NINETEENTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
VIENNA – MARCH-APRIL 2012

MEDITERRANEAN ELITE CONFERENCE SERVICES, LTD., CLAIMANT
V.
EQUATORIANA CONTROL SYSTEMS, INC., RESPONDENT

MEMORANDUM FOR CLAIMANT

VICTOR BAN
VIVIAN BAN
JESSICA BEESS UND CHROSTIN
KYLIE CHISEUL KIM
JESSICA MOYER
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STATEMENT OF FACTS

CLAIMANT, Mediterraneo Elite Conference Services, Ltd., is a company incorporated under the laws of Mediterraneo which operates high-end venues for conferences held by small to medium sized businesses and professional associations [App. Arb., pp. 4-5]. It has six land-based facilities and, in spring 2010, purchased a luxury yacht, the M/S Vis, for use as a seventh conference venue [App. Arb., p. 5]. CLAIMANT sought to refurbish the yacht to a high level of luxury, superior to anything else available on the market. In order to do so, CLAIMANT engaged a number of subcontractors and suppliers to work on the refurbishing.

CLAIMANT engaged RESPONDENT, Equatoriana Control Systems, Inc., an Equatoriana company, to supply, configure and install the on-board master control system [App. Arb., p. 5]. The contract between CLAIMANT and RESPONDENT was signed on 26 May 2010 [Id.]. The contract provided that the “installation and configuration of the control system shall be completed by 12 November 2010” [Cl. Ex. 1, p. 9]. This date was chosen due to the fact that ten weeks of testing were required before the master control system would be fully functional [App. Arb., ¶ 7, p. 5]. Although CLAIMANT was aware that third-party suppliers may be involved in its procurement of the master control system, it had no specific knowledge that the manufacture of the processing units would be manufactured by someone other than RESPONDENT [Proc. Ord. 2, ¶ 6, p. 46]. As such, the contract contained no requirement as to suppliers [Cl. Ex. 1, p. 9].

CLAIMANT contracted with Worldwide Corporate Executives Association (“WCEA”), a high profile, long-standing client of CLAIMANT’S, to hold its annual conference aboard the M/S Vis from 12-18 February 2011 [App. Arb., p. 6]. WCEA demanded the very finest in comfort and efficiency, and was delighted to be the first to hold an event on the M/S Vis [Id.]. WCEA emphasized in its publicity for the event that it would be held on a luxury yacht [App. Arb., ¶ 17, p. 7; Res. Ex. 1, p. 41]. RESPONDENT was informed of the conference on 5 August 2010 [Proc. Ord. 2, ¶ 14, p. 47].

The core element in the master control system is a series of semi-configurable processing units. Although the contract between CLAIMANT and Respondent only mentioned performance requirements and made no mention of the specific component parts, RESPONDENT contracted with Oceania Specialty Devices (“Specialty”), who manufactured the processing units to be solely compatible with the D-28 “super chip” [App. Arb., p. 5]. The D-28 chip is designed and produced by another party, Atlantis High Performance Chips (“High Performance”) [Id].
On 13 September 2010, Respondent informed Claimant that it would be unable to meet its contractual obligation to deliver the control system by 12 November 2010 due in part to a fire in the production facility of the D-28 super chips [App. Arb., p. 6]. While there were enough chips in existence that a pro rata distribution would have sufficed to complete the master control system on time [Proc. Ord. 2, ¶ 9, p. 47], High Performance distributed the chips to only one of its regular customers [St. Cl., p. 6]. As a result, delivery of the control system was delayed until 14 January 2011 and installation, configuration and verification were delayed until 11 March 2011 [Id]. Claimant paid the full purchase price of USD 699,950 to Respondent on 21 March 2011 [App. Arb., p. 7].

When it learned that the M/S Vis would not be available for the WCEA event, Claimant offered WCEA use of one of its on-shore facilities for the conference, but WCEA refused to accept this alternative [App. Arb., ¶ 17, p. 7]. Claimant proceeded to make arrangements for a suitable substitute location [App. Arb., p. 7]. Claimant chartered a substitute yacht, the M/S Pacifica Star, at a cost of USD 448,000 which included USD 404,000 rental fee plus port and handling fees of USD 44,000 [Id]. It also incurred the cost of a standard broker commission of 15%, or USD 60,600, and a Broker Success Fee of USD 50,000 [Id]. Finally, Claimant made a rebate payment of USD 112,000 to WCEA to maintain the goodwill of its long-time client [Id].

Claimant wrote Respondent on 9 April 2011 requesting it to contribute to the costs it incurred from the delay in the installation of the control system [Cl. Ex. 4, p. 12]. Respondent replied several days later categorically refusing [Cl. Ex. 5, p. 13].

Claimant referred this dispute to the China International Economic Trade Arbitration Commission on 15 July 2011 seeking a total of USD 670,600 in damages due to Respondent’s late performance of its contractual duties [App. Arb., p. 3-4]. Respondent denies all liability for damages, challenges the jurisdiction of the Tribunal to hear all claims in relation to the lease of the M/S Pacifica Star based on allegations of bribery, and challenges the participation of Dr. Elisabeth Mercado as a member of Claimant’s legal team [St. Def., pp. 37-40]. Further, Respondent attempts to reserve a right to challenge Professor Presiding Arbitrator as arbitrator in the case, if the challenge to counsel is not accepted.
SUMMARY OF ARGUMENT

This Tribunal has jurisdiction to hear this matter. This Tribunal also has authority to address damages associated with the lease contract despite any allegations of corruption. RESPONDENT’S allegation that the lease is tainted by corruption is without merit, and thus an award of damages including the Broker Success Fee is enforceable under the New York Convention.

RESPONDENT’S challenge to the participation of CLAIMANT’S counsel is a mere disruptive tactic in attempt to subvert the arbitral process and should be denied. Even if a challenge were heard as to the participation of Dr. Mercado or Professor Presiding Arbitrator, it would fail. If the Tribunal decides to abstain from hearing the attorney disqualification issue, any award issued by it will be enforceable under the New York Convention.

The Convention on the International Sale of Goods (CISG) governs the merits of this dispute. CLAIMANT is entitled to damages in the amount of USD 670,600, as all damages claimed including the charter of a substitute vessel, the standard yacht broker commission, the yacht Broker Success Fee, and the rebate payment are reasonable and foreseeable. The awardable damages should not be reduced pursuant to Article 77 CISG because CLAIMANT took reasonable measures to mitigate its losses.

RESPONDENT is not exempt from liability under Article 79(1) CISG because the shortage of the D-28 chip was within the control of RESPONDENT and Specialty Devices. Further, Specialty Devices is not a third party under Article 79(2) CISG, nor is Specialty Device’s subcontractor, High Performance. RESPONDENT is still liable for damages caused by delay under Article 79(3) CISG.

Thus, CLAIMANT respectfully asks this Tribunal to declare all claims submitted by CLAIMANT admissible, find no jurisdiction over the disqualification of counsel issue, find that RESPONDENT has breached its contract with CLAIMANT and is therefore liable for full damages; find that CLAIMANT took reasonable measures to mitigate its losses; and award CLAIMANT full compensation for the incurred damages in the amount of USD 670,600, plus interest and costs of arbitration, including legal fees, which will be calculated after the evidentiary hearing.
ARGUMENT

I. THIS TRIBUNAL HAS JURISDICTION TO HEAR THIS MATTER

1. According to the well-established principle of Kompetenz-Kompetenz, an arbitral tribunal, at least as an initial matter, has the authority to determine its own jurisdiction [Reisman/Craig/Park/Paulsson, p. 646]. The seat of arbitration, Danubia, has adopted the UNCITRAL Model Law, which applies to this dispute [St. Cl. ¶ 21, p. 7]. Art. 16(1) of the Model Law states, "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement" [UNCITRAL Art. 16(1)]. This authority includes the ability of the arbitral tribunal to determine the scope of the arbitration agreement [UNCITRAL Art. 16(2)].

2. On 26 May 2010, CLAIMANT and RESPONDENT concluded a contract for the sale, installation and configuration of the master control system aboard the M/S Vis. The contract, which execution is uncontested [St. Cl. ¶ 3, p. 4; St. Def. ¶ 2, p. 37], included an arbitration clause, which gives the Tribunal the power to settle the dispute here in question [Poultry feed case]. The CIETAC Rules [Cl. Ex. 1 p. 9], in conjunction with the UNCITRAL Model Law [supra ¶ 1] and the New York Convention [St. Cl. ¶ 21, p. 7], govern the arbitral procedure. Relevant to the discussion are the IBA Guidelines on Conflicts of Interest ("IBA Guidelines"), the IBA International Principles on Conduct for the Legal Profession ("IBA Principles"), and Dr. Mercado’s Bar Association Code of Ethics [St. Def., ¶ 23, p. 40].

II. THE TRIBUNAL HAS AUTHORITY TO ADDRESS DAMAGES ASSOCIATED WITH THE LEASE CONTRACT DESPITE ANY ALLEGATIONS OF CORRUPTION

3. The doctrine of Kompetenz-Kompetenz holds, in general terms, that arbitral tribunals have the power to consider and to decide disputes concerning their own jurisdiction [supra ¶ 1; Born 2009, p. 853], i.e., the jurisdiction of the Arbitral Institution, CIETAC, and the Tribunal’s competence over the dispute. The Tribunal derives its jurisdiction to decide a particular dispute from the agreement between the parties, which extends to the jurisdiction to craft a remedy [Casey].

4. RESPONDENT misconceives this Tribunal’s authority to rule over CLAIMANT’s claims on various points. The Tribunal has authority to address damages flowing from the breach of the contract between CLAIMANT and RESPONDENT because the claims brought fall squarely within the arbitration agreement therein [A]. RESPONDENT’s allegation that the lease contract is tainted by an alleged corruption is without merit [B]. Finally, this Tribunal’s award on CLAIMANT’s claims will be fully enforceable despite RESPONDENT’s allegations of corruption [C].
A. All claims submitted by CLAIMANT are in accordance with the arbitration clause in the contract and are therefore admissible

5. Absent legislation granting authority, there is no “inherent jurisdiction” in an arbitral tribunal; it is a creature of contract [Casey]. Here, the Tribunal has exclusive jurisdiction over the contract between CLAIMANT and RESPONDENT arising from the arbitration clause [Cl. Ex. 1, p. 9], which provides for the settlement of the dispute [CIETAC Art. 5.2]. Arbitration clauses are liberally construed to cover every dispute related to the primary contract, meaning that all disputes “arising out of” or “arising under” the contract are within the arbitral tribunal’s purview [see, Fiona Trust, reiterated in El Nasharty; Mediterranean Enterprises, Inc.; Tracer Research Corp. (holding that an “independent wrong from any breach of the contract… does not require interpretation of the contract and is not arbitrable” under the contract); see also Cape Flattery]. By agreeing to the CIETAC Rules, CLAIMANT and RESPONDENT agreed to refer the entire dispute to CIETAC jurisdiction without providing for derogation from the CIETAC Rules [Cl. Ex. 1, p. 9; CIETAC Art. 4]. Similarly, the ICSID Convention explains, “[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy” [Czech Bank, ¶ 35].

6. To the extent that there is competence and jurisdiction, the Tribunal has the authority to determine as a preliminary matter whether the claims submitted by the parties are admissible [Waste Management; Paulsson, p. 604; Douglas, p. 297]. As stated in Waste Management, jurisdiction is the power of the Tribunal to hear the case; admissibility is whether the case itself is defective—whether it is appropriate for the Tribunal to hear it [Waste Management, ¶ 58; Methanex, ¶ 139]. RESPONDENT maintains that the contract for the lease of the M/S Pacifica Star—the cover agreement used by CLAIMANT to lease an alternate ship in an effort to mitigate damages flowing from the breach of the contract that is the subject of this arbitration—is tainted by alleged corruption. As such, RESPONDENT asserts that the Tribunal has no authority to consider the lease contract or its consequences [St. Def. ¶15, p. 39]. Therefore, RESPONDENT erroneously asserts that CLAIMANT’S damages for payments made under the contract—which all parties agree were made without any knowledge of possible corruption—are inadmissible, i.e. not recoverable [Id., ¶24].

7. One should “enquire whether in a given case the parties should reasonably be considered to have intended that contentions regarding this particular issue should be decided conclusively by the arbitrators [Paulsson, p. 615]. By virtue of “the principles of effectiveness and finality applicable to the matter of jurisdiction” [Czech Bank, ¶ 31], the Tribunal can assert jurisdiction to determine damages in event of breach, even if such an evaluation requires review of secondary contracts. Without the
ability to assert jurisdiction over the issue of damages, arbitral tribunals would lose their efficiency advantages which militate in favor of the use of arbitral tribunals in dispute resolution. However, the Tribunal does not require jurisdiction over CLAIMANT’s cover transaction with WCEA in order to assess damages relevant to the contract between CLAIMANT and RESPONDENT. Interpretation of the primary contract by the Tribunal should take into account “the consequences of commitments the parties may be considered as having reasonably and legitimately envisaged” [AMCO Asia].

8. As stated in Methanex, the core of the dispute required establishing whether the Tribunal “may adjudicate claims with respect to measures adopted or maintained by… relating to… investments” [Methanex, ¶ 139]. Following this analysis, the full extent of damages can only be determined if the cover contract, such as the cover contract between CLAIMANT and WCEA, is included in the Tribunal’s consideration. The Tribunal in Czech Bank rests its analysis on “the common will of the parties” [Czech Bank, ¶ 26], which the Tribunal uses to avoid jurisdiction of secondary agreements not reasonably envisaged at the time of the original contract. In the present case, RESPONDENT’s breach required that CLAIMANT – in an effort to mitigate damages – to enter the cover contract; RESPONDENT should have reasonably and legitimately envisaged this circumstance at time of the original contract, signing of which expressed the common will of the parties. Failing to take into account of damages the secondary contract for the M/S Pacifica Star would be an abdication of the Tribunal’s responsibility to fully decide the dispute between CLAIMANT and RESPONDENT per their agreement. Conclusively, CLAIMANT does not intend to obtain jurisdiction over the cover contract, nor does the Tribunal require it. RESPONDENT’S objection to the authority of the Tribunal to hear the claims submitted by CLAIMANT pertains to the issue of the admissibility of the claim; the Tribunal should hear the claim and render a final and binding decision.

B. RESPONDENT’S allegation that the lease is tainted by corruption is without merit

9. RESPONDENT has failed to provide clear and convincing evidence that the entire cover contract is tainted by the broker’s alleged bribery [1]. Moreover, as the contract dictates use of Mediterraneo law, Pacifica law is irrelevant to the determination of damages [2].

1. RESPONDENT has failed to provide clear and convincing evidence that the entire cover contract is tainted by the broker’s alleged bribery

10. Under both the CIETAC Rules and the Model Law, each party shall have the burden of supporting its claim or defense [CIETAC Art. 39; UNCITRAL Art 24.1]. As RESPONDENT alleges that CLAIMANT’S cover agreement with a third party was tainted by bribery, RESPONDENT has the burden of proving CLAIMANT has committed the alleged corruption [ICC 649 (demonstration of bribery]
must be made by party alleging existence of bribes; if not convinced, tribunal should reject allegations, even if tribunal has doubts about possible bribery underlying agreements]. Moreover, ICC Case No. 6474 found that prima facie evidence of corruption cannot affect a tribunal’s jurisdiction unless the arbitration clause itself was entered into via corruption and fraud [ICC 6474, ¶144].

11. RESPONDENT has presented no evidence of bribery related to the cover contract. Importantly, RESPONDENT must satisfy a high evidentiary standard, as most legal systems impose a strict standard of proof for cases involving allegations of bribery [Westinghouse II (American standard is “clear and convincing evidence”; Martin, 7 (English standard is “a degree of probability which is commensurate with the occasion”); African Holdings (ICSID standard is irrefutable evidence and particularly high standard of proof) Hilmarton (certainty of the evidence)]. The burden of proving illegality—consisting in demonstrating all the elements of the alleged crime—falls solely on RESPONDENT. Generally, bribery consists of giving value to a person with the knowledge and intent to influence a reward, often in connection with any business or transaction [see, e.g., US Federal Law 18 U.S.C. § 215].

12. Here, the elements of bribery have not been met. The contested success fee was given to the broker by CLAIMANT as contractual payment for services already rendered in connection with the chartering of a luxury yacht [Proc. Ord. 2, ¶22, p. 49]. CLAIMANT had no intent to pass a portion of the USD 50,000 success fee to anyone within the WCEA. Nor had CLAIMANT authorized any payment in this fashion to any personnel at WCEA. Unbeknownst to CLAIMANT, the yacht broker transferred some of the money to the personal assistant of Mr. Goldrich, CEO of WCEA [Res. Ex. 1, p. 41 (no one at Elite knew about the bribery)]. Because the yacht broker make this payment of his own volition—without CLAIMANT’S knowledge or authorization—RESPONDENT has failed to prove that CLAIMANT committed bribery as per Art. 1453(1).

2. As the contract dictates the use of Mediterraneo law as lex arbitri, Pacifica law is irrelevant to the determination of damages

13. Commentator Born states, “The arbitrability of disputes involving allegations of bribery is well recognized today. Such disputes no longer appear to confront arbitrators with questions of jurisdiction” [Born, 2011; Westinghouse (providing for power to investigate allegations of bribery)]. This practice is fully justified. ICC Case No. 3916 stands for the principle that arbitrators are in better position than domestic courts to decide cases related to international public order [ICC 3916]. The parties have recognized the force of this argument by including an arbitration clause to resolve disputes, appreciating the complexities of competing local laws and the interpretive challenge that would otherwise stymie efficient adjudication in domestic courts. As such, for the purpose of assessing
damages consequent to RESPONDENT’s breach, this Tribunal may investigate allegations of bribery to ensure its award will conclude the dispute before it, without any risk to having the award quashed. In doing its investigations, the Tribunal should not rely on Art. 1453 of the Criminal Code of Pacifica [i]. Even if the Tribunal applied Pacifica law, CLAIMANT has not committed bribery under Art. 1453 [ii]. Finally, CLAIMANT’s conduct was not in breach of international anti-corruption standards [iii].

i. The Tribunal should not consider Art. 1453 of the Criminal Code of Pacifica

14. The laws of Pacifica are not relevant to this dispute. Where the contract is silent with respect to the applicable substantive law, the contract will be governed in accordance with the law of the country having the closest connection to the performance of the contract [Tao, p. 84]. Here, the parties clearly agreed by signing the arbitration clause, “Any dispute arising from or in connection with this Contract shall be submitted…for arbitration” [Cl. Ex. 1, p. 9, clause 15.1; CIETAC Art. 4.2]. Accordingly, the Tribunal shall use the CIETAC procedural rules. Furthermore, the Parties also unequivocally agreed to the substantive law of Mediterraneo [Id., clause 15.2], which determines the powers and duties of the arbitrators [Dalmia; Mann, p. 4]. As such, the parties made affirmative selections of the procedural and substantive law, choosing not to use the laws of Pacifica and to recognize instead the diversity of parties in this case as well as the public policy advantages of using an arbitral tribunal with this selection of substantive law over domestic courts [supra ¶7; see, Soleimany].

ii. Even if the Tribunal were to apply Pacifica law, CLAIMANT has not committed bribery under Art. 1453

15. Pursuant to Art. 1453(1) of the Criminal Code of Pacifica, “It shall be unlawful to pay, promise to pay, or authorize payment of any money…to an employee of a third person or company in order to obtain…business with that third person” [Art. 1453(1) CCP, Res. Ex. 2, p. 42]. As stated in the Westinghouse case, evidence of knowledge on behalf of the accused that payments will be directed as bribes is necessary before allegations will affirmed and the Tribunal will conclude bribery existed [Westinghouse]. From a mere reading of the facts, CLAIMANT did not make the payment to the third party’s employee to obtain business with the third party; rather, the yacht broker transferred the money without CLAIMANT’s knowledge or authorization. Accordingly, RESPONDENT failed to prove that CLAIMANT has committed bribery as per Art. 1453(1).

16. Furthermore, although the third party’s employee was convicted for accepting the payment from the yacht broker [Art. 1453(2) CCP; Proc. Ord. 2, ¶ 26, p. 49], CLAIMANT cannot be held
vicariously liable for the alleged criminal act of its agent. In fact, the yacht broker acted as CLAIMANT’s agent for the chartering of the Pacifica Star, but he acted outside the scope of the agency agreement when he transferred a portion of his fees to the personal assistant of Mr. Goldrich. As such, CLAIMANT has not violated the Criminal Code of Pacifica in payment of the Broker Success Fee. Agency law in both common and civil law jurisdictions requires either express authorization for that transaction or creation, by the principal, of the appearance of such authority [Wool case; Granular plastic case]. In their absence, CLAIMANT cannot be held liable under the Criminal Code of Pacifica for its agent’s broker payment.

iii. CLAIMANT’s conduct was not in breach of international anti-corruption standards

17. The agreed substantive law in a commercial arbitration should be applied under the principle of party autonomy, unless it violates accepted international norms or would contravene international public policy [Kreindler, 42; Westacre; see also Sayed, pp. 268-69]. Tribunals may also expressly refer to principles of international public policy to assess the alleged illegal conduct. Under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions – which Danubia, Equatoriana, and Mediterraneo, along with the 34 OECD member nations and others have adopted – a payment constitutes bribery only if it is made to a foreign official [Proc. Ord. 2, ¶27, p. 49]. Here, CLAIMANT paid the fee to a private individual to secure the replacement vessel and not to a foreign official. Therefore, the Broker Success Fee does not constitute a bribe under international standards. RESPONDENT’s allegations do not meet the requirements necessary to render the payment a bribe.

C. An award of damages including the Broker Success Fee is enforceable under the NY Convention, despite the bribery allegations concerning the cover contract

18. Public policy defenses to enforcement under the NY Convention are construed narrowly “to encourage the recognition and enforcement of commercial arbitration agreements and international contracts” [Karaba Bodas]. With an award of damages, public policy will not have been violated under Art. V of the NY Convention [1], as well as the ultra petita principle will not have been violated [2].

1. Public policy has not been violated under Art. V of the NY Convention

19. Art. V of the NY Convention permits domestic courts to refuse recognition of an award if the agreement is not valid under the law which the parties have subjected to it [NY Convention Art. V(1)(a)], or if the recognition and enforcement of the award is contrary to public policy in that country [NY Convention Art. V(2)(b)]. Generally, courts only accede to public policy challenges of
awards in exceptional circumstances [Born, 2009, pp. 1274, 2625, 2841]. Since the applicability of Art. V is limited to a violation of basic or fundamental principles, it cannot be applied in the present case.

20. As stated above, tribunals must evaluate bribery claims under the chosen law of the parties to determine whether the claims refer to acts contrary to public policy [ICC 6248]. Moreover, if applied by this Tribunal, neither the domestic law of Pacifica, nor the international anti-corruption acts will annul this award on the basis of public policy grounds, as the payment made by CLAIMANT did not constitute a crime as per these laws [supra ¶¶ 14-17]. In sum, courts rarely annul awards on public policy grounds despite evidence of possible bribery [Mitsubishi; Westinghouse II], and there is no reason RESPONDENT’s allegations would change this.

2. The ultra petita principle has not been violated

21. Enforcement of an award may be refused on the basis of Art. V(1)(c) of the NY Convention, which states the principles of the ultra petita doctrine, but only if the party against whom enforcement is sought alleges and proves that the arbitrators have transgressed the boundaries of their authority. Art. V(1)(c) pertains to situations where the scope—not the existence—of the arbitrators’ jurisdiction is in question [Silveira/Lévy, pp. 639-78]. The main issue is whether the Tribunal departs from its mandate when examining legal grounds other than those set forth by the parties to support their claims [Id., p. 633; Rubino-Sammartano, p. 957].

22. Here, the Tribunal can consider the terms of secondary contracts—specifically those which may reasonably and legitimately envisaged—when making an assessment of the consequential damages. Therefore, the Tribunal will not exceed its authority in awarding consequential damages as the issue was properly submitted before it. Accordingly, granting such damages to CLAIMANT would not represent an ultra petita decision by this Tribunal.

III. RESPONDENT'S CHALLENGE TO PARTICIPATION OF CLAIMANT’S COUNSEL IS A MERE DISRUPTIVE TACTIC IN ATTEMPT TO SUBVERT THE ARBITRAL PROCESS AND SHOULD BE DENIED

23. It is paramount for both CLAIMANT and RESPONDENT to avoid procedural delays and to have adequate opportunity to present their case. In challenging the participation of Dr. Mercado as counsel, RESPONDENT is merely attempting to delay the proceedings by asking the Tribunal to take unusual measures to decide a conflict of interest issue for which there are established procedures. The Tribunal should deny RESPONDENT’s challenge to counsel [A]. Even if a challenge were heard as to the participation of Dr. Mercado or Professor Presiding Arbitrator, it should fail [B]. Finally,
even if it were to abstain from hearing the attorney disqualification issue, any award issued by this Tribunal will be enforceable under the New York Convention [C].

A. The Tribunal should deny RESPONDENT’S challenge to counsel

24. The parties have a fundamental due process right to retain counsel of their choice [1]. The Tribunal lacks authority to disqualify counsel under all rules relevant to this dispute [2]. As a result of its decision to challenge counsel, RESPONDENT has lost its right to challenge Professor Presiding Arbitrator at a later stage of the proceedings [3].

I. Parties have a fundamental due process right to retain counsel of their choice

25. Along with the right to an unbiased and independent tribunal, the right to equal treatment and the right to an adequate opportunity to present its case are fundamental to a party to arbitration [Waincymer, pp. 597-98; Lew/Mistelis/Kröll, p. 95]. These rights are also supported in Art. V(1)(b) of the New York Convention. As consequence to these rights, it is well-established that “a party should have virtually unlimited choice as to who represents it as its counsel in international arbitration” [Kurkela/Turunen, p. 191]. Free choice of counsel is important in two ways. First, it allows a party to enforce its substantive and procedural rights effectively in the manner it chooses [Id., p. 192]. Second, the procedure may only be fair if a party is represented by counsel it trusts [Id.].

26. The fundamental right of parties to be represented by the counsel of their choice is well reflected in the national laws in many countries. Exempli gratia, the English Arbitration Act provides that “a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him” (emphasis added) [Arbitration Act 1966 of England, § 36]. Article 3(13) of the Swiss Rules provides, in part, “The parties may be represented or assisted by person of their choice” [Swiss Rules, Art. 3(13)]. Likewise, in China the choice of an “agent” is broad, allowing parties to be represented by agents with no special requirements for the representation of a party in arbitration [Houzhi/Shengchang]. Finally, one basic right delineated by the European Convention on Human Rights is a person’s right “to defend himself in person or through legal assistance of his choosing” (emphasis added) [ECHR Art. 6(3)].

27. Almost all arbitral institutions’ rules echo the same endorsement of absolute party choice in their own representation. The CIETAC Rules provide for representation “by [a party’s] authorized Chinese and/or foreign representative(s)” [CIETAC Art. 20], while the UNCITRAL Rules state, “Each party may be represented or assisted by person chosen by it” [UNCITRAL Arbitration Rules, Art. 5]. The IBA Principles require lawyers to “respect the freedom of clients to be represented by
the lawyer of their choice” [IBA Principles, Art. 7]. The rules of the ICDR, ICC, and LCIA contain similar provisions [ICDR Arbitration Procedures, Art. 12; ICC Rules, Art. 21(4); LCIA Rules, Art. 18.1].

2. The Tribunal lacks authority to disqualify counsel under all rules relevant to this dispute

28. While any lex arbitri, institutional or ad hoc rules, expressly address the challenge to a prospective member of the Tribunal, neither the CIETAC Rules nor the UNCITRAL Model Law, which governs this dispute [supra ¶ 2], provides express authority for the Tribunal to exercise control over counsel. In contrast, party choice in selection of its counsel is paramount, thus, “[o]ne would normally expect to see such a power specifically provided for in the legal texts governing the tribunal and its operation” [Rompetrol, ¶ 16].

29. The IBA Guidelines address in great detail the duty of an arbitrator to be impartial and independent of the parties [IBA Guidelines, Art. 1 (arbitrators shall be, and remain, independent and impartial of the parties); IBA Guidelines, Art. 2; IBA Guidelines Art. 7]. Further, the Explanation to General Standard 7 clarifies that such duty on a party exists “to reduce the risk of abuse by unmeritorious challenge of an arbitrator’s impartiality or independence” [Explanation to General Standard 7]. Thus, the duty is placed on arbitrators, not counsel, to remain impartial and independent.

30. On the other hand, The IBA Principles enumerate duties of counsel in international proceedings. While standards exist for independence [IBA Principles, Art. 1.1] and conflicts of interest [IBA Principles, Art. 3.1], these standards reaffirm counsel’s duty to the client to avoid conflicts between a client’s interest and counsel’s interest. The IBA Principles are silent on counsel’s duty to an arbitral tribunal. Further, Dr. Mercado’s Bar Association Code of Ethics, which governs her conduct as counsel, is silent on the issue of conflicts of interest between counsel and arbitrators and offers no guidance to the Tribunal. Thus, there exists no authority by which the Tribunal could issue an order disqualifying Dr. Mercado from CLAIMANT’S counsel team.

31. Such authority may be found in a recent ICSID arbitration read in conjunction with the IBA Guidelines. Although the ICSID rules conferred no explicit authority to disqualify counsel, a tribunal, applying a more general power to guarantee the legitimacy of the process, found that it had an inherent power to disqualify a member of the respondent’s legal team and did in fact exercise that authority [Hrvatska, ¶ 15]. The Tribunal accepted as a general rule that “parties may seek such representation as they see fit – and that this is a fundamental principle” [Id., ¶ 24]. The Hrvatska Tribunal centered its reasoning on the fundamental idea that the proceedings should not be tainted by any justifiable doubt as to the qualifications of the arbitrators; its main concern was the
appearance of impropriety due to the fact that counsel was affiliated with the same barrister’s chambers as the President of the Tribunal [Id.; see also, Société Technimon]. Upon closer examination, this unprecedented decision seems to turn on its own facts, as the decision on the motion to disqualify counsel was based mainly on counsel’s refusal to disclose when he had been retained and what role he intended to play at the hearing [Hrvatska, ¶ 26].

32. The Hrvatska Decision cannot be a binding precedent for this Tribunal, nor should the Tribunal consider it as persuasive authority, as on 30 August, 2011, CLAIMANT promptly disclosed the addition of Dr. Mercado to RESPONDENT [Proc. Ord. 2, ¶ 29, p. 50]. Dr. Mercado did not have a duty to disclose facts to the arbitrators [supra ¶ 30], which even if true [Proc. ord. 2, ¶ 29, p. 50], in any event were already made known to the entire Tribunal by RESPONDENT [St. Def., ¶¶ 17-22, p. 39].

33. In a subsequent ICSID case, the Tribunal noted that there was no requirement for legal representatives to be impartial or unbiased and reiterated the principle of freedom of choice in legal representation [Rompetrol, ¶ 19]. Importantly, the claimant informed the respondent and the Tribunal of the addition of the counsel at issue within a short time after the new counsel’s appearance [Id., ¶ 26]. Commenting on the Hrvatska Decision, the Tribunal noted that by disqualifying counsel, the Hrvatska Tribunal was imposing an ad hoc sanction due to extraordinary circumstances, which indisputably impaired the integrity of the arbitral process [Id., ¶ 25; see also Porter]. Such a sanction is not necessary here, as Dr. Mercado poses no real danger to the integrity of the proceedings.

3. As a result of its decision to challenge counsel, RESPONDENT has lost its right to challenge Professor Presiding Arbitrator at a later stage of the proceedings

34. Despite RESPONDENT’s assertion that “if the challenge to Dr. Mercado is not accepted by the tribunal, we reserve our right to challenge Professor Presiding Arbitrator as arbitrator in this case” [St. Def., ¶ 23, p. 40], it has foreclosed its opportunity to challenge Professor Presiding Arbitrator. The CIETAC Rules provide a fifteen-day period within which a party may challenge an arbitrator in writing after it becomes aware of a reason for challenge [CIETAC, Art. 30.3]. Counsel for CLAIMANT notified counsel for RESPONDENT on 30 August 2011 that Dr. Mercado was joining CLAIMANT’s counsel team [Proc. Ord. 2, ¶ 29, p. 50]. RESPONDENT knew of the relationship between Professor Presiding Arbitrator and Dr. Mercado, at the latest, by the date of the filing of its Statement of Defense, 2 September 2011 [St. Def., p. 40]. Thus, the fifteen-day period in which to challenge Professor Presiding Arbitrator has lapsed. RESPONDENT may not extend the time period or preserve its claim by a simple declaratory statement in its Statement of Defense. As the Rompetrol case makes clear, “there should be no room for any idea to gain ground that challenging counsel is a
handy alternative to raising a challenge against the tribunal itself, with all the consequences that the latter implies” [Rompetrol, ¶ 21].

B. Even if a challenge were heard as to the participation of Dr. Mercado or Professor Presiding Arbitrator, it should fail

35. The Tribunal should adhere to the strict “Real Danger” test in considering the alleged conflict of interest [1]. Under this test, the relationship between Professor Presiding Arbitrator and Dr. Mercado poses no real danger to the integrity of the arbitral proceedings [2].

1. The Tribunal should adhere to the strict “Real Danger” test in considering the alleged conflict of interest

36. Because conflicts of interest are typically raised in the context of arbitrator challenge, there is little guidance as to arbitral procedure for challenges to counsel. However, because the concerns of conflict of interest involved are substantially similar to concerns raised in arbitrator challenges, the Tribunal may look to tests used in arbitrator challenges to inform its analysis. The same test could then be used if the Tribunal accepted a later challenge by RESPONDENT to Professor Presiding Arbitrator. In choosing an approach analogous to that used in arbitrator challenges, a party choosing to challenge counsel would gain no additional benefit by raising its concerns in the context of a challenge to counsel rather than a challenge to an arbitrator.

37. The Tribunal should adopt a strict test such as the “Real Danger” test, first laid out by the House of Lords in R v. Gough, which requires that there be a real danger of bias on the part of a member of a tribunal [Gough]. French courts have endorsed a strict test similar to the “Real Danger” test by placing a heavy burden on the applicant to prove “a situation which is liable to affect the judgment of the arbitrator by creating a definite risk of bias in favour of a party to the arbitration” (emphasis added) [TAI].

38. Adhering to a strict test would ensure that party autonomy and choice of representation is respected and that counsel is disqualified only in the narrowest of circumstances where the integrity of the arbitral process is at stake [see, Rompetrol, ¶ 16]. Considerations of practicality and efficiency also weigh in favor of adopting the strict “Real Danger” test. Disqualifying a member of a party’s counsel team is a serious matter and requires the party to find new legal counsel. This would entail unnecessary inconvenience, delay, and expense. As such, bias challenges often are used “by parties who seek to delay and disrupt ICA proceedings” [Luttrell, p. 274]. Although these considerations may be subordinate to proper invocations of concerns of judicial impartiality [Luttrell, p. 63], a strict test
would allow the Tribunal to dispose of frivolous challenges to counsel and address only those posing a real danger to the process.

39. Further, adoption of the strict “Real Danger” test would enhance the enforceability of any award issued by the Tribunal by ensuring procedural fairness. Procedural fairness is critical to the enforcement of an award under the UNCITRAL Model Law and the New York Convention. Art. V(1)(b) of the New York Convention allows a court to refuse enforcement if the party against whom an award is invoked is "unable to present his case" [New York Convention, Art. V(1)(b)]. Therefore, because party freedom in choice of counsel is a fundamental policy in many countries and institutions [supra ¶¶ 26-27], an award may be denied effect where the Tribunal has interfered with a party's choice of counsel.

2. Under this test, the relationship between Professor Presiding Arbitrator and Dr. Mercado poses no real danger to the integrity of the proceedings

40. Relationships which generate the most concern of arbitrator bias are those which are commercial or pecuniary in nature [Park, p. 705]. Personal or professional relationships are less suspicious and will raise fewer concerns [Id.]. The IBA Guidelines identify circumstances which relate to arbitrator bias challenges and categorize them into three lists [IBA Guidelines, pp. 17-19]. The Red List deals with situations where a conflict of interest clearly exists; the Orange List describes situations where a conflict could justifiably exist in the eyes of the parties; and the Green List involves situations of no conflict of interest where disclosure is unnecessary [Id.]. The IBA Guidelines contain several provisions which involve relationships between arbitrators and counsel. Orange List 3.3 involves a "relationship between an arbitrator and another arbitrator or counsel." However, all of the enumerated examples involve much closer relationships than those in the case at hand. Orange List Item 3.3.6 includes "a close personal friendship… between an arbitrator and a counsel of one party, as demonstrated by the fact that the arbitrator and the counsel regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations" [IBA Guidelines, p. 22]. Green List 4.4 covers "[c]ontacts . . . with counsel for one of the parties" [IBA Guidelines, Art. 4.4]. Such contacts include membership in the same professional association or social organization, or situations in which arbitrator and counsel for one of the parties have previously served together as arbitrators or as co-counsel [IBA Guidelines, p. 24].

41. The relationship between Professor Presiding Arbitrator and Dr. Mercado is analogous to Green List 4.4 in that it is not a “close personal friendship,” yet is social and professional in nature.
Dr. Mercado is a Visiting Lecturer at the same university as Professor Presiding Arbitrator [St. Def., ¶ 18, p. 39], but has only "occasional contact" with Professor Presiding Arbitrator; the majority of her contact is with the ITL Faculty's full-time staff [St. Def., ¶ 20, p. 39]. Although Dr. Mercado is godmother to the Professor's youngest child and is on first name terms with his children, she is closest to the Professor's wife, who she occasionally meets for lunch or coffee [St. Def., ¶ 21, p. 39]. Therefore, because the relationship between Professor Presiding Arbitrator and Dr. Mercado is incidental to other relationships (that of the ITL faculty or Professor Presiding Arbitrator's wife), their contacts with one another are not of the type that creates a conflict requiring disclosure, much less disqualification.

42. In fact, situations like the one at issue here are not uncommon in international arbitration, which is a small and familiar community [KFTCIC (Court allowed two lawyers from same barrister's chambers to participate in arbitration—one as arbitrator, one as counsel)]. The international arbitration community is made up of many repeat players who “demonstrate a high degree of role reversibility" [Luttrell, p.5]. "[H]e (or she) who sits as arbitrator in one matter is just as likely to stand as counsel in the next" [Id.]. Indeed, the international arbitration system works well because its actors know each other, as the principal players acquire familiarity with each other, "this rotation of roles contributes greatly to the smooth running of these mechanisms of arbitration." [Dezalay/Garth, p. 49]. These ideals are reflected in the jurisprudence of the European Court of Human Rights, which has held that membership in the same professional body does not cause a lack of objective impartiality [HAR v. Austria; H v. Belgium], and that indirect personal interests are not sufficient to imply lack of impartiality [Academy Training].

43. Due to the silence of the rules relating to this matter, the overarching policy of respecting party choice in legal representation, the public policy implications affection national and local jurisdictions and the fact that the issues at play fall outside the scope of the arbitration agreement, should not allow RESPONDENT to circumvent the procedures in place for challenging arbitrators and should refrain from hearing the issue of counsel disqualification. The Tribunal should find that RESPONDENT has forfeited his ability to challenge Professor Presiding Arbitrator at a later time. If the Tribunal should decide to hear either the counsel challenge or an arbitrator challenge, the relationship between Professor Presiding Arbitrator and Dr. Mercado poses no real danger to the impartiality of the Tribunal. The Tribunal should thus feel comfortable proceeding to rule on the merits of the dispute and issuing an enforceable award.
C. Even if it were to abstain from hearing attorney disqualification issue, any award issued by this Tribunal will be enforceable under the New York Convention

44. Art. V(2)(b) of the New York Convention permits a national court to refuse to recognize and enforce an arbitral award if it would be “contrary to public policy of that country” [Art. V(2)(b) NY Convention]. Because allegations of counsel misconduct raise complex domestic public policy concerns, such issues are beyond the purview of an arbitral tribunal [FGG, p. 332; Bidermann]. Counsel conflict of interest involves interpretation of the local jurisdiction’s codes of professional responsibility and rules on attorney ethics and discipline [Bidermann], which are best resolved by a national court [Bennett, p. 5; Simon, p. 5]. Commentators Brower and Schill argue that treaty-based arbitration (i.e. ICSID), which exercises “a genuinely judicial function in international dispute settlement,” can presume powers to develop and enforce regulations in relation to counsel conduct [Brower/Schill, p. 496]. However, commercial arbitration differs in that it is solely consent based, ad hoc in nature and is constrained by commercial instruments between parties [Id.]. As such, commercial arbitrators have less authority to regulate counsel conduct.

45. American case law “makes clear that courts, not arbitrators should decide attorney disqualification motions based on conflicts of interest that arise in the context of arbitration proceedings” [Simon, p. 5]. In Bidermann, counsel for respondent made an application to the arbitral tribunal to disqualify claimant’s counsel. Claimant moved to stay arbitration on the grounds that the issue of attorney disqualification was non-arbitrable. A New York Court agreed that arbitration was an inappropriate method for resolution of issues implicating important public interests in stating that “the regulation of attorneys, and determinations as to whether clients should be deprived of counsel of their choice… implicate fundamental public interests and policies which should be reserved for courts and should not be subject to arbitration” [Bidermann, p. 23]. Bidermann has been cited in a number of American court opinions which similarly found issues of attorney disqualification non-arbitrable [See, e.g., R3 Aerospace (“disqualification of an attorney for alleged conflict of interest is substantive matter for the courts, not the arbitrator”); Munich Reinsurance (stating that courts have determined that “possible attorney disqualification… is not capable of settlement by arbitration”).

46. Respondent’s application for the disqualification of Dr. Mercado involves important issues of attorney ethics and discipline which concern Dr. Mercado’s home state of Danubia. Although the relevant rules in Danubia do not specifically address conflicts of interest in arbitration [Proc. Ord. 2, ¶ 40, p. 51], Danubia has a strong interest in regulation of attorneys within its borders and uniform
application of its rules of its bar rules, codes and guidelines. If the Tribunal were to intervene, there could be a risk of offending the public policy of Danubia.

47. The Tribunal should not decide the counsel conflict of interest issue [supra ¶ 24]. However, if the Tribunal desires findings on the issue, it could stay proceedings to allow a determination of the issue by a Danubian national court, pursuant to the Tribunal’s authority to issue interim measures [CIETAC Art. 21(3)]. This would allow for the effective resolution of the issue in the appropriate forum, consistent with Danubian public policy, ultimately leading to a resolution of the dispute on the merits and the issuance of an enforceable award under the NY Convention.

IV. THE CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) GOVERNS THE MERITS OF THIS DISPUTE

48. Pursuant Art. (1)(a), the CISG applies to the contract executed by CLAIMANT and RESPONDENT on 26 May 2010, as both the lex arbitri (the law of Mediterraneo) and the countries of the respective headquarters of the parties to the present dispute, are party to the Convention [Schlechtriem, p. 42; Mushroom case]. Also of note, the seat of arbitration is Danubia, which has adopted the UNCITRAL Model Law [App. Arb., ¶ 20, p. 7]. Furthermore, the contract is within the scope of the application of the CISG [A] and was breached by RESPONDENT [B].

A. The Parties formed a valid contract for the supply, installation and configuration of the master control system aboard the M/S Vis

49. On 26 May 2010, in order to refurbish its yacht, the M/S Vis, with the latest in cabin and conference technologies [App. Arb., ¶ 6, p. 5], CLAIMANT concluded a contract with RESPONDENT, whereby RESPONDENT would supply, install and configure the master control system [Cl. Ex. 1, p. 9]. The contract was for the supply of goods [Art. 3(1) CISG], for which CLAIMANT did not supply any part of the materials necessary for the manufacture or production of the control system [Id., App. Arb., ¶ 6, p. 5]. Furthermore, Art. 3(2) CISG is not applicable in the present case, as the preponderant part of the obligations of RESPONDENT, the party who furnished the goods, consisted in the supply of goods and not of labor or other services [Ferrari, pp. 322-25]. Indeed, CLAIMANT agreed to pay USD 650,000 for the control system, but only USD 49,950 for the actual installation and configuration [Cl. Ex. 1, p. 9]. Because RESPONDENT was wholly in control of manufacturing the control system and the primary purpose of the contract was the supply of said control system, a valid contract for the sale of goods was concluded under the provisions of CISG.

B. RESPONDENT fundamentally breached its contract with CLAIMANT by failing to timely deliver the control system
50. RESPONDENT breached the contract by failing to deliver the master control system by the date specified in the contract or by a reasonable date given the intent of the parties. Under Art. 33(a) CISG, a seller must deliver goods by the date fixed by or determinable from the contract [Art. 33(a) CISG; American Juice]. Under Art. 25 CISG, a breach is fundamental if it results in such detriment to the other party as to substantially deprive him of what he is entitled to expect under the contract [Art. 8(2) CISG]. Given the clear installation deadlines contained in the contract [Flexo label printing machine case].

51. The contract between CLAIMANT and RESPONDENT unambiguously states that 12 November 2010 was the deadline for completion [Cl. Ex. 1, p. 9]. Furthermore, according to Art. 8(2) CISG, the reasonable person standard should be used to interpret the conduct of the parties [Art. 8(2) CISG; Lautenschlager, pp. 259-90]. As RESPONDENT completed its configuration and verification on 11 March 2011, RESPONDENT failed to deliver the control system by the contractually agreed upon date [App. Arb., ¶ 16, p. 6]. RESPONDENT’s four-month delay undoubtedly deprived CLAIMANT of its expectations. The detriment to CLAIMANT was substantial as it frustrated CLAIMANT’s larger goal of refurbishing the M/S Vis in time for a conference scheduled for February 2011, of which RESPONDENT was aware [Proc. Ord. 2, ¶ 14, p. 47].

V. CLAIMANT IS ENTITLED TO DAMAGES IN THE AMOUNT OF USD 670,600

52. Pursuant to Art. 45(1)(b) CISG, if the seller fails to perform any of its obligations under the contract, the buyer may claim damages as provided in Art. 74 and Art. 77 CISG [Art. 45(1)(b) CISG], in order to compensate for the harm suffered as a consequence of the seller’s breach [Secretariat Commentary to Art. 45, ¶ 5; Will, p. 45; Enderlein/ Maskow, ¶ 7; OGH 28 Apr. 2000 (aggrieved party pay claim damages under Art. 74 even if it also could claim other remedies under Art. 75 or 76).

53. The purpose of Art. 74 CISG is to place the aggrieved party in the same pecuniary position it would have been in had the breach not occurred and had the contract been properly performed [Schlechtriem/Schwenzer 2005, p. 445; Secretariat Commentary to Art. 74, ¶ 3]. Under Art. 74 CISG, CLAIMANT may recover damages of a “sum equal to the loss, including loss of profit, suffered … as a consequence of the breach” [Art. 74 CISG; Delchi]. Furthermore, Art. 74 limits damages recoverable to those that “do not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract,” [Gruber/Stoll, 2005, p. 765; Cooling system case]. The same limitation of foreseeability applies to incidental damages [Id; Art. 74 CISG]. By including the words “foresaw or ought to have foreseen,” CISG distinguishes damages there were actually
contemplated from those that were merely foreseeable [Murphey, p. 435-36] thereby incorporating both a subjective test and an objective test [Sutton, pp. 743-44]. As commentator Knapp elaborates, whenever the non-breaching party alerts the breaching party to the possible consequences of breach in due time, the breaching party is considered to have known the facts and matters enabling it to foresee those consequences [Knapp, 1987; Art 74 ¶ 11-2.12].

54. In addition, the actual non-performance loss refers to the buyer not receiving what it has contracted for and is recoverable under Art. 74 CISG [Schlechtriem/Schwenzer 2005, 2010, p. 1006]. When the seller is late in delivering the goods, the buyer is entitled to compensation for the loss resulting from the delay. Under such circumstances, the buyer may recover the expenses for reasonable measures taken to bridge the temporal gap until the arrival of the goods, as well as to avoid consequential loss [OLG Köln (buyer required to contract with third party due to seller’s delay in delivery)]. Accordingly, RESPONDENT should be required to pay USD 670,600 to CLAIMANT as this sum represents the amount of all foreseeable damages that CLAIMANT has suffered as a result of RESPONDENT’s breach, namely USD 448,000 for the cost of chartering a substitute vessel for the M/S Vis, USD 60,600 for the standard yacht broker fee, USD 50,000 for the yacht broker’s success fee, and USD 112,000 for the rebate payment to WCEA.

55. CLAIMANT is entitled to all damages incurred since they were foreseeable as a possible consequence of breach at the time of contract [A]. The damages awarded should not be reduced because CLAIMANT took reasonable measures to mitigate its loss pursuant to Art. 77 CISG [B].

A. CLAIMANT is entitled to all damages incurred since the damages were foreseeable as a possible consequence of breach at the time of contract

56. The charter of a substitute vessel was a foreseeable cover transaction at the time of contract and was made in accordance with Art. 74 CISG [I]. The standard yacht broker commission, the yacht Broker Success Fee, and the rebate payment to the WCEA were foreseeable incidental costs of chartering a substitute vessel [2].

   1. The charter of a substitute vessel was a foreseeable cover transaction at the time of contract and was made in accordance with Art. 74 CISG

57. Consequential damages are recoverable when the non-breaching party is threatened by a breach of contract claim by a third party. Under Art. 74 CISG, only consequential damages that were foreseeable may be recovered [Schneider, p. 2]. Commentators Kritzer and Murphey respectively note that although there is no reference to incidental damages, there is nothing in the legislative
history of the CISG to suggest an intention to abolish incidental damages [Kritzer, p. 19; Murphey, p. 459]. In accordance with this analysis, and in light of the principle of full compensation, commentator Schneider argues that “damages which would be characterized as incidental in other legal systems should be recoverable as consequential damages under the CISG” [Schneider, p. 2]. This view is further confirmed by Professor Schlechtriem who writes that the recoverability of incidental damages under Art. 74 CISG is “beyond debate” [Schlechtriem/Schwenzer 2010, p. 1009; Frozen meat case]. As to the incidental damages, commentators Gruber and Stoll argue from the so-called "American Rule,” that "[o]nly commercially reasonable charges, expenses, or commissions are to be compensated as incidental damages under US-UCC" [Gruber/Stoll, Art. 74 ¶ 2]. Whether the damages claimed by the aggrieved party are reasonable must be ascertained, and not only in the context of whether the damages could have been mitigated [Weaving machines case].

58. On 5 August 2010, CLAIMANT alerted RESPONDENT to the fact that it had scheduled a conference of the WCEA to be held aboard the M/S Vis from 12 to 18 February 2011 [Proc. Ord. 2, ¶ 14, p. 47]. As a result, RESPONDENT knew or should have reasonably known that, in order to use the M/S Vis as a conference facility, the installation of the control system and ten weeks of testing were needed before the start of the conference [App. Arb., ¶ 7 p. 5]. Considering that RESPONDENT was aware of CLAIMANT’S intention to use the M/S Vis as the venue, RESPONDENT should reasonably have foreseen that CLAIMANT would need to charter a comparable substitute vessel should the M/S Vis not be available by the contractually agreed upon date.

59. Under Art. 74 CISG, CLAIMANT is “entitled to damages for pecuniary loss resulting from claims by third parties as a result of the breach of contract” [CISG-AC Opinion No. 6]. RESPONDENT breached the contract by failing to complete installation, configuration and verification of the control system until four months after the contractually agreed upon date for completion and approximately one month after the February conference [App. Arb., ¶ 16, p. 6; Proc. Ord. 2, ¶ 14, p. 47]. RESPONDENT’S failure to deliver the goods on time directly caused CLAIMANT’S loss and put CLAIMANT at risk of breaching its contract with WCEA [Lindane case]. Under the circumstances, chartering an equivalent luxury yacht (the M/S Pacifica Star) from a third party at the cost of USD 448,000 was a reasonably foreseeable cover transaction, as CLAIMANT had a preexisting contract with WCEA [App. Arb., ¶ 17, p. 7]. Accordingly, RESPONDENT should be required to pay the costs incurred by CLAIMANT, i.e., the reasonable rental fee of USD 448,000.
2. The standard yacht broker commission, the yacht Broker Success Fee, and the rebate payment to the WCEA were foreseeable incidental costs of chartering a substitute vessel

60. The standard yacht broker commission of 15% of the yacht rental fee was necessary to charter a substitute vessel as a result of RESPONDENT’s breach [i]. Similarly, the Broker Success Fee in the amount of USD 50,000 was necessary to secure a replacement vessel [ii]. RESPONDENT should also be required to pay USD 112,000 to cover the partial refund made to the WCEA [iii].

   i. The standard yacht broker commission of 15% of the yacht rental fee was necessary to charter a substitute vessel

61. Incidental losses are additional costs that the aggrieved party sustains which are unrelated to the realization of its expectation interest, but are instead incurred in the effort to avoid any further detriment [Schlechtriem/Schwenzer 2010, p. 1009; Cf § 2-710 and § 2-715(1) UCC]; they can be recovered when reasonable [Blase/Höttler]. Here, CLAIMANT had a preexisting contractual relationship with WCEA for a highly publicized conference aboard a luxury yacht, the M/S Vis. RESPONDENT’s notice that it would not be able to deliver and install the master control system on time was unexpected and was given only two months prior to the date the refurbishment was scheduled to be finished [Cl. Ex. 2-3, pp. 10-11]. In order to avoid a possible breach of contract claim by WCEA, CLAIMANT had to find a comparable substitute yacht. This substitute yacht had to be sufficiently large, luxurious, and equipped with conference technologies, the same features that the M/S Vis offered. CLAIMANT had limited time and opportunity to find a comparable substitute yacht. In order to secure a replacement yacht with such unique qualifications in such a short time, CLAIMANT needed to hire a yacht broker. A yacht broker has knowledge of the market for chartering luxury yachts, including knowledge of how to find a comparable vessel in such short time. Thus, it was reasonably foreseeable that the CLAIMANT would require a specialized broker.

62. Additionally, the broker commission of 15% is the standard in the industry in the relevant market [App. Arb., ¶¶ 4, 18, pp. 4-7]. As it was reasonably foreseeable that CLAIMANT would need to hire a yacht broker to find a comparable luxury yacht as a result of RESPONDENT’s breach, it was also foreseeable that CLAIMANT would be required to pay the standard yacht broker fee for the required services. RESPONDENT should have foreseen it as a reasonable incidental cost of securing a substitute vessel following RESPONDENT’s breach [Lentils case (holding “standard” charge by professional attorney appropriate as reimbursement for attorney fees)]. As the yacht rental fee was USD 448,000; the standard 15% broker commission amounted to USD 60,600.
ii. The yacht Broker Success Fee of USD 50,000 was a necessary incidental payment required to secure a replacement vessel

63. RESPONDENT is obligated to pay USD 50,000 for the Broker Success Fee, as the fee was a necessary payment to secure the M/S Pacifica Star in accordance with Art. 74 CISG. In an international context such as the present one, companies often require agents to facilitate their transactions. Moreover, the amount of the fee must be examined in light of the circumstances [Schaefer, p. 6; Weaving machines case]. The brief window CLAIMANT had to secure a substitute vessel necessitated the use of an agent and commensurate payment. USD 50,000 represented 12% in additional commission, beyond the 15% standard commission. ICC Case No. 9333 found a 27% commission justified under similar circumstances, which included consideration of the difficulty involved in securing a deal [ICC 9333]. Such fees happen occasionally, and are more common when the broker has a difficult time locating a yacht [Proc. Ord. 2, ¶23, p. 49, Nickel-plating machine case]. Given time pressures created by RESPONDENT’s late breach, incentives for a yacht broker to seek a high commission, and the scarcity of vessels suitable for CLAIMANT’s purpose, USD 50,000 was necessary and foreseeable as well as an effective mitigation against potentially higher damages if CLAIMANT could not secure another vessel.

iii. RESPONDENT is obligated to pay USD 112,000 to cover the partial refund made to WCEA as it was a reasonably foreseeable consequence of RESPONDENT’s breach

64. The CISG recognizes that breach of contract may not only cause a party to suffer direct and incidental losses, but also losses from dealing with third parties [Schlectriem/Schwenzer, ¶21]. These damages are subject to limitations of foreseeability and mitigation [Id.]. In select circumstances, a breach of contract may cause an aggrieved party to incur additional costs in an attempt to avoid further losses [Korpela, pp. 73-168]. These costs are in addition to CLAIMANT’s loss from delay in performance under the original agreement [CISG-AC Opinion No. 6, Art. 4.1].

65. Terms of CIETAC and CISG do not preclude rebate payments beyond the scope of specific contract terms. Art. 74 CISG does not expressly provide for recovery for loss of goodwill, but such damages are implicitly permitted under the Article’s principle of full compensation [CISG-AC Opinion No. 6, Art. 7.2; Blase/Höttler; Schneider, p. 226, Murphey, p. 459]. UNIDROIT Art. 7.4.2 also allows for recovery of goodwill [UNIDROIT Art. 7.4.2, cmt. 5]. In such situations, the “aggrieved party is only expected to take action which is reasonable, or to refrain from action which is unreasonable, in the circumstances; it need not act in any way that will damage its commercial reputation just to reduce the non-performing party's liability” [Chengwei, ¶ 14.5.2]. Importantly, losses
recoverable as damages are not merely confined to actual losses, but can include future losses and loss of chance as well [Zeller, pp. 43-44]. Previous panels have noted, “Parties do not enter into contracts involving risk in order to be repaid their costs. To limit the recovery of the victim of a breach to actual expenditures is to transform it into a lender, which is intolerable when that party was full risk for the amount of investments made on the strength of the contract” [CISG-AC Opinion No. 6, Art. 2.3; Himpurnae].

66. As a direct and foreseeable result of RESPONDENT’s breach, CLAIMANT was unable to furnish the M/S Vis as conference facility and was consequently forced to expend time, effort and money to make alternate arrangements. Cancelling the February conference would have posed a greater loss of revenue for CLAIMANT, especially as it stood to damage its long-standing relationship and future business opportunities with WCEA. Recognizing the difference in the fair market value of services to WCEA – likely including a premium for state-of-the-art technologies and novel services – CLAIMANT returned the rebate payment of USD 112,000. [Hot-rolled steel billets case (due to seller’s breach buyer could not fulfill contract with third party, CIETAC arbitral tribunal held seller obligated to compensate buyer for economic loss, including penalty of USD 125,000); Dried sweet potato case (seller’s delayed delivery of goods prevented buyer from fulfilling contract for resale with third party, arbitral tribunal awarded buyer USD 699,000 as costs of compensating third party].

67. The rebate payment made to WCEA functioned to restore the relationship to where it would have been had RESPONDENT performed its contractual obligations in a timely fashion. It was hence a payment aimed at re-establishing goodwill. Damages for loss of goodwill may be awarded if the aggrieved party can prove with reasonable certainty that its reputation has been damaged by the breach [St. Calzados Magnanni; HG Zürich case; LG Darmstadt case]. As WCEA required a luxury yacht and could have withdrawn business if such a yacht was not provided, the payment was necessary to prevent permanent and extensive harm to CLAIMANT’s reputation and loss of one of its most important clients [St. Cl., p.7].

68. RESPONDENT should have foreseen such payment in event of breach. If unable to supply products as promised, parties along the supply chain are recommended to find the best possible alternative, as CLAIMANT did here. RESPONDENT need not foresee the exact amount of damages, but rather only the assumed risk and potential liability that would result in damages at the conclusion of the contract under Art. 74 CISG [Singh/Zeller, p. 228]. RESPONDENT should have foreseen that CLAIMANT would need make rebate payment should the M/S Vis not be available for that date. Additionally, inability to use the vessel resulted in a loss of opportunity to earn profit for CLAIMANT;
aggrieved parties may seek damages for the loss of chance or opportunity to earn a profit [Schlechtriem/Schwenzer 2005, ¶ 22; UNIDROIT Art. 7.4.2(1) cmt. 2]. Such costs were reasonably foreseeable consequences of RESPONDENT’s breach.

69. CLAIMANT has satisfied its burden of proof as to the recoverable value of the rebate payment and goodwill. As one court noted, “it is particularly in the area of quantifying the amount of lost profits that courts impose the risk of uncertainty on the breaching party whose breach gave rise to the uncertainty” [Mid-America]. As CLAIMANT executed its mitigation of damages with reasonable costs for both the rebate and goodwill, any claims challenging the USD 112,000 figure requires substantial countervailing evidence from RESPONDENT, who bore risk over the uncertainty of the value of such payments. RESPONDENT has thus far failed to meet this burden.

70. Parties may agree upon the remedies available for breach of contract [Art. 6 CISG]. However, the terms of agreement between CLAIMANT and RESPONDENT do not place a contractual limit on damages or preclude recovery for rebate payments to CLAIMANT’s clients when it is not able to perform services per terms of agreements with third-parties due to failure of RESPONDENT-suppliers [CISG-AC Opinion No. 6, Art. 1.3]. Accordingly, as the payment to WCEA was a commercially reasonable and foreseeable incidental consequence of RESPONDENT’s breach, RESPONDENT should be required to pay CLAIMANT USD 112,000, representing the cost of the partial rebate to WCEA.

B. The awardable damages should not be reduced pursuant to Art. 77 CISG because CLAIMANT took reasonable measures to mitigate its losses

71. Art. 77 CISG has been interpreted as a statement of “public policy against waste,” imposing a duty to mitigate losses and, according to commentator Vilus, a duty to cooperate in case of breach [Opie, ¶ II; Vilus, ¶ 3]. Under Art. 77 CISG, RESPONDENT bears the burden of proving that CLAIMANT did not reasonably mitigated its losses, a burden that RESPONDENT has failed to meet [1]. Rather, CLAIMANT clearly satisfied its duty to mitigate avoidable losses [2], as well as its duty to cooperate in good faith by taking “reasonable” measures to mitigate loss [3].

1. RESPONDENT bears and has failed to meet the burden of proving that CLAIMANT did not reasonably mitigate its losses

72. Under Art. 77 CISG, CLAIMANT was required to mitigate its loss resulting from RESPONDENT’s breach [Art. 77 CISG; Electro-erosion case]. As the breaching party, RESPONDENT bears the burden of proving that CLAIMANT did not “reasonably” mitigate losses [Tantalum carbide case]. RESPONDENT may not merely assert that CLAIMANT failed to take measures to mitigate the
amount of loss, but must instead specify the measures that would have reduced the amount of damages [Id.]. Since RESPONDENT has not specified any other measures whatsoever that CLAIMANT could have taken to reduce the claimed damages, RESPONDENT has failed to meet its burden. On the contrary, as discussed CLAIMANT took reasonable measures in satisfaction of its Art. 77 duty and the awardable damages should hence not be reduced on Art. 77 grounds.

2. **CLAIMANT has satisfied its duty to mitigate avoidable losses**

73. As noted by commentator Knapp, Art. 77 CISG requires parties to take adequate measures to mitigate their loss, including loss of profit, upon breach of contract [Knapp, pp. 559-567]. These measures must be those aimed at lessening the effects of the breach as far as reasonably possible [Id.] Additionally, UNIDROIT Principles expressly provide that an “aggrieved party is entitled to recover any expense reasonably incurred in attempting to reduce the harm,” which is implied in Art. 77 CISG [UNIDROIT Art. 7.4.8(2); Opie]. As numerous commentators and cases emphasize, such measures for mitigation frequently include purchasing substitute goods [Win, ¶ 6.3; Cold-rolled coils case; Polyester thread case], as well as contracting with a third-party supplier due to inability of the breaching party to deliver goods on time [Nova Tool]. Indeed, as Commentator Saidov notes, such measures seem to be “usual” in international sales [Saidov, fn 247]. However, aggrieved buyers may not be held to have violated the principles of mitigation where delivery time is short and there is a high level of difficulty in finding a suitable substitute supplier [Chinese goods case].

74. RESPONDENT breached the contract by failing to deliver and install the control system in time for the M/S Vis to function as a conference venue in February 2011. As a result of RESPONDENT’s breach, CLAIMANT was forced to mitigate its loss by chartering a substitute vessel as venue for the WCEA conference. Since the M/S Vis was a luxury yacht with state-of-the-art conferencing facilities, finding an adequate replacement was difficult and CLAIMANT had to hire a yacht broker to locate one [App. Arb., ¶ 17, p. 7]. CLAIMANT’s charter of a substitute yacht as well as the costs incidental to the charter were aimed at lessening CLAIMANT’s loss. Had CLAIMANT repudiated the contract with WCEA, it would have suffered greater loss than it did as a result of chartering a substitute vessel [Proc. Ord. 2, ¶ 17, p. 48]. Hence, upon learning of RESPONDENT’s breach, CLAIMANT promptly took reasonable measure to mitigate its loss by finding a comparable vessel. At the time, no other measures were reasonable in CLAIMANT’s position. CLAIMANT’s actions fulfilled its duty to mitigate its losses.

3. **CLAIMANT has satisfied its duty to cooperate in good faith and to take “reasonable” measures to mitigate its loss**
75. Under Art. 77 CISG, the measures for mitigation available to the non-breaching party shall be reasonable “under the particular circumstances” and should be those that “could be expected... of a person acting in good faith” [Stoll, 2005, p. 588; Wu, ¶ 6.3; Propane case]. What is “reasonable” depends on and should be construed in light of the particular circumstances of the case in question [Knapp, ¶ 23, p. 560]. Such circumstances include each party’s skills and position as a businessman having regard to, for example “ingenuity, experience, and financial resources,” among others [Lookofsky, p. 103]. This interpretation of Art. 77 CISG is consistent with the general requirement to interpret the provisions of the CISG with regard to need for good faith dealings in international trade [Wu, ¶ 2.1] and has also been described as a duty to cooperate [Vilus, ¶ 3].

76. Under Art. 7(1) CISG, the parties to a contract in international trade are required to deal with each other in good faith and tribunals interpreting the CISG in cases brought under CIETAC have, in practice, given effect to this requirement [Wu, ¶ 2.1; Silicon metal case]. Consequently, when interpreting whether measures aimed at mitigation were “reasonable” under the circumstances under Art. 77 CISG, this Tribunal should take into account the principle of good faith dealings.

77. CLAIMANT has satisfied its duty to cooperate in good faith and to take reasonable measures to mitigate its loss. Once it became clear that RESPONDENT would not comply with the contractual deadline for the supply and installation of the control system, CLAIMANT made a good faith effort to avoid loss by offering WCEA use of one of its on-shore conference facilities for the February conference [App. Arb., ¶ 17, p. 7]. WCEA, however, refused to accept this alternative and, in order to avoid a breach of contract claim and to maintain business goodwill with this high-profile client, CLAIMANT was forced to find an adequate substitute vessel. Had CLAIMANT instead repudiated the contract with WCEA, its losses would have exceeded those suffered by CLAIMANT following its efforts to mitigate [Proc. Ord. 2, ¶ 17, p. 48]. Even though the damages resulting from RESPONDENT's breach and presently claimed amount to a significant sum, USD 670,600, CLAIMANT’s actions were reasonable considering the circumstances of the case and RESPONDENT should therefore be required to pay CLAIMANT USD 670,600.

78. Further, in a good faith effort to cooperate, CLAIMANT kept RESPONDENT informed of its actions to mitigate and offered to pay 50% of the loss suffered as a consequence of RESPONDENT’s breach if RESPONDENT agreed to pay the remaining 50%. RESPONDENT, however, refused to accept this generous offer, thereby refusing to cooperate in good faith [Cl. Ex. 4, p. 11]. Consequently, CLAIMANT’s recoverable damages should not be reduced on Art. 77 grounds.
VI. RESPONDENT IS NOT EXEMPT FROM LIABILITY UNDER ARTICLE 79 CISG

79. Under Art. 79(1) CISG, a party is only exempt from liability for non-delivery or late delivery if it proves that the failure is “due to an impediment beyond his control” and the impediment was unforeseeable at the conclusion of the contract or the consequences of the impediment were unavoidable or could not be overcome. Under Art. 79(2) CISG, if a failure to deliver is caused by a third party, whom has been engaged to perform the whole or part of the contract, the breaching party is only exempt if both he and the third party would be exempt under Art. 79(1) CISG. Here, neither RESPONDENT nor Specialty meets the requirements for exemption under Art. 79(1) [A]. Moreover, RESPONDENT is not exempt from liability under Article 79(2) CISG [B]. Finally, RESPONDENT is still liable for damages under Art. 79(3) CISG [C].

A. Neither RESPONDENT nor Specialty is exempt under Article 79(1) CISG

80. Under Art. 79(1) CISG, the burden of proof rests with the party seeking exemption to prove non-delivery is “due to an impediment beyond his control” and the impediment was either unforeseeable at the conclusion of the contract or its consequences were unavoidable or insurmountable. Here, the shortage of the D-28 chip was within the control of both RESPONDENT and Specialty [1]. Moreover, both RESPONDENT and Specialty could have taken a potential shortage into account at the contract was concluded [2], and both RESPONDENT and Specialty could have overcome or avoided the consequences caused by the shortage of the D-28 chip [3].

1. The shortage of the D-28 chip was within the control of both RESPONDENT and Specialty

81. Only in exceptional circumstance, where “the contracting party was not able to choose or control the third person,” may the contracting party be exempt under Art. 79(1) CISG [CISG-AC Opinion No. 7]. According to Commentator Schlechtriem the exemption applies only when the seller “could neither choose nor control his auxiliary suppliers and it was not possible to procure, produce or repair the goods in any other manner” [Schlechtriem, p. 103]. By maintaining control of whom to contract with, the seller “guarantees’ his ability to perform” [Schlechtriem, p. 100; Stoll; Vine wax case].

82. Here, the contract between CLAIMANT and RESPONDENT only set performance specifications and did not require a D-28 chip [Proc. Ord. 2, ¶ 5 p. 46]. Moreover, CLAIMANT made no restrictions on the parties to whom RESPONDENT could engage to manufacture the processing units for the control system [St. Def., ¶ 6, p. 38; Proc. Ord. 2, ¶ 5-6 p. 46]. RESPONDENT had full autonomy in choosing to contract with Specialty and was wholly aware that Specialty processing
units were designed to use the D-28 chip [App. Arb., p. 5]. During contract formation, RESPONDENT had the ability to restrict parties with which Specialty might contract to manufacture the processing units, to disclaim liability, to set specifications for the units, and to choose which risks, if any, it was willing to undertake. As RESPONDENT had discretion in choosing to contract with Specialty, RESPONDENT had responsibility for the subsequent decisions taken by Specialty [see Schelechtriem, p. 103].

83. Additionally, Specialty was secured to create a series of semi-configurable processing units [App. Arb., ¶ 8, p. 5], but the process used to create these units was wholly within the discretion of Specialty. Nothing in the contract between CLAIMANT and RESPONDENT required Specialty to use D-28 chips [Cl. Ex. 1, p. 9]; the specifications in Annex 1 of the contract related primarily to performance [Proc. Ord. 2, ¶ 5, p. 46]. By contracting with High Performance, Specialty brought an outside party into its sphere of risk. Moreover, by designing its processing unit to be compatible with only the D-28 chip, Specialty autonomously restricted its choice of supplier. Finally, Specialty, at the time of contracting with High Performance could have taken the risk into account and sought contractual guarantees of performance, which would assure Specialty’s supply of D-28 chips in the event of a shortage. Specialty had substantial freedom in creating the processing units and choosing, which risks, if any, to undertake.

2. Both RESPONDENT and Specialty could have taken a potential shortage into account at the time the contract was concluded

84. Should the Tribunal find that the shortage of D-28 chips was not within RESPONDENT’s control, a seller is still liable for impediments beyond his control as long as the impediment was either reasonably foreseeable or known to him at the conclusion of the contract [Schlechtriem]. As all impediments to performance are foreseeable to some degree [Secretariat Commentary to CISG Art. 79, ¶ 5], Commentator Loofosky notes that unforeseeability will be very difficult for the breaching CISG promisor to prove [Loofosky, p. 161] and tribunals have applied a strict approach to assessing a lack of foreseeability [Steel Bar case]. When another party is involved, it is nearly always foreseeable that the party may fail to perform [Loofosky, p. 161].

85. Because RESPONDENT approached Specialty to manufacture the processing units, [App. Arb., p. 5], it was reasonably foreseeable that Specialty may fail to perform. Moreover, The processing units RESPONDENT purchased from Specialty use the novel D-28 chip [Id]. By relying on one supplier and one type of chip, RESPONDENT was aware, or should have been aware, that a supply disruption would significantly impede his ability to perform CLAIMANT’S contract. It was
reasonably foreseeable that if anything were to happen to the supply of chips, there would be no substitute, and, therefore, performance of the contract would be delayed. A commercially prudent party would protect itself by including appropriate liability limitation or liability exclusion clauses in a contract with a supplier, or by developing contingency plans and procuring alternate suppliers. [Construction materials case]. Here, RESPONDENT refused to develop an alternate course of action, relying solely on one supplier who relied solely on one chip. As it is reasonably foreseeable that any impediment may cause such a plan to delay performance, RESPONDENT should be precluded from exemption.

86. It was likewise foreseeable for Specialty that limiting itself to a single supplier could lead to negative consequences in its ability to perform. Specialty was aware that the D-28 chips were not on the market yet and a comparable chip would not be on the market for another 6 months [App. Arb., ¶ 9, p. 5]. It is foreseeable that High Performance may have failed to perform [Loofosky, 161], and therefore foreseeable that a setback in the supply of the chip would lead to a delay in the production of the processing units. With this in mind, Specialty should have developed a back-up plan in case of such a change in market conditions [Construction Materials case]. Its failure to do so precludes it from relying on Art. 79.

87. Even if RESPONDENT or Specialty could not reasonably have foreseen the shortage of D-28 chips at the conclusion of the contract, “he must also prove that he could neither have avoided the impediment nor overcome it nor avoided or overcome the consequences of the impediment” [Secretariat Commentary to CISG Art. 79, ¶ 7]. A lack of supply from a seller’s intended source does not exempt a seller from liability under Art. 79(1) as the seller can usually avoid breach by securing an alternative source. [Loofosky, p. 162]. As a German case notes, “even if the exact quality required by the contract could not be acquired, replacement material slightly deviating with respect its composition but reasonable according to commercial perception could have been acquired. The Buyer would have accepted the delivery of such slightly worse material” [Germany. 02/28/1997]. Moreover, as the seller guarantees financial capability to procure and produce the goods, increased procurement and production costs do not constitute exempting impediments [Schlechtriem, p. 101; Iron molybdenum case].

88. Here, RESPONDENT and Specialty Device’s source of processing units did “dry up”, in the sense that they were not longer distributable [Loofosky, p. 162; Cl. Ex. 2, p. 10]. However, the contract with CLAIMANT does not bar RESPONDENT from purchasing substitute processing units that satisfy the performance requirements from a different supplier [Proc. Ord. 2, ¶ 5, p. 46]. Likewise,
Specialty was not barred from manufacturing processing units that used a chip other than the D-28 chip: the record does not indicate that use of D-28 chip was the only means of meeting the performance specification nor does it suggest that redesign of the processing units to use an alternate chip would have been costly and delayed performance [Proc. Ord. 2, ¶ 5, p. 46] is a risk born by the seller [Schlechtriem, p. 101; Iron Molybdenum case] and no fault of CLAIMANT.

B. RESPONDENT is not exempt under Article 79(2) CISG

89. Under Art. 79(2) CISG, if a failure is caused by a third party which has been engaged to perform the whole or part of the contract, the breaching party is only exempt if both it and the third party would be exempt under Art. 79(1) CISG. Specialty fails to meet the Art. 79(1) CISG requirements for exemption [supra ¶ 80]. In any regard, RESPONDENT cannot rely on Specialty as a third party under Art. 79(2) CISG [1]. Finally, Specialty cannot claim exemption, thereby providing exemption for RESPONDENT, by relying on a theory of non-delivery by High Performance [2].

1. Specialty is not a third party under Art. 79(2) CISG.

90. Art. 79(2) is applicable only where “[a party’s] failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract [Art. 79(2) CISG].” Commentators and adjudicatory bodies interpret the provision to be applied in only narrow circumstances. A “third person” under Art. 79(2) excludes “suppliers of the goods or of raw materials to the seller” [Secretariat Commentary to Art. 65, ¶ 12]. A seller exercises control over its suppliers, and Art. 79(1) is thus sufficient for assessing a seller’s liability when a supplier defaults [CISG-AC Opinion No. 7, ¶ 18]. Indeed, Art. 79(2) exception applies to suppliers only in very limited cases, primarily “when the seller could neither choose nor control his auxiliary suppliers and it was not possible to procure, produce or repair the goods in any other manner” [Schlechtriem, p. 103, Omnibus case]. If a seller chooses his supplier, the seller “must be held responsible for the behavior of the latter” [ICC, Chemical fertilizer case]. Tribunals refuse to consider defaults of suppliers under Art. 79(2) [Wool case; Warm rolled steel plates case], reasoning that a liable seller could bring a separate claim against its supplier if it so desired [Compound fertilizer case].

91. Specialty is not a “third person” under art. 79(2) CISG. Specialty is one of several “specialist suppliers” engaged by RESPONDENT for the M/S Vis project [App. Arb., ¶ 8, p. 5]. Similar to the contractual relationship in the Chemical Fertilizer case, Specialty was chosen by RESPONDENT to supply the processing units that RESPONDENT then integrated into the control system for the M/S Vis [App. Arb., ¶ 8, p. 5; Chemical fertilizer case]. RESPONDENT had a choice of suppliers; the original
contract required neither engagement of Specialty nor the use of D-28 chips, which was specified in the design of Specialty and absent from the main contract [Cl. Ex. 1, p. 9; Proc. Ord. 2, ¶ 5, p. 46; Omnibus case]. Specialty is a supplier chosen freely by RESPONDENT and thus not a “third person” under Art. 79(2).

92. Assuming arguendo that Specialty is considered a third person, it was not “engaged to perform the whole or a part of the contract” [Art. 79(2) CISG]. To be so engaged, there must be an “organic link” between the main and sub-contracts, by which the third person “should know that his action is a means of performing the main contract” [Tallon, p. 584]. Commentator Honnold provides two instances of this unique commercial relationship: (1) the party “turns over to a third party (T) the performance of [the party’s] duty to manufacture goods to buyer’s (B’s) specifications;” and (2) the party “delegates [to a third party its] duty to procure goods and deliver them to a buyer (B) [Honnold § 434(1), p. 487; Schlechtriem, p. 103 (giving example of “subcontractors who are engaged by the seller to perform directly to the buyer”); Loofo asky (describing example of third person having obligations to seller that arise from those of seller toward buyer)].”

93. Here, Honnold’s first situation of delegation of contractual duty is inapplicable as RESPONDENT never “turn[ed] over” part of its “duty to manufacture goods to buyer’s specifications [Honnold § 434(1), p. 487 Cl. Ex. 1, p. 9].” Rather, RESPONDENT maintained full responsibility for the contractual obligation to “supply, install and configure the master control system” [Id] and the contract made no mention of Specialty or engaging any third party [Id]. Honnold’s second situation of delegation is also inapplicable as RESPONDENT did not entrust Specialty with the task of procuring and delivering its processing units directly to CLAIMANT [App. Arb., p. 5]. Specialty delivered the processing units to RESPONDENT, who then incorporated the units into the control system for installation [Cl. Ex. No. 2, p. 10]. RESPONDENT thus retained responsibility for full and final performance. Finally, RESPONDENT’s relationship with Specialty does not meet Tallon’s “organic link” standard [Tallon, p. 584]. Specialty was not aware of the conference aboard the M/S Vis until 5 August 2010, indicating a lack of awareness of the main contract between RESPONDENT and CLAIMANT [Proc. Ord. 2, ¶ 14, p. 47]. There was thus no direct link between the main contract binding RESPONDENT and the sub-contract between RESPONDENT and Specialty

2. **Even if Specialty’s failure to perform was caused by High Performance, Specialty would not be exempt under Art. 79(2) CISG**

94. Specialty cannot rely on High Performance as a third party under Art. 79(2) CISG because High Performance is a general supplier [4]. Even if High Performance were considered a third party
for Art. 79(2) purposes, High Performance would not be exempt under Art. 79(1) CISG, thus denying Specialty exemption under Art. 79(2)(b) CISG [i].

i. High Performance is not a third party under Art. 79(2) CISG because High Performance is a general supplier

95. Under Art. 79(2), “third persons” exclude general suppliers, except when the seller is contractually restricted [Schlechtriem, p. 103]. Here, High Performance is a general supplier because High Performance was producing the D-28 chip generally and purchasable as-is by any buyer apart from contractual requirements [App. Arb., ¶ 9, 12-16, p. 5-6; Cl. Ex. 3, p. 11]. Moreover, Specialty chose to engage High Performance as its supplier by designing the processing units to include the D-28 chips [App. Arb., ¶ 9, p. 5]. Although the D-28 chip featured “novel technology that offered significant improvements over rival chips,” it was available only from High Performance prior to February 2011 [App. Arb., ¶ 9, p. 5] and Specialty was never obligated to use the D-28 chip by Annex I of the main contract [Proc. Ord. 2, ¶ 5, p. 46]. Indeed, alternative designs not using D-28 chip were possible [Proc. Ord. 2, ¶ 12, p. 47].

ii. Even if High Performance were considered a third party, High Performance would not be exempt under Art. 79(1) CISG

96. A breaching party is only exempt under Art. 79(2) CISG if both he and the third party would be exempt under Art. 79(1) CISG. High Performance does not meet the requirements for exemption under Art. 79(1) CISG. High Performance could have taken a potential shortage into account at the contract was concluded. Although the fire was an accident and not within High Performance’s control [Proc. Ord. 2, ¶ 8 p. 47], the consequences of any impediment were reasonably foreseeable [Chengwei]. Again, “all potential impediments to the performance of a contract are foreseeable to one degree or another. Such impediments as wars, storms, fires, government embargoes and the closing of international waterways have all occurred in the past and can be expected to occur again in the future [Secretariat Commentary to CISG Article 79, ¶ 5]. Knowing that it was the only supplier of D-28 chips, that there would not be similar chips on the market for another six months, [App. Arb., ¶ 9, p. 5], that it was responsible for the shipment of D-28 chips to several buyers, [Cl. Ex. 3, p. 11], and that the chips available in its warehouse would not cover all the shipments which were due [Cl. Ex. 3, p. 11]. High Performance should have foreseen a possible shortage of chips and should have contractually provided for the possibility that it was not able to deliver to all its buyers. Therefore, High Performance had the option to either contract out of liability in the case of a shortage of chips, or, to bear the risk of a failure to deliver the D-28 chips to...
all its buyers. High Performance chose the latter path and should accept liability flowing from such a decision.

97. Moreover, High Performance could have overcome or avoided the consequences caused by the shortage of the D-28 chips. The only true exception to the requirement to overcome an impediment is where the “seller cannot provide that which was contracted for” [Secretariat Commentary to CISG Article 79, ¶ 9]. In the Tomato concentrate case, the Tribunal held that “heavy rainfalls in France had certainly reduced the production of tomatoes and provoked an increase in its price, but it did not cause the perishing of the entire tomato crop” [Tomato Concentrate case]. There, the Tribunal established that only the eradication of the entire crop would make the seller’s performance impossible and so as to provide exemption. [Id.]. This was clearly not the case for High Performance. High Performance had enough chips to completely perform its obligations to Specialty. It deliberately and without justification refused to allocate the chips to Specialty and thus fundamentally breached its contractual obligations [Proc. Ord. 2, ¶ 9, p. 47].

C. RESPONDENT is still liable for damages caused by delay under Art 79(3) CISG

98. Even if the Court finds that RESPONDENT is exempt, under CISG 79(1) or 79(2), from liability due to an impediment, under CISG 79(3), RESPONDENT’s exemption from liability ended at the time the processing units became available again. The Secretariat Commentary states that the impediment’s removal “reinstates the obligations of both parties under the contract” [Secretariat Commentary to Art. 79, ¶ 14]. RESPONDENT cannot claim that it is exempt from liability because of the failure to receive the processing units [St. Def. ¶ 7, p. 37]. Specialty’s processing units were shipped to RESPONDENT on 29 November 2010 [App. Arb., ¶ 16, p. 6]. However, RESPONDENT did not install the control system until 11 March 2011 [Id.]. Under CISG 79(3), RESPONDENT is liable for the delay in delivering and installing the control systems from 29 November 2010 to 11 March 2011. As the claimed impediment ended months before the control systems were delivered and installed, RESPONDENT should be liable for the delay.

REQUEST FOR RELIEF

For the reasons stated above, CLAIMANT respectfully requests that the Tribunal:

(1) Declare admissible all claims submitted by CLAIMANT;

(2) Find no jurisdiction over the disqualification of counsel, or, in the alternative, find that Dr. Elisabeth Mercado continue to serve on CLAIMANT’s legal team;

(3) Find that RESPONDENT has breached its contract with CLAIMANT, and therefore
RESPONDENT is liable for full damages;

(4) Find that CLAIMANT took reasonable measures to mitigate its losses and that damages therefore should not be reduced;

(5) Award CLAIMANT full compensation for the incurred damages in the amount of USD 670,600, plus interest and costs of arbitration, including legal fees, which will be calculated after the evidentiary hearing.

(signed)

\s\ Vivian Ban
\s\ Victor Ban
\s\ Jessica Bees und Chrostin
\s\ Kylie Chiseul Kim
\s\ Jessica Moyer
\s\ Neil Rao
\s\ Michael Springer