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Willem C. Vis East International Commercial Arbitration Moot

MEMORANDUM FOR RESPONDENT

Case Number: HKIAC/A18128 – Phar Lap Allevamento v. Black Beauty Equestrian

On Behalf of	**Against**
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TABLE OF ABBREVIATIONS

¶ / ¶¶	Paragraph / paragraphs
Art.	Article
Arts.	Articles
AUS	Australia
BEL	Belgium
CE	CLAIMANT's exhibit
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
Co.	Corporation
e.g.	for example (exempli gratia)
Ed.	Edition
ed./eds.	Editor/Editor
et al.	and others (et alii/et aliae/et alia)
FRA	France
GBR	United Kingdom of Great Britain and Northern Ireland
GCC	General Conditions of Contract
i.e.	that is (id est)
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration (The Hague, The Netherlands)
ICSID	International Centre for Settlement of Investment Disputes (Washington, D.C., United States of America)
Inc.	Incorporated
IND	India

IRL	Ireland
Ltd.	Limited
No.	Number
NZL	New Zealand
NYC	New York Convention
p.	Page Number
PO No.1	Procedural Order Number. 1
PO No.2	Procedural Order Number. 2
q.	Question
RE	RESPONDENT's exhibit
SGP	Singapore
Standard Conditions	General Conditions of Contract/sale inclusive of the Codes of Conduct
SUI	Switzerland
UML	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1985
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules, 2010
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
USA/U.S.	United States of America
v.	Versus

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Bernardini	Bernardini, "Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Centre" ICCA Congress Series No. 9 (1999)	¶ 25
Bianca/Bonell	CM. Bianca & Micheal J. Bonell Commentary on the International Sales Law – The 1980 Vienna Sales Convention (1987)	¶ 110
Born	Gary Born International Commercial Arbitration Kluwer Law International, 3d ed. (2009)	¶ 3
Brunner	Brunner Force Majeure and hardship under General Contract Principles - Exemption for Non-performance in International Arbitration International Arbitration Law Library Volume 18 (2008)	¶¶ 84, 112

Craig/Park/Paulson	Laurence Craig, William Park, et al. International Chamber of Commerce Arbitration Oceana Publications, 3d ed. (2000)	¶ 12
Derains/Schwartz	Yves Derains & Eric Schwartz A Guide to the ICC Rules of Arbitration Kluwer Law International, 2d ed. (2005)	¶¶ 21, 39, 57, 114
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Frasnworth	Edwards A. Fransworth Fransworth on Contracts Kluwer law International, 4d ed. (2004)	¶ 61
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Holtzmann/Neuhaus	H.N. Holtzmann & J.E. Neuhaus A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary Kluwer Law International (1995)	¶ 52
Honnold	John Honnold Uniform Law for International Sales under the 1980 United Nations Convention Kluwer Law International, 3d Ed. (1999)	¶¶ 106, 108
Jarvin/Derains	Sigvard Jarvin &Yves Derains Collection of ICC Arbitral Awards 1974-1985 Kluwer Law International (1990)	¶ 18, 114
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Rahim Moloo	Rahim Moloo "A Comment on the Clean Hands Doctrine in International Law" Available at SSRN: https://ssrn.com/abstract=2358229 (2010)	¶¶ 75, 76
Redfern/Hunter	Blackaby, Nigel, Partasides, Constantine, et al. Redfern and Hunter on International Arbitration Oxford University Press 6h. ed. (2015)	¶ 2
Schlaepfer/Bartsch	Anne Schlaepfer & Philippe Bartsch "A Few Reflections on the Assessment of Evidence by International Arbitrators" International Business Law Journal, Volume 21 Issue 3 (2010)	¶ 45
Schlechtriem/ Schwenzer	Schlechtriem & Ingeborg Schewenzer Commentary on the UN Convention on the International Sale of Goods Oxford University Press, 2d ed. (2005)	¶¶ 89, 106
Schlosser	Das Schlosser The Law of Private International Arbitration Recht der internationalen privaten Schiedsgerichtsbarkeit Volume I No. 43 (1975)	¶ 89
Schwenzer	Ingeborg Schwenzer "Force Majeure and Hardship in International Commercial Contracts"	¶ 89

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Van den Berg (ed.)	Van den Berg "Improving the Efficiency of Arbitration Agreements and Awards: 40 years of application of the New York Convention" ICCA Congress Series No.9 (1999)	¶ 20

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HKIAC Rules	Hong Kong International Arbitration Centre Administered Arbitration Rules, 2018
IBA Rules	IBA Rules on the Taking of Evidence, London May 29, 2010
ICCA	Guide International Council for Commercial Arbitration's Guide to the Interpretation of the 1958 New York Convention, The Hague 2011
New Zealand Arbitration Act	New Zealand Arbitration Act of 1996 with amendments as adopted in 2007.
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York June 10, 1958
UML	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1985
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STATEMENT OF FACTS

1) The CLAIMANT is Phar Lap Allevamento (Phar Lap), It is registered and located in capital city, Mediterraneo. Phar lap offers frozen semen of its champion stallion for artificial insemination. The star among Phar Lap's stallions is Nijinsky III. The RESPONDENT, Black Beauty Equestrian (Black Beauty) in Oceanside, Equatoriana, is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions.

2) RESPONDENT had in its email of **28 March 2017** (Claimant's Exhibit 3) objected to the forum selection clause and asked for delivery DDP. CLAIMANT in its email of **31 March 2017** accepted DDP delivery in principle but asked to be relieved from all risks associated with such a delivery or at least to be protected against the risk of changing health and security requirements by a hardship clause (Claimant's Exhibit 4). Thus, the Parties concentrated in their following discussions on the inclusion of a hardship clause. Again, RESPONDENT considered the originally suggested ICC-hardship clause to be too broad. 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.

3) After deliberations about the place of arbitration, the newly suggested neutral place of arbitration, was acceptable to the RESPONDENT, meant, however, that also the choice of law provision had to be changed, to avoid the uncertainties resulting from the absence of a choice. Thus Mr. Antley had listed the choice of law governing the arbitration agreement as one of the points to be addressed in the final contract (Respondent's Exhibit 3).

4) In relation to the hardship clause, the negotiations finally resulted in a very narrowly worded clause, which was then included into the existing force majeure clause and did not provide for any adaptation by the arbitral tribunal (Respondent's Exhibit 3). Moreover, Mr.Shoemaker made it clear that he had no authority to agree for the adaptation.

5) CLAIMANT is not claiming the originally agreed contractual remuneration which has been undisputedly been paid by RESPONDENT. Instead, CLAIMANT is seeking a remuneration which goes beyond that amount and for which the arbitrators would have to adapt the contract.

6) The interpretation of the arbitration agreement is governed by the law of Danubia which recognizes that arbitrators may adapt contracts but requires an express empowerment for that. Such an express conferral of powers is, however, missing in the present contract. Quite to the contrary, RESPONDENT, when suggesting the arbitration clause explicitly reduced the broad wording of the Model Clause of the HKIAC by deleting any reference which could be interpreted as an empowerment for contract adaptation.

7) In the present case, the arbitration agreement itself, which is to be treated as a separate contract for its interpretation under the four corners rules, contains no choice of law wording. Unlike in many other contracts the choice of law clause for the main contract, the sales agreement, is not contained in the arbitration clause. Instead, it is included in a separate clause preceding the arbitration agreement.

8) CLAIMANT's claim for an increased remuneration is completely baseless. CLAIMANT has no right to ask for an adaptation of the contract, neither under the force majeure/hardship clause nor under Art. 79 CISG.

9) Reliance on the hardship clause is not possible. The narrowly worded clause is not applicable to the present impediment and does not provide for the requested remedy, i.e. adaptation by the Arbitral Tribunal. RESPONDENT would have never entered into such a contract the financial dimension of which would be dependent on the discretion of the arbitrators.

10) CLAIMANT can also not rely on Art. 79 of the CISG. First of all, by including the force majeure and hardship clause into the contract the Parties have provided for a special regulation of the problem of changed circumstances excluding an application of Art. 79 CISG. It constitutes a derogation in the sense of Art. 6 CISG.

11) Second, Art. 79 CISG does not regulate hardship and does not provide for the remedy requested by CLAIMANT, which is the increase of the contract price as considered appropriate by the arbitral tribunal.

INTRODUCTION

I. The Arbitral Tribunal does not possess the requisite power to decide the case and to adapt the clause in consonance with the hardship. The law governing the arbitration agreement will be the law of Danubia, as the CLAIMANT did not deny the law of arbitral seat to govern the law of arbitration agreement expressly. Further, the conflict of law rules shall be applied and the law of the arbitral seat will be the law governing the arbitration agreement for its real and closest connection. Since Danubian law lays down the four corners rule, the interpretation of the arbitration agreement is very limited in its wording and no sort of eternal evidence can be relied upon in the proceeding. Therefore, the tribunal cannot adapt the contract nor does it provide for any hardship from the contract.

II. The evidence sought by the CLAIMANT should not be admitted as it was obtained from the other arbitral proceedings illegally. Further, the materials are irrelevant to the current proceedings, thereby cannot be admissible as evidence The Award given in the other proceeding is not a public document and the only way the claimant can obtain it is through breach of confidentiality. Confidentiality acts as an implied duty on the arbitrators and the parties to the proceedings. Such confidentiality breach is illegal and violate an integral part of Arbitration, thereby making the information illegal. The documents wanting to be submitted by the Claimant is not credible as evidence because it breaches principles of equity, good faith and fairness, thus being rendered as illegal.

III. The tribunal is respectfully requested to find that the CLAIMANT's are not entitled to compensation of $1,250,000 on the adaptation of the contract since all the requirements for the hardship under Clause 12 of the contract has not been fulfilled. Furthermore it is respectfully submitted that the contract falls outside the scope of CISG. Moreover there is no fundamental alteration justifying the invocation of the doctrine of hardship under Art. 6.2.2 of UNIDROIT Principles.

ARGUMENTS

I. THE TRIBUNAL CANNOT ADAPT THE CONTRACT AS THE LAW PROVIDES FOR STRICTER INTERPRETATON

A. THE TRIBUNAL HAS THE COMPETENCE TO DETERMINE THE LAW GOVERNING THE ARBITRATION AGREEMENT

1) The arbitration clause as contained in Frozen Semen Sales Agreement (the Contract) provides for dispute resolution with respect to any dispute arising out of the contract, including the existence, validity, interpretation, performance, breach or termination thereof, which shall be settled by arbitration in accordance with the HKIAC Administered Arbitration Rules. (Claimant Exhibit No.5, p.14).Hence, the corollary of the same is that the Arbitral Tribunal, by the application of principle of Kompetenz - Kompetenz, exercise jurisdiction over matters arising out of such contract, but the power of adaptation is directly subject to the determination of the law applicable to the arbitration agreement.

2) Parties to an international commercial agreement are free to choose for themselves the law (or the legal rules) applicable to that agreement. The doctrine of party autonomy, has gained extensive acceptance in national systems of law (Redfern/Hunter ¶3.97 p.187). The arbitration Clause 15 states that, "Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by settled by arbitration in accordance with the HKIAC Administered Arbitration Rules…" (Claimant Exhibit No.5, p.14). Therefore, the procedure governing any dispute has been referred to be settled by the application of the HKIAC Administered Arbitration Rules.

3) The kompetenz-kompetenz doctrine provides, in general terms, that international arbitral tribunals have the power to decide disputes concerning their own jurisdiction. The doctrine is closely related to the allocation of competence to consider and decide jurisdictional disputes between arbitral tribunals and national courts. (Born, p.1048). The Parties have agreed upon the application of the HKIAC Administered Arbitration Rules to govern the procedure of the arbitral proceedings. Therefore, the Arbitral Tribunal is conferred the power by virtue of Article 19 of the HKIAC Administered Arbitration Rules to rule on its own jurisdiction (Born, p.853).

4) The arbitrators' jurisdiction to rule on their own jurisdiction and powers is one of the effects of the arbitration agreement; the basis of that power is neither the arbitration agreement

itself nor the principle of pacta sunt servanda under which the arbitration agreement is binding (Gaillard/Savage ¶658 p.399). Kompetenz-Kompetenz, although presents a number of variations, affirms that arbitral tribunal has power to assess its own jurisdiction and powers. (Landolt, p.511)

5) Thus, the tribunal is competent to decide on its own jurisdiction and derives such authority to do so by virtue of the law as provided for under the HKIAC Administered Arbitration Rules and UML, but the power to adapt the contract is clearly subject to the determination of the law governing the arbitration agreement and its allied interpretation on the same.

B. THE LAW GOVERNING THE ARBITRATION AGREEMENT IS THE LAW OF THE ARBITRAL SEAT

6) The law governing the Arbitration Agreement is the law of the arbitral seat, as inferred from the corresponding communication between the parties which shows their intention to submit the arbitration agreement to the law of the arbitral seat. Further, the law governing arbitration agreement cannot be the law of the underlying contract, as there is no express rejection of the proposal by the Claimant which amounts to tacit acceptance (1). Even when the intention cannot be determined ipso facto, the application of conflict of laws rules and the established commentaries on the application of New York Convention concludes the law of the arbitration agreement to be that of the arbitral seat (2).

B1. Law governing the Arbitration Agreement is the law of the Arbitral Seat as inferred from the intention of the parties

7) The arbitral clause in the Sale Agreement has been drafted by the Respondent based largely on the model clause of the HKIAC (RE No.1, p.33). The proposed arbitration clause had included a reference to the law of the arbitration clause, which was proposed to be the law of Equatoriana, which as a corollary meant the law of the seat to govern the arbitration clause (RE No.1, p.33).

8) In the reply communication made by the CLAIMANT to the proposal on the arbitral clause, the CLAIMANT had only objected to the seat of arbitration being the State of the RESPONDENT. The reason given by the CLAIMANT was that the Creditors Committee of the CLAIMANT does not allow for any contract to be submitted to a foreign law or for resolution of dispute in the country of the counterparty; but however, be possible to agree on arbitration in a neutral country for which the approval is not mandatory (RE No.2, p.34).

9) It is pertinent to note that, CLAIMANT had only objected to the seat and changed it to a neutral venue, which is Danubia. This per se shows that CLAIMANT did not oppose to the law of the arbitration agreement being the law of the arbitral seat as was proposed by the RESPONDENT. Further, CLAIMANT had clearly accepted to the complete proposal with only an amendment to the seat of arbitration. Thus, it is clear that only the seat was changed to Danubia and the law governing the arbitration agreement was not opposed in the reply communication (RE No.2, p.34).

10) In the absence of an express choice of law, the arbitral tribunal will usually look first for the law that the parties are presumed to have intended to choose. This is often referred to as a tacit choice of law. Significant connection between the place of arbitration and the dispute may justify the application of the conflict of laws rules of the place of arbitration. Thus, by application of the intention of the parties, it is clear that the act of non-opposition by the CLAIMANT in the reply amounts to the law of arbitral seat to be the tacit choice of law.

B2. Law governing the Arbitration Agreement can be inferred from the application of Choice of law Rules

11) The New York Convention rests on the premise that the arbitration agreement is a separable agreement, subject to specialized international rules of both substantive and formal validity, which is set forth in Articles II of the Convention. Article II set forth international rules of presumptive substantive validity, directly applicable to international arbitration agreements. The necessary consequence of these substantive standards of international law is that the arbitration agreement will be subject, at least in part, to a different substantive legal regime from the parties' underlying contract. [A. van den Berg, p.124]

12) Article V(1)(a) of the New York Convention prescribes a default choice of law rule, applicable incase where the parties have not expressly or impliedly chosen the law governing their international arbitration agreement. That default rule provides for application of the law of the arbitral seat to the substantive validity of the arbitration agreement. Commentaries [Craig, et. al.] and court decisions [Infowares Ltd (IND, 2009); Judgment of 24 November 1994, XXI Y.B. Comm. Arb. 635, 638 (Rotterdam Rechtbank) (1996)] are unanimous that Article V(1)(a)'s default rule, in the absence of a choice-of-law by the parties, is the law of the arbitral seat.

13) In more recent decades, a number of jurisdictions, both common and civil law, have applied the substantive law of the arbitral seat to the validity of arbitration agreements [Rhone Mediterranee (USA, 1983); Farrell (USA, 2011)]. This result conforms to the rule adopted by Article V of the New York Convention, but was also arrived at by independent choice of law analysis in national courts.

14) The traditional view under English law was that a general choice of law clause presumptively extends to the associated arbitration agreement. More recently, however, English courts have adopted a contrary presumption, holding that the law applicable to the arbitration agreement is prima facie that of the arbitral seat – notwithstanding a general choice of law clause specifying a different substantive law [Arsanovia Ltd (GBR, 2012)]. An arbitration agreement is more likely to be governed by the law of the seat of arbitration than the law of the underlying contract, because the arbitration agreement will normally have a closer and more real connection with the place of the seat [Sulamérica (GBR, 2012)].

15) Similarly, a decision of the Swiss court in Judgment of 26 May 1994 [XXIII Y.B. Comm. Arb. 754, 757 (Bezirksgericht Affoltern am Albis 1994)] held that in the absence of a choice-of-law provision, the validity of the arbitral clause must be decided according to the law of the seat of the arbitral tribunal. This approach was also reflected in the decision of the Tokyo High Court, relying on the "procedural" character of the arbitration agreement, which reasoned, if the parties' will is unclear, it should be presumed, as it is the nature of arbitration agreements to provide for given procedures in a given place, that the parties intend that the law of the place where the arbitration proceedings are held will apply [Judgment of 30 May 1994, XX Y.B. Comm. Arb. 745, 747 (Tokyo Koto Saibansho1995)]. Some countries have even adopted the same approach by legislative enactment [Swedish Arbitration Act, §48].

16) As with national arbitration legislation and court judgments, a number of arbitral awards have applied the substantive law [ICC Case No. 6149; ICC Case No. 5294], or, occasionally, the choice of law rules of the arbitral seat [ICC Case No. 5832]. Also, some national court decisions and arbitral awards reason that, by seating the arbitration in a particular state, the parties impliedly agreed that the arbitration clause should be governed by the law of the seat [Hamlyn Co.]. A frequently-cited arbitral award concluded: "Except in cases where the parties make an express choice concerning the law governing the arbitration agreement, the choice of the place of arbitration generally implies a choice of the application of the arbitration law of that place." [ICC Case No. 7373; Grigera Naon, ¶12 p.947]

17) Therefore, the recent trend is that where there is no express choice of the law governing the contract as a whole, or the arbitration agreement as such, a rebuttable presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement [National Thermal Power Corporation (IND, 1993)].

a. Procedural nature of the arbitration agreement inevitably attracts the applicability of the law of arbitral seat

18) New York Convention and European Convention do not always appear to rely on the parties' intent in providing for the application of the law of the arbitral seat, and instead reflect at least in part the view that arbitration agreements are "procedural" and therefore almost inevitably subject to the law of the arbitral seat [Owerri (NEL, 1994)]. Similarly, certain contemporary awards apparently conclude that an arbitral tribunal is obliged to apply the law of the arbitral seat, citing the procedural character of the arbitration agreement [ICC Case No. 5294; Jarvin/Derains, p.216].

19) High point of the procedural approach to the law governing arbitration agreements was reflected in resolutions adopted by the Institute of International Law (Institut de Droit International). These resolutions were adopted on the basis that "it appears to be of the greatest utility that the conflicts of laws to which private arbitration gives rise should be submitted to a single system of private international law." [Lew/Mistelis/Kroll, ¶72]

20) Despite its apparent affirmation of party autonomy, the International Law Institute's resolution proceeded from the assumption that the law of the seat was required, as a matter of mandatory law, to govern the arbitration agreement. [Gaillard/Savage, ¶424] As a consequence, national court decisions, arbitral awards and commentary increasingly relied upon the theory that the parties impliedly intended that the law of the seat govern their arbitration agreement [Van den Berg (ed.), p.168)].

b. The seat is neutral to keep away the influence of local laws of the parties and hence, the law governing the arbitration agreement cannot be the local law of any of the party.

21) An exclusive focus on the law governing the underlying contract was also difficult to square with the fact that the parties' chosen arbitral seat was often more closely connected to their arbitration agreement than was the law they chose to govern their underlying contract. [Derains/Schwartz p.112] This was particularly true in cases where the local law of one of the parties' home states governed a contractual relationship, but the arbitration agreement provided

for arbitration in a neutral forum. For example, the parties' underlying contract might be expressly subject to the national law of the place of performance (law of Mediterraneo in this case), while the arbitral seat might be located elsewhere, precisely to disassociate the arbitration agreement from the host state.

22) In XL Insurance Ltd (GBR, 2000), the court held that a clause providing for arbitration in London under the provisions of the English Arbitration Act, constituted an implied choice of English law to govern the validity of the arbitration agreement (despite a general choice of law clause in the underlying contract selecting New York law). Other recent English decisions have accorded similar weight to the law of the arbitral seat, holding that the arbitral seat's law presumptively governs the parties' arbitration agreement [Abuja Int'l Hotels Ltd, (GBR, 2012)].

23) The Singapore approach takes the law of the seat as its starting point – parties are presumed to want a different (neutral) law to apply in the event of a dispute [First Link Investments Corp Ltd (SGP, 2014)]. Further, the law applicable to the arbitration agreement can depend on which institution's Model Clause and/or institutional rules are adopted. LCIA Rules provide that the law of the arbitration clause will be the law of the seat of the arbitration, unless otherwise specified. Similarly, the HKIAC Model clause specifies Hong Kong law as the default law applicable to arbitration agreements. In this case, since the RESPONDENT had adopted the HKIAC model arbitral clause, the default law of arbitration agreement will thus be the law of the arbitral seat.

c. Law of the arbitral seat has the Real and Closest Connection with that of the arbitration agreement

24) English courts have begun to consider factors essentially identical to those relevant to a "most significant relationship" or "closest connection" test with that of the arbitration agreement. [Compagnie Tunisienne De Navigation SA. (GBR, 1970)] Moreover, commentators have also concluded that English courts have in practice applied a validation principle in choosing between the law of the underlying contract and arbitral seat. [Pearson, ¶29 p.115]

25) Similarly, commentators observed that application of the substantive law of the arbitral seat to the arbitration agreement finds support in the consideration that, inasmuch as it may be said that the place of performance of the arbitration agreement is at the seat of the arbitration, the law of the seat is the one having the closest connection with such an agreement. [Bernardini, p.197]

26) Properly conceived, the choice of law governing an international arbitration agreement must be drawn, not from abstract connecting factors, but from the commercial purposes of parties to international arbitration agreements and from the underlying objectives of the international arbitral process [Mastrobuono (USA, 1995)]. Other jurisdictions also give effect to parties' agreements on the law governing their international arbitration agreement, while also frequently adopting validation or similar principles.

27) A recent Court of Appeal decision [C v. D (GBR, 2007)] reasoned that it would be rare for the law of the separable arbitration agreement to be different from the law of the seat of the arbitration.[Trukhtanov, p.140] English commentary has undergone the same evolution, or reversal, from a strong presumption that the arbitration agreement is governed by the law chosen by the parties to govern their underlying contract to a strong, contrary presumption that the arbitration agreement is governed by the law of the arbitral seat. [Dicey/Morris/Collins, ¶16 p.217]

d. The rule of contra proferentum will not apply as there were negotiations between the parties

28) CLAIMANT may not subsequently rely on rule of contra proferentum, according to which a contractual clause has to be interpreted against its drafter if it still remains ambiguous after an interpretation under Art. 8, as a last resort [Liebscher/Fremuth-Wolf ¶¶2.11-2.12]. The contra proferentum rule is inapplicable if both parties had the opportunity to review the clause, [Terra Intern Inc. (USA, 1997); Duhl, p.96] and participated in its negotiation [Doucet (CAN, 2013); Sykes, p.66].

29) CLAIMANT specifically reviewed the clause, discussed it with RESPONDENT [Ex. R5, p. 41] and explicitly stated that they could "accept the proposal with an amendment as to the place of arbitration." [Respondent's Exhibit R2, p.34]. The review and negotiation of the clause therefore bars CLAIMANT from relying on the contra proferentum rule.

30) Therefore, the law governing the arbitration agreement and its interpretation shall be the law of the arbitral seat, i.e. law of Danubia. This can be substantiated by a clear analysis of the intention of parties as laid down above. Similarly, the application of conflict of law rules and careful consideration of the decisions from various jurisdictions leads to a conclusion which is parallel to the views of commentators that the law of arbitral seat has the closest connection to the arbitration agreement in the absence of explicit choice of law.

C. STRICTER INTERPRETATION OF THE HARDSHIP CLAUSE PREVENT ADAPTATION OF THE CLAUSE

31) The RESPONDENT's case is that the Tribunal cannot adapt the contract as the wordings of the hardship/force majeure clause is clear in its terms and requires no interpretation as to the intention behind it. Since the law governing the arbitration agreement is the Danubian law, which provides for the application of "four corners rule", adaptation of the contract is not possible. Further, the interpretation of the clause aforementioned should always be narrow in light of the position laid down by the Danubian law.

32) RESPONDENT claims that the Danubian law adheres for the interpretation of contracts including arbitration agreements to the "four corners rule", i.e. the interpretation of the arbitration agreement is limited to its wording and no external evidence may be relied upon. In particular, reliance on the drafting history and preceding communication is excluded if the wording is clear. Therefore, the CLAIMANT's claim for adaptation of this contract must be disposed.

C1. Increase in the tariff rate is not an unforeseeable event and does not qualify to invoke the hardship clause

33) The RESPONDENT emphasizes that the increase in tariff is a foreseeable event and du to this the Force Majeure clause cannot be invoked. The "four corners rule" strictly states that the agreement needs to be interpreted in a strict sense, i.e, only the wordings should be taken into consideration and not beyond that. Therefore, the RESPONDENT declares that they are not liable to compensate the CLAIMANT for the extra cost incurred due to increase in tariff.

34) The RESPONDENT draws parallel analogy to the United States' imposition of a 25 percent tariff on imported steel which has been problematic for contractors alike. The increased cost of steel means increased costs on projects, and in many occasions, on projects for which parties have already entered into contracts. US Courts have offered some guidance on how tariffs could be treated under such a clause, by stating that the force majeure clause should be given the interpretation as intended by the parties expressly.

35) A force majeure clause, in general, is a contract provision that relieves parties from performing their contractual obligations when an unforeseen event or act of God beyond their control arises, making performance of the contract commercially impracticable or impossible. It is common for force majeure clauses to be phrased as a catch-all, though occasionally they will also

enumerate specific types of occurrences that will be deemed "unforeseen" when they occur. A catch-all clause will typically suspend performance for incidents beyond the parties' control.

36) Tariffs imposed on imports cannot be considered as a qualifying occurrence under the usual force majeure provision. The United States' position is that, fluctuating market conditions making performance of a contract unfavorable for one party does not fall under the force majeure clause in the contract [Langham-Hill Petroleum Corp. Inc. (USA,1987)].

37) Similarly, although the clause was worded broadly to include "any act or omission beyond the control of the party having the difficulty, and any restrictions or restraints imposed by laws, orders, rules, regulations or acts of any government or governmental body or authority, civil or military," the United States Court found that attempt to acquire market share and collapse of the world crude oil market was a risk of the market and an unfortunate reality of the business world, not an occurrence covered by the parties' force majeure clause. It appears from the law available on the issue that economic hardship (including increases or decreases in the market price for a good) is typically not a force majeure event [Hemlock Semiconductor Corp., (USA, 2016)].

38) Further, certain international arbitral awards address in a specific way the element of unforeseeability in cases where hardship is claimed in international investment cases, including the award in Methanex Corp. (2005) and Himpurna California Energy Ltd. (2000).

39) In cases where hardship has been claimed, the following circumstances have not been found to meet the criterion of unforeseeability (in other words, the following circumstances have been considered foreseeable). Such includes dramatic changes in market prices for products, unfavorable general economic circumstances in a country, currency fluctuations, armed hostilities between countries with a history of antagonism, etc. [Yves Derains, p. 112].

40) Thus, by application of Danubian law which provides for the four corners rule/ stricter interpretation of the contract, the contract should not be adapted to give effect to the change in the tariff rate.

II. THE CLAIMANT SHOULD NOT BE ENTITLED TO SUBMIT THE EVIDENCE AS IT WAS OBTAINED BY BREACH OF CONFIDENTIALITY

41) The evidence sought to be submitted in the present arbitral proceeding (the evidence, for brevity) was obtained by a breach of confidentiality agreement, it does not deserve to be admitted

as evidence by the Tribunal for the following reasons – It is not a public document and was obtained by a breach of confidentiality agreement; A document obtained by breach of confidentiality agreement cannot be admitted as evidence in any arbitral proceeding; The CLAIMANT has not approached the Tribunal with clean hands and this is against the principles of equity.

A. THE INFORMATION SOUGHT TO BE ADMITTED SHOULD BE OF RELEVANCE TO THE PROCEEDING

42) The International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration clearly specify relevance to the case and materiality to its outcome as two main criteria for evidence to be admitted or requested for production. Relevance concerns the general relationship between the evidence and the case. Materiality is ultimately connected with the sufficiency of evidence. The contentions from the other totally different arbitration cannot be material to the outcome of present case where the parties are different.

43) Relevance is probably the first matter parties and arbitrators have to consider when deciding whether particular materials deserve to be offered as evidence or requested for production. The US evidence law with respect to admissibility establishes one seemingly simple rule: all relevant evidence is generally admissible, evidence which is not relevant is not admissible [US Federal Rules of Evidence R.402]. In theory, the tribunal shall not consider evidence ruled irrelevant, immaterial or inadmissible sensu stricto.

44) In common law, the term "relevant evidence" means evidence having a tendency to make the existence of any fact that is of consequence in the case more probable or less probable than it would be without the evidence. Thus, the submission made by the RESPONDENT from the other proceeding will not bring out the existence of any fact as such but only the contentions of parties and the opinion of arbitrators, even which will not have any binding effect or in persuading this case.

45) It is widely recognised by scholars and arbitration practitioners that the discretion of arbitrators in determining admissibility is subject to the following limitations viz. Evidence obtained in a manner that is contrary to international public policy shall not be admissible; and Evidence may be protected by a privilege or secret (professional privilege, trade secrets, governmental secrecy). It is generally recognised that arbitrators must take into consideration the

above-mentioned privileges and secrets [Schlaepfer/Bärtsch, p.211]. It is even an established stand that privilege rules allow a person or party to refuse to disclose certain information, even though that information might be relevant and reliable. Thus, even privilege rules acts as an antithesis towards the admissibility of evidence in certain cases [Mosk/Ginsburg, p.335]

B. THE AWARD IS NOT A PUBLIC DOCUMENT AND WAS OBTAINED BY A BREACH OF CONFIDENTIALITY AGREEMENT

46) It is not disputed that any document that is available to the public at large or a part thereof is a public document. However, the matter in dispute in the present arbitration is whether the evidence (Partial Interim Award) is a public document. The evidence was not available to unspecified people. It is clear that the evidence could have been obtained only through two former employees of the RESPONDENT or by way of an illegal hack into the computer systems of the RESPONDENT (Letter of the Respondent Counsel dated 03rd October 2018). The former employees of the RESPONDENT are not unspecified people and had access to the evidence by virtue of being employees of the RESPONDENT. This amounts to them having knowledge of trade secrets of the RESPONDENT which they are bound not to disclose after their employment is terminated. In other words, as long as the RESPONDENT is bound by the confidentiality agreement, any person, by virtue of being the RESPONDENT'S employee or otherwise who has access to confidential information, is bound by the confidentiality agreement as if they were party to it. By this, it is contended that even if the information was available to employees, they were not unspecified people but rather were a closed private group and hence the evidence cannot said to have gone public. [Smeureanu, p.112]

47) For the purposes of this argument, it is assumed that the evidence was obtained by breach of confidentiality agreement. So, when the former employees who are also bound by confidentiality agreement disclose information, it also amounts to breach of confidentiality agreement. Hence, on the assumption that the information was received from the former employees of the RESPONDENT, it is clear that there is indeed a breach of confidentiality agreement in obtaining the evidence. Also, since the evidence was obtained on the basis of either an agent relationship or by way of an employee relationship with the RESPONDENT, the evidence can also be argued to be privileged information and it is general principle of law that privileged information cannot be admitted as evidence [Alison Ross, p.22)].

B1. Evidence has been obtained by breach of confidentiality

48) In international commercial disputes, Arbitration is often sought to be the mode of dispute resolution because of the confidentiality it promises to the parties. Evidences that help the parties advocate their cause are admitted by the tribunal. In most cases, the limits of admissibility are defined by the discretion of the tribunal.Therefore, it can be understood that the very basis of arbitration is confidentiality and it is one of its differentiating factors from judiciary. Agreement of Confidentiality can be breached only in certain cases where the disclosure is made – by mutual consent; in public interest; in the interests of justice or when there is a statutory obligation to disclose such information [Smeureanu, p.116].

49) It is clear that there was no consent on the part of the RESPONDENT to disclose the evidence. Therefore the first exception to confidentiality does not apply in this case. The second exception is public interest. This proceeding, being arbitration, is confidential and is not intended to serve the general public. Only if the award of this Learned Tribunal can be used as precedent or at least as a persuasive document elsewhere can we say that the evidence that might influence the decision of the Learned Tribunal is submitted in public interest. To put it simply, only if the evidence influences the award and the award subsequently can be used by the public at large, there can be public interest in this matter. Such public interest is clearly absent here and thus this exception too is not applicable to the present case.

50) There is as such no statutory or legal obligation on the CLAIMANTS to disclose the evidence as the Learned Tribunal has not ordered its submission before it. Hence, even that exception is not applicable to this particular case. The case of the interests of justice is quite a complicated one. A catena of cases has recognized such an exception to the confidentiality agreement.

51) Arguendo, the evidence proves that the RESPONDENT had argued contradictory to what it is arguing in the present arbitration, the evidence is merely an Interim Award of the other Tribunal and not even the final order. Such order will have no binding value on this Learned Tribunal nor can it be used to persuade the Tribunal to award in favor of the CLAIMANT. When the evidence does not have binding or even a persuasive value, it serves no justice to the CLAIMANT and hence shall not be admitted as evidence as it would clearly breach the confidentiality agreement as argued earlier.

B2. Illegal evidence has to be disregarded

52) The inadmissibility of illegally obtained evidence is a significant element in compliance with public policy rules. That is the reason for which in the decision on the admissibility of evidence the tribunal cannot be as flexible as in any other evidentiary matters. In deciding on the admissibility of evidence the autonomy of the parties and the tribunal may not be contrary to international public policy. It might be reasonable for the tribunal to determine that when introducing documents the submitting party must provide a short description of each document, clearly specifying its relevance, materiality and probative value [Holtzmann/Neuhaus, p.566.].

53) In the present case, CLAIMANT had not established the materiality of the information which was sought to be admitted as evidence. Therefore, the information submitted by the CLAIMANT before the tribunal by means specified in Procedural Order No. 2 cannot be admitted as an evidence.

54) English courts have traditionally considered that the obligation of confidentiality, implied into the agreement to arbitrate, arose as a corollary of the privacy of arbitration proceeding, thereby allowing the use of arbitral information in parallel and ensuing proceedings on very strict conditions. Whether confidentiality extends to the information used in the course of arbitral proceedings largely varies with the circumstances of each case, including but not limited to the agreement of the parties to the arbitration, and ultimately depends on the importance that the local courts attach to confidentiality in arbitration [Dolling Baker (GBR, 1990)].

55) As between parties to an arbitration, although the proceedings are consensual and regarded as wholly voluntary, their very nature is such that there must be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration. This has also been the English approach [Dolling Baker (GBR, 1990)]. In essence, the English court found the existence of a duty of confidentiality above and beyond the parties' agreement, which emerged implicitly from the private nature of arbitration and extended over all documents prepared, submitted and used in the framework of an arbitration.

56) In a famous English case, where the issue was whether the supporting documents could be disclosed for use in separate proceedings initiated by one of the arbitrating parties against a third party, the Court held: the assumption that it was implicit in the agreement to arbitrate that hearings were to take place in private, a fact that, in effect, meant that no one other than the parties had access the documents created and used in the course of the hearings [Hassneh Insurance Co. (GBR, 1993)].

57) There is also broad support for the view that the privacy of the parties should be respected and the subject matter of arbitration should not be made known to the public absent some legitimate reason. Thus, there is an inherent expectation that the proceedings will be confidential [Derains/Schwarz, p.285]. Many arbitrators also favour confidentiality agreements over other measures when a party is unwilling to produce documents because these contain confidential information. Some scholars are of the opinion that the duty of confidentiality is all-encompassing, i.e., that it covers any kind of information regarding the arbitration as well as any information exchanged in the course of the arbitration [Berger/Kellerhals, p. 210].

58) Similarly, according to Swiss commentators, the duty of confidentiality is classified as a secondary duty of arbitrators, which results from the principal duty of diligence. It follows that arbitrators are under a contractual obligation to refrain from voluntarily disclosing information relating to the arbitration. It is also widely acknowledged that the arbitrators' duty of confidentiality is founded upon the fiduciary relationship between the arbitrators and the parties [Poudret/Besson, p.654].

C. CONFIDENTIALITY IS AN INTEGRAL PART OF ARBITRATION

59) Arbitrations are known to be part of a set of dispute resolution mechanisms that are collectively called as Alternate Dispute Resolution Mechanisms. The primary motive of these mechanisms in most jurisdictions is to remove the hurdles that are posed by the regular dispute resolution mechanisms i.e. the Judiciary. People, especially ones from the field of business, chose to go with alternate dispute resolution mechanisms because they provided them with advantages that Judiciary failed to provide them. Examples of these advantages are confidentiality, speedy dispute resolution among several others. The CLAIMANTS contend that if confidentiality is removed, arbitration proceedings would become more efficient in cost, time and other such resources. However, it is our view that they fail to see that their model of arbitration would beat the very basic tenets of arbitration – confidentiality.

60) It was also the contention of the CLAIMANTS that the importance of confidentiality has increased and that of confidentiality is decreased. In our view, this contention holds good only when States are party to such arbitration and does not hold good to arbitral proceedings to which only private entities are party. This again takes us to the argument of the basic tenet of arbitration being confidentiality. Businesses can retain their business secrets while still getting the benefit of resolving disputes. It is a win-win situation to the private entities when confidentiality is present in arbitral proceedings. On the contrary, if confidentiality has no importance in arbitral proceedings, they would be no better than taking the normal course of the justice system.

C1. The Evidence Sought to Be Admitted is obtained through Illegal Means

61) RESPONDENT submits that after the first investigation, the only source of information promised to the CLAIMANT were obtained by either, two former employees who were fired or through a hack of RESPONDENT's computer system, where the hackers managed to retrieve a considerable amount of data. The data included the interim award from the other arbitration proceeding, which was easily hacked because of an outdated firewall [PO 2 N.42]. Thus, it is clear from the facts that an illegal hack took place.

62) The RESPONDENT's employees were fired on 6th July, 2018. Subsequently, after a few months the illegal hack happened on 12th September, 2018, which is after the employees were fired. [*SoD, P.51*] At the annual breeder conference held on 4th October, 2018, CLAIMANT had been promised to get a copy of the award from a company that has a doubtful reputation as to where it gets its information from. Moreover, the company has also refused to disclose its sources at hand [*P.O.2 N.41*]. Hence, it can be observed from the facts that the award has been promised only after the illegal hack. Therefore, it does not matter if the hacked information is obtained by the company from the person who hacked the RESPONDENT's computer system or from RESPONDENT's former employees it still amounts to unethical and illegal obtained evidence through unlawful means.

63) The illegally obtained evidence through illicit means produced before the tribunal is not admissible. RESPONDENT intends to establish that one does not obtain legal right to use or retain improperly obtained evidence; even if the evidence is relevant, if it was obtained illegally through unlawful means, it shall not be accepted; and such information and plea for admissal is against the principles of fairness and good faith.

64) There can be no claim of a right to use or retain improperly obtained evidence. In Firemaster Oilfield Services Ltd. (CAN, 2001), the Canadian court refused to admit documents obtained from another proceeding that were subject to a confidentiality agreement. It held that, whether or not the documents were privileged, "the obligation to deal with other lawyers honourably and with integrity can only lead one to the conclusion … that there is no right to retain improperly obtained documents".

65) The admissibility of evidence obtained through illegal means was recently addressed by the Federal Court of Missouri, where the plaintiffs sought to rely on records they obtained solely as a result of a cyber-attack hacking against the company and its members. The Court did not allow the plaintiffs to refer the confidential data obtained illegally. It observed that even if the records have been published online, that does not change their confidential nature or the fact that they were stolen. Further, stolen information cannot form the basis for a good faith belief of evidentiary support for a pleading and hence, there is no lawful right to use these records. [In Re Ashley Madison (USA, 2016)].

66) Evidence obtained illegally through unlawful means should be disregarded and does not warrant admission before the tribunal. In Autosurvey Inc. (CAN, 2005), the company had hacked into its former employee's private servers and copied everything on it to preserve potential evidence, including the private communications exchanged between the employee and his solicitor. The court not only disregarded the evidence, but also stayed the proceeding entirely, admonishing the plaintiff's "brute force entry" into the defendant's computer server. [Miller (CAN, 1984)]

67) French courts do not permit the use of evidence obtained via illicit means. Having regard to Article 6 of the European Convention on Human Rights and the principle of fairness/loyalty in the production of evidence, evidence obtained via illicit means constitute an unfair method rendering inadmissible in its production. The Scottish courts have also held that evidence that is illegally obtained should not be allowed to enter within the confines of the Courts if it is not pure and tainted by ulterior motives [Lawrie (GBR, 1949)]. Similarly, the Russian approach is, as long as one can satisfy the court that the evidence has been obtained unlawfully, the court will not consider whether or not that evidence is relevant to the issues in dispute between the parties.

68) Thus, evidence when obtained through illegal means should be deemed inadmissible before the tribunal and hence, the information submitted by the CLAIMANT which was illegally obtained cannot be accepted as valid evidence in this proceeding.

C2. The process by which the evidence had been obtained is against the principles of fairness, good faith and equity

69) RESPONDENT will further establish that it is against the principles of fairness and good faith. In Libananco Holdings v. Turkey [ICSID Case No ARB/06/8, IIC 327 (2008)], the Respondent had procured more than 2000 privileged and confidential e-mails exchanged between the Claimant and its counsel through Court ordered intercepts. The Respondent claimed that the surveillance was directed at the investigation of certain money laundering activities and was related to the present arbitration proceedings. The tribunal weighed the importance of confidentiality and legal privilege and the obligation of all parties to arbitrate fairly and in good faith and ordered the destruction and exclusion from evidence of all privileged and confidential communication.

70) The CLAIMANT states that, "evidence can be adopted from other arbitral proceeding for reducing unnecessary spending and improving the work efficiency of the arbitral tribunal". The CLAIMANT overlooks that a tribunal as well as the parties owe each other a general duty to conduct themselves in good faith and respect the equality of arms between them.

71) The parties in an arbitral proceeding owes each other and the Tribunal a general duty to conduct themselves in good faith and to respect the equality of arms between them, the principles of equal treatment and procedural fairness imposed by the UNCITRAL Rules. Any information obtained in direct violation of such standards will offend the basic principles of justice and fairness. Thus, such information cannot qualify to be admitted as evidence before the tribunal [Methanex (2005)].

72) To conclude, CLAIMANT is not entitled to submit tainted or illegally obtained evidence as it is not accepted and they do not have a legal right to use or retain improperly obtained evidence. Additionally, even if they do submit the evidence it is against the principles of fairness and good faith.

D. THE INFORMATION SUBMITTED IS NOT CREDIBLE TO BE ADMITTED AS EVIDENCE

73) The ultimate question for any evidence is whether it constitutes reliable proof of what it is offered to prove. This, of course, turns on a closer inspection of the credibility or reliability of the evidence in question. The assessment of credibility is one of the functions of an arbitrator when

weighing up evidence. To put things more simply we can define "credibility" as the capacity of being worthy of belief or confidence, trustworthy.

74) Further, the IBA Rules on Taking of Evidence requires the party requesting the production of evidence to state how the documents requested are relevant to the case and material to its outcome [IBA Rules Art. 3.3(b)]. Despite of such legal backing on the confidentiality of the information, the CLAIMANTS had decided to obtain the same through illegal means [PO No.2, 41, p.60], which per se makes the information inadmissible as the act directly affects the public policy, and for not qualifying as a credible information before the tribunal.

D1. Admission of The Evidence is Against the Principles of Equity

75) The Principle of Equity saw their re-birth at the Chancery Courts of England, otherwise called the Exchequers' Court after having its roots in Roman Law. These principles have been confirmed by the International Court of Justice to be general principles of law directly applicable as law (Case Concerning Continental Shelf, 1982 I.C.J. Rep. 60.). Among these equitable principles is the concept that restricts anyone from making claims due to their illegal conduct. In other words, according to the Clean hands Doctrine a claimant's claim may be barred due to its illegal conduct in relation to the claims it brings [Rahim Moloo, p. 1].

76) Several Arbitral Tribunals have applied the clean hands doctrine in the late 19th century (John Bassett Moore, 1995). Recent decisions in international arbitration suggest that the doctrine has a place in international law and also that where a claimant has itself acted illegally, those claims will be deemed inadmissible before the international tribunal [Rahim Moloo, p. 10].

77) In Plama v. Bulgaria (ICSID Case No. ARB/03/24, 27th August 2008), the Tribunal relied on the general principle contained in international law that a tribunal will not assist a claimant who has engaged in unlawful conduct. This principle is widely used in International Investment Arbitration proceedings and also holds good even to International Commercial Arbitrations [Dumberry, 2018].

78) It is thereby clear that the principles of equity are applicable in international law and is being extensively used. In the present case, the CLAIMANT wants to submit evidence that is obtained out of a breach of confidentiality agreement or out of an illegal hack in the computer system of the RESPONDENT. In either case, the actions of the CLAIMANT would amount to

illegality. The principles of equity as adduced above clearly mention that any claim made by an illegal action is liable to be inadmissible.

79) Further, the breach of confidentiality and illegal hack themselves being unethical and illegal acts, the CLAIMANT cannot expect the RESPONDENT to be ethical. Arguendo, the evidence proves that the RESPONDENT had made inconsistent arguments in two different arbitral proceedings, it would only prove that the RESPONDENT is acting in an unethical manner. However, if the evidence obtained through illegal means such as breach of confidentiality agreement and illegal hacking are admitted as evidence, it would amount to a clear violation of the principles of equity as the CLAIMANT itself has in the first place acted unethically and illegally to obtain the evidence.

80) In light of the above arguments, it is concluded that the evidence is not admissible as such admission would neither invoke any exception to the principles of confidentiality nor will it be in conformity with the doctrine of clean hands, thus rendering injustice to the RESPONDENT.

81) To conclude, it is the case of the RESPONDENT that the CLAIMANT cannot submit the information before the tribunal, and even if the CLAIMANT does, the tribunal shall not be duty bound to accept and admit the same. This is primarily because, the information submitted before the tribunal is from another arbitration and has been obtained by back door means, which per se affects the principles of good faith, fairness and equity. Further, such information qualify to be confidential and the parties with knowledge over such information have an implied duty of confidentiality. Therefore, such information can neither be submitted by the CLAIMANT nor it be admitted as evidence by the tribunal.

III. CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$ 1,250,000 RESULTING FROM ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE CONTRACT AND UNDER THE CISG

82) In its Procedural Order No. 1, the Arbitral Tribunal has requested the parties to address "the issue as to whether CLAIMANT is entitled to the payment of US$1,250,000 or any other amount resulting from an adaptation of the price: i. under Clause 12 of the contract; ii. or under the CISG" [PO. 1, p.51, para.11]. In furtherance to this, it is contended that (A) under Clause 12 of the contract, CLAIMANT is not entitled to the additional payment caused by increased tariffs; (B) CLAIMANT is not entitled to the payment from an adaptation of the price under the CISG;

(C) CLAIMANT is not entitled to the payment from an adaptation of the price under the UNIDROIT Principles.

A. UNDER CLAUSE 12 OF THE CONTRACT, CLAIMANT IS NOT ENTITLED TO THE ADDITIONAL PAYMENT CAUSED BY INCREASED TARIFFS

83) The clause 12 of the sale agreement is a hardship clause which does provides for adaptation of contract since (1)There is no Hardship since the CLAIMANT has assumed all the risks of the change of circumstances except for the Health and Safety Requirements,(2) Arbitrators cannot adapt the Contract since express Conferral of Powers is missing in the Present Contract, (3)The additional tariff does not constitute hardship under clause 12 of the sales agreement,(4) DDP Delivery provides for all charges to be taken up by the CLAIMANT, (5) Risk Allocation through Clause 12 of the Sales Agreement.

A1. There is no Hardship since the CLAIMANT has assumed all the risks of the change of circumstances except for the Health and Safety Requirements

84) There is no hardship if and to the extent that the obligor has assumed the risk of the change of circumstances. To illustrate, in a case decided by the Swiss Federal Tribunal in 1917, the court held that a seller, the allegedly disadvantaged party, had completely assumed the risk of an increase in the price of copper wire. [Kramer/Brunner] Prior to the conclusion of the contract, the seller had assured the buyer that it was already in possession of twenty tons of copper wire which it offered for sale. Thus after the execution of the contract, the seller was not exempted by an export embargo affecting the delivery of copper wire from its suppliers, making performance substantially more onerous for the seller.

85) It is therefore examined through contract interpretation whether the obligor has explicitly or implicitly assumed the risk of the consequences of changed circumstances. The obligor may also have assumed a somewhat greater risk that exceeds the 'default' risk and its limitation which is inherent in the hardship exemption, so that the standard threshold test of the hardship exemption may have to be raised accordingly. Conversely, the risk of the obligor may have been contractually limited or excluded. Hence the parties' contractual risk allocation will prevail over the threshold test of the hardship exemption [Münchener Kommentar].

86) The intention behind incorporating just the health and safety requirements stems from the fact that in 2014 CLAIMANT had sold three mares DDP Danubia to farms in Danubia for an

overall price of 8 million USD. Shortly before the mares were delivered a rare aggressive type of foot and mouth disease was discovered in Danubia. While it was not affecting horses which often carried it, ultimately it killed a quarter of the cow population. As a consequence of the discovery, Danubia had immediately imposed very strict new health and safety requirements involving long quarantine time. In the case of the three mares the additional tests required and the long quarantine amounted to 40 % of the sales price. [PROCEDURAL ORDER NO. 2, PARA. 21].

87) It can therefore be said the CLAIMANTS have carefully articulated the possible hardships that can occur and have narrowly worded it from the ICC-Hardship Clause suggested by Ms.Napravnik which was considered by RESPONDENT to be too broad for the purposes of this contract and the objectives pursued. With reference to the risks mentioned by Ms. Napravnik in her email of 31 March 2017 (CLAIMANT Exhibit C 4) he suggested the wording which was finally added tothe force majeure clause in clause 12. The increased Tariff is not found to be comparable with that of health and safety requirements.

A2. Arbitrators cannot adapt the Contract since express Conferral of Powers is missing in the Present Contract.

88) The interpretation of the arbitration agreement is governed by the law of Danubia which recognizes that arbitrators may adapt contracts but requires an express empowerment for that. Such an express conferral of powers is, however, missing in the present contract. Quite to the contrary, RESPONDENT, when suggesting the arbitration clause explicitly reduced the broad wording of the Model Clause of the HKIAC by deleting any reference which could be interpreted as an empowerment for contract adaptation.

89) Hardship results can be reached similar to those in legal systems that expressly provide for the power of the court or tribunal to adapt the contract to the changed conditions. [Ingeborg Schwenzer]. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration [Schlosser]. The courts will restrain the use of their adaptation powers to changing the contract where such changes can be measured or quantified or controlled in some other way. An arbitrator, even if an expert in the kind of business concerned, will encounter the same limits.

A3. The additional tariff does not constitute hardship under clause 12 of the sales agreement

90) The additional tariff does not fundamentally alter the equilibrium of the contract nor does it make it more onerous. The extra cost of performance was found not to be amounting to hardship in Suez Canal cases.

91) As a result of the closing of the Suez Canal due to hostilities in the Middle East in 1956 and again in 1967, ocean carriers and sellers [Treitel] were forced to use the longer and more costly route around the Cape of Good Hope [Farnsworth; Transatlantic Financing Corp., (USA, 1966)]. The result, i.e., none of them regarded the closure of the Canal and the consequent imposition of unexpected costs on one of the parties as a ground of discharge. When the contracts were made, the Suez Canal was the usual and customary route, so that even where the contracts did not include a reference to that route it was no doubt an implied term that the ship should go via the Suez Canal. [Treitel]

92) The voyage via the Cape would have been two-and-a-half times as long and would have doubled the cost of carriage, but the seller's costs increased by no more than 15% of the contract price [Treitel], and the market price of the goods had risen by more than the extra cost of carriage via the Cape of Good Hope. It was held that the difference between the two methods of performance was not sufficiently 'fundamental' to discharge the contract. In the Suez Canal Cases, the increase in cost by taking the route around the Cape of Good Hope did not amount to hardship, and was not held to frustrate the contract.

93) In American Trading & Prod. Corp. [USA, 1972], Court refused to find 'that the parties contemplated or agreed that the Suez passage was to be the exclusive method of performance', although freight rate was based on passage through Suez Canal.

94) Similarly, It can be determined that the Imposition of additional tariff does not make in an exclusive method of performance. This changed circumstance does not amount to hardship as stipulated in the view of Suez Canal Cases.

A4. DDP Delivery provides for all charges to be taken up by the CLAIMANT

95) The Incoterms Rules, 2010 provides for DDP Delivered Duty Paid which means that the seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import

on the arriving means of transport ready for unloading at the named place of destination. The seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities.

96) The CLAIMANTS after longer internal discussions accepted for the contract a delivery DDP. Given the additional costs associated with a DDP delivery, they had need increased the price by 1000 USD per dose. Seller will ship 3 instalments DDP of Nijinsky III's 100 doses of frozen semen. The first shipment of 25 doses DDP will be on 20 May 2017; the second shipment of 25 doses will be DDP on 3 October 2017; the third and last shipment of 50 doses will be DDP on 23 January 2018. [CLAIMANT's exhibit C4].

97) This proves that the delivery was a DDP as stipulated in the sales agreement [CLAIMANT's Exhibit C5]. The DDP was therefore agreed by the CLAIMANT's against an increase in the price per dose and they have the obligations to send across the good by clearing for not only the export but also the import and to carry out all custom formalities.

A5. Risk Allocation through Clause 12 of the Sales Agreement

98) The risk aversion has been done through the hardship clause. These and other like devices serve to allocate the risk of loss according to the terms of the contract. If the other party is prepared to accept the risk, the reason may be that he believes he is in a better position to cover the risk by insurance or that he is less risk averse than the other party and is prepared to take the consequences if the risk does arise. Thus, it is important to construe the language of the contract. [Hoecheong Products Co. (GBR, 1995); Kriti Rex (GBR, 1996)]

99) In international contracts, which are usually comprehensive, detailed and all-embracing contractual frameworks, there is a presumption that absent an adaption clause in the contract, the Principle of sanctity of contracts prevails since it cannot be assumed that the parties were unaware of possible risks related to a change in the value of the parties' performance. (UNCITRAL Legal Guide)The hardship defense is not available if the party invoking the defense has, unilaterally or by agreement with the other side, assumed the risk for the events on which the hardship defense is based.

100) In this Risk Allocation process, it can be determined that the RESPONDENT is the cost-avoider. The language of the Contract is clear in the sense that the hardship is to arise only for

health and safety requirements and the DDP delivery has allocated the risk of delivery directly to the CLAIMANTS.

B. CLAIMANT IS NOT ENTITLED TO THE ADDITIONAL PAYMENT CAUSED BY INCREASED TARIFFS UNDER THE CISG

B1. CISG is not mandatory and there is scope for party's autonomy

101) Contrary to the CLAIMANT's assertion in paragraph 87 wherein the CLAIMANT has clearly stated that the CISG is applicable in the present case, it is furthermore significant to note that it is not disputed that the CISG governs the contract where the contract in which the parties are signatories to it having places of business in different nations does not have the "choice of law provision". [Amco Ukrservice (USA, 2004); American Biophysics (USA, 2006)]. However giving reference to Article 6 of the CISG. It states that "the parties may exclude the application of the Convention or, subject to Article 12, derogate from or vary the effects of any of its provisions." [Rheinland Versicherungen; Leather good case]

102) On the basis of the above statement it could be said that the most dominant nature of CISG can be seen in Article 6. Article 6 clearly gives the scope for a party's autonomy. In other words, party autonomy is a part of the CISG, and the parties are entitled to opt out of CISG [Ferrari]. The 'Arbitration' clause envisages applicability of domestic law of Danubia. The RESPONDENT humbly submits that in the present case it is the law of Danubia which is to be applies in interpreting the arbitration agreement.

B2. The scope of CISG is limited to the aspect of Contract of Sale

103) The doctrine of separability can be found for example in Article 17 of the Model Law and comparable provisions in other national arbitration laws [Sojuznefte export]. One of the consequences of this separability is that the arbitration agreement may be submitted to a different law than the main contract. Even in cases where the main contract contained an explicit choice of law clause and the parties did not determine a different law to apply to the arbitration clause, courts have not always extended the effect of the choice of law for the main contract to the arbitration clause. [XL Insurance Ltd (GBR, 2000)].

104) Furthermore many commentaries are of the view that CISG application is limited, the question regarding whether the CISG is at all intended to regulate the conclusion of arbitration

agreements. In Accordance of the wordings in Articles 1 through 3 CISG, its sphere of application is limited to contracts of sale. Consequently, no one would apply the CISG to an arbitration agreement concluded as a separate agreement after a dispute has arisen or after the main contract has been concluded. That the arbitration agreement is incorporated into a contract in the form of an arbitration clause does not change its nature as a separate contract, as is evidenced by the doctrine of separability. As a result, the question of whether the parties agreed upon an arbitration clause, while being potentially within the CISG's scope of application, is outside its sphere of application. [Landgericht Duisburg, CISG-online p.186; Ulrich Magnus, p.163].

105) The RESPONDENT does not dispute the fact that the law governing the Contract of Sales is the Law of Mediterraneo. The arbitration law governing that of Mediterraneo has very similar wordings of Article 16 of Danubian Arbitration Law. Clearly, both the domestic laws enshrine the 'Doctrine of Separability'. Thus, the reference in the choice of law clause directly preceding the arbitration clause that "this Sales Agreement is governed by the law of Mediterraneo" is merely determining the law applicable for the main contract, i.e. the "Sales" part of it. Hence it no manner it can be construed to be governing the arbitration agreement. The arbitration clause in this case is separable from the law governing the Sales aspect. On the other hand, if it not suitable to put forward the view that the CISG is not applicable to the Arbitration. The RESPONDENT intends to use the provisions of CISG to prove the same.

B3. Burden on the CLAIMANT preparing, drafting the contract to bear the risk

106) Contra Proferentem is an internationally well-known rule of interpretation and according to commentators it applies to CISG as well [Honnold; Magnus/Staudinger; Test Tubes Case (GER, 1995)]. The rule states that if the contract terms provided by one party are unclear, then, an interpretation against that party will be adopted [Schlechtriem/Schwenzer; Cysteine Case (CHN, 2000); Automobile Case (GER, 2008)]. Therefore, it places the burden on the party who prepared the communication or who drafted the contract, and he must bear the risk of its possible ambiguity (Schlechtriem/ Schwenzer/Schmidt-Kessel; Honnold). This assumes particular importance in international contracts as parties belong to different cultures, languages and business backgrounds. Further, Art. 8 (3) provides that negotiations between the parties should be taken into account while interpreting the contract terms (CISG-AC Opionion No. 13).

107) In the present case relying on the communication as mentioned in RESPONDENT's Exihibt R2 it can be said that the CLAIMANT was the one who redrafted the Arbitration Clause.

In the Exhibit the CLAIMANT has clearly mentioned that and expressly changed the place of arbitration. However the CLAIMANT remained silent with respect to the change in the arbitration agreement. To further support this argument the CLAIMANT has clearly stated in the email communication as mention in RESPONDENT's Exhibit R2 that "it would however, be possible to agree on arbitration in a neutral country". Furthermore looking into the Final Draft which has been authorised by both the parties. In other words, the RESPONDENT clearly refers to the "FROZEN SEMEN SALES AGREEMENT", wherein the exact same clause was finally drafted. Hence on the basis of the principle of 'Contra Proferentem', the RESPONDENT submits that the CLAIMANT must bear the risk and burden and the ambiguity with regard to the dispute of interpretation of the arbitration agreement as it was the CLAIMANT who finally drafted it. Furthermore the CLAIMANT has failed to add the choice of the application of the arbitration agreement. The RESPONDENT requests the Arbitral Tribunal to give effect to the principle of Contra Proferentem by adopting the interpretation against the CLAIMANT and to declare domestic law of Danubia as the governing law of the interpretation of the arbitration agreement.

B4. Any reasonable person in the shoes of the RESPONDENT would comprehend that there was no express or implied acceptance as to the arbitration agreement to be governed law of the contract

108) Implicit deviation can be construed based on the principle laid down in Article 8(2) of the CISG clearly gives reference to the term 'reasonable' person [Kroll/Mistellis/Perales]. Further, Art. 8 (3) provides that negotiations between the parties should be taken into account while interpreting the contract terms (CISG-AC Opionion No. 13). Hence it is on this test the conduct of the CLAIMANT can be interpreted from the point of a reasonable person in the shoes of the RESPONDENT [Honnold]. Given the term 'reasonable person' refers to a person with similar technical knowledge, linguistic background and having the same knowledge of dealing with the past negotiation and the conservations that took place between the contracting parties.

109) On this basis giving reference to the RESPONDENT exhibit R1 the RESPONDENT has clearly communicated its interest for the arbitration agreement which was governed by the law of the place of arbitration and not by the law of the contract. However subsequently in the RESPONDENT's Exhibit R2, the CLAIMANTs merely changed the place of the arbitration but however has not objected to the law of the arbitration. Hence, contrary to the CLAIMANT's contention that the arbitration clause and its interpretation are governed by the law of Mediterraneo. The RESPONDENT has never agreed to have the arbitration agreement governed

by the law of the contract. There is no express choice of such law in the arbitration clause nor is there any implied choice. It is submitted that it was only subsequently forgotten to include the provision in the final version and there was no deliberate intention in favour of the Law of Meritrranneo.

B5. The RESPONDENT has not acted in any manner which is neither inconsistent or misled the claimant

110) Contrary to the CLAIMANT's statement in the mentioned paragraph 90, wherein the RESPONDENT has clearly stated that the RESPONDENT has developed a strategy for making Phar Lap believe is incorrect. Furthermore the CLAIMANT's contention as to the RESPONDENT has acted inconsistently is incorrect. CISG enshrines the principles of 'good faith' in the interpretation of the Convention. Despite there being no specific or express provision which mandates that the individual contract has to obey the main of good faith, it is more specifically mentioned in the Article 1.7 of the UNDROIT principles. It clearly states that "Each party must act in accordance with good faith and fair dealing in international trade". In accordance to some Commentary despite difference in the two conventions with respect to good faith, some are of the view on a common ground that under CISG, the good faith principle also applies to the interpretation of the individual contract and to the party's contractual relationship as such. [Bianca/Bonell; Schlechtriem; Staudinger].

111) In the defense of the RESPONDENT, Mr. Shoemaker has clearly acted in 'good faith' on behalf of the RESPONDENT. Despite Mr. Shoemaker insisting on the importance on the shipment of the last 50 doses. Mr. Shoemaker has not made any inconsistent promise to the CLAIMANTs. Mr. Shoemaker has mentioned in his statement that he did not have the competent authority to adapt the price of the contract of sales. This is very clear in paragraph 91 of the CLAIMANT's contention that there was not any binding commitment.

B6. The duty to overcome the impediment is on the CLAIMANT

112) Contrary to the statement of the CLAIMANT as mentioned in paragraph 9, wherein the CLAIMANT has stated that 'RESPONDENT designed a strategy which the CLAIMANT could rely on the delivery of the last shipment'. The RESPONDENT finds this highly incorrect. It is clearly the obligor's duty to overcome means that the obligor which is faced with an impediment may be obliged to take reasonable steps to effect performance by alternative means or to find an

agreeable substitute. The obligor must generally overcome the effects of an impediment even if it would have to incur significant additional costs or to suffer a substantial loss. (Stoll/Gruber; Magnus, Staudinger; Brunner) In other words, some commentaries are of the opinion that if the obligator's duty to incur the additional cost in order to surmount or overcome the impediment, as if the additional cost are to be excessive is merely limited by the hardship standard.

C. CLAIMANT IS NOT ENTITLED TO THE ADDITIONAL PAYMENT CAUSED BY INCREASED TARIFFS UNDER THE UNIDROIT PRINCIPLES

C1. There is no Fundamental Alteration Justifying the invocation of the doctrine of Hardship under Art. 6.2.2 UNIDROIT Principles

113) While the UNIDROIT Principles are commonly cited as encapsulating lex mercatoria, its hardship provisions do not reflect a widespread domestic norm and hence are rarely applied as such, absent agreement of the parties.

114) Concepts of Hardship is also an expression of Rebus Sic Stantibus. The latter establishes a close relationship between the absence of a formal contract between the parties and the use of the lex mercatoria principle, according to which contractual services must remain balanced. In the same spirit, but in the opposite situation, the sentence here reported justifies its reluctance to use the principle "Rebus sic stantibus" by the fact that the intention of the parties had been "clearly expressed in a contract". [Derains, Yves]

115) As a predicate to legally relevant hardship there must have been the occurrence of events fundamentally altering the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished. "An alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a 'fundamental' alteration" justifying invocation of the doctrine [Joseph. M. Perillo]. The imposition of tariff does not become an" impediment which fundamentally alters the equilibrium of the contract since it is lesser than 50 percent.

116) Thus, in conclusion, RESPONDENT is not duty bound/entitled to bear the additional cost suffered due to the increase in tariff, as such has not been contemplated in the hardship clause nor in the CISG.

CONCLUSION

I. The Arbitral Tribunal cannot adapt the contract, as the law governing the arbitration agreement is the law of Danubia (Arbitral Seat's law), provides for stricter interpretation of the Contract.

II. CLAIMANT is not entitled to submit evidence from the other arbitration proceedings as it has been obtained by a breach of the confidentiality agreement or by way of an illegal hack of RESPONDENT's computer system, both of which makes the evidence illegal.

III. RESPONDENT is not bound to pay the cost of of US $ 1,250,000 under Clause 12 of the contract and under CISG.

PRAYERS FOR RELIEF

Counsel, on behalf of RESPONDENT, respectfully requests the Arbitral Tribunal:

1) To dismiss the claim as inadmissible for a lack of jurisdiction and powers;
2) To reject the claim for additional remuneration in the amount of US$ 1,250,000 as sought by the CLAIMANT
3) To order CLAIMANT to pay the cost incurred by the RESPONDENT in this arbitration.

Respectfully submitted,

Oceanside, 24 January 2019