

# MEMORANDUM FOR CLAIMANT



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*On behalf of*

**Mediterraneo Elite Conferences Service Ltd**  
45 Conference Place  
Capital City, Mediterraneo  
Telephone: (0) 486-2500  
Fax: (0) 486-2511

‘CLAIMANT’

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*Against*

**Equatoriana Control Systems Inc**  
286 Second Avenue  
Oceanside, Equatoriana  
Telephone: (0) 237-8600  
Fax: (0) 237-8601

‘RESPONDENT’

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# BOND UNIVERSITY

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<i>CISG</i>	Convention on Contracts for the International Sale of Goods, Vienna, 1980.	58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 73, 76, 78, 81, 87, 90, 91, 93, 98
<i>Model Law</i>	UNCITRAL Model Law on International Commercial Arbitration, 2006	19, 25, 41, 106, 107, 110
<i>Rome Convention</i>	Rome Convention on the Law Applicable to Civil and Commercial Obligations, 2005.	111
<i>New York Convention</i>	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958.	20, 41
<i>UNIDROIT Principles</i>	UNIDROIT Principles of International Commercial Contracts, 2004.	70
<i>Vienna Convention 1969</i>	Vienna Convention on the Law of Treaties, 1980.	24
<i>IBA Guidelines</i>	IBA Guidelines on Conflicts of Interest in International Arbitration, 2004.	42, 46, 51
<i>ECPHR</i>	The European Convention on Human Rights, 1950.	22
<i>OECD Convention</i>	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997.	114
<i>UNIDROIT Civil Procedure</i>	UNIDROIT Principles of Transnational Civil Procedure, 2004.	22

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**TABLE OF ABBREVIATIONS AND DEFINITIONS**

<b>&amp;</b>	And
<b>Art. /Arts.</b>	Article/Articles
<b>CEO</b>	Chief Executive Officer
<b>CIETAC Rules</b>	China International Economic and Trade Commission Arbitration Rules, revised 2011
<b>CISG</b>	United Nations Convention for the International Sales of Goods, 1980
<b>Claimant</b>	Mediterraneo Elite Conferences Services Ltd
<b>Clm. Ex.</b>	Claimant’s Exhibit
<b>Contract</b>	Contract between Elite and Control Systems, signed 26 May 2010
<b>Control Systems</b>	Equatoriana Control Systems Inc
<b>Corporate Executives</b>	Worldwide Corporate Executives Association
<b>Dr.</b>	Doctor
<b>ed./eds.</b>	Editor/Editors
<b>edn</b>	Edition
<b>Elite</b>	Mediterraneo Elite Conferences Services Ltd
<b>High Performance</b>	Atlantis High Performance Chips
<b>IBA Guidelines</b>	International Bar Association Guidelines on Conflict of Interest in International Arbitration
<b>ICC</b>	International Chamber of Commerce
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>Model Law</b>	UNCITRAL Model Law on International Commercial Arbitration, 2006.
<b>Mr.</b>	Mister
<b>n.</b>	Note
<b>No.</b>	Number
<b>New York Convention</b>	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958
<b>p./pp.</b>	Page/Pages
<b>para./paras.</b>	Paragraph/Paragraphs
<b>Proc. Ord.</b>	Procedural Order
<b>OECD</b>	Organization for Economic Cooperation and Development
<b>Respondent</b>	Equatoriana Control Systems Inc
<b>Resp. Ex.</b>	Respondent’s Exhibit
<b>Specialty Devices</b>	Oceania Specialty Devices
<b>Stmt. Clm.</b>	Claimant’s Statement of Claim
<b>Stmt. Def.</b>	Respondent’s Statement of Defense
<b>Technical Solutions</b>	Atlantis Technical Solutions
<b>Tribunal</b>	Arbitral Tribunal of the China International Economic Trade Arbitration Commission
<b>UN</b>	United Nations
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNIDROIT</b>	International Institute for the Unification of Private Law

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## STATEMENT OF FACTS

1. On **26 May 2010**, Elite entered into the Contract for the supply, installation and configuration of the master control system for the M/S Vis, a yacht purchased as a conference venue [*Stmt. Clm. para. 7*]. The Contract provided the installation and configuration would be completed by the 12 November 2010 [*Clmt. Ex. 1*]. The master control systems were integral to the venue's operation [*Stmt. Clm. para. 8*].
2. Control Systems subcontracted the manufacturing of the processing units for the master control system to Specialty Devices [*Stmt. Clm. para. 8*]. The D-28 chips, an integral part of the processing units, would be supplied by High Performance [*Stmt. Clm. para. 9*].
3. Elite scheduled a conference with Corporate Executives to be held on the M/S Vis between 12 and 18 February 2011 [*Stmt. Clm. para. 11*].
4. On **6 September 2010**, a fire at High Performance's chip manufacturing facility, caused by a short circuit, ceased chip production [*Stmt. Clm. para. 12; Proc. Ord. 2 para. 8*].
5. Although High Performance had sufficient chips in stock to satisfy Specialty Devices' order, High Performance chose to provide all the chips to Technical Solutions on the rationale it wanted to supply to its regular customers first [*Stmt. Clm. paras. 13, 14*]. The real reason was that the CEOs of High Performance and Technical Solutions were good friends [*Clmt. Ex. 7*].
6. Elite chartered the M/S Pacifica Star as a replacement yacht and incurred significant costs [*Stmt. Clm. para. 18*]. The personal assistant of the owner of the M/S Pacifica Star was subsequently convicted of taking bribes in this and other transactions [*Stmt. Def. para. 13; Resp. Ex. 1; Proc. Ord. 2. para. 26*]. Elite also paid Corporate Executives a partial refund of the conference price in the form of an ex gratia payment for the non-conformity [*Stmt. Clm. para. 18*].
7. The master control system was then installed and configured by 11 March 2011 [*Stmt. Clm. para. 16*].
8. On **21 March 2011**, Elite made full payment of the Contract price to Control Systems [*Stmt. Clm. para. 16*].
9. On **15 July 2011**, Elite tendered an application for arbitration to claim USD 670,600 damages plus interests and costs with CIETAC [*Letter 15 July 2011, Horace Fasttrack to CIETAC*].

10. On **2 August 2011**, Elite and Control Systems jointly appointed Professor Presiding Arbitrator as chairman of the Tribunal [*Letter 2 August 2011, Horace Fasttrack to CIETAC*].
11. On **3 August 2011**, Control Systems appointed Dr. Arbitrator 2 to the Tribunal and confirmed the joint appointment of Professor Presiding Arbitrator as chairman of the Tribunal [*Letter 3 August 2011, Joseph Langweiler to CIETAC*].
12. On **22 August 2011**, the three arbitrators of the Tribunal provided their Declarations of Acceptance and Statements of Independence to serve as arbitrator [*Letter 22 August 2011, Ms. Arbitrator 1 to CIETAC*].
13. On **30 August 2011**, Elite and Control Systems received confirmation of the composition of the Tribunal and the arbitrators' Statements of Independence [*Letter 30 August 2011, CIETAC to Elite and Control Systems*]. Control Systems' counsel learnt that Dr. Mercado had been added to Elite's legal team [*Proc. Ord. para. 29*].
14. On **2 September 2011**, Control Systems filed its statement of defense [*Letter 2 September 2011, Joseph Langweiler to CIETAC*]. It also challenges the addition of Dr. Mercado to Elite's legal team [*Stmt. Def. para. 24*]. Dr. Mercado works at the same university as Professor Presiding Arbitrator and is friends with his wife [*Stmt. Def. para. 17, 18, 21*].

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## ARGUMENTS

### **I. THE TRIBUNAL CANNOT EXCLUDE DR. MERCADO FROM THE ARBITRATION.**

15. Control Systems has challenged the appointment of Dr. Mercado to Elite's legal team [*Stmt. Def. para. 16*]. Control Systems advances that Dr. Mercado's participation creates a conflict of interest for Professor Presiding Arbitrator. However, the Tribunal does not have the power to exclude a party's counsel from participating in the arbitration [**A**]. Further, the relationship between Professor Presiding Arbitrator and Dr. Mercado does not give rise to bias [**B**]. In the alternative, by challenging Dr. Mercado, Control Systems has waived its right to challenge Professor Presiding Arbitrator [**C**].

#### **A. The Tribunal does not have the power to exclude Elite's counsel from the arbitration.**

16. The Tribunal does not have the power to exclude Elite's counsel. The Tribunal can rule upon its own jurisdiction [**i**]. However, a party has an unqualified right to choose its legal counsel in international arbitration [**ii**]. This right is not displaced by any express or implied powers for the Tribunal to exclude counsel within the relevant rules that apply to this arbitration [**iii**]. Further, the right to choose legal representatives is not displaced by an inherent power [**iv**]. Even if there is an inherent power, it can only be exercised in exceptional circumstances, none of which are present [**v**].

#### **i. The Tribunal has jurisdiction to decide upon its own jurisdiction.**

17. The Tribunal has the jurisdiction to determine its own jurisdiction. The competence-competence doctrine provides that international courts and tribunals can rule upon their own jurisdiction [*Born, p. 853*]. This principle is an accepted legal principle in international arbitration [*Born, p. 857; ICC Case No. 7929*].

18. This is also provided for in the relevant arbitration rules. Pursuant to the Contract, the CIETAC Rules apply to this arbitration [*Clmt. Ex. No. 1*]. Where CIETAC has delegated the power to determine jurisdiction to a tribunal, the tribunal can rule upon its own jurisdiction [*Art. 6.3 CIETAC Rules*]. In this case, CIETAC has delegated the power 'to make a decision on ... jurisdiction when necessary' to the Tribunal [*Letter, 9 September 2011*].

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19. Further, the competence-competence doctrine is mirrored in Article 16 of the Model Law. The Model Law applies as both parties have their places of business in different countries and Danubia as the seat of arbitration has adopted it [*Art. 1 Model Law*]. The Tribunal can therefore rule on its own jurisdiction.
20. However, if the agreed upon arbitration procedure is not followed or there is a failure of due process, the award will not be enforceable under the New York Convention [*Art. V(1)(b), V(1)(d) New York Convention; Born, p. 2732*]. All of the relevant countries are party to this convention [*Stmt. Clm. para. 21*]. Accordingly, it is necessary for the Tribunal to consider and reject its jurisdiction to exclude counsel.

**ii. The parties have the right to choose their legal representation.**

21. The parties have a well recognised right to choose their legal representatives. Article 20 of the CIETAC Rules provides that a party may be represented at arbitration. This rule impliedly recognises that the parties have the right to choose their legal representatives [*Born, p. 964*].
22. Furthermore, the parties' right to choose their legal representation is a fundamental human right and a right that lies at the basis of civil procedure [*Art. 6(c) ECPHR; Art. 4.1 UNIDROIT Civil Procedure*]. The unfettered right to choose legal representation has been well accepted in international commercial arbitration [*Born, p. 2290; Kurkela, p. 187; Rubino-Sammartano, p.729*].
23. Elite therefore has the right to appoint and employ counsel of its choice, as it sees fit. The Tribunal cannot exclude Dr. Mercado from being involved in the arbitration as it would be contrary to this principle.

**iii. The Tribunal does not have any express or implied powers to exclude Dr. Mercado from the arbitration.**

24. The Tribunal has no express or implied powers to exclude Dr. Mercado from the arbitration. No such power is expressly granted by the CIETAC Rules. Neither is there an implied power. Control Systems may seek to rely on Article 33 of the CIETAC Rules which confers upon the Tribunal the power to '...examine the case in any way it deems appropriate...' and '... issue procedural orders...' However, these cannot be extended to a power to control legal counsel. Further, this Article also provides that the tribunal '... shall afford a reasonable opportunity to all parties to make submissions and arguments.' This is directly linked to proper legal

representation. It would be inconsistent with the remainder of the text to interpolate the power into this Article [*Art. 31 Vienna Convention 1969*].

25. Furthermore, the Model Law also does not include any provision for powers of an arbitral tribunal to interfere in a party's choice of legal representation. A tribunal must have either an express or implied power in order to override the right to choice of legal representation [*Waincymer, p. 614*]. The principle of party autonomy requires that this power stems from the agreed upon rules of arbitration [*Poudret, para. 424*]. The CIETAC Rules and Model Law fail to reference expressly or implicitly a power to exclude counsel. There are no other relevant conventions or laws referenced or incorporated by the parties. As such, this alleged power cannot displace the right to choose one's legal representation.

**iv. The Tribunal does not have any inherent power to exclude Dr. Mercado from the arbitration.**

26. Control Systems' demand for the removal of Dr. Mercado must rely upon the Tribunal having an inherent power to interfere with a party's choice of counsel, as it has no express or implied power to do so. The Tribunal should not find that it has such an inherent power due to the significant associated policy concerns.
27. First, such a finding would be contrary to the principle of party autonomy. Tribunals have been reluctant to recognise inherent powers beyond the relevant rules and the agreement [*Re Construction, para. 14*]. In the CIETAC Rules there is no express or even implicit reference to such an inherent power. An inherent power should not be inferred in such an absence [*Brown, p. 59*].
28. Moreover, in this case, the recognition of this inherent power would be inconsistent with the constitutive instruments of the arbitration, namely the Contract and CIETAC Rules. This power would impugn Article 20 of the CIETAC Rules which provides for a party's right to legal representation. An inherent power cannot be inferred contrary to an express provision of a tribunal's rules [*Brown, p. 63*]. The arbitration process is aimed at facilitating dispute resolution for different parties coming from legal systems with different expectations [*Born, p. 2301*]. '[R]estricting a party's choice of counsel or representatives would seriously impair this objective of the international arbitral process, and would also likely violate the New York Convention' [*Born, p. 2301*].

29. Further, it is not necessary to infer such an inherent power for the Tribunal as it can still carry out its functions without such a power, for example by managing or dealing with conflicts of interest. A power can only be inherent if it is necessary for a tribunal to carry out its purpose [*Beqa Beqaj*, p. 758; *Brown*, p. 79]. A judicial body should look first to powers within its own rules before seeking to rely on an inherent power [*NASCO*, p. 50]. In this case, the Tribunal is empowered to control its own composition for the purposes of managing conflicts of interest through arbitrator challenging mechanisms [*Art. 30 CIETAC Rules*]. It is preferable to remove an arbitrator to avoid conflicts of interest rather than to control the legal counsel of the parties [*Born*, p. 2301].
30. Further, it is long established that tribunals will use their power to grant costs in the final award as a means of controlling proceedings [*Bishop & Stevens*, p. 405]. Here, such an award can be made to prevent misconduct or impropriety by a party or its counsel. This power is expressly conveyed upon the arbitral tribunal [*Art. 47 CIETAC Rules*]. Thus, it removes the need and ability of the Tribunal to infer a separate power to exclude counsel for the same purpose.
31. Finding that the Tribunal has the inherent power to exclude counsel would also be directly inconsistent with the principles of due process, of which the right to choose legal representation is an integral part. An inherent power should not be found contrary to due process [*NASCO*, p. 50].
32. Additionally, the conduct of counsel is almost universally regulated by independent ethical codes of legal societies. It would be arbitrary and conflicting for different arbitration tribunals to impose their own standards *ad hoc* [*Bishop & Stevens*, p. 405].
33. Lastly, if the Tribunal were to find that it has this inherent power, its exercise, on the basis of a conflict of interest with an arbitrator, would be an implied prioritization of the right to an impartial and independent tribunal over the right to choice of legal representation [*Waincymer*, p. 611]. Such an approach was rejected in *Rompetrol*. There is no evidence before the Tribunal that either party has acted in bad faith so as to warrant such a reweighting of these principles. The control of counsel has traditionally only been on the grounds of such misconduct [*Roadway*, p. 767].

34. This inherent power has limited recognition in international arbitration but it should not be applied in these circumstances. There is limited precedent for a tribunal to exclude counsel for a conflict of interest [*Born*, p. 2313]. Three recent cases in the ICSID have discussed the existence of such an inherent power [*Hrvatska*; *Unpublished Decision of the ICSID Annulment Committee (2008)*; *Rompetrol*]. In *Hrvatska* the tribunal found that an inherent power to control counsel existed. When construing the existence of this power, the arbitrators emphasised the principle of the immutability of a properly formed tribunal. Conversely, the CIETAC rules do not include a similar concept. Further, the factual basis on which bias was determined was highly specific. The *Hrvatska* case turned on a repeated refusal of counsel for one of the parties to disclose his relationship with the arbitrator, creating an increased perception of bias. The inherent power in *Hrvatska* should be confined to its factual basis and would not apply in these circumstances.
35. The inherent power to exclude counsel was also recognised in an Unpublished Decision of ICSID Annulment Committee (2008). However, it was not on the basis of a conflict between an arbitrator and counsel. Rather, the counsel was conflicted because he had represented the opposition four years prior and there were confidentiality concerns. The tribunal found it was not necessary to exercise the power in these circumstances. Again, this power turned on a distinctly different factual basis.
36. The Tribunal should instead follow the approach in *Rompetrol*. In that case the tribunal, having regard to the legal and policy concerns, found that no inherent power to interfere with a party's choice of counsel existed. In *Rompetrol* a new counsel was added to the claimant's team who had previously worked at the same law firm as the claimant's chosen arbitrator for a four year period. The tribunal, after having examined the reasoning in *Hrvatska*, was highly reticent to acknowledge the existence of an inherent power to exclude a party's counsel. It went on to state that *Hrvatska* was better viewed as 'an *ad hoc* sanction for the failure to make proper disclosure in good time than as a holding of more general scope' [*para. 25*]. As such, the relevant authorities and substantial policy concerns indicate that no inherent power exists to exclude counsel.

**v. Even if the Tribunal does have an inherent power to exclude a party's legal representative, it can only be exercised in exceptional circumstances, which are not present here.**

37. Should the Tribunal recognise that it has an inherent power to exclude counsel, it could not be exercised in the circumstances because the integrity of the arbitral process is not challenged. In *Rompetrol*, the tribunal found that perhaps in exceptional circumstances a tribunal could exclude the participation of counsel in order to preserve the integrity of the arbitration. This is supported by Canadian courts which have recognised a power for arbitral tribunals to disqualify counsel in 'compelling circumstances' [*Hall, Moore & McPhillips, p. 1.1.23*].
38. However, the relationship between Professor Presiding Arbitrator and Dr. Mercado does not exhibit any exceptional characteristics so as to enable this power. There is no long-term friendship or significant financial dependence. The tribunal in *Rompetrol* stated for this power to be invoked the relationship would have to result in 'the party gaining for itself, through its choice of counsel, an automatic (and unfair) advantage in the litigation... severe enough so as to jeopardize public confidence in the arbitral process' [*para. 17*]. That is not the case here. The fundamental integrity of the Tribunal is not challenged by a relationship where there is no evidence of a friendship and there are weak professional ties. Even if the Tribunal finds that there is some likelihood of bias, it would not satisfy the exceptional circumstances contemplated in *Rompetrol*.

**B. Even if the Tribunal has the power to exclude counsel, Professor Presiding Arbitrator remains impartial and independent despite the involvement of Dr. Mercado in the arbitration.**

39. Professor Presiding Arbitrator is impartial and independent. He remains unbiased as required by the CIETAC Rules, interpreted consistently with the overarching principles of international law. If the Tribunal finds that it has the power to exclude counsel, it should still not exclude Dr. Mercado from Elite's legal team because Professor Presiding Arbitrator is not biased by Dr. Mercado's participation in the arbitration. It is necessary to analyse whether the relationship would give rise to an effective challenge against the arbitrator at the commencement of the arbitration [*Waincymer, p. 616*]. Professor Presiding Arbitrator must be impartial and independent pursuant to the relevant law [i]. Professor Presiding Arbitrator submitted an unqualified statement of impartiality and independence [ii]. His position on the

Tribunal could not be successfully challenged on the basis of any professional [iii] or personal [iv] relationship between him and Dr. Mercado.

40. A challenge based on the relationship between Professor Presiding Arbitrator and Dr. Mercado must fail. The mere fact that they know each other and have some relationship is insufficient to guarantee a successful challenge to the independence or impartiality of Professor Presiding Arbitrator. A relationship between an arbitrator and the counsel for one of the parties is rarely a successful basis for a challenge to an arbitrator [*Fouchard, para. 1031*]. Due to the very nature of the international arbitration community it is inevitable that the parties may be familiar with each other [*Hwang, p. 235; Commonwealth Coatings, p. 151*]. The relationship between Professor Presiding Arbitrator and Dr. Mercado does not extend beyond this expected familiarity.

**i. Professor Presiding Arbitrator must be impartial and independent pursuant to the relevant law.**

41. Professor Presiding Arbitrator is impartial and independent of Dr. Mercado and therefore complies with the requirements under the CIETAC Rules. An arbitrator must be impartial and independent of the parties [*Art. 22 CIETAC Rules; Fouchard, para. 1022*]. An arbitrator found to be partial or dependent can be challenged [*Art. 30 CIETAC Rules*]. Alternatively, if the proceedings come to completion, the final award may be unenforceable [*Art. V(1)(b) New York Convention; Born, p. 2732*]. Article 30(2) of the CIETAC Rules provides that a challenge can be brought against arbitrators where a party has justifiable doubts as to their impartiality or independence. This rule mirrors the test laid down in Article 12 of the Model Law.
42. Article 30(2) of the CIETAC Rules should be read in the context of the IBA Guidelines. These guidelines have received widespread acceptance within the arbitration community [*Luttrell, p. 193*]. Doubts are considered to be justifiable by these guidelines ‘... if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision’ [*Art. 2(3) IBA Guidelines*]. The Tribunal should adopt a subjective-objective approach, that is, what is reasonable with consideration of the different parties’ viewpoints [*Trakman, p. 13*].

43. Control Systems' challenge is concerned with the independence and impartiality of Professor Presiding Arbitrator. Partiality contemplates the state of being subjectively biased towards the subject matter of the arbitration [*Poudret, para. 416*]. Independence is assessed as a purely factual existence of relationships between the relevant parties [*Fouchard, para. 1028*]. In order to judge Professor Presiding Arbitrator's independence and impartiality, the Tribunal must look at the facts of the relationship between him and Dr. Mercado. Dependence may give rise to partiality, however partiality is generally difficult to establish [*Trakman, p. 8*]. Any dependence here is inadequate to satisfy the tests laid down in the CIETAC rules.

**ii. Professor Presiding Arbitrator submitted an unqualified statement of impartiality and independence which was uncontested by all parties.**

44. Professor Presiding Arbitrator was selected by the two parties conjointly as an impartial and independent arbitrator. Upon request by CIETAC, Professor Presiding Arbitrator provided an unqualified Declaration of Impartiality and Independence to the parties [*Letter 22 August 2011*]. The completed Declaration was communicated to both the parties and no challenges were made. As such, Control Systems has waived any right to challenge Professor Presiding Arbitrator for reasons known to it at the time of this declaration [*Arts. 10, 30, CIETAC Rules*].

45. Further, Professor Presiding Arbitrator has not breached any disclosure obligations pursuant to Article 29 of the CIETAC Rules. The IBA Guidelines adopt a subjective level of disclosure, which varies with the parties [*Trakman, p. 11*]. Professor Presiding Arbitrator was unaware of Dr. Mercado's appointment upon making the original declaration and, as such, was not required to disclose this relationship. Even though Professor Presiding Arbitrator is required to disclose throughout the proceedings, an arbitrator's failure to properly disclose does not affect independence or impartiality [*Art. 29(2) CIETAC Rules; Waincymer, p. 618; Poudret, para. 429*]. However, it may contribute to an appearance of bias [*Leeman, p. 13*]. Professor Presiding Arbitrator has not been given an opportunity, or been requested by Control Systems, to disclose his relationship with Dr. Mercado. There has been no failure to disclose and as such there can be no consequent perception of bias.

**iii. Professor Presiding Arbitrator's professional affiliation with Dr. Mercado does not give rise to a successful challenge.**

46. Professor Presiding Arbitrator's professional relationship with Dr. Mercado does not give rise to justifiable doubts as to his impartiality or independence. The IBA Guidelines provide a number of lists of factual circumstances graded according to the strength of relationship and corresponding perception of bias. A situation listed as orange, requiring disclosure, by the IBA Guidelines includes where 'the arbitrator was within the last three years a partner or otherwise affiliated with... any of the counsel in the same arbitration...' [*Art. 3.3.3 IBA Guidelines*]. This guide contemplates a much closer relationship than the situation here. A partnership involves significant financial and legal intimacy. Conversely, Professor Presiding Arbitrator and Dr. Mercado do not share profit or have nearly as close a legal or professional relationship as partners.
47. To demonstrate a business relationship capable of warranting the disqualification of an arbitrator, there must be direct financial contributions [*Commonwealth Coatings, p. 148; Ruffin, p. 172*]. This case is similar to *Andros* where an arbitrator and an affiliate of one of the parties had served on the same tribunal sixteen times prior. As no evidence of a close personal relationship or financial interest was furnished, this relationship was found not to give rise to bias. Similarly here, the purely professional relationship between Dr. Mercado and Professor Presiding Arbitrator is not supplemented with these key factors. Professor Presiding Arbitrator has no pecuniary interest in his relationship with Dr. Mercado.
48. The existence or otherwise of a financial interest in the outcome is also relevant to the establishment of professional or business bias [*Leatherby, p. 674*]. Professor Presiding Arbitrator has no financial interest in the success or otherwise of Dr. Mercado. Professor Presiding Arbitrator is Dr. Mercado's senior at Danubia National University and will not be personally affected by the impact of the case on Dr. Mercado. Professor Presiding Arbitrator does not appear to have any influence on the work environment of Dr. Mercado [*Stmt. Def. para. 20*]. Any professional interest is further diluted because they work in different faculties and Dr. Mercado is not a fulltime employee [*Stmt. Def. paras. 19, 20*]. Although Dr. Mercado was called by Professor Presiding Arbitrator's assistant to apply for the advertised job, she was highly regarded in the area of international commercial arbitration and this does not indicate the existence of any particular relationship [*Stmt. Def. para. 18*].

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49. Additionally, the relationship has no bearing on Professor Presiding Arbitrator's view of the subject matter under arbitration. This was another important factor increasing the likelihood of bias identified by the courts [*Transport and Allied Workers Union*]. The suggestion that Professor Presiding Arbitrator has previously shown a bias towards Dr. Mercado is not for the Tribunal to determine in the absence of a full hearing of those facts. Without a finding of law on these proceedings, they are irrelevant to the question at hand.
50. Involvement in the same arbitration does not in or of itself give rise to bias even where this relationship is engineered by one of the parties. In *Tidewater*, the tribunal found the fact an arbitrator had been appointed by one party several times prior did not give rise to bias. Similarly here, simply because Dr. Mercado has appeared before Professor Presiding Arbitrator three times before, is no indication of bias. Professor Presiding Arbitrator's professional relationship with Dr. Mercado would not lead a reasonable person to believe there is a likelihood of bias.

**iv. Professor Presiding Arbitrator's personal relationship with Dr. Mercado does not give rise to a successful challenge.**

51. Professor Presiding Arbitrator's personal relationship with Dr. Mercado does not give rise to justifiable doubts as to his impartiality or independence. In terms of the IBA Guidelines orange list, arbitrators are only required to disclose, where 'a close personal friendship exists between an arbitrator and a counsel of one party, as demonstrated by the fact that the arbitrator and the counsel regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organization...' [*IBA Guidelines*, 3.3.6]. There is no evidence that Professor Presiding Arbitrator and Dr. Mercado interact outside their professional environment. A close friendship between counsel and an arbitrator may give rise to the risk of dependence and thus bias [*Rubino-Sammartano*, p.331]. However, other than being on a first name basis, which can be the case for bare acquaintances, there is no evidence of such a friendship. In the case of *Alpha*, a challenge against an arbitrator for his relationship with counsel was dismissed because the respondent failed to prove that an ongoing friendship existed.
52. Although, Dr. Mercado may be friends with Professor Presiding Arbitrator's wife, no such strong personal ties exist with Professor Presiding Arbitrator on the facts. While this friendship may increase incidental contact with Professor Presiding Arbitrator and his

children, it is insufficient to constitute a close personal relationship. In *Ancheta*, the Court found that the fact the arbitrator shared office space with the mother of the counsel of one of the parties in the arbitration did not create a conflict in itself. Similarly here, the fact that Dr. Mercado has some personal relationship with Professor Presiding Arbitrator's wife does not extend another step to Professor Presiding Arbitrator.

53. The fact that Dr. Mercado is also the godmother of one of Professor Presiding Arbitrator's children does not contribute to this personal relationship. This very situation was addressed by Advisory Opinion 11 on the Code of Judicial Conduct for United States' Judges. The Committee on Codes of Conduct found such a relationship would not of itself give rise to bias unless it was in addition to a strong friendship. As such, this factor does not contribute to any justifiable doubts as to his impartiality or independence.
54. Further, arbitrators will not be considered to be biased if the decision they will render has a purely professional effect on the familiar counsel rather than a personal effect [*Laker, p. 125*]. Here, any ruling by the Professor Presiding Arbitrator will only have a professional impact on Dr. Mercado and is unlikely to create personal or financial concerns for her.
55. Additionally, Professor Presiding Arbitrator and Dr. Mercado's relationship has not resulted in any *ex parte* communication, confession of partiality or improper behaviour. Such behaviour is an operative point in a finding of bias [*Archdiocesan, p. 2340*]. Professor Presiding Arbitrator's personal relationship with Dr. Mercado would not lead a reasonable person to believe there is a likelihood of bias.

**C. In the alternative, by challenging Dr. Mercado, Control Systems has waived the right to challenge Professor Presiding Arbitrator.**

56. Control Systems has waived its right to challenge Professor Presiding Arbitrator as a result of its challenge to Dr. Mercado. The tribunal in *Rompetrol* viewed the choice of the respondent to challenge counsel for the claimant, rather than the arbitrator, as an election. Similarly here, Control Systems challenge against Dr. Mercado is an election which obviates its right to challenge Professor Presiding Arbitrator.
57. Article 30(3) of the CIETAC Rules states a challenge to an arbitrator must be brought within 15 days after reasons for the challenge become known. Here, Control Systems is proceeding with the arbitration on the basis of its objection to Elite's counsel. It cannot seek to rely upon

this contemporaneously as a timely objection to Professor Presiding Arbitrator, despite its reservation. Well over fifteen days have elapsed since Control Systems became aware of Dr. Mercado's appointment. Control Systems has impliedly acknowledged the proper establishment of the Tribunal.

## **II. CONTROL SYSTEMS IS LIABLE FOR ITS BREACH OF THE CONTRACT WITH ELITE.**

58. Control Systems is liable for its breach of the Contract. The CISG applies to the Contract [A]. Pursuant to Article 33 of the CISG, Control Systems has breached the Contract with Elite by the late delivery of the processing units [B]. Control Systems cannot escape liability for the consequences of its breach of the Contract by relying on Article 79(2) of the CISG [C]. Therefore, Control Systems is liable for the consequences of its breach of the Contract.

### **A. The CISG applies to the Contract between Elite and Control Systems.**

59. The CISG applies to contracts between parties that are based in signatory countries and are contracting for the international sale of goods [*Art. 1 CISG*]. Control Systems agreed to supply, install and configure the master control system for the M/S Vis [*Clmt. Ex. 1*]. Elite is based in Mediterraneo and Control Systems is based in Equatoriana and both of these countries are contracting parties to the CISG [*Stmt. Clm. paras. 1, 2*]. Therefore, the Contract and claim for damages between Elite and Control Systems are subject to the CISG.

### **B. Control Systems has breached the Contract with Elite.**

60. Control Systems' failure to complete its contractual obligation by 12 November 2010, the date stipulated for performance in the Contract, amounts to a breach of the Contract. Control Systems had contracted to supply, install and configure the master control system for the M/S Vis by 12 November 2010 and did not perform its obligations until 11 March 2011 [*Stmt. Clm. para. 16*]. Article 33 of the CISG requires goods to be delivered on the date determined in the contract when such a date is fixed. Control Systems did not perform its obligations on the date determined by the Contract and consequently breached the Contract.

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**C. Control Systems cannot escape liability for its breach of the Contract under Article 79(2) of the CISG.**

61. Control Systems cannot escape liability for its breach of the Contract by relying on Specialty Devices' or High Performance's failure to perform. Article 79(2) of the CISG allows a seller to escape liability if both it, and a third party it has engaged to perform all or part of its obligations, satisfy the requirements of Article 79(1) of the CISG. A seller can escape liability where there is an impediment preventing performance, which is beyond the seller's control, is not reasonably foreseeable and could not reasonably have been overcome [*Art. 79(1) CISG*]. When adopting the term 'impediment' at the Vienna Conference for Article 79 of the CISG, the drafters sought to emphasize the objective nature of a hindrance [*Tallon, p. 579*]. An impediment in terms of the CISG requires it to be external in character [*Tallon, p. 579*]. Consequently, the impediment must both have objectively prevented performance and originated from a source that the breaching party cannot, and is not obliged to, control.
62. Control Systems does not meet the requirements of Article 79(1) of the CISG and therefore cannot escape liability by relying on Article 79(2) of the CISG [i]. In addition, Control Systems' third party supplier, Specialty Devices, fails the tests of Article 79(1) of the CISG and prevents Control Systems from escaping liability under Article 79(2) of the CISG [ii]. Further, Control Systems cannot rely on Article 79(2) of the CISG because High Performance is in the position of a third party engaged to perform part of Control System's obligations and High Performance does not meet the requirements of Article 79(1) of the CISG. [iii]. Even if High Performance cannot be considered to be in the position of a third party engaged by Control Systems, Control Systems is still prevented from avoiding liability under Article 79(2) of the CISG [iv]. As such, Control Systems cannot escape liability through Article 79(2) of the CISG.
- i. Control Systems cannot rely on Article 79(2) of the CISG to avoid liability as it reasonably could have overcome the impediment and its consequences.**
63. Control Systems cannot escape liability as it could reasonably have overcome the impediment. This is despite the fact that the delay in the supply of the D-28 chips and the subsequent delay in the completion of the processing units may not have been reasonably in the contemplation of Control Systems at the time of entry into the Contract. Control Systems

was required to overcome the impediment if it was both possible and reasonable to do so [*Art. 79(1) CISG*]. Control Systems has not discharged its onus to prove that it could not have reasonably overcome the impediment [*Lookofsky, pp. 109-138*]. There is no evidence to suggest that Control Systems even attempted to contact Specialty Devices or High Performance to obtain the D-28 chips or other processing units. Without any evidence of reasonable steps taken by Control Systems to overcome the impediment, it fails the tests of Article 79(1) of the CISG. Therefore, Control Systems cannot escape liability by relying on Article 79(1) or Article 79(2) of the CISG.

**ii. Control Systems cannot rely on Article 79(2) of the CISG as Specialty Devices is a third party engaged by Control Systems, and Specialty Devices does not meet the requirements of Article 79(1) of the CISG.**

1. Specialty Devices was a third party engaged to perform part of the Contract.

64. Specialty Devices was a third party engaged by Control Systems to supply the processing units that would be incorporated in the master control system Control Systems had undertaken to supply to Elite. If a failure to perform is caused by a third party, the third party must fulfil the requirements of Article 79(1) of the CISG, in order for Control Systems to avoid liability pursuant to Article 79(2) of the CISG. When a third party had or should have had knowledge of potential impediments, that knowledge will be imputed to the breaching party [*Schwenzer, p. 1066*]. Control Systems will not be able to avoid liability through Article 79(2) of the CISG because Specialty Devices is a third party and does not satisfy any of the conditions of Article 79(1) of the CISG.
65. Specialty Devices was a third party to the Contract as there was an organic link between the performance required from Specialty Devices and the Contract. Not all third party suppliers can exempt a contracting party from liability under a contract. An organic link between the performance of the third party and the contract is required [*Tallon, p. 585*]. An organic link arises where a third party is contracted to perform a task connected with the performance of the main contract [*Tallon, p. 585*]. Control Systems contracted with Specialty Devices to supply the processing units that were vital to the installation of the control system on the M/S Vis [*Stmt. Clm. para. 8*]. Therefore, Specialty Devices is a third party engaged by Control

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Systems as envisaged by Article 79(2) of the CISG. Accordingly, Specialty Devices must satisfy the tests of Article 79(1) of the CISG for Control Systems to avoid liability.

2. Control Systems cannot avoid liability through Article 79(2) of the CISG as Specialty Devices' failure to perform was not due to an impediment beyond its control.

66. Specialty Devices has not satisfied the requirements of Article 79(1) of the CISG. An emergency stoppage of the operations of a seller's supplier and its consequent refusal to supply the goods is not beyond the seller's control [*Metallic sodium case*]. The reason that Specialty Devices could not obtain D-28 chips to install the processing unit was not the fire at High Performance's premises, but High Performance's refusal to sell chips. High Performance had sufficient chips in stock to perform its obligations to Specialty Devices but chose not to do so [*Stmt. Clm. 14*]. Therefore, High Performance's late delivery was due to a refusal and not an impediment beyond its control. Specialty Devices does not meet the requirements of Article 79(1) of the CISG, thereby preventing Control Systems from avoiding liability under Article 79(2) of the CISG.

3. Control Systems cannot avoid liability through Article 79(2) of the CISG as Specialty Devices could reasonably be expected to have taken the impediment into account.

67. Even if the fire is determined to be outside of Specialty Devices' control, Article 79(2) of the CISG will not apply because Specialty Devices could reasonably have been expected to take the fire into account. The test to determine if an impediment could have reasonably been taken into account is if a reasonable person in the position of the breaching party ought to have foreseen the impediment's existence [*Schwenzer, p. 1068*]. For example, in the *Metallic sodium case*, an emergency stoppage of production and the consequent refusal of a party to perform were held to be a scenario that a reasonable contracting party would have taken into account.

68. In addition, the D-28 chips were a new technology at the time of the Contract and were not even in production at the time of the Contract [*Stmt. Clm. para. 9*]. A reasonable person in the position of Specialty Devices would have contemplated the greater risks associated with designing processing units around a key technology that was not in existence yet. A reasonable person would have taken contingency measures in case the D-28 chips were not

available. By not taking measures to prevent a foreseeable event, Specialty Devices assumed the risk [*Neumayer & Ming, Art. 79, note 4*]. Therefore, Specialty Devices does not meet the requirements of Article 79(1) of the CISG. Consequently, Control Systems cannot rely on Article 79(2) of the CISG to avoid liability.

**iii. Control Systems cannot rely on Article 79(2) of the CISG because High Performance is a third party and does not meet the requirements of Article 79(1) of the CISG.**

1. High Performance falls under the scope of a third party to the Contract pursuant to Article 79(2) of the CISG.

69. High Performance comes within the scope of Article 79(2) of the CISG as a third party, even though there is no direct contractual relationship between Control Systems and High Performance. Control Systems, as the party who contracted with Elite, accepted the obligation and risk of performance notwithstanding the fact that it had employed a third party to perform part of its obligations. The seller adopts a ‘general risk of procurement’ by contracting with the buyer [*Iron molybdenum case*]. Control Systems’ liability for the actions and omissions of its subcontractors extends to suppliers of subcontractors, such as High Performance. In the *Vine wax case*, the Bundesgerichtshof held that the general risk of procurement of a contracting party extends to the suppliers of suppliers. High Performance, as a supplier of a subcontractor, is therefore included in the scope of Article 79(2) of the CISG. This is the case because the performance obligations of High Performance are organically linked to the performance of Control Systems. The master control system was designed around the D-28 chips, and therefore High Performance’s performance was critical to the completion of Control Systems’ obligations to Elite.
70. In addition, Control Systems is incorrect in its assertion that a supplier is only liable for an entire supply chain if the breach relates to the quality of the goods supplied and not late performance [*Stmt. Def. para. 9*]. A seller is responsible for late performance caused by his supplier’s supplier [*Vine wax case*]. In the *Vine wax case*, the Bundesgerichtshof found that the seller’s liability for a supplier, or a supplier of a supplier, is the same as if the seller manufactured the goods itself [*BGH Com. CISG issues*]. Further, the court commented that the CISG does not distinguish between an untimely delivery and defective goods in the context of Article 79 of the CISG [*Kritzer Editorial Remarks*]. Also, according to Article

7.1.1 of the UNIDROIT Principles, defective performance and late performance have the same legal implications in terms of constituting non-performance. Accordingly, Control Systems is liable for late performance caused by any part of its supply chain.

2. The impediment was not beyond the control of High Performance.

71. Control Systems is unable to avoid liability under Article 79(2) of the CISG because the impediment was not beyond the control of High Performance. High Performance must prove that the failure was due to an impediment beyond its control [*Art. 79(2) CISG*]. Impediments are within a party's control if they occurred within the party's own sphere [*Schwenzer, p.1071*]. The breaching party is accordingly not exempted under Article 79(1) of the CISG by circumstances that have their origin within its own sphere of control [*Schwenzer, p.1071*]. The Bulgarian Chamber of Commerce and Industry Tribunal found that storage facilities are within a party's own sphere [*Steel ropes case*]. Accordingly, the fire in High Performance's own production facility was not outside of its control [*Clmt. Ex. 2*]. A party is assumed to have control unless it can prove that the impediment was caused by an external event, such as a natural catastrophe [*Staudinger & Magnus, Art. 79 para. 18*]. Causes of an impediment outside a party's control are for example a lightning strike or wild fire [*Nicholas, Impracticability, pp. 5-14*]. The wiring that short-circuited was installed and maintained by High Performance. Even though the short circuit was determined to be an accident, High Performance is the only known variable that could have affected it [*Proc. Ord. 2 para. 8*]. Consequently, an impediment that occurred within High Performance's sphere of control does not satisfy the requirements of Article 79(1) of the CISG. Therefore, Control Systems cannot rely upon Article 79(2) of the CISG to excuse itself from liability.

3. High Performance could reasonably be expected to have taken the impediment into account.

72. High Performance could reasonably have been expected to foresee a fire at its production facility. If a third party could reasonably have been expected to take an impediment into account, then Article 79(2) will not apply [*Schwenzer, p.1068*]. The relevant test is if a reasonable person in the position of a third party, under the same conditions at the time of the conclusion of the contract, ought to have foreseen the impediment's existence [*Schwenzer, p.1068*]. Fires are a possibility at any building. A reasonable company would have been aware

of the inherent risks of electrical wiring and electronics. Also, the extent of the damage seems to indicate that High Performance's containment and contingency measures may have been lacking. If an impediment was foreseeable at the time of the conclusion of the contract the third party therefore assumes the risk [*Neumayer & Ming, Art. 79, note 4*]. Hence, Control Systems cannot avoid liability under Article 79(2) of the CISG.

4. High Performance could have been expected to overcome the impediment and its consequences.

73. High Performance refused to take the reasonable step of distributing the D-28 chips pro rata in order to overcome the impediment. It therefore does not fulfil the requirements of Article 79(1) of the CISG. Control Systems is liable because overcoming the impediment and its consequences, as required by Article 79 of the CISG, was reasonable for High Performance. The requirements applied in international trade for reasonability are very strict [*Schwenzer, p.1069*]. Consequently, the analysis of what is reasonable should be narrow in scope [*Schwenzer, p.1069*]. It would have only required a small portion of High Performance's stock to fill Specialty Devices' order [*Clmt. Ex. 3*]. High Performance's reasoning for delivering the D-28 chips to Technical Solutions was that it was prioritising the distribution of the chips to regular customers [*Clmt. Ex. 3*]. High Performance refused to allocate the stock on a pro rata basis because it would '...not have been satisfactory for the majority of [its] customers' [*Clmt. Ex. 3*]. However, there were several companies who could be listed as 'regular customers' by High Performance [*Proc. Ord. 2 para. 10*]. If High Performance's major concern was the satisfaction of the majority of its customers then allocating all chips to one client would have been the least reasonable solution. Therefore, High Performance did not perform in accordance with its own determination of what was reasonable in the circumstances.
74. High Performance's breach was not solely caused by the impediment, the fire at the production facility, but by friendship and commercial favouritism. In order for the party in breach to be exempted from liability, the impediment must be the sole cause of the breach [*Schwenzer, p.1069*]. Notwithstanding the fire, High Performance could have fulfilled its contractual obligations to Specialty Devices. Without these ancillary factors, High Performance could have allocated the D-28 chips on a pro rata basis, sufficient to have rendered the M/S Vis functional [*Clmt. Ex. 3; Proc. Ord. 2 para. 9*].

75. Technical Solutions' CEO Roger Abt and High Performance's CEO Henry Swenson have a personal relationship, which was the actual reasoning behind High Performance's decision to provide the chips entirely to Technical Solutions. Control Systems concedes that the two CEOs are close friends [*Stmt. Def. para. 5*]. Mr. Abt and Mr. Swenson were also witnesses at each other's weddings [*Stmt. Def. para. 5*]. This relationship motivated Mr. Swenson to forego his obligations to the majority of his customers and give the entire supply of chips to Technical Solutions.
76. Even if the friendship did not motivate Mr. Swenson to give all the D-28 chips to Technical Solutions, it was commercial favouritism. When questioned if he was unduly favouring an old friend by providing the chips to Technical Solutions, Mr. Swenson stated that if it had not been for the support of Technical Solutions, High Performance would have gone out of business five years ago [*Clmt. Ex. 7*]. Therefore, the fire was not the sole reason for breach by High Performance, precluding Control Systems from relying upon Article 79(2) of the CISG to avoid liability.

### **III. ELITE IS ENTITLED TO CLAIM ALL DAMAGES ARISING FROM CONTROL SYSTEMS' BREACH OF THE CONTRACT.**

77. Elite had a duty to mitigate its loss as a result of Control Systems' anticipatory breach of the Contract [A]. Elite fulfilled its duty to mitigate its losses [B]. Elite is entitled to claim all reasonable costs of mitigation [C].

#### **A. Elite had a duty to mitigate its loss as a result of Control Systems' anticipatory breach of the Contract.**

78. Control Systems' breach of the Contract was anticipatory [i]. Consequently, Elite was faced with significant potential losses [ii]. As such, Elite was obliged by Article 77 of the CISG to mitigate these significant losses [iii].

##### **i. Control Systems' breach of the Contract was anticipatory.**

79. The impossibility of performance of a future contractual obligation constitutes an anticipatory breach [*Bennett, note 2.2*]. Control Systems communicated to Elite on 13 September 2010 that, due to the fire at High Performance, it would not be able to install the master control

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system in the M/S Vis by the contractually agreed date. Therefore, Control Systems' inability to install the master control system on time was an anticipatory breach of the Contract.

**ii. Elite was faced with significant losses because of Control Systems' anticipatory breach.**

80. Control Systems' anticipatory breach of the Contract meant that the M/S Vis would not be ready in time for Corporate Executives' conference. Without taking any steps in mitigation, Elite would have been forced to repudiate its contract with Corporate Executives. This repudiation would have resulted in Elite incurring a number of losses, including a loss of profit [*Proc. Ord. 2 para. 17*]. In addition, Elite may also have been liable to pay damages to Corporate Executives for breach of contract. Moreover, repudiation would have caused significant damage to Elite's goodwill and reputation. It may also have led to loss of future business from Corporate Executives, a long-standing client, and potentially the wider market. Excluding Elite's loss of future business and goodwill and reputation, these potential losses exceed the actual losses suffered by Elite [*Proc. Ord. 2. para. 17*]. Therefore, Elite was faced with significant losses as a result of Control Systems' anticipatory breach.

**iii. Elite had to mitigate its losses.**

81. In facing these significant losses, Elite was obligated to take measures that were reasonable in the circumstances to mitigate its losses [*Art. 77 CISG*]. The requirement to mitigate is an expression of the general principle of good faith in international commerce [*Staudinger & Magnus, Art. 77 para. 2*]. In cases of anticipatory breach, the duty to mitigate losses arises even before the contract is actually breached [*Schwenzer, p. 1043*]. Even though Control Systems had not yet breached the Contract, Elite was obliged to mitigate its losses when it became aware of Control Systems' anticipatory breach.

**B. Elite fulfilled its duty to mitigate its losses.**

82. Elite fulfilled its duty to mitigate its losses by taking reasonable measures in the circumstances. Chartering a replacement yacht for the conference was a reasonable measure in the circumstances to mitigate Elite's losses [i]. In addition, making an ex gratia payment to Corporate Executives was a reasonable measure in the circumstances to mitigate Elite's losses [ii].

**i. Chartering a replacement yacht for the conference was a reasonable measure in the circumstances to mitigate Elite's losses.**

83. Chartering the M/S Pacifica Star was a reasonable measure in the circumstances to mitigate Elite's losses. Control Systems informed Elite on 13 September 2010 that it was not able to complete installation by the contractually agreed date and that a two month delay was expected [*Clmt. Ex. 1*]. As Elite then only had five months until the conference, chartering a replacement yacht was the most reasonable course of action. A reasonable measure is one that a reasonable party in the same position would have taken [*Propane case*]. In determining whether a measure is reasonable, time constraints and the difficulty of sourcing a substitute good are to be considered [*Chinese goods case*]. Attempting to source a different type of master control system for the M/S Vis would not have been reasonable given the short timeframe and the fact that chips with comparable qualities to the D-28 were not available until February 2011 [*Stmt. Clm. para. 9*]. Holding the conference in one of Elite's on-shore venues was not an acceptable option to Corporate Executives [*Stmt. Clm. para. 17*].
84. The steps taken by Elite were reasonable as they were proportionate in cost to the size of the loss. The cost of mitigation measures must be proportionate to the size of the loss in order to be reasonable [*Stainless steel wire case*]. Here, the cost of a replacement yacht is proportional to the size of the loss. Repudiation of the contract with Corporate Executives would have resulted in an even greater financial loss and may have resulted in a loss of future business [*Proc. Ord. 2 para. 17*]. Furthermore, it is unreasonable to expect an aggrieved party to breach its own contracts, even if such action would mitigate the loss [*Schwenzer, p. 1046*].
85. In addition, it was reasonable in the circumstances for Elite to engage the services of a yacht broker. In order to fulfil its contractual obligations to Corporate Executives, Elite required a luxury yacht with the latest in conference technology [*Stmt. Clm. para. 6*]. There were very few yachts that would have met Elite's needs. Only one suitable yacht, the M/S Pacifica Star, was available during the conference period [*Proc. Ord. 2 para. 21*]. In light of the time constraint and the considerable difficulty of sourcing a replacement yacht, it was reasonable for Elite to engage the services of a yacht broker, who could provide specialist knowledge of this market.
86. Moreover, the payment of a 'success fee' to the yacht broker was a reasonable measure in the circumstances. Elite urgently needed to organise a replacement yacht in order to fulfil its

contractual obligations to Corporate Executives. In *Delchi Carrier*, an additional payment to a supplier to expedite an order was considered reasonable and was recoverable as damages. Analogously, it was also reasonable in the circumstances for Elite to pay a ‘success fee’ to the broker to expedite the yacht sourcing process.

87. If a party does not take reasonable measures to mitigate its loss, the party in breach may claim a reduction in damages by an amount representing the loss that should have been mitigated [*Art. 77 CISG*]. As Elite took reasonable measures in the circumstances to mitigate its loss, no reduction in damages may be claimed by Control Systems. Therefore, the USD 404,000 charter cost, USD 44,000 port and handling fees, USD 60,600 brokerage commission and USD 50,000 success fee are all reasonable costs of mitigation that can be recovered as damages by Elite.

**ii. Making an ex gratia payment to Corporate Executives was a reasonable measure to mitigate Elite’s losses in the circumstances.**

88. Elite took reasonable measures by chartering a replacement yacht to attempt to fulfil its contractual obligations to Corporate Executives. However, the replacement yacht did not conform to what was promised in the contract with Corporate Executives. Subsequently, Corporate Executives expressed unhappiness that the replacement yacht did not have all of the features promised by Elite [*Proc. Ord. 2 para. 20*] A buyer voluntarily providing a sub-buyer compensation is an appropriate step to mitigate losses [*Used car case; T-shirts case*]. The ex gratia payment to Corporate Executives was therefore reasonable to mitigate Elite’s loss.
89. The cost of measures taken by an aggrieved party to restore its reputation is recoverable as long as it is reasonable [*Canned goods case*]. Compensation to a sub-buyer is reasonable if it is proportionate to the price of the contract [*Used car case*]. Elite has successfully provided ‘demanding clients’ with high end venues and ‘top of the line service’ for the past ten years [*Stmt. Clm. para. 5*]. It was therefore reasonable for Elite to repair its hard earned reputation, especially with a long-standing client such as Corporate Executives. Therefore, the USD 112,000 ex gratia payment is a reasonable cost of mitigation that can be recovered as damages by Elite.

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**C. Elite is entitled to claim all reasonable costs of mitigation.**

90. Elite is entitled to claim all reasonable costs of mitigation in damages. Pursuant to Article 45(1) of the CISG, Elite is able to claim damages for Control Systems' breach of the Contract. Article 74 of the CISG governs the scope of damages claimable from such breach. Article 74 of the CISG embodies a general principle of full compensation and is designed to place the aggrieved party in the position as if the other party had properly performed the contract [*Rolled metal sheets case; Schwenger, p. 1000*].
91. A seller's delay in the performance of a contract entitles the buyer to compensation for loss resulting from the delay [*Schwenger, p. 1007*]. A buyer is entitled to recover reasonable expenses to mitigate losses, typically in the form of liability to third parties [*Tannery machines case*]. Elite incurred reasonable expenses to avoid liability to Corporate Executives. Elite's reasonable costs of mitigation are claimable as they satisfy the tests of causation and foreseeability contained in Article 74 of the CISG. Specifically, the cost of chartering the replacement yacht is recoverable [i]. In addition, the cost of the ex gratia payment is also recoverable [ii].

**i. Elite is entitled to the cost of chartering the replacement yacht.**

1. The cost incurred by Elite in chartering the replacement yacht was caused by Control Systems' breach of the Contract.
92. The cost incurred by Elite in chartering the replacement yacht was caused by Control Systems' breach of the Contract. The *condition sine qua non* or 'but for' test should be applied [*Saidov, p. 80*]. According to the test, a factual cause of an event is the one that is a 'precondition for the occurrence of the detriment' [*Schwenger, p. 1015*]. If Control Systems had installed the master control system in the M/S Vis as per the Contract, the conference would have taken place aboard the M/S Vis as planned. However, as Control Systems breached the Contract, Elite had to incur the expenses of chartering a replacement yacht in mitigating its losses. Therefore, Control Systems' breach of the Contract caused the loss.
2. The cost of chartering the replacement yacht was foreseeable to Control Systems.
93. Control Systems foresaw or ought to have reasonably foreseen that the cost of chartering a replacement yacht was a possible consequence of the breach of the Contract. In order to claim

a loss as damages, the loss must be foreseeable per Article 74 of the CISG. The test of foreseeability is what a reasonable person in the position of the breaching party and aware of the circumstances at the time of the conclusion of the contract would have foreseen [*Schwenzer, p.1020*]. Control Systems only became aware on 5 August 2010 that the M/S Vis was scheduled to be used by Corporate Executives [*Proc. Ord. 2 para. 14*]. However, it is not necessary to establish that the breaching party actually foresaw the loss as long as a reasonable party in its position would have foreseen the loss [*Saidov, p. 104*].

94. The nature of an aggrieved party's business and the purpose of the contract should be considered when applying the foreseeability test [*Saidov, p. 108; Staudinger & Magnus, Art. 74 para. 37*]. Elite is a business that hosts conferences and the purpose of the Contract was to install a master control system on a yacht to be used as a conference venue [*Stmt. Clm. para. 6*]. At the time of the conclusion of the Contract, a reasonable party in Control Systems' position would have known of both the nature of Elite's business and the purpose of the Contract. With this in mind, a reasonable party in Control Systems' position would have known that incurring the cost of an alternate yacht was a possible consequence of a delay in the delivery of the master control system. Furthermore, the precise details and exact amount of a loss need not have been foreseeable [*Cooling system case*]. Control Systems need not have foreseen the extent of the loss. Therefore, the loss caused by Control Systems was foreseeable.

**ii. Elite is entitled to the cost of the ex gratia payment.**

95. Control Systems is liable to reimburse the ex gratia payment to Elite, as Control Systems knew or ought to have known that Elite would take steps to mitigate any loss of reputation resulting from a breach of the Contract. It is accepted that 'a consequential loss may be incurred where a seller's breach of contract results in the buyer breaching his contracts with his customers thus damaging his reputation' [*Schwenzer, p.1013*]. Control Systems' breach of the Contract made it impossible for Elite to fulfil its contractual obligation to provide the M/S Vis to Corporate Executives. Despite Elite taking reasonable steps to avoid consequential loss, it could not provide Corporate Executives with a yacht of equal standard to the M/S Vis [*Proc. Ord. 2 para. 20*]. Further, Elite suffered a loss of reputation as Corporate Executives expressed unhappiness at the replacement yacht [*Proc. Ord. 2 para. 20*].

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96. Elite can recover costs associated with mitigating its loss of reputation. It is widely accepted that a loss of reputation is generally recoverable under Article 74 of the CISG [*Schwenzer, p.1013*]. Although Article 74 of the CISG does not expressly provide for the recovery of loss of goodwill, such damages are permitted under the Article's principle of full compensation. Furthermore, such an approach is in accordance with the UNIDROIT Principles [*Blase & Höttler*]. When a breach of contract by a seller has made a buyer liable towards third parties, the liability is recoverable [*Used car case*]. To compensate Corporate Executives for the breach of contract and to restore its reputation, Elite partially reimbursed the contract price to Corporate Executives, specifically USD 112,000. Damages for loss of goodwill need not be calculated exactly [*CISG-AC Opinion No. 6, note 7.3*]. Control Systems is liable for this loss subject to the tests of causation and foreseeability.
1. Control Systems' breach caused the expense incurred by Elite in mitigating its loss of goodwill.
97. Control Systems is liable to pay Elite the expenses incurred by Elite in mitigation of its loss of goodwill, resulting from the breach by Control Systems. The proper approach is to apply the *condition sine qua non* or 'but for' test to determine if the breach caused the loss [*Saidov, p. 80*]. But for Control Systems' breach, the conference would have taken place on the M/S Vis. However, the conference in fact took place on the M/S Pacifica Star, which did not have the same facilities and capabilities as the M/S Vis. The fact that Corporate Executives expressed displeasure because the conference was not held on the M/S Vis, is evidence of a loss of goodwill and potential loss of future business on the part of Elite. Therefore, Control Systems' breach of the Contract caused the loss.
2. Elite's payment to mitigate its loss of goodwill was a foreseeable consequence of Control Systems' breach of the Contract.
98. Control Systems knew or ought to have known at the time of the conclusion of the Contract that its breach of the Contract could possibly lead to a loss of goodwill for Elite. Control Systems was aware of the purpose of the Contract, and had in fact specifically designed the master control system to provide state of the art conference facilities on the M/S Vis [*Stmt. Clm. para. 6*]. An aggrieved party can only recover a loss that the breaching party foresaw or could have foreseen, at the time the Contract was concluded, as a possible consequence of the breach of Contract [*Art. 74 CISG*]. The test is an objective one [*Schwenzer, p. 1019*].
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Considering the nature of Elite's business and the purpose of the Contract, a reasonable party in Control Systems' position would have appreciated that Elite intended to host conferences on the M/S Vis. It would have also foreseen that it was a possible consequence of a delay in the installation that Elite would become liable to a third party. In addition, a loss of goodwill is foreseeable particularly when the aggrieved party is in a sensitive market [*Schwenzer, p. 1022*]. A reasonable party in the position of Control Systems would have recognised that Elite was in a sensitive market given the fact the M/S Vis was a luxury yacht being installed with state of the art conference technology.

#### **IV. THE 'BRIBERY' DOES NOT AFFECT ELITE'S CLAIM FOR THE SUCCESS FEE OR THE COST OF THE SUBSTITUTE YACHT.**

99. Control Systems alleges the success fee is not claimable as damages because the yacht broker used a portion of it as a bribe. Control Systems further alleges that, as a consequence of the payment of the bribe, the entire contract for the replacement yacht is tainted and unrecoverable. However, Control System's position is unfounded. The element of bribery does not affect the Tribunal's jurisdiction and disputes involving bribery are capable of arbitration [A]. The Tribunal must apply the laws of Mediterraneo to determine the consequences of the bribe. The laws of Mediterraneo do not recognise any illegality and thus the damages are recoverable [B]. In the alternative, if the laws of Pacifica apply, Elite is not liable for the payment of a bribe, the substitute contract is not tainted and Control Systems is liable for all the damages claimed by Elite [C]. Both are therefore claimable under Article 74 of the CISG.

##### **A. The Tribunal has jurisdiction to consider whether the success fee and the cost of the replacement yacht are claimable despite an element of bribery.**

100. The Tribunal's jurisdiction to hear Elite's claim for the success fee and the cost of the replacement yacht are not affected by an allegation of bribery. The arbitration clause in the Contract requires the Tribunal to hear all disputes arising out of the Contract and the Tribunal's award is enforceable [i]. Furthermore, disputes involving bribery are capable of arbitration [ii].

**i. The arbitration clause in the Contract contemplates all disputes arising out of the Contract, including whether the bribery precludes recovery of damages.**

101. On the requisite broad reading of the arbitration clause, the bribery on the part of the yacht broker is properly characterized as a dispute ‘arising from or in connection with’ the Contract. In the *Fiona Trust case*, the English Court of Appeal held that the words ‘arising out of’ in an arbitration clause cover every dispute except whether there was ever a contract at all. Clause 15.1 of the Contract states that ‘any dispute arising from or in connection with this Contract shall be submitted...for arbitration...’ [*Clmt. Ex. 1*]. A claim for damages is an issue arising in connection with the Contract. Anything that impacts such a claim is therefore also an issue arising in connection with the Contract. The allegation of bribery impacts Elite’s chances of being awarded the success fee and the cost of the substitute yacht as damages. Where a dispute falls within the scope of an arbitration clause a tribunal must deal with that issue [*Rivkin, p. 140*]. Therefore, the Tribunal must consider the implications of bribery upon Elite’s claim for the success fee and the cost of the replacement yacht.
102. The arbitration clause grants the Tribunal jurisdiction to hear all disputes arising under the Contract, including a dispute about the allegation of bribery. An arbitration agreement must not be interpreted narrowly or restrictively [*Amco case; Fiona Trust case*]. There is a presumption that the parties to a contract intended to grant broad powers to the arbitral tribunal. The principle of strict interpretation of arbitration clauses no longer applies [*Amco case*]. It was based upon the idea that an arbitration agreement is an exception to the principle of the jurisdiction of the courts. Since such exceptions are interpreted strictly, it was argued that arbitration agreements should be similarly restrictively interpreted [*Fouchard, para. 480*]. However, it is now accepted that arbitral proceedings are not an exception to the jurisdiction of state courts and, instead, are an accepted means of settling international disputes [*Fouchard, para. 480*]. Accordingly, the foundation upon which the principle of ‘strict interpretation’ was based has fallen away.

**ii. In any event, disputes involving bribery are capable of arbitration.**

103. The contractual consequences of criminal actions are capable of arbitration. Although the sole arbitrator in *ICC Case No 1110* declined to rule on the merits given the presence of bribery, this approach is no longer followed. Numerous arbitral tribunals have retained jurisdiction

and considered the merits of a dispute in which an allegation of bribery is made [*World Duty Free case; Westacre case; National Power case; ICC Award No 3916*]. Thus, disputes involving bribery are considered capable of arbitration and the Tribunal must decide whether the success fee and the cost of the replacement yacht are claimable.

**B. The cost of chartering the replacement yacht is recoverable because the laws of Mediterraneo, which do not recognise any illegality, must be applied.**

104. The laws of Mediterraneo apply to the legality or otherwise of the success fee and to whether bribery taints the contract for the replacement yacht [i]. Furthermore, neither international public policy nor the criminal law of Pacifica can override the application of the laws of Mediterraneo [ii].

**i. The Tribunal must apply the laws of Mediterraneo.**

1. The Tribunal must apply the law chosen by the parties.

105. The Tribunal is bound by the parties' choice of law clause and therefore must apply the laws of Mediterraneo. Although Control Systems now seeks to apply the laws of Pacifica, preference must be given to the parties' intention at the time of the conclusion of the Contract.

106. First, pursuant to Article 28(1) of the Model Law, the Tribunal must decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute. Further, Article 28(4) of the Model law requires the Tribunal to decide the dispute in accordance with the terms of the Contract. Elite and Control Systems, in the Contract, chose the laws of Mediterraneo as the applicable law [*Clmt. Ex. 1*]. Therefore, the Tribunal must decide whether the success fee is a bribe and whether the substitute contract is tainted on the basis of the laws of Mediterraneo.

107. Furthermore, the Tribunal must apply the choice of law clause in accordance with the principle of party autonomy. Article 28(1) of the Model Law is an expression of the principle of party autonomy, for which most arbitral tribunals display considerable respect [*Born, p. 2153*]. One ICC Tribunal noted that parties to a commercial agreement are free to choose the law governing their relationship [*ICC Case No 7929*]. Since arbitral tribunals have an overriding duty to base their decisions on the common intentions of the parties, which are reflected in the choice of law clause, the Tribunal must not derogate from the parties' choice of law [*ICC Case No. 6474*]. Furthermore, upholding party autonomy has significant practical

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consequences. The continued success of international arbitration hinges on the support of parties and the ability of the parties to tailor proceedings to suit their particular needs [*Chukwumerije, p. 199*]. Accordingly, the continued success of international arbitration favours giving party autonomy, including choice of law clauses, significant weight.

108. There is no indication that the parties intended to limit the content of the applicable law. Therefore, the choice of law clause must be interpreted so as to include the substantive law in its entirety [*ICC Case No. 6248*]. This includes the criminal law of Mediterraneo. The laws of Mediterraneo do not recognise the yacht broker's actions as being illegal [*Proc. Ord. 2, para. 27; Resp. Ex. 1*]. Accordingly, the success fee and the cost of the substitute yacht are claimable as damages. Pursuant to the law that Elite and Control Systems chose to govern their contractual relationship, the yacht broker's actions are not illegal.

2. In the alternative, a conflicts of laws analysis favours the application of the laws of Mediterraneo.

109. If the Tribunal finds the choice of law clause is not wide enough to cover the validity or otherwise of the replacement contract, a conflicts of laws analysis favours the substantive law of Mediterraneo.

110. If the choice of law clause is not upheld, the Tribunal must determine the applicable law as if the parties had failed to make a choice of governing law [*Fouchard, p. 860*]. Thus, the Tribunal must first determine the appropriate conflicts of laws rule and then apply the law it arrives at through that conflicts of laws rule [*Art. 28(2) Model Law*]. The proper approach is to select some system of choice of law rules and not merely 'directly' apply some substantive law [*Born, pp. 2116-2117*].

111. The Tribunal can 'refer for guidance to the general principles governing the conflict of laws in private international law' [*Liamco Award*]. It is not uncommon for tribunals to refer to general principles of private international law [*Economy Forms case; Texaco case; Liamco Award*]. In this respect, where the subject matter relates to a contract, numerous arbitral awards, international instruments and academic commentators propose the application of the 'closest connection' test [*Economy Forms case; Art. 4 Rome Convention; Born, p. 2133*].

112. To determine which country is most closely connected to the Contract, the Tribunal must look to the place where the contract was performed [*ICC Case No. 5314*]. The Contract was

performed in Mediterraneo [*Stmt. Clm. para. 12*] Thus, the law of Mediterraneo applies. Elite can therefore claim the success fee and the cost of the replacement yacht.

**ii. The application of the laws of Mediterraneo is not subject to international public policy considerations or mandatory laws.**

113. The Tribunal's application of the laws of Mediterraneo should not be subject to international public policy or mandatory laws. First, international public policy does not extend to the bribery of private individuals. Second, the Pacifica Criminal Code cannot be applied because it is not consonant with international public policy, nor should it be applied even if it is a mandatory law.
114. There is no coherent international public policy that could override the application of the laws of Mediterraneo. The laws of Mediterraneo, whether arrived at via the choice of law clause or a conflicts of laws analysis, must be applied unless their application violates international public policy [*Kreindler, p. 253*]. However, awards that recognised an international public policy against bribery have done so within the context of bribery of public officials and State entities, not private individuals [*Westacre case, World Duty Free case, ICC Case No 1110*]. Similarly, the OECD Convention covers only the bribery of public officials. Furthermore, Born notes that there is 'broad support for an international public policy against bribery of public officials', but makes no mention of bribery of private individuals. [*Born, p. 2194*]. The present case, however, concerns the bribery of Mr. Goldrich's personal assistant, a private individual. [*Stmt. Def. para. 12; Resp. Ex. 1*]. Since there is no consistent international public policy against the bribery of private individuals, the application of the law of Mediterraneo, which permits such actions, cannot violate international public policy. In any event, since international public policy arguments are inherently unpredictable and arbitrary, they 'must be applied with care and reserve' [*Born, p. 2195*]. Indeed, arbitral case law indicates that a tribunal owes its primary duty to the parties and has not been given the task of 'enforcing morality' in international trade [*Crivellaro, p. 118*].
115. Furthermore, the Pacifica Criminal Code cannot override the application of the laws of Mediterraneo. For a national law that is foreign to the arbitration, the rule must either form part of international public policy or be mandatory in nature [*Westacre case; Fathallah, p. 77*]. However, Article 1453 of the Pacifica Criminal Code falls outside the scope of international public policy. Whereas international public policy centres on the bribery of

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public officials, Article 1453 is concerned with the bribery of private individuals. As such, it cannot form part of international public policy.

116. Moreover, even if the Tribunal finds that the Pacifica Criminal Code is a mandatory law, a number of arbitral awards reject the application of mandatory laws and public policies of a state other than the one the parties choose [*German Coffee Award; ICC Case No 6379*]. Indeed, the only clear limit upon party autonomy is international public policy, which is not applicable here [*Derains, p. 251*]. Furthermore, since the mandatory rule (the Pacifica Criminal Code) and the parties' expectations (the application of the law of Mediterraneo) are in conflict, a presumption arises that the mandatory law should not apply [*Barracough & Waincymer, p. 2*].
117. Furthermore, the application of a foreign mandatory law can lead to the annulment of an award given by the Tribunal. In 1994 the Swiss Federal Tribunal vacated an arbitral award in which an Algerian mandatory law was applied in preference to a Swiss choice of law clause [*ICC Case No 5622*]. The award was vacated on the grounds that Swiss law did not have a similar provision to the Algerian law. Thus, the application of the Pacifica Criminal Code, as a foreign mandatory law, opens up a ground for annulment. In light of that, the Tribunal must consider its duty to render an enforceable award [*Horvath; ICC Case No 5946*]. Rendering an enforceable award is an intrinsic part of the arbitrator's task and a tribunal must always consider the future of its award [*ICC Case No 4132; Mayer, pp. 284-286*]. Given that duty, it is improper for the Tribunal to apply the Pacifica Criminal Code.

**C. Even if the laws of Pacifica apply, bribery does not affect any of the transactions claimed as damages.**

118. Even if the laws of Pacifica apply to the dispute, Elite did not pay the success fee as a bribe [i]. Furthermore, the contract for the replacement yacht is not tainted by bribery [ii].
- i. Elite did not pay the success fee as bribe money.**

119. The payment of the success fee must not be considered a bribe because Elite did not intend, nor have any knowledge of, any illicit purpose. In the *World Duty Free case*, an agent paid a bribe to secure a contract. His principal had knowledge of the bribe and had given the agent authority to pay the bribe. On that basis, the bribe was imputed to the principal and the resulting contract was declared void. However, the present facts can be distinguished. '[N]o

one from Elite Conference Services knew about the bribery until contacted by Pacifica police...’ [Resp. Ex. 1]. Thus, Elite did not intend the success fee to be used as bribe money. Nor did Elite have any knowledge that a portion of the success fee would be used as bribe money. Therefore, since Elite did not have any knowledge of the bribe, the illicit payment cannot be imputed to Elite.

120. Furthermore, although a high commission or fee may be evidence of bribery, an agent’s remuneration must be examined in light of the surrounding circumstances [Knoepfler, p. 368]. In particular, the fee must be examined in light of the principal’s chances of success in securing a contract [Scherer, p. 32]. The yacht broker ‘had a difficult time’ locating a suitable yacht for Elite. [Proc. Ord. 2 para. 23]. Indeed, ‘very few’ suitable yachts were available when Elite required one and ‘Mr. Goldrich did not normally lease his yacht’ [Proc. Ord. 2 para. 21]. Given the circumstances, Elite’s chances of finding a suitable yacht were slim. Accordingly, payment of a success fee was justified in the circumstances and cannot give rise to any suspicions of bribery on the part of Elite.

**ii. The contract for the replacement yacht is not tainted by bribery.**

121. The contract between Elite and Mr. Goldrich did not come about as a result of bribery. It is a recognised principle that contracts obtained by corruption or bribery are void [Fouchard, p. 822]. In the *World Duty Free case*, a bribe was paid in order to directly effect entry into a contract. Similarly, in the *Westacre case*, a bribe was paid to the other party to the contract so as to induce entry into a contract. However, in the present case, the yacht broker did not obtain a contract through his bribery. All he obtained was ‘an introduction’ to Mr. Goldrich [Stmt. Def. para. 12; Resp. Ex. 1]. The contract between Elite and Mr. Goldrich did not come about via any money paid to Mr. Goldrich. Indeed, Mr. Goldrich knew nothing of the bribery or the actions of his personal assistant [Proc. Ord. 2 para. 28]. As Mr. Goldrich was the party to the contract, not the personal assistant, and received no bribe money, the contract cannot be tainted. Furthermore, there is no evidence that Mr. Goldrich received any money other than payment for the use his yacht. For the substitute contract to be invalid, the parties must jointly hold an intention to conclude the contract by illicit means [ICC Case No 7047]. This was not the case here. Therefore, the contract for the replacement yacht is not tainted by bribery.

**CONCLUSION**

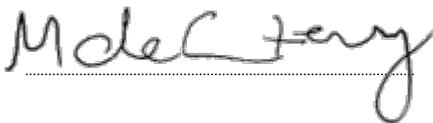
122. Dr. Mercado is entitled to be on Elite’s legal team and her involvement does not give rise to any conflict or bias on the part of Professor Presiding Arbitrator. Further, Control Systems cannot rely on Article 79 of the CISG to escape liability for its breach of the Contract. All of the damages are claimable under Article 74 of the CISG as the cost of mitigation is not affected by illegality.

**REQUEST FOR RELIEF**

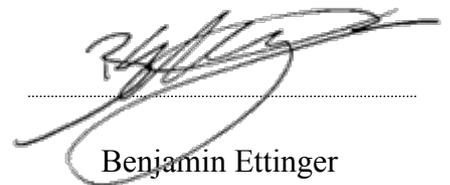
Elite respectfully requests the Tribunal find that:

1. Dr Mercado can remain a member of Elite’s legal team;
2. Control Systems is liable for its breach of the Contract because it cannot rely on Article 79 of the CISG to absolve itself of liability;
3. Controls Systems shall pay Elite damages in the amount of USD 670,600 plus interest on the said sum and the costs of arbitration; and
4. Elite’s claim for the success fee and the cost of the replacement yacht are unaffected by illegality.

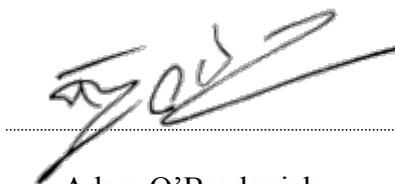
Respectfully Submitted,



Marcus de Courtenay



Benjamin Ettinger



Adam O’Brodovich



Nigel Thomas