Twenty-fifth

Willem C. Vis International Commercial Arbitration Moot

Memorandum for Respondent

Comestibles Finos Ltd v. Delicatesy Whole Foods Sp

On behalf of	**Against**
Comestibles Finos Ltd.	Delicatesy Whole Foods Sp
75 Martha Stewart Drive	39 Marie-Antoine Carême Avenue
Capital City	Oceanside
Mediterraneo	Equatoriana
RESPONDENT	CLAIMANT

Albert DAKAR – Fidèle KAMEL – Ingrid Mary GHANEM

Marina IBRAHIM – Rosabelle SABA – Stephanie BOU CHALHOUB

Holy Spirit University of Kaslik

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TABLE OF ABBREVIATIONS

Art. / Arts.	Article/ Articles
Exh. C/R	Exhibit for CLAIMANT/RESPONDENT
Expl.	Explanation
CISG	United Nations Convention on Contracts for the International Sales of Goods
CL.Memo	CLAIMANT's Memorandum
GS	General Standard
Intro	Introduction
i.e.	id est (that is)
IBA	International Bar Association
ICC	International Chamber of Commerce
Inc.	Incorporation
Ltd	Limited
No.	Number
NoA	Notice of Arbitration
NoC	Notice of Challenge
OLG	Oberlandesgericht (German Regional Court of Appeals)
p. /pp.	Page/Pages
para. /paras.	Paragraph/Paragraphs
PCA	Permanent Court of Arbitration
Po	Procedural Order
Pnt.	point
RNoA	Response to the Notice of Arbitration
SFT	Swiss Federal Tribunal
SoC	Statement of Claim
TPF	Third Party Funder
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
USD	United States Dollar(s)
v.	Against (versus)

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Cited as	Full Citation
UNCITRAL Rules	UNCITRAL Arbitration Rule (as revised in 2010)
CISG	United Nations Convention on Contracts for International Sales of Goods 1980
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with 2006 amendments
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2010
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration 2014
IBA Rules	IBA Rules of Ethics for International Arbitrators 1987

STATEMENT OF FACTS

1. Comestibles Finos Ltd ("RESPONDENT") is a leading gourmet supermarket chain in Mediterraneo. Delicatesy Whole Foods Sp ("CLAIMANT") is a medium-sized manufacturer of fine bakery products in Equatoriana.

2. RESPONDENT and CLAIMANT (jointly referred to as "the Parties") are members of the United Nations Global Compact ("Global Compact"), which is a United Nations initiative established on 26 July 2000 to encourage businesses worldwide to adopt sustainable and socially responsible policies through the application of its principles ("Global Compact Principles"). Thus, RESPONDENT aims to become a Global Compact LEAD Company by 2018 and places great importance on the sustainable source of its products.

3. From 3 till 6 March 2014, RESPONDENT attended the yearly Danubian Cucina food fair, where it sought to add new suppliers to broaden its cake offering. At the food fair, RESPONDENT met CLAIMANT, which shared the same sustainable production standards. Therefore, RESPONDENT put out a tender (the "Invitation to Tender") that was publicized in the pertinent industry newsletters and sent to five of the businesses it had met at Cucina fair, including CLAIMANT. RESPONDENT's tender documents as sent to all potential tenderers (the "Tender Documents") clearly indicated that all offers and contracts are subject to RESPONDENT's General Conditions of Contract ("RESPONDENT's Standard Conditions") and Code of Conduct for Suppliers ("RESPONDENT's Code of Conduct"), which required that all potential suppliers were to deliver ethically and sustainably produced goods.

4. On 17 March 2014, RESPONDENT received from CLAIMANT a letter acknowledging the latter's intention to submit a tender "*in accordance with the specified requirements*", that is the Tender Documents (the "Letter of Acknowledgment"). On 27 March 2014, RESPONDENT received CLAIMANT's response which slightly deviated from the Tender Documents with respect to the size of the chocolate cakes("CLAIMANT's Sales Offer")and the payment method but otherwise adhered to all other terms of the Tender Documents, including the application of RESPONDENT's Code of Conduct. Thus, CLAIMANT's response amounted to an acceptance, and a valid contract was formed (the "Contract").

5. On 1 May 2014, CLAIMANT started delivery of its chocolate cakes made from sustainably farmed cocoa beans. In January 2017, RESPONDENT learned about a fraudulent scheme taking place in Ruritania, where CLAIMANT's cocoa beans supplier is based. On 27 January 2017, RESPONDENT asked CLAIMANT to confirm that the cocoa beans used for the production of CLAIMANT's chocolate cakes were sustainably farmed and not affected by the scheme. RESPONDENT also stopped taking any further deliveries or making any payments until CLAIMANT confirms the method its suppliers were not affected by the fraud.

6. On 12 February 2017, RESPONDENT terminated the Contract with immediate effect. On 30 June 2017, CLAIMANT submitted a notice of arbitration ("Notice of Arbitration") against RESPONDENT and nominated Mr. Rodrigo Prasad ("Mr. Prasad") as its arbitrator. Mr. Prasad's declaration of impartiality and independence ("First Declaration of Independence") was attached to the Notice of Arbitration.

7. On 31 July 2017, RESPONDENT submitted its response to the notice of arbitration ("Response to Notice of Arbitration"), accepting Mr. Prasad's and appointed Mrs. Hertha Reitbauer as its arbitrator. On 22 August 2017, Professor Caroline Rizzo informed the Parties that she was appointed as presiding arbitrator by Mr. Prasad and Mrs. Reitbauer.

8. On 29 August 2017, RESPONDENT requested CLAIMANT to disclose the name of its funder after it obtained information about the existence of a third-party funder in the arbitration. On 7 September 2017, CLAIMANT declared that it is funded by Funding 12 Ltd in which Findfunds LP is the main shareholder (the "Third-Party Funder").

9. On 11 September 2017, Mr. Prasad declared that he has acted as arbitrator in two other cases funded by Findfunds LP, and that a partner at his law firm, Prasad & Slowfood, is also representing a client in an arbitration funded by Findfunds LP. On 14 September 2017, RESPONDENT submitted its notice of challenge against Mr. Prasad (the " Notice of Challenge")based on justifiable doubts regarding Mr. Prasad's impartiality and independence.

10. On 6 October 2017, the Tribunal issued Procedural Order No. 1 ("PO1") directing the Parties to submit their respective memoranda. On 7 December 2017 for the CLAIMANT and on 18

January 2018 for RESPONDENT. On 7 December 2017, CLAIMANT submitted its memorandum as directed under PO1.

INTRODUCTION

11. This memorandum constitutes the Statement of Defense of Comestibles Finos Ltd. in reply to CLAIMANT's Statement of Claim in accordance with PO1.

12. The Parties' professional relationship started on a positive note. After expressing their mutual commitment to sustainable farming methods and principles, the Parties agreed to enter into an agreement whereby CLAIMANT would deliver sustainably-produced chocolate cakes to RESPONDENT. However, to RESPONDENT's dismay, the business venture took a negative turn after RESPONDENT discovered that CLAIMANT was delivering non-conforming cakes made from non-sustainable cocoa beans in direct breach of CLAIMANT's commitment and the Parties' contractual arrangements.

13. After initiating the arbitration, CLAIMANT appointed an arbitrator whose connections create justifiable doubts as to his impartiality and independence. RESPONDENT challenged the arbitrator's appointment as soon as it discovered the relevant facts. CLAIMANT now falsely argues that the challenge of the party-appointed arbitrator was submitted too late. However, it is clear that RESPONDENT could not have made the challenge any sooner, and the challenge is thus admissible. Moreover, Respondent's acceptance of the arbitrator's appointment without objection was made before becoming aware of the new circumstances.

14. In light of the above, RESPONDENT respectfully requests that the Tribunal rules on the challenge, which satisfies all procedural requirements (**Part 1**). RESPONDENT also respectfully requests that the Tribunal disqualify Mr. Prasad based on the existence of justifiable doubts as to his impartiality and independence (**Part 2**). Furthermore, RESPONDENT respectfully requests the Tribunal to declare that the sustainability of the delivered chocolate cakes is a conformity required in both CLAIMANT's and RESPONDENT's Standard Conditions (**Part 3**). Finally, RESPONDENT respectfully requests the Tribunal to find that CLAIMANT has breached its contractual obligation by delivering non-conforming chocolate cakes entitling RESPONDENT to termination (**Part 4**).

ARGUMENTS

PART 1: THE TRIBUNAL HAS THE AUTHORITY TO RULE ON THE CHALLENGE AGAINST MR. PRASAD, WHICH SATISFIES ALL PROCEDURAL REQUIREMENTS

15. Following Mr. Prasad's disclosure of the connections he has with CLAIMANT's Third-Party Funder, RESPONDENT submitted to the Tribunal a challenge for the removal of Mr. Prasad based on the existence of justifiable doubts as to his impartiality and independence [NoC, p. 37] in accordance with the applicable laws. CLAIMANT's objection to the Tribunal's authority to rule on the challenge (I) and its request that the challenge be declared inadmissible as it fails to satisfy the procedural requirements of the UNCITRAL Rules (II) are baseless and should be dismissed.

I. The Tribunal is the competent authority to rule on the challenge against Mr. Prasad without his participation in the decision making.

16. RESPONDENT submitted its challenge to the Tribunal under the Danubian Law on the basis that the Parties have excluded in their arbitration clause stipulated at Section V of RRESPONDENT's GC (the "Arbitration Clause") [Exh.C-2, p. 12] the application of Art. 13(4) of the UNCITRAL Rules, and more generally the intervention of the appointing authority stipulated at Art. 6 of the UNCITRAL Rules. Therefore, the Tribunal should decide on the challenge as required under the Danubian Law (A). In this respect, contrary to CLAIMANT's allegations, Mr. Prasad should be precluded from participating in ruling on a challenge against him in order to preserve the integrity of the decision-making process (B).

A. The Arbitration Clause excludes the appointing authority of Art. 6 and thus entails the application of Art. 13 of the Danubian Law, which gives the Tribunal the authority to rule on the challenge.

17. CLAIMANT alleges that Art. 13(4) of the UNCITRAL Rules, which gives to an appointing authority the power to rule on a challenge against an arbitrator, applies to the present proceedings notwithstanding the exclusion of any involvement of an arbitral institution as stipulated in the Arbitration Clause [CL. Memo, paras. 34-40].

18. However, contrary to CLAIMANT's submission, the Arbitration Clause reflects the Parties' agreement to exclude any recourse to the appointing authority of Art. 6 of the UNCITRAL Rules and thus precludes the recourse to the appointing authority under Art. 13(4) for the

challenge of arbitrators. The Parties' right to exclude the intervention of an appointing authority and more generally to modify the provisions of the UNCITRAL Rules is enshrined in Art. 1 [Croft/Kee/Waincymer, para. 1.1], which provides as follows: "… *such disputes shall be settled in accordance with these rules* ***subject to such modification as the parties may agree***" [emphasis added]. Accordingly, the Parties have agreed to exclude referral to the appointing authority of the UNCITRAL Rules and by the same token the challenge procedure provided for in Art. 13 of the UNCITRAL Rules. The Parties' agreement as to the exclusion of the appointing authority is clearly expressed in the wording of the Arbitration Clause, which provides that "*any dispute* […] *shall be settled by arbitration in accordance with the UNCITRAL Rules* ***without the involvement of any arbitral institution*** […]" [emphasis added].

19. In fact, the Arbitration Clause was taken *ad verbatim* from the model arbitration clause suggested in the UNCITRAL Rules while removing the paragraph relating to the nomination of the appointing authority and replacing it with the expression *"without the involvement of any arbitral institution"* [PO2, p. 52, para. 22]. CLAIMANT was aware of the abovementioned addition to the model arbitration clause [PO2, p. 52, para. 22]. Indeed, had the Parties intended to keep the appointing authority of Art. 6 of the UNCITRAL Rules, they would have kept the suggested paragraph of the model clause relating to the appointing authority and accordingly nominated a non-institutional authority. The use of the expression "*any arbitral institution*" simply results from the common understanding that UNCITRAL Rules generally includes the involvement of an arbitral institution, *i.e.*, the PCA through its Secretary-General in certain events. The Parties intended to exclude the entire procedure of the UNCITRAL Rules that may result in the involvement of any entity or person other than the Tribunal.

20. Such intention is confirmed by an interpretation of the Arbitration Clause under Art. 8 CISG, applicable to the Arbitration Clause by virtue of the Parties' agreement [PO1, p. 48, para. 1]. Art. 8(1) provides as follows: *"Statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was."* It follows that courts are bound to implement the intention of the drafting party provided that the other party knew or could not have been unaware of such intention [CISG Digest, p.55, para 6]. In fact, RESPONDENT had explained to CLAIMANT during their first meeting at the Cucina Food Fair in 2014 that the addition to the Arbitration

Clause was aimed to enhance confidentiality following the damage to its reputation resulting from the intervention of third parties by way of institutional arbitration [Exh. R-5, p. 41, para. 5]. Indeed, RESPONDENT's exclusion was made in order to ensure that as few persons as possible would know about the arbitration. Its intention, clearly expressed to CLAIMANT, was to exclude the appointing authority procedure of the UNCITRAL Rules and beyond it to exclude any third-party intervention in the arbitration process. Therefore, CLAIMANT could not argue that it was not aware of such intention.

21. Furthermore, any reasonable person in the same circumstances as CLAIMANT could have understood RESPONDENT's intention behind the exclusion as stipulated in the Arbitration Clause. Indeed, a reasonable person's interpretation under Art. 8(2) CISG with the same background of negotiation and previous conduct of the Parties, as well as the wording of the arbitration clause, would conclude that the Parties intended to deviate from the procedure of challenging the arbitrators in Art. 13(4) of the UNCITRAL Rules [US Federal Appellate Court 2006; Haters Case]. In fact, having knowledge of RESPONDENT's previous damage to its reputation through the intervention of an institution in the arbitration process, coupled with its awareness of RESPONDENT's strict confidentiality policy and the appointing authority process of the UNCITRAL Rules, a reasonable person in the same context as CLAIMANT could not have understood the exclusion of the intervention of an institution other than the exclusion of the appointing authority process of the UNCITRAL Rules.

22. Consequently, and contrary to CLAIMANT's assertions [CL. Memo. para. 41], the addition of the confidentiality clause in RESPONDENT's GS right after the Arbitration Clause [Exh.C-2, p. 12] confirms the intent to exclude any intervention in the proceedings from any person/institution other than the Tribunal. Thus, any interpretation by CLAIMANT requiring the appointing authority to be a person rather than an institution is not applicable due to RESPONDENT's clear intention to maintain the dispute as confidential as possible.

23. In any case, assuming that the exclusion of institutional arbitration does not extend to the general procedure of the UNCITRAL appointing authority, and given the current status of the Parties' relationship, the occurrence of an agreement as to the appointing authority would be impossible and thus the intervention of the PCA inevitable. Such circumstances lead again to the same result, *i.e.*, the exclusion of such process and the recourse to the default

mechanism of the Danubian Law. Consequently, CLAIMANT's twisted interpretation would defeat the purpose of the clause and violate the parties' intention not to involve an institution. In light of the above, the Tribunal should give full effect to the Parties' intention under Art. 8 CISG by excluding the appointing authority mechanism of Art. 13(4) of the UNCITRAL Rules and by applying the default mechanism of the law of the place of arbitration, *i.e.*, Art. 13 of the Danubian Law, which gives the Tribunal the power to rule on any challenge against one of its members.

B. The challenge should be decided by the Tribunal without the participation of Mr. Prasad in order to preserve the integrity of the decision-making process.

24. As the challenge procedure of Art. 13 of the UNCITRAL Rules was excluded by the Parties, the challenge should be decided according to Art. 13 of the Danubian Law, which is the *lex loci arbitri*, applicable by default to the arbitration proceeding. Art. 13(2) of the Danubian Law provides 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***" [emphasis added]. As Art. 13 does not state if the challenged arbitrator can participate in ruling on the challenge against him or if the Tribunal should decide on the challenge with its full members, there is a need to have recourse to international principles and standard practice to determine whether Mr. Prasad has the authority to rule on the challenge issued against him as required under Art. 2(2) of the Danubian Law. In fact, by virtue of Art. 2(2), General Principles of International Law are incorporated by reference to the Danubian Law and are thus binding on the Tribunal in interpreting the provisions of the Danubian Law. It provides: *"Questions concerning matters governed by this Law which are not expressly settled in it* ***are to be settled in conformity with the general principles*** *on which this Law is based".* International standard practice and general principles of law preclude any person to rule on its own case based on the general principle of *nemo judex in resua* based on which "*no person can be judge of its own case."* This principle entails that *"a judge should not sit in his or her own case.*" [Koch, pp. 325-336].

25. Thus, CLAIMANT's request that Mr. Prasad rule on his own challenge [CL. Memo, paras. 44-51] is in direct conflict with the above general principle and by the same token in breach of Art. 2 of the Danubian Law. By the same token, CLAIMANT's argument that the Model Law

requires the Tribunal to be constituted by all its members to decide on the challenge [CL. Memo., para. 49] is unsupported and defeated by Art. 2 thereof. It is also impossible to expect the Tribunal to be objective and impartial if the challenged arbitrator participates in the decision-making of the challenge [UNCITRAL Report, p. 24]. Moreover, the self-policing feature of the arbitral process is governed by the principle that "*only the non-challenged arbitrators can decide on the challenge*" [Daele]. This principle was applied in several arbitration cases, such as the *ICS Inspection and Control Services Ltd. v. Republic of Argentina*, where a challenge against arbitrator *Mr. Stanimir A. Alexandrov* was submitted, and the latter did not participate in deciding on the challenge against him [ICSID 0910].

26. On another level, CLAIMANT attempted to defend its position that Mr. Prasad should be involved in a ruling on his own challenge by alleging that such participation would guarantee "*equal representation*" of the Parties within the Tribunal [CL. Memo, para. 47]. However, a party-appointed arbitrator is not a representative of the appointing party and is bound by the same duty of impartiality and independence as the chair. In any case, even if we follow CLAIMANT's argument that a party-appointed arbitrator would ensure proper representation of a party's case, such representation is limited to issues relating to the merits of the case and not to the procedure. This argument, which mainly relates to the misrepresentation of "truncated tribunals," does not apply when dealing with a decision on a procedural matter but mainly relates to deliberations pertaining to final awards [Kröll/Lew/Mistelis, p. 323]. Finally, even if a decision by the two-member tribunal would lead to the removal of Mr. Prasad, CLAIMANT's right to be represented in the Tribunal is ensured by the replacement arbitrator, appointed also by CLAIMANT, Mrs. Ducasse [PO1, para. 1]. Accordingly, CLAIMANT's alleged rights of equal representation are not compromised by a ruling on a challenge by a two-member Tribunal and are in any case outweighed by the need to preserve the integrity of the decision-making process of the challenge. The same principles would defeat CLAIMANT's allegation that a two-member tribunal would contravene the Parties' agreement to have a three-member Tribunal [Cl. Memo, para. 48]. This is more so, since such agreement relates to a ruling on the merits of the dispute and not on procedural issues, especially on a challenge against an arbitrator.

II. The challenge against Mr. Prasad should be admitted as it was timely submitted and satisfies the requirements of the applicable law.

27. Contrary to CLAIMANT's allegations, none of the grounds upon which RESPONDENT based its challenge were time-barred or otherwise waived. In fact, RESPONDENT only became aware of Mr. Prasad's connections with CLAIMANT's Third-Party Funder on the date Mr. Prasad made a declaration in this respect and promptly submitted a challenge two days after (A). As for the circumstances that were previously disclosed by Mr. Prasad without objection from RESPONDENT, the newly disclosed connections of Mr. Prasad are such to invalidate the previous waivers, which were made by RESPONDENT without consideration thereof. Moreover, general advance waivers made by a party are not admissible and should be disregarded (B).

A. RESPONDENT's challenge of Mr. Prasad was timely submitted in accordance with Art. 13 of the UNCITRAL Rules.

28. CLAIMANT alleges that three of the four grounds of the challenge against Mr. Prasad were submitted outside the time-limit of 15 days as prescribed by Art. 13(1) of the UNCITRAL Rules and that the Tribunal should declare these three grounds as time-barred. The first ground is Mr. Prasad's previous appointments by Mr. Fasttrack's law firm, the other two grounds being the previous appointments by Findfunds and the article written by Mr. Prasad [CL. Memo, para. 31]. For consistency purposes, RESPONDENT will be dealing in this sub-section with two of the three alleged time-barred grounds and will leave the ground pertaining to previous appointments to the following subsection (B) relating to RESPONDENT's previous waivers.

i. Concerning Mr. Prasad's appointments by Findfunds LP

29. CLAIMANT alleges: "*The second ground, that Mr. Prasad was allegedly "appointed…two times by Findfunds LP*" and the third ground that he expressed his view "*in an article on the irrelevance of the CSR" became known to RESPONDENT on 30 June 2017*" [CL. Memo, para. 31]. CLAIMANT is blatantly attempting to mislead the Tribunal by erroneously stating that RESPONDENT had become aware of Mr. Prasad's appointments by Findfunds LP on 30 June 2017, whereas the Record clearly shows that RESPONDENT only became aware of such appointments on the date Mr. Prasad submitted its second disclosure on 11 September 2017

[The Record, p. 36]. Following such disclosure, RESPONDENT promptly submitted a challenge against Mr. Prasad on 14 September 2017 [NoC, p. 38] ,*i.e.*, plainly within the 15-day time-limit of Art. 13 of the UNCITRAL Rules. CLAIMANT gave no other reasons for its allegations that such ground is time-barred.

30. Indeed, Art. 13(1) of the UNCITRAL Rules stipulates as follows: "*A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator,* ***or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party***" [emphasis added]. The expression "*became known to that party*" in Art. 13 of the UNCITRAL Rules refers to the point in time at which the challenging party acquired actual knowledge of the ground for challenge [Kammergericht Berlin 2000]. Thus, mere negligent ignorance of the ground for challenge without knowing the new information or new circumstances that would constitute the ground for the challenge does not trigger the time limit to submit a challenge against the arbitrator [Superior Court of Quebec 2009].

ii. Regarding the article published by Mr. Prasad

31. CLAIMANT contends that RESPONDENT became aware of the publication of Mr. Prasad's article on the conformity of goods on 30 June 2017-the day it was published- [CL. Memo, para. 31] without any further explanation. As the party raising the time-bar allegation regarding this ground, CLAIMANT has the burden of proving that the date RESPONDENT actually became aware of Mr. Prasad's article is outside the 15-day period prescribed under Art. 13(1) of the UNCITRAL Rules, which CLAIMANT failed to establish. In any case, and as will be seen below, the disclosure by Mr. Prasad of the new circumstances has invalidated the previous waivers and renewed the time limit for making a challenge, including on all the previous grounds as of 11 September 2017, *i.e.*, after the second declaration of Mr. Prasad.

B. Previous waivers are invalidated by new compelling circumstances and general advance waivers by a party are not admissible.

32. CLAIMANT alleges that RESPONDENT gave advance waiver to make an objection with regards to Slowfood Partners' ongoing activities [CL. Memo, para. 32] as it did not object to Mr. Prasad's reservation in its first declaration that *"my colleagues at Prasad & Partners may continue current matters and may also accept further instructions involving the Parties as well*

related companies" [Exh.C-11, p. 23]. It stems out of the abovementioned reservation that it was limited to activities involving Mr. Prasad's law firm before its merger with Slowfood. As for Prasad's merger with Slowfood, RESPONDENT only learned of such merger on 11 September 2017 when it was disclosed by Mr. Prasad, and thus the advance waiver, if any, could not have included Slowfood's activities. Had RESPONDENT known at the time of the first declaration of the expansion of Mr. Prasad's firm, it would have objected to Mr. Prasad's reservation in view of the growing risk of connections which such expansion would entail.

33. Most importantly, RESPONDENT only learned about the connections between Slowfood and Findfunds on the date they were disclosed by Mr. Prasad in its second declaration on 11 September 2017, which resulted, *inter alia,* in RESPONDENT's challenge of 14 September 2017. In any case, if the Tribunal were to consider RESPONDENT's non-objection to Mr. Prasad's reservation as a waiver, such waiver would constitute a general advance waiver that is not admissible in international arbitration standard practice. In fact, in view of the effect a general advance waiver of future conflicts of interest would have on a party's right, the relevant disclosure should be *"specific and concrete enough to decide whether to challenge an arbitrator, as opposed to abstract information on potential conflicts in an abstract sense that might occur in the future"* [Osaka District Court 2015]. Consequently, only constructive knowledge of the arbitrator's alleged conflict would form an advance waiver [US Court of Appeals 2012].

34. In light of the above, and contrary to CLAIMANT's allegations [CL. Memo, para. 32], RESPONDENT's acceptance of Mr. Prasad's appointment despite its abovementioned reservation does not constitute a valid waiver as it never had a constructive knowledge of Slowfood partners' ongoing case with Findfunds LP, and was not aware of these facts at the time it accepted the restrictions.

35. RESPONDENT's previous waivers were invalidated by the change of circumstances recently disclosed by Mr. Prasad. Regarding Mr. Prasad's disclosure relating to two previous appointments by the law firm of Fasttrack made in his first declaration, RESPONDENT had refrained from challenging Mr. Prasad on that basis as it did not have knowledge at the time of all the other compromising connections Mr. Prasad has with CLAIMANT and its Funder. However, the new circumstances discovered by RESPONDENT recently and only three days

before the challenge render any previous waivers invalid as they were not made in full consideration of all the circumstances relating to Mr. Prasad's impartiality. Indeed, a waiver of a right to challenge an arbitrator would not be valid unless all the facts and the grounds argued in the challenge were known before, and no challenge was submitted in the time limit [US Court of Appeals 1989].

36. Therefore, the above grounds all taken together would warrant a challenge against Mr. Prasad, a challenge that was submitted within the time-limit of Art. 13 of the UNCITRAL Rules and thus satisfies all the procedural requirements thereof.

PART 2: THE TRIBUNAL SHOULD DISQUALIFY MR. PRASAD BASED ON THE EXISTENCE OF JUSTIFIABLE DOUBTS AS TO HIS IMPARTIALITY AND INDEPENDENCE.

37. The Parties have adopted the UNICTRAL Rules to apply to the arbitration proceedings. Art. 12 of the UNCITRAL Rules sets out the standard that should be met in order to remove an arbitrator, *i.e.*, the existence of justifiable doubts as to an arbitrator's impartiality and independence. However, neither the UNCITRAL Rules nor the Danubian Law as fallback *lex loci arbitri* give a definition of what would constitute justifiable doubts within the meaning of Art. 12. For this reason, RESPONDENT's position is that the Tribunal should apply Art. 12 in light of the IBA Guidelines, which provide for the requirements that would satisfy the standard of justifiable doubts.

38. CLAIMANT attempts to mislead the Tribunal into excluding the application of the IBA Guidelines on the pretext that they are non-binding by their nature and in any case overridden by the chosen UNCITRAL Rules [CL. Memo, para. 57]. However, the UNCITRAL Rules are not in conflict with the IBA Guidelines, which elaborate further on the standard of justifiable doubts of Art. 12 of the UNCITRAL Rules (I). As the challenge meets the standard of justifiable doubts of Art. 12 and the IBA Guidelines, Mr. Prasad should be removed (II).

I- The UNCITRAL Rules require the existence of justifiable doubts as to Mr. Prasad's impartiality and independence, which should be determined in light of the IBA Guidelines.

39. In order for a challenge to be successful, Art. 12 of the UNCITRAL Rules requires the challenging party to establish that the circumstances it relies on give rise to justifiable doubts

as to the arbitrator's impartiality and independence (A) to the general principles of arbitration practice, of which the IBA Guidelines are part (B).

A- The UNCITRAL Rules and the Danubian Law require the existence of justifiable doubts as to the challenged arbitrator's impartiality and independence with reference to the general principles of arbitration practice.

40. CLAIMANT relies on the UNCITRAL Rules to deny the existence of justifiable doubts regarding Mr. Prasad's impartiality and independence, while objecting to the application of the IBA Guidelines [CL. Memo, para. 54]. However, the application of the UNCITRAL Rules does not preclude reference to the IBA Guidelines.

41. In fact, Art. 12(1) of the UNCITRAL Rules provides as follows: *"Any arbitrator may be challenged if circumstances exist that give rise to* ***justifiable doubts*** *as to the arbitrator's impartiality or independence."* It follows that the standard does not require the applicant to establish actual bias but rather an "appearance of bias" or "doubt" as to an arbitrator's impartiality [Jung, p. 21; ICSID 1004]. In this respect, neither Art. 12 nor other provisions of the UNCITRAL Rules determine the circumstances that would qualify as entailing justifiable doubts.

42. Art. 12(2) of Danubian Law, as *lex loci arbitri*, adopts the same standard, *i.e.*, *"circumstances that give rise to* ***justifiable doubts*** *as to his (the arbitrator) impartiality and independence*" [emphasis added]. Likewise, it does not further define the circumstances that would satisfy such standard. In this case, Art. 2 A(2) of the Danubian Law provides as follows: *"Questions concerning matters governed by this Law which are not expressly settled in it are to be settled* ***in conformity with the general principles on which this law is based****"* [emphasis added]. Accordingly, the Tribunal is required to assess the existence of "*justifiable doubts*" based on the "generally understood international principles of fairness" [Jacobus/Rohner/Hefty, p. 6]. Having adopted the same standard as the UNCITRAL Rules, *i.e.*, "justifiable doubts," and having become part of the international practice, the IBA Guidelines should be considered by the Tribunal when assessing the standard of justifiable doubts applicable to Mr. Prasad's challenge.

B- The justifiable doubts standard of the UNCITRAL Rules should be assessed with reference

to the IBA Guidelines, which are applicable to these proceedings.

43. As previously mentioned, the Danubian Law expressly refers to international arbitration practice to supplement its provisions. The IBA Guidelines are actually part of the international practice that expressly adopt and elaborate on the UNCITRAL Model Law standard of justifiable doubts, which was adopted by the Danubian Law.

44. The IBA Guidelines provide as follows: *"The wording 'impartiality or independence' derives from the widely adopted Article 12 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, and the use of an appearance test based on justifiable doubts as to the impartiality or independence of the arbitrator, as provided in Article 12(2) of the UNCITRAL Model Law, is to be applied objectively (a 'reasonable third person test')"* [IBA, Expl. GS2, (b)].

45. Furthermore, the objective test of both the UNCITRAL Rules and the IBA Guidelines allows the removal of an arbitrator on the basis of appearance of partiality or bias. CLAIMANT is alleging that a "*minor possibility of partiality is insufficient*" [CL. Memo, para. 60]. However, actual partiality of an arbitrator can never be proven [Born.G, p. 737]. Therefore, courts are considering that a mere appearance of partiality is enough to warrant a challenge of an arbitrator and consequently remove him [US District Court 2003.].

46. Thus, and contrary to CLAIMANT's allegations [CL. Memo, para. 57], the IBA Guidelines are applicable to these proceedings. The IBA Guidelines *"have gained wide acceptance within the international arbitration community"* [IBA Guidelines, Preamble]. Indeed, courts and arbitral tribunals dealing with challenge of arbitrators often refer and apply these guidelines [Queen's Bench Division 2005; Brussels Court of Appeal 2007]. Furthermore, courts and tribunals refer to the IBA Guidelines even when the parties did not agree to their application [ICSID 0806]. They are frequently viewed by courts and arbitral institutions *"as providing relevant criteria for assessing the impartiality and independence of a challenged arbitrator"* [Moses].

47. In addition, in another survey administered by the ICC on how often the IBA Guidelines are referred to in ICC cases, it was found that out of 187 challenges and contested confirmations, at least one article of the guidelines was referred to in 106 cases. The use of the IBA

Guidelines as reference to approximately 57% of the ICC cases proves that the Guidelines provide an important baseline in challenge decisions [Moses].

48. Based on the above, the standard of justifiable doubts required under the UNCITRAL Rules should be determined and applied in light of the IBA Guidelines. In fact, the IBA Guidelines provide several circumstances that would create justifiable doubts as to an arbitrator's impartiality and independence and categorize these circumstances according to their severity. The Non-Waivable Red List and the Waivable Red List cover situations in which, from the point of view of a reasonable third person having knowledge of the relevant facts, a conflict of interest definitely exists that creates justifiable doubts. As for the Orange List, it includes situations that may give rise to justifiable doubts according to the facts of each case. These situations need to be disclosed by the arbitrator. Finally, situations "*where no appearance and no actual conflict of interest exists from an objective point of view*" fall within the Green List of the IBA Guidelines [IBA Guidelines, part II, p. 19, para. 7]. The arbitrator does not have a duty to disclose such situations.

II- Mr. Prasad's connections with CLAIMANT's Third-Party Funder and counsel meet the threshold of justifiable doubts as to his impartiality and independence.

49. Contrary to Claimant's allegations, there are several circumstances that would give rise to justifiable doubts as to Mr. Prasad's impartiality and independence. In fact, CLAIMANT has intended to hide Mr. Prasad's appointments by subsidiaries of Findfunds LP, which constitutes a breach of CLAIMANT's disclosure duties under the IBA Guidelines (A). Furthermore, the existence of substantial financial links between Mr. Prasad and the Third-Party Funder reflects his interests in the outcome of the case, which is a Non-Waivable Red List situation that warrants his disqualification (B). Moreover, repeat appointments of Mr. Prasad by Mr. Fasttrack's law firm and Findfunds LP is also a Red List situation that warrants his removal (C). Finally, Mr. Prasad's published article is a further indication of Mr. Prasad's bias(D).

A. CLAIMANT's deliberate non-disclosure of Mr. Prasad's appointments by subsidiaries of Findfunds LP is a breach of its disclosure duty under the IBA Guidelines

50. CLAIMANT is alleging that the UNCITRAL Rules and the Danubian Law only impose a duty of

disclosure on arbitrators [CL. Memo, para. 75]. However, the IBA Guidelines impose on the parties a duty to disclose any direct or indirect relationship that exists between the arbitrator and the Third-Party Funder [IBA Guidelines, GS7 (a)]. Such duty is also commonly adopted in other instruments of international practice. Indeed, and contrary to CLAIMANT's allegations [CL. Memo, para. 75], the fact that a party in arbitration has obtained third-party funding is sufficient to trigger disclosure if it entails procedural issues that in turn require a party to disclose certain facts that may affect an arbitrator's impartiality. [Cremades/Dimolitsa; Goeler, pp. 125 – 162].

51. In addition to the above, CLAIMANT's attempts to justify the non-disclosure of third-party funding because of "*a fear of over-disclosure*" [CL. Memo, para. 78] is defeated by CLAIMANT's own admission that it has intentionally withheld its third-party funding in order *"to avoid potential challenges of Mr. Prasad"* [NoC, p. 38, para. 3]. According to the meta-data retrieved by RESPONDENT, Mr. Fasttrack was willing not to disclose the third-party funding even if a direct connection between Mr. Prasad and Findfunds LP was revealed [The Record, NoC, p. 38, para. 3]. Mr. Fasttrack expressly stated that *"if contacts exist we should definitely do our best to keep the funding secret and not disclose it to the RESPONDENT."* This proves CLAIMANT's real reasons behind its non-disclosure, its awareness of a duty to disclose and its deliberate intention to circumvent it. Indeed, even when CLAIMANT learned about the connections between Mr. Prasad and its Third-Party Funder, it still decided not to disclose these connections to avoid any challenge of Mr. Prasad [PO2, p. 51, para. 12]. It follows that CLAIMANT is aware that Mr. Prasad's connection with its Third-party funder is sufficient to trigger a challenge against him and therefore deliberately decided not to disclose it which justifies RESPONDENT's doubts.

52. In any case, a party's fear of over-disclosure cannot constitute a basis to decide which information should be disclosed. The disclosure's threshold should be defined in accordance with the procedural law of arbitration [Born, p. 2323]. As established, the IBA Guidelines and international arbitration practice require disclosure of third-party funding in case of doubt. In its submission, CLAIMANT attempted to escape the consequences of its statement as reflected through the metadata by requesting it be disregarded under the pretext that it is privileged information [CL. Memo, para. 76]. However, by submitting the document,

CLAIMANT waived its right to legal privilege. In fact, legal privilege is waived either explicitly or by implication, *i.e.* ,*"by failing to take sufficient measures to protect the confidentiality of the privileged communications, or by simply disclosing the communication."* [Van Der Berg, p. 104] It follows that CLAIMANT's submission of the PDF and word version of its Notice of Arbitration without taking sufficient measures to protect the information revealed by the meta-data is an implicit waiver of any privileged information.

53. In light of the above, CLAIMANT blatantly breached its obligations of non-disclosure for the sole purpose of avoiding the removal of its party-appointed arbitrator. Such conduct is under the applicable laws sufficient to create justifiable doubts as to Mr. Prasad's impartiality. Such doubt, when coupled with Mr. Prasad's connections with the Third-Party Funder, results in sharing Mr. Prasad's direct economic interest in the outcome of the arbitration.

B. Mr. Prasad's previous appointments are grounds for disqualification.

54. Contrary to CLAIMANT's contention that the relationship between the Third-Party Funder and Mr. Prasad is "superficial" [CL. Memo, para. 65], Mr. Prasad is financially associated with CLAIMANT's Third-Party Funder in four different arbitrations. This casts serious doubts as to his impartiality and falls under paragraph 1.3 of the Non-Waivable-Red List of the IBA Guidelines and warrants Mr. Prasad's removal. In this respect, Mr. Prasad has four connections with the CLAIMANT's Third-Party Funder. Mr. Prasad has acted as an arbitrator in two cases, funded by two subsidiaries 60%-owned by Findfunds LP [PO2, p. 50, para. 2]. Mr. Prasad is also acting as arbitrator appointed by CLAIMANT in the present arbitration in which Funding 12 Ltd, also 60%-owned by Findfunds LP, is funding CLAIMANT [PO2, p. 50, para. 2].

55. Moreover, Mr. Prasad's equity partner at Slowfood is acting as counsel for a client in an arbitration that is currently being funded by Funding 8, a subsidiary of Findfunds LP [PO2, p. 50 paras. 6&8]. As such, Mr. Prasad is directly being financed by Funding 12 through his equity partners, reflecting the existence of direct and strong financial ties between Mr. Prasad and Findfunds LP. Consequently, Mr. Prasad proves to have financial with Findfunds LP both as arbitrator (i) and counsel (ii).

i. Mr. Prasad's appointment as arbitrator in three arbitrations funded by CLAIMANT's Third-Party Funder shows strong and steady relationship with Findfunds.

56. CLAIMANT focuses on the relationship between Mr. Prasad and the subsidiaries of Findfunds LP funding three different arbitrations from the repeat appointments standpoint [CL. Memo. para.65]. However, RESPONDENT is more concerned with Mr. Prasad's financial connections and interest with the three subsidiaries of Findfunds LP.

57. In fact, Mr. Prasad has acted as an arbitrator in two cases, funded by two subsidiaries 60%-owned by Findfunds LP [PO2, p.50, para.2]. Mr. Prasad is also acting as arbitrator appointed by CLAIMANT in the present arbitration in which Funding 12 Ltd, also 60%-owned by Findfunds LP, is funding CLAIMANT [PO2, p.50, para.2]. Mr. Prasad was appointed by CLAIMANT on 30 June 2017 [NoC, p.6, para.14] after the signature of the funding agreement on 25 June 2017 [PO2, p.50, para.5] It is noteworthy that Mr. Prasad actually signed his First Declaration of Independence on 26 June 2017 [Exh.C-11, p.23], just a day after the signature of the funding agreement. Further, Funding 12 Ltd gets 25% of all amounts awarded in this arbitration [PO2, p.50, para.1].

58. With respect to the financial interest Mr. Prasad has with Findfunds, CLAIMANT attempted to underestimate such interest by asserting that Mr. Prasad's earnings from Findfunds LP's subsidiaries "constitutes only 6-8%" of Mr. Prasad's total income" [CL. Memo, para.69]. First, it should be noted that CLAIMANT admits Mr. Prasad's direct financial interest with Findfunds LP's subsidiaries. Second, CLAIMANT fails to demonstrate the reasons for which 8% of Mr. Prasad's total earnings would constitute insignificant financial interest.

59. In this respect, Mr. Prasad's direct economic interest and dependence upon Findfunds LP's subsidiary should be evaluated in light of an important fact which CLAIMANT failed to put before the Tribunal, and which is that Mr. Prasad' income as arbitrator is financed up to 50% by Findfund LP's subsidiaries. In Fact, as the record shows, 40% of Mr. Prasad's total earnings result from his work as arbitrator and 20% of these 40% are financed by subsidiaries of Findfunds LP [PO2, p.51, para.10]. Consequently, half of Mr. Prasad's income as arbitrator is financed by Findfunds LP. Moreover and in addition to that, Mr. Prasad's fees as counsel are partially financed by Findfunds LP through his equity partner, as will be established further below.

60. Since Findfunds LP relies on the outcome of an arbitration to recover its funds, Mr. Prasad's decisions as arbitrator have a substantial impact on Findfunds LP's financial situation, especially since he is now arbitrating in 2 of the 6 only ongoing arbitration cases Findfunds LP's is currently financing [PO2, p.50, para.2]. Furthermore, there is no merit for CLAIMANT's contention that the current arbitration is funded by a separate legal entity than Findfunds [CL.Memo, para.63]. This is mainly because Findfunds LP is the main shareholder in Funding 12 Ltd since it owns 60% of the shares [PO2, p.50, para. 2]. Findfunds is also the 60% shareholders in the two other subsidiaries that funded the two other arbitrations in which Mr. Prasad acted as arbitrator [PO2, p.50, para.2]. In fact, Findfunds LP never directly funds an arbitrator but establishes different affiliates for each arbitration while retaining the decision-making powers therein [PO2, p.50, para. 2 &4].

61. Accordingly, it is clear that Mr. Prasad, as international arbitrator, has a steady, direct and significant relationship with CLAIMANT's Third Party Funder, which has an interest in succeeding on the merits of the case as it would collect 25% of "all amounts awarded in the arbitration" [PO2, p.50, para.1] Moreover, in all the four cases where Mr. Prasad was appointed by Mr. Fasstrack's law firm and by a party financed by Findfunds' subsidiaries, the awards rendered were in favor of the party that has appointed Mr. Prasad [PO2, p.51, para.15]. These circumstances legitimately create justifiable doubts for any reasonable person to believe that Mr. Prasad will vote for CLAIMANT in order to ensure continuance of the steady relationship it holds with Findfunds LP and to guarantee that the latter collects the 25% per cent outcome it has funded this arbitration for.

ii. Mr. Prasad's law firm has a significant financial relationship with CLAIMANT's Third-Party Funder.

62. In addition to Mr. Prasad's connections with Findfunds LP's subsidiaries as arbitrator, Mr. Prasad has further substantial connections with Findfunds LP's subsidiaries as counsel. In fact, Mr. Prasad's equity partner Mr. Slowfood is acting as counsel for a client funded by Funding 8, a subsidiary of Findfunds LP [PO2, p.50 paras. 6&8]. As such, Mr. Prasad is directly being financed by Funding 12 through his equity partner.

63. In fact, the case has already brought a substantial amount of USD 1.5 million to Slowfood's law firm and it is still expected to bring up to USD 300, 000 after the hearing [PO2, p.50,

para.6]. This case alone has already formed 5% of Slowfood's annual turn. Moreover, Slowfood's client is fully dependent on third-party funding as it could not have initiated arbitration or appointed Slowfood as lawyers without such funding [PO2, p.50, para.6]. Unlike what CLAIMANT is alleging [CL.Memo para. 73], the amount of this case is significant to constitute a financial interest for Mr. Prasad since his shares, as equity partner in the profits of Prasad & Slowfood's firm, is determined by the profits his Slowfood partners make.

64. In addition, CLAIMANT is attempting to comfort RESPONDENT by asserting that the measures taken by Mr. Prasad's law firm to avoid his contact with Slowfood's partner's case will keep Mr. Prasad impartial [CL.Memo, para. 71]. However, when an entity that has an interest in the outcome of the dispute shares close economic involvement with the arbitrator's law firm, the arbitrator tends to render an award in favor of the client as that would imply a financial advantage the arbitrator's law firm. [Bishop/Reed]. Furthermore, contrary to CLAIMANT's allegations [CL. Memo para.71], it is accepted that one partner in a law firm is always acting in the name of all other partners [Bundesgerichtshof 2000]. Every client is not only counseled by one partner but by the entire law firm and in the name of all other partners. Simply put, Mr. Prasad has a financial interest with CLAIMANT's Third-Party Funder, which in turn has a substantial financial interest in the outcome of the current dispute. This shows a financial interest of the arbitrator in the same dispute and falls under the IBA Guidelines Non-Waivable Red List [IBA Guidelines, Non-Waivable Red List, 1.3] which automatically allows for the disqualification of Mr. Prasad.

65. In light of the above, the law firm of Mr. Prasad's steady and direct financial connections with CLAIMANT's Third-Party Funder fall under para.1.3 of the IBA Non-Waivable Red List and constitute circumstances that create justifiable doubts under Art. 12 of the UNCITRAL Rules. These doubts are further corroborated by the repeat appointments of Mr. Prasad by both CLAIMANT's Counsel, Mr. Fasttrack and CLAIMANT's Third-Party Funder.

C. Repeat appointments of Mr. Prasad by Mr. Fasttrack's law firm and Findfunds LP further corroborate justifiable doubts as to his impartiality.

66. Contrary to Claimant's allegations [CL.Memo, para.63], repeat appointments by Mr. Fasttrack's law firm and Findfunds LP give rise to justifiable doubts as to Mr. Prasad's impartiality and independence under the IBA Guidelines and the UNCITRAL Rules.

67. In fact, repeat appointments of the same arbitrator by the same law firm fall under the Orange List of the IBA guidelines which requires disclosure on behalf of the arbitrator and could constitute a valid ground for challenge [IBA Guidelines, Orange List, 3.1.3]. Unlike what CLAIMANT is advancing [CL. Memo, para.64], it is generally accepted that the mere existence of repeat appointments compromises the arbitrator's independence, creating justifiable doubts [Gomez-Acebo, para. 5-44]. Moreover, multiple appointments cannot be considered separately. In fact, the IBA Guidelines' quantitative limits in terms of time are adopted by courts. In the *Frémarc* case [Paris Court of Cassation 2001], the French Court of Cassation annulled a decision by the Paris Court of Appeal to dismiss an application to set aside an arbitral award that was based on the repeat appointments of an arbitrator by the same party in three other cases. Unlike what CLAIMANT is alleging, the repeat appointment of Mr. Prasad by Mr. Fasttrack's law firm could not be a coincidence. It proves legitimate doubts as to his independence since repeat appointments reflect that there is a flow of business between the arbitrator and the appointing party [Gomez-Acebo, para. 5-46].

68. Finally, as established above, Mr. Prasad is also being repeatedly appointed by CLAIMANT's Third-Party Funder for no other obvious reason than the steady financial connections he has with Findfunds.

D. Mr. Prasad's published article is a further indication of Mr. Prasad's bias.

69. CLAIMANT alleges that Mr. Prasad's published article is a general discussion on the law and does not give rise to justifiable doubts [CL. Memo, para.80]. However, if this legal opinion is considered along with all the other circumstances established above, it is clear that Mr. Prasad's presence in the panel would clearly compromise the Tribunal's impartiality and independence to the detriment of RESPONDENT on all levels.

70. In light of the above, Mr. Prasad's impartiality and independence is compromised by more than one event; On the one hand, his strong financial relationship with the CLAIMANT's Third Party Funder which has every interest in CLAIMANT's success on the merits and on the other, his relationship with CLAIMANT's counsel who had gone as far as violating his ethical duties in order to keep Mr. Prasad on the panel. Weighing RESPONDENT's justifiable concerns and due process rights with the removal of Mr. Prasad, at an early stage of the proceedings, the

Tribunal is invited to preserve the most imminent of these interests and the most sacred which is due process.

PART 3: THE PARTIES INTENDED TO INCLUDE SUSTAINABILITY AS A REQUIREMENT IN THE CONTRACT, AND BOTH THE CLAIMANT'S AND RESPONDENT'S STANDARD CONDITIONS INCLUDED THIS OBLIGATION.

71. RESPONDENT's Standard Conditions govern the Contract as they were incorporated into RESPONDENT's offer of 10 March 2014 and accepted by CLAIMANT on 27 March 2014, thus creating a valid contract. While CLAIMANT modified the original offer, those changes were immaterial. Contrary to CLAIMANT's view, the immaterial changes failed to transform the original offer into a counter-offer, and CLAIMANT accepted RESPONDENT's initial offer that included RESPONDENT's Standard Conditions (I). Even if the Tribunal finds CLAIMANT's changes to be material, RESPONDENT's Standard Conditions still apply because the Parties intended to incorporate them into the Contract (II). Even if RESPONDENT's Standard Conditions do not apply, the Parties intended to incorporate sustainability as a requirement into the Contract (III).

I. RESPONDENT's Standard Conditions govern the Contract.

72. According to Art. 14 CISG, the acceptance of the offer creates a valid Contract between the Parties [Schwenzer & Schlechtriem, p.269, para.2]. CLAIMANT accepted the incorporation of RESPONDENT's Standard Conditions by accepting RESPONDENT's offer (A). CLAIMANT's immaterial modifications failed to transform the acceptance into a counter-offer (B).

A. CLAIMANT accepted RESPONDENT's Standard Conditions by accepting the RESPONDENT's offer.

73. Both Parties agreed that a contract was concluded on April 7 2014 [CL Memo, para. 86]. CLAIMANT is alleging that its business and supplier code of conduct published in its official website governs the Contract. ("CLAIMANT's Standard Conditions").

74. Art. 18(1) CISG defines the term *"acceptance"* as a declaration of intent, from the offeree, indicating assent to an offer [Kröll & Mistelis, p.263, para.2]. Such declaration of intent must reach the offeror for it to become effective, as provided in Art. 18(2) CISG. *"An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed".*

75. In its Letter of Acknowledgment, CLAIMANT accepted the Invitation to Tender sent by RESPONDENT and suggested *"to submit a proper offer containing the changes"* [Exh.C-3, p.15]. Even if the offer sent by CLAIMANT under *"Sales-Offer"* included changes, these amendments render the CLAIMANT's notice an acceptance and not a counter-offer [Exh.C-3, p.15].

B. CLAIMANT's acceptance included only immaterial modifications to the original offer and therefore did not amount to a counter-offer but an acceptance.

76. Art. 19(1) CISG provides for the basic principle of the *"mirror-image-rule"* when defining the terms of an acceptance [Kröll & Mistelis, p.280, para.1]. The principle requires that the terms of the offer mirror the acceptance in order for a contract to be concluded. However, in some cases, an acceptance can contain different or additional terms not found in the offer and the response will still amount to an acceptance. Art. 19(2) CISG allows for a contract to be concluded even when the acceptance does not mirror the offer, provided that the different terms in the acceptance "*do not materially alter the offer."*

77. Whether a different or additional term is material depends on the circumstances of the case. Numerous courts and commentators have interpreted Art. 19(3) as a rebuttable presumption of the materiality of changes relating to those terms. Thus, while Art. 19(3) provides a list of possible material changes such as "*the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other, settlement of disputes",* this list by no means is exclusive or determinative. The Austrian Supreme Court has ruled, for example, that *"alterations of these terms will be classified as immaterial due to special circumstances of the particular case, practices established between the parties, pre-contractual negotiations or usage*" [Oberster Gerichtshof, 1997].

78. In this case, CLAIMANT's changes to the price, description of the goods and the method of payment are immaterial alterations under Art. 19(2) CISG for two reasons: trade usage and knowledge of offeror [UNIDROIT commentary on Art. 2.1.11].

i. Modification of price

79. CLAIMANT did not materially change the price because it did not exceed the price required by RESPONDENT in its Tender Document. Indeed, RESPONDENT stated in its General

Conditions that *"the price per chocolate cake should not exceed USD 2.50 per unit"* [Exh.C-2, p.10, Clause.3 (1)]. In its acceptance, CLAIMANT simply set the price at USD 2 [Exh.C-4, p.16], which is within the price requirement of RESPONDENT's offer. Thus, the CLAIMANT's response with respect to price cannot be considered as a material modification but an agreement with RESPONDENT's requirements.

80. Moreover, Clause 3, Section III of the RESPONDENT's Tender Documents clearly states that *"*the *price should be renewable yearly at the anniversary of the contract"* [Exh.C-2, p.10]. This emphasizes the Parties' intent not to fix a price but to allow for flexibility when setting the price of the cakes.

ii. Modification of the description of the goods

81. The shape of the cake was "*slightly*" [Exh.C-3, p.15] altered by CLAIMANT to ensure a better production and packaging of the chocolate cakes. This alteration falls within the requirements of Art. 2 of RESPONDENT's Special Conditions of Contract, which provides that a "(detailed product name and description to be filled by tenderer)" [Exh.C-2, p.11]. RESPONDENT expected from CLAIMANT to modify the shape of the cake.

iii. Modification of the method of payment

82. CLAIMANT's change concerning the method of payment from 60 days after delivery to 30 days after delivery [Exh.C-2, p.11] cannot be considered as a material modification because this modification is commonly used in the trade sector [UNIDROIT Commentary on Art. 2.1.11(2)]. In an open account, payment is due typically in 30,60 or 90 days after delivery of the goods, meaning that changing the terms of payment does not prevent the conclusion of the contract, especially when CLAIMANT has signed the Letter of Acknowledgment. CLAIMANT expressly stated that it only made "*some minor amendments to the documents received*" [Exh.C-3, p.15]. In other words, even CLAIMANT never intended to materially change the offer but to instead accept RESPONDENT's initial offer [ICC No.10422].

II. Even if CLAIMANT's changes are material and its acceptance amounted to a counter-offer, RESPONDENT's Standard Conditions still apply because the Parties intended to incorporate them into the Contract.

83. RESPONDENT's Standard Conditions govern the Contract because the Parties subjectively intended to incorporate them (A). Under the reasonable person standards, it is clear that the

Parties' intention was to make the RESPONDENT's Standard Conditions part of the Contract (B). Furthermore, CLAIMANT failed to make its Standard Conditions available to RESPONDENT, thus violating the making-available rule (C).

A. The Parties subjectively intended to incorporate RESPONDENT's Standard Conditions.

84. Under Art. 8(1) CISG, CLAIMANT accepted the incorporation of RESPONDENT's Standard Conditions in its Letter of Acknowledgment when it accepted the invitation to tender, which included the RESPONDENT's offer and the tender documents [Exh.C-3, p.15].

85. Contrary to what CLAIMANT is alleging now [CL.Memo., para.93], even if RESPONDENT downloaded and read CLAIMANT's Standard Conditions from the website, doing so does not amount to an acceptance because RESPONDENT explicitly mentioned that it was "out of curiosity" that it checked the website [Exh.C-5, p.17]. In addition, CLAIMANT should have expressly stated that it intended that its Standard Conditions apply. Instead, it said in its Letter of Acknowledgment that the changes made to RESPONDENT's offer *"*[a]re *related primarily to the goods and the mode of payment"* [Exh.C-3, p.15]. Thus, if CLAIMANT truly intended to incorporate its Standard Conditions into the Contract, it should have clearly stated this intent and attached the Standard Conditions to the Letter of Acknowledgment [Exh.C-2, pp.10-14].

B. The Parties objectively intended to incorporate RESPONDENT's Standard Conditions.

86. In any event, applying Art. 8(2) CISG, it is clear that CLAIMANT never intended to incorporate its Standard Conditions. A reasonable person in the CLAIMANT's shoes, *i.e.*, someone placing a great importance on its Standard Conditions, would have attached them to its acceptance and made them clearly and easily accessible to RESPONDENT.

87. When referring to its General Conditions, CLAIMANT simply stated that *"*[*t*]he ***above*** *offer is subject to the General Conditions of Sale"* [Exh.C-4, p.16] [emphasis added]. A reasonable person would understand that the CLAIMANT's intention was only to apply its General Conditions to the acceptance and not on the whole Contract. CLAIMANT could have referred to its Standard Conditions by simply saying that they apply to the whole Contract.

88. Contrary to CLAIMANT's allegations [CL.Memo, para.23], RESPONDENT did not reject CLAIMANT's Standard Conditions outright because they merely concurred with its values.

RESPONDENT noted that CLAIMANT's *"codes show that Delicatesy Whole Foods and Comestibles Finos share the **same** values"* [Exh.C-5, p.17] [emphasis added]. In other words, RESPONDENT did not object to the substance of the CLAIMANT's conditions because RESPONDENT's Standard Conditions are interchangeable with the CLAIMANT's. A reasonable person would not object to something it believes is identical in substance.

C. The making-available test precludes the incorporation of CLAIMANT's Standard Conditions.

89. By failing to make its Standard Conditions available to RESPONDENT, CLAIMANT violated the requirement that standard contract terms be made readily available to the other party. Art. 14 CISG states that" [*a*] *proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance".* A proposal can only be interpreted *"according to the offeror's intent that was recognizable to the addressee*" [Oberster Gerichtshof 1996]. Art. 14 CISG also provides that a proposal be sufficiently definite and include certain elements, such as the indication of the goods, quantity, the purchase price, and standard contract terms. However, form requirements do not have to be fulfilled for a proposal to be considered as an offer under the CISG [Kröll & Mistelis, p.218, para.4].

90. Both the CISG and UNIDROIT deal with the issue of incorporation of standard terms in Arts. 14 and 8 of the CISG and Art. 2.1.19 UNIDROIT, respectively. Standard terms contained in a separate document or an electronic file should expressly be referred to by the party intending on using them. "*The addressee is not under a duty to get access to standard contract terms that the user wants against the addressee*" [Kröll & Mistelis, p.234, para.40]. This principle is mostly applicable in international commerce where the parties are unfamiliar and cannot predict the particular terms they agreed to. Consequently, pursuant to the principle of good faith, the opposing party that wants to incorporate its standard terms should explicitly refer to them.

91. As CLAIMANT correctly stated in its submission [CL.Memo, para.96], "*an offer in paper-based writing is insufficient to make the standard conditions available to the other party*" [Bundesgerichtshof 2001]. Moreover, the making-available test provides that a party should not bear the burden to actively search for standard conditions [CL.Memo, para. 96]. The fact

that CLAIMANT added in a footnote a Website URL that leads to its Standard Conditions, shows that it lacked a clear intent to apply its Standard Conditions. The website referred to by CLAIMANT is ambiguous and requires RESPONDENT to search in a different source for the conditions to read them. If CLAIMANT was so concerned with incorporating its Standard Conditions to the contract, it should have at least attached its Conditions to its acceptance Letter of Acknowledgment.

III. If both Standard Conditions form part of the Contract, the knockout rule requires that RESPONDENT's Standard Conditions apply.

92. The "knockout rule" accepts the agreement of the parties on the essential negotiations, leaving the non-conflicting standard terms of both sides as part of the contract intact and removing the conflicting terms [Oberster Gerichtshof 2005]. Recently courts have applied the knockout rule mostly when the circumstances show that the parties have been contractually bound for a long period of time. This is the case here as the business relationship between CLAIMANT and RESPONDENT has lasted for three years.

93. According to the knockout approach, only the matching terms are part of the contract. Even if the conflicting terms are material, courts tend to save the contract especially if there has been some performance, such as here [Anderson/Mazzotta/Zeller, p.149]. In this case, the dispute arose from the CLAIMANT’s failure to provide conforming goods. Since both Parties agree that the cakes should have been made using sustainably-farmed cacao beans, the Tribunal should exclude all conflicting terms concerning the nature of the CLAIMANT’s obligation.

94. Both Parties intended to include sustainability of the cocoa beans as an essential requirement in the production of the chocolate cakes. Art. 8(1) imposes a subjective standard in the interpretation of parties' intent. In determining what a party intended, due consideration is to be given to all circumstances relating to the transaction, including negotiations, practices, usages, and the parties' subsequent conduct [Anderson/Mazzotta/Zeller, p.94].

95. RESPONDENT's intent to require sustainability in the production process of cocoa beans was clear from the beginning, from the commencement of the negotiations and throughout the

Contract formation. RESPONDENT discussed the cost versus the ethical and environmentally sustainable production with CLAIMANT at the yearly Danubian food fair [NoA, p.4, para. 3]. RESPONDENT emphasized on several occasions on the importance of working with suppliers committed to ethical and sustainable behavior. In its email of 10 March 2014, RESPONDENT stated that CLAIMANT's strict adherence to the principles of ethical and sustainable production made the CLAIMANT's company a very interesting supplier for Comestibles Finos [Exh.C-1, p.8]. In addition, in an email of 7 April 2014, RESPONDENT stated that CLAIMANT shares the same values and that they are both committed to ensuring that the goods produced and sold fulfill the highest standards of sustainability [Exh.C-5, p.17]. CLAIMANT did accept this understanding and commitment by making the first delivery of chocolate cakes to RESPONDENT on 1 May 2014.

96. CLAIMANT's intent to be bound by the commitment to produce chocolate cakes made from sustainably farmed cocoa beans is also apparent from its own Business Code of Conduct. In the principle entitled "*Preservation and Regeneration of Environmental Resource Bases", CLAIMANT states that "Delicatesy acknowledges that its environmental effort must be comprehensive and implemented at different stages of its activity*" [Exh.R-3, p.30]. Thus, the production process of the chocolate cakes is included in the sustainability requirement and using non-sustainable cocoa beans renders the chocolate cakes non-conforming.

PART 4: CLAIMANT DELIVERED NON-CONFORMING GOODS AND RESPONDENT IS ENTITLED TO TERMINATION.

97. CLAIMANT failed to fulfill its obligation of ensuring that its suppliers complied with sustainable farming methods as provided for in RESPONDENT's Code of Conduct (I). Such a failure led CLAIMANT to deliver non-conforming chocolate cakes pursuant to Art. 35 CISG, which constitutes a breach of contract and entitles RESPONDENT to termination (II).

I. CLAIMANT guaranteed to achieve a specific result, *i.e.*, that its suppliers would comply with sustainable farming methods.

98. The interpretation of RESPONDENT's Code of Conduct under Art. 8 CISG provides that CLAIMANT has an obligation of achieving a particular result (A), which is to ensure that the supply chain adhered to the Global Compact Principles, and failure would result in the breach of the contract (B).

A. RESPONDENT's Code of Conduct imposes an obligation of result on the CLAIMANT.

99. Contrary to CLAIMANT's submission [CL.Memo, para.107], RESPONDENT's Code of Conduct requires CLAIMANT to guarantee that all its suppliers would comply with the RESPONDENT's Standard Conditions. The Parties intended that RESPONDENT's Code of Conduct contains an obligation of result under Art. 8(1) CISG (i). A reasonable person would understand that RESPONDENT's Code of Conduct contains an obligation of result under Art. 8(2) CISG (ii).

i. The Parties intended that RESPONDENT's Code of Conduct contains an obligation of result under Art. 8(1) CISG.

100. According to Art. 8(1) CISG, the terms of a contract should be interpreted in accordance with the party that made the statement only when the other party knew the actual intent [Schwenzer & Schlechtriem, p.147, para.6; Anderson/Mazzotta/Zeller, p.95; US Court of Appeals, 1998]. Art. 8(1) is to be read in conjunction with Art. 8(3), taking the circumstances of the case into account [Huber, p.236].

101. RESPONDENT on several occasions underlined the importance of its Code of Conduct. During the Parties' discussion at the Cucina Food Fair [NoA, p.4, para.3], RESPONDENT clearly indicated the significance of adhering to its Code of Conduct, including the fact that CLAIMANT was to ensure that its suppliers comply with the principles therein [Exh.C-2, p.14]. Contrary to what CLAIMANT is alleging that it was unaware that its obligation is one of result [NoA, p.7, para.21].

102. Moreover, RESPONDENT told CLAIMANT about its intention to become a Compact LEAD Company by 2018, adding that CLAIMANT's suppliers had to adhere to Comestibles Finos' Philosophy and to its Code of Conduct for Suppliers to ensure such a result [Exh.C-1, p.8]. CLAIMANT itself mentioned in its letter of 27 March 2014 to RESPONDENT's Head of Purchasing, Ms. Ming that it *"will do everything possible to guarantee that the ingredients sourced from outside suppliers comply with our joint commitment to Global Compact Principles"* [Exh.C-3, p.15]. Therefore, CLAIMANT was aware of RESPONDENT's intent to impose an obligation of result concerning the compliance of CLAIMANT's suppliers with RESPONDENT's Code of Conduct.

ii. A reasonable person would understand that RESPONDENT's Code of Conduct contains an obligation of result under Art. 8(2) CISG.

103. If the Tribunal finds Art. 8(1) to be inapplicable, Art. 8(2) of the CISG could be applied which provides that a party's statement should *"be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances".* Applying this test, a reasonable person in the CLAIMANT's shoes would have been aware that its obligation is one of result regarding the sustainability of the production process of the chocolate cakes [Schwenzer & Schlechtriem, p.153, para.20; U.S. District Court 2010; Kantonsgericht St. Gallen 2010].

104. RESPONDENT's Code of Conduct requires not only CLAIMANT to comply with the principles listed therein but also to ensure compliance of its own suppliers with these principles, as is clearly stated in principles C and E [RNoA, para.26, p.27]. RESPONDENT used the terms "*ensure*" and "*make sure*" in its Code of Conduct, meaning that RESPONDENT clearly imposed an obligation of result upon CLAIMANT to guarantee that its supplier, adhere to sustainable methods of production. A reasonable person in the same situation as CLAIMANT would have understood that CLAIMANT had to use not just its best efforts but rather was obligated to produce a specific result, *i.e.*, sustainability and ethical production.

105. CLAIMANT alleges that the interpretation of RESPONDENT's Code of Conduct should be made according to the principle of *contra proferentem* under Art. 4.6 UNIDROIT because the terms used by RESPONDENT are ambiguous. This argument lacks merit. A reasonable person would understand the RESPONDENT's terms as they are clear and unambiguous [Schwenzer & Schlechtriem, p.168, para.49; Paris Court of Appeal 1988; OLG Stuttgart 2008; U.S. Court of Appeals 2002; Del.Ch. 2012]. In addition, the principles were addressed and discussed on numerous occasions throughout the negotiation of the Contract, and if CLAIMANT did not understand them, it should have asked for clarification.

B. CLAIMANT failed to fulfill its obligation under the Global Compact Principles to control its supply chain.

106. CLAIMANT appointed a team of experts Egimus AG to perform its obligation of ensuring that its suppliers of cocoa beans adhered to Global Compact Principles. Egimus AG provided the CLAIMANT with audits and reports about Ruritania Peoples Cocoa mbH every five years

[PO2, para.32, p.53].

107. CLAIMANT hired Egimus AG to ensure the sustainable production of the chocolate cakes and because it was aware that all its suppliers are bound by the Global Compact methods of sustainability. CLAIMANT alleges to have performed its obligation of best efforts in this regard by appointing the team of experts Egimus AG CLAIMANT now argues that it has to be exempted from any liability concerning the non-sustainability of the cocoa beans pursuant to Art. 79(1) CISG because it was also defrauded by the government of Ruritania, and it should not be expected to monitor State agencies. RESPONDENT considers such an exemption to be unjustified.

108. According to Art. 79(2) CISG, the promisor is liable for the conduct of third persons who are engaged to perform the whole or part of the contract [Schwenzer & Schlechtriem, p.1143, para.1]. A party is considered to have breached the contract if it was not able to fulfill the essential conditions for which the contract was concluded [Tribunal di Busto Arsizio, 2001]. RESPONDENT made it clear to CLAIMANT in its email that "o*ne of the decisive issues is a proper supply chain management*" [Exh.C-1, p.8]. CLAIMANT was aware that RESPONDENT places a great importance on the sustainability of the whole supply chain.

109. CLAIMANT alleges that the fraud by the whole government of Ruritania is an impediment outside its sphere of control as well as not in the expertise of Egimus AG. This argument is meritless. In fact,"as *a rule, difficulties in delivery due to the seller's financial problems, or to financial problems of the seller's supplier (even when connected to the act of public authority in the supplier's country) are not to be considered an impediment beyond the seller's control but belong to the seller's area of risk*" [Chinese Goods Case]. It was the CLAIMANT's duty to review the reports received, and thus any errors related to those reports fall within its area of risk. Therefore, the Tribunal should not consider the government fraud as an impediment, and CLAIMANT should not be exempted from liability.

110. Furthermore, "*Art. 79 CISG does not alter the contract's distribution of risks, by which the seller is obliged to deliver (conforming) goods. According to Art. 79(2) CISG, the seller has to bear the risk of a lack of conformity deriving from its own suppliers' non-performance, unless it brings evidence that the impediment did not lie in its and its supplier's control*" [Bundesgerichtshof

1999]. Assuming that the fraud was beyond CLAIMANT's control, as the seller of the cakes, CLAIMANT, rather than RESPONDENT, must bear the risk of the non-sustainable cocoa beans

II. By delivering non-conforming goods CLAIMANT breached the Contract.

111. CLAIMANT breached the Contract under Art. 35 of the CISG. Whether the Tribunal considers Art. 35(1) or Art. 35(2) to apply, the cakes made from unsustainably farmed cocoa beans are non-conforming (A). RESPONDENT clearly stated in its Code of Conduct that the delivery of non-conforming goods is considered a breach which entitles it to the termination of the contract (B).

A. The chocolate cakes are non-conforming because the cocoa beans were farmed in a non-sustainable manner.

112. According to Art. 35(1) CISG, the seller must deliver goods which are of the *"quantity, quality and description required by the contract."* Art. 35 CISG uses the conjunction "and" between all the criteria given and not the word "or", meaning that in order for the goods to be conforming they must match the mentioned criteria cumulatively. Any discrepancy in quality regardless of whether the quality is better or worse than the one stipulated in the Contract represents a lack of conformity, and the same applies to observing certain manufacturing standards such as fundamental ethical principles or religious production requirements [Schwenzer & Schlechtriem, p.596, para.10].

113. Global Compact Principles constitute manufacturing standards. CLAIMANT used cocoa beans farmed unethically, which is in direct violation of the Global Compact Principles. As a result, the chocolate cakes were made from unsustainable ingredients and failed to meet the quality standards agreed upon by the Parties.

114. In its memorandum, CLAIMANT failed to mention that the conformity of goods is not only based on the goods' appearance but also on its description and purpose as required by Art. 35(2). A French Court considered that "*the seller had actually breached the contract in delivering non-conforming metallic elements: as a matter of fact, the defective elements were not fit for the particular purpose made known to the seller (reassembling of the hangar the same way as it was originally*" [Grenoble Court of Appeal, 1995]. While one could argue that the cakes are conforming according to Art. 35(2) (a) because they are fit for their ordinary

purpose, however remain not fit for their particular purpose under article Art. 35(2) (b). Contrary to the CLAIMANT's allegation [CL.Memo, para.126], the particular purpose regarding that the cocoa beans have to be sustainably sourced was never made known to it, RESPONDENT made it clear in its Code of Conduct as well as in all discussions held with CLAIMANT that it requires such a particular purpose to be found in the delivered chocolate cakes.

115. As mentioned previously, as a member of the Global Compact, CLAIMANT was aware of the requirements of becoming Global Compact LEAD Company. In fact, RESPONDENT clearly expressed its intention to become a Global Compact LEAD company [RNoA, p.25, para.5]. Thus, CLAIMANT should have known that all the ingredients used in the production of the chocolate cakes must be sustainably farmed. Clearly, a reasonable person in the shoes of CLAIMANT would have known that it has an obligation to ensure the adherence of its suppliers to the sustainable production methods; as a result, it should have taken more than precautionary steps when appointing Egimus AG.

116. Art. 9(2) CISG imposes on the parties a duty to know and observe a particular usage that is widely known in the industry [Schwenzer & Schlechtriem, p. 189, para.17]. Both CLAIMANT and RESPONDENT are members of Global Compact. Therefore, CLAIMANT has knowledge and is aware of Principle 7 of the Global Compact Principles, which requires that business "should support" a precautionary approach to environmental challenges and that sustainability in all the ingredients CLAIMANT uses is a requirement. The usage is required to have an international nature, *i.e.*, be internationally known [Schwenzer & Schlechtriem, p.190, para.19]. The United Nations Global Compact is a voluntary initiative based on CEO commitments to implement universal sustainability principles and to undertake partnerships in support of UN goals. Currently, approximately about 9,713 companies adhere to the UN Global Compact.

117. Parties should know or ought to have known that the usage is included in their contract. [Schwenzer & Schlechtriem, p.191, para.20]. RESPONDENT made it clear that Global Compact Principles and requirements are included in the contract. In its invitation to tender, RESPONDENT expressly mentioned the *"Delicatesy Whole Foods Sp's Global Compact*

membership and its strict adherence to the principle of ethical and sustainable production make your company a very interesting supplier for Comestibles Finos" [Exh.C-1, p.8].

118. RESPONDENT also told CLAIMANT that *"[y]our Codes show that Delicatesy Whole Foods and Comestibles Finos share the same values and are both committed to ensure that the goods produced and sold fulfill the highest standard of sustainability"* [Exb.C-5, p.17]. In other words, irrespective of whether RESPONDENT's Code of Conduct governs the contract or not, CLAIMANT was always required to adhere to the Global Compact Principles and to use sustainable ingredients, which meant ensuring that its supplier of cocoa beans used sustainable farming methods.

B. RESPONDENT is entitled to terminate the contract because the goods are non-conforming.

119. CLAIMANT delivered non-conforming chocolate cakes which constitute a breach of contract and entitles RESPONDENT to termination pursuant to Art. 38, 39 of the CISG.

120. RESPONDENT included in Clause 4 of its General Conditions of Contract that *"[a]ny breach of some relevance of Comestibles Finos' General Business Philosophy or its Code of Conduct for Suppliers shall be considered to constitute a fundamental breach entitling Comestibles Finos' to terminate the contract with immediate effect and claim damage"* [Exh.C-2, p.12]. RESPONDENT added in its Special Conditions of Contract that *"it has a 'zero tolerance' policy when it comes to unethical business behavior, such as bribery and corruption"* [Exh.C-2, p.11]. RESPONDENT repeatedly mentioned that it will terminate the contract for any breach, and CLAIMANT accepted these consequences by accepting and acknowledging the tender documents.

121. According to Art. 38 CISG, RESPONDENT examined the goods by conducting its own investigation regarding the suppliers' compliance. To its great dismay, RESPONDENT discovered that CLAIMANT's suppliers of the cocoa beans were not using the sustainable methods of farming as required by the contract [Exh.C-6, p.18]. According to Art. 39, RESPONDENT gave CLAIMANT a notice about the nature of lack of conformity within a reasonable time [Oberster Gerichtshof 1999]. CLAIMANT made its last delivery to

RESPONDENT on 27 January 2017 [NoA, p.6, para.16] and RESPONDENT notified CLAIMANT about the lack of conformity on the same day [Exh.C-6, p.18].

122. It is true that CLAIMANT immediately terminated the contract with Ruritania Peoples Cocoa mbH and found a new supplier of cocoa beans to restart delivery to RESPONDENT [Exh.C-9, p.21]. But the mere fact that RESPONDENT discovered the fraud and unsustainable farming of the cocoa beans ***before*** CLAIMANT, which had an obligation to do so, constitutes a fundamental breach of contract and entitles RESPONDENT to immediate termination.

RELIEF SOUGHT

In light of the above, RESPONDENT seeks to obtain an award with the following prayers for relief:

1) A declaration that the Tribunal has the authority to rule on the challenge of Mr. Prasad without the latter's participation under Art. 13 of the Danubian Law;

2) An award declaring Mr. Prasad unsuitable to act as arbitrator in the present case for the existence of justifiable doubts as to his impartiality and independence under Art. 12 of the UNCITRAL Rules, and deciding his replacement by Ms. Ducasse appointed by CLAIMANT;

3) A declaration that CLAIMANT delivered non-conforming goods under Art. 35 of the CISG and is not entitled to any payment for the delivered cakes;

4) A declaration that RESPONDENT's termination of the Contract was made in accordance with Art. 39 of the CISG;

5) An award rejecting any and all other claims made by CLAIMANT in these proceedings; and

6) An award ordering CLAIMANT to pay RESPONDENT's costs incurred in this arbitration in accordance with Art. 42 of the UNCITRAL Rules.

Submitted on 18 January 2018
On Behalf of RESPONDENT