SIXTEENTH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

UNIVERSITAS SEBELAS MARET

SURAKARTA, INDONESIA

Memorandum for Claimant

CLAIMANT	RESPONDENT
Phar Lap Allevamento	Black Beauty Equestrian
Rue Frankel 1	2 Seabiscuit Drive
Capital City	Oceanside
Mediterraneo	Equatoriana

Dini Kartika Salsabila • Gian William Sumule • Jesslyn Antonia Mirabel • Latasya Puan Nagari • Muhammad Irsyad Marwandy • Nadine Rayna Salsabila • Purkon Abdul Latip

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LIST OF ABBREVIATIONS

&	And
%	Percent
ACICA	Australian Centre for International Commercial Arbitration
Art.	Article
CAM	Milan Chamber of Arbitration
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
Cl.Ex.	Claimant Exhibit
DDP	Delivered Duty Paid
Et al.	*et alii* (and others)
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ibid.	*ibidem* (in the same place)
ICSID	International Centre of Investments Disputes
Ltd	Limited
NO.	Number
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 7 June 1959
P./Para	Page/Paragraph
PCE	The Principle of Europan Contract Law 2002
PICC	UNIDROIT Principle of International Commercial Contract Law 2010
PO.1/2	Procedural Order 1/2
Res.Ex.	Respondent Exhibit

UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration of 1985
UNGC	United Nations Global Compact
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principle	UNIDROIT Principles of International Commercial Contracts of 2004
US$	United States Dollar
V.	Versus [against]

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United Nations Convention on Contracts for the International Sale of Goods	United Nations Commision on International Trade Law 11 April 1980 Cited as CISG
UNIDROIT Principles of International Commercial Contracts 2004	International Institute for the Unification of Private Law 2004 Cited as UNIDROIT Principle

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STATEMENT OF FACTS

1. The parties of arbitration are Phar Lap Allevamento ("**CLAIMANT**") and Black Beauty Equestrian ("**RESPONDENT**").

2. CLAIMANT is a most renowned and oldest stud farm company which is a high-quality company that produces superior stallions and is undoubtedly superior in Capital City, Mediterraneo.

3. RESPONDENT is a breeding company which is famous for its broodmare lines in Oceanside, Equtoriana.

4. Both CLAIMANT and RESPONDENT ("**The PARTIES**") are companies that had been in cooperated since 2017 for sales of frozen semen. They began their cooperation because Black Beauty was interested in Nijinsky III's frozen semen due to Equatoriana situation of the ban on artificial insemination for racehorses that had been temporarily lifted.

21 March 2017 RESPONDENT reached CLAIMANT inquiring the availability of Ninjisky III for its newly breeding programme. Because Equatoriana government had imposed restrictions on transportation of animal due to foot and mouth diseases which already lasted for two years. As reaction, the ban on artificial insemination for racehorse had been temporarily lifted cause RESPONDENT was interested in frozen semen of Ninjisky III **[*Cl.Ex.C1*]**

24 March 2017 CLAIMANT offered RESPONDENT 100 doses of Ninjisky III's frozen semen by email. RESPONDENT had no problem with most terms except the choice of law, forum selection clause and insisted on delivery DDP. CLAIMANT accepted delivery DDP against a moderate price increase, the transfer of certain risks to RESPONDENT and the inclusion of a hardship clause. **[*Cl.Ex.C2*]**

28 March 2017 RESPONDENT sent email to CLAIMANT about their objected points in the CLAIMANT's email before. It concerned about price and delivery terms and the applicable law and dispute resolution**. [*Cl.Ex.C3*]**

31 March 2017 CLAIMANT sent email to RESPONDENT to confirm about their acceptance on delivery DDP by additional price US$1000/doses and ask for hardship clause to be added in the contract. **[*Cl.Ex.C4*]**

12 April 2017 There was an accident that made the negotiators (Ms.Napravnik and Mr.Antley) were injured. It made the finalization of the agreement took longer than had been planned. Hence, they had to be replaced for the final contract which was signed on 6 May 2017 by Mr.Ferguson and Mr.Krone**. [*Cl.Ex.C5,C8*]**

6 May 2017 The finalization of the contract signed by Mr.John ferguson (CLAIMANT's representatvie) and Mr.Julian Krone (RESPONDENT's representative). **[*Cl.Ex.C5*]**

18 May 2017 First installment payment by RESPONDENT (US$ 5000.000). **[*Cl.Ex.C5*]**

20 May 2017 The first shipment (25 doses). **[*Cl.Ex.C5*]**

3 October 2017 The second shipment (25 doses). **[*Cl.Ex.C5*]**

23 November 2017 The elected President of Mediterraneo (Mr.IanBouckaert) had announced an increasing of 25 per cent tariffs on agricultural product from Equatoriana. The new tariffs purposed to protect Mediteraneo's agricultural product which contained frozen semen. It had an impact to the last shipment (50 doses). Equatoriana government retaliatory imposed 30 per cent tarrifs on selected product from Mediterraneo. **[*Cl.Ex.C6*]**

20 January 2018 CLAIMANT sent email to RESPONDENT (Mr.Shoemaker) that they were just informed by customs authorities about the new tarrifs (30 %) that made the shipment more expensive. CLAIMANT asked for solution before the shipment (was supposed to go out on 22 January 2018). CLAIMANT

had unsuccessfully tried to call Mr. Shoemaker and left voice mail. CLAIMANT had put the shipment on hold but can still authorize it until 21 January 2018. **[*CL.EX.C7*]**

21 January 2018 The second (last) installment (US$ 5000.000) for frozen semen had been paid by RESPONDENT.**[*Cl.Ex.C5*]**

23 January 2018 The last shipment (50 doses) had delivered by CLAIMANT before an agreement on the new price had been reached. **[*Claimant's Fact No.13*]**

February 2018 Ms. Kayla Espinoza (RESPONDENT's CEO) fed up with additional requests from CLAIMANT which in her view had no basis in the contract. So she stopped the negotiation and refused to pay any additional amount for the tarrifs. It made CLAIMANT borne the additional tarrif by itself. **[*Cl.Ex.C8*]**

December 2018 The end of estimation of Equatorina's ban regulation and it might be permanent. [***Cl.Ex.C1***]

SUMMARY OF ARGUMENTS

ISSUE 1

1. This Arbitral Tribunal has jurisdiction in the present case to hear the dispute. Pursuant to the submitted contract between the CLAIMANT and RESPONDENT namely Frozen Semen Sales Agreement, it is provided regarding how the parties should resolve dispute arisen between them. Hong Kong International Arbitration Centre as institutional arbitration was determined by CLAIMANT and RESPONDENT. When initiating this Tribunal, it also reflect CLAIMANT good faith, while at the same time to promote uniformity in its application and the observance of good faith conducted in international trade as the interpretation of CISG.
2. Law of Mediterraneo, country home of CLAIMANT, governs the main contract between The PARTIES. Equally important, hence the arbitration clause and its interpretation shall be governed by the law of Mediterraneo, not by the law of Danubia as RESPONDENT alleges. Conclusively, this Tribunal shall resolve the present dispute between The PARTIES and any award rendered will be enforceable to the Parties and in particular has power to adapt the contract between The PARTIES.

ISSUE 2

3. CLAIMANT is entitled to submit evidence from the other arbitration proceedings because all proceedings in the arbitration must conform with the fundamental requirements of fairness and justice. Moreover, based on the assumptions that the evidence had not been obtained through a breach of confidentiality agreement thus CLAIMANT is admissible on submitting the relevant case and an award can be disclosed for some circumstances likewise get involved the third party.
4. There is no strong evidence to accuse CLAIMANT on doing illegal hack. Thus, The Arbitral Tribunal should order RESPONDENT to prove its assumptions to CLAIMANT on illegal-hacking RESPONDENT's Computer System. If RESPONDENT only based on baseless assumptions and allegations, it can be too speculative to provide a viable foundation to accuse CLAIMANT.

5. Even if this Arbitral Tribunal found that CLAIMANT indeed has done an illegal hack on RESPONDENT's Computer System, it is merely because RESPONDENT breached the resell agreement on the first place thus it can be called as counter action.

ISSUE III

6. RESPONDENT is required to pay the first initial fee, because CLAIMANT has carried out its duties by sending the first and second frozen semen and paying the tariff of 30%. The increase in tariffs was due to the efforts of the Mediterraneo government to carry out efforts to protect farmers. This has been stated in the contract in point 12, and is reaffirmed pursuant to Article 79 CISG, where the main reason for CLAIMANT to change prices is something that could not be controlled and predicted. RESPONDENT could not just terminate the contract because it is binding to the all parties involved. On the principle of law of pacta sun servada, an agreement could not be terminate by either party if a party does not get the benefit.
7. Reliance to the Art. 79 is possible for CLAIMANT due to its circumstances including impediment as the fundamental of hardship, either possible to be exempted under its Art. Finally, RESPONDENT's avoidence his promisses obligation caused CLAIMANT's losses, regarding to the additional cost to support the Final Shipment. CLAIMANT requested the Tribunal to award CLAIMANT under its losses, RESPONDENT has to bear due to its circumstances beyond CLAIMANT control. Regardless, RESPONDENT should be allowed to entitled the payment in good faith. Accordingly, the Tribunal should require RESPONDENT to adapt the contract in order to bear CLAIMANT losses.

ARGUMENTS

I. THE TRIBUNAL HAS THE JURISDICTION IN THE PRESENT CASE

1. The Parties had been agreed for the Frozen Semen Sales Agreement("Contract")[*Cl.Ex.C5*] CLAIMANT agreed to provide RESPONDENT as buyer with 100 doses from the stallion of Nijinsky III. Ninjinsky III is one of the most successful racehorses.Pursuant to Article of 15 of the Contract regarding the dispute resolution ("Arbitration Clause") ,the parties agreed to have their disputes decided by Hong Kong International Arbitration Centre (HKIAC)[*CL.Ex.C5*].
2. RESPONDENT had agreed that the installment of the Goods will divided into three shipments. First shipment of 25 doses on 20 May 2017 ; second shipment of 25 doses on 3 October 2017. However, there was a increases tariff with amount 25 per cent on agricultural products from Equatoriana, , including the Nijinsky III's semen which are the goods in the Contract.
3. CLAIMANT agreed to establish negotiation first regarding a price adjustment for the goods with RESPONDENT [*Cl.ExC7*], where RESPONDENT had accepted the need for a price increase [*Cl.Ex.8*]
4. Presently. RESPONDENT has concluded that this Tribunal lacks jurisdiction to decide the case [*Answer to notice of Arbitration*] whereas the claim does not merely to order RESPONDENT a payment on the basis of interpretation of the contract but actually for its adaptation. [*Records, p. 31 para 12*].
5. RESPONDENT'S refusal on this Tribunal jurisdiction is inadmissible as the parties has agreed with the Arbitration Clause and that the present case is involve a question of the arbitration agreement of the Contract [*HKIAC Rules 2018 Art 19.4 Sec. b*]
6. Therefore, the tribunal has jurisdiction over the present case and should be remain implemented. Moreover, since the agreement between Parties was refer dispute should be resolved by arbitration administered by HKIAC under its Rules, therefore it can be concluded that the Parties hence rely on the practice of HKIAC.

A. PARTIES AGREED ON INSTITUTIONAL ARBITRATION ADMINISTERED BY HKIAC AND UNDER ITS RULES

i. HKIAC as Institutional Arbitration was determined by the Parties to solve their disputes.

7. The choice of the parties to have a dispute administered by institutional arbitration which mentioned in arbitration clause is an expressed will of the parties hence will created the set of rules. [*Kaufmann-Kohler, p. 10*]. This tribunal shall have the power to determine the existence or validity of any contract of which an arbitration agreement forms a part[*HKIAC Rules 2018 Art19.2*].
8. Furthermore, it is not a requirement to mention the institution itself, since in conformity with most arbitration institution's general standards which their model clauses always determine only the rules of the institution, not the institution itself [*ICC Arbitration clause]*.
9. In subsequent, this arbitral tribunal enjoys the freedom to choose its own methods of interpretation and able to render an award in accordance with the rules it considers appropriate, or it can apply conflict of law rules, when it deems necessary, to reach its conclusion [*D.Jones*]
10. As stated in the present case, that Notice of Arbitration dated 31 July 2018 [*Records page 8 p.20*]by CLAIMANT is consistent pursuant to Article 4 HKIAC Rules 2018, Answer to Notice of Arbitration dated 24 August 2018 [*Records page 32 p.22*] by RESPONDENT is consistent pursuant to Article 5 HKIAC Rules 2018 , has emphasized this Tribunal jurisdiction to continue the present case.

ii. The Proceedings are held in accordance with HKIAC Rules 2018

11. When this Tribunal invited the Parties to have a Telephone Conference on 4 October 2018 [*Records,page 48*] regarding the conduct of the proceedings, it is resulted that the Parties Agreed to conduct the proceedings on the basis of the newest version of HKIAC namely HKIAC Rules 2018 which has come entered into force in November 2018
12. HKIAC Rules 2013 itself empowered to amend its rules by the new ones. For instance, its acknowledged also by few institutional arbitration to provide applicability of the recent provision in its proceedings exercised after the period when the new version entered into force [*Wiggers, p. 17, Art. 6a(1) ICC Arbitration Rules, Art R-1 AAA Commercial Rules,]*
13. This situation is also can be found in the Chamber of Arbitration of Milan [*Cam*] The Cam Rules 2010, which previously is Cam Rules 2004, are generally applicable on the arbitration proceedings [*Art. 43(3) CAM Rules 2004, Art. 39(1) CAM Rules 2010*]. The Cam Rules 2004 still regulate the

issue of confidentiality as the Art. 8 CAM Rules 2010 establishing this duty between the Parties in respective arbitration proceeding.

14. Therefore the HKIAC Rules 2018 is applicable on this proceeding since its already entered into force and applicable in the present case , hence obtain its jurisdiction even its has been changed from HKIAC Rules 2013.

iii. The Tribunal was constituted in accordance with the Parties agreement

15. Danubia as the seat of arbitration has adopted the UNCITRAL Model Law [*PO page 52*]. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement [*UNCITRAL Model Law Art 16 (1)*]
16. Since this tribunal is in accordance with the agreement of the parties, hence will be able to render an enforceable awards [*NY Conv. Art. V(1)(d); UNCITRAL Model Law Art. 34(2)(a)(iv); Poznanski at p. 87]*. By the reason the parties has expressed their consent to be bound with the HKIAC as the institutional arbitral rules, the institution itself eventually controls whether any party-appointed arbitrator will subsequently be confirmed *[Lew/Mistellis/Kröll at p. 237; Redfern/Hunter at p. 251; Born at p. 1387]*
17. This also in conformity with Kompetenz-Kompetenz Principle [*W. Park*] which has been recognized by the main international convention on arbitration, where the arbitral tribunal has authority to decide its own jurisdiction [*Varady, p.12*]

B. CLAIMANT FULFILLED IN GOOD FAITH IN OF THEIR CONTRACTUAL OBLIGATION

i. The Purpose Of The Agreement's Arbitration Clause And The HKIAC Rules

18. The interpretation of CISG itself should to the need to promote uniformity in its application and the observance of good faith conducted in international trade [*CISG Article 7 Section 1*]. The arbitration clause of the Contract has been also conducted by CLAIMANT as an example of the good faith to settle the dispute arisen with RESPONDENT.
19. This also reflects the Article 1.2 HKIAC Rules with the arbitration clause where the parties accept that the arbitration shall be administered by HKIAC. [*Article 1.2 HKIAC Rules*]

20. A party might argue that the CISG does not stipulate the Parties willing shall in accordance with the principle of good faith, yet the UNIDROIT Principles are still applicable as provided in the arguments.
21. Referring to Article 7(1) UNIDROIT Principles provided that " Each party must act in accordance with good faith and fair dealing in international trade [*Article 1(7) UNIDROIT Principle]*
22. A broad interpretation should be given in order that it is addressed to the Parties and each individual contract of sale as well as to the CISG itself and also to support the main goal of CISG [*Povrzenic ¶ 36]*

ii. Respondent Objection As To The Jurisdiction Of This Tribunal Is Not Admissible Because Respondent Must Fulfill The Duty Of Loyalty And Good Faith Principle Under The Contract

23. In this regards, it further will be reflected regarding RESPONDENT'S objection to this Tribunal's jurisdiction which in particular violated RESPONDENT'S obligation of loyalty towards CLAIMANT and not in conformity with the principle of Good Faith and fair dealing in contractual relationships.
24. In preparing to arrange the contract, a long-term commercial relationship was eventually entered by the PARTIES. Moreover, it has been recognized in international level that such a relation imposes a common obligation of loyalty between the parties whom involved as founded on the long-standing commercial principles of good faith and fair dealings.
25. In the same way, this principle has been reflected in the CISG which is not directly applicable, however sets out a standards to guiding the parties conduct [*Secretariat Commentary, O.R., Art 7, p 408]*
26. In addition, this principle should be applied rather strictly to a party challenging an arbitral tribunal's Jurisdiction for lack of the other party's compliance. [*Boog pp 109-110*]. Hence, it also can be applied in RESPONDENT allegation [*Records, para12 page 31*].
27. Presently,in the preparing the final shipements of 50 doses of frozen semen from Nijinsky III to RESPONDEN, CLAIMANT was informed by the customs authorities that the newly price imposed tarriffs of 30% on agrricultural prouduct,frozen semen included.[*Cl.Ex.7*].RESPODENT promise that a solution would be found[*Cl.Ex.8*], however

Kayla Espinoza,RESPONDENT's CEO,got very angry to CLAIMANT about additional payments requets from CLAIMANT[*Cl.Ex.8*].

28. As presented above, it can be concluded that there was no any effort from RESPONDENT to settle the dispute in timely manner.
29. Conclusively, the RESPONDENT'S objection regarding this tribunal lacks jurisdiction is inadmissible because it was not raised in timely manner. Further, RESPONDENT against the duty of loyalty and the good faith to CLAIMANT.

iii. Respondent's Objection As To The Jurisdiction Of The Tribunal Is Not Admissible Because Respondent Has Waived Its Right To Object To The Composition Of The Tribunal

30. It is essential that the deadlines are strictly respected in order to assure the efficiency of the arbitral procedure.
31. HKIAC Rules also provided regarding the challenge of the Arbitral Tribunal
32. Pursuant to Article 11.7 of HKIAC Rules which states that the parties may challenge an arbitrator shall send notice of its challenge within 15 days after the confirmation or appointment of that arbitrator has been communicated to the challenging party or within 15 days after that party became aware of the circumstances mentioned in Article 11.6 of HKIAC Rules. No notice of challenge is provided by RESPONDENT in this matter.
33. This regulation also has been recognized in few institutional arbitration. For instance, In CAM rules, pursuant to Article 18 (3) of CAM Rules, which states that the parties may file written comments concerning the appointment of an arbitrator within 10 days from receipt of the statement of independence of an arbitrator. If the opposing party fails to do so, it thereby waives its right to object the composition of the Tribunal [*Panamanian case; Redfern/Hunter,N4-76, 77*].
34. Conclusively, RESPONDENT has waived its right to object the composition of this Tribunal, hence the jurisdiction still applies.

C. THE PARTIES HAVE SUBMITTED THE CONTRACT TO THE LAW OF MEDITERRANEO WHICH CONSEQUENTLY GOVERNS THE INTERPRETATION OF THE ARBITRATION AGREEMENT

i. This Tribunal Has Power To Adapt The Contract Under The Arbitration Agreement

35. Principle of Adaptation of the Contract is one of the principles in private international law. This principle recognized that such a contract must be adapted to the alteration circumstances if the performance of relevant obligations cannot be awarded by party due to unforeseen situations that cause hardship. Presently, there were no any solution has been meet between the Parties, which lead that this tribunal should adapt the contract.[*Records page 7. P.16*]
36. During in the first discussion of the adaptation clause RESPONDENT's Mr. Antley had explicitly stated to CLAIMANT's Ms. Napravnik that the arbitrators should adapt the contract in case the Parties should not be able to reach a solution [*Cl.Ex.C8*]
37. The possibility of contract adaptation in circumstances of hardship is a relatively main solution among domestic legal systems. [*Abdulkadir Guzeloglu*]
38. For instance in Turkish Code of Obligations. Pursuant to Article 138 of the Turkish Code of Obligations [*TCO*] regulate the adaption of the contract. In the hardship. Preamble published by the Legislator for the Article 138 of the TCO explain how the obliteration of the basis of the transaction shall be evaluated. As such statement, the subject matter shall be evaluated by the principle of the good-faith in order to detect whether the basis of the transaction has collapsed or not.[*Ibid*]
39. As presented above, CLAIMANT submit that this tribunal has power to adapt the contract due the circumstances occurred between the Parties.

ii. The Arbitration Agreement Govern By The Law Of The Contract.

a. Law of Mediterraneo Governs the Main Contract

40. CLAIMANT submits this Tribunal that the law of Mediterraneo is applicable in the present case. Pursuant to *Den Hague Conference*, if the standard forms of each party contain a choice of law clause, but those clauses designate different laws, resolution of the conflict is challenging in as much as those laws may resolve the battle of the forms in different ways [*De Hague Conference Art.6.12.*].

41. RESPONDENT cannot argue that the Law of Danubia shall govern the main contract because in the final contract itself it is stated that the Law of Mediterraneo is the one which govern the contract [*Cl.14 Ex.5*]
42. This arbitral tribunal is aided by the fact that it has the power to decide which law are applicable to the merits and also which law are applicable to its jurisdiction to hear the dispute [*Determination of Jurisdiction J Lew, LMistelis, Comparative Commercial Arbitration 2003 at pp 329*]
43. In the present case, it is known that there were a car accident between the prior negotiator, namely Ms. Julie Napravnik as the representative from CLAIMANT and RESPONDENT was represented by Mr. Chris Antley [*Cl.Ex.C5, p.13*] which lead to their replacement of the new negotiator namely Mr. John Ferguson and Mr. Julian Krone, both coming from CLAIMANT and RESPONDENT, and represent each side in a sequence.[*Res.Ex.R.3, p.35*]
44. RESPONDENT has proposed that the seat of arbitration shall be in Equatoriana, which is the home country of RESPONDENT, and also in particular that the law of this arbitration clause shall be the law of Equatoriana [*Res.Ex.R1*]. However, CLAIMANT only agreed that the place of arbitration will be in Danubia as a neutral country [*Resp.Ex.R2*]
45. The arbitration clause and its interpretation are governed by the law of Mediterraneo, and not as RESPONDENT alleges, by the law of Danubia [*Records, page 7 para 15*]
46. Thus, the PARTIES have submitted the contract after long discussion to the law of Mediterraneo which consequently also governs the interpretation of the arbitration agreement contained therein [*Records, page 7 para 16*]
47. As an instance, pursuant to Article 19 UNCITRAL Model Law provides that '[s]ubject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Further, the parties may choose to have oral hearings or a 'documents only' arbitration,[*Article 19 UNCITRAL Model Law*] and include their own rules regarding the use of experts.[*Article 26 UNCITRAL Model Law*]The parties are also given the freedom to determine the language of the proceedings, the law governing the substance of the dispute[*Article 28 UNCITRAL Model Law*] , the appointment procedure and the place of arbitration. [*Article 20 UNCITRAL Model Law]*
48. Hence, it can be reflected that the Law of Mediterraneo governs the Main Contract since it is written in the Contract.

b. The Arbitral Tribunal Shall Decide As *Amiable Compesiteur*.

49. Thisarbitral tribunal shall decide as *amiable compesiteur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so.[*Art.35 UNCITRAL Model Law*]. As presented above that the law of Mediterraneo governs the main contract[*Cl.14 Ex.5*] hence it has jurisdiction to this arbitral tribunal because only the chosen one law designed in the contract [*De Hague Conference Art.6.12*].

50. In fact that the RESPONDENT has agreed that the arbitrator shall adapt the contract in case the PARTIES not able to reach such a solution [*Records para 16 page*].

51. Additionally, RESPONDENT has not provide any express statement to CLAIMANT regarding this matter, it can be concluded thatno objection for the establishment of the Tribunal was raised.[*ibid*]

52. The present dispute itself is based on the contract where the party has agreed to conduct the arbitration in Vindobona, Danubia [*Cl.Ex.5*]. Furthermore, it also reflected that the Danubian Arbitration Law is relevant and appropriate only as the *Lex Arbitri,* not to govern the main contract.

D. IN ANY CASE, AWARD RENDERED BY THIS TRIBUNAL WILL BE ENFORCEABLE

53. The New York Convention is the basis for this Tribunal for render the Award since the proceeding itself were in conformity with the Parties agreement.

54. Pursuant to Article V(I)(d) of New York Convention where it is stated that the arbitral procedure must be consistent with the agreement of the parties (*NY Convention Article V (1)(d*)). Furthermore, this Tribunal is also given wide discretion in how it executes these procedures. [*Jan van den Berg, p. 323*].

55. CLAIMANT also consider that an additional advantage also will be achieved by Parties if should the parties reach a settlement prior or during this proceeding. For instance, pursuant to Art 35.1 ACICA Rules [*Australian Centre for International Commercial Arbitration*]and

Art.30 of UNCITRAL Model Law has explained and shown that the Tribunal is able to record the settlement in the form of an arbitral award on agreed terms.

56. Such an award would also be practicable under the New York Convention. Whereas an agreement reached in conciliation would only have the legal nature of a contractual obligation, meaning that such agreement is not directly enforceable but has to be fully litigated as a contractual claim [*Bühring-Uhle/Kirchhoff/Scherer2*, p 235; *Dore*, p 4].
57. Alternatively , this Tribunal has the jurisdiction over the present case hence any award rendered will be enforceable to the Parties, and may record its settlement agreement if reached by the Parties

CONCLUSION ON ISSUE 1

58. For all the arguments provided above. CLAIMANT respectfully submit that this Arbitral Tribunal has its jurisdiction over the present case. The Parties has agreed on their Contract that dispute will be resolved by an arbitration proceeding with HKIAC as its institutional arbitration. Further, this Arbitral Tribunal also has power to adapt the Contract under the Arbitration Agremeent , where the Contract have been submitted to the Law of Meditteraneo and consequently governs the interpretation of the Arbitration Agreement. Conclusively, any award renderen by this Arbitral Tribunal will be enforcable under the New York Convention

II. CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM OTHER ARBITRATION PROCEEDINGS ON THE BASIS OF THE ASSUMPTIONS THAT THE EVIDENCE HAD NOT BEEN OBTAINED THROUGH A BREACH OF CONFIDENTIALITY AGREEMENT ; MOREOVER THERE IS NO PROOF ON ILLEGAL HACK MATTERS

59. CLAIMANT has a right to submit evidence thus did not breach its confidentiality **(A)**. Moreover RESPONDENT did not have any proof if CLAIMANT did illegal-hacking to the RESPONDENT's Computer System **(B).**

A. CLAIMANT HAS A RIGHT TO SUBMIT EVIDENCE, THUS DID NOT BREACH ITS CONFIDENTIALITY

i. All Proceedings in An Arbitration must conform with The Fundamental Requirements of Fairness and Justice

60. There are principles to indicate all proceedings of the parties should treat the parties involved equal treatment *[Art.18 UNCITRAL Model Law]*. An Arbitration Proceedings must treat all parties fairly regardless of gender, ethnicity, disability, sexuality, age, religious affiliation, socio-economic background, size or nature of family, literacy level or any other such characteristic. Paternalistic or patronising attitudes have no place in the arbitration. The core guarantees of procedural due process comprise the arbitrator's duty to treat the parties equally, fairly and impartially, and to ensure that each party has an opportunity to present its case and deal with that of its opponent. *[Procedural Fairness and Efficiency in International Arbitration,p. 112, Para. 2]* Here every Parties are entitled to protect their legal rights.

ii. CLAIMANT is entitled to submit Documents which are relevant with the present case as evidence

61. The IBA Rules for Taking of Evidence in International Evidence ("IBA Rules") is an international soft law instrument intended to provide parties and arbitrators with an efficient, economical, and fair process for the taking of evidence in international arbitration *[IBA Rules, Foreword]*. "Evidence" includes the presentations of documents, witness of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings *[Ibid]*. Art 3 (3) of the IBA Rules explicitly contemplates that Parties are allowed to disclose the Documents which are relevant to the case and material to the outcome.

62. CLAIMANT is admissible to submit the evidence from the other arbitration because the award can be disclosed for some circumstances pursuant to Article 45.3 HKIAC 2018, it said that Article 45.1 does not prevent the publication, disclosure or communication of information referred to in Article 45.1 by a party or party representative to protect or pursue a legal right. And, the disclosure can be happened for some exception too especially for the relevant submission. For example, an exception may be invoked where a party wishes to disclose an award obtained in a previous arbitration so as to raise the res judicata ("a matter

already judged") argument in subsequent judicial proceedings. Therefore, CLAIMANT is entitled to submit the award as evidence to pursue its legal right and it has a relevant submission to the present case.

iii. On the contrary, an award may be published for particular circumstances and the Party can get involved as the Third Party

63. On Article 7 UNCITRAL of Transparency stated if confidential and protected infromations shall not be made available to the public pursuant. This general provision does not expressly prohibition to the Parties from revealing information on the mere existence of the arbitration as Respondent indicates. [*Art.7 UNCITRAL Model Law*]

64. And it is strengthened with Article 17 F point 2 of UNCITRAL Model Law that explained if the party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply. It said that the arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted. Hence, it can be concluded that CLAIMANT can provide the evidence by the third party or the submission by them to the arbitral tribunal. [*Art.17 F UNICTRAL Model Law*]

65. Confidentiality may be broken through several particular exceptions**.** Confidentiality could be broken where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party. Although this exception has been held only to disclosure of an award, the principle is understood to cover every action of the party in arbitral proceedings. [*Ali Shipping Case,p.11*]. Consequently, diclosure of a previous award by CLAIMANT must be included in these exceptions as well to protect the legitimations of the CLAIMANT.

66. Hence, an arbitration award may be published for the urgency of evidentiary whether in its entirety or in the form of excerpts or a summary, only under following conditions; a request for publication is addressed to HKIAC, all references to the parties' names are deleted,and no party objects to such publication within the time limit fixed for that purpose by HKIAC. In the case of an objection, the award shall not be published. *[Art. 42.5 HKIAC Rules 2013]*

67. In this case CLAIMANT brought out a Third Party from other arbitration to join the proceedings as the proceedings have also been conducted under the HKIAC-Rules.[*Cl. Letter Oct. 2,Para. 3*]. When and to the extent that disclosure is reasonably necessary for the esabilishment or protection of a party's legal right *vis-a-vis* a third party or to defend a claim brought by the third party. [*Prof. Sundra Rajoo*]
68. In order that, the entitlement of other arbitration to submit evidence by CLAIMANT is not breaching the confidentiality agreement. Moreover, the disclosure of previous arbitration award by the CLAIMANT must be covered as exceptional because it is meant for the esabilishment or protection of a party's legal right.

B. RESPONDENT DID NOT HAVE ANY PROOF IF CLAIMANT DID ILLEGAL-HACKING TO THE RESPONDENT'S COMPUTER SYSTEM

i. This Arbitral Tribunal should order RESPONDENT to prove its assumptions to CLAIMANT on illegal-hacking matters

69. RESPONDENT has a baseless assumption to CLAIMANT on illegal-hacking matters. Because RESPONDENT had used an outdated firewall to protect its computer system which had made it easy for the hackers to enter the system.[*PO 2,P. 61,Para. 42*]. Then, they could not give a specific evidence for this problem. Conclusively, if RESPONDENT still has an assumption to CLAIMANT, This Arbitral Tribunal should order RESPONDENT to prove its assumption and get the evidence rather than only a baseless assumption.

ii. RESPONDENT has baseless assumptions and allegations to accuse CLAIMANT

70. Undoubtedly, RESPONDENT can not provide the arguments only based on certain assumptions without any credible evidence or basis. Any one who claims to have any right or who refers to a fact to support such right, or who objects to another party's right, shall prove the existence of such right, or such fact. *[Indonesian Civil Code,Art. 1865]*. Considering it is only an assumption, it can be too speculative to provide a viable foundation.
71. We may say an assumption is not a real evidence—or at least, it is only an evidence which is extremely tenuous. The Arbitral Tribunal shall determine the weight of the evidence *[Art.*

22.2, HKIAC 2013], specifically the weight of a BASELESS assumption as an evidence which is accused by the RESPONDENT. Exhibits and evidences which have any relevants with the case and material to its outcome are required for the Arbitral Tribunal during the Arbitration.

72. Consequently, since RESPONDENT does not have any strong evidence for their assumptions on illegal-hacking of its computer system done by the CLAIMANT, we can conclude that the assumption is unacceptable and can not be accounted for since there is no fundamental basis.

iii. On the contrary, even if this Arbitral Tribunal found that CLAIMANT has done an illegal hack on RESPONDENT's Computer System, it is merely because RESPONDENT breached the resell agreement in the first place.

73. CLAIMANT has already told RESPONDENT not to resell to the third parties without any CLAIMANT's express writing consent. [*Cl. Ex. C2,P. 10,Para. 3*] After this statement, RESPONDENT did not give any responds on CLAIMANT's provision about resell. Hence, it can be concluded that RESPONDENT is considered to know and realize but merely does not give any responds. Consequently, RESPONDENT should continue to carry out the will of the CLAIMANT even though this requirement is not included in the contract.
74. Furthermore, RESPONDENT had been proved for reselling the frozen semen to the other breeders. CLAIMANT found it when RESPONDENT were approached on 2 February 2018 by another breeders from Equatoriana which was enquiring about the prices of frozen semen from another stallion. During the conversation he told Claimant that he had been very happy with the Nijinski III semen which he had bought from Respondent for US$.120,000 [*PO 2, p.57, NO.20*]. Therefore, as the result of RESPONDENT's action due to breach of resell agreement in the first place. CLAIMANT is entitled to give any counter due to the RESPONDENT's action which is in this case CLAIMANT has done an ille gal-hacking. This kind of counter action also shown before in the increasing of the tariff that had been imposed by CLAIMANT's President then got the retaliatory action by RESPONDENT's State [*Cl.Ex.C6*].
75. For this reason, the counter action should be admissible by the arbitral tribunal reflected to the tariff's retaliation happened between The PARTIES.

CONCLUSION OF ISSUE 2

76. CLAIMANT has right to submit the evidence since they did not breach the confidentiality by a fundamental requirement of fariness and justice and relevant case of the award to the present case thus it can be disclose for some circumstances. Then, RESPONDENT did not have any proof to accuse CLAIMANT on illegal-hacking matters since RESPONDENT only has baseless assumption of it. Even if CLAIMANT did illegal-hacking, it happened as counter action to the RESPONDENT for reselling without express written consent from CLAIMANT.

III. CLAIMANT IS ENTITLED TO ORDER THE PAYMENT OF US$ 1,250,000 OR ANY OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE

77. Claims that a change in the financial aspects of a contract should exempt a breaching party from liability for damages have also appeared repeatedly in the available decisions. This tribunal should determine that CLAIMANT entitled to order the payment from RESPONDENT [*Cl. Ex. C5*].
78. Based on clause 12 of the contract, "The seller is not responsible for the delivery of semen lost or late in delivery that is not under the seller's control such as missed flights, weather delays, failure of third party services, or God's actions not due to difficulties, additional safety or comparable unexpected events that make the contract more burdensome." [*Ibid*]
79. This shows that if there is a delay in shipping or losing the frozen semen, CLAIMANT as the seller did not have to be responsible for it. If RESPONDENT requests CLAIMANT to bear these costs, RESPONDENT is deemed to have failed to performed under clause 12. In addition, based on CISG Art.79 which essentially stated that a party is not liable for a failure to perform any of its obligations if it proves that the failure was due to the impediment beyond its control. [*Art. 79, CISG*] CLAIMANT and RESPONDENT have agreed regarding this matter, hence CLAIMANT remains entitled to pay as much as US$ 1,250,000.

A. CLAIMANT has right for an adaptation of the Contract under the Clause 12 of the Contract or under Article 79 CISG

80. The arbitration proceeds on the assumption that CLAIMANT is exempted under Art. 79 of CISG that clause 12 is including to the hardship clause which related the bearing all the risks of additional cost and increasing imuneration due to regard the final shipment of the frozen semen. Since the Contract has been concluded by the Parties, therefore RESPONDENT should enter the Contract (i); Moreover, RESPONDENT failed to delivered Art. 79 CISG related to all the risks associated with the increasing imuneration and additional cost under the contract (ii), either related that CLAIMANT's reliance on Art. 79 of CISG is possible concerning exemption due to its impediment (iii).

i. Since the Contract has been concluded by the Parties, therefore RESPONDENT should enter the Contract.

81. UNIDROIT Article 6.2.1 emphasize about *pacta sunt servanda*, where this principle means that any decision made between the two parties in an agreement, then the decision is binding on all the parties involved in it [*UNIDROIT Art. 6.2.1*]. The purpose of this Article is to make it clear that as a consequence of the general principle of the binding character of the contract. So that a contract cannot be canceled if one party feels that the contract does not provide any benefits [*UNIDROIT Art. 6.2.1*].
82. Based In Art. 81 CISG stated, "A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently". Build upon the article, because CLAIMANT and RESPONDENT has carried out the buying and selling process that was planned early (first delivery and second delivery).
83. With the tariff already paid by the CLAIMANT [*Cl. Ex. C8*], then RESPONDENT cannot terminate the contract, or RESPONDENT must pay for the restitution [*Art. 81 (2) CISG*].
84. For instance, if party A has carried out at least part of the contents of the contract, party B cannot terminate the contract. Party A can also demand restitution from party B in accordance with the contract that has been approved [*Ibid*]. By interpreting the Article and relating it to the fact that CLAIMANT has carried out the contract by paying a tariff of 30% and sending

frozen semen the first and second stages [*Record, p. 6 para. 9*], RESPONDENT cannot cancel the contract.

85. Based on contract 12, "Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flight, weather delays, failure of third party service, or acts of God neither for hardship…" [*Cl. Ex. C5*]. From this contract, it can be interpreted as if there's any lost semen shipments, delays in delivery, or occurrence beyond CLAIMANT'S control, CLAIMANT is not liable for it.
86. Within this contract, CLAIMANT did not have the entitled to pay US$ 1,250,000 because it is beyond of the CLAIMANT'S control. The 25% tariff was increased from the government. CLAIMANT did not have the authorities for the regulation and the increase tariff cannot be predictable. CLAIMANT had paid 30% of the Equatorian's tariffs [*Record, p.18*] but RESPONDENT had not paid 25% of the Mediterraneo's tariffs, CLAIMANT had loss 25% due to the imposition of the new tariff by the Equatorian authorities [*Record, p.7, no.18*]. Hence, RESPONDENT should compensate CLAIMANT's loss.
87. CLAIMANT entitled to order to pay amount $1,250,000 because CLAIMANT has been performed to contract that CLAIMANT have been paid the 30% in the tariffs of frozen semen delivery. Reliance on RESPONDENT promise that a solution would be found and that they were interested in a long-term relationship [*Cl. Ex. C8*]. Ms. Kayla Espizona, RESPONDENT's CEO, She was fed up with the permanent additional request from CLAIMANT. She stopped the negotiations and refused to pay additional payment [*Ibid*]. No longer interested negotiations from RESPONDENT to CLAIMANT [*Ibid*]. CLAIMANT entitled because termination does not affect to provision in the contract [*Art.7.3.6 para 3*] and in the contract, RESPONDENT who responsible to hardship clause [*Cl. Ex. C5*].
88. Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination [*Art.7.3.6 para. 3 CISG; Art.74 CISG; Clout Case*].
89. The principle of the binding character of the contract is not however an absolute one. When supervening circumstances are such that they lead to a fundamental alteration of the equilibrium of the contract, they create an exceptional situation referred to in the Principles as "hardship" [*UNIDROIT Art. 6.2.1*], and what happen to CLAIMANT is a supervening circumstances.

90. According to adaptation clause, RESPONDENT should already knew that CLAIMANT has made all the risks associated with the agreed change of delivery terms and conditions insisted on the inclusion of the adaptation clause.
91. The general principle is that a change in circumstances does not affect the obligation to perform (*see Article 6.2.1*), it follows that hardship may not be invoked unless the alteration of the equilibrium of the contract is fundamental. [*UNIDROIT Art. 6.2.2*]
92. Furthermore, based on the contract Seller shall not be responsible for lost semen shipment or delay in delivery not within the control of the Seller such missed flights, weather delays, failure of third party service, or acts of God neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous [*Cl. Ex. C5*]. Clause 12 of the contract is consist mechanism of the hardship. Considered the clause 12 that any circumstances which beyond control of the seller which mean CLAIMANT, is including the impediment.
93. As a seller and buyer, the parties add an adaptation clause, because CLAIMANT has made all the risks associated with the agreed upon changes in delivery terms and conditions insisted on the inclusion of the adaptation clause [*Ibid*]. RESPONDENT has also agreed. A party is not allowed to carry out its obligations if the party can prove that the failure that occurred earlier was caused by a reasonable expectation to be taken or not [*Art. 79 CISG*]. From the article, it can be seen that a party is declared free of its responsibilities if it has fulfilled several predetermined conditions, namely: if the following requirements are fulfilled: the party's non-performance is "due to an impediment"; the impediment was "beyond his control"; the impediment "; the party could not reasonably have "avoided" the impediment; and the party could not reasonably have "overcome" the impediment "or its consequences". However, what CLAIMANT did by adjusting prices had a strong background.
94. RESPONDENT has failed to interpreted clause 12 of the contract. RESPONDENT demanded that CLAIMANT should bear all of the risks, but in the contract it said that RESPONDENT should bear all of the risks. According to Principle of International Commercial Contract, “the risk of the events was not assumed by the disadvantage party” [*PICC, 2010, Art 6.2.3*]. It means that the increase of the tariffs and the US$ 1,250,000 were not assumed by CLAIMANT, it is supposed to be assumed by RESPONDENT.

95. If RESPONDENT did not want to bear all of the risks associated with the cost, RESPONDENT is excessively benefited or unfair advantage with the CLAIMANT due to RESPONDENT had already received the final shipment of semen. Based on the Principles of European Contract Law, CLAIMANT may avoid the contract due to economic distress and urgent needs [*PECL, 2002, Art 4:109*]. In this case, CLAIMANT urgently need RESPONDENT to compensate CLAIMANT's loss by reason of CLAIMANT was encountered a bankrupt.
96. CLAIMANT may order to pay US$1,250,000 by the reason that RESPONDENT has taken an advantage from CLAIMANT. RESPONDENT has taken excessive benefits from CLAIMANT. RESPONDENT already obtained 30% of the tariffs and the frozen semen but RESPONDENT did not want to pay 25% of CLAIMANT'S tariffs. Due to the Principles of European Contract Law, RESPONDENT has grossly unfair or has been taken an excessive benefits from CLAIMANT [*PECL, 2002, Art. 4:109*].
97. While Mr. Bouckaert had made clear that he wanted to protect the Mediterranean agricultural sector, because they were badly treated in other markets and advocation limiting the access of foreign agricultural products to the Mediterranean market [*Record p. 6 para. 9*] because the farmers of Mediterraneo were badly treated in other markets and advocation limiting the access of foreign agricultural products to the Mediterranean market. [*PO2, p. 58, para 23*].
98. Previously, Mediterraneo had not taken any protection measures to the farmers by tariffs on foreign agricultural products of a comparable size, but nowadays, by reflecting on the countries that have implemented regulations for their farms, Mediterraneo has not been able to protect them. Also, with the implementation of the tariffs, it can improve the quality of the farmers. [*Ibid*].
99. RESPONDENT have asserted if that any decrease in the value of the goods being sold should be exempted from damages for refusing to take delivery of and pay for the goods [*Ibid*]. The implementation of the tariff, it can improve the quality of farmer protection in Mediterraneo to be better.
100. Conclusively, The Parties could not cancel or even avoided the contract that have been made with consideration bounded by its contract. RESPONDENT should have adaption clause 12, thus CLAIMANT should not bear all the risks associated the tariff, moreover the concern due to circumstances beyond CLAIMANT's control.

ii. RESPONDENT has failed to implement Article 79 CISG related to all the risks associated with the price, either its reliance for exemption due to its impediment.

101. Claims that a change in the financial aspects of a contract should exempt a breaching party from liability for damages have also appeared repeatedly in the available decisions. This tribunal should determine that CLAIMANT's entitled to order the payment from RESPONDENT.
102. Based on clause 12 of the contract, "The seller is not responsible for delivery of frozen semen lost or late in delivery that is not under the seller's control such as missed flights, weather delays, failure of third party services, or God's actions not due to difficulties, additional safety or comparable unexpected events that make the contract more burdensome". This shows that if there is a delay in shipping or losing the frozen semen, CLAIMANT as the seller did not have to be responsible for it.
103. Adaptation clause should be implemented if there was a change on prices. This adaptation clause had been done by both parties due to prices for the frozen semen. CLAIMANT had made a risk to change the delivery terms and condition. RESPONDENT agreed with it. According to Art. 79 CISG, CLAIMANT is free from any liabilities, and it can be prove if CLAIMANT fulfills the conditions, such as "due to impediment", "beyond his controls". Hence, CLAIMANT did fulfill the predetermined conditions and CLAIMANT had a strong reason to adjust the price [*Art 79 CISG*].
104. In addition, based on Art.79 CISG which essentially said that, a party is not liable for a failure to perform any of its obligations if it proves that the failure was due to the impediment beyond its control. CLAIMANT and RESPONDENT have contracted and agreed to this, thus CLAIMANT remains entitled to pay as much as US$ 1,250,000.
105. Art. 79 CISG stated that CLAIMANT is not liable for a failure and the failure is beyond of the CLAIMANT's control. RESPONDENT's deliberate breach of contract means that it is not exempt from liability under Art. 79 CISG. The Art. 79 exempts a party from liability if the breach was caused by an "impediment beyond his control" that he could not reasonably have been expected to have taken into account or avoided. This is a high standard, and "[t]he obligor is always responsible for impediments when he could have prevented them"

[*Schlechtriem, p.100*]. Even where the impediment is unforeseeable, the obligor "must take reasonable measures to avoid or overcome the impediment or its consequences".

106. Art. 79 of the CISG has been interpreted to require proof of a "factual obstacle" beyond the breaching party's control in order to exempt the breaching party from liability for its failure to perform its contractual obligations.
107. Moreover, if RESPONDENT required CLAIMANT to bear all of the risks, hence RESPONDENT has failed to interpret the contract. According to Art. 79 CISG stated that "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control …" [*Art 79 CISG*], CLAIMANT is not liable to pay US$ 1,250,000 because the occurrence of the increase tariffs was not from the CLAIMANT'S regulation, but the Medditerraneo's government regulation.
108. Based on Art. 79 CISG, stated that, "A party is not liabel for a failure to perform any of his obligation if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences." from the Art. 79 CISG, it can be seen that a party is declared free of its responsibilities if it has fulfilled several predetermined conditions, namely: if the following requirements are fulfilled: the party's non-performance is "due to an impediment"; the impediment was "beyond his control"; the impediment "; the party could not reasonably have "avoided" the impediment; and the party could not reasonably have "overcome" the impediment "or its consequences".
109. Related to the fact that Increasing imuneration is beyond control which including to the Art. 79 CISG exemptions. CLAIMANT is fundamentally exempted due to the its circumstances. Increasing imuneration was an impediment which to be RESPONDENT obligation to bear.
110. CLAIMANT performance might be considered as "excessively onerous" to qualify for an exemption. It could be argued that an increasing out of the imuneration is reasonable for an exemption under hardship. If the RESPONDENT fails to perform any of his obligations under the contract or the convention provides the CLAIMANT may exercise his right to a variety of remedies [*Art. 61(1) CISG*]. One of these is require the RESPONDENT to pay the price unless the CLAIMANT has resorted to a remedy which is inconsistent with this requirement [*Art. 62 CISG*].

111. A party's liability for impediments arising from the actions of third-persons, and economic hardship as a ground for exemption, therefore that the party should be exempted from liability for its non performance [*Brandon Nagy, 2013*]. Non-performing parties have frequently claimed that significant changes in the financial aspects of a contract that cause performance to become extraordinarily burdensome should qualify as an "impediment" exempting the party from liability. Because Art. 79 does not define "impediment" as an event that renders performance absolutely impossible, an impediment may be represented by "a totally unexpected event that makes performance excessively difficult. Art. 79 petition expressly on grounds of "hardship" stemming from a rise in the cost of raw materials.
112. Under the CISG Art. 79 (1) has mean that The provision clearly establishes that exemption of liability will operate if non performance is due to an impediment. Such impediment was beyond the control of the CLAIMANT, it reasonably could have not been foreseen at the time of the conclusion of the contract and the impediment or its consequences could have been avoided or overcome by the party.
113. The first aspect to understand is the meaning of "impediment" as an obstacle that is objectively insurmountable [*Almeida 2003, p.104*]. The change in the economic circumstances would have to be measured under the standard of whether the performance became definitely impossible or not. Conclusively, increasing imuneration is one of the impediments which were out of CLAIMANT control, and it caused the delay of delivery of the semen.
114. These circumstances related to the hardship contained on the contract. First, the Hof van Cassatie opined that Art. 79 can govern situations of hardship: "[c]hanged circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and that are unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner, can, under circumstances, form an impediment in the sense of Art. 79 [*Brandon Nagy, 2013*].
115. CLAIMANT has right to ask for an adaption of the contract under the hardship clause either under the Art. 79 of CISG. Thus, did not narrowly worded that it was regulated the hardship on CISG, but it has to be interpreted an extreme and unforeseeable change in economic circumstances" could, if it actually prevented performance, itself qualify as an "impediment" under Art. 79 of CISG [*Brandon Nagy, 2013*].

116. A party's liability for impediments arising from the actions of third-persons, and economic hardship as a ground for exemption, therefore that the party should be exempted from liability for its non performance [*Ibid*].
117. Reliance to the hardship is possible because based on the Art. 79 CISG, CLAIMANT is not liable for a failure which out of his control. Increasing imuneration or additional cost US$. 1.250.000 beyond CLAIMANT's control. Hence, CLAIMANT could be exempted by its impediment according its circumstances.

B. RESPONDENT did not showed his outstanding performance after the conclusion of the Contract

118. Under the contract and any convention according to the contract between the parties, RESPONDENT did not showed his outstanding performance which could support the sustainability after the conclusion the contract. According to the Final shipment by CLAIMANT, it has RESPONDENT's obligation to substituted the price of 30% imposed by RESPONDENT which paid by CLAIMANT to support the shipment through bear 25% increasing imuneration.
119. RESPONDENT's performance did not showed that his promises was did so. Its performance regarded to that RESPONDENT fundamentally avoid his promises obligation to CLAIMANT under clause 12 of the contract and the contract negotiation (A); also after the final shipment was occurred RESPONDENT did not delivered his obligation regarding to the final shipment and its additional cost (B).

i. RESPONDENT fundamentally avoid his Promises to CLAIMANT under Clause 12 of the Contract and its prior negotiation

120. Under clause 12 the contract between the Parties that CLAIMANT did not have an obligation and responsibility for lost semen shipment or delay in delivery not within the control the CLAIMANT [*record p.13*]. CLAIMANT has no any control regarding to the increasing imuneration which contrary to the RESPONDENT argument should be bear by CLAIMANT.
121. Art. 25 CISG stated that "a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a

reasonable person of the same kind in the same circumstances would not have foreseen such a result." The determination of whether the injury is substantial must be made in the light of the circumstances of each case, such as the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party [*Secretariat Commentary to CISG Art. 23, para. 3*]. Such condition made CLAIMANT losses which cause by 30% tariffs imposed by RESPONDENT.

122. The final shipment had been made by CLAIMANT [*Cl. Ex. C8*], also had made payment of tariff which imposed 30% by RESPONDENT to support the final shipment, regarding to the contract that CLAIMANT has responsibility to do its shipment. Hence, CLAIMANT has already follow the contract and support the final shipment through CLAIMANT paid 30% the additional tariffs which imposed by REPONDENT. Increasing imuneration 30% imuneration which imposed by RESPONDENT made CLAIMANT losses his profit.
123. Increasing imuneration is a condition which generally accepted that only a change in circumstances that entails almost economic impossibility should meet the requirements for an exemption. RESPONDENT must pay the imuneration because it is part of RESPONDENT's obligations under the Agreement and the CISG. Regarding to the CLAIMANT's losses it could be substituted by RESPONDENT to pay additional payment in the amount of US$ 1.250.000 which is 25% of the price for the third delivery of semen.
124. During the contract negotiation that for planning of delivery schedule, RESPONDENT generally accept the need for price increase, moreover had made clear that his agreed to bear all the risks including the financial risks through his consent that CLAIMANT was not willing to bear all the other risks associated with the agreed change of the delivery terms and had insisted in the inclusion of the adaption clause [*Record para. 19 p. 7; Cl. Ex. C 8*].
125. The scope of the RESPONDENT's obligation to pay the price as including those steps and formalities necessary to pay the price [*Art. 54 CISG*]. The payment that should be bore by RESPONDENT is included to the steps and formalities necessary to pay the price through substituted the price which already paid by CLAIMANT to support the Final shipment of the Frozen Semen. It might be necessary to valuate the increasing of imuneration in monetary terms which caused CLAIMANT be loosed regarding to his financial problem.
126. Moreover, RESPONDENT has knowledge of the impact of the 30% tariff on CLAIMANT situation during the negotiation. CLAIMANT performance might be considered as

"excessively onerous" to qualify for an exemption. [*Arroyo, 2012 p.12*]. It could be argued that an increasing out of the imuneration is reasonable for an exemption under hardship [*Ibid*]. If the RESPONDENT fails to perform any of his obligations under the contract or the convention provides the CLAIMANT may exercise his right to a variety of remedies [*Art. 61(1) CISG*]. One of these is require the RESPONDENT to pay the price unless the CLAIMANT has resorted to a remedy which is inconsistent with this requirement [*Art. 62 CISG*].

127. The Art. 62 of CISG qualify the CLAIMANT's right to enforce payment where he has resorted to an inconsistent remedy. The inconsistent remedy is avoidance, since, by definition, a party who rightly avoids (terminates) a contract puts an end to both parties' right to demand specific relief [*Lookofsky p.135*]. CLAIMANT did not avoid the contract according to increasing of imuneration, also CLAIMANT had made clear that was is not to willing to bear all other risks associated with the agreed change of delivery terms and had insisted on the conclusion of the adaptation clause. RESPONDENT had consented to that [*Record p.7 para.19*].
128. RESPONDENT had avoid the obligation to bear all the risks which his promised to CLAIMANT that a solution would be found and that they were interested in a long-term relationship [*Cl. Ex. C8*]. RESPONDENT's consent would be consideration to bear all the risks according to increasing of imuneration. The risks was supposed to cover not only the cost prevalent risks of changes in the health and safety requirements but also other risks including additional tariffs, [*Record p. 7 para.19*] it has mean to the increasing of imunertion which would be made CLAIMANT be loss.
129. Therefore, CLAIMANT had paid 30% in tariffs relying on RESPONDENT's promise that solution also had to considerate what should RESPONDENT provide according to solution which RESPONDENT had promised.
130. The RESPONDENT's failure to interpreted clause 12 of the contract which constitutes a fundamental breach of the contract. Clause 12 consist that CLAIMANT has no responsibility for lost semen or delays in delivery not within the control of the CLAIMANT as seller of the semen [*Record p.13*]. Increasing of imuneration is such conditions which make the delivery delayed not within the control of CLAIMANT.

131. If RESPONDENT interpreted that it is out of his responsibility and would not to pay the imuneration, it would be made that the delivery delayed and that RESPONDENT should make good faith on his obligation to make payment by providing the outstanding sum. These obligations primarily include taking delivery of the goods and paying the contract price. [*Henry Deeb Gabriel p.275*]. Specifies that the buyer's obligation to pay the contract price extends beyond the abstraction of owing the money [*Ibid*].
132. According to the increasing of imuneration 30% which conducted by RESPONDENT, his did not gave CLAIMANT confirmation about this matter. CLAIMANT informed by the customs authorities that newly imposed tariffs of 30% on agricultural are applicable to the shipment, during CLAIMANT preparing the final shipment of 50 doses of frozen semen [*Cl. Ex. C7*]. Either CLAIMANT, the President was announced the increasing of imuneration which caused by the newest Election. The increasing of imuneration by CLAIAMANT is narrowly worded by the announcement by Mr. President. As a consequence, there is no evidence that CLAIMANT knew of, or could not have been aware of, the lack of conformity with the contract.
133. The 30% additional cost which imposed by RESPONDENT is baseless, based on it happen upon all agricultural good from Mediterraneo as retaliation for the previous restriction imposed by Mr. Bouckaret, the newly elected President of Mediterraneo [*Cl. Ex. C6*]. Therefore, RESPONDENT closer associated on it than with CLAIMANT due to that CLAIMANT is all affected by the tariffs in the delivery terms.
134. Present action by RESPONDENT, its retaliation should be considerate with the continuing circumstances for both parties, mainly on the tariff concern. In case, RESPONDENT should take a concern due to its retaliation, regarding to that it caused made an increasing of the tariff for both parties. RESPONDENT knew the shipment schedule supposed to considerate by RESPONDENT to inform CLAIMANT regarding to the retaliation in preparation action by CLAIMANT.
135. RESPONDENT has to bear additional tariff US$ 1,250,000 for the third delivery shipment as a buyer. Because a contract has been made between the Parties regarding the delivery of frozen semen, RESPONDENT as a buyer must pay in advance as much as US $ 1,250,000 to CLAIMANT.

136. This is a guarantee to the seller that the contract will not just be interrupted. In addition, as we know, the process of delivering frozen semen requires a fairly expensive cost because the frozen semen must be maintained in a good temperature or condition, so as not to cause damage to prospective superior mares. Thus, payment of US $ 1,250,000 are useful as the initial capital for CLAIMANT when they want to ship the frozen semen.
137. Thus, the payment of US $ 1,250,000 is useful as the initial capital for CLAIMANT, when CLAIMANT want to ship the frozen semen. Beside that, the payment of US$ 1,250,000 is an obligation that must be borne by RESPONDENT as a buyer, because CLAIMANT has paid as much as 30% of the tariff while RESPONDENT is also required to pay 25% or US $ 1,250,000. This is considered as restitution.
138. In clause 5 of the contract stated that the frozen semen would be sent when RESPONDENT has finished making all payment issues between them. Hence, this is an important point in the contract, moreover, the payment of US $ 1,250,000 is an obligation that must be borne by RESPONDENT as a buyer, because CLAIMANT has paid as much as 30% of the tariff while RESPONDENT is also required to pay 25% or US $ 1,250,000. This is considered as restitution [*PO2 p. 59 para 31*].
139. CLAIMANT has calculated the price for the frozen semen and the profit margin on the basis of the general cost calculation in the racehorse department. CLAIMANT included variable costs of 15.000 USD per dose. On the basis of this calculation CLAIMANT came to (fixed & variable) costs in the amount of 95,000 USD. The remaining 5,000 USD per dose are considered to be profit [*Ibid*]. 5,000 USD is calculated as the profit of CLAIMANT.
140. Where the profit obtained by CLAIMANT can be used to simultaneously improve CLAIMANT's deteriorating financial condition, and can also be used to optimize the business of selling frozen semen that in the future it can be better. CLAIMANT already calculated the price correctly, Thus, RESPONDENT’s objection is inadmissable related to the price given by CLAIMANT.
141. Hence, RESPONDENT promise that a solution corning of that, would be found and that RESPONDENT were interested in long-term relationship [*Cl. Ex. C8*]. Conclusively, through this performance concern, CLAIMANT requested that RESPONDENT should proceed his sustainability adaption of the contract within his good faith. Therefore, operating in good

faith mean to fulfill the contract to which they have committed, and parties to contracts in international trade are generally considered equals [*Jenni Miettinen p.1*].

ii. RESPONDENT did not exercised his obligation regarding to the final shipment within his consent

142. The Final Shipment was requested by RESPONDENT in discussion between Ms. Napravnik and Mr. Greg Shoemaker, through his concern about the remaining 50 doses were shipped with RESPONDENT request and consent, also it has consideration with that RESPONDENT urgently needed for start the breeding season [*Resp. Ex. R4*]. Its request and consent was be interpreted that RESPONDENT be aware for the additional payment and related to the increasing imuneration cost which is 30% imposed by RESPONDENT either 25% imposed by CLAIMANT.
143. Through its awareness it is has meant that RESPONDENT take to bear all the risks including the additional shipment also increasing imuneration cost. CLAIMANT has already taken a concern to the tariffs which consider the increasing imuneration.
144. Therefore, CLAIMANT really aware for the final shipment of the frozen semen which urgently needed by RESPONDENT. Moreover, CLAIMANT still has a good faith to deliver its final shipment with consideration of the obligation and the needs of RESPONDENT. It is not totally meant that CLAIMANT willing to bear all the risks related to the final shipment, because it contains RESPONDENT's consent which has meant it consist RESPONDENT's willingness to bear all the risks regarding to the additional cost and 30% increasing imuneration.
145. RESPONDENT's request and his consent to deliver the remaining 50 doses semen [*Resp. Ex. R4*], should be accompanied with his good faith through bear all the risk associated with its cost, because CLAIMANT already take a concern of that, either RESPONDENT already knew associated with CLAIMANT's concern. Moreover, in the contract did not consist hedging value which govern the safeguard of the cost concerning, hence the risks only covered by clause 12 of the contract, which it not regulate that CLAIMANT should be bear it.
146. The Final shipment was occurred to delivered the 50 doses remaining by CLAIMANT [*Cl. Ex. C8*]. The previous condition according to the final shipment that CLAIMANT was take a concern of the tariffs which has consideration with the additional payment and 30%

increasing imuneration which imposed by RESPONDENT to support the shipment. RESPONDENT already knew about the CLAIMANT's concern based on the discussion of him with Ms. Napravnik and the statement of Mr. Greg Shoemaker "if the contract provides for an increased price in the case of such high additional tariff we will certainly find an agreement on the price" [*Resp. Ex R4*]. While the negotiator had agree on DDP delivery it had been clear to both Parties that CLAIMANT should not bear all risks associated with such a delivery [*Cl. Ex. C8*].

147. Mr. Greg Shoemaker already knew the anticipation concern through the discussion [*Resp. Ex R4*]. The Parties already knew from past experiences unforeseeable additional health and safety requirements may highly expensive test necessary which can increase the cost by up to 40% and thereby destroy the commercial basis of the deal terms [*Cl. Ex. C4; Cl. Ex. C8*]. Hereby, with its experience CLAIMANT aware on the tariff for the final shipment. Hence, RESPONDENT should be aware of the tariff of its conduct regarding to additional tariff which also has to be bore by RESPONDENT, consideration with that the final shipment is occurred due to the RESPONDENT's request.
148. Mr. Greg Shoemaker is not the Lawyer and had not been involved in the negotiation of the contract [*Resp. Ex. R4*], therefore, he is not be able to make a decision related to the cost which concerned by CLAIMANT. RESPONDENT should aware for his representative, which could change the main drafter for temporary time. Hence, he did not have any authority to do so. Mr. Greg Soemaker should have an access to the previous negotiator which is Ms. Antley to know what the disscusion before related to the cost to have authority to make decision.
149. CLAIMANT has already delivered his obligation to support the final shipment with his good faith, and already considerate the tariffs according to the additional cost and 30% increasing imuneration. CLAIMANT already sent the remaining 50 doses of frozen semen, due to RESPONDENT were urgently needed given the frozen semen to start the breeding season.
150. CLAIMANT has delivered the semen to RESPONDENT under the responsibility of RESPONDENT to bear all the risks regarding to the additional cost and 30% increasing imuneration, due to CLAIMANT not willing to bear all the risks associated with such alteration in the delivery terms [*Cl. Ex. C4*]. Hereby, RESPONDENT was aware of

CLAIMANT that were not willing to bear all the risks. RESPONDENT ought to considerate of its aims due to regarding all the risks that it would be RESPONDENT's obligation to bear.

151. CLAIMANT did not be bore for increasing imuneration neither additional cost due to the tariffs changes beyond CLAIMANT's control and regard to that the final shipment which is requested by RESPONDENT. Considerated the RESPONDENT's consent regard to the final shipment, it has to be associated with CLAIMANT's concern to the increasing imuneration and additional which imposed by RESPONDENT.
152. If CLAIMANT is deferred to receive the additional tariff, it has meant that RESPONDENT is avoided his obligation, considered any concern and situation of CLAIMANT. If the final shipment is under RESPONDENT's consent, the additional cost has to be bear by RESPONDENT.
153. After the contract was conclude, both parties should gave their best performance. CLAIMANT did his best performance within his good faith. RESPONDENT did not showed his good faith concerning in the final shipment due to increasing imuneration, whereas good faith is did not governed in the contract.
154. Conclusively, through this performance concern, CLAIMANT requested that RESPONDENT should proceed his sustainability adaption of the contract within his good faith.

CONCLUSION OF THE ISSUE 3

155. CLAIMANT is requested this Arbitral Tribunal that Under clause 12 of the contract RESPONDENT had to bear all the risks associated with the payment, regarding to the increasing imuneration 25% was imposed by CLAIMANT's government and additional payment to support the final semen, remaining 50 frozen semen. Moreover, RESPONDENT had no best performance after the conclusion of the contract, In fact, the RESPONDENT's condition is irrelevant with his claim related to the adaption of the contract which regulate Hardship clause, under Art. 79 CISG.

REQUEST FOR RELIEF

In response to the Tribunal's Procedural Orders, Counsel makes the above submissions on behalf of CLAIMANT. For the reasons stated in this Memorandum, Counsel respectfully requests the Arbitral Tribunal to find that:

1. This tribunal has jurisdiction and/or the powers under the arbitration agreement to adapt the contract and Law of Mediterraneo should govern the arbitration agreement and its interpretation.
2. CLAIMANT entitled to submit evidence from the other arbitration proceedings
3. CLAIMANT entitled to the payment of US$ 1.250.000 or any other amount resulting from an adaptation of the price.

In light of the above CLAIMANT asks the Arbitral Tribunal for the following orders:

1. RESPONDENT is ordered to pay to CLAIMANT an additional amount of US$ 1,250,000 which is 25 per cent of the price for the third delivery of semen;
2. RESPONDENT bears the costs of the Arbitration

4th December 2018

Counsel for Claimant.

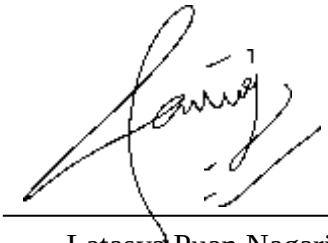
CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

Dini Kartika Salsabila

Gian William Sumule

Jesslyn Antonia Mirabel



Latasya Puan Nagari

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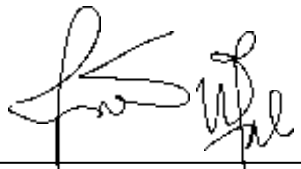

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