الجامعة الملكية للبنات

ROYAL UNIVERSITY FOR WOMEN

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أول جامعة خاصة **"معتمدة من مجلس التعليم العالي"**

Memorandum for CLAIMANT

On behalf of	**Against**
Delicatesy Whole Foods Sp	Comestibles Finos Ltd
Equatoriana (CLAIMANT)	Mediterraneo (RESPONDENT)

Amina Abdulla • Omaima AlAbbasi • May Alfadhel • Raghad Alotaibi • Eman AlSarraf • Asya Bukhowa • Noof Janahi • Raneem Kadhem

Riffa, Bahrain

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ABA	American Bar Association
Art.	Article
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG-AC	Advisory Council for the Vienna Convention on Contracts for the International Sale of Goods
CISG-online	Internet database on CISG decisions and materials
Cl.	Clarifications
Corp.	Corporation
et al.	Et alii (and others)
Exh.	Exhibit
GC	General Conditions
i.e.	Id est (that is)
ICC	International Court of Arbitration
IBA	International Bar Association
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration
LCIA	London Court of International Arbitration
LP	Limited partnership

Ltd	Limited
Mr.	Mister
Ms.	Miss
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
p./pp.	Page/pages
para/paras.	Paragraph/paragraphs
PCA	Permanent Court of Arbitration
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
R.	Record
SC	Standard Conditions
Tribunal	Arbitral Tribunal
UAR	UNCITRAL Arbitration Rules (as revised in 2010)
UML	UNCITRAL Model Law on International Commercial Arbitration (as revised in 2006)
UML Digest	UNCITRAL Model Law on International Commercial Arbitration Digest (2012)
UPICC	UNIDROIT Principles of International Commercial Contract

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Mexico

Mexican Squash Case

Center of Arbitration Mexico

30 November 2006

Cited as: *Mexican Squash Case*

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LEGAL SOURCES

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New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Awards, New York, 1958
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rule as revised in 2010, Vienna
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, Vienna, 2008
UPICC/UNIDROIT PRINCIPLES	UNIDROIT Principles of International Commercial Contracts, Rome, 2016

STATEMENT OF FACTS

The parties to this arbitration are Delicatesy Whole Foods Sp [hereafter: CLAIMANT] and Comestibles Finos Ltd [hereafter: RESPONDENT], collectively referred to as 'parties'.

CLAIMANT is a medium sized manufacturer of fine bakery products registered in Equatoriana.

RESPONDENT is a gourmet supermarket chain in Mediterraneo.

10 March 2014	CLAIMANT receives an invitation to tender for the delivery of chocolate cakes alongside the tender documents from the RESPONDENT, after RESPONDENT's Head of Purchasing, Ms. Annabel Ming, met CLAIMANT's Head of Productions, Mr. Kapoor Tsai, at the yearly Danubian food fair Cucina.	*R. Exh. C 1, p. 8; C 2, p. 9*
27 March 2014	CLAIMANT submits its offer following RESPONDENT's invitation to tender, particularly subjecting such offer to RESPONDENT's acceptance of CLAIMANT's General Conditions of Sale and Code of Conduct.	*R. Exh. C 3, p. 15; C 4, p. 16*
7 April 2014	CLAIMANT is awarded the contract by RESPONDENT, that explicitly accepts the modifications to the contractual conditions proposed by CLAIMANT.	*R. Exh. C 5, p. 17*
1 May 2014	CLAIMANT delivers the chocolate cakes in compliance with the contract and no problems occurred in 2014, 2015, 2016.	*R. p. 5, para. 6*
6 January 2016	A special rapporteur investigating for UNEP releases a report about the deforestation in Ruritania, denouncing the corruption in various public authorities responsible for the protection of the biodiversity in that area.	*R. Exh. C 7, p. 19*
23 January 2017	Michelgault, business paper in Equatoriana, reports news about the forgery of many certificates attesting sustainable production methods for the cocoa beans in Ruritania.	*R. Exh. C 7, p. 19*

27 January 2017	RESPONDENT sends an email to CLAIMANT, on a Friday, requesting clarifications, by the following business day, on whether its suppliers are involved in the Ruritania scandal, and threatens to terminate the contract. CLAIMANT replies immediately and promises to investigate on the issue.	*R. Exh. C 6, p. 18; Exh. C 8, p. 20*
10 February 2017	CLAIMANT informs RESPONDENT that, during its own investigations, it surprisingly discovered that the supplier Ruritania People's Cocoa mbH was involved in the scandal and clarifies that it immediately terminated the contract with such supplier. Moreover, it communicates to be willing to take back the cakes not yet sold and to discuss with RESPONDENT a financial contribution to possible losses.	*R. Exh. C 9, p. 21*
12 February 2017	Regardless of CLAIMANT's effort for reaching an amicable solution, RESPONDENT flatly rejects CLAIMANT's offer and terminates the contract, refusing to pay the outstanding purchase price for the cakes already delivered.	*R. Exh. C 10, p. 22*
30 May 2017	CLAIMANT and RESPONDENT try to settle the dispute by mediation, but no amicable solution was reached.	*R. p. 3, line 1*
26 June 2017	CLAIMANT appoints as arbitrator Mr. Prasad, who makes his declaration of impartiality and independence and availability.	*R. Exh. C 11, p. 23*
30 June 2017	CLAIMANT submits a notice of arbitration according to the dispute resolution clause with RESPONDENT.	*R. p. 3; p.4*
31 July 2017	RESPONDENT submits a late response to CLAIMANT's notice of arbitration, since it was sent beyond the 30 days time limit established under the *lex arbitri*.	*R. p. 24*

SUMMARY OF ARGUMENTS

There is no such thing as business ethics. There is only one kind- you have to adhere to the highest standard. -Marvin Bower-

1. A mouthful of CLAIMANT's moist chocolate cakes was pleasing enough for RESPONDENT and its customers until a cavity came along to rid the Queens' Delight of all their regality. Because of a tiny cocoa bean, RESPONDENT terminated the contract and refused to pay the outstanding purchase price for the chocolate cakes. Therefore, CLAIMANT was left with no choice but to resort to this *ad hoc* arbitration to settle the dispute. To avoid delay, the parties decided to bifurcate the proceedings, by proroguing the outstanding payment and the consequential damages to the next round of submissions. However, RESPONDENT is trying to postpone the decision and submitted sour allegations to the arbitral. Indeed, it is challenging both the chocolates cakes, which everybody was eating till a while ago, and the authority legally designated to decide on the case, that from sweet became bitter. In the light of the arbitration agreement and the Danubian law, the tribunal should not decide on the specious challenge of Mr. Prasad raised by RESPONDENT, because it has not been entrusted with the authority to do so. In any case, if the arbitral tribunal found itself competent, the challenge should be rejected because time-barred under the applicable law. **(ISSUE 1)**

2. In the event the tribunal decides on the challenge, Mr. Prasad shall participate in the decision, because both UAR and UML do not require the challenged arbitrator to abstain from the decision when the arbitral tribunal is already fully constituted. Moreover, the instability of the tribunal would lead to the rejection of the enforcement of the award rendered. **(ISSUE 2)**

3. Notwithstanding the quarrel on the authority to decide, Mr. Prasad should not be removed from the tribunal because he appears immaculate under the scrutiny of both the *lex arbitri* and the *lex loci arbitri*, that require justifiable doubts on his impartiality or independence for a challenge to be successful. In fact, the third-party funding endorsed by CLAIMANT in the current proceeding does not affect at all Mr. Prasad's ability to render a fair and just decision. **(ISSUE 3)**

4. In point of merits, the contractual relationships between the parties is undoubtedly governed by CLAIMANT's standard conditions according to the parties' intention and the substantive law applicable to the case. **(ISSUE 4)**

5. Despite all, CLAIMANT delivered conforming chocolate cakes, in tune with highest business standards, and performed its obligation of best efforts in the production process. Therefore, it is exempted from any liability for misconduct of the supplier of cocoa beans. **(ISSUE 5)**

ARGUMENT ON THE PROCEEDING

ISSUE 1: THE TRIBUNAL DOES NOT HAVE THE AUTHORITY TO DECIDE ON RESPONDENT'S CHALLENGE OF MR. PRASAD

6. RESPONDENT raised a challenge against CLAIMANT on the basis that CLAIMANT's arbitrator Mr. Prasad is not impartial and independent [*R. p. 38*], even though Mr. Prasad disclosed his Declaration of Independence after his appointment [*R. p. 23*]. The tribunal should not decide on the challenge, since the Notice of Challenge has been submitted pursuant to Art. 13(4) UAR [*R. p. 38*]. Thus, the appointing authority will neither be the tribunal nor the PCA, due to confidentiality clause, but the Supreme Court [*R. PO2, p.55. Cl. 47*]. In any case, the challenge raised by RESPONDENT is groundless since it does not fall within the scope of the arbitration agreement **(A)** and if it does, RESPONDENT's request is time-barred **(B)**. Moreover, under the applicable procedural law the challenge shall be decided by the appointing authority, i.e. the Danubian Supreme Court **(C)**.

A. The Challenge of Mr. Prasad Does Not Fall Within the Scope of the Arbitration Agreement

7. The parties did not consent to include the challenge within the arbitration clause **(I)**. In order for the tribunal to decide on the challenge of arbitrators, a clear and explicit arbitration agreement is obligatory [*Várady et. al,* 2009]. Contrary to RESPONDENT's allegations, the challenge procedure does not fall within the scope of the clause [R. *Exh. C 2, clause 20, p. 12*]. Nothing in the arbitration clause suggests or implies that such an act is governed by arbitration, which takes the matter to be interpreted by "the rules of the law applicable to the clause itself" [*Welser et. al,* 2012]. The applicable law to the case at hand is the Danubian Law, whose Art. 13 establishes a procedure concerning the subject matter **(II)**. Furthermore, according to Art. 7 UML the: "Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not". Following both the arbitration agreement and the applicable law, the challenge should not be decided by the tribunal.

I. Parties' Autonomy Is the Leading Principle for Shaping the Arbitral Proceeding

8. When agreeing to arbitration, the parties have the utmost right and freedom in sculpting their arbitration clause to their best needs. Parties have the power to decide on the number of arbitrators, the applicable law, the procedure and so forth [*Redfern & Hunter*, 2004]. Art. 19 UML states that, "...the parties are free to agree on the procedure to be followed by the arbitral tribunal

in conducting the proceedings". Thus, only the matters that the parties consented to are those that fall within the scope arbitration agreement. Consequently, since the challenge was not agreed upon by CLAIMANT and RESPONDENT, it is beyond the ambit of the arbitration agreement.

II. According to Art. 13(1) UML the Parties Should Have Agreed on a Procedure for Challenging Arbitrators

9. RESPONDENT should have taken initiative on choosing a procedure for the challenge, but it did not. Pursuant to Art. 13 UML, the challenge procedure is standardized as follows: "The parties are free to agree on a procedure for challenging an arbitrator". However, RESPONDENT did not conform to such rule, raising the question about the validity of the challenge. Therefore, the grounds for the challenge did not fall within the scope of the applicable law. Thus, in the absence of an agreement, the challenge of Mr. Prasad is considered *tamquam non esset*.

B. The Challenge Is Time-Barred Under UAR and UML

10. RESPONDENT would probably argue that the challenge falls within the scope of the arbitration agreement. Even so, the challenge is time-barred because it should have been submitted within a specific time frame **(I)**, but RESPONDENT raised it beyond the statutory period, since the *dies a quo* is when the metadata was retrieved **(II).**

I. The Challenge Should Have Been Submitted Within the Specific Time Limit

11. Under the *lex arbitri*, RESPONDENT was given 15 days to submit or notify the challenge. Since RESPONDENT did not abide by the law, its request should be dismissed as belated.

1. The Challenge Is Belated When Applying Art. 4(3) and Art. 13(1) UAR

12. CLAIMANT submitted its Notice of Arbitration on 30 June, but RESPONDENT only replied on 31 July 2017, which means that the response *per se* was sent beyond the limit of 30 days established by the *lex arbitri*. Despite that the late submission of RESPONDENT's reply does not affect the composition of the tribunal or the proceeding itself, as per Art. 4(3) UAR, this circumstance is a supporting evidence of the delay techniques used by RESPONDENT for shifting the day of the payment of its monetary obligations. Considering that the Notice of Arbitration was sent on 30 June 2017 [*R. p. 4*], along with Mr. Prasad's Declaration of Independence, but RESPONDENT sent the Notice of Challenge of Arbitrator on 14 September 2017 [*R. p. 38*], the time limit to challenging Mr. Prasad was exceeded.

13. Furthermore, the Notice of Arbitration was submitted pursuant to Art. 13 UAR, thus implicating that RESPONDENT surpassed the time limit mandated and therefore, the challenge is

time-barred. Art. 13(1) UAR states, "A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator…". This article elevates two main pathways, the first being the scope, and the second raises a vital question as to the validity of challenging an arbitrator. "The fifteen-day time period appears to be strict, and challenges out of time will not be accepted. The obligation is only to 'send' the requisite notice within the fifteen-day period and not to ensure that it has been delivered or received as per Art. 2 [UAR]" [*Croft et. al,* 2013]. The same outcome is reached by applying Art. 13(2) UML, which states that the challenge should have been raised "within 15 days after becoming aware of any circumstance" connected to possible doubts about the arbitrator's lack of impartiality or independence. This leads to the conclusion that the challenge of Mr. Prasad is time-barred.

II. The *Dies a Quo* is the Day When Respondent Retrieved the Metadata

14. The metadata was retrieved by RESPONDENT on 27 August 2017. According to the *lex arbitri*, RESPONDENT should have submitted the challenge as soon as it became aware of the circumstances of possible grounds for justifiable doubts. RESPONDENT filed the Notice of Challenge on 14 September 2017, i.e. beyond the time limit prescribed at law [*R. p. 38, para. 3*]. "The scope and efficiency of any document production process can affect the efficiency of the entire proceedings" [*Imhoos et al.,* 2015]. Moreover, previous cases have ruled that most metadata presented by a RESPONDENT in a case mostly results in the information granted in the metadata to be falsely alleged or forged [*Perenco Ecuador Ltd v. The Republic of Ecuador*, 2015]. Presenting this documentation at a later date only exudes the intention that RESPONDENT consistently tries to delay the proceeding, as the metadata was a significant retrieval for RESPONDENT's challenge.

1. Respondent Submitted a Late Challenge

15. Mr. Prasad submitted his Declaration of Independence on 26 June 2017, disclosing all the circumstances that he is aware of [*R. Exh. C 11, the p. 23*]. On the other hand, RESPONDENT accepted and recognized the jurisdiction of the tribunal without objecting to Mr. Prasad's appointment "despite the restrictions in his declaration of independence" on 31 July 2017 [*R. p. 26, para. 22*]. This is a clear proof that RESPONDENT knew about the previous relationships of Mr. Prasad, agreed to such declaration, and did not object to it in its response. Afterwards, to simply delay the proceeding, decided to raise 'accusations' against an arbitrator appointed in compliance with the arbitration agreement and the applicable law.

C. The Challenge Should Not Be Decided by the Tribunal Under UAR and UML

16. Whether the challenge is under the scope of the arbitration agreement or if it was submitted or not within the time limit, the tribunal should not decide as the decision is to be made by the appointing authority, under the *lex arbitri* and the *lex loci arbitri* **(I)**. Upon the enactment of the UML, the appointing authority shall be the Supreme Court, as per Art. 6 **(II)**.

I. The Party Challenging the Arbitrator Shall Seek a Decision by the Appointing Authority

17. RESPONDENT raised its challenge against Mr. Prasad without the agreement of CLAIMANT [*R. p. 45, para. 1*]. In order for the proceeding to continue without delays, RESPONDENT must seek a decision from the appointing authority, but the current proceeding should continue in the interim.

1. Contrary to RESPONDENT's Allegations, Art. 13(4) UAR Is Applicable to the Case at Hand

18. RESPONDENT did not inform CLAIMANT about its will to exclude Art. 13(4) UAR, and therefore the exclusion should not be taken into account, since it was not consented by the parties. According to Art. 35 UAR, the parties can choose the rules apply to their dispute, but since the parties did not agree upon the exclusion of Art. 13(4) UAR, such exclusion shall not apply. Consequently, the appointing authority shall decide. "The article certainly clarifies and potentially expands, the scope of party autonomy in choosing the rules of law applicable to the dispute…the arbitral tribunal shall apply the "rules of law" designated by the parties as applicable to the substance of the dispute" [*Caron & Caplan,* 2013]. This also conforms with Art. 28 UML, which stipulates that the parties choose the "rules of law" based on the substance of the dispute. After the issue arose, RESPONDENT argued that this specific law is not to be applied, although CLAIMANT never agreed to this, regardless of what RESPONDENT had in mind [*R. p. 39, para. 8*]. The challenge must adhere to Art. 13(4) UAR as it is the "fundamental nature of the right to challenge an arbitrator" [*R. p. 46, para. 3*]. Moreover, the parties have not specified the extent of the tribunal's authority, nor its power.

2. The Permanent Court of Arbitration is the Appointing Authority Under Art. 6(4) UAR

19. The procedural law shall prevail to decide the challenge of Mr. Prasad. Art. 6(4) UAR shall apply and, accordingly, the Secretary-General of the PCA will act as a designating authority by the request of the parties, when there has been a failure to decide on the challenge, as in this case. Indeed, since there was no explicit term in the arbitration clause regarding the appointing authority, through the default provisions of the UAR, the Secretary-General must decide.

20. "The Secretary General of the PCA acts as the default designation authority, in case, the disputing parties have not agreed upon an appointing authority, or the chosen appointing authority

by the disputing parties refuses or fails to act, within the PCA's Optional Rules of Procedure and the UNCITRAL Arbitration Rules of 1976 and 2010. In these instances, the PCA's Secretary General will designate an appointing authority for the disputing parties to secure the process" [*Indlekofer*, 2013]. The one on the PCA is a mandatory provision, that the parties cannot opt out of. However, this may not be the case for CLAIMANT and RESPONDENT, due to their dispute resolution clause, as they both had previous encounters with arbitral institutions that did not benefit both parties [*R. Exh. C 1, p. 8, para. 3*; *R. Exh. R 5, p. 41, para.6*]. Therefore, the resort to PCA would be nullified due to the arbitration agreement. The result would be another appointing authority, which is the Court, according to UML.

3. The Parties Intended to Keep the Arbitral Proceeding Confidential

21. In the dispute resolution clause, the parties explicitly excluded the involvement of any arbitral institution. Moreover, the parties bound themselves to a confidentiality clause, which justifies their choice to resort to *ad hoc* arbitration. In accordance to RESPONDENT's GC [*R. Exh. C 2, "Clause 21: Confidentiality", p. 12, para. 6*] and CLAIMANT's Business Code of Conduct [*R. Exh. R 3, "Confidential Information", p. 30, para. 2*], both parties had explicitly stated that their commercial information may not be released to anyone outside of their companies. "In this context, the term 'confidentiality' describes the potential obligations of parties to an arbitration agreement, arbitrators, arbitral institutions, counsel, and other persons involved to not reveal information pertaining to the arbitration to non-parties" [*Goeler 1*, 2016]. Since both parties sought to refrain from any damage to their companies, loss of any assets or claims, the resort to *ad hoc* was the most favorable decision for dispute resolution purposes. "These confidentiality obligations may relate to different categories of information, notably the existence of the arbitration and its key features, the non-public materials submitted in the course of the arbitration, the arbitral hearings, the arbitrator deliberations, and the decisions made by the tribunal, in particular the final arbitral award" [*Goeler*, 2016].

22. CLAIMANT's request for *ad hoc* arbitration rather than institutional was founded on the basis that at the last arbitration CLAIMANT had been in an unfair trial, due to the choice of the presiding arbitrator that was chosen by the court of the *lex arbitri* [*R. Exh. R 5, p. 41, para. 6*].

a) The Intention of the Parties Shall be Interpreted in Accordance to Art. 8 CISG

23. The intention of the parties shall be interpreted by applying the rules laid down in the CISG [*R. PO1, p. 48, para. 1, line 3*]. Art. 8 CISG is considered as the "decisive" law for arbitration

clauses that seem to have a general meaning. Therefore, the CISG governs this arbitration agreement because it identifies "form", "validity", "evidence" and "formation" of the arbitration agreement. The CISG broadly widens the scope of the agreement within its articles, which would be suitable for both the aggrieved party, CLAIMANT, and the RESPONDENT [*Muñoz & Viscasillas*, 2011].

24. It is evident that the parties intended to exclude the involvement of any arbitral institution. According to Art. 8(1) CISG, "statements made by and other conduct of the party are to be interpreted according to his intent where the other party knew or could have not been unaware what that intent was" [*Schwenzer & Jaeger*, 2017]. The intention of the parties is implied rather than explicitly written in the dispute resolution clause. "Continuation of the arbitration clause in spite of the avoidance of the main contract) clearly state that dispute resolution clauses are not excluded from the CISG application" [*Schwenzer & Jaeger*, 2017]. The application of this article suggests that the dispute resolution clause shall be interpreted in accordance to the doctrine of separability to detect the actual intention of the parties, not taking any of the other clauses into consideration [*Moses*, 2008].

25. If Art. 8(1) CISG is deemed to be not applicable, the reasonable person test under Art. 8(2) CISG applies as a tool for understanding the circumstances. In applying Art. 8(2) CISG, "One must give account, whether the clause differs from the expectation of the contractual partner to such an extent that the latter cannot reasonably be expected to have anticipated that such a clause might be included" [*Koch*, 2011]. In the case where Art. 8(2) CISG does not clarify the intention of the parties, the general criteria of Art. 8(3) CISG must be used inasmuch such provision considers the aspects of negotiations, practices that have been established by the parties themselves, usages and other conduct of the parties as a way to determine their intent. Through correspondence, Ms. Ming informed Mr. Tsai of their bad experience with arbitral institutions, due to a lack of confidentiality [*R. Exh. C 1, p. 8, para. 3*]. That is also referred to RESPONDENT's Invitation to Tender, under Clause 20: Dispute Resolution, where the interference of arbitral institutions is excluded [*R. Exh. C 2, p. 12, para. 5*; *R. p. 6, para. 3*].

b) The Arbitration Shall be Conducted as Ad Hoc, Following the Consent of the Parties

26. The arbitration shall be conducted as an *ad hoc*, as agreed by the parties. It is clearly stated by the parties that, "In the unlikely event that a dispute arises and cannot be solved amicably, we are certain that we will be able to overcome any problems relating to the constitution of the arbitral

tribunal even without institutional support." [*R. Exh. C 3, p. 15, para. 4*]. This reiterates that the parties agreed upon *ad hoc* arbitration.

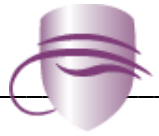
II. Upon the Enactment of UML in Danubia, the Appointing Authority is the Supreme Court

27. Since the parties have agreed on the exclusion of arbitral institutions, the PCA cannot be the appointing authority and, therefore, the issue of the competent authority to decide on the challenge must be solved by resorting to the enactment of the UML, under which the appointing authority shall be the Danubian Supreme Court [*R. PO2, p. 55, Cl. 47*]. Art. 6 UML is a provision that the parties cannot opt out of, as it is the *lex loci arbitri*. "The arbitration law of the place of arbitration governs international arbitration since this principle is applied in most cases in practice" [*Várady et. al*, 2009]. Consequently, the challenge to Mr. Prasad shall not be decided by the tribunal, but by the Supreme Court of Danubia.

1. Art. 13(3) UML Establishes that the National Courts Shall Decide on the Challenge

28. The national [Supreme] Courts have the authority to decide on the challenge. Art. 13(3) UML states that "...the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in Art. 6 to decide on the challenge…". Pursuant to Art. 6 UML, "Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions." Under these articles, the national courts are the competent authority to decide on the challenge. Moreover, Art. 13(3) UML "permits judicial challenges to arbitrators in both ad hoc arbitrations, where no contractually agreed challenge procedure exists" [*Ewen*, 2011]. As a result, no one can deny that the role of the court over the impartiality and independence of an arbitrator is fundamental [*Várady, et. al*, 2009]. To conclude, Art. 6 UML is the applicable article since both parties enacted the Model Law with Option 1, concerning the form of the arbitration agreement, whilst both are contracting states of the NYC [*R. PO2, p. 55, Cl. 47*].

29. As the parties' consented to *ad hoc* arbitration, explicitly excluding arbitral institutions, the proceeding should commence with the rules chosen by the parties. Such procedural rules refer to the PCA, as arbitral institution, entrust with the power to designate an appointing authority. Therefore, RESPONDENT shall adhere to the *lex loci arbitri*, resorting to the Supreme Court in order to have the challenge decided.



CONCLUSION OF THE FIRST ISSUE

30. Under the scope of the arbitration agreement, challenges should not be decided upon the tribunal. Moreover, the challenge raised by RESPONDENT is time-barred, as it exceeded the time prescribed by the applicable laws. However, even if the challenge is deemed admissible, the tribunal should not decide, nor the PCA act as the appointing authority, due to the parties' arbitration agreement, which excludes resorting to arbitral institutions. Therefore, RESPONDENT should have referred the decision on the challenge to the Danubian Supreme Court.

ISSUE 2: IF THE TRIBUNAL DECIDES ON THE CHALLENGE, MR. PRASAD SHALL PARTICIPATE IN THE DECISION

31. According to the arbitration agreement, the tribunal is already fully constituted. Consequently, Mr. Prasad has the right to participate in the decision, since UAR and UML do not require the challenged arbitrator to abstain from the decision **(A)**, and because RESPONDENT based its challenge on allegations against CLAIMANT and not Mr. Prasad **(B)**. Even so, under Art. 5(1) NYC, Mr. Prasad's removal would invalidate the rendered arbitral award **(C)**.

A. The Fully Constituted Tribunal Has the Power to Decide on the Challenge

32. The *lex loci arbitri* is silent regarding the challenged arbitrator refraining from the proceeding while he is being challenged. The UML requires the fully constituted tribunal to make the decision. Therefore, the *lex loci arbitri* does not require Mr. Prasad to abstain from the decision **(I)**. Moreover, Mr. Prasad should participate in the decision-making process, also when applying Art. 29 UML **(II)**.

I. The UML Does Not Require Mr. Prasad to Abstain from the Decision

33. Mr. Prasad should participate in the decision since there are no grounds for his exclusion. The UML does not contain any provision requiring the challenged arbitrator to abstain from the proceeding while he is being challenged. The tribunal shall decide on the challenge in accordance with Art. 13(2) UML, which includes Mr. Prasad as a part of the tribunal, and Art. 13(3) UML, according to which: "…the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceeding and make an award." If the challenged arbitrator has the ability to render an award, he may also have the full right to participate in the decision of the challenge, especially in the case of Mr. Prasad and under the circumstances in the case. Moreover, Art. 29 UML provides that the majority of the members of the tribunal participate in the decision-making process [*UML Digest*]. This emphasizes that Mr. Prasad should not be removed, as he is a part of the tribunal.

II. Respondent Based Its Challenge on Allegations Against Claimant and Not Mr. Prasad

34. There are no impediments as to Mr. Prasad's participation, since the allegations are not against him. However, if the allegations are related to Mr. Prasad, he should still participate. CLAIMANT's decision to have a third-party funder in this arbitration does not affect Mr. Prasad's impartiality or independence, and therefore, Mr. Prasad has the full right to participate. "The fact that a party has obtained third-party funding is usually neither disclosed to the arbitral tribunal nor the opponent.

35. As regard to the litigation funding more specifically, many litigation funders prefer to keep their involvement confidential" [*Goeler 1*, 2016]. Additionally, Mr. Prasad disclosed all the information regarding his connections with the third-party funder as soon as CLAIMANT disclosed the involvement of a funder [*R. p. 36*]. Further, when there are allegations constricting an arbitrator's impartiality and independence, the arbitrator has the duty to disclose in writing any circumstances which might affect his ability to decide to all the parties involved [*Várady et. al*, 2009].

36. In the case at hand, Mr. Prasad disclosed all the facts that would affect his impartiality or independence including his relations to the third-party funder [*R. p. 36*]. RESPONDENT agreed upon the appointment of Mr. Prasad despite the restrictions in his Declaration of Independence [*R. p. 26, para, 22*]. RESPONDENT's allegations were devoid of any merits. Abiding to the international standard of arbitrator ethics, Mr. Prasad disclosed the information that reckon him to be partial and dependent. As a result, there are no impediments to Mr. Prasad's participation in the decision even if the allegations are broadly related to him.

B. Mr. Prasad's Replacement Would Affect the Enforcement of the Award

37. Danubia is a contracting state to the NYC. Hence, any significant change within the arbitral proceeding or the tribunal would affect the rendering final and binding award under the NYC. As a consequence, Mr. Prasad should not be removed from the arbitral tribunal pursuant to Art. 5(1)(d), because the enforcement of the award may be refused when the composed tribunal or the arbitral proceeding was not in accordance with the arbitration agreement **(I)**.

I. Art. 5(1)(d) NYC Should Be Taken into Consideration

38. Recognition and enforcement of the award is ideally a significant matter during arbitral procedures under Art. 5(1)(d) NYC. As a result, disregarding an article from NYC would demolish the significance of a final and binding award, as the arbitral "authority" (as stated in the NYC) was not in accordance with the parties' arbitration agreement. In the case of Mr. Prasad, RESPONDENT's

challenge was already aware of all the circumstances. It also occurred that there has been an abrupt objection after the appointment of the arbitrators, when the parties were notified of the appointment, but decided to raise objections after the timing has lapsed.

39. Knowingly, this did not affect the award rendered, as the award diligently makes a reference to an arbitrator whose partiality was questioned by the RESPONDENT of that case and the recognition of the award must be granted. [*Brazil No. 30, YPFB Andina S/A v. UNIVEN Petroquímica Ltda*, 2012]. Thus, Mr. Prasad's removal would question the legitimacy of the final and binding award upon the parties.To conclude, under the NYC, the composition of the tribunal must be in accordance with the parties' agreement. The fact that RESPONDENT has failed to meticulously object to the circumstances declared by Mr. Prasad should have no impact on the current proceeding.

CONCLUSION OF THE SECOND ISSUE

40. Mr. Prasad has the right to participate in the decision on the challenge, since RESPONDENT raised claims that only refer to CLAIMANT, rather than Mr. Prasad. Moreover, RESPONDENT expressly agreed to the nomination of Mr. Prasad, after he declared the circumstances that might have an impact on his impartiality and independence. Furthermore, the exclusion of Mr. Prasad's participation during the arbitral proceeding would affect the rendering of the final and binding award under Art. 5(1)(d) NYC.

ISSUE 3: DESPITE THE AUTHORITY TO DECIDE, MR. PRASAD SHOULD NOT BE REMOVED FROM THE TRIBUNAL

41. There are no justifiable doubts as to the impartiality and independence of Mr. Prasad. To begin with, independence signifies the correlation between the arbitrator and the parties, be it personally, socially or financially [*Donahey,* 1992]. "This term addresses itself to the issue of the appearance of bias, and not to actual bias" [*Croft et. al,* 2013]. On the other hand, impartiality is a more subjective concept, since it is in correspondence with the state of mind, or in other words, intangible [*Croft et. al,* 2013]. Under the UAR and UML, justifiable doubts are identified as those having sufficient grounds for rationalization **(A)**. Mr. Prasad already disclosed all the information that would give rise to his justifiable doubts **(B)**. In any case, the third-party funding does not affect Mr. Prasad's impartiality or independence **(C)**.

A. Successful Challenges Require Justifiable Doubts as to the Arbitrator's Impartiality or Independence

42. The UAR and the UML established that a challenge to be successful requires justifiable doubts, that are in correlation to the arbitrator's impartiality or independence **(I)**. Justifiable doubts need to be reasonable and legitimate, as per both the specified laws. "...how much "risk" or "doubt" as to an arbitrator's impartiality is acceptable under national law. That is suppose there is a 50% chance, a 33% chance, or a 10% chance that an arbitrator is biased; what degree of risk justifies removing the arbitrator? There is no considered authority addressing this issue." [*Born,* 2014]. In any case, RESPONDENT's allegations have not been proved **(II)**.

I. Art. 12(1) UAR and Art. 12(2) UML Doubts Must Be Justifiable

43. The grounds for challenge can only be raised based on justifiable doubts. Pursuant to Art. 12(1) UAR, arbitrators may be challenged if justifiable doubts exist. And Art. 12(2) UML states that, "An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence". It is important to stress that an appearance of subjectivity does not constitute on one party's alleged idiosyncratic views. "The fact that a party declares that it does not have confidence in an arbitrator is irrelevant to the question whether there is, objectively, an unacceptable appearance of bias or partiality" [*Born,* 2014].

II. Respondent Failed to Prove Mr. Prasad's Lack of Impartiality or Independence

44. RESPONDENT's does not fund his allegations on reasonable grounds, because it utilizes claims against CLAIMANT to support accusations towards Mr. Prasad. According to UML and UAR, there is no explicit wording stating that CLAIMANT has a legal obligation of disclosure. RESPONDENT consented to Mr. Prasad's declaration, which stated "existing partners to take on new work related to one of the parties in an arbitration" [*R. p. 45, para. 6*]. Even if RESPONDENT seeks to challenge Mr. Prasad based on his repeat appointments, this does not justify a sufficient doubt to his disqualification [*Koh,* 2017]. Therefore, RESPONDENT's challenge is unjustifiable, as it was raised after it had agreed to the nomination of Mr. Prasad.

B. Mr. Prasad Disclosed All the Information Likely to Give Rise to Justifiable Doubts

45. Mr. Prasad abided by all the laws provided by the parties and followed all the procedures in disclosing the information likely to give rise to doubts as to his impartiality or independence **(I)**. Mr. Prasad also unveiled any occurrence that would partially imply a bias **(II)**.

I. Art. 11 UAR States that Justifiable Doubts Shall Be Disclosed

46. Mr. Prasad made his Declaration of Independence in compliance with Art. 11 UAR by stating, "I have been asked by Delicatesy Whole Foods Sp...to act as a party appointed arbitrator…in line with Art.11 of the UNCITRAL Arbitration Rules and on the basis of the information available to me, I make the following…" [*R. Exh. C 11, p. 23, para. 1*]. In reference to Art. 11 UAR, "When 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." Mr. Prasad, once again, abided by the *lex arbitri* and disclosed the information at hand for avoidance of such challenge.

1. Mr. Prasad Disclosed All the Relevant Circumstances

47. Mr. Prasad exhausted every remedy provided by law to avoid the grounds for challenge and disclosed the circumstances in his Declaration of Independence, such as past and present relationships [*R. Exh. C 11, p. 23*]. Moreover, justifiable doubts are only those relevant and not classified as spurious or minor matters. Spurious is defined as illegitimate or false, whereas minor matters, mean that they do not affect the course of proceedings and are therefore irrelevant. Therefore, RESPONDENT's allegations are not considered to be of relevance.

2. Claimant's Appointment of a Replacement Arbitrator is Not an Admission of Mr. Prasad's Lack of Impartiality or Independence

48. Even if RESPONDENT is trying to delay the proceeding, CLAIMANT will still abide to the occurrences by providing a replacement arbitrator in the case of RESPONDENT's successful challenge. "The replacement of an arbitrator will most likely cause delay to the arbitration proceedings...Thereafter the replacement arbitrator will have to be given reasonable time to get acquainted with the entire file...Therefore, the replacement of an arbitrator will most likely affect the procedural timetable regardless of whether certain steps will eventually be repeated or not" [*Habegger et. al,* 2005]. The challenge is pursuant to RESPONDENT's attempts of delaying the proceeding.

II. Mr. Prasad's Publication is Not a Sufficient Source to Doubt His Impartiality or Independence

49. Mr. Prasad published his non-allegiance to the conformity concept of Art. 35 CISG regarding the production process and the legal entities involved [*R. Exh. R 4, p. 40*]. RESPONDENT raised this "doubt" under the Notice of Challenge, in which the article has been published through all leading

databases, meaning that it was easy to access. The Vindobona Journal of International Commercial Arbitration is one of the leading journals in the field of international commerce [*R. PO2, p. 51, Cl. 14*]. Mr. Prasad published this article on his main official website, which was available at the time RESPONDENT accepted the nomination of Mr. Prasad as an acting arbitrator on behalf of CLAIMANT. Therefore, Respondent was neglectful in not investigating Mr. Prasad's background.

1. Would be Wrong in Law and Fact to Apply the IBA Guidelines

50. In order for the IBA Guidelines to apply, the parties need to consent to them in the arbitration agreement. However, in this case, RESPONDENT unilaterally assumed the application when addressing Mr. Prasad in its Notice of Challenge, although CLAIMANT had never agreed to their application [*R. PO1, p. 39, paras. 9, 10, 11*]. "A decline in the role of consent also challenges the ongoing relevance of international arbitration standards and distorts the operation of fundamental principles of arbitration law" [*Abou Youssef*, 2010]. Therefore, the applicability of the IBA Guidelines would come into question when referring a justifiable doubt towards an arbitrator whom already disclosed the circumstances which have been raised.

2. Assuming that the IBA Guidelines Apply, Mr. Prasad's Publication Does Not Represent a Conflict of Interest Under the Green List

51. If the IBA Guidelines apply, under the Green List, there is no actual conflict of interest. "The Green List is composed of situations where "no appearance of, and no actual, conflict of interest exists from the relevant objective point of view" [*Berger*, 2015]. Art. 4.1.1 considers expressed legal opinions on articles that concern an issue that arise during the arbitration as permissible. "The Working Group rightly concluded that the Green List describes situations where there is no apparent or actual conflict of interest and, therefore, no duty of disclosure" [*Berger*, 2015]. Consequently, Mr. Prasad's publication should not constitute a conflict of interest.

3. Mr. Prasad's Conduct Conformed to the Ethical Standards of Arbitrators

52. Arbitrators' codes of ethics can be found in institutional arbitration. An institution that defines and set rules for the codes of ethics of arbitrators is the American Bar Association. The first canon deals with whether an arbitrator should accept his or her appointment and states, "he or she can serve impartially…independently from the parties, potential witnesses and the other arbitrators…is competent to serve and he or she can be available…". The second canon affirms that an arbitrator should disclose any circumstance that might affect his or her impartiality or independence, asserting that the disclosure shall concern any, "past financial, business, professional or personal

relationships", also disclosing the knowledge of previous relationships. Referring to the IBA Rules of Ethics, Art. 4.1 states: "Failure to make such disclosure creates an appearance of bias, and may of itself be a ground for disqualification." Mr. Prasad's disclosure does not constitute grounds for challenge based on justifiable doubts, as it was his duty as an arbitrator to comply with standards of ethics and to disclose circumstances which might question his impartiality and independence. Moreover, CLAIMANT's appointment of a replacement arbitrator does not imply recognition of Mr. Prasad's lack of impartiality and independence.

C. Claimant's Third-Party Funding Does Not Affect Mr. Prasad's Impartiality or Independence

53. Mr. Prasad disclosed all his past and present relationships with the parties and other relevant circumstances [*R. Exh. C 11, p. 23*]. Thus, the funding is not relevant as to the evaluation on his impartiality or independence, as Mr. Prasad was unaware of the third-party funder **(I)**. Furthermore, the link between Mr. Prasad and Funding 12 Ltd is too weak **(II)**.

I. Mr. Prasad Was Unaware of the Third-Party Funding

54. CLAIMANT was under no obligation to disclose any information about his funding from FindFunds LP. Referring to General Standard 7(a), the party should disclose any relationship with the arbitrator. "Parties to an international commercial...are under no procedural duty to disclose the fact that they are being funded. No arbitral laws or rules currently require a party to disclose how it finances its claim or defense. A general duty or practice of funded parties to disclose the sources of their funds, for example, 'as a matter of fairness', is not recognized" [*Goeler 2*, 2016; *Mansinghka*, 2016]. RESPONDENT's claim against CLAIMANT is unjustifiable. No applicable law obliges the disclosure of third-party funding.

1. Mr. Prasad's Link to Funding 12 Ltd Is Too Weak

55. Mr. Prasad declared every link he had to the parties or entities likely to be involved in the proceeding [*R. Exh. C 11, p. 23*]. Among all, Mr. Prasad declared to the tribunal and to the parties that his law firm merged with Slowfood, which in fact have a former partner who represents a client in an arbitration funded by Findfunds LP, the main shareholder of Funding 12 Ltd effectively on 1 September 2017. "Arbitrators should reveal any relationship that they have with third-party funding corporations immediately after the funded party discloses the presence of third-party funders in arbitration proceedings...the arbitral tribunal's legitimacy will be in danger and the arbitrator will be in breach of most of the current arbitration regulations, such as the IBA Guidelines

on Conflict of Interest, ICC Rules, LCIA Rules, UNCITRAL Rules, and Article V(d) of the New York Convention regulating arbitrator's duty of impartiality and independence" [*Osmanoglu*, 2015]. "…not all arbitrator conflict of interest leads to automatic disqualification of the arbitrator or to the challenge and/or the annulment of the award; it depends on the intensity of the relationship between the arbitrator/ arbitrators and the third-party funding corporation involved and the degree of control that the third-party funder has over the proceedings" [*Osmanoglu*, 2015]. This reiterates that the Mr. Prasad's relationship with Funding 12 Ltd does not affect his ability to decide, due to the weak relationship between him and the third-party.

56. The fact that the link between Mr. Prasad and Findfunds LP is weak it is confirmed when analyzing the corporate asset of Funding 12 Ltd as a subsidiary of Findfunds LP. "The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as creditor or purchaser, or to prevent the evasion of legal requirements or of obligations" [*the Barcelona Traction, Light & Power Co.*, 1970]. "The essential theory of the "alter ego" doctrine in most jurisdictions is that one party so strongly dominates the affairs of another party...In the context of arbitration agreements, demonstrating an "alter ego" relationship under most developed legal systems requires convincing evidence that one entity dominated the day-to-day actions of another and/or that it exercised this power to work fraud or other injustice or inequality on a third party or to evade statutory or other legal obligations" [*Born*, 2014]. The 'piercing of the veil' entails that the corporation has direct or 'effective' control over the party, including its legal obligations. Nonetheless, "In reality, the vast majority of third-party funding arrangements are structured carefully to ensure that the funder does not have control over the case or the claimant" [*Task Force*, 2017]. This further proves that the funder has no direct control over CLAIMANT and, as consequence, that Mr. Prasad will arbitrate in an impartial and independent way.

II. Mr. Prasad's Law Firm Does Not Have a Significant Relationship with Claimant's Affiliates According to the IBA Guidelines, Should they Apply

57. The IBA Guidelines are general international standards widely recognized at international level, whose scope of application is consistency and diligence of arbitrators, counsel, and parties in arbitral proceeding. As the IBA Guidelines have value of 'soft law', rather than enforceable law, they are only referred to under the express agreement of the parties [*Hodges*, 2017; *Lawson*, 2005;

Landolt, 2005]. The tribunal may refer back to IBA Guidelines for resolving the doubts raised by RESPONDENT regarding Mr. Prasad [*R. PO2, p. 51, Cl.18*].

1. The Application of the Waivable Red List Does Not Justify the Challenge

58. The Waivable Red List is composed of situations considered serious, but not as severe. Such situations underlined state, "are considered to be waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as an arbitrator." As mentioned in General Standard 4(c), these circumstances should be considered waivable if all the parties and the tribunal are aware that these conflicts of interest may interfere upon disclosure. Furthermore, "the IBA Guidelines also establish series of situations that are 'serious' and can only be waived 'if and when the parties, being aware of the conflict of interest situation, nevertheless expressly state their willingness to have such a person act as arbitrator." [*Allen & Mallett*, 2011].

2. The Information Disclosed by Mr. Prasad Are Permissible Under the Orange List

59. General Standard 3(a) IBA requires the disclosure of an arbitrator that might exist as a conflict of interest upon his appointment. Art. 3.3.8 IBA declares the repeat appointments of the arbitrator, while 3.4.1 IBA states the law firm's activity with one of the parties or affiliates of the party, and finally, 3.4.2 IBA the association of the arbitrator with one of the parties or affiliates of the parties in a professional capacity. "General Standard 3 relates to 'Disclosure by the Arbitrator' and not disqualification. It bears noting that the IBA Guidelines also clearly provide that 'Nondisclosure cannot by itself make an arbitrator partial or lacking independence" [*Koh*, 2017].

60. Mr. Prasad's weak link to Funding 12 Ltd should not have an effect on the proceeding as he was unaware of the third-party funder in the first place. Prior to the challenge, RESPONDENT had a chance to invoke his findings, during the time of his awareness, but he did not do so, even though it was aware of Mr. Prasad's background.

CONCLUSION OF THE THIRD ISSUE

61. It is not only established but reaffirmed that Mr. Prasad exhausted every legal remedy at his disposal to avoid grounds for challenge and act impartially and independently. In the above submissions, it has been proved that there no justifiable doubts for Respondent's challenge and, accordingly, Mr. Prasad should continue his service in the proceeding.

ARGUMENTS ON THE MERITS

ISSUE 4: THE CONTRACT IS GOVERNED BY CLAIMANT'S STANDARD CONDITIONS

62. CLAIMANT'S SC shall govern the contract, because RESPONDENT accepted the offer and it is clear that the parties' intention was to apply CLAIMANT' SC. Indeed, RESPONDENT's invitation to tender cannot be classified as an offer, because it was not definite and did not indicate the intention to be bound according to Art. 14 CISG and Art. 2.1.2 UPICC. Accordingly, CLAIMANT's response constitutes an offer pursuant to Art. 18 CISG and Art. 5.1.1 UPICC (**A**). In any case, assuming but not considering that RESPONDENT's invitation was an offer, CLAIMANT'S response constituted a counter-offer in accordance with Art. 19 CISG and the 'Battle of Forms' principles (**B**). Indeed, both parties intended to apply CLAIMANT's standard conditions under CISG (**C**), but if CLAIMANT's SC do not govern the contract, the contract is governed by neither of the parties SC because the shared negotiations between the two parties prevail **(D)**.

A. Claimant's Tender Is an Offer Accepted by Respondent Under CISG and UPICC

63. CLAIMANT's SC and code of conduct shall govern the contract because CLAIMANT's offer was accepted by RESPONDENT as it did not object to it when CLAIMANT clearly stated that its own SC and code of conduct were the prevailing documents [*R. Exh. C 4, p. 16*]. Art. 14 CISG signifies that CLAIMANT sent an offer in response to RESPONDENT's invitation to tender. Therefore, the latter accepted CLAIMANT's offer. In fact, CLAIMANT's offer was definite, and it showed a clear intention to be bound **(I)** and, therefore, RESPONDENT is obliged to comply with CLAIMANT's SC in accordance with the surprise terms regulated under Art. 5.1.1 UPICC **(II).** Consequently, RESPONDENT's tender was considered as an invitation to make offers since it was not definite as well as it did not show a clear intention to be bound **(III).** CLAIMANT's offer was accepted by RESPONDENT because it did not object, however a clear intention of assent was shown **(IV).**

I. According to Art. 14(1) CISG, a Proposal Is an Offer if It Is Sufficiently Definite and Indicates a Clear Intention to Be Bound

64. CLAIMANT submitted an offer to RESPONDENT for the delivery of Queens' cakes. According to Art. 14 CISG, a proposal is definite when it states the goods, implicitly or explicitly, and determines the price and the quantity of the goods. CLAIMANT's offer, was sufficiently definite since it included the place of delivery, the precise description of the goods and the payment terms [*R. Exh. C 4, p. 16*]. It was clear and determined enough to be capable for performance. Moreover, CLAIMANT communicated its intention to be bound by the offer as the goods were sent to RESPONDENT that

accepted them [*R. Exh. C 4, p. 16*]. Therefore, an offer "must meet two main requirements. It should be sufficiently definite, and it should indicate the intention of the offeror to be bound in case of acceptance" [*Eörsi*, 2005], requirements that CLAIMANT fully met indeed.

II. Claimant's Standard Conditions Are Part of the Contract Under Art. 5.1.1 UPICC

65. CLAIMANT' offer clearly referred back to its own website by mentioning at the bottom of the document the link to its website that includes its SC [*R. Exh. C 4, p. 16*]. The same footer was contained in every invoice sent to RESPONDENT [*R. PO2, p. 52, Cl. 24*]. This shows that CLAIMANT's SC apply. Indeed, the non-uniform contractual law of Danubia is the UPICC states in Art. 5.1.1 that "the contractual obligations of the parties may be express or implied". Accordingly, CLAIMANT's SC must prevail. In a dispute between a U.S. buyer and a Mexican seller relating to the non-conformity of the goods delivered by the Mexican seller, the Mexican seller had a clause that exempted him from liability. The U.S. District Court for the Western District Washington at Tacoma referred to the non-unified U.S. law and ruled that the exclusionary clause was in fact valid. The Court found it to be part of the contract, because it was implied, and thus made it enforceable [*Barbara Berry, S.A. de C.V. v. Ken M. Spooner Farms, Inc.*, 2009]. By applying such judgement to the dispute, CLAIMANT's SC govern the contract.

III. Respondent's Tender Is an Invitation to Make Offers Under Art. 14(2) CISG and Art. 2.1.2 UPICC

66. RESPONDENT's tender does not constitute an offer; however, the tender was merely an invitation to make offers. To further clarify, RESPONDENT's invitation to make offers is considered as an invitation to enter into negotiations. RESPONDENT explicitly indicated that CLAIMANT's response constitutes an offer when it stated that it was looking forward to the submission of the offer [*R. Exh. C 1, p. 8*]. Moreover, since the tender was lacking a definite strategy and did not show any sign of intention to be bound as per Art. 14 CISG, CLAIMANT's response cannot be but an offer. The same conclusion is reached when applying Art. 2.1.2 UPICC, which establishes principles identical to those laid down under the CISG. Many cases have ruled that "The parties' performance demonstrates the existence of a contract" [for all, *Standard Bent Glass Corp. v. Glassrobots Oy*, 2003]. Consequently, CLAIMANT SC governs the contract.

IV. Claimant's Offer Was Accepted by Respondent Pursuant to Art. 18 CISG

67. RESPONDENT's consent to CLAIMANT's offer is proved by its reply to CLAIMANT regarding the delivery of the cakes. [R. *Exh. C 5, p. 17*]. "The assent may be either by the making of a mutual

promise or by performance or partial performance." [*Mayer et. al,* 2012] and "acceptance occurs as a result of a declaratory act or conduct" [*Schwenzer 3,* 2010]. A party's "conduct" may "include the supply, delivery or dispatch of goods in response to an offer to buy." [*Huber & Mullis,* 2007]. Therefore, RESPONDENT's will to conclude the contract as per CLAIMANT's SC is proved by its conduct [*Fabrics Case,* 1997]. To further clarify, in a similar case it was ruled that the "buyer's acceptance of goods indicated assent to offer, including standard terms in letter of confirmation*"* [*Doors Case,* 1993]. In another case it was decided that *"*the final bill of sale materially altered the purchase order to exclude warranties, thereby constituting a counter-offer which was accepted via performance" [*Norfolk Southern Railway Company v. Power Source Supply, Inc.*, 2003]. The application of these principles to the case at hand clarifies that CLAIMANT's SC governs the contract because RESPONDENT performed the obligation set out in the contract. RESPONDENT's tender does not constitute an offer but is an invitation to make offers because it lacked definiteness and did not have the intention to be bound. On the other hand, CLAIMANT's tender is an offer because it was definite and had the intention to be bound. Consequently, RESPONDENT accepted CLAIMANT's offer, that includes CLAIMANT's SC.

B. Even if Respondent's Invitation to Tender is an Offer, Claimant's Reply Constitute a Counter-Offer Accepted by Respondent

68. CLAIMANT clearly communicated to RESPONDENT that it had made changes to the merits of the offer sent regarding important aspects of the deal, such as price, size, time of delivery, shape and form [R. *Exh. C 4 p. 16*]. Therefore, CLAIMANT rejected the tender sent by RESPONDENT and made a counter-offer under Art. 19(1) CISG. CLAIMANT modified some of the merits mentioned in the contract which constituted a counter-offer accepted by RESPONDENT under CISG **(I).** RESPONDENT's SC on CSR are not part of the contract; thus, its acceptance of CLAIMANT'S SC is evident by applying the principles of the 'battle of forms' and the 'last shot rule'**(II)**

I. Claimant's Modifications to the Contractual Conditions Are a Counter-Offer Pursuant to Art. 19 CISG

69. CLAIMANT received the invitation to tender from RESPONDENT and made some minor amendments regarding the price, size, time of delivery, shape and form. [*R. Exh. C 4, p. 16*]. As such, CLAIMANT materially altered the merits of the contract. Art. 19(1) CISG states that changing the terms of an offer constitutes a flat rejection. The price, size, time of delivery, shape and form are very significant aspects of an offer and without it an offer cannot be made, so such changing it

means changing the entire offer itself. More generally, any modifications made to the offer elucidates that the prior offer is rejected and instead considered to be a counter offer [*CISG Digest*]. Thus, CLAIMANT's counter-offer was accepted by RESPONDENT.

II. Respondent's Standard Conditions on CSR Are Not a Part of the Contract According to the Battle of Forms

70. RESPONDENT SC on CSR are not part of the contract, because RESPONDENT's reply indicated that it accepted CLAIMANT's offer [*R. Exh. C 5, p. 17*]. The concept of "Battle of forms" seems to be relevant under Art. 19(3) CISG where it is stated if a party does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. Indeed "the offeree's reply will very likely signal some sort of 'purported' acceptance, but not all the standard terms contained in the acceptance are likely to match those contained in the offer" [*Lookofsky, 2005*]. RESPONDENT stated: *"*We are looking forward to receiving your delivery" starting 1 May 2014." Thus, this emphasizes that the reply is an acceptance.

71. It should be clarified that, under Art. 19 CISG, the theory of the last-shot rule "favors the part who last referred to its standard terms of conditions without these being subsequently objected to" [*Schwenzer 3*, 2010; *Conveyor Band Case,* 2005]. The last party who refers back to its SC is the one who wins the "battle of forms" [*Honnold*, 2009]. As consequence, CLAIMANT's SC governs the contract, because CLAIMANT was clearly the last party who referred to the standard terms and conditions [*R. Exh. C 4, p. 16*]. Assuming that RESPONDENT'S invitation to tender is an offer, CLAIMANT's reply is considered a counter-offer, because it changed the merits of the tender submitted by RESPONDENT. In this regard, it is clear that RESPONDENT accepted CLAIMANT's counter-offer, and, therefore, are not part of the contract.

C. The Parties' Intended to Apply Claimant's Standard Conditions

72. Both parties intended to apply CLAIMANT's code of conduct under Art. 8 CISG. RESPONDENT failed to show any objection regarding CLAIMANT's modification, which further confirms that both parties had the same understanding on which contractual conditions would apply. Since it has been ruled that "Buyer accepted counter-offer when its reply did not object to counter-offer" [*Frozen Bacon Case,* 1992] and RESPONDENT failed to communicate any objection to CLAIMANT's offer, anyone can infer that the intention of the parties was to apply CLAIMANT's SC. Indeed, RESPONDENT could not have been unaware of CLAIMANT's intention to refer to its own SC to govern their contractual relationships **(I)**. Any reasonable person, in the same circumstances, would

have understood that CLAIMANT's SC shall prevail over any other document **(II).** Anyways, the shared negotiations and trade usages between the two parties indicate the clear intention to be bound by CLAIMANT's offer. **(III)**

I. According to Art. 8(1) CISG, Respondent Could Not Have Been Unaware of Claimant's Intention to Apply Its Own Standard Conditions

73. CLAIMANT clearly stated that its own SC "shall prevail over any other documents" [*R. Exh. C4, p. 16*]. Art. 8(1) focuses on the statement maker's intent where the "intent must have been known by or, in any case, recognizable to the addressee" [*Schlechtriem,* 2000]. The acceptance can be interpreted in the light of any statement made by one of the parties which indicated assent [*Roder v. Rosedown,* 1995]. CLAIMANT communicated a clear intention in its response to RESPONDENT's tender, stating that its own code of conduct was applicable, and therefore RESPONDENT could not have ignored it.

II. Any Reasonable Person Would Have Understood that Claimant's Standard Conditions Apply in Accordance with Art. 8(2) CISG

74. From the above-mentioned facts, we can infer that any reasonable person in the same place of the parties would have understood that CLAIMANT's SC prevail also because RESPONDENT implicitly accepted when it stated that it was impressed by CLAIMANT's code of conduct [*R. p. 25*]. Art. 8(2) CISG regulates what "reasonable person" would have done in similar circumstances. "An interpretation based upon the real intention is the primary rule to be applied" [*Lautenschlager, 2007*]. Consequently, any reasonable person would interpret the parties' real intention in the sense of the application of CLAIMANT's SC.

III. The Parties' Intention Must Be Interpreted Taking into Consideration the Negotiations and the Trade Usages Under Art. 8(3) and Art. 9 CISG

75. The parties' intention can be inferred by the assent of RESPONDENT to CLAIMANT'S first delivery on 1 May 2014 [*R. p. 5, para. 6*]. The aforementioned fact is supported by Art. 8(3) CISG that deals with the practices established between the parties. In addition, the negotiations, usages and practices between the parties are means which indicate assent [*Schwenzer,* 2010]. The parties have practiced trade usages among themselves when CLAIMANT delivered the goods on 1 May 2014 and RESPONDENT accepted them sold sell the goods, and no problems occurred over the lapse of 3 years. Art. 9(1) CISG signifies the obligations of the parties to be "bound by any usage to which they have agreed and by any practices which they have established between themselves". In

addition, "such an agreement need not be explicit" [*CISG Digest*] as long as "the practice has been recognized and accepted" [*Aksen,* 1996]. As such, the trade usages applied when RESPONDENT sold to its customers the cakes provided by CLAIMANT. As consequence, according to the CISG the common intention of the parties, interpreted in the light of the reasonable person test and the usages established between the parties, CLAIMANT's SC and code of conduct apply.

D. Assuming but Not Considering that Claimant's Standard Conditions Do Not Apply, the Contract is Governed by Neither of the Parties' Standard Conditions

76. In the remote hypothesis that CLAIMANT's SC do not prevail, neither of the parties SC governs the contract according to the knock-out rule. The knock-out rule states that when there is contradicting clauses, the contradictory clauses cancel each other. As consequence, "A contract is concluded on the basis of the negotiated terms and of any standard terms which are common in substance, unless one party clearly indicates in advance, or later on but without undue delay objects to the conclusion of the contract on that basis" [*Vural,* 2006]. CLAIMANT and RESPONDENT both have contradictory clauses and they both want their own SC to govern the contract. Under the knock-out rule, these contracting clauses knock each other out and what is taken into consideration is only what both parties agreed upon. Accordingly, neither of the parties SC govern the contract and what is taken into the contract are the terms that do not contradict each other. The negotiations held between the parties signifies that neither of the parties' SC governs the contract and, therefore, the knock-out rule may resolve the battle of forms between the SC of both parties **(I)**

I. The Knock-out Rule and Art. 2.1.22 UPICC Make Applicable the Shared Negotiation

77. Under Art. 2.1.22 UPICC, the agreed upon essential terms, as they do not contradict each other, are to regulate the relationship between the contractual parties and become part of the contract. The terms, which are common in substance, includes clauses which are considered essential, either by content, or by finality, may be considered as equally satisfying as the interests of both parties. If a contradiction between terms arises, the knock-out rule intervenes to cancel the contradictory clauses and exclude those which, even if not contradictory, alter the terms of the offer.

The knock-out rule signifies that terms in which are in fact conflicting cancel each other out. This means that the contract is concluded on the negotiated terms and the terms which are common in substance; meaning they do not contradict each other. It has been stated that the contract is still valid while the conflicting standard forms are those considered invalid and, thus, they are replaced by the CISG provisions [*Powdered Milk* Case, 2002].

78. CLAIMANT and RESPONDENT have contradictory SC, but when applying the knock out rule neither of the parties SC govern the contract because they knock out each other, instead CISG shall fill in where there is need to regulate any contractual relationship between the parties. Furthermore, the acceptance which contains non-material variations is deemed to be apart from the contract. On the contrary, variations that materially alter the offer may be deemed mutually excluded which cancel each other out in accordance with Art. 2.1.22 UPICC.

1. CISG Fills in the Gaps in which the Terms Knock Out Each Other

79. Both parties agree that the substantive law governing the substance of the dispute is the CISG [*R. PO1, p. 48*]. Consequently, CISG shall fill in where there are matters that need to be dealt with and there is no a common intention between the parties. In a similar case the court decided that in case of contradicting forms in the contract CISG shall be fill in where it is needed [*Powdered Milk Case*, 2002]. As such, in the case when CLAIMANT and RESPONDENT contractual provision knock each other out, the CISG provisions fill the gaps. As consequence, in case neither of the parties' SC govern the contract, according to Art. 2.1.22 UPICC and the knock-out rule the contradicting terms knock each other out, thus making them non-operational. For any possible situation not regulated, the CISG applies.

CONCLUSION OF THE FOURTH ISSUE

80. CLAIMANT's SC and code of conduct shall govern the contract, because CLAIMANT made an offer in response to RESPONDENT'S tender, which the latter accepted without raising objection against the modifications made by CLAIMANT. If RESPONDENT'S tender is considered as an offer, CLAIMANT's response is a counter-offer accepted by RESPONDENT. The negotiations carried out between the parties indicates RESPONDENT'S assent to CLAIMANT's contractual conditions. If the tribunal finds that CLAIMANT's SC are not applicable, by recurring to the knock-out rule neither of the parties' SC shall apply; rather, the contractual relationships must be governed by the non-conflicting terms and, in case of gaps, by the CISG.

ISSUE 5: EVEN IF RESPONDENT'S GENERAL CONDITIONS APPLY, CLAIMANT DELIVERED CONFORMING GOODS

81. CLAIMANT performed its obligation to deliver conforming goods according to the applicable law and the parties agreement **(A)**, as it was only under an obligation of best efforts concerning the compliance of its supplier with ethical production principles **(B).** Moreover, CLAIMANT cannot be held liable for third-party misconduct according to the CISG **(C)**.

A. Claimant Delivered Conforming Chocolate Cakes Under Art. 35 CISG

82. CLAIMANT fulfilled its obligation to deliver conforming chocolate cakes according to CISG **(I)** and the agreement of the parties **(II)**. Moreover, since the ethical production process is not regulated under CISG as a parameter for conformity, it should not be taken into any consideration **(III)**.

I. Art. 35(1) CISG Sets Out Criteria for Evaluating the Conformity of Goods

83. For several years, CLAIMANT has always delivered to RESPONDENT chocolate cakes in accordance with the criteria set forth under Art. 35(1) CISG, which imposes upon the seller the duty to deliver goods of the quantity, quality, and description agreed upon by the parties [*De Luca*, 2015; *Schwenzer 2,* 2010]. CLAIMANT fulfilled its obligation to provide RESPONDENT with cakes conforming to the specifications agreed upon, and therefore RESPONDENT's allegations on lack of conformity are groundless. Indeed, the burden of proof for non-conformity lies with RESPONDENT [*Kroll, 2011*], and in this case, was not met.

1. The Cakes Conformed to the Specifications Agreed Upon by the Parties

84. CLAIMANT has delivered 20,000 chocolate cakes per day starting from 1 May 2014 as agreed upon in the contract [*R. Exh. C 5, p. 17, para. 3*] and never received complaints from RESPONDENT regarding any defects or lack of compliance. In fact, RESPONDENT did not suffer losses in usability nor in value [*Commentary of CISG*]. Under Art. 35(1) CISG, goods shall only meet the description stated within the provisions, disregarding the unaware intentions of each party in the contract [*CISG Digest*]. Therefore, CLAIMANT shall not be held liable for non-conformity**.**

II. Art. 35(2) CISG States that the Goods Are Conforming if they Fulfill the Parameters Set Forth Under such Paragraph

85. Art. 35(2)(a) CISG requires the seller to deliver goods fit for purposes for which goods of same description would ordinarily be used. However, it does not require that the goods should be perfect or flawless [*CISG Digest*]. Art. 35(2)(b) CISG requires goods to be fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract. In

other words, obligation only arises if a particular purpose was revealed to the seller by the time the contract was concluded [*CISG Digest*].

1. The Cakes Were Fit for the Purpose

86. The cakes CLAIMANT conformed to both ordinary and particular purpose pursuant to Art. 35(2) CISG. "The buyer is entitled to expect the delivered goods to be fit for the ordinary use with regard to qualities that have not been defined in the contract" [*Schwenzer*, 2010]. Moreover, the goods must primarily be fit for commercial purposes, meaning that RESPONDENT should have been able to resell the chocolate cakes to the third parties, which is what happened indeed [*R. p. 5, para. 11*]. In the resale business, the goods must be suitable to be sold. If the purpose of the goods is not affected, there is no need to take into consideration how the goods have been produced or manufactured [*Schwenzer & Jaeger*, 2017]. A paramount importance in this case is that it proved that RESPONDENT is obliged to pay the price of the conforming goods that were provided by CLAIMANT. [*Mussels Case*, 1995].

III. Ethical Production Does Not Apply to Evaluate the Conformity of Goods

87. CLAIMANT is a committed member of the Global Compact Principles; however, it strongly dismisses RESPONDENT's claims regarding the effect of its supplier compliance to sustainable production of Cocoa on the conformity of the cakes delivered. Primarily because ethical production does not affect the quality or quantity of the goods delivered by CLAIMANT. Furthermore, because ethical production cannot be part of the conformity of goods inasmuch it does not fundamentally affect the value of the goods.

88. When the goods are to be resold, "the purpose of the goods will not be influenced by the mere way in which the goods are manufactured or processed" [*Schwenzer & Leisinger*, 2007]. The method under which CLAIMANT's supplier produced the Cocoa does not affect the finished goods that were delivered to RESPONDENT. Some national courts have involved the conformity of non-physical features in their application of Art. 35 CISG; however, to apply these rules, the non-physical features must have an effect on the physical features themselves [*Aston Martin Automobile Case*, 2006; *Organic Barley Case*, 2002]. The age or organic origin of the goods all contribute directly to the quality of the goods in its interpretation as "all factual and legal circumstances concerning the relationship of the goods with their surroundings" [*Schwenzer 2*, 2010]. Such interpretation is not applicable to the case at hand, because the production process of the cocoa

beans neither impacts the quality of the goods, nor the status of the goods in the production chain [*Ramberg*, 2005; *Butler*, 2017; *Schwenzer & Schlechtriem*, 2016].

89. The conformity of goods will be affected only in cases where the ethical production fundamentally affects the contract [*Ramberg*, 2005; *Electronique A.M.D Case*, 1993; *Cobalt Sulphate Case*, 1996], where the fundamental effect refers to the economic value of the agreement [*CISG AC No. 4*]. RESPONDENT requested more deliveries which indicates that its customers were satisfied with the quality of the cakes [*R. p. 5, para. 6*]. In any case, should RESPONDENT claim that the ethical production does fundamentally affect the value of the goods, the impact will be minimized because 50% of the Cocoa beans supplied conformed with ethical production [*R. PO2, p. 54, Cl.41*].

90. In conclusion, the cakes delivered by CLAIMANT were conforming under Art. 35(1) CISG because the cakes were produced in accordance to the specifications agreed upon by the parties. The goods also conform to their ordinary purpose of consumption. Indeed, the method of production, including the ethical standards, is not a parameter to evaluate the conformity inasmuch it does not affect the quality or the quantity of the goods.

B. Claimant Was Only Under an Obligation of Best Efforts According to UPICC

91. CLAIMANT did not breach RESPONDENT's CCS as it complied with RESPONDENT's business philosophy **(I)**. Furthermore, the obligations in the GC and CCS are addressed to CLAIMANT and not its supplier **(II)**. CLAIMANT undertook it obligations prescribed for in RESPONDENT's GC and CCS **(III)**. CLAIMANT's obligation to ensure compliance by its supplier is an obligation of best efforts and not of results **(IV)**, which was fulfilled through CLAIMANT undertaking its duties reasonably **(V)**. Even if CLAIMANT was under the obligation of results, it would not have detected its supplier's fraud **(VI)**.

I. Claimant Did Not Breach Respondent's CSR Because It Incorporates the Global Compact Principles Employed by Claimant in Its Business

92. The purpose of RESPONDENT's CCS is to comply with its Business Philosophy [*R. Exh. C 2, p. 13*] which is identical to the UN Global Compact principles [*R. PO2, p. 53, Cl. 31*]. Therefore, in order for CLAIMANT to breach the CCS, CLAIMANT should have not complied with the Global Compact principles [*Williams*, 2014]. CLAIMANT's auditor Egimus AG undertook the same methodology prescribed for compliance with principle 7 as prescribed for by the UN Global Compact Principles which "involves the systematic application of risk assessment, risk

management and risk communication" [*R. PO2, p. 53, Cl. 33*]. Such principle prescribes that the trader will only undertake precautionary measures to prevent environmental challenges "when there is reasonable suspicion of harm" [*UN Global Compact Principles*]. In the case at hand, the criterion of reasonable suspicion is not applicable, due to the lack of any apparent threat to the results of the audits that CLAIMANT undertook [*R. Exh. C 8, p. 20*], in addition to the agreement it had with its supplier to comply to environmentally sustainable production [*R. PO2 p. 53, Cl. 32*]. Thus, CLAIMANT did not breach principle 7 and consequently adhered to RESPONDENT's CCS [*Schwenzer & Leisinger,* 2007].

II. Respondent's General Conditions and Code of Conduct for Suppliers Bind Claimant Only

93. The wording of the GC explicitly indicates that the obligations of the GC and CCS are for CLAIMANT and not for its suppliers [*R. Exh. C 2, p. 12*]. CLAIMANT has upheld its reputation for adhering with the UN Global Compact Principles [*R. PO2 p. 54, Cl. 34*]. Accordingly, the obligation for CLAIMANT to "ensure" that it suppliers undertake their business in the same ethical manner [*R. Exh. C 2, p. 13*] has been fulfilled by CLAIMANT through its audit conducted by Egimus AG, that ensured that its supplier comply with the UN Global Compact Principles [*R. PO2, p. 53, Cl. 33*]. Furthermore, the CCS simply provides that CLAIMANT must select its supplier if they "agree to standards comparable to those set forth in this Comestible CCS" [*R. Exh. C 2, p. 13*], which is exactly how CLAIMANT chose Ruritania People's Cocoa mbh [*R. PO2, p. 53, Cl.28*]. CLAIMANT took necessary actions [*R. Exh. C 2, p. 14, CCS. Clause F*] as soon as it discovered its supplier's fraud [*R. Exh. C 9, p. 21*].

III. Claimant Fulfilled Its Obligation of Best Efforts as Established by Art. 5.1.5 UPICC

94. RESPONDENT's GC impose only an obligation of best efforts on CLAIMANT which is determined under Art. 5.1.5 UPICC, the contract law in the countries involved in the disputes. The UPICC prescribes a criterion that can be used to distinguish between an obligation of best efforts and an obligation of results.

1. The Obligation Lay Down in the General Conditions and Code of Conduct for Suppliers Imply that Claimant Must Only Undertake Its Best Efforts

95. The CCS imposes an implicit obligation of best efforts "to guarantee adherence, the measures and conduct expected from suppliers are set out" [*R. Exh. C 2, p.13*]. The CCS does not specify the outcome such as a quota or percentage nor any specific results expected from adhering to the CSS, but simply that it must adhere whilst it undertakes its business operations [*R. Exh. C 2, p.13*]. The

wording of the CCS implies an obligation of best efforts even if it does not explicitly prescribe it [*Miller,* 2006]. The obligation of best efforts has been applied by the courts as implied terms to save the agreement [*Wood v. Lucy Gordon,* 1917], especially when best efforts obligation is the only feasible way for undertaking an obligation without causing harm to both parties. The duty of best efforts may be established as an implied term because "such a covenant is essential as a matter of equity", even in the instances where the parties have not agreed otherwise [*Vacuum Concrete Corp.*, 1971].

2. The Contractual Price and the Lack of Hardship Clauses Indicate that Claimant Only Had an Obligation of Best Efforts

96. Art. 5.1.5 UPICC establishes that the price is a fundamental element in the contract to assess the nature of the obligations. In the case at hand, the price that the parties agreed upon was not extraordinarily higher than the market price for chocolate cakes [*R. PO2, p. 54, Cl. 40*], which indicates that the obligation does not necessarily impose results, since there is no monetary risk if the obligation is not met. Neither RESPONDENT's GC nor CCS do take into consideration the hardship clauses, which indicates that the obligation is one of best efforts and not results.

3. Achieving the Expected Result Involves Excessive Risks on Claimant

97. The UPICC establishes that if the obligation "involves a high degree of risk it is generally to be expected that, that party does not intend to guarantee a result, and that the other party does not expect such a guarantee". Without resorting to the implied best efforts, CLAIMANT would have to foresee every possible infringement undertaken by any of its suppliers. Indeed, the "desired result is not entirely within a contracting party's control, such party is probably willing to 'do its best' but not to guarantee the result" [*Ly & Fontaine,* 2006].

4. Respondent Had the Power to Control Claimant's Performance, but Did Not Do So

98. Clause E of RESPONDENT's CCS requires CLAIMANT to procure goods in a responsible manner when selecting its own tier of suppliers [*R. Exh. C 2, p.14*]. RESPONDENT inspected and found that CLAIMANT was undertaking its duties in compliance with the CCS [*R. PO2, p. 54, Cl. 34*] and did not object to CLAIMANT's methodology for undertaking its obligation nor invoked any action required by CLAIMANT. Consequently, CLAIMANT fulfilled its obligation of best efforts.

IV. Claimant Undertook the Effort of a Reasonable Person According to Art. 5.1.4 UPICC

99. As CLAIMANT is under a best effort obligation, CLAIMANT is simply expected to exert its best effort to fulfill its obligation. To prove so, a criterion is to verify if CLAIMANT has undertaken its

best effort that a reasonable person of the same kind would have made in a similar circumstance [*Miller,* 2007]. CLAIMANT is only a medium sized manufacturer of baked goods [*R. Exh. C 9, p. 4, para. 1*], thus it cannot be expected to take the same effort for undertaking its obligations as a large sized multinational manufacturer in conforming to the CCS, which is what undertaking an investigation on government fraud entails.

100. Under the Global Compact principles, the reference standard is the reasonableness for other members of the Global Compact when undertaking this obligation. None of the companies have undertook the obligation to verify certificates, but their compliance was mostly through placing policies and observatory actions that ensure that these policies are adhered to [*Global Compact Implementation Survey,* 2011]. Therefore, CLAIMANT adhered to the market's best practices [*Andersen & Skjoett-Larsen,* 2009]. The nature of the fraud committed by the supplier, as it involves the government of Ruritania, requires effort that is not feasible for CLAIMANT, a medium sized manufacturer, would simply not be able to detect governmental fraud with reasonable effort. For a party to prove that the other party breached its obligation of best efforts it is not sufficient to prove that the result was not achieved, but should rather prove that the other had failed to make such efforts as a reasonable Government would have made in same circumstances [*Mexican Squash Case,* 2006]. Since CLAIMANT undertook the same level of care and effort as that which would be taken by a reasonable person, RESPONDENT failed to prove its allegations. Moreover, "the limits of reason must not be overstepped when exercising an obligation of best efforts" [*Sheffield District Railway,* 1911; *Bloor v. Falstaff,* 1979; *Stamicarbon v.Cyanamid,* 1974].

101. It is also worth to mention that CLAIMANT undertook its obligations under the GC and CCS in good faith, which is another proof that its best efforts obligation was fulfilled. Several courts established that the duty of best effort cannot be considered unfulfilled when the parties act in good faith. Courts "have been unable to find any case in which a court found...that a party acted in good faith but did not use its best efforts" and stressed that "an obligation to use best efforts can be met by active exploitation in good faith" [*Triple-A Baseball Club Assocs,* 1987; *Geophysical v. Bolt,* 1969; *Grant v. Bd. of Educ,* 1997*; Bloor v. Falstaff,* 1979]. CLAIMANT ensured compliance by its supplier in good faith [*R. PO2, p. 53, Cl. 33*].

V. Even If CLAIMANT Was Under an Obligation of Results, It Would Not Have Detected Its Supplier's Fraud

102. It has been already sufficiently proved that the failure of the CLAIMANT to detect the supplier's bribery of the government of Ruritania to issue the frauded certificates was inevitable [*R. p. 21; Miller,* 2006*; Atmospheric Diving Systems Inc,* 1994]. Consequently, CLAIMANT did undertake its best efforts obligation to the best of it ability and exerted all possible efforts that a reasonable person would exert to ensure that its supplier complies with RESPONDENT's CCS. CLAIMANT did not breach RESPONDENT's CCS as it complied with RESPONDENT's business philosophy as well as the obligations in the GC and CCS. Even if CLAIMANT was under the obligation of results, it would not have detected its supplier's fraud as it involved the government of Ruritania.

C. Claimant Cannot be Held Liable for Third-Party Misconduct Pursuant to Art. 79 CISG

103. CLAIMANT cannot be considered liable for the acts performed by its supplier, because its conduct is exempted under the CISG (**I**) and, therefore, CLAIMANT is not liable for RESPONDENT's criminal acts (**II**).

I. Art. 79 CISG Establishes Criteria for Liability Exemption in Case of Failure to Perform

104. Art. 79 CISG exempts the promisor if the failure to perform any of its obligations is due to an impediment which is beyond control, or if the failure was unforeseeable and unavoidable at the time the contract was concluded, or if the impediment was unavoidable and could not be overcome, or if notice was given to the other party regarding the impediment and its effects on contract [*Schaffer et al.*, 2015; *Flechtner*, 2007]. Thus, CLAIMANT ensured that its acts are complying with Global Compact Principle. Additionally, as soon as CLAIMANT knew about the misconduct of its supplier, it immediately informed RESPONDENT about the it.

1. Claimant Undertook All the Necessary Steps to Ensure Compliance with Global Compact Principles

105. CLAIMANT's conduct in producing and delivering the goods complied with the agreement, and the eventual breach was due to the illegal interference by a third party [*R. p. 21, Para. 1*]. CLAIMANT did not have any control to prevent such unexpected action taken by the third party and, as consequence, it should not be held liable. Art. 79 CISG absolves the seller from liability if its defective performance results from a third party's failure to perform its own obligation [*CISG-AC Opinion No. 7*]. Since the failure to perform the obligation was due to a third party's misconduct rather than CLAIMANT itself, CLAIMANT is not liable for third party's misconduct. Indeed, CLAIMANT undertook investigations over the Ruritania Peoples to ensure that it is functioning in accordance to Global Compact and the principles of sustainable production. The claim raised by

RESPONDENT cannot be accepted because CLAIMANT fulfilled its obligations and non-conformity was due to a third-party misconduct.

2. Claimant Informed Respondent About its Supplier's Misconduct

106. Art. 79(4) CISG establishes that the party who fails to perform to give notice about the impediment and its effects to the other party within a reasonable time. After CLAIMANT received an email from RESPONDENT [*R. Exh. C 6 p. 18*], it immediately responded back [*R, Exh. C 8, p. 20*]. On 10 February 2017, CLAIMANT resent an email clarifying that indeed, some of the cocoa beans that were used for production of chocolate cakes have not been produced in compliance with the contractually required principles. Moreover, CLAIMANT's supplier also obtained falsified certificates to cover up such breach of contract [*R. Exh. C 9 p. 21*], CLAIMANT fulfilled its duty to inform RESPONDENT about the breached caused by third party.

II. Supplier's Criminal Conduct Cannot Entail Claimant's Liability

107. CLAIMANT is not liable for any criminal act performed by a third party if it could not be able to prevent such act. Art. 79(1) CISG contains the external circumstances which encompasses the object of the obligation [*Schwenzer 1,* 2010]. The criminal act was not performed by CLAIMANT, but rather its supplier. However, the preamble of the Special Conditions of Contract concluded by RESPONDENT [*R. Exh. C 2, p. 11. para. 3*] refers only to RESPONDENT's suppliers. Therefore, third party's misconduct shall not be passed to CLAIMANT. Additionally, it is clear that CLAIMANT undertook all the required steps to ensure that its suppliers method of production was in compliance with the applicable standard [*R. p. 7, para. 22*].

III. Clause 4(3) of Respondent's General Condition Is Not Operational Because the Breach was Committed by Claimant's Supplier

108. Even though the proceeding has been bifurcated and the issues related to the breach of contract will be tackled of the second phase of the arbitration, it is worth to note that the fundamental breach under Clause 4(3) differs from those provided by CISG. Where Clause 4(3) establishes that in case of a breach CCS is considered a fundamental breach. As a result, the contract terminates with immediate effect. However, the act was performed by the Supplier and not CLAIMANT. CLAIMANT is not liable for the acts performed by its supplier, because its conduct is exempted under the CISG as the criminal misconduct was undertook by its supplier.

CONCLUSION OF THE FIFTH ISSUE

109. CLAIMANT delivered conforming goods according to the applicable laws and the parties agreement. CLAIMANT was only under an obligation of best efforts to ensure that its suppliers adhere to ethical production, which CLAIMANT undertook to the standard of reasonableness required of it. In any case, if the cakes were not conforming, CLAIMANT is not liable because the non-conformity has been caused by the conduct of a third-party and not CLAIMANT itself.

PRAYER FOR RELIEF

In response to the Tribunal's Procedural Orders, Counsel makes the above submissions on behalf of CLAIMANT, and respectfully requests the Tribunal to find that:

(1) The Tribunal does not have the authority to decide on RESPONDENT's challenge of Mr. Prasad under the *lex arbitri* and *lex loci arbitri* **[Issue 1]**.

(2) If the Tribunal decides on the challenge, Mr. Prasad shall partake in the ruling **[Issue 2]**.

(3) Nonetheless, Mr. Prasad should remain in the Tribunal, because there are no doubts as to his impartiality or independence **[Issue 3]**.

(4) CLAIMANT standard conditions govern the contract under the CISG and the UNIDROIT Principles **[Issue 4]**.

(5) The chocolate cakes delivered by CLAIMANT conformed to the specifications agreed upon by the parties, even when applying RESPONDENT's general conditions **[Issue 5]**.

CERTIFICATE

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

Amina Abdulla

Noof Janahi

Asya Bukhowa

Omaima AlAbbasi

Eman Alsarraf

Raghad Alotaibi

Raneem Kadhem

May Alfadhel

Riffa, 7 December 2017