SIXTHTEENTH ANNUAL VIS EAST MOOT
INTERNATIONAL COMMERCIAL MOOT ARBITRATION


# MEMORANDUM FOR RESPONDENT

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| Phar-Lap Allevamento<br>CLAIMANT<br>Rue Frankel 1<br>Capital City, Mediterraneo | v. | Black Beauty<br>RESPONDENT<br>2 Seabiscuit Drive<br>Oceanside, Equatoriana |

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# TABLE OF ABBREVIATIONS AND DEFINITIONS

| | |
|---|---|
| ¶, ¶¶ | Paragraph/Paragraphs |
| §, §§ | Section/Sections |
| % | Per cent |
| Ad hoc [Arbitration] | a proceeding that is not administered by others and requires parties to make their own arrangements for selection of **arbitrators**. |
| ANoA | Answer to Notice of Arbitration |
| Art./Arts. | Article/Articles |
| *cf.* | *confer* (see) |
| Ch. | Chapter |
| CIETAC | China International Economic and Trade Arbitration Commission |
| CISG | United Nations Convention on Contracts for the International Sale of Goods |
| Cl. Memo. | Memorandum for CLAIMANT |
| *clausa rebus sic stantibus* | things thus standing |
| Eds. | Editors |
| *e.g.* | *exempli gratia* (for example) |
| *essentialia negotii* | essential term |
| *et al.* | *Et alii* (and others) |
| Et seq. | *Et sequens*; (and the following one) |
| EWHC | High Court of England and Wales |
| Exhibit C(#) | CLAIMANT's Exhibit |
| Exhibit R(#) | RESPONDENT's Exhibit |
| *fn.* | footnote |

| | |
|---|---|
| *force majeure* | *superior* force/Act of God [French] |
| *forum non conveniens* | refusal to take jurisdiction where there is a more appropriate forum |
| HKIAC | Hong Kong International Arbitration Centre |
| HKIAC Rules | Hong Kong International Arbitration Center Rules (2018) |
| *i.e.* | *id est*; (that is) |
| *ipso jure* | as by operation of law |
| IBA Guidelines | IBA Guidelines on Conflicts of Interest in International Arbitration (2014) |
| IBA Rules | IBA Rules on the Taking of Evidence in International Arbitration (2010) |
| ibid. | Ibidem; (in the same place) |
| ICC | International Chamber of Commerce |
| ICC Rules | Rules of Arbitration of the ICC (2012) |
| *infra* | below |
| ISO | International Organization for Standardization |
| Letter by Fasttrack | Letter written by Julia Clara Fasttrack [dated 3 October 2018] |
| *lex arbitri* | law of the seat of arbitration |
| *lex fori* | procedural law applicable to arbitration |
| LCIA | London Court for International Arbitration |
| No. | Number/numbers |
| NoA | CLAIMANT's Notice of Arbitration |
| p. | Page |
| PO1 | Procedural Order No. 1 [dated 5 October 2018] |
| PO2 | Procedural Order No. 2 [dated 2 November 2018] |
| RNoA | RESPONDENT's Response to Notice of Arbitration |

| | |
|---|---|
| SCC | Stockholm Chamber of Commerce |
| SIAC | Singapore International Arbitration Centre [SIAC Rules 2016] |
| *supra* | above |
| UML | UNCITRAL Model Law on International Commercial Arbitration with amendments (2006) |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCITRAL RTTIA | UNCITRAL Rules on Transparency in Treaty Based Investor-State Arbitration |
| UNCITRAL Rules | UNCITRAL Arbitration Rules |
| UNIDROIT Principles | UNIDROIT Principles of International Commercial Contracts (2010) |
| UPICC | UNIDROIT Principles of International Commercial Contracts |
| USD | United States Dollars |
| *v.* | *versus* (against) |
| WS of Napravnik | Witness Statement of Julie Napravnik (CLAIMANT Exhibit C8) [dated 15 June 2018] |

# STATEMENT OF FACTS

RESPONDENT, Black Beauty Equestrian ("Black Beauty") is a horse breeding company based in Oceanside, Equatoriana, that is famous for its bloodmare lines that have resulted in a number of world champion show jumpers. In 2015, Black Beauty established a racehorse stable, and acquired ten mares with excellent racehorse pedigree.

CLAIMANT, Phar Lap Allevamento (Phar Lap), is a company registered and located in Capital City, Mediterraneo. As a part of its business, Phar Lap provides stallions for breeding English thoroughbreds and Anglo Arabs. Breeders have access to the studs throughout the breeding season from February to July for covering. Phar Lap is particularly known for its breeding success regarding racehorses. The star among Phar Lap's stallions is Nijinsky III, which is one of the most successful racehorses ever. It has won inter alia the Triple Crown of Danubia, the Equatorianian Oceanside Cup, and the Capital City Vase, Mediterraneo. Nijinsky III has also successfully sired a number of up-and-coming race-horses, such as Barbaro (winner of the Capital City Mile) and Rachel Alexandra (winner of the Equatorianian Grand National). This has made Nijinsky III one of the most sought-after stallions for breeding.

**21 March 2017** RESPONDENT, Black Beauty reached out to CLAIMANT Phar Lap, via email, expressing interest in the stallion, Nijinsky III for breeding with their newly acquired mares. RESPONDENT made CLAIMANT aware that the ban on artificial insemination in Equatoriana has been temporarily lifted due to the latest foot and mouth disease crisis in Equatoriana, which resulted in restrictions on the transportation of living animals, consequently impacting the business of racehorse breeding. RESPONDENT states in the email that it is confident that the lifted status of the ban, though temporary, will become permanent. RESPONDENT asks that CLAIMANT provide RESPONDENT with an offer of frozen semen from Nijinsky III with CLAIMANT's terms and conditions.

**24 March 2017** CLAIMANT responds to RESPONDENT via email., saying that the purchase would be based on the Standard Frozen Semen Sales Agreement ("Frozen Sales

Agreement") in accordance with the Mediterraneo Guidelines for Semen Production and Quality Standards.

**28 March 2017** RESPONDENT had no problem with most of CLAIMANT's terms. RESPONDENT rejected two specific terms and called for additional direct negotiation in: (1) Price & Delivery Terms, and (2) Applicable Law and Dispute Resolution. As to Price and Delivery terms, RESPONDENT requested a lower price and insisted on a delivery on the basis of DDP.

**10 April 2017** As to Applicable Law and Dispute Resolution, RESPONDENT, in its proposal, had made clear its sincere wish for an arbitration agreement which was governed by the law of the place of arbitration and not by the law of contract. RESPONDENT's proposal which, he sent to CLAIMANT on this date, and was modeled after the HKIAC model clause, narrowed down the broad wording of the clause and specifically provided that the seat and law of the arbitration shall be Danubia.

**11 April 2017** CLAIMANT, in its email reply, accommodates RESPONDENT's wish not to be submitted to the jurisdiction of the courts in Mediterraneo and to arbitrate under the rules of the HKIAC. Also, in this reply, CLAIMANT proposes an arbitration clause based on the HKIAC model clause solely providing that the seat of the arbitration shall be Danubia, and unlike RESPONDENT'S proposal, makes no mention of any "law of arbitration" or "what the number of arbitrators shall be". CLAIMANT also suggests reliance on the ICC hardship clause.

**12 April 2017** Ms. Julie Napravnik, conducting the negotiation for CLAIMANT and Mr. Antley, conducting the negotiation for RESPONDENT, met to continue the negotiations. Both were severely injured in an accident when driving to a restaurant after the annual colt auction Ms. Napravnik was hospitalized for three months and resumed her position thereafter. In the interim, Mr. John Ferguson conducted the final negotiations of the Frozen Sales Agreement on behalf of CLAIMANT. Mr. Antley went into a coma for 4 weeks and due to the graveness of his injuries took an early retirement after he left the hospital. Julian Krone took over the finalization of the contract in his place, from the day of the accident. He continued the negotiation with Ferguson and interpreted to the extent possible the notes of Mr. Antley's negotiation file from the day of the accident, in order to iron out the details of the arbitration. Krone and Ferguson agreed on the inclusion of a narrow hardship

reference into the force majeure clause leading up to the final agreement, and here too there was no provision for any adaptation by the arbitral tribunal

**23 January 2018** CLAIMANT made timey deliveries along the lines of the contract. Mr. Shoemaker, who was not one of the negotiators but responsible for RESPONDENT'S breeding program go on the phone with Ms. Napravnik. Mr. Shoemaker repeatedly stated that he "had no authority to consent to additional payments outside the contract," (RESPONDENT Exhibit 4) and when discussing price negotiations, "merely stated that 'if the contract provides for an increased price . . . [they] will certainly find an agreement'" (RESPONDENT Exhibit 4) and Ms. Napravnik confirms this belief, "[Mr. Shoemaker] could not directly authorize any additional payment . . . urged me to authorize the shipment as planned as . . . had already initiated the payment of the second installment." (CLAIMANT Exhibit 8). In compliance with the contract, CLAIMANT authorized the final shipment of the remaining doses and RESPONDENT has more than compensated for the losses suffered by CLAIMANT. CLAIMANT is asking for remunerations that go beyond the agreed upon contractual remuneration.

# INTRODUCTION

1. Choices, Chances, and Consequences. RESPONDENT chose to invite CLAIMANT to contract with RESPONDENT for the sale of semen. During negotiations, RESPONDENT explicitly informed CLAIMANT that they wanted the arbitration agreement to be governed by the law of the seat of arbitration and not by the law of the contract. [R1 p. 33]. At no point did CLAIMANT object to RESPONDENT's request. [R2 p. 34].
2. It is obvious that CLAIMANT would like to "have their cake and eat it too." Both CLAIMANT and RESPONDENT intended for a narrow hardship clause to be included in the contract. Furthermore, CLAIMANT accepted the risks associated with the performance of the contract as these risks were regulated directly into the contract. [R3, p 35].
3. CLAIMANT disingenuously wants RESPONDENT to pay for their monetary loss and ignore the established international business contract principle of DDP, which is a fundamental tenet of the contract. The DDP clause in the contract meant that CLAIMANT was responsible for all risks associated with the contract until the goods were delivered. CLAIMANT after committing to DDP now wants this Tribunal to ignore international business law principles and precedent and instead find that the contract was adapted.
4. Procedurally, while the Tribunal has the jurisdiction to hear any dispute arising from the contract, it is not within their power to facilitate an adaptation of the contract. It is unfathomable that the Tribunal would seek to enforce a non-existent feature of a contract. RESPONDENT did not commit to any adaptation of price and furthermore, RESPONDENT did not have the authority to do so, as adaptations are not explicit within the contract. [R4, p. 36]. **(Issue 1).**
5. RESPONDENT, in its email of March 28, 2017, asked for DPP and CLAIMANT accepted. [C3, p. 11; C4, p. 12]. Additionally, RESPONDENT clearly intended for the arbitration agreement to be governed by the law of the place of arbitration. [R1, p. 33].
6. On the merits of the case, it is appalling that CLAIMANT seeks to introduce evidence obtained from the illegal hack of RESPONDENT's computer. Ethically, morally and legally, such a request has no place within the ambits of the international business jurisprudence. Furthermore, there is no overarching public policy consideration or government security reason to admit the confidential and illegally obtained information to this proceeding. **(Issue 2)**.

7. *People who lose money always need someone to blame.* Here, CLAIMANT wants RESPONDENT to pay USD $1,250,000; asserting their claim through the principle of hardship. However, CLAIMANT'S claim is flawed. CLAIMANT'S obligation to continue the performance of the contract did not cease. In fact, the UNIDROIT principle 6.2.1 mandate performance even where the contract becomes onerous to perform. Thus, the Tribunal should not offer any additional reward to CLAIMANT for merely performing their duties under the contract. **(Issue 3).**

## ISSUE 1: THE TRIBUNAL DOES NOT HAVE THE POWER AND THE JURISDICTION TO ADAPT THE CONTRACT BETWEEN THE PARTIES TO DECIDE THE LAW THAT GOVERNS THE ARBITRATION AGREEMENT, AS WELL AS ITS INTERPRETATION.

8. The Frozen Sales Agreement is the controlling document in this case and serves as reference to the provisions that the Parties agreed upon.
9. Clause 15 of the contract states that: "*any dispute arising* out of this contract . . . shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (hereinafter, "HKIAC") under HKIAC administered Rules in force when the Notice of Arbitration is submitted." [C5, p. 14](emphasis added).
10. Here, there is a dispute over the adaptation of the contract and as written in Clause 15 of contract, this issue should not be resolved by the tribunal administered by the Hong Kong Arbitration Centre, as the Tribunal lacks the power to make such adaptations.

### A. THE ADAPTATION OF THE CONTRACT IS A PROCEDURAL ISSUE, NOT A SUBSTANTIVE ISSUE.

11. Article 19.1 and 19.2 of the HKIAC clearly gives the Tribunal jurisdiction to hear the claim.
12. However, the Tribunal should refuse to rule on the claim, as the Tribunal lacks the power to adapt the contract, because no such adaptation is needed, nor explicitly stated in the Parties' Agreement. Adaptation of the contract is an appropriate remedy for ambiguities within the agreement, but here, there are no ambiguities. [Alexander J. Belohlavek, *The law applicable to the arbitration agreement and the arbitrability of a dispute.* P.29 (2013), Accessed at: https://www.law.columbia.edu/sites/default/files/microsites/columbia-arbitration-day/files/02_2013_-_belohlavek.pdf].
13. The Agreement between the Parties explicitly states that the substantive law governing the contract is Mediterraneo and that the seat of arbitration is Danubia. Both Parties signed and consented to the Agreement's terms. [C5, p. 14, ¶15].

14. The seat of arbitration, without further clarification, controls all procedural issues for the claims arising from the contract. [Belohlavek, p. 30].
15. Article 19.1 and 19.2 of the HKIAC may give the Tribunal the jurisdiction to hear the claim, however, as the seat of arbitration, Danubian law places limits on the Tribunal's power.
16. Under Danubian law, arbitral tribunals do not have the power to adapt contracts unless explicitly stated in the Agreement signed by the Parties. [ANoA, p. 31, ¶15].
17. Since there is no such clause in the Agreement, the Tribunal does not have the power for adaptations and thus the Tribunal should decline to hear the case.

B. **THERE ARE FOUR (4) AUTONOMOUS AREAS ASSOCIATED WITH THE DETERMINATION OF APPLICABLE LAW, INCLUDING *LEX ARBITRI* THAT IF PROPERLY CONSIDERED BY THE TRIBUNAL, WOULD LEAD TO THE CONCLUSION THAT MEDITERRANEO LAW DOES NOT APPLY TO THE ARBITRATION AT HAND.**

19. There are four (4) autonomous areas associate with the determination of applicable law that the Tribunal should consider. They are as follows: (i) determination (choice) of the substantive law applicable to the *merits of the dispute*; (ii) determination (choice) of the *procedural law* and procedural rules (standards) applicable to the procedure; (iii) determination (choice) of the *conflicts-of-laws rules regulating the determination of the applicable law* (both the substantive law applicable to the merits of the dispute and the procedural law applicable to the procedural issues); and (iv) determination (choice) of the law applicable to the assessment of *validity and effects of the arbitration agreement.* [Belohlavek, *et al.* p. 29-30].
20. The key component of cases lies in the assessment of which law applies to the arbitration agreement (necessary for the determination of jurisdiction) and which procedural law shall apply. [Belohlavek, p. 30].
21. Such procedural rules "are usually also determinative for the examination, determination and application of the substantive law with respect to the merits of the dispute. [Belohlavek, p. 30].
22. The law applicable to the arbitration agreement and the law applicable to the merits of the dispute are two completely separate issues. However, they have shared a strong interconnection. [Belohlavek, p. 31].
23. Alternatively, the law that is applicable to substantive-law issues, the law applicable to the merits, or the applicable law with respect to the merits is often referred to as *curial law*. [Belohlavek, p. 32, citing *Cf.* Rhidian Thomas, The Curial Law of Arbitration Proceedings, Lloyd's Maritime and Commercial Law Quarterly, (1984), 491-498].

**i. *Lex Arbitri* (or *lex loci arbitri*) is independent of the law applicable to the Arbitration Agreement. Thus, the law of Mediterraneo cannot and does not apply**

24. Procedural law that is applicable to arbitration is often referred to as *lex fori*. [Belohlavek, p. 32, citing *Cf.* Alan Redfern, Law and Practice of International Commercial Arbitration, 4th ed., London 2004, Chapters 2-4, Note 2 *et al.*].
25. CLAIMANT contends that the parties *implicitly* chose the law of Mediterraneo when both Parties signed the Agreement.
26. However, explicit in the Agreement is that the governing law of the *main contract* is to be that of Mediterraneo.
27. By accepting that the governing law of the *main contract* is the law of Mediterraneo, RESPONDENT did not, in accepting that fact, accept that the Law of Mediterraneo would also govern the procedural aspects of the Agreement, should a dispute arise.
28. To conflate the law governing the *substantive* disputes of the contract with that of the law governing the *procedural* aspects of the Agreement would be a grave miscarriage of justice.
29. Here, the parties explicitly agreed to a neutral seat of Danubia for all arbitrations arising from the Agreement. [C5, p. 14, ¶15].

C. **THE PARTIES EXPLICITLY AGREED TO HAVE DANUBIA AS A NEUTRAL PLACE FOR ARBITRATION. AS THERE WERE NO OTHER SPECIFYING PROVISIONS, IT CAN BE RIGHTFULLY ASSUMED THAT DANUBIAN LAW GOVERNS THE PROCEDURAL ASPECTS OF THE ARBITRATION.**

30. Ordinarily, if there is no mention of a law that governs the arbitration, then the law governing the substantive contract would apply. [Belohlavek, p. 34].
31. An agreement on procedure can be included in the arbitration agreement, but it is not an essential term (*essentialia negotii*) of the arbitration agreement. [Belohlavek, p. 34].
32. However, if the parties decided on a seat of arbitration, then it should mean that the parties intended that the law of the seat should govern the arbitration. (*Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA [1970] 2 Lloyd's Rep 99 (House of Lords); Tzortzis v Monark Line [1968 1 Lloyd's Rep 30 (Queens Bench Division, Commercial Court); Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1981] 2 Lloyd's Rep 35 at 43 (CA).*
33. The arbitrability of an issue, which is interpreted as a delimitation of the disputes which can be submitted to arbitration [Belohlavek, p. 36], relates to the law applicable to the arbitration agreement and constitutes a requirement of the applicable procedural law. [Belohlavek, p. 35].

34. Here, the Agreement signed by both Parties designates Danubia as the seat of arbitration. [C5, p. 14, ¶15].
35. Thus, both Parties' signatures indicate the implicit agreement to use the law of Danubia for all procedural issues. [C5, p. 14].

**i. It is well established in International Law that the choice of law for procedural issues rests with the place where the physical arbitration should take place, so long as the law of such place is not prejudicial to either party.**

36. The Hague Principles allow for the contract to be governed by Danubian law. [Petsche, p. 25-26].
37. Under French law, absent a choice of law by the parties, arbitral tribunals can directly apply the "rules of law" which they consider appropriate." [Petsche].
38. According to the Hague Principles on Choice of Law in International Contracts, a contract can either be governed by the law applicable to the whole contract, part of the contract or by a law that bears no connection to the parties or the contract. [Petsche, p. 25-26].
39. Although Danubia bears no connection to the substantive contract, Danubian law can still govern the contract.
40. Danubian law, which is the same as the UNCITRAL Principles, with exceptions such as its allowance for the doctrine of separability only with express conferral of powers which is very important in this contract. [PO1, p. 53, ¶4].
41. Danubian law provides the option of separability if both parties come to the agreement on whether or not it is necessary. [PO2, p. 60, ¶36].

***ii.* The Arbitration should be governed by Danubian Law under *forum non convieniens.***

43. Mediterraneo recently imposed agricultural tariffs because of their new stance against free trade and Equatoriana imposed trade tariffs in retaliation for the tariffs imposed by Mediterraneo. [C6, p. 15].
44. It is clear that these two countries are in unrest with regard to trade, leaving the only neutral country as Danubia.
45. Therefore, the arbitration should be governed by Danubian Law.
46. Pursuant to the case *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru,* courts are not very likely to dismiss an arbitral award enforcement request based on this doctrine. This case law also underscores that parties should negotiate dispute resolution provisions with an

eye towards potential arbitration award enforcement and the *forum non conveniens* defense. [Adler].

47. Under the doctrine of *forum non conveniens*, a court has discretion to dismiss a pending lawsuit in favor of a different forum for reasons of judicial economy, convenience, and justice.
48. In 2002, a United States court first dismissed an arbitral award enforcement case on this basis, over three decades after the United States ratified the N.Y. Convention in 1970. [*See* "Monde Re"]. The Second Circuit determined that it could refuse to enforce an award for *forum non conveniens* even though the N.Y. Convention did not list the doctrine as an exception to enforcement because Article III of the Convention allows enforcing courts to apply their own rules of procedure. [O'Brien].
49. The Second Circuit relied on the U.S. Supreme Court's classification of *forum non conveniens* as procedural. The Second Circuit's rationale was criticized for misreading the Convention's Article III reference to rules of procedure as something beyond the formalities of an enforcement action like the fees or manner of filing, which are issues that determine "how recognition will be granted, not whether [it] will be granted." [O'Brien at 2].
50. While the *Monde Re* decision was controversial, it was an extreme case with parties that had little or no connection to the United States and it would have required U.S. courts to apply foreign contract law. [O'Brien].
51. In that case, a Russian company sought to enforce an award that it had obtained against a Ukrainian company based on a contract that called for performance in Ukraine. [*Monde Re*, 311 F.3d Id. at 491]. Before the enforcement action was filed in the United States, however, the Ukrainian company challenged the award in Russian court on the basis of Russian and Ukrainian contract law.

### D. IN APPLYING DANUBIAN LAW TO THE PROCEDURAL ASPECTS OF THIS ARBITRATION, THE TRIBUNAL SHOULD DECLINE TO HEAR THE ISSUE.

52. When a party asks for an adaptation, re-negotiation, or to supplement an agreement, arbitral contract revision is located at the very interface of procedural and substantive law. [Beisteiner at 79, citing Norbert Horn, *Procedures of Contract Adaptation and Renegotiation in International Commerce,* in Adaptation and Renegotiation of Contracts in International Trade and Finance 173 (Horn ed. 1985)].

53. An arbitrator faced with a request for contract revision or adaptation first must determine whether under the pertinent laws, the revision of a contract still qualifies as arbitration. [Beisteiner, p. 79].
54. If contract revision or adaptation still qualifies as arbitration under the pertinent laws, then the arbitrators must ascertain whether *in casu*, they are authorized to revise the contract. [Beisteiner, p. 79; *see also,* OGH, Oct 27, 1989, docket no. 8 Ob 684/89, RdW 249 (1990), ecolex 386 (1991)].
55. Generally, only disputes are arbitrable or capable of settlement by arbitration. [Beisteiner, p. 86].
56. Arguably, a dispute in respect of a defined legal relationship is not necessarily conceptually the same as a legal dispute. For example, Article 25 para. 1 ICSID expressly confines the jurisdiction of the Centre to "legal disputes". [Beisteiner, fn 29; *cf.*, in this regard, Kröll, supra note 23, at 452–453; Klaus Peter Berger, Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators, 36 Vand. J. Transnt'l L. 1374–1375 (2003)].
57. It is not uncommon for contract adaptation to be regarded as a "judicial function"; conceptually, "the interpretation of contracts is not a creative (i.e. rule making) act, but rather the adjudication of pre-existing rights." [Beisteiner, 88].
58. Thus, an adaptation would only be appropriate if there was a mistake or misconception within the Agreement. [Beisteiner, 89; *see generally, Irrtumsanpassung,* Section 872 AGCC].
59. Here, the principles of *pacta sunt servanda* applies. That is, as a matter of principle, the parties must adhere to the contractual terms on which they agreed.
60. The Agreement between the Parties is silent as to the remedy of contract revision or adaptation.
61. Both conceptually and functionally, any revision or adaptation of the contract acts as a mechanism to distort the original intent of the parties. [Beisteiner, p. 80, citing UN-Doc. A/CN.9/254, Article 7 ¶23].
62. If left to the Arbitral Tribunal, the interpretation of the Agreement by the Tribunal allows for the creation of contractual rights.
63. Practically, there is hardly ever such thing as *the one and only* reasonable hypothetical intent. [Beisteiner, p. 80; *see e.g.* 1 Helmuth Koziol & Rudolf Welser, Grundriss des bürgerlichen Rechts 108 (13th ed. 2006)].

64. The Agreement contains a hardship clause in Paragraph 12 but fails to include increase in tariffs or taxes as a hardship and also fails to create a remedy for hardship through contract adaptation. [C5, p. 14, ¶12].
65. Failure to include adaptations and revisions to the Agreement clearly indicates that the Paragraph 12 applies only in cases where the terms of the Agreement cannot be performed.
66. Here, both Parties performed consistent with the terms of the contract; CLAIMANT delivered all three shipments of the specimen outlined in the contract and RESPONDENT paid the amount agreed upon in the contract. [C8, p. 17].
67. *Pacta sunt servanda* is a well-known principle in international arbitration. The Tribunal should deny to hear the issue, as any holding inconsistent with *pacta sunt servanda* would give alternative meaning to the Agreement and undermine the fundamental principle of *arbiter non substituit*—arbitrators do not make contracts. [*See* Kröll].

## ISSUE 2: EVIDENCE OBTAINED EITHER THROUGH A BREACH OF A CONFIDENTIALITY AGREEMENT OR THROUGH AN ILLEGAL HACK IS NOT ADMISSIBLE UNDER THE HKIAC, NOR UNDER RECENT CASE LAW, AS WELL AS THE PRINCIPLES ADOPTED IN INTERNATIONAL ARBITRATION.

68. In International Arbitration, when the parties do not specify the rules, the taking and presentation of evidence will be analyzed pursuant to the parties' arbitration agreement, any applicable institutional rules, the *lex arbitri*; and the discretion of the arbitrator.
69. As this arbitration is administered by the institutional rules of the HKIAC, CLAIMANT seeks to point out a contradiction stemming from another arbitration under the HKIAC, in which RESPONDENT pleads for an adaptation due to tariffs that negatively affect its interests. [Fasttrack Letter, p. 51].
70. The information CLAIMANT is seeking to provide as evidence will not be admissible in this arbitration. Under Article 45 of the HKIAC: "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 (b) an award or Emergency Decision made in the arbitration."
71. Any information deriving from the other arbitration proceedings is therefore confidential, and it is illegal for anyone possessing information with regard to the arbitration to share it.

### A. THE UNCITRAL DOES NOT GOVERN THE ADMISSIBILITY OF EVIDENCE.

72. The UNCITRAL Model Law Article 19 states the that: "(1) [T]he parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings [and] (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate". Contrary to CLAIMANT'S assertions, the UNCITRAL does not encourage tribunals to liberally admit evidence obtained by illegal means. The UNCITRAL does not provide guidance beyond simply letting the Tribunal decide. Furthermore, the IBA Rules on the Taking of Evidence does give instruction on this type of evidence.
73. The guidance on what to do with this type of evidence is provided in the International Bar Association (IBA) Rules on the Taking of Evidence (hereinafter "Rules"), which are designed to supplement the institutional or ad hoc procedural rules applying to an arbitration.
74. Specifically, Article 9(2)(3) states: "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: […] (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable….unless waiver is issued[.]"
75. Pursuant to these Rules, the information stemming from a hack of RESPONDENT's computer system which would be beneficial to CLAIMANT'S case, was prepared "for the purposes of arbitration" and is likely privileged. Its use would also give rise to a legal impediment in that the hacked information was illegally obtained at some point and thus would not be accepted by an international arbitral tribunal unless waiver is issued.

B. **THE EVIDENCE OBTAINED SHOULD NOT BE ADMITTED BECAUSE IT IS PRIVILEGED INFORMATION AND WAS ACQUIRED THROUGH ILLICIT MEANS.**

76. Information stemming from a hack of RESPONDENT's computer system contains information protected by privilege. "A privilege is a right to protect from disclosure communications between lawyers and their clients, and documents prepared for the purposes of litigation or arbitration." [International Arbitration Report].
77. Here the CLAIMANT does not specify the type of document or the form of the evidence it wishes to admit. However, any pertinent documents or information from RESPONDENT's computer that contains the information CLAIMANT seeks to offer is probably prepared "for the purpose of arbitration" and is therefore privileged.

78. CLAIMANT cites to *ConocoPhillips v. Venezuela*, in support of its assertion that the Tribunal should allow it to submit the evidence obtained from the illegal hack. The tribunal in that case however, affirmed its decision ruling in favor of *ConocoPhillips*, precluding illegal information obtained through a website that obtains its information through hacks called Wikileaks, from being admitted into evidence on behalf of Venezuela.
79. The tribunal in *ConocoPhillips* had to decide on whether evidence should be admitted after the award had been made. The tribunal refused to rely on new evidence disclosed by WikiLeaks that would show that the RESPONDENT engaged in good faith negotiations with ConocoPhillips because the arbitration proceeding was final and they could not revise their decisions.
80. That is very different in this issue because a final award hasn't been made and the issue hasn't been heard either. Therefore, CLAIMANT's argument in this current issue as to the validity of a dissent doesn't hold weight.

**i. Privileged information is always protected under the law.**

81. The information acquired by CLAIMANT per PO1 (III)(1)(b) [p. 53] would have been obtained either through a breach of a confidentiality agreement or an illegal hack of RESPONDENT's computer systems.
82. According to the IBA Rules on the Taking of Evidence in International Arbitration, "the arbitral tribunal shall, … exclude from evidence … for the following reason(s): … (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable." [IBA Rules on the Taking of Evidence in International Arbitration (2010)].
83. Even if the evidence obtained by the CLAIMANT was submitted in a previous arbitration, that evidence would have been obtained through an illegal hack of RESPONDENT's computer systems or through a breach of a confidentiality agreement per PO1 (III)(1)(b). Thus, the evidence cannot be admitted.
84. *Libananco Holdings Co v. Republic of Turkey* provides an example of when the Turkish government lawfully obtained information to be used in an arbitral proceeding. The tribunal still weighed in favor of protecting a party's privileged and confidential information by excluding the evidence from the arbitral proceeding. [*Libananco Holdings Co Ltd v Republic of Turkey* (ICSID Case No ARB/06/9)].

85. Here, even if the information was disclosed by parties of a prior proceeding, under *Libananco*, the said information cannot be admitted in favor of protecting RESPONDENT's privileged and confidential information.

86. Therefore, the Tribunal can exclude from evidence materials they find to be privileged information.

### C. ILLEGALLY OBTAINED CONFIDENTIAL INFORMATION SHOWS UNCLEAN HANDS.

87. By and large, there has been no uniform or standard approach or test adopted by tribunals to determine whether or not to admit illegally obtained evidence; the outcome therefore has the potential to vary widely from case to case.

88. The Tribunal should rely on its discretion in considering whether the party offering this illegal evidence has clean hands and whether that party played any part in obtaining that evidence.

89. In *Methanex Corporation v United States of America,* the tribunal stated that to allow Methanex introduce documentation acquired through multiple acts of trespass, would be a violation of its general duty of good faith and offend against the basic principles of justice and fairness required of all parties in every international arbitration. [*Methanex Corporation v United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345, 1410-12 pt. III, ch. A, 1-2 (NAFTA Ch. 11 Arb. Trib. 2005)].

90. A party should not be permitted to profit from its own misconduct. Here, the very fact of using illegally obtained confidential information, is in and of itself, unclean in nature and allowing CLAIMANT to do so, offends basic notions of justice and fairness.

### D. THE INFORMATION FROM THE RESPONDENT'S FORMER EMPLOYEES IS NOT ADMISSIBLE BECAUSE SUCH INFORMATION IS CONFIDENTIAL.

91. Even if the information was disclosed by RESPONDENT's former employees per PO2, ¶41, it should not be admitted because that information is confidential and there is a contractual obligation to keep all information about the other arbitral proceeding confidential.

92. In the Danube case, *Jurisdiction of European Commission of Danube Between Galatz and Braila, Advisory Opinion, 1927 P.C.I.J. (ser. B) No. 14 (Dec. 8))* the court declined the admission of the history of certain articles of the Versailles Treaty, since those were confidential and had not been placed before the court by, or with the consent of, the competent authority.

93. The information that the former employees of RESPONDENT have is confidential, as per the terms of their employment with RESPONDENT.

94. With no clear authority to admit this confidential information, the Tribunal should exclude this evidence in order to maintain fairness and equality between the Parties.

## E. THE GOAL OF THIS TRIBUNAL IS TO RESOLVE THE DISPUTE AT HAND TO THE SATISFACTION OF THE PARTIES AND THERE IS NO OVERARCHING PUBLIC POLICY CONSIDERATION OR GOVERNMENT SECURITY REASON TO ADMIT THE CONFIDENTIAL AND ILLEGALLY OBTAINED INFORMATION FROM THE OTHER PROCEEDING.

95. As to the Tribunal using its discretion to admit the evidence in the "interest of justice", contrary to CLAIMANT's assertions, the interest of justice requires this Tribunal to decide this case on the merits and based on the facts already introduced, especially considering that the circumstances and facts of this transaction between CLAIMANT and RESPONDENT, likely differ from the other arbitration proceedings CLAIMANT wants to offer into evidence. The other arbitration has no legal bearing on the outcome of this case except that they are governed by the same arbitral institution, and the two proceedings should not be conflated.

96. In *Caratube*, the CLAIMANT applied to admit into evidence leaked emails published on a WikiLeaks-type website, following a hacking attack against the Kazakh government's computer network. [*Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan (ICSID Case No ARB/13/13)*].

97. Cases such as *Caratube* and the dissent in *ConocoPhilips*, which weigh in favor of admitting illegal hacked information, are decided on the basis that this information is now public, and thus is no longer privileged or confidential. This type of information, however, by being in the public domain, gave rise to public policy and government security considerations resulting in admissibility.

98. Here, there are no such considerations to be made. This is a commercial dispute between two private parties, and given the nature of the information in question, being in the public domain is irrelevant and immaterial for the purposes of resolving the dispute or the interest of fairness.

99. For the reasons stated above, the Tribunal should not allow CLAIMANT to submit evidence from the other arbitration proceedings which has been obtained through a breach of confidentiality or an illegal hack of RESPONDENT's computer systems.

## F. THERE IS NO INTEREST IN JUSTICE AS TO WHY THE EVIDENCE SHOULD BE ALLOWED INTO THIS ARBITRATION.

100. Furthermore, CLAIMANT improperly cites to the *London & Leeds Estates Ltd. v. Paribas Ltd* as it does not apply to the matter at hand. The issue in *London & Leeds Estates Ltd.* is whether there

is a duty of confidentiality for an expert witness of an arbitration. The issue between the parties does not deal with any expert witness or inconsistent evidence from multiple arbitrations. Though there may have been an interest of justice in the *London & Leeds Ltd.* matter, the same issue is not present between the two parties here. [*London & Leeds Estates Ltd. v Paribas Ltd*, 1 EGLR 102, QBD (1995)].

101. CLAIMANT claims that there is a policy issue of an interest that requires justice but has failed to articulate why such justice is required. CLAIMANT's argument is meritless and does not cite to any proper law that would be applicable to the instant case. [*Arbitration Law* para. 17.32].

102. The principal for disclosure which came from *Emmott v. Michael Wilson & Partners,* permits disclosure in the interest of justice, but CLAIMANT fails to establish what constitutes an interest of justice. Failure to articulate the reasoning behind that assertion further solidifies that an obligation of confidentiality remains in existence. [*John Forster Emmott v. Michael Wilson & Partners Limited* [2008] EWCA Civ 184].

103. Thus, there is no interest of justice and the evidence from previous arbitration proceedings should remain privileged. [*Conoco Philips Petrozuata B.V., Conoco Philips Hamaca B.C.and Conoco Philips Gulf of Paria B.C. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30)].

## ISSUE 3: CLAIMANT IS NOT ENTITLED TO PAYMENT OF $1,250,00 UNDER THE HARDSHIP CLAUSE OF THE CONTRACT.

### A. THE CONTRACT CONTAINS NO HARDSHIP CLAUSE.

104. Many international business contracts, because of their sophisticated nature, require that the *consideration* of the contract allow for adjustment over the life of the contract, typically for the effects of inflation, changes in currency valuation and other changes in law- such allocation often result in a hardship clause being written into the contract. [Frederick R. Fucci, Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts (2006).]

105. "The basic principle was that if performance of a contract was possible, but a fundamental change in the circumstances surrounding the contract had rendered performance much more burdensome, so that continued performance by the party affected would amount to an undue hardship, then the affected party could invoke the principle of *clausula rebus sic stantibus*." [Fucci].

## B. CLAIMANT HAD AN OBLIGATION TO PERFORM THE CONTRACT EVEN IF THE CONTRACT WAS ONEROUS.

106. Section 6.2.1 of the UNIDROIT principle states that that "a party remains bound to perform its contractual obligations even when the performance of the contract becomes more "onerous" for it, subject to the more specific provisions on hardship." [UNDROIT, 6.2.1].

107. Relying on UNIDROIT principle 6.2.1, RESPONDENT has no obligation to pay the additional money to CLAIMANT because CLAIMANT had a duty to perform its contractual obligations even if the contract had become onerous for them.

108. UNIDROIT Principle 6.2.2 states that "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 events was not assumed by the disadvantaged party." [UNIDROIT, 6.2.2].

109. UNCITRAL Principles, require that the event causing the alleged hardship to be "unforeseeable". "Almost all legal provisions adopting a hardship excuse for non-performance, and the UNCITRAL Principles, require that the event causing the alleged hardship be 'unforeseeable.'" [UNIDROIT, 6.2.2].

### i. A dramatic change in market prices for products is not an unforeseeable event.

110. In the ICC Award in Matter No. 2216 (1974), the case arose because a Norwegian company failed to perform a petroleum purchase agreement because the price of petroleum had gone down by more than half between the time of contract and scheduled delivery. The Tribunal did not permit an adjustment in the contract price on the basis of a hardship argument. This was not found to constitute a "bouleversement" of economic circumstances, but a simple fluctuation in market prices.

111. In a commentary to the above case by Yves Derains, then Secretary General of the ICC Court of Arbitration, he pointed out that to accept this type of fluctuation as a ground to exonerate the nonperformance of a contract "would put in danger the security of transactions." [Yves Derain, Chronique des sentences arbitrales, Clunet 1975, p. 921].

112. Similarly, CLAIMANT argues that because of the 30 percent reactionary tariff by the Equatorianian government they deserve least a 25% increase of the purchase price. [CLAIMANT SOF Cl. 18, pg. 7]. This argument is fallacious and does not comply with the standards of international business contract law. Relying on the above quoted decision, CLAIMANT has no basis for its claim.

**ii. Even if the economic circumstances in Equatorianian were unfavorable, it is still not unforeseeable.**

113. With regard to unfavorable general economic circumstances in a country, the award in the *Himpurna* case suggests strongly that the economic crisis in Indonesia beginning in 1997 was not unforeseeable. In that case, which did involve, among other things, a claim of hardship based on changed circumstances by a state-owned power company (known by its acronym PLN), the tribunal considered PLN's argument that its difficulties were "unprecedented." [Himpurna Award].

114. While acknowledging that this may be true for the company PLN, the tribunal pointed out that 1997 was certainly not the first time that Indonesia found itself in economic crisis, citing the example of 1966 where inflation reached 1,500 percent in a twelve-month period. The tribunal found that when the parties entered into a long-term contract (30-year energy sales agreement), "there was no reason to assume that Indonesia would be insulated from a repetition of history." [Himpurna Award].

115. The tribunal also cited many other examples of countries in macroeconomic difficulty to support the finding that "[p]arties entering into international contracts cannot claim unawareness of the risks of macro-economic adversities ... their effects may be extreme but are nonetheless within the contemplation of the signatories." [Himpurna Award, ¶203.]

116. Similarly, CLAIMANT should be aware of the risks of macro-economic adversities and the effects that these adversities could have on the contract for the sale of horse semen hence any risks associated with the contract were assumed by CLAIMANT.

**iii. CLAIMANT'S losses were neither onerous or excessive**

117. UNIDROIT Principle 6.2.2 is clear in establishing the standard of hardship. The principle states that hardship is a fundamental alteration of the equilibrium of the contract. The commentary to article 6.2.2 states that if the performances "are capable of precise measurement in monetary terms," an alteration amounting to 50% of more of the cost or the value of the performance is likely to amount to a 'fundamental' alteration."

118. Here, CLAIMANT suffered a 30% percent loss and therefore does not meet the threshold of the 50% alteration that is mentioned in the article. There based on this assessment CLAIMANT did not suffer any hardship.

119. Furthermore, the commentary to UNIDROIT Principle 6.2.2 also gives some other illustrations of this principle. One illustration cited would allow renegotiation of a construction contract where an unexpected devaluation in the currency of the host country, whose currency is the currency of payment, causes the cost of the imported machinery to increase by more than 50%.

120. In other illustrations, the following situations are said to constitute undue hardship: a ten-fold increase in price due to a post-contracting change in government regulation and the imposition of new safety regulations after conclusion of a contract to build a plant requiring installation of additional equipment and "making [the contractor's] performance substantially more onerous;" a sudden devaluation of a country's currency (the currency of payment) on the order of 80%." [Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC) Stefan Vogenauer, 2015].

121. CLAIMANT's situation does not fit into any of the above examples, further solidifying that having to pay a 30% increase because of the newly imposed tariffs does not amount to hardship.

122. CLAIMANT reports that the imposed tariff made the shipment 30% more expensive than anticipated, which resulted in a "considerable hardship" by destroying [their] profit margin of 5%. [C8, p. 17]. Moreover, the CLAIMANT concedes this was a hardship because "[t]he last two years have been financially difficult for . . . several reasons." [C8, p. 17].

123. Since both common law systems, including in particular English, and major civil law systems recognize an exemption due to frustration of purpose, an alteration in the region of a 80%-100% decrease in the value received, or a corresponding increase in the cost of performance of the same order of magnitude (excluding any profit margin) or of about 100-125% (including a typical profit margin) may therefore be seen as a general point of reference for the hardship test under general contract principles. [Brunner, p. 430-479].

124. This rule is generally in line with the percentages proposed by the case law and legal commentators under civil and common law systems, as well as by the CISG referred to above. [Brunner, p. 430-479]. The Official Comment on the UNIDROIT Principles includes an

explicit statement as to what degree is required in order to constitute a hardship situation [Comment No. 2 on Art. 6.2.2 UPICC (1994 edition)].

125. Whether an alteration is 'fundamental' in a given case will of course depend upon the circumstances. "If, however, the performances are capable of precise measurement in monetary terms, an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a 'fundamental' alteration." [Comment No. 2 on Art. 6.2.2 UPICC (1994 edition)].

126. For example, cost increases of 13%, 30%, 44% or 25-50% were held to be insufficient to amount to a fundamental alteration of the equilibrium of the contract as required by the hardship exemption. [*See* award in ICC Case No. 6281 of 26.08.1989, Y.B. Com. Arb. 1990, 96 at 98, Nuova Fucinati S.p.A. (30% increase generally not sufficient; supra 220 at n. 1117); Arbitration Court of the Japan Shipping Exchange, award of 20.09.1975, Y.B. Com. Arb. 1983, 153, 155. See also award in ICC Case No. 2508 of 1976, Collection of ICC Awards I, 292-94: the tribunal rejected the seller's plea of hardship because it failed to meet its burden of proof relating to the size of the increase in petroleum prices.].

127. Yet in contrast to the 50% threshold test suggested by the Comment on the UPICC in the 1994 edition, some legal commentators on the CISG propose that the required alteration should be at least 100%. [Enderlein/Maskow, Art. 79 CISG para. 6.3; Brunner, Art. 79 CISG para. 26 (on the basis of comparative law considerations); Berger, Private Dispute Resolution in International Business, Vol. II, para. 24-66].

128. It also appears that there is no published arbitral award where, in the absence of a hardship clause, an arbitral tribunal would have granted relief solely on the grounds of an alteration of 50%. [*See also* van Houtte, Arb. Int. 11 (1995): p. 373, 387].

129. In the 2004 edition, the sentence referring to an alteration amounting to 50% or more was deleted in light of criticism by legal commentators and replaced by the general statement "[w]hether an alteration is "fundamental" in a given case will of course depend upon the circumstances." [*See* Bonell, An International Restatement of Contract Law, 42, 117, referring to the criticism of van Houtte, 'The UNIDROIT Principles of International Commercial Contracts and International Commercial Arbitration' in ICC Publ. No. 490 (1995) at p. 190].

130. Such a general rule – and even the 50% rule suggested by the Comment on the UPICC – seems to be in line with the Suez Canal cases, where both English and American courts regarded the point that the closure of the Suez Canal had discharged the contract as an

arguable one, but both consistently rejected it. [Treitel, Frustration and Force Majeure, paras 4-071/72 ff., 6-025].

131. The Suez Canal cases arose when the Suez canal was blocked as a result of hostilities in the Middle East in 1956 and again in 1967. [Treitel at p. 325]. Interestingly, Treitel further notes, "It is perhaps significant that the highest percentage increase was that of 45% in The Massalia [1961] 2 Q.B. 278 (…) and that the contract there was held to have been frustrated; but that case was overruled in The Eugenia ([1964] 2 Q.B. 236)." [Treitel at p. 325, n. 74].

132. Under the doctrine of impracticability, a general distinction is made between situations where the performance of a contract becomes merely more onerous for the obligor, and where it becomes excessively more onerous. [Brunner, p. 429].

133. The required extent to which the performance must become more (i.e., excessively) onerous is very stringent. In the Publicker Industries case decided in 1975, the U.S. District Court for the Eastern District of Pennsylvania summarized the case law as follows, "[The court] is not aware of any cases where something less than a 100% cost increase has been held to make a seller's performance 'impracticable'." [*Publicker Industries v. Union Carbide Corp.*, 17 U.C.C. Rep. Ser. 989 (E.D.Pa. 1975), reported by Treitel, Frustration and Force Majeure, para. 6-010; also cited by Fucci (2006), I.B.

134. In German law, the extent of an alteration expressed in per cent is discussed in connection with § 275(2) BGB (exclusion of the right to require specific performance in case of manifestly disproportionate costs) and § 313 BGB (interference with the basis of the contract, including hardship cases). With regard to § 275(2) BGB, it has been suggested that in case of excused non-performance, the typical risk of a cost increase to be assumed by the obligor may be set at 110% above the obligee's interest in receiving performance. [Huber/Faust, para. 68; Stadler, in Jauernig, § 276 para. 26].

135. Huber and Faust further suggest that a threshold test of 120% in case of non-excused performance in the absence of a fault by the obligor, and of 130%-150% in case of non-excused performance where simple negligence, gross negligence or intentional conduct is attributable to the obligor. These thumbnail percentages have been criticized.

136. As the measure of evaluation is said to be the same for both § 275(2) and § 313 BGB, an alteration of at least 110% with regard to the cost of performance may also amount to a 'fundamental' alteration of equilibrium of the contract under § 313 BGB. [Heinrichs, in Palandt, § 275 BGB para. 29, § 313 BGB para. 39].

137. Russian courts have been reported to be extremely cautious in applying the provisions on substantial change of circumstances. According to a commentator, the hardship test would only be met in case of an alteration of no less than 100%. [Doudko, Unif. L. Rev. (2000): 496].

**iv. Even if CLAIMANT suffered hardship CLAIMANT failed to follow the correct procedure.**

138. However, the UNIDROIT Principles take a different approach. Article 6.3.3 allows that, in the case of hardship, the disadvantaged party is entitled to request renegotiations. However, the request for renegotiation does not entitle the disadvantaged party to withhold performance. If the parties can't agree on an adjustment to the contract within a "reasonable" time, either party may resort to a court. Then it is up to the court to either terminate the contract at a date and on terms to be fixed or adapt the contract with a view to restoring its equilibrium.

139. In CMS Gas and Argentina, CMS Gas argued that "the hardship Civil Code provision was inapplicable because the concept requires the aggrieved party to request the termination before a competent court, while in that dispute the changes in the License term were unilaterally decided by one party." This argument was very convincing to the Tribunal, which found that "the adjustment terms of the License allowed a rebalancing of the contract for economic circumstances." [*CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8.] Applying CMS Gas to the instant problem it is clear that CLAIMANT hardship argument is inapplicable because CLAIMANT failed to follow the established procedures set by both international case law and the UNIDROIT Principles.

**v. CLAIMANT's government is responsible for the economic factors affecting the performance of the contract**

140. "The UNIDROIT principles and most national laws that recognize hardship require that the economic circumstances impeding performance be external to the party relying on them, i.e. that the contracting party is not itself responsible for them. An international arbitral tribunal cannot be expected to accept a hardship claim if the difficulties encountered by a contracting party were the result of its own act or negligence." [Fucci].

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cannot be expected to accept a hardship claim if the difficulties encountered by a contracting party were the result of its own act or negligence." [Fucci].

142. The difficulties faced by CLAIMANT are as a result of measures instituted by CLAIMANT's government. It was CLAIMANT's president Mr. Bouckaert, who first imposed tariffs on goods originating from Equatoriana. [C6, p. 15]. CLAIMANT is only in this predicament because of their government's action. If the Mediterraneo government had not imposed 25% tariffs on Equantorania agricultural goods, then the Equatoriana government would not have retaliated. [CLAIMANT SOF, ¶9 pg. 6].

143. "There are few (and no recent) international arbitral awards that deal explicitly with a claim of hardship by a state enterprise based on an act of the host-country government. There are, however, many awards that deal with claims of force majeure by state enterprises when the source of the event is an act or their own government – and the analysis as to externality should be the same." [Fucci (2006)].

144. Scholars have stated that if the "host country asserts a hardship or force majeure event which it brought about itself (legislation), it cannot rely on the clause even when the contract was not made with the state directly, but instead with a government corporation." [Peter Berger, "Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators", 36 Vanderbilt Journal of Transnational Law 1347, 1352 (Oct. 2003)].

145. CLAIMANT's reliance on the hardship clause is thus flawed and lacks merit.

## C. RESPONDENT HAD NO OBLIGATIONS TO NEGOTIATE IN GOOD FAITH AND TO EXERCISE EFFORTS TO OVERCOME THE EFFECT OF CHANGED CIRCUMSTANCES.

146. It should be noted that in a legal jurisdiction and jurisprudence where hardship claims are enforced once a party claims it is disadvantaged, the other party cannot simply dismiss the claim. "It should be understood to have a duty to negotiate in good faith. If the claim for hardship has a legitimate basis, refusal to negotiate can be construed to that parties disadvantage." [Rucci (2006)].

147. Here, CLAIMANT's claim for hardship has no legitimate basis. Furthermore, CLAIMANT made no argument that RESPONDENT refused to renegotiate the contract. The non-existence of a hardship clause absolve RESPONDENT from liabilities incurred by CLAIMANT. [*See* ANoA, ¶4, pg. 30]. In *Cour de Cassation*, Chambre Commerciale "a contracting party was found liable for damages and interest on a theory of good faith because it refused to allow a revision of the

terms of a contract which led the other party "to ruin." [Cass. Com., 3 Nov. 1992 : Bull. civ. IV, no 338].

148. RESPONDENT at no time refused to renegotiate with CLAIMANT. RESPONDENT maintained to CLAIMANT that they were not willing to pay a higher price for nothing, but CLAIMANT never asked for the contract to be renegotiated.

149. Thus, even if the contract was adapted CLAIMANT failed to initiate correct proceedings to rely on the hardship clause. Under French law, "a breach does not simply result from the fact that the agreement is not made but it must be demonstrated that a party, by its behavior, compromised the progress of the negotiation in order to cause its failure." [Juris Classeur, Contrats, Fasc. 20 : POURPARLERS – 2 – Obligations conventionnelles de négocier ; d) Régime des obligations de négocier, ¶ 47].

150. RESPONDENT did not behave in a manner that CLAIMANT could allege compromised the process of any negotiation. Furthermore, "it is up to the judge or the arbitrator to determine if the behavior complained of constitutes misconduct or not by reference to the standard of a reasonable person." [Juris Classeur, Contrats, Fasc. 20 : POURPARLERS – 2 – Obligations conventionnelles de négocier ; d) Régime des obligations de négocier, ¶ 47].

**i. CLAIMANT misunderstood RESPONDENT's intention as RESPONDENT did not consent to CLAIMANT's board hardship clause.**

151. The CLAIMANT used Art. 4 of the UNIDROIT principle in support of their argument that "a contract shall be interpreted according to the common intention of the parties". While RESPONDENT agrees that when interpreting a contract *consensus ad hiem* is vital. Here, CLAIMANT was mistaken as to the intent of both parties. However, here, the intent of both parties is unclear.

**ii. CLAIMANT mistakenly relied on Article 4 of the UNIDROIT Principles when Article 8 of the CISG is the more appropriate standard for measuring parties intent.**

152. Art. 8 of the CISG "systematically sets out the steps and criteria by which statements and other conduct of a party need to be interpreted." [Bruno Zeller Determining the Contractual Intent of Parties under the CISG and Common Law -- A Comparative Analysis]. It should be noted that "such statements and conduct are classified according to the knowledge which the other party has or ought to have." "If a party knows or ought to know the intent of the other party, Article 8(1) is applicable." [Zeller]. "If that is not the case, the courts and tribunals will

attempt to define such intent using the "reasonable person" test, which is described in Article 8(2).” [Zeller].

153. Article 8(3) assists the courts in determining the intent of the party by listing matters to which the courts must direct their attention, such as "the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties." *Id.* Importantly, Article 8(3) not only specifies some circumstances but also invites the court to give consideration "to all relevant circumstances.

154. The conclusion which can be drawn is that Article 8 is relevant as soon as a question of intent arises. In other words, if there is a real or perceived misunderstanding between the parties, Article 8 of the CISG must be consulted to elicit the true intent. Here, such a question of intent arises.

155. In fact, RESPONDENT’s Exhibit 3 states that the initial negotiation was being handled by Mr. Antley before Julian Krone took over. [R3, p. 35]. Furthermore, Mr. Krone stated that when he took over the negotiation he tried to take into account as much as possible the content of the note written by Mr. Antley. [R3, p. 35].

156. The CLAIMANT has argued that their intention was to have a board hardship clause, while RESPONDENT has maintained that their intention was to have a narrow hardship clause as is shown by RESPONDENT’s Exhibit 3.

157. The hypothetical or objective intention of contractual parties is also well known in civil law countries such as Article 18 of the Swiss Law of Obligations (OR)[25] or Articles 1362/1371 of the Italian Civil Code (Codice Civile).

158. In German Law, the interpretation of the intent of the parties is regulated in Articles 133 and 157 of the Bürgerliches Gesetztbuch (BGB). Article 133 notes that in order to elicit the real intention of the parties, a court must look beyond the literal expressions contained within the contract. The first step is to find out whether an intention has been expressed within the contract. The intention as expressed by the parties cannot be clear and unambiguous, or otherwise, a subjective intent could be discovered. Secondly, there has to be a need for interpretation (auslegungsbedürftig) and, as well, the expressed intention must be capable of being interpreted (auslegungfähig). The linkage of Article 157 of the BGB to Article 133 is interesting. Article 157 notes that "contracts are to be interpreted in good faith and with consideration to customary norms."

159. The precondition of applying this article is that a gap needs filling. However, there has to be a basis for filling the gap. The hypothetical will of the parties has to be determined by taking into consideration the purpose of the contract by applying good faith and customary norms.

160. In essence, the Swiss Law of Obligations reflects the German legal structure. Article 18 is also linked to Article 2 of the Swiss Civil Code (ZGB), which notes that "everybody executing their rights has to act in good faith. Furthermore, this mandate is strengthened by Article 2(2), which states that "misuse of a right is not supported by law." [ICC Arbitration Case No. 7645, March 1995, in (2000) 11 ICC International Court of Arbitration Bulletin [ACAB] Zurich Chamber of Commerce, 25 November 1994, case no 16]. The award concerned the validity of the arbitration clause to "submit the dispute to international and trade arbitration organization in Zurich, Switzerland." One party contended that the Zurich Chamber of Commerce was the applicable institution, whereas the other party argued that, since the name of the institution was not mentioned, the whole arbitration agreement was invalid. The arbitrator referred to Article 18(1) of the Swiss Law of Obligations, which lays down rules to elicit the true intent of the parties, as well as to Article 2 of the Swiss Civil Code, which refers to the principle of good faith. The arbitrator interpreted the subjective as well as the objective intent of the parties and came to the conclusion that the arbitration clause was valid.

161. However, to prove that the interpretation and conclusion reached through domestic law reflects an international consensus, the arbitrator also referred to the UNIDROIT Principles of International Contract (PICC) Article 4.1 and 4.2.[33] It can be said that the arbitrator recognized -- and took into consideration -- that PICC has been established "by a large international working party consisting of specialists in contract law selected from different parts of the world."

**iii. A Reasonable Person Having Given Consideration To All The Relevant Circumstances Of The Case Would Conclude That RESPONDENT Should not Pay CLAIMANT Any Additional Sum.**

162. Article 8(3) of the CISG states that "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."

**iv. Even if the adaptation clause is valid RESPONDENT is not obligated to pay the USD $1,250,000 because the tariffs were not explicitly included in the adaptation clause.**

163. In *Tandrin Aviation Holdings Limited v Aero Toy Store LLC.*, a Force Majeure clause read as follows: "Neither party shall be liable to the other as a result of any failure of, or delay in the performance of, its obligations ... for the period that such failure of delay is due to: Acts of God ... or … any other cause beyond the Seller's reasonable control..." ATS's main defense, to justify not accepting delivery or paying the balance, was that the "unanticipated, unforeseeable and cataclysmic downward spiral of the world's financial markets" triggered the force majeure clause in the Agreement. [2010 2 Lloyd's Rep. 668].

164. The Court held that ATS could not rely upon the force majeure clause to justify its non-performance, as there were no connections between the specific events listed on the clause and the economic downturn or market circumstances. [Tandrin Aviation Holdings].

165. Since the holding, it is made clear that circumstance affecting the profitability of a contract or the ease with which the parties' obligations can be performed, is not regarded as a force majeure event.

166. Tandrin also noted that other situations such as "insufficient financial resources", "miscalculation" and "a rise in cost or expense" are all not considered as force majeure unless they are specifically stipulated in the agreement. It is also not sufficient that merely an occurrence of a force majeure event will excuse a party to meet its contractual obligations. The contract needs to spell out the consequence of the occurrence of such an event. The court stressed that it is vital that a force majeure clause is drafted clearly. Whether a force majeure clause can be triggered, depends on the specific event's reference. Whilst an event is beyond the parties' control, it needs to link together the non-performance and the event as the courts will interpret the clause narrowly.

## D. UNDER ARTICLE 79 OF THE CISG, CLAIMANT HAS NO VALID BASIS FOR ANY OF ITS PURPORTED CLAIMS

### i. The Hardship Clause should not be broadly interpreted, if it happens to be though - RESPONDENT didn't agree to 4.3 citing the preliminary negotiations

167. RESPONDENT, in its email of 28 March 2017, objected to the forum selection clause and asked for delivery DDP. [C3, p. 11]. Black Beauty had no problems with most of the terms of the offer. It only objected to the choice of law and the forum selection clause and insisted on a delivery DDP. The inclusion of a hardship clause had been used to temper some of the additional risks taken.

168. According to DDP, The seller is responsible for delivering the goods to the named place in the country of importation, including all costs and risks in bringing the goods to import destination. This includes duties, taxes and customs formalities. This term may be used irrespective of the mode of transport.

**ii. Since the CLAIMANTS were made aware of the tariff and could have taken actions to ship the doses prior to the tariffs taking effect, the RESPONDENT cannot now be liable after the contract commenced.**

169. "Two months before the last shipment of 50 doses was due Mediterraneo's newly elected President, Ian Bouckaert, announced 25 per cent tariffs on agricultural products from Equatoriana." [SOF, ¶9]. Two days prior to shipment of the final shipment of 50 doses, CLAIMANT reached out to RESPONDENT. [C7, p. 16]. Moreover, representative of CLAIMANT, Julie Napravnik, stated "we will have to find a solution in that regard before we can start the shipment, in direct violation of UNIDROIT principles art.6.2.3 (2), which provides *"the request for renegotiation does not in itself entitle the disadvantaged party to withhold performance"*. [C7, p. 16].

170. Although the main purpose for choosing DDP was questioned, CLAIMANT accepted for this contract to be delivery DDP. Moreover, "given the additional costs associated with a DDP delivery, we would need to increase the price by 1000 USD per dose." [C4, p. 12]. The additional cost per dose was to ensure that the Seller bear the risks and costs, including duties, taxes and other charges of delivering the goods thereto, cleared for importation. Hence, in DDP, the seller does not fulfil his obligation to deliver until the goods have been made available at the named place in the country of importation.

171. Although the tariff was unforeseeable, and beyond the control of CLAIMANT, the decision to deliver after the tariff went into effect was well under his control at the time of delivery. RESPONDENT already fulfilled their obligations under the contract. To wait and now demand payment is against the principle of good faith. [Peak Business News, 20 December 2017, CLAIMANT'S Exhibit 6].

172. Pursuant to CISG Article 8 (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.

173. Pursuant to CISG Article 6, The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary any of its provisions.

174. UNIDROIT principles Art. 6.2.2 interprets imposition of 30 per cent tariff as hardship while the unlikely event meets the requirements of this principle. Pursuant to UNIDROIT principles Art.6.2.2 "There is hardship if a) the cost of party's performance has increased; b) the events occur or become known to the disadvantaged party after the conclusion of contract; c) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of contract; d) the events are beyond the control of the disadvantaged party; e) the risk of the event was not assumed by the disadvantaged party.

## PRAYER FOR RELIEF

In light of the above, RESPONDENT respectfully requests the Tribunal to find that:

1. The Tribunal does indeed have the jurisdiction to hear the case, that the arbitration agreement is governed by the Danubian law, and that the Tribunal not have the authority to adapt the contract;
2. That the extrinsic evidence from the arbitration between RESPONDENT and third party be inadmissible for the purposes of this arbitration;
3. That RESPONDENT is entitled to payment of any and all fees and costs associated with the current arbitration.

RESPONDENT reserves the right to amend its prayer for relief as may be required.

# TABLE OF AUTHORITIES

| *Cited as* | **Reference** |
|---|---|
| Adler | Matthew H. Adler, Figueiredo v. Peru: A Step Backward for Arbitration Enforcement, Northwestern Journal of International Law and Business, Volume 32, Issue 4 (2012))<br><br>Cited in ¶46 |
| Beistener | Lisa Beisteiner, 'Chapter I: The Arbitration Agreement and Arbitrability, The (Perceived) Power of the Arbitrator to Revise a Contract – The Austrian Perspective', in Christian Klausegger , Peter Klein , et al. (eds), Austrian Yearbook on International Arbitration 2014, Austrian Yearbook on International Arbitration, Volume 2014 (© Manz'sche Verlags- und Universitätsbuchhandlung; Manz'sche Verlags- und Universitätsbuchhandlung 2014) pp. 77 – 122<br><br>Cited in ¶52, 53, 54, 55 |
| Belohlavek | Alexander J. Belohlavek, *The law applicable to the arbitration agreement and the arbitrability of a dispute.* P.29 (2013), Accessed at: https://www.law.columbia.edu/sites/default/files/microsites/columbia-arbitration-day/files/02_2013_-_belohlavek.pdf<br><br>Cited in ¶ 19 |
| Belohlavek | Alexander J. Belohlavek, *The law applicable to the arbitration agreement and the arbitrability of a dispute.* P.29 (2013), citing Law Applicable in Proceedings Before International Arbitrators (Trends in the Law of Obligations with Respect to the Rules Applicable in Selected European Countries), Právník, 138 (2002), 1066-1086; Nikolay Natov, The Autonomy of Arbitrators in Determining the Law Applicable to the Merits of a Case, in: Alexander J. Bělohlávek/Naděžda Rozenhnalová (eds.), CYArb--Czech & Central European Yearbook of Arbitration: Party Autonomy versus Autonomy of Arbitrators, Volume II, New York 2012, 171-190)].Paragraph 19<br><br>Cited in ¶ 24 |
| Berger | Peter Berger, "Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators", 36 Vanderbilt Journal of Transnational Law 1347, 1352 (Oct. 2003).<br><br>Cited in ¶ 63, 134. |

Bonell — An International Restatement of Contract Law, 42, 117, referring to the criticism of van Houtte, 'The UNIDROIT Principles of International Commercial Contracts and International Commercial Arbitration' in ICC Publ. No. 490 (1995) at p. 190.

Cited in ¶ 120.

Brunner — 'Chapter 5: Hardship (Change of Circumstances): Fundamental Change of the Equilibrium of the Contract, Section 12: Individual Requirements of the Hardship Defence', in Christoph Brunner, Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration, International Arbitration Law Library, Volume 18 (© Kluwer Law International; Kluwer Law International 2008) pp. 420 - 479.

Cited in ¶ 116, 122, 123.

Cowley — Cowley, Ruth, International Arbitration report. Published by Norton Rose Fulbright – issue 7 – September 2016. Accessed at: http://www.nortonrosefulbright.com/knowledge/publications/142444/conflict-of-privilege-rules-in-international-arbitration).

Cited in ¶ 72.

Derain — Yves Derain, Chronique des sentences arbitrales, Clunet 1975

Cited in ¶ 104.

Doudko — Unif. L. Rev. (2000): 496.

Cited in ¶ 127.

Enderlein/Maskow — Art. 79 CISG para. 6.3; Brunner, Art. 79 CISG para. 26 (on the basis of comparative law considerations); Berger, Private Dispute Resolution in International Business, Vol. II, para. 24-66.

Cited in ¶ 120.

Fucci — Frederick R. Fucci: Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts (2006).

Cited in ¶ 99, 123, 130, 131.

Hague Principles — The Hague Principles on Choice of Law in Commercial Contracts, 19 March 2015, Accessed at: https://docentes.fd.unl.pt/docentes_docs/ma/MHB_MA_31647.pdf

Peter — Wolfgang Peter, Arbitration and Renegotiation Clauses, 3 J. Int'l Arb. 29 (1986).

Cited in ¶ 36

Petsche — Markus A. Petsche, Choice of Law in International Commercial Arbitration, Springer Nature Singapore PTE, Ltd. (2017), DOI: 10.1007/978-981-10-3458-9_2.

Cited in ¶ 37.

Redfern — Alan Redfern, Law and Practice of International Commercial Arbitration, 4th ed., London 2004, Chapters 2-4, Note 2 *et al.*

Cited in ¶ 24.

Statistics Sweden — Statistics Sweden, Terms of delivery, Accessed at: https://www.scb.se/Statistik/HA/HA0201/_dokument/Uppgiftslämnande/Statistiskt-varde/Terms-of-delivery.pdf

Cited in ¶ 157.

Treitel — Frustration and Force Majeure, paras 4-071/72 ff., 6-025.

Cited in ¶ 121.

Van Houtte — Arb. Int. 11 (1995): 373, 387.

Cited in ¶ 120.

Thomas — Rhidian Thomas, The Curial Law of Arbitration Proceedings, Lloyd's Maritime and Commercial Law Quarterly, (1984), 491-498.

Cited in ¶ 23.

Zeller — Bruno Zeller, Determining the Contractual Intent of Parties under the CISG and Common Law -- A Comparative Analysis European Journal of Law Reform (Kluwer) Vol. 4, No. 4 (2002) 629-643

Cited in ¶ 141.

## CODES & STATUTES

Article 18 Swiss Law of Obligations (Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911 (Part Five: The Code of Obligations), SR 220.) Articles 1362/1371 of the Italian Civil Code (Codice Civile).

Cited in ¶ 157

Articles 133, 155, 157 of the Bürgerliches Gesetztbuch (BGB). Bürgerliches Gesetzbuch [BGB] [Civil Code]; § 133, 155.

Cited in ¶ 158

## CASE LAW

AD HOC TRIBUNAL (UNCITRAL)

*Methanex Corp.* *Final Award of the Tribunal on Jurisdiction and Merits, 44* I.L.M. 1345, 1410-12 pt. III, ch. A, 1-2 (NAFTA Ch.11 Arb. Trib. 2005), available at http://www.state.gov/documents/organization/51052.pdf

Cited in ¶ 85.

ARBITRAL AWARD

*Himpurna California Energy* YCA XXV (2000), 13 et seq. *Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listruik Negara,* UNCITRAL Ad Hoc-Award of 4 May 1999

Cited in ¶ 109, 111.

COMMERCIAL COURT OF ENGLAND

Qu11 ICC International Court of Arbitration Bulletin [ACAB] Zurich Chamber of Commerce, 25 November 1994, case no 16.een's Bench Division

*Tandrin Aviation Holdings* *Tandrin Aviation Holdings Limited v Aero Toy Store LLC.*, [2010] 2 Lloyd's Rep 668

Cited in ¶ 163

COURT OF APPEAL OF ENGLAND AND WALES DECISIONS (CIVIL DIVISION)

*John Forster Emmott* EWCA Civ 184.
*John Forster Emmott v. Michael Wilson & Partners Limited* [2008]

Cited in ¶ 97, 102.

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES



JURISDICTION OF THE EUROPEAN COMMISSION



QUEEN'S BENCH DIVISION (COMMERCIAL COURT)



TRIBUNALE [DISTRICT COURT] DI VIGEVANO

Cited in ¶46

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

*Figueiredo Ferraz* (80 U.S.L.W. 801).
*Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d 384* (2D CIR. 2011)

Cited in ¶ 46.

*In Re Arbitration* 311 F.3D 488
*In re Arbitration Between Monegasque De Reassurances S.A.M v. Nak Naftogaz of Ukraine ("Monde Re")* (2d Cir. 2002).

Cited in ¶ 48

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

*Publicker Industries* 17 U.C.C. Rep. Ser. 989 (E.D.Pa. 1975), reported by Treitel, Frustration and Force Majeure, para. 6-010.
*Publicker Industries v. Union Carbide Corp.*(1975)

Cited in ¶ 126.

YEARBOOK COMMERCIAL ARBITRATION

*Japan Shipping Exchange* *Arbitration Court of the Japan Shipping Exchange, award of 20.09.1975, Y.B. Com. Arb. 1983, 153, 155.*

Cited in ¶ 122.