Sixteenth Annual Willem C. Vis East International Commercial Arbitration Moot

UNIVERSITY of HOUSTON LAW CENTER

MEMORANDUM FOR RESPONDENT

ON BEHALF OF	AGAINST
BLACK BEAUTY EQUESTRIAN	PHAR LAP ALLEVAMENT
2 SEABISCUIT DRIVE	RUE FRANKEL 1
OCEANSIDE	CAPITAL CITY
EQUATORIANA	MEDITERRANEO
RESPONDENT	CLAIMANT

UNIVERSITY OF HOUSTON LAW CENTER

ZACHARY BAUMANN • DOMINIC KISIELEWSKI • KATHRYN LAFLIN

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INDEX OF ABBREVIATIONS

&	and
Arb.	Arbitration
Art. / Arts.	Article / Articles
Aug	August
Ch.	Chapter
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl.	Clause
Cl. Mem.	Claimant's Memorandum
Com.	Commentary

Comm.	Commercial
Conv.	Convention
DDP	Delivered Duty Paid
e.g.	*Exempli Gratia* (example given)
Ed.	Edition
ed/eds	Editor/Editors
emph. add.	Emphasis Added
Ex / Exs.	Exhibit / Exhibits
et al.	*et alii* (and others)
Feb	February

GATT	General Agreement on Tariffs and Trade
HKIAC 2013	Hong Kong International Arbitration Centre 2013
HKIAC 2018	Hong Kong International Arbitration Centre 2018
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Id.	Ibidem (in the same place)
i.e.	Id Est (that is)
Jan	January
Ltd.	Limited

Mar	March
no. / nos.	Number / Numbers
Nov	November
NTM	Non-Tariff Measures
NY Conv.	New York Convention
Off.	Official
Oct.	October
p./pp.	Page
PICC	UNIDROIT Principles of International Commercial Contracts
Proc. Ord.	First Procedural Order

Proc. Ord. 2	Second Procedural Order
Pt.	Part
Pty.	Party
R.	Record
Sep.	September
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
U.S.	The United States of America
USD	United States Dollars
V.	versus

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STATEMENT OF FACTS

1 The PARTIES to this arbitration are Phar Lap Allevamento ("CLAIMANT") and Black Beauty Equestrian ("RESPONDENT"; together the "PARTIES"). RESPONDENT is an established racehorse stable; and is famous for its broodmare lines that have resulted in a number of world champion show jumpers and international dressage champions. *(Not. Of Arb.).* CLAIMANT, a company registered and located in Capital City, Mediterraneo, is a stud farm. This issue centers around a Sales Agreement ("CONTRACT"), for 100 doses of racehorse semen at a cost of 1,000 USD per dose.

21 Mar 2017 RESPONDENT contacted CLAIMANT inquiring about the availability of Nijinsky III's semen for RESPONDENT'S ten mares with an excellent pedigree. Thus starting the negotiations for the sale of goods. *See CLAIMANT'S Exhibit C1, R. at p. 9*

24 Mar 2017 CLAIMANT agreed to start negotiating the sale of goods. *See CLAIMANT'S Exhibit C2, P.10*

28 Mar 2017 RESPONDENT sent an email to CLAIMANT, naming Mediterraneo as the law of the CONTRACT, and objecting to the forum selection clause and asked for delivery DDP. *See CLAIMANT'S Exhibit C3, R. at p. 11*

31 Mar 2017 CLAIMANT accepted the modified DDP and the additional price of 1,000 USD per dose. *See CLAIMANT'S Exhibit C4, R. at p. 12.*

10 April 2017 RESPONDENT 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. *See RESPONDENT'S Exhibit R1*.

11 Apr 2017 CLAIMANT changed the suggested place of arbitration but had not objected to the proposal that the law of the place of arbitration should govern the arbitration agreement. *See RESPONDENT'S Exhibit R2.*

12 Apr 2017 Ms. Napravnik's and Mr. Antley's car accident occurs, leaving both of them unable to finish the negotiations. *See Notice of Arb.*

6 May 2017 The final negotiations took place and the CONTRACT was signed. See *CLAIMANT'S Exhibit C5, R. at pp. 13-14.*

19 Dec 2017 Tariffs on agricultural goods were announced by executive order in Equatoriana. *See CLAIMANT'S Exhibit C5, R. at pp. 13-14.*

15 Jan 2018 The Equatorian agricultural tariffs went into effect.

19 Jan 2018 Ms. Napravnik was informed that the agricultural tariffs applied to the race horse semen while obtaining the customs paperwork. *See CLAIMANT'S Exhibit C8, R. at p. 17.*

20 Jan 2018 CLAIMANT contacted RESPONDENT regarding the tariffs. *See CLAIMANT'S Exhibit C7, R. at p. 16.*

21 Jan 2018 Mr. Shoemaker contacted CLAIMANT regarding the tariffs and the delivery schedule. Mr. Shoemaker made clear that RESPONDENT was not committing to any adaptation of the price and would that he would also not have had the required authority to do so, simply stating "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." *See RESPONDENT'S Ex. R4, R. at p. 36*

23 Jan 2018 CLAIMANT shipped the remaining 50 doses of race horse semen. *See Notice of Arb., R. at p. 6.*

29 June 2018 The Partial Interim Award was rendered in the other arbitration. *See Proc. Ord. 2 ¶ 39, R at p. 60.*

31 July 2018 CLAIMANT filed the Notice of Arbitration, *See Notice of Arb., R. at p. 4.*

2 Oct 2018 CLAIMANT informed the Arbitral Tribunal and RESPONDENT of their knowledge and desire to introduce the Partial Interim Award from RESPONDENT'S other arbitration. *See Letter by Langweiler, R. at p. 49.*

SUMMARY OF THE ARGUMENTS

2 PARTIES contracted for the sale of 100 doses of racehorse semen that were to be used for artificial insemination. *(See Ex. C5, and Notice of Arb.)* CLAIMANT was contacted by RESPONDENT, about procuring 100 doses of racehorse semen from CLAIMANT. *(Ex. C1).* This was due to the unique storage technique of the frozen semen and the high caliber studs available. *(Notice of Arb.).* The CONTRACT included a Hardship Clause, and a modified DDP Incoterm. *(Ex. C5).* After signing the Contract, CLAIMANT shipped the first two shipments of 25 doses of racehorse semen. However shortly before the final shipment, Equitoriana imposed a new tariff. *(Notice of Arb.).* This new tariff meant that Claimant was not going to make as much money on the final shipment. Because of the loss of profits, CLAIMANT is attempting to modify the CONTRACT, and started this arbitration.

ISSUE 1: THE ARBITRAL TRIBUNAL DOES NOT JURISDICTION AND THE POWER UNDER THE ARBITRATION AGREEMENT TO ADAPT THE CONTRACT.

3 The Tribunal's broad authority to interpret its own jurisdiction is qualified by its duty to render an enforceable award. Danubian law is implicated as the law of the arbitration agreement by the presumption of separability, the implied choice of Danubian law, Danubian law's status as the law of the closest and most real connection with the arbitration agreement, and the default choice of the law of the seat under the New York Convention. The conclusion that Danubian law controls forecloses the Tribunal's adaptive authority because of the absence of an explicit grant of authority. Subsequently, this Tribunal lacks the authority to adapt the CONTRACT.

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

4 CLAIMANT is not entitled to submit the illegally obtained evidence to this Tribunal. RESPONDENT protested the admission of the evidence from the other Arbitration by written notice on 3 October 2018 arguing that this evidence would violate statutory and confidentiality obligations *(Letter by Fasttrack, R. at p, 50).* While it is true that the Tribunal has the authority to admit any evidence offered to advance the interest of justice and/or public policy, the Tribunal must balance the interests of justice and the interests of the PARTIES in this matter. If the Tribunal admits the Partial Interim Award a dangerous public policy precedent will be set. Because confidentiality is a cornerstone of arbitration, and the PARTIES chose institutional rules with a high confidentiality threshold, the Tribunal must honor the principles of confidentiality and not allow CLAIMANt to submit illegally obtained evidence.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO THE PAYMENT OF 1,250,000 USD RESULTING FROM AN ADAPTATION OF THE PRICE IN THE CONTRACT.

5 CLAIMANT is not entitled to 1,250,000 USD by adapting the CONTRACT price either through Clause 12, the intent of the Parties, or the CISG. Clause 12 is applicable only to a Force Majeure of either a delay or loss of shipments and not to tariffs. The PARTIES never intended for the contract to provide price adaptation as a remedy. CLAIMANT is also not entitled to a price adaptation through the CISG for Hardship is not present within the CISG, and even if hardship is found through Article 79 the requirements are not met, and the CISG lacks a remedy to adapt the CONTRACT. In any case, DDP controls the agreement and assigns responsibility of paying the tariffs to CLAIMANT even if price adaptation were allowed through Clause 12 or the CISG.

ARGUMENTS

ISSUE 1: THE ARBITRAL TRIBUNAL LACKS THE JURISDICTION TO ADAPT THE CONTRACT UNDER THE ARBITRATION AGREEMENT.

6 While the Tribunal has the jurisdiction to determine the scope of the arbitration clause, its authority is limited by the requirement of issuing an enforceable award (A). The separability principle, a doctrinal bedrock of international arbitrations, rebuts the notion

that the law of the CONTRACT should be found to control the arbitration agreement and confirms that the arbitration agreement can be governed by a different law (B). In conjunction with the separability presumption, the PARTIES' negotiations and relevant conflict of law analyses necessitate the conclusion that Danubian law was impliedly chosen to govern the arbitration agreement (C). In the absence of an effective choice, Danubian law is the mandated default choice of the law under the New York Convention (D). Because Danubian law only recognizes explicit grants of adaptive authority and does not allow parol evidence, no effective grant of adaptive authority was consummated and this Tribunal lacks any authority to adapt the contract (E).

A. THE DUTY TO RENDER AN ENFORCEABLE AWARD MANDATES THAT THE TRIBUNAL NOT EXCEED THE AUTHORITY GRANTED TO IT BY THE PARTIES.

7 CLAIMANT states that the HKIAC Rules empower a Tribunal to "rule on its own jurisdiction . . . including any objections with respect to the . . . scope of the arbitration agreement." (*Cl. Mem.*, ¶ *13*). But this arbitral power is never absolute, as "all agree that an arbitrator has a duty to render an enforceable award." (*Waincymer p. 97*). This obligation is such "a central element of the arbitral function that it is held that if an award is not enforceable the arbitrator has failed the responsibility as vested." (*Id.*). The duty to render an enforceable award is especially pertinent to this arbitration because "if the arbitrator exceeds the authority . . . given to her under the parties' arbitration agreement, then the resulting award is not enforceable under the [New York] Convention." *(Moses p. 235; see NY Conv., Art. V(1)(c)).*

8 However, this exception applies when a Tribunal "deals with a dispute not contemplated by the terms of the of the PARTIES' agreement or when the decision rendered applies to matters beyond the scope of the agreement." (*Moses p. 235*). RESPONDENT never agreed, implicitly or explicitly, that the law of Mediterraneo should apply. As detailed in Part D, the PARTIES never intended for the Tribunal to have adaptive powers. If the Tribunal does not define its own authority within the limits of arbitral doctrine discussed in Parts B, C, and D, it will render an award that is fundamentally unenforceable. While the Tribunal has the power to rule on its own jurisdiction, the duty to ensure enforceability limits it to

disputes that the PARTIES consented to arbitrate or that were within the scope of the arbitration agreement.

B. THE SEPARABILITY PRESUMPTION PRECLUDES THE LAW OF THE CONTRACT AS THE PRESUMPTIVE CHOICE OF THE ARBITRATION AGREEMENT.

9 The PARTIES' agreed that "the seat of arbitration shall be Vindobona, Danubia" and provided that the CONTRACT itself shall be "governed by the law of Mediterraneo." (*Ex. C5, p. 14*). CLAIMANT argues that "the separability presumption is not applicable when determining the law applicable to the Arbitration Clause" because "the purpose of the separability presumption is to keep the arbitration agreement valid in case of an invalidity of the main contract." (*Cl. Mem.*, ¶ *20*). CLAIMANT argues that because the arbitration agreement is included within the sales agreement, the arbitration clause "forms part of the 'Sales Agreement.'" *(Cl. Mem.*, ¶ *16).*

10 Contrary to CLAIMANT'S position, authorities hold that any "analysis of the choice of law governing an international arbitration agreement begins with the separability presumption." (*Born, Ch. 4, p. 473*). Under the Separability Principle, the arbitration agreement and the CONTRACT are "considered . . . separate agreement(s)." The inclusion of the arbitration agreement within the underlying CONTRACT makes it a subsidiary part of the contract. (*Moses, p. 21*). It is well established that "courts must treat the arbitration clause as severable from the contract in which it appears." (*Born, Ch. 3, p. 350) (quoting Granite Rock)).* The "ring fenced" nature of arbitration agreements is the "distinguishing feature" of agreements to arbitrate (*Charles, p. 55*) because it makes the "arbitration agreement [have] a validity and effectiveness of its own. (*Born, Ch 3, p. 352*). As a result, it is "common in practice" for the PARTIES' arbitration agreement to "be governed by a different law than the one governing the underlying contract." *(Born, Ch 4, p. 472).*

11 CLAIMANT advanced several theories as to why the law of the underlying contract, rather than the law of the seat, should govern the arbitration agreement. First, they argue that "the [contract] does not contain a separate choice of law provision for the Arbitration Clause," and the explicit choice of Mediterranean law to govern the underlying contract means that "Mediterranean law . . . has to be applied to the Arbitration Clause." *(Cl. Mem. ¶14).* This

argument ignores the separability principle and the explicit choice of Danubian law as the law of the seat. While the presence of an explicit choice of law for the underlying contract may be determinative where no other choice is made, when the parties choose different laws to govern aspects of their agreements, courts engage in a "multiplicity of competing approaches" to determine which of the chosen laws to apply to the arbitration agreement. *(Born Ch. 4, p. 491).*

12 Furthermore, CLAIMANT'S argument would violate arbitral doctrine by limiting consideration of separability to questions of validity. The separability principle has had a powerful effect on determining the law of the arbitration agreement; most critically, because "jurisdictions apply the same law to the interpretation of an arbitration agreement as to its formation and substantive validity." *(Born, Ch. 4, p. 635).* As these two analyses are linked as a matter of arbitral doctrine, it is impossible to simply refuse to "apply the separability presumption in the absence of validity issues" without undermining the chief theoretical aim of the separability principle. (*Cl. Mem., ¶ 20*). Indeed, it is the "nature of separability . . . and the need to promote the effectiveness of agreements to arbitrate, which constitute the critical factors . . . in the developing jurisprudence on the proper law of the agreement to arbitrate." *(Charles, p. 55).* However, this is not to say that the severability doctrine prevents parties from agreeing to subject their arbitration agreements to the same law governing their underlying contracts. Parties are free to "specify a governing law for the arbitration clause." *(Id.)* But "where there is no such express choice," the separability doctrine rebuts the "natural tendency to assume that . . . the proper law of the agreement to arbitrate remains the same as the governing law applicable to all other terms of the contract." *(Id. at pp. 55-56).*

13 Second, CLAIMANT cites practitioner Dongdoo Choi for the proposition that "separability can only become relevant for the choice of law if the PARTIES were aware of this presumption when concluding the contract." *(Cl. Mem.,¶ 19).* CLAIMANT also states that "the negotiator on behalf of CLAIMANT was unexperienced (sic) in the field of arbitration." *(Id. (citing Ex. C8, ¶ 1)).* Even while propounding the importance of the PARTIES' knowledge of the separability presumption, Mr. Choi notes that any assumption in favor of

the law of the underlying contract "could [be] overcome . . . by a presumption that the parties know the intricacies of arbitration law." *(Choi, p. 108).*

14 From the starting point of such a presumption, there is nothing in the record to find separability inapplicable. Ms. Napravnik's statement only explains that she possesses a law degree, is one of two of CLAIMANT'S lawyers, and has the "primarily responsibility" of overseeing CLAIMANT'S "contractual relations." *(Ex. C8, p. 17, ¶ 1).* The record is silent as to her degree of familiarity with the arbitral process, but establishes her status as a contract lawyer who negotiates arbitration agreements. At the least, it has not been affirmatively established that either CLAIMANT or Ms. Napravnik were unaware of basic arbitration principles as to render separability inapplicable.

15 Nonetheless, CLAIMANT argues that "there are no indications that the PARTIES were aware of the separability presumption" and the mere absence of evidence of familiarity nullifies separability. *(Cl. Mem., ¶ 19).* But this standard renders the separability presumption, one of the "conceptual and practical cornerstones of international arbitration," moot and undermines its presumptive nature. *(Born, Ch. 3, p. 350).* While party intent may abridge the separability presumption, the PARTIES' "ability to negate or alter the separable status of their arbitration clause" is prefaced on their mutual "agreement" to do so. *(Born, Ch. 3, p. 353).* It is CLAIMANT'S obligation to present evidence that the parties agreed to stray from the presumption of separability. Because there is no such evidence in the record, CLAIMANT'S arguments for nullifying the separability presumption must fail.

C. DANUBIAN LAW GOVERNS AS IT IS THE IMPLICIT CHOICE OF THE PARTIES AND THE LAW WITH THE HIGHEST CONNECTION TO THE ARBITRATION.

16 In line with its refusal to contemplate separability, CLAIMANT argues that "the initial negotiators never agreed on any different law [from the law of the underlying contract] to govern the arbitration clause." (*Cl. Mem., ¶ 23*). Even though this statement points out the lack of explicit agreement with regards to the law governing the arbitration agreement, scholars agree that it is uncontroversial. However, CLAIMANT'S grander assertion that "the parties did not discuss Danubian law to apply to any part of the [Frozen Semen Sales Agreement]" (*Cl. Mem.,¶ 23*) is unsupported by the record, as evidenced by the inclusion

of Danubia in the arbitration agreement, as the seat of the arbitration, in both Ms. Napravnik's proposal on 11 April 2017 (*Ex. R2*) and the final agreement. (*Ex. C5, ¶ 15).*

17 CLAIMANT also argued that "if RESPONDENT had desired another law to be applicable, it would have had to suggest another law" because "CLAIMANT could not have known that RESPONDENT" was not agreeing to making Mediterranean law govern the arbitration agreement. (*Cl. Mem., ¶ 25*). CLAIMANT asserts that the application of Danubian law is estopped because "a reasonable person . . . knew or could have known" that CLAIMANT "assumed that the prior negotiators agreed on Mediterranean law." *(Id.).* As a factual matter, the separability presumption, CLAIMANT'S failure to express its presumption, and RESPONDENT'S early suggestion that the law of the seat should govern (*Ex. R1*) provide a reasonable basis for RESPONDENT'S belief that Danubian law, rather than Mediterranean law, should control the arbitration agreement. Absent a contract of adhesion or a similar imbalance in negotiating power, there is no principle of estoppel that favors one party's assumption of applicable law over another. The "lodestar" of international arbitration is the mutual consent and intent of the parties. (*Park, p. 1, ¶ 1).* If, as CLAIMANT argues, PARTIES were of different minds as to the law governing the arbitration agreement, the answer is not to estop one party's interpretation to the benefit of the other's, but to turn to the "multiplicity of choice-of-law rules" courts and arbitral tribunals use to find the most plausible law. (*Born, Ch. 4, p. 474).*

18 In the face of the separability presumption, arbitrators and courts have been increasingly likely to find that a choice of the law of the seat manifests an implied choice of the law of the arbitration agreement. (*See Born, Ch 4, p. 510 (stating that "particularly in more recent decades, a number of jurisdictions, both common and civil law, have applied the substantive law of the arbitral seat to the validity of international arbitration agreements.")* Mr. Choi acknowledges that the argument for the law of the underlying contract "tends to be overridden by the separability doctrine." *(Choi, p. 106*). Despite the novelty and persuasive of Mr. Choi's test, the fact remains that the separability presumption is "invariably" adhered to by courts and arbitrators. (*Born, Ch 3, p. 349*).

19 The history of courts and Tribunals favoring the law of the seat over the law of the underlying contract, at least where no explicit choice is made, is reflected in two separate methods: first, the search for an implied choice of law; and second, conducting a traditional conflict of law analysis. The first approach holds that as a general rule, a choice of the law of the seat marks an implicit or implied choice of the law of the arbitration agreement. (*See (Born, Ch. 4).* Furthermore, if the parties' will is unclear we must presume, as it is the nature of arbitration agreements to provide for given procedures in a given place, that the parties intend that the law of the place where the arbitration proceedings are held will apply." *(See Born, Ch. 4).*

20 The second approach often reaches the same result. The case of *C v D* in 2007, illustrated the effect of conflict of laws analyses and a choice of a law of the seat. (*C v D, [2007] EWCA Civ. 1282). C v D* centered upon an insurance dispute, with a contract governed by New York law and an arbitration agreement with London as the seat. (*Id. at ¶ 2*). In that case, Longmore L.J. began his analysis with the observation that "it is necessary to distinguish between the proper law of the underlying contract . . . and the arbitration agreement which is . . . a separable and separate agreement." *(Id. at ¶ 22).* Where the two differ and there is no "express law of the arbitration agreement," it becomes necessary to determine which law has "the most real connection" with the law of the arbitration agreement. *(Id.*). Thus the inquiry turns on a three part test to ascertain: (1) whether "the parties made an express choice" of the law of the arbitration agreement; (2) whether the parties, while failing to make an express choice, made an implied choice of law; and (3) in the absence of an express or implied choice of law, what law has "the 'closest and most real connection' with the arbitration agreement." *(Redfern & Hunter, p. 160, ¶ 3.19).*

21 Longmore L.J. arrived at the conclusion that "where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place," the law of the "agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the law of the underlying contract." (*C v. D at ¶ 26*). Simply put, it would be difficult to articulate why the law of a separable contract should be deemed to have a closer connection to an arbitration agreement than the substantive law of that same agreement. Also critical

to Longmore L.J.'s judgment was assuring that "balance" between American and English law was maintained. (*Id. at ¶ 16*). That balance emphasized "an English arbitration but applying New York law to issues arising under the [insurance] policy." *(Id.).*

22 In this case, the Tribunal faces the same situation confronted in *C v D*. The parties have made an explicit choice of both the law of seat and the law of the underlying contract, but they neglected to explicitly choose a law of the arbitration agreement. Acknowledging the separability of the underlying contract and the arbitration agreement, it is apparent that Danubian law is more connected with the arbitration agreement than Mediterranean law.

23 Nevertheless, the same concerns with the balance that motivated the decision in *C v. D*. Here, PARTIES chose a Danubian Seat of Arbitration applying Mediterranean substantive law. Danubia was chosen because neither party would submit to a dispute resolution that was governed by the law of the other. *(See Exs. C3; C4; R1; R2)*. In fact, the final language was selected by CLAIMANT to "accommodate [RESPONDENT'S] wish not to be submitted to the . . . courts of Mediterraneo." *(Ex. R2).* Thus, Danubian law was chosen specifically to ensure a neutral dispute resolution process after RESPONDENT had already allowed the law CLAIMANT'S country to govern the underlying contract. Finding that the law of the arbitration agreement is Mediterranean would undermine the negotiations undertaken by PARTIES and upset the balance they achieved between Mediterranean substantive law and Danubian procedural law.

D. THE NEW YORK CONVENTION MANDATES THAT IF THE PARTIES DID NOT EFFECTIVELY AGREE TO A CHOICE OF THE LAW IN THE ARBITRATION AGREEMENT, THE LAW OF THE SEAT, MUST ACT AS THE DEFAULT LAW OF THE ARBITRATION AGREEMENT.

24 Article V(1)(a) of the New York Convention provides that "recognition and enforcement of [an] award may be refused" if "the . . . [arbitration] agreement is not valid under the law to which the parties have subjected it." *(NY Conv., Art. V(1)(a)*). This provision has been interpreted as allowing parties to "select a particular law to govern only their arbitration agreement." *(Born, Ch 4, p. 478) (emph. add.).* If neither an express or implied choice was made, Art. V(1)(a) allows for the refusal of enforcement where "the . . . [arbitration]

agreement . . . is not valid under the law of the country where the award was made." (*NY Conv., Art. V(1)(a)*). Thus, the New York Convention "establishes a specialized choice-of-law rule providing that, where the parties have not explicitly or implicitly selected a law to govern the arbitration clause, that provision will be governed by [the law of the seat]." *(Born, Ch. 4, p. 478) (See Geisinger et. al. "*In the absence of a choice of law, the law of country where the award was made, that is, the law of the place of the arbitration, governs the arbitration agreement."). This second element of Art. V(1)(a) "prescribes a mandatory international default rule" that must be adhered to if an award is to be enforceable and thus satisfy the Tribunal's duty to render an enforceable award. (*Born, Ch. 4, p. 500*).

25 Furthermore, the New York Convention demands that the Tribunal apply the law of the seat, if it was implicitly chosen. In conjunction with arguments that the PARTIES made an implied choice of the law of the seat and that Danubian law has the more real connection with the arbitration clause, this default rule implicates Danubian law as the law of the arbitration agreement.

E. DANUBIAN LAW REQUIRES THAT GRANTS OF ADAPTIVE AUTHORITY TO ARBITRAL TRIBUNALS BE EXPLICIT AND THE ARBITRATION AGREEMENT IS WITHOUT ANY EXPLICIT AUTHORIZATION TO ADAPT THE CONTRACT.

26 CLAIMANT proposes several theories to advance a theory of an explicit or implicit grant of adaptive authority. First, CLAIMANT argues that the inclusion of the phrase "any dispute arising out of this contract" and other language in the arbitration clause necessarily implicate adaption. (*Cl. Mem., ¶ 34 (quoting Ex C5, ¶ 15)).* While CLAIMANT is correct that such language "usually . . . suffices to invest an international arbitral tribunal with a decision making power," the "situation is different with respect to the adaption and supplementation of contracts." *(Berger, p. 8).* This is because "the perceived contractual and creative nature of the of the arbitrator's decision is said to require a specific contract clause that contains an explicit authorization by the parties in addition to the usual arbitration agreement." *(Id.).* For such an authorization to be effective, it must "indicate in a clear and precise manner the triggering events which confer the creative competence on the arbitrators and guidelines which indicate the scope and extent to which adaption or

supplementation should be effected." *(Id.).* Not only is the arbitration clause bereft of such a detailed procedure, but it is without any mention of adaptive authority at all.

27 Second, CLAIMANT argues that the prior negotiations between the parties support the intent to grant adaptive authority. However, Danubian Contract Law adheres to the "four corners rule," which does not allow parole or extrinsic evidence to inform constructions of party intent. (*See Rosengren, p. 6*). As a result, this Tribunal cannot consider the emails between the parties, the ex-post testimony of negotiators, or any other parole evidence in considering whether adaptive authority was granted.

28 Third, CLAIMANT argues that the arbitration clause must be interpreted broadly to conform with Professor Gary Born's articulation of the "pro-arbitration presumption." *(Cl. Mem.,* ¶ *44).* However, as CLAIMANT acknowledges, the presumption only works to extend jurisdiction to encompass disputed claims "in cases of doubt" as to the Tribunal's jurisdiction. *(Id.)* In effect, the presumption operates similarly to tie-breaking canons of construction. *(Johnson, S. p. 531).* Here, Danubian law and the demands of an explicit grant of adaptive authority are clear to the exclusion of adaptive authority. Further, some authorities and nations have failed to the adopt the "pro-arbitration approach" and have instead held that "arbitration clauses must be interpreted restrictively, resolving doubts about particular dispute against coverage by the clause. *(Born, Ch. 9, p. 1339).* More commonly, authorities apply neither a "pro-arbitration" or "restrictive approach," instead maintaining a neutrality that simply interprets the language of the arbitration agreement. *(Id. at 1340).*

29 Following the conclusion that Danubian law is the law applicable to the substantive validity of the arbitration clause and the arbitration agreement generally, it follows that the issue of determining whether the agreement provides jurisdiction for the Tribunal to adapt the underlying contract is also controlled by Danubian law. This is because courts and tribunals generally "apply the same law to the interpretation of an arbitration agreement as to its formation and substantive validity." *(Born, Ch. 4, p. 635).*

30 Although CLAIMANT maintains that Danubian law "does not require the authorization [for a tribunal to adapt a contract] to be explicit" *(Cl. Mem.,*¶ *48),* it has been established under

Danubian Arbitration Law that, , "while parties may authorize arbitral tribunals to adapt contracts, an express conferral of powers is required." *(Proc. Ord. 2, ¶ 36) (See Cl. Mem.,¶ 48 ("…in other provisions of Danubian Law, e.g. in [Danubian Arbitration Law], it is explicitly stated that an express agreement is required)).* Thus, with regard to this arbitration, the lack of clarity as to the adaptive powers of Danubian courts is rendered immaterial by the clear prohibition on implicit grants of adaptive authority to arbitral tribunals. The very existence of differing lines of jurisprudence shows the inapplicability of Danubian judicial powers to tribunals operating under Danubian law.

31 Most problematic of all with regard to the Tribunal's explicit or implicit authority to adapt the contract is the need "to refer *simultaneously* to three different sources" to determine whether a Tribunal may adapt a contract. *(Berger, p. 7).* The three sources are: (1) the law of the arbitration agreement; (2) the law of the seat of the arbitration; and (3) the law applicable to the underlying contract. *(Id. at pp. 8-10).* These laws must all be in accord on the issue of adaption because of the exceptional character of adaption, the contractual principles involved, and the procedural powers needed to adapt a contract. *(Id. at 2).* The arbitration agreement must contain some grant of authority because of its role as "the basic source of the arbitrator's powers." *(Id. at 8).*

32 Similarly, the law of the seat must authorize adaption by arbitrators because it "determines whether the arbitrators are procedurally authorized to decide on the contract adaption or supplementation." *(Id. at 10).* Finally, the law of the contract supplies "the substantive requirements" or mechanisms for adaption. *(Id. at 11).* An absence of one of the three elements will leave a Tribunal without the basic authority, procedural power, or substantive guidance to adapt a contract. *(Id. at 12).* The application of this principle precludes the Tribunal's authority to act, even assuming that CLAIMANT is correct that Mediterranean law governs the arbitration agreement, because the law of the seat of this arbitration only recognizes explicit grants of adaptive authority. *(Proc. Ord. 2, ¶ 36).* Accordingly, even if the Tribunal had been authorized by the law of the arbitration agreement and the law of the underlying agreement to modify the contract, its authority to adapt "remains without effect if the applicable [law of the seat] does not contain a corresponding procedural authority" for modification. *(Id. at p. 12).*

33 Danubian Arbitration Law calls for an explicit grant of adaptive authority. No portion of the contract satisfies the rigorous requirements to allow an explicit grant of authority. Even if CLAIMANT is correct that the law of the arbitration agreement empowers this Tribunal to adapt the contract, the Tribunal has no procedural authority under Danubian law to do so. Subsequently, this Tribunal lacks the authority to adapt the PARTIES' underlying contract.

CONCLUSION OF ISSUE 1

34 The Tribunal's broad authority to interpret its own jurisdiction is limited by its duty to render an enforceable award. Danubian law is implicated as the law of the arbitration agreement by the presumption of separability, the implied choice of Danubian law, Danubian law's status as the law of the closest and most real connection with the arbitration agreement, and the default choice of the law of the seat under the New York Convention. The conclusion that Danubian law controls limits the Tribunal's adaptive authority because of the absence of an explicit grant of authority. Subsequently, this Tribunal lacks the authority to adapt the CONTRACT.

ISSUE 2: CLAIMANT IS NOT ENTITLED TO SUBMIT THE ILLEGALLY OBTAINED PARTIAL INTERIM AWARD OF RESPONDENT'S PRIOR PROCEEDING AS EVIDENCE.

35 CLAIMANT is not entitled to submit the illegally obtained evidence to this Tribunal. RESPONDENT protested the admission of the evidence from the other arbitration by written notice on 3 October 2018, arguing that this evidence would violate statutory and confidentiality obligations. *(Proc. Ord., R. at p. 51).* While it is true that the Tribunal has the authority to admit evidence offered to advance the interest of justice or public policy, the Tribunal must balance the interests of justice and the interests of the PARTIES. Article 22.2 of the HKIAC Rules states that "the arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence." *(HKIAC 2018 Art. 22.2).*

36 To ensure that justice is achieved in an Arbitration in which a party attempts to introduce illegally obtained evidence, the Tribunal must balance the interests of Justice and the

interests of the PARTIES. The Tribunal should rule that the CLAIMANT is not entitled to submit the illegally obtained Partial Interim Award. The admission of the Partial Interim Award would violate the rules of confidentiality set forth in the HKIAC Rules and that the Parties agreed to (A). Additionally, because the Partial Interim Award was obtained illegally either through a computer hack or an employee releasing the information, the Tribunal should not allow the Partial Interim Award into evidence. (B). The exclusion of this evidence supports the interest of justice, because allowing this information would set a precedent violating public policy (C).

A. THE CONFIDENTIALITY PRINCIPLES OF THE HKIAC RULES PRECLUDE THE ADMISSION OF THE ILLEGALLY OBTAINED PARTIAL INTERIM AWARD.

37 Confidentiality is a principle cornerstone of international arbitration. While there is not a fixed procedure or evidentiary code, the HKIAC Rules insure a high level of confidentiality. *(HKIAC 2018 Art. 22.2).* Although CLAIMANT argues that the Partial Interim Award would still be confidential if it was admitted to this arbitration, that is not the case. By allowing a third party, CLAIMANT in this case, to use this interim award, the confidentiality principles in an unrelated arbitration will be broken. Because "confidentiality is one of the primary reasons for arbitration being the preferred option for commercial dispute resolution," the Tribunal should not allow CLAIMANT to violate the principles by allowing CLAIMANT to produce illegally obtained evidence. *(Samuel p. 879).*

i. Parties agreed to the expressed obligations of confidentiality by choosing the HKIAC Rules and Claimant must abide by them.

38 By choosing a set of Intuitional Rules to guide the arbitration, PARTIES knew (or should have known), that the Institutional Rules would govern the procedural matters of the arbitration, with the law of the seat acting as a gap filler. When the PARTIES agreed to the HKIAC Rules, they also agreed to a high level of confidentiality. Furthermore, if the Tribunal admitted the interim award, it would not only violate the HKIAC Rules that PARTIES agreed upon, but it would also violate the third party's rights in the other case. Confidentiality is broadly recognized as one of the major benefits of arbitration, and it is

why many parties choose arbitration over other means of dispute resolution. *(See Redfern & Hunter p. 23, 45).*

39 CLAIMANT argues that "the Award will be kept confidential anyway," but that is not the case. *(Cl. Mem., ¶ 78).* Not only is there is a confidentiality clause that governs the arbitration and the award, but the arbitrations are also held in private. This is not only a principle of arbitration, but something that the PARTIES in both arbitrations agreed to.

40 Confidentiality is still regarded as a significant benefit of international commercial arbitration. The private and confidential nature of arbitration is a major drawing factor for many international commercial parties, who want to avoid the public nature within domestic courts. Although the idea that "confidentiality in arbitral proceedings is absolute has eroded in recent years, confidentiality is still perceived as a vital acolyte of arbitration." *(Rueben p. 1256).* Furthermore, Confidentiality provides that "a person shall not disclose freely 'any information about the arbitration, any information learned through the arbitral proceedings and any award or decision rendered by the arbitral tribunal."' *(Brown p. 1014).*

ii. **The 2018 HKIAC Rules have a strict confidentiality requirement.**

41 The other arbitration was governed by the 2013 HKIAC Rules. However, the Hong Kong International Arbitration Centre announced that a new version of the Administered Arbitration Rules was approved and would go into effect on 1 November 2018. *(HKIAC.org).* The new rules went through a "comprehensive revision process overseen by the HKIAC Rules Revision Committee." *(Id.).* The process began in August 2017 and included "extensive public consultation with users, stakeholders and interest groups in Hong Kong and around the world." *(Id.).*

42 CLAIMANT argues that the fact that the Partial Interim Award will be used in another Arbitration, it will be confidential. *(Cl. Mem. ¶ 78).* CLAIMANT stated that "the proceeding is governed by the HKIAC Rules 2018 and therefore has to be kept confidential." *(Id.).* Article 45.5 HKIAC Rules 2018 states that an award may only be published if the anonymity of the parties' names is guaranteed and no party objects to the publication. Claimant is arguing that the Award will only stay in the sphere of both the Tribunal and the PARTIES, and since the award would not be published, so it would not be a violation of

confidentiality.*(Id).* In this case there would be no anonymity because RESPONDENT'S name would not be removed. RESPONDENT, as one of the party's in the other arbitration, objects to the admission of this award. Furthermore, publication is not a factor in deciding if an award remains confidential or not.

43 While the 2018 revision to the HKIAC Rules did introduce substantial amendments, the confidentiality obligations are still in place. That is not to say that the Committee did not discuss confidentiality, since the Committee addressed the confidentiality of third party funding and decided that the funding of third parties should no longer be confidential. The Committee did not lower or waive the obligations of confidentiality for the parties, arbitrators, or witnesses. *(Compare HKIAC 2013 and HKIAC 2018).*

44 CLAIMANT argues that Art. 45.3 of the 2018 HKIAC Rules provides for several exceptions from the confidentiality obligation of Art. 45.1 of the Rules. As a result of these exceptions, the confidentiality obligation does not apply if the information is needed "to protect or pursue a legal right or interest of the party" or "to enforce or challenge the award." According to Art. 45.3 (d) HKIAC Rules 2018, the confidentiality obligation does not apply in cases where additional parties are joined to a proceeding in the sense of Art. 27. HKIAC Rules 2018, i.e. when consolidating two proceedings. However, these exceptions do not apply in this instance. CLAIMANT does not have a legal right to submit illegally obtained evidence, nor is any party attempting to challenge the award. The exception to Art. 45 is for the parties involved in the Arbitration in which the award was issued. In this case, CLAIMANT is attempting to use an exception for PARTIES in an arbitration as a third party. Furthermore, there has been no consolidation of the arbitration and the CLAIMANT in the other Arbitration is not a party to this arbitration.

B. BECAUSE CLAIMANT VIOLATED THEIR DUTY OF GOOD FAITH, AND BECAUSE OF THEIR ACTIONS, THE TRIBUNAL MUST FIND IN FAVOR OF THE RESPONDENT.

i. Claimant took actions to obtain the illegally obtained evidence.

45 CLAIMANT argued that it has "clean hands" and did not take any actions to procure the illegal evidence. *(Cl. Mem. ¶ 63).* Furthermore, CLAIMANT does not have the Partial Interim

Award in their possession. In fact, CLAIMANT took and is actively taking steps to procure the evidence. In fact, for CLAIMANT to have Partial Interim Award, they will have to pay a company to produce the Partial Interim Award. *(Proc. Ord. 2).*

46 In *Methanex Corporation v. United States of America*, the Tribunal was asked to admit into evidence "documentation [that] was obtained by successive and multiple acts of trespass committed by Methanex over five and a half months in order to obtain an unfair advantage over the USA as a Disputing Party to these pending arbitration proceedings." *(Methanex, Pt. II, Ch. I, para* 59*).* The Tribunal reasoned that "it would be wrong to allow Methanex to introduce this documentation into these proceedings in violation of its general duty of good faith and, moreover, that Methanex's conduct, committed during these arbitration proceedings, offended basic principles of justice and fairness required of all parties in every international arbitration." *(Methanex).* While the evidence in *Methanex* was not obtained via a computer hack, the *Methanex* reasoning should still be considered. The Tribunal made it clear that their "reasoning was firmly grounded in the duty of good faith that parties to an arbitration owe each other and the Tribunal." *(Id.).* While CLAIMANT did not pay the hackers or the employees itself, CLAIMANT is still taking steps to obtain the Partial Interim Award. CLAIMANT violated their duty of good faith, and because of their actions, the Tribunal must find in favor of the RESPONDENT.

ii. CLAIMANT'S right to be heard does not outweigh the other PARTIES' rights under the arbitration agreement.

47 While CLAIMANT does have a right to be heard and to fully present their case, this right does not outweigh RESPONDENT'S rights nor are the rights of the other party in the previous arbitration. CLAIMANT is correct in stating that Art. 13.1 HKIAC Rules 2018, states "parties should have a reasonable opportunity to present their case and equal treatment of the parties should be ensured" *(Cl. Mem. ¶ 79).* However, the Article 13.1 is focused on due process and states in its entirety that: "the arbitral tribunal shall adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay or expense, having regard to the complexity of the issues, the amount in dispute and the effective use of technology, and provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case." *(HKIAC 2018 Art. 13.1).*

48 HKIAC Article 13.1 focuses on the procedure of the arbitration and the timing and management of the arbitral proceedings themselves. The Committee added to this Article instructing arbitral tribunals to consider how technology can be effectively used to avoid unnecessary delay or expense when determining how an arbitration is to be conducted. *(HKIAC 2018 Art. 13.1).* Article 13.1 of HKIAC is intended to increase time and financial efficiency in the arbitral proceedings. Furthermore, Article 13.1 ensures an equal opportunity for PARTIES to present their cases, and the rights of all parties. However, Article 13.1 does not allow for illegally obtained evidence to be admitted, nor does it put one party's rights above another.

49 While it is true that the HKIAC confidentiality rules have an exception for pursuing a legal right or interest, the ability to fairly conduct litigation is the paramount concern that Tribunals should consider in these situations, *(Ghosh p. 360);* these interests do not outweigh the other Party's rights. Article 45.3 provides that the duty of confidentiality does not prevent a party from instituting legal proceedings to: "(1) protect or pursue its legal right or interest; or (2) enforce or challenge the confidential award in *legal* proceedings before a court or other judicial authority." *(HKIAC 2018 Art. 45.3).* For example, a party may wish to disclose the confidential information in an arbitral award if it wishes to argue that the prior award precludes subsequent claims in judicial proceedings by virtue of *res judicata,* or a similar legal issue. *(Id.*). Nevertheless, the facts in this situation do not rise to the level of the Tribunal violating two parties' rights in order to protect the right to be heard. Furthermore, this would not violate CLAIMANT'S right to be heard, as CLAIMANT has not seen the Partial Interim Award and does not know what the other arbitration was about.

iii. The IBA Rules preclude the admission of illegal evidence.

50 CLAIMANT argues that Article 3(1) of the IBA Rules allow for this illegally obtained evidence to be admitted. *(Cl. Mem. ¶ 58).* CLAIMANT also argues that illegally obtained evidence that "CLAIMANT wants to submit is a document which is available since it can be obtained from a company providing information on the horseracing industry," because the IBA Rules state that that parties shall submit all documents available on which they rely. (*Cl. Mem. ¶ 79*). CLAIMANT further argues that they relied on the Award to prove RESPONDENT'S contradictory behavior to eventually convince the Tribunal of the need of

a price adaptation. However, CLAIMANT has not relied on this document. In fact, CLAIMANT has not even seen the Partial Interim Award. *(Proc. Ord. 2 ¶ 41)*

51 While the IBA Rules allow for the admission of documents that were relied upon, there are still guidelines as restrictions. There are evidentiary hearings, and objections, and a procedure to follow. A party cannot pay a third party to obtain illegal evidence. Furthermore, because this Partial Interim Award would not only impact the Respondent in this case, but also the other party in the other arbitration, which is a outside party to this arbitration. IBA Art. 3.9 states that a Party may seek permission from the Tribunal to take all legal steps available to procure the documents.

52 However, HKIAC Article 3.9 specifies that: "the Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that *(i)* the Documents would be relevant to the case and material to its outcome, *(ii)* the requirements of Article 3.3, as applicable, have been satisfied and *(iii)* none of the reasons for objection set forth in Article 9.2 applies." (*Art. 3.9 IBA*). RESPONDENT noted that "RESPONDENT was … 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." *(Letter by Fastrack R at p. 50).* Because the Partial Interim Award is not relevant to the arbitration at hand, the IBA Rules allow the Tribunal to use their own discretion to not allow the illegally obtained evidence to be submitted.

C. THE PARTIAL INTERIM AWARD DOES NOT FALL UNDER A PUBLIC POLICY EXCEPTION.

53 CLAIMANT argues that "the difference between investor-state and commercial arbitration is seen in the higher relevance of investor-state arbitration for the public interest," and that the public interest cannot solely be restricted to investment-state arbitration *(Cl. Mem. ¶ 75).* CLAIMANT further argues that because the tariffs impact multiple people, this arbitration is similar to an investor-state arbitration. That is simply not the case. Investor-State arbitration is between at least one governmental entity. Commercial arbitrations deal

with tariffs and international law in almost every circumstance. The mere fact that an arbitration touches a matter of public policy does not mean that UNCITRAL Rules apply.

54 Even if the Tribunal believed that the public policy argument allowed for UNCITRAL Rules to be applied, the Parties agreed that the HKIAC Rules would govern the arbitration. Parties have the option to choose from different arbitrational institutions and confidentiality rules. Parties voluntarily chose the HKIAC Rules, and the Arbitration itself was started under the HKIAC Rules. There is a notable discrepancy in the treatment of transparency and public access in "international commercial arbitration given that the former is often seen as an imperative while the latter is seen as expendable." *(Rogers p. 1312).*

55 Public access is an "individual right that finds its roots in domestic considerations of fairness and justice." *(Id.).* As one commentator notes, this public access would not make sense in the international sphere as "it would be nonsensical to insist that a Brazilian citizen has a right to attend an Austrian hearing governed by German law involving Chinese and Russian parties." *(Id).* Although, public access is an instrument for stimulating transparency, it is not an essential characteristic of transparency. *(Id).* It might be argued that a public policy exception could be found due to a potential application of res judicata, specifically issue estoppel. However, in order for an issue to one of issues estoppel it must be a final award. *(Id.).*

56 Article III of the 1958 New York Convention states that "each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon under the conditions laid down in the following articles." *(NY Conv. Art. 3).* This theory is a form of *res judicata.* Although, issue estoppell and cause of action estoppel traditionally require that the identity of the parties in the earlier and subsequent proceedings also be applied to the issue estoppel. For cause of action estoppel to be employed, the parties from the previous action have to be the same parties in the action in which cause of action estoppel is applied. This is to prevent a party from trying the same matter in front of different Tribunals hoping to get new Awards.

57 While there are countless ways that a case could be an abuse of process, there are certain dicta that suggest when a proceeding is abusive. (*Ghosh p. 666*). A proceeding will be an abuse of process if it: (i) is oppressive or unjustly harasses a defendant; (ii) contains an element of dishonesty; or (iii) could produce inconsistent or mutually exclusive verdicts. *(Id.).* In this proceeding Claimant's actions met many of the elements that indicate an abuse of process. This situation does not fall under a *res judicata* umbrella, as the two arbitrations are between different parties and, as Respondent has already pointed out, are regarding different facts. The reason the confidentiality rules are in place is to stop parties from digging up every arbitration an opposing party is a part of, and trying to use information they would otherwise be confidential.

58 Additionally, this Partial Interim Award being admitted would violate the local and international public policy rules. HKIAC makes it very clear that confidentiality applies not only to the tribunal but also to the parties, witnesses, and experts as well. Because of this extended obligation of confidentiality, CLAIMANT is bound not to seek the confidential information. CLAIMANT may argue that because the award is in the public sphere and they are not a party to the other arbitration, that agreement does not apply to them.

59 CLAIMANT argues that because the Australian High Court, in *Esso v. Plowman,* explicitly stated that an express agreement on confidentiality "would only bind the parties and the arbitrator, but not others" (*Esso v. Plowman,¶ 33*), and since CLAIMANT does not hold any of these positions it would not bind them. Consequently, CLAIMANT may argue that it is not affected by confidentiality obligations stemming from the prior proceeding. However, this ignores the ambiguous point of the source of the award. CLAIMANT only could have gotten this information through the hack or a breach of confidentiality by a party that was involved. The interest of public policy is to preclude "fruit from the poisonous tree" and to protect the interests of all parties.

60 The issue of confidentiality is key to the successful practice of international commercial arbitration. The confidentiality of arbitration proceedings is a reason parties choose arbitration, as distinct from litigation. Despite its central importance, and the mutual agreement to confidentiality of all parties involved, Claimant is trying to violate the rules

of confidentiality to bring in illegally obtained evidence. The HKIAC Rules 2013 impose a confidentiality obligation on CLAIMANT. RESPONDENT'S prior proceeding has been conducted under the HKIAC Rules 2013 [*Letter 3 October 2018, p. 51, ¶ 1*]. According to Art. 42.1 HKIAC Rules 2013, the arbitration under the arbitration agreement and the award made in the arbitration have to be kept confidential. This means that no related information may be published, disclosed or communicated. Nonetheless, this confidentiality obligation only affects the parties of the proceeding as well as "the arbitral tribunal, any Emergency Arbitrator […], expert, witness [and] secretary of the arbitral tribunal and HKIAC." *(Art. 42.1, 42.2 HKIAC Rules 2013).*

CONCLUSION OF ISSUE 2

61 CLAIMANT is not entitled to submit the Partial Interim Award for the Tribunal's consideration. While Tribunals have not ruled on the issue of illegally obtained evidence, some common legal and policy elements serve as much needed guidance. This analysis centers around the actions of the PARTIES themselves. While CLAIMANT did not illegally obtain the Partial Interim Award, CLAIMANT is taking steps to actively pay for and retrieve the Partial Interim Award from an outside source. HKIAC grants the Tribunal liberal authority to admit and analyze of evidence, which allows the Tribunal to analyze the evidence and give it the appropriate weight. However, the Tribunal must balance the interest of justice and the rights of the PARTIES. The Tribunal should not allow the illegally obtained evidence to affect this arbitration because it would violate the HKIAC Rules and set a dangerous new precedent for international arbitration.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO DAMAGES EITHER UNDER CLAUSE 12 OF THE AGREEMENT NOR UNDER THE CISG.

62 CLAIMANT is not entitled to damages through the CONTRACT, specifically Clause 12 (A) since the CONTRACT does not mention or apply to tariffs; lacks a mechanism to adapt the contract price with the only remedial measure applicable to delays or loss of shipments; and although Clause 12 contains the word hardship, it does not refer to the legal concept

of the same name. Moreover, the PARTIES never intended for Clause 12 to provide price adaptation as a remedy (B) because RESPONDENT'S employees communicated that the CONTRACT did not allow for price adaptation, a reasonable person would have understood that RESPONDENT did not want to adapt the CONTRACT, and the occurrence of a car accident placed more weight for interpretation on the final negotiators. CLAIMANT is also not entitled to the $1,250,000 through the CISG (C). The CISG lacks a price adaption measure for Hardship, and the lack of such a provision cannot be internally gap filled. Finally, DDP Incoterm controls the agreement and assigns responsibility for tariffs on CLAIMANT (D).

A. CLAIMANT IS NOT ENTITLED TO DAMAGES UNDER CLAUSE 12 OF THE CONTRACT.

63 CLAIMANT'S arguments focus on the following sequence of events: a *tariff* occurred that increased the price of the semen, the *tariff* made the agreement no longer profitable for CLAIMANT, and that because of the *tariff* the CONTRACT price should be adapted (*Cl. Mem. ¶¶ 4-5*). However, a reading of the CONTRACT does not provide anything to support this sequence of events because the CONTRACT does not contain the word tariff or a price adaptation provision. (*Ex C5*).

64 Tariffs are not applicable to Clause 12 because tariffs are mentioned nowhere in the CONTRACT. CLAIMANT however argues that tariffs are present within the agreement through the following phrase: "hardship, caused by health and safety regulations or comparable unforeseen events…" (*Ex C5, Cl. 12*). CLAIMANT'S argument centers on the idea that the tariffs are a *comparable unforeseen event* to that of health and safety regulations (*Cl. Mem. ¶¶ 93-94)*. However, customs duties tariffs are not comparable.

65 Tariffs are customs duties directly placed on imported goods to provide a price advantage to similar, locally-produced goods for commercial policy *(WTO Tariffs).* On the other hand, health and safety regulations are classified as non-tariff measures (NTMs) which are technical measures that have non-trade policy objectives such as food safety and environmental protections *(UN NTMs*). In fact, the General Agreement on Tariffs and Trade (GATT) by the World Trade Organization (WTO), which aims to cut and in some

cases reduce to zero tariffs *(Understanding WTO),* still permits NTMs when "dealing with food safety and animal and plant health and safety." *(GATT Art. 20).*

66 For the tariffs by Equatoriana to have been comparable to health and safety regulations, they would have needed a non-commercial policy objective. However, these tariffs only served a commercial policy goal because they were created as retaliation against the tariffs imposed by the anti-trade President of Mediterraneo *(Ex C6).*

67 The CONTRACT also does not contain a single provision allowing for the adaptation of the price, particularly if the economic balance (profitability) of the Contract is changed (*Ex C5*). While Clause 12 of the CONTRACT does contain a remedial measure for the CLAIMANT, it is a force majeure provision that excuses liability only because of a delay or loss in shipment and does not provide for price adaptation (*Id.*). It specifically states that "[t]he Seller shall not be responsible *for lost semen shipment or delays in delivery* not within the control of the Seller such as missed flights, weather delays, or acts of God neither for hardship, caused by additional health and safety requirements…" (*Ex. C5, Cl. 12*) *(Emp. add.).* A plain reading of the cited text reveals no price adaptation. A hypothetical example in which CLAIMANT would have a remedy under Clause 12 is one where because of a price increase, Seller did not have the money on hand to purchase shipping to meet the deadline that caused a delay in shipment. In that instance CLAIMANT may have a remedy under Clause 12. However, in the situation at hand, although a price increase occured, CLAIMANT still managed to send the shipment on time, which RESPONDENT then received on time *(Exs. C8 ¶¶ 6, 9).*

68 Although the word hardship is present within Clause 12, it does not, as CLAIMANT asserts *(Cl. Mem. ¶ 82)* refer to the legal concept of Hardship, which if found allows the PARTIES to renegotiate and adapt the CONTRACT (*UNIDROIT Art. 6.2.*3). This is because the word hardship itself is incorporated into Clause 12 through the conjunction of *neither,* which makes it a subset of applicable force majeure scenarios that would excuse performance for lost or delayed shipments.

B. THE PARTIES DID NOT INTEND FOR THE CONTRACT TO ALLOW PRICE ADAPTATION

69 The intent of the PARTIES further reinforces the fact that the CONTRACT does not allow for price adaptation. Article 8 of the CISG "governs the interpretation of all legally relevant conduct of the PARTIES to the contract." (*Schwenzer Com. Art 8 ¶ 2*). While CISG Article 8 focuses interpretation on the individual parties, it is "beyond doubt that Art. 8 CISG is also concerned with the interpretation of the contract." (*Stanivukovic ¶ 1.a*). In application, the "statements made by and the conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware of what that intent was." (*CISG Art. 8(1)).* This is done by examining the subjective intent of the party making the statement. (*Kröll p. 145*). Only when the other party could not have been aware or adduced the subjective intent, then the statements should be interpreted according to the understanding "of a reasonable person of the same kind as the recipient in the same circumstances." (*Kröll p. 143*).

70 CLAIMANT completely neglected to conduct a subjective intent analysis *(Cl. Mem. ¶¶ 86-89),* but if CLAIMANT had done so, it would have been clear that RESPONDENT did not intend for the Contract to allow price adaptation. RESPONDENT'S employees, Ms. Krone and Mr. Shoemaker, communicated to CLAIMANT their understanding that Clause 12 did not allow for price adaptation. (*Exs. R3 and R4*). During final negotiations, Ms. Krone told CLAIMANT about her objection to allow a Tribunal to increase the price upon its discretion (*Ex R3 ¶ 2*). Later, Mr. Shoemaker reaffirmed this position by telling CLAIMANT that there was no intent to allow for adaption in the case of tariffs, and according to his understanding, tariffs were to be covered by CLAIMANT (*Ex R4 ¶ 4*).

71 An objective analysis yields the same result. When asked by CLAIMANT if the price of the horse semen could be adapted, Mr. Shoemaker never committed to adapting the CONTRACT. (*Ex R4 ¶ 2*). He also stated multiple times that he needed to confirm with his superiors and the legal department whether the CONTRACT allowed for price adaptation (*Id.*). Furthermore, Mr. Shoemaker never had the authority to commit to adapting the CONTRACT. (*Id*). Knowing all of the above, a reasonable person would have understood that Mr. Shoemaker was not knowledgeable enough nor with the proper authority to adopt the CONTRACT price, and that none of his statements could be binding. Thus, Mr. Shoemaker merely makes an observation when he states, "*if the contract provides for an*

increased price in the case of such a high additional tariff we will certainly find an agreement on price." (*Ex R4 ¶ 2*) *(Emp. add.)*.

72 The PARTIES' intent is also determined by considering the relevant and surrounding circumstances, including the common meaning given to terms within the CONTRACT, preliminary negotiations, the conduct of the PARTIES after the conclusion of the CONTRACT, usage, and the nature of the CONTRACT (*CISG Art 8(3)*). An important circumstance that impacted the negotiations was a car accident on 12 April 2017 that removed the original negotiators, Ms. Napravnik for CLAIMANT and Mr. Antley for RESPONDENT, from negotiations. (*Ex C8*). This crucial event necessitates analyzing the PARTIES' statements on a timeline divided as pre-versus-post car accident, for "it was clear that due that the graveness of [the original negotiators'] injuries it would not be possible to get any meaningful input from the two main negotiators…" (*Ex R3*). The only statements that the final negotiators had from the predecessors were archived emails (*Exs. C3-C4*) and a note from RESPONDENT'S original negotiator (*Ex R3*). These items did examine price adaptation (*Exs. C3-C4*) but only as proposals with the original negotiators only agreeing to discuss the matter in person, which was interrupted due to the car accident (*Ex C8*).

73 The replacement negotiators were the CEO and Mr. John Ferguson for CLAIMANT (*Ex C8*) and Ms. Julian Krone for RESPONDENT (*Ex R3*). The replacement negotiators, who also signed the final CONTRACT (*Ex C5*), were qualified, knowledgeable, and had enough time to properly negotiate and shape the final agreement without input from the original negotiators. Mr. Krone was head of RESPONDENT'S legal department (*Ex R3*) and the CLAIMANT'S CEO was head of the entire company (*Ex C8*). Crucial terms, such as the DDP Incoterm, which make the Seller responsible for tariffs, are widely known trade terms not limited to the legal profession. (*Incoterm History*). Finally, the replacement negotiators had the same amount of time to negotiate (Apr. 12 to May 6 of 2017) as the original negotiators (Mar 21 to Apr 12 of 2017). (*Exs. C1-C4*) Thus, due to the lack of meaningful input from the original negotiators and qualifications of the replacement negotiators, interpretation of the PARTIES' intent should focus on statements and actions after the car accident.

C. CLAIMANT CANNOT RECOVER 1,250,000 USD OR ANY OTHER DAMAGES UNDER THE CISG.

74 Besides not finding relief through the CONTRACT, CLAIMANT is also not entitled to damages through the CISG. This is because the CISG first, does not have a Hardship provision to address situations when a contract is no longer profitable to perform, and second, it does not contain provisions allowing for price adaptation.

i. CLAIMANT cannot recover under the CISG as Hardship is not present within the CISG.

75 It is necessary for CLAIMANT to find Hardship because it allows the PARTIES to renegotiate and adapt the contract (*UNIDROIT Art. 6.2.3*). Hardship is an unforeseen event beyond the PARTIES' control when there is "an increase in the cost of performance or a decrease in value of the performance received." *(Schwenzer Com. p. 715).* To prove Hardship, a party must show that "the performance of the contract has become *excessively onerous* or, in other words, if the equilibrium of the contract has been fundamentally altered." (*Schwenzer Hard. pp. 714-15*) (*emph. add.).*

76 A contract simply being more onerous does not excuse the obligor from performance. *(Schwenzer Hard. p. 714) (emph. add.).* A crucial factor in determining if the performance has become excessively onerous is whether the event in question meets the threshold of Hardship (*Id.*). Scholars generally agree that as a hard number a 150-200% increase in the cost of performance is the margin for meeting the threshold of Hardship *(Id. at p. 716).* Some courts have taken an even higher threshold, with a German court not exempting a seller from liability even though the market price for the contract item had risen by 300%. *(Oberlandesgericht).* In the situation at hand, CLAIMANT'S performance is not excessively onerous since the increase in the cost of performance due to tariffs was only 30%, making performance merely *more onerous* and not excessively onerous. *(Ex. C8).*

77 Even if CLAIMANT'S impediment is considered a Hardship, the CISG lacks the ability for the tribunal to adapt the CONTRACT price. This is because there is no specific "price

adaptation provision" to cite, there is no internal gap within the CISG to introduce such as provision, and Good Faith cannot be used to introduce price adaptation.

78 The financial situation of a party may be considered to lower the threshold margin for Hardship, but it must be a situation where financial ruin is *imminent*. *(Schwenzer Hard. at p. 716).* Although CLAIMANT is facing financial difficulties with the increased price, these difficulties have existed since 2014 (far before the present 2017 CONTRACT) when CLAIMANT decided to obtain a risky high interest loan to expand their business. *(Proc. Ord. 2 ¶ 31).* CLAIMANT'S situation under the present circumstances of having paid the tariff, in a worst-case scenario, will not lead to bankruptcy. *(Id.).* CLAIMANT may be required to obtain another loan by selling a portion of their business, but the business itself would not cease to exist because of paying the tariffs. *(Id.).*

79 A plain reading of the CISG also does not provide for Hardship, for as scholars have noted, "the CISG itself does not have any provisions concerning 'hardship' situations." (*Ishida at p. 361*). The history of the CISG supports this view because during the drafting of the CISG in 1977, the working group proposed but ultimately rejected an article governing hardship situations that would have seen parties suffering from "…excessive difficulties or threatens either party with considerable damage, any party so affected has a right to claim and adequate amendment of the contract…" (*Honnold ¶ 458, at p. 350*). Moreover, the Official CISG Commentary states that "article 79 points to an insurmountable obstacle that is unrelated to the more flexible notions of hardship" (*Off. CISG Com. ¶ 28*).

ii. CLAIMANT cannot recover under Article 79 of the CISG.

80 Furthermore, Hardship cannot be incorporated in the CISG as a force majeure variant through Article 79 of the CISG. Hardship and Force Majeure are different legal concepts in that Hardship has the "purpose of renegotiating the terms of the contract so as to allow the contract to be kept alive although on revised terms, while Force Majeure has the purpose of non-performance being excused." *(UNIDORIT Art. 6.2.2 Off. Com. 6).* UDNIDOIT explicitly states that under Hardship, a "party is nevertheless bound to perform its obligation." *(UNIDORIT Art. 6.2.1).*

81 Even if Hardship was considered a Force Majeure variant, CLAIMANT would still need to meet Article 79 prerequisites, which are that "the impediment must not fall in the sphere of risk of the obligor, it must have been unforeseeable; and, it or its consequences must have been unavoidable." *(Schwenzer Art. at pp. 714-15).* Although, tariffs as a government measure were not controlled by PARTIES (*Schwenzer Com. 79 ¶ 18*), CLAIMANT still does not meet the requirements of the impediment being unforeseeable and not being within CLAIMANT'S sphere of risk.

82 CLAIMANT does not meet Article 79's foreseeability requirement. Foreseeability is tested at "the time of the conclusion of the contract in the light of the facts and matters of which the breaching party then knew or ought to have known, the underlying idea being that the PARTIES, should be able to calculate the risks and potential liability they assume by agreement." *(Lookofsky at p. 290).* It is widely accepted that "the decisive test [for foreseeability] is whether a reasonable person in the shoes of the promisor, under the actual circumstances at the time of the conclusion of the contract ought to have foreseen the impediments' initial or subsequent existence." *(Schwenzer Com. 79 ¶ 14).*

83 CLAIMANT should have been able to calculate the risk and foresee the tariffs subsequent existence. When the CONTRACT was signed on 6 May 2017 (*Ex. C5),* an anti-trade atmosphere was present because Mediterraneo already in April 2017 imposed agricultural tariffs on Equitoriana and others, with one of those other countries already responded with direct retaliatory measures against Mediterraneo *(Ex. C6).* In such an atmosphere, a reasonable person should have known that retaliatory agricultural tariffs were a possibility. Additionally, CLAIMANT being experienced in the customs formalities for racehorse semen, should have been aware that racehorse semen would be included under agricultural tariffs, for other countries often include animal semen utilized for artificial insemination as an agricultural good. *(Ex. C3 and USDA tariffs).* CLAIMANT confirms as much by stating that racehorse semen was an animal product that could be covered by agricultural tariffs. *(Ex. C8).*

84 Even if the impediment was unforeseeable to promisor at the conclusion of the contract, it does not exempt the promisor if overcoming the impediment or its consequences is both

possible and reasonable for him. (*Schwenzer Com. 79, ¶15*). There is no doubt that performance was both possible and reasonable in the present case, for CLAIMANT actually performed by fulfilling the final delivery without immediately ceasing to exist. *(Ex. C8).*

85 Likewise, the tariffs were within CLAIMANT'S sphere of risk. Under Article 79(1) if the event causing the Hardship was foreseeable, "then it can be expected that this party would insist on incorporating a specific contract clause to deal with the problem. (*Schwenzer Hard. at p. 719).* If not, then "this party must be assumed to have taken the risk*." (Id.).* As previously stated, the final negotiators of the Sales Agreement did not include the word tariff within the document and tariffs are not considered similar to health and safety regulations, which are classified as non-tariff measures by the WTO.

iii. The CISG does not have a provision that allows for price adaptation of the Contract due to Hardship.

86 There is no CISG provision that deals with price adaptation. Simply put, the CISG does not have the possibility of adapting the CONTRACT. *(Schwenzer Hard. at. p. 724).* Thus, "[w]here an event fundamentally alters the equilibrium of the contract because of the increased cost or performance, judge's power to adapt the contract is urgently desired, but no reasonable basis in provisions of the CISG has been suggested." (*Ishiba at p. 331*). The Belgium Supreme Court noted this when it found Hardship but could not use the CISG to provide a remedy of adaptation. *(Scafom).*

87 CLAIMANT misapplies Article 7 of the CISG to argue that the Convention gives the tribunal the power to adapt the contract as an internal gap filler. (*Cl. Mem. ¶¶ 118-122*). Internal gap filling within the CISG is only applicable to questions concerning matters *governed* by the CISG. *(Schwenzer Com. ¶ 27).* However, "it can hardly be conceived that there is a gap in the CISG that can be filled by giving the court or tribunal the power to adapt the contract to the change circumstances. *(Schwenzer Hard at p. 724).* CLAIMANT attempts to utilize Article 50 of the CISG as an internal gap filler for "Art. 50 CISG determines that they buyer may reduce the purchase price under certain circumstances." *(Emph. Add.) (Cl. Mem. ¶ 122).* CLAIMANT however fails to mention that the certain circumstances are applicable

"if the goods do not conform with the contract" *(CISG Art. 50)*, which is not the dispute between the Parties.

88 CLAIMANT also misapplies the concept of good faith within Article 7(1) of the CISG to support the notion that the CISG contains the power to adapt the CONTRACT (*Cl. Mem. ¶¶ 136-138*). Good faith within Article 7(1) deals with interpreting the CISG convention and not in establishing the principle of dealing in good faith among the parties. *(Schwenzer Hard. at p. 722*). As such, "Article 7(1) cannot be used to establish rights and (additional) obligations outside the CISG." *(Schwenzer Com. Art. 7 ¶ 19).*

89 If a remedy could be found for Hardship, then it would be outside the CISG through the UNIDROIT Article 6.2 which addresses Hardship. UNIDROIT states that "in the case of hardship the disadvantaged party is entitled to request renegotiations … without undue delay. *(UNIDORIT Art 6.2.3)* If negotiations fail, then the court that finds Hardship may "adapt the contract with a view to restoring its equilibrium." *(UNIDROIT Art 6.2.3(b)).* Two key concepts are applicable to CLAIMANT: first, CLAIMANT is entitled to request renegotiations, and second, the renegotiations must fail. However, CLAIMANT never asked for a renegotiation. The meeting that took place on 12 February 2018 was not for renegotiating the contract but rather to falsely accuse RESPONDENT of reselling the racehorse semen. *(Ex. C8).* Therefore, if no negotiations took place, then the precondition of the negotiations failing cannot be met to grant a Tribunal the power to adapt.

D. DDP INCOTERM CONTROLS THE ENTIRE AGREEMENT AND ASSIGNS RESPONSIBILITY FOR THE TARIFFS ON CLAIMANT.

90 An Incoterm refers to "a set of rules, developed by the International Chamber of Commerce, that provide [global] uniform definitions for delivery terms commonly used by buyers and sellers in their sales contracts." *(Johnson, W. ¶ 2.2)* The final contract includes an unmodified DDP Incoterm *(Ex. C5 Cl. 8)* in which "[t]he seller … has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities." *(ICC Incoterms).*

91 The inclusion of Incoterms into the CONTRACT is allowed by CISG Articles 8(3) and 9. Article 8(3) states that in determining the Parties' intent within the Contract, usages should

be given due consideration. (*CISG Art. 8(3)).* While Article 9 binds the PARTIES to any usages that they have agreed upon *(CISG Art. 9(1))* and that "the parties are considered, unless otherwise agreed to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade." (*CISG Art. 9(2))*. Article 9 does not require determination of the PARTIES' actual intent. *(Schwenzer Com. 9 ¶ 14*). Usages under Article 9 take precedence over other rules of the convention. *(Id).* Moreover, Article 9 "allocates the risk of mistake to that party which, due to its *lack of care* is mistaken." *(Id.).* Essentially, if a party mistakenly includes DDP due to lack of care, the party is still bound to use DDP.

92 As discussed, although the initial negotiators did examine the inclusion of a modified DDP, the final negotiators were acting independent of the initial negotiators and decided to not modify DDP within the final version of the agreement. Subjective and objective analysis of the contract performance also supports this notion. Subjectively, Mr. Shoemaker stated that he understood DDP to mean that CLAIMANT was responsible for tariffs (*Ex. R4*). Objectively, a person within the position of the final negotiators would understand that the inclusion of DDP, a commonly used international trade term, would bind the CLAIMANT, as seller, to pay tariffs. However, even if the intent analysis is inconclusive, Article 9 makes intent irrelevant and makes DDP and the duty for CLAIMANT to pay custom supreme to the CISG and binding. Finally, CLAIMANT cannot claim mistake in the addition of DDP to explain the initial lack of objection as to why an unmodified DDP was within the agreement.

CONCLUSION OF ISSUE 3

93 CLAIMANT is not entitled to 1,250,000 USD by adapting the CONTRACT price through Clause 12, the PARTIES' Intent, or the CISG. Clause 12 is applicable only to excuse a delay or loss of shipments and not to tariffs. The PARTIES never intended for the contract to provide price adaptation as a remedy. CLAIMANT is also not entitled to a price adaptation through the CISG because Hardship is not present within the CISG; even if Hardship is found as a Force Majeure variant, the prerequisites are not met; and the CISG lacks a remedy to adapt the CONTRACT. CLAIMANT also does not meet UNIDROIT adaptation

requirements. In any case, DDP controls the agreement and assigns responsibility of paying the tariffs to CLAIMANT even if the CISG allowed price adaptation.

PRAYER FOR RELIEF

In light of the foregoing submissions RESPONDENT respectfully requests the Arbitral Tribunal to find that:

(1) The Arbitral Tribunal does not have the jurisdiction and power to adapt the contract under the arbitration agreement (Issue 1);

(2) CLAIMANT is not entitled to submit the evidence from the other Arbitration Proceedings (Issue 2);

(3) CLAIMANT is not entitled to the payment of 1,250,000 USD resulting from an adaptation of the price (Issue 3).

Submitted on behalf of RESPONDENT by the University Of Houston Law Center.

24 January 2019: (signed)

/s/ Zachary Baumann */s/ Dominic Kisielewski* */s/ Kathryn Laflin*