TWENTY FIFTH ANNUAL WILLEM C. VIS INTERNATIONAL

COMMERCIAL ARBITRATION MOOT

Memorandum for RESPONDNET

MIDDLE EAST UNIVERSITY IN AMMAN-JORDAN

On behalf of:

Delicatesy Whole Foods Sp
39 Marie-Antoine Carême
Avenue
Oceanside
EQUATORIANA
Counsel: Horace Fasttrack

CLAIMANT

Against:

Comestibles Finos Ltd
75 Martha Stewart Drive
Capital City
MEDITERRANEO
Counsel: Joseph Langweiler

RESPONDENT

Jude Al-Masri ~ Issa Al- Tarawneh~ Nicole Zaghloul ~ Haya Bako ~ Alissar Al-Hajhasan

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INDEX OF ABBREVIATIONS

Arbitration Rules	UNCITRAL Arbitration Rules
Art.	Article
Artt.	Articles
CEO	
CISG	United Nations Convention on Contracts for the International Sale of Goods.
ie	That is
Ltd	Limited
Memorandum for Claimant	Memorandum for Claimant - Jagiellonian University In Krakow
Model Law	UNCITRAL Model Law
Para.	Paragraph
Pg.	Page
Pgs.	Pages
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
Red List	Non-waivable Red List of the IBA Guidelines
Sect.	Section
UNIDROIT	International Institute for the Unification of Private Law
v.	Versus
G.C	General Conditions
Notice of challenge	Notice of challenge of Mr.Prasad
R	Respondent's exhibit
C	Claimant's exhibit

INDEX OF LEGAL TEXTS

CISG	UN Convention on Contracts for the International Sale of Goods
Global compact principles	The Ten Principles of the UN Global Compact
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration. Adopted by resolution of the IBA Council on Thursday 23 October 2014
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)
UNCITRAL Arbitration Rules	United Nations Commission on International Trade Law Arbitration Rules as Revised in 2010
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2010

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Russia

(CLOUT) abstract no. 139

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Court reference: 309/1993

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(China International Economic And Trade Arbitration Commission)

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International Centre For Settlement Of Investment Disputes

Urbaser SA v. Argentina

ICSID Case No. ARB/07/27

August 12, 2010

STATEMENT OF FACTS

The parties to this arbitration are Delicatesy Whole Foods Sp (CLAIMANT) and Comestibles Finos Ltd (RESPONDENT). CLAIMANT is a medium sized Equatorianian manufacturer of fine bakery products. RESPONDENT is a gourmet supermarket chain in Mediterraneo.

1. **In March 2014,** CLAIMANT met RESPONDENT at the yearly Danubian food fair, Cucina. They discussed product choices, delivery quantities and they discussed the benefits of ethical and environmentally sustainable production and their respective experiences. RESPONDENT made it clear when they met that its main purpose is to become a Global Compact Lead Company by 2018.

2. **On the 10th of March 2014**, RESPONDENT invited CLAIMANT to its invitation to tender which states the zero tolerance policy RESPONDENT has when it comes to unethical business behavior. RESPONDENT also sent CLAIMANT tender documents that included its code of conduct which states the importance of CLAIMANT choosing suppliers that adhere to RESPONDENT's ethical standards, and RESPONDENT further clarified how important it is for CLAIMANT and its suppliers to adhere to its philosophy and code of conduct for suppliers.

3. **On the 27th of March 2014**, CLAIMANT submitted its offer which consisted of RESPONDENT's tender documents including RESPONDENT's Code of Conduct and General Conditions and asked to change two main amendments: the mode of payment and the shape of cake.

4. **On the 7th of April 2014,** RESPONDENT accepted CLAIMANT's offer and the two changes it has asked for, RESPONDENT downloaded CLAIMANTs code of conduct out of curiosity.The reason RESPONDENT accepted CLAIMANT's offer is that it was satisfied with CLAIMANT's strict adherence to of principle of ethical and sustainable production.

5. **On the 27th of January 2017,** RESPONDENT informed CLAIMANT of the news regarding the widespread fraud and corruption in Ruritania and therefore it asked CLAIMANT to make sure that its suppliers did not participate. RESPONDENT reminded CLAIMANT that the suppliers' non-compliance with the ethical standards will cause a breach of contract and therefore RESPONDENT will stop paying until the issue is solved.

6. **On the 10th of February 2017,** CLAIMANT admitted that its own suppliers were involved with the fraud and corruption actions in Ruritania.

7. **On the 12th of February 2017,** RESPONDENT stated that CLAIMANT was in breach of contract and it had explain enough through negotiations the importance of using cocoa in accordance with the ethical standards they have agreed upon.

8. **On the 30th of June 2017,** CLAIMANT sent a notice of arbitration requesting RESPONDENT to pay for the non-conforming goods it delivered. CLAIMANT also appointed Mr. Prasad as an arbitrator.

9. **On the 29th of August 2017**, RESPONDENT obtained information that raises doubts to the independence and impartiality of Mr. Prasad and informed the tribunal of the facts.

10. **On the 1st of September 2017**, the tribunal issued the decisions requesting CLAIMANT to submit a declaration to the tribunal and to RESPONDENT if it is funded by a third party, and **on the 7th of September, 2017** CLAIMANT admitted to the third party funding and confirmed that information.

11. **On the 14th of September 2017**, RESPONDENT sent a notice of challenge of Mr.Prasad, basing that challenge on the Arbitration Rules, the Model Law and the IBA-guidelines. Only 4 days after the conformation of the information. Mr. Prasad rejected that challenge a week later. The Parties agreed to a backup arbitrator in case the challenge is successful.

SUMMARY OF ARGUMENT

Argument on Procedure

12. The Arbitral Tribunal has the authority to judge on the challenge of Mr. Prasad contrary to what CLAIMANT alleges, by applying the Model Law which gives the tribunal this authority rather than the Arbitration Rules, since the parties agreed to exclude the application of Art. 13 of the Arbitration rules, because the applicability of the Arbitration Rules would constitute a major contradiction to the Parties' main aim to arbitrate while excluding the involvement of an arbitral institution. Additionally, having both parties agreeing on considering the Tribunal the only body to decide on the challenge leads to the unavoidable applicability of the Model Law.

13. The Tribunal's decision shall be made without the inclusion of Mr. Prasad but with the inclusion of the substitute arbitrator to ensure a balanced, neutral decision.

14. CLAIMANT and Mr. Prasad acted in a manner that raises doubt to Mr. Prasad's impartiality and independence by concealing important information from RESPONDENT and the tribunal regarding a third party funder and Mr. Prasad's previous work with Mr. Fasttrack and the third party funders. That combined with the information disclosed justifies Mr. Prasad's removal.

Argument on The Merits

15. RESPONDENT's General Conditions govern the contract. RESPONDENT showed from the first meeting with CLAIMANT that its main goal is to ensure the application of ethical standards. After that, RESPONDENT made an invitation to tender where its aim was to receive a proper offer that will satisfy it and CLAIMANT awarded it. CLAIMANT contracted with RESPONDENT after it sent its sales offer including only the fixed price and quantity and amending to change the shape of cake and the payment method, then CLAIMANT told RESPONDENT that it took the rest of RESPONDENT's documents and made them its offer -that is why CLAIMANT incorporated RESPONDENT's General Conditions and not the opposite. RESPONDENT did not accept in any way through letters and negations or in its contractual documents to apply anyone's General Conditions but its own and it did not ask for reservations because CLAIMANT used its tender document as its offer. On the other hand, CLAIMANT did not ask for it also in any place through letters and negations. Plus, there is no way to apply Art.19 of the CISG since CLAIMANT made the offer and RESPONDENT accepted it.

16. CLAIMANT is in breach of the contract as it did not deliver confirming goods as its obligation was to achieve a result of delivering good that adhere to the ethical standards and RESPONDENT's particular purpose of becoming a Global Compact Lead company, otherwise RESPONDENT's reputation. RESPONDENT's General Condition and the contract clearly state that any noncompliance with any of its contractual documents constitutes a breach of contract, ie when one of the conformity standards of goods was absent, then the goods is considered nonconforming. Which gives RESPONDENT the right to terminate the contract and claim damages? CLAIMANT is liable for the breach that was made by its suppliers under the party autonomy rule which excluded the non-liability part which leaves

CLAIMANT in breach of contract and responsible. And therefore, should not be compensated for the nonconforming goods as it owes RESPONDENT damages.

ARGUMENT

I. UNDER THE RULES OF LEX ARBITRY, THE TRIBUNAL HAS AUTHORITY TO DECIDE ON MR. PRASAD'S CHALLENGE

17. The UNCITRAL Model Law (hereinafter referred to as Model Law) should govern should govern the challenge of Mr. Prasad, however, no matter which rules are applicable, the court cannot be resorted to in order to decide on the challenge of Prasad **(1)**. Therefore, the Tribunal has the competence to decide on the challenge of Mr. Prasad **(2)**. Additionally, and regardless of the Parties' agreement on considering the UNCITRAL Arbitration Rules (hereinafter referred to as Arbitration Rules) the applicable law to the issues that might arise from their contract, the issue of who has the authority to decide on challenge of Mr. Prasad must be governed by the Model Law and not the Arbitration Rules **(3)**. And finally, RESPONDENT filed the notice of the challenge within the time limits specified in Art.4 (1) of the Arbitration Rules **(4)**.

1. The court cannot be resorted to in order to decide on the challenge of Mr. Prasad

18. After the Parties fell short to solve their dispute and make ends meet amicably, they decided to resolve their dispute through arbitration *[Mr. Fasttrack's Letter of Notice of Arbitration to RESPONDENT Pg.3, Para. 3]* CLAIMANT went through the arbitral proceedings *[Notice of Arbitration, Pgs. 4-7]* and according to the Parties' autonomies to choose to arbitrate instead of demanding the court to solve their dispute, Art 6 of the Model Law cannot be applied and therefore the Parties can't request the court to decide on the challenge when applying Art.13 (3) of the Model Law.

19. According to Art. 8 (1) of the CISG, statements made by a party are to be interpreted according to their intent, and what's obvious is that both Parties' intentions were to arbitrate and resolve their dispute through arbitration, and Art. 4.1 of the UNIDROIT Principles (hereinafter referred to as the UNIDROIT) which states the contract must be interpreted according to the common intentions of the parties, and since the Parties have common

intentions, these intentions must prevail *[Perillo],* and therefore the courts cannot interfere or be resorted to in order to solve Mr. Prasad's challenge.

20. Moreover, according to the wide interpretation of the arbitration agreement, and because its main purpose is to clarify and prevent ambiguities to the Parties' intentions to arbitrate *[Born1, Pg. 1317]*, and how the parties' intentions must always come first. The issue must not be settled in courts under the New York Convention *[New York Convention - Introduction, Pg. 2]*, the courts of the Parties are obliged to give the arbitration agreement full effect by strictly denying the Parties to resort to the courts and how Parties must refer their dispute to the Arbitral Tribunal.

21. Art. 8 (1) of the Model Law provides that state courts must refer to arbitration a claim that is allegedly subject to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed, therefore state courts are generally not permitted to decide jurisdictional conflicts but must await the arbitrators' jurisdictional decision regarding its own competence *[Timm, Richter, Moralez]*.

22. Further, the court is ineligible to solve the dispute and the Parties cannot request its interference because that would form a huge contradiction to the Parties' choice to arbitrate and their will of considering the Tribunal body to decide on Mr. Prasad's challenge, additionally to their duty of referring the dispute to the Tribunal and denied access to the court under the main aim of the New York Convention which the Parties' are signatories to.

2. The Tribunal Is Competent To Decide On Mr. Prasad's Challenge

23. In accordance with the arbitration agreement and party autonomy, and more importantly under the competence-competence doctrine **(A)**, the Tribunal can rule over its own jurisdiction and has the authority to decide on the challenge of Mr. Prasad **(B)**.

A. The competence-competence doctrine:

24. The principle of the competence-competence doctrine is considered to be widely connected to arbitration in general and is a foundational principle of the modern law of arbitration, according to the principle an arbitral tribunal is competent to decide on its competence, giving the tribunal jurisdiction to decide its own jurisdiction. *[Cook and Garcia, Pgs. 170-171]*

25. The principle demands in turn the tribunal and not the court should in the first instance decide on its competence. The doctrine is broadly sought for in order to enable an Arbitral Tribunal its independence and freedom of judgment over its own jurisdiction *[Heintzman]*. Moreover, highlighting the importance of the competence-competence principle, is its adoption and recognition in most legal systems and its wide international acceptance *[Born1, Pg. 1048]*.

B. The Tribunal is competent enough and can rule over the challenge of Mr. Prasad:

26. The Arbitral Tribunal is competent enough and has the authority to decide on the challenge of Mr. Prasad contrary to what CLAIMANT alleges *[Memorandum for Claimant, Pg. 3, Para. 16]* in accordance with RESPONDENT'S request to the Arbitral Tribunal to decide on the challenge while emphasising on the refusal of the involvement of any arbitration institution and the strong intent of considering the Arbitral Tribunal the only body to decide on the challenge *[Notice of Challenge, Pgs. 38-39, Para. 8]*

27. The context of Art 13 (2) of the Model Law that states that the Arbitral Tribunal shall decide on the challenge and Art.23(1) of the Arbitration Rules that provides that the tribunal shall have the power to rule on its own jurisdiction, the Tribunal gains its decision- making competence from the arbitration agreement of the parties *[Berger, Pg. 503, Paulsson and Petrochilos, Pg. 195, Redfern and Hunter, Pg, 340]* and therefore the Tribunal has the authority to decide on the challenge of Mr. Prasad *[Assam Company India Limited v. Canoro Resources Ltd. and Toronto Standard Condominium Corporation v. York Bremner Developments Limited]* in accordance with the arbitration agreement between the Parties *[Notice of Arbitration, Pgs. 4-7, Para. 13, clause 20],* and their strong intentions to forbid any arbitration institution's interference.

3. Model Law Is The Applicable Law And Not The Arbitration Rules

28. Even though the parties agreed that the Arbitration Rules shall settle any dispute arising from their contract *[Notice of Arbitration, Pgs. 4-7, Para. 13, clause 20]*, the challenge of Mr. Prasad shall be settled by the Model Law because the applicability of the Arbitration Rules would constitute a huge contradiction to the Parties' wills and clear statements to exclude the involvement and interference of any arbitral institution; because the Arbitration Rules give the authority of making a decision on a challenge to the appointing authority as stated in Art.

13 (4) of the Arbitration Rules, and arbitral institutions are commonly apt to serve as the appointing authority *[Viscasillas, Pgs. 8-9]*.

29. Hence, the applicability of the Model Law which gives the authority of making a decision on a challenge to the arbitral tribunal in line with Art 13 (2) of the Model Law. So, regardless of the Parties' initial agreement to apply the Arbitration Rules to anything connected to their contract, the Arbitration Rules aren't suitable to govern this issue and therefore the Model Law is, contrary to what CLAIMANT alleged *[Memorandum for Claimant, Pg. 4, Para. 20]*

30. Furthermore, the parties did actually exclude the application of Art. 13 (4) of the Arbitration Rules **(A)** in addition to the Parties' intentions to exclude any institutional involvement clear and acknowledged by both CLAIMANT and RESPONDENT **(B)**.

A. The Parties did actually exclude the application of art. 13 (4) of the arbitration rules

31. The Parties explicitly excluded the application of Art. 13(4) of the Arbitration Rules by excluding institutions *[Notice of Challenge, Pgs. 37-39, Para. 8]* and therefore the challenge of Mr. Prasad cannot be heard under Art. 13 (4) of the Arbitration Rules because both Parties agreed on the exclusion of the article and the Parties' intentions must always have the priority to prevail and be taken into account *[Gaillard & Savage, Pg. 456]*. Thus, CLAIMANT alleging *[Memorandumfor Claimant, Pg. 4, Para. 22]* that the Parties did not exclude Art. 13 (4) of the Arbitration Rules is completely void due to what was contrarily agreed upon by the Parties.And that's why Art. 13 (4) of the Arbitration Rules is not applicable, so therefore Art. 13 (2) and (3) of the Model Law must be relied on.

B. The Parties' intentions to exclude any institutional involvement were clear and acknowledged by both CLAIMANT and RESPONDENT

32. Both CLAIMANT and RESPONDENT clearly expressed their wills to exclude arbitral institutions in multiple ways *[Notice of Arbitration, Pgs. 4-7, Para. 13, clause 20]*. *[Tender Documents, Pgs. 9-14, section V, Clause 20]*. Additionally, Ms. Annabelle Ming's Witness Statement affirms RESPONDENT'S will to carry on an ad hoc arbitration instead of an institutional one by disclosing that the arbitration clause had been switched from an institutional arbitration clause to an ad hoc arbitration clause assuring the persistent will to explicitly disallow the involvement of an arbitral institution*[R 5, Pg. 41, Para. 5]*.

33. This shows that both Parties were on the same page and that both Parties share the same intentions to exclude the involvement or interference of any arbitral institution and therefore the Parties cannot at any point oppose what was agreed upon and their intentions must come first in line *[Gaillard & Savage, Pg. 456]*.

34. RESPONDENT made CLAIMANT aware and clarified their firm will to exclude the involvement of an arbitral institution adhering to their aim to maintain the Arbitration as covert as possible and how the involvement of an institution will undoubtedly jeopardise their desired security and aim to remain confidential *[Notice of Challenge, Pg. 39, Para. 8]*.

35. Therefore, and in coherence with what RESPONDENT requested *[Notice of Challenge of Mr. Prasad, Pgs. 39, Para. 8]*, the only body to decide on the challenge is the Tribunal.

36. That is why deciding on the challenge must be by the Arbitral Tribunal in consistence with Art 13 (2) of the Model Law. Furthermore, and justifying the refusal and impossibility of the involvement of an arbitral institution –hence the Tribunal's authority to decide on the challenge and not the appointing authority's- the Parties' upfront agreement to carry on an ad hoc arbitration instead of an institutional one for the reason that parties often opt to designate an institution as the appointing authority instead of designating the Secretary General of the PCA at The Hague *[Finizio, Wheeler, Preidt, Pg. 2]*.

37. In conclusion, The Parties' clarified intentions must be taken into account and therefore the Tribunal's authority to decide on the challenge must be decided on by applying the Model Law which gives the Tribunal that authority.

4. RESPONDENT Filed The Notice Of The Challenge In Accordance With Art. 4 (1) Of The Arbitration Rules

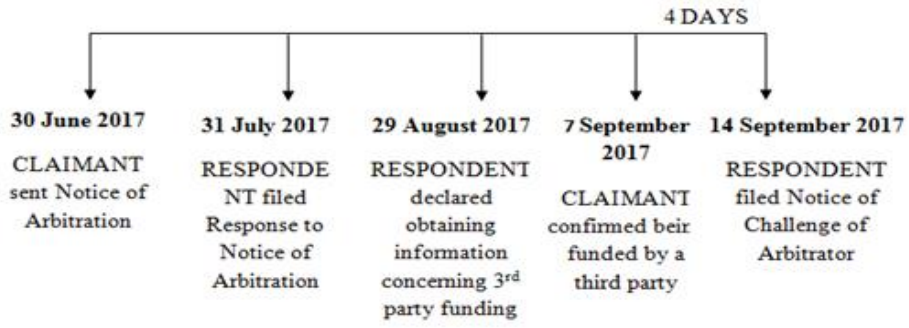
38. CLAIMANT alleged that RESPONDENT did not file the Notice of the Challenge within the time specified in the Arbitration Rules and the Model Law, it can be said that CLAIMANT'S allegations *[Memorandum for Claimant Pgs. 8-9]* are false and void because RESPONDENT actually complied with the time limit stated in Art. 13 (1) of the Arbitration Rules which states that a party that intends to challenge an arbitrator must send its notice of the challenge within 15 days after either receiving the notice of the appointment of the arbitrator or knowing the circumstances that might raise doubts to the arbitrator's independence or impartiality.

39. RESPONDENT disclosed that it has obtained information concerning CLAIMANT being funded by a third party, requesting CLAIMANT to affirm and provide answers regarding the matter *[Letter Langweiler – request to disclose funders, Pg. 33, Para. 3]* and in compliance with the Presiding Arbitrator's request that CLAIMANT must disclose whether it is being funded by a third party or not within a deadline that ends by September 7 2017 *[Letter Rizzo– Request to Name Funders Pg. 34, Para. 3, point 1]* CLAIMANT confirmed that it is for a fact funded by a third party being Funding 12 Ltd *[Letter Fasttrack – Disclosure of Funders, Pg 35, Para.1]*.

40. In accordance to that, RESPONDENT sent its Notice of Challenge of Arbitrator on September 14th 2017 complying with the 15 day time period mentioned in Art.13 (1) of the Arbitration Rules *[Notice of Challenge, Pgs. 38-39]* which shows that RESPONDENT adhered to the time limit included in Art. 13 (1) and abided by the obligatory time period *[Waincymer, Pg. 413]*.

41. Conclusively, CLAIMANT'S allegation that RESPONDENT failed to pursue its challenge within the obligatory time limit is false and on the contrary, completely just.

42.



II. THE TRIBUNAL SHALL MAKE A DECISION ON THE CHALLENGE OF MR. PRASAD WITHOUT HIS PARTICIPATION, ALL WHILE THE TRIBUNAL STILL BEING CONSTITUTED FROM THREE MEMBERS

43. The IBA Guidelines are considered applicable **(1)** and therefore Mr. Prasad should not participate in the decision regarding his challenge under the IBA Guidelines because he cannot be a judge on an issue of his own **(2)**. Highlighting the fact of the Tribunal still remaining

constituted of three arbitrators **(3)** in order to avoid a tie. This means that in all cases the Tribunal is the only body to decide on the challenge of Mr. Prasad.

1. The IBA Guidelines Should Be Applicable When Deciding On The Challenge Of Mr. Prasad

44. CLAIMANT and Mr. Prasad erred when they suggested that the IBA guidelines cannot be applied due to the Parties not agreeing on them *[Memorandum for Claimant, Pg.10, Para. 57]*, *[Mr. Prasad's Letter- Refusal to Step Down, Pg. 43]*

45. The IBA guidelines should be applicable when deciding on the challenge of Mr. Prasad even if the Parties did not agree on applying them because the nature of the guidelines themselves allows for parties to use them; as arbitrators often use the IBA rules in case they encounter difficulties in appointing the arbitrator or if it is difficult to determine what the arbitrator must disclose in a statement of independence and impartiality, and commonly used by counsels and arbitrators in assessing, identifying, improving and clarifying certain gaps related to the arbitral process as a whole.

46. Art. 9 of CISG states that even if the parties did not agreed to apply or they did not mention to apply it in the contract, rules that are widely known and practiced should be applied. ."The Guidelines are frequently viewed by courts and arbitral institutions as providing relevant criteria for assessing the impartiality and independence of a challenged arbitrator."[*Margaret Moses*]

2. Under The IBA Guidelines Mr. Prasad Should Not Be Included In The Decision Regarding His Challenge

47. Mr. Prasad shall in no way participate in the decision regarding his challenge contrary to what CLAIMANT alleges *[Memorandum for Claimant, Pg.7, Para. 39]* based on the overriding principle that no arbitrator shall be their own judge which falls under the Non-Waivable Red List of the IBA Guidelines (hereinafter referred to as Red List), *[Born, 472]*. And therefore his participation in the decision making process regarding his challenge shall be denied under all circumstances because the Red List deals with situations that with given circumstances, will give rise to justifiable doubts to the arbitrator's independence and/or impartiality and such circumstances cannot be accepted because the conflict will not be resolved and thus the refused participation of Mr. Prasad.

3. The Tribunal Shall Decide On Mr. Prasad's Challenge While Consisting Of 3 Arbitrators Without The Inclusion Of Mr. Prasad

48. The Tribunal shall still remain the only body to decide on the challenge of Mr. Prasad while still being constituted from three members, and with the exclusion of Mr. Prasad. The Parties nominated Ms. Chian Ducasse as the potential replacement of Mr. Prasad *[PO1, P. 48-49, para 1]* complying with Art.14 (1) of the Arbitration Rules and Art. 15 of the Model Law to ensure that the arbitral proceedings pursue normally and without jeopardizing the neutrality that should dominate the Tribunal's decision considering the potential withdrawal of the challenged arbitrator which will lead to the Tribunal being constituted from two members which will most likely end up in a draw, hence the importance of the appointment of a substitute arbitrator *[Germany v. State enterprise]*; in order to fill the gap that took place in the tribunal *[Nacimiento, Kröll, Bockstiege, P. 209]*. Conclusively, the decision regarding the challenge of Mr. Prasad shall still be carried out by the Tribunal while remaining constituted from three arbitrators and without the inclusion of Mr. Prasad but with the inclusion of Ms. Chian Ducasse being his replacement.

III. Mr. PRASAD IS NEITHER IMPARTIAL NOR INDEPENDENT

49. Under Art 10 of the Arbitration Rules the "justifiable doubt" standard is sufficient to rule on a challenge of an arbitrator [*AWG Group Limited v. The Argentine Republic*] Under the Arbitration rules, the Model Law and the IBA-guidelines Mr. Prasad is neither independent **(1)** nor impartial **(2)**

1. Mr. Prasad Is Not Independent:

50. Mr. Prasad's lacks independence because the situation of third party funding in this case indicates lack of independence under the Model Law and IBA guidelines **(A)**. The email sent by Mr. Fasttrack regarding the third party funding proves that CLAIMANT wished to use Mr. Prasad's lack of independence **(B)**. The Merger of Mr. Prasad's law firm and Slowfood indicates a possible release of information that could threaten Mr. Prasad's independence **(C)**.The repeated appointments of Mr. Prasad could potentially influence his judgment **(D)**

A. Third party funding in this case indicated a lack of independence under the model law IBA-guidelines:

51. The Tribunal should consider that the existence of a third party funder would affect the arbitral proceedings, especially after CLAIMANT attempted to conceal the presence of a third party funder. And by the existence of a third party financing CLAIMANT, justifiable doubts are raised, also, the existence of a third party funder constitutes a lack of independence by applying both Art. 12 of the Model Law **(i)**, and the IBA guidelines that shows the duties of disclosure that Mr. Prasad did not adhere to **(ii)**.

i. Under article 12 of the model law, third party funding constitutes a lack of independence

52. Third party funding constitutes a lack of independence by applying Art. 12 of the Model Law. Mr.Prasad had to declare the third party funding without delay as soon as he was informed about it *[Mansinghka, Pgs. 105-106]*, and in this case RESPONDENT has the right to challenge the appointment of Mr. Prasad because he did not initially disclose the third party funding, but only after RESPONDENT provided gaining information about that matter *[Mr. Langweiler's Email of August 29th 2017 to Arbitral Tribunal Pg. 33, Para. 1]* that indicates a lack of independence and raises justified doubts to Mr. Prasad's independence due to falling short to adhering to Art. 12 of the Model which states that the arbitrator must submit a full declaration of any circumstances which may bring justified doubts as to his independence and/or impartiality and must submit it before the commencement of the arbitral proceedings.

53. Art. 12 of the Model Law imposes a standard of impartiality and independence that all members of the arbitration must abide by, and this standard does not require proof but requires only the existence of doubts justified by the party that offers to challenge the appointment of an arbitrator *[Born1]*.

54. Accordingly, RESPONDENT shall have the right to challenge the appointment of Mr. Prasad based on his conduct which provided his lack of independence.

ii. Mr. Prasad is not independent due to falling short to adhering to IBA guidelines

55. Mr. Prasad is not independent because he did not adhere to the obligation of disclosure of the circumstances that might lead to justifiable doubts to an arbitrator's independence and/or impartiality mentioned in the IBA Guidelines *[(3) Disclosure by Arbitrators, (a)]*

56. Under Art 11 of the Arbitration Rules the potential arbitrator should disclose all the relevant facts. Moreover, Standard No. 3 of the IBA - guidelines states that "If facts or

circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstance the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment 7 or, if thereafter, as soon as he or she learns of them" highlighting that an arbitrator must disclose any circumstance that would lead to conflict of interest in any dispute submitted to arbitration.

57. An arbitrator shall further disclose any of the circumstances mentioned in the red list. Further, an arbitrator must disclose any circumstance that may lead to justified doubts even if this circumstance is not mentioned in the red list. (Laurent Lévy; Regis Bonnan , Chapter 7. Third-Party Funding Disclosure, Joinder and Impact on Arbitral Proceedings) 58. Therefore, Respondent has the right to challenge the independence of Mr. Prasad because Respondent discovered that there is a third party funder that is involved with Mr. Prasad and this information would raise justified doubts and because Mr. Prasad did not disclose the information related to this circumstance, it is considered as a reason for RESPONDENT to challenge the independence of Mr. Prasad by reference and application of IBA and text of Artt.10 and 12 of the Model Law.

B. The email sent by Mr. Fasttrack regarding the third party funding proves that claimant wished to use Mr. Prasad's lack of independence

59. The email sent by Mr. Fasttrack to CLAIMANT regarding the third-party Funding proves that CLAIMANT wished to use Mr. Prasad's lack of independence *[Notice of Challenge, Pgs. 38, Para. 3]* and the email shows that there was a prior agreement between them to keep the subject of the third-party funder secrete, because the event of revealing it will raise justified doubts to challenge the appointment of Mr. Prasad.

60. Under the IBA guidelines these circumstances must be disclosed by CLAIMANT and Mr. Fasttrack mentioned in the email that he had previously worked with Mr. Prasad twice *[Notice of Challenge, Pgs. 38-39, Para. 3]*, this is an indication of the lack of independent of Mr. Prasad; this email mentions the threat of the potential challenge of Mr. Prasad if RESPONDENT discovered the existence of the third party funder.

61. The contents of the email also show the agreement to breach the rules of disclosure, such breach would lead to justified doubts to challenge Mr.Prasad because the IBA Guidelines

[(Disclosure by Arbitrator, (a)] also state and emphasise on the importance of the disclosure that must be made by the arbitrator regarding the existence of circumstances that might raise doubts to their independence and/or impartiality.

62. Additionally, the appointment of Mr. Prasad also leads to his lack of independent as described in the IBA Guidelines because his appointment must be disclosed by CLAIMANT, as Mr. Fasttrack mentioned in the email that he had worked with Mr. Prasad twice before *[Notice of Challenge, Pgs. 38-39, Para. 3]*. This proves that Mr. Prasad did not adhere to the rules of disclosure mentioned in the IBA Guidelines *[(3)Disclosure by Arbitrators, (b)]* that state how arbitrators should disclose their prior appointment that might form a potential conflict of interest.

63. And because Mr. Prasad did not mention his previous appointment in two arbitrations funded by other subsidiaries of the same funder raises even more major justified doubts to his independence *[Mr. Prasad's Email of September 11th, 2017 to the Parties, Pg. 36, Para. 1]*.

64. Conclusive of all of the stated above, Mr. Prasad provided RESPONDENT with more than enough circumstances to challenge his independence.

C. The Merger of Mr. Prasad's law firm and Slowfood indicate a possible release of information that could threaten the case

65. Contrary to what CLAIMANT states *[Memorandum for Claimant pg. 13 para 78]* there is no way of guaranteeing that the merger between the two firms would not threaten the case and RESPONDENT's privacy and confidentiality.

66. The Merger of Mr. Prasad's law firm and Slowfood indicate a possible release of information that could threaten the case.

67. Such a merger would affect the case and the parties' privacy, especially that Mr. Prasad was twice appointed by Mr. Fasttrack *[Notice of Challenge, Pg. 38-39, Para. 3]* and twice by Findfunds LP *[Declaration Prasad Pg. 36, Para. 1]*.

68. Furthermore one of Mr. Prasad's partners is representing one of the clients in an arbitration, which is also financed by Findfunds LP *[Mr. Prasad's email of September 11th 2017, Pg. 36, Para. 3]*, and the circumstance of such representation will lead to justified doubts to an arbitrator's independence and/or impartiality *[Björn Gehle]*.

69. According to the IBA Guidelines, it was the duty of the party that previously appointed Mr. Prasad as an arbitrator to clarify the nature of their relationship and disclose that Mr.

Prasad had been appointed by it twice before. These circumstances raise justified doubts to challenge Mr. Prasad, Even If Prasad claims that he does not know about the third party, it is difficult to believe this claim, especially since he was twice appointed by this third party, therefore RESPONDENT challenges Mr. Prasad's independence because Mr. Prasad failed to disclose both previously working with Mr. Fasttrack *[Notice of Challenge Pg. 38-39, Para. 3]* and being previously appointed as an arbitrator in two arbitrations that were funded by other subsidiaries of Findfunds LP *[Mr Prasad's email, Pg. 36, Para. 1]* and raised doubts to his independence [Björn Gehle] By applying article 12 of the Model Law and by referring to the IBA guidelines, the merger between Mr. Prasad, and Slowfood affects the confidentiality of the information contained in this dispute, and this indicates the breach of the confidentiality of the information, because RESPONDENT emphasized in multiple way the importance of the information remaining confidential. *[R3, Pg. 30, Para. 2 - Confidential Information]*

70. And for these reasons, this merger threatens the case and would threaten the award that will be issued by the tribunal.

D. The repeated appointments of Mr. Prasad could potentially influence his judgment

71. The repeated appointments could potentially influence arbitrators' judgment for two reasons: first, the arbitrator may be influenced by knowledge about the party derived from other cases. Secondly, they may be influenced by the prospect of further future appointments and prospective remuneration coming from the same party *[Tidewater Inc v. Venzuela]*

72." In my view, if an arbitrator has been repeatedly appointed by one of the parties, this is likely, "in the eyes of the parties", to give rise to doubts as to the arbitrator's impartiality or independence (GS-3 (a)). If in this situation, as in most cases, the award outcome has been basically favorable to such party" *[Ramon Mullerat]*.

73. "Repeat appointments can create justifiable doubts as to the arbitrator's independence or impartiality as the arbitrator has a financial or other personal stake in the outcome, or has become financially dependent upon the same appointer. As a result, the issue of repeat arbitrators can jeopardize public trust and faith in international arbitration*"[HouchiKuo]*.

74. Mr. Prasad has been appointed by proceedings funded by subsidiaries of Findfunds LP and there is a chance of bias arising from a hope of future employment as well. Mr. Prasad was also appointed repeatedly by Mr. Fasttrack's law firm.

75. And while each circumstance alone might not be enough to consider Mr. Prasad dependent, the combination of said circumstances and behavior by Mr. Prasad and CLAIMANT suggests a lack of independence under the objective and subjective standard of independence portrayed in the IBA-guidelines and Artt. 10 and 12 of the Model Law.

2. Mr. Prasad Is Not Impartial Due To His Publications

76. The article published by Mr. Prasad proves his lack of impartiality because Mr. Prasad presented the subject of the dispute to the public *[R4, Pg. 40]* as he expressed his opinion on an issue that is present in the arbitration. *[Parsons, Pg. 6]* This counts as a factor that raises doubts to his impartiality. *[Urbaser SA v Argentina]*

77. Additionally, this article made Mr. Prasad in the eye of CLAIMANT a suitable arbitrator to be represented by *[Notice of Challenge, Pg. 38-39, Para. 3]*.

IV. RESPONDENT'S GENERAL CONDITIONS GOVERN THE CONTRACT

78. RESPONDENT'S general conditions (hereinafter referred to as G.C) govern the contract for the following reasons, firstly, Art. 19 of the CISG is not applicable **(1)**. Secondly, CLAIMANT'S offer included RESPONDENT'S G.C **(2)**. Thirdly, even if the tribunal considers CLAIMANT included its G.C, RESPONDENT did not accept CLAIMANT'S G.C as a part of the contract and did not accept to remove its own G.C **(3)**. Finally, under Art. 8 of the CISG, RESPONDENT'S G.C should apply **(4)**.

1. Art. 19 Of The CISG Is Not Applicable

79. If this article applies, many legal rules will apply according to it. Such as, the battle of forms last shot rule or the knock out rule. The impossibility to apply Art.19 leads to the impossibility of using these rules too since they are resulted from it and they are an application of the Art itself. Contrary to CLAIMANT's argument, Art.19 is not applicable and neither any of the legal rules derived from it by analogy *[Memorandum for claimant, pg.21, para. B]*.

80. Art. 19/1 of the CISG states: "A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer."

81. Article 19 sphere of application is when a counter offer exists under any contractual agreement. A counter offer is a new offer established when one party accepts an offer when there are modifications or limitations or additions and it constitutes a rejection.

82. Since Art.19 needs two essential elements to be applied: A. An offer sent from RESPONDENT to CLAIMANT. Aa. A counter offer sent from CLAIMANT to RESPONDENT. There was no counter offer because RESPONDENT's invitation to tender does not consider as an offer under Art.14 of the CISG.

83. Art. 14 of the CISG indicate that the key elements of a CISG offer are definiteness and the offeror's intention to be bound, and the latter is best regarded as the primary criterion [*Cvetkovic]*.

84. "According to Art.14 CISG, an offer is only able to be accepted if the proposal expressly or implicitly sets forth the price or enables the determination of the price"*[Auto case]*.

85. RESPONDENT did not make an offer for the following reasons: A. Under art. 14.1, RESPONDENT invitation to tender does not constitute an offer since it is not sufficiently definite. B. Under art.14.1 RESPONDENT invitation to tender does not constitute an offer since RESPONDENT did not have the intention to be bound by acceptance. C. Under Art. 14.2, RESPONDENT proposal was merely an invitation to make an offer since it was sent to more than one specific person.

A. Under art. 14.1, respondent invitation to tender does not constitute an offer since it is not sufficiently definite.

86. RESPONDENT's invitation to tender cannot be considered as an offer because it was not sufficiently definite according Art.14 of the CISG.

87. Art.14.1 of the CISG: A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

88. RESPONDENT in its invitation to tender did not set a fixed price or quantity [*C2, pg. 10, paras 2.2 and 2.3*], which means RESPONDENT did not make a fixed indication for the goods and therefore its proposal cannot be an offer since it was not sufficiently definite.

89. "A proposal for concluding a contract should be sufficiently definite. It was considered to be such if it indicated the goods and expressly or implicitly fixed or made provision for determining their quantity and price" *[(CLOUT) abstract no. 139]*.

90. "To be sufficiently definite under the second sentence of paragraph (1) a proposal must expressly or implicitly fix or make provision for determining not only the quantity but also the price" *[Ferrari, Flechtner, Brand pg. 584]*.

91. "Art. 14.1 of CISG rules provides that a communication that does not state or make provision for the price is not an "offer" so that a reply "I accept" does not close a contract" *[Honnold pgs. 147-157]*.

92. "Conversely, a proposal which fails to satisfy the requirement of definiteness cannot qualify as an offer under the CISG. A proposal is sufficiently definite if it (a) 'indicates the goods' and (b) 'expressly or implicitly fixes or makes provision for determining' the quantity and price" *[Lookofsky]*.

93. "According to Article 14(1) sentence 2, the offer must indicate the goods to be sold, determine or make provision for determining the quantity, and fix the price or provide a means for its determination"*[Schlechtriem, pg50]*.

94. "Art.14, conversely, a proposal which fails to satisfy the requirement of definiteness cannot qualify as a CISG offer, nor can it qualify as a counter-offer under Art.19.1" *[Lookofsky]*.

B. Under art.14.1 respondent invitation to tender does not constitute an offer since respondent did not have the intention to be bound by acceptance

95. RESPONDENT did not have the intention to contract with the first person who accepts its proposal and therefore it did not make an offer.

96. Art.14.1 of the CISG states: "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".

97. The tender was published in the pertinent industry newsletter *[Response to Notice of Arbitration, pg. 25, para. 7]* and CLAIMANT submitted its own offer out of six offers which were sent on the 27th of March 2014 *[C3 pg. 15]* and was delighted when it was awarded the contract by letter of 7 April 2014 [*C5, pg. 17]*.RESPONDENT received six offers and CLAIMANT was one of them [*Response to Notice Of Arbitration, pg. 25, para. 9*].

98. Furthermore, Ms. Ming, RESPONDENT's head of purchasing wrote "I look forward to the submission of your offer" *[C1, pg. 8]* making it clear that RESPONDENT was waiting for CLAIMANT's offer after sending the invitation.

99. This means that RESPONDENT did not have to intention to be bound by acceptance immediately but it was looking for offers in order to accept one.

100."Even if a proposal is addressed to 'one or more specific persons' it is not an offer unless ... it 'indicates the intention of the offeror to be bound in case of acceptance"*[Honnold, pg.195.196]*.

C. Under art. 14.2, respondent proposal was merely an invitation to make an offer since it was sent to more than one specific person.

101. RESPONDENT did not send its tender documents to one person or even to more than one specific person and it was an invitation to make an offer.

Art.14.2 of the CISG states: "A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal".

102. RESPONDENT did not specify anyone in its invitation to tender [*CLAIMANT'S exhibit c2, pg9, section I]*. It would not make any sense to make a tender with a public invitation then say it is specified.

103. RESPONDENT invitation to tender was merely an invitation to make offers only and no way to say that RESPONDENT made clear the contrary of that because it did not indicate it in its tender documents in anyway.

104. Article 14(2) is more precise than ULF in that it generally considers proposals to indefinite groups of people to be mere invitations to make offers, unless the offeror has made it clear that the contrary is intended, *i.e.,* that the proposal is truly a public offer" *[Schlechtriem.]*.

105. "This Convention, in article 12(2) *[draft counterpart of CISG article 14(2)]*, takes a middle position in respect of public offers. It states that a proposal other than one addressed to one or more specific persons is normally to be treated merely as an invitation for the recipients to make offers. However, it constitutes an offer if it meets the other criteria for being an offer and the intention that it be an offer is clearly indicated. Such an indication need not be an explicit statement such as "this advertisement constitutes an offer" but it must clearly indicate an intention to make an offer, for example, by a statement that, "these goods will be sold to the first person who presents cash or an appropriate banker's acceptance".[*Secretariat Commentary on Art.14 of the CISG*].

106. CLAIMANT cannot have made a counter offer since RESPONDENT did not make an offer in the first place and that is why Art.19 is not applicable.

"This provision reflects traditional theory that contractual obligations arise out of expressions of mutual agreements. Accordingly, an acceptance must comply exactly with the offer. Should the purported acceptance not agree completely with the offer, there is no acceptance but the making of a counter-offer which requires acceptance by the other party for the formation of a contract" *[Secretariat Commentary on Article 17 of the 1978 Draft]*

2. CLAIMANT's Offer Included RESPONDENT's General Conditions.

107. All letters and negotiations and the tender document show that RESPONDENT asked more than once to apply its contractual documents expressly while CLAIMANT through all letters and negotiations did not show the importance of applying its own. That was proven when CLAIMANT did not manage to make its own separate offer but instead of it, it decided to use RESPONDENT's tender documents when it stated that it wanted to change the payment method and the shape of cake only, and then it will use the tender documents for all the other provisions. This means, CLAIMANT's offer had RESPONDENT's G.C since CLAIMANT did not make a fully new offer or rejected to apply RESPONDENT'S G.C.

108. Subjected to Art.14, an offer has requirements -that were mentioned previously- which makes CLAIMANT'S proposal is the offer since it was -with RESPONDENT's documents usage- determined, sent to a specified person and has the intention to be bounded by its acceptance who is RESPONDENT in our case.

109. CLAIMANT's offer consisted of 1- RESPONDENT'S tender documents *[C3, pg.15, para.2]* 2- attached with a sales-offer included the fixed goods description with the two changes that were amended which are the paying terms and the shape of cake *[C4, pg.16]*.

110. This means that CLAIMANT's offer included RESPONDENTS general conditions which makes them applicable.

3. Even If CLAIMANT Included Its General Conditions, RESPONDENT Did Not Accept That, As A Part Of The Contract Or As A Replacement Of Its Own General Conditions.

111. Even if the tribunal considers claimant included its general conditions, respondent did not accept claimant's general conditions as a part of the contract and did not accept to remove its own general conditions.

112. Since any contract is bounded by the common principle "PARTY AUTONOMY", all terms and provisions should be agreed upon from both parties in the contract which needs an acceptance from both of them and even if the term was written from one side the other side can refuse it because this contract expresses both contractual wills. Therefore CLAIMANT cannot apply its own general conditions for two reasons. A. under Art.18.1 of the CISG and the PARTY AUTONOMY Principle, CLAIMANT'S General Conditions do not govern the contract. B. According to Art.2.1.21 of the UNIDROIT principle, negotiated terms apply always.

A. Under Art.18.1 Of The CISG And The PARTY AUTONOMY Principle, CLAIMANT'S General Conditions do not govern the contract

113. Respondent did not make any approving statement to apply claimant's general conditions or to replace its own general conditions.

114. RESPONDENT did not accept to make CLAIMANT'S G.C the applicable conditions because: Under Art.18.1 of the CISG RESPONDENT did not make any acceptance to apply claimant's general conditions or to replace its own general conditions **(i)**. Under the party autonomy principle respondent did not make any approving statement to apply CLAIMANT's General Conditions **(ii)**.

i. Under art.18.1 of the CISG respondent did not make any acceptance to apply claimant's general conditions or to replace its own general conditions.

115. Rationally, when an offeree accepts an offer that means he accepts all the terms and the provisions it indicates, or else he will either refuse it as a whole or accept it with asking for some changes. RESPONDENT assent the offer that CLAIMANT made after accepting the changes that CLAIMANT asked for - since CLAIMANT took RESPONDENT'S contractual documents and made them it's offer –without accepting to apply CLAIMANTS general conditions on the contract.

117. Art.18.1 of the CISG states:"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."

118. CLAIMANT sent its offer demanding to change only two amendments which are the payment terms and the form of cake [*C3, pg.15, para.2*]. On the other hand, CLAIMANT did not ask expressly or implicitly in the same letter to make its own general conditions the applicable conditions under the contract and only had pointed to them in the sales-offer it has sent [*C4, pg16, last para*], where RESPONDENT made clear in its tender document that its general conditions applies [*C2, pg.12, para.4*]. RESPONDENT accepted the two of the amendments that CLAIMANT made [*C5, pg. 17, para.1*].On the other hand, RESPONDENT did not accept to apply CLAIMANT'S general conditions on the contract instead of its, and only read it out of curiosity[*C5,pg.17, para.2*].

119. Article 18.1 pointed out to a very important point which is: "silence or inactivity does not in itself amount to acceptance" that means, not objecting on applying CLAIMANT'S G.C does not constitute as an acceptance to it. Plus, CLAIMANT relied very much on subjecting its sales-offer to its G.C and that does not expressly or implicitly constitute a demand to apply its own G.C.

120. Therefore, according to this Art. RESPONDENT's silence cannot be interpreted as an acceptance *[Memorandum for claimant, pg.21 para.119]*." On the other hand, since the CISG does not impose upon the offeree a general duty to reply, silence or inactivity does not - *in itself* - amount to acceptance. Thus, the *offeror* cannot bind the offeree in advance merely by stating that silence will be treated as an indication of the offeree's assent. Then again, if the offeree initiates a transaction by soliciting an offer, he - the *offeree* - may bind himself in advance by indicating that an offer received will be deemed accepted absent contrary indication by the offeree within a specified period"[*lookofsky. Pg.69*].

121. RESPONDENT however, did not accept to replace its own G.C and the biggest proof of that is RESPONDENT'S repeatedly asked CLAIMANT to oblige its own conditions in its tender documents *[C2, pg 11,12 and 13]*.

122. Most importantly is that, RESPONDENT did not accept to apply CLAIMANT'S G.C or to replace its own by reading CLAIMANT'S G.C out of curiosity *[C5, pg.17, para.2]* because curiosity is not enough to be translated as an acceptance. "a mere acknowledgement of receipt of the offer or an expression of interest in it is not enough*"[Farnsworth, pg.165]*.

123. "The acceptance of an offer can be communicated verbally or by conduct indicating assent Article 18(1) sentence 1. Whether conduct should be interpreted as acceptance is determined by Article 8" [*Schlechtriem*].

124. "According to the rule in paragraph (1), an acceptance may consist of a statement or of other conduct, e.g., shipping goods which the buyer has offered to buy. Whatever the form, for a statement or conduct to constitute an acceptance, it must provide some *indication* of the offeree's *assent.*"[*Lookofsky, pg.69*].

ii. Under the party autonomy principle respondent did not make any approving statement to apply claimant's general conditions.

125. Many rules and laws included provisions and articles based on the party autonomy principle since an agreement is what governs any contract. The power of agreement is shown under the CISG law in Art.6 (the ability to exclude any application of the CISG articles if the parties agreed to that), the agreement decides what law to be applied under the contract from the outset of the contractual agreement. The CISG itself is an application of the party autonomy principle.

126. What governs the contract under the CISG is the agreement that establishes the contract from the first place and therefore, no provision can be used in any commercial contract without being agreed upon *[The party autonomy principle* "L*'autonomie de la volonté*"].

127. CLAIMANT did not indicate any importance to applying its conditions, it did not ask for it the way it did the other two amendments and did not reject or object from the outset the idea of applying RESPONDENT's conditions.

128. No condition can be impetrated to any party of the contract when it did not get the acceptance from both of them since what governs the contract between parties is the agreement power. Therefore, CLAIMANTS general conditions cannot apply without the approving from RESPONDENT which it did not give. All that leads to, no acceptance was made or stated from RESPONDENT to accept CLAIMANT'S general conditions.

129. "Standard terms are included in the contract where the parties have expressly or impliedly agreed to their inclusion at the time of the formation of the contract"[*CISG Advisory Council Opinion No. 13, Rule #2].*

130. "The doctrine of freedom of contract has always been respected by the Law, which allows parties to provide for the terms and conditions that will govern the relationship"[*The doctrine of freedom of contract*].

B. Under Art.2.1.21 of the UNIDROIT principle, negotiated terms always apply.

131. Basing on the common principle *party autonomy* and the UNIDROIT principle Art 2.1.21, when it comes to a conflict between what have been discussed and agreed upon between the parties and a written provision or term by a sol party, the negotiated terms always win, in this case RESPONDENT'S general conditions.

In case of conflict between a standard term and a term which is not a standard term the latter prevail *[UNIDROIT principle Art 2.1.21]*.

132. In the contractual documents which were part of the negotiations between RESPONDENT and CLAIMANT before accepting the CLAIMANT'S offer and contracting with it, RESPONDENT showed more than once that it wants its conditions to apply in order to protect its reputation and its ethical standards *[C2, pgs. 11,12 and 13]*. CLAIMANT did not disagree and further stated that it discussed the tender documents with its production and finance department and they came up with the only two amendments which mean they had they time reading and analyzing the documents without rejecting the application of RESPONDENT conditions [*C3, pg.15, para.1*].

133. Where there is a conflict between negotiated terms and standard terms in the contract, the negotiated terms override the standard terms [*CISG Advisory Council Opinion No. 13]*.

134. All the above results that both parties did not agree to apply CLAIMANT'S general conditions in any way through negotiations or contract where as CLAIMANT did not refuse any of the documents tender expect the two changes it has made and only the agreed upon terms are taken in the contract.

135. "Where parties have specifically negotiated terms it stands to a reason that such terms more accurately reflect their common intent than those terms which have not been negotiated*"[Schwenzer, Hachem, r Kee, pg 296]*.

136. "The Court found that the terms and conditions can only be applicable if the seller has stipulated their applicability in its offer and the offer has been accepted by the buyer"*[Sesame seed case]*.

137. "The [April contract] was concluded and is binding on both parties. Therefore, both parties are obliged to fix the price by mutual negotiation and to make the relevant part of [the April Contract] capable for actual performance*"[Pig iron case]*.

4.Under Art. 8 Of The CISG, Respondent's General Conditions Should Apply

138. RESPONDENT'S G.C should apply in accordance with Art.8 after interpreting their statements or any other conduct made by any of them for the following: a. According to Art.8/1 of the CISG, CLAIMANT knew or could not be unaware that RESPONDENTs intention was to apply its own G.C, b. CLAIMANT should have Understood as a reasonable person that RESPONDENT wanted to apply its Own G.C under Art.8/2 of the CISG.

139. CLAIMANT'S memorandum stated:" Austrian Supreme Court stated that in order to incorporate standard terms under CISG the offeror has to refer to the terms, so that the other party could not have been unaware of the intent to include them to the contract" and that was according to the (propane case) which did not actually state that but instead, it stated" The general conditions of sale have to be part of the offer according to the offeror's intent, where the offeree could not have been unaware of that intent, in order to become a part of the contract (Art. 8(1) and (2) CISG). This inclusion into the offer can also be done implicitly or can be inferred from the negotiations between the parties or a practice which has developed between them [*Propane case]*".

140. Referring to the terms is not enough to make the other party aware of the party's intention and the same decision pointed to a very important idea which is including into the offer using negotiations which is what RESPONDENT did and CLAIMANT did not do since CLAIMANT did not ask through negotiations to apply its G.C or to replace RESPONDENT'S G.C *[Memorandum for claimant, pg.20, para.111]*.

A. According To Art. 8.1 Of The CISG, CLAIMANT Knew Or Could Not Be Unaware That respondents Intention Was To Apply Its Own General Conditions.

141. RESPONDENT's intentions through negotiations and discussions with CLAIMANT were to apply its general conditions.

142. Art.8.1 of the CISG states: For the purposes of this Convention 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.

143. In Cucina – the Danubian food fair – where RESPONDENT and CLAIMANT met for the first time, RESPONDENT discussed the cost versus the benefits of ethical and environmentally sustainable production and their experiences respective [*Notice of arbitration, pg4, para3*] which means- as a first time discussion- it was very important for respondent to clarify the importance of the ethical standards since it's something that RESPONDENT has a respective experience in and tries to keep it that way.

144. RESPONDENT showed clearly that not following any of the contractual documents will lead to a breach of contract which will cause a fundamental breach of it and a direct termination of the contract *[C2, pg12, clause 4]*.

145. RESPONDENT intentions were very clear towards CLAIMANT that it wanted to contract with the one who would follow its own conditions and terms.

146. "Art. 8 is concerned with rules for determining the parties' intentions where their language or conduct is ambiguous or, *quaere*, where, to the knowledge of the other party, the first party was operating under a mistaken assumption of fact."[Ziegel].

B. CLAIMANT should have understood as a reasonable person that RESPONDENT wanted to apply its own conditions under Art.8.2 of the CISG.

147. Even if CLAIMANT was unaware of RESPONDENT'S intentions, RESPONDENT pointed out in many places of the contractual documents that it is very important to oblige its own code of conduct and G.C.

Article 8.2 of the CISG states that " (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to 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."

148. RESPONDENT through negotiations with CLAIMANT showed more than once that its main goal from this contractual agreement is to find a party who would guarantee the ethical and the sustainable production for two main reasons: **Firstly**, Respondent cares the most about its reputation and do not want to fail again after its bad past experience. **Secondly**, RESPONDENT wants to become a global compact LEAD company by 2018. Not forgetting the fact that RESPONDENT clarified expressly to CLAIMANT the importance of CLAIMANT'S suppliers' adherence to its code of conduct for suppliers which is a part of the general conditions [*C1, pg8, para 3*].

149. RESPONDENT emphasized again the importance of adhering by its code of conduct under the GC of it in its tender document *[C2, pg 11,12 and 13]*.

150. Basically, RESPONDENT clarified expressly and impliedly that it wanted to apply its conditions while CLAIMANT did not do that and only asked expressly for the two changes that were made *[Memorandum for claimant, pg.21, para.116]*.

151. RESPONDENT did all its best to make any reasonable person in the same kind and the same circumstances understands that it wanted its general conditions to be applied not anyone's else conditions *[Memorandum for claimant, pg.21, para.118]*.

152. Standard terms are included in the contract where the parties have expressly or impliedly agreed to their inclusion at the time of the formation of the contract and the other party had a reasonable opportunity to take notice of the terms.[*CISG Advisory Council Opinion No. 13, Rule #2*].

153. "a person with technical skill and knowledge [is] required to make his statement in such a way as to make his meaning clear to a person not possessed of such skill and knowledge"[*Guide to CISG article 8, secretariat commentary*] [*Honnold*] which is basically what RESPONDENT did and CLAIMANT did not when it comes to its G.C.

154. "The Court of Appeal rules that it follows from this interplay of rules that standard terms will be part of the agreement if the parties at the time of the formation of the contract expressly or implicitly agreed to the incorporation of those standard terms into the agreement and the other party has had a reasonable opportunity to take notice of these standard terms" *[Nuts, dried fruits and seeds case]*.

155. "Following Art. 8(1) and (2) CISG, standard terms, in order to be applicable to a contract, must be included in the proposal of the party relying on them as intended to govern the contract in a way that the other party under the given circumstances knew or could not have been reasonably unaware of this intent. This might be done through express or implied reference to them in the statement." [*Tantalum powder case]* which respondent also has done in its tender documents and through negotiations and CLAIMANT on the other hand did not do.

V. CLAIMANT DELIVERED NONCONFORMING GOODS, AS ITS OBLIGATION WAS TO ACHIEVE A RESULT

156. CLAIMANT did not deliver confirming goods to RESPONDENT for the following reasons: firstly, under art. 35 of the CISG CLAIMANT did not adhere with particular purpose of the goods **(1)**. Secondly, under UNIDROIT PRINCIPLES, CLAIMANT'S duty was an obligation to achieve a specific result **(2)**. Thirdly, RESPONDENT'S intentions were not satisfied **(3)**. Fourthly, the contractual agreement gives respondent the right to terminate the contract in case of breach **(4)**. Finally, CLAIMANT is liable for the breach that was made by its suppliers under the party autonomy rule **(5)**.

1. Under Art. 35 Of The CISG Claimant Did Not Adhere With Particular Purpose Of The Goods.

157. The goods that were produced by CLAIMANT did not match with the agreement between both parties, because the main aim for RESPONDENT is to ensure that the goods are made according to the ethical standards.

158. Art.35.2 of the CISG states:" Except where the parties have agreed otherwise, the goods do not conform with the contract unless they... (b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely or that it was unreasonable for him to rely, on the seller's skill and judgment".

159. By excluding the particular purpose *[Memorandum of Claimant pg 29 paras. 168 and 169]* CLAIMANT did not take into consideration that Article 35 expanded in the definition of the concept of conformity of goods- away from material conformity only, through the quality, quantity and method of packaging agreed upon- indicating that every goal desired by the buyer when contracting with the seller if it was not achieved, that will also result non-conformity of the goods.

160. Contrary to what Claimant stated *[Memorandum of Claimant, Pg.31, Paras. 177-180]* RESPONDENT made its particular purpose clear from this Contractual agreement with CLAIMANT, and that purpose is to become a Global Compact Lead Company by 2018 and to find a proper supply chain management *[CLAIMANT's Exhibit C1, p.8, Para.3],* that is done by reserving the ethical standards and to receive conforming goods under its standards.

CLAIMANT did not adhere and therefore the goods were nonconforming and the particular purpose was not achieved.

161. "Prior to the conclusion of the contract, the seller may have been made *aware* of the *particular purpose* to which the goods will be put. If so, the seller assumes an implied obligation under Article 35(2)(b) that the goods are fit for such purpose, in that the buyer may *reasonably rely* on the seller's skill and judgment in this respect."[*Lookofsky, Pg.93]*

162. "The article 35(2)(b) obligation arises only if one or more particular purposes were revealed to the seller by the time the contract was concluded."[*2012 UNCITRAL Digest of the CISG*] [*Skin care products case*]

163. 2. The generated facts from the matters previous court proceedings indicate that during parties' negotiations the Seller agreed that its products will comply with the European HD 1000 standard. However, the delivered goods were unfit for its purpose, as the scaffolds bent, thus indicating they could not carry the weight of the workers. "Concluding, the hooks were unfit for the particular purpose stated in the contract according to Article 35(2)(b) CISG. The Seller agreed to deliver goods complying with the buyer's specifications of which the Seller knew or ought to have known, irrespective of whether the parties have expressly incorporated these specifications into the contract."[*Scaffold hooks case*].

164. "The buyer has purchased the goods for some purpose. He wants to consume, use or resell them. His expectations with respect to the goods can be frustrated if the goods do not possess the features necessary for the use intended by the buyer" *[Schlechtriem, pg.6]*

2. Claimant's Duty Was An Obligation To Achieve A Specific Result Under Unidroit Principles.

165. CLAIMANT's obligation under the contract was not to do its best efforts only, but to achieve a specific result, which is delivering conforming goods according to the ethical standards agreed upon.

166. Under Article 5.1.4 of the Unidroit principles: "(1) To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result."

167. Under Article 5.1.5 of the Unidroit principles: "In determining the extent to which an obligation of a party involves a duty of best efforts in the performance of an activity or a duty to achieve a specific result, regard shall be had, among other factors, to (a) the way in which the obligation is expressed in the contract".

168. RESPONDENT clarified expressly in its contractual documents that CLAIMANT's duty was an obligation of result and therefore CLAIMANT cannot allege that its duty was an obligation of best efforts under the contract which was stated in Memorandum of Claimant *[Memorandum of Claimant pg 27 paras. 158 and 161]*.

169. RESPONDENT stated that under all circumstances CLAIMANT must produce goods in a responsible manner, by selecting CLAIMANT's own suppliers that agree to adhere to ethical standards and to make sure that they comply with them, to avoid any breach of RESPONDENT's general business philosophy and conditions *[CLAIMANT's Exhibit C2, p.14, Para. E]*. This means that CLAIMANT should guarantee that its supplier's ingredients were farmed in compliance with sustainable farming methods, since the specific result was not given as expressed in the contract.

170. "In the case of an obligation to achieve a specific result, a party is bound simply to achieve the promised result, failure to achieve which amounts in itself to non-performance" [*Comments on Art.5.1.4 of the UNIDROIT principles, comment 2, and para.1*].

171. "The way in which an obligation is expressed in the contract may often be of assistance in determining whether the parties intended to create a duty to achieve a specific result or a duty of best efforts "[*Comments on Art.5.1.5 of the UNIDROIT principles, para.2*].

3. RESPONDENT's Intentions Were Not Satisfied.

172. RESPONDENT accepted CLAIMANT's offer because it believed it was a high sustainable and ethical production that will help RESPONDET to be a Global Compact Lead Company, by presenting conforming cakes according to the high ethical standards **(A)**, and by maintaining its reputation **(B)**.

A. RESPONDENT's intention from the outset was to present cakes based on the high ethical standards.

173. RESPONDENT's intention from the contract was to receive goods in accordance with the terms and conditions concluded in the contract, most importantly cakes that match the high ethical standards both parties agreed upon.

174. Under art.8.1 of the CISG:"For the purposes of this Convention 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".

175. The interpretation of the contract must be in the interest of both parties in the contract, where the intentions of the parties must be clear. It cannot be said that RESPONDENT did not clarify or indicate its intentions of the nodal through previous discussions of the contract and through the contractual documents.

176. The main reason that made RESPONDENT accept CLAIMANT's offer is it was satisfied with the strict adherence to the principle of ethical and sustainable production from CLAIMANT's side *[CLAIMANT's Exhibit C1, p.8, Para.2]*.

177. RESPONDENT main intention from this contract is to be a Global Compact Lead Company which will not happen if it was not highly committed with the ethical and sustainable production *[CLAIMANT's Exhibit C1, p.8, Para.3]*.

178. RESPONDENT has zero tolerance when it comes to an ethical business behavior, which it mentioned in its special conditions of contract *[CLAIMANT's Exhibit C2, p.11, intro of special condition of contract]*.

179. CLAIMANT offered a compensate RESPONDENT because of the breach that CLAIMANT admitted in its email. This indicates obviously that CLAIMANT stated that there was a breach; otherwise it would not offer this compensation *[CLAIMANT's Exhibit C9, p.21, Para. 4]*. This means RESPONDENT's intentions were clear to CLAIMANT.

180. The ethical standards were the most important terms under the contract, RESPONDENT highlighted the importance on obliging the high standards of integrity and sustainability in its General Conditions *[CLAIMANT's Exhibit C2, p.12, intro to General Conditions of contract] which RESPONDENT* tried its best to ensure that CLAIMANT understood that it should adhere.

181. As a result, CLAIMANT's failure to oblige the ethical standards which are RESPONDENT's intentions from the outset, is a disappointment and an obstruction to RESPONDENT's main goal which is to be a Global Compact Lead Company, leaving RESPONDENT with possible and a breach of contract from CLAIMANT's side.

182. "As already established in the 1978 Draft Convention, the meaning of the statements or other legally relevant conduct of the parties is to be determined by their actual intent (Article 8(1))" *[Schlechtriem, pg.39]*

B. RESPONDENT's intention from the outset was to maintain its reputation and to be a Global Compact Lead Company.

183. RESPONDENT's intention from the contract with CLAIMANT was to preserve its reputation to be a Global Compact Lead Company by representing confirming goods in accordance with the terms and conditions concluded in the contract based on ethical standards both parties agreed upon.

184. Under art.8.1 of the CISG:"For the purposes of this Convention 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".

185. The interpretation of the contract must be in the interest of both parties in the contract, where the intentions of the parties must be clear. It cannot be said that RESPONDENT did not clarify or indicate its intentions of the nodal through previous discussions of the contract and through the contractual documents.

186. The main reason that made RESPONDENT accept CLAIMANT's offer is it was satisfied with the strict adherence to the principle of ethical and sustainable production by CLAIMANT, that will maintain RESPONDENT's reputation after a bad experience in the past being subjected of a negative press campaign *[CLAIMANT's Exhibit C1, pg.8, Para.2]*.

187. RESPONDENT clarified its intention from the outset that its priority from this contractual agreement is to protect its reputation by not working with bribed suppliers explaining to CLAIMANT that it wants to become a Global Compact Lead Company by 2018 and to find a proper supply chain management *[C1, p.8, Para.3]*.

188. RESPONDENT's main concern and CLAIMANT's main obligation was to adhere to the high standards of integrity and sustainability in its G.C *[C2, p.12, intro to General Conditions of contract]* because RESPONDENT's reputation should be maintained , RESPONDENT made sure that CLAIMANT understood that and expected CLAIMANT to adhere to it.

189. Eventually RESPONDENT's reputation is threatened because CLAIMANT was not a high ethical and sustainable production, it failed to reserve RESPONDENT's reputation which was made clear from the beginning on its importance, prevented RESPONDENT from presenting confirming goods matching the ethical standards both parties agreed upon. RESPONDENT's main goal which is to be a Global Compact Lead Company is hampered.

190. "By contrast with other non-material values, commercial reputation is an integral part of, and often an important prerequisite for, a successful business activity. Conversely, loss of or

injury to reputation is likely to adversely affect the injured party's business.14 It could, of course, be argued that the ultimate purpose of good commercial reputation is to gain profit" *[DjakhongirSaidov, pg.398]*

191. "Non-material damages may be recoverable if a non-material purpose of the contract has been expressly agreed upon" *[Schlechtriem]*.

4. The Contractual Agreement Gives RESPONDENT The Right To Terminate The Contract In Case Of Breach.

192. The contractual agreement between the parties clarified that if the CLAIMANT did not adhere with the conditions, this would result in a fundamental breach of its obligation, which will give RESPONDENT the right to terminate the contract with immediate and claim damage without notice applying the rule of party autonomy.

193. Art.25 of the CISG defined the fundamental breach as "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract".

194. Under art.6 of the CISG: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions".

195. In clause 4 of the general conditions of contract, RESPONDENT showed that any noncompliance with any of its contractual documents constitute a breach of contract. Hence when one of the conformity standards of goods was absent, then the goods are considered nonconforming and it gives the RESPONDENT the right to terminate the contract without a notice *[C2, p.12, Para.4]*.

196. Especially since CLAIMANT terminated its contract with its suppliers without a notice of termination, when it discovered the fraud scheme.

197. Therefore RESPONDENT took the right of terminating the contract with immediate and claim damage without notice from the contractual agreement between the parties which clarified that if the CLAIMANT did not adhere with the conditions, this would result in a fundamental breach of its obligation. Contrary to what was falsely alleged in the Memorandum for CLAIMANT *[Memorandum of Claimant pg 33 paras. 191 - 199]*

198. "Article 6 guarantees party autonomy over both the conflict rules and the substantive law" *[Schlechtriem, pg.35]*.

199. "By agreeing on a German arbitral court the parties had implicitly chosen the law of a Contracting State (German law) as the law governing the contract, and therefore CISG" *[Michael Joachim Bonell and Fabio Liguori]*.

200. "The Convention does not override domestic law that outlaws certain transactions or invalidates proscribed contracts; outside this narrow area the Convention protects the contractual arrangements made by the parties. Moreover, the parties may exclude the Convention, and the terms of their contract will" *[John Honnold, pg.3]*.

5. Claimant Is Liable For The Breach That Was Made By Its Suppliers Under The Party Autonomy Rule

201. CLAIMANT alleges that it's not liable for failure to perform its obligation [*[Memorandum of Claimant pg 28 paras. 162 - 267]*, but CLAIMANT errs in its submission because the contractual agreement between both parties excluded art.79 of the CISG from the contract by using the party autonomy concept and art.6 of the CISG, this article exempts a party from liability for a failure to perform any of his obligations.

202. Under art.6 of the CISG: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions".

203. RESPONDENT stated that under all circumstances CLAIMANT must produce goods in a responsible manner, by selecting CLAIMANT's own suppliers that agree to adhere to ethical standards and to make sure that they comply with them, to avoid any breach of RESPONDENT's general business philosophy and conditions *[CLAIMANT's Exhibit C2, p.14, Para. E]*. This means that CLAIMANT pledged to be liable for its supplier's failure under all circumstances as agreed upon in the contract.

204. The offer made by CLAIMANT in its email to handle the responsibility with RESPONDENT is an obvious admission by CLAIMANT on the breach and the liability it has; otherwise it would not offer this compensation *[CLAIMANT's Exhibit C9, p.21, Para. 4]*. Hence RESPONDENT's intentions were clear to CLAIMANT from the outset as both parties agreed upon; otherwise it would not ask to find a fair solution.

205. CLAIMANT is absolutely liable on the failure to perform its obligation, because the contractual agreement both parties signed excluded art.79 of the CISG from the contract by using the party autonomy in art.6 of the CISG, which leaves CLAIMANT in breach of contract and responsible.

REQUEST FOR RELIEF

RESPONDENT respectfully request this Tribunal:

I. Judge the challenge on Mr.Prasad without his participation and to remove him as an arbitrator.

II. To reject all claims for payment raised by CLAIMANT;

III. To order CLAIMANT to bare all arbitration costs.

Alissar Al-HajHasan Nicole Zaghloul Haya Bako Issa Al-Tarawneh