NINETEENTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
Vienna, Austria 30 March – 5 April 2012

MEMORANDUM FOR CLAIMANT

UNIVERSITY OF ZURICH

On behalf of

Mediterraneo Elite Conferences Services, Ltd
45 Conference Place
Capital City, Mediterraneo

CLAIMANT

Against

Equatoriana Control Systems, Inc
286 Second Avenue
Oceanside, Equatoriana

RESPONDENT

ANGELINA SGIER • DÉSIRÉE KLINGLER • BENJAMIN EIBI • MATTHIAS LEE MANN
I. RESPONDENT FORFEITED ITS RIGHT TO CHALLENGE PROF. PRESIDING ARBITRATOR .. 2
   A. The Tribunal should not consider RESPONDENT’s reservation of the right to
      challenge Prof. Presiding Arbitrator as a sufficient challenge .................. 2
   B. RESPONDENT cannot introduce a proper challenge at this point in time anymore
      because the deadline according to Art. 30(3) CIETAC Rules has expired ........ 3

II. DR. MERCADO SHOULD NOT BE REMOVED FROM CLAIMANT’S LEGAL TEAM .......... 4
   A. The Tribunal should not assume competence to decide upon the removal of
      Dr. Mercado ................................................................................................. 4
   B. In any event, there is no legal basis to exclude Dr. Mercado ..................... 5
      1. There is no legal basis for Dr. Mercado’s removal in the applicable hard law.... 6
      2. There is no legal basis for Dr. Mercado’s removal in any soft law provision ..... 6
         a. The Tribunal should not consider any soft law ................................... 6
         b. Even if soft law was considered, no soft law would contain a legal basis for
            Dr. Mercado’s removal ............................................................................. 7
   C. In any event, the circumstances in the present case do not justify the removal of
      Dr. Mercado ................................................................................................. 7
      1. The facts in the present case greatly differ from the Hrvatska Case ............ 8
      2. The facts in the case at hand do not give rise to justifiable doubts as to
         Prof. Presiding Arbitrator’s impartiality ................................................... 9
         a. The private relationship does not give rise to justifiable doubts ............. 9
         b. The professional relationship does not give rise to justifiable doubts ........ 9
         c. The previous arbitrations do not give rise to justifiable doubts .............. 10
III. THE TRIBUNAL HAS AUTHORITY TO RULE UPON ALL CLAIMS CONNECTED WITH THE LEASE CONTRACT ........................................................................................................................................ 11

ARGUMENT ON THE SUBSTANTIVE ISSUES...................................................................................... 12

IV. RESPONDENT IS LIABLE FOR ALL DAMAGES INCURRED BY CLAIMANT DUE TO RESPONDENT’S BREACH OF CONTRACT ................................................................................................................................. 12
A. RESPONDENT breached the contract under Art. 33(b) CISG by failing to deliver the master control system in time ................................................................................................................................. 13
B. RESPONDENT is not exempt from liability under Art. 79(2) CISG................................. 13
1. Specialty Devices is not exempt from liability under Art. 79 CISG ...................... 14
   a. Specialty Devices is not exempt under Art. 79(1) CISG as it bears the procurement risk for the D-28 chips ................................................................................................................................. 15
   b. Even if Specialty Devices was exempt under Art. 79(1) CISG, it would not be exempt under Art. 79(2) CISG ................................................................................................................................. 16
2. In any event, RESPONDENT is not exempt according to Art. 79(2) in connection with Art. 79(3) CISG as it failed to perform in time after the impediment had ceased ........................................................................................................................................ 17
V. RESPONDENT MUST PAY CLAIMANT USD 670’600 IN DAMAGES.............................. 19
A. The damage claims in connection with the lease contract are allowable since CLAIMANT has clean hands and the lease contract is valid ................................................................. 19
   1. CLAIMANT has the right to claim damages since it has clean hands .............. 20
   2. CLAIMANT’s damages do exist because the lease contract between CLAIMANT and Mr. Goldrich is valid ........................................................................................................................................ 22
      a. According to the laws of Mediterraneo, Equatoriana and Danubia the lease contract is valid ........................................................................................................................................ 22
      b. The lease contract is valid because there is no transnational public policy according to which bribery of private individuals is a crime ......................................................... 23
      c. Even if the Tribunal applied the law of Pacifica, the lease contract is valid 25
B. The prerequisites under Arts. 74 CISG for CLAIMANT’s damage claims are met 26
   1. CLAIMANT is entitled to claim the expenses made for chartering the M/S Pacifica in the amount of USD 448’000 ........................................................................................................................................ 26
      a. The costs for the lease fee is a recoverable damage .................................. 27
      b. The cost for the lease fee is a foreseeable damage for RESPONDENT ....... 27
c. CLAIMANT fulfilled its obligation to mitigate its damages ....................... 27

2. CLAIMANT is entitled to claim the expenses made for the standard broker commission of USD 60’600 .................................................................................................................. 28

3. CLAIMANT is entitled to claim the expenses made for the yacht broker’s success fee in the amount of USD 50’000 ............................................................................................................. 29

4. CLAIMANT is entitled to claim the expenses made for the ex gratia payment in the amount of USD 112’000 .................................................................................................................................. 30
   a. Damages to reputation and goodwill are recoverable ............................ 30
   b. Damages to reputation and goodwill are foreseeable .............................. 30
   c. The ex gratia payment is to be considered as a recoverable mitigation cost 31

REQUESTS FOR RELIEF .................................................................................................................. 33
### INDEX OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
</tr>
<tr>
<td>AfA</td>
<td>Application for Arbitration</td>
</tr>
<tr>
<td>Art./Arts.</td>
<td>Article / Articles</td>
</tr>
<tr>
<td>CCP</td>
<td>Criminal Code of Pacifica</td>
</tr>
<tr>
<td>cf.</td>
<td>confer (compare)</td>
</tr>
<tr>
<td>CIETAC</td>
<td>China International Economic and Trade Arbitration Commission</td>
</tr>
<tr>
<td>Cl. Exh.</td>
<td>CLAIMANT’s Exhibit</td>
</tr>
<tr>
<td>DAL</td>
<td>Arbitration Law of Danubia</td>
</tr>
<tr>
<td>Dr.</td>
<td>Doctor</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention for the Protection of Human Rights and Fundamental Freedoms</td>
</tr>
<tr>
<td>edn</td>
<td>edition</td>
</tr>
<tr>
<td>eds</td>
<td>editors</td>
</tr>
<tr>
<td>e.g.</td>
<td><em>exempli gratia</em> (for example)</td>
</tr>
<tr>
<td>et seq./et seqq.</td>
<td><em>et sequens/sequentes</em> (and the following)</td>
</tr>
<tr>
<td>i.e.</td>
<td><em>id est</em> (that is)</td>
</tr>
<tr>
<td>IBA</td>
<td>International Bar Association</td>
</tr>
<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Commission Of Jurists, Geneva</td>
</tr>
<tr>
<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
</tr>
<tr>
<td>ITL</td>
<td>International Trade Law</td>
</tr>
<tr>
<td>M/S</td>
<td>Motor Ship</td>
</tr>
<tr>
<td>No./Nos.</td>
<td>Number/Numbers</td>
</tr>
<tr>
<td>NY</td>
<td>New York</td>
</tr>
<tr>
<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>p./pp.</td>
<td>page/pages</td>
</tr>
<tr>
<td>para./paras.</td>
<td>paragraph/paragraphs</td>
</tr>
<tr>
<td>PO</td>
<td>Procedural Order</td>
</tr>
<tr>
<td>Rsp. Exh.</td>
<td>RESPONDENT’S Exhibit</td>
</tr>
<tr>
<td>SoD</td>
<td>Statement of Defense</td>
</tr>
<tr>
<td>UCP</td>
<td>Uniform Customs and Practice for Documentary Credits</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
</tr>
<tr>
<td>USD</td>
<td>United States Dollar</td>
</tr>
<tr>
<td>v.</td>
<td>versus</td>
</tr>
<tr>
<td>Vol.</td>
<td>Volume</td>
</tr>
</tbody>
</table>
| WM           | Wertpapier-Mitteilungen (Publications of the WM-Group, a German editor’s association)
## INDEX OF AUTHORITIES

<table>
<thead>
<tr>
<th>Cited as</th>
<th>Source</th>
<th>Cited in</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arfazadeh</td>
<td>Homayoon Arfazadeh, <em>Ordre public et arbitrage international à l’épreuve de la mondialisation</em> (Schulthess, Geneva/Zürich/Basel, 2005)</td>
<td>91</td>
</tr>
<tr>
<td>Cited as</td>
<td>Source</td>
<td>Cited in</td>
</tr>
<tr>
<td>-----------------</td>
<td>------------------------------------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>Cited as</td>
<td>Source</td>
<td>Cited in</td>
</tr>
<tr>
<td>------------------</td>
<td>--------------------------------------------------------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>Cited as</td>
<td>Source</td>
<td>Cited in</td>
</tr>
<tr>
<td>------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>Edelkötter</td>
<td>Frank Edelkötter, <em>Der Anwalt in Deutschland und in England: eine rechtsvergleichende Untersuchung im europäischen Kontext</em> (LIT, Munich, 2005)</td>
<td>15</td>
</tr>
<tr>
<td>Fischer</td>
<td>Nicole Fischer, <em>Die Unmöglichkeit der Leistung im internationalen Kauf- und Vertragsrecht</em> (Duncker &amp; Humbolt, Berlin, 2001)</td>
<td>63, 69</td>
</tr>
<tr>
<td>Fontaine/de Ly</td>
<td>Marcel Fontaine and Filip de Ly, <em>Droit des contrats internationaux: analyse et rédaction de clauses</em> (2nd edn, Bruylant, Bruselles, 2003)</td>
<td>65</td>
</tr>
</tbody>
</table>

IX
<table>
<thead>
<tr>
<th>Cited as</th>
<th>Source</th>
<th>Cited in</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(Dispute Resolution International, Vol. 1 No. 1, June 2007, pp. 58-72)</td>
<td></td>
</tr>
<tr>
<td>Goebel</td>
<td>Roger J. Goebel, <em>Legal Practice Rights of Domestic and Foreign Lawyers in the United States</em>, in Mary C. Daly and Roger J. Goebel (eds), Rights, Liability, and Ethics in International Legal Practice</td>
<td>15</td>
</tr>
<tr>
<td>Kröll/Mistelis/Perales</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(C.H. Beck, Munich, 2011)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(JurissNet, New York, 2006)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(C.H. Beck, Munich, 1991)</td>
<td></td>
</tr>
<tr>
<td>Cited as</td>
<td>Source</td>
<td>Cited in</td>
</tr>
<tr>
<td>------------------</td>
<td>------------------------------------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>Huber/Mullis</td>
<td>Peter Huber and Alastair Mullis, <em>The CISG: a new textbook for students and practitioners</em> (Sellier European Law, Munich, 2007)</td>
<td>52</td>
</tr>
<tr>
<td>Jacobus/Rohner/Hefty</td>
<td>John L. Jacobus, Thomas Rohner and Andrew J. Hefty, <em>Conflicts Of Interest Affecting Counsel in International Arbitrations</em> (Mealey’s International Arbitration Report, Vol. 20, No. 8, August 2005)</td>
<td>20</td>
</tr>
<tr>
<td>Janser</td>
<td>Jacqueline Janser, <em>Die Haftung des Verkäufers für Vorlieferanten, insbesondere bei mangelhafter Ware, nach CISG, OR und BGB</em> (Schulthess, Zurich, 2002)</td>
<td>63, 66</td>
</tr>
<tr>
<td>Cited as</td>
<td>Source</td>
<td>Cited in</td>
</tr>
<tr>
<td>---------------</td>
<td>--------------------------------------------------------------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td><strong>Kuhlen</strong></td>
<td>Dydra Kuhlen, <em>Produkthaftung im internationalen Kaufrecht</em></td>
<td>66</td>
</tr>
<tr>
<td></td>
<td>(Wittmann, Augsburg, 1997)</td>
<td></td>
</tr>
<tr>
<td><strong>Leipziger</strong></td>
<td>Deborah Leipziger, <em>The Corporate Responsibility Code Book</em></td>
<td>94</td>
</tr>
<tr>
<td></td>
<td>(2nd edn, Greenleaf Publishing, Sheffield, 2010)</td>
<td></td>
</tr>
<tr>
<td><strong>Magnus in Staudinger</strong></td>
<td>Ulrich Magnus, in Julius von Staudinger (ed), <em>Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG)</em></td>
<td>124</td>
</tr>
<tr>
<td></td>
<td>(12th edn, Seller-de Gruyter, Berlin, 2005)</td>
<td></td>
</tr>
<tr>
<td>Cited as</td>
<td>Source</td>
<td>Cited in</td>
</tr>
<tr>
<td>---------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>Poudret/Besson</td>
<td>Jean François Poudret and Sébastien Besson, <em>Comparative Law of International Arbitration</em> (2nd edn, Schulthess, Zurich, 2007)</td>
<td>6, 43, 49</td>
</tr>
<tr>
<td>Cited as</td>
<td>Source</td>
<td>Cited in</td>
</tr>
<tr>
<td>----------------</td>
<td>--------------------------------------------------------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>Sachs</td>
<td>Gunnar Sachs, <em>Verhaltensstandards für Schiedsrichter</em> (Carl Heymanns, Cologne/Berlin/Munich, 2008)</td>
<td>24, 28</td>
</tr>
<tr>
<td>Cited as</td>
<td>Source</td>
<td>Cited in</td>
</tr>
<tr>
<td>--------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>Cited as</td>
<td>Source</td>
<td>Cited in</td>
</tr>
<tr>
<td>--------------------------------</td>
<td>------------------------------------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>Cited as</td>
<td>Source</td>
<td>Cited in</td>
</tr>
<tr>
<td>------------------</td>
<td>------------------------------------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>Westermann</td>
<td>Harm Peter Westerman, in Wolfgang Krüger and Harm Peter Westermann (eds), Münchener Kommentar zum Bürgerlichen Gesetzbuch, Schuldrecht, Besonderer Teil, Finanzierungsleasing, HeizkostenV, BetriebskostenV, CISG (5th edn, C.H. Beck, Munich, 2008)</td>
<td>89</td>
</tr>
<tr>
<td>Witz/Salger/Lorenz</td>
<td>Wolfgang Witz, Hanns-Christian Salger and Manuel Lorenz, International Einheitliches Kaufrecht, Praktiker Kommentar und Vertragsgestaltung zum CISG (Recht und Wirtschaft, Heidelberg, 2000)</td>
<td>113</td>
</tr>
</tbody>
</table>
## INDEX OF COURT DECISIONS

<table>
<thead>
<tr>
<th>Cited as</th>
<th>Source</th>
<th>Cited in</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Australia</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Scrap Steel Case</em></td>
<td><em>Downs Investment Pty Ltd. v. Perwaja Steel SDN BHD</em>, Supreme Court of Queensland, 17 November 2000, Case No. SC 10680</td>
<td>113</td>
</tr>
<tr>
<td></td>
<td>CISG Online No. 587</td>
<td></td>
</tr>
<tr>
<td><strong>Austria</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Propane Gas Case</em></td>
<td><em>Friedrich S. OHG v. H GmbH &amp; Z GmbH &amp; Co.</em>, Oberster Gerichtshof (Supreme Court), 6 February 1996, Case No. 10 Ob 518/95</td>
<td>128</td>
</tr>
<tr>
<td></td>
<td>CISG Online No. 224</td>
<td></td>
</tr>
<tr>
<td><strong>Finland</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Plastic Grass Carpet Case</em></td>
<td>Helsingin hovioikeus (Helsinki Court of Appeals), 26 October 2000, Case No. S 00/82</td>
<td>124</td>
</tr>
<tr>
<td></td>
<td>CISG Online No. 1078</td>
<td></td>
</tr>
<tr>
<td><strong>Germany</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Vine Wax Case</em></td>
<td>Bundesgerichtshof (Federal Supreme Court), 24 March 1999, Case No. VIII ZR 121/98</td>
<td>63</td>
</tr>
<tr>
<td></td>
<td>CISG Online No. 396</td>
<td></td>
</tr>
<tr>
<td><em>Stainless Wire Case</em></td>
<td>Bundesgerichtshof (Federal Supreme Court), 25 June 1997, Case No. VIII ZR 300/96</td>
<td>113, 115</td>
</tr>
<tr>
<td></td>
<td>CISG Online No. 277</td>
<td></td>
</tr>
<tr>
<td>Cited as</td>
<td>Source</td>
<td>Cited in</td>
</tr>
<tr>
<td>-----------------------</td>
<td>------------------------------------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>Iron Molybdenum Case</td>
<td>Oberlandsgericht Hamburg (Higher Regional Court Hamburg), 28 February 1997, Case No. 1 U 167/95</td>
<td>69</td>
</tr>
<tr>
<td></td>
<td>CISG Online No. 261</td>
<td></td>
</tr>
<tr>
<td>Tannery Machines Case</td>
<td>Oberlandesgericht Köln (Higher Regional Court Cologne), 8 January 1997, Case No. 27 U 58/96</td>
<td>109</td>
</tr>
<tr>
<td></td>
<td>CISG Online No. 217</td>
<td></td>
</tr>
<tr>
<td>Used Car Case</td>
<td>Oberlandesgericht Köln (Higher Regional Court Cologne), 21 May 1996, Case No. 22 U 4/96</td>
<td>128</td>
</tr>
<tr>
<td></td>
<td>CISG Online No. 254</td>
<td></td>
</tr>
<tr>
<td>Cheese Case</td>
<td>Bundesgerichtshof (Federal Supreme Court), 24 October 1979, Case No. VIII ZR 210/78</td>
<td>124, 125</td>
</tr>
<tr>
<td>Switzerland</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Art Books Case</td>
<td>Handelsgericht Zürich (Commercial Court Zurich), 10 February 1999, Case No. HG 970238.1</td>
<td>124</td>
</tr>
<tr>
<td></td>
<td>CISG Online No. 488</td>
<td></td>
</tr>
<tr>
<td>Frozen Meat Case</td>
<td>Bundesgericht (Federal Supreme Court), 28 October 1998, Case No. BGer 4C.179/1998</td>
<td>124, 125</td>
</tr>
<tr>
<td></td>
<td>CISG Online No. 413</td>
<td></td>
</tr>
<tr>
<td>Cited as</td>
<td>Source</td>
<td>Cited in</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>------------------------------------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td><strong>Netherlands</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Potatoes Case</em></td>
<td><em>Agristo N.V. v. Macces Agri B.V.</em>, Rechtbank Maastricht (District Court Maastricht), 9 July 2008, Case No. 120428 / HA ZA 07-550</td>
<td>65</td>
</tr>
<tr>
<td></td>
<td>CISG Online No. 1748</td>
<td></td>
</tr>
<tr>
<td><strong>United Kingdom</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>United States of America</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Schwartzman v. Harlap</em></td>
<td><em>Betzalel Schwartzman v. Yaakov Harlap</em>, US District Court, Eastern District of New York, 13 April 2009, Case No. 08 Civ. 4990(BMC)</td>
<td>9</td>
</tr>
<tr>
<td>Cited as</td>
<td>Source</td>
<td>Cited in</td>
</tr>
<tr>
<td>----------------------------------------</td>
<td>------------------------------------------------------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>Bidermann v. Avmar</td>
<td>Bidermann Industries Licensing, Inc. v. Amvar N.V., New York State Supreme Court, 26 October 1990, Case No. 173 A.D.2d</td>
<td>15</td>
</tr>
<tr>
<td>DeRosa v. Transamerica</td>
<td>James A. DeRosa v. Transamerica Title Insurance Co. et al., California Courts of Appeals, 15 September 1989, Case No. B037938</td>
<td>81</td>
</tr>
<tr>
<td>Rodriguez v. Shearson/AmEx</td>
<td>Ofelia Rodriguez de Quijas et al. v. Shearson/American Express, Inc. etc., US Supreme Court, 15 May 1989, Case No. 88-385</td>
<td>49</td>
</tr>
<tr>
<td>Scherk v. Culver</td>
<td>Scherk v. Alberto-Culver Co., US Supreme Court, 17 June 1974, Case No. 73-781</td>
<td>49</td>
</tr>
</tbody>
</table>
## INDEX OF AWARDS

<table>
<thead>
<tr>
<th>Cited as</th>
<th>Source</th>
<th>Cited in</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mitigation Case</td>
<td>Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 6 June 2000, Case No. 406/1998</td>
<td>113</td>
</tr>
<tr>
<td></td>
<td>CISG Online No. 1249</td>
<td></td>
</tr>
<tr>
<td>Wool Case</td>
<td>China International Economic and Trade Arbitration Commission (CIETAC), Case No. CISG/1995/04, 10 March 1995</td>
<td>63</td>
</tr>
<tr>
<td>Cited as</td>
<td>Source</td>
<td>Cited in</td>
</tr>
<tr>
<td>------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>----------</td>
</tr>
</tbody>
</table>
### Index of Awards

<table>
<thead>
<tr>
<th>Cited as</th>
<th>Source</th>
<th>Cited in</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICC Award 1110</td>
<td>ICC Award, Case No. 1110 of 1963</td>
<td>49</td>
</tr>
</tbody>
</table>
INDEX OF STATUTES, RULES AND TREATIES

CIETAC Rules  China International Economic and Trade Arbitration Commission
Arbitration Rules, Beijing (as of 1 March 2011)

CIETAC Ethical Rules  China International Economic and Trade Arbitration Commission
Ethical Rules for Arbitrators, Beijing (6 April 1993)

CISG  United Nations Convention on Contracts for the International Sale
of Goods, Vienna (11 April 1980)


IBA Principles  IBA International Principles on Conduct for the Legal Profession, London (28 May 2011)


NY Convention  Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York (10 June 1958)


UCP 600 Uniform Customs and Practice for Documentary Credits 600, Paris (25 October 2006)
STATEDMENT OF FACTS

On 26 May 2010 CLAIMANT and RESPONDENT concluded the contract No. 472/2010 (hereafter “Contract”). RESPONDENT agreed to supply, install, and configure the master control system on the M/S Vis by 12 November 2010.

RESPONDENT subsequently engaged Oceania Specialty Devices (hereafter “Specialty Devices”) to supply it with six semi-configurable processing units that constitute the core element in the aforementioned master control system. Specialty Devices, in turn, engaged Atlantis High Performance Chips (hereafter “High Performance”) to supply it with various numbers of D-28 “super chips” to be incorporated into the semi-configurable processing units.

On 6 September 2010 a fire occurred at the facility where High Performance produced the D-28 chips. Despite the damage caused by the fire, High Performance still had a sufficient supply of D-28 chips in its warehouse to fulfil Specialty Devices’ order. However, High Performance delivered all of its remaining chips to Atlantis Technical Solutions. The CEOs of the two firms are close friends and served as witnesses at each other’s weddings.

On 13 September 2010 RESPONDENT informed CLAIMANT that the master control system could not be delivered before the middle of January 2011 and that installation, configuration, and verification would take a further ten weeks after delivery.

In order that Corporate Executives’ event from 12–18 February 2011 could be held, CLAIMANT was pressed to find an adequate substitute vessel for the M/S Vis due to RESPONDENT’s late performance. Ultimately, Corporate Executives’ event took place on the M/S Pacifica Star (hereafter “M/S Pacifica”). This substitute transaction, i.e. the lease contract for the M/S Pacifica between CLAIMANT and Mr. Goldrich and the ex gratia payment to Corporate Executives, one of CLAIMANT’s most important clients, resulted in damages in the total amount of USD 670’600.

On 11 March 2011 the refurbishment of the M/S Vis was finally completed. RESPONDENT therefore completed its contractual obligations with a total delay of 17 weeks.

In two letters dated 9 and 25 April 2011 CLAIMANT offered to share the costs arising out of RESPONDENT’s late performance, even though all of these costs arose from RESPONDENT’s late performance. In two countering letters dated 14 April and 9 May 2011 RESPONDENT categorically refused to contribute to the costs and rejected all responsibility.
SUMMARY OF THE ARGUMENT

1. **RESPONDENT forfeited its right to challenge Prof. Presiding Arbitrator.** RESPONDENT has waived its right to challenge Prof. Presiding Arbitrator because the mere reservation of this right to challenge does not constitute a sufficient challenge under Art. 30 CIETAC Rules. In any event, RESPONDENT cannot introduce a proper challenge at this point in time anymore, because the deadline according to Art. 30(3) CIETAC Rules has expired.

2. **II. Dr. Mercado should not be removed from CLAIMANT’s legal team.** The Tribunal should rule that it has no competence to decide on Dr. Mercado’s removal because this issue constitutes a non-arbitrable dispute. In any event, there is no legal basis for such a removal. Even if the Tribunal would assume an inherent competence and an implied legal basis, the circumstances of the present case do not justify the removal of Dr. Mercado.

3. **III. The Tribunal has authority to rule upon all claims connected with the lease contract.** Since the broker’s payment to Mr. Goldrich’s assistant does not affect the arbitrability of the claims raised in connection with the lease contract, the Tribunal should assume authority to rule upon all claims in connection with the said contract.

4. **IV. RESPONDENT is liable for all damages incurred by CLAIMANT due to RESPONDENT’s breach of contract.** RESPONDENT breached the contract by virtue of its late performance. It is not exempt from liability under Art. 79(2) CISG because Specialty Devices, in its capacity as a third person, is not exempt from liability either. Specialty Devices is not exempt under Art. 79(1) CISG because it bears the procurement risk for the D-28 chips. Even if Specialty Devices was exempt under Art. 79(1) CISG, it is not exempt under Art. 79(2) CISG since High Performance could have overcome the impediment. Finally and in any event, the Tribunal should not assume an exemption according to Art. 79(2) in connection with Art. 79(3) CISG because RESPONDENT did not perform even after the impediment had ceased.

5. **V. RESPONDENT must pay CLAIMANT USD 670’600 in damages.** All claims in connection with the lease contract are allowable as the broker’s payment to Mr. Goldrich’s assistant has no bearing on the allowability of CLAIMANT’s damage claims. Further, since all prerequisites under Art. 74 CISG are met, RESPONDENT must compensate CLAIMANT in the total amount of USD 670’600.
ARGUMENT ON THE PROCEDURAL ISSUES

The dispute between CLAIMANT and RESPONDENT arises out of the Contract concerning the sale of a master control system for CLAIMANT’s luxury yacht, the M/S Vis (Cl. Exh. 1). According to the arbitration clause contained in Art. 15.1 of this Contract, any dispute arising from or in connection with the Contract shall be settled by arbitration to take place in Vindobona, Danubia (Cl. Exh. 1). Therefore, the DAL constitutes the lex arbitri applicable to the proceedings (cf. Poudret/Besson, paras. 112 et seqq.). The parties further agreed that the arbitration shall be conducted in accordance with the CIETAC Rules in effect at the time of applying for arbitration (Cl. Exh. 1). As the Application for Arbitration was submitted on 15 July 2011, the CIETAC Rules that were in effect as of 1 March 2011 are applicable. Further, the NY Convention is applicable as both CLAIMANT and RESPONDENT are domiciled in states that are parties to this convention (AfA, para. 21; accepted in SoD, para. 2).

RESPONDENT requests to remove one of CLAIMANT’s counsels and asserts the lack of the Tribunal’s authority to consider CLAIMANT’s damage claims (SoD, paras. 15, 24.1). However, RESPONDENT’s arguments are without merit.

I. RESPONDENT forfeited its right to challenge Prof. Presiding Arbitrator

Only arbitrators can be challenged in an arbitral proceeding (cf. para. 13). If a party does not challenge an arbitrator within the time-limit set forth under the applicable procedural law, such a party is deemed to have waived its right to object that an arbitrator does not meet the requirements concerning impartiality and independence (Tweeddale/Tweeddale, para. 5.14; Tao, para. 541; Moses, p. 141). RESPONDENT, indeed, did not properly challenge Prof. Presiding Arbitrator. It merely reserved its right to do so. Such reservation does not constitute a sufficient challenge according to Art. 30 CIETAC Rules (A). In addition, RESPONDENT cannot introduce a proper challenge at this point in time anymore because the deadline according to Art. 30(3) CIETAC Rules has expired (B).

A. The Tribunal should not consider RESPONDENT’s reservation of the right to challenge Prof. Presiding Arbitrator as a sufficient challenge

It is not possible to reserve the right to challenge an arbitrator because a challenge must be raised explicitly, i.e. in a timely fashion and with supporting evidence according to Arts. 30(2), 30(4) CIETAC Rules. Otherwise, a party would be able to hold an alleged ground for challenge in reserve to be used only if the proceedings do not end with a satisfactory result.
Memorandum for CLAIMANT

Argument on the Procedural Issues

(Park 2009, p. 640; cf. Schwartzman v. Harlap). RESPONDENT precisely pursues this tactic. It explicitly states that it would challenge Prof. Presiding Arbitrator only if the Tribunal does not grant its request to remove Dr. Mercado (SoD, paras. 16, 23). Moreover, RESPONDENT was already aware of the circumstances that, in its view, supported a challenge of Prof. Presiding Arbitrator at the time the Statement of Defense was filed (SoD, paras. 16-23; PO 2, para. 29). Therefore, RESPONDENT could have challenged Prof. Presiding Arbitrator at that time, but it decided not to do so.

In conclusion, the Tribunal should not consider the mere reservation of the right to challenge Prof. Presiding Arbitrator as a sufficient challenge.

B. RESPONDENT cannot introduce a proper challenge at this point in time anymore because the deadline according to Art. 30(3) CIETAC Rules has expired

Even if RESPONDENT decided to bring its challenge of Prof. Presiding Arbitrator in the Memorandum for RESPONDENT or in an earlier brief, the deadline for such a challenge has expired. According to the second sentence of Art. 30(3) CIETAC Rules, a party must challenge an arbitrator within 15 days after a reason for a challenge has become known. RESPONDENT bases its reservation for a challenge on the relationship between Dr. Mercado and Prof. Presiding Arbitrator (SoD, paras. 16, 23). The date on which RESPONDENT was informed about Dr. Mercado’s participation is hence the date from which the deadline has to be calculated. RESPONDENT became aware of Dr. Mercado’s involvement on 30 August 2011 (PO 2, para. 29). The deadline therefore expired on 14 September 2011. As demonstrated above (cf. para. 9), the mere reservation of a challenge in its Statement of Defense filed on 2 September 2010 does not constitute a proper challenge. Further, RESPONDENT failed to introduce a proper challenge until 14 September 2011. Even if RESPONDENT would file a challenge as of today, i.e. 8 December 2011, the challenge would not be admissible as the deadline under Art. 30(3) CIETAC Rules has expired.

Conclusion: RESPONDENT has not challenged Prof. Presiding Arbitrator and cannot do so anymore. RESPONDENT has thus forfeited its right to challenge Prof. Presiding Arbitrator.
II. Dr. Mercado should not be removed from CLAIMANT’s legal team

Instead of challenging Prof. Presiding Arbitrator, RESPONDENT unconventionally tries to have Dr. Mercado removed from the proceedings (SoD, paras. 16, 23, 24). According to Art. 20 CIETAC Rules and Art. 18 DAL, it is CLAIMANT’s right to be represented by counsel in matters relating to the arbitration. This right is even enshrined in Art. 6 ECHR as a fundamental human right. Therefore, a party is entitled to choose a representative who is best suited to handle the dispute at hand (Born 2009, p. 2291; Redfern/Hunter, para. 6.189; Rompetrol Case, para. 22). CLAIMANT exercised this right under Art. 20 CIETAC Rules by adding Dr. Mercado to its legal team because of her expertise in arbitration (PO 2, para. 39). The Tribunal has no authority to disrespect this choice of CLAIMANT because it is not competent to decide on her removal (A). In case the Tribunal assumed to be competent, there is no legal basis for a removal of Dr. Mercado (B). Even if the Tribunal were to rely on an inherent competence and an implied legal basis, it should still respect CLAIMANT’s choice because the circumstances in the case at hand do not justify the removal of Dr. Mercado (C).

A. The Tribunal should not assume competence to decide upon the removal of Dr. Mercado

An arbitral tribunal’s powers are limited by the laws applicable to the proceedings (Redfern/Hunter, para. 5.06; Rompetrol Case, para. 14), i.e. the rules chosen by the parties and the lex arbitri (Moses, pp. 63 et seqq.; Redfern/Hunter, para. 3.04; Kawano, p. 58; Weigand/Baumann, para. 1.172; Tweeddale/Tweeddale, para. 7.60). However, the applicable procedural framework, i.e. the CIETAC Rules, the DAL, and the NY Convention, does not contain any legal basis vesting an arbitral tribunal with the competence to decide on the removal of a counsel. Thus, the Tribunal should not assume competence to decide upon the removal of Dr. Mercado.

Further, according to Arts. II(1), II(2)(a) NY Convention, and Arts. 34(2)(b)(i), 36(1)(b)(i) DAL, only disputes that are capable of settlement by arbitration are arbitrable. (Redfern/Hunter, para. 2.111; Moses, pp. 68 et seq.). Disputes implicating fundamental public interests and policies are, on the contrary, not arbitrable (Redfern/Hunter, paras. 2.113 et seqq.; Tweeddale/Tweeddale, para. 4.31). The authority to enforce rules of professional conduct of counsel is an issue that is inherently governmental. It is thus restricted to the competence of state courts and local bar institutions, such as bar associations, because counsel conduct forms part of such fundamental public interests (Goebel, p. 58; Edelkötter,
pp. 214 et seqq.; Miller, p. 368; Brower/Schill, p. 495; Born 2009, pp. 2304, 2319; Erdheim v. Selkowe; Merrill Lynch et al. v. Benjamin). Therefore, it is generally recognized that an arbitral tribunal is not the competent body to rule on the disqualification of a party’s counsel (Bidermann v. Amvar; ICC Award 8879; Croushore v. Buchanan; Born 2009, pp. 2320 et seqq.). The removal of a counsel thus constitutes a non-arbitrable dispute (ICC Award 8879; R3 Aerospace v. Marshall) and an arbitral award ordering the removal of a counsel could not be recognized and enforced (Moses, p. 80; Bidermann v. Amvar). As a result, RESPONDENT’s request to remove Dr. Mercado from CLAIMANT’s legal team should not be considered by the Tribunal.

In addition, these fundamental public policies regarding counsel conduct often differ considerably from state to state (Born 2009, pp. 2307 et seqq.; Park 2006, paras. 7-13, 7-34 et seq.; Lew/Shore, pp. 37 et seq.; Redfern/Hunter, para. 3.228). It is therefore only reasonable that each state may exclusively deal with this issue through its state courts and local bar institutions (Born 2009, p. 2323).

Finally, it is argued that the exclusive jurisdiction of state courts and local bar institutions and propose, in exceptional cases, an inherent competence of tribunals based on their general authority to regulate the proceedings (Born 2009, p. 2323). In the case at hand, the Tribunal should, however, reject this approach. Even the proponents of this theory only recognize such an authority in egregious cases where a counsel commits persistent and grave abuses (Born 2009, p. 2323). Presently, even RESPONDENT admits that Dr. Mercado did not violate her local bar rules (SoD, para. 23). As persistent and grave abuses are accordingly not given, the Tribunal should not assume an inherent competence to rule over Dr. Mercado’s removal.

In conclusion, the Tribunal should find that it does not have the power to remove Dr. Mercado since the competent fora are, in any event, solely state courts and her local Bar Association.

B. In any event, there is no legal basis to exclude Dr. Mercado

Even if the Tribunal found that it is competent to decide on Dr. Mercado’s removal, actually removing Dr. Mercado from the proceedings would be inappropriate as there is no legal basis for doing so. First, there is no legal basis for such a removal in the applicable hard law, i.e. the Code of Ethics of Dr. Mercado’s local Bar Association and the laws applicable to the proceedings (1). Second, such a legal basis may also not be construed by relying on soft law (2).
1. There is no legal basis for Dr. Mercado’s removal in the applicable **hard law**

According to prevailing doctrine, there are neither binding rules governing counsel conduct in international arbitration (Brower/Schill, pp. 24 et seqq.; Born 2009, pp. 2307, 2313, 2318; Vagts, p. 260; Redfern/Hunter, paras. 3.228 et seq.) nor rules concerning the enforcement of such provisions (Born 2009, p. 2312; Park 2006, para. 7-3; Jacobus/Rohner/Hefty, p. 2). This also holds true for the present proceedings. The applicable procedural law in the case at hand, i.e. the CIETAC Rules and the DAL (cf. para. 14), do not contain ethical rules concerning counsel conduct (cf. regarding DAL: PO 2, para. 40). Therefore, there is no legal basis for the removal of Dr. Mercado in the applicable procedural law.

Consequently, a counsel is only subject to the rules of his or her local bar institution (Born 2009, pp. 2307, 2319). Even **RESPONDENT**, however, admits that the Code of Ethics of Dr. Mercado’s Bar Association does not address the facts of this case (SoD, para. 23). Therefore, Dr. Mercado did not violate any ethical provisions of her local bar rules (SoD, para. 23).

Since there is no legal basis for the conduct of counsel in the applicable procedural law, and as Dr. Mercado did not violate the Code of Ethics of her local Bar Association, the Tribunal should not assume a legal basis for her removal in the applicable **hard law**.

2. There is no legal basis for Dr. Mercado’s removal in any **soft law** provision

When assessing counsel conduct in international arbitration, an arbitral tribunal may in principle consider **soft law**, i.e. professional, non-national, guidelines (Redfern/Hunter, paras. 3.226, 3.231). However, in the case at hand the Tribunal should not consider any such **soft law** (a). Alternatively, **CLAIMANT** will show that the only **soft law** **RESPONDENT** could possibly invoke does not contain any legal basis for Dr. Mercado’s removal (b).

a. The Tribunal should not consider any **soft law**

**Soft law** is generally not binding for the parties or an arbitral tribunal unless the parties have specifically agreed upon their application (cf. Introduction of the IBA Guideline, para. 6; Pre-amble IBA Principles; Tweeddale/Tweeddale, para. 5.35; Sachs, pp. 63, 126; Gill, p. 59; Park 2006, para. 7-1; Moses, p. 135). The arbitration clause in Art. 15.1 of the Contract does not, however, refer to any such **soft law** provisions (Cl. Exh. 1).

Further, **soft law** could only be considered for gap filling purposes (Park 2009, p. 676). In the case at hand, however, no such gap exists in the applicable **hard law**. The Code of Ethics Dr. Mercado’s Bar Association exhaustively regulates counsel conduct (cf. para. 21). The fact
that these bar rules do not address the case at hand cannot be accidental. This reasoning is supported in the Rompetrol Case, where the removal of a party’s counsel was an issue. There, the tribunal similarly held that silence with regard to the removal of a counsel may not be considered accidental (Rompetrol Case, para. 19). This silence derives from the fundamentally different duties of arbitrators and counselors. A counsel is to represent its client, as opposed to an arbitrator, whose role it is to judge the dispute impartially and independently (Rompetrol Case, para. 19). Hence, there is no gap that requires the consideration of soft law.

In conclusion, there is no soft law to be considered in the case at hand.

b. Even if soft law was considered, no soft law would contain a legal basis for Dr. Mercado’s removal

None of the existing soft law directly addresses the removal of a party’s counsel. For the sake of completeness, CLAIMANT will show that the only soft law it deems at least remotely connected to the present case, i.e. the CIETAC Ethical Rules, the IBA Guidelines and the IBA Principles, does not contain any legal basis for Dr. Mercado’s removal.

Both the CIETAC Ethical Rules and the IBA Guidelines solely address international arbitrators and not counselors (Harpole, p. 422; Sachs, p. 63). Therefore, neither of these rules contains any legal basis for the removal of Dr. Mercado.

Further, the IBA Principles only serve as a model of how codes of conduct may be drafted by the competent authorities (Preamble IBA Principles). Moreover, the Preamble of the IBA Principles explicitly states that the IBA Principles are not to be used as criteria for imposing liability, sanctions, or disciplinary measures of any kind. As a result, the IBA Principles do not provide a legal basis allowing for the removal of Dr. Mercado.

C. In any event, the circumstances in the present case do not justify the removal of Dr. Mercado

Even though arbitral tribunals are not competent to decide upon the disqualification of a party’s counsel (cf. paras. 14-18), and even though there is no legal basis for such a removal (cf. paras. 19-29), there is one arbitral award in which a party’s counsel was nevertheless removed: the Hrvatska Case. The tribunal in the cited case openly acknowledged that it had neither an explicit competence nor a legal basis to exclude one of the party’s counsels (Hrvatska Case, paras. 24, 33). Nevertheless, the tribunal established an inherent competence and an implied legal basis to remove the defendant’s counsel (Hrvatska Case, paras. 30, 34).
In regard to the predictability and fairness of an arbitral proceeding (*Born 2011, p. 2108*), it is questionable whether a tribunal may at all construe an inherent competence and implied legal basis. Moreover, it should be emphasized that this decision is not a binding precedent (*Rompetrol Case, para. 15*). Finally, it has to be noted that the exclusion of the party’s counsel by the tribunal in the *Hrvatska Case* is better seen as an *ad hoc* sanction for the failure of a party to make proper disclosure in good time, rather than a holding of general scope (*Rompetrol Case, para. 25*).

Irrespective of these general reservations, the Tribunal can in any event not remove Dr. Mercado based on the reasoning in the *Hrvatska Case*. The factual background in the present case greatly differs from the circumstances in the *Hrvatska Case* (1). In addition, the facts in the case at hand do not give rise to justifiable doubts as to Prof. Presiding Arbitrator’s impartiality (2).

1. **The facts in the present case greatly differ from the *Hrvatska Case***

First, in the *Hrvatska Case* the system of the London Chambers, to which both defendant’s counsel and the chairman belonged to, was wholly foreign to plaintiff (*Hrvatska Case, para. 31*). In the present case, however, Dr. Mercado and Prof. Presiding Arbitrator do not belong to a barrister’s chambers, which could be confounded with a law firm, but to Danubia International University (*SoD, para. 18*). Unlike barrister’s chambers, the structure of a university is widely known and can thus not be wholly foreign to RESPONDENT.

Second, the defendant in the cited case initially consciously decided not to disclose the involvement of the counsel in question (*Hrvatska Case, para. 31*). In the case at hand, however, one of CLAIMANT’s counsels openly notified RESPONDENT’s counsel about Dr. Mercado’s participation in CLAIMANT’s legal team on 30 August 2010 (*PO 2, para. 29*).

Third, the defendant announced the counsel’s involvement only a few days before the hearing on the merits would begin (*Hrvatska Case, para. 31*). Contrary to this case, RESPONDENT was informed on 30 August 2011, i.e. seven months before the oral hearing on the merits starts on 30 March 2012 (*PO 1, para. 2*). Thus, the information was provided even before RESPONDENT filed its Statement of Defense on 2 September 2010 (*PO 2, para. 29*).

Fourth, the defendant insistently and repeatedly refused to reveal the scope of the counsel’s involvement (*Hrvatska Case, para. 31*). In the case at hand, however, CLAIMANT was never asked to disclose the scope of Dr. Mercado’s involvement. Further, at this early stage of the
proceedings the specific role of Dr. Mercado is still to be determined (PO 2, para. 39) and can, therefore, not yet be communicated.

Thus, the circumstances in the present case are not at all comparable to the *Hrvatska Case*.

2. The facts in the case at hand do not give rise to justifiable doubts as to Prof. Presiding Arbitrator’s impartiality

In the *Hrvatska Case* the tribunal removed the defendant’s counsel because the specific circumstances gave rise to justifiable doubts as to the impartiality of the chairman (*Hrvatska Case, para. 30*). Such doubts, however, may only be assumed if the circumstances are of extraordinary and compelling nature (*Rompetrol Case*, paras. 15 et seq.). In the case at hand, neither the private relationship (a), the professional relationship (b) nor the previous arbitrations (c) give rise to justifiable doubts as to the impartiality of Prof. Presiding Arbitrator.

a. The private relationship does not give rise to justifiable doubts

RESPONDENT implicitly asserts that there is a private relationship between Dr. Mercado and Prof. Presiding Arbitrator that gives rise to justifiable doubts as to the latter’s impartiality (*SoD, paras. 21, 23*). However, no such private relationship exists. Indeed, a friendship exists solely between Dr. Mercado and Prof. Presiding Arbitrator’s wife (PO 2, para. 32). Furthermore, it was Prof. Presiding Arbitrator’s wife, not Prof. Presiding Arbitrator, who asked Dr. Mercado to be the child’s godmother (PO 2, para. 32). The relationship between the two women is thus not a justifiable reason to doubt Prof. Presiding Arbitrator’s impartiality and to exclude Dr. Mercado from further participation in these proceedings.

b. The professional relationship does not give rise to justifiable doubts

The professional relationship between Dr. Mercado and Prof. Presiding Arbitrator has no impact on Prof. Presiding Arbitrator’s impartiality.

First, Dr. Mercado received the position as visiting lecturer at Danubia International University because of her expertise in international commercial arbitration as well as for her high profile in this field (PO 2, paras. 31, 33). At the time of the public application process for a visiting lecturer, the committee at Danubia International University wanted additional applications, and contacted several individuals in the same way as Dr. Mercado (PO 2, para. 31). Dr. Mercado did not receive the job as visiting lecturer for any other reason than her personal skills and reputation.
Second, Dr. Mercado is merely a visiting lecturer at Danubia International University who is only paid per lecture (SoD, para. 19). Whereas Dr. Mercado delivers half of the faculty’s arbitration lectures, Prof. Presiding Arbitrator’s focus is not on arbitration but on trade law (SoD, para. 17, 19). Thus, they do not focus on the same field of practice. They only have occasional contact when Dr. Mercado delivers lectures in Prof. Presiding Arbitrator’s course on international trade. In fact, the majority of Dr. Mercado’s contact is with the ITL Faculty’s full time staff (SoD, para. 20).

In any event, the existence of an ordinary business relationship, as in the present case, such a relationship is not sufficient for a removal of an arbitrator (Poudret/Besson, paras. 418 et seq.). Therefore, the professional relationship between Dr. Mercado and Prof. Presiding Arbitrator does not constitute a sufficient reason to remove Dr. Mercado.

In conclusion, there are no circumstances regarding the professional relationship between Dr. Mercado and Prof. Presiding Arbitrator that give rise to justifiable doubts as to Prof. Presiding Arbitrator’s impartiality. The Tribunal should therefore not remove Dr. Mercado from the present proceedings.

c. *The previous arbitrations do not give rise to justifiable doubts*

Lastly, the three cases brought forward by RESPONDENT do not at all give rise to justifiable doubts as to Prof. Presiding Arbitrator’s impartiality in the case at hand. In these former cases, Prof. Presiding Arbitrator by coincidence voted in favour of the party represented by Dr. Mercado (SoD, para. 22). However, in two of these cases, Dr. Mercado’s client was successful with a unanimous tribunal (SoD, para. 22). This necessarily means that not only Prof. Presiding Arbitrator but also the two other arbitrators decided in favour of Dr. Mercado’s client. Therefore, no bias of Prof. Presiding Arbitrator can be inferred from these former cases.

Consequently, it cannot be argued that Prof. Presiding Arbitrator would in any way favour Dr. Mercado’s party, i.e. CLAIMANT, for no legitimate reasons in the present proceedings. Since Prof. Presiding Arbitrator’s impartiality can thus not be doubted, Dr. Mercado should not be removed from CLAIMANT’s legal team.

**Conclusion:** The Tribunal should not assume the competence to decide on Dr. Mercado’s removal because this issue constitutes a non-arbitrable dispute. Even if the Tribunal was competent in this matter, there is no legal basis in the applicable hard law for such a removal.
Moreover, there is no legal basis in any *soft law* provision because none of these provisions should be considered in the present case and since these provisions do not provide for a legal basis. Even if the Tribunal would assume an inherent competence and implied legal basis, there are no circumstances in the present case that would justify the removal of Dr. Mercado.

**III. The Tribunal has authority to rule upon all claims connected with the lease contract**

RESPONDENT argues that the Tribunal lacks the authority to rule upon the claims in connection with the lease contract (*SoD, para. 15*). RESPONDENT bases this assertion on the fact that Mr. Goldrich’s assistant was convicted by a court in Pacifica of receiving a bribe, which allegedly lead to the conclusion of the lease contract between CLAIMANT and Mr. Goldrich (*SoD, paras. 13-15*). RESPONDENT infers that the lease contract is *tainted* by the broker’s payment to Mr. Goldrich’s assistant and that therefore the Tribunal lacks authority to consider CLAIMANT’s damage claims in connection with this contract.

This conclusion, however, is incorrect. It may be true that in earlier doctrine it was argued that an allegation of illegality rendered a dispute non-arbitrable and therefore outside an arbitral tribunal’s jurisdiction (*ICC Award 1110*; *cf. Blessing, pp. 57 et seq.; Voser, p. 331*). Today, however, the prevailing doctrine, both national as well as international, states that an allegation of illegality, such as an alleged bribery, does not lead to the non-arbitrability of a dispute (*Blessing, p. 60; Poudret/Besson, para. 364; Redfern/Hunter, para. 2.138; Fathallah, p. 69; Raeschke-Kessler/Gottwald, p. 18; Scherk v. Culver; Mitsubishi v. Soler Chrysler; Rodriguez v. AmEx; ICC Award 6379; ICC Award 6162*).

Since the alleged bribery was conducted by a person outside the contractual relationship between CLAIMANT and RESPONDENT, i.e. Mr. Goldrich’s assistant, the principle that such illegal behaviour does not render a dispute non-arbitrable applies even more so to the case at hand. The damage claims arise out of the Contract between CLAIMANT and RESPONDENT, which has not been tainted by any unlawful behaviour of the parties (*cf. paras. 80-102*).

Therefore, the dispute between RESPONDENT and CLAIMANT is clearly arbitrable and the Tribunal has thus authority to rule upon it.
ARGUMENT ON THE SUBSTANTIVE ISSUES

In Art. 15.2 of the Contract, the parties chose the law of Mediterraneo as the applicable law (Cl. Exh. 1). Mediterraneo, as the seat of CLAIMANT, and Equatoriana, as the seat of RESPONDENT, are both party to the CISG (AfA, para. 20). The Contract constitutes a sale of goods governed by the CISG since the preponderant part of RESPONDENT’s contractual obligation consists in the sale of the master control system. If one of the seller’s obligations includes a service element according to Art. 3(2) CISG, i.e. the installation and configuration of the master control system, the CISG only applies if the sales element is of preponderant economic value compared to the service element (Huber/Mullis, pp. 46 et seq.). In the case at hand the price for the service element amounts in USD 49'950, i.e. less than 10% of the total contract price in the amount of USD 699'950 (Art. 4 of the Contract, Cl. Exh. 1). Consequently, pursuant to Art. 1(1)(a) CISG the Contract is governed by the CISG.

CLAIMANT operates high-end venues in which it provides a complete conference package (AfA, para. 5). In order to provide its very demanding clients with a further exclusive venue, CLAIMANT purchased a luxury yacht in spring 2010, the M/S Vis (AfA, para. 6). CLAIMANT sought to refurbish the yacht with the latest in cabin and conference technologies, superior to anything otherwise available on the market (AfA, para. 6). For this purpose, CLAIMANT and RESPONDENT concluded the Contract according to which RESPONDENT was to supply, install, and configure a master control system on the M/S Vis by 12 November 2010 (Art. 3 of the Contract, Cl. Exh. 1). RESPONDENT, however, failed to fulfil its contractual obligations in time. Therefore, CLAIMANT had to change the already advertised venue to a substitute vessel which did not have the same features as the M/S Vis (PO 2, para. 20), leaving CLAIMANT with the damages now claimed.

IV. RESPONDENT is liable for all damages incurred by CLAIMANT due to RESPONDENT’s breach of contract

RESPONDENT delivered the master control system on 11 March 2011, i.e. with a delay of 17 weeks (AfA, para. 16; accepted in SoD, para. 2). As a result of this delay, CLAIMANT had to rent the M/S Pacifica as a substitute vessel for Corporate Executives’ event from 12-18 February 2010 (AfA, paras. 17, 18). The arrangements for this substitute vessel resulted in damages to CLAIMANT in the total amount of USD 670’600 (AfA, paras. 4, 18). RESPONDENT is liable for these damages because its late delivery constitutes a breach of contract pursuant
Memorandum for CLAIMANT

Argument on the Substantive Issues

to Art. 33(b) CISG (A). Further, RESPONDENT is not exempt from liability under Art. 79(2) CISG because the third person it has engaged, i.e. Specialty Devices, is not exempt from liability under Art. 79 CISG either (B).

A. RESPONDENT breached the contract under Art. 33(b) CISG by failing to deliver the master control system in time

Art. 33(b) CISG provides that the seller must deliver the goods, if a period of time is fixed by or determinable from the contract, at any time within that period. According to Art. 3 of the Contract, RESPONDENT was obliged to complete installation and configuration of the master control system by 12 November 2010 (Cl. Exh. 1). The latest date by which RESPONDENT had to perform its obligations was therefore fixed. CLAIMANT and RESPONDENT thus agreed upon a fixed period of time (cf. Brunner 2004, Art. 33 para. 3; Brösch, p. 13; Piltz in Kröll/Mistelis/Perales, paras. 19 et seq.). RESPONDENT, however, completed the installation, configuration, and verification with a delay of 17 weeks (AfA, para. 16; accepted in SoD, para. 2). RESPONDENT thus failed to fulfil its obligations within the contractual time period, and breached the Contract according to Art. 33(b) CISG.

Moreover, the payment of the contract price by CLAIMANT cannot be considered as an acceptance of RESPONDENT’s breach. According to Art. 5 of the Contract, the contract price was to be paid by letter of credit issued by the Mediterraneo National Bank against certification by Accurate Technical Consultants of completion of the Contract (Cl. Exh. 1). The system of a letter of credit is automatic and cannot be influenced by the applicant once the credit has been issued (Art. 3 UCP 600). In the case at hand, the payment of the contract price was triggered by the certification of Accurate Technical Consultants that the refurbishment was completed (PO 2, para. 16). Hence, CLAIMANT had no influence on the eventual payment of the contract price and was not in a position to prevent it. Therefore, this payment cannot be seen as an acceptance by CLAIMANT of RESPONDENT’s contractual breach.

B. RESPONDENT is not exempt from liability under Art. 79(2) CISG

Due to RESPONDENT’s delay in performance, CLAIMANT is entitled to claim damages according to Art. 45(1)(b) in connection with Art. 74 CISG. RESPONDENT, however, denies its liability for the late delivery by referring to the fire that occurred at High Performance’s production facility (SoD, paras. 5-9). It argues that since High Performance could not have overcome this impediment, Specialty Devices and RESPONDENT are thus saved from liability.
Moreover, RESPONDENT denies that it is liable for its supply chain in regard to the late performance of its suppliers (SoD, para. 9). CLAIMANT, however, will show that RESPONDENT is fully liable for its breach of contract.

58 In order to perform its contractual obligations, RESPONDENT engaged a third person, i.e. Specialty Devices (Cl. Exh. 1). Specialty Devices was to manufacture six processing units, which constitute the core element of the master control system (AfA, paras. 8, 10; accepted in SoD, para. 2). It has to be noted that three processing units would have sufficed to operate the master control system (AfA, para. 10; PO 2, para. 7). Since Specialty Devices had designed these processing units to use D-28 chips, it engaged High Performance, to provide it with various numbers of these chips (AfA, paras. 9, 10; accepted in SoD, para. 2). However, a fire occurred at High Performance’s production facility, which interrupted the production of D-28 chips for seven weeks (Cl. Exh. 2, 3).

59 To set forth CLAIMANT’s argument more clearly, it is necessary to set forth a general outline of Art. 79(2) CISG. If the seller’s failure to perform is due to the failure of a third person the seller has engaged to fulfil its contractual obligations towards the buyer, Art. 79(2) CISG is applicable to the liability of the seller. In order that the seller, i.e. RESPONDENT, is exempt under Art. 79(2) CISG two prerequisites must be met. First, the seller must itself be exempt under Art. 79(1) CISG. Second, the third person the seller has engaged, i.e. Specialty Devices, must be exempt under Art. 79 CISG as well.

60 CLAIMANT does not contest that RESPONDENT is itself exempt under Art. 79(1) CISG. However, RESPONDENT is not exempt from liability under Art. 79(2) CISG since Specialty Devices, in its capacity as a third person engaged by RESPONDENT, is neither exempt under Art. 79(1) CISG nor under Art. 79(2) CISG (1). In any event, RESPONDENT is not exempt from liability under Art. 79(2) CISG as it failed to perform after the impediment had ceased to exist as required by Art. 79(3) CISG (2).

The following submissions are made under the express denial of the burden of proof because the existence of an exemption under Art. 79 CISG must be proven by the seller, i.e. RESPONDENT (Schwenzer in Schlechtriem/Schwenzer, Art. 79 para. 59).

1. **Specialty Devices is not exempt from liability under Art. 79 CISG**

62 As shown above (cf. para. 60), Specialty Devices must fulfil the prerequisites under Art. 79(1) CISG in order to be exempt from liability. However, Specialty Devices is not exempt from liability under Art. 79(1) CISG since it bears the procurement risk for the D-28
chips (a). If the Tribunal found that Specialty Devices was exempt from liability under Art. 79(1) CISG, Specialty Devices would still be liable for High Performance’s late delivery according Art. 79(2) CISG (b).

a. Specialty Devices is not exempt under Art. 79(1) CISG as it bears the procurement risk for the D-28 chips

In order for a seller to be exempt from liability for non-performance under Art. 79(1) CISG, such non-performance must be due to an impediment that is beyond the seller’s control. An impediment is not beyond the seller’s control if the impediment belongs to the seller’s typical sphere of risk (Brunner 2009, pp. 167 et seqq.), which includes the risk of procuring goods that it will need to fulfil its contractual obligations towards the buyer (Schwenzer in Schlechtriem/Schwenzer, Art. 79 para. 11; ICC Award 8128). If these goods are to be procured from a supplier, the seller is generally liable for the supplier’s non-performance (Atamer in Kröll/Mistelis/Perales, Art. 79 para. 68; Brunner 2004, Art. 79 para. 14, Janser, pp. 25 et seqq.; Fischer, pp. 75 et seq.; Vine Wax Case; Wool Case). However, if the supplier’s non-performance is due to an impediment beyond the supplier’s control, the seller only remains liable if it could have procured the goods from the supplier despite the impediment (Atamer in Kröll/Mistelis/Perales, Art. 79 para. 68; Brunner 2004, Art. 79 para. 11, 34).

In the present case, Specialty Devices obtained the D-28 chips from a supplier, i.e. High Performance (AfA, para. 9). High Performance, however, failed to deliver the D-28 chips in time (Cl. Exh. 2; AfA, para. 12; accepted in SoD, para. 2). As seen above (cf. para. 63), Specialty Devices is generally liable for the late delivery of High Performance since the failure of its supplier lies within Specialty Devices’ sphere of risk. Even though High Performance’s late delivery was due to an impediment that was beyond its control, i.e. the fire on 5 August 2010 at its production facility (Cl. Exh. 2, 3; AfA, para. 12; accepted in SoD, para. 2), Specialty Devices is nevertheless liable as it could have procured the D-28 chips.

In the case at hand, the stock of D-28 chips in High Performance’s warehouse was not destroyed by the fire (Cl. Exh. 3; AfA, para. 13; accepted SoD, para. 2). Indeed, the fire did not affect the stock but only the ability to produce more chips (AfA, paras. 12-14; Cl. Exh. 2, 3; accepted in SoD, para. 2). If an impediment only affects a stock in that it prevents additional goods from being manufactured, the seller must procure the goods as its supplier is obliged to make pro rata deliveries from its stock (Schwenzer in Schlechtriem/Schwenzer, Art. 79 para. 27; Potatoes Case). This principle of pro rata division counts as an international
practice (Brunner 2009, p. 261; Fontaine/de Ly, pp. 459 et seqq.; Case No. J 4 32; Dakin v. Oxley). As High Performance’s warehouse was not affected by the fire (cf. para. 58), it should have made pro rata deliveries of the D-28 chips from its stock. A pro rata division would have sufficed to make the master control system function (PO 2, para. 9).

The fact that High Performance had a monopoly over the D-28 chips since a rival chip with comparable qualities was not available until February 2011 (AfA, para. 9), does not change the aforementioned assessment. Even in such cases, the seller is not exempt as long as the goods are available (Schwenzer in Schlechtriem/Schwenzer, Art. 79 para. 37; Dawwas, p. 42; Kuhlen, p. 111; Janser, p. 23).

In conclusion, since Specialty Devices could have procured the D-28 chips from High Performance’s stock, the late delivery by High Performance does not constitute an impediment beyond Specialty Devices’ control. Thus, Specialty Devices is not exempt from liability under Art. 79(1) CISG and RESPONDENT, in turn, is liable for CLAIMANT’s damage claims (cf. paras. 59, 60).

b. Even if Specialty Devices was exempt under Art. 79(1) CISG, it would not be exempt under Art. 79(2) CISG

Even if the Tribunal found that Specialty Devices was exempt from liability under Art. 79(1) CISG, Specialty Devices would still be liable for High Performance’s late delivery according to Art. 79(2) CISG. In cases where a third person engaged by the seller, i.e. Specialty Devices, has itself engaged another third person, i.e. High Performance, the same mechanism of exemption under Art. 79(2) CISG as elaborated above applies (cf. para. 59). Accordingly, Specialty Devices is not exempt under Art. 79(2) CISG because High Performance is not exempt under Art. 79(1) CISG as it could have overcome the impediment by delivering the D-28 chips from its warehouse on a pro rata basis.

Pursuant to Art. 79(1) CISG a party must show a reasonable effort to overcome the impediment in order to be exempt from liability (Atamer in Kröll/Mistelis/Perales, Art. 79 para. 55; Dawwas, p. 39; Tallon in Bianca/Bonell, Art. 79 para. 2.6.4). In international trade, the requirements for such a reasonable effort are very strict (Schwenzer in Schlechtriem/Schwenzer, Art. 79 para. 14; Fischer, p. 71). As a rule, a party can even be expected to overcome an impediment if the performance of its contractual obligations results in a loss (Schwenzer in Schlechtriem/Schwenzer, Art. 79 para. 14; Brunner 2009, p. 322; Iron Molybdenum Case).
In the case at hand, only High Performance’s production facility was affected by the fire, not its stock in the warehouse (Cl. Exh. 2). Therefore, High Performance could have overcome the impediment by allocating the D-28 chips from its warehouse to all of its customers on a pro rata basis. This is a recognized practice in the international sale of goods (cf. para. 65). High Performance, however, chose to satisfy only one of its customers, i.e. Atlantis Technical Solutions. It delivered all of its D-28 chips to this single customer simply because of the close friendship between the CEOs of the two firms, who had even served as witnesses at each other’s weddings (AfA, para. 15; Cl. Exh. 7, 8). However, no justifiable reasons exist to deviate from the general principle of pro rata division, especially since the D-28 chips were not yet designated to a specific customer (AfA, para. 13). High Performance could have easily delivered the D-28 chips on a pro rata basis to Specialty Devices and all other customers from its warehouse. Therefore, High Performance did not make a reasonable effort to overcome the impediment as required by Art. 79(1) CISG (cf. para. 69).

Consequently, High Performance could have overcome the impediment by allocating the order of D-28 chips to Specialty Devices from its stock on a pro rata basis and is therefore not exempt from liability under Art. 79(1) CISG. As a result, Specialty Devices is not exempt under Art. 79(2) CISG and RESPONDENT therefore remains liable for CLAIMANT’s damage claims.

2. In any event, RESPONDENT is not exempt according to Art. 79(2) in connection with Art. 79(3) CISG as it failed to perform in time after the impediment had ceased

Pursuant to Art. 79(3) CISG, the exemption for non-performance only has effect for the period during which the impediment exists. This means that if the impediment is of a temporary nature, the seller must fulfil its contractual obligations towards the buyer as soon as the impediment ends (Schwenzer in Schlechtriem/Schwenzer, Art. 79 para. 41; Brunner 2004, Art. 79 para. 29; Honnold/Flechtner, Art. 79 para. 435.1). High Performance originally started the production of the D-28 chips in the middle of August 2010 (AfA, paras. 9, 12; accepted in SoD, para. 2). According to Art. 15.2 of the Contract RESPONDENT was to supply, install, and configure the master control system by 12 November 2010 (Cl. Exh. 1). This means that RESPONDENT planned a total of 13 weeks to perform its contractual obligations towards CLAIMANT, i.e. the production of the D-28 chips, the production of the processing units, and the construction, delivery, and configuration of the master control system on the M/S Vis.
After the fire at High Performance’s production facility on 6 September 2010, the production of the D-28 chips was expected to be restarted around 25 October 2010 (Cl. Exh. 2, 3; AfA, para. 12). According to RESPONDENT’s schedule, the refurbishment of the M/S Vis should have been completed 13 weeks after the production of the D-28 chips restarted around 25 October 2010, i.e. by the middle of January 2011. In any event, as the D-28 chips became available to Specialty Devices on 2 November 2010, the refurbishment of the M/S Vis should have been completed at the latest by the end of January 2011, i.e. 13 weeks after 2 November 2010 (AfA, para. 16; accepted in SoD, para. 2).

According to the facts stated above (cf. para. 73), RESPONDENT could have delivered, installed, and configured the master control system on the M/S Vis before the beginning of Corporate Executives’ event on 12 February 2011 (AfA, para. 11). The fire had occurred on 6 September 2010 and the production of D-28 chips was definitely restarted before 2 November 2010 (AfA, para. 16; accepted in SoD, para. 2). Thus, the impediment lasted eight weeks at the most. After 2 November 2010 RESPONDENT cannot justify its late performance, as the consequences of the impediment had ceased to exist by this point in time.

Therefore, RESPONDENT is not exempt from liability according to Art. 79(2) in connection with Art. 79(3) CISG because it could have fulfilled its contractual obligations as soon as the impediment had ended.

Conclusion: RESPONDENT breached the contract according to Art. 33(b) CISG by performing late. It is not exempt from liability under Art. 79(2) CISG since Specialty Devices is not exempt from liability either. Specialty Devices, is not exempt under Art. 79(1) CISG as it bears the procurement risk for the D-28 chips. Even if Specialty Devices was exempt under Art. 79(1) CISG, it is not exempt under Art. 79(2) CISG since High Performance could have overcome the impediment by allocating the D-28 chips on a pro rata basis. In any event, RESPONDENT is not exempt from liability under Art. 79(2) in connection with Art. 79(3) CISG as it failed to perform in a timely manner even after the impediment had ceased to exist. As a result, RESPONDENT is liable for CLAIMANT’s damages due to RESPONDENT’s delay in performance since it bears the responsibility for its entire supply chain.
V. RESPONDENT must pay CLAIMANT USD 670,600 in damages

Due to RESPONDENT’s unexcused failure to perform its obligations (cf. para. 55, 56), CLAIMANT could not hold the event of Corporate Executives on the M/S Vis but had to rent an adequate substitute vessel, the M/S Pacifica (AfA, paras. 17, 18). The costs for the lease of the M/S Pacifica amounted to USD 448,000 (AfA, para. 18). In order to find an adequate substitute vessel, CLAIMANT engaged a broker to whom it had to pay a broker commission of USD 60,600 and a success fee of USD 50,000. Since the M/S Pacifica did not have all features of the M/S Vis that had been advertised by Corporate Executives to its membership, CLAIMANT made an ex gratia payment to Corporate Executives in the amount of USD 112,000 so that the latter could make a partial refund to its delegates (AfA, para. 18; PO 2, para. 20).

In its Statement of Defense, RESPONDENT submits that none of the costs associated with the lease contract should be allowable as damages because the entire lease contract is tainted by the corruption abetted by the broker whom CLAIMANT has engaged (SoD, para. 15). RESPONDENT also submits that the success fee should not be considered as allowable damages since it was used in part to pay a bribe (SoD, paras. 13, 14). Furthermore, RESPONDENT argues that the ex gratia payment should not be recoverable as it was a voluntary payment (SoD, paras. 11, 12).

However, RESPONDENT’s arguments are without merit. CLAIMANT’s damages in connection with the lease contract, i.e. the lease fee, the broker commission and the success fee, each constitute allowable damage claims under the CISG since CLAIMANT has clean hands and the lease contract is valid (A). Second, CLAIMANT has a claim for damages in the total amount of USD 670,600 since, in relation to all positions, the general prerequisites of Art. 74 CISG are met (B).

A. The damage claims in connection with the lease contract are allowable since CLAIMANT has clean hands and the lease contract is valid

The broker hired by CLAIMANT paid an amount of money to Mr. Goldrich’s assistant after the conclusion of the lease contract. The assistant was subsequently arrested for receiving this payment, which constitutes bribery under the laws of Pacifica (Rsp. Exh. 1). Neither CLAIMANT nor Mr. Goldrich knew of this payment until they were informed by the police (Rsp. Exh. 1; PO 2, para. 28). Due to the payment of the broker RESPONDENT states that all costs associated with the lease contract should not be allowable as the lease contract is
tainted by bribery (SoD, para. 24). It is unclear which claims RESPONDENT refers to by stating that all costs associated with the lease contract should not be allowable. RESPONDENT, furthermore, only states that the conviction of Mr. Goldrich’s assistant under the law of Pacifica taints the lease contract and CLAIMANT’s damage claims (SoD, para. 15). It does not elaborate what legal consequences this conviction has on the lease contract or the allowability of CLAIMANT’s damage claims. CLAIMANT can only conceive of two possibilities that might lead to the legal effect RESPONDENT refers to: either a party has lost its right to claim damages since it has unclean hands, or the damages do not exist since the underlying contract is invalid. In the instant case, however, CLAIMANT has the right to claim damages as it has clean hands (1) and the damage claims do in fact exist since the lease contract between Mr. Goldrich and CLAIMANT is valid (2).

1. CLAIMANT has the right to claim damages since it has clean hands

CLAIMANT acknowledges that objections to the allowability of claims with a connection to a criminal act may be raised under the principle of nemo auditor propriam turpitudinem allegans in civil law, or the clean hands doctrine in common law (UN Judgement 358; Sayed, pp. 368, 375). According to these doctrines, no one should be able to derive an advantage from his own unlawful act (Cheng, pp. 149 et seqq.). For a party to lose its rights to claim damages, two conditions must be met: first either the party has to have committed a crime, or it has to be aware of an illegal action of a third person attributable to it, and second it has to derive an advantage from the unlawful act (Chitty, paras. 16-164 et seqq.; DeRosa v. Transamerica; Anenson, pp. 64 et seqq.; Wade, p. 265). These prerequisites, however, are not met in the present case.

First, CLAIMANT legitimately concluded the lease contract with Mr. Goldrich without committing any crime. It is undisputed that neither CLAIMANT nor Mr. Goldrich was involved in any acts of bribery abetted by an independent broker (SoD, para. 15; Rsp. Exh. 1). CLAIMANT operates high-end venues on land-based facilities. When CLAIMANT bought the M/S Vis, it was the first time CLAIMANT had any dealings in the maritime market (AfA, paras. 5, 6). Thus, CLAIMANT did not have the knowledge or the time to find an adequate substitute vessel for the scheduled event on its own, and since there was only one yacht available on the market that would meet the needs of CLAIMANT and Corporate Executives (PO 2, para. 21), CLAIMANT was forced to hire a broker. This broker had the duty to find a substitute vessel and provide CLAIMANT with the opportunity to conclude a lease contract (PO 2, paras. 21, 22).
CLAIMANT, however, never approved or even advised the broker to use any illegal means to accomplish his assignment (Rsp. Exh. 1; PO 2, para. 28). Moreover, the payment to Mr. Goldrich’s assistant was made after the conclusion of the lease contract (PO 2, para. 22). Since the broker was only hired to find an adequate substitute vessel for the M/S Vis (PO 2, para. 21), the contract automatically terminated with the conclusion of the lease contract between CLAIMANT and Mr. Goldrich. Therefore, at the time of the payment to Mr. Goldrich’s assistant, the broker no longer had any existing legal relationship with CLAIMANT. Hence, the broker made an independent decision to pay money to the assistant of Mr. Goldrich (Rsp. Exh. 1). As the broker acted on his own authority and without CLAIMANT’s consent, it was the broker and not CLAIMANT who committed bribery. Therefore, CLAIMANT had clean hands when it concluded the lease contract with Mr. Goldrich.

Further, CLAIMANT did not know of the broker’s payment to Mr. Goldrich’s assistant, until it was informed by the police (Rsp. Exh. 1; PO 2, para. 28). CLAIMANT did not pay the success fee in the amount of USD 50’000 to be used as a bribe and it did not support the broker’s illegal behaviour. In addition, nothing was said about what it might take for the broker to secure the contract (PO 2, para. 22). CLAIMANT, therefore, did not know anything about any illegal action of the broker.

Moreover, the broker’s knowledge cannot be imputed to CLAIMANT either. The knowledge of a person can only be imputed to an enterprise if bribery is committed by a person within the organizational structure of this enterprise (Columbia Law Review, pp. 401 et seq.). In the case at hand, the broker was only hired once, i.e. to find an adequate substitute vessel for the M/S Vis (PO 2, para. 21) and was, thus, not incorporated in CLAIMANT’s organizational structure but worked independently. Even if the Tribunal considered the broker as CLAIMANT’s agent, the broker’s knowledge cannot be imputed to CLAIMANT. In agency relationships an imputation of knowledge is only possible, if the agent acted within the authority granted by the principal (Columbia Law Review, pp. 401 et seq.). As CLAIMANT did not authorize the broker to use illegal means to secure the contract, the broker exceeded his authority. Since the broker no longer acted within CLAIMANT’s authority, his knowledge cannot be imputed to CLAIMANT.

Finally, CLAIMANT did not derive any advantages from the actions of the broker since the conditions of the lease contract are in line with the market (cf. para. 100). Moreover, a party’s claim can only be denied if it relies upon and seeks to enforce an illegal contract (Chitty, para. 16-166). In the present case, CLAIMANT does not rely upon the illegal agreement be-
Memorandum for CLAIMANT

Argument on the Substantive Issues

tween the broker and the assistant and does not seek to enforce it. CLAIMANT invokes its damage claims only based on RESPONDENT’s delay in performance (cf. paras. 55, 103-105).

For these reasons, CLAIMANT has clean hands and thus the right to claim damages.

2. CLAIMANT’s damages do exist because the lease contract between CLAIMANT and Mr. Goldrich is valid

In general, a substitute transaction, such as the lease contract, is a recoverable damage under the CISG (cf. para. 108). RESPONDENT, however, argues that the lease contract is tainted by bribery. This bribery allegedly renders the damage claims unallowable (SoD, paras. 13-15). Such a consequence would require the lease contract to be void or voidable because it is only under such circumstances that the damages would not be recognized under the CISG. The lease contract, however, is valid in any case. First, it is valid under any of the national laws which are potentially applicable to the dispute because the actions by the broker and the assistant do not constitute criminal acts under these laws (a). Second, no transnational public policy exists that qualifies payments to private individuals, such as the one at hand, as a crime (b). Finally, even if the Tribunal applied the laws of Pacifica, the lease contract would still be valid since the bribery does not affect the lease contract as a follow up agreement (c).

a. According to the laws of Mediterraneo, Equatoriana and Danubia the lease contract is valid

The parties agreed upon the law of Mediterraneo to be applicable (Art. 15.2 of the Contract, AfA, para. 20; accepted in SoD, para. 2). Thus, the Tribunal should consider the allowability of CLAIMANT’s damage claims under the law of Mediterraneo as chosen by the parties (Fathallah, p. 76; Fawcett/Harris/Bridge, paras. 19.16, 19.38). The parties’ right to choose the law applicable to the merits of their contract constitutes a general principle in international commercial arbitration (Redfern/Hunter, para. 3.94; Tweeddale/Tweeddale, paras. 6.04 et seqq.; Fawcett/Harris/Bridge, para. 16.57; Sayed, p. 163) and is explicitly stated in Art. 47 (2) CIETAC Rules (Stricker-Kellerer/Moser, Art. 43 para. 6). The parties’ choice of law is binding on an arbitral tribunal that is considering a dispute arising out of such a contract (Fawcett/Harris/Bridge, para. 19.38; Fouchard/Gaillard/Goldman, para. 1421; Redfern/Hunter, paras. 3.96 et seqq.).

As demonstrated above (cf. para. 52) the CISG is part of the law of Mediterraneo (AfA, para. 20). According to Art. 4 CISG, the CISG is not, however, concerned with the vio-
lation of statutory prohibitions, such as Art. 1453 Criminal Code of Pacifica (hereafter “CCP”), or the consequences of such an offence, e.g. invalidity of a contract (Schwenzer/Hachem in Schlechtriem/Schwenzer, Art. 4 para. 39; Westermann, Art. 4 para. 8; Siehr in Honsell, Art. 4 para. 7). Therefore, the legal consequences of such violations are a matter of the applicable domestic law (Fawcett/Harris/Bridge, para. 16.62; Schlechtriem/Schwenzer, Art. 4 para. 39), i.e. the law of Mediterraneo. According to the law of Mediterraneo, the actions of the broker and the assistant are not considered a criminal offence (PO 2, para. 27; Rsp. Exh. 1). Even if the law at the seat of RESPONDENT, i.e. Equatoriana (AfA, para. 2), or the law of the seat at the Tribunal, i.e. Danubia (Cl. Exh. 1, Art. 15.1 Contract), were to be considered (cf. Fathallah, p. 76), this would lead to the same conclusion, as the broker’s and the assistant’s actions are not considered a legal offence in both states (PO 2, para. 27).

Since neither the broker’s nor the assistant’s actions are considered criminal in Mediterraneo, Equatoriana, or Danubia, there is no basis to assume that the lease contract is invalid under any of these laws. Therefore, CLAIMANT’s damage claims do exist.

b. The lease contract is valid because there is no transnational public policy according to which bribery of private individuals is a crime

The Tribunal could also take transnational public policy into consideration in order to determine the validity of the lease contract and thus the existence of CLAIMANT’s damage claims (cf. Born 2011, p. 2196; Fawcett/Harris/Bridge, para. 116.13; Raeschke-Kessler/Gottwald, p. 20; Art. V(2)(b) NY Convention; Art. 34(2)(b)(ii), 36(1)(b)(ii) DAL). A legal principle is part of transnational public policy if it is dealt with equally among several legal systems due to fundamental principles of law (Born 2011, pp. 2193 et seq.; Sayed, p. 288; Arfazadeh, p. 225). In this case, however, there is no such transnational public policy leading to an invalidity of the lease contract.

First, the criminal liability of bribery between private parties is not a criminal offence in three of the states involved in the present case, i.e. Danubia, Equatoriana and Mediterraneo (PO 2, para. 27). The only state that considers the assistant’s behaviour to be criminal is Pacifica (Art. 1453 CCP; PO 2, para. 27). Therefore, such behaviour is not dealt with equally among the majority of the involved states and thus does not constitute a fundamental principle of transnational public policy. On the contrary, this suggests that such behaviour does not constitute a criminal offence under transnational public policy.
Second, bribery would only violate transnational public policy if it occurred in relation to a state’s public official and with the objective of retaining a public contract from the respective state (ICC Award 5622; Born 2011, p. 2194; Sayed, pp. 289, 291, 306). The OECD Convention, to which Mediterraneo, Equatoriana and Danubia are parties (PO 2, para. 27), explicitly states in Art. 1 that only the bribery of foreign public officials constitutes an offence in the sense of transnational public policy. Mr. Goldrich is the individual owner of the M/S Pacifica, and a private individual who is not related to the state of Pacifica in any official capacity (SoD, para. 13). Further, CLAIMANT’s broker has neither been instructed to obtain a public order from the state of Pacifica nor did he do so. Therefore, the broker’s as well as the assistant’s behaviour does not violate any transnational public policy.

Bribery between employees of private legal entities, is merely mentioned in the OECD Guidelines (Section VII, para. 1 OECD Guidelines). These guidelines, however, only represent non-binding recommendations by governments to multinational enterprises operating from adhering countries (Foreword to the OECD Guidelines; Leipziger, pp. 54 et seq.; Rieth, p. 122). As these recommendations are thus devoid of any concrete legal basis, the bribery between private persons cannot be qualified as part of transnational public policy. Further, only 42 countries worldwide have adopted the OECD Guidelines so far (Foreword to the OECD Guidelines). This implies that the OECD Guidelines are not internationally recognized. Most importantly, none of the countries connected with the present case, not even Pacifica, has adopted these guidelines (PO 2, para. 27). Therefore, the broker’s and the assistant’s actions are not contrary to transnational public policy and the OECD Guidelines should not be applied.

Finally, even if bribery between private persons was considered to violate international practice, such a practice is only to be taken into consideration if it is not contrary to the applicable law on the merits of the dispute (Tao, Art. 43 para. 1; Stricker-Kellerer/Moser, Art. 43 para. 1). The applicable law in the case at hand is the law of Mediterraneo, according to which neither the assistant nor the broker have behaved in an unlawful way (cf. para. 89).

For all these reasons the Tribunal should not assume the existence of a transnational public policy that bribery of private persons constitutes a crime. Therefore, CLAIMANT’s damage claims exist since the lease contract is valid.
c. Even if the Tribunal applied the law of Pacifica, the lease contract is valid

RESPONDENT relies on Art. 1453 CCP according to which the assistant’s behaviour is criminal (SoD, para. 14; Rsp. Exh. 2). CLAIMANT acknowledges that according to Art. 1453 CCP the actions by the broker and the assistant are considered a criminal offence in Pacifica, but denies that this criminal provision renders the lease contract invalid and the damage claims in-existent for the following reasons.

It might be possible to argue that the agreement between the broker and the personal assistant is void by virtue of an action that is considered a crime in Pacifica. But whether the contract that was allegedly made possible by the illegal deal, is itself void, is a different matter. Generally commentators have held that a so called bribery agreement does not automatically have a tainting effect on so called follow up contract (Schlüter; Pfefferle; Berg, pp. 133, 144; Raeschke-Kessler/Gottwald, p. 11).

This is only seen differently if the follow up contract is legally connected to the bribery agreement (Berg, pp. 132 et seq.). Economically connected follow up contracts are independent and must, therefore, be considered independently, i.e. separate from the bribery agreement (Berg, p. 133). Presently, the lease contract was concluded between different parties and had a different subject matter. Further, there are no indications that the lease contract and the agreement between the assistant and the broker are legally connected. Therefore, the lease contract is valid even if the bribery agreement was invalid.

Moreover, a follow up contract is considered invalid if it contains any terms that are detrimental for any of the parties due to the bribery agreement (Acker/Froesch/Kappel, p. 4; Sethe, p. 2314; Schlüter; Ax/Schneider, p. 83). In the case at hand, it cannot be assumed that the bribery between the assistant and the broker led to terms that are detrimental for either party. In particular, there are no facts that indicate a lower lease fee not in accordance with market prices.

Finally, it is argued that a follow up contract is invalid, if the actions of the bribing person can be imputed to the party of the follow up contract (Acker/Froesch/Kappel, p. 5). The lease contract, in the case at hand, is not tainted by bribery because the broker acted independently and without the consent or knowledge of CLAIMANT (cf. paras. 83, 84). Therefore, the broker’s actions cannot be imputed to CLAIMANT.

For these reasons, the lease contract is valid even if the Tribunal applied the law of Pacifica. Consequently, CLAIMANT’s damage claims do exist.
B. The prerequisites under Arts. 74 CISG for CLAIMANT’s damage claims are met

According to Art. 45(1)(b) CISG the buyer is entitled to claim damages under Art. 74 CISG if the seller fails to perform his obligations. The legal basis to claim damages is Art. 45(1) CISG, whilst Art. 74 CISG sets out the preconditions for such a claim (Honnold, Art. 74 para. 404). Once a breach of contract has occurred, the aggrieved party can recover all suffered damages under Art. 74 CISG (Schwenzer in Schlechtriem/Schwenzer, Art. 74 para. 3; Gotanda in Kröll/Mistelis/Perales, Art. 74 para. 1; Brunner 2004, Art. 74 para. 8). The party in breach does not need to be at fault to be liable (Gotanda in Kröll/Mistelis/Perales, Art. 74 para. 7).

Under Art. 74 CISG, the liability is limited to damages that are foreseeable as consequences of the specific breach (Schwenzer in Schlechtriem/Schwenzer, Art. 74 para. 2). The key moment in terms of foreseeability is the conclusion of the respective contract (Schwenzer in Schlechtriem/Schwenzer, Art. 74 para. 47). To determine foreseeability, the circumstances and the purpose of the contract must be taken into account (Schwenzer in Schlechtriem/Schwenzer, Art. 74 para. 45; Schönle/Koller in Honsell, Art. 74 paras. 22 et seqq.). Damages are foreseeable if a reasonable person, who is aware of the respective circumstances, would foresee such damages resulting from its breach (Schwenzer in Schlechtriem/Schwenzer, Art. 74 para. 49; Schönle/Koller in Honsell, Art. 74 para. 24; Brunner, Art. 74 para. 12). Finally, according to Art. 77 CISG an aggrieved party must mitigate its loss (Gotanda in Kröll/Mistelis/Perales, Art. 77 para. 5).

As a result of RESPONDENT’s breach of contract, CLAIMANT is entitled to recover damages for the expenses made due to chartering a substitute vessel (1) including the broker commission (2). Contrary to RESPONDENT’s submission CLAIMANT is also entitled to recover the yacht broker’s success fee (3) and the expenses related to the ex gratia payment (4).

1. CLAIMANT is entitled to claim the expenses made for chartering the M/S Pacifica in the amount of USD 448’000

RESPONDENT has to compensate CLAIMANT because the expenses made for chartering the M/S Pacifica constitute recoverable damages (a) and were foreseeable for RESPONDENT (b). Further, CLAIMANT fulfilled its obligation to mitigate its damages under Art. 77 CISG (c).
a. The costs for the lease fee is a recoverable damage

As shown above (cf. para. 54), RESPONDENT did not deliver and install the master control system in time. Due to this breach of contract, CLAIMANT had to lease the M/S Pacifica as a substitute vessel to hold Corporate Executives’ event (AfA, paras. 17, 18). The lease fee amounted to USD 404’000 plus USD 44’000 port and handling fees (AfA, para. 18).

If the breach of contract causing the damages consists in a delay, as in the case at hand, the aggrieved party is entitled to claim compensation for the losses resulting from this delay (Gotanda in Kröll/Mistelis/Perales, Art. 74 para. 19). Measures taken to fill the time gap until the party in breach fulfilled its contractual obligations and in order to avoid consequential damages are recoverable, in particular rental costs for a replacement object (Schwenzer in Schlechtriem/Schwenzer, Art. 74 para. 25; Enderlein/Markow, p. 302; Tannery Machines Case).

CLAIMANT rented a substitute vessel in order to comply with its contractual obligations towards Corporate Executives. Therefore, the expenses made for chartering a substitute vessel in the amount of USD 448’000 is a recoverable damage under Art. 74 CISG.

b. The cost for the lease fee is a foreseeable damage for RESPONDENT

By scheduling a fixed period of time for the delivery of the master control system, i.e. by 12 November 2010, CLAIMANT indicated that it wanted to use the ordered master control system on its yacht shortly after the date of delivery. As a reasonable person would expect a yacht equipped with conference technology to be used for conference purposes, RESPONDENT ought to have known that CLAIMANT was about to hold events on its yacht after 12 November 2010.

Further, a yacht with the latest technology, and on which a conference was meant to be held, would clearly not be complete without a master control system (AfA, para. 8). Hence, RESPONDENT ought to have anticipated that a delay in the installation of the master control system could result in damages, especially as it was to be used for Corporate Executives’ event.

For these reasons RESPONDENT could have foreseen that due to its enormous delay in performance CLAIMANT would need to rent a substitute vessel.

c. CLAIMANT fulfilled its obligation to mitigate its damages

As shown above (cf. para. 104), the aggrieved party must mitigate its damages according to Art. 77 CISG. Pursuant to Art. 77 CISG the aggrieved party may be obliged to make a hedg-
ing transaction if possible rather than waiting for delivery (Mitigation Case; Zeller, p. 74; Brölsch, p. 96). Reasonable expenses made in mitigating or averting damages, e.g. the rental of a replacement object, are recoverable items of damages under the CISG (Schwenzer in Schlechtriem/Schwenzer, Art. 74 para. 27; Gotanda in Kröll/Mistelis/Perales, Art. 74 para. 18; Witz/Salger/Lorenz, Art. 74 para. 13; Stainless Wire Case). In accordance with this opinion, it was held that it is reasonable to rent a substitute vessel if the original is not available in order to prevent higher damages (Scrap Steel Case).

CLAIMANT would have suffered even higher damages than the costs arising out of the rental of the M/S Pacifica, including the broker commission, the success fee, and the ex gratia payment, if it had repudiated its contract with Corporate Executives (PO 2, para. 17). Moreover, CLAIMANT ran the risk of losing one of its most important clients (PO 2, para. 17; Cl. Exh. 4). Therefore, CLAIMANT was compelled to rent a substitute vessel, since Corporate Executives would not accept an onshore venue (PO 2, para. 18) and the advertisement for the event had emphasized that it would be held on a luxury yacht (AfA, para. 17). Therefore, by renting a substitute vessel CLAIMANT fulfilled its obligation to mitigate the damages incurred.

2. **CLAIMANT is entitled to claim the expenses made for the standard broker commission of USD 60’600**

RESPONDENT must compensate CLAIMANT for the broker commission because this expense was incurred in direct connection with the lease of the substitute vessel. A damaged party can claim additional expenditures due to a substitute transaction which was necessary because of the other party’s breach of contract (Schwenzer in Schlechtriem/Schwenzer, Art. 74 para. 27). It is also entitled to reimbursement for reasonable expenses made in assessing, averting or mitigating damages (Stainless Wire Case).

In the case at hand, the payment of the broker commission was a reasonable expense to avert further damages. Since CLAIMANT lacks the necessary knowledge to obtain a substitute yacht without hiring a broker, CLAIMANT would have run the risk of not being able to find an appropriate vessel in time for Corporate Executives’ event, since there are only a few yachts that are comparable to the M/S Vis. Further, when CLAIMANT was informed that the master control system would not be delivered in time prior to Corporate Executives’ event (Cl. Exh. 2; AfA, para. 12), it had only five months left to find an appropriate substitute yacht. Therefore, CLAIMANT had little choice but to engage a yacht broker in order to obtain an adequate substi-
For these reasons, the employment of a yacht broker and thus the payment of the standard yacht broker commission was a legitimate, reasonable and necessary expenditure. Hence, the yacht broker commission is a recoverable item of damages according to Art. 74 CISG.

3. **CLAIMANT is entitled to claim the expenses made for the yacht broker’s success fee in the amount of USD 50’000**

As explained in connection with the broker commission, CLAIMANT’s reasonable expenses made in order to avert or mitigate damages are recoverable (cf. para. 115). The success fee also constitutes such a reasonable expense.

For the time period of Corporate Executives’ event, there was only one appropriate substitute vessel available, the M/S Pacifica (PO 2, para. 21). However, the yacht was normally not available for lease (PO 2, para. 21). Under these difficult circumstances it is common to pay a success fee to a broker (PO 2, paras. 22, 23). Therefore, it was reasonable that CLAIMANT had promised its broker a success fee in order to secure the lease contract with Mr. Goldrich (PO 2, para. 22). Hence, the success fee paid to the broker in the amount of USD 50’000 constitutes a legitimate and reasonable payment. This expense is therefore a recoverable item of damages under Art. 74 CISG.

Irrespective of the general recoverability of these expenses, RESPONDENT argues that the success fee should not be considered as a recoverable damage. It bases this argument on the assertion that the success fee constitutes an illegal payment under CLAIMANT’s authority (SoD, para. 14). However, as elaborated above (cf. paras. 80-102), CLAIMANT had no knowledge of the bribery, and the lease contract was not tainted by this bribery. Furthermore, the broker did not pay the exact amount he received from CLAIMANT as a bribe (Rsp. Exh. 1). He only passed part of it to the assistant (SoD, para. 13). Moreover, the payment to the assistant was made after the termination of the contractual relationship between the broker and CLAIMANT (cf. para. 82). Therefore, this payment should be considered as a new and different payment, which is not related to the success fee. CLAIMANT can thus not be held liable for the actions of an independent person with which it had no on-going legal relationship anymore.

As a consequence, the success fee has no proven connection to this bribery and it is not an illegal payment. It is thus recoverable under Art. 74 CISG.
4. **CLAIMANT is entitled to claim the expenses made for the ex gratia payment in the amount of USD 112’000**

CLAIMANT and Corporate Executives agreed to have the latter’s event on the M/S Vis (PO 2, para. 18). As explained above (cf. para. 77), CLAIMANT had to reschedule the event to be held on the M/S Pacifica due to RESPONDENT’s breach of contract. Since the M/S Pacifica did not have the same features as the M/S Vis advertised by Corporate Executives to its members, those members were disappointed when the change of venue was announced (PO 2, para. 20; Rsp. Exh. 1). Moreover, due to the change of venue, CLAIMANT’s reputation was endangered as Corporate Executives’ members are top level executives. Therefore, the loss of their goodwill and damage to CLAIMANT’s reputation could have spread very quickly (Cl. Exh. 4). To prevent the occurrence of such potentially detrimental damages, CLAIMANT was virtually obliged to make an ex gratia payment to Corporate Executives.

Since damages for loss of goodwill are generally recoverable (a) and the risk of their incurrence was foreseeable for RESPONDENT (b), the ex gratia payment is recoverable because it constitutes a reasonable mitigation cost (c).

**a. Damages to reputation and goodwill are recoverable**

According to prevailing doctrine, damages to reputation and goodwill are recoverable under the CISG (CISG-AC Op. No. 6; Schwenzer in Schlechtriem/Schwenzer, Art. 74 para. 34; Gotanda in Kröll/Mistelis/Perales, Art. 74 paras. 66 et seq.; Plastic Grass Carpets Case; Frozen Meat Case; Art Books Case; Cheese Case). This is especially true if the loss of goodwill is the result of a party’s late delivery (Schlechtriem/Butler, p. 213; Schönle/Koller in Honsell, Art. 74 para. 8; Cheese Case). Loss of reputation and goodwill is considered as a pecuniary loss (Schwenzer in Schlechtriem/Schwenzer, Art. 74 para. 34) whose worth, measurable in money, is recoverable (Magnus in Staudinger, Art. 74 para. 27). Based on the foregoing, the loss of goodwill and reputation is a recoverable damage.

**b. Damages to reputation and goodwill are foreseeable**

The risks of loss of goodwill and damage to reputation, do not have to be specifically highlighted to a contractual party in order to be foreseeable, as these risks can be indicated by the circumstances, e.g. if the buyer is in a competitive business (Frozen Meat Case; Cheese Case). Loss of customers due to a breach of contract is normally foreseeable and the resulting damages recoverable (Herber/Czerwenka, Art. 74 para. 12; Plitz, p. 415; Enderlein/Maskow,
p. 302; Gotanda in Kröll/Mistelis/Perales, Art. 74 para. 23). Further, it is foreseeable that a party, aggrieved by a breach by its contractual partner, will have to pay its customers a refund (Cheese Case; Gotanda in Kröll/Mistelis/Perales, Art. 77 para. 23).

In the case at hand, CLAIMANT operates high-end venues providing complete conference packages with luxury venues and top-service (AfA, para. 5). RESPONDENT, as contracting partner, was aware that the installed master control system is of the latest on-board technology, superior to anything else on the market (AfA, para. 6). A reasonable person ought to have known that only demanding clients will rent such a well-equipped yacht. A reasonable person also ought to have known that demanding clients, paying high fees for their events, are not going to accept major changes in venues (AfA, paras. 5, 11). Therefore, RESPONDENT ought to have foreseen that for an enterprise like CLAIMANT, being forced to make a major venue changes will damage its reputation and goodwill as a high-end event enterprise.

c. The ex gratia payment is to be considered as a recoverable mitigation cost

Although the ex gratia payment was effected by CLAIMANT on its own accord, it is nevertheless recoverable because the payment was necessary to avoid further damages to CLAIMANT’s goodwill and reputation.

Under Art. 77 CISG, an aggrieved party must undertake reasonable measures to mitigate its losses (cf. para. 104). As one of such measures, a party may voluntarily pay a reasonable amount to another party in order to mitigate the incurring damages (cf. Used Car Case; Propane Gas Case). The amount of USD 112'000 that CLAIMANT presently paid to Corporate Executives constitutes such a reasonable measure to mitigate the incurring loss of reputation and goodwill.

Corporate Executives’ members are top level executives (AfA, para. 11). They explicitly communicated their displeasure about the change in venue (PO 2, para. 20; Rsp. Exh. 1). Their dismay could have resulted in a loss of goodwill and reputation, which would have been amplified by the fact that the loss of reputation would spread in each and every firm of the participating executives of the event. The ex gratia payment was used in order to make a partial refund to Corporate Executives’ members (PO 2, para. 19). CLAIMANT thereby prevented the executives from being displeased about paying a high fee for a lower standard (PO 2, para. 20). The fee for an event on a used yacht would obviously be lower than the fee for an event on a completely new yacht with the latest on-board technology. Moreover, CLAIMANT
ensured its future business with its long standing client, Corporate Executives (AfA, para. 11), by the ex gratia payment.

Since the payment must be considered as a reasonable means used by CLAIMANT to mitigate its imminent damages it is recoverable.

**Conclusion**: CLAIMANT did not lose its right to claim damages as a result of the broker’s payment to Mr. Goldrich’s assistant since CLAIMANT did not itself commit an unlawful act. Further, CLAIMANT neither had knowledge of the broker’s actions nor derived any advantages from them. Therefore, all of CLAIMANT’s damage claims are allowable. Since the lease contract is valid irrespective of the law considered by the Tribunal, all of CLAIMANT’s damage claims do exist. Finally, as all general prerequisites of Art. 74 CISG are met, the Tribunal should order RESPONDENT to compensate CLAIMANT for all damages incurred.
REQUESTS FOR RELIEF

CLAIMANT respectfully requests the Tribunal to order that:

1. RESPONDENT’s request concerning the removal of Dr. Mercado from CLAIMANT’s legal team is dismissed

2. RESPONDENT shall pay CLAIMANT USD 670,600 in damages, including:
   a. USD 448,000 for the cost of chartering a substitute vessel for the M/S Vis, the substitute vessel having been chartered by CLAIMANT to provide conference services for the annual conference held by Corporate Executives;
   b. USD 60,600 for the standard yacht broker commission of 15% of the rental cost;
   c. USD 50,000 for the yacht broker’s success fee; and
   d. USD 112,000, the amount paid to Worldwide Corporate Executives to make partial refund of the conference fee paid by its members.

3. RESPONDENT shall pay the costs of arbitration, including CLAIMANT’s expenses for legal representation, the arbitration fee paid to CIETAC, and the additional expenses of the arbitration as set out in Article 50, CIETAC Arbitration Rules.

4. RESPONDENT shall pay CLAIMANT interest on the amounts set forth in items 2 and 3, from the date those expenditures were made by CLAIMANT to the date of payment by RESPONDENT.