MEMORANDUM FOR CLAIMANT

ON BEHALF OF

MEDITERRANEO ELITE CONFERENCES SERVICES, LTD
45 CONFERENCE PALACE, CAPITAL CITY, MEDITERRANEO
CLAIMANT

AGAINST

EQUATORIANA CONTROL SYSTEMS, INC
286 SECOND AVENUE, OCEANSIDE, EQUATORIANA
RESPONDENT

Vincent BOCA
Yana LAZAROVA
Julie NATAF
Martin SVATOŠ

Alix de ZITTER
Daria MIRKINA
Alexandre SENECAČNIK
Astrid WESTPHALEN
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I. RESPONDENT CANNOT BE EXCUSED FOR ITS BREACH OF CONTRACT UNDER ARTICLE 79 CISG

A. Respondent cannot escape its liability merely because late delivery originates from a third party with whom it has no contractual dealings

1. A party may be held liable for the failure of its entire supply chain to perform on time
2. Respondent cannot escape liability just because it had no contractual relationship with High Performance

B. Respondent cannot be excused under Article 79(2) CISG since neither Specialty Devices nor High Performance have been engaged to perform the Contract in whole or in part
C. Respondent cannot be exempt from liability since neither Respondent nor Specialty Devices meet the requirements of Article 79(1)

1. Respondent does not meet the conditions of Article 79(1) CISG
   a. Respondent cannot have suffered an impediment since late delivery is not considered as such under Article 79(1) CISG
   b. A late delivery was foreseeable at the time of the conclusion of the contract
   c. Respondent did not take all reasonable measures to avoid or overcome the late delivery or its consequences
2. Specialty Devices does not either meet the provisions of Article 79(1) CISG
   a. Specialty Devices could have foreseen the late delivery from High Performance
   b. High Performance’s late delivery could have been overcome by Specialty Devices

II. ALL COSTS RELATED TO THE CHARTER OF A SUBSTITUTE VESSEL ARE ALLOWABLE ITEMS OF DAMAGES

A. The Tribunal has authority to consider the claims regarding the lease contract or its consequences
B. All costs associated with the lease contract are allowable items of damages

1. The facts alleged by Respondent do not constitute bribery under the applicable legal standard
   a. The law applicable to the lease contract cannot be established with certainty
   b. The international practice the Tribunal should refer to does not condemn the alleged facts
2. In any event, there is no evidence of any unlawful payment in this case
   a. Respondent bears the burden of proving the alleged bribery
   b. The standard of proof in matters of bribery is very high
   c. Evidence presented by Respondent is not credible and should not be given any weight
C. The lease contract is not affected by bribery

1. Neither Claimant nor Mr. Goldrich had a corrupt intention
2. There is no causal link between the procurement of the lease contract and the alleged bribe
III. CLAIMANT IS ENTITLED TO REIMBURSEMENT FOR THE REFUND PAID TO CORPORATE EXECUTIVES

A. Claimant must be compensated for the Refund because it constitutes a loss under article 74 CISG
   1. The Refund is not an *ex gratia* payment since it is legally required
   2. The Refund constitutes an incidental and a non-performance loss under the CISG
      a. The Refund constitutes an incidental loss
      b. The refund constitutes a non-performance loss
         i. The unavailability of the M/S Vis resulted in a major dissatisfaction on Corporate Executives’ side
         ii. Even chartering a substitute boat was not sufficient to fully satisfy Corporate Executives

B. Claimant must be compensated for the Refund because since the loss incurred is a direct consequence of Respondent’s breach

C. Respondent must pay the entire refund to Claimant since its amount was foreseeable at the time of the conclusion of the contract

REQUEST FOR RELIEF
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STATEMENT OF FACTS

Mediterraneo Elite Conferences Services, Ltd, hereafter Claimant, is a company incorporated under the laws of Mediterraneo that “operates high-end venues in which it provides a complete conference package” [Ap. for Ar. pt. 5]. Equatoriana Control Systems, Inc, hereafter Respondent, is a company incorporated under the laws of Equatoriana specialized in supplying and installing control systems regarding notably conference technology [Ap. for Ar. pt. 6, 7].

In spring 2011 Claimant bought a luxury yacht, the M/S Vis, to host events for its demanding clients, combining conference facilities and a luxury restaurant [Ap. for Ar. pt. 5]. Claimant had planned to hold a professional event on the yacht from 12 to 18 February 2011 for its long-standing client the Worldwide Corporate Executives Association, hereafter Corporate Executives. Claimant wanted to refurbish the yacht with the latest in cabin and conference technologies, superior to anything otherwise available on the market [Ap. for Ar. pt. 6]. In order to do that, Claimant contracted the supply and installation of the various elements for the yacht to a number of firms, including Respondent.

Under the contract signed on 26 May 2010 between Claimant and Respondent, Respondent was obliged to supply, install and configure the master control system for Claimant’s M/S Vis yacht [Ap. for Ar. pt. 7, 11] by 12 November 2010 [Cl. Ex. 1]. Respondent itself contracted with Oceania Specialty Devices, hereafter Specialty Devices, incorporated in Oceania for the manufacture of processing units, the core element of the master control system [Ap. for Ar. pt. 8]. Specialty Devices had designed its processing units to use specifically D-28 chips recently announced by its producer, Atlantis High Performance Chips, hereafter High Performance. The production of these chips was planned to begin mid-August 2010 and there were no chips with comparable qualities on the market [Ap. for Ar. pt. 9]. On 6 September 2010 there was a fire at High Performance’s warehouse [Pr. Or. 2 pt. 8]. On 10 September 2010, High Performance informed Specialty Devices that the supply of chips remaining was not sufficient to fulfill all the orders. High Performance declared that it would “satisfy the needs of [its] regular customers first” [Cl. Ex. 3]. In fact, all the chips available were delivered to Atlantis Technical Solutions because of the friendship between the CEOs of the two companies [Cl. Ex. 7]. The chips were eventually delivered to Specialty Devices only on 2 November 2010 and the processing units were produced and delivered to Respondent on 29 November 2010 [Ap. for Ar. pt. 16]. As a result of the late performance of its supply chain, Respondent fulfilled its delivery obligations
under the contract with Claimant only on 11 March 2011, which is four months later than the date fixed by the contract with Claimant \[Ap. for Ar. pt. 16\].

As Respondent was not able to deliver the control system on time, Claimant had to find a substitute vessel to hold the conference on, as its clients would not agree to an on-shore venue \[Pr. Or. 2 pt. 18\]. Moreover, the publicity for the scheduled event had emphasized that it would be held on a luxury yacht \[Ap. for Ar. pt. 17\]. Finding a substitute vessel of the same quality in such a short notice was challenging. Claimant hired a yacht broker to help find a substitute vessel. The broker managed to find a substitute vessel, but it did not have “all the features” of the M/S Vis, which caused Corporate Executives’ unhappiness \[Pr. Or. 2 pt. 20\]. The charter of the yacht cost USD 404,000 plus port and handling fees of USD 44,000. The broker was paid a 15% commission. Since the service it had to render was substantially more demanding than an average broker service, it was also paid an extra success fee once the contract for the lease of the substitute vessel, the M/S Pacifica Star, was signed. Claimant also paid a USD 112,000 refund to Corporate Executives as a partial refund \[Ap. for Ar. pt. 18\]. Claimant made a fair offer to Respondent to share the costs arising out of the delay \[Cl. Ex. 4\]. This offer was rejected by Respondent. An Application for Arbitration was therefore submitted by Claimant on 15 July 2011.

According to the CIETAC Arbitration Rules, the arbitral tribunal, hereafter the **Tribunal**, was formed on 30 August 2011. The parties jointly appointed Professor Presiding Arbitrator as the presiding arbitrator. Professor Presiding Arbitrator is a resident of Vindobona, Danubia, where the arbitration is to take place and a member of the CIETAC Panel of Arbitrators. He is the Schlechtriem Professor of International Trade Law (ITL) at Danubia National University. Mr. Fasttrack, counsel for Claimant, notified Mr. Langweiler, counsel for Respondent, that Dr. Mercado had been added to Claimant’s legal team on 30 August 2011. Dr. Mercado was engaged by Mr. Fasttrack as part of the team representing Claimant because of her expertise in arbitration. She is a Visiting Lecturer at Danubia National University and she has occasional contact with Professor Presiding Arbitrator, but the majority of her contact is with the ITL Faculty’s full-time staff. Dr. Mercado has appeared as Counsel before Professor Presiding Arbitrator in three previous arbitrations. In the first two, Dr. Mercado’s client was successful with a unanimous award. Dr. Mercado has a good relationship with Professor Presiding Arbitrator’s wife and his children. It was the wife who asked Dr. Mercado to be the godmother of her child. This occurred in October 2010. Professor Presiding Arbitrator learned that Dr. Mercado had been added to Claimant’s legal team on 12 September 2011 when he received the Statement of Defense.
PROCEDURAL ISSUE: THE CHALLENGE TO DR. MERCADO IS TO BE REJECTED

1. Dr. Mercado should be allowed to represent Claimant in these proceedings. In its Statement of Defense, Respondent suggests that Dr. Mercado’s relationship with Professor Presiding Arbitrator casts doubts on his impartiality in the instant dispute and requests on that basis that Dr. Mercado be removed.

2. The challenge to Dr. Mercado should be rejected for four reasons. Indeed, the Tribunal can neither disregard Claimant’s fundamental right to choose legal representation (I), nor has it the power to rule on the challenge (II). In any event, there is no conflict of interests between Dr. Mercado and Presiding Arbitrator (III) and Respondent’s request is merely a dilatory tactic to delay these proceedings (IV).

1. CLAIMANT’S RIGHT TO CHOOSE ITS LEGAL REPRESENTATION IS FUNDAMENTAL

3. The Tribunal cannot disregard Claimant’s fundamental right to choose Dr. Mercado as its legal counsel. Indeed, this right is expressly guaranteed by Article 20 CIETAC Rules (A) and derives from the general principle of law protecting the right to be heard (B).

A. Article 20 CIETAC Rules guarantees the right to choose legal representation

4. Article 20 CIETAC Rules provides that “a party may be represented by its authorized Chinese and/or foreign representative(s) in handling matters related to the arbitration”. This article was primarily designed to allow foreign counsel, and not only Chinese counsel, to represent clients in CIETAC arbitrations [Wang, p. 597,598 in Born, p. 2995; Létrès, pt. 7, Webster, 5-8]. Yet, not only does it open CIETAC to foreign counsel, but it also ensures parties that their right to choose legal representation will be guaranteed.

5. Indeed, most leading institutional arbitration rules recognize through a similar formulation that parties in international arbitration “may” be represented by persons of their own choice [Art 26(4) ICC Rules (in force as from 1 January 2012); LCIA Rules, Art 18(1); ICDR Rules, Art 12; WIPO Rules, Art 13(a); ICSID Arbitration Rules, Rule 18(1)]. As Born explains, these provisions guarantee a party’s right to legal representation of its choice [Born, p. 2291].

6. Dr. Mercado was engaged by Mr. Fasttrack, Claimant’s counsel in this Arbitration, for her expertise in arbitration [Pr. Or. 2 pt. 39]. Pursuant to Article 20 CIETAC Rules, Dr. Mercado is
thus “authorized” to represent Claimant in these proceedings. Therefore, Claimant’s right to choose Dr. Mercado as legal representation has to be protected.

B. Removing Dr. Mercado would undermine Claimant’s fundamental right to be heard

7. Removing Dr. Mercado would considerably undermine Claimant’s fundamental right to be heard.

8. A party’s right to choose legal representation is considered of fundamental importance in international commercial arbitration [Born, p. 2290; See also IBA General Principles for the Legal Profession, Art. 7; Kurkela/Snellman p.187]. It is admitted in doctrine that “the basic principle in international arbitration is that a party may choose the person to represent or assist it” [Webster, 5-4].

9. This fundamental right can notably be drawn from the right to be heard as recognised in Article V(1)(b) of the New York Convention [Born, p. 2291, Kurkela/Snellman, p.17]. Indeed, the New York Convention provides that parties have to be able to present their case. Therefore, the Tribunal has the duty to guarantee the parties’ right to be heard. Violation of this right may not only cause a court at the enforcement stage to refuse recognition and enforcement of the award but also cause a court to annul the award rendered in such circumstances [Verbist/Gaillard/Di Pietro, p. 679]. Therefore, if a party has been denied its right to choose its legal representation, this may constitute inability to present one’s case under Article V(1)(b) of the New York Convention [Kurkela/Snellman, p. 17].

For these reasons, depriving Claimant of its right to choose Dr. Mercado would undermine its fundamental right to be heard and therefore, put the award at risk.

II. THE TRIBUNAL HAS NO POWER TO RULE ON THE CHALLENGE TO DR. MERCADO

10. CIETAC Rules do not grant the Tribunal an express power to rule on the challenge to Dr. Mercado (A) nor do they provide a legal basis that would evidence of an inherent power to do so (B). Should there be a power to rule on the challenge, it would belong to the Chairman of the CIETAC and not to the Tribunal (C). Therefore, the Tribunal has no power to rule on the challenge to Dr. Mercado.
A. The CIETAC Rules do not grant an express power to disqualify counsel

11. The power of the Tribunal derives from the will of the parties [Redfern/Hunter, 1-11] and the parties have chosen the CIETAC Rules to apply to this arbitration. These Rules do not give any possibility for the parties to challenge legal counsel. Indeed, only Article 30 CIETAC Rules deals with a challenging procedure. This procedure only applies to arbitrators. The absence of any rule governing challenges to legal counsel, combined with the explicit guarantee of right of representation embodied in Article 20 CIETAC Rules, highlights the unsuitability of Respondent’s request to have Dr. Mercado removed from Claimant’s legal team under CIETAC Arbitration. The appropriate approach in a conflict situation is to challenge the arbitrator.

B. An inherent power to rule on the challenge to a counsel, if any, is extremely limited but in any case not allowed under the CIETAC Rules

12. Though tribunals have recognized an inherent power to rule on the challenge to counsel, they have been extremely reluctant to admit the existence of such a power and have strongly limited it (1). Actually, only ICSID tribunals have assumed having such a power. Yet, the framework of CIETAC does not provide similar legal basis that could ground an inherent power to rule on the challenge (2).

1. When tribunals have recognized an inherent power they have been extremely reluctant to do so and have strongly limited this power

13. Arbitral tribunals have been extremely reluctant to recognize an inherent power to exclude a counsel and in the few instances they decided to exercise it, they have strongly limited its application.

14. Indeed, only an “overriding and undeniable need to safeguard the essential integrity of the entire arbitral process” empowers the tribunal to rule on such challenge. This power shall be used solely in compelling circumstances [Rompetrol v. Romania building up on Hrvatska v. Slovenia in ICSID]. In an UNCITRAL ad hoc procedure, the exclusion could be justified only “to the extent necessary to safeguard those fundamental procedural rights and the compliance with international public policy” [Cited in Dimolitsa, p.13].

15. This power has been limited due to the dangers attached to its use. Indeed, the ad-hoc Committee in Fraport v. Philippines considered that it “does not have deontological responsibilities or jurisdiction over the parties’ legal representatives in their own capacities. Despite the agreement of the parties to submit the present application to it, the Committee has no power to
rule on an allegation of misconduct under any such professional rules as may apply. Its concern is therefore limited to the fair conduct of the proceedings before it” [Fraport v. Philippines, n.39].

16. This is why tribunals have been reluctant to recognize the power to rule on counsel disqualification. Resolving an issue of conflict of interests should in fact be done through a common challenge to the arbitrator. There should be no room for any idea to gain ground that challenging counsel is an appropriate alternative to raising a challenge against the tribunal itself, with all the consequences that the latter implies [Rompetrol v. Romania].

17. Further, “Tribunals accept(ed) that as general rule parties may seek such representation as they see fit – and that this is a fundamental principle” [Hrvatska v. Slovenia, n.24] and an ICSID ad hoc Committee conceded that disqualification of counsels affects “party’s freedom to rely upon advice and representation of counsel of its own free choosing” [Fraport v. Philippines, n.38]. Therefore, though considering being entitled, arbitral tribunals are extremely reluctant to dismiss legal counsels as this exclusion needs to respect equally “two of the fundamental rights of arbitration”, namely the right to choose a counsel and the right to an independent and impartial tribunal [Wainzymer, p. 621]. In the UNCITRAL ad hoc procedure, the tribunal only recommended the immediate voluntary withdrawal from the arbitration but did not make use of any power to exclude the counsel [Dimolitsa, p. 12]. The tribunal only declared that, failing such withdrawal, it might have to issue a more formal order. In this case, a conflict of interests had been established with certainty, i.e. that the new counsel of the respondent party had previously acted for claimant. [Dimolitsa, p. 12].

18. Moreover, the ICSID Decisions mentioned above - though facing similar issues - ended up with three different interpretations of their inherent power to exclude counsels [Stevens/Bishop, p. 404]. In Hrvatska v. Slovenia, the arbitral tribunal found an inherent power to disqualify the counsel, in Rompetrol v. Romania, the arbitral tribunal speculated that if such a power existed, it could only be exercised rarely and in exceptional circumstances but did not exclude the Counsel. In Fraport v. Philippines, it estimated having the duty and power to deal with a request but rejected the Challenge emphasizing that “the Committee cannot act in this regard simply on mere appearances since to prevent a party from having access to its chosen counsel cannot depend upon a nebulous foundation, but rather must flow from clear evidence of prejudice”. Therefore there is not an established jurisprudence which would authorize with, certainty, arbitral tribunals to remove counsels. Were there such a power, it would have to be used with extreme caution keeping in mind that the main principle remains the right to choose legal counsel.
2. CIETAC Rules do not provide legal basis that could ground an inherent power to rule on the challenge contrary to ICSID Convention

19. The ICSID decisions mentioned above cannot justify an inherent power of the Tribunal to rule on the challenge to Dr. Mercado under the CIETAC Rules. Indeed this was possible under ICSID because of special features which have no equivalent in CIETAC. In *Hrvatska v. Slovenia*, the arbitral tribunal considered itself as a judicial formation “governed by public international law” which ensures it the power to “preserve the integrity of the proceedings” [*Hrvatska v. Slovenia*]. The tribunal referred to ICSID Rule 6 (Tribunal shall judge fairly), Rule 18 (Notice of counsel), Rule 19 (orders required for the conduct of the proceeding shall be made by tribunal), Article 44 (Tribunal shall decide question of procedure not expressly provided) and Article 56 of the Washington Convention (Immutability of the Tribunal when constituted). There is an "inherent power of an international court to deal with any issues necessary for the conduct of matters falling within its jurisdiction"; that power "exists independently of any statutory reference" [*Hrvatska v. Slovenia*]. CIETAC Rules do not provide any similar rules to Articles 44 and 56 of ICSID Rules, which played the “pivotal role” in the ICSID tribunal’s analysis [*Luttrell*, p. 236]. Though Article 33 CIETAC Rules provides that arbitral tribunals should examine the case “in any way it deems appropriate unless otherwise agreed by the parties”, it is not comparable to Article 44 ICSID Rules, which refers to the conduct of the arbitration proceedings generally. By contrast, Article 33 CIETAC Rules only refers to the conduct of hearings. Respondent requests that Dr. Mercado shall terminate her role in the legal team representing Elite which goes beyond the simple exclusion from the hearings. Therefore no comparison can be drawn between Article 33 CIETAC Rules and 44 ICSID Rules. This is comforted by the fact that Article 32 ICSID Rules, like Article 33 CIETAC Rules specifically deals with the oral procedure.

20. Arbitral tribunals have been disinclined to admit a power to exclude the counsel and have been very reluctant to make use of it. Moreover, in the absence of CIETAC Rules similar to those invoked in the above mentioned ICSID decisions, this Tribunal cannot justify an inherent power to rule on the challenge to Dr. Mercado.

3. A power to disqualify a counsel, if any, would belong to the Chairman of the CIETAC and not to the Tribunal

21. The Tribunal cannot be entitled to examine the challenge to Dr. Mercado because Chairman of CIETAC should do so if such a power existed at all.
22. Indeed Article 30 (6) CIETAC Rules provides that the Chairman of the CIETAC is entitled to rule on challenges of arbitrators. CIETAC Rules therefore entrust a neutral authority for that purpose.

23. Like other Arbitration Rules in international commercial arbitration – e.g. Art 13(4) UNCITRAL Arbitration Rules – the spirit of CIETAC Rules places the neutrality at the core of the CIETAC System in order to ensure an impartial decision.

24. Undeniably "it is a universally accepted doctrine that no one can be judge in his own cause and all systems of law adopt it" [Report on ICJ Project, 1. Actes et Documents, p. 367 (Transl.) cited in Cheng, p. 279]. Therefore, according to this “general principle of law” [Cheng, p. 279] in order to guarantee the impartiality of the decision, Article 30(6) CIETAC prevents Arbitrators to decide themselves on their challenge.

25. The Challenge to Dr Mercado, as requested by Respondent necessarily questions the relationship between Dr. Mercado and Presiding Arbitrator. Moreover, it questions Presiding Arbitrator’s impartiality. Presiding Arbitrator is a part of the Tribunal, therefore he would have to question his own impartiality. For that reason, the Tribunal is not entitled to examine the challenge to Dr. Mercado and the Chairman of the CIETAC should have this power, admitting such a power exists.

III. IN ANY EVENT, THERE IS NO CONFLICT OF INTEREST

26. Claimant submits that in any case, there is no conflict of interest at all, contrary to Respondent’s allegations. Since CIETAC Rules do not address conflict of interests, this issue should be determined considering the IBA Guidelines as generally understood principles of fairness (A). There is no conflict of interest affecting Dr. Mercado and Presiding Arbitrator in the light of the IBA Guidelines. Indeed, Dr. Mercado and Presiding Arbitrator do not share a close family relationship (B), nor do they share a close friendship (C). Added to that, no proof can be brought of any excessive appointments of Presiding Arbitrator by Dr. Mercado (D). Consequently, the non-disclosure by Presiding Arbitrator does not prejudge his partiality nor his dependence to Dr. Mercado (E). Therefore, Claimant requests the Tribunal to reject the challenge to Dr. Mercado.

A. In the silence of relevant rules to the Arbitration, the issue has to be determined in regard of the IBA Guidelines

27. CIETAC Rules do not provide any procedure for the challenge of counsel. Consequently, in the silence of the Arbitration Rules, the Tribunal is left with applying “one of three potential
standards: (...) the arbitration law of the situs, (...) the ‘home’ ethical standard of conduct rules of the jurisdiction or jurisdictions where the attorney practices; or (...) the arbitrators ‘own discretion informed by generally understood international principles of fairness” [Jacobus/Rohner/Hefty, p. 6]. The law of the seat of the arbitration, in the present case the UNCITRAL Model Law [Ap. for Ar. pt. 21], guarantees equal treatment of the parties, i.e. that “each party shall be given a full opportunity of presenting his case and that an award can be set aside if “the party making the application (...) was otherwise unable to present his case” [Art 34(2)(ii) UNCITRAL Model Law]. It does however not address potential conflicts of interest affecting a counsel. The Tribunal cannot therefore rule on the challenge to Dr. Mercado according to UNCITRAL Model Law standard.

28. ‘Home’ ethical standard of conduct should generally not be taken into consideration by an arbitral tribunal. Indeed, their use raises complications [Paulsson, p. 214] and they may vary from State to State. Arbitral tribunal’s consideration of the matter should not be based upon any particular code of professional ethics because it differs in their detailed application. Moreover Dr. Mercado’s Bar Code in the present case does not address the facts at stake. There is nothing in the relevant rules of Danubia that addresses conflicts of interest in arbitration [Pr. Or. 2 pt. 40]. This question is left to the rules of the administering arbitral organization or the conflict rules of the International Bar Association. [Pr. Or. 2 pt. 40].

29. In the absence of relevant Rules, the Tribunal can only identify a potential conflict of interest according to “generally understood international principles of fairness” [Jacobus/Rohner/Hefty, p. 6]. The IBA Guidelines reflect such international standard and are recognised in international arbitration generally (e.g. previously mentioned ICSID decisions). This is supported by the fact that, although inapplicable, the relevant rules of Danubia and Dr. Mercado’s Bar Code leave the question to IBA Guidelines [Pr. Or. 2 pt. 40]. Therefore, the issue must be determined in accordance with the IBA Guidelines.

B. There is no close family relationship between Presiding Arbitrator and Dr. Mercado

30. Respondent infers a potential conflict of interest because Dr. Mercado is the Godmother of Professor Presiding Arbitrator’s children. Article 2(3)(8) IBA Guidelines addresses the question of the relationship between Arbitrator and legal Counsel in the Red List: “The arbitrator has a close family relationship with (…) a counsel representing a party”. According to the express definition in the IBA Guidelines “the term ‘close family member’ refers to a spouse, sibling, child, parent or life partner » [IBA Guidelines, p. 21, note 4]. Therefore, Presiding Arbitrator and
Dr. Mercado do not have a “close family relationship” in the terms of the IBA Guideline Red List. Hence, there is no conflict of interests according to Article 2(3)(8) IBA Guidelines.

31. There is no relevant rule in the Red List that demonstrates a potential conflict of interests affecting Dr. Mercado and Presiding Arbitrator.

C. There is no close friendship between Presiding Arbitrator and Dr. Mercado

32. The relationship between Dr. Mercado and Presiding Arbitrator does not fall either within the scope of the rule 3(3)(6) IBA Guidelines on the Orange List.

33. Indeed, Dr. Mercado and Presiding Arbitrator do not have “a close personal friendship, as demonstrated by the fact that the arbitrator and the counsel regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations”. Dr. Mercado does not have a close friendship with Presiding Arbitrator himself but has a good friendship with Professor Presiding Arbitrator’s wife and his children. Though it implies occasional contact, being the friend of his wife does not imply a friendship between Presiding Arbitrator and Dr. Mercado. It was furthermore Presiding Arbitrator’s wife who asked Dr. Mercado to be the godmother of their children in October 2010. [Pr. Or. 2 pt. 32]. Therefore, Presiding Arbitrator only consented to it. Actually, the relationship between Presiding Arbitrator and Dr. Mercado is mostly related to professional work commitments at Danubia National University. Respondent acknowledges that Dr. Mercado only has “occasional contact with Professor Presiding Arbitrator, but the majority of her contact is with the ITL Faculty’s full-time staff, particularly the several Course Directors” [St. of De. pt. 20]. Respondent further suggests that Dr. Mercado’s position at Danubia National University was obtained as a result of the direct intervention of Presiding Arbitrator. However, Dr. Mercado has been selected following the usual public application process after an interview by a panel of three. President Arbitrator did not intrude in the usual application process. Dr. Mercado was one of several individuals contacted in the same way that she had been [Pr. Or. 2 pt. 31]. Dr. Mercado had lectured at several universities on international commercial law and international arbitration and is highly regarded in the field. [Pr. Or. 2 pt. 31].

D. There is no evidence of excessive appointments of Presiding Arbitrator by Dr. Mercado

34. The relationship between Dr. Mercado and Presiding Arbitrator does not fall either within the scope of the rule 3(3)(7) IBA Guidelines on the Orange List. Indeed, Dr. Mercado did not “appoint” Presiding Arbitrator as an arbitrator “in the past three years” and there is no proof of
such appointments brought by Respondent. \([St. \ of \ De.]\). Indeed, according to Art 30.2 CIETAC Rules about challenge of arbitrators, Respondent shall carry the burden of proof.

35. As a matter of fact, Dr. Mercado has appeared as a counsel before Presiding Arbitrator in three previous Arbitrations. She was successful with a unanimous award in two cases and unsuccessful on a majority decision in the third case with Presiding Arbitrator issuing a dissenting opinion in her client’s favour \([St. \ of \ De. \ pt. \ 22]\). Respondent doubts Presiding Arbitrator’s impartiality in the presence of Dr. Mercado perhaps because she could have helped in the appointment of Presiding Arbitrator in those arbitrations. Respondent’s inference is based upon no other evidence than the success rate of Arbitrations in which Dr. Mercado has appeared as Counsel before Professor Presiding Arbitrator. As a matter of fact, in the present case it was the first time that Dr. Mercado had worked with Mr. Fasttrack \([Pr. \ Or. \ 2 \ pt. \ 29]\) who engaged her \([Pr. \ Or. \ 2 \ pt. \ 39]\). Furthermore, both Mr. Fasttrack and Mr. Langweiler had come to the conclusion independently to suggest Presiding Arbitrator as the President of the Tribunal, in particular because the arbitration clause called for the arbitration to take place in Danubia and Presiding Arbitrator was from Danubia, member of the CIETAC Panel of Arbitrators and he had the appropriate experience \([Pr. \ Or. \ 2 \ pt. \ 34]\). Therefore, the decision to appoint Presiding Arbitrator was not influenced by Dr. Mercado.

36. This is confirmed by the fact that Presiding Arbitrator learned that Dr. Mercado had been added to the Claimant’s legal team on 12 September 2011 when he received the Statement of Defense \([Pr. \ Or. \ 2 \ pt. \ 35]\). Subsequently, there can be no doubt that Dr. Mercado and the Presiding Arbitrator did not have an agreement in the present case.

37. Respondent further invokes the fact that Dr. Mercado is not salaried but treated as a third party service supplier for payment and tax purposes \([St. \ of \ De. \ pt. \ 19]\). She delivers lectures on Arbitration and contributes to one of Professor Presiding Arbitrator’s ITL lecture because of her expertise as a General Counsel in a large international trading company. The employment status invoked by Respondent does not demonstrate a conflict of interests. Dr. Mercado is neither subject to the authority nor under the direction of President Arbitrator.

38. Therefore, there is no conflict of interests between Dr. Mercado and the Presiding Arbitrator under the rule 3(3)(7) IBA Guidelines.

E. Non-Disclosure by Presiding Arbitrator does not prejudge his impartiality nor his independence to Dr. Mercado

39. Respondent may argue that Dr. Mercado did not disclose information about her relationship to Presiding Arbitrator. Nevertheless, there is no duty for Dr. Mercado to disclose any
information about potential conflicts of interests since the IBA Guidelines require prompt disclosure by arbitrators and parties only [IBA Guidelines, General Standards 3 and 7].

40. Respondent could further try to infer a conflict of interests from Presiding Arbitrator’s non-disclosure of his relationship to Dr. Mercado. Yet, IBA Guidelines explicitly points out that “non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so” [IBA Guidelines Part II, §5]. The professional Relationship between Presiding Arbitrator and Dr. Mercado falls within Art. 4(4)(1) IBA Guidelines (green list) since “The arbitrator has a relationship with (…) the counsel for one of the parties through membership in the same professional association or social organization”.

41. Therefore Presiding Arbitrators’ non-disclosure bears no consequences as to his impartiality.

IV. RESPONDENT’S REQUEST IS MERELY DILATORY AND ATTEMPTS TO THREATEN THE TRIBUNAL

42. Respondent’s request - had there been any genuine concerns about Presiding Arbitrator’s impartiality - is an attempt to delay the proceedings and to threaten the Tribunal. As a matter of fact, Respondent reserved its right to challenge Professor Presiding Arbitrator as arbitrator in this case if the challenge to Dr. Mercado is not accepted by the Tribunal.

43. Indeed, the exclusion of Dr. Mercado from the legal team of Claimant could not be a remedy to any potential partiality of Presiding Arbitrator. Respondent’s challenge falls within the kind of challenges identified by Horvath as challenges “used solely to derail proceedings” [Horvath, p. 302].

44. In fact, Respondent’s request only ends up with delays and supplementary costs. In addition, this tactic constitutes a direct threat to Presiding Arbitrator through the reserved right to challenge President Arbitrator if Dr. Mercado is not disqualified [St. of De. pt. 23]. The challenge to Dr. Mercado is therefore to be rejected.

SUBSTANTIVE ISSUE: RESPONDENT CANNOT BE EXCUSED FOR ITS BREACH OF CONTRACT AND CLAIMANT SHOULD BE AWARDED ALL DAMAGES

I. RESPONDENT CANNOT BE EXCUSED FOR ITS BREACH OF CONTRACT UNDER ARTICLE 79 CISG

45. The parties entered into a sales contract under which it was agreed in the sales contract dated 26 May 2010 that the master control system’s installation and configuration had to be completed
by 12 November 2010 [Cl. Ex. 1]. Respondent failed to perform its contractual obligations since the contract was completed only on 11 March 2011, i.e. four months after the agreed date [Ap. for Ar. pt. 16].

46. Article 33(a) CISG provides that the seller must deliver the goods on the date fixed by the contract. Respondent is therefore in breach of its obligation. The existence of this breach is not disputed in the present case. Yet, Respondent now alleges that it should be exempted from its liability by blaming the failure on its own suppliers under Article 79(2) CISG [St. of Def. pt. 9]. Respondent argues that it can be liable for the failure of its supply chain only “in regard of the quality of the goods”, not in regard of late performance. Respondent also argues that it should be excused since it had no contractual dealings with High Performance [St. of De. pt. 9]. Claimant submits that Respondent misunderstands the nature of Article 79(2) CISG since it cannot escape its liability merely because late delivery originates from a third party with whom it has no contractual dealings (A). Indeed, Respondent should be held liable for its late delivery and should not be excused under Article 79(2) CISG. Indeed, Article 79(2) CISG applies when a contracting party engages an independent third person to perform the contract in whole or in part. In such a case, the contracting party claiming an exemption must establish that the requirements set forth in Article 79(1) are satisfied both in its own regard and in regard to that third person [CISG-AC Opinion No. 7].

47. In the present case, neither High Performance nor Specialty Devices have been engaged by Respondent to perform the contract in whole or in part (B). Furthermore, neither Respondent nor Specialty Devices meet the requirements of Article 79(1) (C). Respondent has to prove that all these cumulative requirements are met. If the Tribunal were to consider that at least one condition is not fulfilled, then Respondent should not be excused under article 79(2) CISG.

A. Respondent cannot escape its liability merely because late delivery originates form a third party with whom it has no contractual dealings

48. Respondent asserts that it can be held responsible for the failure of its supply chain only “in regard of the quality of the goods”, not in regard of its failure to perform on time [St. of De. pt. 9]. Respondent adds that it cannot be held responsible for any alleged failings on the part of High Performance since it had no dealings with it [St. of De. pt. 9]. Respondent misunderstands Article 79(2) CISG. Indeed, a party may be held liable for the failure of its entire supply chain to perform on time (1). Further, Respondent cannot escape its liability just because it had no contractual relationship with High Performance (2).
1. A party may be held liable for the failure of its entire supply chain to perform on time

49. Respondent argues that Article 79(2) CISG establishes liability of the party in breach because of the failure of third parties it has engaged only in regard of the quality of the goods and not in regard of late delivery. In doing so, Respondent misunderstands Article 79(2) CISG. Indeed, Article 79 exempts a party from its liability when that party has failed to perform any of its obligations \[CISG-AC Opinion No. 7\]. In other words the expression “failure to perform” is to be interpreted broadly. Accordingly, non-performance may be total or partial, delayed or defective \[Tallon, p. 575\]. There is thus no reason to distinguish late delivery from non-conformity. The CISG does not indicate at any time that a party may escape its liability because of a late delivery at a previous stage in its supply chain. It rather provides that if there has been a failure to perform previously, no matter what was the failure, then a party should be excused only if it and the third party it has engaged can be excused under Article 79(1) CISG. Therefore, Respondent’s argument is flawed and Respondent should not be excused for the mere reason that a third party failed to perform its obligations on time.

2. Respondent cannot escape liability just because it had no contractual relationship with High Performance

50. Respondent argues that “the responsibility for the actions of a third party is to a third party it has engaged to perform the whole or a part of the contract” \[St. of De. pt. 9\]. Respondent further argues that since it had no dealings with High Performance, it cannot be held responsible for any failings on the part of High Performance \[St. of De. pt. 9\]. Again, Respondent misunderstands Article 79(2) CISG. Indeed, Article 79(2) does not establish a general exemption of liability if there are no contractual dealings between the failing third party and the breaching party to the contract. Rather, Article 79(2) is meant to increase the seller's liability, for it makes the seller in principle responsible for defective performance incurred by independent third persons as if it were the seller's own conduct \[CISG-AC Opinion No. 7\]. If it is true that the seller's liability is not unconditional, it has to establish that the default by the third person was actually beyond its control \[CISG-AC Opinion No. 7\]. If Respondent’s understanding of Article 79(2) was right, any party to a contract could escape its liability because of a failure within its supply chain. This is not what Article 79(2) was designed for and Respondent cannot escape its liability for the mere reason that it has not engaged High Performance. Further, under a proper understanding of Article 79(2), it appears that since neither High Performance nor Specialty Devices have been engaged to perform the contract in whole or in part, then Respondent should not be exempted at all from liability for its late delivery.
B. Respondent cannot be excused under Article 79(2) CISG since neither Specialty Devices nor High Performance have been engaged to perform the Contract in whole or in part

51. To be excused under Article 79(2) CISG, Respondent bears the burden to prove that Specialty Devices and High Performance are third parties which it has engaged to perform the contract with Claimant in whole or in part. Yet, neither of them fulfills this condition.

52. Indeed, a party claiming an exemption under Article 79(2) can only invoke the failure of a sub-contractor to be exempt. [Nicholas p. 5-22]. According to the prevailing view, mere suppliers of goods or raw materials are not covered by Article 79(2) CISG [Brunner p. 187; Rimke p. 216; Secr. Comm. - Official Rec., I, 56]. Arbitral tribunals and courts have confirmed that Article 79(2) applies when the seller claims exemption because of a default by a sub-contractor but not when the third party is a manufacturer or sub-supplier [Arb. Trib. Ham. 21 Jun. 1996; Vinte wax (OLG)]. Overall, under Article 79(2) a third party engaged to perform the whole or a part of the contract is to be understood as a sub-contractor [Honnold p. 488; CISG-AC Opinion No. 7]. In the present case, Specialty Devices was to manufacture processing units for Respondent [Ap. for Ar. pt. 8] and High Performance was to produce D-28 “super chip” for these processing units [Ap. for Ar. pt. 9]. As a result, High Performance and Specialty Devices only provided the necessary material to enable Respondent to perform its contract with Claimant. Therefore, Specialty Devices was a manufacturer and High Performance a mere sub-supplier. Hence, neither Specialty Devices nor High Performance can be understood as third parties in the meaning of Article 79(2) CISG since none of them were Respondent’s sub-contractors.

53. As a conclusion, Respondent cannot be excused for its late delivery because of Specialty Devices failure to perform its contract with Respondent on time.

C. Respondent cannot be exempt from liability since neither Respondent nor Specialty Devices meet the requirements of Article 79(1)

54. Should the Tribunal consider that High Performance and Specialty Devices are sub-contractors, Respondent cannot, in any case, be excused as the conditions of Article 79(2) would still not be fulfilled. Indeed, when a third party has been engaged to perform the contract in part or in whole, the contracting party claiming an exemption must establish that the requirements set forth in Article 79(1) are satisfied both in its own regard and in regard to that third person [CISG-AC Opinion No. 7]. The exemption of liability under Article 79(1) shall not be triggered unless Respondent can demonstrate that non-performance was due to (i) an “impediment” (ii) beyond its control (iii) which it could not reasonably have been expected to take into account at the time
of the conclusion of the contract and (iv) which, or the consequences of which, it could not reasonably have been expected to avoid or overcome. These conditions must be met cumulatively by both Respondent and its third party [Macromex v. Globex]. Respondent has the burden of proving that all conditions are met [Al Palazzo v. Bernardaud]. If at least one condition is missing for either Respondent or the third party it has engaged, Respondent cannot be exempted under Article 79(2). Claimant submits that neither Respondent (1) nor Specialty Devices (2) meet the conditions of Article 79(1).

1. **Respondent does not meet the conditions of Article 79(1) CISG**

55. Respondent cannot be excused under Article 79(2) CISG because it does not meet the conditions of Article 79(1) CISG. Indeed, Respondent did not suffer an impediment since late delivery is not understood as such under Article 79(1) CISG (a). Moreover, such late delivery was foreseeable to Respondent (b). Finally, Respondent did not take all reasonable measures to avoid or overcome the late delivery or its consequences (c).

   a. **Respondent cannot have suffered an impediment since late delivery is not considered as such under Article 79(1) CISG**

56. In order to claim exemption under Article 79 CISG Respondent must prove the existence of the impediment otherwise called “force majeure” [Nicholas p. 5]. Respondent asserts that the impediment it has suffered is the failure to receive the processing units from Specialty Devices [St. of De. pt. 7]. Yet, the manufactured processing units have been delivered to Respondent one month later than agreed with Specialty Devices, which was too late to allow Respondent to perform on time [Ap. for Ar. pt. 7, pt. 16]. The failure to perform Respondent refers to is in fact a late delivery. Therefore, the impediment Respondent is trying to rely on is Specialty Devices’ failure to deliver the processing units on time. However, late delivery by a manufacturer cannot be considered as an impediment under Article 79(1) CISG.

57. To be defined as such, an impediment must be an unmanageable risk or a totally exceptional event, such as war, civil war, extreme weather [CAM 30 Nov. 2006], acts of terrorism, economic impossibility or excessive onerousness [Lindström para. 4.1]. Contrary to Respondent’s assertion, the failure to receive the processing units from Specialty Devices on time is not an impediment under Article 79 CISG. Indeed, late delivery is not an extraordinary event. It is one of the most common difficulties existing in the international trade. If the late delivery was to be an impediment in the meaning of Article 79 CISG, then every party to a contract facing late delivery from its supply chain could be exempted from its liability.
58. Therefore, neither Respondent nor Specialty Devices faced an impediment in the meaning of Article 79(1) CISG thus Respondent should not be excused of its liability.

b. A late delivery was foreseeable at the time of the conclusion of the contract

59. In order to claim an exemption under Article 79(2) Respondent shall demonstrate that the alleged impediment, that is the late delivery from Specialty Devices [St. of De. pt. 7], was unforeseeable at the time of the conclusion of the contract. Yet, nowhere in its Statement of Defense has Respondent ever argued on this ground of unforeseeability. In any case, it is Claimant’s submission that the impediment was foreseeable to Respondent.

60. To be unforeseeable under Article 79(1), an event must not be expectable by a reasonable person [Weiszberg para.B; Brunner p. 160]. Further, the possibility that a third party might fail to perform must almost always be “foreseeable” by the seller [Lookofsky p. 164]. In the present case, the D-28 chips became available to Specialty Devices on 2 November 2010. The manufactured processing units were then only delivered to Respondent one month later, delaying Respondent’s own performance of four months [Ap. for Ar. pt. 7, pt. 10]. The more sophisticated and widespread international commerce becomes, the more a party is expected to take an impediment into account [Bender p. 5-24]. In the instant case, the contractual chain involved traders from four different countries. Moreover, in such a specific field as high technology, a reasonable seller of the same kind as Respondent could have foreseen that there was a risk of late delivery from one of its suppliers at the time of the conclusion of the contract. As Respondent was to configure the master control system it should have known at the time of the conclusion of the contract that any default throughout the manufacturing process, especially late delivery or non-delivery of the core element [Ap. for Ar. pt. 8], would lead to its own non-performance. Thus on the ground of this condition of foreseeability under Article 79(1), Respondent cannot claim exemption under Article 79(2).

c. Respondent did not take all reasonable measures to avoid or overcome the late delivery or its consequences

61. A party must take reasonable measures to avoid or overcome the impediment or its consequences in order to claim an exemption [Schlechtriem/Schwenzer p. 1069]. Contrary to Respondent’s allegations that it could not have overcome the late delivery [St. of De. pt. 8], Claimant submits that this delay could have been overcome.

62. A supplier’s breach is a situation that, for the purpose of Article 79, the seller must avoid or overcome [Vine wax (BGH)]. In other words, the difficulties arising from the delivery of seller’s
suppliers belong to the seller’s area of risk [Arb. Trib. Ham 21 Mar. 1996]. In the case at hand, Respondent was aware of the fire which happened on 6 September 2010 at High Performance’s warehouse [Cl. Ex. 2] and that this fire would lead to a late delivery of the processing units. Respondent also knew that the amount of chips already produced was enough to make the master control system function [Pr. Or. 2 pt. 9]. Furthermore from 20 September 2010, two weeks after the fire, Respondent was aware from a reputable public source (Technical Reporter) that High Performance had decided to allocate all the chips available to Atlantis Technical Solutions. They were allocated for inappropriate reason that the CEOs of the two firms were longstanding close friends and witnesses at each other’s weddings [Cl. Ex. 7]. Considering Respondent’s awareness of the situation that could impede upon its own contract with Claimant, it was in the position to intervene and have the contract performed on time. Indeed, Respondent could and should have contacted High Performance, or at least Specialty Devices, to persuade High Performance to rethink its choice. As a matter of fact, Respondent followed none of these initiatives and took a risk of losing Claimant as a client. Thus Respondent could have overcome “the impediment” or “its consequences” and therefore may not rely on exemption from its liability.

2. Specialty Devices does not either meet the provisions of Article 79(1) CISG

63. Should the Tribunal find that Specialty Devices is a third party in the sense of Article 79(2), nevertheless Respondent cannot be exempted as Specialty Devices does not either meet the cumulative conditions of Article 79 (1). Indeed, just like Respondent, Specialty Devices could have foreseen the late delivery from its own supplier at the time of the conclusion of the contract (a) and could have overcome it (b).

a. Specialty Devices could have foreseen the late delivery from High Performance

64. Respondent argues that Specialty Devices has faced High Performance’s failure to deliver chips on time as an impediment under Article 79(1) [St. of De. pt.7]. Yet, Claimant submits that a late delivery is not an unforeseeable impediment in the present case. At the time of the conclusion of the contract with High Performance, Specialty Devices could have foreseen that there was a risk of late delivery. Indeed, Specialty Devices chose to design its processing units to use the D-28 “super chip” [Ap. for Ar. pt. 9]. These chips had no equivalent at the time Specialty Devices made this choice and it was the first time High Performance ever produced these “super chips” [Ap. for Ar. pt. 9]. Because Specialty Devices chose these specific chips, it was in a position to foresee the risks related to its choice. Like any other state of the art product, it was not
unforeseeable that the production of these “super chips” could meet difficulties of any kind, thus providing risks for delay. If an event is foreseeable, the defaulting party should be considered as having assumed the risk of its realization [Rimke p. 215]. Since it was foreseeable to Specialty Devices that a late delivery of High Performance’s “super chips” may occur, then Specialty Devices does not meet the requirements of Article 79(1) CISG and Respondent cannot be excused for its late delivery of the master control to Claimant under Article 79(2) CISG.

b. High Performance’s late delivery could have been overcome by Specialty Devices

65. Claimant submits that Specialty Devices could have overcome High Performance’s late delivery. A party shall do everything possible and reasonable in order to overcome an impediment [Gomard/Rechnagel p. 223]. Moreover, a party is required to take active appropriate measures in order to avoid the impediment or its consequences [Rautamo/Ramberg p. 219]. In the present case, Specialty Devices could not perform its obligation to manufacture processing units for Respondent without the D-28 chips [Ap. for Ar. pt. 9]. From 10 September 2010, Specialty Devices was aware that High Performance had in mind three alternatives regarding the delivery of the D-28 chips, two of which were beneficial to Claimant [Cl. Ex. 3]. Indeed, either allocating the chips in a pro rata basis or delivering a relatively small order of D-28 chips would have enabled Specialty Devices to start its own performance. Further, the manufacture of processing units actually required only three processing units to operate the system instead of the six ordered. If a disturbance has already revealed itself, it has to be overcome as quickly as possible [Rimke p. 216]. Claimant appreciates that Specialty Devices took the initiative to approach Atlantis Technical Solutions in order to purchase the number of D-28 chips needed for the processing units [Pr. Or. 2 pt. 11]. Nevertheless, Claimant submits that Specialty Devices’ decision to contact its supplier’s client was too late and therefore is not a step of a nature so as to overcome the impediment. The first reasonable step Specialty Devices could have taken was a phone call to High Performance to make them change their mind, arguing in particular that less chips than ordered where needed. It did not even make such a try. Thus, it has not done everything reasonable in order to overcome the late delivery.

66. Therefore Claimant submits that Respondent cannot claim its exemption under Article 79 CISG since the prerequisites of Article 79(2) and the conditions for the exemption under Article 79(1) are not met.
II. ALL COSTS RELATED TO THE CHARTER OF A SUBSTITUTE VESSEL ARE ALLOWABLE ITEMS OF DAMAGES

67. Respondent is trying to disclaim its liability for the costs related to the lease contract between Claimant and Mr. Goldrich for the rent of the M/S Pacifica by alleging a non-existent bribe. It invokes a possible lack of authority of the Tribunal to avoid the payment of damages without making any request on that ground. Even if Respondent had submitted such a request, the Tribunal has the authority to rule on this matter (A) and should find that all claims in regard to the lease contract are allowable items of damages (B).

A. The Tribunal has authority to consider the claims regarding the lease contract or its consequences

68. Respondent restricts itself to merely asserting that the Tribunal does not have authority to hear the claims related to the lease contract. Indeed, it does not raise any objection to this Tribunal’s jurisdiction in its Relief Requested [St. of De. pt. 24]. Actually, the words “objection”, “jurisdiction” or “admissibility” do not even appear in Respondent’s Statement of Defense.

69. Therefore, Respondent is precluded from submitting any objection to the Tribunal’s jurisdiction. Indeed, should Respondent attempt to argue at a later stage of the proceedings that the Tribunal lacks jurisdiction, Article 16 CIETAC Rules provides that the latter may not permit any such amendment if it considers that the amendment is too late and may delay the arbitration proceedings. Claimant submits that had Respondent wished to raise jurisdictional objections, it should have done so at an appropriate time, i.e., in its Statement of Defense. Indeed, schedule for the submission of memoranda for Claimant and Respondent and schedule of oral arguments have already been established. Such an objection would only result in unacceptable delays in the proceedings.

70. In any case, would such an objection be permitted by the Tribunal, it is widely admitted that allegations of bribery are arbitrable and admissible. Indeed, doctrine [Born/O’Connell/Allen; Lew/Mistelis/Kröll, p. 215; Hanotiau, p. 959], arbitral tribunals [ICC Case No. 4145, ICC Case No. 6286, ICC Case No. 6474] and national courts [Westacre – English Court of Appeal, Westacre – Swiss Federal Tribunal, JLM Indus v. Stolt-Neilsen, Sarawak Shell v. PPE3] recognize that arbitral tribunals may consider and resolve claims of bribery.
B. All costs associated with the lease contract are allowable items of damages

71. Since the Tribunal has authority to address the issue of bribery, and, in any case, no objection has been raised in this regard, it should now find that all costs associated with the lease contract are allowable items of damages.

72. Respondent alleges that the success fee paid by Claimant to its yacht broker was given in part to the yacht owner’s personal assistant [St. of De. pt. 13]. Even assuming that Respondent’s allegations were proven, these allegations do not qualify as “bribery” under the applicable legal standard (1). In any event, there is no evidence in this case of any unlawful payment (2) and even if bribery was proven, the cost of chartering a substitute vessel would still be an allowable item of damages since there is no causal link between the procurement of the lease contract and the payment of the alleged bribe (3).

1. The facts alleged by Respondent do not constitute bribery under the applicable legal standard

73. In order to appreciate whether the alleged facts qualify as bribery, it is necessary to first determine the applicable law. Indeed depending on the law applicable to the lease contract, the alleged facts constitute or not a punishable act of bribery (a). However, since the present facts do not allow to determine with certainty the substantive law governing the lease contract, Respondent’s allegations on bribery should be assessed by taking the international standards and practices into consideration (b).

a. The law applicable to the lease contract cannot be established with certainty

74. The substantive law of the contract which is allegedly concerned by bribery is the law according to which the allegation of bribery should be considered [Sayed, p.161, Radjai, p. 140]. Indeed, “Arbitration tribunals confronted with allegations of illegality normally apply the substantive law of the contract chosen by the parties to determine whether a certain act is illegal, except to the extent that applying it would contravene international public policy” [Radjai, p. 140]. Two conclusions can be drawn from this: firstly, it is according to the substantive law of the contract that arbitrators need to verify whether certain facts qualify as bribery. Secondly, the substantive law of the contract is usually the law chosen by the parties.

75. The principle governing the issue of the applicable law to a contract is the doctrine of party autonomy [Mayer/Heuzé, p. 535; Fouchard/Gaillard/Goldman p. 783]. Indeed, the parties have considerable latitude in electing the applicable law. They can agree that such law shall govern, in
all its provisions, including its public policy and mandatory rules, the contract under consideration [Cordero-Moss, p.315, Sayed, p. 163].

76. When parties of two different nationalities choose the applicable law to their contract, they tend to choose a neutral law and therefore the national laws of the contractors are generally excluded [Westacre – English Court of Appeal, ICC case No. 5622 Hilmarton]. In the present case, it is unlikely that the parties would have chosen the law of Pacifica (place of residence of the yacht’s owner, the lessor) or the law of Mediterraneo (place of registration of Claimant, the lessee). In the instant dispute, from all the possible applicable laws, only one qualifies the alleged facts as bribery, the law of Pacifica. However, all other national laws related to the facts of this case - Danubia, Mediterraneo and Equatoriana - have adopted the OECD Convention under which the alleged facts are not punishable. Therefore, the law chosen by the parties is not likely to be a law condemning private corruption.

77. Assuming that there is no express or implied choice of law clause, the law with the “closest and most real” connection with the dispute will be applied [Baughen, p. 390]. In identifying that law, courts have considered the following factors: “the residence and nationality of the parties; the place where the contract was made; the place where it was performed with charter parties, the law of the flag” [Baughen, p. 390]. The parties’ regular dealings - including any express choice of law in other contracts – as well as the law of the place of arbitration are also relevant considerations.

In the present case, there is little indication regarding the parties’ express choice of law, or of the law with the closest and most real connection with the dispute. Therefore, the Tribunal should consider the concept of bribery according to the international practice.

b. The international practice the Tribunal should refer to does not condemn the alleged facts

78. Since there is no consensus against private corruption, in respect to the international practice, the alleged facts shall not be considered as bribery. The main international Convention on corruption to which all three countries relevant in the present matter (i.e. Danubia, Equatoriana and Mediterraneo) are signatories - the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions – does not condemn or even address private corruption.

79. According to article 1.1 of the OECD Convention, punishable bribery is “for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official…” The alleged facts do not concern bribing a public official. Indeed, both parties are officials of private entities.
80. Furthermore, the same applies to the American Convention (Article III). Even “the existence of transnational conventions, resolutions and the like condemning a particular practice does not necessarily translate into a broad consensus which might be used by the arbitrators as justification for ascertaining the existence and violation of a principle of ‘international public policy’” [Kreindler, p. 246]. To be part of the international public policy, a practice must be almost unanimously accepted as such according to different state laws. However, private bribery is far from being unanimously condemned by international practice.

81. Further, this lack of consensus against private bribery also appears at national level. In particular, in the present case, all countries involved (Mediterraneo, Danubia and Equatoriana) except from Pacifica do not condemn private bribery [Pr. Or. 2 pt. 27]. Therefore, there is no international public policy against private bribery.

82. Under the applicable legal standard, the facts alleged by Respondent do not constitute a punishable act of bribery.

2. In any event, there is no evidence of any unlawful payment in this case.

83. Respondent cannot substantiate its allegations of bribery in any case. Indeed, the high standard of proof (b) born by Respondent (a) is not satisfied due to the lack of credibility of the evidence alleged by Respondent (c).

a. Respondent bears the burden of proving the alleged bribery

84. According to the procedural law applicable in the present case, Article 39 CIETAC Rules, “[e]ach party shall bear the burden of proving the facts on which it relies to support its claim.” Since it is Respondent that relies on the existence of bribery, it has to prove its existence, the presumption of innocence being on Claimant’s side.

85. While in the past, arbitral tribunals may well have suggested that the burden of proof could be reversed under certain circumstances, such circumstance are not at stake in the present case. For instance, if the alleging party brought forward relevant but non-conclusive evidence, the tribunal could request the other party to bring counter evidence [Abdel Raouf, p. 5]. “If the other party failed to do so, the tribunal could then conclude that the alleged facts were true” [ICC Case No. 6497]. Such a reversal of the burden of proof has notably been justified by the other party's behavior, for instance if it refused to disclose certain facts [ICC Case No. 6497]. In the present case, there is nothing in regard to Claimant's behavior suggesting that there is any dissimulation of facts and Respondent does not formulate such an accusation. The burden of proof also be reversed because of an inequality in the positions of the parties, for example one party being a
State. Claimant and Respondent are both private entities and both experienced commercial entities, therefore no concern of inequality arises that could justify a reversal of the burden of proof.

86. As a conclusion, Respondent has to bear the burden of proving its allegations on bribery.

b. The standard of proof in matters of bribery is very high

87. Neither the laws relevant to the case, nor the procedural rules applicable address the question of the standard of proof. In such a situation, arbitral tribunals have established a general practice that should be applied by the Tribunal in the present case.

88. The more startling the proposition that a party seeks to prove, the more rigorous the required level of proof should be [Hunter, p. 211]. A high standard of proof is required in order to avoid the risk that a party would take advantage of invoking bribery whenever it wishes to allege the invalidity of the contract in order to disclaim its liability [Sayed, p. 103]. “The party having the burden of persuasion must establish the facts on which it relies by a “preponderance of evidence” [ICC Case No. 6401 Westinghouse]. Indeed, it “must be proven to exist by clear and convincing evidence amounting to more than mere preponderance, and cannot be justified by a mere speculation” [ICC Case No. 6401 Westinghouse, ICC Case No. 9333]. This is confirmed by the required “direct evidence” [Raymond award] or “clear and convincing proof” [Himpurna]. In Hilmarton, the tribunal ruled that “the evidence was not sufficient to establish 'with certainty' the existence of illegality” [Radjai, p. 141]. Moreover, the tribunal has to rely “upon a number of factors rather than any single indication” [Radjai, p. 141]. “There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption” [EDF v. Romania].

89. Furthermore, the seriousness of the consequences that bribery may have on the result of this arbitration requires the allegations to be well proven.

90. In conclusion, Respondent must present strong evidence in support of its allegation of bribery. It would be unacceptable to dismiss Respondent’s liability on a simple allegation of bribery. Indeed, accepting to rule on mere allegations or accepting a reversal of the burden of proof would lead to opening the door to maneuvers targeting to avoid liability upon mere allegation of bribery.

c. Evidence presented by Respondent is not credible and should not be given any weight

91. Respondent does not present sufficient evidence in support of its defense based on the existence of bribery. Indeed, the service rendered is licit. Payment of success fee is well-
established in international practice and nothing relevant can be deduced from the nature and amount of the remuneration. Further, it would not be acceptable to refuse the claims simply on the basis of a press article and a national court decision.

92. The nature of the services to be rendered by the intermediary is to be taken into consideration. There is no objection regarding the use of intermediaries in the procurement of private contracts. The use of a broker's services in finding a yacht is not only common but often the only way to procure lease contracts for yachts. The broker's task was to find a substitute vessel and he consequently arranged the charter of the M/S Pacifica Star. This allowed Claimant to hold the conference for Corporate Executives. Therefore, the nature of the service rendered is identifiable and licit.

93. The payment of a success fee is an established practice in international commerce [Pt. Or. 2 pt. 23]. The payment of such a fee to a broker on top of a regular commission could be justified by the circumstances of a particular situation. In the ICC Case No 9333, it has been ruled that “the amount of promised fees, which totaled 30% of the overall public procurement contract price, was in the particular circumstances of the case, not indicative of corruption […] One should guard against considering the amount of the remuneration, without equally examining the context in which the contract has been negotiated and concluded”. “A brokerage agreement is not invalid merely because an unusually high commission is agreed upon” [Westacre- English Court of Appeal]. Indeed, finding a substitute boat to the highest quality yacht [Ap. for Ar pt 5,6,17], considering the short period of time, is not something brokers do on everyday bases. Claimant submits that considering the difficulty of the task given, the payment of a success fee is justified by the facts.

94. In addition, Respondent is building its whole argumentation on the issue of bribery on a single press article. Respondent cannot be said to show “clear and convincing evidence” just by brandishing a press article. Whatever the reputation of the source, it cannot be considered as sufficient to demonstrate the existence of bribery. Respondent has not provided any other material to evidence its allegations. In fact, Respondent itself discusses the credibility of Claimant’s argumentations “based upon a news story” [St. of Dr. pt. 5].

95. Moreover, Arbitral tribunals are not bidden by national courts' decisions. Although the investigation made by the competent national court has resulted in the conviction of Mr. Goldrich's assistant, this Tribunal must follow its own reasoning and principles. In any event, no conclusion can be drawn from the conviction of Mr. Goldrich's assistant by the competent national criminal courts, especially since Respondent did not bring the evidence that this decision was final.
C. The lease contract is not affected by bribery

96. For the lease contract to be affected by the alleged bribery, there should be a common intention of the signatories, i.e. Mr. Goldrich and Claimant, to enter into a bribery contract. This is not the case (1). Further, the lease of the M/S Pacifica was not conditioned by the payment of the alleged bribe (2).

1. Neither Claimant nor Mr. Goldrich had a corrupt intention

97. One of the first elements of bribery which has to be proven is the corrupt intention of parties [ICC Case No. 4145; ICC Case No. 9333]. Neither Claimant nor Mr. Goldrich had such intention. Claimant was not part of the alleged corruption scheme. The allegation concerns the relation between the yacht broker and Mr Goldrich’s personal assistant. Claimant did not know about the broker’s intention to bribe the assistant should such bribery be proved. Respondent’s attempt to disclaim its liability resulting from its breach of contract by questioning Claimant’s responsible and approved commercial practices is unacceptable. If Claimant encouraged the broker by promising the payment of a success fee, it did not and could not, in any circumstances, perceive that the broker would have recourse to illegal practices. It is unjustified to make the presumption, without any relevant evidence, that Claimant’s intention was to encourage an act of bribery. Claimant’s intention was not corrupt and that is why Respondent will not be able to find any evidence of such intention. Moreover, Mr. Goldrich did not know anything about the alleged act of bribery [Pr. Or. 2 pt. 28]. Therefore, neither Claimant nor Mr. Goldrich had a corrupt intention. In other words none of the parties in the lease contract had such an intention, or even any knowledge of the possible existence of an arrangement between the yacht broker and the assistant.

98. It is normal that since there was only one substitute available, Claimant would encourage the broker to work harder on procuring the vessel. Such an encouragement in the world of commerce is usually of a financial character. There are no grounds to consider, however, that Claimant encouraged the broker to violate any laws. Such a presumption is contrary to the basic principle of criminal law – presumption of innocence.

2. There is no causal link between the procurement of the lease contract and the alleged bribe

99. A high standard of proof is required in matters of bribery. Hence, tribunals tend to demand more than a simple evidence of a payment or to merely show exchange of benefits. Indeed, arbitrators have looked beyond evidence of unnecessary or excessive payments of money and
have examined whether that payment “was causally related to the procurement of the contract” [*Tanzania Electric Supply v. Independent Power Tanzania*].

100. Claimant submits that Mr. Goldrich had good reasons to lease his yacht to Claimant without any influence from his assistant being necessary. In the present case, Mr. Goldrich has already leased his yacht on some occasions even though not doing so on a regular basis. Secondly, the price paid by Claimant (USD 404,000 plus port and handling fees of USD 44,000) is reasonable taking into consideration the market price for a lease of a similar yacht. Mr. Goldrich has signed the lease contract without being influenced by the possibility of some extra payment. Moreover, there is no reason to presume that his opinion has been influenced by his assistant.

101. There is no causal link between the procurement of the lease contract and the payment of the alleged bribe. Therefore, the costs related to the lease contract are allowable items of damages were the Tribunal to consider the existence of a bribe.

### III. CLAIMANT IS ENTITLED TO REIMBURSEMENT FOR THE REFUND PAID TO CORPORATE EXECUTIVES

102. Claimant submits that it is entitled to be reimbursed for the USD 112,000 (hereafter “Refund”) it has paid to Corporate Executives because said Refund constitutes damages under Article 74 CISG.

103. Article 74 CISG provides that damages for a breach of contract by one party consist of the loss suffered by the other party as a consequence of the breach. Hence, said provision fixes two conditions allowing a party to be compensated: firstly, a loss must arise. Secondly, the loss incurred must be a “consequence of the [other party’s] breach”. With respect to the amount of said compensation, Article 74 CISG further provides that the damages incurred shall not exceed what the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract.

104. In the present dispute, Claimant is entitled to reimbursement of the Refund paid to Corporate Executives as it constitutes a loss under Article 74 CISG (A). Indeed, this loss was the consequence of Respondent’s breach of contract (B). Finally, Respondent is entitled to be reimbursed of the entire amount of the Refund since it does not exceed what was foreseeable at the time of the conclusion of the contract (C).
A. Claimant must be compensated for the Refund because it constitutes a loss under article 74 CISG

105. Claimant submits that the Refund it paid was not an *ex gratia* payment, contrary to Respondent’s allegation [*St. of De. pt. 11, 24.3*] (1). Indeed, the loss incurred by paying the Refund constitutes an incidental as well as a non-performance loss, which are both recoverable under Article 74 CISG (2).

1. The Refund is not an *ex gratia* payment since it is legally required

106. Claimant submits that by presenting the Refund as an *ex gratia* payment, Respondent intentionally draws an inaccurate picture of the issue at stake. Indeed, while Claimant does not dispute that it suggested the payment of a refund to Corporate Executives [*Pr. Or. 2 pt. 20*], it is Claimant’s submission that the Refund does not constitute an *ex gratia* payment because it was required to compensate Corporate Executives for the M/S Vis being unavailable.

107. Respondent argues that “an *ex gratia* payment is a voluntary payment” [*St. of De. pt. 11*]. Following such definition, the mere fact that Claimant suggested the Refund would be sufficient to define it as an *ex gratia* payment. However, Respondent’s definition is contradicted by the definition of an *ex gratia* payment, commonly understood as a “payment not legally required” [*Black’s Law Dictionary*]. Respondent claims that the payment of the Refund was “voluntary” [*St. of De. pt. 11*] but its one and only aim was to compensate both Corporate Executives’ and its members’ disappointment, only caused by the unavailability of the M/S Vis, itself a direct result of Respondent’s breach. In the case at hand, paying the Refund as a compensation for Corporate Executives was “legally required” and therefore not an *ex gratia* payment since Claimant had the legal obligation to mitigate its losses under Article 77 CISG.

108. Indeed, when it became clear that the M/S Vis would not be delivered on time, Claimant had the choice between avoiding the contract with Corporate Executives and finding an appropriate remedy. It is undisputed that had Claimant avoided the contract, it would have lost “more money in respect of this contract” [*Pr. Or. 2 pt. 17*]. Indeed, the repudiation of the contract might also have led Corporate Executives to end its business relationship with Claimant by using another conference service in the future [*Pr. Or. 2 pt. 17*]. This would have resulted in loss of profit and loss of goodwill, which are both recoverable losses under article 74 CISG. The amount of the financial consequences would have been higher than the total amount incurred to satisfy Corporate Executives in the instant case. Claimant reached an alternative solution by paying the Refund. The Refund amounts to an incidental loss as it was the only way available to mitigate the loss.
Moreover, Corporate Executives would have been entitled to obtain compensation by filing a lawsuit in court due to its dissatisfaction caused by the unavailability of the M/S Vis. Such damages would then have amounted to a consequential loss for Claimant, as this loss is notably characterized by its “liability to third parties” [Schlechtriem/Schwenzer, p. 1012, pt. 32]. That loss would eventually fall on Respondent’s shoulders, being responsible for the breach causing the unavailability of the M/S Vis.  

As a conclusion, it was Claimant’s legal duty under the CISG to compensate Corporate Executives. Moreover, it amounts to an incidental and a non-performance loss for which Claimant is entitled to be reimbursed.

2. The Refund constitutes an incidental and a non-performance loss under the CISG

Under Article 74 CISG, three categories of losses are identified: non-performance loss, incidental loss and consequential loss [Schlechtriem/Schwenzer, p. 1006, pt. 20]. Claimant submits that the refund amounts both to an incidental (a) and to a non-performance loss (b) under Article 74 CISG.

a. The Refund constitutes an incidental loss

It is commonly admitted that Article 74 CISG is based on the principle of full compensation [Cooling Systems, Rolled metal sheets, Comm. to Art. 74, No. 3]. It means that the party in breach must compensate the aggrieved party for all its losses and it therefore includes incidental loss as a recoverable loss through the allowance of damages [Leser, Art.74, No. 14]. An incidental loss is understood as comprising “expenses incurred by the promisee which are not related to the realization of his expectation interest, but rather are incurred in order to avoid any additional disadvantages”. It includes “reasonable expenses made in assessing, averting or mitigating damages” [Schlechtriem/Schwenzer, p. 1009, pt. 27, confirmed by Tannery machines].

In the instant case, the Refund constituted an expense to mitigate Claimant’s losses for three reasons.

Firstly, but for the Refund, a loss of profit would have arisen as Claimant might have lost Corporate Executives as a client. Indeed, this loss would have been detrimental to Claimant as the association is a “long standing client” [Ap. for Ar. pt. 11]. Relief of having a substitute boat was not enough to satisfy its contractual obligation which was organize the event on the M/S Vis specifically [Pr. Or. 2 pt. 18]. This made the loss highly probable. The alternative solution to offer a discount on future services was not an adequate remedy especially as Claimant’s strategy is to
focus on holding “a flagship event at least once a year” [Ap. for Ar. pt. 5], therefore having no guarantee of the feasibility of such an offer.

115. Secondly, Claimant would have incurred a loss of profit for the loss of business opportunity with Corporate Executive’s members’ companies. Indeed, they are “top level corporate executives” [Ap. for Ar. pt. 11] whose position allows them to decide on venues for further corporate events held by their respective companies. Respondent’s breach of contract will have had an aftermath on Claimant’s position on the flagship events’ market, beyond its contractual relationship with Corporate Executives, considering the quality of the “top executives” [Ap. for Ar. pt. 11] that attended the conference, and the media coverage it benefited from.

116. Thirdly, a loss of reputation would have occurred because of the unavailability of the M/S and the loss of credit it created. The acquisition of the M/S Vis was part of a strategy of diversification, expansion and growth. Holding that first flagship event on the M/S Vis was a one-time opportunity as Claimant was entering into a higher level in its business field [Ap. for Ar. pt. 6]. With a floating venue, Claimant will be able to reach a broader consumer audience and offer new services, targeting Corporate Executives’ members among others. Beyond satisfying its direct client, by fulfilling its obligation, Claimant could have expected from the organization of this conference to drag new and important clients. Therefore, Respondent’s breach did put Claimant’s reputation at risk.

117. In conclusion, the Refund is aimed at mitigating the loss of goodwill Claimant suffered considering its relationship with Corporate Executives, as well as averting a potential loss of profit and reputation regarding other potentials clients, such as Corporate Executives’ members.

118. As such the Refund constituted an incidental loss. However, it was also the only way for Claimant to fulfill its contractual obligation to provide the M/S Vis, amounting then to a non-performance loss.

b. The refund constitutes a non-performance loss

119. Claimant submits that the Refund is a non-performance loss because it was the only way to remedy the consequences of Respondent’s breach. Indeed, only the Refund could fully satisfy Corporate Executives despite the unavailability of the M/S Vis.

120. Under the CISG, a non-performance loss amounts to the loss an aggrieved party directly suffers out of the breach of the contract or to the expenses it has to make in order to remedy the situation that would have arisen had the breach not occurred [Schlechtriem/Schwenzer, p. 1006, pt. 22, CISG-AC Opinion No. 6, pt. 3.2]. In the present case, since the Refund amounted to the
expenses Claimant had to incur in order to bring about the situation had the breach not been committed, it qualifies as a loss.

121. In fact, Claimant had to find a substitute luxury boat to host its client’s conference. However, this was not sufficient to provide for the latter’s members’ full satisfaction, requiring a refund to be paid by Claimant. Indeed, and contrary to Respondent’s argument that claims that the refund was a “voluntary payment” based on “pure speculation” [St. of De. pt. 11, 12], Claimant had no choice but to pay it.

122. The Refund is a remedy to the immediate consequences of Respondent’s breach of contract. As it became clear that the M/S Vis would not be ready on time for the conference, there was dismay on Corporate Executives’ side. Indeed, Corporate Executives’ dismay was caused by the legitimate expectations created by Corporate Executives’ advertising as well as Claimant’s obligation under the contract (i). Furthermore, part of it resulted from the fact that the M/S Vis was the only existing boat that met Corporate Executives’ expectation of the highest standards of luxury and technology. The M/S Pacifica Star not entirely living-up to these expectations, an additional payment was required (ii).

123. Corporate Executives and Claimant contractually agreed upon the chartering of the M/S Vis. Its unavailability for Corporate Executives’ conference logically caused disappointment on their side.

124. Claimant entered into a contract with Corporate Executives under which it obligated itself to supply a state of the art boat [Pr. Or. 2 pt. 18] with “the latest in cabin and conference technologies, superior to anything otherwise available on the market” [Ap. for Ar. pt. 6]. In this regard, Respondent under the contract with Claimant was to “supply, install and configure master control system that is critical to venue operation”, which “core element” is a series of “semi-configurable processing units” [Ap. for Ar. pt. 8] that use the D-28 “super chip”. Therefore, having the D-28 on time was of the utmost importance as it offered “significant improvements over rival chips” [Ap. for Ar. pt. 9]. Respondent could not have ignored it since it was in charge of their installment.

125. These elements were central to Claimant’s contract with Corporate Executives and therefore fueled the latter’s legitimate expectations. Indeed, the M/S Vis was expressly agreed upon during the negotiations that led to the conclusion of the contract [Pr. Or. 2 pt. 18]. On top of that, Corporate Executives’ advertising of the event had highly emphasized on M/S Vis’ characteristics as being a unique and luxury floating venue. That participated to the fact that the
event was “soon fully booked” [Ap. for Ar. pt. 11], raising Corporate Executives’ expectations about the M/S Vis.

126. Therefore, when it became clear that the M/S Vis would not be available and a substitute location would be necessary, “there was dismay” [Re. Ex. 1]. Corporate Executives accepted the idea of a fallback but only provided that it would still be a luxury boat, as its publicity had emphasized on this specific element [Ap. for Ar. pt. 17]. The business association later made it clear that it “would not accept an on-shore venue as a substitute” [Ap. for Ar. pt. 18].

127. On the basis of the legitimate expectations created thereof, the refund amounts to a necessary compensation for the unavailability of the M/S Vis. Indeed, the availability of the M/S Pacifica Star participated in Corporate Executives’ “relief” [Re. Ex. 1]. But the boat contractually agreed upon by both parties had no available equivalent at the time needed. The Refund was therefore an answer to the dissatisfaction inferred and a way to compensate the M/S Pacifica Star insufficiencies.

ii. Even chartering a substitute boat was not sufficient to fully satisfy Corporate Executives

128. Respondent argues that since Claimant provided a luxury boat, it fulfilled its contractual obligations, allegedly making the Refund unnecessary [St. of De. pt. 11, 12]. This is contradicted by the mere facts of the case.

129. Indeed, prior to any negotiations about a replacement of the M/S Vis, Corporate Executives expressed its “disappointment” [Cl. Ex. 4] regarding the fact that the conference would not take place on the M/S Vis. That feeling was the direct consequence of the unavailability of the boat.

130. Respondent cannot exonerate itself from compensating Claimant for the Refund it had to pay under the mere grounds that the M/S Pacifica Star was deemed an “appropriate replacement” [Ap. for Ar. pt. 18]. Claimant does not dispute that the substitute was appropriate in light of the particularly tough circumstances. However, the M/S Pacifica Star was not sufficient to provide full satisfaction, notably to Corporate Executives that had contractually agreed and advertised on a specific, let alone better boat.

131. Moreover, Corporate Executives members required the “very finest in comfort and efficiency” [Ap. for Ar. pt. 11], making it even more difficult to find a substitute boat. Moreover, the event was fully booked [Ap. for Ar. pt. 11] and it was too late to find a state of the art boat designed to hold conferences due to the inexistence of equivalent chips to the D-28 [Pr. Or. 2 pt. 12] and the time implications for reorganization and testing [Ap. for Ar. pt. 7]. In such a context of urgency and high standards of demand, the mere existence and availability of the M/S Pacifica Star can be easily understood as a relief for Corporate Executives [Re. Ex. 1].
132. Nevertheless, the high standards Claimant and Corporate Executives had agreed upon, endorsed by the latter’s members’ enthusiasm [Ap. for Ar. pt. 11], had to be satisfied. Such a disappointment could not have been overcome by the simple chartering of the M/S Pacifica Star which could not meet M/S Vis’ technological standards. Therefore, during the conversation between Claimant and Corporate Executive, the latter expressed its unhappiness that the conference would not take place on the M/S Vis and that the M/S Pacifica Star did not have all the features that had been advertised [Pr. Or. 2 pt. 20]. They finally accepted the Refund as a way to fill the gap between the promised M/S Vis and the available M/S Pacifica Star [Pr. Or. 2 pt. 20]. Corporate Executives’ appreciation of the Refund [Pr. Or. 2 pt. 20] made it the only available solution for Claimant.

133. In conclusion, had Claimant not paid the Refund, Claimant would not have completely satisfied his contractual obligations since the M/S Pacifica Star was not sufficient. Therefore, it is a non-performance loss for which Claimant is entitled to be reimbursed.

B. Claimant must be compensated for the Refund because since the loss incurred is a direct consequence of Respondent’s breach

134. The Refund is a loss recoverable under Article 74 because it was caused by Respondent’s breach of contract. The breach is a sine qua non condition of the loss as required by Article 74 CISG. Many scholars agree on the fact that the causation rule, not specifically detailed in the CISG, can be boiled down to the question of whether or not the loss would have occurred if the considered breach had not occurred [Schönle, pt. 20, 21, Magnus, pt. 28, 29, Witz, pt. 26, Chengwei, pt. 13.3].

135. Respondent’s breach of the contract was the core element that led to the impossibility for Claimant to deliver the M/S Vis on time for the annual conference of Corporate Executives. That impossibility obliged Claimant to find an alternative to fulfill its contractual commitment with Corporate Executives, that had booked the M/S Vis fully equipped for early February. The alternative solution was to provide a substitute boat meeting the same criteria as the M/S Vis.

136. However, the M/S Vis was the unique boat that met all the requirements agreed upon and asked by Corporate Executives in the perspective of the organization of its conference [Ap. for Ar. pt. 9]. It is undisputed that the M/S Pacifica Star was not fully satisfactory to Corporate Executives [Pr. Or. 2 pt. 20].

137. Consequently, beyond finding a replacement boat – the M/S Pacifica Star –, Claimant had to compensate Corporate Executive. It was the only way to make up for the gap between its contractual requirements and what it was able to deliver on time to Corporate Executives.
138. Finally, it is undisputed that had Respondent delivered the master control system on time as contractually required, the chain of events would have taken a totally different path. The Refund would not have been necessary since Corporate Executives would have been satisfied.

139. The Refund was the only possible remedy to the dismay that was caused directly by the breach of Respondent’s contractual obligations. Since that Refund was caused by that breach and since it would not have been necessary without the occurrence of the breach, their causal link is established.

140. Therefore, the loss suffered by Claimant due to the Refund to Corporate Executives is proven to have been caused by the breach. As such, it amounts to damages recoverable under Article 74 CISG.

C. **Respondent must pay the entire refund to Claimant since its amount was foreseeable at the time of the conclusion of the contract**

141. Under article 74 CISG, the damages allowed to the party who suffered the breach of the contract may not exceed the loss that the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract.

142. Claimant submits that it was foreseeable at the time of the conclusion of the contract that if a refund would have to be paid, it would amount to around 20% of the contract with Corporate Executives. While the total amount paid by Corporate Executives’ to Claimant for the organization of the event remains unknown, it is undisputed that it is bigger than the amount of money Claimant had to pay in order to remedy the situation caused by Respondent’s breach. Indeed, it is a fact that Claimant would have lost more money by repudiating the contract with Corporate Executives than it has spent in order to charter the M/S Pacifica Star and pay the refund [Pr. Or. 2 pt. 17]. These costs amount in the current dispute to a total of USD 670,600, divided into the cost of chartering the M/S Pacifica Star (USD 448,000), the 15% commission fee to the Yacht broker (USD 60,600), the Yacht broker’s success fee (USD 50,000) and the refund (USD 112,000) [Ap. for Ar. pt. 4]. On this basis, one can deduce that the total value of the contract with Corporate Executives is at least USD 670,600. As a result, the total amount Corporate Executives made its members pay for the registration fee was at least USD 670,600. USD 112,000 happens to correspond to a mere 16.7% of this amount.

143. Claimant submits that at the time of the conclusion of the contract with Respondent it could have foreseen that said Refund would amount to around 20% since it is the percentage it proposed to Claimant as a discount on future services [Cl. Ex. 5].
144. Therefore, a refund of maximum 16.7% of a contract in case of breach cannot be reasonably qualified as non-foreseeable by the time of the conclusion of the contract under Article 74 CISG. Respondent itself acknowledged the idea of compensating the Claimant in respond to its contractual breach, though in bigger proportions that what Claimant is asking. As such, the Refund qualifies as foreseeable damages under Article 74 CISG.

REQUEST FOR RELIEF

Claimant requests that the Tribunal to:

1. order Respondent to pay the Claimant USD 670,600 in damages, representing:
   a. USD 448,000 for the cost of chartering a substitute vessel for the M/S Vis, the substitute vessel having been chartered by Mediterraneo Elite Conferences Services, Ltd to provide conference services for the annual conference held by Worldwide Corporate Executives Association.
   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.
   d. USD 112,000, the amount paid to Worldwide Corporate Executives Association to make partial refund of the conference fee paid by its members.
2. order Respondent to 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.
3. order Respondent to pay the Claimant interest on the amounts set forth in items 1 and 2 from the date those expenditures were made by Claimant to the date of payment by respondent.