



# Twenty Sixth Annual Willem C. Vis International Commercial Arbitration Moot

## THE PROBLEM

Vienna, Austria  
October 2018 – April 2019

Oral Hearings  
April 13 – 18, 2019

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

And

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

Oral Arguments  
March 31 – April 7, 2019

Organised by:  
Vis East Moot Foundation Limited



# Contents

<b>Document</b>	<b>Page</b>
Letter by Langweiler (31 July 2018)	3
Notice of Arbitration (31 July 2018)	4
Claimant's Exhibit C 1 (Email 21 March 2017)	9
Claimant's Exhibit C 2 (Email 24 March 2017)	10
Claimant's Exhibit C 3 (Email 28 March 2017)	11
Claimant's Exhibit C 4 (Email 31 March 2017)	12
Claimant's Exhibit C 5 (Sales Agreement 6 May 2017)	13
Claimant's Exhibit C 6 (Excerpt from Peak Business News 20 December 2017)	15
Claimant's Exhibit C 7 (Email 20 January 2018)	16
Claimant's Exhibit C 8 (Witness Statement of Julie Napravnik)	17
Letter by HKIAC (31 July 2018)	19
Letter by HKIAC (1 August 2018)	23
Davis's Declaration of Acceptance and Statement of Availability, Impartiality and Independence (1 August 2018)	24
Letter by Langweiler (2 August 2018)	25
Letter by HKIAC (2 August 2018)	26
Letter by Fasttrack (24 August 2018)	28
Answer to the Notice of Arbitration (24 August 2018)	29
Respondent's Exhibit R 1 (Email 10 April 2017)	33
Respondent's Exhibit R 2 (Email 11 April 2017)	34
Respondent's Exhibit R 3 (Witness Statement of Julian Krone)	35
Respondent's Exhibit R 4 (Witness Statement of Greg Shoemaker)	36
Letter by HKIAC (24 August 2018)	37
Letter by Fasttrack (25 August 2018)	39
Letter by HKIAC (28 August 2018)	40
Letter by Davis (14 September 2018)	41
Letter by HKIAC (17 September 2018)	42
Letter by Fasttrack (17 September 2018)	43
Letter by Langweiler (17 September 2018)	44
Letter by HKIAC (18 September 2018)	45
Letter by De Souza (20 September 2018)	48
Letter by Langweiler (2 October 2018)	49
Letter by Fasttrack (3 October 2018)	50
Procedural Order No 1 (5 October 2018)	51

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Advocate at the Court  
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Capital City  
Mediterraneo  
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Langweiler@lawyer.me

By email and courier

Ms. Sarah Grimmer  
Hong Kong International Arbitration Centre  
38<sup>th</sup> Floor Two Exchange Square  
8 Connaught Place  
Central  
Hong Kong

31 July 2018

Dear Ms. Grimmer,

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

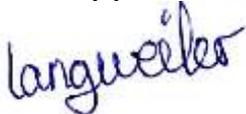
The notice has been served upon Respondent and the registration fee has been paid. The relevant confirmations for service and payment are attached.

The CLAIMANT requests outstanding contractual payments.

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

The required documents are attached.

Sincerely yours,



Joseph Langweiler

cc. Black Beauty Equestrian

Attachments:

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

**Joseph Langweiler**  
Advocate at the Court  
75 Court Street  
Capital City  
Mediterraneo  
Tel (o) 146 9845; Telefax (o) 146 9850  
Langweiler@lawyer.me

## **Notice of Arbitration**

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

in the Arbitral Proceedings

*Phar Lap Allevamento v. Black Beauty Equestrian*

### **Phar Lap Allevamento**

Rue Frankel 1  
Capital City  
Mediterraneo

- CLAIMANT-

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

### **Black Beauty Equestrian**

2 Seabiscuit Drive  
Oceanside  
Equatoriana

- RESPONDENT-

## **STATEMENT OF FACTS**

1. The CLAIMANT is Phar Lap Allevamento (Phar Lap), a company registered and located in Capital City, Mediterraneo. It operates Mediterraneo's oldest and most renowned stud farm, covering all areas of the equestrian sport. It has 300 horses, including its own mare herd, offspring and stallion depot. Its teaching, research, and demonstration facility is a center of excellence offering training and professional development courses on horse care, breeding and riding/driving. Mediterraneo's horse-shoeing or farrier school is also based at Phar Lap.
2. In its racehorse section Phar Lap provides stallions for breeding English thoroughbreds and Anglo Arabs. Breeders have access to the studs throughout the breeding season from February to July for covering. In all other sections of horse sports, Phar Lap additionally offers frozen semen of its champion stallions for artificial insemination. Due to Phar Lap's unique storage technique the semen is long-living and of superior quality.
3. Phar Lap is particularly known for its breeding success regarding racehorses. The star among Phar Lap's stallions is Nijinsky III, which is one of the most successful racehorses



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

4. The RESPONDENT, Black Beauty Equestrian (Black Beauty) in Oceanside, Equatoriana, is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions. Three years ago, Black Beauty decided to establish a racehorse stable. It acquired ten mares with an excellent racehorse pedigree. Horse racing is extremely popular in Equatoriana and the growth rate of the connected business sector has in the last five years never been below 4 per cent per year.
5. On 21 March 2017 Black Beauty contacted Phar Lap, inquiring about the availability of Nijinsky III for its newly started breeding programme (**Claimant's Exhibit 1**). At that time, the Equatorianian Government had imposed serious restrictions on the transportation of all living animals due to severe problems with foot and mouth disease which already lasted for two years. As a reaction to that and driven by powerful interests in the Equatorianian racehorse 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 whether frozen semen of Nijinsky III was available.
6. Phar Lap was told at the time that Black Beauty's investors were keen to see Black Beauty's racehorse breeding programme to commence as soon as possible taking advantage of the temporary lift of the ban on artificial insemination. The explanation given for the high number of doses requested was that under the relevant Equatorianian law all doses acquired during the lifting of the ban could be used. Phar Lap did not question that information at the time, since for them the contract was a good opportunity to increase their revenues without any major additional risk. Phar Lap considered their interests sufficiently protected by the consent requirement in the contract for any other use of Nijinsky III's semen. Therefore, the risk of the usability of the semen would lie with Black Beauty. Phar Lap only subsequently learned that Black Beauty's investors were one of the biggest supporters of a general lifting of the ban and probably from the beginning had the intention to sell a considerable amount of the doses, hoping to induce additional breeders to fight for a permanent lifting of the ban.
7. With email of 24 March 2017 Phar Lap offered Black Beauty 100 doses of Nijinsky III's frozen semen in accordance with the *Mediterraneo Guidelines for Semen Production and Quality Standards* (**Claimant's Exhibit 2**). Black Beauty had no problems with most of the terms of the offer. It only objected to the choice of law and the forum selection clause and insisted on a delivery DDP (**Claimant's Exhibit 3**). Due to past experiences with extremely expensive tests due to changes in customs health requirements Phar Lap was only willing to accept a delivery DDP against a moderate price increase, the transfer of certain risks to Black Beauty and the inclusion of a hardship clause to temper some of the additional risks taken (**Claimant's Exhibit 4**).
8. In the end, the Parties agreed not only on the hardship clause but also on an acceptable choice of law and arbitration clause. Unfortunately, the finalization of the agreement took longer than planned as the two main negotiators, Ms. Napravnik and Mr. Antley, were severely injured in an accident when driving to a restaurant after the annual colt auction in Danubia on 12 April 2017. They had to be replaced for the finalization of the contract which was signed on 6 May 2017 (**Claimant's Exhibit 5**).

9. The Parties had agreed on three shipments (**Claimant's Exhibit 5**). RESPONDENT sent the first shipment of 25 doses on 20 May 2017; the second shipment of 25 doses on 3 October 2017. Two months before the last shipment of 50 doses was due Mediterraneo's newly elected President, Ian Bouckaert, announced 25 per cent tariffs on agricultural products from Equatoriana. This sudden measure came as a complete surprise. While Mr. Bouckaert had made clear that he wanted to protect the Mediterranean agricultural sector, a 25 per cent tariff had neither been part of any strategy papers released earlier by the new President nor of the election manifesto.
10. Even more surprising was the reaction of the Equatorianian government, which has always been an ardent supporter of free trade. Consequently, the Equatorianian government had always tried to resolve trade disputes amicably and had not relied on retaliatory measures against trade restrictions by other countries (see **Claimant's Exhibit 6**). In the present case, however, to the big surprise of everyone the Equatorianian government after a very short period of unsuccessful discussions retaliated by imposing 30 per cent tariffs on selected products from Mediterraneo including on animal semen (**Claimant's Exhibit 6**).
11. CLAIMANT and RESPONDENT were astonished to hear that frozen semen was listed in the schedule released by the Ministry of Agriculture of the products that fell under the new tariffs-regime and that this also applied to racehorse semen. Generally, racehorse breeding is categorized differently from pigs, sheep, or cattle.
12. CLAIMANT and RESPONDENT immediately started negotiations regarding a price adjustment for the frozen semen (**Claimant's Exhibit 7**). RESPONDENT had made clear already during the contract negotiation that for its planning timely delivery was extremely important. At the same time RESPONDENT appeared to generally accept the need for a price increase (**Claimant's Exhibit 8**).
13. In light of the above facts and taking into account that RESPONDENT had created the impression of accepting the general need for a price adaptation, CLAIMANT complied with its delivery obligation and delivered the remaining 50 doses on 23 January 2018 before an agreement on the new price had been reached.

## LEGAL EVALUATION

### Jurisdiction

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

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

***The seat of arbitration shall be Danubia.***

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

15. Contrary to RESPONDENT's allegations during the unsuccessful efforts to solve the dispute amicably the arbitration clause is valid and obviously also covers the claim raised. The arbitration clause and its interpretation are governed by the law of Mediterraneo and not, as RESPONDENT alleges, by the law of Danubia. Thus, it is irrelevant whether under the law of Danubia arbitration agreements have to be interpreted narrowly and in accordance with the parol evidence rule. The Parties have submitted the contract after long discussions to the law of Mediterraneo which consequently also governs the interpretation of the arbitration agreement contained therein.
16. Like in most other jurisdictions the Arbitration Law of Mediterraneo provides for a broad interpretation of arbitration agreements, irrespective of an allegedly narrow wording merely referring to "dispute(s) arising out of this contract". Thus, the arbitration agreement clearly extends to a claim for an increased remuneration. That is even more so, as in the present case during the first discussion of the adaptation clause RESPONDENT's Mr. Antley had explicitly stated to CLAIMANT's Ms. Napravnik that the arbitrators should adapt the contract in case the parties should not be able to reach a solution (Claimant's Exhibit 8). Due to their replacement following the severe car accident no express statement to that extent was either included in the adaptation clause or the arbitration agreement.
17. CLAIMANT nominates Ms. Wantha Davis, 14 Churchill Downs, Capital City, Mediterraneo for confirmation. She has already declared to CLAIMANT her willingness to act as an arbitrator and the absence of any connections which could affect her independence and impartiality. Your will find her CV enclosed and CLAIMANT would like to ask the HKIAC to take the necessary steps for the confirmation of Ms. Davis.

### Contract

18. CLAIMANT is entitled to an increase of the purchase price of at least 25 per cent due to the higher costs following the imposition of the new tariffs. CLAIMANT had a profit margin of 5 per cent for the transaction and now makes a loss of 25 per cent due to the imposition of the new tariff of 30 per cent on the product by the Equatorian authorities. While neither party is directly responsible for the tariffs they are imposed by RESPONDENT's home country and therefore are closer associated with RESPONDENT than with CLAIMANT. That CLAIMANT is at all affected by the tariffs is due to the changes in the delivery terms. The purpose of such changes, however, was not to burden CLAIMANT with all the risks associated with a DDP-delivery but to profit from CLAIMANT's experience in the transportation of frozen semen. In addition to the lower risk for damages to the semen, a greater likelihood of a speedy and non-problematic compliance with export and import formalities and the required paperwork, CLAIMANT was also able to make the transportation to commercially much more favorable terms than RESPONDENT.
19. The Parties intention is very well evidenced by the fact that in connection with a change in the delivery terms they included an adaptation clause into the contract. CLAIMANT had made clear that it was not willing to bear all the other risks associated with the agreed change of the delivery terms and had insisted on the inclusion of the adaptation clause. RESPONDENT had consented to that. The adaptation clause was supposed to cover not only the most prevalent risk of changes in the health and safety requirements but also other risks including additional tariffs, like the present. The fact that such tariffs were not explicitly included had to do with the fact that at the time of contracting no one expected such measures. The Government of Equatoriana had always been an ardent supporter of free trade, in particular in times like the present when the Prime Minister came from the Progressive Liberals. Only once an Equatorian Government under a Prime Minister from the National Party, which is more critical to free trade, had taken retaliatory measures

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

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

### **REQUEST:**

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

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

Capital City, 31 July 2018

For Phar Lap Allevamento



Joseph Langweiler



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**From:** Black Beauty Equestrian <blackbeauty@blackbeauty.eq>  
**Sent:** 21 March 2017, 10:04 a.m.  
**To:** Phar Lap Allevamento <PharLap@allevamento.me>  
**Re:** Inquiry re Nijinsky III

Dear Ms. Napravnik,

I trust that you are doing well. As already indicated during our meeting at Equestrian World last year Black Beauty is building up its own racehorse breeding programme, with the intention to become one of the leading breeders for racehorses. You may have seen in the press that we have acquired over the last months a number of first class mares which due to their successful racing careers have a very promising pedigree for successful breeding. We are now in the process of finding matching world class stallions. Naturally, your Nijinsky III is one of our first choices. You may also be aware that in Equatoriana the ban on artificial insemination for race horses has been lifted – at least temporarily. The latest foot and mouth disease crisis in Equatoriana with the resulting restrictions on the transportation of living animals had such a serious impact on the breeding of racehorses that artificial insemination is now officially permitted. While the permission is presently still temporary until the end December 2018 we are confident that it will become permanent.

Irrespective of whether our expectations will materialize, the present legal situation with its serious transportation restrictions makes natural coverage extremely difficult. At the same time the alleviation of the ban allows us to start our own breeding activities for racehorses by using frozen semen from world class foreign stallions from all over the world, without submitting our mares or the stallions to the stress of long distance travel.

Given your considerable experience with the use of artificial insemination in other areas of horse sports we hope that you will also be able to provide us with frozen semen from Nijinsky III for our purposes. Could I kindly ask you to provide me with an offer for 100 doses of frozen semen from Nijinsky III, including your terms and conditions.

Sincerely,

Chris Antley

**Black Beauty Equestrian**  
2 Seabiscuit Drive  
Oceanside, Equatoriana  
T: (0)214 669804  
Email: blackbeauty@blackbeauty.eq

BlackBeautyEquestrian.com



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**From:** Phar Lap Allevamento <PharLap@allevamento.me>  
**Sent:** 24 March 2017, 11:23 a.m.  
**To:** Black Beauty Equestrian <blackbeauty@blackbeauty.eq>  
**Re:** Inquiry re Nijinsky III

Dear Mr. Antley,

Thank you very much for your email of 21 March 2017 and the interest in buying 100 doses of frozen semen from Nijinsky III. We have indeed seen the various reports about Black Beauty's impressive acquisitions of top class mares over the last few months. Therefore, we were not surprised when you contacted us enquiring about the availability of Nijinsky III for a coverage of the mares. Also according to our evaluation he would be a perfect match for some of your mares.

The sort of your request and its size the 100 doses, however, came as a surprise. Normally, we would not sell frozen semen of our racehorse stallions and definitely not such an amount of semen to a single breeder for obvious reasons.

In your case, taking into account Black Beauty's outstanding reputation in the area of dressage and showjumping and to show you our interest in entering into a long-term mutually beneficial relationship we are willing to make an exception from our general approach. Thus, we will, under certain conditions, supply you with the 100 doses requested. We note, and that should not come as a surprise to you, that the frozen semen will have to be provided in several instalments and may not be re-sold to third parties without our express written consent. Furthermore, we would like to be informed about the use of every dose.

The basic conditions would be as followed:

Price: 99.500 USD per dose; to be picked up at our premises.

The purchase would be based on the Standard Frozen Semen Sales Agreement taking into account the *Mediterraneo Guidelines for Semen Production and Quality Standards* and our general conditions which you can find on our webpages.

Sincerely,

Julie Napravnik

**PHAR LAP ALLEVAMENTO**  
Rue Frankel 1  
Capital City, Mediterraneo  
P: (0)146 9346359

pharlapallevamento.com



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**From:** Black Beauty Equestrian <blackbeauty@blackbeauty.eq>  
**Sent:** 28 March 2017, 11:32 a.m.  
**To:** Phar Lap Allevamento <PharLap@allevamento.me>  
**Re:** Inquiry re Nijinsky III

Dear Ms. Napravnik,

Thank you very much for your offer and your willingness to accommodate our request despite its extraordinary nature and the number of doses needed. It has to do with the particular situation in Equatoriana and the fact that our investors have expressed a clear intention to become within a very short time one of the leading breeders for racehorses, first in Equatoriana but thereafter also beyond its boundaries. In light of that we are highly interested in a long-term cooperation with you, going clearly beyond this single purchase. That would naturally also involve natural coverage should other countries not follow the example of Equatoriana and lift the ban or the permission of artificial insemination or should the lifting of the ban expire or be revoked in Equatoriana.

Most of the terms of your offer are acceptable to us, including the general applicability of your general terms and conditions. The following points, however, are not acceptable and require additional direct negotiations:

**Price and Delivery Terms:**

In light of the size of the order we would have expected a better price, in particular as the possibility is largely on top of what fees could be earned with Nijinsky III through natural coverage. 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.

**Applicable Law and Dispute Resolution:**

Given the desirability of a long-term relationship for the mutual benefit of both parties we consider it not appropriate that your law applies and your courts have jurisdiction. We could accept the application of the Law of Mediterraneo if the courts of Equatoriana have jurisdiction.

Sincerely,

Chris Antley

**Black Beauty Equestrian**  
2 Seabiscuit Drive  
Oceanside, Equatoriana  
T: (0)214 669804  
Email: blackbeauty@blackbeauty.eq

BlackBeautyEquestrian.com



---

**From:** Phar Lap Allevamento <PharLap@allevamento.me>  
**Sent:** 31 March 2017, 08:42 a.m.  
**To:** Black Beauty Equestrian <blackbeauty@blackbeauty.eq>  
**Re:** Inquiry re Nijinsky III

Dear Mr. Antley,

Thank you very much for your email and the ensuing telephone conversation. We have discussed your request internally.

The price offered was already a very competitive price, taking into account the opportunity to increase Nijinsky's breeding potential, the size of your order and our interest in a long-term relationship.

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.

It is, however, not acceptable that we submit to the jurisdiction of the courts in Equatoriana. A possible solution, if you cannot agree on the jurisdiction of the courts in Mediterraneo, would be to opt for arbitration in Mediterraneo.

My suggestion is to discuss these issues in a personal meeting or over the phone. We could meet in Vindobona in the second week of April, should you also attend the annual colt auction in Danubia on 12 April.

Sincerely,

Julie Napravnik

**PHAR LAP ALLEVAMENTO**  
Rue Frankel 1  
Capital City, Mediterraneo  
P: (0)146 9346359

pharlapallevamento.com

## FROZEN SEMEN SALES AGREEMENT

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

and,

*Black Beauty Equestrian, represented by Chris Antley*

*2 Seabiscuit Drive, Oceanside, Equatoriana,*

*PHONE: (0)214 669804*

*EMAIL: blackbeauty@blackbeauty.eq*

hereinafter referred to as 'BUYER'.

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

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

### MARE INFORMATION:

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

### TERMS AND CONDITIONS:

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

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

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

The parties hereto understand and agree to abide by the terms and conditions as set forth in this Agreement:

Seller Signature:  Date: 6 May 2017

Printed name: *John Ferguson*

Buyer Signature:  Date: 6 May 2017

Printed name: *Julian Krone*

## The end of open markets?

AFTER YEARS of continuing growth the system of free trade has received a second serious blow by yesterday's announcement of the Government of Equatoriana to impose a tariff of 30 per cent upon all agricultural goods from Mediterraneo as a retaliation for the previous restriction imposed by Mr. Bouckaert, the newly elected President of Mediterraneo.

The retaliation as well as the size of the tariffs came as a big surprise even to informed circles. Equatoriana has always been one of the biggest supporters of the existing system of free trade. Previous restrictions imposed by other countries affecting imports from Equatoriana have - with one exception - never resulted in direct retaliatory measures. Instead, the various governments have always tried to solve disputes amicably or via invoking the relevant WTO dispute resolution mechanism. It can only be assumed that the hardliners in the Ministry of Economics have been able to convince the Prime Minister of the need to react strongly to the highly controversial measures by the newly elected President of Mediterraneo. The latter had already in its election program in January 2017 announced a certain preference for a more protectionist approach to

international trade, in particular in relation to agricultural products. The measures then taken by him, shortly after his election in April 2017, however, surprised most analysts as they went beyond the worst expectations. In particular, in relation to the agricultural products reliance on an alleged threat to national security as a justification for the tariffs seems to be more a mockery of the system than a good faith effort to justify the controversial tariffs within the boundaries of the existing system. That may have also triggered the prompt and severe retaliation by the Government of Equatoriana.

It is, however, an even more serious blow to the present trading system as other governments have indicated comparable measures.

The first reaction of the Mediterranean President increased the fear that we are presently witnessing a complete unraveling of the international trading system.

### Peak Business News

At Home

World News

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Finance

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Corporate

Restructuring

20 DECEMBER 2017



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**From:** Phar Lap Allevamento <PharLap@allevamento.me>  
**Sent:** 20 January 2018, 9:03 a.m.  
**To:** Black Beauty Equestrian <blackbeauty@blackbeauty.eq>  
**Re:** Additional tariffs for shipment of 50 doses of semen Nijinsky III Urgent!!!  
**Priority:** High

Dear Mr. Shoemaker,

In preparing the final shipment of 50 doses of frozen semen from Nijinsky III to you, I was just informed by the customs authorities that the newly imposed tariffs of 30% on agricultural products are applicable to the shipment. They include apparently all animal products, even if it is for the breeding of racehorses. That makes this shipment 30% more expensive!

You will understand that we will have to find a solution in that regard before we can start the shipment, which was supposed to go out on 22 January 2018.

I have unsuccessfully tried to call you and left a message on your voice mail. Please call me back as soon as possible. I have put the shipment presently on hold but can still authorize it until tomorrow evening, i.e. the 21st.

Sincerely,

Julie Napravnik

**PHAR LAP ALLEVAMENTO**

Rue Frankel 1  
Capital City, Mediterraneo  
P: (0)146 9346359

pharlapallevamento.com

## Witness Statement of Julie Napravnik

I was born on 15 June 1974 and I have a law degree from the University of Mediterraneo. Since 1 January 2011, I work for Phar Lap Allevamento where I am one of two lawyers. My primary responsibility are our contractual relations to our suppliers and customers while all employment matters and internal legal questions are primarily handled by my colleague.

I have been the prime negotiator of the contract on CLAIMANT's side until 12 April 2017 when Mr. Antley, the responsible person on RESPONDENT's side, and myself were involved in a severe car accident on our way to a dinner. I was hospitalized for three months and the final negotiations of the contract were conducted by our CEO with the support of my colleague, Mr. John Ferguson, who has, however, no experience in international contracting.

On the day of the car accident, Mr. Antley and I had a short discussion upon our newest proposal for the dispute resolution clause and the hardship clause from the previous day. Unfortunately, due to other meetings on that day and Mr. Antley's belated arrival we could only shortly exchange views on what still had to be finalized and the various wishes but had not sufficient time to make any amendment to our standard contract beyond the already existing clauses 1 – 6 of the contract.

I mentioned to Mr. Antley that for us it was important to have a mechanism in place which would ensure an adaptation of the contract for the unlikely event that the Parties could not agree on an amendment. Mr. Antley replied that in his view that it should probably be the task of the arbitrators to adapt the contract if the Parties could not agree. Since that had also been my preference and understanding of the existing provisions, I suggested to clarify that issue and to include an express reference into the hardship clause or the arbitration clause to avoid any doubts, irrespective of the fact that from a legal point of view that was not necessary. Mr. Antley promised that he would come back with a proposal the next morning. Due to the accident he never managed to do so. He was in a coma for four weeks and as far as I know has taken early retirement after having left the hospital at the beginning of this year.

In the end, our successors in finalizing the contract did not include such an express reference either in the arbitration agreement or the hardship clause they finally negotiated. I cannot say whether they merely forgot it or considered it not to be necessary in light of our tentative agreement on the issue.

In January 2018, when I prepared the final delivery of 50 doses I was told to my great surprise by the customs officials of Equatoriana that the newly imposed tariffs for agricultural products covered all animal products and therefore would also apply to semen used for artificial insemination in racehorse breeding. That made the shipment 30% more expensive than anticipated, not only destroying our profit margin of 5% but resulting in considerable hardship. The last two years have been financially difficult for CLAIMANT due to several reasons. Through extensive restructuring measures and a considerable cut of the work force CLAIMANT has been able to stay in business but it was impossible for us to shoulder this additional 30% tariff which had to be paid immediately. While we had agreed on a DDP delivery it had been clear to both Parties that CLAIMANT should not bear all risks associated with such a delivery but that the agreement on DDP delivery was primarily to ensure better transportation terms and

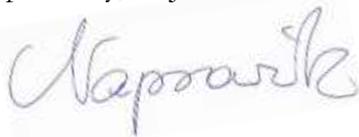
swifter delivery due to CLAIMANT's experience in the shipment of frozen semen. That is also reflected in the contract.

I told that to Mr. Shoemaker when he called me on the 21 January in the morning, following up on my email of the previous day. He said that he had not been involved in the negotiations or the Sales Agreement and could not directly authorize any additional payment but saw our problem. He was certain that a solution would be found through negotiation given the good relationship between the Parties and their interest in further business. He urged me to authorize the shipment as planned since Black Beauty needed the doses and had already initiated the payment of the second installment. He emphasized their interest in a long-term relationship with us and told me about their plans to buy also 50 doses from Empire's State, our second stallion of world reputation.

As I had gotten the impression that RESPONDENT accepted our position that they should bear the bulk of the additional costs due to the tariffs and needing the doses urgently. I authorized delivery even before an agreement on the details had been reached. We paid the 30% in tariffs relying on RESPONDENT's promise that a solution would be found and that they were interested in a long-term relationship.

After the final shipment had been made we discovered that RESPONDENT was actually breaching the resale prohibition under the contract and needed part of the doses shipped for commitments towards other parties. When confronted with our discovery in a meeting of 12 February 2018 Ms. Kayla Espinoza, RESPONDENT's CEO, got very angry and aggressive. She shouted that she was fed up with the permanent additional requests from Phar Lap which, in her view, had no basis in the contract and was no longer be interested in a further cooperation with Phar Lap. She stopped the negotiations and refused to pay any additional amount for the tariffs. With hindsight I have the impression that RESPONDENT planned from the beginning to resell a considerable amount of the 100 doses at an increased price to other breeders to whom we might not have sold directly. Beyond the generation of additional revenue that would have increased the number of breeders at least in Equatoriana who had an interest in completely abolishing the ban on artificial insemination.

Capital City, 15 June 2018





香港國際仲裁中心  
Hong Kong International  
Arbitration Centre

31 July 2018

Joseph Langweiler  
75 Court Street  
Capital City  
Mediterraneo  
By fax: + 0 146 9850  
By email: langweiler@lawyer.me & by courier

Black Beauty Equestrian  
2 Seabiscuit Drive  
Oceanside  
Equatoriana  
By courier only

Dear Sirs/Mesdames,

**Case No.:** HKIAC/A18128  
**Claimant:** Phar Lap Allevamento (Mediterraneo)  
**Respondent:** Black Beauty Equestrian (Equatoriana)  
**Re:** Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017

We refer to the captioned case and acknowledge receipt of a Notice of Arbitration dated 31 July 2018 and the documents included therewith (the “**Notice**”), on even date, from Claimant’s counsel, Mr. Joseph Langweiler.

#### **Commencement of Arbitration**

We note that Claimant has commenced this arbitration under the 2013 HKIAC Administered Arbitration Rules (the “**Rules**”) pursuant to Clause 15 of the Frozen Semen Sales Agreement dated 6 May 2017 (the “**Agreement**”), which provides:

*“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.”*

HKIAC will proceed to administer the captioned arbitration under the Rules. For the parties’ information, the Rules are enclosed and can also be found at [http://www.hkiac.org/images/stories/arbitration/2013\\_hkiac\\_rules.pdf](http://www.hkiac.org/images/stories/arbitration/2013_hkiac_rules.pdf).

#### **Registration Fee**

We confirm receipt, on 31 July 2018, of a bank transfer in the sum of HK\$ 8,000 from Claimant’s counsel, representing payment of the Registration Fee in accordance with Article 4.4 of the Rules.

WP/OB

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香港國際仲裁中心  
Hong Kong International  
Arbitration Centre

**Case No.:** HKIAC/A18128  
**Claimant:** Phar Lap Allevamento (Mediterraneo)  
**Respondent:** Black Beauty Equestrian (Equatoriana)  
**Re:** Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017

### **Documentary Verification of Service of the Notice**

We note from Claimant's documentary verification, enclosed with its counsel's letter dated 31 July 2018, that Claimant successfully served copies of its Notice on Respondent by email and courier on 31 July 2018.

### **Answer to the Notice of Arbitration**

Pursuant to Article 5.1 of the Rules, Respondent shall submit to HKIAC the Answer to the Notice of Arbitration (the "Answer") within **30 days** from the date on which Respondent received the Notice. Accordingly, Respondent shall submit the Answer **by 30 August 2018**.

Pursuant to Article 5.1(g) of the Rules, Respondent shall at that time confirm service of copies of the Answer and any exhibits included therewith on Claimant.

### **Constitution of the Arbitral Tribunal**

We note that Clause 15 of the Agreement provides that "[t]he number of arbitrators shall be three", and that, pursuant to Article 8.1 of the Rules, Claimant has designated Ms. Wantha Davis of 14 Churchill Downs, Capital City, Mediterraneo as the first co-arbitrator in this case. We will invite Ms. Davis to complete a Declaration of Acceptance and Statement of Availability, Impartiality and Independence and provide us with her proposed hourly rate for this arbitration.

We invite Respondent to designate the second co-arbitrator in the Answer pursuant to Articles 5.1(f) and 8.1 of the Rules.

### **Method for Determining the Fees of the Arbitral Tribunal**

Under Article 10 of the Rules, the fees and expenses of the arbitral tribunal shall be determined, at the option of the parties, either on (a) hourly rates in accordance with Schedule 2; or (b) in accordance with the schedule of fees based on the sum in dispute referred to in Schedule 3. In accordance with Article 10.1 of the Rules, the parties are invited to agree on the method for determining the fees of the arbitral tribunal **by 30 August 2018**.

If the parties fail to agree on the applicable method within the specified period, the arbitral tribunal's fees shall be calculated on the basis of hourly rates in accordance with the terms of Schedule 2 of the Rules. We refer the parties to the enclosed Note on the Method for Determining the Fees of the Arbitral Tribunal and the Practice Notes on Costs of Arbitration.

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Hong Kong International  
Arbitration Centre

**Case No.:** HKIAC/A18128  
**Claimant:** Phar Lap Allevamento (Mediterraneo)  
**Respondent:** Black Beauty Equestrian (Equatoriana)  
**Re:** Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017

### Case Number

We have assigned the reference number “**HKIAC/A18128**” for this arbitration. Please use this reference number in all communications throughout the arbitral proceedings. In particular, we request the parties to indicate the reference number in the subject line of all emails sent to HKIAC.

### Initial Deposits

Pursuant to Article 40.1 of the Rules, we request payment of initial deposits as an advance for the arbitral tribunal’s fees and expenses and HKIAC’s Administrative Fees.

The initial deposit for the fees and expenses of the arbitral tribunal is **US\$ 25,560**, which shall be shared equally by the parties. Accordingly, we request each party to deposit with HKIAC its share (i.e., **US\$ 12,780 per party**) **by 14 August 2018**. Please make payment by bank transfer to the following account of HKIAC:

A/C Name: Hong Kong International Arbitration Centre  
A/C No: 1234-1234-002  
Bank: Hong Kong & Shanghai Banking Corporation  
1 Queen’s Road Central, Hong Kong  
Swift Code: HSBC HK HHH KH

The initial deposit for HKIAC’s Administrative Fees is **US\$ 10,673**, which shall be shared equally by each party. Accordingly, we request each party to deposit with HKIAC its share (i.e. **US\$ 5,336.50 per party**) **by 14 August 2018**. Please make payment by bank transfer to the following account of HKIAC:

A/C Name: Hong Kong International Arbitration Centre  
A/C No: 1234-1234-001  
Bank: Hong Kong & Shanghai Banking Corporation  
1 Queen’s Road Central, Hong Kong  
Swift Code: HSBC HK HHH KH

Please identify the paying party and the HKIAC reference number “HKIAC/A18128” when making the payment and notify us with proof of remittance once payment is made. Please note that all bank charges are to be borne by the remitting party.

WP/OB





香港國際仲裁中心  
Hong Kong International  
Arbitration Centre

**Case No.:** HKIAC/A18128  
**Claimant:** Phar Lap Allevamento (Mediterraneo)  
**Respondent:** Black Beauty Equestrian (Equatoriana)  
**Re:** Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017

#### **HKIAC Case Manager**

Please note that the contact details of the HKIAC case manager in charge of the above-referenced matter are as follows:

**Contact Person:** Mr. Formula Wan, HKIAC Deputy Counsel  
**Email:** arbitration@hkiac.org / fwan@hkiac.org  
**Tel:** +852 2912 2000  
**Fax:** +852 2524 2171

#### **Email Communication**

For the purposes of efficiency, we encourage the use of email communication whenever possible. Accordingly, we invite the parties to inform us whether they agree to communicate with HKIAC by email only in these proceedings.

Thank you for your attention.

Yours faithfully,

Hong Kong International Arbitration Centre

Encl. 2013 HKIAC Administered Arbitration Rules and 50 Questions & Answers  
Note on Method for Determining the Fees of the Arbitral Tribunal  
Practice Note on Costs of Arbitration (Based on Schedule 2 and Hourly Rates)  
Practice Note on Costs of Arbitration (Based on Schedule 3 and the Sum in Dispute)

(not reproduced)

WP/OB





香港國際仲裁中心  
Hong Kong International  
Arbitration Centre

1 August 2018

Joseph Langweiler  
75 Court Street  
Capital City  
Mediterraneo  
By fax: +0 146 9850  
By email: langweiler@lawyer.me & by courier

Black Beauty Equestrian  
2 Seabiscuit Drive  
Oceanside  
Equatoriana  
By courier only

Dear Sirs/Mesdames,

**Case No.:** HKIAC/A18128  
**Claimant:** Phar Lap Allevamento (Mediterraneo)  
**Respondent:** Black Beauty Equestrian (Equatoriana)  
**Re:** Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017

We refer to the captioned case and our letter dated 31 July 2018.

We recall that, in the Notice of Arbitration dated 31 July 2018 (the “**Notice**”), Claimant designated Ms. Wantha Davis of 14 Churchill Downs, Capital City, Mediterraneo as the first co-arbitrator in this case. Further to Claimant’s designation, we enclose copies of Ms. Davis’s (i) Declaration of Acceptance and Statement of Availability, Impartiality and Independence and (ii) curriculum vitae, for the parties’ reference.

Ms. Davis agrees to be bound by Schedule 2 of the 2013 HKIAC Administered Arbitration Rules (the “**Rules**”) and her proposed hourly rate for this arbitration is US\$ 380.

In accordance with Article 10.2 of the Rules, we kindly request that Claimant confirm whether it is agreeable to Ms. Davis’s hourly rate **by 8 August 2018**.

Thank you for your attention.

Yours faithfully,

Hong Kong International Arbitration Centre

Encl. Ms. Davis’s Declaration of Acceptance and Statement of Availability, Impartiality and Independence  
Ms. Davis’s curriculum vitae (not reproduced)

WP/OB



**ARBITRATOR'S DECLARATION OF ACCEPTANCE  
AND STATEMENT OF AVAILABILITY, IMPARTIALITY AND INDEPENDENCE**

*(Please check the relevant box or boxes)*

I, the undersigned,

Last Name: DAVIS

First Name: WANTHA

**NON-ACCEPTANCE:**

- I hereby declare that I **decline** to serve as arbitrator in the subject case.  
(If you wish to state the reasons for checking this box, please do so using a separate sheet.)

**ACCEPTANCE:**

- I hereby declare that I accept to serve as arbitrator under the 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules (the "Rules") in the above-referenced case. In so declaring, I confirm that I have familiarized myself with the requirements of the Rules and that I am available to serve as an arbitrator in accordance with all of the requirements of the Rules. In particular, I confirm that my schedule is such that I will be able to devote sufficient time to deal with the above-referenced case in the ordinary course of its development in accordance with Article 13.5 of the Rules which provide for the fair and efficient conduct of the arbitration and that I know of no reason why any award would not be rendered within a reasonable period. I also acknowledge an ongoing duty incumbent on me throughout the arbitration, to disclose, without delay, any circumstances likely to give rise to justifiable doubts as to my impartiality or independence.

- I hereby declare that I **agree** to be bound by the method for determining the arbitral tribunal's fees applicable in accordance with Article 10.1 of the Rules.

**IMPARTIALITY AND INDEPENDENCE**

*(If you accept to serve as arbitrator, please also check one of the following boxes. The choice of which box to check will be determined based on whether any circumstance or relationship—past or present, direct or indirect—with any of the parties or their counsel, third parties including any related entities or other representatives, whether financial, professional or of another kind, and whether the nature of any such circumstance or relationship is such that disclosure is called for pursuant to the criteria set out below. Any doubt should be resolved in favour of disclosure.)*

- I am **impartial and independent** with respect to each of the parties and any third parties relevant for present purposes and intend to remain so. To the best of my knowledge, there are no facts or circumstances, past or present, which need to be disclosed because they are likely to give rise to justifiable doubts as to my impartiality or independence.

OR

- I am **impartial and independent** with respect to each of the parties and any third parties relevant for present purposes and intend to remain so; **however**, in consideration of Article 11 of the Rules, I call your attention to the following facts and circumstances which I hereafter disclose because they might be of such a nature as to give rise to justifiable doubts as to my impartiality or independence. (Please use a separate sheet.)

Signature:

*W. Davis*

Date:

*1 August 2018*

**Joseph Langweiler**  
Advocate at the Court  
75 Court Street  
Capital City  
Mediterraneo  
Tel (o) 146 9845; Telefax (o) 146 9850  
Langweiler@lawyer.me

By email and courier  
Mr. Formula Wan  
Hong Kong International Arbitration Centre  
38<sup>th</sup> Floor Two Exchange Square  
8 Connaught Place  
Central  
Hong Kong

2 August 2018

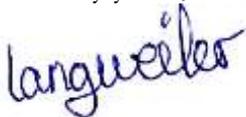
Dear Mr. Wan,

Thank you very much for your letter of 1 August. Giving the requested information, I can confirm the following:

- 1) CLAIMANT agrees to the proposed hourly rate for Ms. Davis of US\$ 380;
- 2) CLAIMANT has paid its share of the initial deposits; and
- 3) CLAIMANT agrees to communicate with HKIAC by email only.

Furthermore, CLAIMANT proposes to determine the arbitral tribunal's fees in accordance with Schedule 2 of the Rules, i.e. on the basis of hourly rates.

Sincerely yours,



Joseph Langweiler

cc. Black Beauty Equestrian



香港國際仲裁中心  
Hong Kong International  
Arbitration Centre

2 August 2018

Joseph Langweiler  
By email: langweiler@lawyer.me only

Black Beauty Equestrian  
2 Seabiscuit Drive  
Oceanside  
Equatoriana  
By courier only

Dear Sirs/Mesdames,

**Case No.:** HKIAC/A18128  
**Claimant:** Phar Lap Allevamento (Mediterraneo)  
**Respondent:** Black Beauty Equestrian (Equatoriana)  
**Re:** Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017

We refer to the captioned case and our letter dated 1 August 2018. We also acknowledge receipt of Claimant's counsel's letter to HKIAC dated 2 August 2018, on even date, which was copied to Respondent.

#### **Co-Arbitrator Designated by Claimant**

We note that Claimant agrees to Ms. Davis's proposed hourly rate of US\$ 380.

Pursuant to Article 9.1 of the 2013 HKIAC Administered Arbitration Rules (the "**Rules**"), all designations of an arbitrator are subject to confirmation by HKIAC, upon which the appointment shall become effective. Once the method for determining the fees and expenses of the arbitral tribunal has been determined in accordance with Article 10.1 of the Rules, we will proceed with the confirmation procedure under Article 9.2 of the Rules in respect of Claimant's designation of Ms. Davis.

#### **Method for Determining the Fees of the Arbitral Tribunal**

In accordance with Article 10.1 of the Rules, the parties are invited to agree on the method for determining the fees of the arbitral tribunal within **30 days** from the date on which Respondent received the Notice (i.e., **by 30 August 2018**).

Claimant has indicated that it prefers adopting the method for determining the fees of the arbitral tribunal according hourly rates in accordance with Schedule 2 of the Rules. If the parties fail to agree on the applicable method within the specified period, the arbitral tribunal's fees shall be calculated on the basis of hourly rate(s) in accordance with the terms of Schedule 2 of the Rules.

WP/OB

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Hong Kong International  
Arbitration Centre

Case No.: HKIAC/A18128

Claimant: Phar Lap Allevamento (Mediterraneo)

Respondent: Black Beauty Equestrian (Equatoriana)

Re: Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017

#### Initial Deposits

We acknowledge receipt of the sums of **US\$ 12,780** and **US\$ 5,336.50** from Claimant, representing payment of its share of the initial deposits for the arbitral tribunal's fees and expenses and HKIAC's Administrative Fees, respectively.

We look forward to receiving Respondent's share of the initial deposits for the arbitral tribunal's fees and expenses (i.e., **US\$ 12,780**) and for HKIAC's Administrative Fees (i.e., **US\$ 5,336.50**) by **14 August 2018**.

#### Email Communication

For the purposes of efficiency, we encourage the use of email communication whenever possible. We note that Claimant has agreed to communicate with HKIAC by email only. We look forward to hearing from Respondent whether it agrees to the same.

Thank you for your attention.

Yours faithfully,

Hong Kong International Arbitration Centre

WP/OB



**JULIA CLARA FASTTRACK**

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

By email and courier

Mr. Formula Wan  
Hong Kong International Arbitration Centre  
38th Floor Two Exchange Square  
8 Connaught Place  
Central  
Hong Kong

24 August 2018

**Phar Lap Allevamento v. Black Beauty Equestrian  
HKIAC/A18128**

Dear Mr. Wan,

I hereby indicate that I represent RESPONDENT in the above referenced arbitral proceedings.  
A power of attorney is attached.

Please find enclosed RESPONDENT's Answer to the Notice of Arbitration, a copy of which  
has been send directly to CLAIMANT. Please note that:

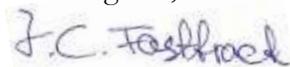
- 1) RESPONDENT has paid its share of the initial deposits;
- 2) RESPONDENT agrees to CLAIMANT's proposal to determine the tribunal's fees in  
accordance with schedule 2 of the Rules; and
- 3) RESPONDENT agrees to communicate with HKIAC by email only.

RESPONDENT nominates as its arbitrator

**Dr. Francesca Dettorie, Circus Maximus Avenue 1, Derby, Equatoriana.**

Could you please take the necessary steps for her confirmation.

Kind regards,



Julia Clara Fasttrack

cc. Joseph Langweiler

**JULIA CLARA FASTTRACK**

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

**Answer to the Notice of Arbitration**

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

in the Arbitral Proceedings Case No HKIAC/A18128

*Phar Lap Allevamento v. Black Beauty Equestrian*

**Phar Lap Allevamento**

Rue Frankel 1  
Capital City  
Mediterraneo

- CLAIMANT-

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

**Black Beauty Equestrian**

2 Seabiscuit Drive  
Oceanside  
Equatoriana

- RESPONDENT-

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

**INTRODUCTION**

1. In its Notice of Arbitration, CLAIMANT presents an incomplete summary of the facts, omitting some important details of the last part of the contract negotiation just before the unfortunate accident of the two main negotiators. In addition, CLAIMANT draws completely wrong legal conclusions from the facts presented.
2. The Arbitral Tribunal lacks jurisdiction and the necessary powers for the claim raised. Furthermore, CLAIMANT's claim for an additional remuneration on the basis of an adaptation of the contract is not justified.

**FACTS**

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



4. As correctly stated by CLAIMANT, RESPONDENT had in its email of 28 March 2017 ([Claimant's Exhibit 3](#)) objected to the forum selection clause and asked for delivery DDP. CLAIMANT in its email of 31 March 2017 accepted DDP delivery in principle but asked to be relieved from all risks associated with such a delivery or at least to be protected against the risk of changing health and security requirements by a hardship clause ([Claimant's Exhibit 4](#)). The first option was not acceptable for RESPONDENT who was not willing to pay a much higher price for receiving basically nothing. Thus, the Parties concentrated in their following discussions on the inclusion of a hardship clause. Again, RESPONDENT considered the originally suggested ICC-hardship clause to be too broad. Consequently, an approach was taken to regulate a number of possible risks directly and then merely add a hardship wording to the existing force majeure clause.
5. In relation to the arbitration clause, RESPONDENT's proposal had made clear its sincere wish for an arbitration agreement which was governed by the law of the place of arbitration and not by the law of the contract. Such a clause was actually included in Mr. Antley's latest draft of 10 April 2017 ([Respondent's Exhibit 1](#)).
6. In its reply, of 11 April 2017, CLAIMANT had changed the suggested place of arbitration but had not objected to our proposal that the law of the place of arbitration should govern the arbitration agreement ([Respondent's Exhibit 2](#)).
7. The newly suggested neutral place of arbitration, which was acceptable for us, meant, however, that also the choice of law provision had to be changed, to avoid the uncertainties resulting from the absence of a choice. Thus Mr. Antley had listed the choice of law governing the arbitration agreement as one of the points to be addressed in the final contract ([Respondent's Exhibit 3](#)).
8. That the choice of law clause was not included into the Sales Agreement as finally agreed was merely due to an oversight resulting from the fact that because of the dreadful car accident on 12 April 2017 the original negotiation team was no longer available. Instead the contract had to be finalized by employees on both sides who had previously not been involved in the negotiation and the drafting of the contract. While Mr. Krone found the note of Mr. Antley he did not fully understand his reference to the law governing the arbitration agreement and to the hardship clause ([Respondent's Exhibit 3](#)).
9. In relation to the hardship clause, the negotiations finally resulted in a very narrowly worded clause, which was then included into the existing force majeure clause and did not provide for any adaptation by the arbitral tribunal ([Respondent's Exhibit 3](#)).
10. Contrary to CLAIMANT's insinuations RESPONDENT did also not agree to any adaptation following CLAIMANT's request in January 2018. Quite to the contrary, Mr. Shoemaker made clear in his telephone conversation that his understanding of the contract was that CLAIMANT had to bear the costs but that he would verify that with the persons involved in drafting. He also pointed out that he had no authority to agree on an adaptation ([Respondent's Exhibit 4](#)). Given RESPONDENT's interest in a delivery of the outstanding doses and CLAIMANT's threats to stop delivery it is obvious that Mr. Shoemaker could not reject CLAIMANT's request outright.

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

## **LEGAL**

### **Lack of Jurisdiction**

12. The Arbitral Tribunal lacks jurisdiction to decide the case. The claim raised does not merely require the arbitrators to order a payment on the basis of an interpretation of the contract but actually asks for its adaptation. CLAIMANT is not claiming the originally agreed contractual remuneration which has been undisputedly been paid by RESPONDENT. Instead, CLAIMANT is seeking a remuneration which goes beyond that amount and for which the arbitrators would have to adapt the contract.
13. The interpretation of the arbitration agreement is governed by the law of Danubia which recognizes that arbitrators may adapt contracts but requires an express empowerment for that. Such an express conferral of powers is, however, missing in the present contract. Quite to the contrary, RESPONDENT, when suggesting the arbitration clause explicitly reduced the broad wording of the Model Clause of the HKIAC by deleting any reference which could be interpreted as an empowerment for contract adaptation.
14. Contrary to CLAIMANT's allegations, RESPONDENT never agreed to have the arbitration agreement governed by the law of the contract. There is no express choice of such law in the arbitration clause nor is there any implied choice. Under Danubian law, as well as under all other potentially relevant arbitration laws the arbitration agreement is considered to be a legally separate agreement from the container contract in which it is included. That is clearly recognized by Article 16 of the Danubian Arbitration law as well as the identically worded Article 16 of the Mediterranean Arbitration Law which both explicitly acknowledge the doctrine of separability. Thus, the reference in the choice of law clause directly preceding the arbitration clause that "this Sales Agreement is governed by the law of Mediterraneo" (emphasis added) is merely determining the law applicable for the main contract, i.e. the "Sales" part of it. It does not refer to the following arbitration clause and can also not be interpreted as an implicit choice for the arbitration agreement.
15. That becomes even clearer if one, as CLAIMANT wants to do, looks at the drafting history of the arbitration clause. The first draft of the arbitration agreement actually contained an express choice of law provision for the arbitration clause. That choice provided for the application of the law of the place of arbitration, which was in that draft Equatoriana. It was subsequently merely forgotten to include that provision in the final version. But there was never any deliberate choice in favor of the law of Mediterraneo as the law governing the main contract. It is one of the distinguishing features of the selected institution that their model clause contains an explicit reference to the law governing the arbitration agreement.

16. Danubian law adheres for the interpretation of contracts including arbitration agreements to the “four corners rule”, i.e. that the interpretation of the arbitration agreement is limited to its wording and no external evidence may be relied upon. In particular, reliance on the drafting history and preceding communication is excluded if the wording is clear.
17. In the present case, the arbitration agreement itself, which is to be treated as a separate contract for its interpretation under the four corners rules, contains no choice of law wording. Unlike in many other contracts the choice of law clause for the main contract, the sales agreement, is not contained in the arbitration clause. Instead, it is included in a separate clause preceding the arbitration agreement.

### **Substance**

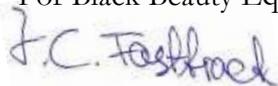
18. CLAIMANT’s claim for an increased remuneration is completely baseless. CLAIMANT has no right to ask for an adaptation of the contract, neither under the force majeure/hardship clause nor under Art. 79 CISG.
19. Reliance on the hardship clause is not possible. The narrowly worded clause is not applicable to the present impediment and does not provide for the requested remedy, i.e. adaptation by the Arbitral Tribunal. RESPONDENT would have never entered into such a contract the financial dimension of which would be dependent on the discretion of the arbitrators.
20. CLAIMANT can also not rely on Art. 79 of the CISG. First of all, by including the force majeure and hardship clause into the contract the Parties have provided for a special regulation of the problem of changed circumstances excluding an application of Art. 79 CISG. It constitutes a derogation in the sense of Art. 6 CISG.
21. Second, Art. 79 CISG does not regulate hardship and does not provide for the remedy requested by CLAIMANT, which is the increase of the contract price as considered appropriate by the arbitral tribunal.

### **REQUESTS FOR RELIEF**

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

Oceanside, 24 August 2018

For Black Beauty Equestrian



Julia Clara Fasttrack





---

**From:** Black Beauty Equestrian <blackbeauty@blackbeauty.eq>  
**Sent:** 10 April 2017, 4:37 p.m.  
**To:** Phar Lap Allevamento <PharLap@allevamento.me>  
**Re:** Inquiry re Nijinsky III

Dear Ms. Napravnik,

To speed up the negotiations on one of our last open points, we have prepared a first draft for the dispute resolution clause which we would consider appropriate in light of the fact that the Sales Agreement is governed by the law of Mediterraneo. Our draft is largely based on the model clause suggested by the HKIAC. The proposal has narrowed down and streamlined a little the fairly broad wording of the clause and provides for arbitration in Equatoriana and also submits the arbitration clause to the law of Equatoriana. It provides:

***"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."***

Please let us know whether you have any objections to the clause.

Sincerely,

Chris Antley

**Black Beauty Equestrian**  
2 Seabiscuit Drive  
Oceanside, Equatoriana  
T: (0)214 669804  
Email: blackbeauty@blackbeauty.eq

BlackBeautyEquestrian.com



---

**From:** Phar Lap Allevamento <PharLap@allevamento.me>  
**Sent:** 11 April 2017, 11:23 a.m.  
**To:** Black Beauty Equestrian <blackbeauty@blackbeauty.eq>  
**Re:** Inquiry re Nijinsky III

Dear Mr Antley,

Thank you very much, for your proposal.

To avoid any further futile discussion on the issue I would like to inform you that Phar Lap has an internal policy according to which consent to a contract submitted to a foreign law or providing for dispute resolution in the country of the counterparty requires special approval by the creditors' committee, a board in which all financing banks are included. It would, however, be possible to agree on arbitration in a neutral country.

To accommodate your wish not to be submitted to the jurisdiction of the courts in Mediterraneo, and to arbitrate under the rules of the HKIAC we would largely accept your proposal with an amendment as to the place of arbitration, so that the clause would read 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."***

That offer is naturally on the condition that the law applicable to the Sales Agreements remains the law of Mediterraneo.

Concerning the other open point, we would suggest reliance on the ICC-Hardship clause.

Sincerely,

Julie Napravnik

**PHAR LAP ALLEVAMENTO**  
Rue Frankel 1  
Capital City, Mediterraneo  
P: (0)146 9346359

pharlapallevamento.com

### Witness Statement of Julian Krone

I am the head of the legal department at Black Beauty Equestrian, which is composed of four lawyers, one of which was Mr. Antley until he left the company following his severe car accident in April 2017. The negotiations for the Sales Agreement with Phar Lap Allevamento were conducted exclusively by Mr. Antley until 12 April 2017. While we discussed the main strategy, i.e. the need for DDP delivery and the non-acceptability of the courts of Mediterraneo I was not involved in the detailed negotiations nor did he report about them.

Mr. Antley had the habit of writing down after each round of negotiations which issues were still open and what he had to address in the next round. He had done this also in the present case. After the car accident on 12 April 2017 we found the following note of Mr. Antley in his "negotiation file", which he had apparently prepared after his short meeting with Ms. Napravnik in the morning of 12 April:

*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*

After it was clear that due to the graveness of their injuries it would not be possible to get any meaningful input from the two main negotiators within the short time available I took over the negotiations and managed to finalize them taking into account as much as possible the content of the note. It was, however, at the time not completely clear to me what Mr. Antley meant with points 1 and 3. The draft of the contract had already a provision in favor of arbitration in Danubia as a neutral country and also a choice of law clause in favor of the law of Mediterraneo. Had I known at the time that Mr. Antley was referring to the law applicable to the arbitration instead of the law applicable to the contract I would have definitively included an express reference to the law of Danubia into the arbitration agreement. Equally, I would have objected to transfer powers to the Arbitral Tribunal to increase the price upon its discretion. In relation to the hardship clause my counterpart from the CLAIMANT's side, Mr. John Ferguson and myself agreed on the inclusion of a narrow hardship reference into the force majeure clause and regulated some other risks directly in the contract.

Oceanside, 23 August 2018

*J. Krone*

### Witness Statement of Greg Shoemaker

I was born on 9 June 1991 and am since 1 November 2017 responsible for the development of the racehorse breeding program which had until then been supervised by my colleague Chris Acatenengo. I am a veterinary by training and have an MBA from the University of Happy Valley. I have not been involved in the negotiation of the contract.

When I received Ms. Napravnik's email of 20 January 2018, I first inquired with the relevant ministry and the customs authority whether the tariffs on "animal products" also covered frozen semen used for artificial insemination in racehorse breeding. That took some time as also in the ministry the employees I spoke to first, were not certain whether frozen racehorse semen was covered under "animal products". Only later it was confirmed that "animal products" covered frozen race horse semen.

On the morning of 21 January 2018, I then called Ms. Napravnik to discuss the issue with her. My primary concern was to ensure that the remaining 50 doses were actually shipped, some of which were urgently needed given that start of the "breeding season".

During the discussion I told Ms. Napravnik several times that I was not a lawyer and had not been involved in the negotiations of the contract. Thus, I first had to confirm with my superiors whether there was an obligation by CLAIMANT to deliver at the conditions agreed upon or not. I also indicated that according to my understanding DDP meant that all risks had to be borne by Phar Lap but that I would try to clarify the legal situation with our legal department or the drafters of the Sales Agreement. I never committed to any adaptation of the price and would also not have had the required authority to do so. I merely stated that "if the contract provides for an increased price in the case of such a high additional tariff we will certainly find an agreement on the price." I actually read that sentence from a note prepared in anticipation of the discussion. I knew that CLAIMANT would not deliver if I were to reject their request outright. At the same time, I had no authority to consent to additional payments outside the contract without speaking to our management which was not available at the time. To avoid making any concessions which I could not keep my wife who is a lawyer, had written down the above quoted sentence for me and advised me to stick to it.

Oceanside, 22 August 2018



Greg Shoemaker



香港國際仲裁中心  
Hong Kong International  
Arbitration Centre

24 August 2018

Joseph Langweiler  
By email: langweiler@lawyer.me only

Julia Clara Fasttrack  
By email: fasttrack@host.eq only

Dear Sirs/Mesdames,

**Case No.:** HKIAC/A18128  
**Claimant:** Phar Lap Allevamento (Mediterraneo)  
**Respondent:** Black Beauty Equestrian (Equatoriana)  
**Re:** Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017

We refer to the captioned case and acknowledge receipt of Ms. Julia Clara Fasttrack's letter to HKIAC dated 24 August 2018, on even date.

#### **Respondent's Legal Representative**

We note Ms. Fasttrack's indication that she represents Respondent in the captioned arbitration. Going forward, HKIAC will address all communications for Respondent to Ms. Fasttrack only, unless and until notified otherwise.

#### **Answer to the Notice of Arbitration**

We also acknowledge receipt of Respondent's Answer to the Notice of Arbitration dated 24 August 2018 (the "Answer"), on even date. We note Respondent's confirmation that the Answer was served on Claimant's counsel in accordance with Article 5.1(g) of the 2013 HKIAC Administered Arbitration Rules (the "Rules").

#### **Constitution of the Arbitral Tribunal**

Respondent has designated Dr. Francesca Dettorie of Circus Maximus Avenue 1, Derby Equatoriana as the second co-arbitrator in this arbitration. Further to Respondent's designation, we enclose copies of Dr. Dettorie's (i) Declaration of Acceptance and Statement of Availability, Impartiality and Independence and (ii) curriculum vitae.

Dr. Dettorie agrees to be bound by Schedule 2 of the Rules. Her proposed hourly rate is US\$ 380.

In accordance with Article 10.2 of the Rules, we kindly request that Respondent confirm whether it is agreeable to Dr. Dettorie's proposed hourly rate **by 31 August 2018**.

WP/OB





香港國際仲裁中心  
Hong Kong International  
Arbitration Centre

**Case No.:** HKIAC/A18128  
**Claimant:** Phar Lap Allevamento (Mediterraneo)  
**Respondent:** Black Beauty Equestrian (Equatoriana)  
**Re:** Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017

#### **Method for Determining the Fees of the Arbitral Tribunal**

We note that the parties have agreed that the fees of the arbitral tribunal shall be calculated on the basis of hourly rates in accordance with the terms of Schedule 2 of the Rules.

#### **Initial Deposits**

We acknowledge receipt of the sums of **US\$ 12,780** and **US\$ 5,336,50** from Respondent, representing payment of its share of the initial deposits for the arbitral tribunal's fees and expenses and HKIAC's Administrative Fees, respectively.

#### **Email Communication**

We note that both parties have now indicated their agreement to communicate with HKIAC by email only in these proceedings.

Thank you for your attention.

Yours faithfully,

Hong Kong International Arbitration Centre

Encl. Dr. Dettorie's Declaration of Acceptance and Statement of Availability, Impartiality and Independence (not reproduced)  
Dr. Dettorie's curriculum vitae (not reproduced)

WP/OB



**JULIA CLARA FASTTRACK**

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

Via Email and Courier

Mr. Formula Wan  
Hong Kong International Arbitration Centre  
38th Floor Two Exchange Square  
8 Connaught Place  
Central  
Hong Kong

25 August 2018

Dear Mr. Wan,

Thank you very much for your letter of 24 August 2018. Giving the requested information, I can confirm that RESPONDENT agrees to the proposed hourly rate of Dr. Dettorie of US\$ 380.

Kind regards,



Julia Clara Fasttrack

cc. Joseph Langweiler



香港國際仲裁中心  
Hong Kong International  
Arbitration Centre

28 August 2018

Ms. Wantha Davis  
By email: wdavis@capitalcity.me only

Dr. Francesca Dettorie  
By email: drfdettorie@derby.eq only

Dear Mesdames,

**Case No.:** HKIAC/A18128  
**Claimant:** Phar Lap Allevamento (Mediterraneo)  
**Respondent:** Black Beauty Equestrian (Equatoriana)  
**Re:** Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017

We refer to the captioned case.

We wish to inform you that, on 27 August 2018, HKIAC confirmed your designations as co-arbitrators in this arbitration in accordance with Article 9 of the 2013 HKIAC Administered Arbitration Rules (the "Rules").

We now invite you to designate jointly the third and presiding arbitrator for this arbitration within 30 days in accordance with Article 8.1(c) of the Rules. Accordingly, we look forward to receiving your joint designation **by 27 September 2018**.

We draw your attention to Article 11.2 of the Rules, which provides as follows: "[s]ubject to Article 11.3, as a general rule, where the parties to an arbitration under these Rules are of different nationalities, a sole arbitrator or the presiding arbitrator of an arbitral tribunal shall not have the same nationality as any party unless specifically agreed otherwise by all parties in writing". We understand that Claimant is incorporated in Mediterraneo and that Respondent is incorporated in Equatoriana.

Please also note that, as Schedule 2 of the Rules is applicable in this case, paragraphs 9.3 and 9.5 therein provide that an arbitrator's hourly rate shall not exceed US\$ 830, unless expressly agreed in writing by all parties or if HKIAC so determines in exceptional circumstances.

Thank you for your attention.

Yours faithfully,

Hong Kong International Arbitration Centre

cc. Joseph Langweiler (By email: langweiler@lawyer.me only)  
Julia Clara Fasttrack (By email: fasttrack@host.eq only)

WP/OB

38/F Two Exchange Square 8 Connaught Place Hong Kong  
香港中環交易廣場第二座38樓

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Ms. Wantha Davis  
14 Churchill Downs  
Capital City  
Mediterraneo

By email and courier

Mr. Formula Wan  
Hong Kong International Arbitration Centre  
38th Floor Two Exchange Square  
8 Connaught Place  
Central  
Hong Kong

14 September 2018

*HKLAC/A18128: Phar Lap Allevamento v. Black Beauty Equestrian*

**Designation of Presiding Arbitrator pursuant to Article 8(1)(c) HKIAC-Rules 2013**

Dear Mr. Wan,

In the above referenced arbitral proceedings, Dr. Dettorie and myself, in close cooperation with the Parties have agreed to designate the following person as Presiding Arbitrator:

**Prof. Calvin de Souza**  
**Happy Valley Road 79**  
**1011 Vindobona**  
**Danubia**

Attached you will find his CV and Declaration of Acceptance and Statement of Availability, Impartiality and Independence. Could you please take the necessary steps for his confirmation?

Kind regards



Wantha Davis

Attachment:

CV of Prof. Calvin de Souza (not reproduced)

Declaration of Acceptance and Statement of Availability, Impartiality and Independence (not reproduced)



香港國際仲裁中心  
Hong Kong International  
Arbitration Centre

17 September 2018

Joseph Langweiler  
By email: langweiler@lawyer.me only

Julia Clara Fasttrack  
By email: fasttrack@host.eq only

Dear Sirs/Mesdames,

**Case No.:** HKIAC/A18128  
**Claimant:** Phar Lap Allevamento (Mediterraneo)  
**Respondent:** Black Beauty Equestrian (Equatoriana)  
**Re:** Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017

We refer to the captioned case and our letter dated 28 August 2018 to the co-arbitrators.

We inform the parties that, in accordance with Article 8 of the 2013 HKIAC Administered Arbitration Rules (the "Rules"), on 15 September 2018, the co-arbitrators designated Prof. Calvin de Souza of Happy Valley Road 79, 1011 Vindobona, Danubia as the third and presiding arbitrator in respect of the captioned case. We hereby enclose copies of Prof. de Souza's: (i) Declaration of Acceptance and Statement of Availability, Impartiality and Independence; and (ii) curriculum vitae, for the parties' reference. Prof. de Souza agrees to be bound by the terms set out in Schedule 2 of the Rules and his proposed hourly rate is US\$ 450.

Pursuant to Article 10.2 of the Rules, we kindly request that the parties confirm whether they are agreeable to Prof. de Souza's hourly rate **by 24 September 2018**. We also invite the parties to submit any other comments they may have in respect of the designation of Prof. de Souza as the third and presiding arbitrator **by the same deadline**.

Thank you for your attention.

Yours faithfully,

Hong Kong International Arbitration Centre

Encl. Prof. de Souza's Declaration of Acceptance and Statement of Availability, Impartiality and Independence (not reproduced)  
Prof. de Souza's curriculum vitae (not reproduced)

cc. Ms. Wantha Davis (By email: wdavis@capitalcity.me only)  
Dr. Francesca Dettorie (By email: drfdettorie@derby.eq only)

WP/OB

38/F Two Exchange Square 8 Connaught Place Hong Kong  
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**JULIA CLARA FASTTRACK**

Advocate at the Court  
14 Capital Boulevard  
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fasttrack@host.eq

Via Email and Courier

Mr. Formula Wan  
Hong Kong International Arbitration Centre  
38th Floor Two Exchange Square  
8 Connaught Place  
Central  
Hong Kong

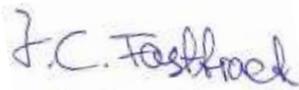
17 September 2018

Dear Mr. Wan,

Thank you very much for your email of 17 September. RESPONDENT hereby agrees to Prof. de Souza's hourly rate.

We have no further comments.

Kind regards,



Julia Clara Fasttrack

cc. Joseph Langweiler

**Joseph Langweiler**

Advocate at the Court  
75 Court Street  
Capital City  
Mediterraneo  
Tel (o) 146 9845; Telefax (o) 146 9850  
Langweiler@lawyer.me

By email and courier

Mr. Formula Wan  
Hong Kong International Arbitration Centre  
38<sup>th</sup> Floor Two Exchange Square  
8 Connaught Place  
Central  
Hong Kong

17 September 2018

Dear Mr. Wan,

It is with great pleasure that I confirm Claimant's agreement to Prof. de Souza's hourly rate.

At this stage of the proceedings, there are no further comments from our side.

Sincerely yours,



Joseph Langweiler

cc. Black Beauty Equestrian



香港國際仲裁中心  
Hong Kong International  
Arbitration Centre

18 September 2018

Joseph Langweiler  
By email: langweiler@lawyer.me only

Julia Clara Fasttrack  
By email: fasttrack@host.eq only

Wantha Davis  
By email: wdavis@capitalcity.me only

Francesca Dettorie  
By email: drfdettorie@derby.eq only

Calvin de Souza  
By email: caldesouza@happyvallye.da only

Dear Sirs/Mesdames,

**Case No.:** HKIAC/A18128  
**Claimant:** Phar Lap Allevamento (Mediterraneo)  
**Respondent:** Black Beauty Equestrian (Equatoriana)  
**Re:** Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017

We refer to the captioned case and acknowledge receipt of the parties' respective letters to HKIAC dated 17 September 2018, on even date.

#### **Constitution of the Arbitral Tribunal**

We note that both parties are agreeable to Prof. de Souza's proposed hourly rate of US\$ 450.

In accordance with Articles 9.1 and 9.2(a) of the 2013 HKIAC Administered Arbitration Rules (the "Rules"), HKIAC has confirmed the designation of Prof. de Souza as the third and presiding arbitrator in the captioned arbitration.

As the arbitral tribunal has now been constituted, HKIAC will transmit electronically the case file to the arbitrators by email today.

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WP/OB

38/F Two Exchange Square 8 Connaught Place Hong Kong  
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**Case No.:** HKIAC/A18128  
**Claimant:** Phar Lap Allevamento (Mediterraneo)  
**Respondent:** Black Beauty Equestrian (Equatoriana)  
**Re:** Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017

### **Fees and Expenses of the Arbitral Tribunal**

Pursuant to Article 10.1 of the Rules, the arbitral tribunal's fees and expenses shall be determined in accordance with the terms of Schedule 2 of the Rules. Accordingly, the fees of the arbitral tribunal shall be calculated on the basis of hourly rates as follows:

Ms. Wantha Davis US\$ 380  
Dr. Francesca Dettorie US\$ 380  
Prof. Calvin de Souza US\$ 450

Guidelines on the payment of fees and accounting of expenses can be found in the Practice Note on Costs of Arbitration – Schedule 2 (the “**Practice Note**”), a copy of which is enclosed.

### **Deposits**

In accordance with Article 40.1 of the Rules, we have requested each party to deposit with HKIAC an equal amount as an initial advance for the fees and costs of the arbitration. The parties have remitted a total of **US\$ 25,560** and **US\$ 12,780** as deposits for the fees and expenses of the arbitral tribunal and for HKIAC's Administrative Fees, respectively. We enclose an updated statement of account for the arbitral tribunal's and the parties' information.

HKIAC may direct interim payments to be paid out of such deposits to cover the arbitral tribunal's fees and expenses from time to time. Guidelines for the accounting of expenses can be found in paragraph 5 of the Practice Note.

We would like to inform the arbitral tribunal that supplementary deposits may be requested by HKIAC during the arbitration pursuant to Article 40.3 of the Rules.

### **Hearing Facilities**

When the appropriate time comes, the parties are encouraged to consider using HKIAC's hearing facilities. They are equipped with state-of-the-art technology, can accommodate large groups, are centrally located in Hong Kong, and can be configured to suit the requirements of any hearing or meeting in this case. For more information about our facilities, please visit <http://hkiac.org/our-services/facilities>.

---

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**Case No.:** HKIAC/A18128  
**Claimant:** Phar Lap Allevamento (Mediterraneo)  
**Respondent:** Black Beauty Equestrian (Equatoriana)  
**Re:** Dispute relating to the Frozen Semen Sales Agreement dated 6 May 2017

#### **HKIAC's Guidelines on the Use of a Secretary to the Arbitral Tribunal**

If the arbitral tribunal intends to appoint a tribunal secretary, we encourage the adoption of HKIAC's Guidelines on the Use of a Secretary to the Arbitral Tribunal (the "Guidelines") by the parties, which contain detailed provisions on the appointment, challenge, duties, and remuneration of tribunal secretaries. A copy of the Guidelines is enclosed.

In this respect, we note that members of the HKIAC Secretariat are available to act as tribunal secretary in this case. HKIAC's Secretariat is composed of qualified Counsel and Deputy Counsel, who are admitted to multiple jurisdictions, speak multiple languages and have experience in international commercial and investment arbitrations. To view profiles of the Secretariat's legal staff, please visit <http://hkiac.org/about-us/secretariat>.

To find out more about HKIAC's Tribunal Secretary's Service, please visit <http://www.hkiac.org/arbitration/tribunal-secretaries/tribunal-secretary-service>.

#### **Case Number**

We have assigned the reference number "HKIAC/A18128" for this arbitration. Please use this reference number in all communications throughout the arbitral proceedings. In particular, we request the parties and the arbitral tribunal to indicate the reference number in the subject line of all emails sent to HKIAC.

Thank you for your attention.

Yours faithfully,

Hong Kong International Arbitration Centre

Encl.: Practice Note on Costs of Arbitration – Schedule 2 (not reproduced)  
HKIAC's Guidelines on the Use of a Secretary to the Arbitral Tribunal (not reproduced)

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20 September 2018

**Arbitral Proceedings HKIAC/A18128**

**Phar Lap Allevamento v. Black Beauty Equestrian**

Dear Colleagues,

First of all, I would like to thank you for the consent to my appointment.

The Arbitral Tribunal would like to discuss with you in a TelCo on 4 October 2018 the further conduct of the proceedings after having familiarized itself with the file.

Kind regards,

For the Arbitral Tribunal



Prof. Calvin de Souza  
Presiding Arbitrator

cc. HKIAC

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2 October 2018

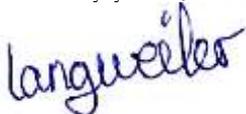
Dear Members of the Arbitral Tribunal,

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

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

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

Sincerely yours,



Joseph Langweiler

cc. HKIAC



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3 October 2018

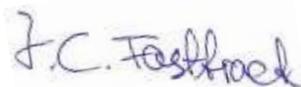
Dear Members of the Arbitral Tribunal,

RESPONDENT strongly objects to CLAIMANT's malicious, false and misleading allegation of contradictory behavior as well as to the announced submission of materials from the other arbitration. Such submission could only occur in violation of contractual and statutory confidentiality obligations. The only other arbitration in which RESPONDENT has been involved in, has been conducted also under the HKIAC 2013 Rules, which contain in Article 42 an express obligation to keep the proceedings confidential.

The existence of such an express confidentiality provision in the applicable arbitration rules should also exclude any argument that documents can be disclosed under "prevailing principles of transparency" or the UNCITRAL Rules on Transparency. They are clearly not applicable in the other arbitration nor in this arbitration.

RESPONDENT is furthermore authorized by the opponent in the other arbitral proceedings to state that the allegations by CLAIMANT do not reflect reality and are taken out of context. A first investigation has disclosed that the only source of the information promised could either be two former employees of RESPONDENT, the contracts of which had been terminated three months ago for cause with immediate effect, or a hack of RESPONDENT's computer system which occurred three weeks ago and where the hackers managed to retrieve a considerable amount of data. In both cases the evidence would have been obtained by illegal means and should not be admitted in the arbitration. That should apply irrespective of whether or not CLAIMANT had any involvement in obtaining the document or whether they have been made available elsewhere in the worldwide web.

Kind regards,



Julia Clara Fasttrack

cc. HKIAC

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

**in the Arbitral Proceedings HKIAC/A18128**

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

- I. Following the receipt of the file from the HKIAC the Arbitral Tribunal held a telephone conference with both Parties on 4 October 2018 discussing the further conduct of the proceedings.
- II. The Arbitral Tribunal takes note of the fact that in the telephone conference of 4 October 2018 both Parties agreed:
- to conduct the proceedings on the basis of the newest version of the Hong Kong Arbitration Rules, i.e. the HKIAC Rules 2018, which officially enter into force in November 2018, available at  
(  
<http://hkiac.org/content/2018-hkiac-administered-arbitration-rules>
  - to reserve the final decision on costs for a separate cost award;
  - that according to Danubian Contract Law, which contains the alleged “four corner rule” excluding all extraneous evidence for the interpretation of contracts and where arbitration agreements are interpreted narrowly, there is a high likelihood that the arbitration agreement would not be interpreted as authorizing a contract adaptation by the Arbitral Tribunal;
  - that in case the Arbitral Tribunal should deny its jurisdiction to adapt the contract, it should indicate that to the parties so that RESPONDENT would reconsider whether or not to maintain its objection to the jurisdiction of the Arbitral Tribunal;
  - that such a reconsideration would be based on the condition that all costs incurred for the jurisdiction phase is borne by CLAIMANT;
  - that therefore both Parties should already in this phase of the proceedings submit pleadings on the merits of the claim, including the admissibility of the contested evidence.
- III. In the light of these agreements and considerations the Arbitral Tribunal hereby makes the following orders:
1. In their next submissions and at the Oral Hearing in Vindobona (Hong Kong) the Parties are required to address the following issues:
    - a. Does the tribunal have the jurisdiction and/or the powers under the arbitration agreement to adapt the contract, which includes in particular the question of which law governs the arbitration agreement and its interpretation;

- b. Should CLAIMANT be entitled to submit evidence from the other arbitration proceedings on the basis of the assumption that this evidence had been obtained either through a breach of a confidentiality agreement or through an illegal hack of RESPONDENT's Computer system;
- c. Is CLAIMANT entitled to the payment of US\$ 1,250,000 or any other amount resulting from an adaptation of the price
  - i. under clause 12 of the contract
  - ii. or under the CISG?

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

2. For their submissions the following Procedural Timetable applies:
  - a. CLAIMANT's Submission: no later than 6 December 2018
  - b. RESPONDENT's Submission: no later than 24 January 2019
3. The submissions are to be made in accordance with the Rules of the Moot agreed upon at the telephone conference.
4. It is undisputed between the Parties that Equatoriana, Mediterraneo and Danubia are Contracting States of the CISG. The general contract law Equatoriana and Mediterraneo is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts. Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments.
 

There is consistent jurisprudence in Mediterraneo that in sales contracts governed by the CISG, the latter also applies to the conclusion and interpretation of the arbitration clause contained in such contracts.
5. In the event Parties need further information, Requests for Clarification must be made in accordance with para. 29 of the Moot Rules no later than 25 October 2018 via their online party (team) account. No team is allowed to submit more than ten questions.
6. For those institutions participating ONLY IN THE VIS EAST questions should be emailed to [clarifications@vismoot.org](mailto:clarifications@vismoot.org). Where an institution is participating in both Hong Kong and Vienna, the Hong Kong team should submit its questions together with those of the team participating in Vienna via the latter's account on the Vis website.

Clarifications must be categorized as follows:

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

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

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

Vindobona, 5 October 2018

For the Arbitral Tribunal



Prof. Calvin de Souza  
Presiding Arbitrator

cc. HKIAC

**PROCEDURAL ORDER NO 2**  
of 2 November 2018

**in the Arbitral Proceedings HKIAC/A18128**

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

1. **Have the Parties ever conducted any business before?** No.
2. **Did the general conditions referred to in Exhibits C2 and C3 include any reference to adaptation and/or modification of contracts, and/or hardship or a prohibition to resell?** No.
3. **Why are there different fonts in the Frozen Semen Sales Agreement (Exhibit C 5)?** The present Frozen Semen Sales Agreement is based on a basic industry template from Mediterraneo. This template is used by Claimant in the other areas of equestrian sport where artificial insemination is allowed for the sale of frozen semen for the use on pre-identified mares in the current breeding session. The template leaves a number of blanks (e.g. parties/price etc.) or alternatives (e.g. clause 3 – Has/Has Not/Unknown) which have to be filled in by the parties, crossed out or underlined. All additions made by the parties are in italics or underlined.
4. **How have the Parties arrived at the final version of the Frozen Semen Sales Agreement?** The template with the first additions (e.g. seller, buyer, stallion, price) had been attached to the email of Ms. Napravnik of 24 March 2017 (Exhibit C 2). As frozen semen of Nijinsky III had never been used before, there was no information about any pregnancies based on the use of frozen semen but there had been pregnancies resulting from natural coverings, so that both alternatives were underlined. Until the accident, Mr. Antley and Ms. Napravnik had already agreed on clauses 1-5 and had made the necessary additions to the template. These clauses were subsequently not changed by Mr. Ferguson and Mr. Krone. They used the preexisting file and merely made the necessary changes and additions to clauses 6 – 15 to reflect their agreement. The original version sent by Ms. Napravnik contained as clause 15 a forum selection clause in favor of the courts in Mediterraneo, to which Respondent objected.
5. **Did the persons who finalized the contract have access to the prior emails chain?** Yes.
6. **Did Mr. Ferguson and Mr. Krone discuss the arbitration and choice of law clauses and, if so, what did they discuss?** No, they merely took the draft of the relevant parts contained in the email of 11 April 2017 (Exhibit R 2) and added the last two sentences containing the number of arbitrators and the language of arbitration as found in the email of 10 April 2017 (Exhibit R 1). They cannot remember with sufficient certainty why they did not also include the sentence concerning the law applicable to the arbitration agreement.
7. **Did Mr. Ferguson or Mr. Krone ever attempt to clarify what was in the note with either Napravnik or Antley?** No. In light of the limited importance attributed at the time of negotiation to the arbitration clause and the hardship clause and the medical conditions of the two former negotiators no efforts were made to contact them.

8. **How was the final contractual price of the semen determined?** It is the result of the negotiations involving also Claimant's request to modify the standard DDP delivery terms and including a hardship clause. Respondent was not willing to accept Claimant's original requests of 99,500 USD for the semen and an additional 1,000 USD for the change of the delivery terms. During the negotiation of the additional clauses there were no distinctions made between the additional costs for DDP delivery and the price for the goods. Instead a single price was discussed and finally an agreement was reached on the terms contained in the contract. While the removal of certain risks associated normally with a DDP delivery obligation had been used as an argument to lower the overall price, no particular figure can be attributed to it. On the basis of the contractual provisions as finally agreed, the direct additional costs associated with transportation and DDP delivery per dose are 200 USD.
9. **Where is the place of delivery according to the Claimant's general conditions?** They provide in their present version of 2016 for delivery EXW Capital City. Claimant, however, regularly offers to its customers to organize the delivery of the frozen semen with Phar Lap Transportation LLP. This previously was a division within the Claimant's own business, but it was sold to an outside investor in the course of the restructuring in 2016.
10. **Did the Parties agree on DDP, Seabiscuit Drive, Oceanside, Equatoriana as the place of delivery and INCOTERMS 2010 edition?** Yes.
11. **What is the reason behind the delivery and payment dates?** The "operational" breeding season for racehorses is from 15 February until 1 July to ensure that the foals are borne early in the year. Thoroughbreds race by age until they are three-years-old and any thoroughbred born in a particular year will turn one year old on the next 1 January. Respondent wanted to ensure that some of the semen could still be used for the breeding season 2017 and that the remainder was available for the beginning of breeding season 2018. At the time the Parties entered into negotiations there was no frozen semen from Nijinsky III as there was no market for it. At the same time the stallion was fully booked for natural coverings for the breeding season 2017. Thus, Claimant could only deliver 25 doses to be used within the breeding season 2017. Irrespective of that, Claimant wanted to split the revenues derived from the agreement equally between 2017 and 2018 to meet conditions imposed by its creditors. As from the beginning Respondent had planned to sell at least 25 doses per year to other breeders, it was willing to accommodate Claimant's wish to also deliver the second installment in 2017. For testing purposes, and an eventual reshipping to its own customers, Claimant needed the batch for 2018 before 1 February 2018.
12. **Was it common ground between the parties that Clause 12 of the Sales Agreement should be interpreted more narrowly than the ICC 2003 clause?** When restarting the negotiation Mr. Krone told Mr. Ferguson that the ICC-Hardship Clause suggested by Ms. Napravnik was considered by Respondent to be too broad for the purposes of this contract and the objectives pursued. With reference to the risks mentioned by Ms. Napravnik in her email of 31 March 2017 (Exhibit C 4) he suggested the wording which was finally added to the force majeure clause in clause 12.
13. **Where did the parties conclude the Frozen Semen Sales Agreement?** The final negotiations and the signing of the Agreement took place in Mediterraneo on 6 May 2017.
14. **Was Phar Lap's Creditors Committee consulted about the final sales agreement?** No. In the context of a different contract the Creditors Committee had declared that there was no need to seek approval for the consent to arbitration clauses, as long as the place of arbitration

was in a neutral country with a functioning judicial system. In that context, the Creditors Committee had considered Danubia to be such a country, which is one of the reasons that Ms. Napravnik in her email of 11 April 2017 suggested Danubia as the place of arbitration. Furthermore, while she was not familiar with details of the Danubian Arbitration Law she knew that it was a largely verbatim adoption of the UNCITRAL Model Law like the arbitration laws of Mediterraneo and Equatoriana.

15. **What are Claimant’s previous policies on offering or refusing to offer frozen race horse semen?** Claimant had never before sold semen for racehorse breeding as there had been no previous requests. In the other areas of equine sport Claimant had regularly sold frozen semen but never more than 10 doses at a time to one breeder. In the present case, Claimant’s primary concern was to increase its revenues due to its strained financial situation. With the additional revenues resulting from the sale, the racehorse section which has been operating at a loss for several years would have generated a small profit for the first time since 2014. As the number of doses was unusual, the issue was discussed internally. The general conclusion was, however, that the deal involved limited risks for Claimant as Respondent bore the risks of the use of the semen.
16. **Where there any safeguards taken to prevent the resale of doses?** To be able to control the further use of semen Ms. Napravnik had in her email of 24 March 2017 made the resale to third parties dependent on an “express written consent”. Furthermore, as one assumed that at the time of contracting not all doses could be matched to named mares, Claimant added an express information requirement (in italics) to the section defining the mares in the template of the Frozen Semen Sales Agreement which had been attached to the email of 24 March 2017.
17. **Could the semen acquired during the lifting of ban be used even after imposition of the ban?** Yes, there was a clause in the order temporarily lifting the ban which allowed the use of acquired frozen semen until 1 July 2019. Furthermore, the offsprings resulting from such inseminations were guaranteed admission to all races in Equatoriana.
18. **Does the Respondent have a past history of reselling doses of frozen semen?** No.
19. **Would the price for the semen be higher for the buyers who intend to resell the goods?** There is no real market for the resale of frozen semen even in the other areas of equestrian sport where breeders rely extensively on frozen semen. In general, breeders only buy frozen semen for a specific mare. That is largely due to the fact, that stud owners have an interest in knowing for which mare the semen is used. The price which can be charged for frozen semen and natural coverings is strongly influenced by the success of offsprings. As a consequence stud owners have a preference that the semen is used on mares with a certain pedigree. The fees charged for natural coverings by Nijinsky III are around 110,000 USD with a profit margin of 15% which is above the ordinary profit margin of 10% for other stallions.
20. **Through what means did Claimant find out that the Respondent sold 15 doses at a price that is 20 percent higher than they initially bought from the Claimant?** Claimant was approached on 2 February 2018 by another breeder from Equatoriana which was enquiring about the prices of frozen semen from another stallion. During the conversation he told Claimant that he had been very happy with the Nijinski III semen which he had bought from Respondent for 120,000 USD. He knew that 15 doses had been sold to 10 different breeders, all of which had bought just one or two doses.

21. **What were the “past experiences...with unforeseeable additional health and safety requirements” resulting in “highly expensive tests” which Ms. Napravik mentioned in her email of 31 March 2017 (Exhibit C 4)?** In 2014 Claimant had sold three mares DDP Danubia to farms in Danubia for an overall price of 8 million USD. Shortly before the mares were delivered a rare aggressive type of foot and mouth disease was discovered in Danubia. While it was not affecting horses which often carried it, ultimately it killed a quarter of the cow population. As a consequence of the discovery, Danubia had immediately imposed very strict new health and safety requirements involving long quarantine time. In the case of the three mares the additional tests required and the long quarantine amounted to 40 % of the sales price. The case was widely reported in the press as it nearly resulted in the insolvency of Claimant. Claimant had heavily invested in new stables the year before and was dependent on the revenues from the sale for servicing its debts. It took Claimant some time to convince the Creditors Committee to authorize new loans which were only granted against firm commitments of restructuring with clear milestones.
22. **Was Respondent aware of Claimant’s financial difficulties?** Respondent was aware of unspecific rumors in the market that Claimant was still in financial difficulties and had been losing money over the last years. Further details were not known before the negotiations about the price adaptation.
23. **Have Mediterraneo or other countries imposed comparable tariffs before?** There have been few countries in the past which had tried to protect their farmers by tariffs on foreign agricultural products of a comparable size, but Mediterraneo was not one of them. The present tariff, which had been imposed by executive order effective from 15 November, being announced only days before, is extraordinary in several regards, i.e. the breadth of the goods and the countries covered, the amount and the speed with which it had been imposed. After his election on 25 April 2017 President Bouckaert had appointed Ms. Cecil Frankel, one of the most ardent critics of free trade, as his “superminister” for agriculture, trade and economics on 5 May 2017. She had been an outspoken protectionist for years, lamenting that the farmers of Mediterraneo were badly treated in other markets and advocacy limiting the access of foreign agricultural products to the Mediterranean market.
24. **Was it the 25 % tariff imposed by President Bouckaert which led to the second arbitration mentioned by Claimant in its letter of 2 October 2018?** Yes. The tariff explicitly mentioned “living animals” as one of the goods covered.
25. **When did the government of Equatoriana announce the imposition of the tariffs and when did the tariffs actually come into effect?** The tariffs were announced on 19 December 2017 by executive order and took effect from 15 January 2018 onwards. Until 2018 there had been no tariffs imposed on agricultural goods (or horse semen) in either Equatoriana or Mediterraneo.
26. **Did the Parties read the newspaper article about the retaliatory tariffs in the Peak Business News?** Yes, they did. However it did not cross their mind that the frozen semen could be considered to be an “agricultural good” so that the tariffs would apply to it. Only when Ms Napravnik asked for customs clearance on 19 January 2018 was she told by email, which she only read in the morning of 20 January 2018, that the tariff applied to semen as well.
27. **Could the Claimant have been exempted from or obtained a reduction in the additional tariffs charged in the last shipping?** No.

28. **Does Respondent have knowledge of the impact of the 30% tariff on Claimant's financial situation?** Yes. Claimant told him during the negotiations.
29. **Is Claimant suffering bankruptcy or is it financially endangered by paying the 30% tariffs?** Claimant has been making losses since 2014 primarily due to the high interest payments for the loan taken on to finance the new stables in 2013 and the costs for the restructuring measures. The restructuring plan which Claimant had agreed with its creditors in 2014 provided that Claimant would be profitable again from 2017 onwards. The automatic prolongation of the two main credit lines depended on being profitable in 2017 and 2018 respectively. With the additional revenues from the sale of the frozen semen Claimant had planned to make a profit in 2018 of 300.000 USD after 180.000 USD in 2017. That plan would be seriously endangered if Claimant had to bear the 1.250.000 USD. Negotiations of a new credit line will most likely be very difficult as one of the major creditors is by now the house bank of Claimant's largest competitor who is interested in buying the dressage part of Claimant. Thus, the bank would probably make the sale a precondition for the entry into a new credit.
30. **Would Respondent be financially endangered if it bore the 1.250.000\$?** No.
31. **How is Claimant's profit margin of 5% calculated?** Claimant has calculated the price for the frozen semen and the profit margin on the basis of the general cost-calculation in the racehorse department. Concerning the allocation of fixed costs and overheads one dose of frozen semen was treated the same as one natural covering, i.e. fixed costs of 80,000 USD were included into the calculation. In relation to the variable costs Claimant relied on its experience with frozen semen in the other areas of equestrian sport, where regularly frozen semen is sold. Claimant included variable costs of 15.000 USD per dose. On the basis of this calculation Claimant came to (fixed & variable) costs in the amount of 95,000 USD. The remaining 5,000 USD per dose are considered to be profit.
32. **Why did Ms. Napravnik contact Mr. Shoemaker instead of contacting Mr. Julian Krone or any of the Respondent's legal department personnel?** Mr. Shoemaker had been introduced to Ms. Napravnik in November 2017 as the person responsible for the racehorse breeding program including all questions concerning the Frozen Semen Sales Agreement. At the same time, she had been informed that Mr. Antley was out of hospital and in rehabilitation but would not return to work but seek early retirement by the beginning of 2018.
33. **Why did Respondent urgently need the January stock?** Respondent needed 6 doses for other customers each with deliver dates prior to 2<sup>nd</sup> February due to the start of the breeding season.
34. **Why did Mr. Shoemaker discuss the issue with his wife and not with member of the legal department?** Mr. Shoemaker has only been in charge of the racehorse breeding program since 1 November 2017 and knew about the great strategic importance attached to it by Respondent's investors. Thus, he wanted to ensure that the frozen semen would be available as agreed to be able to comply with Respondent's contractual delivery obligations towards its customers. When Mr. Shoemaker received the information about the tariff from Ms. Napravnik on Saturday morning he immediately tried to verify information through two friends at the Ministry. After they had confirmed that semen was covered he tried to reach members of the legal department. None were available: Thus, he discussed the strategy with his wife to ensure that the delivery could take place as agreed upon but he would not make any binding commitments.

35. **Who requested the meeting of 12 February 2018, for what purposes, and who was present?** The meeting took place in a hotel in Equatoriana upon Claimant's initiative who wanted to solve the issue of adaptation at the senior management level. It involved the CEO's of both parties and Ms. Napravnik and Mr. Shoemaker.
36. **Is there an express provision in the Danubian contract law that it should be applied to the arbitration agreement instead of the CISG?** No, but it is consistent jurisprudence in Danubia that due to the doctrine of separability the CISG does not apply to the arbitration agreement, as the latter is considered to be a procedural contract and not a sales agreement. Furthermore, the courts in Danubia are of the view that Art. 28(3) of the Danubian Arbitration Law (identical to Art. 28 (3) UNCITRAL Model Law) contains a general standard to be applied to the conferral of exceptional powers to the arbitral tribunal. Thus, while parties may authorize arbitral tribunals to adapt contracts, an express conferral of powers is required.
37. **Have any of the three arbitrators been involved in the Respondent's other HKIAC-arbitration?** No.
38. **Is Respondent represented in the other arbitration by the same counsel?** Yes.
39. **What was the dispute underlying the other arbitration and which were the laws applicable?** As can be deduced from the statement of facts in the "Partial Interim Award", the dispute concerned the sale of a mare by Respondent to a buyer in Mediterraneo. The contract, negotiated also 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 Model HKIAC-Arbitration Clause with all additions. It provided for arbitration in front of three arbitrators under the HKIAC Arbitration Rules with a place of arbitration in Mediterraneo and declared the law of Mediterraneo to be applicable to 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 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. 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 the August 2019.
40. **How did Claimant learn about the other arbitral proceedings?** At the annual breeder conference Claimant's CEO heard about that arbitration from Mr. Kieron Velazquez. He is the new CEO of one of Claimant's regular customers but until the 30 May 2018 had been working for the Mediterranean buyer in the other arbitration. He has not been involved in the arbitration as such but knew the main issues in dispute, i.e. that, due to the tariffs imposed, Respondent was only willing to deliver the mare once the price has been increased to reflect the tariff.
41. **Is Claimant in possession of the Partial Interim Award?** Not yet, but Claimant has in the meantime arranged an opportunity to acquire the "Partial Interim Award" against payment of

1000 USD from a company which provides intelligence on the horseracing industry. It had turned out that contrary to his assumption Mr. Velazquez could not organize from his former employer a copy of the Partial Interim Award or Respondent's submission in the case. He had, however, given Claimant the address of the company which had promised to sell Claimant a copy of the award. 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 not clear 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.

42. **Was there any security gap in Respondent's computer system that the hackers exploited or could have exploited?** Yes. Respondent had used an outdated firewall to protect its computer system which had made it easy for the hackers to enter the system.
43. **What are the general conflict of laws rules for contracts in Danubia, Mediterraneo and Equatoriana?** They are a verbatim adoption of the Hague Principles on Choice of Law in International Commercial Contracts.
44. **What is the legal tradition of Danubia?** Danubia is a common law country.
45. **What are the provisions of Danubian Contract Law?** Danubian Contract Law for international contracts is a largely verbatim adoption of the UNIDROIT Principles on International Commercial Contracts with the two relevant exceptions. First, the interpretation rule in Art. 4.3 is replaced for written contracts by the four corners rule. In substance the four corners rule under Danubian law as applied by the Danubian courts has largely the same effects as a merger clause under Article 2.1.17 UNIDROIT Principles of International Commercial Contracts. Second, Article 6.2.3 (4)(b) is worded differently granting the power "to adapt the contract" to the court only "if authorized". There is no consistent case law as to the meaning of that addition.
46. **Are there any specific rules on evidence in particular how to deal with evidence obtained in breach of contractual obligations or by illicit means in the arbitration laws of Equatoriana, Mediterraneo, and Danubia?** No.
47. **Are Mediterraneo and Equatoriana part of the World Trade Organization?** Yes.
48. **Does Respondent object to the Tribunal's jurisdiction in general (e.g. also on contract interpretation) or only to its jurisdiction to adapt the price?** Only to the latter.
49. **The Arbitral Tribunal would like to make the following correction and clarifications to its Procedural Order 1:**
  - a. The link to the 2018 HKIAC Rules in para. II, 1<sup>st</sup> bullet point should read: <http://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018>
  - b. In para. II, 4<sup>th</sup> bullet point it should read "jurisdiction/power" instead of "jurisdiction"
  - c. The reference in para. III 1 c ii to the CISG covers both alternatives of Art. 7 (2) CISG.
50. **Claimant would like to make the following corrections and clarifications to its submissions:**

- a. In the Notice of arbitration para. 9 2<sup>nd</sup> sentence “RESPONDENT” should be replaced by “CLAIMANT”
- b. In her witness statement (Exhibit C 8) Ms. Napravnik stated that “clauses 1 – 6” were already existing. The reference should be to “clauses 1 -5”. The price and the payment modalities were part of the final discussions.
- c. The reference by Ms. Napravnik in her email of 11 April 2017 (Exhibit R 2) to “Sales Agreements” is meant to be a reference to the “Frozen Semen Sales Agreement”.

**51. Respondent would like to make the following corrections and clarifications to its submissions:**

- a. In his “negotiation file” Mr. Antley had the habit of referring to the other party as “Claimant”. Thus, the reference in the note presented by Mr. Krone in his witness statement (Exhibit R 3) to “Claimant” is due to that habit and is not an indication of bad faith on the side of Mr. Antley.
- b. In para. 15 of the Answer to the Notice of Arbitration it should read “as the law governing **the arbitration agreement**” instead of “the main contract”

Vindobona, 2 November 2018

For the Arbitral Tribunal



Prof. Calvin de Souza  
Presiding Arbitrator