TWENTY-SIXTH ANNUAL WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL MOOT ARBITRATION

MEMORANDUM FOR CLAIMANT

Phar-Lap Allevamento CLAIMANT Rue Frankel 1 Capital City, Mediterraneo	v.	Black Beauty RESPONDENT 2 Seabiscuit Drive Oceanside, Equatoriana

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TABLE OF CONTENTS

TABLE OF ABBREVIATIONS AND DEFINITIONS

¶, ¶¶	Paragraph/Paragraphs
§, §§	Section/Sections
%	Per cent
ANoA	Answer to Notice of Arbitration
Art./Arts.	Article/Articles
cf.	*confer* (see)
Ch.	Chapter
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl. Memo.	Memorandum for CLAIMANT
clausa rebus sic stantibus	things thus standing
Eds.	Editors
e.g.	*exempli gratia* (for example)
et al.	*Et alii* (and others)
Et seq.	*Et sequens*; (and the following one)
EWHC	High Court of England and Wales
Exhibit C(#)	CLAIMANT's Exhibit
Exhibit R(#)	RESPONDENT's Exhibit
fn.	footnote
force majeure	*superior* force/Act of God [French]
HKIAC	Hong Kong International Arbitration Centre

HKIAC Rules	Hong Kong International Arbitration Center Rules (2018)
i.e.	*id est*; (that is)
ipso jure	as by operation of law
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration (2014)
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
ibid.	Ibidem; (in the same place)
ICC	International Chamber of Commerce
ICC Rules	Rules of Arbitration of the ICC (2012)
infra	below
ISO	International Organization for Standardization
Letter by Langweiler	Letter written by Joseph Langweiler [dated 2 October 2018]
lex arbitri	law of the seat of arbitration
LCIA	London Court for International Arbitration
No.	Number/numbers
NoA	CLAIMANT's Notice of Arbitration
p.	Page
PO1	Procedural Order No. 1 [dated 5 October 2018]
PO2	Procedural Order No. 2 [dated 2 November 2018]
RNoA	RESPONDENT's Response to Notice of Arbitration
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre [SIAC Rules 2016]
supra	above
UML	UNCITRAL Model Law on International Commercial Arbitration

	with amendments (2006)
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL RTTIA	UNCITRAL Rules on Transparency in Treaty Based Investor-State Arbitration
UNCITRAL Rules	UNCITRAL Arbitration Rules
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2010)
UPICC	UNIDROIT Principles of International Commercial Contracts
USD	United States Dollars
v.	*versus* (against)
WS of Napravnik	Witness Statement of Julie Napravnik (Claimant Exhibit C8) [dated 15 June 2018]

STATEMENT OF FACTS

CLAIMANT, Phar Lap Allevamento (Phar Lap), is a company registered and located in Capital City, Mediterraneo. It operated Mediterraneo's oldest and most renown stud farm, and has approximately 300 horses, including its own mare herd, offspring, and stallion depot. As a part of its business, Phar Lap provides stallions for breeding English thoroughbreds and Anglo Arabs. Breeders have access to the studs throughout the breeding season from February to July for covering.

RESPONDENT, Black Beauty Equestrian ("Black Beauty") is a horse breeding company based in Oceanside, Equatoriana, that is famous for its bloodmare lines that have resulted in a number of world champion show jumpers. In 2015, Black Beauty established a racehorse stable, and acquired ten mares with excellent racehorse pedigree.

21 March 2017 RESPONDENT, Black Beauty reached out to CLAIMANT Phar Lap, via email, expressing interest in the stallion, Nijinsky III for breeding with their newly acquired mares. RESPONDENT makes CLAIMANT aware that the ban on artificial insemination in Equatoriana has been temporarily lifted due to the latest foot and mouth disease crisis in Equatoriana, which resulted in restrictions on the transportation of living animals; consequently, impacting the business of racehorse breeding. RESPONDENT states that it is confident that the lifted status of the ban, though temporary, will become permanent. RESPONDENT asks that CLAIMANT provide RESPONDENT with an offer of frozen semen from Nijinsky III with CLAIMANT's terms and conditions.

24 March 2017 CLAIMANT responds to RESPONDENT via email. As part of negotiating the terms of the agreement, CLAIMANT states that the frozen semen will have to be provided in installments, may not be resold to third parties without express consent, and CLAIMANT would like to be informed about the use of every dose. The price offered is 99.500 USD

per dose, to be picked up at CLAIMANT's premises. Additionally, the purchase would be based on the Standard Frozen Semen Sales Agreement ("Frozen Sales Agreement") taking into account the Mediterraneo Guidelines for Semen Production and Quality Standards and general conditions found on the CLAIMANT's webpages.

28 March 2017 RESPONDENT purports to accept most of CLAIMANT's terms, and its general terms and conditions. RESPONDENT rejects two specific terms and calls for additional direct negotiation in: (1) Price & Delivery Terms, and (2) Applicable Law and Dispute Resolution. As to Price and Delivery terms, RESPONDENT requests a lower price and insists on a delivery on the basis of DDP. As to Applicable Law and Dispute Resolution, RESPONDENT says that it could accept the application of the law of Mediterraneo if the courts of Equatoriana have jurisdiction.

31 March 2017 CLAIMANT says it cannot lower the price and that delivery DDP would increase the price by $1000.00 per dose. CLAIMANT also expresses that it is not willing to take any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions. In that vein, CLAIMANT points out that the unforeseeable additional health and safety requirements make highly expensive tests necessary, which would increase costs and destroy the commercial basis of the deal, and thus, CLAIMANT refuses to take on such risks. CLAIMANT suggests that, at minimum, a hardship clause should be included into the contract to address such subsequent changes. Next, CLAIMANT rejects the idea of submitting to the jurisdiction of the courts of Equatoriana. Alternatively, if the parties cannot agree on the jurisdiction of the courts in Mediterraneo, CLAIMANT says, a solution is to opt to for arbitration in Mediterraneo. CLAIMANT offers to continue the

negotiation in person or on the phone and suggests the parties attend the annual colt auction in Danubia on April 12 to meet in person.

12 April 2017 Ms. Julie Napravnik, conducting the negotiation for CLAIMANT and Mr. Antley, conducting the negotiation for RESPONDENT, met to continue the negotiations. They were both severely injured in an accident when driving to a restaurant after the annual colt auction. No amendments to the standard contract beyond the existing clauses 1-6 were made. Ms. Napravnik suggestion to Mr. Antley to have a mechanism in place which would ensure an adaptation of the contract and to include an express reference into the hardship clause or the arbitration clause, was never finalized as a result of the accident. Ms. Napravnik was hospitalized for three months and resumed her position thereafter. In the interim, Mr. John Ferguson conducted the final negotiations of the Frozen Sales Agreement. Mr. Antley went into a coma for 4 weeks and took an early retirement after he left the hospital. Mr. Greg Shoemaker took over the negotiation in Antley's place.

6 May 2017 The Frozen Sales Agreement was signed by John Ferguson for the CLAIMANT and Julian Krone for the RESPONDENT.

20 December 2017 The international trading system is shaken, according to Peak Business News, as newly elected President of Mediterraneo imposes new restrictions on foreign trade. In turn, the Government of Equatoriana, retaliates by imposing a 30% tariff on all agricultural goods from Mediterraneo.

20 January 2018 CLAIMANT, represented by its original negotiator Julie Napravnik, sent an email to RESPONDENT's substitute negotiator, Mr. Shoemaker regarding the final shipment of 50 doses frozen semen. In light of the newly imposed tariffs of 30% on agricultural products, CLAIMANT alerted RESPONDENT that this tariff makes the shipment 30% more expensive, and CLAIMANT states that a solution is needed in that regard before

CLAIMANT can ship the final shipment which is supposed to go out 2 days later on 22 January 2018. CLAIMANT tried to call by phone and requested a call back A.S.A.P. and stated that she has put the shipment presently on hold but can still authorize shipment until the following evening of the 21st.

21 January 2018 Ms. Napravnik called Mr. Shoemaker and he said that he had not been involved in the negotiation and he could not authorize any additional payment, but he "saw [CLAIMANT'S] problem". Shoemaker, expressing certainty that a solution would be found through negotiation, urged Napravnik to authorize the shipment as planned since Black Beauty needed the doses and had already initiated payment of the second installment. Ms. Napravnik authorized the shipment as it was clear RESPONDENT accepted CLAIMANT's position that RESPONDENT should bear the additional costs associated with the new tariffs.

23 January 2018 CLAIMANT complied with its delivery obligation and delivered the remaining 50 doses. After the shipment had been made, it was found that RESPONDENT had been reselling the frozen semen to third parties without express permission and needed part of those doses shipped in order to satisfy obligations towards other parties.

12 February 2018 In a meeting between the Parties, RESPONDENT expressed its unwillingness to pay the additional costs associated with the new tariffs and halted further cooperation with CLAIMANT.

INTRODUCTION

1. A man should not bear the consequences for acts that he did not create. Here, RESPONDENT would have CLAIMANT suffer a 25% loss in profits because of conditions that were created by RESPONDENT'S government. When CLAIMANT agreed to the change in delivery terms, they did not agree to bear all the risks associated with the new delivery method. In fact, CLAIMANT only agreed to the change because it was expected to be mutually beneficial to both parties.
2. Consensus ad idem is important to any contract and especially to international business contract Here both CLAIMANT and RESPONDENT agreed that an adaptation clause should be included in the contract. Both CLAIMANT and RESPONDENT included the adaptation clause to protect CLAIMANT against the nature of tariffs, like the present. In spite of, RESPONDENT is now unwilling to honor their intent and wish for CLAIMANT to suffer undue hardship Furthermore, international business transaction jurisprudence allows for price adaptation where a change in circumstances would cause undue hardship.
3. Additionally, a man should not be allowed to benefit from fruits of their misdeeds. RESPONDENT, after learning of the tariffs and the hardships affecting CLAIMANT went ahead and breach the contractual agreement to not resell any of the semen. RESPONDENT has gone ahead and sold 15 doses of the semen at a price which is 20% above the price charged by CLAIMANT.
4. With regards to the procedural issues the Tribunal has both the power and the jurisdiction under the arbitration agreement to adapt the contract **(Issue 1)**. The Frozen Sales Agreement [p. 14, CLAIMANT's Exhibit C5](hereinafter, "the contract", "Sales Agreement") is the controlling document in this case and serves as reference to the provisions that the Parties agreed upon. Furthermore, the parties agreed that disputes arising out of the contract should be decided by the Hong Kong International Arbitration Center.
5. On the merits, CLAIMANT should be allowed to submit evidence from the other arbitration proceedings including RESPONDENT because the illegal hack of RESPONDENT'S computer system is now in the public domain and therefore the information is not protected by the privilege rule. **(Issue 2)**.
6. The Hardship Clause allows for the CLAIMANT to recover for any additional monies paid for the imposed tariffs. RESPONDENT'S claim that clause 12 of the contract is not binding is

flawed. Both parties intended to be bound by clause 12 of the agreement. The clause clearly and expressly stated that seller shall not be responsible for any hardship. **(Issue 3).**

ISSUE 1: THE TRIBUNAL HAS BOTH THE POWER AND THE JURISDICTION TO ADAPT THE CONTRACT BETWEEN THE PARTIES TO DECIDE THE LAW THAT GOVERNS THE ARBITRATION AGREEMENT, AS WELL AS ITS INTERPRETATION.

7. The Frozen Sales Agreement is the controlling document in this case and serves as reference to the provisions that the Parties agreed upon.
8. Clause 15 of the contract states that: "*any dispute arising* out of this contract . . . shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (hereinafter, "HKIAC") under HKIAC administered Rules in force when the Notice of Arbitration is submitted." [p. 14, Exhibit C5](emphasis added).
9. Here, there is a dispute over the adaptation of the contract and as written in Clause 15 of contract, this issue should be resolved by the tribunal administered by the Hong Kong Arbitration Centre.

A. A LITERAL READING OF THE AGREEMENT, MORE SPECIFICALLY CLAUSE 15, MAKES IT MANDATORY FOR DISPUTES ARISING FROM THE AGREEMENT TO BE RESOLVED BY THE TRIBUNAL.

10. A literal reading of the contract signed by both CLAIMANT and RESPONDENT makes it mandatory for any dispute arising from the contract to be solved by arbitration administered by the HKIAC.
11. Clause 15 of the Agreements reads as follows:

> *Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted. The seat of the arbitration shall be Vindobona, Danubia.*
>
> [CLAIMANT Exhibit C5] (emphasis added).

12. The language in Clause 15 is clear and unambiguous, leaving no room for any other interpretation except that the issue must be resolved through arbitration under the relevant HKIAC Administered Arbitration Rules when the Notice of Arbitration is submitted.

B. BOTH CLAIMANT AND RESPONDENT CLEARLY INTENDED TO REFER ANY FUTURE DISPUTES TO THE HKIAC AND THIS THE TRIBUNAL SHOULD PAY CREDENCE TO THE PARTIES' INTENT AND FIND THAT THE TRIBUNAL HAS JURISDICTION TO HEAR THE DISPUTE.

13. A fundamental principle in international arbitration is party autonomy, where the parties are free to choose the laws or rules apply when there are disputes involving substantive rights and obligations. [Jones, p. 911].

14. The principle of party autonomy is also supported by the International Chamber of Commerce (ICC) in Paris, which is the leading provider of international commercial arbitration services worldwide, which is reflected in Article 17(1) of the ICC Rules of Arbitration (ICC Rules), which reads:

> "[T]he parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate."

[Mattli & Dietz, p. 123].

15. CLAIMANT and RESPONDENT went through several rounds of negotiation before the final contract was drafted, thus taking all the relevant information into consideration. [PO2, ¶4].

16. Signatures of both the CLAIMANT and RESPONDENT at the conclusion of the contract further solidifies the Parties' intent to refer any future dispute to a Tribunal of three arbitrators, as well as to be bound to the jurisdiction of the HKIAC over disputes arising from the contract, as clearly stated in Clause 15 of the contract.

I. The United Nations Convention on Contracts for the International Sale of Goods ("CISG"; "The Vienna Convention") further supports the conclusion that the matter at hand was intended to be heard before a Tribunal, governed by the HKIAC Rules.

17. Both CLAIMANT and RESPONDENT are signatories of the CISG. [PO1, III(4)].

18. Article 8(1) of the CISG which states that: "for the purpose of this Convention, statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been aware of what the intent was."

19. In conducting multiple negotiations and signing the contract, the Parties' intent to be heard before a Tribunal governed by the HKIAC is overt and clear, as the language of the contract is not ambiguous in its terms.

20. Further elaborating on Article 8(1), Article 8(3) of the CISG states that, "in determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all the relevant circumstances of the case . . ."

21. Here, there it is irrefutable that both parties had due consideration. The Parties conducted multiple rounds of negotiations [PO2, ¶4], and there were no external circumstances that would have hindered or altered any due consideration between the Parties.

22. Further, the HKIAC Model Law states that the language may be adopted by parties to a contract who wish to refer any future dispute to arbitration in accordance with the HKIAC Rules.

23. Thus, the plain language of the contract and the signatures by both parties undeniably demonstrates that the Parties intended to refer any future dispute to the tribunal, governed by the rules of the HKIAC.

C. THE DISPUTE IN THIS MATTER BETWEEN THE PARTIES ARISES FROM THE SUBSTANTIVE CONTRACT AND NOT FROM THE ARBITRATION CLAUSE.

24. The law of the arbitration clause potentially governs matter including the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause and identities of the parties to the arbitration clause. It does not replace the substantive contract.

25. Here, the dispute arose from the substantive contract. The issue is not one concerned or centered around the arbitration clause within Clause 15 of the contract.

26. The Tribunal is asked to decide a substantive issue not a procedural issue and the Tribunal has the jurisdiction to resolve "*any dispute arising out of this contract"* (emphasis added).

27. The substantive issue before the Tribunal is whether the contract can be adapted.

I. The Parties intended Mediterraneo law to apply in the case of arbitration.

28. The law governing the substantive issues referred to arbitration is generally described as the "applicable law", "substantive law" or simply "governing law". [Jones, p. 912].

29. Most disputes are contractual and are therefore governed by the law of the contract. [Hammond, Petrovas, Hughes Hubbard & Reed LLP: Which Laws Apply In International Arbitration Thomas Reuters Practical Law Arbitration (2018)].

30. Since the Parties included a choice of law clause in their contract, the Tribunal will give effect to that choice. Id.

31. The choice of law clause was included in the contract using the following language: "[T]his Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the Sale of Goods." [Clause 14, CLAIMANT Exh. C5].

32. Thus, the application of any other law other than the law of Mediterraneo would be inconsistent with the intent of the Parties.

D. THE PARTIES EXPRESSLY WANTED MEDITERRANEO LAW TO APPLY, OR THEY WOULD HAVE INDICATED OTHERWISE.

33. The HKIAC Rules 2018 stipulates that language should be included in a contract where the substantive contract and the law of the seat are different. The Sales Agreement is governed by the law of Mediterraneo [*See* CLAIMANT Ex. C5; C14, p. 14], while the seat of arbitration is Danubia. [*Id.*].

34. This provision clearly demonstrates that the all substantive issues arising from the contract would be governed by the law of Mediterraneo and not the law of Danubia as asserted by the RESPONDENT.

35. The law governing the substance of the dispute is the law out or rules of law governing the contract out of which the dispute arises. [Jones, p. 912]. The applicable substantive law determines the legal rights and obligation of the parties but may also affect the causes of action available. [*Id.*]

36. Additionally, "if the parties have made an express choice of law to govern the underlying contract, that law may also govern the arbitration agreement." [Hammond, Petrovas, Hughes Hubbard & Reed LLP: Which Laws Apply In International Arbitration Thomas Reuters Practical Law Arbitration (2018)]. In most cases, effect will be given to the parties' express or implied choice of law to govern the arbitration agreement.

37. The contract expressly states that the law of Mediterraneo is applicable to the substantive portion of the contract, while Danubia is the seat of the arbitration. Such a provision is not uncanny to international arbitration law as sometimes the law of the seat will mandate the application of separate rules for international and domestic arbitrations.

E. DANUBIAN LAW CANNOT APPLY UNLESS IT RELATES TO THE PROCEDURE UNDER WHICH THE ARBITRATION IS CONDUCTED.

38. It is well established in international arbitration law that *lex arbitri* is the law of the seat of the arbitration. Thus, *lex arbitri* is the place in which the arbitration is conducted for legal purposes.

39. *Lex arbitri* deals with the conduct of the arbitration proceedings, which includes factors such as formation of the Tribunal, request for documents production, and the type of award that is available. [*Id.*]. It is the law of the seat that will define many of the procedural aspects of the arbitration. [Herbert Smith, Freehills LLP: How significant is the seat in international arbitration, Thomas Reuters Practical Law Arbitration (2018)].

40. It is a well-known principle of international arbitration law that "because international arbitrations generally take place in a neutral forum, the *lex arbitri* is likely to differ from the law governing the substantive dispute."

41. While the parties have the option to choose the seat of the arbitration, "[a] choice of seat is generally regarded as carrying with it a choice of the corresponding lex arbitri." [[Hammond, Petrovas, Hughes Hubbard & Reed LLP: Which Laws Apply In International Arbitration Thomas Reuters Practical Law Arbitration (2018)].

42. For example, in England, in *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd [2008] EWHC 426 (TCC)*, the court confirmed that, while the choice of seat will usually dictate the corresponding procedural law, the converse can also be true. In this case, the parties' choice of procedural law of a country (England) was held to indicate that England was also the chosen country as the seat of the arbitration.

43. Comparatively in *Shashoua v Sharma [2009] EWHC 957 (Comm)*, the parties had agreed that the "venue" of arbitration was London. Justice Cooke held that London was the seat of the arbitration and English law the curial law. The same approach was followed in *U & M Mining Zambia Ltd v Konkola [2013] EWHC 260 (Comm)* and *Enercon GmbH v Enercon (India) Ltd [2012] EWHC 689 (Comm)*.

44. CLAIMANT does not dispute the fact that the *lex arbitri* in this case is the law of Danubia. However, CLAIMANT maintains that the law of Danubia would only come into effect if the issues before the Tribunal were related to the procedure of the arbitration itself.

45. *Lexi arbitri* would only be applicable if the issue concerned the validity, scope, or meaning of the arbitration agreement (including issues as to the scope of the Tribunal's jurisdiction) are governed by the proper law of the arbitration agreement.

46. It must be noted that an "express[ed] choice of the *lex arbitri* may be regarded as indicating an implied choice of the corresponding seat of the arbitration." [Hammond, Petrovas, Hughes Hubbard & Reed LLP: Which Laws Apply In International Arbitration Thomas Reuters Practical Law Arbitration (2018)].

47. It is evident that *lex arbitri* deals with jurisdiction of the Tribunal as to procedural issues and not substantive issues. Since the choice of seat may have important procedural consequences, parties should give careful consideration to this issue.

48. In *Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics [2015] EWHC 194*, the Court confirmed that there is no difference between an arbitration clause that refers to a "venue" or "place of arbitration" and one that states where the arbitration is to be held. For the issue at hand, is not about the venue but about the adaptation of the contract. Here, the issue concerns a substantive problem, which is the adaptation of the contract. "It is the law of the seat that will define many of the procedural aspects of the arbitration." [Herbert Smith: How Significant is the seat in International Arbitration? **T**homas Reuters Practical Law Arbitration (2018)].

49. In *Arsanovia Ltd and others v Cruz City 1 Mauritius Holdings [2012] EWHC 3702 (Comm)*, in which Andrew Smith J, held that the governing law of the arbitration agreement was Indian law, which was also the governing law of the contract. He considered that, where parties had expressly excluded specific statutory provisions of a particular country's law, the natural inference was that they understood and intended that that law would otherwise apply. Further, the governing law clause of the contract was, at least, a strong pointer to the parties' intentions about the law governing the arbitration agreement, absent other indication.

50. A contract is adapted when "the initial circumstances in which a long-term contract was drafted may change over time." "If this is the case, it may become necessary to review and adapt the contract on the basis of the new situation." [http://www.cepani.be/en/other-adr/adaptation-contracts/what-adaptation-contract] accessed September 13, 2018.

51. Here, the Parties agreed that the CLAIMANT would deliver the horse semen in three (3) separate shipments over the course of numerous months. [PO2, ¶4]. The implementations of the tariffs by Mediterraneo and Equatoriana was an unforeseen change in circumstances that were not accounted for in the negotiations or calculations.

52. As such, adaptation of the contract is necessary to restore the due consideration between the Parties, an act within the Arbitral Tribunal's power and supported by the HKIAC Rules.

53. Clearly, the tribunal does have the jurisdiction under the arbitration agreement to adapt the contract. It is a substantive issue of law that has been referred to the tribunal thus the tribunal has the jurisdiction to hear the matter.

54. Furthermore, "in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction." [UML Art 28(4)].

F. MEDITERRANEO LAW IS THE BEST LAW UNDER WHICH THE ARBITRATION MUST BE CONDUCTED BECAUSE IT HAS THE CLOSEST CONNECTION TO THE SUBJECT MATTER OF THE CONTRACT, THUS THE TRIBUNAL SHOULD HOLD THAT THE LAW OF MEDITERRANEO APPLIES.

56. It is well established through precedent that the contract must be the same law that governs the arbitration agreement. Following such precedent, the Tribunal should hold that the law of Mediterraneo applies.

57. Under Swiss and German law, absent a determination by the parties, arbitral tribunals "shall apply the law of the State with which the subject matter of the proceedings is most closely connected." M. A. Petsche, Choice of Law in International Commercial Arbitration Springer Nature Singapore Pte Ltd. 2017.

58. *Sonatrach Petroleum Corp v Ferrell International Ltd; Peterson Farms Inc v C & M Farming Ltd;* and *Lummus Global Ltd v Keppel Fels Ltd* all found that the law governing a contract must be the same law that governs the arbitration agreement. *Lummus* further found that even in the presence of an arbitration choice of law, the law of the contract must still govern the arbitration.

59. Under French law, absent a choice of law by the parties, arbitral tribunals can directly apply the "rules of law" which they consider appropriate." M. A. Petsche, Choice of Law in International Commercial Arbitration Springer Nature Singapore Pte Ltd. 2017, p. 21.

60. The contract clearly states that: "This Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980)(CISG)." [p. 14, Exhibit C5].

61. Therefore, the law of Mediterraneo or Equitoriana law must govern the contract.

I. Equitoriana law cannot govern the arbitration.

62. Equitoriana law cannot govern the contract due to the tariffs imposed as a retaliatory measure due to the restrictions imposed by Mediterraneo's newly elected President.

63. The government of Equitoriana has a vendetta against Mediterraneo and actively targeted Mediterraneo through tariffs and trade restrictions placed by Mediterraneo, but not directed at Equitoriana. For a fair arbitration to ensue, the law governing the agreement must be Mediterraneo law.

64. The Tribunal has the jurisdiction to hear the dispute as the matter covers a substantive issue. As such, the law of Mediterraneo should apply.

II. Article 19.2 of the HKIAC gives the tribunal jurisdiction to hear the issue.

65. Article 19.2 of the HKIAC gives the Arbitral Tribunal power to "determine the existence or validity of any contract of which an arbitration agreement forms a part." [HKIAC Art 19.2].

66. The Tribunal has both the competence and the power to rule on its own jurisdiction, including issues that arise from the existence, validity, or scope of the arbitration agreement. [HKIAC Art. 19.1].

67. The Hong Kong Arbitration Ordinance, which cites to UNCITRAL Model Law states in Clause 34 that:

> "[T]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."

[Arbitration Ordinance Cl. 34 Cap 609, citing UNCITRAL Model Law Art. 16].

68. The Arbitral Tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

69. A decision by the Arbitral Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Arguably, under most modern arbitration laws, an arbitration agreement is separable from the underlying contract in which it is contained. The

doctrine of separability means that it is possible for an arbitration agreement to be governed by a different law to the underlying contract as is demonstrated by the provision of Art. 16 of the UNCITRAL Model Law 1985 ("UML").

ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS ON THE BASIS OF THE ASSUMPTION THAT THIS EVIDENCE HAD BEEN OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM.

A. EVIDENCE FROM OUTSIDE ARBITRATION PROCEEDINGS CAN BE ENTERED PURSUANT TO THE EVIDENCE RULES OF ARBITRATIONS, AS THE AWARD IS PUBLIC.

70. Arbitration is less formal than litigation, and arbitrators are not required to follow the rules of evidence. [Richard T. Seymour & Edward T. Ellis: Navigating the Evidence and Discovery Roadmap in Arbitration, American Arbitration Association (9 March 2016)]. Since this is arbitration and not litigation, the admissibility of the evidence is irrelevant.

71. In accordance to Article 9 of the IBA Rules on the Taking of Evidence in International Arbitration, the Arbitral Tribunal shall, at the request of a party or on its own motion, exclude from evidence or production any document, statement, oral testimony or inspection for any of the following reasons: any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the document, statement, oral communication or advice contained therein, or otherwise.

72. International Arbitral Tribunal would not accept hacked or leaked emails unless one of the parties was to issue a waiver.

73. In *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, the tribunal reasoned as follows: first, it noted that the plaintiffs alleged the documents were material and relevant to the dispute; second, it observed that the documents were now in the public domain. Thus, the tribunal found in favor of admitting the documents, placing special emphasis on the fact that they were "lawfully available to the public." In the view of the Tribunal, this precluded the documents from being considered privileged information.

74. Since the illegal hack of RESPONDENT's computer system is now in the public domain, the illegal hack is precluded from being considered privileged information.

75. The information obtained from the RESPONDENT is material to the current matter because in the current arbitration, RESPONDENT is vigorously denying any need to adapt the contract to

a change of circumstance. However, in previous arbitration, RESPONDENT itself had asked for an adaptation of the price because of the same aforementioned tariffs, which invoked an unforeseeable change of circumstances.

76. In accordance to Article 7 of the UNCITRAL Rules on Transparency in Treaty Based Investor-State Arbitration (hereinafter "UNCITRAL RTTIA"), CLAIMANT argues that the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of deference and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing party (or parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.

77. CLAIMANT argues as transparency comes across confidentiality, "the conflict between transparency and confidentiality cannot permit the victory of one on the other, and their settlement turns out necessary" [Stefano Azzali: Confidentiality vs. Transparency In Commercial Arbitration: A False Contradiction To Overcome, NYU Law Blog (28 December 2012).

B. THE PARTY TO THE OTHER ARBITRATION MAY BE JOINED TO THIS ARBITRATION.

78. CLAIMANT notified the Tribunal that the "other Party in that arbitration may also be joined to the proceedings as the proceedings have also been conducted under the HKIAC-Rules." [Letter by Langweiler, p. 50].

79. The third party is willing and able to participate in this arbitration, and their presence is of material importance to this arbitration; the third party was involved in the arbitration where RESPONDENT claimed that the aforementioned tariffs imposed by Mediterraneo and Equitoriana constituted a unforeseen change in circumstances, and requested an adaptation to the contract--something the RESPONDENT now objects to, despite RESPONDENT's benefit of the same argument in a previous arbitration. [Letter by Langweiler, p. 50].

80. As such, the third party involved in the prior dispute may be entered as an additional party to the arbitration at hand. Therefore, through the rules of joinder, anything covered under the

"express confidentiality provision" between the RESPONDENT and the new party will be disclosed to the Tribunal.

81. The HKIAC has been at the forefront of dealing with multi-party and/or multi-contract disputes. Unlike the other arbitration institutions that have addressed consolidation in their rules, such as: the Stockholm Chamber of Commerce ("SCC"), the International Chamber of Commerce ("ICC"), the London Court for International Arbitration ("LCIA") and the China International Economic and Trade Arbitration Commission ("CIETAC"); the degree to which consolidation is permitted under the HKIAC Rules is far more expansive.

82. The HKIAC Rules contain extensive provisions on joinder of additional parties (HKIAC Art. 27) and for consolidation of two or more related disputes (HKIAC Art. 28). HKIAC Art. 28.1 sets out the circumstances under which consolidation can be ordered, the relevant factors that the HKIAC may consider when deciding whether to allow consolidation (HKIAC Art. 28.3), the validity of acts done prior to consolidation (HKIAC Art. 28.5), and the appointment of the tribunal for consolidated proceedings (HKIAC Arts. 28.6 and 28.7).

83. Under HKIAC Art. 28.1, the HKIAC may consolidate arbitrations at a party's request if any of the following circumstances exist: (i) the parties agree to consolidate; (ii) all the claims are made under the same arbitration agreement; or (iii) where the claims are made under different arbitration agreements, the HKIAC finds that the arbitrations share a common question of law or fact, the claims arise from the same or series of related transactions, and the arbitration agreements are compatible (incompatible arbitration agreements may include, for example, those specifying different places or rules of arbitration).

84. The third subsection (iii) further substantiates the need for the third party to be enjoined in the current arbitration. In the previous arbitration between the RESPONDENT and the third party, RESPONDENT took the position that an adaptation was needed to account for the tariffs imposed by Mediterraneo and Equitoriana. Both arbitrations involve the same question of law and similar facts. Now on the opposing side of the same or substantially same dispute, RESPONDENT vehemently denies the need for an adaptation.

85. In contrast to HKIAC Art. 28.1, certain other arbitration institutions that provide for consolidation in their rules require that the parties to the arbitrations must be the same or bound by a single arbitration agreement (for example, Art. 10 of the ICC Rules and Art. 22.1(x) of the LCIA Rules). This is not a requirement under Article 28 of the HKIAC Rules, which

permits consolidation of arbitrations involving different parties, even when the arbitrations are conducted under multiple arbitration agreements.

86. As a result, HKIAC Art. 28 covers a wide range of cases that are eligible for consolidation under the HKIAC Rules. Therefore, as cited in Joseph Langweiler's Letter to the Tribunal [p.50], the previous arbitration was also made under the same HKIAC arbitration agreement. RESPONDENT was also represented by the same counsel as here. Moreover, whether the tribunal finds that the previous arbitration was made under the same or different arbitration agreements, the result will be the same. CLAIMANT has complied with the minimum standard of Article 28, and the previous arbitration may be consolidated.

87. In addition to consolidation, HKIAC Art. 27, contains another mechanism for multi-party/contract disputes—joinder of additional parties.

88. HKIAC Art. 27 uses broad and flexible terms on joinder of additional parties. As long as an additional party is prima facie bound by the arbitration agreement, it may be joined to the ongoing arbitration. In contrast to other institutional rules that allow only existing parties to request joinder (for example, ICC Art. 7(1)), the HKIAC Rules permit an additional party to intervene in an existing arbitration by submitting a request for joinder (HKIAC Art. 27.6).

89. In addition, a request for joinder can be made before or after the Arbitral Tribunal has been constituted (HKIAC Arts. 27.1 and 27.8); many other institutional rules cover only one or the other of the two situations (for example, SIAC r.24.1(b) and LCIA 22.1(viii) provide only for post-constitution joinder, and ICC Article 7(1) allows only pre-constitution joinder unless the parties agree otherwise). Under HKIAC Article 27, if the Tribunal has already been constituted, it will have the power to join an additional party (HKIAC Art. 27.1); otherwise, the HKIAC will make the decision (HKIAC Art. 27.8). In the latter case, where an additional party is joined to the arbitration before the Tribunal has been confirmed, the HKIAC may remove any arbitrators already appointed and appoint a new tribunal (Art. 27.11). It is thus clear that the broad language of HKIAC Art. 27 is more progressive, as it offers the possibility of joinder in a greater range of circumstances as compared to certain other institutional rules.

90. The Arbitration Tribunal under the HKIAC wields much broader powers than under any of the other arbitration rules, except the Swiss Rules, as discussed below. Aside from the Swiss and HKIAC, other arbitration rules take different approaches, ranging from full party autonomy and privity to greater flexibility. The Swiss Rules, however, are purposefully designed to be very flexible. Article 4(2) of the Swiss Rules places no restriction on when a

person can be joined, and similar to HKIAC, the Arbitral Tribunal is entitled to decide the issue taking into account all relevant circumstances. Moreover, there is no requirement that all the parties must agree. [Swiss Rules of Arbitration, Art. 4].

91. The HKIAC Rules also allow a tribunal to evaluate the merits of a request for joinder at any stage. Rather than any outright prohibition, the tribunal is given the power to determine the jurisdictional impediments to adding a new party. The other rules do not expressly mention the issue of late joinder, except for the ICC Rules, which do not allow joinder after an arbitrator has been confirmed or appointed, unless all parties agree. This theory conforms to principles of fairness and party equality.

92. The principle of party equality has always been a core principle of arbitration, specifically in arbitrator selection. The ICC Rules' approach minimizes the possibility for unfairness. *See Siemens v. Dutco case (French Cour de cassation, 18 Y.B. Com. Arb. 140 (1993)).* The holding in *Siemens* is not that each party should be entitled to select its own arbitrator, but that all parties should have equal treatment in being able to select an arbitrator.

93. The HKIAC Rules have adopted this approach, and expanded on it. Since the parties have agreed to opt-in to the HKIAC Rules, then enforceability of the Articles should not be a problem, unless the *lex arbitri* prohibits such prior agreement, because the parties agreed at the outset on the manner to constitute the Arbitral Tribunal. [Peter Yuan: The New HKIAC Arbitration Rules and How They Compare to Other Institutional Rules (1 November 2013)].

94. In the case at hand, the additional third party has offered their willingness to intervene into this arbitration, following submission of a request pursuant to HKIAC Art. 27.6, the third party may be joined. These HKIAC mechanisms were designed to promote procedural efficiency and to reduce unnecessary costs, following the motives behind the creation of these rules and in the interest of justice, CLAIMANT requests the Tribunal to accept the copy of the tribunal award and relevant submission.

C. EVEN IF THE EVIDENCE FROM THE OTHER ARBITRATION WAS FROM A BREACH OF CONFIDENTIALITY OR FROM THE RESPONDENT'S HACK, THE EVIDENCE IS STILL ADMISSIBLE AT THE DISCRETION OF THE TRIBUNAL.

95. The Tribunal can decide a party's request interim measure under HKIAC Art. 23.2. However, the Arbitral Tribunal shall take into account the circumstances of the case. The Tribunal can consider the harm not adequately repairable by an award of damages that is likely to result and

whether the current harm substantially outweighs the future harm that is likely to result if the remedy sought is not effectuated.

96. Due to the unique set of circumstances CLAIMANT faces, it is likely that the Tribunal will determine that the harm does not substantially outweigh the harm that is likely to result to the RESPONDENT. RESPONDENT suffers virtually no harm from sharing the award information from the prior arbitration and no amount of money is able to make them whole because the information is already publicized and known. Following this logic, the evidence should be allowed in.

97. There are no specific rules on evidence in particular how to deal with evidence obtained in breach of contractual obligations or by illicit means in the arbitration laws of Equatoriana, Mediterraneo, and Danubia. Therefore, the issues should be examined under the lens of relevant persuasive law such as the CISG, UNIDROIT and/or UNICITRAL. [PO2, ¶46].

98. UNICITRAL Art. 27(4) also provides foundation for a Tribunal's power to draw adverse evidential inferences, as discussed above. The provision allows the Tribunal to assess the 'materiality and weight of the evidence offered'. This means that the tribunal may, and in fact must, assess the totality of the evidential file. In so doing, the Tribunal must assess evidence that could or ought to have been offered but was not in fact offered, by either or both parties.

99. The '*fruit of the poisonous tree*' doctrine provides that information acquired through illegal sources (illegal hack) is inadmissible by association. However, it is undisputed between the Parties that Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments. [PO1, p. 53 ¶4]. As such, the UNCITRAL Rules on Transparency can apply to the contract. Moreover, where the Rules on Transparency apply, they shall supplement any applicable arbitration rules, such as the HKIAC, and where there is a conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail. (See New UNCITRAL Arbitration Rules On Transparency, Article 7). Article 5 states, "[t]hese Rules shall not affect any authority that the arbitral tribunal may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third persons.

100. The New UNCITRAL Arbitration Rules On Transparency, Article. 4 states:

> "[W]here the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account the public interest in transparency in treaty-based investor-State arbitration and in

> the particular arbitral proceedings and the disputing parties' interest in a fair and efficient resolution of their dispute."

CLAIMANT is merely providing a copy to the Tribunal of an award which was granted by anotherarbitration which was also conducted under the same HKIAC Rules. In line with the governing rules, there is nothing preventing the supplied evidence from being accepted.

101. Furthermore, the hack is upon the fault of the RESPONDENT and did not use enough due diligence to protect its information from outside wrong doers. Although RESPONDENT had used a firewall to protect their system, it was outdated which had made it easy for the hackers to enter the system.

102. Pursuant to HKIAC Art. 45.4, the deliberations of the Arbitral Tribunal are confidential. However, this rule does not say that the awards are confidential. Only the deliberations. In accordance with HKIAC Art. 44(1), the Chambers, the arbitrators and the other persons mentioned in this provision may be liable in the case of deliberate wrongdoing. This includes intentional breaches of these persons' obligations and will typically apply to cases of fraud, corruption, intentional failure to disclose information affecting an arbitrator's impartiality and independence, etc. In the instant matter, this is not a breach or fraud. This was simply a fact that was told to CLAIMANT by another person that RESPONDENT had another arbitration that had already finished.

ISSUE 3: THE HARDSHIP CLAUSE ALLOWS FOR THE CLAIMANT TO RECOVER FOR ANY ADDITIONAL MONIES PAID FOR THE IMPOSED TARIFFS.

103. RESPONDENT alleges that Clause 12 of the Agreement does not allow CLAIMANT to recover for any additional monies paid in relation to the increase in tariffs imposed by Equatoriana and subsequently, Mediterraneo.

104. However, RESPONDENT concedes that although an ICC-hardship clause was suggested, such a clause would be too broad. Therefore, "an approach was taken to regulate a number of possible risks directly and then merely add a hardship wording to the existing force majeure clause." [ANoA, ¶4].

105. The hardship clause of the Agreement reads as follows:

> 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.*

[p. 14, CLAIMANT Exhibit C5, ¶12]

106. RESPONDENT contends that the clause is narrowly worded, and thus does not provide for any adaptation by the arbitral tribunal, however, the plain language of Clause 12 of the Agreement explicitly provides that the Seller is not responsible for hardships or comparable unforeseen events that make the contract more onerous, both of which apply to the issue before the Tribunal.

A. USING THE PLAIN LANGUAGE OF THE AGREEMENT, THE WORD "HARDSHIP" IS APPLICABLE TO THE IMPLICATION AND INCREASE IN TARIFFS OF ANIMAL-BASED PRODUCTS, INCLUDING CLAIMANT'S SHIPMENT OF HORSE SEMEN.

107. The hardship clause is a "clause in a contract that is intended to cover cases in which unforeseen events occur that fundamentally alter the equilibrium of a contract" [Ullman, p. 2] which results in an excessive burden being placed on one of the parties involved in the formation of the contract. [*See* Art. 6.2.2 UPICC].

108. Hardship clauses typically recognize that parties must perform their contractual obligations even if events have rendered "performance more onerous than would reasonably have been anticipated at the time of the conclusion of the contract". [*See* Art. 6.2.2 UPICC].

109. The meaning of "hardship" was disputed in the English case, *Superior Overseas Development Corp. v. British Gas Corp., [1982] 1 Lloyd's Rep. 262 (C.A.)*. The case involved a long-term natural gas supply agreement that included a hardship clause triggered in the event of "substantial economic hardship." The lower court held: "the adjustment of the price should only be such as to remove the substantial element of any substantial hardship and thus reduce any substantial hardship to mere hardship. The adjustment should not go further and remove all hardship." The Court of Appeals reversed, stating that all hardships should be compensated. The court began by defining "substantial economic hardship" as "[a] substantial change in economic circumstances means something more than ordinary everyday variations which were current in the late 1960s. 'Substantial hardship' must mean something more than difficulties arising from day to day economic variations. It must have a real impact and not be a mere transient effect."

110. The court then proceeded to explain why all hardships should be compensated: Having found that the party was suffering from substantial hardship, it is next necessary to determine what adjustment to the price is justified to 'offset or alleviate the said hardship.' In my opinion the said hardship refers to the substantial hardship mentioned earlier in the clause, and offsetting or alleviating refers to a condition of normality, that is to say without hardship, not merely without the substantial part of the hardship.

111. Unforeseen supervening circumstances can distort the balance of performance and the respective values of the parties, thus fundamentally altering the equilibrium of the contract. [Brunner, p. 391-420].

112. The UNIDROIT Principles of International Commercial Contracts/Principles of European Contract Law (UPICC/PECL) generally reform or adapt the contract with the purpose of restoring the contract's equilibrium. [*Id.*].

113. A hardship may also be considered as "[a] particular group of cases under the force majeure excuse, in which the impediment to performance consists in a change of circumstances." [*Id.*]. The central inquiry should not be *whether* the equilibrium was fundamentally altered, but the amount of risk that the disadvantaged party assumed must also be examined. [*Id.*].

114. In cases involving the consequences of changed circumstances (*clausa rebus sic stantibus*), the disadvantaged party can request renegotiation or seek a court-ordered adaptation of the contract or even termination of the contract. [*Id.*].

115. In international contracts, there is a presumption that absent an adaptation clause in the contract, the Principle of sanctity of contracts prevails since it cannot be assumed that the parties were unaware of possible risks related to a change in the value of the parties' performance. [Ullman, p. 2].

116. A party cannot invoke a hardship defense if the party has, unilaterally or by agreement with the other side, assumed the risk for the events on which the hardship defense is based. [*Id.*]

117. Here, in the plain language of the Agreement, the CLAIMANT has made clear that they would not be responsible for any hardship associated with delivery. (*See* p. 14, CLAIMANT Exhibit C5, ¶12; "Seller shall not be responsible for….acts of God, *neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous.*"(emphasis added)).

118. The implemented tariffs qualify as additional health and safety requirements, and were surely onerous to the CLAIMANT, as they were performing their part of the contract at a -50% deficit,

a deficit that surely renders the Agreement onerous and fundamentally alters the equilibrium of the contract. (*See* p. 50, Joseph Langweiler Letter). The initial unforeseen tariff of 25% was sufficient to justify a request for adaptation, notwithstanding the unpredicted additional retaliatory tariff of 30%. CLAIMANT calculated 5% profit margin using the original terms of the Agreement.

119. In *Superior Overseas Development Corp.*, for example, Lord Justice Waller found the hardship clause contained an element of unforeseeability even though the clause itself did not specify this element: "It seems probable, therefore, the hardship clause is designed to adjust the price to avoid substantial economic hardship to any party which might arise as a result of substantial economic change which might arise over a period of 25 years and which could not be foreseen at the time of making the agreement."

120. In the leading American case involving a hardship clause, *Georgia Power Co. v. Cimarron Coal Co.*, the court enforced a contract's arbitration clause when the parties were unable to successfully negotiate a new price for coal pursuant to a hardship clause. Even when an arbitration clause is present, courts should pay careful attention to the provisions for renegotiation contained in the hardship clause. Renegotiation is as efficient as arbitration, and a negotiated settlement may be more acceptable to contracting parties than an arbitral decree.

B. INTERNATIONAL PRECEDENT REQUIRES REMUNERATION OR REMEDY FOR THE CLAIMANT UNDER ARTICLE 79 OF CISG.

121. The 1969 Vienna Convention on the Law of Treaties addresses a fundamental change of circumstances in Article 62.

122. Under Art. 62 of CISG, a party cannot terminate or withdraw unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. [*Id.*].

123. In some legal systems like the United States and Germany, the relevant doctrine dealing with hardship is based on the inquiry whether the non-occurrence of the circumstance was a "basic assumption on which the contract was made. [Brunner, p. 393].

124. In many jurisdictions, the principle of changed circumstances has been recognized statutorily in Art. 1467 of the Italian *Codice civile* of 1942; in Arts. 478-480 of the Brazilian Civil Code; in Art. 11998 of the Argentine Civil Code; in Art. 6:258 of the Dutch BW of 1992; in Art. 451

of the Civil Code of the Russian Federation of 1994/1995; in §313 BGB, as well as the Civil Codes of Greece, Portugal, Poland, Hungary, the former Czechoslovakia and the former German Democratic Republic. [*Id.*].

125. In jurisdictions like Switzerland, Austria or Spain, the doctrine is recognized by case law. [*Id.*].

126. The provision on release in Art. 79 CISG rests on investigating what the relevant commercial interests would regard as the normal and appropriate allocation of risks in contracts of the type in question. [*Id.*]. "The *contract* is the law adopted by the parties, and it is the contract which the judge must use as a starting point for his deliberations; if it has a gap, he must fill it in accordance with the standards developed by reputable men for contracts of that type." [*Id.*].

127. Many countries found it necessary to include and/or implement a change of circumstance standard either by statute or by case law. Thus, using the same standard, this Arbitral Tribunal may use the same standard developed by "reputable men for contracts of that type" as set forth in Art. 79 CISG.

I. The CISG clearly allows for the CLAIMANT to recover for any additional expenses outside the terms of the Agreement.

128. Pursuant to Art. 53 of the CISG, "the buyer must pay the price for the goods and take delivery of them as required by contract and the convention." In Ukraine, in the matter of *Bobst S.A. v. Express*, a Swiss seller and Ukrainian buyer entered into a contract for the sale of automatic crucible press. The buyer only made partial payment and the seller filed suit to claim the remaining balance, inter alia. [*Id.*]. The Court found that the buyer had not fulfilled its obligation in payment of the full price pursuant to Art. 53 of the CISG and awarded the seller its requested amount. [*Id.*].

129. Here, RESPONDENT has only made partial payment because it failed to pay for the portion that reflected the increase in tariff price. [NoA, p. 7, ¶¶ 18-19]. Therefore, CLAIMANT should be awarded RESPONDENT's remaining obligation pursuant to Art. 53.

130. According to Art. 61(a) of the CISG, the seller may exercise their rights under Art. 62 if the buyer fails to perform any obligation under the contract. In a Belgium matter, *Vital Berry Marketing v. Dira-Frost NV*, a Chilean company, the seller, contracted with a Belgian buyer to deliver frozen raspberries. After the contract was completed, the buyer requested to negotiate to with the seller for a lower price due to a significant drop in the world market price for the raspberries. [*Id.*]. The seller refused to accept a lower price, made the declaration that the contract be avoided and filed suit to recover damages. [*Id.*]. The court held that "fluctuations

of prices are foreseeable events in international trade and far from rendering the performance impossible they result in an economic loss well included in the normal risk of commercial activities." [*Id.*] Thus, the seller had a right to avoid the contract. [*Id.*]. The court granted damages together with expenses incurred in storing the undelivered frozen goods and lost profits. [*Id.*].

131. In the instant matter, RESPONDENT failed to perform in that it did not pay the complete price that was owed to CLAIMANT for the semen together with the new tariff price. [NoA, p. 7, ¶¶ 18-19]. It is probable that the significant tariff increase, though unexpected, was foreseeable since "fluctuations of prices are foreseeable in dealings with international trade . . . and far from rendering the performance impossible" thus, RESPONDENT should have paid its full obligation in accordance with the contract and the additional costs in tariff. Due the fact that RESPONDENT did not fulfill its end of the contract, it failed its contractual obligation. Therefore, CLAIMANT may exercise its rights under Art. 62 of the CISG.

132. Article 62 states that the seller may "require the buyer to pay the price" unless the parties have agreed to a different remedy.

133. In Switzerland, in *The Matter of H. v. A.*, a Hungarian seller agreed to sell aluminum to a Swiss buyer and four contracts were executed. The seller had everything delivered to the buyer, however, the buyer refused to pay for the goods. [*Id.*]. The court held that the seller was entitled to seek payment pursuant to Art. 62 of the CISG because the buyer breached its duty to pay the price for the aluminum. [*Id.*].

134. Here, RESPONDENT failed to pay CLAIMANT the total price for the semen and left $1,250,000 outstanding, an amount in which CLAIMANT is entitled to as a result of the change in tariff price. [NoA, p. 8]. When RESPONDENT did not fulfill its contractual obligation, it constituted a breach of the contract between the parties pursuant to Art. 62 of the CISG, thus RESPONDENT must be required to pay.

135. Moreover, in Secretariat Commentary: 6, the seller "has a right to the assistance of a court or arbitral tribunal to enforce the buyer's obligations to pay the price . . ." Thus, the CLAIMANT seeking relief from the instant Tribunal is valid. [*Id.*]

136. Further, in another matter which took place in the Russian Federation, with unknown parties, a contract was made between a Russian company and an Italian company. All goods had been delivered in compliance with the contract. [*Id.*]. In an arbitration proceeding, the seller presented the tribunal with evidence that contained a message from the buyer to the seller,

which informed the seller that its financial department had been informed to pay for the goods which had been delivered by the seller. [*Id.*]. The buyer also asked that the seller allow for a postponing of payment for the goods. [*Id.*]. The tribunal concluded that the message constituted acknowledgement of the debt to pay for the goods that were delivered pursuant to the contract between the parties and because the buyer did not present any evidence to show that it should be released from its contractual obligation, the tribunal decided in favor of the seller. [*Id.*].

137. In this matter, Ms. Napravnik's witness statement is presented to the tribunal [CLAIMANT'S Exhibit C8]. It manifests Napravnik's reliance on the impression that she received from Mr. Shoemaker, RESPONDENT. After the January 20th email, [CLAIMANT'S Exhibit C7], Shoemaker called Napravnik the following day on January 21st and explained to her that he was certain that a solution would be found through negotiations due to the relationship between the parties. Shoemaker emphasized that he wished to further their business together. [WS of Napravnik, p. 18]. He urged Napravnik to authorize the shipment as planned because RESPONDENT urgently needed the doses of semen. Moreover, Shoemaker said that he already initiated the payment of the second installment. [*Id.*] Napravnik relied on the conversation between her and Shoemaker and authorized delivery. [*Id.*] However, it was to CLAIMANT'S detriment.

138. Thus, similar to the matter in the Russian Federation, Shoemaker acknowledged that there should be negotiations to solve the issue involving the tariff. Shoemaker then convinced Napravnik to authorize the shipment because RESPONDENT was in urgent need of the horse semen. [*Id.*] Napravnik believed that Shoemaker accepted her position and that RESPONDENT would bear most of the costs due to the tariff and that negotiations would follow. [*Id.*] Following this transaction, the RESPONDENT did not pay the costs of the tariff and did not attempt to negotiate. [*Id.*] Since CLAIMANT is able to provide evidence that RESPONDENT acknowledged the issue and suggested that the parties negotiate, the tribunal must provide remedy for CLAIMANT. [NoA, p. 8].

139. Furthermore, pursuant to the UNIDROIT Principles in Art. 6.2.3 "the disadvantaged party is entitled to request renegotiations"; "upon failure to reach agreement . . . either party may resort to the court." [*Id.*] "If the court finds hardship it may, if reasonable, (a) terminate the contract at a date at a date and time to be fixed or (b) adapt the contract with a view resorting its equilibrium." [*Id.*] In the instant matter, CLAIMANT was under the impression that new

terms would be negotiated due to Mr. Shoemaker's comments on the phone with Ms. Napravnik. [WS of Napravnik, p. 18]. It is clear that no negotiations took place, hence the parties failed to reach an agreement on the issue of the increase in tariff and CLAIMANT resorted to the tribunal. [NoA, p. 4-8]. The contract should be adapted to on the part of the RESPONDENT so that CLAIMANT can be made whole. [UNIDROIT Principles in Art. 6.2.3].

140. Article 26 of the CISG, however, limits this obligation to a degree, because if the court is unable to give a judgement for specific performance under its own law, it is not required to enter such a judgement in a case arising under the CISG, notwithstanding the seller's right to require the buyer's performance under Art. 58.

141. However, if the Court is able give such a judgment under its own law, it would be required to do so if the criteria of Art. 58 of the CISG are met. The referenced article states that if the buyer is not bound to pay the price at another specified time, then the buyer must pay when the seller places documents controlling their disposition at the buyer's disposal in accordance with the contract. CLAIMANT'S email dated January 20, 2018, constitutes the controlling document as to the arrangement between the parties because there had been a change in the tariff price in accordance with the contract between the parties. (CLAIMANT'S Exhibit C7).

142. Pursuant to CISG Art. 61(b), if a buyer does not perform their obligation under the agreement, the seller may claim damages under Art. 74. Damages for not fulfilling one's end of the contract can equal to the loss suffered by the other party due to the breach. (CISG, Art. 74).

143. In China, in *The Matter of Skandinaviska Metemo AB v. Hunan Co. for International Economy and Trade*, a Chinese seller and Swedish buyer entered into two contracts for the sale of iron. The buyer refused to pay for the first installment, so the seller refused to deliver the second installment. [*Id.*]. The buyer sued the seller for partial non-performance. The court held that buyer had to pay the remaining balance on the first installment pursuant to Art. 74, *inter alia.* [*Id.*].

144. In the instant matter, both parties signed the frozen semen sales agreement dated May 6, 2017. (CLAIMANT'S Exhibit C5). RESPONDENT failed to pay the proper cost that reflected the new price of semen due to the tariff. Such non-performance under the agreement should be remedied by RESPONDENT paying damages under CISG Art. 74.

145. Article 78 of the CISG states that "[i]f a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it . . ." in the aforementioned cases, *H.V.A.* and *Bobst S. A. v. Express*, due to the breaches of contract at the fault of the buyer in each

matter, the court awarded interest pursuant to Art. 78 of the CISG. Thus, in the instant matter, CLAIMANT must be awarded interest in addition to the amount in which RESPONDENT has defaulted. [CISG, Art.78].

PRAYER FOR RELIEF

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

1. The Tribunal has jurisdiction to hear the case at hand:
    a. Principally, that the law of Mediterraneo governs the contract;
    b. The extrinsic evidence from the arbitration between RESPONDENT and third party be admissible for the purposes of this arbitration;
    c. That CLAIMANT is entitled to a remedy in the form of $1,250,000 USD or any other amount resulting from an adaptation of the price.

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

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