

**TWENTY FIFTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT**

MEMORANDUM FOR CLAIMANT

On Behalf Of:

Delicately Whole Foods
Sp 39 Marie-Antoine Carême
Avenue Oceanside
Equatoriana
CLAIMANT

On Behalf Of:

Comestibles Finos Ltd
75 Martha Stewart Drive
Capital City
Mediterraneo
RESPONDENT



DANIA AL-AMEERI•FAHED AL-OBAID•NOOR AL-FARHAN
SARA AL-HOUTI

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CISG	United Nations Convention on the International Sale of Goods	Para. 1,12,14,15,16,25,26,27,29,30,34,35,36,37,43,48,50,52,53,54,55,61,65,76,78,82,85,86.
IBA	IBA Guidelines on Conflicts of Interest in International Arbitration	Para. 12
RULES	UNCITRAL Arbitration Rules	Para. 3-6-13
UNCITRAL	UNCITRAL Model Law on International Commercial Arbitration	Para. 17-19-20
UNIDROIT	UNIDROIT Principles for International Commercial Contracts (2016)	Para. 29-39-48-50-74

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ANDREA	Battle of Forms under the Convention on Contracts for the International Sale of Goods (CISG): A Uniform Solution? <i>Andrea Fejös</i> https://www.cisg.law.pace.edu/cisg/biblio/fejös2.html	Para. 34
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MARIA	<i>Maria del Pilar Perales Viscasillas, Cross-References and Editorial Analysis: Article 19,</i> http://cisgw3.law.pace.edu/cisg/text/cross/cross-19.html	Para. 39-41
MISTELIS	<i>Kröll, Mistelis, Perales Viscasillas, UN Convention on Contracts for the International Sale of Goods (CISG), 2011, Buch, Kommentar, 978-3-406-58416-9</i>	Para. 44
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SCHLECHTRIEM	<i>Schwenzer, Art. 39, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT 567 (P. Schlechtriem & C.H. Beck, 2d ed. 1995</i>	Para. 63
SCHLECTIEM	<i>Commentary on the UN convention on the international goods, Schlectiem and Schwenzer, THIRD EDITION</i>	Para. 38

SCHWENZER	<i>Schwenzer., National Preconceptions that Endanger Uniformity, 19 PACE INT'L L. REV. 112 (2007)</i>	Para. 62
CISG COMMENTARY	<i>Schlechtriem & Schwenzler, CISG Commentary 2d English ed. 2005</i>	Para. 78
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STEFAN	<i>The United Nations Convention on Contracts for the International Sale of Goods, Stefan Kröll, Loukas A. Mistelis, Maria del Pilar Perales Viscacillas, 2000</i>	Para. 68
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Bundesgerichtshof, [BGH]
[Federal Court of Justice], Nov. 3,
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BGHX	<i>Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 9, 2002, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHX] (F.R.G.), translated in http://cisgw3.law.pace.edu/cases/ 020109g1.html</i>	Para. 38
CLOUT 230	CLOUT Case 230: Germany: Oberlandesgericht Karlsruhe; 1 U 280/96 (25 June 1997)	Para. 66
CLOUT 665	<i>CLOUT case No. 665 [Oberlandesgericht Naumburg, Germany, 10 SchH 03/01, 19 December 2001]</i>	Para. 6
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TABLE OF ABBREVIATIONS

Art.	Article
Arb.	Arbitration
CISG	United Nations Convention on Contracts for the International Sale of Goods
Cl.	Claimant
Ger.	Germany
UK	United Kingdom
USA	United States of America
ICSID	International Centre for Settlement of Investment Disputes
No.	Number.
P.	Page
Para.	Paragraph
Resp.	Respondent

STATEMENT OF FACTS

1. **CLAIMANT** (Delicatesy Whole Foods Sp) a manufacturer of fine bakery products registered in Equatoriana. **RESPONDENT** (Comestibles Finos Ltd) a gourmet supermarket chain in Mediterraneo.
2. On 10 March 2014 First meeting between Claimant (Delicatesy Whole Foods Sp) and Resp. (Comestibles Finos Ltd). Also Cl. received invitation to tender and the Tender Documents from Resp..
3. 17 March 2014 Resp.'s acknowledgment of invitation to tender package.
4. 27 March 2014 Cl. sent their offer including the changes suggested by them followed by Resp. invitation to tender
5. 7 April 2014 Resp. accepted Cl.'s offer awarded the contract to Cl.
1 May 2014 Cl. made its first delivery. The Delivery of Chocolate cake by Cl. was in the period of the 1 May 2014-27 January 2017.
6. 19 January 2017 Equatorian state news channel showed a documentary which drew attention to the irregularities in the Ruritanian certification practice with regard to sustainable farming which had been criticized in a report of a special rapporteur investigating on behalf of UNEP problems of deforestation in Ruritania.
7. 23 January 2017 the special rapporteur had indicated that probably many certificates certifying sustainable production methods were forged or obtained by bribery.
8. 23 January 2017 Resp. was worried and started its own investigation after the publication of the leading business newspaper in Equatoriana (Michelgault) concerning the disclosure of the fraud carried out by Ruritanian.
9. 27 January 2017 Resp. refrained from taking any further delivery or making any further payment until the issue is solved – the Cl. said that they will investigate further and asked for immediate payment for the cakes delivered. Resp. sought clarification whether the delivered chocolate cake contained cocoa obtained from Ruritania. Immediately the Cl. replied the Resp.'s confirming that they will take further investigation.
10. 10 February 2017 Cl. discovered the fact that their supplier (Ruritania Peoples Cocoa mbH), was involved in the scandal. They also alleged that they were complied with the contractual obligations. Cl. also was willing to take back the cakes delivered and not yet

- sold and to discuss with RESP. a financial contribution to possible losses. Cl. Confirmed Resp.'s allegation that the chocolate cake was made with cocoa beans which had not been farmed in a sustainable way but in clear contradiction to the requirements of the contract.
11. 12 February 2017 Resp. rejected the Cl. offer above. They claimed that cocoa produced not in compliance with the accepted sustainability standards. They also insisted that they were entitled to repudiate the contract on the fact that the Cl. made a fundamental breach. Resp. insisted that they were entitled to terminate the contract according to Clauses 4 (3) of the General Conditions of Contract. They are in the process of evaluating the damages which resulted from such breach of contract.
 12. Notice of Arb.. 26 June 2017 Declaration of Impartiality and Independence and Availability by Cl.'s arbitrator.
 13. 29 August 2017 Resp. concerned about the third party funder for the Cl. On 1 September 2017 The Arbitral Tribunal has made the following decision:
Ordering Cl. to disclose to the Resp. if its claim is financed by a third party funder.
 - 14- 14 September 2017 Notice of challenge of arbitrator was submitted by Resp. On 21 September 2017 Rodrigo Prasad claiming that his connection to Findfunds LP cannot lead to justifiable doubts as to his impartiality and independence.

SUMMARY OF ARGUMENT

PART ONE: ARBITRAL TRIBUNAL SHOULD DECIDE ON THE CHALLENGE OF MR. PRASAD

The RESP. failed to meet the time limit under article 13 (1) UNCITRAL Arbitration Rules. The RESP. is not entitled to challenge Prasad under Article (12) UNCITRAL Arbitration Rules as the RESP. did not raise any sufficient justifiable reasons to challenge him. Also Mr. Prasad disclosed his relationship with the third party funder in compliance with Articles 11 & 12 UNCITRAL Arbitration Rules. The Dispute Resolution Clause must be interpreted according to the party's intention under article 8 CISG. Thus the Arbitral Tribunal should decide on the challenge of Mr. Prasad under Article 13 (2) UNCITRAL Model Law on International Commercial Arbitration.

PART TWO: MR. PRASAD IS ENTITLED TO PARTICIPATE IN THE ARBITRAL TRIBUNAL

Mr. Prasad shall participate on the arbitral tribunal. Since the challenged arbitrator may participate in the arbitral proceeding during the bending period under article 13(3) UNCITRAL model law. Mr. Prasad is entitled to participate in the arbitral tribunal to decide on any challenges. Finally, the decision on the challenges did not concern a matter of procedure under article 29 of the UNCITRAL model law.

PART THREE: THE CONTRACT IS GOVERNED BY THE STANDARD CONDITIONS OF THE CLAIMANT.

The Cl. standards conditions govern the contract under Article 14 and 18 of the CISG. Pursuant to Article 19 CISG the RESP. accepted to be governed by the CL.'s Standard Conditions. Also the intent of both parties was that the General Conditions of the CL. apply to the contract under Article 8 CISG

PART FOUR: IN CASE THE RESPONDENT'S GENERAL CONDITIONS ARE APPLICABLE, THE CLAIMANT DELIVERED CONFORMING GOODS PURSUANT TO ARTICLE 35 CISG

The CL. delivered conforming goods to the Resp.. Therefore the Cl. is not liable due to the fact that the Resp. could not have been unaware of the lack of conformity under article 35 (3) CISG. Also the RESP. loses the right to rely on a lack of conformity and to notify the alleged nonconformity of the goods under Article 39 (1) CISG and Article 39 (2). Finally, The RESP.

has not fulfilled his obligation to allow the CL. to take necessary measures to perform his duties under Article 46.

**PART ONE: ARBITRAL TRIBUNAL SHOULD DECIDE ON THE CHALLENGE OF
MR. PRASAD**

- 1- The RESP. failed to meet the time limit under article 13 (1) UNCITRAL Arbitration Rules. The RESP. is not entitled to challenge Prasad under Article (12) UNCITRAL Arbitration Rules as the RESP. did not raise any sufficient justifiable reasons to challenge him. Also Mr. Prasad disclosed his relationship with the third party funder in compliance with Articles 11 & 12 UNCITRAL Arbitration Rules. The Dispute Resolution Clause must be interpreted according to the party's intention under article 8 CISG. Thus the Arbitral Tribunal should decide on the challenge of Mr. Prasad under Article 13 (2) UNCITRAL Model Law on International Commercial Arbitration.
 - a. **The RESPONDENT failed to meet the time limit under article 13 (1) UNCITRAL Arbitration Rules.**
- 2- The Notice of Arb. was sent and received electronically by the RESP. on 30 June 2017. On the Notice of Challenge of Mr. Prasad, the RESP. stated: Besides the hardcopy, electronic versions of the Notice of Arb. were included in PDF and Word format. During a virus check of these two versions the relevant IT-Security officer of the RESP. managed to retrieve the Metadata of the Word files sent by the CL.” (Problem P. 38 Para. 2).
- 3- The RESP. received an electronic copy of the Notice of Arb. on the 30 June and according to article (2) UNCITRAL Arbitration Rules “A notice transmitted by electronic means is deemed to have been received on the day it is sent”.(Art. 2 RULES). Furthermore, Article 13 (1) UNCITRAL Arbitration Rules mandate that the party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after the appointment of the challenged arbitrator. (Art. 13 (1) RULES)
- 4- The RESP. came across the fact that Mr. Prasad had contacts with Findfunds on 30th June 2017. The RESP. failed to meet the requirement stipulated in Article (13) 1 UNCITRAL Arbitration Rules to send the notice of challenge within 15 days. (AD HOC ARBITRATION, pp. 277-278; BELOHLAVEK).
- 5- According to Article (13) 1 UNCITRAL Arbitration Rules the party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after the disclosure of the circumstances. The RESP. was aware of the relationship between Mr. Prasad and Findfund on 29 August 2017 (Problem P. 33). The Notice of Challenge of Mr. Prasad was sent on 14 September 2017 (Problem P. 38-39) i.e. the time limit exceeded 15 days in order to challenge Mr. Prasad. In

Kammergericht Berlin, It was held that the expression “after becoming aware of” in Para. (2) UNCITRAL Arbitration Rules meant that the time limit for challenging an arbitrator starts from the point in time at which the challenging party acquired actual knowledge of the ground for challenge. Mere negligent ignorance of the ground for challenge, even to such a degree as to constitute constructive knowledge, has not been found sufficient to trigger the time limit. (Art 13 (1); KAMMERGERICHT).

b. The RESPONDENT is not entitled to challenge Prasad under Article (12)

UNCITRAL Arbitration Rules.

1. The RESPONDENT did not raise any sufficient justifiable reasons to challenge Mr. Prasad.

- 6- Article 12(1) UNCITRAL Arbitration Rules and Article 12 (2) UNCITRAL Model Law state the following: “Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence”. (Art. 12(1) RULES) shows that a challenge would be successful where objective circumstances gave rise to justifiable doubts as to the impartiality or independence of the arbitrator. (CLOUT 665)
- 7- The RESP. is relying solely on the fact that there is an involvement by a third-party funder with the CL.’s arbitrator and states that it would have an effect on the arbitrator’s decision. In CLOUT case No. 665 The court found that the fact that a sole arbitrator, at one point in time, held an ownership interest in a limited partnership whose managing partner, at the time of the Arb., was the managing director of one of the parties, did not give rise to justifiable doubts as to the impartiality or independence of the arbitrator. (Id.).
- 8- The involvement of the CL.'s arbitrator in previous cases does not give rise to impartiality and independence. The RESP. does not provide any grounds of challenge stipulated in articles 11 & 12 UNCITRAL Arbitration Rules and article 12 UNCITRAL Model Law. In Hanseatisches Oberlandesgericht It was held that a lawyer appointed as an arbitrator does not have to disclose that he or she has previously acted on behalf of a party where such activities were isolated instances unrelated to the dispute.(HANSEATISSCHES)
- 9- The involvement of a third party funder on the CL.’s side is not grounds for challenging Mr. Prasad. Thus, Mr. Prasad’s past and professional business and other relationships with the parties and the third funder do not affect his independence and impartiality. (BRADFIELD)

- 10- There is neither business nor personal relationships between the CL. or their relatives and Mr. Prasad. In Oberlandesgericht München, the court dismissed a challenge based on the fact that the impugned arbitrator's goddaughter was employed by the law firm who represented the other party. (OBERLANDESGERICHT). A key consideration in the court's reasoning was that that person had no significant involvement in the case and as such was considered to be impartial. Furthermore, in Jung Science Information Technology Co. Ltd. v. Zte Corporation, the parties happened to be represented in the opening stages of the Arb. by a solicitor with whom the challenged arbitrator had had a social and professional relationship in Arb.-related matters but was found not to raise justifiable doubts as to that arbitrator's impartiality and independence.(ZTE)
- 11- The RESP. breached its confidentiality obligation. In the case of Muhammet Cap & amp the RESP. merely requested whether there was a third party funder. The tribunal decided that the RESP.'s request was not justifiable. The tribunal noted that "the factors that may be relevant to justify an order for disclosure, conflicts of interest for the arbitrator, transparency and to identify the true party to the case, costs allocation, security for costs application, and to ensure confidential information is not disclosed to parties with ulterior motives". (ICSID CASE ; STANIC ; SOAS)

c. Mr. Prasad disclosed his relationship with the third party funder in compliance with Articles 11 & 12 UNCITRAL Arbitration Rules.

- 12- The relationship between Mr. Prasad and the third party funder does not amount to a justifiable doubt to challenge the arbitrator. Mr. Prasad complied with his duty to disclose all circumstances under Articles 11 & 12 UNCITRAL Arbitration Rules. Since the parties referred to IBA Guidelines on Conflicts of Interest in International Arbitration, the explanation to General Standard 7 (a) attempts to help define what is meant by "direct economic interest" and provides as an example a relationship with an entity providing funding for the arbitration. Third party funding is also addressed in the Practical Application lists, which were revised in two instances in order to take into account "an entity that has direct economic interest in the award to be rendered in the arbitration".(General Standards 7 (a) IBA; Problem P. 36).

d. The arbitration clause must be interpreted according to the party's intention (article 8 CISG).

- 13- The parties agreed that Arb. should be settled in accordance with the UNCITRAL Arbitration Rules without the involvement of any arbitral institution. Also, the parties agreed that the No. of arbitrators shall be three, one to be appointed by each party and the presiding arbitrator to be appointed by the party-appointed arbitrators or by agreement of the Parties.
- 14- By applying Article 8 CISG, the interpretation of the party's intention relating to the dispute resolution clause "Any dispute, controversy or claim arising out of or relating to this contract...shall be settled by arbitration..." (P. 6). It could be argued that the party did not express or intend to include any clause to determine whether the Arbitral Tribunal has jurisdiction to decide on the challenge of the arbitrator and whether the challenged arbitrator shall participate in that decision Or not. (Art. 8 CISG).

e. CISG Rules shall interpret the Dispute Resolution Clause.

- 15- CISG Rules govern the contractual agreement of the parties. Article 9(1) of the CISG states that "the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves". Since the parties did not agree about who has the jurisdiction to decide on the challenge of the arbitrator, the parties are bound by any usage and/or practices which they have established between themselves. (Art. 9 CISG).
- 16- Therefore, the parties agreed that any claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by Arb. in accordance with the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments. It is stated on (Procedural Order No 1, Problem P. 49) that Equatoriana, Mediterraneo, Ruritania and Danubia are Contracting States of the CISG. The general contract law of the two parties adopts the UNIDROIT Principles on International Commercial Contracts. Both parties have adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments. (Problem P. 12)

f. The Arbitral Tribunal should decide on the challenge of Mr. Prasad under Article 13 (2) UNCITRAL Model Law on International Commercial Arbitration.

- 17- According to Clause 20 Dispute Resolution (Problem P. 6) the parties did not include whether or not the Arbitral Tribunal has jurisdiction to decide on the challenge of the arbitrator. Article 13 (2) of The UNCITRAL Model Law on Commercial Arbitration states that "...unless the

challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge”. Mr. Prasad said: “I will not withdraw from my office as arbitrator”. (Mr. Prasad letter 21 September 2017 P. 44). (Art. 13(2) UNCITRAL)

**PART TWO: MR. PRASAD IS ENTITLED TO PARTICIPATE IN THE ARBITRAL
TRIBUNAL UNDER ARTICLE 13**

- 18- Mr. Prasad shall participate on the arbitral tribunal. Since the challenged arbitrator may participate in the arbitral proceedings during the pending period under article 13(3) UNCITRAL model law. Mr. Prasad is entitled to participate on the arbitral tribunal to decide on his challenge. Also the decision on the challenges did not concern a matter of procedure under article 29 of the UNCITRAL model law.
- 19- The Arbitral Tribunal has jurisdiction to decide on the challenge to Mr. Prasad’s appointment. However, the UNCITRAL Arbitration Rules was silent on this question. Therefore, the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendment shall apply since these rules were adopted by all parties. Article 13 (2) of UNCITRAL Model Law states that: “Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge”. (Art. 12(2) UNCITRAL)
- 20- Under article 13 (3) UNCITRAL Model Law, if the challenge was dismissed, the challenging party may request within 30 days after having received notes of the decision rejecting the challenge, the court decide on the challenge. (Art. 13 (3) UNCITRAL) While such a request is pending, the arbitral tribunal including the challenged arbitrator may continue the arbitral proceeding and make an award. Since the challenged arbitrator may participate in the arbitral proceeding during the pending period, it could be argued that he is also entitled to participate on the arbitral tribunal to decide on the challenge. It could also be argued, that Mr. Prasad should be involved in the arbitral proceedings since the Resp. failed to meet the burden of proof demonstrating the justifiable doubts as to Mr. Prasad’s impartiality under Article 12 UNCITRAL Arbitration Rules.(Art. 12 RULES)

- 21- Under UNCITRAL Arbitration Rules, the parties will have to refer a challenge to the national courts in accordance with Arb. law of the place of Arb.. Since the Arb. law is based on the UNCITRAL Model Law, there will be a two-step process. First, the arbitral tribunal, in its full composition, decides the challenge. E.g. under DIS Rules, the challenged arbitrator participates in the decision-making process and, however, in the case of a sole arbitrator, he/she decides on the challenge. The fact that the seat of Arb. is placed in Vindabona, Danubia, and the Model Law with the 2006 amendments shall apply. (AD HOC ARBITRATION ; ARBITRATION INDEPENDENCE, pp. 279, BELOHLAVEK)
- 22- According to the Working Group Report (Fourth Group, Para. 207, p. 419). The decision on the challenge did not concern a matter of procedure under article 29. Thus, the matter could not be delegated to the presiding arbitrator but have to be decided by a majority or unanimous vote of the entire panel. (Id.)

PART THREE: THE CONTRACT IS GOVERNED BY THE STANDARD CONDITIONS OF THE CLAIMANT.

- 23- The Cl.'s standard conditions govern the contract under Articles 14 and 18 of the CISG. Pursuant to Article 19 CISG, the RESP. accepted to be governed by the CL.'s Standard Conditions. Also the intent of both parties was that the General Conditions of the CL. apply to the contract.(Art. 8 CISG)
- a. The claimant's standard conditions govern the contract under Articles 14 and 18 of the CISG.**
- 24- The Resp.'s reply to the Cl.'s offer was considered an acceptance by stating that "We are pleased to inform you that your tender was successful notwithstanding the changes suggested by you. (Problem P. 17)
- 25- According to article 14(1) of the CISG(Art. 14 (1) CISG) the Cl.'s offer which was based on the invitation to tender constituted a valid offer.(LG)
- 26- Article 18(1) of the CISG indicates that a statement by the offeree to enter into the offer is considered as an acceptance.(Art. 18(1) CISG) The statement by the RESP. to the offeree is an acceptance of the Cl.'s offer(General conditions by the Cl..(JOSEPH).
- 27- Under 18(3) of the CISG (CSIG) accepting the goods by the RESP. is an acceptance to the contract. In Oberlandesgericht Austriait was held that the acceptance of the goods by the buyer

forms an acceptance to the contract and the standard conditions of the seller if there were no objections.(LINZ; GIESELA)

28- The general standard of the CL. governs the contract since the RESP. accepted the offer Under Article 18 (1) and Article 18(3) (Problem P. 17).

b- Pursuant to Article 19 CISG, the RESPONDENT accepted to be governed by the CLAIMANT's Standard Conditions.

29- The RESP. stated: "We are pleased to inform you that your tender was successful notwithstanding the changes suggested by you. The different payment terms and form of the cake are acceptable to us and we are looking forward to a fruitful cooperation." (Problem P. 17). If the statement above was considered as a counter offer The Cl.'s Standard conditions still apply under Article CISG 19 (Art. 19 CISG) and Article 2.1.22 UNIDROIT principles (Art. 2.1.22 UNIDROIT)

30- The RESP.'S counter offer (Problem P. 17) would be considered as an acceptance under Article 19(2) "a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance" (Art. 19 (2) CISG; GIESELA P. 196) The application of the rule depends on whether the changes that were made by the RESP. would Materially alter the contract. (Art. 19(2) CISG).

31- Articles 19(1) and (3) of the CISG adopted the "**Last Shot**" Doctrine. The last shot doctrine means "a contract is formed at the moment when one party begins to perform because performance is considered an acceptance of the last offer" (KAIA).

32- The court in Ger. ruled that "the standard terms sent last became part of the contract since they have not been objected to in Accordance with Article 19 (2)." (CLOUT 716)

33- The Resp. performance after the delivery of the goods is considered as acceptance under the last shot rule. (KAIA).

34- The RESP. performance of contract from receipt of the goods (1 May 2014) until the conflict arose was governed by the standard conditions of the Cl. also arising from the Doctrine of last shot.(ANDREA; Article 19(2) CISG; KAIA)

35- Article 19 (3) states "Additional or different terms relating, among other things, to price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer

materially.”.(Art. 19 (3) CISG). The RESP. accepted the Cl.’s offer (Problem P. 17) without altering any substantial amendments. (KAIA)

- 36- The CISG in article 19 does not provide a method for battle of forms if the two parties have a disagreement to the general standards that should apply to rule the contract. Thus, the parties agreed to have the UNIDROIT principles on international contracts as “gap filler” for any legal doubt not covered under the CISG. (Problem P. 12)(CHOW, P. 183; Art. 19 CISG).
- 37- Since the parties agreed to adopt the UNIDROIT as their “**gap-filler**” in accordance with article 7(2) of the CISG (Art. 7(2) CISG),that would make the application of the knock out rule the most appropriate for the conflict of standard conditions to govern the contract between the CL. and the RESP..(Problem P. 12)(KAIA).
- 38- The court in Ger. used this principle in order to prove the validity of the contract based upon the “**Knock out**” Doctrine. (BGH; BGHX; SCHLECTIEM P. 349).
- 39- The “**Knock Out**” doctrine was incorporated into the UNIDROIT principles Article 2.1.22. This rule holds that conflicting terms cancel each other out and only similar terms will be applied.(Art. 2.1.22 UNIDROIT; MARIA)
- 40- The “**knock out**” doctrine would apply to “eliminate conflicting terms, and fill the gaps in accordance with the rest of the contract or law applicable” (KROLL).
- 41- Since both parties did not agree on the standard conditions. (Problem P. 17) by applying the knock out doctrine the commonalities in the standard conditions of the two parties should govern the contract. (MARIA).
- 42- Thus, the contract between the two parties will be governed by the general conditions of both parties which would result in the exemption of the unilateral termination rule in the RESP.’s general conditions and to be governed by the common General conditions. (Problem P. 12).

c. According to Article 8 CISG, the intent of both parties was that the General Conditions of the CLAIMANT apply to the contract.

- 43- In accordance with Article 8(1) on interpreting the intention of a party, the intent of both parties is interpreted through the statements and conduct of both the RESP. and the CL. through their practices between times of contracting up until the time the dispute arose.(Art. 8 (1) CISG).
- 44- Article 8(1) dictates that in interpreting the intent, “...statements made and other conduct of a party is to be interpreted according to his intent...”. In overseeing the conduct and statements of

both parties, it is clearly shown that their intention is to apply the General Conditions of the CL.. (MISTELIS)

- 45- The first instance proving this conduct was when the RESP. met the CL. at a food fair. The representative of the RESP., namely Ms. Ming approached the CL. and expressed appreciation for both the CL.'s products and their methods of business. It was following this meeting that the RESP. invited the CL. to make a formal business arrangement by issuing an Invitation to Tender. The CL. replied to the Invitation and stated that it had no issue in forming an offer but explicitly stated that the CL.S General Conditions shall govern the contract. (Problem P. 16,17)
- 46- The second instance in which the intent of the parties is proven is shown by the inclusion of the CL.'s Standard Conditions to which no objections were raised by the RESP.. In acting on the inclusion of those General Conditions, the RESP. proves further that by not objecting to them shows acceptance. Usually silence does not constitute acceptance but the acceptance is clearly shown when the RESP. did not only remain silent but actually acted on the issue. (CLOUT 1017).
- 47- When revising a request made by the RESP. to have the goods delivered on the 1st of May 2014 which was the first shipment delivered, there were no objections by the RESP. regarding use of the General Conditions of the CL.. Furthermore, when the RESP. accepted the goods it raised no objections as to delivery, quality and conformity of the goods which were delivered according to agreed upon General Conditions of the CL..(Problem P. 18)
- 48- In regards to Article 8(2) the statement is made that any reasonable person of the same kind in the same circumstances would agree that it was not in doubt that the intent of both parties was to include the CL.'s General Conditions in the Contract.(Art. 8 CISG) This is proven by the facts stating the intention of the RESP. under Article 8(1).(Art. 8 CISG) This is also linked to Article 8(3) and UNIDROIT 4.1 (2), when consideration must be given to all relevant circumstances of the case including negotiations, practices, usages and any subsequent conduct of the parties.(Art. 4.1 (2) UNIDROIT; Art. 8 (3) CISG). After revision of the criteria in Article 8(3) as to what constitutes a reasonable person, the facts stated are evidence that negotiations surrounding the practices, usages and every other conduct between the two parties indicate that the intent for both sides is to have the CL.'s General Conditions apply to the Contract. (Art. 8 (3) CISG)
- 49- It should be noted that although Article 8 CISG is subjective it has been widely applied. In the case of Kolmar Petrochemicals v. Grupo Idesa, the Supreme Court of Mexico applied Article 8

to the dispute. In that case the dispute concerned the legality of a contract but nonetheless Articles 8(1) (2) were applied to show the intent of the parties. This was via statements, conduct and any other practices proving, that the use of Article 8 is used within the legal community for these purposes.(KOLMAR)

50- Furthermore, the UNIDROIT Principles provide for the intention of a party. Article 4.1 of the principles states “(1) a contract shall be interpreted according to the common intention of the parties”. (Art. 4.1 UNIDROIT). The Article is more specific in interpreting the intent not just of a party but of the contract itself. The common intention of the parties has not changed since the formation of the contract and that means that the General Conditions of the CL. still apply to the Contract as a whole. This is proven through the incidents already mentioned previously under Article 8 CISG.(Art. 8 CISG)

**PART FOUR: IN CASE THE RESPONDENT’S GENERAL CONDITIONS ARE
APPLICABLE, THE CLAIMANT DELIVERED CONFORMING GOODS PURSUANT
TO ARTICLE 35 CISG**

51- The CL. delivered conforming goods to the Resp.. Therefore the Cl. is not liable due to the fact that the RESP. could not have been unaware of the lack of conformity under article 35 (3) CISG. Also the RESP. loses the right to rely on a lack of conformity and to notify the alleged nonconformity of the goods under Article 39 (1) CISG and Article 39 (2). Finally, The RESP. has not fulfilled his obligation to allow the CL. to take necessary measures to perform his duties under Article 46.

**a. The CLAIMANT delivered conforming goods pursuant to Article 35 (1) & (2) a of
the CISG**

52- In accordance with Article 35 CISG, the CL. delivered the Cakes which conformed to the standards in the contract, the governing law and all terms and requirements agreed upon between the parties. Under Article 35 (1), the CL. delivered the goods which were of the exact quantity, quality and description required by the contract from the first date of performance 2014 until the day the dispute arose. The CL.’s latter shipments which were the subject of dispute totalled 600,000 cakes in 30 individual shipments i.e. 20,000 daily in accordance with the contract. The payment method agreed upon in the sales offer (Problem P.16) is “30 days after delivery and invoicing”. It is clear that the Cl.’s obligation to deliver the goods shows that the delivery schedule complied with the contract. In addition, regarding conformity of the products

themselves from 2014 up to 2017 the quantity, quality and description of the cakes did not change thus showing full performance of the contract. (Art. 35 CISG).

- 53- Under Article 35(2) (a) the purpose of the product is to be resold by the RESP. in his market as shown on (Problem P. 4, Para. 2) when it is stated that the RESP. is a Supermarket Chain. Since no objections were raised from the beginning of the contract until the day of the dispute, this shows that the product conformed to that which was agreed upon showing that the CL. fulfilled his obligations in this regard.(Art. 35 (2) CISG).
- 54- The CL.'s product was manufactured and presented as fit for purpose in line with contractual obligations. (Art. 35(2)(b) CISG)
- 55- Accepting the sample constituted an implicit agreement that the goods are of the same quality as the sample. The quality of the product since that time has never been questioned and as such the RESP. accepted (on every occasion) the cakes as required in full performance of the Contract. (Art. 35(2) (c) CISG).
- 56- At no point during the lifetime of the Contract has the RESP. in any way questioned containers or packaging or adequacy thereof. No complaints regarding the preservation and protection of goods has ever been received either.
- 57- As mentioned above the CL. fully complied with all matters relating to quality and delivery of his products as required under the Contract.

b. The Respondent could not have been unaware of the lack of conformity.

- 58- When the seller receives notice of not conformity at late date, it is difficult for him to obtain immediate evidence. This could include the condition of the goods at the time of delivery, or invoking the liability of a supplier from whom the seller may have obtained the goods or the materials for their manufacture. (SANNAKUOPPALA)
- 59- At no time were any problems concerning the deliveries in 2014, 2015 and 2016 reported to the CL.. On 27 Jan 2017 the RESP. refrained from taking any further delivery or making any further payment due to the lack of conformity of goods. The RESP. received the same quality of product for three years without objections. This indicates that the RESP. could not have been unaware of the lack of conformity. For instance the case below also shows that the buyer could not be unaware of the lack of conformity.
- 60- In this case the dispute involved an Italian seller and a Chinese buyer who had concluded a contract for the sale of a Hydraulic press. An inspection revealed defects that rendered the press

unusable for its ordinary purposes. In the ensuing Arb. the Arbitral Tribunal recalled how the previous year the buyer had purchased the same type of machine from the seller. As the same defects were also present in the previous product delivered, the tribunal concluded that the buyer “knew that the machine had these defects when concluding the sales contract for the machine involved in this case”. However, the Buyer did not mention this problem when negotiating the contract for this new machine, which indicated to the seller that there were no problems with the machine and as such the buyer “accepted these defects.” The claim was therefore rejected in light of art. 35(3) as the buyer could not have been unaware of the lack of conformity. The CL. made its first delivery on 1 May 2014 and the RESP. accepted the CL.’S products for around three years. (CHINA INTERNATIONAL ECONOMIC)

c. The RESPONDENT loses the right to rely on a lack of conformity of the goods under Article 39 (1) CISG.

- 61- Under Article 39 (1) CISG, the buyer loses the right to rely on non-conformity by the seller when he does not give notice to the seller specifying the nature of lack of conformity within a reasonable time after it was discovered. The RESP. did not comply with article 39 in providing the CL. with notice within a reasonable time to give the CL. chance to ensure that the goods conformed to contractual requirements. The RESP. did not give the CL. any notice, particularly as there was no proof, other than hearsay, that the CL.’S supplier was involved in fraudulent activities.
- 62- In the absence of any special circumstances, one should accept at least one month as a rough average period for timely notice”. (SCHWENZER)
- 63- The German Supreme Court in the Machine for producing hygienic tissues in Bundesgerichtshof case the case defined the one month period as regular or legal norm. (BGH; SCHLECHTRIEM P.. 567; PETER). After the German Supreme Court endorsed the “noble month” principle, the lower courts started to apply it very frequently. (STUTT GART; AMTSGERICHT KEHL; AUGSBURG)
- 64- In another case in Switzerland, the court held that the notification of lack of conformity given to the seller seven to eight months after delivery was by far too late.(CLOUT 256.)
- 65- The CL. showed good intent in giving the RESP. a chance to return the cakes. |They also gave the Resp. their assurance that they would investigate the allegations against their supplier and if proven would find another conform with the Resp.’s code of conduct and moral values. The

RESP. did not comply with this reasonable request under the law agreed upon and under Article 39 specifically.(Art. 39 CISG)

- 66- Therefore, in order to rely on a lack of conformity, the buyer must comply with articles 38 and 39 which concern the burden of examining the goods and of giving notice of the non conformity. The failure to comply means loss of right to invoke a lack of conformity. (KASSEL; CLOUT 262; CLOUT 263). In another case, the court noted that for durable goods, a reasonable time for examination under Article 38(1) would be three or four days, while notice under Article 39 (1) should be given to the seller within 8 days after the lack of conformity ought to have been discovered. CLOUT 230; Dr. S)
- 67- The period within which the goods should be examined is also significant for the purposes of avoiding the contract. Because of the defect, also the seller may have demands on his own suppliers. In order to notify his own suppliers in time the seller needs to be warned about the possible defects as soon as it is possible. It should be stressed that the reasons mentioned in this case were given to allow the non-conforming party to the contract time to achieve compliance. The RESP. clearly did not do this. (PETER p. 301 ROUTAMO, p. 241-242).
- 68- In line with Article 39 (1), a commentary on the CISG by (Stefan Kroll) states: “The American UCC as well as several other laws require notice within a “reasonable time””. Even the English Sales of Goods Act, which normally does not require time, in the instance of termination of a contract, notice must be given. (KROLL)
- 69- The buyer’s awareness, however, is not the sole condition which affects the commencement of the time period to give notice of the non-conformity. Also it can be argued that the reasonable period of time could start from the day on which the buyer “ought to have discovered” the lack of conformity. Article 39 CISG. It was held that the buyer had failed to give seller notice of lack of conformity of goods within a reasonable time according to the provision of Art. 39 CISG. (BELGIUM Case)
- 70- The purpose of Article 39 (1) is to push the buyer to inspect the goods and eventually activate the remedies in the shortest possible period of time. As well as protecting the seller from the negative consequences arising from claims filed long after the goods have been delivered. The reason for the notice is to allow the seller to take appropriate action against the non-conformity. (FERRARI).

71- Under art. 35(3), the buyer's actual or supposed knowledge of the non-conformity excludes the seller's liability. According to art. 39, instead, the seller's liability is not excluded but rather the buyer loses "the right to assert any and all of the various remedies.

d. The RESPONDENT loses its right to notify the alleged nonconformity of the goods under Article 39 (2).

Art. 39(2) CISG provides a "cut-off" period of two years from the handing over beyond which the buyer loses its right to notify the alleged non-conformity of the goods. The "cutoff" period will start to run from the moment the goods have been actually and physically handed over to the buyer. (YEAR BOOK Para. 63; JOSHEPH).

72- In conjunction with Article 39, under Article 53, the RESP.'S obligations were to pay the price for the goods in full. The RESP. explicitly refused to pay the price with no legal grounds and no sufficient reason to refuse to do so. The RESP. is obligated to perform all of his duties under the contract and relevant international conventions.

73- The buyer has to pay for the goods in a timely manner as is customary in a particular trade after the buyer has received the goods and the invoice (reference)

74- Under UNIDROIT Article 7.2.1 addressing monetary and non-monetary obligation, the Article states: "where a party who is obligated to pay money does not do so, the other party may require payment". Thus, the RESP. is under an obligation to make payment for any goods supplied as part of the Contract. (Art. 7.2.1 UNIDROIT)

e. The RESPONDENT has not fulfilled his obligation to allow the CLAIMANT to take necessary measures to perform his duties under Article 46.

75- Article 46(3) mandates "If the goods do not conform to the contract, the buyer may require the seller to remedy the lack of conformity by repair...a request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter". This is parallel to what is agreed upon in the Contract (Problem P. 14) where a non-conforming product must be given sufficient time to be remedied. In effect time should have been given to allow the CL. to source an alternative supplier of Cocoa. Under Article 46(3) the CL. terminated the Contract with the supplier and secured alternative suppliers who meet the RESP.'S requirements (P21C9).

76- The RESP. gave the CL. only 1 business day notice to clarify whether the goods adhere to Global Compact's Principles, knowing that it would be highly unlikely for the CL. to be able to

act and remedy the situation within the period in particular, as they have the legal means to give an extension under Article 47(1) CISG.(Art. 47 (1) CISG)

77- It was held that the failure of buyers to notify the seller within the prescribed period means that the buyers lose the right to rely on the non-conformity. Article 39 bars the full range of remedies: a claim for damages and, requiring performance by the seller, avoidance of the contract and reduction of the price.(P V N)

f. The Claimant is not liable for the suppliers breach for delivering non conforming goods under Article 79 CISG.

78- Article 79 CISG provides an exemption when a party ‘fails to perform any of his obligations due to an impediment, beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences. Hans Stoll & Georg Gruber, argues that a seller who is reasonably unaware of a lack of conformity in delivered goods should, for that reason alone, be exempted from liability under Article 79.(4) (HANS Para. 39; CISG COMMENTARY; FLECHTNER; HONNOLD)

.CL. has included in its own Supplier Code of Conduct largely comparable provisions to which its suppliers have to subscribe to ensure that CL. is able to meet the guarantee given to RESP., that the chocolate cake does not contain cocoa farmed in violation of the principles of sustainable farming.(Problem P. 31)

79- The Cl.’s Supplier Code of Conduct states as follow: “Suppliers are expected to maintain and be able to provide Delicatesy Whole Foods Sp with documentation which demonstrates compliance to this Supplier Code of Conduct. We regularly monitor our suppliers and ask about their business practices through questionnaires to help us identify and assess potential risks. We reserve the right to audit compliance to these guidelines in accordance with criteria formulated by us. If a supplier does not meet our expectations we will work with our suppliers to address the findings through remedial actions” (Problem P. 31).

80- Therefore, the Cl. is exempted under Article 79 as he received the goods from a reliable supplier and the defect could not have been discovered using methods which could reasonably be expected of a reasonable person in the Cl.’s position.

g. The Claimant provided adequate assurance of his performance after the Respondent's suspension under Article 71 (3) CISG.

- 81- Article 71 (3) CISG states that “a party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance”(Art. 71 (3) CISG).
- 82- The Resp. suspended its performance on 27/Jan/2017. We will refrain from taking any further delivery or making any further payment until the issue is solved (Problem P. 18). The Cl. provided adequate assurance of its performance by responding immediately to the Resp.s complaint (Problem P. 21). We have immediately terminated the contract with Ruritania Peoples Cocoa mbH and have in the meantime been able to secure other supplies so that we can start delivery again (Problem P. 21).
- 83- Therefore, the Resp. did not comply with Article 71 (3) CISG by refraining from taking any further delivery or making any further payment until the issue is solved, although an adequate assurance was provided by the Cl..

h. The Respondent is not entitled to terminate the contract under Article 72.

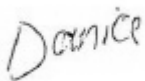
- 84- The Resp. does not have the right to terminate the contract under Article 72 (1) CISG. Article 72 (1) states: “If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided”. Thus, the Resp. did not comply with Article 72 (1) as the termination of the contract occurred after the performance of the contract.(Art. 72(1) CISG)
- 85- The Resp. failed to provide a reasonable notice to the Cl. in order to permit him to provide adequate assurance of his performance. Article 72 (2) emphasize that “If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance”. (Art. 72 (2) CISG).

PRAYER FOR RELIEF

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

1. The Arbitral tribunal has the jurisdiction to decide upon the challenge of Mr. Prasad.
2. Mr. Prasad is part of the arbitral tribunal.
- 3-The Cl. General Conditions should govern the contract.
- 4-The Cl. delivered conforming goods to the Resp..

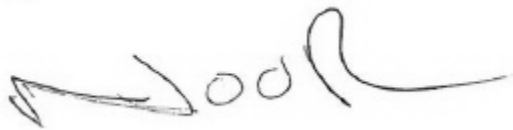
DANIA AL-AMEERI



FAHED AL-OBAID



NOOR AL-FARHAN



SARA AL-HOUTI

