UNIVERSITAS KATOLIK PARAHYANGAN

Bandung, Indonesia

16TH ANNUAL WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
March-April 2019, Hong Kong SAR

MEMORANDUM FOR:

RESPONDENT

ON BEHALF OF:

BLACK BEAUTY EQUESTRIAN

2 Seabiscuit Drive
Oceanside, Equatoriana

RESPONDENT

AGAINST:

PHAR LAP ALLEVAMENTO

Rue Frankel 1
Capital City, Mediterraneo

CLAIMANT

COUNSELS:

Einar Fausta
Elisabeth Tania Ekaputri
Evelyn Tanissa
Jason Edgar
Sherly

TABLE OF CONTENTS

INDEX OF BOOKS AND JOURNAL ARTICLES

Abbreviation	Citation	Cited on
Argen	Robert Argen, 'Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration', 40 Brook. J. Int'L. (2014)	Para. 60
Arvay	Joseph J. Arvay 'Slavutych v. Baker: Privilege, Confidence and Illegally Obtained Evidence' (1977) 15(2)	Para. 68
Bailey	James E. Bailey, 'Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales' (1999) 32(2)	Para. 113
Born	Gary Born, International Commercial Arbitration (Second Edition) (Kluwer Law International 2014)	Paras. 30, 56, 69, 71, 74
Bridge	Michael Bridge, 'The CISG and the UNIDROIT Principles of International Commercial Contracts' (2014)	Para. 116
CISG Commentary	Ingeborg Schwenzer, 'Commentary on the UN Convention on the International Sale of Goods (CISG)' Fourth Edition (2016) (Oxford University Press)	Paras. 103, 119, 120, 122
Dai	Tian Dai, 'A Case Analysis of Scafom International BV v. Lorraine Tubes S.A.S: The Application of Article 79 of the United Nations Convention on International Sale of Goods' (Perth International Law Journal 2016)	Paras. 119, 123
Debattista	Charles Debattista, *ICC Force Majeure Clause 2003, Hardship Clause 2003* (ICC Publication 2003)	Para. 101

Dumberry	Patrick Dumberry, The Fair and Equitable Treatment Standard. A Guide to NAFTA Case Law on Article 1105 (Kluwer Law International 2013)	Para. 69
Fletcher	Harry M. Flechtner, 'The Exemption Provisions of the Sales Convention, Including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court' (University of Belgrade, Belgrade Law Review 2011)	Paras. 123, 124
Gaillard/Savage	Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, (Kluwer Law International 1999)	Paras. 25, 37, 38
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Holtzmann/Neuhaus	Howard M. Holtzmann, Joseph E. Neuhaus, Edda Kristjandsdottir and Thomas W. Walsh, *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, (Kluwer Law International 2015)	Paras. 37, 38
Honnold	John O. Honnold, 'Uniform Law for International Sales under the 1980 United Nations Convention' (1999)	Paras. 112, 115
Johnson	Lise Johnson, 'New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps' (2013)	Para. 62

Knahr/Reinisch	Christina Knahr and August Reinisch, *The Law and Practice of International Courts and Tribunals*, (Martinus Nijhoff Publishers 2007)	Para. 61
Kuster/Andersen	David Kuster and Camilla Baasch Andersen, 'Hardly Room for Hardship-A Functional Review of Article 79 of The CISG' (2016) 35	Para. 104
Leonhard	Chunlin Leonhard, 'Beyond the Four Corners of a Written Contract: A Global Challenge to U.S. Contract Law', 21 Pace Int'l L. Rev. 1 (2009)	Para. 45
Lew	Dr. Julian D.M. Lew, 'Expert Report of Dr. Julian D.M. Lew in Esso/BHP v. Plowman', 11 Arb. Int'l 283, 285	Para. 56
Lew/Mistelis/Kröll	Julian D. M. Lew, Loukas A. Mistelis, and Stefan Michael Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003)	Para. 42
Lookofsky	Joseph Lookofsky, 'Not Running Wild with the CISG' (2011) 29(141)	Para. 127
Marghitola	Reto Marghitola, Document Production in International Arbitration (Kluwer Law International 2015)	Paras. 69, 74
Members of the Eurojuris International Contracts & Litigation Group	Members of the Eurojuris International Contracts & Litigation Group, 'Hardship Provisions & Hardship Clauses in International Business Contracts' (2016)	Para. 96
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Moser/Bao	Michael J Moser and Chiann Bao, *A Guide to the HKIAC Arbitration Rules, First Edition* (Oxford University Press 2017)	Paras. 53, 54, 55
Nicholas	Barry Nicholas, 'Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods' (Pace Law School Institute of International Commercial Law 2004)	Para. 128
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Reisman/Freedman	Reisman, W. Michael and Freedman, Eric E., 'The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication', 76 Am. J. Int'l L. 737 (1982)	Para. 68
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Schwenzer	Ingeborg Schwenzer, Force Majeure and Hardship in International Sales Contracts (Victoria University of Wellington Law Review 2008)	Paras. 108, 110
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Veneziano	Anna Veneziano, 'UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court' (Oxford University Press, 2010)	Para. 124
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Prima Paint v. Flood & Conklin	Prima Paint Corp., v. Flood & Conklin Mfg. Co. [1967] Supreme Court of the United States 388 L.Ed.2d 1270	Paras. 25, 43
Vital Berry Marketing v. Dira-Frost	Vital Berry Marketing v. Dira-Frost [1995] District Court of Koophandel Hasselt A.R. 1849/94, 4205/94	Paras. 110, 124
	Germany	
Iron Molybdenum Case	United Kingdom v. Germany [1997] Hamburg Court of Appeal 1 U 167/95	Paras. 110, 124
	Italy	
Nuova Fucinati v. Fondmetall International	Nuova Fucinati S.p.A. v. Fondmetall International A.B [1993] *Tribunale Civile* (District Court) *di Monza* R.G. 4267/88	Para. 110
Raymond Gosset v. Carapelli	Raymond Gosset v. Carapelli [1963] Court of Cassation No. 13,405	Para. 25
	New Zealand	
Yoshimoto Case	Hideo Yoshimoto v. Canterbury Golf International Ltd [2000] New Zealand Court of Appeal (NZCA 350)	Para. 55

Sweden

URETEK Case	URETEK Worldwide Oy v. Doan Technology Pty Ltd [2015] Svea Court of Appeal T 975-15	Para. 65

Switzerland

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United Kingdom

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United States

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LIST OF ARBITRAL AWARDS

Abbreviation	Citation	Cited on
	Bulgarian Chamber of Commerce and Industry	
Steel Ropes Case	Russia v. Bulgaria [1998] BCCI Case No. 11/96 of 12 February 1998	Paras. 110, 124.
	Court of Arbitration for Sport	
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Machine Case	Canada v. Italy [2002] ICC Court of Arbitration 11333 of 2002	Para. 104
Methanex Case	Methanex Corporation v. United States of America [2005] Ad Hoc Tribunal (UNCITRAL) 44 ILM 1345, Inside US Trade, 19 August 2005, 12, IIC 167 (2005)	Paras. 68, 74
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ICC Case No. 3267 of 1984	Mexican construction company v. Belgian company [1984] ICC Court of Arbitration 3267 of 1984	Para. 38
	International Center for Settlement of Investment Dispute (ICSID)	
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Caratube v. Kazakhstan	Caratube international Oil Company LLP v. Republic of Kazakhstan [2009] ICSID Case No. ARB/08/12	Paras. 70, 72

Libananco Case	Libananco Holdings Co. Limited v. Republic of Turkey [2011] ICSID Case No. ARB/06/8	Para. 74
Merrill & Ring Case	Merrill & Ring v. Canada [2010] ICSID Case No. UNCT/07/1	Para. 69

International Commercial Arbitration at the Ukraine Chamber of Commerce and Industry

Corn Case	Switzerland v. Ukraine [2012] ICAC at the UCCI Case No. 218y/2011	Paras. 110, 124

Permanent Court of Arbitration (PCA)

Yukos Case	Yukos Universal Limited v. The Russian Federation [2014] PCA Case No. A.A 22	Para. 70

LIST OF TREATIES, ARBITRATION RULES, AND STATUTES

Abbreviation	Full Text	Cited on
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, S.Treaty Document Number 98-9 (1984), UN Document Number A/CONF 97/19, 1489 UNTS 3	Paras. 83, 127
HKIAC Rules	Hong Kong International Arbitration Centre on Administered Arbitration Rules 2018	Paras. 25, 36, 37, 54, 55
ULIS	1964 Convention on Sale Annex Uniform Law on The International Sale of Goods	Para. 114
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, as revised 7 July 2006, [2006] Uniform Law Review 866, A/61/17	Paras. 25, 35
UNIDROIT Principles	International Institute for the Unification of Private Law Principles of International Commercial Contracts, 2016 Edition, UNIDROIT	Paras. 49, 109
UNCITRAL Rules on Transparency	United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014)	Para. 62

LIST OF ABBREVIATIONS

Abbreviation	Full Text
&	And
%	Per cent
Art.	Article
cf.	Confer
CISG	United Nations Convention on International Sales of Goods
CLA's Memo	Claimant's Memorandum
CLAIMANT	Phar Lap Allevamento
e.g.	Example Given
Ex.	Exhibit
FIFA	Federation Internationale de Football Association
HKIAC	Hong Kong International Arbitration Centre
HKIAC Website	Hong Kong International Arbitration Centre Website
ICC	International Chamber of Commerce
ICSID	International Centre for the Settlement of Investment Disputes
Inc.	Incorporated
Mr.	Mister
Ms.	Miss
No.	Number
NoA	Notice of Arbitration

p.	Page
pp.	Page(s)
para.	Paragraph
paras.	Paragraph(s)
PCA	Permanent Court of Arbitration
PGT Industries, Inc. SA	Progressive Glass Technology Industries, Inc. Sales Agreement Model Contract
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
RESPONDENT	Black Beauty Equestrian
RNoA	Response to Notice of Arbitration
ULIS	1964 Convention on Sale Annex Uniform Law On The International Sale of Goods
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration
UNCITRAL Rules on Transparency	United Nations Commision on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollar
v.	Versus

SUMMARY OF FACTS

1. Phar Lap Allevamento, the CLAIMANT, is a company registered and located in Capital City, Mediterraneo. It operates Mediterraneo's oldest and most renowned stud farm, covering all areas of the equestrian sport.

2. Black Beauty Equestrian, the RESPONDENT, located in Oceanside, Equatoriana, is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions.

3. Phar Lap Allevamento is famous for one if its stallions, Nijinsky III, being one of the most successful racehorses ever. It has won several awards in Danubia, Mediterraneo, and Equatoriana. This made Nijinsky III one of the most sought-after stallions for breeding.

4. On 21 March 2017, RESPONDENT contacted CLAIMANT for a potential addition of Nijinsky III to its newly started breeding program. At the time, Equatorianian Government had imposed a ban on the transportation of living animals due to severe problems with foot and mouth disease which had already lasted for two years. As a reaction to this and the powerful interests shown by the Equatoriana racehorse breeding industry, a temporary lifting of the ban was done for artificial insemination of racehorses.

5. CLAIMANT and RESPONDENT both agreed on a contract of RESPONDENT purchasing 100 doses of frozen horse semen from CLAIMANT. The Sales Agreement was concluded on 6 May 2017, but beforehand the parties had negotiated the Arbitration Clause and Clause 12 (the clause asserted by CLAIMANT as constituting 'Hardship' Clause) at length.

6. RESPONDENT had in its email of 28 March 2017 objected to CLAIMANT's proposal for Mediterranean court in the forum selection clause, while also asking for delivery DDP. CLAIMANT in its email of 31 March 2017 accepted DDP delivery in principle but asked the inclusion of a 'Hardship' clause to protect itself against the risk of changing health and security requirements. In this regard, CLAIMANT suggested to use the ICC Hardship Clause 2003. However, RESPONDENT considered that ICC Hardship Clause 2003 to be too broad. Consequently, an approach was taken to regulate a number of possible risks directly and then added a 'hardship' wording to the existing *force majeure* clause in CLAIMANT's draft.

7. In relation to the Arbitration Clause, RESPONDENT had proposed at first (on 10 April 2017) to have the arbitration both at Equatoriana and governed by Equatorianian law as the law of the place of arbitration. RESPONDENT considered that proposal as appropriate because the governing law of the contract is already Mediterranean law. In its reply of 11 April 2017,

CLAIMANT had changed the suggested place of arbitration to Danubia but had not objected to RESPONDENT's proposal that the law of the place of arbitration should govern the Arbitration Clause. Instead, the specific reference of the governing law of the Arbitration Clause was simply deleted. Following CLAIMANT's email on 11 April 2017, Mr. Antley's, RESPONDENT's original negotiator, had noted that the governing law of the Arbitration Clause must be clarified.

8. However, the original negotiators from both parties were caught in an accident. The subsequent negotiators did not make any express changes to the negotiated draft before finalising the Sales Agreement.

9. Both parties had agreed to use instalments, divided into 2 separate payments. The first instalment of 5,000,000 USD was due on 18 May 2017, and the second instalment of 5,000,000 USD was due on 21 January 2018. CLAIMANT has agreed to deliver 2 shipments of the frozen semen. The first shipment of 25 doses on 20 May 2017, the second shipment of 25 doses on 3 October 2017, and the last shipment of 50 doses on 23 January 2018. No problems were found when shipping the first two shipments of frozen semen to Equatoriana.

10. Before the last shipment of 50 doses of the frozen semen, which was due on 23 January 2018, Mediterraneo's newly elected president enacted a 25% tariff on agricultural products coming from Equatoriana. Equatoriana retaliated by applying a 30% tariff on agricultural products coming from Mediterraneo. The list of affected products also included frozen semen from racehorses.

11. CLAIMANT immediately approached RESPONDENT to start negotiations for adjusting the price of the frozen semen. RESPONDENT emphasised the urgency of having the shipment, while leaving the question of adaptation depending on the provision of the Sales Agreement. Due to RESPONDENT's urging, CLAIMANT authorized the shipment on 23 January 2018.

12. After further review, RESPONDENT is of the position that no adaptation of the price is warranted under the Sales Agreement. Because of an impasse in negotiation, CLAIMANT submitted the present dispute to arbitration on 31 July 2018.

13. Subsequent to the commencement of arbitration, CLAIMANT received information concerning another HKIAC arbitration between the RESPONDENT and a third party regarding a sale of a promising mare. In that arbitration, the tribunal issued a Partial Interim Award applying 'hardship' to the sales agreement, allowing for an adaptation of the contract. CLAIMANT intends to submit that award as evidence in the current arbitration. To that end, CLAIMANT is currently engaging an intelligence company to obtain the award.

RESPONDENT objects to the submission of that award, and the Tribunal requests the submission of the parties with regards to the admissibility of that award on the assumption that the award is obtained by illegal means.

SUMMARY OF ARGUMENTS

14. **Issue 1: the Tribunal's lack of authority under the Arbitration Clause to adapt the contract.** The Arbitral Tribunal does not have the jurisdiction to adapt the contract under the law of Danubia as the governing law for the Arbitration Clause. This is irrespective of the governing law of the contract, namely the law of Mediterraneo. The negotiating documents show that the parties made an implied choice towards the law of Danubia to govern the Arbitration Clause. Under Danubian law, the Tribunal may only adapt a contract if there exist a prior express authorisation or agreement by the parties. Such express agreement is lacking here. Furthermore, Danubian law subscribes to the Parol Evidence Rule. Hence CLAIMANT cannot rely on any supposed understanding made by the negotiators on the authority of the Tribunal which eventually is not reflected in the express wording of the Arbitration Clause.

15. Even if Mediterranean law governs the Arbitration Clause, the Tribunal still does not have the authority to adapt the contract. The parties' negotiating documents still show that the understanding of both parties is to limit the authority of the Tribunal. This is shown, in particular, with the narrow 'Hardship' Clause and the modification to the HKIAC Model Clause used in the Arbitration Clause to provide for a narrower scope of the Tribunal's authority.

16. **Issue 2: the inadmissibility of evidence (Partial Interim Award) that CLAIMANT intends to submit.** The evidence is inadmissible because the submission of the evidence will violate the confidentiality of the Award as protected under the HKIAC Rules. The confidentiality of the evidence cannot be overridden by the principle of transparency, including as reflected in the UNCITRAL Rules of Transparency because the principle of transparency under the said rules only apply in investor-state arbitration. The principle does not generally apply in commercial arbitration which does not concern questions of public interest.

17. Furthermore, the evidence is inadmissible because general arbitral practice rejects the admission of evidence obtained through illegal or unlawful means. CLAIMANT cannot claim that it does not act in bad faith, or that it does not in itself involve in the illegal or unlawful gathering of the evidence. This is because CLAIMANT actively engages an intelligence company with dubious reputation to obtain the Partial Interim Award.

18. Lastly, the refusal to admit the evidence will not violate CLAIMANT's right to be heard. This is because there is no direct correlation between RESPONDENT's other proceeding and the current Case. The facts and the underlying contractual provision governing the two cases are

different. Hence it is not necessary for the Tribunal to admit the Partial Interim Award as evidence.

19. **Issue 3: CLAIMANT is not entitled to an adaptation of the price under Clause 12 of the Sales Agreement.** Clause 12 of the Sales Agreement only governs a *force majeure* situation and does not cover a 'hardship' situation as argued by CLAIMANT. The wording of the clause is sufficiently narrow, covering only those relating to 'Health and Safety Requirements' and comparable situation. The wording also departs from a common wording of a 'Hardship' Clause, which normally includes a definition of a 'hardship' situation followed by the effects of 'hardship' separate from a *Force Majeure* Clause. These all suggest that Clause 12 of the Sales Agreement does not cover a 'hardship' situation. The negotiating documents also support this position, because they show that the parties intended for a narrow hardship reference into the *Force Majeure* Clause and specifically regulate some other risks.

20. In any case, adaptation of the contract by the Tribunal is not intended as a remedy under Clause 12 of the Sales Agreement. The negotiating documents show that the parties never had a common intention to provide for adaptation of the contract by the Tribunal. In particular, RESPONDENT's negotiator merely promised that he would make a proposal on that point, but ultimately no such proposal was made and the negotiation was continued after the car accident without further common intention to transfer powers to the Tribunal to increase the price.

21. **Issue 3: in addition, CLAIMANT is also not entitled to an adaptation of price under CISG.** First, Clause 12 of the Sales Agreement sets aside the applicability of Art. 79 of the CISG. Under Art. 6 of the Convention, parties may derogate from certain provision in the Convention. In particular, the different wording and scope of the relevant provision in the contract has been held by numerous court decisions to have the effect of derogating the application of the Convention's provision.

22. Furthermore, Art. 79 of the CISG does not cover the situation of 'hardship'. Both the wording *"impediment beyond control"* in Art. 79, as well as the background and drafting history of Art. 79 of the CISG suggests that the provision does not incorporate the notion of 'hardship'. This position is also supported by numerous court decisions. 'Hardship' also cannot be applied under the Convention through a 'gap filling' method under Art. 7(2) of the CISG. This is because 'hardship' is not governed in the Convention to begin with. Furthermore, such 'gap filling' goes against the context, object and purpose of Art. 79 of the CISG.

23. In any event, adaptation of the price is not a remedy available under Art. 79 of the CISG. The paragraphs in Art. 79 of the CISG only refers to exemption of liability as remedy. While Art. 79(5) of the CISG opens the door for the exercise of any right other than claiming damages, there is nothing in the Convention which provides for a right to adapt the contract absent in the parties' agreement.

ISSUE 1: THE TRIBUNAL DOES NOT HAVE THE AUTHORITY TO ADAPT THE CONTRACT

A. THE TRIBUNAL DOES NOT HAVE THE AUTHORITY TO ADAPT THE CONTRACT UNDER DANUBIAN LAW AS THE LEX LOCI ARBITRI

I. The Arbitration Clause is governed by Danubian Law as the Lex Loci Arbitri

(i). Mediterranean law does not automatically govern the Arbitration Clause in accordance with the Principle of Separability

24. RESPONDENT submits that the starting point for the Tribunal's analysis on the law governing the Arbitration Clause should follow the Principle of Separability.

25. Danubia in this Case has adopted the UNCITRAL Model Law, Art. 16 of which affirms the Principle of Separability. Under that provision, an arbitration clause is considered to be an agreement independent of the other terms of the contract [*Art. 16 of the UNCITRAL Model Law*]. Under the HKIAC Rules, a similar provision can be found which stipulates that the arbitration clause is considered to be a separate agreement [*Art. 19(2) of the 2018 HKIAC Rules*]. Court practices around the world also reaffirm this principle [*Raymond Gosset v. Carapelli*; *Prima Paint v. Flood & Conklin*; *Gaillard/Savage, p. 203*].

26. CLAIMANT does not assert that there is a presumption in favor of the governing law of the contract to determine the law applicable to the Arbitration Clause. Therefore, it can only be concluded that the governing law of the Arbitration Clause must be separately determined and does not necessarily follow the governing law of the contract – a reflection of the Principle of Separability.

27. In the case law that CLAIMANT cited, the *Sulamérica Case* decided by the English Court of Appeal, the court held that in identifying the applicable governing law for the arbitration clause, tribunals must first consider whether there is an express choice of law, before moving on to consider whether an implied choice was made [*Sulamérica Case*].

28. In this Case, the parties had left out the express choice of law for the Arbitration Clause. Hence the next step is to determine if there is any implied choice. We will establish below that the implied choice of the parties here is to apply Danubian law, the *Lex Loci Arbitri*, as the law governing the Arbitration Clause.

(ii). The parties have made an implied choice for Danubian law to govern the Arbitration Clause

29. CLAIMANT asserts that there is an implied choice for Mediterranean law as the governing law of the Arbitration Clause [*CLA's Memo, pp. 5-6*]. However, there was never any such implied choice. Instead, the implied choice made by the parties is for Danubian law as the governing law for the Arbitration Clause.

30. With regards to the test in the ***Sulamérica*** court decision, the court adopted a step-by-step approach to ascertain a clear showing of which law applies to an arbitration clause [*Sulamérica Case; First Link Case*]. The steps include first, an express choice of law, followed by an implied choice of law [*Sulamérica Case*]. Lastly, if it cannot be proven by the first two steps, then a realest connection test must be applied to see which governing law prevails [*Sulamérica Case*]. Scholars have also stated that, to prove which implied law will be applied one must also take into consideration the seat of the arbitration and any other relevant factors such as the negotiations of the contract and matters concerning the validity of such agreements if taken to another foreign jurisdiction [*Born, p. 476; Glick/Venkatesan, p. 135*]

31. In the present Case, the Arbitration Clause is an almost identical adoption to the HKIAC Model Clause but without the inclusion of a particular governing law. In other words, there is no express choice of governing law.

32. Within the HKIAC Model Clause, such wording is to allow in one instance if the governing law were to be made to accommodate a different law system than the *Lex Loci Arbitri* to allow interpretation of the clause itself [*HKIAC Website*]. By deleting this particular wording, one can infer that the parties had agreed to not relegate this particularly different system of law and intended to adhere to the law of the seat of arbitration being Danubia.

33. With regards to the first proposal for the Arbitration Clause, RESPONDENT proposed to both seat the arbitration in Equatoriana and the governing law of the clause shall be Equatorianian law [*Ex. R1, p. 33*]. CLAIMANT rejected this proposal, saying "… *Phar Lap has an internal policy according to which consent to a contract submitted to a foreign law…It would, however, be possible to agree on arbitration in a neutral country* [*Ex. R2, p. 34*]." That is the reason CLAIMANT agreed for the seat of arbitration in Danubia, while CLAIMANT never made any counter proposal pointing to Mediterranean law as the law to govern the Arbitration Clause. In their email reply, CLAIMANT only referred to Mediterranean law as the governing law of the contract as a whole, not for the Arbitration Clause. Hence, RESPONDENT understood that Mediterranean law does not apply to the Arbitration Clause. This understanding is reflected as well in RESPONDENT's second negotiators witness statement [*Ex. R3, p. 35*].

34. CLAIMANT on the other hand should have been aware already of the applicability of Danubian law in the Arbitration Clause from the sequence of email correspondence. At least from what is agreed upon, there has been already a clear distinction between the law governing the Sales Agreement and the law governing the Arbitration Clause to satisfy both parties. With CLAIMANT's circumstances with regards to the contract, and in light of the Principle of Separability then the law governing the Arbitration Clause is Danubian law.

II. Under Danubian law, the Arbitration Clause cannot be interpreted to confer authority on the Tribunal to adapt the contract

(i). Danubian Law requires an express provision in the contract to allow adaptation of the contract by the Tribunal

35. CLAIMANT asserts that the Tribunal has the authority to adapt the contract. However, this conclusion can only be reached if, in interpreting the Arbitration Clause, one takes a broader view by also looking at the intention of the parties and not simply the words of the clause [*CLA's Memo, pp. 10-11*]. This clearly goes against the *Lex Loci Arbitri*. Under Danubian arbitration law, adaptation of a contract by an arbitral tribunal requires an express empowerment to that effect from the parties [*Art. 28(3) of the UNCITRAL Model Law*]. Such express empowerment is lacking in this Case.

36. It is generally accepted principle in international arbitration that the paramount duty of the arbitrator is to apply the contract of the parties [*Art. 19(2) of the HKIAC Rules*] – a corollary of the principle *pacta sunt servanda*. Therefore, in principle an arbitral tribunal must not deviate from the terms of the contract. It also follows that the tribunal in principle cannot adapt a contract. Adaptation of a contract by the tribunal, in this context, may be seen as a form of decision *ex aequo et bono* or *amiable compositeur*.

37. Art. 28(3) of the Danubian arbitration law, which is an adoption of the UNCITRAL Model Law, provides that a tribunal: "…*shall decide* ex aequo et bono *or as* amiable compositeur *only if the parties have expressly authorized it to do so."* The same rule also applies in HKIAC arbitration under the 2018 HKIAC Rules [*Art. 36(2) of the HKIAC Rules 2018*]. The requirement to have this conferral of power be expressly stated is to avoid miscommunication and confusion with regard to the tribunal's ability to adjudge a certain proceeding [*Holtzmann/Neuhaus, pp.* 770-771; *Gaillard/Savage, p.* 74].

38. Furthermore, even if the tribunal is authorized to decide *ex aequo et bono* or as *amiable compositeur*, several authorities hold that it does not necessarily mean that the tribunal may adapt a contract [*Holtzmann/Neuhaus, pp.* 770-771; *Gaillard/Savage, p.* 74]. For instance, ICC

arbitral tribunals have held that tribunals acting as *amiable compositeur* must still apply the contract of the parties, unless of reliance on the contract's provision is clearly against the true intent of the parties, or against public policy, or would amount to an abuse of rights [*ICC Award No. 3267 of 1979; ICC Award No. 3267 of 1984*]. No such assertions have been made by CLAIMANT in this Case.

39. Presently, the wording of the Arbitration Clause in the Sales Agreement only goes so far as to allow the Tribunal the authority to resolve *"Any dispute arising out of this contract, including the existence, validity, interpretation, performance, breach or termination…"* [*Ex. C5, p. 14, Clause 15*]. There is simply no express authority for the Tribunal to adapt the contract. As such, RESPONDENT submits that the Tribunal ought to conclude that they do not have the authority or power to do so.

(ii). The text of the Arbitration Clause also cannot be interpreted to give the Tribunal the authority to adapt the contract

40. CLAIMANT asserts that the Arbitration Clause would allow the Tribunal to have the power to adapt the contract if it were to be interpreted broadly. However, this Tribunal should reject such assertion as both parties in this Case has purposefully drafted the final Arbitration Clause narrowly. As such, the Arbitration Clause cannot be interpreted to empower the Tribunal to adapt the contract.

41. The Arbitration Clause was drafted first by RESPONDENT based on the HKIAC Model Clause, with slight deviation to make the clause narrower. The narrow wording in this Case is the omission of the word "*relating to"* which can be found in the HKIAC Model Arbitration Clause. RESPONDENT in their RNoA had stated that they "*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* [*RNoA, para. 13, p. 31*]." In the end, the Arbitration Clause only provide for arbitration of disputes "*arising out of this contract"*. This shows that the Tribunal only has the authority to consider matters directly coming out of the current contract.

42. Generally, scholars and courts have held that an arbitration clause which uses both the wording "*arising out of"* and "*in relation to"* as a broadly worded clause [*Redfern/Hunter, p.* 95; *Pennzoil v. Ramco*]. The meaning of each wording can also be distinctively divided, with the former concerning itself with issues derived out of the contract itself [*Lew/Mistelis/Kröll, p. 168*]. The latter, on the other hand, means to include also matters not directly coming out of the contract, but is closely connected to the contract or its execution [*Lew/Mistelis/Kröll, p. 168*].

43. For example, in *Pennzoil v. Ramco*, the US Court of Appeal upheld the lower court decision that the wordings "*arising out of"* followed and connected to "*in relations to"* is considered to be a clause that is broad and has an expansive reach [*Pennzoil v. Ramco; Prima Paint v. Flood & Conklin*]. The usage of such wordings is meant to encompass as much jurisdiction of the tribunal and the matter of the dispute as possible. By only referring to "*arising out of"* one can categorise this as being a "narrowly" worded clause. Within the case, the court of appeal had agreed without a shred of doubt that because the arbitral clause is worded "…*arising out of and in relation to…"* then it forms a broadly worded clause.

44. By omitting the wording "*in relation to"* as originally present in the HKIAC Model Clause, it is very clear that the parties in this Case had made the Arbitration Clause as being narrowly worded [*Pennzoil v. Ramco*]. They only intend to submit to arbitration those disputes deriving out of the terms of the contract itself – i.e. the interpretation or application of the terms of the contract themselves, not their adaptation. This leaves the adaptation of the contract as outside the Tribunal's jurisdiction.

(iii). Danubian law adopts the Parol Evidence rule in interpreting a contract, hence barring reliance on negotiating history to interpret the Arbitration Clause

45. CLAIMANT asserts that the Tribunal have the authority to adapt the contract, relying on the negotiation history of the Arbitration Clause [*CLA's Memo, p. 10*]. However, in the present Case, Danubian law adopts the Parol Evidence rule in interpreting a contract. Under that rule, a contract is to be interpreted narrowly by solely looking at the wordings of the contract and excluding all of the pre-contractual negotiations of either parties or their subsequent conduct [*Yoshimoto Case; Leonhard, p. 19, para. 1*].

46. Parol Evidence rule is fundamentally similar with 'four corners' rule. The basic principle of 'four corners' rule is to examine the language of the contract solely within its written conduct and excluding all extraneous evidence for the interpretation of the contract [*Rowley, p. 88, para. 5; PO1, p. 52*]. Hence, Parol Evidence rule and 'four corners' rule provides the same manner.

47. Therefore, CLAIMANT's assertion in this respect must be rejected. The Tribunal is without the authority to adapt the contract. This is not to say that the negotiation history indicates otherwise – we will establish in the next section that, even if the Tribunal refer to the negotiating history, it will still find against CLAIMANT's assertion.

B. EVEN IF THE ARBITRATION CLAUSE IS GOVERNED BY MEDITERRANEAN LAW, THE TRIBUNAL STILL DOES NOT HAVE THE AUTHORITY TO ADAPT THE CONTRACT

48. In any event, even if the Tribunal considers that Mediterranean law should govern the Arbitration Clause – as asserted by CLAIMANT – the Tribunal should still find itself without the authority to adapt the contract. It is true that Mediterranean law provides for a broad interpretation for the contract [*NoA, p. 7, para. 16*]. However, in this vein the Tribunal should still come to the same conclusion with regards to its lack of authority.

49. Mediterraneo adopts the UNIDROIT Principles on International Commercial Contracts for the interpretation of the contract [*PO1, p. 53, para. 4*]. Art. 4.1 of the UNIDROIT Principles provides that the tribunal must utilise the common intention of both parties [*Art. 4.1 of the UNIDROIT Principles*]. This can only mean that the tribunal must seek into both parties' intention in a broad manner including the relevant circumstances in which the contract is drafted [*UNIDROIT Principles Commentary, p. 575, para. 3*]. Other than UNIDROIT Principles, the Tribunal may also rely on Art. 8 of the CISG to interpret the intention of both parties [*PO1, p. 53, para. 4*]. Hence, the interpretation of the contract under Mediterranean law is based on the intention of both parties.

50. In the present Case, RESPONDENT's subsequent negotiator, Ms. Krone, stated that "*Equally, I would have objected to transfer powers to the Arbitral Tribunal to increase the price upon its discretion"* [*Ex. R3, p. 35*]. It is very clear that RESPONDENT's negotiator would not want an adaptation of the contract to be done by the Tribunal. Following this, CLAIMANT had also agreed with RESPONDENT to discard the ICC Hardship Clause 2003 which is too broad to be applied for this contract [*Ex. C5, p. 14, Clause 12*]. By virtue of the reduced Arbitration Clause wordings and also the narrow 'Hardship' Clause applied in this contract, one can infer that both parties did not have any common intention to allow the Tribunal to adapt the contract.

51. Therefore, even if Mediterranean law governs the Arbitration Clause, the Tribunal still does not have the jurisdiction to adapt the contract as both parties had not agreed to give the Tribunal such authority.

ISSUE 2: CLAIMANT IS NOT ENTITLED TO SUBMIT EVIDENCE FROM THE OTHER ARBITRATION PROCEEDINGS

A. THE EVIDENCE IS INADMISSIBLE IN LINE WITH THE PRINCIPLE OF CONFIDENTIALITY IN INTERNATIONAL ARBITRATION

I. The submission of evidence would violate Article 42 of the 2013 HKIAC Rules and Article 45 of the 2018 HKIAC Rules

52. RESPONDENT's other arbitration is conducted under the HKIAC Rules 2013 [*Letter Fasttrack dated on 3 October 2018, p. 51, para 1*], while with CLAIMANT, it is conducted under the HKIAC Rules 2018. However, the relevant provisions in HKIAC Rules 2013 and HKIAC Rules 2018 that govern the same matter remain largely similar, such as those governing confidentiality of awards.

53. Under the Art. 42(5) of the HKIAC Rules 2013, *"An award may be published, whether in its entirety or in the form of excerpts or a summary, only under following conditions: … (c) no party objects to such publication within the time limit fixed for that purpose by HKIAC. In that case of an objection, the award shall not be published"*. This provision contains one of the strictest requirements regarding publication of arbitral awards, unlike other institutional arbitral rules [*Moser/Bao, p. 282*]. This provision also specifically deals with the situation where there is an objection from one party regarding the publication of the award to the other party.

54. Pursuant to Art. 42(1) of the HKIAC Rules 2013, *"Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to: … (b) an award made in the arbitration"* [*Art. 42(1) of the HKIAC Rules 2013*]. This article provides that parties in arbitration proceeding are prohibited to publish, disclose, and communicate any information regarding the arbitration proceedings or arbitral awards. If one party breaches this provision, then the other party may bring a claim for damages in the arbitration for any loss suffered because of the breach [*Moser/Bao, p. 282*]

55. Under Art. 42(2) of the HKIAC Rules 2013, it is provided that: *"The provisions of Article 42(1) also apply to the arbitral tribunal, any Emergency Arbitrator appointed in accordance with Schedule 4, expert witness, secretary of the arbitral tribunal and HKIAC"* [*Art. 42(2) of the HKIAC Rules 2013*]. This provision clearly extends the duty to maintain confidentiality to the arbitral tribunal, emergency arbitrator, expert witnesses, witnesses of fact, the secretary of the arbitral tribunal, and HKIAC [*Moser/Bao, p. 282*].

56. As established above, the provisions reflect the principle of confidentiality which is normally applied to prevent disclosure of information regarding the arbitration to third parties. The 'information' that should not be disclosed includes the arbitral awards themselves [*Born, p. 2782, paras. 1&2*; *Lew*]. Furthermore, the practice of confidentiality is also widely accepted in international arbitration, such as in *Dolling Baker v. Merrett*. In that case, the tribunal noted that *"…, their very nature is such that there must, in my judgement, be some implied obligation on both parties not to disclose or use any documents prepared for and used in the arbitration."* [*Dolling Baker v. Merrett*]. There, the British Court held that there exists an implied duty of confidentiality for both parties. Hence, international arbitration practice also recognises the principle of confidentiality [*Dolling Baker v. Merrett; Smeureanu, p. 33, para. 3*].

57. In the present Case, RESPONDENT expressly objects to the disclosure of the Partial Interim Award from its other arbitration proceeding [*Letter Fasttrack dated on 3 October 2018, p. 51, para. 1*]. This is because the disclosure of the Partial Interim Award by CLAIMANT will violate the contractual and statutory confidentiality obligations owed to RESPONDENT, and which the HKIAC Rules are also subjected to, under the Art. 42(1), 42(2) and 42(5) of the HKIAC Rules 2013.

58. Therefore, RESPONDENT submits that CLAIMANT may not submit the evidence or the Partial Interim Award from RESPONDENT's other arbitration

II. The confidentiality of the evidence cannot be overridden by the principle of transparency because the principle of transparency is not applicable in commercial arbitration such as in this Case

59. Transparency is not clearly defined in international commercial arbitration [*Poorooye/Feehily, p. 282, para. 1*]. Nevertheless, it is often invoked as it promotes openness and access to information in an accountable and democratic way. In the realm of arbitration, it commonly involves the disclosure of documents or other materials, open hearings, the participation of third parties in the arbitration proceeding, and public access [*Poorooye/Feehily, p. 282, para. 1*].

60. However, one element that needs to be established in order to apply the principle of transparency is the existence of a public interest because the purpose of transparency is to protect public interest [*Argen, p. 209, para. 2*]. In this context, transparency is based on the notion that the general public is a significant stakeholder in international arbitration insofar as the arbitration can affect the public interest [*Argen, p. 209, para. 2*].

61. One example is *Biwater Gauff v. Tanzania*, a case decided by ICSID tribunal that relates to a water privatisation dispute. There, the tribunal decided to disclose certain documents because

the information in those documents has an impact on the well-being of the public [*Biwater Gauff v. Tanzania; Knahr/Reinisch, p. 98*]. In the present Case, as well as in RESPONDENT's other HKIAC case, there clearly is no element of public interest since both cases have no possible effect on the general public. Hence, the principle of transparency is not applicable in this Case.

62. Therefore, CLAIMANT cannot rely on the principle of transparency including as reflected in the UNCITRAL Rules on Transparency. That instrument is not applicable in this Case, contrary to CLAIMANT's claim [*CLA's Memo, pp. 17-18; Letter Langweiler dated on 2 October 2018, p. 50, para. 3*]. Several provisions in the UNCITRAL Rules on Transparency itself clearly indicates that the transparency rule is not be applicable in commercial arbitration. For instance, Art. 1(1) states that the rule only applies to *"Investor-State"* arbitration, which means it is not applicable for international commercial arbitration [*Art. 1(1) of the UNCITRAL Rules on Transparency; Johnson, p. 9*]. Furthermore, under Art. 1(2) of the UNCITRAL Rules on Transparency, in order to apply the rules for an arbitration proceeding, both parties need to agree for the application of the Rules [*Art. 1(2) of the UNCITRAL Rules on Transparency*].

63. CLAIMANT and RESPONDENT never made any agreement that the UNCITRAL Rules on Transparency shall be applied for the arbitration proceeding. Hence, the principle of transparency and the UNCITRAL Rules on Transparency cannot be applied for the present arbitration proceeding.

B. THE EVIDENCE IS ALSO INADMISSIBLE BECAUSE IT IS OBTAINED THROUGH A BREACH OF CONFIDENTIALITY AGREEMENT OR AN ILLEGAL HACKING OF RESPONDENT'S COMPUTER SYSTEM

I. PO No. 1 already assumed that the evidence is of an unlawful origin

64. CLAIMANT in its memorandum attempts to argue that the Partial Interim Award procured through an intelligence company does not amount to illegally obtained evidence. That argument is irrelevant as the 2nd issue to be addressed at this stage of the proceedings is set by the Tribunal based on PO No. 1 "*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*" [*PO1, p. 53, para. 1*].

65. In general, arbitral tribunals determine procedural orders based on the agreements made by both parties [*URETEK Case*]. Here, the first paragraph of PO No. 1 states, "*the Arbitral Tribunal held a telephone conference with both Parties on 4 October 2018 discussing the further conduct of the proceedings*". This shows that the procedural order is formed by the Tribunal after a

discussion between the Tribunal and both of the parties [*PO1, p. 52, para. 1*]. As such, it should be made clear that the Tribunal has already assumed that the evidence CLAIMANT asked to submit is of an unlawful origin and therefore should not be made admissible.

66. Therefore, the proceeding should continue under the assumption that the evidence came from an unlawful origin, and RESPONDENT will further establish that such evidence should not be deemed admissible by the Tribunal.

II. International arbitral practice shows that, in principle, evidence of an unlawful origin is inadmissible

67. CLAIMANT submits that even if the Partial Interim Award has been illegally obtained, it may still be admissible [*CLA's Memo, p. 16*]. This assertion should be rejected.

68. Numerous authorities on international commercial arbitration have strongly considered that evidences procured from an unlawful origin are not admissible [*Arvay, p. 457; Reisman/Freedman, p. 743; Wälde, p. 184*]. This principled position has also been espoused in *Methanex Case* [*Methanex Case*]. Therefore, in this Case, the Partial Interim Award or the evidence that CLAIMANT seeks to submit to this Tribunal should be deemed inadmissible.

69. Moreover, knowing that the evidence is of an illegal nature, the action of submitting such evidence to the Tribunal would constitute an act of bad faith [*Sussman, p. 4*]. Conversely, this goes against the basic principle in international commercial arbitration that every party must act in good faith [*Born, p. 3483; Marghitola, p. 106; Mirabal/Derains, p. 184; Waincymer, p. 500*]. For this purpose, 'bad faith' can be defined as malicious intent, which in this Case means that CLAIMANT intended to harm RESPONDENT by admitting the evidence [see *Merrill & Ring Case; Dumberry, p. 218*].

70. CLAIMANT itself admitted that, "*The preliminary consideration before the arbitral tribunal while deciding the admissibility of evidence on grounds of alleged illegality is whether the party seeking to rely on the evidence was itself involved in unlawfully obtaining it.*" [*CLA's Memo, p. 15;* citing *Ahongalu v. FIFA; Amos Adamu v. FIFA; Caratube v. Kazakhstan; Yukos Case 2014*]. RESPONDENT submits that CLAIMANT is indeed involved in an unlawful act to obtain such evidence.

71. CLAIMANT intended to acquire the evidence from RESPONDENT's other arbitration by paying an amount of "*1000 USD from a company which provides intelligence on the horseracing industry*" [*PO2, p. 60, para. 41*]. CLAIMANT took this action knowing that the evidence, in the form of a Partial Interim Award, is confidential to RESPONDENT and the other party

in the arbitration [cf. *Born, p. 2782*]. This action can only mean that CLAIMANT has participated in acting illegally and in bad faith.

72. The only other possible exception on the admissibility of illegally obtained evidence also does not apply on the facts here. In the *Caratube Case*, decided by ICSID, the tribunal decided that the evidence is held admissible despite the allegation of illegality on the basis that the evidences were "*lawfully available to the public."* The tribunal held that the *Wikileaks* information submitted as evidence in that case was no longer considered as privileged information [*Caratube Case*]. However, in this Case, the Partial Interim Award from RESPONDENT's other arbitration is not available to the public. Therefore, RESPONDENT submits that CLAIMANT is not entitled to submit that award as evidence in this Case.

III. The evidence is still inadmissible even if CLAIMANT did not participate directly in the unlawful activity in obtaining the evidence

73. CLAIMANT asserts that because they did not participate in any unlawful act, they have acted in good faith [*CLA's Memo, pp. 14-16*]. However, RESPONDENT submits that CLAIMANT did act in bad faith. This is because CLAIMANT now actively engages a third party to procure the evidence, fully knowing the nature of such evidence as confidential.

74. As established before, in international commercial arbitration, generally parties are obliged to act in good faith [*Born, p. 3483; Marghitola, p. 106; Mirabal/Derains, p. 184; Waincymer, p. 500*]. However, this general duty was not reflected by CLAIMANT as CLAIMANT "*arranged an opportunity to acquire the "Partial Interim Award" against payment of 1000 USD from a company which provides intelligence on the horseracing industry*", further establishing the act of bad faith [*PO2, p. 60, para. 41*]. Various cases appeared to have similar decisions where tribunals stressed the importance of confidentiality and "*a general duty to conduct themselves in good faith*" [*Libananco Case; Methanex Case*].

75. Additionally, the intelligence company engaged by CLAIMANT "… *has a doubtful reputation as to where it gets its information from and has refused to disclose its sources in the Case at hand*" [*PO2, p. 60, para. 41*]. This creates a justifiable doubt as to the legality of the way and mean by which CLAIMANT will obtain the Partial Interim Award. Therefore, the Partial Interim Award should not be made admissible.

76. Therefore, as the evidence is established to be illegal, CLAIMANT's efforts to actively acquire the Partial Interim Award would not be in compliance with their duty of good faith. As such, CLAIMANT is not entitled to submit such evidence to the Tribunal and the evidence should be deemed inadmissible.

C. THE REFUSAL FOR THE SUBMISSION OF THE EVIDENCE WOULD NOT VIOLATE THE CLAIMANT'S RIGHT TO BE HEARD BECAUSE THE EVIDENCE DOES NOT HAVE A DIRECT CORRELATION WITH THE CASE AT HAND

77. CLAIMANT argued that the evidence is admissible to protect the party's "*right to be heard*" [*CLA's Memo, p. 19*]. However, RESPONDENT submits that the inadmissibility of the evidence would not violate CLAIMANT's right to be heard. This is so as the evidence have no direct correlation with the Case at hand [*See Robb, p. 10*].

78. Direct correlation would mean that a connection between the other arbitration and the current proceeding was established [*Robb, p. 10*]. It is known that both CLAIMANT in the current Case and RESPONDENT in the other arbitral proceeding demands the same relief, namely to have the tribunal adapt the contract [*PO2, p. 60, para. 39; RNoA, p. 31, para. 12*]. However, the circumstances or context in both arbitration cases can be distinguished.

79. In the other arbitration proceeding, the tribunal granted the adaptation of the contract when "*RESPONDENT asked for a renegotiation of the price under the ICC Hardship Clause 2003"* [*PO2, p. 60, para. 39*]. To be clear, in that case the applicability of the ICC Hardship Clause 2003 and Art. 6.2.3 of the UNIDROIT Principles together served as the authority for the tribunal to adapt the contract. On the contrary, in this Case, the relevant clause that is available for both parties are Clause 12 of the Sales Agreement – a much narrower clause than the ICC Hardship Clause 2003 [*Ex. C5, p. 14, Clause 12*].

80. Because the alleged 'Hardship' Clause in the current arbitral proceeding and the other arbitration is different, there is no direct correlation between both cases. Furthermore, it shows the fact that RESPONDENT has requested an adaptation of the contract from the tribunal in our previous arbitration case has no direct correlation in the Tribunal's consideration here. There is also no need to produce – or for CLAIMANT to submit as evidence - the Partial Interim Award in this Case because the underlying facts and circumstances above have by now been known by both parties.

81. Therefore, CLAIMANT should not be entitled to submit the Partial Interim Award as evidence, as that situation does not amount to a violation of the CLAIMANT's right to be heard.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO AN ADAPTATION OF THE PRICE BASED ON CLAUSE 12 OF THE CONTRACT AND/OR THE CISG

A. CLAIMANT IS NOT ENTITLED TO AN ADAPTATION OF THE PRICE UNDER CLAUSE 12 OF THE SALES AGREEMENT

I. Clause 12 of the Sales Agreement is a '*Force Majeure*' Clause, there was no intention on the parties to extend the clause to cover a 'Hardship' situation as asserted by CLAIMANT

82. Even though CLAIMANT asserts that a 'Hardship' Clause is also included in Clause 12 of the Sales Agreement, the mere inclusion of the word *"hardship"* in Clause 12 of the Sales Agreement does not necessarily mean that Clause 12 of the Sales Agreement contains a 'Hardship' Clause. RESPONDENT submits that Clause 12 of the Sales Agreement essentially remains a *Force Majeure* Clause.

83. Under Art. 8(1) of the CISG, a contract must be interpreted according to the parties' intention. Such intentions are reflected first and foremost in the text of the contract itself [*Greenfields v. Philles Records, Inc.*]. Furthermore, negotiating documents can be used to interpret the intention of the parties [*Art. 8(3) of the CISG*].

84. The text of Clause 12 of the Sales Agreement itself reflects the lack of intention of the parties to extend the provision to include a 'Hardship' Clause as argued by CLAIMANT. The clause merely states *"Seller shall not be responsible for lost semen shipments or delays […] neither for hardship, caused by additional health and safety requirements or comparable unforeseen events making the contract more onerous"* [*Ex. C5, p. 14, Clause 12*]. The text betrays the common formulation or elements of a 'Hardship' Clause.

85. Generally, 'Hardship' clauses always consist of two main parts: (i) a definition of the hypothesis when the clause applies – it is advisable if the parties use broad wordings to describe the circumstances and (ii) the effects of hardship [*Rimke, p. 227*]. As for the effects, 'Hardship' clauses usually provide for revision of the contract. In a case where no agreement between the parties can be reached, the clauses provide for sanctions, such as termination of the contract or adaptation of the contract by a third person [*Rimke, p. 228*].

86. None of the above two common characteristics of a 'Hardship' Clause is present in Clause 12 of the Sales Agreement. Therefore, it may be considered that there is no 'Hardship' Clause in the Sales Agreement.

87. Furthermore, to include a 'Hardship' Clause in a Sales Agreement, generally there must be a separate clause on its own [*PGT Industries, Inc. SA*]. 'Hardship' and *Force Majeure* Clauses are separate due to their difference in definitions and consequences. On the other hand, there is only one existing clause in the present Case, which is the *Force Majeure* Clause.

88. The parties' negotiation history also shows that Clause 12 of the Sales Agreement should not be construed as extending to include a 'Hardship' Clause. During the parties' negotiations after the accident on 12 April 2017, the negotiations finally resulted in a very narrowly worded clause regarding 'hardship' [*Ex. R3, p. 35; RNoA, p. 30, para. 9*]. Even if there was a broad 'hardship' wording in Clause 12 of the Sales Agreement, RESPONDENT has refused [*RNoA, p. 30, para. 4*] to take on *"risks associated with a change in the delivery terms, such as the change in customs regulation or import restrictions"* [*Ex. C4, p. 12*] stated in CLAIMANT's email on 31 March 2017.

89. In the present Case, the word *"hardship"* in Clause 12 of the Sales Agreement is merely an extension of the *Force Majeure* Clause. Although before the accident on 12 April 2017 both CLAIMANT and RESPONDENT's negotiators discussed about including an *"expressed reference into the hardship clause",* such clause was eventually not included in the Sales Agreement [*Ex. C8, p. 17*]. The negotiations also ended by *"merely adding a hardship wording to the existing force majeure clause"* [*RNoA, p. 30, para. 4*].

90. This shows that both parties, or at least RESPONDENT, never intended to include a 'Hardship' Clause in the Sales Agreement in the negotiating history. Therefore, Clause 12 of the Sales Agreement does not include a 'Hardship' Clause and CLAIMANT is not entitled to an adaptation of the price.

II. In any case, the imposition of additional 30% tariff is not a 'Hardship' situation under Clause 12 because the 'Hardship' situation in the clause is limited in scope concerning only "Health and Safety Requirements"

91. Even if Clause 12 of the Sales Agreement also include a 'Hardship' Clause, RESPONDENT submits that such clause does not cover the import tariff in this Case. Contrary to CLAIMANT's assertion [*CLA's Memo, p. 21*], the purported *"hardship"* in Clause 12 of the Sales Agreement only covers a cost increase in relation with Health and Safety Requirements.

92. In interpreting the intention of the parties, Art. 8 of the CISG provides that statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. The word *"hardship"* in Clause 12 of the Sales Agreement aims to regulate events resulting in *"highly expensive tests"*,

with an example of changes in the Health and Safety Requirements that once increased the price up to 40% [*Ex. C4, p. 12*]. This proves that Clause 12 of the Sales Agreement only regulates events resulting in *"highly expensive tests"*, which is clearly different compared to a retaliatory action of imposing tariffs which only increased the shipping price up to 30%.

93. It has already been set out by both parties that Clause 12 of the Sales Agreement has a narrow wording of 'hardship', in particular as signified by RESPONDENT's rejection of the model ICC 'Hardship' Clause 2003 proposed by CLAIMANT.

94. On the email dated 31 March 2017, CLAIMANT asked for relief specifically nsin regard to a possible increase in cost regarding Health and Safety Requirements [*Ex. C4, p. 12*]. CLAIMANT initially proposed for an ICC Hardship Clause 2003 which would govern situations when *"the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control "*. RESPONDENT considered it to be too broad and an approach was taken to regulate a number of possible risks directly instead. This resulted as a rejection to a broader meaning of *"hardship"* [*RNoA, p. 30, para. 4*].

95. The parties then agreed to add a mere *"hardship"* wording to the already existing *Force Majeure* Clause [*PO2, p 56, para. 12*]. The express wording *"hardship caused by additional health and safety requirements"* proves that Clause 12 of the Sales Agreement was formed to only govern *"hardship"* in a narrow meaning [*Ex. C5, p. 14, Clause 12*].

96. CLAIMANT also asserts that the imposition of a 30% tariff constitutes as a *"comparable unforeseen event"* as stated in Clause 12 of the Sales Agreement [*CLA's Memo, p. 24*]. However, this assertion should be rejected by the Tribunal. In drafting a 'Hardship' Clause, one should include a list of change in circumstances, and it should state out clearly what kind of event could trigger the clause [*Members of the Eurojuris International Contracts & Litigation Group*]. This results to an absent threshold for what could be invoked as a *"comparable unforeseen event"*.

97. In conclusion, Clause 12 of the Sales Agreement does not cover the increase of price due to the implementation of tariffs as a situation of 'hardship'. It follows that CLAIMANT is not entitled to an adaptation of the price.

III. In any case, adaptation of the contract by the Tribunal is not intended as a remedy under Clause 12 of the Sales Agreement

98. CLAIMANT asserts that the parties have agreed to include adaptation of the contract as remedy for 'hardship' under Clause 12 of the Sales Agreement [*CLA's Memo, p. 25; Ex. C8, p. 17; NoA, p. 7, para. 6*]. However, even if that provision incorporates 'hardship',

RESPONDENT never agreed to adaptation of the contract as a remedy under Clause 12 of the Sales Agreement.

99. Art. 8(1) of the CISG states that *"[…] statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was."* Such intentions are reflected first and foremost in the text of the contract itself [*Greenfields v. Philles Records, Inc.*]. Even if CLAIMANT had an adaptation of the contract in mind when negotiating Clause 12 of the Sales Agreement, such intention eventually is not reflected in the wording of Clause 12 of the Sales Agreement. The negotiation history of the clause furthermore shows that RESPONDENT did not share that intention and ultimately objected.

100. On the day before the car accident involving both parties' initial negotiators on 12 April 2017, they discussed the inclusion of a mechanism which would ensure an adaptation of the contract if *"[…] the parties could not agree on an amendment"* [*Ex. C8, p. 17*]. At that moment, RESPONDENT's negotiator only *"promised that he would come back with a proposal"* the day after [*Ex. C8, p. 17*]. That promise did not amount to an agreement for a mechanism whereby the contract will be adapted by an Arbitral Tribunal. The proposal could have referred to a different mechanism than the one CLAIMANT had in mind. Indeed, as negotiation continued afterwards, RESPONDENT *"would have objected to transfer powers to the Arbitral Tribunal to increase the price upon its discretion"* [*Ex. R3, p. 35*].

101. Furthermore, even if the parties had agreed to include the ICC Hardship Clause 2003 as CLAIMANT suggested, that clause excludes the reference to adaptation of the contract by court of Tribunal. The ICC Hardship Clause 2003 instead encourages both parties to negotiate between themselves in the event of 'hardship' [*Debattista, p. 17, para. (e)*]. Therefore, when CLAIMANT suggested the ICC Hardship Clause 2003, it can be concluded that even CLAIMANT did not have an adaptation of the contract by the Tribunal in mind as remedy.

102. Hence, RESPONDENT submits that adaptation of the contract by the Tribunal in the event of 'hardship' is not intended by the parties as a remedy under Clause 12 of the Sales Agreement.

B. CLAIMANT also is not entitled to an adaptation of the price under the CISG

I. Clause 12 of the Sales Agreement sets aside the applicability of Article 79 of the CISG

103. Art. 79 of the CISG is not applicable in this Case because Clause 12 of the Sales Agreement sets aside the application of Art. 79 of the CISG. Pursuant to Art. 6 of the CISG, the parties may derogate from or vary the effect of specific provisions in the CISG to shape their rights and obligations in accordance with what they consider to be best for their contractual relationship [*CISG Commentary, p. 113, para. 23*]. This is based on the general principle of freedom of contract, a principle that can be found in other parts of the CISG, all of which must be performed as 'required by the contract' [*Singh, p. 120*].

104. CLAIMANT argues that derogation must be made by express agreement [*CLA's Memo, p. 28*]. However, this is not so. Art. 6 of the CISG have been construed to allow implied or tacit derogation or variation of specific provisions in the Convention [*Packaging Machine Case*]. Hence, any clear contract clause agreed by the parties will take precedence over Art. 79 of the CISG in the question of exemption from liability [*Kuster/Andersen, p. 19*]. In this vein, derogation from the Convention also occurs whenever a provision in the contract provided a different rule from that found in the Convention [*UNCITRAL Note, p. 3*]. As an ICC award states, "*[w]hen a contractual clause governing a particular matter is in contradiction with the Convention, the presumption is that the parties intended to derogate from the Convention on that particular question*" [*Machine Case*].

105. For instance, in *Packaging Machine Case*, the parties used the term *"delivery"* in a different manner than what is generally understood as *"delivery"* by the CISG. The contract contains a provision that defines *"delivery"* as *"the date when all devices are properly installed at the [Buyer]'s works and when they operate to its full satisfaction"*. Delivery in this case does not resemble the actual shipment of the machine, rather the conformity of the machine and upon the [Buyer]'s satisfaction, which is not the approach adopted by the CISG, in particular Art. 49(1)(b). The court held that the parties opted for an autonomous definition of the term *"delivery"* and excluded the application of Art. 49(1)(b) [*Packaging Machine Case*].

106. In this Case, Clause 12 of the Sales Agreement was formed to provide specific regulation for changed circumstances. In the wording *"…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"*, it is clear that Clause 12 of the Sales Agreement intends to govern a *force majeure* situation with an additional risk regarding Health and Safety Requirements, wherein Art. 79 of the CISG merely governs an exemption in events that are "*due to an impediment beyond his control.*" In short, Clause 12 of the Sales Agreement governs the matter differently from Art. 79 of the CISG.

107. Therefore, any matters in correlation with changed circumstances as well as matters constituted as an impediment is governed under Clause 12 of the Sales Agreement, not Art. 79 of the CISG.

II. Even if Article 79 of the CISG is applicable, the provision does not cover a situation of 'hardship'

(i). The provision's express wording does not cover a situation of 'hardship'

108. CLAIMANT argues that Art. 79 of the CISG should be interpreted to include situations of 'hardship' [*CLA's Memo, pp. 28*-30]. This assertion should be rejected. The CISG "… *does not contain a special provision dealing with questions of hardship. It does not mention either force majeure or hardship*" [*Schwenzer, p. 712*]. RESPONDENT submits that this should lead to the conclusion that the Convention, including Art. 79 of the CISG, does not cover a situation of 'hardship'.

109. Under the "traditional view", 'hardship' is implicitly excluded from the scope of application of Art. 79 of the CISG [*Petsche, p. 155*]. When the text of Art. 79 of the CISG is put in its context and in the light of its object and purpose, there is no place for 'hardship' [*Petsche, p. 157*]. By its ordinary meaning, Art. 79(1) of the CISG governs a party's exemption from performance as the result of *impossibility* to perform [*Petsche, p. 156*]. This is different than a case of 'hardship'. In this context, the UNIDROIT Principles contains separate provisions dealing with *force majeure* and 'hardship' respectively. The UNIDROIT Principles' *force majeure* provision, as a matter of substance, is identical with Art. 79(1) of the CISG, with minor changes in wordings [*Art. 7.1.7(1) of the UNIDROIT Principles*]. Hence, by analogy, it can be concluded that 'hardship' is not covered by Art. 79 of the CISG which deals with *force majeure.*

110. Case law supports such position. In a case between an Italian seller and a Swedish buyer decided by *Tribunale Civile di Monza*, the plaintiff, who failed to deliver the goods to the defendant, claimed avoidance of the sales contract on the ground of 'hardship'. The court held that *"the case of hardship falls outside the scope of the Convention both as remedy and as a mean to claim for termination of the contract"* [*Nuova Fucinati v. Fondmetall International*]. Other case laws held the same position [*Corn Case; Iron Molybdenum Case; Steel Ropes Case; Vital Berry Marketing v. Dira-Frost*]. In fact, as noted by Prof. Schwenzer, "*Up to now, there is no single reported court or arbitral decision exempting a party - either a seller or a buyer - from liability under a CISG sales contract due to hardship*" [*Schwenzer, p. 716*].

111. Therefore, CLAIMANT cannot rely on Art. 79 of the CISG to request adaptation of the contract due to 'hardship'.

(ii). The drafting history of Article 79 of CISG indicates that a situation of 'hardship' is not recognised as falling under the provision

112. The drafters of Art. 79 of the CISG never intended for the provision to cover a 'hardship' situation. 'Hardship' is not recognised as an *"impediment beyond control"* by looking at the drafting history. Art. 79 of the CISG is formed to only exempt liability for physical or legal impossibility and not to cater for situation of changed circumstances such as 'hardship' [*Honnold, p. 8*].

113. Art. 79 of the CISG was created as a revision from a provision in the Convention Relating to the Uniform Law on the International Sale of Goods (ULIS). ULIS was one of the first uniform law formed to harmonize international sales law. However, it is considered too far reaching in their scope. Hence, a lot of countries refused to adopt it. This failure prompted the UNCITRAL to draft a new, more widely acceptable treaty on the international sale of goods. Thus, the CISG was formed [*Bailey, pp. 277-278*].

114. Art. 79 of the CISG exists as a revised version of Art. 74 of ULIS. Art. 74 of ULIS states that *"where the circumstances which gave rise to the non- performance of the obligation constituted only a temporary impediment to performance, the party in default shall nevertheless be permanently relieved of his obligation"* [*Art. 74 of ULIS*]. The reason for the revision was due to the fact that Art. 74 of the ULIS was criticized during the CISG Working Group discussions as it is considered to be 'too easy for the promisor to excuse his non-performance of the contract' [*Ruiters, p. 5*].

115. Due to the criticism, the UNCITRAL Working Group decided to draft Art. 79 of the CISG in a stricter manner that would not provide relief for a party who has failed to perform simply because the performance has become unforeseeably more burdensome or unprofitable [*Honnold, p. 6*].

116. During the review of the draft, UNCITRAL's *Committee of the Whole* considered a proposal to add a provision on 'hardship'. This proposal defined 'hardship' as an event which *"results in excessive difficulties or threatens either party with considerable damage"*. This proposal, which can be assumed to have been based on the typical considerations of fairness which generally underpin the doctrine of 'hardship', was rejected by the Committee. The reason for the rejection was that exoneration should only be available on the occurrence of an objective obstacle or impediment, not mere 'hardship' [*Petshce, pp. 164-165*]. The consequence of the rejection means that there is no scope for a 'hardship' provision [*Bridge, p. 17*].

117. To interpret Art. 79 of the CSIG in such a way that it covers a situation of 'hardship' would contradict the reason the provision was formed in the first place. Such interpretation is also

contradicted by the drafting history of the provision. In conclusion, Art. 79 of the CISG does not cover a situation of 'hardship' as asserted by CLAIMANT, and therefore CLAIMANT is not entitled to any adaptation of the contract.

(iii). 'Hardship' cannot be applied under CISG through a gap filling method

118. CLAIMANT asserts that, in the alternative, 'hardship' falls within the scope of CISG through a 'gap filling' method [*CLA's Memo, p. 30*]. However, RESPONDENT submits that this assertion should be rejected.

119. Pursuant to Art. 7(2) of the CISG, a 'gap' only occurs when a matter falls within the scope of the CISG but is not expressly settled by any of its provisions [*Povrzenic, p. 19*]. In filling a 'gap' in the Convention, it should first be settled *"in conformity with the principles on which the convention is based"* (e.g. the principle of party autonomy, the principle of good faith) [*Povrzenic, p. 12*]. Only in the absence of such principles, recourse had to be made to the domestic rules determined by the conflict rules of the forum [*CISG Commentary, p. 132, para. 27*]. 'Hardship' clearly does not fall into this definition. Art. 79 of the CISG does not present a 'gap' as the conditions of 'hardship' are not incorporated within the provision [*Dai, p. 141*].

120. Furthermore, 'hardship' cannot be invoked through a gap filling method by looking at the purpose of Art. 7(2) of the CISG or its drafting history. Gap filling is an instrument for the Convention to adjust to its new needs. The reason is because the CISG reflects knowledge and experience up to the year 1980 only, and its drafters could not foresee new developments such as electronic communications or contracts involving software. Thus, a gap filling method was created to keep the convention updated to future needs [*CISG Commentary, p. 133, para. 30*]. However, by looking at the drafting history [*See above para. 116*], the drafters intentionally excluded 'hardship' from Art. 79 of the CISG. Thus, 'hardship' is not a *"new development"* and gap filling should not be used as an instrument to govern 'hardship'.

121. Indeed, there has been one prominent domestic case in which 'hardship' is considered as a 'gap' in the Convention, namely the Belgian Court of Cassation's decision in *Scafom International BV v. Lorraine Tubes S.A.S* [*Scafom International BV v. Lorraine Tubes S.A.S*]. In that case, the cost of steel unexpectedly increased by 70% after the conclusion of a steel tube sales agreement. The seller wanted to negotiate to a higher contract price, but the buyer refused. The court held that the CISG specifically governs the case under Art. 79 of the CISG but does not present a remedy for 'hardship'. The inexistence of a remedy was considered as a 'gap' in the Convention. However, this ruling has attracted several criticisms.

122. First, the court in *Scafom* based this reasoning for a renegotiation of price by invoking Art. 6.2.2 of the UNIDROIT Principles through Art. 7(2) of the CISG [*Scafom International BV v. Lorraine Tubes S.A.S*]. However, referencing to UNIDROIT Principles on its own is not sufficient to interpret the CISG, as this set of rules are not *"principles on which the CISG is based on"* as required by the wording of Art. 7(2) [*CISG Commentary, p. 137, para. 36*]. It is also impossible for the UNIDROIT Principles to serve as such basis for obvious reason: the UNIDROIT Principles was only concluded for the first time in 1994, 14 years after the CISG.

123. Fletcher elaborates further that courts cannot extract a gap to the convenience of the judgment just because a particular remedy is not specified in the CISG [*Fletcher, 100*]. The UNIDROIT Principles is not a duplication of the standards in Art. 79 of the CISG, and judgements relying on these principles may result in inconsistent decisions. [*Dai, p. 141*]. Furthermore, Art. 79's intention to narrow the scope of exclusion cannot be expanded in the event where one finds preferable [*Dai, p. 135*].

124. Most courts that faced exceptions alleging 'hardship' in relation to contracts governed by the CISG have found those claims to be unavailable on the grounds that the CISG only recognizes *force majeure* exemptions [*Steel ropes Case; Corn Case; Iron Molybdenum Case; Vital Berry Marketing v. Dira-Frost*]. Even after the *Scafom* ruling, some writers such as Zeller, Veneziano, and Fletcher still believes that one cannot invoke 'hardship' under Art. 79 of the CISG [*Petsche, p. 155; Zeller, p. 153; Veneziano, p. 143; Fletcher, 100*].

125. In conclusion, 'hardship' cannot be considered as covered by the CISG through the 'gap filling' method provided under Art. 7(2) of the CISG. It follows that CLAIMANT's request for adaptation of the contract by the Tribunal should be rejected.

III. In any case, adaptation of the contract is not a remedy under Article 79 of the CISG

126. CLAIMANT asserts that it may seek adaptation of the contract from the Tribunal through Art. 79(5) of the CISG [*NoA, p. 8, para. 20*; *CLA's Memo, pp. 31-32*]. RESPONDENT submits that such assertion should be rejected. Even if Art. 79 of the CISG covers a provision for 'hardship', Art. 79(5) of the CISG does not provide for adaptation of the contract as remedy.

127. Art. 79 of the CISG only expressly governs 'exemption of performance' as legal consequence of events falling within the scope of the provision. Art. 79(1) to 79(3) of the CISG mention only 'exemption from liability' due for the aggrieved party, stating with wordings such as *"a*

party is not liable for a failure to perform any of his obligations" [*Art. 79(1) of the CISG*], *"he is exempt under the preceding paragraph"* [*Art. 79(2) of the CISG*], and "*the exemption provided by this article…"* [*Art. 79(3) of the CISG*]. There was no mention of remedy other than 'exemption from liability' under those provisions. In that context, adaptation of the contract has been rejected as a relief under Art. 79 of the CISG as it is *"fundamentally different from a liability exemption, i.e., the only kind of relief expressly authorized by Article 79"* [*Lookofsky, p. 162*].

128. Furthermore, Art. 79(5) of the CISG states that *"Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention."* It can be concluded that the aggrieved party may only seek remedy provided in the four corners of the Convention. Such remedies include *"to avoid the contract, to compel performance or, in case of non-conformity, to reduce the price"* [*Nicholas, p. 5-19*]. There is nowhere in any of the Convention's provisions that provide adaptation of the contract as remedy.

129. Hence, adaptation of the contract is not provided as remedy under Art. 79 of the CISG, and the Tribunal should reject CLAIMANT's request for relief in that regard.

REQUEST FOR RELIEF

130. In light of the above submissions, RESPONDENT respectfully requests that the Arbitral Tribunal finds that:

a) The Tribunal should not have the jurisdiction and/or the powers under the arbitration clause to adapt the contract, which includes in particular the question of Danubian law to govern the Arbitration Clause and its interpretation.

b) CLAIMANT is not entitled to submit evidence from the other arbitration proceedings on the basis of the assumption that the evidence has been obtained either through a breach of confidentiality agreement or through an illegal hack of RESPONDENT's computer system.

c) The Arbitral Tribunal should decide to not adapt the contract under Clause 12 of the Sales Agreement and under the CISG.

131. Respectfully submitted by counsels on Thursday, 24 January 2019

On behalf of **BLACK BEAUTY EQUESTRIAN**

EINAR FAUSTA ELISABETH TANIA EKAPUTRI EVELYN TANISSA



JASON EDGAR SHERLY