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William C. Vis International Commercial Arbitration Moot

NANGARHAR UNIVERSITY

FACULTY OF LAW

MEMORANDUM FOR CLAIMANT

Delicatesy Whole Foods, Ltd v. Comestibles Finos, Ltd

CLAIMANT • RESPONDENT

Mohammad Asghar Azimi • Imran Ullah Sharefi • Azizullah Zohair • Abid Khan

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LIST OF ABBREVIATIONS

&	And
Ans NofCh	Answer to the Notice of Challenge of Arbitrator
Ans St. of Cl	Respondent's answer to statements of claim
Art	Article
Chap	Chapter
CISG	United Nation convention on contracts for international sale of Goods
CISG-AC	CISG Advisory Council
CISG-Online	United Nation Convention for the Contracts on international sale of goods online cases
Cl.	CLAIMANT
Com-on	Commentary on
Dec	December
Ed (s)	Editions
Exh.	Exhibition
IBA	International Bar Association
Ibid	Ibidem (word Origin)
Inc	Incorporated
Jan	January
LCIA	London Court of International Arbitration
Lex-Arbitri	The law of the Seat of Arbitration
Ltd	Limited
Mr	Mister
No	Number
N*of*Ch	Notice of Challenge or Arbitrator
Oct	October
Para	Paragraph
PCA	Permanent Court of Arbitration
Pg	Page
PO1	Procedural Order No 1
PO2	Procedural Order No 2
Req for arb	Request for arbitration [IV]

Res	RESPONDENT
Sec	Section
St Cl	Statement of Claim
UK	United Kingdom
UN	United Nation
UNCITRAL	United Nation convention on international Trade Law
UNIDROIT	International Institute for the Unification of Private law
US$	United States Dollar
V	Versus

LIST OF AUTHORITIES

A. INDEX OF TREATISE, LAWS AND RULES

CISG	United Nation's Convention on Contracts for International sale of goods, 1988. Cited as: CISG In Paras. 13, 16, 17, 19, 97, 95, 96, 98, 102, 126, 161, 162
CISG Digest	Digest on convention on contracts for international sale of goods. Cited as: CISG Digest In Paras. 132
MAL Digest	UNCITRAL model law on international commercial arbitration (1985). Cited as: MAL Digest In paras. 4, 34
Principle	Principle of party autonomy In Para. 34
UNCITRAL Arbitration rules	UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013) Cited as: UNCITRAL Arbitration rules In Paras. 48, 56, 94
UNCITRAL model law	UNCITRAL Model Law on International Commercial Arbitration. 1985 (with amendments as adopted in 2006), 7 July 2006. Cited as: UNCITRAL model law In Paras. 31, 38, 41, 42, 46, 49
UNIDROIT Principles	UNIDROIT principles for unification of trade law.

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STATEMENTS OF FACTS

CLAIMANT, Delicatesy Whole Foods Sp "Seller", is a medium sized manufacturer of fine bakery products

RESPONDENT, Comestibles Finos Ltd "Buyer", is a gourmet supermarket chain in Mediterraneo

2012-2014 Claimant chocolate cakes won the award for Cusina best case, due to it sustainable production *[Exh. R2, Pg. 29]*.

3-6 March, 2014 CLAIMANT and RESPONDENT met and both side discussed about having business relations and RESPONDENT liked CLAIMANT's principle of ethical and sustainability [St of Cl, Pg. 3].

10 March, 2014 After the successful discussions, due to claimant's best management, its regular audits for suppliers and it complains with the principle of Global Compact, CLAIMANT received an invitation to tender for the delivery of chocolate cakes from RESPONDENT [*Ex. C1, Pg. 8]*.

27 March, 2014 CLAIMANT submitted its Tender documents along with some amendments and made it clear that its offer would be subject to the application of its General Condition of sales including its own Code of Conduct *[Ex. C3 & C4, Pg. 15, 16]*.

7 April, 2014 RESPONDENT accepted the changes suggested by claimant and did not raise any objection and awarded the CLAIMANT the contract *[Ex. C5, Pg. 16]*.

1 May 2014 Claimant made its first delivery with the footer that its general condition should govern the contract, respondent took the delivery and there were no problems concerning the deliveries in 2014, 2015 and 2017 *[St Cl, Para. 6, Pg. 5]*.

23 Jan, 2017	Michelgault Business News reported about deforestation and bribery in Ruritania *[Exh. C7, Pg. 19]*.
27 Jan, 2017	Without any prior notice about non-conformity of the goods, RESPONDENT informed claimant about deforestation that CLAIMANT's suppliers strictly adhered to Global Compact principle *[Ex. C6, Pg. 18]*.
10 Feb, 2017	Claimant tried to solve the dispute amicably and offered 25% reduction for the price of chocolate goods *[Exh. C8, Pg. 20]*.
12 Feb, 2017	RESPONDENT did not accept claimant offer and suggestions for amicable solution of the problem and terminated the contract *[Exh. C10, Pg. 22]*.
26 Jun, 2017	CLAIMANT appointed Mr. Prasade as its arbitrator and his statement of impartiality and independence is presented *[Ex. C11, Pg. 23]*.
14 Sep, 2017	RESPONDENT challenged Mr. Prasad alleging that he has connection with third party funder and objected on his impartiality and independence *[NofCh, Pg. 37]*
21&29 Sep, 2017	Horace Fasttrack and Mr. Prasad Presented justifiable answer to respondent's challenge *[NofCh, Pg. 44&45]*

SUMMARY OF ARGUMENTS

I. The arbitral tribunal is not authorized to decide on the challenge of Mr. Prasad raised by respondent, because RESPONDENT's challenge of arbitrator is time barred as per UNCITRAL Arbitration Rules Art.13 (1), and also UNCITRAL Arbitration Rules 6, provides CLAIMANT with the appointing authority, since the parties intended to keep the arbitration proceedings confidential, and their intent had nothing to do with the exclusion by excluding reference to any arbitral institution, and finally, the Secretary-General of the Permanent Court of Arbitration should designate the appointing authority not the tribunal. Even if, the tribunal has the authority to decide on the challenge, Mr. Prasad is a member of the tribunal under article 13(2) of the Danubian arbitration law, because Mr. Prasad is being selected by claimant as its arbitrator by virtue of Clause 20 of the contract. (**ISSUE I**)

II. In the case, the arbitral tribunal has the authority, Mr. Prasade should be involved in the arbitral proceedings, because Mr. Prasad has met his obligations under article 11 of UNCITRAL Arbitration rules and article 12(1) of Danubian Law, and also Mr. Prasad is impartial as either of the parties, since The IBA Guidelines are not applicable to the present case and respondent has not met the burden of proof demonstrating justifiable doubts as to Mr. Prasad's impartiality and independence, likewise, the connections are too indirect to warrant disqualifications. (**ISSUE II**)

III. Claimant's standard conditions govern the contract, since they are accepted by respondent, claimant intended to apply its general condition of sale to the contract under article 8 of the CISG, also the parties common intention was to apply claimant's general condition of sale based on UNIDROIT principles. Same as, RESPONDENT has accepted CLAIMANT's offer without objecting to them under article 19 of the CISG, also CLAIMANT's offer became effective after accepting by RESPONDENT under article 19 of the CISG. (**ISSUE III**)

IV. Even if respondent's general conditions are applicable, claimant delivered conforming goods under article 35 of the CISG and is entitled to the full purchase price, since CLAIMANT to RESPONDENT Are In Conformity With the Requirement of Contract and CISG, also respondent has not fulfilled his obligation of giving notice of lack of conformity of goods under article 39 of the CISG, finally CLAIMANT incurred unfavorable costs, which were all result of RESPONDENT's breach of contract and are recoverable under article 53, 54 and 62 of the CISG. (**ISSUE IV**)

ARGUMENT

ISSUE I: THE ARBITRAL TRIBUNAL IS NOT AUTHORIZED TO DECIDE ON THE CHALLENGE RAISED BY RESPONDENT, EVEN IF IT DID, MR. PRASAD IS INVOLVED IN THE ARBITRAL PROCEEDING

1. The arbitral tribunal is not authorized to decide on the challenge raised by RESPONDENT, even if it did, Mr. Prasad is involved in the arbitral proceeding, because, the arbitral tribunal does not have the authority to decide the challenge of Mr. Prasad Under UNCITRAL arbitration rules, as chosen by the parties **[A],** even if the arbitral tribunal has the authority to decide on the challenge, Mr. Prasad is a member of the tribunal under article 13(2) of the Danubian arbitration law **[B].**

A. The arbitral tribunal does not have the authority to decide the challenge of Mr. Prasad under UNCITRAL arbitration rules, as chosen by the parties.

2. The parties agree that any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules [*Exh. C2, Clause. 20, Pg. 12*], thus, under article 13(4) of the UNCITRAL arbitration rules, as chosen by the parties, the arbitral tribunal does not have the authority to decide the challenge of Mr. Prasad. RESPONDENT'S challenge of arbitrator is time barred as per UNCITRAL Arbitration Rules Art.13 (1) **[a]**, and also UNCITRAL Arbitration Rules 6, provides CLAIMANT with the appointing authority **[b],** the parties intended to keep the arbitration proceedings confidential, and their intent had nothing to do with the exclusion by excluding reference to any arbitral institution **[c]** and the Secretary-General of the Permanent Court of Arbitration should designate the appointing authority not the tribunal**[d].**

a. Respondent's challenge of Mr. Prasad is inadmissible because is time barred under Art. 13 (1) of UNCITRAL arbitration rules

3. Respondent's challenge of Mr. Prasad is not admissible, since it is time bared, because under the applicable arbitration rules challenges had to be made within two weeks after the relevant facts became known [*Lew, Mistelis, Kroll, Comparative international commercial arbitration, Pg. 308*].
4. Same as, like most institutional arbitration rules, UNCITRAL arbitral rules prescribe a basic procedural framework for the arbitration this includes provision for initiating arbitration, selection and challenge of arbitrators and costs of arbitration [*MAL Digest, Pg. 58*]
5. In this regard, Article 13(1) establishes the period within which a challenge must be made. Under this provision, a notice of challenge must be sent within fifteen days after the circumstances constituting the basis for the challenge first become known to the challenging party [*Caron & Caplan, Comm on UNCITRAL arbitration rules, Pg. 286]*.
6. In addition, the drafters made it clear that after 15 days the right to challenge was waived. The purpose was to prevent parties from abusing the challenge mechanism by bringing up doubts

which they had been aware for some time, just to delay proceedings that deem to be going against them [*Ibid*]

7. Besides, Mr. Prasad had declared his statement of impartiality and independence, which shows his capability of performing in this arbitration, and RESPONDENT already, knew about those circumstances [*Exh. C11, Pg. 23*]
8. Furthermore, to avoid a party misusing its appointing right and delaying the proceedings, this right must generally be exercised within a certain time limit, and after the time limit the authority is transferred to an appointing authority or court [*Lew, Mistelis, Kroll, Pg. 249*].
9. In AWG arbitration, the Argentine Government challenged an arbitrator for serving on another tribunal that had rendered an award against Argentina. The challenge was dismissed as untimely because Argentina filed its notice of challenge several days after the 15-days' time limit had expired [*AWG Group Ltd and Argentine Republic (October 22, 2007*)].
10. Here in the present case, RESPONDNET retrieve the Metadata on 27 Aug 2017, and got some unjustifiable doubts about the CLAIMANT and related those doubts as to Mr. Prasad's impartiality and independence [*PO2, Para. 11, Pg. 51*], and on 29 Aug 2017, RESPONDENT informed its law firm, but the Mr. Prasad was challenged on 14 Sep 2017 [*NofCh, Pg. 37*].
11. Consequently, the arbitral tribunal should not rule on the challenge of Mr. Prasad, since it is not within the time limit and should be rejected.

b. The parties intended to keep the arbitration proceedings confidential, thus the exclusion of art 13 (4) in the contract was limited to the composition of the tribunal.

12. The exclusion of Art 13 (4) in the contract was limited to the composition of the tribunal and was never meant to restrict having appointing authority to decide upon the challenge.
13. In this regard, Both Parties agree that the arbitration agreement is subject to the CISG *[PO1, Para 1 (2), Pg. 48*]. And according to Art. 8 of the , when interpreting the provisions of a contract, due regard must be given to the intention of the parties, as well as to the relevant circumstances.
14. In this regard, the well-known scholars Scheletreim & Schwenzer say that the intent of parties in the contract could be vigorously understood by interpreting the contract based on Article 8 of CISG *[Scheletreim& Schwenzer, Pg. 113]*.
15. Furthermore, in international commercial arbitration, due importance has to be given to the real intent of the Parties, in this sense, the intent of the parties should prevail over an incorrect statement or manner of expression whether due to mistake, or with the intention of covering the true nature of the contract - used by the Parties [*Born, pg. 158; Van Den Berg, pgs. 618-619; Redfern & Hunter, p. 186; Mistelis, p. 674; Marnellcorrao v. Sensation Yachts; University of Brighton v. Dovehouse Ltd; HKL Ltd v. Rizq International Ltd*].
16. In addition, the Tribunal should look to the intent of the parties in interpreting the efficiency clause. In determining parties' intent in a tribunal may consider a wide range of evidence and look beyond the text of the agreement. [*CISG, Art. 8(1)*]. "[D]ue consideration is to be given to all relevant circumstances of the case." [*CISG, Art. 8(3)]*. In addition, the Tribunal may consider

"statements and other relevant circumstances" in determining the terms of a contract. *[CISG-AC Opn. No. 3, cmt. 2.1]*.

17. Furthermore, the CISG provides that, when determining the understanding of a reasonable person of the same kind, due consideration must be given to all relevant circumstances of the case, including the negotiations, usages and any subsequent conduct of the parties [*CISG, art. 8(3)]*.
18. Here in the present case, the subjective intent of both parties by excluding the provision of article 13(4) was limited only to the composition of arbitral tribunal [*Exh. C3, Pg. 15; Exh. R5, Pg. 41; Ans NofCh, Pg. 46*].
19. Consequently, the PCA should designate an appointing authority to decide over the matter considering the intent of the parties by excluding provision of article 13 (4) which was limited to the appointment of arbitrators under article 8 of CISG.

c. The secretary-general of the PCA should designate the appointing authority to decide on the challenge under article 6 of UNCITRAL Arbitration rules

20. Parties will chose a set of procedural rules to govern the ad hoc arbitration and the UNCITRAL arbitration rules has published a commonly used set of such rules to govern the Ad hoc arbitration and article 6 and 13 (4) of UNCITRAL arbitration rules talk about designating an appointing authority to solve the matter of the challenge of arbitrators.
21. Same as, if the parties choose the UNCITRAL Arbitration rules, but do not choose an appointing authority, the UNCITRAL arbitration rules provide that one of the parties may ask the secretary general of PCA to designate an appointing authority [*Moses, Pg. 55; Redfern & Hunter, international arbitration, Pg. 257*].
22. In addition, under UNCITRAL arbitration rules the Secretary General of permanent court of Arbitration serves a *sui generis* function of designating a suitable appointing authority [*Born, international arbitration, Pg. 73*].
23. In this regard, Art 6 of UNCITRAL arbitration rules underscores the significance role of the appointing authority, particularity in the contest of non-administered arbitration, it covers four essential matters; the agreement among parties on an appointing authority, the process for designating an appoint authority, suspension of the time periods and the discretion of appointing authority making decisions *[Caron & Caplan, Comm on UNCITRAL arbitration rules, Pg. 212]*.
24. Art 6.1 expressly indicate that the Secretary General of PCA may serve as an appointing authority, it means under the rules the PCA functions as default authority for designating an appointing authority when the parties cannot reach agreement *[Caron & Caplan, Comm on UNCITRAL arbitration rules, Pg. 212]*.
25. Moreover, in ad hoc arbitration, parties need to be particularly careful to specify their method of arbitrator and the selection method should be clear. Normally this is done by choosing an appointing authority who will select the arbitrator if the parties have not been able to do so *[Moses, Pg. 88]*
26. Furthermore, where ad hoc arbitration is chosen, parties will usually designate an appointing authority that will select the arbitrators if the parties cannot agree and consider any subsequent

challenges to members of the tribunal. If the parties fail to select an appointing authority, then national arbitration statutes of many states permit national courts to appoint arbitrators. *[Born, international arbitration, Pg. 71]*

27. From a practical point of view, if a party thinks the arbitrators suggested are in fact impartial, then the parties should agree to change the mechanism into a balanced one by requesting the PCA to designate an appointing authority to decide over the challenge, this would be a timely solution to the problem *[Mattis, Due process in international commercial arbitration, Pg. 109]*.

28. In the case at hand, the parties did not exchange any further communication regarding the arbitration clause in the contract *[PO2, Para. 20, Pg. 52]*, because they knew that the phrase *"without the involvement of any arbitral institution*" belongs to the composition of the arbitral tribunal *[Exh. C3, Pg. 15; Exh. R5, Pg. 41]*.

29. Finally, the CLAIMANT contests the power of the arbitral tribunal to decide on the challenge of Mr. Prasad *[PO1, Para. 1 (1), Pg. 48]*, thus the secretary general of the PCA should designate an appointing authority pursuant to article 6 of UNCITRAL arbitration rules to decide on the challenge.

B. Even if the arbitral tribunal has authority to decide on the challenge, Mr. Prasad is a member of the tribunal under article 13(2) of the Danubian arbitration law

30. Parties have chosen the law of Danubia as lex arbitri, and Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments [*PO1, Para 3 (4), Pg. 49]*, scope of UNCITRAL model law extends to this arbitration as lex arbitri inDanubia, UNICITRAL model Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States[UNCITRAL Art 1], therefore, even if the arbitral tribunal has authority to decide on the challenge Mr. Prasad is a member of the tribunal under article 13(2) of the Danubian arbitration law. The CLAIMANT can choose the arbitrator of its choice under the contract, since The parties agreed to have all disputes settled by a panel of three arbitrators **[a],** and also, Under Article 13(2) of the Danubian Arbitration Law Mr. Prasad is member of the Arbitral Tribunal after being challenged [**b**].

a. The CLAIMANT can choose the arbitrator of its choice under the contract, since the parties agreed to have all disputes settled by a panel of three arbitrators.

31. CLAIMANT can choose Mr. Prasade as its arbitrator, because major attraction of the arbitration is that it allows parties to submit a dispute to arbitrators of their own choice *[Redfern & Hunter, international arbitration, Pg. 251]*.

32. Same as, there are various ways of constituting an arbitral tribunal or appointing arbitrators, by agreement of the parties and by appointing an institution or third party *[Mattis, Due process in international commercial arbitration, Pg. 108]*.

33. In addition, arbitration clauses often specify the number of persons who will comprise an arbitral tribunal in the event of the future disputes *[Born, Pg. 86; Mattis, Pg. 109*], and among other

things, in selecting an arbitrator, parties must consider the procedural mechanisms set forth in their arbitration clause *[Born, international arbitration, Pg. 89]*

34. Furthermore, it is clear from the text of article 11 of Danubian law that the governing principle with respect to the constitution of arbitral tribunal is the principle of party autonomy, so the parties can choose the arbitrators directly either before or after the dispute has arisen. According to the principle of party autonomy, in arbitration of three arbitrators, each party shall appoint one arbitrator, thus it grants the parties extensive freedom to appoint an arbitrator *[MAL Digest, Pg. 59; Caron & Caplan, Comm on UNCITRAL arbitration rules, Pg. 223]*.
35. When there are three arbitrators, the most frequent method of selection is for each party to select one arbitrator, when an arbitrator is selected by only one party, he is nonetheless obliged to be independent and impartial *[Moses, the principle and practice of international commercial arbitration, Pg. 88]*
36. With parties from different legal and cultural backgrounds, the arbitration agreement provides expressly that each party has the right to appoint an arbitrator *[Lew, Mistelis, Kroll, Comparative international commercial arbitration, Pg. 248]*.
37. In the present case, the arbitration clause explicitly gives the CLAIMANT the power to select an arbitrator of its choice *[Exh. C2, Clause 20, Pg. 12]*, thus Mr. Prasad should be in the panel, since he is selected by CLAIMANT by the virtue of the arbitration clause.

b. Under Article 13(2) of the Danubian Arbitration Law Mr. Prasad is member of the Arbitral Tribunal after being challenged

38. Under article 13(2) of UNCITRAL model law Mr. Prasade should be involved in the arbitral proceedings, since respondent's allegations have not met justifiable doubts as to his impartiality of independence.
39. In domestic arbitrations in some countries party appointed arbitrators take the role of the representatives of their appointing party *[Lew, Mistelis, Kroll, Pg. 2]*.
40. In addition, the requirement of model law is that an arbitrator must be independent and impartial, but 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]*.
41. Besides, if the parties have not agreed on a tailor-made challenge procedure, otherwise the parties could be forced to continue arbitration proceedings even if the arbitrators lacked the necessary independence or impartiality. A typical example of those provisions is article 13(2) of UNCITRAL model law *[Lew, Mistelis, Kroll, Pg. 312]*.
42. In this regard, Art. 13(2) of UNCITRAL model law states; 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 circumstances referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal [*UNCITRAL Model law, Art. 12 (2)*]

43. To restrict the possibility of challenges for tactical and dilatory purposes, most rules and laws submit the right to challenge an arbitrator to strict time limit, so if the time limit bars then the arbitrator can be involved in the panel *[Lew, Mistelis, Kroll, Pg. 308]*.
44. Here in this case, RESPONDENT has not complied with the time limit while challenging Mr. Prasad, second, RESPONDENT has not met the burden of proof demonstrating justifiable doubts as to Mr. Prasad's impartiality or independence *[NofCh, Pg. 44]*.
45. Consequently, from the above illustrations and commentators, it could be assumed that Mr. Prasad should be in the panel, since RESPONDENT has not met the requirements under Danubian Arbitration rules and Danubian law.

46. **Conclusion of the first issue:** the arbitral tribunal is not authorized to decide on the challenge of Mr. Prasad, since the Respondent's challenge has not met time limit as per article 13 (1) of UNCITRAL arbitration rules, also the Secretary General of PCA should designate an appointing authority to decide on the challenge, because parties intent about excluding the provision of Article 13 (4) was limited to the composition of the tribunal. Even if, the tribunal has the authority Mr. Prasad should be involved in the proceedings under article 12 (1) of UNCITRAL model law.

ISSUE II: IN THE CASE, THE ARBITRAL TRIBUNAL HAS THE AUTHORITY, MR. PRASADE SHOULD BE INVOLVED IN THE ARBITRAL PROCEEDINGS

47. In the case, the arbitral tribunal has the authority, Mr. Prasad should be involved in the arbitral proceedings. First, Mr. Prasad has met his obligations under article 11 of UNCITRAL Arbitration rules and article 12(1) of Danubian Law **[A]**, also RESPONDENT fails to meet the burden of proof demonstrating the justifiable doubts as to Mr. Prasad's impartiality [**B**], thirdly, Mr. Prasad should be involved in the arbitral proceedings, since respondent's allegations have not met justifiable reasons **[C],** finally, The IBA Guidelines are not applicable, even if they are, respondent's allegations do not meet the requirements under IBA Guidelines [**D**]

A. Mr. Prasad has met his obligations under article 11 of UNCITRAL arbitration rules and article 12(1) of Danubian law

48. Article12 of Danubian law and article 11 of UNCITRAL arbitration rules describe the duty of an arbitrator to disclose the circumstance in order to prevent doubts as to his impartiality or independence [*Mattis, Due process in international commercial arbitration, Pg. 120; Caron & Caplan, Comm on UNCITRAL arbitration rules, Pg. 245]*.
49. Same as, the UNCITRAL model law and a number of arbitration rules require that an arbitrator disclose without delay any circumstances likely to give rise to justifiable doubts as to his impartiality or independence at the time of appointment. Many arbitrators have found it difficult to know what should be disclosed and have concerns about over disclosing, because some parties may be interested in challenging an arbitrator for the wrong reasons, simply to delay the process *[Born, international arbitration, Pg. 187]*.

50. Moreover, independence and impartiality are safeguarded by the arbitrator's duty to disclose facts or circumstances that may cast a doubt in these respects *[Mattis, Due process in international commercial arbitration, Pg. 120]*.
51. In addition, before an arbitrator is nominated by a party, he must sign a statement of independence and impartiality which will then be transmitted to the other party for comments, which shows that an arbitrator deems himself capable of performing as an arbitrator *[Lew, Mistelis, Kroll, Comparative international commercial arbitration, Pg. 248]*.
52. Likely, each arbitrator is under an obligation to ensure a valid and fair resolution of a given dispute, this duty encompasses the duty to disclose all relevant facts which may give raise to doubts as to his impartiality or independence *[Lew, Mistelis, Kroll, Comparative international commercial arbitration, Pg. 264]*.
53. Furthermore, if new circumstances arise that might give rise to any doubts as to an arbitrator's independence or impartiality, they should immediately disclose them to the parties *[Redfern & Hunter, international arbitration, Pg. 269]*.
54. Likewise, this duty extends to all information which could be relevant like any past or present business relationship, whether direct or indirect including prior appointment as arbitrator with any party to the dispute, the nature of the previous relationship with the parties, extend any prior knowledge he may have of the dispute and should extend any commitments of availability [*Ibid*]
55. The model statements of independence reflect two distinct situations that a prospective arbitrator might face. The first statement conveys the appointed arbitrator's decision against disclosure because of the belief that "*there are no circumstances, past or present, likely to give rise to justifiable doubts*" as to his or her impartiality or independence. the second statement indicates the prospective arbitrator's wish to disclose certain *"past and present professional, business and other relationships with the parties*" or *"any other relevant circumstances*," insisting that *"those circumstances do not affect independence and impartiality." [Caron & Caplan, Comm on UNCITRAL arbitration rules, Pg. 248]*.
56. In the present case, the factors invoked by RESPONDENT for its challenge are not only irrelevant but cannot be relied upon, since Mr. Prasad has met his obligations by disclosing them in his Declaration of Impartiality and Independence, as RESPONDENT did not invoke them at the time, it is barred to do so now.
57. Finally, Mr. Prasade should be involved in the arbitral proceedings, because he has met his disclosure obligations under UNCITRAL model law and UNCITRAL arbitration rules.

B. Respondent fails to meet the burden of proof demonstrating the justifiable doubts as to Mr. Prasad's impartiality.

58. In general, a party seeking a change or confirmation bears the burden of proof to establish the relevant facts that will cause the panel to accept his position and award him the relief he seeks *[Mattis, Due process in international commercial arbitration, Pg. 147]*.

59. Besides, impartiality means that an arbitrator will not favor either of the parties, it is a subjective bias, and independence is an external and objective bias which shows relation of an arbitrator with the third party *[Born, Pg. 736; Redfern & Hunter, Pg. 267]*, thus, lack of independence

could be only justified doubts about impartiality *[Caron & Caplan, Comm on UNCITRAL arbitration rules, Pg. 248]*.

60. In addition, impartial means that the arbitrator is not biased because of any defined ideas about the issues and has no reason to favor one party over another. Independence generally means that arbitrator has no financial interest in the case or its outcome *[Moses, due process in international arbitration, Pg. 77]*.
61. Likely, impartiality is needed to ensure that justice is done, independence is needed to ensure that justice is seen to be done, and it requires the arbitrators not to favor either of the parties *[Lew, Mistelis, Kroll, Comparative international commercial arbitration, Pg. 261]*.
62. On the other hand, FindFunds LP leaves the conduct of the arbitration largely to the parties involved and their lawyers and exercises little influence in the appointment of the arbitrators *[PO2, Para. 4, Pg. 50]*, and Mr. Prasad even did not know that it has been annotated by Mr. Horace Fasttrack *[PO2, Para. 13, Pg. 51]*.
63. Furthermore, absolute grounds would only include a direct financial or personal interest in the outcome of the dispute and certain specified close attaches, such as close family relations, between the arbitrator and a party, but Arbitrators often have some relationship with one or both of the parties and many of these relationships, even when commercial, could be minor and not raise justifiable doubts as to impartiality or independence *[Caron & Caplan, Comm on UNCITRAL arbitration rules, Pg. 259]*.
64. In Argentina Government's challenge of Mr. Judd L Kessler in the national grid Arbitration, Argentina challenged Mr. Kessler, the CLAIMANT's appointed arbitrator, as a result of an intervention that he made in Spanish during cross-examination of the CLAIMANT's expert witness. The appointing authority, a Division of the LCIA, dismissed the challenge. The Division found that it was inappropriate to view Mr. Kessler's statement in isolation, because immediately after his statement Mr. Kessler explained his intent [*National Grid PLC and Republic of Argentina, December 3, 2007]*.
65. Here in this case, there is no legal obligation for CLAIMANT under Danubian Law, or the UNCITRAL Arbitration Rules, to make any disclosure *[Ans NofCh, Pg. 45*], and for Mr. Prasad's impartiality and independence, only his conducts should be taken into account not the CLAIMANT's *[Ans NofCh, Pg. 43]*.
66. As a result, Mr. Prasad should be involved in the arbitral proceedings, because he has met his obligations and RESPONDENT has not me the burden of proof demonstrating doubts as to his impartiality or independence.

C. Mr. Prasad should be involved in the arbitral proceedings, since RESPONDENT's allegations have not met justifiable reasons

67. All international rules require that once chosen, arbitrators can favor in any way the party that selected them. One common and important idea that experienced council assert is that they always chose someone they know. Either they know the arbitrators personally or they know him because the particular arbitrator has a reputation of being among the best international arbitrators in the world *[Moses, due process in international arbitration, Pg. 61]*

68. Mr. Prasad has acted as an arbitrator in two case which had been funded by another subsidiaries of FindFunds LP and the cases have already been completed *[PO2, Para. 10, Pg. 51]*, also Mr. Fasttrack has not been involved in any of them *[PO2, Para. 9, Pg. 51]*.
69. In addition, parties can be incredibly casual in making appointment of arbitrators; they may do so without full study of their track record or published writings. It is better for the parties to agree on an arbitrator once the dispute has arisen *[Moses, due process in international arbitration, Pg. 87]*.
70. It is generally recognized that publications do not justify the challenge of an arbitrator. That's to say the article was written and published in 2016, well before these arbitral proceedings were started and the opinion expressed in the article will not influence Mr. Prasad's decision in this case *[Ans NofCh, Pg. 44]*.
71. In this regard, the Vindobona Journal of International Commercial Arbitration and Sales Law is a leading journal in the field of international commerce available via all leading databases. And Mr. Prasad's article was already available when RESPONDENT submitted its Response *[PO2, Para. 14, Pg. 51]*, but RESPONDENT did not raise this issue at that time.
72. When selecting the arbitrator they are entitled to appoint, parties look for an arbitrator who will be the best for their particular case *[Moses, due process in international arbitration, Pg. 76]*.
73. Moreover, Slowfood is funded by Funding 8 Ltd which is a separate entity of FindFunds LP, also all necessary precautions have been put in place to avoid any contact with this case [PO2, Para. 6, Pg. 50], and it is clear that there are no direct connections between FindFunds LP and its subsidiaries, since they are all individual entities *[PO2, Para. 12, Pg. 51]*.
74. Same as, in Gascir v. Ellicott, the buyer "Respondent" sought to remove an arbitrator at the beginning of the arbitration, because the arbitrator had been lead council for some producers in a prior arbitration concerning onshore natural gas, and had made submissions criticizing expert witnesses who were expected to be called in the instant case. The supreme court of Victoria refused to order the removal of the arbitrator, because the circumstance did not constitute ground for removal. *[Gascor v. Ellicott, 1996]*.
75. in particular, party appointed arbitrators may have a loose and special relation with the arbitrators or its lawyers and the lawyers are well acquainted with the arbitrators and on the basis of past experience they are recommended for appointment as arbitrators, thus these factors and informed selections must be taken into account when interpreting the requirements of independence and impartiality *[Lew, Mistelis, Kroll, Comparative international commercial arbitration, Pg. 258]*.
76. In the present case, contrary to respondent's allegation, CLAIMANT is funded by Funding 12 Ltd which is 100% subsidiary of FindFunds LP and there are no direct connections between the persons or law firms that are in these proceedings with pervious proceedings *[Ans NofCh, Pg. 44]*.
77. Consequently, from the above illustrations and commentators, it could be assumed that Mr. Prasad is impartial and independence, and respondent's allegations have not met the justifiable doubts as to Mr. Prasad's impartiality or independence, because the connections are to indirect to warrant a disqualification.

D. The IBA Guidelines are not applicable, even if they are, RESPONDENT's allegations do not meet the requirements under IBA Guidelines.

78. 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]*.
79. 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]*.
80. Likely, the IBA Guidelines shall apply where the Parties have agreed upon, or the Arbitral Tribunal, after consultation with the Parties, wishes to rely upon them, meanwhile, Parties should adopt these Guidelines in their arbitration agreement or at any time subsequently. *[IBA Guidelines on party representation, Pg. 4]*.
81. Moreover, in ICE inspection & control services (UK) Ltd, 17 Dec 2009, republic of Argentina, the arbitrator was challenged by RESPONDENT after the arbitrator for CLAIMANT had disclosed relevant circumstance that could give raise to justifiable doubts against him. PCA designated an appointing authority to decide the respondent's challenge, the PCA appointed Mr. JerneySekolec and he dismissed the challenge and stated that the IBA Guidelines 2004, have no binding status in the present case *[ICE inspection & control services (UK) Ltd v. republic of Argentina]*.
82. The IBA-Guidelines are not applicable to the present arbitration as the parties have never agreed upon their application *[Ans NofCh, Pg. 45]*.
83. On the other hand, article 3 of the IBA Guidelines defines the duty to disclose as follows: If facts or circumstances exist that may give rise to doubts as to the arbitrator's impartiality or independence, and an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties despite the disclosed facts and therefore capable of performing his or her duties as arbitrator [*IBA Guidelines on conflict of interest, Pg. 14*].
84. Mr. Prasad does not fall under the disclosure obligation since in both cases the funding was provided by a separate entity and not FindFunds LP directly *[Ans NofCh, Pg. 43]*
85. In addition, the IBA Guidelines introduce a more "Protestant" view into what has to be disclosed. IBA Guidelines Article 6 provide: the fact that the activities of the arbitrator's law firm involve one of the parties shall not constitute a source of such conflict or a reason for disclosure, and if one of the parties is a legal entity which is a member of a group with which the arbitrator's law firm has an involvement, this fact shall not constitute a source of a conflict of interest or a reason for disclosure *[IBA Guidelines on conflict of interest, Pg. 23]*.
86. Besides, the last section of IBA Guidelines divides a non-exhaustive list of circumstances into four colors, Orange list is a non-exhaustive enumeration of specific situations which give may rise to justifiable doubts as to arbitrators in the eyes of parties, and it assigns a duty of disclosure of those circumstances on arbitrators. Once the properly disclosed, the parties will be deemed to have waived their rights if they fail to make challenge in relation to the disclose circumstances within time limit *[Redfern & Hunter, international arbitration, Pg. 271]*.

87. Likewise, the green list contains examples of situation where no appearance of conflict of interest arises from an objective view point, thus there is no duty on an appointed arbitrator to disclose such circumstances [*Ibid*].
88. Moreover, past business relationships will not operate as an absolute bar to acceptance of appointment, unless they are of such magnitude or nature as to be likely to affect a prospective arbitrator's judgment *[IBA rules of ethic for arbitrators, Pg. 2]*.
89. 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]*.
90. In addition, the indirect connection between an arbitrator and his law firm should not be considered a ground for disqualification as the arbitration company is relatively small and in many case arbitrators are selected because they are known to the lawyers involved, either personally or by reputation *[Lew, Mistelis, Kroll, Comparative international commercial arbitration, Pg. 267]*.
91. According to General standard 5 (a); the activities of an arbitrator's law firm and the relationship of the arbitrator with the law firm, should not necessarily constitute a source of such conflict, or a reason for disclosure. Similarly, if one of the parties is a member of a group with which the arbitrator's firm has a relationship, such fact shall not necessarily constitute a source of a conflict of interest, or a reason for disclosure *[IBA Guidelines on conflict of interest, General Standard 5 (a), Pg. 13]*.
92. None of the requirements of red list are met in the present case *[IBA Guidelines on conflict of interest, Pg. 22]*, it means contrary to respondent's allegations Mr. Prasad is impartial an independence of either of the parties

93. **Conclusion of the second issue:** Even if, the arbitral tribunal has the authority, Mr. Prasad should be involved in the proceedings, since he has fulfilled his disclosure obligations under article 11 of UNCITRAL arbitration rules. And Mr. Prasad is impartial of either of the parties, because IBA Guidelines are not applicable in the present case, also respondent has not met the burden of proof demonstrating justifiable doubts as to his impartiality or independence.

ISSUE III: CLAIMANT'S STANDARD CONDITIONS GOVERN THE CONTRACT, SINCE THEY ARE ACCEPTED BY RESPONDENT.

94. CLAIMANT and RESPONDENT met each other and both side discussed about having business relationship and RESPONDENT liked CLAIMANT's principle of ethical sustainability *[St Cl. Pg. 3]*. Later, CLAIMANT received an invitation to participate in tender process, *[Exh. C1, Pg. 8]*, than CLAIMANT submitted its tender document along with some changes related to the price, quantity, place of delivery, offer number and payment terms stating that the contract will be governed by its general condition of sale *[Exh. C4, Pg. 16]*.And also RESPONDENT accepted changes suggested by CLAIMANT and awarded the contract *[Ex, C5. Pg. 16]*, therefore, CLAIMANT's standard conditions should govern the contract under CISG and

UNIDROIT principles [**A**], and also RESPONDENT has accepted CLAIMANT's offer of standard conditions to govern the contract**[B].**

A. CLAIMANT's standard conditions should govern the contract under CISG and UNIDROIT principles

95. The parties have agreed that this agreement is governed by UN convention on international sale of goods (CISG) and issues not dealt by CISG, UNIDROIT Principles are applicable *[Exh. C2, Pg. 12]*. Schlechtriem and Butler, leading scholars, further elaborate that the actual intent of the parties will determine the meaning of the statements or other legally relevant conduct of the parties *[Schlechtriem/Butler, P.56]*.Therefore, CLAIMANT intended that the contract should be governed by its general condition of sale under article 8 of CISG [**a**], and also the parties' common intention was to apply CLAIMANT's general condition of sales pursuant to UNIDROIT Principles [**b**]

a. CLAIMANT intended to apply its general condition under article 8 of CISG

96. CLAIMANT's general condition should govern the contract pursuant to article 8 of CISG, taking into account the common intention of the parties.
97. Under Art. 8(1) CISG the common intention is "the state of mind of the parties at the time of the conclusion of the contract" *[Commentary on PICC, p.498]*.
98. Article 8(1) allows for inquiry into the subjective intent of a party as long as the other party '*knew or could not have been unaware*' of it [*Art 8(1), CISG; Farnsworth, p. 98*]. Such inquiry is permitted when the subjective intent of the party had been manifested expressly [*Office furniture case*].
99. Moreover, Article 8(1)'s use of the term "*knew or could not have been unaware*" denotes that the intent was easy to discern, or, respectively, the circumstances practically compelled an inquiry *[Schlechtriem/Schwenzer, p. 154 and also fn 86]*.
100. Furthermore, when determining the understanding of a reasonable third person, all relevant circumstances have to be considered. In this regard, special weight is attached to the usual meaning of the words used by the parties [*HG Zürich, 24 Oct 2003; OLG Dresden, 27 Dec 1999; Staudinger /Magnus, Art. 8 para. 24; Schlechtriem/Schwenzer/Schmidt-Kessel, Art. 8 para. 41]*.
101. In this regard, Usages prevail over the principles, once they are applicable in a given case, prevail over conflicting provision contained in the principles, because they bind the parties as implied terms of the contract as a whole or single statements or other conduct on the part of one of the parties. *[UNIDROIT principles, Pg. 28]*.
102. In the present case, the CLAIMANT submitted its tender documents along with some changes stating that the contract will be governed by its general condition of sale *[Exh. C4, Pg. 16]*. And also RESPONDENT accepted changes suggested by CLAIMANT and awarded the contract *[Ex, C5. Pg. 16],* therefore, CLAIMANT's standard conditions should govern the contract under 8 of CISG.

b. The parties' common intention was to apply CLAIMANT's general condition of sales pursuant to UNIDROIT Principles.

103. As stated above the parties have agreed that issues not dealt by CISG, UNIDROIT Principles are applicable. *[Exh. C2, Pg. 12]*. And article 4.1 and 4.2 refer to the common intention and interpretation of the contract.
104. Where there is a question of the scope, validity, or existence of an arbitration agreement, intent of the parties is to be used by the Tribunal for interpretation of the agreement *[Lew, Mistelis, & Kroll, p. 150]*.
105. Same as, Based 4.1, and 4 (3) of UNIDROIT principles, contract shall be interpreted based on the common intention of the parties considering the circumstances. The circumstances include negotiations, conduct of the parties after the conclusion of the contract, the nature and purpose of the contract, and the meaning commonly given to the terms and expressions in the trade concerned between the parties. *[UNIDROIT Principles, Pg. 138]*.
106. The invoices were made reference to the general condition of sale of CLAIMANT*[PO2, Para. 24, Pg. 52]*, and there was no discussion between the parties concerning CLAIMANT's sales offer and first delivery *[PO2, Para. 26, Pg. 52]*, it means there was a common intention between the parties and RESPONDENT knew about CLAIMANT's intent.
107. Furthermore, in order to find the common intention of the parties, regard is to be given to relevant circumstances such as; preliminary negotiations between the parties, the nature and purpose of the contract, practices and usages *[UNIDROIT Principles, Pg. 140]*.
108. Here, the CLAIMANT uses for all its offers the form also used in the present case (C 4) and sent with the accompanying letter of 27 March 2014 (C 3) to RESPONDENT. In the main part of the offer form, (Originator – Expiry date of offer), CLAIMANT then inserts the main commercial terms of its offer, as he has done here (parts in italics). If the offer is not subject to any special terms CLAIMANT either leaves that part blank or explicitly states that no such special terms exist, by inserting phrases such as the "not applicable" used in C 4 *[PO2, Para. 28, Pg. 52]*.
109. Therefore, CLAIMANT's general condition of sales should govern the contract, since parties' common intention was governing the contract by CLAIMANT's general conditions.

B. RESPONDENT HAS ACCEPTED CLAIMANT'S STANDARD CONDITIONS TO GOVERN THE CONTRACT

110. As stated above the common intention of the parties was the applicability of CLAIMANT's general condition of sales, because RESPONDENT has accepted CLAIMANT's offer without objecting to them under article 19 of the CISG [**a**], and also CLAIMANT's offer became effective after accepting by RESPONDENT under article 19 of the CISG [**b**]

a. RESPONDENT accepted CLAIMANT's offer without objecting to them under Article 19 of CISG

111. Respondent's invitation to tender cannot be counted as an offer, because RESPONDENT has accepted CLAIMANT's offer without objecting them.

112. An invitation to tender cannot be accepted as an offer, because the distinction between an offer and such invitations is that invitations to tender are related proposals directed to more than one person or even to the public at large, thus there is no intention to be bound where a proposal is made to enter into negotiations *[Schwenzer, Hachem & Kee, Global sales and contract law, Pg. 557]*.
113. In addition, Art. 18 CISG, distinguishes between oral and written offers. Oral offers must be accepted immediately. As to written offers, all depends upon whether or notthe offer indicated a fixed time for acceptance: if it did, the offer must be accepted within that time, while inall other cases the indication of assent must reach the offerer 'within a reasonable time having regard to the circumstances *[Felemegas, Pg. 101]*.
114. Moreover, the offer becomes effective based on, first, on the offeree's dispatch of his assent, secondly, on the receipt by the offeror of the offeree's assent, and thirdly, the mere communication of the offeree's assent to the offeror *[Ibid]*.
115. Likely, the well-known scholar Felemegas says that an acceptance must correspond with each and every term of an offer in order to conclude a contract; this requirement is known as the "mirror image rule" because the acceptance must be the very reflection of the offer, as in a mirror *[Felemegas, Pg. 316]*.
116. Furthermore, the parties can agree to depart from the traditional of contract formation such agreement may be express or implied by reference to usages to which the parties have. *[Huber & Mulis, complete CISG treatise, Pg. 101]*.
117. Here in the present case, the CLAIMANT made some amendments insisting on applicability of its general condition of sales and offered to RESPONDENT and stated that "*the offer remains open until 11 Apr 2014."[Exh. C4, Pg. 16],* RESPONDENT raised no objection and awarded the CLAIMANT with the contract *[Exh. C5, Pg. 17]*
118. Consequently, CLAIMANT's standard conditions should govern the contract, because they are accepted by RESPONDENT without any objection.

b. CLAIMANT's offer became effective after accepting by RESPONDENT under article 19 of the CISG

119. Art 19 deals with the problem of acceptance that contains modifications to the offer *[Huber & Mulis, complete CISG treatise, Pg. 85]*
120. In addition, taking delivery of the offered goods may constitute assent to an offer and this may be so, even if fewer goods are delivered than had originally been contracted for. *[German Oberlandesgericht Frankfurt, 23 May 1995, CISG-Online NO. 185]*.
121. Likely, where the Offeree in his reply does not accept the terms offered but instead seeks to introduce new terms or in some other way qualifies or modifies the original offer, he will not generally be treated as having accepted the offer. Instead the reply will be treated as a rejection of the original offer and as amounting to a counter-offer on the terms set out in the reply *[Huber & Mulis, complete CISG treatise, Pg. 88; Schlechtriem & Butler, UN law on international sales, Pg. 80]*.

122. Moreover, CLAIMANT's letter of acknowledgment was just a signed form which was provided among tender documents *[PO2, Para. 25, Pg. 52]*, it means the signed letter of acknowledgement cannot have any effect on respondent's acceptance of CLAIMANT's offer.

123. Besides, in the case the battle of the form happens which is an expression that refers to a situation in which the parties exchange general conditions, some scholars believe the *last-shot rule* applies, but others prefer *knock out rules* to be applied. In both cases, it is widely accepted that the last person who send his form is considered to control the terms of the contract *[Viscasillas, "Battle of the Forms under the CISG: A Comparison with Section 2-207 Ucc and the UNIDROIT Principles," Pace Int'l. L. Rev. (1998), vol. 10, no. 1, pp. 97–155]*.

124. Same as, an example of the application of this rule is the following: a German buyer ordered doors that had to be manufactured by the seller according to the buyer's specifications. The seller sent the buyer a confirmation letter that contained his general conditions of sale on the back. Subsequently, the seller delivered the merchandise and the buyer accepted it. In this case, the seller's confirmation letter was considered to be a counter-offer that was implicitly accepted by the buyer's conduct when he accepted the merchandise. [*Ibid*]

125. In a German case, the court treated the seller's delivery of 2,700 pairs of shoes as a rejection of the buyer's offer to buy 3,240 pairs. However, the delivery of 2,700 constituted a counter offer which was accepted by the buyer when he took the delivery *[German Oberlandesgericht Frankfurt, 23 May 1995, CISG-Online NO. 110]*.

126. In the present case, claimant made some changes and offered them to the RESPONDENT insisting that the contract would be governed by its general condition [*Exh. C4, Pg. 16*], RESPONDENT did not raise any objection and accepted the changes suggested by claimant [Exh. C5, Pg. 17].

127. Consequently, the contract should be governed by claimant's standard condition of sale, since RESPONDENT has accepted them without any objection.

128. **Conclusion of the third issue:** claimant's general conditions should govern the contract, since respondent has accepted claimant's general condition under article 19 of the CISG, and also their common intention was to apply claimant's general condition of sales under article 8 of the CISG.

ISSIE IV: EVEN IF RESPONDENT'S GENERAL CONDITIONS ARE APPLICABLE, CLAIMANT DELIVERED CONFORMING GOODS UNDER ARTICLE 35 OF THE CISG AND IS ENTITLED TO THE FULL PURCHASE PRICE.

129. In accordance with the contract, the CLAIMANT made its first delivery on 1 May 2014, there were no problem concerning the deliveries in 2014, 2015 and 2016 *[St Cl, Para. 6, Pg. 5]*, surprisingly, RESPONDENT informed CLAIMANT about deforestation in Ruritania *[Exh. C6, Pg. 18]*, although, CLAIMANT had fulfilled all its obligations under the contract and wanted to solve the dispute amicably, but RESPONDENT terminated the contract unjustifiably *[Exh. C10, Pg. 22]*.

130. Therefore, even if respondent's general conditions are applicable, CLAIMANT delivered conforming goods under article 35 of the CISG, thus the Products Delivered by CLAIMANT to

RESPONDENT Are In Conformity With the Requirement of Contract and CISG **[A]** and also, CLAIMANT is entitled to the full purchase price under CISG. [**B**]

A. The Products Delivered by CLAIMANT to RESPONDENT are in Conformity With the Requirement of Contract and CISG

131. The Products Delivered By CLAIMANT To RESPONDENT Are In Conformity With The Requirement Of Contract And CISG. CLAIMANT satisfied its article 35 obligations by using its best efforts to ensure compliance of its suppliers with its general conditions and code of conduct.**[a]**, Even if the goods are not conforming with Respondent's general conditions, Article 39 requires indication within a reasonable time of the nonconformity **[b]**.

a. CLAIMANT satisfied its article 35 obligation by using its best efforts to ensure compliance of its suppliers with its general conditions and code of conduct.

132. Article 35 employs three subsections to define the seller's obligations. Article 35(1) establishes the primacy of the parties' contract and of party autonomy in defining the seller's obligations. It provides, "The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract." Article 35(2) describes certain implied conformity obligations relating to the capabilities and packaging of the goods *[Schwenzer, international commerce and arbitration, Volume 15, Pg. 176]*.

133. In addition, the CLAIMANT satisfied its Article 35 obligation by using its best effort to ensure compliance of its suppliers with its general conditions and code of conduct. Both the parties agreed on CISG to govern the merit part of this case in arbitration *[Exh. C2, Clause 19, choice of law, Pg.12]*.

134. In accordance with article 35 of CISG; the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Which CLAIMANT has already done the same. The contract requires goods of a particular quantity, quality or description, or requires that the goods be contained or packaged in a particular manner, one must refer to general rules for determining the content of the parties' agreement *[CISG Digest, Pg.145]*.

135. Likely, the CLAIMANT has delivered the goods in accordance with contract and also its specific terms and conditions which is mentioned in its sale offer *[Exh. C4, Pg.16]*. CLAIMANT itself had complied with its entire obligations under the contract including using its best efforts to ensure that its suppliers complied with the global compact principle which had been certified annually *[Exh. C8, Para.2, Pg. 20]*.

136. In this regard, article 35, along with related articles governing the buyer's obligation to examine delivered goods (Article 38) and to notify the seller of any claimed lack of conformity (*Article 39*), has been invoked frequently in litigation and applied in a large number of available decisions. *[Schwenzer, Pg. 177]*.

137. Moreover, the buyer "Respondent" loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller with a short reasonable time *[Butler, A practicable guide to the CISG, Pg. 11]*.
138. Here in the present case, first, CLAIMANT has taken regular audits for its suppliers so that they should comply with the principle Global Compact *[Exh. C1,Pg. 8]*, secondly, the goods were in conformity with the contract in line with the requirement shown in CLAIMANT's general condition of sales as accepted by RESPONDENT*[Exh. C4, Pg. 16]*, and finally the goods were delivered for the required purpose of respondent, because the cakes made part of a special marketing campaign for the opening of three new shops where every customer could get a fairly traded coffee and a piece of cake or a roll *[PO2, Para. 38, Pg 54]*.
139. Consequently, from the above illustration and commentaries, it could be assumed that CLAIMANT has taken its best efforts and the cakes were delivered in line the requirements of the contract for the required purpose.

b. Even if the goods are not conforming to Respondent's general conditions, Article 39 requires indication within a reasonable time of the nonconformity.

140. Even if the goods are not conforming to Respondent's general conditions, Article 39 requires indication within a reasonable time of the nonconformity**,** thus RESPONDENT cannot rely on the conduct of CLAIMANT's supplier in alleging a breach by CLAIMANT **[1]**, and RESPONDENT had no right to avoid the contract as there was no fundamental breach by CLAIMANT **[2].**

1. RESPONDENT should give notice about non conformity of the goods, since RESPONDENT cannot rely on the conduct of CLAIMANT's supplier in alleging a breach by CLAIMANT

141. RESPONDENT cannot rely on the conduct of CLAIMANT's supplier in allegation a breach by CLAIMANT.
142. In this regard, when goods are delivered, Article 38(1) imposes an obligation on the buyer to "examine the goods," or cause them to be examined, within as short a period as is practicable in the circumstances *[Flechtner, conformity of the goods, Pg. 12; Hubber & Mullis, Pg. 147]*.
143. In addition, after the period for the examination according to Art. 38(1) ends, the period of timely notice according to Art.39 (1) begins or upon delivery where the lack of conformity was evident without examination *[CISG-AC Opinion No.2, Examination of the goods and notice of non-conformity, Art. 38 & 39]*.
144. Likely, Art. 39 of the CISG provides that a buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time *[Butler, A practicable guide to the CISG, Pg. 32]*.
145. Besides, CLAIMANT and its suppliers have very good reputation in the market and over the last five years there have been no reported cases about a violation of the UN Global Compact Principle by CLAIMANT or any of its suppliers *[PO2, Para. 34, Pg. 54]*.

146. Moreover, Art.39 (1) provides that the goods are presumed to be accepted if the buyer does not give notice of non-conformity within a reasonable period of time, this rules is applicable where the goods are deficient [*Ibid*].

147. Same as, in order to be able to assess whether the quality is proper, the buyer "respondent" must examine the goods within a short period as is practicable in the circumstances, the time starts to run from the time of delivery *[Butler, A practicable guide to the CISG, Pg. 11; Hubber & Mullis, Pg. 152]*.

148. Furthermore, if the buyer fails to examine the goods within a short reasonable period of time, it means that the goods are in conformity with the contract, so the buyer loses all his rights relating to the lack of conformity *[Hubber & Mullis, Pg. 149; ; Schlechtriem & Butler, UN law on international sales, Pg. 127]*.

149. Relatively, the drafters of the Convention intended that the buyer should act quickly. Indeed courts have stressed that the purpose of such a short period for examination is to ensure whether the buyer accepts the goods as conforming and also that the examination is complete before the condition of the goods changes, so that the seller is no more responsible for the lack of conformity *[(German) Oberlandesgericht Karlsruhe 25 June 1997, CISG-Online No. 263; (German) Oberlandesgericht Köln 21 August 1997, CISG-Online No. 290; (Dutch) Arron-dissementsrechtbank Zwolle 5 March 1997, CISG-Online No. 545]*.

150. CLAIMANT has delivered 600,000 chocolate cakes between 16 December 2016 and 27 January 2017 [St Cl, Para. 16, Pg. 6], it has been one month that CLAIMANT has delivered the chocolate cakes and RESPONDENT has raised no objection, but suddenly informed CLAIMANT about deforestation on 27 January 2017, based on news report without any prior notice *[Exh. C6, Pg. 18]*.

151. In CLOUT Case N0. 107, which was between Danish exporter and an Austrian buyer, the buyer refused to pay the price and argued that the seller committed a fundamental breach of the contract because the flowers he purchase did not bloom throughout the entire summer. The Innsbruck court of Appeal rejected the buyer's claim and denied the breach because the buyer failed to prove that the seller had guaranteed that the flowers would bloom through the entire summer *[CLOUT Case N0. 107, 1 July 199,]*.

152. In the present case, CLAIMANT has clearly used its best efforts to ensure compliance with the relevant standard. CLAIMANT has made such a production method part of its contract with its suppliers and had regularly audited the supplier's main production facility *[Exh. C8, Pg. 20]*, but RESPONDENT without any prior notice suddenly informed CLAIMANT about non-conformity of the goods and terminated the contract *[Exh. C6, Pg. 18]*.

153. As a result, RESPONDENT cannot rely on the conduct of CLAIMANT's supplier alleging breach of contract by CLAIMANT, because RESPONDENT has not fulfilled its obligations under Art. 38&39 of the CISG.

2. RESPONDENT had no right to avoid the contract as there was no fundamental breach by CLAIMANT

154. RESPONDENT had no right to avoid the contract as there was not fundamental breach by CLAIMANT**.**

155. In this regard, several commentators suggest that in case of delivery of defective goods there is no fundamental breach if the seller has made serious offer to cure the defect *[Leonardo Graffi, the notion of fundamental breach in the light of CISG, Pg. 6]*

156. Same as, there is initially no fundament breach of contract in cases in which the seller has tried to repair the goods, deliver substitute goods or remove defects within a reasonable time *[Schlechtriem, Pg. 183]*.

157. The cakes were produced using the design proposed by CLAIMANT as agreed in the contract *[PO2, Para. 39, Pg. 54]*, it means CLAIMANT has fulfilled its contractual obligations.

158. On the other hand, in order for a breach to be fundament a breach must cause detriment that substantially deprives the aggrieved party of what he is entitled to expect under the contract *[Koch, The concept of fundamental breach under the CISG, Pg. 25]*.

159. At this point, the CISG does not any definition for detriment, it is also unclear whether the detriment requires actual injury, damage or loss. It also does not give any examples of detriment that rises to the level of a fundament breach, so one cannot rely on detriment stating fundamental breach, since it is not clear [*Ibid*].

160. Ruritania had a good reputation on the market due to two model farms it was operating in Ruritania which showed how cocoa could be produced in a sustainable way protecting the rainforest [PO2, Para. 32, Pg. 53], it means CLAIMANT has complied with the requirement of the contract, since the contract is not precise enough at this point.

161. Furthermore, the buyer has no right to avoid the contract unless there is fundamental breach by the seller, the breach is fundamental if the creditor does not get what he could have expected under the contract and the party in breach could foresee the condition *[Schlechtriem & Butler, UN law on international sales, Pg. 98]*.

162. Here, CLAIMANT has taken its best efforts to ensure that the goods are produced in line with the requirements agreed upon, thus RESPONDENT has no right to terminate the contract, since there was no fundamental breach of contract by CLAIMANT.

B. CLAIMANT IS ENTITLED TO THE FULL PURCHASE PRICE BASED ON THE CONTRACT AND CISG

163. CLAIMANT made its first delivery on 1 May 2014, as agreed in the contract and there were no problems concerning the deliveries in 2014, 2015 and 2016 [St Cl, Para. 6, Pg. 5]. RESPONDENT confirmed the delivery, and even had apparently already sold the delivered chocolate cakes and surprisingly terminated the contract on 12 Feb 2017 relying on business news about deforestation in Ruritania [Exh. C10, Pg. 22], therefore, CLAIMANT incurred unfavorable costs, which were all result of RESPONDENT's breach of contract and are recoverable under article 53 of CISG [**a**] and also, RESPONDENT has to fulfill its obligation of

full payment under article 54 of CISG[**b**]same as, based on Art. 62 of CISG RESPONDENT is obliged to carry out its obligation of full payment to the CLAIMANT[**c**].

a. CLAIMANT incurred unfavorable costs, which were all result of RESPONDENT's breach of contract and are recoverable under article 53 of CISG.

164. CLAIMANT's is entitled to the full purchase price under article 53 of CISG, since Art.53 of CISG states, "The buyer must pay the price for the goods as required by the contract and this Convention."*[CISG, Art.53]*.
165. Similarly, It is further supported by the commentaries of well-known legal scholars, Schlechtriem and Maskow that the most important obligations of a buyer in a sales contract are to take delivery and to pay the full payment *[Schlechtriem, P.39; Maskow, P.384, para2.2]*.
166. Likewise, Leif Sevon, a leading scholar, also says, "The main obligations of the buyer taking delivery and making the full payment of purchase price" *[Sevon, P.207]*. Art.53 establishes the central obligation of the buyer called "*Essentialianegotii*" *[Butler/Harindranath, P.797]*. Based on Art.53 of CISG, RESPONDENT has the obligation to pay the full purchase price for the fan blades.
167. Furthermore, Under Article 53 of the CISG, obligations of the buyer are; taking delivery and paying the full purchase price *[Gabriel, Sarcevic & Vokeneds, com-on art. 53 CISG]*, "Article 53 recognizes the primacy of the contract in defining the parties' obligations" [Gabriel, P.273]. Similarly, there have been numerous court decisions with the judgments that obliged RESPONDENT to full payment of the purchase price under article 53 of CISG [*CLOUT case No. 652; CLOUT case No. 608; Agriculture products case; Kantonsgericht Schaffhausen*].
168. The buyer's "RESPONDENT's" primary obligation under a contract of sale is to pay the purchase price for the goods delivered and RESPONDENT is obliged to pay the full purchase price at the deadline agreed *[Butler, A practicable guide to the CISG, Pg. 16]*.
169. Here in the present case, CLAIMANT made its first delivery on 1 May 2014, as agreed in the contract and there were no problems concerning the deliveries in 2014, 2015 and 2016 *[St Cl, Para. 6, Pg. 5]*.RESPONDENT confirmed the delivery, and even had apparently already sold the delivered chocolate cakes and surprisingly terminated the contract on 12 Feb 2017 relying on business news about deforestation in Ruritania *[Exh. C10, Pg. 22]*.
170. Based on the contract, Art.53 of CISG and the aforementioned commentaries of leading scholars, RESPONDENT is obliged to pay the full purchase price to the CLAIMANT.

b. RESPONDENT has to fulfill its obligation of full payment under article 54 of CISG.

171. RESPONDENT should comply with all steps enabling payment, since article 54 of CISG obliges RESPONDENT to take all the initial steps for making full payment, article 54 of CISG states as; "the buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made".

172. In this regard, article 54 is further elaborated in a commentary by a leading scholar, Gabriel, which says that, "the buyer's obligation is not only limited to owing the money but rather the obligation also includes all steps which are necessary to ensure that the payment is actually made and the buyer must bear the costs for measures necessary to enable him to pay the price" *[Gabriel, P.274]*.
173. Moreover, the invoices were made in accordance with the CLAIMANT's general condition of sale as stipulated in the footer and accepted by RESPONDENT *[Exh. C4, Pg. 16; PO2, Para. 24, Pg. 52]*
174. The buyer by not taking enabling steps for making the full payment is in breach of contract. Therefore, the seller is entitled to the remedies in case of breach of contract by the buyer *[Schlechtriem & Schwenzer, P.813]*.
175. Furthermore, the buyer must pay the price either as fixed in the contract or as determined according to contractual terms, the buyer's obligations includes all the events agreed upon in the contract to enable payment to be made, such as to provide a letter of credit and to comply with relevant (domestic) laws, in particular currency-exchange regulations *[Schlechtriem, Uniform Sales Law com-on art. 54 CISG]*.
176. Similarly, buyer shall compensate seller for the full purchase price of goods *[CIEATAC Arbitration pro (Leather Case), Paper handkerchiefs production line case/Downs Investments v. Perwaja Steel]*.
177. Here, RESPONDENT agreed to pay the full purchase price by letter of credit to the CLAIMANT within thirty days *[Exh. C3, Pg. 12]*, but RESPONDENT denied to make any payment *[Exh. C10, Pg. 22]*, therefor, CLAIMANT is rightful to enforce RESPONDENT to make the payment in full, and RESPONDENT is obliged to take all necessary steps for making payment.

c. Based on Art. 62 of CISG, RESPONDENT is obliged to carry out its obligation of full payment to the CLAIMANT.

178. Article 62 of the CISG gives the CLAIMANT the right to claim the full purchase price from the Respondent, Art.62 of CISG states, "*The seller may require the buyer to pay the price unless the seller has resorted to a remedy which is inconsistent with this requirement*".
179. Similarly, It is insisted in commentaries by well-known scholars that denying to pay the full amount of the purchase price is a breach of contract which entitles the seller (CLAIMANT) to the remedy under Art.62 of CISG *[Butler/Harindraanath & F. Bell, P.798, 858; Butler, Pg. 324; Schlechtriem & Schwenzer, P.802; Sevon, P.205]*.
180. In addition, the well-known scholar Knapp says that, "*The remedy provided under Art.62 of CISG does not create any new right to the seller or a new obligation of the buyer. It is simply a pursuance of their initial rights and obligations under the contract which the seller will basically require performance under Article 62 by initiating a legal action against the buyer*" *[Knapp, P.453, para2.2]*.
181. Moreover, Article 62 of the CISG, recognizes that the seller's primary concern is to obtain performance, authorizes him to require performance whenever the buyer fails to perform any of his obligations in due time *[Knapp, Comm. on Art.62 of CISG]*. Likewise, in a case under

Article.62 of CISG, it is held that it is the right of the seller "CLAIMANT" to compel the buyer "Respondent" to pay price in full *[Youli v. Gold star case]*.

182. In the case at hand, the CLAIMANT has delivered 600,000 chocolate cakes, 20,000 per day for thirty days excluding the holidays or non-contracted days *[St of Cl, Para. 16, Pg. 6]*, and as per contract RESPONDENT has to pay the full purchase price within 30 days *[Exh. C4, Pg. 16]*. But RESPONDENT against the contract, rejected to make any payment *[Exh. C10, Pg. 22]*.
183. Consequently, CLAIMANT approached the arbitral tribunal to make RESPONDENT fulfill its contractual obligations by paying the full purchase price to the CLAIMANT.

184. **Conclusion of the fourth issue:** Even if, respondent's general conditions are applicable, claimant has delivered conforming goods under article 35 of the CISG and respondent has not met his notice obligations under article 39 of the CISG, finally, claimant is entitled to the full purchase price under article 53, 54 and 62 of the CISG.

REQUEST FOR RELIEF

In the light of the submissions made above, while reserving the right of further claims, CLAIMANT respectfully requests the Tribunal to find that:

1) The arbitral tribunal is not authorized to decide on the challenge of Mr. Prasad raised by respondent, Even if, the tribunal has the authority to decide on the challenge, Mr. Prasad should be a member of the tribunal.
2) In the case, the arbitral tribunal has the authority, Mr. Prasade should be involved in the arbitral proceedings
3) Claimant's standard conditions govern the contract, since they are accepted by respondent under article 8 and 19 of the CISG.
4) Even if respondent's general conditions are applicable, claimant delivered conforming goods under article 35 of the CISG and is entitled to the full purchase price.

Respectfully Submitted
Council for Claimant