**WILLEM C. VIS INTERNATIONAL COMMERCIAL ARB. MOOT**

# MEMORANDUM FOR RESPONDENT

| **On Behalf of:** | **Against:** |
|---|---|
| Black Beauty Equestrian | Phar Lap Allevamento |
| 2 Seabiscuit Drive | 75 Court Street |
| Oceanside | Capital City |
| Equatoriana | Mediterraneo |
| **RESPONDENT** | **CLAIMANT** |

ALI MOHAMMAD YAQOBI ◦ AOGAY ALOZAI WARDAK ◦ SHOAIB MEHRYAR ◦ ZAINAB AZIZI

# TABLE OF CONTENT

## TABLE OF ABBREVIATIONS

| | |
|---|---|
| Art. /Arts. | Article. / Articles |
| Arb. | Arbitration |
| CISG | United Nations Convention on Contracts for the International Sale of Goods |
| CoC | Code of Conduct |
| Clm. | CLAIMANT |
| Ex. | Exhibit |
| e.g. | exempli gratia (example given) |
| FOA | Form of Authorization |
| Ord. | Order |
| UNCITRAL | United Nations Commission on International Trade Law |
| HKIAC | HONG Kong International Arb. Centre |
| UNIDROIT | International Institute for the Unification of Private Law |
| FSSA | Frozen Semen Sales Agreement |
| UN | United Nations |
| USA | United States of America |
| USD | United States Dollar |

| | |
|---|---|
| Versus | V |
| Vol. | Volume |
| Resp. | RESPONDENT |
| RESPONDENT | Black Beauty Equestrian |
| CLAIMANT | Phar Lap Allevamento |
| Lex arbitrii | Law of the place where the arb. is taking place |
| Lex contractus | law of the place where the contract is made |
| P. | Page |
| pp. | Pages |
| Paras. | paragraphs |
| Et. Al. | and others |
| Proc. | Proc. |
| Co. | Company |
| Ltd. | Limited |
| IBA | International Bar Association |
| ICC | International Chamber of Commerce |
| Mr. | Mister |

| | |
|---|---|
| Ms. | Miss |
| No. | Number |
| PCA | Permanent Court of Arb. |
| PO1 | Proc. Order 1 |
| PO 2 | Proc. Order 2 |
| Para. | Paragraph |
| Parties | Phar Lap Allevamento and Black Beauty Equestrian |
| Plc | Public Limited Company |
| SOF | Statement of facts |
| CSR | Corporate social responsibility |
| Req. | Request |
| PIA | Partial Interim Award |

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## STATEMENT OF FACTS

1. Phar Lap Allevamento “Phar Lap” the CLAIMANT, is a stud farm in the capital city of Mediterraneo. It has many different services including its own mare herd, offspring and stallion depot. Black Beauty Equestrian “Black Beauty” the RESPONDENT is famous for its broodmare lines that have resulted in winning many racehorse competitions.

2. RESPONDENT had in its email of 28 March 2017 objected to the forum selection clause and asked for delivery DDP. CLAIMANT in its email of 31 March 2017 accepted DDP delivery 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.

3. 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 add the word “hardship” to the current force majeure clause of contract.

4. 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.

5. Contrary to CLAIMANT’s insinuations RESPONDENT did also not agree to any adaptation following CLAIMANT’s request in January 2018. 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.

6. 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.

7. Furthermore, claimant's allegations against respondent on re selling the doses are completely baseless. 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.

8. RESPONDENT's proposal had made clear its sincere wish for an arb. agreement which was governed by the law of the place of arb. and not by the law of the contract.

9. In its reply, of 11 April 2017, CLAIMANT had changed the suggested place of arb. but had not objected to our proposal that the law of the place of arb. should govern the arb. agreement.

10. 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 arb. agreement.

11. Therefore, the interpretation of the arb. 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.

12. Also, 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.

13. Danubian law adheres for the interpretation of contracts including arb. agreements to the "four corners rule". That the interpretation of the arb. agreement is limited to its wording and no external evidence may be relied upon.

14. In the present case, the arb. 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 arb. clause. Instead, it is included in a separate clause preceding the arb. agreement.

## SUMMARY OF ARGUMENTS

## ISSUE 1: THE ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION AND POWER TO ADAPT THE CONTRACT

15. The arb. tribunal in the current case is bound by the agreement and negotiations of the parties. Based on the agreement of the parties UNCITRAL Model Law is applicable t the arbitration agreement which is different than the sales agreement. Henceforth, referring to the agreements, applicable law (UNCITRAL Model Law), and negotiations between the parties, the arbitral tribunal does not have the jurisdiction and power to adapt the contract.

## ISSUE 2: CLAIMANT IS NOT ENTITLED TO RELY ON THE PARTIAL INTERIM AWARD (PIA) INVOLVING THE RESPONDENT FROM THE OTHER PROCEEDINGS

16. RESPONDENT argues that its award from the other arb. is not admissible in the current arb.. Furthermore, the general rule of confidentiality is breached by the CLAIMANT by obtaining the Partial Interim Award of the other arb.. In addition to the breach of confidentiality, the CLAIMANT is receiving the award through illegal means which excludes the evidence from the current arb..

## ISSUE 3: RESPONDENT IS NOT ENTITLED TO PAYMENT OF US$ 1,25,000,00 OR ANY OTHER AMOUNT UNDER THE CONTRACT AND THE CISG.

17. CLAIMANT argues that it has fulfilled its obligation and is entitled to receive US$**1,25,000.00** because parties had agreed on hardship clause under the contract and tariff is considered an instance of hardship. However, according to the clause 12 and the DDP Delivery terms, tariff is not an instance of hardship. CLAIMANT also argues that according to CISG, tariff is an impediment but Art. 79 of CISG is not applicable in the case and even if it is applicable, tariff is not considered an impediment and it doesn't lift the obligation from CLAIMANT in payment of the mentioned price. Moreover, according

to the negotiations of the parties, there was no adaptation of the price and RESPONDENT never had bad faith against CLAIMANT.

## ARGUMENTS

### ISSUE 1: THE ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION AND POWER TO ADAPT THE CONTRACT

18. RESPONDENT submits that the law of Mediterraneo does not apply to the Proc. issues, instead the law of Danubia is applied. Under the law of Danubia, jurisdiction and power to the adapt the contract is subject to the express empowerment by both parties in the case. Even if we consider that the law of Mediterraneo is applicable, still the arbitral tribunal does not have the jurisdiction and power to adapt the contract.

### A. The law of Mediterraneo does not apply to the current arb. agreement.

19. Responding to CLAIMANT, the arb. agreement is not governed by the law of Mediterraneo. Taking in to consideration the sales and the arb. agreements separately, the law of Mediterraneo does not apply to the current arb. **(a).** Therefore, based on the choice of law analysis in the agreement of the parties the law of Danubia is applied to the arb. agreement **(b).**

#### a. The law of contracts does not govern the arb. agreement.

20. The law applicable to the sales agreement is the law of Mediterraneo and should not be applied to the arb. agreement. Under the doctrine of separability, the law applicable to the contract and the law of arb. should be considered different. Doctrine of separability is a general doctrine that applies to all the arb.s including in Danubia *[P. 60, PO2]*. In the case at hand, parties have agreed on application of "Law of Mediterraneo, including the United Nation's Convention on International Sale of Goods (1980) (CISG)" to be applied to the sales contract *[Claimant Exhibit 8 C8, P. 14]*. The mentioned clause is only applicable to

the substantive contract which the clause in itself has an express mention of it as "This Sales Agreement" not the consequences of the contract such as adaptation. Furthermore, the mentioned clause comes right before the arb. clause, which entails the application of doctrine of separability and clarifies that the arb. is a separate agreement than the sales agreement. Thus, the law of contract, Mediterranean Law, does not apply to the arb. agreement.

**b. According to the choice of law analysis, Danubian Law applies to the arb. agreement**

21. Based on the decision of High Court of Singapore "the governing law of arb. should be determined through a 3-stage test: the parties' express choice, the parties' implied choice, and lastly the system of law with which the arb. agreement has the closest and most real connection" *[ASHURST, 2017]*. CLAIMANT in the case at hand also agrees that there is no express choice of law to govern the arb. agreement *[Claimant Exhibit 8 C8, P. 14]*. Hence, based on the implied choice of the parties **(a)** and the *lex arbitri*, the law closest in relation to the seat of arb., the law of Danubia applies to the arb. Agreement **(b)**.

**i. The implied choice of the parties is to govern the arb. agreement by Danubian Law**

22. Referring to the implied choice of the parties, the arb. agreement is to be governed by neutral law to the countries of both parties. Just because the explicit mention of the choice of law governing the arb. agreement has not taken place, it should not be taken as an indication that the law of the underlying contract will always prevail where the law of the seat and the underlying contract are different *[ASHURST, 2017]*. If there is no express choice of law to govern either the contract as whole or the arb. agreement, but the parties have chosen the seat of arb., the contract will "frequently" be governed by the law of the country that is the seat of arb., thus, choice of the seat is to be regarded as an implied choice the law governing the arb. contract *[Dicey and Moris, Rule 57]*. Denoting the implicit choice of law of the parties, in the absence of an explicit choice of law, arb. agreement shall be governed by the Law of Danubia. After CLAIMANT suggested that the place of

arb. should be neutral, RESPONDENT proposed that the law governing the arb. agreement should be a law of neutral country as well; CLAIMANT in its email of 11 April, 2017 did not object *[Respondent Exhibit 2 R2, P. 34]*. Ms. Napravnik suggesting Danubia as the place for arb. was aware that Danubia's arb. law is largely a verbatim adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law *[P. 57, PO2]*. Mr. Antley had also listed the choice of law among his notes for the meeting of 12 April 2017, with Ms. Napravnik that they had discussed before conclusion of the contract between the parties *[Respondent Exhibit 3 R3, P. 35]*. Therefore, based on the earlier negotiations between the parties, law of Danubia meets the criteria set forth by the parties for selection of law governing the arb. agreement meets.

**ii. Based on the *Lex Arbitri*, Law of Danubia is applied to the arb. agreement.**

23. The lex arbitri in the current case requires the arbitral tribunal to apply the law of the seat of arb.. The ambiguity in the contract and/or non-existence of law of arb., requires the consideration of lex arbitri. Even if the choice of seat does not point to an implied intention to choose the law governing the arb. agreement, the arb. agreement should nonetheless be governed by the law of the seat. An arb. agreement is severable from the contract of "which it forms a part and is normally more closely connected with the country of the seat than with any other country" *[Dicey and Morris. Rule 57]*.

24. In the case of Sulamerica Vs. Enesa in which the law and the seat of the arb. were different, the authorized court decided that "the applicable law of the arb. agreement was the law of the country of the seat, i.e. English law" which is in closest relation to the arb. to the arb. agreement *[Harry Ormsby, 2014]*. Since the seat of arb. is Danubia, a neutral country to the contracting parties, the law applicable in lex arbitri to the seat of arb. should also be the Danubian Law, UNCITRAL Model Law.

**B. Based on the law of Danubia (UNCITRAL Model Law), express empowerment by the parties is needed to adapt the contract.**

25. Art. 28 of the UNCITRAL Model Law, provides that the express empowerment of the parties is needed to adapt the contract. Art. 28(3) states that for the arbitral tribunal to have jurisdiction and power to adapt the contract, both parties must have expressly authorized to do so. Such express empowerment cannot not found in either arb. clause **(a)** or negotiations**(b).**

    a. **Taking the arb. clause into consideration, the arb. does not have the jurisdiction to adapt the contract**

26. In the contract there is no mention of adaptation of the contract nor is there any clause concerning adaptation. The choice of law clause and arb. Clause can have different scopes *[Gary B. Born, 2001]*. Also, arb. Clauses can be "broad" or "narrow". A broad arb. Clause is to be interpreted broadly by courts in favor of arb., while a "narrow" arb. Clause is not *[Gary B. Born, 2001]*. A broad clause is not limited to claims under contract, it also encompasses claims that "touch" mattes covered broadly *[Pennzoil v. Ramco, 1998]*. In the current agreement between parties, the arb. Clause is intended by both parties to be a narrow clause. Since it was intended to be a "narrow" clause, arb. Should not be compelled unless the dispute falls within the clause *[Gary B. Born, 2001]*.
27. When deciding the scope of an arb. Clause, specific words and phrases alone may not be determinative although words of limitations would indicate a narrower clause. The tone of the clause as a whole must be considered when interpreting the arb. Clause. In the case of Texaco, Inc. v. American Trading Transp. Co., it was stated that "arising out of" clause evidences "restrictive language" as it is in the current case. Referring to the arb. Clause, art. 15 of the contract, it was taken from the UNCITRAL model law and modified by parties *[P. 55, PO2]*. Since the arb. Clause is modified by both parties, the intention of the parties was to amend the jurisdiction of the arb. And to limit it to the disputes explicitly stated in the contract which are "*existence, validity, interpretation, performance, breach or termination*" *[Claimant Exhibit 5 C5 P. 14]*.
28. Adaptation of the contract results as a consequence of the contract but not the contract itself to which this arb. Does not have any jurisdiction due to the narrow arb. Clause adopted by both parties.

**b. Even during the negotiations, parties did not expressly empower the tribunal to adopt the contract**

29. In the negotiation process, except in the meeting of 12 April 2017, Mr. Antley had stated that it should probably be the job of the arbitrators to adapt the contract *[Claimant Exhibit 8 C8, P. 17]*. However, stating "probably" does not rise to justifiable reason specially when Mr. Antley was never involved in the discussion of agreements after the meeting of 12 April with Ms. Napravnik *[Claimant Exhibit 8, P. 17]*. Thus, the jurisdiction and power to adapt the contract are both dependent upon the express authorization of the both parties which has not taken place in the current case.

**C. Even if the Law of Mediterraneo is applicable, the contract cannot be adapted**

30. Taking into consideration the subjective intention of the parties while concluding the contract and objective view of a reasonable third person's point of view, the arbitral tribunal does not have jurisdiction and power to modify the contract *[Art. 4.1 & 4.2, UNIDROIT Principles]*.
31. The nature and purpose of the contract should guide the interpretation of the contract and be relied upon when ascertaining the intention of the parties *[Art. 4.3, UNIDROIT Principle]*. The nature and purpose of this contract does not allow the arbitral tribunal to adapt the contract.
32. Also, based on the clauses within the contract, parties are obliged to accept the terms and application of the contract. The clause states parties hereto understand and agree to abide by the terms and conditions as set forth in this Agreement" *[Claimant Exhibit 5 C5, P. 14]*. Thus, the prices of the contract should not be modified, and parties should accept the contract as it is.

**CONCLUSION ISSUE 1:**

33. The arb. tribunal in the current case is bound by the agreement and negotiations of the parties. Referring to the agreements, applicable law, and negotiations between the parties, the arbitral tribunal does not have the jurisdiction and power to adapt the contract.

## ISSUE 2: CLAIMANT IS NOT ENTITLED TO RELY ON THE PARTIAL INTERIM AWARD (PIA) INVOLVING THE RESPONDENT FROM THE OTHER PROCEEDINGS

34. Based on Art. 22.1 of the Hong Kong International Arb. Center (HKIAC) Rules, agreed to by both parties, the arbitral tribunal is required to assess the evidence based on the "admissibility, relevance, materiality and weight of evidence" *[Art. 22, HKIAC Rules]*.

35. Taking into consideration all the elements under this art. , respondent argues that the evidence, Partial Interim Award (PIA) involving RESPONDENT from the other arb., is not admissible before the current arb. **(A)**. Also, the evidence is obtained through a breach of confidentiality by CLAIMANT as well as third party **(B)**. Finally, even if obtaining the evidence did not breach the confidentiality, the evidence itself is illegal **(C)**. Therefore, CLAIMANT is not entitled to rely on PIA and the arbitral tribunal should exclude the evidence from evaluation.

### A. The evidence must not be admitted and evaluated

36. Since both of the arb., the current and the one from which the evidence is obtained, are working under the HKIAC Rules, it is important to first establish the admissibility of the evidence under those rules. As stated earlier, under HKIAK Rules, the evidence is admissible when it is relevant **(a)** and material **(b)** to the outcome of the case before the deciding arbitral tribunal. In the case at hand, the PIA is not admissible and should be barred from submission.

#### a. The evidence is not relevant to the current case

37. The evidence obtained from the other arb. of RESPONDENT is irrelevant to the current arb.. Economou the well-known scholar who has written about the evidences in the international arb. states that evidences that are excluded include "duplicative, defamatory

or obviously irrelevant", putting emphasis on the "irrelevant" feature of the evidences *[Economou, 2012]*. A document is considered relevant if it is likely to prove the facts from which the legal conclusions are drawn *[Kohler, 2004]*.

38. The arb. should take note of the significant impact of the relevancy of the evidence and not consider the evidence obtained in here. In a similar case, Yukos arb., the evidences cited in the award of its final decisions were also held unrelated since they were taken from unrelated sources *[Opic Karimum Corp. vs. Venezuela/ Kılıç vs. Turkmenistan]*. The facts received from the PIA, belong to another arb. of RESPONDENT in which CLAIMANT is not involved, hence, it is irrelevant to the legal conclusions of the current arbitral tribunal *[Claimant Email, P. 50]*.

39. An award must be final in order for it to be subject to any court [arb.] review *[El Mundo Broad. Corp. v. United Steel Workers of Am.]*. The PIA received from another arb. is not final and is subject to changes.

40. Furthermore, allowing the evidence obtained will breach the Proc. fairness and equality of parties in the current case *[Brigitta John, 2018].* The evidence which will be obtained through a third party is not in possession of the CLAIMANT yet *[P. 60, PO2]*. The inclusion of such evidence which is not yet available breaches the due process. Thus, on such grounds it leads to nullification of the Partial Interim Award "as denial of justice and contravention of the principle of equality of the parties" in which RESPONDENT has already submitted its evidences whereas CLAIMANT relies on unavailable evidence *[Economou, 2012]*.

41. In addition, under the two methods of "pursuit of truth" and protecting legal interests for evaluating the relevance of an evidence, the Partial Interim Award is not admissible in the current arb. *[Segesser, 2014]*. Pursuit of truth is the importance of the evidence in the case, whereas, legally protected interest relates to the rank of the affected interest and the intensity of the impairment of parties in the case *[Segesser, 2014].*

42. Since the evidence belongs to another arb., there is no importance, pursuit of truth of it found to the current arb. in hand due to its irreleveancy. Also, the evidence does not bring any change in the interest of the parties since the adaptation of the contract does not take place under the facts and circumstances explained in issue 3. Thus, the PIA should be excluded due to its irrelevancy and that it has no evidentiary value for proving the facts in the current case *[Magdalena Kubalczyk, 2015].*

**b. The evidence is not material to the outcome of the case**

43. The PIA submitted by CLAIMANT is not material to the outcome of the case which renders its inadmissible and should be excluded. Materiality is when a document is necessary in aiding the consideration of a legal issue by tribunal *[Kohler et. Al., 2004].* The parties in the international arb. are obliged to produce those documents upon which they rely to prove their own case, not any other case *[Economou, 2012].*

44. It is also important for the award of the arb. to be recognized and enforced by national courts. Concerns over the recognition and enforceability of the award can arise if the evidence is not material to the outcome of the case because it can undermine the due process *[Kubalczyk, 2015]*. CLAIMANT is buying the evidence from a company which has doubtful reputation as to where it gets its information illegally *[P. 61, PO2].* Hence, the evidence obtained is not admissible because of its immateriality to the outcome of the case and not complying with due process.

**B. There has been a breach of confidentiality**

45. CLAIMANT has committed breach of confidentiality by submitting the data from the other arb. of RESPONDENT. Confidentiality preserves the information exchanged in the arb. proceedings and prevents the parties from disclosing information relating to the arb. *[Freehills, 2019].* Both parties in the current as well as the other arb. have agreed on the application of HKIAC Rules 2013.

46. Agreement to the application of HKIAC Rules requires the application to the agreement of bearing the confidentiality in the current as well as the other arb. *[Art. 42, HKIAC Rules]*. CLAIMANT in obtaining the evidence has breached the confidentiality and has been involving the breach of confidentiality by the third party for obtaining the evidence through buying the CLAIMANT from third party *[P. 61, PO2]*.

47. The document production phase generally involves confidentiality issue in which the arbitral tribunal is obliged to take measures to protect the confidentiality of data even during the proceeding of its production and evaluation *[Geisinger, 2016]*. In addition, under Art. 42.2 even the witnesses in an arb. are also obliged to keep the arb. agreement and the arbitral award confidential. The principle of confidentiality relates to the client-counsel relationship and is usually set out in the ethical rules in each jurisdiction. In the absence of the client's informed consent, the council must not reveal information relating to representation *[Magdalena Kubalczyk, 2015]*.

48. Furthermore, Samuel the leading scholar says that all witnesses must sign a confidentiality undertaking the confidentiality of information of arb. *[Samuel, 2017]*. The evidence in the case at hand could have either been obtained through hacking or the previous employees of the RESPONDENT who had the obligation of confidentiality agreement for all the information relating to RESPONDENT's company substantively and Proc.ly *[P. 61, PO2]*. Also, RESPONDENT has not provided any informed consent through which the information from the other arb. of its company can be obtained. The confidentiality is breached by obtaining the information from the other arb. of RESPONDENT.

### C. Even if breach of confidentiality has not taken place, the evidence production involves illegality

49. The evidence in the current case is obtained through illegal means; this obliges the arbitral tribunal to exclude it. An award is contrary to public policy if it violates a fundamental principle of substantive or Proc. law *[Segesser, 2014]*. The PIA, contrary to public policy, violates the contractual and arb. obligations in the current case which entails substantive and Proc. law. The basis for this reasoning is that "legality must not be enforced by way of

illegality" *[Segesser, 2014]*. The evidences obtained by the way of illegal actions are never admissible in the international arb. *[Peiris]*.

50. There is no valid and legal way of obtaining the PIA by the CLAIMANT or third party when "tribunal's deliberations and the final award should be maintained as confidential by the tribunal, parties, witnesses, experts and administrative personnel" *[Samuel, 2017]*. When a document is illegally obtained, the consideration of third party or one of the parties to the arb. must not be even used *[Segesser, 2014]*. Based on this CLAIMANT cannot argue that they were not involved in the production of PIA, thus, it can be brought before current arbitral tribunal.

51. The evidences obtained improperly or illegally as a result of unlawful or unauthorized entry upon premises should not be recognized and disregarded *[Zilva v Sinn]*. Buying an arbitral award from the non-party company to the current arb. which has doubtful reputation involves illegal means of obtaining the evidence. In the current case, it is found that CLAIMANT takes the arbitral award either through hackers or the witness in the arb. proceeding who are both unauthorized and reasoned illegal to publicize the information of PIA *[P. 61, PO2]*. Hence, the evidence should be excluded from the arb. since it is obtained illegally.

**CONSCLUSION FOR ISSUE 2:**

52. RESPONDENT argues that its award from the other arb. is not admissible in the current arb.. Furthermore, the general rule of confidentiality is breached by the CLAIMANT by obtaining the Partial Interim Award of the other arb.. In addition to the breach of confidentiality, the CLAIMANT is receiving the award through illegal means which excludes the evidence from the current arb..

**ISSUE 3: RESPONDENT IS NOT ENTITLED TO PAYMENT OF US$ 1,25,000,00 OR ANY OTHER AMOUNT UNDER THE CONTRACT AND THE CISG.**

53. The Frozen Sales Agreement was based on DDP delivery in which CLAIMANT had agreed to bear all the costs of deliveries, as well tribunal should consider that the tariff is NOT considered an instance of hardship therefore the obligation to pay the tariff is on RESPONDENT **(A)**. Similarly, under CISG RESPONDENT is not responsible for the payment of newly imposed tariff **(B)**. Furthermore, there was no agreement on modification of the price in negotiations of the parties which makes CLAIMANT responsible for all the costs for delivering the frozen semen **(C)**. More importantly, the false insinuations of CLAIMANT about bad faith is baseless **(D)**.

**A. CLAIMANT should bear the cost of tariff because the newly imposed tariff does not amount to an undue hardship under the contract.**

54. The parties had agreed on Duty Delivery Paid agreement in the contract which puts the obligation of paying the imposed tariff on CLAIMANT. However, CLAIMANT states that they had brought the hardship clause so that CLAIMANT should not be responsible for any unforeseen event which excused them from DDP. Yet, the hardship clause which is clause 12 of the contract says, "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" *[P. 14, CLAIMANT's Ex. C5, para 12].*

55. The clause deliberately lifts the obligation of seller under certain conditions according to the agreement of parties. First, the shipments and delays in delivery of it which is not in the control of the seller. Second, acts of God caused by additional health and safety requirements. None of these conditions include the hardship. And as it is stated in … "the contract should clearly define a force majeure event and typically significant increases in tariffs are not force majeure events [Willan, 2018]", which means first CLAIMANT had to specify the tariff in the contract and if he has not done so, the tariff is not considered a

force majeure. ICC Hardship Clause published a hardship clause that "it doesn't provide for adaptation but only for termination of the contract" It further includes that "even if the events have rendered performance more onerous than would reasonably have been anticipated at the time of the conclusion of the contract, the parties must perform their contractual obligation" *[Lio Vicente Bocorny]*.

56. According to the ICC Hardship clause parties must perform their obligations even if there is an onerous event. Moreover, the modern doctrine of commercial impracticability which is the modern American doctrine most commonly evoked to avoid contractual liability due to changed circumstances, states that, "Changed circumstances can excuse performance, but the contract cannot be adjusted" *[Frederic, 2006]*. The legal mindset that common law attorneys bring to contractual questions is that a changed circumstance like the newly imposed tariff in the current case cannot be a reason to adjust the contract or adapt the price.

57. The latter also applies to the French counterpart of hardship which is the doctrine of *imprevision/unforeseen events* which states that, "If the circumstances which the parties agree to recognize as unforeseeable events are not expressly and clearly stipulated in the given contract, the judges will not agree to adjust the terms of the contract" *[Puelinckx, 1986]*. As mentioned above, any event which is not expressly mentioned in the contract as unforeseeable event, it cannot be a reason to adjust the contract. Whereas in the current case there was no mention of the tariff expressly mentioned in the contract. Meanwhile, Art. 6.2.2 of UNIDROIT Principles clarifies this issue by defining hardship as follow: "There is a hardship where the occurrence of events fundamentally alters the equilibrium of the contract" *[UNIDROIT Principles, 2004]*. UNIDROIT Principles establishes the standard of hardship as a "fundamental" alteration of the equilibrium of the contract. To clarify the mentioned word, the commentary to this art. states that, "If the performances are capable of precise measurement in monetary terms, an alteration amounting to 50% of more of the cost of the value of the performance is likely to amount to a fundamental alteration" *[Frederic, 2006]*. However, in the current case, the imposed tariff is 30% which is lower than the measurement which results in fundamental alteration. Hence, the 30% imposed tariff is not even considered an instance of hardship.

58. Considering this measurement, many ICC awards have rejected hardship where the question of onerous nature of continued contract performance was addressed as the current situation where the parties have looked forward to have continued contract performance *[CLAIMANT's Ex. C2, Para. 3, P. 10]*. Furthermore according to American courts, the circumstance itself that some contractual provisions can be mistaken due to the unexpected changes of the market and financial relations CANNOT be used as a "legal base for the modification" of the contract by the court *[Tekla Paap]*. CLAIMANT argues that the tariff was an unforeseen event which makes it an instance of the hardship, but according to the facts of the case, the imposed tariff was foreseeable **(a)**.

**a. The imposed tariff was foreseeable therefore CLAIMANT is responsible for the tariff.**

59. On April 2017, Mr. Bouckaert the newly elected president of Mediterraneo announced tariff upon all agricultural goods *[CLAIMANT Ex. 6, P. 15]*. The tariff was imposed by Mediterraneo before the parties sign the agreement. Because the parties had signed the agreement on 6th May, 2017. CLAIMANT knew that Equatroiana may react to the imposed tariff of Mediterraneo because the hardliners in the ministry of economics had convinced Prime Minister to react strongly to the highly controversial measures by the newly elected President of Mediterraneo. As latter he announced a certain preference for a more "protectionist approach" to international trade, especially in relation to "agricultural products" on 19th December 2017*[CLAIMANT Ex. 6, P. 15]*. Not only that, Equatorianian Government had taken retaliatory measures against trade restrictions before the newly imposed tariff too *[CLAIMANT's Statement of Facts, P. 17, para 19]*.

60. In Himpurna case where hardship was claimed because of the economic crisis in Indonesia as an unforeseeable event, court rejected the claim *[1999]*.In an ICC Award Case 2216 decided that the following circumstances are considered foreseeable - so that they have differentiated the two terms: "dramatic changes in market prices for products, currency fluctuations, even severe; failure of a central bank to grant authorization to pay in foreign currency when foreign exchange control regulations were in place at the time of contracting, and armed hostilities between countries with a history of antagonism" *[1974]*

The court has outlined all the instances of costs increases which are foreseeable and are not included as an instance of hardship. The tariff is also a dramatic change in price which is one of the circumstances the court in Hampurna case has highlighted as foreseeable event.

61. Therefore, the tariff in the current case was foreseeable because CLAIMANT already knew that the government of Equatoriana will react to the imposed restrictions by Mediterranio. RESPONDENT's claim in including the tariff is hardship, is highly unacceptable.

## B. RESPONDENT is not responsible for the payment of new imposed tariff even under CISG.

62. CLAIMANT argues that the new tariffs imposed by the country of Equatoriana constitute an impediment to the obligations of CLAIMANT. However, based on Art. 6 of CISG, Art. 79 is not applicable because it is derogated **(I)**. Even if, Art. 79 is applicable, increase in price which includes tariff doesn't constitute an impediment **(II)**.

### I. Art. 79 of CISG is not applicable in regulating the hardship in the current case, based on Art. 6 of CISG.

63. CLAIMANT argues that art. 79 of CISG clarifies the hardship in the current case, while art. 6 of CISG denies it by saying that, "The parties may exclude the application of this Convention or, subject to art. 12, derogate from or vary the effect of any of its provisions." Art. 6 clearly explains that the parties "may" derogate any art. of this convention which may vary the effect of any of its provision. However, the terms hardship or change of circumstances are not found in any provision of the CISG. At the same time, the use of the term "impediment" does not authorize to simply rule out the possibility that hardship is dealt with by Art. 79 CISG *[Ishida, 2018]*. Many scholars have shared their view that "Art. 79 CISG did not allow to consider any issue other than impossibility of performance" which clears that a hardship is not even considered an impediment *[Hueze, Vincent, 1992]*.

64. However, UNIDROIT Principle of International Commercial Contracts in Art. 6.2.2 has described four different instances which enables a party facing hardship to modify or terminate the contract but this proposal was rejected because its rejection attests that "CISG

has no room for hardship cases. Even if a case governed by CISG happens to fit the definition of Art. 6.2.2 or 6.2.3 are not readily available under CISG." Therefore, according to the conventional view of Art. 79, "the promisor cannot be exempted from his obligation to perform." As mentioned CLAIMANT who is trying to defend itself by bringing art. 79 of CISG, is liable to perform his obligation and it cannot be exempted from its obligations and it is bind by its promise because it is nothing less than what he himself has said of his own free will. Moreover, where an event fundamentally alters the equilibrium of the contract because of the increased cost of performance, judges' power to adapt the contract is urgently desired, but no reasonable basis in provisions of the CISG has been suggested *[Frederic, 2006].*

65. An Italian court which was deciding on a dispute concerned a contract for the sale of 1000 tons of iron chrome between an Italian seller and a Swedish buyer. Nonetheless the court expressed that "the doctrine of changed circumstances doesn't fit within the structure of the Convention" *[Cf. Italia, 1993].* Meanwhile a Belgium court heard a case on problems related to fluctuations of prices, deciding that "they do not render performance impossible, therefore, Art. 79 CISG was not applicable*" [Belgica. Rechtbank van Koophandel, 1995]* The commentaries and case laws mentioned above prove that CISG cannot govern the hardship in this case because Art. 79 of CISG is not applicable in the current case.

## II. Even if Art. 79 is applicable, tariff is not considered an impediment under CISG.

66. Art. 79 of CISG states at the beginning that, "A party is not liable for a failure to perform any of his obligations" then at the end, it provides in paragraph 5 that "nothing in this art. prevents either party from exercising any right other than to claim damages under this convention." Paragraph 1 and 5 in combination stipulate that "a party is not liable for damages when the failure is due to an impediment that satisfies the conditions listed in paragraph" *[1993].* However, according to the leading scholar, Bocorny, "the promisor is not liable to perform its obligation if it meets the following elements which are: 1) the impediment that caused the failure was beyond his control; 2) he could not reasonably be expected to have taken it into account at the time of the conclusion of the contract; 3) he

could not reasonably be expected to have avoided it or its consequences; 4) he could not reasonably be expected to have overcome it or its consequences" *[Bocorny]*.

67. Referring it to the case, as mentioned above CLAIMANT was aware that the country of Equatoriana would react to the imposed tariff by Mediterraneo. It means that the second element is not met and the CLAIMANT could reasonably be expected to have taken it into account. Moreover, according to Miettinen Jenni, art. 79 of CISG needs to be stressed that the unforeseeability requirement should be interpreted "narrowly". She further includes that, "Changes in market prices are generally foreseeable and a party is generally obliged to fulfill the contract if it is at all possible, it also includes the duty to beat additional costs to overcome difficulties" *[J. Miettinen, 2010].* The leading scholar Jenni mainly highlights the unforeseeability or impediment circumstance where a party is obliged to fulfill his obligation and overcome any circumstance even if it is an additional cost. The United Kingdom had also stated in 1973 in the first addendum to the analysis of comments and proposals by governments that, "Excuses for non-performance falling short of frustration should be either expressly provided for in the contract or ignored" *[J. Miettinen, 2010].* In their opinion, only circumstances making it impossible to perform the contract should be regarded as grounds for exemption, unless otherwise specifically stated in the contract. While in the current case, the newly imposed tariff was increase in cost and it was RESPONDENT's obligation to perform it because it was an economic increase and not impossible.

**C. According to the negotiations of the parties, seller is responsible for paying the newly imposed tariff.**

68. On 24th March CLAIMANT accepted the offer of RESPONDENT to send 100 doses of frozen semen Ninjinsky III. RESPONDENT then objected to few terms of CLAIMANT which were the delivery terms and the applicable law. RESPONDENT clearly mentioned that because of seller's greater experience in the shipment of frozen semen INCLUDING the necessary export and import documentation, they would want this contract on a delivery on the basis of DDP *[P. 11, Ex. C3].* DDP delivery is explained clearly an economist, Olgerio Llamazares, that "an agreement in which the seller is responsible for arranging

carriage and delivering the goods at the named place, cleared for import and all applicable taxes and duties paid" *[Olgerio Llamazares, 2010].*

69. REPSONDENT had acted very cautiously by bringing the DDP terms which has clearly identified the responsibility of CLAIMANT that includes the newly imposed tariff. However, CLAIMANT argues that the DDP terms were modified based on the negotiations with Mr. Shoemaker which is baseless **(I)**. Moreover, according to *pacta sant servanda* an agreement which is based on negotiations are not acceptable **(II)**.

## I. RESPONDENT never agreed to modify the DDP delivery terms which puts the obligation of payment of the tariff on seller.

70. After sending the first two deliveries, the tariff was imposed by government of Equatoriana as a retaliatory act to the tariffs imposed by President Boukaert of Mediterranio on December 19th, 2017, before the last delivery of frozen semen which was agreed to take place on 23rd January, 2018 *[CLAIMANT's Exhbit C5, P. 14].* After confirming that the imposed tariff applies to frozen semen as well, with the customs clearance *[P. 58, PO2],* CLAIMANT sent an email to Mr. Shoemaker, who is responsible for the development of the racehorse breeding program of RESPONDENT *[P. 17 & 18, CLAIMANT'S Ex. C8].* CLAIMANT argues that the negotiations with Mr. Shoemaker was an agreement on modification of the price. However, Mr. Shoemaker himself mentioned several times to CLAIMANT that, "he is not a lawyer and had not been involved in the negotiations of the contract" *[P. 36, RESPONDENT's Ex. R4]*.

71. By mentioning this sentence over and over again, Mr. Shoemaker clarified it to RESPONDENT that he has no proper information and authority to modify the contract. He also included that he first has to confirm with his superiors about this raised issue which was not available at that time *[P. 36, RESPONDENT's Ex. R4].* Miss. Napravnik herself said in its witness statement that "she had gotten the 'impression' that RESPONDENT accepter our position." As she has mentioned in her witness statement she was not sure that

RESPONDENT agreed on negotiation and that she just had gotten the impression *[P. 18, CLAIMANT's Ex. C3]*.

72. Moreover, ICC Award 2291 involved a controversy over the necessity for price adjustment in the transport of a rolling machine from France to Africa by a French conveyer *[1987]*. However, the tribunal ultimately denied the request for adjustment. Therefore, RESPONDENT had never agreed on adaptation of the price which is approved by CLAIMANT's lawyer in her witness statement and according to the ICC Awards there is no adjustment applied for the price.

## II. According to pacta sunt servanda, negotiations of the parties doesn't constitute an agreement.

73. As mentioned above, CLAIMANT argues that Mr. Shoemaker accepted to negotiate about the price if CLAIMANT sent the last shipment of semen which is not the case. However, even if we accept that Mr. Shoemaker accepted their terms which is not the case, according to pacta sunt servanda the contract prevails the negotiations. "The principle of Pacta Sunt Servanda means contract and their clauses are laws which bring binding force between parties. Every party to a contract must keep his promise and fulfil his obligation". As this principle "is a duty for every state to abide by its treaty obligations under Vienna convention on the Law of Treaties" *[Leah Alouch Odhiambo, 2016]*.

74. Communique of the Atlantic Council in response to the Russian Withdrawal from the provisions of the Inter-Allied Agreement Berlin, which stated that "no state has the right, by itself, to free itself unilaterally from its contractual obligation" *[More. John, 1898]*. Hence under the pacta sunt servanda rule, every treaty in force is binding upon the parties to it and must be performed by parties. In the current case, CLAIMANT was obliged to deliver the doses whether there was any tariff imposed or not because the clause it agreed upon is a promise it has to keep. CLAIMANT may argue that this principle is not applicable on private corporations however in the case of Van Bokkelen, between the United States and Haiti, the arbitrator, A. Porter Morse, in his decision of December 4, 1888, stated that "Treaties of every kind, when made by the competent authority are as obligatory upon

nations as private contracts and are binding upon individuals" *[Leah Alouch Odhiambo, 2016*]. Except the mentioned rule, US court believes that a party is entitled to enforce terms of a written contract and the only way the courts can look beyond the corners of the written agreement when a party demonstrates that "the contract terms are ambiguous" *[Frederic, 2006].* In the current case, every clause of the contract is very obvious and there is no question of ambiguity.

75. Moreover, in a case law of Mitchill v. Lath where one of the parties claimed to present the recorded communications to the court, the court announced that, "the surrounding circumstances, course of performance, course of dealing and trade usage can be considered in addition to the contract." The court further included that "recorded communications between parties, testimony regarding communication and regarding party's own beliefs are not considered evidence" *[Prof. Gergen].* Therefore, the recorded communication that the CLAIMANT brings as an evidence of the modification of the contract is not acceptable because of the principle of pacta sant servanda and none of the clauses of the contract is ambiguous so there is no room left to consider the negotiations.

**D. CLAIMANT's false insinuations of bad faith are baseless because RESPONDENT never promised to renegotiate the price.**

76. CLAIMANT argues that Mr. Shoemaker had agreed to renegotiate. However, Mr. Shoemaker himself mentioned several times to CLAIMANT that, "he is not a lawyer and had not been involved in the negotiations of the contract" *[RESPONDENT's Ex. R4, P. 36]*. By mentioning this sentence over and over again, Mr. Shoemaker clarified it to RESPONDENT that he has no proper information and authority to modify the contract. Therefore, Mr. Shoemaker had told CLAIMANT that he first has to confirm with his superiors which was not available at that time *[RESPONDENT's Ex. R4, P. 36].* Which means he had told CLAIMANT that he doesn't have any authority to adapt the contract.

77. Moreover, CISG and UNIDROIT Principles interpret good faith of the contract by putting an obligation that, "Each party must act in accordance with good faith and fair dealing in

international trade" *[UNIDROIT, Art. 1.1]*. The leading scholars Gruszczzyanski and Werner further clarifies the good faith by stating that, "to behave loyally, sincerely, honestly; to keep one's word; to keep one's promise" *[Gruszczynski and Werner, 2014]*. Referring to the case, RESPONDENT has been loyal, sincere and honest by accepting to pay for the price both parties had agreed on in the contract and has kept its word for it. As well, the false insinuations of CLAIMANT about RESPONDENT having bad faith is false because there was no promise made by RESPONDENT for adaptation of the contract and Mr. Shoemaker was not authorized to do so and he didn't mention any firm commitment to negotiate.

**Conclusion issue 3:**

78. To conclude, the seller was under the boundaries of DDP delivery which made CLAIMANT responsible for delivering the doses but CLAIMANT argues that tariff was an instance of hardship and the parties had agreed on it under the contract. Whereas, tariff is not an instance of hardship because whether it had to be written clearly in the contract or it had to be unforeseeable. However, in this case not it was listed, neither it was foreseeable. Moreover, Art. 79 of CISG is not applicable in this case because it is derogated by Art. 6 of CISG and even if it is applicable which is not the case, tariff is not considered an impediment. Hence, seller cannot be excused from not delivering the doses. Similarly, claimant's false insinuations of bad faith are not true based on negotiations of parties. Therefore, considering all the facts and the second sources, CLAIMANT is obliged to pay $1,25,000.00.

## STATEMENT OF RELIEF

79. In the light of submissions above, council for RESPONDENT respectfully requests the arbitral tribunal to consider and adopt the followings:

1. Based on the agreement of the parties, UNCITRAL Model Law governs the arb. agreement which does not give the arbitral tribunal the jurisdiction and power to adapt the contract

2. CLAIMANT is not entitled to rely on the partial interim award (PIA) involving the respondent from the other proceedings which breaches the confidentiality between the parties

3. RESPONDENT is not entitled to payment of US$ 1,25,000,00 or any other amount under the contract and the CISG

## Certificate and Choice of Forum

To be attached to each Memorandum

I _____Fariha Khaliqi_____, on behalf of the Team for (name of School)

___American University of Afghanistan (AUAF) _____ hereby certify that the attached memorandum was prepared by the members of the student team, and that no person other than a student team member has participated in the writing of this Memorandum.

Check off the boxes as appropriate:

☑ Our School will be participating only in the Vis East Moot and is not competing in the Vienna Vis Moot.

☐ Our School is competing in both Vis East Moot and Vienna Vis Moot.

☐ We are submitting two separately prepared, different Memoranda to Vis East Moot and to Vienna Vis Moot.

Or

☐ We are submitting the same Memorandum to both Vis East Moot and Vienna Vis Moot, and we choose to be considered for an Award in (check one box)

☐ Vis East Moot in Hong Kong, or

☐ Vienna Vis Moot

Authorised Representative of the Team for (School name) __American University of Afghanistan__

Name_____Fariha Khaliqi_____

Signature _____