THE NINTH ANNUAL WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT, 2011-2012

BRAR HARPRABDEEP SINGH, CHAN YIN WAI ADA , CHOW YAT SAU JESSICA, LAU CHIRK YEN JASON, KIRPALANI LAVESH PRAKAS, RAJESH SHARMA AND GABRIËL MOENS

INTRODUCTION

City University of Hong Kong School of Law has participated in the prestigious Willem C. Vis (East) International Commercial Arbitration Moot for a number of years. Willem C. Vis (1924-1993) was a world-recognised expert in international commercial transactions and a dispute settlement expert. Success came to the City University team when it won Honorary Mentions for its Memorandum for the Claimant and its Memorandum for the Respondent at the Seventh Willem C. Vis (East) Moot and proceeded to the Grand Final at the Eighth Moot.

In March 2012 a team from the City University of Hong Kong again participated in the Ninth Vis (East) Moot. City University was one of the 90 law schools from 26 countries that participated in the Moot. The Ninth Willem C. Vis (East) Moot was held in Hong Kong from 19 March to 25 March 2012. The School was represented by Brar Harprabdeep Singh, Chan Yin Wai Ada, Chow Yat Sau Jessica, Lau Chirk Yen Jason and Kirpalani Lavesh Prakas. They were coached by Assistant Professor Rajesh Sharma and Professor Gabriël Moens. The team was extremely successful. It proceeded to, and won, the Grand Final. The two oralists were Kirpalani Lavesh Prakas who focused on the procedural aspects of the Moot and Brar Harprabdeep Singh who concentrated on the

substantive arguments. In addition, the team's Memorandum for the Claimant and its Memorandum for the Respondent were also awarded Honorary Mentions. The team from the City University of Hong Kong also won the Australian Vis Pre-Moot and the Shanghai Pre-Moot.

The Willem C Vis Moot brings together students from diverse cultures through a common endeavour: the training of law leaders of tomorrow in principles of international commercial law and techniques of international commercial arbitration. The Willem C. Vis (East) Moot is organised by The Chartered Institute of Arbitrators (East Asia Branch). The Moot is supported by various international commercial arbitration institutions, including UNCITRAL and the Australian Centre for International Commercial Arbitration (ACICA). The goals of the Moot are described in Volumes II and III of *International Trade and Business Law Annual* (1996) 2 ITBLA 229; (1997) 3 ITBLA 277.

It suffices for the purposes of this Introduction to emphasise that the Moot stimulates the study of international commercial law, especially the United Nations Convention on Contracts for the International Sale of Goods, 1980 (CISG) and various arbitration rules. The Moot offers participants an opportunity to interpret these texts in the light of different legal systems and to develop an expertise in advocating a position before an arbitral panel composed of arbitrators from different legal systems. The Moot Problem in the 2011-12 competition involved a controversy arising out of a hypothetical international sale of goods subject to the CISG and the China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules.

In the next sections, the 2011-2012 Moot Problem and its Clarifications are reproduced. Copyright in the Problem is owned by the Association for the organisation and promotion of the Willem C. Vis International Commercial Arbitration Moot. The Problem is published here with the permission of the Director of the Moot, Emeritus Professor Eric Bergsten. The Moot Problem and Clarifications are followed by City University of Hong Kong's Memorandum for the Respondent. The Problem, Clarifications and the Memorandum are useful resources in the teaching of the CISG, and of international commercial

arbitration law. They also serve as a historical record of the Ninth Willem C. Vis (East) Moot 2011-2012.

NINETEENTH ANNUAL
WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

Vienna, Austria
30 March – 5 April 2012

Organized by:

Association for the organisation and promotion of the Willem C. Vis International Commercial Arbitration Moot

And

NINTH ANNUAL

WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

Hong Kong

19 to 25 March 2012

Organized by:

Vis East Moot Foundation Limited

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15 July 2011

Secretariat
China International Economic Trade Arbitration Commission
6/F, CCOIC Building
No.2 Huapichang Hutong
Xicheng District, Beijing, 10035, P.R. China

Subject: Application for Arbitration[1]

Dear Sirs:

I represent Mediterraneo Elite Conferences Services, Ltd. Mediterraneo Elite Conferences Services, Ltd hereby submits five copies of its Application for Arbitration against Equatoriana Control Systems, Inc. I enclose a copy of my power of attorney to represent Mediterraneo Elite Conferences Services, Ltd in this arbitration.

The total claimed is USD 670,600 plus interest and costs. As noted, the claim is denominated in US dollars. At an exchange rate of 6.39935 CNY per U^{2}SD, the claim is CNY 4,291,404. The Bank of China New York branch has been instructed to transfer the arbitration fee of CNY 127,285 to your account in Beijing.

The contract giving rise to this arbitration provides that the seat of arbitration is Vindobona, Danubia and that the arbitration will be in English.

The required documents are attached to the Application for arbitration.

Sincerely yours,
(Signed)
Horace Fasttrack

Attachment:

Application for Arbitration
Registration of Mediterraneo Elite Conferences Services, Ltd in Company register, Mediterraneo

[1] For purposes of the Moot, the CIETAC Arbitration Rules that come into force on 1 March 2012 are deemed to have come into force on 1 March 2011.

Power of Attorney

Mediterraneo Elite Conferences Services, Ltd, Claimant

v.

Equatoriana Control Systems, Inc, Respondent

Application for Arbitration

1. Claimant: Mediterraneo Elite Conferences Services, Ltd, a company incorporated under the laws of Mediterraneo.
Registered at 45 Conference Place, Capital City, Mediterraneo
Tel. (0) 486 25 00; Telefax (0) 486 25 11; E-mail: Info@Conferences.me
Person in charge: Samuel Trusty, Chairman of Board of Directors
Arbitral Agent: Horace Fasttrack
75 Court Street, Capital City, Mediterraneo
Tel. (0) 146-9845; Telefax (0) 146-9850; E-mail Fasttrack@lawyer.me

2. Respondent: Equatoriana Control Systems, Inc, a company incorporated under the laws of Equatoriana.
Address: 286 Second Avenue, Oceanside, Equatoriana
Tel. (0) 237 86 00; Telefax (0) 237 86 01; office@controls.eq

3.The Arbitration Agreement this Application Relies Upon: The arbitration clause—Article 15.1 of the Contract for the sale, installation and configuration of the master control system on the M/S Vis, No. 472/2010, signed by and between the Claimant, Mediterraneo Elite Conferences Services, Ltd, and the Respondent, Equatoriana Control Systems, Inc, (Claimant's Exhibit No. 1) reads: "Any dispute arising from or in connection with this Contract shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties. The arbitration shall take place in Vindobona, Danubia. The arbitration shall be in the English language."

4.Arbitral Claims:

1. The Respondent shall 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. The Respondent shall pay the costs of arbitration, including claimant's expenses for legal representation, the arbitration fee paid to CIETAC and the additional expenses of the arbitration as set out in Article 50, CIETAC Arbitration Rules.

3.The Respondent shall 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.

Facts

5. Mediterraneo Elite Conferences Services, Ltd (hereafter "Elite") operates high-end venues in which it provides a complete conference package. Its core strategy is to focus on small to medium sized businesses and professional associations that hold a "flagship" event at least once a year. The venues are designed to service events of a maximum of 150 persons. They combine the conference facilities proper, plus a luxury hotel and restaurant. Elite has a highly trained staff that works with the event teams of its customers to provide a top of the line service for demanding clients.

6.For the past ten years it has operated six land-based facilities in desirable locations in different countries. In spring 2010 it purchased a luxury yacht, the M/S Vis, for use as a seventh conference venue offering the same level of service as its land-based venues. Elite sought to refurbish the yacht with the latest in cabin and conference technologies, superior to anything otherwise available on the market. In particular, the conference technology had to meet the highest standards. Elite managed the refurbishment itself, using a range of subcontractors and suppliers.

7.The refurbishing of the M/S Vis was scheduled to be completed on 12 November 2010. Elite scheduled ten weeks for testing all of the systems prior to scheduling the first event. Elite contracted the supply and installation of the various elements of the on-board technology to a number of firms, including Equatoriana Control Systems, Inc (hereafter "Control Systems"). The contract with Control Systems was signed on 26 May 2010. (Claimant's Exhibit No. 1)

8.Control Systems was to supply, install and configure the master control system that is critical to venue operation, working with other specialist suppliers and installers to make sure everything functioned according to plan. The core element in the overall control system is a series of semi-configurable processing units. Manufacture of the processing units was to be done by Oceania Specialty Devices, incorporated in Oceania (hereafter "Specialty Devices").

9.Specialty Devices had designed the processing units to use the D-28 "super chip" recently announced by Atlantis High Performance Chips, incorporated in Atlantis (hereafter "High Performance"). The D-28 contained novel technology that offered significant improvements over rival chips. At 26 May 2010 the chip was not yet in production, but that was scheduled to begin in the middle of August 2010, i.e. in good time for the refurbishment. It was expected that it would be another six months, i.e. circa February 2011, before any rival chip with comparable qualities would be available.

10. The facilities on the M/S Vis would need a total of three of the processing units, installed in duplicate, to ensure an uninterruptible service. All of the units would need the D-28 chips

in various numbers.
11.Worldwide Corporate Executives Association (hereafter "Corporate Executives") is a high profile organization of top level corporate executives and is a long standing client of Elite. The members of the association demand the very finest in comfort and efficiency in their meeting locations. During the meeting between Elite and Corporate Executives to plan the event, the Corporate Executives events team was delighted to be invited by Elite to be the first of their clients to hold an event on the M/S Vis. The event was scheduled 12 – 18 February 2011. The venue was a popular choice among the Association's members and the event was soon fully booked.

12.On 13 September 2010 Control Systems telephoned Elite and then confirmed in writing that the processing units for the control systems would not be available to it until at least late November. (Claimant's Exhibit No. 2) As a result, delivery of the control systems could not be expected before the middle of January 2011, with installation, configuration and verification to take another ten weeks or so.. The explanation given by Control Systems was that on 6 September 2010 there had been a fire at the facility where High Performance produced the D-28 chip. Production (which had started as scheduled in August) had ceased until the damage was repaired, which was expected to be about 24 October 2010. Specialty Devices currently expected delivery of the D-28 chips to it beginning of November. It in turn expected to deliver the processing units to Control Systems at the end of November 2010. The control systems would be delivered to the M/S Vis in the middle of January, at which time installation could begin.

13.High Performance had a limited supply of the chips in its warehouse when the fire occurred. The chips in the warehouse had not as yet been designated for a specific customer, although there were several, including Specialty Devices, to whom shipment was due. It had been expected that the balance of the various orders would have been filled from the production that was interrupted by the fire. There was not a sufficient supply in the warehouse to fulfill all of High Performance's contractual obligations by the various contractual due dates. Neither the contracts High Performance had with its customers nor the law of Atlantis required it to pro rate its immediately available supply among its customers. Even had there been such a requirement, anything less than the full contract amount would not have permitted Specialty Devices to finish the processing units it was manufacturing for Control Systems.

14.When High Performance informed Specialty Devices about the fire, it acknowledged that the Specialty Devices' order would require only a small portion of the stock in the warehouse and that it could have filled the order from its stock. It said, however, it intended to supply its regular customers to the extent possible from the limited supply available in the warehouse. Specialty Devices was neither a regular customer nor could it be expected to become one. (Claimant's Exhibit No. 3) High Performance expected delivery of the D-28 chips to Specialty Devices early in November 2010.

15.There was only one customer, Atlantis Technical Solutions, to which High Performance supplied chips from the warehouse prior to the resumption of production. There were several other customers who might well be described as regular customers. The real reason that High Performance supplied Atlantis Technical Solutions with the entire stock of chips in the warehouse was that the CEOs of the two firms were longstanding close friends who had served as witnesses at each other's weddings. (Claimant's Exhibit No. 7).

16.Once the D-28 chips became available to Specialty Devices on 2 November 2010, it completed the processing units and shipped them on 29 November 2010 to Control Systems. The control system was delivered by Control Systems to the M/S Vis on 14 January 2011. Installation, configuration and verification were completed on 11 March 2011. Payment of the full contract price of USD 699,950 was made by Elite to Control Systems via the Mediterraneo National Bank on 21 March 2011.

17.When it became evident that the M/S Vis would not be available to host the Corporate Executives' event, Elite contacted it to discuss the alternatives. One of Elite's on-shore facilities was available, but the officials from Corporate Executives stated that the publicity for the event had emphasized that it would be held on a luxury yacht. They had received many positive comments from their membership and would not accept an on-shore venue as a substitute.

18.Making arrangements for a suitable substitute location for the Corporate Executives' event was rather expensive. After some effort, since there are very few comparable yachts, Elite was able to charter an appropriate substitute yacht, the M/S Pacifica Star, at a cost of USD 404,000 plus port and handling fees of USD 44,000. The standard brokerage commission was 15 % of the rental cost, USD 60,600. In addition, Elite paid the broker a USD 50,000 success fee on top of the commission. Finally, in order to retain the goodwill and future business from Corporate Executives, Elite made an ex gratia payment of USD 112,000 to Corporate Executives so that it could make a partial refund to the delegates to its event.

19.On 9 April 2011 Elite wrote Control Systems requesting it to contribute to the costs arising out of the delay in the installation of the master control system. (Claimant's Exhibit No. 4) Control Systems answered on 14 April 2011 categorically refusing. (Claimant's Exhibit No. 5) In turn Elite wrote on 25 April 2011 that Control Systems was legally responsible for those costs. Even after the fire the producer of the chip, Atlantis High Performance Chips, had had the possibility of supplying the chips needed for the processing units but had decided to allocate its entire stock of the D-28 chips to a company whose CEO was a close friend of its CEO. (Claimant's Exhibit No. 6) The last communication in this sequence was a letter from Control Systems rejecting all responsibility. (Claimant's Exhibit No. 8)

Applicable law

20.The choice of law clause, clause 15.2 of the contract, provides for application of the law of Mediterraneo. Mediterraneo and Equatoriana are party to the United Nations Convention on Contracts for the International Sale of Goods (CISG). Consequently, pursuant to CISG article 1(1)(a) the contract is governed by the convention.

21.Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments. Danubia, Mediterraneo, Equatoriana, Oceania and Atlantis are party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

Conclusion

22.Control Systems did not deliver the master control system at the time required by the contract. Even though the delay in performance was caused by an impediment that Control Systems itself could neither overcome nor avoid, under CISG, article 79(2), Control Systems was not exempted from liability where it had engaged a third party (Specialty Devices) to perform the whole or a part of the contract unless that party met all of the conditions of CISG, article 79(1). Specialty Devices was not exempt under CISG, article 79(2), because the third party it had engaged to perform part of the contract (Atlantis High Performance Chips) could have overcome the impediment of the fire by allocating the "relatively small order" of D-28 chips to Specialty Devices from its stock in the warehouse.

23.The tribunal should, therefore, hold Control Systems liable to pay the damages set out in paragraph 4, above.

Sincerely yours,
(Signed)
Horace Fasttrack

15 July 2011

Claimant's Exhibit No 1

Contract Excerpts

472/2010

1. Equatoriana Control Systems, Inc hereby agrees with Mediterraneo Elite Conferences Services, Ltd to supply, install and configure the master control system for the M/S Vis.

2.The control system shall meet the technical specifications set out in Annex I.

3.Installation and configuration of the control system shall be completed by 12 November 2010.

4.The total contract price is USD 699,950. The price for the control system is USD 650,000. Installation and configuration is USD 49,950.

5.The price to be paid by letter of credit issued by the Mediterraneo National Bank against certification by Accurate Technical Consultants of completion of the contract.

…….

15.1 Any dispute arising from or in connection with this Contract shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties. The arbitration shall take place in Vindobona, Danubia. The arbitration shall be in the English language.

15.2 This contract is subject to the law of Mediterraneo.

Claimant's Exhibit No. 2

Equatoriana Control Systems, Inc
286 Second Avenue
Oceanside, Equatoriana
Tel. (0) 237 86 00
Telefax (0) 237 86 01
office@controls.eq

13 September 2010

Mr. Joseph Alright
Mediterraneo Elite Conferences Services, Ltd
45 Conference Place
Capital City, Mediterraneo

Re: Contract 472/2010

Dear Mr. Alright:

I wish to confirm the information I gave you over the telephone earlier today.

We were informed by Oceania Specialty Devices by telephone, and confirmed by letter of 10 September 2010, that on 6 September 2010 there was a fire at the production facility of Atlantis High Performance Chips. The fire was severe enough that production of the D-28 chips has been interrupted.

Atlantis High Performance Chips does not expect to resume production until about 25 October. As a consequence, delivery of the chips to Oceania Specialty Devices is expected to take place early November. The processing units should be delivered to us end of November. Delivery of the control systems and the beginning of installation on the M/S Vis cannot be expected before the middle of January 2011.

This is highly unfortunate for all of us. I will let you know any further information that I receive in this matter.

Sincerely,
(Signed)
Samuel Horn

Encl: Letter 10 September 2010 from Henry Swenson to Gloria Martins

Claimant's Exhibit No. 3

Atlantis High Performance Chips
14 High Avenue
Technology Center, Atlantis

10 September 2010

Ms. Gloria Martins
Oceania Specialty Devices
322 Fortune Road
Oceania City, Oceania

Dear Ms. Martins:

I wish to confirm our telephone call of this morning.

The fire at our production facility on 6 September 2010 was more serious than we had thought at first. There will have to be a halt in our production of the D-28 chips that you have ordered for about seven weeks. As you may well imagine, this is a particularly bad time for such a fire to have happened, since the chips had just gone into commercial production.

We have only a limited supply of the chips on hand. There are nowhere enough to satisfy the orders we have received for them. This is, of course, a difficult situation for our customers as well as for us.

We have discussed within the firm on what basis we should allocate the limited stock available to us. We had considered filling small orders first, in which case we would have been able to fill your order from our stock. We had also considered allocating the stock on a pro rata basis. However, that would not have been satisfactory for the majority of our customers. Finally, we have decided to satisfy the needs of our regular customers first. As noted, your order was a relatively small one and it appears likely to remain the only one in the near future.

I can only express our regret that this unfortunate event has occurred. We look forward to fulfilling your need for specialty chips in the future.

Sincerely,
(Signed)
Henry Swenson

Claimant's Exhibit No. 4

Mediterraneo Elite Conferences Services, Ltd
45 Conference Place
Capital City, Mediterraneo
Tel. (0) 486 25 00
Telefax (0) 486 25 11
Info@Conferences.me

9 April 2011

Mr. Samuel Horn
Equatoriana Control Systems, Inc
286 Second Avenue
Oceanside, Equatoriana

Re. Contract 472/2010

Dear Mr. Horn:

We are very pleased with the master control system that you have installed on the M.S Vis. It does everything that we had hoped for.

That makes it particularly unpleasant to raise the subject of the significant delay in the installation of the system. The contract date for delivery of the control system was early November. A comfortable period for installation, configuration and verification of the system were written into the contract. Specifically, everything was to be completed in January.
As you are aware, we had booked the annual conference of the Worldwide Corporate Executives Association for the period 12 to 18 February 2011. They were delighted that they were to be the first to hold an event on the M/S Vis. You can imagine their disappointment when we informed them that the yacht would not be available after all.

The Association is a high profile organization and we count it as one of our most important clients. It was not easy to find an appropriate substitute yacht to host the event. We finally did locate one, but it was very expensive. Altogether it cost us USD 670,600. I can, if you wish, furnish you with an itemized description of those costs.

We would suggest that it would be fair if you and we were to share in the costs arising out of the delay. That means that we would suggest that you reimburse us USD 335,300.

I hope that you understand and appreciate our position.
Sincerely
(Signed)
Joseph Alright

Claimant's Exhibit No. 5

Equatoriana Control Systems, Inc
286 Second Avenue
Oceanside, Equatoriana
Tel. (0) 237 86 00
Telefax (0) 237 86 01
office@controls.eq

14 April 2011

Mr. Joseph Alright
Mediterraneo Elite Conferences Services, Ltd
45 Conference Place
Capital City, Mediterraneo

Re: 472/2010

Dear Mr. Alright:

It is a pleasure to know that you are so satisfied with the master control system. The experience of working with your personnel was unusually gratifying. The M/S Vis should now be prepared to give many years of top quality service for your clients.

The delay in the installation of the control system was extremely unfortunate. I am sorry that it ended up being so expensive for you to find a replacement yacht to host the annual conference of the Worldwide Corporate Executives Association.

As you know, the delay was caused by the fire at Atlantis High Performance Chips. While we sympathize with your situation, we do not feel responsible in any way. Consequently, we cannot agree to share in the costs associated with the delay.

As a goodwill gesture, we will, however, be pleased to render any future servicing of the control system that may be necessary at standard rates less 20%.

Sincerely,
(Signed)
Samuel Horn

Claimant's Exhibit No. 6

Mediterraneo Elite Conferences Services, Ltd
45 Conference Place
Capital City, Mediterraneo
Tel. (0) 486 25 00
Telefax (0) 486 25 11
Info@Conferences.me

25 April 2011

Mr. Samuel Horn
Equatoriana Control Systems, Inc
286 Second Avenue
Oceanside, Equatoriana

Re: Contract 472/2010

Dear Mr. Horn:

I am very disappointed in your letter of 14 April. We made you a generous offer to share the cost arising out of the late installation of the master control system on the M/S Vis.

Our legal counsel has advised us that you are fully responsible for those costs. You must be aware of the article in the Technology Reporter of 20 September 2010 in which it is reported that Atlantis High Performance Chips sent all of the available chips to Atlantis Technical Solutions because the CEOs of the two firms were such close friends. I enclose a copy.

Although the fire was at the root of the problems, Atlantis High Performance Chips could have furnished all of the chips that were required from the stock in its warehouse, as Henry Swenson acknowledged to Gloria Martins in his letter of 10 September 2010. The consequences of the fire could have been overcome in regard to our chips, though perhaps not for everyone. As far as our contract is concerned, you are responsible for the actions of your supply chain and we have no contractual relationship with your suppliers.

Nevertheless, we were willing to share the costs with you.

If you continue to insist that you have no responsibility, we will have to pursue our rights in arbitration where we will ask for recovery of the full amount of our costs.

Sincerely
(Signed)
Joseph Alright

Encl: Article, Technology Reporter, 20 September 2010

Claimant's Exhibit No 7

Excerpt from
Technology Reporter
20 September 2010
Page 4

Consternation in high tech world

The fire at Atlantis High Performance Chips two weeks ago is causing more unhappiness in certain sectors than anticipated. The D-28 chip had been greeted with enthusiasm by the industry as a major advance on all similar products. Production of the D-28 chip had just begun when the fire occurred. That by itself would have been met with consternation by the trade at large and with some scarcely concealed relief by rival chip producers.

What is now causing unhappy comment in technology circles is that the entire supply of chips already produced has been shipped to Atlantis Technical Solutions with none of the other orders having been filled even to the extent of receiving a single chip as a token gesture. When Henry Swenson, CEO of Atlantis High Performance Chips, was accused of unduly favoring his old friend, Roger Abt, CEO of Atlantis Technical Solutions, he said that if it had not been for the support of Atlantis Technical Solutions during a particularly difficult period five years ago, "we would have gone out of business". Henry Swenson and Roger Abt were witnesses at each other's weddings.

Claimant's Exhibit No. 8

Equatoriana Control Systems, Inc
286 Second Avenue
Oceanside, Equatoriana
Tel. (0) 237 86 00
Telefax (0) 237 86 01
office@controls.eq

9 May 2011

Mr. Joseph Alright
Mediterraneo Elite Conferences Services, Ltd
45 Conference Place
Capital City, Mediterraneo

Re: 472/2010

Dear Mr. Alright:

I am surprised at the belligerent tone in your letter of 25 April. There is no cause for it.

Your legal counsel tells you one thing. Ours tell us the exact opposite.

If you intend to commence arbitration, the arbitrators will have to decide which of our lawyers is correct. I have confidence in mine. I have less confidence in yours.

Sincerely,
(Signed)
Samuel Horn

中国国际经济贸易仲裁委员会

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

地址：北京市西城区桦皮厂胡同 2 号国际商会大厦六层 **Add**: 6/F CCOIC Building, 2 Huapichang Hutong,
邮编：100035 Xicheng District, Beijing, 100035, P. R. China
电话：(86-10)8221778 **Tel**: (86-10)8221778
传真：(86-10)8221776, 6464350 **Fax**: (86-10)8221776, 6464350
电子信箱：info@cietac.org **E-mail**: info@cietac.org

21 July 2011

Claimant: Mediterraneo Elite Conferences Services, Ltd
Arbitration Agent: Mr. Horace Fasttrack

By EMS

Dear Sir,

Re: Notice of Arbitration for Case No. M20110999

This is to acknowledge receipt on 15 July 2011 of your Application for Arbitration and attachments thereto in quintuplicate with Equatoriana Control Systems, Inc as the Respondent and receipt of your remittance for the arbitration fee in the sum of CNY 127,285.

The Secretariat hereby notifies you as follows:

I. Acceptance of the Case
We have taken cognizance of this case based on the arbitration clause contained in the Contract No. 472/2010 signed on 26 May 2010 by and between you and the Respondent.

II. Application of the Arbitration Rules
The Arbitration Rules of our Commission effective as from 1 March 2011 shall apply to this case. We now enclose a copy each of the Arbitration Rules and the Panel of Arbitrators of our Commission.

III. Notification to the Respondent
We are sending a Notice of Arbitration to the Respondent enclosing your Application for Arbitration and attachments thereto, together with our Arbitration Rules and the Panel of Arbitrators, and asking the respondent to respond in accordance with the Arbitration Rules.

IV. Appointment of Arbitrators

1. According to Article 23 of the Arbitration Rules, the case shall be submitted to a three-member tribunal.

2.You are required to appoint or entrust the Chairman of our Commission to appoint an arbitrator from among the Panel of Arbitrators and inform us of his/her name in writing within fifteen (15) days from receipt of this notice. If you fail to appoint or to entrust the Chairman of our Commission to appoint an arbitrator within the specified time period, the arbitrator shall be appointed by the Chairman of our Commission from among the Panel of Arbitrators.

3.You are required to contact directly with the Respondent to jointly appoint or entrust the Chairman of our Commission to appoint, a presiding arbitrator from the Panel of Arbitrators, and inform us jointly or separately of your decision in writing within fifteen (15) days from the Respondent's receipt of the Notice of Arbitration.

According to Article 25.3 of the Arbitration Rules, you and the Respondent may each recommend one to three arbitrators from among the Panel of Arbitrators as candidates for the presiding arbitrator and shall submit a list of recommended candidates to us within fifteen (15) days from your receipt of the Notice of Arbitration. Where there is only one common candidate in the lists, such candidate shall be the presiding arbitrator jointly appointed by the parties. Where there is more than one common candidate in the lists, the Chairman of our Commission shall appoint a presiding arbitrator from among the common candidates based on the specific nature and circumstances of the case. Where there is no common candidate in the lists submitted by you and the Respondent, the Chairman of our Commission shall appoint the presiding arbitrator.

If you and the Respondent fail to jointly appoint or to jointly entrust the Chairman of our Commission to appoint a presiding arbitrator in the above-mentioned manner, the Chairman of our Commission shall appoint the presiding arbitrator according to Article 25.4 of the Arbitration Rules.

V. Secretary for the Present Case
According to Article 13.3 of the Arbitration Rules, the Secretariat has designated Ms. Secretary of our staff to assist the arbitral tribunal in the procedural administration of the case. You may contact her at (0086 10) 8221778 by phone or at (0086 10) 8221776 by fax.

VI. Other Matters to Be Noted
1.Pursuant to the Arbitration Clause of the Contract No. 472/2010 signed on 26 May, 2010 by and between both parties and Article 71.1 of the Arbitration Rules, the English language shall be the official language to be used in this arbitration proceeding.

2.Pursuant to Article 19 of the Arbitration Rules, the parties shall submit all the documents in quintuplicate.

3.You may amend your claim according to Article 16 of the Arbitration Rules. However, the arbitral tribunal may not permit such amendment if it considers that the amendment is too late and may delay the arbitral proceedings.

4.For cases heard in camera, the parties, their representatives, witnesses and interpreters shall not disclose to any outsiders any substantive or procedural matters of this case according to Article 36 of the Arbitration Rules.

5.Pursuant to your submission, the Secretariat shall service all the documents, notices and written materials of this case to you at the following address, except sending in person or by fax.

Mr. Horace Fasttrack
Advocate at the Court
75 Court Street, Capital City, Mediterraneo

If there is any alteration to the above address in the arbitral proceedings, please notify us promptly.

The Secretariat looks forward to providing both parties with timely, good-quality and efficient services in the arbitration proceedings and hopes that both parties shall proceed with the arbitration in bona fide cooperation for an expedient and appropriate settlement of the disputes involved in this case.

Yours sincerely,

The Secretariat
China International Economic and Trade
Commission (CIETAC)

Encls: 1. The Arbitration Rules
2. The Panel of Arbitrators
CC: Respondent: Equatoriana Control Systems, Inc

中国国际经济贸易仲裁委员会

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

地址：北京市西城区桦皮厂胡同 2 号国际商会大厦六层 **Add**: 6/F CCOIC Building, 2 Huapichang Hutong, Xicheng District, Beijing, 100035, P. R. China
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电话：(86-10)8221778 **Tel**: (86-10)8221778
传真：(86-10)8221776, 6464350 **Fax**: (86-10)8221776, 6464350
电子信箱：info@cietac.org **E-mail**: info@cietac.org

21 July 2011

Respondent: Equatoriana Control Systems, Inc

By EMS

Dear Sir/Madam,

Re: Notice of Arbitration for the Case No. M20110999

The Claimant, Mediterraneo Elite Conferences Services, Ltd has filed an Application for Arbitration in regard to the dispute arising under the Contract No. 472/2010 signed on May 26, 2010 by and between you and the Claimant. The Secretariat now encloses the Claimant's Application for Arbitration and attachments thereto together with our Arbitration Rules effective as from 1 March 2011 and the Panel of Arbitrators, and notifies you as follows:

I. Acceptance of the Case

In accordance with the arbitration clause contained in the contract, we have taken cognizance of this case.

II. Application of the Arbitration Rules
The Arbitration Rules effective as from March 2011 shall apply to this case.

III. Appointment of Arbitrators
1. According to Article 23 of the Arbitration Rules, the case shall be submitted to a three-member tribunal.

2. You are required to appoint or entrust the Chairman of our Commission to appoint an arbitrator from among the Panel of Arbitrators, and inform us of his/her name in writing within fifteen (15) days from receipt of this notice. If you fail to appoint or to entrust the Chairman of our Commission to appoint an arbitrator within the specified time period, the arbitrator shall be appointed by the Chairman of our Commission from among the Panel of Arbitrators.

3.You are required to contact directly with the Claimant to jointly appoint or entrust the Chairman of our Commission to appoint, a presiding arbitrator from the Panel of Arbitrators, and inform us jointly or separately of your decision in writing within fifteen (15) days from your receipt of the Notice of Arbitration.

According to Article 25.3 of the Arbitration Rules, you and the Claimant may each recommend one to three arbitrators from among the Panel of Arbitrators as candidates for presiding arbitrator and shall submit the list of recommended candidates to us within fifteen (15) days from your receipt of the Notice of Arbitration. Where there is only one common candidate in the lists, such candidate shall be the presiding arbitrator jointly appointed by the parties. Where there is more than one common candidate in the lists, the Chairman of our Commission shall appoint a presiding arbitrator from among the common candidates based on the specific nature and circumstances of the case. Where there is no common candidate in the lists, the Chairman of our Commission shall appoint the presiding arbitrator.

If you and the Claimant fail to jointly appoint or to jointly entrust the Chairman of our Commission to appoint a presiding arbitrator in the above-mentioned manner, the Chairman of our Commission shall appoint the presiding arbitrator according to Article 25.4 of the Arbitration Rules.

IV. Business License, Certificate of Legal Representative and Power of Attorney

1.Please submit to the Secretariat within fifteen (15) days from receipt of this notice a copy of your business license in quintuplicate and one original Certificate of Legal Representative and its copy in quadruplicate.

2.Please produce one original Power of Attorney and its copy in quadruplicate to the Secretariat of our Commission if you decide to have an agent(s) to participate in the arbitral proceedings on your behalf.

V. Defense and Counterclaim

1.According to Article 14.1 of the Arbitration Rules, you shall file a Statement of Defense in writing with us within forty-five (45) days from receipt of this notice. Your failure to file a Statement of Defense shall not operate to affect the arbitral proceedings according to Article 14.4 of the Arbitration Rules.

2.The Statement of Defense submitted by you shall include the contents stipulated in Article 14.2 of the Arbitration Rules.

3. According to Article 15.1 of the Arbitration Rules, you shall file with us your counterclaim in writing, if any, within forty-five (45) days from receipt of this notice, and shall pay an arbitration fee in advance according to the Arbitration Fee Schedule attached to the Arbitration Rules.

4.You may apply for an extension of the time periods stated in the foregoing paragraphs 1 and 3 if there is a justified ground. The arbitral tribunal shall decide whether to accept such application. The arbitral tribunal also has the power to decide whether to accept a Statement of Defense or counterclaim submitted beyond the above time limit.

5.You may amend your counterclaim, but the arbitral tribunal may not permit such amendment if it considers that the amendment is too late and may delay the arbitral proceedings.

VI. Secretary for the Present Case

According to Article 13(3) of the Arbitration Rules, the Secretariat has designated Ms. Secretary of our staff to assist the arbitral tribunal in the procedural administration of the case. You may contact her at (0086 10) 8221778 by phone or at (0086 10) 8221776 by fax.

VII. Other Matters to Be Noted

1.Pursuant to Article 19 of the Arbitration Rules, the parties shall submit all the documents for this case in quintuplicate.

2.For cases heard in camera, the parties, their representatives, witnesses and interpreters shall not disclose to any outsiders any substantive or procedural matters of this case under Article 36 of the Arbitration Rules.

3.We shall send you the notice of arbitration for this case to the following address as submitted by the Claimant.

Equatoriana Control Systems, Inc
286 Second Avenue
Oceanside, Equatoriana

Please confirm your address as soon as possible.

The Secretariat looks forward to providing both parties with timely, good-quality and efficient services in the arbitration proceedings and hopes that both parties shall proceed with the arbitration in bona fide cooperation for an expedient and appropriate settlement of the disputes involved in this case.

Sincerely yours,

The Secretariat China International Economic and Trade Arbitration Commission (CIETAC)
Encl.:
1. Application for Arbitration and Its Appendix

2. The Arbitration Rules

3.The Panel of Arbitrators

CC: Claimant: Mediterraneo Elite Conferences Services, Ltd
Arbitration Agent: Mr. Horace Fasttrack

Horace Fasttrack
Advocate at the Court
75 Court Street
Capital City, Mediterraneo
Tel. (0) 146-9845
Telefax (0) 146-9850
Fasttrack@lawyer.me

2 August 2011

Ms. Secretary Secretariat
China International Economic Trade Arbitration Commission
6/F, CCOIC Building
No.2 Huapichang Hutong Xicheng District, Beijing, 10035, P.R. China

Mediterraneo Elite Conferences Services, Ltd, Claimant v. Equatoriana Control Systems, Inc, Respondent
Case No. M20110999

Dear Sirs:

I should like to acknowledge receipt of your communication of 21 July 2011 in which you acknowledged receipt of the Request for Arbitration submitted by Mediterraneo Elite Conferences Services, Ltd.

Claimant, Mediterraneo Elite Conferences Services, Ltd, appoints Ms. Arbitrator 1 as the claimant appointed arbitrator. Ms. Arbitrator 1 is not on the CIETAC Panel of Arbitrators. Her appointment is made pursuant to Article 25(1) of the CIETAC Rules. Her CV is attached.

Claimant and respondent, Equatoriana Control Systems, Inc, have agreed to appoint Professor Presiding Arbitrator as chairman of the tribunal. Professor Presiding Arbitrator is on the CIETAC Panel of Arbitrators and is a native of Danubia, where the arbitration will take place. Professor Presiding Arbitrator has agreed with the two parties that he would be willing to chair the tribunal.

Sincerely yours,
(Signed)
Horace Fasttrack

Attach. CV Ms. Arbitrator 1

Joseph Langweiler
Lawyer
14 Capital Boulevard
Oceanside, Equatoriana
Tel. (0) 214 77 32
Telefax (0) 214 77 33
langweiler@host.eq

3 August 2011

Ms. Secretary Secretariat
China International Economic Trade Arbitration Commission
6/F, CCOIC Building
No.2 Huapichang Hutong Xicheng District, Beijing, 10035, P.R. China

Mediterraneo Elite Conferences Services, Ltd, Claimant v. Equatoriana Control Systems, Inc, Respondent
Case No. M20110999

Dear Sirs:

I refer to your letter of 21 July 2011 addressed to Equatoriana Control Systems, Inc conveying a notice of arbitration in the referenced case.

Equatoriana Control Systems, Inc has instructed me to respond to the letter on their behalf. My power of attorney is attached.

Equatoriana Control Systems, Inc appoints Dr. Arbitrator 2 as the respondent appointed arbitrator. Since he is not a member of the CIETAC Panel of Arbitrators, the appointment is made pursuant to CIETAC Rules, Article 25(1). The CV of Dr. Arbitrator 2 is attached.

I have conferred with Mr. Horace Fasttrack, counsel for claimant in this arbitration, and we have agreed on Professor Presiding Arbitrator as the chair of the panel. Professor Presiding Arbitrator is a resident of Vindobona, Danubia, where the arbitration is to take place and is a member of the CIETAC Panel of Arbitrators.

Sincerely yours,
(Signed)
Joseph Langweiler

Attach:
Power of attorney, original and one copy
Business License, Equatoriana Control Systems, Inc, five copies
Certificate of Legal Representative, five copies
CV Dr. Arbitrator 2

中国国际经济贸易仲裁委员会

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

地址：北京市西城区桦皮厂胡同 2 号国际商会大厦六层 **Add**: 6/F CCOIC Building, 2 Huapichang Hutong,
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传真：(86-10)8221776, 6464350 **Fax**: (86-10)8221776, 6464350
电子信箱：info@cietac.org **E-mail**: info@cietac.org

10 August, 2011

Dear Professor Presiding Arbitrator, Ms. Arbitrator 1 and Dr. Arbitrator 2

Re：Notice of Arbitration for Case No. M20110999

Concerning the captioned arbitration case between the Claimant Mediterraneo Elite Conferences Services, Ltd and the Respondent Equatoriana Control Systems, Inc, the Claimant has appointed Ms. Arbitrator 1 as an arbitrator in this case; the Respondent has appointed Dr. Arbitrator 2 as an arbitrator in this case. Both parties have jointly appointed Professor Presiding Arbitrator as the presiding arbitrator.

The Secretariat of CIETAC is writing to inquire whether you will accept such appointment.

I. Please be advised that:

(a) As required by the CIETAC Arbitration Rules and the Rules of Arbitrators, an arbitrator shall not represent each party and shall remain independent of the parties and treat them equally. If you accept the appointment, please affix your signature to the enclosed DECLARATION, disclose in writing any circumstances that may cause justifiable doubt regarding your independence or impartiality, and return it to the CIETAC as soon as possible.

(b) In light of the rules regarding relevant time limits as stipulated in the Arbitration Rules, before accepting the appointment, please make sure you have the time to devote yourself to the arbitral proceeding of the case.

II. Under the Arbitration Rules, the arbitral proceedings are confidential.

III. Information relevant to the dispute is provided for your consideration as follows:
(a) Claimant: Mediterraneo Elite Conferences Services, Ltd Arbitration Agents: Mr. Horace Fasttrack
(b) Respondent: Equatoriana Control Systems, Inc Arbitration Agents: I Joseph Langweiler
(c) Procedural Rules: CIETAC Arbitration Rules effective as from 1 March, 2011
(d) Amount under dispute: USD 670,600 plus interest and costs
(e) Type of Dispute: Contract for the sale, installation and configuration of control system

(f) Arbitration Language: English

To facilitate the establishment of the Arbitral Tribunal and to advance the arbitral proceedings of the case, your reply within 5 business days of the receipt of this letter will be very much appreciated. If you accept the appointment, please affix your signature to the enclosed DECLARATION and return it to CIETAC promptly. Such DECLARATION and written disclosure will be forwarded to the parties to the dispute. The parties shall, under Article 30.1 of the Arbitration Rules, decide whether a challenge is to be filed.

The Secretariat of CIETAC looks forward to providing you with prompt, good and effective service.

Sincerely yours,
The Secretariat
China International Economic and Trade Arbitration Commission (CIETAC)

Encl.: DECLARATION (blank)

中国国际经济贸易仲裁委员会

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

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传真：(86-10)8221776, 6464350 **Fax**: (86-10)8221776, 6464350
电子信箱：info@cietac.org **E-mail**: info@cietac.org

ARBITRATOR'S DECLARATION OF ACCEPTANCE AND STATEMENT OF INDEPENDENCE

Case No. M20110999

Claimant: Mediterraneo Elite Conferences Services, Ltd Arbitration Agent: Mr. Horace Fasttrack

Respondent: Equatoriana Control Systems, Inc Arbitration Agent: Mr. Joseph Langweiler

(Please mark the relevant box or boxes)

ACCEPTANCE

□ I hereby declare that I accept to serve as arbitrator in the captioned case. In so declaring, I confirm that I have familiarized myself with the requirements of CIETAC Rules of Arbitration and Ethical Rules for Arbitrators and am able to serve as an arbitrator accordingly.

INDEPENDENCE

□ I am impartial and independent of each of the parties and intend to remain so. To the best of my knowledge, there are no facts or circumstances, past or present, that need to be disclosed because they might be of such nature as to call into question my independence or impartiality in the eyes of any of the parties.

OR

□ I confirm that I know of no circumstance that may lead to my withdrawal under the CIETAC Rules of Arbitration or Ethical Rules for Arbitrators before I accept to serve as arbitrator, andI will act impartially, independently, efficiently and diligently as an arbitrator. However, I wish to call your attention to the following facts or circumstances which I hereafter disclosebecause there exists such relationship with the party/parties or their counsel as to call intoquestion my independence in the eyes of any of the parties.

DISCLOSURE DUTY

I will disclose immediately, during the case proceedings, if I know of any facts or

circumstances that might be of such a nature as to call into question my independence and impartiality.

Signature:

Date:

Arbitrator 1
14 Advocate Way
Oceanside, Mediterraneo
Tel: (0) 614-1570
Fax: (0) 614-1571
arbitrator1@lawyers.me

22 August 2011

Secretariat
China International Economic Trade Arbitration Commission
6/F, CCOIC Building,
No.2 Huapichang Hutong Xicheng District, Beijing, 10035, P.R. China

Case No. M20110999

Dear Sirs:

I enclose the requested Declaration of Acceptance and Statement of Independence to serve as arbitrator in the above referenced arbitration.
Sincerely yours,
(Signed)
Arbitrator 1

Encl.

Declaration of Acceptance and Statement of Independence

NOTE; A similar letter accompanied by the Declaration were sent by the two other arbitrators.

中国国际经济贸易仲裁委员会

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

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电子信箱：info@cietac.org **E-mail**: info@cietac.org

ARBITRATOR'S DECLARATION OF ACCEPTANCE AND STATEMENT OF INDEPENDENCE

Case No. M20110999

Claimant: Mediterraneo Elite Conferences Services, Ltd Arbitration Agent: Mr. Horace Fasttrack

Respondent: Equatoriana Control Systems, Inc
Arbitration Agent: Mr. Joseph Langweiler

(Please mark the relevant box or boxes)

ACCEPTANCE

X I hereby declare that I accept to serve as arbitrator in the captioned case. In so declaring, I confirm that I have familiarized myself with the requirements of CIETAC Rules of Arbitration and Ethical Rules for Arbitrators and am able to serve as an arbitrator accordingly.

INDEPENDENCE

X I am impartial and independent of each of the parties and intend to remain so. To the best of my knowledge, there are no facts or circumstances, past or present, that need to be disclosed because they might be of such nature as to call into question my independence or impartiality in the eyes of any of the parties.

OR

□ I confirm that I know of no circumstance that may lead to my withdrawal under the CIETAC Rules of Arbitration or Ethical Rules for Arbitrators before I accept to serve as arbitrator, andI will act impartially, independently, efficiently and diligently as an arbitrator. However, I wish to call your attention to the following facts or circumstances which I hereafter disclosebecause there exists such relationship with the party/parties or their counsel as to call intoquestion my independence in the eyes of any of the parties.

DISCLOSURE DUTY

I will disclose immediately, during the case proceedings, if I know of any facts or circumstances that might be of such a nature as to call into question my independence and impartiality.

Signature:
(Signed)
Arbitrator 1

Date: 22 August 2011

中国国际经济贸易仲裁委员会

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

地址：北京市西城区桦皮厂胡同 2 号国际商会大厦六层 **Add**: 6/F CCOIC Building, 2 Huapichang Hutong, Xicheng District, Beijing, 100035, P. R. China
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电子信箱：info@cietac.org **E-mail**: info@cietac.org

30 August 2011

Claimant: Mediterraneo Elite Conferences Services, Ltd
Arbitration Agent: Mr. Horace Fasttrack

Respondent: Equatoriana Control Systems, Inc
Arbitration Agent: Mr. Joseph Langweiler

Dear Sirs,

Re: Notice on the Formation of Arbitral Tribunal for Case No. M20110999

Concerning the captioned arbitration case, we hereby notify the parties as follows:
1. The Claimant appointed Ms. Arbitrator 1 as the arbitrator while the Respondent appointed Dr. Arbitrator 2 as the arbitrator. Both parties have jointly appointed Professor Presiding Arbitrator as the presiding arbitrator. The afore-mentioned three arbitrators have formed the arbitral tribunal to hear this case.

2. The copies of the Declarations signed by the three arbitrators are attached hereto.

Sincerely yours,

The Secretariat
China International Economic and Trade
Arbitration Commission (CIETAC)
Encl.

中国国际经济贸易仲裁委员会

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

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电子信箱：info@cietac.org **E-mail**: info@cietac.org

30 August 2011

Presiding Arbitrator: Professor Presiding Arbitrator
Arbitrator: Ms. Arbitrator 1, Dr. Arbitrator 2

Dear Sir/Madam,

Re: Notice on the Formation of Arbitral Tribunal for Case No. M20110999

Concerning the captioned arbitration case between the Claimant Mediterraneo Elite Conferences Services, Ltd and the Respondent Equatoriana Control Systems, Inc, the Claimant appointed Ms. Arbitrator 1 as the arbitrator while the Respondent appointed Dr. Arbitrator 2 as the arbitrator. Both parties have jointly appointed Professor Presiding Arbitrator as the presiding arbitrator.

The Secretariat has received the three arbitrators' Declarations of Independence and transferred them to the parties. According to the Arbitration Rules, the afore-mentioned three arbitrators formed the arbitral tribunal on 30 August 2011 to hear this case.

The Secretariat now transfers the parties' documents to you and notifies you as follows:

1. The Tribunal, upon its formation, shall be responsible for the procedural issues of this case. The Secretariat hopes that the Tribunal will resolve the disputes involved in this case efficiently and appropriately in accordance with the relevant laws and the Arbitration Rules.

2. The CIETAC Arbitration Rules (hereinafter referred to as "CIETAC Rules"), effective as from 1 March 2011, are applicable to the present case.

3. According to Article 46.1 of the Arbitration Rules, the Arbitral Tribunal shall render an arbitral award within six (6) months from the date on which the Tribunal is formed, that is, on or before 29 February 2012. Such time period may be extended by the Secretary-General of CIETAC according to the Arbitration Rules. However, the Tribunal is expected to carry on the arbitration process efficiently.

4. According to Article 49 of the Arbitration Rules, the arbitral tribunal shall submit its draft award to CIETAC for scrutiny before signing the award. CIETAC may remind the tribunal of

issues in the award on condition that the tribunal's independence in rendering the award is not affected.

Sincerely yours,

The Secretariat
China International Economic and Trade
Arbitration Commission (CIETAC)

Encl.: Claimant's Application for Arbitration and its attachments

Joseph Langweiler
Lawyer
14 Capital Boulevard
Oceanside, Equatoriana
Tel. (0) 214 77 32
Telefax (0) 214 77 33
langweiler@host.eq

2 September 2011

Ms. Secretary Secretariat
China International Economic Trade Arbitration Commission
6/F, CCOIC Building
No.2 Huapichang Hutong Xicheng District, Beijing, 10035, P.R. China

Mediterraneo Elite Conferences Services, Ltd, Claimant v. Equatoriana Control Systems, Inc, Respondent
Case No. M20110999

Dear Ms. Secretary:

I hereby forward to you five copies of the statement of defense of Equatoriana Control Systems, Inc.

Sincerely,
(Signed)
Joseph Langweiler

Encl.

Mediterraneo Elite Conferences Services, Ltd, Claimant

v.

Equatoriana Control Systems, Inc, Respondent

Case No. M20110999

Statement of Defense

1.Respondent has no independent knowledge as to the statements in paragraphs 1, 4, 5, 6, 11, 17 and 18 of the application for arbitration.

2.Respondent accepts the statements in paragraphs 2, 3, 7 to 10, 12 to 14, 16 and 19 to 21 of the application for arbitration.

3.Respondent accepts the first sentence of paragraph 15. Respondent does not know whether there were other customers that might be described as regular customers of Atlantis High Performance Chips. Nor does it know whether the fact that the CEO of Atlantis High Performance Chips and the CEO of Atlantis Technical Solutions were good friends was the "real reason" that all of the chips available to Atlantis High Performance Chips immediately after the fire were delivered to Atlantis Technical Solutions.

4.Respondent denies paragraphs 22 and 23.

Affirmative defense

5.Claimant, Mediterraneo Elite Conferences Services, Ltd (hereafter Elite), states that, after the fire at the production facility of Atlantis High Performance Chips, the latter could have delivered all the D-28 chips needed for the master control system from the amount already produced and in its warehouse. It further states that the only reason the chips were not delivered to Oceania Specialty Devices was because of the close friendship between the CEO of Atlantis High Performance Chips (hereafter High Performance) and the CEO of Atlantis Technical Solutions, to whom the entire stock in the warehouse at the time of the fire was delivered. This speculation is based upon a news story in the Technology Reporter. (Claimant's Exhibit No. 7) Equatoriana Control Systems, Inc (hereafter Control Systems) accepts that the entire supply of D-28 chips in the warehouse was delivered to Atlantis Technical Solutions and that the two CEOs were good friends. This, however, is not enough to reach the factual conclusion that that was the only reason the chips were delivered to Atlantis Technical Solutions.

6.It also does not prove that, even if that was the reason, the necessary amount of chips would have been delivered from the stock in the warehouse to Oceania Specialty Devices. The available chips might have been allocated on a pro rata basis among all of the orders placed with High Performance. In that case Oceania Specialty Devices would have received some chips, but not enough to fabricate all of the processing units for the M/S Vis.

7.Assuming that Elite is able to convince the tribunal at the appropriate time that High Performance could have performed its contractual obligations to Specialty Devices, Control Systems would nevertheless not be liable to Elite. CISG, Article 79(1) provides that "[a] party is not liable for a failure to perform any of its obligations if he proves that the failure was due

to an impediment beyond his control ...” The impediment to Control System’s performance, which was the failure to receive the processing units from Oceania Specialty Devices, was certainly beyond its control. Article 79(2) goes on to say that where the respondent’s “failure is due to the failure by a third party whom he has engaged to perform the whole or a part of the contract”, ie Specialty Devices, is exempt under the conditions of article 79(1). (Emphasis added) Specialty Devices also could not meet its contractual date of delivery of the processing units to Control Systems for reasons that were beyond its control, ie the failure of High Performance to deliver the D-28 chips to it at the contractual date of performance.

8. In order to be free from liability CISG, Article 79(1) also requires that the party that fails in its performance “could not reasonably be expected ... to have overcome [the impediment] or its consequences.” Control Systems could not have overcome the failure to receive the D-28 chips on time. Conceivably High Performance could and should have overcome the impediment to its performance with Specialty Devices, at the expense of its performance to its other customers, which we argue would not be a reasonable position to take.

9.Elite would have the tribunal hold that Control Systems as seller of the master control system is responsible for the failure of its entire supply chain to perform on time. (Request for Arbitration, para. 22 and Claimant’s Exhibit No. 6) That may be true in regard to the quality of the goods, since the seller affirmatively delivers the goods to the buyer. It cannot be true in regard to late performance. As noted in paragraph 7, the responsibility for the actions of a third party is to a third party he has engaged to perform the whole or a part of the contract. Control Systems had no dealings with High Performance. It cannot be held responsible for any alleged failings on the part of High Performance.

Damages

10 The damages claimed by Elite have several items that should not be recoverable under any circumstances.

11.Elite made an ex gratia payment of USD 112,000 to Corporate Executives to make a partial refund of the conference fee to those of its members who had registered for the conference on the M/S Vis. An ex gratia payment is a voluntary payment. Control Systems cannot be liable to reimburse a voluntary payment made by Elite.

12.Elite claims that the payment was to “retain the goodwill and future business from Corporate Executives.” (Application for Arbitration, paragraph 18) There is no suggestion in the record that Corporate had made any demand for such a payment or that it had threatened to withdraw future business. Elite’s belief that it would help retain future business was pure speculation and the payment should not be recoverable.

13.The payment of the USD 50,000 yacht broker’s success fee raises more troubling issues. According to an article in the Convention Business News of 25 July 2011 the “success fee” paid by Elite to its yacht broker was passed in part to the personal assistant of Samuel Goldrich, the individual owner of the M/S Pacifica Star, to effect an “introduction” to Mr. Goldrich. (Respondent’s Exhibit No 1) The personal assistant was subsequently arrested on charges that of accepting bribes to influence Mr. Goldrich in his various financial affairs.

14.According to the Criminal Code of Pacifica, article 1453, it is illegal for an employee to accept any money or other item of value to assist a third person to obtain or retain business

with the employer. (Claimant's Exhibit No. 2) Elite should not even have considered claiming this payment made under its authority as damages in this arbitration.

15.The bribery which facilitated the rental of the M/S Pacifica Star raises a further and more serious issue in regard to the claim for damages. The entire lease contract is tainted by the corruption abetted by Elite's agent. The arbitral tribunal should rule that it has no authority to consider the contract for the lease of the M/S Pacifica Star or its consequences.

Challenge to Dr. Elisabeth Mercado as member of Elite Legal Team

16. We have been notified by Mr. Horace Fasttrack that Dr. Elisabeth Mercado has been added to the team of counsel representing Elite. We challenge her participation on the Elite legal team and request the tribunal to rule that she should cease all activities in this arbitration. If the challenge to Dr. Mercado is not accepted by the tribunal, we reserve our right to challenge Professor Presiding Arbitrator for the reasons that will be evident.

17.It is important to begin with the position of Professor Presiding Arbitrator. As is known to the entire tribunal, he is the Schlechtriem Professor of International Trade Law (ITL) at Danubia National University. At Danubia National University, the ITL faculty covers (inter alia) Sales Law (including CISG) and International Commercial Arbitration. Professor Presiding Arbitrator is a world-renowned specialist in trade law but arbitration, per se, is not his focus. He sits on the Management Committee of the ITL Faculty and thereby is responsible with the other members of the Committee for all ITL activities, including arbitration. Although he is not a specialist in arbitration, he sits as arbitrator in investor-state arbitrations including ICSID as well as in WTO arbitrations and occasionally in commercial disputes. It is because of this broad experience that he was designated as the presiding arbitrator in this arbitration by the joint agreement of the two parties.

18. Dr. Mercado is a Visiting Lecturer at Danubia National University, teaching the International Commercial Arbitration courses. She secured her Visiting Lectureship following a public application process of which she had been unaware until she received a telephone call from someone who introduced herself as the Professor Presiding Arbitrator's assistant and said she was calling on his behalf. Dr. Mercado was shortlisted along with one other and was selected after interview by a panel of three, chaired by Professor Presiding Arbitrator.

19.She delivers approximately 50% of the arbitration lectures, the remaining 50% being delivered by members of the Faculty's full-time staff. She is paid per lecture and is not salaried but is treated as a third party service supplier for payment and tax purposes. The Tax Authorities have accepted this and no issue arises as to her employment status.

20. In the past, Dr. Mercado had spent time as General Counsel in a large international trading company. As a consequence, in addition to her arbitration lectures she delivers lectures to the ITL Faculty as part of Professor Presiding Arbitrator's course on international trade, focusing on the "real world" of international commerce as opposed to the black-letter law. As a consequence, Dr. Mercado 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. Face-to-face, she calls him "Peter" but in company normally adopts the more formal "Professor".

21.Dr. Mercado is very good with children and is on first name terms with the Professor's

four, aged between 10 and 20. She is godmother to the youngest of the Professor's children. She is also on first name terms with his wife. The two women occasionally meet in the city for lunch or a coffee.

22.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 tribunal. In the third case, Dr. Mercado's client was unsuccessful on a majority decision with Professor Presiding Arbitrator issuing a Dissenting Opinion in her client's favor. In none of the three cases were Dr. Mercado's client's opponents aware of the connections between Dr. Mercado and Professor Presiding Arbitrator. Therefore, no question of a challenge ever arose.

23.We bring to your attention that the Code of Ethics of Dr. Mercado's Bar Association does not address the facts of this case. Nevertheless, the relationship between Dr. Mercado and Professor Presiding Arbitrator is so close that the tribunal should rule that Dr. Mercado should withdraw from the legal team representing Elite. To repeat paragraph 16, above, if the challenge to Dr. Mercado is not accepted by the tribunal, we reserve our right to challenge Professor Presiding Arbitrator as arbitrator in this case.

Relief Requested

24.The respondent requests the tribunal to:

1. Decide that Dr. Elisabeth Mercado shall terminate her role in the legal team representing Elite;

2. On the merits decide that Equatoriana Control Systems is exempt from liability for the late delivery and installation of the master control system on the M/S Vis;

3. Decide that, if Equatoriana Control Systems is held liable for the delay, the ex gratia payment of USD 112,000 is not an allowable item of damages;

4. Decide that the payment of USD 50,000 as the yacht broker's "success fee" that was used by the broker in part to pay a bribe is not an allowable item of damages;

5. Decide that the corruption in the procuring of the lease contract for the M/S Pacifica Star renders all costs associated with that lease contract not allowable items of damages;

6. Award the costs of arbitration including the cost of legal representation to Equatoriana Control Systems.

(Signed)
Joseph Langweiler

2 September 2011

Respondent's Exhibit No. 1

Convention Business News
25 July 2011
Page 3

The conference business does not often lead to the criminal courts, which is what makes the events in Pacifica so unusual.

The conference delegates at the annual meeting in February of the World Wide Corporate Executives Association were satisfied. Mediterraneo Elite Conference Services was relieved. The meeting had been scheduled to be held on the M/S Vis, the new super floating conference center that has been talked about so much in conference circles.

As was reported in Convention Business News on 28 September 2010, the refurbishing of the M/S Vis was delayed by the anticipated late delivery of the novel conference technology. The opening conference on the newest addition to Elite Conference Services' list of luxury venues was to be the Association's annual meeting. The choice was popular with the membership. There was dismay when it was reported that a substitute location would be necessary. The Association insisted the conference should be held on a super yacht. Time was short and the supply of possible alternatives was restricted. There was general relief when it became possible to rent the M/S Pacifica Star, the super yacht owned by Samuel Goldrich.

That was the beginning of the troubles. A source close to the transaction stated that unbeknown to Elite Conference Services its yacht broker had passed some of a USD 50,000 "success fee" to the personal assistant of Mr. Goldrich for an "introduction". That is bribery under the laws of Pacifica, though not in Mediterraneo where Elite is based. Further investigation showed that the personal assistant had been receiving similar payments for help in doing business with Mr. Goldrich.

Although it appears that no one from Elite Conference Services knew about the bribery until contacted by the Pacifica police, it is an unhappy ending for them for what otherwise was a successful conference.

Respondent's Exhibit No. 2

Criminal Code of Pacifica

Article 1453. (1) It shall be unlawful to pay, promise to pay, or authorize payment of any money, or other item of value to an employee of a third person or company in order to obtain or retain business with that third person.

(2) It shall be unlawful for an employee or agent to receive any money or other item of value to assist the provider of the money or other item of value to obtain or retain business with the employer or principal.

中国国际经济贸易仲裁委员会

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

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9 September 2011

Claimant: Mediterraneo Elite Conferences Services, Ltd
Arbitration Agent: Mr. Horace Fasttrack

Respondent: Equatoriana Control Systems, Inc
Arbitration Agent: Mr. Joseph Langweiler

By EMS

Dear Sirs,

Re: Arbitration Case No. M20110999

Concerning the captioned arbitration case, we now enclose to the Claimant a copy of the "Statement of Defense" submitted by the Respondent.

According to Articles 6.2 and 6.3 of the Arbitration Rules, any arguments as to the jurisdiction of the tribunal should be made to the tribunal, which has been delegated by CIETAC to make a decision on such jurisdiction when necessary.

Sincerely yours,

The Secretariat
China International Economic and Trade
Arbitration Commission (CIETAC)

Encl.

CC: Professor Presiding Arbitrator, Ms. Arbitrator 1, Dr. Arbitrator 2

Mediterraneo Elite Conferences Services, Ltd, Claimant

v.

Equatoriana Control Systems, Inc, Respondent

Case No. M20110999

Procedural Order No. 1

1.The tribunal decided during a conference call on 5 October 2011 that the presiding arbitrator was authorized to make procedural decisions subject to later confirmation by the full tribunal.

2.A conference call was arranged for 6 October 2011 between Mr. Fasttrack, Mr. Langweiler and the presiding arbitrator of the tribunal to discuss the arrangements for the arbitral procedure. Because of conflicting calendars, it was necessary to set longer periods of time than would normally be expected. The following schedule was agreed:

Submission of a memorandum for claimant: 8 December 2011
Submission of a memorandum for respondent: 19 January 2012
Oral arguments in Hong Kong: 19 - 25 March 2012
Oral arguments in Vienna: 30 March – 5 April 2012

3.The agreed upon schedule will render it impossible for the tribunal to render an award within the six month time limit imposed by Article 46(1) of the CIETAC Arbitration Rules. The tribunal will, therefore request the Secretary General of CIETAC for an extension pursuant to Article 46(2).

4.Mediterraneo Elite Conferences Services, Ltd initiated the arbitration to recover damages arising out of the late delivery of the conference technology for installation on the M/S Vis.

5. Equatoriana Control Systems, Inc has raised several defenses on the merits of the dispute.
   a. It asserts that it is exempt from liability under the provisions of CISG, Article 79.
   b. It asserts that, even if found liable, it should not be held liable for the ex gratia payment of USD 112,000 paid by Mediterraneo Elite Conferences Services, Ltd to Worldwide Corporate Executives Association, whose conference could not be held on the M/S Vis as scheduled.
   c.It also asserts that it should not be held liable for the USD 50,000 success fee paid to the yacht broker, part of which was allegedly used to pay the personal assistant of the owner of the yacht eventually leased for the Worldwide conference, even though the payment to the personal assistant was unbeknownst to Claimant at the time of payment of the success fee.
   d.It further asserts that the fact that the success fee in part was used to bribe the personal assistant taints the entire lease contract with corruption and that consequently no expense arising out of that contract should be considered as allowable damages.

6.Equatoriana Control Systems, Inc has also asked the tribunal to order that Dr. Elisabeth Mercado be removed from the legal team representing the Claimant because of her relationship with the presiding arbitrator.

7.The factual issues that may need to be developed will be determined in accordance with the procedures found in the Rules of the Nineteenth Annual Willem C. Vis International Commercial Arbitration Moot. In accordance with those Rules questions may be submitted to Professor Eric Bergsten by e-mail at eric.bergsten@chello.at, by Thursday, 27 October 2011. The answers to the requests for clarification will be distributed in Procedural Order No. 2 as promptly thereafter as possible.

(Signed)
Professor Presiding
Arbitrator President of the arbitral tribunal

7 October 2011

Mediterraneo Elite Conferences Services, Ltd, Claimant

v.

Equatoriana Control Systems, Inc, Respondent Case No. M20110999

Procedural Order No. 2

1.Has the Secretary General of CIETAC approved the request made by the Arbitral Tribunal to extend the 6-month time limit for rendering the award?

Yes, he has done so.

2.Has the Respondent raised a jurisdictional argument when it states that the tribunal should rule "that it has no authority to consider the contract for lease of the M/S Pacifica Star or its consequences" or is it arguing on the merits?

This is not a factual question that can be answered in this Procedural Order. The tribunal will be interested to learn upon which legal theory the objection has been raised. Normally, the issue should be argued first by the Respondent so that the Claimant knows which theory it must counter. However, in these proceedings (the Moot) the Claimant will have to decide which of the theories it considers the more likely when preparing the memorandum, but it may have to argue against both of them in the oral arguments.

3. Can or should there be an argument on the amount of interest claimed or whether the costs of arbitration can be recovered?

No. The issues in regard to damages should be limited to the defenses raised by the Respondent. There would be another opportunity in the arbitration for Elite and Control Systems to argue in regard to interest and arbitration costs (but this would be after the Moot is over).

4. Did the contract between Equatoriana Control Systems, Inc and Mediterraneo Elite Conferences Services, Ltd contain any sort of limitation of liability?

No, it did not.

5.Does Annex I contain the specification that the D-28 Chip is needed?

No. The specifications related primarily to performance.

6.Was Elite aware that the manufacture of the processing units was to be done by a third party and not by Control Systems?

It did not know it specifically, but Elite knew that it was common that a party from whom it procured a product would have purchased that product or some elements of it from a third party.

7.What was the overall total number of processing units to be installed in the master control system?

Six processing units were to be installed. Three were necessary to operate the system. Another three were necessary in order to assure uninterruptible performance.

8.What was the cause of the fire?

It started by a short circuit in an electrical installation. The fire inspectors ruled it to be an accident.

9.If distributed pro rata, would D-28 chips available in the warehouse have sufficed to make the master control system function?

Yes.

10. Were there other customers of High Performance that could be described as regular customers?

Yes, there were several who were regular customers.

11.Was it possible for Specialty Devices or for Respondent to acquire D-28 chips from Atlantis Technical Solutions, even for a higher price?

Specialty Devices had approached Atlantis Technical Solutions to see whether it could purchase the number of D-28 it would need for the processing units, but Atlantis Technical Solutions had refused.

12.Could Specialty Devices have used a different chip when it was not going to receive the D-28 chips on time?

As stated in the Application for Arbitration para. 9, "Specialty Devices had designed the processing units to use the D-28 "super chip"." Redesign around a substitute chip with a different specification to the D-28 would have involved severe delay and costs while providing no guarantee of comparable performance given the unique qualities of the D-28. Alternatively, without redesign the processing units could have used another chip only if that chip was in effect a "clone" of the D-28 from another manufacturer. Even ignoring inherent intellectual property issues the "cloning" of the D-28 by another manufacturer would also have involved delay and costs.

13.Is Control Systems a contracting partner of both, High Performance and Specialty Devices or did it contract only with Specialty Devices?

It contracted only with Specialty Devices.

14.When was Control Systems informed that the annual conference of the Worldwide Corporate Executives Association was scheduled to be held on the M/S Vis 12 – 18 February 2011?

It was informed about the conference on 5 August 2010.

15. Did the Claimant and the Respondent communicate with one another regarding the contract between 13 September 2010 and 9 April 2011?

There were communications between the technical personnel about the installation. None of those communications mentioned any issue in regard to the fact that the conference of the Worldwide Corporate Executives Association had had to be rescheduled. There were no communications between the corporate officials following the telephone call and letter from Control Systems on 13 September 2010 until the letter from Elite on 9 April 2011.

16.Why did Claimant pay Respondent the full contract price of USD 699,950 on 21 March 2011 when the delay had already occurred?

According to the contract (Claimant's Exhibit No. 1), the contract price was paid by the Mediterraneo National Bank in accordance with a letter of credit issued by it when it received certification by Accurate Technical Consultants of the completion of the installaton.

17.Would Elite have lost less money following the late delivery of the control system if it had repudiated its contract with Corporate Executives rather than acting in the way it did?

It would have lost more money in respect of this contract. Moreover, repudiation of the contract might have led Corporate Executives to use a different conference service for its future conferences.

18.Did the contract concluded between Elite and Corporate Executives specify that the Corporate Executives' 12-18 February 2011 event be held on board the M/S Vis?

Yes, the contract provided that the conference would be held on board the M/S Vis. As stated in the Application for Arbitration, when Elite informed Corporate Executives that the M/S Vis would not be available, Corporate Executives would not accept an on-shore venue as a substitute

19.Was the registration fee for the conference on the M/S Pacific Star lower than that of the tickets to the event on the M/S Vis?

Not as such. However, the refund to the delegates by Corporate Executives effectively reduced the registration fee.

20.Did Corporate Executives request a refund to it in order to make a partial refund to its members who had registered for the conference?

It did not make a direct request for a refund. However, during the conversations between Elite and Corporate Executives about the arrangements for the conference Corporate Executives expressed its unhappiness that the conference would not be taking place on the M/S Vis. It acknowledged that the M/S Pacifica Star was an appropriate replacement, but it did not have all of the features that had been advertised to the membership. Elite then suggested the possibility to refund some of the fee already paid by Corporate Executives to Elite which Corporate Executives could pass on to the members who had registered for the conference. Corporate Executives indicated that that would be appreciated by it and by its members.

21.Was the request of the Claimant to its yacht broker to charter an appropriate yacht or to charter Mr. Samuel Goldrich's yacht specifically?

The request was to charter an appropriate yacht. There are very few yachts that would have met Elite's needs and, with the exception of Mr. Goldrich's, those yachts were not available for lease during the necessary time period. Mr. Goldrich did not normally lease his yacht, though he had done so on a few occasions.

22 Was the success fee paid before or after signing the rent contract with Mr. Goldrich?

When the yacht broker became aware that the M/S Pacifica Star might be available, he reported his findings to Elite. Elite then promised the success fee of USD 50,000 in addition to the normal brokerage fee if the broker was able to secure the contract. Nothing was said about what it might take for the broker to secure the contract. The actual payment of the success fee was made after the signing of the contract.

23.Is it customary for a yacht broker to receive a "success fee"?

No, but it happens from time to time. It depends on the circumstances. In this case it was evident that the broker had had a difficult time locating a luxury yacht that would meet the needs of Elite to service the contract with Corporate Executives.

24. Did the Corporate Executives' conference take place according to the original schedule, between February 12 - 18, 2011 on M/S Pacifica Star?

Yes. The dates were important to Corporate Executives since they had been advertised those dates to the membership and many of the members who planned to attend had already made various commitments that would have been difficult for them to change.

25.What was the relationship of the country of Pacifica to the facts of this case?

Mr. Goldrich was a resident of Pacifica and the M/S Pacifica Star was registered there.

26.Was the assistant of Mr. Goldrich convicted by the competent national criminal court of Pacifica of committing the alleged bribery at issue?

Yes, he was convicted of receiving the bribe described in the statement of defense as well as three additional counts of receiving a bribe on other occasions.

27. Is the behavior of the assistant of Mr. Goldrich in accepting a bribe/success fee criminal with respect to Danubia, Equatoriana or Mediterraneo?

It is a criminal offense in all three countries to offer a bribe to a foreign government official to procure a contract with the government of that foreign country, but the legislation does not cover the same behavior in respect of an official of a private company. Similarly, it is a criminal offense for a government official in Danubia, Equatoriana and Mediterraneo to accept a bribe. All three countries are party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

28.Did Samuel Goldrich know about the bribe?

Mr. Goldrich did not know of this or of any of the other payments made to his assistant at the time the payments were made. When he became aware of it, he notified the prosecuting

authorities.

29.When did Mr. Fasttrack notify Mr. Langweiler, counsel for the Respondent, that Dr. Mercado had been added to the Elite legal team?

30 August 2011. This was the first time that Dr. Mercado had worked with Mr. Fasttrack.

30.Are Respondent's statements contained in paras. 16-23 of the Statement of Defense concerning the relationship between Dr. Mercado and Professor Presiding Arbitrator true?

The statements in paragraphs 16 through the first sentence of paragraph 23 are true. The remainder of paragraph 23 are arguments on the part of the Respondent.

31.Why was Dr. Mercado called by the assistant to Professor Presiding Arbitrator even though Dr. Mercado had not known of the public application process?

Although there had been a number of applications for the Visiting Lectureship, the committee at Danubia National University wished for additional applications. Dr. Mercado was one of several individuals contacted in the same way that she had been. Dr. Mercado had lectured at several universities on international commercial law and international arbitration and was highly regarded in the field.

32.What brought it about that Dr. Mercado became the godmother of Professor Presiding Arbitrator's youngest child?

As indicated, the Dr. Mercado had a good relationship with Professor Presiding Arbitrator's wife and his children. It was the wife who asked Dr. Mercado to be the godmother. This occurred in October 2010.

33. Does Dr Mercado work for a law firm or is she self-employed?

Dr. Mercado does not practice law on a full time basis. As an expert in arbitration law she is often asked for her advice or is engaged as a member of a team representing a client in an arbitration or in proceedings before the courts relating to arbitration.

34.How was it decided that Professor Presiding Arbitrator was to be the chairman of the arbitral tribunal? Did the proposition come from Mr. Horace Fasttrack or from Mr. Joseph Langweiler?

Professor Presiding Arbitrator was an obvious choice. The arbitration clause called for the arbitration to take place in Danubia. Professor Presiding Arbitrator was on the CIETAC Panel of Arbitrators, was from Danubia and had the appropriate experience. Both Mr. Fasttrack and Mr. Langweiler had come to the conclusion independently to suggest him as the presiding arbitrator.

35.When did Professor Presiding Arbitrator learn that Dr. Mercado had been added to Claimant's legal team?

Professor 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.

36.Did Professor Presiding Arbitrator submit a new statement of independence once he was aware of Ms. Mercado's involvement?

No, he did not. The declaration he made when originally appointed, noted on p. 30 of the Problem, was the only statement he filed. In that declaration he checked the first of the two boxes under "Independence" on the CIETAC form "Arbitrator's Declaration of Acceptance and Statement of Independence."

37.Did Professor Presiding Arbitrator and Dr. Mercado know each other at the time of the three previous arbitral proceedings as referred to in paragraph 22 in Respondent's Statement of Defense?

Yes, Dr. Mercado was lecturing at Danubia National University at the time of the three previous arbitrations.

38.At the time of any of the past arbitrations where Dr. Elisabeth Mercado acted as counsel and Professor Presiding Arbitrator was an arbitrator, was Dr. Mercado in regular contact with the Professor's wife?

Yes. Their friendship had begun soon after Dr. Mercado had been appointed as Visiting Lecturer.

39.What role did Elite envision Dr Elisabeth Mercado would have in the arbitration?

Elite did not engage Dr. Mercado itself. She was engaged by Mr. Fasttrack as part of the team representing Elite because of her expertise in arbitration. The specific role she would have would be determined by the progress of the arbitration.

40.Do bar rules, codes and guidelines applicable in Danubia treat the type of conflict of interest as the one possibly existing in the case of Dr. Mercado?

There is nothing in the relevant rules in Danubia that discuss conflicts of interest in arbitration. That is left to the rules of the administering arbitral organization or the conflict rules of the International Bar Association.

41. Are the Technology Reporter and Convention Business News legitimate sources of information or tabloid newspapers? What is the level of credibility of the information they provide?

They are both reputable sources of information. For the purpose of these proceedings the statements in the two publications are to be taken as correct without the need for further confirmation.

(Signed)
Professor Presiding Arbitrator
President of the arbitral tribunal

1 November 2011

NINTH ANNUAL
WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
2011-2012

City University of Hong Kong

MEMORANDUM FOR THE RESPONDENT

ON BEHALF OF:

Equatoriana
Control Systems, Inc
286 Second Avenue,
Oceanside,
Equatoriana

RESPONDENT

AGAINST:

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

CLAIMANT

BRAR HARPRABDEEP SINGH
CHAN YIN WAI ADA
CHOW YAT SAU JESSICA
LAU CHIRK YEN JASON
KIRPALANI LAVESH PRAKASH

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NOTE ON REFERENCING

As this Argument for the Respondent, Equatoriana Control Systems, Inc, responds to the Memorandum for the Claimant, prepared by students from Friedrich-Alexander-Universität Erlangen-Nürnberg, Germany, it contains references to the Memorandum for the Claimant. Where this Memorandum makes "arguments in response to arguments not made" by the Claimant, as permitted under Rule 33 of the Moot, the relevant headings are followed by the notation [*NEW ARGUMENT*].

References to books or articles in the **ARGUMENTS** of this Memorandum will appear in alphabetical order and are comprised of the surname of the author(s), followed by the year of publication and the relevant paragraph or page number, where applicable. References to cases and arbitral awards in the **ARGUMENTS** of this Memorandum will also appear in alphabetical order and will include, where possible, the name of the case, the year of the judgment or award, the relevant court or tribunal and the relevant paragraph or page number. In cases of multiple references shown in square brackets immediately after a quote, it is the first reference that refers to the quote. The subsequent references in the same square brackets will appear in alphabetical order.

The full citations to references are listed in the **INDEX OF AUTHORITIES, INDEX OF CASES** and the **INDEX OF ARBITRAL AWARDS**. The **INDEX OF AUTHORITIES** will appear in alphabetical order based on the surname of the author(s). The **INDEX OF CASES** and the **INDEX OF ARBITRAL AWARDS** will appear in alphabetical order based on the name of the country or arbitral institution. In accordance with Rule 38 of the Moot Rules, the **INDEX OF AUTHORITIES**, **INDEX OF CASES** and the **INDEX OF ARBITRAL AWARDS** will make reference "*to each paragraph* in the memorandum where the case or doctrinal authority is cited".

INDEX OF ABBREVIATIONS

AAA	International Centre for Dispute Resolution of the American Arbitration Association
CIETAC	China International Economic and Trade Arbitration Commission
CIETAC Ethical Rules	CIETAC Ethical Rules for Arbitrators, 1993
CIETAC Rules	CIETAC Arbitration Rules, 2011
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
Co	Company
CONTROL SYSTEMS	Equatoriana Control Systems, Inc
CORPORATE EXECUTIVES	Worldwide Corporate Executives Association
CRCICA	Cairo Regional Centre for International Commercial Arbitration
ed.	Editor *or* Edition
ed(s).	Editor(s) *or* Edition(s)
ELITE	Mediterraneo Elite Conferences Services, Ltd
et al.	and others
FLRA	Federal Labor Relations Authority
HIGH PERFORMANCE	Atlantis High Performance Chips
IBA	International Bar Association
IBA Ethical Rules	IBA Rules of Ethics For International Arbitrators, 1956
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration, 2004
ICARFCCI	Tribunal of International Arbitration at Russian Federation Chamber of Commerce and Industry
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
Inc	Incorporated
ITL	International Trade Law
Ltd	Limited
Model Law	UNCITRAL Model Law on International Commercial Arbitration, 2006

No.	Number
OECD	Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1999
Para.	Paragraph
SPECIALTY DEVICES	Oceania Specialty Devices
Tribunal	Arbitral Tribunal
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US	United States
v.	Versus

INDEX OF AUTHORITIES

[**Para.** 4]

CHAPPELL, D. *Building Contract Claims*, 5th ed., Wiley-Blackwell, (2011).

[**Cited as:** *CHAPPELL (2011), 8*]
[**Para.** 66]

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION "CIETAC Ethical Rules for Arbitrators 1993", (1995) *Journal of International Arbitration,* Vol. 12 No. 2, 15.

[**Cited as**: *CIETAC ETHICAL RULES*]
[**Para.** 20, 21]

FLAMBOURAS, D. "Comparative Remarks on CISG Article 79 & PECL Articles 6:111, 8:108" in *GUIDE TO ARTICLE 79: Comparison with Principles of European Contract Law (PECL)*, Pace Law School Institute of International Commercial Law, (2007).
URL: http://www.cisg.law.pace.edu/cisg/text/peclcomp79.html

[**Cited as:** *FLAMBOURAS (2002), PARA. 4*]
[**Para.** 46]

"The Doctrines of Impossibility of Performance and *clausula rebus sic stantibus* in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis", (2001) *Pace International Law Review*, Vol. 13 No. 2, 261.
URL: http://www.cisg.law.pace.edu/cisg/biblio/flambouras1.html

[**Cited as:** *FLAMBOURAS (2001), PARA. II B*]
[**Para.** 52, 56]

FLECHTNER, H. "Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods", (2007) *Pace International Law Review*, Vol. 19, 29.

[**Cited as:** *FLECHTNER (2007), 36*]
[**Para.** 50]

FORTIER, Y. "Arbitrability of Disputes", in Aksen, G., Böckstiegel, K., Patocchi, P., Whitesell, A., ed(s)., *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, ICC Publishing S.A., (2005).
URL: http://www.arbitration-icca.org/media/0/12232957414240/1117_001.pdf

[**Cited as:** *FORTIER (2005), 270*]
[**Para.** 30]

FRANC-MENGET, L., SUCHARITKUL, V. *Tecnimont, the saga continues but is not yet over,* Kluwer Arbitration Blog, (2011).
URL: http://kluwerarbitrationblog.com/blog/2011/11/25/tecnimont-the-saga-continues-but-is-not-yet-over/

[**Cited as:** *FRANC-MENGET (2011), PARA. 8*]
[**Para.** 18]

GAILLARD, E., SAVAGE, J. *Fouchard, Gaillard and Goldman on International Commercial Arbitration*, Kluwer Law International, (1999).

[**Cited as:** *GAILLARD/SAVAGE (1999), PARA. 425*]
[**Para.** 76]

GARNER, B. *Black's Law Dictionary,* 9th ed., West, (2009).

[**Cited as:** *BLACK'S LAW DICTIONARY (2009), 654*]
[**Para.** 62, 66]

GILLIES, P. "Enforcement of International Commercial Arbitration Awards – the New York Convention", (2004) *International Trade and Business Law Review*, 9.

[**Cited as:** *GILLIES (2004), 9*]
[**Para.** 38]

GUSTIN, M. "Passing of risk and impossibility of performance under the CISG", (2001) *International Business Law Journal*, 379.

[Cited as: *GUSTIN (2001), PARA. II*]
[**Para.** 50, 52]

HIBER, D., PAVIĆ, V. "Arbitration and Crime", (2008) *Journal of International Arbitration*, Vol. 25 No. 4, 461.

[**Cited as:** *HIBER/PAVIĆ (2008), 468*]
[**Para.** 38]

HOLTZMANN, H., NEUHAUS, J. *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer Law International, (1989).

[**Cited as:** *HOLTZMANN/NEUHAUS (1989), 567*]
[**Para.** 4]

HOLTZMANN, H. *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer Law International, (1995).

[**Cited as:** *HOLTZMANN (1995), 550*]
[**Para.** 13]

HONNOLD, J. *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th ed., Kluwer Law International, (2009).

[**Cited as**: *HONNOLD (2009), PARA. 423.4*]
[**Para.** 46]

HWANG, M., LIM, K. Corruption in Arbitration – Law and Reality, (2012) *Asian International Arbitration Journal* (forthcoming).
URL: http://www.arbitration-icca.org/media/0/13261720320840/corruption_in_arbitration_paper_draft_248.pdf

[**Cited as**: *HWANG (2012), PARA. 38*]
[**Para.** 83]

INTERNATIONAL LAW ASSOCIATION *Final Report On Public Policy As A Bar To Enforcement Of International Arbitral Awards*, International Law Association: Committee on International Commercial Arbitration, New Delhi Conference, (2002).

[**Cited as:** *ILA FINAL REPORT (2002), 11*]
[**Para.** 38]

KAUR, N. Impediment: A Concept under **CISG**, Unidroit and Indian Contract Law - A Comparative Analysis, (2011) *Vindobona Journal of International Commercial Law & Arbitration*, Vol. 15 No. 1, 91.

[**Cited as:** *KAUR (2011), PARA. 2*]
[**Para.** 49]

KAWHARU, A. "The Public Policy Ground for Setting Aside and Refusing Enforcement of Arbitral Awards", (2007) *Journal of International Arbitration*, Vol. 24 No. 5, 491.

[**Cited as:** *KAWHARU (2007), 507*]
[**Para.** 13]

KLOTZEL, T. "The Right to be Heard and the Right to Hear: Cultural Dimensions of International Commercial Arbitration", (2006) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Vol. 72 No. 1, 27.

[**Cited as:** *KLOTZEL (2006), 28*]
[**Para.** 13]

KOLO, A. "Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal", (2010) *Arbitration International*, Vol. 26 No.

1, 43.

[**Cited as**: *KOLO (2010), 64*]
[**Para.** 10]

KREINDLER, R. "Approaches to the Application of Transnational Public Policy by Arbitrators", (2003) *The Journal of World Investment*, Vol. 4 No. 2, 239.

[**Cited as**: *KREINDLER (2003), 245*]
[**Para.** 37]

"Aspects of Illegality in the Formation and Performance of Contracts", in van den Berg, A., ed., *International Commercial Arbitration: Important Contemporary Questions*, *ICCA Congress Series*, Vol. 11, Kluwer Law International, (2002).

[**Cited as:** *KREINDLER (2002), 253*]
[**Para.** 78]

LEW, J., MISTELIS, L., KRÖLL, S. *Comparative International Commercial Arbitration*, Kluwer Law International, (2003).

[**Cited as:** *LEW/MISTELIS/KRÖLL (2003), 9-79*]
[**Para.** 32, 34]

LIU, C. *Force Majeure: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, 2nd ed., Pace Law School Institute of International Commercial Law, (2005).
URL: http://www.cisg.law.pace.edu/cisg/biblio/liu6.html#fmiv

[**Cited as:** *LIU (2005), PARAS. 4.3, 4.5, 6.3, 7*]
[**Para.** 47, 50, 55, 59]

LUTTRELL, S. *Bias Challenges in International Commercial Arbitration*, Kluwer Law International, (2009).

[**Cited as:** *LUTTRELL (2009), 198*]
[**Para.** 20]

MCLLWRATH, M., SAVAGE, J. *International Arbitration and Mediation: A Practical Guide*, Kluwer Law International, (2010).

[**Cited as:** *MCLLWRATH/SAVAGE (2010), PARA. 4-062*]
[**Para.** 23]

MERIJAN, A. "Caveat Arbitor: Laker Airways and the Appointing of Barristers as Arbitrators in Cases Involving Barrister-Advocates from the Same Chambers", (2000) *Journal of International Arbitration*, Vol. 17, 31.

[**Cited as:** *MERIJAN (2000), 64*]
[**Para.** 24]

MOENS, G., LUTTRELL, S. "The appointment and challenge of arbitrators under the Rules of the Australian Centre for International Commercial Arbitration", (2009) *International Arbitration Law Review*, Vol. 12 No. 5, 84.

[**Cited as:** *MOENS (2009), 92*]
[**Para.** 23]

MOSES, M. *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, (2008).

[**Cited as:** *MOSES (2008), 31*]
[**Para.** 33]

NEWMAN, L., HILL, R. *The Leading Arbitrators' Guide to International Arbitration*, 2nd ed., JurisNet, (2008).

[**Cited as:** *NEWMAN/HILL (2008), 341*]
[**Para.** 13]

NICHOLAS, B. "Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods", in Galston, N., Smit, H., ed(s)., *International Sales: The United Nations Convention on Contracts for the International Sale of Goods,* Matthew Bender, (1984).
URL: http://cisgw3.law.pace.edu/cisg/biblio/nicholas1.html

[**Cited as:** *NICHOLAS (1984), 5-11*]
[**Para.** 46]

PIETH, M., LOW, L., CULLEN, P. *The OECD Convention on Bribery: A Commentary*, Cambridge University Press, (2007).

[**Cited as:** *PIETH/LOW/CULLEN (2007), 546*]
[**Para.** 79]

REDFERN, A., HUNTER, M., BLACKABY, N., PARTASIDES, C. *Redfern and Hunter on International Arbitration*, 5th ed., Oxford University Press, (2009).

[**Cited as:** *REDFERN/HUNTER (2009), PARAS. 3.208, 4.89*]
[**Para.** 23, 76]

ROSENNE, S. *The Law and Practice of the International Court, 1920 – 1996*, Springer, (1997).

[**Cited as:** *ROSENNE (1997), 602*]
[**Para.** 4]

ROZAS, J. "Clearer Ethics Guidelines and Comparative Standards for Arbitrators" in Arias, D., Fernandez-Ballesteros, M., ed(s)., *Liber Amicorum Bernardo Cremades*, La Ley, (2010).

[**Cited as:** *ROZAS (2010), 417*]
[**Para.** 23]

SAIDOV, D. "The Present State of Damages under the CISG: A Critical Assessment", (2009) *Vindobona Journal of International Commercial Law & Arbitration*, Vol. 13 No. 1, 197.

[**Cited as:** *SAIDOV (2009), 206*]
[**Para.** 62]

"Methods of Limiting Damages Under the Vienna Convention on Contracts for the International Sale of Goods", (2002) *Pace International Law Review*, Vol. 14 No. 2, 307.

[**Cited as**: *SAIDOV (2001), I 2(C)*]
[**Para.** 68]

SAULNY, S. "Lawyer Is Told Not to Join Defense Team In Her Trial", *New York Times*, 1 May 2004.
URL: http://www.nytimes.com/2004/05/01/nyregion/lawyer-is-told-not-to-join-defense-team-in-her-trial.html

[**Cited as:** *SAULNY (2004), PARA. 4*]
[**Para.** 14]

SAYED, A. *Corruption in International Trade and Commercial Arbitration*, Kluwer Law International, (2004).

[**Cited as:** *SAYED (2004), 142, 143, 216***]**
[**Para.** 79, 84]

SCHERER, M. "Circumstantial Evidence in Corruption Cases Before International Arbitral Tribunals", (2002) *International Arbitration Law Review*, Vol. 5 No. 2, 29.

[**Cited as**: *SCHERER (2002), 31, 32, 33*]
[**Para.** 38, 84]

SCHLECHTRIEM, P. *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd ed., Oxford University Press, (1998).

[**Cited as:** *SCHLECHTRIEM (1998), 568, 571*]
[**Para.** 70]

"Uniform Sales Law – The UN – Convention on Contracts for the International Sale of Goods", Manz, (1986).

URL: http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem-79.html#b431a

[**Cited as:** *SCHLECHTRIEM (1986), 101, 103, 104*]
[**Para.** 53, 54]

SCHLECHTRIEM, P., SCHWENZER, I. *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd ed., Oxford University Press, (2010).

[**Cited as:** *SCHLECHTRIEM/SCHWENZER (2010), 1009, 1014, 1067, 1070*]
[**Para.** 47, 56, 62, 63]

SCHWARTZ, D. "The Recovery of Lost Profits Under Article 74 of the U.N. Convention on the International Sale of Goods", (2006) *Nordic Journal of Commercial Law*, No. 1, 1.

[**Cited as:** *SCHWARTZ (2006), 3-4*]
[**Para.** 62]

SCHWENZER, I. "Force Majeure And Hardship In International Sales Contracts", (2008) *Victoria University of Wellington Law Review*, Vol. 39 No. 4, 709.
URL:
http://www.austlii.edu.au/nz/journals/VUWLawRw/2008/39.pdf

[**Cited as:** *SCHWENZER (2008), 712*]
[**Para.** 46]

SLATE, W., LIEBERMAN, S., WEINER, J., MICANOVIC, M. "UNCITRAL (United Nations Commission on International Trade Law): ITS WORKINGS IN INTERNATIONAL ARBITRATION AND A NEW MODEL CONCILIATION LAW", (2005) *Cardozo Journal of Conflict Resolution*, Vol. 73, 86.

[**Cited as:** *SLATE/LIEBERMAN (2005), 86*]
[**Para.** 13]

SLATER, M., BAMBERGER, N. "Seventh Circuit Creates Novel Rule That Parties May Waive Objection To Appointment Of Substitute Arbitrators Unless They Immediately Apply To A Court For Appointment", (2009) *Mealey's International Arbitration Report,* Vol. 24 No. 12, 25.

[**Cited as:** *SLATER/BAMBERGER (2009), 25-26*]
[**Para.** 17]

SLAOUI, F. "The Rising Issue of 'Repeat Arbitrators': A Call for Clarification", (2009) *Arbitration International*, Vol. 25 No. 1, 103.

[**Cited as**: *SLAOUI (2009), 105*]
[**Para.** 8]

SOUTHERINGTON, T. "Impossibility of Performance and Other Excuses in International Trade", (2001) *Faculty of Law of the University of Turku*, Private Law Publication Series B:55.
URL: http://cisgw3.law.pace.edu/cisg/biblio/southerington.html

[**Cited as:** *SOUTHERINGTON (2001), PARA. 2.3*]
[**Para.** 49]

STOLL, H. "Article 79", in Schlechtriem, P., ed., *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd ed., Oxford University Press, (1998).

[**Cited as:** *STOLL (1998), 603*]
[**Para.** 47]

TALLON, D. "Article 79", in Bianca, C., Bonnell, M., ed(s)., *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*, Giuffrè, (1987).
URL: http://cisgw3.law.pace.edu/cisg/biblio/tallon-bb79.html

[**Cited as:** *TALLON (1987), PARAS. 2.6.2, 2.6.3, 2.8*]
[**Para.** 46, 49, 59]

THOMAS, P. "Disqualifying Lawyers in Arbitrations: Do the Arbitrators Play Any Proper Role?", (1990) *American Review International Arbitration*, 562.

[**Cited as:** *THOMAS (1990), 576-577*]
[**Para.** 13]

TRANSPARENCY INTERNATIONAL Global Corruption Barometer (2010).

[**Cited as:** *GLOBAL CORRUPTION BAROMETER REPORT (2010), 12*]
[**Para.** 31]

UNITED NATIONS OFFICE ON DRUGS AND CRIME *World Drug Report 2011*, United Nations Publication, (2011).
URL: http://www.unodc.org/documents/data-and-analysis/WDR2011/World_Drug_Report_2011_ebook.pdf

[**Cited as:** *WORLD DRUG REPORT (2011), 22*]
[**Para.** 31]

UNCITRAL *CISG Advisory Council Opinion No. 7: Exemption of Liability for Damages Under Article 79 of the CISG*, United Nations Convention on Contracts for the International Sale of Goods Advisory Council 11th Meeting, (2007).
URL: http://cisgw3.law.pace.edu/cisg/CISG-AC-op7.html

[**Cited as:** *CISG ADVISORY COUNCIL OPINION NO. 7 (2007), COMMENTS 18*]
[**Para.** 46, 53]

CISG Advisory Council Opinion No. 6: Calculation of Damages under Article 74, United Nations Convention on Contracts for the International Sale of Goods Advisory Council Spring Meeting, (2006).
URL: http://www.cisg.law.pace.edu/cisg/CISG-AC-op6.html

[**Cited as:** *CISG ADVISORY COUNCIL OPINION NO. 6 (2006), PARAS. 7.2, 7.3*]
[**Para.** 63 64, 69]

"Guide to the CISG Article 79", in *Secretariat Commentary*, Pace Law School Institute of International Commercial Law, (2006).
URL: http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-79.html

[**Cited as:** *SECRETARIAT COMMENTARY ARTICLE 79 (1978), PARA. 5*]
[**Para.** 49, 57]

UNITED KINGDOM DEPARTMENT ADVISORY COMMISSION ON ARBITRATION LAW

Report on the Arbitration Bill (February 1996), (1997) *Arbitration International*, Vol. 13 No. 3, 275.

[**Cited as:** *REPORT ON THE ARBITRATION BILL (1996), PARA. 184*]
[**Para.** 13]

VIETRI, R., DHARMANANDA, K.

"Impartiality and the Issue of Repeat Arbitrators", (2011) *Journal of International Arbitration*, Vol. 28 No. 3, 187.

[**Cited as:** *VIETRI/DHARMANANDA (2011), 188*]
[**Para.** 8]

VOSER, N., GOLA, P.

"Chapter 3 – The Arbitral Tribunal" in Kaufmann-Kohler, G., Stucki B., ed(s)., *International Arbitration in Switzerland: A Handbook for Practitioners*, Kluwer Law International, (2004).

[**Cited as:** *VOSER/GOLA (2004), 44*]
[**Para.** 27]

WAINCYMER, J.

"Reconciling Conflicting Rights in International Arbitration: The Right to Choice of Counsel and the Right to an Independent and Impartial Tribunal", (2010) *Arbitration International*, Vol. 26 No. 4, 597.

[**Cited as**: *WAINCYMER (2010), 614, 616, 617*]
[**Para.** 4**,** 10]

WALSH, T.,

"The LCIA Court Decisions on Challenges to Arbitrators: An

TEITELBAUM, R. Introduction", (2011) *Arbitration International*, Vol. 27 No. 3, 283.

[**Cited as:** *WALSH/TEITELBAUM (2011), 299*]
[**Para.** 9]

WEE, S. "The OECD Convention on Combating Bribery of Foreign Public Officials and its Effectiveness in Australia: Are We Doing Enough?", (2012) *International Trade and Business Law Review*, Vol. 15, 360.

[**Cited as:** *WEE (2012), 362*]
[**Para.** 31]

WILSKE, S.
FOX, T. "Corruption in International Arbitration and Problems with standard of proof", in Kröll S., Mistelis L., et al., ed(s)., *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, Kluwer Law International, (2011).

[**Cited as:** *WILSKE/FOX (2011), 497*]
[**Para.** 84]

INDEX OF CASES

[Cited as: *CLOUT CASE 442 (2000) OBERLANDESGERICHT KÖLN, 255*]
[**Para.** 17]

No. VIII ZR 121/98, 24 March 1999, Bundesgerichtshof, Germany.
URL: http://www.cisg.law.pace.edu/cases/990324g1.html

[**Cited as:** *"VINE WAX CASE" (1999) BUNDESGERICHTSHOF, GERMANY, PARA. II 2*]
[**Para.** 47]

No. 3 U 83/98, 13 January 1998, Oberlandesgericht Bamberg.
URL: http://cisgw3.law.pace.edu/cases/990113g1.html

[**Cited as:** *"FABRIC CASE" (1999) OBERLANDESGERICHT BAMBERG, PARA. 2C*]
[**Para.** 66]

NO. 11 O 4261/94, 21 September 1995, Landgericht Kassel.
URL: http://cisgw3.law.pace.edu/cases/950921g1.html

[**Cited as:** *"WOODEN POLES CASE" (1995) LANDGERICHT KASSEL, PARA. 2*]
[**Para.** 67]

Clout Case 292, 13 January 1993, Oberlandesgericht Saarbrücken.
URL: http://www.unilex.info/case.cfm?id=180

[**Cited as:** *CLOUT CASE 292 (1993) OBERLANDESGERICHT SAARBRÜCKEN, PARA. 3*]
[**Para.** 44]

No. 19 U 97/91, 22 September 1992, Oberlandesgericht Hamm.
URL: http://cisgw3.law.pace.edu/cases/920922g1.html

[**Cited as:** *"FROZEN BACON CASE" (1992) OBERLANDESGERICHT HAMM, PARA. A*]
[**Para.** 44]

GREECE

No. 4505/2009, Multi-Member Court of First Instance of Athens.
URL: http://cisgw3.law.pace.edu/cases/094505gr.html

[**Cited as:** *"BULLET-PROOF VEST CASE" (2009) MULTI-MEMBER COURT OF FIRST INSTANCE OF ATHENS, PARAS. 3.1.2(b), 3.2.2*]
[**Para.** 68]

HONG KONG

China Nanhai Oil Joint Service Corporation Shenzhen Branch v.

Gee Tai Holdings Co. Ltd., 13 July 1994, Supreme Court of Hong Kong.

[**Cited as:** *CHINA NANHAI OIL JOINT SERVICE V. GEE TAI HOLDINGS (1994) SUPREME COURT OF HONG KONG, PARAS. 48-49*]
[**Para.** 10]

HUNGARY *BVM Épelem Kft v. Global Center Kft*., 12 October 2010, Supreme Court of Hungary.
URL: http://www.dlapiper.com/hungarys-highest-court-reverses-award-finding-link-between-counsel-and-arbitrators/

[Cited as: *BVM ÉPELEM KFT (2010) SUPREME COURT OF HUNGARY, PARA. 9*]
[**Para.** 25]

ITALY *Crubo v. Soc Elci*, 4 May 2006, Tribunale Di Genoa.
In: 4 May 2006 – Tribunale (Court of First Instance), Genoa, ITA Board of Reporters.

[**Cited as:** *CRUBO V. SOC ELCI (2006) TRIBUNALE DI GENOA, PARA. 2*]
[**Para.** 25]

NETHERLANDS *Ghana v. Telekom Malaysia Berhad*, 18 October 2004, District Court of The Hague.
In: ASA Bulletin, (Kluwer Law International 2005), Vol. 23 No. 1, 186.

[**Cited as:** *GHANA V. TELEKOM MALAYSIA BERHAD (2004) DISTRICT COURT OF THE HAGUE, 193*]
[**Para.** 15]

PAKISTAN *The Hub Power Co. v. Pakistan WAPDA*, 20 June 2000, Supreme Court of Pakistan.
In: (2000) *Arbitration International*, Vol. 16 No. 4, 439.

[**Cited as:** *HUB POWER V. PAKISTAN (2000) SUPREME COURT OF PAKISTAN, 458*]
[**Para.** 33]

SPAIN *No. 755/95-C*, 20 June 1997, Audiencia Provincial de Barcelona.
URL: http://cisgw3.law.pace.edu/cases/970620s4.html

[**Cited as:** *"DYE FOR CLOTHES CASE" (1997) AUDIENCIA PROVINCIAL DE BARCELONA, PARA. IV*]
[**Para.** 64]

SWITZERLAND *No. 4P.75/2000*, 15 September 2000, Schweizerisches Bundesgericht.

URL: http://cisgw3.law.pace.edu/cases/000915s1.html

[**Cited as:** "*EGYPTIAN COTTON CASE*" *(2000), SCHWEIZERISCHES BUNDESGERICHT, PARA. A*]
[**Para.** 48]

BGE 92 I 271, 26 October 1966, Swiss Federal Tribunal.

[**Cited as:** *BGE 92 I 271 (1966) FEDERAL TRIBUNAL OF SWITZERLAND, PARA. 2A*]
[**Para.** 27]

UNITED KINGDOM

Publicis Consultants UK LTD v. O'Farrell, 27 May 2011, United Kingdom Employment Appeal Tribunal.
In: [2011] UKEAT_0430_10_2705.

[**Cited as:** *PUBLICIS V. O'FARRELL (2011) UK EMPLOYMENT APPEAL TRIBUNAL, PARA. 17*]
[**Para.** 69]

GPS Marine Contractors Limited v. Ringway Infrastructure Services Limited, 17 February 2010, High Court of England and Wales.
In: [2010] EWHC 283 (TCC)

[**Cited as:** *GPS MARINE CONTRACTORS LTD V. RINGWAY INFRASTRUCTURE SERVICES LTD (2010) HIGH COURT OF ENGLAND AND WALES, PARA. 42*]
[**Para.** 15]

ASM Shipping Ltd v. TTMI Shipping Ltd, 28 June 2007, High Court of England and Wales.
In: [2007] EWHC 1513 (Comm.)

[**Cited as:** *ASM SHIPPING LTD V. TTMI LTD (2007) HIGH COURT OF ENGLAND AND WALES, PARA. 51*]
[**Para.** 17]

Porter v. Magill, 13 December 2001, House of Lords.
In: [2002] 2 AC 357.

[**Cited as:** *PORTER V. MAGILL (2002) HOUSE OF LORDS, PARA. 102*]
[**Para.** 7]

Westacre Investment Inc. v. Jugoimport-SPDR Holding Co. Ltd, 3 December 1999, Supreme Court of Judicature of London.
In: [2000] QB 740.

[**Cited as:** *WESTACRE V. JUGOIMPORT (1999) SUPREME COURT OF JUDICATURE OF LONDON, 775*]

[**Para.** 31]

Laker Airways v. FLS Aerospace, 20 April 1999, High Court of England and Wales.
In: [2000] 1 WLR 113.

[**Cited as:** *LAKER AIRWAYS V. FLS AEROSPACE (1999) HIGH COURT OF ENGLAND AND WALES, 388*]
[**Para.** 24]

PPG Industries, Inc. v. Pilkington Plc, 1 November 1989, High Court of England and Wales (unreported).

[**Cited as:** *PPG INDUSTRIES INC V. PILKINGTON PLC (1989) HIGH COURT OF ENGLAND AND WALES*]
[**Para.** 24]

Connelly v. DPP, 1964**,** Appeals Court of England and Wales.
In: [1964] AC 1254.

[**Cited as:** *CONNELLY V. DPP (1964) APPEALS COURT OF ENGLAND AND WALES, 1301*]
[**Para.** 4]

UNITED STATES OF AMERICA

United States Department of Labor Bureau of Labor Statistics v. American Federation of Government Employees Local 12, 12 October 2011, Federal Labor Relations Authority.
In: 66 FLRA No. 47.

[**Cited as:** *US DEPARTMENT OF LABOR V. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (2011) FLRA, 282*]
[**Para.** 17]

Golden Valley Grape Juice and Wine, LLC v. Centrisys Corporation et al, 21 January 2010, District Court of California.
In: CV F 09-1424 LJO GSA.
URL: http://cisgw3.law.pace.edu/cases/100121u1.html

[**Cited as:** *GOLDEN VALLEY GRAPE JUICE (2010) DISTRICT COURT OF CALIFORNIA, PARA. C*]
[**Para.** 43]

Macromex Srl. v. Globex International Inc., 16 April 2008, District Court of New York.
In: 08 Civ. 114 (SAS).
URL: http://cisgw3.law.pace.edu/cases/080416u1.html

[**Cited as:** *MACROMEX SRL V. GLOBEX INTERNATIONAL INC (2008) DISTRICT COURT OF NEW YORK, PARA. IV*]
[**Para.** 56]

In re: Siskiyou Evergreen, Inc., Debtor, 29 March 2004, U.S. Bankruptcy Court for the District of Oregon.
URL: http://www.unilex.info/case.cfm?id=1316

[**Cited as:** *IN RE: SISKIYOU EVERGREEN INC (2004) US BANKRUPTCY COURT FOR THE DISTRICT OF OREGON, PARA. 6*]
[**Para.** 70]

Delchi Carrier, S.p.A. v. Rotorex Corp., 6 December 1995, United States Court of Appeals, Second Circuit.
URL: http://cisgw3.law.pace.edu/cases/951206u1.html

[**Cited as:** *DELCHI CARRIER S.P.A. V. ROTOREX CORP (1995) UNITED STATES COURT OF APPEALS SECOND CIRCUIT, PARA. 20*]
[**Para.** 64]

First Options of Chicago, Inc. v. Kaplan, 22 May 1995, United States Supreme Court.
In: 514 U.S. 938.

[**Cited as:** *FIRST OPTIONS OF CHICAGO V. KAPLAN (1995) SUPREME COURT OF THE UNITED STATES, 946*]
[**Para.** 18]

Tekni-Plex Inc. v. Meyner and Landis, 24 October 1994, Supreme Court of New York.
In: 220 A.D. 2d 326.

[**Cited as:** *TEKNI-PLEX INC V. MEYNER AND LANDIS (1995) SUPREME COURT OF NEW YORK, 326*]
[**Para.** 13]

Jerome Neaman v. Kaiser Foundation Hospital, 17 December 1992, United States Court of Appeal of California.
In: 346 U.S. 427 (1953).

[**Cited as:** *NEAMAN V. KAISER FOUNDATION HOSPITAL (1992) COURT OF APPEAL OF CALIFORNIA, 883*]
[**Para.** 8]

Daniel Avraham v. Shigur Express Ltd, 4 September 1991, United States District Court For The Southern District of New York.
In: 1991 U.S. Dist. LEXIS 12267.

[**Cited as:** *AVRAHAM V. SHIGUR EXPRESS LTD (1991) DISTRICT COURT OF NEW YORK, 12*]
[**Para.** 15]

International Association of Machinists and Aerospace Workers,

Lodge No. 1777 v. Fansteel, Inc., 16 April 1990, United States Court of Appeals, Seventh Circuit.

[**Cited as:** *LODGE NO. 1777 V. FANSTEEL INC (1990) COURT OF APPEALS OF THE UNITED STATES OF AMERICA, SEVENTH CIRCUIT, PARA. 29*]
[**Para.** 15]

Matter of Abrams, 1984, 2nd District Court of New York.
In: 62 N.Y.2d 183.

[**Cited as:** *MATTER OF ABRAMS (1984) SECOND DISTRICT COURT OF NEW YORK, 197*]
[**Para.** 14]

Parsons & Whittemore Overseas Co., Inc., v. Société Générale De L'industrie Du Papier, 23 December 1974*,* United States Court of Appeals, Second Circuit.
In: 508 F.2d 969 (1974).

[**Cited as:** *PARSONS V. SOCIÉTÉ (1974) UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, PARA. 8*]
[**Para.** 38]

Alexander v. Gardner-Denver Co., 19 February 1974, United States Court of Appeals, Tenth Circuit.
In: 415 U.S. 36 (1974).

[**Cited as:** *ALEXANDER V. GARDNER-DENVER (1974) UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, 57, 58*]
[**Para.** 32]

Island Territory of Curaçao v. Solitron Devices Inc., 14 February 1973, United States Court of Appeals, Second Circuit.
In: Yearbook Commercial Arbitration, 1976, Vol. I, 200.

[**Cited as:** *ISLAND TERRITORY OF CURAÇAO V. SOLITRON DEVICES INC (1973) DISTRICT COURT OF NEW YORK, PARA. 8*]
[**Para.** 15]

McMann v. Richardson, 4 May 1970, Supreme Court of the United States.
In: 397 U.S. 759, 771

[**Cited as:** *MCMANN (1970) SUPREME COURT OF THE UNITED STATES, PARA. 771*]
[**Para.** 14]

International Paper Co. v. Rockefeller, 4 March 1914, Supreme Court of New York.

In: 161 A.D. 180.

[**Cited as:** *INTERNATIONAL PAPER V. ROCKEFELLER (1914) SUPREME COURT OF NEW YORK, 184*]
[**Para.** 56]

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In: Yearbook Commercial Arbitration 1987, Vol. XII, 97.

[**Cited as:** *ICC CASE 4145 (1984), 102*]
[**Para.** 38, 83]

Argentine Engineer v. British Company, Award Arbitration Case No. 1110 of 1963, 1963, Court of Arbitration of the International Chamber of Commerce.
In: Yearbook Commercial Arbitration, 1996, Vol. XXI, 47.

[**Cited as:** *ICC CASE 1110 (1963), 51, 52*]
[**Para.** 33]

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION OF THE AMERICAN ARBITRATION ASSOCIATION

Macromex Srl. v. Globex International Inc.,
Interim Award of 23 October 2007, International Centre for Dispute Resolution of the American Arbitration Association.
In: No. 50181T 0036406.

[**Cited as:** *MACROMEX V. GLOBEX (2007) AAA, PARA. II A*]
[**Para.** 54]

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

OPIC Karimum Corporation v. The Bolivarian Republic of Venezuala: *Decision On The Proposal To Disqualify Professor Phillippe Sands, Arbitrator*, 5 May 2011, ICSID Tribunal.
In: ICSID Case No. ARB/10/14.

[**Cited as:** *OPIC KARIMUM (2011) ICSID TRIBUNAL, PARAS. 47, 52*]
[**Para.** 8, 9]

Fraport AG Frankfurt Airport Services Worldwide v. Republic of The Philippines, 23 December 2010, ICSID Tribunal.
In: ICSID Case No. ARB/03/25.

[**Cited as:** *FRAPORT V. PHILIPPINES (2010) ICSID TRIBUNAL, PARA. 197*]
[**Para.** 13]

Tidewater Inc. v. The Bolivarian Republic of Venezuela, 23 December 2010, ICSID Tribunal.
In: ICSID Case No ARB/10/5.

[**Cited as:** *TIDEWATER V. VENEZUELA (2010) ICSID TRIBUNAL, PARA. 64*]
[**Para.** 9]

Rompetrol Group N.V. v. Romania: Decision of Tribunal on Participation of Counsel, 14 January 2010, ICSID Tribunal.
In: ICSID Case No. ARB/06/3.

[**Cited as:** *ROMPETROL (2010) ICSID TRIBUNAL, PARAS. 15, 25, 26*]
[**Para.** 5, 7, 11]

Cemex Caracas Investments B.V. & Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela, 6 November 2009, ICSID Tribunal.
In: ICSID Case No. ARB/08/15.

[**Cited as:** *CEMEX V. VENEZUELA (2009) ICSID TRIBUNAL, PARAS. 35-37*]
[**Para.** 17]

EDF (Services) Limited v. Romania, 8 October 2009, ICSID Tribunal.
In: Case No. ARB/05/13, 8 October 2009.

[**Cited as:** *EDF (SERVICES) LTD V. ROMANIA (2009) ICSID TRIBUNAL, PARA. 221*]
[**Para.** 37]

Hrvatska Elektroprivreda, d.d. v. The Republic of Slovenia, 6 May 2008, ICSID Tribunal.
In: ICSID Case No. ARB/05/24.

[**Cited as:** *HRVATSKA (2008) ICSID TRIBUNAL, PARAS. 26, 33*]
[**Para.** 5, 10, 11]

Suez, Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic, 22 October 2007, ICSID Tribunal.
In: ICSID Case No. ARB/03/17.

[**Cited as:** *SUEZ AND OTHERS V. ARGENTINA (2007) ICSID TRIBUNAL, PARAS. 23-24*]
[**Para.** 17]

Maritime International Nominees Establishment (MINE) v. Guinea; Decision on Annulment, 22 December 1989, ICSID Tribunal.
In: (1989) ICSID Reports Vol. 4, 87.

[**Cited as:** *MINE V. GUINEA (1989) ICSID TRIBUNAL, 87*]
[**Para.** 13]

LONDON COURT OF INTERNATIONAL ARBITRATION

LCIA Reference No. 81160, 28 August 2009, London Court of International Arbitration.

[**Cited as:** *LCIA REFERENCE NO. 81160 (2009), PARAS. 4.6, 4.8*]
[**Para.** 9]

TRIBUNAL OF INTERNATIONAL ARBITRATION AT RUSSIAN FEDERATION CHAMBER OF COMMERCE AND INDUSTRY

Case No. 406/1998, 6 June 2000, Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry.
URL: http://cisgw3.law.pace.edu/cases/000606r1.html

[**Cited as:** *CLOUT CASE 476 (1998) ICARFCCI, PARA. 3.4.2*]
[**Para.** 70]

Case No. 155/1994, 16 March 1995, Tribunal of International Arbitration at Russian Federation Chamber of Commerce and Industry.
In: CLOUT No. 140.

[**Cited as:** *"METALLIC SODIUM CASE" (1995) ICARFCCI, PARA. 5*]
[**Para.** 54]

INDEX OF LEGAL AUTHORITIES

ARGUMENTS

I. BY INCLUDING DR. MERCADO IN *ELITE'S* LEGAL TEAM, PROFESSOR PRESIDING ARBITRATOR IS NOT INDEPENDENT

1. Equatoriana Control Systems, Inc (**CONTROL SYSTEMS**) has asked the Arbitral Tribunal (**Tribunal**) "to order that Dr. Elisabeth Mercado be removed from the legal team" representing Mediterraneo Elite Conferences, Ltd (**ELITE**) because of her relationship with the presiding arbitrator [*PROCEDURAL ORDER NO. 1, PARA. 6*]. If the Tribunal refuses to act upon this request, CONTROL SYSTEMS reserves the "right to challenge Professor Presiding Arbitrator" as arbitrator in this case [*STATEMENT OF DEFENSE, PARA. 16*].

2. CONTROL SYSTEMS asserts that (A) the Arbitral Tribunal has the authority to remove Dr. Mercado from ELITE's legal team. Even if the Tribunal does not have the authority to remove Dr. Mercado, (B) CONTROL SYSTEMS has the right to reserve a conditional challenge against Professor Presiding Arbitrator, and (C) a challenge to Professor Presiding Arbitrator's independence will succeed. Additionally, (D) the contract between ELITE and Mr. Goldrich does not come within the jurisdiction of the Tribunal. Finally CONTROL SYSTEMS asserts that (E) any award rendered by this Tribunal will not be enforceable under the Convention on The Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**).

(A) THE ARBITRAL TRIBUNAL HAS THE AUTHORITY TO REMOVE DR. MERCADO FROM *ELITE'S* LEGAL TEAM

3. On 30 August 2011**,** Mr. Horace Fasttrack, arbitral agent for ELITE, notified Mr. Joseph Langweiler, counsel for CONTROL SYSTEMS, that Dr. Mercado had been added to ELITE's legal team [*STATEMENT OF DEFENSE, PARA. 16; PROCEDURAL ORDER NO. 2, CLARIFICATION 29*]. The President of this Tribunal, Professor 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" [*PROCEDURAL ORDER NO. 2, CLARIFICATION 35*]. Professor Presiding Arbitrator is the Schlechtriem Professor of International Trade Law at Danubia National University [*STATEMENT OF DEFENSE, PARA. 17*]. Dr. Mercado is a Visiting Lecturer at Danubia National University, teaching International Commercial Arbitration courses. CONTROL SYSTEMS asserts that "the relationship between Dr. Mercado and Professor Presiding Arbitrator is so close that the tribunal should rule that Dr. Mercado should withdraw from the

legal team representing Elite" [*STATEMENT OF DEFENSE, PARA. 23*] because (1) the Tribunal has an 'inherent' power to remove counsel; (2) this 'inherent' power allows the Tribunal to remove Dr. Mercado; (3) additionally, allowing Dr. Mercado to serve on ELITE's legal team would constitute a breach of Article 18 of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments (**Model Law**).

(1) The Tribunal has an 'inherent' power to remove counsel

4. The China International Economic Trade Arbitration Commission Arbitration Rules (**CIETAC Rules**) do not provide an express power to exclude counsel. However, contrary to ELITE's contention that the "RESPONDENT's request ... is not justified by a general or inherent power of the TRIBUNAL" [*CLAIMANT'S MEMORANDUM, PARA. 33*], the cases of *HRVATSKA* and *ROMPETROL* are authority for the proposition that arbitral tribunals have an inherent power to exclude counsel. Tribunals have exercised such powers since there is a "necessity" to fulfil their arbitral functions [*WAINCYMER (2010), 616; ROSENNE (1997), 602*], in particular to "suppress any abuses" [*BROWN (2005), 195; CONNELLY V. DPP (1964) APPEALS COURT OF ENGLAND AND WALES, 1301*]. Moreover, the Tribunal has the power to remove Dr. Mercado because Article 19(2) Model Law states that, "the arbitral tribunal may … conduct the arbitration in such manner as it considers appropriate", which is the source of a Tribunal's power to exclude counsel [*WAINCYMER (2010), 614; BROWN (2011), 181-182; HOLTZMANN/NEUHAUS (1989), 567*].

(2) This 'inherent' power allows the Tribunal to remove Dr. Mercado

5. ELITE states that, "Even if an exclusion of Dr. Mercado ... had a legal basis, the request ... must still be dismissed because … her participation does not adversely affect the impartiality and independence of the TRIBUNAL" [*CLAIMANT'S MEMORANDUM, PARA. 37*]. Although the Tribunal's 'inherent' authority to order the removal of a party's counsel should only be exercised in "extraordinary circumstances" [*ROMPETROL (2010) ICSID TRIBUNAL, PARA. 15*], the failure to remove Dr. Mercado from ELITE's legal team jeopardises the "integrity" of the Tribunal [*HRVATSKA (2008) ICSID TRIBUNAL, PARA. 33*]. The 'integrity' of the Tribunal has been affected because (a) there is a "real possibility" that Professor Presiding Arbitrator is "biased" and (b) there is a "reasonable basis" for questioning Professor Presiding Arbitrator's ability to judge fairly or exercise independent judgment.

(a) There is a "real possibility" that Professor Presiding Arbitrator is "biased"

6. ELITE has argued that "Dr. Mercado's appearance as counsel before Prof. Presiding Arbitrator in three previous arbitrations … has no impact on Prof. Presiding Arbitrator's independence" [*CLAIMANT'S MEMORANDUM, PARA. 46*]. In this context, CONTROL SYSTEMS has pointed out that, "In the first two, Dr. Mercado's client was successful with a unanimous tribunal. In the third case, Dr. Mercado's client was unsuccessful on a majority decision with Professor Presiding Arbitrator issuing a Dissenting Opinion in her client's favor" [*STATEMENT OF DEFENSE, PARA. 22*]. Therefore, precisely because Dr. Mercado has appeared before Professor Presiding Arbitrator in "three previous arbitrations" [*STATEMENT OF DEFENSE, PARA. 22; PROCEDURAL ORDER NO. 2, CLARIFICATION 37*], Dr. Mercado's addition to ELITE's legal team results in the "real possibility" of bias [*ROMPETROL (2010) ICSID TRIBUNAL, PARA. 26*]. ELITE's contention, that these appearances do not impact on Professor Presiding Arbitrator's independence "As long as bias in the previous arbitrations is not evidenced and not even brought up" [*CLAIMANT'S MEMORANDUM, PARA. 46*], is specious because in "none of the three cases were Dr. Mercado's client's opponents aware of the connections between Dr. Mercado and Professor Presiding Arbitrator" [*STATEMENT OF DEFENSE, PARA. 22*]. This explains why no challenge ever arose as to the partiality of Professor Presiding Arbitrator. Hence, the multiple appearances of Dr. Mercado do not support the claim that her addition to ELITE's legal team has no impact on Professor Presiding Arbitrator's independence.

7. In order to remove Dr. Mercado, CONTROL SYSTEMS must show whether a "fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" [*ROMPETROL (2010) ICSID TRIBUNAL, PARA. 15; PORTER V. MAGILL (2002) HOUSE OF LORDS, PARA. 102*]. This test is rephrased in General Standard 2(c) of the IBA Guidelines on Conflicts of Interest in International Arbitration (**IBA Guidelines**) which refers to the conclusion of "a reasonable and informed third party … that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision".

8. ELITE argues that "the request to exclude Dr. Mercado should be dismissed because her participation has no impact on the impartiality and independence of the TRIBUNAL, especially in view of Prof. Presiding Arbitrator" [*CLAIMANT'S MEMORANDUM, PARA. 39*]. However, under the Orange List of the IBA Guidelines, which deal with repeat appointments, Dr. Mercado's

previous appearances come within a category of intermediate situations that may give rise to "justifiable doubts" as to the arbitrator's "impartiality or independence" [*PART II, IBA GUIDELINES, PARA. 3; SLAOUI (2009), 105; VIETRI/DHARMANANDA (2011), 188*]. The IBA Guidelines state that justifiable doubts do not arise unless "The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties" [*ORANGE LIST, IBA GUIDELINES, SECTION 3.1.3*]. Although there is no evidence that Professor Presiding Arbitrator's appointments all occurred "within the past three years", it should nevertheless be "carefully considered" whether he is truly impartial in this case [*OPIC KARIMUM (2011) ICSID TRIBUNAL, PARA. 47*]. This is because Dr. Mercado may have been added to ELITE's legal team in order to affect the "independence and impartiality" of the Tribunal [*BORN (2011), 680; NEAMAN V. KAISER FOUNDATION HOSPITAL (1992) COURT OF APPEAL OF CALIFORNIA, 883*].

9. Additionally, though repeat appointments may not be "a ground for disqualification per se" [*WALSH/TEITELBAUM (2011), 299; LCIA REFERENCE NO. 81160 (2009), PARA. 4.6*], it may be "compounded" [*WALSH/TEITELBAUM (2011), 299*] together with other relevant facts such as the "relationship" with counsel [*LCIA REFERENCE NO. 81160 (2009), PARAS. 4.6, 4.8; OPIC KARIMUM (2011) ICSID TRIBUNAL, PARA. 52; TIDEWATER V. VENEZUELA (2010) ICSID TRIBUNAL, PARA. 64*]. In fact, Dr. Mercado has a professional relationship with Professor Presiding Arbitrator, as they both work at Danubia National University [*STATEMENT OF DEFENSE, PARAS. 17-18*]. Furthermore, "Dr. Mercado was lecturing at Danubia National University at the time of the three previous arbitrations" [*PROCEDURAL ORDER NO. 2, CLARIFICATION 37*]. She also has a personal relationship with his wife and is "godmother" to Professor Presiding Arbitrator's son [*STATEMENT OF DEFENSE, PARA. 21*]. Therefore, the repeat appointments of Dr. Mercado, as well as her relationship with Professor Presiding Arbitrator, are likely to "give rise to justifiable doubts" as to his impartiality and independence.

(b) There is a "reasonable basis" for questioning Professor Presiding Arbitrator's ability to judge fairly or exercise independent judgment

10. Parties give implied consent to arbitrate in "good faith" [*WAINCYMER (2010), 616*]. In arbitrating its dispute in "good faith", ELITE's right to select counsel becomes limited when exercising that right would "consciously ... undermine" the impartiality of the Tribunal [*WAINCYMER (2010), 617*] or the "integrity" of the proceedings [*KOLO (2010), 64; HRVATSKA*

(2008) ICSID TRIBUNAL, PARA. 33]. Therefore, CONTROL SYSTEMS argues that ELITE can only select Dr. Mercado, subject to these limitations of 'good faith' [*CHINA NANHAI OIL JOINT SERVICE V. GEE TAI HOLDINGS (1994) SUPREME COURT OF HONG KONG, PARAS. 48-49*] which has not been presently fulfilled since it is likely that Dr. Mercado was added after the appointment of Professor Presiding Arbitrator.

11. Moreover, the late addition of Dr. Mercado influences the Tribunal to a "material degree" [*ROMPETROL (2010) ICSID TRIBUNAL, PARA. 25*], providing a "reasonable basis" [*ROMPETROL (2010) ICSID TRIBUNAL, PARA. 26*] for questioning Professor Presiding Arbitrator's ability to judge fairly or exercise independent judgment. Dr. Mercado's addition and Professor Presiding Arbitrator's confirmation of appointment both happened on 30 August 2011 [*LETTER OF 30 AUGUST 2011, MOOT PROBLEM, 34-35*; *PROCEDURAL ORDER NO. 2, CLARIFICATION 29*]; both ELITE and CONTROL SYSTEMS selected Professor Presiding Arbitrator as the presiding arbitrator on 3 August 2011 [*LETTER OF 3 AUGUST 2011, MOOT PROBLEM, 25*]; as such he was "jointly appointed" [*LETTER OF 10 AUGUST 2011, MOOT PROBLEM, 26*]. Although ELITE is "free to select its legal team as it saw fit prior to the constitution of the Tribunal", the addition of Dr. Mercado would "amend the composition of its legal team in such a fashion as to imperil the Tribunal's status or legitimacy" [*HRVATSKA (2008) ICSID TRIBUNAL, PARA. 26*]. Thus, CONTROL SYSTEMS asserts that the addition of Dr. Mercado was a calculated move on ELITE's part to influence the Tribunal's ability to judge fairly or exercise independent judgment in these circumstances.

(3) Additionally, allowing Dr. Mercado to serve on *ELITE*'s legal team would constitute a breach of Article 18 Model Law

12. ELITE submits that "It is of fundamental importance that parties are free to select their representatives" [*CLAIMANT'S MEMORANDUM, PARA. 29*] under Article 20 CIETAC Rules, which states that, "A party may be represented by its … representative(s) in handling matters relating to the arbitration". However, CONTROL SYSTEMS asserts that Article 20 CIETAC Rules does not provide parties with an unlimited scope to select counsel. This is because the parties' ability to present their case is subject to Article 18 Model Law.

13. Article 18 Model Law stipulates that, "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case". Article 18 establishes "the

requirement of procedural fairness as the indispensable foundation of a system of justice" [*HOLTZMANN (1995), 550; KAWHARU (2007), 507*] and is of "central importance for the entire arbitral process" [*KLOTZEL (2006), 28; NEWMAN/HILL (2008), 341; SLATE/LIEBERMAN (2005), 86*]. Although the right to "be heard" is a "fundamental rule of procedure" [*FRAPORT V. PHILIPPINES (2010) ICSID TRIBUNAL, PARA. 197; MINE V. GUINEA (1989) ICSID TRIBUNAL, 87*], it is limited by the 'principle of equality' contained in Article 18 Model Law. This principle of equality "must not be abused" by a Tribunal to benefit a party and disadvantage the opposing party [*REPORT ON THE ARBITRATION BILL (1996), PARA. 184; ALVAREZ (2006), 689; TEKNI-PLEX INC V. MEYNER AND LANDIS (1995) SUPREME COURT OF NEW YORK, 326; THOMAS (1990), 576-577*]. Relevantly, the principle of equality is breached if the right to appoint counsel is abused. In the circumstances of this case, the addition of Dr. Mercado constitutes an abuse of process, violating the principle of equality and, consequently, the Tribunal must not allow Dr. Mercado to join ELITE's legal team.

14. Additionally, courts have also protected a parties' right to choose their own counsel, but such a right has been limited by the courts' "duty to protect the integrity" of the judicial system through counter-balancing interests of public policy [*MATTER OF ABRAMS (1984) SECOND DISTRICT COURT OF NEW YORK, 197*]. Allowing ELITE to select Dr. Mercado would be a breach of the equal and fair treatment of parties [*POPE & TALBOT V. CANADA (2000) AD HOC TRIBUNAL, PARA. 9*], as the addition of Dr. Mercado would provide ELITE with an "unfair tactical advantage" [*SAULNY (2004), PARA. 4*]. This is why the "right to counsel" has been recognised to be the "right to effective assistance of counsel" [*MCMANN (1970) SUPREME COURT OF THE UNITED STATES, PARA. 771*]. Hence, it is not necessary for Dr. Mercado to serve as a member of ELITE's legal team because, presumably, a suitable replacement can be found who is equally effective and does not affect the independence of Professor Presiding Arbitrator. Therefore, Dr. Mercado should be removed from ELITE's legal team.

(B) CONTROL SYSTEMS HAS THE RIGHT TO RESERVE A CONDITIONAL CHALLENGE AGAINST PROFESSOR PRESIDING ARBITRATOR

15. ELITE has contended that CONTROL SYSTEMS's "mere 'reservation' of its right to challenge … has to be understood as an announcement warning of an eventual recourse to that right at a later stage of the proceedings" but does not constitute an "actual exercise of the right to challenge Prof. Presiding Arbitrator" [*CLAIMANT'S MEMORANDUM, PARA. 51*]. However, at law, a party to arbitration proceedings has a right to reserve a conditional challenge to an

arbitrator [*GHANA V. TELEKOM MALAYSIA BERHAD (2004) DISTRICT COURT OF THE HAGUE, 193*], provided the challenge is raised during the proceedings [*BORN (2011), 1106*], as happened in this case [*STATEMENT OF DEFENSE, PARA. 23*]. Moreover, ELITE's argument that the 'reservation' "wording … cannot be interpreted as the actual exercise of the right" [*CLAIMANT'S MEMORANDUM, PARA. 51*] is flawed, as the reservation was made in "unambiguous language" [*LODGE NO. 1777 V. FANSTEEL INC (1990) COURT OF APPEALS OF THE UNITED STATES OF AMERICA, SEVENTH CIRCUIT, PARA. 29; ISLAND TERRITORY OF CURAÇAO V. SOLITRON DEVICES INC (1973) DISTRICT COURT OF NEW YORK, PARA. 8*], thereby fulfilling its "affirmative obligation" of communicating its clear intention to challenge the independence of Professor Presiding Arbitrator [*AVRAHAM V. SHIGUR EXPRESS LTD (1991) DISTRICT COURT OF NEW YORK, 12*].

16. ELITE also contends that, "The 'reservation' of the right to challenge does not amount to a timely and effective exercise of the right to challenge Prof. Presiding Arbitrator in accordance with Art. 30 CIETAC Rules" [*CLAIMANT'S MEMORANDUM, PARA. 51*]. In particular, as CONTROL SYSTEMS "omitted to challenge Prof. Presiding Arbitrator" [*CLAIMANT'S MEMORANDUM, PARA. 52*] within fifteen days after receiving knowledge of the addition of Dr. Mercado on 30 August 2011 [*PROCEDURAL ORDER NO. 2, CLARIFICATION 29*] as required by Article 13(2) Model Law [*CLAIMANT'S MEMORANDUM, PARA. 52*], it should not be allowed to reserve a conditional challenge against Professor Presiding Arbitrator. However, in accordance with Article 30(3) CIETAC Rules, whilst CONTROL SYSTEMS "may challenge an arbitrator … within fifteen (15) days", it has until the conclusion of the "last oral hearing" to submit its challenge subject to "a final decision" by the Chairman of CIETAC under Article 30(6) CIETAC Rules.

17. In addition, CONTROL SYSTEMS's reservation of its conditional challenge to Professor Presiding Arbitrator also does not constitute a waiver of "its right to object" under Article 10 CIETAC Rules. Under Article 10, which is consistent with Article 4 Model Law, the right to reserve a challenge to Professor Presiding Arbitrator was made "promptly" [*SUEZ AND OTHERS V. ARGENTINA (2007) ICSID TRIBUNAL, PARAS. 23-24; ASM SHIPPING LTD V. TTMI LTD (2007) HIGH COURT OF ENGLAND AND WALES, PARA. 51; CEMEX V. VENEZUELA (2009) ICSID TRIBUNAL, PARAS. 35-37; GPS MARINE CONTRACTORS LTD V. RINGWAY INFRASTRUCTURE SERVICES LTD (2010) HIGH COURT OF ENGLAND AND WALES, PARA. 42*], and without "undue delay" [*CLOUT CASE 442 (2000) OBERLANDESGERICHT KÖLN, 255; SLATER/BAMBERGER (2009), 25-26; US*

DEPARTMENT OF LABOR V. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (2011) FLRA, 282]. Indeed, the Statement of Defense, which reserved the right to a conditional challenge to Professor Presiding Arbitrator, was sent within the prescribed time-limit of 15 days under Article 30(3) CIETAC Rules [*LETTER OF 2 SEPTEMBER 2011, MOOT PROBLEM, 36*].

18. Further, ELITE's claim that "the right to challenge may only be preserved during the period of time expressly provided for" is questionable in the light of *AVAX V. TECNIMONT*, which has widened the scope of the right to reserve a challenge [*CLAIMANT'S MEMORANDUM, PARA. 53*]. Since CONTROL SYSTEMS "continued with the arbitration whilst protesting" [*AVAX V. TECNIMONT (2011) REIMS COURT OF APPEAL, 2-3; FIRST OPTIONS OF CHICAGO V. KAPLAN (1995) SUPREME COURT OF THE UNITED STATES, 946*], a "failure to challenge" within the time limit does "not prevent" it from conditionally challenging Professor Presiding Arbitrator [*FRANC-MENGET (2011), PARA. 8; AVAX V. TECNIMONT (2011) REIMS COURT OF APPEAL, 4*]. Therefore, the right to reserve a conditional challenge to Professor Presiding Arbitrator should be accepted by the Tribunal.

(C) A CHALLENGE TO PROFESSOR PRESIDING ARBITRATOR'S INDEPENDENCE WILL SUCCEED

19. In its Memorandum, ELITE contends that "Prof. Presiding Arbitrator is neither biased with respect to the issues in the dispute nor predisposed towards the parties" [*CLAIMANT'S MEMORANDUM, PARA. 40*]. However, in reply CONTROL SYSTEMS argues that a challenge to Professor Presiding Arbitrator will succeed because (1) Professor Presiding Arbitrator has breached the CIETAC Rules by failing to disclose his relationship with Dr. Mercado to CIETAC, and (2) the relationship between Professor Presiding Arbitrator and Dr. Mercado adversely affects the independence of Professor Presiding Arbitrator.

(1) Professor Presiding Arbitrator has breached the CIETAC Rules by failing to disclose his relationship with Dr. Mercado to CIETAC

20. ELITE has accepted that the CIETAC Rules "impose the obligation to inform the parties and the CIETAC as soon as the arbitrator knows that he might lack qualification, impartiality or independence" [*CLAIMANT'S MEMORANDUM, PARA. 56*]. In CONTROL SYSTEMS's view, Professor Presiding Arbitrator failed to fulfil this obligation. Professor Presiding Arbitrator accepted the application of the CIETAC Rules and the CIETAC Ethical Rules for Arbitrators

(**CIETAC Ethical Rules**) in this arbitration [*LETTER OF 22 AUGUST 2011, MOOT PROBLEM, 30; PROCEDURAL ORDER NO. 2, CLARIFICATION 36*]. As such, under Rule 1 CIETAC Ethical Rules, arbitrators should "fairly and impartially try cases on their facts in accordance with the laws and by reference to international practice". As the CIETAC Ethical Rules were influenced by the IBA Guidelines [*LUTTRELL (2009), 198*], Professor Presiding Arbitrator is required to be "impartial, independent, competent, diligent and discreet" [*INTRODUCTORY NOTE, IBA ETHICAL RULES*]. Therefore, Professor Presiding Arbitrator is subject to a duty of disclosure [*IBA ETHICAL RULES, PARA. 4.1*] which continues "throughout the arbitral proceedings" [*IBA ETHICAL RULES, PARA. 4.3; ARTICLE 29(2) CIETAC RULES*].

21. Rule 5 CIETAC Ethical Rules states: "If the arbitrators think that they have an interest or other relationships in a case which may affect a fair trial of the case, the arbitrators should disclose to the Arbitration Commission their relationship with the parties, such as being a relative; debt, property and monetary relationships; business relationships and relationships in commercial co-operation etc., and should disqualify themselves". This indicates that the list of relationships is non-exhaustive. Therefore, the fact that Dr. Mercado is the "godmother" [*STATEMENT OF DEFENSE, PARA. 21; PROCEDURAL ORDER NO. 2, CLARIFICATION 32*] of Professor Presiding Arbitrator's youngest child should have been disclosed as it may affect the fair trial of the case. Also, Dr. Mercado has a professional relationship with Professor Presiding Arbitrator, since both work at Danubia National University [*STATEMENT OF DEFENSE, PARA. 18*]. Therefore, there is clearly a relationship, which may affect the Tribunal, and Professor Presiding Arbitrator should "disqualify" himself in accordance with Rule 5 CIETAC Ethical Rules.

22. Moreover, Professor Presiding Arbitrator discovered the addition of Dr. Mercado to ELITE's legal team "on 12 September 2011 when he received the statement of defense" [*PROCEDURAL ORDER NO. 2, CLARIFICATION 35*]. Under Article 29(1) CIETAC Rules, an arbitrator nominated by the parties must disclose in writing any circumstances "likely to give rise to justifiable doubts as to his/her impartiality or independence". Further, "If circumstances that need to be disclosed arise during the arbitration proceedings, the arbitrator shall promptly disclose such circumstances in writing to CIETAC" [*ARTICLE 29(2), CIETAC RULES*]. This duty to disclose is not "mere formalism", as ELITE states, but a legal duty imposed on the arbitrator regardless of whether the information is "already shared by the parties and CIETAC" [*CLAIMANT'S MEMORANDUM, PARA. 57*]. For it to be otherwise,

arbitrators could subjectively decide when to reveal any conflict of interest rendering the disclosure rules useless, hence, arbitrators must "fulfil their obligation of disclosure" [*AVAX V. TECNIMONT (2011) REIMS COURT OF APPEAL, 8*]. As a result, Professor Presiding Arbitrator breached his obligation under the CIETAC Rules when he failed to disclose in writing to CIETAC the possible conflict of interest caused by the addition of Dr. Mercado to ELITE's legal team.

(2) The relationship between Professor Presiding Arbitrator and Dr. Mercado adversely affects the independence of Professor Presiding Arbitrator

23. Alternatively, if the Tribunal were to entertain a challenge to the independence of Professor Presiding Arbitrator, it should apply the IBA Guidelines as these have been widely accepted as the standard for determining independence and impartiality in international arbitrations [*MCLLWRATH/SAVAGE (2010), PARA. 4-062; MOENS (2009), 92; REDFERN/HUNTER (2009), PARA. 4.89; ROZAS (2010), 417*]. Accordingly, the Tribunal, although not formally bound by the IBA Guidelines, should apply this standard to ascertain the existence of a conflict of interest. In this context, CONTROL SYSTEMS argues that (a) the working relationship and (b) the personal relationship between Professor Presiding Arbitrator and Dr. Mercado negatively affect the independence of Professor Presiding Arbitrator.

(a) The working relationship between Professor Presiding Arbitrator and Dr. Mercado negatively affects the independence of Professor Presiding Arbitrator

24. Professor Presiding Arbitrator and Dr. Mercado both work at Danubia National University [*STATEMENT OF DEFENSE, PARA. 18*]. Therefore, according to the IBA Guidelines, the working relationship between Dr. Mercado and Professor Presiding Arbitrator, which ELITE argues creates "no conflict of interest" [*CLAIMANT'S MEMORANDUM, PARA. 45*], may be challenged under paragraph 3.4.2 of the Orange List where "The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity". Parties who share offices may be challenged [*LAKER AIRWAYS V. FLS AEROSPACE (1999) HIGH COURT OF ENGLAND AND WALES, 388; MERIJAN (2000), 64; PPG INDUSTRIES INC V. PILKINGTON PLC (1989) HIGH COURT OF ENGLAND AND WALES*], but ELITE contends that this should not be "in the context of a university where different opinions are expressed in scientific discourse" [*CLAIMANT'S MEMORANDUM, PARA. 45*].

25. However, since Professor Presiding Arbitrator and Dr. Mercado both work in the same university and the same faculty, it is likely that a professional relationship exists under the Orange List [*BVM ÉPELEM KFT (2010) SUPREME COURT OF HUNGARY, PARA. 9*]. Moreover, the Court of Genoa found that, where an arbitrator and one of the counsel share the same "premises", and had a "personal relationship" which involved the grandfather of the counsel, this "would jeopardize the arbitrator's independence" and would affect his impartiality [*CRUBO V. SOC ELCI (2006) TRIBUNALE DI GENOA, PARA. 2*]. Therefore, this relationship is in breach of the Orange List of the IBA Guidelines, and creates a conflict of interest. Hence, the Tribunal should remove Professor Presiding Arbitrator in accordance with Article 30(6) CIETAC Rules.

(b) The personal relationship between Professor Presiding Arbitrator and Dr. Mercado negatively affects the independence of Professor Presiding Arbitrator

26. ELITE argues that "Dr. Mercado's role as the godmother of the youngest of Prof. Presiding Arbitrator's four children … does not affect his independence" [*CLAIMANT'S MEMORANDUM, PARA. 47*]. Dr. Mercado is a friend of Professor Presiding Arbitrator's wife and, as such, Dr. Mercado was invited to be the godmother to the youngest child of Professor Presiding Arbitrator [*STATEMENT OF DEFENSE, PARA. 21; PROCEDURAL ORDER NO. 2, CLARIFICATION 32*]. Following the IBA Guidelines, this personal relationship may invoke grounds of challenge under paragraph 2.3.8 of the "Waivable Red List", where "The arbitrator has a close family relationship with … a counsel representing a party" [*GENERAL STANDARD 4(C), IBA GUIDELINES*].

27. CONTROL SYSTEMS argues that the "close family" relationship between Professor Presiding Arbitrator and Dr. Mercado affects the independence of the Tribunal. The IBA Guidelines define a "close family member" as "a spouse, sibling, child, parent or life partner" [*NOTE 4, IBA GUIDELINES*]. Although "A party's counsel being the godmother of an arbitrator's child is an indirect connection" [*CLAIMANT'S MEMORANDUM, PARA. 47*], courts have held that the scope of "close family member" extends to personal relationships, including a stepfather [*MILAN V. MEDIA (1999) COURT OF APPEAL OF PARIS, 382*], as well as a romantic liaison [*BORN (2011), 682*]. Therefore, the godmother relationship is likely to create a conflict of interest. Further, the relationship between Professor Presiding Arbitrator's wife and Dr. Mercado may also create a conflict since arbitrators have been removed due to their own

wives' relationship with the litigating parties [*BGE 92 I 271 (1966) FEDERAL TRIBUNAL OF SWITZERLAND, PARA. 2A; VOSER/GOLA (2004), 44*]. The friendship between Professor Presiding Arbitrator's wife and Dr. Mercado would clearly create a similar conflict. Therefore, the personal relationship between Professor Presiding Arbitrator and Dr. Mercado would be sufficient to raise doubts as to the independence of Professor Presiding Arbitrator.

(D) THE CONTRACT BETWEEN *ELITE* AND MR. GOLDRICH DOES NOT COME WITHIN THE JURISDICTION OF THE TRIBUNAL

28. In addition, the Tribunal also lacks jurisdiction in the hearing of the success fee payment. CONTROL SYSTEMS was contractually obliged "to supply, install and configure the master control system for the M/S Vis" by 12 November 2010 [*CLAIMANT'S EXHIBIT NO. 1*]. As the installation, configuration and verification of the control system was delayed, ELITE chartered another yacht, the M/S Pacifica Star, owned by Mr. Goldrich [*APPLICATION FOR ARBITRATION, PARA. 18; RESPONDENTS EXHIBIT NO. 1*]. CONTROL SYSTEMS contends that, since ELITE's yacht broker engaged in bribery with the personal assistant of Mr. Goldrich [*RESPONDENT'S EXHIBIT NO. 1; PROCEDURAL ORDER NO. 2, CLARIFICATION 26*], the entire lease contract is tainted with corruption. In CONTROL SYSTEMS's view, the "arbitral tribunal should rule that it has no authority to consider the contract for the lease of the M/S Pacifica Star or its consequences" [*STATEMENT OF DEFENSE, PARA. 15*], including ELITE's payment of US$50,000 as the yacht broker's success fee. CONTROL SYSTEMS argues that the payment of the success fee, which arises out of the contract between it and Mr. Goldrich does not come within the jurisdiction of the Tribunal because the lease contract for the rental of the M/S Pacifica Star, being tainted with corruption, is not 'arbitrable'.

29. The contract between ELITE and CONTROL SYSTEMS contained an arbitration clause, Clause 15.1 [*CLAIMANT'S EXHIBIT NO. 1*], the binding nature of which is not contested by CONTROL SYSTEMS [*STATEMENT OF DEFENSE, PARA. 2*]. Clause 15.1 stipulates that "Any dispute arising from or in connection with this Contract shall be submitted … for arbitration". Moreover, in accordance with Article 6(1) CIETAC Rules, CIETAC has delegated the power to determine whether the Tribunal has jurisdiction to the tribunal itself [*LETTER OF 9 SEPTEMBER 2011, MOOT PROBLEM, 43*]. Hence, the Tribunal has competence to rule on its jurisdiction, consistent with Article 16(1) Model Law, to hear the success fee damages as this dispute comes within the scope of the arbitration agreement.

30. Although the disputes relating to the lease contract for the rental of the M/S Pacifica Star and the payment of the US$50,000 success fee come within the scope of the arbitration agreement, thereby activating the Tribunal's jurisdiction, it is still necessary to determine whether issues involving bribery and corruption are "capable of resolution by arbitration" [*FORTIER (2005), 270; BERGER (2007), 310*]. Indeed, CONTROL SYSTEMS's request that the Tribunal "should rule that it has no authority to consider the contract for the lease of the M/S Pacifica Star" is based on its claim that the "entire lease contract is tainted by … corruption" [*STATEMENT OF DEFENSE, PARA. 15*], thereby affecting the 'arbitrability' of disputes arising under that contract.

31. ELITE argues that the success fee damages are arbitrable because "Corruption cannot be compared to drug-trafficking" as it is not "universally condemned" [*CLAIMANT'S MEMORANDUM, PARA. 21*]. However, ELITE's contention is misconceived as the authority on which it relies, *WESTACRE V. JUGOIMPORT*, affirms the position that "corruption … in international commerce should invite the attention of … public policy", even for those contracts "which are not performed with the jurisdiction of the English courts" [*WESTACRE V. JUGOIMPORT (1999) SUPREME COURT OF JUDICATURE OF LONDON, 775*]. Moreover, when comparing statistical data between the number of people adversely affected by bribery and drug abuse, it is clear that bribery is far more rampant as it affects 25% of the global population [*GLOBAL CORRUPTION BAROMETER REPORT (2010), 12*] when compared to only 3% for drug abuse [*WORLD DRUG REPORT (2011), 22*]. Clearly, bribery is a "widespread phenomenon in international ... transactions" [*PREAMBLE, OECD CONVENTION (2011); WEE (2012), 362*] and it is a matter of great importance in international public policy. Thus, instead of allowing "Arbitral tribunals ... to consider disputes involving illegal actions" [*CLAIMANT'S MEMORANDUM, PARA. 22*] national courts should have jurisdiction over the success fee damages.

32. National courts are more competent in resolving issues of bribery since the aim of arbitration is "to function as an efficient, inexpensive, and expeditious means for dispute resolution" [*ALEXANDER V. GARDNER-DENVER (1974) UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, 58*]. This same characteristic, however, makes arbitration an inappropriate forum for the resolution of the success fee tainted by bribery since the factfinding process in arbitration is "not equivalent to judicial factfinding" [*ALEXANDER V. GARDNER-DENVER (1974)*

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, 57]. Arbitration processes, which are "comparatively inferior to judicial processes", do not have the same attributes and resources needed to determine allegations of bribery since "the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony … under oath, are often severely limited or unavailable" [*ALEXANDER V. GARDNER-DENVER (1974) UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, 57-58; LEW/MISTELIS/KRÖLL (2003), 9-79*]. Even ELITE agrees that, since "an arbitral tribunal depends on a state's enforcement apparatus", this may "provoke difficulties in gathering evidence" [*CLAIMANT'S MEMORANDUM, PARA. 22*].

33. As a result, arbitral tribunals have "evidenced considerable reluctance to resolve matters involving claims of corruption or bribery" [*BORN (2009), 804; MOSES (2008), 31*]. One of the most well-known decisions supporting this position is the ICC Case 1110 of 1963 in which Judge Lagergren declined jurisdiction on the ground that corruption claims are non-arbitrable. According to Judge Lagergren, "contracts which seriously violate ... international public policy .... are invalid or at least unenforceable and … they cannot be sanctioned by courts or arbitrators", hence "jurisdiction must be declined" [*ICC CASE 1110 (1963), 51, 52*]. A decision by the Supreme Court of Pakistan re-affirmed Judge Lagergren's views. The Supreme Court in dealing with allegations of corruption stated that, where a "prima facie basis for further probe" exists, then "according to public policy such matters ... require finding about alleged criminality" and "are not referable to Arbitration" [*HUB POWER V. PAKISTAN (2000) SUPREME COURT OF PAKISTAN, 458*].

34. ELITE argues that, if such a position were to be adopted, "arbitrators would be consistently compelled to deny their jurisdiction" [*CLAIMANT'S MEMORANDUM, PARA. 22*]. In contrast, CONTROL SYSTEMS argues that the underlying rationale of settling disputes involving elements of criminality in state courts is that they have "greater means of investigation" and, by recognising the limitations of arbitration, state courts "can better serve the public interest in prosecuting those acts" [*LEW/MISTELS/KRÖLL (2003), 9-79*]. Moreover, it would be "against public policy", since arbitration is confined to settling disputes involving "individuals over private matters as to which they alone are concerned" [*BORN (2009), 789*]. Thus, by arbitrating the success fee damages ELITE would be settling the allegation of bribery "as a private question" which is "forbidden" [*BORN (2009), 790*].

35. In conclusion, the Tribunal cannot hear and decide allegations of bribery arising from the payment by ELITE's broker of part of the success fee to the personal assistant of Mr. Goldrich. As a result, the Tribunal should decline jurisdiction in arbitrating issues relating to the payment of the success fee, as it is tainted by bribery and corruption.

(E) ANY AWARD RENDERED BY THIS TRIBUNAL WILL NOT BE ENFORCEABLE UNDER THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

36. ELITE argues that Dr. Mercado must be added to its legal team, based on its "right to be heard" [*CLAIMANT'S MEMORANDUM, PARA. 29*]. CONTROL SYSTEMS asserts that any award rendered by the Tribunal, with Dr. Mercado remaining a member of ELITE's legal team, will be unenforceable for two main reasons. First, Article V(1)(b) New York Convention states that recognition and enforcement of an award may be refused if a party was "unable to present his case". Hence, as ELITE has not selected Dr. Mercado in 'good faith', CONTROL SYSTEMS's ability to present its case with equality would be impeded and the award will be unenforceable. Second, Article V(1)(d) stipulates that the award may be refused, if a tribunal was improperly constituted. By failing to remove Dr. Mercado, the Tribunal's impartiality and independence are compromised and therefore, any award rendered in this case by this Tribunal will be unenforceable.

37. In addition to the issues of enforcement raised by the selection of Dr. Mercado, CONTROL SYSTEMS contends that any award made on the success fee would also be unenforceable. Article V(2)(b) of the New York Convention provides that an award may be refused if the relevant court finds that "The recognition or enforcement of the award would be contrary to the public policy of that country". Although the national public policy requirement under the New York Convention may differ from international public policy, bribery is "generally condemned throughout the world" [*KREINDLER (2003), 245*]. For that reason, enforcement will be refused on the ground that the award would be contrary to international public policy. [*EDF (SERVICES) LTD V. ROMANIA (2009) ICSID TRIBUNAL, PARA. 221*].

38. Notwithstanding the pro-enforcement bias of the New York Convention [*GILLIES (2004), 9; PARSONS V. SOCIÉTÉ (1974) UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, 974; UGANDA TELECOM (2011) FEDERAL COURT OF AUSTRALIA, PARA. 129*] and ELITE's assertion that "The award ... is not opposed to public policy objections" [*CLAIMANT'S MEMORANDUM, PARA.*

148], circumstantial evidence is sufficient [*HIBER/PAVIĆ (2008), 468; ICC CASE 4145 (1984), 102; SCHERER (2002), 31*] to satisfy CONTROL SYSTEMS's request to refuse enforcement of the award on the ground of its opposition to international public policy [*ILA FINAL REPORT (2002), 11*].

39. The Technology Reporter and Convention Business News which are "to be taken as correct without the need for further confirmation" [*PROCEDURAL ORDER NO. 2, CLARIFICATION 41*] are proof that the yacht broker and Mr. Goldrich's personal assistant engaged in bribery using part of the success fee paid by ELITE. Moreover, according to Article 1453 of the Criminal Code of Pacifica [*RESPONDENT'S EXHIBIT NO. 2*], which CONTROL SYSTEMS asserts should be applied in determining the allegation of bribery, the personal assistant's act of receiving a portion of the money from the success fee constitutes a criminal act. Although there is no direct evidence, the evidence presented by CONTROL SYSTEMS is enough to taint any award made by the Tribunal on the success fee, justifying the refusal to enforce the award.

40. As a result, the bribery committed by the yacht broker has affected ELITE's claim of success fee damages. Hence, the enforcement challenge based on the ground of public policy should be accepted. There is a risk of non-enforcement of the arbitral award under the New York Convention in relation to the success fee damages arising out of the contract between ELITE and Mr. Goldrich.

CONCLUSION: The Tribunal is entitled to exclude counsel using its 'inherent' power because the addition of Dr. Mercado to ELITE's legal team affects the independence and impartiality of Professor Presiding Arbitrator. Moreover, CONTROL SYSTEMS can reserve the right to a conditional challenge to Professor Presiding Arbitrator as he is not independent. Additionally, the allegations of bribery made in connection with the payment of the success fee categorise the disputes arising thereunder as 'non-arbitrable'. Hence, any award rendered by the Tribunal will be unenforceable under the New York Convention.

II. *CONTROL SYSTEMS* IS EXEMPTED FROM LIABILITY UNDER ARTICLE 79 OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

41. CONTROL SYSTEMS asserts that the United Nations Convention on Contracts for the International Sale of Goods (**CISG**) is the governing law for the substantive dispute arising

out of the contract between ELITE and CONTROL SYSTEMS. Article 1(1) CISG provides that the CISG "applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States". In this case, ELITE and CONTROL SYSTEMS are parties whose places of business are in Mediterraneo and Equatoriana respectively [*APPLICATION FOR ARBITRATION, PARAS. 1, 2*]. Further, both Mediterraneo and Equatoriana are parties to the CISG [*APPLICATION FOR ARBITRATION, PARA. 20*]. Hence, the CISG governs the contract concluded between ELITE and CONTROL SYSTEMS.

42. ELITE signed a contract with CONTROL SYSTEMS for installing and configuring the master control system [*CLAIMANT'S EXHIBIT NO. 1; APPLICATION FOR ARBITRATION, PARA. 8*]. The core element in the overall master control system is "a series of semi-configurable processing units" manufactured by Oceania Specialty Devices (**SPECIALTY DEVICES**) [*APPLICATION FOR ARBITRATION, PARA. 8*]. SPECIALTY DEVICES "had designed the processing units to use the D-28 "super chip" recently announced by Atlantis High Performance Chips" (**HIGH PERFORMANCE**) [*APPLICATION FOR ARBITRATION, PARA. 9*]. In the current case, ELITE has argued that CONTROL SYSTEMS "cannot rely on exemption" under Article 79(1) CISG; therefore, it "is liable for USD 670,600 in damages" [*CLAIMANT'S MEMORANDUM, PARAS. 100, 101*]. In response, CONTROL SYSTEMS asserts that (A) CONTROL SYSTEMS's late performance is not a breach of this contract; (B) even if there is a breach, CONTROL SYSTEMS complied with the requirements of Article 79(1) CISG; (C) SPECIALTY DEVICES comes within Article 79(2) CISG and satisfies all the requirements of Article 79(1) CISG; (D) HIGH PERFORMANCE's late delivery comes within Article 79(2) CISG and exempted CONTROL SYSTEMS from its liability under Article 79(1) and (E) further, CONTROL SYSTEMS complied with the requirements of Article 79(4) CISG.

(A) *CONTROL SYSTEMS'S* LATE PERFORMANCE IS NOT A BREACH OF THIS CONTRACT

43. The contract between ELITE and CONTROL SYSTEMS concluded on 26 May 2010 required that the "Installation and configuration of the control system" were to be "completed by 12 November 2010" [*CLAIMANT'S EXHIBIT NO. 1*]. Due to a fire in HIGH PERFORMANCE's facility, the installation of the control system could only be "completed on 11 March 2011" [*APPLICATION FOR ARBITRATION, PARA. 16*]. Immediately after the fire, CONTROL SYSTEMS notified ELITE of the accident by telephone and writing [*APPLICATION FOR ARBITRATION, PARA. 12*]. ELITE has contended that CONTROL SYSTEMS breached the contractual date of delivery through its "late performance" [*CLAIMANT'S MEMORANDUM, PARA. 100*]. Although Article 33(a) CISG states that, "The seller must deliver the goods … if a date is fixed by or determinable from the contract, on that date", CONTROL SYSTEMS asserts that ELITE accepted the new date of delivery in accordance with Article 18(1) CISG. Under Article 18, "conduct of the offeree indicating assent to an offer is an acceptance". Presently, CONTROL SYSTEMS made an offer to ELITE through writing that the "installation on the M/S Vis cannot be expected before the middle of January 2011" [*CLAIMANT'S EXHIBIT NO. 2*]. Rather than rejecting CONTROL SYSTEMS's offer of a new date of delivery, ELITE accepted the offer through its conduct which amounts to an "adequate acceptance" [*GOLDEN VALLEY GRAPE JUICE (2010) DISTRICT COURT OF CALIFORNIA, PARA. C*].

44. When CONTROL SYSTEMS finished the refurbishment of the M/S Vis on 11 March 2011 [*APPLICATION FOR ARBITRATION, PARA. 16*], ELITE made no mention of the "significant delay in the installation" of the master control system until 9 April 2011, almost a month after the completion of the contract [*CLAIMANT'S EXHIBIT NO. 4*]. At law, "taking delivery of … goods" constitutes conduct "indicating assent to the offer and … amounted … to an implied acceptance" [*CLOUT CASE 292 (1993) OBERLANDESGERICHT SAARBRÜCKEN, PARA. 3*]. Moreover, between 11 March 2011, when the "Installation, configuration and verification" of the M/S Vis was completed by CONTROL SYSTEMS and the "Payment of the full contract price … was made by Elite to Control Systems … on 21 March 2011" [*APPLICATION FOR ARBITRATION, PARA. 16*], there was no objection from ELITE regarding the late delivery of the master control system, thereby accepting the offer "unconditionally" [*"FROZEN BACON CASE" (1992) OBERLANDESGERICHT HAMM, PARA. A*]. As a result, CONTROL SYSTEMS asserts that ELITE's "conduct" indicates "assent" to the offer of a new date of delivery under Article 18(1) CISG.

(B) EVEN IF THERE IS A BREACH, *CONTROL SYSTEMS* COMPLIED WITH THE REQUIREMENTS OF ARTICLE 79(1) CISG

45. CONTROL SYSTEMS argues that even if there is a breach of contract, it is exempted from liability under Article 79(1) CISG because (1) CONTROL SYSTEMS's late performance was caused by the failure to receive the processing units on time from SPECIALTY DEVICES which constitutes an impediment beyond control; (2) CONTROL SYSTEMS could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract; further, (3) CONTROL SYSTEMS could not reasonably be expected to have avoided or overcome the impediment or its consequences.

(1) CONTROL SYSTEMS's late performance was caused by the failure to receive the processing units on time from SPECIALTY DEVICES which constitutes an impediment beyond control

46. ELITE, relying on Article 79 CISG, has argued that the failure to deliver "was an impediment under the control of RESPONDENT" [*CLAIMANT'S MEMORANDUM, PARA. 102*]. The term "impediment" in Article 79(1) CISG, which "relieves a party from paying damages only if the breach of contract was due to an impediment beyond its control" [*SCHWENZER (2008), 712; HONNOLD (2009), PARA. 423.4; TALLON (1987), PARA. 2.6.2*], denotes an "obstacle" which is "an external barrier to performance" [*NICHOLAS (1984), 5-11; FLAMBOURAS (2002), PARA. 4*]. SPECIALTY DEVICES's failure to deliver the processing units on time constitutes such an 'external barrier' preventing CONTROL SYSTEMS from completing the installation and configuration of the control system by 12 November 2010. This is because SPECIALTY DEVICES is a "supplier" who comes within the meaning of "third person" under Article 79(2) CISG [*CLAIMANT'S MEMORANDUM, PARA. 113*], whom CONTROL SYSTEMS does not control. Indeed, the "third person", contemplated in Article 79(2) is a third-party supplier who enjoys a "monopoly" [*SCHLECHTRIEM (1986), 103*]. SPECIALTY DEVICES enjoyed a monopoly since it is the only supplier who is capable of designing "the processing units to use the D-28 "super chips"" [*APPLICATION FOR ARBITRATION, PARA. 9*], which is why CONTROL SYSTEMS "has no control over … the supplier or its performance" [*CISG ADVISORY COUNCIL OPINION NO. 7 (2007), COMMENTS 18*]. Therefore, the failure to receive the processing units from SPECIALTY DEVICES was an external event that bars CONTROL SYSTEMS's performance.

47. ELITE has claimed that "Procurement risks generally do not lie outside the seller's sphere of risk" [*CLAIMANT'S MEMORANDUM, PARA. 102*]. However, a seller will only "be deemed "in control" of his/her own business and financial condition" or "internal "excuses" connected with business operation" [*LIU (2005), PARA. 4.3; SCHLECHTRIEM/SCHWENZER (2010), 1067*]. Since SPECIALTY DEVICES is a third-party supplier, its business is not connected with CONTROL SYSTEMS's business operation. Therefore, CONTROL SYSTEMS is not deemed to be in control of SPECIALTY DEVICES. As a consequence, CONTROL SYSTEMS's failure to perform the contract on 12 November 2010 was due to SPECIALITY DEVICES's late delivery, which was an impediment outside CONTROL SYSTEMS's "sphere of control" [*SCHLECHTRIEM/SCHWENZER (2010), 1067; "VINE WAX CASE" (1999) BUNDESGERICHTSHOF, GERMANY, PARA. II 2*]. Therefore, the "inability to control" [*STOLL (1998),* 603] events outside CONTROL SYSTEMS's sphere of control leads to its exemption under Article 79 CISG.

48. ELITE has also argued that "the choice of supplier is in the seller's sphere of risk" [*CLAIMANT'S MEMORANDUM, PARA. 102*]. However, ELITE's reliance on the *EGYPTIAN COTTON CASE* and *WARM ROLLED STEEL PLATES CASE* is erroneous, as the two cases involved the risk of increasing prices in the products, but not the risk of choosing the supplier [*"EGYPTIAN COTTON CASE" (2000) SCHWEIZERISCHES BUNDESGERICHT, PARA. A; "WARM ROLLED STEEL PLATES CASE" (1994) CIETAC, PARA. 4*]. Since CONTROL SYSTEMS could not choose its supplier as SPECIALTY DEVICES enjoyed a monopoly, CONTROL SYSTEMS, unlike the sellers of the two cases, could not "order the goods from other factories" [*"WARM ROLLED STEEL PLATES CASE" (1994) CIETAC, PARA. 23*].

(2) CONTROL SYSTEMS could not reasonably be expected to have taken the impediment into account at the time of conclusion of the contract

49. ELITE has contended that CONTROL SYSTEMS is "responsible for impediments he could reasonably … have taken … into account at the time of the conclusion of the contract" [*CLAIMANT'S MEMORANDUM, PARA. 107*]. However, CONTROL SYSTEMS asserts that it is exempted from liability since SPECIALTY DEVICES's failure to deliver the D-28 chips on time was "reasonably unforeseeable" for two reasons [*TALLON (1987), 2.6.3; KAUR (2010), PARA. 2; SOUTHERINGTON (2001), PARA. 2.3*]. First, there is no indication that ELITE and CONTROL SYSTEMS had a previous business relationship and there are no previous instances of failing to receive goods between these two parties. Second, although "fires … can be expected to occur

again" [*SECRETARIAT COMMENTARY ARTICLE 79 (1978), PARA. 5*], the fire in HIGH PERFORMANCE's facility was not an ordinary fire "started by a short circuit in an electrical installation" [*PROCEDURAL ORDER NO. 2, CLARIFICATION NO. 8*]. The "serious" [*CLAIMANT'S EXHIBIT NO. 3*] nature of the electrical fire resulted in the entire facility producing the D-28 chips to be shut down, which is why CONTROL SYSTEMS would be unaware of any resulting impediment caused by the fire relating to the chips' procurement. Therefore, at the time of the conclusion of the contract between ELITE and CONTROL SYSTEMS, the impediment of failing to receive the processing units from SPECIALTY DEVICES was not foreseeable and CONTROL SYSTEMS could not have taken such impediment into account at the time of the conclusion of the contract.

(3) CONTROL SYSTEMS could not reasonably be expected to have avoided or overcome the impediment or its consequences

50. ELITE has asserted that "a seller is not exempt from liability for late delivery of his supplier if he failed to find reasonable substitutes" and CONTROL SYSTEMS "could have made efforts to find a reasonable substitute meeting CLAIMANT's requirements" [*CLAIMANT'S MEMORANDUM, PARAS. 109, 110*]. In reply, CONTROL SYSTEMS argues that "the procurement risk" only falls within "the seller's sphere of responsibility … in the case of a sale of generic goods" [*LIU (2005), PARA. 6.3*]. The term 'generic goods' "refers to goods that are identified in the contract by a description that more than one specific item might satisfy" [*FLECHTNER (2007), 36*]. Although there was no "contractual agreement upon the … necessity of D-28" [*CLAIMANT'S MEMORANDUM, PARA. 103*], Annex I of the contract, which deals with performance [*PROCEDURAL ORDER NO. 2, CLARIFICATION 5*], reveals that ELITE requested for "conference technologies … superior to anything otherwise available on the market" [*APPLICATION FOR ARBITRATION, PARA. 6*]. Hence, the conference technology had to meet the "highest standards" [*APPLICATION FOR ARBITRATION, PARA. 6*] which, in effect, required the use of the D-28 "super chip". The D-28 chips are not generic goods, because they contain "unique qualities" [*PROCEDURAL ORDER NO. 2, CLARIFICATION 12*], offering "significant improvements over rival chips" [*APPLICATION FOR ARBITRATION, PARA. 9*] and are difficult to substitute [*PROCEDURAL ORDER NO. 2, CLARIFICATION 12*]. Therefore, CONTROL SYSTEMS could not have reasonably been expected to overcome the impediment or its consequences, as the goods are not "substitutable" [*GUSTIN (2001), PARA. II*].

(C) *SPECIALTY DEVICES* COMES WITHIN ARTICLE 79(2) CISG AND SATISFIES ALL THE REQUIREMENTS OF ARTICLE 79(1) CISG

51. ELITE has stated that SPECIALTY DEVICES "falls into the scope of Art. 79(2) CISG" [*CLAIMANT'S MEMORANDUM, PARA. 112*] and "the liability of the seller for the failure of his supplier … is part of the seller's procurement risk" [*CLAIMANT'S MEMORANDUM, PARA. 113*]. In response, CONTROL SYSTEMS asserts that it is exempted from liability as it satisfies all the conditions under Article 79(2), because (1) SPECIALTY DEVICES's late performance was caused by the failure to receive the D-28 chips on time from HIGH PERFORMANCE which constitutes an impediment beyond control; (2) SPECIALTY DEVICES could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract; and (3) SPECIALTY DEVICES could not reasonably be expected to have avoided or overcome the impediment or its consequences.

(1) SPECIALTY DEVICES's late performance was caused by the failure to receive the D-28 chips on time from HIGH PERFORMANCE which constitutes an impediment beyond control

52. In contrast to ELITE's contention that "The late delivery of D-28 was under the control" of SPECIALTY DEVICES [*CLAIMANT'S MEMORANDUM, PARA. 120*], CONTROL SYSTEMS argues that HIGH PERFORMANCE's failure to deliver the D-28 chips on time was an impediment beyond SPECIALTY DEVICES's control because the "fire at the facility where High Performance produced the D-28 chip" [*APPLICATION FOR ARBITRATION, PARA. 12*] was "the only cause" of the late delivery [*FLAMBOURAS (2001), PARA. II B; GUSTIN (2001), PARA. II*]. Moreover, HIGH PERFORMANCE is beyond the control of SPECIALTY DEVICES as it is not a part of SPECIALTY DEVICES's organisational structure, and cannot therefore be deemed "in control" as it was outside "his/her own business and financial condition" [*LIU (2005), PARA. 4.3; STOLL (1998), 603*].

53. Third-party suppliers are the type of "third person" contemplated in Article 79(2) CISG where "the seller has no control over the choice of the supplier or its performance" [*CISG ADVISORY COUNCIL OPINION NO. 7 (2007), COMMENTS 18; SCHLECHTRIEM (1986), 104*]. SPECIALTY DEVICES has no control over the choice of the supplier or its performance since HIGH PERFORMANCE "was the only manufacturer of those chips" and enjoyed a monopoly [*CLAIMANT'S MEMORANDUM, PARA. 115*]. HIGH PERFORMANCE is a third-party supplier which is "distinct and separate" [*CISG ADVISORY COUNCIL OPINION NO. 7 (2007), COMMENTS 18;*

SCHLECHTRIEM (1986), 104] from SPECIALTY DEVICES's organisational structure. Therefore, the failure of receiving the D-28 chips from HIGH PERFORMANCE falls outside SPECIALTY DEVICES's sphere of control.

(2) SPECIALTY DEVICES could not reasonably be expected to have taken the impediment into account at the time of conclusion of the contract

54. SPECIALTY DEVICES will only be liable if it could "have foreseen any possible unfavorable consequences" ["*METALLIC SODIUM CASE*" *(1995) ICARFCCI, PARA. 5*] at the time of conclusion of the contract. In this case, the fire in the factory producing the D-28 chips was of such "serious" nature [*CLAIMANT'S EXHIBIT NO. 3*], that SPECIALTY DEVICES would not have been able to foresee late delivery by HIGH PERFORMANCE. Moreover, if the failure to receive the D-28 chips from HIGH PERFORMANCE was foreseeable, SPECIALTY DEVICES would presumably have specified "the particular impediments for which he will not be liable" [*SCHLECHTRIEM (1986), 101*] in the contract, as an express waiver of liability, because HIGH PERFORMANCE is "the only supplier" of the D-28 chips [*CLAIMANT'S MEMORANDUM, PARA. 107*]. As the failure to receive the D-28 chips from HIGH PERFORMANCE was "an event … that can be neither anticipated nor controlled" by SPECIALTY DEVICES [*MACROMEX V. GLOBEX (2007) AAA, PARA. II A*], SPECIALTY DEVICES could not reasonably be expected to have taken the impediment into account at the time of conclusion of the contract and could not have foreseen the occurrence of a fire, resulting in late delivery.

(3) SPECIALTY DEVICES could not reasonably be expected to have avoided or overcome the impediment or its consequences

55. ELITE has argued that SPECIALTY DEVICES "has not made all efforts suitable to secure a timely delivery of D-28" [*CLAIMANT'S MEMORANDUM, PARA. 122*]. In the current case, SPECIALTY DEVICES could not have overcome the impediment following HIGH PERFORMANCE's notification that there would be a delay in delivering the D-28 chips because the "Redesign around a substitute chip … would have involved severe delay and costs while providing no guarantee of comparable performance given the unique qualities of the D-28" [*PROCEDURAL ORDER NO. 2, CLARIFICATION 12*]. Moreover, SPECIALTY DEVICES took "the necessary steps to preclude the consequences of the impediment" [*LIU (2005), PARA. 4.*5] by approaching "Atlantis Technical Solutions to see whether it could purchase the number of D-28 it would need for the processing units, but Atlantis Technical Solutions had refused"

[*PROCEDURAL ORDER NO. 2, CLARIFICATION 11*]. Therefore, it is practically impossible for SPECIALTY DEVICES to overcome the impediment in order to secure timely delivery.

(D) *HIGH PERFORMANCE'S* LATE DELIVERY COMES WITHIN ARTICLE 79(2) CISG AND EXEMPTED *CONTROL SYSTEMS* FROM ITS LIABILITY UNDER ARTICLE 79(1)

56. CONTROL SYSTEMS argues that HIGH PERFORMANCE satisfies all the conditions under Article 79(2) because HIGH PERFORMANCE "falls into the scope of Art. 79(2) CISG" [*CLAIMANT'S MEMORANDUM, PARA. 124*] and is "a monopoly-like supplier" [*CLAIMANT'S MEMORANDUM, PARA. 125*]. Further, CONTROL SYSTEMS asserts that since the "fire" is "an impediment to the promisor's performance" [*SCHLECHTRIEM/SCHWENZER (2010), 1070; FLAMBOURAS (2001), PARA. II B*], HIGH PERFORMANCE is exempted under Article 79(1) CISG. In the current case, the source of production was "destroyed by fire" [*INTERNATIONAL PAPER V. ROCKEFELLER (1914) SUPREME COURT OF NEW YORK, 184*] while no other substitutions are available rendering "performance … insurmountable" [*MACROMEX SRL V. GLOBEX INTERNATIONAL INC (2008) DISTRICT COURT OF NEW YORK, PARA. IV*]. In addition, the fire which occurred in the production facility was "more serious" than HIGH PERFORMANCE had thought [*CLAIMANT'S EXHIBIT NO. 3*] and, hence, constitutes an impediment beyond its control and caused its failure to supply the D-28 chips on time.

57. Moreover, HIGH PERFORMANCE could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract because it had not "occurred in the past", so it was unforeseeable [*SECRETARIAT COMMENTARY ARTICLE 79 (1978), PARA. 5*]. As the fire is an "accident" [*PROCEDURAL ORDER NO. 2, CLARIFICATION 8*], it would be unreasonable for HIGH PERFORMANCE to have taken fire into account as an impediment at the time of the conclusion of the contract.

58. Finally, ELITE has argued that HIGH PERFORMANCE "was still able to fully satisfy" SPECIALTY DEVICES's needs from the remaining stock in the warehouse [*CLAIMANT'S MEMORANDUM, PARA. 130*]. However, HIGH PERFORMANCE was not legally required by "the law of Atlantis … to pro rate its immediately available supply among its customers" [*APPLICATION FOR ARBITRATION, PARA. 13*]. Instead, it decided to "satisfy the needs of … regular customers first" [*CLAIMANT'S EXHIBIT NO. 3*]. SPECIALTY DEVICES "was neither a regular customer nor could it be expected to become one" [*APPLICATION FOR ARBITRATION,*

PARA. 14]. Therefore, HIGH PERFORMANCE could not reasonably be expected to have avoided or overcome the impediment or its consequences.

(E) FURTHER, *CONTROL SYSTEMS* COMPLIED WITH THE REQUIREMENTS OF ARTICLE 79(4) CISG [*NEW ARGUMENT*]

59. Article 79(4) CISG requires that, "The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform". CONTROL SYSTEMS has fulfilled such duty by notifying ELITE of "the impediment and its probable consequences" [*TALLON (1987), PARA. 2.8; LIU (2005), PARA. 7*]. As soon as CONTROL SYSTEMS was notified of the fire that occurred at HIGH PERFORMANCE's production facility, it informed ELITE and advised it of the new delivery schedule [*CLAIMANT'S EXHIBIT NO. 2*]. Hence, CONTROL SYSTEMS fulfilled the requirement of Article 79(4) and should not be liable for paying damages.

CONCLUSION: CONTROL SYSTEMS is exempted from liability because the respective requirements for exemption under Article 79(1) and 79(2) CISG have been met. Since SPECIALTY DEVICES and HIGH PERFORMANCE are the 'third person' under Article 79(2), they too have satisfied all the requirements under Article 79(1). Further, CONTROL SYSTEMS complied with the notice requirements under Article 79(4) CISG. Hence, CONTROL SYSTEMS is exempted from paying any damages.

III. *CONTROL SYSTEMS* IS NOT LIABLE FOR THE US$112,000 *EX GRATIA* PAYMENT

60. ELITE contends that "it is entitled to damages in the amount of USD 112,000" since this loss "was foreseeable … and CLAIMANT has met the duty to mitigate the loss pursuant Art. 77 CISG" [*CLAIMANT'S MEMORANDUM, PARA. 91*]. However, CONTROL SYSTEMS argues that the *ex gratia* payment, in the amount of US$112,000, cannot be claimed by ELITE. Instead, this amount should be deducted from the total claim of US$670,600 because (A) the *ex gratia* payment is not recoverable under Article 74 CISG; (B) alternatively, the *ex gratia* payment is not foreseeable under Article 74 CISG. Moreover, (C) the *ex gratia* payment is not a reasonable measure to mitigate loss under Article 77 CISG.

(A) THE *EX GRATIA* PAYMENT IS NOT RECOVERABLE UNDER ARTICLE 74 CISG

61. Contrary to ELITE's claim that "The ex gratia payment was a loss of profit" [*CLAIMANT'S MEMORANDUM, PARA. 92*] and "alternatively … a necessary payment to prevent damage to its reputation" [*CLAIMANT'S MEMORANDUM, PARA. 93*], CONTROL SYSTEMS argues that the *ex gratia* payment is not recoverable. Specifically, (1) ELITE's *ex gratia* payment does not constitute a loss of profit under Article 74 CISG; alternatively, (2) Article 74 CISG does not cover damages for the loss of goodwill.

(1) ELITE's *ex gratia* payment does not constitute a loss of profit under Article 74 CISG

62. Although, at law, late delivery provides the non-breaching party with the right to claim "damages in accordance with Arts. 45(1) (b), 74 CISG" [*CLAIMANT'S MEMORANDUM, PARA. 60*], ELITE's *ex gratia* payment does not come within the definition of "a loss of profit" under Article 74 CISG. A loss of profit is the "difference between the contract price and the current price" [*SAIDOV (2009), 206; SCHLECHTRIEM/SCHWENZER (2010), 1014; SCHWARTZ (2006), 3-4*]. Currently, the "total contract price is USD 699,950" which includes "Installation and configuration" [*CLAIMANT'S EXHIBIT NO. 1*]. After installation, as the M/S Vis will contain the D-28 chip which is "superior to anything otherwise available on the market" [*APPLICATION FOR ARBITRATION, PARA. 6*], the value of the yacht is likely to increase. Since ELITE did not suffer any loss of profit, ELITE's *ex gratia* payment is merely made "As a favor" to CORPORATE EXECUTIVES which is not "legally necessary" [*BLACK'S LAW DICTIONARY (2009), 654*]. Hence, the *ex gratia* payment does not come within the definition of loss of profit under Article 74 CISG.

(2) Alternatively, Article 74 CISG does not cover the loss of goodwill

63. Article 74 CISG "does not expressly provide for the recovery of loss of goodwill" [*CISG ADVISORY COUNCIL OPINION NO. 6 (2006), PARA. 7.2*]. However, ELITE, relying on Schlechtriem, has asserted that a loss of goodwill can be compensated under Article 74 CISG as "an incidental loss" [*CLAIMANT'S MEMORANDUM, PARA. 93*]. Schlechtriem only defines an incidental loss for late performance as damages for "additional transport costs" and "the expense of storing goods" [*SCHLECHTRIEM/SCHWENZER (2010), 1009*]. Therefore, loss of goodwill does not come within incidental loss and Article 74 CISG.

64. However, even if loss of goodwill comes within Article 74 CISG, CONTROL SYSTEMS stresses that there is no loss of goodwill in the present case as ELITE has not provided "any evidence to show" that it has lost any of its "clients or … reputation" [*"DYE FOR CLOTHES CASE" (1997) AUDIENCIA PROVINCIAL DE BARCELONA, PARA. IV; BLASE/HÖTTLER (2004), PARA. 3(C)*]. It must be shown with a "reasonable certainty" [*CISG ADVISORY COUNCIL OPINION NO. 6 (2006), PARA. 7.3; DELCHI CARRIER S.P.A. V. ROTOREX CORP (1995) UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, PARA. 20*] that a loss of goodwill may occur. Similar to the case of *GINZA,* ELITE's evidence for making the *ex gratia* payment is "entirely speculative" [*GINZA V. VISTA CORP (2003) SUPREME COURT OF WESTERN AUSTRALIA, PARA. 257; CALZADOS V. SHOES (1999) COUR D'APPEAL, GRENOBLE, PARA. 23*] because CORPORATE EXECUTIVES merely "expressed its unhappiness" but never communicated to ELITE that they did not want to continue their business relationship [*PROCEDURAL ORDER NO. 2, CLARIFICATION 20*]. Therefore, as it is not reasonably certain that CORPORATE EXECUTIVES would withdraw their business, there is no loss of goodwill.

(B) ALTERNATIVELY, THE *EX GRATIA* PAYMENT IS NOT FORESEEABLE

65. Article 74 CISG only allows a party to claim damages which "may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract". It is argued by ELITE that, at the time of the conclusion of the contract, CONTROL SYSTEMS could have foreseen that "CORPORATE might terminate its business relations with CLAIMANT" in the absence of an *ex gratia* payment [*CLAIMANT'S MEMORANDUM, PARA. 96*]. In contrast, CONTROL SYSTEMS asserts that (1) a loss of profit is not foreseeable; and (2) the *ex gratia* payment constituting a loss of goodwill is unforeseeable.

(1) A loss of profit is not foreseeable

66. ELITE contends that CONTROL SYSTEMS "must foresee the consequences that a reasonable person in his situation would have foreseen" [*CLAIMANT'S MEMORANDUM, PARA. 95*]. However, CONTROL SYSTEMS could not have foreseen the *ex gratia* payment "at the time of the conclusion of the contract" [*"FABRIC CASE" (1999) OBERLANDESGERICHT BAMBERG, PARA. 2C*] since an "ex gratia payment is a voluntary payment" [*STATEMENT OF DEFENSE, PARA. 11*] which "has no legal basis" and therefore is unforeseeable [*CHAPPELL (2011), 8*].

67. ELITE's use of the *WOODEN TOWER CASE,* which is actually the *WOODEN POLES CASE*, to impute that "it was foreseeable that CORPORATE might terminate its business relations with … unreliable suppliers" [*CLAIMANT'S MEMORANDUM, PARA. 96*] is misguided. This is because the case focuses on parties with a limited business relationship [*"WOODEN POLES CASE" (1995) LANDGERICHT KASSEL, PARA. 2*]. In contrast, CORPORATE EXECUTIVES "is a long standing client of Elite" [*APPLICATION FOR ARBITRATION, PARA. 11; CLAIMANT'S EXHIBIT NO. 4*] and only ELITE could provide a yacht with the most advanced conference technology [*APPLICATION FOR ARBITRATION, PARA. 9*]. Moreover, ELITE has failed to show any factual or legal basis for the allegation that CONTROL SYSTEMS is an "unreliable supplier" [*CLAIMANT'S MEMORANDUM, PARA. 96*]. Therefore, it is unforeseeable at the time of conclusion of the contract that any *ex gratia* payment may be necessary to maintain ELITE's business relationship with CORPORATE EXECUTIVES.

(2) The *ex gratia* payment constituting a loss of goodwill is unforeseeable

68. ELITE asserts that CONTROL SYSTEMS "had to foresee such goodwill-saving payments that keep CLAIMANT's reputation undamaged" [*CLAIMANT'S MEMORANDUM, PARA. 96*]. In regard to damages for loss of goodwill, it must be shown that ELITE suffered a loss of "business reputation and credibility (subjective foreseeability)", and CONTROL SYSTEMS must "have foreseen it (objective foreseeability) as potential consequence of the contractual breach" [*"BULLET-PROOF VEST CASE" (2009) MULTI-MEMBER COURT OF FIRST INSTANCE OF ATHENS, PARA. 3.2.2*]. However, proving such a loss is difficult and that is why loss of goodwill damages are "hardly … recoverable" [*SAIDOV (2001), I 2(C); "BULLET-PROOF VEST CASE" (2009) MULTI-MEMBER COURT OF FIRST INSTANCE OF ATHENS, PARA. 3.1.2(B)*].

69. CONTROL SYSTEMS argues that 'goodwill' is "quantified by the retention of customers" [*CISG ADVISORY COUNCIL OPINION NO. 6 (2006), PARA. 7.3*]. In the present case, there is no evidence that CORPORATE EXECUTIVES demanded a payment from ELITE or that, unless an *ex gratia* payment were made, it would withdraw its business. ELITE is one of the few companies that are able to provide "conference technologies" which meet the "highest standards" [*APPLICATION FOR ARBITRATION, PARA. 6*], since the M/S Vis is refurbished with technology which is "materially different" [*CASTEL ELECTRONICS V. TOSHIBA (2011) FEDERAL COURT OF AUSTRALIA, PARA. 7*] to its competitors' yachts. ELITE made the *ex gratia* payment "freely and not under obligation" [*PUBLICIS V. O'FARRELL (2011) UK EMPLOYMENT APPEAL TRIBUNAL,*

PARA. 17], since it was merely its belief that the payment would "help retain future business" [*STATEMENT OF DEFENSE, PARA. 12*] and its goodwill. Thus, ELITE's subjective belief cannot be relied upon to claim an unforeseeable loss of goodwill payment.

70. Additionally, CONTROL SYSTEMS asserts that "An even stricter test" applies with regards to the "foreseeability of a buyer's loss of goodwill" and it is only "liable for such loss of goodwill" if, at the time of conclusion of the contract, ELITE "pointed out the risk" [*SCHLECHTRIEM (1998), 571*] of a possible breach of the buyer's own contract with a third party. In pointing out this risk, CONTROL SYSTEMS would have had "an opportunity … to decline liability" [*SCHLECHTRIEM (1998), 568*]. Currently, CONTROL SYSTEMS "had no knowledge" [*CLOUT CASE 476 (1998) ICARFCCI, PARA. 3.4.2; IN RE: SISKIYOU EVERGREEN INC (2004) US BANKRUPTCY COURT FOR THE DISTRICT OF OREGON, PARA. 6*] of the contract between ELITE and CORPORATE EXECUTIVES. Hence, the *ex gratia* payment made in regard to the compensation for loss of goodwill is unforeseeable. [NOTE': I DO NOT RECALL HAVING SEEN THIS PARAGRAPH. I HAVE MADE CHANGES TO THE FIRST SENTENCE WHICH I DID NOT UNDERSTAND = TOO LONG! IS THE REVISION CORRECT?)

(C) THE *EX GRATIA* PAYMENT IS NOT A REASONABLE MEASURE TO MITIGATE LOSS UNDER ARTICLE 77 CISG

71. ELITE has also argued that by making the *ex gratia* payment it "has fulfilled its duty to mitigate the loss pursuant to Art. 77 CISG" [*CLAIMANT'S MEMORANDUM, PARA. 90*]. In response, CONTROL SYSTEMS argues that since the *ex gratia* payment is claimed as damages [*APPLICATION FOR ARBITRATION, PARA. 4*], it cannot be a mitigation measure to "claim a reduction in the damages" under Article 77 CISG. Further, ELITE having failed to approach HIGH PERFORMANCE and Atlantis Technical Solutions to purchase the D-28 chips, did not take reasonable measures to mitigate their loss. Since ELITE violated its obligation to mitigate the loss, the *ex gratia* payment of US$112,000 should be deducted from the total claim of US$670,600 in accordance with Article 77 CISG.

CONCLUSION: Under Article 74 CISG, ELITE is not entitled to claim the *ex gratia* payment since it does not come within the definition of loss of profit or loss of goodwill. Moreover, CONTROL SYSTEMS could not have foreseen the *ex gratia* payment made by ELITE.

Additionally, as ELITE failed to mitigate its loss, CONTROL SYSTEMS is exempted from liability.

IV. *CONTROL SYSTEMS* IS NOT LIABLE FOR THE US$50,000 SUCCESS FEE

72. ELITE has argued that "bribery does not affect the CLAIMANT's right to claim damages" [*CLAIMANT'S MEMORANDUM, PARA. 74*]. In this context, CONTROL SYSTEMS asserts that (A) the success fee payment is not claimable as damages. Even if it is claimable, (B) ELITE's claim to payment of the success fee is unforeseeable.

(A) THE SUCCESS FEE PAYMENT IS NOT CLAIMABLE AS DAMAGES

73. The success fee paid by ELITE to its broker "was passed in part to the personal assistant of Samuel Goldrich … to effect an "introduction" to Mr. Goldrich" [*STATEMENT OF DEFENSE, PARA. 13*]. The personal assistant was later arrested on charges "of accepting bribes to influence Mr. Goldrich in his various financial affairs" [*STATEMENT OF DEFENSE, PARA. 13*], including the signing of the lease contract between ELITE and Mr. Goldrich. ELITE's contention that it "had in no way supported the bribery of Mr. Goldrich's assistant as it was not aware of this payment at all" [*CLAIMANT'S MEMORANDUM, PARA. 67*] is flawed because (1) the payment from the yacht broker to Mr. Goldrich's personal assistant constitutes bribery, and hence (2) the contract between ELITE and Mr. Goldrich is tainted with bribery.

(1) The payment from the yacht broker to Mr. Goldrich's personal assistant constitutes bribery

74. CONTROL SYSTEMS argues that (a) the payment constitutes bribery under the Criminal Code of Pacifica; and (b) alternatively, the payment constitutes bribery within the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (**OECD Convention**).

(a) The payment constitutes bribery under the Criminal Code of Pacifica

75. Based on the "closest connection" test [*GAILLARD/SAVAGE (1999), PARA. 425; REDFERN/HUNTER (2009), PARA. 3.208*], ELITE has argued that the law governing the lease contract between ELITE and Mr. Goldrich "would still not be related closely enough to

Pacifica to oblige the TRIBUNAL to apply it regardless of the normally applicable law" [*CLAIMANT'S MEMORANDUM, PARA. 76*]. However, ELITE's position is self-contradictory and misconceived in law. Even ELITE has accepted that the national law of Pacifica would apply to the lease contract if it is a "mandatory and overriding provision expressing a public policy" [*CLAIMANT'S MEMORANDUM, PARA. 76*]. Since the "observance" of the law of Pacifica "is crucial for the protection of the political, social or economic order in this state", the law of Pacifica will apply "regardless of the choice of law" [*CLAIMANT'S MEMORANDUM, PARA. 76*]. Moreover, since the lease contract signed by ELITE involves Mr. Goldrich who is "a resident of Pacifica" and more importantly, the M/S Pacifica Star, "was registered there" [*PROCEDURAL ORDER NO. 2, CLARIFICATION 25*], the lease contract is more closely connected with Pacifica. Therefore, whether the payment of some part of the success fee to the personal assistant of Mr. Goldrich is a bribe, should be decided with reference to the domestic law of Pacifica, more specifically, the Criminal Code of Pacifica.

76. Article 1453(1) of the Criminal Code of Pacifica stipulates that, "It shall be unlawful to pay, promise to pay, or authorize payment of any money, or other item of value to an employee of a third person or company in order to obtain or retain business with that third person" [*RESPONDENT'S EXHIBIT NO. 2*]. The money that the "yacht broker had passed … to the personal assistant of Mr. Goldrich" [*RESPONDENT'S EXHIBIT NO. 1*] constitutes a bribe under Article 1453(1) because, although the "payment was made only for an introduction" to Mr. Goldrich [*CLAIMANT'S MEMORANDUM, PARA. 69*], it was paid for the purpose of facilitating the signing of a lease contract between ELITE and Mr. Goldrich, the owner of M/S Pacifica Star. Therefore, since part of the success fee was used to commit bribery under the Criminal Code of Pacifica, ELITE is not entitled to claim the success fee payment.

(b) Alternatively, the payment constitutes bribery within the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

77. Even if the law of Pacifica does not apply, in deciding whether the allegation of bribery has been made out, the Tribunal would rely upon the agreed substantive law governing the contract between ELITE and CONTROL SYSTEMS, namely the law of Mediterraneo [*CLAIMANT'S EXHIBIT NO. 1*]. The agreed "substantive law should be applied except to the extent … it would contravene international public policy" [*KREINDLER (2002), 253*]. In particular, the OECD

Convention is relevant because Mediterraneo, in addition to Danubia and Equatoriana, is a party to this Convention [*PROCEDURAL ORDER NO. 2, CLARIFICATION 27*].

78. ELITE has argued that, "The bribe received by Mr. Goldrich's assistant does not violate any international public policy" which is reflected in the OECD Convention, because "the assistant was no government official but a private employee" [*CLAIMANT'S MEMORANDUM, PARA. 77*]. In contrast, CONTROL SYSTEMS argues that the OECD Convention, which is an international convention that expresses "international consensus on combating corruption and bribery in international commerce" [*CLAIMANT'S MEMORANDUM, PARA. 77*], should apply to acts of bribery by private individuals. Article 1 of the OECD Convention states that it is a criminal offence "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, for that official or for a third party … in order to obtain or retain business". Although Article 1 refers to a "foreign public official", the concept of "public official" used in the Convention is "wide" [*SAYED (2004), 216*] since there is an "expanded focus on private as well as public sector bribery" [*PIETH/LOW/CULLEN (2007), 546*]. Furthermore, the international community has expanded its bribery laws, to criminalise acts of bribery by private individuals [*COUNCIL OF EUROPE CRIMINAL LAW CONVENTION ON CORRUPTION (1999), ARTICLES 7, 8; UK BRIBERY ACT (2010), SECTION 1*]. Therefore, following the international trend, the OECD Convention should also apply to private individuals.

79. Mr. Goldrich's yacht, the M/S Pacifica Star is one of the "few yachts that would have met Elite's needs" [*PROCEDURAL ORDER NO. 2, CLARIFICATION 21*]. As the other yachts "were not available for lease during the necessary time period" [*PROCEDURAL ORDER NO. 2, CLARIFICATION 21*], ELITE's yacht broker contacted Mr. Goldrich's personal assistant to rent the M/S Pacifica Star since the personal assistant helped Mr. Goldrich "in doing business" [*RESPONDENT'S EXHIBIT NO. 1*]. As Mr. Goldrich "did not normally lease his yacht" [*PROCEDURAL ORDER NO. 2, CLARIFICATION 21*], his signing of the lease contract and the subsequent conviction of his personal assistant for bribery shows that it is likely that the personal assistant had influenced Mr. Goldrich in signing the lease contract, thereby allowing ELITE to obtain an "undue pecuniary … advantage" under Article 1 OECD Convention.

(2) The contract between ELITE and Mr. Goldrich is tainted with bribery

80. CONTROL SYSTEMS argues there is sufficient evidence indicating ELITE's involvement in the bribery since there is sufficient evidence to prove ELITE's involvement in the yacht broker's act of bribery. Although bribery is an offence that needs to be "proved beyond doubt" in courts [*HILMARTON V. OTV (1994) ICC, PARA. 23*], it "is very rare that direct proof of corruption is available" in arbitral proceedings [*SCHERER (2002), 31*] which is why CONTROL SYSTEMS asserts that circumstantial evidence is sufficient in discharging the burden of proving bribery since "the tribunal is dealing with the consequences of corruption on a matter of *civil* liability" [*HWANG (2012), PARA. 38; ICC CASE 4145 (1984), 102*].

81. ELITE has argued that "the amount of broker's remuneration does not constitute an indication of bribery" and that "Agent fees up to 27% have been accepted" [*CLAIMANT'S MEMORANDUM, PARA. 67*]. However, "An unusually high commission is a "red flag" for arbitrators" and "can be circumstantial evidence for the existence of a corrupt practice" [*SCHERER (2002), 32; ICC CASE 8891 (1998), 1076; WILSKE/FOX (2011), 497*]. ELITE's reliance on Scherer's article, which states that, "In ICC Case No. 9333, a commission of FF 1.9 million, approximately 27 per cent of the value of the contract, was accepted as justified in light of all circumstances" [*SCHERER (2002), 33*] is misconceived. Indeed, in the *ICC CASE 9333*, the arbitrator ruled that "All the elements … show that it was particularly difficult" for the builder "to obtain the procurement contract, in a new field of activity" and that the principal "was ready – and bound – to pay" the broker in order "to access a new market" [*SAYED (2004), 143; ICC CASE 9333 (1998), 766*]. ELITE, on the other hand, "In spring 2010 … purchased a luxury yacht, the M/S Vis" [*APPLICATION FOR ARBITRATION, PARA. 6*], which allows for the reasonable inference that ELITE knew about the intricacies of the yacht market, and so, chartering the M/S Pacifica Star was not an attempt to "access a new market" [*SAYED (2004), 143; ICC CASE 9333 (1998), 766*]. Further, considering "All the elements" [*SAYED (2004), 143; ICC CASE 9333 (1998), 766; SCHERER (2002), 33*], by paying "the broker a USD 50,000 success fee on top of the commission" [*APPLICATION FOR ARBITRATION, PARA. 18*], ELITE had paid the yacht broker in total a sum amounting to 26% of the rental cost: this is "important circumstantial evidence, which could give rise to suspicions" [*SAYED (2004), 142; ICC CASE 9333 (1998), 762*] as it nearly doubles the "standard brokerage commission" of "15% of the rental cost" [*APPLICATION FOR ARBITRATION, PARA. 18*].

82. ELITE has also argued that "There was no agreement between CLAIMANT and the broker about the purpose the success fee should have" [*CLAIMANT'S MEMORANDUM, PARA. 67*] and that "the success fee has been paid to the yacht broker after the conclusion of the lease contract between CLAIMANT and Mr. Goldrich and not before" [*CLAIMANT'S MEMORANDUM, PARA. 70*]. CONTROL SYSTEMS asserts it is likely that ELITE arranged to pay the success fee after the signing of the lease contract in order to avoid suspicion.

83. CORPORATE EXECUTIVES is "a long standing client of Elite" [*APPLICATION FOR ARBITRATION, PARA. 11*], whose event was fast approaching. It can be reasonably inferred that ELITE paid the success fee to the yacht broker because the successful leasing of the M/S Pacifica Star saved its contract with CORPORATE EXECUTIVES. It is also revealing that ELITE had not said anything "about what it might take for the broker to secure the contract" [*PROCEDURAL ORDER NO. 2, CLARIFICATION 22*]. Although Mr. Goldrich "did not normally lease his yacht" [*PROCEDURAL ORDER NO. 2, CLARIFICATION 21*], following ELITE's announcement of a success fee to the yacht broker, a lease contract was signed between Mr. Goldrich and ELITE [*PROCEDURAL ORDER NO. 2, CLARIFICATION 22*]. Subsequently, the personal assistant of Mr. Goldrich "was convicted" [*PROCEDURAL ORDER NO. 2, CLARIFICATION 26*] of "accepting bribes to influence Mr. Goldrich" [*STATEMENT OF DEFENSE, PARA. 13*], which proves the occurrence of the bribe. Since ELITE has ten years of experience in the conference package business [*APPLICATION FOR ARBITRATION, PARAS. 5, 6*], it is reasonable to infer that ELITE would refrain from making any overt acts of bribery. This is why ELITE instead made a "success fee" payment, which the yacht broker understood as money for bribing the personal assistant. Hence, a consideration of all the circumstantial evidence points towards ELITE's involvement in the bribery.

(B) *ELITE'S* CLAIM TO PAYMENT OF THE SUCCESS FEE IS UNFORESEEABLE

84. Even if the lease contract is not tainted by bribery, ELITE's claim to the success fee payment is not "a consequence of the breach" as required by Article 74 CISG. Although ELITE has argued that, "The success fee was a promising chance to create an individual incentive for the yacht broker … and to increase the probability of the conclusion of a lease contract" [*CLAIMANT'S MEMORANDUM, PARA. 88*], the success fee payment is not a consequence of CONTROL SYSTEMS's failure to timely deliver the master control system. Since the yacht broker did not make a request for the success fee as he was to be remunerated

with a brokerage fee [*PROCEDURAL ORDER NO. 2, CLARIFICATION 22*], the payment of the success fee by ELITE was entirely voluntary in nature. As the making of a voluntary payment is not a consequence of CONTROL SYSTEMS's failure to timely deliver the master control system, ELITE is not entitled to be compensated for the payment in securing another yacht.

85. ELITE has also argued that CONTROL SYSTEMS ought to have foreseen that "an additional amount would be necessary to successfully hire a substitute yacht at short notice" [*CLAIMANT'S MEMORANDUM, PARA. 89*]. In response, CONTROL SYSTEMS asserts that since the success fee payment is not customary [*PROCEDURAL ORDER NO. 2, CLARIFICATION 23*], it was not foreseeable at the "time of the conclusion of the contract" under Article 74 CISG. Additionally, CONTROL SYSTEMS did not have knowledge of the success fee, as it only knew about the success fee payment on 15 July 2011 when ELITE submitted the Application for Arbitration. Further, CONTROL SYSTEMS ought not to have known about the success fee payment at the time of the conclusion of the contract since the yacht broker never requested it [*PROCEDURAL ORDER NO. 2, CLARIFICATION 22*]. Therefore, since CONTROL SYSTEMS did not have prior knowledge about the success fee, coupled with the fact that it was paid voluntarily, the claim for the success fee payment has exceeded the loss claimable under Article 74 CISG, and so, CONTROL SYSTEMS is not liable for the success fee payment.

86. Moreover, even if the success fee is foreseeable, ELITE failed to mitigate the loss. ELITE has stated that, "paying the success fee" was "a reasonable measure of mitigation" [*CLAIMANT'S MEMORANDUM, PARA. 90*]. In response, CONTROL SYSTEMS argues that since ELITE claimed the success fee payment as damages [*APPLICATION FOR ARBITRATION, PARA. 4*], it cannot be a mitigation measure nor can it also be considered as costs for a mitigation measure to "claim a reduction in the damages" under Article 77 CISG. Therefore, the success fee payment of US$50,000 should be deducted from the total claim of US$670,600 in accordance with Article 77 CISG.

CONCLUSION: As a portion of the success fee was used as a bribe by the personal assistant, this taints the entire lease contract between ELITE and Mr. Goldrich. Consequently, no expense arising out of that contract should be considered as allowable damages. Therefore, CONTROL SYSTEMS is not liable for the US$50,000 success fee. Additionally, as ELITE failed to mitigate its loss, CONTROL SYSTEMS is exempted from liability.

CONTROL SYSTEMS commends the arguments in this Memorandum to the Arbitral Tribunal to achieve "a just and effective resolution" of the dispute [*ARTICLE 1 IBA ETHICAL RULES*].