

**FIFTEENTH ANNUAL**  
**Vis East International Commercial Arbitration Moot**

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**Memorandum for Claimant**  
**Delicately Foods Sp v. Comestibles Finos Ltd**

**On behalf of**

Delicately Foods Sp  
39 Marie- Antoine Carême  
Avenue  
Oceanside  
Equatoriana

CLAIMANT

**Against**

Comestibles Finos Ltd  
75 Martha Stewart  
Drive  
Capital City  
Mediterraneo

RESPONDENT

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**Abdul Saboor Halamey**

**Tamim Asoulmal**

**Laila Mirzaei**

**Huma Saadat**

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**Kardan University-Afghanistan**

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ABBREVIATION	CITATION	CITED IN
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<i>UNCITRAL</i>	UNCITRAL Model Law on International Commercial Arbitration	P. 5,7
<i>UNIDROIT</i>	UNIDROIT Principles for International Commercial Contract (2016)	P. 20, 23, 28
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<i>Markus 2011</i>	Müller Markus -Chen and Lara M. Pair International Arbitration and International Commercial Law	P.25
<i>Azereido da Silveira</i>	Azereido da Silveira Mercédeh , Liability for	P.27

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## TABLE OF ABBREVIATIONS

Art.	Article
Auth.	Author
CISG	United Nations Convention on Contracts for the International Sales of Goods
Clm.	Claimant
EDI	Electronic Data Interchange
Ex.	Exhibit
IBA	International Bar Association
GCC	General Conditions of Contract
GCT	Group Chimique Tunisiem
ICC	International Chamber of Commerce (Paris, France)
ICDR	International Center for Dispute Resolution
LCIA	London Center for International Arbitration
Ltd.	Limited
No.	Number
NOC	Notice of Challenge
p.	Page(s)
Para.	Paragraph(s)
PO1	Procedure Order Number 1
PO2	Procedure Order Number 2
PCA	Permanent Court of Arbitration

R.	Record
Res.	Respondent
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollars

## STATEMENT OF FACTS

1. Delicatesy Whole Foods Sp (“**CLAIMANT**”) is a social enterprise and medium sized manufacturer of fine bakery products in Equatoria. It uses its best efforts to ensure high quality products. Comestibles Finos Ltd (“**RESPONDENT**”) is a gourmet supermarket chain in Mediterraneo.
2. Both parties met at annual food fair in Danubia on March 2014. Representatives of both parties Ms. Annabelle Ming **RESPONDENT**’s Head of Purchase and Mr. Kapoor Tsai **CLAIMANT**’s Head of Production discussed issues of mutual interest. Later on, they discussed products of interest and its supply feasibility in view of **RESPONDENT**. Mr. Tsai and Ms. Ming had specific discussion on product choices, delivery quantities and other general discussions.
3. On 10 March 2014, **CLAIMANT** received an Invitation to tender for the delivery of chocolate cakes enclosed Tender Documents.
4. On 27 March 2014, **CLAIMANT** submitted its offer with amendments and its standard conditions. Based on provisions of its standard conditions, **CLAIMANT** highly obliged itself to use its best efforts as well as to ensure that its suppliers also complied with **CLAIMANT**’s Code of Conduct. **CLAIMANT** did not guarantee its suppliers would do so.
5. On 7 April 2014, **CLAIMANT** was awarded the contract. **RESPONDENT** explicitly accepted all specifications and purported amendments without any changes in **CLAIMANT**’s standard conditions.
6. On 1 May 2014, **CLAIMANT** made its first delivery and deliveries continued from 2014 until 2016 without any problems.
7. On 27 January 2017, **CLAIMANT** was asked for immediate confirmation of cocoa production process by its supply chain. **RESPONDENT** asked for prompt reply within short notice. Knowingly **CLAIMANT** used its best efforts, the words as like termination, no payment and no more deliveries were mentioned which was completely in contradiction with terms of contract.
8. **CLAIMANT** replied and assured that it will conduct an investigation. **CLAIMANT** saw no justification for halting payments while reiterating that it has exerted out its best efforts to ensure that its suppliers abide by Global Compact principles.
9. On 10 February 2017, **CLAIMANT** informed **RESPONDENT** regarding the issue. Its

discovery was disappointing and Ruritania Peoples Cocoa mbH was involved in the scandal and had provided CLAIMANT with forged official papers. CLAIMANT suggested and adopted corrective actions towards its supplier's fraud.

10. Despite CLAIMANT's goodwill, RESPONDENT terminated the contract and asked for damages of apparently sold cakes. CLAIMANT has exerted out its best efforts to ensure compliance with Global Compact standards.
11. CLAIMANT has regularly audited the supplier's main production facility. Regretfully, the certification was provided by corrupt high ranking government officials where it became impossible for CLAIMANT to discover fraud.
12. Even if, General Conditions are too specific to set out the requirements for the conformity of the goods, under Article 35 CISG CLAIMANT has delivered conforming cakes with as required by this article therefore RESPONDENT's allegations are groundless.
13. In case, RESPONDENT's General Conditions were applicable which not the case is, CLAIMANT imposes merely an obligation on itself to use its best efforts to ensure its suppliers comply with the relevant standards of environmentally friendly and sustainable production, but it has never guaranteed.
14. Section 20 of the contract includes a clause committed by parties to settle disputes, breach and termination or invalidity of this contract in Vindobona, Danubia conducted in accordance "with UNCITRAL Arbitration Rules without involvement of any arbitral institution".
15. CLAIMANT appointed Mr. Rodrigo Prasad as party appointed arbitrator and his Impartiality and Independence Statement is available.
16. All cakes were in line with contract specifications, RESPONDENT had no right or privilege to terminate the contract and deliberately stop further deliveries. There was no breach of contract by CLAIMANT. It is RESPONDENT that committed fundamental breach by termination of the contract while entitling CLAIMANT to damages. The estimated damages will be roughly USD 2,500,000 and also CLAIMANT has the right to increase its actual damages upon estimation, in particular any loss of reputation can be quantified.
17. CLAIMANT is entitled to the full payment of cakes for USD 1,200,000 and also damages for unlawful termination of the contract by RESPONDENT.

## **SUMMARY OF ARGUMENT**

### **ISSUE I: THE ARBITRAL TRIBUNAL DOES NOT HAVE THE AUTHORITY TO DECIDE ON THE CHALLENGE OF MR. PRASAD AND EVEN IF IT DOES, IT SHOULD DO SO WITH THE INVOLVEMENT OF MR. PRASAD.**

The composition clause in the contract requires that Arbitral Tribunal shall be three members who will proceed with arbitration or any challenge given from one party. Mr. Prasad is an integral part of the Arbitral Tribunal and arbitral panel shall take any decision with the inclusion of Mr. Prasad. CLAIMANT has never agreed and intended to exclude article 13(4) and the PCA will act as appointing authority if RESPONDENT persists to prolong its challenge of arbitrator in light of Article 6.1 of UNCITRAL Arbitration Rules.

### **ISSUE II: THE ARBITRAL TRIBUNAL SHALL BE CONSIST OF MR. PRASAD**

RESPONDENT's allegations are groundless and carry unjustifiable doubts therefore Mr. Prasad should not be removed from Arbitral Tribunal. IBA guidelines should not apply since there is no direct connection or affiliation of Mr. Prasad with funding source. Even under IBA guidelines, Mr. Prasad will be placed in green list since he meets all the requirements of the IBA guidelines. Irrelevant factors by RESPONDENT can never justify any challenge and do not affect Mr. Prasad's impartiality and independence.

### **ISSUE III: CLAIMANT'S STANDARD CONDITIONS AND CODE OF CONDUCT GOVERNS THE CONTRACT**

The chosen law and principles by parties provide firm basis that CLAIMANT's Standard Conditions and Code of Conduct govern the contract. CLAIMANT's standard conditions are to be considered by the tribunal. The CISG and UNIDROIT Principles apply to the contract and affirm that the counter-offer is made by CLAIMANT. Moreover, CLAIMANT's general conditions fulfill all the requirement of contractual terms and also expectation of RESPONDENT.

### **ISSUE IV: CLAIMANT DELIVERED CONFORMING GOODS AND WAS MERELY OBLIGED TO USE ITS BEST EFFORTS TO ENSURE COMPLIANCE**

The CISG ensures that CLAIMANT has delivered conforming goods as required by the contract and should receive the full price for the delivered chocolate cakes. The facts and circumstances of the case dictate that the contract should be interpreted that CLAIMANT was obliged to use its best efforts. Finally, the UNIDROIT principles also support CLAIMANT's best efforts are exerted towards RESPONDENT.

## ARGUMENTS

### **ISSUE I: THE ARBITRAL TRIBUNAL DOES NOT HAVE THE AUTHORITY TO DECIDE ON THE CHALLENGE OF MR. PRASAD AND EVEN IF IT DOES, IT SHOULD DO SO WITH THE INVOLVEMENT OF MR. PRASAD**

1. The composition clause in the contract requires that Arbitral Tribunal shall be three members who will proceed with arbitration or any challenge given from one party. Mr. Prasad is an integral part of the Arbitral Tribunal and it shall take any decision with the inclusion of Mr. Prasad. CLAIMANT has never agreed and intended to exclude article 13(4) and the PCA will act as appointing authority if RESPONDENT persists to prolong its challenge of arbitrator in light of Article 6.1 of UNCITRAL Arbitration Rules. It is an explicit requirement of contract that Arbitral Tribunal shall be composed of three arbitrators **(A)**. Art.13 (4) UNCITRAL arbitration rules gives a deserved seat to Mr. Prasad while observing terms set forth in contract **(B)**. PCA will intervene and designate Appointing Authority based on Art. 6.1 UNCITRAL rules and fallback solution **(C)**. Mr. Prasad is integral part of Arbitral Tribunal. **(D)**
  - A. The contract requires a composition of tribunal with three arbitrators so the two person tribunal cannot decide.**
2. In the General Conditions of Contract, both parties agreed that the Arbitral Tribunal for dispute resolution shall be three members. If RESPONDENT insists Arbitral Tribunal to proceed without Mr. Prasad, they clearly breach contractual terms. Hence, based on dispute resolution clause of the contract, the number of arbitrators shall be three members to decide on the challenge of Mr. Prasad. Without Mr. Prasad, two remaining arbitrators cannot decide on the challenge. [R.12, Para.4, GCC].
3. Second, RESPONDENT in its Notice of Challenge (NOC) insists that the only authority to decide on the challenge of Mr. Prasad is arbitral tribunal with two members which is in complete contradiction with the mutual agreement. In RESPONDENT's view, two members tribunal constitutes the appointing authority however the contract did not define any appointing authority. [R.39, Para.8, Resp-NOC].
4. According to General Conditions of Contract agreed by parties, the Arbitral Tribunal shall be composed of three members and therefore inclusion of Mr. Prasad is a mandatory ask

based on standard procedures in Ad hoc arbitration. [Yang, Asian Dispute Review, P.1].

5. RESPONDENT cannot ignore an already put forth Clause 20 under Dispute Resolution in the General Conditions of Contract. RESPONDENT should not demand Arbitral Tribunal to decide on the challenge of Mr. Prasad without his inclusion in Arbitral Tribunal which is opposite of General Conditions. [R.12, Clause 20, GCC].
6. In case, Mr. Prasad is excluded from the Arbitral Tribunal, an even number of arbitrators which is opposite of parties agreement, should not decide on the challenge of Mr. Prasad. Since, it is evident to RESPONDENT that any decision by Arbitral Tribunal, shall be with participation of Mr. Prasad. Mr. Prasad is one of those three arbitrators that compose a complete Arbitral Tribunal.
7. On the note, per article 11 of UNCITRAL Arbitration rules, CLAIMANT has declared his chosen arbitrator and clearly communicated to the RESPONDENT. Also, CLAIMANT's arbitrator has released his Statement of Impartiality and Independence as an arbitrator for fair arbitration proceedings. Therefore no justifiable doubts remain for Arbitral Tribunal to decide on the challenge of Mr. Prasad. [Art.11, UNCITRAL Rules].
8. Proceeding with two members of Arbitral Tribunal to decide on the challenge of Mr. Prasad will constitute breach of contract. Since, it is clearly written in the General Conditions of Contract (GCC) that non-compliance with any of the contractual obligation constitutes a breach of contract. RESPONDENT clearly breaches and acts opposite of its agreed contract. [R.12, Clause.4, GCC].
9. Further on that, an UNCITRAL Report on the UNCITRAL rules reasoned the presence of three arbitrators is essential to ensure that the tribunals own a sufficient degree of competence and expertise. [Born, International Commercial Arbitration, P.13]. In this case, RESPONDENT cannot exclude a competent and expert arbitrator who will argue for CLAIMANT's fairness and integrity in the arbitration.
10. Further on that, a panel of three arbitrators was more likely to guarantee equal understanding of the positions of the parties and three-person arbitral tribunals were the most common configuration in International Commercial Arbitration. [Holtzmann& Neuhaus, Number of Arbitrators, P.1].
11. The Arbitral Tribunal shall consist of three arbitrators and even number of arbitrators cannot decide on the challenge of Mr. Prasad. [Born, International Commercial Arbitration, P.4].

12. Finally based on the above reasons, the Arbitral Tribunal shall consist of three arbitrators. If not, the panel will be defective and cannot reach out to integrity and fairness required for dispute resolution in this contract.

**B. UNCITRAL Arbitration Rules, Art. 13(4) is applicable which prohibits the Arbitral Tribunal to decide**

13. Parties have never agreed on the exclusion of Art.13(4) of UNCITRAL Arbitration Rules. RESPONDENT cannot have Arbitral Tribunal to decide on the Challenge of Mr. Prasad and it is the PCA which will designate an Appointing Authority to resolve the issue of challenged arbitrator. The parties agreed on exclusion of arbitral institution and never agreed on excluding appointing authority.

14. RESPONDENT laterally insists on the exclusion of Article 13 (4) to get success on the challenge of Mr. Prasad, but CLAIMANT neither agreed on its exclusion nor there is any agreed term where CLAIMANT accepted the exclusion of this Article specifically. Any exclusion shall be in line with terms of contract.

15. The parties intended to exclude any arbitral institution for the composition of the Arbitral Tribunal, they have never agreed to exclude appointing authority's power to decide on the challenge. [R.12, Clause 20, GCC].

16. Both parties in the dispute resolution clause merely agreed to exclude any arbitral institution for the composition of arbitral tribunal however they have never agreed to exclude any appointing authority for the challenge of arbitrator. The parties intended to keep arbitration proceedings confidential and they did not intend to exclude the authority to decide on the challenged arbitrator.

17. Based on Article 8.1 CISG, while interpreting provisions of the contract the intension of the parties shall be considered. Confidentiality was the only concern for the parties to choose to Ad hoc arbitration and exclude arbitral institution. [Art.8 (1) CISG]. Therefore CLAIMANT agreed to its exclusion to keep the arbitration proceedings confidential. At no point, CLAIMANT agreed to exclude appointing authority discretion to decide on the challenge. Therefore the parties' intension shall prevail over any ambiguous contractual terms. Any reasonable person in the same circumstances would deem the exclusion of arbitral institution merely for the composition of Arbitral Tribunal and not for the challenge of arbitrators.[Art.8(3) CISG].

18. Even if one were to follow RESPONDENT's allegation that it intended to exclude the application of Art. 13 (4) UNCITRAL Arbitration Rules in the arbitration agreement, in light of the fundamental nature of the right to challenge an arbitrator, a clearer wording would have been required for a deviation from the standard procedure.[R.46, Refusal to removal].

19. In light of aforesaid reasons, Article 13(4) of UNCITRAL Arbitration rules are applicable.

**C. BY DEFAULT, PCA IS THE APPOINTING AUTHORITY TO DECIDE ON THE CHALLENGE**

20. Even if, RESPONDENT does not withdraw from its challenge of arbitrator, PCA will intervene and designate an Appointing Authority to resolve the challenge of arbitrator. Art. 6.1 applies in this context **(a)**. The PCA is authorized and entrusted appointing authority **(b)**. Fallback solution is referring the issue to PCA at The Hague **(c)**.

21. The parties did not agree on the choice of an appointing authority in the contract. In light of Art.6 (2), UNCITRAL Rules, Permanent Court of Arbitration (PCA) is authorized as default to designate the appointing authority.

**a. Article 6.1 of UNCITRAL Arbitration rules is applicable which authorizes the PCA to designate Appointing Authority**

22. Under General Conditions of Contract, it is clearly written that any dispute, controversy or claim arising out of or relating to this contract shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules. [R.12, Clause 20, GCC]. Therefore, it shows that UNCITRAL Arbitration rules are applicable in this contract.

23. In light of Article 6, the Arbitral Tribunal fails to decide upon the challenge of Mr. Prasad because arbitral process requires having three arbitrators, a complete panel, to move forward with any challenge. Without Mr. Prasad, it directly defers the case to the PCA. [Art.6 (1) UNCITRAL Rules].

24. PCA shall be complement to the case constraints from the very creation of the PCA onwards; it was the function of the PCA to complement the constraints of ad hoc and institutional arbitration through an institutional structure. [Indlekofer, International Arbitration and the Permanent Court of Arbitration, P.2].

25. Furthermore, according to Art.6.4 of UNCITRAL Arbitration Rules, this Arbitral Tribunal lacks authority and fails to act as an appointing authority in the arbitral process and therefore there is no justification for RESPONDENT that Arbitral Tribunal can act as an

appointing authority to decide on the challenge of Mr. Prasad. [Art.6 (4) UNCITRAL Rules].

26. Notwithstanding, RESPONDENT insists that Arbitral Tribunal to decide on the challenge of Mr. Prasad, it clearly lacks basis and no decision can be made by incomplete arbitral tribunal.

**b. Article 6.4 of UNCITRAL Arbitration Rules empowers the Secretary-General of the PCA to designate the Appointing Authority**

27. There is no clear agreement on the appointing authority in the contract. RESPONDENT claims that Arbitral Tribunal shall serve as an appointing authority and decide upon the challenge which is a quite misunderstanding of RESPONDENT. Since, both parties have not agreed on the appointing authority in the contract hence this entrusted appointing authority is the PCA by default. [R.39, Para.8, Resp-NOC].
28. Furthermore, within the UNCITRAL Arbitration Rules of 2013, the Secretary-General of PCA acts as designating authority in case of challenges to arbitrators. The RESPONDENT challenge shall be reached out in accordance with the rules and therefore PCA is the only authority to decide upon the challenge of Mr. Prasad. [Art.6 (4), UNCITRAL Rules].
29. Under Article 6.4 of UNCITRAL Arbitration rules, if the appointing authority is not agreed by parties and any failure in selecting the appointing authority automatically refers the case to PCA. [Art.6 (4), UNCITRAL Arbitration Rules].
30. In addition, the Secretary General of the PCA acts as the default designation authority, in case, the disputing parties have not agreed upon an appointing authority, or the chosen appointing authority by the disputing parties refuses or fails to act in these instances, the PCA's Secretary General will designate an appointing authority for the disputing parties to secure the process.” [Indlekofer, International Arbitration and the Permanent Court of Arbitration, P.2]. That is a complementary to CLAIMANT’s claims since the parties have not agreed to appoint any appointing authority to decide on the challenge.
31. In case, the two member Arbitral Tribunal devolve the power to themselves, they explicitly and impliedly oppose the terms of contract that clearly dictates the Arbitral Tribunal shall be consist of three members and panel of two person is defective itself based on contract, to decide on another member. [R.12, Clause 20, GCC]. RESPONDENT drags the Arbitral Tribunal to deficiency and even it defects the decision of arbitral panel and the two other

members of the Arbitral Tribunal.

32. There is no doubt that the impartiality and independence of arbitrators are fundamental requirements of the arbitral process and the impartiality and independence are the cornerstone of arbitration G. Born, International Commercial Arbitration [Daele, Challenge and disqualification of arbitrators, P.45]. As per the commentary, it is a fundamental requirement in the arbitral process that the arbitrators take decision with impartiality and independence.
33. It is not only breaching the General Conditions of Contract by removing one member and desiring to take a decision by two other members, but also it is a misconduct as to common practice of International Commercial Arbitration [Born, International Commercial Arbitration, P.13].
34. The point to be noted, RESPONDENT cannot prove that if the issue is taken to Permanent Court of Arbitration (PCA), PCA will disseminate the issue in public. PCA has been entrusted without any doubt and RESPONDENT is misinterpreting the confidentiality which will be kept as confidential as in the Ad hoc arbitration. [R.39, Para.8, Res-NOC].
35. Furthermore, RESPONDENT does not understand the position of Permanent Court of Arbitration (PCA) because PCA since its establishment has been a complement of the ad hoc arbitral process and it totally respect confidentiality. [Indlekofer, International Arbitration and the Permanent Court of Arbitration, P.2].
36. Even if, RESPONDENT persists to have Mr. Prasad withdraw from his office; the only Appointing Authority designated Secretary-General of the PCA should decide upon the challenge of Mr. Prasad. [Art.13 (4), UNCITRAL Rules].
37. Additionally, in a case between Sino Dragon Trading Ltd v. Noble Resources International Pte Ltd, PCA acted as an appointing authority since one party challenged an arbitrator and their contract did not include any clause defining appointing authority for the challenge of arbitrator. [Sino Dragon Trading Ltd v. Noble Resources International Pte Ltd, Case No.1069]. Similar reasoning shall apply here.
38. CLAIMANT wants that applicability of article 13(4) of UNCITRAL arbitration rules shall be adhered as both parties agreed on UNCITRAL rules to settle any dispute without exclusion of any specific article. To conclude with above mentioned reasons, PCA is only the entrusted Appointing Authority in case Arbitral Tribunal wants decide on the challenge

of arbitrator.

**c. On the basis of fall back solution, the PCA at The Hague shall designate an Appointing Authority**

39. At no point in contract, parties have agreed upon the exclusion of article 13(4). Pursuant to Art. 13.4 dictates the parties to find out an appointing authority and so as default, the appointing authority is the PCA. [Art.13 (4), UNCITRAL Rules].
40. Furthermore, UNCITRAL Arbitration rules resolve this issue in absence of agreement by the parties and recommend the fallback solution for the settlement of appointing authority.
41. The UNCITRAL Rules set forth a sound procedural basis for most ad hoc international commercial arbitrations, although they leave many details to be decided by the arbitral tribunal. The Rules permit the parties to agree upon an appointing authority, empowered to select arbitrators in the absence of agreement by the parties. Where the parties have not, in their arbitration contractor otherwise, designated an appointing authority, the UNCITRAL Rules provide a “fallback” solution – the PCA at The Hague. The PCA will, upon request, act as an appointing authority or choose another appointing authority, which will then select the arbitrator(s). [Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing, P.18].
42. Given that, RESPONDENT cannot desire a decision to be made by Arbitral Tribunal as to Mr. Prasad’s challenge since parties did not have any agreement for appointing authority and therefor it is PCA as default to designate an appointing authority.

**D. MR. PRASAD SHALL BE PART OF THE ARBITRAL TRIBUNAL**

43. Mr. Prasad should include in any decision to be made in Arbitral Tribunal as he meets all the requirement of the seat. Even if Art.13 (4) is not applicable, standard procedure dictates for decision with the entire members of Arbitral Tribunal. Standard procedure rules shall apply and the decision shall be made with Mr. Prasad **(a)**.
44. Based on Art.10 UNCITRAL model law, CLAIMANT has the right to have its chosen arbitrator in the Arbitral Tribunal. Inclusion of Mr. Prasad is necessary in the Arbitral panel moving forward to decide on the challenge while RESPONDENT’s suggestions are groundless and acts in contradiction with this article. [Art.10 (1-2), UNCITRAL Law].
45. Based on Article 18 UNCITRAL model law, CLAIMANT shall be given the right to be represented very well and refute allegations toward it and also there should be an equal

opportunity given to both parties. [Art.18, UNCITRAL Law].

46. The appointment of Mr. Prasad is fitting the nature of CLAIMANT's case as per the leading commentary by Mr. Born stating a judge whom you can choose for yourself, bearing in mind the nature of your case. [Mr. Born, Challenge and Replacement of Arbitrators, P.1].
47. Further on that CLAIMANT is free to select an arbitrator whose background, expertise and abilities are well-suited to the case and therefore CLAIMANT has made a right choice considering Mr. Prasad's capabilities. [Born, Challenge and Replacement of Arbitrators, P.2].
48. RESPONDENT desire is completely unjustifiable and it clearly flicks deficiencies to the position and power of Arbitral Tribunal to decide on the challenge without participation of Mr. Prasad.
49. Participation of Mr. Prasad is absolute requirement in any decision to be taken by Arbitral Tribunal considering the practice of international arbitration. It is a common practice most of international arbitration is composed of three person tribunal. [Born, International Commercial Arbitration, P.13].
50. In case, there are conflicts between the parties' agreed procedures in Arbitral 'which is not the case here' RESPONDENT shall adhere the mandatory law of the seat. . [Born, International Commercial Arbitration, P.4]. in present case, the law of seat which is UNCITRAL model law requires an odd number of three arbitrators and that seat will be clearly lacked with Mr. Prasad's removal. [Art.10 (1-2), UNCITRAL Law].
51. RESPONDENT failed to meet the requirement of burden of proof since Mr. Prasad has already met the circumstances required under Article 11 of UNCITRAL rules. Even after this, RESPONDENT insists to pursue the challenge of Mr. Prasad by Arbitral Tribunal. In light of Art.13 (4) UNCITRAL rules parties shall seek a decision on the challenge by appointing authority. [Art.13 (4), UNCITRAL Rules].
52. Mr. Prasad is a complementary member of Arbitral Tribunal and the incomplete arbitral panel –two person- cannot decide on the challenge of Mr. Prasad because they lack authority. Even if it does, they will evidently decide in the favor of RESPONDENT and it will dampen the impartiality and independence of other two arbitrators in the panel.
53. If the arbitrator is not aware of the existence of a third-party funding agreement between the funder and the party, there can be no conflict of interest involving arbitrators.

[Osmanoglu, Journal of International Arbitration, P.]. Mr. Prasad did not know about third party funder. [R.43, Refusal to withdraw].

54. Since the independence and impartiality of the arbitrators are primacy principle in the International Commercial Arbitration, it will be breached by Arbitral Tribunal if it continues to decide on the challenge without Mr. Prasad.
55. Finally as per above mentioned reasons, the desire that RESPONDENT persists on to have Arbitral Tribunal decide without participation of Mr. Prasad, is explicitly unacceptable, because Ms. Reitbaur RESPONDENT's nominated arbitrator will definitely issue a decision in the favor of RESPONDENT.

**a. Even If Art. 13(4) is not Applicable, in light of Standard Procedure rules the decision is to be taken by the entire Tribunal, including Mr. Prasad**

56. In case, Article 13(4) is excluded supposedly RESPONDENT had in mind the standard procedures intervene and set out a procedure that Arbitral Tribunal shall decide on the challenge with the participation of Mr. Prasad. [Yang, Asian Dispute Review, P.1].
57. The Standard Procedure Rules are appropriate in most instances, particularly where the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. [Art.18, UNCITRAL Law].
58. In case, the Arbitral Tribunal proceeds without Mr. Prasad, it clearly raises justifiable doubts that their decision will be definitely in the favor of RESPONDENT. As a consequence, RESPONDENT creates doubts and declines the independence and impartiality of Arbitral Tribunal.
59. In addition to that, the common practice in the international commercial arbitration is to select three arbitrators for Arbitral Tribunal. RESPONDENT constitutes a deadlock and breaches an international practice while CLAIMANT has avoided deadlocks as always and adheres standard procedures in arbitration. [Born, International Arbitration and Forum Selection Agreement, P.25].
60. IF RESPONDENT continues creating such deadlocks, it clearly causes delay in Arbitral Tribunal proceedings.
61. Finally, the Standard Procedure rules shall apply to the conduct of the arbitration since the parties did not agree otherwise and based on procedure rules decision shall be taken with participation of Mr. Prasad.

## **CONCLUSION OF THE FIRST ISSUE**

62. In accordance with the contract, UNCITRAL Arbitration rules and standard procedure rules the Arbitral Tribunal lacks the authority to decide on the challenge of Mr. Prasad and even if it does Mr. Prasad shall be part of the panel.

## **ISSUE II: IN CASE THE ARBITRAL TRIBUNAL HAS AUTHORITY TO DECIDE ON THE CHALLENGE OF MR. PRASAD, THE ARBITRAL TRIBUNAL SHALL BE CONSIST OF MR. PRASAD**

63. RESPONDENT's allegations are groundless and carry unjustifiable doubts based on Art.12 of UNCITRAL Arbitration rules to which the parties have agreed in the contract. Therefore, Mr. Prasad should not be removed from Arbitral Tribunal. IBA guidelines should not apply since there is no direct connection or affiliation of Mr. Prasad with funding source. Even under IBA guidelines, Mr. Prasad will be placed in green list since he meets all the requirements of the IBA. Irrelevant factors by RESPONDNET can never justify any challenge and do not affect Mr. Prasad's impartiality and independence. RESPONDENT's doubts of arbitrator are groundless to be taken for attention of Arbitral Tribunal **(A)**. International Bar of Association is not applicable in this context **(B)**. Supposedly IBA guidelines are applicable, RESPONDENT demand is irrelevant under IBA **(C)**. CLAIMANT has no direct connection with FindFund LP **(D)**.

### **A. RESPONDENT's Challenge of arbitrator carries unjustifiable doubts under article 12 of UNCITRAL Arbitration rules**

64. RESPONDENT's challenge is groundless and can never lead to justifiable doubts based on Art. 12 governing procedure law. IBA guidelines do not fit in this contract **(a)**. Even if to be considered, Mr. Prasad meets all its requirement **(b)**.
65. RESPONDENT's challenge does not bear justifiable basis since there is no conflict of interest in such circumstances because there is no direct connection of Mr. Prasad with the third party funder, since it is a separate entity that funds CLAIMANT. [R.35, Disclosure of Funder].
66. Under article 12 of UNCITRAL Arbitration rules, doubts related to Mr. Prasad are not justifiable and this article does not qualify the RESPONDENT's allegations and therefore Mr. Prasad should not be doubted and removed from Arbitral Tribunal.[Art.12,

UNCITRAL Rules].

67. Mr. Prasad became aware of the involvement of a third-party funder when CLAIMANT informed RESPONDENT after the telephone conference dated 30 August 2017. [R.34, Decision on Request to name funder].
68. At that stage, Mr. Prasad immediately declared that he had acted in two arbitral proceedings as arbitrator appointed by parties which had been funded by entities that were 100% subsidiaries of Findfunds LP. [R.43, Refusal to withdraw].
69. The parties are free to agree that a specific disclosed relationship between an arbitrator and a party is not to be considered as sufficiently substantial as to disqualify an arbitrator [Redfern & Hunter, international arbitration, Pg. 267].
70. In addition to that, the fact that circumstances should be disclosed does not mean automatically that they justify a challenge. Findfunds LP is known in the industry to take little influence on the actual conduct of the arbitration, in particular the appointment of the arbitrator. In one of the two cases, they only signed the funding agreement after Mr. Prasad had been appointed. Consequently, his involvement in the other two cases would not give rise to justifiable doubts even if one were to equate Findfunds with its subsidiaries. [R.43 Refusal to withdraw].
71. CLAIMANT's failure to disclose these circumstances does not justify a different conclusion. For the question of whether there are justifiable doubts as to Mr. Prasad's impartiality and independence, only Mr. Prasad's conduct and contacts can be relevant and not that of the party which appointed Mr. Prasad. [R.43, Refusal to withdraw]. In light of mentioned reasons, RESPONDENT's allegations are groundless.
72. It is not necessary to find more about third party funder because the remote connection of Mr. Prasad to Findfunds LP which has been created through the merger of his law firm with Slowfood should not create doubts as to his independence.
73. It is also generally recognized that publications, which treat a legal question in a general and abstract manner not connected to the case in question do not justify the challenge of an arbitrator. [Born, International Commercial Arbitration, P.79].
74. In Mr. Prasad's case the article regarding "The notion of Conformity Art.35 CISG in CSR-Codes" was written and published in 2016, well before these arbitral proceedings were started and the opinion expressed in the articles is not in any ways influenced by the case or

will influence his decision in the case. [R.44, Refusal to withdraw]. So, Mr Prasad's presence in the Arbitral Tribunal will not raise any justifiable doubts.

75. As a consequence of the above, and taking into account the importance of the right for each party to choose its own arbitrator, Mr. Prasad shall not be removed from his office.

**a. International Bar of Association (IBA) guidelines are not applicable, so it cannot disqualify Mr. Prasad to decide on his challenge**

76. Both parties have never agreed or discussed the applicability of International Bar of Association guidelines in the contract, so there is no placement of IBA guidelines in this contract.

77. The International Bar of Association is not binding where it is evident that neither the IBA Rules of Ethics nor the IBA Guidelines have independent legal effect. Indeed, the Guidelines provide that they "are not legal provisions and do not override any applicable law or arbitral rules chosen by the parties. [Born, International Commercial Arbitration,P.74]

78. There are no justifiable doubts against Mr. Prasad regarding his impartiality and independence and therefore the applicability of International Bar Association (IBA) guidelines does not fit in this context.

79. The Guidelines have gained general acceptance as non-binding set of principles with which most of international arbitrators seek to comply [[Redfern & Hunter, international arbitration, Pg. 271].

80. In addition, the IBA Guidelines cannot be directly binding either on arbitrators, or on the parties themselves, unless they are adopted by agreement [IBA rules of ethic for arbitrators, Pg. 1].

81. Mr. Prasad has submitted his statement of impartiality and independence in line with Article 11 of UNCITRAL Arbitration rules. [R.23, Clm.Ex.11]. Hence, no justifiable doubts remain in such circumstances.

82. The regulation of disclosure requirement can be implemented in an approach that could be amending the IBA guidelines on Conflict of Interest however it should be taken into the account that IBA could not be substantially pursued on the conflict of interest. [Osmanoglu, Journal International Arbitration, P.10].

83. At last, in light of the aforementioned reasons, the IBA guidelines are not applicable in this

context of agreement between the parties.

**b. Even if, the IBA guidelines were applicable RESPONDENT's doubts do not meet the requirements set forth under IBA guidelines to disqualify Mr. Prasad**

84. Even if, the IBA guidelines are applicable ,which is not the case, Mr. Prasad meets all the requirements of impartiality and independence under IBA guidelines and no justifiable doubts remain towards him.
85. RESPONDENT retrieved from metadata about third party funder that CLAIMANT is funded and tribunal ordered that CLAIMANT should disclose its funder. Such disclosure in the eyes of RESPONDENT raised doubts that Mr. Prasad is not impartial and independent. [R.38, NOC].
86. First, according to terms of contract, the confidentiality obligations shall be observed in any stage in accordance with ad hoc arbitration that was recommended by RESPONDENT. Therefore, RESPONDENT should not demand from Arbitral Tribunal to disclose and find out the funding source of CLAIMANT. [R.12-13, Clause 21, GCC].
87. The Arbitral Tribunal should not order CLAIMANT to disclose source of funding and therefore this disclosure does not have any effect on Mr. Prasad.
88. CLAIMANT was not obliged to disclose its funding source that could affect Mr. Prasad. The guidelines attempt to suggest that the standard for disclosure is not entirely subjective because some situations should never lead to disqualification under the objective test, such situations not to be disclosed regardless of the parties' perspective. These limitations to be subjective test are reflected in the green list, which lists some situations in which disclosure is not required.” [Born, International Commercial Arbitration, P. 96].
89. International Bar of Association set forth three different lists where parties can find placement of one's allegation and doubts as to an arbitrator. If we go through the green list and Mr. Prasad obviously fits in the list.
90. Even we take the applicability of IBA guidelines in this contract, Mr. Prasad will be placed in the green list as IBA sets out three different lists for specific potential conflicts.
91. A red list describes situation in which an arbitrator should not accept appointment or withdraw if already appointed. Mr. Prasad cannot be placed under this list because he does not have any connection to the concerning funding entities and does not bear justifiable doubts.[P.17, Part.2, IBA]

92. An orange list describes non-exhaustive enumeration of specific situation which in the eyes of parties may give rise to justifiable doubts as to arbitrators' impartiality or independence. According to guidelines the arbitrator has duty to disclose situation falling under the orange list. Even to place Mr. Prasad under orange list, he has already disclosed the situation in his case. [P.18, Part.2, IBA].
93. A green list describes situation in which the guidelines do not recommend disclosure let alone withdrawal by the arbitrator. [P.19, Part.2, IBA].
94. Further on that Mr. Prasad's background does not carry any doubts to his impartiality and independence. A "Green List identifies eight circumstances where no disclosure is required (and where no grounds for disqualification exist), The Green List includes an arbitrator's previous publication of "general opinion" concerning an issue that may arise in arbitration, an arbitrator's membership in the same professional association as another arbitrator or counsel for a party, an arbitrator's previous service as arbitrator or co-counsel with another arbitrator or counsel for a party and similar circumstances." [Born, International Commercial Arbitration, P.79].
95. Ms. Herta Reitbauer, RESPONDENT appointed arbitrator has also articulated in an article a very critical view on third party funding, advocating for inter alia extensive disclosure obligations which constitutes a negative opinion towards CLAIMANT. However since general opinion does not constitute conflict of interest CLAIMANT has not challenged RESPONDENT's arbitrator.
96. Based on aforesaid reasons, any mindset regarding legal issues or services cannot be a reasonable justification for disqualification of any arbitrator. So, Mr. Prasad's impartiality and independence does not carry any doubts and therefore RESPONDENTS's allegations are groundless.

**B. There is no direct connection between CLAIMANT and Findfunds LP, so Mr. Prasad is impartial and independent**

97. CLAIMANT receives its fund for arbitration from totally an indirect source. CLAIMANT's disclosure is only for speedy arbitration proceedings. CLAIMANT has no obligation to disclose its funding source **(a)**. RESPONDENT is invoking irrelevant factors **(b)**.
98. There is no direct connection of Mr. Prasad with the third party funder because it is a

separate entity that funds CLAIMANT. Since there is no conflict of interest in such circumstance. [R.35, Disclosure of Funder].

99. Although Funding 12 has been set up by Findfunds, it is a completely separate legal entity and has never before appointed Mr. Prasad. Furthermore, RESPONDENT has not even alleged, let alone proven that the existing connections fulfill the requirement of materiality existing under the IBA-Rules. [R.45, Refusal to Removal].
100. These connections to Findfunds LP cannot lead to justifiable doubts as to Mr. Prasad's impartiality and independence. The IBA-Guidelines on conflict of interest, should they be applicable, include direct connections with third-party funders into those contacts which should be disclosed. In Mr. Prasad's case, there are, however, already doubts whether he falls under the disclosure obligation since in both cases the funding was provided by a separate entity and not Findfunds LP directly. [R.43 Refusal to withdraw].
101. Those connections clearly do not constitute a significant commercial relationship with one of the parties, or an affiliate of one of the parties. [Para. 2.3.6, IBA-Guidelines on Conflict of Interest].
102. In order for an arbitrator to be partial and dependent, there should be close, intense and dependent relation between an arbitrator and a party [Redfern & Hunter, international arbitration, Pg. 282]. However, there is no direct connection between Mr. Prasad and Findfund LP and therefore he is impartial and independent in these circumstances.
103. In general impartiality means that an arbitrator will not favor one party more than another while independence requires that the arbitrator remain free from control of either party. [Born, International Commercial Arbitration, P.50]. Mr. Prasad has no direct connection with CLAIMANT's funder and therefore will not take decision in partiality and will maintain his independence.
104. As CLAIMANT declared its financial source that it gains funds from Findfund 12 where there is no direct connection of CLAIMANT with subsidiaries of Findfund12. RESPONDENT allegations are groundless and cannot justify any sort of connections. [R.35, Disclosure of Funder].
105. The above disclosure of third party funder is only to speed up proceedings and does not consider the demand of RESPONDENT to be justified. CLAIMANT receives its funding directly from FindFunds 12 and it does not relate to Mr. Prasad's impartiality and independence and therefore his existence in the arbitral process completes the seats given

by parties for Arbitral Tribunal. [R.35, Disclosure of Funder].

106. FindFunds 12 entity financially supports FindFunds LP and it has been involved in funding 33 arbitration cases. So, it is the right of each party to choose its own arbitrator irrespective of where they receive the funding from. [R.43, Response to Challenge].

107. Mr. Prasad has acted as arbitrator in two arbitrations. In the arbitration proceedings that he was involved, none of the entities persons or law firm are participating in the present arbitration and the disputes were related to completely different fields of law. So, there is no connection of FindFund 12 a main source of funding for CLAIMANT and therefore RESPONDENT's allegations are not justifiable.

108. Meanwhile, FindFunds 12 is a source for funding the arbitration cases where it is common practice to fund and receive advantages of its funding. Indirect connections cannot justify doubts as to Mr. Prasad's impartiality and independence. [Osmanoglu, Third-Party Funding, P.2].

109. Eventually based on above reasons, there is no third party funder that will influence the arbitration proceedings and CLAIMANT does not have any direct connection with Findfunds LP.

**a. CLAIMANT is not obliged legally to make any disclosure**

110. Confidentiality was of great significance for both parties and in no circumstances, CLAIMANT is obligated to disclose where it gains funding for arbitration proceedings. In that case, RESPONDENT explicitly breached the confidentiality clause under contract and retrieved the information about CLAIMANT's funding source from meta-data. Later on RESPONDENT asked the Arbitral Tribunal to have CLAIMANT to disclose its funding source. [R.38, Para.3, Resp-NOC].

111. In no circumstances, CLAIMANT is obligated to disclose where it gains funding for arbitration proceedings as both parties agreed on Ad hoc arbitration that carries strict confidentiality in which parties shall not disclose any relevant information of both sides.

112. Also, there is no rule that expressly requires CLAIMANT to disclose its funding sources and despite no obligation, CLAIMANT has disclosed its funding source in line with below commentary.

113. There is no obligation for parties to disclose presence of third party funding and it does not adequately affect the conflict of interest in an international arbitration context.

Particularly, regarding the possible arbitrator conflict of interest arising from the involvement of a third-party funder. However, no provision exists as yet regarding the disclosure of third-party funders.” [Osmanoglu, Journal of International Arbitration, P.6].

114. RESPONDENT has confirmed that on 30 June, 2017, CLAIMANT sent its notice of arbitration beside the hardcopy; electronic versions of the notice of arbitration were included in PDF and word format. RESPONDENT clearly states that its IT officer managed to retrieve the meta-data of word file while RESPONDENT has restricted any sort of access to these kind of information. [R.13-12, Clause 21, GCC].

115. According to above reasons, rules and regulations clearly state that substantially, third party funders are not party to the arbitration process. Therefore, CLAIMANT is not obliged to disclose its funding source. Despite being openhanded, CLAIMANT has made the disclosure reflecting its goodwill.

**b. RESPONDENT invoked other irrelevant factors**

116. The further factors as like publication of article and merger of two law firms invoked by RESPONDENT for its challenge is not only irrelevant but are groundless. Mr. Prasad has already expressed either directly or, in case of the publications, was available on his website. So, the facts submitted by RESPONDENT do not create any justifiable doubts as to Mr. Prasad’s impartiality or independence.

117. The article was released in a leading journal “The Vindobona Journal of International Commercial Arbitration and Sales Law” and was also available on Mr. Prasad’s website in PDF format. [R.51, Para.14, PO2]. RESPONDENT knew about the publications before the commencement of arbitral proceedings since it did not invoke them at the time, it is not entitled to do so now.

118. The most obvious evidence for the purely dilatory character of the challenge is RESPONDENT’s reliance on the connections allegedly created by the merger of the two law firms. RESPONDENT first consented to Mr. Prasad’s qualified declaration which allowed Mr. Prasad’s existing partners to take on new work related to one of the parties in arbitration. Now, however, RESPONDENT tries to fabricate a ground for challenge from the remote and previously existing contacts one of the new partners of Mr. Prasad has to Findfunds LP. The case is nearly finished, all important decisions have already been taken and all precautions have been taken to avoid any contacts. [R.45, Refusal to removal].

119. Further on that, existence of Mr. Prasad in the arbitral panel creates no concern because there are no relevant factors even if Mr. Prasad is included in issuance of award. Since there is no award to date which has been challenged or refused enforcement due to arbitrator conflict of interest arising from undisclosed third party funder.” [Osmanoglu, Journal of International Arbitration, P.11].
120. CLAIMANT considers the challenge against Mr. Prasad to be devoid of any merits and therefore do not agree to it. It is an obvious attempt by RESPONDENT to delay these arbitral proceedings and to postpone the date when it will be ordered to pay the amount long overdue. [R.45, Refusal to removal].

### **CONCLUSION OF THE SECOND ISSUE**

121. Based on above mentioned reasons, RESPONDENT’s challenge of arbitrator carries unjustifiable doubts under Art.12 UNCITRAL Arbitration rules and IBA guidelines. There is no direct connection between Mr. Prasad and Findfund LP, therefore Mr. Prasad is impartial and independent.

### **ISSUE III: CLAIMANT’S STANDARD CONDITIONS AND CODE OF CONDUCT GOVERNS THE CONTRACT**

122. The chosen law and principles provide a firm basis that CLAIMANT’s Standard Conditions and Code of Conduct govern the contract. Its standard conditions to be considered by the tribunal. The CISG and UNIDROIT Principles apply to the contract and affirm the counter-offer is made by CLAIMANT. Moreover, CLAIMANT’s general conditions fulfill all the requirement of contractual terms and also expectation of RESPONDENT. CLAIMANT has made a counter-offer to RESPONDENT **(A)**. RESPONDENT accepted the counter-offer with its changes and conditions **(B)**. Under CISG CLAIMANT’s standard conditions govern the contract **(C)**. Based on UNIDROIT principles, last shot rule is implemented in the contract **(D)**.

#### **A. CLAIMANT made a counter-offer to RESPONDENT’s Tender**

123. Based on the contract, on 10 March, 2014, RESPONDENT’s head of purchasing Annabelle Ming sent an invitation letter enclosed with tender documents. RESPONDENT was interested in building business relationship with CLAIMANT after their business talk in Cucina Food fair and therefore RESPONDENT sent the invitation to Mr. Kapoor Tsai CLAIMANT’s head of production. [R.8, Clm.Ex.1].

124. RESPONDET's tender documents were available on the opening of tender and RESPONDENT invited CLAIMANT to tender under contract number 1257. The tender documents contained different section with its specifications. [R.9-14, Clm.Ex.2].
125. After receiving tender, CLAIMANT submitted its counter-offer as of email dated 27 March, 2014 enclosed with their offer following RESPONDENT's invitation to tender. [R.15, Para.1, Clm.Ex.3].
126. CLAIMANT went through RESPONDETN's tender documents in depth and brought some amendments to the documents. CLAIMANT made the changes in terms of the goods, payment methods and standard conditions governing the contract. [R.15, Clm.Ex.3].
127. CLAIMANT again has obviously expressed that considering transparency in the contract, it brought changes and picked relevant section of RESPODNET tender documents. CLAIMANT asserts to be completely transparent and submitting a proper counter-offer along with amendments. [R.15, Para.2, Clm.Ex.3].
128. At the end of sales offer sent, CLAIMANT clearly mentioned that it is interested in the tender process and opened the floor for any further questions regarding the counter-offer made to RESPONDENT.[R.15, Clm.Ex.3].
129. CLAIMANT evidently included in its Specific terms and conditions under the sales-offer stating that the following specific terms and conditions, forming part of offer, shall prevail over any other documents with respect to the sales contract except the main part of the Sale-offer. CLAIMANT stated it so clear to RESPONDENT that its conditions will prevail over all other documents. [R.16, Clm.Ex.4].
130. Pursuant to Article 19.1 of CISG that instructs a reply with changes, limitations and modifications compose a counter-offer and indicate refusal of the offer. [Art.19 (1), CISG].
131. In light of above article, CLAIMANT made modifications for those terms and conditions already set out by RESPONDENT in tender documents. The modifications obviously show a counter-offer by CLAIMANT that is accepted without any objection by RESPONDENT. [R.25, Response to NOA]
132. In light of UNIDROIT principles, Article 2.1.11, RESPONDENT accepted the modifications which altered Tender and refer a new offer with changes deemed to be counter-offer and denote modified acceptance. [Art.2.1.11 (1), UNIDROIT]. Given that above article of UNIDROIT, RESPONDENT tender documents were modified by

CLAIMANT and set out new terms and conditions for RESPONDENT which is explicit counter-offer. According to modified acceptance, RESPONDENT consented and therefore the terms and conditions of CLAIMANT govern the contract.

133. In a case between Midgulf International Ltd v. Groupe Chimique Tunisien, the two companies the claimant (Midgulf), the defendant (GCT) entered into contract. The first contract was in June and contained a London arbitration clause but there was a dispute as to whether the second contract signed in July contained London arbitration. The judge concluded that the counter offer contained in contract dated 7 July was accepted by Midgulf dated 9 July even if it was not an explicit acceptance since Midgulf did not object to it. A contract was then formed on the conditions set out in contract dated 7 July and no other terms.” [Midgulf v. Groupe Chimique, Case No. 1664].

134. According to above case law, CLAIMANT made the last offer which is a counter-offer as referral and no other offers were made after and therefore it constitutes a counter-offer and indicates acceptance of CLAIMANT’s terms and conditions for governing the contract. In our case RESPONDENT accepted the counter offer let alone rejecting it.

135. A contract has to follow the chronological order of the events. An alteration in the offer constitutes “Counter-offer”. Alteration by one party may convert the acceptance into a counter-offer which requires acceptance by the other side. Performance by other party is mostly an expression of assent to the counter-offer. [Berger, Private Dispute Resolution in International Business, P.3]. Considering the chronological order of the events, it is CLAIMANT that sent out a counter-offer with amendments and RESPONENT expressed its assent and informed CLAIMANT for performance.[R.25, Response to NOA]

136. In conclusion as per aforesaid reasons, it is CLAIMANT’s standard conditions that govern the contract to which REPONDENT clearly consented.

**B. RESPONDENT did not make any objections to the counter-offer brought by CLAIMANT**

137. CLAIMANT was informed by RESPONDENT that its offer was successful along with changes and suggested amendments. It obviously indicates that RESPONDENT accepted the counter-offer and there was no objection regarding new amendments. [R.17, Clm.Ex.5, Resp. Decision on Claimant’s offer].

138. Meanwhile, RESPONDENT asked CLAIMANT to start its delivery as of 1 May, 2014. It does not only show the acceptance of offer, but also amendments for initiation of

business. (R.17, Clm.Ex.5, Resp. Decision on Claimant's offer).

139. According to Art.19 (2) of CISG, a reply to an offer that contains additional and different terms of the offer and also are not objected written or orally, the terms of the offer with modifications indicating the acceptance of the offer. [Art.19 (2), CISG].

140. Referring to the contract, CLAIMANT has given the opportunity to RESPONDENT for any objections and suggestions, but never received such objections. [R.15, Clm.Ex.3, Letter of Tsai regarding sales offer].

141. Hence, RESPONDENT never objected the additional amendments of CLAIMANT, so it clearly reflects acceptance of CLAIMANT's standard terms and conditions.

**C. CLAIMANT standard terms and conditions govern this contract under Article 19.1 & 3 CISG**

142. The Sales-offer within the contract contains a specific section on terms and conditions where it states that CLAIMANT's terms and conditions shall prevail over any other documents with respect to the sales contract. [R.16, Clm.Ex.4].

143. RESPONDENT has stated that it chose to accept CLAIMANT's offer for two reasons. First, the chocolate cakes were of the premium product line and second, because of its best efforts and commitment in ethical production. [R.28, Resp.Ex.1]. Above acknowledgement qualifies the acceptance of RESPONDENT including CLAIMANT's standard terms and conditions.

144. CLAIMANT has set out additional and different terms relating to the terms and conditions of contract and it clearly altered the materiality and also stated that it brought necessary amendments in the RESPONDENT's tender documents. CLAIMANT's changes relate to the goods, mood of payment and standard conditions governing the contract. Therefore, CLAIMANT's standard conditions and terms govern this contract.

145. The last shot rule is popular in common law systems. Under the CISG, that party's standard terms that are referred to last shall be incorporated into the contract. This rule is derived from the general principle of last shot. According to this approach, a party's reply that purports to be an acceptance of an offer but contains additions or modifications that materially alter the terms of the offer constitutes a new offer. [Berger, Private Dispute Resolution in International Business, P.15].

146. Pursuant to Article 19 of CISG, there are two circumstances (Counter-offer) and (Acceptance) which is clearly fitting CLAIMANT's situation.

147. First, CLAIMANT's standard conditions govern this contract as per Art. 19. (1) of CISG. The article instructs that a reply to an offer that contains additions, limitation or other modifications indicating a rejection and form a counter-offer. [Art.19 (1) CISG].
148. Second, RESPONDENT accepted the changes and additional amendments plus conditions set forth by CLAIMANT. [Art.19 (1) CISG]. In light of above article, CLAIMANT brought changes as a last shot rule.
149. Pursuant to Article 19(3) of CISG, the parties that set out additional and different terms relating to specific sections as like finance, quality and quantity of goods and deliver place and time which alter the materiality of offer. [Art.19 (3), CISG].
150. Furthermore, CLAIMANT's counter offer meets all the requirements of Article 19(3) of CISG. The prevailing scholarly opinion is that the CISG adopts the common law "Mirror Image Rule" meaning that the acceptance shall be as same as the offer. [P. Revista Brasileira de Arbitragem, Anelize Slomp Aguiar].
151. In conclusion, the above mentioned reasons qualify the right of CLAIMANT for applicability of its standard conditions and terms.

**D. Under Article 2.1.22 of UNIDROIT Principles, the last shot was done by CLAIMANT, so its standard conditions will govern the contract**

152. CLAIMANT made the last offer along with the changes in the contract and sent it to RESPONDENT's attention and RESPONDENT never objected to the changes brought. This circumstance falls under an accepted principle "last shot" in the battle of forms.
153. Under Art. 2.1.22 of UNIDROIT principles CLAIMANT made the counter offer and no objection raised by RESPONDENT regarding the changes. It indicates that the last shot was done by CLAIMANT.
154. Pursuant to UNIDROIT principles and last shot principle, both parties have started implementation of contract.
155. Finally, CLAIMANT's General Conditions govern the contract as no objection was made by RESPONDENT.

**CONCLUSION OF THE THIRD ISSUE**

156. In light of aforesaid reasons, CLAIMANT standard conditions and code of conduct governs the contract. CLAIMANT based on Art.19 of CISG made a counter offer and RESPONDENT without any objection accepted it.

**ISSUE IV: EVEN IF RESPONDENT'S GENERAL CONDITIONS ARE APPLICABLE, CLAIMANT DELIVERED CONFORMING GOODS SINCE IT WAS MERELY OBLIGED TO USE ITS BEST EFFORTS TO ENSURE COMPLIANCE BY ITS SUPPLIERS**

157. The CISG ensures that CLAIMANT has delivered conforming goods as required by the contract and should receive the full price for the delivered chocolate cakes. The facts and circumstances of the case dictate that the contract should be interpreted to mean the CLAIMANT was obliged to use its best efforts. Finally, the UNIDROIT principles also support CLAIMANT's best efforts are exerted towards RESPONDENT. According to Article 35 CISG, CLAIMANT has delivered conforming goods **(A)**. In light of UNIDROIT principles, CLAIMANT has exerted out its best efforts **(B)**. Based on General Conditions of contract, the goods are in conformity **(C)**.

**A. CLAIMANT has delivered conforming goods pursuant to Article 35 CISG**

158. According to chosen laws, CLAIMANT has delivered goods in conformity and the goods comply with situations set forth in the agreed laws. At no point, CLAIMANT has guaranteed although regularly conducted audits and was not reported of the fraud due to involvement of corruption. CLAIMANT has never guaranteed the adherence of suppliers **(a)**. CLAIMANT was aware of fraud due to corruption **(b)** CLAIMANT conducted timely audits **(c)**.

159. In case RESPONDENT's General Conditions are applicable, CLAIMANT has delivered conforming goods in light of article 35 CISG.

160. CLAIMANT's conduct throughout its contractual performance has been ethical and in line with RESPONDENT's General Conditions. CLAIMANT committed itself to use its best efforts that the goods will match the highest standards in line with its business code of conduct at no point CLAIMANT guaranteed such performance.[R.53, Para.29, PO2].

161. Meanwhile, CLAIMANT's adherence to Global Compact principles is not sufficiently specific to result in binding obligations for CLAIMANT which could affect the conformity of the goods. Therefore, CLAIMANT has made its efforts towards its suppliers for adherence to Global Compact principles. [R.20, Clm.Ex.8].

162. RESPONDENT's general business philosophy does not contain any principle specifically for production process that should be adhered by CLAIMANT and its supplier. It is only a

of general principle which are largely identical to the UN Compact principle and additional reference that RESPONDENT is committed as business entity to the sustainable development Goal promulgated by UN. These above principles are always observed by CLAIMANT in delivering goods and RESPONDENT itself has recognized it while sending invitation to Tender. [R.8, Clm.Ex.1].

163. Per Article 35 of CISG, the goods shall be delivered to conform the type, quantity and quality set forth in the contract. [Art.35, CISG]. In light of above article of CISG, CLAIMANT has delivered all goods as required in contract and CLAIMANT's delivery was in conformity because RESPONDENT did not object within three years in row.
164. CLAIMANT has been enjoying its great reputation for delivering conforming goods and a sustainable production and there was no such allegation towards CLAIMANT in the past. CLAIMANT has made sure that all goods shall be in conformity considering its reputation in the market.
165. RESPONDENT's General Conditions is applicable that imposes obligation towards RESPONDENT itself to audit and inspect CLAIMANT's operations and facilities. [R.14, Resp. COC for suppliers]. So, it was mainly the responsibility of RESPONDENT to oversee the production process of CLAIMANT and its facilities. Failure of RESPONDENT in its obligation does not have any effect on conformity of goods since the contract was not the first executed document between the parties under RESPONDENT's general conditions. RESPONDENT is not a simple consumer, but rather a professional market chain to make sure that receives conforming goods.
166. Under Article 35 CISG, non-conformity may appear in various forms. It may be that the goods are not delivered in time, that they are not in conformity with contractual terms, that they are not fit for the ordinary purpose or any particular purpose made known to the seller. [Art.35, CISG]. As per article instruct, these circumstances qualifies CLAIMANT because the goods were delivered on time, in line with contractual terms and clearly meeting the purposes under RESPONDENT's General Conditions. [Muller-Chen, International Arbitration and International Commercial Law, P.1).
167. Article 35. (c) CISG instructs that delivered goods shall possess the qualities of the same sample already provided or held. According this article, all CLAIMANT's chocolate cakes possess the qualities which were held and were shown to RESPONDENT in Cucina food fair. In addition, these chocolate cakes had won Cucina's best cake award for the last five

years that is why RESPONDENT showed interest and acceptance for. [R.29, Resp.Ex.2]. RESPONDENT must examine the goods within a short period as is practicable in these circumstances and if the contract involves examination must be deferred until the goods have arrived at destination.

168. Furthermore, Non-Conformity means that goods do not conform to the terms of the contract. The term 'breach of warranty' is broader and is not deemed to be guaranteed by one of parties. [Case No.6955]. According to above case, CLAIMANT has delivered the goods that are in conformity with RESPONDENT's General Conditions while CLAIMANT has never given any guarantee that goods will be farmed in conformity.
169. It has been stated that a failure of goods to conform to the contract is not a breach if the non-conforming goods are equal in value and utility to conforming goods. [P.162, CISG Digest). As per this digest, CLAIMANT has used its best efforts to produce goods which conform the contract and if a little cocoa bean are received from illegally farmed, this cannot be deemed as breach of contract and suppling of non conformity goods.
170. In a case between Chaperon v. S.A.S NIDERA in which dispute was on the merit of contract. RESPONDENT (Chaperon) could not withhold payment alleging lack of conformity of goods because it had failed to comply with the substantive requirement under the general conditions to object the goods conformity. The final award was in favor of CLAIMANT entitling it for full payment because RESPONDENT did not perform its contractual obligation. [Chaperon v. S.A.S NIDERA, Case No.16015]. In light of above case, RESPONDENT did not perform its obligation set forth in its own General Conditions and CLAIMANT cannot be held liable for others failing in their obligation.
171. According to Article 35.2 CISG, instructs that the main concept of article is to use the sub-parts to determine if the seller produced goods that are in conformity with the buyer's expectation or commercially valuable. [Williams, Analysis of CISG Article 35, P.305]. As per this commentary, the delivered goods to RESPONDENT were in conformity because the goods met the expectations of RESPONDENT and were commercially valuable to it.
172. Finally, even if the RESPONDENT's General Conditions are considered to be applicable. CLAIMANT had complied all its obligations under the contract and delivered conforming goods
  - a. **CLAIMANT by no means guaranteed that its supplier will abide by its code of conduct**

173. In case RESPONDENT's General Conditions are applicable, CLAIMANT imposes an obligation, through its Code of Conduct, towards its supply chain that its suppliers comply with the relevant standards of environmentally friendly and sustainable production. At no point, CLAIMANT has agreed to guarantee compliance of its suppliers with ethical production raised by RESPONDENT.
174. Based on provisions of CLAIMANT's Code of Conduct imposes itself to use its best efforts to ensure that its suppliers also complied with CLAIMANT's Code of Conduct. By no means did CLAIMANT guarantee that its suppliers will comply so and delivered goods only contained ingredients which had been produced in an environmental friendly way. It is completely impossible to conclude from CLAIMANT's Code of Conduct such an obligation.
175. Also, CLAIMANT has never guaranteed and stipulated specific and conforming ingredients shall be used in producing the chocolate cakes and based on RESPONDENT General Conditions there is no specific stipulation obliging CLAIMANT to do so.
176. As per Article 35.1, those specifications which are not mentioned specifically in contract, they cannot result in non-conformity. [Chelechtriem and Schwenger, UN convention on the international sales of Goods, P.106]. In the light above commentary, the farming process and ingredients cannot be part of contract and at no point, it is explicitly mentioned in RESPONDENT General Conditions.

**b. CLAIMANT was not aware of fraud in the certificates, so it did not violate contractual terms**

177. Although, CLAIMANT has relied regarding its suppliers' compliance assessment on the documentation sent to CLAIMANT by Ruritania Peoples Cocoa. There was nothing in the documentation which suggested fraud.
178. CLAIMANT came to know the fact that the supplier had consistently forged certificates testifying such a production process produced in the examined locations using a complicated scheme involving government officials. It qualifies that other cocoa farmers cannot be attributed to CLAIMANT. Further on that, CLAIMANT is not under a legal obligation for checking in issuance process of Certificate and therefore CLAIMANT is not held responsible for involvement of government officials in the fraud. It is an impediment for CLAIMANT to check the issued certificates by government officials involved in corruption. So, it shall never affect the production process by CLAIMANT and cannot be

held accountable for harvested cocoa.

179. Pursuant to Article 79 CISG, in circumstances where a party cannot perform its obligation set forth in contract as a result of impediment that is an impediment beyond party's control. [Art.79. (1), CISG].
180. In light of Article 79 CISG qualifies the position of CLAIMANT to be exempted party to perform its obligations as a result of an "impediment." that constitutes a barrier to the performance of an obligation on checking in its suppliers' certificate.
181. Furthermore, in accordance with the contract, party shall satisfy Article 79 CISG; the impediment to be outside of its control and can no longer reasonably be expected to carry out its obligations. [Da Silveira, Trade Sanctions as legal impediments to performance, Mercedeh Azeredo Da Silveira P.2].
182. Furthermore, the conformity of goods does not depend on their compliance with the very broad and general statements. The conformity of goods is mostly related to the physical nature of the goods neither to production process nor seller related component. Even it does not relate to production process. Such statements are by far too general and unspecific to be concluded in an enforceable contractual obligation. You cannot find any statement in RESPONDENT's General Conditions. [R.44, Refusal of Challenge].

**c. CLAIMANT performed its regular audits to ensure its supplier adherence with Global Compact principles**

183. CLAIMANT has used its best efforts to ensure that its suppliers complied with the Global Compact principle which had been certified annually.
184. Given that, CLAIMANT always supervised its supply chain even in this case CLAIMANT made sure that its supplier Ruritania Peoples Cocoa mbH sign the code of conduct which oblige suppliers to adhere to carbon emission standards. Even further in 2014, CLAIMANT instructed the internationally operating Egimus AG which is specialized in providing expert opinion on Global Compact compliance to scrutinize Peoples Cocoa mbH on site. They certified that Ruritania Peoples Cocoa mbH complied with Global Compact and the principles of sustainable production. Therefore, CLAIMANT has performed its best efforts to check in the compliance of its supply chain according to its own and RESPONDENT's General Conditions. [R.20, Clm.Ex.8].
185. CLAIMANT has always scrutinized the documentation regarding compliance assessment by its supplier and did not find anything in the documentation that reflects fraud.

According to Egimas AG report which assesses the ten principles of UN Global compact and international norms, CLAIMANT's suppliers never breached these norms.

186. With considering auditing efforts by CLAIMANT, there is no report by Egimas AG indicating violation of compliance by CLAIMANT's supplier regarding ten principles and other international norms. So, it clearly indicates the compliance of CLAIMANT's supplier with ethical production and there is no non-confirming goods delivered to RESPONDENT.

**B. Pursuant to Article 5.1.4 of UNIDROIT principles, CLAIMANT has delivered conforming goods**

187. CLAIMANT has always used its best efforts to deliver goods of conformity to RESPONDENT and pursuant to Article 5.1.4 of UNIDROIT principles, CLAIMANT has done its best efforts to deliver conforming goods, but the best efforts does not mean a warranty or guarantee to the achievement of specific result.

188. CLAIMANT evidently pursued its responsibilities set forth in the contract and exerted out its best efforts to ensure the chocolate cakes delivered complies in all respects with the values for which both parties stand for.[R.20, Clm.Ex.8].

189. Pursuant to Article 5.1.4 (2) of UNIDROIT principles, the obligation of party involves the best efforts in performing duty and the party is bounded to do such efforts considering the circumstances and reasonability. [Art.5.1.4 (2), UNIDROIT]. In light of this article, CLAIMANT has given its best efforts that it was bounded to do and in any circumstances it has considered utmost feasibility for conforming goods, although there was no obligation under the General Conditions of RESPONDENT.

190. The determination of the nature of the obligation is generally to be assessed through contract interpretation when interpreting the contract. Even if RESPONDENT's General Conditions are applicable, CLAIMANT has given its best efforts to achieve the result as to be interpreted in the contract, but there is no point in the RESPONDENT's General Conditions to set forth an obligation for CLAIMANT for achieving the result.

191. Party's commitment is to be qualified as an obligation of best efforts: a party commits to exercise its best efforts to promote the products of the other party to the contract; a party commits to put forth the best efforts to provide reasonable standard of skill. If the obligation is expressed by words such as 'will take all necessary steps', 'will do all that is

possible and within its capabilities' or 'will undertake reasonable endeavor. [Brunner Exemption for Non-performance in international Arbitration, P.6]. In the following instances, CLAIMANT qualifies that it should put forth its best efforts while there is no obligation to be regarded based on the contract.

192. No-performance may be excused due to unforeseeable impediments beyond the control of obligor and risk of the obligor (so-called 'force majeure' excuse in accordance with Article 79 CISG. [Brunner, Exemption for Non-performance in International Arbitration, P.1]. CLAIMANT has done all it had to do to the level of sustaining the risk and used its best efforts and has never stopped even if there were fragile impediments. It was because of a good faith and fair dealing permeates the terms and conditions of contract.
193. Eventually, even if RESPONDENT General Conditions are applicable, best efforts are made to the utmost level to deliver the conforming goods in accordance with the contract.

**C. The goods are conforming since they comply with the conditions stated in the contract concerning the quality, quantity and description.**

194. CLAIMANT has delivered the goods in compliance with the contract in the terms of quantity, quality and description set forth in the contract. RESPONDENT admitted itself that we accepted CLAIMANT's offer for the reason of getting best cake award within the last five years. In terms of quantity, CLAIMANT has delivered the quantity which was agreed and asked by RESPONDENT to already specified location in daily basis. [R.25, Respond to NOA].
195. Pursuant to Article 35 of CISG, the delivered goods shall be of the quantity, quality and description required by the contract. [Art.35, CISG].CLAIMANT meets the requirement as per this article since it has delivered the conforming goods as stated in the CISG.
196. Conformity encompasses quality and quantity and it never includes the production process. [Art.35 (3), CISG Digest]. As the article instructs, CLAIMANT's delivered goods that meet the requirement of conformity and never includes the production process as CLAIMANT has not guaranteed the production process.
197. Supposedly, RESPONDENT's General Conditions govern the contract, the first and foremost the contractual terms are decisive in the respect of non-conformity.
198. Non-conformity encompasses that the goods are not delivered in time, they are not in conformity with contractual terms, do not fit for ordinary and particular purpose. [Muller-

Chen Lara M. Pair, International Arbitration and Commercial Law, P.1].

199. Finally, all the goods delivered to RESPONDENT meet the conformity based on article 35 of CISG and requirements put forth in the General Conditions of RESPONDENT and CLAIMANT did not breach the contract. This entitles CLAIMANT to full purchase price for the delivered chocolate cakes.

### CONCLUSION OF THE FOURTH ISSUE

200. CLAIMANT has delivered conforming goods under Art.35 CISG and UNIDROIT principles and it was merely obliged to use its best efforts to ensure its supplier compliance. CLAIMANT was not aware of the fraud hence it shall not be liable.

### Request for Relief

Based on above facts and arguments, Counsel for CLAIMANT respectfully requests the Arbitral Tribunal to:

- Declare that the contractual relationship between CLAIMANT and RESPONDENT is governed by CLAIMANT's General Conditions of Sale.
- Order RESPONDENT to pay the outstanding purchase price in the amount of USD 1,200,000;
- Order RESPONDENT to pay damages in the amount of at least USD 2,500,000.

The CLAIMANT reserves the right amend this request for relief as necessary.

(signed)

Abdul Saboor Halamey



Tamim Asoulmal



Laila Mirzaei



Huma Saadat

