Twenty Fifth Annual Willem C. Vis Moot

MEMORANDUM FOR CLAIMANT

On behalf of:
Delicatesy Whole Foods Sp.
CLAIMANT

Against:
Comestibles Finos Ltd.
RESPONDENT

Counsel for CLAIMANT:

Amer Abu-Sham Leen Amro Nadeen Abawi

UNIVERSITY OF JORDAN

Amman - Jordan

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TABLE OF ABBREVIATIONS

AC	Advisory Council

Art.	Article
Artt.	Articles
CE	CLAIMANT's exhibit
CISG	United Nations Convention on the International Sales of Goods
Co.	Company
CoC	Code of Conduct
e.g	for example
emph.	Emphasis
et al.	and others (et alii/et aliae/et alia)
et seq.	and the following one (et sequence)
E-mail	Electronic Mail
GER	Germany
HK	Hong Kong
Ibid.	Ibidem (in the same/previous source)
IBA	International Bar Association
IBAG	IBA Guidelines on Conflict of Interest
i.e.	that is
Inter alia	among other things
Mr.	Mister
Ms.	Miss
No.	Number

NoC	Notice of Challenge of Arbitrator
NA/NoA/NOA	Notice of Arbitration
Nat.	National
para.	Paragraph / paragraphs
Pt.	Point
p./pp.	page/pages
RE	RESPONDENT's exhibit
Rep.	Report
PCA	Permanent Court of Arbitration
PO	Procedural Order
RNA	Response to the Notice of Arbitration
RNOC	Response to Notice of Challenge
SE	Sweden
sec.	Section
SG	Secretary-General
SUI	Switzerland
TPF	Third-Party Funding
UAR	UNCITRAL Arbitration Rules
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Arbitration Rules

UNIDROIT	International Institute for the Unification of Private Law
USA/U.S.	United States
v./vs.	against (versus)
WG	Working Group

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STATEMENT OF FACTS

1. The Parties to this arbitration are Delicatesy Whole Foods Sp. ("**CLAIMANT**") and Comestibles Finos Ltd. ("**RESPONDENT**", collectively "**the Parties**").
2. **CLAIMANT** is a medium sized manufacturer of fine bakery products registered in Equatoriana. It pays premium prices for its ingredients to guarantee the best quality. It is also a member of Global Compact ("**GC**") and is therefore committed to operate in a sustainable and ethical manner. As required by **GC** it uses its influence to make its suppliers sign a code of conduct ("**CoC**"). CLAIMANT goes beyond GC by including provisions that allow it to monitor supplier adherence to CLAIMANT's CoC.
3. **RESPONDENT** is a leading gourmet supermarket chain in Mediterraneo. It is also a GC member that operates in an ethical and sustainable manner, and uses its influence to make suppliers sign a CoC.
4. On **6 March 2014** the Parties met at the Cucina food fair, and discussed a possible business relationship and some of the difficulties they face. CLAIMANT expressed its concerns regarding the appointment of arbitrators by state courts during the discussion of RESPONDENT's new *ad hoc* arbitration clause.
5. On **10 March 2014** RESPONDENT sent CLAIMANT an invitation to participate in RESPONDENT's publicized tender, along with the Tender Documents. In its letter, RESPONDENT assured CLAIMANT that the *ad hoc* arbitration clause would not cause problems in practice, specifically with regards to the appointment of arbitrators.
6. On **27 March 2014** CLAIMANT sent its Offer filling out the information required by the Tender Documents and making several amendments thereto, including the application of CLAIMANT's General Conditions and CoC. On **7 April 2014** RESPONDENT accepted CLAIMANT's offer and Contract 1257 was concluded. The Parties commenced delivery with no complications. CLAIMANT performed audits to its suppliers, including Ruritanian ones, assuring their compliance with GC principles. Additionally it requested governmentally issued certificates of sustainability and its suppliers adhered.
7. On **27 January 2017** RESPONDENT found out about a fraudulent scheme involving Ruritanian government officials that endangers the sustainability and ethicality of the production of some of the cocoa supplied to CLAIMANT. It unjustly refused to pay for the cakes it had already received, then alleged that this fact renders the goods non-conforming and, and refrained from accepting further deliveries constituting a blatant breach of the Contract 1257.

8. On **30 June 2017** CLAIMANT submitted its Notice for Arbitration pursuing the amounts due with damages for nonpayment. Additionally, it appointed Mr. Prasad as an arbitrator, who then duly complied with his disclosure obligations. RESPONDENT raised no objections.

9. On the **27 August 2017** RESPONDENT found out that in 2016 Mr. Prasad has, in an abstract way, expressed a view about emotional non-conformity under Art. 35 CISG. On **14 September 2017** RESPONDENT challenged Mr. Prasad based on indirect relationships with a company that is indirectly related to CLAIMANT's funder.

10. Further, RESPONDENT alleged that the Parties have excluded the appointing authority from the UNCITRAL Arbitration Rules ("**UAR**"), a situation that would result in resorting to the Arbitral Tribunal for the challenge of an arbitrator under the *lex arbitri*. This was surprising to CLAIMANT as it would also entail resorting to state courts for the appointment of arbitrators, instead of an appointing authority. The exact situation RESPONDENT specifically assured CLAIMANT would not happen. Without legal basis, RESPONDENT also alleged that the Tribunal should exclude Mr. Prasad from the challenge decision.

INTRODUCTION

11. The Parties have agreed to the application of the UAR without any modifications to the procedures. Under the Rules, the challenge of an arbitrator is heard by an appointing authority **(I)**. However, if the artt. relating to the appointing authority were to be excluded, the challenge of an arbitrator would be governed by the *lex arbitri*. In the case at hand, the *lex arbitri* provides that the Tribunal, including the challenged arbitrator, should decide on the challenge **(II)**.

12. Should the Tribunal find that it has the authority to hear the challenge, the Tribunal is respectfully requested to dismiss the challenge on the grounds that RESPONDENT did not prove the existence of justifiable doubts to Mr. Prasad's impartiality and independence **(III)**.

13. RESPONDENT asserts that its own General Conditions and CoC govern the contract and that the cakes were not conforming therewith. However, RESPONDENT's General Conditions and CoC are not part of the contract, as CLAIMANT offered the inclusion of its own General Conditions and Coc and RESPONDENT accepted **(IV)**. This means that the goods are automatically in conformity with the contract.

14. Even if RESPONDENT's General Conditions and CoC were found to be applicable, the goods are in conformity therewith **(V)**.

ARGUMENT

I. THE CHALLENGE DECISION FALLS UNDER THE JURISDICTION OF AN APPOINTING AUTHORITY PURSUANT TO ARTICLES 13(4) AND 6 UAR

15. The Parties agreed for their arbitration to be subject to the UAR [*NA, p. 6, para. 13*]. Pursuant to Art. 13(4) UAR, the challenge of an arbitrator is heard by an appointing authority. Under Art. 6 UAR, the Parties can, at any time, agree on persons or an institution to act as an appointing authority. If the Parties cannot reach an agreement, the Rules provide for a fallback option to prevent deadlocks. The role of designating an appointing authority is assigned to the Secretary-General "**SG**" of the Permanent Court of Arbitration "**PCA**", who would select persons or an institution to serve as an appointing authority. This is the standard procedure for the challenge of an arbitrator under the Rules, especially since the Parties have not agreed otherwise.

16. In the following, CLAIMANT shall show how the Parties may still decide on an appointing authority under Art. 6(1) UAR (**A**). In the event where they cannot reach an agreement, the PCA SG shall be requested by either party to designate an appointing authority (**B**).

A. Art. 13(4) UAR does not provide for the involvement of arbitral institutions

17. Under the applicable framework for challenging an arbitrator, the Parties are at the stage where they must propose the names of persons or an institution to act as an appointing authority. The fact that they can choose persons does not call for the involvement of any arbitral institution whatsoever.

18. Under the UAR, the standard procedure with regards to the challenge of an arbitrator is as follows: First, after both, the counter-party to a challenge and the challenged arbitrator, do not agree to the challenge, Art. 13(4) UAR refers the challenge to the appointing authority [*Art. 13(4),UAR*]. Second, in accordance with Art. 6(1) UAR, if the parties haven't already agreed on an appointing authority, a party should make a proposal suggesting the names of persons or an institution to act as one [*Art. 6(1) UAR*]. Third, only 30 days after that proposal, and only if the

parties fail to agree on an appointing authority, then any party may request the PCA SG to designate an appointing authority [*Art. 6(2) UAR*].

19. RESPONDENT has made the assumption that since the dispute resolution clause provides that disputes, controversies and claims shall be settled "*without the involvement of any arbitral institutions*", then Art. 13(4) UAR has been excluded [*NoC, p. 39, para. 8*]. However, Art. 13(4) UAR does not, in itself, entail the involvement of an arbitral institution. But rather, it points to the appointing authority under Art. 6 UAR, which first allows the parties to propose at any time, the names of persons or institutions to act as an appointing authority. Should that step not be successful, Art. 6(2) UAR allows a party to request the PCA SG to designate an appointing authority. The only provision that could be seen to entail the involvement of an institution is Art. 6(2) UAR. Therefore, any alleged exclusion would be of Art. 6(2) UAR and not Art. 13(4) UAR. RESPONDENT's assumption has disregarded the first step of the process where RESPONDENT may simply propose the names of any persons it deems fit and, if CLAIMANT agrees, there will not be a need for any involvement of arbitral institutions. The fact that CLAIMANT has taken the initiative of appointing and provisionally funding a potential replacement arbitrator, and stated its openness to other possible solutions objectively demonstrates CLAIMANT's diligence to speed up the process [*Fasttrack's letter, p. 46, last para.*]. As pointed out in CLAIMANT's response to the NoC, RESPONDENT is potentially attempting to deviate from the standard procedure to have Ms. Reitbauer as one of two arbitrators deciding on the challenge given her critical views on third party funding [*RNoC, p. 46*].

20. Therefore, the current stage of the applicable procedures for challenging an arbitrator is that RESPONDENT should make a proposal with the names of persons to act as an appointing authority, a step that has in no way been excluded. Additionally, from CLAIMANT's diligence, the Tribunal can objectively infer CLAIMANT's willingness to accept a proposal in good faith.

B. Should the Parties fail to agree on an appointing authority, the PCA SG shall designate an appointing authority under Art. 6(2) UAR

21. Under the applicable procedure, if the Parties fail to agree on an appointing authority, either party may request the PCA SG to designate an appointing authority [*Art. 6 UAR*]. Contrary to what RESPONDENT may argue, the Parties did not exclude the PCA SG's designatory role under the UAR (**i**). Thus, in the event where the Parties fail to agree, the PCA SG shall designate the appointing authority (**ii**).

i. The Parties did not exclude the PCA SG's designatory role under the UAR from their procedural framework.

22. The Parties did not exclude the PCA SG's designatory role, as regulated under Art. 6(2) UAR, from their procedural framework.

23. The Parties have agreed that the arbitration agreement is governed by the CISG [*PO1, p. 48, para. 1*]. Therefore, the issue of interpreting the arbitration agreement is governed by Art. 8 CISG. Interpretation under Art. 8 CISG is concerned with the Parties' intent [*Art. 8 CISG*]. The CISG considers writing to be one, of many circumstances to be considered when interpreting the terms of a contract [*AC Op. 3, 2.2*]. Additionally, the AC Op. 3 further states that "*the fact that the meaning of the writing seems unambiguous does not bar recourse to extrinsic evidence to assist in ascertaining the parties' intent*" [*Ibid., 3.3*]. The CISG AC, chaired by Prof. Schlechtriem, and including some of the most renowned scholars on the CISG such as Bergsten, Schwenzer and Bonell, stated that both the parol evidence and the plain meaning rules are **not** applicable under the CISG [*Ibid. 1,2, emph. added*].

24. CLAIMANT shall show how the Parties did not intend to exclude the appointing authority provisions under Artt. 13(4) and 6(1) and (2) UAR. An examination of the circumstances encompassing the clause demonstrates the Parties' true intent. During Mr. Tsai and Ms. Ming's discussion at Cucina, Ms. Ming informed Mr. Tsai of RESPONDENT's new *ad hoc* arbitration clause providing for an arbitration under the UAR and "*explicitly excluding the involvement of any arbitral institution*" [*RE 5, p.41*]. Mr. Tsai consequently expressed his concerns regarding such a clause by explaining how in CLAIMANT's experience with *ad hoc* arbitration, the issue of the appointment of arbitrators has proven to be troublesome, prompting CLAIMANT to move to institutional arbitration instead [*Ibid.*]. Subsequently, Ms. Ming contacted RESPONDENT's legal department "*to ask them whether the experience of CLAIMANT necessitated any change to the dispute resolution clause*" [*Ibid.*]. Ms. Ming then informed Mr. Tsai that the legal department was "*confident that the existing arbitration clause would not cause any problems in its application in practice*" [*CE1, p.8*].

25. In order to ascertain how a reasonable person in Mr. Tsai's position under the same circumstances would understand RESPONDENT's statements, and therefore its intent, we must examine the basic legal knowledge possessed by RESPONDENT at the time the statement was made. Since the statement was made by RESPONDENT's legal department, the hypothetical reasonable person in Mr. Tsai's shoes would expect such a statement to be as a result of thorough legal research. Additionally, since RESPONDENT chooses arbitration as its dispute resolution method, RESPONDENT's legal department is reasonably expected to be closely familiar with the basic procedural framework of the new rules included in its standard arbitration

clause. When CLAIMANT specifically asks about the issue of the appointment the presiding arbitrator by state courts, the legal department would be reasonably expected to specifically research the matter. This entails two legal facts that respondent could not have been aware of. First, the appointing authority is the body in charge of the appointment of arbitrators, in case it was excluded, the *lex arbitri* assigns this task to state courts (**a**). Second, a UAR arbitration clause that excludes the fallback option of the PCA SG under Art. 6(2) UAR is in no way "practicable" (**b**). These facts show that no reasonable person would understand that the Parties have excluded the PCA SG's role under Art. 6(2) UAR.

26. Further, a reasonable person will also compare RESPONDENT's clear exclusion of the UNCITRAL Rules on Transparency to the vague alleged exclusion of Art. 6(2) UAR (**c**). In light of all the relevant circumstances, the exclusion in the DR clause is merely emphasis that the arbitration is ad hoc and not institutional (**d**).

a. The only reasonable understanding of RESPONDENT's intent that reconciles with the legal department's statement is that the Art. 6 UAR is not excluded.

27. Any legal department under the aforementioned circumstances would be aware that, in the event the party-appointed arbitrators cannot reach an agreement on the presiding arbitrator, the task of appointing the presiding arbitrator will be assumed by the appointing authority pursuant to Artt. 9,8 and 6 UAR. Should the Parties exclude the appointing authority as per RESPONDENT's allegation, the default procedure would be that under the *lex arbitri* [*Born, p.1632*].

28. In the case at hand, Given that CLAIMANT has specifically expressed its concerns regarding the appointment of the presiding arbitrator by state courts [*RE5, p.41*]. The Danubian Arbitration Law assigns that role to the Supreme Court of Danubia [*Art. 11 MAL*]. Therefore, in the hypothetical scenario where the appointing authority is excluded, the state court of Danubia would appoint the presiding arbitrator. This cannot be reconciled with the fact that the legal department retorted to CLAIMANT's concerns by saying that they were confident the clause with the exclusion is practicable and would not cause any problems in practice [*CE1, p.8*]. In summary, RESPONDENT's argument regarding its intent would lead to the exact situation it assured CLAIMANT will not happen. This inherent contradiction shows that any reasonable person would never have understood that Art. 6 UAR has been excluded.

b. No legal department would consider an UAR arbitration clause that excludes the fallback option of the PCA SG under Art. 6(2) UAR as "practicable"

29. Given the aforementioned background of how the clause made its way to RESPONDENT's contract, any legal department undergoing such circumstances would do the basic research on the rules it has incorporated in an *ad hoc* arbitration.

30. That research would show how integral the appointing authority is to the UAR. By reading the rules would lead to such conclusion. The purpose of Art. 6 UAR is to to clarify for the users of the Rules the importance of the role of the appointing authority, particularly in the context of non-administered arbitration [*Kröll/Mistelis/Viscasillas, Ch16, para. 4.1 ; Secretariat's notes, A/CN.9/WG.II/WP.151*]. Further, The model arbitration clause suggested by the UAR entails a designation of the appointing authority [*UAR, Annex, p. 29*].

31. Moreover, an infamous disadvantage of *ad hoc* arbitration among scholars is the error in the drafting of procedures that leads to procedural pitfalls, specifically with regards to the appointment and challenge of arbitrators [*Eliott/Petti, p.16 ; Fouchard/Gaillard/Goldman, pt. 1, ch 2, p.105 ; Grisberger/Voser, ch 1, p. 77*]. Fouchard, Gaillard, and Goldman stress that "*The main concern of the (UNCITRAL Arbitration) Rules is, however, to address the situation where the parties cannot agree on the appointment of an arbitrator, or where a party refuses to make such an appointment.*" [*Fouchard/Gaillard/Goldman p. 538, para. 967*]. They further clarify that this issue is the reason why the parties are invited to designate an appointing authority in advance [*Ibid., para. 968*]. That is the whole purpose of including the modification of what is now Art. 6 UAR to employ the PCA SG as the safety net to the designation of an appointing authority [*Born I, C3, para. 86*]. Furthermore, the designation of an appointing authority is one of the backbones of an *ad hoc* arbitration clause according to most scholars [*Eliott/Petti, p. 18 ; Waincymer, p. 156*].

32. The minimum amount of research regarding the rules would show the importance of the appointing authority and specifically the PCA SG operating as the safety net for procedural pitfalls. From the wording of Art. 6 UAR to the model arbitration clause and all the relevant scholarly opinion in that regard. There is no legal department under such circumstances that would make the statement that it is "*confident that the existing arbitration clause would not cause any problems in its application in practice*" [*CE1, p.8*] if it had the intent to exclude the appointing authority or the PCA SG's designatory role thereunder. Any legal department would know that a clause under the UAR that excludes the appointing authority would definitely not be practicable especially where it is one of the most commonly listed disadvantage of *ad hoc* arbitration.

c. RESPONDENT's use of direct explicit language to exclude the Rules on Transparency in the contract show that it did not intend to exclude Art. 6 UAR.

33. A reasonable person in CLAIMANT's position would notice RESPONDENT's choice of direct explicit language to exclude the UNCITRAL Rules on Transparency. In contrast, the wording of the alleged exclusion of Art. 6 UAR is highly indirect and ambiguous. Considering the fact that the UNCITRAL Rules on Transparency will only apply if the Parties choose them, there is no need for such a specific direct exclusion [*Art. 1 UAR; Art. 1 UROT*]. RESPONDENT resorted to language such as: "*excluding the application, direct or by analogy, of the UNCITRAL Rules on Transparency*" [*NA, p.6, para. 13*]. RESPONDENT has made it unmistakably clear that it wishes to exclude the Rules on Transparency although they would not be applicable unless chosen by the Parties. A reasonable person reading the DR clause would only understand that RESPONDENT exercises cautions and thorough drafting when it intends to exclude procedures. Therefore, a reasonable person would not understand the phrase "*without the involvement of arbitral institutions*" to amount to an exclusion of Art. 6(2) UAR.

d. The clause excluding the involvement of arbitral institutions is merely an emphasis that the arbitration is *ad hoc* and not institutional.

34. In light of the legal department's statement and the language of the contract, there is only one reasonable interpretation of the exclusion. It's clear that RESPONDENT is merely emphasizing that the arbitration is *ad hoc* and not institutional.

v. Conclusion.

35. Regarding the legal department's statement, there is absolutely no way a reasonable person would understand that RESPONDENT intended to exclude the appointing authority by its arbitration clause. Rather, the exclusion of the involvement of arbitral institution is merely an emphasis that the arbitration is Ad Hoc and not institutional.

ii. If the Parties do not agree to an appointing authority, the PCA SG shall be requested to designate one.

36. Since the Parties did not exclude Art. 6(2) UAR, it shall apply in the event the Parties cannot reach an agreement under Art. 6(1) UAR. Consequently, one of the Parties shall request the PCA SG to designate an appointing authority, which shall be the body with the sole jurisdiction to decide on the challenge under the Parties' choice of law.

II. Should the Tribunal find that it has the authority to decide on the challenge, the *lex arbitri* provides for Prasad's participation in the decision.

37. RESPONDENT has argued that the default procedure in the event where the Parties exclude the appointing authority, is for the Tribunal to decide on the challenge without Mr. Prasad. However, gaps in procedural rules are filled by the *lex arbitri.* Under the *lex arbitri*, the Tribunal, including the challenged arbitrator, decide on challenges.

38. Since the *lex arbitri* is verbatim adoption of the MAL [*PO1, p. 49, para. 3(4)*]. The *travaux preparatoires* of the MAL, indicate that the challenged arbitrator should decide on the challenge *[314th Meeting ,p. 463, para. 44,45,46*]. There were no comments to the contrary and it was so agreed [*Ibid.*]. Countries which adopted the MAL had varying approaches. Some opted to explicitly exclude the challenged arbitrator from deciding on the challenge, such as Guatemala and Peru. On the other hand, there are several countries that also based their legislation on the Model Law, which explicitly expressed in their rules that the challenged arbitrator should decide on the challenge [*Alberta Arbitration Act, s 13 ; Austrian Arbitration Act, s 589*]. A number of countries have taken the same approach as Danubia, where the wording was left to be largely identical to the MAL [*Ger arbitration act section 1037 ; Malaysia ARBITRATION ACT 2005,* Art. *14 ; Norwegian Arbitration act,* Art. *15 ; Jung Vs. ZTE*]. This was seen as to implicitly include the challenged arbitrator, where the wording of these laws means that the tribunal in its full composition should decide. *[Winnie. P. 319; Gayer/Thomas/ Koch, p. 338; Ryssdal, p. 13].*

39. As a matter of legislative policy, the challenged arbitrator should participate in the decision so that the same procedure applies regardless of the number of the challenged arbitrators [*Winnie, p. 301*]. Simplicity and certainty are desirable, because the more complicated the challenge procedures, the more likely they may be manipulated for dilatory or tactical purposes [*Ibid.*]. In addition, even if the challenged arbitrator was biased, there are two other supposedly impartial and independent members of the Tribunal, that are capable of producing a fair decision not favoring either party to the other. On the other hand, excluding the challenged arbitrator will pose two serious problems. First, the arbitrator appointed by the challenging party will have a larger voting power, from 33.3% to 50% which significantly favors that party*[Winnie, P. 302].* Second, the two remaining arbitrators may be evenly divided on the challenge issue, resulting in deadlock and delay in decision-making [*Ibid.*]. The only reason RESPONDENT is attempting to rewrite the law in its favor, is that, Ms. Reitbauer, its own appointed arbitrator, has articulated in an article a critical view on third party funding, advocating inter alia extensive disclosure obligations [*Fasttrack's letter, P. 46*].

40. In conclusion, according to the *lex arbitri*, the wording highly indicates that Mr. Prasad should participate in the challenge. This interpretation of the law is in line with the legislative history, and the applications in similar MAL countries. Further, it creates a situation that where there are

very low chances of prejudice towards either party. In contrast, excluding Mr. Prasad will very likely prejudice CLAIMANT.

III. IN CASE THE TRIBUNAL SHOULD DECIDE ON THE CHALLENGE, MR. PRASAD SHOULD NOT BE REMOVED

41. For RESPONDENT's challenge of Mr. Prasad to be successful, it must prove the existence of justifiable doubts to Mr. Prasad's impartiality and independence. The standard for challenge to be met by RESPONDENT, excludes the IBA Guidelines on Conflict of Interests ("**IBAG**"). This standard has not been met (**A**). Even if the examination was under the examples envisioned by the IBAG, Mr. Prasad would remain impartial and independent (**B**). Finally, contrary to RESPONDENT's allegations, CLAIMANT did not breach its disclosure obligations (**C**).

A. The Standard for the Challenge of Arbitrator Under the Applicable Laws has not Been Met

42. In the case at hand, the Parties have chosen specific laws that contain the same identical standard for challenging an arbitrator. Allowing Guidelines with a different standard for challenge to create legal obligations on the Parties would be a violation of the intent underlying their choice of law. In the following, CLAIMANT shall show how the applicable standard for challenging an arbitrator is that of the UAR and the *lex arbitri* and not the IBAG (**i**). Subsequently, CLAIMANT will show how the aforementioned standard for challenging Mr. Prasad has not been met (**ii**).

i. The applicable standard for challenging an arbitrator is that of the UAR and the MAL and not the IBA Guidelines.

43. RESPONDENT, in its NoC, has argued that the Tribunal "should take into account" General Standards of the IBAG [*NoC, p. 39, para. 9*]. In addition to referencing the alleged disclosure obligations burdening CLAIMANT pursuant to the guidelines [*Ibid.*]. Such arguments imply the premise that the IBAG are applicable. However, such reasoning is in violation of the legal framework imposed by the Arbitration Agreement reflecting the Parties' exercise of their procedural autonomy and thus must be rejected.

44. An agreement specifying the seat of arbitration creates a presumption that the procedural law of that place applies to the arbitration [*Born , p. 1616*]. The only way for other rules to be applicable, is for the parties to exercise their procedural autonomy under the *lex arbitri* by agreeing to them [*Ibid., p.1632*]. When the parties have reached such an agreement, the *lex arbitri* will apply and

give effect to the parties' choice of procedural law thereby substituting the rules in the *lex arbitri* with the chosen rules with regards to many procedural matters [*Ibid.*].Therefore, the only rules that can replace the *lex arbitri* are those chosen by the parties.

45. In this particular case, the UAR were chosen by the Parties as the procedural choice of law [*CE2, p.12 Clause 20*]. Whereas the *lex arbitri* is a verbatim adoption of the MAL [*p. 49, PO1, para. 4*]. Therefore the legal framework of the current arbitration is that the directly applicable procedural rules are the UAR, and any gaps are to be filled by the *lex arbitri.* It is clear that by examining the Parties' use of their autonomy, they have chosen highly specific rules and laws that point to the same direction. In addition to the laws chosen by the Parties, the countries involved in the dispute have also adopted the MAL [*p. 49, PO1, para. 4*].

46. In the case at hand, every procedural law was originally drafted by the same legislative body, the UNCITRAL. Further, the standard for challenging an arbitrator in <u>all</u> the laws involved is identically phrased [*Born, p.1780*]. Therefore it is clear that the Parties have a common intent and understanding regarding the applicable standard for challenge that is highly specific. This is due to the fact that the Parties are from states where the standard for challenge is identical, they have also chosen a seat and Arbitral Rules where the standard is exactly the same. Therefore, since the IBAG are what the IBA Arbitration Committee has understood as the "*best current <u>international</u> practice*" [*IBAG, p. 2, para. 4, emph. added*], the Guidelines are unsuitable in the current <u>specific</u> legal setting. Especially since the IBAG provide a significantly lower standard for challenging an arbitrator than the one found in the MAL and the UAR, as they have been regarded as "needlessly detailed and encourage challenges to both arbitrators and awards" [*Born I, p. 202*].

47. Further, the IBAG themselves provide that they *"are not legal provisions and do not override any applicable law or arbitral rules chosen by the parties."*[*IBAG, p. 3, para. 6*]. Not only that, but the Guidelines have also been subject to considerable criticism. In the words of Born, "*the precise role and weight of the Guidelines ... in national courts and institutional settings remains ill-defined, as does the legal basis for any such role….. The Guidelines do not explain what the legal basis for these prescriptive rules is and it is unclear what the rationale for this conclusion might be In principle, the Guidelines …. have no great legal effect than writings of commentators or surveys of practitioners.*" [*Born , p. 1839*]. Further, Born notes that The IBAG have been the subject of considerable criticism, on the grounds that they are needlessly detailed and encourage challenges to both arbitrators and awards [*Born I, Vol I, p.202*].

48. In conclusion, the Tribunal must give due consideration to the Parties' autonomy in creating a legal framework that has a highly specific standard for challenging an arbitrator. Since the IBAG were not chosen by the Parties, and they provide for a lower standard for challenge, they are in conflict with the Parties' choices. Consequently, the IBAG must be rejected.

ii. There are no justifiable doubts to Mr. Prasad's impartiality and independence under the UAR and the *lex arbitri*

49. RESPONDENT has failed to prove the existence of justifiable doubts to Mr. Prasad's impartiality and independence under the UAR and the *lex arbitri*. Therefore, the Tribunal should dismiss the challenge.

50. For an arbitrator to be legitimately challenged, circumstances must be present "*that give rise to justifiable doubts as to his impartiality and independence*" pursuant to artt. 12(2) MAL and 12(1) UAR. Justifiable doubts is an objective standard, it requires reference to the views of a disinterested, reasonable person rather than one of the parties or arbitrators [*Born, p. 1780*].

51. An arbitrator is impartial when he/she does not arbitrate in favor of a party [*Born, p. 1776*]. It is usually judged subjectively by the arbitrator's own "*state of mind*"[*Alfonso, p. 75, para. 4-11*]. On the other hand, an arbitrator is independent when he/she is free from the control of the parties [*Born, p. 1776*]. This requires that that there are no unacceptable external relationships or connections between an arbitrator and a party or its counsel [*Born, p. 1776*]. Examples include financial, professional, employment, or personal relations [*Ibid.*].

52. Expression of opinion by an arbitrator is rarely regarded a circumstance affecting impartiality and independence. In almost every instance, statements of legal interpretation, or approaches to particular issues are not considered even relevant to the arbitrator's independence or impartiality [*Born, p. 1888*]. However, even the minority opinion that regards it as a circumstance affecting impartiality and independence, excludes publications dealing in an abstract way with the legal issue in question. [*Lew/ Mistelis/Kröll, p. 258, para. 11-15*]. Further, having arbitrators' with different point of views does not harm the parties in multi-member tribunals where a presiding arbitrator is present to gather those differences and reach one unified decision [*Alfonso, p. 83, para. 4-24* ; *Jung/ZTE*].

53. Additionally, impartiality and independence may be questioned including when an arbitrator has a financial interest in the dispute, this includes cases where the arbitrator would profit financially from his or her own decision or had an ownership interest in a party to the arbitration [*Born, p. 1876*]. In addition to any relationship between the arbitrator and one of the parties or counsels, where one of them has represented the other in legal proceedings [*Ibid., ch. 12.05 (K), et seq.*]. With regards to repeat appointments, there have been decisions ruling that recurrent appointments by a party can in principle be relevant to an arbitrator's independence. [*Ibid., p. 1880, et seq*]. However, Born notes that "*Most courts and appointing authorities reason that repeat appointments are usually the result of an arbitrator's (independent) qualities and experience in the field, which*

makes him or her desirable as an arbitrator, without giving rise to any relationship of dependence or partiality with the involved law firm or lawyers." [*Ibid.*]. Courts and Tribunals often consider the arbitrator's total caseload and the arbitrator's appointments from other sources, in addition to the nature of the appointments [*Ibid.*].

54. In the case at hand, RESPONDENT has assumed that the standard for justifiable doubts is a subjective one, requiring an examination through the "*eyes of RESPONDENT*" [*NoC, p. 39, para. 10*]. Such view is in clear contradiction to the general consensus within jurisprudence regarding the standard under the UAR and the MAL. The relevant standard is clearly an objective one.

55. As for Mr. Prasad's article , it was published in one of the leading journals and was publically available on his website prior to the commencement of proceedings [*PO2, p. 51, para. 14*]. Usually, such publications do not affect an arbitrator's impartiality and independence. Especially where it merely treats the topic in an abstract way. Mr. Prasad is merely offering his opinion on approaches regarding the interpretation of Art. 35 CISG. In principle, Mr. Prasad agrees that if the parties have incorporated ethical production as part of the goods, then ethical production becomes part of the conformity of the goods [*RE4, p. 40*]. This is a general and abstract conclusion and does not specifically relate to the present case. The only conclusion that could be reached is that Mr. Prasad is a highly qualified arbitrator who is knowledgeable in the subject matter of the dispute [*RE4, p. 40*]. Thus, Mr. Prasad's expertise is advantageous to both Parties where he will correctly apply the substantive rules to the dispute as he has previous knowledge in them without being in favor of any party. In addition, the fact that the tribunal is composed of three arbitrators, the award that shall be rendered will be the product of different arbitrators, each possessing different points of view emerged into one. [*NoA, p. 6, para. 13*].

56. RESPONDENT did not prove any commercial interest causing Mr. Prasad to rendering the award in favor of CLAIMANT. The fact that one of the former Slowfood partners is representing a claimant that is currently funded by Funding 8 has no relevance to CLAIMANT, as it is funded by Funding 12 [*PO2, p. 50, para. 6*]. Further, Mr. Prasad does not have any relationship with Mr. Fasttrack, nor CLAIMANT [*PO2, p. 51, para. 9*]. The fact that Mr. Prasad was appointed twice by Mr. Fasttrack's law firm is irrelevant to Mr. Prasad's impartiality and independence unless there was a significant relationship between them causing the existence of bias. Mr. Prasad only derives 30-40% of his earnings from working as an arbitrator [*PO2, p. 51, para. 10*]. Further, his case load is large enough to not be impacted by two appointments where he has acted as an arbitrator in 21 arbitrations in the last three years [*Ibid.*]. This is bolstered further by the fact that the two aforementioned cases were only of minor value [*Ibid.*]. Finally, since the awards in those two arbitrations were rendered unanimously, there is no reason to

believe that Mr. Prasad is biased towards Mr. Fasttrack's law firm [*PO2, p. 51, para. 15*]. Therefore, there are no relationships between Mr. Prasad and CLAIMANT or Mr. Fasttrack.

57. In conclusion, RESPONDENT's assertions regarding the impartiality and independence of Mr. Prasad are without merit and should be dismissed. Mr. Prasad is both impartial and independent pursuant to the MAL and the UAR.

B. Even if the IBA Guidlines are applicable, Mr. Prasad would still remain impartial and independent.

58. The practical applications under the IBAG provide rebuttable arguments that a conflict of interest exists. Other than the fact that these arguments are rebuttable and do not necessarily cause a conflict, the applications relied upon by RESPONDENT materially differ from the facts of this case. First, the repeated appointments of Mr. Prasad by CLAIMANT and Findfunds do not create a conflict under the IBA (**i**). Second, there is no significant commercial relationship between Mr. Prasad and one of the Parties (**ii**).

i. RESPONDENT did not prove that repeated appointments of Mr. Prasad raise doubts to his impartiality and independence under apps (3.1.3) and (3.3.8) IBA Guidelines.

59. The orange list in the IBAG is concerned with "situations that **may or may not**, depending on the specific circumstances of the case, justify disqualification" [*Daele, p. 245*].

60. With regards to app 3.1.3 IBAG, one court ruled against the party who challenged the arbitrator where it deemed that the repeated appointments are irrelevant in the case of a multi-member tribunal. The court explained that even if the arbitrator had been appointed previously by one of the parties involved, the rendered award was the product of the tribunal as a whole. Moreover, the other arbitrators are not obliged to adopt the challenged arbitrator's point of view. In addition, the court added that the repeated appointments of an arbitrator is advantageous as it implies that the arbitrator is skilled [*Scherer I]*. CLAIMANT has never appointed Mr. Prasad in any proceedings. app 3.1.3 requires repeat appointments on two or more instances by one of the parties or an affiliate of one of the parties [*para. 3.1.3, IBAG*]. If a third-party funder is to be equated to a "party", then the entity in question would be Funding 12, as it is CLAIMANT's funder [*Fasttrack's letter, p. 35*]. The fact that Mr. Prasad was also appointed by Findfunds is irrelevant, as is an entirely separate entity than CLAIMANT's actual funder [*Ibid.*]. Therefore, this circumstance cannot be seen to create doubts to Mr. Prasad's impartiality and independence.

61. As for app 3.3.8, it tackles the situation where an arbitrator has been appointed more than three instances by the same counsel or law firm [*para. 3.3.8 IBAG*]. According to one court, the fact

that an arbitrator has been appointed twice by the same counsel, does not justify grounds for challenge pursuant to app 3.3.8 IBAG [*AB case*]. The disclosure of repeated appointments is of relevance in certain circumstances.*[Scherer, p. 2]*. In all respect, the disclosure does not always lead to the arbitrator's disqualification [*IBA WG, p. 434*]. Mr. Prasad disclosed this fact at the outset of these arbitral proceedings [*CE10, p. 23*]. In the eyes of RESPONDENT, there was no conflict as RESPONDENT did not challenge Mr. Prasad following that disclosure. Under the IBAG, the Parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made, as established in General Standard 4(a) [*IBA, p. 18, para. 3*].

62. The fact that Mr. Prasad had been previously appointed as arbitrator is an indication of his knowledge in arbitration, which will speed up the proceedings. [*PO2, p. 51, para. 10*]. There is no evidence of Mr. Prasad being biased towards parties that have appointed him, especially when the awards reached by the tribunals, in which Mr. Prasad acted as arbitrator, were unanimous [*PO2, p. 51, para. 15*].

63. In conclusion, circumstances under the Orange list are not sufficient to raise justifiable doubts to impartiality and independence. Presently, the repeated appointments of Mr. Prasad largely differ from the examples given in the IBAG. The connections between Mr. Prasad and Findfunds do not amount to repeated appointments by "a party". Further, the appointments made by Mr Fasttrack's law firm are less than the number envisioned in the IBA app. In addition, RESPONDENT has missed the time period for objecting to this fact, following its disclosure.

64. Therefore, RESPONDENT's allegations with regards to Mr. Prasad's repeated appointments should be dismissed.

ii. There is no significant commercial relationship between Mr. Prasad and one of the Parties

65. The fact that one of the former Slowfood partners is currently acting as counsel in an arbitration where the CLAIMANT is funded by Funding 8 does not cause a conflict of interest.

66. App 2.3.6 in the IBAG imagines a scenario where "*The arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties"*[*IBA 2.3.6*]. This scenario clearly requires a commercial relationship to be present between the arbitrator's law firm and one of the parties or an affiliate of one of the parties. Not only that, but the relationship must be significant.

67. Presently, even if RESPONDENT proves that Funding 12 can be regarded as CLAIMANT or an affiliate thereof, there exists no "*significant commercial relationship*" between Funding 12 and Mr. Prasad's law firm. First, the law firm is set to receive the amount of USD 300,000 from Funding

8 [*PO2, p. 50, para. 6*]. Any amounts received before the merger are outside the scope of any potential conflict as they were not paid to Mr. Prasad's law firm. In order to assess whether or not the remaining amount can be regarded as significant, it is important to ascertain what percentage it would constitute out of the annual turn of Slowfood's firm. The record shows that the USD 1.5 million received by Slowfood's law firm before the merger constituted 5% of the annual turn of Slowfood in each of the last two years prior to the merger [*Ibid.*]. Therefore, if 1.5 million is only 5% of Slowfood's firm's annual turn, then USD 0.3 million is only 1% of Slowfood's firm's annual turn for the last two years. Not only is this percentage sufficiently trivial to immediately disqualify any conflict, but considering the fact that the turn of Slowfood's firm has been added to the turn of Mr. Prasad's law firm following their merger. Therefore the amount to be received from Funding 8 is even less than 1% of Prasad and Slowfood's annual turn. In normal situations, this disqualifies any conflict of interests as the IBA requires there to be a significant commercial relationship.

68. Alas, the situation at hand makes a conflict seem even more unlikely, given that there is no relationship between Slowfood and Funding 8. This is due to the fact that this was the first time that Slowfood has used a third party funder [PO2, *p. 50, para. 6*]. Therefore, this does not constitute a commercial relationship [*emph added.*].

69. Further, the links between Funding 8 and Funding 12 are miles apart. Findfunds LP only owns 40% of Funding 8, the company that is currently funding Slowfood's partner's case [*PO2, p. 50, para. 6*]. Therefore, Findfunds LP is not a majority shareholder, and does not own a controlling interest in Funding 8 [*Ibid.*]. This distinguishes Funding 8 from other subsidiaries of Findfunds LP, as it does not allow for Findfunds LP to be involved in the proceedings as much as it is with other subsidiaries in which it owns a controlling interest. Therefore, Findfunds LP and Funding 8 cannot be considered as affiliates. However, even if that was the case, the indirectness of the relationship is highlighted given the fact that the IBA requires the connection to be with CLAIMANT's immediate funder, Funding 12.

70. In conclusion, there is no relationship between Mr Prasad's law firm and Funding 8. Even if there were, it would not constitute a commercial relationship. In any case, the amounts to be received by Mr. Prasad's law firm are by far less than 1% of their annual income and are entirely insignificant.

C. CLAIMANT did not breach its disclosure obligations

71. Contrary to RESPONDENT's allegations, CLAIMANT did not breach its disclosure obligations as it was not required to disclose its TPF agreement.

72. There is no national law or arbitral rule that grants parties to an international arbitration to an automatic right to demand documents to be disclosed by their counter-parties [*Born, p. 2348*]. Such disclosure requires an affirmative order by the tribunal [*Ibid.*]. Additionally, there is also no general obligation on parties to disclose all documents relevant to the parties' dispute [*Ibid.*].

73. IBA General Standard (7) requires a party to disclose information about relationships that might raise a conflict of interest. The presence and identity of a funder would only need to be disclosed in certain circumstances, namely if a funder might have a material relationship with an arbitrator that might give rise to a potential conflict of interest. A funder who had never had any contact or interaction with an arbitrator, or that has not funded numerous cases involving that arbitrator, would not need to have its presence and identity in the case disclosed. [*ICCA, p. 88*]

74. First, there is no obligation on CLAIMANT to generally disclose its TPF agreement. Even under the IBAG, the disclosure of TPF agreements would only be disclosed in specific circumstances. Mr. Fasttrack inquired as to any direct relationships with Funding 12 or even Findfunds [*PO2, p. 51, para. 12*]. The only connections found were with two other subsidiaries of Findfunds [*Ibid.*]. Therefore, there is no relationship between Mr. Prasad and Funding 12, or even with Findfunds requiring any disclosure. Further, the claimants funded by Findfunds's subsidiaries were not represented by Mr. Prasad, they only appointed Mr. Prasad as an arbitrator [*PO2, p. 51, para. 10*]. Such an indirect relationship does not fall under CLAIMANT's disclosure obligations in the IBAG.

75. The relationship between the former Slowfood partner and Findfunds does not create grounds for CLAIMANT to disclose the TPF agreement. First, Mr. Prasad was appointed on 30 June 2017 while the merger was only formally announced on 15 August 2017 [*NoA, p. 4 ; PO2, p. 50, para. 7*]. However, the merger did not become effective until 1 September 2017, therefore, any hypothetical conflict would have only risen from this point onwards [*PO2, p. 50, para. 7*]. There is no evidence that CLAIMANT knew of the merger before the TPF agreement was disclosed. Therefore, CLAIMANT could not have disclosed a situation it had no knowledge of.

76. To conclude, there is no general duty for Parties to disclose TPF agreements. The situations known to Mr. Fasttrack prior to the disclosure of the TPF agreement do not create an obligation for CLAIMANT to disclose its TPF agreement. Therefore, CLAIMANT did not breach its disclosure obligations.

IV. CLAIMANT INCLUDED ITS GENERAL CONDITIONS IN ITS OFFER, AND RESPONDENT ACCEPTED THEM

77. The dispute between the Parties revolves around a simple case of offer and acceptance. Under the CISG, the situation where both Parties assert the application of their own standard conditions, also known as "battle of the forms", is handled "*in a modest way*" under Art. 19 CISG [*Schlechtriem/Butler, p. 81*]. This Art., however, entails the premise that three things are present; an offer, an acceptance that purports to be an acceptance but materially alters the terms of the offer and is therefore a counter-offer, and a final acceptance [Art. *19 CISG*]. In the present case, there exists merely one offer, and one acceptance. This is due to the fact that the ITT is not an offer under the CISG while CLAIMANT's Sales Offer is (**A**). The peculiarity of the dispute is that CLAIMANT submitted a "*proper offer*" in a separate document as a Sales Offer instead of filling out the tender docs for two purposes: One, it contains the provisions that should have been filled in by the offeror. And two, it amends certain provisions of the Tender documents. CLAIMANT attached the "*proper offer*" entitled as a "Sales Offer" to the unchanged tender documents and informed RESPONDENT [*PO2, p. 52, para. 27; CE3, p. 15*]. In its Sales Offer, CLAIMANT expressed that the Sales Offer shall be subject to CLAIMANT's General Conditions including its CoC in the footnote. Consequently, the crux of the dispute at hand is summarized in two questions. First: "Did CLAIMANT include its own standard conditions as one of the modifications of the Tender Documents thereby replacing RESPONDENT's?" (**B**). Second: "Did RESPONDENT accept the aforementioned modification?"(**C**). The applicable standard conditions will be decided based on the answers to those two questions. The answer requires an examination of the offer and acceptance under Artt. 14 and 18 CISG respectively. The decisive issue in the aforementioned examination is the interpretation of the parties' intent under Art. 8 CISG, and specifically, the Art. application to standard conditions.

A.The Only Communication Which Meets the CISG's Requirements of an Offer is CLAIMANT's Sales Offer

78. The offer sent by CLAIMANT following the ITT, is the only communication that legitimately fulfills the requirements of the CISG.

79. Art. 14 CISG entails requirements for a proposal to be considered as an offer [*Ferrari/Torsello p. 136]*. One requirement is the intention to be bound which shows the offeror's willingness to enter into a contract with the offeree, should the offeree express his acceptance. Further, Art. 14 CISG deems a proposal sent to more than one persons as an invitation to make an offer, and not an actual offer [*Huber/Mullis, p. 71*]. To determine the existence of the intention to be bound, regard must be given to the rules of interpretation under Art. 8 CISG [*Ibid.*]. One element to assess whether or not the offeror intends to be bound, is the wording used within the offer

[*Ibid.*]. In one case, a party sent an offer in the form of an order. The court deemed phrases such as "we order" and "delivery due immediately" as indications of the offeror's intention to be bound [*CISG-online Case No. 245 (SUI, 1995)*].

80. Art. 8 CISG sets forth the rules of interpretation. First, the subjective intent shall be determined as it shows the actual intent of the parties' [*Schwenzer/Fountoulakis*]. However , when this intent cannot be proven, Art. 8(2) CISG allows for the objective test. This intent is scrutinized through hypothesizing the understanding a reasonable person would have had under the same circumstances [*Schlechtriem/Butler p. 56*]. Irrespective of whether either test is applied, relevant circumstances should be considered [*Art. 8(3) CISG*]. Irrespective of whether either test is to be applied, relevant circumstances should be observed. These circumstances include, the negotiations between the parties, the practices or usages and the subsequent conduct [*Ibid.*].

81. Firstly, the language of the ITT docs shows how RESPONDENT was expecting the potential suppliers to respond to the ITT by sending offers. This can be seen from the terms *"The* ***offer*** *should contain indications as to..."* [*CE1, p. 10, emph. added*]. In addition, the Special Conditions of the Contract left out key specifications of the goods to be filled by the tenderer [CE*1, p. 11*]. With regards to the negotiations between the Parties, RESPONDENT pointed out in its email that it is waiting for CLAIMANT's offer following the ITT [CE*1, p. 9*]. This is due to the fact that RESPONDENT's ITT has been publicized [*RNA, p. 25, para. 7*]. Thus, RESPONDENT was waiting for multiple offers to determine which offer suits its needs. Consequently, RESPONDENT had no intention to be bound by CLAIMANT's offer. If CLAIMANT accepted the ITT, there would be no contract, because CLAIMANT was merely "participating" in RESPONDENT's tender process, and RESPONDENT wanted to choose the best offer. Therefore, CLAIMANT, or a reasonable person in its position, could not have understood the existence of any intention by RESPONDENT to be bound in case of CLAIMANT's acceptance.

82. In contrast, CLAIMANT's Sales Offer does meet all the requirements as it was sufficiently definite where it indicates the goods and expressly fixes the quantity and the price [*CE4, p. 16*]. The fact that the Parties, following RESPONDENT's reply to said offer, went on to perform the contract blatantly proves this point [*CE5, p. 17*].

83. Thus, the ITT is not an offer in the eyes of the CISG as RESPONDENT had obviously no intention for it to be bound in case of CLAIMANT's acceptance. Whereas CLAIMANT's Sales Offer possessed the requirements underlying Art. 14 CISG and does thereby constitute an offer.

B. CLAIMANT's General Conditions and CoC were part of its offer

84. CLAIMANT submits that its intent with regards to the incorporation of its standard terms was clear to a reasonable person in RESPONDENT's position. Thus, RESPONDENT's assertion is without merit [*RNA, p. 27, para. 25*].

85. An offeror's intent is crucial in determining what the offer entails. This is done through an examination of the offer and the circumstances surrounding it through Art. 8 CISG. The subjective test under Art. 8(1) CISG requires proving that RESPONDENT knew or could not have been unaware of CLAIMANT's intent [*Art. 8 CISG*]. Should the subjective test not be met, the objective test shall apply. In this event, the Sales Offer and the surrounding circumstances will be examined from a reasonable person of the same kind as the recipient, under the same circumstances. Prof. Farnsworth notes that "*The test of paragraph (2) is not that of a reasonable person in the abstract. Para (2) requires a tribunal to hypothesize a reasonable person of the same kind as the other party with respect, for example, to such matters as linguistic background and technical skill.*" [*Farnsworth, p.99*].

86. The incorporation of standard conditions should be "*made available and retrievable electronically*" to the other party at the time of negotiating the contract [*AC Op. 13, Rule 3.3*]. Consequently, the reference to the inclusion must be clear and readable to a reasonable person of the same kind as the other party under the same circumstances [*Ibid. Rule 5*; *Ibid. para. 6.1*].

87. RESPONDENT knew or could not have been unaware of CLAIMANT's subjective intent to incorporate its General Conditions. RESPONDENT received the Sales Offer and the accompanying letter [*CE3, p. 15; CE4, p. 16*]. A clear reference was made in relation to the amendments to the tender documents, where they were included in the Sales Offer [*CE3, p. 15*]. The Sales Offer amending the documents had a clear incorporation clause in the footnote. Subsequently, RESPONDENT replied stating that it had read CLAIMANT's CoC "*following (CLAIMANT's) tender out of curiosity*" [*CE5, p. 17*]. The fact that RESPONDENT read the CoC after receiving a document containing a link where the CoC is directly available provides an indication that RESPONDENT has actually read the footnote and thus, knew or could not have been unaware of the incorporation clause.

88. Alternatively, an objective examination shows CLAIMANT's clear intent to incorporate its own standard conditions. The objective test requires ascertaining the kind of the reasonable person to be hypothesized, and the circumstances in which that hypothetical person would view the statement subject matter of the interpretation.

89. First, RESPONDENT is a "*leading gourmet supermarket chain*" in Mediterraneo [*RNA, p. 24, para. 4*]. Being a leading company. indicates that it is professional. Therefore, the hypothetical reasonable person must be of such stature. Second, the circumstances are that the incorporation

clause was sent to RESPONDENT within the same document that contained modifications to the Tender Documents [*CE3, p. 15*].

90. A reasonable person similar to RESPONDENT's, receives a letter containing the following statement "*To be completely transparent, we have decided to submit a* ***proper offer containing the changes*** *and have left the relevant sections in the Tender Documents open or* ***refrained from including the changes in the documentation*** *(referring to the Tender Documents).*", would read the "proper offer" thoroughly [*CE3, p.15*]. Consequently, no reasonable professional merchant under the same circumstances would have neglected such a clear incorporation clause.

91. RESPONDENT may assert that the clause was unreadable as it was in the footnotes. Nevertheless, such assertions are unjustified. First, there is no difference between the font size of the footnote and the text of the paragraph above it. Thus, any assertion regarding the size should be dismissed. Second, the footnote is not unreasonably distant from the preceding paragraph to cause any reasonable reader to disregard it. Therefore, the incorporation clause is clear and conspicuous.

92. Finally, in its incorporation clause, CLAIMANT included a link to its website where both the standard terms and CoC were available for download [*CE4, p. 16 ; PO2, p. 53, para. 28*]. Thus, they were made available "at the time of negotiating the contract". The fact that RESPONDENT immediately downloaded the standard terms following this email makes this point undeniable [*CE5, p. 17*]. Not only did RESPONDENT understand the general conditions and CoC, it even referred to them as "impressive" [*Ibid.*]. As a result, CLAIMANT's standard conditions fulfill the requirements of incorporation under the CISG.

93. In conclusion, under the subjective test, there exists strong indications that the RESPONDENT could not have been unaware of CLAIMANT's intent to incorporate its own standard conditions. Alternatively, under the objective test, any reasonable person would have read and understood CLAIMANT's incorporation clause in its Sales Offer. And finally, CLAIMANT's incorporation clause does in fact meet all the requirements under the CISG.

C. RESPONDENT Accepted CLAIMANT's Offer Including the General Conditions and CoC

94. To determine whether RESPONDENT has accepted CLAIMANT's offer or not, Art. 18 CISG must be analyzed. Under Art. 18 CISG, acceptance is done through statements or other conduct indicating assent to an offer. Therefore, Art. 8 CISG shall be read along with Art. 18 CISG to determine RESPONDENT's intent [*Schlechtriem/Butler, p. 78, para. 84 ; Schwenzer/Fountoulakis, p. 154*].

95. With regards to the application of Art. 8 CISG to standard terms specifically, scholars have provided specific rules. First, Where the offeror has clearly communicated to the offeree that it wanted the agreement to be subject to its standard terms then the standard terms should be applicable where the offeree accepts the offer If the offeree rejects that offer, then it has to clearly indicate its intent [*AC Op. 13, para. 1.6*]. If the offeree does not clearly indicate that it does not agree, and chooses to accept such an offer, the acceptance creates the reasonable impression in the mind of the offeror that the offer has been accepted.

96. Scholars have also tackled the situation where the offeree failed to read the incorporation clause. In that case, the offeree would not have the subjective intent to accept the standard terms. Therefore, the conduct of the offeree creates the objective impression that the offer was accepted. Art. 8(2) CISG should be applied to ascertain that a reasonable person would be under the impression that the offeree has accepted [*Ibid. para. 1.8*]. Thus, the statements and conduct of the Parties must be interpreted under Art. 8 CISG to ascertain whether or not there was a clear indication that RESPONDENT does not accept the standard terms. In addition to whether or not RESPONDENT's acceptance created the reasonable impression that it had accepted the terms. By virtue of Art. 8(3) CISG, all statements and conducts must be viewed as a whole in light of the surrounding circumstances [*Schlechtriem II, p. 40 ; Secretariat's Commentary, p. 18*]. This examination of the facts and their surrounding circumstances is limited to the scope of what the recipient knew, could not have been unaware of or should have reasonably understood [*Schlechtriem/Butler, p. 55-56, para. 54-55 ; Farnsworth, p .99*]. The framework of interpretation under the CISG requires two steps. First, ascertaining the subjective intent of the party making the statement or conduct, to the extent that the other party knew or could have been unaware of that intent [*Art. 8(1) CISG*]. If that test is not successful, or in other words, if the party making the statement fails to show that the recipient knew or could not have been unaware, then the objective test will be applied. This entails that the communication will mean what a reasonable person, under the same circumstances as the recipient was in, would have understood it to mean [*Art. 8(2) CISG*]. Therefore, if RESPONDENT intended to reject CLAIMANT's General Conditions through its email it needs to show that CLAIMANT knew or could not have been unaware of that intent (**i**). If CLAIMANT's knowledge or the fact that it could not have been unaware cannot be proven, then RESPONDENT's intent in the email becomes limited to the understanding which a reasonable person would have had after receiving the communication (**ii**).

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i. There is no evidence that CLAIMANT knew or could not have been unaware that RESPONDENT objected CLAIMANT's General Conditions.

97. To determine whether, under the subjective test of Art. 8(1) CISG, RESPONDENT has fulfilled its obligation of "clearly indicating" that it does not accept CLAIMANT's General Conditions, it is necessary to ascertain what CLAIMANT subjectively knew or could not have been aware of RESPONDENT's objection.

98. After CLAIMANT sent a letter to RESPONDENT stating that "*to be completely transparent*" CLAIMANT was making a "*proper offer*" including all the changes it shall make to the Tender Documents. There is no indication that RESPONDENT rejected any of the modifications suggested in CLAIMANT's Sales Offer. RESPONDENT in fact stated that CLAIMANT's tender was "*successful notwithstanding the changes suggested*" by CLAIMANT [*CE5, p. 17*]. The fact that RESPONDENT specifically referred to the different payment terms and form of the cake does not amount to an indication, let alone a clear indication, that RESPONDENT does not accept CLAIMANT's General Conditions.

99. Therefore, examining RESPONDENT's acceptance within the context of CLAIMANT's offer and its efforts to clearly communicate its modifications to RESPONDENT shows one thing; CLAIMANT did not know, and could not have been aware that RESPONDENT "clearly indicated" that it does not accept CLAIMANT's General Conditions.

ii. A reasonable person in CLAIMANT's position would not have understood that RESPONDENT clearly indicated an objection to CLAIMANT's General Conditions.

100. The objective test of Art. 8(2) CISG requires the tribunal to hypothesize a reasonable person of the same kind as CLAIMANT under the same circumstances. This hypothetical reasonable person would have to be in CLAIMANT's position, as there are two main circumstances to be considered. First, RESPONDENT's acceptance email (**a**), and second, RESPONDENT's subsequent conduct and the objective impression arising thereout (**b**).

a. A reasonable person would not have understood that RESPONDENT objects to CLAIMANT's General Conditions

101. Under Art. 8 CISG, if RESPONDENT rejected CLAIMANT's General Conditions to apply, it was supposed to "clearly indicate" that it does not accept them. This clear indication has to be determined according to the understanding of a reasonable person in the recipient's position. Any reasonable person that sends an email to RESPONDENT stating that it will be making changes to the Tender Documents, and that to be "*completely transparent*" it will be submitting a

"*proper offer*", and then receives RESPONDENT's acceptance email, will only understand that RESPONDENT accepted the General Conditions [*CE3, p. 15*]. In RESPONDENT's acceptance email, it accepted the changes CLAIMANT made to the Tender Documents and then made specific reference to some of the changes [*CE5, p. 17*]. Given, the clarity of the incorporation clause, and CLAIMANT's efforts to make it crystal clear that it will be making changes to the Tender Documents, a reasonable person would not understand that RESPONDENT made a clear indication that it rejects the General Conditions.

102. The fact that RESPONDENT stated that it had read CLAIMANT's CoC out of curiosity does not in any way alter the understanding of a reasonable person, let alone amount to a rejection of the General Conditions [*CE5, p. 17*]. First, RESPONDENT stated that it read the CoC but was silent regarding the General Conditions. RESPONDENT's silence regarding the General Conditions along with its general statement accepting the amendments to the Tender Documents creates the objective impression that CLAIMANT has accepted the General Conditions. In any event, it cannot be understood as a clear indication that RESPONDENT rejected the General Conditions.

103. Under CLAIMANT's General Conditions, CLAIMANT is not **contractually** obligated to have its suppliers sign a CoC, it is merely required to "*use its best effort to guarantee that the goods sold match the highest standards in line with its Business Code of Conduct and its Supplier Code of Conduct*"[*PO2, p. 53, para. 29*]. Therefore, since RESPONDENT had no bearing on what CLAIMANT makes its suppliers sign, the fact that RESPONDENT was curious to read CLAIMANT's CoC is perfectly understandable. Any person in RESPONDENT's position would also be curious about the contents of the CoC for Supplier which is adopted by CLAIMANT. Especially since CLAIMANT already told RESPONDENT about how it's CoC allows it to monitor its own suppliers [*RE5, p. 41*]. It is also quite natural for any GC member to be curious about this issue, since GC members are free to create their own CoC for suppliers, therefore, the way in which each member exercises this freedom can be of particular interest to other members for the purpose of improving their own codes of conduct for suppliers. Thus, in no way can RESPONDENT's curiosity be construed, in the eyes of a reasonable person, to contradict the fact that it accepted CLAIMANT's General Conditions. At least, it does not amount to a clear indication that RESPONDENT rejects the General Conditions and CoC.

104. Additionally, any argument regarding an alleged failure to read the clear incorporation clause must be rejected. Since a failure to read a clear and conspicuous incorporation clause creates the objective impression that RESPONDENT has accepted CLAIMANT's General Conditions. Which amounts to an intent to accept under the objective test of Art. 8(2) CISG.

b. RESPONDENT's subsequent conduct creates the objective impression that it accepted CLAIMANT's General Conditions.

105. Not only did RESPONDENT fail to "clearly indicate" its objection CLAIMANT's General Conditions as required, its silence also created the impression that it had accepted them. Within its email, RESPONDENT requested the first delivery of goods [*CE5, p. 17*]. When CLAIMANT sent the first batch of goods, it also sent an invoice containing another reference to CLAIMANT's General Conditions [*PO2, p. 52, para. 24*]. RESPONDENT, notwithstanding its obligation to clearly indicate its objection, accepted the goods and paid the invoice with no comments regarding the General Conditions. The Parties have been in a business relationship since 1 May 2014 [*NoA, p. 5, para. 6*], where CLAIMANT sent 20,000 cakes daily with an invoice to RESPONDENT [*CE2, p. 10, Clause 2.1*]. Every invoice sent with the goods delivered on each day, since 1 May 2014 until the deliveries were stopped in 2017, contained a reference to CLAIMANT's General Conditions [*PO2, p. 52, para. 24*]. Aside from the fact that RESPONDENT failed to "clearly indicate" its objection, it's silence regarding the sheer amount of times CLAIMANT has referred to the applicability of its General Condition, before and after the conclusion of the contract, created the objective impression that it had accepted them. This is the only understanding that a reasonable person in CLAIMANT's situation would have.

iii. Conclusion

106. In conclusion, RESPONDENT was supposed to clearly indicate that it does not accept CLAIMANT's General Conditions and Codes of Conduct. The interpretation of RESPONDENT's statements and conducts under Art. 8 CISG shows that it did not make such an indication. The interpretation in fact shows that RESPONDENT's statements and conduct have created the reasonable impression that it has accepted the General Conditions and Codes of Conduct. Therefore, in the eyes of the CISG, RESPONDENT has in fact accepted CLAIMANT's General Conditions and Codes of Conduct.

V. THE CAKES DELIVERED BY CLAIMANT CONFORM WITH RESPONDENT's GENERAL CONDITIONS AND COC PURSUANT TO ARTICLES 35 CISG

107. After CLAIMANT delivered the cakes with the exact specifications, RESPONDENT, refused to perform its sole obligation to pay the price under the allegation that CLAIMANT has

delivered non-conforming cakes due to the fact that part of the cakes were not produced ethically[*CE 6, p. 18*].

108. CLAIMANT is entitled to the outstanding payment of USD 1,200,000 for the delivery of the cakes. The fact that not all ingredients were produced ethically is irrelevant to the issue of conformity under the CISG. Conformity under Art. 35(1) CISG requires an examination of the contract to determine the intent therein with regards to the description of the goods. CLAIMANT shall show how the Parties did not intend to include the production of 100% ethically produced cakes as part of the description of the goods **(A)**. Art. 35(2) CISG offers an alternative test in the event where the contract does not entail such description. CLAIMANT shall show that even an examination under Art. 35(2) CISG will also deem the goods conforming (**B**).

A. The Contract does not require CLAIMANT to deliver ethically produced cakes.

109. Whether or not goods are conforming is governed by Art. 35(1) CISG. connects conformity to what the parties have agreed upon in their contract [*Schlechtriem/Butler, p.114*]. And therefore, this Art. regulates the "subjective defect" that is found in the "*quality, quantity or description*" [*Schwenzer in Schlechtriem/Schwenzer*]. The contract must include express provisions to include non-physical features, such as ethical production, as part of the specifications of the goods [*Schwenzer I; CISG-online Case No. 786 (GER, 2002)*].

110. The rules of interpretation set forth in Art. 8 CISG shall be examined to determine whether or not there were express provisions requiring CLAIMANT to deliver goods with non-physical specifications [*Henschel, p. 168*]. Art. 8 CISG requires the tribunal to determine the parties' intent by assessing the "true intent" found under the subjective test. Should the tribunal not be able to determine this intent, Art. 8(2) CISG includes an alternative objective test in which the intent is determined pursuant to the reasonable person standard. To determine the intent under both tests. Regard is to be given to relevant circumstances pursuant to Art. 8(3) CISG.

111. In the following, CLAIMANT shall show how it did not know and could not have been aware that RESPONDENT intended to include ethical production as part of the description of the goods (**i**). Alternatively, under the objective test, a reasonable person would not have understood such intent (**ii**).

i. There was no subjective intent to incorporate ethical production into the contractual description of the goods.

112. CLAIMANT did not know or could not have been aware of RESPONDENT's intent to entail an obligation on behalf of CLAIMANT to ensure the delivery of ethically produced goods through the reference of the GC Principles.

113. The subjective intent under Art. 8(1) CISG requires determining if the recipient knew or could not have been unaware of the other party's intent [*supra, para. 96*]. In examining the subjective test, RESPONDENT's reference to the GC principles is a circumstance to be considered.

114. GC is a voluntary initiative which calls for its members to conduct their businesses in a way which supports the GC principles. Therefore, it is merely concerned with a member's method of conducting business rather than the relationship of one member to its suppliers. Principle 7, which RESPONDENT takes pride in implementing [*RNA, p. 24*], is the only principle that is vaguely concerned with a member's suppliers. Under Principle 7, businesses should support a precautionary approach to environmental challenges. To do so, a member could for example "*Develop a code of conduct or practice for **its** operations and products that confirms commitment to care for health and the environment*" [*GC Principle 7, emph. added*]. Additionally, a member could develop company guidelines, create a managerial committee and establish two-way communication with stakeholders [*Ibid.*]. There is absolutely nothing under this principle that relate directly to the goods themselves. It is merely concerned with GC members implementing risk management within their own corporation. This Principle is not concerned with the the goods themselves. CLAIMANT's obligation, with regards to its relationship to its supplier, under Principle 7 does not extend past developing a CoC and having its supplier sign it. Consequently, any reference to GC cannot possibly entail an obligation with regards to the goods. This is the reason why CLAIMANT could not have understood RESPONDENT's intent in adding an obligation of results on behalf of CLAIMANT.

115. To conclude, RESPONDENT's references to GC do not create a subjective intent to include ethical production under the conformity of goods, since GC is not involved with the production of goods but rather, the means a party conducts its business operation.

ii. In any event, the objective test set forth in Art. 8(2) CISG leads to the same result

116. Should the Tribunal render the assessment of the subjective test insufficient for the purposes of determining the intent, Art. 8(2) CISG, shall be scrutinized where a party's intent is interpreted through the understanding of a reasonable person in the same position as the other party under the same circumstances [*Farnsworth, p. 96*]. Scholars have also deduced the application of the contra proferentem rule under the objective test [*Honnold, p. 118*] where the party bears the risk of communicating clearly to a reasonable person under the same circumstances as the other party

[*Ibid.*]. The two circumstances to be considered pursuant to the objective test are; the word of RESPONDENT's CoC **(a)** and second, the negotiations between the Parties **(b)**.

a. A reasonable person would not understand that RESPONDENT is intending to impose an obligation on CLAIMANT to ensure the delivery of ethically produced goods through the words of the CoC

117. Respondent alleges that the cakes delivered by CLAIMANT violate paragraphs C and E of the contract. This assertion however is without merit where a reasonable person would not deduce that the contract itself indicates an obligation on behalf of CLAIMANT to guarantee such result.

118. Paragraph C of RESPONDENT's CoC is concerned with the health, safety and environmental management [*CE1, p. 13*]. It obligates CLAIMANT to establish structures and procedures to manage health, safety and environmental risks [*CE2, p. 14*]. In addition, it entails an obligation to ensure its suppliers' adherence to the same requirements. [*Ibid.*]. This obligation does not in any way relate to the description or quality of the goods, as it is merely concerned with the way CLAIMANT is supposed to manage its business. Furthermore, CLAIMANT has ensured its suppliers' adherence the instance its auditor confirmed that the supplier complies through the ISO standards [*PO2, p. 54, para. 33*]. Second, in paragraph E, entitled "Procurement by supplier", the first point under this paragraph states that CLAIMANT will select its own suppliers "*based on them agreeing to adhere to standards* ***comparable*** *to those set forth in this Comestibles Finos' Code of Conduct for Suppliers*" [*CE2, p. 14*]. CLAIMANT has complied with this obligation to the letter, where CLAIMANT's supplier has in fact contractually agreed to follow CLAIMANT's CoC [*EC8, p. 20*]. In RESPONDENT's own words, CLAIMANT's CoC includes provisions that are "*largely comparable*" to RESPONDENT's CoC [*RNA, p. 27, para. 27*]. Furthermore, prior to CLAIMANT's contract with its supplier, CLAIMANT opted to choose a supplier from a country with a good reputation on the market [*PO2, p. 53, para. 32*]. In addition to that, CLAIMANT followed the norm and entered into a contract with its supplier only after an initial thorough audit [*PO2, p. 53, para. 32*] to make sure that the future supplier complies with the standards required.

119. Moreover, a reasonable person reading the words of the CoC would observe it in its entirety. With that being said, regard is to be had to other paragraphs of the CoC to understand the provisions more clearly. In paragraph F for example, entitled "Inspections and corrective actions", RESPONDENT informs its supplier that in case RESPONDENT is of the opinion that its supplier is not adhering to the CoC, the supplier shall take necessary corrective actions as

directed by RESPONDENT [*CE2, p. 14*]. The premise underlying this paragraph is that a supplier has not complied with the CoC, such non-compliance is imagined as engagement in forms of unethical or unsustainable production. Thus the goods delivered to RESPONDENT, during the period from when the noncompliance begins until it is discovered through an audit, would have been produced in an unethical or unsustainable manner and still the contract would stand.

120. The inherent contradiction between the paragraphs underlying the CoC clearly shows that there is an ambiguity in the CoC where each paragraph leads to a different conclusion. Therefore, the tribunal should interpret the CoC pursuant to the *contra proferentem* rule in which RESPONDENT bears the risk of any ambiguity. Consequently, the CoC in its entirety merely obligates CLAIMANT to exert its best efforts in performing the contract and not guarantee any result.

121. In conclusion, the only intent that can be construed from RESPONDENT's CoC pursuant to a reasonable person is that the CoC calls for an obligation of best efforts and not the result of delivering ethically produced goods.

b. Respondent's statements in the negotiation do not show any intent as to the inclusion of ethical production as part of the quality of the goods.

122. In attempting to prove its alleged intent to include ethical production as part of the quality of the goods, RESPONDENT may rely on its statement in the negotiations leading up to the conclusion of the contract. Nevertheless, CLAIMANT shall explain how this allegation is without merit.

123. From the point the Parties met at the cucina food fair [*RE5, p. 41*] up to the conclusion of the contract [*CE5, p. 15*], RESPONDENT made a repeated reference regarding its intent to become a GC LEAD Co. by 2018. This reference is irrelevant to the quality of the cakes or the way they were produced where RESPONDENT's goal in becoming a LEAD Co. will not be harmed should part of the cakes be produced unethically. For RESPONDENT to become a LEAD company, RESPONDENT should show commitment to GC by taking initiative in projects that are concerned with this initiative and by showing leadership in tackling the GC issues [*What is LEAD*].

124. GC regularly demonstrates actions taken by LEAD companies to show other businesses what being a LEAD company entails on a business. Examples of such revolve around the reduction of problems GC is concerned with or the improvement of goals GC aspires to achieve that are also related to the SDGs.

125. One goal targeted by LEAD companies revolves around the supply chain [*LEAD projects*]. Where GC notes that the procurement by the supplier is critical to the GC goals and the ultimate sustainable production [*Supply Chain*]. Irrespective of that, GC itself stresses on the difficulty of this challenge as it is quite possible that businesses are sometimes required to outsource production to suppliers from developing countries that do not share the same view regarding ethical production [*Ibid.*]. Consequently, GC asks its LEAD companies to take part in this challenge by reducing the risks outsourcing from suppliers with no shady background [*Ibid.*]. Nowhere is it indicated that LEAD companies are obligated to guarantee that the outsourcing is 100% sustainable where GC notes that this is the most difficult challenge [*Ibid.*].

126. A reasonable person would not understand from RESPONDENT's intent in becoming a LEAD company that RESPONDENT is obliging CLAIMANT to deliver ethically produced goods since a LEAD company is not required to obligate its suppliers to do so. By examining the projects undertaken by the LEAD companies, it becomes clear that these companies merely do their best in achieving the goals where there is no obligation of results entailed by GC.

127. In conclusion, RESPONDENT's intention to become a LEAD company that has been referenced in the negotiations is irrelevant for a reasonable person with regards to the conformity of the cakes.

c. Conclusion

128. Following an examination through the objective test of Art. 8(2) CISG, it is clear that the reasonable person in CLAIMANT's position would not understand from the contractual provisions in conjunction with the negotiations that ethical production falls within the scope of conformity. Thus, the Parties did not agree upon including ethical production under the conformity of goods.

B. CLAIMANT was not obligated to deliver ethically produced cakes to RESPONDENT by virtue of Art. 35(2) CISG

129. Should the primary rule be insufficient to determine conformity, Art. 35(2) CISG allows for the secondary rule in which conformity is assessed based on the purpose of the good. CLAIMANT shall show how there was no violation of Art. 35(2) CISG. First, the cakes were fit for their ordinary purpose according to Art. 35(2)(a) CISG **(i)**. Second, CLAIMANT was not obliged to deliver ethically produced goods where RESPONDENT never disclosed this requirement **(ii)**. In any event, RESPONDENT could not have relied on CLAIMANT's skill and judgement **(iii)**.

i. The cakes were fit for the ordinary purpose in accordance with Art. 35(2)(a) CISG

130. Irrespective of what RESPONDENT alleges, that the cakes were fit for the purposes for which goods of the same description would ordinarily be used.

131. Should the tribunal deem Art. 35(1) CISG as insufficient to determine the conformity of the goods, the secondary rule in Art. 35(2) CISG shall be used to guide the tribunal [*Henschel, p. 167*]. Art. 35(2)(a) CISG stipulates that the goods shall be conforming when they "*are fit for the purposes for which goods of the same description would* ***ordinarily*** *be used*". This means that the goods should be "*fit for commercial purposes"* [*Schwenzer, Leisinger p. 267*] in which it is possible to resell the goods [*Honnold I, p. 255*] . The ordinary purpose is not influenced by the means the goods were produced [*Schwenzer*, *Leisinger, p. 267*].

132. The cakes delivered by CLAIMANT were fit for the ordinary purpose. The fact that a portion of the ingredients was not produced ethically does not render the cakes as unfit for their ordinary purpose. Pursuant to Art. 35(2)(a) CISG, the description of the goods found in the contract is not related to ethical production where the contract contains no express description that is concerned with ethical production. Since the ordinary purpose is not influenced by the means of manufacturing, the cakes are not just fit for an ordinary purpose, but also, possess the qualities of top quality products [*CE1, p. 8*]. These cakes have been sold since 2014 with no objection by customers prior to the Scandal [*CE7, p. 19*].

133. As a result, RESPONDENT may not allege non-conformity by virtue of Art. 35(2)(a) CISG where the cakes were certainly fit for their ordinary purpose that is in no way relevant to the issue of ethical production which RESPONDENT failed to shed light on in the contractual description.

ii. The cakes were conforming in accordance with Art. 35(2)(b) CISG

134. Art. 35(2)(b) CISG sets an obligation on the seller to deliver goods fit for particular purpose. However, the buyer has to disclose the particular purpose either explicitly or implicitly to the seller at the conclusion of the contract. Yet, no obligation would arise if circumstances show that it was unreasonable for the buyer to rely on the seller's skill and judgement [*Enderlein/Maskow, p. 157*]

a. The Particular purpose was neither expressly nor implicitly made known to CLAIMANT at the conclusion of the contract

135. The cakes were conforming to Art. 35(2)(b) CISG since RESPONDENT did not prove that it disclosed the obligation of delivering ethically produced goods on CLAIMANT's behalf.

136. First, for a party to benefit from the legal consequences of an Art. under the CISG, the party has to solely prove the existence of the factual prerequisites underlying the Art. [*Graffi, p. 240,243*]. With regards to the issue of conformity, the burden of proof "lies with the party who has control of the goods" [*CISG-online Case No. 840 (SUI, 2003)*]. Thus, the burden of proof is tied with the delivery of goods [*Ibid.*]. Thus, the moment the goods are delivered and are in control of the buyer, the buyer has to prove their non-conformity pursuant to Art. 35 CISG [*Ibid.*].

137. Furthermore, The first section of Art. 35(2)(b) CISG is concerned with the particular purpose and if such purpose was made known to seller by the buyer [*Flechtner p. 5*]. One court ruled that the buyer has to make this purpose known to the seller in a "*crystal clear and recognizable way*" [*CISG-online Case No. 654 (GER, 2002)*]. The reason for that is that the seller needs to know before the contract is concluded if he is able to produce such goods [*Secretariat's Commentary, Art .35, para. 9*].

138. In its RNA, RESPONDENT asserts that CLAIMANT has delivered non conforming goods that were not fit for their particular purpose as 50% of the cocoa used was not ethically produced [*RNA, p. 27, para. 26*]. RESPONDENT did not, prove how the guarantee of ethical production became part of the contract. Firstly, there was no express communication made by RESPONDENT that entailed an obligation on CLAIMANT to ensure the delivery of ethically produced goods. In any event there was no implicit communication as well. As RESPONDENT was obliged to disclose the particular purpose to CLAIMANT in a "*crystal clear and recognizable way*", RESPONDENT merely repeated its commitment to GC [*CE1, p. 8; CE5, p. 17*] which as been previously discussed, is irrelevant to the conformity of goods [*supra, para. 114*]. RESPONDENT further noted the importance for CLAIMANT and its supplier to adhere to the highest ethical standards as per GC [*CE5, p. 17*]. CLAIMANT performed this obligation by drafting a CoC which its supplier signed [*NA, p. 7, para. 20*] and carrying out audits [*PO2, p. 53, para. 33*]. The fact that the auditor informed CLAIMANT that its supplier complies to the requirements shows that CLAIMANT performed its obligation of adhering to the highest ethical standards.

139. Consequently, There is no obligation on CLAIMANT to guarantee the production of ethically produced cakes since RESPONDENT failed to disclose such purpose explicitly and implicitly.

b. The circumstances of the dispute show the RESPONDENT could not have relied on CLAIMANT's skill and judgement

140. The seller is not liable when circumstances show that the buyer did not rely or it was unreasonable for him to rely on the seller's skill and judgement [*Art. 35(2)(b) CISG*; *Henschel, p. 171*]. A Seller could be liable when he is more skilled than the buyer [*CISG-online Case No. 1447 (GER, 2006)*]. Thus, a buyer may not rely on the seller's skill and judgement if he is more skilled than the seller. Additionally, a court deemed the goods as conforming notwithstanding the fact that they were not fit for the particular purpose where the seller did not guarantee that he would [*Ibid.*].

141. CLAIMANT rejects the notion brought by RESPONDENT in which CLAIMANT had to guarantee its supplier's adherence to RESPONDENT's CoC where circumstances show that it was unreasonable for RESPONDENT to rely on CLAIMANT's skill and judgement. The record is clear on the fact that RESPONDENT is more knowledgeable than CLAIMANT with regards to ethical production and compliance to ethical standards. RESPONDENT made it clear that it is planning on becoming a GC LEAD company in 2018 [*CE1, p. 8, para. 3*]. In addition to that, RESPONDENT has been a member since 2002. CLAIMANT however is merely an ordinary member and has been so for five years [*PO2, p. 54, para. 34*]. In those five years, there were no reported violations of the GC principles on CLAIMANT's behalf [*PO2, p. 54, para. 34*] where CLAIMANT's auditor uses two ISO standards to audit CLAIMANT's supplier [*Ibid.*]. With a difference between the level of skill each party has, RESPONDENT could not have relied on CLAIMANT's skill and judgement in monitoring its supplier where RESPONDENT could have avoided the dispute by asking CLAIMANT to appoint an auditor experienced with examining the suitability of certification [*PO2, p. 54, para. 33*].

142. In conclusion, the cakes delivered by CLAIMANT were conforming pursuant to Art. 35(2)(b) CISG where RESPONDENT could not have reasonably relied on CLAIMANT's skill and judgement in monitoring its supplier.

C. Conclusion.

143. The contractual relationship between the Parties had been scrutinized pursuant to Art. 35 CISG. CLAIMANT has complied with its obligations in accordance with the agreement. The fact that RESPONDENT is alleging non-conformity is irrelevant where the Parties did not agree upon that nor did they intend to include ethical production as part of the contract. In any event, the standard rules for conformity under Art. 35(2) CISG also deem the cakes as conforming.

PROCEDURAL REQUEST

On the basis of the foregoing submissions, CLAIMANT kindly requests the Tribunal to refrain from hearing the Challenge as it falls under the jurisdiction of an Appointed Authority designated under Art. 6 of the UNCITRAL Rules.

In the alternative where the Tribunal finds that it does have the authority to hear Mr. Prasad's challenge, CLAIMANT kindly requests the Tribunal to find that Mr. Prasad should participate in the decision.

PRAYERS FOR RELIEF

On the basis of the foregoing submissions, CLAIMANT respectfully seeks the following:

1) CLAIMANT kindly request the Tribunal to reject the challenge of Mr. Prasad in the event where the Tribunal finds that it has the authority to hear the challenge.

2) CLAIMANT respectfully requests the Tribunal to declare that the contract is governed by CLAIMANT's General Conditions and Codes of Conduct and to dismiss RESPONDENT's claims for non-conformity.

   In the alternative where the Tribunal finds RESPONDENT's General Conditions and Code of Conduct to be applicable, CLAIMANT kindly requests the Tribunal to declare that the goods are conforming to the contract and therefore to dismiss RESPONDENT's claims of non-conformity.

Certificate

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

Amer Abu-Sham	Leen Amro	Nadeen Abawi
(Signed)	(Signed)	(Signed)