FIFTEENTH ANNUAL WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MARCH 24TH–29TH 2018

MEMORANDUM FOR CLAIMANT

SRI LANKA LAW COLLEGE

COLOMBO, SRI LANKA

ON BEHALF OF:	**AGAINST:**
DELICATESY WHOLE FOODS SP. 39 MARIE-ANTOINE CARÊME AVENUE OCEANSIDE EQUATORIANA	COMESTIBLES FINOS LTD. 75 MARTHA STEWART DRIVE CAPITAL CITY MEDITERRANEO
CLAIMANT	RESPONDENT

SHAMILKA KARUNANAYAKE **SULAIMAN** RAMEEZ **DILANI** JAYATILAKE

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Art.	Art.
CE	CLAIMANT's Exhibit
Chap.	Chapter
CLAIMANT	Delicatesy Whole Foods Sp
Contract	Contract between Delicatesy Whole Foods Sp and Comestibles Finos Ltd
CISG	The United Nations Convention on Contracts for the International Sale of Goods
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ILO	International Labour Organization
ICA	International Court of Arbitration
Ltd	Limited
Mr.	Mister
Ms.	Miss
NOA	Notice of Arbitration
Para	Paragraph
Pg	Page
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2

RE	RESPONDENT's Exhibit
Rec	Record
Res. NOA	Response to NOTICE OF ARBITRATION
RESPONDENT	Comestibles Finos Ltd
RFCCI	Russian Federation Chamber of Commerce and Industry
UNCITRAL	United Nations Commission on International Trade Law
Q	Question
Tribunal	Panel consisting of Professor Caroline Rizzo, Mr. Prasad Rodrigo and Ms. Hertha Reitbauer
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	Arbitration Rules of United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US	United States of America
V	Versus

STATEMENT OF FACTS

Claimant	1. Delicatesy Whole Foods Sp (hereinafter "CLAIMANT"), is a medium sized manufacturer of fine bakery products registered in Equatoriana.
Respondent	2. Comestibles Finos Ltd (hereinafter "RESPONDENT") is a gourmet supermarket chain in Mediterraneo.
03 Mar 2014	3. The CLAIMANT was approached by the RESPONDENT at the Danubian food fair, Cucina, by the RESPONDENT's head of purchasing, Annabelle Ming where product choices and delivery quantities were discussed.
10 Mar 2014	4. Shortly after the food fair CLAIMANT received an Invitation to tender for the delivery of chocolate cakes. 5. The tender documents were also sent along with the Invitation to tender which included the RESPONDENT's Special conditions of contract, General conditions of contract, General business philosophy and the Code of conduct.
27 Mar 2014	6. The CLAIMANT submitted its tender which stipulated that the offer would be subject to application of its own General conditions of sale, including its own Code of conduct. The offer was for 20,000 chocolate cakes per day (Queen's Delight) at the rate of 2 USD per cake.
07 Apr 2014	7. The CLAIMANT's offer was accepted by the RESPONDENT.
01 May 2014	8. In accordance with the contract, the CLAIMANT made its first delivery and there was no issue pertaining to deliveries made in 2014, 2015 and 2016.
27 Jan 2017	9. An email was sent by the RESPONDENT to the CLAIMANT based on the findings of a report by Michelgault, which required the CLAIMANT to investigate the supply of Cocoa and whether it adhered to the Global Compact principles of sustainable farming. RESPONDENT also mentioned that they would refrain from taking any further delivery or making further payments.

10 Feb 2017	10. The CLAIMANT informed the RESPONDENT about the CLAIMANT's Cocoa Supplier, Ruritania Peoples Cocoa mbH, being implicated in the scandal. The CLAIMANT was willing to extend an offer of price reduction.
12 Feb 2017	11. The RESPONDENT refused the offer and purportedly terminated the contract.
30 Jun 2017	12. The CLAIMANT sent the Notice of Arbitration stipulating the merits of their case and appointed Mr. Rodrigo Prasad as their arbitrator. Mr. Prasad's Declaration of Impartiality and Independence and Availability was enclosed with the Notice of Arbitration.
31 Jul 2017	13. The RESPONDENT filed a Response to the Notice of Arbitration, which rejected all allegations made by the CLAIMANT and accepted the appointment of Mr. Rodrigo Prasad as the CLAIMANT's Arbitrator, whilst nominating Ms. Hertha Reitbauer as the RESPONDENT's Arbitrator.
22 Aug 2017	14. The Presiding Arbitrator - Caroline Rizzo, consented to his appointment and asked that the parties join a case management conference to discuss matters of the arbitral proceedings.
29 Aug 2017	15. Mr. Langweiler, counsel for RESPONDENT sent an email to the CLAIMANT's counsel and the Arbitral Tribunal stating that reliable information has been received that the CLAIMANT is financed by a third party funder and requested the CLAIMANT to disclose the name and relevant documentation of the said funder.
07 Sep 2017	16. Mr. Fasttrack, counsel for the CLAIMANT declared that its claim is funded by Funding 12 Ltd whose main shareholder is Findfunds LP.
11 Sep 2017	17. Mr. Prasad declared that he had acted as arbitrator in two cases which were funded by other subsidiaries of Findfunds LP, and that none of the entities, persons or law firms of the present arbitration were involved in the two cases and the said cases were relating to completely different fields of law.
14 Sep 2017	18. The RESPONDENT filed the Notice of Challenge against Mr. Prasad's appointment pursuant to Art. 13 of the UNCITRAL Arbitration Rules.

ISSUE 01: THE ARBITRAL TRIBUNAL DOES NOT HAVE THE POWER TO RULE ON THE CHALLENGE OF MR. PRASAD. EVEN IF IT DOES, THE CHALLENGE MUST BE DECIDED WITH MR. PRASAD AS A MEMBER OF THE TRIBUNAL

1. The RESPONDENT wrongfully asserts in the Notice of Challenge of Mr. Prasad that the body to decide on the challenge is the Arbitral Tribunal itself and that the parties excluded the application of Article 13(4) of UNCITRAL Arbitration rules *[NOA, para 8]*. The parties explicitly agreed on UNCITRAL Arbitration rules as the law governing all procedural issues arising out of the contract and agreed only to exclude the UNCITRAL Rules on Transparency under Clause 20 of the agreement *[Rec. ¶6]*. As such the CLAIMANT submits that the Arbitral Tribunal does not have power to rule on the challenge of Mr. Prasad **(1).** Alternatively if the Arbitral Tribunal has authority to decide on the challenge, Mr. Prasad is a member of the Tribunal for that purpose **(2).**

(1) THE ARBITRAL TRIBUNAL DOES NOT HAVE POWER TO RULE ON THE CHALLENGE OF MR. PRASAD

2. The dispute resolution clause states that any dispute shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules without the involvement of any arbitral institution *[Rec. ¶6]*. Statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances *[Art. 8 (2) CISG].* As such the CLAIMANT submits that the CLAIMANT's understanding as a reasonable person was that the provision of non-involvement of an arbitral institution was only relevant for the appointment of arbitrators. While acknowledging that Art. 1 of the UNCITRAL Arbitration Rules state that parties may agree to modify the rules, it is important that such modification be evident in the negotiation of the contract and that such modification is agreed upon by both parties *[Vivendi]*. The CLAIMANT therefore asserts that if the RESPONDENT intended to exclude the application of Article 13(4) of the UNCITRAL Arbitration Rules in the arbitration agreement, a clearer wording would have been required for the deviation from the standard procedure *[Rec. ¶46]*.

3. The RESPONDENT himself agreed to use the UNCITRAL Arbitration Rules in the challenge procedure as it clearly states in its cover letter to the Notice of Challenge of Arbitrator,

"pursuant to Article 13 UNCITRAL Arbitration Rules" ***[Rec. ¶38]***. Accordingly, the CLAIMANT submits that, an Appointing Authority, described under Article 6 (1), has to decide the challenge of Mr. Prasad as required under Article 13(4) **(A)**, the confidentiality clause in the agreement has no direct connection to proposing an Appointing Authority **(B)** and an inherent power to rule on the challenge of Mr. Prasad, if any, is not applicable under the UNCITRAL Arbitration Rules **(C)**.

(A) AN APPOINTING AUTHORITY MUST RULE ON THE CHALLENGE OF MR. PRASAD

4. The CLAIMANT's General Conditions of sale contains in Art. 11 the model ICC arbitration clause fixing the place of arbitration in Equitoriana and declaring Equitorian law to be applied ***[PO2, Q29]***. However, both parties were in agreement to Clause 20, the dispute resolution clause of the contract that made the UNCITRAL Arbitration Rules the law applicable to govern any dispute ***[CE.C2, Rec. ¶12]***, where the CLAIMANT also expressly agreed to the arbitration clause suggested by the RESPONDENT ***[Rec. ¶15]***. The CLAIMANT submits that an arbitral tribunal's powers are limited by the laws applicable to the proceedings ***[Redfern/Hunter; Rompetrol]***. The UNCITRAL Arbitration rules, do not contain any provisions vesting an arbitral tribunal, the competence to decide on the removal of an Arbitrator ***[Florasynth, Inc.]***. As such the CLAIMANT submits that the Arbitral Tribunal does not have power to decide on the challenge of Mr. Prasad.

5. In the Notice of the Challenge of the Arbitrator the RESPONDENT states that the drafters of UNCITRAL Arbitration law wanted the circumstances to be such that the challenged arbitrator would possibly avoid judging his own cause ***[Rec. ¶39]***. The CLAIMANT submits that UNCITRAL Arbitration Rules provide for an Appointing Authority to determine the case of a challenged arbitrator ***[Art. 13 (4) UNCITRAL Rules]***. The procedure set out via an Appointing Authority does in fact bring about effective procedural fairness in the interests of both parties ***[Mobil Oil Corp.]***. This supports the CLAIMANT's contention that an Appointing Authority, designated pursuant to provisions of Art. 6 of UNCITRAL Arbitration Rules, has to decide the challenge of Mr. Prasad as required under Art. 13(4) of UNCITRAL Arbitration Rules.

(B) CLAIMANT IS NOT BARRED FROM PROPOSING AN APPOINTING AUTHORITY UNDER THE CONFIDENTIALITY CLAUSE IN THE ARBITRATION AGREEMENT

6. In the Notice of Challenge of Mr. Prasad, the RESPONDENT claims that the only body to rule on the challenge is the arbitral tribunal itself and that the parties excluded the application of Art. 13(4) of UNCITRAL Arbitration rules, because the parties agreed that the dispute shall be settled "*without the involvement of any arbitral institution*" which was based on reasons of confidentiality discussed during negotiation of the contract ***[Rec. ¶39]***. The CLAIMANT submits that unless the parties have already agreed on the choice of an Appointing Authority, a party may at any time propose the name or names of one or more institutions or *persons* to rule on the challenge ***[Art. 6 (1) UNCITRAL Rules]***. The UNCITRAL Arbitration Rules do not restrict parties by limiting the choice of selecting an Appointing Authority from only arbitral institutions; rather the Article has express provision for parties to select "*a person or persons*" of their choice ***[Art. 6 (1) UNCITRAL Rules; Born]***. As such the CLAIMANT submits that seeking a decision on the challenge by an Appointing Authority does not violate the confidentiality under the agreement.

7. The parties agreed to an express confidentiality clause in the agreement ***[Rec. ¶12].*** The CLAIMANT submits that there are exceptions to the binding nature of such a clause, one exception being that a party has to disclose the proceedings or documents and information provided in and for the purpose of Arbitration ***[Esso]***. Therefore the CLAIMANT submits that it is suitable for the parties to disclose information to an Appointing Authority in furtherance of procedural fairness. The CLAIMANT also asserts that if the Arbitral Tribunal decides on the challenge of Mr. Prasad under the UNCITRAL Model Law, the aggrieved party by the decision of the Tribunal can always appeal to the Danubian Court provided under Article 6 of the Model Law ***[Art. 13 (2); Art. 13 (3) UNCITRAL Model Law]***. The decision of an Appointing Authority is not subject to direct appeal and the CLAIMANT submits that the procedure set out in the UNCITRAL Arbitration Rules, that is to settle the matter through an Appointing Authority, would keep the parties' information confidential.

(C) AN INHERENT POWER TO RULE ON THE CHALLENGE OF MR. PRASAD, IF ANY, IS NOT APPLICABLE UNDER THE UNCITRAL ARBITRATION RULES

8. The CLAIMANT submits that the arbitral tribunal cannot invoke an inherent power to rule on the challenge of Mr. Prasad as an inherent power to hear the challenge of an arbitrator cannot exist in the presence of an express provision on an authority that could hear the challenge of Mr. Prasad **(i)** and there is no overriding need to safeguard the integrity of the arbitral tribunal by resorting to inherent powers **(ii)**.

(i) An inherent power to hear the challenge of an arbitrator cannot exist in the presence of an express provision on an authority that could hear the challenge of Mr. Prasad

9. The CLAIMANT submits that a decision on Mr. Prasad's challenge should be given by an Appointing Authority as per Art. 13 (4) and Art. 6 of the UNCITRAL Arbitration Rules ***[Art. 6; Art. 13 (4) UNCITRAL Rules].*** The CLAIMANT submits that the fact that inherent power is used in the context of novel or controversial situations, for which no express or implied rule appears to apply supports the CLAIMANT's position as UNCITRAL Arbitration rules expressly specifies an Appointing Authority to hear the challenge of an arbitrator ***[Rompetrol; Moses]***. The conclusion by the Iran-U.S. Claims Tribunal on the inapplicability of an inherent power to revise a final award in the existence of an express rule that the award was final and binding ***[IUSCT No. 286]***, supports the CLAIMANT's proposition. Further, the CLAIMANT submits that the definition of inherent power given by the Iran-U.S. Claims Tribunal, that *"those powers that are not explicitly granted to the tribunal but must be seen as a necessary consequence of the parties' fundamental intent to create an institution with a judicial nature"* ***[IUSCT No. B61]*** does not relate to the circumstances of this case because the power to hear Mr. Prasad's challenge has been expressly conferred to an Appointing Authority under Art. 6 of the UNCITRAL Arbitration Rules which is judicial in nature ***[Art. 6 UNCITRAL Rules].*** Therefore, the CLAIMANT submits that in the presence of express provisions, there is no justification for the tribunal to award itself the power to hear the challenge of Mr. Prasad.

(ii) There is no overriding need to safeguard the integrity of the Arbitral Tribunal by resorting to inherent powers

10. The CLAIMANT submits that the inherent power is used only in compelling situations "*overriding and undeniable need to safeguard the essential integrity of the entire arbitral*

process" which empowers the tribunal to rule on such challenge ***[Rompetrol; Hrvatska]***. Similarly, in a UNCITRAL ad hoc procedure, the exclusion could be justified only *"to the extent necessary to safeguard those fundamental procedural rights and the compliance with international public policy"* ***[Dimolitsa, pg. 77]***. The case of Rompetrol v. Romania supports the CLAIMANT's position where the tribunal was reluctant to endorse the fact that the tribunal had inherent power to remove a counsel ***[Rompetrol].*** Further, in the *Hrvatska* case, the need to preserve the integrity of the proceedings drove the Tribunal to declare that it had the *inherent power* to remove a party's counsel on the reasoning that the proceedings should not be tainted by any justifiable doubt as to the qualifications of the arbitrators but held the contrary due to the decision on the motion to disqualify counsel was based mainly on counsel's refusal to disclose when he had been retained and what role he intended to play at the hearing ***[Hrvatska, pg. 26]***. As such the CLAIMANT submits that unlike in the Hrvatska case Mr. Prasad submitted a letter of disclosure when his appointment was made ***[CE.C11, Rec. ¶23]*** and when he was requested to do so by the arbitral tribunal ***[Rec. ¶36]*** and therefore there is no possibility for the proceeding to be tainted. Therefore the CLAIMANT submits that there is no overriding need to safeguard the integrity of the arbitral tribunal by resorting to inherent powers.

(2) EVEN IF THE ARBITRAL TRIBUNAL HAS AUTHORITY TO DECIDE ON THE CHALLENGE, THE TRIBUNAL MUST CONSIST OF MR. PRASAD

11. The CLAIMANT submits that even if the arbitral tribunal has the authority to decide on the challenge of Mr. Prasad, Mr. Prasad must sit in on the challenge as a member of the tribunal for the following reasons. The lex arbitri requires the challenged arbitrator to remain in the tribunal and rule of the challenge **(A).** Mr. Prasad can only be replaced if the challenge is successful **(B)** and the award of a truncated tribunal may not be enforced **(C)**.

(A) The LEX ARBITRI REQUIRES THE CHALLENGED ARBITRATOR TO REMAIN IN THE TRIBUNAL AND RULE ON THE CHALLENGE

12. The parties agreed on Arbitration Rules to govern the proceedings of the arbitration and the number of arbitrators to be three; one to be appointed by each party ***[CE. C2, Rec. ¶12; CE. C2, Rec. ¶12].*** If the tribunal finds the power to rule on the challenge in deviation from Art. 13 (4) of Arbitration Rules, Model Law becomes applicable by default as the *lex arbitri* ***[Born, pg.***

1923], and as such ***Art. 13 of Model Law*** requires the tribunal to decide on the challenge. The working group of the Model Law agreed that the challenged arbitrator should remain on the tribunal and rule on the challenge ***[314th Model Law Meeting]***. Art. 13 of Model Law was passed without a single objection or disagreement to the notion that the challenged arbitrator should remain and rule on his challenge ***[332nd Model Law Meeting].*** Therefore, the CLAIMANT submits that Mr. Prasad should remain in the tribunal and rule on the challenge.

(B) Mr. PRASAD CAN ONLY BE REPLACED IF THE CHALLENGE IS SUCCESSFUL

13. The CLAIMANT nominated Ms. Chian Ducasse as a *potential* replacement arbitrator for the sole purpose of saving time ***[PO1 para 1]***. Ms. Ducasse can only be appointed as a member of the tribunal if the RESPONDENT's challenge of Mr. Prasad's is successful ***[Telekom Malaysia]***. The parties are bound to respect party autonomy in selecting arbitrators, which is recognised in Art. 7, 8, 9 and 10 of the Arbitration Rules, in Art. 11 (2) of the lex arbitri ***(Model Law)*** and in Art. II (3) of the New York Convention. If the tribunal is constituted in a manner contrary to the parties' agreement, and there has been no waiver, the award might not be enforced ***[Fouchard, pg. 463 & 474].*** The normal practice in international commercial arbitration is that a replacement arbitrator is only appointed following the originally appointed arbitrators death, resignation or successful challenge ***[Redfern/Hunter, pg. 250].*** Hence, the CLAIMANT submits that Mr. Prasad cannot be replaced before the challenge in decided.

(C) MR. PRASAD'S CHALLENGE CANNOT BE DECIDED BY A TRUNCATED TRIBUNAL

14. The RESPONDENT requests the tribunal to decide on the challenge of Mr. Prasad without his participation i.e. a truncated tribunal ***[Rec. ¶38].*** A truncated Tribunal would only be allowed to function in very narrow circumstances where an arbitrator resigns, dies or fails to attend the proceedings at the very late stages of the arbitration. In addition ***Art. 14 & 15 of Model Law*** restrict the operation of a truncated tribunal further, by providing procedure to fill in the vacancy by reappointment within a short time ***[Portsmouth].*** Therefore, the parties nor the tribunal has the authority to decide on Mr. Prasad's challenge without his participation and as such, the CLAIMANT submits that the tribunal deciding on the challenge must consist of Mr. Prasad.

ISSUE 01 CONCLUSION: THE ARBITRAL TRIBUNAL DOES NOT HAVE POWER TO RULE ON THE CHALLENGE OF MR. PRASAD. EVEN IF IT DOES, THE CHALLENGE MUST BE DECIDED WITH MR. PRASAD AS A MEMBER OF THE TRIBUNAL

ISSUE 02: EVEN IF THE ARBITRAL TRIBUNAL HAS THE POWER TO DECIDE ON THE CHALLENGE, MR. PRASAD MUST NOT BE REMOVED

15. In the event the Arbitral Tribunal has the power to decide on the challenge, Mr. Prasad must not be removed from the Tribunal because the existing connections of Mr. Prasad cannot be considered justifiable doubts **(1),** the CLAIMANT is not required to disclose the funding information **(2)** and the CLAIMANT's conduct is irrelevant to Mr. Prasad's impartiality and independence **(3)**.

(1) THE EXISTING CONNECTIONS OF MR. PRASAD CANNOT BE CONSIDERED JUSTIFIABLE DOUBTS

16. The Notice of Challenge of the Arbitrator is submitted pursuant to Art.13 of the UNCITRAL Arbitration rules ***[Rec ¶37,38]***. Art. 13(1) refers to Art. 12 of the said statute regarding the circumstances which supports the challenge of arbitrators. As *"any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence"* ***[Art. 12 (1) UNCITRAL Rules]***, the CLAIMANT submits that the RESPONDENT must justify the challenge against Mr. Prasad as 'justifiable doubts'.

17. The drafting history of the UNCITRAL Arbitration Rules states that the omission of the term justifiable in explaining the scope of doubts is not advisable as it would open too many areas of challenge ***[Drafting History 1976]***. A Hong Kong court of first instance was of the view that the facts to be disclosed are not confined to those warranting or perceiving to be warranting disqualification but those that might find or warrant a *bona fide challenge* ***[Jung]***. An ICSID case also supports the contention of the CLAIMANT in its decision that in challenging an arbitrator an objective standard should be undertaken, where it requires not only showing a doubt, but that the doubt is justifiable ***[Vito]***. The Oberlandesgericht Köln held that *"challenge may only be granted if legitimate doubts regarding an arbitrator's independence and impartiality exist…… only grave violations of the objectivity requirement and inappropriate accusations may justify such an assumption of partiality and bias"* ***[Case 1062]*** which further supports the CLAIMANT's contention. The CLAIMANT further asserts that if the RESPONDENT

fails to justify the alleged connections of Mr. Prasad as justifiable doubts, Mr. Prasad must not be removed.

18. CLAIMANT refutes Mr. Prasad's challenge as the alleged connections of Mr. Prasad with Findfunds LP does not give rise to justifiable doubts **(A)**, repeat appointments of Mr. Prasad by Mr. Fasttrack's law firm does not hinder his impartiality and independence **(B)** and Mr. Prasad's article on conformity under the CISG, does not give rise to justifiable doubts **(C).**

(A) THE CONNECTIONS OF MR. PRASAD WITH FINDFUNDS LP DOES NOT GIVE RISE TO JUSTIFIABLE DOUBTS

19. The allegations regarding Mr. Prasad's impartiality and independence in the Notice of Challenge results from his alleged connections with Findfunds LP *[Rec. ¶38]*. Mr. Prasad's alleged connection with FindFunds LP is during a period when he was acting as an arbitrator in a matter involving a former client of the firm *[PO2, Q6]*. Justifiable doubts would have to be direct, definite, and capable of demonstration rather than remote, uncertain, or speculative *[Giddens; Pitta; Florasynth, Inc.; Morelite Corp.]* and therefore the CLAIMANT submits that Mr. Prasad's alleged connections does not give rise to justifiable doubts.

20. The drafting history of the UNCITRAL Arbitration Rules reasons out the exclusion of the reference to past and present commercial ties, in developing Art. 12 on challenging an arbitrator's independence or impartiality, on the basis of the difficulty to find an arbitrator who is conversant in the subject matter but had no connections with the parties in concern, due to some trades being small *[Drafting History 1976]*. The CLAIMANT agrees that personal or business relationships between an arbitrator and one of the parties are possible grounds for justifiable doubts as to the impartiality or independence *[Middlesex Mutual Ins.; National Shipping; Ilios Shipping]*. The CLAIMANT asserts that just being one out of 20 partners and 60 associates *[PO2, Q8]* of a law firm which has represented a party to the arbitration before cannot be sufficient to raise such doubts *[Standard Tankers]*. A challenged arbitrator submitted details that his firm had represented Exxon (current party to arbitration) in two proceedings during the last few years, one action on going at the time the arbitration started. However, the challenged arbitrator carefully noted that he did not personally supervise or assist in the Exxon litigation, and courts held they *"can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that*

arbitrators disclose to the parties any dealings that might create an impression of possible bias" ***[Standard Tankers]***. In support of the contention of the CLAIMANT, *"it is inevitable that experts in a particular industry, discipline, or legal community have contacts and relationships with the parties and their counsel"* ***[Born, pg. 1787]***. Law firms have grown in size and geographical spread in recent years; hence it has become increasingly common for lawyers to discover a prior or existing link of some kind with one or more of the parties to an arbitration ***[Derains/Schwartz, pg. 114]***. The unique role of arbitrators, whose special expertise arises from wide experience in their fields, sometimes leads to a gain of their professional knowledge and skill at the cost of the appearance of less than complete impartiality ***[Pitta]***, Mr. Prasad does not suffer from such appearance of impartiality. As such the CLAIMANT submits that if all these arbitrators were deemed to be partial or non-independent, merely because another partner or associate of the same firm has represented a party to the arbitration before, after a short time the pool of skilled arbitrators eligible to be appointed to serve on tribunals in international disputes would be severely reduced.

21. Mr. Prasad himself has had no relationship with the CLAIMANT which would give rise to justifiable doubts, as made clear in the preceding paragraph. In addition, Mr. Fasttrack has not been directly involved in the two cases in which Mr. Prasad had been appointed as an arbitrator ***[PO 2, Q8]***. Remote connections must not give rise to justifiable doubts ***[National Shipping; Mobil Oil Corp.; Sanford]*** and as such the CLAIMANT asserts that such remote connections of Mr. Prasad must not give rise to justifiable doubts. A party-nominated arbitrator cannot be expected to be totally unknown to the party appointing him. It is in fact impossible to appoint someone without any prior contact ***[Derains/Schwartz, pg. 112].*** The mere fact that there is some business relationship between an arbitrator and one of the parties to the arbitration is not in and of itself sufficient to disqualify the arbitrator ***[Reed & Martin; Ilios Shipping].*** Therefore CLAIMANT submits that Mr. Prasad does not have any business relationship with the CLAIMANT indicates that it would not give rise to justifiable doubts as to his impartiality or independence.

22. The declaration of Mr. Prasad on his connections to Findfunds LP discloses that he acted as an arbitrator in two already completed cases relating to completely different field of law, which were funded by other subsidiaries of Findfunds LP and further adds that in one of the above cases, the arbitral tribunal had been appointed only after the funding agreement was signed

[Rec. ¶ 36]. In addition the third party funder of the CLAIMANT is not Findfunds LP itself but Funding 12 Ltd of which Findfunds LP is the main shareholder *[Rec. ¶35]*. A Court of Hamburg, Germany decided that the mere fact that an arbitrator had participated as counsel in other proceedings involving a party to the arbitration did not justify a challenge *[SchH 03/02]*. As Mr. Prasad has never participated as counsel on behalf of the CLAIMANT, the CLAIMANT submits that the RESPONDENT has failed to establish any direct or indirect interest of Mr. Prasad in the already completed cases that would amount to justifiable doubts.

23. The RESPONDENT also alleges that the recently merged partner Slowfood with Mr. Prasad's law firm, acting for a client in an arbitration funded by Findfunds LP, is a breach of Mr. Prasad's impartiality and independence *[Rec. ¶39]*. The Higher Regional Court of Naumburg, Germany held that an arbitrator had not breached its disclosure duty by not revealing that he and the respondent's managing partner were both members of the board of a German legal institute, that he was a limited partner in a company set up by the respondent's managing director and that he and that managing director were both engaged as arbitrators and experts in arbitral proceedings *[CLOUT 665]*. In further support of the CLAIMANT's contention, an ICSID case on the challenge to the President of the Committee, Argentina challenged the president of the ad hoc committee on the ground that his firm had been instructed on a tax matter by a party connected to one of the parties, Vivendi. The challenge was rejected on the basis that the work was unrelated and the arbitrator was not involved in that work *[Vivendi]*. Thus, the CLAIMANT submits that, the funding of a client of an unrelated matter handled by a colleague of Mr. Prasad's law firm must not give rise to justifiable doubts regarding Mr. Prasad's impartiality and independence.

(B) REPEAT APPOINTMENTS BY MR. FASTTRACK'S LAW FIRM DOES NOT IMPACT MR. PRASAD'S IMPARTIALITY AND INDEPENDENCE

24. Another ground on which Mr. Prasad's impartiality and independence is challenged in the Notice of Challenge is that Mr. Prasad had been appointed twice before by Mr. Fasttrack's law firm and two times by Findfunds LP *[Rec. ¶39]*. The independence of an arbitrator can only be endangered if the topic of the former representation and the present arbitration are the same *[Hublein-stich, pg. 65]*. The CLAIMANT's contention is supported by the "*general standard*" drafted by the "IBA Working Group on Guidelines Regarding the Standard of Bias and Disclosure in International Commercial Arbitration" on the basis of Art. 12 (2) UNCITRAL

Model Law. The situation where an arbitrator's law firm has acted before for one of the parties in a case not related to the dispute before the Arbitral Tribunal is included in the white list which enumerates specific situations where no appearance of a conflict of interest exists from an objective point of view *[Draft Joint Report, pg. 25]*. An ICSID case decided that nothing prevents an arbitrator receiving multiple appointments from a party or counsel, and a party that seeks to challenge an arbitrator on that basis needs to show that the appointments give rise to justifiable doubts as to the arbitrator's impartiality or independence, which has been interpreted as requiring a showing that the arbitrator is professionally dependent on the party or counsel *[OPIC Karimum Corp.]*. Thus the CLAIMANT asserts that repeat appointments of Mr. Prasad by Mr. Fasttrack's law firm does not give rise to justifiable doubts.

25. Mr. Prasad, in his declaration of impartiality and independence disclosed that Mr. Fasttrack's law firm had previously appointed Mr. Prasad twice *[CE. C11, Rec. ¶23]*. Consequently, the RESPONDENT in the Response to the Notice of Arbitration states that they have *"no objection to the appointment of Mr. Rodrigo Prasad despite the restrictions in his declaration of independence"* *[Rec. ¶24]*. As such the RESPONDENT challenging the arbitrator at a later stage is a violation of Art. 12(2) which states that *"a party may challenge the arbitrator appointed by it only for reasons of which it becomes aware of after the appointment has been made"* *[UNCITRAL Rules]*.

26. The major advantage of arbitration as a means of dispute resolution is the opportunity to have a tribunal that is more aware of the subject matter of the dispute than a court skilled in legal argument but with only limited knowledge of the subject matter *[Merit Insurance Company; Born]*. Knowing that their interest is being fully considered by the tribunal in making its decision, both parties are more likely to accept the tribunal's decision *[Hublein-stich, pg. 67]*. This is ensured if a party appoints a person it trusts and whom it believes to be capable of being a good arbitrator, understanding its point of view *[Craig/Park/Paulsson, pg. 196; Redfern/Hunter, pg. 213; Derains/Schwartz, pg. 110]*. As such the CLAIMANT asserts that Mr. Prasad is one of those experts with a great reputation in his field of business, as he has been appointed as an arbitrator in 21 arbitrations over the last three years *[PO2, Q10]* meaning he has accumulated considerable knowledge of international trade law, based on previous professional experience. In all four previous arbitrations where Mr. Prasad was nominated either by the law firm of Mr. Fasttrack or by a party financed by a subsidiary of Findfunds LP,

the vote of Mr. Prasad was unanimous with that of the other members of the Tribunal ***[PO2, Q15]***, and this fact further asserts the CLAIMANT's contention that Mr. Prasad is an expert in his field of business and that he acted impartially.

27. The number of such experts is limited and in addition there is a growing demand for qualified arbitrators because the popularity of arbitration as a means for resolving international commercial disputes has increased significantly over the past decades ***[for example, the world's leading international arbitration institution – the ICC – handled request for 32 arbitrations in 1956, 210 arbitrations in 1976, 337 arbitrations in 1992, 452 arbitrations in 1997, and 529 arbitrations in 1999]***. The two cases in which he had been appointed by the law firm of Mr. Fasttrack were only of minor value [***PO2, Q10***]. Therefore the CLAIMANT submits the mere fact that someone is acting as an arbitrator in a matter involving a former client of the law firm cannot give rise to justifiable doubts as to his impartiality or independence.

(C) MR. PRASAD'S ARTICLE ON CONFORMITY UNDER THE CISG, DOES NOT GIVE RISE TO JUSTIFIABLE DOUBTS

28. The Notice of Challenge states that the journal article titled *"The notion of conformity in Art.35 in the age of Corporate Social Responsibility Codes and Ethical Contracting"* authored by Mr. Prasad shows bias on the part of Mr. Prasad ***[Rec. ¶38]***. A Regional Court of Munich stated *"the defendant's refusal of the referee is well founded[…] the defendant rightly assumes that the published article deals with facts which are the subject of the present arbitration proceedings; so he is not mistaken if he recognizes in the publication 'his' case"* ***[CLOUT 902]***. As such CLAIMANT submits that an issue regarding impartiality would arise only if the published article deals with facts of the '*present arbitration proceedings*' which is not the issue at hand. Mr. Prasad's article treats a legal question in a general and abstract manner and not in connection to the case in question. Further, it was written and published in 2016 ***[RE. R4, Rec. ¶40]*** well before these arbitral proceedings started. Thus, the CLAIMANT submits that it must not give rise to justifiable doubts.

29. Supporting the CLAIMANT's contention the United States Supreme Court held that *"since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions […]"* ***[Laird]***. Therefore the

CLAIMANT submits that it is not unusual for legal professionals to have written articles on issues that may be a part of arbitrations they preside, in the future.

30. Furthermore, the CLAIMANT submits that if the journal article is reviewed in light of the IBA guidelines, the article would be categorized under the Green List *[IBA Guidelines, pg. 24]* which specifically flags previously expressed legal opinions as a situation that does not bring about a conflict of interest from an objective point of view *[IBA Guidelines, pg. 19]*.

31. In addition, in an ICSID case that determined the disqualification of an arbitrator, the challenged arbitrator had written about most favoured nation clauses and the defence of necessity in various publications. Both issues were relevant in the arbitration, and Argentina argued that the opinions expressed by the arbitrator meant that he had already prejudged the issues and therefore manifestly lacked the qualities required to exercise independent judgment. However, the tribunal rejected the challenge: taking a position on an issue raised in the arbitration did not establish bias. Nor was there any appearance of bias because a reasonable person would not consider that the arbitrator would rely on his expressed academic opinions without giving proper consideration to the facts, circumstances and arguments in the arbitration. On a more pragmatic level, the tribunal considered that excluding arbitrators because of previously expressed academic opinions would stifle debate and would mean that many ICSID arbitrators would be open to challenge *[Urbaser SA]*. Therefore the CLAIMANT submits that the RESPONDENT has failed to prove that Mr. Prasad's article give rise to justifiable doubts.

(2) CLAIMANT IS NOT REQUIRED TO DISCLOSE INFORMATION REGARDING FINDFUNDS LP

32. The Notice of Challenge of the Arbitrator specifically states that in reference to the IBA Guidelines on conflicts of interest, non-disclosure of funding information relevant to an arbitrator can disqualify the Arbitrator *[Rec. ¶39]*. As such the CLAIMANT submits that the parties did not agree to the application of the IBA guidelines on conflict of interest **(A)** and even if the IBA guidelines on conflict of interest are applicable, the existing connections of Mr. Prasad do not fulfil the materiality requirement **(B)**.

(A) THE PARTIES DID NOT AGREE TO THE APPLICATION OF THE IBA GUIDELINES ON CONFLICTS OF INTEREST

33. The choice of law mutually consented by both parties as per the agreement only empowers the UNCITRAL Arbitration Rules and the UNCITRAL Model Law to govern the procedural issues of the case *[NOA, para 13; PO1 para 04]*. Introduction to the IBA Guidelines read "these guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties *[IBA Guidelines, pg. 3]*. The recommended procedures under the IBA Rules must be adjusted according to the needs of each arbitration and where their application is inappropriate; the provisions of the IBA Rules can and should be disregarded by the tribunal *[Webster, pg. 389]*. Party autonomy is the fundamental cornerstone of international commercial arbitration *[Redfern/Hunter, pg. 365; Fouchard, pg. 648]*. Parties wishing to adopt the IBA Rules should provide for this in their arbitration agreement since the IBA Rules cannot have any direct binding force upon the tribunal without party consent *[Lew/Mistelis, pg. 560; Waincymer, pg. 757]*. As such the CLAIMANT submits that at no point have any party agreed upon the application of IBA guidelines and in such an event the RESPONDENT cannot arbitrarily impose an unknown obligation, requiring the CLAIMANT to disclose information that may potentially amount to a conflict of interest on the part of Mr. Prasad. Hence the CLAIMANT has breached no law.

(B) EVEN IF THE IBA GUIDELINES ON CONFLICTS IF INTEREST ARE APPLICABLE, THE EXISTING CONNECTIONS OF MR. PRASAD DO NOT FULFIL THE MATERIALITY REQUIREMENT

34. The Notice of Challenge of Mr. Prasad refers to connections with Findfunds LP and states it is likely to fall under the Waivable Red List in the IBA guidelines, where clause 2.3.6 [*Rec. ¶39*] states *"the arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties"*. The CLAIMANT submits that there is no significant commercial relationship as the RESPONDENT had failed to establish justifiable doubts on Mr. Prasad's impartiality. Nevertheless, even if the Arbitral Tribunal determines the connections with Findfunds LP to fall under the waivable red list, general standard 2 of the IBA guidelines state that in such a case although the relationship would be serious, it would not be severe to substantiate apparent bias by the arbitrator *[IBA Guidelines, Pg. 17]*.

35. IBA Guidelines state that if "*the arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties*"

then it will be categorised under the Orange List ***[IBA Guidelines, clause 3.1.3]***. The repeat appointments of Mr. Prasad by Mr. Fasttrack's law firm does not hinder Mr. Prasad's impartiality and independence due to the situation most likely to be categorised under the Orange list where the situation would be waivable, if the parties are aware of the conflict of interest situation and expressly state their willingness to have a such a person act as arbitrator as set forth in General Standard 4c of IBA guidelines ***[IBA Guidelines, pg. 17]***. The RESPONDENT, via the Response to the Notice of Arbitration has clearly agreed to the previously disclosed repeat appointments of Mr. Prasad ***[Rec. ¶26]***. Hence, the CLAIMANT is not in violation of the IBA guidelines with regards to repeat appointments.

36. Mr. Prasad disclosed the relationships on the 21st of September 2017, merely two days after he had received the information about the nature of the representation ***[Rec. ¶43]***, even when there was no mandatory requirement to do so as argued in the preceding paragraph. As such Mr. Prasad disclosed information and he even met the high requirements set by a leading U.S. Supreme Court decision ***[Commonwealth Coatings Corp.; Born]***. In this decision, the Supreme Court held that arbitrators have to disclose any circumstances that might impact their impartiality, since the same ethical standards apply to both judges and the arbitrators. CLAIMANT submits that Mr. Prasad disclosed circumstances even in the absence of a mandatory requirement to do so.

(3) CLAIMANT'S CONDUCT IS IRRELEVANT TO MR. PRASAD'S IMPARTIALITY AND INDEPENDENCE

37. Notice of Challenge of Mr. Prasad sets out that the *"RESPONDENT has little doubt that Mr. Prasad had no involvement in this plot and was probably unaware that the CLAIMANT had received funding from a third party funder"* ***[Rec. ¶39]***. Mr. Prasad in his letter dated 21st September 2017 states that he was unaware of the third party funder and as he became aware he immediately declared about his previous arbitral proceedings ***[Rec. ¶43]***. Mr. Prasad also had no knowledge of the annotation by Mr.Fasttrack ***[PO2, Q13]***. As such the CLAIMANT submits that Mr. Prasad had no intention of concealing any information that would raise justifiable doubts as to his impartiality or independence. The very notion that once appointed, Arbitrators and parties to the arbitration are independent of each other ***[IBA Guidelines, pg. 4]*** gives rises to the presumption that a party's conduct has no bearing on the arbitrator appointed by it. The term 'neutrality' can be used to refer to a party-appointed arbitrator

who is expected to vote for the party with the better case, despite having sympathy toward the party who appointed him or her because of a shared background, tradition or culture *[Redfern/Hunter, pg. 221]*. The above concept is vis-à-vis applicable to show that the party's conduct also has no bearing on the arbitrator. Hence it is submitted that the CLAIMANT's conduct is irrelevant to Mr. Prasad's impartiality and independence.

ISSUE 02 CONCLUSION: EVEN IF THE ARBITRAL TRIBUNAL HAS THE POWER TO DECIDE ON THE CHALLENGE, MR. PRASAD MUST NOT BE REMOVED

ISSUE 03: CLAIMANT'S STANDARD CONDITIONS GOVERN THE CONTRACT BETWEEN THE PARTIES

38. The Contract is governed by the CLAIMANT's General Conditions for the following reasons. The CLAIMANT's General Conditions are valid **(1).** The CLAIMANT's General Conditions are applicable **(2).**

(1) CLAIMANT'S GENERAL CONDITIONS ARE VALID

39. The CLAIMANT's General Conditions are valid because the CLAIMANT's Sales Offer is valid **(A)**, the CLAIMANT incorporated the General Conditions in the Sales Offer **(B)** and the RESPONDENT's Invitation to tender is only an invitation to treat **(C).**

(A) CLAIMANT'S SALES OFFER IS VALID PURSUANT TO ART. 14 OF THE CISG

40. The CLAIMANT's Sales Offer is valid pursuant to Art. 14 of the CISG because it is sufficiently definite **(i)** and it indicates the intention of the CLAIMANT to be bound on acceptance **(ii).**

(i) CLAIMANT's Sales Offer is sufficiently definite

41. Art.14 (1) of the CISG states that an offer is constituted when it is sufficiently definite. The essential terms of the agreement, was introduced in the CLAIMANT's proposal; such that, when the CLAIMANT's Sales Offer was accepted, as it was, by the RESPONDENT; it lead to the conclusion of a valid and binding agreement *[CE. C4, Rec. ¶16; Magellan; Kessel]*. The article qualifies that "*a proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provisions for determining the quantity and price*" *[Art. 14 (1) CISG]*. The CLAIMANT's Sales Offer meets the qualification, as it includes the description of the goods, the quantity of cakes, the price and the terms of payment *[CE. C4, Rec. ¶16]*. A RFCCI

arbitration tribunal held in affirmation of the qualification, that the proposal for concluding a contract is sufficiently definite, where there is an indication on the goods and an express or implicit fixation or provision to determine their quantity and price ***[CLOUT 309]***. Therefore, the Sales Offer of the CLAIMANT satisfies the requirement of being sufficiently definite.

(ii) CLAIMANT's Sales Offer indicates the intention of the CLAIMANT to be bound upon acceptance

42. The CLAIMANT submitted the Sales Offer to the RESPONDENT ***[CE. C4, Rec. ¶16]*** following the RESPONDENT's Invitation to Tender ***[CE. C1, Rec. ¶08].*** The letter accompanying the CLAIMANT's Sales Offer contained amendments to the RESPONDENT's Tender Documents ***[CE. C3, Rec. ¶15]***. The CLAIMANT's intention to be bound is a prerequisite for CLAIMANT's Sales Offer to be valid; which also distinguishes the CLAIMANT's Sales Offer from a mere invitation to make offers ***[Schwenzer/Mohs, pg. 239]***. The language used by the CLAIMANT made it clear that the CLAIMANT intended to be bound in case of acceptance, because in a commercial context phrases such as "*we offer for sale*" normally indicates an intention to be bound in the event of acceptance ***[CLOUT 330; Huber/Mullis, pg. 71]***. As such the CLAIMANT submits that its Sales Offer is valid as it indicated the real intention of the CLAIMANT to be legally bound in the case of acceptance by the RESPONDENT ***[Art. 14 (1) CISG; ICC 10329]***.

(B) CLAIMANT INCORPORATED THE GENERAL CONDITIONS IN THE SALES OFFER

43. The CLAIMANT incorporated the CLAIMANT's General Conditions in the Sale Offer ***[CE. C, Rec. ¶16]***. The general principles governing the incorporation of General Conditions can be derived from Articles 8 & 14 of the CISG ***[Schwenzer/Mohs, pg. 240]***. The Bundesgerichtshof in deciding a CISG case, summarised two requirements for the inclusion of the CLAIMANT's General Conditions; the CLAIMANT's intention to incorporate his general conditions must be apparent to the RESPONDENT and the CLAIMANT must *"transmit the text or make it available in another way"* ***[CLOUT 445; Huber/Mullis, pg. 31]***. Further, the offer or acceptance must contain the clear notice that the general terms are part of it and must be exchanged during the formative phase of the contract ***[Magnus, pg. 188]***. As such, the CLAIMANT submits that the CLAIMANT made available the General Conditions to the RESPONDENT **(i)** and the RESPONDENT knew or could not have been unaware of the CLAIMANT's intention **(ii).**

(i) CLAIMANT made the General Conditions available to the RESPONDENT

44. The CLAIMANT's Sales Offer unambiguously stated, *"the above offer is subject to the General Conditions of the Sale"* on the front page of the offer ***[CE. C4 Rec. ¶16]*** and made available to the RESPONDENT the CLAIMANT's General Conditions via the CLAIMANT's website, disclosed in the very same paragraph of the Sales Offer ***[CE. C4 Rec. ¶16]***. The minimum requirement for the incorporation of standard contract terms under the CISG is clear information in the offer, which constitutes the contract ***[CLOUT 203; Anderson/Schroeter]***. It is sufficient that the general conditions are contained in an attachment to an email or can easily be retrieved from a website, be it via a link on the website where the offer is available, or via a link in the email, that constitutes the offer ***[Schwenzer/Mohs, pg. 240; Anderson/Schroeter, pg. 322]***. Even a clear reference to the general conditions may suffice ***[Kessel]***. Hence, the CLAIMANT submits that it had made the General Conditions available to the RESPONDENT during the formative phase of the contract and the RESPONDENT's act of downloading the CLAIMANT's Code of Conduct ***[CE. C5 Rec. ¶17]*** (available in the same website as the General Conditions) is sufficient proof of the matter.

(ii) RESPONDENT knew or could not have been unaware of the CLAIMANT's intention

45. The CLAIMANT's General Conditions and Code of Conduct were both available on the CLAIMANT's website declared in the Sales Offer ***[CE. C4 Rec. ¶16]***. The parties; were aware or could not have been unaware that the CLAIMANT's General Conditions apply to the contract, as the RESPONDENT would have had to read the reference that the contract is *"subject to the General Conditions"* of the CLAIMANT when downloading the Code of Conduct ***[CE. C5 Rec. ¶17]***. The RESPONDENT further knew or could not have been unaware of the CLAIMANT's General Conditions because, the RESPONDENT has reasonable possibility to understand its content; the possibility to understand is described as the terms are not too long and are written in a language widely spoken, so that they may be translated easily ***[CLOUT 534].*** Therefore, the CLAIMANT's express incorporation of the General Conditions satisfies the accepted standard for incorporation of General Conditions for contracts governed by the CISG.

(C) RESPONDENT'S INVITATION TO TENDER IS MERELY AN INVITATION TO TREAT

46. The CLAIMANT was invited by the RESPONDENT through the letter dated 10th March 2014 to partake in the tender process for the supply of chocolate cakes ***[CE. C1, Rec. ¶08]***. The CLAIMANT was one of the six companies that had submitted offers to the RESPONDENT ***[PO2, Q23]***. Although ***Art. 14 (2) of the CISG*** states that a proposal *"addressed to one or more specific persons"* may constitute an offer, it is not an offer unless it satisfies the basic test of Art. 14 (1) which requires the *"intention of the offeror to be bound in case of acceptance"* ***[Honnold, pg. 147]***. Furthermore, the RESPONDENT's expression of a tender does not constitute an offer as the terms are not clear enough to form a binding contract ***[Carlill]*** and the words used in the expression do not indicate a clear intention to be bound on acceptance ***[Harvela]***. Therefore, the RESPONDENT's Invitation to Tender is merely an invitation to treat.

47. The CLAIMANT's Sales Offer was accompanied with a cover letter, which distinctly stated that the Sales Offer is following the RESPONDENT's Invitation to Tender ***[CE. C3 Rec. ¶15]***. Moreover, Ms. Ming, in her letter accompanying the RESPONDENT's Invitation to Tender stated that she *"looks forward to the submission of the CLAIMANT's offer"* ***[CE. C1, Rec. ¶08],*** which indicates that the RESPONDENT's Invitation to Tender does not amount to an offer as the terms used in the expression rebut the presumption that the RESPONDENT had intended to be bound in the case of acceptance ***[Spencer; Art. 8 CISG]***. The legislative history of the CISG shows that the requirements set out in ***Art. 14 (1)*** apply to ***Art. 14 (2)*** of the CISG as well ***[8th CISG Meeting; 35th CISG Meeting]***. Therefore in light of article 8 and article 14 of the CISG, the RESPONDENT's Invitation to Tender, did not indicate any intention be legally bound in case of acceptance, and did not satisfy the requirement of being sufficiently definite and as such is merely an invitation to treat.

(2) CLAIMANT'S GENERAL CONDITIONS ARE APPLICABLE

48. The CLAIMANT submits that the CLAIMANT's General Conditions are applicable to the contract governing the parties on the grounds that the RESPONDENT accepted the CLAIMANT's General Conditions **(A)**, the CLAIMANT has not deviated from trade usage **(B)** and the CLAIMANT's General Conditions are applicable according to the last shot rule **(C).**

(A) CLAIMANT'S GENERAL CONDITIONS WERE ACCEPTED BY THE RESPONDENT

49. The CLAIMANT's General Conditions were accepted by the RESPONDENT, because the RESPONDENT's conduct indicates acceptance according to Art. 18 of the CISG **(i)** and the RESPONDENT's failure to object to the incorporation of the CLAIMANT's General Conditions indicates acceptance **(ii).**

(i) Pursuant to article 18 of the CISG, RESPONDENT's conduct indicates acceptance

50. The CLAIMANT's Sales Offer that included the CLAIMANT's General Conditions, was accepted by the RESPONDENT in writing, by the letter dated 7th Apr 2014 ***[CE. C5, Rec. ¶17]***. As a rule, three elements must be satisfied before a reply to an offer can constitute an acceptance ***[Huber/Mullis, pg. 84]***. First, The RESPONDENT indicated assent to the offer **(a).** Secondly, the RESPONDENT's assent was unqualified **(b).** Thirdly, the RESPONDENT's assent was effective **(c).**

(a) RESPONDENT indicated assent to the offer

51. Acceptance can be effectuated either by a statement or by other conduct indicating assent to the offer ***[Schwenzer/Mohs, pg. 241]***. The letter of acceptance received by the CLAIMANT indicated clear assent of the RESPONDENT to the offer ***[CE. C5, 17; CLOUT 395]***. Alternatively the RESPONDENT's acceptance of the delivery of chocolate cake beginning 1st May 2014 ***[Res NOA, para 13]*** qualifies as clear assent of the offer by conduct ***[CLOUT 292]***. The statement made by or other conduct of the RESPONDENT indicating assent to an offer is an acceptance ***[CLOUT 429; Art. 18 (1) CISG]***. Hence, the RESPONDENT's letter of acceptance and conduct of acceptance indicate a clear assent to the CLAIMANT's offer.

(b) RESPONDENT'S assent was unqualified

52. The letter of acceptance sent to the CLAIMANT by the RESPONDENT states that the CLAIMANT's *"tender was successful notwithstanding the changes suggested"* ***[CE C5, Rec. ¶17].*** The RESPONDENT's expression of assent to the General Conditions proposed by the CLAIMANT is final and unqualified as the RESPONDENT intended it to be so; evidenced by the absence any objection, amendments or subsequent offers ***[CLOUT 395; CE C5, Rec ¶17]***. The CLAIMANT or alternatively a reasonable person would understand the RESPONDENT's

intentions in the letter of acceptance as an unqualified assent *[Art. 8 CISG; Huber/Mullis, pg. 88]*. Hence, the acceptance of the CLAIMANT's offer by the RESPONDENT notwithstanding any changes, the absence of any subsequent change by the RESPONDENT and the clear statement of the RESPONDENT's intention in the letter of acceptance, indicates that the assent was unqualified.

(c) RESPONDENT's assent was effective

53. The CLAIMANT received the letter of acceptance on 7th April 2014 *[CE. C5, Rec. ¶17]*. As a rule an acceptance is not effective until it is communicated to the CLAIMANT which, under the CISG, occurs when it reaches the CLAIMANT *[Art. 18 (2) CISG]*. The Convention does not prescribe any particular method by which an acceptance must be communicated *[Huber/Mullis, pg. 95]*. Hence, as the letter of acceptance was communicated in the same manner the offer was sent, the CLAIMANT's Sales Offer and General Conditions included therewith were accepted by the RESPONDENT on the reception of the letter of acceptance by the CLAIMANT *[CLOUT 203]*.

(ii) RESPONDENT's failure to object to the incorporation of the CLAIMANT's General Conditions indicates acceptance

54. The RESPONDENT did not reject the CLAIMANT's offer, nor was there any objection to the incorporation of the CLAIMANT's General Conditions in the offer. Following acceptance, the CLAIMANT commenced delivery on the 1st of May 2014 *[Res NOA, para 13]*. The RESPONDENT as an experienced business has a duty to object immediately to the application of the CLAIMANT's General Conditions if the RESPONDENT is unable to understand the CLAIMANT's General Conditions, or objects to its application to the contract *[CLOUT 534]*. Therefore, as there was no objection to the application of the CLAIMANT's General Conditions *[CE. C5 Rec. ¶17]* , or any express or implied rejection of the CLAIMANT's Sales Offer or any inclusion of new terms, to indicate a counter offer *[Art. 19 CISG]*, the CLAIMANT submits that the RESPONDENT accepted the CLAIMANT's General Conditions.

(B) CLAIMANT HAS NOT DEVIATED FROM TRADE USAGE OR ESTABLISHED PRACTICES

55. The CLAIMANT's Sales Offer was presented in the standard format that is used by the CLAIMANT in all its business transactions including sales invoices *[PO2, Q24]*. The parties are

only bound by practices to which they have agreed, whether expressly, implicitly or by conduct *[Art 9 (1) CISG]*. As this contract is the first commercial interaction between the CLAIMANT and the RESPONDENT *[NOA, para 03]*, there are no established trade practices between the parties and therefore the CLAIMANT has no provision to deviate from.

(C) CLAIMANT'S GENERAL CONDITIONS ARE APPLICABLE ACCORDING TO THE LAST SHOT RULE

56. The CISG is silent on conflicting standard terms. However, its general rules on formation of contract may allow a solution. *Art. 19 of the CISG* combined with the general principle of party autonomy in *Art. 6 of the CISG* provide a set of rules on the formation of contract. Therefore, a solution must be sought within their ambit *[Magnus, pg. 190].* The CLAIMANT did not explicitly or impliedly allow the RESPONDENT to fix or specify any of the conditions of the offer *[CE. C4, Rec. ¶16].* The RESPONDENT also unequivocally accepted the offer and did not add or alter the CLAIMANT's Sales Offer *[CE. C5, Rec. ¶17].* Therefore, the RESPONDENT neither has rejected nor constituted a counter offer pursuant to *Art. 19 (1) of the CISG.*

57. The CLAIMANT's Sales Offer inclusive of the General Conditions communicated on the 27th of March 2014 was the final expression of willingness to contract between the parties, before the contract was formed following the RESPONDENT's acceptance of the Offer *[CE. C4, Rec. ¶16]*. The RESPONDENT's acceptance did not contain additional or different terms, which could materially alter the terms of the Sales Offer within the meaning of *Art. 19 (2) & (3) of the CISG*. Therefore, pursuant to *Art. 6 & 19 of the CISG*, as it was the CLAIMANT's Sales Offer that was accepted by the RESPONDENT, it was the CLAIMANT that fired the last shot and hence, the General Conditions incorporated into the CLAIMANT's Sales Offer is applicable to the contract *[Ruhl, pg. 191].*

58. Although the CLAIMANT's General Conditions apply to the contract, the CLAIMANT made an implied exception to forfeit the application of the CLAIMANT's arbitration clause contained in Art. 11 of the CLAIMANT's General Conditions *[PO2, Q29]*, by agreeing to ad hoc arbitration in the letter accompanying the Sales Offer *[CE. C3 Rec. ¶15]*. The overarching principle of party autonomy of CISG leaves provision for the CLAIMANT to make modifications to the terms that govern the contract, subject to acceptance by the RESPONDENT *[Magnus, pg. 190]*. The RESPONDENT's unqualified acceptance of the Sales Offer, applies to the General Conditions incorporated therewith and the implied exception made in the enclosed letter *[Butler ; CE. C5,*

Rec. ¶17]. Therefore, the contract was formed only when the RESPONDENT accepted the CLAIMANT's Sales Offer - including its general conditions; the terms of the contract are those of the party whose offer has been accepted and thus of the party who has managed to "fire the last shot" ***[Ruhl]***.

ISSUE 03 CONCLUSION: THE CLAIMANT'S GENERAL CONDITIONS ARE VALID, APPLICABLE AND GOVERN THE CONTRACT BETWEEN THE PARTIES.

ISSUE 04: EVEN IF THE RESPONDENT'S GENERAL CONDITIONS ARE APPLICABLE, CLAIMANT DELIVERED CONFORMING GOODS IN ACCORDANCE WITH ART. 35 OF THE CISG AND THE RESPONDENT'S ETHICAL STANDARDS. FURTHER, CLAIMANT WAS ONLY REQUIRED TO USE BEST EFFORTS TO ENSURE COMPLIANCE

59. The CLAIMANT submits that it fulfilled its obligations under the contract and the CISG by delivering conforming chocolate cakes. Under the RESPONDENT's General Conditions which are applicable, the CLAIMANT performed its obligations under Art. 35 of the CISG **(1).** Alternatively, should it be found that there were non-conforming goods CLAIMANT was only required to use best efforts **(2)**.

(1) THE CHOCOLATE CAKES CONFORMED UNDER ART. 35 OF THE CISG

60. The CLAIMANT duly delivered Queens' Delight chocolate cakes that complied with the contractual specifications, as the chocolate cakes were of the quality and description required by the contract under Art. 35 (1) of the CISG **(A)** and the delivered goods were in conformity with the contract under Art. 35 (2) of the CISG **(B).**

(A) THE CHOCOLATE CAKES WERE OF THE QUALITY AND DESCRIPTION REQUIRED BY THE CONTRACT UNDER ART. 35 (1) OF THE CISG

61. The CLAIMANT was in agreement to supply Queens' Delight Chocolate Cakes ***[CE. C4, Rec. ¶16]***, in the size that was showcased at the Cucina fair ***[CE. C3, Rec. ¶15].*** The CLAIMANT did not deviate from Art. 35 (1) of the CISG as CLAIMANT delivered goods in accordance with the quantity, quality and description required by the contract ***[Art. 35(1) CISG].*** The CLAIMANT submits that RESPONDENT raised no issue of non-conformity upon examination of chocolate cakes and hence did not issue a notice to the CLAIMANT on a possible non-conformity as per

Art. 39 of the CISG ***[Art. 39 CISG; Frutas Caminito].*** The CLAIMANT submits that a German court supports the CLAIMANT's position by the reasoning that a notice should have been given within a reasonable time to establish an alleged non-conformity on a patent defect such as imperfect sewing and measurements and loss of colour of shoes ***[CLOUT 4].*** As such the RESPONDENT's failure to object at the time the chocolate cakes were delivered on its form and description of the cake, indicates that the CLAIMANT has delivered conforming goods as per Art. 35(1) of the CISG. Thus the decisive factor on whether goods are conforming based on the contractual description of the goods ***[Schlechtriem, pg. 67]*** has been met by the CLAIMANT.

62. The RESPONDENT's General Conditions also require chocolate cakes manufactured with ingredients sourced according to section IV of the tender documents ***[CE. C2, Rec. ¶10].*** In line with the said specifications, the CLAIMANT had made ethical and sustainable production methods part of its contract with its supplier and regularly audited the supplier's main production facility and therefore complied with the contract specifications for the chocolate cakes ***[NOA, para 22].*** The CLAIMANT submits that neither the CISG nor its legislative history mentions the concept of ethics ***[14th CISG Meeting; 15th CISG Meeting; Comm. Report CISG].***

63. Further, section IV of the tender documents specifies that the RESPONDENT expects the CLAIMANT to adhere to similar standards of integrity and sustainability to which the RESPONDENT is committed to as a Global Compact Member ***[CE. C2, Rec. ¶11].*** To assess such a contractual specification, the contract has to be interpreted in accordance with Art.8 of the CISG ***[ICC 16561].*** Art. 8 of the CISG stipulates that statements made by the other party should be explained according to the intent "*where the other party knew or could not have been unaware what the intent was*" ***[Art. 8 CISG].*** In light of Art. 8 of the CISG the CLAIMANT submits that the use of language in the specification of the goods such as "*expects*" does not infer a mandatory contractual obligation to meet the highest standards of integrity and sustainability and hence could not have been aware of any intention of the RESPONDENT in requiring goods produced in a completely ethical manner ***[Dysted, pg. 24].***

64. Further, the CLAIMANT submits that, several chocolate manufacturing companies such as Mars and Hersheys who also follow UN Global Compact Principles reflect mere guidelines and expectations in their supplier codes of conduct ***[Mars; Hersheys].*** Further the CLAIMANT

submits that sponsoring a general initiative of the United Nations such as the Global Compact is not the same as contractually agreeing on a set of ethical standards *[Ramberg, 5.3]* and its broad nature of application and the wording used reflects a character that is only suggestive *[Dysted, pg. 24].* On the other hand, the RESPONDENT differentiates between its Code of Conduct for Suppliers and the contractual obligations *[CE. C2, Rec. ¶12]* which indicates that such a stipulation on sustainable sourcing would have related only to the CLAIMANT's general business conduct rather than the contractually binding terms of quality or description of the chocolate cakes. Further, the CLAIMANT submits that the RESPONDENT's assertion that a cake made using sustainably sourced cocoa fails as the CLAIMANT presented the King's Delight cake at the fair and not the Queen's Delight cake *[Res NOA, para 11].* Nevertheless the CLAIMANT submits that the delivered goods are of the quality and description required by the contract under art. 35 (1) of the CISG.

(B) THE DELIVERED GOODS WERE IN CONFORMITY WITH THE CONTRACT UNDER ART. 35 (2) OF THE CISG

65. Even if the chocolate cakes were not in conformity in respect of quality or description specified in the contract according to Art. 35 (1) of the CISG, the CLAIMANT submits that the goods were in conformity with the contract under Art. 35 (2) of the CISG as the chocolate cakes were fit for the RESPONDENT's ordinary purpose of sale **(i)** and the chocolate cakes were fit for its particular purpose made known to the CLAIMANT **(ii).** Alternatively it was unreasonable for the RESPONDENT to rely on the CLAIMANT's skill and judgment **(iii).**

(i) The chocolate cakes were fit for the ordinary purpose of sale

66. The CLAIMANT submits that the RESPONDENT had received no complaints from any of its customers *[PO2, Q38].* Further half the delivered cakes were made part of a special marketing campaign for the opening of three new shops promoting fairly traded cake and other eatables *[PO2, Q38].* This indicates that the CLAIMANT conforms to Art. 35 (2) (a) of the CISG as the Queen's Delight chocolate cakes are fit for the purpose of consumption for which goods of the same description were ordinarily used *[Art. 35 (2) (a) CISG].* As such there is no latent defect which the RESPONDENT could reasonably discover in the initial examination *[CLOUT 378; CLOUT 284]* and hence does not indicate any non-conformity.

67. The standard under Art. 35 (2) (a) of the CISG was considered violated, when the seller delivered wine that had been diluted with 9 % water, causing domestic authorities to destroy the wine *[CLOUT 170]* and when the seller substituted a different component in a machine with no permission which led to the failure of the machine *[CLOUT 237].* As such the CLAIMANT submits that the chocolate cakes being in a condition to be consumed, evidences that it was fit for the ordinary purpose of sale. Further a defect that would not harm the ordinary purpose of goods does not render the goods non-conforming *[CLOUT 252; CLOUT 341].* The CLAIMANT submits that in the absence of such a latent defect in the chocolate cakes and due to the RESPONDENT offering those to its customers for consumption partly by sale and partly by the marketing campaign, the ordinary purpose of the goods have been achieved.

68. The CLAIMANT submits that under Art. 35 (2) (a) of the CISG, tradability of the goods is an aspect of fitness of goods for ordinary purposes, and food intended for human consumption must at least not be harmful to health and mere suspicion of any harm to health would constitute a breach *[CLOUT 774].* The arbitral tribunal of CIETAC and the District Court for Commercial Matters in Belgium reasoned that goods delivered were in such poor quality that it could not even be resold at a discounted price and hence were not merchantable as per Art. 35 (2) of the CISG *[CLOUT 1097; Rechtbank].* Further *ordinary purpose* means that the goods must be fit for commercial purposes *[Schwenzer/Leisinger]* and there should be a possibility to resell those *[Honnold; International Housewares; Lookofsky, pg. 79; Bianca/Bonell, note 2.5.1].* As such the CLAIMANT submits that the RESPONDENT's actions does not indicate an inability to sell the chocolate cakes as the RESPONDENT made a choice to give away the chocolate cakes for free to its customers instead of attempting to sell the cakes to another company who is not a member of the Global Compact to mitigate possible losses and therefore proves that the chocolate cakes served its ordinary purpose.

69. The CLAIMANT asserts that the merchantability test in English Common Law is incompatible with the applicable law of the dispute i.e. preparatory works of the CISG *[Drafting History, CISG],* and that the 'reasonable quality standard' is compatible to assess conformity of goods *[UNILEX 2319].* Alternatively, even if the contract implies a standard of quality, it *"must be ascertained in the light of the normal expectations of persons buying goods of this contract description" [Secretariat Commentary, CISG].* The CLAIMANT submits that the CLAIMANT had

adhered to the *justifiable expectation* of the buyer by delivering chocolate cakes that are edible and therefore could be sold ***[Beijing Light; Honnold/Flechtner, para 225].*** As such the CLAIMANT submits that the RESPONDENT having sold half the cakes and used the rest to promote the three newly opened shops to its most valued customers, proves that the cakes met the normal expectation of people buying the goods and that the goods are fit for the ordinary purpose of sale.

(ii) The chocolate cakes were fit for its particular purpose made known to the CLAIMANT

70. The CLAIMANT submits that in situations where the buyer requires goods of a general description to meet a particular purpose, the buyer should communicate such a purpose either expressly or impliedly to the seller ***[Secretariat Commentary, CISG]*** as per Art. 35 (2) (b) of the CISG. As such the CLAIMANT submits that it had made environmentally friendly and sustainable production methods part of its contract with its supplier and had regularly audited the supplier's main production facility ***[NOA, para 22].*** Further the CLAIMANT submits that it relied on the certification of Egimus AG who was tasked with reviewing and regulating the CLAIMANT's supplier: Ruritania Peoples Cocoa mbH and hence relied on the documentation provided by Ruritania Peoples Cocoa ***[CE. C8, Rec. ¶20].*** This indicates that the CLAIMANT had taken measures to deliver chocolate cakes that are fit for its particular purpose and that Egimus AG's failure does not reflect the CLAIMANT's failure.

(iii) Alternatively it was unreasonable for the RESPONDENT to rely on the CLAIMANT's skill and judgment

71. The CLAIMANT submits that even if the tribunal declares that the RESPONDENT had relied on the CLAIMANT's skill and judgement, the RESPONDENT's reliance was unreasonable because the CLAIMANT had no knowledge and could not have had any knowledge on the fraud **(a)** and the CLAIMANT's failure to perform was due to an impediment beyond the CLAIMANT's control according to Art. 79 of the CISG **(b)**.

(a) CLAIMANT did not know or could not have known the cocoa supplier's fraud

72. The CLAIMANT submits that until the scandal was discovered, Ruritania had a good reputation in the market due to two model farms based on sustainable production ***[PO2, Q32]*** and the CLAIMANT being a UN Global Compact member ***[NOA, para 01]*** has sustained trade with the

RESPONDENT with no dispute from 2014 to 2017 ***[NOA, para 06].*** As such the CLAIMANT had zero knowledge of the forged certificates that testified a sustainable production process by tripling the number of beans produced in examined locations using a sophisticated scheme involving government officials and other cocoa farmers ***[NOA, para 22].*** In light of such circumstances the CLAIMANT was not in violation of Art. 35(2) (b) of the CISG as it was unreasonable for the RESPONDENT to rely on the CLAIMANT's skill and judgment on the particular purpose of the goods ***[Art. 35 (2) (b) CISG].***

73. The rule in Art. 35 (2) (b) of the CISG can be derogated from, if the circumstances show that it was unreasonable for the buyer to rely on the seller's skill and judgment ***[Henschel].*** The fraudulent scheme devised was beyond the scope of Egimus AG's expertise to discover the violation ***[PO2, Q 33].*** In fact the scheme involved Ruritanian ministers, government officials and business leaders through bribery ***[CE. C7, Rec. ¶19].*** Hence the CLAIMANT being a manufacturer of fine bakery products does not have the capacity or knowledge to discover the unethical practices which could not even be uncovered by Egimus AG an expert organisation.

74. Further, the CLAIMANT submits that if Comestibles Finos' Code of Conduct for Suppliers is applicable, the RESPONDENT reserves the right to audit and inspect the CLAIMANT's operations and facilities to verify compliance ***[CE. C2, Rec. ¶14].*** The CLAIMANT submits that if the "*contract contains provisions regarding auditing procedures, the purchaser may lose his right to rely on a lack of non-conformity if he does not make the contracted auditing and therefore do not discover production methods that violate the contract*" ***[Ramberg].*** However, the CLAIMANT submits that due to the CLAIMANT's reputation in the market and its reputation in supervising its supply chain for the past five years with no reported cases on a violation of UN Global Compact principles, the RESPONDENT decided to make no further audits or site visits ***[PO2, Q 34]*** and therefore the RESPONDENT would not have discovered the scheme if not for the Michelgault article ***[PO2, Q 36]***. As such the CLAIMANT submits that this indicates that the RESPONDENT itself could not have known the fraud when one of their suspicions itself was deemed to be unjustified ***[PO2, Q36]*** and hence the reason it was unreasonable for the RESPONDENT to rely on the CLAIMANT's skill and judgement in the event of a fraud.

75. The CLAIMANT submits that reasonableness is a general principle under the CISG ***[Kritzer]*** and in reference to the aspect of *reliance*, the German Federal Court of Justice held that "*a buyer cannot reasonably rely on the seller's knowledge of the importing country's public law requirements or administrative practices relating to the goods, unless the buyer pointed such requirements out to the seller"* ***[CLOUT 123].*** Nestlé argued *"that it has no duty to disclose labor conditions in its supply chain because the information at issue does not relate to product safety, and because Nestlé did not have exclusive knowledge"* on child labour violations ***[McCoy].*** Hence, the CLAIMANT submits that even if the tribunal declares that the RESPONDENT had relied on the CLAIMANT's supposed knowledge to supply guaranteed sustainably produced goods, circumstances are such that it was unreasonable for the RESPONDENT to rely on the CLAIMANT's skill and judgment when the CLAIMANT had no knowledge and could have not had any knowledge on such a fraud.

(b) CLAIMANT's failure to perform was due to an impediment beyond the CLAIMANT's control according to Art. 79 of the CISG

76. Alternatively, if the tribunal finds that the CLAIMANT failed to deliver conforming chocolate cakes, the CLAIMANT submits that the fraudulent conduct of its supplier does not extend to an obligation for the CLAIMANT as the failure to perform was due to an impediment beyond the CLAIMANT's control according to Art. 79 (1) of the CISG ***[Art. 79 (1) CISG].*** As such the CLAIMANT submits that the seller could rely on Art. 79 of the CISG in cases of non-conformity of goods ***[Secretariat Commentary 1].*** The CLAIMANT submits that it can rely on Art. 79 (2) of the CISG as Ruritania Peoples Cocoa: the CLAIMANT's cocoa supplier, a third party engaged to perform part of the contract, presented forged official papers ***[NOA, para 09]*** which indicates that the CLAIMANT could be exempted from any liability ***[Art. 79 (2) CISG].*** The reasoning of a French court supports the CLAIMANT's position where it had granted a seller an exemption from damages for delivery of non-conforming goods on the basis that the defective merchandise was manufactured by a third party, which the court found was an exempting impediment as long as the seller had acted in good faith ***[Flippe Christian]*** and in several cases a seller has invoked its supplier's default as an impediment that, they argued, should exempt the seller from liability for its own resulting failure to deliver conforming goods ***[CLOUT 271].*** Therefore the CLAIMANT submits that the default and fraud of its supplier does not oblige the

CLAIMANT to be responsible and that it is unreasonable for the RESPONDENT to rely on the CLAIMANT's skill and judgement.

(2) ALTERNATIVELY, SHOULD IT BE FOUND THAT THERE WERE NON CONFORMING GOODS CLAIMANT WAS REQUIRED TO ONLY USE BEST EFFORTS

77. Should it be found that there was non-conforming chocolate cakes, the CLAIMANT is not obliged to achieve a specific result as ethical standards are mere guidelines (A) and the CLAIMANT used best efforts as would be made by a reasonable person in the same circumstances (B).

(A) CLAIMANT IS NOT OBLIGED TO ACHIEVE A SPECIFIC RESULT AS ETHICAL STANDARDS ARE MERE GUIDELINES

78. Both the CLAIMANT and RESPONDENT are members of the Global Compact ***[NOA, para 01; CE. C1, Rec. ¶8].*** The CLAIMANT submits that the minimalist approach which is the most dominant view through an international perspective ***[Hoff]*** believes that the character of codes of conduct is not legally binding and that compliance with these codes should be voluntary ***[Vytopil].*** The OECD Guidelines supports the CLAIMANT's position which indicates that "*observance is voluntary and not legally enforceable*" ***[OECD guidelines].*** As such the CLAIMANT submits that the general notion is that voluntarily drafted or accepted codes are not legally binding for those that adhere to them, but if it flows from a national or international legislation the code would contain legally binding clauses ***[Koelemeijer]***.

79. The CLAIMANT submits that in a case concerning non-disclosure of child labour practices by the suppliers of cocoa beans for Mars chocolates, Judge Seeborg held that the absence of such information on the packaging is not "substantially injurious to consumers" or necessarily immoral and the claim would not advance ***[Hodsdon].*** Similarly the claim on the failure to disclose Nestlé's suppliers' labor abuses on Nestlé's product packaging was dismissed ***[McCoy].*** Despite "*adopting Corporate Business Principles which require ethical practices in its supplier chain and a Supplier Code that strictly prohibits child labour and forced labour",* Nestlé acknowledges child and slave labour happening in the Ivory Coast but also *"works with a Certification Programme that does not permit child labour"* ***[McCoy]*** Nevertheless despite allegations on violating national legislation such as the California's Unfair Competition Law

and the Consumers Legal Remedies Act, the claim was dismissed ***[McCoy].*** The CLAIMANT submits that courts have not granted relief to claims brought against companies such as Hershey's, Costco and Whole foods for allegedly misleading customers on non-disclosure of information on child labour, ethical treatment of animals, slavery and human trafficking ***[Sud; Dana; PETA].*** As such the CLAIMANT submits that it has not attempted to disclose any unethical practices but adhered to the ethical standards and terminated the contract with the cocoa supplier upon verifying the scheme ***[CE. C9, Rec. ¶21].***

80. The CLAIMANT submits that the manner in which the obligation is expressed in the contract may assist in deciding the intention of the parties to create a duty to achieve a specific result or a duty of best efforts ***[UNIDROIT, Art. 5.1.5, Comment pg.153].*** Further the ten principles of the UN Global Compact which advances corporate sustainability and a principle's approach in doing business; principles 7 to 9 reflecting on the environmental aspect uses language such as "*promote"* and "*encourage"* ***[UN Global Compact]*** and does not use language such as 'must', 'will' or 'required to' which indicates that the ten principles are merely suggestive ***[Dysted, pg.24].*** The CLAIMANT submits that the UN Global Compact is a purely voluntary initiative which does not enforce the behavior or actions of companies but rather stimulates change and to promote corporate sustainability and encourage innovative solutions and partnerships ***[UN Global Compact]*** unlike the Equator Principles which has a defined scope and uses words such as "will" in their initiative suggesting a commitment to the principles ***[Equator Principles].*** An assessment of Code of Conducts referring issues in respect of the 8 ILO core conventions categorized three types of content as weak, moderate and strong content out of which <u>weak content</u> was defined as codes of conduct that used terminology such as *"<u>promoting</u> respect for people and their work environment"* ***[Vytopil].*** Such weak content with unclear phrasing generally does not include compliance mechanisms ***[Vytopil].*** Therefore, the CLAIMANT submits that it is not obliged to achieve a specific result as ethical standards are mere guidelines.

81. Further, the CLAIMANT submits that the supplier cannot know that the purchaser's intent is to resell the goods in an area or country where the customers are willing to pay a higher price for ethically produced goods ***[Ramberg, 5.4].*** The CLAIMANT submits that the predominant part of a Nike shoe stems from its ethical value, where 75 % of the purchase price is ethical value and the last 25 % is physical value ***[Ramberg, 4].*** As such the CLAIMANT submits that

although the price paid for the chocolate cake is towards the upper end paid for a premium product, the price is not an extraordinary one ***[PO2, Q 38].*** This indicates that the expectation of the buyer and the intention of the RESPONDENT are not aligned with the sale of ethical chocolate cakes.

(B) CLAIMANT USED BEST EFFORTS AS WOULD BE MADE BY A REASONABLE PERSON IN THE SAME CIRCUMSTANCES

82. In 2014 the CLAIMANT *"instructed the internationally operating Egimus AG which is specialized in providing expert opinion on Global Compact compliance to scrutinize Peoples Cocoa mbH on site"* ***[CE. C8,Rec. 20].*** Egimus AG certified that Ruritania Peoples Cocoa mbH complied with Global Compact and the principles of sustainable production and consequently for the past two years the CLAIMANT had relied on the documentation sent by Ruritania Peoples Cocoa in relation to the compliance assessment ***[CE. C8, Rec. 20].*** In fact the CLAIMANT had definitively done everything in its capacity to meet with its values on sustainability by complying with its *"general policy and the commitment to Global Compact in the selection and supervision of Ruritania People Cocoa"* and *"the Business and Human Rights Act 2012"* ***[CE. C9, Rec. 21].*** Codes of Conduct of leading companies such as Ferrari Corporate and Nestlé specifies that *best efforts* will be taken to comply with best practices in business conduct ***[Ferrari; Nestlé].***

83. Art. 5.1.4 (2) of UNIDROIT Principles on the duty of best efforts stipulates that "*to the extent that an obligation of a party is involved a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances"* ***[Art. 5.1.4 (2) UNIDROIT].*** In achieving the standard of best effort, it should be the performance of a reasonable person in the same circumstances but does not guarantee the achievement of a specific result ***[Art. 5.1.4 (2) UNIDROIT Commentary].*** On the other hand the best-efforts standard is described as "*a more rigorous standard than good faith"* ***[Corbin].*** In reference to the term *best efforts, the United States Court of Appeal* imposed an obligation to act "*in good faith and to the extent of its own total capabilities*" or at least perform *"as well as the average prudent*" comparable performer ***[Bloor].*** In addition the seller may be excused if the seller obtains the goods from its supplier and the defect could not have been detected by reasonable examination of the goods ***[Stoll/Gruber].*** Hence, the CLAIMANT submits that it complied with all obligations under the

contract including using its best efforts to ensure that its suppliers complied with the Global Compact principles.

ISSUE 04 CONCLUSION: EVEN IF THE RESPONDENT'S GENERAL CONDITIONS ARE APPLICABLE, THE CLAIMANT DELIVERED CONFORMING GOODS IN ACCORDANCE OF ART. 35 WITH THE CISG AND THE RESPONDENT'S ETHICAL STANDARDS. FURTHER, THE CLAIMANT WAS ONLY REQUIRED TO USE BEST EFFORTS TO ENSURE COMPLIANCE.

PRAYER FOR RELIEF

On the basis of the foregoing arguments and CLAIMANT's prior written pleadings, CLAIMANT respectfully submits to the Tribunal, while dismissing all contrary requests and submissions by the respondent,

TO DECLARE THAT:

1. The contractual relationship between the CLAIMANT and the RESPONDENT is governed by the CLAIMANT's General Conditions of Sale;

TO ORDER THE RESPONDENT TO:

1. Pay the outstanding purchase price in the amount of USD 1,200,000;
2. Pay damages in the amount of at least USD 2,500,000;
3. Bear the costs of the arbitration.

CERTIFICATION

07. 12. 2017
Colombo, Sri Lanka

We hereby confirm that this memorial was written by the undersigned.

Shamilka Karunanayake Sulaiman Rameez Dilani Jayatilake