Twenty Sixth Annual Willem C. Vis
International Commercial Arbitration Moot

# THE PROBLEM

Vienna, Austria
October 2018 – April 2019

Oral Hearings
April 13 – 18, 2019

Organised by:
Association for the Organisation and Promotion of the
Willem C. Vis International Commercial Arbitration Moot

And

Sixteenth Annual
Willem C. Vis (East)
International Commercial Arbitration Moot
Hong Kong

Oral Arguments
March 31 – April 7, 2019

Organised by:
Vis East Moot Foundation Limited

# Contents

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By email and courier
Ms. Sarah Grimmer
Hong Kong International Arbitration Centre
38th Floor Two Exchange Square
8 Connaught Place
Central
Hong Kong

31 July 2018

Dear Ms. Grimmer,

On behalf of my client, *Phar Lap Allevamento*, I hereby submit the enclosed Notice of Arbitration pursuant to Article 4 HKIAC-Rules. A copy of the Power of Attorney authorizing me to represent *Phar Lap Allevamento* in this arbitration is also enclosed.

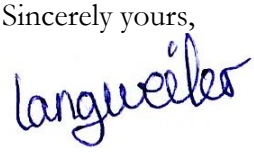
The notice has been served upon Respondent and the registration fee has been paid. The relevant confirmations for service and payment are attached.

The CLAIMANT requests outstanding contractual payments.

The contract giving rise to this arbitration provides that the seat of arbitration shall be Vindobona, Danubia, and that the arbitration shall be conducted in English. The arbitration agreement provides for three arbitrators. *Phar Lap Allevamento* hereby nominates Ms. Wantha Davis as its arbitrator.

The required documents are attached.

Sincerely yours,



Joseph Langweiler

cc. Black Beauty Equestrian

Attachments:
Statement of Claim with Exhibits
Power of Attorney (not reproduced)
CV of Ms. Wantha Davis (not reproduced)
Proof of Service upon Respondent – Courier delivery Report (not reproduced)
Proof of Payment of Registration Fee (not reproduced)

**Joseph Langweiler**
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# Notice of Arbitration

(pursuant to Article 4 Hong Kong International Arbitration Rules 2013)

in the Arbitral Proceedings

*Phar Lap Allevamento v. Black Beauty Equestrian*

**Phar Lap Allevamento**
Rue Frankel 1
Capital City
Mediterraneo

- CLAIMANT-

Represented by Joseph Langweiler (75 Court Street, Capital City, Mediterraneo)

**Black Beauty Equestrian**
2 Seabiscuit Drive
Oceanside
Equatoriana

- RESPONDENT-

## STATEMENT OF FACTS

1. The CLAIMANT is Phar Lap Allevamento (Phar Lap), a company registered and located in Capital City, Mediterraneo. It operates Mediterraneo's oldest and most renown stud farm, covering all areas of the equestrian sport. It has 300 horses, including its own mare herd, offspring and stallion depot. Its teaching, research, and demonstration facility is a center of excellence offering training and professional development courses on horse care, breeding and riding/driving. Mediterraneo's horse-shoeing or farrier school is also based at Phar Lap.

2. In its racehorse section Phar Lap provides stallions for breeding English thoroughbreds and Anglo Arabs. Breeders have access to the studs throughout the breeding season from February to July for covering. In all other sections of horse sports, Phar Lap additionally offers frozen semen of its champion stallions for artificial insemination. Due to Phar Lap's unique storage technique the semen is long-living and of superior quality.

3. Phar Lap is particularly known for its breeding success regarding racehorses. The star among Phar Lap's stallions is Nijinsky III, which is one of the most successful racehorses

ever. It has won inter alia the Triple Crown of Danubia, the Equatorianian Oceanside Cup, and the Capital City Vase, Mediterraneo. Nijinsky III has also successfully sired a number of up-and-coming racehorses, such as Barbaro (winner of the Capital City Mile) and Rachel Alexandra (winner of the Equatorianian Grand National). This has made Nijinsky III one of the most sought-after stallions for breeding.

4. The RESPONDENT, Black Beauty Equestrian (Black Beauty) in Oceanside, Equatoriana, is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions. Three years ago, Black Beauty decided to establish a racehorse stable. It acquired ten mares with an excellent racehorse pedigree. Horse racing is extremely popular in Equatoriana and the growth rate of the connected business sector has in the last five years never been below 4 per cent per year.

5. On 21 March 2017 Black Beauty contacted Phar Lap, inquiring about the availability of Nijinsky III for its newly started breeding programme (Claimant's Exhibit 1). At that time, the Equatorianian Government had imposed serious restrictions on the transportation of all living animals due to severe problems with foot and mouth disease which already lasted for two years. As a reaction to that and driven by powerful interests in the Equatorianian racehorse breading industry the ban on artificial insemination for racehorses had been temporarily lifted. Due to the special situation in Equatoriana, Black Beauty was particularly interested whether frozen semen of Nijinsky III was available.

6. Phar Lap was told at the time that Black Beauty's investors were keen to see Black Beauty's racehorse breeding programme to commence as soon as possible taking advantage of the temporary lift of the ban on artificial insemination. The explanation given for the high number of doses requested was that under the relevant Equatorianian law all doses acquired during the lifting of the ban could be used. Phar Lap did not question that information at the time, since for them the contract was a good opportunity to increase their revenues without any major additional risk. Phar Lap considered their interests sufficiently protected by the consent requirement in the contract for any other use of Nijinsky III's semen. Therefore, the risk of the usability of the semen would lie with Black Beauty. Phar Lap only subsequently learned that Black Beauty's investors were one of the biggest supporters of a general lifting of the ban and probably from the beginning had the intention to sell a considerable amount of the doses, hoping to induce additional breeders to fight for a permanent lifting of the ban.

7. With email of 24 March 2017 Phar Lap offered Black Beauty 100 doses of Nijinsky III's frozen semen in accordance with the *Mediterraneo Guidelines for Semen Production and Quality Standards* (Claimant's Exhibit 2). Black Beauty had no problems with most of the terms of the offer. It only objected to the choice of law and the forum selection clause and insisted on a delivery DDP (Claimant's Exhibit 3). Due to past experiences with extremely expensive tests due to changes in customs health requirements Phar Lap was only willing to accept a delivery DDP against a moderate price increase, the transfer of certain risks to Black Beauty and the inclusion of a hardship clause to temper some of the additional risks taken (Claimant's Exhibit 4).

8. In the end, the Parties agreed not only on the hardship clause but also on an acceptable choice of law and arbitration clause. Unfortunately, the finalization of the agreement took longer than planned as the two main negotiators, Ms. Napravnik and Mr. Antley, were severely injured in an accident when driving to a restaurant after the annual colt auction in Danubia on 12 April 2017. They had to be replaced for the finalization of the contract which was signed on 6 May 2017 (Claimant's Exhibit 5).

9. The Parties had agreed on three shipments (Claimant's Exhibit 5). RESPONDENT sent the first shipment of 25 doses on 20 May 2017; the second shipment of 25 doses on 3 October 2017. Two months before the last shipment of 50 doses was due Mediterraneo's newly elected President, Ian Bouckaert, announced 25 per cent tariffs on agricultural products from Equatoriana. This sudden measure came as a complete surprise. While Mr. Bouckaert had made clear that he wanted to protect the Mediterranean agricultural sector, a 25 per cent tariff had neither been part of any strategy papers released earlier by the new President nor of the election manifesto.

10. Even more surprising was the reaction of the Equatorianian government, which has always been an ardent supporter of free trade. Consequently, the Equatorianian government had always tried to resolve trade disputes amicably and had not relied on retaliatory measures against trade restrictions by other countries (see Claimant's Exhibit 6). In the present case, however, to the big surprise of everyone the Equatorianian government after a very short period of unsuccessful discussions retaliated by imposing 30 per cent tariffs on selected products from Mediterraneo including on animal semen (Claimant's Exhibit 6).

11. CLAIMANT and RESPONDENT were astonished to hear that frozen semen was listed in the schedule released by the Ministry of Agriculture of the products that fell under the new tariffs-regime and that this also applied to racehorse semen. Generally, racehorse breeding is categorized differently from pigs, sheep, or cattle.

12. CLAIMANT and RESPONDENT immediately started negotiations regarding a price adjustment for the frozen semen (Claimant's Exhibit 7). RESPONDENT had made clear already during the contract negotiation that for its planning timely delivery was extremely important. At the same time RESPONDENT appeared to generally accept the need for a price increase (Claimant's Exhibit 8).

13. In light of the above facts and taking into account that RESPONDENT had created the impression of accepting the general need for a price adaptation, CLAIMANT complied with its delivery obligation and delivered the remaining 50 doses on 23 January 2018 before an agreement on the new price had been reached.

## LEGAL EVALUATION

### Jurisdiction

14. The Arbitral Tribunal has jurisdiction to hear the case. After long discussions, which involved the exchange of several drafts, the Parties agreed on the following arbitration clause

> ***"Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.***
>
> ***The seat of arbitration shall be Danubia.***
>
> ***The number of arbitrators shall be three. The arbitration proceedings shall be conducted in English."***

15. Contrary to RESPONDENT's allegations during the unsuccessful efforts to solve the dispute amicably the arbitration clause is valid and obviously also covers the claim raised. The arbitration clause and its interpretation are governed by the law of Mediterraneo and not, as RESPONDENT alleges, by the law of Danubia. Thus, it is irrelevant whether under the law of Danubia arbitration agreements have to be interpreted narrowly and in accordance with the parol evidence rule. The Parties have submitted the contract after long discussions to the law of Mediterraneo which consequently also governs the interpretation of the arbitration agreement contained therein.

16. Like in most other jurisdictions the Arbitration Law of Mediterraneo provides for a broad interpretation of arbitration agreements, irrespective of an allegedly narrow wording merely referring to "dispute(s) arising out of this contract". Thus, the arbitration agreement clearly extends to a claim for an increased remuneration. That is even more so, as in the present case during the first discussion of the adaptation clause RESPONDENT's Mr. Antley had explicitly stated to CLAIMANT's Ms. Napravnik that the arbitrators should adapt the contract in case the parties should not be able to reach a solution (Claimant's Exhibit 8). Due to their replacement following the severe car accident no express statement to that extent was either included in the adaptation clause or the arbitration agreement.

17. CLAIMANT nominates Ms. Wantha Davis, 14 Churchill Downs, Capital City, Mediterraneo for confirmation. She has already declared to CLAIMANT her willingness to act as an arbitrator and the absence of any connections which could affect her independence and impartiality. Your will find her CV enclosed and CLAIMANT would like to ask the HKIAC to take the necessary steps for the confirmation of Ms. Davis.

**Contract**

18. CLAIMANT is entitled to an increase of the purchase price of at least 25 per cent due to the higher costs following the imposition of the new tariffs. CLAIMANT had a profit margin of 5 per cent for the transaction and now makes a loss of 25 per cent due to the imposition of the new tariff of 30 per cent on the product by the Equatorianian authorities. While neither party is directly responsible for the tariffs they are imposed by RESPONDENT's home country and therefore are closer associated with RESPONDENT than with CLAIMANT. That CLAIMANT is at all affected by the tariffs is due to the changes in the delivery terms. The purpose of such changes, however, was not to burden CLAIMANT with all the risks associated with a DDP-delivery but to profit from CLAIMANT's experience in the transportation of frozen semen. In addition to the lower risk for damages to the semen, a greater likelihood of a speedy and non-problematic compliance with export and import formalities and the required paperwork, CLAIMANT was also able to make the transportation to commercially much more favorable terms than RESPONDENT.

19. The Parties intention is very well evidenced by the fact that in connection with a change in the delivery terms they included an adaptation clause into the contract. CLAIMANT had made clear that it was not willing to bear all the other risks associated with the agreed change of the delivery terms and had insisted on the inclusion of the adaptation clause. RESPONDENT had consented to that. The adaptation clause was supposed to cover not only the most prevalent risk of changes in the health and safety requirements but also other risks including additional tariffs, like the present. The fact that such tariffs were not explicitly included had to do with the fact that at the time of contracting no one expected such measures. The Government of Equatoriana had always been an ardent supporter of free trade, in particular in times like the present when the Prime Minister came from the Progressive Liberals. Only once an Equatorianian Government under a Prime Minister from the National Party, which is more critical to free trade, had taken retaliatory measures

against trade restrictions imposed by a third state. Consequently, the hardship clause has to be interpreted as covering also the present case.

20. Even if the Arbitral Tribunal should – against all expectations – come to the conclusion that the imposition of the tariffs is not covered by the adaptation clause, the price should be increased under the CISG. It has been recognized on several occasions that the CISG allows for a price adaptation in the case of changed circumstances along the lines of the hardship provision in Art. 6.2.3 UNIDROIT Principles. The requirements for such an adaptation, which can be deduced from the Art. 6.2.3 are clearly met. That applies a fortiori as – according to our information – RESPONDENT itself, after the imposition of the tariffs and in breach of its contractual requirements not to resell the semen has done so for 15 doses at a price which is 20 per cent above the price charged by CLAIMANT.

**REQUEST:**

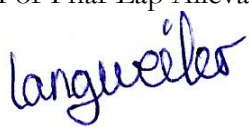
In light of the above CLAIMANT asks the Arbitral Tribunal for the following orders:

1) Black Beauty Equestrian is ordered to pay to Phar Lap Allevamento an additional amount of US$ 1,250,000 which is 25 per cent of the price for the third delivery of semen;

2) Black Beauty Equestrian bears the costs of the Arbitration.

Capital City, 31 July 2018

For Phar Lap Allevamento



Joseph Langweiler

# FROZEN SEMEN SALES AGREEMENT

This Agreement is made this __*sixth*__ day of _*May 2017*_ by and between, Phar Lap Allevamento, Rue Frankel 1, Capital City, Mediterraneo, represented by *Julie Napravnik*, hereinafter referred to as 'SELLER'
and,

*Black Beauty Equestrian, represented by Chris Antley*
*2 Seabiscuit Drive, Oceanside, Equatoriana,*
*PHONE: (0)214 669804*
*EMAIL: blackbeauty@blackbeauty.eq*

hereinafter referred to as 'BUYER'.

Seller agrees to provide the Buyer with _*100 doses*_ of Frozen Semen from the stallion _*Nijinsky III, English Thoroughbred, born 21 January 2008, ME6799010*_ in exchange for a non-refundable fee of *US$ 100,000* per insemination dose, payable to Phar Lap Allevamento, Mediterraneo State Bank, Banking Plaza 24, Capital City, Mediterraneo, IBAN ME25050038299904.

The semen is to be used for the following mares: *(and others after information of the Seller)*

MARE INFORMATION:

1. *Registered name of mare*: Azeri — *Age*: 10
   *Breed*: English Thoroughbred — *Registry*: Danubia
   *Registration #*: DA3938400 — *Color*: black
   *Sire*: Secretariat — *Dam*: Genuine Risk
   *Dam Sire*: Snowbound
2. *Registered name of mare*: Ta Wee — *Age*: 8
   *Breed*: English Thoroughbred — *Registry*: Danubia
   *Registration #*: DA192837 — *Color*: brown
   *Sire*: Warrior — *Dam*: Rags to Riches
   *Dam Sire*: Big Ben
3. *Registered name of mare*: Zenyatta — *Age*: 8
   *Breed*: English Thoroughbred — *Registry*: Equatoriana
   *Registration #*: EQ564738 — *Color*: black
   *Sire*: Eclipse — *Dam*: Winning Colours
   *Dam Sire*: Brigadier Gerard

**TERMS AND CONDITIONS:**

1. A "dose" is defined as a single insemination unit (8 x 0.5ml straws) containing a minimum of 800 million total sperm, which upon thawing using the supplied thawing technique,

shows at minimum a 35% post-thaw progressive motility. The Seller will provide detailed thawing and handling instructions for the frozen semen doses provided.

2. Seller makes no guarantees or warranties, expressed or implied as to the fertilizing capacity of any semen provided under the terms of this Agreement.
3. Frozen semen from *Nijinsky III* : *Has* Has Not *Unknown* resulted in pregnancies.
4. The stallion *Nijinsky III* has been tested negative for: Equine herpesvirus-1 (EHV-1); Equine infectious anaemia virus (EIA); Equine viral arteritis (EVA); Leptospira spp; Taylorella spp. (contagious equine metritis, CEM) on *3 March 2017*.
5. All fees are payable upon execution of this Agreement. Buyer specifically agrees and understands that no semen will be shipped until all fees have been paid.
6. The purchase price has to be paid *in two instalments. The first instalment of US$ 5,000,000 is due on 18 May 2017, the second instalment of US$ 5,000,000 is due on 21 January 2018.*
7. There is no live foal guarantee.
8. Seller will ship *3 instalments DDP of Nijinsky III's 100 doses of frozen semen. The first shipment of 25 doses DDP will be on 20 May 2017; the second shipment of 25 doses will be DDP on 3 October 2017; the third and last shipment of 50 doses will be DDP on 23 January 2018.*
9. Buyer is responsible for compliance with registry requirements for the use of frozen semen and payment of any fees for the subsequent registration of foals conceived.
10. *Buyer is responsible for all tank rental and handling fees associated with delivery of the semen from the storage facility and return of the shipping container.*
11. *Once the shipment arrives it should be inspected immediately. Any claims regarding the integrity of the shipment must be filed within 24hrs of delivery.*
12. Seller shall not be responsible for lost semen shipments or delays in delivery not within the control of the Seller such as missed flights, weather delays, failure of third party service, or acts of God *neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous.*
13. *The frozen semen is not insured during shipment. Insurance for the value of the semen can be purchased through FedEx. Buyer is responsible for additional insurance fees*.
14. This Sales Agreement shall be governed by the law of Mediterraneo, including the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG).
15. *Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.*
    *The seat of arbitration shall be Vindobona, Danubia.*
    *The number of arbitrators shall be three. The arbitration proceedings shall be conducted in English.*
    The parties hereto understand and agree to abide by the terms and conditions as set forth in this Agreement:

Seller Signature:  Date: *6 May 2017*

Printed name: *John Ferguson*

Buyer Signature:  Date: *6 May 2017*

Printed name: *Julian Krone*

JULIA CLARA FASTTRACK
Advocate at the Court
14 Capital Boulevard
Oceanside
Equatoriana
Tel. (0) 214 77 32 Telefax (0) 214 77 33
fasttrack@host.eq

# Answer to the Notice of Arbitration

(pursuant to Article 5 Hong Kong International Arbitration Rules 2013)

in the Arbitral Proceedings Case No HKIAC/A18128

*Phar Lap Allevamento v. Black Beauty Equestrian*

**Phar Lap Allevamento**
Rue Frankel 1
Capital City
Mediterraneo

- CLAIMANT-

Represented by Joseph Langweiler (75 Court Street, Capital City, Mediterraneo)

**Black Beauty Equestrian**
2 Seabiscuit Drive
Oceanside
Equatoriana

- RESPONDENT-

Represented by Julia Clara Fasttrack (14 Capital Boulevard, Oceanside, Equatoriana)

## INTRODUCTION

1. In its Notice of Arbitration, CLAIMANT presents an incomplete summary of the facts, omitting some important details of the last part of the contract negotiation just before the unfortunate accident of the two main negotiators. In addition, CLAIMANT draws completely wrong legal conclusions from the facts presented.

2. The Arbitral Tribunal lacks jurisdiction and the necessary powers for the claim raised. Furthermore, CLAIMANT's claim for an additional remuneration on the basis of an adaptation of the contract is not justified.

## FACTS

3. CLAIMANT's description of the negotiation process has deliberately avoided a number of communications which will shed a completely different light on the case, one which shows that the claims are completely baseless.

4. As correctly stated by CLAIMANT, RESPONDENT had in its email of 28 March 2017 (Claimant's Exhibit 3) objected to the forum selection clause and asked for delivery DDP. CLAIMANT in its email of 31 March 2017 accepted DDP delivery in principle but asked to be relieved from all risks associated with such a delivery or at least to be protected against the risk of changing health and security requirements by a hardship clause (Claimant's Exhibit 4). The first option was not acceptable for RESPONDENT who was not willing to pay a much higher price for receiving basically nothing. Thus, the Parties concentrated in their following discussions on the inclusion of a hardship clause. Again, RESPONDENT considered the originally suggested ICC-hardship clause to be too broad. Consequently, an approach was taken to regulate a number of possible risks directly and then merely add a hardship wording to the existing force majeure clause.

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

6. In its reply, of 11 April 2017, CLAIMANT had changed the suggested place of arbitration but had not objected to our proposal that the law of the place of arbitration should govern the arbitration agreement (Respondent's Exhibit 2).

7. The newly suggested neutral place of arbitration, which was acceptable for us, meant, however, that also the choice of law provision had to be changed, to avoid the uncertainties resulting from the absence of a choice. Thus Mr. Antley had listed the choice of law governing the arbitration agreement as one of the points to be addressed in the final contract (Respondent's Exhibit 3).

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

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

10. Contrary to CLAIMANT's insinuations RESPONDENT did also not agree to any adaptation following CLAIMANT's request in January 2018. Quite to the contrary, Mr. Shoemaker made clear in his telephone conversation that his understanding of the contract was that CLAIMANT had to bear the costs but that he would verify that with the persons involved in drafting. He also pointed out that he had no authority to agree on an adaptation (Respondent's Exhibit 4). Given RESPONDENT's interest in a delivery of the outstanding doses and CLAIMANT's threats to stop delivery it is obvious that Mr. Shoemaker could not reject CLAIMANT's request outright.

11. Furthermore, RESPONDENT strongly objects to CLAIMANT's baseless insinuations of bad faith and assumptions concerning the intentions of RESPONDENT's investors. The contractual document does not contain any resale prohibition. Whether and at what price RESPONDENT has sold doses to other breeders is for the following dispute completely irrelevant. CLAIMANT has not submitted any proof for its allegation that RESPONDENT resold the doses and made a 20% profit therefrom.

## LEGAL

### Lack of Jurisdiction

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

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

14. Contrary to CLAIMANT's allegations, RESPONDENT never agreed to have the arbitration agreement governed by the law of the contract. There is no express choice of such law in the arbitration clause nor is there any implied choice. Under Danubian law, as well as under all other potentially relevant arbitration laws the arbitration agreement is considered to be a legally separate agreement from the container contract in which it is included. That is clearly recognized by Article 16 of the Danubian Arbitration law as well as the identically worded Article 16 of the Mediterranean Arbitration Law which both explicitly acknowledge the doctrine of separability. Thus, the reference in the choice of law clause directly preceding the arbitration clause that "this Sales Agreement is governed by the law of Mediterraneo" (emphasis added) is merely determining the law applicable for the main contract, i.e. the "Sales" part of it. It does not refer to the following arbitration clause and can also not be interpreted as an implicit choice for the arbitration agreement.

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

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

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

**Substance**

18. CLAIMANT's claim for an increased remuneration is completely baseless. CLAIMANT has no right to ask for an adaptation of the contract, neither under the force majeure/hardship clause nor under Art. 79 CISG.

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

20. CLAIMANT can also not rely on Art. 79 of the CISG. First of all, by including the force majeure and hardship clause into the contract the Parties have provided for a special regulation of the problem of changed circumstances excluding an application of Art. 79 CISG. It constitutes a derogation in the sense of Art. 6 CISG.

21. Second, Art. 79 CISG does not regulate hardship and does not provide for the remedy requested by CLAIMANT, which is the increase of the contract price as considered appropriate by the arbitral tribunal.

## REQUESTS FOR RELIEF

22. In light of the above RESPONDENT requests the Arbitral Tribunal
    a. To dismiss the claim as inadmissible for a lack of jurisdiction and powers;
    **b.** To reject the claim for additional remuneration in the amount of US$ 1,250,000 raised by CLAIMANT;
    **c.** To order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.

Oceanside, 24 August 2018

For Black Beauty Equestrian

J.C. Fasttrack

Julia Clara Fasttrack

**Joseph Langweiler**
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Via Email
Calvin de Souza (caldesouza@happyvallye.da)
Wantha Davis (wdavis@capitalcity.me)
Francesca Dettorie (drfdettorie@derby.eq)

2 October 2018

Dear Members of the Arbitral Tribunal,

The Arbitral Tribunal is without doubt well aware of the obvious inconsistencies in RESPONDENT's Answer to the Notice of Arbitration rejecting any "extraneous" evidence where it would be to its detriment but immediately thereafter relying upon such evidence where it is in its favor.

In preparation for the upcoming Case-Management-Conference on October 4, CLAIMANT would like to inform the Arbitral Tribunal that it just received reliable information at the annual breeder conference about another arbitration under the HKIAC-Rules which RESPONDENT had with one of its customers concerning the sale of a promising mare to Mediterraneo. That sale had been affected by the unforeseen tariff of 25% imposed by the president of Mediterraneo. In that arbitration, RESPONDENT who is here vigorously denying any need to adapt the contract to a change of circumstance had itself asked for an adaptation of the price invoking an unforeseeable change of circumstances. The only difference to the present case seems to be that in the other case RESPONDENT has been negatively affected by the tariffs. It is highly contradictory that in such case an additional tariff of 25% is sufficient to justify a request for adaptation while an even less predictable retaliatory tariff of 30% allegedly does not justify an adaptation when it is to RESPONDENT's detriment.

CLAIMANT has been promised a copy of the award and the relevant submission and will immediately submit them once they have been received. If need be, the other Party in that arbitration may also be joined to the proceedings as the proceedings have also been conducted under the HKIAC-Rules. That would be in line with the prevailing principles of transparency as now evidenced in the Transparency Rules of UNCITRAL.

Sincerely yours,

Joseph Langweiler

cc. HKIAC

**PROCEDURAL ORDER NO 1**
of 5 October 2018

**in the Arbitral Proceedings HKIAC/A18128**

**Phar Lap Allevamento (Mediterraneo) v Black Beauty Equestrian (Equatoriana)**

I. Following the receipt of the file from the HKIAC the Arbitral Tribunal held a telephone conference with both Parties on 4 October 2018 discussing the further conduct of the proceedings.

II. The Arbitral Tribunal takes note of the fact that in the telephone conference of 4 October 2018 both Parties agreed:

- to conduct the proceedings on the basis of the newest version of the Hong Kong Arbitration Rules, i.e. the HKIAC Rules 2018, which officially enter into force in November 2018, available at
  (
  http://hkiac.org/content/2018-hkiac-administered-arbitration-rules
- to reserve the final decision on costs for a separate cost award;
- that according to Danubian Contract Law, which contains the alleged "four corner rule" excluding all extraneous evidence for the interpretation of contacts and where arbitration agreements are interpreted narrowly, there is a high likelihood that the arbitration agreement would not be interpreted as authorizing a contract adaptation by the Arbitral Tribunal;
- that in case the Arbitral Tribunal should deny its jurisdiction to adapt the contract, it should indicate that to the parties so that RESPONDENT would reconsider whether or not to maintain its objection to the jurisdiction of the Arbitral Tribunal;
- that such a reconsideration would be based on the condition that all costs incurred for the jurisdiction phase is borne by CLAIMANT;
- that therefore both Parties should already in this phase of the proceedings submit pleadings on the merits of the claim, including the admissibility of the contested evidence.

III. In the light of these agreements and considerations the Arbitral Tribunal hereby makes the following orders:

1. In their next submissions and at the Oral Hearing in Vindobona (Hong Kong) the Parties are required to address the following issues:

   a. Does the tribunal have the jurisdiction and/or the powers under the arbitration agreement to adapt the contract, which includes in particular the question of which law governs the arbitration agreement and its interpretation;

b. Should CLAIMANT be entitled to submit evidence from the other arbitration proceedings on the basis of the assumption that this evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's Computer system;

c. Is CLAIMANT entitled to the payment of US$ 1,250,000 or any other amount resulting from an adaptation of the price
   i. under clause 12 of the contract
   ii. or under the CISG?

The Parties are free to decide in which order they address the various issues. **No further** questions going to the merits of the claims should be addressed.

2. For their submissions the following Procedural Timetable applies:

   a. CLAIMANT's Submission: no later than 6 December 2018
   b. RESPONDENT's Submission: no later than 24 January 2019

3. The submissions are to be made in accordance with the Rules of the Moot agreed upon at the telephone conference.

4. It is undisputed between the Parties that Equatoriana, Mediterraneo and Danubia are Contracting States of the CISG. The general contract law Equatoriana and Mediterraneo is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts. Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments.

   There is consistent jurisprudence in Mediterraneo that in sales contracts governed by the CISG, the later also applies to the conclusion and interpretation of the arbitration clause contained in such contracts.

5. In the event Parties need further information, Requests for Clarification must be made in accordance with para. 29 of the Moot Rules no later than 25 October 2018 via their online party (team) account. No team is allowed to submit more than ten questions.

6. For those institutions participating ONLY IN THE VIS EAST questions should be emailed to clarifications@vismoot.org. Where an institution is participating in both Hong Kong and Vienna, the Hong Kong team should submit its questions together with those of the team participating in Vienna via the latter's account on the Vis website.

Clarifications must be categorized as follows:

(1) Questions relating to the parties involved and their business.

(2) Questions relating to the negotiation, drafting and conclusion of the Arbitration Clause.
(3) Questions relating to the negotiation, drafting and conclusion of the Hardship Clause.
(4) Questions concerning the tariffs imposed by the President of Mediterraneo.
(5) Questions concerning the tariffs imposed by the Government of Equatoriana.
(6) Questions concerning the information/documents offered from the second arbitration proceedings.
(7) Questions relating to the applicable laws and rules to the case and in the countries concerned.
(8) Other questions.

IV. Both Parties are invited to attend the Oral Hearing scheduled for 13th – 18th April 2019 in Vindobona, Danubia (31st March – 7th April 2019 in Hong Kong). The details concerning the timing and the venue will be provided in due course.

Vindobona, 5 October 2018

For the Arbitral Tribunal

Prof. Calvin de Souza
Presiding Arbitrator

cc. HKIAC