despite the fact that RESPONDENT undertook major risks, and CLAIMANT was relieved from various risks and obligations under the Contract, CLAIMANT insists on interpreting Clause 12 as protecting it from another risk i.e. imposition of import tariffs. However, by applying the principle of commercial common sense, the Tribunal must interpret Clause 12 in a manner so as to maintain parity of risks between the Buyer and the Seller. Accordingly, Clause 12 must be interpreted narrowly, implying that PARTIES did not absolve the

Seller (CLAIMANT) of risks associated with import tariffs.

### 3. CLAIMANT cannot claim that imposition of import tariffs constitutes hardship by relying upon definition of hardship under PICC.

**79.** CLAIMANT has argued that the definition of hardship under the PICC constitutes an implied usage between PARTIES, and that it must be used to interpret the hardship clause in Clause 12 of the Contract [*Cl. Memo. ¶62 et seq.*]. It is true that Art. 8(3) CISG allows "usages" to be taken into consideration while determining parties' intentions [*CISG, art. 8(3)*]. However, RESPONDENT submits that CLAIMANT cannot rely upon this definition of hardship under PICC as it has not sufficiently established that it is an implied usage to PARTIES **[a]**. *In any case,* import tariffs imposed on last shipment do not constitute as hardship as per the PICC **[b]**.

#### *a. CLAIMANT has not sufficiently established that the definition of hardship under the PICC constitutes as implied usage to PARTIES.*

**80.** While arguing that that definition of hardship under PICC constitutes an implied usage to PARTIES, CLAIMANT has failed to make a distinction between "usages" established between parties as per Art. 9(1) CISG, and "international trade usages" as per Art. 9(2) CISG [*Cl Memo. ¶62 et seq.*]. *First,* to determine "usages" established between the parties under Art. 9(1), there must be a repetition in certain practices between the parties over a course of several contractual transactions [*Kroll, p. 157*]. However, since PARTIES in the present case were not involved in any business transaction before, no such "*usage*" can be established to exist between them [*P.O. 2, ¶1*].

**81.** *Second,* under Art. 9(2) CISG, to effectively bind the parties a "usage" must be: **1)** widely known in international trade, **2)** regularly observed by parties to contracts of type involved in the particular trade concerned, and **3)** the parties knew or ought to have known of it [*Kroll, p. 154-155*]. The burden of proof to establish that a "*usage*" exists, is upon the party that alleges its existence [*Kroll, p. 169*]. CLAIMANT has asserted that since both Equatorianian and Mediterranean law is verbatim adoption of PICC, it can be inferred that definition of hardship under PICC is of international nature and regularly observed by parties involved in such business [*Cl. Memo. ¶64*].

**82.** However, the threshold of proof under Art. 9(2) is very high, such that the party alleging the existence of such usage must establish the territorial, temporal, personal, and factual sphere of application of the usage [*Doors Case(Germany); Kroll, p. 169*]. While CLAIMANT has submitted that PARTIES knew or ought to have known of the definition of hardship under PICC, it has not sufficiently established that this definition is of international nature, and is regularly used by parties involved in the trade of horse semen [*Cl. Memo. ¶65*]. Consequently, since CLAIMANT has

failed to discharge its burden of proof, it cannot be held that the definition of hardship under the PICC is an implied usage to PARTIES.

***b. Import tariffs imposed on last shipment do not constitute hardship under the PICC.***

**83.** Even if the Tribunal rules that the PICC is an implied usage under Art. 9(2) CISG, RESPONDENT submits that the import tariffs do not constitute as hardship under the PICC. Under the PICC, hardship is defined as the occurrence of events that fundamentally alter the equilibrium of the contract; **and** *inter alia*, could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract, and the risk of these events was not assumed by the disadvantaged party. [*PICC, art. 6.2.2*]. As already established, the import tariffs imposed on last shipment could have been reasonably taken into account by CLAIMANT at the time of conclusion of the Contract [*Arg., ¶62-67*]. Moreover, CLAIMANT assumed the risk of such tariffs by not expressly including them into the hardship clause despite their predictability [*id.; Schwenzer (2009), p. 719*]. Therefore, even as per the definition of hardship under PICC, import tariffs imposed on last shipment do not constitute as hardship.

**4. *In any case,* Clause 12 of the Contract cannot be used to adapt the purchase price as it does not provide for adaptation as a remedy.**

**84.** Clause 12 of the Contract does not expressly state that the Arbitral Tribunal shall adapt the Contract in case PARTIES fail to renegotiate [*Cl. Exh. 5, ¶12*]. CLAIMANT has stated that from a legal point of view, it is not necessary to include an express reference of adaptation into the hardship clause [*Cl. Memo. ¶77*]. However, CLAIMANT'S assertions are not backed by any legal basis, and are thus without any merit [*id.*]. Moreover, it must be noted that even the ICC-hardship clause suggested by CLAIMANT during the negotiations related to drafting of Clause 12 [*Res. Exh. 2*], does not provide for adaptation as the remedy in situations of hardship [*ICC-hardship*]. In fact, the ICC-hardship only allows the party facing the hardship to terminate the contract if both the parties fail to renegotiate the terms of the contract [*id.*].

**85.** Further, CLAIMANT has vehemently argued that the real intention of both PARTIES was to provide for adaptation as a remedy under Clause 12 of the Contract [*Cl. Memo. ¶73 et seq.*]. In order to determine the real intention of the parties, the interpretative tools under Art. 8 CISG must be relied upon [*Schwenzer (2010), pp.154,156; Honnold (1999), p.116*]. While alleging PARTIES' common intention, CLAIMANT has relied upon the witness statement of its own lawyer, Julie Napravnik, to assert that PARTIES agreed upon including an express reference into the hardship clause to ensure that arbitrators can adapt the Contract if PARTIES could not agree on an amendment [*Cl. Memo.*

¶*75*]. However, CLAIMANT has drawn incorrect conclusions from Ms. Napravnik's witness statement, as Ms. Napravnik merely discussed the possibility of adaptation with Mr. Antley and wanted to clarify it further [*Cl. Exh. 8*].

**86.** In fact, even Mr. Antley did not expressly agree to such a proposal, rather merely agreed to come back with a proposal of his own next morning [*id.*]. Thus, it is incorrect to state that PARTIES agreed to include an express reference of adaptation into the hardship clause, because they merely agreed to discuss and negotiate this issue further. Since Mr. Antley could not return back with his proposal owing to the accident [*id.*], the negotiations on this issue did not sufficiently conclude so as to infer 'meeting of minds' between PARTIES. Consequently, CLAIMANT'S assertions that the final Contract was signed by those employees on both sides who were not initially part of the negotiations [*Cl. Memo.* ¶*76*], are irrelevant because even the original negotiators did not reach an agreement on providing adaptation as a remedy in cases of hardship [*Arg.* ¶*85*].

**87.** Further, according to the principle of *contra proferentem*, the party that supplies a certain term or insists on including it in the contract must bear the risks of its ambiguity [*Schwenzer (2010), p. 170; Honnold, p. 107*]. Since Clause 12 was added at CLAIMANT'S insistence, to the existing *force majeure* clause used by CLAIMANT as a standard form of contract [*Cl. Exh. 4; P.O. 2,* ¶*3*], it should be interpreted *contra proferentem* i.e. against CLAIMANT. Therefore, in the absence of express reference to adaptation under Clause 12 and lack of PARTIES' intention to provide for the same, the Tribunal must interpret Clause 12 against CLAIMANT. Accordingly, CLAIMANT'S claim which relies solely on the assumption that Clause 12 of the Contract allows for adaptation, must be dismissed.

### B. CLAIMANT IS NOT ENTITLED TO AN INCREASE IN THE PURCHASE PRICE OF THE FINAL SHIPMENT UNDER THE CISG.

**88.** CLAIMANT has sought adaptation of the purchase price by relying upon the application of Art. 79 CISG to the present case [*Cl. Memo. 81*]. However, CLAIMANT cannot rely upon Art. 79 CISG as PARTIES had derogated from its application by incorporating Clause 12 into the Contract **[1]**. *In any case,* RESPONDENT submits that adaptation of the price cannot be done under Art. 79 CISG because it does not cover the events of economic hardship **[2]**. Moreover, CLAIMANT cannot rely upon PICC to claim adaptation as there is no gap in the CISG which warrants recourse to PICC **[3]**. In any case, RESPONDENT submits that imposition of tariffs does not constitute as hardship under Art. 79 CISG **[4]**. Moreover, CLAIMANT'S request for adaptation is unreasonable, and not permissible under the general principles of CISG **[5]**.

### 1. PARTIES had derogated from the application of Art. 79 CISG by incorporating Clause 12 into the Contract.

**89.** RESPONDENT had in its Answer to the Notice dated 24 August 2018, submitted that CLAIMANT cannot rely upon Art. 79 CISG as it has derogated from its application in the sense of Art.6 CISG [*ANOA, ¶20*]. However, this CLAIMANT has not made any submissions so as to establish that there is no derogation under Art. 6 and that Art. 79 CISG is applicable to the present case [*Cl. Memo., ¶80 et seq.*].

**90.** RESPONDENT submits that the legislative history of the CISG shows that party autonomy is not only limited to the good faith principle [*UN CISG Official Records, 1981 pp. 247-248*], but it also allows parties to agree upon the provisions to derogate from the CISG [*Bullet-proof vest case (Greece)*]. In this regard, Art. 6 CISG provides that parties may expressly or impliedly derogate from some or all of the provisions of the CISG [*Schlechtriem/Butler, p.3; Bridge para. 11.42*]. Specifically, as per Art. 6 CISG, incorporating an exemption clause to limit the liability of a party in case of non-performance or defective performance causes an implied derogation from Art. 79 CISG [*CISG AC Opinion No. 17, ¶2.1.1; Fontaine, pp. 351-401; David*]. In the present case, since PARTIES negotiated and agreed to incorporate an exemption clause in the form of hardship/*force majeure* clause into the Contract [*Cl. Exh. 5, ¶12*], it constitutes implied derogation from the application of Art. 79 CISG.

**91.** Accordingly, CLAIMANT cannot request adaptation of the contract under Art. 79 CISG.

### 2. Adaptation of the price cannot be done under Art. 79 CISG because it does not cover the events of economic hardship.

**92.** Art. 79 CISG exempts a party from performance of its obligations if it is due to an "*impediment*" [*Kroll, p. 1057*]. CLAIMANT has contended that the import tariffs imposed on last shipment that has caused hardship is an "*impediment*" under Art. 79 CISG, and has sought to adapt the Contract as a remedy therein [*Cl. Memo ¶82-85*]. Contrary to CLAIMANT'S assertions, RESPONDENT submits that economic hardship is not envisaged as an impediment under Art.79 CISG **[a]**. Moreover, CLAIMANT cannot seek adaption under Art. 79 CISG because "impediment" under this provision deals exclusively with impossibility of event **[b]**.

**93.** Further, CLAIMANT has asserted that since the import tariffs has made the performance onerous, by placing reliance upon CISG AC Opinion No. 7, the price must be adapted [*Cl. Memo. ¶83-84*]. However, RESPONDENT submits that the price of final shipment cannot be adapted as the excessive onerousness is not a valid defence under Art.79 **[c]**, and CISG AC Opinion No. 7 is not a good precedence in law **[d]**.

**a. *Hardship is not envisaged as an impediment under Art.79 CISG.***

**94.** According to the traditional view, the word 'impediment' does not envision the scenario of hardship in its text and as per the drafting history of Art. 79 CISG [*Petsche, pp. 147-148*]. This interpretation of Art. 79 is in accordance with Art. 31 & 32 of VCLT which envisage the principle of ordinary meaning interpretation, and object and purpose respectively [*VCLT, Art. 31,32*]. Looking at the drafting history of Art. 79 CISG, it is observed that the UNCITRAL Working Group recommendation on inclusion of hardship, as well as the Norwegian & German proposal to consider change of circumstances as a reason of exemption under Art. 79 CISG, were both rejected, indicating the clear exclusion of hardship from Art.79 CISG [*Rimke*; *Petsche pp.163-166*]. Additionally, there existed a consensus among the delegates that the hardship doctrine is unavailable under Art. 79 CISG [*CISG AC No.7, ¶36*]. Hence, the economic hardship faced by the CLAIMANT on account of imposition of tariffs does not constitute as an impediment within the ambit of Art. 79 CISG.

**b. *The impediment under Art.79 CISG deals exclusively with impossibility of an event.***

**95.** RESPONDENT submits that the term impediment under Art.79 CISG provides for a remedial exemption in relation to an event rendered impossible and not merely altered by difficulty/hardship [*Petsche, pp. 147-148*]. There are contrasting differences between situations of hardship and impossibility under Art. 7, CISG which shall prove the exclusion of hardship from the scope of impediment. *First*, the language of Art. 79 in relation to impediment relates to the impossibility of the performance of contract and not merely the contract becoming difficult or excessively onerous for the disadvantaged party [*Petsche, p.157*]. *Second*, reading impediment so as to not cover hardship promotes international character and uniformity of the Convention, which is envisaged in its object and purpose [*Id., p.147; Art. 7(1) CISG*]. Therefore, hardship is excluded from the possible interpretation of Art.79 CISG, and hence subsequent remedies of adaptation cannot be allowed.

**c. *The defence of excessive onerousness situation is not valid under Art.79 CISG.***

**96.** The defence of excessive onerous circumstances has been denied under Art. 79 CISG because the *doctrine of excessive onerousness* is not fit within the structure of the convention in both invoking a defence and as a reason to avoid the contract [*Nicholas, p. 54; Nuova v. Fondmetal(Italy)*]. Accordingly, courts of various jurisdictions have denied to adapt the contract on the grounds that an increase in price of goods/price fluctuations does not constitute an impediment under Art. 79 CISG [*Vital Berry v. DiraFrost(Belgium); Iron Molybdenum Case(Germany); Société Romay v. SARL Behr*

*I(France)*]. Therefore, CLAIMANT'S assertions that imposition of tariffs has caused performance of the Contract to be onerous, are invalid under Art. 79 CISG.

#### d. *CLAIMANT cannot rely upon AC Opinion No. 7 to seek adaptation due to hardship.*

**97.** CLAIMANT has relied upon AC Opinion No.7 to argue that the adaptation of the contract is justified in case of hardship [*Cl. Memo ¶83*]. Admittedly, AC Opinion No. 7 opined that adaptation in case of hardship may be allowed under Art. 79 CISG [*CISG-AC Opinion 7, ¶40*]. However, CLAIMANT has failed to take into consideration that the AC admitted that hardship may even be considered as a validity-related issue, and thus can be excluded from the scope of GISG altogether [*CISG-AC Opinion 7, ¶36; Lookofsky, p. 496*].

**98.** Additionally, it must be noted that the AC replaced the CISG '*conformity criteria'* with the more elastic '*consistency criterion*' in order to give a more expansionist approach to Art.79, CISG [*J. Lookofsky (2011), p.162*]. However, such a manoeuvre is not in consonance with the general principles of CISG, and hence is not a persuasive authority for any hardship relief [*id.; Ferrari p. 63-92; Henschel p. 43-47; Steensgaard p.43*]. Further, the AC Opinion creates a divide between the Civil and Common law traditions, as the term 'hardship' connotes a factual scenario and not a legal doctrine [*Flechtner, p. 85*]. In light of which, the common law completely rejects the adaptation of contract if not backed up by the general principles of CISG [*id.; Daniel Behn p. 190*]. Moreover, mere price increase is not considered a sufficient ground for change of circumstances and to claim an exemption under Art. 79 CISG [*Schwenzer & Hachem, p. 669*]. Thus, in the absence of supplementing general principles, hardship cannot be covered under Art. 79 CISG.

### 3. CLAIMANT cannot rely upon PICC to claim adaptation as there is no gap in the CISG which warrants recourse to PICC.

**99.** Art. 7(2) CISG provides that matters which are not expressly settled by the CISG shall be settled in conformity with the general principles on which it is based [*kroll p. 112*]. In this regard, CLAIMANT has contended that there is a gap in Art. 79 CISG since there is no specific remedy in situations of hardship [*Cl. Memo. ¶86*]. Contrary to CLAIMANT'S assertions, the drafting history of Art. 79 CISG indicates that it does not contain a gap in relation to situations of hardship [*Rimke p.220, J. Honnold p. 349-350*]. Even the purpose of Art. 79 CISG was to set definite limits on the promisor's liability for breach of contract [*Kroll, p. 1057, Stoll, p. 602*]. Subsequently, various proposals brought forward during the drafting process of Art. 79 CISG with regards to the hardship question were expressly rejected [*Arg. ¶94*]. This is because the adaptation of the contract by the judges is not allowed under the convention, although the contracting parties are given the

autonomy to include specific provisions in their contracts for changed circumstances [*Rimke, p. 197-243*]. To that extent, PARTIES in the present case, had included Clause 12 into the Contract to deal with the different situations such as *force majeure,* hardship and safety requirements [*Cl. Exh. 5, ¶12*]. Therefore, CLAIMANT cannot claim that there is a gap in Art.79 CISG which warrants recourse to PICC.

**100.** Even if the Tribunal rules that there is a gap in Art. 79 CISG, CLAIMANT'S reliance upon PICC for filling this gap is based on an erroneous application of Art. 7(2) CISG [*Cl. Memo ¶86 et seq.*]. This is because Art.7 (2) CISG mandates filing of a gap by the general principles on which the CISG is based, and not on the basis of general principles of the international trade [*Klepac, p. 34, Flechtner, p. 95*]. Further, the scope of application of CISG and PICC is significantly distinctive, as the CISG deals exclusively with the international contracts on sale of goods [*Art. 1(1) CISG*]. Whereas, PICC has a much wider ambit in relation to general commercial contract principles which can be used in wide array of commercial transactions [*Tepes, p.688*]. Accordingly, PICC and other external principles cannot be used to supplement the CISG [*id., p. 682*].

**101.** Moreover, CLAIMANT has relied on the judgement of Belgian Supreme Court in the *Scafom case*, in order to establish the application of Art. 6.2.3 PICC under Art. 7(2) CISG [*Cl. Memo ¶87; Scafom International v. Lorraine (Belgium)*]. However, the Court in the *Scafom case* interpreted "*the general principles of CISG"* as the *"general principles of the international trade*", and subsequently resorted to the provision Art. 6.2.3 PICC to allow the adaptation of the contract [*id. p. 12*]. As already established, general principles of CISG are not analogous to general principles of international trade under PICC [*Arg., ¶100*]. Accordingly, this approach adopted by the court in *Scafom case* is not in consonance with the gap-filling approach under Art. 7(2) CISG [*id.*], and hence cannot be used to provide a remedy of adaptation [*Flechtner, p.96*].

### 4. The imposition of tariffs does not constitute hardship under Art. 79 CISG.

**102.** Even if the Tribunal rules that Art. 79 CISG covers situations of hardship, it must be noted that Art. 79 CISG covers only those events that, occur after the conclusion of the contract, could not reasonably have been taken into account and was beyond the control of the disadvantage party, and the risk for such event was not have been assumed by the disadvantaged party [*Kroll, p. 1039*]. CLAIMANT has argued that the change of circumstances caused due to the imposition of 30% tariffs on imports by Equatoriana has met all the requirements of hardship and justifies adaptation of the contract [*Cl. Memo ¶92 et seq(q).*].

**103.** However, it must be noted that the requirements of Art.79 CISG are cumulative in nature i.e. a party may not be able to invoke the hardship defence if it is established that any of these requirements were not met in the given facts and circumstances [2012 *UNCITRAL Case Digest*].

Accordingly, RESPONDENT submits that imposition of import tariffs does not constitute hardship under Art. 79 CISG as *first,* CLAIMANT could reasonably have taken into account imposition of tariffs at time of conclusion of the Contract **[a]**; and *second,* it had assumed the risk of such tariffs at the time of entering into the Contract **[b]**. *In any case*, imposition of tariffs does not meet relevant threshold level required to claim hardship **[c]**.

### a. *CLAIMANT could have reasonably taken into account imposition of tariffs at time of conclusion of the Contract.*

**104.** A party can claim exemption under Art. 79 CISG only if it could not have been reasonably expected to take the impediment into account at the time of signing the contract [*Brunner, pp. 111-113; CISG, art. 79*]. As already established by RESPONDENT, the imposition of tariffs on last shipment were reasonably foreseeable and could have been taken into account by CLAIMANT at the time of conclusion of the Contract [*Arg., ¶62-67*].

### b. *CLAIMANT had assumed the risk at the time of entering into the Contract.*

**105.** It is generally presumed that if an event could have been taken into account by the aggrieved party, but it did not incorporate a specific contract clause to deal with the same, then that party had assumed the risk [*Schwenzer (2009), p. 719*]. In the present case, PARTIES had disregarded the wide ICC-hardship clause and inserted a narrowly-worded hardship clause in Clause 12 of the Contract so as to regulate the specific risks that CLAIMANT sought to be relieved of [*Arg., ¶73*]. Since CLAIMANT could reasonably foresee imposition of tariffs at the time of Contract conclusion and yet it chose not to include such event into Clause 12 of the Contract [*Arg., ¶62-67*], it can be presumed that CLAIMANT had assumed its risk.

### c. *Imposition of import tariffs does not meet the requisite threshold of hardship.*

**106.** The principle of *pacta sunt servanda* does not allow for hardship to be read under Art.79 CISG on the mere fact that the performance of contract has become more expensive for the disadvantaged party [*Schwenzer 2009, p.714*]. *Schwenzer* in her Commentary on CISG, has presented a hypothetical case where a seller cannot perform his obligation to deliver certain amount of goods due to an increase in the cost after increase in import duties, and, has observed that the seller is expected to obtain the goods at a higher price [*Schwenzer (2016) p.1142*]. Additionally, the judicial and arbitral practice denies the exemption even in the extreme cases of price fluctuations, indicating the unwillingness to consider it as a hardship [*Kroll, ¶78; Arg. ¶68*]. Accordingly, it has been held that even a 100% increase in the price of the goods is not sufficient to constitute hardship [*Arg., ¶68*]. In the present case, the imposition of tariffs on last shipment has increased

CLAIMANT'S cost of performance only by 30% [*Cl. Exh. 7*]. Therefore, such tariffs do not meet the requisite threshold for hardship under Art. 79 CISG.

### 5. CLAIMANT'S request for adaptation is unreasonable, and not permissible under the general principles of CISG.

**107.** CLAIMANT has requested the remedy of adaptation by the application of general principles of good faith and promissory estoppel under the CISG [*Cl. Memo ¶110 et seq(q).*]. However, RESPONDENT submits that CLAIMANT'S request for adaptation must be rejected as *first,* RESPONDENT did not act in bad faith **[a]**, and *second,* the principle of promissory estoppel does not apply in this case **[b]**.

#### a. *RESPONDENT did not act in breach of the good faith principle in the present case.*

**108.** Admittedly, CISG embodies the principle of good faith that imposes an obligation on the parties to fulfil their contractual obligations in a fair and just manner [*Powers, pp.333-353*]. CLAIMANT has argued that RESPONDENT acted in bad faith by reselling the frozen semen doses since the Contract between PARTIES prohibited resale of frozen semen [*Cl. Memo. ¶113-114*]. However, RESPONDENT submits that CLAIMANT'S interpretation of the Contract is erroneous, and that on a proper interpretation it shall be established that the Contract does not bar resale of semen. In this regard, the predominately used reasonable standard test under Art. 8(2) CISG must be relied upon so as to interpret the Contract, and to determine whether PARTIES agreed on prohibition of resale of frozen semen [*Schwenzer(2010), p.155; Honnold (1999), art. 8, ¶107; Marble Ceramic v. Ceramica Nuova(USA)*].

**109.** In the present case, there is no express provision in the Contract that prohibits RESPONDENT from reselling the semen doses [*Cl. Exh. 5*]. In fact, the Contract merely mentions that the semen is to be used for three mares that were below-mentioned *and others after information of the Seller,* which cannot be interpreted as prohibiting resale of semen [*id.*]. Despite the express language of the Contract not containing any resale prohibition, CLAIMANT has argued that PARTIES had agreed to such a prohibition, as it had conveyed in an email that the frozen semen *may* not be resold to third parties without its express consent, and that RESPONDENT did not object to such request [*Cl. Memo. ¶113*].

**110.** However, it must be noted that as per Art. 8 CISG, for a statement of a party to constitute agreement between the parties, it has to be manifested unambiguously and with absolute clarity [*Magnesium Case(ICC); Office Furniture Case(Switzerland)*]. Whereas, CLAIMANT did not use words like shall' or 'must' to convey its intention to prohibit resale of semen but merely used the word

"*may*" [*Cl. Exh. 2*]. A reasonable person in RESPONDENT'S place would not construe such statement as manifesting CLAIMANT'S absolute intention to prohibit resale of semen.

**111.** Moreover, CLAIMANT could reasonably be expected to know that there might be resale of semen because 100 doses of semen were to be shipped within a year, and RESPONDENT merely had 10 mares out of which only 3 were specified in the Contract for insemination purposes [*NoA, ¶4; Cl. Exh. 5*]. CLAIMANT cannot reasonably expect that all 100 doses could be used upon RESPONDENT'S mares [*Cl. Exh. 5*]. Therefore, since CLAIMANT knew the possibility of resale of semen, and did not include an express prohibition on resale, it cannot contend that the Contract prohibited resale of semen.

**112.** Accordingly, RESPONDENT did not act in bad faith by reselling the frozen semen doses.

### b. *General principle of promissory estoppel is inapplicable in the present case.*

**113.** CLAIMANT has relied on statement of Mr. Shoemaker (RESPONDENT'S employee) to assert that RESPONDENT promised to adapt the price, and that according to the principle of promissory estoppel, price must be adapted [*Cl. Memo ¶117*]. However, CLAIMANT has presented an incorrect picture of Mr. Shoemaker's conversation with Ms. Napravnik (CLAIMANT'S lawyer) on 21 January 2018 regarding tariff imposition [*Cl. Ex. 8, Res. Exh. 4*].

**114.** It must be noted that as per Ms. Napravnik's (CLAIMANT'S lawyer) own witness statement [*Cl. Ex. 8*], Mr. Shoemaker told her that he was not involved in the negotiations of the Contract, and was not even authorized to sanction additional payments. He merely mentioned that he "*saw [Claimant's] problem*", which cannot be interpreted as agreeing to adapt the price [*id.*]. Moreover, Ms. Napravnik agreed to bear the additional cost because she wanted to continue business relations with RESPONDENT, and secure another the order of 50 doses of Empire's State from the RESPONDENT [*Cl. Exh. 8*]. Therefore, Mr. Shoemaker's conversation with Ms. Napravnik does not constitute RESPONDENT'S promise to adapt the price. Accordingly, general principle of promissory estoppel is inapplicable in the present case.

**Conclusion to the Third Issue**:

Since parties in a contract are bound by the terms and clauses of their contract, CLAIMANT is bound to pay the additional amount of US$1,250,000 on account of import tariffs according to its obligations under DDP delivery. Moreover, CLAIMANT cannot claim adaptation of the price as the imposition of import tariffs does not constitute hardship, neither within the ambit of Clause 12 of the Contract, nor under the ambit of 'impediment' under Art. 79 CISG. In any case, the Tribunal cannot adapt the price as the remedy of adaptation is neither provided under Clause 12 of the Contract, nor under the CISG.

## REQUEST FOR RELIEF

In light of the submissions made above, RESPONDENT respectfully requests the Tribunal to find that:

I. The Tribunal does not have the power and jurisdiction to adapt the FSSA, under the arbitration clause.

II. CLAIMANT is not entitled to submit the PIA from the other arbitration as evidence.

III. CLAIMANT is not entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price, neither under Clause 12 of the Contract, nor under the CISG.

*Respectfully submitted,*

**COUNSELS-**

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Aditya Suresh

Aman Gupta

Mayuri Manwani

Sarthak Singla