TWENTY FIFTH ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

24 – 29 MARCH 2018 VIENNA, AUSTRIA

MEMORANDUM FOR RESPONDENT

DAR AL-HEKMA UNIVERSITY

ON BEHALF OF	AGAINST
Delicatesy Whole Foods Sp	Comestibles Finos Ltd
39 Marie-Antoine Carême Avenue	75 Martha Stewart Drive
Oceanside	Capital City
Equatoriana	Mediterraneo
CLAIMANT	**RESPONDENT**

BSHAYER BIN YAMIN • DANA AL-AQEEL • HADEEL TAYEB • RAGAD ALFARAIDY • RANA MUDARRIS • YARA AL SAYGH

Jeddah • Saudi Arabia

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INDEX OF ABBREVIATIONS

Art. / Artt.	Article / Articles
Aug	August
Cl. Ex.	Claimant's exhibit
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CISG Digest	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods -2012 & 2016
CLAIMANT	Delicatesy Whole Foods Sp
ed.	Editions
etc.	*et cetera* (and so on)
Ex.	Exhibit
Fasttrack's Letter RAR	Fasttrack's Letter (Refusal to Agree to Removal)
Feb	February
IBA Guidelines	International Bar Association Guidelines on Conflict of Interest
ICC	International Chamber of Commerce
ISO	International Organization for Standardization
ISO 14001	International Standards Organization Environmental Management System
ISO 26000	International Standards Organization Social Responsibility
ITT	Invitation to tender
Jan	January
KPCS	Kimberley Process Certification Scheme
Ltd.	Limited
MAL	Model Arbitration Law (United Nations Commission on International Trade Law)
NA.	Notice of Arbitration
NCP.	Notice of Challenge of Mr. Prasad
Not. Ch.	Notice of Challenge
No.	Number
NYC	New York Convention on the Recognition and Enforcement of

	Foreign Arbitral Awards 1958
p. /pgs.	Page / Pages
PCA	Permanent Court of Arbitration
PO1	Procedural Order Number 1
PO2	Procedural Order Number 2
p. /paras.	Paragraph/paragraphs
R.	Record
Req. for Arb.	Request for Arbitration
RESPONDENT	Comestibles Finos Ltd
Res. Ex.	Respondent's Exhibit
RPC GmbH	Ruritania Peoples Cocoa GmbH
RNA.	Response to Notice of Arbitration
Sec.	Section
Sep	September
Tribunal	Arbitral Tribunal
UN	United Nations
UNCITRAL rules	Arbitration rules of United Nations Commission on International Trade Law 2013
UNCTAD	United Nations Commission of Trade and Development
UNEP	United nations Environment Programme
UNGC	United Nations Global Compact
UNGCP	United Nations Global Compact Principles
UNIDROIT	International Institute for the Unification of Private Law
UTZ	Universal Trade Zone
v.	versus (against)
Vol	Volume
WS	Witness Statement

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ICC Rules	International Chamber of Commerce
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985) as adopted in 2006
UNCITRAL Rules	UNCITRAL Arbitration Rules (2013)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2016)

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INTRODUCTION

1. RESPONDENT believes in a healthy, green, and fair world. It seems like CLAIMANT shares RESPONDENT's pursuit, however, of only a healthy and green world: it insists on unfair methods to decide the challenge of its arbitrator, unreasonably demands that an unsuitable arbitrator be kept in the Tribunal, and would even go as far as to deny its contractual obligations.
2. Being true to its nationwide advertising campaign, RESPONDENT only contracts with businesses that can guarantee the strict adherence to the values of ethical production set out in its standard conditions. As such, before awarding CLAIMANT the offer, RESPONDENT made sure that its standard conditions apply. Accordingly, RESPONDENT successfully incorporated its standard conditions and established its intent to have them govern the contract throughout the course of the negotiations, when CLAIMANT did neither **(ISSUE 3)**.
3. When RESPONDENT awarded CLAIMANT the contract it believed that CLAIMANT was just as committed to ensuring that its products fulfill the highest standard of sustainability, or so RESPONDENT thought. It turns out that up to 50% of the cocoa beans used to make the chocolate cakes sold to RESPONDENT came from farms that violated RESPONDENT most basic ethical values. CLAIMANT had violated its duty under the contract to deliver conforming goods and guarantee sustainably produced chocolate cake **(ISSUE 4)**.
4. CLAIMANT's serious violation of its contractual obligation along its unreasonable insistence on getting paid for non-conforming cakes has necessitated the start of arbitral proceedings. However, CLAIMANT's violations continue even during dispute resolution. Not only does CLAIMANT intentionally conceal the existence of a third-party funder associated with the arbitrator it appointed, but it also insists that he participates in deciding his own challenge. However, the two remaining arbitrators should decide on Mr. Prasad's challenge, as is the case in practice **(ISSUE 1).**
5. As such, the two remaining arbitrators should disqualify Mr. Prasad from the Tribunal as there are justifiable doubts to his impartiality and independence. The combination of various factors that could potentially lead to a conflict of interest makes it necessary that he is disqualified **(ISSUE 2)**.

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 UN Global Compact ("UNGC") member.

RESPONDENT is the leading gourmet supermarket chain in Mediterraneo and also a UNGC member. RESPONDENT aims to become a UNGC LEAD company by 2018, and thus, places particular importance on sourcing goods from sustainable sources.

10 March 2014: RESPONDENT sends its Invitation to Tender ("ITT") for the supply of chocolate cakes to CLAIMANT. The arbitration clause in the ITT excludes institutional involvement, as RESPONDENT suffered great losses in the past from a leak to the press it suspects was caused by an arbitral institution administering its case. However, in light of some challenges CLAIMANT had faced with ad hoc arbitration, RESPONDENT informs CLAIMANT that it has never experienced any problems concerning the composition of the tribunal, which is what CLAIMANT feared would happen. A week later, CLAIMANT signs and returns the Letter of Acknowledgment, as requested by RESPONDENT. In the letter, tenderers promise to tender in accordance with RESPONDENT's specified requirements.

27 March 2014: CLAIMANT agrees to the arbitration clause proposed and submits its tender accompanied with a letter and a form that was titled "Sales-Offer". To RESPONDENT's surprise, however, it discovers from the accompanying letter that CLAIMANT had proposed changes in the size of the cake and payment method. Moreover, the Sales-Offer, which followed the standard form CLAIMANT uses for all its transactions, contained a footnote that referred to the inclusion of CLAIMANT's standard conditions, along with a link to CLAIMANT's online homepage.

7 April 2014: Regardless of the changes in size and payment method, RESPONDENT decides to award CLAIMANT the contract, as the latter accepted all other terms in the Tender Documents.

Summer 2014: Exercising its rights under the Contract to audit its suppliers, owing to its standard conditions, RESPONDENT audits CLAIMANT's facilities. RESPONDENT decides to make no further audits due to CLAIMANT's reputation after thoroughly learning about how it monitors its suppliers.

May 2014 – Jan 2016: Deliveries start and go on for two years and eight months without issues.

6 Jan 2016: The UNEP Special Rapporteur releases a report on the widespread fraud and

corruption in Ruritania, specifically in the agricultural industry and sustainability certificates. CLAIMANT's cocoa supplier, Ruritania Peoples Cocoa mbH ("RPC"), is based in Ruritania.

16 Dec 2016 – 27 Jan 2017: CLAIMANT delivers 600,000 potentially non-conforming cakes that RESPONDENT withholds payment for until it is assured that they are conforming.

27 Jan 2017: After the issuance of an article exposing the involvement of the Ruritanian cocoa industry in the sustainability fraud, RESPONDENT grows worried and asks CLAIMANT to verify whether its suppliers were involved in the scheme.

10 Feb 2017: CLAIMANT reports back its failure to guarantee that its suppliers used sustainably produced cocoa. CLAIMANT offers RESPONDENT a 25% reduction on the affected cakes. However, RESPONDENT no longer has faith in CLAIMANT's efforts, and terminated the contract. CLAIMANT's insistence on getting paid necessitates the start of arbitral proceedings.

4 May 2017: Horace Fasttrack, CLAIMANT's counsel, investigates whether there are connections between FindFunds LP and Mr. Rodrigo Prasad, CLAIMANT's potential arbitrator. After knowing that connections exist with two FindFunds LP subsidiaries, CLAIMANT intentionally withholds this information to avoid any challenges of Mr. Prasad.

30 May 2017: After a meeting to reach a settlement fails, CLAIMANT starts negotiations with Findfunds LP. Findfunds LP is a third-party funder. Almost a month later, CLAIMANT signs a funding agreement with Findfunds LP subsidiary, Funding 12 Ltd.

26 June 2017: Mr. Prasad submits to the Tribunal a declaration of his impartiality and independence and availability. Four days later, CLAIMANT sends its Notice of Arbitration and appoints him as its arbitrator. After which, RESPONDENT approves Mr. Prasad's appointment and nominates Ms. Hertha Reitbauer as its arbitrator in the Response to Notice of Arbitration.

29 Aug 2017: RESPONDENT demands disclosure of CLAIMANT's funder's identity, if it has one.

1 Sep 2017: Merger between the law firms of Prasad & Partners and Slowfood goes into effect.

7 Sep 2017: CLAIMANT discloses its third-party funder, Funding 12 Ltd. Four days later, Mr. Prasad declares that he was an arbitrator in two cases funded by Findfunds LP subsidiaries, and that a partner in his current firm is representing a client in an arbitration funded by Funding 8 Ltd., another subsidiary. A week after the disclosure, RESPONDENT sends the Notice of Challenge of Mr. Prasad, upon which Mr. Prasad refuses to withdraw. CLAIMANT responds, asking the tribunal to dismiss the challenge.

ISSUE 1: THE TRIBUNAL SHOULD DECIDE MR. PRASAD'S CHALLENGE, WITHOUT HIS PARTICIPATION

1. In this arbitration, the Parties could not reach an agreement on whether Mr. Prasad's challenge is to be decided by the Tribunal, or by the appointing authority under the stipulated procedure of Art. 13(4) UNCITRAL Arbitration Rules ("UNCITRAL Rules"). The UNCITRAL Rules are the arbitration rules chosen by the Parties, according to which the dispute shall be settled according to [*R.12, Cl. Ex. C2*]. In response to CLAIMANT's allegations that the Permanent Court of Arbitration ("PCA") should be the appointing authority, the Parties have expressly agreed to exclude the involvement of any arbitral institution in the Arbitration Clause [*Cl. Memo, para.18*; *R.12, Cl. Ex. C2*], and the PCA is an arbitral institution [*Holtzmann/ Shifman, p.5*]. Therefore, the Tribunal shall decide the challenge **(A)**, and Mr. Prasad should not participate in deciding the challenge **(B)**. In case the Tribunal has no authority to decide the challenge, the Supreme Court of Danubia should decide the challenge **(C)**. Lastly, the International Chamber of Commerce ("ICC") arbitration clause in CLAIMANT's General Conditions is not applicable **(D)**.

A. THE TRIBUNAL SHALL DECIDE THE CHALLENGE

2. The Tribunal shall decide Mr. Prasad's challenge, because the Parties excluded Art. 13(4) UNCITRAL Rules **(I)**. Even if the appointing authority is not an arbitral institution, the Parties' intention to maintain confidentiality requires taking the decision by the Tribunal **(II)**.

I. The Parties Excluded Art. 13(4) UNCITRAL Rules

3. CLAIMANT is alleging that the Parties did not exclude Art. 13(4) UNCITRAL Rules [*Cl. Memo, para.15*]. However, the Parties agreed to exclude the involvement of any arbitral institution in the Constitution of the Tribunal **(1)** which means they excluded Art. 13(4) UNCITRAL Rules, therefore, the PCA has no authority to decide the challenge **(2)**.

1. The Parties Agreed to Exclude the Involvement of Any Arbitral Institution in the Constitution of the Tribunal

4. The Parties agreed in the Arbitration Clause to have any dispute settled "*by arbitration in accordance with the UNCITRAL Arbitration Rules"* but they expressly excluded any involvement by an arbitral institution "*without the involvement of any arbitral institution*" [*R.12, Cl. Ex. C2*]. CLAIMANT has stated clearly that "*We can very well live with the clause as it is*" which means it accepted the modification to Art. 13(4) UNCITRAL Rules [*R.15, Cl. Ex. C3*]. Moreover, CLAIMANT stated that he is certain that it will be able to "*overcome any problems relating to the constitution of the arbitral tribunal even without institutional support*" [*R.15, Cl. Ex. C3*]. The challenge procedure of an arbitrator is discussed as a matter of the constitution

of the arbitral tribunal [*Born, p.2201, para.(c)*], which shows that CLAIMANT expressly agreed to exclude the involvement of any arbitral institution even in the challenge procedure. Therefore, the Parties have agreed to modify Art. 13(4) UNCITRAL Rules and derogate from the stipulated procedure under it, and exclude any arbitral institution in deciding the challenge.

5. The UNCITRAL Rules support the principle of party autonomy by permitting modifications to the Articles [*Born, p.2137*]. Art. 1(1) of the UNCITRAL Rules provides that, whenever a dispute arises and the parties agree that it be settled through arbitration under the UNCITRAL Rules, such dispute shall be settled in accordance with these Rules subject to any modifications made by the parties [*Born, p.2137*]. Modifications to the UNCITRAL Rules includes any exclusion made to those rules [*Caron/ Caplan, p.15*]. Furthermore, the UNCITRAL Rules do not contain any mandatory procedural requirements from which the parties are unable to derogate by agreement [*Born, p.2137*].

6. According to Art. V(1)(d) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC"), not following the parties' agreement on the arbitral procedure, including procedures different from or contrary to the laws of the seat of arbitration, will lead to non-recognition of the award [*Born, p.2138*; *Redfern/ Hunter, p.647, para.11.80*].

7. CLAIMANT's non-compliance with the agreed upon exclusion of the involvement of any arbitral institution will risk the recognition and enforceability of the award [*R.12, Cl. Ex. C2*]. Therefore, involving any arbitral institution as in the present challenge would risk the enforcement of the award [*R.12, Cl. Ex C2*]. In conclusion, no arbitral institution shall decide the challenge due to the Parties' agreement to exclude the involvement of any arbitral institution in the arbitral proceedings.

2. The PCA Has No Authority to Decide the Challenge or Designate an Appointing Authority

8. CLAIMANT alleges that the PCA has the authority to decide the challenge or to designate an appointing authority by virtue of Art. 13(4) [*Cl. Memo, para.18*]. However, the PCA has no authority to decide the challenge because it is a global arbitral institution for international dispute resolution [*Holtzmann/ Shifman, p.5; UNCTAD dispute settlement, p.5*], and the Parties excluded the involvement of any arbitral institution [*R.12, Cl. Ex. C2*].

9. Moreover, the Parties agreed on an ad hoc arbitration and the CLAIMANT raised the challenge based on that [*R.6, NA, para.13*]. Ad hoc arbitration occurs where no institution is used to supervise or coordinate the arbitration process [*Waincymer, p.210*].

10. Even if the PCA does have such authority, none of the Parties requested the PCA to decide the challenge as stipulates under Art. 6(1) UNCITRAL Rules which states that any party may propose the

name of an arbitral institution including the PCA to act as the appointing authority. Nor did the Parties request the PCA to designate an appointing authority as stipulated under Art. 6(2) UNCITRAL Rules, which states that if the Parties did not agree on an appointing authority "*any party may request the Secretary-General of the PCA to designate the appointing authority*."

II. Even if the appointing authority is not necessarily an arbitral institution, the Parties' intention to maintain confidentiality requires taking the decision by the Tribunal

11. Confidentiality is an essential requirement to RESPONDENT. Negotiations between the Parties, in which RESPONDENT made clear that the reason why it chose ad hoc over institutional arbitration is to protect its company's reputation [*R.41, Res. Ex. R5, para.4-5; R.12, Cl. Ex. C2*], along with Confidentiality Clause in the Contract, show and reinforce the need for further measures to maintain confidentiality [*R.12-13, Clause 21, Cl. Ex. C2*]. Hence, one of ad hoc arbitration advantages is the added confidentiality it provides compared to institutional arbitration [*Waincymer, p.214*]. Thus, involving any arbitral institution would risk the arbitration's confidentiality.

12. In response to CLAIMANT's assertions that a party can request the court within 30 days to decide the challenge in case the challenge was not successful [*Cl. Memo, para.22*], the Open Court Principle, which is a general rule [*Attorney General v Leveller Magazine Limited*], requires that court proceedings be open and accessible to the media and the public [*A.B. v. Bragg Communications Inc.,; Russell v Russell; Scott v Scott*]. This would absolutely violate the confidentiality of the case at hand.

13. Ms. Ming's statements that due to the damage done to their reputation they changed from institution arbitration to ad hoc, should be interpreted according to her intention which shows that RESPONDENT's concern was to maintain more confidentiality [*R.41, Res. Ex. R5, para.4-5*]. Under Art. 8(1) The United Nations Convention on Contracts for the International Sale of Goods ("CISG"), which is the applicable arbitration law in the dispute at hand, statements made by a party are to be interpreted according to his intent where the other party knew or could not have been unaware of what that intent was [*R.12, Cl. Ex. C2*]. In the case at hand, CLAIMANT wants to involve an arbitral institution and courts regardless to exclusion in the Arbitration Clause and negotiations [*R.12, Cl. Ex. C2; R.41, Res. Ex. R5, para.4-5*], and Mr. Tsai could not have been unaware of that [*R.41, Res. Ex. R5, para.4-5*]. Therefore, no arbitral institution or any other entity but the Tribunal should be involved in the arbitration in order to maintain confidentiality.

B. MR. PRASAD SHOULD NOT PARTICIPATE IN DECIDING ON THE CHALLENGE

14. Under the *Nemo Judex in Sua Causa* principle where a judge cannot rule in his own case, Mr. Prasad should not participate in deciding on the challenge as such participation would violate the principles

of fairness and natural justice **(I)**. Moreover, a decision made by the two remaining arbitrators would not violate the applicable law **(II)**. Even if having a tribunal with two arbitrators violates the Parties' agreement and the Model Arbitration Law ("MAL"), the enforcement of the award is not in risk **(III)**.

I. Mr. Prasad's Participation Would Violate the Principles of Fairness and Natural Justice

15. Mr. Prasad should not be part of the Tribunal when deciding the challenge because he will be a judge in his own cause, violating the principles of fairness and natural justice [*R.39, NOT.CH., para.8*]. The *Nemo Judex in Sua Causa* principle covers any situation where a judge, in this case an arbitrator, has a proprietary interest in the decision before him or her [*Laker Airways Inc. v. FLS Aerospace Ltd.*]. Mr. Prasad has an interest in deciding the challenge as he will be deciding in his own favor in order to proceed with the arbitral proceedings and receive compensation.

II. A decision by the two remaining arbitrators does not violate the Parties' agreement or the applicable law

16. In response to CLAIMANT's allegations that the Tribunal shall decide the challenge in full composition [*Cl. Memo, para.20*], Art. 13(2) MAL states that "*Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.*", not mentioning, however, whether with the exclusion or inclusion of the challenged arbitrator. In practice, having a Tribunal with two arbitrators to decide the challenge is acceptable. In countries that adopt the MAL as the national arbitration law, tribunals with two arbitrators are acceptable and there have been cases where even-numbered tribunals have performed satisfactorily and produced effective dispute resolution results [*Born, p.1666; Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*]. Therefore, a decision by the two remaining arbitrators will not violate the MAL.

III. Even if having a tribunal with two arbitrators violates the Parties' agreement and the MAL, the enforcement of the award would not be risked

17. CLAIMANT admits that the participation of Mr. Prasad in the Tribunal to decide the challenge is criticized, because Mr. Prasad would be ruling on his own eligibility [*Cl. Memo, para.22*]. Even though the Parties agreed on three arbitrators in the Tribunal [*R.12, Cl. Ex. C2*], a Tribunal composed of the two remaining arbitrators to decide the challenge of Mr. Prasad would be a fairer procedure.

18. As per Art. V(II)(b) NYC, the recognition or enforcement of the award would be refused if the domestic competent authority finds that the enforcement of the award would be contrary to the public policy. Public policy under the NYC involves the violation of fundamental principles of justice

[*Paulsson, p.222*]. The award's enforceability will not be risked if the Parties' agreement was not followed when the new procedure would lead to a fairer arbitral proceeding [*Born, p.3560*].

19. In the case at hand, Mr. Prasad's participation in the Tribunal to decide the challenge would violate the fundamental principle of justice as he would be ruling on his own eligibility [*Supra para.15*].

20. In conclusion, having the two remaining arbitrators decide the challenge, contrary to the Parties' agreement and the MAL, would not risk the enforcement of the award.

C. IN CASE THE TRIBUNAL HAS NO AUTHORITY TO DECIDE THE CHALLENGE, DANUBIA'S SUPREME COURT SHOULD DECIDE THE CHALLENGE

21. Given to the Confidentiality Clause agreed between the Parties, the Parties are obliged to keep the exchanged information between them confidential [*R.12, Cl. Ex. C2*]. As an exception to the Confidentiality Clause, any party is required to disclose details related to the case by a statutory obligation, including without limitation, pursuing a legal right in bona fide legal proceedings before any court of competent jurisdiction; in this case, the Supreme Court of Danubia as it is the seat of arbitration [*R.12-13, Clause 21, Cl. Ex. C2; R.55, PO2, para.47*].

22. According to the UNCITRAL Rules the designated appointing authority is the PCA. However, the Parties excluded the involvement of "*any arbitral institution*" which includes the PCA [*R.12, Cl. Ex. C2; Holtzmann/ Shifman, p.5*]. In the case of the absence of an appointing authority, any challenge will be decided by the courts of seat of arbitration [*Redfern/ Hunter, p.273,para.4.94*].

23. All of Danubia, Mediterrano and Equatoriana have provided in the equivalents to Art. 6 MAL that the functions listed there shall be performed by their country's Supreme Court [*R.55, PO2, para.47*]. Therefore, the appointing authority deciding the challenge should be Danubia's Supreme Court as it is the seat of arbitration.

D. THE ICC ARBITRATION CLAUSE IN CLAIMANT'S GENERAL CONDITIONS IS NOT APPLICABLE

24. A model International Chamber of Commerce ("ICC") arbitration clause is found in Art. 11 under CLAIMANT's General Conditions of Sale [*R.53, PO2, para.29*]. However, the Parties, throughout the proceedings, did not refer to any arbitration clause but the Arbitration Clause in RESPONDENT's General Conditions [*R.12, Cl. Ex. C2*], thus, any negotiated or referred to agreements would prevail over the non-referred to or negotiated ones [*Born, p.1392*].

25. Moreover, the ICC is a is one of the most prominent arbitral institutions which means it is used in institutional arbitrations [*Blanke/ Landolt, p.1765*]. Yet, CLAIMANT initiated the arbitration based on the ad hoc Arbitration Clause that exists under RESPONDENT'S General Conditions [*R.6, NA, para.13*],

which means no arbitral institution will interfere in the arbitration proceedings and the Parties will be responsible for determining their own arbitration proceedings [*International Arbitration Law*].

26. Therefore, the ICC arbitration clause is not applicable in the case at hand.

CONCLUSION OF THE FIRST ISSUE

27. The Tribunal, composed of the two remaining arbitrators with Mr. Prasad, should decide the challenge, due to the Parties' agreement to exclude the involvement of any arbitral institution. Alternatively, if the tribunal does not have the authority to decide the challenge Danubia's Supreme Court should decide the challenge.

ISSUE 2: MR. PRASAD SHOULD BE REMOVED FROM THE TRIBUNAL

28. On 14 September 2017, RESPONDENT sent a Notice of Challenge of Arbitrator pursuant to Art. 13(1) UNCITRAL Rules challenging Mr. Prasad in order to remove him from the Tribunal.

29. In response to CLAIMANT's allegation, Mr. Prasad should not be removed and the challenge must fail, since Mr. Prasad is impartial and independent [*Cl. Memo, para.31*]. The Tribunal should hear RESPONDENT's challenge of Mr. Prasad **(A)**, because the doubts are justifiable as to his impartiality and independence **(B)**. Moreover, the IBA Guidelines should be applicable **(C)** to govern the conflict of interest situations caused by Mr. Prasad. Under the IBA Guidelines, the doubts are justifiable as to Mr. Prasad's impartiality and independence **(D)**, Mr. Prasad had a duty to investigate the existence of a conflict of interest **(E)**, and CLAIMANT's disclosure obligations were not fulfilled **(F)**.

A. THE TRIBUNAL SHOULD HEAR RESPONDENT'S CHALLENGE OF MR. PRASAD

30. CLAIMANT'S claim that the challenge must not succeed because it was not raised in a timely manner [*Cl. Memo, para.42*] has no basis. On the contrary, the challenge was raised in a timely manner under Art. 13(1) UNCITRAL Rules **(I)**. In addition, CLAIMANT cannot rely on RESPONDENT's acceptance of Mr. Prasad's initial declaration of Impartiality and Independence and Availability **(II)**.

I. RESPONDENT's challenge was raised in a timely manner under Art. 13(1) UNCITRAL Rules

31. RESPONDENT's mere doubts about the existence of a third-party funder arose from the Metadata retrieved in 27 August 2017, which Mr. Fasttarck states that "*we should definitely do our best to keep the funding secret… to avoid potential challenges of Mr. Prasad.*" [*R.51, PO2, para.11*]. The Metadata did not provide certain information that Findfunds LP indeed is the third-party funder in the upcoming arbitration. A party cannot base their challenge on mere doubts, because under Art. 12(1) UNCITRAL Rules a challenge must be based on justifiable doubts, RESPONDENT only had mere doubts which did

not amount to justifiable doubts. As the UNCITRAL Rules drafters' intention is to establish an objective standard not a subjective one based on a party's concerns [*Caron/ Caplan, p.208; Challenge Decisoin of January 11, 1995, para.30*].

32. Even if RESPONDENT knew that there was a possibility that a third-party funder exists, it could not have known about the conflict of interest between Mr. Prasad and Findfunds LP, contrary to CLAIMANT's assertions that RESPONDENT overdue the time limit under Art. 13 UNCITRAL Rules to raise the challenge [*Cl. Memo, para.40*]. RESPONDENT did not learn about the merger of the law firms Prasad & Partners and Slowfood until 11 September 2017, several weeks after the Metadata was retrieved [*R.51, PO2, para.11*].

33. The notice of challenge must be sent within fifteen days after the circumstances became known to the challenging party [*UNCITRAL Rules, Art. 13*], considering that the circumstances on which the challenge is based on, became known to the challenging party following a disclosure by the arbitrator during the arbitration [*Teitelbaum, p.559; Daele, p.138, para.2*]. In this case, RESPONDENT only became aware of the circumstances that give rise to the challenge after CLAIMANT's disclosure on 7 September 2017 [*R.35, Cl. Disclosure*] followed by the disclosure of the funding by the third-party funder on 11 September 2017 [*R.36, Mr. Prasad's Disclosure*]. This gives RESPONDENT a longer period of time to raise the challenge against Mr. Prasad

34. Therefore, RESPONDENT sent the Notice of Challenge of an Arbitrator pursuant to Art. 13 UNCITRAL Rules on 14 September 2017 within the 15 days limit.

II. RESPONDENT's acceptance of Mr. Prasad's Declaration of Impartiality and Independence and Availability is not a Waiver

35. CLAIMANT claims that RESPONDENT cannot challenge Mr. Prasad, because he initially declared that he was appointed twice by Mr. Fasttrack and that he made reservation for his colleagues at Prasad & Partners to continue current matters and accept further instructions involving the Parties and RESPONDENT accepted it [*Cl. Memo, para.37; R.23, Cl. Ex. C11*]. However, the initial declaration by Mr. Prasad was confined to Prasad & Partners, as he expressly said "*my colleagues at Prasad & Partners*" [*R.23, Cl. Ex. C11*]. At that time, negotiations between Slowfood and Mr. Prasad was on going since January 2017, which means Mr. Prasad was aware that a possible partnership in the future might occur and he could have extended his reservation to such future partnerships [*R.50, PO2, para.7*].

36. Therefore, CLAIMANT 's unethical behavior in concealing the existence of a third-party funder should affect the standard for challenging its appointed arbitrator, because he had a duty to disclose but failed to fulfill it.

B. THERE ARE JUSTIFIABLE DOUBTS AS TO MR. PRASAD'S IMPARTIALITY AND INDEPENDENCE

37. Contrary to CLAIMANT's allegations that there are no justifiable doubts as Mr. Prasad's independence and impartiality [*Cl. Memo, para.64*] due to his connections with the third-party funder Findfunds LP [*R.38, NOT. CH., para.1*], there are justifiable doubts as Mr. Prasad is not independent and not impartial **(I)** Moreover, Disclosure Obligations were not fulfilled by CLAIMANT **(II)**.

I. Mr. Prasad is not impartial or independent

38. Impartiality means that an arbitrator should not have any predispositions regarding the question in dispute and should not privilege one party over the other [*Lew/ Mistelis/ Kröll, p.255; Waincymer, p.294*]. Due to Mr. Prasad dependence as a result of the external connections to the third-party funder [*Infra paras.34*], he may be expected to be subject to undue pressure and hence to be lacking impartiality [*Waincymer, p.294*]. Therefore, RESPONDENT has no duty to prove actual or apparent bias as long as there are exterior connections to Mr. Prasad proving his dependence.

39. In *Szilard v. Szasz* it was established by a unanimous judgement that the law does not require the existence of actual bias to disqualify an arbitrator. Rather, the presence of a real likelihood of bias in favor of one party will constitute disqualifying bias [*Szilard v. Szasz*]. Thus, to challenge and disqualify Mr. Prasad, the real likelihood of bias is enough.

40. On the other hand, independence means that an arbitrator must have no close relationship with a party in the arbitration or its counsel, be the relationship of a financial, professional or personal nature [*Daele, p.270*]. Independence also refers to an objective situation, where no external circumstances to the case might influence the arbitrator's judgement [*Bucher/ Tschanz, p.69*].

41. However, external connections between Mr. Prasad and entities involved in the case exist. Thus, Mr. Prasad should be removed from the Tribunal because Findfunds LP has an influence over its subsidiaries **(1)**, Mr. Prasad was repeatedly appointed by Mr. Fasttrack's firm **(2)**, and Mr. Prasad published an article that favors CLAIMANT's position in the arbitration **(3).**

1. Findfunds LP has an influence over its subsidiaries

42. Findfunds LP does not usually interfere, but has the full authority to do so regarding Funding 12 Ltd. and most of its other subsidiaries, because it owns 60% of the subsidiary's shares. It also has an influence over Funding 8 Ltd. because it owns 40% of its shares [*R.50, PO2, para.2*]. A full control over a subsidiary can be achieved if the parent company owns 51% or more of the shareholding [*Kraenzle/ Volkin, p.1*]. Furthermore, owning 20% or more of the shareholding gives the parent

company a huge influence over the control of the subsidiary [*Kraenzle/ Volkin, p.1*], meaning that Findfunds LP has a great influence over its subsidiaries.

43. Mr. Prasad has external connections with the third-party funder as his law firm is associated with the subsidiary Funding 8 Ltd. **(a)**, and he arbitrated in arbitrations funded by two other subsidiaries **(b)**.

a. Mr. Prasad's law firm is associated with Findfunds LP

44. The fact that Mr. Prasad was unaware of the presence of the third-party funder is not accepted as a situation that would result in an exemption for an obligation to disclose, especially when there are financial connections between Mr. Prasad and the third-party funder which contribute to his welfare [*Osmanoglu, p.322, para.2*]. Mr. Prasad and Slowfood's partner, which is representing a party funded by Funding 8 Ltd., are equity partners. Thus, any financial gains to the partner through Funding 8 Ltd. will add to Mr. Prasad's welfare [*R.50, PO2, para.6*], meaning that Mr. Prasad is not independent.

45. The *Nemo Judex in Sua Causa* principle covers any situation where an arbitrator has an economic interest in the case. In such circumstance disqualification of an arbitrator is automatic and there is no need to investigate whether there is a likelihood of bias [*Laker Airways Inc. v. FLS Aerospace Ltd.*] Mr. Prasad has an economic interest in the case because he is an equity partner with Slowfood's partner, who is being paid by Funding 8 Ltd. [*R.50, PO2, para.6*]. Thus, a vote for CLAIMANT by Mr. Prasad would be a vote for his firm's client, Findfunds LP, which may then award Mr. Prasad's firm further work.

46. It is assumed that all the precautions taken by Mr. Prasad to avoid any contacts with his partner at Slowfood means that; he built a Chinese Wall within Slowfood & Prasad [*R.46, Letter Fasttrack, para.6*]. In *Fund of Funds, Ltd. v. Arthur Andersen & Co. and Westinghouse Elec. Corp. v. Kerr-McGee Corp. v. Kerr-McGee Corp.*, the Chinese Wall defense was rejected. In that case, a law firm sought to defend itself by arguing that a Chinese wall built between its attorneys working for the adverse clients prevented any confidential information from passing hands. The trial judge replied, "*the Court finds that such a 'Chinese Wall' cannot be built within a single law firm.*" [*No. 75 Civ. 540; Westinghouse Elec. Corp. v. Kerr-McGee Corp.*]. Accordingly, whatever precautions taken by Mr. Prasad to prevent contact within the law firm as CLAIMANT asserts, are not sufficient [*Cl. Memo, para.67*].

47. In *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan,* the Chinese Wall was dismissed because the information that the arbitrator had known from a previous case, will definitely affect his judgment on his current arbitration [*Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*].

48. In this case, Mr. Prasad knew that Slowfood's partner is representing a party that is being funded by the third-party funder Funding 8 Ltd., one of Findfunds LP subsidiaries in May 2017, before the initiation of the of the arbitration proceedings [*R.50, PO2, para.6-7*].

49. Therefore, justifiable doubts exist as to Mr. Prasad's impartiality and independence as his law firm is highly associated with Findfunds LP.

b. Mr. Prasad arbitrated in arbitrations funded by two other subsidiaries

50. In response to CLAIMANT's claims that Mr. Prasad should not be challenged due to the fact that he acted twice before in arbitrations funded by Findfunds LP's subsidiaries, because it is assumed that he is still able to rule on the present case objectively [*Cl. Memo, para.62*]. Mr. Prasad "*cannot reasonably be asked to maintain a 'Chinese wall' in his own mind*", knowing that the party appointed him is being funded by a third subsidiary, Funding 12 Ltd., would affect his comprehension of the case and he would most probably render his opinion in favor of CLAIMANT [*International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*].

51. In conclusion, Mr. Prasad has previously arbitrated in arbitral proceedings funded by two other subsidiaries.

2. Mr. Prasad was repeatedly appointed by Mr. Fasttrack's firm

52. CLAIMANT claims that according to Art. 32 UNCITRAL Rules, a party may object to any breach of an arbitration agreement or the UNCITRAL Rules if the objection was prompt [*Cl. Memo, para.33*]. Otherwise, RESPONDENT is considered to have waived its right to object to the prior appointments of Mr. Prasad by Mr. Fasttrack's law firm. Only if RESPONDENT can show that there was a reasonable justification not to have objected in time can the objection be heard [*Cl. Memo, para.33*].

53. In *Tidewater v. Venezuela*, it was ruled that repeated appointments alone do not lead to justifiable doubts. However, if coupled with other factors, they can lead to justifiable doubts [*Tidewater v. Venezuela; Newcombe, para.12*]. Thus, repeated appointments can be sufficient to disqualify an arbitrator when *"(a) the prospect of continued and regular appointment, with the attendant financial benefits, might create a relationship of dependence or otherwise influence the arbitrator's judgment…etc.*" [*Tidewater v. Venezuela*].

54. Moreover, when an arbitrator was challenged on the grounds of repeated appointments by the law firm representing Venezuela in *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela*, the two remaining arbitrators stated that "*multiple appointments of an arbitrator by a party or its counsel constitute a consideration that must be carefully considered in the context of a challenge.*" [*OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela, para.47*].

55. In line with that, at the time RESPONDENT accepted Mr. Prasad's appointment, RESPONDENT had no reason to object as he could not have known that Mr. Fasttrack would act in bad faith. Mr. Fasttrack had both intentionally and knowingly concealed the existence of a third-party funder, in addition to connections to Mr. Prasad, which could lead to justifiable doubts as to Mr. Prasad's impartiality and independence [*R.38, NOT.CH., para.3*].

56. Additionally, when considering the context of Mr. Prasad's challenge, it is easy to note the number of problematic factors that lead to justifiable doubts as to Mr. Prasad's impartiality and independence. Not only was Mr. Prasad repeatedly appointed by Mr. Fasttrack's law firm, but his law firm is also associated with CLAIMANT's funder. Alongside the Metadata made in bad faith by Mr. Fasttrack [*R.38, NOT.CH., para.3*], the repeated appointments of Mr. Prasad by Mr. Fasttrack's firm lead to justifiable doubts as to Mr. Prasad's impartiality and independence.

57. Therefore, the repeated appointments of Mr. Prasad by Mr. Fasttrack's law firm affect his impartiality and independence.

3. Mr. Prasad published an article that favors CLAIMANT's position in the arbitration

58. Mr. Prasad had published an article expressing his opinion and prejudgment about the interpretation of Art. 35 CISG, which is the question in the dispute at hand. Mr. Prasad's opinion favors CLAIMANT's position in the case. Mr. Prasad claims that the article does not affect his impartiality as it was published before the arbitral proceedings started. Accordingly, there was no need to disclose it as part of the circumstances that might give rise to justifiable doubts [*R.44, Prasad's disclosure, para.7*].

59. While parties are free to choose arbitrators compatible with their understanding of the legal issues, it would be unfair for only one party to do so [*Waincymer, p.280*], especially when the arbitrator had published such legal opinion [*Redfern/ Hunter, p.277, para.4.141*]. In this case, CLAIMANT appointed Mr. Prasad based on his opinion about the interpretation of Art. 35 CISG, which was in line with CLAIMANT's position. However, RESPONDENT did not appoint Ms. Reitbauer based on a predisposition [*R.51, PO2, para.17*]. This tilts the fair balance of the tribunal towards one party, resulting in an unfair tribunal.

60. In *Sierra Fishing Company and others v Hasan Said Farran and others,* the court established that it is the arbitrator's duty to disclose to the parties any circumstances known to him which might give rise to justifiable doubts as to his impartiality, regardless of its availability [*Sierra Fishing Company and others v Hasan Said Farran and others*]. RESPONDENT's true consent on Mr. Prasad as an arbitrator requires full knowledge of the underlying facts [*Shaughnessy/ Tung, p.72, para.B*].

61. Not only does Mr. Prasad's predisposition place RESPONDENT at a disadvantage, but his failure to disclose also leads to justifiable doubts as to his impartiality and independence. Even though the published article may have been accessible to RESPONDENT, Mr. Prasad should have at the very least made RESPONDENT aware of its existence. Hence, the published article in addition to Mr. Prasad's failure to disclose it affect Mr. Prasad's impartiality and independence.

II. Disclosure Obligations were not fulfilled by CLAIMANT.

62. The fact that no arbitral laws, rules, or practices oblige a party to disclose the existence of a third-party funder does not mean that disclosure will never be required in the course of an international arbitration proceeding [*Goeler, p.132*]. Thus, the absence of an obligation to disclose under the UNCITRAL Rules does not exempt CLAIMANT from disclosing the existence of a third-party funder.

63. After the bad experience RESPONDENT incurred in the past, RESPONDENT has inserted a confidentiality clause in its standard conditions, to prevent such incidents from recurring. The clause states that the parties to the contract shall hold confidential all information relating to the contract, and shall restrict the access to the information to their "*employees, accountants, auditors, or any professional advisors or counsels*" [*R.12-13, Cl. Ex. C2*], as noted, the clause does not entitle CLAIMANT to disclose any information to a third-party funder.

64. CLAIMANT signed the funding agreement on 25 June 2017 [*R.50, PO2, para.5*], however, it failed, throughout the proceedings, to disclose the existence of a third-party funder.

65. Third-party funding may cause specific procedural issues such as impartiality and independence of arbitrators in the context to the arbitration; and confidentiality in international arbitration proceedings and third-party funding, that require a party to disclose facts related to the funding [*Goeler, p.131,132*].

66. In the case at hand, CLAIMANT breached the Confidentiality Clause and tried to conceal the fact that the third-party funder might have connection to Mr. Prasad, stating that "*If contacts exist we should definitely do our best to keep the funding secret and not disclose it to the Respondent, to avoid potential challenges of Mr. Prasad.*" [*R.38, NOT.CH., para.3*]. Thus, alongside intentionally failing to fulfill its obligation to disclose the existence of third-party funder, CLAIMANT breached the confidentiality clause stipulated by RESPONDENT, therefore entitling RESPONDENT to a fine of USD 500, 000.

C. THE IBA GUIDELINES SHOULD BE APPLICABLE

67. As asserted by RESPONDENT in the Notice of Challenge of Mr. Prasad [*R.38, NOT.CH., para.9*], the IBA Guidelines are applicable, because they constitute the best practice in conflict of interest cases, because the UNCITRAL Rules do not address issues or specific circumstances of conflict of interest. Thus, in order to address the conflict of interest issue the IBA Guidelines shall act as a gap filler

[*Windsor, p. 221*], contrary to CLAIMANT's allegations that it shall not prevail over the UNCITRAL Rules [*Cl. Memo, para.51*].

68. Moreover, the Parties do not need to agree on applying the IBA Guidelines for it to be applicable. In *Sierra Fishing Company and others v Hasan Said Farran and others*, the court applied the IBA Guidelines in cases of conflict of interest or apparent bias even though the parties to that case did not agree to apply them [*Sierra Fishing Company and others v Hasan Said Farran and others*]. Moreover, the IBA Guidelines were used in 106 out of 187 challenge decisions made by the ICC between 2004 and 2009 even without the parties' agreement to apply them [*Waincymer, p.296*].

69. In *ICS Inspection v. Argentina*, the tribunal noted that although the IBA Guidelines were not agreed upon between the parties to apply in the current UNCITRAL Rules proceedings, they reflect international best practices and offer illustrations of circumstances that may give rise to justifiable doubts as to an arbitrator's impartiality or independence [*Paulsson/ Petrochilos, p.85*]

70. This shows that arbitrators can use the IBA Guidelines without the Parties' agreement for it to apply.

71. Therefore, the IBA Guidelines should govern the conflict of interest issue in the case at hand.

D. UNDER THE IBA GUIDELINES, THE DOUBTS ARE JUSTIFIABLE AS TO MR. PRASAD'S IMPARTIALITY AND INDEPENDENCE

72. Given to the IBA Guidelines, justifiable doubts as to the arbitrator's impartiality and independence exist if the arbitrator's law firm currently has a commercial relationship with an affiliate of one of the parties [*IBA Guidelines, 2.3.6*]. In the case at hand, Prasad & Slowfood has a commercial relationship with Funding 12 Ltd. through Funding 8 Ltd. Moreover, Mr. Prasad's law firm has, within the past three years, acted for an affiliate of one of the parties, which is Funding 8 Ltd, in matters not related to the subject matter of the current case, without his involvement, and the firm is currently rendering services to an affiliate of one of the parties, without creating a significant commercial relationship for the law firm and without the involvement of Mr. Prasad. [*IBA Guidelines, 3.1.4, 3.2.1*].

73. Moreover, the term 'affiliate' under the IBA Guidelines has developed and is subsequently applied to situations involving litigation funders. [*Goeler, p.255; Trusz, p.1670*]

74. In conclusion, due to all the existing circumstances under the IBA Guidelines, which give rise to justifiable doubts, Mr. Prasad is not impartial and independent.

E. UNDER THE IBA GUIDELINES, MR. PRASAD HAD A DUTY TO INVESTIGATE THE EXISTENCE OF A CONFLICT OF INTEREST

75. Responding to CLAIMANT's allegations that Mr. Prasad did not know about the third-party funder until CLAIMANT's disclosure [*Cl. Memo, para.28*], and is therefore not affected, under General

Condition (7) of the IBA Guidelines, Mr. Prasad is obliged to investigate any possible conflicts of interests, and any circumstances that may affect his impartiality or independence. Furthermore, it states that ignorance is no excuse for failing to investigate a potential conflict [*Windsor, p. 210*]

76. Therefore, Mr. Prasad's unawareness of the conflict of interest due to the existence of the third-party funder is not a valid excuse as he should have investigated and disclosed any circumstances that might give rise to justifiable doubts.

F. UNDER THE IBA GUIDELINES, CLAIMANT'S DISCLOSURE OBLIGATIONS WERE NOT FULFILLED

77. Under the General Standard (7) IBA Guidelines, CLAIMANT had a duty to inform the Tribunal and RESPONDENT about any direct or indirect relationship between it and the arbitrator [*IBA Guidelines, GS (7)*]. In this case the relationship with Mr. Prasad is through the third-party funder, therefore CLAIMANT should have disclosed the existence of a third-party funder [*Supra para.46*]. However, it did not to disclose, on the contrary it tried to conceal it [*R.38, NOT.CH., para.3*].

78. In conclusion, according to the IBA Guidelines, CLAIMANT is under an obligation to disclose potential situations that might give rise to a conflict of interest, however, it failed to disclose the existence of a third-party funder and intentionally tried to conceal it in order to avoid the challenge of Mr. Prasad.

CONCLUSION OF THE SECOND ISSUE

79. Mr. Prasad should be removed from the Tribunal because RESPONDENT raised the challenge in a timely manner. Moreover, there are justifiable doubts to his impartiality and independence under the UNCITRAL Rules and the IBA Guidelines on Conflict of Interest.

ISSUE 3: RESPONDENT'S STANDARD CONDITIONS APPLY

80. Aiming to broaden its cake offerings, RESPONDENT visited the annual Cucina Food Fair. Due to the number of potential candidates it met there, RESPONDENT put out an invitation to tender for the provision of chocolate cakes [*R.25, RNA, para.7*]. Because RESPONDENT places great importance on the applicability of its own standard conditions and its own codes of conduct, it requested any party wishing to participate in its tender to sign and return a Letter of Acknowledgement before submitting any offer [*R.25, RNA, para.7*].

81. CLAIMANT alleges that the Contract is governed by its own standard conditions, the General Conditions of Sale [*Cl Memo, para.73*]. However, it is RESPONDENT's standard conditions that govern the Contract **(A)**, not CLAIMANT's standard conditions **(B)**. In any case, CLAIMANT's standard conditions are not applicable as the rules of the Battle of the Forms are not applicable **(C)**.

A. RESPONDENT'S STANDARD CONDITIONS ARE PART OF THE CONTRACT

82. Contrary to CLAIMANT's assertions, RESPONDENT's standard conditions have been both incorporated into the contract **(I)**, and accepted by CLAIMANT **(II)**. As such, the standard conditions are applicable in their entirety, as all of the clauses contained in them are valid **(III)**.

I. RESPONDENT properly incorporated its standard conditions

83. While the incorporation of standard conditions is not specifically dealt with in the CISG, the question of their valid incorporation is governed by the provisions of contract formation and interpretation [*DiMatteo/ Dooghe/ Greene/ Maurer/ Pagnattaro, p.347, para.B (3)f; Kröll/ Mistelis/ Perales Viscasillas, p.211, para. 5*]; namely, Artt. 8, 14, 18, and 19 CISG [*Kröll 2005, p.46, para.C*]. In order for a set of standard conditions to be incorporated into a contract, the party relying on them must express its clear intention to have them govern the contract, and they have to be sent to the other party [*CISG Advisory Council Opinion, No.13; Kröll 2005, para.24; Newhouse/ Tsuneyoshi, p.56, para.5.1.2; German Machinery Case*].

84. After RESPONDENT decided to put out a competitive tender, it made clear that it would only accept tenders that were in line with the specified requirements proposed in the ITT [*R.25, RNA, para.8*]. As outlined by Art. 5 of the Special Conditions of Contract [*R.11, Cl. Ex.C2*], RESPONDENT specifically stipulates that the General Conditions of Contract be part of the Contract. Following that article, RESPONDENT attached their full text in English [*R.12, Cl. Ex.C2*].

85. In the *Austrian Propane Case*, the court established that contractual negotiations are evidence that the offeree was aware of the inclusion of the standard terms [*Case No. 10 Ob 518/95*]. Likewise, where a seller makes repeated reference to its standard conditions throughout negotiations, the buyer is deemed aware or should have been aware that they are part of the contract [*Gantry v. Research Consulting Marketing; DiMatteo/ Dooghe/ Greene/ Maurer/ Pagnattaro, p.347, para.3*]. In other words, a party is bound by standard terms if they are noticeable to the other party [*Dysted, p.19, para.6.2.1.3*]. In determining how noticeable the standard conditions are, all statements and conduct of the parties leading up to and including the conclusion of the contract are interpreted in light of Art. 8 CISG. [*Eiselen, para.2*].

86. Throughout the Parties' relationship, RESPONDENT had emphasized the importance of adhering to its standard conditions [*R.8, Cl. Ex.* C1].

87. Seeing that RESPONDENT has both established its intent to be bound by its own standard conditions, and made them available to CLAIMANT, they were properly incorporated.

II. CLAIMANT accepted RESPONDENT's standard conditions

88. CLAIMANT states that its actions "*during the negotiations cannot be considered as an acceptance*" of RESPONDENT's General Conditions of Contract [*Cl. Memo, para.89*]. This is not true because

CLAIMANT accepted RESPONDENT's General Conditions by promising to abide by them during the negotiations stage **(1)**, and by attaching them to its offer **(2)**.

1. CLAIMANT promised to abide by RESPONDENT's standard conditions

89. While it is true that there are no specific rules under the CISG for the proper incorporation of standard conditions into a contract [*supra. para. 4*], it is false to assert that agreements to include them during negotiations cannot be binding [*Schlectriem/ Schwenzer, p.283, 286 paras.28, 31*]. Even though RESPONDENT's ITT was merely an invitation to make offers, that does not mean that the terms and conditions required by the ITT cannot be binding. Whenever the parties have expressly agreed during the negotiation stage to incorporate specific terms into the contract, the negotiated terms they have agreed on are binding [*Schlectriem/ Schwenzer, p.283, para.28*]. The content of the contracts may be set out in preliminary negotiations or agreements. Therefore, the terms of the contract are not only limited to those set out in the offer [*Schlectriem/ Schwenzer, p.289, para.38*].

90. When RESPONDENT requested the Letter of Acknowledgement, its request was both to ensure the comparability of the tenders, and to guarantee that all parties would abide by the requirements it has set out in its ITT [*R.25, RNA, para.8*]. The Letter of Acknowledgement forms a binding agreement between the Parties to abide by the "*specified requirements*" made by RESPONDENT [*R.28, Res. Ex. R1*], regardless of the fact that it was made during negotiations.

91. RESPONDENT made it very clear in Section III of its Tender Documents, which outlines the specifications of the goods and the delivery terms, what specified requirements it holds against all tenderers. In Clause 1.5 of Section III, RESPONDENT stipulates that all "*ingredients have to be sourced in accordance with the stipulations under Section IV*" [*R.10, Cl. Ex. C2*]. Under Section IV, RESPONDENT stipulates that its General Conditions are to be part of the Contract [*R. 11, Cl. Ex. C2*].

92. Hence, by signing the Letter of Acknowledgement, CLAIMANT has promised to abide by RESPONDENT's standard conditions.

2. CLAIMANT attached RESPONDENT's standard condition to its offer

93. CLAIMANT did not only promise to abide by RESPONDENT's General Conditions of Contract, but it also attached them to its offer. When CLAIMANT dispatched its Tender, it included a full set of the Tender Documents sent by RESPONDENT [*R.52, PO2, para.27*]. Amongst the Tender Documents were RESPONDENT's General Conditions of Contract [*R.9, Cl. Ex. C2*].

94. In light of that, CLAIMANT cannot argue that it did not intend to incorporate RESPONDENT's General Conditions because its offer had a clause which states that "*there were no terms or conditions which would be considered preferential to other documents and conditions*" [*Cl. Memo, para.80*]. The clause neither relevant nor

appropriate because RESPONDENT'S standard conditions are not "*preferential*"; rather, they are the only applicable standard conditions, as CLAIMANT had previously agreed on them.

95. With that in mind, CLAIMANT cannot contest that RESPONDENT's standard conditions are applicable.

III. RESPONDENT's Standard Conditions Are Valid

96. In Clause 4 of its standard conditions, RESPONDENT outlines the contractual documents and maintains that any violation of them constitutes a breach. In particular, RESPONDENT specifies that violations of its Code of Conduct for Suppliers, or its General Business Philosophy would constitute a fundamental breach [*R.12, Cl. Ex. C2*]. CLAIMANT argues that Clause 4 of the General Conditions of Contract is invalid because it is a surprising term [*Cl. Memo, para.96*]. This claim is invalid because the Tribunal found RESPONDENT's standard conditions to be entirely valid **(1)**. Even if it did not, however, they would still be entirely valid, as Clause 4 is not a surprise term **(2)**.

1. The Tribunal declared RESPONDENT's Standard Conditions to be entirely valid

97. The Parties' agreement to arbitrate entails that they comply with the Tribunal's procedural directions and orders. Accordingly, procedural orders issued by a tribunal are decisions that the parties to arbitration are required to comply with [*Born, p.*2230]. The Tribunal declared all clauses of RESPONDENT's General Conditions to be valid [*R.54, PO2, para.42*]. Hence, CLAIMANT cannot argue that Clause 4 is invalid, and therefore inapplicable. The Tribunal has settled this matter and it is not up for dispute.

2. In any case, Clause 4 is not a surprise term

98. Assuming, *arguendo*, that the validity of RESPONDENT's standard conditions is up for dispute, CLAIMANT's allegations are still unfounded. It was known to CLAIMANT that by 2018, RESPONDENT aims to become a LEAD UNGC Company [*R.8, Cl. Ex. C1*]. A LEAD Company bears the responsibility of posing as model company in terms of ethical production and maintaining a sustainable supply chain through committing itself to the highest standards of sustainability issued by the UNGC [*UNGC, Leaders in Corporate Sustainability*]. Throughout the course of the Parties' relationship, starting from their first meeting at the food fair, and up to the Contract's conclusion, RESPONDENT had always emphasized the importance of maintaining a sustainable supply chain and adhering to principles of ethical production [*R.8, Cl. Ex. C1; R.17, Cl. Ex. C5; R.41, Res. Ex. R5*]. In fact, RESPONDENT does not conduct business with suppliers that violate Global Compact principles [*R.24, RNA, paras.4-5*]. In other words, adherence to the standards of ethical production has become an indispensable part of RESPONDENT's trade [*Dysted, p.17, para.6.2.12*].

99. With that in mind, CLAIMANT cannot claim that Clause 4 is surprising. A party intending to adopt a specific Corporate Social Responsibility ("CSR") policy can stipulate the strict adherence to such policy by another contractual party. As such, it can also enforce sanctions, and declare the other party to be in breach of contract if it violated the ethical standards in the contract [*Dysted, p.14, para. 6.1*]. In addition, terms that are generally encountered in a particular trade, such as RESPONDENT's stipulation that parties strictly adhere to ethical production, cannot qualify as unusual or surprising; no matter how "*very harsh or one-sided*" they are [*Eiselen, para.2*].

100. In line with that, RESPONDENT has outlined in Clause 4 of its General Conditions of Contract the CSR policy it applies to the procurement of supplies, and declared that any violation by the other party would constitute a fundamental breach entitling RESPONDENT to terminate the contract with immediate effect and claim damages [*R.12, Cl. Ex. C2*]. CLAIMANT is surely familiar with this practice, as it reserves the same right to contract termination against its suppliers, in case of non-compliance with its own Code of Conduct for Suppliers [*R.30, Res. Ex. R3*]. Even though the strict adherence stipulated by RESPONDENT may come off as "*very harsh or one-sided*" [*supra. para.86*], the term cannot qualify as surprising as it is an indispensable part of RESPONDENT's trade.

101. Therefore, CLAIMANT cannot credibly argue that Clause 4 was surprising.

B. CLAIMANT'S STANDARD CONDITIONS ARE NOT PART OF THE CONTRACT

102. When CLAIMANT sent RESPONDENT its tender, it accompanied it with a letter, informing RESPONDENT that it has proposed certain changes to the ITT, and explicitly stated that it made changes to the size and payment method of the cake. Unlike its express indication of the changes in size and payment method, CLAIMANT did not explicitly indicate that it would apply its own standard conditions [*R.15, Cl. Ex. C3, p.15*]. There is no mention in this letter of any changes to RESPONDENT's standard conditions. Along with a full set of Tender Documents, CLAIMANT sent a Sales-Offer in a boilerplate form with a footer stating that the offer was subject to CLAIMANT's standard conditions, the General Conditions of Sale [*R.16, Cl. Ex. C4*]. The form CLAIMANT sent was the same form it uses for all of its other offers [*R.53, PO2, para.28*], thereby constituting a boilerplate form. There is no indication on this boilerplate form or in the letter accepting the conditions of the ITT that CLAIMANT expected its terms and conditions to apply in this instance. When RESPONDENT awarded CLAIMANT the Contract, it explicitly accepted the proposed changes in size and payment method. However, short for commending CLAIMANT on its codes, RESPONDENT did not state anything to indicate its acceptance of CLAIMANT's standard conditions [*R.17, Cl. Ex. C5*]. Accordingly, CLAIMANT incorrectly

claims that it has properly incorporated its standard conditions **(I)**, and misrepresents the facts in arguing that RESPONDENT accepted its standard conditions **(II)**.

I. CLAIMANT did not properly incorporate its standard conditions

103. CLAIMANT argues that its tender clearly indicated its intention to only apply its standard conditions, and that it successfully incorporated them into the Contract [*Cl. Memo, para.80*]. However, CLAIMANT's use of its boilerplate form was not sufficient to incorporate CLAIMANT's standard conditions into the Contract **(1)**. In addition to that, CLAIMANT also failed to establish its intent to be bound by its own standard conditions **(2)**.

1. CLAIMANT's reference is insufficient

104. As previously established, the general consensus is that the standard terms have to be sent to other party for proper incorporation [*supra. para. 72*]. This is because it is considered an unfair risk allocation to impose a duty on the other party to look for the standard conditions, as the principles of good faith under Art. 7 CISG require that a party makes its standard terms available [*Magnus, p.319*].

105. Moreover, the reference to the incorporation of standard conditions should not be printed in such a manner that it is easy to overlook. The inclusion has to be so clear that there should be "*no obligation on a party to go hunting for a reference on their inclusion*" [*CISG Advisory Council Opinion, No.13*].

106. The *German Machinery Case* established that for standard conditions to be applicable, they must be made available in a manner such that the addressee can reasonably access them. The court did not find it sufficient "*that the offer only contains a reference to the standard terms without them being sent to the offeree*" [*German Machinery Case*]. The only exception to that rule is when the contract is concluded through email, and a direct link to the standard conditions is attached [*Schwenzer/ Mohs/ Basel, p.240, para.III.*], meaning that even if the contract was concluded through email, the standard conditions are not applicable if the link provided was not direct [*Schwenzer/ Hachem/ Kee, p.167, para.12.11*].

107. Accordingly, where the contract was not concluded online, placing the terms on an internet site does not give the addressee a reasonable opportunity to become acquainted with the terms [*Case No. 13 W 48/09; Vogenhauer/ Kleinheisterkamp, p.328, para.22; Schwenzer/ Schlectriem, p.300, para.57*]. After all, "*the addressee is not under a duty to get access to standard contract terms that the user wants to use against the addressee*" [*Kröll/ Mistelis/ Perales Viscasillas, p.234, para.40*].

108. CLAIMANT alleges that RESPONDENT had a reasonable opportunity to familiarize itself with the content of the conditions, and that the reference in its offer, along with the website it placed, is more than sufficient to make them available [*Cl. Memo, para. 81*]. However, that is not the case.

109. CLAIMANT cannot allege that its standard conditions were made reasonably available. To begin with, the Contract between CLAIMANT and RESPONDENT was concluded through mail, and no part of it was carried out online [*R.8-17, Cl. Ex. C1-5*]. In addition to that, the link provided by CLAIMANT was a link to its homepage, and not to the General Conditions of Sale [*R.16, Cl. Ex. C4*]. In order to find the General Conditions of Sale, RESPONDENT had to first access CLAIMANT's homepage and then search for the General Conditions of Sale [*R.53, PO2, para.28*].

110. As mentioned previously, RESPONDENT was under no duty to access the CLAIMANT's homepage, let alone search for the General Conditions of Sale. While it is true that RESPONDENT managed to find the General Conditions of Sale, its resourcefulness is not to be mistaken for a contractual obligation. Imposing CLAIMANT's standard conditions on RESPONDENT just because RESPONDENT cared enough to look them up would violate the principles of good faith under Art. 7 CISG [*supra. para. 91*]. By allowing CLAIMANT to apply its standard conditions without making active effort to make them available to the other party, the Tribunal is institutionalizing "*unfair risk allocation*" [*supra. para.*91].

111. CLAIMANT also claims that it "*could trust that RESPONDENT had access to the Internet and to the conditions even though the negotiations were concluded on paper*", because RESPONDENT has an e-mail address and a website [*Cl. Memo. para.81*]. However, CLAIMANT's reference is still insufficient, because the availability of the standard conditions over the internet does not make their text otherwise available, even if the other party lists its own e-mail address on its stationary [*Schwenzer/ Schlectriem, p.300, para.57*].

112. CLAIMANT also inaccurately asserts that RESPONDENT had two weeks to read and understand the General Conditions of Sale [*Cl. Memo, para.81*]. CLAIMANT's Sales-Offer would have expired by 11 April 2014, as indicated by CLAIMANT in the offer [*R.16, Cl. Ex. C4*]. The offer was sent on 27 March 2014 [*R.15, Cl. Ex. C*3]. This means that RESPONDENT had no more than three business days to evaluate CLAIMANT's offer, read CLAIMANT's standard conditions, and compare the other five submitted tenders.

113. Therefore, CLAIMANT's standard conditions are inapplicable because CLAIMANT's reference is insufficient.

2. CLAIMANT did not establish its intent to be bound by its terms and conditions

114. In order for a party to rely on its standard conditions, it must establish its intent to be bound by them [*Case No. 8 Ob 104/16a*]. Throughout the negotiations, CLAIMANT has made no reference whatsoever to its intention to be bound by its own standard conditions, as opposed to RESPONDENT, who repeatedly did so. In fact, what CLAIMANT did express, was its agreement to apply RESPONDENT's standard conditions [*R.28, Cl. Ex. R1*].

115. CLAIMANT is relying on the footnote in the bottom of its standard form offer. Nevertheless, due to its boilerplate nature, CLAIMANT cannot argue that it really did intend to be bound by it. The evidence does not establish that the footnote was anything more than an incidental part of this form, and not an intentional move to override RESPONDENT's ITT requirements on CLAIMANT's part.

116. Therefore, CLAIMANT did not establish its intent to be bound by its own standard conditions.

II. Respondent did not accept CLAIMANT's standard conditions

117. When RESPONDENT awarded CLAIMANT the contract, it only explicitly accepted the changes expressly indicated by CLAIMANT, meaning the changes in size and the payment method. RESPONDENT made no mention of its acceptance of CLAIMANT's standard conditions. In fact, RESPONDENT even stated that it only viewed CLAIMANT's standard conditions "*out of curiosity*" [*R.17, Cl. Ex. C5*]. Nevertheless, CLAIMANT insists that RESPONDENT accepted its standard conditions.

118. CLAIMANT's whole argument relies on the presumption that silence constitutes acceptance [*Cl. Memo, paras.83-85*]. That is a false assumption to make in this case, and it violates the principles of contract formation under the CISG. Art. 18(1) CISG states that "*A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance"* [*CISG, Art. 18*]. Under Art. 18(2), silence can amount to acceptance only when there is usage or an established practice between the parties [*Viscasillas, p.386, para.VIII*]. Otherwise, no acceptance can be derived from silence or non-objection, whatsoever.

119. When it comes to the acceptance of standard conditions, the rule is no different. Case law has established that a party cannot be bound by a set of standard conditions it did not expressly accept [*Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*; *Mobile car phones case; Golden Valley Grape Juice and Wine, LLC v. Centrisys Corporation et al.*].

120. In a decision rendered by a Dutch court, it was ruled that "*It cannot be assumed that the buyer tacitly accepted the clause because silence in itself cannot be considered as an acceptance pursuant to Art 18(1) CISG…only if a practice has been established between the parties according to Art. 18(3) CISG a party could tacitly accept the general terms*" [*Case no. 146453*].

121. To supplement its argument, CLAIMANT claims that even if RESPONDENT had not understood that CLAIMANT's standard conditions apply, it would have had time to understand that they do, and therefore, object to their application over the course of their contractual relationship, because CLAIMANT used the same footer in its invoices [*Cl. Memo, para.84*]. Nevertheless, in *Solae, LLC v Hershey,* a forum selection clause did not become part of the contract, even though the seller sent

multiple invoices containing the Conditions of Sale, because the buyer never "*affirmatively assented"* to them [*Solae, LLC v. Hershey Canada, Inc.*].

122. Hence, RESPONDENT did not accept CLAIMANT's standard conditions.

C. THE RULES OF THE BATTLE OF THE FORMS DO NOT APPLY

123. The premise of CLAIMANT's argument is that RESPONDENT's standard conditions do not apply because the Last Shot approach eliminates them. In making this argument, CLAIMANT unsuccessfully presents its tender as a counter-offer to RESPONDENT's ITT [*Cl. Memo. para.76*]. In doing so, it subjects the incorporation of its own standards conditions to the rules of the Battle of the Forms to deem them applicable, instead of RESPONDENT's. However, CLAIMANT's tender was not a counter-offer, and therefore Art. 19 CISG is inapplicable **(I)**. In any case, in practice, the party initiating the tender always determines the applicable conditions **(II)**.

I. Art. 19 CISG is inapplicable because CLAIMANT's offer was not a counter-offer

124. Art. 19 CISG states that a reply to an offer which includes material modifications is a rejection of it, and constitutes a counter-offer. If a reply contains modifications that are not material, however, then it is said to be an acceptance, and the modified terms are the terms of the contract [*Huber, para.3.4*].

125. CLAIMANT alleges that its tender was a counter-offer that RESPONDENT accepted [*Cl. Memo, para.74*]. That cannot be the case as RESPONDENT's ITT was not an offer to begin with. It was merely an invitation to make offers, which CLAIMANT responded to by submitting its tender. The tender CLAIMANT submitted constituted an offer. In that offer, CLAIMANT agreed to the terms of the ITT except for size and payment method, and attached RESPONDENT's standard conditions to its offer [*R.15, Cl. Ex. C3; R.51, PO2, para.27*]. Hence, the Last Shot doctrine under Art. 19 CISG is inapplicable; there is no evidence that CLAIMANT took a shot by proposing a counter-offer.

126. Even if CLAIMANT was to argue that the footnote in its invoices would deem its own standard conditions incorporated owing to the fact that they were the last referred to, its attempt would fail. Allowing the footnote in the invoices to become part of the contract would entail that additional terms be allowed into a contract after its conclusion. It is "*totally unacceptable"* to allow standard conditions, or any other conditions for that matter, to be included *ex post facto,* or in retroactive effect, in cases other than modification of the contract [*Eiselen, para.3.4*].

127. Hence, even if the Last Shot doctrine applies, CLAIMANT's standard conditions are not part of the Contract, as they are not the conditions that were last referred to during Contract formation.

II. The Party initiating the tender determines the applicable conditions

128. It is undisputable that the party with the "*stronger bargaining position*" is usually the party whose standard conditions govern the contract [*Eiselen, para.1*]. In fact, especially in cases of procurement and tenders, it is the party initiating the tender that determines the applicable conditions. After all, tenders are an attempt to achieve the best price by competition without entering into negotiations [*Furmston/ Tolhurst, p.147, para.5.02*].

129. RESPONDENT, being the party that initiated the tender, is a distributor that operates a chain of supermarkets in Meditteraneo, while CLAIMANT is but a medium-sized bakery in Equatoriana [*R.4, NA, paras. 1-2*]. In addition to that, CLAIMANT attested to the fact that it is RESPONDENT's standard conditions that apply during the negotiations stage. When CLAIMANT signed and returned the Letter of Acknowledgement, it promised RESPONDENT that it would tender "*in accordance with the specified requirements*" [*R.28, Res. Ex. R1*]. Through binding itself with the specified tendering requirements, which include incorporating the Tender Documents in the contract, CLAIMANT agreed to have RESPONDENT's standard conditions govern the contract.

130. Therefore, it is RESPONDENT's standard conditions that apply, as it is the party that initiated the tender and set out the tendering requirements.

CONCLUSION OF THE THIRD ISSUE

131. Contrary to CLAIMANT's allegations, RESPONDENT's General Conditions of Contract govern the Contract at hand. RESPONDENT's standard conditions are applicable because it has properly incorporated them, and because CLAIMANT accepted them. They are also entirely valid. On the other hand, CLAIMANT's standard conditions are not part of the contract as they were neither properly incorporated, nor accepted by RESPONDENT. Finally, CLAIMANT's conditions are also not applicable under the rules of the Battle of the Forms.

ISSUE 4: CLAIMANT DELIVERED NON-CONFORMING GOODS UNDER ART. 35 CISG

132. CLAIMANT alleges that it delivered conforming goods as required by Art. 35 CISG [*Cl. Memo, para.100*]. To rebut this allegation, RESPONDENT confirms that CLAIMANT is in breach of the Contract, as it delivered non-conforming goods under Art. 35 CISG, since the cocoa was produced in a non-sustainable manner **(A)**. The Contract specifically required CLAIMANT to ensure compliance by its supplier to produce sustainable cocoa, and not merely use its best efforts to do so **(B)**. Even if CLAIMANT was merely required to use its best efforts, it did not **(C)**.

A. CLAIMANT IS IN BREACH OF CONTRACT AS IT DELIVERED NON-CONFORMING GOODS UNDER ART. 35 CISG

133. Art. 35(1) CISG requires the seller to deliver goods of the same quality, quantity and description set forth in the contract. CLAIMANT is in breach of the Contract as it delivered non-conforming goods under Art. 35(1) CISG (**I**). Even if the cakes were fit for their ordinary use as per Art. 35(2)(a) CISG as CLAIMANT asserts [*Cl. Memo, para.125*], they were not fit for their particular purpose under Art. 35(2)(b) CISG **(II)**.

I. The goods were non-conforming under Art 35(1) CISG

134. The goods were non-conforming under Art. 35(1) CISG because CLAIMANT did not comply with the contractual requirements to deliver sustainably produced goods **(1)**, since the method of production accounts for the quality of the goods for purposes of Art. 35(1) CISG **(2).**

1. CLAIMANT did not comply with the contractual requirements to deliver goods of the agreed upon quality

135. The goods must comply with RESPONDENT's contractual requirements according to Art. 35 CISG. If the contract explicitly states that certain ethical values must be met in the manufacturing process of the goods, the seller must comply with such requirement. [*Schwenzer/ Hachem/ Kee, p.381, para.31.87; Schwenzer B, p.126, para.2*]. In one case, the Swiss Civil Court, held that manufacturing products that are non-genetically modified amounts to a contractual requirement [*Soyprotein products case*].

136. CLAIMANT did not fulfil the contractual requirements to deliver chocolate cakes of the agreed upon quality. First, RESPONDENT's Special Conditions require the Seller to deliver the good "*complying with all the obligations arising from this contract*." [*R.11 Cl. Ex C2*]. Second, RESPONDENT's Specification of Goods and Delivery Terms requires the seller to deliver high quality chocolate cakes [*R.11, Cl. Ex. C2*]. Third, RESPONDENT's Supplier Code of Conduct imposes an obligation on sellers to conduct their business in and environmentally sustainable way and to ensure their own suppliers do so as well [*R.13,14, Cl. Ex. C2*]. CLAIMANT did not comply with the agreed upon quality standard to deliver high quality cakes using sustainable cocoa. Thus, it did not deliver conforming goods in compliance with the contractual requirements as required by Art. 35(1) CISG, since only 50% of the cocoa used in the cakes were sustainable.

137. CLAIMANT's allegation that the specification of RESPONDENT's general conditions requires only physical characteristics is erroneous [*Cl. Memo, para.100*]. In situations where the contract obliges the seller to produce the goods in compliance with certain ethical standards and the seller fails to do so, the contract is deemed breached, even if the goods were physically conforming [*Schwenzer/ Hachem/*

Kee, p.377, para.31.71]. Thus, CLAIMANT is in breach RESPONDENT's general conditions as it did not deliver ethically produced cakes.

138. CLAIMANT asserts that Clause 1.5 of Section III of the Tender Documents, titled Specification of the Goods and Delivery Terms, refers only to Section IV, which lays RESPONDENT'S Special Conditions of Contract [*Cl. Memo, para.107*]. Section IV states that "*Ingredients have to be sourced in accordance with the stipulations under Section IV*". However, Section IV, Article 5, titled Order of Precedence of Contract Documents, lists the composition of the Contract as follows: The Special Conditions of Contract, the General Conditions of Contract, and the Tender Documents. In fact, Section XXVI of the Tender Documents is Comestibles Finos' Code of Conduct for Suppliers, and as a result, a part of the Contract [*R.9, Cl. Ex. C2*]. Accordingly, the production method is a requirement under Principle C of Section XXVI, thus, under sections III and IV of the Tender Documents, the ethical sourcing provision was a contractual requirement.

139. Therefore, CLAIMANT did not comply with the requirements to deliver goods of the quality set forth in the contract.

2. Production methods fall under the scope of quality in the sense of Art. 35(1) CISG

140. The definition of goods in the CISG comprises the physical and non-physical attributes connected to the goods [*Maley, p.85, para.10*]. This demonstrates that the production method of the cocoa is considered a non-physical attribute, and as a result, a part of the quality of a good under Art. 35(1) CISG. Consequently, ethical production methods are also governed by the CISG and fall under the scope of quality [*Schwenzer/ Hachem/ Kee, p.381, para.31.87*]. Notably, quality does not only encompass the physical characteristics of the goods; in fact, it extends to all circumstances regarding the goods' relationship to its environmental surroundings, including, the origin of the goods and its relation to ethical standards [*Schwenzer/ Leisinger, p.266, para.IV(1)(a)*]. Moreover, the good's organic nature is also considered a part of its quality [*Organic barley case; Soyprotein products case*].

141. In this case, CLAIMANT asserts that it delivered conforming goods as per the physical characteristics of the quality [*Cl. Memo, para.100*], which RESPONDENT does not dispute. However, the sustainable production of the cocoa is considered part of the non-physical quality under Art. 35(1), and CLAIMANT did not fulfill such requirement.

142. In addition, where it is made known by the buyer that the quality of the goods includes compliance with certain ethical standards, the seller is under a contractual obligation to produce the goods in such

manner [*Williams, p.305, para.V*]. Here, RESPONDENT made known to CLAIMANT that it specifically chose it for its "*commitment to sustainable production*" [*R.17, Cl. Ex. C5*].

143. In conclusion, it is evident that production methods are considered part of the quality requirement. Therefore, CLAIMANT did not deliver conforming goods as per Art. 35(1) CISG.

II. Even if the cakes were fit for ordinary use as per Art. 35(2) CISG, they were not fit for their particular purpose

144. Even if the cakes were fit for their ordinary purpose under Art. 35(2)(a) CISG [*Cl. Memo, para. 129*], they were not fit for their particular purpose under Art. 35(2)(b) CISG. Art. 35(2)(a) CISG requires the seller to provide goods that are fit for their ordinary purpose in cases where the buyer did not make known to the seller any particular purpose. Under Art 35. (2)(a) CISG the goods must be of an average quality as the default minimum standard [*Kroll/ Mistellis/ Valesquez, p.508, para.15; Henschel, para.(f)*]. However, Art. 35(2)(b) CISG imposes an obligation on the seller to deliver goods fit for a particular purpose provided that it was expressly or impliedly made known to it during the conclusion of the contract [*Honnold, p.336 para.226*]. In one case, the French court found that the seller is liable under Article 35(2)(b) CISG, merely because of his knowledge of the intended use of the goods [*Coin Change machine case; vine wax case; de Luca, p.50,51, para.2.5.2.2.1*].

145. In this case, RESPONDENT specifically asked CLAIMANT to produce high quality chocolate cakes [*R.11, Cl. Ex. C2*]. Thus, the "*average quality*" standard of Art. 35(2)(a) CISG does not apply.

146. RESPONDENT repeatedly made known to CLAIMANT its particular purpose and its intended use for the cakes to be sold as part of an ethically sourced food line. RESPONDENT made this particular purpose known to CLAIMANT in a variety of ways.

147. First and foremost, RESPONDENT provided CLAIMANT with its Supplier Code of Conduct in which Principles C and D, state that CLAIMANT'S suppliers must conduct their business "*in an environmentally sustainable way"* and *"in an ethical manner.*" [*R.13,14, Cl. Ex. C2*]. RESPONDENT asserts that it made known to CLAIMANT what it particularly expects from the goods provided, that they are expected to be ethically and sustainably produced.

148. Second, the particular purpose was made known to CLAIMANT during negotiations. After the Cucina food fair, Ms. Ming sent an email to Mr. Tsai providing the reasons to why CLAIMANT's tender was impressive to RESPONDENT and an interesting supplier for it out of the other bidders [*R.17, para.2, Cl. Ex. C5*; *R.8, para.2, Cl. Ex C1*]. One of those reasons was CLAIMANT's strict adherence to the principles of ethical and sustainable production [*R.8, para.2, Cl. Ex C1*]. In addition to the fact that CLAIMANT and RESPONDENT's codes of conduct "*share the same values and are both committed to ensure that*

the goods produced and sold fulfill the highest standard of sustainability" [R.*17, para.2, Cl. Ex. C5*]. Moreover, another reason why RESPONDENT was impressed by CLAIMANT is due to the management of CLAIMANT's supply chain through regular audits and reporting obligation [*R.8, para.3, Cl. Ex C1*].

149. Third, RESPONDENT also made known, in its Supplier Code of Conduct, that it is a UNGC member committed to the principles of the UN Sustainable Development Goals ("SDGs") [*R.13, Cl. Ex. C2*]. Goal 12 of the SDGs is to ensure sustainable consumption and production patterns [*SD Knowledge Platform*]. In addition, RESPONDENT also made known to CLAIMANT its intention to become a UNGC LEAD Company by 2018 [*R.8, para.3, Cl. Ex C1*].

150. Fourth, because CLAIMANT is a UNGC member, and both CLAIMANT and RESPONDENT have impliedly made relevant to their contract this trade usage thus, the UNGC standards are binding to both Parties as per Art. 9(2) CISG which addresses usages and practices. The UNGC is the world's largest sustainability initiative where minimum ethical standards become part of its member's contract as an international trade usage [*Schwenzer A, p.107, para.2.2; Wood case*]. Eradicating child labor, ethical production, human rights, and gender equality, are all considered measures to demonstrate environmental development goal, which are supported by the practice of UNGC member companies. Hence, this demonstrates that members of the UNGC are committed to ethical standards to fulfil environmental goals.

151. This proves that CLAIMANT was aware that the particular purpose of the cakes is to be ethically produced, therefore, the cakes were not fit for their particular purpose under Art. 35(2)(b), even if they were fit for their ordinary use as per Art. 35(2)(a).

B. The Contract requires CLAIMANT to ensure compliance by its supplier

152. The Contract required CLAIMANT to ensure compliance by its supplier [*R.13, Cl. Ex C2*]. However, CLAIMANT argues that the Contract only required it to use its best efforts [*Cl. Memo, paras.102-105*].

153. Since the parties are not able to agree on what was required by RESPONDENT's Standard Terms and Conditions the Contract must be interpreted according to Art. 8 CISG. According to Art. 8(1) CISG statements made by a party must be interpreted according to his intent provided that the other party knew, [*MCC v. Ceramica Nuova D'Agostino; Industrial product case*] or could not have been unaware of that intent. [*Glass bottles case*].

154. In this case, the Contract is to be interpreted according to RESPONDENT's intentions, because CLAIMANT knew of such intention, or could not have been unaware of it through RESPONDENT's language. CLAIMANT's duty to ensure compliance by its supplier is governed by Art. 5.1.4 (1)

UNIDROIT (**I**). Additionally, the language used by RESPONDENT in the Contract also requires CLAIMANT to ensure compliance by its supplier and not merely use its best efforts (**II**).

I. CLAIMANT is required to achieve a specific result under Art. 5.1.4 UNIDROIT

155. CLAIMANT is under a duty to achieve a specific result, and such duty is governed by Art. 5.1.4 (1) UNIDROIT, since the Contract explicitly stated that the UNIDROIT principles are applicable for issues not dealt with by the CISG [*R.12, Cl. Ex C2*]. CLAIMANT is not merely under an obligation to use the efforts of a reasonable man as it alleges, [*Cl. Memo, para.106-109*] because Art. 5.1.4 (1) UNIDROIT provides that, in certain circumstances, the duty of the party is to achieve a specific result rather than just use its best efforts to achieve it. Such circumstances arise when a guarantee is provided by the contract, this imposes an obligation on the seller to fulfill its promise [*Schwenzer/ Kee/ Hachem, p.362, para.31.53; Bonell M, p.255, para.1(1)*]. Moreover, there are some obligations under contracts that need to be deemed as a duty to achieve a promised result, especially, when dealing with raw materials, where the seller must undertake to achieve a specific result [*Fauvarque-Cosson/ Mazeaud, p.209, para.4*].

156. In this case, CLAIMANT was bound to achieve a specific result, as to ensure the sustainable production of the cocoa. This was due to the negotiations that were held at the Cucina food fair, when Mr. Tsai introduced CLAIMANT's new code of conduct to Ms. Ming. CLAIMANT's Code of Conduct for suppliers allows CLAIMANT to monitor the activities of its supplier in a way that could "*largely guarantee compliance with the code by its supplier."* [*R.41, Res. Ex. R5*].

157. Hence, CLAIMANT was under a duty to guarantee this compliance and to achieve a promised result as required by Art. 5.1.4 (1) UNIDROIT.

II. The language used by RESPONDENT in the Contract requires CLAIMANT to ensure compliance of its supplier

158. CLAIMANT argues that the wording in Section XXVI of the Contract in the Tender Documents is "*non-specific and non-obligatory*" [*Cl. Memo, para.110*]. However, RESPONDENT used clear wording in its Special Conditions of the Tender Documents. The Special Conditions state that RESPONDENT "*expects all of its suppliers to adhere to similar standards and to conduct their business ethically*." [*R.11, Cl. Ex. C2*]. The word "*expects*" means that RESPONDENT "*requires*" its suppliers to fulfill such obligation [*English Oxford Living Dictionaries; The Law Dictionary*]. The wording of the ethical requirements specifically obliges CLAIMANT to ensure compliance of its suppliers to sustainable production, and not simply to use its best efforts to do so. In the letter attached to the Sales–Offer, Mr. Tsai also states that CLAIMANT "*will do everything possible to guarantee"* that its supplier adheres to sustainable production [*R.15, Cl. Ex. C3*], and the use of the word "*guarantee*" is equivalent to "*ensure compliance*".

159. The wording used in explicit terms is proof to determine the content of the contract [*Campell, p.SWE/3, para.4*]. In this case, it is evident that RESPONDENT had the intention to create a binding obligation to guarantee the sustainable production, since it provided explicit statements in Principles C, E, and D of its Code of Conduct [*infra. para.24-30*]. Thus, the language of the Contract requires CLAIMANT to guarantee compliance of its supplier.

160. The German Court held that the buyer's intention was known to the seller, or the seller could not have been unaware of it [*Glass Bottles case*]. Even if the language used by RESPONDENT, in this case, was not clear, according to Art. 8(1) CISG, the Contract's language is to be interpreted in accordance with RESPONDENT's subjective intentions. This is because CLAIMANT knew of this intention, or could not have been unaware of it. Art. 8(2) CISG provides for objective interpretation of the reasonable third person only where the true intention was not apparent [*Lautenschlager, p.262, para.3.1*]. However, objective interpretation is not applicable in this case; because RESPONDENT expressly stated its intentions that it expected CLAIMANT to ensure compliance by its suppliers [*R.13, 14, Cl. Ex. C2*].

161. In light of the above, CLAIMANT breached Principle C **(a)**, Principle E **(b)**, and Principle D of RESPONDENT's Code of Conduct for Suppliers **(c)**.

a. CLAIMANT breached Principle C of RESPONDENT's Code of Conduct for Suppliers.

162. CLAIMANT violated Principle C of RESPONDENT's Supplier Code of Conduct. Principle C imposes an obligation on the seller to conduct its business "*in an environmentally sustainable way*" and requires the seller to ensure that its own suppliers adhere to contractual requirements [*R.13,14, Cl. Ex. C2*].

163. CLAIMANT itself recognized that the produced cocoa used in the chocolate cakes were not in compliance with the contractual requirements [*R.21, Cl. Ex. C9*]. It was evident that up to 50% of the cocoa beans were not farmed sustainably [*R.54, PO2, para.41*], and were not in compliance with the agreed upon "*principles of sustainable farming and global compact*" [*R.18, Cl. Ex. C6*]. Therefore, CLAIMANT breached Principle C of RESPONDENT's Code of Conduct for Suppliers, as it did not abide by the requirements mentioned above concerning ethical production.

b. CLAIMANT breached Principle D of RESPONDENT's Code of Conduct for Suppliers

164. CLAIMANT violated Principle D of RESPONDENT's Code of Conduct for Suppliers. Principle D specifically requires the seller to conduct its business "*in an ethical manner*" by not engaging in any means of corruption, extortion and bribery transactions. The principle also binds the seller to ensure that other parties involved, and government officials are abiding with anti-bribery rules [*R.14, Cl. Ex. C2*].

165. CLAIMANT has failed to do so, as its supplier was involved in the fraud and corruption scheme in Ruritania. According to the report released by the Special Rapporteur, the fraud was associated with falsified zoning plans and certificates for environmental origin [*R.18, Cl. Ex. C6*]. Afterwards, the published article "*The Money with Ethical Business*" has confirmed that the business leaders have bribed the government officials at the ministry for falsified zoning plans and issuing permits within nature reserves [*R.19, Cl. Ex. C7*]. Even if CLAIMANT was unaware of the interference of the government, CLAIMANT was under a duty to assure that the government officials are in compliance with all applicable anti-bribery rules. Therefore, CLAIMANT breached Principle D of RESPONDENT's Code of Conduct for Suppliers.

c. CLAIMANT breached Principle E of RESPONDENT's Code of Conduct for Suppliers.

166. CLAIMANT is in violation of Principle E of RESPONDENT's Code of Conduct for Suppliers. Principle E explicitly states that the supplier "*must under all circumstances procure goods and services in a responsible manner*" [*R.14, Cl. Ex. C2*].

167. Although Principle E gives the seller the choice to select its own supply chain provided that they agree to follow comparable standards as those set in RESPONDENT's Code of Conduct, RESPONDENT's own suppliers must follow Comestibles Finos Ltd. Code of Conduct as is, and not one that is simply comparable [*R.14, Cl. Ex. C2*]. In addition, the Principle's strong language "*must under all circumstances*", binds CLAIMANT to make sure that its own supplier complies with the standards agreed upon [*R.14, Cl. Ex. C2*], and not merely use their best efforts as CLAIMANT asserts [*Cl. Memo, para.110*]. Hence, CLAIMANT breached Principle E, as it did not follow the standards set in RESPONDENT's Code of Conduct for Suppliers as is, and did not ensure that its supplier complies to such standards.

C. EVEN IF CLAIMANT WAS MERELY REQUIRED TO USE ITS BEST EFFORTS, IT DID NOT

168. Alternatively, even if CLAIMANT was only under a duty to use its best efforts as it asserts, [*Cl. Memo, paras.113-118*] it did not. CLAIMANT did not use its best efforts as it could have expected the occurrence of the impediment **(I)** and could have overcome it **(II)** at the time of the conclusion of the Contract.

I. CLAIMANT Could Have Foreseen the Occurrence of The Impediment At The Time of The Conclusion of The Contract

169. CLAIMANT could have reasonably foreseen the occurrence of such scheme at the time of the conclusion of the Contract. The test for foreseeability is whether the reasonable man in the shoes of

the promisor could have foreseen the occurrence of such impediment at the time of the conclusion of the contract [*Schlechtriem/ Schwenzer p.1134, para.14*]. Generally, the cocoa industry faces many challenges regarding the sustainability of cocoa farming, such as, uncontrolled deforestation [*UTZ*]. CLAIMANT could have reasonably foreseen the non-sustainable production of cocoa by its supplier, as the possibility of such occurrence in the cocoa sector is quite high.

170. There are certain events where the seller can claim for an exemption from liability under Art. 79 CISG, since these events fall outside the seller's sphere of control [*Aksoy, p.101, para.III(1)*], for an example, export and import government bans [*Macromex Srl. v. Globex*]. However, there was no mention that the interference of the government through illegal actions is considered beyond the seller's control. Which suggest that the fraudulent scheme conducted by the government was within CLAIMANT's control. And even if the seller was unaware that its supplier was involved in the government orchestrated scheme as claimant alleges [*Cl. Memo, para.120*] [*R.19, para. 6, Cl. Ex. C7*], that does not exempt the seller's liability from supplying non-conforming goods.

171. It is deemed that in cases of non-conformity of goods caused by the seller's supplier or producer, it is considered within the seller's sphere of control [*Mazzacano, p.15, para.5*]. Additionally, a seller can only be exempted from liability under Art. 79 CISG if he could not have chosen its suppliers [*Schlechtriem, p.104, para.433*]. In this case, CLAIMANT did in fact, have the option to select its own supplier according to Principle E of RESPONDENT's Code of Conduct for Suppliers [*R.14, Cl. Ex C2*], and specifically chose RPC GMBH. Thus, CLAIMANT cannot be exempted from liability.

172. Hence, CLAIMANT could have reasonably foreseen the occurrence of the impediment at the time of concluding the contract.

II. CLAIMANT Could Have Avoided The Impediment At The Time of The Conclusion of The Contract

173. Even if CLAIMANT was merely required to use its best efforts, the extensive measures it asserts to have taken [*Cl. Memo, paras.113-118*] were not sufficient. Thus, CLAIMANT was capable to avoid such impediment as per Art. 79 CISG. According to Art. 79 CISG, to avoid the risks of a contractual obligation, the seller needs to act before the impediment takes place and not after it occurs. The seller must take the necessary precautions when the event is still avoidable [*Kröll/ Mistelis/ Perales Viscasillas p.1076, para.54*]. Further, the buyer cannot monitor the seller's manufacturing process regularly; it is, in fact, the seller's duty to ensure that ethical standards are satisfied [*Schwenzer B, p.126, para.2*].

174. CLAIMANT could have avoided the impediment if he took the necessary precautions at the right time to ensure the compliance of its supplier. Even though Egimus AG conducted an impact-focused

assessment, the fraudulent scheme fell outside Egimus AG's main expertise. As a result, Egimus AG did not inspect the suitability of the State Certificate System which had been applied [*R.54, PO2, para.33*] which suggests that the Audit was not as thorough as CLAIMANT alleges [*Cl. Memo, para.115*]. Therefore, CLAIMANT did not use its best efforts to ensure compliance by its supplier.

175. CLAIMANT argues that the efforts it took to monitor its own suppliers' compliance consists of a 5 years-cycle auditing and detailed reporting obligations, as well as requiring RPC GmbH to fill out questionnaires [*R.53, PO2, para.32*]. However, such efforts are not enough for CLAIMANT to allege that it has performed extensive measures.

176. In addition, CLAIMANT did not perform the alleged extensive measure under the UNGCP. As per Principle 7 of the UNGCP a company must develop a code of conduct and a company guideline for its operations and products that ensures commitment to care for the environment. Even if CLAIMANT has adopted a strict code of conduct as per principle 7 of the UNGCP, it is still in violation of the principle, as it did not abide by the outlined provisions in its own supplier code of conduct. Provision 1 that addresses "*ethical business*" provides that a supplier must conduct its business with integrity and in compliance with the ethical standards of the country [*R.31, para.1, Res. Ex. R3*]. In this case, CLAIMANT has failed to do so, as it was under an obligation to ensure that its own supplier is not involved in the fraudulent scheme, including, the government of Ruritania [*R.19, para.1, Cl. Ex. C7*].

CONCLUSION OF FOURTH ISSUE

177. In conclusion, RESPONDENT verifies that CLAIMANT is in breach of the Contract as it delivered non-conforming goods under Art. 35 CISG, since the cocoa was non-sustainably produced. CLAIMANT is under an obligation to achieve a specific result under Art. 5.1.4 (1) UNIDROIT. Additionally, the Contract's language specifically required CLAIMANT to ensure that its supplier complies to produce sustainable cocoa, and not merely use its best efforts to do so. Even if CLAIMANT was merely required to use its best efforts, it did not, as the extensive measures it asserts to have taken were not sufficient.

REQUEST FOR RELIEF

In light of the above arguments, Counsel for RESPONDENT respectfully requests the Tribunal:

1) To bar Mr. Prasad from deciding on the challenge, and remove him from the Tribunal

2) to reject all claims for payment raised by CLAIMANT; and to compensate RESPONDENT a sum of USD 500, 000 for the breach of the Confidentiality Clause

3) To declare that the contractual relationship between CLAIMANT and RESPONDENT is governed by RESPONDENT's standard conditions;

4) to order CLAIMANT to pay the costs incurred by RESPONDENT in this arbitration;

CERTIFICATE

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

Jeddah, 18 January 2018

BSHAYER BIN-YAMIN	**DANA AL-AQEEL**	**HADEEL TAYEB**
RAGAD ALFARAIDY	**RANA MUDARRIS**	**YARA AL SAYGH**