Sixteenth Annual Willem C. Vis International Commercial Arbitration Moot
Hong Kong, 13-18 March 2019

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# ATENEO DE MANILA UNIVERSITY


## MEMORANDUM FOR CLAIMANT

| On Behalf Of | Against |
|---|---|
| *Phar Lap Allevamento* | *Blackbeauty Equestrian* |
| *Claimant* | *Respondent* |
| Rue Frankel 1 | 2 Seabiscuit Drive |
| Capital City | Oceanside |
| Mediterraneo | Equatoriana |

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*Counsels*
Raphael Niccolo L. Martinez • Andrew Ray E. Rosales • Jaims Gabriel L. Orencia
Bianca Isabel D. Soriano •

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MANILA • PHILIPPINES

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| | |
|---|---|
| & | And |
| ¶/¶¶ | Paragraph/s |
| §/Sec. | Section/s |
| Art./Arts. | Article/s |
| AA | Appointing Authority |
| Answer to NoA | Answer to the Notice of Arbitration |
| CISG | United Nations Convention on Contracts for the International Sale of Goods |
| CISG-AC | Advisory Council of the Vienna Convention on Contracts for the International Sale of Goods |
| *cf.* | Confer/*conferatur* [with cross-reference] |
| Cl. | Claimant |
| Co. | Company |
| Corp. | Corporation |
| e-mail | Electronic mail |
| e.g. | Exempli gratia |
| ed. | Edition |
| et. al | And others |
| Exh. | Exhibit |
| FSSA | Frozen Semen Sales Agreement |
| ICC | International Chamber of Commerce |
| ICSID | International Centre for Settlement of Investment Disputes |
| *Id.* | *Idem* [the same] |
| Inc. | Incorporated |
| *infra* | [See] beneath |
| Memo. | Memorial |
| ML | UNCITRAL Model Law on International Commercial Arbitration |
| Mr. | Mister |
| Ms. | Miss |
| No. | Number |
| NoA | Notice of Arbitration |
| p./pp. | Page/pages |

| | |
|---|---|
| PO1 | Procedural Order No. 1 |
| PO2 | Procedural Order No. 2 |
| R. | Respondent |
| RNoA | Response to Notice of Arbitration |
| *supra* | [See] above |
| UN. Doc. | UN Documents |
| UNCITRAL | United Nations Commissions on International Trade Law |
| UNIDROIT | International Institute for the Unification of Private Law |
| v. | Versus |
| Vol. | Volume |
| WG | Working Group |

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## STATEMENT OF FACTS

The Parties to this arbitration are Phar Lap Allevamento ("**CLAIMANT**"), a company registered and located in Capital City, Mediterraneo which operates Mediterraneo's oldest and most renown stud farm, covering all areas of equestrian sport, and Black Beauty Equestrial ("**RESPONDENT**"), a company famous for its broodmare lines, registered and located in Oceanside, Equatoriana.

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| *21 March 2017* | RESPONDENT contacted CLAIMANT, inquiring about the availability of Nijinski III for its newly started breeding programme. |
| *24 March 2017* | CLAIMANT offered RESPONDENT 100 doses of Nijinski III's frozen semen in accordance with the *Mediterraneo Guidelines for Semen Production and Quality Standards*. |
| *28 March 2017* | RESPONDENT had no problems with most of the terms of the offer. It only objected to the choice of law and the forum selection clause and insisted on a delivery DDP. |
| *31 March 2017* | Due to past experiences with extremely expensive tests due to changes in customs health requirements CLAIMANT was only willing to accept delivery DDP against a moderate price increase, the transfer of certain risks to RESPONDENT and the inclusion of a hardship clause to temper some of the additional risks taken. |
| *11 April 2017* | CLAIMANT had changed the suggested place of arbitration and had not objected to RESPONDENT'S proposal that the law of the place of the arbitration should govern the arbitration agreement. |
| *12 April 2017* | Ms. Napravnik and Mr. Antley were severely injured in an accident. |
| *6 May 2017* | Finalization of the Sales Agreement signed by John Ferguson and Juliane Krone. |
| *18 May 2017* | The first installment of $5,000,000 for Nijinsky III's frozen semen became due. |

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| *20 May 2017* | The first 25 doses of Nijinsky III's frozen semen was shipped. |
| *3 October 2017* | The second 25 doses of Nijinsky III's frozen semen was shipped. |
| *23 November 2017* | Mediterraneo's newly elected President, Ian Bouckaert announced 25 per cent tariff on agricultural products from Equatoriana. |
| *19 December 2017* | Government of Equatoriana imposed 30 per cent tariff on agricultural goods from Mediterraneo as a retaliation for the previous restriction imposed by Mr. Bouckaert, the newly elected President of Mediterraneo. |
| *20 January 2018* | CLAIMANT sent an email to Mr. Shoemaker regarding finding a solution the the newly imposed tariffs of 30 per cent on agricultural products. |
| *21 January 2018* | The second installment of $5,000,000 for Nijinsky III's frozen semen became due. |
| *31 July 2018* | Joseph Langweiler sent a Notice of Arbitration to CLAIMANT and RESPONDENT. |
| *24 August 2018* | RESPONDENT sent its Anwer in response to CLAIMANT'S Notice of Arbitration. |

## SUMMARY OF ARGUMENTS

The Tribunal has jurisdiction and powers under the arbitration agreement to adapt the contract which includes, in particular, the question of which law governs the arbitration agreement and its interpretation. This is because the determination of the law governing Sec. 15, FSSA and Claimant's claim of US$ 1,250,000.00 are within the scope of Sec. 15, FSSA. Although the applicable law governing the arbitration agreement remains disputed, the Tribunal has the power to rule upon this because the determination of which law to govern Sec. 15, FSSA is a "dispute arising out of" the contract. Further, Sec. 19.1 of the HKIAC Rules grants the Tribunal the power to determine the law governing Sec. 15, FSSA. In any event, under the law of Mediterraneo, the Tribunal has the power to adapt the contract. Mediterranean Law is the applicable law to the arbitration agreement as it is no only the parties' express choice, but also its implied choice and the law which bears the closest connection to the FSSA **[ISSUE 1].**

## PLEADINGS AND AUTHORITIES

### ISSUE 1: THE TRIBUNAL HAS JURISDICTION AND/OR POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT WHICH INCLUDES, IN PARTICULAR, THE QUESTION OF WHICH LAW GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.

1. The principle of competence-competence, as embodied in Art. 19.1, HKIAC Rules, grants the Tribunal the power to hear and decide objections to the existence, scope, and validity of the arbitration agreement [Moser & Bao, ¶9.129]. In this case, Respondent argues that Claimant's claims require an adaptation of the contract, which is a remedy excluded or not contemplated by the arbitration agreement [Answer to NoA, ¶12-13]. These objections are premised on the ground that the current dispute is outside the scope of the arbitration agreement in Sec. 15, FSSA. Thus, Art. 19.1 grants the Tribunal undisputed power to rule on the objections brought by Respondent.

2. Having established that the Tribunal has the power to rule on Respondent's objections, Claimant respectfully submits that it must exercise that power to overrule these objections. Claimant will establish that the determination of the law governing Sec. 15, FSSA and the Claimant's claim of US$ 1,250,000.00 are within the scope of Sec. 15, FSSA [**I**]. The law governing Sec. 15, FSSA is Mediterranean law and, thus, the Tribunal has the power to adapt the contract [**II**]. Should the Tribunal not find that Mediterranean law governs Sec. 15, FSSA, the Tribunal nonetheless has the power to adapt the contract [**III**].

#### I. THE DETERMINATION OF THE LAW GOVERNING SEC. 15, FSSA AND THE CLAIMANT'S CLAIM OF US$ 1,250,000.00 ARE WITHIN THE SCOPE OF SEC. 15, FSSA.

3. Sec. 15, FSSA grants broad powers to the Tribunal to decide "any dispute arising out of" the contract. Further, the parties agreed upon the application of the 2018 HKIAC Rules [*PO1,* ¶II]. Thus, the Tribunal has the power to determine the law governing Sec. 15, FSSA [**A**]. The Tribunal also has the power to grant Claimant's claim of US$1,250,000.00 as it is within the scope of Sec. 15, FSSA [**B**].

The Tribunal has the power to determine the law governing Sec 15, FSSA.

4. The determination of the law governing Sec. 15, FSSA is a "dispute arising out of" the contract [**i**]. The Tribunal is granted the power to determine the law governing Sec. 15, FSSA under Sec. 19.1., HKIAC Rules [**ii**].

**i. The determination of the law governing Sec. 15, FSSA is a "dispute arising out of" the contract.**

5. "The construction of an arbitration clause should start from the assumption that the parties intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal" [*Premium Nafta Products,* ¶13]. Hence, for a dispute or question to be outside of the tribunal's jurisdiction, the parties must have expressly excluded this from the arbitration clause [*Premium Nafta Products,* ¶15]. Indeed, the "most minimal indication of the parties' intent to arbitrate must be given full effect" [*Standard Fruit*, ¶43] and the parties must be bound to the agreement they freely entered into.

6. When an arbitration agreement covers disputes "arising out of" the contract, it must be interpreted broadly [*Hillcrest Homes,* ¶51; *Brown & Sons,* ¶49] and must be interpreted to mean that arbitration was "chosen as a one-stop method" for the adjudication of all disputes [*Premium Nafta Products,* ¶27]. Sec. 15 of the FSSA categorically and plainly reads that "any dispute arising out of this contract" is within the scope of the arbitration agreement [*Cl. Exh. 5*]. This broadly worded arbitration clause, evidenced by the use of the terms "arising out of," clearly does not exclude the question of which law governs the arbitration agreement. Thus, this is properly within the jurisdiction of the Tribunal.

**ii. The Tribunal is granted the power to determine the law governing Sec. 15, FSSA under Sec. 19.1, HKIAC Rules.**

7. In addition to powers expressly granted, arbitral tribunals are vested with implied powers, which allow it to perform acts necessary and desirable to uphold the parties' agreement [*ROVINE,* 93; *Libananco,* ¶78, *ILC Res No. 4/2016*]. As stated, Sec. 19.1, HKIAC Rules allows the Tribunal to rule on objections regarding the scope of the arbitration agreement. In this case, this express grant of power operates to grant the implied power to determine the law governing Sec. 15, FSSA.

8. Claimant asserts that the Mediterranean Law governs Sec. 15, FSSA and thus, the Tribunal has the jurisdiction to grant its claim [*NoA,* ¶16]. On the other hand, Respondent has objected to the jurisdiction of the Tribunal to grant Claimant's claims, stating that the law of Danubia does not allow the Tribunal to adapt the contract [*Answer to the NoA,* ¶14; *PO1,* ¶II.]. Hence, the law governing Sec. 15, FSSA is the very crux of whether the Tribunal has jurisdiction and whether the present dispute is within the scope of Sec. 15, FSSA. Since the parties expressly

granted the Tribunal the power to rule on the scope of the arbitration agreement, they must also have necessarily granted it the power to determine the proper law governing Sec. 15, FSSA.

### A. THE TRIBUNAL HAS THE POWER TO GRANT CLAIMANT'S CLAIM OF US$1,250,000.00 AS IT IS WITHIN THE SCOPE OF SEC. 15, FSSA

9. One of Claimant's bases for its claim is that the hardship clause in Sec. 12, FSSA grants it the right to claim US$ 1,250,000.00 [*PO1,* ¶III1.c.i.; *Infra*]. In this regard, Claimant seeks the interpretation of the Tribunal as to the effect of Sec. 12, FSSA and whether the provision relieves Claimant from the burden of the Equatoriana tariff.

10. As stated, Sec. 15, FSSA covers all disputes "arising out of" the contract. The wording of the arbitration clause evinces that the parties intended an arbitral tribunal to decide all kinds of disputes that arise from the contract [*Supra,* I.A.]. Since Claimant seeks an interpretation of a provision stated directly in the contract, its claims are clearly within the purview of Sec. 15, FSSA.

## II. THE LAW GOVERNING SEC. 15, FSSA IS MEDITERRANEO LAW AND THUS, THE TRIBUNAL HAS THE POWER TO ADAPT THE CONTRACT.

11. It comes as a surprise to Claimant that Respondent now disputes the application of Mediterranean Law to Sec. 15, FSSA. Respondent admits that it has no objections, and, in fact, even proposed, that Equatoriana law should apply to Sec. 15, FSSA [*Answer to NOA,* ¶15; R. *Exh. 1*]. Thus, it is perplexing that Respondent is now objecting to the application of Mediterranean Law when the general contract law of both countries are verbatim adoptions of the UNIDROIT-PICC [*PO1,* ¶III.4]. Hence, applying Mediterranean Law would, effectively, be aligned with both Claimant's and Respondent's intentions. This notwithstanding, Claimant will establish that Mediterranean Law applies to Sec. 15, FSSA, not the law of Danubia as Respondent now confusingly claims. The contract law of the seat of the arbitration, Danubia, does not invariably govern the arbitration agreement, Sec. 15, FSSA [**A**].

12. To guide the Tribunal's discretion, the English Court of Appeal, in *Sul America,* devised a three-step inquiry process to determine the proper law of the arbitration agreement. This was enforced in the subsequent case of *Arsanovia, Ltd.* Following the three-step inquiry process in *Sul America*, Mediterraneo law governs Sec. 15, FSSA [**B**]. The Tribunal has the power to adapt the contract under Sec. 15, FSSA, as governed by Mediterraneo law [**C**].

### B. THE CONTRACT LAW OF THE SEAT OF THE ARBITRATION, DANUBIA, DOES NOT INVARIABLY GOVERN THE ARBITRATION AGREEMENT, SEC. 15, FSSA

13. At the onset, the *lex arbitri* must be distinguished from the law governing the arbitration agreement. The *lex arbitri,* refers to the body of arbitration laws of the chosen seat of the arbitration [*MOSER & BAO*, ¶4.09; *REDFERN & HUNTER*, ¶2-08]. The *lex arbitri* governs the internal conduct of the proceedings as well as establishes supervisory jurisdiction of the courts of the seat [*MOSER & BAO*, ¶4.09; *REDFERN & HUNTER*, ¶2-10; *Smith, Ltd.,* 130]. On the other hand, the law governing the arbitration agreement deals with the existence, scope, validity interpretation, performance, termination, breach, and enforceability of the arbitration agreement [*MOSER & BAO*, ¶4.19].

14. Neither of the parties dispute that the DAA forms part of the *lex arbitri* as Danubia is the chosen seat of the arbitration [*PO1*, ¶III.4]. Respondent has raised an issue, not with the *lex arbitri,* but with the law governing Sec. 15, FSSA [*Answer to the NoA,* ¶12]. Their objections, however, are misplaced.

15. Since the two are distinct from each other, there is no rule that the contract laws of the seat of the arbitration invariably govern the arbitration agreement as well [*Klockner-Pentaplast GMBH,* ¶14]. This is supported by the choice-of-law rules of Medditeraneo, Equatoriana, and Danubia, which state that an agreement conferring jurisdiction to a court or tribunal is "not, in itself, equivalent to a choice of law" [*PO2,* ¶43; *Hague PCOL-ICC,* art. 4]. Thus, Respondent cannot argue that the law of Danubia governs the arbitration agreement by simply pointing to Danubia as the seat of the arbitration [*Answer to NoA,* ¶14].

### C. FOLLOWING THE THREE-STEP INQUIRY OF *SUL AMERICA,* MEDITERRANEAN LAW GOVERNS SEC. 15, FSSA.

16. In the case of *Sul America,* the English Court of Appeal ruled that the proper law of the arbitration agreement may be determined by undertaking a three-stage inquiry into the parties' express choice, implied choice, and the law with the closest and most real connection with the contract.

17. This process was later implemented in the case of *Arsanovia, Ltd.,* where the English High Court ruled that the choice of Indian law in the substantive contract, also governed the arbitration agreement even though London was the chosen seat of arbitration [*Arsanovia, Ltd.,* ¶23].

18. In determining the parties' choice of law to govern Sec. 15, FSSA, the Tribunal may resort to prior statements and agreements to interpret the contract [*UNIDROIT-PICC,* Art. 2.1.17]. Should Respondent object to the Tribunal's resort to prior statements of the parties, the objection should be overruled. First, Art. 2.1.17 is operative, regardless of whether Mediterraneo or Danubia law governs Sec. 15, FSSA [*PO1,* ¶II.; *PO2,* ¶45]. Second, Respondent also resorts to the prior statements of the parties in its arguments in the *Answer to the NoA* [*R. Exh. 1,2,3; Problem, p. 49*].

19. The process in *Sul America* was later implemented in the case of *Arsanovia, Ltd.,* where the English High Court ruled that the choice of Indian law in the substantive contract, also governed the arbitration agreement even though London was the chosen seat of arbitration [*Arsanovia, Ltd.,* ¶23].

20. In this case, Mediterranean Law is the parties' express choice **[i]**, implied choice **[ii]**, and the law with the closest and most real connection with the contract **[iii]**.

**i. Mediterranean Law is the parties' express choice of law to govern the arbitration agreement.**

21. Respondent argues that since "the arbitration agreement is considered to be a legally separate agreement from the container contract in which it is included," Mediterranean Law does not apply to Sec. 15, FSSA [*Answer to NoA,* ¶14]. The principle of separability, however, although well-recognized in arbitration, refers simply to the parties' intention to preserve their preferred mode of dispute resolution if the substantive contract is deemed invalid, "not to insulate the arbitration agreement" from the rest of the contract [*Sul America,* ¶26; *REDFERN & HUNTER*, ¶2-87]. Thus, while, certainly, the arbitration agreement is separable from the substantive contract, this does not isolate the arbitration agreement from the law governing the substantive contract [*Sul America,* ¶26].

22. When the arbitration agreement contains no express choice of law, the choice of law of the substantive contract will be considered the body of law expressly chosen to govern the arbitration agreement [*Sonnatrach Petroleum,* ¶32]. On this alone, the Tribunal may find that the Mediterranean Law is the parties' express choice of law to govern Sec. 15, FSSA. Nonetheless, the contract itself shows that the parties made an express choice in favor of Mediterranean Law.

23. In *Arsanovia, Ltd.,* the contract contained a stipulation that "This Agreement" would be governed by the laws of India. The Court considered this to evidence an express choice of law

in favor of Indian law [*Arsanovia, Ltd.,* ¶22]. "Express terms do not stipulate only what is absolutely and unambiguously explicit," but also those than are within the "ordinary and natural meaning of the parties' express words" [*Arsanovia, Ltd.,* ¶22].

24. Similarly, Sec. 14, FSSA states that the "Sales Agreement" is to be governed by Mediterranean Law [*Cl. Exh. 14*]. Notably, the provision used capital letters to refer to the contract. This evidences that Sec. 14, FSSA is referring to the FSSA by its title, not simply the "Sales part" as Respondent argues [*Answer to the NoA,* ¶14]. Neither was there any provisions excluding the arbitration agreement from its application. Hence, Sec. 14, FSSA governs the entire contract, including the arbitration agreement in Sec. 15.

**ii. Mediterranean Law is the parties' implied choice of law to govern the arbitration agreement.**

25. Should the Tribunal not find that Mediterranean Law is the express choice of the parties, Claimant respectfully submits that it is the parties' implied choice of law to govern the arbitration agreement.

26. An express choice of law to govern the contract "in one respect is a strong indication that they might have understood or intended that it should apply to others." [*Arsanovia, Ltd.,* ¶10]. Indeed, in the absence of an express choice in the arbitration agreement, there is a strong presumption that the parties impliedly intended the law of the substantive contract to govern the entire contract, including the arbitration agreement [*REDFERN & HUNTER*, ¶2-86; *Sul America,* ¶26]. Again, on this alone, the Tribunal may find that Mediterranean Law is the parties' implied choice of law to govern Sec. 15, FSSA. Nonetheless, the circumstances surrounding the conclusion of the FSSA reveal that Mediterranean Law is the parties' implied choice of law [*Klockner-Pentaplast GMBH,* ¶27].

27. As stated, the contract law of Equatoriana, which the Respondent initially proposed as the law governing the arbitration agreement, is exactly the same as the contract law of Mediterraneo [*Answer to the NoA,* ¶15; *PO1,* ¶III.4]. Indeed, it was Respondent who initially proposed the draft arbitration agreement, with an express choice of Equatoriana law [*R. Exh. 3*]. Ms. Napravnik's e-mail of 11 April 2017 did not purport to delete the earlier choice of law provision [*R. Exh. 2*]. Rather, her proposed changes, which referred only to the "relevant part," involved choosing Danubia as the seat of the arbitration [*R. Exh. 2*]. Up until it filed its *Answer to NoA,* Respondent insisted that, all along, the proper law of the arbitration agreement should have been

the law of Equatoriana [*Answer to the NoA,* ¶15]. Thus, Respondent cannot dispute that the UNIDROIT Principles, without alterations, and thus, Mediterraneo law, is the parties' implied choice of law governing Sec. 15, FSSA.

28. Respondent cannot disclaim the current draft of the FSSA due to the alleged "oversight" of Mr. Krone [*Answer to NoA,* ¶8]. First, Claimant could not reasonably be expected to know the instructions that Mr. Antley left to Mr. Krone as these were contained in his private files [*R. Exh. R3*]. Second, as far as the Respondent's own exhibits show, at the time Mr. Krone accessed Mr. Antley's files, the current draft of the arbitration agreement had a choice-of-law provision in favor of Equatoriana law [*R. Exh. R1, R3*]. Thus, even if Mr. Krone had incorporated Mr. Antley's last draft, it would still have shown that the parties preferred Mediterranean Law, as an equivalent of Equatoriana law, over the law of Danubia to govern Sec. 15, FSSA.

29. As an agent acting with full authority to conclude the FSSA, Mr. Krone bound his principal, Respondent, when he gave his consent to the FSSA [*UNIDROIT-PICC*, Art. 2.2.3, p. 80]. Even if Respondent now claims that his failure to insert an express choice of law was mere oversight, a party is bound by the inaction of his agent [*Alken Ziegler*, 641]. For this reason, Respondent cannot now refute the actions of Mr. Krone for his inaction toward Mr. Antley's instructions [*R. Exh. R3*].

30. Besides, if Respondent had any objections to the drafting of the FSSA, it is now too late in the day for it to raise these. Only when it submitted its *Answer to the NoA* on 24 August 2018, did it make known its objections to the drafting of Sec. 15, FSSA, claiming that it preferred the law of Danubia as the governing law [*Answer to the NoA,* ¶14]. The FSSA, which was signed on 6 May 2017, had already been in force for more than a year [*Cl. Exh. 5*] and Respondent had already received the frozen semen before it decided to make its objections known.

### iii. Mediterranean Law bears the closest commercial connection with the FSSA.

31. As Mediterranean Law is, the parties' choice of law, whether express or implied, to govern the arbitration agreement, the Tribunal need not delve into which law bears the closest commercial connection with the contract [*Sul America,* ¶26; *Arsanovia, Ltd.,* ¶24]. Indeed, the implied choice of the parties is already considered the law that bears the closest connection to the contract [*Id.*]. Nonetheless, should the Tribunal deem it necessary, an analysis of the circumstances shows that Mediterraneo law, indeeed, bears the closest commercial connection

32. In the absence of an effective choice of law by the parties, the Tribunal may consider 5 factors to determine the law applicable to Sec. 15, FSSA: (1) the place of contracting, (2) negotiation of the contract, (3) performance of the obligation, (4) subject matter of the contract, and (5) the nationality of the parties [*2nd Restatement CoL,* §188].

33. First, the contract was negotiated and concluded in Medditeraneo on 6 May 2017 [*PO2, ¶13*]. The place of performance of the arbitration may vary, as though Danubia is the seat of the arbitration, the hearings may be heard elsewhere [*MOSER & BAO*, ¶4.11]. Indeed, some of the hearings may take place in Mediterraneo. Lastly, the parties are from Mediterraneo and Equatoriana, countries with identical contract laws. Admittedly, though, the place of the subject matter of the contract is Danubia, as it is the seat of the arbitration. All these considered, since 4 out of the 5 factors are in favor of Mediterraneo, its laws bear the closest commercial connection.

34. Further, as the brunt of the burden of delivery falls unto Claimant by virtue of the stipulated delivery DDP, the export and import formalities would necessarily be within Claimant's control. The nature of a delivery DDP obligates that the seller take care of all export clearance formalities *at the origin* including "any and all export permits, quotas, special documentations, etc. relating to the cargo" [*Incoterms 2010,* 149]. Therefore, Claimant as the seller is tasked to assume all these obligations. Respondent's proposal to have Claimant assume all these obligations establishes the close commercial connection Respondent had intended Claimant to have with the contract. For this reason, Claimant had every reason to believe that Mediterranean Law would similarly apply to the arbitration agreement

35. As a final note, Claimant is aware that in the case of *Sul America,* the English Court of Appeal ruled that the law of the seat of the arbitration, London, would govern the arbitration agreement as against the law of the substantive contract, Brazil. However, in that case, the Court considered that "a powerful factor" was that if Brazilian law were to govern the arbitration agreement, it would "undermine" the parties' intention to arbitrate their dispute [*Sul America,* ¶30].

36. Here, the opposite is true. If the Tribunal finds that the law of Danubia governs Sec. 15, FSSA, the parties' agreement to arbitrate any dispute under the FSSA will be undermined. This is because under Danubian law, arbitration agreements are interpreted narrowly and it is unlikely that the Sec. 15 will be interpreted as granting the Tribunal the power to rule on Claimant's claims [*PO1,* ¶II]. In this regard, while the enquiry process in *Sul America* may guide the Tribunal in determining the proper law of Sec. 15, FSSA, the conclusion reached in *Sul America*

was reached in circumstances different to this case. Thus, in deference to, and in order to uphold the arbitration agreement, Mediterraneo law governs Sec. 15, FSSA.

### D. THE TRIBUNAL HAS THE POWER TO ADAPT THE CONTRACT UNDER SEC. 15, AS GOVERNED BY MEDITERRANEAN LAW.

37. Under the *principle of synchronized competences,* Arbitral Tribunals have the equal powers to decide a dispute as the state courts [*BRUNNER,* 495]. This was enforced in *N.V. Distrigas,* where in a decision dated 19 December 2001, the Swiss Federal court ruled that since Swiss law grants the courts the power to adapt the contract, so too must an arbitral tribunal operating under Swiss law [*BRUNNER,* 495]. The courts of Mediterraneo have also upheld this principle *vis-à-vis* Art. 6.2.3(4b) of Mediterranean Contract Law [*PO2,* ¶39].

38. Under Mediterraneo Contract Law, a court, if its finds hardship, may adapt the contract with a view to restoring its equilibrium [*UNIDROIT PICC,* art. 6.2.3.(4)(b)]. Thus, since the courts of Mediterraneo have power to adapt contracts, so too must a Tribunal governed by the same law.

39. It must be emphasized that Mediterranean Law governs the arbitration agreement, pursuant to the parties' agreement [*Supra,* II.B.]. Following this, Respondent cannot argue that the enforceability of a future award will be set aside or refused as it dealt with a dispute not contemplated by the arbitration agreement [*DAA,* Art. 34(2)(a)(iii); *NY Convention*, Art. V.1.c.].

## III. SHOULD THE TRIBUNAL NOT FIND THAT MEDITERRANEAN LAW GOVERNS SEC. 15, FSSA, THE TRIBUNAL NONETHELESS HAS THE POWER TO ADAPT THE CONTRACT.

40. The Tribunal may adapt the contract pursuant to Sec. 6.2.3, UNIDROIT PICC, as the law of the substance of the dispute [**A**]. The Tribunal may have power to adapt the contract under Danubian Law [**B**].

### A. THE TRIBUNAL MAY ADAPT THE CONTRACT PURSUANT TO SEC. 6.2.3, UNIDROIT PICC, AS THE LAW OF THE SUBSTANCE OF THE DISPUTE.

41. The power of the tribunal to adapt the contract may arise from the law applicable to the substance of the dispute [*REDFERN & HUNTER*, 8-21]. In the case of *GNA,* Court of the Southern District of New York considered a provision in the contract allowing an adaptation of the price in the contract as authorization for the Tribunal to grant such price increase. Here, the parties agreed

upon Sec. 12, FSSA, which adapts the principle of *rebus sic stantibus* and grants either party relief from "unforeseen events making the contract more onerous." To give meaning to this provision, the Tribunal has the power to enforce its stipulation and so, if needed, adapt the contract. In this regard, enforcing the contractual stipulation, *pacta sunt servanda* would support, rather than detract from, the Tribunal's competence to adapt. [*Berger,* 5].

42. Further, the parties agreed and do not dispute that Mediterranean Law governs the substance of the dispute, according to Sec. 14, FSSA. As stated above, since Mediterranean Law grants courts the power to adapt contracts, so too does arbitral tribunal possess this power.

43. The arbitral tribunal would, thus, be exercising its power to adapt the contract under the rules and laws agreed upon by the parties. This should obviate any arguments against the enforceability of a future award will be set aside for the failure of the Tribunal to adhere to the parties' agreement [*DAA,* Art. 34(2)(a)(iii) and (iv); *NY Convention*, Art. V.1.c. and d.]

### B. THE TRIBUNAL MAY HAVE POWER TO ADAPT THE CONTRACT UNDER DANUBIA LAW.

44. Should the Tribunal not find for Claimant and decide that the law of Danubia governs Sec. 15, FSSA, the Tribunal may still have the power to adapt the contract.

45. Under Danubian law, there is merely a "high likelihood," not complete impossibility, that the Tribunal would be considered as having no power to adapt the contract [*PO1,* ¶II]. Indeed, under Danubian law, courts may adapt the contracts "if authorized" by the parties [*PO2,* ¶45].

46. As discussed, under the *principle of synchronized competences,* the Tribunal has the same powers of a court in the jurisdiction [*Supra,* II.C.]. Hence, if the parties authorize the Tribunal, it may adapt the contract under the Danubian Law. This the parties did by entering into a hardship clause in Sec. 12, FSSA. As also discussed, this stipulation grants the Tribunal the power to enforce it and, thus, if needed, adapt the contract to relieve a party from the burden of an unforeseen comparable event [*Supra,* III.A.]. In this regard, the Tribunal may still have the power to adapt the FSSA, should it decide to operate under Danubian Law.

**CONCLUSION ON ISSUE 1**: To conclude, under the principle of *competence-competence*, the Tribunal has the power to rule on its jurisdiction to determine the law applicable to Sec. 15, FSSA and to grant Claimant's claims. Claimant respectfully submits that the Tribunal exercise this power to rule that Mediterranean Law governs Sec. 15, FSSA and that it has jurisdiction to

grant Claimant's claim of USD 1,250,000.00, whether by enforcement of the FSSA's terms or by adaptation of the contract.

- END OF DISCUSSION ON ISSUE 1 –

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

47. It has come to the attention of Claimant that in another arbitration under the HKIAC Rules, Respondent argued and maintained that the Tribunal had the power to adapt contracts and grant it its claim. In that arbitration, Respondent was the one affected by a tariff and thus, asked the Tribunal to relieve it of its effects [*PO2, ¶39*]. Yet now, conveniently, when the tables are turned, Respondent denies the Tribunal's power to grant Claimant's claims and adapt the contract [*Answer to the NoA,* ¶12-13].

48. Through Claimant's own efforts, it has managed to locate and secure a copy of the Partial Interim Award of that arbitration [*PO2,* ¶41]. In order to bring Respondent's inconsistent arguments to light and test its arguments, Claimant now intends to present the copy before this Tribunal.

49. Claimant is permitted to present the Partial Interim Award before this Tribunal [**I**]. The Partial Interim Award is not excluded under any of the grounds in Art. 9.2, IBA Rules on Evidence [**II**]. Lastly, in deference to the *UNCITRAL Rules on Transparency*, Claimant may submit the Partial Interim Award before the Tribunal [**III**].

### I. CLAIMANT IS PERMITTED TO PRESENT THE PARTIAL INTERIM AWARD BEFORE THIS TRIBUNAL.

50. Claimant is permitted to present the Award under its right to fully present its case provided in Art. 18, DAA [**A**]. Under Art. 22.3, HKIAC Rules, Claimant is allowed to present the Partial Interim Award as it is relevant to the case and material to its outcome [**B**]. Claimant did not and will not violate any contractual confidentiality obligations in presenting the Partial Interim Award [**C**].

#### A. CLAIMANT IS PERMITTED TO PRESENT THE AWARD UNDER ITS RIGHT TO FULLY PRESENT ITS CASE PROVIDED IN ART. 18, DAA.

51. Art. 18, DAA secures the rights of the parties to fully present their case in an arbitration. This ensures that each party must be given a reasonable opportunity to understand, test, and rebut its opponent's case, as well as present evidence in support of its own [*Amasya,* ¶45; *Rotaira Forest Trust,* 463].

52. In the other arbitration, Respondent argues in favor of contract adaptation [*PO2,* ¶39]. However, in this arbitration, Respondent now conveniently argues the opposite way, when the circumstances are not in its favor [*Answer to the NoA,* ¶12-13]. This flip-flopping of Respondent may be considered inconsistent behavior that violates the duty of good faith and fear dealing and is inconsistent behavior [*UNIDROIT PICC,* Arts. 1.7-1.8]. In this regard, the Partial Interim Award will allow Claimant to rebut and test Respondent's arguments in the current arbitration.

53. In *Tozer,* the High Court of Auckland ruled that a party was denied its right to fully present its case when it was denied access to a document relevant to the proceedings. In *Fraport AG,* the Tribunal ruled that denying a party's right to present counter-evidence on the arguments of the opponent violated the party's right to be heard [*Fraport AG,* ¶¶218, 230]. Hence, since the Partial Interim Award will allow Claimant to rebut Respondent's arguments, allowing its presentation will uphold Claimant's right under Art. 18, DAA.

54. Further, in *Front Row,* the Singapore High Court ruled that a party was denied a fair opportunity to present its case when the tribunal did not consider the parties' submission that was previously presented before the tribunal in deciding the case [*Front Row,* ¶37]. Here, the Tribunal already has detailed information as to the contents of the Partial Interim Award [*PO2,* ¶39]. The facts involved in the other arbitration, as well as the arguments of Respondent there, are already within the knowledge of the Tribunal. Thus, respectfully, the Tribunal must not disregard the award in deciding this case. In this regard, to fully appreciate the implication of the arguments made in that arbitration to the current one, the Partial Interim Award must be allowed.

### B. UNDER ART. 22.3, HKIAC RULES, CLAIMANT IS ALLOWED TO PRESENT THE PARTIAL INTERIM AWARD AS IT IS RELEVANT TO THE CASE AND MATERIAL TO ITS OUTCOME.

55. Under Art. 22.3, HKIAC Rules, the Tribunal may allow evidence which is relevant to the case and material to its outcome. The requirements of "relevant to the case" and "material to its

outcome" are separate from each other and evidence sought to be presented must satisfy both criteria [*O'MALLEY,* ¶3.68]. The Partial Interim Award fulfills both criteria. The Partial Interim Award is both relevant to the case [**i**] and material to its outcome [**ii**].

**i. The Partial Interim Award is relevant to the case.**

56. Evidence is relevant when it tends to establish the truth of the allegations on which the legal conclusions of a party are based [*MOSER & BAO,* ¶9.161; *O'MALLEY,* ¶3.69].

57. In *Telesat Canada,* a previous arbitration award, between Boeing and Thuraya, was admitted into evidence by the Tribunal in the arbitration between Telesat and Boeing. The Award was considered relevant as the previous ruling may have had an effect on the dispute between Telsat and Boeing [*Telesat Canada*, ¶61, 91]. The Ontario Superior Court of Justice affirmed the Tribunal's ruling that the Tribunal correctly admitted the award in order to decide whether the claims made by Telesat were extinguished by virtue of the previous ruling [*Telesat Canada, ¶*89].

58. Similarly, in the current arbitration, the Partial Interim Award will support Claimant's legal conclusion that the Tribunal has the power to adapt the contract. As discussed, the Partial Interim Award will show that Respondent has already accepted the power of Tribunals governed by Mediterraneo law to adapt the contract [*PO2,* ¶39]. Further, the Partial Interim Award will support Claimant's position that the tariff imposed by Equatoriana is a hardship contemplated by Art. 6.2.3, Mediterraneo contract law [*Id.*]. Thus, the Partial Interim Award is relevant to the current case.

**ii. The Partial Interim Award is material to its outcome.**

59. Evidence is material to the outcome of a case if it will allow complete consideration of the allegations and thus, affect the deliberations in reaching the award [*MOSER & BAO,* ¶9.161; *O'MALLEY,* ¶9.13].

60. The Partial Interim Award deals with the very same issues in the instant arbitration. First, the Partial Interim Award concerned the power of a Tribunal to adapt a contract [*PO2,* ¶39]. The previous Tribunal was constituted under similar rules and circumstances as the current one. Consequently, the Partial Interim Award may convince the Tribunal to find that it has jurisdiction to grant Claimant's claims and, if necessary, adapt the contract.

61. Second, the Partial Interim Award deals with the very same issue on the merits of the instant arbitration: whether a tariff suddenly imposed by a government can be considered a hardship

under the PICC and the contract [*PO2,* ¶39]. Therefore, the Partial Interim Award may convince the Tribunal that the tariff imposed upon Claimant is also a hardship, as defined under Meditteraneo Contract Law.

62. Further, it may convince the Tribunal that Respondent has made inconsistent arguments in the current arbitration. As discussed, after advocating for its own case in the previous arbitration, Respondent now conveniently argues the other way in the current proceedings. Admitting the Partial Interim Award may allow the Tribunal to completely consider the merit of Respondent's arguments in light of its inconsistent positions.

63. Hence, since the Partial Interim Award may be considered by the Tribunal in making its decision over the issues in the current arbitration, it is material to the outcome of this case.

### C. CLAIMANT DID NOT AND WILL NOT VIOLATE ANY CONFIDENTIALITY OBLIGATIONS IN PRESENTING THE PARTIAL INTERIM AWARD.

64. In objecting to the submission of the Partial Interim Award, Respondent invokes the obligation of confidentiality under Art. 42, HKIAC Rules [*Problem,* p. 50]. Claimant is, of course, aware that Art. 42, HKIAC Rules protects the confidentiality of the proceedings. However, in obtaining and presenting the Partial Interim Award, Claimant is not violating this obligation.

65. Claimant is not bound by the confidentiality provisions in the other arbitration [**i**]. Even if Claimant were bound by confidentiality as regards the other arbitration, it may present the Partial Interim Award in order to protect a legal right [**ii**].

#### i. Claimant is not bound by the confidentiality provisions in the other arbitration.

66. Contracts bind only the parties thereto and cannot impose obligations on third persons [*UNIDROIT-PICC*, Art. 5.2.1., p. 167]. Claimant is clearly not a party to the arbitration agreement entered into between Respondent and its buyer in the other arbitration [*PO2,* ¶39]. Hence, whatever obligations that agreement imposed on the parties does not bind Claimant.

67. In that arbitration, the parties also chose to conduct the proceedings under HKIAC Rules. Hence, indubitably, the parties were bound by the obligation of confidentiality imposed in Art. 42, HKIAC Rules. However, as stated, Claimant is, by no stretch of the imagination, a party to the arbitration agreement and the proceedings in that arbitration. Whatever obligation the parties have bound themselves to, including the obligation of confidentiality, are not imposed upon Claimant.

68. Claimant is likewise aware that Art 42.2, HKIAC Rules extends the obligation of confidentiality to the arbitrators, experts, witnesses, the secretary of the Tribunal, and the HKIAC. Clearly, though, Claimant is not one of the persons listed in Art. 42.2. Neither is Claimant bound by the contractual obligations to keep the proceedings confidential with Respondent and its former employees [*PO2,* ¶41]. Hence, Claimant is, indubitably, not bound by confidentiality as regards the other arbitration.

**ii. Even if Claimant were bound by confidentiality as regards the other arbitration, it may present the Partial Interim Award in order to protect a legal right.**

69. If, however, Respondent were to insist that Claimant is bound by, and is thus, a party to the obligations of confidentiality in the other arbitration, Claimant is still entitled to present the Partial Interim Award.

70. Under Art. 42.3, HKIAC Rules and Art. 3.13, IBA Rules of Evidence, a party may present an otherwise confidential document in order to protect a legal right. Needless to say, a sales contract, such as the FSSA, grants a concomitant right to the buyer to require payment from the seller [*UNIDROIT-PICC* Art. 5.1.1, 7.2.1.; *CISG,* Art. 53, 62]. Further, Claimant is presenting the document in order to enforce the provisions of Sec. 12, FSSA and compel Respondent to relieve it of the impacts of the tariff. Hence, since Claimant is presenting the document to enforce a legal right granted by the FSSA, it may present the Partial Interim Award, even if is is confidential.

71. In a decision by the Privy Council, it was ruled that the use of an award in another arbitration between the same parties did not violate the confidentiality agreement [*REDFERN & HUNTER,* ¶1-59]. This is a sensible approach as it would prevent the parties from arguing over the same issue *ad infinitum* [*Id.*]. Hence, should Respondent insist that Claimant is a party to the confidentiality agreement in the other arbitration, then Claimant would be even more permitted to present the Partial Interim Award to the Tribunal. Indeed, it would prevent the parties from arbitrating over the same issue, especially when Respondent now contradicts its previous arguments.

## II. THE PARTIAL INTERIM AWARD IS NOT EXCLUDED UNDER ANY OF THE GROUNDS IN SEC. 9.2., IBA RULES OF EVIDENCE.

72. The IBA Rules of Evidence, which codify the procedures in use in numerous jurisdictions, are commonly employed by Tribunal constituted under HKIAC Rules [*MOSER & BAO*, ¶9.155].

Art. 9.2. of the IBA Rules provides for the grounds on which documentary evidence may be excluded by the tribunal. None of these grounds apply to the Partial Interim Award.

73. As discussed, the Partial Interim Award is relevant to the case and material to its outcome [*Supra,* I.B.]. Further, the Partial Interim Award is not protected by legal impediment or privilege, [**A**] or under commercial or technical confidentiality [**B**].

### A. THE PARTIAL INTERIM AWARD IS NOT PROTECTED BY LEGAL IMPEDIMENT OR PRIVILEGE.

74. None of the privileges listed under Art. 9.3, IBA Rules of Evidence in relation to Art. 9.2(b) are attendant in the instant arbitration.

75. First, the Partial Interim Award was not made in connection with obtaining legal advice [*IBA Rules of Evidence,* Art. 9.3(a) and(c)]. The Award was not communicated by Respondent to its counsels and *vice-versa.* Clearly, neither was the Award communicated as legal or any sort of advice.

76. Second, the Partial Interim Award is not covered by settlement privilege, under Art. 9.3(b), IBA Rules of Evidence. This pertains to the exchanges of proposals between parties with the aim of settling a dispute submitted to arbitration [*O'MALLEY,* ¶9.33]. The Award was rendered by the Tribunal and was not a communication emanating from either party, with a view to settle the case.

### B. THE PARTIAL INTERIM AWARD IS NOT UNDER COMMERCIAL OR TECHNICAL CONFIDENTIALITY.

77. As previously discussed, the Partial Interim Award is not protected by confidentiality, as regards Claimant.

78. The Tribunal is empowered to deny admission of evidence that constitutes "unacceptable invasion of business privacy. These documents also cover know-how, trade secrets, or other proprietary information which reveal financial inner workings of a company [*O'MALLEY,* ¶9.84]. In an *ICC Case,* the Tribunal ordered the production of documents despite a claim of business secrecy for want of specificity and specified claims to such "business secrecy" [*O'MALLEY,* ¶9.85]. The Partial Interim Award is in no way considered a business or trade secret. It does not contain proprietary information, know-hows, or formulas that would put Respondent to an economic disadvantage. Furthermore, Respondent has not given any specific claim of business

secrecy over the Partial Interim Award. In any case, even if the Partial Interim Award contains any possible business secret of Respondent, the Tribunal can order the redaction of such proprietary information.

79. In *Jardine*, the Alberta Court of Queen's Bench ruled that the Tribunal may compel disclosure of documentary evidence in spite of a confidentiality agreement between the parties [*Jardine*, ¶38]. Citing previous rulings, the Alberta Court ruled that a confidentiality agreement cannot defeat the right of parties to "get at the truth" [Id, par 35]. If relevant and material to the issue in the proceedings, the requested information must be produced notwithstanding confidentiality [Id., ¶37].

80. Notwithstanding any confidentiality provisions provided by the HKIAC Rules to the other arbitration, the Partial Interim Award therein is still admissible as evidence in the instant arbitration. As discussed above, the Partial Interim Award is relevant to the case because it will support Claimant's legal conclusion that the tribunal has the power to adapt the contract. It is likewise material as it deals with the very same issues in the instant arbitration [*Supra,* I.B.].

81. All these considered, the Tribunal retains the power to admit evidence, which would otherwise be inadmissible [*MOSER & BAO,* ¶9.162]. In *Telesat Canada,* cited above, a previous arbitration award, between Boeing and Thuraya, was admitted into evidence by the Tribunal in the arbitration between Telesat and Boeing, over objections that the award was confidential [*Telesat Canada*, ¶¶56,61]. Thus, even if the Tribunal should find that the Partial Interim Award is covered by confidentiality, this does not prevent its admission in these proceedings.

82. Further, the Tribunal in *Enron* stated that evidence may still be admitted, despite the violation of a contractual duty of confidentiality [*Enron,* ¶178]. Whether the evidence was obtained in violation of a contractual duty of confidentiality is a legal issue between those bound by that contract [*Enron,* ¶¶176-177, *O'MALLEY,* ¶9.119]. As discussed, Claimant is not bound by the obligations of confidentiality in the previous arbitration. Hence, whether it was obtained through a witness who or source violated that contractual duty, does not prevent this Tribunal from admitting the Partial Interim Award into evidence.

## III. IN DEFERENCE TO THE UNCITRAL RULES OF TRANSPARENCY, CLAIMANT MAY SUBMIT THE PARTIAL INTERIM AWARD.

83. The Tribunal enjoys broad discretion in determining the admissibility of evidence and may apply any established rules of evidence [*MOSER & BAO,* ¶9.153-154]. This power was granted by the

parties when they chose to arbitrate any dispute arising out of the FSA under HKIAC Rules [*REDFERN & HUNTER*, ¶5-06].

84. In accordance with the prevailing principles of transparency as now evidenced in the Transparency Rules of UNCITRAL, Claimant may submit the Partial Interim Award before the Tribunal [*Problem,* p.50].

85. The Transparency Rules were promulgated to a fair and efficient settlement of disputes and promote transparency and accountability [*Transparency Rules, Preamble*]. Under Art. 3, Transparency Rules, the award of the Tribunal shall be made available to the public. In this regard, that Claimant procured a copy and is now intending to submit a copy to the Tribunal is in furtherance of this provision of the Transparency Rules.

**CONCLUSION ON ISSUE 2:** The Tribunal must admit the Partial Interim Award because Claimant has the right to fully present its case as provided in Art. 18, DAA. The Partial Interim Award is also admissible, relevant, and material to the present arbitration. In admitting the evidence, Claimant did not and will not violate any contractual confidentiality obligations.

- END OF DISCUSSION ON ISSUE 2 –

## ARGUMENT ON THE MERITS

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

86. In asking the Tribunal for the adaptation of the price under Clause 12 of the FSSA, CLAIMANT emphasizes at the outset that, not only had it been suffering financial losses since 2014 [*PO2*, ¶29], its credit standing stands to be seriously threatened and its dressage part potentially sold to its competitor, if CLAIMANT were to bear the additional US$ 1,250,000 arising from the imposition of the tariff [Id.]. Thus, CLAIMANT submits that it is entitled to the adaptation of the price because the imposition of the 30% additional tariff constitutes a hardship under Clause 12 of the FSSA [I]. Alternatively, the parties modified the FSSA and under the modified terms of the FSSA, Claimant is not liable for hardship caused by *additional* health and safety requirements or comparable unforeseen events [II].

### I. CLAUSE 12 OF THE FSSA ENTITLES CLAIMANT TO THE PAYMENT OF US$1,250,000.00.

87. Clause 12 of the FSSA provides that "[CLAIMANT] shall not be responsible for the lost semen shipments or delays in delivery not within the control of the Seller x x x *neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous"* [*Cl. Exh. 5*, ¶ 12].

### A. THE ADDITIONAL TARIFF OF 30% IS A HARDSHIP WITHIN THE AMBIT OF CLAUSE 12 OF THE FSSA.

*88.* The term "hardship" means a change in economic, financial, legal or technological factors that causes serious adverse economic consequences to a contracting party, thereby rendering more difficult the performance of his contractual obligations *[UNCITRAL Legal Guide, ¶ 12].* There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract [*UNIDROIT-PICC,* Art. 6.2.2*].*

89. Hardship exists where the occurrence of events fundamentally alters the equilibrium of the contract because the cost of a party's performance has increased or because the value of the performance a party receives has diminished and (i) the events occur or become known to the disadvantaged party after the conclusion of the contract; (ii) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (iii) the events are beyond the control of the disadvantaged party; (iv) the risk of events was not assumed by the disadvantaged party [*UNIDROIT-PICC,* Art. 6.2.2*].*

90. Here, there is a hardship that complies with the requirements of the PICC: The 30% increase in tariff became known to CLAIMANT after the conclusion of the contract (i); The 30% increase in tariff could not reasonably have been taken into account by CLAIMANT at the time of the conclusion of the contract (ii.); The 30% increase in tariff is beyond the control of CLAIMANT (iii.); and The 30% increase was not assumed by the CLAIMANT (iv.).

#### i. The 30% increase in tariff became known to Claimant Only after the conclusion of the contract.

91. The events causing hardship must take place or become known to the disadvantaged party after the conclusion of the contract [*UNIDROIT Commentary, p. 220; UNIDROIT-PICC,* Art. 6.2.2,]. Here, the Government of Equatoriana announced the imposition of a tariff of 30% on December 19, 2017, 7 months after the signing of the contract on May 6, 2017.

92. Contrary to what Respondent may argue, CLAIMANT is not precluded from relying on hardship because it did not know of, and could not have taken into account [*UNIDROIT Commentary; UNIDROIT-PICC,* Art. 6.2.2], the imposition of the tariff at the time of the conclusion of the FSSA on 6 May 2017. That *"additional tariffs"* was not explicitly enumerated in the FSSA was simply because none of the parties expected such measures [*NoA*, ¶19]. In fact, Claimant could not even have the slightest inkling on the possibility of the imposition of the tariff, considering that until the Equatorianian Executive Order came into effect on 15 January 2018, neither Equatoriana nor Mediterraneo have imposed tariffs on agricultural goods or horse semen [*PO2*, ¶25].

93. In this case, the adaptation clause was supposed to cover not only the most prevalent risk of changes in the health and safety requirements but also other risks including additional tariffs, like the present. [NoA, ¶19]. The fact that such tariffs were not explicitly included had to do with the fact that at the time of contracting no one expected such measures.

**ii. The 30% increase in tariff could not reasonably have been taken into account by CLAIMANT at the time of the conclusion of the contract**

94. Even if the change in circumstances occurs after the conclusion of the contract, Art. 6.2.2(b) makes it clear that such circumstances could not reasonably have been taken into account by the disadvantaged party at the time the contract was concluded [*UNIDROIT Commentary; UNIDROIT-PICC,* Art. 6.2.2]. The imposition of 30% tariff upon all agricultural goods as a retaliation as well as the size of the tariffs came as big surprise even to informed circles [Cl. Exh. 6]. The Government of Equatoriana had always been one of the biggest supporters of the existing system of free trade [*NoA*, ¶19, *Cl. Exh.* 6]. Previous restrictions imposed by other countries affecting imports from Equatoriana have never resulted in direct retaliatory measures, except in one case [*NoA*, ¶19, *Cl. Exh.* 6]. Instead, the various governments have always tried to solve disputes amicably or via invoking the relevant WTO dispute resolution mechanism [*Cl. Exh.* 2, *Cl. Exh.* 6].

**iii. The 30% increase in tariff is beyond CLAIMANT's control.**

95. Hardship can only arise if the event is liked to external causes outside the obligor's of control [*UNIDROIT Commentary; UNIDROIT-PICC,* Art. 6.2.2]. State intervention (*faits du prince*) lie outside of the parties' sphere of control [*Schletrim & Schwenzer,* p. 1137*; Caviar* Case]. In this case, it was the Government of Equatoriana that imposed the 30% tariff on

selected products from Mediterraneo including on animal semen. Such imposition was a State intervention that was beyond CLAIMANT'S control.

#### iv. The 30% increase in tariff was not assumed by CLAIMANT.

96. Under Art. 6.2.2(d), there can be no hardship if the disadvantaged party had assumed the risk of the change in circumstances. [*UNIDROIT Commentary; UNIDROIT-PICC,* Art. 6.2.2]. Here, CLAIMANT had made clear that it was not willing to bear all the other risks associated with the agreed change of delivery terms and had insisted on the inclusion of the adaptation clause [*NoA*, ¶19]. In fact, Respondent was even well aware of Claimant's "past experiences with unforeseeable additional health and safety requirements" — as it was in fact widely reported in the press — that in 2014, additional tests and longer quarantine time imposed by Danubia had nearly resulted in Claimant's insolvency [PO2, ¶21].

### B. CLAUSE 12 SHOULD BE INTERPRETED USING ARTILES 8(1), (2), AND (3) OF THE CISG

97. Insofar as many writers presume the possibility of an exemption from damages due to 'economic hardship', the question is primarily one of distribution of risk, ascertained through interpretation [*Schmidit-Kesse,* p. 149]. In interpreting Clause 12, the Tribunal may apply Art. 8(1) and 8(2), vis-à-vis Art. 8(3) of the CISG [*Footwear Case; Cl. Exh.* 5, ¶ 12].

98. Art. 8(1) provides for a subjective analysis [*Aircraft Spares Case*] of the parties' intent determined by the statements and conduct that suggest the other party knew of the intent or could not have been unaware of the intent [Art. 8(1), *CISG; Fabrics Case*]. Art. 8(1) of the CISG, in recognizing subjective criteria for interpretation, invites an inquiry as to the true intent of the parties, but excludes the use of in-depth psychological investigations [*Machine for Repair of Bricks Case*]. Therefore, if the terms of the contract are clear, they are to be given their literal meaning, so parties cannot later claim that their intentions should prevail [*CISG*, Art. 8(1); *Machine for Repair of Bricks Case*].

99. When the statements are ambiguous or the conduct is unclear, Art. 8(2) is used as an objective analysis [*Textiles Case*] where intent is interpreted according to the understanding of a reasonable person of the same kind as the other party would have had in the same circumstance.

100. In either case, the Tribunal shall give due consideration to the relevant circumstances of the case, including the negotiations between the parties. [CISG, Art. 8(3); *Supply of Labor Personnel Case; Fashion Products Case*]. Moreover, in interpreting a contract and associated statements, regard must be had to the contract's purpose [*Schmidt-Kessel,* p. 157*]*. Here, CLAIMANT'S intended to include a hardship clause to temper some of the additional risks taken [*NoA*, ¶ 7, *Cl. Exh.* 4].

101. CLAIMANT made in clear in its letter that it is not willing to take over "any further risks" associated with such a change in the delivery terms, in particular not those associated with changes in customs regulations or import restrictions [*Cl. Exh.* 4]. The term 'further' means "additional to what already exists or has already taken place, been done, or been accounted for" [*Oxford Dictionaries*]. CLAIMANT, therefore, refused to assume risks to the exclusion of the ones already preceding.

102. The risks mentioned do not only include the most prevalent risk of changes in the health and safety requirements but also other risks including additional tariffs, like the present [*NoA* ¶ 19]. After CLAIMANT informed RESPONDENT of the hardship clause, RESPONDENT suggested reliance on the ICC-Hardship clause [R. Exh. 2].

103. Moreover, upon restarting the negotiation, Mr. Krone informed Mr. Ferguson that the ICC-Hardship Clause suggested by Ms. Napravnik was considered by RESPONDENT to be too broad for the purpose of this contract and the objectives pursued [*ANoA*, ¶4; PO2 ¶12]. Consequently, an approach was taken to regulate a number of possible risks directly and then merely add a hardship wording to the existing force majeure clause [*ANoA*, ¶4]. A reasonable person under the same circumstances [*CISG*, Art. 8(2)] would understand that the hardship wording shall include risks involving tariffs, like the present addition 30% tariff.

## II. EVEN ASSUMING CLAUSE 12 OF THE FSSA DOES NOT ENTITLE CLAIMANT TO THE PAYMENT OF US$1,250,000.00, THE FSSA HAD BEEN MODIFIED BY THE PARTIES.

104. An impliedly agreed contract modification is more likely to be found in situations in which, since the conclusion of the contract, 'relevant circumstances' [Art. 8(3)] have changed, as notably one of the parties' ability to pay or deliver the goods [*Schroeter,* p. 501]. Although usually not legally bound to do so, the parties will then often be interested in adapting their contract to the new circumstances [*Schroeter,* p. 501]. In this case, there is a modification of the contract as seen in CLAIMANT'S offer for the price adjustment through an email and a phone call (A.), to which RESPONDENT accepted (B.).

### A. CLAIMANT'S EMAIL AND PHONE CALL SATISFY THE REQUIREMENT OF A VALID "OFFER".

105. CLAIMANT submits that the letter and phone call satisfy the requirements of an offer [Art. 14, CISG]. There is an offer when it is sufficiently definite and indicates the offeror's intention to be bound by the offeree's acceptance [Art. 14, CISG; *Steel Bars Case*]. To be sufficiently definite, an offer must indicate the goods and expressly or implicitly makes a provision for determining the quantity and price [*CISG*, Art. 14(1); *Butler* §3.03; *Cloth Case*; *Dextrose Case*].

106. In this case, upon knowledge of the 30% tariff increase, **CLAIMANT** immediately offered to re-negotiate regarding a price adjustment for the frozen semen [*NoA*, ¶12]. In its letter to RESPONDENT, **CLAIMANT** requested that the parties find a solution before it can start the third and last shipment of frozen semen [*Cl. Exh.* 7]. Moreover, **CLAIMANT'S** intention to be bound by Respondent's acceptance was patently urgent due to the fact that the final shipment was scheduled on 22 January 2018 [*Cl. Exh.* 7].

### B. RESPONDENT'S ANSWER CONSTITUTES AN ACCEPTANCE

107. CLAIMANT submits that Respondent's answer constitutes an acceptance. A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance [*UNIDROIT-PICC*, Art. 2.1.6.1,]. An indication of assent is subject to interpretation rule under Art. 8 CISG [*Schlechtriem & Schwenzer,* p. 54; *Doors Case*; *Yarn Case*]. Art. 8(1) of the CISG takes place with regard to a statement or conduct that is obvious and therefore needs no further effort for the other party to investigate the said intention [*Honnold*, p. 259].

108. In this case, RESPONDENT assented to CLAIMANT's offer of a price adjustment by virtue of its statement and conduct. During the contract negotiation, RESPONDENT stated that "if the contract provides for an increased price in the case of such a high additional tariff, we

will certainly find an agreement on the price" [*R. Exh.* 4]. That being said, RESPONDENT appeared to generally accept the need for a price increase [*NoA*, ¶12]. Moreover, RESPONDENT accepted CLAIMANT'S position that RESPONDENT should bear the bulk of additional costs due to the tariffs [*Cl. Exh.* 8]. Clearly, Respondent's statements indicated assent to Claimant's offer. Therefore, Respondent accepted the price adjustment.

## III. EVEN ASSUMING THE FSSA HAS NOT BEED MODIFIED BY THE PARTIES, PRICE ADAPTATION ENTITLES THE CLAIMANT TO THE PAYMENT OF US$1,250,000.00.

### A. THE TRIBUNAL SHOULD EXERCISE POWER TO ADAPT TO GRANT $1,250,000.00 TO CLAIMANT.

109. If the court finds hardship, it may, if reasonable, adapt the contract with a view to restoring its equilibrium [*UNIDROIT-PICC*, Art. 6.2.3(b),]. Such an 'adaptation' may involve an adaptation or reformation of the contract (in the narrow sense), with the aim of restoring its equilibrium (e.g., a price adaptation or an amendment of other contractual clauses) [*Brunner*].

110. In adapting, the court will seek to make a fair distribution of the losses between the parties [*UNIDROIT Commentary*, p. 226]. This may or may not, depending on the nature of the hardship involve a price adaptation [*UNIDROIT Commentary*, 226]. Since there was hardship in this case and it has been proven that the Tribunal has jurisdiction over the case [*supra,* Issue 1, ¶2] the Tribunal should exercise power to adapt to grant payment of $1,250,000.00 to Claimant.

### B. THE STANDARD OF ADAPTATION ENTITLES THE CLAIMANT TO THE FULL AMOUNT OF $1,250,000.00 TO BE RESTORED TO ITS EQUILIBRIUM

111. Since hardship consists in a fundamental alteration of the equilibrium of the contract, Art. 6.2.3.1 entitles the disadvantaged party to be restored to its equilibrium. Whether a disequilibrium may be considered as "fundamental" or "excessively onerous" will depend on the facts of each particular case [*Girsberger & Zapolskis,* p.125].

112. In determining disequilibrium, regard should be given to the circumstances surrounding the contract, including but not limited to its duration and purpose, the level of risk

assumption, as well as the experience, economic status and financial capabilities of the parties. Also, it should be examined whether and how the supervening events burdened the counter-performance, *i.e.* not only the debtor's but also the creditor's situation should be assessed. All these criteria are also important when determining the further requirements for the application of hardship, namely foreseeability, possibility to control the events, risk assumption etc. [*Girsberger & Zapolskis,* p. 129].

113. According to the general rule, the deterioration of a party's financial capacity falls within the sphere of control of this party and thus not does not authorize this party to invoke the hardship exemption, however, in some exceptional cases, especially when the debtor is a small company and loses a major part of its income due to changed circumstances, a more flexible approach towards alteration threshold may be justified [*Girsberger & Zapolskis,* p. 131]. The essential criterion in this situation is the fact the performing the contract in its unaltered form would result in a financial ruin and possible bankruptcy of the debtor [*Brunner,* pp. 435-437].

114. In this case, CLAIMANT had a profit margin of 5% for the transaction and now makes a loss of 25% due to the imposition of the new tariff of 30% on the product by the Equatorianian authorities [NoA, ¶18]. It must also be noted that in this case, the last two years have been financially difficult for CLAIMANT due to several reasons [Cl. Exh. 8]. Through extensive restructuring measures and a considerable cut of the work force CLAIMANT has been able to stay in business but it was impossible for CLAIMANT to shoulder this additional 30% tariff which had to be paid immediately [Cl. Exh. 8]

115. Moreover, CLAIMANT is affected by the tariffs due to the change in delivery terms [NoA, ¶18]. The purpose of such changes, however, was not to burden CLAIMANT with all the risks associated with DDP-delivery but to profit from CLAIMANT'S experience in the transportation of frozen semen [NoA, ¶18]. In addition to the lower risk for damages to the semen, a greater likelihood of a speedy and non-problematic compliance with export and import formalities and required paperwork, CLAIMANT was able to make the transportation to commercially much more favorable terms than RESPONDENT [NoA, ¶18]. Therefore, the Tribunal should award the full amount of US$ 1,250,000 as damages in order to restore the equilibrium of the contract.

**CONCLUSION ON ISSUE 3:** The imposition of the 30% additional tariff fundamentally altered the equilibrium of the contract. Such imposition constitutes a hardship under Clause 12

of the FSSA that entitles CLAIMANT for the adaptation of the price. In any case, CLAIMANT and RESPONDENT agreed for a price adjustment after RESPONDENT accepted CLAIMANT'S position that RESPONDENT shall bear additional costs due to the tariffs. Having suffered a deterioration of its financial capacity, CLAIMANT shall be awarded the full amount of US$1,250,000.00 to restore the contract to its equilibrium.

## ISSUE 4: CLAIMANT IS ENTITLED TO $1,250,000 OR ANY AMOUNT FROM THE ADAPTATION OF THE CONTRACT

116. While Parties may exclude the application of the CISG or vary the effect of any of its provisions [Art. 6, CISG], the Parties did not do so in this case, more particularly insofar as the applicability of Art. 79 of the CISG is concerned, as Respondent suggests [R. Exh. 3]. Thus, contrary to Respondent's position, CLAIMANT is entitled to the adaptation of the price under the regime of the CISG resulting in the payment of US$1,250,000 or any other amount due to CLAIMANT for the following reasons: first, the CISG applies to the FSSA as agreed by the parties (I); second, CLAIMANT is entitled to full compensation in accordance with the CISG (II); and finally, the 30% unforeseen tariff constitutes an "impediment" in the sense of Art. 79 of the CISG entitling CLAIMANT to adaptation of the contract(III).

### I. THE CISG APPLIES TO THE FSSA AS AGREED BY THE PARTIES

117. Article 6 provides that parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions [Art. 6, CISG]. The intent of the parties to exclude must be determined in accordance with Art. 8 CISG. Such intent should be clearly manifested, whether at the time of conclusion of the contract or at any time thereafter. Generally, such exclusion an be inferred should be inferred, for example, from:(i) express exclusion of the CISG; (ii) choice of the law of a non-Contracting State; (iii) choice of an expressly specified domestic statute or code where that would otherwise be displaced by the CISG's application. [CISG Advisory Op. 16].

118. Here, CLAIMANT and RESPONDENT both tacitly agreed on the CISG to govern the FSSA under clause 14 [Cl. Exh. C5], hence Respondent cannot argue that the CISG does not apply.

### II. CLAIMANT IS ENTITLED TO FULL COMPENSATION UNDER ART. 74

119. CLAIMANT and RESPONDENT both entered into the FSSA with mutual expectations arising from the sales contract. During negotiations, the parties agreed that the frozen semen was not to be re-sold to third parties without our express written consent of CLAIMANT [Cl. Exh. C2]. CLAIMANT added an express information requirement (in italics) to the section defining the mares in the template of the Frozen Semen Sales Agreement which had been attached to the email of 24 March 2017 [PO, ¶16].

120. Respondent resold 15 doses Nijinsky's frozen semen without CLAIMANT'S consent at a price which is 20 per cent above the price charged by CLAIMANT [NoA 20]. Clearly, this is a breach of the FSSA.

121. The CISG is based upon a principle of full compensation for losses in the event of breach [SO. M. AGRI Case]. Article 74 reflects the general principle of full compensation [CISG Advisory Op. 6]. Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach [Art 74, CISG].

122. Since RESPONDENT has breached the FSSA, CLAIMANT is entitled to damages

## III. ART. 79 ALLOWS FOR ADAPTATION OF THE CONTRACT

123. During the negotiation of the FSSA, CLAIMANT requested the insertion of a hardship clause as a result from past experiences on unforeseeable additional health and safety requirements may make highly expensive tests necessary which can increase the cost by up to 40% and thereby destroy the commercial basis of the deal [Cl. Exh. 4]. However due to the accident of both negotiators, the hardship clause was not fully discussed [Cl. Exh.8]. Professor Eisenberg rightly pointed out that "unspecified terms are usually determined on the basis of what the contracting parties probably would have agreed to if they had addressed the relevant issue." [Eisenberg, 214]

124. Hardship under Art. 79 of the CISG is more or less unanimously accepted in court and arbitral decisions Hardship can be considered as a special group of cases under the general force majeure provisions. All that is added to the force majeure provisions on the level of prerequisites is a clarification of the term impediment in cases where performance in the strict sense is possible but just too onerous. [Ingeborg Schwenzer, 39]

### A. THE 30% INCREASE OF TARIFF COULD NOT HAVE BEEN ACCOUNTED FOR UNDER THE REASONABLE EXPECTATION TEST

125. When parties negotiate for and conclude a contract, both share many tacit assumptions. They are a part of a contract in that the parties would not have made the contract or would have agreed otherwise if they had been fully aware that the assumed situations would not come about [Eisenberg, 214].

126. However, Article 79(1) focuses on the tacit assumption only of the failing party (not of the other party), and it demands reasonableness for not having assumed or foreseen the impediment, and for not taking measures to avoid or overcome the impediment. The tacit assumption of the other party is inferred by the "reasonable expectation test," [(Ishida, 358]

127. Article 8(2) provides that "statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances." [CISG, Art 8]. This provision formulates a so-called "reasonable person" standard.

128. Incorporating the "reasonable person" standard of Article 8 into Article 79, we end up with the following test: "whether a reasonable person in the shoes of the [failing party], under the actual circumstances at the time of the conclusion of the contract and taking into account trade practices" [Schwenzer, 1134] could expect the failing party to have taken the impediment into account or to have avoided or overcome it or its consequences.

129. The Reasonable Expectation Test is whether a failing party could reasonably be expected to have overcome the impediment. Determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties [Ishida, 214]

130. Applying the Reasonable Expectation test, claimant could have not reasonably expected the sudden increase of tariff by Respondent because the increase of tariffs went beyond the worst expectations of analysts [Cl. Exh. 6]. This shows how Claimant could have not taken into consideration the sudden increase of tariffs therefore this fulfills the conditions of Art 79 (1).

### B. THE EISENBERG FORMULA ALLOWS FOR ADAPTATION

131. In a Belgian case where Hof van Cassatie gave a hypothetical increase of steel tubes by 70% [Scafom Case] shows the predicament of sudden increase of price. The sudden increase of prices was "beyond the control of the seller" which is similar in the case at hand.

132. A solution was made by Prof. Eisenber called the Eisenberg formula: What constitutes a reasonably foreseeable increase in the seller's cost of performance should be historically based; more specifically, it should be the maximum percentage increase in the cost of the relevant inputs over a comparable stretch of time during a reasonable past period. In most cases, consideration of price movements during the prior ten to twenty years probably would suffice [Eisenberg, 245].

133. "Eisenberg Formula is far more rational and versatile than any fixed static percentage, often discussed under the name of "limit of sacrifice." The test is rational because it sophisticates crude statements concerning risk-bearing, for example, an argument that sellers in speculative businesses are regarded as bearing the risk of fluctuations. The "Eisenberg Formula" refines those statements and provides a rational answer to the question of when and how much a party should bear the risk. It is versatile because it can be applied to all kinds of transactions with equal validity, regardless of their kinds, natures, lengths, or the types of goods [Ishida, 374-375].

134. Applying the Eisenberg Formula to the case at hand, Medietarraneo's tariffs never increased over a twenty year period [PO2, ¶ 23], hence the 30% increase of tariffs satisfies the Eisenberg formula which a reasonable person would have expected.

### C. ADAPTATION UNDER THE CISG

135. Professor Schlechtriem said that Article 50 of the CISG is an example of adaptation under the convention [Flechtner, 238].

136. Article 60, which uses a phrase similar to Article 79(1): "The buyer's obligation to take delivery consists: (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery." In a China International Economic and Trade Arbitration Commission ("CIETAC") case which applied Article 60(a), it was held that the buyer was reasonably expected to dispense with an inspection not specified in the

contract and to send a ship to the loading place [Mung Bean Case] What this award did is no less than modifying the contract.

137. Taking account of these extensive powers granted to judges by the CISG, it would not be a deviation from the language of the Convention for them to adapt the contract based on the "reasonable expectation test" of Article 79(1), particularly when they deal with an unexpected skyrocketing price beyond once-in-decade increase [Ishida, 380].

138. Also, Respondent who is here vigorously denying any need to adapt the contract to a change of circumstance had itself asked for an adaptation of the price invoking an unforeseeable change of circumstances [Langweiler Email]. Respondent cannot have its cake and eat it too.

**CONCLUSION ON ISSUE 4:** The $1,250,000 must be paid by Respondent because [1] The CISG applies as agreed by the parties and [2] the payment will be paid in accordance with the principle of full compensation. Under Art 79 of the CISG, hardship is recognized by parties under an expanded view. Using the Reasonable Expectation test and the Eisenberg formula, the increase of tariffs was an impediment that Claimant could have not foreseen. Verily, the contract must be adapted to reflect the true intention of the parties.

## REQUEST FOR RELIEF

On the basis of the foregoing arguments, Claimant asks the Arbitral Tribunal for the following orders:

1. Black Beauty Equestrian is ordered to pay to Phar Lap Allevamento an additional amount of US$ 1,250,000 which is 25 percent of the price for the third delivery of semen;

2. Black Beauty Equestrian bears the costs of the Arbitration.

## *CERTIFICATE*

We hereby confirm that this Memorandum was written only be the persons whose names are listed below and who signed this Certificate.

RAPHAEL NICCOLO L. MARTINEZ

ANDREW RAY E. ROSALES

BIANCA ISABEL D. SORIANO

JAIMS GABRIEL L. ORENCIA