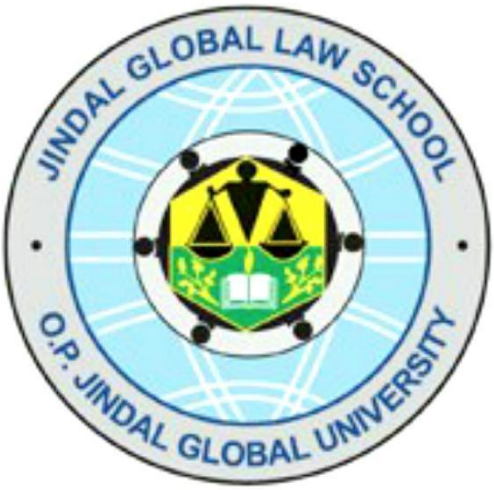
Sixteenth Annual Willem C. Vis East International Commercial Arbitration Moot

JINDAL GLOBAL LAW SCHOOL



Memorandum for Claimant

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

SUDARSHAN SRIKANTH • MADHUR ARORA • CHINAR GUPTA

PAVAN KALYAN • KARAN KUMAR • KARAN HIMATSINGKA

SONIPAT • India

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TABLE OF ABBREVIATIONS AND DEFINITIONS

§/§§	paragraph/paragraphs
%	per cent
AA	Arbitration Act
ANoA	RESPONDENT's Answer to Notice of Arbitration of 24 August 2018
ab initio	from the beginning
a contrario	on the contrary
a fortiori	with stronger reason
Art./Artt.	Article/Articles
cf.	confer (see)
Ch.	Chapter
CISG	United Nations Convention on Contracts for the International Sale of Goods
e.g.	exempli gratia (for example)
ed.	edition
Eng	English
et al.	et alii (and others)
e.g	Exemplum gratii [for example]
emph. add.	Emphasis added
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
fn.	Footnote

FSSA	Frozen Semen Sales Agreement
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts
i.e.	id est (that is)
IBA	International Bar Association
IBA Rules	The International Bar Association Rules on the Taking of Evidence in International Arbitration (2010)
ibid.	ibidem (in the same place)
ICC Rules	Rules of Arbitration of the ICC (2012)
in arguendo	for the sake of argument
in casu	in the case at hand
infra	below
in sui	on its own
inter alia	among other things
Italian Code	Italian Civil Code (1942)
lex arbitri	law of the seat of arbitration
LP	Limited Partnership
Ltd	Limited company
Model Law	UNCITRAL Model Law on International Commercial Arbitration with amendments (2006)
mutatis mutandis	with the necessary changes having been made

NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)
No.	number/numbers
NoA	CLAIMANT's Notice of Arbitration
p./pp.	page/pages
PO1	Procedural Order No. 1 of 5 October 2018
PO2	Procedural Order No. 2 of 2 November 2018
supra	above
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Arbitration Rules (as revised in 2010)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2010)
USD	United States Dollars
v.	versus (against)

STATEMENT OF FACTS

Phar Lap Allevamento (**"CLAIMANT"**) is a registered company operating Mediterraneo's oldest and most renowned stud farm covering all areas of equestrian sport. In addition to providing stallions for breeding purposes, CLAIMANT also offers frozen semen of its champion stallions for artificial insemination. **Black Beauty Equestrian** (**"RESPONDENT"**) is a company located in Equatoriana, renowned for its champion show jumper and dressage horses and also has a nascent racehorse stable.

21 March 2017	RESPONDENT contacted CLAIMANT and expressed their intention to purchase 100 doses of frozen semen of the horse Nijinsky III from CLAIMANT and spoke at length regarding the temporary lifting of the ban on artificial insemination of horses in Equatoriana.
24 March 2017	CLAIMANT submitted to RESPONDENT the price for each dose of semen (USD 99,500) and communicated certain pertinent conditions. CLAIMANT also expressed their intention to form a long-term relationship with RESPONDENT.
28 March 2017	RESPONDENT insisted on delivery of the semen on the basis of a DDP due to the urgent nature of the contract and CLAIMANT's experience in the field. RESPONDENT further demanded that the courts of Equatoriana have jurisdiction.
31 March 2017	CLAIMANT accepted delivery on the basis of a DDP, subject to an increase in the price per dose and the inclusion of a '*hardship clause*' to account for the volatile nature of customs regulations and import restrictions. Further, CLAIMANT refused to cede jurisdiction to Courts in Equatoriana and suggests the alternative of arbitration in Mediterraneo.
10 April 2017	RESPONDENT submitted a draft dispute resolution clause based on the Model Clause suggested by the HKIAC. The draft clause provided for the seat of

	arbitration to be Equatoriana and the law governing the arbitration clause to be the law of Equatoriana.
11 April 2017	CLAIMANT expressed concerns regarding submission of the contract to a foreign law and the seat of arbitration being placed in the counterparty's place of operations. In light of this, CLAIMANT submitted an amended version of the draft dispute resolution clause which placed the seat of arbitration in Danubia, subject to the law of Mediterraneo continuing to govern the Sales Agreement.
12 April 2017	CLAIMANT's and RESPONDENT's lead negotiators met with a car accident which resulted in both of them retiring from the contract negotiations. Prior to said accident, RESPONDENT's lead negotiator had left a memo regarding the status of the negotiations.
6 May 2017	RESPONDENT and CLAIMANT finalized and entered into the Frozen Semen Sales Agreement. ("the **Agreement**")
15 November 2017	Mediterraneo imposed a tariff of 25% on agricultural products
19 December 2017	Equatoriana imposed a tariff of 30% on all agricultural goods from Mediterraneo in response to the earlier tariffs placed on Equatoriana by Mediterraneo.
15 January 2018	Tariffs imposed by Equatoriana on 19 December 2017 came into force
20 January 2018	CLAIMANT, upon the receipt of the knowledge that the tariff was applicable to horse semen, contacted RESPONDENT to stresse upon the need for a solution prior to the delivery of the shipment on **22 January 2018.**
21 January 2018	RESPONDENT called CLAIMANT and insisted

	that the final shipment go through as the doses were urgently required. Further, RESPONDENT's representative did not explicitly agree to an increase in the price. Additionally, he merely stated his lack of authority to decide this matter and that *in the case the contract provides for an increase in the price,* RESPONDENT would be able to reach an agreement for the same.
22 January 2018	CLAIMANT delivered the final shipment of 50 doses to RESPONDENT before arriving upon an agreement with respect to the change in price, allegedly relying on RESPONDENT's promise to reach an agreement in the interest of a long-term relationship.
2 February 2018	Claimant found out about the resale of frozen semen by RESPONDENT at a higher price to another breeder.
12 February 2018	Negotiations to adapt the price between the parties broke down.
29 June 2018	An Arbitral Tribunal in another arbitration proceeding which the Respondent is part of confirmed its power to adapt the contract should the 25% tariff imposed by Mediterraneo result in hardship to them
31 July 2018	CLAIMANT submitted the Notice of Arbitration **('NoA')** to RESPONDENT and appointed **Ms. Wantha Davis** as its arbitrator.
24 August 2018	RESPONDENT filed their Answer to the NoA (**'ANoA'**) and appointed **Dr. Francesca Dettorie** as its arbitrator.
2 October 2018	Counsel for CLAIMANT alleged to the Arbitral Tribunal that RESPONDENT argued for an adaptation of a contract by a different Arbitral Tribunal in a separate proceeding. Counsel for CLAIMANT requested admission of this evidence in light

of the Transparency Rules of UNCITRAL.

3 October 2018	Counsel for RESPONDENT objected to CLAIMANT's allegations, and stressed upon the requirement of confidentiality of arbitral proceedings and objected to the importing of UNCITRAL Rules.

INTRODUCTION

Good people get cheated, just as good horses get ridden. Respondent wanted to resell Nijinsky III's doses and run CLAIMANT out of business.

Transnational sales are encumbered with high risks and are susceptible to cause disturbances in contractual equilibrium. While being privy to the presence of a hardship clause, as well as intent on part of both parties to confer the Tribunal with powers of adaptation, RESPONDENT insisted upon paying as per contract, and persisted for delivery.

Additionally, prior to its attempt in furtherance of the aforementioned, RESPONDENT adopted and profited from a stance antithetical to these proceedings. RESPONDENT now aspires to encumber the already financially indisposed CLAIMANT.

With respect to the procedural issues, the law of Mediterraneo applies to the arbitration agreement and consequently the Arbitral Tribunal has the power to adapt the contract (1). CLAIMANT's evidence obtained from the other Arbitration proceeding is also admissible, and RESPONDENT must be estopped from making contradictory arguments (2). Lastly, CLAIMANT is entitled to an adaptation to the tune of 1,250,000 USD for hardship caused by the tariffs. (3)

ARGUMENTS ADVANCED

ISSUE 1: The Tribunal has the jurisdiction and/or the powers under the arbitration agreement to adapt the contract

1. Contrary to the RESPONDENTs allegations, the arbitral tribunal has the jurisdiction to adapt the contract so as to give effect to the prayed price change due to the fact that the law applicable to the arbitral agreement is the law of Mediterraneo. The RESPONDENT alleges that the law applicable to the arbitral agreement is the law of Danubia which does not allow for the arbitral tribunal to adapt the contract unless expressly authorized to do so by the parties. The CLAIMANT will demonstrate how the applicable law is the law of Mediterraneo (I) and how under Mediterranean law, the arbitrators have the jurisdiction to adapt the contract. (II)

I. The law governing the Arbitral Agreement is Mediterranean Law:

2. The RESPONDENT erroneously argues that the applicable law is that of Danubia due to the seat being Danubia. The presumption of the law applicable states, that the substantive law that applies to the contract is the applicable law when the same has not been expressly stated in the Arbitral Agreement. (A) The doctrine of separability only has the effect of affording the parties a choice to have separate laws for the main contract and the arbitral agreement however has no bearing in dictating that the law must not be the one applicable to the main contract. (B) Additionally, the law of Mediterraneo bears the closest and realest connection with the arbitral agreement. (C)

A. The presumption of the law applicable states the substantive law to be the applicable law when not expressly stated

3. The RESPONDENT erroneously presumes the law applicable to the arbitral agreement to be that of Danubia and rely on the fact that the law applicable, in their first draft too, was that of the place of the arbitration which was then "forgotten" *[ANoA, p. 31, ∫ 15]*. The CLAIMANT will demonstrate how the presumption, when there is no express choice of law, states that the substantive law of the contract is the one that shall be applicable to the arbitral agreement as well. (a) Additionally, the RESPONDENT states that it did not expressly agree to the law of Mediterraneo being the governing law however, considering that there is no express choice of law clause, the presumption is that the implied choice shall dictate the applicable law, which in this case, is the law of Mediterraneo (b).

a. The Arbitral Agreement is a part of a main contract invoking the presumption of the substantive law being an indicator to the law governing the arbitral agreement

4. The presumption of the law considered applicable to the arbitral agreement states that the substantive law which governs the contract will be the law applicable to the arbitral agreement as well. This is generally true when the law applicable to the arbitral agreement has not been expressly stated in the contract. Additionally, another vital distinguishing factor for the same is if the arbitral agreement is a part of a larger contract and the reference to arbitration is given for disputes arising out of the main contract. *[Sulamerica]*
5. Justice Cooke reaffirmed the presumption that, in the event there is no express agreement upon the choice of law, the substantive law applicable to the main contract shall be the one that would be applicable to the arbitral agreement as well. This was stated by him clearly in his analysis of the case of Black Clawson International *[Black Clawson]* in his judgement in Sulamerica *[Sulamerica]*. Emphasis was placed on the fact that where the laws diverge in terms of their applicability to the arbitral agreement, it is commonplace to observe that the law governing the arbitration agreement is generally the same as the substantive law of the contract in which the arbitral agreement itself is embodied *[Sulamerica]*.
6. It must be appreciated that in the present situation, there is no express declaration of the law applicable to the arbitral agreement. *[FSSA, p.14 Clause 14]* Additionally, the arbitral agreement is a part of a larger contract, and contrary to the argument raised by the RESPONDENT, there is no presumption as to the law of the seat being the governing law. It may be noted that the proper law of the arbitration agreement would likely be the same as the law of the substantive contract in which the agreement rests *[Black Clawson]*
7. This was later also reaffirmed in the Arsanovia case *[Cruz City case]* where the presumption was held to be that the governing law of the contract is the law that governs the arbitral agreement as well by stating that "The governing law clause is, at the least, a strong pointer to their intention about the law governing the arbitration agreement".

b. **The parties implicitly agreed to the Arbitral Agreement being governed by Mediterranean Law**

8. In this given case, there is no express provision in the FSSA with regards to what law shall apply to the arbitral agreement. *[FSSA, p.14 Clause 15]* In that circumstance, Article 28 (2) of the Model Law states:
9. "Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable" *[Model Law, Art. 28(2)]*

10. Regardless of whatever the tribunal may conclude to be the law governing the arbitral agreement, whether Danubia or Mediterraneo; they both have the identical provision in their respective arbitration laws. Therefore, the conflict of law rules applicable to either Danubia or Mediterraneo must be considered the appropriate Conflict of Laws Rules, considering they are both a verbatim adoption of the Hague Principles on Choice of Law in International Commercial Contracts *[PO2 p. 61, ∫ 43]*. The Hague Principles on Choice of Law in International Commercial Contracts do not dictate any procedure or method to resolve a contention with regards to conflict of laws as it does not lay down conflict of laws rules for determining the applicable choice of law in arbitration agreements. *[Hague Principles]*
11. It is in this circumstance, that the test laid down in the case of Sulamerica *[Sulamerica]* must be used to determine the applicable law. The Court of Appeals laid down a threefold test by concluding that the proper law of the arbitration agreement is to be determined in accordance with the established common law rules for ascertaining the proper law of any contract. This requires any court adjudicating upon the matter of applicable law to recognise and give effect to the parties' choice of proper law. This choice may either be express or implied; preference is given to the express in the absence of which the implied choice inferable from the contract is seen to be the correct choice. If neither seem clearly discernible, it is necessary to identify the system of law with which the contract has the closest and most real connection *[Sulamerica]*.
12. Considering the fact that there is no specific law expressly designated as the choice of law, the implied choice of the parties must be considered. In the present situation, the exchanges between the RESPONDENT and CLAIMANT clearly establish that they "could accept the application of the Law of Mediterraneo if the courts of Equatoriana have jurisdiction" *[Exh. C 3, p.11]*. The CLAIMANTs too were only open to Mediterranean law having jurisdiction over the Arbitral Agreement,*[Exh. R 2 p.34]* which shows an implied common ground, level of acceptability and subsequent understanding that the law applicable would be that of Mediterraneo.
13. Additionally, it must be appreciated that in the Arsanovia case *[Cruz City case]*, it was also held that the fact that the seat of the arbitration is different from that of the supposed arbitral law governing the arbitration agreement is not sufficient cause to state that it is an indication contrary to the implicit presumption to have the substantive law governing the contract to be the applicable law. Justice Smith stated that the presumption of the substantive law governing the contract to be the applicable law stands and "there is no

contrary indication other than choice of a London seat for arbitrations", which according to him was insufficient in constituting a valid contrary opinion to negate the said presumption. Similarly, in the present situation, no sufficient contrary intention appears from the contract.

14. The same has also been reaffirmed by the High Court of the Republic of Singapore wherein Justice Chong, in the case of BCY v. BCZ stated that he agreed with Moore-Bick LJ's approach in Sulamérica. He reaffirmed that the implied choice of law for the arbitration agreement is likely to be the same as the expressly chosen law of the substantive contract. This presumption has been a part of international arbitral jurisprudence as a well-established principle *[Shares case]*.
15. Justice Cooke in Sulamerica relied on *Dicey, Morris & Collins, The Conflict of Laws*, 14th ed. for expressing that "If there is an express choice of law to govern the arbitration agreement, that choice will be effective, irrespective of the law applicable to the contract as a whole. If there is an express choice of law to govern the contract as a whole, the arbitration agreement will also normally be governed by that law: this is so whether or not the seat of the arbitration is stipulated, and irrespective of the place of the seat." *[Sulamerica]*

B. The Doctrine of separability does not have a bearing in determining the choice of law applicable to the Arbitral Agreement

16. The RESPONDENT erroneously construes the meaning of the doctrine of separability. It relies on Art. 16 of Danubian Arbitration law, which is identical to Mediterranean law to state that the arbitration agreement is considered to be a legally separate agreement from the container contract in which it is included. *[ANoA, p.31 ∫ 14]* They subsequently argue that due to the agreements being separate, the law governing the contract does not stand as the law applicable to the arbitral agreement. This contention is ill-founded in law and the CLAIMANT will demonstrate how the presumption of the law of the substantive contract being the same as that applicable to the arbitral agreement stands and is unaffected by the doctrine of separability.
17. The intent behind Art. 16 of Danubian and Mediterranean arbitration law is quite clear from the wording of Art. 16 itself. It reads, "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

A decision by the arbitral tribunal that the contract is null and void, shall not entail ipso jure the invalidity of the arbitration clause." *[Model Law, Art.16]*

18. It is apparent from a bare reading of the article that the purpose of the doctrine of separability is to ensure that if in case the contract containing the arbitral agreement is declared void, the arbitral agreement still stands valid so as to not invalidate the decision of the tribunal itself. It however, in no way states that the law of the contract has no bearing over the arbitral agreement *[Secretary Report]*.
19. The Arbitrators in ICC Award No. 5485 [*Petrochemical Products case]*, De Haas, Cremades and Sanchez, reinforce the idea that separability of the arbitration clause allows for the law applicable to the arbitration clause to be different from the law applicable to the contract, however still agree that the purpose of said separability is to clarify that the nullity of the contract does not necessarily imply the nullity of the arbitration clause. It does not negate the presumption; it merely allows for it to be negated by an express choice of law being dictated by the parties. They dictate that although the doctrine of the separability of the arbitration agreement from the main contract has long been recognized as a general principle of international commercial arbitration; its implication is merely the fact that the law applicable to the arbitration clause may possibly be different from the law applicable to the contract. However, the purpose of said separability is to clarify that the nullity of the contract does not necessarily imply the nullity of the arbitration clause. It does not negate the presumption; it merely allows for it to be negated by an express choice of law being dictated by the parties.

C. The law of Mediterraneo bears the "closest and realest connection" to the arbitral agreement

20. The final metric of deciding the law applicable to the arbitral agreement is to see that the law of which bears the most real and close connection to the arbitral agreement. The sole arbitrator in ICC Case 4237 states in his award that the decided international awards published so far show a preference for the conflict rule according to which the contract is governed by the law of the country with which it has the closest connection. He also believes that the country with which it has the closest connection is the country where the party, who has to carry out the most characteristic performance, has its head office which in this case is Mediterraneo. *[NoA, p.4, ∫1]* In the case of a contract for the sale of goods, the most characteristic performance has to be carried out by the seller *[Plywoods case]*.

21. This serves as a benchmark to infer that in light of the fact that the CLAIMANT was the one carrying out the most characteristic performance of the contract despite its own financial liability increasing manifold due to circumstances completely out of its control and still ensuring that its performance of the contract was in line with what it agreed to perform, clearly depicts that the country in which it is located, that is, Mediterraneo, *[NoA, p.4, §1]* is the one most closely related to the Arbitral agreement as well as the contract. The fact that Mediterranean law applies to the larger contract, *[FSSA, p.14 Clause 14]* that the contract was negotiated and signed in Mediterraneo, [PO2, p.56, *§13]* are other factors which shows that the realest and closest connection here exists with the law of Mediterraneo. Finally, the fact that the FSSA was modelled around a basic industry template from Mediterranean. *[PO2, p.55 §3]*
22. Additionally, it must not be ignored that in the case of Sulamerica, Justice Cooke had a different understanding of what the closest connection seemed to be based on. In his belief, an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract, especially, in cases where the parties have deliberately chosen to arbitrate in one place, disputes which have arisen under a contract governed by the law of another place.*[Sulamerica]*
23. It is however vital to understand the motivation behind choosing Danubia as the seat for the arbitration. Danubia was only chosen as the seat because of it being a neutral country and no other reason whatsoever. The RESPONDENT wished to hold the same in Equatoriana, however, the CLAIMANTs suggested a neutral location. *[Exh. R 2 p.34]* Danubia being a country from which neither of the parties belong, cannot be said to bear the closest and realest relation to the contract. The fact that the seat of the arbitration is in a different country is not significant enough to negate the presumption that the law governing the underlying contract also governs the arbitral agreement. The law of Danubia would not have the closest and realest connection as the law of Mediterraneo governs not only the substantive contract but also is the country where the party who has to carry out the most characteristic performance, has its head office. *[NoA, p.4, §1]*

II. The Arbitral Tribunal has the power to adapt the contract

24. Respondent wrongly avers that the phrase "any disputes arising out of this contract" does not include the present claim. It claims that by removing certain terms of the HKIAC Model Clause, the parties have removed the conferral of powers of adaptation on the arbitral tribunal. *[ANoA, p.31, §13]* In the event that the Tribunal holds the law applicable to the Arbitration Agreement as the Law of Mediterraneo, the four corners rule shall not apply and the Arbitration Agreement can be interpreted in light of the parties' intention. Further, in Mediterraneo, no express authorization is needed to confer powers upon the Arbitral Tribunal to adapt the contract. In light of this, the Tribunal has the power to adapt the contract on an interpretation of the Arbitration Agreement **(A)**, and the parties intended to confer the Tribunal with the power to adapt **(B)**.

A. The Tribunal has the power to adapt the contract on an interpretation of the Arbitration Agreement.

25. The Arbitral Tribunal has the authority to adapt the contract as they act as an *"Amiable Compositeur."* The jurisdiction of the tribunal can only be limited in the event that there is any provision of law that has been agreed upon by the parties that imposes any additional burden or prohibition upon the arbitrator. Assuming the applicable law to be Mediterranean Arbitration Law, there is no prohibition or additional condition that mandates an express authorization required to confer powers upon the tribunal to adapt the contract. The presumption here acts as if the arbitral tribunal is an unbiased third party, in the spirit of which a neutral seat was chosen. *[Liberty Insurance Case]*
26. It is therefore presumable that the arbitral tribunal is an *amiable compositeur* and has been given the unfettered right to adapt the contract *[ibid.]* as under Article 36 of the HKIAC Rules. If the parties have intended the contract to be an honourable agreement which is based on the principles of equal respect, equity and mutual benefit, then the arbitral tribunal is said to have the requisite authorization under Article 28(3) of the Mediterranean Arbitration Law. *[Liberty Insurance Case]* The same is evident from the facts of this case. The Claimant had expressed its intention to enter into a long term relationship. *[Exh. C 2, p. 2; Exh. C 8, p.18]* Respondent had represented their interest to be in a long term business relationship while insisting on delivery of the last instalment. *[Exh. C 8, p.18]* Being a neutral venue, Danubia was chosen to be the seat of arbitration.

[FSSA, p.14 Clause 15] These go on to show that the parties intended to enter into an honorable agreement.

27. It has been held that the Arbitration Agreement should be interpreted in a way that gives effect to other clauses of the contract. A clause worded as "All disputes arising in connection with this contract" has been interpreted wide enough to include adjustment when adjustment was needed to give effect to other clauses of the agreement. *[ICC Case 5754/1988; Craig/ Park/ Paulsson p. 90]* Clause 12 of the FSSA absolves Claimant of difficulty caused by hardship. *[FSSA, p.14, Clause 12]* To give effect to Clause 12, it is necessary to award Claimant an increase in price by conferring the power to the Arbitral Tribunal to adapt the contract by widely interpreting the similarly worded arbitration agreement - "Any disputes arising out of this contract…" *[FSSA, p.14, Clause 15]*

B. The parties intended to confer the Arbitral Tribunal with the power to adapt the contract.

28. Under Art. 8(3) of the CISG, to understand the intent of the parties, negotiations leading up to the contract are given due consideration. *[CISG, Art. 8(3)]*. Therefore, to interpret Clause 12 and give effect to it, it is necessary to go into the drafting history and the negotiations the parties had. In an email to Respondent had conveyed its intention of not bearing any additional risks related to changes in government regulations. *[Exh. C 4, p.12]*During a meeting between the two parties, it was agreed upon that in case an adjustment was not reached by the parties, it would be necessary to allow for adaptation. *[Exh. C 8, p.17]* Respondent had suggested that such powers must be conferred on the Arbitral Tribunal, which was what Claimant had intended on suggesting too. *[ibid.]* Respondent had agreed on drafting such a proposal for conferring the power to the Arbitration Agreement. *[ibid.]* RESPONDENTs' negotiator met with an accident and could not draft a proposal. *[Exh. C 8, p.17]* Thus, this was not explicitly included in the FSSA, but the agreed upon conferral of powers on the Arbitral Tribunal must be interpreted into Clause 12 to give effect to their agreement. Hence, by interpreting Clause 12 of the FSSA by giving consideration to the parties' intention, adaptation is a power which was conferred on the Tribunal by the parties.

Conclusion on Issue 1

29. The parties choice of Danubia as the *lex arbitri* was not an implicit agreement to be bound by the law of Danubia. In the event that the Tribunal holds the applicable law to the arbitration agreement to be the law of Mediterraneo which does not have the parole evidence rule, due consideration can be given to parties previous negotiations. Furthermore, Mediterraneo does not require an express authorization to be present to give an arbitral tribunal the power to adapt. Therefore, to avoid placing undue hardship on Claimant and materialize the parties' intention, the Arbitral Tribunal must be held to have the power of adaptation.

ISSUE 2 : Claimant is Entitled to Submit Evidence from the Other Arbitration Proceeding that Involves the Respondent

30. RESPONDENT erroneously avers that CLAIMANT is precluded from submitting evidence from the other arbitration proceedings the RESPONDENT was involved in *[PO1, p. 53, §. III 1(b)]*. RESPONDENT's claims are based upon two assumptions; RESPONDENT assumes such evidence was obtained through RESPONDENT's former employees breaching a confidentiality agreement. Alternatively, RESPONDENT assumes such evidence was obtained through an illegal hack of RESPONDENT's Computer system *[PO1, p.53 , §. III 1(b)]* .
31. However, CLAIMANT submits that the impugned piece of evidence is not rendered inadmissible by the alleged illegal nature of its acquisition and is admissible due to its necessity. There is no sufficient cause for excluding said evidence (I) and such evidence is admissible even if acquired via illegal means. (II)

I. There is no sufficient cause for the tribunal to exclude such evidence's admission.

32. With reference to Professor Waincymer *(Waincymer)*, admissibility of illegal evidence depends on the circumstances, "in particular, who obtained it illegally". If the party presenting such evidence can be held in breach of its good faith obligations under that particular arbitration agreement, it is sufficient to exclude such evidence.
33. CLAIMANT submits that its course of acquisition of the impugned piece of evidence is not in violation of the aforementioned authority. CLAIMANT adhered to its good faith obligations under the current arbitration agreement, with nothing on record to

demonstrate its involvement in the hacking of RESPONDENT's computer, or its former employees breaching their confidentiality agreements with RESPONDENT.

34. CLAIMANT asserts this position as the provider for the impugned piece of evidence is a company which provides intelligence on the horseracing industry *[PO1, p. 61, ∫. 41]*. CLAIMANT is neither privy to the said company's source, nor a party to said company's acquisition of the impugned evidence. Hence, CLAIMANT asserts that in light of the the impugned evidence reaching it via a third, disinterested party who is not a party to the proceedings stands to gain or lose nothing from its outcome *(Nicaragua case)*, further demonstrates its adherence to good faith. Further, in lieu of CLAIMANT's demonstration of adherence to good faith and its bona fides, the manner in which the intelligence company acquired the impugned evidence is immaterial to the current proceedings.

II. Admissibility Is Permitted Even If Acquired Via Illegal Means.

35. CLAIMANT submits that even if such evidence is deemed to be acquired illegally, it is still admissible due to its necessity. Article 22.3 of the HKIAC Rules holds that "at any time during the arbitration, the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome. The arbitral tribunal shall have the power to admit or exclude any documents, exhibits or other evidence."
36. Hence, the Tribunal is empowered to exclude or admit any evidence that is relevant and material. CLAIMANT asserts that the impugned evidence satisfies both of the criteria stated supra.

A. Impunged evidence satisfies the requirements of necessity

37. CLAIMANT contends the admissibility of such evidence is necessary in lieu of its **(a)** relevance and **(b)** materiality to the pursuance of justice. Both of these thresholds find mention in Article 3(3)(b) of The IBA Rules.
38. CLAIMANT will demonstrate how both the requisites are fulfilled.

a. Relevancy

39. Professor Waincymer held that relevance of a piece of evidence is established if it pertains prima facie to the claims a party is making *[Waincymer]*. CLAIMANT submits that the

relevancy of the impugned evidence is established as it is inextricably linked with its claim for the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price.

40. The impugned piece of evidence is a Partial Interim Award from another arbitration administered by this Tribunal. Such Award demonstrates the RESPONDENT adopting a stance that directly contradicts the one adopted by RESPONDENT in these proceedings vis-à-vis adaptation of the price invoking an unforeseeable change of circumstances. Such award establishes conclusively the dichotomy in RESPONDENT's positions in two proceedings, with the former being accepted by the Tribunal. Therefore, CLAIMANT submits that RESPONDENT is judicially estopped from doing so *[Davis]*. Judicial Estoppel is attracted when a party adopts two clearly contradictory positions when one of such has been accepted by the authority adjudicating upon the dispute.

41. The relevancy of such evidence is to protect the integrity of the Tribunal *[Piscataqua River case]*. CLAIMANT submits that the impugned evidence demonstrates the RESPONDENT's lack of bona fides with respect to the proceedings at hand and its attempt to defraud or mislead the Tribunal in rendering distinct awards upon the same set of facts, hence negatively affecting its integrity.

b. **Materiality**

42. CLAIMANT seeks to justify the materiality of the impugned evidence upon two grounds : **(i)** necessity **(ii)** validity.

i. Necessity

43. CLAIMANT submits that the admission of such evidence is necessary. This necessity does not mean that the case being made cannot be won without the admission of such evidence. It means that the case cannot be presented optimally without it. CLAIMANT avers that the impugned piece of evidence is essential as a failure to consider it will result in a "travesty of justice", as held in the dissent to the an award *[Conoco Phillips Award, ∫ 67]*. Therefore, admission of the impugned evidence is necessary to avoid such negative implication.

ii. Validity

44. CLAIMANT asserts the materiality of such evidence as it possesses the tendency to influence the Tribunal's determination of the issue in dispute *[Waincymer]*. Further, in

assessing such materiality, the Tribunal is to consider the prima facie validity of such evidence, and whether such evidence is reasonable.

45. CLAIMANT submits that the impugned evidence is prima facie valid. Such validity is not questioned by the RESPONDENT, as there is no denial on its part to the contents or the merits of the impugned piece of evidence *[PO1, p.53 , §. III 1(b)]* .

Conclusion on Issue 2

46. CLAIMANT is entitled to submit evidence, howsoever acquired, from the other arbitration proceedings due to its merits warranting its admissibility, in addition to the reasons which preclude the Tribunal from rendering such evidence inadmissible.

ISSUE 3: Claimant is Entitled to Receive 1,250,000 USD Amount through an Adaptation of the Price

47. RESPONDENT erroneously avers that CLAIMANT is not entitled to an increased remuneration. [*ANoA, p. 232 §18*]. In RESPONDENT's opinion, CLAIMANT cannot rely on either Clause 12 of the FSSA or the CISG to argue for an adaptation of the price. [*ANoA, p. 25 §§19-21*].

48. However, CLAIMANT submits that it is entitled to an increased remuneration under Clause 12 of the FSSA. **(I)** In the unlikely event that Clause 12 of the FSSA does not cover the case at hand, CLAIMANT shall demonstrate that the hardship created due to the tariffs and the adaptation thus required are within the scope of the CISG. **(II)** Through this, CLAIMANT is entitled to an increased remuneration of up to 1,250,000 USD. **(III)**

I. CLAIMANT is Entitled to a price increase under Clause 12 of the FSSA.

49. CLAIMANT contends that it is entitled to a price increase under Clause 12 of the FSSA as **(A)** Tariffs fall within the ambit of the term 'Comparable Unforeseen Events' **(B)** The Tariffs made the contract significantly more onerous for the CLAIMANT **(C)** The parties agreed upon adaptation as a remedy to Clause 12.

A. Tariffs fall within the ambit of the term 'Comparable Unforeseen Events'

50. The intent of the parties was to include Tariffs within the ambit of 'Comparable Unforeseen Events'

51. According to Art. 8(1) of the CISG, a contract shall be interpreted according to the parties' subjective intent, where the other party could not have been unaware of what this intent was. *[CISG, Art. 8(1)]*

52. In an email dated *31st March 2017* the CLAIMANT after agreeing upon a delivery DDP conveyed that it would not be willing to take any further risks associated with the changes in delivery terms and in particular the ones associated with changes in customs regulations or import restrictions. *[Exh. C4, p.11]*

53. Subsequently, the RESPONDENT in its email did not object to the CLAIMANT's shifting out the risks of customs regulation and import restriction from itself. *[Exh. R2, p.33]* RESPONDENT has a duty to enquire or object to risks it does not seek to assume. [*Schlechtriem/Schwenzer, Art. 8 §§37 ff; Schlechtriem/Butler, p. 57 §57; Candy Case*] *In Casu* the RESPONDENT did not abide by its duty to object, hence, the CLAIMANT is relieved of the risks.

54. Further, the World Trade Organization defines Tariffs as "Customs duties on import merchandise". Hence, tariffs fall within the ambit of customs duties and Customs Regulations. Further, tariffs also fall within the ambit of import restrictions. Thus, it can be said that tariffs fall within the ambit of comparable unforeseen events.

B. The Tariffs made the contract more onerous for the CLAIMANT.

55. On the 20th of January, while shipping the third instalment of horse semen, the CLAIMANT was told by the customs authorities that it would have to pay a tariff of 30%. The payment of these tariffs made the contract more onerous for the CLAIMANT as (a) It has disturbed the equilibrium of the contractual allocation of risks (b) It affected the CLAIMANT who is on the verge of financial ruin (c) and that there was a Derogation from the ICC Hardship Clause which indicates a lower threshold (d) Tariffs caused the impending ruin of the CLAIMANT.

a. The tariffs have disturbed the contractual allocation of risks

56. In order to prove that the contract has become more onerous, it is essential to show that there has been a fundamental alteration of the equilibrium of the contract. The CLAIMANT contends that there has been an alteration of the equilibrium of the contract as (i) There was no assumption of any delivery related risks by the CLAIMANT (ii) Derogation from the ICC Hardship Clause and the UNIDROIT principles lower the threshold for adaptation

b. There was no assumption of any delivery related risks by the CLAIMANT

57. The parties' intent clearly modified the usual definition of the DDP price delivery term such that the allocation of responsibility for unforeseen tariff increases remained on the buyer. Despite the inclusion of a DDP term, the original intent of the parties was that the buyer would be responsible for all import tariff costs.

58. All risks and costs in DDP INCOTERMS 2010 are borne by the seller till the place of delivery. *[Ramberg, p. 149]* This notion of risk in DDP can be limited to only those related to government regulations and restrictions operating at the time of conclusion of contract, and the cost of any unforeseeable changes in government regulations beyond the control of the seller can be limited. *[Ramberg, p. 150-151]* This can be done by way of contractual allocation and parties need to show their intention to limit such risks. *[Brunner, p.132]*
59. As per Art. 8(3) of the CISG, all relevant circumstances present before and at the time of conclusion of the contract must be considered while interpreting the contract. *[CISG Art. 8(3)]* Negotiations leading up to the conclusion of the contract, reveal whether a party was aware of the other's intentions *[Employment Agency Case]*. CLAIMANT has wide expertise in frozen semen shipment. RESPONDENT had requested for delivery DDP to take advantage of CLAIMANT's expertise in frozen semen shipment and ensure easy and swift compliance with import and export regulations. *[Exh.C3,p.5]*CLAIMANT had clearly indicated its intention to not bear any additional risks related to delivery, especially those related to change in government regulations and import restrictions, due to past experiences with DDP. *[Exh. C 4, p.12]* This was reflected in clause 12 of the FSSA too with hardship caused by such risks being mitigated. *[FSSA, p.14 Clause 12]* RESPONDENT had even relied on this as a reason to negotiate and lower the price. *[PO2, p. 56, §8]* This evidences that RESPONDENT was aware of CLAIMANT's intention and even agreed to the same. Even a reasonable man in RESPONDENT's position would be aware of CLAIMANT's intention to not bear any additional risks associated with unforeseeable changes and hence RESPONDENT cannot hold CLAIMANT liable for the additional costs as both parties had agreed to such a position and included Clause 12 in reliance of this.

c. Derogation from the ICC Hardship Clause and UNIDROIT principles indicate lower threshold for Adaptation

60. The ICC hardship clause indicates that parties must perform the contract <u>even if it is more onerous</u> than anticipated at the time of conclusion of the contract and grants relief from performance only if it is "<u>Excessively Onerous".</u> Further, the official comment on Article 6.2.1 indicates that parties must perform even though the performance becomes "<u>More Onerous</u>."*[UNIDROIT Principles, Article 6.2.1]*
61. At this juncture, it is important to note that the contractual clause 12 indicates that the seller shall not be responsible for hardship which makes the contract "more onerous*".[FSSA ,p.14 Clause 12]* This is a clear divergence from the ICC Hardship clause

and Article 6.2.1 of the UNIDROIT principles which indicate exemption only when performance has become "Excessively Onerous".

62. The parties derogated from the ICC Hardship clause by not including it despite discussing its inclusion. They have also derogated from Article 6.2.1 of the UNIDROIT Principles by exempting liability of performance of the seller automatically in cases where performance becomes "More Onerous".

63. Thus where courts have held that the obligor has to perform even if the contract is more onerous is based on the fact that parties only agreed to be exempt only if the threshold of hardship reaches excessively onerous levels. *[UNIDROIT Principles, Article 6.2.1-6.2.2; PECL, Article 6:111; Debattista]*

64. A survey of the threshold set forth by various arbitral awards indicates that under International commercial arbitration cases a cost increase by 13%, 30% ,44% or 25-50% was considered insufficient to qualify as hardship.*[Brunner p.427]* There would be no arbitral award granting adaptation if the increase in performance was 50% or less.*[Zaccaria p.169; Brunner p.428-431]*

65. But it is important to note that these thresholds have been set as these awards involved international instruments which do not exempt parties if the threshold is more onerous. However, the parties had agreed to exempt the seller for a lower threshold of more onerous and hence the arbitral tribunal in interpreting the contract must give effect to that. Hence, to give to the interpretation of the parties the threshold for adaptation of a contract must be less than 50%.

66. Further pursuant to Article 8(3) of the CISG, communications must be taken into account while ascertaining intention*[Employment Agency case; Fashion products case]*. CLAIMANT in the communication states that one of the purposes of the hardship clause was to relieve it of any undue risk with respect to health and safety measures. This was proposed keeping in mind 40% hardship the CLAIMANT faced in a previous transaction, thus giving us a range on which the parties intended to place the requirement of adaptation.

d. Tariffs have affected the CLAIMANT who is at the brink of financial ruin

67. If this Tribunal were to hold that the fundamental equilibrium of the contract is not affected and that there is no hardship being caused by the tariffs of 30%, CLAIMANT submits that the threshold limit for hardship should be lowered as CLAIMANT would suffer financial ruin because of this transaction. It is against the basic notions of justice to allow one party to benefit from unforeseeable events at the cost of the other party going bankrupt.

68. Changed circumstances which are outside the control of the obligor can lower the threshold of hardship if the obligor would be financially ruined. *[Brunner, p. 435-436]* CLAIMANT was at the brink of insolvency in 2014 and has since been in financial troubles due to high interest payments and expected that this transaction with the RESPONDENT would turn around its fortunes. *[PO2, p.59, §29]* CLAIMANT had expected to make a profit of 300,000 USD in 2018. *[ibid.]* If it were to bear the 1,250,000 USD additional tariffs then it would face huge financial troubles and it would be tough for it to negotiate a new credit line. *[ibid]* CLAIMANT would thus have to bear severe hardship while RESPONDENT would benefit from this unforeseeable event, which is against notions of justice. *[Brunner, p. 437]* RESPONDENT would not face any financial endangerment and has instead profited from this transaction by breaching the contract and reselling a few doses of semen at considerably higher prices. *[PO2, p.59, §30]*

C. **A remedy of adaptation exists within the Contract**

69. RESPONDENT claims that the remedy of adaptation is not available within the present contract. It claims that the present hardship clause is too narrow to allow for an adaptation by the arbitral tribunal. The present hardship clause does allow for adaptation as a remedy to hardship which was what was intended by the parties (a). A part of Clause 12 is further ambiguous and has to be interpreted in a way against the RESPONDENT (b).

70. CLAIMANT had suggested that the ICC Hardship clause be included in the FSSA to which the RESPONDENT objected.*[Exh. R 2, p.34]* Finally, RESPONDENT suggested the present clause 12 which was finally included in the FSSA *[PO2, p.56, §12]*. Clause 12 is ambiguous to the extent that it mentions "The Seller shall not be liable…" but does not define what remedies are available. *[FSSA, p.14 Clause 12]* The rule of *contra proferentem* states that when there is any ambiguity in the terms of the contract, it must be interpreted against the party which has supplied the term. *[AC- OP No.13, §9.1]* As RESPONDENT had supplied the present clause which was finally included and there is an ambiguity present, the interpretation given must be against them. In this regard, the words "shall not be liable" have to be interpreted to include any remedy which would absolve the seller of any liability in case of hardship. As RESPONDENT had insisted on performance due to their need for the doses before February, a remedy of exemption of performance is not possible and the only remedy which can give effect to this clause is adaptation to increase the price of the doses.

71. Art. 8(3) allows for previous negotiations to be considered while interpreting a contract. *[CISG Art. 8(3)]* CLAIMANT had made its intention clear to not be liable for certain risks

and RESPONDENT had agreed to the same. RESPONDENT had even agreed to adaptation by the tribunal as a remedy for hardship which was communicated to the CLAIMANT. *[Exh C 8, p. 17-18]* RESPONDENT's Negotiator post his meeting with CLAIMANT's Negotiator had promised to come back with a proposal for the clause and had even noted this down in his memo in the third point where he mentioned of a connection between the hardship and arbitration clause indicating RESPONDENT's intention to be bound by adaptation of the contract in cases of hardship by an arbitration tribunal. *[Exh. R 3, p. 35]*

II. Claimant is entitled to an adaptation of the price under the CISG

72. RESPONDENT incorrectly argues that CLAIMANT cannot rely on the CISG to request an adaptation of the price as the parties have derogated from the CISG and in any event, Art. 79 of the CISG does not cover cases of economic hardship [*ANoA, p. 25 §§19-21*]. CLAIMANT will demonstrate that parties did not in fact derogate from the CISG (A) and that Art. 79 of the CISG covers claims of hardship, (B) and by extensions the tariffs *in casu*. (C) Further, adaptation is a recognized form of redressal under the CISG, (D) thereby providing CLAIMANT a legitimate ground for adaptation.

A. The parties did not derogate from the CISG.

73. RESPONDENT erroneously argues that the parties have derogated from Art. 79 and by including Clause 12 in the FSSA have asked for special regulation of situations of hardship. *[RNoA, p. 32 §20]* RESPONDENT claims that the very inclusion of a hardship clause provides for a special resolution and constitutes a derogation in the sense of Art. 6 CISG. *[RNoA, p. 32 §20]* RESPONDENT has the burden of proof to show such a derogation and this burden of showing intent to derogate is higher than the ordinary standard under CISG (a). Clause 12 merely supplements Art. 79 rather than derogating from it. (b)

a. RESPONDENT has the burden of proof to show such a derogation

74. Burden of proof is not explicitly mentioned in the CISG but can be said to be a general rule governed but not settled under Art 8(2) CISG. The *Tribunale de Vigevano* in Italy has held that this general rule puts the burden on the party who is affirming and not the one who denies. (*Vulcanized rubber case) [Rheinland Versicherungen v. Atlarex]* RESPONDENT when affirming derogation has the burden of proof to show derogation from Art. 79. The threshold of intent needed to prove derogation from the CISG is high and there must be a clear intent of the parties to derogate which must be manifested clearly. *[AC-OP No. 16,*

§3.4] RESPONDENT has not satisfied the burden of proof to show intent to derogate and has only alleged that the existence of Clause 12 shows an intention to derogate from Art. 79 whereas it is possible for Art. 79 to apply even with an express force majeure/hardship contractual clause and both have been used by a Court to determine whether it applies to the case in consideration *[Iron molybdenum case]*.

b. Clause 12 supplements Art. 79 and does not derogate from it

75. It is submitted that Clause 12 reaffirms and supplements the existing provision of Art. 79 and does not preclude it. Clauses supplementing the CISG are not taken to be a derogation from it. *[Press Case]* The parties agreed to a standard of "more onerous" for hardship circumstances which supplements the provisions under Article 79 which does not mention any express standard for hardship. This cannot be taken as an intent to derogate either as just the use of a contractual term associated with a particular jurisdiction does not refer to an implicit exclusion of the CISG. *[AC-OP No. 16, §4.7]*

76. An intent to completely derogate is absent from the facts and nothing in clause 12 shows this either. Clause 12 provides for a list of events falling under the scope of force majeure/hardship and this can be at best construed as limiting the scope of events covered by "impediments" in Art. 79 but does not remove the clause from covering government regulations and import restrictions. It defines standard of hardship which has not been included in Art. 79 as "more onerous" but neither of these exclude the application of any provision of Art. 79 and cannot be seen as a complete derogation. *[FSSA, p.14 Clause 12]*.

B. Claims of hardship are within the scope of Article 79 of the CISG.

77. CLAIMANT submits that hardship is a recognized form of *impediment* under Art. 79 of the CISG. While Article 79 does not expressly use the term hardship, the term *impediment* employed encompasses cases of hardship *in sui.* (a) Additionally, Art. 79 while read along with the provisions of Art. 7 of the CISG must be interpreted to include cases of hardship. (b)

a. The term 'impediment' is sufficiently wide to envelop cases of hardship.

78. 'Hardship' is commonly described as an event which creates excessive burdens on one contracting party while bestowing upon the other the fruits of unjust enrichment. [*Berger, p.103*] The CISG uses the term '*impediment*' [*CISG, Art. 79(1)*] unlike other international and domestic contract law instruments where the term '*hardship*' is seen frequently. [*UNIDRIOT Principles, Art. 6; Italian Code, Art. 1467*] However, the usage of the term

impediment does not by itself amount to a preclusion of cases of hardship by the CISG. The definition of the term "impediment" is an event which renders the achievement of a particular goal "*difficult or impossible."* [*Cambridge Dictionary*] Thus, the terminology of Art. 79 is *'sufficiently flexible'* to include cases of hardship [*Tallon, §3.2; cf. Bonell, Vallebella, p.4; Lindström, p. 218*]. In fact, the employment of the term impediment '*widens the possibility'* of invoking Art. 79 of the CISG beyond cases of *force majeure.* [*Tarquinio, p.11; Arroyo, p. 27*] The drafters of the CISG expressly rejected the usage of the term *force majeure* while interpreting Art. 79. [*Secretariat Commentary, pp. 84-85; Miettinen, p.27*] The concepts of impediment and hardship under the CISG must be interpreted in the broadest sense possible in order to protect parties from disproportionate harm. [*Schwenzer II, p. 718-719*]

79. It is apparent that the situations permitting the invoking of Art. 79 are not restricted to mere cases of physical impossibility, i.e., *force majeure*, [*Schlechtriem USL p. 101*] but also extend to cases where performance is technically physically possible but creates a disproportionately high burden on one of the contracting parties. [*Ishida, p. 366; AC-OP No. 7, §3.1*] Thus, cases similar to an unexpected scarcity of a raw material would amount to an *impediment* within the meaning of Art. 79 of the CISG, [*Honnold, p.483*] thereby leading to the conclusion that Art. 79 is more similar than not to domestic doctrines of hardship and excessive onerousness. [*Chinese Goods Case*]

80. In light of the above, it is apparent that the use of the term *impediment* does not constrain the usage of Art. 79 to mere cases of *force majeure* and such a constraint would be contrary to the true intention of Art. 79. [*Schlechtriem USL, p. 102*]

b. **Art. 79 read alongside Art. 7 must be interpreted to include hardship.**

81. Hardship is a quintessential element of Art. 79 in order to meet the requirement of good faith under Art. 7(1). While interpreting the provisions of the CISG, there must be due regard given to the observance of *good faith* in all practices. [*Art. 7(1), CISG*] It comes as no surprise that the provisions of Art. 79 are closely linked to the concept of good faith, as "*morality holds hands with hardship".* [*Tarquinio, p.9; Mazzacano, p.3*] The concept of good faith thus is a useful tool in interpreting the true meaning and scope of Art. 79. [*Citrus Fruits case, §4.11*] A party, while acting in good faith under the meaning of Art. 7(1) of the CISG must be willing to take into account unavoidable burdens which the other has to bear in the course of performance of the contract. [*Steel Tubes Case*] In the absence of a concept of hardship within the ambit of Art. 79, the requirement of good faith cannot be observed, as one party would be disproportionately burdened for a fault beyond their control or foreseeability. Thus, in order to maintain fairness, which is a cardinal principle of good

faith, [*Carter, fn. 3; cf. Lücke*] Art. 79 cannot be interpreted to exclude the crucial element of hardship.

C. CLAIMANT has met the conditions laid down by Art. 79.

82. The tariffs fall squarely within the requirements of Art. 79 of the CISG as CLAIMANT did not assume the risk caused by the tariffs as a reasonable business entity could not foresee (a) *or* overcome the tariffs. (b) The hardships caused to CLAIMANT are directly due to the tariffs imposed. Additionally, CLAIMANT served due notice upon the RESPONDENT as soon as possible. (c)

a. The tariffs were unforeseeable by a reasonable business entity.

83. A key element of Art. 79 of the CISG is the requirement of foreseeability. The definition of foreseeability in such a situation is not merely whether a situation *could possibly have been imagined*, but rather rests on a whether there existed a high degree of probability of such an event occurring. [*Ishida*, p.365] This can be gleaned from the usage of the term 'reasonably' in Art. 79(1) of the CISG. Thus, the question becomes whether a reasonable person, from the point of view of the party claiming hardship, would have taken into account the hardship at the time of drafting the contract. [*Schlechtriem/Schwenzer, p.1134*; *Coal Case*]

84. On the basis of such a definition, it is abundantly clear that the tariffs were not reasonably foreseeable while taking into account the political climate in both Equatoriana and Mediteranneo (i) and the historical trends exhibited by both nations. (ii)

i. The existing political climate in Mediterraneo and Equatoriana did not allude to the imposition of tariffs.

85. Restrictions on export through government intervention have been considered to within the ambit of Art. 79. [*Caviar Case*] The decision in such cases once again turns on whether such an occurrence was reasonably foreseeable. [*Shirts Case, Metallic Sodium Case, Equipment Case*] Government interventions are generally considered to be extraordinary occurrences, which are outside of parties' sphere of control. [*DiMatteo, p. 293; Schlechtriem/Schwenzer, p. 1071, §17*] This was more pronounced in the case at hand. The political atmosphere within both relevant nations, i.e., Mediterraneo and Equatoriana heavily indicated the continuance of free trade. Both countries are member states of the WTO, [*PO2, p.61, §47*] an organization which was created in pursuance of upholding existing systems of free trade. The Prime Minister of Equatoriana is a member of the Progressive Liberals and an *"ardent supporter of free trade"* [*NoA, p.7, §19*] thereby rendering the imposition of tariffs an extremely unlikely event. While it is true that the Mediterranean President had insinuated a mild

preference towards protectionist measures, [*Exh. C6, p. 15*] this did not signal an imposition of tariffs or more importantly, of tariffs at such a large scale, thus surprising even trade analysts. [*ibid.*] Even if this preference was an indication of times to come, the retaliation by the liberal Prime Minister of Equatoriana came as an unpleasant surprise to CLAIMANT and many others in both nations.

ii. The tariffs imposed were historically unprecedented.

86. While examining the foreseeability of the existence and scale of impediments, due regard must be given to the historical trends in the industry. [*Eisenberg, p. 245, §87*] If the impediment at hand had never occurred in the recent past, or had occurred but at a much smaller scale, then such an impediment could not have been reasonably foreseen. [*ibid.*]
87. The tariffs imposed by the Government of Meditarraneo were unprecedented in terms of the width of goods it covered, and the scale of tariffs imposed. Such tariffs had never been imposed in the past by Mediterraneo. [*PO2, p. 58,* §23] Neither nation has imposed any tariffs on agricultural goods, let alone horse semen in the past. [*PO2, p. 58,* §25]
88. Historically, Equatoriana was a country which firmly believed in the practice of free trade. [*NoA, p.7, §19; Exh. C6, p.15*] Barring one exceptional circumstance, there have been no instances of retaliations to tariffs by the Equatorianan Government in the past. [*ibid.*] Even in the exceptional case, the erstwhile Prime Minister was a representative of a political party which was averse to free trade systems. [*ibid.*]
89. Thus, the tariffs imposed by the Governments of both nations were historically unprecedented in terms of both the subject-matter and in terms of scale, thereby rendering them acutely unforeseeable by a reasonable person in CLAIMANT's shoes.

b. A reasonable party could not be expected to overcome the hardships created by the tariffs.

90. CLAIMANT submits that a reasonable party in CLAIMANT's position could not overcome the hardships caused by the tariffs as it were not in CLAIMANT's sphere of control **(i)** and the financial distress caused was beyond the CLAIMANT's limit of sacrifice. **(ii)** CLAIMANT's agreement to ship the final 50 doses before an explicit price change does not amount to CLAIMANT agreeing to overcome the tariffs. **(iii)**

i. The tariffs were not within the CLAIMANT's sphere of control.

91. A contracting party can claim the relief granted by Art. 79 of the CISG if it can prove that the impediment caused was beyond its sphere of control. [*Schlechtriem/Schwenzer, p. 1067, §§10-12; Egyptian Cotton Case*] If the impediment was within the sphere of control of the

party claiming hardship, then it was the party's duty to either shield itself from such risks [*Powdered Milk Case*; *DiMatteo, p. 286*] or once it became aware of the impediment, to mitigate the damage caused. [*Tarquinio, p. 13*]

92. CLAIMANT could not have avoided the tariffs or accounted for it at the time of the conclusion of the contract as even analysts and those in "*informed circles"* could not predict the imposition of tariffs by Equatoriana. [*Exh. C6, p. 15*] Further, CLAIMANT being a modest equestrian company which was facing financial difficulties did not have the ability to influence large scale governmental decisions. In fact, CLAIMANT did not even have the option of requesting an exemption or a reduction with regards to the tariffs. [PO2, p.58, §27] Thus, the tariffs were completely beyond CLAIMANT's sphere of control, rendering it impossible for CLAIMANT to avoid the tariffs or mitigate the harm caused.

ii. The economic harm caused to CLAIMANT is beyond its limit of sacrifice.

93. For a party to claim hardship under Art. 79, it must prove that performance of the contract would lead to losses beyond it's *'limit of sacrifice'* or, amount of risk it was willing to bear. [*Iron Molybdenum Case, Schlechtriem/Schwenzer, p.1076, §30, Tomato Case*] However, there exists no uniform number-based standard for what aforementioned limit is, but instead has to be decided on a case to case basis, [*ibid*] while taking into account the nature and financial condition of the party invoking hardship. [*Miettinen p. 34*] Therefore, in some cases a 100% increase may not be an impediment under Art. 79 [*Graphite Electrodes Case*] while a much smaller increase in costs might be considered to be an impediment if the party claiming hardship would suffer financial ruin due to performance of the contract. [*Miettinen*, *p. 35*] Effectively, the threshold for such a test boils down to whether the party facing the hardship would have entered into the contract at all had it known about such a risk before the conclusion of the contract. [*Arroyo, p. 12*]

94. In the present case, one of the main purposes of entering into this contract for CLAIMANT was to help finance their corporate restructuring program. [*PO2, p. 57, §15*; *Exh. C 8, p. 17*] However, if CLAIMANT were forced to bear the brunt of the tariffs, then this entire purpose would have to be foregone as it would receive increased scrutiny from its creditors, rendering the receipt of funding for their restructuring program close to impossible, and further causing CLAIMANT's financial ruin all but inevitable. [*PO2, p. 59, §29*] On the other hand, RESPONDENT is fully financially capable of bearing the hardship caused by the tariffs. [*PO2, p. 59, §16*]

95. The general thumb-rule in such a situation is to allocate the risk of such hardship to the "*superior risk-bearer*", i.e., the party more capable of bearing such risk. [*Posner & Rosenfield*] Thus, the requirement of bearing the brunt of the tariffs must be accorded to RESPONDENT.

iii. CLAIMANT's agreement to perform does not constitute an agreement to overcome the tariffs.

96. CLAIMANT agreed to deliver the final shipment of the horse semen before an explicit agreement on the new price for the horse semen was reached. [*Exh. C8, p. 17-18*] However, this does not amount to an agreement to deliver the shipment at the initially agreed upon price. CLAIMANT agreed to deliver the final 50 doses on RESPONDENT's representation that an agreement on the new price would be reached through negotiations [*Exh. C8, p.18*] and in the interest of building a long term relationship, as RESPONDENT had indicated its interest in the same. [*Exh. C3, p.11*] CLAIMANT was still under the impression that RESPONDENT would respect the agreement, rather than causing a complete breakdown of negotiations. [*Exh. C8, p.18*]

97. In light of the fact that CLAIMANT's agreement to perform was in good faith based on the representations made by RESPONDENT, and not in any way due to its ability to shoulder the harms of the tariffs, it is clear that CLAIMANT continues to suffer considerable hardship due to the lack of an adaptation of the price, and is therefore entitled to increased remuneration.

c. *CLAIMANT served due notice upon RESPONDENT as soon as possible.*

98. In general, the party claiming hardship has an obligation to inform the other regarding the cause and effect of the impediment as soon as it knew or ought to have known. [*Schlechtriem/Schwenzer, p. 1080, §43; Magnus, p. 425*] CLAIMANT did exactly this as soon as it received word that the tariffs were applicable to horse semen as well. [*Exh. C7, p.16*]

99. CLAIMANT received word of the applicability of the tariffs to horse semen quite late, merely because, by RESPODENT's own admission, even the customs authorities were uncertain as to the scope of applicability of the tariffs. [*Exh. R4, p. 36*] Further, the tariff imposed by President Bouckaert merely mentioned "living animals" to be included. [*PO2, p. 58, §24*] Horse semen is not a 'living animal', but rather an animal by-product and therefore could not have been reasonably contemplated to be included within the scope of the tariffs. Finally, even the tariffs imposed later failed to explicitly include animal by-products under the ambit of the tariffs, and instead merely included "agricultural goods." [*Exh C6, p. 15*] Neither party contemplated the inclusion of horse semen within the ambit

of the term "agricultural goods." [*PO2, p. 58, §26*] Thus, it would be incorrect to hold that CLAIMANT ought to have learnt of the tariffs earlier, as neither party contemplated such an occurrence.

D. Claims for adaptation can be sustained within the CISG.

100. There exists no explicit provision regarding adaptation of a contract by a Tribunal owing to an impediment or hardship within the four corners of the CISG. [*AC-OP No. 7*; *Schlechtriem Workshop*] Relying upon this, RESPONDENT alleges that CLAIMANT cannot rely on the provisions of the CISG for an adaptation of the price. [*ANoA, p. 32 §§19-21*] *A contrario,* the remedy of adaptation is a 'governed-but-not-settled' matter within the folds of the CISG, (a) thereby enabling the use of the "gap-filling" provisions of Art. 7. Through this, it is apparent that the power of the Tribunal to adapt and supplement a contract is firmly impregnated in the general principles of the CISG. (b) In any event, the power of the Tribunal to adapt is clear from the provisions of the applicable private international law. (c)

a. The question of adaptation is a 'governed but not settled' matter.

101. Art. 79 of the CISG explicitly allows for exemption from performance if a party can prove that the above conditions have been met. However, a limitation of the textual or literal interpretation of Art. 79 is the absence of any form of remedy besides exemption from performance. [*Arroyo, p.34*] However, the text of the CISG is not an exhaustive body of rules which requires no further qualifications. [*cf. Ferrari & Torsello*]

102. Thus, some crucial questions of law which are governed by the CISG have no express settled answers, often referred to as matters which are governed but not settled. [*Povrzenic, §3; Viscasillas, p. 15*] Art. 7 of the CISG was included to remedy such gaps. [*Rosenberg, §3*]

103. The concept of adaptation is one such 'gap' in the body of rules constructed by the CISG, [*Nagy, p. 35; Garro in Felemengas, pp. 241-245*] thereby triggering the deployment of the "gap-filling" principles under Article 7(2) of the CISG. [*Visser*]

b. The power to adapt can be gleaned from the general principles of the CISG.

104. CLAIMANT submits that the capacity of the Tribunal to adapt the provisions of the contract can be clearly extrapolated from the general principles of the CISG. While there is no explicit provision regarding the adaptation of contracts, judges and tribunals nevertheless routinely 'adapt' contracts through their interpretative power. [*Ishida, p. 378-*

380] This power arises out of the ability to interpret contracts in a reasonable manner, for reasonableness is undisputedly a general principle of the CISG. [*Ishida, p.* 359] For instance, in interpreting the meaning of the term '*reasonable time'* under Art. 39(1) of the CISG, if a tribunal holds the meaning to be one month, then the tribunal has effectively added a clause in the contract stating that notice must be given within a one-month period. [*Schwenzer III, pp. 353-366*] Similar powers are accorded to tribunals under Art. 60(a) of the CISG, which allows tribunals to decide what measures the buyer could have reasonably expected to undertake in order to take delivery. If this was interpreted to require an inspection of the goods by the buyer, then it effectively amounts to an addition of a clause imposing such a duty upon the buyer, as tribunals have done in the past. [*Mung Bean Case*] The CISG also explicitly recognizes the competency of tribunals and judges to adapt contracts, as seen in Article 50, thereby extending the support to the proposition that the Tribunal has the power to adapt the contract if the balance of equilibrium is disturbed due to changed circumstances and hardship [*Schlechtriem Workshop*], as is the situation in the case at hand. Thus, the power of the Tribunal to adapt the contract to more realistically reflect the status quo in light of significant hardship incurred by CLAIMANT is firmly within the contours of the CISG.

c. The power to adapt can be extrapolated from the provisions of private international law.

105. Even if the Tribunal were to hold that the power to adapt does not exist within the contours of the CISG, CLAIMANT submits that the power to adapt can then be considered to be an '*external gap'* requiring recourse to domestic and international law. [*Steel tubes case*] *In casu,* the nation states of both contracting parties subscribe to a verbatim adoption of the UNIDROIT Principles as their domestic law on contractual matters. [*PO1, p. 53, §4*] Thus, the applicable private international law is the UNIDROIT Principles. As per Art. 6.2.3 of the UNIDROIT Principles, CLAIMANT has the power to request negotiations without creating undue delay. Further, CLAIMANT has the authority to approach the Court in case the negotiations break down. In the case at hand, as established above, RESPODENT's uncooperative nature led to the downfall of negotiations, [*Exh. C8, p.18*] thereby providing CLAIMANT with the power to approach the Tribunal to adapt the contract. The power to adapt the contract is clearly bestowed upon the Tribunal by Art. 6.2.4 of the UNIDROIT Principles, which empowers the Tribunal to adapt the contract in an aim to restore the equilibrium of the contract.

III. CLAIMANT is entitled to an amount of $ 1,250,000 as an increased remuneration for hardships faced

106. The tariffs of 30% have caused tremendous hardship to the CLAIMANT which has been illustrated above. The CLAIMANT was making a profit of 5% which has been reduced to a loss of 25% due to the tariffs imposed. *[NoA, p.7, ∫18]* Further, RESPONDENT has profited from this transaction by reselling the doses and breaching the contract. Therefore, while CLAIMANT is suffering a loss of 1,250,000 USD, RESPONDENT has made a profit of at least 300,000 USD by selling 15 doses at a profit of 20,000 USD. *[PO2, p. 57, ∫20]* This figure may even amount to 1,000,000 USD if RESPONDENT had successfully sold 25 doses per year which it had planned on doing. *[PO2, p. 56, ∫11]* CLAIMANT prays for nothing more than the loss suffered due to the tariffs and not claiming profits in good faith. CLAIMANT will be put to undue hardship if such an amount is not awarded as the financial restructuring plan made with the Creditors Committee will be impossible to achieve. Thus, it is submitted that CLAIMANT is entitled to an amount of 1,250,000 USD by an adaptation of the contract. *[PO2, p. 59 ∫29]*

Conclusion on Issue 3

107. It is clear from the conduct and intention of the parties that the tariffs imposed fall well within the ambit of Clause 12 of the Frozen Semen Sales Agreement. Even if the Tribunal were to hold that the terminology of Clause 12 is not expansive enough to cover the tariffs, *quod non*, claims for hardship are within the ambit of the CISG. Further, the recourse of adaptation can be extrapolated from the CISG, both through the general principles and from applicable domestic and private international law. Thus, CLAIMANT is owed 1,250,000 USD as an increased remuneration for substantial hardship faced in pursuance of performance of the contract.

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REQUEST FOR RELIEF

In light of the above, CLAIMANT respectfully requests the Tribunal to find that:

1. The Arbitration Agreement is governed by the law of Mediterraneo;
2. The Tribunal has the powers under the Arbitration Agreement to adapt the contract;
3. CLAIMANT is entitled to submit evidence from the other arbitration proceeding involving the RESPONDENT, irrespective of the manner in which such evidence was acquired;
4. CLAIMANT is entitled to 1,250,000 USD consequential to the adaptation of the price under Clause 12 of the FSSA as well as upon the applicability of the CISG;

CLAIMANT reserves the right to amend its prayer for relief as may be required.

From Mediterraneo

*signed*_____, 6th December 2018

ATTORNEYS

/S/	/S/
_____	_____
(Sudarshan Srikanth)	(Pavan Kalyan)
/S/	/S/
_____	_____
(Madhur Arora)	(Karan Kumar)
/S/	/S/
_____	_____
(Chinar Gupta)	(Karan Himatsingka)