TWENTY FIFTH ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRAION MOOT

Carthage University

Faculty of Legal, Political and Social Sciences of Tunis

Memorandum for CLAIMANT

On behalf of Delicatesy Whole Foods SP Equatoriana CLAIMANT	Against Comestible Finos Ltd Mediterraneo RESPONDENT
Achref Medini **Malek Zakraoui**	**Khawla Mraydi** **Yesmine Ben Mabrouk**

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

&	And
ACHR	American Convention on Human Rights
AGBs	Allgemeine Geschäftsbedingungen
Art. /Arts	Article/Articles
BGH	Bundesgerichtshof (German federal Court of Justice)
C	CLAIMANT's Exhibit N.
CISG	United Convention on Contracts for the International Sale of Goods
Cucina	Cucina Food Fair
ECHR	European Convention on Human Rights
G.C	General Conditions of sale
IBA Guidelines	International Bar association Guidelines
ICC	International Chamber of Commerce
i.e.	That is
Mr.	Mister
Ms.	Miss
N.	Number
OGH	Oberster Gerichtshof
OLG	Oberlandesgericht = Appellate Court
p.	Page
para./ paras.	Paragraph/ paragraphs
PCA	Permanent Court of Arbitration
PECL	Principles of European Contract Law

PO1	Procedural order N.1
PO2	Procedural order N.2
S.C	Standard Conditions of sale
TPF	Third-party funder
T. docs	Tender Documents
UNCITRAL ML	UNCITRAL Model Law on International Commercial Arbitration of 1985
UNEP	United Nations Environment Program
UNIDROIT	International Institute for the Unification of Private Law
UNUDHR	United Nations Universal Declaration of Human Rights
USD	United States Dollar
V.	Versus

INDEX OF AUTHORITIES

Cesare Massimo **Bianca**	Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) 268-283. Reproduced with permission of Dott. A GiuffrèEditore, S.p.A. Cited as: *BIANCA*	In para. 145
Christopher **Koch**	Standards and Procedures for Disqualifying Arbitrators p.8 *Cited as : Koch*	In para.11
CISG-AC Opinion N. 13	CISG Advisory Council Opinion N. 13 "Inclusion of Standard Terms under the CISG" Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa. Adopted by the CISG Advisory Council following its 17th meeting, in Villanova, Pennsylvania, USA, on 20 January 2013. *Cited as: CISG-AC Opinion N. 13*	In paras. 97, 108
Dezalay, Y and **Garth**, B.G.	International Commercial Arbitration and the Construction of a Transnational Legal Order, University of Chicago, 1996 Cited as: *Dezalay & Garth*	In para.56
E. **Gaillard** and J. **Savage**	Fouchard Gaillard Goldman On International Commercial Arbitration(The Hague: Kluwer Law International, 1999), p.57 Cited as: *Fouchard*	In para. 41
Fritz **Enderlein** & Dietrich **Maskow**	International sales law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the	In para.92

	International Sale of Goods: Commentary, New York, Oceana, 1992, p. 84 Cited as*: Enderlein & Maskow*	
Franco **Ferrari** , Marc **Torsello**	International Sales Law –CISG- in a nutshell *Cited as : Ferrari &Torsello*	In para. 143
Franz T. **Schwarz** & Christian W. **Konrad**	The Vienna Rules: A Commentary on International Arbitration in Austria. *Cited as : Schwarz & Konrad*	In para.24
Gary **Born**	International Commercial Arbitration p 1915, p 1705 *Cited as : Born*	In paras. 14, 16, 65
Gerhard **Dannemann** & Stefan **Vogenauer**	The German Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (AGBG) [Unfair Contract Terms Act] The Common European Sales Law in Context Interactions with English and German Law. Edited by Gerhard Dannemann and Stefan Vogenauer *Cited as: The common European Sales Law in Context*	In para.94
Harry M. **Flechtner**	Decisions on Conformity of Goods Under Article 35 of the U.N. Sales Convention (CISG): The 'Mussels Case,' Evidentiary Standards for Lack of Conformity, and the 'Default Rule' vs. 'Cumulative' Views of Implied Conformity Obligations *Cited as: Flechtner*	In para. 139
Jacob **Ziegel**	"The Vienna International Sales Convention", New	In para.

	Dimensions in International Trade Law: Canadian Perspectives, Ziegel & Graham Eds., Butterworths (1982), p. 44. *Cited as : Ziegel*	131
John D. **Fox** Wolfgang &**Münch** Khalil & **Issa** Othman	*Renforcer la fonction d'investigation dans les organisations du système des nations unies*. Cited as : *Fox & Münch & Issa*	In para. 136
John **O.Honnold**	*Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed. (1999), pages 182-192. Reproduced with permission of the publisher, Kluwer Law International, The Hague. *Cited as: O.Honnold*	In paras. 84, 132, 140
Joseph M **Lookofsky**	Convention on Contracts for the International Sale of Goods (CISG), Alphen aan den Rijn, The Netherlands, Kluwer Law International, 2012, p. 65. *Cited as: Lookofsky*	In para.89
	The 1980 United Nations Convention on Contracts for the International Sale of Goods Published in J. Herbots editor / R. Blanpain general editor, International Encyclopaedia of Laws - Contracts, Suppl. 29 (December 2000) 1-192. Reproduced with permission of the publisher kluwer law International, The Hague. Cited as: *J. Lookofsky*	In para. 142

Kenneth A. **Adams**	Understanding "Best Efforts" And Its Variants (Including Drafting Recommendations, P12) *Cited as : Adams*	In paras. 157, 161
Klaus Peter **Berger**	Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration (Third Edition p.503 *Cited as : Berger*	In para.31
Moses	*The Principles and Practice of International Commercial Arbitration* (2008), p.131 *Cited as : Moses*	In para.42
M**. Gusy,** J.M. **Hosking and** F.T. **Schwarz**	A Guide to the ICDR International Arbitration Rules (New York: Oxford University Press, 2011), p.91 Cited as: *Writers of the "Guide to the ICDR International Arbitration Rules"*	In para. 41
Oxford Dictionary	https://www.oxforddictionaries.com *Cited as : Oxford Dictionary*	In para.85
Peter **Kindler**	Kindler, Ob Walzfrasmaschine oder Schreibtischsessel' supra fn 3 p.233 *Cited as: Kindler*	In para.99
Peter **Huber**	Standard terms under the CISG, Reproduced with permission of 13 *Vindobona Journal of International Commercial Law & Arbitration* (1/2009) 123-134 *Cited as: Huber*	In para.95

Peter **Huber** & Alastair **Mullis**	CISG: A new textbook for students and practitioners. European Law publishers, October 2, 2007. *Cited as: Huber-Mullis*	In Paras. 91, 111, 119, 121, 122
Peter **Schlechtriem**	Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods Published by Manz, Vienna: 1986. Reproduced with their permission. Cited as : *Schlechtriem*	In para. 145
Predrag N. **Cvetkovic**	Remarks on the manner in which the PECL may be used to interpret or supplement Article 14 CISG, January 2002 *Cited as: Cvetkovic*	In paras. 82,89
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 as : Henschel*	In paras. 139, 140
Report of the Secretary-General	Preliminary draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (UNCITRAL Arbitration Rules) (A/CN.9/97) *Cited as : Report of the Secretary-General (A/CN.9/97)*	In paras. 10,11
Sam **Luttrell**	Bias Challenges in International Commercial Arbitration—The Need for a "Real Danger" Test	In paras. 44,46

	(2009), p.129 Cited as: *Luttrell*	
Schlechtriem & Schwenzer	Commentary on the UN Convention on the international sale of goods (CISG) Third edition. Edited by: Inceborg Schwenzer *Cited as: Schlechtriem & Schwenzer*	In paras.125, 127.
Schmidt-Kessel	Schmidt-Kessel, in: Schlechtriem/Schwenzer, Commentary, Art. 8 para. 53. *Cited as: Schmidt-Kessel*	In paras.9, 106.
Thomas **Zerres**	Principles of the german law on standard terms. p.1 *Cited as: Zerres*	In para.94
Ulrich **Magnus**	Incorporation of Standard Terms under CISG Reproduced with permission of Camilla B. Andersen & Ulrich G. Schroeter eds., Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday, Wildy, Simmonds & Hill Publishing (2008) 303-325 *Cited as: Magnus*	In paras. 99, 101, 102, 103, 113, 123
UN Global Compact	*"An Introduction to Linkages between UN Global*	In paras.

INDEX OF CASES

AUSTRIA

Conveyor band case

OLG

March 23 th 2005

N. 6 R 200/04f

Cited as: *Conveyer band case*

Cited in: para.127

Tantalum powder case

OGH

December 17th 2003

7 Ob 275/03x

Cited as: *Tantalum powder case*

Cited in: para.107

FRANCE

ISEA Industrie V. Lu

France 13 December 1995

Appellate Court Paris

December 13th , 1995

Cited as: *ISEA V. Lu*

Cited in: paras.101, 128

Qatar v Creighton Ltd

Cour de Cassation

March 16th 1999
N.88
Cited as: *Qatar V. Creighton case*
Cited in: para.48

République de Guinée case

Paris Arbitration Chamber

Cited as: *République de Guinée* case

Cited in: para.17

Tecnimont V. Avax

Cour de cassation - Première chambre civile

June 25th 2014

Case n° 758

ECLI: FR:CCASS:2014:C100758

Cited as: *Tecnimont V. Avax*

Cited in: para.37

GERMANY

Doors case

Appellate Court Saarbrücken

January 13th, 1993

Tribunal OLG Saarbrücken

Cited as: *The doors case*

Cited in: para.120

Machinery case

BGH

October 31th 2001

Cited as: *Machinery case*

Cited in: para.95

Mussel's case

March 8th, 1995

German Supreme Court

CLOUT Case No. 84

Cited as: *The mussels case*

Cited in: para.141

SPAIN

Case involving machine for repair of bricks

Appellate Court Navarra

Audiencia Provincial de Navarra, sección 3ª

December 27 th 2007

Cited as: *machine for repair of bricks*

Cited in: para.102

SWEDEN

Anders Jilkén v. Ericsson AB, Svea

Court of Appeal

May 5th 2006

N. T 6875-04

Cited as: *Jilken V. Ericsson*

Cited in: para.53

Judgment of the Swedish Supreme Court

June 9th 2010

T 156-09

Cited as: *The Swedish Supreme Court Judgment*

Cited in: para.55

UNITED KINGDOM

Armstrong V. Langley

British Colombia

Cited as: *Armstrong V. Langley*

Cited in: para.165

Locabail (UK Limited) Regina v. Bayfield Properties Limited ("Locabail")

Court of appeals

2000

QB 451

Cited as*: Regina V. Bayfield case*

Cited in: para.57

Sierra Fishing Company & Ors v Farran & Ors

High Court

January 30th 2015

EWHC 140 (Comm)

Cited as: *Sierra Fishing V. Farran*

Cited in: para.70

UNITED STATES

Compania Maritima SA V. Marc Rich & Co

1978

2nd Circuit

N. 579 F.2d 691

Cited as: *Compania Maritima case*

Cited in: para.55

Ecoline, Inc. V. Local Union

2008

2nd Circuit

N. 12, 271 F. Appx. 70, 72

Cited as: *Ecoline, Inc. V. Local Union*

Cited in: para.79

Federal Supreme Court Decision

4A_506/2007

March 20th 2008

Cited as: *Federal Supreme Court Decision*

Cited in: para.39

Florasynth, Inc. V. Pickholz

March 7 th 1984

598 F. Supp. 17 (S.D.N.Y. 1984)

US District Court for the Southern District of New York

Cited as: *Florasynth, Inc. V. Pickholz*

Cited in para.46

Giddens V. Board of education of the city of Chicago

Illinois Supreme Court

1947

N. 75 N.E.2d 286 (Ill)

Cited as: *Giddens V. Board of education*

Cited in: para.46

Hilaturas Miel, S.L. V. Republic of Iraq

August 20th 2008

U.S. District Court, New York (Southern District) [federal court of 1st instance]

CASE NUMBER/DOCKET NUMBER: 06 Civ 12

Cited as: *Hilaturas V. Republic of Iraq*

Cited in: para.85

Morelite Constr. Corp. V. New York City Dist. Council Carpenters Benefit Funds

US Court of Appeals for the Second Circuit

1984

N. 748 F.2d 79

Cited as: *Morelite Constr. Corp. V. New York City Dist*

Cited in: para.46

Pitta V. Hotel Ass'n of New York City INC

United States Court of Appeals, Second Circuit

N. 806 F.2d 419

Cited as: *Pitta v. Hotel Ass'n, Inc*

Cited in: para.46

Standard Tankers (Bahamas) Co. v. Motor Tank Vessel AKTI

1977

438 F.Supp. 153, 160 (E.D.N.Y.)

Cited as: *Standard Tankers V. Motor Tank*

Cited in: para.51

Woods v. Saturn Dist. Corp.

1996

9th Circuit court

78 F.3d 424

Cited as: *Woods v. Saturn Dist. Corp*

Cited in: para.78

INDEX OF ARBITRAL AWARD

Guaracachi America, Inc. and Rurelec PLC V. The Plurinational State of Bolivia

UNCITRAL, PCA

N. 2011–2017

Procedural Order N. 13

Cited as*: Guaracachi Case*

Cited in: para.80

Islamic Republic of Iran V. United States of America

International Arbitral Tribunal

Seat of arbitration: The hague, Netherlands

Cited as: *USA V. Islamic republic of Iran*

Cited in: para.12

STATEMENT OF FACTS

The parties to this arbitration are Delicatesy Whole Foods Sp (hereafter CLAIMANT) and Comestibles Finos Ltd (hereafter RESPONDENT). **CLAIMANT** is a medium sized manufacturer of fine bakery products registered in Equatoriana and a member of Global Compact, committed to produce sustainably and ethically. **RESPONDENT** is a gourmet supermarket chain operating in Mediterraneo and also a Global Compact member.

The parties met for the first time at *Cucina* in March 2014 where they shared their common perception of commitment to a sustainable ethical production.

10 March 2014: RESPONDENT sent a tender package; an Invitation to tender to CLAIMANT and four other of businesses it met at *Cucina*.

27 March 2014: CLAIMANT submitted its tender and suggested some minor amendments to the tender documents concerning the quantity of the cocoa beans and the mode of payment. CLAIMANT did also subject its Tender-offer to its own S.C and code of conduct.

07 April 2014: RESPONDENT accepted the tender-offer and the amendments within the time-limit set out by CLAIMANT in its offer.

01 May 2014: CLAIMANT made its first fruitful delivery in accordance with the S.C governing the contract and the business relationship carried on rightfully until 2016.

23 January 2017: The UNEP published the outcome of unofficial investigations in a report issued by Michelgault Business News, and revealing the existence of a corruption scheme.

27 January 2017: RESPONDENT suspended the contract after it received delivery then emailed CLAIMANT requesting him for clarification about the origin of the cocoa beans used in the chocolate cakes delivered within three days, CLAIMANT responded the very same day and promising to investigate the issue.

30 June 2017: CLAIMANT initiated arbitral proceedings against RESPONDENT after its failure to reach an amicable resolution of the dispute.

27 August 2017: RESPONDENT's IT-Security office retrieved the metadata concerning Mr. Prasad's article, on the same day RESPONDENT informed its law firm of the discovery.

29 August 2017: Mr. Langweiler Requested the disclosure of the TPF.

07 September 2017: Mr. Fasttrack complied with the Arbitral Tribunal orders affirming the existence of the TPF and identifying its main Shareholder.

14 September 2017: RESPONDENT submitted a notice of Challenge of Mr. Prasad after the expiration of the time-limit set out by the UNCITRAL Arbitration Rules.

11 September 2017: Mr. Prasad's disclosed his connections with the main shareholder of Funding 12 Ltd.

21 September 2017: Mr. Prasad's refused to withdraw from the arbitration for lack of solid and justifiable grounds.

29 September 2017: CLAIMANT refused to agree to the removal of Mr. Prasad arguing that it was a mere attempt to derail and to delay the Arbitral Proceedings.

INTRODUCTION

1. The beginning of the relationship between CLAIMANT and RESPONDENT, dates back to 2014 where RESPONDENT sought CLAIMANT's service by accepting its tender-offer. Shortly after they met and expressed their common commitment to a sustainable ethical production. This was translated to a contract between CLAIMANT and RESPONDENT that was drafted in a way that includes CLAIMANT's very own G.C and its own code of conduct. Unfortunately, one of CLAIMANT's suppliers turned out to have a falsified certificate of conformity with ethical production and thus was defrauded itself.

2. RESPONDENT who was afraid of its name being brought up in a future big campaign raising awareness on social and environmental responsibility of companies, immediately sought to destroy any connection it may have had with the fraudulent cocoa supplier. The resort to arbitration was made inevitable by RESPONENT's refusal to cooperate.

3. In a mere attempt to disrupt the arbitral process, RESPONDENT challenges the arbitrator that was appointed by CLAIMANT **(Issue 1)**.

4. Secondly, RESPONDENT challenges CLAIMANT's appointed arbitrator basing its argument on his lack of impartiality and independence. **(Issue 2)**

5. In addition, it claims that the S.C governing the contract are the RESPONDENT's even though CLAIMANT made it clear that the contract is subject to its S.C. **(Issue 3**).

6. Finally, RESPONDENT alleges that the cakes delivered are non-conforming which entitles him to end the contract with immediate effect **(Issue 4)**

ARGUMENT

ISSUE 1: THE ARBITRAL TRIBUNAL DOES NOT HAVE AUTHORITY TO DECIDE ON THE CHALLENGE

7. The Arbitral Tribunal is requested to decide on whether it has the authority to decide on the challenge of Mr. Prasad. In this case, the UNCITRAL Arbitration Rules, chosen by the parties to govern their dispute states clearly that the appointing authority has jurisdiction to decide on challenges of arbitrators. We will therefore, start the argument by arguing that the Arbitral Tribunal does not have authority to decide on the challenge of Mr. Prasad (**I**). But even if it did, Mr. Prasad is part of the Arbitral Tribunal and will participate in the decision-making process (**II**)

I. The Arbitral Tribunal does not have authority to decide on the challenge of Mr. Prasad

A. The appointing authority has authority to decide on the challenge under Art. 13(4) UNCITRAL Arbitration Rules

8. The parties have chosen the UNCITRAL Arbitration Rules to govern any dispute arising from their contract [C2, "*T.docs", p.12. clause 20*]. It is worth mentioning here that RESPONDENT alleges that both CLAIMANT and RESPONDENT have excluded Art. 13(4) UNCITRAL Arbitration Rules from the resolution of the dispute regarding the challenge procedure [*Notice of challenge, p.39. para.8*], whereas, the presumed exclusion was not clearly mentioned in any part of the negotiations nor in the contract itself.

9. Besides, during the negotiations with Ms. Annabelle Ming ,CLAIMANT openly shared its previous bad experience with institutional arbitration, specifically with the appointment of an unqualified presiding arbitrator by the state court[*R5, p.41*] .In fact according to Art.8 CISG regarding the interpretation of statements of the parties, a reasonable person would have understood from CLAIMANT's statements [*Schmidt-kessel*] that CLAIMANT never had the intention to deviate from the ordinary challenge procedure set

in UNCITRAL Arbitration Rules and that CLAIMANT did not intend to exclude the use of a pre-defined set of rules to administer the arbitration.

10. This is to say that the challenge must be decided in accordance with the procedure listed in Art.13 (4).According to the latter, in case all the parties did not agree on the challenge and the challenged arbitrator did not withdraw within 15 days from the date of notice of challenge, the challenging-party shall seek a decision by the appointing authority within 30 days from the notice of challenge; "[…]in the case where the challenge is not accepted, a decision on the challenge must then be made by the appropriate arbitral institution or appointing authority" [*Report of the Secretary-General (A/CN.9/97)*]**.** In the case at hand, the notice of challenge of Mr. Prasad was sent on the 14th of September 2017.This notice was followed by Mr. Prasad's refusal to step down and CLAIMANT's refusal to agree on the removal on 29th of September 2017.

11. To shield the arbitration from intervention of national courts, the UNCITRAL Arbitration Rules created a mechanism for designating an appointing authority. [*Koch*].In fact, the "*appointing authority*" will be in charge of any challenge against an arbitrator, even if the arbitral tribunal was not constituted with the help of an appointing authority. If the appointment was made by the parties or by the arbitrators, another solution had to be provided. In non-administered arbitration, it was necessary to provide for the choice or appointment of an appointing authority. [*Report of the Secretary-General (A/CN.9/97)*].

12. Moreover, RESPONDENT alleges that the exclusion of the arbitral institution was only to keep the arbitration confidential. While the appointing authority has a duty to respect the confidentiality rule, this position was confirmed by the appointing authority in the *USA vs. Islamic Republic of Iran claims tribunal* , Judge Moons , who considered that this rule is so important "*in the interest of a proper functioning of the tribunal*". In fine, a decision by the appointing authority will not affect the confidentiality of the arbitration.

13. As a result, even if no arbitral institution is involved in running the arbitral proceedings under ad hoc arbitration, there still is a need to designate a neutral third party as the " *appointing authority* " to decide on the challenge of Mr. Prasad.

14. After reviewing the parties' submissions and arbitrator's comments, the appointing authority will ordinarily resolve the challenge quickly "*typically in a matter of days or*

(more likely) a few weeks". The appointing authority's decision is generally announced without reasons, in a letter, and is final and binding [*Born*].

B. RESPONDENT's failure to designate an appointing authority makes the PCA's involvement necessary

15. Since RESPONDENT did not suggest an appointing authority in order to decide on the challenge of Mr. Prasad, it became a matter of necessity to invoke the secretary-general of the PCA in the decision-making process pursuant to Art. 6 UNCITRAL Arbitration Rules. In fact, the UNCITRAL Arbitration Rules entrust to the Secretary-General of the Permanent Court of Arbitration the role of designating an "appointing authority" upon request of a party to arbitration proceedings "*In case the parties have not reached an agreement on an appointing authority within 30 days following a proposal of one or more institutions or persons, one of whom would serve as appointing authority*" under Art.6 (2) UNCITRAL Arbitration Rules.

16. The Secretary General's role is not to appoint an arbitrator, but instead merely to designate an authority that will then make such an appointment. This is a relatively circumscribed responsibility, but it can play a critical role in ensuring timely constitution of arbitral tribunals [*Born*]. In the case at hand, RESPONDENT alleged that it intended to exclude the involvement of any arbitral institution, because it wanted the dispute to be kept confidential [*Notice of challenge of Mr. Prasad*].In addition, RESPONDENT proceeded with its notice of challenge in respect to Art.13 UNCITRAL Arbitration Rules [*Notice of challenge, p.39*]. RESPONDENT would be contradicting itself, if it started the challenge using Art.13, while excluding the procedure determined by the same article.

17. Furthermore, by choosing the UNCITRAL Arbitration Rules to govern the parties' dispute, RESPONDENT could not allege to exclude the involvement of the appointing authority in the decision-making process. This position has been confirmed in the *République de Guinée case* "*the parties agreed to adhere to its procedural rules and thereby empowered that institution to organize the arbitral proceedings in accordance with its statutes and rules*"

18. Even though RESPONDENT is claiming the exclusion of Art.13 (4) it has failed its responsibility to suggest an appointing authority to decide on the challenge of Mr. Prasad. Consequently, this situation leaves no choice but to resort to the application of Art.6 by making the secretary general of the PCA the default designator of the appointing authority that will decide on the challenge.

II. Even if the Arbitral Tribunal should decide on the challenge Mr. Prasad will participate in the decision-making process

A. The arbitration clause states that any dispute will be decided by the party-appointed arbitrators

19. The parties have included in their contract an arbitration clause [*C2, "T.docs", p.12. clause 20*] stating that any dispute has to be decided by arbitration in accordance with the UNCITRAL Arbitration Rules by three arbitrators. Each party appoints an arbitrator and the presiding arbitrator will be Selected by the two remaining arbitrators.

20. Moreover, both CLAIMANT and RESPONDENT agreed that the arbitration dispute is subject to the CISG. Art.8 CISG dealing with the interpretation of statements or other conducts of the parties so it is applicable to the case at hand. In fact at the time of the conclusion of the contract RESPONDENT "*could not have been unaware*" that CLAIMANT's intent was to have their disputes settled by a panel of three arbitrators.

21. In fact, in most modern international arbitration statutes, the primacy of the agreement of the parties is the fundamental principle underlying whole the arbitral proceedings. This principle exists in several laws: the parties are free to appoint the arbitrators or to set forth a mechanism for their appointment according to UNCITRAL ML [(*Arts. 10(1) and 11(2)*] and to Swiss Private International Law Statute Art.179 that states that "*the arbitrators shall be appointed ... in accordance with the agreement of the parties."*Thus, in the case at hand, the arbitrators were appointed in accordance with the agreement i.e. their agreement is entitled to rule the arbitration procedure.

22. Another principle emphasizing the importance of determining the will of the parties is the principle of party autonomy. This principle is expressed in numerous laws and through different ways. Party autonomy was described by the authors *Redfurn & Hunter* as the

"*guiding principle*" in determining the procedure to be followed in an international commercial arbitration. This principle has been endorsed both in national and international laws and by many international arbitral institutions [*Redfern & Hunter*].

23. Thus, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings [*Art. 19(1) UNCITRAL ML*]. They also have the freedom to agree on how their disputes will be resolved except in matters of public interest [*section 1(b) of the Arbitration Act1996 (UK*)]. Therefore while drafting an arbitration agreement; the parties enjoy a broad freedom to construct a dispute resolution system of their choice. This includes the choice of the type of arbitration i.e. ad hoc or institutional, the number of arbitrators, and the procedure of their appointment and of their challenge. In case the tribunal decides to exclude Mr. Prasad from the decision-making process, it will be violating CLAIMANT's right of party autonomy.

24. In addition, the parties have a fundamental right to due process and equal treatment. These notions are fully accepted and recognized by all major jurisdictions and international instrument. They are considered as part of "*natural justice*". Together, these essential values have been said to form part of the "*procedural Magna Carta of arbitration*" *and have been termed "basic principles that inform transnational procedural public policy*" [*Schwarz & Konrad*].

25. Art.15(1) of the UNCITRAL Rules provides that "*subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.*" This is an accepted standard in international arbitration.

26. On the other hand, the European significance of fair treatment is linked to Art.6 ECHR. Several Court decisions have recognized the relevance of this provision for arbitral proceedings. The *Swiss Bundesgericht*, for instance, held, although Art.6 ECHR does not directly apply in arbitration proceedings, the arbitral tribunal must nevertheless respect fundamental rules of due process. Therefore, if the arbitral tribunal decides to prevent Mr. Prasad from the participation in the decision-making process it would be violating one of CLAIMANT's most basic human rights. In the current case, both RESPONDENT and CLAIMANT have a right to a due process, including having the proceedings conducted

by arbitrators appointed by them. This means, that the initial full arbitral tribunal that expresses the parties' choice, has to decide regarding the challenge of Mr. Prasad.

27. To conclude, the contract states that *ab initio*, the parties agreed to have their disputes settled by a panel of three arbitrators. Furthermore, CLAIMANT appointed Mr. Prasad as his appointed arbitrator. As a result, given all the above explained legal principles i.e. party autonomy, the primacy of the agreement of the parties and due process Mr. Prasad's participation in the challenge is simply the execution of the parties' will in case the arbitral tribunal is going to decide on the challenge.

B. As part of the full Arbitral Tribunal, Mr. Prasad should decide in the challenge n accordance with ML

28. Art.13 (2) of the UNCITRAL ML provides, that after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance giving rise to justifiable doubts about the independence or the impartiality of an arbitrator, the challenging party shall seek a decision from the arbitral tribunal if the challenged arbitrator did not withdraw from his office.

29. In fact, if the *lex arbitri* is based on the UNCITRAL ML on International Commercial Arbitration, then the arbitral tribunal, in its full composition, decides the challenge. In the situation at hand, the deadlock created regarding the applicability of the UNCITRAL Arbitration Rules, makes the model law the adequate law to resolve the dispute. The agreement on the seat of arbitration has become a regular component of arbitration agreements. It has a major practical importance, as it directly influences a number of issues: arbitrability, determination of the governing law [*Belohlávek*].

30. The Geneva protocol on arbitration clauses illustrated a view that the law applicable to the arbitration should be that of the arbitral seat "*the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose arbitration takes place*".

    Furthermore, the Austrian Arbitration Act includes an express provision regarding the participation of the challenged arbitrator "*Unless the challenged arbitrator resigns from office, or the other party agrees to the challenge, the arbitral tribunal, including the challenged arbitrator, shall decide on the challenge*."[*Austria's Arbitration Act 2006*].

31. Moreover the German Arbitration Act also provides that the decision should be taken by the whole arbitral tribunal. In fact, during the legislative process, the German legislature indicated that allowing the remaining arbitrators to decide on the challenge alone would mean that the interests of the challenging parties would be over-represented [*Berger*].
32. In the case at hand, it is undisputed between the parties that the place of arbitration is in Danubia [*C2, "T.docs", p.12. clause 20*] and that all the states related to the dispute have adopted the UNCITRAL ML [*PO1, p.49*]. As a result, the law of the place of arbitration in this case plays the role of a gap-filler since the parties could not reach an agreement on the challenge under the UNCITRAL Arbitration Rules. *In fine*, if we agree to RESPONDENT's allegations about the exclusion of any arbitral institution and that the decision should be taken only by the arbitral tribunal then Mr. Prasad, as a member of the tribunal should participate in the decision-making process.

CONCLUSION OF THE FIRST ISSUE

33. In view of the above, CLAIMANT respectfully asks the tribunal to hold that it does not have the authority to decide on the challenge of Mr. Prasad and that even if it did, the full arbitral tribunal has to take a decision i.e. with the participation of the challenged-arbitrator.

ISSUE II: MR.PRASAD SHOULD NOT BE REMOVED FROM THE ARBITRAL TRIBUNAL

34. The Arbitral Tribunal do not have any reasonable grounds to neither accept the challenge of Mr. Prasad nor to remove him, within this context, his removal is unconceivable under neither the UNCITRAL Arbitration Rules **(I)** nor the IBA Guidelines **(II)**

I. Mr. Prasad should not be removed by the arbitral tribunal under UNCITRAL Arbitration Rules

35. The arbitral tribunal while applying the UNCITRAL Arbitration Rules should dismiss the challenge of Mr. Prasad because RESPONDENT's right to object is waived (**A**), Besides, the arbitrator fully exercised his duty of disclosure (**B**), and proves to be both impartial and independent (**C**).

A. RESPONDENT waived its right to challenge the arbitrator

1. The notice of challenge of Mr. Prasad is time-barred under Art.13.1 of UNCITRAL Arbitration Rules

36. RESPONDENT's submission is time barred according to Art.13 UNCITRAL Arbitration Rules, which states that the party has to submit the challenge within 15 days after the circumstances raising justifiable doubts to the impartiality and independence of the appointed arbitrator became known to the challenging party. The information upon which RESPONDENT based its challenge were obtained on the 27 of August [*PO2, p.51, para.11*] and it filed its notice of challenge only on the 14 of September, it took them over 19 Days to disclose it to the tribunal. Therefore, the submission is out of time, i.e. RESPONDENT waived its right to challenge.

37. Furthermore, if a party becomes aware of facts which might affect an arbitrator's independence or impartiality during the arbitration proceedings, it has to raise such facts within the time limits set out in the arbitration rules. The French Supreme Court considered the importance of not waiting to challenge an arbitrator in *Tecnimont V. Avax*.

2. Mr. Prasad's publication cannot be used as a ground for his removal, his publication does not give rise to justifiable doubts to his impartiality

38. Art. 13 of the UNCITRAL arbitration rules sets a time limit for the challenge of an arbitrator's independence or impartiality to prevent strategic fraudulent delays. Indeed, if a party accepts the appointment of an arbitrator without making any timely objection regarding his independence or impartiality, it may not raise that objection later unless it proves that, at the time, it did not know and could not with reasonable diligence have discovered the grounds for objection.

39. Since the Article was published in 2016 and was publicly available on Mr. Prasad's website directly under the button "*publications*" [*PO2, p.51, para.14*], RESPONDENT could have easily accessed the article and used it as an objection to his appointment. In a Federal Supreme Court decision, it was held that the claimant "*at the very least could have been expected to conduct further enquiries"* and dismissed the arbitrator's challenge because it was not raised at the appointment of the tribunal, similarly to our case, the information on which the challenge was based upon was also a publicly accessible one.

40. However, RESPONDENT visited the website without taking the time to look into Mr. Prasad's publication; it could be interpreted as a waiver of its right to challenge the arbitrator. Thus, it did not consider the publication as a ground for challenge at that time. Consequently, its claim exceeded the rightful deadline to submit its challenge on Mr. Prasad's appointment.

B. Mr. Prasad complied with the arbitrator's duty of disclosure under Art.11 UNCITRAL Arbitration Rules

41. It has been said by the writers of the "*Guide to the ICDR International Arbitration Rules*" that the duty to be impartial and independent cannot exist without a duty to disclose conflicts of interest. The UNCITRAL Rules leave the disclosure duty to the discretion of the parties to the dispute. Indeed, in order for parties to enforce the highest standards of independence and impartiality, they will need to be informed when a "*prospective*" arbitrator has a "*potential*" conflict of interest. The existence of a duty to disclose is well established, "*almost universally recognized*" [*Fouchard*].

42. However, when looking at "*which facts or relationships"* need to be disclosed, we find that no universally-uniform accepted standard exists [*Moses*]. The wording of the Art.11 UNCITRAL Rules suggested that circumstances need only be disclosed if they would reasonably call into question the arbitrator's independence, which leaves a considerable margin for the sole discretion of the arbitrator.

43. Notwithstanding the full disclosure voluntary policy and the great level of transparency and professionalism adopted by the arbitrator through the objective assessment of "circumstances" potentially raising "*justifiable doubts*" [*Prasad's Declaration, p.36, paras.3,4& Prasad's Letter, p.43, paras.3,4*], courts tend to interpret such attitude as features of an honest character, it is important to point out that each disclosed element was dully clarified. Hence, it showcases the lack of significance and material connection to the alleged bias.

44. In this context, Mr. Prasad's challenge and pressure to withdraw from his position by RESPONDENT without providing any conclusive proof can be interpreted as an attempt to impede the arbitration from going forward. The so-called: "*emergence of the Black Art of bias challenge in international commercial arbitration*" [*Luttrell*].

C. Mr. Prasad is impartial and independent under the meaning of Art.12 UNCITRAL Arbitration Rules

1. Neither the merger nor the repeat appointments are sufficient to raise justifiable doubts for the challenge under Art 12.2 UNCITRAL Arbitration Rules

45. Impartiality and independence are the cornerstones in ensuring fairness in arbitration. Under the UNCITRAL Arbitration Rules Art.12(1) an arbitrator may be challenged if

circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence "*bias*". Similar principles for the requirement of an impartial and independent tribunal are echoed in the UNUDHR [*Art. 10*], the ECHR [*Art. 6(1*)] and the ACHR [*Art. 8(1)*].

46. The justifiable doubt concept expressed in the provision is too vague to be applied with certainty. This abstract and general nature leads to its misuse in challenging arbitrators. Consequently, the challenging party carries the burden of proving an undeniable link with the arbitrator's behavior or connections. Such doubts should be "*justifiable*,""*direct, definite, and capable of demonstration*" rather than "*remote, uncertain, or speculative*" [*Giddens v. Board of education; Pitta v. Hotel Ass'n, Inc.; Florasynth, Inc. v. Pickholz; MoreliteConstr. Corp. v. New York City Dist*].

47. The mere fact that one of the old partners at Slowfood is conducting arbitration with one of Findfunds LP subsidiaries does not constitute "*direct, definite, and capable of demonstration*" suspicion of bias towards CLAIMANT. Not only is the case almost completed since it is at the final hearings stage, but also most of the decisions have been made throughout the two-years processing period ["*Prasad's letter", p.43, para.4*].

48. Furthermore, the previous appointment of Findplus Ltd's shareholder namely Findfunds, does not constitute a circumstance giving rise to justifiable doubts as to the arbitrator's independence of impartiality, In *Qatar v Creighton*, the French Cour de Cassation found that an arbitrator's involvement in a case relating to one of the party's subcontractors was not considered material to his impartiality as an arbitrator.

49. Indeed, such rationale showcases that Mr. Prasad's relationship with Findfunds does not concern the funding party in this dispute at hand but one of its numerous legally separate subsidiaries (Funding 12 Ltd) to which Mr. Prasad has no connection.

50. Regarding the Mr. Prasad's new partner and its ongoing case with the funding of Findfunds, the low percentage of the case's contribution to their annual income is almost undetectable even before the merger. Thus, it could not reasonably be a source of temptation. Furthermore, concerning the new structure of the merged firm, it is important to point out that Mr. Prasad, and his involved colleague are just 2 out of 20 partners and 60 associates of the new law firm, i.e. the likelihood of overlaps between the cases is

almost inexistent. Indeed, the new partnership already implemented measures to prevent such interference.["*Prasad's Declaration", p.36, para.4; PO2, p.50,paras. 6,8*].

51. The Court in *Standard Tankers V. Motor Tank*, has concluded in its holding that the composition, number of attorneys and the degree of involvement in the case are to be taken into consideration in determining if it leads to partiality and dependence of the arbitrator. The court concluded that because of the great number of attorneys and the *"not direct*" involvement of the challenged arbitrator, the challenge should be rejected.

52. RESPONDENT's allegations also included Mr. Prasad's relation to Mr. Fasttrack claiming that he appointed him in two cases. It should be stated in both appointments that the latter has not been directly involved in the two cases. In reality, the counsel had no direct involvement nor the final say. Similarly, The two cases in which he was appointed by Findfunds allegedly raising doubts of bias is unfounded, besides being over, unrelated to this dispute and on an extended period, in one of them his appointment was made before the involvement of any TPF, their indirect and unimportant nature and consequently cannot constitute basis for challenge. [*PO2, p.51, para.10*]

53. I*n Jilken v. Ericsson case*, which dealt with Arbitrator's Relationship with the Counsel to Part*y*, the court went as far as confirming the award even though the sole arbitrator had failed to disclose that he was *"of counsel*" member of the law firm that represented one party in arbitration after assessing the facts and context of the non-disclosure. This proves that even in this severe case and direct connection with the law firm of the counsel of the parties; it does not amount to a solid ground to challenge the independence and impartiality of the arbitrator.

54. One of the alluring features of arbitration, is the specialization of the parties involved in the adjudication of the dispute, indeed, most arbitrators would have developed a certain degree of expertise and a certain reputation from their different experiences which leads to their multiple appointments. Accordingly, it would be unfair to hold Mr. Prasad's success and his renowned competence and qualification be a reason for his challenge. If we follow this rationale, all exercising Arbitrators would be deemed to be dependent, biased and partial, it would be the end of International Arbitration as the pool of eligible arbitrators would be empty.

55. In *Compania Maritima case*, the court upheld an award where the presiding arbitrator had frequently appointed, and been appointed by one party-appointed arbitrator. Furthermore, in a *Swedish Supreme Court Judgment*, it was held that there was no lack of independence where arbitrator was appointed 12 times by the same firm in past 10 years, including four times in past 3 years; appointments by law firm were 10% of arbitrator's total appointments [*PO2, p.50, 51, paras.8, 10*].

56. The international arbitration community is made up of many repeat players who "*demonstrate a high degree of role reversibility*" [*Luttrell*]. This rotation of roles contributes greatly to the smooth running of these mechanisms of arbitration [*Dezalay & Garth*]. Therefore, it cannot be used against them because it is part of their profession.

2. Mr. Prasad has no financial interest in the outcome of the arbitration

57. As held in *Regina V. Bayfield,* instances of actual bias occur when an interest in the outcome exists, it is clear from the relevant facts of the case at hand, no circumstances instills a justifiable doubt as to the arbitrators' bias as he will not receive any additional remuneration beside the one of his fees.

58. In respect of the various situations disclosed, the case dealt by one of his new partners does not have sufficiently valuable revenues for it to be considerate important to make any reasonable person doubt of his impartiality or independence, this would be the case if he had a tacit expectation of increasing his own income unduly by favoring CLAIMANT during the arbitration proceedings, in order to procure additional business for either his Law firm, or himself.

59. This scenario is highly unlikely because in the case of his law firm, since the increase of its seize and the important number of partners, as the income earned by each partner is in large part determined by the profits of the particular individual office, consequently, only a small and minor part of their income comes from the entire firm's profits. Furthermore, Mr. Prasad's income does not come from arbitration, besides he has been an arbitrator in a consequent number of arbitration over the past three years, precisely 21, which showcases his highly esteemed competence and reputation [*PO2, p.51.para.10*].

60. In regard to RESPONDENT's allegations of partiality and dependence because of Mr. Prasad's newly merged law firm's relation to an ongoing case with minor annual income contribution of roughly 5% of the partnering Law Firm's income before the merger, the

idea of favoring CLAIMANT does have neither real merits nor direct connection. Indeed, the hypothetical fees earned in future cases by the Law firm are so negligible that a financial interest in the outcome of the arbitration cannot be assumed.

3. Mr. Prasad's Publication cannot be used as basis for his removal

61. It is of a common usage that professionals of the legal practice publish abstracts reflecting on current issues and classic concepts. Every lawyer has expressed or unexpressed views about legal issues that may be relevant in arbitral proceedings. Indeed, it is desirable that the tribunal include individuals who are experienced in the matters in dispute, which necessarily involves the prior formulation of thoughts and positions.

62. Mr. Prasad is no exception to this custom, as he is a frequent contributor to the Vindobona Journal of International Commercial Arbitration and Sales Law. His article that allegedly shows a sign of pre-conceived opinion on the subject matter of the case is only a mere general and abstract analyses of a companies' social responsibility with no consequent relevance to the present case. The text and its interpretation do not give a sided opinion in favor of CLAIMANT, even if it does showcase a certain preference to the classic adoption of the meaning of Art.35 of the CISG, it does not replace or transcend the facts and special circumstances of the case at hand, Mr. Prasad himself mentioned the existence of special contractual obligations that expressly includes the production process as a part of the description of goods [*R4," Prasad's letter", p.40, 44, para.2*].

II. Mr. Prasad should not be removed by the Arbitral Tribunal even if the IBA guidelines were to be considered

63. The arbitral tribunal should not consider it when reviewing the arbitrator's challenge (**A**), in case the tribunal chooses to take it into consideration, the application of its provisions does not give legal basis to Mr. Prasad's removal (**B**)

A. The Tribunal should not consider the IBA Guidelines based on the contract

64. To establish clarity and uniformity with respect to ethical obligations, many arbitral institutions and bar associations have developed ethics codes, rules and guidelines. These soft law tools are supposed to provide guidance to foster ethical conduct and obligations for the participants in arbitration. Concerns have been expressed regarding their usage as it varies so greatly among courts to a point in which it undercuts any possibility of developing uniform standards. Moreover, in case of the IBA Guidelines and because its

subjective nature, it may led to conflicting views in an international context because of the various legal backgrounds.

65. Furthermore, The IBA Guidelines' approach to repeat appointments is poorly-considered as, "*A mechanical rule, based on two or three appointments in the past three years, has virtually no connection to an arbitrator's independence and imposes an arbitrary, often random, disqualification that is frequently misused*". It risks substituting overbroad mechanical rules in the evaluation of particular factual circumstances [*Born*].

66. That is why; the IBA Guidelines and principles are considered not binding for the parties or an arbitral tribunal unless the parties have specifically agreed upon their application which is not the case of the parties of the dispute at hand [*Tweeddale & Tweeddale*]. The Guidelines provide in Introduction 6 that they are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. Therefore, the Guidelines state themselves that they are not binding and cannot override parties' autonomy to consensually decide the governing laws which in this case are exclusively the UNCITRAL Arbitration Rules that fully cover all aspects and different aspects of the procedural proceedings, which raises the question of RESPONDENT'S intention in bringing up Guidelines with no real added value in the case at hand.

67. Thus, the Arbitral Tribunal needs to take into consideration that parties chose arbitration over litigation for a reason. Party autonomy and their consent over the applicable law and standard is one of the defining features of arbitration, and there is no expression of the choice of the IBA Guidelines in their agreement. Therefore it should not be applied.

B. Even if IBA Guidelines were to be considered, it does not provide a ground for Mr. Prasad's removal

68. Mr. Prasad complied with IBA Guidelines conditions, therefore he cannot be considered partial as he fulfilled his duty to disclose under standard3 of the IBA Guidelines (**1**) and his connections do not justify suspicions of potential conflict of interest (**2**)

1. Mr. Prasad fulfilled his duty to disclose under standard 3 of The IBA Guidelines

69. The requirement for disclosures by the arbitrators and the Guidelines' treatment of this obligation is of central procedural and practical importance to the IBA Guidelines. This requirement is set forth in General Standard 3(a). It is important to point out that Mr.

Prasad has been transparent during all the stages of the arbitral process so far, he has been cooperating and disclosing all matters he found relevant.

70. A recent case illustrating what the court's expects from arbitrators in accordance with the IBA Guidelines is *Sierra Fishing V. Farran*, in which Justice Popplewell reiterated the duty of the arbitrator to make voluntary disclosure to the parties of connections revealing "*an attitude which would reinforce a fair-minded observer's*" justifiably doubts as to the Arbitrator's impartiality.

71. Not only did Mr. Prasad fulfill this duty, but the extent of his statements and the objectivity he used in the disclosed facts is remarkable and should weight in favor of his honest, impartial and independent character. Indeed, he provided perfectly reasonable explanation to emphasize the irrelevancy and inexistence of a potential conflict of interest. Thus, the fact that the arbitrator has consistently adhered to this principle according to the new shared information can only be seen as the demonstration of his honesty and transparence.

2. Mr. Prasad's connections do not justify suspicions of potential conflict of interest under IBA Guidelines

72. RESPONDENT's failure to satisfy the burden of proof as to the justifiable doubt to Mr. Prasad's impartiality and independence shows the inexistence of the sufficient connections 'requirement of materiality existing under the IBA-Rules

a. Arbitrator's Relationship with law Firm and counsel to Party do not raise potential conflicts

73. This rule is reflected in the Orange List (N.23-31) contained in Part II of the IBA Guidelines. Sections 3.1.1 and 3.1.4 of that list make it clear the fact that an arbitrator himself or his law firm has served as counsel for one of the parties or one of its affiliates in an unrelated matter within the past three years does not automatically serve as a ground for challenge, but much more for a duty to disclose (N.23-27).

74. The growing size of law firms led to a dramatic increase of conflicts of interest; therefore the activities of an arbitrator's firm should not automatically constitute a conflict of interest. However, the relevance of such activities, such as the nature, timing and scope of the work by the law firm, as well as the individual corporate structure of which the party is a member and the specific relationship of that corporate entity with the arbitrator's law

firm, should be reasonably considered in each individual case as stipulated in Explanation (a) to General Standard 6(a) IBA Guidelines on Conflicts of Interest. Consequently, Mr. Prasad's Challenge based on his relationship with the parties' counsel's Law Firm doesn't have the necessary tenure, relevance and importance to be considered as a justifiable doubt as to his integrity.

75. The Orange List upon which most allegations from RESPONDENT regarding our arbitrator are based upon, is an intermediary list between the green and the red list, which gives a big discretionary power to the arbitral tribunal as it is reviewed case by case. In paras. 3.1.3 and 3.3.7, it mentions the specific issues relevant to the dispute which do not fulfill criterion cited. Thus, making Mr. Prasad's connection insufficiently material to create doubt of bias.

b. Arbitrator's past publication does not raise doubts on his impartiality

76. The Green List consists of matters which give rise to no appearance of, nor any actual, conflict of interest from the objective point of view. It includes an arbitrator's previous publication of "general opinion" concerning an issue that may arise in arbitration, an arbitrator's previous service as arbitrator or co-counsel with another arbitrator or counsel for a party and similar circumstances, Mr. Prasad's publication falls within this list and doesn't showcase any sign of partiality.

c. Arbitrator's business dealings with third-party funder is remote and insignificant

77. When the business dealings are insignificant, and unrelated to the parties' dispute, they are unlikely to constitute grounds for removal. If they are significant, even indirect financial or commercial relations with a party can be grounds for removal. [*IBA-Guidelines on Conflict of Interest, paras. 2.3.6*] The commentary of General Standard (6) B provide for the specific case of TPF and states that its funding is indirect in the case it is given through one of its subsidiaries, which is the case in the ongoing dispute, thus Findfunds has no direct nor indirect involvement and is known to have minor influence in the arbitral process [*PO2.p.50, para.4*]

78. It is relevant to mention that, Mr.Prasad never conducted any business activity with Findfunds LP directly but through subsidiaries with separate legal identities. Past business relations which are also indirect should not be grounds for challenge. In *Woods v. Saturn*

Dist. Corp, the 9th Circuit court rejected bias claim based on disclosed financial relationship between arbitrator and party.

79. In regard of the cases referred to by RESPONDENT, not only they concern other fields of law but also their final judgments were issued . However, one of the cases should not even figure as showing any alleged connections since the appointment of the arbitrator was made before Findfunds LP's subsidiaries became the TPF. [*PO2, p.43, para.4*] Therefore, it had no implication or influence in his appointment and should not be used against Mr. Prasad. His disclosure of these connections despite them not showing any "*evident partiality*" as held in the *Ecoline, Inc. V. Local Union case*, proves his honest character and absence of any grounds to raise justifiable doubts as to his impartiality or independence.

80. Similarly, The UNCITRAL Tribunal in the *Guaracachi* case dismissed a claim for lack of proof relating to arbitrator's conflict of interest. Accordingly, neither Mr. Prasad 'relation with the parties' counsel or their funding party is significant nor important enough to be a valid reason to remove him.

CONCLUSION OF THE SECOND ISSUE

81. In light of the arguments above, the Arbitral tribunal should dismiss the challenge of Mr. Prasad under the UNCITRAL Arbitration Rules an, and reject the application of the IBA Guidelines because of its concurrent provisions to the parties' chosen applicable rules.

ISSUE 3: CLAIMANT'S S.C DO GOVERN THE CONTRACT

82. Both the CISG Art.14 (1) and the PECL Art.2:101 recognize the traditional "*offer-acceptance*" model of contracting as the principal model in most legal systems of the world[*Cvetkovik*]. The CISG governs claims arising from the present agreement as mentioned in the choice of law clause.

83. Conformingly, the tribunal is requested to find that CLAIMANT's S.C are the ones governing the contract N.1257 by means of offer & acceptance dichotomy. These S.C formed part of CLAIMANT's offer (**I**), then RESPONDENT accepted CLAIMANT's offer pursuant to Art. 18 CISG (**II**)

I. S.C are part of CLAIMANT's Offer under CISG

84. CISG does not expressly address the issue of incorporating S.C. This gap is filled in Art.7 para.2 CISG: "*Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based*." Accordingly, S.C' incorporation is therefore determined by to the gap-filling approach [*O.Honnold*]. At hand, CLAIMANT made an offer in the sense of Art.14 CISG (**A**) and consequently respected the requirements for the incorporation of S.C (**B**)

A. CLAIMANT made an offer in the sense of Art.14 CISG

85. One must not confuse an invitation to tender or so-called invitation to treat & an offer. Actually an invitation to tender is an act which leads to the offer by inviting other parties to do so and which is made with an aim of inducing and negotiating terms. [*Hilaturas V. Republic of Iraq*]. For further clarification, the word tender is defined as ***"****Offer or present (something) formally*."[*Oxford Dictionary*].

86. There are certain criteria that differentiate a mere proposal from a valid and binding offer, these criteria are laid down under Art.14 CISG. Firstly, the proposal must be addressed to one or more specific persons, secondly it must indicate the intention of the offeror to be bound by such proposal in case of acceptance and thirdly, it must be sufficiently definite.

87. CLAIMANT & RESPONDENT met at Cucina where they held a consistent conversation about their mutual professional expectations. RESPONDENT kept CLAIMANT in its mind and shortly afterwards sent an invitation to tender and the T.docs within[*C1 "invitation to Tender" p.8 ; C2 "T.docs" p.9*].

88. RESPONDENT included in its invitation to tender its own code of conduct and its G.C. However, there is no rule or whatsoever stating that the initiator of a tender process can bindingly dictate its G.C. RESPONDENT's allegation that the incorporation of its G.C was initially its prerogative cannot bind CLAIMANT [*PO2, p.55, para.44*].

89. Following the invitation to tender, CLAIMANT submitted its tender. The latter was a specific one [*C4,"Sales-Offer", p.16*], made particularly to RESPONDENT "*offer ad personam"*[*Cvetkovik*]. The definiteness of the addressee distinguishes a mere invitation from an offer. Pursuant to Art. 14 (2), a proposal is considered as a mere invitation to make offer if it is not addressed to one or more specific persons. A *contrario*, an offer must be addressed to a specific person or group of persons in order to hold a binding effect; otherwise such manifestation is considered only as "an invitation to make an offer" for the other party [*Lookofsky*].

90. As for the sufficient definiteness criterion of Art.14 para.1 CISG, CLAIMANT was able to observe this criterion by fixing expressly the goods and the quantity *"20.000 per day* and the price "*USD 2*". Furthermore, CLAIMANT went beyond its "*minimum requirement*" by referring to additional matters such as the place of delivery, payment terms and the description of the goods [*C4 "Sales Offer" p.16*].The offer in question is *largo sensu* qualified as sufficiently definite offer [*UNIDROIT Arts.5.1.6, 5.1.7, 6.1.1, 6.1.6*].

91. Thus, nothing is left for speculation or determinability. In other terms, the essential terms of the agreement are contained in the offer [*Huber-Mullis*]. CLAIMANT also complied with the Art.14 (2) *animus contrahendi* requirement[*Eng: intention to be bound*] in its offer stating "*We hope that you find our offer attractive despite the necessary minor amendments*" [*C3, p.15, para.5*].

92. When a party lacks intention to be bound by its own proposal, there exists no binding offer due to absence of intention to conclude a binding agreement in the event of acceptance [*Enderlein & Maskow*]. Such criterion is rarely declared expressly in the sense of Art.2.1.2 UNIDROIT principles; it has to be inferred from the circumstances. CLAIMANT not only introduced it as "*Our offer*" in the letter following RESPONDENT's invitation to tender but also qualified it *"…we have decided to submit a proper offer…*" [*C3, p.15, paras.1,3*].

93. In light of the above, the tribunal should find that CLAIMANT as a contracting party, i.e. offeror, fulfilled its part of the contractual obligation by submitting a sufficiently definite offer in the sense of Art14 CISG.

B. CLAIMANT respected the requirements for the incorporation of S.C

94. At the offer's footer [*C4 "Sales-Offer", p.16*], CLAIMANT subjected the latter to its S.C which by definition are a set of standard terms incorporated into a separate document and are referred to or attached to the contract document [*Fejõs* **].** As a matter of clarification, the terminology differs; each legal system develops its own special terminology. In France, for example, terms are called "*les contracts d'adhésion*" [*The common European Sales Law in Context*], in Germany they are called AGBs or even "*Incoterms*" in ICC., they are often referred to as "the fine print" because they are often included in the contract in small type [*Zerres*].

95. It is common practice that the party making the offer includes S.C in the offer with the intention that these terms become part of the contract. In the present issue, the denomination is S.C or G.C [*PO2, p.55, para.44*]. Two requirements must be met for an

effective incorporation of S.C [*Machinery case*]. The *BGH* took a rather restrictive approach by requiring the intention of the offeror must be apparent to the recipient. Also, it is ruled that the S.C must be made available to RESPONDENT [*Huber*].

96. First, CLAIMANT's intention to incorporate its S.C must be apparent to RESPONDENT **(1)**. Second, CLAIMANT must make them available to it **(2).**

1. CLAIMANT's intention to incorporate S.C is apparent to RESPONDENT

97. First, CLAIMANT's intention to incorporate its S.C must be apparent to the recipient; this requirement will require a clear and understandable reference to the S.C. As defined in Art.2.1.19(2) UNIDROIT principles, S.C are provisions prepared in advance unilaterally for general & repeated use, i.e., prepared by CLAIMANT. S.C are to be interpreted according to the rules for the formation and interpretation of contracts under the CISG [*CISG-AC Opinion N. 13*].

98. What is of great importance here is that S.C are prepared without negotiation with the other party i.e. RESPONDENT and referred to in the offer as:"The *above offer is subject to the G.C of sale and our commitment to a fairer and better world.*"[*C4, p.16*]. In order to incorporate S.C, CLAIMANT had to refer to the terms so that RESPONDENT could not have been unaware of the intent to include them into the contract according to Art.8 (2) CISG. This action has been perfectly undertaken by CLAIMANT as abovementioned. This requisite is related to the CISG's reaching principle i.e. a declaration becomes effective when it reaches the other party. The standard for imputable knowledge in Art.8 para.1 is the formula "could not have been unaware [*Art.35 para.3 CISG, Art.5:101 (2) PECL*].

99. In this context, a question must be raised; how far the information duty of the user of standard terms goes? [*Magnus*]. Views differ on this matter, the prevailing view requires CLAIMANT to make the terms available to the other party but what is more preferable, and more in harmony with the liberal spirit of CISG [*Kindler*], is that the duty of information is not an absolute one and can bear exceptions. It is regarded as reasonable and conscionable that the addressee if in doubt inquires the contents of S.C which were not made available.

100. Hence, the S.C were referred to at the bottom of the sales-offer as a manifestation of the freedom of form principle in Art.11 CISG [*C4, p16*]. Despite the fact that this principle gives freedom to CLAIMANT in the way of implementing its S.C, the latter did not abuse of its power and made its intention sufficiently apparent to be perceived by a reasonable person.

101. Under the CISG a minimum requirement for the incorporation of S.C would be a clear information in the agreement [*Magnus*]. The reference must then be contained in the text of the contractual declaration itself on the front page [*ISEA V. Lu]*. Accordingly, CLAIMANT referred to S.C in the front page of the letter in below via the link to its homepage [*C3, p15 & C4, p16*].

102. A mere reference of S.C here would suffice [Magnus]. It does not matter if the S.C are attached to the document or not because such attachment if it can be printed or uploaded by RESPONDENT gives sufficient notice of the terms. It is RESPONDENT's duty to print or to electronically store the S.C. It should not be incumbent upon CLAIMANT to submit a copy of the S.C. The burden of taking notice of the S.C is on RESPONDENT's side if CLAIMANT's reference to those conditions is clear and apparent, because often the contract contains an incorporation clause without any accompanying text like CLAIMANT's Offer [*machine for repair of bricks*].

103. The timing of the reference to S.C must occur before or at the time when the contract is concluded [Magnus]. Indeed, CLAIMANT's reference was respectful of the time-limit. Furthermore, CLAIMANT repeatedly referenced the G.C on the invoices since the first delivery [*Emphasis, PO2, p.52, para.24*]. It should be sufficient for S.C to be provided to RESPONDENT at the beginning of a long-standing business relationship.

104. Therefore, S.C contained in the contract document itself will normally be binding upon the mere signature of the contract document as a whole and are to be accepted as a whole, contrary to the other terms of the contract which can be subject to negotiation [*UNIDROIT commentary, p.68*]. Consequently, the G.C have to be part of the offer according to CLAIMANT's intent according to Art.8 CISG, where RESPONDENT could not have been unaware of that intent, in order to become part of the offer.

2. CLAIMANT made S.C available to RESPONDENT

105. Should the tribunal find that the incorporation of S.C into the offer by mere reference does not suffice, it is then respectfully requested to consider the predominant availability of S.C. on internet (**a**) and in a comprehensible language (**b**)

a. CLAIMANT made S.C Available on the internet to RESPONDENT

106. It is commonplace today for commercial parties to have websites containing information about them where the S.C are downloadable and storable via any hyperlink leading to the applicable terms "e-commerce" [*Borges*]. If the user refers merely to its website, such reference is regarded as sufficient [*Schmidt-Kessel*].

107. By a mere click the reproducible version of S.C can be reached and immediately printed or electronically stored [*Tantalum powder case*]. The *Austrian court* ruled in the same spirit and accepted that S.C may be validly incorporated even if they are not transmitted in the offer, provided that there is a clause referring to these terms which is so clear that a reasonable party in the shoes of the recipient would have understood it.

108. A party is deemed to have had a reasonable opportunity to take notice of S.C; where, in electronic communications, the terms are made available and retrievable electronically and are accessible to that party at the time of negotiating the contract. Where there is a conspicuous reference to the incorporation of the S.C, their incorporation is valid [*CISG-AC Opinion N. 13*].

109. The SC were available on CLAIMANT's website on Internet *"Refer to our website in regard to our G.C and our commitments and expectations set out in our Codes of Conduct"*[*C4,"Sales-offer", p.16*]. CLAIMANT made S.C easily, freely and publicly accessible [*PO2, p53, Para.28*]. The reference is set out in a reasonable manner, at a reasonable venue where a reasonable contractual party would have noticed them.

b. CLAIMANT made S.C available in a comprehensible language to RESPONDENT

110. The reasonableness test [*Art.8 (2) CISG*] is verified once again concerning the question in which language the reference to the S.C and the terms themselves must be formulated in order to become effectively part of the contract. The language of the contract is the language in which the parties negotiated and concluded the contract, i.e. English. Indeed, the reference is made in a language which the addressee "*or its representative*" understands which constitutes a valid reference if they are readable and understandable and available in a language that the other party could reasonably be expected to understand.

111. There are no particular form requirements in regard to lay-out, design, format or size of the text of S.C which enforces the freedom of form principle under CISG. In CLAIMANT's offer, the reference wasn't neither too small to read, nor invisible for a reasonable person to reach [*Art.11 CISG*]. Consequently, the making-available test is fully checked by CLAIMANT. Thus, RESPONDENT cannot blink an eye on the S.C referred to in a valid manner or ignore their predominant accessibility [*Huber-Mullis*].

II. RESPONDENT accepted CLAIMANT's offer Pursuant to Art.18 CISG

112. Arts. 14 & 18 CISG represent the consent principle, as demonstrated-above CLAIMANT made a proper offer in the sense of Art.14 CISG and RESPONDENT did accept it. The effective acceptance of RESPONDENT happened in two occasions,

firstly it had reasonable opportunity to take notice of S.C (**A**) Secondly, RESPONDENT agreed on S.C's incorporation in the offer (**B**)

A- RESPONDENT had reasonable opportunity to take notice of S.C

113. The most disputed element in the incorporation of S.C is the standard of information the other party must be given. The widely accepted starting point is the requirement that RESPONDENT must have a reasonable opportunity to take notice of the S.C[*Magnus*].

114. Art.8 (2) CISG contains the principal concept of interpretation; statements are to be interpreted according to the understanding that a reasonable person in the shoes of the other party would have had. It is rather an objective test [*Shmidt-Kessel*].

115. The burden of taking notice of S.C is on the recipient's side, if the offeror's reference to these conditions is apparent in the sense of Art.8 Para.2 then the recipient had reasonable opportunity to take notice of S.C. Thus, CLAIMANT effectively performed its duty to make S.C available to RESPONDENT when its duty did not require a general duty of transmission. CLAIMANT went beyond its obligation to make terms available by supplying a phone number [*C3, p.15& C4, p.16*].

116. Concretely and following Art.18 (2), RESPONDENT had a multitude of opportunities to acquire knowledge of S.C or to make inquiry about them if it had some doubts. Actually, RESPONDENT acknowledged the S.C's reference by downloading CLAIMANT's Code of conducts [*R3, p30,31*] and even described it as "*impressive*" and expressed its willingness forward the receipt of the first delivery [*C5, p17, paras.2,3*].

117. Moreover, RESPONDENT qualified the tender i.e. offer as "successful" which underlines a determinant recognition of the offer and its S.C. CLAIMANT cannot be held liable for RESPONDENT's lack of professionalism. The latter had more than enough time to contact CLAIMANT in order to challenge the S.C' incorporation. However, no objection took place, although CLAIMANT was very professional and transparent "*To be completely transparent, we have decided to submit a proper offer containing the changes and have left the relevant sections in the T.docs open or refrained from including the changes in the documentation*"[*C3,p.15, para.3*].

118. Meanwhile, no discussion was held between the parties in between CLAIMANT's letter of acknowledgment of March 2014 and its Sales Offer of 27 March 2014 and the first delivery of 1st of may 2014[*PO2, p52, para.26*].

B. RESPONDENT Agreed on S.C' incorporation in the Offer

119. Art.18 (1) CISG addresses the acceptance of an offer that can be a statement, as much as it can be inferred from conduct. The payment of the price, taking delivery, the

dispatch of invoices or its signature [*C5, p.17*] by RESPONDENT may in all circumstances constitute acceptance [*Huber-Mullis*].

120. Evenly, RESPONDENT's assent is stressed upon when the performance of the contract has been accomplished from 2014 until 2017 pursuant to Art.23 CISG [*The doors case*]. Accordingly, the contract became effective the moment the parties accomplished their first delivery. Putting differently, S.C have reached RESPONDENT in the sense of Art.24 CISG together with the offer & acceptance [*Arts. 1.10(2) & (3), 2.1.3(1) & (2), 2.1.4(1), 2.1.5, 2.1.6(2), 2.1.9(2) & 2.1.10 UNIDROIT Principles*].

121. An acceptance is not effective until it is communicated to the offeror which occurs when it reaches RESPONDENT [*Art.18 (2) CISG*]. Until that moment no contract is concluded.[*Huber-Mullis*] The communication in here reaches the addressee when it is delivered to its mailing-address. It is sufficient if the communication enters RESPONDENT's "*sphere of control*", it is not necessary that RESPONDENT actually becomes aware of it. Thus it would be enough that a declaration of acceptance be sent to the offeror's courier-box [*Hubber-Mullis*].

122. The time for acceptance is also fixed by CLAIMANT in the offer "*remains open until 11 April 2017*", and RESPONDENT is bound to respect the time limit. RESPONDENT conformingly replied on the 7th of April.[C4, p.16; C5, p.17] In result, the acceptance is crystal-clear once again. [Huber-Mullis & Art. (2) CISG]. Even if we were to assume that no assent have reached CLAIMANT and therefore the acceptance is not effective, Art.18 (3) provides an exception which considers the performance of an act or the payment of the price as the starting point of the effective acceptance. [*Huber-Mullis*]

123. Even though, the inclusion of S.C in an offer is a form of parties' discretion, ensuring their validity requires the other party's consent under the general consent principle in CISG embodied in Arts 14, 18, 23. The consent may be expressed by the party's signature or by express statement or by conduct from which a reasonable person would infer assent. Such conduct may be the performances of the contract after knowing that CLAIMANT's S.C apply [*Magnus*]. Indeed, RESPONDENT's consent is sufficiently clear throughout the above mentioned elements and the three-year old professional relationship between the parties. Consequently, the contract is validly concluded and the S.C are effectively incorporated in the given contract.

C. **Even if we were to consider that there was a battle of form under Art.19 CISG CLAIMANT's S.C would still apply**

124. Art.19 CISG distinguishes between an acceptance which is materially different from the terms of an offer and an acceptance which is immaterially different. When material additional or different terms alter the core spirit of the contract such as the price, the quantity or quality of the goods, the offer is consequently materially altered. A reference to S.C can also be regarded as a material alteration [C4 "Sales-Offer", p.16].

125. The legal consequences of these material alterations could be a rejection or a termination of the offer which is not the case in our dispute. This leaves us with an acceptance with the effect of a counter- offer[*Schlechtriem & Schwenzer*].

126. Nevertheless, it is quite frequent in commercial transactions for each party to refer to its own S.C. In the absence of express acceptance by the offeror of the offeree's terms, the problem arises as to which, if either, of the two conflicting sets of S.C should prevail pursuant to Art 2.1.22 UNIDROIT.

127. The Convention does not have special rules to address the issues raised when both parties use S.C, "battle of the forms". Several decisions would include those terms on which the parties substantially agreed, and replace those terms that conflict with the default rules of the Convention, namely the Knock-out rule. [*Schlechtriem & Schwenzer*]**.**Whereas, the last-shot rule gives effect to the S.C of the last person to make an offer or counter-offer [*Conveyor band case*]. CLAIMANT is the last one to have made an offer or "*counter-offer*" so its S.C would still apply.

128. In *ISEA V. Lu***,** the court refused to give effect to the standard terms of either party. However, it does not correspond to the facts of this dispute since the reference was sent after the conclusion of the contract and Art. 19 CISG does not contain a regulatory gap which would allow national law to rule the question of inclusion of S.C.

CONCLUSION OF THE THIRD ISSUE

129. CLAIMANT submitted a tender i.e. offer which validly included its S.C in the sense of Art.14 CISG. In other terms, CLAIMANT's offer is subjected to its own S.C which RESPONDENT accepted pursuant to Art.18 CISG. By accepting the offer, RESPONDENT simultaneously accepted CLAIMANT's S.C. As a result, the present contract N.1257 is in all cases governed by CLAIMANT's S.C.

ISSUE 4: CLAIMANT complied with its contractual obligation even in case respondent's general conditions were to be applied in light of article 35 CISG and UNIDROIT principles

130. Even if RESPONDENT's G.C were applicable in our present case, CLAIMANT honored its contractual obligations by delivering conforming goods in accordance with Art 35 of CISG (**I**). Furthermore, CLAIMANT merely had an obligation of best efforts to insure compliance by its suppliers (**II**).

I. Claimant delivered conforming goods pursuant to Art. 35 CISG

131. The delivered goods are conforming goods in the sense of Art.35 CISG since the chocolate cakes supplied are conforming to ordinary purposes of quantity, quality and description "*contractually promised*" [*Ziegel*] pursuant to Art.35(1) CISG(**A**). Moreover, the fact that the chocolate cakes supplied do not have to be fit for an implied purpose pursuant to Art.35(2), they must only be fit to the general purpose (**B**).

A. The chocolate cakes supplied are conforming to ordinary purposes of quantity, quality and description pursuant to Art 35 (1) CISG

1. The origin of cocoa beans does not constitute a description of the chocolate cakes

132. Art. 35(1) lays down the first standard to consider in assessing the conformity of goods, i.e their conformity with the contractual provisions. The contract is "*the overriding source for standard of conformity"* [*O.Honnold*]. This first rule tackles a substantial general requirement of conformity to quality, quantity, and description of the good required by the contract, besides the fact that it should be packaged in a way that preserves it.

133. While the present case raises no objections as to the quantity and quality of the chocolate cakes manufactured by CLAIMANT, the contested aspect is related to the description. In fact, it is arguable to consider the ethical production of cocoa beans as a proper description of the chocolate cakes sold. Indeed, the term "*description*" under Art.35 CISG must be understood in a way that focuses on the good itself, being the subject of the contract. Specifically, components of the good that are not manufactured by CLAIMANT are external to the contract at hand.

134. According to the special conditions of the contract [*C2, p.11, section IV*] art 5 provides that in case of ambiguity or divergence, the documents "*should be read in the order in which they appear*". In the light of this provision, Art.2 related to the specification of the goods referred to "*Chocolate cake*" with description *to be filled in by tenderer*". The only description of the good featuring in the contract contains the name of the product, i.e. "*Chocolate cake-Queen's Delight* "[*C4, p.16*].

2- The unethical character of the beans is uncertain

135. Shall the Arbitral Tribunal consider that the process of producing cocoa beans falls within the description of the chocolate cakes, then attention must be drawn to an important fact which is the uncertainty of the unethical character of the beans supplied. The uncertainty pertaining to the ethical production of beans makes RESPONDENT's behavior in withdrawing from its obligations unjustified.

136. In absence of any ''*official*'' statement that would declare the report to be valid, [*PO2, p.54, para37*]. RESPONDENT had no solid reason to terminate the contract. First, UNEP reports are not binding by nature , and they merely provide recommendations for national governments up to whom it is to lead proper investigations that would pave the way for issuing official judgments by the national courts [*Fox& Münch& Issa*]. Second, not only is the report not binding , it has also been proven to contain erroneous accusation to at least one supplier who turned out to be innocent [*PO2 , p;54, para37*].

137.Again , while no official investigations have led to the firm conclusion that the cocoa beans supplied to and used by CLAIMANT in its production of Chocolate cakes was ''*unethically produced* '' ,RESPONDENT's poor investigation together with its reliance on a non-binding report makes its withdrawal from the contract unjustified.

138.Even if the tribunal would consider that the report is accurate in our present, only part of the delivered chocolate cakes would have contained unethically produced beans. More precisely, a maximum of 50 per cent [*PO2,p.54, Para 37*]. Now given the fact that all cakes have exactly the same size and weight, the quantity of cocoa beans used is the same in each piece. Therefore, there is no way to identify which cakes, exactly, contain the presumed unethically produced beans. In terms of probability, the chances that sustainably-produced beans have been incorporated in the process-making of the cakes are higher.

B. The chocolate cakes supplied do not have to fit an implied purpose pursuant to Art 35 (2), they must only fit the general purpose

139. Art 35(2)(a) is a very important provision considered to be ''*the codification of a basic principle of international sales law''* [*Henschel*].It brings into focus the existence of implied conformity obligations. When the obligation is not explicitly stated; Art35 (2)(a)

"*appear(s) to express what the drafters considered a buyer's normal, unspoken quality expectations that arise automatically in every international sales transactions"*[*Flechtner*].

140. The goods delivered must be adequate to their usual purpose. In other terms, with reference to an early English case law standard, the goods must be ''*merchantable* '' [O.*Honnold*]. The fact that the good delivered may be resold constitutes alone a fitness for the purpose it is destined to fulfill [*Henschel*].

141. In *the Mussels case*, it was held that the delivery of New Zealand mussels by a Swiss seller to a German buyer containing a cadmium concentration exceeding the limit recommended by the German health authority did not amount to a breach of contract and that despite the description being expressly stated in the contract , the mussels were still eatable. Similarly, the cakes delivered by CLAIMANT are still eatable and thus they are adequate for the usual purpose of goods having the same description.In our case, RESPONDENT never returned the delivered cakes manufactured by CLAIMANT. More than that, RESPONDENT was very much willing to make use of them in the opening of three new store [*PO2,p.54 Para.38]*.

142. *"Within the context of international trade, resale must be considered an 'ordinary' use*" [J. *Lookofsky*]. Therefore, the fact that RESPONDENT is able to resell the cakes means that the cakes delivered are being used for their usual purpose. Additionally, using the delivered cakes by RESPONDENT in opening its new store shows that the promotion of RESPONDENT's presence in the market is not affected by the source of the cocoa beans contained in the cakes. RESPONDENT's behavior indicates that good reputation is not an implied purpose in the sense of art 35 CISG. Consequently, RESPONDENT cannot argue that the cakes do not fit their purpose.

143. But even if RESPONDENT alleges that the use of ethically produced beans in making the cakes was a particular purpose, this may still be deemed irrelevant for determining the conformity of the goods in the sense of Art 35 (2). Indeed, the latter is "*dispositive by nature*" [Ferrari & Torsello].This means that parts of the article may not govern the sale of good due to the lack of precision and indication as to the characteristics of the good.According to these scholars, the non-fulfillment of some conditions, may render section [b], pertaining to express or implied purposes made known to the seller, inapplicable. These conditions would include in our case a sufficiently clear indication of the description of the good.

144. RESPONDENT claims that the origin of the cocoa beans supplied is the most important feature of the cakes. Yet, it did not even insert a proper provision indicating this. Though an explicit statement of the description of the cocoa beans in the contract would have been required given the significant repercussions that it holds for both parties to the contract.

145. Further, art 35 CISG sustains that whether or not the seller was aware of any particular purpose is not determinant in some cases where circumstances show that the buyer was not reasonable in relying on the seller's skill and judgment [*Schlechtriem*].This standard is to be examined on a case-by-case basis, since these circumstances "*cannot be specified in advance"* [*BIANCA*].

146. In our case, the reliance of RESPONDENT on CLAIMANT's capacity to guarantee that the cocoa beans supplied would be ,under all circumstances ,environmental friendly is unreasonable, since they are not farmed by CLAIMANT itself. CLAIMANT had only a duty to attempt to meet such requirement.

II. CLAIMANT is merely bound by an obligation to use its best efforts, to which it complied under UNIDROIT principles

147. CLAIMANT merely has an obligation of best efforts is in accordance with UNIDROIT principles (**A**), which apply in the given case as gap-fillers to issues non-governed by CISG. Further, CLAIMANT fulfilled its expected obligations (**B**).

A.CLAIMANT had an obligation of best efforts pursuant to Art 5.1.5 UNIDROIT PRINCIPLES

148. CLAIMANT has a duty of best efforts given the wording of the contract (**1**) as would have been understood by a reasonable person (**2**).

1. The way the obligation is expressed in the contract binds CLAIMANT by a duty to provide its best efforts to make sure the ingredients used are ethically produced

149. Art 5.1.5 UNIDROIT distinguishes the duty to achieve a specific result from the duty to use best efforts, it draws the line between two different obligations based on a non-exhaustive list of factors .First and foremost the duty in question is identified according to the way it is expressed in the contract, the contract did not contain any solid expression of the duty to meet a specific result regarding the origin of cocoa beans used in manufacturing the cakes .

a. The plain wording of the contract does not indicate a duty of specific result

150. Although RESPONDENT might argue that the contract binds CLAIMANT to deliver cakes containing ethically produced beans, CLAIMANT in fact does not bear an absolute obligation of result under the contract. Indeed, in the unlikely event that RESPONDENT's code was to be applied, the contract governed by this code and translating the meeting of minds of CLAIMANT and RESPONDENT, never explicitly stated that CLAIMANT should bear an obligation contrary to the duty of vesting its best efforts in order to make sure its supplier also complied and adhered to sustainable production principles and values.

151. Section E of the contract contains an obligation of the seller to adhere to standards "*comparable*" to those established by RESPONDENT's code[*C2, p.14*].The plain words of the contract are not direct, nor substantially determinant. The reference to the standards is inferable from the use of a mere exhortative language, because of which it is not possible to underline an express well-drafted, specific obligation.

b. The contractual price does not indicate the existence of a duty to achieve a specific result

152. Moreover, clues may be found in other terms of the contract, mainly the ones referring to the price. i.e to say that an unusually high price may be a sufficient reason to assume that the contractual party receiving the monetary compensation is under a duty to achieve a specific result. This is not the case here, where RESPONDENT paid a "*not extraordinary*" price for the chocolate cakes [*PO2, p.54, Para40*], without linking the successful achievement of the specific transaction to a high price , or to the payment of the price at all**.**

c. RESPONDENT's ability to influence the performance of the duty is contrary to the obligation of specific result

153. Whenever a party has the possibility and the means to ensure reaching a specific goal, the other party cannot be bound by anything contrary to the duty of attempting to meet this goal. While RESPONDENT had the possibility to choose its suppliers, control the supply chain, and monitor it as it requested in its very own conduct of conduct, should it apply, RESPONDENT itself could have had an influence on the operation of supply of cocoa beans, pertaining to the contract, and failed to do so.

For instance, RESPONDENT stopped auditing CLAIMANT's supplier, as a result to his approval of the choice of supplier [*PO2, p.54, Para34*] .

2-The reasonable person's understanding of the contract as to the obligation of the seller under article 8 CISG.

154. Under the contract CLAIMANT has merely a duty to observe a degree of Diligence. The latter can be defined as "*the attention and care required from a person in a given situation*" [Black's Law Dictionary].

155. In order to interpret the contractual provisions, it is needed to resort to Art 8 CISG, under which it is necessary to consider the intent of the parties, whether it was explicitly stated or reasonably deduced. In our present case, RESPONDENT used exhortative language asking CLAIMANT; to only "*make sure*" other suppliers complied with "*general business philosophy*".

156. In fact, the latter is a vague statement lacking precision and substantial requirement. Indeed, a business "*philosophy*" is not a sufficiently precise statement, being composed of a list of principles and commitment to ethical production standards. In practice, it fails to identify, and thus create any specific clear obligation.

157. Alternatively, Art 8 (2) holds that interpreting the parties 'statements shall be conducted in respect of the understanding that a reasonable person would have had under similar circumstances. For the sake of reasonableness, it is inconceivable to consider that one party is willing to enter into a contract where it is bound by an obligation to accomplish a specific result that is not "*entirely*" within its control and voluntarily subject itself to unnecessary risks [*Adams*]. Furthermore, Art 8 (3) emphasizes on the importance of considering the circumstances revolving around the contract including established dealings between the parties, and usages.

158. However the circumstances show that there are noprevious dealings between CLAIMANT and RESPONDENT. In addition to that, there is no trade usage pertaining to environmental, ethical or sustainable production in the bakery industry [*PO2, p.54, para.35*]. Consequently, it is impossible to consider that CLAIMANT is bound by a duty of specific result.

B- CLAIMANT has made all efforts expected from a reasonable person under same circumstances pursuant to Art 5.1.4

1-CLAIMANT's choice of supplier was reasonable

159.Art 5.1.4 posits that any party bearing an obligation of best effort shall be "*bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances*" which involves the duty of duty care.In our present case, CLAIMANT made its best efforts in being careful regarding the choice of a well-reputed supplier that was free from any history or past charges related to corruption, bribery, and unethical business conduct, and more generally in the context of UN Global Compact Principles [*PO2, p.54, para.34*] .

160. Moreover, the process of selection of the third supplier was based on its expertise and reputation. Indeed Ruritania Peoples Cocoa GmbH was able to provide a good model for farming and producing cocoa beans in an ethical way , while still making sure its own employees get educated about the process and the aims of these techniques[*PO2,p.53,para.32*]. On the other hand, CLAMANT chose a supplier that had "*good reputation*" in the market [*PO2, p.53, para.32*] which is deemed a good basis for contracting in commercial field.

161.As a result , it is only natural to assume that in interpreting the contract's provisions pertaining to the selection of the supplier , any other person in CLAIMANT's shoe would have made the same choice , for it fulfilled every single criterion laid down in Section E of the contract supplier. In other terms , the contract did not demand CLAIMANT to make a better choice than it already has. In fact, CLAIMANT , using its contractually granted discretion made a "*commercially reasonable*" [*Adams*] choice , which was based on good faith and due care.

2- CLAIMANT's monitoring method of the cocoa supplier was reasonable and careful

162. CLAIMANT complied with section F under which it is requested to keep all relevant documentation to the supplier‘s performance and the extent of its compliance with the code of conduct.This is shown in hiring an agency Egimus AGthat openly and explicitly adhered to Global compact principles

163.Although the statement "*with or without support of a third party* "in Section F left CLAIMANT with complete discretion to resort to professional help in monitoring the supplier, and even though RESPONDENT already reserved the right to audit

CLAIMANT ‘s operations at CLAIMANT’s own expense ; CLAIMANT made the onerous choice of hiring an agency specialized in controlling cocoa beans suppliers.

164. The agency selected adhered to UN-Global Compact Principles. Actually it used ISO 14001 and ISO 26000, as guidance to undertake its tasks. These norms are connected to Global Compact Principles and sharing the same beliefs [*UN Global Compact publication*]. Further, Egimus AG was able to set out a satisfying quality of performance to the extent of its expertise [*PO2, p.53 , para.33*] because of which RESPONDENT itself was pleased to the point of no longer showing up to audit[*PO2, p.54, para.34*]. The degree of care can also be deduced from the fact that the agency selected had a good reputation and was well known for its high quality services.

165. In *Armstrong V Langley*, the court held that “*Reasonable effort does not require...all possible steps ...[butrather] reasonable steps*..”to be taken. The steps undertaken by CLAIMANT as to the choice of supplier and the monitoring agency and process are thus deemed sufficient to conclude that it complied with its duty of best efforts. CLAIMANT need not to do “every possible” thing

CONCLUSION OF THE FOURTH ISSUE

166. Assuming but not conceding that RESPONDENT’s S.C apply CLAIMANT delivered conforming goods under art 35. Moreover, the contract‘s wording never explicitly stated a duty of specific result, it merely obliged CLAIMANT to manage its work “responsibly” and be bound by a duty of best efforts, to which it complied.

REQUEST FOR RELIEF

In the light of the submissions above, Counsel respectfully requests the Tribunal

1) To dismiss the challenge of Mr. Prasad with the participation of the full composition of the Tribunal.
2) To declare that the contractual agreement of CLAIMANT and RESPONDENT is governed by CLAIMANT’s S.C and that it did comply with its best efforts by delivering conforming goods.
3) To order RESPONDENT to pay the outstanding purchase price, the damages and to bear the costs of the arbitration

CERTIFICATE

Tunis, 07 December 2017

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate.

Achref Medini

Khawla Mraydi

Malek Zakraoui

Yesmine Ben Mabrouk