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International Commercial Arbitration Moot

**ANALYSIS OF THE PROBLEM
FOR USE OF THE ARBITRATORS**

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If you do not already have a copy of the Problem, it is available on the Vis Moot web site, <https://vismoot.pace.edu/site/26th-vis-moot/the-problem>. If you downloaded the Problem during October you will need to download the revised version issued at the beginning of November which includes Procedural Order No 2 (PO 2) and subsequent comments.

This analysis of the Problem is primarily designed for the use of arbitrators. Arbitrators who may be associated with a team in the Moot are *strongly urged* not to communicate any of the ideas contained in this analysis to their teams *before* the submission of the Memorandum for RESPONDENT.

The analysis will be sent to all teams after all Memoranda for RESPONDENT have been submitted. Many of the team coaches/professors participate as arbitrators in the Moot and therefore receive this analysis. It only seems fair that all teams should have the analysis of the Problem for the oral arguments. If the analysis contains ideas teams had not thought of before, the respective teams will still have to turn those ideas into convincing arguments to support the position they are taking. At the same time, the analysis is not intended to give away all possible arguments. For that reason, this analysis often does no more than merely flag the issue without mentioning the arguments for or against a certain position. It does not contain a full analysis of the problem.

All arbitrators should be aware that the legal analysis contained herein may not be the only way the Problem can be analyzed. It may not even be the best way that one or more of the issues can be analyzed. The number of issues that arise out of the fact situation makes it necessary for the teams to decide which of the issues they emphasize in their submissions and oral presentations. Arbitrators should keep in mind that the team's background might influence its approach to the Problem and its analysis. In addition, the decision may be influenced by the presentation a team has to respond to. Full credit should be given to those teams that present different, though fully appropriate, arguments and emphasize different issues.

In the oral hearings, in particular in the later rounds, arbitrators may inform the teams which issues they should primarily focus on in their presentation, if they want to discuss certain issues specifically. They should do so, if they want to make the in-depth discussion of a particular issue part of their evaluation.

THE FACTS

I. Parties and contractual history

CLAIMANT, Phar Lap Allevamento (Phar Lap), is a company registered and located in Capital City, Mediterraneo. It operates Mediterraneo's oldest and most renowned stud farm, covering all areas of the equestrian sport. Phar Lap is particularly known for its breeding success regarding racehorses. The star among Phar Lap's stallions in the racehorse section is Nijinsky III. Nijinsky III is one of the most successful racehorses ever and has also successfully sired a number of up-and-coming racehorses. Both facts have made Nijinsky III one of the most sought-after stallions for breeding. Breeders have access to Nijinsky III and other studs throughout the breeding season from February to July for natural covering. In horseracing, most countries only allow for natural covering and prohibit artificial insemination. By contrast, in all other sections of horse sports artificial insemination is the norm and Phar Lap offers frozen semen of its champion stallions for artificial insemination. Due to Phar Lap's unique storage technique the semen is long-living and of superior quality.

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

On 21 March 2017 Black Beauty contacted Phar Lap, inquiring about the availability of Nijinsky III for its newly started breeding programme for racehorses (**Claimant's Exhibit C 1**). At that time, the Equatorian Government had imposed serious restrictions on the transportation of all living animals due to severe problems with foot and mouth disease which already lasted for two years. As a reaction to that and driven by powerful interests in the Equatorian racehorse breeding industry, the ban on artificial insemination for racehorses had been temporarily lifted. Due to the special situation in Equatoriana, Black Beauty was particularly interested in obtaining 100 doses of frozen semen of Nijinsky III.

Phar Lap was told at the time that Black Beauty's investors were keen to see Black Beauty's racehorse breeding programme to commence as soon as possible taking advantage of the temporary lift of the ban on artificial insemination. The explanation given for the high number of doses requested was that under the relevant Equatorian law all doses acquired during the lifting of the ban could be used for later breeding.

Phar Lap did not question that information at the time. It was undergoing financial difficulties and saw the contract as a good opportunity to increase its revenues without any major additional risk. The risk of the usability of the semen would lie with Black Beauty. Phar Lap considered its own interest in regulating the use of the semen sufficiently protected by a

clause in the contract stating that the semen could be used for the insemination of a number of mares specifically listed “*and others after information of the seller*”. Phar Lap interpreted that clause as a consent requirement for any further use of the semen. It only subsequently learned that Black Beauty’s investors were one of the biggest supporters of a general lifting of the ban and probably from the beginning had the intention to sell a considerable amount of the doses, hoping to induce additional breeders to fight for a permanent lifting of the ban.

With email of 24 March 2017 Phar Lap offered Black Beauty 100 doses of Nijinsky III’s frozen semen in accordance with the Standard Frozen Semen Sales Agreement and its General Conditions (**Claimant’s Exhibit C 2**). Black Beauty had no problem with most of the terms of the offer. It objected, however, to the choice of law and the forum selection clause – both pointing to Mediterraneo – and insisted on a delivery DDP (**Claimant’s Exhibit C 3**). Due to past experiences with extremely expensive tests due to changes in customs health requirements Phar Lap was only willing to accept a delivery DDP against a moderate price increase, the transfer of certain risks to Black Beauty and the inclusion of a hardship clause to temper some of the additional risks taken (**Claimant’s Exhibit C 4**).

In the end, the Parties agreed not only on a modified “hardship clause”, set out below, but also on an acceptable choice of law and arbitration clause. Unfortunately, the finalization of the agreement took longer than planned as the two main negotiators, Ms. Napravnik and Mr. Antley, were severely injured in an accident when driving to a restaurant after the annual colt auction in Danubia on 12 April 2017. They had to be replaced for the finalization of the contract by other employees who were not completely aware of the previous negotiations and the backgrounds of particular terms already agreed upon. The agreement (**Claimant’s Exhibit C 5**) was finally signed on 6 May 2017 and provided for three shipments of 25, 25 and 50 doses, the last of which was to be made on 23 January 2018.

As provided for in the agreement RESPONDENT sent the first shipment of 25 doses on 20 May 2017 and the second shipment of 25 doses on 3 October 2017. On 15 November 2017, two months before the last shipment of 50 doses was due, Mediterraneo’s newly elected President, Ian Bouckaert, announced 25% tariffs on agricultural products from Equatoriana. On 19 December 2017, after a very short period of unsuccessful discussions, the Equatorian Government retaliated by imposing 30% tariffs on selected agricultural products from Mediterraneo, including animal semen, taking effect as of 15 January 2018 (**Claimant’s Exhibit C 6**).

CLAIMANT’s inhouse counsel, Ms. Napravnik, when preparing the final shipment in January 2018, learned to her big surprise that the new tariffs regime for agricultural products also extended to the frozen racehorse semen. That made the third shipment 30% more expensive and would have destroyed CLAIMANT’s profit margin, which – on the basis of the calculation presented in PO 2 (para. 31) – lay at 5% per dose. With email of 20 January 2018, Ms. Napravnik immediately informed Mr. Shoemaker, the person responsible for the deal at RESPONDENT’s side, that

shipment would only be authorized after a solution for the allocation of the tariffs had been found (**Claimant's Exhibit C 7**). The issue was discussed in a telephone call with Mr. Shoemaker on the following day. In the end, Ms. Napravik authorized the shipment though no final agreement on a price increase had been reached. She had the impression that Mr. Shoemaker generally accepted the need for a price increase but was unable to authorize the increase personally though he needed the semen urgently (**Claimant's Exhibit C 8**).

In subsequent negotiations no agreement on a price increase could be reached. Furthermore, CLAIMANT found out that RESPONDENT had actually resold at least 15 doses to other breeders at a 20% higher price without informing CLAIMANT or even asking for its consent. When confronted with that discovery in a meeting on 12 February 2018, the CEO of RESPONDENT terminated all negotiations about a price increase and refused to make any additional payments for the imposition of the new tariffs.

In summary, it is RESPONDENT's position that in light of the agreement on DDP delivery, the costs for the additional tariffs had to be borne by CLAIMANT. The newly imposed tariffs do neither meet the requirements of the narrowly worded hardship clause nor do they justify an adaptation under the CISG. CLAIMANT, by contrast, is of the view that taking into account the drafting history and the hardship clause the imposition of the additional tariffs led to a change of circumstances which give rise to a right for an increased price, either under the hardship clause or the CISG.

II. Initiation of arbitration and Statement of Relief

On 31 July 2018, CLAIMANT initiated the present arbitration proceedings, asking primarily for the payment of an additional amount of US\$ 1,250,000 for parts of the additional tariffs of 30% for the third delivery of semen.

More specifically, CLAIMANT raises the following claims in the arbitration proceedings:

- a) Black Beauty Equestrian is ordered to pay to Phar Lap Allevamento an additional amount of US\$ 1,250,000 which is 25% of the price for the third delivery of semen;
- b) Black Beauty Equestrian bears the costs of the Arbitration.

RESPONDENT requests the Arbitral Tribunal

- a) To dismiss the claim as inadmissible for a lack of jurisdiction and powers;
- b) To reject the claim for additional remuneration in the amount of US\$ 1,250,000 raised by CLAIMANT;
- c) To order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.

THE ISSUES

I. Overview

Following a telephone conference on 4 October 2018 in which the Parties agreed on some procedural issues, including the application of the new HKIAC-Rules 2018 to the arbitration, the Arbitral Tribunal has set forth the issues to be decided in the first part of the proceedings, and therefore at issue in the Moot, in Procedural Order No 1 (PO 1) para. III (1). It has ordered the Parties to address in their next submissions and at the Oral Hearing in Vindobona (Hong Kong) the following issues:

- a) Does the tribunal have the jurisdiction and/or the powers under the arbitration agreement to adapt the contract, which includes in particular the question of which law governs the arbitration agreement and its interpretation;
- b) Should CLAIMANT be entitled to submit evidence from the other arbitration proceedings on the basis of the assumption that this evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's Computer system;
- c) Is CLAIMANT entitled to the payment of US\$ 1,250,000 or any other amount resulting from an adaptation of the price
 - i. under clause 12 of the contract
 - ii. or under the CISG?

While the Parties are in principle free to select the order in which they address the various issues (PO 1 para. III (1) last sentence), it makes sense to start with the Arbitral Tribunal's general authority to adapt the contract followed by the other procedural question as to the admission of evidence. In relation to the merits, PO 1 states explicitly that beyond the two questions under c) no further questions referring to the merits of the claims should be addressed.

II. General considerations

More or less unforeseen changes of circumstances making performance of the contract more onerous for one of the parties are a common occurrence in international transactions. They give rise to a number of questions of procedural and/or substantive nature relating to the right of a party negatively affected by such changes to request an adaptation of the contract to the changed circumstances. The particularity of the present case is that the contract contains a badly drafted "hardship clause" and an arbitration clause which in describing its scope deviates from the broad and all-including wording of the HKIAC Model Clause. Both of them are part of an agreement which has been negotiated by two teams of negotiators and where the second team lacked important information as to the background and content of some of the already agreed upon clauses. That makes it difficult if not impossible to clearly discern what the Parties (or the drafters) intended with the particular clauses.

These problems and particularities are to different extents relevant for the “solution” of this case and will have to be addressed in one way or another in the written submissions or the oral pleadings. The two procedural issues are completely separate from each other. Obviously, only the first issue appears to relate directly to the question of contract adaptation, i.e. the powers of the arbitral tribunal to do so. In the past, the issue has given rise to considerable discussion, as – in adapting the contract – arbitrators go beyond their ordinary task which is to determine the existence of rights agreed upon between the parties. Instead, they may engage in a “creative” task of regulating the future relationship of the parties, i.e. a task that is normally reserved for the parties. In the present case, however, due to the particular set up and the information provided, the issue of the powers of an arbitrator to adapt a contract only provides the background against which the really relevant question has to be discussed, that of the law governing the arbitration agreement. It is an issue which had been at the heart of a number of high-profile cases during the last decade advocating often slightly different tests. By contrast, the two questions concerning the merits of the case relate to the core issues arising in the context of adaptation requests due to economic hardship created by a change of circumstance. In the end, it boils down to the question of how to allocate the risks which materialized through the imposition of the additional tariffs in light of the contractual provisions and the existing legal provisions, given the absence of an express hardship rule in the CISG.

The second procedural issue is part of the overall problem to what extent evidence obtained by illicit means can be relied upon in arbitration.

The broad topics to be discussed by the students are the following:

1. In relation to arbitration:

- a) What law applies to the arbitration agreement in light of the drafting history, the choice of Mediterranean law for the main contract and the selection of Vindobona, Danubia as the place of arbitration.
- b) Whether the Arbitral Tribunal can and should allow CLAIMANT to submit evidence which has been obtained in a questionable way, either because someone has breached confidentiality obligations or through an illegal hack of RESPONDENT’s computer system

2. In relation to the CISG:

- a) Whether the badly drafted hardship addition to the force majeure clause that the *“Seller shall not be responsible ... for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous”* covers the present case of increased shipping costs of 30% due to an additional tariff imposed as a retaliatory measure to a previous imposition of a tariff.

- b) Whether in case the “hardship clause” does not cover the additional burden imposed through the tariff, the latter may justify an adaptation under the CISG or the otherwise applicable UNIDROIT Principles.

Unlike in previous years, the procedural and substantive problems of the present case can be completely separated from each other. Irrespective of that, the decision on the merits depends on the preliminary determination of the two procedural issues so that it makes no sense to start with the merits, even if no order was prescribed by the Arbitral Tribunal.

The following remarks are merely intended to highlight the legal issues arising from the Problem. They follow the order of the questions posed by the Tribunal. It is for the Arbitrators to evaluate whether the Parties have addressed the problems in a convincing and effective order in their written submission and to suggest an order for the oral hearings should the Parties not have agreed upon an order.

A common issue relating to questions of procedure as well as to questions of substance is that, due to changes in the negotiation teams, the final version of the relevant arbitration and hardship clauses is everything but perfect and may not reflect what was originally intended by the drafters. That raises questions as to whether the true intention was known to the other party and if not how a reasonable person with the knowledge of the parties would have understood the clauses. The file contains sufficient facts which may be used to support the various positions. The Frozen Semen Sales Agreement ([Claimant’s Exhibit C 5](#)) itself is based on a basic industry template used in other areas of equestrian sports where artificial insemination is allowed. The Parties have amended that template where considered necessary and have filled the blanks by providing the required information, which explains the different fonts (PO 2 paras. 3-4).

III. The Tribunal's power to adapt the contract: Procedural Order No 1 para. III (1 a)

1. Background

CLAIMANT bases the arbitration and its request for contract adaptation on the following arbitration clause contained in para. 15 of the Frozen Semen Sales Agreement:

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

The seat of arbitration shall be Vindobona, Danubia.

The number of arbitrators shall be three. The arbitration proceedings shall be conducted in English."

The arbitration clause is the result of lengthy negotiations between the Parties as to the appropriate mode of dispute resolution. The first offer by CLAIMANT contained a forum selection clause in favor of the courts in Mediterraneo coupled with a choice of law clause in favor of the law of Mediterraneo. RESPONDENT suggested to maintain the choice of law clause but to provide for the jurisdiction of the courts in Equatoriana as it considered *"it not appropriate that your [Phar Lap's] law applies and your [Phar Lap's] courts have jurisdiction"* (Claimant's Exhibit C 3). In its reply of 31 March 2017 (Claimant's Exhibit C 4), CLAIMANT made clear that it would not submit to jurisdiction of the courts in Equatoriana but could accept arbitration in Mediterraneo. On 10 April 2017, RESPONDENT submitted a draft of an arbitration clause based on the HKIAC Model Clause, which had, however, been *"narrowed down and streamlined a little bit"* in relation to the situations covered (not mentioning "differences") (Respondent's Exhibit R 1). The clause provided as follows, containing an express choice of the law governing it as suggested in the HKIAC Model Clause (emphasis not in original document):

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

The seat of arbitration shall be Equatoriana.

The law of this arbitration clause shall be the law of Equatoriana.

The number of arbitrators shall be three.

The arbitration proceedings shall be conducted in English."

On 11 April 2017, CLAIMANT replied informing RESPONDENT that according to internal guidelines for any submission of dispute resolution in the country of the counterparty special approval of the creditors' committee was required (Respondent's Exhibit R 2). To avoid the need for such an approval, CLAIMANT suggested to change the place of arbitration and amended the clause proposed by RESPONDENT stating the clause would read in its relevant part:

"Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination thereof shall be referred to and finally resolved by arbitration

*administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.
The seat of arbitration shall be Danubia."*

This last draft had been discussed shortly at the meeting between CLAIMANT's Ms. Napravnik and RESPONDENT's Mr. Antley on the following day (12 April 2018) at the annual colt auction in Vindobona. Ms. Napravnik made clear that CLAIMANT wanted to have an adaptation mechanism in place in case the Parties could not agree on arbitration. As it was understood that the task should be performed by the arbitrators, Ms. Napravnik suggested clarifying that issue either in the arbitration clause or the hardship clause. Mr. Antley promised to come back with a proposal for the wording the next day, which did not happen due to his hospitalization following the car accident in the evening. The final version of the arbitration agreement was then agreed upon by the successors of Ms. Napravnik and Mr. Antley, Mr. John Ferguson and Mr. Julian Krone respectively. The final version of the arbitration clause is a collation of the last two drafts (**Respondent's Exhibits R 1 and R 2**). However, the two negotiators cannot remember with sufficient certainty why they did not include the sentences concerning the law applicable to the arbitration agreement (PO 2 para. 6). They had only access to the email exchange and a note made by Mr. Antley on 12 April following its discussion with Ms. Napravnik, which provided as follows:

" 12 April 2017

List of issues for further negotiations following draft by Phar Lap of 11 April and short discussion with Napravnik this morning

- Clarify in arbitration clause that neutral venue and applicable law*
- ICC hardship clause suggested by Claimant too broad*
- Connection of hardship clause with arbitration clause*

Mr. Krone stated in his witness statement (**Respondent's Exhibit R 3**) that it "was, however, at the time not completely clear to me what Mr. Antley meant with the points 1 and 3". He had seen the mail providing for arbitration in Danubia and the choice of law in favor of Mediterranean law and was unaware that the reference in point 1 to the applicable law was to the law applicable to the arbitration agreement. He further stated that if he had understood the reference properly, he "would have definitively included an express reference to the law of Danubia into the arbitration agreement". In relation to point 3, Mr. Krone stated that he "would have objected to transfer powers to the Arbitral Tribunal to increase the price upon its discretion".

There is no statement from Mr. Ferguson as to his motivation in agreeing on the arbitration clause as it was finally included into the contract without any express reference to the law governing the arbitration agreement or the powers of the arbitral tribunal to adapt the contract.

2. The relevance of the law governing the arbitration agreement for the issue of contract adaptation

In general, the power to adapt a contract may arise from different sources. Conceptually, such power may either be conferred upon the tribunal by the arbitration agreement or by the applicable arbitration law or may even follow from doctrines of substantive law such as hardship, if they provide for an adaptation by the courts/arbitral tribunals as a final remedy. A proper understanding and presentation of the complex interplay of the various potential sources is one of the distinguishing factors in the present case.

In the case, the *lex arbitri* is the Danubian Arbitration Law which is a nearly verbatim adoption of the UNCITRAL Model Law (ML) and consequently contains no express provision on contract adaptation. The drafters of the Model Law discussed the express conferral of such power but opted against it, considering it to be one of the issues which should be left to the national legislator to add or not. In Danubia, no such power was included into the law, but the courts are of the view that the parties may grant such power to an arbitral tribunal. Such a conferral of power, however, requires an express agreement according to the Danubian jurisprudence. In this respect, the Danubian courts consider Art. 28(3) ML to contain a general principle that extraordinary powers require an express agreement (PO 2 para. 37).

Whether the arbitration agreement in combination with the hardship clause constitutes such an “express conferral” of powers depends, thus, to a considerable extent on its interpretation which in turn is governed by the law applicable to the arbitration agreement.

In the present case, the law applicable to the arbitration agreement may either be the law of Mediterraneo, as the law governing the main contract, or the law of Danubia, as the law of the place of arbitration. Both laws differ in two respects which may be crucial in the case.

Under the law of Mediterraneo, arbitration agreements are consistently interpreted to include the power to adapt a contract even if no special hardship clause is included into the contract, but a party relies on the hardship doctrine contained in Mediterranean contract law (Art. 6.2.3 UNIDROIT Principles) (PO 2 para. 40). Furthermore, their interpretation is governed by Art. 8 CISG (PO 1 para. 4), with the effect that all circumstances can be taken into account in interpreting the agreement. Therefore, the discussion between Ms. Napravnik and Mr. Antley on 12 April 2017 could – eventually – be taken into account in interpreting the wording of the arbitration agreement.

By contrast under Danubian law, arbitration agreements are interpreted narrowly and their interpretation is governed by the “four corner rule” excluding all extraneous evidence for the interpretation. Thus, the discussion on 12 April 2017 is irrelevant for the interpretation of the arbitration agreement. As a consequence of these two factors, there is a high likelihood that the arbitration agreement will be interpreted as not authorizing the arbitral tribunal to adapt the contract.

Conceptually, unless the Parties have chosen (expressly or impliedly) Mediterranean law to govern the arbitration agreement, Danubian law, as the law of the place of arbitration will most likely be applicable to the arbitration agreement. It can therefore be expected that most Claimants will try to argue that the choice of Mediterranean law for the main contract is – despite the doctrine of separability – at the same time at least an implicit choice of the same law also for the arbitration agreement. There is a number of recent cases from courts in important venues for arbitration which would support such a proposition as a general rule. The Respondents, by contrast, will either argue that the determination of the place of arbitration is at the same time at least an implicit choice of the law governing an arbitration agreement or at least an indication that the choice of the law governing the main contract should not be extended to the arbitration agreement. As there would be no choice then, the arbitration agreement would be governed by the law of the place of arbitration.

In light of the particularities of the case, some students may even try to argue for an express choice of either law. In the argumentation for either position the following factors may play a role:

- drafting history;
- deviation(s) from the HKIAC Model Clause;
- legal consequences of the choice;
- inclusion of hardship clause;
- conduct in the other HKIAC-arbitration.

While the determination of the applicable law is intended to be largely determinative for the issue, it is also possible to argue in a second step that the particularities of the case justify a deviation from the interpretation which could normally be expected under the particular law. The factors which may play a role in this context are largely the same. Additionally, the choice of Mediterranean law as the law governing the merits may become relevant. It is a verbatim adoption of the UNIDROIT Principles, including 6.2.3 (4)(b) which considers “judicial” contract adaptation to be a remedy. Thus, teams could try to argue that even if Danubian law governs the arbitration agreement, the choice of Mediterranean law for the merits constitutes an express conferral of adaptation powers to the arbitral tribunal.

IV. Admission of evidence: Procedural Order No 1 para. III (1 b)

1. Background

In its letter of 2 October 2018 CLAIMANT informed the Tribunal that it had become aware of another HKIAC-arbitration in which RESPONDENT was involved and which related to the effects of the newly imposed tariff regime upon contractual obligations. According to CLAIMANT's information, that arbitration concerned the sale of a mare by RESPONDENT to Mediterraneo. The respective sale had also been affected by the 25% tariff imposed by the President of Mediterraneo for the import of agricultural products. In the arbitration, RESPONDENT had argued that the imposition of the tariff constituted an unforeseen change of circumstance justifying a price increase. CLAIMANT had allegedly been promised a copy of the Partial Interim Award which it wanted to submit once received to support its case that the additional tariffs justified an adaptation of the contract.

On 3 October 2018, RESPONDENT objected to the admission of such evidence should it be submitted. It stated that the submission of the award would violate confidentiality obligations in the other arbitration. According to its investigations, the source of the information and the award could either be two former employees of RESPONDENT or a hack of RESPONDENT's computer system. As in both cases the award would be obtained by illegal means it should not be admitted.

CLAIMANT had learned about the other arbitration from Mr. Kieron Velazquez, a former employee of the buyer of the mare, who had since then become the CEO of one of CLAIMANT's regular customers. Mr. Velazquez had not been involved in the arbitration proceedings but knew about its existence. Contrary to its earlier assumption, Mr. Velazquez was not able to provide CLAIMANT with a copy of the award so that CLAIMANT at the time of PO 2 was still not in possession of the award. However, CLAIMANT had meantime obtained from Mr. Velazquez the address of a company which provides intelligence on the horseracing industry which had promised to organize the Partial Interim Award against payment of US\$ 1000.

The company has a doubtful reputation as to where it gets its information from and has refused to disclose its sources in the case at hand. Thus, it is unclear whether the person who had provided the award to the company was the hacker or one of the former employees of RESPONDENT. Both employees had been witnesses in the other arbitration before they were fired on 6 July 2018 and had been under a contractual obligation to keep all information about the other arbitral proceedings confidential. RESPONDENT had used an outdated firewall to protect its computer system which had made it easy for the hackers to enter the system (PO 2 para. 42).

The statement of facts of the Partial Interim Award reveals that the contract was also negotiated by Mr. Antley, provided for delivery DDP Mediterraneo (INCOTERMS 2010), contained an ICC-hardship clause 2003, a choice of law clause in favor of Mediterranean law

and the HKIAC Model Clause with all additions, including the choice of Mediterranean law to govern the arbitration agreement. Following the imposition of the tariffs on agricultural products by the President of Mediterraneo, RESPONDENT asked for a renegotiation of the price under the ICC-hardship clause 2003 and Art. 6.2.3 of the Mediterranean Contract Law (UNIDROIT Principles) and refused delivery of the mare. In light of that refusal, the buyer had challenged the powers of the arbitrator to adapt the contract under the hardship clause or Art. 6.2.3 para. 4b of the Mediterranean Contract Law. In a Partial Interim Award rendered in those proceedings on 29 June 2018, the respective arbitral tribunal had confirmed its power to adapt the contract should the tariff result in hardship for RESPONDENT. That is in line with the consistent jurisprudence of the courts in Mediterraneo in the context of Art. 6.2.3 para. 4b Mediterranean Contract Law (UNIDROIT Principles). A standard arbitration agreement is considered to be sufficient to grant an arbitral tribunal the same powers as a court has under the provision. There is no case law in connection with the ICC-hardship clause. An award on the merits has not yet been rendered but is expected for August 2019.

2. Discussion

Pursuant to the applicable procedural rules the Tribunal has a wide discretion “to determine the admissibility ...[of] evidence, including whether to apply strict rules of evidence” (HKIAC Rules Art. 22.1 – Art. 19 (2) ML). Neither the HKIAC-Rules nor the Model Law contain any express provision on how to deal with evidence submitted which may have been obtained by illicit means. Thus, the solution must be found in balancing the various general procedural principles which may be affected by the admission or rejection of evidence. Some teams may also discuss the issue under the heading of “privileged documents” and discuss whether any of the “generally accepted” privileges apply to the Partial Interim Award.

By refusing to admit the Partial Interim Award as evidence the Tribunal may infringe CLAIMANT’s right to properly present its case. Whether that is actually the case also depends on whether one considers the findings in the Partial Interim Award to be of any relevance for CLAIMANT’s case in the present arbitration. On the one hand, it shows that RESPONDENT considered already the 25% tariff to be a change of circumstance to justify an adaptation and that it considered adaptation a remedy available to the arbitrator under Mediterranean law. On the other hand, the contract contained a different and potentially broader hardship clause in form of the ICC-hardship clause which had been rejected by RESPONDENT in the case at hand.

By admitting the Partial Interim Award as evidence, the Tribunal may become an accomplice of a breach of a contractual confidentiality obligation which existed for the other arbitration pursuant to Art. 42 HKIAC-Rules 2013 which provides in its pertinent part:

- 42.1 Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to:
- (a) the arbitration under the arbitration agreement(s); or
 - (b) an award made in the arbitration.

42.2 The provisions of Article 42.1 also apply to the arbitral tribunal, any Emergency Arbitrator appointed in accordance with Schedule 4, expert, witness, secretary of the arbitral tribunal and HKIAC.

At the same time, one may argue that the breach of the confidentiality obligation occurred in the release of the award to the company from which CLAIMANT wanted to acquire it. Once it had been acquired by the company it was in public domain. Furthermore, the company as an outsider to the other arbitration was under no confidentiality obligation pursuant to Art. 42 HKIAC-Rules 2013, so that its release of the Partial Interim Award was no a breach of any confidentiality obligation. The role of CLAIMANT in obtaining the evidence – which is described deliberately vague in the case – will play an important role in the discussion. It is clear that CLAIMANT did not itself hack RESPONDENT’s computer system (which was prone to attack due to an outdated firewall (PO 2 para 43) but he may have taken a role which is broadly comparable to that of a receiver of stolen goods, by arranging “the opportunity to acquire the “Partial Interim Award” against payment of 1000 USD from a company which provides intelligence on the horseracing industry” (PO 2 para. 42), which had acquired the award either from the hacker or one of the employee’s submitted to a confidentiality obligation.

Another principle which may be invoked by the teams against admitting the Partial Interim Award is that of procedural fairness (or good faith in arbitration) prohibiting the use of “tainted” evidence. To what extent such a principle exists and what its consequences are, is definitively open to discussion.

V. Adaptation under the “hardship clause”: Procedural Order No 1 para. III (1 c i)

1. Background

Pursuant to Art. 8 of the Frozen Semen Sales Agreement CLAIMANT is required to ship the three installments “DDP”, which the Parties understood to mean DDP to RESPONDENT’s premises in Equatoriana (Claimant’s Exhibit C 5; PO 2 para. 10). The determination of the place of delivery and the delimitations of obligations and risks associated with that had been one of the major points of discussion during the negotiations.

CLAIMANT’s first offer of 24 March 2017 had provided for a price of US\$ 99,500 per dose “to be picked up at our premises” (Claimant’s Exhibit C 2) and was based on CLAIMANT’s general conditions which provide for delivery EXW Capital City (PO 2 para. 9).

In its reply of 28 March 2017 (Claimant’s Exhibit C 3) RESPONDENT asked for a change of the delivery terms stating as follows:

“Furthermore, given the urgency of the delivery and your much greater experience in the shipment of frozen semen including the necessary export and import documentation we would insist for this contract on a delivery on the basis of DDP. That could be changed for future contracts, in particular if natural coverage is considered.”

That request was in principle accepted by CLAIMANT in its email of 31 March 2017 (**Claimant's Exhibit C 4**) against a higher price to reflect the additional costs and with a certain caveat as to the risk allocation. The relevant part of the email reads as follows:

“After longer internal discussions we can accept for this contract a delivery DDP. Given the additional costs associated with a DDP delivery, we would need to increase the price by 1000 USD per dose.

Furthermore, we are not willing to take over any further risks associated with such a change in the delivery terms, in particular not those associated with changes in customs regulation or import restrictions. As we both know from past experiences unforeseeable additional health and safety requirements may make highly expensive tests necessary which can increase the cost by up to 40% and thereby destroy the commercial basis of the deal. At minimum, a hardship clause should be included into the contract to address such subsequent changes.”

The past experience referred to, was a sale of three mares to Danubia in 2014 by CLAIMANT which had been widely reported in the media as it nearly led to the insolvency of CLAIMANT (PO 2 para. 21). The sale which had been affected by very strict new health and safety requirements imposed by the Danubian government due to an aggressive type of foot and mouth disease. The additional tests and the costs for the long quarantine time consumed 40% of the sales price which CLAIMANT urgently needed at the time to finance previous investments.

The subsequent discussions on the issues first between Ms. Napravnik and Mr. Antley and then between Mr. Ferguson and Mr. Krone led to a number of modifications of the obligations normally associated with DDP-delivery under INCOTERMS 2010 and inclusion of a hardship provision into the Frozen Semen Sales Agreement. In her email of 11 April 2017 (**Respondent's Exhibit R 2**), Ms. Napravnik had suggested reliance on the ICC-hardship clause which Mr. Antley, according to his note, apparently considered to be *“too broad”*. In the end Mr. Ferguson and Mr. Krone decided to include *“a narrow hardship reference into the force majeure clause”*. Thus, Clause 12 of the Frozen Semen Sales agreement provides now:

“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.”

(The different fonts reflect the additions made to the standard force majeure clause.)

After CLAIMANT had performed the first two shipments as agreed, the third shipment in January 2018 was affected by the newly imposed tariff regime imposed by the Equatorian authorities as a retaliation to the tariffs imposed by the new president of Mediterraneo on agricultural products. The new tariffs have made the shipment 30% more expensive for CLAIMANT.

With its claim in the arbitration, CLAIMANT wants to recover the major part of these additional costs either under the hardship clause or under a comparable hardship doctrine under the CISG.

2. Existence of hardship

A price increase under the “hardship clause” would require that

- The additional costs created by the 30% tariff constitute “*hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous*” and
- Contract adaptation is a remedy available under the clause which only provides that the “*Seller shall not be responsible*”.

Both questions have to be answered through an interpretation of the clause pursuant to Art. 8 CISG which provides as follows:

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph 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.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

The drafting history provides good arguments that both Parties either had the actual intention in the sense of Art. 8(1) CISG or a reasonable person pursuant to Art. 8(2) CISG would have understood their statements to mean that adaptation should be an available remedy despite the wording of the clause. CLAIMANT made clear from the beginning that it was not willing to bear certain risks and suggested the inclusion of the ICC-hardship clause. The later explicitly provides that the Parties should try to adapt the contract stating as follows:

(1) A party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.

(2) Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:

(a) the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that

(b) it could not reasonably have avoided or overcome the event or its consequences, the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow for the consequences of the event.

(3) Where paragraph 2 of this Clause applies, but where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this Clause is entitled to termination of the contract.

RESPONDENT had no problems with the inclusion of a hardship clause as such but merely with the width of the suggested clause, indicating that it also considered adaptation to be the primary remedy.

One could, however, also argue that the Parties finally did not include a separate hardship clause but merely added a hardship part to the existing force majeure clause.

In addition, the drafting history plays a major role in determining whether the price increase through the additional tariffs is covered by the clause or not. The wording of the hardship clause is both narrower (hardship caused by particular events) and broader (no requirement that it must be “excessively onerous”) than that of the ICC-hardship clause. Both issues may play a role and may either be discussed separately or jointly.

Concerning the question whether an increase in costs of 30% constitutes “hardship” the following factor may be relevant for the discussion:

- Alleged profit margin of 5% per dose (PO 2 para. 32);
- CLAIMANT’s problematic financial situation (PO 2 para. 30);
- RESPONDENT’s behavior in the second arbitration – tariff of 25% used as ground to request adaptation under ICC-hardship clause (PO 2 para. 40);
- Profits made by RESPONDENT through the sale of doses;
- Drafting history – purpose of the shift to DDP / limitations of the DDP obligations.

Concerning the origin of hardship, it is clear that the tariffs do not constitute “*additional health and safety requirements*“. While CLAIMANT’s past experience with such requirements triggered the inclusion of the hardship clause into the contract the parties did not limit the clause to such requirements but also included “*comparable unforeseen events making the contract more onerous*“.

The determination whether the tariffs are “*comparable*” to additional health and safety requirements depends largely on whether one looks at their effect on the contract (making it more onerous) or the objectives pursued with them. Issues which may play a role in this context are

- The general purpose of hardship clauses;
- The other deviations from the DDP-delivery obligations;
- RESPONDENT’s rejection of the ICC-hardship clause;

- RESPONDENT's behavior in the second arbitration.

In determining whether the tariffs were “foreseeable” the following facts may play a role

- The past behavior of the Mediterranean government (no tariffs of comparable breadth, PO 2 para. 23);
- The announcements of a more protectionist approach during the campaign;
- The past behavior of Equatorianian government (ardent free trade supporter / no retaliatory measures);
- WTO-obligations of both states;
- Whether “frozen racehorse semen” can easily be classified as an agricultural product;
- RESPONDENT's behavior in the second arbitration.

VI. Adaptation under the CISG: Procedural Order No 1 para. III (1 c ii)

1. Background

The only provision in the CISG which addresses directly the influence of a change of circumstance on the contractual obligations – at least for a specific case – is Art. 79. It provides in its first paragraph:

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

By contrast, there is no express provision for the general problem of allocating the risk of severe and unpredictable changes in circumstances which alter the contractual equilibrium fundamentally. There are different views as to the legal consequences of that silence. Some authors submit that the CISG excludes the concept of hardship. The majority of authors, including the CISG Advisory Council, reads a hardship concept into the CISG, which is also supported by some widely reported decisions from Belgium or France.

Differences exist, however, as to the correct conceptual way of doing it. Some authors want to apply Art. 79 directly interpreting the notion of “impediment” broadly, some submit that the Convention has a gap to be filled either by using Art. 79 by analogy or by relying on the hardship provision in Art. 6.2 UNIDROIT Principles. Then, these are either classified as “general principles on which [the CISG] is based” in the sense of Art. 7(2) Alt. 1 CISG or a codification of customs in the sense of Art. 9 CISG or they become relevant as part of the national law used to fill gaps under Art. 7(2) Alt. 2 CISG. (For a summary of the discussion see Atamer, Art. 79 paras. 78 et seq. in: Kröll/Mistelis/Perales Viscasillas, CISG, 2nd ed. 2018).

Art. 6.2. UNIDROIT Principles provides as follows:

6.2.1 (Contract to be observed)

Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

6.2.2 (Definition of Hardship)

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.

6.2.3 (Effects of Hardship)

(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) If the court finds hardship it may, if reasonable,

- (a) terminate the contract at a date and on terms to be fixed; or
- (b) adapt the contract with a view to restoring its equilibrium.

In light of the absence of clear guidance about the requirements of hardship in the text of the CISG, it is highly likely that the teams which advocate the existence of a doctrine of hardship under the CISG will eventually discuss the concept of hardship in one way or another under the definition provided in the UNIDROIT Principles. Notwithstanding the fact, that it is important that the teams are aware of the dogmatic weaknesses of some of the approaches, the way in which Art. 6.2 UNIDROIT Principles becomes applicable is of limited importance for the outcome of the case. Thus, there may be teams which, in the interest of space and time, leave that issue open.

What has to be discussed, however, is the effect of the contractually agreed upon hardship provision in Clause 12 of the Frozen Semen Sales Agreement on the applicability of the doctrine of hardship as defined in the CISG.

2. Doctrine of hardship under the CISG

Pursuant to Art. 6 CISG the parties may “derogate from or vary the effect of any of its provisions”. That raises the question to what extent Clause 12 constitutes either a derogation or a variation of the hardship doctrine found under the CISG. Reliance on the “statutory” hardship provisions only becomes necessary if an adaptation is not possible under the more specific contractual provisions, either because its requirements are not met or because adaptation is not a remedy available under the clause.

Consequently, any interpretation of Clause 12 as a comprehensive and conclusive regulation of the effects of changed circumstances on the contract would exclude any reliance on any CISG-hardship doctrine.

It is also possible to interpret Clause 12 as a mere modification of the statutory hardship doctrine for particular risks where it should be made easier for the seller to invoke hardship in return for its willingness to accept additional risks which are associated with delivery DDP Equatoriana. Last but not least, there may even be teams trying to argue that Clause 12 led to a general modification of the thresholds for the application of the hardship doctrine.

In determining whether an adaptation is possible under Art. 6.2 UNIDROIT Principles the questions which have to be discussed are:

- Did the tariff result in a fundamental alteration of the contractual equilibrium?
- Could CLAIMANT have taken them reasonably into account at the time of contracting?
- Did CLAIMANT by agreeing on delivery DDP took the risk of additional tariffs?

The facts which are relevant for that discussion are largely the same as in the discussion of “hardship” and “foreseeability” in the context of the hardship clause.