FIFTEENTH ANNUAL WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MARCH 24TH–29TH 2018

MEMORANDUM FOR RESPONDENT

SRI LANKA LAW COLLEGE

COLOMBO, SRI LANKA

AGAINST:

DELICATESY WHOLE FOODS SP.
39 MARIE-ANTOINE CARÊME AVENUE
OCEANSIDE
EQUATORIANA

CLAIMANT

ON BEHALF OF:

COMESTIBLES FINOS LTD.
75 MARTHA STEWART DRIVE
CAPITAL CITY
MEDITERRANEO

RESPONDENT

SHAMILKA KARUNANAYAKE **SULAIMAN** RAMEEZ **DILANI** JAYATILAKE

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&	And
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Art.	Article
CE	CLAIMANT's Exhibit
CLAIMANT	Delicatesy Whole Foods Sp
Contract	Contract between Delicatesy Whole Foods Sp and Comestibles Finos Ltd
CISG	The United Nations Convention on Contracts for the International Sale of Goods
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ICA	International Court of Arbitration
Ltd	Limited
Mr.	Mister
Ms.	Miss
NOA	Notice of Arbitration
Para	Paragraph
PCA	Permanent Court of Arbitration
Pg	Page
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
RE	RESPONDENT's Exhibit

Rec.	Record
Res. NOA	Response to Notice of Arbitration
RESPONDENT	Comestibles Finos Ltd
UNCITRAL	United Nations Commission on International Trade Law
Q	Question
Tribunal	Panel consisting of Professor Caroline Rizzo, Mr. Prasad Rodrigo and Ms. Hertha Reitbauer
UNCITRAL	United Nations Commission on International Trade Law
UNGC	United Nations Global Compact
UNCITRAL Rules	Arbitration Rules of United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US	United States of America
V	Versus

STATEMENT OF FACTS

CLAIMANT	1. Delicatesy Whole Foods Sp (hereinafter "CLAIMANT"), is a medium sized manufacturer of fine bakery products registered in Equatoriana.
RESPONDENT	2. Comestibles Finos Ltd (hereinafter "RESPONDENT") is a gourmet supermarket chain in Mediterraneo.
03 Mar 2014	3. The CLAIMANT was approached by the RESPONDENT at the Danubian food fair, Cucina, by the RESPONDENT's head of purchasing, Annabelle Ming where product choices and delivery quantities were discussed.
10 Mar 2014	4. Shortly after the food fair CLAIMANT received an Invitation to Tender for the delivery of chocolate cakes. 5. The tender documents were also sent along with the Invitation to Tender which included the RESPONDENT's Special Conditions of contract, General Conditions of contract, General business philosophy and the Code of conduct.
27 Mar 2014	6. The CLAIMANT submitted its offer, which referred to its General Conditions of sale, including its Code of conduct. The offer was for 20,000 chocolate cakes per day (Queen's Delight) at the rate of 2 USD per cake.
07 Apr 2014	7. The RESPONDENT accepted the CLAIMANT's offer.
01 May 2014	8. In accordance with the contract, the CLAIMANT made its first delivery and there was no issue pertaining to deliveries made from 2014 - 2016.
27 Jan 2017	9. The RESPONDENT sent an email to the CLAIMANT based on the findings of a report published in Michelgault, which required the CLAIMANT to investigate the supply of Cocoa and whether it adhered to the Global Compact principles of sustainability. The RESPONDENT also mentioned that they would refrain from taking any further delivery or making further payments.
10 Feb 2017	10. The CLAIMANT informed the RESPONDENT about the CLAIMANT's Cocoa Supplier, Ruritania Peoples Cocoa mbH, being implicated in the scandal. The CLAIMANT was willing to extend an offer of price reduction.

12 Feb 2017	11. The RESPONDENT refused the offer and purportedly terminated the contract.
30 Jun 2017	12. The CLAIMANT sent the Notice of Arbitration stipulating the merits of their case and appointed Mr. Rodrigo Prasad as their arbitrator. Mr. Prasad's Declaration of Impartiality and Independence and Availability was enclosed with the Notice of Arbitration.
31 Jul 2017	13. The RESPONDENT filed a Response to the Notice of Arbitration, which rejected all allegations made by the CLAIMANT and accepted the appointment of Mr. Rodrigo Prasad as the CLAIMANT's Arbitrator, whilst nominating Ms. Hertha Reitbauer as the RESPONDENT's Arbitrator.
22 Aug 2017	14. The Presiding Arbitrator - Caroline Rizzo, consented to his appointment and asked the parties to join a case management conference to discuss matters of the arbitral proceedings.
29 Aug 2017	15. Mr. Langweiler, counsel for RESPONDENT sent an email to the CLAIMANT's counsel and the Arbitral Tribunal stating that reliable information has been received that the CLAIMANT is financed by a third party funder and requested the CLAIMANT to disclose the name and relevant documentation of the said funder.
07 Sep 2017	16. Mr. Fasttrack, counsel for the CLAIMANT declared that its claim is funded by Funding 12 Ltd whose main shareholder is Findfunds LP.
11 Sep 2017	17. Mr. Prasad declared that he had acted as arbitrator in two cases, which were funded by other subsidiaries of Findfunds LP, and that none of the entities, persons or law firms of the present arbitration were involved in the two cases and that the said cases were relating to completely different fields of law.
14 Sep 2017	18. The RESPONDENT filed the Notice of Challenge against Mr. Prasad's appointment.

SUMMARY OF ARGUMENTS

ISSUE 1:- The RESPONDENT submits that the Arbitral Tribunal must decide on the challenge of Mr. Prasad, as the challenge against Mr. Prasad is within time. Party autonomy and the agreement on confidentiality, bars an Appointing Authority deciding on the challenge. Further, the challenge must be decided without the participation of Mr. Prasad as Mr. Prasad cannot rule on his own challenge and the impartiality of the Arbitral Tribunal remains unaffected as Ms. Ducasse will maintain the Tribunal's composition and integrity.

ISSUE 2:- The RESPONDENT asserts that Mr. Prasad's independence and impartiality have justifiable doubts and must be removed from the tribunal, as the applicable laws, both the UNCITRAL Model Law and the IBA Guidelines, require the removal of Mr. Prasad. The existing connections of Mr. Prasad must be considered justifiable doubts as Findfunds LP's influence over Mr. Prasad establishes justifiable doubts. In addition Mr. Prasad's financial dependence on his repeat appointments compromises his impartiality and Mr. Prasad's published article on conformity under the CISG, confirms justifiable doubts.

ISSUE 3:- The RESPONDENT submits that its Standard Conditions govern the contract between the parties. The RESPONDENT's Standard conditions are applicable to the contract as it was incorporated in the Invitation to Tender and were accepted by the CLAIMANT. Further, the RESPONDENT's Standard Conditions are applicable according to the Last Shot Rule. The RESPONDENT further submits that the CLAIMANT's Standard Conditions are not applicable as the CLAIMANT had no intention to apply its Standard Conditions to the contract and as the text of the CLAIMANT's Standard Conditions were not transmitted to the RESPONDENT. The RESPONDENT also asserts that the invalidity of both party's Standard Conditions is unarguable.

ISSUE 4:- The RESPONDENT asserts that the CLAIMANT did not deliver conforming goods in accordance with Art. 35 of the CISG and the RESPONDENT's ethical standards. Further, the CLAIMANT was required to achieve specific results. The CLAIMANT was required to achieve specific results in ethical compliance as achieving specific results in the ethical sourcing of ingredients for the chocolate cakes was a contractual obligation. In addition, the negotiation process indicates an obligation of specific results. Further, the chocolate cakes were not fit

for ordinary purpose under Art. 35 (1) of the CISG. Further, the CLAIMANT delivered Chocolate Cakes that were not fit for the particular purpose under Art. 35 (2) of the CISG. The CLAIMANT had a duty to deliver conforming goods irrespective of its fault in the breach of the obligation.

ISSUE 01: THE ARBITRAL TRIBUNAL MUST DECIDE ON THE CHALLENGE OF MR. PRASAD AND THE CHALLENGE MUST BE DECIDED WITHOUT THE PARTICIPATION OF MR. PRASAD

1. The UNCITRAL Model Law, which is the lex arbitri, gives power to the Arbitral Tribunal to decide on the challenge of Mr. Prasad. The RESPONDENT submits that the challenge against Mr. Prasad is within time **(1)**, the Arbitral Tribunal must decide on the challenge **(2)** and that the challenge must be decided without the participation of Mr. Prasad **(3).**

(1) THE CHALLENGE AGAINST MR. PRASAD IS WITHIN TIME

2. The challenge of Mr. Prasad is based on three grounds that gives rise to justifiable doubts regarding his impartiality and independence; First, the connections of Mr. Prasad with Findfunds LP ***[Cl. Memo, Pg. 12]***, Second, the repeat appointments of Mr. Prasad ***[Cl. Memo, Pg. 19]*** and Third, Mr. Prasad's article on conformity under the CISG ***[Cl. Memo, Pg. 20]***. The 15-day time limit to challenge an arbitrator will be triggered in two circumstances. An arbitrator can be challenged after becoming aware of the constitution of the Arbitral Tribunal, if he does not possess qualifications agreed to by the parties or after becoming aware of any circumstances that give rise to justifiable doubts as to his impartiality or independence ***[Art. 12 (2) Model law]***. As such the RESPONDENT submits that the challenge against Mr. Prasad based on his connections with Findfunds LP is within time **(A)**, the challenge based on the repeat appointments of Mr. Prasad is within time **(B)** and the challenge raised on Mr. Prasad article is within time **(C)**, under both the above circumstances.

(A) THE CHALLENGE AGAINST MR. PRASAD BASED ON HIS CONNECTIONS WITH FINDFUNDS LP IS WITHIN TIME

3. The letter dated 22 August 2017, which is the invitation to the Case Management Conference, by the Presiding Arbitrator, is the earliest evidence for the constitution of the

Arbitral Tribunal ***[Rec. ¶32]***. An English High Court removed an arbitrator on the basis that he did not satisfy the requirement of relevant experience contractually agreed by the parties ***[Tonicstar]***. The Parties' Arbitration Agreement has no mention of the explicit qualifications of arbitrators ***[CE.C2, Rec. ¶9]*** and as such, what needs to be considered is the arbitrator's impartiality and independence ***[Case 897]***. The RESPONDENT initially did not object to the appointment of Mr. Prasad as the RESPONDENT did not know of any circumstances that would give rise to justifiable doubts regarding his impartiality and independence ***[Rec. ¶26]***. Mr. Prasad can be challenged only if the grounds under Art. 12 (2) of the UNCITRAL Model Law are established ***[Art. 13 (2) Model Law]***. As such, the RESPONDENT submits that Mr. Prasad could not be challenged after the RESPONDENT became aware of the constitution of the Arbitral Tribunal.

4. The RESPONDENT retrieved information regarding a third party funder from the metadata on the 27th August 2017, as made note by the CLAIMANT ***[Cl. Memo, Pg. 11]***. A Superior Court of Berlin held that the expression "*after becoming aware of*" meant that the time limit for challenging an arbitrator starts running only from the point of time at which the challenging party acquired *actual knowledge* of the ground for challenge. The Court also held that mere negligence of the ground for challenge, even to such a degree as to constitute constructive knowledge, has not been found sufficient to trigger the time limit ***[28 Sch 24/99]***. For the information retrieved from the metadata, to be *justifiable* doubts serious enough to affect Mr. Prasad's impartiality and independence, the RESPONDENT requested funding information from the CLAIMANT on the 29th August 2017 ***[Rec. ¶33]***, preserving its right to challenge within time. The CLAIMANT replied to the above request only on the 7th September 2017 ***[Rec. ¶35]***, by which the justifiable doubts regarding Mr. Prasad was confirmed and the RESPONDENT filed the challenge on the 14th of September 2017 ***[Rec. ¶38]***, which is well within the 15 day limit.

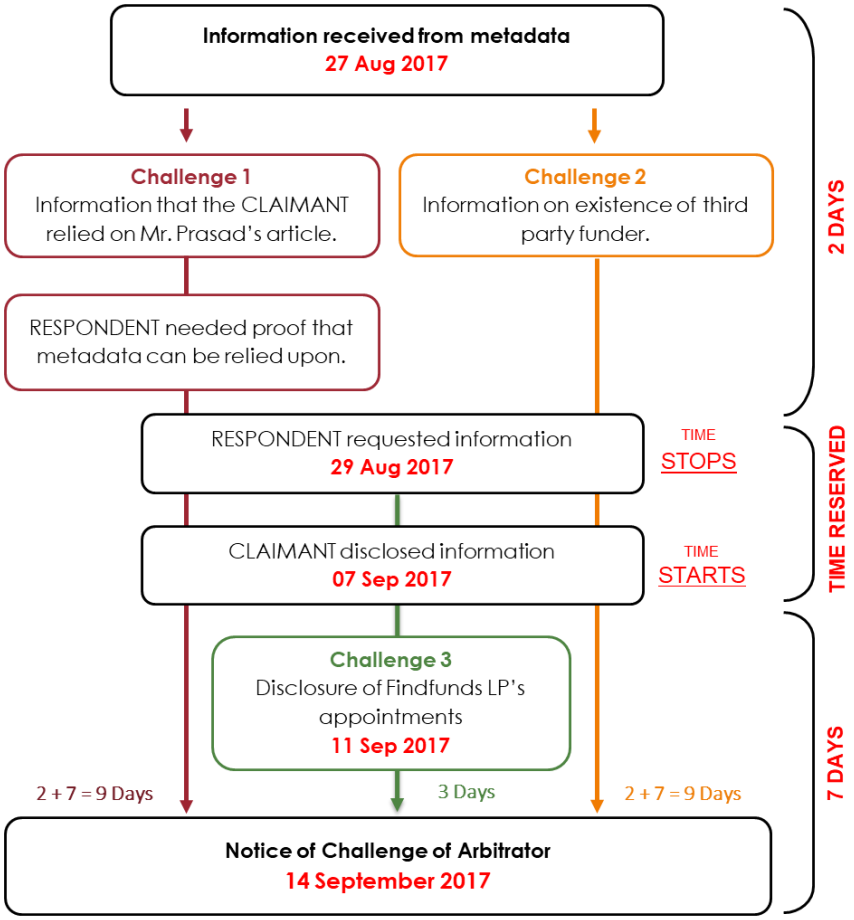
(B) THE CHALLENGE BASED ON THE REPEAT APPOINTMENTS OF MR. PRASAD IS WITHIN TIME

5. The challenge of Mr. Prasad on repeat appointments is based on both appointments by Mr. Fasttrack's law firm and by Findfunds LP ***[NOA, para. 10]***. The Swiss Supreme Court held that in order to fulfil the duty of inquiry the challenging party's counsel should at least have formally questioned about the repeat appointments of the arbitrator ***[4A.110/2012]***. Mr.

Prasad in his Declaration of Impartiality and Independence disclosed his prior appointments by Mr. Fasttrack's law firm but no disclosure was done regarding his appointments by Findfunds LP *[CE. C11, Rec. ¶23]*. Only after the RESPONDENT questioned about the third party funding and the CLAIMANT disclosed the same, the appointments by Findfunds LP was disclosed by Mr. Prasad on the 11th of September 2017 *[Rec. ¶36]*. The RESPONDENT asserts that Mr. Prasad was challenged on the 14th September 2017, which is well within the 15 day time limit, as the duty of inquiry was fulfilled by the RESPONDENT by its letter on the 29th August 2017.

(C) THE CHALLENGE RAISED ON THE ARTICLE OF MR. PRASAD IS WITHIN TIME

6. The RESPONDENT submits that it became aware of the publication of Mr. Prasad only from the retrieved metadata *[Rec. ¶38]* in response to the CLAIMANT's contention that since Mr. Prasad's article was available on his website and that the RESPONDENT knew of Mr. Prasad's appointment from the Notice of Arbitration that the challenge against Mr. Prasad is time barred *[Cl. Memo, Pg. 11]*. When using the IBA Guidelines, parties should not choose among guidelines, but analyse fact patterns in line with the obligations provided in the guidelines around general topics *[Carter]*. Further, a Regional Court in Munich held that if the published article deals with facts, which are the subject of the present arbitration proceedings, it must affect the arbitrator's impartiality *[CLOUT 902]*. The RESPONDENT does not object to Mr. Prasad's expertise in Art. 35 of the CISG, but to the fact that the article discussed the active subject matter of the case and that the CLAIMANT relied on Mr. Prasad's conclusive view that the production process is irrelevant to conformity, evident in the retrieved metadata *[Rec. 38]*. The RESPONDENT had to await the confirmation about the validity of the information in the metadata, which was confirmed by the CLAIMANT on the 7 September 2017 *[Rec. ¶35]*. As such the RESPONDENT submits that the challenge of Mr. Prasad based on his article was well within the time limit of 15 days.



The challenge against Mr. Prasad is within time

(2) THE ARBITRAL TRIBUNAL MUST DECIDE ON THE CHALLENGE OF MR. PRASAD

7. The states of both the parties have adopted the UNCITRAL Model Law ***[PO1, Rec. ¶49]***. The UNCITRAL Model Law gives the power to the Arbitral Tribunal to decide on the challenge of an arbitrator ***[Model Law, Art. 13 (2)]***. The RESPONDENT submits that the parties have excluded the application of an Appointing Authority **(A)**, the agreement on confidentiality bars an Appointing Authority deciding on the challenge **(B)** and the impartiality of the Arbitral Tribunal remains unaffected **(C).**

(A) THE PARTIES HAVE EXCLUDED THE APPLICATION OF AN APPOINTING AUTHORITY

8. The RESPONDENT submits that the Arbitral Tribunal must decide on the challenge of Mr. Prasad and not an appointing authority, in response to the CLAIMANT's argument that an appointing authority should decide on the challenge ***[Cl. Memo, Pg. 4]***. In addition to the procedural law chosen by the parties, the law of the seat of the arbitration, affects the rights

and remedies available to parties ***[Lee]***. In addition, the arbitral award may be subject to annulment if some aspect of the arbitral proceeding or award is found to violate the lex arbitri ***[Cheskin/Hertell]***. Further, Party Autonomy is a key principle of arbitration ***[Bay Hotel]*** and will ensure that arbitration will proceed according to the aspirations of the parties ***[Chatterjee, Pg. 539-540]***. As such, the RESPONDENT submits that Party Autonomy was to exclude an Appointing Authority deciding on the challenge as parties expressly agreed to ad hoc arbitration and to solve disputes without institutional support ***[Rec. ¶6]***.

9. The RESPONDENT asserts that the CLAIMANT by the letter dated 27th March 2014, claimed that they are certain that they will be able to overcome *any problem relating to the constitution of the Arbitral Tribunal* without institutional support ***[CE. C3, Rec. ¶15]***. As per the CISG, the 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 would have had ***[CISG, Art. 8 (2)]***. The RESPONDENT submits that the statement by the CLAIMANT shows the explicit agreement of the CLAIMANT to opt out an Appointing Authority and the Challenge must be decided by the Arbitral Tribunal as the Party Autonomy was to exclude an Appointing Authority.

(B) THE AGREEMENT ON CONFIDENTIALITY BARS AN APPOINTING AUTHORITY DECIDING ON THE CHALLENGE

10. The UNCITRAL Arbitration Rules gives power to an Appointing Authority to decide on the challenge of Mr. Prasad ***[Cl. Memo, Pg. 4]***. The RESPONDENT submits that the parties have agreed to keep the proceedings confidential in the present case ***[CE. C1, Rec. ¶8]*** and though arbitration does not have a confidential nature per definition, it may be confidential if the parties so wish and expressly agree in an *ad hoc* proceedings, or by reference to a set of Rules, containing a provision on confidentiality, in administered arbitration ***[Boyd]***. As such the RESPONDENT asserts that since the parties expressly agreed on ad hoc arbitration, the agreement on confidentiality bars an Appointing Authority deciding on the challenge.

11. The RESPONDENT moved to ad hoc arbitration for the possibility of appointing an arbitrator of their choice, to appoint an arbitrator who is qualified and to receive an award in time ***[Rec. ¶41]***. Confidentiality was a latter requirement as information regarding one of the

arbitrations of the RESPONDENT was leaked ***[Rec. ¶41]***. The CLAIMANT was made known about the requirement of confidentiality ***[CE. C1, Rec. ¶8]*** and in appropriate cases, contractual definitions of the duty of confidentiality must be considered ***[Paulsson/Rowding]***. The RESPONDENT in opposition to the CLAIMANT's contention that the Appointing Authority can even be a person such as the Secretary General of the PCA ***[Cl. Memo, Pg. 5]***, submits that even the Secretary General of the PCA is an institutional position and also submits that the reason the RESPONDENT changed to ad hoc arbitration is also due to information of a previous arbitration being leaked by a person in an arbitral institution ***[Rec. ¶41]***. The RESPONDENT submits that an Appointing Authority deciding on the challenge of Mr. Prasad violates the confidentiality expected from the CLAIMANT by the RESPONDENT.

(C) THE IMPARTIALITY OF THE ARBITRAL TRIBUNAL REMAINS UNAFFECTED

12. Ms. Ducasse is a potential replacement arbitrator selected by the CLAIMANT and is paid for by the CLAIMANT ***[PO1, Rec. ¶48]***. The United States Court of Appeal, Second Circuit held that the opportunity of the relevant party to appoint a replacement arbitrator, was appropriate to avoid a manipulation of the process ***[Zeiler]***. As such, the RESPONDENT asserts that the Arbitral Tribunal without the participation of Mr. Prasad and with the inclusion of Ms. Ducasse will remain impartial as the opportunity was awarded to the CLAIMANT to appoint the replacement arbitrator.

(3) THE CHALLENGE MUST BE DECIDED WITHOUT THE PARTICIPATION OF MR. PRASAD

13. The RESPONDENT's challenge of Mr. Prasad must be decided without his participation because Mr. Prasad cannot rule on his own challenge **(A)** and Ms. Ducasse will maintain the composition and integrity of the tribunal as the potential replacement arbitrator **(B).**

(A) MR. PRASAD CANNOT RULE ON HIS OWN CHALLENGE

14. Mr. Prasad refutes all grounds of the challenge and refuses to withdraw from his office as arbitrator ***[Rec. ¶43]***. Principles of Natural Justice and the *"duty to act fairly"* confirm that Mr. Prasad cannot be the judge of his own cause ***[McCarthy; Jones / S. De Villars, Pg. 208].*** Mr. Prasad ruling on his own challenge is a violation of the fundamental duty of impartiality ***[Singh]*** that applies to those with a duty to act judicially ***[Mackay].*** The omission of the duty of impartiality will regrade public confidence in the legal system ***[Tang Kin Hwa]*** and user

confidence in arbitration ***[Klausegger/Klein/Kremslehner, Pg. 78].*** Lord Denning confirms the need for impartiality in ***Metropolitan;*** *"Justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking: 'the judge was biased'"*. Mr. Prasad ruling on his own challenge would taint user confidence in arbitration and therefore, such must not be allowed.

15. Mr. Prasad has made clear the decision on the grounds of the challenge against him ***[Rec. ¶43]***. Mr. Prasad's decision is that the challenge holds no merit and that he refuses to withdraw ***[Rec. ¶44].*** Principles of natural justice do not allow Mr. Prasad, who has a duty to act judicially, to be a judge of his own cause. A case decided by the English High Court of Justice on the impartiality and recusal of judges; confirms that the mere appearance of Mr. Prasad's bias is sufficient to annul an award and in addition, that Mr. Prasad cannot be a judge in a case where he fails the tests of impartiality and independence ***[McCarthy]***. The decision further confirms that even the appearance of bias of Mr. Prasad would require the award to be set aside because one cannot judge one's own cause ***[Pinochet]***. Therefore, Mr. Prasad judging being a part of the tribunal for the purposes of deciding the challenge would violate fundamental principles of natural justice.

(B) MS. DUCASSE WILL MAINTAIN THE TRIBUNAL'S COMPOSITION AND INTERGRITY

16. Through the agreement on confidentiality, the arbitration is to be known by the least amount of people as possible ***[Rec. ¶39].*** The Parties agreed that the tribunal would consist of three arbitrators, one by each party and the third by the party appointed arbitrators ***[Rec. ¶12]***. Following the RESPONDENT's challenge of Mr. Prasad, the CLAIMANT appointed and provisionally funded Ms. Ducasse as a potential replacement arbitrator ***[PO1, Rec. ¶48; Rec. ¶46]***. The RESPONDENT submits that Ms. Ducasse is given access to all submissions and will be present at the hearings ***[PO1, Rec. ¶48]***. Therefore, Mr. Prasad must not rule on his own challenge and Ms. Ducasse must provisionally rule on the challenge as the CLAIMANT's appointed Arbitrator.

17. The RESPONDENT submits that in circumstances such as the arbitrator <u>*defaulting*</u> to fulfil his obligation such as *"the non-disclosure of information that the Court considers should reasonably have been disclosed may, in and of itself, provide a basis for the replacement of an*

arbitrator" ***[Hascher, Pg. 15; Fouchard/Gaillard/Goldman, Pg. 505].*** Further, when an arbitrator is challenged for reasons that may question his independence, if the arbitration proceedings are not severely disrupted by the replacement of an arbitrator, the court would accept it ***[Schwartz/Derains, Pg. 122,123].*** As such the failure to appoint a suitable arbitrator to the tribunal permits a judicial appointment ***[Born, Pg. 1722; Model Law 11 (3)]***, contrary to the interest of the parties. Hence, the RESPONDENT submits that Ms. Ducasse will maintain the composition and integrity of the Arbitral Tribunal.

CONCLUSION

THE ARBITRAL TRIBUNAL MUST DECIDE ON THE CHALLENGE OF MR. PRASAD AND THE CHALLENGE MUST BE DECIDED WITHOUT THE PARTICIPATION OF MR. PRASAD

ISSUE 02: MR. PRASAD'S INDEPENDENCE AND IMPARTIALITY HAVE JUSTIFIABLE DOUBTS AND MUST BE REMOVED FROM THE TRIBUNAL

18. Contrary to the CLAIMANT's argument that the challenge of Mr. Prasad is without merit ***[Cl. Memo, Pg. 12]***, the RESPONDENT submits that Mr. Prasad should be removed from the Arbitral Tribunal to ensure a fair hearing, as the applicable law requires the removal of Mr. Prasad **(1)** and the existing connections of Mr. Prasad must be considered justifiable doubts **(2).**

(1) THE APPLICABLE LAWS REQUIRE THE REMOVAL OF MR. PRASAD

19. The Notice of Challenge of Mr. Prasad was submitted by the RESPONDENT upon the discovery of justifiable doubts regarding Mr. Prasad's impartiality and independence ***[Rec. ¶38]***. Such a challenge was made in compliance with the applicable laws which require the removal of Mr. Prasad from the Arbitral Tribunal as Art. 12 of the Model Law sets out the grounds for challenge of Mr. Prasad **(A)** and the IBA Guidelines on Conflicts of Interest are applicable **(B).**

(A) ART. 12 OF THE MODEL LAW SETS OUT THE GROUNDS FOR CHALLENGE OF MR. PRASAD

20. It is undisputed that all states have adopted the Model Law ***[PO1, Rec. ¶49].*** Further, the exclusion of Art. 13 (4) of the UNCITRAL Arbitration Rules negates the applicability of its

challenge procedure *[Rec. ¶39]* and hence the RESPONDENT submits that Art. 12 (2) of the Model Law, being the lex arbitri gives power to the RESPONDENT to challenge Mr. Prasad on the existence of circumstances that give rise to justifiable doubts about his impartiality and independence *[Art. 12 (2) Model Law].* Further, the RESPONDENT submits that Mr. Prasad has failed in his obligation to disclose circumstances that is likely to give rise to justifiable doubts relating to his impartiality and independence as signified in Art. 12 (1) of the Model Law *[Art. 12 (1) Model Law].*

(B) THE IBA GUIDELINES ON CONFLICTS OF INTEREST ARE APPLICABLE

21. The RESPONDENT submits that the drafting history of the Model Law suggests disparity in the agreement of the restrictive nature on the grounds for challenge of an arbitrator due to the wording of Article 12 *[313th Model Law meeting].* Even though the representative of France suggests that "*impartiality"* and *"independence*" are wide ranging concepts, concerns raised by representatives of Yugoslavia, Tanzania, Egypt, Algeria and the Cairo Regional Centre for Commercial Arbitration indicate uncertainty and ambiguity in interpreting the coverage of all possible grounds for challenge of an arbitrator *[313th Model Law meeting].* As such the RESPONDENT submits that the applicability of the *Suez Test Criterion* over the IBA guidelines as argued by the CLAIMANT *[Cl. Memo, Pg. 15,16]* fails as the IBA guidelines are *"frequently viewed by courts and arbitral institutions as providing relevant criteria for assessing the impartiality and independence of a challenged arbitrator" [Moses].* Further, the RESPONDENT submits that *"more fundamentally, the IBA Guidelines' General Standards could be articulated more directly as interpretations of the UNCITRAL Model Law's requirements of independence and impartiality, prescribing international standards developed specifically for international arbitration" [Born, Pg. 1864].*

22. The RESPONDENT submits that IBA guidelines drafted by a working group of 19 experts reflecting best current international practice *[IBA guidelines, Pg. i/2; Born, Pg. 1698]* have been influential in situations of increasing challenges to international arbitrators *[Moses].* The Supreme Court of Columbia applied the IBA guidelines to decide the enforcement of an ICC award as the claimant's party-appointed arbitrator had not disclosed that it had previously served as counsel in a case in which the claimant's current counsel was an arbitrator *[Tampico].* Further, the court's reasoning to the application and recognition of the IBA

guidelines as representative of international practices, supports the RESPONDENT's proposition *[Pereira].* Similarly, in an English Commercial Court, Mr. Justice Knowles commended the 2014 IBA Guidelines for a distinguished contribution in international arbitration *[W Ltd.].* In fact, English Courts have made extensive use of IBA guidelines as a useful guide for arbitrators regarding their disclosure obligations and challenges *[Sierra; Cofely; Moses].*

23. The RESPONDENT submits that a Kluwer Arbitration Blog survey on soft law instruments in 2014 found that the IBA Guidelines, constituted the second most popular instrument in the survey, with 44.4% of respondents stating that they use them always or regularly *[Mereminskya]* and the 2015 International Arbitration Survey by White & Case and Queen Mary University, noted that 60.2% users perceive the IBA guidelines as effective *[Int. Arb. Survey].* Hence, the RESPONDENT submits that the IBA guidelines are applicable.

(2) THE EXISTING CONNECTIONS OF MR. PRASAD MUST BE CONSIDERED JUSTIFIABLE DOUBTS

24. In line with Article 12 of the Model Law and the IBA guidelines the RESPONDENT submits that the existing connections of Mr. Prasad must be considered justifiable doubts as Findfunds LP's influence over Mr. Prasad establishes justifiable doubts (A), Mr. Prasad's financial dependence on his repeat appointments compromises his impartiality (B), and Mr. Prasad's published article on conformity under the CISG, confirms justifiable doubts (C).

(A) FINDFUNDS LP'S INFLUENCE OVER MR. PRASAD ESTABLISHES JUSTIFIABLE DOUBTS

25. The RESPONDENT submits that the CLAIMANT's failure to willingly disclose the connection between Mr. Prasad and Findfunds LP supports the RESPONDENT's proposition that justifiable doubts exist as to the independence and impartiality of Mr. Prasad *[Rec. ¶38].* As such, an *"arbitrator should not have any actual or past dependent relationship with the parties of a nature to influence the arbitrator's freedom of judgment"* *[Lew/Mistelis/Kröll, Pg. 255]*. Therefore, the non-disclosure of a potential conflict of interest between the arbitrator and the third-party funder carries the risk of endangering the valid constitution of the tribunal *[Lévy/Bonnan, Pg. 85]*. The RESPONDENT submits that Findfunds LP's influence of Mr. Prasad is fivefold.

26. Firstly, the RESPONDENT submits that FindFunds LP's 60% ownership of Funding 12 Ltd; the third party funder of the CLAIMANT *[PO2, Q2]* proves the possibility of significant control as a majority shareholder over its subsidiary Funding 12 Ltd. *[Bruno/Ruggiero, Pg. 63; Rosenberg/Lewis-Reisen, Pg. 1].* Secondly, Findfunds LP has acted as the parent company of two subsidiaries which acted as third party funders in two arbitrations which Mr. Prasad was involved in *[Rec. ¶36]* which further confirms FindFunds LP's influence on Mr. Prasad. The RESPONDENT submits that the funding agreement may expressly entitle the litigation funder to exercise control over certain decisions relating to the appointment of arbitrators which may have been decided by the time it has made the investment decision *[De Morpurgo, Pg. 343/356].* As such, the RESPONDENT submits that one; Findfunds LP and/or its subsidiaries initially discuss possible strategies with the party *[PO2, Q4]*. In addition, the standard agreement used by Findfunds LP allows the third party funder to exercise greater influence in the appointment of arbitrators *[PO2, Q4]*. This proves the RESPONDENT's position that justifiable doubts pertaining to a significant commercial relationship between Mr. Prasad the third party funder exist. Hence, this arbitration being the third that is funded by Findfunds LP with Mr. Prasad as arbitrator, establishes the RESPONDENT's proposition that FindFunds LP's influence over Mr. Prasad establishes justifiable doubts.

27. Thirdly, in the process of signing the funding agreement, the CLAIMANT initially negotiated with Findfunds LP which further validates the RESPONDENT's proposition *[PO2, Q5].* The RESPONDENT submits that "*in negotiating the litigation funding agreement, the funder may exert control over the claim in that it makes certain case assessment criteria a precondition for funding"* *[Von Goeler, Pg. 26].* Fourthly, although it is the practice of Findfunds LP to establish a separate legal entity for each case which it intends to fund, the deviation from such practice in this case has not been justified by the CLAIMANT which further proves the existence of justifiable doubts on a commercial relationship between Mr. Prasad and Findfunds LP *[PO2, Q3].* Therefore, the RESPONDENT submits that the identity of the third party funder and their connections associate ethical violations as it can create confusion concerning the party who controls the lawsuit *[Fausone].*

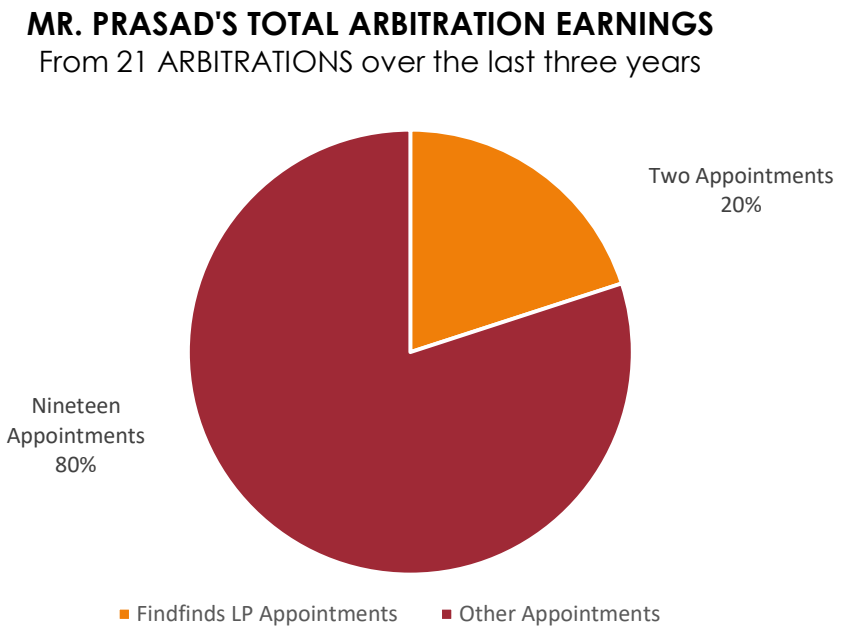
28. Fifthly, contrary to the CLAIMANT's argument that Findfunds LP has no *'managerial control'* over Funding 8 Ltd *[Cl. Memo, Pg. 16],* the RESPONDENT submits that the 40% shareholding

of Funding 8 Ltd by Findfunds LP does not indicate any lack of control. The RESPONDENT submits that Funding 8 Ltd has been paying all costs of the on-going arbitration with Slowfood; the newly merged company to Prasad and Partners *[PO2, Q6]* which indicates an additional commercial relationship between Mr. Prasad's law firm and an affiliate of the CLAIMANT under the waivable red list of the IBA guidelines *[IBA guidelines, 2.3.6. Pg. 21].* In addition, the RESPONDENT submits that the CLAIMANT's argument that 83.3% of the attorney fee being paid before the merge is unsubstantiated *[Cl. Memo, Pg. 16].* Further, the 3 million USD which is due for the oral hearing and post hearing submissions indicate that the CLAIMANT is exposed to a significant commercial interest which gives rise to justifiable doubts *[PO2, Q6].*

(B) MR. PRASAD'S FINANCIAL DEPENDENCE ON HIS REPEAT APPOINTMENTS COMPROMISES HIS IMPARTIALITY

29. The RESPONDENT submits that Mr. Prasad being appointed twice by Mr. Fasttrack's law firm over the past two years *[CE. C11, Rec. ¶23]* amounts to justifiable doubts on Mr. Prasad's independence and impartiality as the repeat appointments fall under the Orange List of the IBA guidelines *[IBA guidelines, Pg. 22].* In opposition to the CLAIMANT's argument that the RESPONDENT has waived its right by failing to object to the information on repeat appointments which was disclosed via Mr. Prasad's declaration on independence and impartiality *[Cl. Memo, Pg. 19],* the RESPONDENT submits that additional information on Mr. Prasad's dependence on the repeat appointments which were revealed later, strengthens and confirms the justifiable doubts of Mr. Prasad and hence the RESPONDENT's right of objection cannot be waived. The RESPONDENT submits that *"repeat appointments of the arbitrator by the same third-party funder may give rise to arbitrator conflicts of interest" [Rogers, Pg. 199; Trusz, Pg. 101].* The RESPONDENT submits that Mr. Fasttrack has had an involvement in the two appointments through giving advice to the colleague running the case and recommending Mr. Prasad as arbitrator in the second arbitration *[PO2, Q9]* as Mr. Fasttrack was well known with Mr. Prasad following the previous two arbitrations *[Rec. ¶38].* As such, the RESPONDENT submits that in case of repeat appointments, the question of whether the funder or the counsel was involved in the appointment of the arbitrator should be taken into consideration *[Osmanoglu, Pg. 335; Daele, Pg. 362].*

30. Further, contrary to the CLAIMANT's argument that repeat appointment of an arbitrator is *'precisely'* due to the trust built as a fair and experienced arbitrator ***[Cl. Memo, Pg. 19]***, the RESPONDENT submits that Mr. Prasad's financial dependence on acting as an arbitrator for two cases which were funded by other subsidiaries of Findfunds LP indicate justifiable doubts ***[Rec. ¶36].*** The RESPONDENT submits, *"Because arbitrators get paid only when selected to serve, arbitrators have an incentive to favour parties more likely to select them in future"* ***[Drahozal/Naimark, Pg. 267].*** As such the RESPONDENT submits as displayed by the diagram below, out of Mr. Prasad's total arbitration earnings from 21 arbitrations that happened within the course of the last three years, the two arbitrations in which the party appointing Mr. Prasad had been funded by a subsidiary of Findfunds LP, made up for 20% of arbitrator fees ***[PO2, Q10].*** The RESPONDENT submits that an arbitrator's repeat appointment by a party or by a law firm causing the arbitrator to derive a significant part of his income from that party or counsel may be relevant in determining whether justifiable doubts exist as to the arbitrator's capacity to remain independent ***[Scherer/Gerbay, Pg. 181].*** Hence, the RESPONDENT submits that out of 30% - 40% of Mr. Prasad's earnings from his work as an arbitrator indicates Mr. Prasad's financial dependence on the repeat appointments from a single law firm where majority of the fees are derived from proves the existence of justifiable doubts ***[PO2, Q10].***



31. The RESPONDENT submits that Mr. Prasad has been appointed as arbitrator on two occasions within the past three years by Mr. Fasttrack's law firm, and by Funding 12 Ltd, which is *affiliated* to the CLAIMANT as a subsidiary of Findfunds LP and hence falls under the Orange List of the IBA guidelines ***[IBA guidelines, 3.1.3, Pg. 22].*** As such the RESPONDENT submits that the *"funder becomes an affiliate as a result of his/her correspondence with one of the parties in order to provide financing for the arbitration, and even though situations under the Orange List do not automatically result in disqualification of the arbitrator, it is a situation that needs to be disclosed"* ***[Trusz, Pg. 101].*** In fact, the French Supreme Court annulled a decision by the Paris Court of Appeal to dismiss an application to set aside an arbitral award. The application was based on the repeat appointment of a party-appointed arbitrator in three other cases ***[Frémarc].*** Hence, the RESPONDENT submits that Mr. Prasad's financial dependence on repeat appointments establishes justifiable doubts as to his independence and impartiality.

(C) MR. PRASAD'S PUBLISHED ARTICLE ON CONFORMITY UNDER THE CISG CONFIRMS JUSTIFIABLE DOUBTS

32. Contrary to the CLAIMANT's argument, that Mr. Prasad's article is a general legal opinion, which cannot amount to proof of bias ***[Cl. Memo, Pg. 20]***, the RESPONDENT submits that the impact of Mr. Prasad's article should not be considered in isolation. Mr. Prasad's article in the Vindobona Journal cannot be categorised as a mere previously expressed legal opinion as the metadata retrieved of the word file sent by the CLAIMANT signifies the CLAIMANT's total reliance on the content of the article ***[Rec. ¶38].*** The RESPONDENT submits that Mr. Prasad may not be impartial if he has already have formed such a strong opinion regarding a certain matter that he is unlikely to be able to take an objective look at the situation based on the facts of the specific case ***[Verbist/Schäfer/Imhoos, Pg. 497].*** As such, the RESPONDENT submits that the CLAIMANT's reliance may have a direct bearing on the outcome of the arbitration as the article discusses non-conformity of goods in relation to ethical compliance, which favours the case of the CLAIMANT ***[RE. R4, Rec. ¶40].***

33. Further, Mr. Prasad's published article suggests his *conclusive* opinion that corporate social responsibility codes such as the Global Compact principles are irrelevant to conformity of goods and therefore should be rejected, as it does not result in an enforceable contractual obligation ***[RE. R4, Rec. ¶40],*** which proves the existence of justifiable doubts. The

RESPONDENT submits that "*an arbitrator is said to be prejudged if his judgment is reached before the evidence is available…(such as having) prior views of the arbitrator related to the subject-matter of the arbitration in the form of doctrinal opinions or positions adopted by the arbitrator in related cases*" ***[Gomez-Acebo, Pg. 117].*** As such, the RESPONDENT submits that the metadata stating that Mr. Prasad *"is the perfect arbitrator for our case given his view expressed in an article on the irrelevance of CSR on the question of the conformity of goods"* indicates the CLAIMANT's real reason why he was appointed and the establishment of a direct relationship between the article of Mr. Prasad and the dispute ***[Rec. ¶38].***

34. Therefore, given that the lists and situations in the IBA guidelines are non-exhaustive ***[IBA guidelines, Pg. 17],*** the RESPONDENT submits that the circumstances indicate a relationship of the arbitrator to the dispute under the waivable red list ***[IBA guidelines, 2.1, Pg. 20]*** which the CLAIMANT deliberately attempted to conceal for their advantage. Therefore, the RESPONDENT submits that Mr. Prasad's published article on conformity under the CISG, confirms justifiable doubts.

CONCLUSION

MR. PRASAD'S INDEPENDENCE AND IMPARTIALITY HAVE JUSTIFIABLE DOUBTS AND MUST BE REMOVED FROM THE TRIBUNAL

ISSUE 03: RESPONDENT'S STANDARD CONDITIONS GOVERN THE CONTRACT BETWEEN THE PARTIES

35. The contract is governed by the RESPONDENT's Standard Conditions as the Invitation to Tender is an Invitation to treat **(1)**, RESPONDENT's Standard Conditions are applicable to the contract **(2)**, the CLAIMANT's Standard Conditions are not applicable **(3)** and in any case the RESPONDENT's Standard Conditions must apply **(4)**.

(1) RESPONDENT'S INVITATION TO TENDER IS AN INVITATION TO TREAT

36. The RESPONDENT in its cover letter to the tender documents states that the RESPONDENT looked forward to an 'Offer' by the CLAIMANT ***[CE. C1, Rec. ¶8]***. The Court of Appeal in the United Kingdom held that a document is an Invitation to Treat if the party expects an offer which it will either accept, decline or vary ***[Zambia Steel]***. Further, the Court of Appeal of New Zealand held that the primary rule is that a tender process involves simply an invitation to

treat on the part of the party calling for tenders with no contractual obligation crystallizing until an offer is accepted *[Shivas]*. However, the tender process will sometimes create process contracts between the party calling for tenders and the tenderers *[Shivas]*. As such, the RESPONDENT submits that the Invitation to Tender is a special public tender that creates a process contract between the parties, as the tender documents also state that the 'contract' is made of the RESPONDENT's relevant documents, which includes the documents containing the standard terms and conditions *[Rec. ¶9]*. Also, in cases of tender the contract is not completed by an offer, but by the acceptance of the actual bid which was a reply to the Invitation to Treat and the conditions and specifications annexed to the 'contract' and contained in the schedule of conditions were a part thereof *[Asian Company]*. The RESPONDENT submits that the Standard Conditions in the tender documents are the Standard Conditions of the contract.

37. The RESPONDENT also submits that this tender process is different than a normal public tender as in addition to the invitation to tender all documents of the contract are also included *[Rec. ¶10]*, creating a process contract to which the principal and each tenderer is legally bound *[Hughes]*. The instructions and forms issued to tenderers *establish the specific terms and conditions of the contract* *[March construction]*. The RESPONDENT asserts that the invitation to tender was not an offer but an invitation to treat which creates a process contract, which is legally binding on the parties.

38. The RESPONDENT titles its Tender Documents as an Invitation to tender making it a clear invitation to treat *[CE. C2, Rec. ¶9]*. Article 19 of the CISG deals with an offer and a reply to an offer *[Honnold, Pg. 188]*, and as such the RESPONDENT submits that Article 19 is not applicable to the present dispute as the Tender Documents containing the Standard Conditions of the RESPONDENT is an Invitation to Treat and not an offer or a reply to an offer.

(2) RESPONDENT'S STANDARD CONDITIONS ARE APPLICABLE TO THE CONTRACT

39. The RESPONDENT submits that the RESPONDENT's Standard Conditions are applicable to the contract governing the parties on the grounds that the RESPONDENT's Standard Conditions were incorporated in the Invitation to Tender (A), the RESPONDENT's Standard Conditions

were accepted by the CLAIMANT **(B)** and the RESPONDENT's Standard Conditions are applicable according to the Last Shot Rule **(C)**.

(A) RESPONDENT'S STANDARD CONDITIONS WERE INCORPORATED IN THE INVITATION TO TENDER

40. The RESPONDENT incorporated the RESPONDENT's Standard Conditions in the Invitation to Tender ***[CE. C2, Rec. ¶9]***, in accordance with Articles 8 and 14 of the CISG ***[Schwenzer/Mohs, Pg. 240]*** as the incorporation of the standard terms falls within the scope of the CISG ***[Schlechtriem/Schwenzer]***. Further, the offer or the acceptance must contain the clear notice that the general conditions are a part of it and must be exchanged during the formative phase of the contract ***[Magnus, Pg. 188]***. As such, the RESPONDENT submits that the RESPONDENT made accessible its Standard Conditions in the Invitation to Tender **(i)** and RESPONDENT's intention to incorporate the Standard Conditions was known by the CLAIMANT **(ii).**

(i) RESPONDENT included its Standard Conditions in the Invitation to Tender

41. The RESPONDENT sent to the CLAIMANT the Tender Documents, which included the Standard Conditions of the RESPONDENT ***[CE. C2, Rec. ¶9]***, clearly making the Standard Conditions of the RESPONDENT a part of the contract. A valid incorporation requires that the general terms be deliberately made part of the contract offer ***[Tantalum powder]***. In the requested letter of acknowledgement the RESPONDENT made clear that, it would only accept offers, which complied with the tender documents ***[Rec. ¶25]***, and as such there is a clear reference to the incorporation and in principle there should be no problem about the incorporation of the terms ***[Schlechtriem/Schwenzer]***. Further, the CLAIMANT in its letter of acknowledgement states that they would tender in *accordance with the specified requirements* ***[RE. R1, Rec. ¶28]***. As such, the RESPONDENT submits that the RESPONDENT made the Standard Conditions accessible to the CLAIMANT in the Invitation to Tender.

42. In the cover letter to the Offer sent by the CLAIMANT, it is mentioned that minor amendments were made to the documents received by the invitation to submit a tender Offer and the CLAIMANT asserts that the changes primarily relate to the goods and the mode of payment ***[CE. C3, Rec. ¶15]***. The comment 2 to Article 2.1.19 of the UNIDROIT Principles

describe Standard Terms as ones which are drafted in advance for general and repeated use and that they are actually used in a given case by one of the parties without negotiation by the other party *[UNIDROIT]*. Further, Articles 2.19 and 2.20 of the UNIDROIT Principles require the user of the General Conditions to take the initiative in good faith to offer a reasonable possibility for the accepting party to know the contents of the General Conditions *[Dutch Seller]*. The RESPONDENT's Standard Terms were drafted in advance for general and repeated use as it was sent to several other companies as well as to the CLAIMANT *[PO2, Q23]*. Furthermore, it was not negotiated by the CLAIMANT as it said that the amendments to the documents relates primarily to the goods and mode of payment *[CE. C3, Rec. ¶15]*, and the contents of the Standard Conditions were made known to the CLAIMANT. As such, the RESPONDENT asserts that the RESPONDENT's Standard Terms were incorporated in the contract.

(ii) RESPONDENT's intention to incorporate the Standard Conditions was known by the CLAIMANT

43. The RESPONDENT in its cover letter to the Tender Documents states that it is very important to the RESPONDENT that the CLAIMANT's suppliers also adhered to the Comestibles Finos' Philosophy and the Code of Conduct for suppliers due to the bad experience it had with one of its previous suppliers not complying with the RESPONDENT's Code of Conduct *[CE. C1, Rec. ¶8]*. Statements made by a party are to be interpreted according to his intention where the other party knew or could not have been unaware what that intent was *[Art. 8 (1) CISG]*. The Austrian Supreme Court states that the intention to incorporate the standard conditions must be made known to the other party or that the other party could not have been unaware of such an intention *[Propane]*. The RESPONDENT submits that it made known to the CLAIMANT its intention to incorporate the RESPONDENT's Standard Conditions and the CLAIMANT knew or could not have been unaware of such intention.

44. Out of the six companies which submitted a bid only two companies including the CLAIMANT suggested some changes to the tender documents *[PO2, Q23]*. Statements made by and other conduct of the party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had *[Art. 8 (2) CISG]*. The Bundesgerichtshof held that whether the Standard Conditions are a part of the contract is to

be determined by reference to how a reasonable person of the same kind as the other party would have understood and that the intention to incorporate should be apparent to the recipient *[German Machinery]*. As such even if the Arbitral Tribunal decides that the intention of the RESPONDENT was not made known to the CLAIMANT, such intention is understood by a reasonable person as many other companies that submitted the bid understood such and did not suggest changes.

45. The RESPONDENT in its Invitation to Tender states that the tender for the contract consists of the special conditions and the general conditions of the RESPONDENT *[CE. C2, Rec. ¶9]*. The intention of a party is also to be interpreted in light of the relevant circumstances of the case *[Art. 8 (3) CISG]*. Article 8 (3) of CISG explicitly provides for a basis to consider the parties' negotiations, customs, established practices between themselves and subsequent conduct of the parties *[Schwenzer/Jaeger]*. The RESPONDENT clearly indicated its intention to incorporate its Standard Conditions by including the documents containing the Standard Conditions in the tender documents. As such, the RESPONDENT asserts that the RESPONDENT's intention to incorporate the Standard Conditions was known by the CLAIMANT.

(B) RESPONDENT'S STANDARD CONDITIONS WERE ACCEPTED BY THE CLAIMANT

46. The RESPONDENT in the tender documents makes it clear that the obligation imposed on the CLAIMANT as a supplier to comply with all applicable laws and regulations and the requirements set out by the RESPONDENT, required full compliance *[CE. C2, Rec. ¶12]*. The CLAIMANT in its Letter of Acknowledgement state that they received all the documents listed in the Invitation to Tender and further state that they will tender in accordance with the specified requirements *[RE. R1, Rec. ¶28]*. The CLAIMANT as an experienced business has a duty to object immediately to the application of the RESPONDENT's General Conditions, if the CLAIMANT is unable to understand the RESPONDENT's General Conditions, or object to its application to the contract *[Tantalum powder]*. As the Standard Conditions of the RESPONDENT were included in the Tender Documents that the CLAIMANT agreed to abide by, the RESPONDENT submits that the Standard Conditions of the RESPONDENT were accepted by the CLAIMANT.

47. The arbitration clause of the CLAIMANT was an institutional arbitration clause and the discussion of Mr. Tsai with Ms. Ming did not result in a change in the arbitration clause used by the CLAIMANT in its contract model *[PO2, Q19]*. The arbitration clause of the RESPONDENT in contrast is an ad hoc arbitration clause *[Rec. ¶6]*. Further, the arbitration clause is a part of the Standard Conditions *[CE. C2, Rec. ¶12]*. When the contract refers to Standard Terms and Conditions containing an arbitration clause, it must be investigated whether or not both parties had actual knowledge of the arbitration clause in question and whether or not they intended to accept it *[Dreistern]*. Both the parties explicitly agreed to the RESPONDENT's arbitration clause contained in the RESPONDENT's Standard Conditions *[CE. C3, Rec. ¶15]* waiving the ICC Clause of the CLAIMANT and confirming the acceptance of the RESPONDENT's Standard Conditions.

(C) RESPONDENT'S STANDARD CONDITIONS ARE APPLICABLE ACCORDING TO THE LAST SHOT RULE

48. The RESPONDENT's Standard Conditions were incorporated in the Invitation to Tender *[CE. C2 Rec. ¶9]*. The governing terms are those, which were exchanged last in accordance with the Last Shot Rule *[CLOUT 824]*. The Sales Offer of the CLAIMANT had no explicit reference to the CLAIMANT's Standard Conditions as it only state to refer to their website for their General Conditions *[CE. C4, Rec. ¶16]*. Further, effect is being given to the Standard Terms of the last person to make an offer or counter-offer that is accepted by subsequent performance by the other party *[ICC 8611]*. The RESPONDENT asserts that no counter-offer was made in the current arbitration and the offer by the CLAIMANT had no standard terms included. The contract is to be formed including the general conditions of the party whose terms and conditions were accepted and thus according to the party who managed to "fire the last shot" *[Ruhl]*. As such, the RESPONDENT submits that the RESPONDENT's Standard Conditions are applicable according to the Last Shot Rule.

49. The RESPONDENT submits that the letter of acknowledgement sent by the CLAIMANT has no mention about its standard conditions *[RE. R1, Rec. ¶28]*. In a case before the Queen's bench, one party initially quoted and in doing so incorporated its own terms and conditions. These terms and conditions were countermanded by a purchase order from the other party which incorporated its own terms and conditions. In turn, the party that quoted acknowledged the

purchase order in *an acknowledgement that contained its own terms and conditions*. It was held that the terms and conditions incorporated in the acknowledgement would be applicable to the contract ***[Chichester]***. Noteworthy is the change of format of the two letters sent by the CLAIMANT where the letter of acknowledgement mentions no Standard Conditions as opposed to the letter of offer ***[RE. R1, Rec. ¶28; CE. C4, Rec. ¶16]***. The RESPONDENT asserts that since no incorporation of the Standard Conditions by the CLAIMANT in its letter of acknowledgement, no shot was fired by the CLAIMANT, and the RESPONDENT's Standard Conditions are applicable according to the Last Shot Rule.

(3) CLAIMANT'S STANDARD CONDITIONS ARE NOT APPLICABLE

50. The CLAIMANT's Standard Conditions are not applicable as the CLAIMANT did not incorporate its Standard Conditions in the Sales Offer. The RESPONDENT submits that the CLAIMANT had no intention to apply its Standard Conditions to the contract (A) and the text of the CLAIMANT's Standard Conditions were not transmitted to the RESPONDENT (B).

(A) CLAIMANT HAD NO INTENTION TO APPLY ITS STANDARD CONDITIONS TO THE CONTRACT

51. It is the CLAIMANT's contention that the CLAIMANT's intention to incorporate its General Conditions is apparent for two reasons; the phrase "not applicable" under specific terms and conditions and the phrase which states to question any concerns with regard to "our applicable sustainability strategy" ***[Cl. Memo, Pg. 23]***. Article 8 of the CISG deals with the interpretation of any statements made by the parties ***[Magnus]***. Contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded and that terms are not brought appropriately to a party's attention by a mere reference to them in a contract document even if that party signs the document ***[Dutch Seller]***. As such, the RESPONDENT submits that the intention of the CLAIMANT is to be interpreted according to Article 8 of the CISG.

52. If the offer is not subject to any special terms CLAIMANT either leaves that part blank or explicitly states that no such special terms exist, by inserting phrases such as "not applicable" ***[PO2, Q28]***. Where there is a clear reference to the incorporation of the standard terms in the document provided to the offeree, there is no problem about the incorporation of the

terms *[Schlechtriem/Schwenzer]*. In this case, there is no clear reference to the incorporation of the standard terms as a mention regarding the same is only done in a footer *[CE. C4, Rec. ¶16]*. The UNIDROIT Principles dealing with surprising terms states that no term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party. Further, in determining whether a term is of such a character regard shall be had to its content, language and *presentation* *[UNIDROIT, Art. 2.1.20]*. As such, the RESPONDENT submits that since this is the first time the two parties are dealing with each other, such an act of the CLAIMANT was surprising to the RESPONDENT and the RESPONDENT never expressly agreed to such a surprising clause.

53. The RESPONDENT also asserts that it has no obligation to question regarding the applicability of Standard Conditions of the CLAIMANT which the CLAIMANT states to be incorporated by reference *[Cl. Memo, Pg. 22]*. Rule 5.1 of CISG Advisory Council states that the reference to the incorporation of standard terms should not be hidden away or printed in such a manner that it is easy to overlook *[Opinion No.13]*. In light of Art. 8(2) of the CISG, there should be a reasonable attempt to make the other party aware of the incorporation *[Schlechtriem/Schwenzer]*. The Advisory Council further states under the same rule that there should be no obligation on a party to go hunting for a reference on their inclusion. The obligation should be on the party relying on them to ensure that they are set out in a manner and at a place where a reasonable contractual party would have noticed them *[Opinion No.13]*. As such, the RESPONDENT submits that the RESPONDENT had no reasonable opportunity to take notice of the terms of the CLAIMANT.

(B) CLAIMANT'S STANDARD CONDITIONS WERE NOT MADE AVAILABLE TO THE RESPONDENT

54. The CLAIMANT argues that its General Conditions were incorporated into the Offer by reference *[Cl. Memo, Pg. 22]*. In a leading German case the *Bundesgerichtshof* held that standard terms will not be regarded as having been validly incorporated into the contract unless the offeror has provided the offeree with a copy of the standard terms *[German Machinery]*. The reference to the CLAIMANT's General Conditions was only mentioned in the footer in the Sales Offer in small print *[CE. C4, Rec. ¶16]*. A French case supports the contention of the RESPONDENT by simply deciding that the lack of an incorporation clause on

the front part of the document was enough to deny the standard terms on the reverse side any legal relevance ***[ISEA]***. The RESPONDENT asserts that the CLAIMANT's Standard Conditions were not transmitted to the RESPONDENT.

(4) IN ANY CASE THE RESPONDENT'S STANDARD CONDITIONS MUST APPLY

55. The Arbitration clauses of both the parties are included in their respective Standard Conditions ***[Rec. ¶12; PO2, Q29]***. The effect of the knock out doctrine would have been to eliminate the contradictory arbitration clauses from the contract. The result could have been a contract without an agreement to arbitrate. That would have left each party with the option to bring the dispute before a domestic court in the competent jurisdiction. However, such a result would not have been in line with the parties' initial intentions as expressed in the two arbitration clauses contained in their standard terms, i.e., their will to *arbitrate* future disputes ***[Berger]***. As such if both the party's Standard Conditions are invalid, no arbitration clause would also be valid and no arbitration could commence any further. The RESPONDENT therefore asserts that the invalidity of both party's Standard Conditions is unarguable.

CONCLUSION

THE RESPONDENT'S STANDARD CONDITIONS GOVERN THE CONTRACT BETWEEN THE PARTIES

ISSUE 04: CLAIMANT DID NOT DELIVER CONFORMING GOODS IN ACCORDANCE WITH ART. 35 OF THE CISG AND THE RESPONDENT'S ETHICAL STANDARDS. FURTHER, THE CLAIMANT WAS REQUIRED TO ACHIEVE SPECIFIC RESULTS

56. The Contract between the Parties imposed an obligation of guarantee on the CLAIMANT to deliver chocolate cakes with ethically sourced cocoa; and the chocolate cakes received by the RESPONDENT were non-conforming because the CLAIMANT was required to achieve specific results in ethical compliance **(1)** and the chocolate cakes were non-conforming under Art.35 of the CISG **(2).** CLAIMANT's duty to deliver conforming goods applies irrespective of its fault in breach of the obligation **(3).**

(1) CLAIMANT WAS REQUIRED TO ACHIEVE SPECIFIC RESULTS IN ETHICAL COMPLIANCE

57. The CLAIMANT has an obligation to achieve specific results in ethical compliance because achieving specific results in the ethical sourcing of ingredients for the chocolate cakes was a contractual obligation **(A)** and alternatively, the negotiation process indicates an obligation of specific results **(B).**

(A) ACHIEVING SPECIFIC RESULTS IN THE ETHICAL SOURCING OF INGREDIENTS FOR THE CHOCOLATE CAKES WAS A CONTRACTUAL OBLIGATION

58. The Contract is made up of the documents set out in article 5 of Section IV of the Tender Documents ***[CE. C2 Rec. ¶11]*** including the RESPONDENT's Code of Conduct for suppliers. The obligation of specific results in ethically sourcing cocoa is contractual because the wording of the Contractual Documents are clear **(i)** and alternatively, the negotiation process indicates an obligation of specific results **(ii).**

(i) The requirement of specific results was explicitly incorporated into the Contract

59. Clause 1 of Section III of the Tender Documents, titled Specification of the Goods and Delivery Terms states, *"ingredients have to be sourced in accordance with the stipulations under section IV"* ***[CE. C2, Rec. ¶10].*** The RESPONDENT's inclusion of the requirement of specific results of ethical compliance in Clause 1 of Section III of the Tender Documents qualifies as an express incorporation ***[Schwenzer/ Leisinger, Pg. 263].*** Principles C & E of the RESPONDENT's Code of Conduct for suppliers contains the ethical standard to be complied with by the CLAIMANT's suppliers ***[CE. C2, Rec. ¶13; CE. C2, Rec. ¶14]***. The provision of ethical standards in the contract indicates the express incorporation of the requirement of specific ethical compliance ***[Dysted, Pg. 14]***. Hence, the express mention of the requirement of ethical compliance and the ethical standards is sufficient incorporation of an obligation of specific results in the contract documents.

(ii) The wording of the Contractual Documents are clear

60. Section IV, Special Conditions of Contract states, "*Comestibles Finos has a zero tolerance policy when it comes to unethical business behaviour, such as bribery and corruption"* ***[CE. C2, Rec ¶11]***. The General Conditions of Contract reiterates the zero tolerance policy and adds, *"As a supplier, you must comply with… the requirements set out in Comestibles Finos Code of*

Conduct for suppliers". Art 8 of the CISG governs not only the interpretation of unilateral facts of each party but also is "equally applicable to the interpretation of the contract, when the contract is embodied in a single document ***[CLOUT 877]***. The intent of the parties therefore under Art. 8 of the CISG is evident, because the inclusion of the requirement of ethical compliance across all Tender Documents indicates the importance of the guarantee of ethical compliance to the contract ***[Crudex; CLOUT 303]***. Further, If both parties have agreed to the UN Global Compact, it must be presumed that the parties have, at least implicitly, made this standard a part of their contract in their *inter partes* relationship ***[Schwenzer/ Leisinger, Pg. 264]***. Therefore, the wording of the contractual documents are clear.

61. The RESPONDENT's use of the terms *"guarantee adherence"* ***[CE. C2, Rec. ¶13]***, *"ensure" and "make sure they comply with"* are indicative that the RESPONDENT intended the obligation of Ethical compliance to be one of specific results ***[Ramberg, Pg. 14]***. The RESPONDENT's visit of the CLAIMANT'S premises in 2014 and the CLAIMANT'S detailed presentation on the steps taken to monitor there supply chain indicates that the CLAIMANT was aware that the Contract stipulated an obligation of specific results ***[PO2, Q34; Dysted, Pg. 27]***. Hence, the clear wording used in the contract binds the CLAIMANT to fulfil the obligation of specific results in ethical compliance.

(iii) The negotiation process confirms the contract's requirement of specific results

62. The negotiations prior to the formation of the contract under Art. 8 (3) of the CISG must be given due consideration in establishing the requirement of ethical compliance and the obligation of specific results ***[CLOUT 932; CLOUT 429]***. The RESPONDENT identified the CLAIMANT as a potential supplier due to its *"Global Compact membership and strict adherence to the principle of ethical and sustainable production"* ***[CE. C1, Rec ¶8]***. The RESPONDENT highlighted in the letter, that it was important for the RESPONDENT that the CLAIMANT's suppliers adhered to the RESPONDENT's Business Philosophy and Code of Conduct, indicating the RESPONDENT's intention of purchasing chocolate cakes produced with ethically sourced ingredients ***[CLOUT 176]***.

63. The CLAIMANT's letter accompanying their offer acknowledged the obligation and stated, *"we will do everything possible to guarantee that the ingredients sourced from outside*

suppliers comply with our joint commitment to the Global Compact Principles" ***[CE. C3, Rec. ¶15]***, which under Art 8 (3) of the CISG is accepted as an acknowledgement of the obligation of specific results. Therefore, the RESPONDENT's inclusion of the obligation of specific results and the CLAIMANT's knowledge and acceptance of the obligation is evident from the pre contractual negotiations ***[CE. C1, Rec. ¶8; CE. C3, Rec. ¶15]*** and confirms the contractual requirement of specific results in ethical compliance.

(B) Art. 5.1.5 OF THE UNIDROIT PRINCIPLES CONFIRMS THE CLAIMANT'S CONTRACTUAL OBLIGATION OF SPECIFIC RESULTS

64. Art. 5.1.5 of the UNIDROIT Principles sets out a guiding criterion to identify nature of the obligation owed by the CLAIMANT ***[UNIDROIT 5.1.5]***. As such, the RESPONDENT submits that the price of the chocolate cake is not related to risks of ethical compliance **(i)**, the ethical sourcing of cocoa does not warrant any risk above industry standards **(ii)**, The RESPONDENT had no control over the CLAIMANT's performance of the contract **(iii).**

(i) The price of the chocolate cake is not related to risks of ethical compliance

65. The RESPONDENT placed a price cap of USD 2.50 in the Invitation to Tender ***[CE. C2, Rec. ¶10]***. The CLAIMANT chose to sell a unit for USD 2.00. Although the CLAIMANT admits that the figure is towards the upper end in the industry price range ***[Cl. Memo, Para 117],*** prices of products are determined by market interest in the product and not by the risk associated to producing it ***[Hazlitt].*** Sales contracts with open pricing mechanisms are only for goods with fluctuating markets or niche products ***[Pitted Sour Cherries]***, which is not the case in the dispute under consideration. The conclusion of the contract based on the price range provided by the Tender Documents ***[CE. C2, Rec. ¶10]*** indicates that the economic value of the goods is not a 'characteristic' of the goods. *'Value is never a "quality" of the objects, but a judgement upon them which remains inherent in the observer'* ***[Simmel].*** Therefore, the use of party autonomy to determine the price has no bearing on the risks of producing general goods like chocolate cakes.

(ii) The ethical sourcing of cocoa does not warrant any risk above industry standards

66. The RESPONDENT invited the CLAIMANT to supply chocolate cakes for the reason that the CLAIMANT was reputed for a being a company that adhered to strict principles of ethical and

sustainable production ***[CE. C1, Rec. ¶8]***. Further, the CLAIMANT's advertisement of the Vanilla-Chocolate cake - Kings Delight with the tagline of *"sustainably sourced cocoa"* indicates that ethical compliance was business as usual for the CLAIMANT ***[RE. R2, Rec. ¶29]***. Therefore, as the CLAIMANT's performance of ethical compliance involves a degree of risk that the CLAIMANT is familiar with, it is expected that the CLAIMANT intends to guarantee the result ***[Joseph; Comment 4, UNIDROIT 5.1.5]***. Therefore, the ethical sourcing of cocoa does not involve any risk above the CLAIMANT's normal business practice or industry standard.

(iii) RESPONDENT had no control over the CLAIMANT's performance of the Contract

67. The RESPONDENT first interacted with the CLAIMANT at the Danubian food fair in 2014 ***[NOA, Rec. ¶4]***. The CLAIMANT was an already established medium sized manufacturer of fine bakery products ***[NOA, Rec. ¶4]***. The CLAIMANT's manufacturing process is neither dependent upon, nor influenced by any act or omission of the RESPONDENT. Therefore, the absence of any influence by the RESPONDENT over the CLAIMANT's performance of the contract cannot transform the existing duty of specific results into a duty of best efforts ***[Joseph; Comment 5, UNIDROIT 5.1.5]***.

(2) THE CHOCOLATE CAKES WERE NON-CONFORMING UNDER ART 35 OF THE CISG

68. The Contractual Documents including the Code of Conduct for suppliers required the CLAIMANT to deliver ethically produced chocolate cakes ***[CE. C2, Rec. ¶13]***. The RESPONDENT alleged and the CLAIMANT admitted that, *"some of the cocoa beans used for the production of our chocolate cakes have not been produced with the contractually required principles"* ***[CE. C9, Rec. ¶21]***. Therefore, the RESPONDENT submits that the Chocolate Cakes did not conform to the Quality under Art 35 (1) of the CISG **(A)** Further, the CLAIMANT delivered non-conforming Chocolate Cakes under Art 35 (2) **(B).**

(A) THE CHOCOLATE CAKES DID NOT CONFORM TO THE QUALITY UNDER ART. 35 (1) OF THE CISG

69. The Contract required the CLAIMANT to deliver Chocolate Cakes produced using ethically sourced Cocoa ***[CE. C2, Rec. ¶10].*** Even if the departure from the contractual requirement has no bearing on the usability or value, the Chocolate Cakes will be non-conforming ***[CLOUT 168]***. Therefore, where the contractual description required chocolate cakes with ethically

sourced cocoa, even the delivery of physically identical Chocolate Cakes would be non-conforming *[Huber/Mullis, Pg. 132]*.

70. The RESPONDENT's Global Compact membership and goal of becoming a UNGC Lead company confirms the RESPONDENT's public reputation of being an ethical company ***[CE. C1, Rec. ¶8].*** Consumer purchasing decisions are influenced by considerations that relate to the processes used to produce the goods *[Maley, Pg. 106]*. For example, consumers will particularly buy goods produced with methods that are environmentally sound *[Loureiro/McCluskey/Mittelhammer, Pg. 203 – 219],* are socially responsible *[Warhurst, Pg. 151- 168]*. The Appellationsgericht Basel-Stadt held that 'free of genetically modified organisms' amounts to a contractual description for the purposes of Article 35 (1) of the CISG, and non-conformance with such a description amounts to a fundamental breach of the contract ***[Soyprotein].*** Similarly, the RESPONDENT submits that the ethical sourcing of ingredients *[CE. C2, Rec. ¶10; 11; 13; 14]*, amounts to a contractual description accepted by the CLAIMANT *[CE. C3, Rec. ¶15]* and the failure of the CLAIMANT to conform to the contractual description is a fundamental breach of contract and renders the cakes non-conforming.

71. In a case where the goods (barley) was declared 'organic', the parties agreed that the goods would meet Council Regulations on organic production of agricultural products. Suspicions arose that the barley was not organic within the meaning of the Regulation. The Oberlandesgericht München considered that the description of 'organic' was a contractual quality ***[Organic Barley].*** The buyer was unable to establish that, as a factual matter, the barley was organic. However, as the Oberlandesgericht noted, 'Organic barley cannot be distinguished from other barley, at least not by usual methods'. The designation of 'organic' related to the process, specifically, 'a system of certification of companies at production, trade and processing'*[Organic Barley]*. Further, although the Court considered that 'organic' was a contractual quality, it was quality of a procedural nature, i.e. the observation of the inspection scheme at production, transport and processing', *[Organic Barley]*. Thus, the quality (i.e. 'organic' nature) of the Barley was held to describe the non-physical history of the goods, confirming that in the current case the failure of the CLAIMANT to use ethically sourced cocoa in the production of the chocolate cakes *[CE. C9, Rec. ¶21]* which was the required 'quality' in the contract, renders the Chocolate Cake non-conforming.

(B) FURTHER, CLAIMANT DELIVERED NON-CONFORMING CHOCOLATE CAKES UNDER ART. 35 (2)

72. Alternatively, if the tribunal decides that the contract is absent of any description that requires the CLAIMANT to deliver Chocolate Cakes produced with ethically sourced ingredients, the RESPONDENT submits that the cakes were non-conforming as they are not fit for ordinary purpose under Art 35 (2) (a) **(i),** the chocolate cakes were not fit for the particular purpose under Art 35 (2) (b) **(ii)** and it was reasonable for the RESPONDENT to rely on the CLAIMANT's skill and judgement **(iii).**

(i) The chocolate cakes were not fit for ordinary purpose under Art. 35 (2) (a)

73. The RESPONDENT's emphasis on avoiding any negative press campaigns indicates that the RESPONDENT's market is ethically conscious of goods *[CE. C1, Rec. ¶21]*. The CISG applies to contracts between businesses and not from business to consumer. As such, article 35 (2) (a) must be used objectively to assess what a reasonable businessperson in the same situation would expect of the goods *[Ferrari, Pg. 196]*. The RESPONDENT's main objective is to sell their goods. The goods must at least, according to article 35(2) (a), be fit for commercial purposes, which means that it must be possible to resell the goods *[Schlechtriem/Schwenzer]*. Resaleability is one part of the being fit for purpose in terms of article 35 (2) (a). This was confirmed in the Frozen Pork case from the German Supreme Court where the mere suspicion that Belgium pork was contaminated with dioxin, and therefore unfit for human consumption, was enough to constitute lack of conformity due to the loss of Resaleability *[Frozen Pork]*. Therefore, the RESPONDENT submits that the resale of goods is dependent upon compliance with certain manufacturing standards and practices *[Dysted, Pg. 35]* and the CLAIMANT failed to meet the test of ordinary purpose.

(ii) The chocolate cakes were not fit for the particular purpose under Art. 35 (2) (b)

74. The RESPONDENT was made aware of the possibility that the Chocolate Cakes received from the CLAIMANT may be tainted through a report by the UNEP Special rapporteur *[CE. C6, Rec ¶18]*. The particular purpose need not be an express or implied term of the contract *[Scaffold Hooks]*. A proposal that the particular purpose must be a term of the contract was rejected at the 1980 Diplomatic Conference *[A/CONF.97/C.I/L.73]*. The effect of Article 8 (3) CISG is that the particular purpose may arise from the circumstances *[Huber/Schwenzer],* including

negotiations, the purpose of the contract and other standards by which fulfilment of the contract is judged *[Enderlein/Maskow].* The CLAIMANT confirmed the RESPONDENT's doubt that the CLAIMANT's supplier was implicated in the fraud and corruption scandal *[CE. C6, Rec ¶18].* The CLAIMANT's failure to deliver chocolate cakes that are fit for the particular purpose of emotional conformity, render the goods non-conforming under Art. 35 (2) (b) of the CISG *[CLOUT 882].*

75. The RESPONDENT communicated in its Tender Documents *[CE. C2, Rec. ¶10]*, the enclosed letter with the Invitation to Tender *[CE. C1, Rec. ¶8]* and even during pre-contractual negotiations *[RE. R5, Rec. ¶41]* the requirement that the CLAIMANT'S production process must adhere to strict principles of ethical and sustainable production. As such, the particular purpose of emotionally conforming chocolate cakes was expressly made aware to the CLAIMANT *[EP S.A.]*. The CLAIMANT's acknowledgment of the particular purpose, in the letter enclosed with the Sales Offer guaranteed that the ingredients sourced would comply with the joint Global Compact principles *[CE. C3, Rec. ¶15].* The CLAIMANT was therefore aware or could not have been unaware of the particular purpose of the Chocolate Cakes and had a duty to decline making an offer if unable to deliver goods fit for the particular purpose *[Honnold].* Therefore, the CLAIMANT's failure to fulfil the production of Chocolate Cakes with a particular purpose that was expressly and impliedly made known to the CLAIMANT *[CLOUT 492]* render the Cakes non-conforming.

(iii) It was reasonable for the RESPONDENT to rely on the CLAIMANT's skill and judgement

76. The RESPONDENT only became aware of the possibility of the use of tainted cocoa following a news documentary on ethical food production in Ruritania *[RNA, Rec. ¶26].* This confirms that the RESPONDENT relied on the skill and judgement of the CLAIMANT to ensure an ethical production process of the chocolate cakes. The burden to prove that the RESPONDENT relied on the CLAIMANT's skill and judgement rests with the CLAIMANT *[Honnold, Pg. 257; Kritzer, Pg. 147-187, 283].* Further, it is reasonable for the RESPONDENT to rely on the CLAIMANT's skill and judgment because firstly, the CLAIMANT is a manufacture of fine bakery products *[NOA, Rec. ¶4]* and has special knowledge of the goods and the production process in question *[Huber/Schwenzer, Pg. 205]*. In addition, the CLAIMANT advertising ethically sourced cocoa in the Kings Delight cake as one of their premium cakes is

further indicative of the special knowledge ***[RE. R2, Rec. ¶29].*** Secondly, the basic presumption is that the RESPONDENT relies on the CLAIMANT's skill and judgement in producing conforming Chocolate Cakes ***[Neumayer/Ming, Pg. 280; Staudinger/Magnus]***. The presumption is based on the sphere of influence principle; i.e. the CLAIMANT is directly responsible for producing the Cakes and is therefore in a better position to determine the conformity of the goods ***[EP S.A.; Henschel, Pg. 3-4]***. Therefore, the RESPONDENT did rely on the skill and judgement of the CLAIMANT and it was reasonable to do so.

(3) CLAIMANT'S DUTY TO DELIVER CONFORMING GOODS APPLIES IRRESPECTIVE OF ITS FAULT IN BREACH OF THE OBLIGATION

77. The CLAIMANT alleges that fraud committed by Ruritania People Cocoa mbH does not constitute a breach of contract ***[CE. C9, Rec. ¶21].*** The RESPONDENT submits that duty to deliver conforming goods applies 'irrespective of fault in breach of an obligation' ***[Kruisinga, Pg. 123; Schlechtriem].*** In a case before the Bundesgerichtshof, non-conformity was caused by defective raw materials provided by the seller's supplier. The court held that the seller's liability is 'not based on the supplier's obligation to inspect goods before delivery'; rather, 'the seller's culpability is not important due to the statutory allocation of risk' ***[CLOUT 271].*** The CISG in this respect reflects the common law doctrine of implied warranty. The Civil Law doctrine of Fault based liability ('positive Vertragsverletzung') is not applicable to International sale of goods agreements. Because this caveat emptor rule was based on the parties' moral obligations ***[Tuñón]*** and was appropriate in the Roman marketplace, where the seller was able to physically inspect the goods ***[Henschel].*** In this case, there is a clear delineation between the sphere of influence of the RESPONDENT and CLAIMANT ***[Henschel]***. Economic efficiency demands that the risk of loss lies with the party that is best able to prevent that loss; the party in control of the production process; i.e. the CLAIMANT. Therefore, the contractual duty to deliver conforming goods applies irrespective of any fault of breach by the CLAIMANT.

CONCLUSION

CLAIMANT DID NOT DELIVER CONFORMING GOODS IN ACCORDANCE WITH ART. 35 OF THE CISG AND THE RESPONDENT'S ETHICAL STANDARDS. FURTHER, THE CLAIMANT WAS REQUIRED TO ACHIEVE SPECIFIC RESULTS

PRAYER FOR RELIEF

On the basis of the foregoing arguments and the RESPONDENT's prior written pleadings, the RESPONDENT respectfully submits to the Tribunal, while dismissing all contrary requests and submissions by the respondent,

TO REJECT:

1. All claims for payment raised by the CLAIMANT;

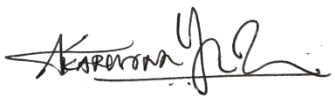
TO ORDER THE CLAIMANT TO:

1. Pay the RESPONDENT's costs incurred in this arbitration.

CERTIFICATION

18. 01. 2018
Colombo, Sri Lanka

We hereby confirm that this memorial was written by the undersigned.



Shamilka Karunanayake

Sulaiman Rameez

Dilani Jayatilake