TWENTY FIFTH ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRAION MOOT

Carthage University

Faculty of Legal, Political and Social Sciences of Tunis

Memorandum for RESPONDENT

On behalf of	Against
Delicatesy Whole Foods SP	Comestible Finos Ltd
Equatoriana	Mediterraneo
CLAIMANT	RESPONDENT
Achref Medini	**Khawla Mraydi**
Malek Zakraoui	**Yesmine Ben Mabrouk**

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&	And
AAA	American Arbitration Association
Art. / Arts.	Article / Articles
BGH	Bundesgerichtshof (German Federal Court of Justice)
C	CLAIMANT's Exhibit N.
CILSA	Central Iowa Library Service Area
CISG	United nations convention on contracts for the international Sale of Goods
CL's memo	CLAIMANT's memo
CPHRFF	Convention for the protection of Human Rights and Fundamental Freedoms
Cucina	Cucina Food Fair
DAL	Danubian Arbitration Law
ECHR	European Convention on Human rights
GC	General Conditions of sale
IBA	International Bar association guidelines
ICC	International Chamber of Commerce
ICSID	International center for settlement of investment dispute
i.e.	That is
LCIA	London Court of International Arbitration
Mr.	Mister
Ms.	Miss
N.	Number
NAFTA	North American Free Trade Agreement
NOA	Notice of Arbitration
NOC	Notice of Challenge
p.	Page
Para. / paras.	Paragraph / paragraphs
PCA	Permanent court of arbitration
PECL	Principles of European contract Law
PO1	Procedural order N.1
PO2	Procedural order N.2

S.C	Standard Conditions of sale
SRC	Socially Responsible Corporation
TPF	Third party funder
T.docs	Tender documents
UCC	Uniform Code of Commerce
UDHR	Universal Declaration of Human rights
UNCITRAL ML	UNCITRAL Model Law on international commercial arbitration of 1985
UNIDROIT	International institute for the unification of private law
UNUDHR	United nations universal declaration of human rights
UPICC	UNIDROIT *(International Institute for the Unification of Priva te Law)* Principles of International CommercialCont
USD	United States Dollar
V.	Versus

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SERBIA

Crystal sugar case

20070710

Serbia

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BUYER'S COUNTRY: Germany (plaintiff)

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STATEMENT OF FACTS

The parties to this arbitration are Delicatesy Whole Foods Sp (hereafter CLAIMANT) and Comestibles Finos Ltd (hereafter RESPONDENT). **CLAIMANT** is a medium sized manufacturer of fine bakery products registered in Equatoriana and a member of Global Compact. **RESPONDENT** is a gourmet supermarket chain operating in Mediterraneo and a Global Compact member, and has zero tolerance policy towards unethical business behavior.

The parties met for the first time at *Cucina* in March 2014 where RESPONDENT expressed its intention to become a Global Compact LEAD company by 2018.

10 March 2014: RESPONDENT sent a tender package; an Invitation to tender to CLAIMANT and four other of businesses it met at *Cucina* where it attached its own S.C.

27 March 2014: CLAIMANT submitted its tender conformingly to the tender offer and only suggested amendments concerning the quantity of the cocoa beans and the mode of payment.

07 April 2014: RESPONDENT accepted the tender-offer and the amendments concerning the quantity and the mode of payment.

01 May 2014: RESPONDENT and CLAIMANT made their first delivery in accordance with RESPONDENT's S.C.

2016: Publication of Mr. Prasad's article which is suitable for CLAIMANT's interests.

23 January 2017: Publication of a report about illegal cocoa farmers by one of the most important and leading business newspapers in the country, which led RESPONDNENT to properly investigate the issue before making any hasty judgments.

27 January 2017: RESONDENT gave CLAIMANT a sufficient notice of termination of the contract in case CLAIMANT has breached its contractual obligation in hiring an illegal cocoa supplier. The email sent by RESPONDENT merely demanded a confirmation that CLAIMANT was not involved in the corruption scheme, thus CLAIMANT was offered a chance to defend itself.

30 June 2017: RESPONDENT refused any attempt to settle because of CLAIMANT's breach of contract and lack of professionalism. CLAIMANT initiated arbitral proceedings against RESPONDENT.

29 August 2017: Mr. Langweiler requested the disclosure of the TPF.

07 September 2017: Mr. Fasttrack affirmed the existence of the TPF.

14 September 2017: After becoming aware of the partiality and dependence of Mr. Prasad, RESPONDENT submitted a NOC against him.

21 September 2017: Mr. Prasad's refused to acknowledge the numerous circumstances that justified RESPONDENT doubts on his bias.

29 September 2017: CLAIMANT refused to agree to the removal of Mr. Prasad in an attempt to derail and to delay the Arbitral Proceedings.

INTRODUCTION

1. The beginning of the relationship between the parties dates back to 2014 where RESPONDENT discussed its need of ethical sustainable products with several businesses in Cucina. Later on, it sent a tender to all potential companies and CLAIMANT was the chosen one as it committed to RESPONDENT's S.C "*in accordance with the specified requirements*". Unfortunately, and to its deceiving surprise, RESPONDENT found out that it has been misguided the whole business relationship when CLAIMANT supplied RESPONENT with goods contrary to its most basic business values.
2. RESPONDENT who is a socially responsible company, to whom it is vital to live up to honor its moral commitments to global compact principles, aspiring to become a leading company in the sphere of SRC, and whose' concern is to live up to the expectations of its customers, was afraid of its name being brought up in a future big campaign raising targeting illegal cocoa farmers which threaten the environment in a deforested area . As a reasonable reaction, RESPONDENT immediately sought to destroy any connection it may have had with the fraudulent cocoa supplier. The resort to arbitration was made inevitable by CLAIMANT refusal to accept the end of the business relationship according to the terms of the contract.
3. Due to Mr. Prasad's lack of impartiality and independence, RESPONDENT exercised its legitimate right to a fair trial by challenging his appointment as part of the arbitral tribunal. Moreover, RESPONDENT sought a decision by the arbitral tribunal that guarantees having the dispute settled by a panel of neutral arbitrators.
4. Firstly, the arbitral tribunal should decide that it has the authority to decide on the challenge of Mr. Prasad (**ISSUE1**).
5. Secondly, RESPONDENT challenges CLAIMANT's appointed arbitrator basing its argument on his lack of impartiality and independence
6. Thirdly, CLAIMANT's alleges that the contract is governed by its S.C even though RESPONDENT insisted since the first time they met on the application of its own S.C & code of conduct (**ISSUE3**).
7. Fourthly, CLAIMANT was bound by a duty to achieve a specific result under the contract governed by the general conditions of RESPONDENT, which it failed to observe in delivering non-conforming chocolate cakes under art 35 CISG (**ISSUE 4**).

ARGUMENT

ISSUE 1: THE ARBITRAL TRIBUNAL HAS AUTHORITY TO DECIDE ON THE CHALLENGE

8. The Arbitral Tribunal is requested to decide on whether it has the authority to decide on the challenge of Mr. Prasad. In this case, the respect of the arbitration agreement would give the Arbitral Tribunal the authority to decide on the challenge of Mr. Prasad. We will therefore, start the argument by arguing first, that the Arbitral Tribunal should have the authority to decide on the challenge of Mr. Prasad **(I)**. Second, under no circumstances Mr. Prasad should participate in his own challenge decision **(II)**.

I. The arbitral tribunal should decide on the challenge of Mr. Prasad as it is required under the arbitration agreement

9. The application of the arbitration agreement would grant the authority to decide on the challenge of Mr. Prasad to the Arbitral Tribunal as the parties explicitly excluded institutional arbitration in their agreement (**A**). Moreover, their common intent was to keep the arbitration proceedings confidential (**B**).

A. The parties explicitly excluded institutional arbitration in their agreement

10. The arbitration agreement included an explicit exclusion of the involvement of any arbitral institution in the arbitration proceedings [C2, "*T.docs", p.12. clause 20*]. This exclusion was the expression of both RESPONDENT and CLAIMANT's will to keep the dispute away from the participation of arbitral institutions and the risks this may have on the confidentiality of the proceedings [*R5, p.41*].
11. Furthermore, if we were to follow CLAIMANT's allegations about the "compatibility" between the authority of the appointing authority and the requirements of the arbitration agreement as CLAIMANT stated that a natural person could be appointed as an appointing authority. Under Art. 6 UNCITRAL Arbitration Rules "*In case the parties have not reached an agreement on an appointing authority within 30 days following a proposal of one or more institutions or persons, one of whom would serve as appointing authority*". In fact, there is still a need to invoke the secretary-general of the PCA as it is the default designator of the appointing authority.
12. It is important here to note that the PCA is one of the rare arbitral institutions that constitutes an international organization set up by treaty [*Gerbay*]. Thus, the secretary-general of the PCA represents the arbitral institution and his involvement in designating the appointing authority would mean the involvement of the institution itself.

13. We may agree with a part of CLAIMANT's argument that having an appointing authority decide on the challenge of Mr. Prasad is not incompatible with the arbitration agreement but the designation of the appointing authority itself would involve the participation of arbitral institution which means a clear violation to the parties' arbitration agreement.
14. Besides, the definition of ad-hoc arbitration excludes any participation of an arbitral institution. Ad hoc arbitration may be defined as a form of arbitration in which the participants include only the tribunal and the parties to the disputes i.e. CLAIMANT and RESPONDENT, and where the parties and the tribunal alone are responsible for organizing their procedure [*Kluwer Law International*]. On the other hand, Institutional arbitration, may be defined by adding one additional participant i.e. the arbitral institution. Some scholars tend to define ad hoc arbitration by stating that it is conducted without the benefit of an appointing or administrative authority and it is subject only to the parties' arbitration agreement. In the case at hand, the parties selected ad-hoc arbitration as a method to resolve their dispute [*R5, p.41*] so CLAIMANT's allegation that an appointing authority should decide on the challenge of Mr. Prasad is contradictory to the most basic definition of ad-hoc arbitration.
15. Nevertheless, the principle of party autonomy emphasizes the importance of determining the will of the parties. Party autonomy was described by the authors Redfern & Hunter as the "guiding principle" in determining the procedure to be followed in an international commercial arbitration. This principle has been endorsed both in national and international laws and by many international arbitral institutions [*Redfern & Hunter*].party autonomy would be disrespected if the tribunal disregards the parties' arbitration agreement. Party autonomy is a key element of the arbitral process*[Lew/Mistelis/Kröll,; Born; McIlwrath/Savage,]*.The parties made use of their party autonomy by jointly excluding the involvement of arbitral institutions [C2, "*T.docs", p.12. clause 20*]. Hence, if the arbitral tribunal decides to simply ignore the parties' will it would constitute a violation to the party autonomy principle.

B. The common intent of the parties was to keep the arbitration proceedings confidential by excluding institutional arbitration

16. RESPONDENT clearly expressed its intention to keep the arbitration proceedings confidential. [*R5, p.41*]. In fact, RESPONDENT expressly told CLAIMANT that they have changed from institutional arbitration to ad hoc arbitration due to a bad experience related to the confidentiality of the proceedings. CLAIMANT acknowledges in its

memorandum that RESPONDENT's intention of excluding institutional arbitration was "only related to previous confidentiality problems" and that even if the parties' exclusion of the involvement of an appointing authority were to be applied, this will not apply to challenges "due to its extraordinary nature"[CL's memo, *p.5, para.16*].

17. It is important to emphasize on the dangerousness of such an allegation; according to CLAIMANT it would be fine to simply disregard the parties' common intent i.e. keeping the arbitration confidential for the sake of "an exceptional treatment" wanted by it. First, it is necessary to demonstrate that there is nothing extraordinary about the challenge procedure, it has rather an administrative character. Second, it is quite a common procedure, since it practically exists in all arbitration laws. [*AAA International arbitration rules arts.8,9,10, German Institute of arbitration DIS section 12, 1998 ICC Arbitration Rules arts. 7,11,12, ICSID Arbitration Rules rule.9*]. It is legitimate therefor to defend the idea that there is nothing exceptional about the challenge of arbitrators, it is an important mechanism of granting the parties' rights to neutral and impartial arbitrators and that is the reason it was incorporated in almost all domestic and international arbitration laws.
18. Moreover, CLAIMANT alleges that under the clear wording of the Arbitration Agreement, a natural person could be appointed as an appointing authority to decide on the Challenge [*CL's memo , p.3, para.1.1.1.1*]. CLAIMANT seems to reduce the issue to whether the appointing authority should be a natural or moral person whereas both the clear wording of the arbitration agreement and CLAIMANT's conduct reflects that the parties excluded the appointing authority mechanism set forth in Art.13 (4) UNCITRAL Arbitration Rules.
19. In ad hoc arbitration if the parties don't insert a statement relating to the selection of the arbitrator and the resolution of the issue in case either party does not make its choice of selected arbitrator, it is up to the appointing authority to select the arbitrators [*Margaret L. Moses*].
20. In the case at hand the parties have included a statement setting up the selection process [*C2, "T.docs", p.12. clause 20*]to which they complied by selecting their party-appointed and presiding arbitrator. Therefore, the clear wording of the contract indicates that the parties have indirectly excluded the resort to an appointing authority.
21. Further, the conduct of CLAIMANT reaffirms the exclusion of the resort to an appointing authority as it did not leave it to the appointing authority to choose the replacement arbitrator whereas under Art 11(3) it is up to it to revoke any appointment already made

and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.

22. Thus, we can conclude from the above that both CLAIMANT and RESPONDENT intended to keep the proceedings confidential by excluding any participation of institutional arbitration.

II. Under no circumstances Mr. Prasad should participate in his own challenge decision

23. The arbitral tribunal should not allow the participation of Mr. Prasad in his own challenge decision. The opposite case would constitute a violation to "natural justice" principles (**A**). Besides, contrary to CLAIMANT's allegations, art.13 (2) DAL does not state that the full arbitral tribunal decides on the challenge (**B**)

A. The participation of Mr. Prasad would constitute a violation to "natural justice" principles

24. The principle of *Nemo judex in causa sua* is one of the important pillars of natural justice. This principle suggested that a person should not be a judge in his or her own cause. In other words, this element provides that a judge should be impartial and neutral and in a position to apply his mind objectively In fact, "It is essential that justice not only be done, but must also ensure that it is implemented" [*Lord Hewart R V. Sussex Justice*].
25. Moreover, it is relevant in this case to define natural justice as a doctrine that pervades the procedural law of arbitration as its observance of fair play in action. In fact "Procedural fairness and regularity are indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied" [*R. Jackson U.S Supreme Court, J Shaughnessy v. United States*].
26. The doctrine of natural justice seeks not only to secure justice but also to prevent miscarriage of justice. In addition, the parties have a fundamental right to due process and equal treatment. The notion of fair trial is fully accepted and recognized by all major jurisdictions and international instruments. They are considered as part of "natural justice". Together, these essential values have been said to form part of the "procedural Magna Carta of arbitration" and have been termed "basic principles that inform transnational procedural public policy" [*Schwarz & Konrad*].
27. Nowadays, art.6 of the European convention on human rights grants the protection of the right to a fair trial. The *Swiss Bundesgericht*, for instance, held, although Art.6 ECHR does not directly apply in arbitration proceedings, the arbitral tribunal must nevertheless respect fundamental rules of due process. Thus, the participation of Mr. Prasad in the

decision-making of his own challenge would constitute a violation to RESPONDENT's right to a fair trial contrary to CLAIMANT's idea that we can sacrifice what is right for the sake of the "exceptional nature" of the challenge.

B. Art.13 (2) DAL does not state that the full arbitral tribunal decides on the challenge

28. Art.13 (2) of the UNCITRAL ML provides, that after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance giving rise to justifiable doubts about the independence or the impartiality of an arbitrator, the challenging party shall seek a decision from the arbitral tribunal if the challenged arbitrator did not withdraw from his office. In fact, if the *lex arbitri* is based on the UNCITRAL ML, then the arbitral tribunal decides the challenge. In the situation at hand, the deadlock created regarding the applicability of the UNCITRAL Arbitration Rules, makes the model law the adequate law to resolve the dispute.
29. To go in depth within the above-mentioned article, it is important to note that the article itself never included anything about "the full" arbitral tribunal nor did it exclude the challenged-arbitrator from the decision making-process. It was not indeed specific enough unlike CLAIMANT's allegation that the article did authorize the participation of the challenged arbitrator *[CL's memo p.7 para.24*].
30. Art.13 (2) merely attributes the power to decide on the challenge in a first phase, to the arbitral tribunal. CLAIMANT is attempting to make the law stipulate something that it did not intend to do. In this regard, the drafters of the model law reported that the challenging party shall seek a decision by the arbitral tribunal as a preliminary procedure before the court intervention over the case. In the absence of an express provision regarding the participation or the exclusion of challenged arbitrators some domestic arbitration laws expressly excluded the challenged arbitrators from participating on his own challenge decision e.g. Guatemala and Peru [*Guatemala's Decree No. 67-95 of 1995 art. 17(2); Peru's Arbitration Act 2008 (Legislative Decree No. 1071) art. 29(2)(d)(ii)*].
31. Furthermore, the challenged party does not have to stand before the tribunal to defend himself. Although the challenge procedure forms part of the arbitral proceedings, which is, by its nature, contentious, the challenge procedure is not adversarial. The fact that the challenged arbitrator and all other persons involved in the arbitration is given a chance to comment on the challenge does not make them generally stand in adversarial positions. "*That is why neither the arbitrator nor the challenging party appears before the*

institution in defense of their position" [*Koch*]. Consequently, the decisions on challenges have an administrative character rather than a judicial one.

32. Moreover, among the main arguments for excluding the challenged arbitrators we can find the follow: First, it is difficult to expect an arbitral tribunal to be objective if its challenged arbitrators participate in the decision-making [*Report of the Working Group on Arbitration*]. Second, no one should be allowed to be his/her own judge. Third, the self-policing feature of the arbitral process should be qualified by the principle that "only the non-challenged arbitrators can decide on the challenge" [*Daele*]. Fourth, Judges are prohibited from deciding on challenges to themselves. The same rule should apply to arbitrators, notwithstanding the differences between litigation and arbitration. This is because all parties expect the adjudicators of their disputes whether judges or arbitrators to be independent and impartial [*Rubins & Lauterburg*]. Furthermore, arbitral awards have "*the same force*" as court judgments. Arbitral integrity and legitimacy should take precedence over arbitral expediency and efficiency. Public confidence is crucial for the utility and longevity of the arbitration system.
33. To shield the arbitral proceedings from the unfairness of the participation of the challenged arbitrator on his own challenge, The ICSID's rules introduce a certain compromise inspired by UNCITRAL Model Law, which is compatible with the principle of *nemo iudex in causa sua*. Accordingly, only if the challenge is directed at one or at a minority of the arbitrators, will it be decided by the majority of all other arbitrators in the absence of the arbitrator concerned. In all other cases, if the challenge relates to a sole arbitrator or to the majority of an arbitral tribunal, will it be decided by the Chairman of the ICSID Administrative Council. ICSID has avoided the unfortunate solution of the Model Law, by leaving the decision on the challenge with the arbitral tribunal for as long as it is consistent with the notion of justice being seen to be done [*Koch*].
34. If we were to consider CLAIMANT's allegation that a panel of three arbitrators should decide on the challenge of Mr. Prasad. There is a solution that should be considered by the arbitral tribunal; the substitute arbitrator Ms. Chian Ducasse who was appointed by CLAIMANT [*PO1, p.48*]. In fact, she can replace the challenged arbitrator in the decision-making process, such a decision would be beneficial for both CLAIMANT and RESPONDENT. First, because CLAIMANT would have a legal representative of his choice to decide on the challenge of Mr. Prasad as he wished [*CL's memo, p.11 para.44*].

Second, RESPONDENT's right to a fair trial and to the application of natural justice principles i.e. to have the dispute decided by a neutral arbitrator would be granted as well.

CONCLUSION OF THE FIRST ISSUE

35. In view of the above, RESPONDENT respectfully asks the tribunal to hold that it does have the authority to decide on the challenge of Mr. Prasad and that He should not participate on the decision of his own challenge because that would be a violation to natural justice principles.

ISSUE 2: MR. PRASAD SHOULD BE REMOVED

I. Mr. Prasad's removal safeguards the integrity of the arbitral proceedings

36. Due to the various existing circumstances that give rise to justifiable doubts on the dependence and partiality of the arbitrator (A), it is important to refer to the predominant usages and therefore the IBA Guidelines should be applied (B) in deciding Mr. Prasad's removal whose disclosure duty does in no way override his duty to investigate (C).

A. The arbitral tribunal should remove Mr. Prasad due to the justifiable doubts on his dependence and partiality

37. Tribunal's power to remove Mr. Prasad safeguards the integrity of these proceedings and does not infringe on CLAIMANT's right to an arbitrator of choice. In order to promote the integrity of the proceedings and the tribunal's legitimacy, a tribunal may exercise its powers to limit a party's right to choose an arbitrator [*Hrvatska*], this right is not an absolute one and it can be restricted when necessary to safeguard conflicting rights [*Waincymer; Born ;Lubowitz, ; Wheat V. US; US V. Gipson; US v. Hobson*].

38. The right to an independent and impartial tribunal is mandatory [*Holtzmann; Neuhaus*] and ensures the integrity & fairness of the arbitral process [*Born*; *Art.6 CPHRFF*].

39. Because Arbitrator's "*source of authority*" is derived from "*the parties' consent and the parties' trust*", it is logical that both parties fully recognize the arbitrator's legitimacy by investing in him their full trust [*Mourre*].

40. In contrast, if one of the parties loses this fundamental premise to an arbitrator's legitimacy, the arbitrator should be removed from the arbitral tribunal as he lost the core element that sustains the arbitration practice, which is trust and could rightfully challenge the award [*Mourre*].

41. In the case at hand, and due to the numerous circumstances existing between Mr. Prasad and CLAIMANT, RESPONDENT appeals to the right of due process and the right to a fair trial recognized by the Art. 10 of the UDHR, which includes the right to be heard by

"an independent and impartial tribunal". Since justice must, as a basic principle, beyond all suspicion as to any lack of independence and impartiality, no matter whether it is administered by the courts or an arbitral tribunal [*Jaksic; David*].

42. The suspicion generated by the multidimensional connections of the challenged arbitrator even if he is convinced that no risk of bias exists, it is not the challenged arbitrator's subjective judgment that decides over the challenge, but the existence of justifiable doubts from the perspective of the challenging party. The tribunal when assessing the situation should balance the parties' interests and the consequences of the removal, which in this case could only provide the arbitration process with legitimacy and justice.
43. This echoes the well-known dictum of Lord Hewart C.J. in *the Sussex case* which states: "it is not merely of some importance but is of fundamental importance justice should not be only done, but should manifestly and undoubtedly be seen to be done".
44. Therefore, Mr. Prasad's removal should be warranted for 'prudential' concerns to ensure the arbitration's perceived legitimacy [*Bernasconi-Osterwalder, Johnson, Marshall*].

B. The IBA Guidelines should be applied

45. In essence, ethical rules for arbitrators should not be regarded as absolute, but merely collective creation of generally accepted standards [*Fouchard, Bühler, Weigand, Ball, Introduction on IBA Guidelines*].
46. Commonly, an arbitration clause which simply includes an unequivocal agreement to finally resolve all disputes connected with the contract by arbitration would be sufficient in many jurisdictions, notwithstanding the fact that it leaves many questions unanswered, the IBA Guidelines has been proven to fill the gaps and give guidance relating to various situations. Because of the exclusion of the application of Art. 13(4) UNCITRAL Arbitration Rules the arbitral tribunal should take into account the IBA Guidelines.
47. Parties and tribunals often refer to the IBA-Guidelines in case of missing specific rules/ laws on transparency in arbitral proceedings, In *ICS Inspection v. Argentina*, the tribunal noted that "*[a]lthough the IBA Guidelines have no binding status in the present [UNCITRAL] proceedings, they reflect international best practices and offer examples of situations that may give rise to objectively justifiable doubts as to an arbitrator's impartiality or independence*".
48. Most international arbitrators consult the Guidelines whenever they must exercise their judgment on disclosure of conflict of interest. The report notes that courts are increasingly referring to the Guidelines when called upon to decide on challenges to arbitrators. In addressing an argument by the respondent, the High Court in *ASM Shipping case*

commented that the IBA Guidelines are to be applied with robust common sense without unduly formulaic interpretation.

49. In *Switzerland, the Federal Supreme Court* held that the IBA Guidelines are "a valuable working tool to contribute to the uniformization of standards in international arbitration in the area of conflicts of interest. As such this instrument should impact on the practice of the courts and the institutions administrating arbitration proceedings".
50. The IBA Guidelines establish a high level of basic principles shared by a mutual or even global international consensus, they provide more predictability and legal certainty for the conduct of the arbitral procedure, thereby eliminating what has been called the 'dark side of arbitral discretion' The dark side of all this [*arbitral*] discretion lies in the discomfort that a litigant may feel when arbitrators make up the rules as they go along, divorced from any precise procedural canons set in advance" [*Berger; IBA Guidelines*].
51. *"Arbitral tribunals may also apply the Guidelines in their discretion subject to any applicable mandatory rules, if they determine that they have the authority to do* so" it can provide guidance to determine whether doubts are objectively reasonable [*Scherer*].

C. RESPONDENT's duty to investigate does not override Mr. Prasad's duty to disclose

52. CLAIMANT mentioned that RESPONDENT's challenge is time-barred because the time limit of 15 days was surpassed [*CL's memo, para.91, p.21*], relaying in its reasoning on the parties' duty to investigate, while the duty imposed to the parties is true it does not prevail nor substitute the arbitrator's obligation to undertake a comprehensive investigation to provide a full disclosure. There ought not to be an overriding obligation to make inquiries to determine if the arbitrator is holding something back [*Rogers*].
53. Indeed, facts and circumstances cannot be ignored in analyzing an arbitrator's independence and impartiality, all relevant facts must be considered, even if they were previously known to a party and did not result in a challenge. they should be interpreted in light of the entire factual setting [*Born*], the strict time limit requirement should be relaxed when events subsequently arise or are discovered that add force to or confirm that party's initial concerns should be relied upon [*LCIA decisions; Calvo; Derains& Schwartz*]
54. It is the parties' rights to at least consider the matter must be respected is a most sensible direction. The arbitrator should not decide for the parties but should give them an opportunity to consider any matter that might be legitimately of concern to an independent observer. The obligation to notify may be higher, the more serious the factors under consideration. French courts have considered that the duty is to be determined 'with

regard to the notoriety of the situation giving rise to the challenge and to its reasonably foreseeable impact on the arbitrator's decision.'

55. The arbitrator should not rely on the fact that his or her activities or connections are in the public domain because they are easily identifiable through a quick internet search or otherwise known to the parties or their counsel. Indeed, disclosure also serves to protect the arbitrator and the arbitration from challenges and if no disclosure is made, the arbitrator will often not be in a position to establish actual knowledge by the party raising the challenge of that circumstance. Also, where the arbitrator had an actual duty to disclose, the fact that the information is in the public domain normally does not excuse a breach of his or her duty [*Verbruggen*].
56. *The French cour de cassation* refused to require a party to investigate and discover matters which an arbitrator should have disclosed, this illustrates the vision that it is up to the nominated arbitrator to make reasonable inquiries to investigate any potential circumstances that might cause a party to question his independence or impartiality, and an article that expresses a defined position on the subject-matter of the cases is definitely something that should have been disclosed expressly by Mr. Prasad.
57. The *Tecnimont case,* decided by the *Paris Court of Appeals*, should also serve a signal for prospective arbitrators and for multinationals law firms to have conflict-checks conducted in the most exhaustive way possible, and disclose any link there may exist between the arbitrator's law firm and any of the parties or their affiliates, incomplete disclosure may sometimes appear worse than non-disclosure
58. Concerning the time limit imposed by the UNCITRAL Arbitration Rules, even though its aim is to assure rapid and efficient decisions, it should not become an obstacle to justice, a fair trial by an uncompromised tribunal is a timeless right, accordingly, the arbitral tribunal should take into consideration the subsequently-discovered fact by RESPONDENT and decide to rely on it to remove Mr. Prasad who did not fully commit to both his duties; investigate and disclose.

D. Mere disclosure does not exonerate Mr. Prasad

59. These guidelines represent what is considered best practice in international commercial arbitration. For instance, all business contacts to a party or to other arbitrators, as well as prior knowledge of the dispute, must be disclosed [*Musielak-Voit]*.
60. RESPONDENT concludes that CLAIMANT's refusal to apply the IBA Guidelines comes mostly from the fear of the application of General Standard 7 (a) stipulating that a Party has to disclose that it is funded by a third party. CLAIMANT has deliberately not done so

to conceal the occurrence of obvious circumstances of conflict of interest coming from Mr. Prasad's contacts, in doing so CLAIMANT suppressed RESPONDENT's right to oppose the initial appointment of the challenged arbitrator failure to disclose relevant facts by itself constitutes a ground for disqualification, disclosure cannot exonerate [*Berger*].

61. The duty to disclose is an obligation spelled out in General Standard 7(a) IBA Guidelines. That Standard may be regarded as a general procedural principle that applies even if the IBA Guidelines are not directly applicable in a given case. Failure to do so can be seen as a waiver by that party of the right to challenge that arbitrator on the ground of that relationship or fact [Berger]. An arbitrator should not be entitled to refuse to investigate in order to be sheltered from knowledge of a potential conflict. Such an approach would be contrary to IBA Guidelines General Standard 7(b).

II. Existence of justifiable doubts regarding Mr. Prasad's independence and impartiality under UNCITRAL Arbitration Rules and IBA Guidelines

A. The existence of justifiable doubts on Mr. Prasad's dependence and partiality is undeniable

62. Pursuant to the meta-data retrieved from the word document [*NOC, para.2, p.38*], the existence of justifiable doubts is undeniable. Even though the challenged arbitrator had no knowledge of the comments made by Mr. Fasttrack, it nevertheless showcases the real intentions behind his appointment, i.e, his classical view on the Art.35 and his past relations with his law firm.

63. Furthermore, the non-disclosure of the existing connections between Mr. Prasad and Findfunds LP is an infringement of their obligation "to take the initiative and to provide information about a known relationship of the nominee with another member of its group or other circumstances that the party thinks might be relevant for the nominee's decision to disclose" [*Berger*], this only reinforces RESPONDENT's belief of the existence of partiality and dependence which is stressed by CLAIMANT's attempt to conceal such connections to anticipate their appointed arbitrator's challenge.

64. The evaluation of independence and impartiality under the justifiable doubts standard has to be subject to a strict review [*Holtzmann/Neuhaus; Eastwood; Gearing; Cane/Shub; Svea Court*]. The rationale behind this lies in the consensual nature and the lack of appellate review in arbitration [*Commonwealth Coatings case*], together with the paramount importance of arbitrators' independence and impartiality as hallmarks of international arbitration [*Redfern et al; Schwarz/Konrad; Born ; Swedish Supreme Court; van den Berg ; Jaksic; David*].

65. The Working Group uses the wording "impartiality or independence" derived from the broadly adopted Article 12 of the UNCITRAL ML, and the use of an appearance test, based on justifiable doubts as to the impartiality or independence of the arbitrator, as provided in Article 12(2) of the UNCITRAL ML, to be applied objectively (a 'reasonable third person test')", which entails that doubts that are substantiated and justifiable in the eyes of a reasonable and fair-minded person can meet the standard of justifiable doubts thus, the test should be objective [*Mourre; Fouchard*].
66. RESPONDENT, in the light of the "*totality of circumstances*" [van den Berg ; Luttrell; Brubaker] is calling for the removal of Mr. Prasad because of his apparent conflicting interest, which is " regularly interpreted" [*Heider, Nueber*] as sufficient cause to create "*justifiable doubts*" about the independence and impartiality of an arbitrator [*Fouchard*].
67. In a relatively recent decision in a NAFTA dispute, Gallo v. Canada (2009), The case, stated that '*under the UNCITRAL Arbitration Rules doubts are justifiable [...] if they give rise to an apprehension of bias that is, to the objective observer, reasonable'* [Bernasconi-Osterwalder, Johnson, Marshall].
68. An application of the objective and strict test of the reasonable person would conclude that Mr. Prasad's numerous connections whether direct or indirect raises actual and justifiable doubts on his independence and impartiality**,** acknowledging the appearance of bias as ground for his dismissal supports the parties' confidence in the arbitrators, otherwise it undermines the efficiency of arbitration and might delegitimatize its award.

B. Mr. Prasad is dependent and partial

69. In the present case, Mr. Prasad had been appointed twice before by Mr. Fasttrack's law firm and two times by Findfunds LP, one of Mr. Prasad's partners is acting for a client in an arbitration which is funded by Findfunds LP. Taken together they leave no doubt that in the eyes of a reasonable person in RESPONDENT's situation there are justifiable doubts as to Mr. Prasad's independence (**1**) and impartiality (**2**).

1. Mr. Prasad has multiple sources of dependence Under UNCITRAL Arbitration Rules

a. Law firm conflicts

70. Some courts and appointing authorities adopting fairly strict prohibitions against any connection between an arbitrator's law firm and the parties to arbitration [*LCIA decision*; *Schmitz case*; *Beebe Med. Case*].
71. According to the Court one partner is always acting in the name of all other partners. Therefore, every client is not only counselled by one partner, but by the entire law firm

and in the name of all other partners, so the number of partners is irrelevant in this matter as long as they hold the title of partner, they represent the firm and the rest of the partners, Mr. Prasad and his new partner are both equity partners in the newly merged law firm.

72. One of the main concerns about this relationship with Mr. Prasad's law firm is the existence of the expectation of a future representation for the client, which demonstrates the existence of an economical interest, which creates a risk that an award will be rendered in favor of the client for inappropriate reasons, the ongoing relationship with Findfunds LP has already resulted in a 1.5 Million charged fees for two years by Slowfood and by itself constituted 5% of its annual revenue and is expected to cash 300.000$ by the end of the ongoing proceeding [*PO2, para.6, p.50*].
73. This particular situation raises the improper economic interest flag, because in principle any client-firm relationship represents a financial interest, as continuous representations constitute the economic basis of a law firm. When expecting a future representation of an appointing party, any partner from the law firm has a financial interest in the award due to the firm's future income from the party which is the case of Mr. Prasad.
74. Indeed, as an equity partner he gets a share of the firm's total profits. Consequently, he has a pecuniary interest in the outcome of this arbitration. Any such interest creates a relationship of subordination and therefore is a compelling ground for challenge [*locabail v. bayfield, craig/park/paulsson; berger*].
75. The SCC recently sustained a challenge to an arbitrator because his firm had worked for one of the parties, even though the work was unrelated to the dispute at hand and had occurred several years earlier.

b. Repeat appointment

76. Mr. Prasad has been appointed for a total of 4 arbitrations by both CLAIMANT and its TPF, these repeated appointments suggests the existence of a strong and continuing connection, not only the expectation of future appointments is present but there is also an existing economic interest from the past appointments, two of the appointments by Findfunds subsidiaries constituted 20% of Mr. Prasad's generated revenues [*PO2,para.10,page51*].
77. Individuals who supplement their incomes as arbitrators are not immune from temptations to greed and bias to which humanity has always been heir [*Park*].
78. CLAIMANT is stressing the separate legal entities between Findfunds and its subsidiaries, namely Funding12 in which Findfunds owns 60% of its shares and Funding 8 Ltd, in which Findfunds LP has a shareholding of 40%, it is crucial to understand that Findfunds

LP uses subsidiaries to conduct its business and "bears their identity", it is their business model and the biggest beneficiary in case of win notwithstanding the format of the entering in the transaction. Despite Findfund LP's reputation of exercising "little influence in the appointment of the arbitrators", however, their standard funding agreement allows them a great influence margin [*PO2, para.4, p.50*].

79. The second worrisome connection is between the challenged arbitrator and the CLAIMANT's law firm and counsel, Indeed, Mr. Prasad has been appointed by the law firm under the recommendation of Mr. Fasttrack which supposes his confidence in Mr. Prasad's views as a suitable arbitrator.
80. In 2008, the ICC refused to confirm the appointment of an arbitrator who had served as the claimant's party-appointed arbitrator in three previous cases [*Fry & Greenberg*].
81. With regards to Mr. Prasad's direct and indirect economic interests coming from his own law firm and the CLAIMANT's law firm, it is mandatory to remove him from the tribunal because of his justifiable dependence

2. Mr. Prasad is partial under UNCITRAL Arbitration Rules

82. Justice Rix L.J stated in the AMEC case that "Impartiality is the watchword of all tribunals, including arbitrators. It is sometimes argued that an arbitrator's public statements of his or her opinion concerning matters raised in the arbitration will be grounds for removal. [*Levine;AMEC Civil Engineering v Secretary of State for transport*].
83. Mr. Prasad has positioned himself very clearly against the modern trend in the understanding of the conformity concept in Art. 35 CISG, which goes beyond the mere physical characteristics of the goods and includes the production process, in his article he specifically excludes what he called the "broad and general statements in CSR Codes, such as that production has to be in line with Global Compact principles". The objection and exclusion of the Global compact principles are the exact subject matter of the dispute at hand, and the challenged arbitrator has published an entire article stated his position against it and considered them to not be "enforceable contractual obligation." [*R4, p.40*]
84. RESPONDENT in light of the narrow analysis of the subject matter of the case fears that Mr. Prasad may want to use the award of the case to advocate for his position, thus even if the article was not influenced by the case, it may however influence its decision-making.
85. A public expression of views about the particular dispute, as distinguished from views about legal issues, involved in the arbitration is often held grounds to remove an arbitrator [Judgment of 27 June 2002, 2 OH 1728/01 ;Born].

3. Under the IBA Guidelines, Mr. Prasad is both dependent and partial

86. Justifiable doubts exist when a reasonable and informed third party [*IBA Guidelines, General Standard 2(c); Born 2009*], with supporting objective evidence suspects that a member of the tribunal would be influenced when reaching its decision. Most of Mr. Prasad's relations fall within the Red list: he has an indirect interest in the outcome of the case (please a client of his new law firm) and a direct interest (he expects to be appointed in the future by CLAIMANT's law firm and by Findfunds LP), these connections illustrates "*significant commercial relationship with one of the parties, or an affiliate of one of the parties*" [*IBA-Guidelines on Conflict of Interest, para. 2.3.6*].
87. Mr. Prasad's connections also fall within the IBA Guidelines 'Orange List' of situations that may, give rise to 'justifiable doubts' about an arbitrator's independence or impartiality.
88. IBA Guidelines, supra n. 15 at Pt II, s.3.13. That provision describes an arbitrator who has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties, the orange list's logic is to permit the parties to be their own judges in assessing the existence of justifiable doubts.
89. In the case at hand, Mr. Prasad has had a total of 4 appointments by "the affiliates" of CLAIMANT, namely its Counsel's law firm, and its TPF. The reasonable person would find the multidimension of Mr. Prasad's connections are too close to CLAIMANT and his TPF and are a clear basis for dependence and partiality
90. *Craig Park & Paulsson* claim that the general trend is towards not allowing partners in a large firm to act as arbitrators on cases where one of their partners has advised one of the parties, even on unrelated matters on the basis that there is a theoretical financial conflict of interest – the partner will profit from his or her colleague's ongoing work for the party.

CONCLUSION OF THE SECOND ISSUE

91. In light of the above reasoning that demonstrates the justifiable doubts raised by RESPONDENT as to Mr. Prasad's obvious conflicts of interests and the need to apply the IBA Guidelines to insure the transparency and legitimacy, Mr. Prasad should be removed and replaced.

ISSUE 3: RESPONDENT'S S.C GOVERN THE CONTRACT

92. RESPONDENT's S.C are the ones governing the contract since CLAIMANT's S.C were invalidly incorporated (**I**) and even if we were to consider that there was a battle of form, RESPONDENT's S.C would still apply (**II**).

I. CLAIMANT's S.C cannot govern the contract because their incorporation was invalid

93. In the *Machinery case*, the German BGH ruled that, due to the differences between the many legal systems worldwide, S.C vary considerably from one country to another. These legal differences justify that stricter requirements are to be met in international trade law in order for S.C to become part of a contract [*Huber-Mullis ;Lookofsky*].

94. The *BGH* took a rather restrictive approach by requiring that the intention of the offeror must be apparent to the recipient and that the S.C must be transmitted or made available in another way to the offeree during the negotiations, i.e. before the conclusion of the contract [*Huber, Machinery Case*]. CLAIMANT did not fulfill the validity requirements for the incorporation of S.C (**A**), nor did it give RESPONDENT reasonable opportunity to take notice of them (**B**).

A. CLAIMANT did not fulfill the requirements for S.C's incorporation

95. The inclusion of S.C under the CISG is determined according to the rules for the formation and interpretation of contracts [*CISG-AC Opinion N. 13*]. Unexpected clauses have been analyzed as a matter of incorporation of S.C and thus to be assessed under Art.8 CISG in conjunction with the principle of good faith.

96. S.C that are so surprising or unusual that a reasonable person could not reasonably have expected such a term in the agreement, do not form part of the agreement [*CISG-AC Opinion N. 13, para.7*]. Under the CISG and the UPICC, clauses are considered surprising if they are "*of such a nature that the other party could not reasonably have expected them*". Such surprising terms should not form part of the consensus between the parties. This is not a validity issue but a contract formation issue [*Schlechtriem&Schwenzer*].

97. If the party using the S.C wishes to include them, it needs to specifically inform the other party of their existence and inclusion. A party is not bound to a term that the party by virtue of their content, language or presentation are of such a character that it could not reasonably have expected them to be included in the consensus [*Mobile car phones case;UNIDROIT commentary, Art. 2.1.20*].

98. In determining the surprising character, regard shall be had to the individual negotiations between the parties [*Schlechtriem&Schwenzer ; Schmidt-Kessel]*.S.C are validly included in the contract where the parties have expressly or impliedly agreed to their inclusion at the time of the formation of the contract and the other party had a reasonable opportunity to take notice of the terms. According to Art. 8(3), in determining a party's intent or the understanding a reasonable person would have had, due consideration is to be given to all

relevant objective circumstances of the case like the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties[*Fruit &vegetables case*]. For this purpose, the declarations of the parties must be interpreted according to their reasonable meaning in the light of wording, context and the principle of good faith [*Brunner*; *Schmidt-Kessel*] as correctly expressed by CLAIMANT [*CL's memo, p.25, para.110*].

99. Therefore, an effective inclusion of S.C first requires that the intention of CLAIMANT that it wants to include its S.C into the contract be apparent to the recipient of the offer, i.e. RESPONDENT. In addition, as the BGH assumed, the Uniform Sales Law requires the user of S.C to transmit the text or make it available in another way [*Piltz*].
100. It is the second requirement 'making available' that is problematic, it places on the offeror the burden to make the S.C available to the recipient rather than require the recipient to enquire about the contents of the S.C. The *BGH* justified this on the basis that it is easier for the offeror to provide a copy of its S.C than for the recipient to make enquiries as to their content and that while in domestic transactions the parties will often be familiar with 'typical' sets of standard terms, this will not usually be the case in the international context.
101. Furthermore, it is much easier for CLAIMANT to transmit its S.C, which generally favor him, to the other party than it is for RESPONDENT to inquire about them [*Machinery case; Schroeter*].
102. It would be contrary to the principle of good faith in international trade as well as to the general obligations of cooperation and information of the parties, if the addressee were to be bound by S.C whose content he could not be aware of when concluding the contract [*Plants case*]. For this reason, CLAIMANT has to make its S.C available before the conclusion of the contract [*Schroeter*]. Contrary to CLAIMANT's submission, the offeree has no duty to actively inquire about the offeror's S.C [*Plants case; Magnus ;Piltz*].
103. The mere reference to CLAIMANT's website is not sufficient to make S.C available to RESPONDENT. When a contract is concluded electronically, i.e. via email or on a website, a mere reference to the offeror's website on which S.C are published is not sufficient in order to make them available to the addressee [*Recorders case; Magnus*].
104. Even the indication of an exact internet address does not suffice in that case: otherwise, the offeree would have the duty to actively search the website for the S.C that the other party seeks to include into the contract [Ferrari;Schroeter]. In the case at hand, the only possibility to access S.C RESPONDENT had was a reference to CLAIMANT's website in

the footer of CLAIMANT's letter [*C4 "Sales-Offer", p.16*]. As demonstrated above, such a reference to an internet website cannot be considered to be sufficient to make S.C available to RESPONDENT. In any case, RESPONDENT did not have a reasonable opportunity to take knowledge of them.

B. RESPONDENT did not have a reasonable opportunity to take knowledge of CLAIMANT's S.C.

105. In order to determine whether the addressee had *a reasonable opportunity to* gain knowledge of S.C, the hypothetical understanding of a reasonable person in the same conditions as RESPONDENT is decisive. [*Magnus; Schmidt-Kessel*].

106. A party is deemed to have had a reasonable opportunity to take notice of the S.C; Where the terms are attached to a document used in connection with the formation of the contract or printed on the reverse side of that document, Where the terms are available to the parties in the presence of each other at the time of negotiating the contract [*CISG-AC Opinion N. 13, paras.3 ; 3.1; 3.2*].

107. In most instances where S.C are attached to the offer or other document used in connection with the formation of the contract or printed on the reverse side of such document it should be deemed that the other party had a reasonable opportunity to take notice of them [*Isea V. Lu*]. The approach adopted in the American *Golden Valley Grape Juice* case where there was no incorporation clause in the offer, but other clearly contractual attachments to an email discussed above, provides an example of a commercially sound approach.

108. A reference to the inclusion of S.C and S.C themselves must be clear to a reasonable person of the same kind as the other party and in the same circumstances [*CISG-AC Opinion N. 13, para.5*]. The reference to the incorporation of S.C should not be hidden away or printed in such a manner that it is easy to overlook. There should be a reasonable attempt to make the other party aware of the incorporation. Although S.C are very frequently used in international trade, there should be no obligation on a party to go hunting for a reference on their inclusion.

109. However, the most important element is the standard of information the other party must be given. As already mentioned the widely accepted starting point is the requirement that the contract partner must have a reasonable opportunity to take notice of the S.C.

110. How far the information duty of the user of S.C goes. The prevailing view requires the offeror to make the terms available to the other party, by sending them or handing them over. The BGH followed that reasoning and denied a valid incorporation because the S.C

had neither been sent nor handed over nor made available in another way to the other party. The Court held further that the addressee of a reference to standard terms is not obliged to inquire what the contents of those terms is [*Ferrari &Brand&Flechtner]*.

111. It would wrong and unfair if a mere reference would suffice and if the other party had an obligation to search the contents of the S.C before the conclusion of the contract at the peril that they become binding. And since both RESPONDENT & CLAIMANT try to incorporate their own S.C both users of those terms share the same burden to inform the other party which was dully fulfilled by RESPONDENT [*C2,"T.docs*"]Therefore, knowledge of the contents of the used S.C cannot be simply presumed. .
112. Resolving the dispute gets harder when it's an electronic communication: where CLAIMANT refers merely to its website where the addressee can find the S.C. The reference to the website alone does not suffice. It will not always be easy to find the correct S.C since the user may offer terms in different languages or only in its own language which the addressee may not understand. Furthermore, the S.C on the website may be subject to various modifications. Sometimes the addressee may not be able to print or otherwise reproduce the standard terms. It is not the addressee's duty to avoid these risks. This is the user's duty who is interested in the incorporation of the own S.C into the contract. Only if it is certain that by a mere click the reproducible version of the S.C can be reached and immediately printed or electronically stored is a reference to the terms sufficient in order to incorporate them into the contract [*Magnus*].
113. The reference to and the availability of, S.C terms must occur before or at the time when the contract is concluded. A reference of S.C on an invoice which is sent only after the due time does not modify the concluded contract [*Emphasis, PO2, p.52, para.24*].
114. CLAIMANT invokes that RESPONDENT expressed its acceptance to the incorporation of S.C by its subsequent conduct, namely the payment of the purchase price. RESPONDENT's performed obligations under the contract do not lead to the inclusion of the S.C by modification of the contract [*Granulate case*]. Likewise, the silence of RESPONDENT does not constitute an acceptance to a modification of the contract, pursuant to Art. 18 CISG [*Magnus &Staudinger, Schroeter*]. On the contrary, if the parties subsequently fulfill their obligations under the contract, this reflects their intent to uphold the contract as it was concluded, i.e. without CLAIMANT's S.C [*Lautenschlage*r].

II. Even if we were to consider that there was a battle of form, RESPONDENT's S.C would still govern the contract

115. Contrary to CLAIMANT's line of argumentation, CLAIMANT did not make a counter-offer but rather an offer [*CL's memo, p.23, para.100*]. RESPONDENT made an invitation to treat to 5 bidders including CLAIMANT [*Response to NOA, p.25, para.7*] which replied throughout a proper offer in the sense of Art.14 CISG.

116. But if we were to consider that there was a battle of form where both parties seek to incorporate S.C and reach agreement except on those terms, a contract is concluded on the basis of the negotiated terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later on but without undue delay objects to the conclusion of the contract on that basis [*CISG-AC Opinion N. 13, Para.10*].

117. In most cases the parties are in agreement on the negotiated part of their agreement, but the two sets of S.C will invariably be in conflict as in the dispute at hand [Schroeter].

118. Two main different solutions have been offered to resolve the problem [*Eiselen&Bergenthal*]. Namely, the "last shot" & the "knock out" rule. However, both solutions have been roughly criticized and seem not to be the best fit. Thus, in a first part we will scrutinize the unfairness of the last shot rule (A) and in a second part; we will demonstrate the irrelevance of the knock out rule in the present issue (B).

A. The application of the last shot rule is unfair for RESPONDENT

119. This approach simply concludes that the party, who succeeds in getting the last word in without the other party objecting, will be successful in getting its S.C included [*Kelso*]. It is based on the mirror image rule requiring the acceptance to exactly mirror the offer [*Eiselen&Bergenthal]*.

120. Nonetheless, as demonstrated above, CLAIMANT failed to give notice of its S.C to *RESPONDENT.* The latter had no knowledge of the applicability of the other S.C.

121. Therefore, last shot theories have been rightly criticized as casuistic and unfair [*O.Honnold*] because of the accidental results, shortcomings and generally unconvincing outcome of this theory [*U.Magnus*]. The last shot theory is particularly unsatisfactory when the parties have started performance but still insist on their respective conflicting S.C or like in the case at hand, when one of the parties, i.e. RESPONDENT is suffering of a misrepresentation. From 2014 to 2017, there was going-on deliveries between the parties, RESPONDENT had the impression that it got what it contracted for and paid for.

122. Since S.C are provisions which are designed to care for situations when something goes wrong with the contract, they are therefore fundamentally based on the assumption, and found the presumption, that a valid contract has been concluded. Only in that event they are intended to have effects. Put differently, they are second class contract terms which

enter the battlefield only as a reserve army after the battle between the parties has started. If a party wants that no contract be concluded unless the own S.C are accepted, its intention must then be declared to the other party in another way than by GC.

123. The ambit of the last shot rule should be rather restricted in case of a battle of forms. Only if there is a clear indication of disagreement otherwise than by standard terms can there be a relevant dissent and no conclusion of a contract. Or, if there is an unambivalent surrender of one party to the S.C of the other then the contract is concluded to these conditions. In all other cases the solution must however be different [*U.Magnus*].
124. Moreover, shall we test the reality as well as the practicality and fairness of the "last shot" approach by the following case: Suppose that after arrival of the goods Buyer rejected the shipment. The "last shot" theory that there was no contract until buyer accepted the goods would support Buyer's rejection. Such a rejection, in view of the transportation and redisposal costs typical in international sales, would be consistent with commercial expectations or with standards of good faith and fair dealing [*O. Honnold*].
125. The UCC section 2-207(3) rejects the application of the latter; the section disarray is particularly disconcerting in light of the simple purpose it was designed to serve. The common law "mirror image" rule requires the acceptance to match the terms of the offer. As CLAIMANT's counsel alleged, where a response to an offer contains different or additional terms in boilerplate clauses, the mirror-image rule insists that the response must be a "conditional acceptance," i.e., a counteroffer, even though it reasonably appears to be a definite expression of acceptance [*CL's memo, p.23, paras. 101, 102*].
126. In the paradigm transaction, a buyer sends a purchase order (offer) and the seller's response is an acknowledgment form that appears to be an acceptance but contains variant terms in the boilerplate clauses such as a disclaimer of warranty, an arbitration clause or an exclusion of consequential damages. Since the seller's response is a counteroffer, there is no contract via the exchange of forms. The seller, however, ships the goods which the buyer accepts, thereby unwittingly accepting the seller's terms in the counteroffer that had been fired as the "last shot" in the battle. Though the buyer is unfairly surprised to learn that the contract contains the seller's terms, this is the result ordained under the "last shot" principle. Section 2-207 was designed to remedy this injustice [*Murray***].**
127. In addition, the UNIDROIT Principles contains recognition of the unfairness of the "last shot" rule induced special treatment of the "battle of the forms." Though recognizing the concept that a party should be bound by S.C that she has accepted regardless of knowledge of their contents, Principles includes an "important exception" to this rule by

exempting the party of the effect of S.C which she should not "reasonably have expected" to be included in the standardized form.

128. The purpose is to avoid unfair surprise to a reasonable party who may not, under the surrounding circumstances, expect such a term. If terms are common in the trade or consistent with the way in which the parties negotiated the deal, they would not be surprising. In other contexts, terms would be surprising as they are unfortunately in our context for RESPONDENT [*E. Murray*].
129. Such boilerplate terms are ignored on such standardized forms as purchase orders and acknowledgments [UNIDROIT, Art. 2.22] i.e., these terms may conflict with each other, notwithstanding agreement on negotiated terms that Karl Llewellyn would call "dickered" terms. If, however, a party *clearly* informs the other party either in advance or later, without undue delay, that it does not intend to be bound except on its S.C, such a manifestation of intention will preclude the formation of a contract except on its terms. Admittedly, RESPONDENT insisted in its T.docs"*as a supplier, you must comply with all…and Comestibles Finos code of conduct...*" It is deducible here that '*must*' implies an obligation of compliance [*C2, "T.docs",p.12, Section V*].
130. This provision rejects this unless a party clearly expresses its unwillingness to contract except on its standard as well as negotiated terms. A statement expressing such unwillingness in the S.C will normally not be sufficient. It must appear in the "non-standard" terms where it would be more likely to be noticed [*Murray*].
131. Delegates refused to deal with the 'battle of form' problem when it was raised at the Diplomatic Conference in 1980, one cannot rely on Arts. 18(1) and 19 for this solution. Besides, the last shot theory is also casuistic and arbitrary, since it is often a coincidence who fired the last shot [*Ole Lando*].
132. The Achilles' heel of the proposed solution that "*one party clearly indicates in advance that it does not intend to be bound by such a contract*." By conditionally linking the contract's validity to the substantial enforcement right, the incorporation and defense clauses -their wording and clearness- receive decisive relevance [*Schlechtriem*].
133. The European Principles express the invalidity of such standardized defense clauses even more clearly: "*if one party has indicated in advance, explicitly, and not by way of GC* " (emphasis added). It will nonetheless be easy to attach to the respective declaration to conclude the contract a special declaration as sought by the UNIDROIT Principles which, expressly and clearly separated from the standard terms, emphasizes the incorporation of one's own terms and rejection of any other standard terms.

134. Assessing this exception, one must therefore take into account that in cases of full performance of the contract which turned out to be disadvantageous for one party, should such a clear, unambiguous and maybe even individual defense clause suffice "*to get out of*" the contract? [*UNIDROIT, comment 3, p. 63*].
135. The Last Shot Doctrine imposes an implied duty on the offeror to object to additional or conflicting terms. The failure to object combined with performance result in what is deemed an implied consent to the terms of the last submitted offer. But parties are often not even aware of the fact that their S.C are clashing. Therefore, the Last Shot Doctrine imposes on the performing party an unfair burden of an implied consent.
136. Another argument against the Last Shot Doctrine is that it is not always clear which party sent his terms last. This makes the determination of the last terms of the contract hard to pin. Sometimes one party or both parties' terms include a "*defensive incorporation clause*" which expressly rejects the terms of the other party and expressly excludes them from becoming part of the contract. In such situations, it takes much effort to assume an implied consent to the other party's terms from performance [*Wildner*].
137. Although the last shot rule seems to be in accordance with a strictly literal interpretation of Article 19, it often leads to results which are random, casuistic, unfair and very difficult to foresee for the parties.

B. The application of the knock out rule is contrary to the principles of the CISG

138. This approach concludes that the parties are in agreement on the main terms and that all S.C which are not in conflict, will form part of the agreement. Conflicting terms are excluded and replaced by the dispositive or residual law applicable.
139. The rule aims to avoid an arbitrary choice between the two sets of competing S.C, instead using only those elements which are common to both sets, in accordance with the actual intention of both parties.
140. In *Powdered milk case* the court justified the choice for the knock-out rule as follows: "*the partial contradiction of the referenced GC of [buyer 1] and [seller 1] did not lead to the failure of the contract within the meaning of Art. 19(1) and (3) CISG because of the lack of a consensus…According to the prevailing opinion, partially diverging GC become an integral part of a contract insofar as they do not contradict each other; the statutory provisions apply to the rest "rest validity theory*" [*Schlechtriem&Schlechtriem*].
141. The knock-out approach will apply to a battle of forms situation unless a party has explicitly excluded the operation of the rule by explicitly indicating in advance that it will not be bound by other standard terms than its own. The mere inclusion of such a clause in

the standard terms should not be sufficient [Comment 3 to Art 2.1.22 of the UNIDROIT Principles]. If RESPONDENT intends to contract only on its own S.C, the mere fact that CLAIMANT attaches its own S.C does not prevent the contract from being concluded on the basis of RESPONDENT's S.C. CLAIMANT sent a letter of acknowledgment in which it acknowledged RESPONDENT's requirements "*in accordance with the specified requirements..."* It only objected modifications regarding the cakes and the payment mode [*R1,"CLAIMANT's letter of acknowledgment",p.*28].

142. What makes this solution highly unlikely is that it produces an implied exclusion of CISG Article 19 [*Viscasillas*; *Piltz]* which is contrary to the parties choice of law clause and to the party autonomy principle [*C2, "T.docs", p. 12, p.20*].

143. Other than deviating from Art.19 CISG, another reason for criticism is that the Knock Out Rule was rejected by the majority of the Drafters of the Convention. In the course of drafting the Convention, the Belgian delegation submitted a proposal that addressed the problem of the battle of the forms directly. That proposal would have added a fourth paragraph to Art. 19 CISG, stating that if parties used general conditions, any conflicting terms in the forms would not become part of the contract. This proposal was rejected on the grounds that the issue needed further investigation and consideration. Another argument against the Knock Out Rule is that it conflicts with the goal of Art. 7 CISG, which is to promote a uniform application of the rules of the CISG [*Wildner*].

CONCLUSION OF THE THIRD ISSUE

144. In light of the above, RESPONDENT made an invitation to tender in which it insisted on the application of its own S.C, CLAIMANT conformingly submitted an offer which turned out to be after 3 years of deliveries, purportedly governed by CLAIMANT's surprising and invalidly incorporated S.C. Therefore, none of the claims raised by CLAIMANT has any merits. The tribunal is respectfully requested to find that RESPONDENT's S.C govern the contract.

ISSUE 4: CLAIMANT was bound by a duty to achieve a specific result under the contract governed by the general conditions of RESPONDENT, which it failed to observe in delivering non-conforming chocolate cakes under art 35 CISG

145. It is respectfully requested that the arbitral tribunal finds that CLAIMANT was bound by a specific obligation to achieve a particular outcome, which is to provide ethically produced chocolate cakes, and that it failed to honor its obligation, as it provided chocolate cakes that were non-conforming under article 35 CISG.

I. CLAIMANT had an obligation of specific result

146. CLAIMANT failed to comply with its specific obligation to deliver ethically produced cakes. Even if CLAIMANT here a mere duty of best efforts, it did not fulfill it.

A. There was a valid contractual obligation to guarantee a specific characteristic of the chocolate cakes supplied

1. The contract's general conditions indicate the existence of a duty to achieve a specific result.

147. Contrary to CLAIMANT's understanding, when GC apply, they apply in their entirety, as the code of conduct for suppliers of claimant is not part of the special conditions since it has not been approved, and the tender was made in accordance with RESPONDENT's specified requirements [*R1, p29*]. Moreover, the order of precedence suggested by RESPONDENT [*CL's memo, para.132*] does not apply. For such order is only invoked in cases of "*ambiguity or divergence"* [*C2, p11*].

148. Art 5.1.4 of UNIDROIT principles provides the distinction between two types of duties: duty of best efforts and duty to achieve a specific result. The main difference between these two types in the degree of diligence required in performing the contractual obligation. In a duty of specific result, the result is promised, and guaranteed. This is why more than ordinary care is required, and failure to obtain the specific result amounts to non-performance of the contract. In determining the type of duty involved, attention should be called to three requirements: the way the obligation is expressed, contractual price and other terms, and the degree of risk.

149. First, contrary to what CLAIMANT submitted, both the ethical standards underlying the general conditions and comestible Finos code of conduct indicate a specific duty to observe sustainability requirements while manufacturing the chocolate cakes. Terms such as "*commitment to high standards of integrity and sustainability*" "*Zero tolerance policy*" clearly set out RESPONDENT's expectations of its suppliers '*to adhere to similar standards*". The wording used is sufficiently reflective of the type of obligation the suppliers should bear. In its code, RESPONDENT precisely states that it is "*important that suppliers be aware of the philosophy and adhere to it.*" [*C2 ,preamble, p13*].

150. Likewise, it explicitly asks suppliers to stick to environment friendly standards "*and shall conduct your business in an environmentally sustainable way".* Second, contractual price and other terms may indicate the existence of a specific duty under UNIDROIT principles. Indeed,penalty clauses and clauses linking payment of price to the successful achievement

of the result corroborate the fact that the duty expressed in the contract is contrary to a duty of best efforts. In our present case, there was a valid choice to derogate from the provision of the convention, as permitted by its art.6, in considering every breach a "*fundamental breach*" that precludes the seller's right to cure in case of non-performance.

151. This choice constitutes also a penalty clause that links the payment of the price of chocolate cakes to guaranteeing the ethical character of its production process. Also, the price of the chocolate cakes itself may point out this type of duty as it was "*towards the upper end of the price paid for a premium product in the relevant market segment*" [*PO2, para 40, p 55*]. By the same token , the fact that the tender permitted the price per unit to go up to USD 2.50, while insisting t *p10*] shows clearly that RESPONDENT's first and specific concern is to have high quality cakes that are ethically produced.

152. In addition to that , the degree of risk involved in achieving the outcome as well as the ability of the other party to influence the successful performance of the obligation provide useful guides in qualifying the obligation. When it comes to the promise CLAIMANT undertook under the contract, no undue risk was involved in the process. Also, RESPONDENT, in leaving CLAIMANT totally free to select its supplier, had no possibility to influence the achievement of the expected result [*C2, para E, p14*]. With regard to this choice RESPONDENT made, there is no way to consider CLAIMANT's allegation valid, i.e. "*there's no provision contained in the contract or CLAIMANT's GC or special condition which set out in sufficient detail an obligation concerning the production process of the chocolate cake or it's ingredients.*"

153. Indeed, section V of the contract made CLAIMANT entirely responsible in stating that it must "*under all circumstances provide goods and services in a responsible manner*". Leaving it with complete discretion to choose the supplier and the monitoring method so long as it is based on ethical standards and capable of making sure to "*avoid that the goods or services breach the code*". In conclusion, CLAIMANT promised to guarantee that its chocolate cakes were entirely environment friendly, and it was what RESPONDENT was entitled to expect under the given contract, whether the present terms sufficiently prove the existence of a duty of specific result, or whether such duty is to be presumed.

2. Alternatively, art 4.8 UNIDROIT PRINCIPLES applies to supply an omitted term

154. Art 4.8 UNIDROIT principles provides that where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and

duties, such term will be supplemented to the contract. The term should be appropriate. This appropriateness is to be inferred from the terms expressly stated; in the contract, negotiations prior to the establishment of the contract, as well as subsequent conduct of the parties. Moreover, the appropriate term is to be determined based on the intention of the parties the nature and purpose of the contract good, faith, fair dealing and reasonableness.

155. With regards to the facts of this case, the aforementioned conditions are met. First, the terms expressly stated in the contract: "*zero tolerance policy*", "*under all circumstances*", "to avoid delivering goods that are in breach "are all statements that indicate an absolute obligation to guarantee the specific contractually required outcome. Second, the prior negotiations between CLAIMANT and RESPONDENT since their first meeting at the food fair are compatible with RESPONDENT's expectation that CLAIMANT was both willing and capable of guaranteeing such a vital goal.

156. Finally, RESPONDENT's conduct in giving respondent a lot of space to monitor its suppliers on its own and by any means it deems "*appropriate*", coupled with CLAIMANT's onerous choice to hire a monitoring agency show that the parties' subsequent conduct was compatible with a duty to achieve a particular result that is produce ethically chocolate cakes.

157. A specific duty to make sure the entire production process is sustainable and environment friendly is compatible with the parties' intention as well as reasonableness, pursuant to Art.8 CISG. Any person in RESPONDENT's shoe would not require its contracting party anything less than the guarantee that the special characteristic of the good be flawlessly attained. This is not only reasonable to the buyer, but also to the seller which willingly tendered along with other competitors and was chosen because of its capacity to commit to such "high standards". CLAIMANT is aware that the purpose of contracting was to achieve a common objective to both CLAIMANT and RESPONDENT. Last but not least, the obligation of specific result is very common in "performance-based contracts" and it is not in any way contrary to fair trade nor good faith.

B. In case general conditions' applicability is paired with the application of CLAIMANT's code of conduct; CLAIMANT did not respect its own code

1. CLAIMANT's code entails a duty of specific result

158. Contrary to CLAIMANT's assertions [CL's memo, para 146]; the wording *'make sure*" and "*ensure*" does not indicate a duty of best efforts, but rather a duty to achieve a specific result. CLAIMANT correctly states that" to *ensure means to make certain something will*

occur". However, it fails to draw the proper conclusions from such statement. In making sure something will occur, the meaning is closer to guarantee than it is to simply attempt.

159. As a SR company itself, CLAIMANT is expected to behave in a specific way as well as promote such behavior through its supply chain. It must search for the legal tools to live up to the expectation [*Peterková*]. Such expectancy is also compatible with RESPONDENT's code, which is the reason why RESPONDENT was "*impressed*" by the similarities [C1, p8].

2. Even if CLAIMANT's code contains a duty of best efforts, CLAIMANT did not live up to it

160. In case CLAIMANT's code was actually applicable, and in case it only binds CLAIMANT by a duty to provide best efforts, CLAIMANT did was not careful enough and did not provide its best effort. CLAIMANT argued that "*the fact that the supplier's documents were forged does not mean that claimant did not comply with its obligation*". This statement is without any merits, and the fact that government officials may have been involved is actually irrelevant in this specific context.

161. *Beckers* defines corporate social responsibility codes as: "*unilateral corporate commitments that indicate a corporation's willingness to take on a global regulatory role in the absence of a global political government".* Thus, by definition, code of conducts bears a unilateral responsibility to ethical standards, without reliance on any political government to be on the side of SRC. It is even the point of creating such codes: the unlikely capacity to entrust governments with environmental issues.

162. For this reason, CLAIMANT, which owns a code of conduct, and which is, then, presumably aware of its own responsibility, was not providing much effort as another company in its shoe would have. It failed to foresee such a scandal, it didn't provide the due care and diligence in its choice of monitoring agency as it chose one that lacks an expertise in verifying the authenticity of the certificates of conformity handed to illegal farmers. Such verification should have taken place a short time before the delivery was made otherwise it is rather useless. In "*cocoa beans case*", it was held that: "*The certificate attesting to the conformity of the cocoa on 27 April 1994, that is, more than twenty days before loading…is certainly not sufficient*".

163. It is rather unlikely to assume that CLAIMANT did all what was in its power to ensure the origin of cocoa beans was safe. Withal, CLAIMANT could have done more than simply delegating its monitoring obligation to an agency. For instance, CLAIMANT could have thought about farming the cocoa beans itself and supervising their farming directly.

II. CLAIMANT failed to deliver conforming goods under article 35 CISG

164. It is, for more than one reason, inappropriate to apply art 79 CISG in this arbitration[*CL's memo, paras 157-168*]. But even if it was to be applied, its application would lead to the conclusion that the cakes delivered were non-conforming in all cases under Art 35 CISG, regardless of the liability of the CLAIMANT for such failure to perform the contract.

A. The chocolate cakes supplied are not conforming to ordinary purposes of quantity, quality, and description, pursuant of the sample handed out under Art 35 (1)

1. The cakes delivered are not conforming to the quantity

165. In Enderlein and Maskow's view "*The CISG treats differing quantities (partial deliveries, lesser than agreed quantities) as a lack of conformity*". Such statement means that even if only a part of the cakes supplied contains unethically produced cocoa beans, [*PO2, para41, p 54*]. This would still lead to the conclusion that the goods delivered lack conformity. CLAIMANT argued that not the fact that not all cocoa was environmental friendly "does not render the cake non-conforming" [*NOA, para 17*].

166. Such allegation does not stand, as the cakes delivered are not conforming to the quantity required by the contract [*C2, clause 3, p10*]. To boot, conformity to sustainability standards, not being a physical aspect of the good, is not detectable. Therefore, the fact that only a portion of the total delivery is plagued with non-conformity produces the same effects for RESPONDENT.

2. The description of the goods entailing the origin of the cocoa beans was not observed.

167. Art 35 CISG provides that in order for the goods to be conforming, they must observe the description agreed upon by the parties, before entering the contract. However, Art 4 CISG precludes CISG from dealing with validity of provisions in the contract. Therefore, in order to assess whether there was a valid term regarding the description of the cakes, and whether the latter contains an indication to the ethical character of its production, UNIDROIT principles apply as a gap-filler. Pursuant to article 1.2 UNIDROIT, a contract, statement or any other act may be made and evidenced by a particular form, and it may be "*proved by any means, including witnesses*".

168. In Mrs. Ming's mail [C*10, p 22*], RESPONDENT communicates to CLAIMANT that it has "*made clear during negotiations and at all times thereafter that the use of cocoa beans produced not in compliance with the accepted sustainability standards is such a*

serious breach" This statement should be regarded as sufficient proof to the description required by RESPONDENT and agreed upon by CLAIMANT, who did not object to it.

169. The origin of the cocoa beans, even if not expressly stated as such in the contract, can be inferred from it. In ensuring other suppliers be in compliance with ethical standards, certificates of conformity were demanded to prove the origin of cocoa used in the cakes. In crystal sugar case; a dispute arose out of a contract for the sale of white crystal sugar. The buyer commenced arbitration against the seller to recover the customs the buyer had to pay in Italy as a result of withdrawal by the Serbian authorities of the certificates of origin required by the contract.

170. The arbitral tribunal ruled, that under Article 35 (1) CISG, the provision regarding specific origin of the goods and the duty to provide the certification of origin was an express contractual term. The seller was then deemed to have been aware that any failure to provide the required certification of origin may have financial effects on the buyer.

171. These facts are similar to our case in that the specific origin has a big stake for the buyer for whom it constitutes not only a description but probably the most important requirement. This description includes sustainability clauses that are enforceable by nature. Indeed, "*The contracting parties, including the final buyers of a global supply chain, have the right to enforce*" it [*Pereira*]. Subsequently, the sustainable character of the cocoa beans was addressed as a description of the good. When this description is not verified, it renders the goods non-conforming, and entitles RESPONDENT to terminate the contract with immediate effect [*D.Karton & Germiny*].

3. **The unethical character of the beans affects the quality of the goods**

172. **"**T*he standard of quality which is implied from the contract must be ascertained in the light of the normal expectations of persons buying goods of this contract description*" [*Secretariat Commentary*]. The quality of goods depends on the expectations of the consumers whose choice of consumption is built upon the description of the good.

173. This statement calls attention to the specificities required by categories of consumers in their consuming behavior. Particularly this is of a big significance when it comes to ethical consumers for whom the quality of a product is measured upon the extent to which its production does not constitute a violation of international ethical standards, including environment friendly requirements [*Weber*]. These consumers are even willing to pay higher prices [*Schwenzer*]. Comestible Finos is a food supply chain that presents itself as a socially responsible corporation. For such considerations, its target customers will cease to buy any goods under its label if it becomes known to the public that it is somehow

involved in illegal farming and misrepresenting itself in the market. Under the light of such events, the goods may be deemed non-merchantable.

174. In the *canned food case* the court ruled in favor of a buyer, for where the process of manufacturing canned mushrooms affected their quality.it held that "*a prerequisite for entering into the contract has been the good quality of the product*". Therefore, the quality required by contract binds the seller, as it constitutes a big stake for the seller. Correspondingly, the quality of cocoa beans was a fundamental prerequisite to establishing the contract with CLAIMANT.

B. The chocolate cakes supplied do not fit the implied requirements

1. The cakes do not fit the particular purpose

175. For the sake of this argument under CISG Article 35(2)(b), four conditions must be satisfied. First, there must be a particular purpose for the goods. Second, explicitly or implicitly the buyer must have made the seller aware of this particular purpose. Third, the seller must have been made aware of it before entering into the contract. Finally, the buyer must have reasonably relied on the seller's skill and judgment in the circumstances.

176. CLAIMANT does not address the conformity of its cakes to any particular purpose that may fall outside of the scope of the normal or "*ordinary*" use of the cakes. While in fact, these conditions are met in our present case.

177. The cakes have to be ethically produced in order to serve promote and sustain COMESTIBLE FINOS's reputation of a socially responsible corporation. Such reputation is vital in light of its targeted "*conscious consumers*", which seek to consume ethically. Thus, not any cakes having similar physical requirements of the cakes delivered may serve the purpose of the contracts. The ethical character of the ingredients used in manufacturing the cake is the most important feature, without which the conformity in terms of number, shape, and taste is insufficient to serve the point of contracting with CLAIMANT specifically.

178. Nonetheless, the ethical character is something RESPONDENT believes in, and cannot be prompted to accept anything contrary to it as one cannot "e*xpect others to act contrary to their consciences*"[D. Chryssides&Kaler].

179. Moreover, good reputation, crucial in the commercial field [*Nestle Case*] is specifically important for RESPONDENT in the context of its aspirations as a leading global compact company, as well as its specific type of activity, as it is promising its customers a certain quality. Thus, maintaining it in making sure it sells ethically produced cakes may also be

deemed a particular purpose, in absence of which, RESPONDENT is threatened to lose its customer base, whose confidence in responsible stance is needed [Body Shop case].

180. "*The obligation of fitness for a particular purpose arises only if buyer makes the particular purpose known to seller (expressly or impliedly)*" [*Folsom, Gordon &Spanogle*]. While the first purpose was explicitly made known to CLAIMANT since the very first meeting, at the negotiation stage, and by the time the contract was concluded, the second one should have been reasonably expected and inferred from RESPONDENT's code of conduct for instance, or from its insistence of promoting its business philosophy.
181. Hence, it is not arguable that CLAIMANT was made known the particular purpose behind selecting him as a supplier, i.e before entering the contract. Finally, the remaining criteria is pertaining to reliance of the buyer on the seller's skill and judgment. While such reliance need not be expressly communicated to the seller, it still needs to be reasonable. In our case, the method chosen by RESPONDENT to find the ideal contracting party that adhered to the same values of ethical production and commitment to a' *fairer better world*' [*R2, p29*] along with a demonstrated flexibility in accepting some changes made by CLAIMANT , show that RESPONDENT was relying on CLAIMANT.
182. Beyond simple reliance, especially in an important business period that precedes the opening of three new stores [*PO2, para. 32, p54*], RESPONDENT fully trusted CLAIMANT to the point of deciding to "*make no further audits*" [*PO2, para34, p54*] , relying completely on its discretion and capacity to provide the "*appropriate*" [*C2 , para c, p14*] frame to monitor the cocoa suppliers and avoid that they breach any of the contractually agreed provisions.

2. The cakes delivered do not conform with the quality of sample held out as a model

183. When the contracts' negotiations involved the handing out of a sample or model, on the basis of which the contract was concluded, the goods delivered must possess the same qualities possessed by the goods held out as the sample or model by the seller. In the alternative case, the goods shall be deemed non-conforming under article 35.b. CISG.
184. The good delivered may differ from the sample in many ways, whether the difference is physical and easily detectable, or when it's hidden. In some cases, a different process may alter the good and lead it to become non-conforming to the "*original*" one. In *Barbara berry case*, Defendant Spooner Farms sold raspberry plants to Plaintiff Barbara Berry which used Spooner Farms certified root stock to produce a new generation of raspberry plants contrary to the standards of the industry.

185. The court condemned the different process and method uses and held that due to such difference, the product is no longer the same "*the resulting generation of plant is no longer a product of Spooner Farms...meaning it no longer possesses the major characteristics of the originating plant, or can have other induced problems stemming from sources out of the control of Spooner Farms*". Similarly, the production process of cocoa beans used in the chocolate cakes should be regarded as denying the goods delivered of the major characteristic possessed by the original cake model.

CONCLUSION OF THE FOURTH ISSUE

186. RESPONDENT left CLAIMANT with entire discretion to the method it should use to guarantee that the chocolate cakes comply in every aspect and under all circumstances to all the ethical standards that the two companies adhere to. The latter were clearly enclosed in their respective codes of conduct irrespective of which, CLAIMANT failed to deliver conforming cakes since the cocoa beans used in the cakes were not ethically produced.

REQUEST FOR RELIEF

In light of the above-mentioned submissions, Counsel respectfully requests the tribunal

1) To remove Mr. Prasad without his participation in the decision-making process as a sitting arbitrator
2) To declare that the contractual agreement of CLAIMANT & RESPONDNET is governed by RESPONENT's S.C
3) To hold that CLAIMANT had a specific duty that he failed to achieve by delivering non-conforming cakes under art 35 CISG.

CERTIFICATE

Tunis, 17 January 2018

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

Achref Medini

Khawla Mraydi

Malek Zakraoui

Yesmine Ben Mabrouk