SIXTEENTH WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

APIIT LAW SCHOOL

MEMORANDUM FOR RESPONDENT

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

● NISHEL BOTEJU ●NITHMA FERNANDO ● SHAAMIL SHAKEER●VINUSHA FERNANDEZ

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

&	And
¶/¶¶	Paragraph
§/§§	Section/s
Sub§/sub§§	Sub section/s
HKIAC Rules	Hong Kong International Arbitration Centre Rules 2018
Arbitration Agreement	Clause 15 of the Frozen Semen Sales Agreement.
Art./Arts	Article/ Articles
CLAIMANT	Phar Lap Allevamento
CE	Claimant Exhibit
CISG	The United Nations Convention on Contracts for the International Sale of Goods 1980
Cl./Cls.	Clause/s
DDP	Delivery Duty Paid (incoterm 2010)
Ex.	Exhibit
ed	Edition
FSSA	Frozen Semen Sales Agreement

GC	General Conditions
Hardship Clause	Clause 12 of the frozen Semen sales Agreement
IBA Rules	IBA rules on the taking of evidence in International Arbitration 2010.
UNCITRAL Transparency rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
Ibid	Ibidem
Ltd.	Limited
Model Law	UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006)
New York Convention	Convention on the recognition and Enforcement of Foreign Arbitral Awards New York 1958
No./Nos.	Number/s
NoA	Notice of Arbitration
ANoA	Answer to Notice of Arbitration
Parties	Phar Lap Allevamento and Black Beauty Equestrian
p./pp.	Page/s
PCA	Permanent Court of Arbitration
PO	Procedural Order
Pt./Pts.	Point/s
Q	Question

RESPONDENT	Black Beauty Equestrian
RE	Respondent Exhibit
Tribunal	The Arbitral Tribunal that consists of Ms. Wantha Davis, Dr. Francesca Dettorie, Prof. Calvin de Souza
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
UMMC	Claimant Memorandum for the University of Mannheim
WTO	World Trade Organization

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EN UNCITRAL	Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006	

STATUTES, INSTITUTIONAL RULES, AND GUIDELINES

CISG	United Nations Convention on Contracts for the International Sale of Goods	

The Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006
Arbitration Rules	UNCITRAL Arbitration Rule (as revised in 2010)
UNIDROIT	Principles UNIDROIT Principles of International Commercial Contracts 2016
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
IBA Rules	IBA Rules on taking Evidence in International Arbitration 2018
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958

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World Tariff Profiles 2006	World Tariff Profiles 2006 AVAILABLE AT: https://www.wto.org/english/tratop_e/tariffs_e/tariff_profiles_2006_e/tariff_profiles_2006_e.pdf	112
World Tariff Profiles 2017	World Tariff Profiles 2017 AVAILABLE AT: https://www.wto.org/english/res_e/booksp_e/tariff_profiles17_e.pdf	

STATEMENT OF FACTS

2017	
MARCH	• RESPONDENT contacted the CLAIMANT for 100 doses of Nijinsky 3's semen [21st]. [CE 1] • CLAIMANT made an offer to deliver 100 doses of semen in 3 installments [24th]. [CE 2] • RESPONDENT objected to the Choice of Law, the dispute resolution clause and insisted on DDP delivery terms, while accepting most of the other terms [28th]. [CE 3] • CLAIMANT agreed on the delivery terms with the conditions of an increase in price and an inclusion of a hardship clause. [CE 4]
APRIL	• RESPONDENT proposed the model arbitration clause under the HKIAC [10th]. [RE 1] • CLAIMANT accepted the clause amending the seat of arbitration and suggested the ICC hardship clause [11th] [RE 2], subsequently the final negotiations on the hardship clause, choice of law and the arbitration clause, the two main negotiators were severely injured in an accident when driving from the colt auction [12th]. [RE 3]
MAY	• The contract was finalized [6th]. [CE 5]
NOVEMBER	• President of Mediterraneo imposed a tariff of 25% on agricultural products from Equatoriana [23rd].
DECEMBER	• The Equatorian government retaliated and imposed a tariff of 30% for selected products from Mediterraneo including race horse semen in response to the above restriction [19th]. • Article on the 30% Tariff was published [20th]. [CE 6]
2018	
JANUARY	• • The CLAIMANT contacted the RESPONDENT regarding the price for the remaining 50 doses [20th] [CE 7]. The RESPONDENT requested the doses due to the importance of timely delivery. (During the Telephone discussion between Mr. Shoemaker and Ms. Napravnik) [21st].

	CLAIMANT delivered the doses before agreeing on a price [23rd]. [CE 8]
FEBRUARY	• The CLAIMANT had a meeting with the RESPONDENT'S CEO who was frustrated with their additional requests and decided to end relationships with the CLAIMANT. [12th]. [CE 8]
JULY	• CLAIMANT submits the NoA and Nominates Ms. Wantha Davis as their arbitrator and a letter by HKIAC mentioning the Receipt of NOA by the CLAIMANT. [31st] [Pg 19]
AUGUST	• Ms. Wantha Davis declares her acceptance and impartiality [1st]. CLAIMANT agrees to rates of Ms. Wantha Davis and has completed payments to HKIAC [2nd]. [Pg 26] • Witness statements by Julian Krone and Greg Shoemaker [22nd]. [RE 3], [RE 4] • RESPONDENT submits the Answer to the Notice of Arbitration and nominates Dr. Francesca Dettorie as the arbitrator [24th]. [Pg 29], [Pg 37] • Letter by HKIAC mentioning receipt of the ANOA while RESPONDENT agrees to the fees of the Arbitrator [25th] [Pg 39] a letter by HKIAC requests to appoint a presiding Arbitrator [28th]. [Pg 40]
SEPTEMBER	• Arbitrator, Prof. Calvin de Souza was proposed as presiding arbitrator[14th]. [Pg 41] Letters by HKIAC confirming the presiding arbitrator fee [17th] [Pg 42] and confirming the constitution of the tribunal [18th] [Pg 45]. The presiding arbitrator accepted the appointment [20th]. [Pg 48]
OCTOBER	• CLAIMANT receives information regarding another arbitration involving the RESPONDENT based on HKIAC [2nd]. [Pg 49] • RESPONDENT objects to the above submission of the CLAIMANT [3rd] [Pg 50] and Parties have a telephone conference [4th].

ISSUE I: THE ARBITRAL TRIBUNAL IS NOT EMPOWERED TO ADAPT THE SALES AGREEMENT

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO ADAPT THE CONTRACT UNDER DANUBIAN LAW

1. The Arbitral Tribunal does not have the power to adapt the FSSA under the law governing the Arbitration Agreement, i.e the Law of Danubia [A]. Further the Law of Danubia, i.e. Model Law, does not provide for the application of the substantive law, i.e. Law of Mediterraneo, in interpreting the arbitration agreement. [B].

A. THE LAW OF DANUBIA DOES NOT CONFER THE ARBITRAL TRIBUNAL POWER TO ADAPT THE CONTRACT

2. The Arbitral Tribunal is allowed to rule on their own jurisdiction as stipulated by the principle of competence-competence as stated in Article 16 of the Model Law. The RESPONDENT submits that that even if the Arbitral Tribunal does decide on the question of jurisdiction, it does not have the power to adapt the Frozen Semen Sales Agreement (FSSA), under the Law of Danubia, the law that governs the Arbitration Agreement.

a. THE ARBITRATION AGREEMENT IS GOVERNED BY THE LAW OF DANUBIA

3. The RESPONDENT submits that Danubian Law, i.e. the lex arbitri, is the law that governs the Arbitration Agreement and not the Law of Mediterraneo. Prior communications between the CLAIMANT and the RESPONDENT, proves that both Parties agreed the Law of Danubia will be the lex arbitri that governs the Arbitration Agreement.

i. The Arbitration Agreement and the Sales Agreement are separate

4. The doctrine or principle of separability is a cornerstone principle of international arbitration. "The characteristics of an arbitration agreement… are in one sense independent of the underlying or substantive contract [and] have often led to the characterization of an arbitration agreement as a 'separate contract'" [**Born p.350**].

5. The doctrine of separability allows the Tribunal to look at the agreement by separating it into two contracts; The FSSA, and the Arbitration Agreement. HKIAC rules recognize the Arbitration Agreement to be separate from the sales contract between the two Parties [**HKIAC Art 19(2)**].

6. "An arbitration clause is considered to be separate from the contract in which it is contained" [**Redfurn and Hunter ¶5.101**]. As the two agreements are separate, even if the Law of Mediterraneo governs the

substantive contract, the Arbitration Agreement is governed by the Law of Danubia. It is not uncommon for a separate law to apply to the Arbitration Agreement, as in the case of [**Fiona Trust & Holding Corporation and ors v Privalov and ors**] where the courts decided that the arbitration agreement and the sales contract to be two different agreements, in this instance the Law of Danubia is the Law that governs the Arbitration Agreement.

7. RESPONDENT submits that it is also the doctrine of separability that permits the validity of , the Arbitration Agreement, even when the substantive contract is void. As such, the doctrine of separability prevents "any party that could seek to avoid arbitration by simply alleging the invalidity of the contract in which the arbitration agreement is contained.

8. If the contract is not valid or is non-existent, then the basis for the tribunal to decide whether or not the arbitration clause is valid or not is immediately apparent". [**Redfurn and Hunter ¶5.100**]. Accordingly, the RESPONDENT submits that the separability of the Arbitration Agreement and the contract is indisputable, and thus the Arbitration Agreement is governed by Danubian Law, as was expressly agreed between the parties.

ii. Law applicable to the substance does not apply to the Arbitration Agreement

9. The CLAIMANT has misunderstood and therefore misinterpreted the law in ¶44 of the CLAIMANT'S memo. *[UMMC ¶44]*. The heading of Art 28 of the Danubian Arbitration Law clearly states, *"Rules applicable to the substance of the dispute".* The term "substance" refers to the actual contractual dispute between the Parties and not the matters related to the Arbitration Agreement.

10. Chapter VI of the Model Law, under which the Article in discussion is found, discusses making of awards. Art.28 discusses the law applicable to the substance of the contract and subsection 1 allows for any choice of the parties to be given precedence. The Law of Danubia expressly recognizes the principle of separability and the Arbitration Agreement is considered a procedural contract and the sales agreement is considered otherwise *[PO2 ¶36]*. In this instance, Ar.t 28 refers to the substance contract and hence does not govern the procedural contract, i.e. Arbitration Agreement.

11. As per Art. 28(3) of the Danubian Law, adaptation does not fall within the exercise of ordinary powers conferred on by the Parties but an exercise of exceptional powers. There must be an express conferral of powers in order for the exercise of such exceptional powers, i.e. the adaptation of the contract *[PO2 ¶36]*. However, such express conferral is not present in this instance. Therefore, most emphatically the Tribunal is not empowered to adapt the FSSA.

12. Art 28(1) of the Danubian Arbitration Law states that the "arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the Parties as applicable to the substance of the dispute". This again refers to the fact that the Tribunal shall decide on the dispute, that arises due to the substance and not the procedural matter.

13. Art. 28(2) of the Danubian Law, which states *"failing such designation by the Parties"* , is only applicable in a situation where Parties have failed to agree on the law that should govern the arbitration agreement and in a scenario where Art. 28(1) is void. However, the parties, in the instant case have expressly designated Danubian Law to govern the Arbitration Agreement and therefore Art. 28(2) is not applicable.

b. LAW OF DANUBIA ALLOWS FOR A NARROW INTERPRETATION OF THE ARBITRATION AGREEMENT

14. Danubian Law is a based on the UNCITRAL Model Law, [PO1, 4] and Danubian Law contains the "four corner rule" which excludes all extraneous evidence for the interpretation of contracts and where arbitration agreements are 'interpreted narrowly' [PO1, 2]. This requires the Tribunal to strictly restrict themselves to the scope of the existing contract. The scope for interpretation allowed by Danubian law is limited and does not allow for adaptation of the contract [PO1, 1, ii].

i. The express wording of the Arbitration Agreement does not empower the Arbitral Tribunal to adapt the contract

15. The Arbitration Agreement, i.e. Cl. 15, is primarily based on the Arbitration Clause proposed by the RESPONDENT, which was drafted primarily based on the HKIAC Model Arbitration Clause. Most importantly the RESPODNENT in drafting the said proposed Arbitration Clause narrowed down and streamlined the fairly broad wording of the HKIAC Model Arbitration Clause. The Respondent submits that the said amendments were made in order to avoid the conferral of any exceptional powers such as the power to adapt contract, to the Arbitral Tribunal. *[RE1 p.33].* The only amendments made by the CLAIMANT to the proposal was the change to the seat of arbitration, to be Danubia *[RE2 p.34].* Therefore, it is apparent that even the CLAIMANT did not intend to confer wider powers to the Arbitral Tribunal, and that they expressly consented to the narrowing down of the powers of the Arbitral Tribunal.

16. The Model Arbitration Clause reads "Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it

shall be referred to and finally resolved by arbitration" *[HKIAC website]* . However, Cl. 15 *[CE 5 p.14]* reads "Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration". The express exclusion of terms "controversy, difference or claim", the term " relating to" and the phrase "or any dispute regarding non-contractual obligations arising out of or relating to it", most clearly establishes that the both the RESPODNENT and the CLAIMANT were aware and agreeable to the limitation and or restriction of the powers of the Tribunal.

17. The Arbitration Agreement, i.e. Cl.15, only covers issues arising out of the contract in contrast to matters relating to the contract *[CE 5 p. 14].* This substantially narrows down the arbitrability of certain disputes in contrast to the words "arising out of or related to", which allows for a broader interpretation *[American Recovery Corporation V Computerized Thermal Imaging, Incorporated]* . Matters that fall within the term " arising out of", are matter which are directly emanates from the contract *[Tracer Research Corp. v. Nat'l Environmental Servs. Co, Reddam v. KPMG LLP, 2004 WL 3761875].* In contrast the term "in relation to is generally subjected to a broader interpretation covering a wide range of disputes that can be related to a contract. *[Born p.1349]*

18. In addition, the claim for adaptation is not covered by the Arbitration Agreement as arbitration, according to the agreement, is restricted only to disputes that arise out of the contract in contrast to any claim or difference that relate to the contract. This further proves the intention of the parties to restrict the powers of the Tribunal.

19. According the RESPODENT most emphatically submits that in this instance, the narrowly worded Arbitration Agreement is incapable of conferring the Tribunal the power to adapt the contract, due to its limited scope of application in disputes arising out of the contract, as opposed to any external claims for adaptation based on an increased tariff that is not covered under the contract.

B. In terms of CISG and Danubian Law, the Arbitration Agreement cannot provide for adaptation of the FSSA by the Arbitral Tribunal

20. The CLAIMANT argues that the jurisprudence in Mediterraneo allows the application of CISG for the interpretation of arbitration clauses of sales contracts governed by the CISG *[UMMC ¶30; POI p.53].* Accordingly Art. 8 of CISG provides for the ascertainment of the intention of the parties in interpreting an Arbitration Agreement.

21. The Respondent submits that the contract at hand does not contain an adaptation clause. However, it is vital that the parties engaged in extensive negotiations on the inclusion of an adaptation clause in the

Arbitration Agreement *[CE 8 p.17].* Therefore, it is undeniable that the intentional exclusion of an adaptation clause, following the said extensive negotiations, expressed the Parties' intention not to adapt the contract at any time or to confer the Tribunal any such power to adapt the contract .

22. A Hardship clause must be differentiated from renegotiation clauses. Renegotiation clauses allow for renegotiation of contract upon the fulfilled requirements renegotiated upon and thereby facilitates adaptation. *[Brunner p.513].* Accordingly Clause 12 of the agreement, which is merely a hardship clause as opposed to a clause which allows renegotiation and thereby adaptation, the CLAIMANT can not rely on such hardship to infer any intention to adapt the contract.

23. The RESPONDENT has not been irresponsible in not clarifying the situation regarding its position on the situation. However, prior to the accident Mr. Antley only stated that adaptation would "probably" be the task of the arbitrators *[CE 8 p. 17].* At no point did he state that RESPONDENT was certain on conferring the powers on adaptation to the Tribunal. Therefore, since there was no initial agreement on the Tribunals power to adapt the RESPONDENT rightfully considered that the Tribunal would not be granted powers to adapt the contract and therefore did not assume any uncertainties.

a. Under and in terms of Article 8(3) of CISG, the Arbitration Agreement is governed by the Lex Arbitri.

24. The CLAIMANT refers to the drafting history of the Arbitration Agreement to determine the law applicable to the interpretation of the Arbitration Agreement *[UMMC ¶17].*

25. From the initial stages of drafting the Arbitration Agreement, the RESPONDENT communicated its intention to select a separate law to govern the Arbitration Agreement. The CLAIMANT states that in the email dated 28th March the RESPONDENT agreed to the application of the Law of Mediterraneo. It should be noted that the RESPONDENT was only willing to accept application of the Law of Mediterraneo only if courts of a different country had jurisdiction over such disputes *[CE3 pg.11].* The intention of the RESPONDENT to deviate from the norm of application of the Law and courts of Mediterraneo was made evident to the CLAIMANT.

26. Accordingly, following the CLAIMANT's proposal to opt for arbitration in Mediterraneo *[CE4 pg.12],* the RESPONDENT proposed the seat of arbitration and the law governing the Arbitration to be Equatoriana while it was decided that the FSSA would be governed by the Law of Mediterraneo as the

Law governing the FSSA ***[CE3 pg11].*** Firstly, this communicates the insistence of the RESPONDENT for a distinction between the law of the Sales agreement and Arbitration Agreement.

27. Secondly, the intention of the application of the lex arbitri was communicated. The RESPONDENT expressly states that the proposed clause is based on the HKIAC model clause***[RE1 p33]***. The Model Clause suggests the inclusion of a specific choice of law governing the Arbitration Agreement ***[HKIAC website]***. In the email dated 10th April, the RESPONDENT expressly mentioned the seat of arbitration to be Equatoriana and the law governing the arbitration to be the Lex Arbitri, law of Equatoriana ***[RE1 p.33].***

28. Thereby the CLAIMANT accepted the proposal stating that *'we would largely accept your proposal with an amendment as to the place of arbitration*' and the only amendment was the need to arbitrate in a neutral country making the seat of arbitration Danubia ***[RE2 p.34].*** There was no objection to the application of the lex arbitri or for a separate law to be governing the Arbitration Agreement, with the implication that the Lex Arbitri would govern the arbitration Agreement.

29. The RESPONDENT most categorically denies the CLAIMANT's allegation of negligence, ***[UMMC ¶21],*** and the RESPONDENT most clearly submits that the drafting of the dispute resolution clause was a joint effort by both parties, and further in view of the emails sent by the RESPODNENT, clearly setting out its intention to opt out of the jurisdiction of the courts of Mediterraneo, and the CLAIMANT's response requesting for a neutral seat, cumulatively establishes most unequivocally the express agreement between the parties to subject the substantive contract to the law of Mediterraneo, and the Arbitration to the Law of Danubia.

30. Moreover, the RESPONDENT submits that it has always been the constant practice of the RESPONDENT, to abide by the law of the seat of arbitration, just as they did in the ongoing arbitration. [p.60 PO2 ¶39].

31. In the totality of these circumstances, the RESPONDENT submits that the arbitration agreement is separate from the substantive contract, and thus is governed by the Law of Danubia, in accordance with the intention of the parties, as inferred from the drafting history of the Arbitration Agreement, exclusion of the adaptation clause and most importantly the narrow and express wording of the Arbitration Agreement.

ISSUE 2: THE CLAIMANT MUST NOT BE ENTITLED TO SUBMIT THE EVIDENCE OF THE CONCURRENT ARBITRATION.

32. The arbitral tribunal shall not allow the submission of the evidence of the concurrent arbitration proceedings as it will be a breach of the applicable laws and guidelines *[I]* and that such restriction will not violate any right of the CLAIMANT *[II]*. The CLAIMANT cannot rely on the decision given in the partial interim award *[III]*.

I. THE APPLICABLE RULES AND GUIDELINES DOES NOT ALLOW THE SUBMISSION OF THE EVIDENCE FROM THE CONCURRENT ARBITRATION.

33. Article 19 of the model law allows the Parties to agree on a procedure to be followed by the Arbitral Tribunal. The CLAIMANT states that the Parties have agreed to the HKIAC rules to govern the arbitration *[PO1 p.51]* which gives the tribunal a wide discretion on the admissibility of evidence and therefore, the tribunal must allow the submission of the evidence *[UMMC ¶52]*. However, the Parties freedom to agree on a procedural law is subjected to some mandatory rules on procedure

[EN UNCITRAL ¶34] Considering that the concept that an arbitration is governed by the law of the place in which it is held, which is the 'seat' of the arbitration, is well established in both the theory and practice of international arbitration" *[Redfurn and Hunter ¶171]*.

34. Considering that the seat of arbitration is Danubia *[CE5 p.14]*, the lex arbitri of the current arbitration is the Danubian Arbitration Law which is the UNCITRAL Model Law with the 2006 amendments *[PO2 pt.4 p.53]*. Section 5, of the UNCITRAL Model Law (including the amendments made in 2006) illustrates the basic requirement of procedural fairness which must be followed in arbitration proceedings. Fairness and efficiency in arbitration proceedings is further discussed in Art.13.5 in the HKIAC rules.

35. The RESPONDENT submits that arbitral tribunals refuse to admit evidence that either results in procedural unfairness or those obtained in bad faith, thus violating the Parties' obligations to act in good faith *[Sicard-Mirabal and Derains §208]*.

36. Accordingly, the Respondent most emphatically submits that the evidence sought to be submitted by the Claimant should be rejected by the Arbitral Tribunal on the following grounds: Extraneous evidence must not be admitted to the current arbitration *[A]*. The evidence discussed is privileged information of the RESPONDENT which has been obtained by an illegal manner *[B]*. Acts of procedural unfairness have taken place violating the obligation to act in good faith *[C]*.

A. EXTRANEOUS EVIDENCE MUST NOT BE ADMITTED TO THE CURRENT ARBITRATION.

37. The Danubian Contract Law contains the four-corner rule which restricts the submission of external evidence in the current arbitration *[PO1 ¶2 pt.3]*. The CLAIMANT addresses the fact mentioned above by stating that such a procedural standard does not apply to the current arbitration as such standard is only followed in criminal proceedings *[UMMC ¶55]*. Despite the CLAIMANTs assertion, the four-corner rule has been discussed in many cases including civil proceedings *[NL industries; Water well solutions]*. Therefore, the four-corner rule shall apply to the current arbitration.

38. Courts are restricted to consider anything beyond the written contract under the four-corner rule. However, external evidence such as negotiations and usages between the Parties may be considered in order to interpret ambiguous statements of the contract *[Farnsworth; Cooperativa Agraria]*. In Response to the CLAIMANT, who has falsely accused the RESPONDENT of using external evidence in its' favor *[p. 49]*, the RESPONDENT submits that such evidence was only used to cure an ambiguity in the contract relating to the choice of law in clause 15 *[RE 1 p.33, RE 2 p.34]*. The RESPONDENTs usage of the evidence is accepted unlike the purpose for which the CLAIMANT has used the RESPONDENTs confidential information.

39. The current evidence which was brought forward by the CLAIMANT does not relate to an ambiguity in the contract. In fact, the CLAIMANT only tries to submit RESPONDENTs privileged information regarding the concurrent arbitration to gain additional benefits from the current arbitration. Accordingly, the information regarding the concurrent arbitration must not be admitted according to the four-corner rule.

B. THE CLAIMANT HAS OBTAINED THE RESPONDENTS PRIVILEGED INFORMATION IN AN ILLEGAL MANNER.

40. The CLAIMANT knew very well that the company providing the information on the horse racing industry had a doubtful reputation in regard with the source of its information. Knowing the same, the CLAIMANT made arrangements to purchase the partial interim award of the RESPONDENTs ongoing arbitration *[p.60 PO2 ¶41]*.

a. THE RESPONDENTS PRIVILEGED INFORMATION MUST NOT BE ADMITTED IN ARBITRATION PROCEEDINGS.

41. Confidentiality is one of the biggest benefits of international commercial arbitration for commercial aspects. It ensures that legal complications in one market do not affect the profitable projects in another *[Samuel].* A party or a third party may submit an arbitration hearing and disclose communications that have occurred within an arbitration only if the arbitration agreement does not contain a confidentiality provision *[Marc Alexander].*

42. However, the concurrent arbitration of the RESPONDENT is governed by the HKIAC 2013 rules *[p.51]* which have an express confidentiality provision in Art.42.1 which restricts the submission of the award made in the arbitration, *"Unless otherwise agreed by the Parties, no party may publish, disclose or communicate any information relating to: … (b) an award made in the arbitration and keeps all deliberations of the arbitral tribunal confidential"* in Art. 42.4. which is also included Art. 45 of the HKIAC 2018 which is the law governing the current arbitration proceedings.

43. The confidentiality agreement between the Parties in the ongoing arbitration is binding on the CLAIMANT as, confidentiality refers not only to the protection of trade secrets but also applies to various persons including third Parties who have knowledge of the arbitration. *[Marc Alexander].*

44. Considering that a confidentiality provision is supposed to ensure that legal complications in one market do not affect the profitable projects in another, the CLAIMANT cannot use the ongoing arbitration as evidence for the present case. The RESPONDENTs information is confidential, and confidentiality restricts the CLAIMANT to use such information against the RESPONDENT. The CLAIMANT uses the information regarding the RESPONDENT in its' favor, in order to gain an additional benefit from the arbitration making a negative effect on the RESPONDENT.

45. As mentioned previously *[¶42]* the confidentiality provisions in the HKIAC rules restrict Parties from submitting information regarding the arbitration and therefore the evidence in question is privileged. Submission of such privileged information will be unfair to the RESPONDENT and must not be admitted *[Danube case; Methanex case].*

c. ILLEGALLY OBTAINED EVIDENCE MUST NOT BE SUBMITTED IN ARBITRATION.

46. Inadmissibility of illegally obtained evidence is a well-recognized principle in procedural law, including laws such as the swiss procedural law *[football federation case; 4A_448/201]*.When arbitral tribunals order illegally obtained evidence as inadmissible, it further discourages the Parties from resorting to illegal means *[Vladimir Khvalei ¶358]* which must be done in order encourage Parties to resolve disputes in a fair and legal manner.

47. Further Art. 9(2) of the IBA rules discuss that the arbitral tribunal at the request of the Parties or in its own motion may exclude evidence due to privilege under legal or ethical rules determined by the Arbitral Tribunal to be applicable. It further explains that the tribunal must consider the need to maintain fairness and equality between the Parties, particularly if they are subjected to different legal or ethical rules.

48. Considering the company providing information on the horse racing industry has not mentioned its sources, one of the assumptions would be that the evidence was obtained through an illegal hack of the RESPONDENTs computer system. This took place a few weeks before the communication regarding the evidence by the CLAIMANT where the hackers have managed to retrieve a considerable amount of data *[p. 50]*.

49. The CLAIMANT states that it was not involved in the hack, nor endorsed the hack and therefore is not liable for a breach *[UMMC ¶54]*. However, Art. 9(2) of the IBA is applicable to situations where a party comes into possession of information that was previously illegally obtained by another party as Art. 9 (7) of the IBA deals with situations where Parties with direct involvement to such illegal activities.

50. If the party or a council was involved in obtaining the evidence that evidence will be inadmissible as the party bringing the evidence does not have clean hands *[Brecht Valcke]*. In contrast if the information was already in the public domain the consequences would differ. The information was never available to the public and information was obtained only on the CLAIMANTs request. Therefore, the CLAIMANT is the reason for the actions of the company. Accordingly, the evidence will be inadmissible as the CLAIMANT does not have clean hands as it was involved in the process of obtaining the evidence by illegal means. *[Brecht Valcke]*.

d. PRIVILEGED, ILLEGALLY OBTAINED INFORMATION NEED NOT BE SUBMITTED AS THERE IS NO PUBLIC INTEREST TOWARDS IT.

51. The CLAIMANT mentions that the evidence should be assessed based on case by case weighing of evidence and mentions the ***football federation case*** to prove that illegally obtained evidence was admitted *[UMMC ¶60]*. The RESPONDENT submits that such weighing of interest is mostly concerned with matters of public interest in arbitrations where public entities are involved *[Georg von Segesser]*. In the present case there aren't any public entities involved and is not a matter of public interest.

52. In the case mentioned by the CLAIMANT, illegally obtained evidence is inadmissible according to the federal tribunal and only one of the two illegally obtained evidence was admitted. That too was admitted only due to public interest in fair football which the investigative tools of the state failed to enforce *[**football federation case**]*.

53. Public interest exists mostly in arbitrations involving public entities where the public have a greater interest in being informed. Only the public's legitimate interest in obtaining information about the affairs of *public authorities* would call for disclosure *[Smeureanu ¶¶38,39]*.

54. In the present instance there are no public authorities involved for the public to have any legitimate interest regarding the proceedings unlike in the cases mentioned by the CLAIMANT *[__Yukos, football federation case__]* . It Is only the CLAIMANT who is trying to rely on information obtained in an unethical manner to make a profit out of the situation.

55. Therefore, the RESPONDENTs privileged information shall not be admitted as there is no public interest towards it.

C. ACTS OF PROCEDURAL UNFAIRNESS HAVE TAKEN PLACE VIOLATING THE PRINCIPLE OF GOOD FAITH.

56. The principle of good faith imposes a positive obligation of cooperation upon the Parties in the conduct of arbitration. Under this principle Parties must provide relevant and material evidence that is within their control which is not subject to any privilege *[Procedural Good Faith in International Arbitration]*. Moreover, the IBA Rules call for adverse implications and additional costs if a party has failed to act in good faith in the process of obtaining evidence *[Berger/Kellerhals, ¶1320]*. This principle too prevents the tribunal from admitting evidence which was obtained through illegal means *[Michael Noth, Ulrich Haas ¶1553]*.

57. Considering that the CLAIMANT has reached out to obtain privileged information either by a breach of confidentiality or by hacking the RESPONDENTs computer system, it is evident that the CLAIMANT has acted unfairly and is in breach of the principle of good faith.

58. According to the case of ***__Libananco Holdings__*** where the respondent had obtained evidence in a questionable manner, the tribunal weighed the importance of confidentiality, legal privilege and the obligation of all Parties to arbitrate fairly and in good faith has ordered the evidence to be inadmissible *[__Libananco Holdings__]*. It is an accepted fact that the tribunal will most likely refuse to admit evidence that either results in procedural unfairness or was obtained in bad faith, thus violating the Parties' obligations to act in good faith *[Sicard-Mirabal and Derains; Waincymer p.797]*.

59. Even in the present instance the tribunal must not allow the submission of the evidence regarding the concurrent arbitration since the method followed to obtain the evidence proves lack of good faith and is unfair to the RESPONDENT as the information is privileged.

II. SUCH RESTRICTION WILL NOT VIOLATE THE CLAIMANTS RIGHT TO BE HEARD

60. According to article V(1)(b) of the New York Convention, enforcement of the foreign award may be refused if the party against whom the award is invoked

'*was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case*'.

61. Under the definition of the New York Convention, right to be heard entails

62. firstly, prerequisites such as communications regarding the existence of the arbitration between the Parties, the notification of an arbitration and its commencement; the other party's receipt of such a notification are the most basic considerations.

63. It also considers representation when constitution of the tribunal pursuant to the arbitration agreement and applicable law, including the Parties' factual and legal submissions, the language of the proceedings, the taking of evidence and the results of the evidentiary process. *[Schwarz and Konrad]*

64. Submission of illegally obtained evidence is not a fact mentioned under any of the requirements. The CLAIMANT falsely claims for a violation of its' right to be heard by mentioning that material facts of the case includes the external evidence as material facts of the current arbitration matches the interests of the other arbitration.

65. Material interest in establishing that the Parties had matching intents in regard to the understanding of *"DDP"* and the Hardship Clause at the time of contract conclusion. *[UMMC ¶ 80]*

66. However, the material interests mentioned by the CLAIMANT have not been exactly the same as the concurrent arbitration contained a ICC hardship clause *[PO2 p.60]* which is broad and may allow a price adaption while the current arbitration consists a ICC hardship clause which was narrowed down as it was too broad for the Parties.

67. The HKIAC model arbitration clause in the concurrent arbitration includes all additions, with the benefit of express agreement on the law governing the arbitration agreement as the law of Mediterraneo, in the present contract, a clearly narrowed version of the model clause is present intending to restrict arbitrable disputes and no such express law is agreed upon *[PO2 ¶39]*.

68. Further, the nature of delivery of goods was largely different since the concurrent dispute concerns a one time delivery of a mare *[p. 50]*, whereas the present agreement was for a delivery of three installments spanning a period of near 8 months *[CE5 §8 p.14]* which shows a clear distinction of the material facts of the two arbitrations.

69. It should be noted that Tribunals allow a very limited number of cases to be annulled due to Violations of right to be heard. Specifically, the Swiss Federal Tribunal upheld only 6.5% of the challenges in the period between 1989 and the first half of 2009. And the percentage of approved appeals under the claim of right to be heard were lower *[Marghitola]* Courts clarified that the ignorance or denial of requests for evidence is not a ground to set aside an award.

70. Therefore, it is evident that restricting the submission of the illegally obtained evidence will not violate any right of the CLAIMANT in the arbitration proceedings and the evidence must not be admitted in the arbitration.

III. THE CLAIMANT CANNOT RELY ON THE DECISION GIVEN IN THE PARTIAL INTERIM AWARD

71. A decision by which the arbitral tribunal decide on one or several preliminary questions of procedure, such as the jurisdiction of the arbitral tribunal or substance, such as the principle of liability, without ending the arbitral proceedings in respect of any of the claims is known to be an Interim award. *[Arroyo]*

72. In the present instance the CLAIMANT seeks to submit the partial interim award of the RESPONDENTs ongoing arbitration as evidence despite the fact that it was illegally obtained.

73. However, interim awards are temporary measures given by tribunals and such measures contain risks as, facts and matters which have bearing on the decision of the partial interim award may become evident later in the arbitration. *[GAR]* Such Interim awards may be challenged by Parties *[Hui v. Esposito; ARB(AF)/98/3].* Considering that the final award on the issue has not be given yet such challenge would be possible.*[Kinnear, Bjorklund and Hannaford]*

74. Therefore, The CLAIMANT cannot rely on the Partial interim award of the ongoing arbitration not just due to the fact that it was obtained in an illegal manner but also due to the risks associated with the same.

75. In conclusion the evidence regarding the concurrent arbitration which was obtained either by a breach of confidentiality or a hack in the RESPONDENTs computer system is inadmissible and shall not be submitted in the current arbitration.

ISSUE 3: THE CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT UNDER THE FSSA NOR UNDER THE CISG.

76. The CLAIMANT is not entitled to payment of US$ 1,250,000 any other amount as CLAIMANT cannot not be compensated under the hardship clause of the contract*[I]*, because the CLAIMANT is not entitled to an adaptation of price and RESPONDENT has acted in good faith *[II]*, the situation does not

give rise to hardship pursuant to International Law *[III]* and finally given the fact that the Tribunal should not adapt the purchase price *[IV]*.

I. CLAIMANT SHOULD NOT BE COMPENSATED BY ADAPTATION UNDER THE HARDSHIP CLAUSE.

A. THE EXISTENCE OF A HARDSHIP CLAUSE IS INSUFFICIENT FOR ADAPTATION AND THE CONTRACT AS IT IS MUST BE RESPECTED.

77. A Hardship clause is not an automatic agreement to adaptation. Hardship clauses and force majeure clauses are included into contracts with a variety of possible remedies, adaptation being among them *[Schwenzer 39 VUWLR pp.719-725]*. However, it needs to be understood that adaptation is not an automatic response to the hardship clause, and in this case, it was not the Parties' intention for the contract to be adapted.

78. The cornerstone principle of contract law is the sanctity of contract or Pacta Sunt Servanda which entails that contracts made must be respected *[Hans van Houtte; Sapphire v. National Iranian Oil Company]*. However, it is undeniable that changes in circumstances affect the binding nature of contracts as accepted by the maxim of rebus sic stantibus and can be understood to involve either adaptation of contracts under hardship or a defense to a claim of damages under force majeure *[Chengwei Liu]*. Given the adverse impact upon the finality of contracts that this principle has, it is interpreted narrowly and only allowed in exceptional circumstances.

79. Adaptation of contracts is not an automatic response to change of circumstance. In fact, rebus sic stantibus is strictly applied. It is insufficient for the remedies of hardship to be used simply due to the contract being unprofitable to one party *[ICC Case 8486]*. It is also understood that in instances where contracts are precisely drafted, and the risk is not transferred by the contract, the party who is supposed to bear the risk does so. Especially in international transactions where Parties are fully aware of associated risks *[ICC CASE 1512]*.

80. The insistence by the CLAIMANT to include a hardship provision and the explanations prove awareness of risks associated. The wording of the contract is precise and is focused on transfer of risks expressly related to "additional health and safety requirements or comparable unforeseen events". As proven by negotiations, it was the intention of the CLAIMANT to be covered against risks born by safety requirements as previously experienced by an outbreak of aggressive foot and mouth disease *[PO2 ¶21]*.

The instance of tariffs were not discussed by the Parties or intended to be covered and the risk was not transferred to the RESPONDENT.

B. THE AGREEMENT OF THE PARTIES PROVE THAT THERE WAS NO INTENTION TO RESORT TO ADAPTATION

a. THE EXPRESS AGREEMENT ON THE USE OF ICC 2003 HARDSHIP CLAUSE PREVENTS AUTOMATIC ADAPTATION

81. The changes made to the ICC 2003 hardship provision too reflect the current situation. The ICC 1985 hardship clause which gave four alternative options for adaptation by contracting Parties has been amended to one formulation with the clear alternative consequences of negotiation or termination replacing adaptation in the 1985 clause *[ICC website]*.

82. Considering that the ICC clause itself has made such changes, the current hardship clause of the Parties was a narrowed version of the ICC clause *[RE 3 pg.35]* and it is clear that the clause does not allow for adaptation.

b. THE INTERPRETATION OF THE ICC 2003 HARDSHIP CLAUSE PREVENTS AUTOMATIC ADAPTATION

83. It should be noted that one of the purposes of the ICC hardship clause is not to afford a party invoking a listed event too much protection. The drafters of the ICC clause regarded it wrong for a party to simply point towards the mere occurrence of a listed event. In such instances where hardship is restricted to specific possible events, the Parties are not granted the protection afforded to Parties who may use the approach of the ICC 2003 Hardship clause.

84. Considering that at present the Parties did in fact choose such a restrictive approach and that the present instance of tariff is not expressly or impliedly listed in the hardship clause of the contract. At no point will the contract be interpreted such that the tariff falls under the current hardship clause and entitle the CLAIMANT for possible remedies. *[ICC website]*

C. THE CONTRA PROFERENTEM RULE SHOULD NOT APPLY

85. In response to the submissions of the CLAIMANT that the Hardship clause must be interpreted contra proferentem *[UMMC ¶111]*, The RESPONDENT submits that the contra proferentem should not apply.

86. According to the contra proferentem rule if a contract provision drafted by one party is obscure, it is said that the clause should be resolved against the party which drafted it

[Klingler; Parkhomenko and Salonidis ¶241].

87. The contra proferentem rule has a very limited role in commercial contracts negotiated between Parties with equal bargaining power *[<u>K/S Victoria Street v House of Fraser; Transocean Drilling v Providence Resources</u>]* . The hardship clause was drafted by the involvement of both Parties and the CLAIMANTs intention in including hardship cause was to deal with hardships such as tests required for additional health and safety requirements *[CE 4 pg.12]*.

88. However, it should be noted that the contra proferentem rule has been extensively debated upon. When applying it, there has been rarely decisive and was applied more loosely in the form of guidelines rather than a strict rule. Even if the CLAIMANT states that the provision is ambiguous, courts have found its commercial sense, and the documentary and factual contexts were normally sufficient to determine the meaning of a contractual provision instead of using the contra proferentem rule [*<u>Transocean Drilling UK Ltd v Providence Resources PLC</u>*].

89. Finally, both Parties agreed to the inclusion of the narrow-worded hardship clause into the force of the majeure clause to the contract *[RE 3 pg.35]*.

90. Therefore, the REESPONDENT cannot be accused to bear the circumstances regarding the provision and the contra proferentem rule must not be used to interpret the hardship clause.

D. IN ANY CASE THE CIRCUMSTANCES DO NOT FULFILL THE PREREQUISITES OF THIS CLAUSE

a. A LOW THRESHOLD WAS NOT AGREED UPON

91. The tribunal does not have jurisdiction to adapt the contract based on the existence of a hardship clause. However, if the tribunal were to decide otherwise, the contract cannot be adapted as the prerequisites of the hardship clause are not fulfilled.

92. The subject of change of circumstances is the situation where the performance of the contract has become excessively onerous *[Uribe]*. It has been argued that the word 'fundamental' implies a high threshold for the configuration of hardship *[Uribe]*. A numeric expression of the contractual equilibrium alteration is a regular and useful tool to determine a hardship situation. International practice shows that an alteration of less than 50% of the contractual price, value or consideration does not qualify as hardship

[Girsberger ;Zapolskis].

93. Professor Schwenzer notes that even a 100% cost increase is usually insufficient to exempt the party from contractual obligations under Article 79 of the convention *[Schwenzer 39 VUWLR]*. Even if the CLAIMANT is burdened by heavy losses instead of the expected profit, it still needs to respect the

contract *[Commentary on the UNIDROIT].* In recent times a threshold of at least 100% is favoured. However, courts are very reluctant to allow hardship in case of fluctuations of prices and thereby shows that in most cases even a 100% is not sufficient. The suggested "100 per cent threshold" is mostly based upon considerations of domestic markets where price fluctuations are not to be expected to the same degree as in international markets where a threshold of 150% to 200% seems advisable

[Schwenzer 39 VUWLR].

94. In addition, instances of falling in value of performance are to be considered identical to cases of increase of cost of performance *[Brunner p.412]*. Previously, drastic reduced value of performance has been held to be insufficient to constitute to hardship, or more specifically economic hardship, as is similar in this instance *[Borregaard Indus., Ltd. v. AMRI Rensselaer, Inc]*.

95. As stated, the contract is to be interpreted as to the intention of the Parties where the Parties were aware of such intent and such intent is to be determined through previous negotiations

96. *[UMMA ¶30; CISG Art.8 (3)]*. The remodeling of the ICC clause was for the customization of Parties. The Parties agreed that delivery DDP would allow a risk of the CLAIMANT bearing extraneous costs due to health and safety requirements as had happened in the past. CLAIMANT only requested for a hardship clause based on the previous experiences of tests required due to a rare type of foot and mouth disease *[PO2 ¶21 p.65]*.

97. As expressed by the RESPONDENT and Mr. Antley's note following the discussion in Danubia, the ICC hardship clause was too broad to be acceptable *[RE 3 p.35]*. Claiming that the threshold for hardship was to be lowered when the intention behind the final hardship clause agreed upon was to the contrary, is not plausible as it was not the intention of the Parties to lower the threshold required for all possible circumstances of hardship.

98. As expressed by the CLAIMANT the hardship clause was to cover "*unforeseeable additional health and safety requirements*" *[CE 5 p. 14]*. The final contract included a reference to hardship with the seller not being held responsible for such occurrences. As the final clause was based on this concern, the threshold was lowered to be "more onerous" for health and safety requirements. This does not mean that any and all instances of Hardship were to be regarded, given the limited scope, and therefore such a low threshold does not apply to the tariff in question.

b. THE REQUIREMENTS OF THE HARDSHIP CLAUSE AS PER THE FSSA ARE NOT MET

99. Cl.12 of the FSSA includes a hardship reference, which was included with the change of circumstances of health and safety requirement in mind. The clause regards the responsibilities of the seller and states that the seller is not responsible for certain unforeseen circumstances "*neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous".*

100. It is insufficient for the tariff to be comparable to health and safety requirements or to be unforeseeable. It is a requirement of the tariff to be comparable to health and safety requirements ***[i]*** and as unforeseeable as health and safety requirements***[ii]***.

i. The tariff is not comparable to health and safety requirements

101. Brunner considers that the requirements for Hardship and Force Majeure are quite the same with the exception that the scope of hardship is limited ***[Brunner pp.397,420].*** It is further explained that among the elements which constitute to Force Majeure are Acts of God, Acts of authority, etc. Acts of authority or mandatory rules are defined as those "*aimed at protecting the general interest such as economic, social or political interests of a particular state"* ***[Brunner p.266].*** Impediments categorized under Mandatory rules by Brunner are those of a completely restrictive nature as quotas and embargos, to which the impositions of tariffs or import duty does not categorize under ***[Brunner p.267]***, In contrast epidemics and health requirements as expected to be covered categorize under Acts of God which amount to hardship.

102. Furthermore, trade sanctions in relevance to force majeure and hardship, it is that quotas, exchange controls, complete bans, change of licenses required are considered equivalent to wars, terrorism, riots, natural catastrophes as natural disasters and epidemics ***[Azerdo Da Silveira pp.216-218]***. The examples for acts of government constituting to fulfilling the requirements of hardship of force majeure are as compete bans imposed by governments ***[ICC Award 4462]*** and even in the agricultural sector, complete bar of imports prompted by outbreaks of disease ***[Macromex Srl. v. Globex International Inc]***. Natural disasters, epidemics and wars are recognized as qualifying impediments ***[Brunner pp.206-208].*** However, tariffs do not constitute to trade sanctions and therefore are not to be considered to amount to hardship ***[Azerdo Da Silveira reference no.43]***.

103. It can therefore be concluded that the tariff does not amount to being comparable to health and safety requirements in order to fulfill the prerequisites of the hardship clause.

ii. The tariff was not comparably unforeseeable as health and safety requirements

104. It can be clearly expressed that tariffs are not comparably unforeseeable as the nature of health and safety requirements. It must be noted that there had been comparable tariffs imposed before *"to protect their farmers on tariffs on foreign agricultural products…" [PO2 ¶23 p.65].* The mere fact that such a tariff was not imposed on Mediterraneo is not a reasonable excuse for the CLAIMANT to completely ignore the possibility of such a situation and even after reading the newspaper article regarding retaliatory tariff *[PO2 ¶26 p.66].*

105. Furthermore, the Equitoriana tariff of 30% was imposed in retaliation to the 25% tariff imposed by Mediterraneo. The Mediterranean tariff was in fact foreseeable as the president had expressed views even prior to the election of following a protectionist approach in terms of the agricultural sector *[CE6 p.15].* Following the election, Ms. Cecil Frankel, a longstanding and outspoken critic of free trade was appointed on 5th May 2017 *[PO2 ¶26 p.66].* Both these occurrences were prior to the conclusion of contract on May 6th of 2017, and it was clear that measures were to be taken by the Mediterranean government.

106. A reasonable party with the experience of the CLAIMANT must not have disregarded the possibility of the imposition of an import tax with the thorough understanding of its' contractual obligations. An act of God, or outbreak of diseases as the previous experience of the CLAIMANT, is completely unforeseeable and is therefore not remotely comparative to the foreseeability of the imposition of an import duty in retaliation to a foreseeable tariff in the CLAIMANT's country itself. The prerequisites of comparative foreseeability of circumstances comparative to that of health and safety requirements is not met and therefore, the contract should not be adapted.

E. DDP EXCLUDES THE TARIFF FROM THE HARDSHIP CLAUSE AS THE RESPONSIBILITY SHIFTED

107. As made evident in the FSSA by Cl. 8 on delivery terms, the Parties agreed on delivery DDP for all three instalments. This clause was incorporated into the contract following the request of the RESPONDENT for DDP *[CE3 p.11]* and the negotiations thereafter as requested by the CLAIMANT, including an agreement of the inclusion of a hardship clause and an increase of price. *[CE4 p.12].*

108. The Parties agreed that the reference to DDP was in fact to the delivery terms of Delivery Duty Paid as found in the INCOTERMS 2010 *[PO2 ¶10 p.63].* It must be understood that despite the agreement on DDP was due to the request of the RESPONDENT. The CLAIMANT made it very clear that they were fully aware of the risks associated with agreeing to deliver under the terms of DDP.

109. As made evident by the CLAIMANT, they were aware of the content of INCOTERMS and all risks associated with DDP and had they objected to bearing certain risks associated with DDP. The CLAIMANT agreed to the condition of DDP *"after long discussions"* ***[CE4 p.12].*** They did not agree without contemplating the effects of the change of delivery terms as the agreement was following extensive discussion on the part of the CLAIMANT and they requested for changes such as a price increase and a hardship clause. The CLAIMANT was aware of the detriments of DDP delivery and has previous suffered major losses by the increased prices caused by a requirement for additional tests by the Danubian government which had to be borne by itself due to the agreement to deliver DDP, under which seller bears all import and export costs ***[PO2 ¶21 p.65]***.

110. INOTERMS 2010 consist of several possible adoptable rules on delivery of goods for Parties. The first class of INCOTERMS consist of seven rules including DDP (Delivery Duty Paid), DAT (Delivery at Terminal), DAP (Delivery at Place) ***[Incoterms® 2010 excerpt p.2]***. Each possible rule entails a different level of costs, risks and duties for the Parties. ***[INCOTERMS® RULES ICC Webpage]***. DDP sets the maximum responsibility of the rules upon the seller by conferring all risks, costs and responsibilities for delivery upon the seller ***[Schwenzer Appendix I]***. Section A6 under DDP of the INCOTERMS expressly discuss allocation of costs, and subsection c makes clear the seller must pay, *"where applicable, the costs of customs formalities necessary for export and import as well as all duties, taxes and other charges payable upon export and import of the goods, and the costs for their transport through any country prior to delivery"* ***[Schwenzer Appendix I]***.

111. The responsibilities of the Parties under DAP and DDP are largely similar including that exports costs as well as costs for transport to the agreed point of delivery are to be borne by the seller. Among the sections A1-A10 of both DDP and DDP terms, the differences lie in A2 on licenses, authorization and other formalities, A6 on allocation of costs and A9 on packaging, where the costs and responsibilities born by the Buyer in DAP delivery are transferred to the seller in DDP delivery. All other terms remain identical ***[Schwenzer Appendix I]***.

112. The WTO recognizes that the term "tariff" is used in reference to duty and defines duty as "*A customs duty is a tax levied at the border on imported goods"* ***[World Tariff Profiles 2006 p.206].*** In this instance the tariff imposed by Equitoriana is a charge payable upon import.

113. As it is evident the CLAIMANT was aware of INCOTERMS and the risks attached to DDP Delivery and knew that agreement to the specific delivery terms was consent to bearing any import duty. Had they wished to exclude import tax as in this instance, they were given all opportunity to amend the delivery

conditions to DAP, upon which the CLAIMANT would only be bound to pay for export costs and formalities. This would still fulfill the objectives of the RESPONDENT recognized by the CLAIMANT in effective handling of documentation and timely delivery and the outcome of delivery to RESPONDENT's premises would be the achieved under DAP delivery as well *[CE3 p.11]*.

114. However, the CLAIMANT is bound to bear the cost due to agreement of delivery DDP to which they expressly consented to and must therefore respect the contract between the Parties.

115. Contrary to the claims made *[UMMC ¶103]*, Clause 10 is not a shift in the burden of DDP but rather a covering of costs the CLAIMANT had specified they were not willing to bear, as the costs of unforeseen health and safety requirements. The CLAIMANT cannot deny that the increase in cost was not inclusive of probable risks as this renegotiation of price was due to the probable risks associated with DDP *[UMMA ¶104; CE4 p.12]*, since an increase of $200 suffices to fulfill direct costs associated with DDP delivery *[PO2 ¶8]*. The CLAIMANT requested an increase of $1000 and upon negotiations insisted on an increase of $500, which is over twice that is required for the costs of delivery. If the CLAIMANT had intended for all unforeseen risks to be covered by the RESPONDENT and the 5% profit margin targeted by the CLAIMANT was secure before the increase of price and upon conclusion of contract, this increase would be entirely unnecessary.

116. As stated by Mr. Shoemaker, he was under the correct understanding that all risks are to be borne by the CLAIMANT as per the contract and the price adaptation was dependent on if the contract allows for adaptation *[RE4 p.36]*. The contract does not allow for the claim of costs and the express reference to DDP proves that the seller accepted the highest threshold for risk imposed by INCOTERMS without variation through which the CLAIMANT is restricted from claiming the costs associated with DDP Delivery.

II. THE CLAIMANT IS NOT ENTITLED TO AN ADAPTATION OF PRICE AND RESPONDENT HAS ACTED IN GOOD FAITH.

A. THE CLAIMANT IS NOT ENTITLED TO AN ADAPTATION OF PRICE UNDER THE CISG

a. THE HARDSHIP CLAUSE IN THE SALES AGREEMENT BETWEEN THE PARTIES EXCLUDES THE APPLICATION OF ART. 79(1) CISG

117. The contractual terms between the Parties do not allow for price adaptation as the Parties have derogated from Art. 79 of the CISG by the inclusion of a Hardship and Force majeure clause under Cl. 12 of the sales agreement.

118. Art. 79(1) of the CISG reads;

'A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.'

119. Art. 6 of the CISG based on the principle of autonomy states that,

'*The Parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.'*

Accordingly Article 6 embodies a vigorous affirmation of the principle of party autonomy ***[Winship; Schlechtriem].*** Hence pursuant to Art. 7, the principle of party autonomy must be followed when establishing the Parties' derogation from certain provisions in the CISG ***[CISG Digest]***

120. According to several courts, opting-out requires a clear expression of intent by the Parties ***[CISG Digest; Asante Technologies, Inc. v. PMC-Sierra, Inc.].*** The Parties clearly expressed their intention of derogating from Article 79 of the CISG by the inclusion of a customized clause instead of Article 79 in the form of clause 12 in the FSSA at the time of concluding the contract ***[CE 5 p.14].*** Therefore the Parties have derogated from Article 79 of the CISG and have agreed to the terms mutually agreed upon.

121. Considering that the clause agreed, i.e Clause 12, too was narrowly worded, it does not allow for price adaptation nor cover the entire scope of article 79. Therefore to be bound by such provisions which were derogated from, would be a violation of good faith ***[Harsch Properties, Inc. v. Nicholas].***

122. Even if the Tribunal finds that the Parties have not expressly agreed on same, the actions of the Parties show an intention of an implied agreement to rely on Cl. 12 derogating from article 79 of the CISG. At no point did the CLAIMANT disagree to Cl. 12 of the contract and if the CLAIMANT wanted to disagree or had any concerns regarding the clause, it could have done so before or at the time of contracting between the Parties.

123. Many courts admit the possibility of an implicit exclusion ***[Fruits and vegetables case].*** Although there is no express support for this view in the language of the Convention, a majority of delegations were opposed to a proposal advanced during the diplomatic conference which would have permitted total or

partial exclusion of the convention only if done "expressly" *[Official Records of the United Nations]*. Therefore under pacta sunt servanda consideration must be given to the legislative history of the convention and be used to help interpret the convention.

124. Even if Art. 79 was neither expressly nor impliedly derogated from; the pre-requisites of Hardship have not been met by the CLAIMANT.

i. The 30%-Tariff does not constitute an impediment in the sense of Art. 79(1) CISG

125. Pursuant to this article an exemption is permitted only when the impediment to performance is beyond the obligor's control. The obligor is always responsible for impediments when it could have prevented them but, despite its control over preparation, organization, and execution, failed to do so and thereby the obligor "guarantees" his ability to perform. If in a situation it wishes to restrict its liability, he must specify the particular impediments for which he will not be liable *[Schlechtriem]*.

126. Tariff falls within the ambit of economic hardship *[ICSID Case No. ARB/07/26]* and an increase in cost caused by tariff does not constitute a valid excuse to escape a party's contractual obligations *[ICSID Case No. ARB/02/5]*.

127. The CLAIMANT specifies certain impediments i.e. additional health and safety requirements and comparable unforeseen events. However the listed situations include a situation of economic hardship pursuant to an increase in any form of tariff *[CE 5 p.14]*

128. An impediment in the sense of Article 79(1) of the Convention is only an occurrence that absolutely bars performance, but under very narrow conditions, impediment also includes "unaffordability" but as a rule, however, since the Seller guarantees performance, an increase in cost does not constitute an impediment beyond its control *[Schlechtriem]*.

129. A German court of second instance did not exempt a seller from liability under Article 79 of the CISG although the market price for the contract item, iron molybdenum from China, had risen by 300 per cent. The court gave reason to its decision stating that in trade with speculative traits fluctuations of price cannot be considered hardship and not an impediment *[Iron molybdenum case]*. Thereby 25% increase in the present case which is 1/12th of the cost increase mentioned in the case above would not constitute itself to be a considerable percentage.

130. The CLAIMANT argues that it was in a difficult financial situation which would cause an impediment *[UMMC ¶119]* However, as proven above the payment of $1,250,000 would not result in bankruptcy and would not be considered an impediment beyond the CLAIMANTs control [PO2 ¶29 p.66].

ii. The 30%-Tariff is not beyond CLAIMANT's control and could have been reasonably expected by the CLAIMANT.

131. Tariff is a schedule of duties imposed by a government on imported or in some countries exported goods *[Merriam-Webster]*. The CLAIMANT argues that the tariff was unforeseeable *[UMMC ¶24]*. However, consideration needs to be given to the fact that comparable tariffs have imposed before to protect domestic farmers *[PO2 ¶¶23-25 pp.65-66]*. As previously mentioned in ¶ 105 Mediterraneo, not having faced such a situation is not an excuse to be ignorant of such a possibility particularly in view of its' express consent to DDP delivery.

132. The CLAIMANT was fully aware that the RESPONDENT was determined to *"…become one of the leading breeders in racehorses."* and had made its intentions very clear on several occasions *[CE 1 p.9 CE 3 p.11]*. Considering the culmination of the aforementioned facts the CLAIMANT should have reasonably expected the probability of a similar situation. The exact percentage of tariff might have been unforeseeable however the CLAIMANT should have reasonably known the possibility of an imposition of tariff when dealing in international trade *[WTO]*. The CLAIMANT is liable even for impediments beyond his control, as long as they were either reasonably foreseeable or known to him at the conclusion of the contract *[Schlechtriem; ziegel]*. Therefore, it is clear that an impediment in the form of tariff was definitely foreseeable.

B. THE RESPONDENT HAS ACTED IN GOOD FAITH.

133. Article 7 of the CISG states;

'In the interpretation of this Convention, regard is to be had to its international

character and to the need to promote uniformity in its application and the observance of good faith international trade.'

'Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.'

134. CLAIMANT argues on the fact that the RESPONDENTs behavior contradicts the principle of good faith *[UMMA ¶¶129-131]*. Based on the general principle of party autonomy of the CISG, Parties may derogate from or vary the effect of any of the provisions of the CISG *[Lookofsky]*. Therefore, pursuant to Article 7 (2) of the CISG, the general principle of party autonomy should be followed when ascertaining the Parties' derogation from provisions in the CISG *[CISG Digest]*. The Parties are governed by the

hardship and force majeure clause within the sales agreement which both Parties agreed to the contract which included a force majeure and a hardship clause *[CE 5, Cl. 12 p.14]*. The Parties thereby have derogated from Art. 79 of the CISG while agreeing upon their own terms.

135. When the RESPONDENT requested a change of incoterms to DDP *[CE 3 p. 11]* it was clear that the CLAIMANT should bear any risk which pursued. CLAIMANT agreed to be bound by delivery on the basis of DDP for an increase in price and limitation of burden. However, the RESPONDENT was not willing to agree to such terms as it would result in an additional payment for risks which would not be borne by the CLAIMANT *[PO2 ¶ 8 p.63]*.

136. The RESPONDENT did not agree to the ICC hardship clause which was put forward by the CLAIMANT *[RE 2 p.34]*. At the time of the sales agreement being signed by the Parties, Mr. Krone was fully aware of the understanding concerning the inclusion of a hardship clause into the contract as Mr. Antley had included it in his negotiation file, *"ICC hardship clause suggested by the CLAIMANT was <u>too broad</u>"* *[RE 3 p.35]*. ICC hardship clause was not agreed upon and therefore the Parties resorted to a narrowly interpreted hardship clause *[RE 3 p.35]*.

137. Pursuant to Art. 8 Cl. 3 of the CISG, the Parties intended a narrow hardship clause as opposed to a broad clause as suggested by the CLAIMANT, as it would have then relieved the CLAIMANT of its DDP delivery obligations. Under DDP delivery, the supplier is responsible for paying for all of the costs associated with the delivery of goods right up to the named place of destination ***[Incoterms® 2010]***. Therefore the 30% tariff does not fall into the ambit of the hardship clause included in the contract and as such the CLAIMANT is responsible for the additional costs incurred.

138. The clause was narrowly worded and did not include a price adaptation in case of a hardship, nor did it cover the entire ambit of Article 79. If the CLAIMANT was to derogate from the terms agreed upon then it would in fact be a violation of good faith on the part of the CLAIMANT itself.

139. THE CLAIMANT states that Mr. Shoemaker agreed on price adaptation however Ms. Napravink had only been acting upon an assumption and authorized the delivery based on the *"<u>impression</u> that the RESPONDENT accepted [CLAIMANTs] position"* *[CE 8 p.18]*

140. Mr. Shoemaker was clear regarding his position and mentioned to Ms. Napravink that 'he had not been involved in the negotiations or the sales agreement and <u>could not directly authorize</u> any additional payment' *[CE 8 p.18, RE 4 p.34]*.

141. A reasonable person in Ms. Napravinks' situation would not have taken this as a confirmation of an adaptation of price. Mr. Shoemaker further stated that to his knowledge DDP delivery meant that CLAIMANT had to bear all the risks and therefore could not have made a commitment to enter into negotiations for a price adaptation *[RE 4, ¶4].* Mr. Shoemaker merely stated that if the contract so provides, RESPONDENT will find an agreement on the price. Therefore, it is very clear to any reasonable person that Mr. Shoemaker had not given any assurance to the CLAIMANT regarding a price adaptation.

142. Even if Mr. Shoemaker had given such an impression, Ms. Napravink should not have relied on such a statement as he did not have the authority to do so and his promise would not be binding *[CE 8 p.18].*

143. The CLAIMANT also argues that resale of frozen semen without written consent was prohibited as it was a contractual term in the contract *[UMMC ¶131].* However, the RESPONDENT never agreed to such a contractual term. The term was not legally binding as it was not included in the contract between the Parties even if there might have been pre-contractual negotiations *[CE 3 p.11].*

144. Even if the negotiations were to be taken into consideration the letter sent by the CLAIMANT on the 24^{th} of March 2017 stated,

145. '*…the frozen semen […]* *<u>may or may not</u>* *be resold without our express written consent.'* The language itself leaves room for re sale of the semen as it uses the word "may" which means "the possibility of" *[Oxford Dictionary].* The language is weak and does not require the RESPONDENT to ensure that they have approval of the CLAIMANT. If the CLAIMANT was transparent about such strict measure it should have used the term "must" or "requisite" or "obligation" or any such word which would have made it clear to the RESPONDENT that the CLAIMANT had a very strict policy regarding resale of semen.

146. Therefore, the CLAIMANT is not allowed for a price adaptation pursuant to the Article 79 of the CISG and Good faith on the part of the RESPONDENT has not been violated as it has upheld the requirements put forward by the agreement between the Parties regarding all aspects.

III. THE SITUATION DOES NOT GIVE RISE TO HARDSHIP PURSUANT TO INTERNATIONAL LAW.

147. The CISG mainly concerns force majeure and therefore to fill its gap regarding hardship the UNIDROIT Principles must be referred to. Article 6.2.2 defines hardship and its prerequisites. The definition of hardship, which appears in Article 6.2.2, is complex, because it not only defines the nature of the burden, but also other factors that must coexist with the burden to make it legally relevant *[Perillo].*

148. Article 6.2.2 states,

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

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

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

the events are beyond the control of the disadvantaged party; and

the risk of the events was not assumed by the disadvantaged party.'

149. The Article defines hardship as a situation where the occurrence of events fundamentally alters the equilibrium of the contract, provided that those events meet the requirements which are laid down in sub-paragraphs (a) to (d) *[UNIDROIT]*.

150. Hardship cannot be invoked unless there is an alteration of the equilibrium of the contract which is fundamental. Whether an alteration is fundamental in a particular case will depend on the circumstances. To establish a legally relevant hardship, there must have been "the occurrence of events fundamentally altering the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished *[UNIDROIT]*.

151. The CLAIMANT states that private international law would lead to an adaptation of the contract *[UMMC ¶¶133-138]*. However the commentary to Article 6.2.2 itself states that equilibrium of a contract is fundamentally altered when an alteration amounting to 50% or more of the cost or value is increased and justifies invocation of the doctrine. Further international commercial arbitration cases reveal that a cost increase by 13%, 30%, 44% or 25-50% was considered insufficient to qualify as hardship and a threshold of 100% should be favoured as the general rule in standard situations *[Girsberger, Zapolskis]*.

152. As previously noted even a 100% increase is considered insufficient to exempt a party from its contractual obligations *[¶7; Schwenzer]*. Considering that the increase in cost was a mere 25%, a minor change which does not qualify as a sufficient percentage to rely on hardship.

153. As mentioned in ¶ 93 CLAIMANT needs to respect the contract irrespective of losses and thereby it is apparent that the CLAIMANTs increase in cost is not sufficient to fall into the ambit of hardship under international law. Furthermore, the additional conditions i.e (a)-(d) have not been met by the CLAIMANT as proven in ¶¶ 131-133.

IV. THE TRIBUNAL SHOULD NOT ADAPT PURCHASE PRICE.

A. CLAIMANT IS NOT ENTITLED TO PAYMENT OF US$ 1,500,000 FOR THE LAST 50 DOSES OF FROZEN SEMEN BASED ON THE PARTIES' RISK ALLOCATION IN THEIR AGREEMENT

154. CLAIMANT claims that it is entitled to payment of US$ 1,500,000 for the last 50 doses of frozen semen considering Parties risk allocation *[UMMC ¶¶142-143]*. However, the CLAIMANT agreed to and assumed risk in a change of incoterms when it accepted a price increase which would cover the risk of DDP [¶¶107-109].

155. Further as stated, Mr. Shoemaker correctly understood that all risks were to be borne by the CLAIMANT as per the contract and the price adaptation was dependent on if the contract allows for adaptation *[¶25; RE4 p.36]* and the contract does not allow for the claim of costs and express reference to DDP is in itself sufficient to prove that the seller accepted the highest threshold for risk imposed by incoterms without variation through which the CLAIMANT is restricted from claiming the costs in regard to DDP delivery.

156. Therefore, the RESPONDENT is under no obligation to pay the CLAIMANT the amount for the last 50 doses of semen.

B. ALTERNATIVELY, CLAIMANT IS NOT ENTITLED TO PAYMENT OF US$ 1,500,000 BASED ON THE HYPOTHETICAL INTENTIONS OF THE PARTIES

157. The CLAIMANT states that the hypothetical intention of the Parties should be looked at to determine the increase of price *[UMMC ¶¶144-146]*. However, it should be noted that such principle is looked at under the German law and is not an internationally accepted principle. However, the hypothetical intention need not be considered as the actual intention of the Parties is evident. If hypothetical intention is to be referred to, attention must be paid to what the Parties, in view of the terms of the contract and other declarations made during or after the conclusion of the contract, would have provided if they had considered the change of circumstances ***[CE4 pg.12].*** In this instance, the actual intention after considering possible change of circumstances is evident in the contract. As discussed previously [¶], the Parties concluded the contract following risk allocation of possible change of circumstance as of tank rental fees in cl.10 and Cl.12 of Force Majeure and hardship ***[CE 5pg.14].*** Even prior to consideration of possible risks DDP was agreed upon with the intent for the CLAIMANT to bear import duty.

158. Secondly, the Parties' intent to avoid adaptation is evident in having excluded an adaptation clause following consideration of possible future changes of circumstances.

159. Even in regard to hypothetical intention of the Parties, the respondent would not have agreed to adaptation and nor for an unreasonable increase in price as expected by the claimant.

C. UNDER NO CIRCUMSTANCES SHOULD THE ARBITRAL TRIBUNAL ADAPT THE SALES AGREEMENT BY US$ 1,250,000

160. Contrary to the CLAIMANT *[UMMC ¶¶147-149]* it is under an obligation to fulfill its contractual duties irrespective of the fact that they are faced with a loss *[Brunner p.499]*. Therefore, it has to bear the additional costs resulted by the imposition of tariff which it has assumed. Consideration needs to be given to the fact that the CLAIMANT is not facing bankruptcy and in only financially endangered *[PO2 ¶ 29 p.66]* and the contract with the RESPONDENT is only one of many for the CLAIMANT and it is not up to the RESPONDENT to bear the costs of a risk already assumed by the CLAIMANT.

PRAYER FOR RELIEF

Based on the foregoing arguments and RESPONDENT's prior submissions, RESPONDENT respectfully requests the Tribunal to find that,

1. The Tribunal does not have jurisdiction to adapt the contract under the Danubian Law.

2. The CLAIMANT must not be entitled to submit the evidence of the concurrent arbitration.

3. The CLAIMANT is not entitled to the payment of US$ 1,250,000 or any other amount under the FSSA or Article 79 of the CISG.

Finally, the RESPONDENT respectfully requests the Tribunal to order the CLAIMANT to pay all costs incurred by the RESPONDENT.

<u>CERTIFICATION</u>

This is to confirm that this memorial was the creation of the undersigned.

Nishel Boteju

Shaamil Shakeer

Nithma Fernando

Vinusha Fernandez