SIXTEENTH ANNUAL WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
31st March – 7th April 2019, Hong Kong

MEMORANDUM FOR RESPONDENT

NATIONAL CHIAO TUNG UNIVERSITY
SCHOOL OF LAW

ON BEHALF OF	**AGAINST**
BLACK BEAUTY EQUESTRIAN	PHAR LAP ALLEVAMENTO
14 CAPITAL BOULEVARD	75 COURT STREET
OCEANSIDE	CAPITAL CITY
EQUATORIANA	MEDITERRANEO
RESPONDENT	**CLAIMANT**

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INDEX OF ABBREVIATIONS

ANoA	Answer to the Notice of Arbitration
Art./Arts.	Article/Articles
ASA	Association Suisse de l'Arbitrage (Swiss Arbitration Association)
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)
CL. Memo	Claimant's Memorandum
DAL	Danubian Arbitration Law
DCL	Danubian Contract Law
DDP	Delivered Duty Paid
ed.	Edition
Exh.	Exhibit
FSSA	Frozen Semen Sales Agreement
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	2018 HKIAC Administered Arbitration Rules
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ibid.	ibidem (in the same place)
i.e.	id est (that is)
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
LCIA	London Court of International Arbitration
Ltd.	Limited
MCL	Mediterranean Contract Law
No.	Number

NoA	Notice of Arbitration
p./pp.	Page/Pages
¶/¶¶	Paragraph/Paragraphs
PECL	Principle of European Contract Law
PICC	UNIDROIT Principles of International Commercial Contracts
PO	Procedural Order
Sec.	Section
UNCITRAL	United Nations Commission on International Trade Law
UN	United Nations
US	United States
UK	United Kingdom
US$	United States Dollar
v.	Versus
VCLT	Vienna Convention on the Law of Treaties (1969)

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LEGAL SOURCES AND MATERIALS

CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
DAL	Danubian Arbitration Law, adoption from Model Law(UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006)
HKIAC Rules	Hong Kong International Arbitration Centre Administered Arbitration Rules, 1 September 2008, with amendments on 1 November 2013 and 1 November 2018
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, 28 May 1983, with amendments on 29 May 2010
ICC Hardship Clause	International Chamber Of Commerce Hardship Clause, February 2003
LCIA	London Court of International Arbitration, *1 January 1998, eith amendments on* 1 October *2014*
MCL	Mediterranean Contract Law, adoption from PICC
PECL	Principles of European Contract Law, Parts I and II revised 1998, Part III 2002
PICC	International Institute for the Unification of Private Law (UNIDROIT), May 2016
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 11 December 1985, with amendments on 4 December 2016
VCLT	Vienna Convention on the law of treaties, concluded at Vienna on 23 May 1969

STATEMENT OF FACTS

1. The parties to this arbitration are Phar Lap Allevamento ("CLAIMANT") and Black Beauty Equestrian ("RESPONDENT", together "the Parties"). The present dispute is regarding the adaptation of the Frozen Semen Sales Agreement ("the FSSA").
2. RESPONDENT is a company operating the broodmare lines in Equatoriana, and CLAIMANT is a company operating stud farm in Mediterraneo.

21 March 2017 [*Exh. C1, p.9*]	The Parties began negotiating a transaction regarding frozen semen. Chris Antley, representing RESPONDENT, requested 100 doses of frozen semen of Nijinsky III from CLAIMANT.
24 March 2017 [*Exh. C2, p.10*]	Julie Napravnik, representing CLAIMANT, replied that CLAIMANT would accept RESPONDENT's request under certain conditions.
31 March 2017 [*Exh. C4, p.12*]	During the negotiation, CLAIMANT accepted the delivery DDP but transferred some specific risks to RESPONDENT.
10-11 April 2017 [*Exh. R1, p.33; Exh. R2, p.34*]	RESPONDENT proposed the first draft of the dispute resolution clause and CLAIMANT revised the seat of arbitration as Danubia and deleted the governing law of Clause 15 FSSA ("the Arbitration Agreement").
12 April 2017 [*NoA, ¶8, p.5*]	Ms. Napravnik and Mr. Antley discussed the choice of law, the forum selection clause, and the possible inclusion of the adaptation mechanism into the contract. However, Ms. Napravnik and Mr. Antley were severely injured in a car accident after the discussion. As a result, the FSSA does not contain any reference to adaptation mechanism in the final version.

6 May 2017 [*Exh. C5, p.13*]	The FSSA was concluded by two new negotiators, John Ferguson and Julian Krone. CLAIMANT agreed to provide RESPONDENT 100 doses of frozen semen for US$ 100,000 per insemination dose.
November 2017 [*NoA, ¶9, p.6*]	Mediterranean newly elected President, Ian Bouckaert, announced 25 per cent tariff on agricultural products from Equatoriana.
20 December 2017 [*Exh. C6, p.15*]	The Equatorianian government announced to impose 30 per cent retaliatory tariff on selected products from Mediterraneo including animal semen.
20 January 2018 [*Exh. C7, p.16; Exh. R4, p.36*]	The Parties started negotiations regarding the issue of the increase of tariff. RESPONDENT only promised to find a solution for this issue if the FSSA provides adaptation mechanism.
23 January 2018 [*NoA, ¶13, p.6*]	CLAIMANT delivered the remaining 50 doses before the Parties found a solution.
31 July 2018 [*NoA, p.4*]	CLAIMANT initiated the arbitration against RESPONDENT by submitting its Request for Arbitration to the HKIAC.
24 August 2018 [*ANoA, p.29*]	RESPONDENT submitted its Answer to the Notice of Arbitration to the HKIAC.
2 October 2018 [*HKIAC's Letter, p.50*]	During the arbitral proceedings, CLAIMANT intended to submit the partial interim award from another arbitration ("the Evidence") as an evidence to the arbitration.
3 October 2018 [*HKIAC's Letter, p.51*]	RESPONDENT objects to the submission of the evidence which is in breach of contractual obligations or obtained by illicit means.

SUMMARY OF ARGUMENTS

1 The Tribunal is not authorized by the Arbitration Agreement to adapt the FSSA. To explain the requirement of "*express authorization*" from Danubia Arbitration Law, the Tribunal shall apply four corners rule under the law of Danubia which is the governing law of Arbitration Agreement. Since the wording of the Arbitration Agreement exclude the Tribunal's power to adapt the FSSA, no extraneous evidence may be relied upon and the requirement of Danubia Arbitration Law is not met. Thus, the Tribunal does not have the authority to adapt the FSSA (**Issue 1**).

2 Second, during the arbitral proceedings, CLAIMANT intended to submit a partial interim award as evidence from another arbitration. CLAIMANT falsely claims that the evidence is admissible to the present case. According to IBA Rules, the evidence is not relevant to the case, a legal impediment, and shall be excluded due to its confidentiality. Thus, the Tribunal shall exclude the evidence accordingly (**Issue 2**).

3 Third, the Parties do not have the intention to include the adaptation mechanism into the FSSA since the final negotiators did not contemplate the issue of the adaptation. Moreover, the requirements under the Hardship Clause are not fulfilled, namely, the Tariff is foreseen by the Parties, not onerous, and not comparable to the health and safety requirements. In any event CLAIMANT is not entitled to claim for adaptation under CISG. The wording and the drafting history indicate that Art. 79 CISG does not cover hardship. Furthermore, Art. 79 CISG does not provide the legal effect for CLAIMANT to claim for adaptation because both Art. 6.2.3 PICC and Art. 6.2.3 Mediterranean Contract Law cannot supplement the legal effect of adaptation of Art. 79 CISG. If the Tribunal determines to adapt the FSSA, the Parties should share the additional cost equally to restore the equilibrium of performance. US$ 625,000 is equitable for CLAIMANT to bear. Therefore, CLAIMANT is not entitled to US$ 1,250,000 (**Issue 3**).

ARGUMENTS

ISSUE 1: THE TRIBUNAL DOES NOT HAVE THE POWER TO ADAPT THE FSSA.

1 The arbitral tribunal of the present case ("the Tribunal") does not have the jurisdiction and/or power to adapt the Frozen Semen Sales Agreement ("the FSSA"). Clause 15 of the FSSA ("the Arbitration Agreement") is governed by the law of Danubia (**A**). Under the law of Danubia, the Tribunal is not empowered to adapt the FSSA (**B**).

A. The governing law of the Arbitration Agreement shall be the law of Danubia.

2 The governing law of the Arbitration Agreement shall be the law of Danubia. In the absence of an express choice of governing law for the Arbitration Agreement, the Parties impliedly chose the law of Danubia to govern the Arbitration Agreement by identifying Danubia as the seat of arbitration (**I**). In any event, the governing law of the Arbitration Agreement shall still be the law of Danubia based on the closest and most real connection test (**II**).

I. The Parties impliedly chose the law of Danubia to govern the Arbitration Agreement by identifying Danubia as the seat of arbitration.

3 The Parties impliedly chose the law of Danubia to govern the Arbitration Agreement. The Arbitration Agreement is separate from Clause 1 to 14 FSSA ("the Main Contract") (**1**). The Parties did not intend to apply the law of Mediterraneo to the Arbitration Agreement (**2**). Danubia as the seat of arbitration is an implied choice of the Parties to submit the Arbitration Agreement to the law of Danubia (**3**).

1) The Arbitration Agreement is separate from the Main Contract.

4 The Arbitration Agreement is a separate contract from the Main Contract. CLAIMANT alleges that the doctrine of separability is limited to preserve the validity of the arbitration agreement [*CL. Memo, ¶8, p.7*]. However, the doctrine of separability also provides that it is possible to apply a different national law to the arbitration agreement [*Born, p.351*]. Because the arbitration agreement serves a procedural purpose, which is different from the main contract, the arbitration agreement is separable with regard to the contracting parties' intent to

preserve the effectiveness of the arbitration agreement [*Born, pp.396-397*].

5 In the present case, the original template of the FSSA provided by CLAIMANT did not contain the Arbitration Agreement, and the Arbitration Agreement was added to the FSSA afterwards [*PO2, ¶3, p.56*]. In addition, the Parties use "*this Sales Agreement*" in Clause 14 FSSA while use "*this contract*" in the Arbitration Agreement [*Exh. C5, p.14*]. The two different terms also demonstrate that the Arbitration Agreement is not a part of the Main Contract. Thus, the Arbitration Agreement shall be treated as a separate contract from the Main Contract.

2) The Parties did not intend to apply the law of Mediterraneo to the Arbitration Agreement.

6 CLAIMANT alleges that the express choice of the law of Mediterraneo in the Main Contract constitutes an implied choice of the governing law of the Arbitration Agreement [*CL. Memo, ¶¶2, 10, pp.5, 8*]. However, because the arbitration agreement is a separate contract from the main contract, the law of the main contract does not necessarily extend to govern the arbitration agreement [*Born, p.473*]. Therefore, the law of Mediterraneo, which is the governing law of the Main Contract [*Exh. C5, Clause 14, p.14*], does not extend to govern the Arbitration Agreement.

7 Furthermore, the drafting history of the Arbitration Agreement demonstrates that RESPONDENT never agreed to apply the law of Mediterraneo to the Arbitration Agreement. In the first draft of the Arbitration Agreement, RESPONDENT proposed that the governing law of the Arbitration Agreement shall be the same as the law of the seat of arbitration [*Exh. R1, p.33*]. However, CLAIMANT changed the seat of arbitration from Equatoriana to Danubia but failed to identify the governing law of the Arbitration Agreement [*Exh. R2, p.34*].

8 CLAIMANT alleges that the law of Mediterraneo applies to the Arbitration Agreement because CLAIMANT explicitly stated that "*the offer is naturally on the condition that the law applicable to the Sales Agreement remains the law of Mediterraneo*" [*CL. Memo, ¶5, p.6*]. Nonetheless, because the Arbitration Agreement is separate from the Main Contract, if

CLAIMANT intends to choose the law of Mediterraneo to govern the Arbitration Agreement, CLAIMANT should expressly point out that "*the law of this arbitration clause shall be the law of Mediterraneo.*" CLAIMANT's statement only demonstrates that the law of Mediterraneo applies to the Main Contract. Therefore, the law of Mediterraneo does not extend to govern the Arbitration Agreement.

3) Danubia as the seat of arbitration is an implied choice of the Parties to submit the Arbitration Agreement to the law of Danubia.

9 Danubia as the seat of arbitration is an implied choice that the Parties intended the law of Danubia to govern the Arbitration Agreement. To ensure the consistency between the governing law of the arbitration agreement and the procedural arbitration proceedings, parties' selection of the seat of arbitration implies that parties accept the law of the seat in the absence of the governing law in the arbitration agreement [*FirstLink case, ¶15*]. This is particularly the case when the arbitration is submitted to a neutral forum and the choice of neutral forum is the result of intensive negotiations between the parties [*Born, p.518*].

10 In the present case, RESPONDENT proposed that the governing law of the Arbitration Agreement shall be the same as the law of the seat of arbitration in the first draft of the Arbitration Agreement [*Exh. R1, p.33*]. As CLAIMANT changed the seat of arbitration in the reply [*Exh. R2, p.34*], the governing law of the Arbitration Agreement shall also change accordingly. After heated negotiations, the Parties have identified Danubia, a neutral state, as the seat of arbitration [*ibid.*]. CLAIMANT could not have been unaware that RESPONDENT's intent is to choose the law of the seat of arbitration to govern the Arbitration Agreement because the seat of arbitration can be an implied choice for the governing law of the Arbitration Agreement. Thus, the identification of Danubia as the seat of arbitration is an implied choice that the law of Danubia governs the Arbitration Agreement.

11 In addition, although CLAIMANT alleges that by amending RESPONDENT's proposal, CLAIMANT rejected RESPONDENT's proposal that a foreign law would apply to the

Arbitration Agreement [*CL. Memo, ¶7, pp.6-7*] CLAIMANT's amendment of the Arbitration Agreement indicates that CLAIMANT rejected to submit the Arbitration Agreement to the law of Equatoriana but did not refuse to submit the Arbitration Agreement to any other foreign law. Therefore, the governing law of the Arbitration Agreement shall remain the law of Danubia.

II. Alternatively, the law of Danubia still governs the Arbitration Agreement based on the closest and most real connection test.

12 Even if the Tribunal finds that there is no choice of law for the Arbitration Agreement, the law of Danubia still governs the Arbitration Agreement based on the closest and most real connection test. CLAIMANT alleges that based on the closest and most real connection test, the law of Mediterraneo shall apply to the Arbitration Agreement due to the connection with the Main Contract and the place where the FSSA was concluded [*CL. Memo, ¶¶9-11, pp.7-8*]. However, the governing law of the Main Contract and the governing law of the Arbitration Agreement shall be examined separately. While the Main Contract is largely affected by the law of Mediterraneo, the validity of the Arbitration Agreement is mostly influenced by the law of the seat of arbitration because the Arbitration Agreement would be invalid under the law of the place where the arbitration is conducted [*FirstLink, ¶3*]. This would result in setting aside of the award [*Art. 34(1)(a)(i) DAL*]. Due to the above reason and the procedural nature of the arbitration agreement, the arbitration agreement has the closest and most real connection with the law of the place where the arbitration is to be held to ensure that the dispute resolution is effective [*Sulamerica case, ¶32; Japan case, ¶3; Choi, p.110*]. Because Danubia is the place where the arbitration is conducted, the Arbitration Agreement shall have the closest and most real connection with the law of Danubia. Therefore, the law of Danubia still governs the Arbitration Agreement.

B. Under the law of Danubia, the Tribunal is not empowered to adapt the FSSA.

13 Based on the above conclusion, the governing law of the Arbitration Agreement shall be the

law of Danubia. Through interpreting the Arbitration Agreement with the law of Danubia, the requirement of an express empowerment by the Parties for the Tribunal to adapt the FSSA in DAL is not fulfilled. CLAIMANT incorrectly alleges that the Tribunal has the power to adapt the FSSA by ignoring the requirement of DAL [*CL. Memo, ¶¶17-33, pp.9-13*].

14 For the tribunal to adapt a contract, it is necessary that the *lex arbitri* and the arbitration agreement jointly convey the authority to the arbitral tribunal [*Berger, p.10*]. Even if the arbitration agreement provides basic authority to adapt a contract, it is the *lex arbitri* which determines whether the arbitrators are procedurally authorized [*ibid.*].

15 In the absence of a clear and explicit agreement to the contrary, the procedural law of the arbitration is the law of seat of arbitration [*Born, p.1600*]. In the present case, the Parties chose Danubia as the seat of arbitration and did not agree otherwise on the procedural law of the arbitration [*Exh. C5, Clause 15, p.14*]. Thus, DAL shall apply to the arbitration proceedings.

16 DAL, the *lex arbitri*, requires an express authorization by the Parties for the Tribunal to adapt the FSSA [*Art. 28(3) DAL; PO2, ¶36, p.60*]. Whether an express authorization exists should be interpreted under the law governing the arbitration agreement, since the law governing the arbitration agreement governs its interpretation [*HKIAC Press Release*]. In the instant case, the law governing the Arbitration Agreement is the law of Danubia. Interpreting with Danubian Contract Law ("DCL"), the requirement of an express authorization is not fulfilled (**I**). Therefore, the Tribunal does not have the power to adapt the FSSA. Furthermore, the Tribunal should not adapt the FSSA to avoid the award from being set aside (**II**).

I. The requirement of an express authorization by the Parties for the Tribunal to adapt the FSSA under DAL is not fulfilled.

17 By interpreting with the four corners rule in Danubian Contract Law ("DCL"), the requirement of an express authorization by the Parties for the Tribunal to adapt the FSSA under DAL is not fulfilled. The Arbitration Agreement explicitly excludes the Tribunal's power to adapt the FSSA; therefore, CLAIMANT cannot use extraneous evidence to interpret the Arbitration

Agreement under the four corners rule in DCL (**1**). Furthermore, even if the wording is unclear and that extraneous evidence should be considered, the Parties have no intent to authorize the Tribunal to adapt the FSSA (**2**).

1) Under the four corners rule in DCL, the external evidence is excluded because the wording of the Arbitration Agreement does not authorize the Tribunal to adapt the FSSA.

18 Under the law of Danubia, the Arbitration Agreement does not authorize the Tribunal to adapt the FSSA. CLAIMANT's claim that the wording of the Arbitration Agreement confers power to adapt on the Tribunal is unfounded [*CL. Memo, ¶¶21-26, pp.10-11*]. The four corners rule in DCL forbids contract interpretation with external evidence while the wording of the Arbitration Agreement excludes the Tribunal's power to adapt the FSSA [*PO1, ¶II, p.52*].

19 Compared to HKIAC Model Clause, the Arbitration Agreement removes the reference which could be interpreted as empowering the Tribunal to adapt the FSSA [*Exh. R1, p.33*], such as "*controversy, difference or claim 'relating to'*" this contract as well as "*any dispute regarding noncontractual obligations arising out of or relating to it*". CLAIMANT alleges that"*disputes arising out of the contract*" has a broad meaning, which may be taken as covering all disputes that can be submitted to arbitration [*CL. Memo, ¶¶23-24, pp.10-11*]. However, in *Kinoshita* case, the court held that when an arbitration clause "*refers to disputes or controversies 'under' or 'arising out of' the contract*", arbitration is restricted to "*disputes and controversies relating to the interpretation of the contract and matters of performance*." [*Kinoshita case, p.953*]. Because the phrase "*arising out of*" is narrower in scope than the phrase "*relating to*", omitting reference to disputes "*relating to*" the agreements is significant [*ibid.; Mediterranean case, p.1464; Michele case, p.1080*].

20 These arrangements made by RESPONDENT were intended to preclude the submission of a noncontractual claim to the Tribunal, such as contract adaptation, *culpa in contrahendo*, torts, and restitution claim [*Berger, p.2; Greenberg, p.346*], since these would create additional

obligations which were not originated from the FSSA.

21 Therefore, by interpreting the Arbitration Agreement under DCL, since the wording of the Arbitration Agreement excludes the Tribunal's power to adapt the FSSA, the requirement of an express authorization under DAL is not met.

2) The rule of *contra proferentem* does not apply to the interpretation of the Arbitration Agreement.

22 Even if the Tribunal considers the wording of the Arbitration Agreement to be ambiguous, contrary to CLAIMANT's allegations [*CL. Memo, ¶32, p.13*], the Tribunal cannot apply the rule of *contra proferentem* to interpret whether the Arbitration Agreement covers contract adaptation.

23 The rule of *contra proferentem* is used when the bargaining power of the contracting parties is "*unequal*" and the contract exists ambiguities in a "*non-negotiated*"clause [*McDermott case, p.1207*]. However, in the present case, the Arbitration Agreement was discussed and is the same as the version amended by CLAIMANT [*Exh. R1, p.33; Exh. R2, p.34*]. These discussions and adoption of CLAIMANT's opinions also demonstrate that the Parties are of equal bargaining power. Thus, even if the wording of the Arbitration Agreement is unclear, the Tribunal could not apply the rule of *contra proferentem* to interpret the Arbitration Agreement to RESPONDENT's detriment.

3) Under the four corners rule, even if the wording is unclear and that external evidence should be considered, the Parties have no intent to authorize the Tribunal to adapt the FSSA.

24 Even if the Tribunal considers that the scope of the Arbitration Agreement is unclear and external evidence is allowed by an exception of the four corners rule, contrary to CLAIMANT's allegation [*CL. Memo, ¶¶27-31, pp.11-12*], the negotiation process demonstrates no intent to confer the power to adapt the FSSA to the Tribunal.

25 In the meeting on 12 April 2017, though Mr. Antley, representing RESPONDENT, replied to

the suggestion of adaptation mechanism by Ms. Napravnik, representing CLAIMANT, with his view to probably authorize the arbitrators to adapt the FSSA, what they had was only a preliminary discussion. Due to the severe car accident, Mr. Antley had no opportunity to further contemplate on the issue [*Exh. C8, p.17*]. They were then replaced by the final negotiators, Mr. Krone and Mr. Ferguson, who finalized Clause 6 to 15 FSSA [*PO2, ¶4, p.55*]. Contrary to CLAIMANT's allegation, the replacement of the negotiators does affect the Parties' intention which empowers the Tribunal to adapt the FSSA [*CL. Memo, ¶31, p.12*]. As the authority of final decision-making of Clause 6 to 15 FSSA belongs to the final negotiators, the discussions between previous negotiators would only be effective on Clause 1 to 5 FSSA. The interpretation of Clause 6 to 15 FSSA shall base on the intentions of the final negotiators. Since the final negotiators do not demonstrate any intent or include any express reference of adaptation in the hardship clause under Clause 12 FSSA ("the Hardship Clause") or the Arbitration Agreement, the Parties have no intent to authorize the Tribunal to adapt the FSSA.

4) Even if the law of Mediterraneo governs the Arbitration Agreement, the Tribunal is still not authorized to adapt the FSSA.

26 Even if the Arbitration Agreement should be governed by the law of Mediterraneo as CLAIMANT alleged [*CL. Memo, ¶¶2-16, pp.5-9*], and CISG applies to the interpretation of the Arbitration Agreement according to Mediterranean jurisprudence [*PO1, ¶4, p.52*], the Parties still demonstrated no intent to authorize the Tribunal to adapt the FSSA.

27 Art. 8(3) CISG provides that the negotiations should be considered in determining the parties' intent [*Art. 8(3) CISG*]. However, as discussed above [*see above, ¶¶24-25*], the negotiations of the Parties do not convey the intent to authorize the Tribunal to adapt the FSSA.

28 In sum, the requirement of DAL for an express authorization was not fulfilled either by looking into the text of the Arbitration Agreement or by the negotiation process of the Parties. Therefore, the Tribunal is not authorized to adapt the FSSA.

II. The Tribunal should not adapt the FSSA to avoid the award from being set aside.

29 As discussed above, the Tribunal is not empowered to adapt the FSSA [*see above, ¶¶13-28*]. In other words, adapting the FSSA by the Tribunal is beyond the scope of the Arbitration Agreement. According to Art. 34(2)(a)(iii), an arbitral award may, at the request of the party, be set aside by the court if the award contains decisions on matters beyond "*the scope of the submission to arbitration*" [*Art.34(2)(a)(iii) DAL*]. "*The scope of the submission to arbitration*" includes matters submitted to arbitration by the parties' arbitration agreement [*Born, p.3294*].

30 In the instant case, if the Tribunal adapts the FSSA, the award deals with the matters beyond the scope of the submission to the arbitration. The award could be set aside, which would make the Tribunal and the Parties' efforts in vain. Thus, the Tribunal should not adapt the FSSA in view of the legal consequence.

CONCLUSION OF THE FIRST ISSUE

31 To conclude, RESPONDENT submits that the Arbitration Agreement, governed by the law of Danubia, excludes the Tribunal's power to adapt the FSSA. Since the requirement of DAL for an express authorization is not fulfilled, the Tribunal does not have the power to adapt the FSSA.

ISSUE 2: CLAIMANT IS NOT ENTITLED TO SUBMIT THE EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS.

32 To decide whether the evidence is admissible in present case, RESPONDENT agrees with CLAIMANT to apply IBA Rules on the Taking of Evidence 2010 ("IBA Rules") to the present case because IBA Rules is widely used in international arbitrations and can reflect different legal backgrounds [*Born, p.2212*].

33 However, the partial interim award from the other arbitration ("the Evidence") cannot be submitted as evidence to the arbitral proceedings in the present case. The Evidence CLAIMANT intends to submit to the arbitral proceeding is illegally obtained either through

hack or through two former employees who are bound by confidentiality agreements. Therefore, the Tribunal shall exclude the Evidence based on the following reasons. According to Art. 9.2(a) IBA Rules, the Evidence shall be excluded for its lack of relevance and materiality (**A**). Moreover, the illegally obtained Evidence is inadmissible according to Art. 9.2(b) IBA Rules (**B**). Last, the Evidence shall be excluded because the Evidence is confidential based on Art. 9.2(e) IBA Rules (**C**).

A. Under Art. 9.2(a) IBA Rules, the Evidence shall be excluded due to its lack of relevance and materiality.

34 The Evidence which CLAIMANT intends to submit shall be excluded due to its lack of sufficient relevance to the case (**I**) and materiality to the outcome of the case (**II**).

I. Under Art. 9.2(a) IBA Rules, the Evidence shall be excluded due to its lack of relevance to the present case.

35 The Tribunal shall exclude the Evidence because it lacks relevance to the present case. According to Art. 9.2(a) IBA Rules, the arbitral tribunal shall exclude the evidence if the evidence is lack of sufficient relevance [*Art. 9.2(a) IBA Rules; Marghitola, p.48*]. Relevance means that the document must be useful for the line of evidence in order to establish factual allegations [*Raeschke-Kessler, p.657*].

36 The Evidence which CLAIMANT intends to submit is not relevant to the present case. The Evidence is an award from another arbitration between RESPONDENT and a third party [*PO2, ¶39, p.60*]. CLAIMANT claims that the Evidence can prove RESPONDENT's contradictory behavior and even undermine RESPONDENT's credibility because the two arbitrations are analogous [*CL. Memo, ¶86, p.28*]. Nonetheless, the two transactions are between different parties, based on different contracts, and different factual backgrounds. The contract of the other arbitration contains the ICC-Hardship clause while the FSSA does not [*PO2, ¶39, p.60*]. Moreover, RESPONDENT refused to ship the mares in the other transaction whereas CLAIMANT did ship the semen in the present case [*ibid.*]. The two transactions are

so different that CLAIMANT cannot compare that arbitration with the present case. Thus, having different allegations in different cases will not undermine RESPONDENT's credibility. Furthermore, the explanation of the Parties' intent should base on the chain of emails and negotiations between the Parties instead of the Evidence. The Evidence cannot establish any factual allegations in the present case because RESPONDENT's claims in another case cannot be applied to the present case. Hence, the Evidence is not relevant to the present case.

II. The Evidence is not material to the outcome of the present case.

37 The Evidence is not material to the outcome of the case and therefore the Evidence should be excluded. Under Art. 9.2(a) IBA Rules, besides relevance, the evidence shall also be material to the outcome of the case [*Art. 9.2(a) IBA Rules*]. Materiality means that the tribunal must deem it necessary that the document is needed as an element to consider if a factual allegation is true or not [*Raeschke-Kessler, p.657*]. Compared to relevance, materiality more focuses on how the evidence is decisive with regard to the resolution of the dispute [*Davies, p.178*]. Moreover, materiality to the outcome of the case is a higher threshold for parties to prove [*Marghitola, p.49*].

38 The Evidence is not material to the outcome of the present case. The decisive question in the present case is whether the Parties have the intention to adapt the FSSA or not. The Evidence can at most prove that RESPONDENT is involved in another arbitration related to the issue of tariff. Therefore, the Evidence shall be excluded due to its lack of materiality to the present case.

B. Under Art. 9.2(b) IBA Rules, the Evidence shall be excluded because the legal impediment prohibits CLAIMANT from submitting the Evidence.

39 In addition to the Evidence being irrelevant and immaterial to the present case, the Evidence shall be excluded because the legal impediment prohibits CLAIMANT from submitting the Evidence under Art. 9.2(b) IBA Rules. Art. 9.2(b) IBA Rules provides that the tribunal shall

exclude the evidence if it is a legal impediment under the legal or ethical rules determined by the tribunal to be applicable [*Art. 9.2(b) IBA Rules*]. A legal impediment can be defined as a rule of law or an order of a public authority which prohibits disclosure [*Marghitola, ASA Bulletin, p.90*]. Furthermore, good faith is a part of principle of customary law [*Rajput, p.166*]. This principle is also specified in ¶3 of Preamble and Art. 9.7 IBA Rules. The submitting of evidence shall be conducted on the principle that each party shall act in good faith [*¶3 of Preamble, IBA Rules*]. The principle of good faith can be applied to evaluate the conduct of the parties and revise the outcome in arbitrations [*Henriques, p.514*]. The concept of good faith is the duty to conduct honestly and without malice and intent to deceive [*ibid., p.517*]. Also, abuse of rights is an important application of principle of good faith [*Rajput, p.171*]. Thus, good faith can be one of the legal impediments regulated in Art. 9.2(b) IBA Rules.

40 In *Methanex* case, the claimant trespassed on the respondent's property, obtained documents, and intended to submit the documents as evidence. The tribunal excludes the illegally obtained evidence because the claimant does not conduct in good faith [*Methanex case, Part II, Chapter I, p.26*]. Moreover, the principle of good faith can also prevent tribunals from admitting evidence collected by unlawful means [*Noth, p.1940*]. Thus, the tribunal shall analyze whether the evidence violates the principles of good faith to ensure the parties' equal rights of defense [*Ireton, p.238*].

41 In the present case, CLAIMANT did not comply with the principle of good faith to obtain the Evidence. CLAIMANT planned to purchase the Evidence from a company with doubtful reputation. The company obtained various evidence from unknown sources and refused to disclose their origins [*PO2, ¶41, p.61*]. The source of the Evidence is particularly doubtful in the present case since the nature of arbitration awards is confidential. A partial interim award will not be leaked out legally to others who are not related to that arbitration. Thus, the Evidence can only be procured through hacking or leaked from two former employees of RESPONDENT [*HKIAC's Letter, ¶3, p.51*]. CLAIMANT must know the source of the

Evidence is unlawful but still insists on submitting such Evidence. CLAIMANT has a malicious intention and abuses the right of presenting its case. Consequently, CLAIMANT did not fulfill its duty to conduct with good faith. The Tribunal shall not allow the submission of illegally obtained evidence because the Evidence is a legal impediment.

C. Under Art. 9.2(e) IBA Rules, the Evidence shall be excluded because it is confidential.

42 The Tribunal shall exclude the Evidence to protect the confidentiality of the Evidence according to Art. 9.2(e) IBA Rules (**I**). The purpose of excluding the Evidence is not only to protect this single arbitration but benefit the whole arbitration system (**II**).

I. The Tribunal shall exclude the Evidence to protect the confidentiality of the Evidence according to Art. 9.2(e) IBA Rules.

43 The Tribunal shall exclude the Evidence to protect the confidentiality of the Evidence according to Art. 9.2(e) IBA Rules. Confidentiality is one of the key characteristics in international arbitration [*Smeureanu/Lew, p.xvi*]. Thus, the Tribunal shall exclude the Evidence because the nature of awards is confidential (**1**). Second, the Tribunal shall exclude the Evidence which contains sensitive commercial information (**2**).

1) The Tribunal shall exclude the Evidence because the nature of awards is confidential.

44 The Tribunal shall exclude the Evidence from the arbitral proceedings because the nature of awards is confidential. Confidentiality is perceived to be a key advantage of international commercial arbitration [*Moser/Bao, p.281*]. All information or documents related to arbitration shall be kept confidential. Such duty is specified in Art. 45.1 HKIAC Rules. Art. 9.2(e) IBA Rules also provides that the tribunal shall exclude the evidence if the tribunal determines the evidence is confidential [*Art. 9.2(e) IBA Rules*]. In addition, Art. 34(5) UNCITRAL Arbitration Rules 2013 provides that the award may be made public only if parties agree [*Art. 34(5) UNCITRAL Arbitration Rules*].

45 In *UMS* case, the high court of UK established the necessity to protect the confidentiality of arbitration award unless the party could explain the exact use of the award to remove the confidentiality restrictions [*UMS case, ¶57*]. Moreover, whether the award is leaked out to the public or not will not undermine its confidentiality [*ibid.*]. The tribunal shall still keep the award confidential.

46 In the present case, the Evidence which CLAIMANT intends to submit is a partial interim award from another arbitration also conducted under HKIAC Rules [*HKIAC's Letter, p.50*]. Since the Evidence is the award from another arbitration, the Evidence shall be kept confidential. Moreover, the confidential agreement between RESPONDENT and the other party in that arbitration represents parties' intention to keep all information confidential [*PO2, ¶41, p.61*]. Without further agreement of the parties in the other arbitration to make the award public, the Tribunal shall exclude the Evidence to protect its confidentiality.

2) The Tribunal shall exclude the Evidence because the Evidence is an award containing sensitive commercial information.

47 The Tribunal shall exclude the Evidence because the Evidence contains sensitive commercial information. Art. 9.2(e) IBA Rules provides that the tribunal shall exclude the evidence if the evidence is commercially confidential [*Art. 9.2(e) IBA Rules*]. Commercial confidentiality can be defined as sensitive commercial information such as profit margins, production costs, pricing policies, know-how, trade secrets, price calculations, financial records, tax records, and documents covered by confidentiality agreements with third parties [*Meza-Salas, ¶10; Marghitola, p.92*].

48 In the instant case, the Evidence contains sensitive commercial information such as RESPONDENT's transaction details and trade secrets [*PO2, ¶39, p.60*]. For example, the sale price, the list of mares, and the agreement on conditions of business are all based on RESPONDENT's business experience and shall be kept confidential. As RESPONDENT is starting a new breeding program, any disclosure of the commercial information may have huge

impact on RESPONDENT's business [*NoA, ¶6, p.5*]. The reveal of the Evidence may harm the reputation of RESPONDENT and even the development of RESPONDENT's new program. No matter whether the final award is favorable to RESPONDENT or not, the reveal of the Evidence is harmful to RESPONDENT's business. Furthermore, the confidentiality agreement between RESPONDENT and the third party also represents its confidentiality.

49 CLAIMANT claims that RESPONDENT did not use great efforts to keep the Evidence confidential so Art. 9.2(e) IBA Rules would not apply [*CL. Memo, ¶¶95-96, pp.30-31*]. However, confidentiality is characterized by the subjective intent or the efforts to protect the confidentiality [*Marghitola, p.93*]. RESPONDENT has signed the confidentiality agreement with the third party and used firewall to protect its computer system [*PO2, ¶42, p.62*]. Thus, Art. 9.2(e) IBA Rules applies to the present case and the Tribunal shall exclude the Evidence to protect the confidentiality of the Evidence.

II. The purpose of excluding the Evidence is not only to protect this single arbitration proceeding but benefit the whole arbitration system.

50 Art. 9.2(e) IBA Rules provides that the evidence shall be excluded if the evidence is compelling to remain commercially or technically confidential [*Art. 9.2(e) IBA Rules*]. Art. 9.4 IBA Rules also indicates that the tribunal can order confidentiality protection if the tribunal deems it appropriate [*Art. 9.4 IBA Rules*]. The confidentiality rules are not merely set to protect parties in specific cases but to maintain the confidential environment of international arbitration in a long term [*Born, p.2780*]. Confidentiality is also the main characteristic HKIAC emphasizes so that parties can ensure that the duty of confidentiality applies by adopting HKIAC Rules [*Moser/Bao, p.282*]. Parties who choose HKIAC Rules must also demand confidentiality. Therefore, admitting the Evidence equals to disrupting parties' reliance on the confidentiality provided by HKIAC Rules.

51 In the present case, CLAIMANT may argue that the Evidence is already leaked to the public and there is no need to protect the Evidence anymore. Since the present case and the other

arbitration are both conducted under HKIAC Rules and still on going, confidentiality shall be especially considered by the Tribunal [*HKIAC's Letter, p.50; PO2, ¶39, p.60*]. If the Tribunal admit the Evidence, it will set a bad precedent and encourage future,parties to breach the confidentiality agreement in order to obtain the evidence. Thus, the Tribunal shall not only consider the harm to RESPONDENT but also the spirit of confidentiality in international arbitrations. The Tribunal shall exclude the Evidence to protect the integrity of the arbitral system.

CONCLUSION OF THE SECOND ISSUE

52 CLAIMANT is not entitled to submit the Evidence because the Evidence is neither relevant nor material to the present case. Moreover, the way CLAIMANT procured the Evidence is a legal impediment. Last, the Evidence is confidential. According to the IBA Rules, the Tribunal shall exclude the Evidence.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF US$1,250,000 OR OTHER AMOUNT RESULTING FROM AN ADAPTATION OF THE PRICE UNDER THE HARDSHIP CLAUSE AND CISG.

53 CLAIMANT is not entitled to the additional payment resulted from the increase in tariff by 30 per cent ("the Tariff"). Firstly, the Hardship Clause does not entitle CLAIMANT to claim for an adaptation of the purchase price under Clause 6 with regard to the last installment of the payment ("the Price") (**A**). Secondly, the Hardship Clause is a derogation of the application of CISG (**B**)**.** In any event, CLAIMANT is not entitled to claim for adaptation on the Price under CISG (**C**). Lastly, in any event, RESPONDENT should only bear US$ 625,000 instead of US$ 1,250,000 which CLAIMANT alleges (**D**).

A. CLAIMANT cannot rely on the Hardship Clause to adapt the Price.

54 Upon interpretation, the Hardship Clause does not entitle CLAIMANT to seek for adaptation in case of hardship (**I**). Additionally, the present circumstances do not meet the requirements under the Hardship Clause (**II**). Therefore, CLAIMANT cannot rely on the Hardship Clause

to adapt the Price.

I. By interpreting the Hardship Clause, it does not entitle CLAIMANT to seek for adaptation in case of hardship.

55 In the instant case, by interpreting the Hardship Clause in accordance with the intention of the Parties, the Hardship Clause should not empower the Tribunal to adapt the FSSA (**1**). Furthermore, a reasonable person in the same situation would not interpret the Hardship Clause as entitling CLAIMANT to request for adaptation in case of hardship (**2**).

1) By interpreting the Hardship Clause in accordance with the intention of the Parties, the Hardship Clause should not empower the Tribunal to adapt the contract.

56 To interpret the Hardship Clause, one should follow the rules under CISG. Art. 8(1) CISG, which provides that to interpret statements and other conduct made by a party, one must first consider the subjective intentions of the parties [*CISG Digests, ¶6, p.54*]. To determine the intention of the parties, Art. 8(3) CISG states that due consideration should be given to all relevant circumstances of the case including negotiations [*Art. 8(3) CISG*].

57 In the present case, the Parties do not have an explicit intention to include an adaptation mechanism in the FSSA (**a**), nor do the Parties have an implicit intention for the Tribunal to adapt the FSSA based on the principle of good faith (**b**).

a) The Parties do not have an explicit intention to include an adaptation mechanism in the FSSA.

58 To ensure the stability of the contract, the adaptation of the contract is generally considered as an exception to the contract [*Peter, p.243*]. Unless the parties have the intent to include an adaptation clause into the contract, the tribunal is not authorized to adapt contract and the parties are obligated to perform their respective obligations under the contract [*Strobach, p.45; ICC Case No. 2404*].

59 To determine the intent, under Art. 8(1) CISG, the intention of the parties should be a "*subjective meeting of the minds*" of both parties or where the other party "*could not have*

been unaware" the intention of statement [*Huber/Mullis, p.12*]. In the latter scenario, CISG uses an objective filter in order to protect the other party [*Franco, p.177*].

60 In present case, the previous negotiators, Ms. Napravnik and Mr. Antley drafted Clauses 1 to 5 FSSA [*PO2, ¶4, p.55*]. However, the Hardship Clause itself was finalized by Mr. Ferguson and Mr. Krone [*PO2, ¶4, p.55*]. Mr. Krone, the final negotiator of RESPONDENT, never intended to add an adaptation mechanism into the Hardship Clause [*Exh. R3, p.35*]. Therefore, there was no subjective meeting of the minds between Mr. Ferguson and Mr. Krone. Furthermore, although Mr. Ferguson and Mr. Krone had the prior email chain of the previous negotiators, the intention to include an adaptation mechanism into the FSSA was never shown in the email or any previous files. Ms. Napravnik and Mr. Antley only discussed the issue of adaptation in their private meeting verbally [*Exh. C8, p.17*]. Neither did Mr. Krone wish to add the adaptation mechanism into the FSSA nor could Mr. Krone have known about the private discussion between the previous negotiators. Therefore, the finalizer of the Hardship Clause, Mr. Krone, does not intend to have the adaptation mechanism in the Hardship Clause and could not have been aware of the legal effect of adaptation within the Hardship Clause.

61 In addition, both the previous and final negotiators relied on the ICC-Hardship clause 2003 as a reference to the Hardship Clause under the FSSA [*Exh. R2, p.34; PO2, ¶12, p.56*]. However, the ICC-Hardship clause 2003 provides only two legal consequences: renegotiation by the parties and termination of the contract [*ICC Hardship Clause*], but not an adaptation of the contract [*Brunner, Sec. 13, p.506*]. The ICC-Hardship clause 2003 deliberately precludes the legal effect of adaptation to give the parties an incentive to work out their own solution through renegotiation [*ibid.*]. As the other party may want to avoid the termination of the contract, they has a strong incentive to work out a reasonable alternative terms [*Debattista, ¶32*]. Therefore, the Parties, by referring to the ICC-Hardship clause 2003 as a basis of the Hardship Clause [*PO2, ¶12, p.56*], did not intend to include an adaptation mechanism into the Hardship Clause.

b) In any event, the Parties do not have the implicit intention for the Tribunal to adapt

the FSSA based on the principle of good faith.

62 At a minimum, only a price-review provision [*ICC Case No. 13504*; *ICC Case No. 10351*] can be considered as an implicit indication that the parties wish to facilitate appropriate adjustments to counter unexpected economic developments which could distort the long-term viability of the contract [*ICC Case No. 13504*]. On the contrary, when the contract provides a fixed price, it usually indicates the parties have assumed the risk and do not intend to adapt the contract [*Florida Power case, p.445*].

63 In the present case, Clause 6 FSSA provides a fixed price for every installment of the semen [*Exh. C5, Clause 6, p.14*]. There is no price-review provision in the FSSA. These facts indicate that the Parties already agreed on the allocation of the risk of the FSSA and did not intend to alter the Price at the time of the conclusion of the FSSA. Therefore, the adaptation of the FSSA is neither expressly nor implicitly agreed by the Parties.

2) A reasonable person in the same situation would not interpret that the Hardship Clause entitles CLAIMANT to request for adaptation in case of hardship.

64 When it is not possible to use the subjective intent approach within Art. 8(1) CISG to interpret party's statements or conduct, one must resort to "*a more objective analysis*" as provided by Art. 8(2) CISG [*CISG Digests, ¶11, p.55*]. Under this provision, statements and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind would have had in the same circumstances [*Oldenburg 12 O 2943/94*].

65 In the present case, since hardship as a triggering event of adaptation is not a trade usage [*ICC Case No. 13284*], a reasonable person would not always interpret the term hardship as including the legal effect of contractual adaptation. On the contrary, the Parties included both the Hardship Clause and the *force majeure* clause into Clause 12 FSSA [*Exh. C5, Clause 12, p.14*]. Since two legal concepts were combined into the same provision, a reasonable person would construe that the two parts of Clause 12 FSSA have the same legal effect. While Clause 12 FSSA begins with *force majeure* [*Exh. C5, Clause 12, p.14*], the general legal consequences

of *force majeure* should govern Clause 12 FSSA. Generally, the events of *force majeure* exempt the disadvantaged party from performing its obligation, rather than adapting the contract [*Brunner, Sec. 9, p.347*]. Therefore, based on the combination and arrangement of Clause 12 FSSA, a reasonable person would understand that the Hardship Clause should be of the same legal effect as *force majeure*, i.e. the exemption of obligation but not adaptation. Therefore, the Tribunal should not adapt the FSSA.

66 In addition, since the principle of *pacta sunt servanda* is the essence of the general contract law, the sanctity of the contract should be upheld and the parties should perform their respective contractual obligations [*Schlechtriem/Butler, p.104*]. Based on the principle of good faith, the legal effect of adaptation of contracts is an exception and only crucial to long-term contracts to counter the unforeseeable changes during the long contractual period [*PICC, Art. 6.2.3, Comment 5*]. In other words, where the parties do not explicitly include an adaptation clause under the contract, the tribunal can only adapt the contract in case of "long-term contract" [*Ferrario, p.192*]. The average duration to be considered as long-term contract should be around 20-25 years [*ibid, p.31*]. In the instant case, the contractual duration of the FSSA is less than one year [*Exh. C5, Clause 8, p.14*], which is a rather short-term contract. Therefore, the Tribunal should not adapt the FSSA.

II. Alternatively, even if the Hardship Clause provides an adaptation mechanism, the precondition of the Hardship Clause is not met.

67 The instant case does not fulfill the three requirements under the Hardship Clause. The Tariff is foreseen by the Parties at the time of the conclusion of the FSSA (**1**). The Tariff is not onerous for CLAIMANT to bear the additional cost (**2**). The Tariff is not comparable to health and safety requirements (**3**).

1) The Tariff is foreseen by the Parties.

68 Under the Hardship Clause, the hardship has to be "*unforeseen*" events for CLAIMANT not to be responsible for the delivery [*Exh. C5, Clause 12, p.14*]. The notion of unforeseen

includes a subjective standard which requires the parties have not considered the events at the conclusion of the contract [*Martin, pp.300-301; DiMatteo, p.304*].

69 Generally, tariff includes both currency and country inflation which should be foreseen by the parties under international transaction [*CMS Award,* ¶*225*]. Therefore, the Tariff can be foreseen by the Parties.

70 CLAIMANT alleges that the Tariff was unforeseen by the Parties since the Equatorianian Government was not known for retaliating with import restrictions in trade disputes [*CL. Memo,* ¶*36, pp.14-15*]. However, the newly elected president of Mediterraneo announced a preference for a more protectionist approach to international trade before the conclusion of the FSSA, particularly to agricultural products [*Exh. C5, p.15*]. Even more, before the conclusion of the FSSA, the newly elected president of Mediterraneo appointed Ms. Cecil Frankel as "*superminister*" for agricultural, trade and economics [*PO2,* ¶*23, p.58*]. She had consistently advocated limiting the access of foreign agricultural products to the Mediterranean market [*ibid.*]. Thereafter, Mediterraneo imposed a "*targeted*" 25 per cent tariff on Equatoriana [*NoA,* ¶*9, p.6*]. It can be reasonably anticipated there will be a dispute on trade between the two countries and Equatoriana may use countermeasure against Mediterraneo. Furthermore, during the negotiation process, the Parties paid special attention to the customs regulation on semen [*Exh. C1, p.9; Exh. C3, p.11*]. Specifically, CLAIMANT discussed that the customs regulation and import restriction may increase the cost with RESPONDENT [*Exh. C4, p12*]. Therefore, the Tariff is foreseen by the Parties.

2) The Tariff is not onerous.

71 The instant case does not fulfill the requirement of onerous under the Hardship Clause. Under international practice, the threshold of "*onerous*" should be an increased in cost by 80 to 100 per cent in international transaction [*Brunner, Sec. 12, p.432*].

72 In the present case, the Tariff only affects 50 doses of the semen [*Exh. C7, p.16*], i.e. half of the amount of the shipment under the FSSA [*Exh. C5, Clause 8, p.14*]. Therefore, considering

the entire contract, the cost is only increased by 15 per cent. The 15 per cent tariff does not meet 80 to 100 per cent threshold under general international transaction.

73 CLAIMANT falsely alleges that the Parties chose the term "*more onerous*" in Clause 12 FSSA [*Exh. C5, Clause 12, p.14*], indicating a lower threshold [*CL. Memo, ¶¶37-38, p.15*]. Both Art. 6.2.1 PICC and Art. 6:111 PECL use the term "*more onerous*" to describe the general requirement of hardship. PICC and PECL are considered as a model contract law of international character [*Perillo, p.27*]. Therefore, by using the term "*more onerous*" under the Hardship Clause, the Parties do not intend to deviate from general international practice. Thus, the threshold is not lowered and should remain increasing the cost by 80 to 100 per cent.

74 In any event, even if the threshold of Clause 12 FSSA is lower than international commercial practice, the only reference would be where CLAIMANT mentioned about health and safety requirements "*make highly expensive tests necessary which can increase the cost by up to 40 per cent* [*Exh. C4, p.12*]." This is the only threshold that RESPONDENT agreed. In the present case, as above mentioned, the cost is only increased by 15 per cent. The increase does not meet the threshold of 40 per cent.

75 CLAIMANT also alleges that the threshold of onerous is met since bearing the 30 per cent Tariff will result in CLAIMANT's financial ruin [*CL. Memo, ¶39, p.16*]. However, an impending financial ruin is not the standard to determine whether it is onerous. Financial ruin is a subjective standard [*Brunner, Sec. 12, p.437*]. A deterioration of a party's financial situation is the party's own problem and the party cannot shift that risk to other parties [*ibid., p.436; Girsberger/Zapolskis, p.131*]. The requirement of onerous should have an objective standard for a stable application of hardship unless otherwise agreed. Therefore, CLAIMANT's financial ruin cannot be a basis to claim for onerous under the FSSA. CLAIMANT's argument is unfounded.

3) The Tariff is not comparable to health and safety requirements.

76 Under the Hardship Clause, hardship can either be caused by additional health and safety

requirements or anything comparable to health and safety requirements. "*Comparable*" means "*able to be likened to another; similar* [*Oxford Dictionary*]." Thus, only the events that are similar or able to be likened to health and safety requirements could fulfill this precondition.

77 In the present case, Mr. Krone told Mr. Ferguson that the ICC-Hardship clause 2003 was considered by RESPONDENT to be too broad for the purposes of the FSSA [*PO2, ¶12, p.56*]. The Parties intended to narrow down to regulate only specific requirements [*Exh. R3, p.35*]. In particular, the Parties agreed to something that is only "*comparable to health and safety requirements*" can trigger hardship under the FSSA. However, the Tariff and health and safety requirements are not comparable. The purpose of the health and safety requirements is to protect the health of the citizens [*Matsushita, p.215*], while the purpose of the tariff is to collect governmental revenue or protect domestic industry [*ibid., p.433*]. Therefore, the Tariff is not comparable to the health and safety requirements. The requirement under the Hardship Clause is not fulfilled.

78 To conclude, upon interpretation, the Hardship Clause does not allow the Parties to seek for adaptation. Furthermore, the requirements of the Hardship Clause are not fulfilled in the present case; namely, the Tariff is foreseen by the Parties, is not onerous, and is not comparable to the health and safety requirements. Hence, the Tribunal should not adapt the Price.

B. The Hardship Clause is a derogation of the application of CISG.

79 The Parties have listed the situations of which constitute a hardship in the Hardship Clause. Therefore, if the Tariff is not comparable to "*health and safety requirements*", CLAIMANT cannot further claim for adaptation under CISG.

80 According to Art. 6 CISG, the parties may derogate from or vary the effect of any of CISG provisions [*Art.6 CISG*]. In Russia Arbitration Award No. 123, the contract which is governed by CISG has an exhaustive list of *force majeure* circumstances. The tribunal states that the

buyer's lack of foreign currency should not be regarded as *force majeure*, because it is not included in the list of *force majeure* circumstances. The list narrows down the situation that can be regarded as *force majeure* under CISG; thus, the provision constitutes a derogation of CISG [*Russia 123, ¶16; CISG Digests, p.379*].

81 The present case is similar to Russia Arbitration Award No. 123. The requirement of comparable to "*health and safety requirements*" of the Hardship Clause narrows down the events of hardship [*Exh. C5, Clause 12, p.14*]. Therefore, the Hardship Clause is a derogation of the application of any possible provision of CISG with regard to hardship. CLAIMANT can only claim for remedy under the events that comply with the requirements of the Hardship Clause. As established above, since the Tariff is not comparable to health and safety requirements [*see above, ¶76-78*], CLAIMANT cannot claim for remedy under CISG.

C. In any event, CLAIMANT is not entitled to claim for adaptation under CISG.

82 If the Hardship Clause does not include an adaptation mechanism, CLAIMANT is not entitled to claim for adaptation under CISG either. CLAIMANT alleges that the Tariff constitutes a hardship and is covered under Art. 79(1) CISG [*CL. Memo, ¶¶54-57, pp.20-21*]. However, the final version of Art. 79(1) CISG does not cover hardship (**I**). Even if Art. 79(1) CISG covers hardship, Art. 79(1) CISG does not entitle CLAIMANT to claim for adaptation (**II**).

I. The final version of Art. 79(1) CISG does not cover hardship.

83 Upon the textual interpretation, the text of Art. 79(1) CISG does not cover hardship (**1**). If the Tribunal finds that the wording of Art. 79(1) CISG remains ambiguous, upon the historical interpretation, Art. 79(1) CISG also does not cover hardship (**2**).

1) Upon the textual interpretation, the text of Art. 79(1) CISG does not cover hardship.

84 CLAIMANT alleges that the Tariff is a hardship and is covered by the term "*impediment*" under Art. 79 CISG [*CL. Memo, ¶¶54-57, pp.20-21*]. Contrary to CLAIMANT's assertion, the term "*impediment*" relates to the situation of making the performance of the contract impossible, and not merely difficult or excessively onerous for the disadvantaged party

[*Jenkins, p.2024*].

85 To interpret a treaty, the interpreter must begin with the text of the particular provision [*Art. 31(1) VCLT*]. Upon the textual interpretation, there are two reasons why Art. 79 CISG does not cover hardship.

86 First, the text of Art. 79(1) CISG excludes an impediment that could "*reasonably be expected to take into account*" when the contract was concluded [*Art. 79(1) CISG*]. In international transactions, the tribunal is often reluctant to exempt a party from liability in situations of hardship, because the parties are seldom unaware of the risk of hardship in the future [*CISG Digests, p.377; ICC Case No.6281*]. As the economic and political situations are subject to continual change, the risk of hardship caused by alteration in the political situation of a nation, price increase in raw material or depreciation of currency is virtually inevitable in the field of international trade [*Zaccaria, p.136*]. It is particular in the present case because this is an international transaction and the Tariff was imposed due to an alteration of political situation between Mediterraneo and Equatoriana [*Exh. C6, p.15; PO2, ¶23, p.58*].

87 Second, Art. 79(1) CISG states that a disadvantaged party is liable if the party could reasonably be expected to "*overcome it or its consequences*" [*Art. 79(1) CISG*]. However, hardship does not fit in to this requirement, because the party is still able to perform under the situation of hardship and there is no need to overcome the consequences caused by hardship [*Petsche, p.158*]. This argument is supported by the wording of PICC and PECL which do not use the term "*overcome its consequences*" in those hardship provisions [*Klepac, p.19*]. In *Tomato Concentrate* case, the court further held that a change in financial circumstances is a consequence which can be overcome [*Tomato Concentrate case; CISG Digest, p.378*].

88 In the present case, CLAIMANT still performed its obligation by shipping the last installment of the semen [*Exh. C8, p.18*]. This indicates that the Tariff is an event that can be overcome. Therefore, the Tariff is not an impediment under Art. 79 CISG.

2) Upon the historical interpretation, Art. 79(1) CISG indicates that CISG does not

cover hardship.

89 Should the Tribunal find the wording of Art. 79(1) CISG remains ambiguous, the Tribunal should turn to the legislative history of CISG. The legislative history of CISG indicates that Art. 79 CISG does not cover hardship. According to Art. 32 Vienna Convention on the Law of Treaties 1969 ("VCLT"), when the interpretation according to Art. 31 VCLT leaves the meaning of an article ambiguous or obscure, the *travaux préparatoires* of the treaty and the drafting history may be invoked to supplement the meaning [*Art. 32 VCLT*].

90 CLAIMANT incorrectly alleges that the drafters of CISG wanted to include hardship in the scope of Art. 79 CISG [*CL. Memo, ¶55, p.20*]. On the contrary, the drafters of CISG deliberately excluded hardship. In the drafting process of CISG in 1977, an independent provision on hardship was proposed but ultimately rejected [*UN Year Book VIII, ¶¶458-460, p.57*]. Later on, at the 1980 Vienna Diplomatic Conference, a Norwegian delegation proposed to release the debtor from its obligation if there had been a radical change in the underlying circumstances after the end of a temporary impediment based on Art. 79 CISG, but the proposal was rejected [*Committee Report: 28th Meeting, ¶¶16-17, p.383*]. The legislative history indicates that the drafters deliberately exclude hardship from the scope of entire CISG and especially from Art. 79 CISG. Therefore, Art. 79 CISG cannot be interpreted as including hardship [*Schwenzer, pp.712-713*].

91 CLAIMANT alleges that if Art. 79 CISG does not cover hardship, CISG still intends to govern hardship because hardship is not the subject matter that Art. 4 CISG intend to exclude from CISG, there is an internal gap in CISG [*CL. Memo, ¶69-70, p.24*]. RESPONDENT agrees that hardship is not excluded by Art. 4 CISG. However, hardship is settled in CISG. The fact that the drafters refused to put hardship in Art. 79 indicates that CISG only provides solution to *force majeure*. In the case of hardship when the performance is still possible, CISG will not intervene the parties. Thus, the issue of hardship is settled in the drafting process.

II. Art. 79 CISG does not entitle CLAIMANT to claim for adaptation.

92 If the Tribunal finds that Art. 79 CISG covers hardship and applies to the present case, Art. 79 CISG does not entitle CLAIMANT to claim for adaptation. Art. 79 CISG intends to exclude the legal effect of adaptation; therefore, Art. 7 CISG is not applicable (**1**). Even if Art. 7 CISG is applicable, Art. 6.2.3 PICC is not a general principle of CISG and cannot supplement Art. 79 CISG (**2**). Moreover, Art. 6.2.3 Mediterranean Contract Law ("MCL") cannot supplement Art. 79 CISG either (**3**).

1) Art. 7 CISG is not applicable because Art. 79 CISG intends to exclude the legal consequence of adaptation.

93 CLAIMANT alleges that the lack of the legal consequence of adaptation in Art. 79 CISG is an internal gap which should be filled by Art. 7(2) CISG [*CL. Memo, ¶59, p.21*]. However, this view is only a civil law perspective, because under the common law system, courts do not generally have the power to adapt the contract due to changing circumstances [*Pejovic, p.824*].

94 Moreover, Art. 7(2) CISG can only be used to address the problem that is covered by CISG but not expressly settled in CISG [*Art. 7(2) CISG*]. Art. 79 CISG expressly provides the legal effect of exempting the disadvantaged party from liability. Hence, if Art. 79 CISG covers hardship, the legal effect of hardship is exemption of liability and is already settled under this article. Therefore, there is no internal gap [*Stoll/Gruber, pp.812-813; Flechtner, p.93*].

95 CLAIMANT further alleges that adapting the FSSA is a milder and less interfering remedy than terminating the FSSA. Thus, adaptation is the only reasonable consequence [*CL. Memo, ¶67, p.23*]. However, if the parties do not intend to allow third parties to adapt a contract, adaptation is a remedy that will impose additional contractual terms "*not agreed*" by the parties [*Flechtner, p.90*]. The interference by the third parties is not necessarily milder and less interfering. In addition, CISG puts emphasis on the stability of the contract and respects the intention of the parties [*Schlechtriem/Butler, p.177*]. Thus, CLAIMANT's argument is unfounded.

2) Even if Art. 7 CISG is applicable, Art. 6.2.3 PICC is not a general principle of CISG.

96 If the Tribunal finds that the lack of the legal consequence of adaptation in Art. 79 CISG is an internal gap, according to Art. 7(2) CISG, the gap should be supplemented by the general principles of CISG [*Art. 7(2) CISG*]. Contrary to CLAIMANT's allegation, Art. 6.2.3 PICC is not the general principle of CISG [*CL. Memo, ¶62, p.22*].

97 Art. 7(2) CISG requires the interpreter to look at the general principles that are derived from CISG, and not to look outside of CISG to find general principles [*Flechtner, p.95*]. Since the provisions of PICC are not provided by the text of CISG, PICC cannot be considered as a direct source to supplement or interpret CISG [*Schwenzer, Commentary, pp.137-138*].

98 Contrary to CLAIMANT's allegation that PICC contains international and uniform rules [*CL. Memo, ¶62, p.22*], Art. 6.2.3 PICC is not an international rule. PICC does not always reflect the modern approaches of international contract law in every field, because some provisions have been heavily influenced by the civil law system [*Schwenzer, Gap-Filling, p.117*]. For example, Art. 6.2.3 PICC provides the legal effect of adaptation. However, under the common law system, courts do not have the power to adapt the contract due to changing circumstances [*Pejovic, p.824*]. This is different from most civil law countries. This shows an inconsistency between different jurisdictions in the situation of hardship [*ibid.*]. Therefore, Art. 6.2.3 PICC does not have international and uniform characteristics.

99 PICC can only be used to supplement the gap in CISG when the relevant articles of PICC and CISG are similar in the context [*Liu, Preface*] and are the expression of a general principle underlying CISG [*Honnold, p. 667-91: Gotanda, p.117*]. CLAIMANT failed to prove Art. 6.2.3 PICC is the expression of a general principle underlying CISG [*CL. Memo, ¶62, p.22*].

100 CLAIMANT may allege that the general principle of good faith under Art. 7(1) CISG entitles CLAIMANT to claim for adaptation. Under the principle of good faith, the parties are only required to renegotiate. There is no indication that the principle of good faith would include an obligation for the parties to allow tribunal to adapt the contract [*Lindström, ¶94*]. Although the renegotiation did not work out as expected, but RESPONDENT tried to renegotiate with

CLAIMANT in good faith [*Exh. C8, p.18*].

3) Art. 6.2.3 MCL is not appropriate to supplement Art. 79 CISG either.

101 CLAIMANT alleges that if the Tribunal should decide that PICC cannot be used to interpret and supplement CISG, Art. 6.2.3 MCL applies as the applicable national law under Art. 7(2) CISG [*CL. Memo, ¶63, p.22*]. This argument is also unfounded.

102 In the case of hardship, the use of domestic rules would not be the most advisable approach since the doctrine of change of circumstances is subjected to different requirements and interpretations in different jurisdictions [*Zaccaria, p.136*]. Therefore, in the present case, it is not suitable to apply Art. 6.2.3 MCL due to the controversial nature of hardship in the field of international transaction.

103 In conclusion, CLAIMANT is not allowed to seek for adaptation since Art. 79 CISG does not include hardship nor have the legal effect of adaptation. Hence, CLAIMANT cannot claim for adaptation of the FSSA under CISG.

D. In any event, RESPONDENT should only bear US$ 625,000 instead of US$ 1,250,000 as CLAIMANT alleges.

104 Even if the Tribunal determines that it has the authority to adapt the FSSA, CLAIMANT is not entitled to the payment of US$ 1,250,000. Contrary to CLAIMANT's allegation that RESPONDENT should bear the majority of the cost, the Parties have to share the risk of hardship resulted from the Tariff (**I**). To restore the equilibrium of performance, the Parties should share the additional cost equally (**II**). The equal sharing would be the only resolution if the Parties had known the Tariff (**III**). US$ 625,000 is equitable for CLAIMANT to perform. Therefore, CLAIMANT is not entitled to US$ 1,250,000.

I. The Parties should share the risk of hardship resulted from the Tariff and RESPONDENT should not bear the majority of the cost.

105 CLAIMANT falsely alleges that RESPONDENT bears the majority of risk including unsuccessful fertilization and the risks of lost shipment and delays; therefore, RESPONDENT

should bear the majority of the cost resulted from the Tariff [*CL. Memo, ¶77, p.26*].

106 Firstly, the risk of transportation is different from the risk of products [*Cheung, p.24*]. Specifically, Clause 12 FSSA only refers to "*delivery*", i.e. a transportation risk. Therefore, the risk of products shall not be taken into account when the Tribunal adapts the FSSA.

107 Secondly, CLAIMANT misinterprets the allocation of risks. A contract is an instrument of reciprocal allocation of specified risks [*Kolo/Walde, pp.52-53*]. A greater profit margin may indicate that the supplier assumes a greater risk with regard to contingencies [*Brunner, Sec. 12, p.433*]. Thus, one who takes risks expecting to derive benefits should bear those risks instead of shifting risks to the other party who did not assume them nor expect to benefit from them [*Kolo/Walde, p.53*]. In the present case, during the negotiation process, RESPONDENT asked CLAIMANT to lower the overall price through reducing the DDP obligation of CLAIMANT [*PO2, ¶8, p.56*]. After CLAIMANT adjusted the DDP fees, CLAIMANT still charged US$ 500 per dose (the original DDP-included price US$ 100,500 minus the final DDP-included price US$ 100,000 equals to US$ 500) [*ibid.*]. The genuine additional costs associated with transportation and DDP delivery per dose are US$ 200 [*ibid.*]. CLAIMANT can still have US$ 300 profit per dose. This fact indicates that CLAIMANT has also prepared a certain margin to respond to the risk during transportation. The outcome of the negotiation demonstrates that the Parties decided to share the risk of hardship and RESPONDENT did not bear the majority of the risk. CLAIMANT's allegation is unfounded.

II. To restore the equilibrium of the performance, the Parties should share the additional cost equally.

108 The equal sharing is the only equitable allocation. By weighing the principle of *pacta sunt servanda* against the principle of good faith, the tribunal should determine the adaptation to a reasonable extent to restore the equilibrium of the performance for the parties [*Brunner, Sec. 11, pp.391-395*]. The adaptation does not mean to compensate every loss sustained by the disadvantaged party due to the hardship [*Art. 6.2.3 PICC, Comment 7*]. Even if the financial

ruin can be a consideration for adaptation, the tribunal should ensure that the financial ruin is a direct result of the hardship but not a lack of management skills [*Brunner, Sec. 12, p.437; Girsberger/Zapolskis, p.131*].

109 CLAIMANT alleges that RESPONDENT should bear 25 per cent tariff, and itself should only bear 5 per cent tariff [*CL. Memo, ¶78, p.26*]. This allegation equals to that RESPONDENT must compensate for every loss suffered by CLAIMANT but not to restore the equilibrium of performance. In addition, CLAIMANT alleges that the financial ruin allows it to bear only 5 per cent tariff [*ibid.*]. However, CLAIMANT's financial ruin should not be considered when the Tribunal adapts the Price. CLAIMANT's financial ruin arises from the failure on the last transaction in 2014 and its careless investment on new stables. CLAIMANT's own management skills resulted in its serious debt [*PO2, ¶21, p.58*]. Therefore, RESPONDENT should not be responsible for CLAIMANT's business failure.

110 In the present case, the Tariff, which neither Party is responsible for, distorted the original equilibrium of performance. Therefore, to restore the equilibrium, the Parties should share the Tariff equally. RESPONDENT should only bear 15 per cent tariff, i.e. US$ 625,000.

III. The equal sharing would be the only resolution if the Parties had known the Tariff.

111 CLAIMANT also erred in asserting the presumption of the Parties' hypothetical intention. The hypothetical intention of the parties should be the primary reference, since the arbitral tribunal must balance the parties' interest and minimize the intervention when adapting the contract [*Brunner, Sec. 13, p.500*]. CLAIMANT argues that RESPONDENT would have agreed a higher price if the Parties had known about the Tariff at the time of contracting [*CL. Memo, ¶76, p.25*]. However, this argument contradicts RESPONDENT's statement during the negotiation process of the transaction. RESPONDENT rejected CLAIMANT's original requests of US$ 99,500 per dose for the semen and an additional US$ 1,000 for DDP delivery [*PO2, ¶8, p.56*]. This fact shows that RESPONDENT would not accept a price higher than US$ 100,500 per dose, while adding 25 per cent tariff would be US$ 125,000 per dose.

112 Although CLAIMANT alleges that RESPONDENT needs the semen of Nijinsky III [*CL. Memo, ¶76, p.25*], CLAIMANT also wants to close the deal because CLAIMANT needs lots of cash more eagerly to service its debts [*PO2, ¶21, p.58*]. Since the Parties want to close the deal and the Tariff had been known at the time of the conclusion of the FSSA, RESPONDENT would only agree to share equally, i.e. 15 per cent tariff.

113 To conclude, in any event, if the Tribunal determines to adapt the FSSA and make RESPONDENT share the Tariff, the adaptation should only be applied to the extent that restores the equilibrium of the performance. Namely, RESPONDENT should only bear 15 per cent tariff, i.e. US$ 625,000, and CLAIMANT is not entitled to the payment of US$ 1,250,000 resulting from an adaptation of the price.

CONCLUSION OF THE THIRD ISSUE

114 Under the Hardship Clause, CLAIMANT is not entitled to seek for adaptation since the legal consequence is not included in the Hardship Clause and the present case does not fulfilled the requirements under the Hardship Clause. In any event, CLAIMANT is not allowed to seek for adaptation since Art. 79 CISG does not include hardship nor have the legal effect of adaptation. In any event, even if the Tribunal were to adapt, RESPONDENT should only bear US$ 625,000 instead of US$ 1,250,000 as CLAIMANT alleges.

PRAYER FOR RELIEF

Counsel of RESPONDENT respectfully requests this Tribunal to declare that:

The Arbitration Agreement governed by the law of Danubia does not empower the Tribunal to adapt the FSSA **[Issue 1]**.
CLAIMANT is not entitled to submit the Evidence because the ways CLAIMANT obtained the Evidence violate the rules for the admission of evidence **[Issue 2]**.
Under the Hardship Clause or Art. 79 CISG, CLAIMANT is not adaptation of the Price. Alternatively, even if the Tribunal were to adapt, RESPONDENT should only bear US$ 625,000. **[Issue 3]**.

We hereby confirm that this Memorandum was written only by the persons who signed below. We also confirm that we did not receive any assistance during the writing process from any person who is not a member of this team.

COUNSEL

Shih-Hui, Wang	Ai-Hsiang, Chang	Yu-Syuan, Chen
Chien-Yu, Lung	Zu-Yin, Ye	Yu-Wen, Lee