Twenty Sixth Annual

Willem C. Vis International Commercial Arbitration Moot

13 April – 18 April 2019

Vienna Austria

MEMORANDUM FOR CLAIMANT

University of Maribor

Faculty of Law

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

Stefan Danojević • Elena Fridau • Luka Kreitner

Hana Šrot • Petra Zupančič

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TABLE OF ABBREVIATIONS

§/§§	paragraph/paragraphs
Art. /Arts.	Article
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
ICC	International Chamber of Commerce
ibid.	ibidem (in the same place)
i.e.	id est (that is)
infra	Bellow
Model Law	UNCITRAL Model Law on International Commercial

	Arbitration with amendments as adopted in 2006
Mr/Ms	Mister/Miss
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 breeder for racehorses in Equatoriana.

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". 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, Mrs. Julie Napravnik and Mr. Chis Antley, were severely injured in a car crash. Consequently, neither of them participated in finalizing the contract. 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. Due to the unexpected and sudden tariffs increase CLAIMANT immediately contacted RESPONDENT on price adjustment, before the third and the last shipment of Nijinsky III frozen semen was sent to RESPONDENT.

5 On **21 January 2018** CLAIMANT discussed the circumstances of the third shipment of Nijinsky III frozen semen with RESPONDENT. CLAIMANT delivered the remaining 50 doses of Nijinsky III frozen semen on **23 January 2018.**

6 On **12 February 2018** CLAIMANT confronted RESPONDENT's CEO, Ms. Espinoza, regarding the breach of the re-sale prohibition. Ms. Espinoza decided to terminate the contract and refused to reach an agreement on adaptation of the price.

7 CLAIMANT initiated arbitration proceedings by sending Notice of Arbitration on **31 July 2018.** On **2 October 2018** CLAIMANT had informed the Arbitral 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

8 The arbitration clause in Art. 15 of the FSSA provides the Tribunal with the jurisdictions and the power to adapt the contract. In the absence of an explicit choice of law in the arbitration agreement, the law of Mediterraneo governs the arbitration agreement and its interpretation, regardless of the application of the doctrine of separability. As a result of the law of Meditteraneo governing the arbitration agreement, the Tribunal has the power to adapt the contract under the Art. 6.2.3 (4) (b) of the UNIDROIT Principles (**ISSUE I**).

9 CLAIMANT has requested the Tribunal to admit an arbitral award as evidence relevant to these proceedings. The conditions for the admissibility of evidence are met as it is both relevant and material to the case at hand. Further, if the Tribunal were to reject the evidence proposed by CLAIMANT, it would breach CLAIMANT's right to present its case. Finally, burden of proof to establish the inadmissibility of the evidence is upon RESPONDENT, which it fails to satisfy. (**ISSUE II**).

10 Thirdly, CLAIMANT is entitled to payment of 1.250.000,00 USD based on clause 12 FSSA, since RESPONDENT assumed all economic risks in situations of hardship. Moreover, CLAIMANT's right to remuneration also stems from CISG, since the unforeseen tariff increase is to be considered an impediment beyond control of Parties pursuant to Art. 79 CISG. Alternately, if the Tribunal finds that CISG does not contain a provision on hardship, CLAIMANT has the right to the payment under Art. 6.2.2. UNIDROIT Principles. (**ISSUE III**).

ISSUE I: TRIBUNAL HAS THE JURISDICTION AND THE POWER TO ADAPT THE CONTRACT

11 CLAIMANT was contacted by RESPONDENT in hope of buying 100 doses of Nijinsky III frozen semen, which would ensure the growth of RESPONDENT's company and ensure their position on the way to one of the leading breeders for racehorses [*Ex. C2, p. 10*]. After long negotiation the Parties have agreed to conclude the deal regarding 100 doses of frozen semen. Moreover, the Parties have demonstrated the intent to provide a power to the Tribunal for adaptation of the contract. However, this was never included expressly into the contract as the two main negotiators, were severely injured, after the agreed on this kind of mechanism [*Ex. C8, pp. 17-18*]. Finally, the Parties agreed that 100 doses of frozen semen will be delivered in three separate shipments [*Ex. C5, p. 14*].

12 Two months prior to the last shipment, 25 % tariffs on all agriculture products were announced by Mediterraneo. Even more surprising was the reaction of the Equatoriana, imposing 30 % tariffs [*Ex. C6, p. 15*]. Consequently, CLAIMANT immediately reached out to RESPONDENT in order to renegotiate the terms of the contract [*Ex C7, p. 16*]. RESPONDENT has promised that the solution for the price adjustment would be found, as they are interested in long term cooperation over the phone on 31 January 2018 [*Ex. C8, pp. 17-18*]. Therefore, the last 50 doses of frozen semen were sent to RESPONDENT. However, subsequently RESPONDENT refused to pay the additional costs and refused to pursue an amicable resolution. Therefore, CLAIMANT was left with no other option but to file Notice of Arbitration.

13 In its claim CLAIMANT is requesting the Tribunal to adapt the contract adequately. It must be stressed that the Tribunal does have the jurisdiction and the power to adapt the contract. CLAIMANT will establish that firstly, the arbitration clause provides the Arbitral Tribunal with the jurisdiction and the power to adapt the contract (**A**). Secondly, that the law of Mediterraneo governs the contract (**B**).

A. The arbitration clause provides the arbitral tribunal with the jurisdiction and the power to adapt the contract

14 While drafting the FSSA, the Parties have decided to include the arbitration clause and thus determined the arbitration as the dispute resolution mechanism [*Ex. C5, p. 14*]. It shall be noted that through the contract negotiation process and with the formation of the arbitration agreement itself, the Parties have demonstrated the express intent for any dispute to be resolved before an arbitral tribunal. Therefore, the Tribunal's jurisdiction and power to adapt the contract primarily stems from the arbitration agreement.

15 Firstly, the FSSA contains the arbitration clause in the Art. 15 stating that "*any dispute arising out of the contract… shall be referred to and finally resolved by arbitration*" [*Ex. C5, p. 14*]. The word "dispute" in context of arbitration agreement should be interpreted in a broad sense encompassing any type of disagreement, difference, or claim [*Born, p. 1348; Rajoo, p. 161*]. This position was further confirmed in *Tjong v. Antig* where the court stressed that irrespective of the word used "*these formulations encompass any sort of disagreement, dispute, difference, or claim that may be asserted in arbitral proceedings"* [*Tjong v. Antig*]. What is more, Center for Transnational law created Trans-Lex Principles in an attempt to codify *lex mercatoria*. Trans-

Lex Principles provide that broad definition of dispute shall be interpreted in a manner to empower tribunals wit to adapt the contract [*Principle No. XIII.1.1, Principle XIV.1, Trans-Lex Principles*]. Aforementioned leads to the conclusion that broad wording of the Art. 15 of the FSSA vests the necessary power into the Tribunal to adapt the contract.

16 Additionally, arbitration clause further provides that disputes regarding the interpretation of the contract shall be resolved by an arbitral tribunal [*Ex. C5, p. 14*]. It shall be noted that interpretation of the Art. 12 of the FSSA is disputed between the Parties [*AtNoA, p. 31, ∫ 12*]. Art. 12 specifically deals with hardship and its implications [*Ex. C5, p. 14*]. Therefore, it should be concluded that the Tribunal's jurisdiction and power to adapt the contract based on hardship can be derived directly form the arbitration agreement.

17 Secondly, arbitration clause should be interpreted according to parties' intent [*Moses, p. 72*]. It was held that in interpretation of the arbitration agreement real and common intent must be observed [*4A 136/2015; Zhejiang v. Jade*]. It is worth noting that dispute resolution mechanism in the FSSA only provides for disputes to be resolved by the means of the arbitration [*Ex. C5, p. 14*]. What is more, both Parties have expressly objected the involvement of court of opposing party [*Ex. C3, p. 11; Ex. C4, p. 12*]. Parties were able to agree only on dispute resolution via arbitration [*Ex. R2, p. 34*]. It should be further observed that despite the fact that due to the series of unfortunate events Ms. Napravnik and Mr. Antley were not able to include the express reference to adaptation, the two negotiators agreed on the fact that arbitrators should have the power to adapt the contract, failing Parties' agreement on the matter. They even discussed whether such express inclusion would even be necessary from legal viewpoint [*Ex. C8, p. 17*]. Therefore, Parties' real and common intent for disputes to be resolved by arbitration and only arbitration is evident.

18 Thirdly, even in the event that the Tribunal still deems the arbitration agreement is worded ambiguously it should find that it has the power to adapt the contract. It must be stressed that "pro-arbitration" principle is accepted in most legal systems. That means that when ambiguity in regard to arbitration agreement is encountered it should be interpreted in a way to keep the arbitration clause valid [*Berger, p. 431; Born, p. 1326*]. "Pro-arbitration" is particularly utilized when assessing the scope of an arbitration agreement [*Born, pp. 1330-1331*]. In present case it is disputed whether or not Tribunal's power to adapt the contract is

within the scope of arbitration clause. Therefore, it should be interpreted as to provide arbitral tribunal with the power to adapt the contract.

19 In conclusion, the Parties have agreed to arbitration as the means of dispute resolution. It stems from the FSSA and the negotiation process between the Parties that their intent was for the arbitration to resolve disputes including the possibility of adaptation of the contract. Thus, Tribunal's jurisdiction and power to adapt the contract stems from Art. 15 of the FSSA.

B. the law of mediterraneo governs the arbitration agreement and its interpretation

20 CLAIMANT will establish that the arbitration agreement contained in Art. 15 of the FSSA is governed by the law of Mediterraneo. Consequently, the Tribunal has the power to adapt the FSSA under the law of Mediterraneo, as the law governing the FSSA and consequently the arbitration agreement and its interpretation. Furthermore, CLAIMANT's request for additional remuneration on the basis of an adaptation of the FSSA is justified, since the arbitration agreement extends to a claim for an increased remuneration under the law of Mediterraneo.

21 Art. 15 of the FSSA is in line with the principle of party autonomy (**1.**) in connection with the Parties' right to determine the law applicable. The doctrine of separability is not applicable and the law of Mediterraneo governs the arbitration agreement and its interpretation (**2**). Finally, the Tribunal has the power to adapt the contract under the law of Mediterraneo (**3**).

1. Art. 15 of the FSSA is in the line with the principle of party autonomy

22 The primary factor in determining the applicable law is the principle party autonomy [*Lew/Mistelis/Kröll, p. 124, § 6-68*]. In the process of negotiations, the Parties have only agreed on the seat of the arbitration being Danubia, omitting an reference as to the law governing the arbitration agreeement [*Ex. C5, p. 14*]. The law of Danubia cannot be taken into account as a Parties' choice to govern the arbitration agreement, as a result of restrictions from CLAIMANT'S internal policy.

23 Firstly, according to CLAIMANT'S internal policy a contract submitted to a foreign law or providing for dispute resolution in the country of the counterparty requires special approval by the CLAIMANT'S creditors' committee [*Ex. R2, p. 34*]. To avoid acquiring special approval

and to speed up the negotiations, CLAIMANT proposed arbitration and a change of the seat of arbitration to be Danubia, as a neutral country [*Ex. R2, p. 34*]. Party autonomy provides contracting parties with a mechanism of avoiding the application of an unfavourable or inappropriate law to an international dispute. This choice should be binding on the arbitration tribunal. [*Lew/Mistelis/Kröll, p. 413, § 17-8*]. Hence, CLAIMANT could not agree with RESPONDENT on the place of arbitration or the law governing the arbitration agreement to be the law of Equatoriana or any other foreign law, including law of Danubia [*Ex C4, p. 12, § 5; Ex R1, p. 33, § 2*]. Further, the choice of Danubia, as the place of the arbitral seat, cannot be considered as a choice determining which law governs the arbitration agreement, because CLAIMANT merely wanted Danubia to be the seat of arbitration to comply with its internal policy.

24 Furthermore, it is not always the case that, when the choice-of-law clause is absent, the law of the seat of arbitration should be taken as a starting point to determine the law governing the arbitration agreement [*King/Palmer, p. 2*]. RESPONDENT alleges, that Art. 14 of the FSSA is merely determining the law applicable to the Sales part of the main contract [*AtNoA, p. 31, § 14*]. Where the matrix contract contains an express choice of law, this is a strong indication in relation to the parties' intention as the governing law of the agreement to arbitrate, in the absence of any indication to the contrary [*Flannery, p. 10*]. Further, in the absence of a choice of law by the parties, international arbitral tribunals enjoy broad discretion when determining the applicable substantive law [*Petsche, p. 36; Fouchard/Gaillard/Goldman, p. 871*]. Therefore, the law of the seat does not always prevails.

25 Finally, the choice of the seat of arbitration cannot reflect the Parties' choice as to the law governing the arbitration agreement, since the Parties had to adhere to CLAIMANT'S internal policy in order to continue the negotiation process.

2. The doctrine of separability is not applicable and the law of Mediterraneo governs the arbitration agreement and its interpretation

26 The Danubian Arbitration Law (hereinafter: DAL) as well as the Mediterraneo Arbitration Law explicitly acknowledge the doctrine of separability [*AtNoA, p. 31, § 14*]. CLAIMANT will demonstrate that the FSSA and the arbitration agreement contained therein are not separable, due to the fact that the validity, non-existence and termination of the FSSA are not challenged and thus the FSSA and the arbitration agreement shall not be considered

separately (**2.2**). On the other hand, if the doctrine of separability is applicable, the law of Mediterraneo still governs the FSSA and the contained arbitration clause (**2.2**).

2.1 If the doctrine of separability is not applicable the law of Mediterraneo constitutes an express choice of law of the arbitration agreement

27 The primary consequence of the separability doctrine is that the non-existence, invalidity, illegality or termination of the main contract does not necessarily negate the agreement to arbitrate comprised within it. International arbitral tribunals apply separability in cases where the main contract is allegedly terminated and also in cases where the main contract is allegedly non-existent or invalid [*Feehily, pp. 362, 368; Sanders, p. 171; Prima Paint v. Flood*]. Admittedly, RESPONDENT does not argue that the FSSA is allegedly terminated, non-existent, void, or illegal. However, RESPONDENT states that the arbitration agreement is considered to be a legally separate agreement from the container contract. Given that the validity of the underlying contract is not in question, there is no basis for the court to apply the doctrine of separability [*FirstLink v. GT*]. Therefore, if the underlying contract is not invalid, non-existent, or ineffective, then there is no justifiable reason to invoke the doctrine of separability [*Primrose, p. 150*]. As there are no challenges in respect with the existence or validity of the FSSA, the application of the doctrine of separability contained in Art. 16 of the DAL is not needed. Thus, Art. 16 of the DAL is not applicable in the present case, as the FSSA is not contested as null, void or non-existent.

28 In the absence of the application of the doctrine of separability, the arbitration agreement is a clause in the contract like any other. Therefore, there is a persuasive argument that the governing law of the underlying contract should apply to the arbitration agreement as if it were an express choice [*Primrose, p. 150*]. Consequently, the law of the arbitration agreement may be the same as the governing law of the underlying contract. Since the governing law clause constitutes an express choice of the law of the arbitration agreement [*Sulamerica v. Enesa*].

29 In conclusion, in the present case doctrine of separability does not apply since the validity, termination, non-existence is not disputed. Therefore, express choice of law contained in the FSSA extends to arbitration agreement as well.

2.2 Even if the doctrine of separability is applicable the law of Mediterraneo still governs the arbitration agreement and its interpretation

30 At the outset, the doctrine of separability or the separability presumption means that an international arbitration agreement is presumptively separable from the underlying contract with which it is associated [*Born I, p. 411; Feehily, p. 355; Lew/Mistelis/Kröll, p. 102*]. Where the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract [*Tonicstar v. American; Sonatrach v. Ferrell; Peterson v. C&M; Svenska v. Lithuania*]. Further, choice of law clause in underlying contract was implied choice of law governing arbitration agreement [*Arsanovia v. Cruz City*]. By including the arbitration agreement in Art. 15 of the FSSA the Parties submitted the arbitration agreement to the law of Mediterraneo, as it is the law governing the FSSA [*Ex. C5, P. 14*]. Since the arbitration clause is only one of many clauses in a contract, it would seem reasonable to assume that the law chosen by the parties to govern the contract will also govern the arbitration clause [*Redfern/Hunter, p. 125, § 2-86*].

31 To conclude, regardless of the applicability of the doctrine of separability, the law of Mediterraneo governs the arbitration agreement and its interpretation.

3. The Tribunal has the power to adapt the contract under the law of Mediterraneo

32 The intention of the Parties' representative, Ms. Julie Napravnik and Mr. Antley, was to include a mechanism in place which would ensure an adaptation of the contract for the unlikely event that the Parties could not agree on an amendment [*Ex. C8, p. 17, § 4*]. Ultimately, the contract did not include an express reference either in the arbitration agreement or the hardship clause [*Ex. C8, p. 17, § 5*]. Furthermore, the general contract law of Mediterraneo is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts (hereinafter: UNIDROIT Principles) [*PO1, p. 52, § 4*] and thus apply in regard to adaption of the FSSA.

33 Firstly, in order to determine the power of an international arbitrator to adapt or supplement a contract in an individual case, one has to refer simultaneously to three different legal sources: the arbitration agreement, the law applicable to the arbitration *(lex arbitri)* and the law applicable to the substance of the dispute *(lex causae)* [*Berger II, pp. 7, 8*]. In case at hand,

CLAIMANT is requesting the Tribunal for a price adaptation in the case of changed circumstances along the lines of the hardship provision in Art. 6.2.3 UNIDROIT Principles. In the present case, the law of Mediterraneo is the law applicable to the substance of the dispute or *lex causae*. The law applicable to the arbitration is the law of Danubia or *lex arbitri*. The issue of the arbitral tribunal's jurisdiction to amend the contract in light of changed circumstances must then be assessed under the law governing the arbitration at the seat of the arbitral tribunal [*Brunner I, p. 493*]. Under the UNIDROIT Principles, the courts are given wide powers to adjust or terminate the contract affected by the changed circumstances at their discretion [*Brunner I, p. 502; Art. 6.2.3 (4) (b) of the UNIDROIT Principles*].

34 Tribunal should bear in mind that in the view of the restrictions on the setting aside of awards at their seat, the significance of the *lex arbitri* is substantially reduced. In practice, however, international arbitrators focus more on the law applicable to the substance of the dispute in order to determine the basis and scope of their power to adapt and supplement contracts [*Berger II, p. 12; Briner, p. 370; Kröll, p. 245*]. Moreover, Art. 19 (2) of the UNCITRAL Model law confers full disrection on the arbitral tribunal as to how to run 'its' arbitration, subject to the agreement of the parties and the requirements of equal treatment of the parties and due process [*Arts. 18, 19 (2) of the UNCITRAL Model Law*]. An arbitral tribunal's ability to adapt a contract may derive from the law applicable to the substance of the dispute [*Redfern/Hunter, ∫ 8-20*]. To conclude, the Tribunal can base its power to adapt the contract on the law of Mediterraneo, as the law applicable to the substance of the dispute.

35 Secondly, as mentioned before, the general contract law of Mediterraneo is a verbatim adoption of the UNIDROIT Principles [*PO1, p. 53, ∫ 4*]. According to Art. 6.2.3 of the UNIDROIT Principles the disadvantaged party must prove that hardship exists, that it made a request for renegotiations without undue delay, and that it indicated the grounds on which the request was based upon [*UNIDROIT Commentary, p. 821*]. CLAIMANT had informed RESPONDENT about the problem at the earliest possible opportunity and without undue delay. In fact, CLAIMANT had informed RESPONDENT immediately after CLAIMANT had been informed by the custom authorities about the imposition of the tariffs. In addition, RESPONDENT was sufficiently informed about the imposition of tariffs of 30 %, about the 30 % increase of the price due to the tariff imposition and the problem with the final shipment

of the frozen semen. In sum, CLAIMANT also provided sufficient information for RESPONDENT to decide whether CLAIMANT is entitled to make a request for renegotiations.

36 Additionally, in the event that the parties fail to reach agreement within a reasonable time, either party may resort to court. Under Art. 6.2.3 (3) of the UNIDROIT Principles, the Parties must have failed '*to reach agreement'*. RESPONDENT assured CLAIMANT that a solution would be found through negotiation given the good relationship the Parties and their interest in further business [*Ex. C8, p. 18*]. Consequently, CLAIMANT had authorized the delivery even before the agreement on the details had been reached [*Ex. C8, p. 18*], CLAIMANT was in good faith presuming that an agreement, resulting from previous negotiations, would be reached and that RESPONDENT would bear the bulk of the additional costs due to the tariffs. After CLAIMANT delivered the final shipment in good faith, RESPONDENT stopped the negotiations and refused to pay any additional amount for the tariffs [*Ex. C8, p. 18*]. The aforementioned situation complies with one of the conditions under Art. 6.2.3 of the UNIDROIT Principles, that the renegotiations took place but failed to produce an agreement [UN*IDROIT Commentary, p. 820*]. Finally, as soon as CLAIMANT sent the final shipment, RESPONDENT lost interest in a further cooperation with CLAIMANT, despite its duty to co-operate with CLAIMANT.

37 Thirdly, according to Art. 6.2.3 (4) (b) of the UNIDROIT Principles if the court finds hardship it may, if reasonable, adapt the contract with a view to restoring its equilibrium. This is most likely solution in the majority of cases. A tribunal is likely to enjoy substantial discretion in adapting the contract and will be able to have regard to a broad range of factors, including the risks assumed by the parties when entering into the contract [*UNIDROIT Commentary, p. 821*]. Further, CLAIMANT has proved the existence of hardship [*infra ISSUE III*], made a request for renegotiation without undue delay and indicated the grounds on which the request was based in a sufficient manner. Given that the tribunal will be responding to the evidence that is put before it, it is obviously important that both parties submit all relevant evidence so that the tribunal has before it the information which it requires in order to decide what the appropriate remedy is in the circumstances of the case [*UNIDROIT Commentary, p. 822*]. In the case at hand, the UNIDROIT Principles empower the Tribunal to adapt the contract with all the requirements of Art. 6.2.3 of the UNIDROIT Principles.

38 Finally, the Tribunal has the jurisdiction to adapt the contract under the hardship clause and Art. 6.2.3 (4) (b) of the UNIDROIT Principles.

CONCLUSION ON ISSUE I

39 The arbitration clause in Art. 15 of the FSSA provides the Tribunal with the jurisdictions and the power to adapt the contract. In the absence of an explicit choice of law in the arbitration agreement, the law of Mediterraneo governs the arbitration agreement and its interpretation, regardless of the application of the doctrine of separability. As a result of the law of Meditteraneo governing the arbitration agreement, the Tribunal has the power to adapt the contract under the Art. 6.2.3 (4) (b) of the UNIDROIT Principles. Therefore, CLAIMANT urges the Tribunal to recognize its jurisdiction and the power to adapt the FSSA.

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

40 RESPONDENT stated that the evidence proposed by CLAIMANT should not be admitted in this arbitration since it was obtained by illegal means [*Fasttrack letter, p. 51, § 3*]. However, RESPONDENT fails to provide any legal argumentation why the way in which the evidence was obtained would impact its admissibility. Generally, in absence of parties' agreement, the manner in which evidence is taken depends on the terms of the parties' arbitration agreement, any applicable institutional rules, and the procedural law governing the arbitration [*Born IV, p. 768, 771*]. In the present case, the chosen HKIAC Rules provide in Art. 22.2 that the »*arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence*«. A similar provision is contained in Art. 19(2) of the DAL, which empowers the Tribunal to decide on the admissibility of any evidence. Both provisions are in line with the prevailing international arbitration practice, which gives tribunals wide discretion in the process of evidence taking. Tribunals are the sole judges of quantity in quality of evidence and are free in determining the admissibility of evidence [*Rajoo, p. 451; Born IV, p. 769*].

41 Contrary to RESPONDENT's allegations, CLAIMANT will demonstrate that the evidence should be admitted since all of the conditions for their admissibility are met (**A**). Additionally, if the evidence is not admitted, this would breach CLAIMANT's right to present its case (**B**). And in

any case, RESPONDENT failed to satisfy the burden of proof for inadmissibility of evidence (**C**).

A. The conditions for the admissibility of evidence are met

42 Both the chosen institutional rules and the applicable arbitration law empower the Tribunal to determine the admissibility, relevance and materiality of evidence [*Art. 22.2 HKIAC Rules; Art. 19(2) Danubian Arbitration Law*]. In order for tribunals to admit evidence, three criteria have to be met - one of relevance, materiality and admissibility *sensu stricto*, i.e. in the narrow sense [*Pilkov, p. 148*]. While relevance and materiality are not a matter of strict law but rather of common sense and factual reasoning, admissibility *sensu stricto* is a purely legal criterion under which the proposed evidence must not breach public policy considerations or mandatory provisions of applicable arbitration law [*Pilkov, pp. 148-150; Lew/Mistelis/Kröll, p. 558*]. Whether the evidence was obtained legally should not be one of the Tribunal's criteria for admitting the evidence, since it is not provided in any of the applicable rules. Moreover, illegally obtained evidence has been admitted in the past [*Caratube v. Kazakhstan; Corfu Channel case*]

43 Consequently, whether CLAIMANT is entitled to submit this evidence should only be determined through the Tribunals decision on admissibility, relevance and materiality of the evidence. Those are the only factors that the Tribunal should consider under the applicable law. Accordingly, CLAIMANT asserts that the evidence in question is both relevant and material to this case (**1.**). Moreover, the evidence is admissible *sensu stricto* as their admittance would not breach public policy considerations or any mandatory provisions of the applicable law (**2.**).

1. The evidence is relevant and material

44 As with the whole procedure of evidence taking, arbitrators are allowed a great deal of discretion to decide what is relevant and material [*Edling, p. 7*]. The Tribunal should not apply any strict rules of relevance in the present case, since they are not contained in the applicable law, were not agreed by the Parties and they were not even suggested by RESPONDENT itself. Where parties have agreed to institutional rules which empower tribunal to determine the admissibility of evidence the tribunal is also entitled to disregard any

traditional evidentiary rules [*Born IV, p. 771; Lew/Mistelis/Kröll, p. 559; BQP v. BQQ*]. In any case, the Danubian law does not contain any specific rules on evidence [*PO2, p. 61, § 46*]. Therefore, the Tribunal should use their full discretion and determine the relevance and materiality of the proposed evidence.

45 Evidence is relevant to the case when it is associated with the subject matter of the dispute and it is material when it is material to the outcome of the case [*Sattar, p. 7*]. It must be pointed out that the threshold for evidence to be relevant and material is not high, and arbitrators extremely rarely sustain objections regarding irrelevancy or immateriality [*Cooley/Lubet, p. 125; Scheinman, p. 15*]. In the present case, the documents from the other arbitration proceedings are both relevant and material to the case at hand.

46 There are many parallels between the present case and RESPONDENT's other arbitration. Firstly, the facts of both cases are rather similar. The other arbitration concerned a sales contract of mare from RESPONDENT to third party [*PO2, p. 60, § 39*]. That business deal was also impacted by the unexpected imposition of additional tariffs, which resulted in hardship for RESPONDENT [*ibid.*]. What is more, the hardship for RESPONDENT resulted from the 25 % tariff imposed by Mediterraneo, the same tariff that also affected CLAIMANT in this case [*PO2, p. 58, § 24*]. Secondly, the contract and arbitration agreement in both cases are governed by the law of Mediterraneo and both arbitrations are administered in accordance with the HKIAC Rules [*ibid.*]. With so many correlations in subject matter, the relevance of evidence proposed by CLAIMANT is apparent. Although decision in the other case is not binding on the Tribunal, it could offer some guidance and may very well be material to the outcome of this case. Findings in the other arbitration affirm CLAIMANT's position as that tribunal confirmed its power to adapt the contract if the tariff resulted in hardship for RESPONDENT [*PO2, p. 60, § 39*].

47 To conclude, both criteria, relevance and materiality, for the admissibility of the evidence have been fulfilled. Thus, Tribunal should allow CLAIMANT to submit the proposed evidence in order to respect CLAIMANT's right to present its case.

2. If the evidence is admitted, this would not breach public policy considerations or mandatory provisions of arbitration law

48 To begin with, a decision on what constitutes a breach of public policy is completely dependent upon the laws of individual states [*Moses, § 4*]. Additionally, public policy is interpreted very narrowly by national courts in majority of the developed arbitral jurisdictions [*Sattar II, p. 4; Vassilakakis, p. 38*].]. In the present case, there are no specific rules on taking of evidence in Danubia [*PO2, p. 61, § 46*]. This means that if the Tribunal admits evidence proposed by CLAIMANT, even if they were obtained illegally, it cannot mean a breach of public policy.

49 Further, if the Tribunal admits this evidence it would not mean a breach of any of the mandatory provision of the DAL. RESPONDENT's right to equal treatment of the parties from Art. 18 of the DAL and its right to fair proceedings would not be breached. In determining whether a party can use illegally obtained evidence and whether their admittance would mean a breach of the other party's rights tribunals tend to use one test – the "clean hands" doctrine [*Betz, p. 295; O'Sullivan, § 5*]. The doctrine is essentially based on the principle of good faith [*Kreindler, p. 317*] and means weighing of whether the wrongdoing was done by the party seeking to benefit from the evidence [*O'Sullivan, § 5*]. Admittedly, tribunals have in the past rejected party's right to submit evidence which was obtained by illegal means by that party [*Methanex v. USA; Libananco v. Turkey*].

50 However, the situation is substantially different in this case since CLAIMANT was not the one who originally obtained the evidence, which means that it has clean hands. CLAIMANT found about the other arbitration from a third person, a current CEO of one of CLAIMANT's regular customers [*PO2, p. 60, § 40*]. It has now arranged to obtain relevant documents from a company which already has them in possession [*PO2, p. 61, § 41*]. CLAIMANT had no influence and played no role in the way the evidence was obtained. Even RESPONDENT makes no allegation that CLAIMANT was involved in obtaining the documents [*Fasttrack letter, p. 51, § 3*]. Therefore, CLAIMANT should not be prevented from submitting evidence, even if they were illegally obtained, as it was not involved in that.

51 Consequently, there are no circumstances which would prevent the Tribunal to admit this evidence. There would be no violation of public policy and RESPONDENT's rights would not

be breached, especially since CLAIMANT had no impact on the manner in which the evidence was obtained.

B. If the evidence is not admitted it would breach CLAIMANT's right to present its case

52 In order to present its claims adequately, CLAIMANT wishes to submit into evidence the relevant documents from another arbitration in which RESPONDENT is involved. If the Tribunal does not admit this evidence, it would infringe CLAIMANT's right to present its case. It must be stressed that breaching the right to present the case constitutes the ground for challenge of an arbitral award [*Graves/Morrissey, p. 465*].

53 To begin with, the right to be heard or the right to present one's case is among the most basic procedural rights [*Born II, p. 2175; Knuts, p. 670*]. Further, the right to submit evidence that is relevant to the case is of paramount importance for a party in order to present its case [*Schütze, p. 1110; Zaheeruddin, pp. 89-90*]. Right to be heard is represented in all relevant arbitration provisions. Under the HKIAC Arbitration Rules the Tribunal must conduct the proceedings in a manner that respects a party's right to present its case [*Art. 13(1) HKIAC Rules*]. DAL explicitly provides that a "*party shall be given a full opportunity of presenting his case*" [*Art. 18 DAL*]. The Tribunal should take note of the strict language contained in Art. 18 of the DAL. Certain rules and legal systems contain provisions referring to "reasonable opportunity" in contrast to "full opportunity" [*Schütze, p. 1110*]. Since Art. 18 of the DAL refers to the full opportunity, it must be concluded that the relevant rules governing these proceedings acknowledge the importance of right to present one's case and that it shall be respected to its full extent.

54 Furthermore, under Art. 34(2)(a)(ii) of the DAL, an arbitral award may be set aside if a party was unable to present its case. In such instances, national courts are inclined to set aside the final award [*AKM v. AKN; OGH, 18 OCg 3/15; Moloko v. Ntsoane*]. Courts have also decided that failure to examine evidence constitutes grounds for setting aside of the award [*IV CSK 187/2013; II CSK 557/2013; Case nº 6/2017*]. Thus, if the Tribunal would not admit CLAIMANT's evidence, its right to present evidence and the right to be heard would be breached. This could bear consequences as grave as having the final award vacated.

55 In conclusion, as the evidence CLAIMANT wants to submit is not only relevant and material to this case, but also of paramount importance for being able to present CLAIMANT's case,

the Tribunal should deem it admissible. If the Tribunal were to decide to the contrary it would expose future arbitral award to a challenge and subsequent vacation.

C. RESPONDENT failed to satisfy the burden of proof for the inadmissibility of evidence

56 Art. 27 (1) of the DAL provides that "*each party shall have the burden of proving the facts relied on to support its claim or defense*". The general rule of admissibility of evidence places the burden of proof on a party challenging the admissibility of evidence - the party making the challenge has to prove specific grounds on which the evidence is not admissible [*Kazazi Mojtaba, p. 432; Pilkov, p. 150; Riahi v. Iran; Biloune v. Ghana*]. In the case at hand, RESPONDENT merely stated that the evidence should not be admitted since it was allegedly obtained in an illegal manner [*Fasttrack Letter, p. 51, § 1*]. RESPONDENT offers no legal justification as to why this fact would lead to inadmissibility of evidence. Moreover, even if evidence was obtained illegally, RESPONDENT fails to explain why this should be to CLAIMANT's detriment. CLAIMANT took no part in obtaining the evidence and is merely trying, in good faith and in accordance with Art. 27(1) of the DAL, to submit documents supporting its claims.

57 Admittedly, CLAIMANT carries the initial burden of proving the facts upon which it relies. However, there is a point at which one party may be considered to have made sufficient showing in order to shift the burden of proof to the other party [*Malek v. Iran*]. Accordingly, the burden of proof has shifted in the moment that RESPONDENT made allegation of inadmissibility of CLAIMANT's proposed evidence. A mere allegation is not sufficient for excluding the evidence [*ASA Bulletin, p.* 316]. Therefore, in order to satisfy the burden of proof, RESPONDENT would have to substantiate its claims and prove that grounds for inadmissibility exist. Nevertheless, RESPONDENT failed to do so.

58 CLAIMANT asserts that RESPONDENT could not have proven its allegations of inadmissibility even if it attempted to. As already stated, it is true that some tribunals have rejected evidence illegally obtained by the party trying to submit it [*EDF v. Romania*]. Even then, tribunals have discretion to determine whether a taint of illegality attached to evidence is of such nature as to render it inadmissible [*O'Malley, p. 322, § 9.119*]. In this case, CLAIMANT was not the one who used illegal means to obtain the evidence. Moreover, RESPONDENT used an outdated firewall to protect its computer system, making it easy for the hackers to enter the system [*PO2, p. 61, § 42*]. Therefore, even if we disregard that it was not CLAIMANT who obtained

the evidence, the Tribunal should find that the hacking could be prevented by Respondent, which means that there is not a sufficient degree of illegality for the exclusion of evidence. Further, if evidence is obtained in violation of a contractual duty of confidentiality, this does not result in exclusion of evidence [*O'Malley, p. 322, § 9.119*; *Enron v. Argentina*]. This means that even if the documents were leaked by Respondent's former employees, that should have no impact on the admittance of evidence in these proceedings.

59 To conclude, it was first and foremost Respondent who was under the obligation to prove that the evidence should not be admitted. It only made a very general and unsubstantiated allegation, thus failing to comply with its burden of proof. Regardless, CLAIMANT can very well prove that the evidence must be admitted. If evidence is illegally obtained it does not automatically render it inadmissible and, in any case, CLAIMANT was not the one who obtained it illegally.

CONCLUSION ON ISSUE II

60 CLAIMANT has established that criteria for the admissibility of evidence has been satisfied. Evidence CLAIMANT wishes to present is not only relevant and material, but of paramount importance to the resolution of the present case. If CLAIMANT was denied the right to present its evidence, its right to present the case would be breached. This would mean the final award could be subject to a challenge and set aside. What is more, although it is upon RESPONDENT to establish that evidence is inadmissible, it fails to do so. For the reasons listed above CLAIMANT urges the Tribunal to find that CLAIMANT is entitled to submit evidence from the other arbitration proceedings.

ISSUE III: CLAIMANT IS ENTITLED TO PAYMENT 1.250.000,00 USD PURSUANT TO CLAUSE 12 OF FSSA

61 On 6 May 2017, Parties have signed FSSA where they agreed on the delivery of 100 doses of frozen semen from the stallion Nijinsky III in several installments in exchange for a price of 100.000 USD per dose [*Ex. C5, p. 13*]. Due to CLAIMANT's greater experience in the shipment of such goods, RESPONDENT insisted on a delivery based on DDP clause [*Ex. C3, p. 11; Ex. C5, p. 14 § 8*]. Although CLAIMANT agreed with the proposition, it immediately refused to bear any further risks associated with changes in customs regulation and import

restrictions [*Ex. C4, p. 12*]. CLAIMANT insisted on the inclusion of a hardship clause, which would exclude its liability for any unforeseen events [*Ex. C4, p. 12, Ex, C8, p. 17*].

62 RESPONDENT received the first delivery of 25 doses of frozen semen on 20 May 2017, the second shipment of 25 doses was sent on 3 October 2017 [*NoA, p. 6, ∫ 9*]. The problems arose, when CLAIMANT was preparing the last shipment of frozen semen, which was supposed to be delivered on 23 January 2018 [*Ex. C7, p. 16*]. Equatorianian government increased the tariffs on all agricultural goods from Mediterraneo by 30 % [*NoA, p. 6, ∫ 9, Ex. C6, p. 15*]. These tariffs covered all animal products, including frozen semen [*Ex. C7, p. 16; Ex. R4, p. 36*]. Due to the unexpected and sudden tariff increase, CLAIMANT immediately informed RESPONDENT about the additional costs [*Ex. C7, p. 16*].

63 RESPONDENT adjured CLAIMANT to send the last shipment, as it urgently needed the last stock of frozen semen due to the start of breeding season [*Ex. R4, p. 36; PO2, p. 59, ∫ 33*]. Since CLAIMANT shipment became 30 % more expensive, due to additional tariffs, RESPONDENT agreed to find a solution after the urgent delivery of frozen semen will be made [*Ex. R4, p. 36*]. RESPONDENT stated "*that parties will certainly find an agreement on price adaptation*" [*ibid.*]. Since CLAIMANT wanted to continue doing business with RESPONDENT, it fulfilled all its contractual obligations and delivered the remaining 50 doses of Nijinsky III frozen semen on 23 January 2018 [*Ex. C8, p. 18*]. Wishing to reach an agreement on adaptation of the FSSA, CLAIMANT organized a meeting with RESPONDENT's CEO, Ms. Espinoza [*PO2, p. 60, ∫ 35*]. During the meeting she refused to pay any additional amount for the tariffs and severed any further cooperation with CLAIMANT [*EX. C8, p. 18*].

64 RESPONDENT erroneously contends that CLAIMANT's right to remuneration is baseless, as CLAIMANT has no right to adaptation of the FSSA. On the contrary, CLAIMANT will demonstrate that it has the right to remuneration based on Clause 12 of the FSSA (**A**). Alternatively, CLAIMANT has the right to compensation based on CISG (**B**).

A. RESPONDENT must pay CLAIMANT under Clause 12 of the FSSA

65 Since the beginning of negotiations, CLAIMANT emphasized that it will not bear any increased risks associated with the change in delivery terms, in particular any changes in customs regulation or import restrictions [*Ex. C4, p. 12*]. This is precisely the reason, CLAIMANT insisted on the inclusion of hardship exemption [*Ex. C8, p. 17; Ex. R3, p. 35*]. Parties agreed on a hardship reference in Clause 12 of the FSSA, which excluded

CLAIMANT's liability for hardship, caused by additional health and safety requirements or comparable unforeseen events [*Ex. C5, p. 14, § 12*].

66 Firstly, CLAIMANT will establish that RESPONDENT assumed economic risk in cases of hardship (**1**). Secondly, hardship arose as increased tariffs are to be considered an additional health and safety requirement for which RESPONDENT assumed economic risk (**2**). Alternatively, increased tariffs represent comparable unforeseen events (**3**).

1. RESPONDENT assumed economic risk in case of hardship

67 Economic risk is a possibility that macroeconomic conditions, such as raise of tariffs, will affect the contract [*Hirschey, p. 622*]. CISG does not include provisions regulating the assumption of economic risk, as Arts. 66 to 70 of the CISG only deal with risk of physical loss or deterioration of goods. However, under principle of party autonomy, parties are free to determine the content of the contract [*Born, p. 82; Schwenzer Commentary, p. 106, § 8*]. Consequently, Parties can allocate the economic risk according to all the circumstances of the specific contract [*Brunner I, pp. 159-160*]. If the economic risk is assigned to one of the parties, that party bears the burden for any contractually allocated occurrences [*Goddard/Fellner/Ormand, p. 33*]. In the present case, Parties assigned the risk of hardship to RESPONDENT. When the circumstances of hardship arose, RESPONDENT should bear the economic risk of its consequences. Consequently, CLAIMANT is entitled to the payment of 1.250.000 USD.

68 Admittedly, during the negotiations Parties agreed upon the delivery based on the inclusion of DDP clause [*Ex. C3, p. 11*]. RESPONDENT insisted on a DDP based delivery, given the urgency of the delivery and CLAIMANT's much greater experience regarding the shipment of frozen semen [*Ex. C3, p. 11*]. DDP based delivery includes paying for shipping costs, export and import duties, insurance and any other expenses, which could occur during shipping to an agreed upon location in the buyer's country [*ICC guide on transport and the INCOTERMS 2010 rules, p. 69; Bergami, p. 331*]. With this insertion, CLAIMANT was obligated to assume all of the responsibility and costs associated with transporting goods, until the moment RESPONDENT received the frozen semen. Because of the additional risks, which burdened CLAIMANT, it increased the price by 500 USD per dose [*Ex. C2. p. 10; Ex. C4, p. 12*].

69 However, intent of inclusion of DDP clause, was not to shift economic risks to CLAIMANT, but to speed up the process of delivery. Pursuant to Clause 12 of the FSSA, CLAIMANT's liability was excluded if hardship would arouse in situations caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous [*Ex. C5, p. 14, § 12*]. Under normal circumstances CLAIMANT would bear all costs and risks involved in bringing the frozen semen to RESPONDENT, due to the agreed DDP delivery. However, if circumstances would make the frozen semen delivery more onerous, RESPONDENT was the one to bear all the additional expenses.

70 The first two deliveries of frozen semen were made under normal circumstances [*Ex. C5, p. 14, § 8*]. However, during the last shipment, the circumstances changed in such a way that the equilibrium of the contract was fundamentally altered. Accordingly, CLAIMANT invoked the hardship clause, yet still delivered the goods, as RESPONDENT needed them urgently [*Ex. C8, p. 18*]. Considering relationship between Parties, CLAIMANT acted in good faith, even though it could have withheld the delivery by referring to the hardship clause included in the contract, until RESPONDENT paid for additional tariffs.

71 In conclusion, it is unfathomable why RESPONDENT's attitude suddenly changed. The only explanation that comes to mind is that RESPONDENT is driven purely by monetary motives and is acting in bad faith. However, CLAIMANT's good deeds and RESPONDENT's wrong doings do not change the content of the contract. The decisive factor is the fact that under the Clause 12 of the FSSA Parties decided to shift the economic risk from CLAIMANT to RESPONDENT. Thus, in light of everything stated above, CLAIMANT urges the Tribunal that RESPONDENT assumed economic risk in cases of hardship.

2. Increased tariffs are to be considered an additional health and safety requirement

72 Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity [*Constitution of The World Health Organization, p. 1*]. The health of all people is fundamental to the attainment of peace and security. Health as a human right creates a legal obligation on states and imposes a responsibility of governments for the health of their people [*UDAW; Constitution of The World Health Organization, p. 1*]. The importance of animal welfare is well established and supported by many philosophers [*Regan, p. 103*], political scientists [*Boyer/Scotton/Svärd/Wayne, p. 1*] legal experts [*Posner, p. 537*] and economists [*Sandilands/Hocking, p. 340*] since it is well known, that if a state wanted to ensure

public health, it is necessary to provide for animal health. CLAIMANT will establish that tariffs imposed by Equatoriana were not retaliatory measure, but measure to ensure public health and safety. Therefore, falling under the scope of the Clause 12 of the FSSA.

73 In 2014 a rare aggressive type of foot and mouth disease was discovered in Danubia. While it was not affecting horses, which were often carriers of the disease, other animal population was effected. Disease resulted in death of quarter of the Danubia's cow population. Danubia instantly imposed health and safety requirements, which involved long quarantine time. Similarly, Equatoriana has been facing the same disease for last couple of years [*NoA, p. 5, § 5*]. For this reason, in March 2017 it imposed serious restrictions on the transportation of all living animals due to severe problems with foot and mouth disease [*NoA, p. 5, § 5*]. Pressured by powerful interests in the Equatorianian racehorse breading industry, the ban on artificial insemination for racehorses had been temporarily lifted [*Ex. C8, p. 18, Ex. C3, p. 11*].

74 Following temporary lift by the Equatoriana, Mediterraneo imposed tariffs on all agricultural products. The newly elected president of Mediterraneo argued his previous restrictions were merely a mean to protect national security of the state [*Ex. C6, p. 15*]. Considering, that there is a serious foot and mouth disease crisis in Equatoriana [*Ex. C1, p. 9*], imposing tariffs was a way of limiting the spread of foot and mouth disease, in order to protect health of people and animals. Transmissible animal diseases may have a significant impact on public health and food safety. [*The World Organisation for Animal Health*]. Additionally, newly elected president of Mediterraneo imposed measures shortly after his election in April of 2017. The tariffs on the side of Equatoriana were announced on 19 December 2017 by executive order, taking effect from 15 January 2018 onwards [*PO2, p. 58, § 25*]. Until 2018 no tariffs have been imposed on horse semen [*NoA, p. 5, § 5*]. Given the fact that Equatoriana had always been avid supporters of free trade [*Ex. C6, p. 15; NoA, p. 7, § 19; NoA, p. 6, § 10*], imposing such measures would be surprising. Considering the 8-month period between measures taken by Mediterraneo and measures taken by Equatoriana [*Ex. C6, p. 15*], serious doubts emerge if imposed measures can be perceived as retaliatory at all.

75 Furthermore, both CLAIMANT and RESPONDENT are members of World Trade Organization (hereinafter: WTO) [*PO2, p. 61, § 47*]. WTO agreements permit members to take measures to protect not only the environment but also public health, animal health and plant health

[*Understanding the WTO*]. Thus, Equatoriana's actions would only be lawful were the tariffs imposed as a health and safety requirement.

76 Considering all the aforementioned circumstances, Tribunal should consider raise of tariffs as additional health and safety measure imposed by state of Equatoriana. Clause 12 of the FSSA covers not only the most predominant risk of changes in the health and safety requirements but risks including additional tariffs as well. Consequently, as RESPONDENT assumed risk in case any additional health and safety requirements occurred, it should be the one paying the additional tariffs in the amount 1.250.000 USD.

3. Alternatively, additional tariffs are to be considered as a comparable unforeseen event

77 If the Tribunal concludes that the tariffs could not constitute a health and safety requirement, tariff increase should be considered as a comparable unforeseen event. CLAIMANT will demonstrate that in any case hardship arose from comparable unforeseen events, which made the performance of FSSA more onerous. Firstly, the imposed tariffs are comparable to additional health and safety requirements (**3.1**). Secondly, the imposed tariffs were unforeseen (**3.2**). Thirdly, the tariffs made the performance more onerous (**3.3**).

3.1 The imposed tariffs are comparable to additional health and safety requirements

78 When determining whether additional tariffs imposed by Equatoriana are to be considered comparable, Tribunal should take into account Art. 8 of the CISG. The provisions of Art. 8 of the CISG are relevant to the interpretation of statements, conduct of parties, intent and circumstances before conclusion of the contract, [*Honnold, p. 116; Smallmon case; Propane case*]. The underlying principle of said article is the determination of 'true intent' of the parties, arrived at through consideration of all the facts and circumstances surrounding the case [*Zeller, p. 638; Yang, p. 618; Cedar Petrochemicals inc. case; Chinchilla furs case*].

79 Under Art. 8(1) of the CISG statements and other conducts of a party are to be interpreted subjectively [*Textiles case; Egg case*], according to its intent where the other party knew or could not have been unaware of other party's intent [*Roser Technologies, Inc. case; Propane case; Corporate Web Solutions Ltd. case*]. Art. 8 of the CISG expressly requires that due consideration be given to all potentially relevant circumstances, including the negotiations [*Lookofsky p. 55*].

80 The intent to include a hardship clause that would cover present situation was more than evident to RESPONDENT. CLAIMANT emphasized several times during the negotiations that it had no intent to bear any further risks associated with the change in delivery terms, in particular the changes, associated with custom regulations or import restrictions [*Ex. C4, p. 12; Ex. C8, p. 17*]. Due to the DDP delivery of the frozen semen, which extremely burdens CLAIMANT, who must assume all costs associated with transporting goods, Mrs. Napravnik, CLAIMANT's negotiator, was determined to include an express reference to the hardship clause into the contract [*Ex. C8, p. 17*], mainly since she wanted to protect CLAIMANT's business interests. This intent was very well known to RESPONDENT's negotiator Mr. Antly [*Ex. R2, p. 34; R3, p. 35*].

81 Admittedly, FSSA was not concluded by Mr. Antly and Mrs. Napravnik due to the car accident [*Ex. C8, p. 17*], but by newly appointed negotiators. However, both of the Parties' negotiators had full access to prior email chain between CLAIMANT and RESPONDENT [*PO2, p. 55, § 5*], meaning RESPONDENT could not have been unaware of CLAIMANT's intent to exclude its liability for any additionally imposed tariffs [*Ex. C4, p. 12; Ex. C8, p. 17*].

82 Moreover, under Art. 8(2) of the CISG statements are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had [*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, who is also in the same set of external circumstances [*Bianca/Bonell/Farnsworth, Art. 8, note 2.4.; Honnold, Art. 8, § 107.1*]. Intent is to be understood from the point of view of an objective person [*Schwenzer Commentary, p. 154, § 17; Staudinger/Magnus, Art. 8, § 11*]. In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case, including the negotiations [*Lookofsky p. 55;*].

83 It follows from the foregoing that a reasonable person would consider all the relevant circumstances of declaration and would therefore be objective [*Honsell, Art. 18, §§ 28-29; Auto case*]. CLAIMANT unambiguously and clearly stated to RESPONDENT that it was not willing to take over any further risks associated with a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions [*Ex. C4, p. 12*]. Therefore, it follows that any reasonable person would understand CLAIMANT's

intent. It is of great importance that the Tribunal considers all the facts and circumstances of the case, which are crucial for the interpretation of the FSSA provisions.

84 Additionally, regardless of Parties' intentions, imposed tariffs are also factually comparable to any abstract additional health and safety requirements. Firstly, additional health and safety requirements can also be imposed as a tariff. Secondly, both health and safety requirements as well as current tariffs can only be imposed by a state. Finally, they represent a change in at least one parties obligation.

85 In light of arguments made, it is evident that additional tariffs imposed by Equatoriana are comparable to any additional health and safety requirement.

3.2 The imposed tariffs were unforeseen

86 Second criterion for invoking hardship under Clause 12 of the FSSA is that the comparable events were unforeseeable. Extent and time of the impediment of performance was anything but foreseeable. Admittedly, Equatoriana imposed a ban on the transportation of living animals in March 2017 [*NoA p. 5, § 5; Ex. C1 p.9*]. However, this ban was temporarily lifted for racing horses [*Ex. C1 p.9*]. Subsequently, because of political changes in Mediterraneo 25 % tariffs were imposed on all agricultural products [*Fasttrack letter, p. 50*]. The retaliatory nature as well as the size of the tariffs subsequently imposed by Equatoriana were unanticipated even by the well-informed circles [*Ex. C6, p. 15*]. The breadth of the goods, countries affected, amount and the speed with which tariffs have been imposed made the imposed measure almost unprecedented, let alone foreseen [*PO2, p. 58, § 23*]. This is especially true because Equatoriana was always one of the biggest supporters of free trade [*Ex. C6 p. 15*]. For this reason, it was impossible for both Parties to foresee that these tariffs would be imposed.

3.3 The tariffs made the performance of the contract more onerous

87 Third and final criterion for invoking hardship under Clause 12 of the FFSA is that the comparable unforeseen event made the performance of the FSSA are more onerous. CLAIMANT was in precarious financial situation, making monetary loses since 2014, due to high interest loans [*PO2, p. 59, § 29*]. RESPONDENT was aware of CLAIMANT financial difficulties, because of extensive media coverage of disease outbreak in Danubia, where CLAIMANT almost bankrupted [*PO2, p. 58, § 22*].

88 If CLAIMANT would bear the additional tariffs in the amount of 1.250.000 USD the prolongation of its credits would be seriously endangered [*PO2, p. 59, § 29*]. CLAIMANT would probably only be able to extend the credit if would sell considerable amount of its shares to CLAIMANT's largest competitor. On the other hand, RESPONDENT would not be financially endangered if it bore 1.250.000 USD [*PO2, p. 59, § 30*]. Consequently, RESPONDENT should be the one carrying the burden of additional tariffs.

89 To conclude, since the imposed tariffs are comparable, unforeseen, and they made the performance of the contract more onerous, they are to be considered as hardship pursuant to Clause 12 FSSA. Therefore, the Tribunal should find that RESPONDENT should bear the additional costs arising out of the increased tariffs.

B. CLAIMANT is entitled to the payment of 1.250.000,00 USD under CISG

90 Before Parties could reach an adaptation of FSSA, RESPONDENT decided that it was no longer interested in a long-lasting and mutually beneficial business relationship [*Ex. C8, p. 18*]. CLAIMANT will demonstrate that it acted in good faith at the time, when it became aware of the additional 30 % tariffs which were imposed by Equatoriana's government on all agriculture goods. CLAIMANT fully complied with all of its contractual obligations despite the additional unexpected tariffs, when it prepared and sent the last shipment to RESPONDENT. Therefore, CLAIMANT urges the Tribunal to consider the unlawfulness of RESPONDENT's actions, which deprived CLAIMANT of all the reasonably expected profits, which would result from the fulfilment of all its contractual obligations.

91 CLAIMANT has already established that it has the right to payment under Clause 12 of the FSSA. In any case, the same right stems from the CISG, since tariff increase on agricultural products is to be considered a hardship pursuant to Art. 79 of the CISG (**1**). Alternatively, if the Tribunal finds that CISG does not contain special provisions on hardship, CLAIMANT has the right to the remuneration under the UNIDROIT Principles (**2**).

1. CLAIMANT is intitled to payment pursuant Art. 79 of the CISG

92 In international business contracts unpredictable events, which influence the fulfilment of contractual obligations for at least one party, are more likely to occur [*Brunner I, p. 1*]. These contracts are often subject to different laws of both parties' countries (*e.g.* export and import bans, exchange controls, trade bans *etc.*), making the task of contract fulfilment more difficult

and often calling for dispute [*Lee, p. 38*]. 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*]. The autonomy of Art. 79 of the CISG is illustrated by the lack of reference to accepted wording and concepts of domestic laws (*force majeure*, frustration, impracticability, hardship, …), which allows the interpretation of Art. 79 to be extremely broad, since one cannot resort to domestic laws as a guide [*Nicholas, pp. 5-9, § 24; Liu, § 4.2*]. The system set forth in Art. 79 of the CISG is unitary in the sense that it does not distinguish between inability to perform and difficulty of fulfilling contractual obligations [*Tallon, p. 574, § 1.3*].

93 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 [*CISG Advisory council Opinion No. 7*]. Consequently, as the legal response is granted in the CISG, the application of domestic rules on hardship is not needed. 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; Liu § 4.1; Caforn International case; Vine wax case*].

94 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 parties' control [*Schwenzer Commentary, p. 1067; Ferrari, p. 828; CISG Advisory council Opinion No. 7; Miettinen, p. 9; Zeller, p. 182; Chinese goods case*]. Important question when dealing with application of Art. 79 of the CISG is whether situations of hardship are covered by the term impediment [*Bianca/Bonell, pp. 581-582; Flambouras, § 2*]. International Chamber of Commerce concluded that an "impediment" should be some kind of obstacle, which has prevented performance as normally foreseen, consequently, including hardship [*International Chamber of Commerce, § 9*]. 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; Arbitration Award case No. 155/1996; Coal case*]. In hardship situations, it is typically a question as to whether performance of the contract has become excessively onerous, and whether it is still reasonable to have one party exclusively carrying the risk of changed circumstances [*Blum/Bushaw p. 678; United States v. Wegematic Corp; Brunner I, pp. 391-392*]. CLAIMANT delivered the frozen semen to RESPONDENT despite the fact that Claimant's liability was explicitly excluded for additional costs, which could arouse after the conclusion of the contract [*NoA, p. 6, § 13; Ex. C4, p. 12; Ex. C5, p. 14, § 12*]. CLAIMANT's last shipment is to be considered as an impediment, since CLAIMANT had to pay 1.250.000 USD due to the newly imposed tariffs [*Ex. C8, p. 17*]. The additional tariffs were imposed by Equatoriana's government, thus falling outside of CLAIMANT's control.

95 Secondly, in order to satisfy the requirements for an exemption under Art. 79 of the CISG, 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 I, p. 157; Bianca/Bonell, p. 580, § 2.6.3.; Malaysia Dairy Industries v. Dairex Holland case*]. Additional tariffs came as a complete surprise, especially since these tariffs were imposed by a country which was always one of the biggest supporters of the free trade. Moreover, even the informed circles had no inside knowledge that tariffs would be imposed [*Ex. C6, p. 15*]. Furthermore, CLAIMANT could not predict that if the country already banned the transportation of living animals [*Ex. C1, p. 9*], which made the insemination process difficult to execute, is now trying to sabotage the breeders and make the insemination process completely onerous.

96 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, § 434; Metallic sodium case; Steel bars case*] and helps establish the criteria of how much effort must the seller make in order to overcome the impediment that has arisen [*Huber/Mullis, p. 262; Schlechtriem/Butler, p. 202*]. In situations involving an excessive increase in the cost performance hardship exemption can be granted, since the cost increase may be considered an impediment to performance [*Brunner I, p. 222; Girsberger, p.125*]. When CLAIMANT was faced with the struggle to send the last shipment with extra costs, it immediately contacted RESPONDENT to achieve an agreement on alteration of the price in the FSSA [*Ex. C7, p. 36*]. RESPONDENT understood the difficulties CLAIMANT was facing, promised to find a solution and yet urged

CLAIMANT to send the last shipment [*Ex. R4, p. 36*]. Wishing to keep this business relationship flourishing, CLAIMANT delivered the shipment, regardless the fact that it had to pay 1.250.000 USD to Equatoriana. For CLAIMANT, which is under financial restructuring plan, the paid sum represented a severe economic impediment that CLAIMANT could not overcome [*PO2, p. 59, § 29*].

97 In the light of the arguments above, CLAIMANT urges the Tribunal to conclude that Art. 79 of the CISG includes hardship. Further, CLAIMANT established all the required prerequisites to invoke hardship under Art. 79 of the CISG. Consequently, CLAIMANT is entitled to payment of 1.250.000 USD.

2. CLAIMANT is intitled to payment under UNIDROIT Principles

98 CLAIMANT demonstrated that above mentioned circumstances constitute an impediment which, with the fulfilled required prerequisites, governs the situation of hardship under Art. 79 of the CISG. However, if the Tribunal concludes that Art. 79 of the CISG does not define the situations of hardship, the gap of the CISG should be filled with the help of Art. 7(2) of the CISG. Parties can rely on UNIDROIT Principles for the purpose of supplementing CISG **(2.1)**. Further, since UNIDROIT Principles are applicable, CLAIMANT will establish that it also has the right to payment pursuant to Art. 6.2.2 of the UNIDROIT Principles **(2.2)**.

2.1 UNIDROIT Principles are applicable pursuant to Art. 7(2) of the CISG

99 When matters are not governed by the CISG, they must be dealt with either under domestic law or other uniform sets of rules in force, which address the matter at issue [*Schwenzer Commentary, p. 77, § 6; Ferrari, § 4.1*]. 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 and Meyer, p. 263; Perales Viscasillas, p. 5; Schwenzer Commentary, pp. 121-122, §§ 4-5*].

100 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*]. In case 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*]. When the court or arbitral tribunal is faced with an issue it considers a gap within the meaning of Art. 7(2) of the CISG, it should first try to resolve this gap within the text of the CISG, by applying UNIDROIT Principles and only in the absence of such principles, the Tribunal can resort to rules of applicable domestic law [*CISG Advisory opinion no. 7, § 34; Kotrusz, p. 151; Schlechtriem, p. 37*].

101 Furthermore, *lex mercatoria* and the UNIDROIT Principles are to be considered as a means of interpreting and supplementing the CISG when no general principles within the CISG are found [*Perales-Viscasillas, p. 20; Bridge, p. 6*]. The 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 the CISG implementation [*ICC Publication No. 642.2002; ICC 8817/1997; ICC 8128/1995; ICC 8769/1996*]. The UNIDROIT Principles are not just used as a mere 'doctrinal reference' but, more importantly, 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 an autonomous clarification of the provisions in the CISG [*Schwenzer Commentary, p. 122, § 5; Magnus, p. 173; Monberg, § 2.1.1*]. Consequently, if the Tribunal determines that Art. 79 of the CISG does not include cases of hardship, it should observe relevant provisions of UNIDROIT Principles. Especially, since the general contract law of Equatoriana and Mediterraneo are a verbatim adaption of the UNIDROIT Principles [*PO1, p. 52, § 4*].

2.2 CLAIMANT is entitled to payment pursuant to Article 6.2.2 of the UNIDROIT Principles

102 The importance of the formation and performance of the contract cannot be undermined. A contract gives parties the warranty that their mutual promises will be performed and if not, that they will have a legal right to claim a remedy against the defaulting party [*Eicher, p. 33*; *Schlechtriem, p. 101, § H; Whittington, p. 429*]. Pursuant to Art. 6.2.1 of the UNIDROIT Principles, given the binding character of the contract, performance must be rendered as long as it is possible and regardless of the burden it may pose on the performing party [*UNIDROIT Commentary, p. 812, § 1*]. This principle acts as a reminder that the general duty

of a party is to perform and that relief is very much the exception [*UNIDROIT Commentary, p. 819, § 4*]. However, the disadvantaged party who wishes to use the hardship exemption in Art. 6.2.2. of the UNIDROIT Principles must provide relevant evidence to demonstrate how certain changed circumstances influenced the party's ability to perform the contract [*Girsberger, p. 123*]. When ascertaining whether any circumstances relate to hardship, primary consideration must be given to the surroundings of the individual case, especially surroundings of the contract, level of risk assumption, economic status and financial capabilities of the parties [*Brunner I, pp. 438-442; Girsberger, p. 129; Schwenzer 2014, p. 37; UNIDROIT Commentary, p. 816, § 7*].

103 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 § C*]. Admittedly, there were several cases, where parties were denied to be excused based on hardship, even though they proved an alteration amounting to more than 50 %. In a German case, the building companies could not invoke hardship due to the high price increase of coal, because the enterprise was large enough to absorb such losses [*Girsberger, p. 132*]. Similarly, in the case *Petrobras & El Paso Arbitration Process* the hardship was invoked because of the consequences of the drought, which inhibited the supply of power in Brazil. Petrobras's energy sector suffered significant losses, however the tribunal denied the hardship exemption, since Petrobras was a very profitable enterprise and could still make the payment [*Fucci, p. 17*].

104 Nevertheless, the hardship exemption can be justified where completion of performance would, especially due to increased costs of performance, result in a financial ruin for a party [*Brunner I, p. 436; Girsberger, p. 132*]. CLAIMANT's company was suffering severe loses since 2014, primarily due to the high payments for the loans financing new stables for race horses and costs connected to restructuring measures. The restricting plan agreed with the CLAIMANT's creditors is based on the condition that CLAIMANT would be profitable again from 2017 onwards [*PO2, p. 59, § 29*]. CLAIMANT was motivated to establish a successful long-term and mutually beneficial relationship with RESPONDENT [*Ex. C2, p. 10; Ex. C4, p. 12*]. With the additional revenues from the FSSA, CLAIMANT planned to make 300.000 USD of profit in 2018 and 180.000 USD of profit in 2017. When CLAIMANT had to pay additional costs due to the newly imposed tariffs on agricultural products, its performance became excessively onerous. Not only that CLAIMANT would gain no profit from the FSSA, it would even suffer a

loss of 25 %. Its company could not survive a loss of all profits. The restructuring plan is seriously endangered, if CLAIMANT would be required to bear 1.250.000 USD of additional costs [*PO2, p. 59, § 29*]. Negotiations on a new credit with the bank will be based on the precondition of the resale of CLAIMANT's company. It is unreasonable that CLAIMANT, despite its effort to fulfil all its contractual obligations to RESPONDENT, is now facing potential financial ruin [*PO2, p. 59, § 28*].

105 The said provision of the UNIDROIT Principles further specifies requirements for the hardship situation: firstly, the events must occur or become known to the disadvantaged party after the conclusion of the contract, secondly, the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract, thirdly, the events are beyond the control of the disadvantaged party and lastly, the risk of the events was not assumed by the disadvantaged party [*UNIDROIT Commentary, pp. 817, §§ 10-15*].

106 Following these requirements, 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, § 41; Jenkins, p. 2028*]. CLAIMANT and RESPONDENT concluded the FSSA on 6 May 2017 [*Ex. C5, p. 14*]. CLAIMANT submitted two successful shipments of frozen semen to RESPONDENT. The first shipment of 25 doses arrived on 20 May 2017 and the second shipment of 25 doses was delivered on 3 October 2017 [*NoA, p. 6, § 9*]. Just before CLAIMANT prepared the last shipment of 50 doses, on 20 January 2018, CLAIMANT became aware that Equatoriana imposed 30 % tariffs on agricultural products, which unexpectedly included frozen semen [*Ex. C7, p. 16*]. Astonished by the discovery, CLAIMANT immediately contacted RESPONDENT, with the hopes of reaching an agreement on adaptation of the price, since CLAIMANT specifically stated that it could not bear any additional risks and costs connected to the delivery of frozen semen. However, even though RESPONDENT knew about the additional tariffs on agricultural products since 19 December 2017 [*PO2, p. 58, § 25*] and it was aware of the impact that 30 % tariffs would pose on CLAIMANT's company [*PO2, p. 59, § 28*], it denied any cooperation and understanding.

107 Secondly, the hardship situation could not have been reasonably considered by the disadvantaged party at the time of the conclusion of the contract [*UNIDROIT 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. Based on several studies made in the area of artificial insemination in comparison with natural reproduction of animals, it is clear that artificial insemination process is more expensive. The process requires well trained operators and special equipment, resulting in a more upscale labour costs. More importantly, preservation and transportation of semen is risky, especially where the countries have different climatic conditions [*Jacobsen, pp. 17-18; Steichen/Dahlen/W. Neville, p. 1; Equine fact sheet*]. Furthermore, the studies even established that pregnancy rates are lower for 40 to 50% in comparison with natural insemination. Thus, it seemed unreasonable that a country would pose additional tariffs on all agricultural products, including frozen semen, making the insemination process nearly impossible.

108 Thirdly, circumstances, which influence the performance of a party, must be beyond the control of the party invoking hardship. When import prohibitions, restrictive import licensing, and tariffs, imposed by a certain country, raise the price of goods, consequently, parties pay a higher price they would have paid if the free trade would be established [*Kreuger, p. 165*]. Acts of rulers and government officials are generally beyond the control of a party [*UNIDROIT Commentary, p. 818, § 14; Maskow, p. 662*]. Tariffs were imposed by Equatoriana, RESPONDENT's home country, and therefore, they automatically fall out of the sphere of control of CLAIMANT. These tariffs measures surprised even the economic analysts as they went beyond their worst expectations. Furthermore, not even well-informed circles knew about the imposition of additional tariffs [*Ex. C6, p. 15*]. Consequently, it is unreasonable to expect that CLAIMANT would be aware of such tariffs, especially if they were imposed so unexpectedly and by a country, which was always one of the greatest supporters of free trade [*Ex. C8, p. 17*].

109 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 it can be inferred from the circumstances or from the nature of the contract [*UNIDROIT Commentary, p. 818, § 15*]. Before CLAIMANT agreed on a DDP delivery clause, it specifically excluded its liability for any further risks associated with the change in the delivery terms. CLAIMANT expressly stated that it is not willing to bear any increase in costs, which may be associated with changes in customs regulation or import restrictions [*Ex. C4, p. 12*]. Both parties knew from past

experiences that health and safety requirements make highly expensive tests, which can increase the costs up to 40 % and thereby destroy the commercial basis of the deal [*PO2, p. 58, ∫ 21*]. CLAIMANT was aware of this potential risk, since it nearly suffered insolvency due to the rare aggressive type of mouth and health disease, discovered in Danubia. The additional test, which were posed by Danubian government, and the long quarantine amounted to 40 % of the sales price [*PO2, p. 58, ∫ 21*]. Precisely because of this reason Parties included hardship in Clause 12 of the FSSA and consequently RESPONDENT assumed all the economic risk for the circumstances, which could potentially arise after the conclusion of the FSSA.

110 If the Tribunal determines that Art. 79 of the CISG does not include cases of hardship, it should apply relevant provisions of UNIDROIT Principles. As all the criteria for invoking hardship under Art. 6.2.2. of the UNIDROIT Principles are fulfilled, Tribunal should adapt the FSSA. Consequently, CLAIMANT is entitled to payment of 1.250.000 USD.

CONCLUSION ON ISSUE III

111 CLAIMANT fulfilled all its contractual obligations, despite the fact that performance of FSSA became more onerous due to the additional tariffs, imposed by Equatoriana. By inclusion of clause 12 FSSA CLAIMANT excluded its liability for any additional costs and risks associated with the delivery terms, which would arouse after the conclusion of the FSSA. Pursuant to clause 12 FSSA, in situation of hardship, RESPONDENT assumed all economic risk. Alternately, CLAIMANT has the right to remuneration, since it established all the required prerequisites to invoke hardship under Art. 79 CISG. However, if the Tribunal would determine that Art. 79 does not contain special provision on hardship, CLAIMANT has the right to payment under UNIDROIT Principles as they supplement CISG. CLAIMANT established that all the criteria for invoking hardship under Art. 6.2.2. UNIDROIT Principles are fulfilled and therefore, the Tribunal should adopt the FSSA. Consequently, CLAIMANT is entitled to payment of 1.250.000,00 USD.

REQUEST FOR RELIEF

In light of the submissions made above, Counsel for CLAIMANT respectfully requests the Arbitral Tribunal:

1. to declare it has the jurisdiction and power to adapt the contract and decide on the claim;
2. to declare CLAIMANT's evidence as admissible;
3. to adapt the contract appropriately and order Black Beauty Equestrian to pay to Phar Lap Allevamento an additional amount of 1,250,000 USD which is 25 % of the price for the third delivery of semen;
4. order Black Beauty Equestrian to bear the costs of the Arbitration.

Respectfully signed and submitted by counsels on 6 December 2018.

Stefan Danojević

Elena Fricau

Luka Kreitner

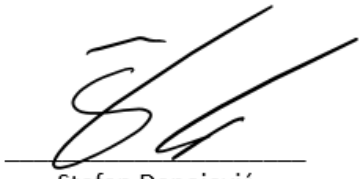
Hana Srot

Petra Zupančič

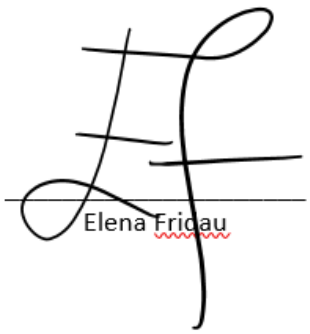
CERTIFICATE

Maribor, 6 December 2018

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



Stefan Danojević



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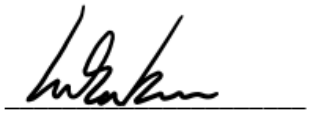
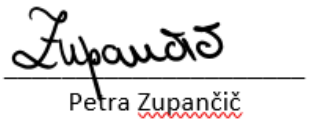


Luka Kreitner

Hana Šrot



Petra Zupančič