MEMORANDUM FOR CLAIMANT

HIDAYATULLAH NATIONAL LAW UNIVERSITY

ATAL NAGAR, INDIA

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

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CITED AS:	FULL CITATION
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
IBA Rules	IBA Rules on the Taking of Evidence in International Commercial Arbitration
INCOTERMS 2010	International Commercial Terms 2010 published by the International Chamber of Commerce
PICC	UNIDROIT Principles on International Commercial Contracts
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985 with amendments adopted in 2006)

LIST OF ABBREVIATIONS

&	And
¶ / ¶¶	Paragraph/Paragraphs
Ans. To NoA	Answer to Notice of Arbitration
Arb. Int'l	Arbitration International
Arg.	Argentina
Art./Arts.	Article/Articles
Aus.	Australia
Aut.	Austria
Bel.	Belgium
Bul.	Bulgaria
Can.	Canada
CAS	Court of Arbitration for Sports
CIArb	Chartered Institute of Arbitrators
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods, of 11 April 1980
CISG-AC	CISG- Advisory Council
CISG-online	CISG Database (http://www.cisg-online.ch)
Cl.	Clause
DDP	Delivered Duty Paid
Doc.	Document
Dt.	Dated
Ed.	Edition
ed./eds.	Editor/Editors
EU	European Union
Ex.	Exhibit
Fr.	France
FSSA	Frozen Semen Sales Agreement
Ger.	Germany
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	HKIAC Administered Rules 2018

i.e.	*id est* [that is]
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Commercial Arbitration
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
INCOTERMS	International Commercial Terms
It.	Italy
K.B.	King's Bench
Ltd.	Limited
No.	Number
NoA	Notice of Arbitration
Off. Cmt.	UNIDROIT Official Comment
Op.	Opinion
p./pp.	Page/Pages
PCA	Permanent Court of Arbitration
PICC	UNIDROIT Principles of International Commercial Contracts (2016)
PO	Procedural Order
Pvt.	Private
Q.B	Queen's Bench
SGHC	Singapore High Court
Sing.	Singapore
Switz.	Switzerland
U.K.	United Kingdom
U.S.A.	United States of America
U.N.	United Nations
UNCITRAL	United National Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollars
v.	Versus
Y.B. Comm. Arb.	Yearbook of Commercial Arbitration

STATEMENT OF FACTS

1. Phar Lap Allevamento (CLAIMANT) is the most renowned stud farm in Mediterraneo, known for its breeding success in racehorses, particularly, Nijinsky III, which has won many laurels and has sired many up and coming racehorses. Black Beauty Equestrian (RESPONDENT) is a company famous for its broodmare lines with excellent pedigree. The CLAIMANT and the RESPONDENT are hereinafter collectively referred to as the "Parties".

2. In furtherance of its aim to expand business, and taking advantage of the temporary lift of the ban on artificial insemination of racehorses, the RESPONDENT enquired with the CLAIMANT about the availability of frozen semen of Nijinsky III [*Exhibit C1, p. 9*]. Despite the unusual nature of the request, Phar Lap offered 100 doses of frozen semen of Nijinsky III to the RESPONDENT [*Ex C2, p. 10*].

3. On 6 May 2017, the Parties concluded a Frozen Semen Sales Agreement (FSSA) for sale of 100 doses of frozen semen of Nijinsky III to the RESPONDENT [*Ex. C1, p. 9*]. The FSSA provided for a hardship clause and a DDP delivery with certain risks transferred to the RESPONDENT. Clauses 14 & 15 stipulate that disputes between the parties shall be decided by arbitration in Vindobona in accordance with the rules of the Hong Kong International Arbitration Centre (HKIAC). The Contract is governed by the laws of Mediterraneo, which includes the UN Convention on Contracts for the International Sale of Goods (CISG).

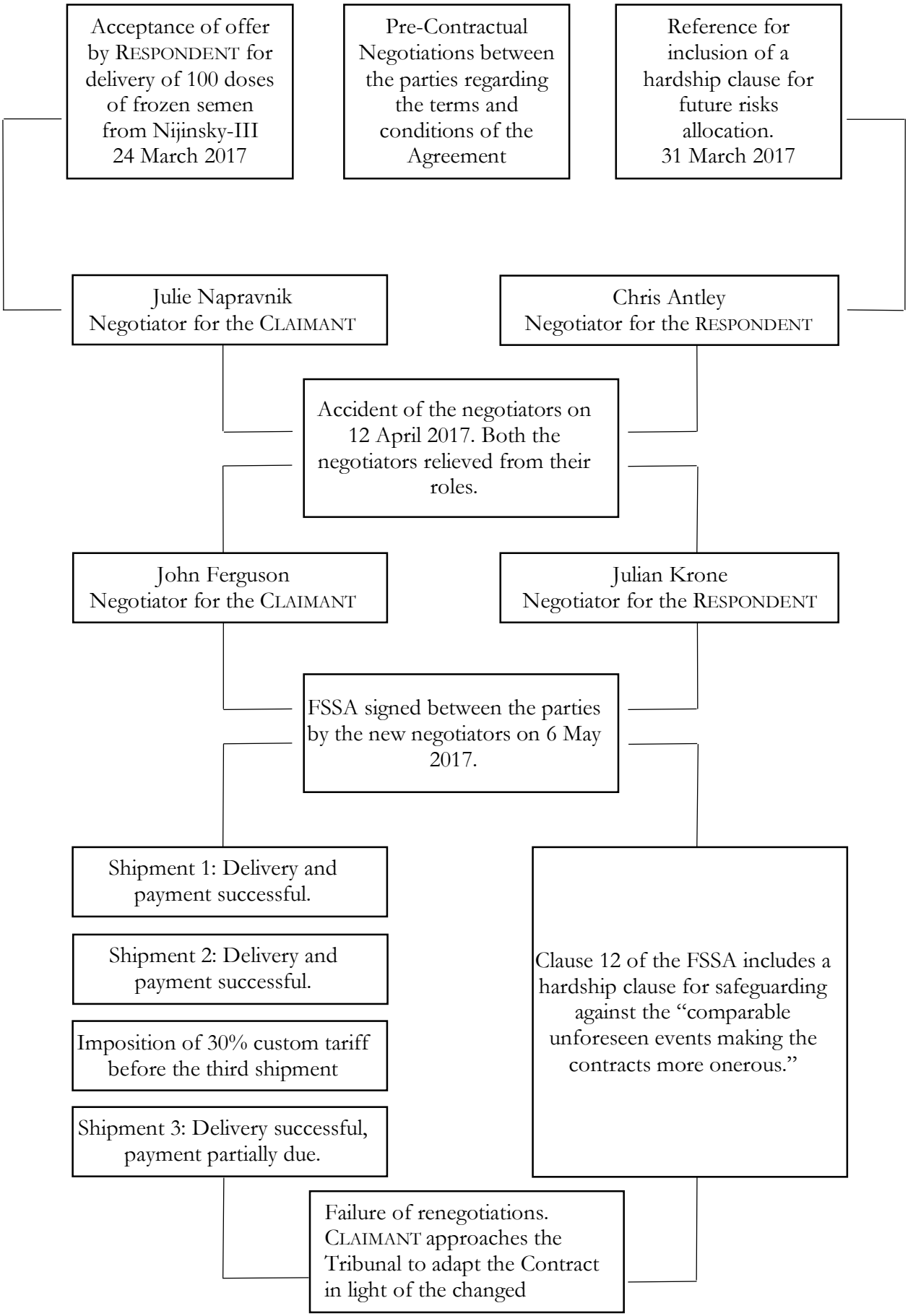
4. Before the final delivery of the third shipment, an unexpected rise in tariffs was imposed by Mediterraneo on products from Equatoriana. In an unexpected move, Equatoriana imposed a retaliatory tariff of 30% on selected products from Mediterraneo including horse semen.

5. Under the impression that the RESPONDENT had agreed to renegotiate the prices and to fulfill their requirement for an urgent delivery, the CLAIMANT performed the contract.

6. However, the negotiation for the price adaptation failed. The CLAIMANT subsequently, commenced thearbitration [*Exhibit C8 p.17*]. Consequently, and entirely as a matter of chance, the CLAIMANT was made aware of another arbitration to which the RESPONDENT was a party, where it sought a price adaptation to account for an unforeseen change in circumstances [*CLAIMANT Mail dt. 02 October 2018, p. 49*]. A Partial Interim Award passed in the other arbitration, corroborates these facts [*PO2, ¶Para 41, p. 61*].

TIMELINE OF EVENTS

21 March 2017	RESPONDENT contacted CLAIMANT inquiring about the availability of Nijinsky III sperm for breeding program.
24 March 2017	CLAIMANT acknowledged the special nature of the request and showed interest in the transaction.
28 March 2017	RESPONDENT agreed to all terms offered by CLAIMANT, except dispute forum selection and DDP terms.
31 March 2017	CLAIMANT focused on its unwillingness to accept additional risks associated with DDP and insisted on inclusion of hardship clause.
10 April 2017	RESPONDENT prepared a draft of arbitration clause submitting disputes to HKIAC and *lex arbitri* and *lex causae* to be law of Equatoriana.
11 April 2017	CLAIMANT made the RESPONDENT aware of its internal policy relating to seat (suggesting Danubia) and contract submitted to foreign law.
12 April 2017	The primary negotiators, Julie Napravnik and Chris Antley, met with an accident and were forced to withdraw from the negotiations.
6 May 2017	FSSA was signed between parties.
November 2017	Mediterraneo imposed 25% tariff on agricultural products from Equatoriana.
December 2017	Reactionary tariff hike by Government of Equatoriana and unprecedented increase of 30% on commodities including racehorse semen.
20 January 2018	CLAIMANT initiated renegotiation of price and was assured by Mr. Shoemaker, on behalf of the RESPONDENT of a positive outcome.
23 January 2018	Third shipment of semen was authorised.
12 February 2018	Renegotiation regarding price failed. Ms. Kayla, RESPONDENT CEO got aggressive and thereafter refused to engage in further negotiations.
29 June 2018	Partial Interim Award was passed in the other arbitral proceeding.
31 July 2018	Notice of Arbitration by CLAIMANT.
24 August 2018	Answer to the Notice of Arbitration by RESPONDENT.
2 October 2018	CLAIMANT brought to the notice of the Tribunal RESPONDENT'S other arbitration proceeding.
3 October 2018	RESPONDENT refuted allegations, imputed illegality on the documents.
5 October 2018	Procedural Order No. 1 released.
2 November 2018	Procedural Order No. 2 released.


Acceptance of offer by RESPONDENT for delivery of 100 doses of frozen semen from Nijinsky-III 24 March 2017
Pre-Contractual Negotiations between the parties regarding the terms and conditions of the Agreement
Reference for inclusion of a hardship clause for future risks allocation. 31 March 2017
Julie Napravnik Negotiator for the CLAIMANT
Chris Antley Negotiator for the RESPONDENT
Accident of the negotiators on 12 April 2017. Both the negotiators relieved from their roles.
John Ferguson Negotiator for the CLAIMANT
Julian Krone Negotiator for the RESPONDENT
FSSA signed between the parties by the new negotiators on 6 May 2017.
Shipment 1: Delivery and payment successful.
Shipment 2: Delivery and payment successful.
Imposition of 30% custom tariff before the third shipment
Shipment 3: Delivery successful, payment partially due.
Clause 12 of the FSSA includes a hardship clause for safeguarding against the "comparable unforeseen events making the contracts more onerous."
Failure of renegotiations. CLAIMANT approaches the Tribunal to adapt the Contract in light of the changed

SUMMARY OF ARGUMENTS

7. Since the law governing the arbitration agreement is not expressly provided, the implied choice of the parties, which was the law of Mediterraneo, governs the arbitration agreement. The same law shall govern the interpretation of the agreement to arbitrate as well. Since the laws of Mediterraneo call for a broad interpretation of terms, the arbitration clause, albeit narrowly worded, does encompass a dispute with respect to price adaptation. Further, the intent of the parties and the pre-contractual negotiations also indicate that the parties had envisaged such a dispute and had agreed that in case the parties were unable to renegotiate, the Tribunal shall exercise its power to adapt the contract. This power was implied into the terms of the contract. Lastly, the vesting of this power with the arbitrator is not contrary to any of the legal systems concerned. **[I].**

8. The contested evidence is admissible as the CLAIMANT has approached the Tribunal with clean hands and is not responsible for any illegality averred by the RESPONDENT. The admissibility is not barred by confidentiality restrictions as it is available in the public domain and the obligations of confidentiality do not apply to the CLAIMANT. The evidence is relevant and material to the outcome of the case, as it establishes the contradictory claims of the RESPONDENT before the two fora. The Tribunal must also give due regard to the award in the previous arbitration which allowed for price adaptation in case of hardship under the law of Mediterraneo and confirmed the power of the tribunal to do so. Therefore, the CLAIMANT is entitled to submit the evidence **[II].**

9. The CLAIMANT is entitled to reimbursement for an outstanding price of USD 1,250,000 or any other amount. The CLAIMANT'S liability for the unexpected increase in custom tariff is exempted as it qualifies as an unforeseen event under Clause 12 of the FSSA, by the virtue of the principle of ejusdem generis. CLAIMANT is also entitled to claim relief under Article 79. In the absence of any agreement under Article 6, CISG to derogate from the provisions, the CLAIMANT has a remedy under Article 79. The CLAIMANT is also entitled to find a relief through Article 7(2), through general principles of good faith and UNIDROIT Principles. Furthermore, the RESPONDENT has acted in bad faith by showing inconsistency on multiple occasions. The RESPONDENT falsely induced the CLAIMANT to enter into renegotiations without the intention of reaching an agreement as well as breaking off the negotiations. The RESPONDENT has also breached the resale clause by concealing that the doses had been resold to multiple customers. Therefore, the Tribunal must adapt the contract in the favour of the CLAIMANT. **[III]**

ARGUMENTS WITH REGARD TO PROCEDURAL ISSUES

I. THE TRIBUNAL HAS THE JURISDICTION AND THE POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, AND THE LAW OF MEDITERRANEO IS THE LAW THAT GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION.

10. The law which governs the arbitration agreement and its interpretation will, in turn, determine scope of the terminology used in the agreement. The scope being wide enough in the present case, the Arbitral Tribunal has the jurisdiction and the power to adapt the contract. It is submitted that firstly, the law governing the arbitration agreement is the law of Mediterraneo **[A]**. Secondly, the law of Mediterraneo governs the interpretation of the arbitration agreement **[B].** Thirdly, the Tribunal has the jurisdiction and power to adapt the contract **[C].**

A. THE LAW GOVERNING THE ARBITRATION AGREEMENT IS THE LAW OF MEDITERRANEO

11. It is submitted that where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract. [*Sonatrach (UK)*]. The parties agreed to a general choice of law as the law of Mediterraneo knowing very well that there is no law governing the arbitration agreement in specific [*FSSA, Cl. 14, p.14*]. Moreover, the parties had made an implied choice of the law of Mediterraneo to govern the arbitration agreement **[1].** Therefore, the seat of the arbitration is immaterial **[2].** Further, separablility does not affect this implied choice **[3].**

1. There was an implied choice of the law of Mediterraneo to govern the arbitration agreement

12. The CLAIMANT submits that according to the three-stage choice-of-law analysis, when there is no express law to govern the arbitration agreement, it is necessary to consider as to whether the parties had made any implied choice of law [*Sulamerica (UK)*; *BCY (Sing.)*].

13. While the RESPONDENT had suggested that the law of the arbitration clause be the law of Equatoriana, the CLAIMANT had expressly denied it on the ground that they needed a

special approval from their Creditors Committee for the contract to be governed by any foreign law [*Ex. R2, p.34*]. It is pertinent to note that the CLAIMANT never received a response to this e-mail. While the law governing the rest of the agreement was clear, the doubt was regarding the law governing the arbitration agreement [*Ex. R1, R2, pp.33-34*]. Mr. Krone, the new negotiator of the RESPONDENT, also was fully aware of this circumstance, since he had access to the previous mails exchanged [*PO 2, ¶5, p.55*].

14. It is incorrect for the RESPONDENT to claim now that they always intended for the law of the seat to be the law of the arbitration agreement as it had during the negotiations itself stated that *"it should probably be the task of the arbitrator to adapt the contract if the Parties could not agree"* and that there was no necessity for an express clause [*Ex. C8, p.17*]. Clearly, RESPONDENT would not have intended the laws of Danubia to apply as according to Danubian law, the arbitration agreement would not be interpreted as authorizing a contract adaptation by the Tribunal [*PO 1, ¶II(3), p.52*]. Further, it is only under the laws of Mediterraneo that the agreement could be broadly construed so as to include adaptation, even without express authorisation [*NoA, ¶16, p.7*]. Therefore, there was always an implied choice of the parties to apply the laws of Mediterraneo to the arbitration agreement.

2. The seat of arbitration is immaterial

15. The arbitration clause states that the seat of arbitration shall be Danubia [*FSSA, Cl. 15, p.14*]. While the law of the seat governs the procedure of arbitration, it does not necessarily follow that the substantive law of the seat must govern the arbitration agreement [*BCY (Sing.)*].

16. The CLAIMANT submits that the parties have subjected the arbitration agreement to an implied choice [*As submitted in I A, ¶¶11-14*]. Further, the parties have also expressly chosen the substantive law of the underlying contract (the law of Mediterraneo). Therefore, the question of application of the default rule of the seat, does not arise [*Habas (UK); BCY (Sing.)*]. Hence, the choice of a seat does not displace the implied choice of law governing the arbitration clause [*Habas (UK)*].

3. Despite the arbitration clause being separable, it is still governed by the Law of Mediterraneo

17. The CLAIMANT notes that the doctrine of separability serves to give effect to the parties' expectation that their arbitration clause remains effective even if the main contract is

alleged or found to be invalid. However, this does not mean that the arbitration clause forms a distinct agreement from the time the main contract is formed [*BCY (Sing.)*]. Therefore, the agreement to arbitrate is severable, but that does not mean it is separate. [*Briggs, p.14.37*].

18. The CLAIMANT submits that resort need only to be had to the doctrine of separability when the validity of the arbitration agreement itself is challenged [*BCY (Sing.)*]. Therefore, the intent behind the separability principle is to save the arbitration agreement when the rest of the contract is void. The principle does not "insulate the arbitration agreement from the substantive contract for all purposes" [*Sulamerica (UK)*].

19. Further, Article 16 of the Danubian Arbitration law states that "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract". The CLAIMANT notes that the arbitration agreement is only considered independent of the other terms of the contract "for the purpose of" an arbitral tribunal's jurisdiction to consider challenges to its own jurisdiction [*Art. 16, UNCITRAL Model Law*]. However, that question does not arise in the present situation as the validity of the contract is undisputed. Therefore, the principle of separability has no consequence in the present case.

B. THE LAW OF MEDITERRANEO GOVERNS THE INTERPRETATION OF THE ARBITRATION AGREEMENT

20. The law governing the arbitration agreement does not *ipso facto* apply to its interpretation. Therefore, the CLAIMANT submits that the law of Mediterraneo governs the interpretation in the present case **[1].** In any case, the pro-arbitration principle gives effect to the more liberal interpretation **[2].** Lastly, the term "dispute arising out of" should be interpreted to include adaptation **[3].**

1. The law of Mediterraneo governs the interpretation

21. The CLAIMANT submits that *"[i]f the parties have not chosen which law shall govern the interpretation of the arbitration agreement, the law chosen by the parties to apply to, or the law otherwise applicable to, the arbitration agreement shall govern its interpretation as well."* [*Born, p.1394*]. Since the law applicable to the arbitration agreement is the law of Mediterraneo, it shall govern the interpretation of the arbitration agreement as well [*As submitted in I A, ¶¶11-14*].

2. In any case, the pro-arbitration principle gives effect to the more liberal interpretation

22. The pro-arbitration principle provides that a valid arbitration clause should generally be interpreted expansively, and in cases of doubt, it must be extended to encompass disputed claims [*Born, p.1326*]. That is particularly true where an arbitration clause encompasses some of the parties' disputes and the question is whether it also applies to related disputes, so that all such controversies can be resolved in a single proceeding rather than in multiple proceedings in different forums [*Born, p.1325*]. This applies irrespective of which national law is to govern the interpretation of the arbitration agreement. The CLAIMANT submits that most civil and common law countries have adopted this approach in the recent years [*Born, p.1335; Hancock(Aus.), Doga (Fr)*]. Since the law of Mediterraneo calls for a broad interpretation of terms, it is one of the many nations that support the pro-arbitration principle [*NoA, ¶16, p.7*].

3. The term "dispute arising out" should be interpreted to include adaptation

23. The CLAIMANT notes that the terms used in the arbitration agreement are to be given a broad interpretation given the law applicable to it [*As submitted in I-B1 and I-B2, ¶¶ 20-22; NoA, ¶16, p.7*]. Further, these terms are always given a broad interpretation **[i]** and the general principles of contract interpretation must be considered **[ii].**

i The terms in the arbitration clause are always given broad interpretation

24. It is submitted that the terms "dispute," "difference" and "controversy" should all be given expansive interpretations, to cover any circumstance where one party demands something and the other party refuses, fails, or is unable to provide it [*Born, p.1348*]. Further, "[m]ost arbitration clauses provide for arbitration of all 'disputes' or 'differences,' while some clauses instead refer to 'claims' or 'controversies.' These formulations encompass any sort of disagreement, dispute, difference, or claim that may be asserted in arbitral proceedings" [*Tjong (Sing.)*].

25. It is submitted that the underlying basis for a generous approach towards construing the scope of an arbitration clause is the assumption that "commercial parties, as rational business entities, are likely to prefer a dispute resolution system that can deal with all types of claims in a single forum" [*Petropod (Sing.)*] and that is why the other terms, namely "arising out of", "relating to," or "in connection with," have merely linguistic differences and no

substantial difference [*J.J. Ryan & Sons (USA)*]. This rational businessman approach is applicable in the present scenario as both, the CLAIMANT and the RESPONDENT are prospering companies [*NoA, pp.4-5, ¶1, 5*].

26. Therefore, it is immaterial that some of the terms were dropped while drafting the contract [*FSSA, Cl. 15, p.14*]. This, in no way reduces the scope of the clause. The fact that the parties defined a limited arbitral jurisdiction does not suffice to negate the reasons for interpreting the scope of that agreement liberally, given the gains in efficiency and fairness from doing so, rather than narrowly [*Born, p.1342*].

ii The general principles of contract interpretations must be considered

27. The CLAIMANT submits that the CISG shall apply to the interpretation of Arbitration agreements when the law governing the contract is the law of Mediterraneo [*PO 1, ¶4, p.52*]. Therefore, pre-contractual negotiations must be taken into consideration in determining intention [*Art. 8(3), CISG*]. Consequently, the CLAIMANT submits that where it appears that the parties have not agreed to submit all disputes arising out of a particular contract to arbitration, the parties' intention may also be referred [*Gaillard, p.298*]. The arbitral tribunal may construe the validity and scope of an arbitration clause in accordance with the general principles of the interpretation of contracts, i.e. seeking the real and common intent of parties, based on the wording of the clause, and the principle of confidence or good faith" [*ICC 7929*].

28. The RESPONDENT may have narrowed down the wording of the clause, but it provides no rationale behind doing so at the time of narrowing it [*Ex. R1, p.33*]. Therefore, it is impossible to assume that the RESPONDENT intended to exclude price adaptation as they have claimed [*Ans. to NoA, ¶13, p.31*]. Furthermore, the RESPONDENT has not mentioned any alternate dispute settlement mechanism for the types of disputes they allegedly wished to exclude either, a practice followed by parties that wish to exclude certain claims from arbitration.

29. On the contrary, the CLAIMANT, time and again, mentioned the risk associated with customs regulations and this was the reason the CLAIMANT wanted the inclusion of the hardship clause [*Ex. C4, p.12*]. This furthers shows that the CLAIMANT always intended for the arbitration clause to "address such subsequent change" [*Ex. C4, p.12*]. In spite of being aware of this, the RESPONDENT made no attempt to clarify which disputes, according to it, should be arbitrable. Instead, it signed an agreement with a hardship clause which implies

that it also acceded that such risks would be addressed through arbitration [*FSSA, Cl. 12, p.14*]. Further, since dispute arises from a hardship, which is an express clause, there is no reason to believe that it is not a "dispute" in its true sense [*FSSA, Cl. 12, p.12*].

30. The CLAIMANT further submits that price adaptation is indeed an arbitrable matter, and several tribunals in the past have exercised their power to adapt contracts [*Distrigas (Switz.)*]. Therefore, the issue about non-arbitrability does not arise in the present case.

C. THE TRIBUNAL HAS THE JURISDICTION AND POWER TO ADAPT THE CONTRACT

31. An arbitral tribunal derives its jurisdiction to decide a particular dispute from the arbitration agreement [*Gaillard, p.29; Electricity Board (UK)*]. The RESPONDENT has raised erroneous objections to the Tribunal's jurisdiction and its lack of power to adapt the contract [*Ans. to NoA, ¶12, p.31*]. Pursuant to the principle of *kompetenz-kompetenz*, the Tribunal has the jurisdiction **[1].** Furthermore, the Tribunal has the power to adapt the contract **[2].**

1. The Tribunal has the jurisdiction in the present matter

32. An Arbitral Tribunal may validly resolve only those disputes that the parties have agreed that it should resolve [*Hunter, ¶5.91*]. The CLAIMANT submits that by virtue of the FSSA, the HKIAC Rules would resolve their disputes [*FSSA, Cl. 15, p.14*]. When parties agree to arbitrate under institutional rules, they are deemed to have incorporated those rules into their agreement, and are therefore bound by such rules as a contractual matter [*Westinghouse (USA)*]. Therefore, the arbitral tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement [*Art. 19.1, HKIAC Rules*].

33. It is submitted that since the current matter is a dispute arising out of the contract, the tribunal does have the jurisdiction to adapt the price [*As submitted in I-B1 and I-B3, ¶¶ 20-22*]. Further, when the contract contains an arbitration clause and arbitrators are asked to give effect to a hardship clause, they consider there to be a dispute and they will therefore interpret or apply the disputed clause [*Gaillard, p.28*].

2. The Tribunal has the power to adapt the contract

34. Even if the arbitration agreement does not explicitly allow price adaptation, arbitrators can still be allowed to fill the gap in the contract to maintain the equilibrium of the initial

agreement [*Distrigas; Bruner p.76*]. However, regard must be had to the common intention of the parties **[i],** law applicable to the substance **[ii]** and the law of the seat **[iii].**

i There was a common intention between the parties

35. It is submitted that an arbitrator's power to resolve a dispute is founded upon the common intention of the parties to that dispute [*Gaillard, ¶39, p.27*]. If such an intention does exist, one has to accept both that it is legitimate, and that there is nothing improper about calling the intended procedure arbitration. [*Gaillard, ¶41, p.28*]. The intention of the parties can either manifest itself as an express clause in the contract or can be implied in the terms expressed.

36. It is submitted that the common intention of the parties to authorise the adaptation by the arbitrator can be seen from the very inclusion of the hardship clause [*FSSA, Cl.12, p.14; Berger, p.8*]. Although it may not be expressly stated in the clause, it was implied that the power of adaptation was to be vested in the arbitrator. It is submitted that, in certain cases, judges and arbitrators, even in the lack of an adaptation clause, should be entitled to adjust the contract in order to rebalance it if this is the parties' will [*TimeGate (USA); Alcoa (USA)*].

37. It is generally accepted that an arbitral tribunal has implied consent of parties to 'fill gaps' by making a determination as to the presumed intention of the parties in order to make a contract operable. [*Hunter, ¶9.65*]. Arbitrators may determine the presumed intention or will of the parties by interpreting the contract. Implication is a part of the process of interpretation as it determines the scope of the contract [*Marks & Spencer (UK); Belize (UK)*].

38. The CLAIMANT notes that a term can only be implied *"If it is such a term that it can confidently be said that if at the time the contract was being negotiated, someone had said to the parties, 'What will happen in such a case' and they would both have replied, 'Of course, so and so will happen; we did not trouble to say that, it is too clear'"*. [*Reigate (UK)*]. Therefore, a term can only be implied if there was no need to express it, or if it necessary to make the contract work in a business context [*Calnan, p.156*]. These are alternative tests and only one of these conditions needs to be satisfied [*Marks & Spencer (UK)*].

39. It is submitted that the question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. [*Belize (UK)*]. In the instant case, when Ms. Napravnik raised the question as to who would adapt the contract if the parties could not reach a consensus, Mr. Antley had stated that the arbitrators should probably do the needful. Since Ms. Napravnik had the same understanding, the objective

common intention between the parties was thus created [*Ex. C8, p.17*]. Further, Mr. Krone, the subsequent negotiator stated that he would have objected to transfer powers to the Tribunal to adapt had he known what Mr. Antley was referring to [*Ex. R3, p. 35*]. This establishes that, the contract as negotiated, and as it stands today, confers the power of adaptation on the arbitrators.

ii The tribunal is legally permitted to adapt the contract according to the law applicable to the contract (lex causae)

40. If the doctrine of change of circumstances (hardship concept) is to be recognized as a general principle of (substantive) law, the legal consequence of adaptation (within reasonable limits) should also be generally accepted [*Brunner, p.497*].

41. It is submitted that the law of Mediterraneo is the law governing the contract [*FSSA, Cl.14, p.14*]. It is for the *lex causae* to provide for a substantive basis for the interference by the arbitrator [*Briner, pp.362,371*]. The general contract law of Mediterraneo is a verbatim adoption of the UNIDROIT Principles [*PO 1, ¶4, p.51*]. According to the UNIDROIT Principles, in case of hardship, the courts have the power to adapt the contract and this is in line with the consistent jurisprudence in Mediterraneo as well [*Art. 6.2.3 para 4b, PICC, PO 2, ¶39, p.60*]. Further, if the courts have the authority to adapt the contract, then the arbitral tribunal acting under the arbitration law of that jurisdiction enjoys the same competence [*Berger, p.10; Sanders, p.70; Brunner, p.495*]. Therefore, according to the substantive law, the arbitrator is permitted to adapt the contract.

iii The procedural law (lex arbitri) does not divest the arbitrator of adaptation power

42. The issue of the arbitrators' power to adapt contracts, when their balance is altered upon the occurrence of unforeseen events, has to be analysed under a procedural law perspective due to the procedural nature of such power [*Ferrario, p.84*]. Therefore, while the arbitration agreement provides the basic authority to adapt or supplement a contract, it is the law applicable to the arbitration, the *lex arbitri*, which determines whether the arbitrators are procedurally authorized to decide on the contract adaptation or supplementation [*Berger, p.10; Brunner, p.493*].

43. The CLAIMANT notes that Danubia has adopted the UNCITRAL Model Law [*PO 1, ¶4, p.53*]. However, it has chosen to be silent on the issue of adaptation [*Working Group Report, ¶20, p.62*]. In order to consider the procedural applicable law to arbitration really silent on

the issue of adaptation of contracts by arbitrators it is necessary that, firstly, the legal system to which it belongs in general recognises the concept of hardship (or imprèvision or impracticability); secondly, neither the arbitration law nor the norms disciplining the courts' procedural powers expressly or implicitly provide, as a general rule, that judges or arbitrators have not the authority to adapt the agreement [*Ferrario, p.151*].

44. The present arbitration law satisfies both these conditions as the Danubian contract law, an adoption of the UNIDROIT principles, recognises the concept of hardship [*PO 1, ¶4, p.53, Art. 6.2.2, PICC*]. Further, the courts may adapt the contract if it is found that hardship exists, provided they are authorised to do so [*Art. 6.2.3*(4)*, PICC*]. However, the courts are only granted the power to adapt the contract *"if authorised"* [*PO 2, ¶45, p.61*]. It is submitted that the term "authorised" can also include implied authorisation in the instant case despite of the four corners rules [*Art. 4.3, Danubian Contract Law*].

45. A prominent exception to the four corners rule is that when the contract is ambiguous, the court may go beyond the four corners of the contract. A contract is facially ambiguous when the writing has conflicting terms or no provision relating to the contingency under which the dispute arises [*Posner, p.535*]. In the present case, the contract mentions hardship but does not elucidate on the recourse available to parties when hardship arises [*FSSA, Cl. 12, p.14*]. Therefore, it is an ambiguous contract requiring extrinsic evidence to bring meaning into it.

46. It is submitted that the pre-contractual negotiations may be expended in order to understand the hardship clause entirely in the present contract. The parties had agreed that there would be an express clause in either the hardship or arbitration clause which would ensure an adaptation by the tribunal in the unlikely event that parties could not agree on an amendment [*Ex. C8, p.17*]. Consequently, the parties had intended to authorise arbitrators to adapt the contract in case parties fail to renegotiate. The parties wanted to clarify the same in express terms either in the hardship or adaptation clause [*Ex. C8, p.17; Ex. R3, p.35*]. However, due to the unfortunate accident, it never saw the light of day. But a mere lack of express terms cannot obviate the oral authorisation given by the parties. Therefore, since the *lex arbitri* also doesn't divest the arbitrator of his power to adapt contracts, the power of adaptation can be exercised by the Tribunal.

3. In any case, no special authorisation is required to invest the arbitrators with the decision making power

47. It is submitted that the current dispute is similar to the traditional disputes over a legal issue in which an incidental decision is required from the arbitral tribunal with respect to the validity, meaning, scope or effect of a hardship or other adaptation clause [*Berger, p.6*]. This is further substantiated by the point that an express reference for conferring the power to adapt on the arbitrator is not required from a legal point of view [*Ex. C8, p.17*]. This implies that the power is vested with the tribunal irrespective of there being an express or implied choice. Conversely, if the parties had to divest the tribunal of this power, an express provision should have been made thereof.

48. The hardship issue forms an integral part of the parties' dispute. The arbitrator's decision forms an interim step in the process of making the final award. It is thus covered by the tribunal's general authority granted to it by the arbitration agreement. The CLAIMANT submits that the tribunal can exercise its inherent powers to fulfil its adjudicatory function. These inherent powers can only be exercised in circumstances so compelling that failure to exercise such power would risk subverting the integrity of the tribunal or the arbitral process or endangering the enforceability of the award [*Moses, p.4*].

49. Further, when there is silence regarding an arbitrator's power to deal with a certain issue, the implication is not that there is no authority to act, but rather that there is no prohibition on acting in ways that are called for in the circumstances [*Abaclat Case (ICSID)*].

CONCLUSION

50. The law of Mediterraneo shall be the law governing the arbitration agreement and its interpretation. Since Mediterraneo law calls for a broad interpretation of arbitration agreements, price adaptation falls well within the ambit of the present arbitration agreement. Therefore, it falls in the jurisdiction of the tribunal. Furthermore, the Tribunal is vested with the power to adapt the contract.

II. THE CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDING

51. The parties agreed that all disputes would be decided in accordance with the HKIAC Rules [*FSSA, Cl.15, p.14*]. Each party has the burden of proving the facts relied on to support its claim or defence [*Art. 22.1, HKIAC Rules*]. The CLAIMANT intends to submit the Partial Interim Award from the other arbitral proceeding between the RESPONDENT and one of its customers to prove the contradictory assertions of the RESPONDENT with respect to the issue of price adaptation before the two arbitral forums.

52. It is submitted that the Arbitral Tribunal is not bound by any strict rules of evidence and enjoys broad discretion to determine the admissibility of any evidence [*Art. 22.3 HKIAC Rules; Art.19(2) UNCITRAL Model Law; Moser/Bao* ¶*9.21*]. Where evidentiary rules have not been previously agreed upon by the parties, reliance may be placed on the IBA Rules [Ashford, p.45]. The IBA Rules, perform gap-filling function, with regard to the gaps left by most arbitration rules on matters of evidence. [*O'Malley, p.10*]. The IBA Rules represent international best practices, and guide the Arbitral Tribunals in the taking of evidence even in the absence of an explicit reference to these rules by the parties [*Railroad Development (ICSID); Noble Ventures (ICSID)*]. The IBA Rules are widely referred to and adopted in HKIAC Arbitration [*Moser/Bao,* ¶*9.22*].

53. As per the IBA Rules, evidence is admissible if the criteria of relevance, materiality and admissibility are met [*Pilkov, p.148*]. For these reasons, the CLAIMANT submits that firstly, the evidence is admissible **[A].** Secondly, the evidence is relevant and material to the dispute **[B].** Thirdly, the interests of justice favour the admission of the documents **[C].** Lastly, refusing the admission of the evidence would impair CLAIMANT'S opportunity to be heard **[D].**

A. THE EVIDENCE IS ADMISSIBLE

54. The general principle in international commercial arbitration is that the arbitral tribunal determines the admissibility, relevance, materiality and weight of the evidence [*Art. 22.2 HKIAC Rules; Waincymer, p.792; Berger/Kellerhals p.460; Art. 9(1) IBA Rules*].

55. The CLAIMANT submits that the contested evidence is admissible for the following reasons: Firstly, the CLAIMANT approaches the Tribunal with clean hands **[1].** Secondly, the CLAIMANT owes no obligation of confidentiality towards the RESPONDENT **[2].** Thirdly,

there can be no breach of confidence in revealing information already in the public domain **[3].**

1. The CLAIMANT approaches the Tribunal with clean hands

56. It is submitted that in cases where the evidence is alleged to be obtained from illegal sources, reliance is to be placed upon the "clean hands approach" [*Yukos (PCA); Conoco Phillips (ICSID)*]. According to the clean hands approach, the *"possible unlawful nature of the disclosure"* of the evidence cannot be held against a party which wants to place reliance on such evidence and, was not involved in its illegal disclosure [*Blair/Gojkovic p.22*]. The consideration for whether this type of evidence is admissible depends on involvement of the party, or its counsel [*Persia International Bank (EU)*]. The Court of Arbitration for Sports, has in a number of cases, relied on evidence which was illegally obtained, but without the participation of the persons seeking to admit it [*Ahongalu Fusimalohi (CAS); Amos Adamu (CAS)*]. Importantly, in Ahongalu Case, the CAS held "*even assuming that the evidence has been obtained illegally, there is no bar on the arbitral tribunal to admit such evidence as an arbitral tribunal is not bound by strict rules of evidence* [*Ahongalu Fusimalohi (CAS)*]".

57. In the present case, the CLAIMANT was made aware of the other arbitration proceeding as a matter of chance at the annual breeder conference [*CLAIMANT Mail, dt. 02 October 2018, p. 49*]. Subsequently, the Partial Interim Award was made available to the CLAIMANT by a company [*PO 2, ¶41, p.61*]. The CLAIMANT had no role to play in obtaining such evidence. Further, the CLAIMANT was not a party to any illegality either by way of breach of confidentiality obligations or illegal hacking in obtaining the document. Hence, the CLAIMANT cannot be blamed for illegality committed by the third parties. Rather, the CLAIMANT employed evidence derived from a *fait accompli*. Therefore, the submitted evidence must be held to be admissible under the clean hands approach.

58. Furthermore, the party claiming that the evidence was procured illegally by the CLAIMANT must also bear the burden of providing prima facie evidence to support its position. The mere allegation is not a sufficient basis for excluding the evidence from the record [*Enron Creditors Recovery Corp (ICSID)*].

2. The CLAIMANT owes no obligation of confidentiality towards the RESPONDENT.

59. The CLAIMANT notes that the confidentiality obligation under Article 45 of HKIAC Rules does not extend to non-parties to arbitration [*Art. 45, HKIAC Rules*]. Since the CLAIMANT

is not a party to the other arbitration under the same institution, it is not bound by Article 45, or the obligation to maintain confidentiality under the said rules. Therefore, in seeking the admission of materials from the other arbitration, the CLAIMANT is not breaching any confidentiality provisions whatsoever [*CLAIMANT Mail dt. 02 October 2018, p.49*].

60. Moreover, third parties are generally free to disclose materials from arbitral proceedings that were provided to them without separate confidentiality restrictions [*Born, p.2789*]. The CLAIMANT submits that as a third party, it has no obligation to maintain the confidentiality of the Partial Interim Award.

3. The information ceased to be confidential, as it was available in the public domain

61. It is submitted that information cannot be confidential if it is in the public domain [*Christou, p.621*]. Further, information which was originally confidential ceases to be so, if it comes into the public domain [*Christou, p.621*]. Once made public, an award falls in the public domain, with all the resulting consequences of disclosure [*Smeureanu, p.87; International Coal Pte Ltd (Sing.)*]. Moreover, inaccessibility is the base attribute of confidentiality and "there can be no breach of confidence in revealing to others something which is already in common knowledge" [*Attorney-General (Eng.)*].

62. It is submitted that the arbitral tribunal must not be deprived of the information which is available in the public domain and that which is allegedly relevant and material to the case [*Caratube International Oil Company LLP (ICSID)*]. The CLAIMANT in the aforementioned case sought to admit into evidence leaked emails published on a website known as KazakhLeaks, following a hacking attack against the RESPONDENT'S computer network. The arbitral tribunal allowed such request [*Caratube International Oil Company LLP (ICSID)*].

63. Similarly, in the present case the evidence is available in the public domain as it is available for sale to anyone interested in its acquisition, therefore it has ceased to be confidential and may be admitted as evidence [*PO 2, ¶41, p.61*].

64. In the alternative, if the Tribunal finds the evidence to be confidential, admission is not excluded as the Courts have held that an international arbitral tribunal does not exceed its authority when ordering documents to be produced in breach of a claimed confidentiality undertaking to a third party [*Jardine Lloyd Thompson (Can.)*]. There are times when the production of sensitive commercial or technical records may be appropriate because of the

high probative value of such evidence [*O' Malley, p.45*]. The IBA Rules provide in Article 3.13 that all documents are to be kept confidential and used only for the purposes of the arbitration. The Tribunal may also issue a specific procedural order setting rules for the protection of confidentiality that are binding on the parties [*O' Malley, p.45*].

65. Therefore, the RESPONDENT'S claim that the admission of evidence from the arbitral proceeding can occur only in violation of contractual and statutory obligations of confidentiality can be allayed by the Tribunal by maintaining confidentiality of evidence submitted or issuing a procedural order to that effect [*RESPONDENT Mail dt. 03 October 2018, p.50*].

B. THE EVIDENCE REQUESTED TO BE ADMITTED IS RELEVANT AND MATERIAL IN DETERMINING THE OUTCOME OF THE DISPUTE

66. The HKIAC Rules allow the Arbitral Tribunal to admit documents which are "relevant to the case" and "material to its outcome" [*Art. 22.3, HKIAC Rules*]. The relevance of the evidence to the case factors upon whether the proffered information is likely to be necessary for a party to prove an allegation [*O' Malley, p.270; Waincymer, p.859*]. If a document is material, it must be related to the claims, and consideration must be given to the matters sought to be established by the document [*Ashford, p.70*].

67. It is submitted that evidence from other arbitral proceedings might also be tendered to show that the opposing party has made contradictory assertions in different fora, which can have the consequence of undermining the veracity of the party acting contradictorily [*Waincymer, p.789*]. An ICC Tribunal has recognized the persuasiveness and due consideration that may be attributed to other, non-binding awards, based on similar facts and legal issues [*Klöckner Industrie (ICSID)*].

68. In the present case, the Partial Interim Award makes it sufficiently clear that the RESPONDENT when involved in a similar factual matrix, and undergoing hardship due to unexpected tariffs had sought price adaptation [*PO 2, ¶39, p.60*]. The arbitral tribunal in the other arbitration, in accordance with the Mediterranean Contract Law confirmed its power to adapt the contract in the case where hardship was caused to the RESPONDENT [*PO 2, ¶39, p.60*]. The CLAIMANT seeks to submit the Partial Interim Award as evidence in order to prove its allegations with regard to the contradictory behavior of the RESPONDENT before the two arbitral tribunals under the HKIAC, which has the effect of reducing the veracity of its claims. Further, by such submission the CLAIMANT seeks to place reliance

upon the finding of the Arbitral Tribunal that power of adaptation flows from invocation of a hardship clause. The reliance upon the interpretation of Article 6.2.3, paragraph 4b given by the Arbitral tribunal in the other arbitration proceeding is material to the determination of issues of power of the arbitrator to adapt the contract as well as adaptation of the contract, in the present case.

69. Furthermore, evidence is reliable and authentic when the party from which the documents were taken acknowledges its authenticity [*Blair/Gojkovic p.23*]. The CLAIMANT notes that the evidence from the other arbitration is reliable and authentic, as the RESPONDENT has confirmed that the *"only source of the information"* could be either the hack of their system or the two former employees [*RESPONDENT mail dt. 03 October 2018, p.50*]. The Partial interim Award pertains to the "*only other arbitration"* to which the RESPONDENT was party to under the HKIAC [*RESPONDENT mail dt. 03 October 2018, p.50*]. Therefore, acknowledgement of the evidence by the RESPONDENT, is a clear indication of its reliability and upholds its relevance.

C. THE INTEREST OF JUSTICE FAVOURS ADMISSION OF THE DOCUMENTS

70. Principles such as the need to discharge the tribunal's function fairly and justly, and in a way that results in a manifestly right decision, needs to be weighed in admission of evidence [*Blair/Gojkovic, p.23*]. Non-admission of relevant and material evidence was described as a 'travesty of justice' [*ConocoPhillips (ICSID)*]. The CLAIMANT notes that the reference to the Partial Interim Award from the other arbitral proceeding is necessary to substantiate its claim that Article 6.2.3 paragraph 4b of the Mediterranean Contract Law empowers the tribunal to adapt the contract in case of hardship. Therefore, the admission of relevant and material evidence is called for in the interest of justice and to ensure a right adjudication of the current dispute.

D. REFUSING THE ADMISSIBILITY OF THE EVIDENCE WOULD IMPAIR CLAIMANT'S OPPORTUNITY TO BE HEARD.

71. The UNCITRAL Model Law provides that "each party shall be given a full opportunity of presenting his case" [*Art. 18, UNCITRAL Model Law*]. The drafting history of the Model Law emphasizes that the right to be heard is "fundamental" in nature and reflects "basic notions of fairness" [*UNCITRAL Report, ¶62, p.189*]. The mandatory procedural guarantees apply to, and override, both the parties' procedural autonomy and the arbitral tribunal's procedural discretion [*Born, p.2164*]. As a mandatory fundamental procedure,

procedural fairness in arbitration requires that each party be afforded a reasonable opportunity to present their evidence [*Paklito Investment Ltd. (Hong Kong)*]. Furthermore, the right to be heard guarantees each party the right to request that evidentiary measures be taken before an award is rendered [*Born, p.2175*].

72. It is submitted that in cases where the admissibility of the evidence is contested, the arbitral tribunal should admit it, in order to respect procedural fairness [*Zuberbühler/ Müller/ Habegge, p.266*]. A party that has not been afforded a fair opportunity to present its evidence will not have been afforded the due process [*O'Malley, p.5*]. The CLAIMANT notes that upon denial of request to admit the documents, the CLAIMANT will be deprived of its opportunity to be heard [*Girsberger/Voser, p.85*]. This would be contrary to the principle of procedural fairness enshrined in Article 18 of the UNCITRAL Model Law. Therefore, placing due regard to the principles of procedural fairness, the arbitral tribunal must admit the evidence.

CONCLUSION

73. The CLAIMANT is entitled to submit the evidence from the other arbitration proceeding as it fulfills the criteria of relevance, materiality and admissibility. The evidence is not to be excluded on grounds of confidentiality or illegality of means of its acquisition, as the evidence is available in the public domain, and the CLAIMANT has approached the Tribunal with Clean hands. The interest of justice favours admissibility of the document. The refusal of admissibility of the evidence would result in the violation of mandatory principle of procedural fairness and violate the CLAIMANT'S right to be heard.

ARGUMENTS WITH REGARD TO THE MERITS OF THE CLAIM

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

74. The CLAIMANT submits that the Tribunal should grant request for the adaptation of the contract and reimbursement for an outstanding price of USD 1,250,000 or any other amount for the following reasons: First, the unexpected increase in custom tariff qualifies as an unforeseen event under the hardship clause of the FSSA **[A].** Second, the term 'impediment' under Article 79 of the CISG is inclusive of hardship situations thereby providing a remedy to the seller **[B].**

A. THE UNEXPECTED INCREASE IN CUSTOM TARIFF QUALIFIES AS AN UNFORESEEN EVENT UNDER THE HARDSHIP CLAUSE OF THE FSSA

75. The CLAIMANT notes that the parties incorporated a force majeure/hardship clause under the contract [*FSSA, Cl. 12, p.14*]. In the present case, the CLAIMANT was confronted with the unanticipated situation of imposition of extortionate custom tariff rates by Equatoriana, an otherwise free-trade loving country [*Ex. C6, p.15*]. Consequently, the CLAIMANT attempted to renegotiate the FSSA with the RESPONDENT, however, these attempts did not produce a favourable result. For the reasons set out below, the CLAIMANT submits that it has a valid remedy for reimbursement under Clause 12, FSSA: "Comparable unforeseen events" must be read *ejusdem generis* to the events listed in the hardship clause **[1].** Hardship clause was suggested by the RESPONDENT themselves **[2].** CLAIMANT had no intention of bearing any further risks associated with change in delivery terms **[3].**

1. "Comparable unforeseen events" must be read *ejusdem generis* to the events listed in the hardship clause

76. The RESPONDENT in its Answer to NoA has fallaciously attempted to construe the hardship clause to be so narrowly worded so as to exclude unanticipated economically onerous events. Contrary to this submission, the hardship clause should not be limited so as to deny the CLAIMANT an exoneration from the payment of custom tariffs [*PO 2, ¶12, p.56*].

77. Clause 12 of the FSSA reads: "Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as 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.*" [Emphasis added]

78. The CLAIMANT places reliance on the *ejusdem generis* principle of statutory interpretation to eliminate the disagreement between the parties with respect to the wordings of the clause. The rule *ejusdem generis* implies that where several words preceding a general word point to a confined meaning, the general word shall not extend in its effect beyond subjects of the same class [*Nevill (Eng.); Brown (Eng.)*]. This principle has been accepted in the construction of contracts across both the civil as well as common law jurisdictions [*Chitty, pp.1065-66; Cullen (Eng.); Harrison (Eng.); Sun Fire (Eng.*; *Norfolk (USA)*].

79. For the *ejusdem generis* principle to apply, there must be sufficient indication of a category that can properly be described as a class or genus from which the nature of 'common and dominant feature' is inferred [*Bennion, pp.1108-09*]. The general words are only intended to guard against some accidental omission in the objects of the kind mentioned and are not intended to extend to objects of a wholly different kind. Further, this principle follows as a corollary of the principle that the whole contract is to be considered, being simply that every word shall be taken in conjunction with the words that accompany it [*Chitty, ¶¶13-065,066, pp.1052,1053; Noscitur a sociis: Newby (Eng.)*].

80. The CLAIMANT notes that the phrase *"unforeseen event"* constitutes a genus and should be construed *ejusdem generis* with the specified event already listed in the clause. The use of the word "comparable" itself attracts the principle of *ejusdem generis* because it is intended by the parties that the clause must have a limited scope [*PO 2, ¶12, p.56*]. The use of the word "comparable" points out to the fact that any other event that is included in the ambit of this clause must possess similar characteristics as the other events specifically mentioned therein, i.e., the "additional health and safety requirements".

81. In 2014, the CLAIMANT had a burdensome experience with an imposition of unforeseeable additional health and safety requirements as an import restriction, imposed by Danubia. It had increased the sales price by 40%, which nearly resulted in the insolvency of the CLAIMANT [*PO 2, ¶21, p.58*]. The CLAIMANT has not been able to recover from those losses till date. After the experience of 2014, the CLAIMANT has been extremely insistent on an inclusion of a hardship clause to absolve itself of any changes in the price arising out of alterations in custom regulation or import restrictions [*Ex. C4, p.12*].

82. Similar to the situation of 2014, an imposition of 30% tariff upon all agricultural goods from Mediterraneo in the instant case was completely unforeseeable considering the fact that Equatoriana has always been a free-trade loving country that has preferred to solve disputes amicably rather than resorting to retaliatory measures [*Ex. C6, p.15*]. Furthermore, even after the reading the newspaper report, it did not occur to either of the parties that the tariffs on agricultural goods would apply to the horse semen as well [*PO 2, ¶26, p.58*].

83. The CLAIMANT notes that the principle of *ejusdem generis* allows the clause to be extended to economic unforeseen events because it is comparable to "*Additional health and safety requirements*" on the grounds that both the events constitute a change in the import regulation, they are unforeseeable, beyond the control of the seller as well as make the contract more onerous upon the CLAIMANT. Moreover, additional health and safety

requirements have, in the past, increased the price up to 40% and have destroyed the commercial basis of the deal [*PO 2, ¶21, p.58; Ex. C4, p.12*]. In the present scenario, the unforeseen 30% increase is also placed on a similar footing considering the financial status of the CLAIMANT who has been making losses since 2014, and is in a state of a financial ruin. [*Ex. C8, p.17; PO 2, ¶21,29, pp.58-59*].

84. The *ejusdem generis* principle provides a guiding criterion to limit the scope of the clause as well as the discretion of the arbitrators. The Tribunal must adjudge the inclusion of any "*comparable unforeseen events making the contract more onerous*" on the basis of it being *ejusdem generis* to the clause.

85. Furthermore, the placement of comma after the word "hardship" in the clause clearly denotes that there are two categories of hardship that the CLAIMANT intended to protect themselves from: firstly, the additional health and safety requirements in particular because of their past experiences and secondly, the comparable unforeseen events making the contract more onerous [*FSSA, Cl. 14, p.14*]. As has been established above, change in the custom tariff was an unforeseen event which led to an additional burden of 30% upon the CLAIMANT making the contract more onerous, the CLAIMANT is therefore protected from such a change in the delivery terms.

2. Hardship Clause was suggested by the RESPONDENT themselves

86. The hardship clause was suggested by Mr. Krone after taking into consideration the risks mentioned by Ms. Julie Napravnik on behalf of the CLAIMANT via her email on 31 March 2017 [*Ex. C4, p.12; PO 2, ¶12, p.56*]. Therefore, the scope of the hardship clause, even if narrowly construed, cannot in any case exclude the event of unforeseeable imposition of the Custom tariffs by the government of Equatoriana because the RESPONDENT was well aware of the risks from which the CLAIMANT wanted a discharge of burden. The CLAIMANT had shared their experience of 2014 wherein an imposition of 40% tariff had commercially destroyed the basis of the deal [*Ex. C4, p.12*].

87. Even while discussing Clauses 6-15 of the FSSA, the RESPONDENT did not raise any objections or clarifications regarding the scope of the hardship clause and therefore, the Tribunal must not allow the RESPONDENT to subsequently alter the meaning of the hardship clause.

88. The email sent by Ms. Julie Napravnik on 31 March 2017 is sufficient to show that the intention of inclusion of the hardship clause was to protect the CLAIMANT from any

additional financial burden posed due to a change in the delivery terms in particular those associated with changes in custom regulation or import restrictions [*Ex. C4, p.12*]. The hardship clause was an important term of the contract for the CLAIMANT as it was added with the intention of allocating minimal risks upon the CLAIMANT with respect to a change in delivery terms. The use of the phrase, "*At minimum*, a hardship clause *should* be included" stipulates that the incorporation of a hardship clause was the least basic criterion required by the CLAIMANT. The insertion of the word *should* corroborates *ipso facto* that the clause was posed as an obligation rather than an alternative option and without it the contract could not have been concluded. The RESPONDENT was well aware of these facts while suggesting the wording of the hardship clause [*PO 2, ¶12, p.56*]. In addition to this, the RESPONDENT had an inclination about the financial position of the CLAIMANT because it was aware of the unspecified rumors in the market about the financial difficulties that the CLAIMANT was going through [*PO 2, ¶22, p.58*].

89. After the commencement of the performance of the obligations of the parties, the standard contract delivered last stands valid, if not objected to by the other party before the commencement [*Off. Cmt. to Art. 2.1.22, ¶2, p.*72]. At the pre-negotiation stage, the RESPONDENT did not have any objection, nor did they explicitly exclude economically onerous events from the hardship clause, even when they were aware of the apprehensions of the CLAIMANT [*Plants Case (Ger.); RB Kortrijik Case (Bel.); Vine Wax Case (Ger.)*; *Ex. C4, p.12*]. The RESPONDENT must bear the import tariffs because, a party that foresees or discerns a circumstance and fails to protect itself accordingly through agreement bears the risk of circumstance [*Schwenzer/Schlectreim, Art. 8, ¶40, p.165*].

3. CLAIMANT had no intention of bearing any further risks associated with change in delivery terms

90. The contract law of Mediterraneo is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts [*PO 1, ¶III.4, p.52*]. Every provision in the contract, as well as the acts of the parties, is to be interpreted in accordance with Law of Mediterraneo, including CISG [*FSSA, Cl. 14, p.14*].

91. There is no dispute that the RESPONDENT 'could not have been unaware' of the CLAIMANT'S intention of including a hardship clause in the contract in light of the negotiations between the parties [*Art. 8, CISG*]. Firstly, in the mail sent by Julie Napravnik on behalf of the CLAIMANT, it was clearly stated that the CLAIMANT was not willing to take

any further risks associated in the delivery terms, in particular not those associated with changes in customs regulations or import restrictions [*Ex. C4, p.12*]. Secondly, the mail also indicates that from the past experiences, unforeseeable additional changes in health and safety requirements may increase the cost by 40% and thereby destroying the commercial basis of the deal [*Ex. C4, p.12*]. Thus, considering that the CLAIMANT'S apprehension regarding any subsequent changes in the import restriction, the imposition of 30% tariff upon all agricultural goods from Mediterraneo falls in the ambit of *"comparable unforeseen events making the contract more onerous'* [*FSSA, Cl. 12, p.14*]. Furthermore, the financial position of the CLAIMANT was also unstable during the 2 years prior to this performance [*Ex. C8, p.17*]. In such circumstances, it is indubitable that the extent of applicability of the hardship clause was intended to be extended to give defence to the CLAIMANT in case of economically onerous events relating to unforeseeable import restrictions.

92. The RESPONDENT alleges that DDP was accepted only in principle [*Ans. to NoA, ¶ 4, p.30*]. However, all obligations under DDP Incoterms were accepted, and all exceptions were indicated to the RESPONDENT in the pre-negotiation stage [*Ex. C4, p.12*]. Furthermore, Incoterms do not apply in cases of unexpected and unforeseen events [*INCOTERMS 2010*]. Therefore, the tariff in the instant case should not be an obligation of the CLAIMANT under the delivery terms.

B. THE TERM 'IMPEDIMENT' UNDER ARTICLE 79 OF THE CISG IS INCLUSIVE OF FORCE MAJEURE AND HARDSHIP SITUATIONS THEREBY PROVIDING A REMEDY TO THE SELLER

93. The CLAIMANT is entitled to find relief under the terms of the CISG because there is no agreement between the parties under Article 6 to exclude the application of Article 79 **[1]**, by reading the word 'impediment' in Article 79 to include hardship **[2]** or by concluding that there is a gap within the CISG to be filled by some underlying general principles **[3]**.

1. There is no agreement between the parties under Article 6 to exclude the application of Article 79

94. It is submitted by the CLAIMANT that any term that constitutes a derogation under Article 6 of the CISG must be expressly agreed to between the parties [*Schwenzer, ¶10, p.107*]. The inclusion of a force majeure hardship clause does not in itself lead to a derogation from Article 79. The parties must 'agree' expressly or impliedly to derogate from Article 79. It is accepted that Article 6 is based on the principle of party autonomy, and that parties are

free to choose provisions of the CISG which shall not be applicable to their contract. However, such a decision cannot be made univocally, and needs the consent of both parties involved [*Schwenzer, ¶10, p.107*]. Herein, the parties have expressly stipulated the law applicable to their contract to be CISG and UNIDROIT, thereby 'opting into' the Convention as a positive choice of law [*FSSA, Cl. 14, p.14*; *Schwenzer, ¶12, p.106*]. Therefore, a unilateral derogation from the principles of the Convention is not possible [*Trees case (Netherlands)*]. A mere inclusion of a hardship clause which stipulates a special allocation of risks between the parties cannot lead to an automatic exclusion of the remedies under Article 79 unless the requisites of Article 6 have been complied with.

95. RESPONDENT has the unsubstantiated belief that Clause 12 of the FSSA would constitute a derogation under Article 6 of the Convention [*Ans. to NoA, ¶20, p.32*]. However, the two parties had never discussed the exclusion of Article 79 under CISG during the pre-contractual negotiations, and the RESPONDENT did not allege exclusion at the time of formation of the contract. It is sufficient to establish that there was no explicit, or implied, derogation that had been mutually agreed upon by the two parties, as is required when excluding terms under Part 1 or Part 3 of the Convention [*Bonnell, ¶2.4*]. Even by their conduct, neither of the parties hinted or showed that they wanted an exclusion from the application of Article 79.

96. As limitation and exclusion clauses fall under the CISG, their uniform interpretation is required under Article 7(1) and is governed by Articles 8 and 9 CISG [*CISG-AC op. No. 17, p.19*]. Therefore, the CLAIMANT submits that the intent of the parties to exclude must be determined in accordance with Article 8 of the CISG. Such intent should be clearly manifested, whether at the time of conclusion of the contract or at any time thereafter [*CISG-AC op. No. 16, Rule 3*]. The intention of the parties during the pre-contractual stages can be relied on to ensure clarity and the true purpose behind the contract. Even an implied exclusion can only be accepted if the intent of the parties is sufficiently clear [*Gasoline and gas oil case (Aut.)*]. The RESPONDENTS never raised reservations to the application of Article 79 during pre-contractual negotiations. There has been no deliberation in this regard and the CLAIMANT reasonably concluded the lack of objection as acceptance of the Convention in its entirety.

97. Article 8 also allows for inquiring into the subjective intent of the parties 'even if the parties did not engage in any objectively ascertainable means of registering this intent [*Marble Ceramic case (USA)*].' Reading all these provisions together can lead the Tribunal to the

logical conclusion that the parties needed to have made a specific reference to such derogation during the pre-contractual or contractual stage. The negotiations over the exclusion of Article 79 are conspicuous in their absence. The subjective intent of the parties was never to derogate from the application of provisions, as elucidated from the facts mentioned above.

98. Moreover, the hardship clause provided in the contract suffices to prove that the instant case of unforeseeable changes in the custom tariffs falls in the purview of unforeseeable events making the contract more onerous [*FSSA, Cl. 12, p.14*]. However, should the Tribunal against all probabilities conclude that the hardship clause FSSA excludes unforeseeable economically onerous events, then the CLAIMANT must place its reliance on the remedy provided under Article 79 of the CISG which supplements the hardship clause provided in the contract. The inclusion of a provision for special regulation of the problem of changed circumstances does not *ipso facto* exclude the application of Article 79. In the absence of any exclusion clause, the RESPONDENT has no reasonable ground to claim that Article 79 is excluded from application and constitutes a derogation under Article 6 of the Convention.

2. Impediment under Article 79 must be read to include hardship

99. CISG Advisory Council Opinion No. 7 has comprehensively acknowledged that a change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("hardship"), may qualify as an "impediment" under Article 79(1) [*CISG-AC Op. No. 7, ¶3.1*]. The language of Article 79 does not expressly equate the term "impediment" with an event that makes performance absolutely impossible. Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79 [*CISG-AC Op. No. 7, ¶3.1*]. The doctrine of *rebuc sic stantibus* provides an exception to *pacta sunt servanda* and allows the party to overcome the burden of maintaining the sanctity of contracts in exceptional situations of changed circumstances. Furthermore, in the *Steel Tubes case (Bel.),* the Belgian Supreme Court has expressly held that hardship may constitute an impediment for the purposes of Article 79 CISG, which may exempt a party from liability for damages. *"Changed circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and that are univocally 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 this provision of a treaty* [*Emphasis added*]*."* In this case, the unforeseeable rise in the price of steel after the time of conclusion of contract had

made performance of contract detrimental to the seller, in such circumstances the buyer was allowed to renegotiate the contract terms. *"It is imperative to treat radically changed circumstances as 'impediments' under Article 79 CISG in exceptional cases"* [*Schlectreim, p.92*] Sometimes extreme prices and currency dislocations may be sufficiently widespread leading to require a contract readjustment and also support the argument that hardship situations can be examined under Article 79 giving to the parties and the courts athe option to apply legal consequences of Article 6.2.3 of the UNIDROIT Principles [*Honnold in Pirozzi, p.214*].

100. It can be construed that there exists a gap in the CISG. The CLAIMANT is also entitled to find relief under the said gap by reading the word "impediment" in Article 79 to include hardship, by using the "governed-but-not-settled" gap-filling technique promoted by CISG Article 7(2) under the general principles of good faith **[i]**; and UNIDROIT **[ii].**

i General Principles under Article 7(2) include 'Good Faith'

101. Obedience of good faith in international trade cannot be achieved without requiring the contracted parties to act in good faith. In fact, applying good faith to interpret the Convention will lead indirectly to interpreting the contract and the parties' intentions on the principle itself [*Eörsi, Ch. 2, p.2–8*]. In the *Mushrooms Case* (*Hungary*), the Arbitration Court observed that *"the observance of good faith is not only a criterion to be used in the interpretation of the CISG but also a standard to be observed by the parties* in the performance of the contract." Furthermore, even in the *Chemical Products case* (*Switz.*), the court went further by adapting the concept of good faith as a tool to impose obligations on the parties. Thus, it is undisputed that Good faith is a general principle under Article 7(2), CISG.

102. It is submitted that the CLAIMANT acted in good faith by making a timely delivery of the third shipment on 22nd January 2018 for three reasons: firstly, to fulfil the urgent requirement of doses by the RESPONDENT to start off their breeding season [*Ex. C1, p.9; Ex. C8, p.18*]. Secondly, the conversation between the parties gave the CLAIMANT a positive impression that the RESPONDENT was willing to have a meaningful renegotiation to address the issue [*Ex. C8, p.18*]. Thirdly, due to the impending financial ruin upon the CLAIMANT, they would have incurred a loss of USD 5,000,000 by not fulfilling their obligation. Supervening events beyond the sphere of risk and control of the obligor resulting in an alteration of somewhat less than 100% may arguably also constitute hardship, in a case in which the obligor's financial (lasting) ruin is impending and it must fully perform the contract. The essential criterion in this situation is the fact that performing the contract in

its unaltered form would result in a financial ruin and possible bankruptcy of the debtor. Especially, the performance of instalment contracts may become significantly more onerous, even though the required alteration of the equilibrium of the contract may not be met [*Brunner, pp.435-437*].

103. The contract was of a special nature because the CLAIMANT did not sell frozen semen of their racehorse stallions and definitely not such an amount to a single breeder [*Ex. C2, p.10*]. The CLAIMANT usually dealt with race horse breeding through natural coverage and the RESPONDENT'S order of frozen semen was a sole exceptional case. Had the third shipment not been delivered, the CLAIMANT would have incurred a greater loss.

104. The CLAIMANT also submits that the RESPONDENT acted inconsistently with its prior actions, and the Arbitral Tribunal must apply the doctrine of *venire contra factum proprium* and prohibit the RESPONDENT from going against their previous conduct [*Joseph Charles (ICSID); Paolillo Rosaria (It.)*]. Article 1.8 stipulates that a party that behaves inconsistently to the understanding it has caused to the other party does so in bad faith [*Vogenauer, p.227*]. The party confronted with a request for renegotiation must use its best efforts when assessing the request. This means in particular that it must take into account all elements invoked by the party invoking hardship. It may not make a bad faith assessment, e.g., by disregarding elements which are clearly established [*Brunner, pp.485-486*]. The RESPONDENT also negotiated in bad faith under Article 2.1.15(2) of the UNIDROIT Principles by breaking off the negotiation abruptly and without any justification [*Ex. C8, p.18*].

105. Mr. Greg Shoemaker stated in his witness statement that *"if the contract provides for an increased price in case of such a high additional tariff we will certainly find an agreement on the price"*. Considering the fact, the CLAIMANT believed that they were protected under the hardship clause, renegotiation appeared as a definite outcome arise out of the hardship clause under the laws governing the underlying contract. Furthermore, Mr. Greg Shoemaker on his call with Ms. Julie Napravnik on 21 January 2018 gave her an assurance of a long term relationship between the parties and their plans to buy 50 doses from Empire's State, the CLAIMANT'S second stallion of world reputation [*Ex. C8, p.18*]. He also expressed the urgency to get the timely delivery of the doses. The CLAIMANT was under a false impression that the doses were only required to start the breeding season. Contrary to this, the RESPONDENT needed 6 doses for other customers each with delivery dates prior to 2nd February thereby showing bad faith in the transaction [*PO 2, ¶20, p.57*].

106. The RESPONDENT gave a positive assurance to find a solution to the CLAIMANT's problem merely to ensure that the shipment of the remaining 50 doses was done timely to the RESPONDENT'S benefit. However, the subsequent conduct shown by the RESPONDENT has been entirely contradictory to the said understanding. Moreover, the RESPONDENT falsely induced the CLAIMANT by giving the impression for renegotiation because an outright rejection of the request would have led the CLAIMANT to withhold the shipment till any further agreement took place [*Ex. C8, p.18*]. Thus, the RESPONDENT entered the renegotiation with an intention to not reach an agreement thereby showing bad faith and is liable for the losses caused to the other party [*Art. 2.1.15(2), PICC*].

ii General Principles under Article 7(2) include 'UNIDROIT Principles'

107. The CLAIMANT has already established that the gap in the CISG can be filled internally by the general principles of the Convention itself. Additionally, the text of UNIDROIT Principles of International Commercial Contracts can also be used to satisfy the claims.

108. UNIDROIT Principles act as a supplementary tool where there is a gap in the interpretation of the CISG. The gap-filling role of the UNIDRO1T Principles is aimed at supplying those "international uniform law instruments" with a set of rules that the interpreter or decision-maker is unable to find, expressly or impliedly, in those instruments [*Garro, p.1153*]. According to one Arbitral Tribunal, the UNIDROIT "Principles are principles in the sense of article 7(2) CISG" [*Dupiré Invicta (Fr.); Netherlands Case*].

109. While one can internally fill the gap in Article 79 using the principles of good faith, UNIDROIT Principles give substantial corroboration to the said conclusion. Arbitral tribunals have referred to these Principles to corroborate results under rules of the Convention; one court also referred to the UNIDROIT Principles of International Commercial Contracts in support of a solution reached on the basis of the Convention [*Food Products Case (ICC); Stock equipment case (Fr.)*].

110. In fact, in case of hardship, it is suggested that resort should be had to Article 6.2.3(2), UNIDROIT Principles, thus giving the aggrieved party the right to renegotiate the contract by interpreting this provision as being part of usage of trade within the scope of 9(2) by deriving the right from the principle of good faith or by construing it as forming part of the general principles underlying the convention according to Article 7(2), CISG as long as required conditions are present [*Steel Tubes Case (Bel.); Brunner/Sgier, Art. 79, ¶28; Vogenauer,*

Art 6.2.3 PICC; Schmidt-Kessel, Art. 9, ¶27; Pirozzi, p.211; Staudinger/Magnus, Art. 79, ¶24; Honnold/Flechtner, Art. 79, ¶432.2].

111. Hardship is governed by the UNIDROIT Principles under Section 2 of Article 6. The prerequisites of hardship as mentioned under Article 6.2.2. are all fulfilled in the instant case. The imposition of a 30% tariff rate had substantially changed the equilibrium of the contract performance, and not only was it beyond the control of the seller, but it was also entirely unprecedented [*As has been submitted in III-A1, ¶¶76-85*]. Having fulfilled all the conditions of the said provision, it gives the right to the seller to seek renegotiations under Article 6.2.3(1) from the buyer. The Belgian Court also acknowledged this right to seek renegotiation under Article 7(2) CISG, *"under these principles, as incorporated inter alia in the UNIDROIT Principles of International Commercial Contracts, the party who invokes changed circumstances that fundamentally disturb the contractual balance . . . is also entitled to claim the renegotiation of the contract."* [*Steel Tubes Case (Bel.)*].

112. The renegotiations had failed in February 2018 when Ms. Kayla Espinoza, RESPONDENT'S CEO, got angry and aggressive and refused to reach an amicable solution [*Ex. C8, p.18*]. Upon such failure, the courts, including the arbitral tribunal have the power to either terminate the contract or to adapt the contract with a view to restore equilibrium [*Art. 6.2.3(4), PICC*].

3. The CLAIMANT is covered under Article 79, which regulates hardship and provides the remedy for price adaptation

113. The CLAIMANT fulfils all conditions stipulated for the application of Article 79. A party can claim exemption under 'hardship' if the event it is affected by disturbs the contractual equilibrium fundamentally, making performance exceptionally onerous. This even must be beyond the control of the party, unforeseeable at the time of contract conclusion, and must not have been assumed in the contract by any party [*Kroll, Art. 79, p.1089-1090*].

114. It is pertinent to assess the relevant threshold for a hardship to constitute an impediment under Article 79, CISG. 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 [*Staudinger/Magnus, Art. 79, ¶4*; *Art. 6.2.2, PICC*]. The particularities of each case, however, are critical to decide whether the "excessive onerousness" requirement is met, and various factors affect it [*Silveira, p.9*]. This threshold varies according to the contract between the parties [*Brunner, pp.147-48*]. Commentators

have often mentioned a "limit of sacrifice" beyond which the disadvantaged party should not be any more expected to perform the contract [*MünchKomm/P Huber, Art. 79, ¶9*]. It is an established practice that the parties are free to decide the terms and conditions of their contract, and that the party autonomy should be given precedence over the conventional terms of CISG [*Horn, p.27*].

115. The starting point to determine the threshold of risk allocation in a hardship clause is the contract itself. Primarily, it is up to the parties to define their respective spheres of risk in the contract thus the "limit of sacrifice" varies with the different circumstances of each case [*Steel Rope Case (Bul.)*; *Schlechtriem/Schwenzer, 'Art. 79'; Schwenzer (2009), p.715*]. The key issue of risk allocation is first of all to be considered in the light of the parties' explicit or implicit intention, i.e., on the basis of contract interpretation. The main objective inquiry is whether the equilibrium of the contract has been fundamentally altered. The hardship exemption is therefore not only based on the central inquiry of whether, but also of 'how much risk the disadvantaged party assumed' [*Wegematic (USA)*]. 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 [*Brunner, ¶19, pp.147-48*]. Hence the parties' contractual risk allocation will prevail over the threshold test of the hardship exemption [*Brunner, pp.423-424*].

116. The Tribunal should take into consideration the special risk allocation between the parties in light of the financial status and intention of the CLAIMANT, and the clear threshold of risk allocation supplied by the CLAIMANT [*Ex. C8, p.17; FSSA, Cl. 12, p.14*]. The contract must be interpreted in the light of the hardship clause. It is extremely pertinent to note that the clause in the FSSA includes the phrase "comparable unforeseen events making the contract *more* onerous [*FSSA, Cl. 12, p.14*]." It can be deduced from the usage of the word "more" that the CLAIMANT impliedly excluded any further risks pertaining to subsequent changes that may have made the contract additionally onerous in comparison to what it already is. The threshold test had been lowered considering the past experience of the CLAIMANT and the current financial condition as expressed by Ms. Julie Napravnik in her mail on 31 March 2017 [*Ex. C4, p.12*]. Furthermore, the CLAIMANT had made it clear at a pre-contractual stage itself that they were not willing to take over any further risks associated with a change in the delivery terms, customs regulations and import restrictions [*Ex. C4, p.12*]. In the witness statement of Julie Napravnik, it has been stated that *"the last two years have been financially difficult for Claimant due to several reasons"* and it has been able to stay in business through extensive restructuring and measures and a considerable cut of the

work force [*Ex. C8, p.17*]. This situation was also made known to the RESPONDENT, who even at the time of the conclusion of the contract had sufficient inclination about the financial position of the seller.

117. The CLAIMANT also submits that the hardship by reason of additional expense is not to be determined by reference to the loss, or failure to profit, from one particular contract term in isolation. Rather, it is to be judged from the perspective of the entire undertaking [*Eastern Air Lines (USA); Wegematic (USA)*]. In the present factual matrix, the CLAIMANT had a profit margin of 5% on the overall contract, i.e. of USD 500,000. However, they were forced to pay the 30% tariff that amounted to USD 1.500,000 [*PO, ¶27, p.58*]. Not only did the CLAIMANT lose its profit margin in the course of the third shipment, but overall were in a loss of USD 1,250,000 for the said shipment. This payment also destroyed the profit margin of the entire contract. Therefore, the contractual equilibrium was distorted to the extent that it crossed the CLAIMANT'S limit of sacrifice.

118. One of the primary requirements of a hardship clause is the disturbance such an unanticipated situation causes in the contractual equilibrium [*Silveira, p.8*]. Not only had the RESPONDENT requested the delivery to resell the doses at a price 20% higher than the price charged by CLAIMANT, it was also doing so in violation of its contractual obligations [*NoA, ¶20, p.8; PO 2, ¶20, p.57; Ex. C2, p.10; FSSA, p.13*]. Further, the payment of the tariff rate financially endangered the CLAIMANT, who would be unable to take new credit lines [*PO 2, ¶29, p.59*]. Their restructuring plan would be severely endangered with the loss of a major credit line and it may bring them again to its position of near insolvency, as it experienced in 2014 [*PO 2, ¶21, p.58*]. CLAIMANT was relying heavily on this contract, and therefore even performed all its obligations based on the promises made by the RESPONDENT in anticipation of a price negotiation [*As submitted in III-B2(i), ¶¶101-106*]. The contractual equilibrium has become extremely endangered, and the Tribunal must take all necessary measures to adapt the price and restore the equilibrium.

119. The past experience of 2014 had nearly resulted in the insolvency of the CLAIMANT. The CLAIMANT had a difficult time convincing the Creditors Committee to authorize new loans which were only granted against firm commitments of restructuring with clear milestones [*PO 2, ¶ 21, p. 58*]. Furthermore, it is essential for the CLAIMANT to be profitable in 2017 and 2018 as the prolongation of two main credit lines depend on it [*PO 2, ¶ 29, p. 59*]. The Credit line is extremely important for the CLAIMANT to recover from the debts and losses incurred in 2014. If the CLAIMANT is required to pay the outstanding amount of USD

1,25,000, the CLAIMANT will not be able to pay for the interests taken on the loans [*PO 2, ¶¶ 21, 29, pp. 58-59*].

120. In such a situation, negotiations of a new credit line will in turn become extremely tedious because the one of the major creditors of the CLAIMANT is by now the house bank of the CLAIMANT'S largest competitor who is interested in buying the dressage part of CLAIMANT. Any bank would probably make the sale a precondition for the entry into a new credit [*PO 2, ¶ 29, p. 59*]. Thus, the CLAIMANT will again be in a state of near insolvency.

121. Under such circumstances, the CLAIMANT notes that it is evident that Article 79 covers the present situation adequately. Further, due to such an extreme distortion in the contractual equilibrium, Article 79 of the CISG as well as Article 6.2.3 of the Law of Mediterraneo provides for the remedy of price adaptation, and the Tribunal should grant the same.

122. The Tribunal must also draw attention to the partial interim award from another arbitration wherein the RESPONDENT sought price adaptation under the Laws of Mediterraneo [*Mail, dt. 02 October 2018, p. 49; PO 2, ¶23, p. 58*]. Mediterraneo's imposition of 25% tariff in November 2017 was more predictable with the appointment of Ms. Cecil Frankel as the agricultural minister. Furthermore, the tariff explicitly mentioned "living animals" as one of the goods covered. [*PO 2, ¶¶23-24, p.58*]. Given such predictability of the tariff, and explicit mention of living animals, the Tribunal has still assumed the power to adapt the contract under the Laws of Mediterraneo [*PO 2, ¶ 39, p.60*]. The imposition of retaliatory 30% tariff with the inclusion of horse semen was far less predictable and in such situation the Arbitral Tribunal must assume the power to adapt the contract [*As submitted in III-A1, ¶¶80-83; III-A3, ¶92*].

CONCLUSION

123. The CLAIMANT is exempted from the liability arising out of subsequent changes in the contract due to unforeseeable events making the contract more onerous. The current tariff is an unforeseeable event under clause 12 of the FSSA. Secondly, 'Impediment' under Article 79 of the CISG includes hardship. The parties must adhere to the risk allocation as per the hardship clause. The RESPONDENT has also acted in bad faith by showing inconsistent behaviour. The contractual equilibrium has been distorted and therefore, requiring a price adaptation.

REQUEST FOR RELIEF

On the basis of the foregoing submissions, CLAIMANT respectfully requests the Arbitral Tribunal to find that:

1. the claims submitted by the CLAIMANT are admissible;
2. the Law of Mediterraneo governs the Arbitration agreement and its interpretation;
3. the Tribunal has the jurisdiction and power under the arbitration agreement to adapt the contract;
4. the evidence submitted by the CLAIMANT is admissible;
5. the unexpected increase in custom tariff qualifies as an unforeseen event under the hardship clause of the FSSA;
6. the term 'impediment' under Article 79 of the CISG is inclusive of hardship and provides for the remedy of price adaptation.

Based on these findings the Arbitral Tribunal is requested to grant payment of USD 1,250,000 or any other amount from price adaptation to the CLAIMANT.

Vindobona, Danubia, 06 December 2018

Most respectfully submitted,

Anushka

Pallavi Mishra

Shetty Neha Santosh

Varshini Sunder