

Twenty-Fifth Annual

William C. Vis International Commercial Arbitration Moot

NANGARHAR UNIVERSITY
FACULTY OF LAW



MEMORANDUM FOR RESPONDENT

On behalf of

Comestibles Finos, Ltd

RESPONDENT

v.

.

Against

Delicatesy Whole Foods, Ltd

CLAIMANT

Mohammad Asghar Azimi • **Imran Ullah Sharefi** • **Azizullah Zohair**
• **Abid Khan**



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LIST OF ABBREVIATIONS

&	And
Ans. NofCh	Answer to the Notice of Challenge of Arbitrator
Ans St. of Cl	RESPONDENT's answer to statements of claim
Art	Article
Chap	Chapter
CISG	United Nation convention on contracts for international sale of Goods
CISG-AC	CISG Advisory Council
CISG-Online	United Nation Convention for the Contracts on international sale of goods online cases
Cl.	CLAIMANT
Cl. Memo	CLAIMANT Memorandum
Com-on	Commentary on
DAL	Danubian Arbitration Law
Dec	December
Ed (s)	Editions
Exh.	Exhibition
IBA	International Bar Association
IBAG	IBA Guidelines
Ibid	Ibidem (word Origin)
Inc	Incorporated
Jan	January
LCIA	London Court of International Arbitration
Lex-Arbitri	The law of the Seat of Arbitration
Ltd	Limited
Mr	Mister
No	Number
No/Ch	Notice of Challenge or Arbitrator
Oct	October
Para	Paragraph
PCA	Permanent Court of Arbitration



Pg	Page
PO1	Procedural Order No 1
PO2	Procedural Order No 2
Req for arb	Request for arbitration
Res	RESPONDENT
Sec	Section
St Cl	Statement of Claim
UK	United Kingdom
UN	United Nation
UNCITRAL	United Nation convention on international Trade Law
UNIDROIT	International Institute for the Unification of Private law
US\$	United States Dollar
V	Versus



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Cited as: CISG
In Paras. 3, 4, 20, 22, 29, 36, 37, 127, 128, 139, 144, 199
- CISG Digest*** Digest on convention on contracts for international sale of goods.
Cited as: CISG Digest
In Para. 132, 141, 197
- MAL Digest*** UNCITRAL model law on international commercial arbitration (1985).
Cited as: MAL Digest
In Paras. 65, 66, 67, 71
- Principle*** Principle of party autonomy
In Para. 9, 10
Principle of right of a party to be heard
In Paras. 49, 64
Principle of Meeting of the Mind
In Paras. 12, 13
- UNCITRAL Arbitration rules*** UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013)
Cited as: UNCITRAL Arbitration rules
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- UNCITRAL model law*** UNCITRAL Model Law on International Commercial Arbitration. 1985 (with amendments as adopted in 2006), 7 July 2006.



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STATEMENT OF FACTS

CLAIMANT, Delicately Whole Foods Sp the “Seller”, is a medium sized manufacturer of fine bakery products

RESPONDENT, Comestibles Finos Ltd the “Buyer”, is a gourmet supermarket chain in Mediterraneo

2012-2014 CLAIMANT chocolate cakes won the award for Cucina best cake, due to its sustainable production [*Exh. R2, Pg. 29*], which made RESPONDENT enter into contract with the CLAIMANT.

3-6 March 2014 CLAIMANT and RESPONDENT met and both sides discussed about having business relations and RESPONDENT liked CLAIMANT’s principle of ethical and sustainability [*St of Cl, Pg. 3*].

10 March 2014 After the successful discussions, RESPONDENT sent an invitation to tender to the CLAIMANT, and informed the CLAIMANT that it intends to become Global Compact Lead company by 2018, so the focus should be on sustainable production [*Ex. C1, Pg. 8*].

17 March 2014 CLAIMANT submitted its Tender documents and accepted that it would tender in accordance with the specified requirements [*Ex. R1, Pg. 28*].

27 March 2014 CLAIMANT made some minor changes to the original offer which primarily related to the shape of cake and mode of payment, but without any modification to the document and original offer [*Ex. C4, Pg. 16*].

7 April 2014 RESPONDENT accepted those minor changes for two reasons, first the form of the cake was from CLAIMANT’s premium product line, and second, CLAIMANT’s commitment to ethical production [*Ex. C5, Pg. 16*].



- 1 May 2014** CLAIMANT made its first delivery and the chocolate cakes had only ingredients which were produced and packaged in a minor that conformed the contract, so RESPONDENT effected the payments [*St Cl, Para. 6, Pg. 5*].
- 23 Jan 2017** CLAIMANT failed to fulfill its contractual obligation and the cakes delivered by CLAIMANT had ingredients which were produced in an unfriendly environment, because there were deforestation and bribery in Ruritania [*Exh. C7, Pg. 19*].
- 27 Jan, 2017** RESPONDENT informed CLAIMANT about deforestation and corruption in Ruritania and insisted on the CLAIMANT to confirm the ethical and sustainable production of Cocoa bean [*Ex. C6, Pg. 18*].
- 10 Feb, 2017** CLAIMANT confirmed that the cocoa beans used for the production of the chocolate cake have not been produced in accordance with the contractually required principles [*Exh. C9, Pg. 21*].
- 12 Feb, 2017** CLAIMANT terminated the contract with its suppliers and was insisting RESPONDENT to pay the additional amount, however, RESPONDENT terminated the contract based on a clear breach by the CLAIMANT [*Exh. C10, Pg. 22*].
- 26 Jun, 2017** CLAIMANT resorted to Arbitration and appointed Mr. Prasad as its arbitrator [*Ex. C11, Pg. 23*].
- 14 Sep, 2017** RESPONDENT challenged Mr. Prasad, since there were some justifiable doubts as to his impartiality or independence [*NofCh, Pg. 37*].



SUMMARY OF ARGUMENTS

1. The Arbitral tribunal has the authority to decide RESPONDENT's challenge as to Mr. Prasad, because the parties have explicitly excluded the involvement of any arbitral institution to interfere in the present proceedings, and the parties have excluded the application of Art. 13 (4) UNCITRAL Arbitration rules, so the only body to decide the challenge is this tribunal based on the interpretation of the parties' conducts and statements considering relevant circumstance. On the other hand, even if, the challenge is to be decided by an appointing authority, Mr. Prasad should not be a member of the tribunal, because DAL does not support the participation of Mr. Prasad, and he would be a judge in his own cause which will violate RESPONDENT's right to be heard, thus the tribunal should decide the challenge raised by RESPONDENT without Mr. Prasad's participation. **(PART ONE)**
2. The arbitral tribunal should remove Mr. Prasad as he is not impartial and independent under both UNCITRAL "justifiable doubts" standard and the IBA guidelines, first, Mr. Prasad is not impartial or independence under UNCITRAL Arbitration rules, because, Mr. Prasad's article constitutes a valid ground for his removal, and repeat past appointment of Mr. Prasad create justifiable doubts sufficient to warrant removal, and also the involvement of FindFunds LP in other proceedings involving Mr. Prasad and his partner Mr. Slowfood compromise Mr. Prasad's independence and impartiality, finally, CLAIMANT's failure to disclose the funding agreement with FindFunds affects Mr. Prasad's independence and impartiality, second, the circumstances raised by RESPONDENT justify the removal of Mr. Prasad under IBA Guidelines, since the IBA Guidelines apply to the present case. **(PART TWO)**
3. RESPONDENT's standard conditions govern the contract, because RESPONDENT's offer is a genuine offer and has met the requirements under Art. 14 of CISG, and RESPONDENT's intent could be understood by interpreting his conduct under Art. 8 of CISG, considering parties conducts, negotiations and relevant circumstance, on the other hand, even if, CLAIMANT's tender documents were counter offer, they have not materially changed the original offer, alternatively, contradictions in terms do not prevent the existence of the sales contract. **(PART THREE)**
4. CLAIMANT has delivered non-conforming goods under art. 35 of the CISG, because the cakes delivered by CLAIMANT do not confirm with contractual standards under Art. 35 of CISG, The cakes were not produced for the required purpose under the contract the cakes were produced and delivered in a manner that violates the contract, also, CLAIMANT has not fulfilled its contractual obligations, since CLAIMANT has not fulfilled its contractual obligations for "best result", and CLAIMANT did not exercise its best efforts to procure sustainable Cocoa, finally, CLAIMANT is not entitled to claim any additional amount by virtue of Art. 53 of CISG. **(PART FOUR)**



ARGUMENTS

PART ONE: THE ARBITRAL TRIBUNAL HAS THE AUTHORITY TO DECIDE RESPONDENT'S CHALLENGE AS TO MR. PRASAD WITHOUT THE INVOLVEMENT OF MR. PRASAD.

5. CLAIMANT states that Parties only intended to restrict the involvement of an arbitral institution in the composition of the arbitral tribunal [*Cl. Memo, Para. 19*], Contrary to the CLAIMANT's allegations, the parties excluded the application of Art. 13 (4) of UNCITRAL Arbitration rules, and excluded involvement of any arbitral institution to interfere in the present proceedings [*Exh. C2, P. 121*], therefore, the arbitral tribunal has the authority to decide RESPONDENT's challenge as to Mr. Prasad [I], even if, the challenge is to be decided by an appointing authority, Mr. Prasad should not be a member of the arbitral tribunal [II].

I. The arbitral tribunal has the authority to decide RESPONDENT's challenge as to Mr. Prasad.

6. Parties have adopted an arbitration clause in their contract which excludes involvement of any arbitral institution [*Exh. C2, Pg. 12*], and from practical point of view, parties draft international arbitration clauses broadly, to cover all disputes or matters, having any connection with the parties' disputes [*Born, Pg. 86*], therefore, The Arbitration Agreement explicitly excludes all kinds of institutional interference and gives the tribunal the power to decide over the challenge [A], even If the Tribunal Were to Find That the Clause Was Ambiguous, the parties have excluded the application of Art. 13 (4) of UNCITRAL Arbitration rules [B], alternatively, the Tribunal should exercise its discretion and should decide RESPONDENT's challenge to Mr. Prasad [C].

A. The Arbitration Agreement explicitly excludes all kinds of institutional interference and gives the tribunal the power to decide over the challenge

7. The Parties have reached to an agreement to exclude any kind of arbitral institution to interfere in the present proceedings.
8. In this regard, the well-known writer Gary B. Born states that one of leading Theories of Arbitration is Contractual Theory and based on this theory, it is the arbitration agreement that gives the arbitral award its existence; it is from the arbitration agreement that it derives all its substances [*Born, Pg. 214*].



9. Scholars wrote that “Party Autonomy” is the guiding principle in determining the procedure to be followed in international commercial arbitration. It is a principle that has been endorsed not only in national laws, but also by international arbitral institutions and organization” [Redfern/Hunter, Pg. 320; Blackaby/Partasides, Pg. 35].
10. Also, the parties to arbitration possess fundamental freedom to choose how to conduct the arbitral proceedings, it is widely accepted that party autonomy is the prevalent source of procedure rules in an international arbitration [*Blackaby, Pg. 365; Born, Pg. 715*].
11. In addition, Pursuant to arbitration clause of the contract, clause 20 states that “... *without the involvement of any arbitral institution.*” [*Exh C2, Clause. 20, Pg. 12* (emphasis added)], accordingly, in *CLOUT Case no. 618*, Canadian Court of Appeal ruled in the favor of defendant that requested validity and priority of arbitration clause to be applied [*Silverberg & Silverman v. Clark Hooper*].
12. Besides, according to the principle of “meeting of the mind” the parties have implicitly agreed on the power of tribunal to set the procedures of the arbitration enabling an efficient proceeding.
13. Likely, Meeting of the minds is a principle in contract law used to describe the intentions of the parties forming the contract. In particular, it refers to the situations where there is a common understanding in the formation of the contract [*Baltimore & Ohio Railroad. Co. v. United States*].
14. In this stance, based on Contractual theory, there is an arbitration clause in the contract accepted by the parties that bans any institution to interfere in the arbitral proceeding including deciding the challenge which empowers the tribunal to decide over the challenge [*Exh C2, Clause 20, Pg 12*].
15. Consequently, the Tribunal has the power to decide on the challenge raised by RESPONDENT based on the parties’ agreement.

B. Even If the Tribunal Were to Find That the Clause Was Ambiguous, the parties have excluded the application of Art. 13 (4) of UNCITRAL Arbitration rules.

16. CLAIMANT submits that Article 8 of the CISG can be utilized to interpret the arbitration clause [*Schmidt-Ahrendts, Pg. 219; Chateau de Charmes Wines case*], accordingly, a choice of substantive law by the parties can be interpreted to apply the same laws to the arbitration clause [*Lew/Mistelis/Kroll, Pg. 120, Owerri v. Dielle*]. In the present case, the substantive law governing the contract is the law of Danubia, including the CISG [*Exh. C2, Clause, 19,*



Pg. 12]. Arbitration clauses are within the scope of the CISG [*Walker, Pg. 163; Schwenzer/Tebel, Pg. 746; Filanto v. Chilewich*].

17. In this regard, when there is a question of the scope, validity, or existence of an arbitration agreement, intent of the parties is to be used by the Tribunal for interpretation of the agreement [*Lew/Mistelis/Kroll, Pg. 150*].
18. Likely, Art. 8 CISG governs the interpretation not only of statements, but also of party agreements [*HG Aargau, 26 Nov 2008; Enderlein/Maskow, Para. 2.3; Bianca/Bonell, Art. 8*].
19. The clause should therefore be interpreted according to how it was granted by an average and diligent businessman [*ZCC Case*]. Here, the Tribunal should first evaluate the parties' request in light of its own obligations and duties, and then identify the reasons why the parties have reached this agreement [*Pryles, Pg. 337*].
20. As a result, Applying Art. 8.1 of the CISG, excludes involvement of arbitral institution. [i], also, Applying Art. 8.2 of the CISG, excludes involvement of arbitral institution [ii], and finally, Applying Art. 8.3 of the CISG, excludes involvement of arbitral institution considering relevant circumstances [iii].

i. Applying Art. 8.1 of the CISG, excludes involvement of any arbitral institution.

21. RESPONDENT's conducts should be interpreted according to his intent under Art. 8.1 of CISG.
22. Likely, the contract is to be interpreted according to the intent, where the other party knew or 'could not have been unaware' of such intent [*Art. 8.1 of CISG*], relatively, Negotiations are to be taken into account while interpreting the contract [*Schlechtriem/Schwenger, Pg. 125*]. However, the process of interpretation should be initiated by taking into account the actual wording of the statement [*Schlechtriem/Schwenger, p. 117*], also clear contract terms are to be 'given their literal meaning [*Bricks case*].
23. In addition, the starting point for assessing the parties' subjective intent is the statements that a party makes as well as the wording of those statements [*Schlechtriem/Schwenger, Pg. 153*]. The subjective intent needs to coincide with the views of the other party [*Zeller 2000, Pg. 643*].
24. Furthermore, CLAIMANT cannot prove the ambiguity of the phrase "without the involvement of an arbitral institution" [*Cl. Memo, Para. 20*], because it is normal in Ad hoc proceedings that the



Arbitral Tribunal has to decide the challenge, so the clause covers everything related to the present arbitral proceedings [*NofCh, Pg. 39*].

25. Similarly, Ad hoc arbitrations are not conducted under the supervision of an arbitral institution; instead, parties simply agree to arbitrate, without designating any institution to administer their arbitration [*Born, Pg. 71*].
26. In the preset case, contrary to CLAIMANT's allegations [*Cl. Memo, Para. 22*], RESPONDENT excluded the involvement of any arbitral institution and CLAIMANT shared the same understanding, finally, the parties reached the agreement to exclude the application of Art. 13 (4) of UNCITRAL Arbitration rules [*NofCh, Pg. 39*], thus the only body to decide the challenge is this Arbitral Tribunal.

ii. Applying Art. 8.2 of the CISG, excludes involvement of any arbitral institution.

27. When the parties have a "different understanding of the meaning of the contract, the contract language should be interpreted under article 8(2)" [*Roland Schmidts v. Textil-Werke; Textiles case; Fabrics case; Yarn case*].
28. Under Art. 8(2) CISG, a party's conduct and statements are objectively interpreted [*Schlechtriem/Schwenzer, Pg. 155*]. Thus, an arbitral tribunal applies the hypothetical understanding of a reasonable person in the shoes of the party to whom the statement was addressed [*Official Records, Pg. 243*].
29. In the event that subjective intent is unclear, the contract is to be interpreted in accordance with the 'understanding of a reasonable person of the same kind as the other party' [*Art. 8, CISG*].
30. When determining the understanding of a reasonable third person, all relevant circumstances have to be considered. In this regard, special weight is attached to the usual meaning of the words used by the parties [*HG Zürich, 24 Oct 2003; OLG Dresden, 27 Dec 1999; Staudinger /Magnus, Art. 8 Para. 24; Schlechtriem/Schwenzer/Schmidt-Kessel, Art. 8 para. 41*].
31. Contrary to CLAIMANT's allegation [*Cl. Memo, Para. 24*], in the light of their experience with Ad hoc Arbitration, the parties have never had any problems with the clause, because, this is the tribunal who would decide everything [*NofCh, Pg. 39*].



32. In addition, the secretary General of Permanent court of Arbitration cannot interfere in Ad hoc Arbitrations, because it serves as an institutional administering body for arbitrators conducted under the PCA Arbitration Rules. [*Born, Pg. 81*].
33. Moreover, because of confidentiality, RESPONDENT switched arbitration clause from an institutional arbitration clause to an ad hoc clause, because, Privacy is a complete hallmark of international commercial arbitration, and the principal attractions of arbitration is the ability to resolve commercial disputes confidentiality [*Caron/Caplan, Pg. 118*].
34. In the present case, a reasonable person could understand that the tribunal should decide the challenge, taking into consideration the relevant circumstance, because, the clause excludes any interference by any arbitral institutions.
35. Consequently, the arbitral tribunal should decide the challenge without the involvement of Mr. Prasad, and no arbitral institution should interfere in the present proceedings due to issue of confidentiality.

iii. Applying Art. 8.3 of the CISG, excludes involvement of any arbitral institution considering relevant circumstances.

36. Art. 8 CISG governs the interpretation of the Parties' intention following a three-step analysis [*CIAG-ACO No.6, Pg. 3, ¶2.2; Schlechtriem/Schwenzer, p.148, ¶5; Huber/Mulis, Pg .236; Vorobey, Pg.143*]. The first step is interpreting the party's conduct or statements according to that party's subjective intent, where the other party knew or could not have been unaware of that intent [*Art. 8(1) CISG; Vorobey, Pg(s). 143-144*]. the second step is to apply the reasonable person's understanding when the subjective intent cannot be determined [*Art. 8(2) CISG; Hanwha case; Bowling alleys case; Roland Schmidt case*]. The third step applies to both previous steps, which is that an arbitral tribunal should consider all circumstances surrounding the contract [*Art. 8(3) CISG; Vorobey, Pg. 144; ICC Case No. 11849/2003*].
37. In addition, in determining the intent of a party, any subsequent conduct of the parties also should be considered [*Art. 8(3) CISG; Schlechtriem/Butler, Pg. 57; Huber/Mulis, Pg. 236; Felix, Para. 3.2*].
38. In this regard, the parties in the preset case, switched arbitration clause form institutional to Ad hoc, because, Ad hoc is more confidential than institutional arbitration and no person or institution can interfere in the arbitral proceedings [*Born, Pg. 72*].



39. According to Art. 8(3) CISG, in determining the intent of a party due consideration is to be given to all relevant circumstances of the case, including negotiations and subsequent conduct [*Fabrics case; Alpha Prime v. Holland Loader; Loin Ribs case; Surface protective film case; Plastic filter plate case*].
40. In the present case, the parties did not exchange any further communications regarding the phrase “without the involvement of any arbitral institution,” because they shared the same understandings.
41. As result, from the above illustrations, it could be assumed that the tribunal has to decide over the challenge, taking into account all the circumstance of the given case.

C. Alternatively, the Tribunal Should Exercise Its Discretion and should decide RESPONDENT’s challenge to Mr. Prasad.

42. The power of arbitrators to conduct the proceedings is determined by the lex arbitri and the agreement of the parties, including any arbitration rules chosen to that effect [*Fouchard/Gaillard/Savage, Pg. 648*].
43. In addition, deciding on challenges in international arbitration is subject to the agreement of the parties, the applicable national law, applicable institutional rules, and the discretion of the Tribunal [*Born 2001, Pg. 470*].
44. Similarly, the power of the arbitral tribunal to determine the appropriate procedure includes the power to determine the challenges, and excluding the partial and dependent arbitrators from the panel and not obstructed by fads of national procedural laws. [*William, Pg. 3*]
45. In the present case, there is a valid arbitraio clause in the contract which gives the tribunal the power to rule on its own jurisdiction.
46. Therefore, the Tribunal has the power to decide on the challenge raised by RESPONDENT based on international arbitration law of Danubia, UNCITRAL Arbitration rules and parities’ agreement.

II. Even if, the challenge is to be decided by an appointing authority, Mr. Prasad should not be a member of the arbitral tribunal.

47. Contrary to the understanding of CLAIMANT [*Cl. Memo, Para. 25*], Article 13(4) establishes the rule that an appointing authority will decide a challenge in those cases where the parties do



not agree to the challenge or the challenged arbitrator chooses not to withdraw, but parties' agreement prevails [*Alston, Pg. 323*]

48. In addition, CLAIMANT asserts that international arbitration practice supports the selection of appointing authority [*Cl. Memo, Para. 27*], however, the fact is that unless otherwise agreed by the parties, the appointing authority may not decide the merits of the underlying dispute or any other matters solely within the discretion of the arbitral tribunal [*Alston, Pg. 343*]
49. Under Danubian Law and UNCITRAL Arbitration rules, the powers of the appointing authority are not limitless. The appointing authority's discretion necessarily ends where the arbitral tribunal's begins, therefore, Danubian Arbitration law does not support the participation of Mr. Prasad to decide on the challenge [**A**], and also, Mr. Prasad cannot be a member of the arbitral tribunal, because he would be a judge in his own cause [**B**], and also, allowing Mr. Prasad to be in the tribunal would harm RESPONDENT's right to be heard [**C**].

A. Danubian Arbitration law does not support the participation of Mr. Prasad to decide on the challenge.

50. Parties have chosen the law of Danubia as *lex arbitri*, and Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments [*PO1, Para 3 (4), Pg. 49*].
51. In this regard, other than the agreement as the source of their powers, the tribunal also derives its powers as may be conferred by the applicable laws, the requirement of model law is that an arbitrator must be independent and impartial [*Redfern/Hunter, Pg. 267*]
52. Besides, contrary to the understanding the CLAIMANT [*Cl. Memo, Para. 37*], the challenged arbitrator should not continue to act as an arbitrator if the arbitrator lacked the necessary independence or impartiality. A typical example of those provisions is article 13 (2) of UNCITRAL model law [*Lew/Mistelis/Kroll, Pg. 312*].
53. In addition, contrary to CLAIMANT's allegations [*Cl. Memo, Para. 38*], Two member tribunal has the authority to decide upon the challenges, because the process should move more quickly, so sole arbitrator can make decisions without the necessity of conferring with colleagues at any stage of the arbitration. [*Moses, Pg. 123*].
54. Furthermore, the problem for an arbitrator who appears to be favoring one party is that he loses credibility with the two other members of the tribunal. He is therefore less able to act in the



proceedings to favor the party who appointed him, thus the other two arbitrators will essentially decide the case. [*Moses, Pg. 131*].

55. Similarly, English High Court, in *ASM Shipping Ltd v. TTMI Ltd*, has held that the challenged arbitrator should not continue to act as an arbitrator and the other two arbitrators would continue. [*ASM Shipping Ltd v. TTMI Ltd*].
56. Likely, In *AWG Group Ltd and Argentine Republic, Argentina* challenged Professor Kaufmann-Kohler because she lacked impartiality or independence by prior involvement in the ICSID tribunal in the case of *Vivendi Universal S.A. v Argentine Republic*. Thus, the two members of the arbitral tribunal other than Professor Kohler decided the challenge. [*AWG Group Ltd and Argentine Republic, (May 12, 2008)*].
57. Similarly, in the present case, Mr. Prasad is not impartial or independence and there are justifiable doubts that warrant his removal, thus he should not be involved in the arbitral proceedings.

B. Mr. Prasad cannot be a member of the arbitral tribunal, because he would be a judge in his own cause.

58. Mr. Prasad should not be involved in the arbitral proceedings, sine he will be a judge in his own cause. Article 13 (4) shows that the drafters of the UNCITRAL Arbitration Rules wanted to avoid that the challenged arbitrator decides in its own cause [*NofCh, Pg. 39*].
59. Under Art. 13 of UNCITRAL Arbitration rules, could the appointing authority be trusted to make an impartial decision? As a result there are some possibilities that help the decision to be impartial; the first was to have the other two members of the arbitral tribunal decide the challenge [*Alston, Pg. 327*].
60. In the case, the parties' appointed arbitrator is not impartial or independence, then the arbitrator will be parachuted and he may not be the best person for the case. [*Moses, Pg. 131*].
61. Likely, In *Veritas Shipping Ltd. v. Anglo-Canadian Cement Ltd*, RESPONDENT challenged Dr. Wallersteiner, CLAIMANT's appointed arbitrator, for close relation that he had with Anglo, but he refused to withdraw. English High Court by exercising its discretionary power removed Dr. Wallersteiner and held that he cannot be a judge in his own cause. [*Veritas Shipping Ltd. V. Anglo-Canadian Cement Ltd, 1966*]



62. It is elementary that a party may not be an arbitrator in its own case, and it is a fundamental principle of every well-regulated judicature that nobody can be a judge in his own cause. [*Born, Pg. 743*].
63. Similarly, in the present case, Mr. Prasad definitely pursue the challenge, since he is not impartial or independence, thus he should not be a member of the arbitral tribunal, because he would be a judge in his own cause.

C. Allowing Mr. Prasad to be in the tribunal would harm RESPONDENT's right to be heard.

64. The RESPONDENT's right to be heard from Art. 18 Model Law would be violated by allowing Mr. Prasad to be in the tribunal [*Redfern/Hunter, Para. 6.15; Jenkins, Pg. 159*]. Firstly, the right to be heard is a mandatory provision of the Model Law. According to Art. 19(1) Model Law, the parties are free to determine the procedure to be followed in their arbitration [*Lew/Mistelis/Kröll, Para. 2.44; Luttrell, Pg. 9; Morrissey/Graves, Pg. 344*].
65. Similarly, Art. 18 Model Law, stating that "each party shall be given a full opportunity of presenting its case", is one of these mandatory rules [*Digest, Pg. 97; Binder, Para. 5-018; Holtzmann/Neuhaus, Pg. 551*]. This phrasing is the preferred phrasing of the right to be heard in international arbitration [*Cairns, Pg. 186 etseq; Model Law Explanatory Note, Pg. 21*]. Thus, the parties' right to be heard is a mandatory rule of the *lex loci arbitri*.
66. In addition, the right to be heard is a mandatory requirement of procedural fairness [*Born 2012, Pg. 152; MAL Digest, Pg. 97*], which arbitrators must observe at every stage of the proceedings [*VIAC Handbook, Pg. 168; Analytical Commentary, Pg. 46*].
67. Likely, In Fuel Corporation case, the Supreme Court of Victoria stated that one amplification of the mandatory right to be heard is that each party must be given a fair hearing and a fair opportunity to present its case [*Berg, Pg.358*].
68. The Court of Appeal in Singapore emphasized that parties' opportunity to present their respective cases is a universal requirement in every arbitration and that a breach of the rules of natural justice significantly alter the final outcome of the arbitral proceedings, thereby violating the right to be heard [*SohBeng Tee case*].
69. Similarly, in the present case, RESPONDENT has the right to be heard and should be given the full opportunity of presenting its case, thus Mr. Prasad should not be a member of the tribunal, because it will harm the enforceability of the final award.



Conclusion of the first issue: the Arbitral tribunal has the power to decide RESPONDENT's challenge as to Mr. Prasad, because the arbitration Agreement empowers the tribunal to decide the challenge, since parties intent about this clause could be understood by interpreting the contract based on Art. 8 of CISG. Even if, the challenge is to be decided by an appointing authority, Mr. Prasad should be removed from the tribunal, because he would be a judge in his own case and DAL does not support the participation of Mr. Prasad.

PART TWO: THE ARBITRAL TRIBUNAL SHOULD REMOVE MR. PRASAD AS HE IS NOT IMPARTIAL AND INDEPENDENT UNDER BOTH UNCITRAL "JUSTIFIABLE DOUBTS" STANDARD AND THE IBA GUIDELINES.

70. The arbitral tribunal should remove Mr. Prasad, since there are justifiable doubts as to his impartiality or independence under UNCITRAL Arbitration rules and IBA Guidelines, moreover, sustaining a challenge of an arbitrator under Article 12 of UNCITRAL Arbitration rules, do not necessarily require proof of an arbitrator's actual lack of impartiality or independence. CLAIMANT states that the circumstances raised by RESPONDENT are not justifiable doubts under UNCITRAL Arbitration rules [Cl. Memo, Para. 48], however, contrary to the understandings of the CLAIMANT, the appearance of these deficiencies may alone suffice in certain circumstances to disqualify an arbitrator [*Caron & Caplan, Pg. 261*]. The parties are in agreement that any dispute shall be settled by arbitration in accordance with the UNCITRAL Arbitration rules [*Exh. C2, Pg. 12*], therefore, The circumstances raised by RESPONDENT are justifiable doubts under UNCITRAL Rules as to Mr. Prasad's impartiality and independence [I], and also, Mr. Prasad is not impartial and independent under IBA Guidelines [II].

I. The circumstances raised by RESPONDENT are justifiable doubts under UNCITRAL Rules as to Mr. Prasad's impartiality and independence

71. Same as, like most institutional arbitration rules, UNCITRAL arbitral rules prescribe a basic procedural framework for the arbitration this includes provision for initiating arbitration, selection and challenge of arbitrators and costs of arbitration [*MAL Digest, Pg. 58*].
72. Several circumstances could potentially justify doubts as to an arbitrator's impartiality and independence, such as; financial relationship with a party through shareholdings, previous



employment by the parent corporation of a party, representation of a third party with a right to intervene in the proceedings, statement regarding a party or the dispute, decision-making [*Caron & Caplan, Pg. 270*].

73. Therefore, the circumstance raised by RESPONDENT are justifiable doubts, because, first, Mr. Prasad's article constitutes a valid ground for his removal [A], second, repeat past appointment of Mr. Prasad create justifiable doubts sufficient to warrant removal [B], third, the involvement of FindFunds LP in other proceedings involving Mr. Prasad and his partner Mr. Slowfood compromise Mr. Prasad's independence and impartiality [C], fourth, CLAIMANT's failure to disclose the funding agreement with FindFunds affects Mr. Prasad's independence and impartiality [D].

A. Mr. Prasad's article constitutes a valid ground for his removal

74. Mr. Prasad's opinion under Art. 35 of the CISG, shows that he will favor the CLAIMANT and he will take his side.
75. The selected arbitrator is obliged to be independent and impartial, and all international rules insist that arbitrators cannot favor in any way the party that selected them, otherwise, then he should not act as an arbitrator [*Moses, Pg(s). 127, 129*].
76. In this regard, partiality means that an arbitrator seems to favor one party over another, due to an arbitrator's preconceived notion about the case [*Moses, Pg. 77; Born, Pg. 736; Redfern/Hunter, Pg. 267*].
77. In addition, contrary to the allegation of the CLAIMANT [*Cl. Memo, Para. 49*], it generally accepted that an arbitrator's public statements of his opinion concerning matters raised in the arbitration will be grounds for removal. [*Born, Pg. 748*].
78. Likely, in *Perceno Ecuador Ltd v. Republic of Ecuador*, the arbitrator was removed from the arbitral tribunal because he had expressed his opinions about the present matter in the arbitration in favor of the CLAIMANT. [*Perceno Ecuador Ltd v. Republic of Ecuador, (8 Dec 2009)*].
79. Here in the present case, Mr. Prasad has written an article about conformity of the goods, which positions him clearly against the modern tendency in the understanding of the conformity concept that made Mr. Prasad a "suitable" arbitrator in the eyes of CLAIMANT [*Exh. R5, Pg. 40 (emphasis added)*].



80. Consequently, Mr. Prasad should be removed from the tribunal, since his opinion about the present matter in this arbitral proceeding makes him partial.

B. Repeat past appointment of Mr. Prasad create justifiable doubts sufficient to warrant removal.

81. Repeat past appointment of Mr. Prasad by the same law firm or third party creates justifiable doubts and warrants his removal.

82. Contrary to the CLAIMANT's allegations [*Cl. Memo, Para. 51*], if an arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties . . . in an unrelated matter, then the arbitrator deems to be partial and dependent, so shall not continue to act as an arbitrator [*Moses, Pg. 138*].

83. Already in "ordinary cases" the IBA-Guidelines consider repeat appointments by a party/law firm to be problematic [*NofCh, Pg. 39*], because another presumptive for finding a lack of impartiality or independence is an arbitrator's prior involvement in the parties' dispute, either as corporate or other decision maker or lawyer [*Born, Pg. 745*]

84. Likely, in *ASM Shipping Ltd v. TTMI Ltd*, RESPONDENT challenged CLAIMANT's appointed arbitrator, because there were some doubts as to his impartiality or independence, since the arbitrator had been council for the party over last six months. English High Court held that the arbitrator should not continue to act in this matter and the other two arbitrators would continue. [*ASM Shipping Ltd of India v. TTMI Ltd of England*].

85. Similarly, if an arbitrator has substantial closed business relation with a party or has acted as an arbitrator in the past and has ruled in the favor of the appointing party, it constitutes lack of independence or impartiality [*Born, Pg. 744*].

86. In addition, CLAIMANT misinterpreted the case [*Cl. Memo, Para. 52*], because Mr. Prasad has acted in two case funded by FindFunds and he was earning 30%-4% from his job [*PO2, Para. 10, Pg. 51*], also Mr. Fasttrack has given advices to colleagues running those cases [*PO2, Para. 9, Pg. 51*], and in those case, Mr. Prasad rendered awards which were all in favor of the parties which had appointed him [*PO2, Para. 15, Pg. 51*].

87. Therefore, the tribunal should remove Mr. Prasad, since he has been appointed by the same law firm or third party over last three years, and he has rendered awards all in favor the parties which had appointed him.



C. The involvement of FindFunds LP in other proceedings involving Mr. Prasad and his partner Mr. Slowfood compromise Mr. Prasad's independence and impartiality.

88. Connection between Mr. Prasad, Slowfood and FindFunds LP shows Mr. Prasad's lack of impartiality or independence and is sufficient to justify removal.
89. Contrary to CLAIMANT's allegation [*Cl. Memo, Para. 53*], several situations may give rise to arbitrator's conflict of interest due to the implication of the third-party funders in arbitration proceedings, especially if the third-party funding is undisclosed [*Osmanoglu, Pg. 334*].
90. In this regard, independence generally means that the arbitrator has no financial interest in the case or its outcome. It can also mean that the arbitrator is not dependent on one of the parties for any benefit [*Moses, Pg. 135*].
91. In addition, Arbitrators should not have a close business or professional relationship with one of the parties, if an arbitrator has a serious conflict, he should not accept an appointment as arbitrator [*Moses, Pg. 136*].
92. In addition, a potential for conflicts of interests exists where the litigation funder with whom the arbitrator has established a relationship is supporting one of the parties to the arbitration, and will be relevant to assessing an arbitrator's impartiality or independence [*Goeler, Pg. 253; Born, Pg. 745*].
93. Likely, in *ASM Shipping Ltd v. TTMI Ltd*, English High court held that if an arbitrator or his law firm has any kind of direct or indirect connection with another law firm which is representing another client in a similar case, it constitutes a ground for removal [*ASM Shipping Ltd of India v. TTMI Ltd of England*].
94. In the present case, contrary to CLAIMANT's interpretation [*Cl. Memo, Para. 55*], FindFunds LP has 40% Shareholding in Funding 8 Ltd, which has funded Slowfood. And it has 60% shareholding in Funding 12 Ltd, which has funded the CLAIMANT [*PO2, Para. 2, Pg. 50*], and for its financing role, funding 12 Ltd gets 25% of all amount awarded [*PO2, Para. 1, Pg. 50*], and finally, the standard funding agreement used by FindFunds LP would allow for greater influence in the appointment of arbitrator [*PO2, Para. 4, Pg. 50*].
95. Consequently, Mr. Prasad should be removed, because there are serious issues of conflict of interest which show his partiality or dependence and warrant his removal.



D. CLAIMANT's failure to disclose the funding agreement with FindFunds affects Mr. Prasad's independence and impartiality

96. CLAIMANT's deliberately concealing of the third-party funding and trying to hide the real story creates doubts as to Mr. Prasad's impartiality or independence.
97. In this regard, a party can challenge the appointment of an arbitrator and seek his removal at the time the tribunal is constituted – or later, if new facts come to light, so the appointing party is under obligation to disclose the circumstances to the other party [*Moses, Pg. 147*].
98. In addition, CLAIMANT asserts that CLAIMANT's failure to disclose the funding agreement does not create justifiable doubts as to Mr. Prasad's impartiality and independence [*Cl. Memo, Para. 56*], but Contrary to the CLAIMANT's allegation, non-disclosure by either arbitrators or the parties which appointed them constitutes justifiable doubts as to the appointed arbitrators impartiality or independent [*Born, Pg. 725; Caron & Caplan, Pg. 270; Burcu, Pg. 325*].
99. In addition, if an arbitrator is repeatedly appointed by the same party or lawyer, this may give rise to justifiable doubts concerning his impartiality or independence. The IBA Guidelines require disclosure of repeat appointment of an arbitrator by the same party, if they are sufficiently frequent and provided for the possibility of challenges in these circumstances [*Born, Pg. 745*].
100. When a funding-related relationship is revealed in the course of the arbitral proceedings, a party can challenge the appointed arbitrator and argue that the arbitrator is now conflicted [*Goeler, 276*].
101. In the present case, CLAIMANT did not fulfill its disclosure obligation and tried to hide the funding, because he knew that it would affect Mr. Prasad's impartiality or independence, because Mr. Prasad had past connection with FindFunds LP and had ruled in its favor.
102. As a result, from the above illustration and legal sanctions it could be clearly assumed that a reasonable person would understand Mr. Prasad's partiality or dependence and these situations definitely warrant Mr. Prasad's removal.

II. Mr. Prasad is not impartial and independent under IBA Guidelines.

103. CLAIMANT states that IBA Guidelines do not apply to the present case, and the circumstances raised by RESPONDENT are not justifiable doubts under IBA Guidelines [*Cl. Memo, Para. 58*], Contrary to CLAIMANT's allegations, IBA Guidelines apply to the present case [**A**], and also,



the circumstances raised by RESPONDENT justify the removal of Mr. Prasad under IBA Guidelines [B].

A. IBA Guidelines apply to the present case

104. CLAIMANT states that the IBA Guidelines do not apply to the present case [*Cl. Memo, Para. 59*], Contrary to CLAIMANT's allegation, the IBA Guidelines are applicable to the present case, because they have been applied by Arbitral Tribunals in various jurisdictions, even when the parties have not agreed upon their application [*Methanex case, Waste Management case*].
105. The International Bar Association (IBA) appointed a Working Group that has created the IBA Guidelines on Conflict of Interest in International Arbitration which are applicable not only in institutional arbitrations but also in Ad hoc arbitrations [*Moses, Pg. 136*].
106. In addition, the IBA Guidelines reflect procedures from a plethora of legal systems, merging different procedural traditions into generally accepted norms to overcome the gap between different legal backgrounds [*Fouchard/Gaillard/Goldman, Para. 352; Kaufmann-Kohler, Soft Law, Pg. 289; Tawil/Gill, Foreword IBA Rules*].
107. Similarly, a detailed 2015 survey of international arbitration practice shows that IBA Guidelines have been used in 60% of arbitrations and 77% of the participants have seen it used in practice [*QM/WC, Pg (s). 35-36*].
108. Furthermore, IBA Guidelines has its significance since it could influence both the arbitral tribunal's disposition of challenge issues and the parties' approach. In this regard, international arbitral tribunals generally refer to the IBA as "guidelines" or "principles" [*Born, Pg. 978*].
109. In the case at hand, since Danubian Arbitration Law is an adoption of Model Law, IBA Guidelines shall also act as an annex and shall be applied. [*Redfern/Hunter, 2009, para 5.08, Pg 315*], likely, the tribunals often refer to IBA Guidelines [*PO2, Para. 18, Pg. 51*]. Therefore, IBA Guidelines are applicable to the present case.

B. The circumstances raised by RESPONDENT justify the removal of Mr. Prasad under IBA Guidelines.

110. As discussed above, the circumstances raised by RESPONDENT fulfill the requirements under IBA Guidelines and warrant removal of Mr. Prasad.



111. First, contrary to the understanding of the CLAIMANT [*Cl. Memo, Para. 71*], if the arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties, it falls under the Waivable Red list [*IBAG, Standard, 2.3.6*].
112. In addition, arbitrators should not have a close business or professional relationship with one of the parties, if an arbitrator has a serious conflict, he should not accept an appointment as arbitrator [*Moses, Pg. 136*].
113. Second, contrary to what CLAIMANT asserted [*Cl. Memo, Para. 67*], under standard 3.1.3, if an arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties, it constitutes conflict of interest [*IBAG, Pg. 22*].
114. Likely, according to the IBA Guidelines standard 2.1.2, if the arbitrator has previous involvement in the case in comes under Waivable Red List and the arbitrator is required to decline the appointment [*Moses, Pg. 138; Born, Pg. 745*].
115. Moreover, under IBA Guidelines, doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances would reach the conclusion that the arbitrator might make a decision based on factors other than the merits of the case [*Moses, Pg. 137*].
116. In the present case, the factors invoked by RESPONDENT are justifiable doubts, and a reasonable person having knowledge of the facts and circumstances would reach the conclusion as to Mr. Prasad's partiality or dependence.
117. Consequently, from the above illustration and commentaries, it could be assumed that Mr. Prasad should be removed from the tribunal, since he is not impartial or independence under UNCITRAL Arbitration rules "justifiable doubts" Standards and IBA Guidelines.

Conclusion of the second issue: the Tribunal should remove Mr. Prasad, since he is not impartial or independence under UNCITRAL Arbitration rules and IBA Guidelines, because, Mr. Prasad's article constitutes a ground for removal, repeat past appointment of Mr. Prasad create justifiable doubts sufficient to warrant removal, and also, the involvement of FindFunds LP in other proceedings involving Mr. Prasad and his partner Mr. Slowfood compromise Mr. Prasad's independence and impartiality.



PART THREE: RESPONDENT'S STANDARD CONDITIONS GOVERN THE CONTRACT

118. CLAIMANT states that its general conditions govern the contract [*Cl. Memo, Para. 82*], contrary to the CLAIMANT's assertions, RESPONDENT submits that RESPONDENT's general conditions govern the contract, because, first, RESPONDENT's offer was a genuine offer [I], second, RESPONDENT's intent could be understood by interpreting the contract based Art. 8 of CISG [II], third, even if, CLAIMANT's tender documents were counter offer, they have not materially changed the original offer [III], and alternatively, contradictions in terms do not prevent the existence of the sales contract [IV].

I. RESPONDENT's offer was a genuine offer

119. RESPONDENT's offer fulfills the requirements under Art. 14 of CISG, this Art talks about offer and acceptance concerning the necessary content, timing and revocation of the offers. [*Dimatteo, Pg. 14*]
120. Article 14(1) of the CISG starts: "A proposal for concluding a contract . . . constitutes an offer" [*Felemegas, Pg. 76*]. And valid offer is an offer to one or more specific persons, to be sufficiently definite and indicate the offeror's intention to be bound in case of acceptance [*Dimatteo, Pg. 14; Butler, Pg. 3*].
121. In this regard, CLAIMANT states that The invitation to offer was advertised widely, prompting six responses similar to CLAIMANT [*Cl. Memo, Para. 85*], contrary to CLAIMANT's assertion, the offer was sent in the relevant industry and sent to five of the businesses RESPONDENT had met at Cucina including CLAIMANT, it means the persons were specific [*St. Cl. Para. 7, Pg. 25*].
122. In addition, Art. 14(1) provides two crucial requirements for an offer to be sufficiently definite: that the proposal indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price of the goods [*Huber/Mulis, Pg. 71; Butler, Pg. 5*].
123. Identification of the goods, quantity and price are the essential elements that determine whether the offer fulfills the sufficiently definite requirement, on the other hand, an offer does not fail, if these terms are not expressly fixed, Art 14 (1) allows such terms to be implicitly fixed [*Dimatteo, Pg. 14*].



124. Moreover, in CISG-Online No. 189, it was held that a proposal to purchase three ‘truck loads’ of eggs was sufficiently definite. While the precise quantity was not expressly stated, a person in the position of the seller could only reasonably have understood that the proposal referred to full trucks. [(German) Landgericht Oldenburg 28 February 1996, CISG-Online No. 189].
125. CLAIMANT states that no definite price term was listed, only a maximum the RESPONDENT was willing to pay [Cl. Memo, Para. 87], however, from practical point of view, in the absence of an express or implicit determination of the price, a contract can be validly concluded, [Ferrari/Flechtner/Brand, Pg. 277] and Commercial letter of conformation “letter of acknowledgement” indicates acceptance [Dimatteo, Pg. 18 (emphasize added)].
126. In the present case, RESPONDENT’s offer has fulfilled all the requirements under Art. 14 of CISG, first, it indicates the goods, quantity, quality payment condition, choice of law and disputes resolution, second, RESPONDENT clearly stated that supplier must comply with all applicable laws and regulations, the requirements set out in Comestibles Finos’ Code of Conduct and similar standards, and fixed the time for tender submission so that it could award them the contract [Exh. C2, Pg. 12 (emphasize added)].
127. Consequently, RESPONDENT standard conditions should govern the contract, since RESPONDENT’s offer was a genuine offer and has fulfilled all the requirements under Art. 14 of CISG.

II. RESPONDENT’s intent could be understood by interpreting the contract based Art. 8 of CISG

128. RESPONDENT’s intent can be interpreted based on Art. 8 of CISG, because, reference to Art 8’s methodology for interpreting intent is a vital component in determining whether a term is sufficiently definite under Art 14 [Dimatteo, Pg. 15]. Whether the offeror “RESPONDENT” had an intention to be bound has to be discovered by interpreting his declaration in accordance with Article 8 CISG, whereby Articles 8(2) and 8(3) CISG play an important role determining the objective meaning of the statement made. [Scheletreim/Butler, Pg. 70], therefore, RESPONDENT’s conduct should be interpreted according to his intent under Art. 8.1 of CISG [A], and statements made by RESPONDENT are to be interpreted according to the understanding of a reasonable person under Art. 8.2 of CISG [B], and also negotiations are to be taken into account while interpreting the contract, under Art. 8.3 of CISG [C]



A. RESPONDENT's conduct should be interpreted according to his intent under Art. 8.1 of CISG

129. RESPONDENT's statements should be interpreted according to its intent under Article 8.1 of CISG.
130. In this regard, Article 8.1 of CISG states: "For the purpose 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 of what that intent was".
131. In this sense, the intent of the parties should prevail over an incorrect statement or manner of expression with the intention of covering the true nature of the contract - used by the Parties [*Born*, Pg. 158; *Van Den Berg*, pgs. 618-619; *Redfern/Hunter*, Pg. 186; *Mistelis*, Pg. 674; *Marnellcorrao v. Sensation Yachts*; *University of Brighton v. Dovehouse Ltd*; *HKL Ltd v. Rizq International Ltd*].
132. In addition, intentions of the parties which have legal relevance are formative, the subjective intention of the parties needs to be known to the other party [*Scheletriem/Butler*, Pg. 55], the actual intent can be interpreted on the basis of the parties' interests and purpose of the contract [*CISG digest*, Pg.75].
133. In *Magnesium case*, tribunal has awarded that the statements made by a party are to be interpreted according to his intend [*Magnesium case*].
134. Likely, RESPONDENT wanted to become Global Compact Lead Company by 2018, required not only the CLAIMANT but also its suppliers to adhere to Comestibles Finos' Code of Conduct for Suppliers [*Exh. C1*, Pg. 8].
135. An offer becomes effective when it reaches the offeree, Art 24 interprets "reaches" mean that the offer has been communicated orally or has been delivered to the offeree's place of business [*Dimatteo*, Pg. 14(emphasize added)].
136. In the present case, CLAIMANT shared the same understandings by signing the letter of acknowledgement, and clearly stated that "We have read the Invitation to Tender and will tender in accordance with the specified requirements" [*Exh. R1*, Pg. 28 (emphasize added)]. RESPONDENT's code of conduct and general condition were provided in the documents which were accepted by CLAIMANT [*Exh. C2*, Pg. 12].
137. Consequently, RESPONDENT's standard conditions should govern the contract, since CLAIMANT has had the same understandings as RESPONDENT under Art. 8.1 of CISG.



B. Statements made by RESPONDENT are to be interpreted according to the understanding of a reasonable person under Art. 8.2 of CISG

138. Considering the virtue of Article 8.2 of the CISG, If the intend of a party is neither known nor recognizable to the other party, then the understanding of a reasonable person is the controlling standard [*Schlechtriem, Art. 8.2 CISG*].
139. In this regard, Article 8.2 of CISG states as, “..., *statements made by and other conduct of a party are to be interpreted according to the understanding...a reasonable person... would have had in the same circumstances*” [Art. 8.2, CISG].
140. Moreover, Art. 8 (2) of the CISG maintain that an offer is capable of acceptance if “a reasonable person of the same kind” and “in the same circumstances” as the recipient would understand it as an offer. [*Schlechtriem/Schwenzer, Pg. 273*].
141. In building material case, it is held that Article 8.2 of the CISG refers to the understandings of a reasonable person would have had as receipt of the statement, and the buyer’s intent should be bound to contract regarding to understanding of a reasonable person [*Building materials case; CISG Digest, Pg.56*].
142. In the present case, CLAIMANT had attached a full set of the Tender Documents where some of the blanks in the Special Conditions of Contract, were left open, but without any modifications to the Tender Documents [*PO2, Para. 27, Pg. 52*], thus a reasonable person in CLAIMANT’s position could assume that RESPONDENT’s offer was a genuine offer and his intention should be bound to the contract.

C. Negotiations are to be taken into account while interpreting the contract, under Art. 8.3 of CISG

143. Negotiations and usages play an important role in interpretation process under Art. 8.3 of CISG
144. In this regard, Art. 8.3 of CISG states: “*In determining the intent of a party or the understanding a reasonable person...due consideration is to be given to all relevant circumstances of the case including the negotiations... and any subsequent conduct of the parties*”[Art. 8.3, CISG].
145. CLAIMANT made some minor amendments to the documents and related primarily to the goods and mode of payment, but without any modification to the documents [*Exh. C3, Pg. 15*].
146. In addition, Art. 8.3 give a non-exclusive list of circumstances that are to be taken into consideration in the interpretation process of the contract. These include negotiations, practices, usages and subsequent conduct of the parties [*Schlechtriem, Pg.39*].



147. In the present case, RESPONDENT accepted the changes which were only related to the form of cake and mode of payment for two reasons, first cake offered was from CLAIMANT's premium product line, and second, CLAIMANT's commitment to ethical production [*Ans. St. Cl. Para. 11, Pg. 25*], and there were no further discussions regard to the general conditions [*PO2, Para. 26, Pg. 52*], which CLAIMANT knew RESPONDENT's intent and had accepted RESPONDENT's standard conditions to govern the contract.
148. Consequently, RESPONDENT's standard conditions govern the contract, because RESPONDENT's offer was a genuine offer taking into account the relevant circumstances and negotiations between the parties.

III. Even if, CLAIMANT's tender documents were counter offer, they have not materially changed the original offer.

149. Under Art. 19 (1); a reply to an offer that contains additions, limitations or other modifications is a rejection of the original offer and constitutes a counter-offer [*Dimatteo, Pg. 18*]
150. In addition, if the acceptance contains modifications which do not alter the conditions of the offer significantly, the conclusion of the contract is made easier according to Article 19(2) CISG. [*Scheletreim/Butler, Pg. 80*].
151. Contrary to CLAIMANT's assertion [*Cl. Memo, Para. 88*], CLAIMANT's reply did not meet the requirements under Art. 19 (3) to materially alter the original offer, since it had only description of the goods and payment terms, and other terms were as per RESPONDENT's tender document [*Exh. C4, Pg. 16*].
152. Furthermore, Art. 19 (3) sets a broad materially standard which are price, payment, quality and quantity of the goods, place and time of delivery, extent of one party to another and settlement of disputes", as terms that would materially altar the offer [*Dimatteo, Pg. 19*].
153. In this regard, CLAIMANT made some minor amendments to the documents and the changes primarily related to the cake and mode of payment, but without any modification to the documents [*Exh. C3, Pg. 15*].
154. Moreover, the additional terms do not materially altar the original offer, unless they are clearly indicated and the receiving party does not object their inclusion. Minor differences do not defeat a valid contract and do not alter an original offer [*Dimatteo, Pg. 20*].
155. However, the Supreme Court of Austria held that change in quantity of the goods is neither materially modification nor materially alteration [Austria 20 Mar, 1997], it has been held that a



modification of an offer concerning the quantity of the goods which was exclusively favorable to the offeror was a non-material alteration [*Huber/Mulis, Pg. 90*].

156. In the present case, CLAIMANT states that RESPONDENT accepted the offer [*Cl. Memo, Para. 91*], contrary to CLAIMANT's assertion, RESPONDENT accepted CLAIMANT's changes which related to the shape of cake and mode of payment stating that "*The different payment terms and form of the cake are acceptable to us*" [*Exh. C5, Pg. 17 (emphasize added)*], because there were all favorable for RESPONDENT, thus CLAIMANT's changes have not materially altered the original offer.

IV. Alternatively, contradictions in terms do not prevent the existence of the sales contract.

157. Contradictions in terms do not prevent the contract from being made.
158. Although the Convention does not have special rules dealing with the use of standard terms, the question has to be answered affirmatively, since the Convention governs the formation of contracts, thus it should be resolved in conformity with the general principles of the Convention [*Ferrari/Flechtner/Brand, Pg. 256; Soterios Loizou, Pg. 4*]
159. In addition, the best solution for the problem could be the fact that some courts apply the CISG to solve the problem by taking into account the language used during the negotiations that led to the conclusion of the contract. [*Ferrari/Flechtner/Brand, Pg. 266*]
160. Moreover, the federal supreme court of Germany confirmed the knock out rule approach to cases where the parties have agreed on essential terms of the contract for the sale and have performed. In that case, a dispute arose when customers of a buyer that the powder milk delivered by the seller had a sour taste, the court found that the contradiction in terms did not prevent the existence of the sales contract. [*BGH VIII ZR 304/00, Jan 9, 2002, (FRG)*].
161. Here, the contract should be interpreted in conformity with the general principles of the convention, i.e. the principle of good faith and uniformity which require fair solution for the problem.

Conclusion of the third issue: RESPONDENT's standard conditions govern the contract, because RESPONDENT's offer was a genuine offer, and, even if, the CLAIMANT's tender documents were counter offer, they have not materially altered the original offer.



PART FOUR: CLAIMANT HAS DELIVERED NON-CONFORMING GOODS UNDER ART. 35 OF THE CISG AND IS NOT ENTITLED TO CLAIM ANY ADDITIONAL AMOUNT FROM RESPONDENT.

162. CLAIMANT states that the cakes were in conformity with the contract under Art. 35 of the CISG, and CLAIMANT has taken best efforts in procuring ethically sourced cocoa beans [Cl. Memo, Para. 113], but contrary to the allegation of the CLAIMANT, RESPONDENT submits that CLAIMANT has not fulfilled its contractual obligations, because the cakes delivered by CLAIMANT do not confirm with contractual standards under Art. 35 of CISG [I], and CLAIMANT has not fulfilled its contractual obligations under the contract [II], and also, CLAIMANT cannot claim any additional amount under Art. 53 of the CISG [III].

I. The cakes delivered by CLAIMANT do not confirm with contractual standards under Art. 35 of CISG.

163. CLAIMANT states that the cakes conformed to the physical characteristics required by the contract [Cl. Memo, Para. 116], contrary to CLAIMANT's allegations, RESPONDENT submits that The cakes were not produced for the required purpose under the contract [A], also the cakes were produced and delivered in a manner that violates the contract [B].

A. The cakes were not produced for the required purpose under the contract

164. The CLAIMANT is obliged to deliver the goods that are of quality, quantity, description, and packaging required by the contract under Art. 35 of the CISG [DiMatteo, Pg. 216].

165. In addition, Art. 35 (2) b addresses the sale of goods in which the seller is of the particular purpose for which the buyer will use the goods and the buyer relying upon the seller to use the skill and judgment to provide the goods. In fact, it creates an implied warranty for a particular purpose [Dimatteo, Pg. 3; Honnold, Pg. 254].

166. Furthermore, the implied warranty for particular purpose has been the subject of several courts [BGH VIII ZR 121/98, March 24, 1999, supra note 95].

167. CLAIMANT knew that RESPONDENT intended to become a Global Compact LEAD Company by 2018, and contracted CLAIMANT for its proper supply chain management, thus CLAIMANT was required to deliver goods that could keep RESPONDENT's reputation in the market [Exh. C2, Pg. 8].



168. Likely, the goods must be fit for the purposes for which goods of the same description would ordinarily be used” (Article 35(2) (a)); the goods should be fit for particular purposes “expressly or impliedly made known to the seller at the time of the conclusion of the contract [*Flechtner, Pg. 5*]
169. Moreover, Art. 35(2) (a) of CISG states that the goods shall be “fit for purpose” required by the contract. The notions of merchantability and “fit for purpose” concern not only the goods’ practical and physical use, but also include emotional characteristics [*Ramberg, Pg. 17*].
170. Courts and tribunals have described the standard as being one of ‘average quality’, and ‘reasonable quality’. First and foremost, goods must be able to be resold. [*Shoes case, Rijn Blend case*].
171. Similarly, in *Chilling press case*, it is held that the seller shall take back the goods, since the goods are not in conformity with the contract, and are not produced for the required purpose [*Chilling press case*].
172. In the present case, CLAIMANT itself has accepted that the cocoa beans used for the production of chocolate cake have not been produced in accordance with the contractually required principles, so RESPONDENT did not sell the remaining cakes [*PO2, Para. 38, Pg. 54*]
173. Therefore, the cakes were not conforming to the contract, because they were not produced for the required purpose.

B. The cakes were produced and delivered in a manner that violates the contract.

174. The cakes delivered by CLAIMANT to the RESPONDENT do not comply with contractual and ethical standard.
175. This is a particular concern with respect to Article 35(2)(a), which describes one of the most substantively significant concepts of the Convention – the basic standard of quality that a buyer is entitled to expect [*Flechtner, Pg. 5*].
176. In addition, placing the goods “at the buyer’s disposal” and “packaged in a manner required by the contract” means that the seller’s duty under Article 31(b) is to take all steps necessary under the contract to affect delivery. [*Ferrari/Flechtner/Brand, Pg. 372*]
177. Furthermore, A seller is responsible for ensuring that goods are fit for a purpose other than their ordinary purpose, the buyer must also have relied on the seller’s skill and judgment as to the fitness of the goods for that purpose [*Wilson, Pg. 34*]



178. Likely, the conformity of the goods with the contract is not determined objectively but depends first and foremost on the “subjective” description of the goods in the contract. The same applies in regard to packaging [*Schlechtriem & Butler, Pg. 162*].
179. Where the seller has held out goods to the buyer “as a sample or model” he has created an understanding that the goods would conform to the sample. Thus, paragraph Art. 35 (2) (c) even more clearly articulates contractual understandings that are given effect by paragraph (1). [*Honnold, Pg. 258*].
180. Likely, a decisive element for RESPONDENT’s decision was CLAIMANT’s commitment to sustainable production [*Exh. C5, Pg. 17*], that is the only reason, RESPONDENT awarded the CLAIMANT the contract, but CLAIMANT failed to perform its contractual obligation and the Cocoa beans were not produced under contractual principles [*Exh. C9, Pg. 21; PO2, Para. 41, Pg. 54*], thus the chocolate cakes delivered to RESPONDENT were not in conformity with the contract.

II. CLAIMANT has not fulfilled its contractual obligations under the contract.

181. CLAIMANT states that it was under the duty of “best effort” [*Cl. Memo, Para. 119*], contrary to CLAIMANT’s assertion, CLAIMANT has not fulfilled its contractual obligations for “best result” [A], and also, CLAIMANT did not exercise its best efforts to procure sustainable Cocoa beans [B], because it is equally important to consider that it is the obligation of the seller to deliver “goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. [*Felemegas, Pg. 77*].

A. CLAIMANT has not fulfilled its contractual obligations for “best result”

182. CLAIMANT was under duty to carry out its obligations for “best result” and the cakes should be produced in line with the requirement of the contract.
183. In addition, supply chains often run through several countries, but seller should have knowledge and control over the lower levels of the chain, and make sure that its suppliers also comply with Global Principles [*Wilson, Pg. 42*]
184. Contrary to the CLAIMANT’s assertion [*Cl. Memo, Para. 128*], CLAIMANT has not exercised its best efforts, because CLAIMANT did not have control over its suppliers, since wrong certificates of origin were issued for cocoa farms so that the beans could be sold as “sustainably



grown” [Exh. C7, Pg. 19], but CLAIMANT even did not know about it, because when RESPONDENT informed CLAIMANT about deforestation [Exh. C6, Pg. 18], then CLAIMANT promised to investigate this issue [Exh. C8, Pg. 20].

185. Likely, it is common place nowadays for corporations to take precautions to ensure that their contractual partners and suppliers adhere to the required ethical standards. [Schwenzer/Leisinger, Pg. 266].
186. Under Art. 7.1.1. Of the UNIDROIT Principles, non-performance is defined as a failure by a party to perform any of its obligations under the contract, including defective performance [Felemegas, Pg. 168].
187. Where the subject matter of the contract was agreed by reference to a sample or model, there will be a breach of Art. 35(2) lit. (c) CISG where the goods delivered do not possess the qualities that was present in that sample or model [Huber/Mulis, Pg. 140]
188. In the present case, CLAIMANT failed to fulfill its obligations to produce and deliver the cakes in line with the requirements contracted [Exh. C9, Pg. 21], thus the chocolate cakes are not in conformity with the contract.

B. CLAIMANT did not exercise its best efforts to procure sustainable Cocoa beans.

189. As discussed above, CLAIMANT failed to perform its obligations, thus the goods were not in conformity with the contract.
190. In this regard, Principle Ten of Global Compact Principles states that businesses should work against corruption in all its forms, including extortion and bribery. [Schwenzer/Leisinger, Pg. 259].
191. CLAIMANT’s general conditions also put an obligation on CLAIMANT to comply with ethical and environmental standard, it states, “we expect our suppliers to conduct business activities ... ethical standards Environmentalnot engages in any form of corruption including bribery [Exh. R3, Pg. 31 (emphasis added)].
192. Furthermore, The first way to incorporate ethical standards into sales contracts is to stipulate that the seller has to abide by specific standards concerning human rights, labor conditions or the environment, so that such norms become part of the contract [Schwenzer/Leisinger, Pg. 264]
193. According to Article 35(1) of the Convention, the seller must deliver goods that are of the quantity, quality, and description required by the contract and that are produced and packaged in



the manner required by the contract. This provision is the primary rule on the assessment of the conformity of goods, and it covers all kinds of defects [*Felemegas, Pg. 168; Huber/Mulis, Pg. 131*].

194. Moreover, the last ten years have brought many interesting decisions, surveyed in the updated UNCITRAL Digest; decisions applying Article 35(1) have held that a “lack of conformity” under that provision exists where goods are accompanied by false documents relating to their origin [*DiMatteo, Pg. 216*].
195. Here, from the above illustration and commentaries, it could be assumed that the goods delivered to RESPONDENT are not conforming with the contract, since CLAIMANT has failed to fulfill its contractual obligations.

III. CLAIMANT cannot claim any additional amount under Art. 53 of the CISG.

196. CLAIMANT cannot claim the additional amount by virtue of Art. 53 of the CISG. CLAIMANT claims that Art. 53 of CISG entitles it to the additional amount from RESPONDENT [*St. Cl. Para. 15, Pg. 6*], but contrary to CLAIMANT’s allegations, this Article Applies in the absence of a contractual agreement between the parties [*Gabriel, Pg. 273*].
197. Article 53 of CISG has raised no particular difficulties for tribunals, because in application of this Article, priority is given to the parties’ agreement, same as, Article 53 of CISG describes the general obligations of the buyer which are taking delivery and paying the contract price [*UNCITRAL digest on CISG, Pg.252*].
198. Article 53 describes the general responsibilities of the buyer in an international sales transaction, which are paying the contract price and taking delivery as fixed in the contract or this convention [*Gabriel, Pg. 273*].
199. In this regard Article 53 of CISG states as; “The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention” [*Art. 53, CISG*].
200. Same as, Under Article 53 of the Convention, these obligations primarily include taking delivery of the goods and paying the purchase price since the specifications of these obligations are dealt with in other Articles [*Gabriel, Pg. 273*].
201. In the present case, CLAIMANT cannot claim the addition amount by virtue of Art. 53 of CISG, since it has breached its contractual obligations towards RESPONDENT by delivering non conforming goods [*Exh. C9, Pg. 21*].



202. Consequently, CLAIMANT is not entitled to claim the additional amount, since it itself has accepted that the cocoa beans used for the production of chocolate cake have not been produced in accordance with the contractually required principles.

Conclusion of the fourth issue: CLAIMANT has delivered non-conforming goods under Art. 35 of CISG, because the goods were not produced for the required purpose and CLAIMANT failed to fulfill its contractual obligations for the best result, thus CLAIMANT is not entitled to any additional amount under Art. 53 of CISG.



REQUEST FOR RELIEF

In response to the Tribunal's Procedural Orders, Counsel makes the above submissions on behalf of RESPONDENT. For the reasons stated in this memorandum, Counsel respectfully requests the Arbitral Tribunal to reject CLAIMANT's Claims and grant RESPONDENT the following relief;

- a) The arbitral tribunal has the authority to decide RESPONDENT's challenge as to Mr. Prasad without his participation in the tribunal.
- b) Mr. Prasad should be removed from the tribunal, since he is not impartial or independence.
- c) RESPONDENT's standard conditions govern the contract.
- d) CLAIMANT has delivered non-conforming goods under Art. 35 of CISG.