Sixteenth Annual Willem C. Vis (East) International Commercial Arbitration Moot

MEMORANDUM FOR RESPONDENT

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

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

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LIST OF ABBREVIATIONS

$	US Dollar
&	And
¶	Paragraph
AIR	All India Reporter
art	Article
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl. Memo.	Centro Universitario de Joao Pessoa (Unipê) Memorandum for Claimant
Co.	Company
Comm. arb.	Commercial Arbitration
CRCICA	Cairo Regional Centre for International Commercial Arbitration
DAP	Delivered at Place
DDP	Delivery Duty Paid
ed(s).	Editor(s)
edn.	Edition
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
HKIAC	Hong Kong International Arbitration Centre
i.e.	id est (that is)
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA Yearbook Comm. Arb'n	ICCA Yearbook Commercial Arbitration
ICSID	International Centre for Settlement of Investment Disputes
INCOTERMS	International Commercial Terms

J.D.I. (Clunet)	Journal du droit international (Clunet)
LLP	Limited Liability Partnership
Mr.	Mister
Ms.	Miss
No.	Number
p./pp.	Page/Pages
per cent	Percentage
PO	Procedural Order
SC	Supreme Court
ULIS	Uniform Law for International Sales
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT PICC	UNIDROIT Principles of International Commercial Contracts
v.	Versus

DEFINITIONS

Arbitration Agreement/ Arbitration Clause	Clause 15 of the Contract, which refers any disputes arising between Parties to arbitration administered by the HKIAC.
Choice of Law Clause	Clause 14 of the Contract, which states that the agreement would be governed by the Law of Mediterraneo, including CISG.
CLAIMANT	Phar Lap Allevamento, a company registered and located in Mediterraneo operating one of the oldest and most renowned stud farms.
Hardship Clause	Clause 12 of the Contract.
Ninjisky III	Claimant's prized stallion whose semen Respondent is interested in.
Parties	Phar Lap Allevamento and Black Beauty Equestrian who have entered into the Contract.
RESPONDENT	Black Beauty Equestrian, operators of a stable based in Equatoriana, popular for its broodmare lines.
Tribunal	A panel of arbitrators constituted by the HKIAC consisting of Ms. Wantha Davis, Dr. Francesca Dettorie and Prof. Calvin de Souza as the Presiding Arbitrator.

DRAMATIS PERSONAE

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

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CISG-AC Opinion No. 10	CISG-AC Opinion No. 10, Agreed Sums Payable upon Breach of an Obligation in CISG Contracts, Rapporteur: Dr. Pascal Hachem, Bär & Karrer AG, Zurich, Switzerland. Adopted by the CISG-AC following its 16th meeting in Wellington, New Zealand on 3 August 2012 ***available at:*** http://www.cisg.law.pace.edu/cisg/CISG-AC-op10.html
Danubian Arbitration Law	Verbatim adoption of the UNCITRAL Model Law
Danubian Contract Law	Verbatim adoption of *UNIDROIT PICC with two relevant exceptions* *First, the interpretation rule in Art. 4.3 is replaced for written contracts by the four corners rule. In substance the four corners rule under Danubian law as applied by the Danubian courts has largely the same effects as a merger clause under Article 2.1.17 UNIDROIT Principles of International Commercial Contracts. Second, Article 6.2.3 (4)(b) is worded differently granting the power "to adapt the contract" to the court only "if authorized".*
HKIAC	Hong Kong International Arbitration Centre Rules, 2018 ***available at:*** http://hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/HKIAC%20Rules%20-26%20Sept%202018.pdf

IBA Rules	IBA Rules on Evidence on the Taking of Evidence in International Arbitration adopted in 2010 ***available at:*** https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC
INCOTERMS Rules 2010	INCOTERMS Rules 2010 ***available at:*** https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ***available at:*** https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf
Progress Report, Working Group on International Sale of Goods	Progress Report of the Working Group on the International Sale of Goods on the Work of its Fifth Session, 1974 ***available at:*** https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/401/82/PDF/NL740182.pdf?OpenElement
UNCITRAL Model Law	United Nations Commission on International Trade Law with amendments as adopted in 2006 ***available at:*** https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

UNIDROIT PICC	UNIDROIT Principles of Commercial Contracts, 1994 ***available at:*** https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf

MISCELLANEOUS SOURCES

Animal and Animal Product Information, US Dept. of Agriculture

United States Department of Agriculture Website – Animal and Plant Health Inspection Service – Animal and Animal Product Export Information

available at:

https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/export/ct_animal_and_animal_product_export_information

FAIRS Export Certificate Report

Ukraine Food and Agricultural Import Regulations and Standards – Certification - FAIRS Export Certificate Report – Date 12/11/17 – GAIN Report Number – UP1729

available at:

http://agriexchange.apeda.gov.in/ir_standards/Import_Regulation/Food%20andAgriculturalImportRegulationsandStandardsCertificationKievUkraine12112017.pdf

Importing, Ministry of Primary Industries NZ

Ministry for Primary Industries New Zealand Website – Importing

available at:

https://www.mpi.govt.nz/importing/live-animals/semen-and-embryos/fees-and-charges/

Reproductive Material, Australian Government

Australian Government - Department of Agriculture and Water Resources website – Reproductive Material

available at:

http://www.agriculture.gov.au/export/controlled-goods/live-animals/reproductive-material

STATEMENT OF FACTS

A. The Parties

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

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

B. List of Dates and Events

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

24 Mar 2017 CLAIMANT made an offer to RESPONDENT for 100 doses of frozen semen at $99,500 per dose.

31 Mar 2017 Parties agreed for delivery on a DDP basis and due to the additional costs associated with a DDP delivery, CLAIMANT increased the price per dose.

10 Apr 2017 RESPONDENT stated that the Arbitration Agreement should be interpreted according to the law of the place of arbitration and not by law of the Contract.

11 Apr 2017 CLAIMANT suggested a change of place of arbitration but did not object to RESPONDENT's proposal that the arbitration agreement should have been interpreted according to the law of place of arbitration.

12 Apr 2017 The initial negotiators met with an unfortunate car accident and had to be replaced for the finalisation of the Contract.

06 May 2017 Parties concluded the Contract which provided for a delivery on DDP basis without any exemption as requested by CLAIMANT. Secondly, the Contract provided for a narrowly worded hardship clause without conferring any powers of adaptation to the Tribunal.

19 Dec 2017 In response to certain trade restrictions imposed by the Mediterranean Government, the Equatoranian Government imposed 30 per cent tariff on selected products from Mediterraneo including on animal semen.

20 Jan 2018 CLAIMANT informed RESPONDENT that the tariff was applicable to animal semen which made the doses 30 per cent more expensive. Accordingly, Parties started renegotiations.

21 Jan 2018 RESPONDENT requested CLAIMANT to authorise the final shipment as it was urgently needed in view of the impending breeding season. Further, without making any commitments as to the price, a RESPONDENT employee stated that an agreement on the price could be found 'if the contract provided for an increased price in case of such a high tariff'.

23 Jan 2018 CLAIMANT delivered the remaining 50 doses.

12 Feb 2018 Contrary to the agreed risk allocation, CLAIMANT attempted to shift its liability to pay tariff onto the RESPONDENT. RESPONDENT refused to undertake such additional liability.

31 Jul 2018 CLAIMANT served RESPONDENT with a Notice of Arbitration.

02 Oct 2018 CLAIMANT claimed to have received information about another arbitration where RESPONDENT had itself asked for adaptation of the price involving an unforeseeable change of circumstances.

03 Oct 2018 RESPONDENT replied that CLAMANT had obtained the evidence of the other arbitration by illegal means and therefore, the evidence should not be admitted in the present arbitration.

05 Oct 2018 By way of Procedural Order No.1, the Tribunal laid out specific issues that Parties were required to address.

INTRODUCTION

1. ***Stable contract:*** The Contract provided for delivery on a DDP basis. Accordingly, CLAIMANT i.e. the seller would be responsible for all costs and risks for the delivery, including duties for import at the destination country. Further, the Contract did not provide for any adaptation by the Tribunal and Claimant's request to adapt the Contract is without any legal or factual basis.

2. ***A case of foal play:*** RESPONDENT submits that Parties made an implied choice to apply Danubian Law to the Arbitration Agreement. Parties deliberately chose Danubia as a neutral seat which is indicative of their implied choice to be governed by Danubian Law. Alternatively, the Arbitration Agreement has its real and closest connection with the Danubian Law and therefore Danubian Law governs the present Arbitration Agreement. Since Danubian Law restricts arbitrators from adapting the Contract without express authorisation from the parties, the Tribunal does not have the power to adapt the Contract. However, even if Mediterranean Law governs the Arbitration Agreement, the Tribunal is not empowered to adapt the Contract (**Issue I**).

3. ***Horsing around:*** CLAIMANT seeks to submit a Partial Interim Award from an HKIAC administered arbitration. In response, RESPONDENT submits that CLAIMANT has obtained the award through illegal means and therefore, it is not admissible. Further, rules of confidentiality exclude its admission. It is not clear that there is a common question of law or fact between the two arbitral proceedings. Lastly, arbitral tribunals are not bound by principles of *stare decisis* and the principle of collateral estoppel is not applicable to arbitral proceedings (**Issue II**).

4. ***Horseship:*** In the present case, Parties included a narrowly worded and unique Hardship Clause to govern the Contract. RESPONDENT submits that the 30 per cent tariffs neither constitute hardship under the Hardship Clause nor under Article 79 of CISG. In fact, the mere consequence of invoking the Hardship Clause is delay in delivery or loss of semen shipments and not any adaptation of price by the Tribunal. Further, CLAIMANT cannot even invoke the hardship provision in art. 6.2.3 of UNIDROIT PICC to claim an adaptation of the price as they can be used only as far as the principles can also be found within the CISG. RESPONDENT submits that the CISG does not provide for adaptation of contracts and therefore CLAIMANT's requests should be rejected by the Tribunal (**Issue III**).

ARGUMENTS ON PROCEDURE

I. THE TRIBUNAL DOES NOT HAVE THE POWER TO ADAPT THE CONTRACT

5. Parties entered into the Contract for the sale of 100 doses of Nijinsky III's frozen semen, containing a Hardship Clause. While negotiating the terms of the Contract, CLAIMANT requested for the Tribunal to be conferred with the power to adapt price. However, Parties were unable to arrive at a consensus. As a consequence, the Hardship Clause in its final form merely provides for a remedy where delay in delivery or loss of shipment in circumstances of hardship.

6. Subsequently, the Equatorianan Government imposed a 30 per cent tariff on agricultural products, including on animal semen. Parties were subsequently unable to reach an agreement on the revised price of the Contract. Faced with this failure, CLAIMANT resorts to conferring the Tribunal with overarching authority to adapt the Contract. In doing so, they request the Tribunal to admit and consider illegally obtained evidence. To this, RESPONDENT raises two preliminary objections: on the authority of the Tribunal, and on the admissibility of tainted evidence. On merits, RESPONDENT denies any claims of hardship or adaptation.

7. In an attempt to confer this power, CLAIMANT argues that Mediterranean Law is the law with the closest connection to the Arbitration Agreement [*Cl. Memo. at p.5 ¶21*]. However, CLAIMANT's position is incorrect for two reasons:

   A. Danubian Law governs the Arbitration Agreement; and

   B. Even if Mediterranean Law governs the interpretation of the Arbitration Agreement, the Tribunal is not empowered to adapt the Contract.

A. DANUBIAN LAW GOVERNS THE ARBITRATION AGREEMENT

8. The Contract does not contain an express choice of law governing the Arbitration Agreement. This gives rise to a general presumption favouring the law of the seat, i.e., Danubian Law, to govern the Arbitration Agreement [*Owerri Commercial Inc v. Dielle Sri (Netherlands); C v. D (England); Craig, Park & Paulsson, 2000 at ¶5.05; Van Den Berg (1981); Award in ICC Case 5832 (1988)*]. The Tribunal must give effect to this presumption unless CLAIMANT provides concrete evidence to a contrary intention [*Abuja v. Meridien (England) at ¶¶20-24; Born, 2014 at p.519*]. CLAIMANT does not discharge this burden. In fact, CLAIMANT

attempts to divert the Tribunal's attention from Parties' true intentions by skipping the implied choice test as laid out in the *Sulamerica* ruling [*Sulamerica Case (England) at ¶25*]. Further, they incorrectly argue that there exists a presumption in favour of the law of the Contract. To counter, RESPONDENT submits that:

(a) Parties made an implied choice to apply Danubian Law to the Arbitration Agreement;

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

(c) Consequently, the Tribunal does not have the power to adapt the Contract.

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

9. Where the intention of the parties is not express, the tribunal ought to look at the implied choice of the parties to determine the law governing the arbitration agreement [*Sulamerica Case (England) at ¶25; Dicey, Morris & Collins, 2006 at ¶16R-001; Born, 2014 at p.489*]. The implied choice may be found in words or acts which manifest the intention and expectation of the parties that a particular law governs their relations [*Lew, Mistelis & Kröll, 2003 at p.415; Fouchard Gaillard Goldman, 1999 at ¶477*].

10. Pre-contractual negotiations must guide the tribunal's interpretation of the contract [*Danubian Contract Law art 4.3(a); French Corporation v. Danish Corporation*], as they reflect the parties' intention at the time of entering into the contract [*CRCICA Award No. 64 (1995)*]. While the parole evidence rule bars the use of pre-contractual negotiations to supplement or contradict the contract [*UNIDROIT PICC 2016 Commentary; The Restatement (Second) of Contracts by ALI (1981)*], there is no bar on its reliance to interpret parties' true intentions [*Danubian Contract Law art* 4.3; *Fouchard Gaillard Goldman, 1999 at ¶477; Procedural Order No. 2 ¶45*]. RESPONDENT shall rely on pre-contractual negotiations in this limited manner to interpret the Arbitration Agreement and argue that implied choice favours Danubian Law, since: the separability of the Arbitration Agreement shows that there is no implied choice in favour of Mediterranean Law **(i)**; and Parties' choice of a neutral Danubian seat implies that Danubian Law applies to the Arbitration Agreement **(ii)**.

(i) The separability of the Arbitration Agreement shows there is no implied choice in favour of Mediterranean Law

11. The separability presumption dictates that different national laws may govern the arbitration agreement and the contract [*Born, 2014 at p.466; Partial Award in ICC Case 13764 at ¶140; Interim Award in ICC Case 7263 (1994)*]. According to this presumption, an arbitration agreement is autonomous and juridically independent from the underlying contract [*Final Award in ICC Case 8938 (1994); Born, 2014 at p.350*], except where exceptional circumstances exist [*Raymond Gosset v. Carapelli (France) at ¶405; Sté Les Pains du Sud v. Sté Spa Tagliavini (France); Born, 2014 at p.399*]. These exceptional circumstances arise where the arbitration agreement is rendered ineffective if the contract is ineffective [*ICC Award 1526 (1968); Raymond Gosset v. Carapelli (France) at ¶405*].

12. In our case, no such exceptional circumstances exist, especially considering that the Arbitration Agreement is valid under both Mediterranean Law and Danubian Law. Therefore, the Arbitration Agreement is separable from the Contract. What further benefits RESPONDENT's submission is that the wording of the Choice of Law Clause, is not wide enough to encompass a separable Arbitration Agreement [*Born, 2014 at p.110*]. This conclusion refutes CLAIMANT's suggestion that Mediterranean Law is applicable to the Arbitration Agreement merely because it governs substantive rights under the Contract [*Cl. Memo. at p.3 ¶¶4-5*]. Consequently, there is no implied choice in favour of Mediterranean Law.

(ii) The Parties' choice of a neutral Danubian seat implies that Danubian Law applies to the Arbitration Agreement

13. When commercial relationships breakdown and parties descend into the realm of dispute resolution, parties' desire to be governed by a neutral law gains primacy [*FirstLink v. GT Payment (Singapore) at ¶13*]. This is to avoid situations where a home court bias might favour one of the parties [*Clermont & Eisenberg, 1995; Born & Rutledge, 2011; Born, 2014 at p.75*]. In *Government of the Republic of Philippines v. Philippine International Air Terminals Co. Inc.* [*Govt. of Philippines v. PIAT (Singapore)*], the Singapore High Court held that the designation of Singapore as a neutral place of arbitration was a strong connecting factor to determine the implied choice of the parties as to the law governing the arbitration agreement.

14. Similarly, Parties deliberately chose Danubia as a neutral seat. This is indicative of their implied choice to be governed by Danubian Law [*XL Insurance v. Owens (England); Sulamerica Case (England) at ¶29; FirstLink v. GT Payment (Singapore) at ¶15; Sumitomo v. Natural Gas Commission (England) at ¶¶56-59*]. There is clear evidence of Parties' intention to substantiate this. Ms. Napravnik, CLAIMANT's initial negotiator, stated that it would be desirable to have arbitration in a neutral country. Subsequent to a meeting with Ms. Napravnik, Mr. Antley, RESPONDENT's initial negotiator left a note, which stated that a clarification was required regarding the neutral venue and the applicable law. Although no explicit clarification materialized, Mr. Krone, RESPONDENT's subsequent negotiator, admitted that he misunderstood Mr. Antley's note as being a reference to the applicable law of the Contract. If there was clarity needed on applicable law of the Arbitration Agreement, Mr. Krone admitted that Danubian Law would have been chosen. These events indicate Parties' clear intention for the Arbitration Agreement to be governed by Danubian Law [*Exhibit R2 at p.34 and Exhibit R3 at p.35*].

15. Where Parties have made no express choice and have reposed their dispute resolution structure to a neutral regime, applying any other law to the Arbitration Agreement would create an unjust result on RESPONDENT's expectations.

16. Therefore, the choice of a neutral seat, supplemented by the separability presumption reflects Parties' implied choice for Danubian Law to govern the Arbitration Agreement [*Black Clawson v. Papierwerke (England); Petrasol BV v. Stolt Spur Inc (Netherlands); XL Insurance v. Owens (England)*].

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

17. Should the Tribunal be unable to arrive at a clear conclusion as to Parties' implied choice, it must resort to the law which has real and closest connection to the Arbitration Agreement [*Fouchard Gaillard Goldman, 1999 at p.221; Lew, Mistelis & Kröll, 2003 at p.114; ICC Case 2585 (1977); BMO v. BMP (Singapore)*]. Factors which have a connection to the arbitration agreement include where the arbitration agreement is concluded, where the contract is to be performed and where the seat of the arbitration is located [*Fouchard Gaillard Goldman, 1999 at p.224; Bomar v. ETAP (France); Dicey, Morris & Collins, 1993 at p.1223*]. Since the obligation to undertake arbitration is procedural in nature, an application of this test generally favours the law of the seat [*Mann on UNCITRAL Model Law, 1986*].

18. The function of an arbitration agreement is to provide a mechanism to resolve disputes arising under that contract [*Westacre v. Jugoimport-SPDR (England); Fiona Trust Case (England); Friedland, 2007 at pp.112-14; Born, 2013*]. This makes arbitration a remedial process. Any rights which are remedial are considered procedural in nature [*Judgement on 30 May 1994 (Japan); Judgement on 30 January 1957 (Germany); Interim Award in VIAC Case SGH-5024A (2008)*]. This is supported by rulings which have upheld the procedural character of arbitration agreements [*All-Union v. JOC OIL (USSR); Interim Award in Case 7047 (1994); Award in Case of 7 May 1963; Judgement of 20 January 1957 (Germany)*].

19. Where parties seek legal remedies, their procedural rights are governed by the *lex fori,* which is the law of the place where the action is brought [*Stern, 1952 at p.569; Gantt v. Felipe (US)*]. In arbitration proceedings, the *lex arbitri* is treated as the *lex fori.* This *lex arbitri* controls various aspects of arbitral proceedings [*Rhone Mediterranee v. Lauro (US); R. Shashoua v. Mukesh Sharma (England); Karaha Bodas Co. v. Perusahaan Negara (Hong Kong); Altain Khuder v. IMC Mining (Australia); Raguz v. Sullivan (Australia); Judgment of 28 March 1998 (Italy)*], which makes the determination of the seat of arbitration an important provision [*Judgment of 22 April 2004 (Colombia); Am. Diagnostica Inc. v. Gradipore (Australia); Judgment of 28 October 1997 (France)*].

20. In the present case, Parties have chosen Danubia as the seat of arbitration. Hence, Danubian Arbitration Law will govern two aspects of the arbitration proceedings.

21. *First,* Danubian Law will control jurisdictional objections to the Arbitration Agreement [*UNCITRAL Model Law arts 1(2), 8 & 16*] including the validity and scope of the same [*Final Award in ICC Case No. 6437 (1990); Final Award in ICC Case No. 3987 (1983); Victor Pey Casado v. Chile; Elf v. National Iranian Oil*].

22. *Second*, Danubian courts will exercise supporting and supervisory jurisdiction necessary to ensure that the procedure is effective [*Sulamerica Case (England) at ¶32; FirstLink v. GT Payment (Singapore) at ¶15*]. This supervision includes, *inter alia*, judicial assistance in issuing provisional measures in aid of the arbitration proceedings, judicial review of procedural rulings of the tribunal, judicial review of arbitral awards in annulment actions [*Craig, Park & Paulsson, 2000; Born, 2014 at p.1532*]. Hence, after the award is passed, the courts of *lex arbitri* can annul or render the award unenforceable due to non-compliance with the requirements of the Danubian Arbitration Law [*Poznanski, 1987 at p.86; New York Convention art V(1)(c); Blessing, 1999*].

23. These factors evidence the extent to which the *lex arbitri* controls the arbitration proceedings. This indicates the inherent connection between the seat of the arbitration and the arbitration agreement. Moreover, no other law, that is, neither Mediterranean, nor Equitaronian Law possesses such a connection. This is especially true because neither of these laws is the *lex arbitri,* nor do they influence the arbitral proceedings in any manner. Therefore, where Parties have expressed no intention whatsoever, RESPONDENT submits that it is Danubian Law which has real and closest connection with the Arbitration Agreement, and must govern its interpretation.

c. Consequently, the Tribunal does not have the power to adapt the Contract

24. An arbitral tribunal derives its powers from the arbitration agreement [*Berger, 2001 at p.8; Redfern & Hunter, 2015 at p.92; Fouchard Gaillard Goldman, 1999 at ¶625; Born, 2014 at p.489*]. The tribunal cannot exercise this power in the absence of any procedural power conferred by the applicable law or by parties through contract [*Beisteiner, 2014 at p.83; Award in ICC Case 3742 (1984)*].

25. Danubian Law applies to the Arbitration Agreement. Danubian Arbitration Law mandates express conferral of the power to adapt the Contract [*Procedural Order No. 2 at ¶36*]. Since Parties do not fulfil this mandatory, formal requirement of express conferral, the Tribunal is not empowered to adapt the Contract. The same cannot be read into the Arbitration Agreement due to the parole evidence rule **(i)**. Further, under Danubian Law, the Tribunal does not have the power to act as an *amiable compositeur* **(ii)**.

(i) The power to adapt cannot be read into the Arbitration Agreement due to the parole evidence rule

26. Application of the parole evidence rule contained in Danubian Contract Law [*Procedural Order No. 2 at ¶36; Danubian Contract Law art 4.3*] is premised on two assumptions. *First*, that parties have included all relevant terms of the contract in the text of the contract itself. *Second*, that the contract is complete in nature [*Treitel, 2005 at p.4; Posner, 1997 at p.535*]. These conclusions imply that extrinsic evidence cannot be utilized to supplement or contradict the agreed terms.

27. Parties have provided a complete Arbitration Agreement stipulating that the Tribunal shall decide on any dispute arising out of the Contract, including its existence, validity, interpretation, performance, breach or termination. Despite extensive discussions, Parties

have deliberately omitted to allow the Tribunal to amend or adapt the Contract in cases of hardship. In the absence of such a provision, if the Tribunal adapts the Contract, it will not merely be interpreting the Arbitration Agreement or the Contract but rather supplementing it. This is barred by the parole evidence rule as contained in Danubian Contract Law. Consequently, the Tribunal should not adapt the Contract.

(ii) The Tribunal does not have the power to act as an amiable compositeur

28. A tribunal deciding as an *amiable compositeur* or deciding *ex aequo et bono* is not strictly bound by settled legal principles [*Waincymer, 2012 at p.1046; Loquin, 1983 at p.315-20*]. The fixing of a price or adaptation by third parties does not, in principle, constitute a judicial act [*Motulsky, 1974 at p.47; Berger 2001 at p.2*] since there is no "dispute" [*Marcantonio, 1985 at p.238*]. In the absence of conferment of powers to do so, the tribunal would be acting as an *amiable compositeur* [*Fouchard Gaillard Goldman, 1999 at p.26; ICC Award 3938 (1982)*] since it will be providing an equitable relief.

29. However, the Tribunal itself cannot adopt such an approach unilaterally [*Waincymer, 2012 at p.1046; AMINOIL Award (1982); Beisteiner, 2014 at p.110*] since both the HKIAC Rules and the Danubian Arbitration Law require express agreement of parties that the tribunal can decide *ex aequo et bono* or as *amiable compositeur* [*HKIAC Rules art 36.2; UNCITRAL Model Law art 28(3)*]. In the absence of any authorisation whatsoever, the Tribunal should not adapt the Contract.

B. EVEN IF MEDITERRANEAN LAW GOVERNS THE ARBITRATION AGREEMENT, THE TRIBUNAL IS NOT EMPOWERED TO ADAPT THE CONTRACT

30. CLAIMANT argues that Parties intended for the Tribunal to adapt the Contract [*Cl. Memo at p. 6 ¶28*]. Even if the Tribunal finds that Mediterranean Law applies to the Arbitration Agreement, RESPONDENT argues that it is not empowered to adapt the Contract, since:

(a) Parties did not intend to allow the Tribunal to adapt the Contract; and

(b) The *lex arbitri* restricts the Tribunal's power to adapt the Contract.

a. Parties did not intend to allow the Tribunal to adapt the Contract

31. Since contractual relationships form the basis of an arbitral tribunal's power to resolve disputes [*Roses v. Moller (France)*], the arbitration agreement ought to be interpreted using the

common intention of parties at the time of formation of contract [*Kotuby Jr. & Sobota, 2017 at p.92*]. Further, a recognized principle of party autonomy is that this common intention shall prevail over national laws [*Fouchard Gaillard Goldman, 1999 at p.32; Lew, Mistelis & Kröll, 2003*].

32. The common intention of Parties reflects that the Tribunal is not empowered to adapt the Contract. During negotiations, Ms. Napravnik requested for an explicit clause on adaptation to be contained in the Contract [*Exhibit C8 at p.17*]. However, owing to the accident on 12 April 2017, RESPONDENT was unable to reply, and no further correspondence took place on this matter. While CLAIMANT may argue the presence of an initial intention, this intention remained stillborn, since despite having access to previous correspondences [*Procedural Order No.2 at* ¶*5*], subsequent negotiators did not include an adaptation clause in the Contract.

33. CLAIMANT attempts to rely on the Hardship Clause to argue that Parties empowered the Tribunal to adapt the Contract. To do so, they incorrectly assume that article 79 of CISG allows for adaptation in circumstances of hardship as elucidated in ¶¶72-74 of this Memorandum. This is further emphasized by the fact that Parties discussed the model ICC Hardship Clause, which provides for renegotiation and adaptation as remedies to hardship, but chose to discard this in favour of a narrower clause [*Exhibit R2 at p.34 & Exhibit R3 at p.35*]. Their conscious agreement upon a narrower hardship clause, which merely laid out the scope of hardship, is indicative of their intention not to empower the Tribunal.

34. In spite of preliminary deliberations on adaptation, these omissions reflect Parties' common intention to exclude adaptation from the scope of the Tribunal's power. Therefore, finding a power to adapt the Contract would subvert Parties' common intention.

b. The *lex arbitri* restricts the Tribunal's power to adapt the Contract

35. The selection of a particular seat of arbitration ordinarily results in the arbitration being conducted in accordance with that jurisdiction's legal framework [*Henderson, 2014 at pp.890-91; Garuda v. Birgen (Singapore); R. Shashoua v. Mukesh Sharma (England); BALCO Decision (India)*]. As a result, the procedural powers of the tribunal, such as that of adaptation, ought to be in consonance with the *lex arbitri* [*Ferrario, 2017 at p.75*].

36. The law applicable to arbitration governs procedural matters as well as decisions on jurisdiction [*Brunner, 2008 at p.514; Ness, 2018 at p.392*]. Further, it includes the grounds on which the award may be challenged and set aside [*Paulsson, 2011 at p.887; Henderson, 2014*].

Such an award may be rendered unenforceable under the New York Convention [*UNCITRAL Model Law art 34(2); New York Convention art V(1)(c); Brunner, 2008 at p.493; Berger, 2001*]. The tribunal's power to adapt depends on and must be assessed under the *lex arbitri* [*Brunner, 2008 at p.514; Ness, 2018 at p.392*]. If the *lex arbitri* does not allow an arbitral tribunal to adapt a contract, any power to do so under the applicable substantive law becomes moot [*UNCITRAL Model Law art 34(2); New York Convention art V(1)(c); Brunner, 2008 at p.493; Berger, 2001*]. Despite this, if an award of adaptation is passed by a tribunal, it runs the peril of being set aside and rendered unenforceable.

37. The *lex arbitri*, i.e., Danubian Arbitration Law, and the HKIAC Rules state that the tribunal's power to adapt requires express conferment of power since in adapting the contract, the tribunal would be deciding *ex aequo et bono* or as *amiable compositeur* [*Answer to the Notice of Arbitration at p.32 ¶13; Procedural Order No. 2 at ¶36*]. Parties have failed to expressly confer the power to adapt to the Tribunal. Despite this non-conferment, if the Tribunal adapts the Contract, the award would be rendered unenforceable. Therefore, the Tribunal does not have the power to adapt the Contract since it is not allowed under the *lex arbitri*.

38. **CONCLUSION TO ISSUE I:** RESPONDENT's primary submission is that the Arbitration Agreement is governed by Danubian Law. However, even if Mediterranean Law was to apply, no interpretation of Parties' intentions can lead to the conclusion that the Arbitration Agreement includes the power of adaptation. Moreover, the seat of the arbitration being Danubia, adaptation would require express authorization, which is not present in the Contract.

II. CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM OTHER ARBITRATION PROCEEDINGS

39. CLAIMANT seeks to submit an illegally obtained Partial Interim Award from an HKIAC administered arbitration [*Procedural Order No. 2 at ¶41*]. They argue that the Tribunal must hold itself bound by the decision in that arbitration, since tribunals have broad powers to decide on the admissibility of evidence. Exercising these powers, tribunals may choose to apply strict rules of evidence [*HKIAC Rules art 22.2*]. The basic rule governing admissibility is that the evidence must not be subject to any exclusions [*Dolphin Tanker v. Wesport Petroleum (England)*]. While CLAIMANT correctly places reliance on the IBA Guidelines to list out specific grounds of exclusion, [*Cl. Memo. at p.9 ¶41*] their conclusion is misplaced. Addressing these claims, RESPONDENT submits:

A. CLAIMANT's reliance on international practice is misplaced.

B. The IBA Guidelines specifically prohibit the admission of the evidence.

C. The clean hands doctrine prohibits the admission of the evidence.

A. CLAIMANT'S RELIANCE ON INTERNATIONAL PRACTICE IS MISPLACED

40. Article 45.1 of the HKIAC Rules indicates that confidentiality will protect any proceedings relating to an arbitration administered by the HKIAC [*HKIAC Rules art 45.1*]. The sources from whom CLAIMANT has received information are former RESPONDENT employees, who were bound by these confidentiality obligations [*Procedural Order No. 2 at ¶41*]. Where rules of confidentiality protect documents, arbitral tribunals have consistently ruled against their admission. This is because confidentiality and privilege of arbitral proceedings is treated sacrosanct and is not to be breached under any circumstances [*Methanex v. USA; Libananco Holdings v. Turkey; Abaclat v. Argentina; Biwater Gauff v. Tanzania; Esso Australia Resources Ltd. Plowman (Australia)*]. Further, if tribunals routinely allowed the admission of confidential evidence, the object of provisions conferring privilege to arbitral communications would become redundant.

41. CLAIMANT appears to rely on awards that allow evidence even where confidentiality rules protect the evidence. However, CLAIMANT's reliance on these awards is misplaced. The tribunal in *Caratube v. Kazakhstan* has allowed for confidential information to be admitted because of the nature of the dispute [*Caratube v. Kazakhstan*]. Being a dispute of international

investment law, and with a State party, tribunals have elected to admit the evidence on account of a public interest in the dispute. There being no such public interest in the present dispute, pertaining exclusively to commercial relationship between Parties, the Tribunal ought not to admit the evidence.

B. THE IBA GUIDELINES SPECIFICALLY PROHIBIT THE ADMISSION OF THE EVIDENCE

42. The IBA Guidelines state that characteristics of materiality or relevance must be considered in determining the admissibility of evidence before an arbitral tribunal [*O'Malley, 2012 at p.54 ¶3.67; Decision of 7 January 2004 (Switzerland)*]. The evidence that CLAIMANT seeks to admit is a Partial Interim Award in another HKIAC administered arbitration involving the RESPONDENT. However, this Partial Interim Award is wholly irrelevant in the present proceedings.

43. Contrary to CLAIMANT's submissions, it is not clear that there is a common question of law or fact between the two arbitral proceedings [*Cl. Memo. at p.10 ¶45*]. In fact, a clear distinction can be drawn between the two proceedings. This is because in the arbitration proceeding CLAIMANT relies on, parties expressly chose for Mediterranean Law to be applicable to the arbitration agreement. Furthermore, the contract therein contained the Model ICC Hardship Clause [*Procedural Order No. 2 at ¶39*]. Where the outcome of that legal decision hinges on these active choices of Mediterranean Law and a broad hardship clause, its use in a case with substantially different choices cannot be relevant.

44. Moreover, arbitral tribunals are not bound by principles of stare decisis [*Jeffery P. Commission, 2007 at pp.149-50; Dow Chemical v. Isover; Final Award in ICC Case 5480 (1991); Generica Ltd v. Pharmaceutical Basics (US)*], and ought to use their discretion to admit evidence on a case-to-case basis. Additionally, the principle of collateral estoppel is not applicable to arbitration [*Cromwell, 2000*]. Therefore, RESPONDENT, cannot be bound by its statements in the previous arbitration. Consequently, the Partial Interim Award ought to be excluded from admission.

C. THE CLEAN HANDS DOCTRINE PROHIBITS THE ADMISSION OF THE EVIDENCE

45. Tribunals have applied the clean hands doctrine to assess the admissibility of evidence [*Yukos awards*]. This test examines whether the party seeking to rely on unlawfully obtained evidence

has played a role in its procurement. The Partial Interim Award that CLAIMANT seeks to rely upon is not publicly available [*Procedural Order No. 2 at ¶41*]. Therefore, the only manner in which the Partial Interim Award can be obtained is by hacking, or through other illegal means. CLAIMANT has arranged to obtain the Partial Interim Award from a company that provides intelligence on the horseracing industry [*Procedural Order No. 2 at ¶41*]. CLAIMANT's actions indicate that it is complicit to, and has facilitated the unlawful procurement of the evidence it seeks to rely on. CLAIMANT's dishonest conduct should preclude it from profiting from its own complicity. RESPONDENT therefore, submits that this evidence should not be admitted in the present arbitration.

46. **CONCLUSION TO ISSUE II:** The Tribunal must exercise its discretion to refuse admission of the evidence, as it is irrelevant and immaterial. Rules of confidentiality further exclude its admission. Admitting the evidence would be a departure from the practice of previous tribunals in international commercial arbitrations. More importantly, its admissibility would lead to a conclusion that is inequitable to RESPONDENT, which would be held hostage to a stance taken in an incomparable factual circumstance.

ARGUMENTS ON MERITS

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

47. As contended above, the Arbitration Agreement does not confer the Tribunal with power to adapt the Contract. RESPONDENT submits that should the Tribunal deem that it has such powers, the Contract cannot be adapted in the present case. CLAIMANT contends that the Tribunal must adapt the Contract since bearing the 30 per cent tariff on animal semen imposed by the Equatorianan Government constitutes a case of hardship. However, the tariff imposition neither fulfils the requirements of hardship under the Contract, nor under other international principles governing Parties' relationship. In this context, RESPONDENT submits:

A. The imposition of the tariff does not constitute hardship under the Contract; and

B. The imposition of the tariff does not constitute Hardship under article 79 of CISG.

A. THE IMPOSITION OF THE TARIFF BY THE EQUATORIANAN GOVERNMENT DOES NOT CONSTITUTE HARDSHIP UNDER THE CONTRACT

48. In accordance with the agreed risk allocation under the Contract between Parties, Claimant is liable to bear the additional 30 per cent tariff. In this regard, RESPONDENT submits the following:

(a) Claimant bearing the tariff does not amount to a situation of hardship. Parties agreed on a DDP delivery mechanism;

(b) The tariff does not fulfil the requirements of the Hardship Clause;

(c) Subsequent conduct of RESPONDENT does not indicate any agreement for it to undertake liability of the tariff; and

(d) The doctrines of impracticability and incomplete contracts are inapplicable in the present case.

a. Parties agreed on a DDP delivery mechanism

49. While CLAIMANT correctly points out that Parties agreed on a DDP delivery mechanism, they wrongly contend that RESPONDENT ought to be liable for payment of the additional tariff. After a DDP delivery mechanism was agreed on, CLAIMANT increased the price of each dose by USD 200, to cover costs associated therewith [*Procedural Order No. 2 at* ¶*8*].

50. DDP represents the maximum obligations for the seller [*INCOTERMS Rules 2010*]. In this mechanism, the seller is responsible for all costs and risks during the delivery, including duties for import and other customs procedure at the destination country [*INCOTERMS Rules 2010; ICC Guide to INCOTERMS 2010; Eldović, Vukašinović, Tešić, Bijelić, 2015*]. Accordingly, CLAIMANT is responsible for the additional 30 percent tariff and all other charges till the point of delivery.

51. If CLAIMANT wished to be protected from the liability of the tariff, it should have requested for delivery on DAP basis. The Guidance Note to DDP expressly states that if the parties wished for the buyer to bear all risks and costs of import clearance, the DAP rule should be followed [*ICC Guide to INCOTERMS 2010*]. The seller's added obligation to carry out all customs formalities, including paying all duties, taxes and other charges payable on import is the essence of a DDP delivery mechanism, differentiating it from DAP.

52. Therefore, since Parties explicitly chose a DDP delivery mechanism, CLAIMANT should bear the 30 per cent tariff imposed by the Equatorianan Government. If, as CLAIMANT desires, the tariff is borne by RESPONDENT, it will lead to a scenario that is inconsistent with Parties' intentions.

b. The 30 per cent tariff imposed by the Equatorianan Government does not fulfil the requirements under the Hardship Clause

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

54. The conditions precedent to invoke the Hardship Clause include and are limited to either a loss in shipment or any delays in delivery [*Exhibit C5 at p.14 Cl.12*]. In the present case, CLAIMANT cannot invoke the Hardship Clause since neither is there a loss in shipment nor

any delay in delivery. By incorrectly placing reliance on the Hardship Clause, CLAIMANT is attempting to evade its obligations to pay a tariff.

55. Further, in the event that the Tribunal holds that CLAIMANT can invoke the Hardship Clause, the requirements to establish a situation of hardship are not fulfilled. The Hardship Clause uses the phrase "*comparable unforeseen events making the contract more onerous*", which does not cover the 30 per cent additional tariff declared on the frozen semen.

56. CLAIMANT could have foreseen the declaration of an import restriction in the nature of the 30 per cent tariff imposed by the Equatorianan Government at the time of conclusion of Contract. In January 2017, the newly elected Prime Minister of Equatoriana had already announced its preference towards to a protectionist regime in international trade, particularly relating to agricultural goods [*Exhibit C6 at p.15*]. It is a general practice to include animal semen within the ambit of agricultural goods [*FAIRS Export Certificate Report; Reproductive Material, Australian Government; Animal and Animal Product Information, US Dept. of Agriculture; Importing, Ministry of Primary Industries NZ*]. Additionally, CLAIMANT's email dated 31 March 2017 also indicates that it had already considered the possible risks of customs regulations or import restrictions [*Exhibit C4 at p.12*]. Thus, CLAIMANT could have foreseen declaration of the tariff by the Equatorianan Government.

57. Further, the declaration of the 30 per cent tariff on frozen semen by the Equatorianan Government did not make CLAIMANT's performance of the Contract more onerous. According to the contractual risk allocation between Parties, CLAIMANT was responsible for all customs procedures, including payment of any import duties and taxes [*INCOTERMS Rules 2010; ICC Guide to INCOTERMS 2010; Eldović, Vukašinović, Tešić, Bijelić, 2015*], that is, bearing the additional tariff was a part of CLAIMANT's obligations under the Contract.

58. Where they rely on the Hardship Clause, CLAIMANT is simply attempting to recover losses sustained by it in course of performance of the Contract. However, since all businesses involve an element of risk, including risks relating to incurring losses [*UIIC v. Lehru (India)*], CLAIMANT should have been prepared to incur certain losses while performing the Contract. Thus, the imposition of the 30 per cent tariff did not make the performance of the Contract more onerous for CLAIMANT.

59. Therefore, the 30 per cent tariff imposed on frozen semen by the Equatorianan Government did not constitute hardship under the Hardship Clause.

c. Subsequent conduct of RESPONDENT indicates no agreement to accept liability of the 30 per cent tariff

60. After becoming aware of the applicability of the 30 per cent tariff to the frozen semen, CLAIMANT attempted to initiate renegotiations with RESPONDENT. In the course of these renegotiations, Mr. Shoemaker, RESPONDENT's employee, never committed to the adaptation of the price. Further, Mr. Shoemaker did not even have the authority to make such a commitment [*Exhibit R4 at p.36*]. Therefore, CLAIMANT is misplaced in assuming that an agreement had been arrived at between Parties.

61. Moreover, RESPONDENT did not authorize delivery of the last shipment on the promise of an increased price. Rather, the shipment was authorized since the frozen semen was urgently required in view of the impending breeding season [*Exhibit R4 at p.36*].

62. Therefore, subsequent conduct of RESPONDENT indicates no agreement to increase the price in context of the 30 per cent tariff imposed by Equatorianan Government.

d. The doctrines of commercial impracticability and incomplete contracts are inapplicable

63. CLAIMANT has attempted to invoke the doctrine of impracticability to be exempted from the liability of the additional tariff [*Cl. Memo. at p.15 ¶75*]. However, this doctrine is unavailable when the contract has merely become more expensive than anticipated or that the contractor is unable to sustain his anticipated profit margin [*Knoll & Kappelman, 2014; Natus Corp. v. United States*]. The imposition of the 30 per cent tariff has not made the performance of Contract commercially impracticable, but only more expensive than anticipated [*Gulf & Western Industries Case (US); Raytheon v. White (US); BMN Ltd. v. LDC Ltd. (England)*].

64. Further, CLAIMANT argues that Parties entered into an incomplete contract since the Hardship Clause was illustrative and did not describe every possible situation of hardship. [*Cl. Memo. at p.17 ¶83*]. However, the Hardship Clause is complete. Parties decided to regulate all possible risks directly by adding a hardship wording to the *force majeure* clause. This is to say that the Hardship Clause elucidates every possible scenario in which CLAIMANT would be exempted for a delay in delivery. Thus, Parties did not intend to cover CLAIMANT against the additional tariff under the Hardship Clause [*Exhibit C6 at p.15; Exhibit R3 at p.35*]. Therefore, the doctrines of commercial impracticability and incomplete contracts are not applicable in the present case.

65. RESPONDENT submits that the DDP delivery mechanism was agreed on, and the requirements of the Hardship Clause are not met. Moreover, CLAIMANT is misplaced in relying on the doctrines of commercial impracticability and incomplete contracts. Therefore, the only conclusion that arises is that CLAIMANT is liable to bear the 30 per cent additional tariff.

B. THE IMPOSITION OF THE TARIFF DOES NOT CONSTITUTE HARDSHIP UNDER ARTICLE 79 OF CISG

66. CLAIMANT attempts to rely on article 79 of CISG to seek adaptation of price [*Cl. Memo. at p.19* ¶*96*]. Article 79 of CISG exempts the parties from performance if they can establish that non – performance was due to an impediment beyond their control. To be covered by article 79, the impediments must be unforeseeable at the time of making the contract, and create consequences which cannot be reasonably expected to be overcome by the parties. In this context, RESPONDENT submits:

(a) CISG neither governs hardship nor adaptation;

(b) Parties have chosen to derogate from article 79 of the CISG by including a Hardship Clause;

(c) Even if article 79 is applicable in the present case, the requirements to constitute hardship are not fulfilled.

a. CISG neither governs hardship nor adaptation

67. By reading article 79 of CISG in an expansive manner, CLAIMANT argues that it includes hardship and adaptation within its scope. To this, RESPONDENT submits: *First,* article 79 of CISG does not govern hardship **(i)**. *Second*, article 79 of CISG does not provide for a remedy of adaptation **(ii)**.

(i) Article 79 of CISG does not govern hardship

68. Contrary to CLAIMANT's belief, article 79 of CISG covers only cases of force majeure or impossibility of performance. Hardship refers to the performance of the disadvantaged party having become much more burdensome, but not impossible, while *force majeure* refers to the performance of one party's obligations that has become impossible, even on a temporary basis [*Rimke, 1999-2000*].

69. Article 79 uses the term 'impediment' to describe the types of events beyond the contracting party's control that will be acceptable as an excuse for non-performance of its obligations under the contract. The term 'impediment' denotes an external force that objectively interferes with performance of the contract and renders performance impossible [*Gabriel, 1997 at p.280*]. Hence, a disturbance which does not fully exclude performance, but only makes it considerably more onerous or unprofitable cannot be considered to be an impediment [*Tallon, 1987 at p.576; Honnold, 1991 at p.543; Enderlein & Maslow, 1992 at p.325*].

70. Support can also be drawn from the *travaux preparatoires* of the CISG which also indicate the exclusion of situations of hardship from its scope. The UNCITRAL debates show that the CISG drafters were opposed to allowing commercial or economic hardship as an excuse for non-performance. This was the reason for adopting the requirement of 'impediment' for relief instead of the more liberal ULIS test of 'change of circumstances' [*Honnold, 1991 at ¶¶432.1-432.2; Progress Report, Working Group on International Sale of Goods*].

71. Further, for article 79(1) to be applicable, the impediment must have caused the party to fail in the performance of its obligations. This means that the exemption is unavailable in situations similar to the present case where CLAIMANT can perform their obligations despite the alleged impediment.

72. Therefore, the word 'impediment' in article 79 of CISG does not cover events that result in hardship, and accordingly, article 79 does not cover situations of hardship.

(ii) Article 79 of CISG does not provide for a remedy of adaptation of contracts

73. CLAIMANT argues that the Tribunal should adapt the Contract under article 79 of CISG. However, article 79 only provides for exemption from performance of the contract; not for adaptation of the terms of contracts. The adaptation of the contract by a judge is not expressly allowed by the CISG, and must therefore be regarded as impossible in that context [*Tallon, 1987 at p.592*].

74. At this juncture, CLAIMANT might make reference to the UNIDROIT PICC. However, RESPONDENT submits that no reliance can be placed on the hardship provision in article 6.2.3 of UNIDROIT PICC to claim an adaptation of price. The UNIDROIT PICC can be used only as far as the Principles can also be found in the CISG. In so far as the Principles deal with issues not expressly addressed under the CISG, the Principles should not be used for uniform interpretation [*Schlectriem & Butler, 2009 at p.56*]. Since the CISG does not

expressly provide for the remedy of adaptation, CLAIMANT cannot resort to the Principles in this regard.

75. In conclusion, should the Tribunal rely on article 79 of CISG to adapt the Contract, it would be going against internationally settled principles. Therefore, RESPONDENT submits that article 79 of CISG does not provide for a remedy of adaptation of contracts.

b. Parties have chosen to derogate from article 79 of CISG by agreeing on a DDP delivery mechanism and including the Hardship Clause

76. The application of CISG is subject to the principle of party autonomy [*Huber and Mullis, 2007 at p.60*]. Article 6 of CISG provides that parties are free to exclude the application of the Convention or derogate from its provisions, either entirely or partially. This total or partial exclusion or derogation from CISG can also be made implicitly [*Dore & DeFranco, 1982 at p.53-54*].

77. By agreeing on a DDP delivery mechanism, CLAIMANT agreed to undertake all liabilities relating to customs procedures, including payment of import duties. Exemption under article 79 of CISG does not alter the risk allocation between Parties [*Vinewax Case (Germany)*]. Thus, Parties agreed on a DDP delivery mechanism, thereby excluding the applicability of the exemption under article 79 of CISG.

78. CLAIMANT, at this stage, incorrectly assumes that RESPONDENT is attempting to exclude the entirety of CISG [*Cl. Memo. at p. 23 ¶117*]. However, Parties have impliedly chosen only to derogate from article 79 of the CISG by incorporating a Hardship Clause in the Contract. The CISG Advisory Council has observed that parties may derogate from articles 74 – 79 of CISG by incorporating such relevant clauses. Such a derogation shall be held valid under article 6 of CISG embodying the principle of freedom of contract [*CISG-AC Opinion No. 10*].

79. The interpretation of such derogation agreements should be governed by principles of article 8 of CISG [*Huber and Mullis, 2007 at p.66*]. Article 8(1) provides that statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what the intent was.

80. Upon CLAIMANT's request, Parties concentrated their discussions on the inclusion of a hardship clause. Further, RESPONDENT informed CLAIMANT that it considered the suggested ICC Hardship Clause to be too broad [*Exhibit R3 at p.35*]. Subsequently, Parties regulated a

number of risks directly by adding a hardship wording to the existing *force majeure* clause [*Exhibit C5 at p.14 Cl.12*].

81. Since the Contract contains a DDP delivery mechanism and a Hardship Clause, it is evident that Parties have exercised their autonomy under article 6 of CISG to derogate from obligations under article 79 of CISG. Therefore, RESPONDENT submits that article 79 is inapplicable in the present case.

c. Even if article 79 of CISG is applicable, requirements of article 79 have not been fulfilled

82. The 30 per cent tariff imposed on animal semen by the Equatorianan Government does not attract article 79 of CISG. However, if the Tribunal rules that article 79 of CISG is applicable, RESPONDENT submits that the requirements of article 79 have not been fulfilled. This is because CLAIMANT failed to give notice of its failure to perform the contract **(i)**; CLAIMANT could have reasonably foreseen the impediment **(ii)**; and CLAIMANT could have reasonably overcome the impediment **(iii)**.

(i) CLAIMANT failed to provide notice of its failure to perform the Contract

83. Article 79(4) of CISG requires the party availing the exemption under article 79 to give notice to the other party of the impediment and its effect on the party's ability to perform the contract. On failure of providing such notice within a reasonable time after the party knew of such impediment or ought to have known of such impediment, the defaulting party is liable for any resulting damages.

84. The duty to inform arises from the moment the obligor knew or ought to have known of the impediment [*Kröll, Mistelis and Viscasillas, 2011 at p.1095 ¶96*]. CLAIMANT failed in its duty to provide notice of the impediment and its effect on their ability to perform the Contract within a reasonable time.

85. The 30 per cent tariff on the frozen semen was announced by the Equatorianan Government by way of an executive order on 19 December 2017. Despite reading the newspaper article about the imposition of the 30 per cent tariff in the Peak Business News, they did not consider the possibility of the tariff being applicable to the frozen semen. CLAIMANT informed RESPONDENT of the tariff's applicability only on 20 January 2018, one day before the agreed date of delivery of the shipment.

86. Therefore, CLAIMANT failed in its duty under article 79(4) of CISG to provide RESPONDENT with notice of the impediment and its effect on their ability to perform the Contract within a reasonable time.

(ii) CLAIMANT could have reasonably foreseen the impediment

87. Article 79(1) of CISG requires that the seller could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract. However, CLAIMANT could have reasonably foreseen the impediment at the time of conclusion of Contract.

88. Foreseeability is judged against the background of an objective standard. The CISG presupposes that a party may be regarded as having taken the risk of occurrence of a certain event if that risk would have been anticipated by a reasonable person engaged in the type of business in question [*Kröll, Mistelis and Viscasillas, 2011 at p.1075* ¶¶*50, 52*]. Parties entered into the Contract in May 2017. In January 2017, the Prime Minister of Equatoriana had already announced a preference for a protectionist approach to international trade, particularly in relation to agricultural products [*Exhibit C6 at p.15*]. It is a general practice that animal semen generally falls within the scope of 'agricultural goods' [*FAIRS Export Certificate Report; Reproductive Material, Australian Government; Animal and Animal Product Information, US Dept. of Agriculture; Importing, Ministry of Primary Industries NZ*].

89. Moreover, as is evident from the email dated 31 March 2017, Claimant anticipated the possibility of risks associated with changes in customs regulations or import restrictions [*Exhibit C4 at p.12*]. In the given context, CLAIMANT could have reasonably foreseen the imposition of import restrictions by the Government of Equatoriana at the time of negotiating the Contract.

90. Further, when CLAIMANT charged RESPONDENT an additional $200 per dose, it was also expected to undertake any associated risks and losses with such risk allocation. Anything which falls within the ordinary range of commercial probability is foreseeable [*Kröll, Mistelis and Viscasillas, 2011 at p.1075* ¶*50*]. All persons carrying on business must take risks associated with the business, including bearing any losses [*UIIC v. Lehru (India)*].

91. Therefore, CLAIMANT could have reasonably foreseen the impediment at the time of the conclusion of the contract.

(iii) CLAIMANT could have reasonably overcome the impediment

92. The 30 per cent tariff on the animal semen by the Equatorianan Government was announced on 19 December 2017 by way of an executive order [*Procedural Order No. 2 at ¶25*]. Any impediment that arose through the additional tariff could have easily be overcome if CLAIMANT initiated prompt renegotiations or organized the delivery of the shipment through an alternate route.

93. Despite reading the newspaper article about the imposition of the 30 per cent tariff in the Peak Business News, CLAIMANT did not consider the possibility of the tariff being applicable to the frozen semen [*Procedural Order No. 2 at ¶26*]. CLAIMANT became aware of the applicability of additional tariff to frozen semen only on 20 January 2018 when it was sent for customs clearance. In the agreed DDP delivery mechanism, CLAIMANT was responsible for all official authorizations and customs formalities, including payment of any import duties and taxes [*ICC Guide to INCOTERMS 2010; INCOTERMS Rules 2010*]. CLAIMANT attempted to initiate renegotiations merely one day prior to the scheduled delivery.

94. In this factual background, had CLAIMANT taken prompt steps to renegotiate the delivery terms with RESPONDENT, the consequences of the impediment could reasonably have been avoided. Alternatively, CLAIMANT could have avoided the consequences of the impediment by organizing the delivery through Phar Lap LLP, now owned by an outside investor [*Procedural Order No. 2 at ¶9*].

95. Therefore, CLAIMANT could have reasonably overcome the consequences of the 30 per cent tariff impediment.

96. **CONCLUSION TO ISSUE III:** Declaration of the 30 per cent tariff does not constitute a situation of hardship under the Hardship Clause and under provisions of the CISG. Consequently, CLAIMANT is not entitled to a remedy of adaptation or payment of $1,250,000.

REQUEST FOR RELIEF

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

i. The Tribunal does not have the requisite power under the Arbitration Agreement to adapt the Contract.

ii. The Tribunal should not admit the evidence from the other arbitration proceeding to which RESPONDENT was party.

iii. CLAIMANT is not entitled to any payment whatsoever from an adaptation of the price neither under the Contract nor under the CISG.

24 January 2019
Counsels for RESPONDENT
Danubia

CERTIFICATE

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

ACHYUTHA G. M

DARSHAN PATANKAR

KUNAL GOPAL

ROHIN GOYAL

SURABHI SABOO

TEJAS RAO