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MEMORANDUM FOR CLAIMANT

On Behalf of

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Against

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Table of Abbreviations

Abbreviation	Explanation
¶ / ¶¶	Paragraph / paragraphs
#	Number
Arb.	Arbitration
Corp.	Corporation
UN CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980.
CLOUT	Case Law on UNCITRAL
Cl.	Claimant
Ex.	Exhibit
HOP	Head of Purchasing
IBA Guidelines	IBA Guidelines on Conflict of Interest in International Arbitration.
ICC	International Chamber of Commerce.
ICSID	International Centre for Settlement of Investment Disputes
i.e.	Id est. (that is)
ISO 14001	ISO 14001 is an internationally agreed standard
INT'L.	International
Ltd.	Limited Company
Model Law	UNCITRAL Model Law with amendments, as adopted in 2006
Mr.	Mister
Ms.	Miss
No.	Number
p.	Page
Para	Paragraph
Proc. Ord. No. 1	Procedural Order Number 1
Proc. Ord. No. 2	Procedural Order Number 2
Q.	Question
Resp.	Respondent
Sec.	Section
UN Global Compact	United Nations Global Compact Principles

UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
V.	Versus (against)

TABLE OF AUTHORITIES

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New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards; 1958; http://www.uncitral.org/uncitral/en/ uncitral_texts/arbitration/NYConvention.html. Cited in Para Nos. 112 & 114. *Passim*
UNIDROIT Principles	UNIDROIT Principles of International Commercial contracts 2010. Cited in Para Nos. 126, 155 &160.

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German case: Hanseatisches Oberlandesgericht Hamburg, Germany, 9 SchH 01/05, 12 July 2005, available on the Internet at http://www.dis- arb. de/de/47/datenbanken/rspr/hanseat-olg-hamburg-az-9-schh-01-05-datum-2005-07-12-id1170. Cited in Para Nos. 53.

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CLOUT Case 1466: Cited in Para Nos. 108.

STATEMENT OF FACTS

1. The parties to this arbitration are Delicatesy Whole Foods Sp (hereafter CLAIMANT) and Comestibles Finos Ltd (hereafter RESPONDENT). The **CLAIMANT** is a medium-sized manufacturer of fine bakery products registered in Equatoriana. The **RESPONDENT** is a gourmet supermarket chain in Mediterraneo.
2. In **2002** Respondent became a Global Compact member and plans on becoming a Global Compact LEAD company by 2018.
3. On **March 3rd-6th 2014** the yearly Danubian food fair was hosted in Cucina, where the Claimant was approached by the Respondent's representative Mrs. Annabelle Ming at Claimant's stall and she invited the Claimant to Respondent's stall, and they discussed choices and delivery quantities and costs and benefits of ethical and environmentally sustainable production.
4. On **March 10th 2014** Respondent sends an e-mail to Claimant saying that it was interested in Claimant ethical and environmentally sustainable production and invited Claimant to the Tender process.
5. On **March 17th 2014** Claimant submitted the requested letter of acknowledgement.
6. On **March 27th 2014** Claimant submitted its tender where it made it clear that its offer would be subject to the application of its own General Conditions of Sale including its own Code of Conduct.
7. On **April 7th 2014** Respondent awarded the Claimant the contract, explicitly accepting the changes Claimant requested and Respondent noted expecting the first delivery of 20,000 chocolate cakes starting 1st of May 2014.
8. On **May 1st 2014** Claimant initiated deliveries of chocolate cakes regularly until the 27th of January.
9. On **2016** Mr. Rodrigo Prasad posted an article in the Vindobona Journal of International Commercial Arbitration and Sales Law titled (The notion of conformity in Art. 35 in the age of Corporate Social Responsibility Codes and "Ethical Contracting").
10. On **December 16th 2016 (until Jan 27th 2017)** Six Hundred Thousand (600,000) Chocolate Cakes have been delivered to Respondent by Claimant but Respondent had not made any payments for them.

11. On **January 19th 2017** The Documentary "How a Country cashes in on Human Rights" was showed on the Equatorian News Channel and it critically assessed ethical food production and drew attention to the irregularities in the Ruritanian certification practice with regard to sustainable farming.
12. On **January 23rd 2017** An article was published in the Equatorianian Michelgault and revealed further details of assumed fraud discussed in the documentary.
13. On **January 27th 2017** Last delivery of Chocolate Cakes was made. Respondent sent an email asking Claimant to confirm that Claimant's supplier was not involved in the fraud issue by the 30th of January 2017, Respondent also refrained from taking any more deliveries and making any further payment. On the same day Claimant said it will investigate further but asked for payments and delivers to be resumed until investigation results are out.
14. On **February 10th 2017** Claimant confirmed Respondent's doubts about fraud and corruption affecting the Claimant's supplier, and confirming the Cocoa Beans Claimant received had not been farmed in a sustainable way.
15. On **February 12th 2017** Respondent sent an email to Claimant and considered the fraud as a breach of contract and terminated the contract with immediate effect and will evaluate damages to claim them.
16. On **May 4th 2017** a virus check by Respondent revealed a secret text written by Claimant where it was asking to keep the third-party funding a secret from the Respondent to avoid challenges of Mr. Prasad.
17. On **May 30th 2017** The parties met and tried to sort things out through mediation, where it had become clear that no settlement can be reached through mediation.
18. On **June 26th 2017** Mr. Rodrigo Prasad submitted a Declaration of Impartiality and Independence and Availability and listed a few things that might raise some doubts regarding his impartiality just to be transparent but also confirmed that these circumstances will not affect his independence and impartiality.
19. On **June 30th 2017** Claimant sent Respondent a Notice of Arbitration and Clause 20 explicitly stated that disputes will be solved by Arbitration without the involvement of any arbitral institution and will be according to the UNCITRAL Arbitration Rules.
20. On **July 31st 2017** Respondent sent Claimant a response to the Notice of Arbitration.

21. On **August 22nd 2017** Caroline Rizzo sent an email stating that she was appointed by the other two arbitrators as the third arbitrator and invited the parties to a Case Management Conference.
22. On **August 29th 2017** Respondent requested that Claimant reveals the name of the funder and relevant documentation prior to the conference.
23. On **August 30th 2017** Case Management Conference was conducted and involvement of a third party funder was revealed.
24. On **September 1st 2017** The Arbitral Tribunal made three decisions and asked the parties to reserve time from 24th-29th March 2018 for an Oral Hearing in Vindobona (Vienna).
25. On **September 7th 2017** Deadline for Claimant to disclose whether its claim is financed by a third party funder decided by the arbitral tribunal, accordingly, Claimant revealed the requested information.
26. On S**eptember 11th 2017** Mr. Prasad confirmed that he has acted as arbitrator in two cases which were funded by other subsidiaries of Findfunds LP, but he does not consider this relative to his independence or impartiality. A witness statement of Annabelle Ming was also submitted on the same day.
27. On **September 14th 2017** Respondent sent a Notice of Challenge of Arbitrator to the Claimant and Arbitral Tribunal challenging Mr. Prasad according to article 13 of the UNCITRAL rules.
28. On **September 21st 2017** Mr. Prasad replies to challenge and decides that he will not withdraw from his office as an arbitrator preserving the right of every party to choose its own arbitrator and proving that the challenge has no real basis.
29. On **September 29th 2017** Claimant considers the challenge of Mr. Prasad made by Respondent is devoid of any merits and that the facts provided by the Respondent do not create any justifiable doubts to Mr. Prasad's impartiality.
30. On **October 6th 2017** Caroline Rizzo sent the Procedural Order No. 1
31. On **November 6rd 2017** Procedural Order No.2 passed.
32. On **March 24th-29th 2018** Oral Hearings will take place in Vienna, Austria.

SUMMARY OF ARGUMENT

33. In the first arbitration argument, the discussed issue is the authority of the arbitral tribunal to decide on Mr. Prasad's challenge. The arbitral tribunal should have no authority to decide on the challenge if we excluded the challenged arbitrator, since he is a part of tribunal, unless both parties agree or if the challenged arbitrator withdraws [Art. 13(4) of UNCITRAL Arbitration Rules], and neither happened. If the challenged arbitrator was to be excluded, it wouldn't be possible for a tribunal constituted of an even number of arbitrators to decide on the challenge. Therefore, the court or the appointing authority should decide on the challenge. [**Issue 1**]
34. In the second arbitration argument, the discussed issue is whether all legal proceedings should be suspended until after the decision on the challenge. To avoid any delay, the whole arbitral tribunal (all three members) should proceed with the legal proceedings and make an award while the challenge request is pending and to appoint a potential replacement arbitrator to immediately take over the role of Mr. Prasad should the challenge succeed before an award is made. Should the challenge fail, the award will be ready. Should it succeed, the award can simply be eradicated and new legal proceedings shall start with a newly appointed arbitrator. [**Issue 2**]
35. In the first CISG argument, the discussed issue is the true applicability of either the General Conditions of Sale of the Claimant or the Respondent's or neither of them. The Claimant's General Conditions govern the contract because it is included in the offer [CL. Ex. C4] and the respondent did not object to it [CL. Ex. C5]. Even if the Respondent's General Conditions were applicable, in nowhere do they impose a duty to achieve a specific result on Claimant, it is basically a duty of best efforts of which Claimant has clearly adhered to. [**Issue 3**]
36. In the second CISG argument, the discussed issue is the conformity of the goods delivered by the claimant and the duty of best efforts imposed upon claimant. The cakes the claimant had delivered are definitely in conformity according to article 35 of the CISG. Fraud by the supplier does not in any way affect the conformity of the goods. Therefore, the goods are in conformity, and the fraud is the responsibility of the Cocoa Peoples mBH, not the responsibility of the Claimant, especially since claimant has obliged to its duty of best efforts to ensure compliance by suppliers to sustainable production [PO 2, Question 2]. [**Issue 4]**

ARGUMENTS

I. THE ARBITRAL TRIBUNAL HAS NO AUTHORITY OR DECIDE ON THE CHALLENGE OF MR. PRASAD, ANY COURT OR OTHOR AUTHORITY SPECIFIED IN ARTICLE 6 SHALL DECIDE ON THE CHALLENGE:

A. According to the arbitration agreement, each party is entitled to choose its own arbitrator:

37. Each party should have the full right to choose its own arbitrator according to Clause 20. 'A' of Dispute Resolution. Therefore, the Claimant would like to exercise this right to the fullest extent.
38. According to clause 20. 'A' of Dispute Resolution "the number of arbitrators shall be three, one to be appointed by each party and the presiding arbitrator to be appointed by the party-appointed arbitrators or by agreement of the Parties".
39. According to J. Frick in his book "arbitration in Complex International Contracts" (2001) Chapter XV Page 23, "both Claimants or Defendants should be given the right to appoint one arbitrator each, provided that the other party of the contract can appoint an equal number of arbitrators."
40. The parties have agreed to settle any dispute related to the contract through arbitration, and that is due to the many benefits of arbitration, including the speed of settlement, ability to elect arbitrators, the right to choose the applicable procedural and substantive laws, and more importantly privacy due to the fact that any leakage in the confidential information provided to the arbitral tribunal might cause severe losses to the parties. Therefore, both parties agreed that Ad Hoc arbitration includes more guarantees to the privacy of the arbitration process. (*CL. Ex. C1, C3), (Res. Ex. R5*).
41. Since the parties agreed that the number of arbitrators shall be three, each party shall have the right to choose an arbitrator from its side according to the Clause 20 'A' of "Dispute Resolution". The agreement in Article 20 referred to the UNCITRAL Rules of Arbitration, it is worth mentioning that just like it was stated in Article 20.A, the UNCITRAL Arbitration Rules reconfirmed each party's right to appoint one arbitrator where the arbitration tribunal consists of three arbitrators. (CL. Ex. C2). Thus, this right should not be violated and accordingly, the Claimant is entitled to choose its own arbitrators.

B. The Claimant's Arbitrator declared his impartiality and independence in accordance with article 11 of UNCITRAL Arbitration Rules:

42. According to Article 11 of the UNCITRAL Arbitration Rules "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. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances."
43. Similar provisions can be found in Article 5.4 of the Dubai International Financial Centre Arbitration Rules & the LCIA (London Court of International Arbitration) & Article 3.3.3 of the ADRIC (ADR Institute of Canada) & Articles 11.2 and 11.3 of the ICC (International Chamber of Commerce) Arbitration Rules & Rule 6.2 of the ICISD (International Centre for Settlement of Investment Disputes) Convention Arbitration Rules
44. When the Claimant appointed Mr. Rodrigo Prasad as its choice of arbitrator for the arbitration process, he proceeded to the submission of his Declaration of Independence and Impartiality on June 26th 2017 in accordance with the 11th article of the UNCITRAL Arbitration Rules and with the rules of many other institutions across the whole world. This is to be counted as the first step towards guaranteeing the independence and impartiality of Mr. Rodrigo Prasad.
45. As required by the article 11 of the UNCITRAL Arbitration Rules, Mr. Rodrigo Prasad, he was very transparent and listed events from his past that ever related to either parties, this further proves and supports the impartiality and independence of Mr. Rodrigo Prasad, especially since he ensured that the aforementioned events of his past will have absolutely no effect on his independence and impartiality (*CL. Ex. C11*).
46. In accordance with the 11th article of the UNCITRAL Arbitration Rules, Mr. Rodrigo Prasad stated in his declaration that he will reveal and notify the parties of any such further circumstances that may come to his attention while the case is pending. And he actually did, in his letter on the 11th of September 2017 where he informed the parties of having acted as an arbitrator in two cases which were funded by other subsidiaries of FindFunds

LP. Consequently, he reassured that such circumstances would have absolutely no effect on his impartiality and independence.

47. Such transparency and the repetition of the confirmation that such circumstances will have no effect on his impartiality or independence, which makes him more than suitable and valid to rule on the provided dispute.
48. Therefore, and since Mr. Rodrigo Prasad has declared his impartiality and independence in accordance with the 11th Article of the UNCITRAL Arbitration Rules, he should not be removed from the arbitral tribunal and should be allowed to rule on the case.

C. Respondent's allegations against Mr. Prasad are based on unjustifiable doubts, an arbitrator may only be challenged if circumstances that give rise to justifiable doubts as to his impartiality or independence existed:

49. Article 12 of UNCITRAL Arbitration Rules provides that an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts. In the present case the challenge was made on without justifiable grounds.
50. According to Article 12.2 of the UNCITRAL Model Law and Arbitration Law of Danubian Law (which adopted Model Law) "an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made."
51. Article 12 of UNCITRAL Rules provides that "any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence." It is generally contended that this provision establishes an objective test - to be applied in accordance with the view of a "reasonable, fair-minded and informed person" even though the article does not provide expressly for such a third-person approach [*Gabriel Bottini*].
52. *In Jung Science Information Technology Co. Ltd. Case,* the Hong Kong Special court dismissed an argument to the effect that the challenged arbitrator had failed to sufficiently disclose a pre-existing relationship with a solicitor who had acted on behalf of one of the parties in the arbitration.

53. In a case, the German court held that a lawyer appointed as arbitrator does not have to disclose that he or she has previously acted on behalf of a party where such activities were isolated instances, were unrelated to the dispute and had been terminated for some years. [*Hanseatisches Oberlandesgericht Hamburg, Germany, 9 SchH 01/05, 12 July 2005*].
54. In CLOUT case No. 665, a German court has held that the "justifiable doubts as to his impartiality or independence" test set out in paragraph (2) generally corresponds to the test applicable to the disqualification of judges under local law.
55. The German court dismissed a challenge based on the fact that the impugned arbitrator's goddaughter was employed by the law firm who represented the other party. A key consideration in the court's reasoning was that that person had had no significant involvement in the case [*Oberlandesgericht München, Germany, 34 SchH 05/06, 5 July 2006*].
56. A business relationship between one of the parties and the sole arbitrator was found not to give rise to justifiable doubts as to the impartiality or independence of the arbitrator, irrespective of whether the business relationship consisted of a single or repeated contacts [*Oberlandesgericht Hamm, Germany, 17 SchH 13/01, 22 July 2002*].
57. It was found that the fact that a sole arbitrator, at one point in time, held an ownership interest in a limited partnership whose managing partner, at the time of the arbitration, was the managing director of one of the parties, did not give rise to justifiable doubts as to the impartiality or independence of the arbitrator [CLOUT case No. 665].
58. Although the standard as to the impartiality of arbitrators was set at a high level, the mere fact that an arbitrator had participated as counsel in other proceedings involving a party to the arbitration did not justify a challenge [*Hanseatisches Oberlandesgericht Hamburg, Germany, 6 SchH 03/02, 11 March 2003*].

D. According to IBA Guidelines on Conflicts of Interest Mr. Prasad has no conflict of interest:

59. According to IBA Guidelines: Part I: General Standards Regarding Impartiality, Independence and Disclosur
60. Conflicts of Interest: an arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent. Justifiable

doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the Non-Waivable Red List.

61. Provisions similar to the aforementioned UNCITRAL's provisions can be found in Article 10 of the Swiss Rules of International Arbitration & Article 13.2 of the ACICA (Australian Centre for International Commercial Arbitration) Arbitration Rules & Article 18.1 of the DIS (Arbitration Rules of the German Institution of Arbitration) & Article 14.1 of the ICDR (International Centre for Dispute Resolution).
62. According to the *Gabriel Bottini* "in relation to the ICSID cases, the unchallenged arbitrators stated that "Article 57 places a heavy burden of proof on the Respondent to establish facts that make it obvious and highly probable, not just possible, that Professor Kaufmann-Kohler is a person who may not be relied upon to exercise independent and impartial judgment." In this light, they asserted that a connection between a party and an arbitrator is not enough in and of itself for a challenge to succeed, since "arbitrators are not disembodied spirits dwelling on Mars, who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another." The unchallenged arbitrators used this peculiar phrase - together with "the theory of six degrees of separation" to indicate that arbitrators have many connections with persons and institutions."
63. But the fact of an alleged connection between a party and an arbitrator in and of itself is not sufficient to establish a fact that would establish a manifest lack of that arbitrator's impartiality and independence [*AWG Group Limited & Others case*].
64. The record does not establish any objective basis to suggest that a reasonable person would conclude that Judge Smith was potentially biased against appellant or appellant's counsel [*Mary Roitz case*].
65. Arbitration and Award, arbitrator disqualification on bias, with regard to claims of racial, ethnic, religious, or gender bias, arbitrators are held to the same standard pertaining to judicial officers--they should be disqualified if a person aware of the facts might reasonably entertain a doubt that the arbitrator would be able to be impartial. The burden of proof is on the party claiming bias to establish facts supporting it" [*Heide V Betz case*].
66. According to the IBA Guidelines: Part II: Practical Application of the General Standards (2). The Red List consists of two parts: 'a Non-Waivable Red List' (see General Standards 2 (d) and 4(b)); and 'a Waivable Red List' (see General Standard 4(c)). These lists are

non-exhaustive and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence…

67. The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence.
68. The Green List is a non-exhaustive list of specific situations where no appearance and no actual conflict of interest exists from an objective point of view.
69. Thus, the arbitrator has no duty to disclose situations falling within the Green List.
70. Previously expressed legal opinions: The arbitrator has previously expressed a legal opinion (such as in a law review article or public lecture) concerning an issue that also arises in the arbitration (but this opinion is not focused on the case) (4.1.1).
71. A firm, in association or in alliance with the arbitrator's law firm, but that does not share significant fees or other revenues with the arbitrator's law firm, renders services to one of the parties, or an affiliate of one of the parties, in an unrelated matter (4.2.1).
72. According to IBA Guidelines "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 (3.1.3).
73. For disqualification, the Guidelines provide an *objective test.* This test consists of determining whether circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence *from a reasonable third person's point of view.* The objective test is also used for the parties to challenge the arbitrator [*Laurence Shore and Emmanuelle Cabrol*].
74. The "Green list" contains a list of situations where, from an objective point of view, the arbitrator has no duty to disclose, and therefore need not disclose. This list was introduced to limit the cases where the subjective test could lead to disclosure [*Laurence Shore and Emmanuelle Cabrol*].
75. It may be of little help for the arbitrator to consider the parties' culture and customs in order to define whether she should disclose the fact that she received more than three appointments by the same counsel within the past three years, or that she is a lawyer in the same law firm as another arbitrator. The Orange list fails to provide useful guidance as to what kind of subjective preoccupations of a party should be taken into consideration by the arbitrator [*Laurence Shore and Emmanuelle Cabrol*].

76. The illustrations in the lists carry a "rebuttable presumption" of conflict, which can be overcome if specific circumstances of the case permit the conflict to be disregarded. In order to determine whether the presumption should be rebutted or not, one must go back to the principles, and apply the objective test by reference to a reasonable third party [*Laurence Shore and Emmanuelle Cabrol*].
77. In *Sobrior and Potier v. ITM and La Violette*, it was held that athough the chairman of the Arbitral Tribunal had failed to disclose a prior appointment as arbitrator by a franchising company unrelated to the group of companies of the franchisor party involved in the arbitration proceedings, the Court of Appeal held that the chairman's incomplete statement raised no doubts as to his independence or impartiality.
78. Claimant exercised its right to a choice of an arbitrator and has chosen Mr. Rodrigo Prasad in its Notice of Arbitration to the respondent dated 30th of June 2017 to which Mr. Prasad agreed to and declared his impartiality and independence and availability as well. To be completely transparent, Mr. Prasad disclosed some information from his past and present relationships of any kind with the parties, this included the fact that he had been appointed as an arbitrator by Mr. Fasttrack's Law Firm twice in the past two years, and both cases have been completed. He also confirmed that those circumstances do not affect his impartiality and independence. (*CL Ex. 11*).
79. In response to the notice of arbitration, the Respondent mentioned that it has no objections to the appointment of Mr. Rodrigo Prasad despite the restrictions in his Declaration of Impartiality and Independence.
80. On the 1st of September 2017, the Arbitral Tribunal ordered the claimant to reveal whether it was funded by a 3rd party funder for the arbitration or not, and if yes, to disclose the true identity of the funder as requested by the Respondent in its letter of the 29th of August 2017. Claimant disclosed that its claim is funded by Funding 12 Ltd. with the main shareholder of the company being FindFunds LP. Despite that, the claimant does not think that this order by the tribunal is justified.
81. In continuity to his obligation to disclose any relevant information and to be completely transparent, Mr. Rodrigo Prasad sends a letter on the 11th of September 2017 where he informed the tribunal and parties that he has as an arbitrator in two cases which were funded by other subsidiaries of FindFunds LP, and in one of them, FindFunds LP only entered as a funder he had been appointed. He also mentioned that his Law Firm has

merged with another law firm from Ruritania, and that is Slowfood, to create Prasad & Slowfood, and one of the former partners of Slowfood is representing a client in an arbitration funded by FindFunds LP. However, all necessary measures have been taken to avoid any sort of contact between Mr. Rodrigo Prasad and that case.

82. Respondent mentioned that the Claimant's efforts to conceal the 3rd party funding information also creates a "serious and justifiable doubt" to the impartiality and independence of Mr. Rodrigo Prasad [Resp. Notice of Challenge]. Acts by the Claimant are the responsibility of the claimant and it should have the right to conceal whichever information it sees as confidential. The Respondent's alleged obligation imposed by the IBA Guidelines on Claimant to reveal such information is also flawed due to the existing doubt of the applicability of the IBA Guidelines in the first place. The term used in the second procedural order "Parties and Tribunals often refer to the IBA Guidelines" is not sufficient in itself to impose an obligation stated in those guidelines, therefore this allegation should be dismissed [*Procedural Order No. 2, Question 18*].
83. In addition and even if the IBA Guidelines were applicable, concealment by the Claimant does not lead in any way to raising doubts on the impartiality and independence of the arbitrator. It is an integral part of the general principles of justice that one should not be held accountable for the actions of someone else.
84. The Respondent then refers to the article in the Vindobona Journal of International Commercial Arbitrations and Sales Law written by Mr. Rodrigo Prasad, where he discusses his own opinion on the changing concept of Conformity of Goods (RES Ex. R4). The Respondent should realize that arbitrators are also human beings with certain preferences and opinions. Thus, doubting the impartiality and independence of Mr. Rodrigo Prasad based on an article he wrote where he stated an opinion of his is not acceptable and should not be considered a justifiable doubt, and that is in accordance with the IBA Guidelines, where it listed previously expressed legal opinions of arbitrators in the Green List, therefore it is impossible that such an opinion would raise serious doubts on the impartiality and independence of Mr. Rodrigo Prasad.
85. Respondent claims that the IBA Guidelines consider repeat appointments by the party or a law firm to be "problematic" [Resp. Notice of Challenge, (10)]. However, since the rules concerning repetitive appointments of an arbitrator by a party or a law firm are mentioned in the Orange List, the arbitrator executed his obligation by mentioning the

past two appointments by Mr. Fasttrack's Law Firm. The respondent explicitly stated that it had no objection in the appointment of Mr. Rodrigo Prasad despite the repetitive appointments.

86. As for the two cases funded by other subsidiaries of FindFunds LP, where Mr. Rodrigo Prasad acted as an arbitrator, the rule 3.1.3 in the Orange List of the IBA Guidelines clearly states that for the repetitive appointment to serve under the Orange List, they have to be done either by a party or an affiliate of it. FindFunds LP subsidiaries are in no way affiliated to the Claimant, they should rather be affiliated with FindFunds LP, which are also not affiliated with the Claimant. In addition to that, while it is true that Funding 12 Ltd was set up by FindFunds LP, it is not true that it is a subsidiary of FindFunds LP, but in fact it is a separate legal entity and it has never appointed Mr. Rodrigo Prasad before. Thus, the alleged repetitive appointments of an affiliate of the claimant should be rejected.
87. With regards to Mr. Rodrigo Prasad's partner who is acting for a client funded by FindFunds LP, the rule 2.3.6 of the IBA Guidelines does not apply to this case –should they be applicable in the first place-. Reason being is that according to the rule 2.3.6 of the IBA Guidelines, disqualification of the arbitrator might only be possible if the arbitrator's law firm has a significant commercial relationship with a party or an affiliate of it, however there is no "significant commercial relationship", simply acting for a client in an arbitration funded by FindFunds LP is not a commercial relationship between Mr. Rodrigo Prasad's Law Firm and FindFunds LP. Therefore, rule 2.3.6 of the IBA Guidelines does not apply to the present facts.
88. Respondent is trying to prove that any sort of connection between the Claimant and Mr. Prasad or his Law Firm or between Mr. Prasad's Law Firm and FindFunds LP. In *AWG Group Limited and the Argentine Republic case*, where it stated that arbitrators are not creatures that do not belong to the planet and that it is normal that they are connected to the whole world, including the parties, in one way or another.
89. Since Mr. Rodrigo has declared his impartiality and independence, and since the respondent is claiming that Mr. Rodrigo Prasad is lacking independence and impartiality, the burden is on the respondent to prove that lack.

E. The arbitral tribunal shall decide on the challenge only if the challenged arbitrator withdraws from his office or if the other party agrees to the challenge. If neither happens, the appointing authority shall decide on the challenge of the arbitrator:

90. Since the challenged arbitrator, Mr. Rodrigo Prasad, refused to withdraw from his office and decided to continue as an arbitrator, and since the Claimant did not agree to the challenge of Mr. Rodrigo Prasad commenced by the Respondent, the appointing authority shall be the one to decide on the challenge
91. According to Article 13(3) of the UNCITRAL Model Law and Danubian Arbitration Law, unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
92. If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, 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 article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award (*Art. 13.3)*."
93. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority [Art. 13 (4)].
94. In the present case Mr. Rodrigo Prasad explicitly refused to withdraw from his office in his letter of 21 Sept. 2017 because he does not believe that the alleged doubts are justifiable nor do they have any effect on his impartiality and independence. Following that, the Claimant submitted its letter of 29 Sept 2017 where it considered the claims of the Respondent doubting the impartiality and independence of Mr. Rodrigo Prasad to be meritless and thus the claimant does not agree to the challenge and considers it a desperate attempt by the respondent to postpone the date where it will have to pay the full amount due.
95. The Respondent's claim of the mutual agreement to exclude Article 13(4) is based solely on a witness statement by Annabelle Ming, the Head of Purchasing at the Respondent's Company (*Resp. Ex. 5*). The Claimant denies this alleged agreement, and the clear provisions of the contract between the Claimant and the Respondent do not mention the exclusion of Article 13(4) anywhere, on the contrary, they explicitly that any dispute shall be settled with the UNCITRAL Arbitration Rules without excluding any of its provisions.

Therefore, the Claimant denies the allegations made by Mrs. Annabelle Ming in her Witness Statement.

96. It has been made clear now that the other two members of the Arbitral Tribunal should not be allowed to decide on the challenge, this is for both a logical reason and a legal reason. The logical reason is that an even number of arbitrators should not be granted the power to decide on a challenge because they could possibly go for opposing decisions, and without a 3rd arbitrator, there will be no solution to this sophisticated issue, therefore, it is either that the whole arbitral tribunal including Mr. Rodrigo Prasad shall decide on the challenge, or that the court should decide on that according to articles 13(3) of the Danubian Law or another appointed authority according to articles 6 and 13(4) of the UNCITRAL Arbitration Rules.
97. Therefore, the courts of Danubia or any other appointing authority according to the provisions of article 6 of the UNCITRAL Arbitration Rules shall be the one to decide on the challenge and not the remaining two arbitrators.

II. WHILE THE REQUEST OF CHALLENGE IS PENDING, MR. PRASAD SHOULD BE CONTINUED IN THE TRIBUNAL AND MAKE AN AWARD:

A. Article 13 of UNCITRAL Arbitration Rules deals with challenge of Arbitrator:

98. Article 13 of Uncitral Arbitration Rules deals with procedure of challenge. The notice of challenge shall state the reasons for the challenge [Article 13 (2)]. When an arbitrator has been challenged by a party, all parties may agree challenge or the arbitrator may withdraw from his office [Art. 13 (3)]. If there is no agreement between the parties or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue and it shall seek a decision from Appointing Authority [Art. 13 (4)].
99. Unless the parties have agreed, a party may at any time propose the name of one or more institutions or persons, including Secretary General of PCA (Permanent court of Arbitration), one of whom would serve as appointing authority [Art. 6 (1)].
100. Article 13 sets out a twofold procedure governing challenges to arbitrators. In a preliminary phase, challenges are handled within the arbitral proceeding, according to either a procedure agreed to by the parties or the default procedure set out in paragraph (2). Challenges that have not been successful at that preliminary phase may subsequently

be brought to a court or competent authority, whose decision on the matter is final [UNCITRAL 2012 Digest of Case Law, page 68].

101. While the parties are free to agree on a challenge procedure applicable in the arbitral proceeding, it is clear from paragraph (1) that court intervention pursuant to paragraph (3) is mandatory. …however, it was ultimately decided that such intervention was necessary to avoid unnecessary waste of time and delay [*UNCITRAL 2012 Digest of Case Law, page 69*].

102. Article 13 (3) of UNCITRAL Model law permits judicial challenges to arbitrators in both Ad hoc arbitrations, where no contractually agreed challenge procedure exists, & in institutional arbitrations, where the parties have agreed upon a mechanism resolving challenges; parties may not contract out Article 13 (3)'s provision for interlocutory judicial considerations of challenges [*Gary Born, page 1563*].

103. For the most part, however, states that have been adopted the Model Law have retained Article 13 (3), including Germany, Austria and Japan. [*Gary Born, page 1564*].

104. Challenge can be asserted either in accordance with institutional rules or national law. It is also generally possible to pursue interlocutory judicial challenge to an arbitrator in a National Court, in both Ad hoc & in some cases, institutional arbitrations (*Gary Born, page 1562*).

B. According to Danubian Arbitration Law, Mr. Prasad may continue in the tribunal and make an award while challenge is pending:

105. Payments of the Cakes delivered to the Respondent have already been delayed for a quite long time, therefore and to avoid any further delays, Mr. Rodrigo Prasad should continue as a part of the Arbitral Tribunal and make an award while the challenge request is pending. For if the challenge fails and Mr. Rodrigo Prasad is allowed to continue as an arbitrator, his award becomes enforceable instead of delaying the arbitration until after the challenge request is awarded.

106. According to Article 13(3) of the UNCITRAL Model Law "If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, 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 article 6 to decide on the challenge, which decision shall be subject to no

appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award."

107. According to Article 15 of the UNCITRAL Model Law "Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced."

108. The Court of Appeal upheld the District Court's decision stating that, according to Article 1176 § 6 of the Polish Civil Procedure Code (Kodekspostępowaniacywilnego) that corresponds to Article 13(3) MAL, filing of a motion to challenge an arbitrator had no impact on the proceedings before an arbitral tribunal. Such motion shall not prevent an arbitrator from taking part in works of the arbitral tribunal or exclude his right to do so. Additionally, in case an arbitrator is being challenged, he or she has no obligation to refrain from participating in the case, as prescribed in Article 51 of the Polish Civil Procedure Code. The arbitral tribunal, including the arbitrator who is being challenged, continues the arbitral proceedings and, as in the case at hand, may render an award before the motion to challenge an arbitrator is decided upon" [*CLOUT Case 1466*].

109. The respondent, after challenging Mr. Rodrigo Prasad, asked the other two members of the arbitral tribunal to make a decision regarding the challenge, and the apparent reason for this is that the Respondent concluded from the agreement between the parties to exclude the involvement of arbitral institutions that "The only body to decide the challenge is the Arbitral Tribunal" [Resp. notice of Challenge]. This is however inaccurate, that is because the agreement only excluded the involvement of other Arbitral Institutions, and in nowhere did it limit the decision making process to the Arbitral Tribunal, correspondingly the court should not be excluded by in light of that agreement.

110. Claimant had already explained why this challenge should be settled by the court or the appointing authority instead of the remaining members of the arbitral tribunal. This could possibly result in putting the original dispute on hold which will definitely lead to prolonging the time required to settle the dispute, and in order to avoid this, we have to realize that there are non-other than two possible outcomes to the challenge, either the replacement of Mr. Rodrigo Prasad or allowing him to continue as an arbitrator. In the

second case, it will be quite inefficient to prolong the time and to put the original dispute on hold because the award will be made including Mr. Rodrigo Prasad.

111. We can also find the legal basis for this in Article 13(3) of the UNCITRAL Model Law and in many other Arbitral Institutions Rules such as the VIAC (Vienna International Arbitral Centre) and the DIFC (Dubai International Financial Centre), as well as in other national laws such as the Norwegian Act of Arbitration and the German Act of Arbitration, all of the aforementioned rules and laws do not prohibit the Arbitrator from continuing with the arbitration process. They do differ however in whether the Arbitrator should make the award or not before the final decision regarding the challenge is announced. Claimant thinks that the arbitrator should make the award regardless of whether the challenge has been decided yet or not, and this is supported by the UNCITRAL Model Law in Article 13(3), which is the Law adopted by the State of Danubia, and thus should unquestionably apply to the current situation. In case the court or the appointing authority decides that the arbitrator, Mr. Rodrigo Prasad, is to be replaced according to the 15th Article of the Danubian Law, if the award is made then it is to be eradicated. If the award has not been made yet, then the arbitrator is simply replaced and the new tribunal shall decide on the case all over again.

112. As mentioned previously, payments of the Cakes delivered to the Respondent have already been delayed for quite a long time, therefore and to avoid any further delays, Mr. Rodrigo Prasad should continue as a part of the Arbitral Tribunal and make an award while the challenge request is pending.

C. The Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement:

113. According to Article V (1) (d) of the New York Convention, the recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement or was not in accordance with the law of the country where the arbitration took place.

114. In the present case parties agreed to settle any dispute according to UNCITRAL Arbitration and the place of arbitration shall be Danubia. Danubia adopted the UNCITRAL Model Law.

115. The respondent challenged the appointment of Mr. Prasad as an arbitrator for Claimant. If this conflict is not resolved according to Article 13 (4) of UNCITRAL Arbitration rules and Arbitration Law of Danubia, which is similar to Article 13 (3) UNCITRAL Model Law, the claimant may challenge the recognition and enforcement of the award under Article V (1)(d) of the New York Convention.

III. THE CLAIMANT'S GENERAL CONDITIONS OF SALE GOVERNS THE CONTRACT:

A. The Claimant's General conditions of Sale are applicable to the contract:

116. A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal [*Article 14 (2)]*.
117. In the present case the respondent sent the invitation tender to the claimant [*Cl. Ex. C2*] and stated in the letter addressed by Ms. Annabelle Ming to Mr. Tsai that she is looking forward for the submission of offer from the Claimant [*CL EX. C1*]. In response to the invitation, Claimant has submitted the sales offer to the respondent [*CL. EX. C4*] along with a proper offer containing the changes in the Tender Documents [*CL EX. C3*].
118. An offer becomes effective when it reaches the offeree [Article 15 (1)]. The Claimant submitted his offer to the respondent on 27th March 2014 and the offer remained open until 11 April 2014 [*CL EX. CL 4 &5*].
119. An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror [*Article 18 (2)]*. The Claimant received the response to his offer from the Respondent on 7th April 2014. The respondent in his acceptance letter stated that they are pleased to inform claimant that their tender was successful notwithstanding the changes suggested by the claimant [*CL EX. C5*].
120. In *Golden* Valley Grape Juice and Wine case held that the Convention does not include special rules addressing the legal issues raised by the use of standard contract terms prepared in advance for general and repeated use.
121. In *CLOUT case No. 428,* the court held that the Convention does not govern the substantive validity of a particular standard term--a matter left to applicable national law by virtue of article 4 *(a).*

122. A decision held that a seller's standard terms were incorporated into the contract where the buyer was familiar with those terms from the parties' prior dealings and the seller had expressly referred to the terms in his offer [*CLOUT case No. 541*].
123. In *CLOUT case No. 165* it was held that the "general principle" that ambiguities in the standard terms are to be interpreted against the party relying upon them.
124. The court in a case concluded that the Convention was silent on the effect of a confirmation letter that incorporated standard terms; the court therefore applied domestic law to determine whether the standard terms were applicable [*Arrondissemenetsrechttbank Zutphen*].
125. The Convention does not have special rules to address the issues raised when a potential seller and buyer both use standard contract terms prepared in advance for general and repeated use (the so-called “battle of the forms”). A conflict exists when the two sets of terms differ partially and also when one of the standard terms does not contain provisions on an issue expressly included in the other’s set of standard terms [*UNCITRAL Digest of Case Law, page 98*].
126. In the present case the offer submitted by the Claimant clearly states that their offer is subject to the General Conditions of the Claimant. It is also clear from the Claimant’s offer form, under the heading of Specific Terms and conditions, it is stated that “not applicable”, which refers to any Special terms and conditions forming part of the offer [*CL. EX. C4*]. The Claimant’s General Conditions of Sale start with the following general statement: “Delicatesy Whole Foods is a UN Global Compact company committed to a fairer and better world and expects its business partners to embrace the same goals as well [*Pr. Or no.2, Clarification no. 29*].

B. According to the UNIDROIT Principles and the battle of forms rule the conditions referred by the Claimant governs the contract:

127. According to article 2.1.22 of UNIDROIT principles in the battle of forms stated that: “where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.”

1. Knock out principle:

128. It accepts the agreement of the parties on the *essentialia negotü,* leaves the non-conflicting standard terms of both sides as part of the contract intact and substitutes the conflicting terms by the respective provisions of the Convention or the otherwise applicable law [*Ulrich Magnus*].
129. The knock out rule enjoys greatest support if both parties have already performed the contract. Of particular interest in this respect is the leading decision of the German Federal Court (BGH) which concerned a German-Dutch sale of milk-powder. Both parties had agreed to the contract on the basis of their standard contract terms which differed on the regulation of liability for damage. After delivery and payment the buyer gave notice of defects of the powder. The seller conceded the defect but invoked its general conditions which restricted the amount of damages insofar differing from the buyer's general conditions. The Court held that neither the seller's nor the buyer's standard terms applied [*BGHZ 149,113 = IHR 2002*].
130. Both the knock out rule *(Restgültigkeitslehre)* and the last shot rule *(Theorie des letzten Wortes)* would result in that consequence: the knock out rule would exclude the conflicting terms; under the last shot rule the principle of good faith (Art. 7 par. 1 CISG) would yield the same result because the seller could not expect that the buyer would accept the seller's conditions to which it had objected via its own conditions. [*Ulrich Magnus*].
131. The Knock Out Rule strictly distinguishes between the issue of contract formation and the terms of the contract. The Knock Out Rule gives much credit to the party's autonomy. If the parties perform, it is assumed that both parties acted on the assumption of a valid contract. The terms of the contract are those with which the parties substantially agree. The conflicting terms cancel each other out and are replaced by the provisions of the Convention. Literally, conflicting terms knock each other out [Kaia Wildner].
132. In the present case the documents sent by the respondent include, invitation to tender, specification of goods, special conditions of contract, general conditions and respondent code of conduct for suppliers [*CL EX. C2*]. In reply to the respondent's invitation to tender, the Claimant submitted a detailed offer, made changes in respect of mode of payment and goods. The Claimant's offer clearly stated that his offer is subject to the Claimant's General Conditions of Sale [*CL EX. C4*]. Respondent replied that the claimant's offer was successful notwithstanding the changes suggested by the claimant

[*CL EX. C5*]. Therefore, the General Conditions of Claimant governs the contract on the basis of knock-out rule.

2. Final shot or Last-shot Rule:

133. The Last Shot Doctrine addresses the problem of the battle of forms by strictly following the rules of offer and acceptance. A reply to an offer by a form including boilerplate with material alterations is not an acceptance, but instead it is a rejection of the offer and a counter-offer, Art. 19(1) and (3) CISG. If the other party again responds with a form containing material different or additional terms, the counter-offer is likewise rejected and constitutes a new offer itself. Offers are rejected and new counter-offers submitted back and forth, until one party finally begins to perform. The performance is considered an acceptance of the last submitted counter-offer [*Kaia Wildner*].
134. According to the Last Shot Doctrine, a contract is formed at the moment one party begins to perform because performance is considered an acceptance of the last offer [*Kaia Wildner*].
135. In the present case the Claimant submitted his detailed offer and clearly stated that the offer is subject to his General Conditions of contract [*CL EX. C4*] and responded accepted this offer in his reply letter to the claimant [*CL EX. C5*]. Hence, the conditions stated in claimant's offer governs the contract.
136. According to the facts of the case on the10th March 2014 Claimant was approached by Respondent's Head of Purchasing, Ms. Annabelle Ming when she sent an email to Mr.Tsai inviting them to a tender process for the supply of chocolate cakes and that they are looking forward to the submission of claimant's offer and remain [*CL.Ex1.Page 8*].
137. A relative point to consider is that the claimant was chosen out of six companies because of the good reputation concerning the product and the (Superior production standards compared to all other companies) production standards of all bidders, not only that but also claimant was the only company that considered as a member of Global Compact Company [*Pro. Ord 2. Para 23*].
138. It is necessary to mention that even if the respondent wants to apply their general conditions which are not applicable to this case, there is no common trade usage in Mediterraneo or Equatoriana stating that the initiator of a tender process can bindingly dictate its General Conditions [*Pro. Ord. 2.Page 55 Para 44*].

139. On the 27th of March 2017 claimant made some amendments in the Tender documents regarding the price and the size of the chocolate cakes and submitted proper offer form which considers a part of the contract.
140. According to Claimant's sales offer it is quite clear that the offer is not subject to any special terms because they left that part empty and that can be evidenced by the explicit phrase *"Not applicable"*.
141. Moreover, the landing page of the claimant's offer stated that the above offer is subjected to claimant's general conditions of sale and their commitment to a Fairer and Better world which set out and implements a certain codes of conduct for itself and for its supplier.
142. Additionally claimant's general conditions of sale refer to the application of claimant's code of conduct and that can be derived from the general statement that expressly stated that claimant would always use its best effort to ensure that the goods sold match the highest standards in line with its business code of conduct and its supplier code of conduct.
143. The claimant stated in his letter that they will do everything possible to ensure that the ingredients sourced from outside suppliers comply with their joint commitment to Global Compact Principles; such a commitment shall be interpreted as an assurance by the claimant not a guarantee. [*CL. Ex. 3.Page 15 & Pro. Ord. 2. Page 53. Para 28*].
144. Respondent replied back to claimant's offer on 7th of April 2014 that the modifications were made by claimant regarding the payment and the size of the cakes are acceptable to them.
145. In most cases the battle of forms can, therefore, only be solved in the basis of Article 19 CISG which deals in a modest way with some of the counter-offer issue that typically arise where there is a " battle of forms" [*Peter Schlechtriem & Petra Butler, page 81*].
146. The above facts are clearly establish that the respondent accepted the claimant's offer and did not object to any of its provisions, therefore, the contract is governed by the Claimant's General Conditions of Sale and not the Respondent's Special Conditions.

C. The Contract is governed by claimant's General conditions of Sale in pursuant to Article 19 of CISG:

147. A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer [Article 19 (1)]. Additional or different terms relating, among other things, to the price, payment,

quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially [Article 19 (3)].

148. Article 19 qualifies article 18 by providing that a purported acceptance which modifies the offer is a rejection of the offer and is considered instead to be a counter-offer.1 Paragraph (1) of article 19 states this basic proposition, while paragraph (2) makes an exception for immaterial modifications to which the offeror does not object. Paragraph (3) lists matters which are considered material [UNCITRAL Digest of Case Law on the UN CISG, page 98].
149. Several decisions have reviewed the parties' exchange of multiple communications and have concluded, without specifying the modifications, that at no point was there an acceptance of an offer [UNCITRAL Digest of Case Law, page 98].
150. Modifications relating to the following listed matters have been found to be material: price [CLOUT case No. 424]; payment [CLOUT case No. 176]; time of payment, quality and quantity of the goods [CLOUT case No. 291]; place and time of delivery [CLOUT case No. 413], delivery terms; settlement of disputes [CLOUT case No. 242, as cited in UNCITRAL Digest of Case Law on the UNCISG, page 98].
151. In the present case the Claimant made some changes to the documents received by the invitation to submit a tender. These changes relates to the goods and mode of payment [CL. EX. C3]. The Claimant's General Conditions of Sale also deals with ICC arbitration clause, place of arbitration and application of arbitration rules [Pr.Or. No. 2. Q no. 29]. The Respondent accepted Claimant's tender without objecting to them. The Conditions of Sale provide for the application of Claimant's Code of Conduct [Cl. Notice of Arb. ¶18].
152. Any limitations or other modifications of a contract are always significant in practice since Article 19(3)CISG does not leave room for any insignificant modifications unless the interpretation rule is in concrete refuted [Peter Schlechtriem & Petra Butler, page 80].
153. The claimant alerts some terms of the tender regarding the price and the size of the cake as it turned to be a counter offer where respondent agreed on without listing out any rejections [CL. Ex. 3 Page 15 & CL. Ex 5. page.17].
154. In the present case Respondent accepted Claimants tender on the 7th of April without raising any objections to it and made it clear that their Code of Conducts shares the same

values and are both committed to ensure that the goods produced and sold fulfill the highest standard of sustainability. [CL.Ex5.Page17] Furthermore, Claimant at its offer expressly stipulated that the above offer is subject to the Claimant's General Conditions of Sale and Commitment to a Fairer and Better World [CL. Ex4. page16].

D. Even if the Respondent's general conditions are applicable, which is not in this case , they impose merely an obligation on the claimant to use its best efforts and Claimant did not guarantee such compliance:

155. In line with the Articles 30 to 34 of CIGS that stated seller's obligations, claimant fulfilled his contractual obligations towards the duty of its best effort to ensure the compliance of the goods.
156. According to Article 5.1.4 of UNIDROIT principles that states as follows: (1) to the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result; (2) to the extent that an obligation of a party involves 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 circumstance.
157. In the present case, on 27th march 2017 claimant sent a letter deciding to submit a proper offer including the changes and they assured that they will do everything possible to guarantee that the ingredients sourced from outside suppliers comply with their joint commitment to Global Compact Principles [CL. Ex.3.Page15].
158. The claimant did everything they could to ensure that their suppliers were producing the raw material in compliance with their code of conduct , and that can be evidenced by the expert opinion on global compact compliance to examine and inspect Peoples Cocoa GmbH on their site and as a result they attested that Peoples Cocoa GmbH is producing the raw materials in accordance with global compact and the principles of sustainable production, and for the past two years claimant relied on the documentations , questionnaires that were sent from its supplier which does not include any chance of fraud [CL. Ex 8. Page 20].
159. It is also relevant to mention that there were no problems concerning the deliveries from 2014 until 2016, which means that during this period of time claimant never violated or breached any of its obligations, in contrary respondent was satisfied by claimant's performance.

E. The Claimant has made his efforts to ensure that the suppliers also complied with Claimant's Code of Conducts:

160. Claimant itself had complied with all its obligations under the contract including using its best efforts since the agreement requires claimant duty of best effort to ensure that its suppliers complied with the Global Compact principle and did not breach their contractual obligation from their side.

161. According to Article 5.1.5 of UNIDROIT Principles regarding determination of kind of duty involved stated that "in determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or a duty to achieve a specific result, regard shall be had, among other factors, to (a) the way in which the obligation is expressed in the contract; (b) the contractual price and other terms of the contract".

162. The claimant in present case exercised his best efforts to use the ingredients from reliable source. The commitment provided by the Claimant [CL.Ex3. page15] shall be interpreted as an assurance by the claimant and not as a guarantee. Along with that, claimant actually asked respondent to contact them if they have any questions in particular concerning their applicable sustainability strategy, no documents were provided that proved any discussion or clarifications requested from respondent in that matter. Thus, Claimant obligation towards the compliance of the goods is a duty of best effort not a duty to achieve a specific result.

F. The statements made by and other conduct of a party are to interpreted according to his intent:

163. According to the Article 8 of UN CISG the statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent.

164. In the present case, the claimant clearly stated in his invoice that the offer made by the claimant is subject to the Claimant's General Conditions of Sale [*CL EX. 4*]. The respondent acknowledged that he read the Code of Conduct of the claimant and the changes made by the claimant were acceptable to them [*Cl. Ex. 5*].

165. The meeting between Ms. Ming (Respondent's Head of purchase) and Mr. Kapoor Tsai (The Claimant's Head of production) indicates that the respondent is satisfied with the

products and production process of the claimant, therefore, the respondent knew the sources from where claimant procures the raw material.

IV. THAT THE CLAIMANT HAS DELIVERD THE CONFIRMING GOODS AND ACCORDING TO THE TERMS OF CONTRACT, HE IS MERELY OBLIGED TO USE ITS BEST EFFORTS TO ENSURE COMPLINCE BY IT SUPPLIERS:

A. The cakes delivered by the claimant are in conformity with the requirements of Article 35 of CISG:

166. Article 35 (1) CISG states that the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Article 35(2) CISG sets out what reasonable parties would have agreed upon had they put their mind to it. This is important since it means that the first inquiry has to be what the parties agreed upon and only if that inquiry is not satisfactory is Article 35 (2) CISG applicable. Article 35 (2) CISG, should been seen as a continuum of the parties' presumed intention.

167. Under Article 35(3) CISG the seller is not liable for the non-conformity of the goods if the buyer could not have been unaware of a lack of conformity. The seller is not liable for the implied characteristic in accordance with Article 35(2) CISG if the buyer knew or could not have been unaware of the lack of conformity of the goods (Article 35 (3) CISG)."could not have been unaware " is generally understood to mean gross negligence [*Schwenzer in Schlechtriem/ Schwenzer, commentary*].

168. In line with Article 37 CISG it gives the seller the right to cure any lack of conformity in the goods until the agreed time of the delivery if the goods were delivered early [*Peter Schlechtriem & Petra Butler, page 123*].

169. In 2002, a Netherlands Arbitration Institute arbitral award held that the quality required to be derived under Article 35(2) (a) CISG was “reasonable " quality [*Peter Schlechtriem & Petra Butler, page 116*]. "Reasonable” quality is defined as what the buyer could justifiably expect. *[Netherlands Arbitration Institute award]*.

170. If the contract provides expressly or impliedly that the seller was to supply the goods from a particular source, or if the seller promised to deliver “provided that” he received the necessary deliveries from his supplier, then a failure of the intended source or a failure by the supplier to deliver will exempt the seller from having to perform [*Stoll & Gruber, in Schlechtriem/Schwenzer, para. 18*].

171. According to the facts of the present case, Claimant always has been keen to fulfill his contractual obligations including delivering the goods in conformity to the contract. Claimant has delivered 600,000 chocolate cakes between 16 December 2016 and 27 January 2017 for which payment has not been made and during this whole time claimant delivered the chocolate cakes that complies in all respects with the values for which both companies stand for.

172. Claimant delivered the chocolate cakes in line with their General Conditions and Code of Conduct and there's no such provision contained in the contract or claimant's General Conditions of Sale or its Code of Conduct which set out in sufficient detail an obligation of claimant towards respondent concerning the production process of chocolate cake or its ingredients.

173. The fact, that not all cocoa was produced in an environmentally friendly manner does not render the cakes non-conforming. Claimant's supplier did not have any past history in selling non-confirming goods in, in fact Claimant was known of a very good reputation in the market also for their supervising role over its supply chain [*Pro.Ord.2. Page 54.para 34*].

174. Moreover, over the last five years there have been no reported cases about a violation of the UN Global Compact Principle by Claimant or any of its suppliers [Pro.Ord.2.Page 54.para34]. Furthermore, it's relative to mention that one of the reasons why respondent choose claimant company to supplies them with the chocolate cake is because their report about the management of their supply chain including their regular audits and reporting obligation. That can be evidenced by the email sent by Ms. Ming on the 10th of March 2014. [*CL.Ex1.Page 8*].

175. Claimant ensured that its suppliers complied with the Global Compact principle which had been certified annually. In 2014, claimant instructed the internationally operating Egimus AG which is specialized in providing expert opinion on Global Compact compliance to scrutinize Peoples Cocoa GmbH on site.

176. They certified that Ruritania Peoples Cocoa GmbH complied with Global Compact and the principles of sustainable production. For the last two years claimant relied on the documentation sent by its supplier and they tracked it down and no fraud had been found [CL. Ex 8.Page 20]. Therefore, the facts of the case clearly proves that the Claimant has

fulfilled his contractual obligations by delivering the cakes in conformity with the requirement of the contract in line with Article 35 of CISG and he has made his best efforts.

B. According to UNIDROIT Principle the seller is not liable for damages if the impediment is beyond its control:

177. Article 7.1.7 of UNIDRIOT Principles, which deals with *force majeure* states that " (1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

178. By referring to the facts of the case, the defect of the chocolate cake was hidden and claimant did not know or could knew about the non compliance since they did their part on auditing it's supplier throughout the visiting's, documentations and the questionnaires that has been made by the international operating Egimus AG, taking into consideration that it was not involved in the corruption in Ruritania and the way the fraudulent scheme was devised fell outside Egimus AG's main expertise.

179. The audit of the Ruritania Peoples Cocoa GmbH was conducted by Egimus AG in January and claimant has decided for a 5 year cycle of extensive third party audit by and detailed reporting of obligations of supplier. For that reason, Egimus did also not examine the suitability of the State Certificate System which had been implemented [Pro. Ord. 2. Para 32 & 33]. Such actions by claimant may interpret and considered as methods that a reasonable person would have taken at the same circumstances.

180. Furthermore, Claimant failed to perform his obligations due to the sudden breach of contract by their suppliers regarding the non compliance of the chocolate cakes. The fact that Ruritania Peoples Cocoa GmbH produced some of the chocolate cakes not in accordance with the claimant contractual principles considered as an impediment that claimant could not control.

181. Besides, Claimant could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract otherwise, he would have included this event as impediment i.e. force majeure.

182. More than that, on 10th February 2017 Claimant gave the prompt notice to the respondent thought the email were sent by Mr.Tasi informing respondent their discovery of the fraud committed by it supplier, and they took an immediate serious action by terminating their contract with them and they're doing their best effort to secure other suppliers and offering a reduction of 25 % for the price for the 60000 cakes delivered and not yet paid. [*Cl. Ex.9. Page21*].

183. Since the fraud has been committed by claimant suppliers and due to the applicability of article 79 (1) of CISG and *force majeure* principle of UNIDROIRT, the Claimant is exempted from paying for any damages.

C. The fraud committed by claimant's supplier does not constitute a breach of contract by the claimant:

184. Claimant trusted their suppliers and expected them to meet their code of conduct and to produce the Cocoa with the best practices of sustainable production, so the discovered fraud by respondent is committed by Ruritania Peoples Cocoa Gmbh where they breached its solemn promises and contractual obligations toward claimant. The fact that the supplier had consistently forged certificates testifying such a production process by tripling the number of beans produced in the examined locations using a sophisticated scheme involving government officials and other cocoa farmers cannot be attributed to claimant.

185. According to Article 79 of CISG that states " (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences. (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: (a) he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him."

186. Exemption under Article 79 is basically possible in any case where one of the parties to the contract has not or not properly performed one of his contractual duties [*Peter Schlechtriem & Ingeborg Schwenzer, page 809*].

187. Unlike English and American law, the CISG does not impose on the seller a special warranty that the goods will conform to the contract in addition to the seller's general obligations to deliver the goods duties [*Peter Schlechtriem & Ingeborg Schwenzer, page 810*].

188. Exceptionally, circumstances which have their origin in the promisor's sphere of control can also be beyond his control [*Peter Schlechtriem & Ingeborg Schwenzer, page 814*].

189. In the case of a sale of a specific good, the seller bears the risk of procurement only if the express or implied terms of the contract indicate that he has undertaken to procure the good. The counterpart to such a 'procurement obligation' is the 'ex-stock obligation'[Keil, p.126]. In this case, the seller undertakes to deliver a good already in his possession and is always exempted when the delivery of this good is prevented by an event within the meaning of Article 79(1) duties [*Peter Schlechtriem & Ingeborg Schwenzer, page 816*].

190. The seller must therefore be permitted the defense that the defect was hidden and could not have been discovered by methods which a reasonable person in the seller's position could reasonably have been expected to adopt. [*CISG-online 265; CISG-online*].

191. Exemption is conceivable here only in the rare case where an insuperable event can be shown to have caused the defect, for example, a natural catastrophe or an act of sabotage. The seller cannot be held liable for so-called development defects: if the product meets the technical standards commonly recognized and is state-of-the-art at the time of the conclusion of the contract and at the time of its production, subsequent developments of science and technology cannot render the product defective [*CISG-online 481*].

192. While it is true that the seller has undertaken the contractual obligation to deliver goods that conform with the contract, in the absence of an express or implied warranty, the CISG does not justify the conclusion that the seller has necessarily absolutely and unconditionally guaranteed that the goods will be free of defects [*Peter Schlechtriem & Ingeborg Schwenzer, page 829*].

193. Accordingly, the seller should be exempted under Article 79 if he received the goods from a reliable supplier and the defect could not have been discovered using methods which could reasonably be expected of a reasonable person in the seller's position and was

therefore unavoidable. [*CE LG Ellwangen*]. Admittedly, the different approaches will only rarely lead to divergent results [*CISG-online 396; CISG-online 481*].

194. The exemptive effect of an impediment within the meaning of Article 79(1) is limited to the cessation of the promisor's obligation to pay damages 'under this convention' to the extent that the impediment exists (Article 79(5)). The exemption only relates to the contractual obligation which has not been performed and does not affect the existence of the contract. If the promisor is prevented from performing only in part, then he is relieved of liability for damages only in respect of that part [*Honnold, para 435.2*]. The promise may continue to exercise his rights in respect of the performance which is still possible [*Peter Schlechtriem & Ingeborg Schwenzer, page 831*].

D. The Claimant took reasonable precautions against delivering defective goods; therefore, he is not liable to pay any damages:

195. When a seller has delivered non-conforming goods that were furnished by a third-party supplier: such a seller can claim exemption provided it was not at fault for the non-conformity, i.e., it took reasonable precautions against delivering non-conforming goods by choosing a "reliable" supplier and was reasonable in its failure to discover the non-conformity prior to delivery to the buyer. The seller will be liable in damages only if it fails to perform properly with respect to matters within its control. [*Harry Flechtner*].

196. The seller should be exempted under Article 79 if he received the goods from a reliable supplier and the defect could not have been discovered using methods which could reasonably be expected of a reasonable person in the seller's position and was therefore unavoidable [*Stoll & Guber*].

197. To evaluate the question of whether the seller's duty to deliver conforming goods under Art. 35 CISG is included under the obligations covered in Article 79, and therefore whether an exemption for the seller is possible [*Commentary by Peter Schlechtriem*].

198. The Stoll & Gruber Commentary asserts that a seller who does not itself manufacture the generic goods (i.e., the seller acts as "only a dealer or a commission agent" who procures the goods from a supplier for resale to its customer) should be exempt "if he received the goods from a reliable supplier and the defect could not have been discovered using methods which could reasonably be expected of a reasonable person in the seller's position and was therefore unavoidable. [*Hans Stoll & Georg Gruber*].

199. The focus here, clearly, is on whether the seller was "at fault" for delivering non-conforming goods. If the seller can show that it took reasonable precautions against delivering defective goods (that is, if it was non-negligent in procuring the goods), the Stoll/Gruber Commentary asserts that the seller is not responsible in damages for the breach. [*Hans Stoll & Georg Gruber*].

200. Professor Honnold's view highlights the no-fault nature of a seller's liability for damages if it delivers non-conforming goods, and specifically rejects exemption for a seller just because the non-conforming goods were furnished by a reliable supplier and the seller had no reasonable opportunity to discover the defects before delivery [John O. Honnold].

201. The seller must ... be permitted the defence that the defect was hidden and could not have been discovered by methods which a reasonable person in the seller's position could reasonably have been expected to adopt." [*Hans Stoll & Georg Gruber*].

202. According to Professor Peter Schlechtriem, there is a possibility of exemption for the seller in the case of an undiscoverable defect caused by suppliers or their suppliers, despite even the most careful inspection. According to the CISG a party is not liable for damages due to "failure to perform any of [a party's] obligations" if the prerequisites for an exemption stated in Art. 79(1) CISG are met. In simple terms this would include impediments that were unforeseeable and beyond the control of the party in breach and therefore unavoidable. This means, at least theoretically, that a seller can escape his liability for damages by an excuse under Art. 79 CISG. [*Peter Schlechtriem*].

203. According to Professor Harry Flechtner, the approach adopted by the Bundesgerichtshof in the Vine Wax case and praised by Professor Schlechtriem, that Article 79 may in some circumstances exempt a seller that has delivered non-conforming goods, but that the seller bears the risk that its suppliers will provide defective goods irrespective of the precautions the seller has taken, appears to be a sensible position which reflects an international perspective and around which a uniform interpretation could coalesce [*Harry Flechtner*].

204. In *Vine Wax case* the court left open the question of whether or not ar413icle 79 of the CISG can be raised as a defense against all kinds of non-performance, including the delivery of defective goods. In this case the court identified a conflict among scholars as to whether: "CISG Article 79 encompasses all conceivable cases and forms of non-performance of contractual obligations creating a liability and is not limited to certain

types of contractual violations and, therefore, includes the delivery of goods not in conformity with the contract because of their defectiveness.

205. According to the facts of the case, the supplier has a very good past record. The Claimant has a very good reputation in the market, also for supervising its supply chain and over the last five years there have been no reported cases about a violation of the UN Global Compact Principle by Claimant or any of its suppliers [*Pro. Ord. 2. Para 34*]. There is no official confirmation that Ruritania Peoples Cocoa GmbH is involved in any briary and certificate falsification, the criminal action against its CEO is still pending before the court [*Pro. Ord. 2. Para 37*]. The supplier has a good reputation on the market due to two model farms it was operating in Ruritania, which showed how cocoa could be produced in a sustainable way protecting the rainforest [*Pro. Ord. 2. Para 32*].

206. The claimant engaged Egimus AG for auditing the accounts and implementation of 10 Principles of UN Global Compact and also audited by third party. The Egimus AG uses ISO 14001 and ISO 26000 as guidance in the preparation of the report. It was not involved in the corruption in Ruritania. [*Pro. Ord. 2. Para 33*] .Further, the respondent also not received any complaint regarding non compliance with Global Compact Principles [Pro. Ord. 2. Para 38]. Therefore, the claimant has exercised his best efforts like a reasonable person against the delivery of non-conforming goods, the defect was hidden in this case, hence the claimant is not liable to pay any damages.

E. The Respondent shall compensate the Claimant for unilateral breach of contract:

207. Pursuant to article 25 CISG, the Arbitral Tribunal ruled that the buyer's unilateral avoidance of the contract constituted a fundamental breach. Therefore, in accordance to article 75 and article 78 CISG, the buyer shall compensate the seller for the price difference between the original contract price and the resale price, as well as interests accrued on it [*CISG Case no. 860*].

PRAYER FOR RELIEF

In regard of the submissions made above, the Claimant Delicatesy Whole Foods Sp requests the Tribunal to find that:

I. The Arbitral Tribunal has no authority to decide on the challenge of Mr. Prasad, any court or other authority specified in article 6 shall decide on the challenge.

II. While the request of challenge is pending, Mr. Prasad should be continued in the tribunal and make an award.

III. The Claimant's General Conditions of Sale governs the contract.

IV. The Claimant has delivered the conforming goods and Claimant is merely obliged to use its best efforts to ensure compliance by its suppliers.

Respectfully submitted on 7 December 2017 by

____/s/_____	_____/s/_____
Ms. Suhaila Khamis	Ms. Shaikha Younis Al Khouri
_____/s/_____	_____/s/_____
Ms. Mariam Saeed Khalfan Alneyadi	Ms. Nouf Hamad Abdulla
_____/s/_____	_____/s/_____
Mr. Marwan Abdulla Al Nooryani.	Mr. Ahmed Alhashemi