Nineteenth Annual Willem C. Vis International Commercial Arbitration Moot

ALBERT LUDWIG
UNIVERSITY OF FREIBURG

Memorandum for Respondent

On behalf of
Equatoriana Control Systems, Inc (RESPONDENT)

Against
Mediterraneo Elite Conference Services, Ltd (CLAIMANT)

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

Freiburg • Germany

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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
EDPA	Eastern District of Pennsylvania
ed.	Edition

Ed./Eds.	Editor/Editors
e.g.	exempli gratia
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
USD	United States Dollar
US Supr Ct	United States Supreme Court
v.	versus
WDMI	Western District of Michigan
WL	Westlaw
ZPO	Zivilprozessordnung

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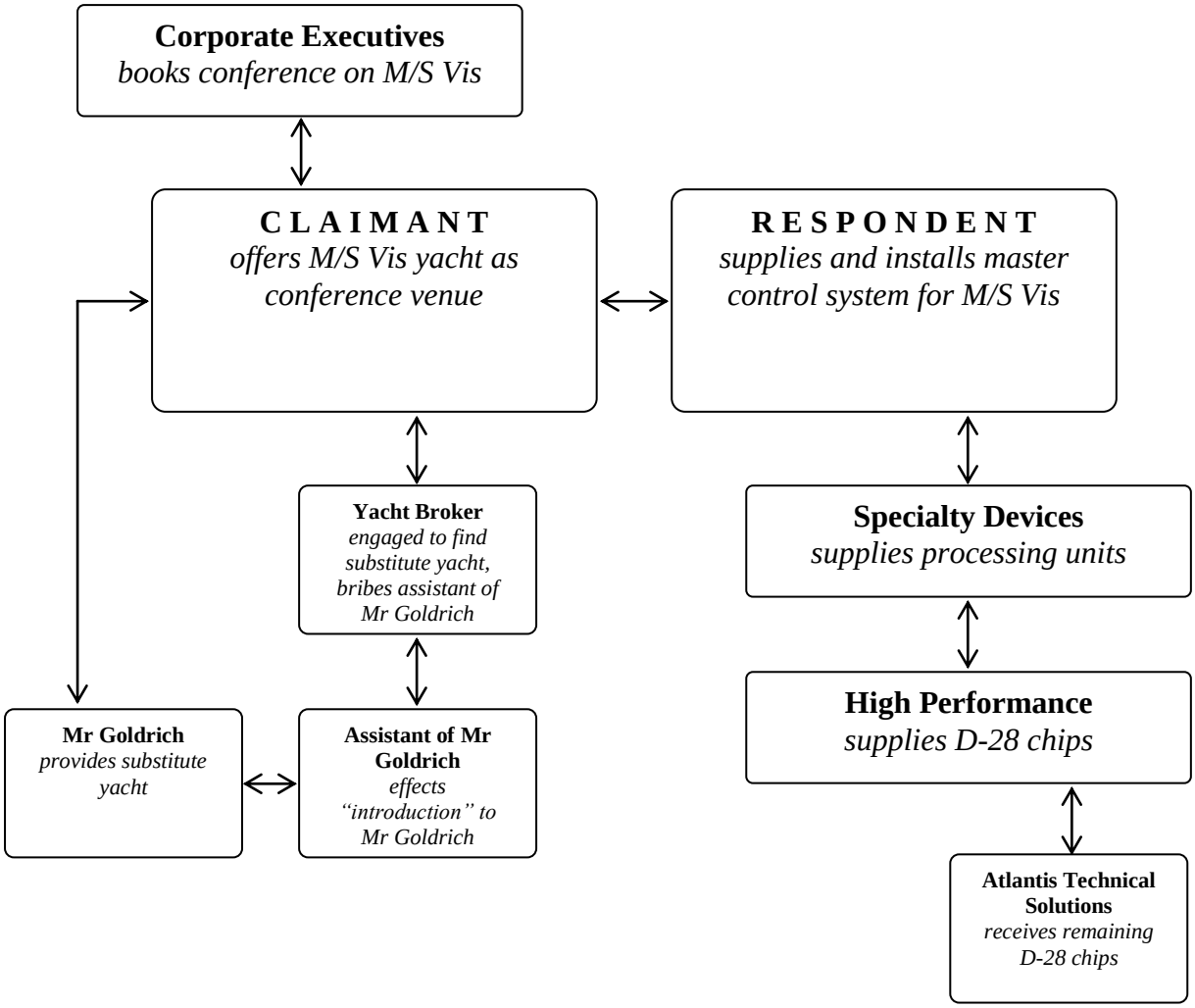
STATEMENT OF FACTS



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 jointly 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 High demand must be handled with care. CLAIMANT set clear standards by demanding superior quality for the conference technology on its yacht. RESPONDENT and its subcontractors made every effort to comply with this demand. CLAIMANT, by contrast, did not only rely on a "just in time performance", but when damages arose due to a force majeure fire accident, CLAIMANT even worsened the situation by making unreasonable and unrequested payments. Instead of taking the responsibility for its decisions, CLAIMANT seeks full reimbursement from RESPONDENT.

2 RESPONDENT however, is exempt from liability. Through CLAIMANT'S explicit demand for only the best technology available, RESPONDENT was contractually obliged to use the novel, yet to be produced D-28 computer chip. As the fire accident at High Performance's premises occurred, the only source for those chips became unavailable. Neither RESPONDENT nor its suppliers had an influence on the fire accident and it was not possible for them to overcome the subsequent shortage of computer chips. Under these circumstances, RESPONDENT and its suppliers are exempt from liability under Art. 79 CISG **(Issue 2**).

3 Irrespective of this exemption, the damages CLAIMANT demands are irrecoverable. After the conference had been held on a substitute vessel, CLAIMANT made an unrequested ex gratia payment of USD 112,000 to its client, Corporate Executives, although the participants had been satisfied with the performance. Alleged goodwill damages were thus nonexistent. Further, the contract CLAIMANT concluded to lease the substitute vessel is tainted by bribery. Paying its yacht broker an unreasonably high success fee merely to effect an introduction to the yacht owner, CLAIMANT condoned that its broker might feel incited to take on impure means. The bribery prohibits arbitration over the lease contract and alternatively renders it void. RESPONDENT cannot be expected to reimburse any money connected to the bribery. It should not bear the consequences of CLAIMANT'S errant payments (**Issue 3**).

4 CLAIMANT'S actions also lack reasonability in the proceedings of this case. With the Arbitral Tribunal constituted and the proceedings about to begin, CLAIMANT added Dr Mercado, the godmother of Professor Presiding Arbitrator's child, to its legal team. It thereby deliberately put the integrity of the Tribunal at risk. The most efficient, fair and reasonable approach to deal with this risk is to remove Dr Mercado from CLAIMANT'S legal team. The Tribunal has the competence to order Dr Mercado's removal and is requested to make use of it (**Issue 1**).

ARGUMENT ON THE PROCEEDINGS

ISSUE 1: THE TRIBUNAL SHOULD REMOVE DR MERCADO

5 RESPONDENT respectfully requests the Tribunal to remove Dr Mercado from CLAIMANT'S legal team.

6 By 2 August 2011, CLAIMANT and RESPONDENT had agreed on the appointment of Professor Presiding Arbitrator [*Fasttrack to CIETAC nominating arbitrators, 2 August 2011, p. 24*]. Four weeks later, on 30 August 2011, CLAIMANT added Dr Mercado to its legal team [*Procedural Order No. 2, p. 50*]. Dr Mercado is not only Professor Presiding Arbitrator's colleague and a good friend of his wife, but also the godmother of his youngest child [*Statement of Defence, p. 39, para. 18, 21; Procedural Order No. 2, p. 51, para. 38*].

7 A close personal and business relationship between a legal representative and an arbitrator, like the relationship in the present case, is intolerable. The removal of the legal representative in question by the tribunal is the only solution which is not only fair and adequate, but also legally justified. The Tribunal has the competence to remove Dr Mercado **(A)**. Moreover, the facts of this case justify her removal **(B)**.

A. The Tribunal Has the Competence to Remove Dr Mercado

8 The Tribunal has the competence to remove a legal representative. RESPONDENT agrees with CLAIMANT'S submission that the question whether the Tribunal has the competence to remove Dr Mercado is governed by the CIETAC Rules, the arbitration rules chosen by the parties, and the UNCITRAL Model Law, the lex loci arbitri. CLAIMANT states that neither the CIETAC Rules nor the UNCITRAL Model Law confers competence on the Tribunal to exclude a legal representative [*Memorandum for Claimant, p. 6, para. 28, p. 7, para. 29*].

9 However, the Tribunal's competence to exclude a legal representative can be derived from Art. 19(2) UNCITRAL Model Law **(I)**. Additionally, the Tribunal possesses an inherent competence to the removal of counsel, as confirmed by recent decisions of the International Centre for Settlement of Investment Disputes (hereafter ICSID) **(II)**. The Tribunal and not state courts is the competent institution to decide on this matter **(III)**.

I. Art. 19(2) UNCITRAL Model Law Confers Competence on the Tribunal to Exclude a Legal Representative

10 The Tribunal's competence to remove a legal representative is conferred upon the Tribunal by Art. 19(2) UNCITRAL Model Law. According to this provision, a tribunal may "conduct the arbitration in such manner as it considers appropriate", provided that the parties did not agree otherwise. In order to be able to do so, the Tribunal is equipped with a wide discretion [*Analytical Commentary, Art. 19, para. 1; Hußlein-Stich, p. 109; UNCITRAL Secretariat Explanatory Note, para. 35*]. Consequently, the Tribunal's competence to remove a legal representative can be derived from Art. 19(2) UNCITRAL Model Law. General principles of arbitration call for such a competence **(1)**, which is neither barred by the CIETAC Rules nor by Art. 18 UNCITRAL Model Law **(2)**.

1. General Principles of Arbitration Call for a Discretionary Competence to Remove A Legal Representative, Arising Out of Art. 19(2) UNCITRAL Model Law

11 Taking into account considerations of efficiency, prevention of abuse of rights, party autonomy and fairness, Art. 19(2) UNCITRAL Model Law must be understood as granting a competence to remove a legal representative.

12 First, the principle of efficiency militates in favour of such a competence. Efficiency is one of the most significant traits of international arbitration [*Redfern/Hunter, para. 1-01; Fouchard/Gaillard/Goldman, para. 1*]. Efficiency requires a tribunal to protect the procedural agreements made between the parties. Usually, an arbitrator is appointed after the parties have chosen their legal representatives. If in such a case the impartiality of the arbitrator is in doubt, the most efficient approach is to challenge the arbitrator in question. However, when a legal representative with a relationship to an arbitrator is added to one party's legal team subsequent to the formation of the tribunal, the most efficient approach is to challenge that legal representative directly. Therefore, the principle of efficiency requires the possibility to challenge a legal representative [*Waincymer, pp. 612, 613*].

13 Second, the tribunal's competence to exclude a legal representative prevents abuse of the right of free choice of counsel. If a tribunal was unable to disqualify counsel, a party would always be free to add a new legal representative to its team in order to trigger the other party to challenge an arbitrator. One party would have the opportunity to get rid of any undesired arbitrator. In order to prevent such abuse, a tribunal must have the competence to exclude counsel.

14 Third, party autonomy would be disrespected if a tribunal did not have the competence to remove a legal representative. Party autonomy is a key element of the arbitral process [*Lew/Mistelis/Kröll, para. 17-10; Born, p. 82; Lionett/Lionett, p. 54-55; McIlwrath/Savage, para. 5-051*]. The parties made use of their party autonomy by jointly deciding on Professor Presiding arbitrator, Art. 25(3) CIETAC Rules. Hence, if one party was forced to challenge Professor Presiding Arbitrator, party autonomy would be undermined.

15 Fourth, the exclusion of one legal representative does not leave a party without legal representation. CLAIMANT could have argued that Dr Mercado has expertise in the field of arbitration and is therefore irreplaceable [*cf. Procedural Order No. 2, p. 50, para. 33*]. However, in the modern world of arbitration, it is unrealistic to assume that there are no two legal representatives equally qualified [*DAC Report; Waincymer, p. 611*]. The disqualification of a legal representative is comparable to an attorney's refusal of a client due to a conflict of interest. Attorneys generally check for a conflict of interest before accepting a mandate. Whenever such a conflict exists, the client will need to find another attorney. The client's second choice will still be an attorney of its choice.

16 Finally, not disqualifying the legal representative would contradict the principle of fairness. Considerations of fairness and equality play an important role under the CIETAC Rules [*Tao, p. 105; Kniprath, p. 53; Stricker-Kellerer, in: Schütze, Introduction to CIETAC, para. 4*]. CLAIMANT states that it is a party's fundamental right to have a free choice of counsel [*Memorandum for Claimant, p. 8, para. 33*]. However, a party's right of free choice of counsel can only be enforced to the extent that the other party's rights are still ensured. If the Tribunal could not exclude the legal representative, the other party would likely be pressured into challenging the affected arbitrator. Such pressure would violate the parties right of a fair treatment. Therefore, the right of a free choice of counsel must be limited. As a result, the exclusion of a legal representative must be admissible.

2. Neither the CIETAC Rules Nor Art. 18 UNCITRAL Model Law Bars the Tribunal's Competence that Arises from Art. 19(2) UNCITRAL Model Law

17 The Tribunal's competence to remove a legal representative is neither barred by the CIETAC Rules nor by Art. 18 UNCITRAL Model Law. Generally, the arbitration rules chosen by the parties and the mandatory provisions of the lex loci arbitri limit a tribunal's discretionary competence [*Várady/Barceló/von Mehren, p. 61; Fouchard/Gaillard/Goldman, para. 368; Lachmann, para. 213; Schmidt-Ahrendts/Schmitt, p. 524*]. However, if the parties have agreed

on institutional rules which are silent on a specific procedural question, the tribunal is competent to decide this question [*Holtzmann/Neuhaus, p. 565*]. Therefore, Art. 19(2) UNCITRAL Model Law equips a tribunal with the competence to fill unregulated gaps [*cf. Hußlein-Stich, p. 109; UNCITRAL Secretariat Explanatory Note, para. 35*]. The CIETAC Rules do not contain any rule which deals with the exclusion of a legal representative [*Waincymer, p. 614*]. Consequently, Art. 19(2) UNCITRAL Model Law allows the Tribunal to fill this gap and exclude a legal representative.

18 CLAIMANT alleges that a removal of Dr Mercado would violate CLAIMANT'S right to present its case, inherent to Art. 18 UNCITRAL Model Law [*Memorandum for Claimant, p. 8, para. 35*]. However, Art. 18 UNCITRAL Model Law does not encompass the right of free choice of counsel [*Sachs/Lörcher, in: Böckstiegel/Kröll/Nacimiento, § 1042, para. 20; Trittmann/Duve, in: Weigand, p. 327, para. 2; Schütze, para. 157*]. For this reason, some countries, which have adopted the UNCITRAL Model Law, added a provision explicitly prohibiting the removal of a legal representative, § 1042(2) ZPO Germany, § 594(3) ZPO Austria. Danubia, however, has adopted the UNCITRAL Model Law without alterations [*Application for Arbitration, p. 7, para. 21*]. Hence, Art. 19(2) UNCITRAL Model Law confers competence on the Tribunal to exclude Dr Mercado.

II. Additionally, the Tribunal Has an Inherent Competence to Exclude Dr Mercado As Confirmed by Recent ICSID Decisions

19 The Tribunal's competence to remove a legal representative may not only be based on Art. 19(2) UNCITRAL Model Law but also on an inherent competence. An inherent competence is a competence that belongs to the intrinsic nature of a tribunal and is therefore solely derived from its position as a tribunal [*Black's Law Dictionary, p. 1189; Brown, p. 205; Kolo, pp. 43, 45*]. The existence of such a competence in the case at hand is supported by recent ICSID decisions.

20 Since the question whether a tribunal has the competence to disqualify a legal representative arises in both investment and commercial disputes, the ICISD cases addressing these matters may serve as persuasive authority. According to the cases of Hrvatska Elektroprivedra, d.d. v. The Republic of Slovenia (hereafter Hrvatska Case) and The Rompetrol Group N.V. v. Romania (hereafter Rompetrol Case), a tribunal has an inherent power to take measures to preserve the integrity of its proceedings [*ICSID ARB/05/24, Hrvatska Case*; *ICSID ARB/06/3, Rompetrol Case*].

21 The facts of the Hrvatska Case resemble the facts of the case at hand: A legal representative was added to the respondent's legal team after the tribunal had been formed. Similarly, Dr Mercado was added to CLAIMANT'S legal team four weeks after CLAIMANT had become aware of the appointment of Professor Presiding Arbitrator [*Procedural Order No. 2, p. 50, para. 29*]. The tribunal of the Hrvatska Case was compelled to preserve the integrity of the arbitral proceedings. Likewise, the integrity of arbitral proceedings at hand requires the Tribunal to safeguard efficiency, party autonomy and fairness while preventing abuse of one party's right to free choice of counsel [*see supra, para. 11-16*]. As demonstrated, solely the exclusion of the added legal representative ensures these fundamental principles of arbitration [*see supra, para. 11-16*]. In conclusion, the Tribunal is vested with an inherent competence to exclude Dr Mercado.

III. The Tribunal Is the Competent Institution to Decide on the Removal of Dr Mercado

22 CLAIMANT alleges that state courts and not the Tribunal are the competent institution to decide on the exclusion of Dr Mercado [*Memorandum for Claimant, p.7, para. 31*].

23 However, CLAIMANT itself states that the challenge of counsel should be treated no different than the challenge of an arbitrator [*Memorandum for Claimant, p. 7, para. 30*]. It is usually the tribunal which decides on the challenge of an arbitrator. Consequently, it should also decide on the challenge of a legal representative.

24 Moreover, the Tribunal is the competent institution since it is best informed about the case. It already knows the parties and is able to decide promptly on an exclusion. A decision by state courts would undoubtedly result in increasing costs for both parties. Furthermore, the arbitral proceedings would be severely delayed. For these reasons, several state courts have found that the tribunal is the competent institution to decide on the matter of attorney disqualification [*Hibbard Brown v. ABC Family Trust, US Ct App (4th Cir); Pour le Bebe v. Guess, California Ct App; Cook Chocolate v. Salomon, US Dist Ct (SDNY)*].

25 CLAIMANT brings forward the cases of Bidermann v. Avmar and Munich Reinsurance America v. ACE Prop. & Cas. Ins. [*Memorandum for Claimant, p. 7, para. 31*], which allegedly support the state courts' competence. However, those cases can be distinguished from the case at hand. In both cases, a legal representative was challenged because he violated attorney discipline. Attorney discipline is a matter of public interest. The arbitral tribunals

refused jurisdiction merely due to this specific matter of public interest. Consequently, those cases constitute an exception and cannot serve as a persuasive authority.

26 In conclusion, the Tribunal is not only the correct institution to decide on the matter of attorney disqualification but it also has the competence to do so.

B. The Facts of This Case Justify the Exclusion of Dr Mercado

27 The Tribunal should exercise its competence to remove Dr Mercado, since her position on CLAIMANT'S legal team jeopardises Professor Presiding Arbitrator's ability to judge independently.

28 The independence of arbitrators is a key element of arbitration [*Mullerat, p. 4*]. According to Art. 12 UNCITRAL Model Law and Art. 30(2) CIETAC Rules, the standard for a successful challenge of an arbitrator are justifiable doubts as to his independence. This must be true since justice is already endangered by the mere suspicion of bias [*Piersack v. Belgium, European Court of Human Rights; De Cubber v. Belgium, European Court of Human Rights; Millar v. Procurator Fiscal, Privy Council; Locabail v. Bayfield Properties, Ct of App*].

29 CLAIMANT and RESPONDENT agree that if justifiable doubts serve as a standard to disqualify an arbitrator, the same standard applies to the disqualification of a legal representative [*cf. Memorandum for Claimant, p. 7, para. 30*]. They further agree that an objective test must be applied when a party issues a challenge based on the potential bias of an arbitrator [*cf. Memorandum for Claimant, p. 9, para. 40*]. In the case at hand, the relationship between Professor Presiding Arbitrator and Dr Mercado raises justifiable doubts from the perspective of a fair-minded observer **(I)** as well as under the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (hereafter IBA Guidelines) **(II)**.

I. The Relationship Between Professor Presiding Arbitrator and Dr Mercado Raises Justifiable Doubts from the Perspective of a Fair-minded Observer

30 Professor Presiding Arbitrator and Dr Mercado have a relationship which raises justifiable doubts as to the arbitrator's independence in the eyes of a reasonable third person.

31 The exclusion of an arbitrator is justified if the specific circumstances of the case lead a fair-minded and informed observer to conclude that there is a possibility of bias [*ICSID ARB/06/3, Rompetrol Case; LCIA, 27 Dec 2005; LCIA, 3 Dec 2007; Ad Hoc Award,*

11 Jan 1995; Magill v. Porter, House of Lords; Director v. Proprietary, Ct of App]. Numerous facts concerning the relationship between Professor Presiding Arbitrator and Dr Mercado give rise to the possibility of his bias.

32 First, Professor Presiding Arbitrator has a professional relationship with Dr Mercado. The problematic aspect of colleagues is that they establish reliance on and sympathy for each other. Professor Presiding Arbitrator initiated that Dr Mercado was notified of the application process at the university and encouraged her employment [*Statement of Defence, p. 39, para. 18*]. Moreover, Professor Presiding Arbitrator relies on Dr Mercado since she delivers lectures as a part of his course on international trade [*Statement of Defence, p. 39, para. 20*].

33 Second, Professor Presiding Arbitrator also has a close private relationship with Dr Mercado. Dr Mercado is on first name terms with Professor Presiding Arbitrator, his wife and his children [*Statement of Defence, p. 39, para. 21*]. She meets his wife for "lunch and coffee" [*Statement of Defence, p. 39, para. 21*]. This indicates that Professor Presiding Arbitrator and Dr Mercado have a relationship which exceeds their professional association. CLAIMANT insists that Dr Mercado only has a "courteous" relationship with Professor Presiding Arbitrator [*Memorandum for Claimant, p. 13, para. 54*]. However, not only superficial acquaintances may treat each other courteously but also good friends. Indeed, appointing someone godmother of one's child must be considered the finest badge of friendship.

34 Third, a fair-minded observer would become suspicious knowing that Professor Presiding Arbitrator has served as an arbitrator on cases in which Dr Mercado was involved and voted in favour of the party she represented each time, even issuing a dissenting opinion [*Statement of Defence, p. 40, para. 22*].

35 Considering that doubts do not only arise in regard to their work relationship, but also in regard to their private interaction, a fair-minded and informed observer would conclude that the doubts as to Professor Presiding Arbitrator's impartiality are justified.

II. The Relationship Between Professor Presiding Arbitrator and Dr Mercado Also Raises Justifiable Doubts under the IBA Guidelines

36 Applying the standard of the IBA Guidelines supports the existence of justifiable doubts as to Professor Presiding Arbitrator's independence.

37 CLAIMANT alleges that the relationship between Dr Mercado and Professor Presiding Arbitrator "matches closely to the Green List" of the IBA Guidelines [*Memorandum for Claimant, p. 12, para. 48*]. However, CLAIMANT ignores the close personal ties between Dr Mercado and Professor Presiding Arbitrator. The relationship between Professor Presiding Arbitrator and Dr Mercado qualifies for both the "Red List" **(1)** and the "Orange List" **(2)** of the IBA Guidelines, proving that doubts as to Professor Presiding Arbitrator's ability to judge independently are justified.

1. The Relationship Between Professor Presiding Arbitrator and Dr Mercado Qualifies for the "Red List" of the IBA Guidelines

38 Justifiable doubts whether Professor Presiding Arbitrator is capable of judging independently arise since the relationship between him and Dr Mercado qualifies for the "Red List".

39 According to the "Red List", justifiable doubts as to an arbitrator's independence arise when the arbitrator has a close family relationship with a counsel representing a party [*IBA Guidelines, Part II, "waivable Red List", para. 2.3.8*]. It is true that Dr Mercado is not related to Professor Presiding Arbitrator. However, the lists of the IBA Guidelines are non-exhaustive enumerations [*IBA Guidelines, Part II, para. 1, 2*]. As a result, it is preferable to consider the situations outlined on the list as mere examples describing the character and intensity of a relationship.

40 The term "close family member" refers to spouses, siblings, children, parents or life partners [*IBA Guidelines, Part. II, "waivable Red List", para. 2.2.2*]. Since a godmother is responsible for the child in case the parents become unable to do so [*Encyclopaedia Britannica*], the parents will only choose the person they have most confidence in. Although appointing somebody the godmother of one's child does not make this person "family" in the literal sense, it still creates a relationship of the same intensity, thereby falling in the same category as a family relationship. Thus, Dr Mercado's position as a godmother constitutes a close family relationship between her and Professor Presiding Arbitrator and qualifies for the "Red List".

2. Additionally, the Relationship Between Professor Presiding Arbitrator and Dr Mercado Qualifies for the "Orange List" of the IBA Guidelines

41 The relationship between Professor Presiding Arbitrator and Dr Mercado also qualifies for the IBA Guidelines' "Orange List". According to this list, a close personal friendship and time that is regularly spent together apart from professional work may give rise to justifiable doubts as to the arbitrator's independence [*IBA Guidelines, Part II, para. 3, 3.3.6*].

42 All features of the relationship between Professor Presiding Arbitrator and Dr Mercado point towards a close friendship. Dr Mercado is befriended with his family and is the godmother of his child [*see supra, para. 6*]. Hence, Professor Presiding Arbitrator and Dr Mercado have a close personal relationship as described in the "Orange List" of the IBA Guidelines. Therefore, the doubts as to Professor Presiding Arbitrator's independence are justified.

43 Consequently, as opposed to CLAIMANT'S allegation, the relationship between Dr Mercado and Professor Presiding Arbitrator is not admissible just because there is no economic relationship between Professor Presiding Arbitrator and Dr Mercado [*cf. Memorandum for Claimant, p. 11, para. 46*]. The fact that no significant economic relationship exists cannot erase the doubts in respect to their private relationship. Solely because CLAIMANT has found one part of the relationship that does not give rise to doubts does not mean that Professor Presiding Arbitrator is independent.

44 In conclusion, it is justified to remove Dr Mercado from CLAIMANT'S legal team.

CONCLUSION OF THE FIRST ISSUE

45 Exceptional circumstances require exceptional measures. The Tribunal has an explicit and an inherent competence to remove Dr Mercado from CLAIMANT'S legal team. Dr Mercado's involvement on CLAIMANT'S legal team leads to justifiable doubts as to Professor Presiding Arbitrator's ability to judge independently. In order to safeguard the integrity of the arbitral proceedings, prevent the abuse of the right of free choice of counsel and apply the fairest and most efficient approach to deal with this conflict, the Tribunal should remove Dr Mercado from CLAIMANT'S legal team.

ARGUMENT ON THE MERITS

ISSUE 2: RESPONDENT IS EXEMPT FROM LIABILITY UNDER ART. 79 CISG

46 CLAIMANT and RESPONDENT contracted for the delivery and installation of a master control system on the M/S Vis yacht [*Claimant's Exhibit No. 1, p. 9*]. CLAIMANT sought to refurbish the M/S Vis with the latest conference technology [*Application for Arbitration, p. 5, para. 6*]. RESPONDENT therefore designed the master control system, the key element of the conference technology, to run with processing units manufactured by Specialty Devices [*Application for Arbitration, p. 5, para. 8*]. These processing units were in turn based on the superior and newly developed D-28 "super chip", produced by High Performance and yet to be brought onto the market [*Application for Arbitration, p. 5, para. 9*].

47 An accidental fire at High Performance's facility delayed the production and the delivery of the D-28 chip to Specialty Devices. In turn, Specialty Devices' delivery to RESPONDENT was delayed as well [*Application for Arbitration, p. 6, para. 12; Procedural Order No. 2, p. 47, para. 8*]. As a consequence, it was not possible for RESPONDENT to perform the Contract in time.

48 This delay was due to an impediment beyond RESPONDENT'S control. Thus, RESPONDENT is exempt from liability under Art. 79(1) CISG **(A)** as well as under Art. 79(2) CISG **(B)**.

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

49 RESPONDENT'S exemption is solely governed by Art. 79(1) CISG **(I)**, the conditions of which are met **(II)**.

I. RESPONDENT'S Exemption Is Exclusively Governed By Art. 79(1) CISG

50 In order for RESPONDENT to be exempt, only the requirements of Art. 79(1) CISG, not those of Art. 79(2) CISG have to be met. CLAIMANT alleges that Art. 79(2) CISG, which would require Specialty Devices and eventually High Performance to fulfil the provisions of Art. 79 CISG as well, is applicable [*Memorandum for Claimant, p. 17, para. 69*]. However, Art. 79(2) CISG is not applicable because Specialty Devices does not qualify as a third person in terms of Art. 79(2) CISG.

51 Third persons in terms of Art. 79(2) CISG are subcontractors to the seller who take charge of the entire or part of the contract performance [*Garro, in: CISG-AC Op. 7, para. 18;*

Huber, in: MünchKomm BGB, Art. 79, para. 23; Enderlein/Maskow, Art. 79, para. 7.3 et seq.; Achilles, Art. 79, para. 9; Flambouras, p. 274; Sänger, in: Bamberger/Roth, Art. 79, para. 7; Loewe, p. 97; Lautenbach, p. 28]. By contrast, suppliers who merely create the prerequisites for the seller to conduct his business are not considered third persons [*Brunner, Art. 79, para. 14; Saenger, in: Ferrari/Kieninger, Art. 79, para. 8; Mankowski, in: MünchKomm HGB, Art. 79, para. 49; Salger, in: Witz/Salger/Lorenz, Art. 79, para. 9; cf. OLG Hamburg, 28 Feb 1997; HCC, 21 Mar 1996; Lüderitz/Dettmeier, in: Soergel, Art. 79, para. 22; Karollus, p. 212; Achilles, in: Ensthaler, Art. 79, para. 9*].

52 Specialty Devices did not take charge of RESPONDENT'S contractual performance since Specialty Devices merely supplied RESPONDENT with semi-manufactured goods RESPONDENT needed for proper production [*cf. Application for Arbitration, p. 5, para. 8*]. As CLAIMANT correctly states, there is no "organic link" between the sub-contract and the main contract [*Memorandum for Claimant, p. 23, para. 89*]. Thus, Specialty Devices is a supplier to RESPONDENT, but not a third person in terms of Art. 79(2) CISG. Consequently, RESPONDENT'S exemption is governed exclusively by Art. 79(1) CISG.

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

53 Contrary to what has been argued by CLAIMANT [*cf. Memorandum for Claimant, p. 18, para. 71 et seq.*], the requirements of Art. 79(1) CISG are met. According to Art. 79(1) CISG, the seller is exempt from liability if its failure to deliver 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 facilities led to an impediment beyond RESPONDENT'S control **(1)** which RESPONDENT could neither foresee **(2)** nor overcome **(3)**.

1. The Unavailability of Processing Units Based on the D-28 Chips Constitutes an Impediment Beyond RESPONDENT'S Control

54 The fire at High Performance's production facilities caused 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)**. Due to the fire, such processing units were not available on the market. Thus, RESPONDENT faced an impediment **(b)** which was beyond its control **(c)**.

a) RESPONDENT Was Contractually Bound to Supply a Master Control System Using Processing Units Based on the D-28 Chip

55 Contrary to CLAIMANT'S allegations [*cf. Memorandum for Claimant, pp. 23, 24, para. 91*], RESPONDENT was contractually bound to deliver a master control system using processing units based on the D-28 chip.

56 A contract is a meeting of minds [*cf. Honnold, Art. 8, para. 106*]. Hence, in order to determine what a contract specifically calls for, not only written terms are to be considered. To the contrary, Art. 35(2)(b) CISG requires goods to fit the purpose of the contract as known to the seller. Furthermore, Art. 8(2),(3) CISG provide that attention must be drawn to the intentions of the parties as well as the circumstances of the case [*cf. Memorandum for Claimant, p. 24, para. 92; Chemical Marketing v. Purolite, US Dist Ct (EDPA); BGer, 22 Dec 2000*]. Moreover, there is no parol evidence rule under the CISG, which would restrict the interpretation of the contract to written terms [*MCC-Marble Ceramic v. Ceramica Nuova, US Ct App (11th Circuit); Toons, Inc. v. Schubert, US Dist Ct (SDNY); Filanto v. Chilewich, US Dist Ct (SDNY)*].

57 CLAIMANT itself requested the "highest standards", "superior to anything otherwise available" for its conference technology [*Application for Arbitration, p. 5, para. 6*]. As a result, the purpose of the Contract was to equip CLAIMANT with the very best technology. Hence, the Contract called for nothing less than a state of the art master control system. The processing units are the core element of the master control system [*Application for Arbitration, p. 5, para. 8*]. In turn, the heart of any processing unit is the computer chip it is based on. Thus, the capability of the processing units and eventually the entire master control system depends on the installed computer chip.

58 The latest technological achievement concerning computer chips was the highly advanced D-28 chip, offering significant improvements over any rival chip available [*Application for Arbitration, p. 5, para. 9*]. Moreover, the development of a comparable chip was estimated to take another six months from the start of the production of the D-28 chip. [*Application for Arbitration, p. 5, para. 9*]. Thus, at the time of the conclusion of the Contract, only a master control system containing the D-28 chip was on top of current technology. As CLAIMANT asked for the finest technology available, no other system would have satisfied the purpose of the Contract.

59 Hence, in accordance with Art. 8(2),(3) CISG, any reasonable person in the shoes of RESPONDENT and aware of current technological developments would have interpreted CLAIMANT'S request as the order of a master control system run by processing units using the D-28 chip. In conclusion, taking into consideration the purpose of the Contract, in line with Art. 35(2)(b) CISG, the Contract called for exactly such master control system.

b) Due to the Unavailability of the Required Processing Units, RESPONDENT Faced an Impediment

60 As the above-mentioned processing units were not available on the market, it was impossible for RESPONDENT to deliver and install the required master control system in time. RESPONDENT thus faced an impediment. Impediments in terms of Art. 79(1) CISG are objective circumstances external to the seller which prevent performance [*Schwenzer, in: Schlechtriem/Schwenzer, Art. 79, para. 11; Piltz, para. 4-234; cf. Heuzé, para. 469*].

61 In the case at hand, the processing units were designed to use the D-28 chip. The fire occurring at the facilities of High Performance interrupted the production of the D-28 chip which had just started [*Application for Arbitration, p. 6, para. 12*]. Since the D-28 chip had not been regularly sold yet and was only provided by High Performance, the required chips were not otherwise available on the market [*cf. Application for Arbitration, p. 5, para. 9*]. As a consequence, it was impossible for RESPONDENT to obtain the required processing units from Specialty Devices or elsewhere within the necessary time period. Hence, RESPONDENT faced an impediment.

62 The impediment was the sole reason for RESPONDENT'S late performance, even though CLAIMANT brings forward that RESPONDENT would not have delivered in time anyway [*cf. Memorandum for Claimant, pp. 20, 21, para. 82 et seq.*]. CLAIMANT alleges that RESPONDENT originally intended to deliver the master control system within three months but actually needed more than four months to perform after the production of the D-28 chip resumed [*Memorandum for Claimant, pp. 20, 21, para. 82*]. However, CLAIMANT incorrectly contrasts a four and a half months period, which includes the time CLAIMANT planned for testing, with an originally scheduled period of three months which only encompassed installation and configuration of the system by RESPONDENT [*cf. Application for Arbitration, p. 6, para. 16; Claimant's Exhibit No. 1, p. 9*]. Thus, contrary to CLAIMANT'S allegations, RESPONDENT performed its obligations within three months after the production of D-28 chips resumed. In

conclusion, CLAIMANT'S allegation that RESPONDENT would not have delivered in time anyway is unfounded.

c) The Impediment Was Beyond RESPONDENT'S Control

63 Contrary to CLAIMANT'S allegations [*cf. Memorandum for Claimant, p. 18, para. 73 et seq.*], the impediment, i.e. the unavailability of processing units based on the D-28 chip, was beyond RESPONDENT'S control. An impediment is to be considered beyond the seller's control if it lies outside its contractual sphere of risk [*BGH, 24 Mar 1999; OLG München, 5 Mar 2008*]. It was CLAIMANT who insisted on the latest technology, thus obliging RESPONDENT to use the D-28 chip which was not yet in production [*see supra, para. 55 et seq.*]. Therefore, CLAIMANT assumed the risk for a delay in the production of the D-28 chip.

64 CLAIMANT suggests that under usual circumstances, the failure of a supplier to deliver in time falls within the seller's sphere of risk since he generally bears the risk of procurement [*Memorandum for Claimant, pp. 18, 19, para. 74*]. However, CLAIMANT ignores that the seller may be exempt if the generic good in question is not available on the market due to unforeseeable events [*Schwenzer, in: Schlechtriem/Schwenzer, Art. 79, para. 27; Magnus, in: Staudinger, Art. 79, para. 22; cf. Huber/Mullis, p. 261*] In particular, the seller is exempt 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*]. At hand, the halt in High Performance's production caused by an accidental fire affected the entire branch of producers of processing units based on the D-28 chip, rendering RESPONDENT incapable of obtaining the required processing units from any supplier. Thus, the impediment was beyond RESPONDENT'S control.

2. RESPONDENT Could Not Have Taken the Impediment Into Account

65 Moreover, the impediment was not foreseeable. A seller is not obliged to take every possible impediment into account [*Magnus, in: Honsell, Art. 79, para. 15*]. On the contrary, force majeure is only foreseeable if it was apparent at the time of the conclusion of the contract, as for instance a regularly occurring flood or drought [*Schwenzer, in: Schlechtriem/Schwenzer, Art. 79, para. 16; cf. CIETAC, 30 Nov 1997; CIETAC, 2 May 1996; Raw Materials v. Forberich, US Dist Ct (NDIL); Neumayer/Ming, Art. 79, para. 4*]. The fire was an accident [*Procedural Order No. 2, p. 47, para. 8*]. It was not apparent at the time of the conclusion of

the Contract. Hence, a halt in High Performance's production, preventing the production of processing units using the D-28 chip was not foreseeable.

3. RESPONDENT Could Not Have Overcome the Impediment

66 Contrary to CLAIMANT'S allegations [*cf. Memorandum for Claimant, p. 20, para. 81 et seq.*], RESPONDENT could not have reasonably overcome the impediment. An impediment can only be overcome if it is possible for the seller to deliver a commercially reasonable substitute which would satisfy the purpose of the contract just as well as the good originally contracted for [*OLG Hamburg, 28 Feb 1997; AAA, 12 Dec 2007; Secretariat Commentary, Art. 65, para. 7; Schwenzer, in: Schlechtriem/Schwenzer, Art. 79, para. 12; cf. Audit, para. 182*].

67 CLAIMANT alleges that RESPONDENT should have delivered a master control system using different processing units based on another computer chip. CLAIMANT is mistaken. As shown above, the purpose of the Contract was to equip CLAIMANT with the very best master control system available [*see supra, para. 55 et seq.*]. Thus, regarding the purpose of the Contract, substitute processing units using another chip would have had to enable the master control system to perform in the very same way as the originally planned one. As the reason for the processing units' performance was the unique superiority of the D-28 chip [*Procedural Order No. 2, p. 47, para. 12*], a master control system using different processing units based on a less efficient chip would not have provided the same performance. Therefore, RESPONDENT could not have overcome the impediment by using different processing units.

68 Hence, RESPONDENT faced an impediment beyond its control which it could neither foresee nor overcome. Thus, RESPONDENT is exempt from liability under Art. 79(1) CISG.

B. Even If Art. 79(2) CISG Was Applicable, RESPONDENT Would Still Be Exempt

69 Assuming but not conceding that Art. 79(2) CISG was applicable, RESPONDENT would still be exempt from liability. Under Art. 79(2) CISG, the seller is exempt from liability if both the seller itself and the third person it engaged are exempt under Art. 79 CISG. RESPONDENT is exempt from liability [*see supra, para. 53 et seq.*]. The assumed third persons, Specialty Devices **(I)** and High Performance **(II)** are so exempt as well.

I. Specialty Devices Would Be Exempt Under Art. 79(1) CISG

70 Contrary to what CLAIMANT has brought forward [*Memorandum for Claimant, p. 23, para. 90 et seq.*], Specialty Devices meets the requirements set forth by Art. 79(1) CISG. The

unavailability of the D-28 chips constituted an unforeseeable impediment beyond Specialty Devices control **(1)** which Specialty Devices could not have overcome **(2)**.

1. The Unavailability of the D-28 Chips Constitutes an Unforeseeable Impediment Beyond Specialty Devices' Control

71 Specialty Devices was contractually bound to manufacture processing units using the D-28 chip [*cf. Application for Arbitration, p. 5, para. 9*]. As the D-28 chips required for production were not available on the market due to force majeure, Specialty Devices could not manufacture such processing units, hence facing an impediment beyond its control. Contrary to CLAIMANT'S allegations [*Memorandum for Claimant, p. 24, para. 94*], Specialty Devices could not have foreseen this impediment. As stated above, force majeure is only foreseeable if it was apparent at the time of the conclusion of the contract [*see supra, para. 65*]. Since the fire was an accident, neither Specialty Devices nor any reasonable person could have foreseen it.

2. Specialty Devices Could Not Have Overcome the Impediment

72 Specialty Devices could not have overcome the impediment, although it attempted to do so. Generally, the seller is supposed to take reasonable measures to fulfil its contractual obligations when facing an impediment [*ICC, 7197/1992; Bianca/Bonell, Art. 79, para. 2.6.4.*]. In the case at hand, there were three possible ways of overcoming the impediment: Obtaining the chips either from High Performance or from Atlantis Technical Solutions, or using different chips. None of these approaches could lead to success.

73 When High Performance informed Specialty Devices about the fire and the resulting halt in production, High Performance had already made clear that it would ship the remaining chips to its regular customers only [*Claimant's Exhibit No. 3, p. 11*]. Since Specialty Devices was not one of those customers, it had no opportunity to secure the delivery of the D-28 chips which it had ordered. Nevertheless, Specialty Devices approached Atlantis Technical Solutions, the sole recipient of the entire stock of remaining D-28 chips and sought to buy the chips there [*Application for Arbitration, p. 6, para. 15*]. However, Atlantis Technical Solutions categorically refused [*Procedural Order No. 2, p. 47, para. 11*]. Specialty Devices did not have any chance to obtain any of the remaining D-28 chips either from High Performance or from Atlantis Technical Solutions.

74 In addition, even though CLAIMANT alleges otherwise [*cf. Memorandum for Claimant, pp. 23, 24 para. 91*], Specialty Devices could not have used other chips. First of all, there was no chip with qualities comparable to the D-28 chip on the market until February 2011, i.e. after the contractual due date [*Application for Arbitration, p. 5, para. 9*]. Furthermore, redesigning the processing units which were designed to use the D-28 chip in order to make them run with any other chip or even a clone of the D-28 chip would also have caused severe delay [*Procedural Order No. 2, p. 47, para. 12*]. Moreover, there would have been no guarantee of a performance comparable to the processing units based on the D-28 chip [*Procedural Order No. 2, p. 47, para. 12*]. Consequently, even if Specialty Devices had used different chips, it would not have been able to fulfil even part of its contractual obligations. Hence, Specialty Devices could not have overcome the impediment.

75 Thus, meeting all the requirements, Specialty Devices is exempt from liability under Art. 79(1) CISG.

II. High Performance Would Be Exempt Under Art. 79(1) CISG As Well

76 Apart from RESPONDENT and Specialty Devices, High Performance also faced an unforeseeable impediment beyond its control **(1)**, which it could not have overcome **(2)**.

1. The Fire Constitutes an Unforeseeable Impediment Beyond High Performance's Control

77 The accidental fire at High Performance's production facilities constituted an impediment beyond High Performance's control. As shown above, the seller is generally exempt in cases of force majeure, e.g. fire [*see supra, para. 64*]. Also, High Performance could not have foreseen the fire at the time of the conclusion of the contract. Thus, High Performance faced an impediment beyond its control, which it could not have foreseen.

2. High Performance Could Not Have Reasonably Overcome the Impediment

78 CLAIMANT alleges that High Performance could have overcome the impediment by distributing the remaining chips on a pro rata basis, instead of allocating all of them to Atlantis Technical Solutions [*Memorandum for Claimant, pp. 26, 27, para. 103*]. However, even a pro rata distribution would not have allowed Specialty Devices to fulfil its contract with RESPONDENT [*Application for Arbitration, p. 6, para. 13; Procedural Order No. 2, p. 46, para. 7*].

79 After the fire at its production facilities, High Performance only had a small amount of chips left. Therefore, not all of the contracts with its customers could be fulfilled [*Application for Arbitration, p. 6, para. 13*]. Thus, it was impossible for High Performance to overcome the consequences of the fire regarding all of its contracts. Hence, High Performance made the rational business decision to overcome the effect the fire had on its contract with Atlantis Technical Solutions since the latter was a long-standing customer [*Claimant's Exhibit No. 3, p. 11*]. After fulfilling that contract, there were no chips left to overcome the effect the fire had on the other contracts.

80 High Performance was free to act in the way it did. First, it is undisputed between the parties that no explicit legal obligation required High Performance to distribute the remaining chips on a pro rata basis [*Memorandum for Claimant, p. 27, para. 104; Application for Arbitration, p. 6, para. 13*]. Second, an implicit obligation can neither be drawn from Art. 79(1) **(a)**, nor from the principle of good faith **(b)**.

a) High Performance Was Not Required Under Art. 79(1) CISG to Distribute the Chips on a Pro Rata Basis

81 The wording of Art. 79 (1) CISG requires the seller to take reasonable measures to overcome an impediment. High Performance fulfilled this requirement. High Performance acted economically reasonable when it decided to supply regular customers first. Specialty Devices was no such customer [*Application for Arbitration, p. 6, para. 14*]. Atlantis Technical Solutions, in contrast, was a regular customer [*cf. Application for Arbitration, p. 6, para. 15*]. Furthermore, High Performance had received considerable support from Atlantis Technical Solutions [*Claimant's Exhibit No. 7, p. 15*]. Choosing regular customers over the others is a reasonable means to maintain long-standing business relationships, thus ensuring future profit.

82 The friendship between the two CEOs as invoked by CLAIMANT [*Memorandum for Claimant, pp. 26, 27 para. 103*] does not affect the above-stated reasons. It cannot be unreasonable to uphold business relations. Hence, High Performance acted as a reasonable merchant.

b) High Performance Was Not Required By the Principle of Good Faith to Distribute the Chips on a Pro Rata Basis

83 Also, while acting economically reasonable, High Performance did not violate the principle of good faith. First, the principle of good faith does not require any particular behaviour of a party concerning the performance of its contract under the CISG, e.g. pro rata distribution. Art. 7(1) CISG, the only provision in the CISG which mentions good faith, only deals with the interpretation of the Convention. It does not require a specific way of performing the contract [*ICC, 8611/1997; Gerechtshof Arnhem, 18 Jul 2006; Schlechtriem, UN-Kaufrecht, para. 44; Honnold, Art. 7, para. 94; Farnsworth, p. 18; Schwenzer/Hachem, in: Schlechtriem/Schwenzer, Art. 7, para. 17; cf. Secretariat Commentary, Art. 6, para. 4; Ferrari, in: Schlechtriem/Schwenzer (Ger.), Art. 7, para. 26; Magnus, in: Staudinger, Art. 7, para. 25; Reinhart, Art. 79, para. 3*]. Thus, the principle of good faith did not require High Performance to perform its contract by distributing the chips on a pro rata basis.

84 For the sake of the argument, even if one were to apply good faith to modify the obligation of performance, good faith would only be violated in cases of abusive exercise of rights or contradictory behaviour of a party [*cf. OLG Köln, 21 May 1996; OLG Karlsruhe, 25 Jun 1997; Magnus, in: Staudinger, Art. 7, para. 25; Herber/Czerwenka, Art. 7, para. 6; Najork, pp. 78 et seq.*]. High Performance acted in good faith since it behaved by no means contradictory or abusive.

85 In conclusion, since there was no obligation to distribute on a pro rata basis, High Performance was free to act in the way it did. It could not have reasonably been expected to overcome the fire. RESPONDENT, Specialty Devices and High Performance all meet the requirements of Art. 79(1). Thus, RESPONDENT is in any case exempt, even under Art. 79(2) CISG.

CONCLUSION OF THE SECOND ISSUE

86 RESPONDENT is exempt from liability. The destruction of the necessary D-28 chips by an accidental fire led to an impediment beyond RESPONDENT'S control which it could neither have foreseen nor overcome. Therefore, the requirements of Art. 79(1) CISG are met. Even if the Tribunal found Specialty Devices and High Performance to be third persons in terms of Art. 79(2) CISG, RESPONDENT would still be exempt since Specialty Devices and High Performance fulfil the requirements of Art. 79(1) CISG as well. Thus, RESPONDENT is exempt from liability in any case.

ISSUE 3: CLAIMANT IS NOT ENTITLED TO ANY DAMAGES

87 CLAIMANT aims at recovering damages in the amount of USD 670,000. This sum consists of USD 448,000 for chartering the M/S Pacifica Star as a substitute vessel, USD 60,600 for a brokerage commission, USD 50,000 for a success fee paid to its broker and an additional USD 112,000 for an ex gratia payment made to its client [*Application for Arbitration, p. 4, para. 4; Memorandum for Claimant, p. 33*]. None of these claims is justified.

88 Bribery committed on CLAIMANT'S behalf prohibits arbitration and prevents entitlement to damages for substantive reasons **(A)**. In any case, CLAIMANT is not entitled to the success fee **(B)** or the ex gratia payment **(C)** under the CISG.

A. Bribery Prohibits Arbitration and Prevents Entitlement to Damages

89 A bribery payment has been made by CLAIMANT'S broker **(I)**. Such bribery committed on CLAIMANT'S behalf constitutes a barrier to the proceedings **(II)**. Further, it renders damages based on the transaction effected by bribery irrecoverable for substantive reasons **(III)**.

I. Bribery Has Been Committed to Facilitate Business for CLAIMANT

90 As opposed to CLAIMANT'S allegation that bribery accusations are merely supported by an unreliable magazine [*cf. Memorandum for Claimant, pp. 28, 29, para. 110*], it is evident in the case at hand that bribery has been committed to facilitate business for CLAIMANT.

91 CLAIMANT had hired a yacht broker to locate a substitute yacht for the event of its client. CLAIMANT paid that broker a success fee of USD 50,000 on top of the USD 60,600 commission. The broker passed parts of this money on to the personal assistant of Mr Goldrich, the owner of the substitute yacht. The broker did so in order to achieve an "introduction" to Mr Goldrich [*Statement of Defence, p. 38, para. 13; Respondent's Exhibit No. 1, p. 41*]. According to Art. 1453 Criminal Code of Pacifica, the country Mr Goldrich and his assistant live and contract in, paying and receiving such payment constitutes unlawful bribery [*Respondent's Exhibit No. 2, p. 42*]. Consequently, the personal assistant of Mr Goldrich was convicted for accepting the bribe from CLAIMANT'S broker [*Respondent's Exhibit No. 2, p. 38, para. 13; Respondent's Exhibit No. 1, p. 41*].

92 These facts were disclosed by the "Convention Business News" which is a reputable source of information that does not need any further confirmation [*Procedural Order No. 2,*

p. 51, para. 41]. Thus, it is evident from the facts that bribery has been committed to facilitate business for CLAIMANT.

II. Bribery Constitutes a Barrier to Arbitral Proceedings

93 As claims based on a transaction tainted with bribery are non-arbitrable, the Tribunal should decline jurisdiction over these claims **(1)**. Additionally, any award granting bribery-affected damages would not be enforceable **(2)**.

1. The Tribunal Should Decline Jurisdiction over Any Claims Affected by Bribery

94 The Tribunal shall refuse jurisdiction over the claims for the rental costs of USD 448,000, for the USD 60,600 broker commission and for the USD 50,000 success fee as CLAIMANT resorts to arbitration for an illegitimate reason.

95 When arbitration is being conducted for an illegitimate reason, it is the tribunal's duty to dismiss arbitration [*CIArb Practice Guideline, p. 8, para. 4.4.2*]. Claiming damages which occurred in connection with a contract overshadowed by corruption is an illegitimate reason for arbitration. Gunnar Lagergren established in a pioneer award 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*]. Even though Lagergren dealt with a case in which both parties attempted to invoke arbitration as a means to cover up bribery, jurisdiction must all the more be denied in cases where only one party is involved in bribery. The non-involved party must be protected from claims resulting from illegal actions, as well as from being associated with bribery since this would severely harm this party's reputation.

96 All claims but the ex gratia payment are based on the lease contract that had been concluded by means of bribery. Claiming such bribery-tainted damages is an illegitimate reason for arbitration. Thus, jurisdiction over the dispute concerning all damages but the ex gratia payment must be declined.

2. Any Award Granting Damages Based on Bribery Would Not Be Enforceable

97 Awarding damages based on bribery would violate international public policy and will hence be likely not to be enforceable. 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 contradicts the relevant public policy. CLAIMANT alleges that public policy in Pacifica differs

from the one in Equatoriana [*Memorandum for Claimant, p. 31, para. 119*]. However, CLAIMANT does not furnish proof that Equatoriana would enforce an award for damages which occurred in connection with corruption. When discussing enforceability of international awards, one should refer to international public policy [*BGH, 18 Jan 1990; Parsons v. Société Générale, US Ct App (2nd Cir); Cour Supérieure Luxembourg, 24 Nov 1993; Hwang/Lim, para. 86, 166; Paulsson, pp. 110, 113*]. It is "international consensus that corruption and bribery are contrary to international public policy" and that awards granting damages for contracts obtained by bribery would not be enforceable [*Redfern/Hunter, para. 3-20; ILA Report on Public Policy, p. 218; cf. ICSID ARB/00/7, World Duty Free; Pieth, in: FS Schwenzer, p. 1380*].

98 The substitute transaction CLAIMANT alleges to be the legal basis of most subsequent claims has been concluded by means of bribery [*Respondent's Exhibit No. 1, p.41*]. Given that bribery is condemned on an international level, any award granting damages based on bribery will not likely to be enforceable.

III. Alternatively, Bribery Hinders Claim for Most Damages for Substantive Reasons

99 CLAIMANT has not suffered any damages, since the lease contract from which they allegedly arise is void. CLAIMANT'S assertion that the contract is not affected by the bribery [*Memorandum for Claimant, p. 29, para. 111*] is incorrect. Contracts contaminated with bribery are void [*Born, Bribery*].

100 The lease contract is contaminated with bribery. Contrary to CLAIMANT'S allegations [*cf. Memorandum for Claimant, p. 29, para. 112*], the steps taken by the yacht broker are to be attributed to CLAIMANT because CLAIMANT condoned illegal actions by its broker **(1)** and because CLAIMANT engaged the latter **(2)**.

1. CLAIMANT Is Responsible, Since It Condoned Illegal Actions of Its Broker

101 CLAIMANT condoned illegal actions by offering its broker USD 50,000 to ensure that the M/S Pacifica Star would be secured by any means possible. This renders the lease contract void. RESPONDENT agrees with CLAIMANT that the chronological order of events is important [*cf. Memorandum for Claimant, p. 29, para. 111*]. The timing of the disproportional payment, however, suggests that CLAIMANT condoned illegal tactics since CLAIMANT did not promise the success fee until after its broker had already located a suitable yacht [*Procedural Order No. 2, p. 49, para. 22*]. Thus, the admittedly difficult task of locating a suitable substitute

vessel for CLAIMANT'S client had already been accomplished. At this point in time, CLAIMANT promised to pay an additional amount of USD 50,000 if the broker "was able to secure the contract" [*Procedural Order No. 2, p. 49, para. 22*]. As the main part of the yacht broker's profession, i.e. locating vessels according to its client's demands, had already been accomplished, all that was left to do for the broker was to introduce the potential contracting parties, who would then themselves secure the contract. In comparison to the difficult task of locating an adequate vessel, this introduction appears fairly simple to achieve. Consequently, CLAIMANT should have known that the sum was used as more than a pure incentive.

102 It is to be emphasised that the additional payment of USD 50,000 was excessive compared to the regular brokerage commission of USD 60,600. It almost doubled the final amount the broker received. Thus, if CLAIMANT did not implicitly order its broker to bribe the assistant of Mr Goldrich, CLAIMANT at least condoned the possibility of a bribe. Although CLAIMANT admittedly had no positive knowledge of the bribery [*Memorandum for Claimant, p. 29, para. 111*], the illegal affairs are nevertheless to be attributed to CLAIMANT, since condoning a crime is sufficient to be actively involved.

2. CLAIMANT Is Responsible Since It Engaged an Independent Agent

103 According to the OECD-Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter OECD-Convention), a principal is responsible for independent agents it engages as they might be a risk to the contract [*Pieth, pp. 124, 125*]. The question of attribution of a third persons' actions to a principal is separate from the sensitive topic of bribery of public officials. In any case, for the subject of commercial bribery, a distinction between the public and the private sector is unnecessary [*Chaikin, p. 272*]. Determining whether an agent's action is imputable to the initiator can hence be answered by guidance of the OECD-Convention. To prevent illegal action, the principal either has to introduce the agent to "rules of conduct" or must add a contract clause "dismissing" the agent in case bribery is committed [*Pieth, p. 125*].

104 CLAIMANT engaged an independent broker, but did not take any precautionary measures as suggested by the OECD-Convention to prevent its broker from undertaking illegal actions. Consequently, the unduly measures the broker invoked to achieve an "introduction" are to be attributed to CLAIMANT.

105 As CLAIMANT condoned illegal actions by its broker and is thus responsible for its steps, the lease contract in question is contaminated with bribery and hence void. In line with

effective arbitration, CLAIMANT must not derive financial profit from the transaction concluded by means of corruption after all.

106 In conclusion, bribery constitutes a barrier to arbitral proceedings, endangers the enforceability of any future award and renders claims based on the lease contract irrecoverable for substantive reasons.

B. Even if Bribery Did Not Invalidate the Lease Contract, CLAIMANT Would Not Be Entitled to Damages in the Amount of the Success Fee

107 CLAIMANT is not entitled to recover the USD 50,000 it paid to its yacht broker. The success fee is not recoverable under Art. 74 CISG as it was not foreseeable **(I)**. It also does not constitute a reasonable measure of mitigation in terms of Art. 77 CISG **(II)**.

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

108 As opposed to what CLAIMANT could have sought to invoke, the success fee is not recoverable under Art. 74 CISG. 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 entering into a contract, a party must be able to assess the extent of liability that 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*].

109 In order to be recoverable under Art. 74 CISG, damages must have been either probable [*Delchi Carrier v. Rotorex, US Ct App (2nd* Cir); *Stoll, in: v. Caemmerer/Schlechtriem, Art. 74, para. 34; Stoll/Gruber, in: Schlechtriem/Schwenzer (Ger.), Art. 74, para. 35; Lüderitz/Dettmeier, in: Soergel, Art. 74, para. 15; Witz, in: Witz/Salger/Lorenz, Art. 74, para. 28*], or possible consequences of a breach of contract [*SCCI, 1998; Russian CCI, 24 Jan 2000; Downs v. Perwaja, Supr Ct Queensland, 12 Oct 2001; Schwenzer, in: Schlechtriem/Schwenzer, Art. 74, para. 48; Huber, in: MünchKomm BGB; Art. 74, para. 28; Faust, pp. 269 et seq.; Gotanda, in: Kröll/Mistelis/Viscasillas, Art. 74, para. 46*].

110 RESPONDENT could neither have foreseen the success fee as a possible nor as a probable consequence of the breach of contract at the time the contract was concluded.

111 First, at the time of the conclusion of the contract, RESPONDENT could not have foreseen that CLAIMANT would pay a success fee as a reaction to the unavailability of the M/S Vis for the conference of its client. At this point, RESPONDENT did not even know of the conference.

CLAIMANT and RESPONDENT concluded their contract on 26 May 2011 [*Application for Arbitration, p. 5, para. 7*]. RESPONDENT was only informed about the conference on 5 August 2011 [*Procedural Order No. 2, p. 47, para. 14*]. Therefore, RESPONDENT had no knowledge about the conference at the time the Contract was concluded.

112 Second, RESPONDENT could not have foreseen that CLAIMANT'S schedule for the conference would be as inflexible as it was. Being a prudent merchant, CLAIMANT should have borne in mind that problems might arise, especially with demands as high as his. CLAIMANT asked for the latest and highest standard of technology that was available on the market [*Application for Arbitration, p. 5, para. 6; see supra, para. 57*] RESPONDENT could not have foreseen that CLAIMANT'S schedule would collapse, as soon as there was a late delivery, giving rise to consequences as severe as the ones present.

113 Third, CLAIMANT justifies paying the success fee with the tight situation on the yacht market [*Memorandum for Claimant, p. 28, para. 109*]. Yet, this was not foreseeable to RESPONDENT at the time of the conclusion of the contract as it had no independent knowledge of the situation on the yacht market [*cf. Statement of Defence, p. 37, para. 1; Application for Arbitration, p. 7, para. 18*].

114 Last, success fees are not customary, but instead they are only paid "from time to time" [*Procedural Order No. 2, p. 49, para. 23*]. If a measure that follows a breach of contract is uncustomary, it will only fall under Art. 74 CISG if the party in breach knew about 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 a possibility. RESPONDENT had no independent knowledge about the payment of the success fee [*Statement of Defence, p. 37, para. 1; Application for Arbitration, p. 7, para. 18*].

115 In conclusion, RESPONDENT could not have foreseen the success fee as either a possible or probable consequence of the breach of contract at the time of conclusion. The success fee is therefore not recoverable under Art. 74 CISG.

II. The Success Fee Is No Reasonable Measure of Mitigation in Terms of Art. 77 CISG

116 Contrary to what CLAIMANT argues, the success fee is no reasonable measure of mitigation under Art. 77 CISG and is consequently not recoverable under Art. 74 CISG [*cf. Memorandum for Claimant, p 28. , para. 109*]. According to Art. 77 CISG, a party relying on a breach of contract is only obliged to undertake reasonable measures to mitigate losses. 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., Schwenzer in: Schlechtriem/Schwenzer, Art. 77, para. 7*].

117 Under the given circumstances, paying a success fee was not reasonable, but excessive. As such, it contradicts the purpose underlying Art. 77 CISG. This article is based on the principle that avoidable losses are not recoverable [*Schwenzer in: Schlechtriem/Schwenzer (Ger.), Art. 77, para. 1*]. In particular, excessive measures of mitigation 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, II, 4(b), Huber/Mullis, p. 290*]. The yacht broker could have fulfilled his task equally well without a success fee [*see supra, para. 101*]. Paying the success fee was therefore no measure of mitigation, but unnecessarily increased the damage that CLAIMANT seeks to recover. It was thus an excessive measure and hence not reasonable in terms of Art. 77 CISG.

118 Further, the success fee is no reasonable measure of mitigation, as success fees are unusual [*see supra, para. 114*]. Unusual measures do not fall under Art. 77 CISG [*Witz, in: Witz/Salger/Lorenz, Art. 77, para. 9*].

119 It is not convincing that CLAIMANT tries to justify the success fee by stating that only few comparable yachts were able to serve as substitutes, thus causing a "desperate" situation [*cf. Memorandum for Claimant, p. 28 , para. 109*]. CLAIMANT paid its yacht broker USD 50,000 to "ensure the contract" with Mr Goldrich [*Respondent's Exhibit No. 1, p. 41*]. The USD 50,000 success fee nearly doubled the USD 60,600 broker commission. Normally, Mr Goldrich does not lease his yacht [*Procedural Order No. 2, p. 49, para. 21*]. Changing this lay outside the broker's sphere of legally permissible influence. An extra payment of USD 50,000 was thus no reasonable incentive for the yacht broker, but a seduction to take on impure means and commit bribery.

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

C. Claimant Is Not Entitled to Damages for the Ex Gratia Payment of USD 112,000

121 In addition to the costs arising in connection with the substitute transaction, CLAIMANT paid USD 112,000 to its client Corporate Executives to "retain the goodwill and future business

from Corporate Executives" [*Application for Arbitration, p. 7, para. 18*]. Id est, CLAIMANT paid a great amount of money to compensate or prevent alleged goodwill damages.

122 Yet, as CLAIMANT did not suffer goodwill damages, the ex gratia payment was made for no reason **(I)**. Even if CLAIMANT suffered goodwill damages, such damages would not be recoverable under Art. 74 CISG **(II)**. Even if goodwill damages were recoverable under the requirements of Art. 74 CISG, in the case at hand the alleged damages were not foreseeable **(III)**. Additionally, the ex gratia payment is not a measure of mitigation under Art. 77 CISG **(IV)**.

I. The Ex Gratia Payment Is Not Recoverable as CLAIMANT Neither Did Nor Would Have Suffered Any Goodwill Damages

123 CLAIMANT'S business reputation vis-à-vis its client Corporate Executives was never endangered. Hence, the ex gratia payment as a compensation or prevention of goodwill damages is not recoverable under Art. 74 CISG. As a primary condition for compensation, Art. 74 CISG requires a damage to have occurred.

124 First, Corporate Executives was well-disposed to CLAIMANT as it did not claim any damages or expressly state dissatisfaction about the final performance of the contract. Corporate Executives is a long-standing client of CLAIMANT [*Application for Arbitration, p. 6, para. 11*]. A long-standing business relationship often leads to critical reviews as to the performance in order to make future relations even more satisfying. Problems, discontent or disagreements are discussed openly. For example, although CLAIMANT and RESPONDENT do not have a long business relationship, even CLAIMANT directly expressed its concerns to RESPONDENT, stating: "I am very disappointed in your letter […]." [*Claimant's Exhibit No. 6, p. 14*].

125 However, Corporate Executives neither voiced dissatisfaction with CLAIMANT'S substitute performance, nor demanded any money. Corporate Executives only expressed that it was not happy that the conference would not be taking place on the M/S Vis [*Procedural Order No. 2, p. 48, para. 20*]. Yet, at the same time Corporate Executives acknowledged that the M/S Pacifica Star was an "appropriate" substitute yacht [*Procedural Order No. 2, p. 48*]. Overall, considering the reserved and benevolent feedback of Corporate Executives, there was no indication of the business relationship being at risk or of CLAIMANT'S reputation vis-à-vis Corporate Executives being endangered.

126 Additionally, Corporate Executives' members, the participants of the conference, were pleased as well. Corporate Executives stated that it would only use the ex gratia payment to make "a partial refund of the conference fee paid by its members" [*Application for Arbitration, p. 4, para. 4*]. Consequently, the ultimate use of the ex gratia payment was not to compensate or prevent any alleged damages by CLAIMANT, but to compensate goodwill damages of Corporate Executives vis-à-vis its members. However, although there was "dismay" among the membership when they were informed that the conference would be held on a substitute location, the dismay turned into "general relief", when it became possible to rent the "appropriate" M/S Pacifica Star [*Respondent's Exhibit No. 1, p. 41*]. The relief was sustained after the conference: The members of Corporate Executives were not disappointed, but instead "satisfied" and the conference itself was considered "successful" [*Respondent's Exhibit No. 1, p. 41*].

127 Therefore, neither CLAIMANT nor Corporate Executives did suffer or would have suffered any goodwill damages. Nevertheless, CLAIMANT voluntarily paid a great amount of money to Corporate Executives to prevent or compensate goodwill damages which never existed. Thus, the ex gratia payment is not recoverable under Art. 74 CISG.

II. Even If CLAIMANT Suffered Goodwill Damages, They Would Still Not Be Recoverable Under the CISG

128 RESPONDENT is not liable for the ex gratia payment CLAIMANT made to Corporate Executives as goodwill damages are not foreseeable. It is almost impossible to pre-estimate goodwill damages and the reputation of a company depends on various criteria which the other party is unaware of. Hence, goodwill damages are not foreseeable and therefore not recoverable under the CISG [*Ct FI Athens, 1 Jan 2009; Honsell, pp. 364 et seq.*] At least, goodwill damages are not foreseeable if not explicitly indicated at the time of the conclusion of the contract [*Stoll, p. 263; Ryffel, p. 69; Karollus, p. 218; cf. Huber, p. 499*]. CLAIMANT paid the amount of USD 112,000 to Corporate Executives to "retain the goodwill and future business from Corporate Executives" [*Application for Arbitration, p. 7, para. 18*]. Yet, CLAIMANT did not warn RESPONDENT of the possibility of such damages at the time of the conclusion of the contract. Thus, the ex gratia payment was made to compensate or prevent goodwill damages and is therefore not recoverable under Art. 74 CISG.

129 Additionally, the Tribunal is invited to take into consideration the persuasive authority of the Landgericht München (hereafter LG München), which also states that goodwill damages

are never recoverable under the CISG. In that case, the claimant, an Italian wine producer, was obliged to directly deliver wine to the clients of the respondent, a wine sub dealer. The Respondent tried to avoid payment for delivered wines by stating that various deliveries contained insufficient wine bottles and the respondent would have consequently suffered goodwill damages vis-à-vis its client. The LG München rejected this argument by stating 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 Were Recoverable under the Requirements of Art. 74 CISG, the Circumstances of the Case at Hand Would Not Meet These Conditions

130 The ex gratia payment as a means of compensation or prevention of goodwill damages was not foreseeable and is therefore not recoverable. Art. 74 CISG limits recoverable losses to the amount "which the party in breach foresaw or ought to have foreseen at the time of conclusion of the contract". As stated above, foreseeability under Art. 74 CISG requires a certain probability, but by all means foreseeable events are those which were foreseeable as a possible consequence under the individual circumstances of the case [*see supra, para. 109*]. The refund paid by CLAIMANT was not requested by Corporate Executives, but instead paid voluntarily [*Procedural Order No. 2, p. 48, para. 20*].

131 First, a voluntary payment is an unusual action for a business company in general. Nevertheless, CLAIMANT did not inform RESPONDENT at any time about the fact that in case of late delivery, it would make such payments to its clients. Yet, CLAIMANT brings forward that gestures of goodwill are "common usage in business" by stating that RESPONDENT itself offered a gesture of goodwill [*Memorandum for Claimant, p. 32, para. 124*]. RESPONDENT offered CLAIMANT to provide necessary future repairs at standard charges less 20 % [*Claimant's Exhibit No. 5, p. 13*]. This might be seen as an example for non-recoverable goodwill gestures. Certainly, it is not an example for the common usage of unrequested and greatly generous voluntary payments, which afterwards seek to be recovered as damages. The first kind is common, while the latter is a unique manner of CLAIMANT and not foreseeable.

132 Second, RESPONDENT had no knowledge about CLAIMANT'S business sector at the time of the conclusion of the Contract [*Statement of Defence, p. 37, para. 1*]. As voluntary payments are only common to make in some branches, it was CLAIMANT'S duty to inform RESPONDENT

that it provides luxury conferences on super-yachts for which late performances may require voluntary payments. CLAIMANT failed to do so. Thus, the ex gratia payment as a compensation or prevention of goodwill damages was neither foreseeable as a possible nor as a probable consequence of the breach of contract for RESPONDENT. Consequently, the amount of USD 112,000 is not recoverable under Art. 74 CISG.

IV. Alternatively, the Ex Gratia Payment Cannot Be Demanded As a Reasonable Measure of Mitigation Under Art. 77 CISG

133 Contrary to CLAIMANT'S assertions, the ex gratia payment was also not a reasonable measure of mitigation [*cf. Memorandum for Claimant, p. 32, para. 123*]. Art. 77 CISG sets forth the obligation of a party demanding damages to keep the arising damages to a minimum. The ex gratia payment was meant to mitigate alleged goodwill damages. As shown above [*see supra, para. 130-132*], goodwill damages, if existent at all, were not foreseeable and can therefore not be demanded from RESPONDENT. Consequently, costs for measures mitigating these damages cannot be demanded from RESPONDENT either.

CONCLUSION OF THE THIRD ISSUE

134 After all, the Tribunal should refuse jurisdiction as CLAIMANT tries to misuse arbitration. Consequently, an award granting damages to CLAIMANT would not be enforceable due to a conflict with international public policy. Even if the Tribunal assumed jurisdiction, it should find that the bribery invalidates the lease contract as CLAIMANT ought to have known of bribery actions. Furthermore, the success fee is not recoverable under Art. 74 CISG as it was unforeseeable and not a measure of mitigation in terms of Art. 77 CISG. Lastly, the ex gratia payment is not recoverable as there were no goodwill damages to compensate for. Alternatively, goodwill damages are in general not recoverable under the CISG and in particular not foreseeable as a consequence of the breach of contract under Art. 74 CISG in the case at hand.

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) The entire lease contract is tainted by corruption, rendering all expenses arising out of that contract non-allowable damages; in any case, RESPONDENT would not be 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