Twenty–Fifth Annual Willem C. Vis International Commercial Arbitration Moot

Memorandum for Claimant

Qatar University College of Law

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

Counsel:

Amna Saif M S AlNaimi ◆ Aisha Ali Alhammadi ◆ Maryam Ahmed AlMaraghi
Maryam Yaqoub Al Jefairi ◆ Reihana Khoja ◆ Reem Hany Al Raeesi
Nada Salman A Eid ◆ Sara Ibrahim M A Al-Obaidli
Hanan Abdulwahed Abdulrahman ◆ Hiba Sekoura Oussedik

Doha, Qatar

TABLE OF CONTENTS

STATEMENT OF FACTS

CLAIMANT	Delicatesy Whole Foods Sp (hereafter "CLAIMANT") is a medium–sized manufacturer of high–end bakery products. CLAIMANT is registered in Equatoriana. CLAIMANT is a social enterprise, but places greater importance on the quality of the final product than sustainable production. CLAIMANT is a member of the Global Compact.
RESPONDENT	Comestibles Finos Ltd (hereafter "RESPONDENT"), is the leading gourmet supermarket chain in Mediterraneo. RESPONDENT's products are generally sourced locally, if possible from organic farms or plantations.
March 2014	RESPONDENT approached CLAIMANT at Cucina, the annual Danubian food fair. CLAIMANT and RESPONDENT discussed the possibility of entering into a business arrangement based on the high quality of CLAIMANT's products and the parties' shared business values.
10 March 2014	RESPONDENT sent an Invitation to Tender to CLAIMANT, along with the supporting Tender Documents.
27 March 2014	CLAIMANT submitted its tender offer to RESPONDENT, noting that the tender offer differed from the requirements of RESPONDENT's Tender Documents on three terms: product specifications, payment terms, and the source of general conditions (CLAIMANT's instead of RESPONDENT's).
Apr. 7, 2014	RESPONDENT informed CLAIMANT that its tender offer had been accepted, including the modified terms.
1 May 2014	CLAIMANT made its first delivery. There were no problems concerning any deliveries in 2014, 2015, and 2016.
May 2014–Jan. 2017	The parties performed as agreed under the contract, with no issues.
23 Jan. 2017	Michelgault, the leading business paper in Equitoriana, published an article on the report of a UNEP special rapporteur investigating deforestation in Ruritania, as well as widespread fraud and corruption in the various agencies tasked with protecting the remaining rainforest.
27 Jan. 2017	CLAIMANT was surprised to receive an email from RESPONDENT halting deliveries. In the email, RESPONDENT demanded confirmation that

CLAIMANT's suppliers all complied with the Global Compact Principles. RESPONDENT threatened to terminate the contract, and stated that until the issue was resolved no further payments would be made nor deliveries accepted.

27 Jan. 2017 — CLAIMANT replied the same day, stating that it was confident its Ruritanian cocoa supplier would not be party to any fraudulent scheme, but that it would immediately investigate and report back to RESPONDENT. CLAIMANT also informed RESPONDENT that it did not believe this concern justified RESPONDENT's decision to no longer perform under the contract.

10 Feb. 2017 — CLAIMANT regretfully informed RESPONDENT that its cocoa supplier, Ruritania Peoples Cocoa GmbH, had in fact been involved in the scandal. CLAIMANT stated that although CLAIMANT had complied with its obligations under the contract, it would be willing to take back the most recent shipment in the interest of maintaining a good relationship. CLAIMANT also informed RESPONDENT it had already secured a new supplier for sustainably–sourced cocoa beans.

12 Feb. 2017 — RESPONDENT rejected CLAIMANT's offer, and terminated the contract. RESPONDENT refused to submit its last payment owed, stating it would withhold the payment as an offset against any damages incurred due to CLAIMANT's alleged breach.

INTRODUCTION

1. CLAIMANT and RESPONDENT have enjoyed a long and profitable business relationship. The unfortunate behavior of one of CLAIMANT's suppliers has placed an unnecessary stain on this fruitful relationship. However, the fraud perpetuated by Ruritania Peoples Cocoa GmbH is not grounds to terminate the parties' agreement.

2. CLAIMANT has taken every possible precaution to ensure that its cocoa beans were sustainably sourced. While CLAIMANT understands and shares RESPONDENT's disappointment, the fraud was masterminded by a small number of powerful businessmen and politicians in Ruritania. As such, it was not something that could have been easily discovered. This conspiracy eluded even CLAIMANT's best efforts to monitor its suppliers. Incidentally, CLAIMANT's monitoring procedures had been previously reviewed and approved by RESPONDENT. And immediately after learning of this fraud, CLAIMANT terminated its relationship with Ruritania Peoples Cocoa GmbH and secured another supplier.

3. In the present dispute, RESPONDENT mistakenly claims that the parties had agreed to exclude UNCITRAL Rules Art. 13.4 from the arbitration clause. This is untrue. In the arbitration clause, the parties did agree to exclude involvement from any arbitral institution. However, an "appointing authority" under UNCITRAL Rules Art. 13.4 (and linearly, UNCITRAL Rules Art. 6) is not required to be an arbitral institution. As such, the language of the arbitration agreement does not support the conclusion that the parties ever shared such intent.

4. Furthermore, this Tribunal does not have the authority to decide on the challenge to Mr. Prasad because this Tribunal is not an "appointing authority" under UNCITRAL Rules Art. 13.4. In order to identify an "appointing authority," the parties must follow the procedure outlined in UNCITRAL Rules Art. 6.

5. However, if this Tribunal finds it does have the authority to decide on the challenge to Mr. Prasad, both Danubian arbitration law Art. 13.2 and the parties' arbitration clause support the

conclusion that Mr. Prasad is entitled to participate as a member of the Tribunal for that purpose **(Issue 1)**.

6. Moreover, this Tribunal should decide that Mr. Prasad is "impartial" and "independent" under UNCITRAL Rules Art. 12, and therefore should not be removed from the arbitral tribunal. No "justifiable doubts" exist as to Mr. Prasad's impartiality and independence to arbitrate the present case. Mr. Prasad has satisfied his disclosure obligations under UNCITRAL Rules Art. 11. Immediately after learning about Funding 12 Ltd (CLAIMANT's third–party funder), Mr. Prasad disclosed his past connections with two other subsidiaries of Findfunds LP (its main shareholder). Additionally, Mr. Prasad also immediately disclosed his new law partner's single contact with the main shareholder of CLAIMANT's third–party funder.

7. Furthermore, Mr. Prasad had no obligation to disclose the Vindobona Journal article, because it had been made available to RESPONDENT at the time of his appointment. Even more significantly, the article actually demonstrates Mr. Prasad's impartiality on the issue. Finally, The IBA Guidelines on Conflict of Interest do not apply to the present dispute; but even if this Tribunal decides to apply them there is no violation **(Issue 2)**.

8. In terms of the substantive issues, CLAIMANT's standard conditions govern the contract under CISG Art. 18. CLAIMANT's tender constituted an offer which RESPONDENT accepted. RESPONDENT's Invitation to Tender did not constitute an offer, but was instead an invitation to receive an offer from CLAIMANT. RESPONDENT's acceptance of CLAIMANT's offer constituted an acceptance of CLAIMANT's general conditions, which CLAIMANT has satisfied.

9. In the alternative, RESPONDENT's acceptance of CLAIMANT's tender constituted an acceptance of CLAIMANT's general conditions which were consistent with RESPONDENT's general conditions, but which "knocked out" inconsistent terms. In this case, the inconsistent terms are found in the parties' general conditions related to supplier certification requirements. More specifically, the provisions related to guarantee (RESPONDENT's) versus best efforts (CLAIMANT's) would have been knocked out. Additionally, there is substantial evidence that RESPONDENT was aware that

CLAIMANT had intended its General Conditions and Supplier Code of Conduct to govern the parties' agreement **(Issue 3)**.

10. However, even if this Tribunal finds that RESPONDENT's general conditions are applicable, CLAIMANT delivered conforming goods under CISG Art. 35 by using its best efforts to ensure compliance by its cocoa supplier. CLAIMANT reasonably agreed to the use of a "best efforts" standard, and would have never reasonably agreed to provide an absolute guarantee of performance by its suppliers.

11. The fact that RESPONDENT had previously reviewed and approved of CLAIMANT's monitoring procedures, along with the fact that the fraudulent and corrupt conduct of CLAIMANT's supplier was masterminded by a small number of powerful businessmen and politicians, provides further evidence that a best efforts standard is more appropriate for evaluating the present dispute than a guarantee standard **(Issue 4)**.

ARGUMENT

ISSUE 1: UNDER UNCITRAL RULES ART. 13.4, THIS TRIBUNAL DOES NOT HAVE THE AUTHORITY TO DECIDE ON THE CHALLENGE TO MR. PRASAD, AND IF IT DID HE WOULD BE ENTITLED TO PARTICIPATE AS A MEMBER OF THE TRIBUNAL FOR THAT PURPOSE.

(A) Under both CISG Art. 8 and UNIDROIT Art. 4, the parties never intended to exclude UNCITRAL Rules Art. 13.4 from the arbitration agreement.

(1) Under CISG Art. 8.1 and UNIDROIT Art. 4.1.1, RESPONDENT knew or could not have been unaware that CLAIMANT intended to include UNCITRAL Rules Art. 13.4 in the arbitration agreement.

12. CISG Art. 8.1 provides that "[s]tatements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware

what that intent was." Similarly, UNIDROIT Art. 4.1.2 states that "[a] contract shall be interpreted according to the common intention of the parties." To the extent the two instruments govern the same issues, the rules found in the UNIDROIT Principles are consistent with the provisions of the CISG. [*Bonell, p. 2, § 2(a)*]. As such, commentary on the former has strong persuasive value. [*Bonell, p. 2, § 2(a); Gabriel, p. 51*].

13. If a party knew or could not have been unaware of the other party's intent, that intent will prevail. [*Farnsworth, p. 99*]. All extrinsic evidence, facts, and circumstances of the case, including the negotiations, will be considered when determining the parties intention during the course of contract interpretation. [*CISG–AC, Op. No. 3, p. 3, § 3.2*].

14. The arbitration clause states that "[a]ny 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 without the involvement of any arbitral institution and excluding the application, direct or by analogy, of the UNCITRAL Rules on Transparency." [*Ex. C 2, p. 12*].

15. In this case, RESPONDENT knew or could not have been unaware that CLAIMANT intended to include UNCITRAL Rules Art. 13.4. The arbitration clause includes the "UNCITRAL Arbitration Rules," without qualification. This supports the conclusion that the parties intended to include the UNCITRAL Rules in their entirety, without excluding any of its articles.

16. Significantly, the arbitration clause explicitly excludes the UNCITRAL Rules on Transparency. This supports the conclusion that if the parties had intended to exclude UNCITRAL Rules Art. 13.4, they would have included similar language in the arbitration agreement to evidence that intent.

17. Furthermore, UNCITRAL Rules Art. 13.4 does not require the involvement of an arbitral institution, so there is no conflict with the arbitration agreement. On the contrary, the parties have broad discretion in determining an appointing authority. UNCITRAL Rules Art. 6.1 states that the parties may agree on a choice of "appointing authority." An appointing authority does

not need to be an arbitral institution, but can rather be comprised of "one or more institutions or persons." [*UNCITRAL Rules Art. 6.1*]. As such, the language of the arbitration agreement in no way supports the conclusion that the parties intended to exclude UNCITRAL Rules Art. 13.4.

(2) Under CISG Art. 8.2 and UNIDROIT Art. 4.1.2, a reasonable person in similar circumstances would have intended to include UNCITRAL Rules Art. 13.4 in the arbitration agreement.

18. CISG Art. 8.2 states "[i]f the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances." Similarly, UNIDROIT Art. 4.12 states "[i]f such an intention (common) cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances."

19. If there are no indicators of the parties' true intentions, CISG Art. 8.1 instructs the tribunal to apply the same understanding a reasonable person with similar experience would attribute to the statements and conduct of the other party in equivalent circumstances. [*PECL/CISG Art. 8, § 3(f)*].

20. In this case, the language of the arbitration agreement includes the UNCITRAL Arbitration Rules (with no express exclusions). It also explicitly excludes the UNCITRAL Rules on Transparency. This supports the conclusion that a reasonable person would have understood the arbitration agreement to include all articles in the UNCITRAL Arbitration Rules.

21. Additionally, the parties had agreed to ad hoc arbitration "without the involvement of any arbitral institution." The parties did not provide another mechanism for resolving disputes during the arbitration (such as challenge and removal of an arbitrator) *other than* the UNCITRAL Arbitration Rules.

22. This supports the conclusion that a reasonable person in similar circumstances would have *especially* desired to include UNCITRAL Rules Art. 13.4. Without UNCITRAL Rules Art. 13.4 (coupled with UNCITRAL Rules Art. 6), the parties would be left without recourse in the event of disagreement as to procedural aspects of the arbitration, which is precisely what has occurred in the present dispute.

23. Therefore, a reasonable person in similar circumstances would have come to the conclusion that the parties intended to include all of the UNCITRAL Arbitration Rules.

(3) Under CISG Art. 8.3 and UNIDROIT Art. 4.3, the parties' negotiations, practices, usages, and subsequent conduct demonstrate that CLAIMANT never intended to exclude UNCITRAL Rules Art. 13.4 from the arbitration agreement.

24. CISG Art. 8.3 states that "[i]n determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties." Similarly, UNIDROIT Art. 4.3 states that "[i]n applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including... preliminary negotiations between the parties..." As such, surrounding circumstances are relevant in determining the intent of the parties.

25. In this case, all surrounding circumstances related to the Agreement support the conclusion that the parties intended to include all provisions of the UNCITRAL Rules. There is nothing in the record indicating the parties had ever negotiated (or even had a conversation about) excluding UNCITRAL Rules Art. 13.4.

26. On the contrary, CLAIMANT had expressed concern about the composition of arbitral tribunals in ad hoc arbitration. [*Ex. C 1, p. 8*]. This provides additional evidence to support the conclusion that CLAIMANT would never have intended to exclude UNCITRAL Rules Art. 13.4. Significantly, CLAIMANT's concern relates to the very issue currently before this Tribunal.

27. In response, Ms. Ming's 10 March 2014 letter to CLAIMANT stated that RESPONDENT had checked with their legal department regarding CLAIMANT's concerns about ad hoc arbitration. [*Ex. C 1, p. 8*]. Ms. Ming reported that RESPONDENT's legal department had stated they had "never had any problems concerning the composition of arbitral tribunals" and that it "was confident that the existing arbitration clause would not cause any problems in its application in practice." [*Ex. C 1, p. 8*].

28. This statement would not make sense if the parties had intended to exclude UNCITRAL Rules Art. 13.4, other than to perhaps state that RESPONDENT had been lucky in the past and had never previously had any disagreements as to the composition of an arbitral tribunal. Because without UNCITRAL Rules Art. 13.4, the parties would be left with no mechanism for resolving such disagreements other than the courts, which would cause unnecessary additional delay and expense, and thereby undermine the primary purpose of arbitration.

29. Therefore, the circumstances surrounding the formation of the arbitration agreement support the conclusion that the parties had intended to include all of the UNCITRAL Arbitration Rules, *especially* Art. 13.4.

(B) This Tribunal is not an "appointing authority" under UNCITRAL Rules Art. 13.4.

30. Arbitral tribunals must be separately constituted, either by the parties' agreement or in line with the applicable rules or law. [*Born, p. 671*]. UNCITRAL Rules Art. 13.4 states that "[i]f, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority."

31. UNCITRAL Rules Art. 6.1 states that the parties may agree on an appointing authority, or that one of the parties may propose "one or more names or institutions." If the parties do not agree on an appointing authority within 30 days after proposing an appointing authority, a party may

request the secretary general of the Permanent Court of Arbitration at the Hague (PCA) to designate an appointing authority. [*UNCITRAL Rules Art. 6.2; see also Redfern/Hunter, p. 243*].

32. In this case, the arbitration agreement provides for the appointment of arbitrators, but does not designate an appointing authority in the event of disputes related to challenge and removal. [*Ex. C 2, p. 12; § 20*]. The UNCITRAL Rules include a safeguard to ensure that both parties are able to be heard, resolve conflicts, and efficiently reconcile their dispute. As such, in this case both parties should either reach agreement regarding an appointing authority, or they should request the secretary–general of the PCA to designate an appointing authority.

33. This supports the conclusion that this Tribunal currently lacks the authority to decide on the challenge of Mr. Prasad, because it has not been designated as an appointing authority under UNCITRAL Rules Art. 6 and Art. 13.4. Unless the parties agree that this Tribunal is the appointing authority under UNCITRAL Rules Art. 6.1, or the secretary–general of the PCA is petitioned under UNCITRAL Rules Art. 6.2 to identify this Tribunal as the appointing authority, this Tribunal lacks the authority to decide on the challenge to Mr. Prasad.

(C) If this Tribunal finds it does have the authority to decide on the challenge to Mr. Prasad, he is entitled to participate as a member of the Tribunal for that purpose.

34. One of the most fundamental principles governing international commercial arbitration is that of party autonomy. [*Fagbemi, p. 224*]. An essential aspect of party autonomy is the ability to select arbitrators who will resolve their dispute, or alternatively, to indirectly choose a means by which this selection can be made. [*Born, p. 3*]. Challenges to arbitrators have the potential to greatly delay arbitral proceedings, resulting in additional costs. [*Caron/Caplan, p. 285*].

35. In the absence of superseding authority, Danubian arbitration law Art. 13.2 gives the arbitral tribunal (including the challenged arbitrator) the authority to decide on a challenge to an arbitrator. [*Caron/Caplan, p. 285*]. Danubian arbitration law Art. 13.2 states that "[u]nless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge." Where the parties have failed to agree to a

different procedure, "the arbitral tribunal, including the challenged arbitrator, should decide the challenge as an initial matter." [*Holtzmann/Neuhaus, pp. 406–07*].

36. In this case, the parties have agreed that "[a]ny dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof" shall be decided by three arbitrators. [*Ex. C 2, p. 12*]. Each party is authorized to appoint one arbitrator, with the presiding arbitrator to be appointed by the party–appointed arbitrators. [*Ex. C 2, p. 12*].

37. As such, if this Tribunal finds it has authority to decide on the challenge to Mr. Prasad despite UNCITRAL Rules Art. 6 and Art. 13.4, then Mr. Prasad is entitled to participate in that decision under Danubian arbitration law Art. 13.2. He is a part of this Tribunal, even though he is currently under challenge by RESPONDENT.

38. Additionally, the language of the parties' arbitration agreement supports the same conclusion. If Mr. Prasad is excluded from participation, the principle of party autonomy will be undermined because CLAIMANT will have been deprived of its right to choose one of the three arbitrators required to participate in every decision related to the dispute between the parties. Therefore, Mr. Prasad is entitled to participate in this decision.

CONCLUSION OF THE FIRST ISSUE

39. Under UNCITRAL Rules Art. 13.4, this Tribunal does not have the authority to decide on the challenge to Mr. Prasad because this Tribunal is not an "appointing authority" under UNCITRAL Rules Art. 13.4. It is clear that the parties never intended to exclude UNCITRAL Rules Art. 13.4 from the arbitration agreement for three reasons. First, the language of the arbitration agreement is evidence that RESPONDENT knew or could not have been unaware that CLAIMANT intended to include UNCITRAL Rules Art. 13.4. Second, a reasonable person in similar circumstances would have reached the same conclusion. Third, the parties' negotiations, practices, usages, and subsequent conduct demonstrate that CLAIMANT never intended to exclude UNCITRAL Rules Art. 13.4 from the arbitration agreement. However, if this Tribunal finds it does have the authority to decide on the challenge to Mr. Prasad, both Danubian arbitration law

Art. 13.2 and the arbitration clause support the conclusion that he is entitled to participate as a member of the Tribunal for that purpose.

ISSUE 2: UNDER UNCITRAL RULES ART. 12, THIS TRIBUNAL SHOULD DECIDE THAT MR. PRASAD IS "IMPARTIAL" AND "INDEPENDENT" AND THEREFORE SHOULD NOT BE REMOVED FROM THE ARBITRAL TRIBUNAL.

(A) No "justifiable doubts" exist as to Mr. Prasad's impartiality and independence to arbitrate the present case.

(1) Mr. Prasad has satisfied his disclosure obligations under UNCITRAL Rules Art. 11.

40. UNCITRAL Rules Art. 11 states that "[w]hen a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances."

41. As such, a potential arbitrator has the obligation to disclose anything that may give rise to "justifiable doubts" as to their impartiality and independence. After appointment, the arbitrator has a continuing obligation to make such disclosures, as the need arises.

42. Although standards for impartiality and independence vary depending on the jurisdiction and/or arbitral institution, the various definitions share common themes. "The prevailing understanding is that impartiality refers more to the arbitrator's state of mind (subjective concept), while independence concerns the arbitrator's relationships with the parties or third persons (objective concept)." [*Von Goeler, p. 256*]. This highlights the fact that such concepts differ from one arbitrator to another, or even with the same arbitrator in different arbitrations.

43. Previous relationships with parties and/or the lawyers who represent them do not create justifiable doubts as to an arbitrator's impartiality and independence. [*Lew/Mistelis/Kröll, p. 258; Mullerat p. 2*]. "Frequently, lawyers are well acquainted with the arbitrators and it is on the basis of this knowledge, and past experience, that they are recommended for appointment as arbitrators." [*Lew/Mistelis/Kröll, p. 258; see also Mullerat p. 2*]. As such, arbitrators are often chosen *precisely because* of those relationships. [*Lew/Mistelis/Kröll, p. 258; Mullerat p. 2*].

44. Different levels of contact are acceptable in different jurisdictions. However, it is widely accepted that relationships do not alone constitute a threat to an arbitrator's impartiality. [*Lew/Mistelis/Kröll, p. 258; Mullerat p. 2*]. For example, a Swiss court held that an affiliation between an arbitrator and the lawyer of the appointing party was not grounds to question the arbitrator's impartiality. The court reasoned that appointed arbitrators are usually chosen based on previous knowledge of the arbitrator's work or previous dealings with them. [*X SA v. Y 28 July 2010*].

45. Similarly, public expressions of opinion on subjects related to the arbitration do not create a presumption of bias. "In almost every instance, statements of legal philosophy, interpretation, or approaches to particular issues are not considered even relevant to the arbitrator's independence or impartiality." [*Born*, p. 1888–89]. On the contrary, it is reasonable to expect that qualified arbitrators have, in fact, many opinions on subjects related to their areas of expertise. Arbitrators are working members of the legal profession. They are expected to be knowledgeable, and to develop opinions related to the subjects they arbitrate.

46. An arbitrator's impartiality is called into question only in the presence of concrete evidence of bias. [*Lew/Mistelis/Kröll, p. 258; Mullerat p. 2; see also PT Central Investindo v. Franciscus Wongso 30 September 2014*]. Simply having doubts about impartiality does not constitute grounds for removal of an arbitrator. [*PT Central Investindo v. Franciscus Wongso 30 September 2014*].

47. Similarly, independence involves freedom of thought without external influence. [*Schwarz/Konrad, p. 149*]. "Independence…refers to the relationship between the arbitrator and

the parties. Independence thus means the absence of a close, substantial, recent and proven relationship between a party and a prospective arbitrator." [*Schwarz/Konrad, p. 149*]. An independent arbitrator is one who is free to decide a dispute without external pressure from an appointing authority or any other party. [*Schwarz/Konrad, p. 149*].

(2) Immediately after learning of Funding 12 Ltd (CLAIMANT's third–party funder), Mr. Prasad disclosed his past connections with other subsidiaries of Findfunds LP (its main shareholder).

48. In this case, Mr. Prasad satisfied his continuing disclosure obligation. He disclosed the relationship with CLAIMANT's third–party funder as soon as he became aware of it. [*Declaration Prasad, p. 36*]. Mr. Prasad did not previously know about CLAIMANT's third–party funder. Even RESPONDENT concedes that it "has little doubts that Mr. Prasad had no involvement in this plot and was probably unaware that CLAIMANT had received funding from a third–party funder." [*Challenge, p. 38, § 6*].

49. Furthermore, Mr. Prasad's remote connection with the major shareholder of CLAIMANT's third–party funder does not create justifiable doubts as to his impartiality and independence. Technically, Mr. Prasad has had no direct relationship or contact with CLAIMANT's third–party funder. Whatever potential connections exist are shallow and indirect, and have absolutely no effect on his impartiality and independence.

50. Although not required to do so, Mr. Prasad disclosed that he had been involved in two arbitrations where subsidiaries of Findfunds LP had provided financial support to one of the parties. [*Declaration Prasad, p. 36*]. Findfunds LP is the major shareholder of Funding 12 Ltd., CLAIMANT's third–party funder. [*3P, p. 35*]. In fact, in one of those arbitrations the subsidiary became involved only after Mr. Prasad had already been appointed. [*Declaration Prasad, p. 36*]. These connections are not sufficient to create a "justifiable doubt," nor do they indicate that Mr. Prasad was inappropriately connected with this third–party. [*Declaration Prasad, p. 36*].

(3) Immediately after learning of CLAIMANT's third–party funder, Mr. Prasad disclosed his new law partner's relationship with the main shareholder of CLAIMANT's third–party funder.

51. The same is true for Mr. Prasad's new partner from his firm's recent merger with Slowfood. One of his new partners from that merger is representing a client in an arbitration that is being funded by Fundfunds LP. [*Declaration Prasad, p. 36*]. Again, there is no direct relationship between Mr. Prasad's firm and CLAIMANT's third–party funder. There is also no justification to pierce the corporate veil and project undue influence where there is none.

52. For an arbitrator to be removed, justifiable doubts should call into question an arbitrator's impartiality and independence. That is not the case here. Even RESPONDENT acknowledges that Mr. Prasad is independent from CLAIMANT's third–party funder. [*Challenge, p. 38, § 6*]. RESPONDENT also acknowledges that the present challenge arises out of CLAIMANT's behavior, not out of anything Mr. Prasad has personally done. [*Challenge, p. 38, § 6*].

(4) Mr. Prasad had no obligation to disclose the Vindobona Journal article, because it had been made available to RESPONDENT at the time of his appointment, and because it actually demonstrates his impartiality on the issue.

53. RESPONDENT attempts to raise further "justifiable doubts" by referencing an article published in the Vindobona Journal of International Commercial Arbitration and Sales Law. [*Ex. R 4, p. 40*]. In an article entitled "The Notion of Conformity in Art. 35 in the Age of Corporate Social Responsibility Codes and 'Ethical Contracting,'" Mr. Prasad expresses his opinion that, in the absence of explicit agreement by the parties, the "conformity of goods does not depend on their compliance with the very broad and general statements in CSR Codes." [*Ex. R 4, p. 40*]. This is hardly a controversial opinion, and is addressed similarly by other scholars, even those who wish to see this presumption changed. [*See, e.g., Butler; Ramberg; Schwenzer/Leisinger*].

54. Mr. Prasad's position is that CISG Art. 35 does not inherently require compliance with broad statements in CSR Codes. However, parties can agree to incorporate specific requirements into

their agreements, which could then be defended under CISG Art. 35. In particular, Mr. Prasad states that scholars in support of including ethical conformity of goods under CISG Art. 35 "also consider extraneous factors relating to the goods such as the production process and other ethical conduct of the seller to be part of the conformity–requirements. That may be true, where the parties specifically make compliance with certain production standards part of the goods." [*Ex. R 4, p. 40*].

55. As such, rather than calling into question Mr. Prasad's impartiality, it proves that he is *in fact* impartial on the subject. Mr. Prasad has an opinion on the subject, but he acknowledges that ultimately it is the parties' right to establish the terms of their agreement. As a result, his article raises no "justifiable doubts" as to his impartiality in this case.

56. Additionally, RESPONDENT's objection to Mr. Prasad's article is not timely. The article has been available to RESPONDENT since the time of its publication in 2016 in the Vindobona Journal of International Commercial Arbitration and Sales Law. [*P.O. No. 2, p. 51, § 14*]. Vindobona Journal is a leading journal in the field of international commerce, and is available on all leading databases. [*P.O. No. 2, p. 51, § 14*]. It has also been directly available on Mr. Prasad's website. [*P.O. No. 2, p. 51, § 14*]. RESPONDENT concedes that it had visited Mr. Prasad's website, but that it had not looked at his publications before submitting its Response. [*P.O. No. 2, p. 51, § 14*].

57. Regardless, Mr. Prasad's article is not new information. More than six weeks had passed between the Response where RESPONDENT accepted Mr. Prasad's appointment and RESPONDENT's Challenge of Mr. Prasad. As such, RESPONDENT should be estopped from challenging Mr. Prasad's impartiality on the grounds of this article.

58. As established before, RESPONDENT had already acknowledged that Mr. Prasad is independent. [*Challenge, p. 38, § 6*]. The third–party challenge is grounded in Claimant's behavior, not Mr. Prasad's. Additionally, RESPONDENT is trying to stall progress of the arbitration by using the article that Mr. Prasad wrote back in 2016 to question his impartiality. [*Ex. R 4, p. 40*]. In sum, neither of these grounds for challenge raise "justifiable doubts" as to Mr. Prasad's impartiality or independence.

(B) The IBA Guidelines on Conflict of Interest do not apply to the present dispute, but even if this Tribunal decides to apply them there is no violation.

(1) The parties never agreed to apply the IBA Guidelines to this arbitration, and they should not be used as persuasive authority.

59. The arbitration agreement does not mention the IBA Guidelines on Conflict of Interest in International Arbitration. [*Ex. C 2, p. 12, § 20*]. The omission is significant. The parties were clear as to which rules and standards they intended to apply to disputes. In the arbitration agreement, the parties specifically agreed to use the UNCITRAL Model Law. They also specifically agreed to exclude the UNCITRAL Rules on Transparency. The implication is that the parties were well aware of the standards they wished arbitrators to use in resolving their dispute. Glaringly, the parties chose not to include the IBA Guidelines among those standards.

60. Although the IBA Guidelines may be used as persuasive authority in some disputes, the exclusion of the IBA Guidelines from the parties' arbitration agreement should not be treated as a casual omission. On the contrary, there are legitimate reasons why the parties did not include the IBA Guidelines in their arbitration agreement, and why they should not be used as persuasive authority by this Tribunal.

61. The IBA Guidelines should not be used as persuasive authority by this Tribunal. They are prescriptive and ill–equipped to address subtle nuances in individual disputes. [*Born, p. 46, § 2*]. As a result, the IBA Guidelines "give rise to unfortunate, and unnecessary, uncertainties for the international arbitral process." [*Born, p. 46, § 2*]. Because they are open to vastly different interpretations, they are applied inconsistently in different legal systems and contexts. [*Born, p. 46, § 2*]. Although there have been some initiatives to standardize the IBA Guidelines' interpretation and applications, they continue to be "interpreted differently in different national legal systems." [*Born, p. 46, § 2*]. This makes the IBA Guidelines neither a suitable source of international legal standards, nor a desirable tool to be used in this arbitration. [*Born, p. 46, § 2*]. The IBA Guidelines simply give rise to too much ambiguity and unpredictability. The parties did not include them for a reason.

(2) Even if the IBA Guidelines were to apply, there is no violation because Mr. Prasad does not have a significant commercial relationship with CLAIMANT or one of CLAIMANT's affiliates.

62. Article 7(a) of the IBA Guidelines states that "[a] party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. The party shall do so on its own initiative at the earliest opportunity."

63. Under the IBA Guidelines, an arbitrator is required to disclose any situation or circumstance that would give justifiable doubts to his or her impartiality or independence. [*IBA Guidelines, p. 5, § 2(b)*].The guidelines classify various disclosure topics into lists. Each list informs whether a topic could be used as grounds for removal of an arbitrator. The topics are divided into four categories: the Green List; the Orange List; the Waivable Red List; and the Non–Waivable Red List.

64. First, the "Green List" include situations where there is no lack of impartiality or independence. [*IBA Guidelines, p. 19, § 7*]. Second, the "Orange List" includes situations where parties could have doubts as to the arbitrator's impartiality and independence. The arbitrator should disclose these situations to remove any ambiguity or doubts in the parties' minds. [*IBA Guidelines, p. 18, § 3*]. Third, the "Waivable Red List" includes situations that parties of an arbitration must be made aware of, but that do not necessarily preclude participation in the arbitration. [*IBA Guidelines, p. 17, § 2*]. Finally, the "Non–Waivable Red List" includes situations where an arbitrator may not participate in the arbitration. [*IBA Guidelines, p. 17, § 2*].

65. In this case, none of the disclosure issues give rise to justifiable doubts about impartiality or independence. Furthermore, none of the issues in this case justify Mr. Prasad's removal. First, the article that Mr. Prasad wrote falls under subsection 4.1.1 of the Green List. [*IBA Guidelines,*

p. 25, § 4]. As stated above, arbitrators are usually chosen because of their knowledge in a certain field. [*Lew/Mistelis/Kröll, p. 258; Mullerat p. 2*]. These opinions do not affect the arbitrator's impartiality, provided the arbitrator decides disputed matters based on the merits of each case (which is what Mr. Prasad's article clearly states he would do).

66. Second, Mr. Prasad's relationship with other subsidiaries of the major shareholder of CLAIMANT's third–party funder falls under subsection 3.1.1 of the Orange List. [*IBA Guidelines, p. 22, § 3*]. Mr. Prasad is neither a controlling beneficiary of the third–party funder nor a person of interest to that third–party funder. Additionally, a third–party funder's relationship with an arbitrator does not constitute a justifiable doubt requiring their removal, unless the arbitrator has a direct interest in that third–party.

67. When an arbitrator does share a direct interest with the third–party, the relationship shifts from Orange List to Non–Waivable Red List. However, in this case Mr. Prasad's relationship with the third–party is shallow and indirect. As a result, this situation falls under the Orange List, and does not create justifiable doubts as to Mr. Prasad's impartiality and independence.

68. Third, Mr. Prasad's new law partner's relationship with the major shareholder of CLAIMANT's third–party funder falls under subsection 3.1.4 of the Orange List. [*IBA Guidelines, p. 23*]. A law firm's relationship is classified differently than a particular arbitrator's relationship. This kind of relationship has the potential to fall under subsection 2.3.6 of the Waivable Red List. [*IBA Guidelines, p. 21*]. But in this case, the relationship between the Slowfood partner and the major shareholder of CLAIMANT's third–party funder is already shallow. [*Declaration Prasad, p. 36*]. Furthermore, Mr. Prasad has disclosed that "all necessary precautions" have been put in place. [*Declaration Prasad, p. 36*]. As such, this situation falls under subsection 3.1.4 of the Orange List. [*IBA Guidelines, p. 23*]. This means that when Mr. Prasad became aware of the relationship he needed to disclose it, which is exactly what he did. [*Declaration Prasad, p. 36*]. As a result, this situation does not establish grounds for his removal.

69. Neither party disputes that CLAIMANT failed to inform Mr. Prasad about its third–party funder. As soon as Mr. Prasad discovered this information, he made the necessary disclosures. Even so,

Mr. Prasad's connections to CLAIMANT's third–party funder are shallow and indirect. Nothing in RESPONDENT's Challenge creates "justifiable doubts" as to Mr. Prasad's impartiality and independence. This is acknowledged even by RESPONDENT, who stated that CLAIMANT had deliberately concealed its relationship with its third–party funder from both RESPONDENT and Mr. Prasad. [*Challenge, p. 38, § 6*].

70. Therefore, if this Tribunal decides to apply the IBA Guidelines as persuasive authority (in violation of the parties' arbitration agreement), there are still no justifiable doubts as to Mr. Prasad's ability to remain impartial and independent in this arbitration.

CONCLUSION OF THE SECOND ISSUE

71. This Tribunal should decide that Mr. Prasad is "impartial" and "independent" under UNCITRAL Rules Art. 12, and therefore should not be removed from the arbitral tribunal. No "justifiable doubts" exist as to Mr. Prasad's impartiality and independence to arbitrate the present case. Mr. Prasad has satisfied his continuing disclosure obligations under UNCITRAL Rules Art. 11. Immediately after learning of Funding 12 Ltd (CLAIMANT's third–party funder), Mr. Prasad disclosed his two past connections with other subsidiaries of Findfunds LP (its main shareholder). Additionally, Mr. Prasad also immediately disclosed his new law partner's current relationship with the main shareholder of CLAIMANT's third–party funder. Furthermore, Mr. Prasad had no obligation to disclose the Vindobona Journal article, because it had been made available to RESPONDENT at the time of his appointment. Even more significantly, the article actually demonstrates Mr. Prasad's impartiality on the issue. Finally, The IBA Guidelines on Conflict of Interest do not apply to the present dispute. However, even if this Tribunal decides to apply them there is no violation.

ISSUE 3: UNDER CISG ART. 18, CLAIMANT'S STANDARD CONDITIONS GOVERN THE CONTRACT, BECAUSE CLAIMANT'S TENDER CONSTITUTED AN OFFER WHICH RESPONDENT ACCEPTED.

(A) RESPONDENT's Invitation to Tender did not constitute an offer, but was rather an invitation to receive an offer from CLAIMANT.

72. Under CISG Art. 18.1, "[a] statement made by or other conduct of the offeree indicating assent to an offer is an acceptance…." However, a contract is not created unless there is a meeting of the minds. Where the offeree accepts the contract but proposes different terms, traditional contract law would consider the acceptance to instead be a rejection and counteroffer. [*Perales Viscasillas, p. 157*].

73. In modern commercial transactions, this approach is not favored. Where there has been an acceptance with a proposal of different or additional terms, modern jurisdictions tend to acknowledge an acceptance, with the additional terms either being merged or omitted from the central agreement. [*Ferrari/Flechtner/Brand, p. 595, § 2; Schlechtriem/Schwenzer, p. 233, § 1*]. Where the dispute centers around general conditions commonly used by one or both parties in their contracts, a "battle of forms" situation arises. [*Del Duca, p. 144, § 2; Ferrari/Flechtner/ Brand, p. 595, § 2*].

74. Battle of forms conflicts are generally resolved using either the "knockout" or "last–shot" approaches. [*Perales Viscasillas, p. 157*]. The knockout approach merges non–contradictory terms in the two agreements, where there is considered to be an agreement. [*Moccia, p. 672; Perales Viscasillas, p. 157*]. The "last shot approach" gives the last party to modify the terms of the contract final control over its terms, on the theory that the last modification of terms before acceptance constituted the last offer. [*Moccia, p. 659; Perales Viscasillas, p. 157*]. Therefore, the last exchanged terms between the two parties will govern the agreement. [*Moccia, p. 659; Perales Viscasillas, p. 157*].

75. In this case, CLAIMANT received an Invitation to Tender from RESPONDENT. [*Ex. C 2, pp. 9–14*]. The Invitation to Tender was an invitation to receive an offer from CLAIMANT. In its accompanying correspondence, RESPONDENT stated it was looking "forward to the submission" of CLAIMANT's "offer." [*Ex. C 1, p. 8*].

(B) Under CISG Art. 18.1, RESPONDENT's acceptance of CLAIMANT's offer constituted an acceptance of CLAIMANT's general conditions, which CLAIMANT has satisfied.

76. CLAIMANT replied to RESPONDENT's Invitation to Tender with an offer. [*Ex. C 4, p. 16*]. CLAIMANT informed RESPONDENT that its offer deviated from RESPONDENT's Invitation to Tender terms on the issues of product description, payment terms, and source of general conditions. [*Ex. C 4, p. 16*].

77. CLAIMANT's offer stated, at the bottom of the page, that "[t]he above offer is subject to the General Conditions of Sale and our Commitment to a Fairer and Better World. Refer to our website www.DelicatesyWholeFoods.com in regard to our General Conditions and our commitments and expectations set out in our Codes of Conduct." [*Ex. C 4, p. 16*]. Significantly, CLAIMANT included the same language in all of its subsequent invoices to RESPONDENT. [*P.O. No. 2, p. 52, § 24*].

78. RESPONDENT accepted CLAIMANT's offer without proposing a modification to the terms, stating that "your tender was successful notwithstanding the changes suggested by you." [*Ex. C 5, p. 17*]. As such, CLAIMANT's terms formed the agreement between the parties, including the changes in product description, payment terms, and CLAIMANT's general conditions. This is true under general contract law of offer and acceptance, as well as under the last–shot approach to resolving conflicting general conditions.

79. In the interest of efficiency, it has become acceptable in modern commercial transactions to make contract documents available via the internet, provided the document is easily accessible. [*CISG–AC, Op. No. 13, p. 13, § 3.4*]. It is considered reasonably easy to retrieve a document if

the link to the website directly opens the page of the contract. [*CISG–AC, Op. No. 13, p. 13, § 3.4*].

80. In this case, RESPONDENT was able to access CLAIMANT's General Conditions of Sale and Supplier Code of Conduct on CLAIMANT's website, stating that these "impressive" documents were a "decisive element" for RESPONDENT's decision to accept CLAIMANT's offer. [*Ex. C 5, p. 17*]. RESPONDENT further evidenced its agreement with CLAIMANT's General Conditions of Sale and Supplier Code of Conduct by observing that the parties "share the same values and are both committed to ensure that the goods produced and sold fulfill the highest standard of sustainability." [*Ex. C 5, p. 17*].

81. As a result, RESPONDENT accepted the terms of CLAIMANT's offer, which included CLAIMANT's General Conditions of Sale and Supplier Code of Conduct. RESPONDENT's Invitation to Tender was not an offer, but rather an invitation to receive an offer based on the terms included in the Invitation to Tender. CLAIMANT informed RESPONDENT that it had submitted an offer containing three deviations from the Invitation to Tender. RESPONDENT accepted that offer, which included the changed terms.

(C) In the alternative, RESPONDENT's acceptance of CLAIMANT's tender constituted an acceptance of CLAIMANT's general conditions which were consistent with RESPONDENT's general conditions, but which "knocked out" the incompatible terms in RESPONDENT's general conditions related to supplier certification requirements.

82. The knockout approach "accepts the agreement of the parties on the essential aspects or basic terms, leaves the non–conflicting term of the two parties intact, and substitutes the conflicting terms by the respective provision of the convention or the applicable law." [*Moccia, p. 659*].

83. As stated above, CLAIMANT's tender was an offer which RESPONDENT accepted, including the changed terms. However, to the extent that this Tribunal finds that RESPONDENT's General Conditions and Supplier Code of Conduct were incorporated into CLAIMANT's offer, the knockout approach would apply to resolve any conflicting terms.

84. CLAIMANT's offer proposed to include CLAIMANT's General Conditions of Sale and Supplier Code of Conduct. Under the knockout approach, the parties' respective documents came into conflict. Although the parties' documents share many similarities, there is at least one fundamental difference between them, with regard to the standard of obligation employed (guarantee vs. best efforts).

85. RESPONDENT's General Code of Conduct uses the language of guarantee, including phrases such as "'*zero tolerance*' policy" and "you *must comply* with…" [*Ex. C 2, p. 12, Preamble*] [emphasis added].

86. By contrast, CLAIMANT's General Code of Conduct uses the language of best efforts, stating that "Delicatesy Whole Foods is a UN Global Compact company committed to a fairer and better world and *expects* its business partners to embrace the same goals as well. Delicatesy Whole Foods *will always use its best effort* to guarantee that the goods sold match the highest standards in line with its Business Code of Conduct and its Supplier Code of Conduct." [*P.O. No. 2, p. 53, § 29*] [emphasis added].

87. Similarly, RESPONDENT's Supplier Code of Conduct uses the language of guarantee, stating that the supplier "*must under all circumstances* procure goods and services in a responsible manner…[and] *make sure that they comply* with the standards agreed upon to avoid that goods or services delivered are in breach of Comestibles Finos' General Business Philosophy." [*Ex. C 2, p. 14, § E*] [emphasis added]. It also uses language such as "to *guarantee* such adherence…" [*Ex. C 2, p. 14, Preamble*] [emphasis added].

88. By contrast, CLAIMANT's Supplier Code of Conduct uses the language of best efforts, stating "expectations" that would be monitored using inspections and compliance documentation. [*Ex. R 3, p. 32, § E*]. Significantly, the compliance verification procedures instituted by CLAIMANT's Supplier Code of Conduct had been previously reviewed and expressly approved by RESPONDENT prior to the present dispute (which will be discussed in greater detail in Issue 4 below).

89. As such, to the extent CLAIMANT's and RESPONDENT's General Conditions and Supplier Codes of Conduct are in conflict, there was no agreement between the parties on those issues. The non–conflicting terms of the Agreement remain intact. However, there was no contract created between the parties with regard to the standard of obligation governing either the General Conditions or the Supplier Codes of Conduct.

(D) Under both CISG Art. 8 and UNIDROIT Art. 4, the parties intended CLAIMANT's General Conditions and Supplier Code of Conduct to govern the Agreement.

(1) RESPONDENT was aware or could not have been unaware CLAIMANT intended the Agreement to be governed by CLAIMANT's General Conditions and Supplier Code of Conduct.

90. CLAIMANT's offer stated that it had different terms on the three issues of product description, payment terms, and source of general conditions. [*Ex. C 4, p. 16*].

91. Significantly, CLAIMANT's offer stated at the bottom of the page that "[t]he above offer is subject to the General Conditions of Sale and our Commitment to a Fairer and Better World. Refer to our website www.DelicatesyWholeFoods.com in regard to our General Conditions and our commitments and expectations set out in our Codes of Conduct." [*Ex. C 4, p. 16*]. Moreover, CLAIMANT included this same language in all of its later invoices to RESPONDENT. [*P.O. No. 2, p. 52, § 24*].

92. RESPONDENT accepted CLAIMANT's offer, stating that "your tender was successful notwithstanding the changes suggested by you." [*Ex. C 5, p. 17*]. Prior to accepting the offer, RESPONDENT had accessed CLAIMANT's General Conditions of Sale and Supplier Code of Conduct on CLAIMANT's website, and stated that these "impressive" documents were a "decisive element" for RESPONDENT's decision to accept CLAIMANT's offer. [*Ex. C 5, p. 17*].

93. As such, RESPONDENT was aware or could not have been unaware that CLAIMANT intended its General Conditions and Supplier Code of Conduct to govern the agreement between the parties.

(2) Under Art. 8.2 of CISG and UNIDROIT Art. 4.1.2, a reasonable person in similar circumstances would have concluded CLAIMANT intended the parties' agreement to be governed by CLAIMANT's General Conditions and Supplier Code of Conduct.

94. Based on the facts stated above, a reasonable person in RESPONDENT's position would similarly have concluded that CLAIMANT intended the Agreement to be governed by CLAIMANT'S General Conditions and Supplier Code of Conduct.

(3) Under CISG Art. 8.3 and UNIDROIT Art. 4.3, the parties' negotiations, practices, usages, and subsequent conduct demonstrate RESPONDENT was aware CLAIMANT intended the Agreement to be governed by CLAIMANT's General Conditions and Supplier Code of Conduct.

95. In addition to the facts outlined above, CLAIMANT included the same language from its initial offer in all of its invoices to RESPONDENT. [*P.O. No. 2, p. 52, § 24*]. This means that *every invoice, from every delivery,* echoed the expectations from CLAIMANT'S initial offer, which was that its General Conditions and Supplier Code of Conduct would govern the parties' agreement.

96. As such, RESPONDENT's subsequent conduct by paying each invoice provides additional evidence that it would have been reasonably aware that CLAIMANT had always intended the Agreement to be governed by CLAIMANT'S General Conditions and Supplier Code of Conduct.

CONCLUSION OF THE THIRD ISSUE

97. Under CISG Art. 18, CLAIMANT's standard conditions govern the contract, because CLAIMANT's tender constituted an offer which RESPONDENT accepted. RESPONDENT's Invitation to Tender did not constitute an offer, but was rather an invitation to receive an offer from CLAIMANT based on those terms. RESPONDENT's acceptance of CLAIMANT's offer constituted an acceptance of

CLAIMANT's general conditions, which CLAIMANT has satisfied. In the alternative, RESPONDENT's acceptance of CLAIMANT's tender offer constituted an acceptance of CLAIMANT's general conditions which were consistent with RESPONDENT's general conditions, but which "knocked out" the terms in RESPONDENT's general conditions related to supplier certification requirements. Additionally, the parties intended CLAIMANT's General Conditions and Supplier Code of Conduct to govern the Agreement for three reasons. First, RESPONDENT was aware or could not have been unaware CLAIMANT intended the Agreement to be governed by CLAIMANT'S General Conditions and Supplier Code of Conduct. Furthermore, a reasonable person in similar circumstances would have concluded CLAIMANT intended the Agreement to be governed by CLAIMANT'S General Conditions and Supplier Code of Conduct. Finally, the parties' negotiations, practices, usages, and subsequent conduct demonstrate RESPONDENT was aware CLAIMANT intended the Agreement to be governed by CLAIMANT'S General Conditions and Supplier Code of Conduct.

ISSUE 4: EVEN IF RESPONDENT'S GENERAL CONDITIONS ARE APPLICABLE, CLAIMANT DELIVERED CONFORMING GOODS UNDER CISG ART. 35 BY USING ITS BEST EFFORTS TO ENSURE COMPLIANCE BY ITS COCOA SUPPLIER.

(A) Under CISG Art. 8, CLAIMANT reasonably agreed to the use of a "best efforts" standard, and would have never reasonably agreed to provide an absolute guarantee of performance by its suppliers.

98. There are several levels of commercial obligation in business agreements. [*Rocks, p. 1*]. The highest and most onerous on the performer is the "guarantee." [*Chorley, p. 332*]. A guarantee creates an absolute duty on the performing party. [*Chorley, p. 332*]. It is based on results, regardless of efforts. [*Rocks, p. 2*]. A guarantee is not entered into lightly. "A party to the contract cannot be expected to assume liability for absolutely all circumstances that could affect the performance of the contract, including circumstances that cannot be foreseen upon entry into the contract and that the obligor cannot affect in any manner." [*Värv/Karu, p. 92*]. A guarantee is particularly undesirable when aspects of performance lie outside of the performing party's

control because it poses an undue risk of future liability for non–performance. [*Rocks, p. 2; Värv/Karu, p. 92*].

99. The "best efforts" standard also creates high expectations, but is grounded in the performing party's efforts to achieve a result. [*Miller, p. 618*]. It is appropriate when performance is not entirely within the performer's control. [*Adams, p. 12*]. The best efforts standard requires the promisor to do everything in its power to accomplish the goal. [*Adams, p. 13*].

100. In this case, CLAIMANT would have never agreed to provide an absolute guarantee of performance by its suppliers. On the contrary, it reasonably agreed to use a "best efforts" standard, which obligated it to do everything possible to ensure performance. Performance of this particular obligation was outside of CLAIMANT's control. And because the relevant part of the obligation was non–physical, it was impossible for CLAIMANT to ensure that it was in a position to guarantee performance.

101. In its 27 March 2014 email, CLAIMANT emphasized that it intended to agree to a best efforts standard when it stated that it would "*do everything possible to guarantee* that the ingredients sourced from outside suppliers comply with our joint commitment to Global Compact Principles." [*Ex. C 3, p. 15*] [emphasis added]. Additionally, CLAIMANT's General Code of Conduct uses the same language of best efforts, stating that it "will always use its *best effort to guarantee* that the goods sold match the highest standards in line with its Business Code of Conduct and its Supplier Code of Conduct." [*P.O. No. 2, p. 53, § 29*] [emphasis added]. Significantly, this language is qualified in both cases, and neither provides an absolute guarantee based on results.

102. Furthermore, CLAIMANT did exactly what it promised. CLAIMANT's subsequent conduct indicates that it did everything in its power to make sure that this standard had been met. CLAIMANT had retained a highly–qualified third–party firm, Egimus AG, to conduct extensive audits. [*P.O. No. 2, p. 53, § 32*]. The fact that CLAIMANT retained a third–party auditing firm that specialized in auditing and providing expert opinions supports the conclusion that CLAIMANT intended to do

everything in its power to ensure that Ruritania Peoples Cocoa GmbH adhered to CLAIMANT's expectations.

(B) CLAIMANT satisfied its obligations under CISG Art. 35 by using its best efforts to deliver goods that conformed to RESPONDENT's Code of Conduct.

(1) Under CISG Art. 35, conformity of goods relates to the apparent fitness of goods for a particular purpose, and not to intangibles or non–physical characteristics of production.

103. CISG Art. 35.1 states that "[t]he 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. CISG Art. 35.2 states that "[e]xcept where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement; (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods."

104. Under CISG Art. 35.1, conforming products must meet the description, quality, and quantity outlined in the agreement. Additionally, CISG Art. 35.2 requires conforming products to be fit for the commercial purposes goods of the same description would ordinarily be used. "In international wholesale and intermediate trade, an important part of being fit for the purposes of ordinary use is resale ability." [*Dysted, p. 35; see also Frozen Pork Case*].

105. As such, CISG Art. 35 focuses on the observable, physical characteristics of delivered goods. "Historically, the notion of lack of conformity has been associated with physical defects. It is rather certain that none of the CISG drafters had the sale of feelings and emotions in mind." [*Ramberg, p. 82; see also Butler, p. 9*]. Non–physical characteristics may have market effects

related to price premiums or consumer emotion. However, these characteristics are difficult to enforce, and fall outside of the scope of CISG Art. 35. [*Butler, p. 9*]. "It may be difficult to prove that a breach of a CSR contractual provision constituted a fundamental breach of contract, because the breach is not obvious from the delivered products." [*Peterkova Mitkidis, p. 1*]. As such, non–physical characteristics, such as production standards or corporate social responsibility codes, have no effect on the conformity of goods under CISG Art. 35, although several scholars have recently advocated a shift in this position. Currently, "[t]he violation of ethical standards does not negatively influence the physical features of the goods." [*Schwenzer/Leisinger, p. 266*].

106. In this case, the goods delivered were conforming goods under CISG Art. 35. CLAIMANT provided 20,000 "Queen's Delight" chocolate cakes per day. [*Ex. C 4, p. 16*]. Each chocolate cake met the size and shape requirements stated in the Agreement. [*Ex. C 4, p. 16*]. The goods were saleable and well–received by consumers. As such, the delivered goods conformed to the terms RESPONDENT and CLAIMANT had agreed to under CISG Art. 35.

107. The fact that the cocoa beans used in the cakes were not sourced from sustainable farms, as both CLAIMANT and RESPONDENT had believed, is unfortunate. However, it does not affect the conformity of the cakes delivered to RESPONDENT for purposes of CISG Art. 35. Significantly, neither party detected a defect in the goods during their three–year relationship, precisely because the beans used in the final product were essentially identical to beans that had been sourced from sustainable farms. This is evidence of the difficulty of incorporating non–physical characteristics into the conformity obligations of CISG Art. 35. And while it is disappointing that Ruritania Peoples Cocoa GmbH deceived both CLAIMANT and RESPONDENT as to the origin of its cocoa beans, there was no resulting physical defect. As such, it does not render the beans (or the resulting cakes) non–conforming under CISG Art. 35.

(2) Under CISG Art. 35, CLAIMANT was not required to guarantee compliance of its suppliers to RESPONDENT's general conditions.

108. As stated above in Issue 3(C) and in more detail in Issue 4(A), CLAIMANT would not have reasonably agreed to guarantee performance for obligations beyond its control, for the exact reasons raised in the present dispute. It was impossible for CLAIMANT to have ensured compliance by Ruritania Peoples Cocoa GmbH, even though it used its best efforts to do so. Significantly, CLAIMANT's monitoring efforts had also been previously reviewed and deemed sufficient by RESPONDENT before the fraud perpetrated by Ruritania Peoples Cocoa GmbH was discovered.

109. CLAIMANT did what it promised to do under the parties' agreement. It delivered goods that physically conformed to the specifications required by the contract. It also used its best efforts to ensure the cocoa beans included in the goods were sourced from sustainable farms. CLAIMANT has a good reputation in the market for supervising its supply chain. [*P.O. No. 2, p. 54, § 34*]. Neither CLAIMANT, nor any of its suppliers, have received a reported violation of the UN Global Compact Principle during the past five years. [*P.O. No. 2, p. 54, § 34*]. Moreover, prior to the scandal, Ruritania Peoples Cocoa GmbH also had a good reputation in the market. [*P.O. No. 2, p. 53, § 32*].

110. As such, the fraud perpetuated by Ruritania Peoples Cocoa GmbH was a complete surprise to everyone, and eluded even CLAIMANT's best efforts to monitor and ensure compliance.

(C) RESPONDENT is not allowed to avoid the contract under CISG Art. 39 because it reviewed and approved of CLAIMANT's monitoring methods and chose not to audit CLAIMANT's suppliers, even though it had the right to do so under the contract.

111. Under the Agreement, RESPONDENT reserved the right to audit CLAIMANT's operations and examine CLAIMANT's documentation. [*P.O. No. 1, p. 14, § 3*]. However, RESPONDENT declined to do so and instead chose to rely on CLAIMANT'S compliance audit. RESPONDENT, "after an initial visit to CLAIMANT's premises in summer 2014, including a detailed presentation by

CLAIMANT about the steps taken to monitor the supply chain and an examination of the documentation existing for that monitoring, decided to make no further audits or site visits." [*P.O. No. 2, p. 54, § 34*].

112. This supports the conclusion that RESPONDENT deemed the compliance procedures instituted by CLAIMANT to be sufficient to guarantee compliance with the parties' agreement. It also supports the conclusion that the compliance procedures instituted by CLAIMANT conformed to the best efforts standard. As will be discussed in subsection (D) below, the deception perpetrated by Ruritania Peoples Cocoa GmbH was an isolated incident, masterminded by only three highly powerful individuals. It was not something either CLAIMANT or RESPONDENT would have reasonably anticipated.

(D) RESPONDENT is not allowed to avoid the contract because the fraudulent and corrupt conduct of CLAIMANT's supplier constituted an impediment beyond CLAIMANT's control under CISG Art. 79.

113. CISG Art. 79.1 provides that "[a] party is not liable for a failure to perform any of his obligations if he proves that the failure was 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."

114. As stated above, a performing party should not be held accountable for circumstances beyond its control. "A party to the contract cannot be expected to assume liability for absolutely all circumstances that could affect the performance of the contract, including circumstances that cannot be foreseen upon entry into the contract and that the obligor cannot affect in any manner." [*Värv/Karu, p. 8*]. Furthermore, in the absence of a warranty, "the seller should not be deemed to guarantee, absolutely and unconditionally, that the goods are free from defects." [*CISG–AC, Op. No. 7, § 13*].

115. In this case, CLAIMANT cannot be held responsible for an impediment that was beyond its control. Ruritania Peoples Cocoa GmbH provided CLAIMANT with official certification

papers that CLAIMANT could not have reasonably expected were forged. [*Ex. C 9, p. 21*]. As such, CLAIMANT reasonably believed the cocoa beans it obtained from Ruritania Peoples Cocoa GmbH were farmed in the manner represented by the documentation.

116. Furthermore, the fraud was perpetrated by a small number of highly influential people. [*Ex. C 7, p. 19*]. Michelgault Business News, a leading business newspaper, pointed out in its article that "investigators believe that a group of three business people realized this, and devised a scheme to defraud billions of US dollars. The group bribed officials at the Ministry for Agriculture to change the zoning plans and issue permits within nature reserves." [*Ex. C 7, p. 19*]. These officials also issued fake certificates indicating the cocoa had been sustainably produced, which has since been disproven. [*Ex. C 7, p. 19*].

117. As stated above, CLAIMANT is known to have a good reputation in the market. [*P.O. No. 2, p. 54, § 34*]. CLAIMANT's supply chain over the last five years has had no reported cases that violated the UN Global Compact Principles. [*P.O. No. 2, p. 54, § 34*]. Additionally, Ruritania Peoples Cocoa GmbH was actively supervised by CLAIMANT to ensure it followed the UN Global Compact Principles. [*Ex. C 8, p. 20*]. And significantly, RESPONDENT decided to make no further audits or site visits. based on its initial visit to CLAIMANT's facilities and review of its auditing and monitoring procedures. [*P.O. No. 2, p. 54, § 34*]. RESPONDENT too had apparently believed CLAIMANT's processes were sufficient to ensure sustainably–sourced cocoa beans.

118. However, neither CLAIMANT nor RESPONDENT could have reasonably predicted or suspected that Ruritania Peoples Cocoa GmbH would forge documents and fraudulently supply beans obtained from non–certified sources.

119. Additionally, CLAIMANT had complied with RESPONDENT's (as well as its own) audit standards. CLAIMANT retained Egimus AG for an extensive audit. [*P.O. No. 2, p. 54, § 33*]. Egimus AG is a well–respected firm that assesses a company's involvement in controversies related to the 10 Principles of the UN Global Compact and international norms, as well as the company's risk of breaching those principles. [*P.O. No. 2, p. 54, § 33*]. The resulting report on Ruritania Peoples Cocoa

GmbH stated that it did not violate the 10 Principles or other international norms. [*P.O. No. 2, p. 54, § 33*]. Therefore, CLAIMANT reasonably trusted the professional and ethical performance of its supplier.

120. Prior to the present incident, Ruritania Peoples Cocoa GmbH had a good reputation in the market. [*P.O. No. 2, p. 53, § 32*]. They had two model farms that produced cocoa in a sustainable way while also protecting the rainforest. [*P.O. No. 2, p. 53, § 32*]. Ruritania Peoples Cocoa GmbH provided CLAIMANT with official documentation that certified it was in compliance with the Global Compact and other principles of sustainable development production. [*P.O. No. 2, p. 53, § 32*]. CLAIMANT reasonably relied on this documentation.

121. When it turned out that Ruritania Peoples Cocoa GmbH had been involved in the scandal even after CLAIMANT's extensive audit and review, CLAIMANT could not reasonably have foreseen that it would have been deceived.

122. As a result, the scandal was an impediment beyond CLAIMANT's control. Neither CLAIMANT nor RESPONDENT would have reasonably expected such a fraudulent scheme at the time they signed the contract. This provides additional evidence that CLAIMANT would have never reasonably agreed to provide an absolute guarantee, when the fraudulent behavior of Ruritania Peoples Cocoa GmbH was clearly an aspect of performance that was beyond its control.

CONCLUSION OF THE FOURTH ISSUE

123. Even if RESPONDENT's general conditions are applicable, CLAIMANT delivered conforming goods under CISG Art. 35 by using its best efforts to ensure compliance by its cocoa supplier. CLAIMANT reasonably agreed to the use of a "best efforts" standard, and would have never reasonably agreed to provide an absolute guarantee of performance by its suppliers. CLAIMANT satisfied its obligations under the Agreement by using its best efforts to deliver goods that conformed to RESPONDENT's Code of Conduct. Under CISG Art. 35, conformity of goods relates to the apparent fitness of goods for a particular purpose, and not to intangibles or non–physical characteristics related to production. As such, CLAIMANT was not required to guarantee

compliance of its suppliers in order to meet RESPONDENT's general conditions. Furthermore, RESPONDENT is not allowed to avoid the contract under CISG Art. 39 because it chose not to audit CLAIMANT's suppliers, even though it had the right to do so under the contract. Finally, RESPONDENT is also not allowed to avoid the contract because the fraudulent and corrupt conduct of Ruritania Peoples Cocoa GmbH constituted an impediment beyond CLAIMANT's control under CISG Art. 79.

REQUEST FOR RELIEF

In the light of the above submissions, Counsel for CLAIMANT respectfully requests this Arbitral Tribunal to find that:

1. RESPONDENT's is required to pay the outstanding purchase price in the amount of USD 1,200,000;

2. The contractual relationship between CLAIMANT and RESPONDENT is governed by CLAIMANT's General Conditions of Sale and Supplier Code of Conduct;

3. RESPONDENT is required to pay damages in the amount of at least USD 2,500,000; and

4. RESPONDENT shall bear the cost of these arbitral proceedings.

CERTIFICATE

Doha, Qatar

7 December 2017

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

/s/ Amna Saif M S AlNaimi	/s/ Aisha Ali Alhammadi
Amna Saif M S AlNaimi	Aisha Ali Alhammadi
/s/ Maryam Ahmed AlMaraghi	/s/ Maryam Yaqoub Al Jefairi
Maryam Ahmed AlMaraghi	Maryam Yaqoub Al Jefairi
/s/ Reihana Khoja	/s/ Reem Hany Al Raeesi
Reihana Khoja	Reem Hany Al Raeesi
/s/ Nada Salman A Eid	/s/ Sara Ibrahim M A Al–Obaidli
Nada Salman A Eid	Sara Ibrahim M A Al–Obaidli
/s/ Hanan Abdulwahed Abdulrahman	/s/ Hiba Sekoura Oussedik
Hanan Abdulwahed Abdulrahman	Hiba Sekoura Oussedik

INDEX OF ABBREVIATIONS

§	Section; Paragraph
§§	Sections; Paragraphs
3P	Third Party
Answer	Answer to the Request for Arbitration
Apr.	April
Art./Arts.	Article/Articles
Aug.	August
C	Claimant
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG–AC	Advisory Council, Convention on Contracts for the International Sale of Goods
Comm.	Commercial
Dec.	December
ed.	Edition
et seq.	and the following
EUR	Euro
Ex.	Exhibit
Feb.	February
GmbH	Gesellschaft mit beschränkter Haftung
IBA	International Bar Association
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
Jan.	January
Jul.	July
Jun.	June
Ltd	Limited
Mar.	March

Mr.	Mister
Ms.	Miss
n.	Note
No.	Number
Notice	Notice of Arbitration
Nov.	November
Oct.	October
Op.	Opinion
p./pp.	Page/Pages
Para.	Paragraph
Plc	Professional Liability Corporation
P.O.	Procedural Order
R	Respondent
Response	Response to Notice of Arbitration
Sept.	September
SP	Sole Proprietorship
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollar
v.	Versus
Vol.	Volume

INDEX OF AUTHORITIES

Caron, David

Caplan, Lee

"The UNCITRAL Arbitration Rules: A Commentary" (2d ed.) (Oxford Commentaries on International Law) (2013).

Cited as: *Caron/Caplan*

In paragraph(s): 34, 35

Chorley, Lord

"Law of Banking" (6th ed.) (London: Sweet and Maxwell) (1974).

Cited as: *Chorley*

In paragraph(s): 98

CISG Advisory Council

"Opinion No. 3: Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG" **(**Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA) (adopted 2004).

Available at: http://www.cisg.law.pace.edu/cisg/CISG-AC-op3.html

Cited as: *CISG–AC, Op. No. 3*

In paragraphs: 13

CISG Advisory Council

"Opinion No. 7: Exemption of Liability for Damages Under Article 79 of the CISG" (Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, New York, United States) (adopted 2007).

Available at: http://cisgw3.law.pace.edu/cisg/CISG-AC-op7.html

Cited as: *CISG–AC, Op. No. 7*

In paragraphs: 114

CISG Advisory Council

"Opinion No. 13: Inclusion of Standard Terms under the CISG" (Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa) (adopted 2013).
Available at: http://www.cisg.law.pace.edu/cisg/CISG-AC-op13.html
Cited as: *CISG–AC, Op. No. 13*
In paragraphs: 79

Del Duca, Louis F.

"Implementation of Contract Formation Statute of Frauds, Parol Evidence, and Battle of Forms CISG Provisions in Civil and Common Law Countries"
In: Journal of Law and Commerce (Vol. 25) (2005–6) pp. 133–46.
Available at: https://www.uncitral.org/pdf/english/CISG25/Del%20Duca.pdf
Cited as: *Del Duca*
In paragraph(s): 73

Dysted, Christian

"Ethical Defects in Contracts under United Nations Convention on Contracts for the International Sale of Goods" (Thesis; University of Copenhagen Faculty of Law) (2015).
Available at: http://cisgw3.law.pace.edu/cisg/biblio/dysted.pdf
Cited as: *Dysted*
In paragraph(s): 104

Fagbemi, Sunday

"The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?"
In: Journal of Sustainable Development Law and Policy (Vol. 6, No. 1) (2015).
Available at: https://www.ajol.info/index.php/jsdlp/article/view/128033
Cited as: *Fagbemi*
In paragraph(s): 34

Farnsworth, Edward Allan

"Article 8"

In: "Commentary on the International Sales Law: The 1980 Vienna Sales Convention" (eds. C. M. Bianca, Michael Joachim Bonell) (Giuffrè: Milan; Fred B Rothman & Co.) (1987) pp. 95–102.

Available at: http://cisgw3.law.pace.edu/cisg/biblio/farnsworth-bb8.html

Cited as: *Farnsworth*

In paragraphs: 13

Ferrari, Franco

Flechtner, Harry M.

Brand, Ronald A.

"The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention" (eds. Franco Ferrari, Harry Flechtner, Ronald A. Brand) (Sellier European Law Publishers) (2003).

Cited as: *Ferrari/Flechtner/Brand*

In paragraph(s): 73

Gabriel, Henry Deeb

"Contracts for the Sale of Goods: A Comparison of U.S. and International Law" (2d ed.) (Oxford University Press) (2008).

Cited as: *Gabriel*

In paragraphs: 12

Holtzmann, Howard

Neuhaus, Joseph

"A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary" (2015 ed.) (Kluwer Law International) (2015).

Cited as: *Holtzmann/Neuhaus*

In paragraph(s): 35

Lew, Julian

Mistelis, Loukas

Kröll, Stefan

"Comparative International Commercial Arbitration" (Kluwer Law International) (2001).

Cited as: *Lew/Mistelis/Kröll*

In paragraphs: 43, 44, 46, 65

Miller, Zachary

"Best Efforts?: Differing Judicial Interpretations of a Familiar Term"

In: Arizona Law Review (Vol. 48) (1981) pp. 615–38.

Available at: http://arizonalawreview.org/pdf/48-3/48arizlrev615.pdf

Cited as: *Miller*

In paragraph(s): 99

Moccia, Christine

"The United Nations Convention on Contracts for the International Sale of Goods and the 'Battle of the Forms'"

In: Fordham International Law Journal (Vol. 13) (1989) pp. 649–79.

Available at: http://ir.lawnet.fordham.edu/ilj/vol13/iss4/8

Cited as: *Moccia*

In paragraph(s): 74, 82

Mullerat, Ramon

"Arbitrators' Conflicts of Interest Revisited: A Contribution to the Revision of the Excellent IBA Guidelines on Conflicts of Interest in International Arbitration"

Dispute Resolution International (International Bar Association) (May 2010).

Cited as: *Mullerat*

In paragraphs: 43, 44, 46, 65

Perales Viscasillas, Maria del Pilar

"Battle of the Forms, Modification of Contract, Commercial Letters of Confirmation: Comparison of the United Nations Convention on Contracts for the International Sale of Goods (CISG) with the Principles of European Contract Law (PECL)"

In: Pace International Law Review (Vol. 14) (2002) pp. 153–62.

Available at: http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1192&context=pilr

Cited as: *Perales Viscasillas*

In paragraph(s): 72, 74

Peterkova Mitkidis, Katerina

"How Contracts Can Make Suppliers Behave"

In: Contracting Excellence (Vol. 2013) (Oct./Nov. 2013).

Available at: http://www.academia.edu/7689500/How_Contracts_Can_Make_Suppliers_Behave

Cited as: *Peterkova Mitkidis*

In paragraph(s): 105

Ramberg, Christina

"Emotional Non–Conformity in the International Sale of Goods, Particularly in Relation to CSR–Policies and Codes of Conduct"

In: Boundaries and Intersections: 5th Annual MAA Schlechtriem CISG Conference: 21 March 2013, Vienna: Conference in Honour of Peter Schlechtriem 1933–2007 (eds. Ingeborg Schwenzer and Lisa Spagnolo) (Eleven International Publishing) (2015) pp.71–94.

Available at: https://www.researchgate.net/publication/298395806

Cited as: *Ramberg*

In paragraph(s): 53, 105

Redfern, Alan

Partasides, Constantine

Blackaby,Nigel

Hunter, Martin

"Redfern and Hunter on International Arbitration" (6th ed.) (Kluwer Law International; Oxford University) (2015).

Cited as: *Redfern/Hunter*

In paragraph(s): 31

Rocks, Sandra

"Provisions of Standard Commercial Guarantee Agreements: Technical Guide" (CGAP) (2010).

Available at: https://www.cgap.org/sites/default/files/CGAP-Technical-Guide-Provisions-of-Standard-Commercial-Guarantee-Agreements-Oct-2010.pdf

Cited as: *Rocks*

In paragraph(s): 98

Schlechtriem, Peter

Schwenzer, Ingeborg

"Article 19"

In: "Schlectriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)," (ed. Ingeborg Schwenzer) (3rd ed.) (Oxford) (2010) pp. 232–45.

Cited as: *Schlechtriem/Schwenzer*

In paragraph(s): 73

Schwarz, Franz

Konrad, Christian

"The Vienna Rules: A Commentary on International Arbitration in Austria" (2009).

Cited as: *Schwarz/Konrad*

In paragraph(s): 47

Schwenzer, Ingeborg

Leisinger, Benjamin

"Ethical Values and International Sales Contracts"

In: Commercial Law Challenges in the 21st Century; Jan Hellner in Memorium (eds. Ross Cranston, Jan Ramberg, Jacob Ziegel) (Stockholm Centre for Commercial Law, Juridiska Institutionen) (2007) pp. 249–75.

Available at: http://cisgw3.law.pace.edu/cisg/biblio/schwenzer-leisinger.html

Cited as: *Schwenzer/Leisinger*

In paragraph(s): 53, 105

Stanivukovic, Maja

"Guide to Article 8"

In: Comparison with Principles of European Contract Law (PECL) (2007).

Available at: http://www.cisg.law.pace.edu/cisg/text/peclcomp8.html

Cited as: *PECL/CISG Art. 8*

In paragraphs: 19

Värv, Age

Karu, Piia

"The Seller's Liability in the Event of Lack of Conformity of the Goods"

In: Juridicia International (Vol. XVI) (2009) pp. 85–93.

Available at: http://www.juridicainternational.eu/public/pdf/ji_2009_1_85.pdf

Cited as: *Värv/Karu*

In paragraph(s): 98, 114

Von Goeler, Jonas

"Third–Party Funding in International Arbitration and its Impact on International Arbitration Proceedings" (Kluwer Law International) (Jan 2016).

Cited as: *Von Goeler*

In paragraphs: 42

INDEX OF CASES

Germany

Bundesgerichtshof
2 March 2005
Case No.: VIII ZR 67/04
CLOUT Abstract No.: 774
Available at: http://cisgw3.law.pace.edu/cases/050302g1.html
Cited as: *Frozen Pork Case*
In paragraph(s): 104

Singapore

PT Central Investindo v. Franciscus Wongso et al. (Supreme Court of Singapore, High Court)
30 September 2014
Case No.: 48 of 2014
Available at: http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15718-pt-central-investindo-v-franciscus-wongso-and-others-and-another-matter-2014-sghc-190
Cited as: *PT Central Investindo v. Franciscus Wongso* 30 September 2014
In paragraph(s): 46

Switzerland

Switzerland No. 41, X SA v. Y (Swiss Federal Tribunal) (2010).
28 July 2010
Case No.: 4A_233/2010
Available at: http://www.servat.unibe.ch/dfr/bger/100728_4A_233-2010.html
Cited as: *X SA v. Y 28 July 2010*
In paragraph(s): 44

LEGAL SOURCES AND MATERIALS

CISG

United Nations Convention on Contracts for the International Sale of Goods
(Vienna, April 11, 1980).

IBA Guidelines

IBA Guidelines on Conflicts of Interest in International Arbitration
(Adopted by resolution of the International Bar Association Council, 23 October 2014).

UNCITRAL Arbitration Rules

(United Nations Commission on International Trade Law, February 2014).

UNCITRAL Model Law

UNCITRAL Model Law on International Commercial Arbitration
(Vienna, June 21, 1985 as amended 2006).

UNIDROIT Principles

UNIDROIT Principles of International Commercial Contracts of the International Institute for the Unification of Private Law
(Rome, 2004 as amended 2010).