Nineteenth Annual Willem C. Vis International Commercial Arbitration Moot

ALBERT LUDWIG
UNIVERSITY OF FREIBURG

Memorandum for Claimant

On behalf of Mediterraneo Elite Conference Services, Ltd (CLAIMANT) Against Equatoriana Control Systems, Inc (RESPONDENT)

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

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

CLAIMANT is a company incorporated in Mediterraneo, which organises luxury business events. It supplies conference facilities, including the newly purchased M/S Vis yacht.

RESPONDENT is a company organised under the laws of Equatoriana. It agreed to equip the M/S Vis yacht with a “master control system”, a significant part of the on-board conference technology.
26 May 2010  CLAIMANT and RESPONDENT conclude a contract, which obliges RESPONDENT to supply, install and configure the master control system for the M/S Vis yacht (hereafter the Contract). According to the Contract, this must be completed until 12 November 2010. The Contract is subject to Mediterranean law and contains an arbitration clause.

5 August 2010  Specialty Devices is informed about the conference scheduled for 12 to 18 February 2011.

6 September 2010  Due to a short circuit, a fire occurs at High Performance’s production facility where the D-28 chips are produced.

10 September 2010  High Performance informs RESPONDENT’S subcontractor, Specialty Devices, about the fire. High Performance states that there would be a halt in production until the beginning of November 2010. High Performance announces not to allocate the remaining chips on a pro rata basis. It prefers to supply only its regular customers. Yet, a pro rata allotment would have provided Specialty Devices with enough chips to produce a sufficient amount of processing units.

13 September 2010  RESPONDENT informs CLAIMANT about the fire explaining that this occurrence would delay delivery of the master control system until the end of November 2010. Installation could therefore not begin before the middle of January 2011 and would take about another ten weeks.

20 September 2010  A trade magazine reveals that High Performance, the chip producer, sent all remaining chips to Atlantis Technical Solutions, a different company desiring the D-28 chips, due to a friendship between the companies’ CEOs.

In the meantime  CLAIMANT has to make arrangements for the event of its client, Corporate Executives, which cannot be held on the M/S Vis yacht due to RESPONDENT’S delay. CLAIMANT charters the M/S Pacifica Star yacht as a substitute. The M/S Pacifica Star is inferior to the M/S Vis, but is eventually accepted by Corporate Executives. CLAIMANT has
additional expenses of USD 670,600. This sum consists of USD 448,000 for chartering a substitute vessel; USD 60,600 (15% of the rental cost) as a standard yacht broker commission; USD 50,000 as the yacht broker’s success fee and a USD 112,000 ex gratia payment to Corporate Executives.

**12–18 February 2011** CLAIMANT’s client, Corporate Executives, holds its annual conference on the M/S Pacifica Star.

**11 March 2011** RESPONDENT completes the installation and verification of the master control system on the M/S Vis.

**9 April 2011** CLAIMANT notifies RESPONDENT about the extra costs of USD 670,600 that arose due to RESPONDENT’S delay. CLAIMANT offers that the parties share the costs, paying USD 335,300 each.

**14 April 2011** RESPONDENT rejects this offer denying any responsibility and merely suggests to give CLAIMANT a price reduction of 20% on future services.

**15 July 2011** Following RESPONDENT’S continued refusal to share the costs, CLAIMANT applies for arbitration.

**25 July 2011** An article in a business newspaper states that a partial passing on of the USD 50,000 broker’s success fee to Mr. Goldrich’s assistant constitutes bribery under the laws of Pacifica. The article also declares that CLAIMANT was unaware of this.

**30 August 2011** CLAIMANT informs RESPONDENT that Dr Mercado has been added to CLAIMANT’S team of legal representatives.

**2 September 2011** RESPONDENT challenges Dr Mercado as counsel for CLAIMANT.
INTRODUCTION

1 Contract reads cooperation. On one side of the present case, CLAIMANT cooperated with all parties involved and spared no effort to ensure its ability to perform. On the other side, RESPONDENT and its production partners stood still where taking reasonable measures could have been expected.

2 RESPONDENT’s ability to supply the master control system in time appeared threatened as a fire occurred at High Performance’s production facilities. At this point, RESPONDENT and each of its production partners failed to take adequate measures to maintain their ability to perform.

3 High Performance should have allocated the remaining D-28 chips among its contractual partners on a pro rata basis. Doing so would have been the fair way to proceed and the legally required one. A pro rata allotment would have provided Specialty Devices with the number of chips needed to produce a sufficient amount of processing units. Specialty Devices on its part should have tried to obtain the needed D-28 chips by promptly offering a reasonably higher price. RESPONDENT itself should have used other processing units for its master control system instead of waiting for processing units featuring the newish D-28 chips. The Contract did not even call for D-28 chips. Altogether, RESPONDENT and its production partners stood still and made no effort to maintain their ability to perform. RESPONDENT is therefore not exempt from liability (Issue 2).

4 CLAIMANT, in contrast, took reasonable measures to make up for RESPONDENT’s inadequate performance. Although a substitute yacht was hard to find, CLAIMANT succeeded in enabling its client’s conference. CLAIMANT thereby prevented significant losses, for which RESPONDENT would have been liable. As a consequence, CLAIMANT is entitled to recover all costs of chartering a substitute vessel, irrespective of bribery accusations (Issue 3).

5 Besides, RESPONDENT chose not to challenge the presiding arbitrator but to invent a right to challenge a legal representative instead. There is no such right. RESPONDENT could have challenged the presiding arbitrator but knowingly exceeded the deadline. The Tribunal has no legal authority to remove a representative and no reason to find it (Issue 1).
ARGUMENT ON THE PROCEEDINGS

ISSUE 1: THE TRIBUNAL SHOULD REFRAIN FROM ORDERING CLAIMANT TO REMOVE DR MERCADO FROM ITS LEGAL TEAM

The Tribunal is respectfully requested to refrain from ordering CLAIMANT to remove Dr Mercado from its legal team.

RESPONDENT alleges that Professor Presiding Arbitrator is no longer impartial and independent. RESPONDENT relies on the fact that Dr Mercado, a member of CLAIMANT’S legal team, serves as Visiting Lecturer at the same university as Professor Presiding Arbitrator, occasionally meets his wife and is the godmother of his child [Statement of Defence, p. 39, para. 18; Procedural Order No. 2, p. 51, para. 38; Statement of Defence, p. 39, para. 21]. RESPONDENT therefore requests the Tribunal to order the removal of Dr Mercado [Statement of Defence, p. 40, para. 24; Procedural Order No. 1, p. 44, para. 6]. At the same time, RESPONDENT claims to reserve its right to challenge Professor Presiding Arbitrator, if the Tribunal refuses to remove Dr Mercado from CLAIMANT’S legal team [Statement of Defence, p. 39, para. 16].

The Tribunal should refrain from ordering CLAIMANT to remove Dr Mercado. The Tribunal has no competence to remove a legal representative (A). Even if the Tribunal had such competence in cases of abuse, the present case would not justify exercising this competence (B). In any case, the independence of Professor Presiding Arbitrator is not endangered by his relationship with Dr Mercado (C).

A. The Tribunal Has No Competence to Remove a Legal Representative

The Tribunal is not provided with the competence to remove a legal representative. Neither the CIETAC Rules nor the UNCITRAL Model Law entitles the Tribunal to order a removal of a party’s legal representative (I). The ruling of the Rompetrol Case supports the absence of a competence to remove a legal representative (II). The absence of such a competence corresponds to the applicable legal system (III).
I. Neither the CIETAC Rules nor the UNCITRAL Model Law Empowers the Tribunal to Order the Removal of Dr Mercado

None of the applicable arbitration rules and laws empower the Tribunal to issue an order to remove Dr Mercado from CLAIMANT’s legal team. The Parties decided that any dispute arising from or in connection with their contract shall be governed by the China International Economic and Trade Arbitration Commission (hereafter CIETAC) [Claimant’s Exhibit No. 1, p. 9, para. 15.1]. Should a matter remain unsettled by the CIETAC Rules, the arbitration law at the place of the arbitration, the lex loci arbitri, is subsidiarily applicable [Várady/Barceló/v. Mehren, p. 59; Fouchard/Gaillard/Goldman, para. 368; Lachmann, para. 213; Schmidt-Ahrendts/Schmitt, p. 524]. Danubia, the place of arbitration, has adopted the UNCITRAL Model Law as its lex loci arbitri [Application for Arbitration, p. 7, para. 21].

The CIETAC Rules and the UNCITRAL Model Law neither grant the Tribunal express (1) nor implied (2) competence to remove Dr Mercado from CLAIMANT’s legal team.

1. Neither the CIETAC Rules nor the UNCITRAL Model Law Expressly Grants the Tribunal Competence to Remove Dr Mercado From CLAIMANT’s Legal Team

Neither the application rules the parties agreed on, nor the applicable lex loci arbitri contains any provisions which expressly authorise the removal of a legal representative.

2. Neither the CIETAC Rules nor the UNCITRAL Model Law Implicitly Grants the Tribunal Competence to Remove Dr Mercado From CLAIMANT’s Legal Team

The applicable rules and laws to this arbitration do not implicitly provide the Tribunal with the competence to remove Dr Mercado. RESPONDENT has not provided any legal grounds for its unsubstantiated claim.

RESPONDENT may not derive competence from Art. 19(2) UNCITRAL Model Law. According to this article, a tribunal may only conduct the arbitration in such manner as it considers appropriate if the parties did not agree on the manner the procedure should be conducted in. However, as the parties agreed on CIETAC Rules, these, as well as mandatory norms of the UNCITRAL Model Law, restrict the scope of Art. 19 UNCITRAL Model Law [cf. Redfern/Hunter, para 2-19; Poudret/Besson, para. 293; Park, p. 23; Hoffmann, in: Böckstiegel, p. 10].
Art. 20 CIETAC Rules regulates questions of legal representation. However, this article does not expressly address the subject of challenging a legal representative. The CIETAC Rules, being an elaborated set of rules, govern the issue of legal representation exhaustively in Art. 20 CIETAC Rules. It must be presumed that a party which subjected its arbitration agreement to a law which contains no mandatory provisions in the respect of power of representation, but instead provides for a different solution, excluded this right [Poudret/Besson, para. 293]. Thus, by choosing CIETAC Rules to regulate the proceedings, the Parties excluded their ability to challenge a legal representative.

Even if Art. 20 CIETAC Rules did not cover the matter of legal representation exhaustively, Art. 18 UNCITRAL Model Law, ensuring free choice of counsel, would supersede Art. 20 CIETAC Rules as it is a mandatory provision. Art. 18 UNCITRAL Model Law states that each party shall be given a full opportunity to present its case. Having a full opportunity to present one's case is the basis of a fair trial [BGH, 26 Sep 1985; Born, p. 2290; Lachmann, para. 1295] This norm is mandatory [Analytical Commentary, Art. 19, para. 7; Roth, in: Weigand, Art. 18 para. 1; Hußlein-Stich, p. 108; Calavros, p. 104]. As Art. 18 UNCITRAL Model Law is a fundamental principle, it is considered one of the pillars of the Model Law [Binder, para. 5-005; Holtzmann/Neuhaus, p. 550; Roth, in: Weigand, Art. 18, para. 1]. The choice of a legal representative has substantial consequences for a party’s opportunity to present its case, as the presentation of a case in its entity depends not only on arguments and submissions, but also on the quality in which they are brought forward [Born, p. 2290]. Consequently, a party must have the ability to choose counsel without any restriction [Lew/Mistelis/Kröll, para. 21-66; Born, p. 2290; ICSID ARB/05/24, Hrvatska Case, para. 24]. Therefore, the right to select one’s legal team is an inherent aspect of a party’s opportunity to present its case [Born, pp. 2292, 2293; Lionett/Lionett, p. 142; Waincymer, p. 597].

In light of the fact that Art. 18 UNCITRAL Model Law underlines a party’s right to fully present its case, neither the CIETAC Rules nor the UNCITRAL Model Law implicitly grants the Tribunal competence to remove Dr Mercado from CLAIMANT’s legal team.
II. The Ruling of the Rompetrol Case Supports the Absence of a Competence to Remove a Legal Representative

The ruling of the Rompetrol Group N.V. v. Romania (hereafter Rompetrol Case) [ICSID ARB/06/3, Rompetrol Case] confirms a tribunal’s lack of competence to issue an order to remove a legal representative.

The International Centre for Settlement of Investment Disputes (hereafter ICSID), the CIETAC Rules and the UNCITRAL Model Law share the same approach in circumventing biased tribunals, cf. Art. 57 ICSID Convention, Art. 30 CIETAC Rules, Art. 12 UNCITRAL Model Law. The three sets of rules are comparable when it comes to the provisions of legal representation. Therefore, ICSID cases and hence the Rempetrol case, serve as an indicator whether a competence to remove a legal representative exists.

Similar to the case at hand, the tribunal of the Rompetrol case dealt with the question of removing a legal representative. In the Rompetrol Case, a legal representative joined and remained on the claimant’s legal team after the formation of the tribunal [ICSID ARB/06/3, Rompetrol Case, para. 4; para. 27]. The concerns for bias of one of the arbitrators arose due to the fact that the legal representative and one of the arbitrators had until recently been members of the same law firm [ICSID ARB/06/3, Rompetrol Case, para. 5]. The tribunal held that it was not empowered to control the claimant’s legal representation [ICSID ARB/06/3, Rompetrol Case, para. 14]. Instead, it left the respondent with the possibility to challenge the affected arbitrator [ICSID ARB/06/3, Rompetrol Case, para. 21]. Thus, the ruling of the Rompetrol Case supports that the Tribunal is not empowered to remove a legal representative.

III. The Absence of a Competence to Remove a Legal Representative Corresponds to the Legal System

Considering that the CIETAC Rules and the UNCITRAL Model Law already define avenues of approach to remove a biased arbitrator, it is consistent to deny the Tribunal the competence to remove a legal representative.

The silence in arbitration rules concerning the challenge of a legal representative can be explained by the fundamentally different duties inherent in the roles of arbitrators and counsel. An arbitrator must be independent at any time of the proceedings; counsel will by definition be biased [ICSID ARB/06/3, Rompetrol Case, para. 19]. A legal representative’s
duty is to present its party’s case with the degree of dependence and partiality that this role implies [ICSID ARB/06/3, Rompetrol Case, para. 19].

The CIETAC Rules, as well as the UNCITRAL Model Law, contain provisions that address the issue of a partial arbitrator. A party should adhere to the provisions of challenging the affected arbitrator, namely Artt. 12, 13 UNCITRAL Model Law and Art. 30 CIETAC Rules. Alternatively, the party may await the rendering of the award in order to initiate a setting aside procedure according to Art. 34 (2)(a)(iv) UNCITRAL Model Law by arguing that the tribunal was not properly constituted.

The absence of measures to allow the challenge of a legal representative in the applicable legal system is thus consistent with regard to the existence of procedures to overcome possible bias.

B. Even If the Tribunal Had a Competence to Remove a Legal Representative in Cases of Abuse, the Present Case Would Not Justify Exercising Such Competence

Given that a competence to remove a legal representative existed in cases of abuse, the facts of the present case would not justify a removal of Dr Mercado.

Overriding a party’s own choice of representation is considered a weighty instrument [ICSID ARB/06/3, Rompetrol Case, para. 16]. The removal of a member of counsel can therefore only be justified in compelling circumstances [ICSID ARB/06/3, Rompetrol Case, para. 16; Cook Chocolate v. Salomon, US Dist Ct (SD NY), 28 Oct 1988; Jacobus et al., p. 5]. Compelling circumstances require an “overriding and undeniable need to safeguard the essential integrity of the arbitral process” [ICSID ARB/06/3, Rompetrol Case, para. 16].

However, no compelling circumstances exist in the case at hand since CLAIMANT neither acted inappropriately nor abused any rights (I). RESPONDENT has to bear the consequences of choosing not to challenge Professor Presiding Arbitrator in time (II).

I. CLAIMANT neither Acted Inappropriately nor Abused Any Rights

In adding Dr Mercado to its legal team, CLAIMANT merely exercised its right of free choice of counsel.

Art. 9 CIETAC Rules demands the parties to observe the principle of good faith and thus governs the matter of abusive behaviour. An abuse of the right of free choice of counsel could be seen if a counsel was added to a legal team either to influence the arbitrator or in order to
provoke the other party to challenge the arbitrator. In such situations, it could be considered unfair that the only alternative to withstand this misconduct is to challenge the party-chosen arbitrator. Instead, a right to challenge a legal representative might exist under these circumstances.

In the case of Hrvatska Elektroprivedra, d.d. v. The Republic of Slovenia (hereafter Hrvatska Case) such circumstances were given and lead to the removal of an added legal representative [ICSID ARB/05/24, Hrvatska Case]. The respondent repeatedly refused to disclose that its counsel was a member at the same Chamber in which the tribunal’s president was a door tenant [ICSID ARB/05/24, Hrvatska Case, para. 5]. Further, this counsel’s participation as legal representative was revealed only ten days before the hearing began [ICSID ARB/05/24, Hrvatska Case, para. 3]. Through this behaviour, the respondent created “an atmosphere of apprehension and mistrust” [ICSID ARB/05/24, Hrvatska Case, para. 31].

However, the case at hand must be distinguished from the Hrvatska Case. Although Dr Mercado and Professor Presiding Arbitrator work at the same university, they only have occasional contact [Statement of Defence, p. 39, para. 17]. Their professional connection cannot be compared to the connection through the Chamber present in the Hrvatska Case. Furthermore, CLAIMANT behaved cooperatively. Dr Mercado was added to the legal team on the same day the Tribunal was formed [CIETAC to parties, 30 August 2011, p. 33; Procedural Order No. 2, p. 50, para. 29]. Instead of informing the respondent ten days before the oral hearing began, RESPONDENT was made aware of the participation of Dr Mercado on CLAIMANT’s legal team more than six months in advance [Procedural Order No. 2, p. 50, para. 29; Procedural Order No. 1, p. 44, para. 2]. CLAIMANT has never explicitly been asked to explain the nature of the relationship between Dr Mercado and Professor Presiding Arbitrator. If CLAIMANT had been asked to do so at a prior stage, CLAIMANT could have easily dispelled any doubts. In the Hrvatska Case, the respondent intended for the tribunal to be biased, as the new counsel was merely able to contribute by his presence during the hearings. In the case at hand, CLAIMANT’s sole legitimate intention behind adding Dr Mercado was to trust in Dr Mercado’s qualities as a legal representative: Not only is she a Lecturer for International Commercial Arbitration, but she has spent time as General Counsel in a large international trading company [Statement of Defence, p. 39 para. 18, 20]. She is an expert in arbitration [Procedural Order No. 2, p. 51, para. 39]. Dr Mercado’s presence contributes to
the strength and quality of CLAIMANT’s legal team. Thus, CLAIMANT did not abuse its right of free choice of counsel by adding Dr Mercado to its team of legal representatives.

Moreover, the Tribunal should be aware that CLAIMANT did not aim at provoking RESPONDENT to challenge Professor Presiding Arbitrator by adding Dr Mercado to its legal team. A challenge of Professor Presiding Arbitrator would not correspond to CLAIMANT’s intentions, as CLAIMANT itself recommended Professor Presiding Arbitrator [CIETAC Notice of Arbitration to Fasttrack, p. 18, para. IV 3; Fasttrack to CIETAC nominating arbitrators, p. 24].

Hereafter, the Tribunal is requested not to apply the finding of the Hrvatska Case, as the facts of the present case differ. CLAIMANT did not exercise its right of free choice of counsel abusively but instead acted appropriately. Consequently, ruling a removal of Dr Mercado would not even be justified if a competence to remove a legal representative existed.

II. RESPONDENT Has to Bear the Consequences of Choosing Not to Challenge Professor Presiding Arbitrator in Time

RESPONDENT decided to waive its right to challenge Professor Presiding Arbitrator. It now has to accept the consequences of its failure to take proper measures instead of claiming that compelling circumstances disrupt this arbitration.

Art. 30 CIETAC Rules provides the possibility to challenge an arbitrator as the only way to resolve a conflict if one of the parties fears that the arbitrator might be partial or dependent. RESPONDENT did not exercise its right to challenge Professor Presiding Arbitrator. According to Art. 30(3) CIETAC Rules, a party may challenge an arbitrator within fifteen days after a reason for challenge has become known. According to Art. 10 CIETAC Rules, if a party proceeds with the arbitration without submitting its objection to any non-compliance with the CIETAC Rules, it is deemed to have waived its right. CLAIMANT notified RESPONDENT about the involvement of Dr Mercado by 30 August 2011 [Procedural Order No. 2, p. 50, para. 29]. Since CLAIMANT has not received a notification concerning the challenge of Professor Presiding Arbitrator by 14 September 2011, it is understood that RESPONDENT renounced its right to challenge an arbitrator.

In any case, it cannot be tolerated that RESPONDENT claims to reserve its right to challenge Professor Presiding Arbitrator, thereby circumventing set deadlines of the CIETAC Rules. Challenging a counsel must not constitute a handy alternative to raising a challenge
against the tribunal itself [ICSID ARB/06/3, Rompetrol Case, para. 21]. RESPONDENT had already been given the opportunity to challenge Professor Presiding Arbitrator. Hereby, RESPONDENT’s legal protection was ensured.

In conclusion, in the present case compelling circumstances justifying an exceptional removal of counsel neither arise due to any misbehaviour of CLAIMANT nor due to the fact that RESPONDENT waived its right.

C. In Any Case, the Independence of Professor Presiding Arbitrator Is Not Endangered by His Relationship With Dr Mercado

The connection between Professor Presiding Arbitrator and Dr Mercado does not affect his independence.

RESPONDENT might argue that Professor Presiding Arbitrator violates Art. 22 CIETAC Rules due to his relationship with Dr Mercado. A generally accepted standard to determine an arbitrator’s independence is set by the International Bar Association’s Guidelines of Conflict of Interest in International Arbitration (hereafter IBA Guidelines) [Binder, para. 3-053, Procedural Order No. 2, p. 51, para. 40]. These guidelines are generally recognised worldwide and offer an influential perspective on customary attitudes towards an arbitrator’s obligation to be independent and impartial with both national courts and arbitral institutions [Binder, para. 3-053; Born, pp. 172, 1535]. Moreover, they summarize the best current international practice in determining an arbitrator’s independence [Pitkowitz, para. 290]. Therefore, the IBA Guidelines should be used as a standard to determine whether Professor Presiding Arbitrator’s independence is jeopardised by his relationship with Dr Mercado.

The IBA Guidelines distinguish between three categories of relationships. While the situations enumerated on the “Green List” only address cases where there is undisputedly no manifestation of bias, the cases on the “Orange List” raise justifiable doubts as to the arbitrator’s independence [IBA Guidelines, Part II, para. 3]. The situations that qualify for the “Red List” lead to an objective conflict of interest [IBA Guidelines, Part II, para. 2]. The “Red List” is subdivided into a “waivable” and a “non-waivable” list.

The connection between Professor Presiding Arbitrator and Dr Mercado neither qualifies for any of the “Red Lists” (I) nor for the “Orange List” (II). Even if the Tribunal concluded that the connection qualified for the “Orange List”, any arising doubts can be dispelled (III).
I. The Connection Between Professor Presiding Arbitrator and Dr Mercado Does Not Qualify for Any “Red List”

No “Red List” relationship exists between Professor Presiding Arbitrator and Dr Mercado. The “non-waivable Red List” merely deals with the relationship of an arbitrator to the party itself and thus is irrelevant for the case at hand. To qualify for the “waivable Red List”, the only relationship potentially covering the connection between Professor Presiding Arbitrator and Dr Mercado requires a “close family relationship” [IBA Guidelines, Part II, “Waivable Red List”, para. 2.3.8]. The IBA Guidelines define “close family relationships” as the relation between spouses, siblings, children, parents and life partners [IBA Guidelines, Part II, “Waivable Red List”, para. 2.2.2]. There is no such relationship between Professor Presiding Arbitrator and Dr Mercado. Their connection does not qualify for the “waivable Red List”.

II. The Connection Between Professor Presiding Arbitrator and Dr Mercado Does Not Qualify for the “Orange List”

The “Orange List” does not describe the relationship between Professor Presiding Arbitrator and Dr Mercado either.

The only description potentially covering the present case demands a close personal friendship between an arbitrator and a counsel [IBA Guidelines, Part II, “Orange List”, para. 3.3.6]. Dr Mercado meets with Professor Presiding Arbitrator’s wife from time to time [Statement of Defence, p. 39, para. 21]. However, this friendship does not extend upon Professor Presiding Arbitrator.

The “Orange List” also requires that a considerable amount of time is regularly spent together unrelated to professional associations [IBA Guidelines, Part II, “Orange List”, para. 3.3.6]. In order for a party’s request to remove an opponent’s legal representative to be successful, a high burden of proof must be satisfied [Glueck v. Logan, US Ct App (2nd Cir), 6 Jul 1981; Feinberg v. Katz, US Dist Ct (SD NY), 5 Feb 2003; Simply Fit v. Poyner, US Dist Ct (ED NY), 26 Sep 2008; Miness v. Ahuja, US Dist Ct (ED NY), 20 May 2010]. However, the facts of the present case do not support that Dr Mercado spends a considerable amount of time with the father of her godchild. Thus, the connection between Dr Mercado and Professor Presiding Arbitrator does not qualify for the “Orange List”.

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III. Even If the Tribunal Was to Conclude That the Connection Between Professor Presiding Arbitrator and Dr Mercado Qualified for the “Orange List”, Any Arising Doubts Can Be Dispelled in the Case at Hand

46 Even if the Tribunal found that the connection in question qualified for the “Orange List”, any arising doubts could be dispelled. Qualifying for the “Orange List” does not automatically lead to a removal [IBA Guidelines, Part II, para. 4]. Whether doubts are justifiable has to be decided on a case to case basis [IBA Guidelines, Part II, para. 3].

47 Professor Presiding Arbitrator clearly separates his personal and professional affairs. Even though Dr Mercado and Professor Presiding Arbitrator are on first-name-terms in private, Professor Presiding Arbitrator is respectfully addressed with “Professor” when in company [Statement of Defence, p. 39, para. 20]. This demonstrates that Professor Presiding Arbitrator, as well as Dr Mercado, clearly distinguish between private and professional life.

48 RESPONDENT unconvincingly argues that Professor Presiding Arbitrator’s partiality is proven by his vote in favour of Dr Mercado’s clients in previous cases [Statement of Defence, p. 40, para. 22]. However, in two of the three cases in question, the vote for Dr Mercado’s client was in line with the votes of the other arbitrators. Further, Professor Presiding Arbitrator’s dissenting opinion in favour of Dr Mercado’s client in the third case does not confirm a correlation between his vote and Dr Mercado’s participation in the process. Finally, favouring Dr Mercado’s party solely in order to support her would damage his reputation and risk his position as a future arbitrator.

49 Any doubts arising from the nature of the relationship between Dr Mercado and Professor Presiding Arbitrator can be dismissed. A removal of Dr Mercado would be unjustified. Even if RESPONDENT had taken appropriate actions in dealing with the alleged bias, a removal of Professor Presiding Arbitrator would equally be unjustified.

CONCLUSION OF THE FIRST ISSUE

50 CLAIMANT respectfully requests the Tribunal to refrain from ordering CLAIMANT to remove Dr Mercado from its legal team as it lacks the adequate competence. Even if such a competence existed in compelling circumstances, it cannot be exercised in the present case: CLAIMANT’s actions did not create compelling circumstances which would justify the removal of Dr Mercado. Thus, Dr Mercado cannot be removed from CLAIMANT’s legal team.
ARGUMENT ON THE MERITS

INTRODUCTION AND APPLICABILITY OF THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS

CLAIMANT offers luxurious conference venues for its clients. As a new venue for future conferences, it purchased the luxury yacht M/S Vis. For proper conference technology on the M/S Vis, CLAIMANT and RESPONDENT concluded the Contract, which obliged RESPONDENT to supply, install and configure a master control system on the yacht by 12 November 2010 [Claimant’s Exhibit No. 1, p. 9, para. 1]. RESPONDENT engaged a subcontractor, Specialty Devices, to supply it with necessary processing units for the control system. Specialty Devices itself engaged another supplier, High Performance, to provide it with the chips for the processing units. However, due to a fire leading to complications within this supply chain, RESPONDENT did not complete installation of the control system in time [Application for Arbitration, p. 6, para. 16].

The Contract is governed by the United Nations Convention on Contracts for the International Sale of Goods (hereafter CISG). In accordance with Art. 47(2) CIETAC Rules, CLAIMANT and RESPONDENT agreed on applying the law of Mediterraneo [Claimant’s Exhibit No. 1, p. 9, para. 15.2]. As their places of business, Mediterraneo and Equatoriana, are Contracting States of the CISG [Application for Arbitration, p. 7, para. 20], the Contract is governed by the CISG by virtue of Art. 1(1)(a) CISG. Particularly, by choosing the law of Mediterraneo, the parties did not exclude the CISG under Art. 6 CISG [cf. Cour de Cassation, Chambre commerciale, 17 Dec 1996; OGH, 17 Dec 2003; ICC Ct Arb, 8324/1995; Ferrari, in: Schlechtriem/Schwenzer (Ger.), Art. 79, para. 22; v. Sachsen, p. 93].

Further, CLAIMANT and RESPONDENT concluded a sales contract. As approximately 93 % of the contract price is the purchase price for the control system, the preponderant part of the obligations lies in the exchange of goods for money. Therefore, Art. 3(2) CISG does not hinder the application of the CISG. Thus, the CISG governs the Contract. This is common ground between the parties [Statement of Defence, p. 37, para. 2].

However, RESPONDENT breached the Contract under Art. 33(a) CISG as it did not deliver in time and is therefore liable for damages under Artt. 45(1)(b), 74 CISG.
IISSUE 2: RESPONDENT IS NOT EXEMPT UNDER ART. 79 CISG

As RESPONDENT has engaged a third person to perform the Contract, Art. 79(2) CISG is applicable to determine RESPONDENT’s exemption (A). However, RESPONDENT itself does not fulfil the requirements of Art. 79(2)(a) CISG (B). Additionally, RESPONDENT is not exempt because of the failings of its subcontractor under Art. 79(2)(b) CISG (C). Even if Art. 79(2) CISG was not applicable, RESPONDENT would still be liable under Art. 79(1) CISG (D).

A. Art. 79(2) CISG Is Applicable

Art. 79(2) CISG is applicable to determine RESPONDENT’s exemption. Art. 79(2) CISG states that if the failure is “due to the failure by a third person whom he has engaged to perform the whole or a part of the contract”, both parties involved have to fulfil the requirements of Art. 79(1) CISG. Only if the two parties cumulatively meet these requirements, the party seeking exemption may be exonerated from liability.

Specialty Devices is a third person in the sense of Art. 79(2) CISG. Undisputedly, subcontractors fulfilling parts of the contractual performance are third persons within the scope of Art. 79(2) CISG [Hamburg Chamber of Commerce, 21 Mar 1996; Salger, in: Witz/Salger/Lorenz, Art. 79, para. 9; Magnus, in: Honsell, Art. 79, para. 18; Achilles, in: Ensthaler, Art. 79, para. 9; Wilhelm, p. 34; cf. Bartels/Motomura, p. 665].

Specialty Devices was obliged to deliver the processing units for the control system to RESPONDENT. These processing units were the core element and therefore an essential part of the control system [Application for Arbitration, p. 8, para. 8]. As Specialty Devices independently manufactured these units, it performed part of the Contract and is thus a third person under Art. 79(2) CISG. This conclusion was already disclosed by CLAIMANT [Application for Arbitration, p. 7, para. 22] and in return adopted by RESPONDENT [Statement of Defence, p. 37, para. 7]. Thus, in accordance with the assumptions of CLAIMANT and RESPONDENT, Specialty Devices is a third person to RESPONDENT and must additionally fulfil the requirements of Art. 79(1) CISG.

B. RESPONDENT Itself Does Not Fulfil the Requirements of Art. 79(1) CISG

RESPONDENT does not meet the requirements of Art. 79(1) CISG.
Under Art. 79(1) CISG, no impediment to RESPONDENT’s contractual obligation occurred (I). Even if there had been an impediment, it would not have been beyond RESPONDENT’s control (II). Moreover, RESPONDENT could have reasonably been expected to overcome the consequences of the impediment (III).

I. No Impediment to the Contractual Obligation Ever Existed

Under the Contract, RESPONDENT was not obliged to deliver the control system using a specific type of chip. Consequently, the inability to use the D-28 chip was no impediment to RESPONDENT’s performance. An impediment under Art. 79(1) CISG is defined as an “objective circumstance, that prevents performance” [Schwenzer, in: Schlechtriem/Schwenzer, Art. 79, para. 11; cf. Trib Monza, 14 Jan 1993; Int Ct Bulgarian CCI, 12 Feb 1998; OLG München, 5 Mar 2008; Honnold/Flechtner, para. 432.1; Tallon, in: Bianca/Bonell, Art. 79, p. 579; Lüderitz/Dettmeier, in: Soergel, Art. 79, para. 10]. Therefore, the seller is not exempt under Art. 79 CISG if he is obliged to deliver a generic good, which is not specified under the contract, and only one particular source became unavailable [CIETAC, 30 Nov 1997].

RESPONDENT’s obligation was to supply, install and configure a master control system for the M/S Vis [Claimant’s Exhibit No. 1, p. 9, para. 1]. Using processing units containing the D-28 Chip never became part of the Contract [Procedural Order No. 2, p. 46, para. 5]. Whereas CLAIMANT did not specifically ask for particular technical components, it did however include in the Contract that RESPONDENT had to complete installation of the master control system by 12 November 2010 [Claimant’s Exhibit No. 1, p. 9, para. 3]. Therefore, RESPONDENT was capable of independently deciding which processing unit would run the master control system – as long as punctual performance was not endangered. Consequently, the halt in production of one specific type of chip, the D-28 chip, did not constitute an impediment, as it was not affecting RESPONDENT’s contractual obligation.

II. Even If There Had Been an Impediment, It Would Not Have Been Beyond RESPONDENT’s Control

RESPONDENT assumed the risk inherent in its production line, which was likely to be interrupted from the start. Therefore, even if the Tribunal held that there was an impediment to RESPONDENT’s obligation, it was certainly not beyond its control. “Beyond control” under Art. 79(1) CISG are impediments outside the seller’s sphere of risk [OLG München, 5 Mar 2008; Schwenzer, in: Schlechtriem/Schwenzer, Art. 79, para. 11; Magnus, in:
Staudinger, Art. 79, para. 16; Huber, in: MünchKomm BGB, Art. 79, para. 7; Achilles, Art. 79, para. 5]. This sphere of risk is determined by the contractual allocation of risks; the promisor may hence easily assume risks beyond the “typical” sphere of risk – by implied or expressed terms [Hamburg Chamber of Commerce, 21 Mar 1996; BGH, 24 Mar 1999; Schwenzer, in: Schlechtriem/Schwenzer, Art. 79, para. 11; eadem, in: FS Bucher, pp. 729 et seq.; Stoll, in: v. Caemmerer/Schlechtriem, Art. 79, para. 7; Brunner, Art. 79, para. 6; Zweigert/Kötz, pp. 536/537; Lautenbach, p. 29].

Even if the Tribunal held that RESPONDENT was obliged to supply, install and configure a control system including the D-28 chip, RESPONDENT would still have impliedly assumed the risk of late delivery by its subcontractors as it was aware of the fragility inherent to its supply chain. RESPONDENT is specialised in the manufacturing and installation of control systems and has detailed knowledge about the production process [Application for Arbitration, p. 5, para. 8]. It had an overview of the market situation and knew that the production of the D-28 chip had not yet started [Application for Arbitration, p. 5, para. 9; Statement of Defence, p. 37, para. 2]. Therefore, RESPONDENT ought to have known the various dangers inherent in buying a unique chip the production of which was yet to commence.

In contrast, CLAIMANT organises business events for which it offers a complete conference package including catering, a unique location and accommodations equipped with conference technology [Application for Arbitration, p. 5, para. 5]. Accordingly, it simply contracted for a control system to be delivered in time, uninformed about any future developments in the market of micro-technology.

RESPONDENT must have been aware of the possible risks and the difference in knowledge. Nevertheless, it did not limit these risks in the Contract [Procedural Order No. 2, p. 46, para. 4]. Thus, by implied assumption, RESPONDENT’s contractual sphere of risks expands to all impediments delaying production. Therefore, the impediment was not beyond RESPONDENT’s control as it falls within its contractual sphere of risks.

III. Even If There Had Been an Impediment Beyond RESPONDENT’S Control, RESPONDENT Could Have Reasonably Been Expected to Overcome the Consequences of the Impediment

RESPONDENT could have reasonably been expected to rely on a different subcontractor to purchase the processing units and thereby overcome the consequences of the impediment. When a subcontractor or supplier has let the seller down or causes difficulties which endanger
production, it can reasonably be expected from the seller to engage an alternative subcontractor, even if this results in greatly increased costs \[ \text{Int Ct Russia, 16 Mar 1995; Schwenzer, in: Schlechtriem/Schwenzer, Art. 79, para. 14; eadem, Force Majeure, p. 719; Herber/Czerwenka, Art. 79, para. 13; Mankowski, in: MünchKomm HGB, Art. 79, para. 33; cf. Reiley, p. 139; Rummel, p. 187}. \]

Engaging a different subcontractor would have been possible for RESPONDENT. First, under the Contract, using the D-28 chip was not required \[ \text{Procedural Order No. 2, p. 46, para. 5}. \] Therefore, RESPONDENT was not inhibited from relying on an alternative subcontractor. RESPONDENT could have easily switched the subcontractor and purchased the necessary processing units from a different company.

Second, there was enough time left for RESPONDENT to procure alternative processing units. 62 days before the contractual delivery date, RESPONDENT was informed about the fire and the expected consequences \[ \text{Claimant’s Exhibit No. 2, p. 10}. \] RESPONDENT immediately concluded that it would not be able to fulfil the contractual obligation to CLAIMANT in time \[ \text{Claimant’s Exhibit No. 2, p. 10}. \] According to the information provided about RESPONDENT’S actual production process, it takes 46 days to manufacture the control system once the processing units are delivered \[ \text{Application for Arbitration, p. 6, para. 16}. \] Consequently, RESPONDENT had 16 days left to purchase the processing units from a different manufacturer in order to perform in time. Purchasing processing units within a time period of more than two weeks is an effort that could have reasonably been expected from RESPONDENT.

Third, buying alternative chips should have suggested itself to RESPONDENT as it is a company in the same industry as Specialty Devices and High Performance. As RESPONDENT is specialised in the production of control systems \[ \text{Application for Arbitration, p. 5, para. 8}. \], which use processing units, RESPONDENT can be expected to have some knowledge about the market situation of these products.

Taking all the facts into account, it could be expected from RESPONDENT to rely on a different subcontractor and thereby overcome the consequences of the impediment.

Thus, RESPONDENT does not fulfil the requirements of Art. 79(1) CISG. Consequently, RESPONDENT is not exempt from liability and CLAIMANT is entitled to damages. The further arguments about the other parties within the supply strengthen this result but do not change it.
C. Specialty Devices Does Not Fulfil the Requirements of Art. 79(2) CISG

As RESPONDENT engaged Specialty Devices to supply the processing units for the control system, Specialty Devices must additionally fulfil the requirements of Art. 79(1) CISG in order for RESPONDENT to be exempt. However, Specialty Devices in turn engaged High Performance as another third person.

Thus, to determine Specialty Devices’ exemption, Art. 79(2) CISG is applicable again (I). Neither Specialty Devices (II) nor High Performance (III) does fulfil the exempting requirements of Art. 79(1) CISG.

I. Art. 79(2) CISG Is Applicable to Determine Specialty Devices’ Exemption

Art. 79(2) CISG is applicable again as Specialty Devices, the third person in relation to RESPONDENT, engaged another third person, i.e. High Performance. Not only subcontractors, but also suppliers are considered third persons under Art. 79(2) CISG [ICC Ct Arb, 8128/1995; Loewe, Art. 79, p. 97; Honsell, Vertragsverletzung, p. 364; Huber, Haftung, pp. 20 et seq.; Reinhart, Art. 79, para. 8; Posch, in: Schwimann, Art. 79, para. 11; Corvaglia, p. 121, para. 8.4; Keller/Siehr, p. 220; Verweyen/Foerster/Toufar, p. 148, para. 4.2.3.2]. High Performance was obliged to manufacture and deliver the chips for the processing units to Specialty Devices [Statement of Defence, p. 37, para. 7]. As High Performance was to provide Specialty Devices with a part of the processing units, High Performance is a supplier and therefore a third person to Specialty Devices. Thus, to determine Specialty Devices’ exemption, Art. 79(2) CISG is to be applied again and both Specialty Devices and High Performance have to fulfil the requirements of Art. 79(1) CISG in order for Specialty Devices to be exempt.

II. Specialty Devices Does Not Fulfil the Requirements of Art. 79(1) CISG

Specialty Devices as the producer of the processing units could have reasonably been expected to overcome the consequences of the impediment (I). But even if the consequences of the impediment were unavoidable for Specialty Devices due to financial hardship, it would not be exempt under Art. 79(1) CISG (2).
1. Specialty Devices Could Have Reasonably Been Expected to Overcome the
Consequences of the Impediment

Specialty Devices could have acquired the chips by offering a higher amount of money to
High Performance and thus overcome the consequences of the impediment. If the
consequences of an impediment can be overcome, the promisor might only be exempt if the
necessary financial efforts would exceed the limit of sacrifice [Hamburg Chamber of
sacrifice is the highest cost reasonably acceptable to pay in order to overcome the
consequences of the impediment [Schwenzer, in: Schlechtriem/Schwenzer, Art. 79, para. 14].
This limit is to be determined by a case-to-case analysis and is not restricted by greatly
increased costs or a resulting loss for the promisor [Schwenzer, in: Schlechtriem/Schwenzer,
Art. 79, para. 14; Atamer, in: Kröll/Mistelis/Viscassias, Art. 79, para. 56; Karollus, p. 209].

When High Performance informed Specialty Devices about the fire leading to the halt in
production of the D-28 Chip, High Performance also stated that there were enough chips
available to “fill the order from the stock” [Claimant’s Exhibit No. 3, p. 11] and that they had
considered a pro rata distribution of the remaining chips. This pro rata solution would have
allowed Specialty Devices to meet its contractual obligation [Procedural Order No. 2,
para. 9].

High Performance explained its non-performance to Specialty Devices by reasoning that
“the order was a relatively small one and it appears likely to remain the only one in the near
future” [Claimant’s Exhibit No. 3, p. 11]. Therefore, the choices made by High Performance
were based on financial profit that could possibly be gained from its clients. Thus, by offering
a higher price, RESPONDENT could have achieved a pro rata delivery or even a full delivery,
which was eventually provided to Atlantis Technical Solutions.

To conclude, Specialty Devices had a reasonable opportunity to overcome the
consequences of the impediment. As it did not even attempt to act on that opportunity,
Specialty Devices does not fulfil the requirements of Art. 79(1) CISG.

2. Specialty Devices Would Not Be Exempt Under Art. 79(1) CISG Due to Financial
Hardship

Even if the costs for buying the D-28 chips were beyond the limit of sacrifice, Specialty
Devices would still not be exempt under Art. 79(1) CISG. Heavily increased costs, which
exceed the limit of sacrifice and may constitute a case of financial hardship, never exempt the promisor under Art. 79 CISG [Trib Monza, 14 Jan 1993; Stoll, p. 274; Keil, pp. 185 et seq.; cf. Nicholas, p. 6]. As shown above, the case at hand is one of financial strength and economic capability; Specialty Devices could have received the D-28 chips by offering more money to High Performance [see supra, para. 79]. Therefore, even if the consequences of the impediment were unavoidable due to financial hardship, Specialty Devices would still not be exempt under Art. 79(1) CISG.

III. High Performance Does Not Fulfil the Requirements of Art. 79(1) CISG

Like Specialty Devices, not even High Performance, the party Specialty Devices engaged to produce the D-28 chips, does fulfil the requirements of Art. 79(1) CISG.

First, there was no impediment to High Performance’s contractual obligation (1). Even if the fire was considered to be an impediment, High Performance could have reasonably been expected to overcome the impediment by delivering on a pro rata basis (2).

1. No Impediment to High Performance’s Contractual Obligation Occurred

As enough D-28 chips remained to fulfil Specialty Devices’ order, there was no impediment to High Performance’s contractual obligation. As stated above, an impediment under Art. 79(1) CISG is defined as an “objective circumstance, that prevents performance” [see supra, para. 61]. The fire in the facility of High Performance interrupted the production process, but there was still a sufficient amount of chips left [Claimant’s Exhibit No. 3, p. 11]. Therefore, the only effort High Performance had to make was to deliver a small number of the chips from the stock to Specialty Devices. Thus, performance was possible and the fire did not constitute an impediment under Art. 79(1) CISG.

2. Even If There Was an Impediment, High Performance Could Have Reasonably Been Expected to Overcome the Impediment by a Pro Rata Distribution

Even if the fire constituted an impediment to High Performance’s contractual obligation, High Performance could have reasonably been expected to distribute the remaining chips on a pro rata basis to all of its customers. In case the promised good is partially destroyed, the promisor can reasonably be expected to deliver the remaining goods pro rata [Schwenzer, in: Schlechtriem/Schwenzer, Art. 79, para. 27; Stoll, in: Schlechtriem, Art. 79, para. 31; Brunner, Force Majeure, p. 262; Keil, p. 126]. After the fire, High Performance had
unfulfilled contractual obligations with several partners [Application for Arbitration, p. 6, para. 15] and several D-28 chips left [Claimant’s Exhibit No. 3, p. 11]. Thus, it could have reasonably been expected to distribute the remaining chips on a pro rata basis.

In particular, because first, future relations with one customer cannot allow a breach of contract with another.

Second, the actions of High Performance were in fact out of all reasonableness and contrary to good faith in international trade. The reason given by High Performance for not allocating the remaining goods on a pro rata basis was that it would not have been “satisfactory for the majority of [the] regular customers” and therefore the regular customers, which were expected to make more orders in the future, were satisfied first [Claimant’s Exhibit No. 3, p. 11]. However, this statement is a false testimony. The majority of the regular customers were not satisfied, but rather frustrated. As it was stated by the Technology Reporter and accepted by RESPONDENT, all the remaining chips were delivered to only one out of several regular customers: Atlantis Technical Solutions [Claimant’s Exhibit No. 7, p. 15; Statement of Defence, p. 37, para. 5; Procedural Order No. 2, p. 47; para. 10]. As the contract with Specialty Devices was breached with an explanation that turned out not to be true, the actions of High Performance were against good faith in international trade.

Third, the Tribunal is kindly requested to additionally take into consideration the persuasive authority of the Oberlandesgericht Hamburg (OLG Hamburg), which also states that under the CISG a pro rata distribution is the reasonable measure to take in cases where the promised goods are partially destroyed. Among other contracts, a seller was obliged to supply a buyer with 20 loads of tomato puree. Due to heavy rain falls, parts of the source were destroyed but the seller had a certain amount of tomatoes left. Relying on force majeure instead of distributing the remaining tomato product on a pro rata basis, the seller did not provide any goods to the buyer. The Oberlandesgericht stated that the seller could have reasonably been expected to partly fulfil all of its obligations by a distribution on a pro rata basis [OLG Hamburg, 4 Jul 1997].

After all, High Performance does not fulfil the requirements of Art. 79(1) CISG because it could have reasonably been expected to overcome the impediment.
D. Even If Art. 79(2) CISG Was Not Applicable, RESPONDENT Would Be Liable Under Art. 79(1) CISG

Even if Specialty Devices and High Performance were not to be regarded as third persons, RESPONDENT would still be liable under Art. 79(1) CISG as it is responsible for all parties within its supply chain. When the promisor engages a party that is not a third person under Art. 79(2) CISG, the engaged party falls within the promisors’ sphere of responsibility. Therefore, the “liability for them is the same as if he had manufactured the goods himself” [Schlechtriem, Uniform Sales Law, p. 427; cf. BGH, 24 Mar 1999; Huber, UNCITRAL pp. 466 et seq.]. The same holds true when the party assisting in performance engages another party [Schlechtriem, Uniform Sales Law, p. 427].

Additionally, there is no legal authority for RESPONDENT’s allegation that under Art. 79(1) CISG a promisor is not liable for late delivery within its supply chain. On the contrary: The CISG does not distinguish between late delivery and delivery of non-conforming goods and therefore a promisor is liable when its supplier or sub-supplier does not deliver in time [BGH, 24 Mar 1999; Schwenzer, in: Schlechtriem/Schwenzer, Art. 79, para. 5].

As a result, even if one did not consider Specialty Devices or High Performance third persons under Art. 79(2) CISG, RESPONDENT would still be liable for them as RESPONDENT is liable for its own personnel. Consequently, both of them must fulfil the requirements of Art. 79(1) CISG in order for RESPONDENT to be exempt from liability. However, as shown above, neither Specialty Devices nor High Performance fulfils these requirements. Thus, even if Art. 79(2) CISG was not applicable to one or both of the parties in the supply chain, RESPONDENT would not be exempt.

CONCLUSION OF THE SECOND ISSUE

All parties within RESPONDENT’s supply chain, including itself, must fulfil the requirements of Art. 79(1) CISG. However, none of them does. RESPONDENT and High Performance did not face impediments beyond their control. Even if there were impediments, all parties could have reasonably been expected to overcome the impediments or their consequences. Thus, RESPONDENT is not exempt from liability under Art. 79 CISG.
ISSUE 3: CLAIMANT IS ENTITLED TO ALL DAMAGES IRRESPECTIVE OF BRIBERY ACCUSATIONS

94 In consequence of RESPONDENT’s breach of contract, CLAIMANT is entitled to recover damages under Artt. 45(1)(b), 74 CISG. According to Art. 74 CISG, the buyer may seek compensation for all damages resulting from a breach of contract by the seller if the damages were foreseeable at the time of the conclusion of the contract [HG Zürich, 26 Apr 1995; Downs v. Perwaja, Supr Ct Queensland, 12 Oct 2001; Schwenzer, in: Schlechtriem/Schwenzer, Art. 74, para. 45]. As shown above, RESPONDENT breached the Contract [see supra, para. 54]. CLAIMANT is thus entitled to fully recover its damages.

95 Due to RESPONDENT’s breach, CLAIMANT, inter alia, had to bear expenses for a lease contract concerning the M/S Pacifica Star and a standard brokerage fee. Apart from rather vague bribery accusations, RESPONDENT does not dispute liability for those damages. Thus, no further submissions concerning the previously mentioned items shall be made.

96 Furthermore, CLAIMANT is entitled to the costs of the ex gratia payment paid to Corporate Executives (A) and the additional success fee paid to CLAIMANT’s yacht broker (B). Finally, the alleged bribery does not hinder the above claims (C).

A. CLAIMANT is Entitled to the Costs of the Ex Gratia Payment Under Art. 74 CISG

97 The costs of the ex gratia payment are recoverable damages under Art. 74 CISG. Due to RESPONDENT’s breach of contract, the M/S Vis was not fit for service when CLAIMANT was contractually obliged to provide it to Corporate Executives for their annual flagship conference [Application for Arbitration, p. 7, para. 17; p. 5, para. 5]. The M/S Pacifica Star leased by CLAIMANT as a substitute was the only yacht available for lease during the required time period [Procedural Order No. 2, p. 49, para. 21]. Still, it lacked several of the previously advertised features [Procedural Order No. 2, p. 48, para. 20]. In addition, Corporate Executives was deprived of being the premiere customer to hold an event on the M/S Vis [Claimant’s Exhibit No.4, p. 12]. Thus, CLAIMANT breached the contract with Corporate Executives. CLAIMANT consequently offered Corporate Executives an ex gratia payment as a partial refund to retain future business opportunities with Corporate Executives and to maintain its good reputation.

98 The ex gratia payment is recoverable under Art. 74 CISG as it was caused by RESPONDENT’s breach and as it was foreseeable (I). Alternatively, the ex gratia payment is
recoverable under Art. 74 CISG, irrespective of the requirement of foreseeability since it constitutes a measure of mitigation required by Art. 77 CISG (II).

I. The Ex Gratia Payment is Recoverable Under Art. 74 CISG As it Was Caused by the Breach And Foreseeable

Damages in terms of Art. 74 CISG include voluntary payments, even though RESPONDENT claims otherwise (I). Hence, the ex gratia payment is recoverable as it was caused by RESPONDENT’s breach (2) and foreseeable (3).

1. Voluntary Payments Are Recoverable Under Art. 74 CISG

RESPONDENT alleges that CLAIMANT is not entitled to compensation for the ex gratia payment as the payment was made voluntarily. However, voluntary payments, like any damage caused by the other party’s breach, are recoverable to the extent to which they are foreseeable.

The wording of Art. 74 CISG only sets forth two requirements, i.e. causality and foreseeability. Involuntariness is not mentioned. Consequently, scholarly opinions and cases do not distinguish between voluntary and involuntary payments. This is in line with the principle of full compensation established by Art. 74 CISG, providing reparation for all detriments suffered as a consequence of a breach [Secretariat Commentary, Art. 70, para. 3; OGH, 14 Jan 2002; OGH, 9 Mar 2000; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft Wien, 15 Jun 1994; Treitel, p. 82; Saenger, in: Ferrari, Art. 74, para. 2; cf. Gabriel, p. 230]. Moreover, Artt. 75, 76 CISG expressly declare one specific type of voluntary payments recoverable, i.e. substitute transactions. Also, expenses occurring under settlement agreements with third parties, which constitute voluntary payments as well, are recoverable damages under Art. 74 CISG [CIETAC 25 Oct 1994; OLG Köln, 21 May 1996]. Conclusively, the voluntary nature of a payment cannot per se hinder its recoverability.

2. The Ex Gratia Payment Was Caused by RESPONDENT’s Breach of Contract

The ex gratia payment was caused by RESPONDENT’s breach. Damages are considered to be caused by a breach if the breach was their precondition [Hof van Beroep Antwerpen, 22 Jan 2007; Schwenzer, in: Schlechtriem/Schwenzer, Art. 74, para. 40; cf. Heuzé, p. 330]. It is irrelevant whether the breach caused the damage directly or indirectly [Knapp, in: Bianca/Bonell, Art. 74, para. 2.6; Schwenzer, in: Schlechtriem/Schwenzer, Art. 74, para. 40;
Saenger, in: Bamberger/Roth, Art. 74, para. 8; cf. Audit, p. 163]. If RESPONDENT had not breached its Contract, CLAIMANT would have been able to provide the M/S Vis to Corporate Executives. It would then not have breached its contract and would not have needed to make an ex gratia payment to Corporate Executives. Therefore, the ex gratia payment was caused by RESPONDENT’s breach.

3. The Ex Gratia Payment Was Foreseeable

It is up to RESPONDENT to furnish sufficient proof for a lack of foreseeability. Therefore, until RESPONDENT proves otherwise, foreseeability of the ex gratia payment is to be presumed.

The negative wording of Art. 74 CISG indicates that damages are presumed to be foreseeable. The party alleging a lack of foreseeability hence claims an exception from this rule. Thus, it is obliged to allege, substantiate and prove the facts indicating a lack of foreseeability [Enderlein/Maskow, Art. 74, para. 10; Magnus, in: Staudinger, Art. 74, para. 62; Herber/Czerwenka, Art. 74, para. 13; Mankowski, in: MünchKomm HGB, Art. 74, para. 46; Henninger, p. 248; Weber, p. 204]. So far, RESPONDENT failed to do so.

In any case, it was foreseeable that CLAIMANT would make an ex gratia payment as a refund to its customer (a). In addition, it was foreseeable that CLAIMANT would make an ex gratia payment as a measure to maintain its good reputation (b).

a) Making an Ex Gratia Payment As a Refund to Corporate Executives Was Foreseeable

Making a refund to Corporate Executives was a foreseeable reaction to CLAIMANT’s breach of contract which was in turn caused by RESPONDENT’s breach. According to Art. 74 CISG, damages are to be considered foreseeable if the party in breach foresaw or ought to have foreseen the damage as a possible consequence of the breach; normative aspects have to be taken into account [Schwenzer, in: Schlechtriem/Schwenzer, Art. 74, para. 48; Huber, in: Huber/Mullis, p. 274]. Only utterly implausible consequences of the breach are to be considered non-foreseeable [Faust, p. 33].

RESPONDENT ought to have foreseen that its breach might prevent CLAIMANT from fulfilling third party obligations. After CLAIMANT was forced to breach its contract, CLAIMANT made an ex gratia payment in order to retain Corporate Executives as a customer. It naturally comes to mind that when breaching its contract, a merchant is likely to lose the
aggrieved customer. This consequently leads to a loss of future profits. In addition, such breach of contract may lead to damage claims. Making a partial refund, thus finding a mutual solution, helps to retain a business relationship and to avoid future claims. Therefore, it is reasonably foreseeable that a party in breach will make a refund to the customer relying on the breach.

As a reaction to CLAIMANT’S breach caused by RESPONDENT, CLAIMANT made an ex gratia payment to Corporate Executives. After first expressing their unhappiness about CLAIMANT’S breach, Corporate Executives was pleased to receive the refund [Procedural Order No. 2, p. 48, para. 20]. In doing so, CLAIMANT made an effort to secure the well-established and profitable business relationship with Corporate Executives. Such behaviour appeared economically reasonable. Consequently, RESPONDENT could have reasonably foreseen that CLAIMANT would make a refund when in breach. Hence, the ex gratia payment was foreseeable.

b) Making an Ex Gratia Payment As a Means to Maintain CLAIMANT’S Reputation Was Foreseeable

Making an ex gratia payment was a reasonable measure to maintain CLAIMANT’S reputation. Thus, the ex gratia payment was foreseeable for RESPONDENT.

A loss of goodwill is generally recoverable under Art. 74 CISG and at least foreseeable when the buyer is a merchant in a visibly sensitive market [BGer, 28 Oct 1998; OGH, 6 Feb 1996; BGH, 24 Oct 1979; Schlechtriem, UN-Kaufrecht, para. 306; Schlechtriem/Butler, para. 306; Witz, in: Witz/Salger/Lorenz, Art 74, para. 14; cf. Gotanda, in: CISG-AC Op. 6, para. 7.1].

Operating in the luxury market, CLAIMANT’S reliability, reputation and perceived quality of venues are amongst its most valuable assets. CLAIMANT’S clients pay considerable amounts of money to receive a top of the line service [Application for Arbitration, p. 5, para. 5]. In such a sensitive business, a good reputation is difficult to earn but easy to lose. Consequently, when breaching a contract, CLAIMANT’S reputation of being a trustworthy and reliable merchant is immediately at stake.

RESPONDENT argues that at the time it concluded the Contract, it did not have any independent knowledge about the business sector CLAIMANT acts in [Statement of Defence, p. 37, para. 1]. However, a party must not close its eyes to the obvious [cf. Korpela, p. 157].
CLAIMANT’s name reads “Mediterraneo Elite Conference Services”. This already implies that CLAIMANT is engaged in the luxurious conference business. Thus, RESPONDENT ought to have been aware of the above-mentioned circumstances.

By making an ex gratia payment, CLAIMANT proved to still be a reliable partner in the luxurious and sensitive conference business. Trying to avoid a loss of reputation was reasonable for CLAIMANT. Thus, taking all circumstances into account, RESPONDENT could have foreseen that CLAIMANT would make an ex gratia payment in order to maintain its reputation.

II. Irrespective of Foreseeability, the Ex Gratia Payment Constitutes a Reasonable Measure of Mitigation Required by Art. 77 CISG

Regardless of foreseeability, the ex gratia payment is recoverable under Art. 74 CISG in any case as it constitutes a reasonable measure of mitigation required by Art. 77 CISG. According to Art. 77 CISG, the party claiming damages is obliged to take all possible and appropriate measures to mitigate losses [Schwenzer, in: Schlechtriem/Schwenzer, Art. 77, para. 1; cf. Morrissey/Graves, p. 286]. Expenditures for this purpose may be recovered under Art. 74 CISG without the requirement of foreseeability. To the contrary, all expenditures for reasonable measures of mitigation are recoverable under Art. 74 CISG [BGH, 25 Jun 1997; Delchi Carrier v. Rotorex Corp, US Dist Ct (ND NY), 9 Sep 1994; Audiencia Provincial de Barcelona, 2 Feb 2004; Schwenzer, in: Schlechtriem/Schwenzer, Art. 77, para. 11; Magnus, in: Staudinger, Art. 77, para. 20]. Reasonable measures are those aimed at reducing the loss as far as sensibly possible [Knapp, in: Bianca/Bonell, Art. 77, para. 2.2; Piltz, para. 5-556; Saidov, para II 4.6; Neumayer/Ming, Art. 77, para. 3]. In order to be recoverable, measures of mitigation are merely required to appear reasonable from an ex ante perspective. It is of no relevance whether the measures, from a hindsight perspective, actually lead to a successful mitigation of damages [Knapp, in: Bianca/Bonell, Art. 77, para. 2.6; Magnus, in: Honsell, Art. 77, para. 14; Witz, in: Witz/Salger/Lorenz, Art. 77, para. 12].

Breaching the contract with Corporate Executives brought about the risk of losing Corporate Executives as a long-standing customer [cf. Procedural Order No.2, p. 48, para. 17]. From an ex ante perspective, it appeared reasonable for CLAIMANT to make an effort to retain future business opportunities with that client. Hence, the ex gratia payment was a reasonable measure aimed at preventing a loss of goodwill. If CLAIMANT had failed to reduce the damage inflicted on it, RESPONDENT would have been liable for an even greater
loss. Thus, making the ex gratia payment was in RESPONDENT’s interest and to its advantage. Conclusively, the ex gratia payment is in any case recoverable under Art. 74 CISG as it constitutes a reasonable measure of mitigation required by Art. 77 CISG.

B. CLAIMANT is Entitled to the Costs of the Success Fee Under Art. 74 CISG

Constituting a measure of mitigation required by Art. 77 CISG, the success fee is recoverable under Art. 74 CISG as well. As shown above, costs of mitigation measures are recoverable if they appear reasonable from an ex ante perspective.

Instead of repudiating the contract with Corporate Executives, CLAIMANT leased a substitute vessel [Application for Arbitration, p. 7, para. 18]. In doing so, CLAIMANT reduced the damage inflicted on it by RESPONDENT [Procedural Order No. 2, p. 48, para. 17]. Yet, the success of this substitute transaction depended on the successful communication by CLAIMANT’s yacht broker. As an additional incentive, it was reasonable to assume for CLAIMANT that a success fee would increase the yacht broker’s motivation to find an opportunity for CLAIMANT to conclude a lease contract. In the case at hand, finding a substitute yacht constituted a difficult task for the yacht broker [Procedural Order No. 2, p. 49, para. 23]. In fact, the M/S Pacifica Star was the only yacht available for lease during the necessary time period [Procedural Order No. 2, p. 49, para. 21]. In addition, it is not uncommon for yacht brokers to receive success fees [Procedural Order No. 2, p. 49, para. 23]. Making an additional effort to secure the substitute transaction therefore appeared reasonable from an ex ante perspective.

In conclusion, paying a success fee was a reasonable measure of mitigation required by Art. 77 CISG, hence recoverable under Art. 74 CISG.

C. The Bribery Payment by the Yacht Broker Does Not Affect CLAIMANT’s Entitlement to Damages

CLAIMANT is entitled to recover the damages arising from the substitute lease contract, irrespective of the yacht broker’s bribery payment.

As a result of RESPONDENT’s late performance, CLAIMANT was obliged to find a substitute yacht for the M/S Vis [Claimant’s Exhibit No. 4, p. 12]. For that purpose, CLAIMANT hired a yacht broker [Application for Arbitration, p. 7, para. 18]. Without CLAIMANT’s knowledge, the yacht broker passed parts of CLAIMANT’s success fee to the
personal assistant of Mr Goldrich, the owner of the M/S Pacifica Star [Respondent’s Exhibit No. 1, p. 41]. This payment was supposed to effect an introduction to Mr Goldrich and create an opportunity for CLAIMANT to negotiate and conclude a lease contract [Statement of Defence, p. 38, para. 13]. Paying or receiving such a payment constitutes bribery under the laws of Pacifica [Respondent’s Exhibit No. 2, p. 42]. Consequently, Pacifian criminal courts convicted Mr Goldrich’s personal assistant [Procedural Order No. 2, p. 49, para. 26].

121 RESPONDENT now claims that the entire lease contract is “tainted by corruption” [Statement of Defence, p. 39, para. 15]. Based on this claim, RESPONDENT refuses to reimburse CLAIMANT not only for the expenses of leasing the M/S Pacifica Star (USD 448,000), but also for the yacht broker’s commission (USD 60,600), and the broker’s success fee (USD 50,000) [Statement of Defence, p. 40, para. 24]. However, RESPONDENT remains unclear in its accusations about the manner in which the bribery might impact CLAIMANT’S entitlement to damages.

122 In fact, neither procedural nor substantive objections bar CLAIMANT from demanding its damages. Irrespective of the bribery payment, the Tribunal has jurisdiction to consider the lease contract (I) and CLAIMANT is entitled to damages (II).

I. The Tribunal Has Jurisdiction to Consider the Substitute Lease Contract, Irrespective of Bribery

123 The Tribunal’s jurisdiction is not affected by the bribery payment between the yacht broker and the personal assistant of Mr Goldrich. CLAIMANT and RESPONDENT agreed that any dispute arising from or in connection with their Contract shall be submitted to arbitration [Claimant’s Exhibit No. 1, p. 9, para. 15.1]. The lease contract was only concluded as a consequence of RESPONDENT’S late performance and is thus in connection with the Contract.

124 RESPONDENT might claim that due to the bribery the lease contract would be non-arbitrable or that any award considering the lease contract would conflict with public policy. Both would prevent the enforceability of the Tribunal’s award or would provide reasons for a successful set-aside procedure, Art. 5(2) New York Convention, Art. 34(2)(b) UNCITRAL Model Law. However, RESPONDENT’S potential concerns relating to arbitrability and public policy are unsustainable: Neither did CLAIMANT misuse arbitration in order to conceal criminal actions (1), nor would the Tribunal’s award violate public policy (2).
1. **CLAIMANT Did Not Misuse Arbitration to Conceal Criminal Actions**

CLAIMANT did not engage in arbitral proceedings to conceal criminal actions by preventing national courts from investigating. A tribunal’s jurisdiction can be declined, when at the time of signing the arbitration agreement a party already has the intention to pay a bribe to obtain business with a third party [ICC Ct Arb 7047/1994, Westacre; ICC Ct Arb 6474/1992]. Under these circumstances, a party would have “forfeited any right to ask for assistance of the machinery of justice” [ICC Ct Arb 1110/1963, Lagergren Award]. However, CLAIMANT was neither involved in nor aware of the bribery [Respondent’s Exhibit No. 1, p. 41]. Furthermore, the arbitration agreement between CLAIMANT and RESPONDENT was concluded long before the yacht broker engaged in corruption [Application for Arbitration, p. 5, para. 7; Respondent’s Exhibit No. 1, p. 41]. Finally, Pacifican criminal courts have already investigated the bribery. It is thus ensured that the competent authorities were not deprived of any relevant information [Respondent’s Exhibit No. 1, p. 41]. Conclusively, CLAIMANT did not misuse arbitration to conceal criminal actions.

2. **The Award Would Not Conflict With Public Policy**

Any award rendered by the Arbitral Tribunal would not violate public policy. Art. 5(2)(b) New York Convention requires an award to conform to public policy of the state where enforcement is sought. Furthermore, in a set-aside procedure, the award has to comply with public policy of the country where arbitration takes place, Art. 34(2)(b)(ii) UNCITRAL Model Law. CLAIMANT would seek enforcement in Equatoriana, where RESPONDENT is located and is likely to hold assets [Application for Arbitration, p. 4, para. 2]. The challenge of the award could only take place at the seat of arbitration, i.e. in Danubia [Claimant’s Exhibit No. 1, p. 9, para. 15.1]. Consequently, only the public policies of Equatoriana and Danubia have to be taken into account.

Public policy can be defined as a country’s basic perception of morality and justice [Parsons & Whittemore v. Papier and Bank of America, US Ct App (2nd Cir), 23 Dec 1974; Fotochrome v. Copal Company, US Ct App (2nd Cir), 29 May 1975; Renusagar Power v. General Electric, Supreme Court of India, 7 Oct 1993; Seven Seas Shipping v. Tondo, US Dist Ct (SD NY), 25 Jun 1999]. The laws of a country serve as an indicator for public policy. Yet, an action considered unlawful by the legislation of one state does not affect the public policy of another state [CCIG, 23 Feb 1988; ICC Ct Arb, Award of 1989; Ad Hoc Award of 1989; Scherer, p. 30; Blackett, p. 5]. Moreover, not every action considered unlawful violates
public policy as well. To the contrary, a violation of public policy should be assumed with caution [Dell Computer v. Union des consommateurs, Canada Supreme Court, 13 Jul 2007; Soleimany v. Soleimany, Ct App, Civil Division, 30 Jan 1998; Ironsands v. Toward Industries, High Ct Auckland, 8 Jul 2011].

In contrast to the exceptional Pacifican code prohibiting the bribery of private persons, in Equatoriana and Danubia it is merely unlawful to bribe a government official [Respondent’s Exhibit No. 2, p. 42; Procedural Order No. 2, p. 49, para. 27]. Thus, since there are no laws in Equatoriana and Danubia that forbid the bribery of a private person, the Tribunal’s award would not conflict with public policy. In conclusion, there are no reasons for this Tribunal to deny jurisdiction.

II. CLAIMANT Is Entitled to Damages, Irrespective of Bribery

The bribery between the yacht broker and the personal assistant does not affect CLAIMANT’s right to damages. Neither did CLAIMANT and Mr Goldrich engage in the corrupt affairs (1) nor is CLAIMANT liable for the yacht broker’s actions (2). Moreover, CLAIMANT is entitled to recover the suffered losses as no damage arose from the bribery (3).

1. Neither CLAIMANT nor Mr Goldrich Was Involved in the Bribery

CLAIMANT and Mr Goldrich neither engaged in corruption, nor did they know of the bribe. Correspondingly, they are not liable to prosecution under the Pacifican Criminal Code. As the substitute lease contract is independent from the bribery agreement between the broker and the personal assistant, CLAIMANT and Mr Goldrich did not engage in corrupt affairs.

2. The Yacht Broker’s Actions Cannot Be Attributed to CLAIMANT

CLAIMANT is not responsible for the yacht broker’s actions. RESPONDENT might argue that, although CLAIMANT did not commit the bribe, CLAIMANT could still be considered liable for the yacht broker’s actions. However, CLAIMANT neither knew of, nor did it intend the bribe [Respondent’s Exhibit No. 1, p. 41]. Moreover, CLAIMANT did not order the broker to use illegal means to obtain a substitute vessel. Instead, the yacht broker acted independently. After the broker had located the substitute yacht, he passed money to Mr Goldrich’s personal assistant. Yet, at that time, CLAIMANT had not even paid the success fee [Procedural Order No. 2, p. 49, para. 22]. Thus, the yacht broker bore the financial risk by using his own funds to bribe Mr Goldrich’s assistant. Consequently, his actions cannot be attributed to CLAIMANT.
3. **CLAIMANT Is Entitled to Recover the Suffered Losses as No Harm Occurred**

No harm arose from the bribery. Bribery can cause damage in three different ways. First, damage can occur to the public and its interests if an official is involved in bribery [Friedrich, p. 74; Philp, p. 63]. Second, bribery can cause damages as it obstructs competition, leading to a disruption of free trade. In this case, it is the highest bribe and not quality which determines the contractual partner [Mills, p. 289; Sayed, pp. 13, 14; Galtung, p. 265; Johnston, pp. 65, 66; Jacoby/Nehemekis/Eells, p. 183]. Third, damage might arise to one of the parties if the contract is not in accordance with that party’s interests [James, p. 210; Pieth, p. 1385].

At hand, none of these cases apply. No official was involved in the bribery, only private persons. Consequently, neither the public nor its interests were harmed. Furthermore, the free market was not disrupted by the yacht broker’s payment. The bribe was merely used to effect an introduction to Mr Goldrich [Statement of Defence, p. 38, para. 13]. Thus, negotiation and conclusion of the lease contract were not affected by the bribe but determined by the factors of supply and demand. Independent in his decision-making, Mr Goldrich had the freedom of choice with whom and to which conditions he would conclude a contract. Consequently, neither the parties’ interests nor the integrity of the free market was harmed. As no harm arose from the bribery, CLAIMANT is entitled to recover all damages.

**CONCLUSION OF THE THIRD ISSUE**

By paying the ex gratia payment and the success fee, CLAIMANT mitigated damages caused by RESPONDENT’S breach of contract. Had CLAIMANT not taken these measures, the potential losses would have exceeded the current damages. Should CLAIMANT be denied its entitlement to damages, CLAIMANT would be disadvantaged twice: First by RESPONDENT’S breach of contract and second by having to pay for measures taken in RESPONDENT’S interest. This is not changed by RESPONDENT’S vague bribery allegations: neither procedural nor substantive objections hinder CLAIMANT’S entitlement to damages in the amount of USD 670,600.
REQUEST FOR RELIEF

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

(1) Dr Mercado is not to be removed from the legal team representing CLAIMANT;
(2) RESPONDENT is not exempt from liability under Art. 79 CISG;
(3) CLAIMANT is entitled to recover damages in the amount of USD 670,600, consisting of expenses for the lease contract, the standard broker commission fee, the ex gratia payment and the success fee, irrespective of RESPONDENT’s bribery accusations.
CERTIFICATE

Freiburg im Breisgau, 8 December 2011

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

(signed) Julian Egelhof
(signed) Carolin Fretschner

(signed) Franziska Härle
(signed) Annika Laudien

(signed) Constantin Meimberg
(signed) Bastian Nill

(signed) Sita Rau
(signed) Monika Thull