CHENNAI DR AMBEDKAR GOVERNMENT LAW COLLEGE, PATTARAIPERUMBUDUR

SIXTEENTH ANNUAL WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT, 2019

MARCH 31 – APRIL 7, 2019

HONG KONG

MEMORANDUM FOR RESPONDENT

HKIAC Arbitration Proceedings No. HKIAC / A18128

CHENNAI DR.AMBEDKAR GOVERNMENT LAW COLLEGE, PATTARAIPERUMPUDUR.

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

S. SRIKA • MD JAFFAR SADIQ • HAMSAVENI G

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INDEX OF ABBREVIATIONS

Art.	Article
Cl. Exh.	Claimant Exhibit
CISG	Conventions on Sale of Goods
Com.	Commentary
DAL	Danubian Arbitration Law
DDP	Delivery Duty Paid
ed.	Edition
et al.	Et aliter (and others)
FSSC	Frozen Semen Sales Contract
GCC	General Conditions of Contract
HKIAC	Hong Kong International Arbitration Center
IBA	International Bar Association
Ibid.	Ibidem (In the same place)
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
i.e.	id est (that is)
Ltd.	Limited
LCIA	London Court of International Arbitration
Mr.	Mister

Ms.	Miss
No.	Number
NoA	Notice of Arbitration
Para	Paragraph
Pg	Page
PCA	Permanent Court of Arbitration
PECL	Principles of European Contract Law
PO No.1	Tribunal's Procedural Order No.1
PO No.2	Tribunal's Procedural Order No.2
Res. Exh.	Respondent Exhibit
RNoA	Response to the Notice of Arbitration
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
Swiss Rules	Arbitration Rules and Laws- Swiss Chamber's Arbitration Institution
UAR	UNCITRAL Arbitration Rules
UCC	Uniform Commercial Code
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UNGP	United Nations Global Compact

v.	Versus
Vol.	Volume

INDEX OF AUTHORITIES

BOOKS JOURNALS AND ARTICLES

STATUTES AND RULES

CITED AS	SOURCE
CISG	The United Nations Convention on Contracts for the International Sale of Goods, 1980
HKIAC Rules	Hong Kong International Arbitration Rules 2018
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with 2006 amendments
UNICITRAL Rules	UNCITRAL Rules on Transparency in Treaty-Based Investor – State Arbitration 2014
UNIDROIT	UNIDROIT Principles of International Commercial Contracts, 2010

CASES CITED

CITED AS	SOURCE
Bundesgerichtshof, 1968	Bundesgerichtshof, NJW 1968
Cour de Cassation, 1970	Cour de Cassation, Dalloz 1970
Ditta Augusto Miserocchi v. S.p.a. Paolo Agnesi	Ditta Augusto Miserocchi v. S.p.a. Paolo Agnesi, Corte di Cassazione, 13 Dec. 1971,YCA I 1976
LG Düsseldorf, 1981	LG Düsseldorf, 10 Aug. 1981, Staudinger-Magnus, Rechtsprechungsreport Art. 8 No. 3
Essex Cement Company v. Italmare S.p.A.	Essex Cement Company v. Italmare S.p.A. US District Court S.D.N.Y., 13 May 1991
Iran Aircraft Industries v. AVCO Corp.	Iran Aircraft Industries v. AVCO Corp. US Court of Appeals 2nd Circuit, 24 Nov. 1992
Frankfurt .O, 1994	Oberlandesgericht Frankfurt, 18. Jan. 1994, NJW 1994
Bundesgerichtshof, 1996	Bundesgerichtshof, 3 Apr. 1996, IPRax 1997
OLG Hamburg, 1997	OLG Hamburg, 4 July 1997, Staudinger-Magnus, Art. 79 No. 22
MCC Marble Ceramic Center v. Ceramica Nuova D'Agostino	MCC Marble Ceramic Center v. Ceramica Nuova D'Agostino US Circuit Court 11th Circuit, 29 June 1998, *in:* Pace Database

STATEMENT OF FACTS

The Parties to this arbitration are Phar Lap Allevamento (Phar Lap), a company registered and located in Capital City, Meditterraneo hereinafter referred to as the CLAIMANT and Black Beauty Equestrian (Black Beauty) in Oceanside, Equatoriana hereinafter referred to as the RESPONDENT.

CHRONOLOGICAL ORDER OF THE COMMENCEMENT OF THE EVENTS

21 March 2017	RESPONDENT wrote a mail to the CLAIMANT inquiring about the availability of Nijinsky III for its newly started breeding programme
24 March 2017	CLAIMANT offered RESPONDENT 100 doses of Nijinsky III's frozen semen in accordance with the Mediterraneo Guidelines for Semen Production and Quality Standards It only objected to choice of law and the forum selection clause and insisted on a delivery DDP. Parties discussed on the inclusion of hardship clause
28 March 2017	RESPONDENT and CLAIMANT negotiated the terms via an email with regards to the Price, Delivery terms, and Applicable law and dispute resolution
31 March 2017	CLAIMANT writes an email to the RESPONDENT addressing the need for price increase, associated risks factors and jurisdiction conclusions
10-11 April 2017	The seat of arbitration suggested as Danubia
12 April 2017	Two main negotiators Ms. Napravnik and Mr. Antley got severely injured in an accident
6 May 2017	The finalization and the signing of Contract
18 May 2017	The first installment US$ 5,000,000 due

20 May 2017	Timeline for the first shipment of 25 doses
24 August 2017	Respondent nominates Dr. Francesca Dettorie as it's arbitrator
3 October 2017	Timeline for the second shipment of 25 doses
20 January 2018	CLAIMANT writes an email to the RESPONDENT regarding the newly imposed tariffs of 30% on all agricultural products
21 January 2018	Mr. Shoemaker's phone call to Ms. Napravnik following up on the email
	Second installment of US$ 5,000,000 due
23 January 2018	Third shipment of 50 doses were delivered
12 February 2018	RESPONDENT's CEO, Ms. Espinoza was confronted about the breaching of the resale prohibition
31 July 2018	Notice of Arbitration
1 August 2018	Arbitrator's Availability of Acceptance: Wantha Davis
2 August 2018	Langweiler's letter of confirmation to Mr. Wan
2 October 2018	Letter from Joseph Langweiler
3 October 2018	Letter from Julia Clara Fasttrack requesting to not allow CLAIMANT's evidences obtained through illegal means against the RESPONDENT
5 October 2018	Procedural Order No. 1
2 November 2018	Procedural Order No. 2

SUMMARY OF ARGUMENTS

A. DOES THE TRIBUNAL HAVE THE JURISDICTION AND/OR THE POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT, WHICH INCLUDES IN PARTICULAR THE QUESTION OF WHICH LAW GOVERNS THE ARBITRATION AGREEMENT AND ITS INTERPRETATION

THE ARBITRATION AGREEMENT IS GOVERNED BY THE LAW OF DANUBIA AND THE ARBITRAL TRIBUNAL HAS NO JURISDICTIONAL AUTHORITY TO ADAPT THE CONTRACT

The parties intended to apply Danubian law to govern the arbitration agreement and its Interpretation and it does not permit adaptation of the contract. It is undisputed that Danubia is the agreed seat of arbitration. The law of Danubia as the lex arbitri is applicable to questions relating to the validity and scope of the Arbitration Agreement The UNCITRAL Model Law on International Arbitration ("the Model Law") is applicable as part of the law of Danubia. The Model Law does not provide answers to all of the questions which can arise when interpreting arbitration agreements. However, it provides a base-line of minimum standards on which the validity of arbitration agreements can be . On questions of the formation of the agreement, the general contract law of the place of arbitration applies. If the parties' choice of a set of rules is considered too uncertain to be enforceable, they cannot be deemed to have chosen a specific arbitral institution. Therefore the Arbitral Agreement would take effect as an agreement for an ad hoc arbitration. Since the parties ex hypothesi have not agreed on applicable procedural rules, the applicable arbitration statute will fill any gaps. As noted above, the applicable arbitration statute on the facts is the Model Law, which is the Danubia arbitration statute

B. SHOULD CLAIMANT BE 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

CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM OTHER ARBITRAL PROCEEDINGS

Under the HKIAC Rules, CLAIMANT is entitled to submit evidences from another arbitral proceeding, including those obtained from a breach of confidentiality to pursue its legal right only if it satisfies the criteria, According to Art. 42.1 on Confidentiality, "Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information" Respondents say, in the reply letter that "such submissions could only occur in violation of contractual and statutory confidentiality obligations". The only other arbitration in which RESPONDENT has been involved in, has been conducted also under the HKIAC 2013 Rules, which contain in Article 42 an express obligation to keep the proceedings confidential.

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

(I) UNDER CLAUSE 12 OF THE CONTRACT

(II) OR UNDER THE CISG?

UNDER CLAUSE 12 OF THE FSSA OR THE CISG, CLAIMANT IS NOT ENTITLED TO THE EXTRA AMOUNT OF USD 1,250,000

The responsibility of the foreseeable tariff changes remains only on the buyer and is a contractual obligation undertaken with unbiased intention. The contract allocated the obligation to pay import tariffs to the seller, under clause 12 & the seller is responsible for all of the tariff increase since it was an foreseeable event making the contract more onerous. The tribunal should not award the CLAIMANT US $ 1,250,000 under the CISG through the adaptation of the contract. Existence of the arbitration Clause 12 of FSSA does prevent the application of CISG to adapt the price. The Tribunal should not consider Art. 79 as being applicable. The Tribunal may also find that the general rules from the CISG do not allow for price adaption in the foreseeable circumstances. The contract allocated the obligation to pay import tariffs to the seller, as under clause 12, also the seller is responsible for tariff increase burden since it was not an unforeseeable event or a godly act making the contract more onerous.

ARGUMENTS ADVANCED

ISSUE NO. 1

THE ARBITRATION AGREEMENT IS GOVERNED BY THE LAW OF DANUBIA AND THE ARBITRAL TRIBUNAL HAS NO JURISDICTIONAL AUTHORITY TO ADAPT THE CONTRACT

1 The parties intended to apply Danubian law to govern the arbitration agreement and its Interpretation and it does not permit adaptation of the contract. It is undisputed that Danubia is the agreed seat of arbitration. The law of Danubia as the lex arbitri is applicable to questions relating to the validity and scope of the Arbitration Agreement The UNCITRAL Model Law on International Arbitration ("the Model Law") is applicable as part of the law of Danubia. The Model Law does not provide answers to all of the questions which can arise when interpreting arbitration agreements. However, it provides a base-line of minimum standards on which the validity of arbitration agreements can be . On questions of the formation of the agreement, the general contract law of the place of arbitration applies.

2 If the parties' choice of a set of rules is considered too uncertain to be enforceable, they cannot be deemed to have chosen a specific arbitral institution. Therefore the Arbitral Agreement would take effect as an agreement for an ad hoc arbitration. Since the parties ex hypothesi have not agreed on applicable procedural rules, the applicable arbitration statute will fill any gaps. As noted above, the applicable arbitration statute on the facts is the Model Law, which is the Danubia arbitration statute

1.1. The Hague Principles on Choice of Law in International Commercial Contracts

3 According to THE HAGUE PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS Approved on 19 March 2015, Art. 2, Freedom of choice suggests that "1. A contract is governed by the law chosen by the parties. 2. The parties may choose – a) the law applicable to the whole contract or to only part of it; and b) different laws for different parts of the contract"

4 According to Art. 4 that revolves around the Express and tacit choice states that "A choice of law, or any modification of a choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances" whereas it also states that "…An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law…". According to Art. 6 on Agreement on the choice of law and battle of forms, "a) whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to; b) if the parties have used standard terms designating two different laws and under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies; if under these laws different standard terms prevail, or if under one or both of these laws no standard terms prevail, "….there is no choice of law..". Art. 9 on the Scope of the chosen law states that "The law chosen by the parties shall govern all aspects of the contract between the parties, including but not limited to – a) interpretation; b) rights and obligations arising from the contract; c) performance and the consequences of non-performance, including the assessment of damages"

5 In relation to the arbitration clause, RESPONDENT's proposal had made clear its sincere wish for an arbitration agreement which was governed by the law of the place of arbitration and not by the law of the contract. Such a clause was actually included in Mr. Antley's latest draft of 10 April 2017 (Respondent's Exhibit 1). In its reply, of 11 April 2017, CLAIMANT had changed the suggested place of arbitration but had not objected to our proposal that the law of the place of arbitration should govern the arbitration agreement (Respondent's Exhibit 2).

6 The newly suggested neutral place of arbitration, which was acceptable for us, meant, however, that also the choice of law provision had to be changed, to avoid the Contrary to CLAIMANT's allegations, RESPONDENT never agreed to have the arbitration agreement governed by the law of the contract. There is no express choice of such law in the arbitration clause nor is there any implied choice. Under Danubian law, as well as under all other potentially relevant arbitration laws the arbitration agreement is considered to be a legally separate agreement from the container contract in which it is included. That is clearly recognized by Article 16 of the

Danubian Arbitration law as well as the identically worded Article 16 of the Mediterranean Arbitration Law which both explicitly acknowledge the doctrine of separability. Thus, the reference in the choice of law clause directly preceding the arbitration clause that "this Sales Agreement is governed by the law of Mediterraneo" (emphasis added) is merely determining the law applicable for the main contract, i.e. the "Sales" part of it. It does not refer to the following arbitration clause and can also not be interpreted as an implicit choice for the arbitration agreement.

7 That becomes even clearer if one, as CLAIMANT wants to do, looks at the drafting history of the arbitration clause. The first draft of the arbitration agreement actually contained an express choice of law provision for the arbitration clause. That choice provided for the application of the law of the place of arbitration, which was in that draft Equatoriana. It was subsequently merely forgotten to include that provision in the final version. But there was never any deliberate choice in favor of the law of Mediterraneo as the law governing the main contract. It is one of the distinguishing features of the selected institution that their model clause contains an explicit reference to the law governing the arbitration agreement.

8 Danubian law adheres for the interpretation of contracts including arbitration agreements to the "four corners rule", i.e. that the interpretation of the arbitration agreement is limited to its wording and no external evidence may be relied upon. In particular, reliance on the drafting history and preceding communication is excluded if the wording is clear.

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

1.2. The law of Danubia arbitration agreements have to be interpreted narrowly and in accordance with the parol evidence rule

10 Uncertainties resulting from the absence of a choice. Thus Mr. Antley had listed the choice of law governing the arbitration agreement as one of the points to be addressed in the final contract (Respondent's Exhibit 3). That the choice of law clause was not included into the Sales Agreement as finally agreed was merely due to an oversight resulting from the fact that because of the dreadful car accident on 12 April 2017 the original negotiation team was no longer available. Instead the contract had to be finalized by employees on both sides who had previously not been involved in the negotiation and the drafting of the contract. While Mr. Krone found the note of Mr. Antley he did not fully understand his reference to the law governing the arbitration agreement and to the hardship clause (Respondent's Exhibit 3)

11 The law chosen by the parties shall govern all aspects of the contract between the parties, including but not limited to – a) interpretation; b) rights and obligations arising from the contract; c) performance and the consequences of non-performance, including the assessment of damages; d) the various ways of extinguishing obligations, and prescription and limitation periods; e) validity and the consequences of invalidity of the contract; f) burden of proof and legal presumptions; g) pre-contractual obligations. Therefore the Application of Law chosen by the party here is wider in nature.

1.3. The parties never intended to give the Arbitral Tribunal the Power of adapting the contract

INTENTION OF THE PARTIES

12 The intent may be shown by interpretation of a statement or act in accordance with paragraphs (1) or (2)(3) of Art. 8 of the CISG.

Article 8 of CISG provides as follows;

"(1) For the purposes 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 unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

13 The CLAIMANT submits that by virtue of article 8, this intent may be established by all the relevant circumstances, including statements or other conduct during negotiations and the conduct of the parties after the alleged conclusion of the contract (CLOUT case No. 215). Here there are innumerable evidence to prove the fact that CLAIMANY is well aware of the intention of RESPONDENT. Because, CLAIMANT stressed on several occasion that they cannot consent to a contract submitted to a foreign law (Page No. 34 Ex. R2). Moreover, RESPONDENT's head of the legal department agreed that the draft of the contract had already a provision in favour of arbitration in Danubia as a neutral country and also a choice of law clause in favour of the law of Mediterraneo (Page No.35 Ex. R3).

14 Therefore, any reasonable person in the shoes of the CLAIMANT as per para (2) & (3) of Article 8 would believe that law of Mediterraneo will govern that arbitration agreement. An arbitration agreement is to be interpreted in accordance with the general principles governing international commercial transactions, first and foremost with the principle of good faith [ICC AWARD NO. 2291; FOUCHARD/ GAILLLARD/ GOLDMAN, PARA.476]. Applying this principle, an arbitral tribunal has to investigate the real intent of the parties [MANGISTAUMUNAIGAZ OIL PRODUCTION ASSOC. V. UNITED WORLD TRADE INC., Q.B.D.; ICC AWARD NO.6709]. When the plain wording of an arbitration clause does not fully reflect the parties' real intent but the latter can be established by interpretation, an arbitral tribunal shall give full effect to the parties' real intent [ICSID AWARD NO. ARB/ 81/ 1; ICC AWARD NO.1434; FOUCHARD/ GAILLARD/ GOLDMAN, PARA.477]

15 The two parties to the contract are expressly named in the contract [Art. 1 of Exhibit C 1]. The contracting parties are named as Mediterraneo (Seller) and Vulcan (Buyer). In constructing this contract, the Tribunal must give effect to the express written terms of the agreement, which is usually strong evidence of the intention of the parties [Stone, para 6.5.4]. The parol evidence rule states "If there be a contract which has been reduced to writing, verbal evidence is not allowed to be given…so as to add to or subtract from, or in any manner to vary or qualify the written contract" [Chitty, 12-096].

16 By application of the parol evidence rule, the written agreement of the parties should not be disregarded or interpreted in a way that is contrary or inconsistent with the most obvious meaning conveyed by the words of the agreement [Stone, para. 6.5.4], especially when the instrument is meant to represent the formal and conclusive expression of the agreement [Chitty, para 12-107]. [Stone and Chitty, it should be noted, are two of the preeminent doctrinal authorities on common law contract law.] 90. The words of the contract between Mediterraneo and Equtoriana are unambiguous in this regard

17 Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process. Respondent object to the Tribunal's jurisdiction only to its jurisdiction to adapt the price The Arbitral Tribunal lacks jurisdiction and the necessary powers for the claim raised. Furthermore, CLAIMANT's claim for an additional remuneration on the basis of an adaptation of the contract is not justified.

18 The Arbitral Tribunal lacks jurisdiction to decide the case. The claim raised does not merely require the arbitrators to order a payment on the basis of an interpretation of the contract but actually asks for its adaptation. CLAIMANT is not claiming the originally agreed contractual remuneration which has been undisputedly been paid by RESPONDENT. Instead, CLAIMANT is seeking a remuneration which goes beyond that amount and for which the arbitrators would have to adapt the contract.

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

20 Further, CLAIMANT also asserts that similar Arbitration Rules have also provided for the Tribunal to have power to adapt the Contract. Articles 6.2.2 and 6.2.3 of the UNIDROIT principles provide that "On failure to reach an agreement, a court or Tribunal may either i) terminate the contract at a date and on terms to be fixed or ii) adapt the contract with a view to restoring its equilibrium."

1.6. Express Conferral of Powers

21 Does this imply the use of words such as "conferral", "delegation", "transfer", "competences" or "powers"? Is it possible for a treaty not to use these particular terms and yet still confer powers to an international organisation? Nevertheless, even if express conferral is interpreted in a very rigid manner, so that, based on this criterion, no conferral of competence is established, it still might be possible to determine that such a conferral has occurred, provided that we do not regard this criterion as the only threshold for actual conferral. In other words, the criteria that uses for determining the type of competence can also be used to determine whether a conferral of competence has taken place when a treaty contains no express statement regarding the same. It speaks of three criteria for determining the type of competence: revocability of powers, control over the exercise of powers, and exclusive or concurrent competence to exercise the conferred powers. The first criterion, revocability of powers, cannot be determinative for the issue of conferral.

22 It would result to the failure by an administrative tribunal as according to Lord Diplock „basic rules of natural justice…. cover also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative

instrument by which its jurisdiction is conferred…." the lack of an express conferral of powers from the parties to adapt the contract precluded the tribunal and commercial exploitation of events from adapting the contract to favour general economic interest of the claimant.

1.7. The Principle of Competence-Competence allows the Arbitral Tribunal to Rule on its own Jurisdiction

23 The arbitral tribunal has jurisdiction over the RESPONDENT by virtue of the arbitration agreement contained in para 15 of the FSSA contract between CLAIMANT and RESPONDENT of 6 May 2017 [Cl. Exh. C 5]. The clause provides 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 arbitration shall be Vindobona, Danubia. The number of arbitrators shall be three. The arbitration proceedings shall be conducted in English."

24 The clause provides that all disputes shall be settled amicably and in good faith between the parties. If no agreement can be reached the dispute shall be decided by arbitration in Vindobona, Danubia by the Hong Kong International Arbitration Centre (HKIAC) under its HKIAC Arbitration Rules in accordance with international practice.

25 Tribunal may have jurisdiction to determine its own jurisdiction (19) It is generally acknowledged that an arbitral tribunal has jurisdiction to determine its own jurisdiction [SEE REDFERN/HUNTER PARAS.5:38 ET SEQQ.]. In particular, both the applicable law and relevant rules in this case recognise this principle [ART.16(1)MODEL LAW,ART.15(2)ROMANIAN RULES,ART.21(1)UNCITRALRULES OF ARBITRATION ("UNCITRALRULES")]. Therefore, the Tribunal can rule on its jurisdiction regardless which rules apply

26 According to the well-established principles of arbitration it is provided that neither party shall be given an advantage over the other [cf. BINDER § 5-008]. The principle of equality requires that both parties are given an equal opportunity to present their cases and that no party is placed at a clear disadvantage compared to the other party [DERAINS/SCHWARTZ, P. 229; JERMINI, P. 606; FOUCHARD/GAILLARD/GOLDMAN, P. 744 ¶. 1363; VAN DEN BERG, P. 189]

27 The Respondent contests the jurisdiction of the arbitral tribunal for lack of agreement on an arbitration clause. Respondent has set forth jurisdictional objections, indicating that the arbitration clause in the General Conditions of Purchase did not become part of the contract between the parties. The Respondent requests the tribunal: - if it should find that it has jurisdiction, to dismiss the claim brought by the claimant to adapt the contract or to govern them based on the Mediterranean arbitration rules as it claims so. He reiterated that the arbitration clause was so unclear as to what it meant. It was agreed that it would be more efficient and less expensive for the parties for the Tribunal to consider the challenge to the jurisdiction of the Tribunal raised by at the same time that it considered the substantive issues that were ready for presentation to the Tribunal.

28 To the contrary, the granting of CLAIMANT's request would unduly favour CLAIMANT and thereby violate RESPONDENT's right to equal treatment. The action initiated by the CLAIMANT is to be dismissed since the court lacks jurisdiction to adapt such changes

ISSUE NO. 2

SHOULD CLAIMANT BE 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

2.1. CLAIMANT is not entitled to submit evidence from other arbitral proceedings

29 Under the HKIAC Rules, CLAIMANT is entitled to submit evidences from another arbitral proceeding, including those obtained from a breach of confidentiality to pursue its legal right only if it satisfies the criteria, According to Art. 42.1 on Confidentiality, "Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information"

30 Respondents say, in the reply letter that "such submissions could only occur in violation of contractual and statutory confidentiality obligations". The only other arbitration in which RESPONDENT has been involved in, has been conducted also under the HKIAC 2013 Rules, which contain in Article 42 an express obligation to keep the proceedings confidential.

31 According to Art. 3 of the IBA Rules, any document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.

32 Detriment and preclusion: The responsibility imposed by the Article is to avoid detriment Preclusion is only one way of avoiding detriment. There may, in the circumstances, be other reasonable means available that can avert the detriment, for example, by giving reasonable notice before acting inconsistently, or by paying for costs or losses incurred by reason of reliance.

33 "If not produced…it is adverse and not in good faith": The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection. 5. If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed h to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of

that Party. 7. If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.

34 Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.

2.3. The parties' agreement as well as the involved states laws do not exclude the admissibility of illegally obtained evidences in arbitration

35 The party shall have the burden of proving the facts, Art. 20 of the HKIAC 2018 rules. The arbitral tribunal shall decide which further written statements, shall be required from the

Article 22 – Evidence and Hearings

" 22.1 Each party shall have the burden of proving the facts relied on to support its claim or defence.

22.2 The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence."

The strict rules of evidence includes the following:

1. Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal all Documents available to it on which it relies,

2. Any Party may submit to the Arbitral Tribunal a Request to Produce.

3. A Request to Produce shall contain:

(a) A description of each requested Document sufficient to identify it, or

(b) A statement as to how the Documents requested are relevant to the case and material to its outcome; and (The submitted arbitration differs as there was as an express..so its not relevant)

(c) A statement that the Documents requested are not in the possession, or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce

4. A statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

5. If the Party to whom the Request to Produce is addressed has an objection, it shall state the objection in writing to the Arbitral Tribunal and the other Parties. The reasons for such objection shall be any of those set forth in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3.

6. Upon receipt of any such objection, the Arbitral Tribunal may invite the relevant Parties to consult

7. Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Article 9.2 applies; and (iii) the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.

2.4. Only the Arbitral tribunal has jurisdiction to determine the admissibility of evidence

36 The Discretion and authority of the arbitral tribunal where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account mainly the "disputing parties' interest in a fair and efficient resolution of their dispute. These 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.

37 In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. , the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.

38 Submission of evidences separately to different issues if the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal may, after consultation with the Parties, schedule the submission of Documents and Requests to Produce separately for each issue or phase.

39 According to Art. 9 - Admissibility and Assessment of Evidence

1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence. 2. 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: (a) lack of sufficient relevance to the case or materiality to its outcome; (c) unreasonable burden to produce; (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling or (g) considerations of procedural economy or equality of the Parties that the Arbitral Tribunal determines to be compelling. 3. In considering issues of legal impediment, the Arbitral Tribunal may take into account: (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice; (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations and (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.

40 The evaluation of evidence is entirely within the discretion of the Tribunal. In those cases in which a party has played no part in obtaining the leaked confidential information, arbitral tribunals often appear to base their decision on the question of privilege. Many international arbitration proceedings now incorporate the IBA Rules on the Taking of Evidence in International Arbitration 2010 (IBA Rules), Tribunals and evidence obtained unlawfully – Tribunals' discretion to determine admissibility and weight

According to the UNCITRAL Model Law

Art. 9(2) "The Arbitral Tribunal shall … exclude from evidence or production … for any of the following reasons … (b) legal impediment or privilege under the legal or ethical rules … (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) …; or (g) considerations of procedural economy, proportionality, fairness or equality of the Parties ... "

41 Art. 9 of the IBA Rules was relied upon by the tribunal in the case of Caratube International Oil Company and Mr Devincci Saleh Hourani v Kazakhstan. Here, the claimant applied to admit into evidence leaked emails published on a WikiLeaks-type website, following a hacking attack against the Kazakh government's computer network. Whilst the tribunal appreciated the need to protect against computer and cybercrime, and the potential unfairness of allowing confidential evidence obtained through hacking to be admitted, it also referred to the need for the tribunal to have access to information that is in the public domain, and allegedly relevant and material to the dispute. The tribunal held that, of the 11 documents to which the application related, any non-privileged leaked documents should be admitted, with the issues of authenticity and weight attached to the leaked documents to be resolved after they had been admitted in the proceeding In Caratube v. Kazakhstan, Caratube attempted to introduce 11 documents that had been made publicly available on the Internet as a consequence of a hacking of Kazakhstan's government IT system. Hackers had uploaded about 60,000 documents onto a website known as "Kazakhleaks." The tribunal allowed the admission of all non-privileged leaked documents but excluded from the record all illegally leaked privileged documents 21 finding that the tribunal must "afford privileged documents the utmost protection.

ISSUE NO. 3

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

(I) UNDER CLAUSE 12 OF THE CONTRACT

(II) OR UNDER THE CISG?

3.1 Under Clause 12 of the FSSA or the CISG, Claimant is not entitled to the Extra Amount of USD 1,250,000

42 The responsibility of the foreseeable tariff changes remains only on the buyer and is a contractual obligation undertaken with unbiased intention. The contract allocated the obligation to pay import tariffs to the seller, under clause 12 & the seller is responsible for all of the tariff increase since it was an foreseeable event making the contract more onerous. The tribunal should not award the CLAIMANT US $ 1,250,000 under the CISG through the adaptation of the contract. Existence of the arbitration Clause 12 of FSSA does prevent the application of CISG to adapt the price. The Tribunal should not consider Art. 79 as being applicable. The Tribunal may also find that the general rules from the CISG do not allow for price adaption in the foreseeable circumstances.

43 The contract allocated the obligation to pay import tariffs to the seller, as under clause 12, also the seller is responsible for tariff increase burden since it was not an unforeseeable event or a godly act making the contract more onerous. Furthermore, CLAIMANT is not entitled to the "outstanding amount" of USD 1,250,000 as CLAIMANT alleges under CISG, in the existence of the already agreed Hardship Clause 12 of FSSA. The Tribunal should not consider Art. 79 as being applicable. The Tribunal should also find that even if the general rules from the CISG does allow for price adaptation under certain circumstances, foreseeable circumstances cannot take the cover under CISG principles' shadow.

44 The responsibility of the foreseeable tariff changes remains only on the buyer and is a contractual obligation undertaken with unbiased intention. Under clause 12 of the

contract, the CLAIMANT's claim for an increased remuneration is completely baseless. CLAIMANT has no right to ask for an adaptation of the contract, neither under the force majeure/hardship clause. RESPONDENT strongly objects to CLAIMANT's baseless insinuations of bad faith and assumptions concerning the intentions of RESPONDENT's investors. The contractual document does not contain any resale prohibition. Whether and at what price RESPONDENT has sold doses to other breeders is for the following dispute completely irrelevant. CLAIMANT has not submitted any proof for its allegation that RESPONDENT resold the doses and made a 20% profit there from.

45 In relation to the hardship clause, the negotiations finally resulted in a very narrowly worded clause, which was then included into the existing force majeure clause and did not provide for any adaptation by the arbitral tribunal (Respondent's Exhibit 3).

Further, this Tribunal may also obtain guidance from an examination of the UNIDROIT Principles. Under principle 6.2.3, a party suffering hardship has a right to renegotiate terms. RESPONDENT submits that in contravention of this, CLAIMANT insisted on strict performance. At no time did CLAIMANT communicate intentions to re-negotiate the contract after the change of circumstances.

Art. 6.2.3 UNIDROIT Principles

EFFECTS OF HARDSHIP

(1) In case of hardship the disadvantaged party is entitled to request renegotiations. (

(4) If the court finds hardship it may, if reasonable,

(a) terminate the contract at a date and on terms to be fixed, or

(b) adapt the contract with a view to restoring its equilibrium.

46 Whereas a price adaptaion in this scenario shall not serve the purpose of restoring the equilibrium but in fact put a burden of un-consented risk on the RESPONDENT. The contract allocated the obligation to pay import tariffs to the seller, under the hardship

clause 12 & the seller is responsible for any tariff increase since it was an foreseeable event and does not amount to making the contract more onerous

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

48 The RESPONDENT contends that the term "failure to perform" must be considered where the buyer and the seller are subject to the same conditions. Three elements must be proved by a non-performing party who seeks to establish that it is not liable for failure to perform: the failure was due to an impediment beyond his control

"(i) the impediment was reasonably unforeseeable at the time of the conclusion of the contract (ii) and the impediment was reasonably impossible to overcome (iii) these elements constitute the traditional components of force majeure"

Whereas the impediments were reasonably foreseeable by the CLAIMANT at the time of the conclusion of the contract (CL. Exh C4) based on the Claimant's Email dated 31st March 2017. The tribunal should not award the CLAIMANT US $ 1,250,000 underthe CISG through the adaption of the contract. Existence of the arbitration Clause 12 of FSSA does prevent the application of CISG to adapt the price. The Tribunal should not consider art. 79 as being applicable. The Tribunal may also find that the general rules from the CISG do not allow for price adaption in the foreseeable circumstances

Art. 7.1.7 (Force majeure) of the UNIDROIT Principles

Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract (The CLAIMANT was well aware of the alleged impediment and had foreseen changes associated with custom or import regualtions.(CL. Exh C4) based on the Claimant's Email dated 31st March 2017.

(1) or to have avoided or overcome it or its consequences. (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract. (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt. (4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

49 If a foreseeable change has already revealed itself, it has to be overcome as quickly as possible; to overcome means to take the necessary steps to preclude the consequences of the impediment which the CLAIMANT had failed to initiate.

An Unreasonable burden

In exceptional cases, particularly when there has been a drastic change of circumstances after the conclusion of a contract, performance, although still possible, may have become so onerous that it would run counter to the general principle of good faith and fair dealing (see Article 1.7) to require it. It is submitted that CLAIMANT is particularly unreasonable, when it intends to add the unnecessary burden, by passing the risk entirely on the Respondent and seeking cover under the general principles of CISG for remedy. The existence of an explicit hardship clause in the FSSA agreement(Cl. Exh. C5) gives no room for the general principles of the CISG to apply. Foreseeable circumstances has to be overcome as quickly as possible; it means to take the necessary steps to preclude the consequences of the impediment which the CLAIMANT had failed to initiate through the primary dispute resolution means.

50 CLAIMANT can also not rely on Art. 79 of the CISG, By including the force majeure and hardship clause into the contract the Parties have provided for a special regulation of the problem of changed circumstances excluding an application of Art. 79 CISG. It constitutes a derogation. Art. 79 CISG does not regulate hardship and does not provide for the remedy requested by CLAIMANT, which is the increase of the contract price as considered appropriate by the arbitral tribunal. CLAIMANT’s claim for an increased

remuneration is completely baseless. CLAIMANT has no right to ask for an adaptation of the contract, under Art. 79 CISG in the existence of an hardship clause FSSA agreement(Cl. Exh. C5).

51 Instead of looking for a workable solution in regard to all the existing problems, CLAIMANT tried to force RESPONDENT to breach its contracts. In a clear violation of the duty to solve upcoming problems in good faith CLAIMANT created unnecessary costs by, first, immediately initiating arbitration proceedings for relief, then, second, not cooperating in finding a solution to the unclear arbitration clause.

REQUEST FOR RELIEF

In light of the above RESPONDENT requests the Arbitral Tribunal

a. To dismiss the claim as inadmissible for a lack of jurisdiction and powers;

b. To reject the claim for additional remuneration in the amount of US$ 1,250,000 raised by CLAIMANT;

c. To order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.