Twenty Fifth Annual Willem C. Vis Moot

MEMORANDUM FOR RESPONDENT

On behalf of:	Against:
Comestibles Finos Ltd.	Delicatesy Whole Foods Sp.
RESPONDENT	CLAIMANT

Counsel for RESPONDENT:

Amer Abu-Sham Leen Amro Nadeen Abawi

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TABLE OF ABBREVIATIONS

AC	Advisory Council
Art.	Article
Artt.	Articles
CE	CLAIMANT's exhibit
CISG	United Nations Convention on the International Sales of Goods
CoC	Code of Conduct
Cl. Memo.	Memorandum for Claimant, The University of Montpellier
emph.	Emphasis
et seq.	and the following one (et sequence)
GC	General Conditions
GER	Germany
Ibid.	Ibidem (in the same/previous source)

IBA	International Bar Association
i.e.	that is
Inter alia	among other things
Ltd	Limited Company
Mr.	Mister
Ms.	Miss
No.	Number
NoC	Notice of Challenge of Arbitrator
NY	New York
para.	Paragraph / paragraphs
p./pp.	page/pages
RE	RESPONDENT's exhibit
PO	Procedural Order
RNA	Response to the Notice of Arbitration

SUI	Switzerland
Sp.	Sole proprietorship
UAR	UNCITRAL Arbitration Rules
UML	UNCITRAL Model Law
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Arbitration Rules
UNIDROIT	UNIDROIT Principles for International Commercial Contracts (2010)
USA/U.S.	United States
v./vs.	against (versus)

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CISG/Convention	United Nations Convention on Contracts for the International Sale of Goods, Vienna April 11, 1980
IBA Guidelines On Conflicts of Interest	Adopted by resolution of the IBA Council on Thursday 23 October 2014
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules, as adopted in 2013.
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, Vienna June 21, 1985
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (201(

STATEMENT OF FACTS

1 The Parties to this arbitration are Delicatesy Whole Foods Sp. ("**CLAIMANT**") and Comestibles Finos Ltd. ("**RESPONDENT**", collectively "**the Parties**").

2 **CLAIMANT** is a medium sized manufacturer of fine bakery products registered in Equatoriana. It is a member of Global Compact and is therefore committed to operate in a sustainable and ethical manner. As required by Global Compact it uses its influence to make its suppliers sign a code of conduct ("**CoC**"). However, it places greater importance on the quality of its products rather than the ultimate sustainable production.

3 **RESPONDENT** is a leading gourmet supermarket chain in Mediterraneo. It is also a Global Compact member that operates in an ethical and sustainable manner. Respondent has been a Global Compact member since 2002 and is planning on becoming a LEAD member by 2018.

4 On **6 March 2014** the Parties met at the Cucina food fair, and discussed a possible business relationship. During the meeting, the parties mainly discussed the importance of sustainable production and its effect on the reputation of a business. The parties also had a discussion regarding *Ad Hoc* arbitration and the importance of confidentiality to RESPONDENT.

5 On **10 March 2014** RESPONDENT sent CLAIMANT an invitation to participate in RESPONDENT's publicized tender, along with the Tender Documents. The main reason RESPONDENT chose CLAIMANT to participate in the tender was due to CLAIMANT's commitment to Global Compact.

6 On **27 March 2014** CLAIMANT sent its Offer filling out the information required by the Tender Documents and making minor amendments thereto. On **7 April 2014** RESPONDENT accepted CLAIMANT's offer and Contract 1257 was concluded. The Parties commenced delivery with no complications.

7 On **27 January 2017** RESPONDENT found out about a fraudulent scheme involving Ruritanian government officials that endangers the sustainability and ethicality of the production of the cocoa supplied to CLAIMANT. It refused to pay for the unethically produced cakes since CLAIMANT failed to cherish its basic obligation in assuring the delivery of ethically produced cakes.

8 On **30 June 2017** CLAIMANT submitted its Notice for Arbitration unjustifiably pursuing the amounts due with damages. Additionally, it appointed Mr. Prasad as an arbitrator.

9 On the **27 August 2017** RESPONDENT found out that in 2016 Mr. Prasad has expressed a view about emotional non-conformity under Art. 35 CISG. On **14 September 2017** RESPONDENT challenged Mr. Prasad based on relationships with a company that is related to CLAIMANT's funder.

10 Further, CLAIMANT alleged that the Parties have not excluded the appointing authority from the UNCITRAL Arbitration Rules ("**UAR**"), where the Parties originally agreed to resort to the Arbitral Tribunal for the challenge of an arbitrator under the *lex arbitri*.

INTRODUCTION

11 The Parties have agreed to the application of the UNICTRAL Arbitration Rules. Under the Rules, the challenge of an arbitrator is decided by The Arbitral Tribunal **(I)**.

12 Should the Tribunal find that it has the authority to hear the challenge, the Tribunal is respectfully requested to accept the challenge and remove Mr. Prasad from the tribunal due to the doubts of his impartiality and independence **(II)**.

13 CLAIMANT asserts that its own GC and CoC govern the contract and that the cakes were conforming therewith. However, CLAIMANT's General Conditions and CoC are not part of the contract, as the only applicable GC and CoC are RESPONDENT's **(III)**.

14 Since RESPONDENT's General Conditions and CoC are applicable, the goods are not in conformity therewith **(IV)**.

ARGUMENTS

I. THE PARTIES HAVE GRANTED THE TRIBUNAL THE AUTHORITY TO DECIDE THE CHALLENGE and MR. PRASAD SHOULD NOT PARTICIPATE IN DECIDING HIS OWN CHALLENGE

15 The Parties are in agreement that the Arbitral Tribunal has the authority to decide on the challenge.

16 The principle of the parties' procedural autonomy allows the parties to agree on the procedures they deem fit whether prior or subsequent to the arbitration. This principle is

found under the NY Convention Art. V (1) (d) *[Born, p. 2131]*. Additionally, it is found in the *lex arbitri* [*Ibid, p. 2132*]. Furthermore, it is also found in the UAR *[Ibid, p. 2138]*.

17 Since all the applicable laws in the case at hand provide the Parties the authority to determine procedures, their agreement that the Tribunal should decide the challenge is a valid one. RESPONDENT has already argued that the Tribunal should decide the *challenge [NOC, p. 39, para. 8]*. CLAIMANT has agreed to the Tribunal's authority on this matter *[Cl. memo, p. 4, et seq.]*. Therefore, the Parties are in agreement that the Tribunal shall decide on the challenge.

18 In addition, since the Tribunal has the power to decide on the challenge, it should do so without the participation of Mr. Prasad. The legal basis for the Tribunal's power is Art. 13(2) of the *lex arbitri*. This art. allows for a challenge decision to be rendered without the participation of the challenged arbitrator (**A**). The issue of whether or not the challenged arbitrator should participate in the challenge is not expressly settled by Art. 13(2). Therefore, it remains up to the Tribunal to adopt the interpretation under the criteria provided Art. 2A(2) of the *lex arbitri*. Consequently, filling the gap under Art. 2A(2) leads to the exclusion of Mr. Prasad (**B**). CLAIMANT has argued that Mr. Prasad should participate in deciding his own challenge based on the principle of Collegiality, however, this principle does not apply to the challenge of an arbitrator (**C**).

A. The *lex arbitri* allows for a challenge decision without the participation of Mr. Prasad

19 The Arbitral Tribunal has the power to interpret the applicable law. This extends to Art. 13(2) of the *lex arbitri* as it does not expressly regulate whether or not the challenged arbitrator should participate in the challenge.

20 Article 13(2) of the *lex arbitri* states that "*the arbitral tribunal shall decide the challenge.*" The issue of the challenged arbitrator's participation is not explicitly settled by this article. This is evidenced by the varying approaches taken by countries that have adopted the UML. There are states that opted to explicitly regulate this matter *[Born, p. 1866]*. While other states like Germany have taken the same route as Danubia, in retaining the wording of Article 13(2) of

the UML. German courts applying the UML have found that the non-participation of the challenged arbitrator in the challenge decision is of "*no legal consequence*" *[Ibid ; 34 SchH 06/09 case]*. Another court found the issue of non-participation "*immaterial*" *[34 SchH 10/05 case]*. The power to interpret the law lies with the Arbitral Tribunal *[Lew/Mistelis/Kröll, p. 444]*. The Tribunal should adopt an international context while performing such an interpretation [*Ibid.*].

21 Applied to the case at hand, Danubia has retained a wording of Art. 13(2) UML. This wording allows for both, the participation and non-participation of the challenged arbitrator.

22 The German approach shows that under art. 13(2), the challenged arbitrator does not necessarily have to decide on the challenge. Further, the challenged arbitrator's non-participation will not prejudice CLAIMANT, as it is immaterial and of no legal consequence. And since the Arbitral Tribunal has the authority to interpret the *lex arbitri*, it should adopt the interpretation under an international context, subject to Art. 2A of the UML which governs the interpretation of that law.

23 In conclusion, it is possible under Art. 13(2) UML for the challenged arbitrator to not participate in his own challenge. Therefore, it remains up to the Tribunal to adopt the approach that it deems appropriate subject to Art. 2A of the *lex arbitri*.

B. An interpretation of Art. 13(2) under the criteria of Art. 2A(2) *lex arbitri* will lead to excluding Mr. Prasad from deciding on his own challenge

24 Since the Tribunal has the authority to interpret the *lex arbitri*, it should do so under the criteria provided by Art. 2A(2) thereof. Such an interpretation will lead to the exclusion of Mr. Prasad from deciding on his own challenge.

25 Art. 2A UML was one of the amendments introduced in 2006 *[Born, p. 137]*. Danubia is among the few states have revised their local adaptations of the Model Law to reflect its 2006 amendments [*Ibid.*]. Paragraph 2 of the Art. states that "*Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based" [Art. 2A(2), UML]*. One of the most important principles on which the Model Law is based, is the limited scope for court intervention in the arbitral

process *[Holtzmann,/Neuhaus/Kristjansdottir/Walsh, p. 25]*. The principle is found in articles 5 and 6 *[Ibid.]*.

26 Since the participation of the challenged arbitrator is not expressly settled within the UML, the Tribunal should fill this gap in conformity with the general principles of the UML. Namely, the limited scope of court intervention in the arbitral process. The process envisioned under Art. 13 of the UML is twofold. First, the Tribunal decides on the challenge *[Art. 13(2), UML]*. If the challenge is successful, then the challenged arbitrator will be removed from the tribunal, and if the challenge is not successful, the challenging party may appeal the tribunal's decision before a state court *[Art. 13(3), UML]*.

27 There is no doubt that the challenged arbitrator will always be inclined to rule that he's impartial and independent. After all, the entire standard of impartiality and independence is based on applications of the rule "*nemo judex in causa sua*" where no man is allowed to be his own judge. It is described as the overriding principle underlying the applications of the non-waivable Red List in the IBA Guidelines *[IBA Guidelines, p. 17]*. The arbitrator has a great interest in remaining as a member of the Tribunal to receive his fees. Additionally, if the arbitrator is found to be partial or dependent, this may cause damage to his reputation, which will consequently discourage parties from appointing him. Not only will the challenged arbitrator be inclined to rule that he is impartial and independent, he may also influence the other arbitrators *[Rivera-Lupu/Timmins, p. 105]*. Mr. Prasad has already submitted a written statement containing legal arguments against the challenge *[Prasad's letter, p.43, et seq.]*. This means that the chances of the challenged arbitrator influencing the Tribunal to reject the challenge are high. This results in increasing the probability of having the challenge decided by a court rather than the Tribunal.

28 Therefore, In order to fill the gap with the principle of the limited scope of court intervention in the arbitral process, the Tribunal should adopt the interpretation where the challenged arbitrator does not participate in deciding his own challenge. This is to decrease the chances of having the matter settled by court intervention. Instead, this interpretation increases the chances of having the Tribunal sustain the challenge from the beginning without the need for court intervention.

C. The principle of Collegiality does not apply to the issue of challenging an arbitrator

29 Although the principle of Collegiality is important, it does not extend to the procedure for challenging an arbitrator.

30 CLAIMANT has presented an argument that Mr. Prasad should decide on his own challenge pursuant to the principle of Collegiality *[Cl. Memo, p. 7, para. 20 et seq.]*. CLAIMANT argues that the principle extends to challenge procedure *[Cl. Memo, p. 7, para. 20]*. However, CLAIMANT has only provided legal authorities proving the importance of the principle to the validity of the award, but presented none proving that the principle extends to challenge procedure as well. In actuality, courts applying the UML have found the non-participation of the challenged arbitrator in the challenge decision is of "*no legal consequence*" and "*immaterial*" *[supra. para. 20]*.

31 Therefore, the argument based on the principle of Collegiality must be dismissed.

II. Mr. Prasad Should Be Removed from The Arbitral Tribunal

32 RESPONDENT's challenge of Mr. Prasad should be successful, as it will prove that the challenge was not time-barred according to the rules governing the arbitration proceedings **(A).** In addition RESPONDENT will show the existence of justifiable doubts to Mr. Prasad's impartiality and independence **(B).**

A. The Challenge of Mr. Prasad is admissible

33 Respondent challenged Mr. Prasad on the 14th of September 2017. The challenge was based on two reasons, first the four appointments of Mr. Prasad by Mr. Fasstrack's Law firm and and by Findfuns. Second, on the grounds that CLAIMANT is funded by a third party funder.

34 Article 13(1) UNCITRAL Arbitration Rules states that "*A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the*

challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party." The words "became known" means that those information are new to the challenging party, as they may become new after the arbitrator's disclosure or "*because the challenging-party discovers non-disclosed circumstances during the arbitration.*" *[Daele, p. 137]*.

35 If a party discovers non-disclosed circumstances that does not mean that the challenging party should challenge the arbitrator immediately, as those information might be based on incomplete information which need to be investigated and confirmed in order for them to become hard facts. In this situation the time-limit which is specified in article 13 UNCITRAL Arbitration rules should start *"running from the day that these hard facts become known to the challenging party." [ibid p. 142]*

36 In addition, if the challenging party knew those circumstances before the appointment or at any stage that was not relevant at that time that does not mean that the party is obligated to challenge the arbitrator. However, the challenging party may use those circumstances later when they become relevant due to any new developments. *[Ibid p. 143]*

37 CLAIMANT argued that RESPONDENT's challenge is not admissible as the latter knew about the relationship between Mr. Prasad and the third party funder on 27th August 2017 which means that RESPONDENT according to what claimant argued should have sent the notice of challenge before the 11th of September 2017 *[Cl memo. p. 10, para. 44]*. However, according to scholars what RESPONDENT did does not make its challenge time-barred. Even if RESPONDENT knew about it on the 27th of August 2017, however it asked the tribunal on the 29th of August 2017 to request CLAIMANT to provide it with the name of the funder *[The record, p. 33]*. This indicates that RESPONDENT was not sure that the name of the funder will be a ground for challenging Mr. Prasad at that time, as before knowing who the funder is there was no way that it would be sure that this information is considered to be "hard fact" and can challenge Mr. Prasad.

38 Thus, regarding the funder the time-limit specified in article 13 UNCITRAL Arbitration rules should start running from the day CLAIMANT informed the tribunal and RESPONDENT about the funder's name i.e. on 7 September 2017 *[P.35]*, and that makes the 22nd of September 2017 is the last day RESPONDENT can challenge Mr. Prasad on, which makes the 14th of September 2017 is within the right time period for the challenge.

39 In addition, Mr Prasad declared that it was appointed twice by the subsidiaries of the funder (Findfunds) on the 11th of September 2017 *[The record, p. 36]* which makes the 26th of September 2017 is the last day RESPONDENT could have challenged Mr. Prasad on.

40 RESPONDENT's challenge was submitted on time and was not after the time period written in article 13.

B- There are justifiable doubts regarding Mr. Prasad's impartiality and independence

41 Article 12 UNCITRAL Arbitration Rules requires that in order to challenge an arbitator "justifiable doubts" should exist regarding the arbitrator's impartiality and independence.

42 RESPONDENT's doubts are justified according to scholars, as there is no need for the challenging party to be certain of the arbitrator's partiality, it is instead enough to show "*enough "doubt" or "suspicion" as to an arbitrator's impartiality to justify either not appointing or removing the arbitrator"[Born, p. 1777]*. There is no specific answer for the percentage of doubt as to the arbitrator's impartiality and independence, however according to Born it should be *"less than a 50/50 risk of partiality or bias is generally sufficient for disqualification of an arbitrator during the arbitral proceedings" [Ibid p. 1779]*.

43 RESPONDENT has justifiable doubt to Mr. Prasad's impartiality and independence, as the third party funder is considered to be a party which can influence the proceedings **(1)** and the repeated appointments should be added which raise the justifiable doubts **(2)**.

1. The third party funder is a party who can influence the proceedings

44 Even if Findfunds is not funding CLAIMANT directly, however it is still a party to the arbitration which is considered to be a reason for the partiality and dependency of Mr. Prasad.

45 A third party funder is considered to be a party to the arbitration according to the IBA guidelines on Conflict of Interests. General standard 6(b) of the guidelines states that *"If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party*". Third party funders are equivalents to parties in

the arbitration proceedings, as they have direct economic interest in the arbitration proceedings *[Explanation to GS 6(b) in the IBA guidelines]*.

46 In addition, the IBA guidelines modified the Non-waivable Red list and the Orange list to refer to "third party funders" as entities that have economic interest in the arbitration. *[Nieuwveld/Shannon, p. 17]*. Having economic interest in the outcome of the proceedings might be a reason why third party funders can influence and control the arbitral proceedings in several matters, such as appointing arbitrators and choosing the CLAIMANT's legal team *[Landi, p. 99,100]*.

47 Contrary to CLAIMANT's arguments *[Cl memo. p. 12, 13]*, Findfunds is a party to the arbitral proceedings as it has direct economic interest in the outcome of the arbitration proceedings. Findfunds owns 60% of Funding 12 ltd *[PO2, p. 50, para. 2]* which is the subsidiary that is funding CLAIMANT. Thus, what goes to Funding 12 Ltd 60% of it goes to Findfunds.

48 In addition, even if Findfunds LP exercised little influence on this arbitration, however Findfunds' funding agreements allows it for a greater influence on the conduct of the arbitration including appointing arbitrators *[PO2, p. 50, para. 4]*., and that is sufficient to consider that there might be a "justifiable doubt" for any conflict of interests as a result of the relationship between Mr. Prasad and Findfunds. Mr. Prasad's partner "Slowfood" is representing a case that is funded by another subsidiary of Findfunds LP. Paragraph (2.3.6) of the IBA guidelines consider that if Mr. Prasad's law firm which is in our case "Prasad and Slowfood" has significant commercial relationship with one of the parties "Findfunds" then that is also a reason for doubting Mr. Prasad's impartiality and independence.

49 To conclude, Mr. Prasad will be partial and dependent due to the commercial interest he has in the outcome of these proceedings and in regards to the relationship his law firm have with Findfunds in the other arbitration case, which may affect his decision in this case.

2. Mr. Prasad's repeated appointments

50 Mr. Fasttrack's law firm and the subsidiaries of Findfunds LP each appointed Mr. Prasad as an arbitrator twice for the past three years. *[PO2, p. 51, para. 10]*

51 The issue of repeated appointments might be a source of conflict of interests when the repeated arbitrator is a professional arbitrator i.e he somehow depends on arbitration for income *[Obe, p. 82]*.

52 The IBA guidelines paragraphs (3.1.3) and (3.3.8) tackle the repeated appointments issue, which is considered to be a reason that raises justifiable doubts to the arbitrator's impartiality and independence *[Alfonso, p. 114]* The circumstance in para. (3.1.3) which is "one of the parties" and the circumstance in para. (3.3.8) which is "same counsel, or the same law firm" are related and should be discussed together, as the arbitrator being repeatedly appointed by the same law firm or party will lead the opposing party to fear that this arbitrator's impartiality and independence will be *"tainted by the wish to receive future appointments" [Obe, p. 86]*. In addition, what makes this issue a more potential source of conflict of interest is when the arbitrator is repeatedly appointed in cases involving the same third-party funder. *[Park/Rogers, p. 119]*.

53 Findfunds LP and its subsidiaries are parties to this arbitration, as third party funders are considered to be parties in the proceedings as provern earlier. Thus, pursuant to the IBA guidelines paras. (3.1.3 and 3.3.8) Mr. Prasad might be partial and dependent due to its repeated appointments by the same party and law firm within the past 3 years *[PO2, p. 51, para. 10]*.

54 Those appointments should be added, as scholars state that those two paragraphs are related as long as they tackle the same issue which is the fear the opposing party which is RESPONDENT in this case will have in regards to the decision.

55 On the other hand, Mr. Prasad *"derives between 30% - 40% of his earnings from his work as an arbitrator" [Ibid]*, which makes it a reason that he might try to satisfy CLAIMANT in order to receive future appointments.

56 In conclusion, the repeated appointments for Mr. Prasad should be taken into consideration in order to remove him from the tribunal.

III. THE ONLY APPLICABLE GENERAL CONDITIONS AND CODE OF CONDUCT ARE RESPONDENT'S

57 The issue at hand is which GC and CoC are validly incorporated into the contract.

58 The answer is found through examining the Parties' intentions pertaining this matter. Since the genesis of the Parties' relationship, RESPONDENT made crystal clear in every communication, the importance of preserving confidentiality and ensuring compliance with ethical standards by its whole supply chain *[RE 5, p. 41; CE 1, p. 8]*. Thus, it included, in its GC and CoC, legal provisions ensuring that these pillars are protecting the balance of the contract *[CE 2, p. 9-14]*. Interpreting these facts pursuant to Art. 8 CISG will show that RESPONDENT was only willing to contract based on its own GC (**A**).

59 The Parties' relationship escalated further as they concluded a contract. The contract was a product of RESPONDENT's Tender Documents, CLAIMANT's Sales Offer and RESPONDENT's final acceptance. All three stages of the formation of the contract do **not** entail any intent by either party to apply any GC other than RESPONDENT's (**B**).

60 Pursuant to Art. 8(3) CISG, CLAIMANT's conduct following the dispute provides a clear indication of the Parties' true intent at the time of the conclusion of the contract. Additionally, it supports RESPONDENT's interpretation of the Parties' intent as provided in this Memorandum (**C**).

61 Alternatively, even in the event where the Tribunal finds that CLAIMANT's GC were intended to be part of the contract, they still must be excluded. This is due to the fact that CLAIMANT's GC are "Surprising Terms" (**D**).

A. RESPONDENT was only willing to contract based on its own GC and CoC

62 RESPONDENT clearly showed CLAIMANT its intent to only contract based on its own GC.

63 Art. 8 CISG sets forth the tools to interpret the parties' intentions behind statements and conduct. Regardless of the method used to ascertain that intent, Art. 8.3 CISG provides that the interpretation requires the examination the relevant circumstances of the case including *inter alia* the negotiations between parties. The purpose of the contract must be considered as

well as the interests of either party and systematic context of the contract as part of the relevant circumstances *[Melis*, Art. 8 margin numbers 10 *et seq]*

64 Art 8(1) CISG provides that the "*true*", "*real*", or "*subjective*" intent shall be examined first.*[8.1 CISG ; Enderlein/Maskow, p. 64]*. This means that the party having a certain intent when making a statement must show that this intent was the subjective understanding of both parties. To do that, that party must show that the recipient knew or could not have been unaware of this intent. the actual intent can be construed on the basis of the parties' interests, the purpose of the contract *[Schmidt-Kessel, in: Schlechtriem/Schwenzer, Art. 8 margin number 12]*

65 However, when the subjective intent cannot be ascertained, Art 8 CISG provides for an "*objective*" test as an alternative *[Art. 8.2 CISG]*. This is where the statement or conduct is observed from the reasonable person's position of the same kind as the recipient, and under the same circumstances *[Ibid.]*. Thus, the Tribunal shall hypothesize such a reasonable person *[Farnsworth]* in order to determine what understanding a reasonable person would have had. This understanding becomes the intent of the parties.

66 In the following, RESPONDENT shall first demonstrate the circumstances and statements within the negotiations between the Parties, which shall be considered under both Artt. 8(1) and 8(2) CISG (**1**). Second, RESPONDENT shall apply Art. 8(1) CISG to show its subjective intent to only contract based on its General Conditions. Where CLAIMANT knew or could not have been unaware of this intent (**2**). Finally, RESPONDENT shall apply Art. 8(2) CISG to show that a reasonable person would have understood RESPONDENT's intent (**3**).

1. The relevant circumstances are the Parties' discussions prior to the contract, interests of the parties and purpose of the contract

67 RESPONDENT's interests and purpose of the contract were clearly communicated to CLAIMANT at various stages during the parties' relationship.

68 The Parties met at the Cucina food fair, where a discussion was made regarding a business cooperation. In that discussion, RESPONDENT made it clear how negative press can be detrimental in the field of ethical production *[RE 5, p. 41]*. RESPONDENT informed

CLAIMANT of its negative past experiences with a supplier in which it was targeted in a bad press campaign amounting to a considerable drop in its sales *[Ibid.]*. RESPONDENT further clarified that the experience led RESPONDENT to change fundamental provisions of its General Conditions *[Ibid.]*. First, it moved away from institutional arbitration, and included a DR clause providing for an *Ad Hoc* arbitration without the involvement of arbitral institutions *[Ibid.]*. Second, it added a confidentiality clause with a very high penalty for breach *[Ibid.]*. RESPONDENT also informed CLAIMANT that it intends on becoming a GC LEAD company where supply chain management, and preserving its reputation are crucial.

69 Subsequently, RESPONDENT sent CLAIMANT the invitation letter, along with the Tender Documents *[CE 1, p. 8]*. To make its intention even clearer, RESPONDENT reiterated in its invitation letter, the importance of being sure that CLAIMANT's suppliers adhere to RESPONDENT's CoC, and that RESPONDENT wants to be sure it will not again be the subject of negative press *[Ibid.]*.

70 In every communication between the Parties, RESPONDENT made it crystal clear that protecting its reputation from bad press was its top priority. This is necessary for RESPONDENT since its sales are inextricably linked to its reputation as an ethically operating company. Additionally, negative press may harm its aspirations to become a GC Lead company. That is the reason for the high penalty for breaching confidentiality, and its *Ad Hoc* arbitration clause. RESPONDENT also protects its reputation and profits by legally binding its suppliers to have their suppliers sign a CoC and to make sure they comply with it *[CE 2, para E, p. 14]*.

71 Therefore, the circumstances that need to be considered under both tests of Art. 8 are the discussions between the parties, in which RESPONDENT clearly showed that its interests and purpose of the contract is to make profit, which is tied to preserving its reputation as an ethically operating company. RESPONDENT also reiterated that this reputation extends to its supply chain which includes CLAIMANT.

2. Pursuant to Art. 8(1) CISG, RESPONDENT had the subjective intent to only contract based on its own GC

72 Applying Art. 8(1) CISG to the statements and circumstances of the case shows the Parties' subjective understanding that RESPONDENT is only willing to contract based on its own General Conditions.

73 The purpose of any contract is to make profit. However, for RESPONDENT, its profits are tied to preserving its reputation. RESPONDENT repeatedly expressed the importance of preserving its reputation, which entails heightened measures to ensure confidentiality. This extends to the penalty for breaching confidentiality in addition to having as few persons as possible involved in any of RESPONDENT's disputes. The latter is accomplished by the *Ad Hoc* DR clause excluding the involvement of arbitral institutions. Preserving RESPONDENT's reputation also entails that its suppliers must adhere to its CoC, and their suppliers must adhere to a comparable CoC as well. Therefore, given that RESPONDENT emphasized the importance of its reputation and its need to not be subject of bad press in every single communication between the parties, CLAIMANT could not have been unaware that this was part of the purpose of the contract for RESPONDENT.

74 The only way RESPONDENT achieves the purpose of its contract is by having its own General Conditions govern the contract, as they provide for the legal basis for obligating its suppliers to have their suppliers adhere to standards comparable to RESPONDENT's CoC. Therefore, the purpose of the contract for RESPONDENT would be endangered unless its General Conditions were applicable. For this reason, CLAIMANT could not have been unaware that RESPONDENT was only willing to contract based on its own General Conditions.

3. Pursuant to Art. 8(2) CISG, the objective understanding of the facts shows RESPONDENT's intent to only contract based on its own GC

75 Any reasonable person in CLAIMANT's position would understand RESPONDENT's intent to only contract based on its own General Conditions. RESPONDENT has communicated the importance of preserving its reputation in every single communication

with CLAIMANT. Additionally, it communicated the fact that any damage to RESPONDENT's reputation would lead to a very detrimental financial impact. Therefore, no reasonable person can imagine that RESPONDENT would enter into a contract without including a legal basis for obligating it's suppliers to follow its CoC, having their suppliers sign a comparable CoC with their own suppliers, and including strict measures to insure confidentiality. Such would be the case if the contract were to be governed by CLAIMANT's GC.

4. Conclusion

76 In conclusion, RESPONDENT clearly communicated the fundamental pillars for its purpose from contracting with CLAIMANT. Such pillars would only stand if RESPONDENT's GC were applicable. This is why CLAIMANT could not have been aware of RESPONDENT's intent to only contract based on its own GC. Further, this is the only understanding a person in CLAIMANT's situation would have.

B. Both the offer and acceptance only entail the intent to apply RESPONDENT's GC

77 CLAIMANT has included two lines of arguments covering the scenarios where the Sales Offer is an offer, and where it is a counter-offer *[CL. memo, pp. 21-25]*. However, regardless of whether CLAIMANT's Sales Offer was an offer pursuant to Art. 14 CISG, or a counter-offer under Art. 19 CISG, the decisive issue under both instances is the intent underlying the Sales Offer in accordance with Art. 8 CISG.

78 RESPONDENT sent the Tender Documents to CLAIMANT, including RESPONDENT's GC. CLAIMANT was supposed to fill out the necessary information and return the Tender Documents as an offer. Instead, CLAIMANT submitted a separate document as a Sales Offer instead of filling out the tender documents containing the provisions that should have been filled in by the offeror in addition to modifications of certain provisions of the Tender Documents. CLAIMANT attached the "proper offer" entitled as a "Sales Offer" to the

unchanged tender documents and informed RESPONDENT *[PO2, p. 52, para. 27; CE 3, p. 15]*.

79 If the Sales Offer was an offer, then RESPONDENT's GC could apply since CLAIMANT attached a set of the Tender Documents, which include RESPONDENT's GC, along with the Sales Offer. On the other hand, CLAIMANT's GC could apply if it had the intent to include the application of its own GC as one of the minor amendments to the Tender Documents. The decisive issue is the intention underlying the offer and the acceptance. This means that the Sales Offer would have to be interpreted pursuant to Art. 8 CISG. If the Tender Documents were an offer and the Sales Offer a counter-offer modifying the original offer, then the decisive issue would be whether or not the Sales Offer entailed a modification of the applicable GC. The answer is also found by ascertaining the Parties' intent pursuant to Art. 8 CISG.

80 Therefore, both scenarios boil down to one question: Did the Sales Offer entail the intent to modify the applicable GC? The answer is to be ascertained by applying Art. 8 to the Sales Offer **(1).** However, the offer is only effective insofar as it matches the acceptance, therefore, the acceptance too must be interpreted pursuant to Art. 8 **(2).**

1. CLAIMANT's Sales Offer only entails the intent to apply RESPONDENT's GC

81 Since the crux of the issue is whether or not CLAIMANT intended, in its Sales Offer, to include the application of its own GC in place of RESPONDENT's, then the Sales Offer must be interpreted pursuant to Art. 8 CISG.

82 The CISG does not contain specific provisions concerning standard terms, thus, the general provisions for contractual formation and interpretation must be applied *[AC Op. 13, para A.3. ; CISG-online Case No. 828 (AUT, 2003)]*. This requires the interpretation of the Parties' statements and conduct in order to ascertain their intentions regarding the applicable GC. CLAIMANT has argued that its GC are applicable due to the incorporation clause in the footnote of its Sales Offer *[Cl. memo, p. 34, para. 111]*. However, the incorporation clause was part of a two document correspondence between the parties *[CE 3, p. 15]*. Therefore, CLAIMANT cannot simply choose statements within those two documents and deem it as an indication of its intent. The examination of CLAIMANT's true intent requires an

examination of the both documents and all the statements therein. Consequently, RESPONDENT shall demonstrate how applying Art. 8 to the whole correspondence between the Parties shows that there was no intent to include CLAIMANT's GC.

83 Following the same structure used for Art. 8 CISG in the preceding heading *[supra. para. 64-66]*.RESPONDENT shall first demonstrate the circumstances that need to be considered for interpretation pursuant to Art. 8(3) (**a**). The incorporation of standard terms depends on whether the intent to apply the standard conditions to the contract is known or ought to have been known to the other party. *[CISG-online Case No. 828 (AUT, 2003)]* This requires an unambiguous declaration of the offeror's intent. Hence, a reference to standard terms given in the offer must be specified and clear enough so that a reasonable person standing in the shoes of the other party *[Ibid.]*.

84 Therefore, RESPONDENT shall apply both the subjective test of Art. 8(2) to the circumstances, in order to show that RESPONDENT did not know and could not have been aware of CLAIMANT's alleged intent (**b**). Alternatively, RESPONDENT shall also apply the objective test of Art. 8(2) to show that a reasonable person would not have understood that CLAIMANT's intended to incorporate its own GC (**c**). In addition to the preceding explanation of Art. 8(2) *[supra. para. 75]*.scholars and courts have found this para to be an application of the *contra proferentem* rule, where ambiguities in statements are to be resolved against the drafter *[Magnus Art. 8 para. 18; Schmidt-Kessel in Schwenzer I (ed) Schlechtriem & Schwenzer Art 14 para 49. ; CISG-online Case No. 152 (GER, 1995)]*. Specifically, the party drafting a communication bears the burden of making its communication "*unmistakably clear*" to a reasonable person in the recipient's position under Art. 8(2) *[Honnold, p. 118]*.

a. The relevant circumstances pursuant to Art. 8(3) CISG are the Parties' prior discussions and the wording of CLAIMANT's Sales Offer and accompanying letter

85 The Parties' discussions prior to the Sales Offer provide a context for the statements within the Sales Offer and subsequent correspondence. The discussions are mainly how RESPONDENT made it clear to CLAIMANT that it will only contract based on its own GC due to the importance of preserving its reputation through ensuring confidentiality and

compliance with its CoC [*supra, para. 64-66]* This remains as a circumstance to be considered pursuant to Art. 8(3) CISG. Additionally, in response to RESPONDENT's ITT, CLAIMANT sent its Sales Offer along with a letter clarifying why it opted to submit a Sales Offer instead of merely filling and returning the Tender Documents *[CE 3, p. 15, ; CE 4, p. 16]*. The letter accompanying the Sales Offer is necessary for the interpretation thereof. In particular, a few statements offer a massive insight into what CLAIMANT intended through its offer, and simultaneously affect a reasonable person's understanding of that intent. First, CLAIMANT wrote that it had to make "*some **minor** amendments*" to the Tender Documents, which relate "*primarily to the goods and mode of payment*" *[CE 3, p. 15, emph. added]*. The fact that CLAIMANT referred to the amendments as minor is a prime indicator of CLAIMANT's actual intent, while simultaneously influencing a reasonable person's understanding of CLAIMANT's statements.

86 CLAIMANT also informed RESPONDENT that it can "*live with the (Ad Hoc DR) clause as it is*" *[Ibid.]*. This clause was only present in RESPONDENT's GE *[CE 2, p. 12, Clause 20]*. Aside from describing the amendments as "*minor*" in the beginning of its letter, CLAIMANT reiterated this fact towards the end of the letter stating that it hopes RESPONDENT finds the "*offer attractive despite the necessary **minor** amendments*" *[CE 3, p. 15]*.

87 Finally, the footnote in the Sales Offer includes a general statement that is present in all of CLAIMANT's forms that states that the offer is subject to CLAIMANT's GC and commitment to a fairer world *[PO2, p. 53, para. 28; CE 4, p. 16]*.

b. Pursuant to Art. 8(1) CISG, CLAIMANT's subjective intent was to contract based on RESPONDENT's GC

88 It is quite clear that CLAIMANT never had the subjective intent to incorporate its own GC into the contract. This is due to the fact that RESPONDENT did not know and could not have been aware that the Sales Offer included the GC as one of the modifications suggested by CLAIMANT.

89 RESPONDENT emphasized the importance of setting up a high penalty for breaching confidentiality, the supply chain's compliance with RESPONDENT's CoC and the *Ad Hoc* arbitration clause [*supra, para. 64-66]* This was made clear to CLAIMANT or any reasonable person in its position *[Ibid.]*. RESPONDENT covered all three issues in its General Conditions and CoC for supplier by including provisions that legally bind CLAIMANT to abide by confidentiality at the risk of a high penalty for breach, in addition to legally binding CLAIMANT to have its suppliers sign a comparable CoC and make sure they adhere to it *[Ibid.]*. And finally, RESPONDENT included the *Ad Hoc* arbitration clause in its GC. Such emphasis shows that covering these three issues is of supreme importance to the contract.

90 Should CLAIMANT's GC be applicable instead of RESPONDENT's, then CLAIMANT will no longer be under the threat of the high penalty for breaching confidentiality. Additionally, this would mean that CLAIMANT would no longer be bound by RESPONDENT's CoC and can therefore produce and source its products without adhering to ethical and sustainable standards without any legal consequences. Additionally, this would also mean that the *Ad Hoc* clause is not part of the contract, but instead, the contract is governed by the ICC clause in CLAIMANT's GC *[PO2, p. 51, para. 19]*. Given the fact that RESPONDENT has made it crystal clear that these three issues are integral to preserving its reputation and therefore its sales and profit, this renders them as a major part of the contract. RESPONDENT received CLAIMANT's letter in addition to the Sales Offer *[CE 3, p. 15]*. Aside from reading the standard incorporation clause found on all of CLAIMANT's offer templates, RESPONDENT also read the accompanying letter where CLAIMANT clearly states twice that it made "***minor***" amendments *[PO2, p. 53, para. 28; Ibid.]*.

91 Additionally, RESPONDENT also read that CLAIMANT accepted the *Ad Hoc* DR clause found in RESPONDENT's GC [*CE 3, p. 15*].

92 Therefore, since CLAIMANT described the amendments as minor, and since changing the applicable GC would constitute the most major amendment possible, then it is clear that CLAIMANT never had the intent to incorporate its own GC. Further, CLAIMANT's acceptance of a DR clause that is only present in RESPONDENT's GC indicates its

subjective intent to be bound by those GC. This is the reason RESPONDENT did not know, and could not have been aware of any alleged intent to apply CLAIMANT's GC.

c. Pursuant to Art. 8(2) CISG, the objective understanding of the facts shows CLAIMANT's intent to contract based on RESPONDENT's GC

93 By virtue of Art. 8(2) CISG and the *contra proferentem* rule, CLAIMANT bears the burden to communicate with RESPONDENT in an unmistakably clear manner. Should CLAIMANT's statements raise doubts, these statements should be interpreted against it. CLAIMANT's email containing its sales offer was undoubtedly ambiguous. Specifically, the conflict between the incorporation clause and the description "minor amendments" *[CE 3, p. 14; CE 4 p. 15]*.

94 There are two interpretations to CLAIMANT's offer. The first is that CLAIMANT is only making minor amendments, therefore the incorporation clause was merely a standard clause printed on CLAIMANT's usual forms and entails no intent whatsoever. The second is that CLAIMANT intended to incorporate its own general conditions despite its own statements. A reasonable person would in no way conclude that CLAIMANT is attempting to make drastic amendments to the contract by switching the dispute resolution clause, the confidentiality clause and the scope of liability under the general conditions especially since RESPONDENT made it clear since Cucina that these basic provisions are the pillars of the parties' future contractual relationship. In the event where CLAIMANT is indeed attempting to make such amendments that contradict with the parties intentions, CLAIMANT should communicate with RESPONDENT more clearly. Since Claimant failed to do so, the email sent by Claimant should be subject to the *contra proferentem* rule and thus interpreted against CLAIMANT. This means that the only way the amendments would actually be considered minor is if CLAIMANT did not intend to apply its own GC but rather intends to abide by RESPONDENT's. Consequently, the Tribunal must adopt the interpretation where the incorporation clause is disregarded as a mere sentence present in the footnote of a template free of any indications regarding the Parties' true intentions.

d. Conclusion

95 Contrary to CLAIMANT's approach of merely interpreting statements that only support its position, the interpretation of the incorporation clause in light of the whole communication uncovers CLAIMANT's true intent. CLAIMANT never intended to apply its own GC, but rather it intended to only make two minor amendments to the Tender Docs limited to the size of the cake and mode of payment

2. RESPONDENT did not accept CLAIMANT's GC

96 Any offer is only relevant insofar at it has been accepted. Ascertaining which parts of the offer has been accepted is a matter of interpreting the offeree's intent underlying its acceptance *[Schwenzer/Fountoulakis, p. 154]*. Therefore, Art. 8 must be employed to ascertain RESPONDENT's intent behind it's acceptance letter. CLAIMANT argued that RESPONDENT's statement of accepting CLAIMANT's offer notwithstanding the changes amounts to " *a pure, unconditional and unequivocal acceptance*" *[Cl. memo, p. 37, para. 127]*. Once again, CLAIMANT has once again resorted to isolating sentences from a whole document and attaching its own meaning to them. However, the acceptance letter as a whole must be interpreted to ascertain what RESPONDENT actually intended to accept.

97 Following the same structure used above for Art 8 *[supra. para. 64-66]* RESPONDENT shall first demonstrate the circumstances that need to be considered as per Art. 8(3) (**a**). Subsequently, RESPONDENT shall apply both the subjective (**b**) and objective (**c**) tests of Art. 8(1) and (2) respectively.

a. The relevant circumstance pursuant to Art. 8(3) CISG is the wording of RESPONDENT's acceptance letter

98 In response to CLAIMANT's offer and the accompanying letter, RESPONDENT sent a letter of acceptance *[CE 5, p. 17]*. In this letter, two inextricably linked points constitute relevant circumstances that must be considered during interpretation pursuant to Art. 8(3). First, RESPONDENT did accept CLAIMANT's offer notwithstanding the changes *[Ibid.]*. However, it proceeded to specify which changes it refers to, where it accepted the "*different*

payment terms and form of the cake", without making reference to CLAIMANT's GC *[Ibid.]*. Second, the fact that RESPONDENT informed CLAIMANT that the only reason it downloaded CLAIMANT's GC was "*out of curiosity*" *[Ibid.]*.

b. Pursuant to Art. 8(1) CISG, RESPONDENT's subjective intent was to only accept CLAIMANT's "minor amendments"

99 RESPONDENT never had the subjective intent to accept CLAIMANT's GC. This is due to the fact that CLAIMANT knew or at least could not have been unaware that RESPONDENT only accepted the different payment terms and form of the cake, but made no reference to CLAIMANT's GC *[CE 5, p. 17]*. Aside from the fact that silence does not amount to acceptance, RESPONDENT also made a statement indicating that it is not aware of CLAIMANT's alleged intent to incorporate its own GC. When RESPONDENT stated that it only downloaded CLAIMANT's GC "*out of curiosity*", CLAIMANT should have known that RESPONDENT is not aware of any alleged intent to incorporate them *[Ibid.]*. Therefore, it is impossible for RESPONDENT to have the subjective intent to accept something it is not aware of.

c. Pursuant to Art. 8(2) CISG, the objective understanding of the facts shows RESPONDENT only accepted CLAIMANT's "minor amendments"

100 Any reasonable person in CLAIMANT's position under the same circumstances would have understood that RESPONDENT only intends to accept the different payment terms and form of the cake and not CLAIMANT's GC. The circumstances under which the hypothetical reasonable person would reach an understanding are the Parties' discussions *[supra. para. 85]* the fact that the Sales Offer only entailed "*minor*" amendments *[supra. para. 88]* and the fact that RESPONDENT only downloaded CLAIMANT's GC out of curiosity *[supra. para. 93]*

101 The only thing a reasonable person would understand is that RESPONDENT is not aware of CLAIMANT's alleged intention to incorporate its own GC. Thus, the only reasonable

conclusion is that RESPONDENT could not intend to accept an amendment it is clearly unaware of.

C. CLAIMANT's subsequent conduct confirms RESPONDENT's interpretation.

102 CLAIMANT's conduct after the contract clearly confirms the Parties' true intentions, which is to apply RESPONDENT's GC.

103 Although the interpretation of intent under the CISG is largely concerned with the circumstances at the time of contractual formation, Art. 8(3) includes the "*subsequent conduct*" of the parties. Subsequent conduct is to be understood as behavior after the conclusion of the contract which allows for evaluating the party's intent at the time of making the statement *[Schlechtriem/Butler, p. 57]*. The party's subsequent conduct is used in determining their understanding of the contract *[Farnsworth, p. 100; Honnold, p. 123]*. A court deemed a buyer's complaint about the quantity of the goods as a reason for believing a valid contract had been concluded *[CISG-online case no. 336 (SUI, 1997)]*.

104 In the case at hand, there are two DR clauses. The first is the *Ad Hoc* clause only found in RESPONDENT's GC *[CE 2, p. 12]*. The second is the ICC institutional arbitration clause, only found in CLAIMANT's GC *[PO2, p. 53, para. 29]*. CLAIMANT initiated its arbitration on the basis of the *Ad Hoc* DR clause *[NA, p. 6, para. 13]*. If CLAIMANT's intent was to contract according to its own GC, then it would have initiated arbitration based on the DR clause therein. The fact that CLAIMANT resorted to the clause that is only a part of the contract due to RESPONDENT's GC shows the Parties' mutual understanding that the contract is only governed by RESPONDENT's GC.

105 In conclusion, CLAIMANT's subsequent conduct of initiating arbitration based on RESPONDENT's GC reflects its real understanding of the contract. Specifically, that the contract is only governed by RESPONDENT's GC and the DR clause therein.

D. Alternatively, in the event where the Tribunal finds CLAIMANT's GC to be part of the contract, they must be excluded for being "Surprising Terms"

106 Even if the Tribunal finds CLAIMANT's GC to form part of the contract, they would still be excluded due to the fact that they constitute Surprising Terms as described by the AC Op. 13.

107 CLAIMANT has argued that its GC and the incorporation clause thereof are enforceable *[Cl. memo, p. 19, para. 93]*. CLAIMANT further based its arguments on the AC Op. no. 13 to deduce that its GC are valid *[Cl. memo, p. 20, para. 98, et seq.]*. However, CLAIMANT completely neglected rule no. 7 of the AC Op. Within rule no. 7, the AC held that standard terms that are so surprising or unusual that a reasonable person of the same kind as the relevant party could not reasonably have expected such a term in the agreement, do not form part of the agreement *[AC Op 13, Rule 7]*. The AC further states that if the party using the standard terms wishes to include such surprising terms, it needs to specifically inform the other party of their existence and inclusion *[AC Op 13, para. 7.2]*.

108 In the case at hand, CLAIMANT's GC contain no penalty for breaching confidentiality, no explicit legal basis for an obligation on CLAIMANT to guarantee ethical production and an institutional ICC arbitration clause *[PO2, p. 53, para. 29]*. In light of the parties' discussions, RESPONDENT clearly communicated the importance of confidentiality measures, being able to guarantee its supplier's compliance to RESPONDENT's CoC, and the *Ad Hoc* arbitration clause [*supra, para.68]* Therefore, within the context of the circumstances of this case, this renders CLAIMANT's GC surprising and unusual to a reasonable person in RESPONDENT's position. If CLAIMANT wanted to include such terms, it should have specifically informed RESPONDENT of their existence and inclusion. Since CLAIMANT failed to do so, its GC are considered surprising terms and thus do not form part of the contract.

IV: The Goods Delivered by CLAIMANT are not in Conformity with RESPONDENT's General Conditions and Code of Conduct pursuant to Art. 35 CISG

109 Three years following the conclusion of the contract, RESPONDENT discovered that CLAIMANT was not delivering cakes that are produced ethically and thus, was not cherishing its basic contractual obligation. For that reason, RESPONDENT terminated the contract and refused to pay the price of the cakes.

110 CLAIMANT is unjustifiably asking the tribunal for the payment of the cakes based on the incorrect assertion that the cakes delivered were in compliance with the contract and Art. 35 CISG. in addition, CLAIMANT incorrectly suggests that its obligation was to merely use its best efforts in delivering ethically produced cakes.

111 Therefore, RESPONDENT shall show how CLAIMANT allegations are without merit where the contract requires CLAIMANT o deliver ethically produced cakes **(A)**. Second, RESPONDENT shall explain how CLAIMANT did not comply with Art. 35(2) CISG **(B)**. Third, RESPONDENT shall show how CLAIMANT was obligated to achieve a specific result and not use its best efforts **(C)**.

A. The Contract requires CLAIMANT to deliver ethically produced cakes

112 Whether or not goods are conforming is governed by Art. 35(1) CISG which connects conformity to what the parties have agreed upon in their contract *[Schlechtriem/Butler, p. 114]*. And therefore, this Art. regulates the "subjective defect" that is found in the "*quality, quantity or description*" *[Schwenzer in Schlechtriem/Schwenzer]*. It is undisputed that the contractual requirement of delivering ethically produced goods falls within the scope of the goods' quality *[Schwenzer/Leisinger p. 267; CISG-online Case No. 135 (GER, 1996*)]. The contract must include express provisions to include non-physical features, such as ethical production, as part of the specifications of the goods *[CISG-online Case No. 786 (GER, 2002)]*. The rules of interpretation set forth in Art. 8 CISG shall be examined to determine whether or not there were express provisions requiring CLAIMANT to deliver goods with non-physical specifications *[Henschel, p. 168; supra. para. 64-66]*.In the following, RESPONDENT shall show how CLAIMANT knew and could not have been unaware that

113 RESPONDENT intended to include ethical production as part of the description of the goods **(1).** Alternatively, under the objective test, a reasonable person would not have understood such intent **(2).**

1. CLAIMANT knew or could not have been unaware that RESPONDENT intends to incorporate ethical production in the contract

114 CLAIMANT's assertions with regards to the words of the contract being too broad are without merit. CLAIMANT may not argue that the contract does not obligate it to deliver ethically produced cakes where it knew or could not have been unaware of RESPONDENT's intent in incorporating such obligation from the words of the contract.

115 To begin with, CLAIMANT may not assert that the quality of the cakes is "not at stake" *[Cl. memo, p. 27, para. 143]*. The fact that it is widely agreed that ethical production falls under the quality of the goods leads to the conclusion that the quality of the cakes is the foundation of the dispute, primarily since CLAIMANT failed to deliver goods of such quality. Second, CLAIMANT may not argue that the obligation arising under section iii clause 1 of the contract is "too broad*" [Cl. memo, p. 27, para. 144]*. This section obligates CLAIMANT to source ingredients pursuant to section IV of the contract *[CE 2, p. 10]*. With that said, Section IV of the contract sets forth the method to understand CLAIMANT's obligation. This section start with RESPONDENT noting how it has "a 'zero tolerance' policy when it comes to unethical business behavior, such as bribery and corruption" *[CE 2, p. 11]* and how RESPONDENT *"expects all of its suppliers to adhere to similar standards and to conduct their business ethically" [ibid]*.

116 CLAIMANT cannot argue that it was not aware of RESPONDENT's intent specifically due to the fact that there is a repeated reference to those statements in the contract *[CE 2, pp. 11-13]* asides from those statement, section IV of the contract provides that the documents in the contract have a particular order and are mutually explanatory. In case of any ambiguity, the documents are to be read pursuant to their order *[CE 2, p. 11]* thus, CLAIMANT may not assert that the CoC is inapplicable because its the last document regarding the order of the documents *[Cl memo, p. 27, para. 146]*. Since the CoC is undoubtedly applicable,

CLAIMANT may not argue that it was not aware or could not have been unaware of RESPONDENT's intent in incorporating ethical production in the contract by observing the wording of the CoC. section C of the CoC clearly imposes an obligation on CLAIMANT to not only appoint a formally competent person to manage health, safety and environmental programs but also, ensure that its own suppliers comply with said requirements *[ibid]*.

117 Irrespective of whether or not CLAIMANT was actually defrauded, it is clear from the wording that RESPONDENT intends to purchase cakes that are in line with suitable environmental programs. With regards to section E of the CoC, CLAIMANT was obligated to select its "own tier one suppliers providing goods or services directly or indirectly to Comestibles Finos Ltd based on them agreeing to adhere to standards comparable to those set forth in this Comestibles Finos' Code of Conduct for Suppliers" further, CLAIMANT was obligated to "make sure that they comply with the standards agreed upon to avoid that goods or services delivered are in breach of Comestibles Finos' General Business Philosophy". Since CLAIMANT read the words of the CoC and deliberately accepted them, CLAIMANT knew or could not have been unaware of the fact that RESPONDENT intends to incorporate ethical production under the quality of the cakes where CLAIMANT was obligated to make sure its suppliers comply with suitable requirements for the sole purpose of assuring that the cakes delivered do not breach RESPONDENT's principles.

118 Consequently, CLAIMANT knew or could not have been unaware that RESPONDENT intends to incorporate ethical production into the contract by reading the words of the contract.

2. Any Reasonable person in CLAIMANT position would understand from the negotiations between the parties that RESPONDENT **intends to purchase ethically produced cakes**

119 Pursuant to Art. 8(2) CISG, a reasonable person in CLAIMANT position would understand that RESPONDENT intends to purchase ethically produced cakes by observing the negotiations between the parties leading up to the conclusion of the contract.

120 From the moment the parties met at the Cucina food fair in 2014 until the conclusion of the contract in 7 April 2014, RESPONDENT clearly communicated to CLAIMANT that ethical production is the essence of the quality of the cakes and the contract. To begin with,

during the parties' meeting at Cucina, RESPONDENT noted how its reputation is closely linked to the ethical production of goods *[RE 5, p. 41]*. Furthermore, throughout the discussion at Cucina, the main topic was the importance of ethically produced goods to RESPONDENT *[NA, p. 4, para. 3]*.

121 Following the food fair, RESPONDENT emailed CLAIMANT an invitation to tender. In that email, RESPONDENT mentioned that the main reason it chose CLAIMANT as a tenderer was primarily due to CLAIMANT's commitment to ethical production *[CE 1, p. 8]* in addition to that, RESPONDENT stated that the supply chain is of utmost importance where it needs to be sure that CLAIMANT supplier is also producing ethically *[ibid]*. When the parties concluded the contract, RESPONDENT noted in its email that CLAIMANT was awarded with the contract primarily because of the parties' shared commitment to Global Compact so that RESPONDENT would ensure that "the goods produced and sold fulfill the highest standard of sustainability" *[CE 5, p. 17; PO2, p. 52, para. 23]*. Thus, any reasonable person in CLAIMANT's position observing RESPONDENT's emails would automatically understand that RESPONDENT intends to purchase ethically produced cakes where CLAIMANT's commitment to Global Compact was the reason Responded chose CLAIMANT as a seller to guarantee the delivery of ethically produced cakes.

122 In conclusion, a reasonable person in CLAIMANT's situation observing the negotiations between the parties would understand that the contract requires ethically produced cakes.

B. CLAIMANT was obligated to deliver ethically produced cakes to RESPONDENT by virtue of Art. 35(2) CISG.

123 Should the primary rule be insufficient to determine conformity, Art. 35(2)(b) CISG allows for the secondary rule in which conformity is assessed based on the particular purpose of the good. Art. 35(2)(b) CISG sets an obligation on the seller to deliver goods fit for a particular purpose. This Art. creates the aforementioned obligation when the buyer discloses the particular purpose either expressly or impliedly to the seller at the conclusion of the contract. In addition to that, for the buyer to correctly assert the application of Art. 35(2)(b) CISG the buyer has to reasonably rely on the seller's skill and judgment [*Enderlein/Maskow, p. 157*]

124 RESPONDENT shall show how CLAIMANT violated Art. 35(2)(b) CISG. First, CLAIMANT was obliged to deliver ethically produced cakes where RESPONDENT impliedly disclosed this particular purpose **(1).** Additionally, RESPONDENT reasonably relied on CLAIMANT's skill and judgment **(2).**

1. The Particular purpose was impliedly made known to CLAIMANT at the conclusion of the contract

125 RESPONDENT impliedly made known to CLAIMANT that the particular purpose of the cakes is that they are produced ethically at the time of the conclusion of the contract.

126 By virtue of Art. 35(2)(b) CISG, the goods are not conforming when they are not *"fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract" [Art. 35(2)(b) CISG]*. The particular purpose is made known to the seller when the buyer expressly or at least impliedly informs the seller of such purpose at the conclusion of the contract *[Bianca, in Bianca-Bonell, art. 35, para. 2.5.2]*.

127 CLAIMANT was correct in conceding to the fact that the particular purpose of the cakes was impliedly made known to it at the conclusion of the contract *[Cl. memo, p. 29, para. 155]*. The facts of the dispute clearly show that RESPONDENT's intent to purchase ethically produced goods was impliedly made known to CLAIMANT as the parties were concluding the contract. First of all, RESPONDENT mentioned that the strict adherence of suppliers is crucial when it enters into contracts with sellers *[CE 1, p. 8]*. Second, at the conclusion of the contract, RESPONDENT clearly stated how the parties are "both committed to ensure that the goods produced and sold fulfilled the highest standard of sustainability" *[CE 5, p. 17]*. Since CLAIMANT did not argue that the particular purpose was not made known to it or was ambiguously made known to it, it should be uncontested that RESPONDENT impliedly informed CLAIMANT that it demands ethically produced cakes.

128 Therefore, the unethically produced cakes were not conforming to the contract where RESPONDENT impliedly made known to CLAIMANT the particular purpose at the conclusion of the contract.

2. The circumstances of the dispute show the RESPONDENT reasonably relied on CLAIMANT's skill and judgment

129 Contrary to CLAIMANT's assertions *[Cl. memo, p. 29, para. 157],* RESPONDENT reasonably relied on CLAIMANT's skill and judgment. Therefore, the cakes were not conforming to the contract.

130 Art. 35(2)(b) CISG obligates the buyer to reasonably rely on the seller's skill and judgment for a legitimate assertion of the Art. *[Bianca, in Bianca-Bonell, p. 275; CISG-online Case no 625 (USA, 2002)]*. Reasonable reliance is present when the seller is skilled enough to be able to deliver goods that meet the particular purpose *[Schwenzer in Schliectriem/Schwenzer, para. 23]*. Furthermore, a buyer may reasonably rely on a seller's skill and judgement as long as the buyer is not more knowledgeable and skilled than the seller *[CISG-online Case No. 1447 (GER, 2006)]*.

131 CLAIMANT may not argue that RESPONDENT could not reasonably rely on CLAIMANT's skill and judgment based on its experience with a previous supplier *[Cl. memo, p. 29, para. 157]*. This is primarily because the reliance on skill and judgment is solely determined by the skills possessed by the seller and the buyer and certainly not by previous suppliers whom are not even part of the contractual relationship or the dispute. With that being said, CLAIMANT is a medium sized manufacturer of fine bakery products *[NA, p. 4, para. 1]*. On the other hand, RESPONDENT is a gourmet supermarket chain *[RNA, p. 24, para. 4]* CLAIMANT works closer with its suppliers and thus should be more aware of any possible breach of the contractual provisions regarding the ethical production of the cakes.

132 Moreover, CLAIMANT's assertions regarding the numerous scandals faced by the cocoa industry is false and inapplicable *[Cl. Memo, p. 29, para. 157]* where it is known that Ruritania's reputation was not subject to numerous scandals following the UNEP's report *[PO2, p. 53, para. 32]*. Therefore, RESPONDENT's reliance on CLAIMANT's skill and judgment was reasonable in that aspect as it did not "blindly trust" *[Cl. Memo, p. 29, para. 157]* CLAIMANT in asking it to deliver ethically produced cakes.

133 Consequently, RESPONDENT reasonably relied on CLAIMANT's skill and judgment where CLAIMANT is more skilled than RESPONDENT in that aspect. Finally, CLAIMANT's assertions regarding skill and judgment are without merit.

C. CLAIMANT was obligated to achieve a specific result and not use its best efforts in delivering ethically produced cakes

134 RESPONDENT shall show how, The wording of the contract clearly obligates CLAIMANT to deliver ethically produced cakes **(1)** Second, the price of the cakes indicates that CLAIMANT is obligated to achieve a specific result and not use its best efforts **(2),** Third, the degree of risk involved is not high enough to create an obligation of best efforts on CLAIMANT **(3)** Finally, RESPONDENT had no influence over the performance of CLAIMANT's obligation in delivering the cakes **(4)**

1. The wording of the contract clearly obligates CLAIMANT to deliver ethically produced cakes

135 CLAIMANT's assertions regarding the type of duty underlying the contract is without merit. The contract clearly stipulates a duty of result and not merely best efforts.

136 Art. 5.1.5(a) UNIDROIT provides that *"the way in which the obligation is expressed in the contract" [Art. 5.1.5 Unidroit]* helps determine the extent of a party's obligation *[ibid]*. Thus, pursuant to the official comment under this Art. *"The way in which an obligation is expressed in the contract may often be of assistance in determining whether the parties intended to create a duty to achieve a specific result or a duty of best efforts" [Official Comment Art. 5.1.5 UNIDROIT]*.

137 CLAIMANT incorrectly assumes that the wording of the contract is "too vague" to establish a duty of results *[Cl. memo, p. 30, para. 164]*. On the contrary, the contract between the parties clearly creates an obligation on CLAIMANT to deliver ethically produced cakes. First of all, under clause 1, section III of the contract, *"Ingredients have to be sourced in accordance with the stipulations under Section IV" [CE 2, p. 10]*. The words used in this clause clearly show how CLAIMANT is not obligated to merely *"try to source ingredients"* but rather, is obligated to deliver a specific result of producing cakes sourced with special ingredients. Section IV of the contract is clear on the matter that RESPONDENT intends to purchase ethically produced cakes where it is stated that RESPONDENT has a "*'zero tolerance' policy when it comes to unethical business behavior, such as bribery and corruption" [CE 2, p. 11]*. In addition to that,

Section IV of the contract states that the ingredients must be sourced pursuant to all the contract documents that are mutually explanatory in case the reader of the contract finds a provision to be ambiguous *[ibid]*. Thus, CLAIMANT may not assert ambiguity of the contract based on a few contractual provisions *[Cl, memo, p. 31, para. 165]*.

138 In conclusion, the wording of the contract shows that CLAIMANT was obligated to deliver ethically produced cakes and not merely try to produce ethically. CLAIMANT may not assert that the contract was ambiguous based on a few provisions in the contract.

2. The price of the cakes indicates that CLAIMANT is obligated to achieve a specific result and not use its best efforts

139 Contrary to what CLAIMANT has argued, the price of the cakes indicates that CLAIMANT is obligated to deliver ethically produced cakes and not merely use its best efforts in doing so

140 Pursuant to Art. 5.1.5 UNIDROIT, the contractual price of the goods can be used in determining the extent of the seller's obligation *[Art. 5.1.5 UNIDROIT]*. Thus, for a seller to expect that it is obligated to deliver goods with special features, the contractual price of such goods is assessed to determine the scope of such obligation.

141 CLAIMANT may not argue that it was only required to use its best efforts given that the price of the cakes agreed upon by the parties was not extraordinary *[Cl memo, p. 32, para. 170]*. The fact that the price of the cakes was *"towards the upper end of the price paid for a premium product in the relevant market segment" [PO2, p. 54, para. 40]* clearly shows that RESPONDENT was expecting a specific result from CLAIMANT. In addition to that, the fact that the price was not extraordinary is irrelevant to the situation at hand where the price should give an indication of the nature of the goods themselves. With that being said, CLAIMANT paid a price for the cocoa beans from its supplier which is equal to the price of sustainably produced cocoa *[PO2, p. 54, para. 41]*. Therefore, the final price of the cakes automatically give an indication that they were produced ethically.

142 To conclude, the price of the cakes indicates that CLAIMANT was required to deliver ethically produced cakes to RESPONDENT and not just use its best efforts as CLAIMANT suggested.

3. The degree of risk involved is not high enough to create an obligation of best efforts on CLAIMANT

143 The degree of risk involved is not high enough to permit CLAIMANT in fulfilling its contractual obligations without achieving a specific result

144 In accordance with Art. 5.1.5 UNIDROIT, the degree of risk involved in achieving a specific result indicates the extent of the party's obligation *[Art. 5.1.5 UNIDROIT]*. When a party is required to perform a particular obligation that typically involves a high degree of risk, neither parties would reasonably expect an obligation of result *[Official Comment Art. 5.1.5 UNIDROIT]*

145 CLAIMANT's arguments with regards to the degree of risk in the cocoa industry is without merit. First of all, CLAIMANT reaches a false conclusion by asserting that the cocoa industry is subject to "numerous and recurrent" scandals regarding bribery, corruption and deforestation *[Cl. memo, p. 33, para. 170]*. It is undoubtedly true that Ruritania was never the subject to those scandals as it had a good reputation on the market following the UNEP's report *[PO2, p. 53, para. 32]*. Consequently, there was no high risk expected by either party at the conclusion of the contract. CLAIMANT noted how it was sure that there was no high degree of risk involved when it assured RESPONDENT that it was "fairly confident" that there was no problem associated with its cocoa supplier *[CE 8, p. 20]*. In addition, CLAIMANT may not argue that the degree of risk is associated with RESPONDENT's previous supplier *[Cl. memo, p. 33, para. 177]* where there is no proof that the supplier did not comply with its obligations due to a scandal in the cocoa industry where there are various reasons as to why a supplier could breach its obligations. Finally, the fact that not all of RESPONDENT's suppliers from Ruritania were affected from the scandal *[PO2, p. 54, para. 36]* shows that the degree of risk is not as high as CLAIMANT suggests.

146 To conclude, the degree of risk surrounding CLAIMANT's obligation is not high enough to exempt it from delivering unethically produced cakes.

4. RESPONDENT had no influence over the performance of CLAIMANT's obligation in delivering the cakes

147 CLAIMANT's argument regarding RESPONDENT's influence over the production of cakes is without merit where RESPONDENT was not involved in CLAIMANT's production process.

148 Art. 5.1.5 UNIDROIT provides that *"the ability of the other party to influence the performance of the obligation"* determines the nature of the parties obligation *[Art. 5.1.5 UNIDROIT]*. Furthermore, if the other party has an influence over the party's performance of its obligation, the obligation may be merely an obligation of best efforts *[Official Comment Art. 5.1.5 UNIDROIT]*

149 For CLAIMANT to assert the application of Art. 5.1.5 UNIDROIT legitimately, it has to prove how RESPONDENT influenced the performance of its obligation in delivering ethically produced cakes. RESPONDENT had no influence whatsoever in that aspect. This is primarily because RESPONDENT is a gourmet supermarket *[RNA, p. 24, para. 4]* while CLAIMANT is the manufacturer of bakery products *[NA, p. 6, para. 1]* RESPONDENT has no influence over the production process as that falls out of its expertise. Furthermore, CLAIMANT cannot assert that RESPONDENT's audit right constitute such influence *[Cl. memo, p. 34, para. 179]* where these rights do not affect the production process, but rather, strictly monitor it.

150 Consequently, RESPONDENT's had no influence over CLAIMANT's obligation in delivering ethically produced cakes where the audit rights are not related to such influence.

PROCEDURAL REQUEST

On the basis of the foregoing submissions, RESPONDENT kindly requests the Tribunal to hear the Challenge.

Additionally, RESPONDENT kindly requests the Tribunal to find that Mr. Prasad should not participate in the decision.

PRAYERS FOR RELIEF

On the basis of the foregoing submissions, RESPONDENT respectfully seeks the following:

1) RESPONDENT respectfully requests the Tribunal to declare that the contract is governed by RESPONDENT's General Conditions and Codes of Conduct
2.) RESPONDENT kindly requests the Tribunal to deem the cakes nonconforming to the contract and dismiss CLAIMANT's claims for the payment of the cakes.
3.) RESPONDENT respectfully requests the Tribunal to order CLAIMANT to bear the costs of this arbitration

Certificate

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

Amer Abu Sham	Leen Amr	Nadeen Abawi
(Signed)	(Signed)	(Signed)