8TH ANNUAL MIDDLE EAST AND SOUTH ASIA PRE MOOT

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION

FEBRUARY 19-23, 2018

MANAMA, BAHRAIN

MEMORANDUM FOR CLAIMANT

On Behalf Of:	**Against:**
Delicatesy Whole Foods Sp 39 Marie-Antoine Carême Avenue Oceanside Equatoriana	Comestibles Finos Ltd 75 Martha Stewart Drive Capital City Mediterraneo
CLAIMANT	**RESPONDENT**

ABDULATIF ZAKI • FARIHA KHALIQI • MEHRAFROZ GHANI

MUSKA GILLANI • SANA AHMADI • SHABANA AKBARI

Kabul, Afghanistan

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATUTES AND RULES	CITATION	CITED IN PARA.
CISG	United Nations Convention on the International Sale of Goods, 1980 (CISG)	*Cited in Para 34, 47, 49, 50, 52, 53*
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration	*Cited in Para 34, 35*
UNCITRAL Arbitration rules	UNCITRAL Arbitration Rules	*Cited in Para 23,24,25,27,28,30*
UNIDROIT Principles	UNIDROIT Principles of International Commercial Law, 2010 (UPICC)	*Para 61, 62,*
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration Adopted by resolution of the IBA Council on 23 October 2014	*Par. 35, 36, 37*

COMMENTARIES

Ferrari et al.	Internationales Vertragsrecht, 2007, pg. 103 & 128	*Cited in Para.90*
Christina Ramberg	Emotional non conformity in international sale of goods particurlarly in relation to CSR policies and code of conducts, 1992	*Cited in Para. 90*
Neil Kokemuller	https://www.asyousow.org/publications/2011/2011-01-07_eHow_Definition_of_Corporate_Social_Responsibility.pdf	*Cited in Para. 92*
BV Ikejiaku,	*Consideration of Ethical and Legal Aspects of Corporate Social Responsibility', 2012*	*Cited in Para. 88*
Petra Butler	THE CISG – A SECRET WEAPON IN THE FIGHT FOR A FAIRER WORLD-Volume 7 Issue No2, 2017 Victoria University of Wellington Legal Research Papers	*Cited in Para. 88*
Professor Sieg Eiselen.	CISG Advisory Council Opinion No. 13, Inclusion of Standard Terms Under the CISG, 20 January 2013, Schlechtriem & Schwenzer 3rd English edition,	*Cited in Para. 64, 69*

Brödermann & Oertel	Brödermann, Eckart. Oertel, Christoph, "The Incorporation of Standard Terms under the CISG" 31 October 2014.	*Cited in Para. 44*
HUBER, Peter/ MULLIS, Alastair	The CISG: A new textbook for students and practitioners Sellier. European Law Publishers, Munich, 2007	*Cited in Para. 55*
Nathalie Bernasconi-Osterwalder Lise Johnson Fiona Marshall	Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel	*Cited in Para.86*
John O. Honnold,	UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, 3rd ed. (1999), pages 252-263. Reproduced with permission of the publisher, Kluwer Law International, The Hague	*Cited in Para. 58*
René Franz Henschel	Interpreting or supplementing Article 35 of the CISG by using the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law, November 2004	*Cited in Para.61, 62*
Schlechtriem	Battle of the Forms in International Contract Law: Evaluation of approaches in German law, UNIDROIT Principles,	*Cited in Para. 68, 75*

WEIBEL et al.	The Backlash against Investment Arbitration: KUSHAL, Asha Perception and Reality, CHUNG, Kyo-Hwa Kluwer Law International, 1st Edition BALCHIN, Claire Den Haag, 2010	*Cited in Para. 71*
Luttrell	Sam Luttrell Bias Challenges in International Commercial Arbitration: The Need for a "Real Danger" Test Kluwer Law International (2009)	*Cited in Para. 36*
Slaoui	Fatima-Zahra Slaoui The Rising Issue of 'Repeat Arbitrators': A Call for Clarification Oxford University Press (2009)	*Cited in Para. 44*
Sanz-Pastor/Dimolitsa	Bernardo M. Cremades Sanz-Pastor & Antonias Dimolitsa Third-Party Funding in International Arbitration (ICC Dossier) Dossiers of the ICC Institute of World Business Law, Vol. 10, Kluwer Law International (2013)	*Cited in Para. 45*
Nieuwveld/Sahani	Lisa Bench Nieuwveld & Victoria S. Sahani Ethical Considerations for Third-Party Funding: in Third-Party Funding in International Arbitration Kluwer Law International (2017)	*Cited in Para. 46*
Khouri/Hurford/ Bowman	S. Khouri, K. Hurford & C. Bowman Third Party Funding in International Commercial	*Cited in Para. 46*

	and Treaty Arbitration – A Panacea or A Plague? A Discussion of the Risks and Benefits of Third Party Funding Transnational Dispute Management (2011)	
Waincymer	Jeffrey Waincymer Procedure and Evidence in International Arbitration Kluwer Law International (2012)	*Cited in Para. 46*
Goeler	Jonas Von Goeler Third-Party Funding in International Arbitration and its impact on Procedure Kluwer Law International (2016)	*Cited in Para. 46*
Park/Rogers	William Park & Catherine A. Rogers Third-Party Funding in International Arbitration: The ICCA Queen Mary Task Force Austrian Yearbook on International Arbitration 113 (2015)	*Cited in Para. 46*
Cleis	Maria Nicole Cleis The Independence and Impartiality of ICSID Arbitrators Leiden (2017)	*Cited in Para. 47*
Berger	Klaus Peter Berger Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration Kluwer Law International, 3rd ed. (2006)	*Cited in Para. 48*

CASE LAWS

Case No. 97009265	*Case No. 97009265 – 1998 – Austria – tribunal de commerce de besoncon*	*Cited in Para. 78*
Steiner v. Mobil Oil Corp	L.A. No. 30741. Supreme Court of California. October 11, 1977.] JOSEPH R. STEINER, Plaintiff and Respondent, v. MOBIL OIL CORPORATION, Defendant and Appellant	*Cited in Para. 80*
Butler Machine	Butler Machine Tool Co Ltd v Ex-Cell-O Corp Ltd [1977], EWCA Civ 9,, 1 WLR 401	*Cited in Para. 70*
NSW V Australian	*State Transit Authority of NSW v Australian Jockey Club* [2003] NSWSC 726	*Cited in Para. 60*
E.D.C., 6 September 1977, (U.S.A.)	Eastern District Court of North Carolina 438 F. Supp. 153; 6 September 1977 Available at: https://www.trans-lex.org/311980	*Cited in Para. 54*

LIST OF ABBREVIATION

Art.	Article
Arb.	Arbitration
CISG	United Nations Convention on Contracts for the International Sale of Goods
CoC	Code of Conduct
COO	Chief Operating Officer
Clm.	CLAIMANT
Ex.	Exhibit
et al.	et alia/et aliae/et alii
e.g.	exempli gratia (example given)
FOA	Form of Authorization
Ord.	Order
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UN	United Nations
USA	United States of America
USD	United States Dollar
V	Versus

Vol.	Volume
Resp.	RESPONDENT
Proc.	Procedural
Ltd.	Limited
IBA	International Bar Association
ICC	International Chamber of Commerce
Mr.	Mister
Ms.	Miss
No.	Number
NME	Non-Minimal Ethical Standards
PCA	Permanent Court of Arbitration
PO1	Procedural Order 1
PO 2	Procedural Order 2
Para.	Paragraph
Parties	Delicatesy WholeFoods Sp. And Comestibles Finos Ltd.
Plc	Public Limited Company
SOF	Statement of facts
CSR	Corporate social responsibility
Req.	Request

STATEMENTS OF FACT

1. Delicatesy Whole Foods Sp "**Delicatesy**", the **CLAIMANT**, is a medium sized manufacturer of fine bakery products registered in Equatoriana. Comestibles Finos Ltd "**Comestibles**", the **RESPONDENT**, is a gourmet supermarket chain in Mediterraneo.
2. In March, during Cucina food fair, CLAIMANT and RESPONDENT were in negotiations for making a contract on delivery of chocolate cakes.
3. After the discussion between CLAIMANT and RESPONDENT in the food fair, Mr. Tsai, CLAIMANT's head of production, received an invitation to tender for the sale of chocolate cakes. The tender documents attached to the email included Specification of the Goods and Delivery Terms, conditions of contract, Comestibles Finos' General Business philosophy and Comestibles Finos' Code of Conduct for Suppliers.
4. On 27 March 2014, Mr. Tsai sent a new offer to the RESPONDENT with some amendments in the first offer such as the size of the cake, payment by a letter of credit and timing of payment after delivery being 30 days instead of 60. Furthermore, CLAIMANT in its sales offer document has mentioned that their offer is subject to their General Condition and commitments and expectations set out in CLAMINAT'S Codes of Conduct.
5. CLAIMNAT was awarded the contract confirmed by an email sent by RESPONDENT on 7 April 2014. RESPONDENT accepted the amendments brought to the new offer regarding size of cakes and payment and also did not object the inclusion of CLAIMANT 'S code of conduct.
6. CLAIMANT made the first delivery on 1 May 2014 and there were no problems in the deliveries until the report by a special rapporteur investigating for UNEP the deforestation in Ruritania was released in 2017.
7. On 27 January 2017, RESPONDENT sent an email asking CLAIMANT to confirm by the close of business on Monday, 30 January 2017 whether CLAIMANT's supplier strictly adhered to Global Compact principles and if the confirmation was not to be received, RESPONDENT will terminate the contract. Additionally, RESPNDENT declared that it will not make payment for the delivered 600,000 cakes and that it will not accept more deliveries.

8. On the same day, CLAIMANT replied to the email sent by RESPONDENT guaranteed that its suppliers of Cocoa are not involved in the scheme but it will investigate the issue and let the RESPONDENT know as soon as possible. CLAIMANT further clarified that RESPONDENT has no justification for no payment of delivered cakes.
9. CLAIMANT sent an email to RESPONDENT to inform them from it discovery about Ruritania Peoples Cocoa mbH being involved in the scandal. CLAIMANT further clarified that it has been defrauded itself by the Cocoa supplier, and that the Cocoa supplier has not adhered to the CLAIMANT 'S code of conduct which does not put the liability of any breach of contract by the CLAIMANT. CLAIMANT had some offers for contributing to the RESPONDENT possible financial loss.
10. On 12 February 2017, RESPONDENT rejected the offers by CLAIMANT. RESPONDENT terminated the contract and also asked CLAIMANT for the damages stating that there is a serious of breach of contract because the cocoa is not produced in compliance with the accepted sustainable production standards.
11. As the parties did not reach to an amicable resolution, they decided to solve the dispute through an ad hoc arbitration proceeding, as agreed upon in the contract. Therefore, each party introduced an arbitrator and the presiding arbitrator was chosen by two other members.
12. Mr. Rodrigo Prasad was introduced by CLAIMANT and on 26 June 2017 he declared his impartiality and independence. In his statement, Prasad disclosed all required information related to this arbitration proceeding.
13. On 29 August 2017, RESPONDENT obtained information that CLAIMANT is financed by a third-party funder in this arbitration proceeding. Meanwhile, the arbitral tribunal ordered CLAIMANT to disclose whether it is financed by a third-party funder.
14. Accordingly, on 7 September 2017 CLAIMANT declared that its claim is funded by Funding 12 Ltd, whose main share hold is Findfunds LP. CLAIMANT also declared that the third party funding complies with the order to speed up proceedings. Later, on 11 September 2017, Mr. Prasad disclosed the information on its previous relationship as arbitrators with subsidiaries of Findfunds LP.
15. On 14 September, 2017 RESPONDENT submitted notice of challenge of arbitrator on basis of Mr. Prasad's impartiality and independence which included Mr. Prasad's published

article on Article 35 of CISG, his appointment in previous cases funded by FindFunds LP, repeated appointments by Mr. Fasstruck law firm and his relationship with SlowFood.

16. Mr. Prasad did not withdraw from his office by the challenge of RESPONDENT as there were no legal obligations for CLAIMANT to make any disclosure since CLAIMANT was funded by Funding 12 Ltd not FindFunds LP.

SUMMARY OF ARGUMENTS

ISSUE ONE: UNDER ARTICLE 13 OF UNCITRAL ARBITRATION RULES, THE ARBITRAL TRIBUNAL DOES NOT HAVE THE AUTHORITY TO DECIDE ON THE CHALLENGE OF MR. PRASAD. EVEN IF DOES, PRASAD IS A MEMBER OF TRIBUNAL.

Based on UNCITRAL Arbitration Rules, the applicable rules chosen by the parties, the Arbitral Tribunal is not empowered to decide on the challenge of Mr. Prasad. Pursuant to article 13. 4 of UNCTIRAL rules, the appointing authority is to decide on the case. Although the arbitrators were not initially appointed by an appointing authority, the appointing authority should be designated in accordance with article 6 of UNCITRAL Rules. Parties never agreed on the exclusion of article 13. 4 with a written agreement. Furthermore, even if the tribunal is to decide on the challenge, Mr. Prasad should be part of the panel in accordance with article 13. 2 of Model which is the lex arbitri in this case.

ISSUE TWO: EVEN IF THE ARBITRAL TRIBUNAL HAS THE AUTHORITY TO DECIDE ON THE CHALLENGE, MR. PRASAD SHOULD NOT BE REMOVED FROM ARBITRAL TRIBUNAL.

Mr. Prasad, should not be removed from the arbitral tribunal, even if the Arbitral tribunal has the authority to decide on the challenge. In accordance with article 12 of UNCITRAL rules, RESPONDENT fails to provide factual as well as legal bases as to impartiality and independence of Mr. Prasad. There was no agreement among the parties on the application of IBA Guidelines. The application of IBA guidelines does not override the existing rules in UNCITRAL rules. Even if the IBA guidelines are to be considered in this case, the claims brought by RESPONDENT does not satisfy the conditions laid down in the IBA guidelines.

ISSUE THREE: THE STANDARD CONDITIONS OF THE CLAIMANT GOVERN THE CONTRACT.

Pursuant to applicable law on merits of the case, CISG, the standard conditions of CLAIMANT govern the contract. RESPONDENT sent an invitation to tender to CLAIMANT which was in fact invitation for offers according to article 14 of CISG and RESPONDENT was the one who made the offer for the current contract. RESPONDENT, however, did not object any part of the offer including the general conditions of the CLAIMANT which was included in the offer. The fact that CLAIMANT included reference to its general conditions of sale in its offer indicates its intention that the contract will be governed by its general conditions of sale, in accordance with article 8 of CISG.

ISSUE FOUR: EVEN IF RESPONDENT'S GENERAL CONDITIONS ARE APPLICABLE, CLAIMANT HAS DELIVERED CAKES IN CONFORMITY WITH CONTRACT SINCE CLAIMANT WAS MERELY OBLIGED TO USE ITS BEST EFFORTS TO ENSURE COMPLIANCE BY ITS SUPPLIERS, AND NOT TO GUARANTEE.

CLAIMANT delivered the confirming good in accordance with the contract and article 35 of CISG. The fact that the cocoa was not produced in a sustainable manner does not count as non-conformity since the production process does not come under conformity of the goods under article 35 of CISG. Also, there is no specific reference given to production process under conformity of goods in the contract. Additionally, CLAIMANT was merely obliged to use its best efforts to ensure compliance by its suppliers and not to guarantee. The global compact principles is not binding to CLAIMANT which could affect the conformity of goods and the lack of conformity is resulted from the sub suppliers of the CLAIMANT which is not attributable to the CLAIMANT .

ARGUMETNS

ISSUE ONE: UNDER ARTICLE 13 OF UNCITRAL ARBITRATION RULES, THE ARBITRAL TRIBUNAL DOES NOT HAVE THE AUTHORITY TO DECIDE ON THE CHALLENGE OF MR. PRASAD.

1. RESPONDENT sent its notice of challenge of Mr. Prasad's Independence and Impartiality on 14 September 2017, where Mr. Prasad was expected to withdraw from the arbitration [*NoC, Pg. 37, ¶ 2*] In case of no withdrawal by Mr. Prasad, RESPONDENT sought to ask the two other arbitrators to decide on challenge and removal of Mr. Prasad from the arbitral proceedings *[NoC, p. 37-38]* In other words, RESPONDENT claimed that the decision of challenge of Mr. Prasad should be taken by the Arbitral Tribunal without the involvement of Mr. Prasad *[NoC, p. 39]* However, the challenge to Mr. Prasad's Independence and Impartiality raised by RESPONDENT does not have any legal basis. Based on applicable arbitral rules in the case, the UNCITRAL Arbitration Rules, the Arbitral Tribunal is not empowered to decide on the challenge of an arbitrator **(I)**. Even if such authority of the Tribunal is accepted, Mr. Prasad should be part of Tribunal when considering the challenge

I. According to UNCITRAL Arbitration Rules, the Arbitral Tribunal is not empowered to decide on the challenge of an Arbitrator.

2. In Section V, Clause 20 of contract, parties have chosen "arbitration" as the mechanism for dispute resolution in case of any dispute and have adopted the UNCITRAL arbitration rules as the applicable rules on the arbitral proceedings [*Cl. Ex. 2]* The rules chosen by the parties "provide largely autonomous procedural mechanisms and substantive standards governing the selection, challenge and replacement of the arbitrators" [*Born, 2014, p. 1638*]. Therefore, any proceedings related to constitution of arbitral tribunal should be in accordance with UNCITRAL Arbitration Rules, including the subsequent challenge procedure. However, the challenge procedure of Mr. Prasad is not in accordance with UNCITRAL Arbitration rules. RESPONDENT's Challenge of Arbitration is time barred

pursuant to UNCITRAL Arbitration rules **(A).** Article 13.4 of UNCITRAL Arbitration Rules gives the power of deciding on challenge to appointing authority **(B).** And parties never agreed on exclusion of article 13. 4 **(C).** Furthermore, there is no provision under UNCITRAL Arbitration Rules or the contract that give the authority to decide on challenge to the Arbitral Tribunal **(D).**

A. The notice of Challenge sent by RESPONDENT is time barred pursuant to article 13. 1 of UNCITRAL Arbitration rules.

3. RESPONDENT's notice of arbitration is time barred and should not be accepted to trigger a challenge against Mr. Prasad. According to Article 13.1 of UNCITRAL Arbitration rules, a party that intends to challenge an arbitrator should send the notice of challenge within 15 days after appointment of the arbitrator, or 15 days after they became aware of the circumstances mentioned in article 11 and 12 of UNCITRAL Arbitration Rules. RESPONDENT, however, failed to send the notice of challenge in both given time periods.
4. First, the notice of arbitration was sent to RESPONDENT on 30 June 2017 where the CLAIMANT also mentioned the issue of appointment of Mr. Prasad *[NoA, p. 4-6]*. RESPONDENT on the other hand, sent notice of challenge of Mr. Prasad on 14 September 2017, which is two months late form the date that Mr. Prasad was appointed as arbitrator.
5. Second, RESPONDENT has challenged Mr. Prasad's Impartiality and independence on basis of possibility of existence of justifiable one his repeated appointment by law firm of Mr. Fastrack, his relationship with FindFunds LP and his article about conformity of goods. However, they failed to send the notice of challenge on required time period after the circumstances the mentioned become known to them. The phrase "become known" in article 13.1 was interpreted by the drafters of the law as "should have known" or actual knowledge of the challenging party. In other words, having merely doubts on certain issues does not constitute the condition of "become known" [*Caron and Caplan 2012*]. Respondent also had actual knowledge of circumstances giving rise to existence of justifiable doubts according to them.

6. Frist, Mr. Prasad had clearly disclosed his appointment with law firm of Mr. Fastrack on his notice of declaration of impartibly and independence which was sent on 26 June 2017*[Cl. Ex. 11]*. Respondent however, raised challenge regarding this issue on 14 September 2017 which is 2 months and 4 days late from the given time period
7. Second, the issue of relationship of Mr. Prasad with FindFuns LP and his Article about non conformity of Goods was known to Respondent on 27 August 2017 when Information Technology (IT)- security officer of Respondent retrieved the comment from PDF version of Notice of Arbitration sent to the Respondent during a virus check *[Proc. Ord. 2. p. 51, ¶ 11]*.In the comment, the possibility of existence of relationship of Mr. Prasad with FindFunds LP as well as the issue of his article was mentioned *[NoC, p. 38]*. But respondent sent its notice of challenge on 14 September 2017, which is still 3 days late from the given time period.
8. Even if it is accepted that the issue of relationship of Mr. Prasad with FindFunds LP clear, Respondent had actual knowledge of the article of Mr. Prasad which is a ground for challenge according to it. Article of Mr. Prasad was available in the Vindobona Journal of International Commercial Arbitration and Sales Law which is "a leading journal in the field of international commerce available via all leading databases. Furthermore, Mr. Prasad has a PDF of the article on his website directly under the button "Publications" which was already available when Respondent submitted its Response". *[Proc. Ord. 2. p. 51, ¶ 14]*. The fact that Respondent did not look at the article before accepting his appointment, or after seeing the comment does not create the situation that circumstances regarding to the article was not known to the respondent. In other words, all the circumstances related to existence of grounds for challenge according to Respondent was known to it, while it failed to send notice of challenge in timely manner.

B. According to article 13. 4 of UNCITRAL arbitration rules, the appointing authority should decide on a challenge.

9. According to article 13. 4 of UNCITRAL Arbitration rules, "If…all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the

challenge … shall seek a decision on the challenge by the appointing authority *[UNCITRAL Rules, Art. 13. 4]* Since RESPONDENT and CLAIMANT did not agree on the challenge of Mr. Prasad, nor did Mr. Prasad withdraw from the office, RESPONDENT must seek a decision the challenge of Mr. Prasad from appointing authority, not the Arbitral Tribunal. The challenge proceedings should be in accordance with article 13. 4 regardless of the fact that the parties have not designated an appointing authority in the beginning **(1).** Should the parties now fail to agree on an appointing authority, it should be designated by PCA in accordance with the procedural rules agreed by the parties **(2).**

1. **The challenge procedure should be in accordance with article 13.4 despite the fact that parties had not designated an appointing authority in the beginning.**

10. Article 13. 4 of UNCITRAL Arbitration Rules states that the challenging party shall seek a decision on the challenge from the appointing authority. But, the article does not mention the scenario where, the appointment is not made by the appointing authority. However, "Article 13.4 parallels Article 12.1 of the 1976 UNCITRAL Rules despite the omission of specific provisions outlining three scenarios for determining how to designate the appointing authority with responsibility for deciding the challenge" ***[****Supra p. , p. 309]*.
11. Under article 12.1 of 1976 UNCITRAL Rules, the challenge could be decided **a.** by the appointing authority who made the original appointment, **b.** by the appointing authority that is already being designated by the parties even if the appointment is not made by that authority and **c.** finally the remaining cases where the appointing authority will be designated in accordance with procedure provided in Article 6 of UNCITRAL Arbitration Rules. These scenarios are not present in the current Article 13. 4 of 2010 UNCITRAL Arbitration Rules, however, "the Travaux preparatoires of the 1976 UNCITRAL Rules nevertheless remain instructive as to the interpretation of the 2010 UNCITRAL Rules" [Id].
12. If we interpret the current situation in accordance with article 12.1 of 1976 UNCITRAL Rules, Mr. Prasad was not appointed by an appointing authority. Rather, it was the Claimant who appointed him. Nor did Respondent and claimant had designated any

appointing authority in arbitration agreement. Therefore, the power to decide on the challenge should be given to appointing authority which is going to be designated in accordance with article 6.2 of the same UNCITRAL Rules which is also present in 2010 UNCITRAL Arbitration Rules.

2. PCA should designate the appointing authority in accordance with article 6. 2 of UNCITRAL Arbitration Rules.

13. Unless parties have already designated an appointing authority, any of the parties can propose name of persons or institutions including the Secretary General of PCA to act as appointing authority *[Art. 6.1. UNCITRAL Rules]* However, if all parties do not agree on the proposed appointing authority, a party can request PCA to designate an appointing authority *[Art. 6.2. UNCITRAL Rules]* Since RESPONDENT claims that the power to decide on the challenge is with the arbitral tribunal, reaching to an agreement for designating an appointing authority in accordance with article 6.1 will not be practical between RESPONDENT and CLAIMANT. And therefore, in accordance with article 6.2 PCA should designate an appointing authority.
14. A similar scenario was present in *IRAN-US Claims* in challenge of judge *Mangard*, where Iran claimed that the procedure set forth in article 6 and 12 of 1983 Tribunal Rules *("The rules were established on basis of UNCITRAL Rules with some amendments to govern IRAN-US claims arbitration")* were not followed. "Specifically, Iran charged that the United States had requested that the Secretary-General designate an appointing authority before attempting to reach an agreement on an appointing authority with the Iranians" *[IRAN – US claims]* However, judge Moons, the appointing authority designated by PCA, rejected the claim of Iran stating that, the main purpose of the article 12 was to ensure a speedy process including the cases mentioned in 12. 1 C by designating "an Appointing Authority to decide on the challenge as quickly and as simply as possible". *[Supra , p. 310]*
15. Furthermore, Judge Moons also mentioned that the reference to UNCITRAL Rules article 6 in article 12.1(C) should be interpreted "as meaning that except in cases in which the Parties have agreed upon an Appointing Authority in the context of the procedure relating

to the appointment of an arbitrator, the Secretary-General of the Permanent Court of Arbitration at The Hague is empowered to designate an Appointing Authority to decide on a challenge, if he receives a request to that effect from one of the Parties". *[US – IRAN claims]*.

C. Parties never agreed on exclusion of article 13. 4 UNCITRAL arbitration rules.

16. There was no agreement for exclusion of Article 13. 4 between Claimant and the respondent. Respondent argues that it has excluded application of article 13. 4 by the phrase "without involvement of arbitral institution" to the arbitration clause. However, the addition was intended to be appointment of the arbitrators, not the challenge process **(1)** and parties did not have an explicit written agreement **(2).**

1. The "addition" to arbitration clause was intended to be applicable for appointment of the arbitrators. Not challenge process.

17. The *"addition"* to arbitration clause is subject to interpretation according to the "rules as applicable to contract" (i.e. intention of the parties) as they are also a form of contract. More specifically, an arbitration agreement should be interpreted "according to its language, in the context of the agreement as a whole, and in the light of the circumstances in which it is made" *[Herbst, 2012, p.2]* In addition, according to Interim Award in ICC, it was decided that that arbitration agreements should also be interpreted following the general principles of interpretation of contract i.e "seeking the real and common intent of parties, based on the wording of the clause, and the principle of confidence or good faith" *[Interim Award]*
18. The language of dispute resolution clause in the existing contract is not explicit regarding the exclusion of arbitral institutions from the challenge process. Even if the agreement is considered as a whole, one cannot conclude that the arbitral institution is excluded on challenge of an arbitrator. Most importantly the circumstances present, the conversations exchanged with the claimant by respondent regarding the arbitration clause, clearly

indicates the intention of addition was for appointment of the arbitrators not other parts of the arbitral proceedings. In its email of 10th March, Respondent by stating, "Apparently, we have never had any problems concerning the *composition of arbitral tribunals* and…existing arbitration clause would not cause any problems…" clearly shows concerns about effect of existing arbitration on composition of arbitral tribunal *[Cl. Ex. 1. ¶ 5]* Moreover, in its email of 27th March, Claimant replies to Respondent with the same intention as it writes "…we are certain that we will be able to overcome any problems relating to the *constitution of the arbitral tribunal* even *without institutional support*." *[Cl. Ex. 3. ¶5]* Furthermore, parties did not exchange any other conversation regarding the addition in arbitration clause except Cl. Ex. 1 and 3 [*Proc. Ord. 2. p. 52, ¶ 2*].

19. From the existing conversation among the parties, any third reasonable person will understand that parties intended exclusion to apply only to initial constitution of tribunal, and not to subsequent challenges.

2. **Parties did not have an explicit written agreement to exclude article 13. 4**

20. All of the provisions of UNCITRAL arbitration rules are optional for parties adopting them. However, to deviate from any part of rules a written agreement is needed. [*Gaillard et al.*] But, there is no such written agreement between responded and claimant regarding exclusion of article 13. 4 of UNCITRAL Arbitration Rules. Thus, article 13. 4 is one of the most important provisions relating to party autonomy, and should not be excluded merely for Respondent's allegation regarding exclusion of their article on basis of only two exchanged conversation regarding this issue.

D. The power of Tribunal is not supported by UNCITRAL Arbitration Rules and is not practical.

21. Under UNCITRAL Arbitration rules, parties are not empowered to decide on the challenge of its members [*Paulsson & Petrochilos]*. Contrary to Respondent's claim that "Article 13 (4) shows that the drafters of the UNCITRAL Arbitration Rules wanted to avoid that the

challenged arbitrator decides in its own cause. That is the only reason why the task to decide on the challenge is entrusted to the appointing authority" *[Notice of Challenge, p. 39, ¶ 8]*, report of UNCITRAL on its eight session states a different scenario. While the role of appointing authority was discussed for deciding on the challenge, and there were suggestions in this regard, "One possibility was that the other two members of the arbitral tribunal should decide on the question. But it was noted that this might not lead to any decision as these members might not agree" *[Report on Eight session, p. 34, ¶85]* Consequently, instead of the arbitral tribunal, involvement of the courts was suggested. In other words, the power of Arbitral Tribunal to decide on the challenge was not approved by drafters of UNCITRAL Arbitration Rules.

22. Furthermore, the practicality of two other members of the tribunal deciding on the challenge of its member should be taken into consideration. This concern was also raised while drafting article 13.2 of Model law, where the drafters mentioned "the possible psychological difficulties of making the arbitral tribunal decide on a challenge of one of its members" *[UNCITRAL Report, 18th session]* More importantly, there exists some future concerns relating this practice. "By setting standards in deciding over challenges brought against fellow arbitrators, the deciding co-arbitrators thus set standards that one day may be invoked against themselves" *[Daele, 2012, p. 172]* Hence, the parties' contract, the applicable institutional rules, and even common sense require that Respondent's challenge procedure be rejected.

II. Even if the Arbitral Tribunal is to decide on the challenge, Mr. Prasad should be present in Tribunal.

23. Respondent asked a decision on the challenge of Mr. Prasad by arbitral tribunal without his involvement, claiming that it is a common practice in ad hoc arbitration. But, it does not give any legal basis for power of arbitral tribunal to decide on a challenge. In other words, while the power of appointing authority comes from article 13.4 of UNCITRAL Rules, which is rejected by respondent, Respondent fails to bring the legal authority that gives decision making power to Arbitral Tribunal.

24. On the other hand, article 13.2 UNCITRAL model law which is lex arbitri in this case or law of seat of arbitration, is the legal base for power of an Arbitral Tribunal to decide on a challenge. In other words, if the arbitral tribunal agrees that article 13. 4 of the UNCITRAL Rules were excluded, there will be a gap or "lacunae" to be filled. For the gap to be filled we refer to lex arbitri, the Model Law .
25. The article does not explicitly states inclusion of the challenged arbitrator, nor does it specify exclusion of the challenged arbitrator. However, referring to drafting history of Article 13. 2 of Model law, it was concluded at the end that the challenged arbitrator should be present in the panel for deciding on his challenge [*Holtzmann & Neuhaus*] Inclusion of challenged arbitrator in the challenge process is also supported by decision of a Germen court, Oberlandesgericht Dresden, which concluded that the challenge to an arbitrator should first be decided by Arbitral Tribunal including the challenged Arbitrator *[CLOUT Case]*.

Issue One Conclusion

26. The Arbitral Tribunal is not empowered to decide on the challenge of Mr. Prasad. The challenge procedure should be in accordance with the applicable rule chosen by the parties which is UNCITRAL Rules. According to article 13. 4 of UNCITRAL Rules, the appointing authority is to decide on the challenge of Mr. Prasad. Also, parties never had an agreement on exclusion of article 13. 4 in the contract or otherwise. Furthermore, even if the arbitral tribunal is to decide on the challenge of Mr. Prasad, he should be in the panel pursuant to article 13.2 of Model Law which is the lex arbitri in this case.

ISSUE TWO: EVEN IF THE ARBITRAL TRIBUNAL HAS THE AUTHORITY TO DECIDE ON THE CHALLENGE, MR. PRASAD SHOULD NOT BE REMOVED FROM ARBITRAL TRIBUNAL.

27. RESPONDENT has challenged impartiality and independence of Mr. Prasad on the basis of repeated appointment, article written by Mr. Prasad, not disclosing the matter of third party funder and conducts of Mr. Prasad's law firm that cannot be further supported by governing laws of the contract. According to UNCITRAL Arbitration rules, there are no sufficient grounds for challenging Mr. Prasad's impartiality and independence, whereas RESPONDENT supports claim based on IBA guidelines.
28. RESPONDENT fails to prove existence of any justifiable doubts as to impartiality and independence of Mr. Prasad, as laid down in UNCITRAL Arbitration rules **(I)**. The fact that RESPONDENT asks IBA guidelines to be considered while deciding on challenge of Mr. Prasad, does not override the existing rule in UNCITRAL arbitration rules regarding this issue **(II)**. Even if IBA guidelines are to be considered while challenging Mr. Prasad, the circumstances laid down in IBA guidelines are not present in this case (**III).**

I. Should The Arbitral Tribunal find that it has the authority to decide on the Challenge of Mr Prasad, under the UNCITRAL Arbitration Rules, RESPONDENT fails to show any justifiable doubts as to Mr Prasad's Impartiality and Independence

29. In general conditions of the contract, clause 20 states conditions of dispute resolution, where parties have chosen UNCITRAL arbitration rules as governing law of the proceeding of the case [*Clm. Exh. 2*] Whereas, deciding about challenging Mr. Prasad's impartiality and independence, article 12 of UNCITRAL arbitration rules should be taken into consideration. The article states that whenever there are justifiable doubts against an arbitrator, there are grounds for challenge. However, RESPONDENT failed to prove existence of any justifiable doubts on impartiality and independence of Mr. Prasad present to article 12 of UNCITRAL arbitration rules. There are no factual evidences presented by RESPONDENT that rises justifiable doubts as to independence of Mr. Prasad **(A)** Nor the

RESPONDENT could prove partiality of Mr. Prasad based on governing rules in this case **(B)**

A. RESPONDENT should prove that Mr. Prasad is dependent based on the governing law and rule of the case.

30. Mr. Prasad is independent in this case and there are no sufficient evidences indicating his dependence towards the CLAIMANT. Independence of an arbitrator is always as "non-existence of any unacceptable external relationships or connections between an arbitrator and a party or its counsel such as financial, professional, employment, or personal *[Born 2014]* In the independence and impartiality declaration letter of Mr. Prasad, all needed information were disclosed by Mr. Prasad *[Cl. Ex. 11]* No information was hidden because of which any doubt would arise among parties.
31. the term justifiable doubts are unhelpfully abstract and we can define it through some situations in which arbitrators were disqualified. such as, arbitrator's prior involvement in the case, the party being arbitrator for its own case, arbitrator's direct financial interest in the case, arbitrator's business dealing with the party, or arbitrator's close personal or family relationship with the party. Mr. Prasad does not come under any mentioned circumstances, therefore there are no justifiable doubts against him *[Born. 2014]*
32. Moreover, justifiable doubts are also being measured based on a reasonable mind of a third person who knows laws and facts of the case. Even if we examine the current case from a reasonable third person's point of view, Mr. Prasad is not dependent or partial to the current case *[Born. 2014]*
33. In case of *JungScience Information Technology Co. Ltd. v. ZTE Corp* the high court of Hong Kong did not disqualify the challenged arbitrator based on view of third reasonable person and stated that there should be different standards for independence and impartiality of arbitrators based on context of the case. *[Jung Science Information Technology Co. Ltd. v. ZTE Corp, 2008, court of Hong Kong]*

B. RESPONDENT could not prove partiality of Mr. Prasad before Arbitral Tribunal under the governing law and rules of the case

34. Mr. Prasad is impartial in this case and RESPONDENT has failed to provide sufficient evidence proving the partiality of Mr. Prasad. RESPONDENT is raising concerns regarding Mr. Prasad's recent work experience and current law firm. According to commentator Born, partiality is often considered as state of un-biasness of the arbitrator towards one of the parties and is often affected by dependence of a party *[Born. 2014]*.
35. An arbitrator shall be more open minded than being impartial from both sides. In other words, an arbitrator's nationality, personal experience, legal work, ideology and other relating matters may be related to specific party. However, these measures are not sufficient for disqualification of an arbitrator unless there are solid circumstances and high level of prove regarding partiality of arbitrator [*Born; Daele]* which is not proven by RESPONDENT yet.
36. Based on a policy reasoning, disqualification of arbitrators based on simple reasons can lead to violation of rights and also reputation damage of arbitrators. This is to prevent abusing arbitrator's rights *[Luttrell]* which overall can affect the efficiency of arbitral proceedings. Also, it will make the process of arbitration slower than it should be. Therefore, there should be always solid grounds for proving the justifiable doubts against an arbitrator.
37. In the case of *Tidewater. v Venezuela* Professor Stern, one of the party's arbitrator, was appointed four times by Venezuela and 6 times by counsel of Venezuela. The other party challenged the arbitrator for so many repeated appointments however the court did not disqualify the arbitrator by saying independence and impartiality of arbitrator depends on the substance matter not mathematical calculation of appointment of parties *[Tidewater. v Venezuela, 2010]*.

II. IBA Guidelines does not override application of Article 12 of UNCITRAL arbitration rules.

38. IBA Guidelines are not being considered in this case since Article 12 of UNCITRAL arbitration rules already sets the standards of impartiality and independence of arbitrators. Article 12 of UNCITRAL arbitration rules is about circumstances where an arbitrator can be challenged on basis of his/her impartiality and independence. On the other hand, RESPONDENT seeks consideration of IBA guidelines while challenging independence and impartiality of Mr. Prasad. However, based on IBA guidelines itself, when parties have chosen applicable laws, the guidelines should not override the chosen law of the contract *[IBA guidelines. Pg. 3. ¶6]*.
39. Application of IBA guidelines as legal provision in the arbitrations is a big misconception for some parties, including respondent in the current case. Such interpretation is wrong since IBA in its name is a guideline not a rule. These guidelines do not override other laws specified in this case *[Will Sheng Wilson]*.
40. These guidelines are there only for helping arbitrators to decide in the cases. It does not itself function as a separate law and does not override laws determined in a case. Also, in most of the cases where IBA guidelines were used, they were only for guidance and decisions were not based on the guideline *[Schwarz. J]*.
41. In a similar case of *W Ltd vs. M SDN BHD,* the English court rejected the challenge, which was based on the guideline. It was clearly indicated that whenever there is a law, a guideline cannot override it [*W Ltd vs. M SDN BHD, 2015]*.
42. Also, when IBA guidelines were made, the working group wanted to make sure that guidelines are applied based on common sense and without unduly formalistic interpretations. In other words, the guidelines application differs in each case and should be applied based on the facts *[2014 Bar Association]*.

III. Even if the Tribunal determines that, contrary to Claimant's submissions above, the IBA Guidelines should either apply or be persuasive authority in some way, Respondent's challenge still fails

43. Even if parties want IBA guideline to be legally binding as other laws of arbitration, both parties should agree in first hand *[Will Sheng Wilson Koh]* which did not happen in current

case. IBA guidelines are set forth for arbitrators to use when there are cases of disclosure and conflict of interest. RESPONDENT asked for IBA guidelines to be considered while challenge of Mr. Prasad arguing that the circumstances present in this case are taken serious in IBA. However, RESPONDENT fails to bring strong evidence to support their allegations. Claimant did not have any obligation of disclosure regarding third party funder **(A)** Repeated appointment of Mr. Prasad is not indicator of his partiality and dependence **(B)** Mr. Prasad's law firm case does not affect his impartiality and independence **(C)** article written by Mr. Prasad comes under IBA's green list **(D)**

A. Claimant's Non – disclosure of third party funder does not affect impartiality and independence of Mr. Prasad.

44. RESPONDENT is raising concerns regarding non – disclosure of third party funder by CLAIMANT *[Notice of Challenge. Pg.39. ¶9]* However, CLAIMANT does not have any obligation of disclosure under governing rule and law of the contract. According to *Lévy & Bonnan,* leading scholars, putting an obligation of third party funder disclosure is time consuming and unnecessary. Also, funding is a sensitive and confidential issue, which is usually preferred not to be disclosed to anyone. A party does not have any obligation to disclose third party funder unless the funding agreement is related to merits of the case *[Slaoui]* since funding is a private matter and it does not affect the merits of the case *[Sanz-Pastor/Dimolitsa; Sahani; Khouri/Hurford/Bowman]*
45. Since third party funders do not want to be involved very much in the proceedings, it is good not to make disclosure of third party mandatory *[Nieuwveld & Shannon]*. Therefore, CLAIMANT by having a third party funder, is not obliged to disclose such matter *[Waincymer; Goeler; Park/Rogers]*.
46. Even if CLAIMANT was obliged to disclose such fact, it never affects impartiality and independence of Mr. Prasad since he was not aware of such fact. CLAIMANT disclosed the fact of having a funder on 7 September 2017 *[Res. Pg.35]*. Mr. Prasad immediately disclosed his indirect relationships with third party funder on 11 September 2017, which is itself indicator of Mr. Prasad's commitment to current case *[Res. Pg.36]*.

47. Impartiality and independence of an arbitrator shall be judged based on his performance not the related party *[Cleis]*. A party's failure to disclosure does not automatically disqualify an arbitrator from panel *[Berger; Slaoui]*
48. Also, relationship of Mr. Prasad with FindFunds LP does not create grounds for challenging his impartiality and independence. According to IBA General Standards 6 (b), relationship with third party funding is problematic where relationship with third party involve direct economic interest. However, FindFunds does not have any direct economic interest in this case. Direct interest means, arbitrator is having percentage benefit from proceedings or is directly involved in the case. Therefore, disqualifying an arbitrator based on this issue shall be examined carefully and the intensity of relationship shall be considered *[Burcu Osmanoglu]*.

B. Repeated appointments of Mr. Prasad is not indicator of his partiality and dependence

49. RESPONDENT is raising concerns about repeated appointments of Mr. Prasad by Mr. Fasttrack's law firm and the parties funded by FindFunds LP *[Notice of Challenge. Pg. 39, ¶10]* First, Mr. Prasad disclosed his appointment by Mr. Fasttrack's law firm and it was accepted by RESPONDENT *[Res. to Notice of Arbitration, Pg. 26, ¶22]* Second, Mr. Prasad immediately disclosed the relationship he had with findfunds LP after he was informed about third party funder. An arbitrator is obliged to disclose about such relationships immediately after being informed by the party, which was done by Mr. Prasad in the current case *[Burcu Osmanoglu]*
50. Moreover, though findfunds LP and its subsidiaries were funders of the party by, which Mr. Prasad was appointed, the funder had very little or no influence at all in the arbitration proceedings, especially appointment of arbitrator. In other words, FindFunds LP did not have any effect on appointment of Mr. Prasad. Therefore, there are no grounds for challenge of Mr. Prasad *[PO2, Pg. 50, ¶4]*
51. According to Karel Daele, arbitrators are being appointed many times by the same party, they have legal academic writings or they have relationship with ex – law firm. However,

these circumstances are common knowledge that those arbitrators are active members and have served one party many times.

52. Also, repeated appointments of Mr. Prasad is actually indicator of his impartiality and independence rather than indicator of justifiable doubts. Since it is indicator of how much the arbitrator is qualified, impartial and independent that he/she is being appointed over and over again *[Will Sheng Willson]*.

C. Conduct of Mr. Prasad's law firm partner does not affect Mr. Prasad's impartiality and independence

53. The relationship of Mr. Prasad's partner Slowfood with FindFund LP does not affect impartiality and independence of Mr. Prasad. RESPONDENT has raised this claim based on IBA guidelines par. 2.3.6 which states the challenge grounds when there is significant commercial relationship between arbitrator's law firm and one of the parties or affiliate of one of the parties. However, RESPONDENT has failed to prove existence of "significant" relationship.

54. A significant relationship is when there are continuous and long lasting relationship between the law firm of arbitrator and one of the parties or affiliate of one of the parties. Generally, significant means noticeable, something big or important. It implies that the relationship should be strong enough to be noticed easily *[Ramón, 2012]*. In the current case, there is no significant relationship between Mr. Prasad and his partner representing a client. A lawyer's prior contacts and actions do not necessarily make a conflict of interest *[E.D.C., 6 September 1977, (U.S.A.)]*

55. Bogart, one of the legal scholar, quotes "it is not necessary for an arbitrator to disclose the fact that he is counsel to the claimant in an unrelated arbitration proceeding with the same third-party funder for the simple reason that funders are not 'affiliates' of the parties. In other words, since third party funders are not affiliate of a party, therefore the relationship is not considered as significant commercial relationship and disclosure is not mandatory.

56. Also, IBA guidelines define circumstances of disclosure obligation of arbitrator, not disqualification. In other words, they are guidelines for assistance of arbitration panel too *[Otto De Wjnan et. al]*.

D. According to IBA's green list, Mr. Prasad's article about conformity of goods does not indicates his partiality or dependence

57. RESPONDENT is claiming that Mr. Prasad's legal opinion about article 35 of CISG, was hidden by Mr. Prasad and he has already expressed his view about the disputed issue which is indicator of his partiality and dependence *[Res. Ex. C4, Pg. 40]*. However, based on Article 4.1.1 of IBA's green list, an arbitrator can express legal opinion relating to particular issues of the case. Also, Mr. Prasad's written article was already available on his website and was published by one of the leading arbitration database, which indicates that neither CLAIMANT nor Mr. Prasad had intention of hiding the article *[Proc. Ord. No.2. Pg. 51, ¶14]*.
58. Also, According to Born, tribunal should be consistent of expertise and experienced lawyers. An arbitrators's legal philosophy and written article is not related to his impartiality and independence. Therefore, Mr. Prasad's legal opinion cannot be a reason for his disqualification *[Weibel et al.]*
59. A case held on 7 June 1990, Uni-Inter v Maillard, is similar to current case. In the mentioned case, arbitrator expressed his view over a legal issue, which was the main issue of the dispute. The challenge against the arbitrator was rejected since expressing idea regarding a legal issue is not problematic and an arbitrator should not be disqualified for that reason *[Uni-Inter vs. Mialland, 1990]*.

Issue Two Conclusion

60. Even if the arbitral tribunal is empowered to decide on the challenge of Mr. Prasad, he should remain in the office. First, RESPONDENT has failed to prove impartiality and independence of Mr. Prasad, factually and legally. Second, there are no justifiable doubts as to impartiality and independence of Mr. Prasad as required by article 12 of UNCTIRAL Rules. Third, parties have never agreed on application of IBA guidelines nor does it override the existing UNCITRAL Rules. Finally, even if the IBA guidelines are applicable in this case, conducts of Mr. Prasad cannot be a base for his partiality and dependence.

ISSUE THREE: THE STANDARD CONDITIONS OF THE CLAIMANT GOVERN THE CONTRACT

61. RESPONDENT sent its Invitation to Tender to CLAIMANT on 10th March 2014 for the supply of chocolate cakes and asked the CLAIMANT for submitting their offer. In its Invitation to Tender, RESPONDENT had attached its own code of conduct for the suppliers and specified that the contract will be subject to the general conditions of RESPONDENT *[Cl. EX, pg. 8]*. However, in response to the invitation to tender, CLAIMANT sent its offer for the conclusion of the contract with amendments in the manner of payment and size of the cakes. It is also mentioned that CLAIMANT'S offer will be subject to the application of its own general conditions of sale including its own code of conduct *[Cl. EX C4. Pg. 16]*.
62. RESPONDENT did not object to any of the amendments including the application of general conditions of CLAIMANT, which became part of the contract in accordance with article 19 of CISG. According to article 14 (2) of CISG, tender was an invitation to offer and it was the CLAIMANT who made the offer. Pursuant to article 8 of CISG, CLAIMANT had the intention to apply its own standard terms to the contract **(I).** RESPONDENT indicated assent to the offer of CLAIMNANT by not objecting to the offer terms **(III).**

I. Pursuant to article 8 of CISG, CLAIMANT had the intention to apply its own standard terms to the contract.

63. CLAIMAINT in its email of 27 March 2014 clearly indicated that CLAIMANT is the party making the offer by stating "To be completely transparent, we have decided to submit a proper offer containing the changes and have left the relevant sections in the Tender Documents open or refrained from including the changes in the documentation" *[Cl. Ex C4. Pg. 15]*. Additionally, CLAIMANT in its offer has given explicit reference to its code of conduct and standard conditions available in their website.

64. According to Schwenzir, the question on whether terms are included in the contract or not and whose standard terms govern the contract is an issue falling squarely within the scope of CISG. Article 8 must be applied in the interpretation of statements by and other conduct of the parties leading up to and including the conclusion of the contract. Additionally, offer made by the offeror in terms of article 14 and the acceptance of the offer by the offeree must be interpreted in the light of article 8.
65. Under to article of 8 of CISG and principle 4.1 of UNIDROIT principles, contract is to be interpreted according to the common intention of the parties or the understanding of a reasonable person with due considerations to the surrounding circumstances. Pursuant to article 8 (1) of CISG and principle 4.1 of UNIDROIT principles, common intention of parties was to apply CLAIMANT'S standard condition to the contract **(A).** Under article 8(2) and 8 (3) of CISG, reasonable person's understanding and due consideration to the relevant circumstances demonstrate that Claimant's standard condition apply to the contract **(B).**

A. Pursuant to article 8 (1) of CISG and principle 4.1 of UNIDROIT principles, common intention of parties was to apply CLAIMANT'S standard condition to the contract

66. CLAIMANT in its offer of 27 march 2014, clearly indicated that "The above offer is subject to the CLAIMANT'S General Conditions of Sale and their Commitment to a Fairer and Better World" and CLAIMANT has explicitly given reference to its code of conduct available in their website. As required by Art. 8(1) of CISG and principle 4.1 of UNIDROIT, "statements made by and other conduct of a party are to be interpreted according to the common intention of the parties."
67. According to Schwenzir, "Where the offeror the claimant in the current case has clearly communicated to the offeree that it wanted the agreement to be subject to its standard terms then the standard terms should be applicable where the offeree accepts the offer, unless the offeree clearly indicates that it does not agree to such incorporation, provided that the offeree has a reasonable opportunity to take notice of the contents of the standard terms." The fact that CLAIMANT has given explicit reference to its standard terms in the offer of 27 March, 2017 and RESONDENT has also not objected to such inclusion indicates that

the common intention of parties was to apply CLAIMANT'S standard conditions at the time of conclusion of the contract.

68. CLAIMANT'S position in this regard is further supported by CISG advisory council opinion No. 13. The CISG Advisory Council has explained that standard terms are included in the contract where the parties have expressly or impliedly agreed to the inclusion of the terms and the other party has had a reasonable opportunity to take notice of the terms. "Implied agreement may be inferred where the conduct of the other party has created a reasonable understanding that it has accepted the inclusion of the standard terms."

B. Under article 8(2) and 8 (3) of CISG, CLAIMANT'S standard condition apply to the contract.

69. Pursuant to article 8(2) and 8(3) of CISG, reasonable person's understanding and due consideration to the relevant circumstances demonstrate that CLAIMANTS standard conditions govern the contract. Article 8(2) stipulates that where a party is not aware of the intent that the other party had with a specific statement, that statement must be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. Article 8(3) requires that in determining the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case.
70. Commentators explain that, statements and conduct of parties is to b interpreted according to the understanding of a third reasonable person that the third person of the same kind as the addressee would have had in those circumstances, where one party was unaware or could not have been aware of the subjective intention of the other party *[Schwenzeir. Article 8.2]*.
71. Furthermore, according to Sonja A. Kruising, a leading scholar, as per article 8 (2) of CISG, it shall be made clear that offerror had the intention to include its general terms to the contract and that a third reasonable person of the same kind would have had the same understanding as the offeree. Kruising further clarifies that for an inclusion of the general terms and conditions to be effective, it first requires that the intention of offeror in regards

to such incorporation of general terms in the contract is made apparent to the recipient of the offer.

72. According to Schlechtriem & Schwenzer, where the other party was unaware or could not have been aware of the subjective intention of the offeror, then the statement is to be interpreted according to the understanding that a reasonable person 'of the same kind' as the addressee would have had in the same circumstances. In the current case language of the offer was explicit enough that RESPONDENT had a reasonable opportunity to take notice of the terms.
73. According to CISG advisory council opinion NO. 13, a party is deemed to have had a reasonable opportunity to take notice of the standard terms: Where, in electronic communications, the terms are made available to and retrievable electronically by that party and are accessible to that party at the time of negotiating the contract. RESPONDENT had access to the standard terms of claimant in their website and had already read them before accepting the offer and according to RESPONDENT, CLAIMANT'S code of conduct was one of the factors convincing RESPONDENT'S decision to award the contract to CLAIMANT [*Cl. Ex C.5. Pg. 17*].

II. RESPONDENT indicated assent to the additional terms of CLAIMANT'S offer by not objecting to the offer terms

74. Conditions of sale of CLAIMANT has become part of the contract because offer by the CLAIMANT constitutes a purported counter offer to the Tender sent by RESPONDENT. RESPONDENT accepted the terms of contract. Article 19 (1) states, "a reply to an offer, which purports to be an acceptance containing additions, limitations or other modifications 20 is a rejection of the offer and constitutes a counter-offer".
75. According to Predrag Cvetkovik, a leading scholar, article 19 reflects the traditional theory that expressions of mutual agreement is required for giving raise to contractual obligations. Accordingly, an acceptance must comply with the offer. Should the purported acceptance not comply completely with the offer, it is making of a counter-offer and there is no

acceptance. The counter-offer, requires acceptance by the other party for the formation of a contract.

76. However, according to Ulrich Magnus, the acceptance need not to use the exact same words as used in the offer so long as the differences in the wording used in the acceptance would not change the obligations of the parties. The reply by CLAIMANT to the tender made inquiries and suggested the possibility of additional terms and according to Schwenzir and shlekhtrim, "it may be that the reply does not purport to be an acceptance under article 19 (1). The reply may be an independent communication intended to explore the willingness of the offeror to accept different terms while leaving open the possibility of later acceptance of the offer." RESPONDENT has only sent its tender to five other businesses including CLAIMANT **(A).** Pursuant to article 14 (2), Tender was invitation to offer and thus CLAIMANT made the offer **(B).** CLAIMANT According to article 19 (2), in the Last Shot Rule the set of contractual terms sent last in the exchange of standard terms will prevail **(C).** RESPONDENT'S act indicating assent to the offer constitutes acceptance **(D).** Alternatively, the knock out rule also supports the non-liability of CLAIMANT **(E).**

A. RESPONDENT has sent its tender to only five businesses including the CLAIMANT

77. RESPONDENT claims that they have put out a public tender according to which it's the initiating party who will decide the terms of the case [Res. Statement of facts, page 27, para 25]. And therefore, their code of conduct was to be applied on the parties sending a tender offer. However, RESPONDENT not only had publicized its tender in the pertinent industry newsletters, but it was also sent to five other business including CLAIMANT [*Res. SoF, page 25, para. ¶7*].
78. CLAIMANT did not refer to the "pertinent industry newsletters" to get the tender put out by the RESPONDENT, but received an invitation to tender and the tender documents on 10th March 2014 from the RESPONDENT [*Clm. Ex1, p. 8*]. In other words, the process that CLAIMANT participated in was not a public tender, but a closed tender where the 21 terms of the contract was not to be determined by the initiating party but by agreement of both parties. According to law of tendering, closed tender is a formal process whereby

contractors are invited providers to submit firm and unequivocal offers where the terms of the contract are not to be determined by the initiating party but by agreement of both parties. In a similar case, in State Transit Authority (NSW) v Australian Jockey Club the, Judge found an exclusion contract to be valid, stating that it was "abundantly clear that the plaintiff… was entitled to deal with individual Tenderers differently and was under no obligation to follow any particular process."

B. Pursuant to article 14 (2), Tender was invitation to offer and thus CLAIMANT made the offer

79. RESPONDENT sent an invitation to tender to CLAIMANT on 10 March, 2014 and received an offer from CLAIMANT on 27 March 2014 [*Clm. Ex. 1, p. 8*]. Article 14.1 of CISG defines offer, as a proposal for concluding a contract addressed to one or more specific persons if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. Article 14(2) provides a proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers.
80. Determination of the person for whom the offer is intended "invitation ad offerendum", is one of the conditions for a proposal to be considered an offer. According to Schlechtriem and Schwenzer, "article 14 (2), takes a middle position in respect of public offers. It states that a proposal other than one addressed to one or more specific persons is normally to be treated merely as an invitation for the recipients to make offers. However, it constitutes an offer if it meets the other criteria for being an offer and the intention that it be an offer is clearly indicated. Such an indication need not be an explicit statement".

C. In the Last Shot Rule, the set of contractual terms sent last in the exchange of standard terms will prevail

81. CLAIMANT made the offer, which had different terms other than those required by the tender and was the last party to give explicit reference to the application of its own standard terms and code of conduct. Respondent accepted the offer. According to the last shot rule

22 in article 19 (2), If the offer is the last document to change hands before performance, its terms will bind the parties.

82. In the “Last Shot” Rule the set of contractual terms sent last in the exchange of standard terms will prevail. The original offeror (or counter-offeror) accepts by conduct the counteroffer of the original offeree. Considering that the buyer will, usually, be the first party to send his/her standard contract terms, the seller will be in an advantageous position. The buyer, instead, will have two options: i. reject the goods and deprive himself/herself of the benefits of the contract, or ii. Accept the goods under the terms of the seller. [John E. Murray,Jr, The Definitive "Battle of the Forms": Chaos Revisited] As stated by Miss Ming, head of purchasing of RESPONDENT, in her email of 27 March, 2014 “please find attached our offer following your invitation to tender”, this language of CLAIMANT is obviously intended to make it clear that it was CLAIMANT making the offer and was the last one to offer his standard terms.
83. Similar to the current case, In the Butler Machine Tool Co. Ltd. v. Ex-Cell-O Corp. (England) Ltd., there was an exchange of forms between Butler and Ex-Cell-O. All three courts of appeal judged in favor of Ex-Cell-o (the buyer) who was the last man who put forward the latest term and conditions: and, they were not objected by the other party.

D. RESPONDENT’S act indicating assent to the offer constitutes acceptance

84. On 27 March 2014, CLAIMANT brought amendments to the close tender sent by RESPONDENT, which were accepted by the RESPONDENT. RESPONDENT in its email of 7 April 2014, indicated that they accepted the offer of CLAIMANT notwithstanding the changes being brought to the payment terms and size of the cakes. Additionally, RESPONDENT showed consent to the application of standard conditions of CLAIMANT including its code of conduct by not objecting to such inclusion.
85. Pursuant to article 19 (2) of CISG, the standard conditions of sale of CLAIMANT has become part of the contract. RESPONDENT’S act indicating assent to changes in payment terms and size of the cakes and not objecting to the application of general standard of CLAIMANT constitutes acceptance of the offer pursuant to article 18 (1). In a similar case

of Steiner v. Mobil Oil Corp. case, court ruled that Steiner had expressly limited acceptance
23 to the terms of his offer however Mobil's proposed terms, which materially altered Steiner's offer, were applicable to the case, because Steiner's did not object to the inclusion of buyer's standard terms and it accordingly excised the onerous terms from the parties' contract. In the current case, RESPONDENT accepted the offer and application of standard conditions of CLAIMANT stating that "we are pleased to inform you that your tender was successful notwithstanding the changes suggested" [*Clm, Ex C 5, Pg. 17*].

E. Alternatively, the knock out rule also supports the non-liability of CLAIMANT

86. Some commentators believe that last shot rule is not the best possible solution for the battel of form. As an alternative, knock out rule is one of the solutions for the battle of forms application of which is also supporting the CLAIMANT in the issue of non-liability. Under Art. 2.1.22 of UPICC, differently from CISG, the contract is ruled by the common terms of the code of conducts of both parties. "If one concludes that the issue of the "battle of forms" is not covered by the CISG, then the problem should be settled in conformity with the general principles on which the CISG is based, and with the applicable law chosen by the Parties in case of a gap in the CISG, i.e., in both cases, the UPICC" [*Huber-Mullis, p.92; Digest, p.98*].
87. The standard terms of both CLAIMANT and RESPNDENT are putting a similar obligation on CLAIMANT just to ensure compliance by its suppliers and not to guarantee it. Consequently, the contract will take effect when the selected terms of respective standard terms are not in conflict with each other and the remaining gaps will be filled by the applicable laws which is CISG and UNIDROIT in the current case.

Issue Three Conclusion

88. According to article 8 (1) of CISG common intention of the parties was to apply CLAIMANT'S general conditions to the contract. Even if the subjective intention of CLAIMANT was not known to RESPONDENT, due consideration to a reasonable person's understanding and surrounding circumstances indicate that CLAIMANT'S standard conditions govern the contract.

89. Additionally, According to article 14.2 of CISG, tender was an invitation to offer and it was the claimant who made the Offer. Respondent did not object any of the amendments brought to the payment terms and size of cakes including the application of general conditions of Claimant which became part of the contract in accordance with article 19 (2) of CISG. So the general conditions of CLAIMANT is governing the contract.

ISSUE FOUR: EVEN IF RESPONDENT'S GENERAL CONDITIONS ARE APPLICABLE, CLAIMANT COMPLIED WITH THE CONTRACT BY DELIVERING CONFORMING CAKES.

90. If the tribunal does not accept that claimant's conditions were incorporated, and instead finds that Respondent's term governs, claimant still has not breached the contract. RESPONDENT asserts that CLAIMANT has breached its contractual obligation by not delivering conforming cakes and thus, entitling RESPONDENT to terminate the contract. Allegedly, the cakes were not in conformity with the requirements set out by the RESPONDENT's code of conduct for suppliers because they were made with cocoa, which had not been produced in a sustainable manner.
91. Additionally, RESPONDENT claims that CLAIMANT has guaranteed compliance by its suppliers *[SoF. Res. pg. 26]* Pursuant to article 35 of CISG, production process of cocoa is not part of conformity of goods and failure to comply, with that shall not amount in fundamental breach *[SoF. Cl. pg. 7]*. In repudiation of the assertions made by RESPONDENT, CLAIMANT submits that RESPONDENT was not entitled to terminate the contract because there was no breach of contract by CLAMANT, let alone fundamental breach justifying termination of the contract by RESPONDENT.
92. CLAIMANT delivered cakes that were in conformity with the contract and article 35 of CISG. **(I)** CLAIMANT, at no point, agreed to guarantee compliance by its suppliers and thus, conduct of suppliers is not attributable to CLAIMANT **(II).**

I. CLAIMANT has delivered conforming goods pursuant to the requirements set out by the contract and article 35 of CISG

93. CLAIMANT delivered cakes that conformed to the conclusive quality requirements article 35 of CISG, which deals with the conformity of goods. Cakes delivered by CLAIMANT were of the quality and quantity required by the contract, because there is no express reference given to the inclusion of production process as the requirement for the conformity of goods in the contract **(A).** Production process does not come under conformity of goods

and **(B).** Also, CLAIMANT was only obliged to take good faith steps to ensure compliance of its suppliers, not to absolutely guarantee such compliance **(C).**

A. There is no express reference given to the inclusion of production process under conformity of goods in the contract

94. Production process is not expressly mentioned in the contract as a requirement for conforming goods. General conditions of the contract states "Comestibles Finos Ltd has a 'zero tolerance' policy when it comes to unethical business behavior, such as bribery and corruption." [*Cl. Ex. 2. pg. 12*]. The text of the contract has no express naming of production process when talking about their tolerance level towards unethical behavior.
95. According to Petra Butler, since production process comes under non-minimal ethical standard conditions, "it should be explicitly mentioned in the contract. By so doing, such norms become part of the contract and may be enforced, or their violation sanctioned, in the same way as with any other terms." It is highly advisable that the interested party insists on incorporating such express terms into the contract, in order to circumvent any later disputes in this respect and in order to "tailor" individual clauses to address specific human rights issues [*Schwenzer & Leisinger*]. Therefore, in the contract, the code of conduct of REPONDENT, even if applicable, has only been referred [*Cl. Ex. 2, pg. 13*]. BV Ikejiaku, in his book '*Consideration of Ethical and Legal Aspects of Corporate Social Responsibility'* states that: a simple reference to the Code of Conducts – *such as "*Please take note of the Code of Conduct of Company X, enclosed as Annex A" *as done by RESPONDENT* [*Cl. Ex. 2, pg. 13*] is not sufficient, as it is not clear for the supplier if he has to adhere to it or not.

B. Production process does not come under the conformity requirements of goods pursuant to article 35 (1) and 35 (2) of CISG.

96. RESPONDENT constantly claims that cakes delivered by CLAIMANT are not conforming pursuant to article 35 of CISG without specifying the particular applicable clause of article

35 [*SoF, Cl. pg. 6. ¶17*]. Article 35 (1) is conclusive and thus, the party proclaiming breach of contract when the contract is conclusively addressing all quality requirements can only refer to article 35 (1) [*MAGNUS in Staudinger Art. 35, 17*]. Therefore, based on the facts provided by the case, the contract does not have clear indication of production process under the conformity of goods, additionally, when the contract does not contain or insufficient detail under the conformity of goods is provided, then the recourse is to refer to article 35 (2) of the CISG [*supra. P. schwenzer and leisinger*].

97. Article 35 (2) is having a subsidiary nature and requires goods to be either fit for their particular use or ordinary use *[Ferrari et al*]. According to Christina Ramberg, Stockholm University, almost all CSR policies are being covered by "international initiatives which will in the long run lead us to established expectations in regards to emotions and feelings. But for the time being, we are not in a stage where we can solely base a claim on fit for purpose for nonconforming emotions. She further clarifies that "Normally the purchaser will have little of check quote holding the supplier responsible if ethical standards have not been met by referring to fitness for the ordinary purpose according to CISG Article 35.2(a) or to the purchaser's particular purpose in CISG Article 35.2(b)."
98. Schwenzer and Leisinger argue that the only ordinary purpose in goods is that it can be resold in the resale business and the mere way of goods manufacturing or production shall not influence this. In the case of a German seller and an Austrian buyer dealing woods, the production process criteria was not met but as the goods provided by the seller fulfilled its normally intended usage then court decided to announce the goods conforming.
99. Additionally, if we argue based on the policy reasoning and consider the overall benefit of society as a whole, inclusion of production process based on the UN Global Compact Initiatives will harm the middle class and lower class businesses and it enables the big Multi-National Companies to further capture the control of market, according to Neil Kokemuller, a leading Business scholar, implementation of CSR or Corporate social Responsibility is relatively difficult and it causes difficulties for the small businesses due to the lower available capitals *[Neil Kokemuller, 2011]* – therefore, the society, middle class and lower class of people owning businesses will be hurt and will cause the further empowerment of big companies.

100. CISG applies to sales contract that entails transfer of ownership from seller to the buyer as purpose of the contract. Ownership of emotions cannot be transferred from the seller to the buyer because emotions cannot be owned. According to article 3 (2) of CISG, when "labor or other services" are the predominant part of the obligation under the contract, CISG is not applicable to such sales contracts and to provide an emotional feeling, it is closely related to services.

101. The cakes, which have been delivered by CLAIMANT are in conformity with the requirements of the contract [*CISG, Article 35*]. Contrary to RESPONDENT's allegations, the fact, that not all cocoa was produced in an environmentally friendly manner does not render the cakes non-conforming.

II. CLAIMANT was only merely obliged to ensure compliance by its suppliers and not to guarantee, so the lack of conformity is not attributable to the CLAIMANT.

102. CLAIMANT has always complied with all obligations resulting from contract [*Cl. Ex C.9. P. 21*]. The fact that cocoa cakes have not been produced in accordance with contractually required principles and lacks conformity, is not attributable to the CLAIMANT. The global compact principles are not binding on CLAIMANT, which could affect the conformity of goods. The lack of conformity is resulted from the sub suppliers of the CLAIMANT, which is not attributable to the CLAIMANT. CLAIMANT has always complied with all obligations resulting from contract [*Cl. Ex C. 9, P. 21*]. Also, as stated in the email 27 March 2014 sent to Annable Ming *[Cl. Ex C3. P.15. ¶ 5]* Claimant will use its best efforts to ensure its suppliers will provide goods as requested. Additionally, Claimant has done its best efforts to make sure its suppliers compliance by monitoring Ruritania People Cocoa MBH in line with its guideline, instructed Egimus AG, a well-known company to provide CLAIMANT with Global Compact Compliance on site and they certified this particular supplier. Furthermore, CLAIMANT has monitored the related documentation for the last two years and nothing was there to suggest a fraud *[Cl. Ex C8, P.20, ¶2]*.

Issue Four Conclusion

103. Cakes delivered by CLAIMANT are conforming with the requirements set out by the contract pursuant to article 35 of CISG. The production process does not come under conformity of goods under article 35 of CISG and CLAIMANT was merely obliged to use its best efforts to ensure compliance by its suppliers and not to guarantee. Therefore, the lack of conformity resulted from the sub suppliers of the CLAIMAINT is not attributable to the CLAIMANT

STATEMENT OF RELIEF

In light of the forgoing submissions, counsel respectfully submits that the Tribunal should order RESPONDENT:

1. To order RESPONDENT to pay the outstanding purchase price in the amount of USD 1,200,000;
2. To declare the contractual relationship between CLAIMANT and RESPONDENT is governed by CLAIMANT ’s General conditions of sale
3. To order RESPONDENT to pay damages in the amount of at least USD 2,500,000;
4. To reject the RESPONDENT’s claims on ground of challenge of Mr. Prasad

To order RESPONDENT to bear the costs of the arbitration