SIXTEENTH ANNUAL

WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG SAR

MEMORANDUM FOR CLAIMANT

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

JAMES FORD | AJAY RUHELA | MATHEW CASTELINO

AHMED SOLIMAN | MARKO VESELINOVIC

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&	And
Art. /Arts.	Article/Articles
Answer	Respondent's Answer to the Notice of Arbitration dated 24 August 2018
CISG	United Nations Convention on Contracts for the International Sale of Goods [2010]
Cl.	Clause
Clm.	Claimant
Comm.	Commentary
DAL	Danubian Arbitration Law
DDP	Delivered Duty Paid
Ex. C 1	Claimant's Exhibit Number 1 [*Numbers interchangeable*]
Ex. R 1	Respondent's Exhibit Number 1 [*Numbers interchangeable*]
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICSID	International Centre for Settlement of Investment Disputes
INCOTERMS	International Commercial Terms
LF	Letter from Fasttrack dated 3 October 2018
LL	Letter by Langweiler dated 2 October 2018
Ltd	Limited
MCL	Mediterraneo Contract Law

No.	Number
Notice	Claimant's Notice of Arbitration dated 31 July 2018
¶ / ¶¶	Paragraph/Paragraphs (External Document)
Para. /Paras.	Paragraph/Paragraphs (Internal, within this Memorandum)
Parties	Claimant and Respondent
PO No. 1	Procedural Order No. 1 dated 5 October 2018
PO No. 2	Procedural Order No. 2 dated 2 November 2018
Resp.	Respondent
Sales Agreement	Frozen Semen Sales Agreement dated 06 May 2017 (Claimant's Exhibit C5)
Sec.	Section
Tribunal	The Arbitral Tribunal for this arbitration, including Dr. Calvin de Souza Presiding Arbitrator; Ms. Wantha Davis; and Dr. Francesca Dettorie
TP	Travaux Préparatoires UNCITRAL Model Law on International Commercial Arbitration (1985).
TP Working Group	Travaux Préparatoires Working Group on International Contract Practices.

UNCITRAL	United Nations Commission on International Trade Law.
UNCITRAL Rules	UNCITRAL Arbitration Rules (as revised in 2010).
UNIDROIT	UNIDROIT (International Institute for the Unification of Private Law) Principles of International Commercial Contracts (2016)
v.	Versus

STATEMENT OF FACTS

1. Phar Lap Allevamento ("**Claimant**") is a renowned stud farm operator, registered and located in Mediterraneo. Black Beauty Equestrian ("**Respondent**") is a well-known equestrian dressage company, incorporated in Equatoriana.

2. From **March to April 2017**, Claimant and Respondent engaged in negotiations for the purchase of 100 doses of frozen semen of Nijinsky III, one of the most successful racehorses in history. Respondent indicated its intention to use the semen doses for its newly launched breeding programme.

3. On **6 May 2017**, Claimant and Respondent executed the Frozen Semen Sales Agreement ("**Sales Agreement**"). Under the Sales Agreement, Respondent agreed to purchase 100 doses of frozen semen from Nijinski III at the rate of USD 100,000 per insemination dose. The purchase price was to be paid in two instalments. The first instalment of USD 5,000,000 was due for payment on **18 May 2017**, and the second instalment of USD 5,000,000 was due for payment on **21 January 2018.**

4. Sales Agreement contained an express condition that the semen doses would be used for the insemination of three mares, with others subject to Claimant's written consent.

5. Sales Agreement provided in for the frozen semen doses to be Delivered Duty Paid ("**DDP**") in three instalments.

6. Claimant shipped the first 25 doses on **20 May 2017**, and the second 25 doses on **3 October 2017**, in accordance with the Sales Agreement.

7. On 20 December 2017, prior to delivery of the third shipment by Claimant, the government of Equatoriana surprisingly announced to impose a tariff of 30% upon all agricultural goods from Mediterraneo.

8. **On 20 January 2018**, while preparing the shipment of the final 50 doses, which was to be shipped on 23 January 2018 the custom officials of Equatoriana informed Claimant that the new 30% tariff imposed by the Equatorianian government on agricultural products is also applicable to the shipment, making it 30% more expensive. On the same day, Claimant notified Respondent of the fact that the newly imposed 30% tariff also applies on the frozen semen and informed it that the final shipment would be placed on hold unless a solution was found by the evening of **21 January 2018**.

9. In a phone call on **21 January 2018**, Respondent expressed its certainty that a solution to the problem could be found through negotiations, given the good relationship between the parties and Respondent's interest in a long-term relationship, including plans to 50 more doses of frozen semen from a second champion racehorse. Respondent urged Claimant to authorise the final shipment, as it had already initiated the payment of the final instalment.

10. In reliance on Respondent's promise that a solution would be found, Claimant, in absolute good faith, paid the 30% tariff and authorised the final shipment on **23 January 2018**.

11. On **2 February 2018**, Claimant received an inquiry from another party from Equatoriana, who had informed Claimant that it was very happy with the Najinski III semen which it had purchased from Respondent for USD 120,000. The party also informed Claimant that it knew of 15 doses of the same semen that had been sold to 10 different breeders, each of which had bought one or two doses.

12. On **12 February 2018**, post delivery of the whole shipment, Claimant and Respondent met to negotiate the issues arisen out of the Sales Agreement., During the negotiation, Claimant confronted Respondent about the resale of the semen doses, in clear breach of the Sales Agreement. Upon which Respondent got angree and the negotiations broke down. Respondent, thereafter expressed its refusal to pay any additional amount for the tariffs.

13. On **31 July 2018**, Claimant submitted its Notice of Arbitration ("**Notice**") to the Hong Kong International Arbitration Centre ("**HKIAC**") with a copy to Respondent.

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

A. Background

1. The Tribunal [hereafter Tribunal] is respectfully requested to find that it derives the necessary power and jurisdiction under the arbitration clause (contained within the Frozen Semen Sales Agreement) to hear Claimant's request for the following orders:

   a. Respondent is ordered to pay to Claimant an additional amount of US$ 1,250,000 which is 25 per cent of the price for the third delivery of semen;

   b. Respondent bears the costs of the Arbitration.

2. It will be demonstrated that this Tribunal has the necessary jurisdiction and powers to decide upon Claimant's request for relief. In particular it will be shown that:

   a. The correct Law governing the arbitration clause and its interpretation is Mediterranean Law;

   b. The Tribunal has the jurisdiction and powers to adapt the contract under Mediterranean Law;

   c. In the alternative, the Tribunal still has the jurisdiction and powers to adapt the contract under Danubian Law.

3. It is undisputed fact that the Sales Agreement signed by the Parties on 6 May 2017 contain following arbitration clause, which serves as an arbitration agreement between the Parties:

   "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"[*Ex. C5*].

4. An arbitration tribunal bases its jurisdiction only on a valid arbitration clause. The above referenced arbitration clause satisfies all the requisite conditions to constitute a valid Arbitration Agreement [*Craig 5.01; Redfern et al 5.85 – 5.87*].

5. The lex arbitri governing the arbitration under UNCITRAL Model Law [hereafter Model Law], which has been adopted by Danubia, is the Seat of the Tribunal [Born 105].

6. The substantive law of the Sales Agreement is the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG) [*Ex. C5*].

7. There is no express provision within either the arbitration clause or the Sales Agreement to stipulate the law which will govern the arbitration clause, which indeed is the only arbitration agreement between the Parties.

8. Respondent incorrectly asserts that the applicable law governing the arbitration agreement is Danubian law.

9. Claimant will demonstrate that the applicable law governing the arbitration clause and its interpretation is Mediterranean law and that the arbitration clause should follow the law of the Sales Agreement.

B. Respondent's reliance on the doctrine of separability of the arbitration clause is misguided

10. Respondent makes reference to the separable nature of the arbitration clause and asserts that the choice of law for the Sales Agreement should not be interpreted as an implicit choice for the arbitration agreement [*Answer, ¶ 14*].

11. The doctrine of separability of the arbitration clause is a well-established rule which confirms that the arbitration clause is separate from the matrix contract (irrespective of whether it is a part of such contract) [Fiona Trust Case, ICC Case 4145/1983]. Indeed, such principle is codified in Art. 7 of the English Arbitration Act, 1996, and is mirrored under Article 16 of the Model Law and also within the New York Convention.

12. However, Claimant asserts the view of numerous academics who note that the presumption that the arbitration clause has an applicable law totally independent from the main contract is taking the doctrine of separability too far [Briggs 8.09]. Indeed, one French Commentator has asserted that:

> *"The autonomy of the arbitration clause and the principal contract does not mean that they are totally independent one from the other, as evidenced by the fact that acceptance of the contract entails acceptance of the clause, without any other formality" [Derains 16-17].*

13. A further academic, Professor Pierre Meyer has pointed out that it makes sense for the same law to apply to both the matrix contract and arbitration agreement particularly because there may be different statutes of limitations that could cause one agreement to be time barred, but not the other [*Meyer,* 267]. In short if the arbitration clause and matrix contract are not aligned there may be significant conflicts in the provisions of the two agreements impacting upon the ability of either party to seek remedy or to recover their entitlement.

14. In conclusion, Respondents reliance upon the doctrine of separability is misguided. Whilst Claimant concedes that the doctrine exists, functionally there is still a very close link between the main contract and arbitration clause which will be further demonstrated in the paragraphs that follow.

C. Historically the implied choice of law to govern the Arbitration Clause follows the law of the matrix contract

15. In the absence of an express provision for the law governing the arbitration clause, Claimant will demonstrate to this Tribunal that the law of Mediterraneo is the implied choice of the Parties.

16. One arbitral tribunal has confirmed that:

"It is commonly accepted that the choice of law applicable to the principal contract also tacitly governs the situation of the arbitration clause, in the absence of specific provision" [*ICC Case No. 2626*].

17. Professor Lew further asserts as follows:

"There is a very strong presumption in favour of the law governing the substantive agreement which contains the arbitration clause also governing the arbitration agreement. This principle has been followed in many cases. This could even be implied as an agreement of the parties as to the law applicable to the arbitration clause" [*Lew*].

18. Claimant notes that it has long been held that the choice of law to govern the substantive contract implies that the arbitration clause will also follow the same law [*Sumitomo* Case, *Peterson* Case]. In the Sumitomo case, Potter J expressed the view *obiter "that the choice of law to govern the substantive contract will usually be decisive in determining the proper law of the arbitration agreement"*. In that case, the proper law of the matrix contract was Indian Law, but the arbitration clause provided that *'the proceedings shall be held in London'. Potter J ruled that this*

was a sufficiently express choice of London as the seat of the arbitration, and therefore English law as the procedural law of the arbitration, but left the arbitration agreement governed by Indian Law".

19. The Tribunal is requested to note the distinct parallels between the Sumitomo Case and the current case.

D. The Sulamerica test confirms that the implied choice of the law governing the arbitration clause presumptively follows the law of the matrix contract

20. In the landmark 2012 decision [*Sulamerica Case*], the English Court of Appeal formulated a test to determine the law of an arbitration agreement if agreement of the parties is not expressly provided, namely that:

21. "*The proper law of the arbitration agreement is to be determined in accordance with the established common law rules for ascertaining the proper law of any contract. These require the court to recognize and give effect to the parties' choice of proper law, express or implied*".

22. As there is no express provision within the Sales Agreement, Claimant makes reference to the second limb of the Sulamerica test which is to see whether a choice could be implied. In this regard the English Court of Appeal confirmed the rule as follows: *"It has long been recognized that in principle the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole, but it is probably fair to start from the assumption that, in the absence of any indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law".*

23. Consequently, Claimant asserts that the arbitration clause and clause 14 of the Sales Agreement should be read in tandem with one another to derive the correct understanding of the law applicable to the arbitration clause. Clause 14 confirms that the applicable law for the matrix contract is Mediterranean Law and that the CISG also applies.

24. In conclusion Claimant asserts that the implied choice of the Parties was that the arbitration clause would also be subject to Mediterranean law, there then being a single source of law to govern their entire agreement and relationship.

E. The Sulamerica test has been applied to numerous subsequent cases and has been upheld

25. The Sulamerica test has been applied in numerous subsequent cases. One particular case [*Arsanova* Case] draws distinct parallels with this case. In Arsanova the express law

governing the substantive contract was Indian law which contained an arbitration agreement that was silent as to its governing law but did provide for the Seat to be in London.

26. Claimant notes that the court in Arsanova was satisfied on the facts of the case that the parties had evinced an intention that Indian law was to apply to the arbitration agreement. The court were also satisfied that the choice of law governing the substantive contract was a strong pointer toward the law of the arbitration agreement and that it could not be displaced alone by the choice of the seat in a foreign jurisdiction [*Pullinger* p5].

27. In Singapore two recent cases [*Firstlink Case; BCY Case*] demonstrate that the rules governing the implied choice of the law of the arbitration agreement have not changed. BCM was a departure from Firstlink, a decision two years prior.

28. In Firstlink the assistant registrar observed several prior decisions post – dating Sulamerica and noted that this line of authorities boils down to the following principle: *"In competition between the chosen substantive law and the law of the chosen seat of arbitration all other facts being equal, the law will make an inference that the parties have chosen the substantive law to be the proper law applicable to the arbitration agreement"*.

29. Despite this the assistant registrar made clear that he was departing from these authorities, including Sulamerica and took the view that the implied choice of law should presumptively be the law of the seat.

30. The Tribunal should note that such a rogue decision has not changed the overriding principle that the law of the substantive contract is presumptive in dictating the law governing the arbitration agreement. Indeed, in the latter case [*BCY Case*] Chang J, returned to the rationale promoted by Sulamerica and other precedent, therefore in Singapore and elsewhere the Sulamerica test still holds firm [*Leong* p9].

31. Chang J reiterated that the choice of a seat different from the country whose law governs the matrix contract is not in itself a sufficient contra-indication.

32. Numerous other international cases support Claimant's position and were either referenced by Chang J in his decision [*Piallo Case, Cassa Case*] or were subsequent to BCY [*BMO Case*].

33. Finally, in a High Court decision [*Dyna-Jet Case*] the Judge held that it would be *"unduly parochial"* for the seat law to apply instead.

F. The choice of the Seat of Danubia is not sufficient to override the implied choice of law of the parties

34. Claimant notes and accepts that the Sulamerica test requires the Tribunal to identify factors (if any) to negate the implied choice derived from the express choice of a law in the substantive contract and that the choice of a different jurisdiction for the seat of the arbitration is a factor pointing the other way (towards their being a closer connection with the law of the Seat). There is no doubt that this is the argument of the Respondent.

35. Claimant avers that the choice of the seat of Danubia it is not in itself sufficient to displace the indication of choice implicit in the express choice of law to govern the matrix contract. The BCY, Dyna-Jet and Arsanova cases are testament to this school of thought.

G. In the alternative, the arbitration agreement has the closest and most real connection with the law of the Sales Agreement

36. If this Tribunal does not find that the choice of law of the arbitration agreement is implied as being Meditteraneo law then in the alternative the Claimant asserts that the arbitration clause has the closest and most real connection also with Meditteraneo law.

37. The third limb of the Sulamerica test confirms that if an express or implied choice of law for an arbitration agreement cannot be derived *"it is necessary to identify the system of law with which the contract has the closest and most real connection"*.

38. In this regard Claimant notes that "there is consistent jurisprudence in Mediterraneo that in sales contracts governed by the CISG, the latter also applies to the conclusion and interpretation of the arbitration clause contained in such contracts" [*PO No. 1, ¶ 4*]. Such jurisprudence and the applicability of the CISG to both agreements clearly demonstrates that the Meditteraneo courts have derived a close and most real connection between the law of the substantive contract and that of the arbitration clause.

39. Another example of the close and real connection between the arbitration agreement and the law of the matrix contract comes from the wording of article 34(2)(a)(i) of the Model Law. Reference to *"the law to which the parties have subjected [the agreement]"* is likely to be construed to mean that when parties chose the substantive law of the contract, they had also implicitly chosen the law of the arbitration agreement, therefore the parties' substantive choice of law would govern [*Moses 67*].

40. As a result of the foregoing and, in the alternative, Claimant concludes that the "closest and most real connection" with the arbitration clause is also with Mediterranean law.

H. Background to Tribunal's powers to adapt the contract under Mediterranean Law

41. Claimant will demonstrate that, contrary to Respondent's allegations, this Tribunal has the powers and or jurisdiction to adapt the contract pursuant to the arbitration clause whether such arbitration clause is construed to be governed by Mediterranean law, which is the position of Claimant or by Danubian law (the position of the Respondent).

42. This section deals with the position under Mediterranean law.

43. Claimant asserts that "the Arbitration Law of Mediterraneo provides for a broad interpretation of arbitration agreements, irrespective of the allegedly narrow wording merely referring to "dispute(s) arising out of this contract". Thus, the arbitration agreement clearly extends to a claim for an increased remuneration" (*Notice,* ¶ *16*).

44. In order to ascertain the legal basis for this Tribunals powers to adapt the contract it is essential to refer to several different legal sources, namely the arbitration clause, the Sales Contract, the law applicable to the arbitration (*lex arbitri*), the law applicable to the substance of the dispute (*lex causae*) and the CISG, which also applies to Sales contracts in Mediterraneo.

45. The law of the *lex arbitri* is undisputedly Danubian Law as the Seat of the Arbitration. Danubian arbitration procedural law aligns with the Model law. While the arbitration clause provides the basic authority to adapt or supplement a contract, it is the law applicable to the arbitration, the *lex arbitri*, which determines whether this Tribunal are procedurally authorized to decide on the contract adaptation or supplementation.

46. There is however a severe problem with the relationship between the arbitration clause and the *lex arbitri* in that very few national arbitration laws contain express provisions dealing with arbitrators' powers to adapt contracts. Exceptions are the 1986 Dutch Arbitrators Act, the 1999 Swedish Arbitration Act and the 1993 Bulgarian Law on International Commercial Arbitration [*Berger 10*].

47. However, whilst the Model Law does not provide specific reference to the powers to adapt a contract it does provide significant pointers which will assist this Tribunal.

I. The Tribunal has the jurisdiction and or powers to adapt the Sales agreement conferred from the Model Law and CISG

48. Claimant notes that the agreement or authorization of the parties is a prerequisite under Article 28(3) of the Model Law for the arbitrator to decide *ex aequo et bono* or as an *amiable compositeur*. There is an important reason why things look different if the parties have authorized the arbitrators to adapt or supplement the contract. In such cases, the principle of *pacta sunt servanda* does not speak against but in favor of the arbitrator's competence to reshape the contract [*Draetta 202*].

49. CISG Article 8 refers to the ability to refer to the intent of the parties when formulating a Sales Agreement. Numerous cases support the fact that such discussions, whether expressly included within the contract or not, can be assessed by the court or tribunal to ascertain the true intent of the parties and to derive meaning to contractual clauses [*MCC - Marble Case, Calzaturifico Case*].

50. With regards to the intent of the parties, it is evident that within the period of contract negotiations discussions took place regarding the requirement for arbitrators to adapt the contract in cases where the parties were unable to find a solution. In fact prior to execution of the Sales Agreement, on 12 April 2017, the Claimant's & Respondent's then prime negotiators, Ms. Julie Napravnik & Mr. Chris Antley respectively, discussed the importance of having a mechanism in place to ensure adaption of the contract in case the parties could not agree on such an amendment. Mr. Antley was of the opinion that it probably is the Arbitrator's task to adapt the contract, if parties could not agree [*Ex. C8, ¶ 4*].

51. Secondly, the witness statement of Ms. Julian Krone, who carried out further negotiations and executed the Sales Agreement from the Respondent's side after Mr. Antley's car accident, states that she found a note in Mr. Antley's negotiation file. The note talks about the list of issues for further negotiations following the short discussion on 12 April 2017. One of the issues noted in there is, *"clarify in arbitration clause that neutral venue and applicable law."* This in itself is not clear, but after reading Ms. Julie Napravnik's witness statement, it implies that they intended to make the arbitration clearer to the effect that it gives power to the Tribunal to adapt the contract in case the parties do not agree by themselves to amend it [*Ex. R3, ¶ 2*].

52. Specific reference was also made to the ICC Hardship Clause although this did not materialize in the final contract

53. The position of interrogating the history of negotiations to derive the intent of the parties is very much aligned with the CISG, UNIDROIT Principles and indeed with the French and Continental European view. There is a distinct difference between this approach and the more traditional approach of the English Courts [*Chartbrook Case*].

54. In conclusion Claimant avers that the intent of the parties was clearly to authorize the Tribunal to have the powers to adapt the contract.

J. The Tribunal has the jurisdiction and or powers to adapt the Sales agreement conferred from the UNIDROIT Principles.

55. In the alternative, if the Tribunal considers that agreement to adapt the Sales agreement is not implied by the previous discussions and actions of the parties, Claimant still considers that the Tribunal has authority to adapt the contract. Where no express or implied authorization has been given [*ICC Award No 5754*] then arbitrators must look for legal authority in the applicable rules of law, in this case the substantive law of the Sales Agreement, which is governed by the UNIDROIT principles may apply [*Berger 5*].

56. Article 6.2.3(4) of the UNIDROIT Principles provides that in case of hardship, the court may, if reasonable, adapt the contract with a view to restoring equilibrium [*Berger 15; Case 333/2014*]. Also pursuant to Article 1.10 of the Principles the term court includes arbitral tribunal. This is known as the principle of synchronized competencies [*Sanders 70*].

57. The Claimant further notes that in a recent case in Mediterreneo the arbitral tribunal made a partial interim award confirming its power to adapt the contract due to the consistent jurisprudence in Mediterreneo in the context of Art 6.23 para 4b Mediterranean Contract Law (*PO No. 2, ¶ 39*).

K. The amended HKIAC model arbitration clause does not restrict the powers of this Tribunal to adapt the Sales Agreement

58. Respondent considers that the allegedly narrow wording of the arbitration clause which is an adaptation of the HKIAC Model Clause and refers to *"any dispute arising out of this contract"* dictates that this Tribunal does not have the powers to adapt the contract as Respondent considers the order to be additional to or outside of *"this contract"*.

59. Claimant notes that the definition of an Arbitration Agreement under Model Law Article 7(1) is "an agreement by the parties to submit to arbitration all or certain disputes which

have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not".

60. Claimant asserts that the wide wording of Model Law Article 7(1), the inclusion of a hardship clause in the Sales Agreement [*Cl. 12*] and the prior agreement of the parties that adaptation should be included for is sufficient when read with the arbitration clause to confer the powers this Tribunal needs to adapt the contract.

61. The allegedly narrow wording needs to be interpreted in conjunction with Model Law Article 7(1), the hardship clause and the previous intent of the parties.

L. Tribunal still has power to adapt the contract even if the law governing the arbitration clause is Danubian Law

62. Danubian law for International Commercial Arbitration is an adoption of the Model Law [*PO No. 1, ¶ 4*], just as it is for Mediterreneo. As such, as with Mediterraneo, express provision is required for the Tribunal to decide "*ex aequo et bono or as amiable compositeur*" to adapt the contract.

63. Claimant considers that such express provision has been provided due to the earlier discussions and intent of the parties. (*See para 48 -53 above*)

64. Respondent in denying Tribunal's power to adapt the contract also heavily relies on the adherence of Danubian Contract law. The Danubian Contract law for international commercial contracts has adopted the UNIDROIT principles with the following two exceptions-

a. Interpretation rule in Article 4.3 is replaced for written contract by four corner rule.

b. Art 6.2.3(4)(b) is worded differently granting the power "to adapt the contract" to the court only "if authorized". [*PO No. 2, ¶ 45*]

65. The "four corners rule" dictates that the interpretation of a contract is limited to its wording and no external evidence may be relied upon [*Answer, ¶ 16*]. The four-corners rule as applied under the Danubian law has the same effect as a merger clause under Article 2.1.17 of UNIDROIT principles [*PO No. 2, ¶ 45*]. It states,

"A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing."

66. As a result of foregoing Respondent is of the view that authorization to adapt the Sales Agreement cannot be derived from viewing the history of the contract negotiations and the intent of the parties.

67. Claimant denies Respondent's allegations and points to numerous cases where the four corners rule has been overridden by the application of CISG Article 8 which allows interpretation of the parties' intent and all relevant circumstances to be taken into account [*ECEM Case; Mitchell Case*].

68. Claimant also points to examples where the use of extrinsic evidence for contract interpretation has not been precluded in contracts containing a merger clause such as Article 2.1.17 [*Scotia Case*].

69. Claimant notes that "it is consistent jurisprudence in Danubia that due to the doctrine of separability the CISG does not apply to the arbitration agreement, as the latter is considered to be a procedural contract and not a sales agreement" [*PO No. 2, ¶ 36*]. However, Claimant asserts that if this is the case then as a matter of procedure the arbitration agreement would only be subject to the Model Law rules and not to the UNIDROIT principles which dictates that the four corners rule applies.

70. In conclusion, Claimant asserts that this Tribunal has the necessary authorization to adapt the contract irrespective of whether the four corners rule applies.

ISSUE 2: CLAIMANT IS ENTITLED TO SUBMIT EVIDENCE FROM OTHER ARBITRATION PROCEEDINGS

71. [**M]** The Tribunal must exercise its discretion under the Model Law and HKIAC rules to permit submission of evidence from the Other Arbitration as it meets the admissibility criteria of relevance and materiality. Alternatively, the Tribunal may also order disclosure of the said evidence in accordance with the HKIAC rules or with the help of the Courts in Danubia.

72. **[N]** Even if 'relevant and material' evidence from the Other Arbitration is subject to a confidentiality obligation under the HKIAC 2013 Rules that it was carried out under or a contractual agreement [*LF, ¶ 1*], it must still be admitted as: **[i]** there are no grounds for inadmissibility based on the evidentiary privileges claimed by Respondent under the law of the forum (viz. the DAL / Model Law); **[ii]** Danubia is a common law jurisdiction [*PO No. 2, ¶ 41*] and there is consistent jurisprudence of making exceptions to the implied confidentiality of Arbitral proceedings in Common law jurisdictions; **[iii]** the argument for confidentiality under the HKIAC 2013 rules lacks merit, besides confidentiality would be extinguished in the event of a joinder. **[iv**] Any inadmissibility based on soft-law such as the IBA rules of evidence should be disregarded by the Tribunal in the absence of the Parties' agreement.

73. **[O]** Not admitting evidence that is material and relevant to the current Arbitration, would go against the principle of procedural fairness and natural justice. **[P]** The mere fact that an evidence is assumed to be obtained through a breach of a confidentiality agreement by third parties does not imply illegality on the part of Claimant. Alternatively, even if the evidence from the Other Arbitration is deemed to have been obtained through an illegal hack, it must still be admissible as Claimant has clean hands and that prima facie, the said evidence is not subject to any privilege.

M. The HKIAC Rules and Model Law allow consideration of the Evidence from the Other Arbitration as Relevancy and Materiality are satisfied

74. Nothing contained in the Model Law nor in the HKIAC rules prevent the Tribunal from admitting the evidence in question. Instead, Art. 19(2) of the Model Law and Art. 22 of the HKIAC Rules provide an unfettered discretion to the Tribunal to admit any evidence based on its relevance and materiality and accord it the appropriate weight. The HKIAC rules are aligned with a 2011 Hong Kong Ordinance [*Cap. 609*] which in turn was

formulated on the basis of Model Law with minor amendments. The Ordinance had the effect of amending Art. 19(2) of the Model Law as follows: "When conducting arbitral proceedings, an arbitral tribunal is not bound by the rules of evidence and may receive any evidence that it considers relevant to the arbitral proceedings, but it must give the weight that it considers appropriate to the evidence adduced in the arbitral proceedings" [*Cap. 609* ¶ 47]. The intent behind the drafting of Art. 19(2) as seen from the UNCITRAL TPs [*Meeting No. 330* ¶¶ *58-60*] was to avoid application of the technical rules of evidence to arbitrations whether procedural or substantive. Clearly, this position is reflected both in the Model Law and the HKIAC rules and must be respected.

75. Respondent has termed Claimant's announcement of the former's contradictory behaviour vis-à-vis Contract adaptation [*LL*, ¶ *2*] in the Other Arbitration as false, misleading and malicious [*LF*, ¶ *1*]; it has also asserted that the Claimant's claim is baseless and a right for adaptation of the contract does not exist. Claimant is merely seeking to discharge its burden of proof to rely on the facts [*LL,* ¶ *2*] it wishes to prove in its defence and is hence requesting the Tribunal to allow submission of the said evidence. In practice, a party should not be prevented from submitting evidence that may genuinely assist the tribunal in establishing the facts should they be disputed [*Redfern et al,* ¶ *6.83*], considering that fact finding is one of the most significant functions of an arbitral tribunal [*Redfern et al,* ¶ *6.76*].

76. The submissions from the Other Arbitration indicate that the Respondent when faced with the imposition of tariffs, denied providing to his opponent a mare he had promised to, on DDP terms, until an adaptation of the contract and increase in price was agreed [*PO No. 2* ¶ *39*]. This clearly demonstrates Respondent's contradictory behaviour towards adaptation of the contract when confronted with similar circumstances as experienced by Claimant. In essence, the facts and transactions in dispute in that case are strikingly similar (*See Para. 76*). It thus follows that a clear logical connection is exhibited between the evidence and what it purports to prove; hence relevance is met. [*Konstantin; p. 148*]. As one of the basic principles of arbitral proceedings is protecting the party's right to be heard [*Model Law Digest, p.98* ¶*2*], any irrelevancy-based refusal to admit evidence submitted by a party is associated with significant risk, unless the evidence is manifestly irrelevant [*Konstantin, p.149*].

77. In an International Commercial Arbitration, the materiality criterion concerns the general relationship of the evidence with the outcome of the case [*Konstantin, p.149* ¶ *3*]. Given

the similarity of the nature of facts, governing law of the contract (law of Mediterraneo [*PO No. 2, ¶ 39*]), points of law to be determined (hardship and contract adaptation) and the arbitral rules (HKIAC), the tribunal's award from the Other Arbitration will be persuasive or at the very least will aid this Tribunal in consideration of the legal issue [*Anna, p.103*].

78. Additionally, the Tribunal is also empowered to and should order the evidence in question as per Art. 22.3 of the HKIAC Rules. There would be little or no burden on the Tribunal to probe the authenticity of the evidence as the submission and partial interim award from the other Arbitration must be in possession of HKIAC.

79. In Hong Kong, a common law jurisdiction, the Courts have claimed jurisdiction under Art. 27 of the Model Law to grant subpoenas in order to assist arbitral tribunals in taking evidence on the grounds that an international arbitration covered by the Model Law was involved, even if the parties were foreign [*Vibroflotation*]. This was permitted on grounds that the domestic law of Hong Kong provided for subpoenas. As this is an International Commercial Arbitration covered by the Model Law and seated in Danubia, also a common law jurisdiction, the Tribunal is requested to consider taking the assistance of the Danubian Courts to grant subpoenas in so far as the DAL allows for.

80. In the Canadian case of *JLT Canada* concerning the production of a document subject to a confidentiality agreement between claimant to the dispute and a third party, the judge held that the tribunal was permitted by Art. 19(2) of the Model Law to determine its own procedure and order production of the document despite claimants' obligation to the third party not to do so without their consent.

81. To conclude, given that relevance and materiality of the evidence from the other arbitration are met and nothing contained in the *lex arbitri* [Model Law/DAL] or the HKIAC rules lead to inadmissibility, the evidence must be admitted by the Tribunal. The Tribunal is also empowered to and should exercise its powers either under the HKIAC rules or the *lex arbitri,* to order production of the evidence. Any opposition from Respondent must lead to drawing adverse inferences [*Hirsch & Rosher* pp. *65-77*].

N. There exist no strict grounds for inadmissibility of the evidence based on either the evidentiary laws of the forum, Common law, the HKIAC rules or the IBA rules.

82. With regards to the evidence Claimant purports to submit, Respondent is asserting a confidentiality privilege based on Art. 42 of the HKIAC 2013 rules [*LF*, ¶¶ *1, 2*]. In this

regard, it must be noted that evidentiary matters are primarily procedural in nature [*Berger Klaus* p. 508; *Commentary on Hague Principles,* ¶¶ *1.6, 1.7*] and therefore subject to the *lex arbitri* (DAL/Model Law). Even if some rules of evidence are deemed substantive (e.g. attorney client privilege), they would still be subject to the *lex loci arbitri*, i.e. the national law at the seat of arbitration, also the DAL [*Berger Klaus, p. 508*].

83. In order to assess the evidentiary privilege, the contract laws of Danubia, Mediterraneo and Equatoriana shall be irrelevant as the UNIDROIT principles which they are based on [*PO No. 1,* ¶ *4*, *PO No. 2,* ¶ *45*], lack the required guidance. Also, nothing contained in the Hague Principles which are the applicable 'Conflict of Laws Rules' for contracts in these three jurisdictions [*PO No. 2*, ¶ *43*], prevent the Tribunal to exercise application of the DAL as the law of the forum (see Art. 11(5)). Hence during enforcement of an award, any challenge on evidentiary issues on the grounds that the DAL as the law of the forum was applied instead of the municipal laws of Mediterraneo or Equatoriana is not anticipated. Considering that the law of the forum is the DAL which is both the *lex arbitri* as well as *lex loci arbitri*, the subsequent case law cited from common law jurisdictions shall be deemed persuasive given Danubia's common law tradition [*PO No. 2*, ¶ *44*].

84. The decision in *Panhandle*, a Federal case from the United States, suggests that a rule of an arbitral body preventing disclosure of arbitration communications on grounds of confidentiality alone would not be persuasive [*Richard,* pp. *1265-1267*]. The court emphasized on the need for demonstrating a "good cause" to enforce the privilege to meet the ends of justice viz. requirement to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, failing which a privilege to prevent disclosure of information in an International Commercial Arbitration proceeding was turned down.

85. It should be noted that privileges reflect the public policy of the state that created them [*Michelle, p.681*] – as such the privilege afforded by the HKIAC 2013 rules would have a closer connection to Hong Kong than to the jurisdictions of Danubia, Equatoriana or Mediterraneo. Since policy choices vary across jurisdictions, imposing such a privilege purely based on institutional rules would be inappropriate; also see applicable case law requirements [*see Para. 84*].

86. It is obvious that a sale of a mare to a breeder and an issue on hardship arising out of a change in tariff and DDP costs [*PO No. 2*, ¶ *39*] in the Other Arbitration would hardly

qualify as a trade secret or a confidential matter, nor would the disclosure of the partial interim award likely to cause any economic harm or reputation losses to Respondent [*PO No. 2*, ¶ *30*]. *Panhandle* would therefore be persuasive in so far as admissibility of the evidence is concerned [*see Para. 84*].

87. In practice, the privileges widely accepted in an International Commercial Arbitration are the attorney-client privilege, the business or trade secrets privilege, the privilege protecting settlement discussions and the national security or State secrets privilege [*Richard & Tom, p.384*]. The partial interim award and submissions for the Other Arbitration do not fall within the definition of any of these accepted privileges [*see also Para. 86*]. Moreover, the current trend in international arbitration is in favour of diluting the confidentiality of arbitral proceedings as a whole [*Redfern et al,* ¶ *2.170*].

88. In turning to the Model Law based case law, in *JLT Canada,* it was observed that the tribunal may order evidence that is subject to a confidentiality obligation [*see Para. 80*]. In the American case of *Contship*, failing an express agreement between the Parties to keep arbitration proceedings confidential, the court ordered discovery of communications from an International Commercial Arbitration while rejecting the argument that confidentiality is somehow implied at law in an agreement to arbitrate. Nothing contained herein including the model HKIAC Arbitration Clause adopted in the Other Arbitration [*PO No. 2,* ¶ *39*] indicates an express agreement to keep the arbitration proceedings confidential. Hence the Tribunal is urged not to consider any implied confidentiality in proceedings of the Other Arbitration.

89. In the UK, there is an implied confidentiality obligation that is subject to exceptions [*Redfern et al,* ¶ *2.169*] – those include as stated in *John Forster*, amongst other reasons, reasonable necessity for protecting the legitimate interests of an arbitrating party and interests of justice [*Redfern et al,* ¶ *2.168*] all of which apply to Claimant's case as adduced in *Paras. 75-78, 86-88* and the subsequent sections. The Tribunal is also aware of the hardship faced by Claimant arising out of this dispute [*PO No. 2*, ¶ *29*]

90. Claimant has no objections to and requests the Tribunal to permit the joinder of the Respondent's opponent from the Other Arbitration to these proceedings as per Art. 27.1(a) and 29 of the HKIAC rules, given that both the disputes have given rise to a common question of law or fact, the rights to relief claimed arise out of related transactions, and the arbitration agreements are compatible [*PO No.2*, ¶ *39*]. This would

not only promote procedural economy but help avoid inconsistent awards on the same point of law [*Peter Yuen*]. Doing so would also, by default, extinguish the confidentiality obligations asserted by Respondent since Article 42.3 (b) of the HKIAC 2013 Rules offers a ground to allow lawful disclosure of evidence from that arbitration to this Tribunal.

91. Based on the above and considering that the forum of arbitration is a common law jurisdiction (Danubia), the burden is on Respondent asserting the confidentiality privilege [*Richard & Tom*, *p.385*] to show its existence and applicability under the DAL and to establish both "good faith" and a "good cause" in respect of the request for a protective order. In the absence of the above, no privilege must be enforced on the grounds of Confidentiality.

92. Any possible attempts at disregarding the said evidence based on a strict application of a soft-law such as the IBA rules which the Parties have never agreed to, must be avoided by the Tribunal. The Tribunal is not bound to apply any other rules of evidence outside of the *lex arbitri* (Model Law) and the HKIAC 2018 rules – neither of them mandate application of the IBA rules of evidence.

93. It must be noted that a blind and wholesale application of the IBA Rules is improper [*Veeder, pp.291-301*] as the tribunals are not bound by technical rules of evidence as such [*Born* 1852; *Redfern et al, ¶ 6.89*]. Moreover, if blindly applied, the harmonization of civil law and common law approach attempted by the IBA rules could in principle contradict its own basic tenet set out in Article 1(1). Article 1(1) of the IBA rules state that its evidentiary rules cannot conflict with a mandatory applicable municipal law [*Klaus, p.171*].

94. Therefore, in the absence of an express agreement between the parties to use the IBA rules and in consideration of their limitation to properly deal with evidentiary privileges [*Anna p.109*], the rules if applied, will be open to challenge. Therefore, the Tribunal is urged to uphold Claimant's right to present its case and accord appropriate weight to the evidence [*Anna*, *p.101*], instead of disregarding it [*Anna*].

O. Not admitting Relevant and Material Evidence violates Natural Justice

95. The principle of natural justice rests on two limbs: the right of a party to be treated fairly and be provided an opportunity to present its case; compromise of any one limb would lead to injustice. [*Moses Oruaze, p.115 ¶ 3*]. These core values and rights are so fundamental to the arbitral process that they have been enshrined in all the arbitral rules [*Waincymer,* p. *182*], including Art. 13.1 of the HKIAC 2018 rules. Art. 18 of the Model Law also

provides that each party be afforded a full opportunity to present its case or defence as applicable.

96. The evidence from the Other Arbitration is vital in view of the strikingly similar circumstances of the case [*LF, ¶ 1*; see *Paras. 76, 77*] and to allow a rebuttal of Respondent's allegations [*LF*, ¶ *1*]. Besides the evidence would go a long way in endorsing Claimant's justifiable stand on hardship and Contract Adaptation [*LL*, ¶ *2*] which was refuted by Respondent [*Answer*, ¶¶ *18, 19*]. The tribunal in rejecting the evidence would cause Claimant to be unfairly deprived of a fair opportunity to present its case fully, thereby violating Claimant's process rights much against the core arbitral values. This could result in challenges to the Tribunal's award since the violation constitutes as a ground for setting aside and refusing enforcement of the award under Art. 34(2)(a) of the Model Law and Art. V(1)(b) NYC respectively.

97. Allowing the said evidence does not prejudice Respondent's due process rights, as it does not hamper Respondent from fully presenting its case; rather it will enable the Tribunal to explore both the Parties' viewpoints and arrive at a fair and balanced determination of all the facts [*Redfern et al, ¶ 6.83*]. Therefore, Claimant requests the Tribunal to uphold procedural fairness and natural justice by allowing and considering the said evidence.

P. Even if the evidence is assumed to have been obtained illegally, it must be admissible as it lacks privilege and Claimant comes with "clean hands"

98. Claimant cannot be held responsible for impropriety, much less illegality, for procuring the evidence from that Arbitration, even if it was obtained through a breach of a confidentiality agreement either between the parties to the Other Arbitration or between Respondent and its former employees. The burden of proof is on the Respondent to prove the alleged illegality on the part of Claimant.

99. Even if the evidence was obtained from a hack of the Respondent's computer network, Claimant has clean hands and denies any wrong doing on its part. It should be noted that privilege will only protect a document or a communication that is confidential in nature - if the contents of a such communication become public knowledge, it will no longer be protected by privilege. The evidence in question is available for purchase in the market for a small fee – Claimant reiterates that it has not indulged in any 'bad faith' in seeking to buy information available in the market [*PO No. 2*, ¶ *41*]. Arguably, the onus was on

Respondent to protect its confidential documents which it had failed to do by having an outdated firewall [*PO No. 2, ¶ 42*] [*Hirsch & Rosher, pp. 65, 77*].

100. In the ICSID case of *Caratube*, it was held that the need for the tribunal to have access to unprivileged information in the public domain and allegedly relevant and material to the dispute should override any potential unfairness of allowing confidential evidence obtained through hacking [*Brigitta*, Nicky]. The tribunal allowed admission of leaked emails published on a wikileaks-type website as evidence which followed from a hacking attack against the Kazakh government's computer network. The issues of authenticity and weight were to be addressed after admission. In that case, only evidence attracting legal privilege was excluded clearly indicating that not all confidential information attracted privilege, once exposed.

101. At the recent *Bergsten Lecture*, a two-step admissibility test was proposed by Cherie Blair QC that takes account of the "clean hands" doctrine (whether the wrongdoing was by the party seeking to benefit from the evidence) and public interest (whereby documents subject to privilege should always be inadmissible) [*Nicky*]. These tests seem to have been consistently applied in the investment arena including in *Caratube*. The "clean hands doctrine" is a principle that is widely accepted across all jurisdictions: common law, civil law and international law serving the purposes of judicial integrity, justice and public interest [*Le Moullec, p. 15*].

102. In conclusion, given that the evidence is proved to be material and relevant [*see Paras. 74-81*] and not attracting privilege [*see Paras. 99-100*], and that the evidence can be easily examined for authenticity by the Tribunal (given the Other Arbitration is administered by HKIAC), the Tribunal is urged to use their discretion and apply the "clean hands doctrine" to ensure a fair result including the circumstances of the dispute which the law would not normally disregard [*Le Moullec p. 19*]

ISSUE 3: TRIBUNAL SHOULD FIND THAT CLAIMANT IS ENTITLED TO ADDITIONAL PAYMENT RESULTING FROM ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE SALES AGREEMENT AND THE CISG

Q. The Tribunal should conclude from Cl. 12 of the Sales Agreement that the parties agreed that the Seller shall not be responsible for hardship events.

103. Upon an examination of Cl. 12 of the Sales Agreement, it will become clear to the Tribunal that it was the intention of the parties that Claimant would not be responsible for hardship events. Clause 12 states that the "Seller shall not be responsible… for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous" [*Ex. C 5*].

104. Respondent asserts in para. 19 of its Answer that it is not possible to apply Cl. 12 to the present impediment, as the clause is narrowly worded and does not provide the requested remedy. On the contrary, Claimant will establish that through the application of interpretation rules, the Tribunal should conclude that Respondent consented to the fact that Claimant would not bear the risk of unforeseen hardship.

R. Cl. 12 of the Sales Agreement must be interpreted in accordance with Art. 8 of the CISG

105. To determine the meaning and scope of the dispute clause under Art. 8(1) of the applicable CISG, the Tribunal is required to subjectively interpret the statements and conduct of a party in accordance with his intent, "where the other party knew or could not have been unaware of what that intent was" [*Headgear Case*]. If such a subjective intent can not be determined, the Tribunal is required to apply an objective analysis to establish the understanding that a "reasonable person of the same kind as the other party" would have had [*CISG Art. 8(2); Toluene Case*]. Article 8(3) of the CISG further requires the Tribunal to give due consideration "to all relevant circumstances of the case, including the negotiations, any practices which the parties have established… and any subsequent conduct of the parties." Among others, the relevant circumstances to be taken into account include the exact wording chosen by the parties [*Fruit and vegetables case*, ¶ *6*].

S. Claimant clearly communicated its intent not to be liable for unforeseeable events that could destroy the commercial basis of the contract

106. In its e-mail of **31 March 2017**, Claimant expressed its extreme concern with changes in Equatoriana's customs regulations or import restrictions, which could "increase the cost

by up to 40%." Claimant expressly communicated to the Respondent that it is "…not willing to take over any further risks… associated with changes in customs regulation or import restrictions" [*Ex. C 4*]. On the basis of these fears, Claimant concluded that a hardship clause should be included into the contract to address such potential changes.

107. By its conduct, it can be concluded that Respondent agreed and accepted that a hardship clause should be included in the Sales Agreement. In its e-mail reply of **10 April 2017** [*Ex. R 1*], Respondent did not object to Claimant's express desire to exclude its liability for any changes in customs regulations or import restrictions, through the inclusion of a hardship clause – even though it had the opportunity to.

108. Furthermore, Claimant's subsequent e-mail of **11 April 2017** [*Ex. R 2*] shows that only the issue of the wording of the hardship clause was an "open point," and not its desire to reduce the risk from hardship events.

109. Accordingly, from the above e-mail exchange, it is clearly open to the Tribunal to conclude that from a subjective point of view, Respondent was well aware of Claimant's intention to avoid the additional risk from changes in customs regulations through the inclusion of a hardship clause. Clause 12 of the Sales Agreement should therefore clearly be interpreted on the basis of this clear and mutual intention of the parties, in accordance with Art. 8(1) of the CISG.

T. An objective, reasonable person would clearly conclude that the purpose of the hardship clause was to avoid risk events which could destroy the commercial basis of the contract, in accordance with Art. 8(2) and Art. 8(3) of the CISG

110. If the Tribunal does not agree that the intention of the parties can be deduced from a subjective point of view, Art. 8(2) of the CISG requires it to determine is whether an objective analysis of the e-mail exchange between the parties would clearly lead a reasonable, third person in the same circumstances to conclude that Claimant's intention was to reduce its exposure to risk resulting from unforeseeable changes to customs regulations by resorting to the hardship clause.

111. In deciding on what such a reasonable person would conclude, the Tribunal is required to give due consideration to all relevant circumstances, in accordance with Art. 8(3) of the CISG, which includes both the negotiations and the wording chosen by the parties [*Fruit and vegetables case*, ¶ *6*].

112. In para. 19 of its Answer, Respondent asserts that that the narrowly worded hardship clause is not applicable to this clearly acknowledged "impediment." However, if the Tribunal were to adopt this interpretation, it would negate the whole intention and purpose of the hardship clause, which Claimant clearly communicated to Respondent.

113. Furthermore, Respondent does not in any way support its assertion that Cl. 12 of the Sales Agreement should be interpreted narrowly. Presumably, its argument is that the phrase "comparable unforeseen events" refers to "hardship, caused by additional health and safety requirements" [*Answer,* ¶ *19*].

114. However, *Claimant's* Exhibit *C 4* clearly rebuts this presumption. In that e-mail, Claimant unequivocally expressed the position that it is not willing to assume "any further risks" associated with the change in the delivery terms proposed by Respondent. It highlighted, in particular, that "any further risks" referred to changes in custom regulation or import restrictions.

115. The subsequent reference to "unforeseeable additional health and safety requirements" was intended to be an illustration of just some of the kinds of "further risks" that Claimant did not wish to be subjected to, and was in no way intended to be an exhaustive list. The phrase "any further risks" should correctly be read in conjunction with Claimant's concern that the occurrence of such impediments could "increase the cost by up to 40%," thereby destroying the commercial basis of the deal.

116. The application of the narrow interpretation of Cl. 12 asserted by Respondent would lead to the conclusion that Claimant only intended to shield itself from significant cost increases caused as a result of changes to health and safety regulations, but that "any further risks" - which are not related to health and safety but which do increase the cost of performance to the point of destroying the commercial equilibrium of the contract – were acceptable to Claimant.

117. Such a conclusion would completely ignore both the subjective and objective intentions of the parties and should therefore be rejected by the Tribunal.

118. Accordingly, applying the test under Arts. 8(2) and 8(3) of the CISG, it is clear on the facts of the case that a reasonable person in the same circumstances would conclude that the objective purpose underlying Cl. 12 of the Sales Agreement was the avoidance of any changes to customs or import regulations which could have the effect of seriously

increasing the cost of Claimant's performance, and which could destroy the commercial basis of the deal.

U. Claimant did not agree to assume all costs and risks associated with Equatoriana customs regulations

119. Claimant's position that it did not agree to assume all of the costs and risks related to Equatorianian customs regulations is further supported by Art. 9(2) of the CISG. Under Art. 9(2), the *"parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage… which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."*

120. Courts have held that Art. 9(2) incorporates INCOTERMS into the CISG, even without an explicit reference [*Explosive Boosters Case; MRI Case*]. However, INCOTERMS have been held to apply only in cases where the parties have expressly agreed to their application, unless they have established a prior practice between themselves [*Composite Materials Case*]. On the contrary, where there are conflicting usages, contract clauses should prevail over INCOTERMS as a result of the principle of party autonomy as the primary source of obligations under the CISG [*Wood Case*].

121. Applying the facts of the case, the Tribunal should conclude, both subjectively and objectively, that the Claimant did not agree to the complete transfer of costs and risk associated with Equatorianian customs regulations, and that the terms of Cl. 12 of the Sales Agreement should prevail over any transfer of risk implied by the reference to INCOTERMS.

122. In its e-mail of **28 March 2017**, Respondent stated that it wished for delivery of the frozen semen doses to be effected on the basis of DDP, "given the urgency of the delivery and [Claimant's] much greater experience in the shipment of frozen semen including the necessary import and export documentation" [*Ex. C 3*]. In its reply of **31 March 2017** [*Ex. C 4*], Claimant agreed to handle all of the logistics of the shipment and the import and export formalities, but expressly rejected the transfer of any risks associated with delivery on the basis of DDP.

123. In standard cases where delivery is on the basis of INCOTERMS 2010 DDP, the seller agrees to bear all costs and risks of carriage, up to the point where the goods are cleared for import and unloaded at the place of destination [*ICC Guide*, p. 152]. However, as Claimant expressly rejected the transfer of costs and risk associated with INCOTERMS

2010 DDP delivery, and as there was no prior practice between the parties, the Tribunal should find that Claimant did not agree to deliver DDP within the meaning of INCOTERMS 2010. Accordingly, under the hierarchy of rules, Cl. 12 of the Sales Agreement precedes INCOTERMS 2010, and the Tribunal should construe the clause in accordance with Art. 8 of the CISG, as discussed above.

124. In conclusion, on the construction of Cl. 12 of the Sales Agreement, and the applicable interpretation rules under Arts. 8(1), 8(2), 8(3) and 9(2) of the CISG, the Tribunal should find that that the parties agreed that Claimant would not be liable for any hardship events which could destroy the commercial basis of the contract.

V. Claimant is entitled to the payment of US$ 1,250,000 or any other amount resulting from the adaptation of the contract price under the Mediterranean Contract Law

125. As provided for in Cl. 14, the Sales Agreement is governed by the law of Mediterraneo. Under *PO No. 1*, ¶ *III(4)*, it is established that the Mediterranean Contract Law (MCL) is a verbatim adoption of the UNIDROIT Principles.

126. Art. 6.2.2 of the MCL defines hardship as the occurrence of events which *"fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished.*" It lists four further requirements for the events to amount to hardship, namely:

a. they occur or become know after the conclusion of the contract,

b. they could not reasonably have been taken into account at the time of the conclusion of the contract,

c. they are beyond the control of the disadvantaged party, and

d. the risk of the events was not assumed by the disadvantaged party.

127. Claimant will clearly show that the impediments it suffered amount to hardship within the definition of Art. 6.2.2 of the MCL, which allows the Tribunal to adapt the contract under Art. 6.2.3(4)(b) of the MCL.

W. The imposition of the tariffs fundamentally altered the equilibrium of the contract, rendering the cost of performance of Claimant's obligations grossly disproportionate

128. From the facts of the case, it is clear that Claimant performed its contractual obligation, despite the fact that it had become disproportionately burdensome. It is not simply the

case that Claimant sustained a tremendous loss on this transaction. Claimant was already suffering financial hardship when it entered into the Sales Agreement with Respondent, as a result of which it had implemented a restructuring plan with its creditors in 2014 [*PO No. 2, ¶ 29*]. If Claimant is forced to bear the effects of the tariff without relief, its restructuring plan will be critically jeopardised. Not only will it sustain a significant financial loss, but it will also have to sell off a part of its business to a large competitor, in order to even have a hope of obtaining a new loan.

129. Without relief, the alternatives for Claimant are either the break-up of its business in order to obtain a new line of credit, or bankruptcy. On the other hand, Respondent would suffer no real hardship if it had to bear some or all of the consequences of the tariff [*PO No. 2, ¶ 30*]. Claimant entered into the Sales Agreement with the aim of making a modest five per cent profit [*Notice, ¶ 18*], rather than having to choose between break-up or bankruptcy.

130. It is clear, therefore, that the imposition of the tariffs fundamentally altered the equilibrium of the contract and imposed an unreasonably and grossly disproportionate burden on Claimant. Accordingly, it is submitted that the Tribunal should find that the circumstances encountered by Claimant satisfy the definition of hardship under Art. 6.2.2 of the MCL.

X. The hardship events occurred after the conclusion of the Sales Agreement, could not reasonably have been taken into account by the parties, and was beyond the control of the parties.

131. From the facts of the case, it is clear that the hardship events (the imposition of the tariffs by the Equatorianian government) occurred significantly after the conclusion of the Sales Agreement [*Ex. No. 6*]. The imposition of tariffs by Mediterranean President Bouckaert, which prompted the retaliation by the government of Equatoriana, was sudden, extraordinary and unprecedented in scope [*PO No. 2, ¶ 23*]. It is an accepted fact that Mediterraneo had never in its past resorted to tariffs in a bid to protect its farmers. Indeed, President Bouckaert's "superminister" for agriculture trade and economics, Ms Cecil Frankel, was appointed only one day before the Sales Agreement was signed on 6 May 2017 [*PO No. 2, ¶ 23*].

132. From *Clm. Ex. No. 4*, the Tribunal can clearly see the kinds of risks that Claimant believed could materialise, threatening the destruction of the commercial basis of the deal. Due to

Claimant's awareness of prior cases of rare and aggressive types of foot and mouth disease in Danubia [*PO No. 2, ¶ 21*], Claimant clearly expressed its concern about unforeseen additional health and safety requirements, and these were duly communicated to Respondent [*Ex. C 4*]. It would therefore require tremendous foresight to imagine that Minister Frankel, who was appointed only one day prior to the signing of the Sales Agreement, would end up imposing such unprecedented measures, so swiftly, and on the basis of nothing less than allegations of threats to national security [*Ex. C 6*].

133. It would have taken an even greater stretch of the imagination to have been able to predict that the government of Equatoriana - which had, up until that point and with one sole exception, been one of the most ardent supporters of international free trade and the WTO dispute resolution mechanisms – would react so swiftly with its own counter-tariffs, resulting directly in Claimant's loss [*Ex. 6*]. And finally, it would take nothing short of a flight of fancy to imagine that such unexpected measures would be so broad as to include shipments of frozen equine sperm.

134. It is clear, therefore, that the imposition of a tariff on frozen equine sperm can in no way be considered to have been foreseeable by a reasonable person. It is equally evident that the imposition of tariffs by two governments as a result of a trade war is a factor that is beyond the control of Claimant.

135. Finally, Claimant has already established above that it had no intention to assume the risk of events resulting from changes to the customs regulations stemming from the imposition of protectionist tariffs.

136. On this basis, it is submitted that Tribunal should conclude that the requirements of hardship under Art. 6.2.2 of MCL have been satisfied.

Y. Hardship entitles the Tribunal to adapt the contract under Art. 6.2.3 of the MCL

137. Once the elements of hardship under Art. 6.2.2 of MCL, the affected party may request a court or Tribunal to adapt the contract under Art. 6.2.3 of the MCL, provided that it meets the requirements laid out under that article.

138. Under Art. 6.2.3(1), the first remedy available to a party affected by hardship is to request the renegotiation of the contract, with a view to restoring the fundamentally disrupted contractual equilibrium, and on the basis of the principle of good faith and cooperation

[*ICC-ICA Case No. 9994; MCL Art. 1.7; MCL Art. 5.1.3*]. The request needs to be made without undue delay, and must indicate the grounds upon which it is based.

139. From the facts of the case, it is clear that Claimant made the request to "find a solution" as soon as it found out from the customs authorities of Equatoriana that the tariff would apply to the third shipment [*Ex. No. C 7*]. It was not made in bad faith, and it stated that the tariff has made the shipment 30 per cent more expensive. Accordingly, these requirements have been satisfied.

140. The request for renegotiations does not entitle the affected party to withhold performance. This is in line with the obligation under Art. 6.2.1 of the MCL, and restates the international law maxim of *pacta sunt servanda*. Indeed, Claimant clearly performed its obligations under the Sales Agreement, even when it became aware of the drastic effects that such performance would have on its solvency.

141. Article 6.2.3(4) establishes the Tribunal's power to either terminate the contract in case of hardship (sub-para (a)), or to adapt the contract with a view to restoring the equilibrium (sub-para (b)). In *ICC-ICA Case No. 7365/FMS*, the Arbitral Tribual found that the principle in Art. 6.2.3(4) of the UNIDROIT Principles has been "incorporated into so many legal systems that it is widely regarded as a general principle of law." Similar reasoning was applied by the arbitral tribunal in I*CC-ICA Case No. 9479*, where it was held that a change in law making the performance of a party's contractual obligations significantly more onerous entitled the party to an equitable adjustment of the contract under Art. 6.2.3(4) of UNIDROIT.

142. On the basis of the above, Claimant submits that the Tribunal is clearly empowered to adapt the terms of the Sales Agreement in order to restore the equilibrium of the contractual performances.

Z. In the alternative, Claimant is entitled to additional payment resulting from adaptation of the price of the contract under the CISG

AA. The parties had no intention to exclude the CISG or any of its provisions; Exclusion of the CISG requires language that is clear, unequivocal, and affirmative.

143. Even if the Tribunal accepts Respondent's arguments that the imposition of tariffs is not covered by Cl. 12 of the Sales Agreement or the MCL, Claimant is entitled to relief under the CISG.

144. Contrary to Respondent's submissions in Para. 20 of its Answer, Cl. 12 of the Sales Agreement does not constitute a special regulation of the problem of changed circumstances, amounting to a derogation in accordance with Art. 6 of the CISG. Article 6 of the CISG stipulates that "The parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions." For any provision to amount to a derogation from the CISG, it needs to clearly and unequivocally indicate the intention of the parties to do so [*Tunnelling Machine Case*]. Opting out of the CISG requires an affirmative statement, in line with the principles of uniformity and the observance of good faith in international trade, as embodied in Art. 7(1) of the CISG [*BP Oil Case*]. The terms of the agreement between the parties needs to explicitly exclude, or otherwise express a clear intent to displace the CISG [*Cedar Petrochemicals Case*].

145. Similarly, the CISG Advisory Council held that the intention of the parties to exclude must be clearly manifested, and determined in accordance with Art. 8 of the CISG [*CISG-AC Op. No. 16, ¶ 3*]. Both court decisions and legal scholars overwhelmingly agree that the threshold for establishing the intent of the parties to exclude the application of the CISG, or a provision thereof, should be high [*CISG-AC Op. No. 16, ¶ 3.4*]. The Tribunal, therefore, would need to determine whether such a clear intention to exclude the CISG can reasonably be inferred from the words and conduct of the parties, in accordance with Art. 8(2) of the CISG. Where such a clear intention can not be reasonably and readily inferred from the facts, the balance should shift in favour of non-exclusion [*Spagnolo, 208*].

146. Courts have held, for example, that contractual provisions specifying that complaints about delivered goods should be communicated to the Seller within a specific number of days were sufficient to derogate from the "reasonable time" requirement of Art. 39 of the CISG [*Tree Case*, *Women's Garments Case*]. Similarly, a tribunal has held that provisions of a contract entitling a party to suspend the performance of its obligations in the event of a breach of the terms of payment amounted to a derogation from Art. 79 of the CISG [*Goods Case*].

BB. Clause 12 of the Sales Agreement should properly be characterised as a hardship clause

147. Upon examination of the formulation of Cl. 12 of the Sales Agreement, it becomes obvious that it contains nothing whatsoever which clearly indicates the parties' intention to derogate from the CISG. There is neither a clear, affirmative expression of the parties'

desire to exclude any specific provision of the CISG, nor is it clear from the wording which article the parties intended to derogate from.

148. On the contrary, from Respondent's Answer, it would seem that Respondent itself is confused about how to characterise Cl. 12. Firstly, in para 18 of its Answer, Respondent refers to Cl. 12 as the "force majeure/hardship clause." Subsequently, in para 19, it refers to it as being solely a "hardship clause." Finally, in para 20 of its Answer, Respondent refers to Cl. 12 as the "force majeure *and* hardship clause." (emphasis added) The effect of Cl. 12 of the Sales Agreement therefore depends on its proper characterisation.

149. While there is no universal and authoritative definition of force majeure, it is a generally accepted principle of public international law [*Vienna Convention* Art. 61, *Draetta, Ugo, 547*]. It is generally taken to refer to events which are beyond the control of the parties, which the affected party is unable to overcome, and which therefore prevents the affected party from performing their obligations. The effect of force majeure is the release of the affected party from liability for damages for its breach, usually as a prelude to termination. [*Southerington,* ¶ *2.3*]

150. Depending on the jurisdiction, force majeure rules must contain the following elements: 1) definition of the concept and events that trigger the clause, 2) non-performance, 3) causal link between the events and the non-performance, and 4) consequences for the non-performance [*Southerington,* ¶ *2.3*]. The key element is the objective impossibility of performance, whether for a shorter or more prolonged period.

151. In contrast, hardship involves situations where the performance of a party's contractual obligations does not become impossible, but merely more onerous, to the point of fundamentally altering the economic equilibrium of the contract [*Konarski* 419, *UNIDROIT* Art. 6.2.2]. Unlike with force majeure clauses, the impossibility of performance is not an element of hardship [*Southerington,* ¶ *2.4*]. Furthermore, the ultimate purpose of a hardship clause is to allow the affected party the opportunity to renegotiate the contract in good faith, in order to re-establish the fundamental economic equilibrium [*Konarski*, *419*]. In other words, hardship clauses aim to allow the contractual relationship to continue, rather than paving the way for the termination of the relationship [*Southerington,* ¶ *2.4*].

CC. Clause 12 of the Sales Agreement does not amount to a derogation from the CISG in the sense of Article 6 of the CISG

152. While it may appear that Cl. 12 contains elements of a force majeure clause (i.e. references to events not within the control of the Seller, or acts of God), it makes equal reference to hardship and "unforeseen events making the contract more onerous." However, on its construction, Cl. 12 does not have sufficient elements to be characterised as a force majeure clause within the true meaning of the concept. There are no references to the foreseeability of the relevant event, no requirements for the obligor to act to minimise the effects of the event, no requirement to notify the other party of the event and its impact on the obligor's ability to perform, and no provisions for the consequences of the event (i.e. temporary suspension of performance and/or termination of the contract) [*Southerington, ¶ 2.3, Code Civil Arts. 1147 and 1148*]

153. Furthermore, for a derogation to be effective under Art. 6 of the CISG, the disputed clause must provide for an alternative mechanism or regulation of its analogue in the CISG. While Art. 79 of the CISG deals with force majeure-type situations - including the elements of foreseeability and irresistibility, as well as the duration of the exemption and notice requirements - Cl. 12 of the Sales Agreement contains none of these elements.

154. Accordingly, from the construction of Cl. 12 of the Sales Agreement, the only clear conclusion that can be drawn by the Tribunal is that it is not evident that they unequivocally and explicitly intended to derogate from Art. 79 of the CISG. Clause 12, therefore, does not meet the high threshold for establishing the intent of the parties to exclude the application of the CISG or any of its parts. Furthermore, cl. 12 is not a force majeure clause and therefore cannot vary or derogate from the provisions of Art. 79 of the CISG.

155. On this basis, it is submitted that the correct conclusion is that it is open for Claimant to rely on Art. 79 of the CISG.

DD. Article 79 of the CISG allows for a price adaptation in cases of changed circumstances

156. The question for the Tribunal to decide is whether the circumstances of the hardship encountered by Claimant – the unexpected imposition of tariffs by the government of Equatoriana – has rendered the performance of Claimant's contractual obligations so disproportionately and extremely onerous as to amount to a disturbance of the equilibrium of the exchanged performances [*Schlechtriem workshop, 237*].

157. As discussed above, hardship is defined as an unexpected change in circumstances that fundamentally alters the equilibrium of the contract, making the performance of

contractual obligations by the affected party disproportionately more onerous [*Fucci*]. It has become almost unanimously accepted, by both courts in various jurisdictions and legal scholars alike, that Art. 79 of the CISG applies to hardship situations [*Schwenzer*, *713; Brunner, 218*].

158. Under provision 3.1 of its Opinion No. 7, the CISG Advisory Council held that *"A change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ("hardship"), may qualify as an "impediment" under Article 79(1)... Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79."*

159. Under provision 3.2 of the same Opinion No. 7, the Advisory Council held that in such situations of hardship under Art. 79, a court or arbitral tribunal may provide relief "consistent with the CISG and the general principles on which it is based."

160. The Belgian Court of Cassation applied similar reasoning to the CISG-AC in its ruling in the *Scafom Case*. In that instance, the Court found that circumstances which were not reasonably foreseeable by the parties at the time the contract was concluded, and which are "unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner," can amount to an "impediment" within the meaning of Art. 79 of the CISG [*Scafom Case*]. The Court's approach implies that the notion of "impediment" under Art. 79 should be interpreted broadly, and is not restricted to cases of absolute impossibility to perform [*Uribe, 245*].

161. It is submitted that the Tribunal should apply the same reasoning as provided by the CISG-AC and the court in the *Scafom Case*, and that it is open to the Tribunal to conclude that the hardship encountered by Claimant falls within the definition of "impediment" under Art. 79 of the CISG.

EE. Fundamental disruption of the contractual equilibrium entitles Claimant to request renegotiation, in line with good faith principle under Art. 7(1) of the CISG

162. In the *Scafom Case,* the court held that circumstances which fundamentally disturb the contractual balance entitle the affected party to claim the renegotiation of the contract as a remedy. While the court in that case relied on the obligation to perform contractual obligations in good faith under the applicable French law as the basis of the duty to renegotiate the contract, the court's rationale for resorting to the external gap-filling role of Art. 7(2) of the CISG has been subject to criticism [*Flechtner*].

163. Commentators and courts alike have highlighted that the intention of the drafters of the CISG was that it be interpreted "autonomously," i.e. within the "four corners" of the CISG, rather than "nationalistically," (in line with domestic law) [*Ferrari on gap filling* para 2.1, *Zeller*]. Such an approach is in line with the "need to promote uniformity in its application," as espoused by Art. 7(1), as well as with the ruling of the CISG Advisory Council [*CISG-AC Op. No. 7,* ¶ *35*].

164. In light of the general obligation to interpret the CISG in line with Art. 7(1), it is submitted that once the hardship situation arose, the parties had an implied obligation to attempt to renegotiate the terms of the contract in good faith [*CISG-AC Op. No. 7,* ¶ *40*].

165. Claimant indeed attempted to renegotiate the contract in good faith, both during the phone call on 21 January 2018 [*Ex. C 8*], as well as by requesting the meeting between the CEOs of both parties on 12 February 2018 [*PO No. 2* ¶ *35*].

166. On the contrary, Respondent has demonstrated nothing but bad faith. Respondent admitted in Mr Shoemaker's statement [*Ex. R 4*] that it knew that Claimant would not deliver the final shipment if it had rejected Claimant's renegotiation request outright. Between 21 January 2018 and 2 February 2018, when Claimant was approached by another breeder from Equatoriana, Respondent had already sold at least 15 doses to 10 different breeders, in breach of the Sales Agreement and clearly in breach of the good faith obligation under Art. 7(1) of the CISG.

167. On this basis, and in light of the parties' failed attempt to renegotiate the contract, it is submitted that the Tribunal has the power to adapt the contract to the extent necessary to restore the contractual equilibrium, in accordance with Cl. 12 of the Sales Agreement, Art. 6.2.3(4)(b) of the MCL and Art. 79 of the CISG.

REQUEST FOR RELIEF

For the foregoing submissions and prior written pleadings, Claimant respectfully requests the Arbitral Tribunal while dismissing all contrary request and submissions by Respondent,

TO ADJUDGE AND DECLARE that:

1. Claimant is entitled for the full amount of his loss of USD 1,250,000 which is 25 percent of the price for the third delivery of semen;
2. Respondent bears the costs of the Arbitration.

06 December 2018: (signed)

James Ford

Ajay Ruhela

Mathew Castelino

Ahmed Soliman

Marko Veselinovic