Twenty Sixth Annual

Willem C. Vis International Commercial Arbitration Moot

13 April – 18 April 2019

Vienna Austria

MEMORANDUM FOR RESPONDENT

ON BEHALF OF:	**AGAINST:**
Black Beauty Equestrian	Phar Lap Allevamento
2 Seabiscuit Drive	Rue Frankel 1
Oceanside	Capital City
Equatoriana	Mediterraneo
(**RESPONDENT**)	(**CLAIMANT**)

Stefan Danojević • Elena Fridau • Luka Kreitner

Hana Šrot • Petra Zupančič

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TABLE OF ABBREVIATIONS

§/§§	paragraph/paragraphs
Art./Arts.	article/articles
CEO	Chief Executive Officer
CISG	United Nations Convention on Contracts for the International Sale of Goods
DAL	Danubian Arbitration Law
e.g.	exempli gratia (for example)
Ex. C	CLAIMANT's Exhibit
Ex. R	RESPONDENT'S Exhibit
fn.	footnote
FSSA	Frozen Semen Sales Agreement
HKIAC	Hong Kong International Arbitration Centre
ibid.	ibidem (in the same place)
ICC	International Chamber of Commerce
i.e.	id est (that is)
infra	bellow
MfC	Memorandum for CLAIMANT
Model Law	UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006
Mr	Mister

no.	number
PO1	Procedural order No. 1
PO2	Procedural order No. 2
p. /pp.	page/pages
supra	above
Tribunal	Arbitral Tribunal
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2010
USD	United States dollar
v.	versus

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STATEMENT OF FACTS

1 The parties to this arbitration are Phar Lap Allevamento (hereinafter: **CLAIMANT**) and Black Beauty Equestrian (hereinafter: **RESPONDENT**), collectively "**Parties**". CLAIMANT is a company located in Mediterraneo, which is engaged in offering training and professional development courses on horse care, breeding and riding. RESPONDENT is a renowned mare breeder in Equatoriana, which established racehorse stable three years ago.

2 On **21 March 2017** RESPONDENT sent an email to CLAIMANT, with the request to buy 100 doses of frozen semen from CLAIMANT's most successful racehorse "Nijinsky III". At that time, the Equatorianian Government had imposed restrictions on the transportation of all living animals due to severe problems with foot and mouth disease. On **24 March 2017** CLAIMANT agreed to supply requested 100 doses of Nijinsky III frozen semen in several instalments to RESPONDENT.

3 On **12 April 2017** the main negotiators of Parties, Mrs. Julie Napravnik and Mr. Chis Antley, were severely injured in a car crash. Consequently, new lawyers Mr. Julian Krone and Mr. John Ferguson were appointed in finalizing and signing the Frozen Semen Sales Agreement (hereinafter: **FSSA**). On **6 May 2017** FSSA has been signed.

4 In **November 2017** newly, elected President of Mediterraneo announced 25 % tariffs on all agricultural products. Equatoriana's government shortly after, increased the tariffs to 30 % on all agriculture goods from Mediterraneo. Before the third and the last shipment of Nijinsky III frozen semen, CLAIMANT contacted RESPONDENT regarding the tariffs increase. Delivery of the last 50 doses of Nijinsky III frozen semen was made on **23 January 2018.**

5 On **12 February 2018** CLAIMANT contacted RESPONDENT's CEO, Ms. Espinoza. Due to the CLAIMANT's constant additional requests regarding the FSSA, Ms. Espinoza decided RESPONDENT is no longer interested in a further cooperation with CLAIMANT and decided to terminate the FSSA.

6 CLAIMANT initiated arbitration proceedings by sending Notice of Arbitration on **31 July 2018. On 2 October 2018** CLAIMANT had informed the Tribunal with the fact that the RESPONDENT is in another arbitration under HKIAC rules, which RESPONDENT had with one of its customers concerning the sale of a promising mare in Mediterraneo.

SUMMARY OF ARGUMENTS

7 The Tribunal lacks jurisdiction to adapt the FSSA under the law of Danubia, since the law governing the arbitration agreement and its interpretation is the law of Danubia i.e. the law of the seat of arbitration. Further, the arbitration agreement does not contain a choice of law in favor of the law of Mediterraneo, since RESPONDENT's intention was not that the law of Mediterraneo governs the arbitration agreement. Furthermore, the separability doctrine is applicable and the law of Danubia governs the arbitration agreement, because the arbitration agreement and the FSSA are treated separately. Moreover, the interpretation of arbitration agreement should not exceed Parties' intent. Finally, the law of Danubia does not allow for adaptation of the FSSA and the Tribunal lacks the power to adapt the FSSA (**ISSUE I**).

8 The evidence from the other arbitration proceeding that CLAIMANT is attempting to submit should be declared inadmissible by the Tribunal. The evidence was obtained by illegal means, which should preclude its admittance. In any case, the criteria for the admissibility is not met since the evidence is not relevant for the present case and it is not material to its outcome. Therefore, under the HKIAC Arbitration Rules, the applicable arbitration law as well as the international practice, the evidence should be deemed inadmissible (**ISSUE II**).

9 CLAIMANT is not entitled to payment of 1.250.000,00 USD for several reasons. Firstly, hardship prerequisites determined in clause 12 of FSSA are not fulfilled, as additional tariffs cannot be considered as comparable unforeseen event. Secondly, the tariff increase does not constitute as an impediment that CLAIMANT could not overcome and therefore, the exemption under Art. 79 of the CISG is groundless. Thirdly, if the Tribunal finds that CISG does not contain special provisions on hardship, CLAIMANT'S demand for payment under the UNIDROIT Principles is nevertheless unjustified (**ISSUE III**).

ISSUE I: THE TRIBUNAL LACKS JURISDICTION TO ADAPT THE FSSA

10 The Parties have agreed on the terms and conditions of the sale of 100 doses of Nijinsky's III frozen semen in the Frozen Semen Sales Agreement on 6 May 2017 (hereinafter: FSSA) [*Ex. C5, p. 14*]. The arbitration agreement contained therein provides for arbitration under the HKIAC Administered Arbitration Rules (hereinafter: HKIAC Rules) with the seat of arbitration in Vindobona, Danubia. In the FSSA, the Parties have not successfully included a choice of law governing the arbitration agreement and narrowed down the wording of the hardship reference in the force majeure clause [*Ex. C8, p. 17; Ex. R3, p. 35*]. Although the main negotiators discussed the need for adaptation of the FSSA and including an express choice of law for the arbitration agreement, the FSSA was signed by the Parties without these amendments due to the circumstances of the case [*Ex. C7, p. 16; Ex. C8, p. 17; Ex. R3, p. 35*]. On the other hand, the Parties have agreed on the law governing the FSSA, which is the law of Mediterraneo in Art. 14 of the FSSA [*Ex. C5, p. 14, §14*].

11 Contrary to CLAIMANT'S allegations, the law of Danubia governs the arbitration agreement and its interpretation as the law of the seat of arbitration (**A**). Furthermore, the arbitration agreement must be interpreted narrowly, meaning that the arbitration agreement is limited to its wording (**B**). Consequently, the Tribunal lacks the power to adapt the FSSA under the law of Danubia and even if the law of Mediterraneo was applicable, the Tribunal still lacks the power to adapt the FSSA (**C**).

A. The law governing the arbitration agreement and its interpretation is the law of Danubia

12 The law governing the arbitration agreement is the law of the seat of arbitration, which is the law of Danubia (**1**). CLAIMANT itself suggested the seat of arbitration to be Danubia, as a neutral place, which was acceptable for RESPONDENT [*Ex. R2, p. 34, §1; AtNoA, p. 30, §7*]. The fact that the law of Mediterraneo governs the FSSA does not automatically extend to the arbitration agreement. Accordingly, RESPONDENT will demonstrate, that in the absence of an express choice of law contained in the arbitration agreement, the law governing the arbitration agreement is the law of Danubia due to the application of the doctrine of separability (**2**).

1. The arbitration agreement and its interpretation are governed by the law of the seat of arbitration

13 In its written submission, CLAIMANT is expanding the law governing the FSSA to the arbitration agreement, stating that in the absence of an explicit choice of law governing the arbitration agreement, such agreement is governed by the law chosen by the Parties for the substantive contract, i.e. the law of Mediterraneo [*MfC, p. 11, §6*]. To the contrary, RESPONDENT will demonstrate, that the arbitration agreement does not contain a choice of law (**a**), specifically, in favour of the law of Mediterraneo. Consequently, the law of the seat of arbitration governs the arbitration agreement (**b**).

a) The arbitration agreement does not contain a choice of law in favour of the law of Mediterraneo

14 Party autonomy provides contracting parties with a mechanism of avoiding the application of an unfavourable or inappropriate law to an international dispute [*Lew/Mistelis/Kröll, p. 413, §17-8*]. In the written submission, CLAIMANT stated that there is a strong presumption that the Parties implicitly intended to submit the arbitration agreement to the same law as the FSSA, i.e. the law of Mediterraneo [*MfC, p. 12, §9*]. However, there is no indication that RESPONDENT has ever, explicitly or implicitly, expressed any preference for the law of Mediterraneo to govern the arbitration agreement.

15 Moreover, in the very first draft of the arbitration agreement, RESPONDENT wanted the law of Equatoriana to govern the arbitration agreement, considering that the law of Mediterraneo already governs the FSSA [*Ex. R1, p. 33, §1*]. Furthermore, RESPONDENT even intended to include an express reference to the law of Danubia into the arbitration agreement, but due to the accident of the main negotiators, such provision was never included in the FSSA [*Ex. R3, p. 35, §2*]. Therefore, there was no express agreement between the Parties regarding the law of Mediterraneo as the law governing the arbitration agreement. Additionally, even if there was any implied choice of law governing the arbitration agreement, it would be the law of Danubia.

16 The first presumption in assessing the applicable law is party autonomy—that is, parties are free to have their disputes governed by the law they desire according to the principle of party autonomy [*Rampall/Feehily, p. 382*]. This freedom to choose the governing law is a

logical extension of party autonomy to agree to submit to a favourable method of dispute resolution [*Shackelford, p. 902*]. However, if the tribunal fails to respect the will of the parties by exceeding the mandate entrusted to it, these benefits are lost as the jurisdiction exercised may be outside the scope of what the parties bargained for and would voluntarily have chosen. Thus, in order to uphold the role that arbitration serves in the international commercial realm, arbitration tribunals must determine the parties' intent and act within that scope [*Lew/Mistelis/Kröll, pp. 411- 412*].

17 The Tribunal is requested to find that a determination that the law of Mediterraneo governs the arbitration agreement is not in line with the principle of party autonomy. Therefore, the Tribunal must take into consideration the circumstances of the case and determine that the law of Mediterraneo is not considered a choice as the law governing the arbitration agreement.

b) The law of the seat of arbitration governs the arbitration agreement

18 The Parties have not expressly chosen the law governing the arbitration agreement. CLAIMANT argues that the law governing the arbitration agreement is the law of Mediterraneo, since it governs the FSSA [*MfC, p. 11, §6*]. On the contrary, RESPONDENT contends that in the absence of an express choice as to the law governing the arbitration agreement, the law of the seat of arbitration is an implied choice and more connected to the arbitration agreement as the law of the FSSA.

19 The parties' choice may be express or tacit [*Fouchard, p. 787, §1427; Lew/Mistelis/Kröll, p. 415, §17-13; Frick, p. 99; Redfern/Hunter, p. 120, §2-76*]. A tacit or implied choice is considered as good as an express choice and relevant in circumstances where the parties' intention is clear but appears through means other than a choice-of-law clause, such as in the conduct of the parties or circumstances of the case [*Bouwers, p. 172*]. In the present case, the arbitration agreement in Art. 15 of the FSSA does not contain an express choice of law governing the arbitration agreement, meaning that the existence of a tacit or implied choice of law must be put to scrutiny. Furthermore, the circumstances of the case at hand must be examined to determine the law governing the arbitration agreement. To the contrary, CLAIMANT is wrongfully presuming that since the contracting Parties expressly chose the applicable law to the main contract there is a strong presumption that they intended to

submit the arbitration agreement to the same law chosen for the main contract [*MfC, p. 11, §8*].

20 The law of the underlying contract is not sufficient to overturn the law of the seat of arbitration. It requires an express choice of law to be made in relation to the arbitration agreement, not merely in the relation to the whole contract [*Bulgarian Bank v. Al Trade*], since an agreement to arbitrate is usually more closely connected with the country of the seat of the arbitration than any other country [*Dicey/Morris, p. 598; ICC Case No. 6162; Bulgarian Bank v. Al Trade; XL Insurance v. Owens Corning; Matermaco v PPM; Black Clawson v. Papierwerke*]. CLAIMANT is presuming that the law of Mediterraneo expands to the arbitration agreement, disregarding the close connection between the seat of the arbitration agreement and the law of the seat of arbitration, which is widely accepted.

21 Secondly, the UNCITRAL Model Law (hereinafter: Model Law) in Art. 34(2)(a) and similarly the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: New York Convention) in Art. V. 1(a) point out to the same conclusion. In the provisions relating to the enforcement, the New York Convention stipulates that the agreement under which the award is made must be valid "*under the law the parties have subjected it*" or failing any indication thereon "*under the law of the country where the award was made",* which would be the law of the seat of arbitration i.e. the law of Danubia. Similarly, arbitrators and courts strive (both expressly and otherwise) to apply a law that will give effect to the parties' international arbitration agreement [*Born II, p. 254*]. Consequently, under the law of Mediterraneo, the award would be invalid, because it is not the law the parties have subjected to it. Therefore, the law of the seat of arbitration, i.e. the law of Danubia, must be the law governing the arbitration agreement due to the validation principle.

22 Thirdly, CLAIMANT alleges that an implicit choice of law by the Parties never occurred and that the Tribunal shall apply the closest connection test [*MfC, p. 12, §11*]. As to the legal system with which the arbitration agreement has its closest and most real connection in the absence of an express or implied choice of law, there are only two real possibilities that emerge. The arbitration may have the closest connection to either the law of the main contract (despite the two being separable) or to the law of the seat of the arbitration.

23 Although in cases where the matrix contract contains an express choice of law that can be an indication in relation to the parties' intention as to the governing law of the agreement to arbitrate, this is only true where there no indication to the contrary [*Flannery, pp. 5-10*]. In the present case, there is indeed an indication to the contrary. As stated before, it would not be in line with the principle of party autonomy to determine that the implied choice of law is the law of Mediterraneo. RESPONDENT not only never made any implication that the law of the main contract should govern the arbitration agreement, it even persistently rejected such a possibility, since it did not deem it appropriate in light of the fact that the FSSA is already governed by the law of Mediterraneo [*Ex. R1, p. 33, §1*].

24 Further, CLAIMANT incorrectly concludes that as a consequence of the closest connection test, the law of Mediterraneo is the law with which the arbitration agreement has the closest connection and therefore it should be deemed the applicable law [*MfC, p. 13, §13*]. To the contrary and especially when the parties' will is unclear, the arbitral seat can be said to have the most significant relationship with the parties' arbitration clause [*Born II, p. 253; Tokyo case*]. Even if the Tribunal should apply the closest connection test, it would be the law of Danubia that would govern the arbitration agreement, because the arbitration is seated in Vindobona, Danubia. Where there are sufficient factors pointing the other way to negate the implied choice derived from the express choice of law in the matrix contract, the arbitration agreement will be governed by the law with which it has the closest and most real connection. That is likely to be the law of the country of seat, being the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective [*Flannery, p. 9; Dutch shipbuilder v. Swedish buyer; Shashoua & Ors v Sharma; Abuja v. Meridien*].

25 In conclusion, the law of the seat of arbitration must be deemed more appropriate in the light of the circumstances of the case. The Tribunal is requested to find that the law of Danubia, as the law of the seat of arbitration, is more appropriate on the basis of both, an implied choice criterion and the closest connection test.

2. The separability doctrine is applicable and the law of Danubia governs the arbitration agreement

26 In the written submission, CLAIMANT stated that as a consequence of the doctrine of separability, the same law may govern both the arbitration agreement and the FSSA [*MfC,*

p. 13, §17]. CLAIMANT correctly concludes that that the arbitration agreement may be considered as a legally separate agreement from the contract it is contained in. However, CLAIMANT draws the wrong conclusion that the Parties chose to submit the arbitration agreement to the law of Mediterraneo [*MfC, p. 14, §19*]. RESPONDENT shall establish that the FSSA and the arbitration clause are separate agreements and consequently subjected to different laws.

27 Firstly, an arbitration clause and the underlying contract are generally considered separable contracts under a widely accepted legal theory known as the separability doctrine. Therefore, different laws may apply to the contract and the agreement to arbitrate [*Cheskin/Hertell, §9; Lew/Mistelis/Kröll, p. 102, §6-9; Lookofsky II, p. 566*]. In the case at hand, the Parties opted for arbitration under the HKIAC Rules [*Ex. C5, p. 14, §15*], which acknowledges the doctrine of separability in Art 19.2. Consequently, where the parties have referred to arbitration rules which states the doctrine of separability of the arbitration agreement, those parties are presumed to have intended that the arbitration agreement be treated separately from the main contract [*Sklenyte, p. 35*].

28 Secondly, separability protects the integrity of the agreement to arbitrate and plays an important role in ensuring that the parties' intention to submit disputes is not easily defeated. In this way it also protects the jurisdiction of the arbitration tribunal [*Lew/Mistelis/Kröll, p. 102, §6-10*]. Moreover, the whole point of "separability" is to direct attention to the parties' intention in forming a "separate" contract [*Born p. 353*]. In the case at hand, it was RESPONDENT's intention to separate the FSSA and the arbitration agreement in the matter of the law applicable to the arbitration agreement. This was made clear when RESPONDENT argued for the application of different law governing the arbitration agreement in the light of the fact that the FSSA is governed by the law of Mediterraneo [*Ex. R1, p. 33, §1*].

29 Moreover, it is the parties' intentions – either express or implied – that provide the foundation for the separability of their arbitration agreement [*Born, p. 353*]. There are legislative recognitions of the separability presumption, e. g. in Art. II and V(1)(a) of the New York Convention, as well as Art. 7 and 16 of the Model Law. These provisions reflect and implement – and do not override – the parties' intention. In the written submission, CLAIMANT concludes that, as a consequence of the doctrine of separability, the same law may govern both the arbitration agreement and the underlying contract [*MfC, p. 17, §17*].

On the contrary, RESPONDENT established that the base of the separability presumption is the Parties' intention. Further, RESPONDENT'S intention, contrary to CLAIMANT statements, was not, that the law of Mediterraneo governs both the FSSA and the arbitration agreement.

30 Fourthly, in theory, because the arbitration agreement is separate from the underlying agreement, a law different from that applied to adjudicating the merits of the dispute may resolve issues regarding the arbitration agreement's interpretation, scope, validity, and enforceability [*Engle, p. 331*]. Since the law of Mediterraneo govern the FSSA, the law of Danubia governs the arbitration agreement [*see supra A.*], as a consequence of the separability presumption.

31 To conclude, the separability presumption is applicable in the case at hand. Therefore, the FSSA and the arbitration agreement are deemed separable. As a consequence, the law governing the arbitration agreement, in absence of an express choice of law, is the law of Danubia.

B. The interpretation of arbitration agreement should not exceed Parties' intent

32 When interpreting the arbitration agreement, the Tribunal should pay respect to Parties' intent. Primarily, the Tribunal should seek the express intent trough the wording of the agreement itself. Only if the express intent cannot be construed the Tribunal should analyse implicit intent of the Parties. In interpreting the arbitration clause, the Tribunal should be cautious so as not to exceed the scope of the agreement between the Parties.

33 Firstly, the law governing the arbitration agreement is the law of Danubia [*see supra A.*]. Contract law of Danubia contains four corners rule in regard to the interpretation of the contract [*PO2, p. 61, §45*]. Four corners rule provides that document in question shall be interpreted in accordance with written text [*Rowley, pp. 88-89*]. What is more, when four corners rule is applied, arbitration agreement shall be interpreted narrowly [*PO1, p. 52*]. Therefore, the Tribunal should adhere to the only relevant law, law of Danubia, and consequently find that it does not have jurisdiction or power to adapt the contract since such authorisation is not found in the arbitration agreement.

34 Secondly, even in case the agreement is interpreted under the CISG, the Tribunal should not interpret the arbitration agreement broadly. In its written submission, CLAIMANT

argues that the Tribunal should apply the "principle of *favor negotii"* [*MfC, p. 15*]. Said principle means that a contract shall be interpreted in a manner that it stays in effect [*Schwenzer Commentary Art. 8, §20*]. In the present case, concluding that the Parties have decided to limit tribunal's power in regard to the adaption of the contract would not render the arbitration agreement invalid but merely restrict the scope of its application. Thus, CLAIMANT erroneously concludes that application of *favor negotii* principle means that any and every dispute between the parties must be resolved before an arbitral tribunal.

35 Further, CLAIMANT states that a reasonable person would understand the arbitration agreement in a way to provide the Tribunal with the power to adapt the contract [*MfC, p. 15*]. However, CLAIMANT'S assumption is incorrect. Parties have never included any wording as to empower any tribunal to adapt the contract [*Ex. C5, p. 14*]. What is more, while accusing RESPONDENT of making "far-fetched" allegations [*MfC, p. 15*], CLAIMANT states that Ms. Napravnik and Mr. Antley have agreed that the Tribunal should be able to adapt the contract [*MfC, p. 16*]. However, Mr. Antley never agreed to such a solution and merely stated that in his own personal view the adaptation "*should probably be the task of the arbitrators*" [*Ex. C8, p. 17*]. Further, Mr. Antley promised that he would make a proposition on the matter and not what the content of such proposition would be [*ibid.*]. Therefore, no conclusions can be drawn in regard to the adaptation in the manner that CLAIMANT is proposing. Accordingly, the Tribunal should find that parties made no agreement, explicit or implicit, that would empower the Tribunal to adapt the contract.

36 In conclusion, the Tribunal should carefully examine all the circumstances in order not to exceed the scope of Parties' agreement. As Parties have never agreed that the Tribunal should have the power to adapt the contract, the Tribunal should declare CLAIMANT's claims as inadmissible.

C. The law of Danubia does not allow for adaptation of the FSSA and the Tribunal lacks the power to adapt the FSSA

37 RESPONDENT will establish that the *lex arbitri,* i.e. the law of the seat of the arbitration, does not allow the adaptation of the FSSA. Further, CISG does not contain provisions on hardship. Furthermore, CLAIMANT's request for adaptation under the UNIDROIT Principles on International Commercial Contracts (hereinafter: UNIDROIT Principles) is groundless since the requirements of the hardship test are not met. Therefore, CLAIMANT

is not entitled to the amount requested according to the law of the seat of arbitration, i.e. the law of Danubia.

38 Firstly, CLAIMANT argues that under the law of Mediterraneo the Tribunal can adapt the FSSA and that CLAIMANT is entitled to the amount requested under the law of Mediterraneo [*MfC, p. 37, §117*]. Where the applicable substantive law allows for the adaptation of a contract under the hardship concept (doctrine of changed circumstances), it may still be arguable whether an arbitral tribunal has the procedural power, i.e. the jurisdiction, to adapt a contract even when the substantive law requirements of the hardship test are met [*Brunner, p. 493; Berger, p. 10; Frick, p. 190*]. It is generally accepted that an arbitral tribunal has the power to change the terms of the contract if the arbitration agreement contains an express authorization [*Redfern/Hunter, §8-10*]. The Tribunal cannot substitute itself for the parties in order to make good a missing segment of their contractual relations -or to modify a contract- unless that right is conferred upon it by law or by the express consent of the parties [*Kuwait v. AMINOIL*]. In the case at hand, the arbitration agreement does not contain such an express authorization for the Tribunal to adapt the FSSA. The issue of the arbitral tribunal's jurisdiction to amend the contract in light of the changed circumstances must then be assessed under the law governing the arbitration at the seat of the arbitral tribunal (*lex arbitri*) [*Brunner, p. 493*].

39 Secondly, in the case at hand, the *lex arbitri* is the law of Danubia as the law of the seat of arbitration. Danubian Contract Law for international contracts is a largely verbatim adoption of the UNIDROIT Principles with the relevant exceptions. One of the important exceptions is that Article 6.2.3 (4)(b) UNIDROIT Principles is worded differently, granting the power to adapt the contract to the court only if authorized [*PO2, p. 61, §45*]. Further, the Danubian Arbitration Law – identical to Art. 28 (3) UNCITRAL Model Law – contains a general standard to be applied to the conferral of exceptional powers to the arbitral tribunal. Thus, while parties may authorize arbitral tribunals to adapt contracts, an express conferral of powers is required [*PO2, p. 60, §36*]. In this case, neither the arbitration agreement nor the *lex arbitri* contain an express authorization for the Tribunal to adapt the FSSA. If the *lex arbitri* does not allow an arbitral tribunal to adapt a contract, any power to do so under the applicable substantive law becomes moot. An award providing for adaptation, rendered by an arbitral tribunal that lacks jurisdiction to do so, could be

challenged and set aside under the *lex arbitri* and may not be enforceable under the NY Convention [*Berger, p. 10; 34(2)(iii) of the Model Law; Art. V(I)(c) of the NY Convention*].

40 Thirdly, CLAIMANT is not entitled to the amount requested, which would supposedly result from an adaptation of the FSSA under the hardship clause. Further, hardship is implicitly excluded from the scope of application of Art. 79 of the CISG [*see infra §§ 90-94*]. Furthermore, CLAIMANT's request for payment pursuant to Article 6.2.2 of the UNIDROIT Principles is groundless [*see infra §§ 107-114*]. If neither the arbitration law, the procedural law nor the substantive law of the seat of the arbitration provide any basis for contract adaptation or supplementation by arbitrators, the arbitrators are acting as third-party interveners, irrespective of the fact that the parties wanted to have an "arbitral tribunal" decide the case [*Berger, p. 11*]. The Tribunal is requested to find, that it lacks jurisdiction and the power to adapt the FSSA under the law of the seat of arbitration. Therefore, CLAIMANT is not entitled to the amount requested that would result from the adaptation of the FSSA.

41 To conclude, the Tribunal is requested to find that the adaptation of the FSSA is not possible under the law of Danubia as the law of the seat of arbitration. Even if the law of Mediterraneo would allow for the adaptation of the FSSA, the *lex arbitri,* i.e. the law of Danubia, does not empower the Tribunal to adapt the FSSA.

CONCLUSION ON ISSUE I

42 The arbitration agreement and its interpretation are governed by the law of Danubia under which the Tribunal does not have the jurisdiction to adapt the FSSA. Further, the arbitration agreement does not contain an express choice of law in favour of the law of Mediterraneo. Additionally, RESPONDENT's intention was not that the law of Mediterraneo governs both, the arbitration agreement and the FSSA. The law of Danubia governs the arbitration agreement because the arbitration agreement and the FSSA are treated separately due to the effects of the separability presumption. Moreover, the interpretation of arbitration agreement should not exceed Parties' intent. Finally, the law of Danubia does not allow for adaptation of the FSSA and the Tribunal lacks the power to adapt the FSSA.

ISSUE II: CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDING

43 CLAIMANT seeks to present the arbitral award from the arbitral proceedings RESPONDENT was previously involved in as evidence in these proceedings [*Letter Langweiler, p. 50; MfC, p. 22*]. However, it is unclear exactly what CLAIMANT desires to prove with the aforementioned award even if the Tribunal were to admit it as evidence. Further, the proposed evidence was neither legally obtained nor does it prove relevant or material to the case at hand.

44 RESPONDENT shall demonstrate that the evidence proposed by CLAIMANT should be deemed inadmissible. Firstly, the evidence should not be admissible due to illegal means of procurement (**A**). Secondly, the criteria for admissibility of evidence is not met (**B**). Thirdly, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (hereinafter: UNCITRAL Rules on Transparency) are irrelevant to the case at hand (**C**).

A. The Tribunal should declare CLAIMANT's evidence as inadmissible since it was procured illegally

45 In its written submission, CLAIMANT discusses at length that it cannot be subjected to confidentiality requirements under the HKIAC Rules [*MfC, pp. 21-22*]. Although CLAIMANT's position in this regard is correct and in fact undisputed, it is irrelevant to the present case. The fact remains that evidence was acquired illegally, either by means of breach of confidentiality by one of the parties in the other arbitral proceeding or due to an illegal hack. What is more, CLAIMANT is willing to purchase the evidence in bad faith as it is aware or ought to be aware of the illegal means of the procurement of the evidence [*PO2, pp. 60-61, §41*].

46 Firstly, it is worth noting that obtaining evidence illegally results in the inadmissibility of such evidence [*Waincymer, pp. 816-817; Valcke, §1*]. This fact is not disputed by CLAIMANT but rather confirmed [*MfC, p. 23*]. When presented with the issue of illegally obtained evidence tribunal should weigh between the good faith of the person who is offering the evidence and other party's right to privacy and secrecy [*Reisman/Freedman, p. 738*]. Therefore, the Tribunal should primarily asses the boundaries to which CLAIMANT's good faith extends. Furthermore, even in the unlikely event that it deems that evidence was

procured in good faith, the Tribunal must further balance its findings to RESPONDENT's right to privacy.

47 CLAIMANT has not yet acquired the other award [*PO2, pp. 60-61, §41*] and at this point CLAIMANT must be aware that its source came into the possession of the evidence illegally. Therefore, any subsequent acquisition of the award would undoubtably constitute bad faith on CLAIMANT's part. As CLAIMANT cannot be acting in good faith in regard to procurement of evidence, the very first condition for admissibility of illegally obtained evidence is not fulfilled, rendering CLAIMANT's proposition *prima facie* unacceptable.

48 Furthermore, even when plaintiff is not acting in bad faith in relation to evidence procurement, impact on defendant's privacy should still be taken into the account [*Reisman/Freedman, p. 738; Libananco Holdings case*]. Provided that the evidence in question relates to the arbitral proceedings where RESPONDENT was one of the parties, the sensitivity of information is undisputable. This is further supported by the fact that parties to that case were bound by confidentiality agreements. Therefore, the importance of privacy is evident [*PO2, p. 60, §40*]. The Tribunal should respect RESPONDENT's right to privacy and thus deny CLAIMANT's request to present the evidence stemming from the other arbitral proceeding in which RESPONDENT was involved.

49 Secondly, while certain recent decisions [*Bible case; ConocoPhillips case; RosInvestCo case*] allowed for evidence obtained by way of illegal hacking to be assessed in arbitral proceedings, a clear line must be drawn between those proceedings and the case at hand. The former cases involved information permitted to be used as evidence by tribunals, that has been illegally hacked and published on WikiLeaks and similar websites and thus readily available for anyone and everyone to access at any point in time [*Bible case; RosInvestCo case*]. However, this marks the key difference from the case at hand. Evidence CLAIMANT seeks to present is not available to everyone. It was only offered to CLAIMANT upon the payment of 1,000 USD. Therefore, the Tribunal should take different approach and respect RESPONDENT's privacy since it has not yet been breached. As many arbitral tribunals have observed, respecting a party's right to privacy is of utmost importance and prevails over the interests of the party wishing to submit illegally obtained evidence. Thereby, making illegally obtained evidence inadmissible [*Methanex case; Libananco Holdings case; Caratube International Oil case*].

50 In conclusion, the evidence CLAIMANT is proposing to be assessed by the Tribunal has been obtained illegally. As CLAIMANT cannot obtain it in good faith and since presenting said evidence would constitute a breach of RESPONDENT's privacy, the Tribunal should deem the evidence inadmissible.

B. The evidence should not be admitted under the Art. 22.2 of the HKIAC Rules

51 Irrespective of the manner in which CLAIMANT has procured the evidence, production of any evidence must fulfil the criteria under the Art. 22.2 of the HKIAC Rules. CLAIMANT acknowledges this fact in its memorandum and correctly states that evidence must be relevant and material to the case [*MfC, pp. 23-24*]. However, CLAIMANT's assessment of the relevance and materiality of proposed evidence is inaccurate.

52 In order to establish that CLAIMANT's proposition is inadmissible, RESPONDENT will demonstrate that evidence in question is not relevant to the present case (**1**). Further, evidence is not material to the outcome of the case (**2**).

1. The evidence is not relevant

53 In order for evidence to be admissible it must be relevant to the case [*HKIAC Rules, Art. 22.2*]. Party that is requesting the tribunal to accept any type of evidence must establish its relevance to the case. Otherwise the tribunal should dismiss the request as inadmissible [*Sussman, p. 15*].

54 To begin with, it is important to specify the meaning of relevance in regard to production of evidence. When the tribunal is assessing whether or not evidence is relevant it must determine if it supports claims of the party that is proposing the evidence [*Raeschke-Kessler, Art. 9s.2(a)*]. Specifically, the tribunal should ascertain does the evidence aid the requesting party in demonstrating the credibility of the stated facts [*Moser/Bao, Art. 22; O'Malley, §§3.69-3.73*]. Thus, it is Tribunal's task to determine if CLAIMANT's evidence has any tendency to make any consequential fact more probable.

55 It must be stressed, that CLAIMANT fails to specify what factual allegations would be supported the proposed evidence. CLAIMANT merely states the supposed similarities between the case at hand and the other case [*MfC, pp. 23-24*]. Further, CLAIMANT does not provide an adequate, or for that matter any, explanation as to what it intends to prove with

the introduction of the evidence in question. Although in CLAIMANT's opinion the award from the other proceeding would favour its position in present proceedings [*ibid.*], actual relevance to the facts of present case has not been established.

56 In conclusion, any presented evidence must be relevant, meaning that it must support the fact facts alleged by the party that is submitting such evidence. As CLAIMANT fails to establish the correlation between the evidence and its allegations, the Tribunal should declare CLAIMANT's evidence proposal as inadmissible.

2. The evidence is not material

57 Adjacent to relevance, in order for evidence to be admissible, it must be material to the outcome of the case as well [*HKIAC Rules, Art. 22.2*]. Contrary to CLAIMANT's allegations [*MfC, p. 25*], proposed evidence does not fulfil the materiality criterion. Thus, if CLAIMANT's evidence is to be admitted before the Tribunal it should be both relevant and material, however, it is neither.

58 At the outset, the distinction between relevance and materiality must be made when it comes international arbitration proceedings [*Pilkov, pp. 148-149*]. While relevance of the evidence is related to the facts of the case, materiality signifies the impact of the evidence on legal reasoning behind the final award [*Kubalczyk, p. 103; Pilkov, pp. 148-149*]. Further, evidence lacking relevance or materiality should be declared inadmissible [*Cooley, p. 94*]. Therefore, the Tribunal should assess whether or not CLAIMANT's evidence significantly contributes to the final decision.

59 CLAIMANT alleges that materiality of the evidence is established trough similarities between the two cases [*MfC, p. 25*]. Admittedly, certain factual parallels may be drawn between aforementioned cases. However, CLAIMANT fails to acknowledge two essential differences. First, parties to the other case have agreed to ICC Hardship Clause 2003 [*PO2, p. 60, §39*]. Consequently, making the circumstances crucially divergent, as the meaning of hardship in ICC Hardship Clause 2003 is exceedingly different from the one in the FSSA. Second, the other case has express provision regarding the law governing the arbitration agreement. Namely, in that case parties agreed for the arbitration agreement to be governed by law of Mediterraneo [*PO2, p. 60, §39*], whereas in present case arbitration agreement is governed by *lex arbitri*, being Danubian law. As both differences pertain to key aspects of the case,

CLAIMANT's assertion that cases are significantly similar are overreaching and flawed at the core.

60 To conclude, although Parties are free to submit evidence as they see fit, there are certain restrictions as to which evidence can be deemed admissible. The Tribunal must primarily observe the relevance and the materiality of presented evidence. Since in present case, CLAIMANT's evidence is neither relevant nor material, the Tribunal shall declare it inadmissible.

C. UNITRAL Rules on Transparency are irrelevant to the case at hand

61 CLAIMANT alleges that the production of proposed evidence should be allowed under the UNCITRAL Rules on Transparency [*Langweiler Letter, p. 50*] as well as under the general principles of transparency in international commercial arbitration [*MfC, p. 26, §75*]. CLAIMANT further refers to Art. 3.1 of the UNCITRAL Rules on Transparency [*ibid.*], while completely disregarding the fact that those rules were created to be used in treaty-based investment arbitrations [*Art. 1 of the Rules; IISD, p. 10; Shirlow, §3*]. Since the present case is not an investment arbitration nor were the UNCITRAL Rules on Transparency agreed upon by the Parties, the Tribunal should not apply them.

62 Firstly, CLAIMANT states that the evidence should be procured in accordance with a growing principle of transparency in the international arbitration practice and it cites three cases to support its claims [*MfC, p. 26, §76*]. However, the cases are misused and irrelevant since they dealt with either the admissibility of arbitration documents in the court proceedings by the same party [*Esso Australia case*] or with England's domestic arbitration law provisions on confidentiality [*Hassneh Insurance case; Ali Shipping case*]. Instead of CLAIMANT's makeshift principle of transparency, the Tribunal should rely on a principle that is one of the foundations of international commercial arbitration – the principle of confidentiality. Confidentiality is one of the main features of international commercial arbitration proceedings [*Moses, p. 34; Malatesta/Sali, p. 39; Kaushal, p. 6; Lew/Mistlis/Kröll, p. 8*]. Therefore, RESPONDENT should be able to rely on the confidentiality of the other arbitration and CLAIMANT should not be allowed to submit the documents which were obtained by illegal breach of that confidentiality.

63 Secondly, if CLAIMANT is so keen on using the international practice, the Tribunal should apply the IBA Rules on the Taking of Evidence in International Arbitration (hereinafter: IBA Rules). Admittedly, the Parties have not expressly agreed on their application. However, they have become the *de facto* set of guidelines used by tribunals when faced with questions on evidence production even when parties do not expressly include them in their arbitration agreement [*Scherer, p. 195; O'Naghten/Vielleville, p. 42; Lee, §8; IBA Rules Foreword, p. 3*]. Under the IBA Rules, the tribunal shall exclude evidence that is irrelevant or immaterial [*IBA Rules, Art. 9.2.(a)*] or obtained illegally and the aggrieved party has not issued a waiver [*IBA Rules Art. 9.2.(b) and Art. 3; Ortiz, §7*]. In the present case, the proposed evidence is neither relevant or material [*see supra B.*] and RESPONDENT has not issued a waiver for its admittance. Therefore, the Tribunal should not allow the production of such evidence.

64 In conclusion, the UNCITRAL Rules on Transparency are not applicable in this arbitration and the Tribunal should recognise that principle of confidentiality takes primacy over transparency in international commercial arbitration. Therefore, RESPONDENT's right to confidential proceedings should be respected and consequently, CLAIMANT's request for submission of additional evidence denied.

CONCLUSION ON ISSUE II

65 The Tribunal should not allow CLAIMANT to submit evidence from the other arbitration proceedings that RESPONDENT is involved in. The Tribunal should deem it inadmissible since it was procured illegally by either an email hack or a breach of contractual and statutory confidentiality. In any case, the evidence should not be admitted as it is neither relevant to the present case nor material to its outcome. Therefore, the evidence is inadmissible, which is also in line with the relevant international practice, namely the IBA Rules.

III. CLAIMANT IS NOT ENTITLED TO PAYMENT OF 1.250.000,00 USD

66 On 6 May 2017, Parties concluded the FSSA, where they agreed on the delivery of 100 doses of frozen semen from the stallion Nijinsky III in several instalments in exchange for a price of 100.000 USD per dose [*Ex. C5, p. 13*]. Before the conclusion of the FSSA, RESPONDENT specifically requested for a DDP delivery, due to the CLAIMANT'S much greater expertise in the shipment of frozen semen and necessary export and import documentation [*Ex. C3, p. 11*]. Since CLAIMANT agreed with the preposition and even increased the price of frozen semen, RESPONDENT reasonably assumed that CLAIMANT calculated all the risks and costs associated with the delivery terms.

67 First delivery of 25 doses of frozen semen was sent on 20 May 2017 and the second shipment of 25 doses was sent on 3 October 2017 [*NoA, p. 6, §9*]. Problems arose during CLAIMANT's last shipment of frozen semen, which was supposed to be sent on 23 January 2018 [*Ex. C7, p. 16*]. Equatoriana's government increased the tariffs on all agricultural goods from Mediterraneo by 30 % [*NoA, p. 6, §9, Ex. C6, p. 15*]. Imposed tariffs covered all animal products, including frozen semen [*Ex. C7, p. 16; Ex. R4, p. 36*].

68 RESPONDENT will demonstrate that it acted in good faith when CLAIMANT informed it about the additional 30 % tariffs. When RESPONDENT was confronted with the threat that CLAIMANT would not deliver the last shipment due to the additional tariffs, it promised to find a solution only if the increase in price is provided in the FSSA [*Ex. R4, p. 36*]. Therefore, RESPONDENT urges the Tribunal to consider that CLAIMANT's request for payment under hardship exemption is groundless, since its performance was not excessively more onerous. CLAIMANT delivered the last and the largest shipment of frozen semen without any delay and consequently completed all its contractual obligations.

69 CLAIMANT mistakenly claims that RESPONDENT is the one who is obligated to carry the additional costs arising out of given situation. RESPONDENT will demonstrate that additional costs should be paid by CLAIMANT since hardship clause prerequisites determined in clause 12 of the FSSA are not met **(A)**. Furthermore, RESPONDENT will also demonstrate that CLAIMANT's claim for an increased remuneration is baseless under Art. 79 of the CISG and unjustified under the UNIDROIT Principles **(B)**.

A. RESPONDENT IS NOT OBLIGATED TO PAY ANY AMOUNT RESULTING FROM TARIFF INCREASE UNDER CLAUSE 12 OF THE FSSA

70 CLAIMANT argues that it accepted the inclusion of DDP delivery terms as long as CLAIMANT would be excused from any further risks associated with the delivery of frozen semen. These risks related specially to changes in customs regulation or import restrictions [*Ex. C4, p. 12*]. RESPONDENT agreed with CLAIMANT's proposal that seller will not carry any potential costs arising out of additional health and safety requirements or comparable unforeseen events. This agreement is materialized in wording of clause 12 of the FSSA. RESPONDENT accepted such conditions in good faith. RESPONDENT did not agree to carry the burden of costs of any potential unforeseen event making the contract more onerous, but only the ones arising out of additional health and safety or similar requirements. Wording of clause 12 of the FSSA is completely clear on the circumstances in which CLAIMANT is not responsible for additional costs. Retaliatory tariffs are not one of these costs and thus CLAIMANT needs to cover them.

71 Firstly, RESPONDENT will establish that tariff increase was foreseeable at the time of the conclusion of the FSSA **(1)**. Secondly, imposed tariffs are not comparable to additional health and safety requirements **(2)**. Finally, RESPONDENT will demonstrate that the *contra proferentem* rule does not apply **(3)**.

1. Tariff increase was foreseeable at the time of conclusion of the FSSA

72 RESPONDENT rejects CLAIMANT's argument that the supervening tariffs were unforeseen because the Parties could expect them at the time of the conclusion of the FSSA. A party's failure to perform must be due to an impediment that the defaulting party could not reasonably be expected to have taken into account at the time of the conclusion of the contract [*Liu, §1.4.*]. Moreover, foreseeability should relate not only to the impediment *per se* but also to the time of its existence. The party could only be excused if the impediment arose after acceptance of the offer and before last delivery [*Tallon, pp. 580-581*].

73 In the given case, both Parties were aware that the lift of artificial insemination was only temporary [*Ex. C1, p. 9*], meaning that there was foreseen danger of impediment occurring during performance of the FSSA. Moreover, CLAIMANT was faced with the

same kind of circumstances in 2014, when the government-imposed measures increased the costs of the deal [*PO2, p. 58, §21*], further disputing its argument how unforeseen imposed measure was. RESPONDENT will demonstrate that the tariff increase was completely foreseen. Consequently, RESPONDENT is not obligated to pay any amount arising under clause 12 of the FSSA.

74 RESPONDENT admits that the imposed tariffs were unusual as Equatoriana was one of the biggest supporters of free trade [*Ex. C6, p. 15*]. However, retaliatory tariffs are a political decision; a tax that a government charges on imports to punish another country for charging tax on its own exports [*Golan v. Holder case*; *Oxford Dictionary, p. 1570; Paul Johnson*]. Nearly all potential impediments to performance - even wars, fires, embargoes and terrorism – are increasingly foreseeable in the modern commercial setting [*Lookofsky/Flechtner, p. 206*]. It is correspondingly noted in the Secretariat Commentary on the Draft Convention on the CISG that: *"All potential impediments to the performance of a contract are foreseeable to one degree or another. Such impediments as wars, storms, fires, government embargoes and the closing of international waterways have all occurred in the past and can be expected to occur again in the future"* [*Secretariat Commentary, §5*]. Additionally, CLAIMANT wrongfully submits that the imposed tariffs were novel, as Equatoriana had already enacted retaliatory measures in the past [*NoA, p. 7, §19; Ex. C6, p. 15*]. Moreover, in January 2017, the newly elected President of Mediterraneo even announced a more protectionist approach to international trade, in particular in relation to agricultural products [*Ex. C6, p. 15*].

75 In 2014, CLAIMANT had sold mares to farms in Danubia. Shortly before the delivery was made, a rare aggressive type of foot and mouth disease was discovered in Danubia. Following the discovery, Danubia immediately imposed very strict new health and safety requirements. Additional tests and the long quarantine were required, which resulted in an increase of 40 % of the sales price [*PO2, p. 58, §21*]. Just four years later, CLAIMANT is stating how such imposed measure by state of Equatoriana was unforeseen and could not be expected. Even if Equatoriana would not impose retaliatory tariffs, additional health and safety requirements could be predictable, given the similarities of situations and the reappearance of the same disease [*Ex. C1, p. 9*]. Later, Equatoriana was faced with the identical foot and mouth disease, which was present in Danubia. Consequently, Equatoriana immediately reacted by imposing a ban

on the transportation of all living animals. Before the conclusion of the FSSA, CLAIMANT was aware of this restriction [*Ex. C1, p. 9*]. All of these circumstances refute CLAIMANT's argument of tariff's unforeseeability.

2. Imposed tariffs are not comparable to additional health and safety requirements

76 Even if the Tribunal would decide that the retaliatory tariffs were unforeseen, RESPONDENT is not obliged to pay any amount to CLAIMANT under the hardship clause, as the imposed tariffs are not comparable to additional health and safety requirements. The wording of clause 12 of the FSSA is: "*seller shall not be responsible, neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Ex. C5, p. 14*]. As already established above and not disputed by CLAIMANT [*MfC, p. 28, §81*], the raise of tariffs by the state of Equatoriana is to be considered as a retaliatory measure [*Ex. C6, p. 15*].

77 Contractual consensus of both Parties was that the hardship clause is included in the FSSA. Nevertheless, clause 12 of the FSSA covers only additional costs and risks in connection with potential health and safety requirements imposed by any of the contracting parties' government. To determine the true intent of the parties, the Tribunal should consider Art. 8 of the CISG. The provisions of Art. 8 of the CISG are relevant for the interpretation of statements, conduct of parties and circumstances before conclusion of the contract [*Honnold, p. 116; Smallmon case; Propane case*]. Under Art. 8(1) of the CISG, all the statements and conducts of a party are to be interpreted subjectively [*CSS case; Egg case; Fabrics case; Textiles case; Gabriel, p. 66*], according to its intent where the other party knew or could not have been unaware of other party's intent [*Roser Technologies Inc. case; Corporate Web Solutions Ltd. case*]. Consideration should be given to all potentially relevant circumstances, including the negotiations [*Lookofsky p. 55; Enderlein/Maskow, p. 66; Peanuts case; Plants case*].

78 RESPONDENT made it clear during negotiations that the proposed ICC Hardship Clause was too broad [*Ex. R3, p. 35; PO2, p. 56, §12*]. Therefore, the Parties agreed on narrower interpretation, as it can be seen from correspondence between the Parties [*Ex. R3, p. 35; PO2, p. 56, §12*]. CLAIMANT argues that the imposed tariffs are comparable to health and safety requirements because its effects are similar. However, CLAIMANT's submission is faulty, and its application would lead to conclusion that every event that

would make CLAIMANT's obligation more onerous would be covered by this hardship clause. It was the Parties intent to limit the scope of hardship only to situations of additional health and safety requirements and those similar to them. Consequently, the Parties did not opt for ICC Hardship Clause, which covers every event making the contract more onerous [*PO2, p. 56, §12*].

79 Furthermore, under Art. 8(2) of the CISG, statements of parties are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had [*Machinery case; Rubber sealing parts case; Roder case; Health care products case*]. This standard is the hypothetical understanding of a reasonable person of the same kind as the other party [*Honnold II, p. 118, §107.1; Tantalum case*]. Intent is to be understood from the point of view of an objective person [*Schwenzer Commentary, p. 154, §17; Magnus/Staudingres, Art. 8, §11*]. Under the objective approach, consideration must be given to the circumstances listed in Art. 8(3) of the CISG [*Lookofsky, p. 55; Bianca/Bonell/Farnsworth, p. 97, note 1.4.*].

80 CLAIMANT is arbitrarily extending the wording of clause 12 in the FSSA to situations, which would not constitute as a comparable health and safety requirement. However, it is safe to assume that a reasonable third person is acquainted with the expression "comparable", which means something is of equivalent quality; worthy of comparison [*Oxford Dictionary, p. 306*]. CLAIMANT's argument how additional 30 % tariffs imposed by Equatoriana constitute a health and safety requirement is far reaching. As already established, these tariffs were a retaliatory measure by Equatoriana [*see supra § 74*]. Consequently, a reasonable third person would conclude that the additional 30 % tariffs are not a comparable unforeseen event, since the imposition of tariffs could not conceivably constitute as health and safety requirement, as envisioned in clause 12 of the FSSA.

81 In the light of arguments made above, RESPONDENT urges the Tribunal to decide that CLAIMANT should carry all the financial burden arising out of the increased costs, since the tariffs imposed by Equatoriana were foreseeable even before the conclusion of FSSA and are not to be considered as comparable to additional health and safety requirement.

3. *Contra proferentem* rule does not apply

82 The *contra proferentem* rule or ambiguity doctrine is broadly applied in contract interpretation and shall be considered as an internationally recognized rule of interpretation applicable under the Art. 8 of the CISG [*Schwenzer Commentary, p. 283, §49; CISG Advisory Council Opinion No. 13, note 9.1*]. Said rule provides that any ambiguous clause, which has not been individually negotiated, must be interpreted against the party that drafted the clause [*Sykes, p. 66; Berger II, p. 551; Farnsworth, p. 287; UNIDROIT Principles 4.6*].

83 RESPONDENT contends that clause 12 of the FSSA is clear and unambiguous. It states that: "*Seller shall not be responsible for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*" [*Ex. C5, p. 14*]. Clause 12 of the FSSA is clearly and unambiguously written. Therefore, RESPONDENT is requesting the Tribunal to find that *contra proferentem* rule does not apply.

84 Even if clause 12 was ambiguous, *contra proferentem* rule is not applicable. CLAIMANT argues that RESPONDENT is the one who drafted the hardship clause and opted for a narrower wording as compared to the ICC Hardship Clause proposed by CLAIMANT [*Ex. R2, p. 34*]. However, RESPONDENT will establish that both Parties participated in negotiations of the wording of the hardship contained in clause 12 of the FSSA [*Ex. R3, p. 35*].

85 A joint drafting effort is a circumstance which does not allow the application of the *contra proferentem rule* [*Schwenzer Commentary, p. 170, §49*; *New Zealand mussels case; Marzipan case*]. Furthermore, the rule of *contra proferentem* applies only where the drafting party was entirely responsible for the clause in question [*Haraszti, p. 191; Berglin, p. 69*]. The doctrine does not apply in cases where there is clear evidence that the non-drafting party directed its attention to an individual clause and specifically agreed to it [*Sykes, p. 67*]. Both Parties' negotiators agreed on the inclusion of a narrow hardship reference in the clause 12 of the FSSA [*Ex. R3, p. 35*]. RESPONDENT only presented the final version of the clause, which was included in the FSSA with CLAIMANT's consent [*PO2, p. 56, §12*].

86 Moreover, *contra proferentem* rule cannot apply in cases where both parties are represented by a legal advisor [*Beanstalk Grp. v. AM Gen. Corp. case; Elliott v. Pikeville Nat'l Bank &*

Trust Co. case]. The same goes for situations where, before signing the contract, a party showed the contract to an attorney [*Bee Bldg. Co. v. Peters Trust Co. case*]. In the case at hand, both Parties were lawfully and professionally represented by their lawyers, Julian Krone on RESPONDENT'S side and John Ferguson on CLAIMANT'S side [*Ex. R3, p. 35; PO2, p. 55, §4*]. Subsequently, this refutes the use of the *contra proferentem* doctrine.

87 CLAIMANT expressly admits that the inclusion of a narrow hardship into clause 12 in the FSSA was done through mutual agreement [*PO2, p 56, §12*]. Both Parties voluntarily signed the contract, pleased with its content. Claiming now that RESPONDENT was the one who drafted the final version of hardship clause is baseless. By participating in the drafting of the clause, CLAIMANT must be considered responsible for the current version of the hardship clause. Thus, if the Tribunal decides that clause 12 of the FSSA is ambiguously written, it should find that both Parties cooperated in drafting of said clause, consequently accepting it in its final form.

B. RESPONDENT IS NOT OBLIGED TO PAY CLAIMANT UNDER CISG

88 RESPONDENT urges the Tribunal to consider that CLAIMANT's request for payment under Art. 79 of the CISG is groundless. Additional tariffs of 30 % could not constitute an impediment, which would subsequently make the performance of the FSSA excessively more onerous. RESPONDENT will demonstrate that CLAIMANT easily overcame the payment of additional tariffs on agricultural products, since it successfully delivered the last shipment of frozen semen without any delay and consequently completed all its contractual obligations.

89 CLAIMANT's claim for an increased remuneration is baseless. RESPONDENT will demonstrate that the CISG does not contain provisions on hardship (**1.**). However, if the Tribunal concludes that the additional tariffs constitute an impediment, CLAIMANT still has no right to payment, since none of the prerequisites for hardship exemption under Art. 79 of the CISG have been fulfilled (**2.**). Alternatively, if the Tribunal finds that CISG does not contain special provisions on hardship, CLAIMANT'S demand for payment under the UNIDROIT Principles is nevertheless unjustified (**3.**).

1. CISG does not contain provisions on hardship

90 In accordance with one of the founding principles of contract law, *pacta sunt servanda*, hardship exemption should be justified only in exceptional circumstances [*Lindström, p. 23*]. It is indisputable that unforeseeable changed circumstances are probably one of the major problems for parties, which are in a complex international business relationship [*Schwenzer 2009, p. 709*]. Different legal concepts exist in all legal systems dealing with the problem of changed circumstances and excusing a party from performance of its obligations when a contract has become unexpectedly more onerous or impossible to perform [*Flambouras, p. 263, §1*]. CISG aims to harmonize divergent legal concepts and principles from various national laws and legal systems [*Nagy, p. 3; Mazzacano, p. 50; Schwenzer Commentary, p. vi*] with the purpose to achieve grounds for fair play for both parties in an international business relationship [*Tarquinio, p. 6*].

91 Hardship is implicitly excluded from the scope of application of Art. 79 of the CISG [*Petsche, p. 150; Tallon, pp. 581-582, §2.6.4; Lindström, p. 25*]. The term impediment, which is not defined by the CISG, relates to the situation of making performance of contract impossible and not merely excessively onerous for the disadvantaged party [*Petsche, p. 157; Mastromatteo/Landi, p. 32; DiMatteo II, p. 426*]. Legal commentators point towards the nature of risk inherent within international commercial sales [*Zaccaria, p. 135*] and argue that nothing short of "impossibility" satisfies the wording of Art. 79(1) of the CISG. Consequently, hardship is excluded from the scope of said article [*Jenkins, p. 2024*]. Considering the absence of a specific hardship remedy under Art. 79 of the CISG, parties' liability can only be excluded in cases of *force majeure* or impossibility [*Fletchner, p. 86*].

92 Courts are consistently refusing to exempt parties from liability due to hardship under Art. 79(1) of the CISG, as the threshold in international commercial contracts is so high that the fluctuations of price have never been considered drastic enough [*Davies/Snyder, p. 334; Kuster/Baasch Andersen, p. 11; Sunflower seed case*, *Canned oranges case*]. Although the courts are reluctant to address whether theoretically and in principle a claim for a hardship under Art. 79(1) of the CISG could be sustained, they all dismiss the possibility of a party being exempt from liability due to hardship [*Kuster/Baasch Andersen, p. 13*].

93 As stated by prof. Fletcher "*Art. 79(1) is difficult to understand, challenging to distinguish, and daunting to apply*" [*Flechtner, p. 85*]. The courts remain clearly unified in terms of outcome when applying Art. 79(1) of the CISG in situations of hardship. They have continually denied hardship under the CISG or set an artificially high threshold that is effectively unachievable, thus virtually ruling out hardship as an exemption in international commercial trade under the CISG [*Kuster/Baasch Andersen, pp. 15-16*].

94 In situations of significant change of market prices, the hardship defense gets denied for the following reasons. Firstly, the market price fluctuation could not constitute as an impediment in the sense of Art. 79 of the CISG and secondly, the requirements for invoking hardship are simply not fulfilled [*Iron Molybdenum Case, Frozen Raspberries Case*]. The Tribunals are specifically reluctant towards granting an exemption of party's liability in international transactions, since it is generally less likely that the parties have been unaware of the risk they assumed [*ICC Award No. 1512; ICC Award No. 8873*]. However, pursuant to Art. 79 of the CISG a party's performance cannot be excused if performance had not been made physically impossible. Consequently, a party cannot be excused of a performance of a contract in cases of severe price increases, because performance is always physically possible in these cases [*Nuova Fucinati S.p.A v. Fondmetall International A.B. case; Clout case no. 166*]. Therefore, CLAIMANT already fulfilled its obligations when it delivered the frozen semen and payed 1.250.000,00 USD for additional tariffs on agricultural products. Thus, it cannot invoke hardship.

2. Prerequisites for hardship exemption under Art. 79 CISG are not fulfilled

95 If the Tribunal were to find that Art. 79 of the CISG includes hardship, CLAIMANT is still not entitled to payment of 1.250.000,00 USD. If hardship is encompassed in Art. 79 of the CISG, all the perquisites for hardship exemption must be fulfilled cumulatively. However, RESPONDENT will establish that they are not.

96 As stated in *CISG Advisory Council Opinion No. 7*, if the parties are faced with a situation of genuinely unexpected and radically changed circumstances, those may qualify as an "impediment" under Art. 79(1) of the CISG. Consequently, simple changes in the surrounding economic conditions could not exempt the party's liability under the contract [*Schwenzer 2009, p. 710; Steel ropes case; Zweigert/Kotz, pp. 534-535*]. When invoking Art. 79 of the CISG, the non-performing party must prove: firstly, that an

impediment to performance was beyond the party's control, secondly, that it could not be reasonably expected or foreseen and thirdly, that an impediment could not have been avoided or overcome [*Bianca/Bonell, p. 578*; *Nagy, p. 8.*; *Schwenzer Commentary, p. 1067, §11; Scaforn International BV & Orion Metal BVBA v. Exma CPI SA case; Vine wax case*].

97 Firstly, the requirement for an exemption under Art. 79 (1) of the CISG is that the failure to perform is due to an impediment, in other words an overwhelming difficulty, which was beyond the party's control [*Schwenzer Commentary, p. 1067, §11; Ferrari, p. 828; CISG Advisory council Opinion No. 7; Miettinen, p. 9; Zeller, p. 182; Chinese goods case*]. Admittedly, an impediment beyond the control of a party is for example where governmental regulations or the actions of governmental officials impacted on a party's performance [*DiMatteo, p. 293; High Arbitration Court: Information Letter No. 29; Coal case*]. However, hardship exemption can only be granted if the impediment was of such importance that it affected the performance of the contract, which has become excessively more onerous [*Schwenzer 2009, p. 715; Steel ropes case; CISG online case no. 102; CISG online case no. 1067; CISG online case no. 436; Powdered milk case*]. When dealing with hardship under Art. 79, courts concluded that even a price increase or decrease of more than 100 % would not suffice [*Iron molybdenum case; "FeMo" alloy case; Steel ropes case; CISG online case no. 694*]. Moreover, in international contracts the relevant margin for hardship exemption should be between 150 – 200 % [*Schwenzer 2009, p. 717*]. CLAIMANT states that when the last shipment of frozen semen became burdened with additional 30 % tariffs, it made its performance fundamentally more onerous [*MfC, p. 35, §106*]. However, as established by RESPONDENT, only the threshold above 100 % would be sufficient to alter the equilibrium of the FSSA. Furthermore, according to the general rule, the decline of a party's financial capacity falls within its own of control. Consequently, said party is not entitled to invoke the hardship exemption [*Girsberger, p. 131*]. The financial ruin, which CLAIMANT was facing, existed even before the conclusion of the FSSA. Therefore, CLAIMANT is not intitled to invoke hardship.

98 Secondly, a party's failure to perform must be due to an impediment that the party could not reasonably be expected to have taken into account at the time of the conclusion of the contract [*Schwenzer Commentary, p. 1068, §13; DiMatteo, p. 301; Lando/Beale, p. 380; Brunner, p. 157; Bianca/Bonell, p. 580, §2.6.3.; Malaysia Dairy Industries*

v. Dairex Holland case]. CLAIMANT states that the additional tariffs came as a complete surprise for both parties [*MfC, p. 28, §81*]. As already established above [*see supra §§ 72-75*], CLAIMANT predicted the imposing of additional health and safety measures by Equatoriana. Thus, CLAIMANT cannot claim that the additional tariffs on horse semen were unforeseen at the time of the conclusion of the FSSA.

99 Thirdly, Art. 79(1) of the CISG presupposes that the party could not reasonably be expected to have overcome the impediment or its consequences [*Honnold, p. 474; Metallic sodium case; Steel bars case*]. This means that the party who invokes hardship must provide relevant evidence to demonstrate how certain changed circumstances influence its ability to perform a specific contract [*Girsberger, p. 123*]. This requirement asks how much effort the seller must make in order to overcome the impediment that has arisen [*Huber/Mullis, p. 262; Schlechtriem/Butler, p. 202*]. An impediment that the seller could foresee at the time of the conclusion of the contract does not exempt it from its liability, if the impediment is both possible and reasonable to overcome [*Brunner, p. 322; Schwenzer 2009, p. 719*]. It is important to highlight that CLAIMANT was able to make a payment of 1.250.000,00 USD immediately upon request and delivered the last shipment on 23 January as agreed in the FSSA. Furthermore, CLAIMANT was able to make a payment to Equatoriana's government without being financially damaged or taking a loan. Consequently, the additional tariffs were an impediment, which CLAIMANT easily overcame.

100 In the light of the arguments made above, RESPONDENT urges the Tribunal to conclude that the prerequisites to invoke hardship under Art. 79 of the CISG have not been fulfilled. Consequently, CLAIMANT's claim for payment of 1.250.000,00 USD under CISG is baseless.

3. CLAIMANT's claim for payment under the UNIDROIT principles is groundless

101 RESPONDENT demonstrated that the above-mentioned circumstances do not fulfil the required prerequisites to be considered as hardship under Art. 79 of the CISG. Since hardship is already included in CISG, which is the law governing the FSSA, there is no purpose to apply UNIDOIT Principles. However, if the Tribunal concludes that Art. 79 of the CISG does not define the situations of hardship, gap of CISG should be filled according to Art. 7(2) of the CISG.

102 Firstly, if there is a gap in CISG regarding the hardship exemption, it should be filled according to Art. 7(2) of the CISG. Parties can rely on the UNIDROIT Principles for the purpose of supplementing the CISG (**a**). Secondly, even if the UNIDROIT Principles are applicable, RESPONDENT will once again establish that the prerequisites, which would justify hardship pursuant to Art. 6.2.2 UNIDROIT, are not fulfilled (**b**).

a) UNIDROIT Principles can supplement the CISG pursuant to Art. 7(2) of the CISG

103 In cases of conflict between the rules in the UNIDROIT Principles and the rules established in the CISG, the rules laid down in the CISG will prevail [*Carlsen, p. 124*]. As stated in the Preamble of the UNIDROIT Principles, the rules "may" be applied when contracting parties have agreed that their disputes shall be settled according to general principles of law, the *lex mercatoria* or have simply failed to make any provision for an applicable law [*UNIDROIT Principles Commentary, p. 38, §§7-8; Bridge, p. 3; Michaels, p. 51*]. Furthermore, CISG will normally take precedence over the UNIDROIT Principles, since CISG is a binding instrument, whereas the UNIDROIT Principles are a non-binding instrument [*Bonell, p. 405; Kotrusz, p. 157*]. In order to apply the UNIDROIT Principles in cases where they do not explicitly govern the contract between the parties, the decisive element is whether provisions of the CISG do not provide a functionally adequate solution to the problem [*Honnold, p. 115; Bianca/Bonell, p. 48; Enderlein/Maskow, p. 41*].

104 When matters are not governed by the CISG, they must be dealt with under either domestic law or other uniform sets of rules in force, which address the matter at issue [*Schwenzer Commentary, p. 77, §6; Ferrari II, p. 66*]. The drafters of the CISG established autonomous interpretative criteria based upon the principles of internationality, uniformity, and good faith in Art. 7(1) of the CISG and an autonomous gap-filling method through the application of the general principles inherent in Art. 7(2) of the CISG [*Janssen/Meyer, p. 263; Perales Viscasillas, p. 5; Schwenzer Commentary, pp. 121-122, §4-5*].

105 As stated in *CISG Advisory opinion no. 7*, if the Tribunal takes the CISG's purpose of unifying the law of sales, as expressed in Art. 7(1), then it will probably exhaust all technically available means to respond to the hardship situations within the CISG

[*CISG Advisory opinion no. 7, §35*]. If the Tribunal would resort to the application of potentially diverse domestic legal rules and doctrines, the outcome could be very uncertain, since different legal systems have adopted different approaches when it comes to hardship situations [*Girsberger, p. 122; Rimke, p. 200*]. Therefore, the court should primary exhaust all technically available means to respond to the hardship problem within the "four corners" of the CISG [*CISG Advisory opinion no. 7, §35; Kotrusz, p. 151; Schlechtriem, p. 791*].

106 Moreover, *lex mercatoria* and the UNIDROIT Principles are to be considered as a means of interpreting and supplementing the CISG when no general principles within CISG are found [*Perales Viscasillas, p. 20; Bridge, p. 6*]. CISG may be supplemented by those general principles, which have inspired its provisions and particularly those, which have been substantiated and codified in the UNIDROIT Principles and used in relation with CISG implementation [*ICC Publication No. 642.2002; ICC 8817/1997; ICC 8128/1995; ICC 8769/1996*]. UNIDROIT Principles in relation to the CISG are not just used as a mere 'doctrinal reference' but, more importantly, are used to interpret and fill gaps in the provisions of the CISG, leading to a macro systematic interpretation of law instruments [*Perales Viscasillas, p. 22; Bonell, p. 231*] and moreover, an autonomous clarification of the provisions in CISG [*Schwenzer Commentary, p. 122, §5; Magnus p. 173; Monberg, p. 454, §2.1.1*]. Thus, if the Tribunal concludes that Art. 79 of the CISG does not include cases of hardship, it should resort to relevant provisions of the UNIDROIT Principles.

b) CLAIMANT's claim for payment pursuant to Article 6.2.2 of the UNIDROIT Principles is groundless

107 The importance of the formation and performance of the contract cannot be undermined. It reflects natural justice and economic requirements because it binds a party to its promises [*Houtte, p. 107; Liu, p. 23*]. A contract gives parties the warranty, that their mutual promises will be performed and if not, then they have a legal right to claim a remedy against the defaulting party [*Eicher, p. 33*; *Schlechtriem II, p. 314*]. The principle of hardship is universally considered as being of strict and narrow interpretation, as a dangerous exception to the principle of sanctity of contracts [*ICC Award No. 1512; ICC Award No. 8486; ICC Award No. 6281; Houtte, p. 115*]. There is a

necessity to limit the application of hardship to cases where compelling reasons justify it, having regard not only to the fundamental character of the changes, but also to the requirements of fairness and equity and to all circumstances of the case [*Brunner, pp. 438-442; Girsberger, p. 129; Schwenzer, 2009, p. 37; UNIDROIT Principles Commentary, p. 816, §7*].

108 Pursuant to Art. 6.2.1 of the UNIDROIT Principles, performance must be rendered as long as it is possible and regardless of the burden it may pose on the performing party [*UNIDROIT Principles Commentary, p. 812, §1*]. This principle acts as a reminder that the general duty is to perform, and that relief is very much the exception [*ibid., p. 819, §4*]. However, the disadvantaged party who wishes to use the hardship exemption in Art. 6.2.2., must provide relevant evidence to demonstrate how certain changed circumstances influenced the party's ability to perform the contract [*Girsberger, p. 123*].

109 Pursuant to Art. 6.2.2. of the UNIDROIT Principles hardship can be invoked when the occurrence of events fundamentally alters equilibrium of the contract [*Bonell, p. 327; Fucci, p. 8*]. As stated in the UNIDROIT Commentary essential modification of the contract may be characterized by a substantial increase in the cost for one party. Nevertheless, only an alteration amounting to 50 % or more of the cost or the value of the performance is anticipated to amount to a "fundamental" alteration [*UNIDROIT Principles Commentary, p. 816, §8; Rimke, p. 239*]. CLAIMANT wrongfully states that the equilibrium of the FSSA was fundamentally altered by the 30 % increase of the price due to the imposition of new tariffs [*MfC, p. 38, §119*]. Further, 30 % increase of costs only burdens the last shipment and certainly does not constitute as a fundamental alteration of the equilibrium of the FSSA. It is unreasonable that CLAIMANT is, after completing all its contractual obligations, now striving to RESPONDENT for payment of costs of the delivery, even though, due to the inclusion of DDP clause, the delivery costs and risks were CLAIMANT'S responsibility and RESPONDENT even paid a higher price as initially agreed due to that reason [*Ex. C4, p. 12*].

110 The provisions of the UNIDROIT Principles further specify requirements for the hardship situation [*UNIDROIT Principles Commentary, pp. 817, §§10-15*]. Firstly, hardship exemption is justified if the circumstances, which made the performance of the contract more onerous, become known to the disadvantaged party after the conclusion of the

contract [*Reinisch, p. 618; Jenkins, p. 2028*]. Admittedly, the tariffs became known to both Parties after the conclusion of the FSSA.

111 Secondly, the hardship situation could not have been reasonably considered by the disadvantaged party at the time of the conclusion of the contract [*UNIDROIT Principles Commentary, p. 817, §12*]. Due to the foot and mouth disease crisis in Equatoriana, the transportation of living animals was prohibited, making the animal reproduction possible only with artificial insemination [*Ex. C1, p. 9*]. CLAIMANT was aware of potential risks of the disease due to its past business experiences in Danubia in 2014. CLAIMANT nearly suffered insolvency in 2014, when it had to pay for additional highly expensive tests, which increased the costs of the delivery up to 40 % [*PO2, p. 58, §21*]. Therefore, CLAIMANT was aware of the precautionary measures that need to be taken by a country when fighting with this disease.

112 Thirdly, circumstances, which influenced the performance of the party must have been beyond the control of the party invoking hardship. This is particularly in cases of import prohibitions, restrictive import licensing, and tariffs, imposed by a certain country. All of such circumstances raise the price of the goods, resulting in parties paying a higher price in comparison to the price they would have paid if free trade would be established [*Krueger, p. 165*]. Acts of rulers and government officials are generally beyond the control of a party [*UNIDROIT Principles Commentary, p. 818, §14; Maskow, p. 662*]. RESPONDENT already established that the additional tariffs as a health and safety requirement were not unforeseen [*see supra §§ 74-75*]. However, RESPONDENT acknowledges the tariffs imposed on agricultural products by Equatoriana's government were beyond CLAIMANT's control. Admittedly, this prerequisite is fulfilled, but to establish hardship pursuant to Art. 6.2.2 of the UNIDROIT Principles, all the all prerequisites must be fulfilled cumulatively.

113 Lastly, where the risk of the event has been assumed by the disadvantaged party, it cannot invoke hardship. The assumption of risk need not to be express when it can be inferred from the circumstances or from the nature of the contract [*UNIDROIT Principles Commentary, p. 818, §15*]. The additional tariffs did increase the costs of the last shipment only for 30 %. However, that did not disrupt the commercial basis of the deal. CLAIMANT delivered 100 doses of frozen semen in three instalments on the dates agreed in the FSSA. Despite CLAIMANT's possible financial ruin, which it was facing

even before the conclusion of the FSSA, CLAIMANT still managed to successfully complete all its contractual obligations and immediately pay 1.250.000,00 USD to Equatoriana's government. RESPONDENT initially hoped that this successful corporation could be transformed into to a long-term fruitful business relationship. However, everything changed with CLAIMANT's demands for payment of 1.250.000,00 USD with no justified legal grounds.

114 As proven by RESPONDENT, the perquisites for hardship exemption are not fulfilled either under CISG or under the UNIDROIT Principles. Therefore, there is no legal grounds for the Tribunal to adapt the FSSA, specially knowing CLAIMANT already successfully completed all its contractual obligations. Consequently, CLAIMANT's claim form payment of 1.250.000,00 USD is unjustified.

CONCLUSION ON ISSUE III

115 CLAIMANT is not entitled to payment of 1.250.000,00 USD for several reasons. Firstly, since the additional tariffs cannot be considered as a comparable unforeseen event, the hardship clause in the FSSA is not applicable. Secondly, a slight tariff increase does not constitute as an impediment that would make a performance excessively more onerous. Furthermore, CLAIMANT upon request immediately payed 1.250.000,00 USD to Equatoriana's government and successfully completed all its contractual obligations. Therefore, the exemption under Art. 79 of the CISG is groundless. Thirdly, if the Tribunal finds that CISG does not contain special provisions on hardship, CLAIMANT'S demand for payment under the UNIDROIT Principles is nevertheless unjustified. A 30 % tariff increase, which burdened only the last shipment of frozen semen, did not fundamentally alter the equilibrium of the FSSA. Consequently, CLAIMANT has no right to payment of 1.250.000,00 USD, either under the clause 12 in the FSSA or under Art. 79 of the CISG.

REQUEST FOR RELIEF

In light of the submissions made above, counsels for RESPONDENT respectfully requests the Arbitral Tribunal:

1. to dismiss the claim as inadmissible for a lack of jurisdiction and powers;
2. to declare CLAIMANT's request for evidence as inadmissible;
3. to reject the claim for additional remuneration in the amount of US$ 1.250.000,00 raised by CLAIMANT;
4. to order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.

Respectfully signed and submitted by counsels on 24 January 2019.

Stefan Danojević

Elena Fridau

Luka Kreitner

Hana Srot

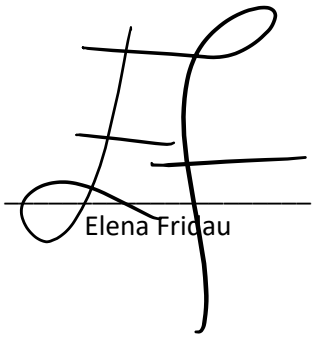
Petra Zupančič

CERTIFICATE

Maribor, 24 January 2019

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate.

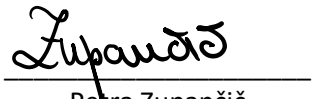
Stefan Danojević



Elena Fridau

Luka Kreitner

Hana Srot



Petra Zupančič