Sixteenth Annual Willem C. Vis East International Commercial Arbitration Moot

UNIVERSITY of HOUSTON LAW CENTER

MEMORANDUM FOR CLAIMANT

ON BEHALF OF	AGAINST
PHAR LAP ALLEVAMENT	BLACK BEAUTY EQUESTRIAN
RUE FRANKEL 1	2 SEABISCUIT DRIVE
CAPITAL CITY	OCEANSIDE
MEDITERRANEO	EQUATORIANA
CLAIMANT	RESPONDENT

UNIVERSITY OF HOUSTON LAW CENTER

ZACHARY BAUMANN • DOMINIC KISIELEWSKI • KATHRYN LAFLIN

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

&	and
Arb.	Arbitration
Art. / Arts.	Article / Articles
Aug	August
Ch.	Chapter
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl.	Clause
Com.	Commentary
Comm.	Commercial
Conv.	Convention
DDP	Delivered Duty Paid
e.g.	*Exempli Gratia* (example given)
Ed.	Edition
ed/eds	Editor/Editors

emph. add.	Emphasis Added
Ex / Exs.	Exhibit / Exhibits
et al.	et alii (and others)
Feb	February
HKIAC 2013	Hong Kong International Arbitration Centre 2013
HKIAC 2018	Hong Kong International Arbitration Centre 2018
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Id.	Ibidem (in the same place)
i.e.	Id Est (that is)
Jan	January
Ltd.	Limited
Mar	March
no. / nos.	Number / Numbers
Nov	November

NTM	Non-Tariff Measures
Off.	Official
Oct	October
%	Percent
p./pp.	Page
para/paras	Paragraph / Paragraphs
Proc. Ord.	First Procedural Order
Proc. Ord. 2	Second Procedural Order
Pt.	Part
Pty.	Party
R.	Record
Sep	September
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
U.S.	The United States of America

USD	United States Dollars
V.	versus

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STATEMENT OF FACTS

1 The PARTIES to this arbitration are Phar Lap Allevamento ("CLAIMANT") and Black Beauty Equestrian ("RESPONDENT"; together the "PARTIES"). CLAIMANT is Mediterraneo's oldest and most renowned stud farm, covering all areas of the equestrian sport. It has 300 horses, including its own mare herd, offspring and stallion depot. RESPONDENT is a corporation attempting to start their own horse breeding program in Equatoriana. This issue centers around a Sales Agreement ("Contract"), for 100 doses of racehorse semen at a cost of 1,000 USD per dose.

21 Mar 2017 RESPONDENT contacted CLAIMANT inquiring about the availability of Nijinsky III for its newly started breeding program, starting the negotiations for the sale of goods. *See CLAIMANT'S Exhibit C1, R. at p. 9*

24 Mar 2017 CLAIMANT agreed to start negotiating the sale of goods. *See CLAIMANT'S Exhibit C2, P.10*

28 Mar 2017 RESPONDENT sent an email back with changes, naming Mediterraneo the law of the Contract. *See CLAIMANT'S Exhibit C3, R. at p. 11*

31 Mar 2017 CLAIMANT accepted the modified DDP and the additional cost of 1,000 USD per dose. CLAIMANT stressed in the email that Seller will not be taking on the risks associated with shipping. *See CLAIMANT'S Exhibit C4, R. at p. 12.*

12 Apr 2017 Ms. Napravnik's and Mr. Antley's car accident occurs, leaving both of them unable to finish the negotiations.

6 May 2017 The final negotiations took place and the Contract was signed. *See CLAIMANT'S Exhibit C5, R. at pp. 13-14.*

18 May 2017 The first Payment of 5,000,000 USD was received. *See Notice of Arbitration, R. at p. 4*

20 May 2017 The first shipment of 25 doses of race horse semen was fulfilled. *See Notice of Arbitration, R. at p. 4*

3 Oct 2017 The second shipment of 25 doses of race horse semen is fulfilled. *See Notice of Arbitration, R. at p. 4*

Nov 2017 Mediterraneo's newly elected President, Ian Bouckaert, announced a 25% tariff on agricultural products from Equatoriana. *See CLAIMANT'S Exhibit C5, R. at pp. 13-14.*

19 Dec 2017 Retaliatory tariffs on agricultural goods were announced by Executive Order in Equatoriana. *See CLAIMANT'S Exhibit C5, R. at pp. 13-14.*

15 Jan 2018 The Equatorian agricultural tariffs went into effect.

19 Jan 2018 Ms. Napravnik was informed that the agricultural tariffs applied to the race horse semen while obtaining the customs paperwork. *See CLAIMANT'S Exhibit C8, R. at p. 17.*

20 Jan 2018 CLAIMANT informed Respondent of the tariffs. *See CLAIMANT'S Exhibit C7, R. at p. 16.*

21 Jan 2018 RESPONDENT agreed to adapt the Contract in order to ensure shipment of the final installment. CLAIMANT relied on this promise and acted upon this promise moving forward. *See CLAIMANT'S Exhibit C7, R. at p. 16.*

23 Jan 2018 CLAIMANT complied with its delivery obligation and delivered the remaining 50 doses of race horse semen. *See Notice of Arb., R. at p. 6.*

12 Feb 2018 CLAIMANT attempted to negotiate this issue with RESPONDENT. The talks were unsuccessful when RESPONDENT'S CEO abruptly left. *See CLAIMANT'S Exhibit C8, R. at p. 18.*

31 July 2018 CLAIMANT filed a Notice of Arbitration, appointing Ms. Wantha Davis, 14 Churchill Downs, Capital City, Mediterraneo for confirmation. *See Notice of Arb., R. at p. 4.*

2 Oct 2018 CLAIMANT informed the Arbitral Tribunal and RESPONDENT of their knowledge and desire to introduce the Partial Interim Award from RESPONDENT'S other arbitration. *See Letter by Langweiler, R. at p. 49.*

SUMMARY OF THE ARGUMENTS

2 PARTIES contracted for the sale of 100 doses of racehorse semen that were to be used for artificial insemination. CLAIMANT is "particularly known for its breeding success regarding racehorses. The star among Phar Lap's stallions is Nijinsky III, which is one of the most successful racehorses*." (Notice of Arb.).* After the lifting of the ban on importing horse semen to Equitoriana, CLAIMANT was contacted by RESPONDENT, about procuring 100 doses of racehorse semen from Claimant. This was due to the unique storage technique of the frozen semen and the high caliber studs available. The Contract included a Hardship Clause, and a modified DDP that limited CLAIMANT'S shipping costs to procuring the customs paperwork. After signing the Contract, CLAIMANT shipped the first two shipments of 25 doses of racehorse semen. However shortly before the final shipment, Equitoriana imposed a new tariff. CLAIMANT contacted RESPONDENT, and was reassured that PARTIES would adapt the Contract price to reflect the change. Based on this assurance, CLAIMANT paid the increased shipping price. CLAIMANT was surprised when RESPONDENT refused to adapt the contract price, and stopped negotiations.

ISSUE 1: THE ARBITRAL TRIBUNAL HAS THE JURISDICTION AND THE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT.

3 RESPONDENT contends that the governing law of the arbitration is Daunbian. However, the law governing the Contract and the Arbitration Clause is Mediterranean. While PARTIES did not explicitly choose a law to govern the arbitration agreement or speak to the issue of contractual adaption in the Arbitration Clause *(Exhibit C5),* the intent of the PARTIES is clear. Furthermore, the tribunal has the authority to "apply the rules of law which it determines to be appropriate*." (HKIAC 2018 Art. 36.1).* The Tribunal has the jurisdiction to adapt the Contract because the law of the arbitration agreement is Mediterranean, which allows for adaptation based on an implied grant of jurisdiction. Additionally, the principles

of international arbitration and the New York Convention demand a choice of the law of the arbitration agreement.

ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT THE EVIDENCE FROM THE OTHER ARBITRAL PROCEEDINGS.

4 At the annual breeder's conference CLAIMANT was informed of an additional arbitration in which RESPONDENT was asking for a price adaption due to tariffs. This award was leaked to the public, and CLAIMANT is working on obtaining a copy of it. The Tribunal has liberal authority over the admission and analysis of evidence. This authority allows the Tribunal to analyze the evidence and give it the weight it deserves. Because CLAIMANT did not illegally obtain this award, CLAIMANT is entitled to submit the evidence. The rules of confidentiality do not prohibit the interim award from being admitted. Furthermore, the public interest and the interest of justice exceptions apply, as RESPONDENT is making contradictory arguments in the second arbitration.

ISSUE 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF 1,250,000 USD RESULTING FROM AN ADAPTATION OF THE PRICE IN THE CONTRACT.

5 After the increase of tariffs, CLAIMANT acted in reliance on Respondent's assurance that price adaption would occur. CLAIMANT paid the increased shipping price. This put CLAIMANT in financial jeopardy. When CLAIMANT attempted to recover the increased fees, RESPONDENT refused. CLAIMANT is entitled to damages under Clause 12 of the Sales Agreement because it contains a Hardship clause, which allows allow for price adaptation. Furthermore, PARTIES included a modified DDP incoterms that limited CLAIMANT'S responsibilities to completing customs documentation. CLAIMANT is also entitled to damages under the CISG (C) for Article 6 of the CISG does not preclude the application of Article 79. Finally, UNIDROIT provides the specific remedies to Hardship that cumulate in allowing the award of damages of 1,250,000 USD.

ARGUMENTS

ISSUE 1: THE ARBITRAL TRIBUNAL HAS THE JURISDICTION AND THE POWER TO ADAPT THE CONTRACT UNDER THE ARBITRATION AGREEMENT.

6 Based on the PARTIES' intent, the Arbitral Tribunal has the jurisdiction and power to adapt the contract. PARTIES did not explicitly choose a law to govern the Arbitration Agreement or speak to the issue of contractual adaption in the Arbitration Clause. *(Exhibit C5).* Absent a designation of applicable law, this Tribunal has the authority to "apply the rules of law which it determines to be appropriate*." (HKIAC 2018 Art. 36.1).* The Tribunal has the jurisdiction to adapt the contract because: (A) the law of the Arbitration Agreement is Mediterranean, which allow adaptation based on an implied grant of jurisdiction; and (B) the principles of international arbitration and the New York Convention demand a choice of the law of the Arbitration Agreement that validates this arbitration and the parties' intent to grant adaptive powers to the Tribunal.

A. THE ARBITRATION AGREEMENT IS GOVERNED BY THE LAWS OF MEDITERRANEO, WHICH ALLOW THE TRIBUNAL TO MODIFY THE CONTRACT BASED ON AN IMPLIED GRANT OF JURISDICTION.

7 RESPONDENT alleges that Danubian law controls the Arbitration Agreement and that "Danubian law adheres to the 'four corners rule,*'"* which Respondent argues should control the interpretation of the Arbitration Agreement*. (Answer to the Notice of Arb.).* Contrary to RESPONDENT'S allegations, "the arbitration clause and its interpretation are governed by the law of Mediterraneo," which allows parol evidence to inform interpretation*. (Notice of Arb.).* CLAIMANT respectfully requests that the Tribunal reject RESPONDENT'S claim that Danubian governs and recognize that Mediterranean law is the law of the Arbitration Agreement.

i. **The PARTIES implicitly chose the law of Mediterraneo as the law governing the Arbitration Clause.**

8 The intent of the PARTIES is clarified by an examination of the record. RESPONDENT'S objection to laws of Mediterraneo was prefaced on the dispute being litigated in traditional court. *(Exhibit C3).* In CLAIMANT'S follow-up email on 31 March 2017, PARTIES contemplated arbitration and the resulting issue of the law of the Arbitration Agreement. *(Exhibit C4).* RESPONDENT then sent a draft agreement on 10 April 2017 that set the seat of the arbitration in Equatoriana and made Equatoriana law govern the Arbitration Clause. *(Exhibit R1).*

9 At no point in the 10 April 2017 email or any other correspondence did RESPONDENT condition the offer on the eventual seat of the arbitration providing the law governing the arbitration agreement. *(Id.).* While CLAIMANT counteroffered with a draft clause that named Danubia as the seat, the counteroffer was silent on the issue of the law governing the Arbitration Agreement. *(Exhibit R2).* The counteroffer was primarily prefaced on "accommodat[ing] [RESPONDENT'S] wish not to be submitted the jurisdiction of the courts in Mediterraneo." *(Id.).*

10 This is a reference to the choice of the seat, which usually provides the legal system in which an award may be set aside. *(Moser & Bao, at p. 216, note 1).* Such a reading comports with RESPONDENT'S initial position that "[CLAIMANT's] courts [not] have jurisdiction" over this contract. *(Exhibit C3).* The negotiations did not end in an agreement that the laws of Danubia would govern the arbitration clause, as evidenced by RESPONDENT'S counsel's view that the issue remained unresolved prior to the severe car accident in April 2017. *(Exhibit R3).* The parties initially negotiated an increase in remuneration. *(Exhibit C8.)* As will be discussed in Section I(B), this is in line with hardship adaption obligations arising under Mediterranean Contract Law (*Proc. Ord. 2)* and evidences that the parties understood their contract to be governed by Mediterraneo.

11 Absent an express designation of the law of the arbitration agreement, Tribunals and commentators have found "any of a number of laws" to control. *(See Moser & Bao, p. 74, "suggesting nine different laws or rules of law that could govern the arbitration*

agreement"). Part of the confusion stems from the New York Convention's permission to deny of enforcement of arbitral awards where an agreement was "not valid under the law to which the parties have subjected it*." (New York Convention, Art. V(1)(a)).* Where no explicit choice is made, the importance of party choice and autonomy has led to the promulgation of several theories of implied choice of law. *(See generally, Born Chapter 4).*

12 As a result, "Tribunals and courts answer [the question of what law parties impliedly chose] differently*." (See, Moser p. 75).* However, the debate has solidified into a "principal choice . . . between the law of the seat of the arbitration and the law that governs the contract as a whole". *(See Redfern & Hunter, Ch. 3, p. 2; see also Moser & Bao p. 74).*

13 This rift also stems from the doctrine of separability, which "provides that an . . . arbitration agreement is presumptively separable from the underlying contract." *(See Born, Ch. 4 p. 475).* Separability implies that an arbitration clause "may perfectly well be governed by a law different from the underlying contract." *(Id.)*

14 Although other laws can control, it in no way "mean[s] that the law applicable to the arbitration clause is necessarily different from . . . the underlying agreement." (Id.). In fact, there is a "very strong presumption in favor of the law governing the substantive agreement". *(Redfern & Hunter, p. 158, Sulamerica para 11, Black Clawson, p. 455).* This presumption is due to the fact that the choice of a law for the contract is seen as an "implied…agreement of the parties as to the law applicable the arbitration clause." *(Redfern & Hunter, p. 158).* When, as in the present arbitration, "the parties included a choice-of-law clause in their underlying contract, selecting the law governing that contract," the presumption is that the choice of law is implied. *(Born, p. 491).* Furthermore, this Tribunal is empowered to "rule on its own jurisdiction . . . including any objections with respect to the . . . scope of the arbitration agreement." *(HKIAC 2018 Art. 19.1).*

15 Ordinarily, it is "only in these general choice-of-law clauses that there will there be a choice of the law applicable to the associated arbitration agreement." *(Born p. 491).* Historically it was "rare for the law of the arbitration clause to be found to differ from the governing law of the contract." *(Spigelman, p. 239).* But there is also a doctrinal dimension to the

presumption; as a "general rule the arbitration agreement will be governed by the [law of the contract], since it is part of the substance of the underlying contract." *(See Mustill & Boyd*). By contrast, the seat of the arbitration generally determines arbitral procedure, making its selection an inapt source of implied intent to decide substantive matters of interpretation and scope. *(Moser & Bao, p. 51).*

16 Practical considerations also point to the law of the underlying contract. Whatever the value of the "legal fiction" of separability, it "does not mean that the underlying contract and the arbitration clause are totally independent of each other." *(Ware pp. 131, 159).* This is evidenced by "the fact that acceptance of the contract entails acceptance of the clause, without any other formality." *(Id.).* In this case, the law of Mediterraneo was subject to long discussion by the parties, imbuing it with considerable implied authority. *(Notice of Arb.).*

17 Conversely, the arbitration clause was viewed as having limited importance *(Proc. Ord. 2)*. Moreover, in practice the case for deeming the choice of a seat to be an implied choice is weaker than the same argument for the law of the contract. *(See Sulamerica, para. 26).* While the substantive law of the contract is typically one of the "major issues" resolved in legal negotiations, the arbitration clause is generally subject to "sad neglect." *(Moser & Bao pp. 46-47).* It is illogical to propose that a clause that parties "simply may not believe is worth the costs of researching, understanding, and negotiating" should be imbued with implied authority. *(Id.).* What is more, an overreliance on separability and the law of the seat may undermine "the intimate connection (both textual and functional) between the arbitration agreement and the law of the contract." *(Born p. 517).* Against this doctrinal backdrop and in this instance, the intent of the Parties is clear. The law of the Contract is Mediterranean.

ii. The principles of international arbitration and the New York Convention demand a choice of the law of the arbitration agreement that validates this arbitration and the PARTIES' intent to grant adaptive powers to the Tribunal.

18 Absent an expressed designation or a plausible case for implied choice of the law of the seat, this Tribunal is left with the "very strong presumption in favor of the law governing the substantive agreement." *(Redfern & Hunter p. 158).* But if it is unconvinced by arguments along the traditional underlying contract-seat dichotomy, the Tribunal could turn to international concepts to derive its choice. *(Born p. 474)*. Instead, Born proposes validation as a principle capable of determining what law governs an arbitration clause and resolving issues of interpretation. Born argues that the variations of presumptive validity provide "promising avenues for reducing the confusion and uncertainty surrounding the choice of law applicable to international arbitration agreements." *(Id. at 475).*

19 Born's articulation of validation is based in the New York Convention, "the keystone on which the entire edifice of international commercial arbitration is built." *(See Moser & Bao, foreword)*. Articles II(1) and II(3) of the New York Convention establish a standard of "presumptive validity" that is a "uniform, mandatory rule of substantive international law." *(Born p. 494)*. A related idea enshrined by Article II is the "validation principle, which demands that an international arbitration agreement is valid and enforceable if any national law potentially applicable to the agreement would uphold its validity*." (Born, pp. 475, 495).*

20 Together, these principles seek to enshrine the "intentions of parties to most international commercial arbitration agreements," by deducing that PARTIES generally desire their arbitration clauses be valid and maximally enforceable. *(Born, p. 475; see Born, p. 474, "noting that French judicial decisions have held that the substantive validity of international arbitration agreements is directly governed by pro-arbitration principles of substantive international law").* This principle has been accepted to one degree or another by many jurisdictions, most notably in France and Switzerland. *(Born, p. 475," noting that Swiss law has adopted a specialized validation principle that gives effect to agreement to arbitrate in Switzerland if they satisfy any one of a number of potentially-applicable national laws").*

21 This backward-looking validation or intent of the parties analysis can be decisive when the arbitration clause contains no express choice of governing substantive law. In *Sulamerica*,

an English Court of Appeal ascertained the law governing an arbitration clause by way of validation principles. *(See generally, Pearson).* The underlying insurance contract was governed by Brazilian Law and contained "an exclusive jurisdiction clause in favor of Brazil", but the arbitration clause affixed London as the seat. *(Id.).* Although the Court noted the general presumption toward the law of the contract, the express choice of Brazilian law, and the exclusive jurisdiction clause as powerful factors pointing toward the application of Brazilian law, the Court ultimately found English law to govern. *(Id.).*

22 Decisive to the court's analysis was the conclusion that if the arbitration clause was subject to the law of Brazil, then the absence of the insured party's consent to the referral to arbitration would invalidate the arbitral proceedings. *(Id.).* The Court found that "there [was] nothing to indicate that the parties intended to enter into a one-sided arrangement of that kind." *(Id.).* In fact, such a proposition would have undermined a contractual provision authorizing "either party . . . [to] refer to arbitration a dispute." *(Id.).*

23 Such an analysis has direct bearing on the current Tribunal's search for interpretive authority as a result of the linkage between interpretive and substantive validity conflict of law analyses. There are several conflict of law categories or issues contained within the general search for the law of the arbitration clause. *(See generally, Born Ch. 4).* Some have counted as many as thirteen, many of which could be governed by entirely different laws and the analyses of which can differ by jurisdiction. *(Id at p. 489).* The majority of jurisdictions apply the law governing "the formation and substantive validity*"* of the arbitration clause to the issue of what law governs interpretation. *(Born, Ch. 4, p. 635; see also Born Ch. 9, p. 1397)*. Thus, the principles that apply to the determination of the former can inform the search for the latter.

24 This acknowledgement undergirds the importance of Born's novel linkage of the same principles to the law governing interpretation of the arbitral clause. National courts have relied upon the same " 'pro-arbitration' objectives of the New York Convention" that inform the validation principle to develop "liberal rules of construction of international arbitration agreements." *(See Born, Ch. 4).* These rules of construction assume that parties to international arbitrations intent to "resolve all disputes related to their business

relationship in a single, centralized proceeding, rather than in separate and potentially inconsistent proceedings."(*Born p. 1319).* Born argues that the presumptive encompassment of all of the parties' disputes is not a matter of national preference, but is "prescribed, as a matter of international law, by the Convention's pro-arbitration objectives and is mandated by the parties intentions as rational businesspersons…acting in good faith." *(Id.).*

25 Taking the shared foundation between the New York Convention's views of substantive validity and interpretation to its logical conclusion, a *Sulamerica*-like analysis of the law of interpretation is mandated by pro-arbitration objectives and a rational or good faith construction of party intent. The applicability of such principles could be most potent where, as here, parties of different states have not made an express choice of law. This is because their application would not infringe on party autonomy. *(Born, p. 513).* This analysis points toward the law of the underlying contract, Mediterranean law.

26 The parties were conscious of the governmental uncertainty regarding the sale of horse semen from the beginning of their correspondence. RESPONDENT'S email on 28 March 2017 prefaced the "extraordinary nature of RESPONDENT'S" request on the "particular situation in Equatoriana" and contemplated "the lifting of the ban expir[ing] or be[ing] revoked*". (Exhibit C3).* CLAIMANT on 31 March 2017 expressed unwillingness to "take over any further risk associated with . . . changes in customs regulation or import restrictions, noted that unforeseeable additional . . . requirements could destroy the commercial basis of the deal, and called for, at minimum, the inclusion of a hardship clause." *(Exhibit C4).*

27 CLAIMANT expressed on 12 April 2017, that it was "important to have a mechanism in place which would ensure an adaption of the contract." *(Exhibit C8).* RESPONDENT agreed that "it should probably be the task of the arbitrators to adapt the contract*." (Id.).* This documented anticipation of unforeseen obstacles and insistence on the possibility of contract adaption was consummated in the final contract, which included a hardship clause. *(Exhibit C5).*

28 The Parties contemplated that unforeseen events could impede the transaction and saw the need for a mechanism for adaption, it would be antithetical to their negotiating posture to find an implied choice of the law of the seat. This observation stems from the fact that the law of the seat, Mediterraneo law, contains what its courts believe to be a "general standard to be applied to the conferral of exceptional powers to the arbitral Tribunal." *(Proc. Ord. 2).* This general standard operates to require "an express conferral of powers" for an arbitral Tribunal to adapt a contract. *(Id.).* Acknowledging that no express conferral of adaption powers is contained in the final contract or arbitration clause, there is no logical reason to suppose CLAIMANT would have acceded to a law of the arbitration agreement that discouraged the very sort of remedy they demanded during the contractual negotiations. *(Exhibit C5).*

29 A finding that Danubian law controls would invalidate CLAIMANT's established intention to grant adaptive powers to the Tribunal in case unforeseeable events impacted the transaction. In effect, this would grant RESPONDENT a "one-sided" arrangement that prevented CLAIMANT from seeking relief, the likes of which the Court of Appeal in *Sulamerica,* found antithetical to any reasonable construction of the parties' intent. *(Id.).* Moreover, it would contravene the pro-arbitration and dispute encompassment principles that are mandated by the New York Convention.

30 Ultimately, a traditional implied choice of law analysis of the law of the underlying contract and the law of the arbitral seat determine law of Mediterraneo to govern the Arbitration Clause. The same result is arrived at under an application of international principles, particularly an articulation of validation and pro-arbitration principles mandated by the New York Convention. These observations make it clear that a finding that Danubian law governs the arbitration agreement would contravene not only established choice of law applications, but the very principles that undergird the system of international commercial arbitration.

B. THE ARBITRAL TRIBUNAL HAS THE POWER TO ADAPT THE CONTRACT PURSUANT TO THE ARBITRATION AGREEMENT.

31 If the Tribunal accepts that Mediterranean law governs the arbitration clause, it would have the authority to adapt because: (i) Mediterranean law allows adaption authority; (ii) the addition of a hardship clause manifests an implicit grant of adaption authority; (iii) parol evidence establishes that the parties intended to grant the Tribunal jurisdiction; and (iv) even if the Tribunal does not find that Mediterranean law controls, it would still be bound to adapt because the New York Convention imposes a mandatory "pro-arbitration" approach to questions of scope.

i. **The ability to adapt a contract is a substantive matter and is allowed under Mediterranean law.**

32 Some hold that adaption is a procedural matter and thus governed by the law of the seat. *(Berger, p. 10).* The better view is that it falls in the category of substantive matters governed by the law of the arbitration agreement. *(Id.).* This is particularly true where there exists a potential implied choice of law, because the effect of that clause can only be determined as a matter of interpretation of the agreement. *(Born, p. 489).*

33 If the Tribunal accepts the governance of Mediterranean law, the arbitration clause itself would substantiate the Tribunal's jurisdiction to adapt the contract. The Mediterranean courts' consistent interpretation of Art. 6.2.3. para. 4b Mediterranean Contract Law, is that it makes "a standard arbitration agreement . . . sufficient to grant an arbitral Tribunal the same powers as a court under the provision*." (Proc. Ord. 2).* The reference to *a* "court" relates to Art. 6.2.3. para 4b, an adaption of the UNIDROIT provision, which allows a court finding hardship to "adapt the contract with a view to restoring its equilibrium." *(UNIDROIT Art. 6.2.3).* The prerequisite negotiations Article 6.2.3 were fulfilled in the present case by the PARTIES correspondence regarding increased remuneration after tariffs were imposed. Moreover, the parties failed to reach an accommodation during the period after the tariffs were imposed. *(Id.).* Thus, under Mediterranean contract law and consistent Mediterranean jurisprudence, the Tribunal has the power to adapt the contract upon a finding of hardship.

ii. **The addition of the hardship clause implicitly grants the Tribunal the ability to adapt the contract.**

34 Aside from the application of Mediterraneo's Contract Law and jurisprudence, the contract contains an implied choice by the parties to grant the Tribunal adaptive power. Where parties "authorize the arbitrators to adapt or supplement the contract", principles of contractual sacrosanctity speak "in favor the arbitrators' competence to reshape the contract." *(Berger p. 5).* This authorization can be "express or implied," so long as they apply to "supervening gaps" in the contract. *(Id. pp. 3-5).* Supervening gaps arise "after the conclusion of the contract and are unforeseen at that moment." *(Id. p. 3).* PARTIES included a hardship clause into the contract that contemplated future events. *(Exhibit C5).*

35 This inclusion necessarily implicates adjudication on the happening of future events. It also makes the Tribunal's adaption authority a creature of party autonomy, not national law. This elevates the Tribunal's responsibility to adapt the contract above non-mandatory national law, as "arbitration is a creature that owes its existence to the will of the parties alone." *(Born, p. 229).* Finding a lack of authority despite this implied grant of authority would contravene the principle that "parties are almost entirely free to draft their arbitration clauses in whatever way they choose*." (Born, p. 1317).*

iii. **Parol evidence establishes that the PARTIES intended to grant the Tribunal jurisdiction to adapt the contract.**

36 If parol evidence is allowed upon the resolution of issue 1(A), the record can further bolster the case for an implied grant of authority. Claimant was clear that they were not willing to take over any further risks associated with the unforeseeable. *(Exhibit C4).* Claimant made clear to Respondent that it was importance to have a mechanism in place which would ensure adaption. *(Exhibit C8).* Respondent agreed that it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree. *(Id.).*

iv. **Even if Mediterraneo law does not apply, the Pro-Arbitration Objective of the New York Convention Requires Tribunals to Liberally Construe the Jurisdiction of the Arbitration Clause.**

37 No matter what law the Tribunal holds governs the issue of adaption, the basic "pro-arbitration" objective of the New York Convention demand liberal rules of construction of

international arbitration agreements. Those objectives have led many jurisdictions to articulate the same assumptions introduced in Section 1(B): that parties intended to arbitrate any issues flowing from their contract and that "any doubts concerning the scope of arbitrable issues should be resolve in favor or arbitration." (*Born, p. 1319).* These principles are mandated both by the convention and the parties' intentions, and the *overwhelming weight of national court decisions is consistent with the existence of this rule of construction. (Born, p. 1319; see also Mitsubishi Motors, noting that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.")*

38 The importance of the pro-arbitration principle is only made more important because of the "silence of . . . national legislation" on the issue of interpretation. *(Born p. 1320).* To the extent national laws have spoken on the issue, they have been "significantly influenced" by the convention and its policies, and so should be applied in reference to the pro-arbitration principles. *(Id. at p. 1321).*

39 Despite the vagueness with which national legislation and some arbitration conventions approach interpretation, there are a few broadly recognized tools that Tribunal may use to divine the meaning of the arbitration agreement and its underlying contract. For instance, it is "almost uniformly held or assumed that generally-applicable rules of contract construction," or what many common law countries call the canons of construction, "apply to the interpretation of international arbitration agreement." *(Id.).* One such rule is that "contracts should be interpreted as a whole, so that their provisions make sense together." *(21 ASA Bull. 59).*

40 In the present arbitration, this canon is applicable to reconciling the agreement to arbitrate and the hardship clause. The former chooses arbitration as the PARTIES' dispute resolution method of choice, while the latter contemplates a change in the PARTIES' contractual obligations owing to an unforeseen event. The two can be reconciled as an implied grant of authority to the Tribunal to amend the contract; any other construction would suggest that the parties intended to litigate in two separate forums, which is generally unlikely. *(Born, Ch. 9).* It would also lead to "impracticable solutions*"* or absurd results, such as

inconsistent judgments, which courts and Tribunals are enthusiastic to avoid. *(VIAC SCH-5024 A).*

41 Such a result would do violence to the rising perception that "a commercially logical and sensible construction [is] to be preferred over another that [is] commercially illogical*." (3 SLR(R) 936).* This is because parties generally prefer that "all disputes related to their business relationship in a single, centralized proceeding, rather than in separate and potentially inconsistent proceedings." *(Born p. 1319).*

42 Interpreting the jurisdiction-granting clause against the backdrop of the New York Convention's pro-arbitration objectives also shows an intent to grant broad power to the Tribunal. First, the very choice of arbitration is "the more reliable and authentic expression of the parties' intentions." *(Id).* The choice signifies that the parties prized "a presumptive desire for a single, neutral, efficient, and competent dispute resolution mechanism." *(Id.).* Advancing these expectations necessarily requires "an expansive interpretation of the scope of international arbitration agreements," but also advanced "the public interest by avoiding costly and unproduction litigation . . . over the scope of arbitration agreements and by encouraging international commerce." *(Id. pp. 1343-1344).*

43 The language employed by the parties expresses a similarly broad intent to arbitrate. The arbitration agreement called for "any dispute" to be arbitrated. *(Exhibit C5).* Authorities have interpreted such language very broadly so as to "extend to all disputes having any plausible factual or legal relation to the parties' agreement or dealings." *(Born, p. 1347).* This includes granting the Tribunal the authority to rule on "issues of interpretation" and "broad remedial" measures. *(Id.).* The choice of any dispute language documents the intent of the PARTIES to empower the Tribunal to have all disputes, including interpretive matters, and expansive remedial measures under its purview.

44 PARTIES also chose to subject disputes "arising out of " the contract to arbitration. (*Exhibit C5).* While some jurisdictions have historically subjected such language to a *narrow* formulation, the "clear trend in contemporary national court decisions is in favor of [a] liberal interpretation." *(Born, pp. 1353-1354).* This shift is evidenced most clearly in United States decisions. Although "some older U.S. judicial decisions concluded that the

formula is narrow," more recent decisions have given it a "broader formulation" than similar clauses. *(Id. p. 1353).* In a similar fashion, European jurisdictions now extend "arising out of " language to "a broad interpretation." By choosing such broad language, the parties evidenced their intent to grant the Tribunal expansive powers to resolve their disputes. *(Id. p. 1354).*

CONCLUSION OF ISSUE 1

Ultimately, relevant indicators of the PARTIES' intent evidence their preference that this Tribunal have adaptive powers. First, they made an implied choice of the very pro-adaption laws of Mediterraneo for the arbitration agreement, which would nonetheless be mandated by the pro-arbitration goals of the New York Convention. Second, they implicitly extended the Tribunal adaption authority with the inclusion of a hardship clause. Third, parol evidence available for consideration under the laws of Mediterraneo shows that they intended the Tribunal to have the jurisdiction to adapt the contract. Fourth, a relevant analysis of the applicable canons and the provisions of the arbitration clause, particularly through the lens of the pro-arbitration directives of the New York Convention, further evidence the PARTIES' intent to grant adaptive powers to the arbitrators.

ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT THE EVIDENCE FROM THE OTHER ARBITRAL PROCEEDINGS.

45 RESPONDENT protested the admission of the evidence from the other Arbitration by written notice on 3 October 2018 arguing that this evidence would violate statutory and confidentiality obligations *(Proc. Ord.).* However, CLAIMANT is entitled to submit the evidence from the other arbitration as the Tribunal has the authority to admit any evidence offered to advance the interest of justice and/or public policy. The Tribunal must balance the interests of justice and the interests of the Parties in this matter. Article 22.2 of the HKIAC Rules states that "the arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence." *(HKIAC 2018 Art. 22.2)* In order to ensure that justice is achieved in an Arbitration with illegally obtained evidence, the Tribunal must "balance the needs of a good faith plaintiff

to secure evidence for its case against the rights of the defendant to the integrity of its own processes of confidentiality and secrecy." *(Reisman & Freedman, p.738).*

46 CLAIMANT has acted in good faith and did not take steps to produce this evidence illegally (A). Additionally, this evidence's admission would not violate the rules of confidentiality (B). The admission of this evidence is paramount to the interest of justice not allowing this information would set a precedent violating public policy (C).

A. THE TRIBUNAL SHOULD ADMIT THE EVIDENCE AS CLAIMANT DID NOT PROCURE THE EVIDENCE ILLEGALLY, AS THE INFORMATION IS READILY AVAILABLE IN THE PUBLIC DOMAIN DUE TO THE HACK.

47 CLAIMANT did not illegally procure the evidence. During the annual breeder conference CLAIMANT was informed by Mr. Kieron Velasquez of the other arbitration and the position that RESPONDENT was taking in this arbitration. *(Proc. Ord. 2).* Throughout this process CLAIMANT has only acted in good faith. Once CLAIMANT was informed of this additional arbitration, CLAIMANT informed the Tribunal *(Letter by Langweiler)* in the letter dated 2 October 2018.

48 While the use of hacked and/or breached evidence is a relatively new issue that Tribunals are faced with, this is not the first time a Tribunal has made a decision regarding hacked evidence. It is clear that "the practice of international Tribunals in the admission of evidence has developed a pattern comparable to that of the liberal system of procedure in the civil law countries." *(Pietrowski p. 391).* International Court and Tribunals have found that, "the fact that evidence is obtained illegally will not automatically disqualify such evidence as inadmissible." *(See Blair & Gojković).* This liberal approach to the admission of evidence is found throughout the field of International Adjudication.

49 Throughout this process CLAIMANT has acted in good faith, and continues to do so. The actions of the party attempting to admit evidence has been a deciding factor for Tribunals for many years. In *Methanex Corporation v. United States of America*, the Tribunal was asked to admit into evidence "documentation [that] was obtained by successive and multiple acts of trespass committed by Methanex over five and a half months in order to

obtain an unfair advantage over the USA as a Disputing Party to these pending arbitration proceedings." *(Methanex, Pt. II, Ch. I, para* 59*).* The Tribunal reasoned that "it would be wrong to allow Methanex to introduce this documentation into these proceedings in violation of its general duty of good faith and, moreover, that Methanex's conduct, committed during these arbitration proceedings, offended basic principles of justice and fairness required of all parties in every international arbitration." *(Methanex).*

50 While the evidence in *Methanex* was not obtained via a computer hack, the *Methanex* reasoning should still be considered. The Tribunal made it clear that their "reasoning was firmly grounded in the duty of good faith that parties to an arbitration owe each other and the Tribunal." *(Id.)*. In this case CLAIMANT is seeking to admit evidence that was hacked by a third party. CLAIMANT did not breach the duty of good faith in obtaining this evidence. The *Methanex* Tribunal "relied upon principals of due process in international arbitration rather than focusing on the illegal collection of evidence, indicating that illegally obtained evidence might otherwise be admissible if it does not impinge upon a party's right to due process". *(Ireton p. 236).* The Tribunal narrowly ruled on this issue, focusing on the issue of due process and good faith. Applying the UNICTRAL Rules, the Tribunal held that the documents "illegally obtained by Methanex to be inadmissible due to the corporation's lack of good faith and procedural fairness in acquiring them." *(Methanex, Pt II, Ch. I, para 54).*

51 The contours of this theory of good faith were further demonstrated in the *RosInvestCo UK v. Russian Federation* award. Here, the Tribunal relied upon "confidential diplomatic cables from the United States that had been published on WikiLeaks." *(Boykin & Havalic, p. 1).* In Yukos, the CLAIMANT did not purposefully undertake illegal actions to obtain the hacked documents. The Yukos claimant did not violate the duty of good faith to the respondent or the Tribunal in obtaining these documents.

52 The use of WikiLeaks has become more prevalent in International Arbitration. However, the admissibility of the cables has only been challenged a few times. In *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, which recently considered this question of privileged

and confidential evidence, "Venezuela requested a hearing to address the finding of lack of good faith negotiations in light of new evidence." *(ConocoPhillips).* This letter included information from WikiLeaks of communications between officials in the *"*US Embassy in Caracas and ConocoPhillips executives discussing the Venezuelan government's offer to compensate the company for expropriation using market value standards instead of their previous offer of book value*." (Id.).* The Bolivarian Republic of Venezuela argued that *"*this evidence contradict[ed] the Tribunal's conclusion that Venezuela negotiated in bad faith." *(Id.).*

53 However, the Tribunal found that Venezuela was seeking reconsideration by the same Tribunal, not an appeal by an ad hoc committee, *(ConocoPhillips).* The Tribunal did not rule on the admissibility of the WikiLeaks evidence, but instead focused on the *res judicata* issues that arose in the letter. Thus far, only *ConocoPhillips* has challenged the use of such cables, but since the Tribunal majority denied the request for a new hearing, no decision was made regarding their admissibility.

54 ICSID Arbitrations are predominantly the situations in which illegal evidence has been contemplated. However, there have been no concrete rulings on the matter. For example, "two other ICSID Tribunals provided with WikiLeaks evidence were similarly unwilling to comment on its propriety and admissibility." *(Ireton, p. 240).* The Tribunals did not reject the WikiLeaks cables in either case. The opposing parties also made no objections to their admission.

55 CLAIMANT did not violate the duty of good faith when obtaining this partial interim award. CLAIMANT was informed of the award by Mr. Kieron Velazquez at the breeder's convention. CLAIMANT has arranged to obtain the Partial Interim Award from an intelligence company in the horse breeding arena. By attempting to procure a copy of the Partial Interim Award, CLAIMANT has not violated the duty of good faith, as CLAIMANT is simply attempting to obtain something in the public domain.

B. THE PARTIAL INTERIM AWARD IS ADMISSIBLE UNDER HKIAC ARTICLE 22 EVIDENCE PRINCIPLES.

56 The HKIAC Evidence Principles give the Tribunal the authority to determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence. *(HKIAC 2018 Art. 22.2).* Article 22.3 gives the Tribunal a "wide discretion to allow or order production of the documents that are relevant to case and material to its outcome*." (Moser & Bao p. 156, HKIAC 2018 Art. 22.3)*. Tribunals commonly "refer to Article 3 of the IBA Rules of Evidence when conducting the document production process*." (Born p. 2207; Waincymer pp 841, 842).* Under the IBA Rules of evidence the Parties may request for a document to be produced if the documents are relevant to the case and material to its outcome. *(Moser & Boa p. 155).*

57 Article 22.3 advances this practice by allowing the Tribunal to order a party to produce the documents that are relevant to the case and material to its outcome. Generally, "all relevant evidence is material to the outcome of the arbitration is admissible." (*Id.*). In this situation, the Partial Interim Award is material and relevant to the case as it will change the outcome of the issues at stake. CLAIMANT has the burden of proof, and this evidence is essential in proving that the Parties intended for the Buyer to bear the risks.

58 The Tribunal is not bound by any strict rules of "evidence and enjoys broad discretion in the admissibility, relevance, materiality, and weight of any evidence*." (Id).* While this gives the Tribunal a liberal discretion, Article 22 is far from the only authority that grant this power. It is in line with the "Article 19(2) of the UNCITRAL Model Law (2006), Section 47(3) of the Arbitration Ordinance and Article 9(1) of the IBA Rules on the Taking of Evidence in International Arbitration (2010)." *(Id.).* There is a reason that the Tribunal is able to use their own discretion in admitting this evidence, and not abide by strict rules of evidence. The Tribunals will already see the evidence, or at least know what it is regarding, when the Tribunal makes a ruling. Due to this knowledge, the Tribunal is able to give the evidence the weight that it deserves and take it into consideration if the evidence is admitted. The Tribunal is able to decipher the facts and decide if the evidence is relevant, material, and admissible.

C. THE HKIAC RULES OF CONFIDENTIALITY AND EVIDENCE ALLOW THE PARTIAL INTERIM AWARD TO BE ADMITTED.

i. The Confidentiality Article in HKIAC 2018 is limited in its scope.

59 The confidentiality rule in HKIAC 2013 Article 42 (now Article 45 under HKIAC 2018) is limited in its scope, and is not binding on this Arbitration. *(HKIAC 2018 art. 45).* Article 45 is limited to the "party or party representative in the arbitration, as well as the arbitral Tribunal, any emergency arbitrator, expert, witness, Tribunal secretary and HKIAC." *(Id.).* RESPONDENT contends that the only way the information could have become available was through "two former employees of RESPONDENT, the contracts of which had been terminated three months ago for cause with immediate effect, or a hack." *(Letter from Fasttrack).* However, this does not prevent the Tribunal from considering the evidence.

60 In fact, Tribunals have found that if "arbitration materials are reasonably necessary to protect the interests or vindicate the rights of the party*". (Ghosh p. 362).* In order to qualify for this exception, courts have defined the reasonably necessary standard narrowly.

ii. Disclosure of the Partial Interim Award is required in the interest of Justice and Public Policy.

61 HKIAC confidentiality rules have an exception for pursuing a legal right or interest. The ability to fairly conduct litigation is the paramount concern that Tribunals should consider in these situations. *(Ghosh p. 360).* Article 45.3 provides that the duty of confidentiality does not prevent a party from instituting legal proceedings to: "(1) protect or pursue its legal right or interest; or (2) enforce or challenge the confidential award in *legal* proceedings before a court or other judicial authority." *(HKIAC 2018 Art. 45.3).* For example, a party may wish to disclose the confidential information in an arbitral award if it wishes to argue that the prior award precludes subsequent claims in judicial proceedings by virtue of *res judicata,* or a similar legal issue. *(Id.*.). If the Partial Interim Award is not admitted, an Abuse of Process under *res judicata* would occur.

62 The Abuse of Process doctrine is a "discretionary aspect of the inherent power which any court of justice must possess to prevent misuse of its procedure." *(Ghosh p. 665).* This theory is a form of *res judicata.* While there are countless indications that the application of abuse of process is appropriate, "there are certain dicta that suggest that a proceeding is

abusive." *(Ghosh p. 666)*. A proceeding may manifest an abuse of process if it: "(i) is oppressive or unjustly harass[es] a defendant; (ii) contains an element of dishonesty; or (iii) could produce inconsistent or mutually exclusive verdicts*." (Ghosh p. 666).* In this proceeding RESPONDENT'S actions met many of the dicta that show an Abuse of Process. By reselling the contracted goods and violating the duty of good faith, the RESPONDENT has shown themselves to be dishonest. Additionally, this Partial Interim Award could show that the decision on the issues today would produce mutually exclusive outcomes.

63 In *London & Leeds*, it was found that "an expert valuer in an arbitration had given contrary expert evidence in two previous arbitrations." *(Hwang & Chung, p. 625).* The Tribunal held that where "a witness was proved to have expressed himself in a materially different sense when acting for different sides, that would be a factor which should be brought out in the interests of individual litigants involved and in the public interest." (*Id).* While the issue in *Leeds,* was an expert giving contradictory opinions in in different arbitrations, the public policy and interest of justice reasoning is the same. In *Leeds,* Mance, L.J. "held that the duty of confidentiality that the parties in the two previous arbitrations owed to the expert valuer in respect of his evidence in those arbitrations was overridden in the interests of the fair disposal of the proceedings." *(Hwang & Chung, p. 625).*

64 RESPONDENT admits that they sold the horse semen to a buyer in Mediterraneo. "The Contract, negotiated also by Mr. Antley, provided for delivery DDP Mediterraneo (INCOTERMS 2010), contained an ICC Hardship Clause 2003, a choice of law clause in favor of Mediterranean law and the Model HKIAC-Arbitration Clause with all additions." (*Proc. Ord.* 2) Following the imposition of the tariffs on agricultural products by the President of Mediterraneo, RESPONDENT asked for a renegotiation of the price under the ICC Hardship Clause 2003 and Art. 6.2.3 of the Mediterranean Contract Law (UNIDROIT Principles) and refused delivery of the mare. This position is directly opposite of their posture in the current arbitration and mirrors CLAIMANT's legal arguments. If a party has given "inconsistent evidence in two separate arbitrations, it is clear that the interests of justice… would require disclosure of arbitration documents in spite of any obligation of confidentiality*." (Hwang & Chung p. 625).*

65 In the other Arbitration, RESPONDENT "had itself asked for an adaptation of the price invoking an unforeseeable change of circumstances." *(Letter from Langweiler).* The change of circumstances was a 25% tariff that increased the price of shipping. *(Id.).* CLAIMANT is seeking only to admit the Partial Interim Award, not any of the evidence that the Tribunal relied on. Admitting the award would follow the principles of transparency and public policy, as the public demand for transparency is increasing for arbitration. *(See Schoenherr).*

CONCLUSION OF ISSUE 2

CLAIMANT is entitled to submit the Partial Interim Award to the Tribunal. While Tribunals have not ruled on the issue of illegally obtained evidence, at least some common legal and policy elements may be distinguished and serve as much needed guidance. This analysis centers around the actions of the PARTIES themselves. If a party violated the duty of good faith in obtaining the evidence, Tribunals have not admitted the evidence. However, CLAIMANT did not illegally obtain the Partial Interim Award. HKIAC grants the Tribunal liberal authority to admit and analyze of evidence, which allows the Tribunal to analyze the evidence and give it the appropriate weight. Finally, the rules of confidentiality do not prohibit the interim award from being admitted. Because the award is already in the public domain the confidentiality rules *de facto* no longer apply. Furthermore, the public interest and the interest of justice exceptions apply, as RESPONDENT is making contradictory arguments in the second arbitration.

ISSUE 3: CLAIMANT IS ENTITLED TO THE PAYMENT OF 1,250,000 USD THROUGH AN ADAPTATION OF THE PRICE IN THE CONTRACT.

66 On 6 May 2017, PARTIES entered into an agreement for the sale of 100 doses of shippable racehorse semen. *(Exhibit C5).* The Contract included a Hardship Clause, which allowed for an adaptation of the Contract in the event of a tariff, and a modified DDP Incoterm that limited the Seller's responsibilities to completing customs documents. *(Exhibit C5).* These terms and their functions were included after months of negotiations with the record

reflecting that Parties intended to do so. *(Exhibits C3, C4, C8).* After signing the Contract, Claimant fulfilled the first two shipments. A few weeks prior to the third shipment the pro-free trade government of Equatoriana, imposed agricultural tariffs in retaliation to recently imposed tariffs by Mediterraneo's newly elected President. *(Exhibit C6).* This came as a surprise even to senior government officials because "until 2018 there had been no tariffs imposed on agricultural goods (or horse semen) in either Equatoriana or Mediterraneo." *(Proc. Ord. 2).*

67 PARTIES were unaware that the tariffs impacted the Contract until two days before the date of the final shipment, when CLAIMANT was obtaining the customs paperwork. *(Exhibit C7).* Both PARTIES were surprised that racehorse semen was considered an agricultural product and covered by the tariffs. *(Exhibits C8, R4).* The tariffs destroyed the economic viability of the agreement which CLAIMANT communicated with RESPONDENT. (*Exhibit C7*). To ensure shipment, RESPONDENT made representations that a price adaptation could be agreed to after the final shipment. *(Exhibit R4).* Negotiations did commence but failed due to RESPONDENT'S CEO getting angry when CLAIMANT raised concerns about RESPONDENT reselling the semen, which was not allowed under the Contract. Shortly after, CLAIMANT initiated arbitration proceedings. (*Exhibit C8)*.

68 In the case at hand, the Contract is governed by the CISG and UNIDROIT (A). CLAIMANT is entitled to damages under Clause 12 of the Sales Agreement because it contains a Hardship Clause (B). CLAIMANT is also entitled to damages under the CISG as Article 6 of the CISG does not preclude the application of Article 79 and Hardship is covered by Article 79 of the CISG. Finally, UNIDROIT provides the specific remedies to Hardship that allow the awarding of damages of 1,250,000 USD (C).

A. THE CONTRACT IS GOVERNED BY THE CISG AND THE UNIDROIT PRINCIPLES.

69 The CISG governs the Contract and its interpretations. Article 1(1) of the CISG requires: "a sale of goods between parties whose places of business are in different States . . . when the States are Contracting States*." (CISG Art. 1).* Goods are to be equated with things and the subject of the international sale must be a movable thing. *(Lookofsky p 23).*

70 The Sales Agreement meets these requirements for the goods are 100 physical doses of shippable racehorse semen *(Exhibit C5),* the Parties are domiciled in different States as CLAIMANT is from Mediterraneo *(Notice Of Arb.)* and RESPONDENT is from Equatoriana. *(Answer to Notice of Arb.).* Both PARTIES' States are signatories to the CISG. *(Proc. Ord.).* In any case, PARTIES agreed "that the United Nations Convention on Contracts for the International Sale of Goods (CISG) will govern the agreement*."* (*Exhibit C5).*

71 Mediterranean law and the Principles on International Commercial Contract (UNIDROIT) govern the Sales Agreement. The parties state in clause 14 of the Agreement, that the "law of Mediterraneo … will govern the agreement." *(Id.).* Respondent confirms this by stating that the law of Mediterraneo "is merely determining the law applicable for the main contract, i.e. the "Sales" part of it." *(Answer to the Notice of Arb.).* In turn, UNIDROIT is applicable to the contract since the general contract law of Mediterraneo is a "verbatim adoption of UNIDROIT." *(Proc. Ord.).*

72 With respect to sales contract, both the CISG and UNIDROIT can be used to support each other. *(See Bonell).* UNIDORIT can play an important role in in understanding and interpreting the CISG. UNIDORIT does not compete or claim to displace the CISG, "but instead fits well within the [CISG] as part of a multilayered approach [enabling] them to supplement each other." *(Rosett, p. 449).*

B. CLAIMANT IS ENTITLED TO RECOVER 1,250,000 USD UNDER CLAUSE 12 OF THE AGREEMENT.

73 A Hardship Clause is explicitly provided for within Clause 12 of the Agreement, which provides that hardship applies when "caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous." *(Exhibit C5).* Respondent affirms the inclusion of the hardship clause within their Answer, which stated that the "Hardship Clause … was then included." *(Answer to the Notice of Arb.).*

i. The presence of a Hardship Clause necessitates an adaptation of the contract.

74 Hardship is an unforeseen event beyond the PARTIES' control that disturbs the contract's balance. (*See Fucci*). Hardship allows the PARTIES to renegotiate and adapt the contract (UNIDROIT Art. 6.2.3). Respondent contends that the Hardship Clause was narrowly tailored to exclude any adaptation. This argument stems from the Hardship Clause being merged with a Force Majeure Clause in Clause 12 of the agreement. *(Answer to the Notice of Arb.).* Although Hardship and Force Majeure may overlap, they are differentiated in that Hardship has the "purpose of renegotiating the terms of the contract so as to allow the contract to be kept alive although on revised terms, while Force Majeure has the purpose of non-performance being excused*." (UNIDORIT Art. 6.2.2 Off. Com. 6).* UDNIDOIT explicitly states that "when the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligation." *(UNIDORIT Art. 6.2.1).*

75 As such the Hardship and Force Majeure clauses are mutually exclusive. One cannot excuse non-performance while on the other hand demand performance. Thus, RESPONDENT cannot claim that Force Majeure's remedy of excusing non-performance controls the Hardship Clause's remedy of adapting a contract to ensure its performance.

ii. The Parties intended for the Hardship Clause to allow for adapting the contract.

76 Contract interpretation assumes an agreement between the parties, necessitating an examination of the common intent of the parties. *(Schwenzer Com. p. 154).* Both the CISG and UNIDROIT hold that the contract is to be interpreted by PARTIES' intent. CISG Article 8 first requires that a party's statements "be interpreted according to his intent where the other party knew or could not have been unaware of what that intent was." *(CISG Art. 8(1)).* This is done by examining the subjective intent of the party making the statement. *(Kröll p. 145).* When the other party could not have been aware or adduced the subjective intent, then the statements should be interpreted according to the understanding "of a reasonable person of the same kind as the recipient in the same circumstances." *(Kröll p. 143).* While CISG Article 8 focuses interpretation on the individual parties, it is "beyond

doubt that Art. 8 CISG is also concerned with the interpretation of the contract." (*Stanivukovic para. 1.a).*

77 UNIDROIT examines contract interpretation through Article 4.1 which states that contracts are "interpreted according to the common intention of the parties*." (UNIDROIT Art. 4.1.)* or if there is no common intent, the meaning a "reasonable person of the same kind as the parties would give to it in the same circumstances*." (UNIDROIT Art. 4.2).* UNIDROIT allows a term within the contract to be given a different meaning than it would normally have if a "different understanding was common to the parties at the time of the conclusion of the contract*." (UNIDROIT Off. Com. Art. 4.1 par. 1).*

78 Both the CISG and UNIDROIT also allow for determining intent by considering the relevant and surrounding circumstances, including the common meaning given to terms within the contract, preliminary negotiations, the conduct of the parties subsequent to the conclusion of the contract, usage, and the nature of the contract *(CISG Art 8(3) and UNIDORIT Art. 4.3).*RESPONDENT knew of CLAIMANT'S subjective intent to have a Hardship Clause which allowed for an adaption of the contract. In an email during negotiations CLAIMANt noted that past governmental actions caused an "increase the cost by 40% and thereby destroy the commercial basis of the deal. At a minimum a hardship clause should be included … to address such subsequent changes*." (Exhibit C4).*

79 Even if CLAIMANT'S subjective intent could not be found, a reasonable person in similar circumstances would have understood that the Hardship Clause's purpose was to maintain the commercial viability of the contract in the case of a sudden cost increase. A reasonable person would also have known that a cost increase can only be overcome by increasing the price paid by the buyer.

80 Contract terms show that the Hardship Clause is applicable to tariff situations. PARTIES agreed that hardship was applicable when "caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous". *(Exhibit C5).* Health and safety requirements are comparable to tariffs in that they are government-imposed actions that affect the price of the goods. In fact, health and safety regulations are often utilized as Non-Tariff Measures (NTM) which are "policy measures

– other than ordinary customs tariffs – that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both." *(UNCTAD).* Although serving non-trade policy goals, as tariff barriers were reduced during globalization, NTMs became utilized more as protectionist barriers in place of tariffs, especially on agriculture. *(UNCTAD Non-Tariff Measures pp. 2-3).* Prior health and safety regulations causing price increases of 40% *(Exhibit C5)* could described as being used in a tariff manner, for the effect was harsher than recent US tariffs on China were at 25%. *(Huileng).*

81 The PARTIES' subsequent actions confirmed that the Hardship Clause allowed for a price adaptation due to a tariff. In an email notifying RESPONDENT that frozen racehorse semen was affected by the new Equatoriana tariffs, CLAIMANT stated that "you [RESPONDENT] will understand that we will have to find a solution in that regards before we ca start the shipment." *(Exhibit C7).* A solution necessitates a payment adjustment from the RESPONDENT to offset the 30 % tariff. RESPONDENT knew this and in response stated that "if the contract provides for an **increased price** in the case of such a high additional **tariff,** we will certainly find an agreement on the price." *(emph. add. Exhibit R4).*

C. THE PARTIES ADOPTED A MODIFIED USAGE OF DDP WHICH LIMITED CLAIMANT'S RESPONSIBILITIES TO PROVIDING EXPORT AND IMPORT DOCUMENTATION.

82 A potential argument against CLAIMANT is that as seller CLAIMANT is responsible for tariffs through Delivered Duty Paid (DDP). DDP is an Incoterm, which is an internationally recognized standard in trade agreements clarifying "the tasks, costs and risks involved in the delivery of goods from sellers to buyers." *(ICC Incoterms 2010)*. DDP designates that a "seller has the obligation … to pay any duty for both export and import and to carry out all customs formalities*." (ICC Incoterms 2010).* Incoterms are incorporated into the CISG through Article 9 section 2, which states that "parties are considered to have … made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known*." (CISG Art 9(2)).*

83 Incoterm party responsibilities can be modified. The CISG states that parties are bound to any agreed usage or practices established between then. *(CISG Art. 9(1)).* Within Article

9, a hierarchy of rules apply where above all, the agreement of the parties (Art. 6) and usages and practices (Art. 9(1)) will displace the CISG except for articles 12 and 96 *(Kröll p. 155)*. Next in the hierarchy is a usage of trade is CISG Art. 9(2)). (*Kröll pp. 154, 155*). At the bottom of the hierarchy is the Convention itself. *(Kröll p. 155)*. The Parties' intent in Article 8 of the CISG should also be considered as to the scope of a utilized Incoterm. *(Kröll p. 143).*

84 RESPONDENT knew of CLAIMANT'S subjective intent to not have DDP applicable to tariffs. RESPONDENT first requested the inclusion of DDP due to the "[CLAIMANT'S] much greater experience in the necessary export and import documentation." *(Exhibit C3).* CLAIMANT responded by accepting DDP only for documentation but stated that "we are not willing to take over any **further** risks associated with such a change in the delivery term." *(emph. add. Exhibit C4).* A reasonable person in similar circumstances would also have understood that DDP did not include responsibilities beyond custom documentation.

85 Operationally, PARTIES had to use DDP, for it is the only 2010 Incoterm that assigns export and import documentation responsibility. Included in DDP is the obligation of the seller ... "to pay any duty for both export and import and to carry out all customs formalities". *(ICC Incoterms 2010).* Customs formalities relate to the declaration documentation and the inspection of goods but not tariffs. *(Kyoto Conv. Ch. 3).* As such, CLAIMANT operated under customs formalities when agreeing to only be responsible for documentation.

D. ARTICLE 79 OF THE CISG IS APPLICABLE TO HARDSHIP SITUATIONS

i. The Force Majeure clause through Article 6 of the CISG does not preclude the use of Article 79 of the CISG.

86 RESPONDENT argues that CISG Article 6 prevents the use of CISG Article 79 through the inclusion of a Force Majeure clause in the Agreement. However, Article 6 empowers the PARTIES to "derogate from or vary the effect of" provisions of the CISG. *(CISG Art. 6).* If derogation does occur the extent or degree is not always easy to ascertain. *(Kröll p. 107 para 24).* Either way, a mutual agreement in necessary for the parties not wishing to have provisions of the CISG applies. *(Schwenzer Com. p. 102 par. 2).* Contrary to the PARTIES' agreement, the CISG applies. (*id*.).The terms within the Force Majeure/Hardship Clause

are too general to be seen as an exclusion of the CISG. The Clause is silent as to the requirements of identifying a loss of equilibrium, acceptance of risk, foreseeability for Hardship to exist with no mention or agreement by the PARTIES to exclude these requirements. These gaps necessitate a utilization of Article 79. At most, the PARTIES were attempting to modify the extend of the applicability of Article 79 to certain health and safety regulation scenarios but not a full derogation from the CISG.

ii. The Concept of Hardship is Present within Article 79 of the CISG.

87 Although there is no specific hardship wording within the CISG, the word impediment with Article 79 can be read to include Hardship within the CISG. *(Brunner p.99).* CISG Scholars including Ingeborg Schwenzer argues that today "it is more or less unanimously accepted in court (See *Belgium 19 June 2009 Court of Cassation [Supreme Court] (Scafom International BV v. Lorraine Tubes S.A.S.*)) and arbitral decisions (*See e.g. CISG-online Case No 436; CISG-online Case No 371; and CISG-online Case No 102*) as well as in scholarly writing that Article 79 does indeed cover issued relating to hardship as a group of cases under force majeure." *(Schwenzer Art. pp. 713-715).* It is important for Tribunals and courts to recognize hardship in the CISG in order to promote the unification of the law of sales. Otherwise non-uniform approaches will filter through the many domestic legal systems that already recognize hardship through the concepts of "frustration of purpose" or "fundamental mistake." *(Schwenzer Art. at p. 713).*

88 *"*Hardship can only be found if the performance of the contract has become excessively onerous or, in other words, if the equilibrium of the contract has been fundamentally altered." (*Schwenzer Art. pp. 714-715*). For Hardship, a contract being more onerous does not excuse the obligor from performance. *(Schwenzer Art. p. 714).* The Hardship analysis begins with a determination of when the equilibrium of the contract became excessively onerous, or in other words, fundamentally altered. This occurs when there is either "an increase in the cost of performance or a decrease in value of the performance received*." (Schwenzer Art. p. 715).* An increase in the cost of performance is defined as "a substantial increase in cost for one party of performing its obligation*."* (*UNIDORIT Off. Art. 6.2.2. Com. at par. 2).* The equilibrium of the contract on was fundamentally altered on 19

December 2017 when the government of Equatoriana imposed a 30 % tariff on Agricultural product. *(Exhibit C6).* This tariff destroyed the 5 % profit margin within the original agreement and thus altered the equilibrium of the agreement. *(Exhibit C8).*

89 After finding when the contract's equilibrium was altered, the affected party must prove Hardship prerequisites that are shared with Force Majeure: "the impediment must not fall in the sphere of risk of the obligor, it must have been unforeseeable; and, it or its consequences must have been unavoidable." *(Schwenzer Art. pp. 714-715).* UNIDROIT adds an additional requirement that "the events occur or become known to the disadvantaged party after the conclusion of the contract." *(UNIDOIRT Art. 6.2.2).*

90 If contract interpretation determines whether the event in question was expressly or impliedly included within the parties' respective spheres of risk. (*Schwenzer Art. p.* 715). "One party may have expressly or impliedly assumed the risk for a fundamental change of circumstances or, on the contrary, certain risks may have been expressly or impliedly excluded." *(Id.).* As previously discussed, the events at hand were not within the CLAIMANT'S sphere of risk since there was a modification of DDP incoterms that excluded CLAIMANT'S responsibility to pay for any customs duties. (*See paras 84, 85*).

91 Second, the affected party must show foreseeability, "the decisive test is whether a reasonable person in the shoes of the promisor, under the actual circumstances at the time of the conclusion of the contract ought to have foreseen the impediments' initial or subsequent existence." *(Schwenzer Com. p. 1134).* A conclusion of the contract occurs when there "is a declaration of acceptance*." (Id. at p. 391 par. 1).* "All potential impediments to the performance of a contract are foreseeable to one degree or another." *(CF Secretariat's Comm, Art 65, No5).* The imposition of the Equatoriana tariffs was unforeseeable to a reasonable person. After the conclusion of the Agreement, the tariffs came as a surprise to the public at large and even senior members of the government, which had a pro-free trade ideology. *(Exhibit C6).* Furthermore, both CLAIMANT *(Exhibit C6)* and RESPONDENT *(Exhibit R4)* were surprised that frozen horse semen was included in the tariff, with Equatoriana government officials initially uncertain when asked. *(Exhibit R4).* Third, an impediment is seen as avoidable "if [it is] overcoming the impediment or its

consequences is both possible and reasonable for him*." (Schwenzer Com. p. 1135 par. 15).* "State interventions preventing performance generally lie outside of the parties' sphere of influence." *(Id. at p. 1137 par. 18).* Since the tariffs were a State measure by the government of Equatoriana, CLAIMANT, a Mediterranean company, would have little opportunity to influence to the tariff's implementation.

92 If the event meets the prerequisites, then an analysis concludes by determining the Hardship Threshold necessary for relief by giving primary consideration to the circumstances of the specific case. *(Schwenzer Art. p. 722).* A hardship term should be interpreted in the broadest sense, "encompassing any change of circumstances after the conclusion of the contract*." (Id. at 718).* The threshold can be lowered based on the time length of the contract, the profit margin, and whether financial ruin for the obligor is imminent *(Id. at 716).* Short term contracts lower the threshold level for dramatic changes in the original basis of the agreement are more likely to occur. *(Brunner p 438).*

93 CLAIMANT faces a low Hardship Threshold. First, the profit margin amount was very slim at 5%, which made it impossible for CLAIMANT to absorb the 30% tariff *(Exhibit C8).* Second, the contract a short-term ten-month contract susceptible to a dramatic change. *(Exhibit C5 para. 8).* Finally, RESPONDENT is in financial difficulty and requires a new line of credit *(Proc. Ord. 2).* If CLAIMANT must continue to bear the tariff, then the ability to obtain a new line of credit will be difficult and could result in part of CLAIMANT'S business being sold as a prerequisite for new credit. *(Proc. Ord. 2).*

E. UNIDROIT PROVIDES THE CLAIMANT WITH HARDSHIP REMEDIES.

94 CLAIMANT seeks 1,250,000 USD in damages to restore the contract to a 5% profit margin. Neither the Agreement nor the CISG provide an explicit remedy for Hardship. However, "nothing in [article 79] prevents either party from exercising any right other than to claim damages under this Convention." *(CISG Art. 79(5))* and the contract is governed by the Law of Mediterraneo which has adopted verbatim UNIDORIT principles which provide adaptation as a remedy to Hardship through Article 6.2.

95 The Belgium Supreme Court, in finding a basis for Hardship in Article 79, noted that UNIDORIT could be used to provide hardship remedies. *(Scafom International)* UNIDROIT is applicable through the concept of 'Gap Filing' within CISG Article 7, which states that "questions concerning matters governed by this convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." *(CISG Art 7(2))*. Both PARTIES agreed through the rule of private international law that UNIDORIT is applicable to the Contract as a procedural gap filler.

96 UNIDROIT states that "in the case of hardship the disadvantaged party is entitled to request renegotiations … without undue delay" *(UNIDROIT Art 6.2.3)* and that "the request for renegotiation does not in itself entitle the disadvantaged party to withhold performance." *(UNIDROIT Art. 6.2.3)*. There is no express obligation that the other party must enter the negotiations, but UNIDORIT does contain a duty to co-operate in article 5.1.3 and like the CISG contains principles of good faith within article 7. *(Vogenauer, p. 819)*. CLAIMANT meets these requirements of UNIDROIT, for CLAIMANT did not withhold performance for the shipment affected by the tariff. CLAIMANT notified RESPONDENT without delay on the same day when it was determined that frozen race horse semen was covered by the Equatoriana tariff. *(Exhibit C7)*. RESPONDENT agreed to renegotiate the price but did so only to ensure delivery of the goods, for "CLAIMANT would not deliver if I were to reject their request outright." *(Exhibit R4)*. The negotiations failed with the RESPONDENT becoming irate and immediately leaving after a discussion occurred about RESPONDENT reselling doses in violation of the contract. *(Exhibit C8)*.

97 If negotiations fail, then the Tribunal that finds Hardship may "adapt the contract with a view to restoring its equilibrium". *(UNIDROIT Art 6.2.3(b); Vogenauer, pp. 820-821)*. Adaptation can be applied to the contract price. *(Vogenauer p. 821)*. PARTIES met to negotiate adapting the Contract to cover the tariff cost. *(Exhibit C8)*. The negotiations failed *(Exhibit C8)*, which now necessitates the Tribunal to provide a remedy of adapting the contact through a price adaptation to offset the cost of the tariffs.

CONCLUSION OF ISSUE 3

CLAIMANT is entitled to recover the 1,250,000 USD in damages for paying the tariffs through both Clause 12 of the Contract and the CISG. Clause 12 is a Hardship Clause that necessitates price adaptation, and it was the PARTIES' intent for the clause to allow for adaptation. Article 79 of the CISG covers the concept of Hardship. Finally, UNIDTROIT Article 6.2 is the applicable law through which the Tribunal can adapt the contract.

PRAYER FOR RELIEF

In light of the foregoing submissions CLAIMANT respectfully requests the Arbitral Tribunal to find that:

(1) The Arbitral Tribunal has the jurisdiction and power to adapt the contract under the arbitration agreement (Issue 1);

(2) CLAIMANT is entitled to submit the evidence from the other Arbitration Proceedings (Issue 2);

(3) CLAIMANT is entitled to the payment of 1,250,000 USD resulting from an adaptation of the price (Issue 3).

Submitted on behalf of CLAIMANT by the University of Houston Law Center.

6 December 2018: (signed)

/s/ Zachary Baumann */s/ Dominic Kisielewski* */s/ Kathryn Laflin*