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Memorandum for Respondent

On behalf of
Equatoriana Control Systems,
Inc (RESPONDENT)

Against
Mediterraneo Elite Conference
Services, Ltd (CLAIMANT)

JULIAN EGELHOF • CAROLIN FRETSCNER • FRANZISKA HÄRLE • ANNIKA LAUDIEN
CONSTANTIN MEIMBERG • BASTIAN NILL • SITA RAU • MONIKA THULL

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INDEX OF ABBREVIATIONS

A.D.2d	New York Supreme Court Appellate Division Reports, Second Series
AAA	American Arbitration Association
Art./Artt.	Article/Articles
BGB	Bürgerliches Gesetzbuch (Germany)
BGer	Bundesgericht (Swiss Federal Court of Justice)
BGH	Bundesgerichtshof (German Federal Court of Justice)
Cal.Rptr.3d	California Reporter, Third Series
CCI	Chamber of Commerce and Industry
CEO	Chief Executive Officer
cf.	confer
CIETAC	China International Economic and Trade Arbitration Commission
Cir	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG- AC	Advisory Council of the Vienna Convention on Contracts for the International Sale of Goods
CISG-online	Internet database on CISG decisions and materials, available at www.globalsaleslaw.org
Ct	Court
Ct FI	Court of First Instance
Ct of App	Court of Appeal of England and Wales
DAC	Departmental Advisory Committee
Dr	Doctor
e.g.	exempli gratia (for example)



ed.	Edition
Ed./Eds.	Editor/Editors
EDPA	Eastern District of Pennsylvania
et al	and others
et seq.	and the following
EWCA Civ	Court of Appeal (Civil Division)
F.2d	Federal Reporter, Second Series
F.3d	Federal Reporter, Third Series
F.Supp.2d	Federal Supplement, Second Series
FS	Festschrift
Ger.	German version
HCC	Hamburg Chamber of Commerce
HG	Handelsgericht (Swiss commercial Court)
HGB	Handelsgesetzbuch
i.e.	id est (that is)
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ILA	International Law Association
Inc	Incorporated
LCIA	London Court of International Arbitration
LG	Landgericht (German Regional Court)
Ltd	Limited
Lux Sup Ct	Cour Supérieure de Justice de Luxembourg
M/S	Motor Ship
Mr	Mister
MünchKomm	Münchener Kommentar (Germany)



NDIL	Northern District of Illinois
No.	Number
OECD	Organisation for Economic Co-operation and Development
OECD Convention	OECD Convention on Combating Bribery of Foreign Public Officials
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (German Regional Court of Appeals)
Op.	Opinion
p./pp.	page/ pages
para.	paragraph/ paragraphs
SCC	Stockholm Chamber of Commerce
SDNY	Southern District of New York
Supr Ct Canada	Supreme Court of Canada
Supr Ct Queensland	Supreme Court of Queensland – Court of Appeal
UKHL	United Kingdom House of Lords
UKPC	United Kingdom Privy Council
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UN-Doc.	UN-Documents
US Ct App	United States Court of Appeals
US Dist Ct	United States District Court
US Supr Ct	United States Supreme Court
USD	United States Dollar
v.	versus
WDMI	Western District of Michigan
WL	Westlaw
ZPO	Zivilprozessordnung

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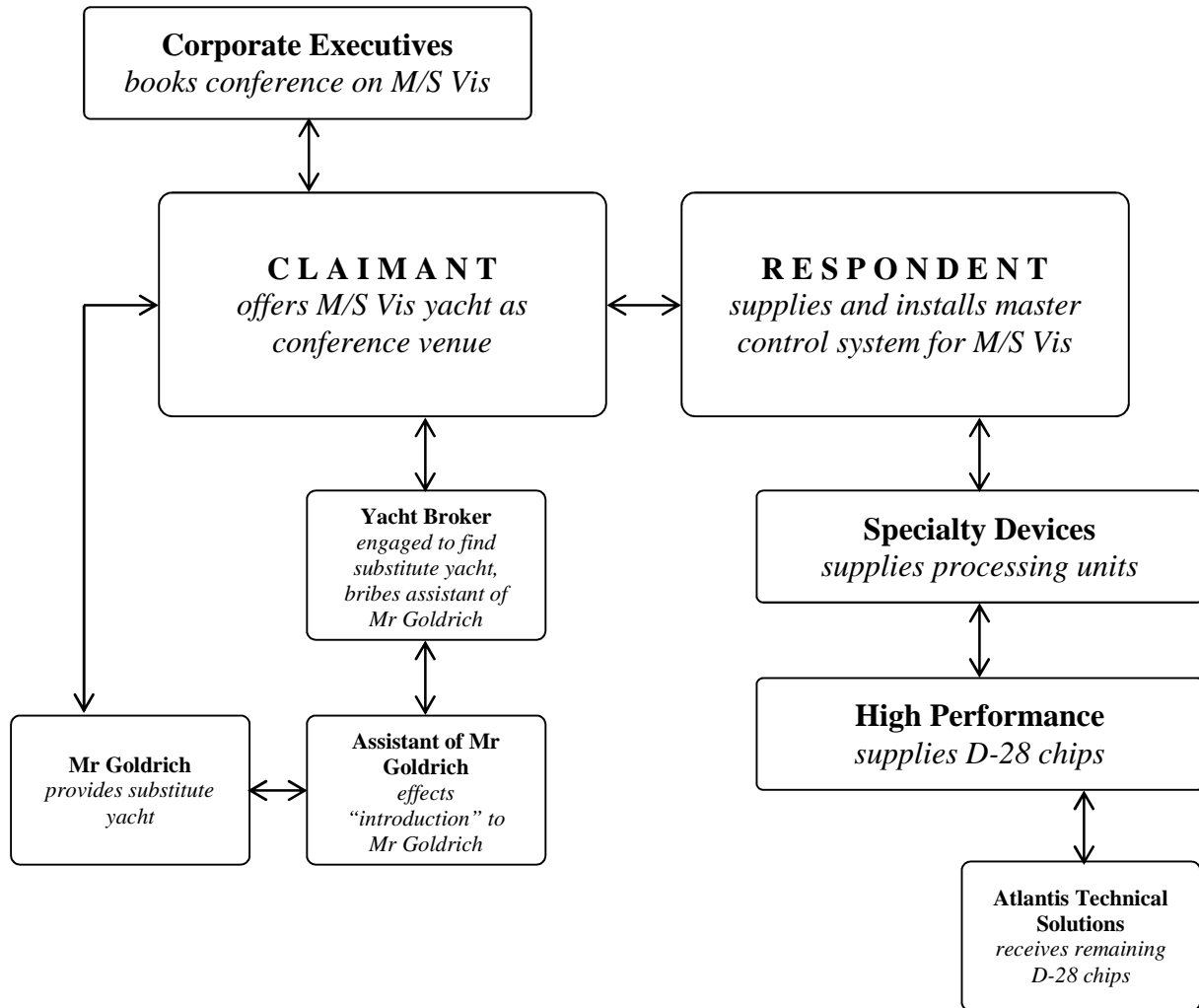
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STATEMENT OF FACTS



The parties to this arbitration are Mediterraneo Elite Conference Services, Ltd (hereafter CLAIMANT) and Equatoriana Control Systems, Inc (hereafter RESPONDENT).

CLAIMANT is a company incorporated in Mediterraneo, which organises luxury business events. It purchased the M/S Vis yacht as its first off-shore conference facility.

RESPONDENT is a company organised under the laws of Equatoriana. It agreed to equip the M/S Vis yacht with a “master control system”, the core element of the on-board conference technology.



- 26 May 2010** CLAIMANT and RESPONDENT conclude a contract (hereafter the Contract) which obliges RESPONDENT to supply, install and configure the master control system for the M/S Vis yacht until 12 November 2010. The Contract is subject to Mediterranean law and contains an arbitration clause.
- 5 August 2010** Almost six weeks after the conclusion of the Contract, RESPONDENT is informed that CLAIMANT has scheduled a conference on the M/S Vis for 12 to 18 February 2011.
- 6 September 2010** Due to a short circuit, a fire occurs at the premises where High Performance produces the D-28 chips. RESPONDENT depends on these chips as they are part of the processing units of the master control system.
- 10 September 2010** High Performance informs RESPONDENT'S supplier about the fire. It states that there will be a halt in production until the beginning of November 2010. As there is only a small stock of D-28 chips left, High Performance decides to allocate these to its regular customers first. Specialty Devices is not a regular customer. Atlantis Technical Solutions, a long standing client and regular customer of High Performance, receives the remaining chips.
- 13 September 2010** RESPONDENT informs CLAIMANT about the fire, explaining that the delivery of the master control system will be delayed until the end of November 2010. Installation can therefore not begin before mid-January 2011. As a consequence, the event scheduled for 12 to 18 February 2011 cannot be held on the M/S Vis.
- In the meantime** CLAIMANT charters the M/S Pacifica Star yacht as a substitute venue. In order to find a substitute, CLAIMANT engages a yacht broker. After the broker already located the substitute, he is promised a USD 50,000 success fee in case he secures the lease contract. As later revealed by a trade journal, CLAIMANT'S yacht broker has partially passed on this success fee to Mr Goldrich's assistant to effect an "introduction" to Mr Goldrich. This is bribery under the laws of Pacifica.



- 14 January 2011** RESPONDENT delivers the master control system to the M/S Vis yacht.
- 12–18 February 2011** CLAIMANT’S client holds the scheduled conference on the substitute yacht M/S Pacifica Star. The conference members are satisfied with the event.
- 9 April 2011** CLAIMANT lists expenses of USD 670,600. This sum consists of USD 448,000 for chartering a substitute vessel, USD 60,600 for a standard yacht broker commission, USD 50,000 for the additional yacht broker’s success fee and USD 112,000 for an unrequested ex gratia payment made to Corporate Executives. CLAIMANT requests RESPONDENT to pay half of these expenses.
- 14 April 2011** RESPONDENT rejects responsibility for CLAIMANT’S expenses. However, as a goodwill gesture RESPONDENT offers a price reduction of twenty percent on future services.
- 15 July 2011** Rejecting RESPONDENT’S goodwill gesture, CLAIMANT applies for arbitration.
- 2 August 2011** CLAIMANT and RESPONDENT agree on Professor Presiding Arbitrator as the chairman of the Arbitral Tribunal.
- 30 August 2011** CLAIMANT informs RESPONDENT that it has added Dr Mercado to its legal team. Dr Mercado has both professional and private ties to Professor Presiding Arbitrator. Among other facts, they work at the same university and Dr Mercado is the godmother of Professor Presiding Arbitrator’s youngest child.
- 2 September 2011** Due to the close relationship between Dr Mercado and Professor Presiding Arbitrator, RESPONDENT requests the removal of Dr Mercado as a legal representative for CLAIMANT.



INTRODUCTION

- 1 Arbitration requires fairness. While CLAIMANT is jeopardising the integrity of the arbitral proceedings, increased damages and attempts to recover a bribe, RESPONDENT and its entire supply chain cooperated in every reasonable manner, even after an unforeseeable event of force majeure had prevented regular performance.
- 2 In the course of the arbitral proceedings, CLAIMANT added a close friend of Professor Presiding Arbitrator to its legal team after the Tribunal had jointly been constituted. In doing so, CLAIMANT has compromised the Presiding Arbitrator's ability to judge independently. RESPONDENT in turn chose the fairest and most efficient reaction by requesting the removal of CLAIMANT'S legal representative. The Tribunal has the competence to remove the representative in question and should find that the circumstances of the case require making use of it (**Issue 1**).
- 3 As to the merits of the case, only the latest development in chip technology would satisfy CLAIMANT'S exclusive demands. RESPONDENT did all it could to meet those demands. Yet, now that an accidental and unforeseeable fire at one of RESPONDENT'S sub-suppliers has made timely delivery impossible, CLAIMANT tries to hold RESPONDENT liable. However, under the circumstances of this case, RESPONDENT is exempt from liability under Art. 79 CISG (**Issue 2**).
- 4 Furthermore, CLAIMANT attempts to use the unfortunate delay as an excuse to make excessive expenses, assuming that it could subsequently pass them on to RESPONDENT. CLAIMANT increased damages by making an unrequested, voluntary payment to its client, even though the latter had been satisfied with CLAIMANT'S performance. Adding to its failings, CLAIMANT paid a success fee to the yacht broker it hired to locate a substitute yacht, condoning bribery on its behalf. Under Art. 74 CISG, RESPONDENT is not liable for any of those unwarranted payments. The Tribunal should find neither the ex gratia payment, nor the success fee, nor any other damage affected by the bribery recoverable (**Issue 3**).



ARGUMENT ON THE PROCEEDINGS

ISSUE 1: THE TRIBUNAL SHOULD DISQUALIFY DR MERCADO FROM CLAIMANT'S LEGAL TEAM

- 5 The Tribunal is respectfully requested to issue an order disqualifying Dr Elisabeth Mercado from CLAIMANT'S legal team. Dr Mercado has a close relationship with Professor Presiding Arbitrator. She is not only his colleague at university, but also the godmother of his youngest child [*Statement of Defence, p. 39, para. 17, 18; Statement of Defence, p. 39, para. 21*]. In order to counter possible doubts concerning Professor Presiding Arbitrator's independence, RESPONDENT could challenge him directly. However, such a challenge would not address the root of the problem. Almost one month after the parties agreed on the appointment of Professor Presiding Arbitrator (2 August 2011), CLAIMANT added Dr Mercado to its legal team (30 August 2011) [*Fasttrack to CIETAC nominating arbitrators, 2 Aug 2011, p. 24; Procedural Order No. 2, p. 50, para. 29*]. Therefore, disqualifying Dr Mercado rather than Professor Presiding Arbitrator is the straightforward approach.
- 6 The Tribunal has the competence to disqualify Dr Mercado (A) and the circumstances of the present case justify making use of it (B). Contrary to CLAIMANT'S allegations, RESPONDENT could in any case still challenge Professor Presiding Arbitrator (C).

A. The Tribunal Has the Competence to Disqualify Dr Mercado

- 7 The Tribunal is empowered to disqualify Dr Mercado from CLAIMANT'S legal team. RESPONDENT agrees with CLAIMANT that the question whether the Tribunal has such a competence is governed primarily by the rules of the China International Economic and Trade Arbitration Commission (hereafter CIETAC Rules) and secondarily by the UNCITRAL Model Law on International Commercial Arbitration (hereafter UNCITRAL Model Law) [*Memorandum for Claimant, p. 5, para. 3*].
- 8 Contrary to CLAIMANT'S allegation that the Tribunal's competence to disqualify a legal representative lacks any legal basis [*cf. Memorandum for Claimant, p. 5, para. 3; p. 6, para. 6*], the Tribunal's competence arises directly from Art. 19(2) UNCITRAL Model Law (I). At the same time, the Tribunal has an inherent competence to disqualify a legal representative, as supported by recent decisions by tribunals of the International Centre for Settlement of Investment Disputes (hereafter ICSID) (II).



I. Art. 19(2) UNCITRAL Model Law Allows the Removal of a Legal Representative

9 Art. 19(2) UNCITRAL Model Law provides the Tribunal with the competence to remove a legal representative. This provision states that a tribunal may conduct the arbitration in such manner as it considers appropriate unless the parties have agreed otherwise. It therefore provides a tribunal with a wide discretionary competence [*Analytical Commentary, Art. 19, para. 1*]. The Tribunal's discretion under Art. 19(2) UNCITRAL Model Law encompasses its competence to disqualify a legal representative. Fundamental principles of arbitration call for such a competence of a tribunal (1). Neither the CIETAC Rules nor the UNCITRAL Model Law limits the Tribunal's competence to disqualify a legal representative (2).

1. Fundamental Principles Call for a Competence to Disqualify a Legal Representative

10 Efficiency (a), the prevention of abuse (b), party autonomy (c) and fairness (d) demand that a tribunal has the competence to disqualify a legal representative.

a) Efficiency Calls for the Competence to Exclude a Legal Representative

11 Efficiency is one of the most significant characteristics of international commercial arbitration [*Redfern/Hunter, para. 1-01; Fouchard/Gaillard/Goldman, para. 1*]. It requires a tribunal to protect the procedural agreements made between the parties. In order to meet this requirement, a tribunal should pay special attention to the order of events. Usually, the parties choose their legal teams first and then agree on appropriate arbitrators. If in that situation doubts as to an arbitrator's independence arise, efficiency will oblige the tribunal to protect the parties' counsel and disqualify the arbitrator. Yet, in the reverse order of events, when the tribunal was constituted first and one party subsequently adds a new representative to its legal team, efficiency will compel the tribunal to protect the arbitrator and disqualify the added counsel [*Waincymer, pp. 611, 612*]. As a result, considerations of efficiency call for a tribunal's competence to remove a legal representative.

b) The Competence to Exclude a Legal Representative Is Necessary to Prevent Abuse

12 A competence to remove a legal representative is also necessary to prevent the parties' abuse of their right of free choice of counsel [*Waincymer, p. 613*]. If a tribunal never had the competence to disqualify a legal representative, a party could add a new representative to its legal team with the intention to effect the removal of an undesired arbitrator. The other party would be forced to accept a possibly biased tribunal or challenge the affected arbitrator. By



creating allegedly admissible grounds for the challenge of an arbitrator, the first party would have abused its right of free choice of counsel. In order to prevent a party from reorganising a tribunal as it wishes, a tribunal must have the competence to disqualify a legal representative.

c) Party Autonomy Calls for the Competence to Exclude a Legal Representative

- 13 Party autonomy constitutes another key element of the arbitral proceedings [*Lew/Mistelis/Kröll, para. 17-10; Lionett/Lionett, pp. 54, 55; McIlwrath/Savage, para. 5-051*]. Party autonomy demands a tribunal's competence to remove a legal representative especially where, like in the case at hand, the presiding arbitrator's independence is at stake. In contrast to most arbitration rules, Art. 25(3) CIETAC Rules allows the parties to directly choose the tribunal's president. After a disqualification of the tribunal's president, it is unlikely that the parties would again agree on a candidate. If the parties fail to name a common candidate, the Chairman of the CIETAC Institution shall appoint the presiding arbitrator, Art. 25(3) CIETAC Rules. In practice, the CIETAC Chairman nominates an arbitrator who is willing to leave competences to the CIETAC Secretariat [*Kaplan, p. 248; Schroeter, p. 296; Moser, p. 31*]. Replacing the presiding arbitrator chosen by the parties with an arbitrator chosen by the CIETAC Chairman would thus violate party autonomy. Party autonomy therefore requires a tribunal's competence to disqualify a legal representative.

d) Fairness Calls for the Competence to Exclude a Legal Representative

- 14 The CIETAC Rules put special emphasis on equality and fairness [*Tao, p. 105; Kniprath, p. 53; Stricker-Kellerer, in: Schütze, Introduction to CIETAC, para. 4*]. CLAIMANT contends that the exclusion of counsel is unfair since it interferes with a party's fundamental right to select counsel of its choice [*Memorandum for Claimant, p. 4, para. 1, 2; p. 6, para. 7*]. However, CLAIMANT disregards that this right must not conflict with fundamental rights of the other party. If the legal representative was excluded, the first party would be free to choose another legal representative who would most likely be equally qualified as the party's first choice [*DAC Report, p. 305; Waincymer, p. 611*]. In contrast, if the other party was forced to challenge the arbitrator, this would constitute a violation of its right of fair treatment. Conclusively, the first party's right of free choice of counsel must be limited by a tribunal's competence to exclude a new representative that jeopardises an arbitrator's independence [*Waincymer, p. 610*]. As a result, considerations of fairness demand a tribunal's competence to disqualify a legal representative.



15 Hence, fundamental principles of arbitration call for the Tribunal's competence to disqualify Dr Mercado.

2. Neither the CIETAC Rules Nor the UNCITRAL Model Law Limits the Tribunal's Competence to Disqualify a Legal Representative

16 The Tribunal's competence to exclude a legal representative is neither limited by the CIETAC Rules nor by Art. 18 UNCITRAL Model Law. Generally, a tribunal's discretion is barred by the arbitration rules the parties agreed on and by the mandatory provisions of the *lex loci arbitri* [Várady/Barceló/von Mehren, p. 61; Fouchard/Gaillard/Goldman, para. 368; Lachmann, para. 213; Schmidt-Ahrendts/Schmitt, p. 524]. Only if the arbitration rules chosen by the parties do not regulate a particular procedural question, a tribunal retains the competence to determine the proceedings on that question [Holtzmann/Neuhaus, p. 565; cf. Born, p. 1759; Moses, p. 2]. Art. 19(2) UNCITRAL Model Law therefore provides a tribunal with the competence to fill unregulated gaps [Hußlein-Stich, p. 109; UNCITRAL Secretariat Explanatory Note, para. 35]. Most likely, the drafters of arbitration rules did not consider the disqualification of a legal representative due to his relationship with an arbitrator [Waincymer, p. 614]. Similarly, the CIETAC Rules remain silent on a tribunal's competence to disqualify a legal representative. Since the CIETAC Rules leave a gap that needs regulation, they provide for the Tribunal's competence to exclude a legal representative.

17 Contrary to CLAIMANT'S suggestion [cf. Memorandum for Claimant, p. 6, para. 7], removing a legal representative does not violate a party's opportunity to present its case as laid down in Art. 18 UNCITRAL Model Law. While it is true that Art. 18 UNCITRAL Model Law is a mandatory provision [Analytical Commentary, Art. 19, para. 7; Binder, para. 5-005], it does not guarantee the right of free choice of counsel [Sachs/Lörcher, in: Böckstiegel/Kröll/Nacimiento, § 1042, para. 20; Trittmann/Duve, in: Weigand, Art. 4 UNCITRAL Arbitration Rules, para. 2; Schütze, para. 157]. Consequently, when adopting the UNCITRAL Model Law, some countries added a provision which expressly forbids the disqualification of a legal representative [§ 1042(2) ZPO Germany, § 594(3) ZPO Austria]. Danubia in contrast has adopted the UNCITRAL Model Law without alteration [Application for Arbitration, p. 7, para. 21]. Thus, the disqualification of a legal representative does not infringe any rights protected by Art. 18 UNCITRAL Model Law and therefore does not limit the Tribunal's competence to remove a legal representative either.



- 18 In conclusion, Art. 19(2) UNCITRAL Model Law confers competence on the Tribunal to disqualify a legal representative.

II. The Tribunal Further Has an Inherent Competence to Disqualify a Legal Representative as Emphasised by Recent ICSID Decisions

- 19 Apart from the competence arising from Art. 19(2) UNCITRAL Model Law, the Tribunal also has an inherent competence to disqualify a legal representative. An inherent competence is a competence which emerges solely from a tribunal's position [*Black's Law Dictionary*, p. 1189; *Brown*, p. 205; *Kolo*, p. 43]. Two recent ICSID cases demonstrate that the Tribunal has such an inherent competence. Since the question whether a tribunal has the competence to disqualify a legal representative arises in investment as well as in commercial disputes, the ICISD cases serve as a valid reference. Furthermore, the fact patterns of the two cases are similar to the present case: in both cases, a legal representative was added to a party's legal team subsequent to the tribunal's constitution. These representatives both had a connection with one of the arbitrators, jeopardising the arbitrator's independence.

- 20 Both tribunals acknowledged an inherent competence to take measures in order to preserve the integrity of their proceedings [*ICSID ARB/05/24, Hrvatska Case*; *ICSID ARB/06/3, Rompetrol Case*]. The integrity of arbitral proceedings requires that efficiency, party autonomy and fairness are safeguarded while abuse of a party's right of free choice of counsel is prevented. As shown above, forcing RESPONDENT to challenge Professor Presiding Arbitrator would not be adequate regarding the chronological order of events. Moreover, it would violate the parties' agreement on the chairman and interfere with the fairness of the proceedings while providing an incentive for parties to abuse their right to freely choose a representative [*see supra, para. 11-14*]. Consequently, the Tribunal also has an inherent competence to disqualify a legal representative. Either way, the Tribunal is equipped with the competence to disqualify Dr Mercado from CLAIMANT's legal team.

B. The Circumstances of the Present Case Justify the Exclusion of Dr Mercado

- 21 The Tribunal is not only equipped with the competence to disqualify a legal representative, but should also make use of it, as the circumstances of the case at hand require disqualifying Dr Mercado. Her relationship with Professor Presiding Arbitrator raises justifiable doubts as to his ability to judge independently.



22 Justifiable doubts as to the independence of an arbitrator lead to his disqualification, since the mere suspicion of bias already endangers justice [*Piersack v. Belgium, European Court of Human Rights, 1 Oct 1982; De Cubber v. Belgium, European Court of Human Rights, 26 Oct 1984; Millar v. Procurator, Privy Council; Locabail v. Bayfield, Ct App*]. This standard for the challenge of an arbitrator shall be applied by analogy to the challenge of a legal representative if he has a relationship with an arbitrator. Therefore, justifiable doubts must also be the standard for the disqualification of Dr Mercado. From the perspective of a reasonable observer (I) as well as under the International Bar Association's Guidelines on Conflict of Interest in International Arbitration (hereafter IBA Guidelines) (II), justifiable doubts arise as to Professor Presiding Arbitrator's independence. His failure to file a new Statement of Independence indicates his potential bias (III).

I. From the Perspective of a Reasonable Observer, Justifiable Doubts Arise Concerning Professor Presiding Arbitrator's Independence

23 For a reasonable observer, the relationship between Dr Mercado and Professor Presiding Arbitrator raises justifiable doubts as to his independence. Arbitral tribunals as well as state courts argue that doubts concerning an arbitrator's independence are justified when the specific circumstances of a case lead a fair-minded and informed observer to conclude that the arbitrator is possibly biased [*ICSID ARB/06/3, Rompetrol Case; Ad Hoc Award, 11 Jan 1995; LCIA, 27 Dec 2005; LCIA, 3 Dec 2007; Magill v. Porter, House of Lords; Director v. Proprietary, Ct App*].

24 In the case at hand, an objective observer would conclude that Professor Presiding Arbitrator is potentially biased due to his professional and personal relationship with Dr Mercado. With regard to their professional relationship, Professor Presiding Arbitrator initiated Dr Mercado's application at the Danubia National University and encouraged her employment [*Statement of Defence, p. 39, para. 18*]. Today, she delivers lectures as part of Professor Presiding Arbitrator's course [*Statement of Defence, p. 39, para. 20*]. In fact, Dr Mercado is a highly recognised expert in arbitration, which is not the focus of Professor Presiding Arbitrator [*Procedural Order No. 2, p. 51, para. 39; Statement of Defence, p. 39, para. 17*]. As a result, Professor Presiding Arbitrator is likely to trust in Dr Mercado's opinion.



25 Professor Presiding Arbitrator and Dr Mercado also have a close personal relationship, extending to his entire family. Dr Mercado is on first name terms with Professor Presiding Arbitrator as well as with his wife and his children [*Statement of Defence, p. 30, para. 21*]. She meets his wife for lunch and coffee. Most alarming, she is the godmother of his youngest child [*Statement of Defence, p. 30, para. 21*]. Conclusively, Professor Presiding Arbitrator’s professional appreciation as well as his personal affection for Dr Mercado is sufficient to manifest his bias.

26 When combining these two aspects, it seems even more likely for a fair-minded and informed observer that Professor Presiding Arbitrator might vote for the party which Dr Mercado represents, i.e. CLAIMANT. It should also be considered that Professor Presiding Arbitrator voted in favour of the parties represented by Dr Mercado in all three previous cases [*Statement of Defence, p. 40, para. 22*]. As a result, from the perspective of a reasonable observer, the relationship between Professor Presiding Arbitrator and Dr Mercado raises justifiable doubts concerning his independence.

II. The IBA Guidelines also Confirm Justifiable Doubts Concerning Professor Presiding Arbitrator’s Independence

27 Under the IBA Guidelines, the relationship between Professor Presiding Arbitrator and Dr Mercado raises justifiable doubts as to his ability to judge independently. As CLAIMANT agrees, the IBA Guidelines serve as an indicator to determine an arbitrator’s independence [*Memorandum for Claimant, p. 9, para. 15*]. They distinguish between three categories of relationships. The “Red List” raises justifiable doubts as to the arbitrator’s independence, the “Orange List” may give rise to such doubts, the “Green List” does not give rise to any doubts [*IBA Guidelines, Part II, para. 2, 3, 6*]. The aspects of the relationship between Dr Mercado and Professor Presiding Arbitrator raise justifiable doubts under the “Red List” (1) as well as under the “Orange List” (2).

1. As a “Red-List-Scenario”, the Relationship Raises Justifiable Doubts

28 The private nature of the relationship between Professor Presiding Arbitrator and Dr Mercado meets the requirements of the “Red List”. As opposed to CLAIMANT’S allegations that the relationship is only encompassed by the “Orange List” as a “close personal friendship” [*cf. Memorandum for Claimant, p. 9, para. 16*], it indeed equals a “Red-List-Scenario”. The “Red List” names the relationship between close family members, such as spouses, siblings,



children, parents or life partners, but it is not exhaustive [*IBA Guidelines, Part II, para. 2.3.8, 2.2.2, 2*]. The relationship between a godmother and the father of her godchild resembles the relationship between family members. A godmother bears the responsibility to take care of her godchild in case the parents become unable to do so [*Encyclopaedia Britannica*]. This responsibility requires trust in the other person which is only created by a connection as deep as that between close family members. Therefore, Dr Mercado's position as godmother of Professor Presiding Arbitrator's child qualifies her personal relationship with Professor Presiding Arbitrator for the "Red List".

2. As an "Orange-List-Scenario", the Relationship Raises Justifiable Doubts

- 29 The relationship between Professor Presiding Arbitrator and Dr Mercado is also covered by the "Orange List", as CLAIMANT concedes [*Memorandum for Claimant, p. 9, para. 16*]. CLAIMANT, however, alleges that the IBA Guidelines require the doubting party to additionally object to the possibly biased arbitrator within 30 days after disclosure, since that party is otherwise deemed to have waived the potential conflict of interest, IBA Guidelines, Part I, General Standard 4(a) [*Memorandum for Claimant, p. 9, para. 17*]. Yet, since the IBA Guidelines are not legally binding [*IBA Guidelines, Introduction, para. 6*], a party cannot waive a right by missing a deadline. In fact, RESPONDENT would even have met such deadline: It objected to Professor Presiding Arbitrator's conflict of interest within three days by challenging Dr Mercado on the grounds of his possible bias [*Procedural Order No. 2, p. 50, para. 29; Statement of Defence, p. 40*]. As a result, the relationship raises justifiable doubts concerning Professor Presiding Arbitrator's independence.

III. Professor Presiding Arbitrator's Failure to Disclose Indicates His Potential Bias

- 30 Professor Presiding Arbitrator did not file a new statement of independence, which indicates his bias. While the effort of an arbitrator to disclose relevant relationships is relatively low, the result of a disclosure is immense: It safeguards the trust in the arbitration process [*Commonwealth v. Casualty, US Supr Ct*]. Therefore, an arbitrator's failure to disclose relevant information concerning a possible bias is proof of evident partiality [*Applied Ind. v. Ovalar, US Ct App (2nd Cir); Branson, p. 628*]. Professor Presiding Arbitrator did not disclose after he had been informed about Dr Mercado's participation on CLAIMANT'S legal team [*Procedural Order No. 2, p. 51, para. 36*]. This indicates his possible bias. Since



justifiable doubts arise concerning Professor Presiding Arbitrator's independence, the disqualification of Dr Mercado is justified.

C. In Any Case, RESPONDENT Could Still Challenge Professor Presiding Arbitrator

- 31 Regardless of the Tribunal's decision concerning the removal of Dr Mercado, RESPONDENT could alternatively challenge Professor Presiding Arbitrator. CLAIMANT incorrectly alleges that RESPONDENT missed the deadline of 15 days to challenge Professor Presiding Arbitrator and therefore waived its right of challenge [*cf. Memorandum for Claimant, p. 8, para. 14*]. In fact, RESPONDENT has objected to Professor Presiding Arbitrator within three days by challenging Dr Mercado, thereby meeting the deadline [*see supra, para. 29*].
- 32 RESPONDENT did not waive but instead reserved its right to challenge Professor Presiding Arbitrator. CLAIMANT and RESPONDENT agree that the purpose of the deadline is that parties should not be allowed to continue with an arbitration while retaining secret grounds for objections [*Memorandum for Claimant, p. 10, para. 19*]. Otherwise, a party could inadmissibly hold back its objections to an arbitrator's independence and challenge the tribunal's award on these grounds later [*Ghirardosi v. Minister of Highways, Supr Ct Canada; ASM Shipping v. TTMI Ltd., High Court; Cook v. C. ITOH, US Ct App (2nd Cir); AAOT v. Intern. Dev., US Ct App (2nd Cir); Redfern/Hunter, para. 4-76; Born, p. 2615*]. However, RESPONDENT did not hold back its objections but reacted without hesitation by challenging Dr Mercado due to her relationship with the Presiding Arbitrator. It would be an inefficient formalism to require RESPONDENT to initiate challenge proceedings against both, the legal representative and the arbitrator, on the same grounds. As a result, RESPONDENT reserved its right to alternatively challenge Professor Presiding Arbitrator.

CONCLUSION OF THE FIRST ISSUE

- 33 Exceptional circumstances require exceptional measures. The Tribunal has the competence to disqualify a legal representative, arising from Art. 19(2) UNCITRAL Model Law as well as from an inherent competence. Efficiency, party autonomy, fairness and the prevention of abuse call for such a competence. The circumstances of the present case justify the exclusion of Dr Mercado, since her addition to CLAIMANT's legal team raises justifiable doubts as to Professor Presiding Arbitrator's independence. Irrespective of the Tribunal's decision, RESPONDENT reserved its right to challenge Professor Presiding Arbitrator.



ISSUE 2: RESPONDENT IS EXEMPT FROM LIABILITY

34 CLAIMANT and RESPONDENT concluded a Contract calling for the supply, installation and configuration of a master control system, the key element of the conference technology on CLAIMANT’S newly purchased M/S Vis yacht [*Claimant’s Exhibit No. 1, p. 9, para. 1*]. Core element of the master control system is a series of processing units produced by Specialty Devices [*Application for Arbitration, p. 5, para. 8*]. In order to meet the highest standards these units were based on the novel D-28 “Super Chip” produced by High Performance [*Application for Arbitration, p. 5, para. 9*].

35 However, on 6 September 2010 an accidental fire occurred at High Performance’s production facility, causing a halt in production of the D-28 chip [*Application for Arbitration, p. 6, para. 12*]. Consequently, Specialty Devices did not receive the chips until the beginning of November, preventing it from delivering the processing units to RESPONDENT in time [*Application for Arbitration, p. 6, para. 12*]. Thus, it was impossible for RESPONDENT to deliver the master control system to CLAIMANT in time [*Application for Arbitration, p. 6, para. 12*].

36 Contrary to CLAIMANT’S allegations [*cf. Memorandum for Claimant, pp. 22 et seq., para. 65 et seq.*], CLAIMANT cannot recover the damages as RESPONDENT is exempt from liability for the consequences of this delay under Art. 79(1) CISG (A). Alternatively, when applying Art. 79(2) CISG, RESPONDENT would still be exempt from liability (B).

A. RESPONDENT Is Exempt from Liability under Art. 79(1) CISG

37 As Specialty Devices is no “third person” in terms of Art. 79(2) CISG, solely Art. 79(1) CISG governs RESPONDENT’S exemption (I). The requirements of Art. 79(1) CISG are met (II).

I. Exclusively Art. 79(1) CISG Governs RESPONDENT’S Exemption, because Specialty Devices Is No Third Party in Terms of Art. 79(2) CISG

38 As CLAIMANT agrees, Specialty Devices is no “third party” in terms of Art. 79(2) CISG, leading to an exclusive application of Art. 79(1) CISG [*Memorandum for Claimant, p. 22, para. 65*].

39 “Third persons” encompassed by Art. 79(2) CISG are such subcontractors that are engaged to perform the whole or a part of the contract independently [*Schwenzer, in:*



Schlechtriem/Schwenzer, Art. 79, para. 34; Flambouras, p. 274; Brunner, Art. 79, para. 14; Sanger, in: Bamberger/Roth, Art. 79, para. 7; Loewe, p. 97;].

40 In contrast, suppliers whose performance merely constitutes a precondition for the seller’s performance are not considered “third persons” in terms of Art. 79(2) CISG [*Schwenzer, in Schlechtriem/Schwenzer, Art. 79, para. 37; Mankowski, in: MunchKomm HGB, Art. 79, para. 49; Luderitz/Dettmeier, in: Soergel, Art. 79, para. 22; Enderlein/Maskow, Art. 79, para. 7.3 et seq.*]. These suppliers are no “third persons” since they only assist in the preparation of performance, but are neither commissioned with performance in whole nor in part [*Schwenzer, in: Schlechtriem/Schwenzer (Ger.), Art. 79, para. 37; Achilles, Art. 79, para. 9; cf. Huber, in: MunchKomm BGB, Art. 79, para. 23; Karollus, p. 212; Achilles, in: Ensthaler, Art. 79, para. 9*]. This is especially true for suppliers of semi-manufactured parts [*HCC, 21 Mar 1996; OLG Hamburg, 28 Feb 1997; Secretariat Commentary, Art. 65, para. 12; Garro, in: CISG-Ac Op. 7, para. 18; Tallon, in: Bianca/Bonell, Art. 79, para. 2.7.1.*].

41 Specialty Devices was entrusted with supplying the processing units to RESPONDENT. The processing units were a precondition for RESPONDENT’S production of the master control system and constitute semi-manufactured parts. Thus, Specialty Devices is no “third person” in terms of Art. 79(2) CISG. Hence, only Art. 79(1) CISG governs RESPONDENT’S exemption.

II. All Requirements of Art. 79(1) CISG Are Met

42 According to Art. 79(1) CISG, a seller “is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences”. The fire at High Performance’s production facility caused an impediment beyond RESPONDENT’S control (1), which RESPONDENT could have neither foreseen (2), nor overcome (3).

1. The Unavailability of the Processing Units Constitutes an Impediment Beyond RESPONDENT’S Control

43 The fire at High Performance’s production facility led to an impediment beyond RESPONDENT’S control. RESPONDENT was contractually bound to deliver a master control system using processing units based on the D-28 chip (a). Since these processing units were not available, RESPONDENT faced an impediment beyond its control (b).



a) RESPONDENT Was Obligated to Use D-28 Chips in the Master Control System

- 44 Contrary to what has been brought forward by CLAIMANT, RESPONDENT was bound to implement the D-28 chip [*cf. Memorandum for Claimant, p. 24, para. 70*]. The Contract states that RESPONDENT is obliged to supply a master control system [*Claimant's Exhibit No. 1, p. 9*]. Yet, no specifications in regard to the construction of the master control system were made. Thus, the Contract has to be interpreted.
- 45 In determining the extent of contractual obligations, the statements and conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the seller would have had in the same circumstances, Art. 8(2) CISG. Therefore, also an obligation not explicitly worded can be part of a contract [*cf. Chemical Marketing v. Purolite Company, US Dist Ct (EDPA); Packaging Systems v. Jacob Tsonakis, US Dist Ct (WDMI); Schmidt-Kessel, in: Schlechtriem/Schwenzer (Ger.), Art. 8, para. 11; Zuppi, in: Kröll/Mistelis/Viscasillas, Art. 8, para. 3; Farnsworth, in: Bianca/Bonell, Art. 8, para. 2.4.*]. The parol evidence rule, which establishes that only the written agreement is decisive, does not apply [*Filanto v. Chilewich, US Dist Ct (SDNY); Calzaturificio v. Olivieri, US Dist Ct (SDNY); MCC v. Ceramica Nuova, US Ct App (11th Cir); Mitchell Aircraft. v. European Aircraft, US Dist Ct (NDIL); Hyland, in: CISG-Ac Op. 3, para. 2*]. Moreover, Art. 35(2)(b) CISG requires a seller to deliver goods which are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract.
- 46 When CLAIMANT decided to refurbish the newly purchased M/S Vis yacht, it requested the “latest in cabin and conference technology”, “superior to anything otherwise available” [*Application for Arbitration, p. 5, para. 6*]. Particularly, the conference system was supposed to “meet the highest standards” [*Application for Arbitration, p. 5, para. 6*]. At the time of the conclusion of the Contract in May, it was known that the production of a new “Super Chip” starting in mid-August would offer significant improvements over any rival chip [*Application for Arbitration, p. 5, para. 9*].
- 47 Thus, a reasonable person in the same circumstances as RESPONDENT would have concluded that CLAIMANT’S demands could only be met by delivering a master control system using the D-28 chip.



b) RESPONDENT Faced an Impediment Beyond Its Control

- 48 The unavailability of the processing units caused by the fire constitutes an impediment beyond RESPONDENT'S control. Impediments are external circumstances which prevent performance and are thus outside of the seller's sphere of risk [Schwenzer, in: *Schlechtriem/Schwenzer*, Art. 79, para. 11; *Atamer*, in: *Kröll/Mistelis/Viscasillas*, Art. 79, para. 47; *Heuzé*, para. 469; *Wilhelm*, p. 33; *Corvaglia*, para. 8.4].
- 49 Contrary to CLAIMANT'S allegation [cf. *Memorandum for Claimant*, p. 23, para. 69], the procurement risk is not within the seller's typical sphere of risk. A seller is exempt if the unavailability was caused by an unforeseeable event [Schwenzer, in: *Schlechtriem/Schwenzer*, Art. 79, para. 27; *Magnus*, in: *Staudinger*, Art. 79, para. 22; *Achilles*, Art. 79, para. 6; *Huber/Mullis*, p. 261; *Achilles*, in: *Ensthaler*, Art. 79, para. 6]. Particularly, exemption is granted if all possible suppliers are unable to deliver due to force majeure, e.g. fire [*Magnus*, in: *Staudinger*, Art. 79, para. 27; cf. *Rummel*, p. 187; *Morrissey/Graves*, pp. 293, 294].
- 50 Production of the D-28 chip came to a halt when a fire occurred at High Performance's premises [*Application for Arbitration*, p. 5, para. 12]. The fire was caused by an accidental short circuit in the electrical installation [*Procedural Order No. 2*, p. 47, para. 8]. This is a textbook example of force majeure. As High Performance is the only producer of D-28 chips [*Application for Arbitration*, p. 5, para. 9], it was impossible for Specialty Devices and in turn RESPONDENT to fulfil their contractual obligations in time [*Application for Arbitration*, p. 6, para. 12]. Thus, the unavailability of the processing units resulting from the fire constitutes an impediment beyond RESPONDENT'S control.

2. RESPONDENT Could Not Have Foreseen the Impediment

- 51 RESPONDENT could not have taken the unavailability of the processing units into account at the time the Contract was concluded. The seller is only considered responsible if it could reasonably have taken the impediment into account at the time of the conclusion of the contract [Schwenzer, in: *Schlechtriem/Schwenzer*, Art. 79, para. 13; *Lookofsky*, p. 139; *Nicholas*, para. 5-10; *Gabriel*, p. 240; *Verweyen/Foerster/Toufar*, p. 218]. Consequently, force majeure is foreseeable only in such cases like regularly occurring floods or droughts [*CIETAC*, 30 Nov 1997; *CIETAC*, 2 May 1996; *Raw Materials v. Forberich*, *US Dist Ct (NDIL)*; *Schwenzer*, in: *Schlechtriem/Schwenzer*, Art. 79, para. 16; *Neumayer/Ming*, Art. 79, para. 4]. By contrast, it lies within the nature of an accident that it is not foreseeable.



52 CLAIMANT brings forward that RESPONDENT should have incorporated an explicit force majeure clause and that it should have foreseen the impediment as it relied on a risk-inherent production line [*Memorandum for Claimant*, pp. 24, 25, para. 72, 73]. However, a seller is not obliged to take into account every possible impediment [*Atamer*, in: *Kröll/Mistel/Viscasillas*, Art. 79, para. 50; *Tallon*, in: *Bianca/Bonell*, Art. 79, para. 2.6.3.; cf. *Mankowski*, in: *MünchKomm HGB*, Art. 79, para. 39; *Herber/Czerwenka*, Art. 79, para. 10; *Magnus*, in: *Honsell*, Art. 79, para. 15]. RESPONDENT cannot be expected to foresee a fire accident at the production facility of its sub-supplier. Consequently, RESPONDENT could not have foreseen the unavailability of the processing units when the Contract was concluded.

3. RESPONDENT Could Not Have Overcome the Impediment

53 The unavailability of the processing units could not have been overcome by RESPONDENT. CLAIMANT alleges that RESPONDENT should have offered a reasonable substitute [*Memorandum for Claimant*, p. 25, para. 76], suggesting that RESPONDENT should have used different processing units. Yet, a seller is only obliged to provide a substitute which is commercially reasonable with regard to the contractual purpose [*OLG Hamburg*, 28 Feb 1997; *AAA*, 12 Dec 2007; *Secretariat Commentary*, Art. 65, para. 7; *Schwenzer*, in: *Schlechtriem/Schwenzer*, Art. 79, para. 14; *Audit*, para. 182].

54 CLAIMANT'S demand fails to meet this standard. When the D-28 chip became unavailable, no other chip with comparable qualities could be obtained until February 2011 [*Application for Arbitration*, p. 5, para. 9]. As it was CLAIMANT'S request that the conference technology should meet the highest possible standards [*Application for Arbitration*, p. 5, para. 6], it would not have been in accordance with the purpose of the Contract to use chips of lower quality.

55 In any case, redesigning the processing units based on a substitute chip would have caused severe delay while providing no guarantee of comparable performance due to the unique qualities of the D-28 chip [*Procedural Order No. 2*, p. 47, para. 12]. Likewise, attempting to "clone" a D-28 chip would have involved comparable delays, not to mention intellectual property conflicts inherent to "cloning" [*Procedural Order No. 2*, p. 47, para. 12].

56 Consequently, no commercially reasonable substitute was available which would have allowed RESPONDENT to satisfy the purpose of the Contract. Hence, RESPONDENT could not have overcome the impediment. RESPONDENT is thus exempt from liability under Art. 79(1) CISG.



B. Even If the Tribunal Found That Specialty Devices and High Performance Were “Third Persons”, RESPONDENT Would Still Be Exempt from Liability under Art. 79(2) CISG

57 Even if the Tribunal considered Specialty Devices and consequently High Performance to be “third persons” in terms of Art. 79(2) CISG, RESPONDENT would nevertheless be exempt under said provision. Art. 79(2) CISG requires both the seller and the “third person” it has engaged to cumulatively fulfil the conditions of Art. 79(1) CISG in order to be exempt from liability. RESPONDENT is exempt from liability under Art. 79(1) CISG [*see supra, para. 56*]. Specialty Devices (I) and High Performance (II) are also exempt from liability under Art. 79(1) CISG.

I. Specialty Devices Is Exempt from Liability under Art. 79(1) CISG

58 Specialty Devices is exempt from liability since the unavailability of the D-28 chip constitutes an impediment beyond Specialty Devices’ control (1), which it could have neither foreseen (2) nor overcome (3).

1. The Unavailability of the D-28 Chips Constituted an Impediment Beyond Specialty Devices’ Control

59 The unavailability of the D-28 chips was beyond Specialty Devices’ control. As shown above [*see supra, para. 50*], the fire causing a halt in the production constituted an event of force majeure. This impediment which was also beyond Specialty Devices’ control. Specialty Devices did not assume the risk of its supply becoming unavailable due to force majeure.

2. Specialty Devices Could Not Have Foreseen the Impediment

60 Specialty Devices could not have taken High Performance’s late delivery into account at the time it concluded its contract with RESPONDENT. Just like RESPONDENT, Specialty Devices could not have foreseen that a fire would occur leading to the unavailability of the chips. Consequently, Specialty Devices could not have foreseen High Performance’s late delivery.

3. Specialty Devices Could Not Have Overcome the Impediment

61 The unavailability of the D-28 chips could not have been overcome by Specialty Devices. Under the CISG, a seller is generally exempt if its supplier is the only available source, e.g. if it has a monopoly [*Schwenzer, in: Schlechtriem/Schwenzer (Ger.), Art. 79, para. 36*;



Reinhart, Art. 79, para. 8; Vischer, p. 179; Rathjen, p. 562; Lautenbach, p. 64]. This applies to Specialty Devices, because High Performance is the only producer of D-28 chips.

62 CLAIMANT alleges that Specialty Devices made no sufficient effort to acquire the D-28 chips from High Performance [*Memorandum for Claimant, p. 27, para. 82*]. However, High Performance's decision to allocate the remaining chips only to its regular customers had already been made when it informed Specialty Devices about the halt in production resulting from the fire [*Claimant's Exhibit No. 3, p. 11*]. Specialty Devices even made the additional effort to approach Atlantis Technical Solutions who had received the remaining D-28 chips [*Procedural Order No. 2, p. 47, para. 11*]. However, the latter refused to sell any of the chips [*Procedural Order No. 2, p. 47, para. 11*].

63 Furthermore, Specialty Devices, just like RESPONDENT, could not have overcome the impediment by using any other chip. A redesign of the processing units would have caused severe delay, also, there was no chip with comparable qualities [*see supra, para. 54*].

64 Consequently, even if Specialty Devices had used different chips, it would have neither been able to fulfil its contract with RESPONDENT in time nor would it have been able to provide the requested standard. As a result, Specialty Devices could not have overcome the impediment. Specialty Devices is therefore exempt from liability under Art. 79(1) CISG.

II. High Performance Is Also Exempt from Liability Under Art. 79(1) CISG

65 The fire constitutes an impediment beyond High Performance's control, which it could have neither foreseen (1), nor overcome (2).

1. The Fire Constitutes an Impediment Beyond High Performance's Control Which it Could Not Have Foreseen

66 Fire is considered a circumstance outside of the seller's sphere of risk, as it is an unforeseeable event of force majeure [*see supra, para. 49 et seq.*]. There was no reason for High Performance to expect a fire at its production facility at the time it concluded its contract with Specialty Devices. Consequently, the impediment was beyond High Performance's control and not foreseeable.



2. High Performance Could Not Have Overcome the Impediment

67 CLAIMANT asserts that High Performance should have distributed the remaining chips on a pro rata basis amongst all its customers [*Memorandum for Claimant, p. 27, para. 81*]. Yet, neither High Performance’s contracts, nor any explicit provision within the laws of Atlantis or the CISG require a pro rata allotment [*Application for Arbitration, p. 6, para. 13*]. Furthermore, even if the chips had been allocated on a pro rata basis, Specialty Devices would not have received enough chips to manufacture all of the processing units needed for the master control system [*Statement of Defence, p. 37, para. 6*]. High Performance could not have reasonably overcome the impediment (a). High Performance’s conduct did not violate the principle of good faith (b).

a) It Was Not Possible for High Performance to Reasonably Overcome the Impediment

68 CLAIMANT brings forward that High Performance deliberately chose not to fulfil its contract with Specialty Devices by supplying all chips to Atlantis Technical Solutions [*Memorandum for Claimant, p. 27, para. 82*]. In addition, CLAIMANT alleges that this decision was solely based on the friendship between the Chief Executive Officers of High Performance and Atlantis Technical Solutions [*Memorandum for Claimant, p. 27, para. 81*]. Yet, High Performance could not have overcome the impediment it faced. Art. 79(1) CISG only requires reasonable measures to overcome the impediment.

69 Due to the fire, there was only a limited stock available, insufficient to allow High Performance to fulfil all of its contractual obligations [*Application for Arbitration, p. 6, para. 13*]. Thus, High Performance faced an impediment affecting all its contractual obligations and had to choose which contract it would fulfil. Eventually, High Performance decided to meet the demand of its regular customers first, especially considering that a pro rata allotment would not have satisfied the majority of its customers [*Claimant’s Exhibit No. 3, p. 11*]. As it was impossible for High Performance to fulfil all of its equivalent contractual obligations, it was reasonable for High Performance to choose the duration and future prospects of its business relationships as the basis for its decision.

70 Specialty Devices was neither a regular customer nor could it have been expected to become one in the future [*Application for Arbitration, p. 6, para. 14*]. In contrast, Atlantis Technical Solutions is a long standing and regular client of High Performance [*Application for Arbitration, p. 6, para. 15*] who had supported High Performance “during a particularly



difficult period five years ago” [*Claimant’s Exhibit No. 7, p. 15*]. Consequently, High Performance made a reasonable business decision by delivering to Atlantis Technical Solutions and could in consequence not overcome the impediment.

b) High Performance’s Conduct Did Not Contradict Good Faith

- 71 High Performance’s behavior did not violate the principle of good faith. The principle of good faith cannot be applied directly to individual contracts [*ICC, 8611/1997; Gerichtshof Arnhem, 18 Jul 2006; Schlechtriem, para. 44; Schwenger/Hachem, in: Schlechtriem/Schwenger, Art. 7, para. 17; Ferrari, in: Schlechtriem/Schwenger (Ger.), Art. 7, para. 26; Bridge, para. 11.33*]. Instead, it is solely used for interpreting the CISG [*cf. Secretariat Commentary, Art. 6, para. 4; Schlechtriem/Butler, para. 44; Honnold, p. 94; Farnsworth, p. 18; Eörsi, para. 2-7*].
- 72 Even if the principle of good faith could be applied directly, only abuse of rights as well as contradictory behaviour may be considered a violation of the principle of good faith [*OLG Köln, 21 May 1996; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft Wien, 15 Jun 1994; Witz, in: Witz/Salger/Lorenz, Art. 7, para. 14; Piltz, para. 2-186; Saenger, in: Ferrari, Art. 7, para. 6*].
- 73 However, High Performance’s decision not to allocate the chips on a pro rata basis was neither abusive nor contradictory. Thus, High Performance did not contradict the principle of good faith. To conclude, even if Art. 79(2) CISG was applied, High Performance and consequently Specialty Devices and RESPONDENT are exempt from liability under Art. 79(1) CISG.

CONCLUSION OF THE SECOND ISSUE

- 74 RESPONDENT is exempt from liability. RESPONDENT faced an impediment beyond its control as the D-28 chips needed for the production of the master control system were destroyed by an accidental fire at the production facility of its sub-supplier. Even if Specialty Devices and High Performance had to meet the requirements of Art. 79(1) CISG as well, RESPONDENT would be exempt in any case: RESPONDENT, Specialty Devices and High Performance meet the requirements of Art. 79(1) CISG and are consequently exempt from liability.



ISSUE 3: CLAIMANT IS NEITHER ENTITLED TO THE COSTS ARISING FROM THE LEASE CONTRACT NOR TO THE EX GRATIA PAYMENT

75 Besides the USD 448,000 rental costs for the M/S Pacifica Star, CLAIMANT further intends to recover the USD 60,600 broker commission and the USD 50,000 success fee paid to its yacht broker. CLAIMANT also demands recovery for an ex gratia payment of USD 112,000 made to its client [*Application for Arbitration, p. 4, para. 4*]. Parts of the USD 50,000 success fee were used as bribe to facilitate business for CLAIMANT [*Respondent's Exhibit No. 1, p. 41; Procedural Order No. 2, p. 51, para. 41*]. None of these claims is justified.

76 Bribery prevents entitlement to damages for procedural and substantive reasons (A). Alternatively, neither the success fee (B) nor the ex gratia payment (C) is recoverable.

A. Bribery Prevents Entitlement to Damages for Procedural and Substantive Reasons

77 On top of the usual broker commission, CLAIMANT paid an additional USD 50,000 success fee to the broker it engaged to find a substitute vessel. The broker passed parts of this money on to the personal assistant of Mr Goldrich, the owner of the M/S Pacifica Star. This payment was used to facilitate an introduction between Mr Goldrich and CLAIMANT and allowed for subsequent negotiations [*Statement of Defence, p. 38, para. 13; Respondent's Exhibit No. 1, p. 41*]. Such behaviour constitutes bribery under Art. 1453 Criminal Code of Pacifica – the country Mr Goldrich and its assistant live in [*Respondent's Exhibit No. 2, p. 42*]. The fact that bribery has been committed is evident and undisputed by CLAIMANT [*Respondent's Exhibit No. 1, p. 41; Procedural Order No. 2, p. 51, para. 41*]

78 The bribery hinders arbitration (I) and renders claims affected by bribery irrecoverable for substantive reasons (II).

I. Bribery Prevents Arbitration and Would Render Tainted Awards Unenforceable

79 Since damages based on a transaction concluded by means of bribery are non-arbitrable, the Tribunal shall refuse jurisdiction over these damages (1). If the Tribunal assumed jurisdiction, an award granting such damages would not be likely to be enforceable (2).

1. The Tribunal Shall Refuse Jurisdiction Over Any Claims Tainted by Bribery

80 In line with CLAIMANT'S statement that corruption matters are beyond the scope of this arbitration [*Memorandum for Claimant, p. 20, para. 56*], the Tribunal should refuse



jurisdiction over the damages related to the lease contract, i.e. the rental costs for the M/S Pacifica Star of USD 448,000, the USD 60,600 brokerage commission and the USD 50,000 success fee as CLAIMANT attempts to resort to arbitration for an illegitimate reason.

81 It is the Tribunal's duty to decline jurisdiction if the proceedings are being conducted for illegitimate reasons, e.g. to recover damages suffered in connection with a contract concluded by means of bribery [*CIArb Practice Guidelines, p. 8, para. 4.4.2*]. Gunnar Lagergren, the first arbitrator to decline jurisdiction due to involved bribery found that the party claiming money in connection with bribery has "forfeited [his] right to ask for assistance from the machinery of justice" [*ICC, 1110/1963, Lagergren Award*]. Although Lagergren dealt with a case in which both parties tried to misuse arbitration to cover up bribery, jurisdiction must all the more be denied if only one party is involved in bribery. Especially if the bribery was committed unbeknownst to the non-involved party, it must be protected from claims resulting from such illegal actions. Moreover, harm may arise to that party's reputation if associated with the expression bribery, a key word for business crime.

82 The rental costs for the substitute yacht, as well as any costs resulting from engaging a yacht broker, i.e. the commission fee and the success fee, are connected with the lease contract which has been concluded by means of bribery. CLAIMANT, however, resorts to arbitration to recover costs emerged by illegal activities. The Tribunal should decline jurisdiction over the named damages.

2. An Award Granting Damages Linked to Bribery Would Not Be Enforceable

83 Contrary to CLAIMANT'S belief [*cf. Memorandum for Claimant, p. 21, para. 62*], an infringement of Art. 1453 Criminal Code of Pacifica will violate international public policy and hence risk the enforcement of an award granting damages affected by bribery. In line with Art. V(2)(b) New York Convention, Art. 36(1)(b)(ii) UNCITRAL Model Law states that an award is not enforceable if it is in conflict with relevant public policy. Because of the international nature of arbitration, the correct standard to apply when determining public policy is international public policy [*BGH, 18 Jan 1990; Parsons v. Société Générale, US Ct App (2nd Cir); Lux Sup Ct, 24 Nov 1993; Hwang/Lim, para. 86, 166; Paulsson, pp. 110, 113*]. In this regard, it is "international consensus that corruption and bribery are contrary to international public policy" and that awards on contracts that are overshadowed by bribery are thus not enforceable [*ILA Report on Public Policy, p. 218; cf. ICSID ARB/00/7; Redfern/Hunter, para. 3-20; Pieth, in: FS Schwenzler, p. 1380*].



84 The lease contract as CLAIMANT’S legal basis for damages has been concluded by means of bribery, illegal under Pacifican Criminal Law [*Respondent’s Exhibit No. 1, p. 41*]. As only the ex gratia payment is separable from the lease contract, enforceability of an award granting any other damages would likely not be enforceable with regard to international public policy.

II. Alternatively, the Bribery Prevents the Named Damages for Substantive Reasons

85 The damages invoked by CLAIMANT cannot be granted in any case since the lease contract as the legal basis for all claims but the ex gratia payment is void. Contracts contaminated with bribery are void [*Born, Bribery*]. Contrary to CLAIMANT’S assertion [*cf. Memorandum for Claimant, p. 17, para. 46; p. 18, para. 51*], the lease contract is contaminated with bribery attributed to CLAIMANT.

86 The bribery is to be attributed to CLAIMANT since it consciously ignored possible bribery (1) and because CLAIMANT is responsible for the yacht broker it employed (2).

1. CLAIMANT Is Responsible Since It Consciously Ignored the Possibility of Bribery

87 The lease contract is void since CLAIMANT ignored that paying the success fee of USD 50,000 encouraged bribery. As opposed to what has been argued by CLAIMANT [*cf. Memorandum for Claimant, p. 18, para. 52*], CLAIMANT did not merely play the role of a spectator which was all of a sudden faced with bribery accusations. Quite to the contrary, CLAIMANT consciously ignored the fact that paying USD 50,000 at this point in time would encourage the yacht broker to bribe. This is supported by the chronological order of events as well as by the disproportionally high success fee.

88 Attention must be drawn to the fact that CLAIMANT did not promise the USD 50,000 until after the broker had already located the yacht [*Procedural Order No. 2, p. 49, para. 22, 23*]. Consequently the broker’s task to find a substitute for CLAIMANT had already been fulfilled.

89 At this point in time, CLAIMANT promised to pay the success fee of USD 50,000 if the broker managed to “secure the contract” [*Procedural Order No. 2, p. 49, para. 22*]. As the main part of the yacht broker’s work, i.e. locating vessels according to its client’s demands was done, all that was left to do was to introduce CLAIMANT to Mr Goldrich, who would then secure the contract themselves. This task, in comparison to the admittedly difficult task of locating an adequate vessel, is relatively easy. Consequently, paying USD 50,000 in order to solely effect an introduction, i.e. arranging a place and date for a meeting, is inappropriate.



CLAIMANT must have known and hence consciously ignored that promising an additional USD 50,000 when the preponderant part of efforts had already been made would encourage the yacht broker to misuse this money.

90 Furthermore, paying USD 50,000 in addition to the regular USD 60,600 brokerage commission was a disproportional and therefore an excessive expense. The success fee almost doubled the regular payment. The bribery did hence not constitute “unexpected external factors” to CLAIMANT [*Memorandum for Claimant, p. 18, para. 52*]. If not implicitly ordering its broker to bribe the assistant of Mr Goldrich, CLAIMANT must at least have been aware that bribery was possible. CLAIMANT should in no case have been “completely unaware” of bribery [*cf. Memorandum for Claimant, p. 18, para. 50*]. The lease contract is thus contaminated with bribery and hence void.

2. CLAIMANT Is Responsible for the Broker It Engaged

91 CLAIMANT is responsible for the actions of its yacht broker. The question whether a principal is responsible for its agent’s actions should be answered by applying the principles of the OECD Convention Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter OECD Convention). The OECD Convention directly applies only to bribery of public officials. Yet, the responsibility for other people’s actions is independent from the type of bribery committed. As all relevant countries are members of the OECD Convention [*Procedural Order No. 2, p. 49, para. 27*], the OECD Convention can analogically be applied. A distinction between the private and the public sector should not be drawn in this matter [*Chaikin, p. 272*].

92 According to the OECD Convention, a principal is responsible for independent agents it engages since they constitute a potential risk to the contract [*Pieth, pp. 124, 125*]. As the agent is not obliged to respect any anti-bribery guidelines possibly established by the principal or its company, the agent either has to be introduced to “rules of conduct” or there must be a contract clause “dismissing” the agent in case he commits bribery [*Pieth, p. 125*].

93 CLAIMANT hired the yacht broker to prepare negotiations with Mr Goldrich. However, CLAIMANT refrained from taking any precautionary measures to prevent bribery, such as adding rules of conduct to the agent’s contract or a provision that would dismiss the agent if bribery was committed. Consequently, the unduly methods of the broker to achieve an “introduction” are attributed to CLAIMANT, who is therefore responsible for its broker’s illegal



actions. Thus, attributed bribery on CLAIMANT'S behalf renders the lease contract invalid, thereby preventing recovery of all related damages.

94 Conclusively, bribery does not only prohibit jurisdiction, but would also render an award granting bribery-affected damages unenforceable. Finally, claims affected by bribery are irrecoverable for substantive reasons.

B. Even If the Lease Contract Was Not Void Due to Bribery, CLAIMANT Would Not Be Entitled to Damages in the Amount of the Success Fee

95 CLAIMANT seeks reimbursement for the USD 50,000 that it paid to its yacht broker. The success fee is not recoverable under Art. 74 CISG as it was not foreseeable (I). The success fee does not constitute a measure of mitigation under Art. 77 CISG, either (II).

I. The Success Fee Is Not Recoverable Under Art. 74 CISG As It Was Not Foreseeable

96 Contrary to CLAIMANT'S allegations, the success fee is not recoverable under Art. 74 CISG as it was not foreseeable at the time of the conclusion of the contract [*cf. Memorandum for Claimant, pp. 12, 13 para. 28, 29*]. In order for damages to be recoverable, Art. 74 CISG requires them to be foreseeable "at the time of the conclusion of the contract". When concluding a contract, a party must be able to assess the extent of liability it will assume [*OGH, 14 Jan 2002; Brunner, Art. 74, para. 11; Zeller, p. 91; Huber/Mullis, p. 272; Schönle/Th. Koller, in: Honsell, Art. 74, para. 25*].

97 In order to be recoverable under Art. 74 CISG, damages are required to either have been possible consequences of a breach of contract [*SCC, 1998; Russian CCI, 24 Jan 2000; Downs v. Perwaja, Supr Ct Queensland; Schwenger, in: Schlechtriem/Schwenger, Art. 74, para. 48; Gotanda, in: Kröll/Mistelis/Viscasillas, Art. 74, para. 46; Huber, in: MünchKomm BGB, Art. 74, para. 28; Faust, pp. 269 et seq.*], or probable consequences of a breach [*Delchi Carrier v. Rotorex, US Ct App (2nd Cir); Stoll, in: v. Caemmerer/Slechtriem, Art. 74, para. 34; Stoll/Gruber, in: Schlechtriem/Schwenger (Ger.), Art. 74, para. 35; Lüderitz/Dettmeier, in: Soergel, Art. 74, para. 15; Witz, in: Witz/Salger/Lorenz, Art. 74, para. 28*]. In this case, RESPONDENT could neither foresee the success fee as a possible, nor as a probable consequence of the breach of contract.

98 First, the success fee was not foreseeable to RESPONDENT at the time of the conclusion of the contract because it did not know of the conference that should be held on the M/S Vis.



CLAIMANT and RESPONDENT concluded their contract on 26 May 2011 [*Application for Arbitration*, p. 5, para. 7]. RESPONDENT was informed about the conference on 5 August 2011 [*Procedural Order No. 2*, p. 47, para. 14]. Being unaware of the conference, RESPONDENT could not have foreseen that CLAIMANT would pay a success fee to react to the unavailability of the M/S Vis. Unconvincingly, CLAIMANT invokes that RESPONDENT must have known of the conference, as CLAIMANT said that it “scheduled ten weeks for testing all of the systems prior to scheduling the first event” [*Memorandum for Claimant*, p. 14, para. 34; *Application for Arbitration*, p. 5, para. 7]. This, however, does not indicate on which date such an event would take place. RESPONDENT could thus not foresee the conference at the time the contract was concluded.

99 Moreover, the inflexibility of CLAIMANT’S time schedule was not foreseeable to RESPONDENT. CLAIMANT demanded only the highest available standard of technology [*Application for Arbitration*, p. 5, para. 6; *see supra*, para. 46]. As a prudent merchant, CLAIMANT should have considered that problems might arise with such demands. RESPONDENT could not have foreseen that CLAIMANT scheduled events in such a way that any late delivery would evoke consequences as severe as those in the present case.

100 Furthermore, RESPONDENT could not foresee the small amount of yachts available that CLAIMANT states as a reason for the success fee [*cf. Memorandum for Claimant*, p. 15, para. 39], because RESPONDENT has no independent knowledge of the yacht market [*cf. Statement of Defence*, p. 37, para. 1; *Application for Arbitration*, p. 7, para. 18].

101 Additionally, the success fee was not foreseeable as success fees are uncustomary. Success fees are only paid “from time to time” [*Procedural Order No. 2*, p. 49, para. 23]. If a measure which follows a breach of contract is uncustomary, it is only recoverable under Art. 74 CISG if the party in breach knew of the possibility of such a measure beforehand [*OLG Bamberg*, 13 Jan 1999; *Magnus, in: Staudinger, Art. 74*, para. 36]. Yet, CLAIMANT never informed RESPONDENT about such possibility.

102 Last, CLAIMANT invokes RESPONDENT’S expertise in the conference business [*Memorandum for Claimant*, p. 13, para. 33]. However, knowledge about the conference business does not simultaneously indicate knowledge about the yacht market. Moreover, the decisive question is whether RESPONDENT could have foreseen the success fee in the circumstances of this particular case, not whether it might have known that success fees exist at all. As shown above, RESPONDENT could not foresee the success fee in the present case.



103 Hence, at the time of the conclusion of the contract, RESPONDENT could not foresee the success fee as a possible or probable consequence of the breach of contract. The success fee is therefore not recoverable under Art. 74 CISG.

II. The Success Fee Is No Measure of Mitigation Under Art. 77 CISG

104 Contrary to CLAIMANT'S allegation, the success fee is no measure of mitigation in terms of Art. 77 CISG and is thus not recoverable under Art. 74 CISG [*cf. Memorandum for Claimant, p. 16, para. 44; p. 17, para. 45*].

105 According to Art. 77 CISG, a party relying on a breach of contract is only obliged to undertake reasonable measures to mitigate losses. Hence, only costs for reasonable measures are recoverable. In order to assess what is reasonable, one has to take into account the specific circumstances of the case [*Knapp, in: Bianca/Bonell, Art. 77, para. 2.3., Schwenger in: Schlechtriem/Schwenger, Art. 77, para. 7*].

106 The success fee was excessive and thus no reasonable measure under Art. 77 CISG, as excessive measures contradict the purpose underlying this article. The purpose underlying Art. 77 CISG is that avoidable losses are not recoverable [*Schwenger in: Schlechtriem/Schwenger (Ger.), Art. 77, para. 1*]. In particular, excessive measures do not fall under Art. 77 CISG [*OGH, 14 Jan 2002; Knapp in: Bianca/Bonell, Art. 77, para. 2.3.; Zeller, Guide to Art. 77, para. II; Saidov, para. II, 4(b); Huber/Mullis, p. 290*]. In the case at hand, the broker could have fulfilled his task equally well if he had not been paid a success fee since he had already located a substitute yacht and only needed to get in contact with Mr Goldrich [*see supra, para. 89*]. The success fee was hence no measure of mitigation, but it even increased the damage that CLAIMANT seeks to reimburse. Thus, the success fee was an excessive measure, which is not recoverable under Art. 77 CISG.

107 Also, the success fee is no reasonable measure of mitigation because success fees are unusual [*see supra, para. 101*]. Unusual measures, however, are not covered by Art. 77 CISG [*Witz, in: Witz/Salger/Lorenz, Art. 77, para. 9*].

108 CLAIMANT invokes that few comparable yachts were able to serve as substitutes and that Mr Goldrich does not normally lease his yacht [*Procedural Order No. 2, p. 49, para. 21; Memorandum for Claimant, p. 15, para. 39*]. However, the fact that Mr Goldrich does not normally lease his yacht lies outside the broker's sphere of legally permissible influence. An extra payment of USD 50,000 seduced the yacht broker to commit bribery to secure the



contract. It was thus no reasonable measure to support the chartering of a substitute vessel. On the contrary, in light of the given circumstances, the payment was inappropriate.

109 In conclusion, the success fee cannot be recovered under Art. 74 CISG, as it was neither foreseeable, nor is it a reasonable measure of mitigation under Art. 77 CISG.

C. The Ex Gratia Payment of USD 112,000 Is Not Recoverable Under the CISG

110 In addition to the expenses arising in connection with the lease contract, CLAIMANT paid USD 112,000 to its customer Corporate Executives to “retain the goodwill and future business” [*Application for Arbitration*, p. 7, para. 18]. Hence, CLAIMANT made a generous payment to compensate or prevent alleged goodwill damages.

111 However, as CLAIMANT did not incur goodwill damages, the ex gratia payment was made without a reason (I). Even if CLAIMANT’S goodwill was damaged, such damage is not recoverable under the CISG (II). Even if goodwill damages are generally recoverable, CLAIMANT’S alleged damages were not foreseeable (III).

I. As No Goodwill Damages Occurred or Would Have Occurred, the Ex Gratia Payment Is Not Recoverable

112 As a first condition for recoverability, Art. 74 CISG requires a damage to have emerged. However, CLAIMANT’S business reputation vis-à-vis its client Corporate Executives was not at risk. Consequently, the ex gratia payment as a means of compensation or prevention of alleged goodwill damages was not foreseeable and is therefore not recoverable under Art. 74 CISG.

113 Primarily, Corporate Executives did neither demand any money nor did it explicitly state discontent about the final performance of the contract. Corporate Executives is a long-standing customer of CLAIMANT [*Application for Arbitration*, p. 6, para. 11]. A long-standing business partner is expected to express critical feedback about the performance in order to make future business relations even more satisfying. Problems or disagreements are addressed openly and straightforward among business partners.

114 However, Corporate Executives neither confronted CLAIMANT with any allegation concerning the performance with M/S Pacifica Star nor asked for money. Corporate Executives merely expressed that it was not happy that the conference would not be held on the M/S Vis [*Procedural Order No. 2*, p. 48, para. 20] while at the same time acknowledging



that the M/S Pacifica was an “appropriate“ substitute yacht [*Procedural Order No. 2, p. 48, para. 20*]. Considering the relation between the parties, the reaction of Corporate Executives can be described as reserved and benevolent. In fact, there was no hint or indication that the business relationship or CLAIMANT’S reputation vis-à-vis Corporate Executives was endangered.

115 Second, the participants of the conference were content as well. Corporate Executives specified that it would only use the payment to make “a partial refund of the conference fee paid by its members” [*Application for Arbitration, p. 4, para. 4*]. Hence, the final use of the voluntary payment was to compensate alleged goodwill damages of Corporate Executives vis-à-vis the conference participants. Yet, even though there was “dismay” among the members of Corporate Executives when it first became clear that a substitute location was needed, the dismay changed into “general relief” when they were informed that the conference was to be held on the “appropriate” substitute yacht M/S Pacifica Star [*Respondent’s Exhibit No. 1, p. 41; Procedural Order No. 2, p. 48, para. 20*]. Besides, the participants were “satisfied” in the end and the conference itself was considered “successful” [*Respondent’s Exhibit No. 1, p. 41*].

116 Thus, neither CLAIMANT nor Corporate Executives suffered or would have suffered goodwill damage. Nevertheless, CLAIMANT voluntarily made a generous payment to Corporate Executives to prevent or compensate goodwill damages which never occurred. As a result, the ex gratia payment, as a compensation or prevention of hypothetical goodwill damages, is not recoverable under Art. 74 CISG.

II. Even If CLAIMANT Sustained Goodwill Damages, They Are Not Recoverable Under Art. 74 CISG

117 RESPONDENT cannot be held liable for the voluntary payment CLAIMANT made to Corporate Executives as goodwill payments are not foreseeable and thus not recoverable under the CISG. Goodwill payments are difficult to anticipate. At the same time, the reputation of a company depends on diverse criteria which may be impossible for the other party to influence. Consequently, goodwill damages are not foreseeable [*Ct FI Athens, 1 Jan 2009; Honsell, pp. 364 et seq.*], at least if not explicitly announced at the time of the conclusion of the contract [*Stoll, p. 263; Ryffel, p. 69; Karollus, p. 218; cf. Huber, p. 499*]. CLAIMANT made the USD 112,000 payment to Corporate Executives to retain “the goodwill and future business from Corporate Executives” [*Application for Arbitration, p. 7, para. 18*]. Therefore,



the ex gratia payment was a goodwill payment and is thus not recoverable under Art. 74 CISG.

118 In addition, the Tribunal is kindly requested to take into account the ruling of the Landgericht München (hereafter LG München), which also points out that goodwill damages are never recoverable under Art. 74 CISG. In that case, the claimant, a wine producer, promised to directly deliver wine to the clients of the respondent, a wine sub dealer. The respondent tried to avoid paying for the already delivered wine as its bad quality had caused goodwill damages vis-à-vis its customers. The LG München rejected the argument and clarified that “losses caused by the loss of customers, who, because of non-conforming deliveries, fail to place new orders, do not constitute a [...] loss of wealth caused by the sellers’ breach of contract in the meaning of Art. 74 CISG” [*LG München, 30 Aug 2001*].

III. Even If Goodwill Damages Are Recoverable Under Certain Circumstances, CLAIMANT’S Alleged Damages in Particular Were Not Foreseeable

119 The voluntary payment CLAIMANT made as a means of compensation or prevention of alleged goodwill damages were not foreseeable under Art. 74 CISG. This provision states that recoverable losses are limited to the amount, “which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract”. As stated above, foreseeability under Art. 74 CISG implies a certain probability, but foreseeable events are in any case those which were foreseeable as a possible consequence in the particular circumstances of the case [*see supra, para. 97*].

120 First, a voluntary payment is in general an uncommon action for a business company. Nevertheless, CLAIMANT did not inform RESPONDENT at any time that it would make voluntary payments to its client in case of late delivery. However, CLAIMANT brings forward that in the conference business the reputation of a company is “directly connected to its survival” and, therefore ex gratia payments are sometimes necessary to make [*Memorandum for Claimant, p. 16, para. 42*]. To strengthen this conclusion in the particular case, CLAIMANT adds that Corporate Executives “demands the highest standards in conducting its events” [*Memorandum for Claimant, p. 16, para. 42*]. However, CLAIMANT disregards that RESPONDENT did not have any knowledge about CLAIMANT’S business situation [*Statement of Defence, p. 37, para. 1*]. CLAIMANT failed to inform RESPONDENT beforehand why this case should be especially prone to goodwill compensation payments. CLAIMANT did not even communicate to RESPONDENT that it provides luxurious conferences.



121 Especially, CLAIMANT’S name “Mediterraneo Elite Conferences Services” does not imply its business orientation. The labelling “Elite” is commonly used as a favourable promotion of a company’s performance and not as a description of its business sector. Additionally, when working in a sensitive branch, it finally remains unclear, why CLAIMANT did not invoke its clients to the outstanding situation, but apparently relies on doubtful criteria such as the company name. Thus, the ex gratia payment as a prevention or compensation for any goodwill damages was neither foreseeable as a possible nor as a probable consequence and is therefore not recoverable under Art. 74 CISG.

CONCLUSION OF THE THIRD ISSUE

122 The Tribunal should respect bribery as a barrier to arbitration and find that it has no jurisdiction over claims affected by bribery. Further an award granting these damages would not be enforceable due to conflicts with international public policy. In substance, the lease contract as the alleged legal base for claims is void as CLAIMANT condoned the possibility of bribery. In any case, the success fee is not recoverable as it was neither foreseeable under Art. 74 CISG nor did it constitute a measure of mitigation in the terms of Art. 77 CISG. Finally, the ex gratia payment is not recoverable as CLAIMANT did not suffer goodwill damages. Even if it did, goodwill damages are generally not recoverable under the CISG and in the case at hand not foreseeable as a probable or a possible consequence of the breach of contract.



REQUEST FOR RELIEF

For the above reasons, Counsel for RESPONDENT respectfully requests the Tribunal to find that

- (1) Dr Mercado is to be removed from the legal team representing CLAIMANT;
- (2) RESPONDENT is exempt from liability under Art. 79 CISG;
- (3) in the alternative, the entire lease contract is tainted by corruption, rendering the dispute non-arbitrable and all expenses arising out of that contract non-allowable damages; in any case, RESPONDENT is not liable for the USD 50,000 success fee and the USD 112,000 ex gratia payment.



CERTIFICATE

Freiburg im Breisgau, 19 January 2012

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

(signed)

Julian Egelhof

(signed)

Carolin Fretschner

(signed)

Franziska Härle

(signed)

Annika Laudien

(signed)

Constantin Meimberg

(signed)

Bastian Nill

(signed)

Sita Rau

(signed)

Monika Thull