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WILLEM C. VIS (EAST)

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG

MARCH 31 – APRIL 7, 2019

XIANGTAN UNIVERSITY LAW SCHOOL TEAM

MEMORANDUM FOR RESPONDENT

ON BEHALF OF:

BLACK BEAUTY Equestrian
2 Seabiscuit Drive
Oceanside
Equatoriana

RESPONDENT

AGAINST:

PHAR LAP Allevamento
Rue Frankel 1
Capital City
Mediterraneo

CLAIMANT

KUANG JINGDAN, WANG LEI, CHEN YAZHENG, LI XIN

AN SHUTING, LIU RUIXIN, CHEN XI, ZHONG HUIYU

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NOTE ON REFERENCING

References to books or articles in the **ARGUMENTS** of this Memorandum will appear in alphabetical order and are comprised of the surname of the author(s), followed by the year of publication and the relevant paragraph or page number, where applicable. References to cases and arbitral awards in the **ARGUMENTS** of this Memorandum will also appear in alphabetical order and will include, where possible, the name of the case, the year of judgment or award, the relevant court or tribunal and the relevant paragraph or page number. References to the Moot Problem will include the name of the relevant document, followed by the page number and paragraph, if possible. In cases of multiple references shown in square brackets immediately after a quote, it is the first reference that refers to the quote. The subsequent references in the same square brackets will appear in alphabetical order.

The full citations to references are listed in the **INDEX OF AUTHORITIES, INDEX OF CASES** and the **INDEX OF ARBITRAL AWARDS**. The **INDEX OF AUTHORITIES** will appear in alphabetical order based on the surname of the author(s). The **INDEX OF CASES** and the **INDEX OF ARBITRAL AWARDS** will appear in alphabetical order based on the name of the country or arbitral institution. In accordance with Rule 38 of the Moot Rules, the **INDEX OF AUTHORITIES**, **INDEX OF CASES** and the **INDEX OF ARBITRAL AWARDS** will make reference "to each paragraph in the memorandum where the case or doctrinal authority is cited".

INDEX OF ABBREVIATIONS

AAA Rules	International Arbitration Rules of the American Arbitration Association Rules
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
Co.	Company
Commentary on the IBA Rules	Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration
HKIAC	Hong Kong international arbitration centre
HKIAC Rules	Hong Kong international arbitration centre administered arbitration rules, 2018
IBA	International Bar Association
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, 2010
ICC	International Chamber of Commerce
Model Law	UNCITRAL Model Law on International Commercial Arbitration, 2006 Revision
New York Convention	United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
Para.	Paragraph
Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

INDEX OF AUTHORITIES

MAURIZIO GOTTI.	"The influence of legal tradition on Italian arbitration discourse[J].", (2017) Semiotica, 2017(216).Page1,para1. **Cited in:** Para.37
MAJA S.	MAJA STANIVUKOVIC, Editorial remarks on the manner in which the PECL may be used to interpret or supplement CISG Article 8 URL: https://www.britannica.com/topic/tariff **Cited in:** Para.55
NOUSSIA, KYRIAKI	"Confidentiality in international commercial arbitration: a comparative analysis of the position under english, us, german and french law springer-verlag berlin heidelberg (2010)" **Cited in:** Para. 29
SCHWENZER, I.	INGEBORG SCHWENZER, Force majeure and hardship in international sales contracts, Victoria University of Wellington Law Review, (2009), 39. pp. 709-725,717 **Cited in:** Para.76
Song Changrui	Song Changrui, New Development of legal Application of International Commercial Arbitration Agreement in Judicial practice, Arbitration in Beijing, (2017), 104. **Cited in:** Para13
TAWIL,GUIDO S. GILL	"Judith Foreword to the IB A Rules on the Taking of Evidence in International Arbitration", as adopted by a resolution of the IBA Council International Bar Association 29 May 2010 Available at: http://www. ibanet. org/LPD/Dispute_Resolut ion_Section/Arbitration/IBA_Rules_Evidence /Overview.aspx **Cited in:** Para.32

YUAN QI	"Study on evidence Adoption rules of Foreign Commercial Arbitration in China", Anhui University of Finance and Economics. (2017) **Cited in :** Para.37
DIONYSIOS FLAMBOURAS	DIONYSIOS FLAMBOURAS, The doctrines of impossibil ity of performance and clausula rebus sic stantibus in the 1980 convention on contracts for the international sale of goods and the principles of European contract law-a comparative analysis, in Pace international law review, 2001, Fall. **Cited in:** Para.61
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ALI SHIPPING V. SHIPYARD (UK 1998)	*ALI SHIPPING CORP. V. SHIPYARD TROGIR [1998], ENGLISH COURT OF APPEAL, 1 LLOYD'S REP. 643 CITED AS: ALI SHIPPING V. SHIPYARD (UK 1998)* **Cited in**: Para.29
FIRSTLINK	FirstLink Investments Corp Ltd v GT Payment Pte Ltd (the Singaporean High Court) [2014] SGHCR 12 **Cited in**: Para.4
EMMOTT V. MICHAEL WILSON (UK 2008)	EMMOTT V. MICHAEL WILSON & PARTNERS LTD. [2008], ENGLISH AND WALES COURT OF APPEAL CIVIL DIVISION, EWCA 184 **Cited in**: Para.29
VITAL BERRY MARKETS CASE	Vital Berry Markets v. Dira Frost NV, in Belgium, 1995 02-May-1995, CISG-online 371, AR 1849/94 **Cited in:** Para. 63
NUOVA FUCINATI CASE,1993	Nuova Fucinati v. Fondmetall International, in Italy,14 January 1993, District Court Monza at http: //CISGw3. Law.pace.edu/cases/930114i3.html. **Cited in:** Para.62
SCAFOM INTERNATIONAL BV CASE	Belgium, Scaforn International BV and Orion Metal BVBA v. Exma CPI SA ,2005 Belgium, 25-Jan-2005, CISG-online 1106, A.R. A/04/01960 **Cited in:** Para.64.71

LIST OF CHARACTERS

1. Black Beauty Equestrian ……..……Respondent
2. Dr. Francesca Dattorie ……..…… Arbitrator nominated by Respondent
3. Greg Shoemaker ……...……Veterinary of respondent
4. Ian Bouckaert …….……...……. Mediterraneo's newly elected President
5. John Ferguson …….…….…… Seller of the contract
6. Joseph Langweiler …….…….……..…… Attorney of claimant
7. Julia Clara Fasttrack …….……..…Attorney of Respondent
8. Julian Krone…….……. Buyer of the contract
9. Kayal Espinoza ……...……... RESPONDENT's CEO
10. Mr. Chris Antley. ……....……..…. Respondent's negotiator
11. Ms. Julie Napravnik …….…….……. Claimant's negotiator
12. Ms. Wantha Davis…...……..... Arbitrator nominated by claimant
13. Phar Lap Allevamento …….…….…….……. Claimant
14. Prof. Calvin de Souza ……...……The presiding arbitrator

ARGUMENTS

I. THE ARBITRAL TRIBUNAL LACKS JURISDICTION AND THE POWERS UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT

1. In its Procedural Order No. 1, the Arbitral Tribunal has requested the parties to address "the issue as to whether the tribunal has 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" [*PROCEDURAL ORDER NO. 1, 51, PARA. 11*]. In this context, BLACK BEAUTY argues that (A) the arbitration agreement and its interpretation are governed by the law of Danubia; (B) the Arbitral Tribunal has no jurisdiction to adapt the contract under the arbitration agreement.

(A) THE ARBITRATION AGREEMENT AND ITS INTERPRETATION ARE GOVERNED BY THE LAW OF DANUBIA

(1) The doctrine of severability applies.

(a) Both Article 16(1)Model Law and Article 19(2) HKIAC Rules recognize the doctrine of severability.

2. The doctrine of severability is firmly entrenched in international commercial arbitration and is recognized by the Model Law and HKIAC Rules. Specifically, Article 16(1) Model Law states that, for the purposes of determining the jurisdiction of the tribunal "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract". CLAIMANT has argued that both Article 16(1) Model Law and Article 19(2) HKIAC Rules deal only with the validity of the arbitration agreement, which have nothing to do with the applicable law. *[CLAIMANT'S MEMORANDUM, PAGE 4, PARA. 6]* However, this argument is flawed. As is stated by Zuxin Wang: "The severability of the arbitration clause is not only reflected in the separation of the validity from the main contract, but also in the choice of the applicable law to its own validity" *[ZUXIN WANG, THE SITUATION OF CHINA'S ARBITRATION SYSTEM AND*

*REFORM,PAGE,48.] I*n addition, an international arbitration agreement is almost invariably treated as presumptively "separable" or "autonomous" from the commercial or other contract within which it is found. This separability presumption is one of the conceptual and practical cornerstones of international arbitration *[GARY BORN, PP. 349]* Hence, in our present case, the doctrine of severability applies when deciding which law governs the arbitration agreement.

(b) There is a presumption of separability agreed by the parties during the negotiation

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In the present case, the parties have explicitly made Danubia the seat of the arbitration. *[SALES AGREEMENT, 16, PARA. 15]*. Danubian Law, which has adopted UNCITRAL Model Law, is therefore the law of the arbitration, or in other words, lex loci arbitri. Similarly, the parties have agreed to be administered by HKIAC and apply HKIAC Rules *[SALES AGREEMENT, 16, PARA. 15]*. As discussed above, both Model Law and HKIAC Rules have expressly acknowledged the doctrine of separability. In conclusion, the parties have undoubtedly chosen to be bound by two laws that stipulates the separability and autonomy of arbitration agreement. There is a presumption of separability implied by the parties.

Redfern observes that it is this separability of an arbitration clause that opens the way for the possibility that it may be governed by a different law from that which governs the main agreement *[REDFERN & HUNTER, 157, PARA. 3.13]*. In the present case, such presumption of separability is not displaced by other factors. The parties were negotiating the applicable law and dispute resolution clause immediately after they reached preliminary consensus for this purchase and sale on 28 March 2017 *[CL. EX. 3, 11, PARA. 4]*. The dispute resolution clause was discussed multiple times back and forth, and in this context, the applicable law under discussion clearly refers to the law of the arbitration agreement, not the law of the sales contract. RESPONDENT does not deny the fact that there is still ambiguity left on this issue as the law of the arbitration agreement is not provided expressly in the final version of arbitration agreement. However, it is obvious that the parties have negotiated the arbitration agreement and its applicable law separately, and also been fully aware of the fact that there is an issue on the law of the arbitration agreement. Where the Law of Mediterraneo is mentioned it expressly covers the Sales

Agreement only and in the negotiations the dispute resolution clause is always dealt with as a separate matter. In addition, the "negotiation file" left by Mr. Antley after his short meeting with Ms. Napravnik in the morning of 12 April 2017, listed the issues needed further clarification, and arbitration clause and its applicable law is included [*R. Ex. 3, 35, PARA. 4]*.

In conclusion, looking at the negotiation process and the drafting history, a different law is clearly in the picture. The law of the seat is the only law that have been suggested and negotiated between the parties for the arbitration agreement, which will be further elaborate in paragraph 11 and the following

(c)The arbitration clause in the FROZEN SEMEN SALES AGREEMENT has to be distinguished from other clauses in the contract.

3. The FROZEN SEMEN SALES AGREEMENT, including an arbitration clause, consists of two independent contracts. The first contract stipulates the rights and obligations of the Parties in terms of their commercial interests, while the arbitration clause relates to another obligation between the Parties, that is, to resolve disputes arising from commercial transactions obligations by arbitration. The former clauses are meant to solve the substantive problems of the contract, and the arbitration clause is meant to solve any procedural problems. The purpose of these two kinds of clauses is different. Therefore, the law applying to the main contract cannot simply be regarded as the law applicable to the arbitration agreement.

(2)The Parties hope to apply the law of the seat instead of Mediterraneo to the arbitration agreement, which is a neutral country.

4. In the case of Firstlink Investments Corp in Ltd (2014) in Singapore in 2014, the court stated that the law of arbitration agreement implied by the parties was the law of the seat of arbitration. In reaching that conclusion, the Court attached great importance to neutrality. According to the judge, the arbitration relationship normally only comes into play when the substantive relationship has already broken down. So, when such dispute arises, the same in our case, the parties' desire for neutrality comes to the fore; the law

governing substantive contracts should give priority to the neutral law chosen by the parties to govern their agreed method of dispute resolution.

5. In the present case, it is clear that the parties value neutrality. It was actually Claimant's primary concern, and they proposed to change the arbitration seat to Danubia as it is a neutral country *[Respondent. Ex. 2, 34, Para. 2]*. Claimant's Creditors Committee had also acknowledged the neutrality of Danubia and its functioning judicial system *[PO2, 56, Para. 14]*. From the beginning of their communications, RESPONDENT considered that a equitable dispute resolution clause, instead of being fully subject to the law of one side, is much more favorable and mutually beneficial for a long-term business relationship. In conclusion, the choice of the law of the seat is desirable for both parties by virtue of its neutrality, which reflected in the respondent's letter: It would, however, be possible to agree on arbitration in a neutral country. To accommodate your wish not to be submitted to the jurisdiction of the courts in Mediterraneo, and to arbitrate under the rules of the HKIAC we would largely accept your proposal with an amendment as to the place of arbitration, so that the clause would read inits relevant part:"The seat of arbitration shall be Danubia." *[Respondent. Ex. 2, 34, Para. 2-3]*.

6. Also, National court decisions, arbitral awards and commentary increasingly relied upon the theory that the parties impliedly intended that the law of the seat govern their arbitration agreement *[Born, p. 513]*. Considering civil law jurisdictions first, for example, the Belgian Commercial Court in the case Matermaco recognized this. And which deserves to be emphasized is that the Parties, throughout their negotiations，contrary to Claimant's allegation *[CL, 5, PARA 9-10]* ,never agreed to apply the law of Mediterraneo to the arbitration agreement. Mediterraneo 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. *[Respondent. Ex. 1, 33, Para. 2]*.

7. Based on the several reasons discussed above, Respondent has made its proposal clear that the arbitration agreement should be governed by the law of the seat of arbitration from the beginning of the negotiation. *[Respondent's Ex.1, P33]* When accepting

arbitration in a neutral country as suggested by Claimant, RESPONDENT actually indicated to apply the law of the neutral country, in the present case, that is the law of Danubia. Besides, Claimant focused the controversy on the choice of the seat of arbitration and did not mention the law of the arbitration clause at all in its emails. *[Respondent's Ex. R3]*

8. Hence, the Parties have never agreed to apply the law of Mediterraneo to the arbitration agreement, and they want to apply the law of the seat, which is Danubia, to the arbitration agreement.

(3)According to the doctrine of most closely related principle, the law of Danubia should apply in this case

9. Contrary to CLAIMANT's allegations that the law of Mediterraneo bears closet connection to the arbitration agreement and the law of the main contract should apply *[CL, 8, PARA 27]*, RESPODENT argues that according to the doctrine of most closely related principle, the law of the seat of arbitration should apply in the case at hand.

10. As is stated in ICC Case No.6719, "In the practice of international commercial arbitration in recent decades, there are many judges in common law countries judge the validity of arbitration agreement according to the principle of the closest relation or the most important relation".

11. According to the doctrine, among the various connection factors involved in the arbitration such as the location of the object of the dispute, the seat of arbitration, the language applicable to the arbitration, etc., the seat of arbitration has the closest connection with the arbitration. If the Parties fail to make an agreement on the law applicable to the arbitration agreement, the "closest connection principle" applies and the law of the country that is most closely related to the arbitration agreement applies in this situation. In the Sulamérica Case, the English Court of Appeal held that the arbitration agreement had its closest and most real connection with the law of the place where the arbitration was to be held. *[*Sulamérica *(2012)]*

12. Consequently, even if the parties have agreed on the applicable law of the main contract, and the law of the seat of arbitration is different from the law of main contract, the applicable law of arbitration contract shall be the law of the seat of arbitration, instead of the law of main contract. As is stated in the judgment of the case C v. D [2007] EWCA Civ 1282: "if there is no express law of the arbitration agreement, the law with which that agreement has its closest and most real connection is the law of the underlying contract or the law of the seat of arbitration. It seems to me that if this is a relevant question, the answer is more likely to be the law of the seat of arbitration than the law of the underlying contract." *[C (2007)]*

13. Besides, CLAIMANT has argued that the law of the seat would disregard the connection between the arbitration agreement and underlying contract and fail to account for Parties' expectations in negotiating the underlying contract*[CL, 6, PARA 15]*. However, this argument is flawed for two reasons. First, the law of the seat of arbitration could be regarded as the applicable law of the arbitration agreement as an acquiescence of the Parties when they choose and agree on the seat of the arbitration*[Song Changrui, (2017), 104]*.Secondly, the arbitration agreement concerns how the Parties resolve their potential disputes. That is to say, the subject matter of the arbitration agreement is more of a procedural nature while the underlying contract is purely about substantive legal rights and obligations. When the Parties conclude the main contract, it shows that they agree to be regulated by such law. Therefore, When the Parties choose the seat of arbitration, the law of the seat of the arbitration automatically applies.

14. Hence, in our present case, the Parties have agreed on the seat of arbitration, in accordance with "closest connection principle" and considering all factors concerned with arbitration, the law of Danubia has the closest connection with arbitration agreement.

(B) THE ARBITRAL TRIBUNAL HAS NO JURISDICTION TO ADAPT THE CONTRACT UNDER THE ARBITRATION AGREEMENT

15. PHAR LAP wants the arbitral tribunal to adapt the contract [*NOTICE OF ARBITRATION, 7, PARA 2*]. However, BLACK BEAUTY argues that the Arbitral Tribunal has no jurisdiction to adapt the contract because (1) Clause 15 does not contain the adaptation power by

deleting the broad wording of the Model Clause of HKIAC and did not refer to adaptation; (2) under Danubia law, the arbitral tribunal has no power to adapt the contract; (3) BLACK BEAUTY did not agree on an adaptation.

(1) Clause 15 does not contain the adaptation power by deleting broad wording of the model clause of HKIAC

16. In order to narrow down the broad wording of the HKIAC Model Clause, the Parties deleted the expression of "relating to the contract" and "regarding non-contractual obligations arising out of or relating to the contract". And the final clause in the contract prescribes that, "Any dispute, controversy, difference or claim arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration…" [*CLAIMANT'S EXHIBIT NO. 5, 14, PARA 15*].

17. As we can see from the email from BLACK BEAUTY to PHAR LAP on 10 April 2017 [*RESPONDENT'S EXHIBIT NO. 1, 33, PARA 2*] and the email from PHAR LAP to BLACK BEAUTY [*RESPONDENT'S EXHIBIT NO. 2, 34, PARA 3*], both of the parties used "Any dispute arising out of this contract" in the suggested arbitration clause and this phrase was included in the final sales agreement [*CLAIMANT'S EXHIBIT NO. 5, 14, PARA 15*]. Compared to the HKIAC Model Clause, the parties deliberately removed two phrases that refer to a broad wording. Therefore, both parties agreed to narrow down the scope of the arbitration clause. Further, Courts from Common Law Countries used to distinguish between "narrow" arbitration agreements (where only disputes "out of the contract" were referred to arbitration) and "wide" clauses (those that encompassed disputes out of the contract as well as those in connection with the contract). The narrow clauses were held to include only disputes on contractual obligations, while wide clauses also applied to non-contractual obligations in connection with the contractual relationship of the parties. As a result, as the arbitration clause and its interpretation are to construed narrowly, an adaptation of the contract is not feasible because it would involve a broadening of the Clause which, itself, would defeat the agreement entered into by the Parties. [*CLAIMANT'S EXHIBIT NO. 5, 14, 15*].

(2) Under Danubia law, the Arbitral Tribunal has no power to adapt the contract

(a) The arbitral tribunal should not adapt the contract without the conferment of an adaptation power on the arbitrators

18. PHAR LAP stated that during the first discussion of the adaptation clause RESPONDENT's Mr. Antley had explicitly said to CLAIMANT's Ms. Napravnik that the arbitrators should adapt the contract in case the Parties should not be able to reach a solution [*NOTICE OF ARBITRATION, 7, PARA 2*]. However, the interpretation of the arbitration agreement is governed by the law of Danubia. Under the law of Danubia, arbitrators may adapt contracts only if an express adaptation power has been conferred on them [ANSWER TO THE *NOTICE OF ARBITRATION, 31, PARA 3*]. The FROZEN SEMEN SALES AGREEMENT has 15 clauses, but none of these clauses provides for adaptation of the contract, and they do not confer the power of adaptation on the arbitrators.

19. PHAR LAP argues that 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. But when they talked about adaptation, they did not reach an agreement because Ms. Napravnik wanted to have a mechanism in place which would ensure an adaptation of the contract for the unlikely event that the parties could not agree on an amendment, while Mr, Antley thought it should be the task of the arbitrators [WITNESS STATEMENT OF JULIE NAPRAVNIK, *17, PARA 4*]. Here, they failed to reach a consensus and, consequently this discussion between Mr. Antley and Ms. Napravnik does not involve the conferment of the power of adaptation on the arbitrators.

(b) Pursuant to Danubian law, the "Four corners rule" should apply, in which case the the arbitration agreement should be narrowly interpreted

20. ACCORDING to Danubian Contract Law, which contains the alleged "four corners rule" excluding all extraneous evidence for the interpretation of contracts and the narrow interpretation of arbitration agreements, there is a high likelihood that the arbitration

agreement would not be interpreted as authorising a contract adaptation by the Arbitral Tribunal [PROCEDURAL ORDER NO 1, *51*, *PARA 5*].

21. According to the 'Four corners rule', the parol evidence rule should apply and be effective, because the agreement between CLAIMANT and RESPONDENT is a complete, final and integrated contract. As the parol evidence rule applies, all extraneous evidence for the interpretation of contracts should be excluded and, as such, the arbitration agreement does not authorise a contract adaptation by the Arbitral Tribunal.

(3) BLACK BEAUTY did not agree on an adaptation

22. BLACK BEAUTY did not agree to any adaptation following PHAR LAP'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 PHAR LAP 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 4,36]*. 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. Additionally, the witness statement of Julian Krone reveals that BLACK BEAUTY would have objected to transfer discretionary powers to the arbitral tribunal to increase the price *[WITNESS STATEMENT OF JULIAN KRONE, 35, PARA 2]*. BLACK BEAUTY did not agree on the adaptation of contract. To conclude: the Arbitral Tribunal has no jurisdiction and the powers to adapt the contract.

CONCLUSION: The Arbitral Tribunal Lacks Jurisdiction And The Powers Under The Arbitration Agreement To Adapt The Contract. The Law Of Danubia Governs The Arbitration Agreement And Its Interpretation

II. THE CLAIMANT SHOULD NOT 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 ARGUMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT' S COMPUTER SYSTEM

23. BLACK BEAUTY strongly objects to PHAR LAP's malicious, false and misleading allegation of contradictory behaviour as well as to the requested submission of materials from the other arbitration *[LETTER BY LANGWEILER (3 OCTOBER 2018)]*. Such submissions by PHAR LAP should be rejected because: (A) PHAR LAP is bound by confidentiality obligations; (B) Even if the Arbitral Tribunal determines the admissibility of the evidence, the evidence from that the other arbitration which are obtained through illegal ways cannot be used; (C) There are no specific Articles in HKIAC Rules that prohibit "contradictory" behaviour.

(A) PHAR LAP IS BOUND BY CONFIDENTIALITY OBLIGATIONS

24. PHAR LAP has alleged that it did not breach any duty of confidentiality *[CL, 9, PARA.29]*. However, this submission is flawed for the following reasons.

(1) Under Article 45 HKIAC Rules, PHAR LAP should abide by confidentiality obligations

25. Both Parties agreed to conduct the proceedings on the basis of the newest version of the HKIAC Rules in their telephone conference of 4 October 2018 *[PROCEDURAL ORDER NO 1, 51]*. Therefore, the Arbitral Tribunal should apply the HKIAC Rules 2018.

26. Article 45.1 HKIAC Rules provides that, "Unless otherwise agreed by the parties, no party or party representative may publish, disclose or communicate any information relating to: (a) the arbitration under the arbitration agreement; or an award or Emergency Decision made in the arbitration." According to this Article which focuses on

confidentiality, no party or party representative may publish, disclose or communicate any information relating to arbitration unless otherwise agreed. In this case, PHAR LAP has been promised a copy of the Partial Interim Award by a company with a bad reputation and the relevant submission and will immediately submit them once they have been received *[LETTER BY LANGWEILER, 49, 4]*. If PHAR LAP were to disclose or communicate information following its receipt of a copy of the Partial Interim Award, it would use information relating in this arbitration even though BLACK BEAUTY did not agree with this course of action. Obviously, this action breached the confidentiality obligation in Art.45.1 HKIAC Rules. Therefore, PHAR LAP, which is bound by confidentiality obligations, should not be entitled to submit the evidence from the other arbitration proceedings.

(2) PHAR LAP is bound by the duty of confidentiality because of the nature of international arbitration proceedings

27. Phar LAP has argued that transparency is vital to a fair and efficient arbitral process *[CL, 10, PARA.36]*. However, this is incorrect because confidentiality is one of the most important features in international commercial arbitration.

28. All parties to international arbitrations are presumed to owe an implied duty of confidentiality *[BORN, 2282]*. This implied duty is one of the most important considerations for parties choosing to arbitrate their disputes *[NOUSSIA, 125]*. The objectives of arbitration, neutral, efficient, and binding dispute resolution, compel the imposition of confidentiality obligations on parties. Arbitration preserves privacy and confidentiality "to the greatest extent possible" *[NOUSSIA, 22]*.

29. This implied duty prohibits disclosure of any evidence, communication, or information about arbitration proceedings *[NOUSSIA, 40; BORN, 2252]*. English courts have long implied an obligation of confidentiality arising from the parties' arbitration agreement *[BORN, 2259; NOUSSIA, 79; ALI SHIPPING V. SHIPYARD (UK 1998)]*. The English Court of Appeal has affirmed that implied confidentiality obligations prohibit the disclosure of any documents or evidence related to arbitral proceedings *[EMMOTT V. MICHAEL WILSON (UK 2008)]*. It has been known that confidentiality is an "essential corollary of the

privacy of arbitration proceedings" *[ALI SHIPPING V. SHIPYARD (UK 1998)]*. Hence, all parties related to arbitration should recognize that by its very nature, arbitration requires implied confidentiality obligations. Therefore, because of the nature of international arbitration proceedings, PHAR LAP is bound by the duty of confidentiality, which is generally applied to all participants of an arbitration.

(B) EVEN IF THE ARBITRAL TRIBUNAL DETERMINES THE ADMISSIBILITY OF THE EVIDENCE, THE EVIDENCE WHICH WAS OBTAINED THROUGH A BREACH OF CONFIDENTIALITY AGREEMENT OR ILLEGAL WAYS CANNOT BE USED.

30. PHAR LAP has argued that the Arbitral Tribunal has discretion to admit evidence *[CL, 11, PARA.42]*. Indeed, pursuant to Art.22.2 HKIAC Rules, "The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence." Furthermore, Article 22.3 HKIAC Rules provides that, "The arbitral tribunal shall have the power to admit or exclude any documents, exhibits or other evidence." Nevertheless, this does not mean that BLACK BEAUTY is prevented from excluding evidence which has been obtained illegally.

(1) Pursuant to Art. 9.2 of the IBA Rules, the evidence from the other arbitration should be excluded

(a) The Arbitral Tribunal shall apply the IBA Rules

31. First, it should be emphasized that the IBA Rules "are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions *[IBA RULES, 4]*." Since PHAR LAP and BLACK BEAUTY belong to different legal traditions *[NOTICE OF ARBITRATION, 4, PARA.1;4]*, they may have different perspectives on evidentiary procedures. Considering the fact that the HKIAC Rules do not provide for detailed provisions on evidentiary procedure, it makes sense for the Arbitral Tribunal to apply the IBA Rules as a supplement to the applicable arbitration rules.

32. Secondly, the IBA Rules "have proved to be extremely effective in practice" *[BLACKABY ET AL., 79]*. They are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations *[TAWIL/GILL, 2]*. Through practice they have been recognized as an international standard and as such have not been questioned, neither in concept nor in principles they embody *[WIJNEN 353]*. Considering that the IBA Rules are extremely effective in practice, it is also reasonable to adopt the IBA Rules in our case because it may improve the efficiency of the Arbitral Tribunal and can be practically useful. Therefore, it is reasonable for the Arbitral Tribunal to apply the IBA Rules.

(b) Pursuant to Art. 9.2 of the IBA Rules, the evidence from the other arbitration should be excluded

33. Article 9.2 provides that, "The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons: (a) lack of sufficient relevance to the case or materiality to its outcome ...(e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling..."

34. First, in the case at hand, PHAR LAP alleged that it received information about another arbitration which BLACK BEAUTY had with one of its customers concerning the sale of a promising mare to Mediterraneo *[LETTER BY LANGWEILER, 49, PARA.3]*. However, the contractual document does not contain any resale prohibition. Whether and at what price BLACK BEAUTY has sold doses to other breeders is completely irrelevant *[ANSWER TO THE NOTICE OF ARBITRATION, 31, PARA.11]*. Therefore, the evidence from the other arbitration lacks relevance to this dispute or materiality to its outcome. Secondly, if the evidence from the other arbitration is about the sale of a promising mare, which BLACK BEAUTY had with one of its customers, this evidence must be related to the commercial confidentiality of BLACK BEAUTY. Therefore, the evidence should be excluded because it breached the commercial confidentiality.

35. Hence, the Arbitral Tribunal shall exclude from the evidence from the other arbitration because of its lack of sufficient relevance to the case and grounds of commercial confidentiality.

(2) The evidence from the other arbitration should be excluded to maintain the fairness of international arbitration and the preservation of the Rule of Law in society

36. Under any circumstances, the Arbitral Tribunal shall exclude the evidence which are obtained either through a breach of confidentiality agreement or through illegal means to maintain the fairness of international arbitration and the preservation of the Rule of Law in society.

37. According to Art.2.3 HKIAC Rules, "HKIAC has no obligation to give reasons for any decision it makes in respect of any arbitration commenced under these Rules. Unless otherwise determined by HKIAC, all decisions made by HKIAC under these Rules are final and, to the extent permitted by any applicable law, not subject to appeal." Therefore, the award is final and binding on both parties, which makes arbitration effective in the settlement of international commercial disputes *[MAURIZIO GOTTI, (2017), 1, PARA.1]*". Furthermore, Scientific procedures of evidence adoption can be helpful to improve the efficiency of arbitration *[YUAN QI, 19]*. Therefore, considering the finality of the award and the importance of adopting evidence scientifically, arbitrators shall make decisions with an extremely careful and cautious attitude to make decisions, including decisions on the accessibility of evidence. From this perspective, the Arbitral Tribunal must consider all circumstances and factors to facilitate the making of a correct decision.

38. First, if the Arbitral Tribunal were to recognize the evidence which was accessed through illegal ways, such recognition would be equivalent to condoning illegal conduct. As such, parties may seek to violate the law in order to access the information which they want to acquire. In the case at hand, the only source of the information promised could either be two former employees of BLACK BEAUTY, the contracts of which had been terminated three months ago for cause with immediate effect, or a hack of BLACK BEAUTY's computer system *[LETTER BY FASTTRACK (3 OCTOBER 2018), PARA.4]*. Therefore,

in both situations the evidence would have been obtained by illegal means and should not be admitted in the arbitration. If such evidence accessed through illegal ways should be entitled to be submitted, the Rule of Law would be compromised.

39. Secondly, if the evidence which was accessed either through a breach of confidentiality agreement or through an illegal hack of BLACK BEAUTY's computer system should be submitted, the fairness of arbitration will not be guaranteed. According to Art.13.5 HKIAC Rules, "the arbitral tribunal and the parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration." "Fairness is the most basic value of international commercial arbitration *[YUAN QI, 18]*. BLACK BEAUTY's computer system was hacked, yet it still needs to undertake the disadvantage caused by the hack. It is obvious that allowing evidence obtained through illegal means is not fair to BLACK BEAUTY. Therefore, the evidence which are obtained through illegal means should be excluded in order to maintain the fairness of international arbitration and the preservation of the Rule of Law.

40. Hence, even if the Arbitral Tribunal determines the admissibility of the evidence, the evidence which was obtained through a breach of confidentiality agreement or illegal ways cannot be used.

(C) THERE ARE NO SPECIFIC ARTICLES IN THE HKIAC RULES THAT PROHIBIT "CONTRADICTORY" BEHAVIOUR.

41. Even if the Arbitral Tribunal should against all expectations come to the conclusion that confidentiality does not apply in this case and it is reasonable to use the evidence from the other arbitration, there are no specific Articles in the HKIAC Rules that prohibit "contradictory" behaviour.

42. Phar LAP has alleged that 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 BLACK BEAUTY's detriment *[LETTER BY LANGWEILER, 49, PARA.3]*.

43. Although this argument was not raised in the Memorandum submitted by PHAR LAP, it is important to emphasize that even if BLACK BEAUTY's behaviour in two different arbitrations may be contradictory, there are no specific Articles in HKIAC Rules that prohibit "contradictory" behaviour. Therefore, it makes no sense for PHAR LAP to submit evidence from the other arbitration, which was not related to our arbitration directly. Pursuant to Art. 22.3 HKIAC Rules, "At any time during the arbitration, the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome..." This illustrates that the evidence submitted to the Arbitral Tribunal shall be related to the case. As such, the Arbitral Tribunal shall not allow PHAR LAP to produce the evidence from the other arbitration.

44. Therefore, PHAR LAP should not be entitled to submit the evidence from the other arbitration proceedings because there are no specific articles that prohibit "contradictory" behaviour in the HKIAC Rules.

CONCLUSION: THE CLAIMANT SHOULD NOT 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 ARGUMENT OR THROUGH AN ILLEGAL HACK OF RESPONDENT'S COMPUTER SYSTEM.

III. PHAR LAP IS NOT ENTITLED TO THE PAYMENT OF US $ 1,250,000 UNDER CLAUSE 12 OF THE CONTRACT OR UNDER THE CISG.

45. IN its Procedural Order No. 1, the Arbitral Tribunal has requested the parties to address "the issue as to whether PHAR LAP is 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" [*PROCEDURAL ORDER NO. 1, 51, PARA. 11*]. In this context, BLACK BEAUTY argues that (A) PHAR LAP is NOT entitled to the payment of US $ 1,250,000 under clause 12 of the contract; (B) PHAR LAP is not entitled to the payment from an adaptation of the price under the UNIDROIT principles; (C) BLACK BEAUTY is not liable for its failure to perform under Article 79 CISG.

(A) PHAR LAP IS NOT ENTITLED TO THE PAYMENT OF US $ 1,250,000 UNDER CLAUSE 12 OF THE CONTRACT

(1) PHAR LAP should pay for the increased tariff under DDP delivery term

(a) PHAR LAP had taken the responsibility to pay the tariffs under DDP term

46. Pursuant to Art. 8 of the Frozen Semen Sales Agreement PHAR LAP is required to ship the three instalments "DDP", which the Parties understood to mean DDP-delivery to Equatoriana under Incoterms 2010 [*CLAIMANT'S EXHIBIT C 5, 14, PARA.8; PROCEDURAL ORDER NO.2, 56, PARA.10*]. Under DDP delivery term, PHAR LAP should pay for the increased tariff. DDP, delivered duty paid, means that seller is responsible for delivering the goods to the named place in the country of the buyer, and pays all costs in bringing the goods to the destination including import duties and taxes. The most important consideration for DDP terms is that the seller is responsible for clearing the goods through customs in the buyer's country, including both paying the duties and taxes, and obtaining the necessary authorizations and registrations from the authorities in that country *[INCOTERMS RULES 2010]*.

(b) Modification of the DDP term in the contract does not include tariff

47. Parties had made modifications of the obligations associated with the DDP-delivery which is incorporated in their contract. Whilst this is not prohibited by Incoterms 2010, any derogation from the relevant interpretation rules is fraught with danger. In order to avoid any uncertainty in international transactions with the purpose of Incoterms is to provide a set of international rules for interpretation, the parties need to make the need of changes in their contracts extremely clear. Thus, the parties need to clearly indicate whether they intend to change the critical point at which risk is transferred from the seller to the buyer [*INCOTERMS 2010, PREFACE*]. Therefore, if parties want to modify the DDP term, the modification should be made "extremely clear".

48. However, in this case, the Parties agreed on a hardship clause to ensure that seller would not be responsible for lost semen shipments or delays in delivery not within the control of the Seller under some kinds of hardship. The Parties did not expressly modify the obligation of tariff associated with DDP term. Hence, Parties should comply with the allocation of risk as stated in the contract.

(2)The increased tariffs does not constitute hardship under Clause 12 of the contract

49. According to Clause 12 of the contract, to constitute "hardship", the newly imposed tariff should fulfil all three elements required: (i) it is comparable with additional health and safety requirements; (ii) it is an unforeseen event; (iii) it makes the contract more onerous. As long as one requirement is not satisfied, the increased tariff does not constitute hardship. As adjectives the difference between unforeseen and unforeseeable is that unforeseen is not foreseen while unforeseeable is incapable of being foreseen or anticipated *[COLLINS ENGLISH DICTIONARY, 2014]*. The increased tariff is an unforeseen event, but it cannot satisfy the other two requirements, therefore it does not constitute hardship under Clause 12.

(a) The additional tariff is not comparable with additional health and safety requirements

50. From past experience, PHAR LAP was charged with 40% of sale price for the additional tests involving long quarantine time, because a rare aggressive type of foot and mouth disease was discovered in the import state [*PROCEDURAL ORDER NO 2, 58, PARA.21*]. The additional tariff is not comparable with health and safety requirements. Firstly, the additional health and safety requirements involve long quarantine time which may cause delay delivery even further led to the break of contract. Secondly, the purpose of which are different. In international trade, a WTO agreement on food safety and animal and plant health standards (the Sanitary and Phytosanitary Measures Agreement or SPS) suggests that health and safety requirements are to be applied to the extent necessary to protect human, animal or plant life or health. While the tariff is a tax levied by a government on imports or occasionally exports for purposes of protection, support of the balance of payments, or the raising of revenue [*COLLINS DICTIONARY OF BUSINESS, 3RD ED,*

2002]. Thirdly, tariff is a common cost in an international trade which political goals often motivate the imposition or removal of [*GABRIEL SMITH, CHARLES E. MCLURE AND OTHERS, 2018*] while the additional health and safety requirements are caused by rare diseases. Hence, the increased tariff is not comparable to health and safety requirements.

(b) The increased tariff did not make the contract more onerous

51. Though the newly imposed tariff of 30% for the third shipment of frozen semen has increased the cost of performance, the increased cost cannot make the contract more onerous. The 30% tariff has cost 5% of profit margin and made a loss of 25%. The last shipment was 50 doses of frozen semen accounting for 50% of the all 100 doses to be delivered according to the contract, meaning that the 25% loss was a cost increase of relatively small percentage of 12.5% of the whole contract. PHAR LAP had consciously taken the risk that conditions might alter such as the risks of the use of the semen and other possible costs as it included variable costs of 15,000 USD per dose in the general cost-calculation [*PROCEDURAL ORDER NO. 2, 59, CLARIFICATION 31*] and charged for it. Hence, the increased tariff did not make the contract more onerous.

52. Hence, the increased tariff does not constitute hardship under Clause 12 of the contract.

(3)Under CISG Article 8 the Arbitral Tribunal cannot adapt the contract

53. RESPONDENT has argued that Danubia law is the law governing the contract which means that four corners rule applies so that Article 8 of the CISG cannot apply or otherwise it would be self-contradiction. However, CLAIMANT argued that under CISG Article 8 the Arbitral Tribunal can adapt the contract. Even if CISG Article 8 applies it flows for the following reasons.

(a) Both the subjective and objective intent of the parties was for PHAR LAP to assume the risk of tariffs

54. According to Article 8(1) CISG, PHAR LAP is to be interpreted according to its subjective intent known to BLACK BEAUTY. The drafting history of the contract shows that the

intent of PHAR LAP was to shoulder the increased tariff. Firstly, PHAR LAP had agreed with DDP delivery term and taken the duty of paying tariffs. Secondly, to avoid taking uncertain risks Ms. Napravnik representing PHAR LAP had suggested reliance on the ICC-hardship clause which is narrower than Clause 12 with requirement that the hardship must be "excessively onerous" [*RESPONDENT'S EXHIBIT R 2, 34, PARA.6*]. Thirdly, with the DDP term in contract PHAR LAP finally agreed to an approach taken to regulate a number of possible risks directly and then merely add a narrow hardship wording to the existing *force majeure* clause. The intent of both parties was to include a delivery DDP and to limit PHAR LAP's risk against particular changing circumstances. The duty of tariff had been taken and there is no intent of its transfer to BLACK BEAUTY.

55. Under Article 8(2) CISG, only if Article 8(1) is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances which is an objective intent. Article 8(2) CISG takes the role only when no intention different from the literal meaning of the words can be established, i.e., when no evidence of parties' actual intentions is available [*Maja S., PARA.3*]. In email from Ms. Napravnik states "a hardship clause should be included into the contract to address such subsequent changes" [*CLAIMANT'S EXHIBIT C 4, 12, PARA.4*]. It is clear that the actual intent was to regulate it directly through a hardship clause. Article 8(2) of the CISG does not apply.

(b) There was no intent of the party to grant the Arbitral Tribunal the power to adapt the contract under the Article 8(1) of the CISG

56. Due consideration must be given to all relevant circumstances, including not only the text of the contract but also the negotiations, practices and subsequent conduct of the parties according to Article 8(3) CISG.CLAIMANT has argued that Ms. Napravnik suggested to have a mechanism in place which would ensure an adaptation of the contract for the unlikely event that the Parties could not agree on an amendment, and that Mr. Antley replied it should be the task of the arbitrators to adapt the contract [*CLAIMANT'S EXHIBIT C 8, 17, PARA.4*]. But Mr. Krone, who later represented Black Beauty and took over the job to conclude and sign the contract, objected to arbitrarily

transfer powers to the Arbitral Tribunal to increase the price [*RESPONDENT'S EXHIBIT R 3, 35, PARA.3*]. It is clear that the latest negotiation before the conclusion of the contract was by Mr. Krone and Mr. Ferguson. No matter what the Parties were intended to reach in the past, the effective real intention should be pursuant to the latest proposition of each party. So, according to the intent of Mr. Ferguson and Mr. Krone, which is obvious from the contract, they did not want to grant the tribunal power to adapt the contract to increase the price.

57. The Parties finally did not include a separate hardship clause but merely added a hardship part to the existing force majeure clause and under the clause which only provides that the "Seller shall not be responsible". There is not any express that contract adaptation is a remedy available.

58. Hence, even if the additional tariff constitutes hardship under Clause 12 of the contract, the Arbitral Tribunal cannot adapt the contract.

59. In conclusion, PHAR LAP is not entitled to the payment of us $ 1,250,000 under clause 12 of the contract.

(B)PHAR LAP IS NOT ENTITLED TO THE PAYMENT FROM AN ADAPTATION OF THE PRICE UNDER THE CISG.

60. Claimant has argued that article 79 of the CISG exempts them from responsibility for the increased cost imposed by the agricultural tariff under the principle of economic hardship because: 1. article 79 of the CISG governs, but does not settle, economic hardship; 2. an unforeseen agricultural tariff constitutes economic hardship under article 79 of the CISG. Meanwhile, Claimant argue that they were induced to rely on Respondent's promise. However, these arguments are false and misleading. We argue that: 1. Article 79 CISG does not stipulate anything about hardship; 2. The agricultural tariff does not constitute economic hardship because Claimant has already performed all of its obligations under the contract;3. There is no inducement or promise about increasing the price.

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(1) Article 79 doesn't stipulate hardship.

61. In fact, it is the view the majority accepts that article 79 does not stipulate hardship. *[Dionysios Flambouras,2001]* It is important to pay attention to the authority quoted in the memorandum of claimant that Article 79 applies in both cases of impossibility and hardship. In fact, in this paper, Brunner held that: "Although performance has become more onerous or burdensome, if performance is possible, such possibility of performance distinguishes hardship from article 79 of the convention where performance is impossible." *[Sarah Howard Jenkins, 2015]* As to the CISG Advisory Op. No. 7, ¶3.1, it is a private initiative of scholars of international trade law and belongs to expert opinions and theoretical interpretations. These opinions have the status of secondary sources in form and are not legally binding.

62. There are lots of cases objecting to including the hardship into the scope of article 79 CISG. Earlier Italian courts had clearly stated in their decisions that hardship was insufficient to constitute an impediment to performance. In an Italian case, the seller and the buyer entered into a contract for the sale of 1,000 tons of ferrochrome alloy. However, after the conclusion of the contract and before the delivery date, the market price of ferrochrome alloy increased by 30%. Therefore, the seller wanted to exempt the delivery obligation through article 79 on the grounds of difficult circumstances. However, the court held that article 79 CISG only provides for impediments that make the performance of the contract completely impossible to be exempted from the obligation. So, it decided that the seller shall not terminate the contract on the basis of hardship, because article 79 of CISG does not intend to take the hardship as a plea *[Nuova Fucinati case,1993]*.

63. Similarly, in another case *[Vital Berry Markets case]*, the court thought dispute does not conform to the outlined requirements of article 79 CISG because the fact did not result in objective impossibility to perform the contract obligations. and the court expressly further interpreted the "impossibility" as only the force majeure, such as natural disasters, the third person behaviour, but not include the hardship.

64. As for the reason why the hardship is precluded, there is also a case interpreting the need to maintain the legal certainty. In a case *[Scafom International BV case]*, the court said

that article 79 CISG did not mention hardship and therefore excluded sellers from renegotiating prices. At the same time, the judge said the main reason Belgian law rejected the hardship principle -- an unwritten rule -- was that "doing so would undermine legal certainty". The text of CISG does not clearly define hardships. If we consider that article 79 implied hardships, then how to uniformly and clearly measure and determine whether a situation constitutes a hardship, and further determine whether it is within the scope of exemption? Such a standpoint undoubtedly deprives the law of certainty and causes confusion about the application of the law. Therefore, the understanding of article 79 cannot be taken to include hardships.

(2) Claimant has already performed all of its obligations under the contract

65. Article 79 CISG only applies to the case of non-performance. However, combining the contract content with the objective facts, we would have sufficient grounds to argue that claimant has fulfilled all its obligations and therefore article 79 would not apply.

66. According to the Frozen Semen sales contract, it is obvious that the obligation of Claimant is to provide the Buyer with 100 doses of Frozen Semen from the stallion Nijinsky III *[Cl Ex. 5,13, Para.2]*. CLAIMANT complied with its delivery obligation and delivered the last 50 doses on 23 January 2018 without any delay or non-performance *[Cl Ex. 5,6, Para.13]*. At this point, contractual obligations of both sides have been fulfilled without anything improper.

67. In the memorandum of Claimant, they argue that they refused to deliver the final shipment of horse semen in its email to Respondent on 20 January 2018 and this constitutes constructive failure to perform under Article 79(1). “Claimant failed to perform under the contract because it had no intent to deliver the goods without resolution of the tariff issue.” *[Cl,24, Para 94.]* This is flawed because the judgement of whether there is non-performance should be based on the objective fact which is specified in the last paragragh. Although Ms.Napravnik who wrongly understand the statement of Mr. Shoemaker, who was an employee of the Black Beauty, that a solution would be found through negotiation, the claimant should be responsible for its own behaviour because Mr. Shoemaker didn’t expressly state how to solve it and he made it

clear to Ms.Napravnik that he had no authority to adapt price*[Cl Ex. 8,16, Para.2; Answer to the Notice of Arbitration,30,Para.10.]*.

(3) There is no inducement or promise about increasing the price.

68. Claimant argue that they were induced to rely on Respondent's promise to come to a solution when it made the final shipment of goods and further come up with "induced reliance should be protected" *[Cl,24, Para 95.]*. However, this is quite wrong for two aspects.

69. Firstly, Mr. Shoemaker didn't promise any increase of price. He said that "I never committed to any adaptation of the price" and "I merely stated that 'if the contract provides for an increased price in the case of such a high additional tariff, we will certainly find an agreement on the price.'" *[Re Ex. 4,36, Para.4]* And in the Julie Napravnik 's witness statement, it was also mentioned that Mr. Shoemaker merely mentioned a solution without explicitly increasing the price, "He was certain that a solution would be found through negotiation." *[Cl Ex. 8,18, Para.2]* Obviously, there is no agreement in the contract to adapt the price in case of high tariff. Therefore, to think that the claimant made a promise to additional payment is actually a wishful and misapprehensive thinking of Ms. Napravnik.

70. Secondly, in terms of the status of Mr. Shoemaker, there is no room for him to induce the other party. Obviously, Mr.Shoemaker has already clearly stated and Ms. Napravnik also know that Mr.Shoemaker is not a lawyer and has no power to authorize additional payment. *[Cl Ex. 8,18, Para.2]* So, Ms. Napravnik should have known that what Mr. Shoemaker said has no legal binding force. As a lawyer of Black Beauty and with years of work experience, Ms. Napravnik should have checked the capability or power of a negotiator to adapt the contract and, it is not advisable to assume that what an unauthorized person says constitutes a direct adaptation to a contract.

71. In the Scafom case *[Scafom International BV case]*, the court held that the meaning of Article 79 CISG cannot be that it lends a helping hand to a party because of its own negligence. Thus, it should be said that if Ms. Napravnik arbitrarily believes that what

Mr. Shoemaker said constitutes a promise and carelessly takes further steps to fulfill the contract, then she should be responsible for her own negligence, not to blame on Respondent.

72. To sum up, Phar Lap is not entitled to the payment from an adaptation of the price under the CISG.

(C) PHAR LAP IS NOT ENTITLED TO THE PAYMENT FROM AN ADAPTATION OF THE PRICE UNDER THE UNIDROIT PRINCIPLES

73. Claimant argued that Phar Lap is entitled to the payment of 1,250,000 USD or any other amount resulting from the adaptation of price because Art 79 CISG governs but does not settle economic hardship and then they can invoke the general principles of CISG which is UNIDROIT Principles *[CL, 21, PARA, 80]*. Whereas these arguments are flawed and not convincing for two reasons. First, the tariff impositions do not constitute hardship under UNIDROIT Principles. Second, even if the tariff impositions make up hardship, Phar Lap is still not entitled to the payment because the arbitral tribunal has no power to adapt the contract.

(1) The tariff impositions do not constitute hardship under UNIDROIT Principles

74. Article 6.2.2 (Definition of hardship) UINIDROIT Principles reads as follows:

"There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party."

75. Pursuant to Art 6.2.2 UNIDROIT Principles, we can readily get to know that if Claimant wants to rely on this stipulation, all the requirements should be satisfied. And we contend that Claimant is not allowed to invoke this article because: (a) No fundamental alteration of equilibrium of the contract has occurred; (b) the events could reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) Risks have been assumed by Phar Lap.

(a) No fundamental alteration of equilibrium of the contract has occurred

76. Though the newly imposed tariff of 30% for the third shipment of frozen semen has increased the cost of performance, the percentage of increased cost cannot cause fundamental alteration of equilibrium. The last shipment was 50 doses of frozen semen accounting for 50% of the all 100 doses to be delivered according to the contract, meaning that the 30% tariff was a cost increase of relatively small percentage of 15% of the whole contract. It was widely discussed that what percentage of performance increase is the threshold for hardship, a 150-200 per cent margin seems to be advisable in an international market according to Pro. Schwenzer [*SCHWENZER, (2009), 717*]. Brunner stated that the threshold shall be 80 to 100% decrease in the value received or a corresponding increase in the cost of performance [*BRUNNER, (2007), 432*].

77. The increased cost could not make PHAR LAP's business more onerous. PHAR LAP operates Mediterraneo's oldest and most renown stud farm, whose teaching, research, and demonstration facility is a centre of excellence offering training and professional development courses on horse care, breeding and riding/driving, covering all areas of the equestrian sport. Mediterraneo's horse-shoeing or farrier school is also based at PHAR LAP [*NOTICE OF ARBITRATION, 4, PARA.1,2*]. The shipping business of frozen semen only come as an avocation not a major business as PHAR LAP had never sold frozen semen for racehorse breeding and for that much doses before [*PROCEDURAL ORDER NO.2, 57, CLARIFICATION 15*]. A 30% tariff on the last shipment could not possibly cause the ruin for PHAR LAP nor make its business excessively onerous.

(b) The events could reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract

78. In our case, the tariff impositions are not unforeseen. The criterion for unforeseen events depends on the objective situations and market trading usages. As a matter of fact, from the objective situation, there are so many facts in the moot problem to prove that the tariff impositions are not unforeseen. First, Black Beauty located country Equatoriana had once imposed the higher tariffs before the conclusion of the contract *[CLAIMANT EX NO 6, 15, PARA 2]*. Even though there is just one exception, for both of the parties who are going to do international business it should be taken into consideration. Second, Mediterraneo's newly president Mr. Bouckaert had appointed Ms. Cecil Frankel, one of the most ardent critics of tree trade, as his "superminister" for agriculture, trade and economics on 5 May 2017 *[PROCEDURAL ORDER NO 2, 58, CLARIFICATION 23]*. Third, Ms. Cecil Frankel had been an outspoken protectionist for years, lamenting that the farmers of Mediterraneo were badly treated in other markets and advocation limiting the access of foreign agricultural products to the Mediterraeo market. Consequently, the tariff impositions are not unforeseen.

(c) Risks have been assumed by PHAR LAP

79. The tariff is a typical situation of implicit risk assumption as for the speculative nature of the transaction [*BRUNNER, (2008), 124*]. PHAR LAP had never before sold semen for racehorse breeding and more than 10 doses at a time to one breeder even though it had regularly sold frozen semen in the other areas of equine sport [*PROCEDURAL ORDER NO.2, 57, CLARIFICATION 15*]. PHAR LAP aimed for the additional revenues resulting from the sale and signed the Frozen Semen Sales Agreement because the number of doses was unusual. PHAR LAP had consciously taken the risk that conditions might alter such as the risks of the use of the semen and other possible costs as it included variable costs of 15,000 USD per dose in the general cost-calculation [*PROCEDURAL ORDER NO.2, 59, CLARIFICATION 31*].

(2) even if the tariff impositions make up hardship, Phar Lap is still not entitled to the payment because the arbitral tribunal has no power to adapt the contract.

80. As argued and proved in the first issue, we came to the conclusion that the arbitration agreement is governed by the law of Danubia. An under the Dabunian contract law which is a largely verbatim adoption of the UNIDROIT Principles on International Commercial Contracts with two exceptions, one of the exceptions is Art 6.2.3 (4)(b). This article is worded differently granting the power to adapt the contract to the court only if authorized. However, in our sales agreement there is no such stipulation about adaptation authority. Therefore, Phar Lap is not entitled to the payment through the arbitral tribunal's adaptation.

81. What's more, pursuant to Art 6.2.3, it stipulates that when hardship exists, the court may adapt the contract with a view to restoring its equilibrium. However, adaptation is not the common way as adaptation by anyone aside from the parties involved in the contract would breach the fundamental principle of contract law, the notion of sanctity of contracts. Even if there is hardship, the circumstances may even be such that neither termination nor adaptation is appropriate and in consequence the only reasonable solution will be for the court either to direct the parties to resume negotiations with a view to reaching agreement on the adaptation of the contract, or to confirm the terms of the contract as they stand, according to Comment 7 on Article 6.2.3 UNIDROIT Principles and Joern Rimke *[JOERN RIMKE, FORCE MAJEURE AND HARDSHIP, P24, PARA 2]*.

82. Hence, PHAR LAP is not entitled to the payment from an adaptation of the price under the UNIDROIT Principles.

CONCLUSION: PHAR LAP is NOT entitled to the payment of US $ 1,250,000 or any other amount resulting from the adaptation of contract under clause 12 of the contract nor under the CISG.

CONCLUSION

I. The tribunal lacks jurisdiction and the powers under the arbitration agreement to adapt the contract, which includes the law of Danubia which governs the arbitration agreement and its interpretation

II. The CLAIMANT should not 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 argument or through an illegal hack of RESPONDENT' s computer system

III. PHAR LAP is not entitled to the payment of US $ 1,250,000 under Clause 12 of the contract or under the CISG.

PRAYER FOR RELIEF

For the reasons provided in this Memorandum, BLACK BEAUTY respectfully requests the Arbitral Tribunal:

1. To dismiss the claim as inadmissible for lack of jurisdiction and powers;
2. To reject the claim raised by PHAR LAP for additional remuneration in the amount of US $ 1,250,000 ;
3. To order PHAR LAP to pay BLACK BEAUTY's costs incurred in this arbitration.