

Twenty Fifth Annual
Willem C. Vis International Commercial Arbitration Moot

24 March – 29 March 2018

Vienna Austria

MEMORANDUM FOR RESPONDENT



Faculty of Law

ON BEHALF OF:

Comestibles Finos Ltd
75 Martha Stewart Drive
Capital City
Mediterraneo
(RESPONDENT)

AGAINST:

Delicatess Whole Foods Sp
39 Marie-Antoine Carême
Avenue
Oceanside
Equatoriana
(CLAIMANT)

**Leon Brulc • Stefan Danojević • Vivian Mohr • Mihael Pojbič
Barbara Smogavc • Hana Šrot • Petra Zupančič**



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TABLE OF ABBREVIATIONS

§/§§	paragraph/paragraphs
AA	Arbitration Agreement
Art. /Arts.	Article
CGC	CLAIMANT's General Conditions of Sale
Challenge	Challenge of Mr. Prasad
CISG	United Nations Convention on Contracts for the International Sale of Goods
e.g.	exempli gratia (for example)
Ex. C	CLAIMANT's Exhibit
Ex. R	RESPONDENT's Exhibit
FL1	Letter Fasttrack (30 June 2017), p. 3
FL3	Letter Fasttrack (Refusal to Agree to Removal – 29 September 2017), p. 45
fn.	Footnote
IBA	International Bar Association
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ibid	ibidem (in the same place)

i.e.	id est (that is)
infra	Bellow
LP	Limited Partnership
Ltd.	Limited
Model Law	UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006
Mr./Ms.	Mister/Miss
NCA	Notice of Challenge of Arbitrator
no.	Number
PL	Letter Prasad (Refusal to step Down – 11 September 2017)
PO1	Procedural order No. 1
PO2	Procedural order No. 2
p./pp.	page/pages
RGC	RESPONDENT's General Conditions of Contract
RNA	Response to Notice of Arbitration
SUP	RESPONDENT's Code of Conduct for Suppliers
Supra	Above
Tribunal	Arbitral Tribunal
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Arbitration Rules

UNIDROIT	International Institute for the Unification of Private Law
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UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2010
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USD	United States dollar
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v	Versus
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STATEMENT OF FACTS

- 1 The parties to this arbitration are Delicatesy Whole Foods Sp (hereinafter: **CLAIMANT**) and Comestibles Finos Ltd (hereinafter: **RESPONDENT**), collectively “**Parties**”. **CLAIMANT** is a manufacturer of fine bakery products registered in Equatoriana. **RESPONDENT** is a gourmet supermarket chain in Mediterraneo.
- 2 **Parties** met at the yearly Danubian food fair Cucina in **March 2014** where **RESPONDENT’s** Head of Purchasing Annabelle Ming approached **CLAIMANT**. She and Kapoor Tsai, **CLAIMANT’s** Head of Production, discussed the possibility of future cooperation.
- 3 On **10 March 2014**, **RESPONDENT** sent the Invitation to Tender, to which **CLAIMANT** replied with Letter of Acknowledgement on **17 March 2014** and with its offer on **27 March 2014**. In Sales-Offer **CLAIMANT** proposed several changes, including the payment and description of the cakes.
- 4 On **7 April 2014**, **RESPONDENT** sent a letter following **CLAIMANT’s** offer. **RESPONDENT** also requested that **CLAIMANT** started its delivery of 20,000 chocolate cakes per day on **1 May 2014**. In accordance with the contract, **CLAIMANT** made its first delivery on that date. There were no problems concerning the deliveries in **2014**, **2015** and **2016**.
- 5 In **2016**, Mr. Prasad published an article in the Vindobona Journal of International Commercial Arbitration and Sales Law.
- 6 On **6 January 2017**, the United Nations Environment Programme special rapporteur published a report on the investigation on deforestation in Ruritania. This report was followed by a documentary, shown on the Equatorian state news channel on **19 January 2017**, and an article published on **23 January 2017** in Michelgault.
- 7 On **27 January 2017**, **RESPONDENT** sent an email seeking clarification whether **CLAIMANT’s** suppliers all strictly adhered to the Ten Principles of UN Global Compact. **RESPONDENT** also stated that it would refrain from taking any further delivery and making any further payment until the issue was resolved. On the same day **CLAIMANT** replied with an email, stating that it did not believe that the cocoa beans came from unsustainable farms. **CLAIMANT** also promised to investigate further and insisted on payment for the cakes delivered.
- 8 In the email of **10 February 2017**, **CLAIMANT** informed **RESPONDENT** that it cannot exclude the possibility that some of the cocoa came from unsustainable farms. **RESPONDENT** terminated the contract in the email of **12 February 2017**.

- 9 Following unsuccessful mediation on **30 May 2017**, CLAIMANT initiated arbitration proceeding by sending Notice of Arbitration on **30 June 2017**. RESPONDENT submitted Response to Notice of Arbitration on **31 July 2017**.
- 10 On **29 August 2017**, RESPONDENT informed both Tribunal and CLAIMANT about obtaining information on CLAIMANT's third-party funder. On **7 September 2017**, CLAIMANT disclosed that Funding 12 Ltd, whose main shareholder is Findfunds LP, funded its claim. On **11 September 2017**, in light of the newly emerged information, Mr. Prasad sent clarification regarding his impartiality.
- 11 On **14 September 2017**, RESPONDENT submitted Notice of Challenge of Arbitrator. On **21 September 2017**, Mr. Prasad responded to the challenge and on **29 September 2017**, CLAIMANT refused to agree to removal.

SUMMARY OF ARGUMENTS

- 12 Firstly, Parties have excluded application of Art. 13(4) of the UNCITRAL Arbitration Rules in their arbitration agreement. Therefore, appointing authority cannot decide on challenge of Mr. Prasad as it should not be designated in the first place. Further, arbitral tribunal should recognize their power and make the decision on challenge of Mr. Prasad. The decision should be made without Mr. Prasad's vote (**ISSUE I**).
- 13 Secondly, Mr. Prasad should be disqualified from Tribunal due to justifiable doubts to his impartiality and independence. Since UNCITRAL Arbitration Rules do not provide concrete criteria for disqualification of arbitrators, arbitral tribunal should advise IBA Guidelines on Conflict of Interest in International Arbitration 2014. Tribunal should consider Mr. Prasad's connection to CLAIMANT's third-party funder, his previous appointments by parties connected to CLAIMANT and review his position on conformity of goods. Said circumstances raise doubts regarding Mr. Prasad's impartiality and independence (**ISSUE II**).
- 14 Thirdly, RESPONDENT's General Conditions govern the contract, as they are the only set of standard terms validly included into the contract. RESPONDENT's counter-offer is governed solely by its standard terms. Moreover, RESPONDENT's General Conditions lost the nature of standard terms by being attached to CLAIMANT's offer. Even if RESPONDENT's General Conditions did not become negotiated terms, the contract is not governed by CLAIMANT's General Conditions of Sale due to order of precedence, knock-out doctrine, and their surprising nature. Moreover, RESPONDENT was neither aware of CLAIMANT's intent to incorporate CLAIMANT's General

Conditions of Sale nor were the terms made sufficiently available to RESPONDENT. CLAIMANT's references to its general conditions on invoices are irrelevant (**ISSUE III**).

- 15 Fourthly, since the sustainability requirements were included into the contract, CLAIMANT breached its obligations under Art. 35(1) of the CISG by delivering cakes produced from unethically sourced cocoa. Moreover, the cake presented at the Cucina Food Fair cannot be a model under Art. 35(2)(c) of the CISG. Ultimately, Parties agree that RESPONDENT's particular purpose was selling sustainably produced cakes. Since CLAIMANT delivered cakes that were non-conforming with contractual requirements and the particular purpose, RESPONDENT rightfully terminated the contract (**ISSUE IV**).

ISSUE I: THE TRIBUNAL HAS THE POWER TO DECIDE ON CHALLENGE OF MR. PRASAD

- 16 At the time of conclusion of the contract, RESPONDENT explicitly pointed out to CLAIMANT the importance of confidentiality in any potential arbitration [*Ex. R5, p. 41*]. CLAIMANT acknowledged said reservations and agreed to *ad hoc* arbitration as per RESPONDENT's proposed Arbitration Agreement (hereinafter: AA). In AA, Parties decided on the usage of the UNCITRAL Arbitration Rules (hereinafter: UNCITRAL Rules). However, in the same sentence, a clause excluding the involvement of any arbitral institution in the arbitral proceedings was added. Thus, UNCITRAL Rules were not agreed on by Parties in their entirety but only with a modification.
- 17 CLAIMANT states that the procedure for the challenge of an arbitrator provided by UNCITRAL Rules should be followed and that Tribunal does not have the power to decide on Challenge [*MfC, pp. 3-6, §§2-11*]. However, proposed procedure cannot be observed without breaching Parties' AA. The procedure contained in UNCITRAL Rules foresees the involvement of the Permanent Court of Arbitration (hereinafter: PCA), an arbitral institution, as well as involvement of an appointing authority. Thus, RESPONDENT asserts that Tribunal does have the power to decide on Challenge since Parties have excluded the application of Art. 13(4) of the UNCITRAL Rules (**A**). Consequently, Tribunal should exercise its power and should do so without participation of Mr. Prasad (**B**).

A. Parties have excluded the application of Art. 13(4) of the UNCITRAL Arbitration Rules

- 18 CLAIMANT argues that UNCITRAL Rules apply in their entirety and that application of Art. 13(4) of the UNCITRAL Rules was not waived by Parties [*MfC, p. 3, §5*]. However, such reasoning cannot be interpreted without opposing the will of Parties enshrined in AA. RESPONDENT was clear in its reasons for *ad hoc* arbitration and CLAIMANT expressly agreed to the exclusion of any

arbitral institution during the proceedings [Ex. C3, p. 15, §5]. This mutual agreement between Parties would be breached by application of Art. 13(4) of the UNCITRAL Rules.

19 Therefore, appointing authority should not participate in Challenge procedure and Tribunal should find that it is within its powers to decide on Challenge instead. Firstly, this is due to the fact that Parties have waived Art. 13(4) of the UNCITRAL Rules in their AA (1). Secondly, RESPONDENT will demonstrate that Art. 13(4) of the UNCITRAL Rules cannot be applied without violating Parties' agreement (2). Thirdly, contrary to CLAIMANT's allegations, excluding appointing authority would be reasonable (3).

1. Parties have waived Art. 13(4) of the UNCITRAL Arbitration Rules in arbitration agreement

20 CLAIMANT asserts that Parties have not excluded the application of Art. 13(4) of the UNCITRAL Rules [MfC, p. 3, §4]. However, that is incorrect. Parties have excluded involvement of arbitral institutions [Ex. C2, p. 11], which results in exclusion of Art. 13(4) of the UNCITRAL Rules.

21 Firstly, contrary to CLAIMANT's allegations [MfC, pp. 3-4, §5], arbitration rules do not have to be modified by explicit exclusion of certain articles. There are no provisions prescribing explicit modification in the agreed upon arbitration rules or the *lex arbitri*. What is more, drafters of UNCITRAL Rules agreed that exclusion of articles does not have to be explicit, as it would be in conflict with international commercial practice [UN Committee Report, pp. 7-8, §§49, 53]. Legal theory does not provide basis for explicit exclusion either. It is telling that CLAIMANT fails to support its argument with any authorities [MfC, pp. 3-4, §5].

22 Secondly, CLAIMANT observes that Art. 13(4) of the UNCITRAL Rules cannot be excluded by oral agreement [MfC, p. 4, §6]. However, RESPONDENT has never claimed that said article was excluded orally. Art. 13(4) of the UNCITRAL Rules was excluded in written form through AA [NCA, p. 39, §8].

23 Thirdly, contrary to CLAIMANT's assertions [MfC, p. 4, §7], Parties have excluded Art. 13(4) of the UNCITRAL Rules implicitly. It is of paramount importance to analyse the composition of AA thoroughly. Clause 20 of the contract contains two distinct features. First, there is an addition excluding any involvement of arbitral institution and use of the UNCITRAL Rules on Transparency. Second, there is no agreement on appointing authority [Ex. C2, p. 11]. Aside from aforementioned features, dispute resolution clause is a verbatim adoption of the UNCITRAL model arbitration clause [UNCITRAL Rules, annex].

24 Both alterations bear considerable significance. Firstly, it must be pointed out that UNCITRAL Rules make reference to institution only in regard to appointing authority [UNCITRAL Rules, Art. 6(1), annex]. As model arbitration clause was created specifically for *ad hoc* arbitration under UNCITRAL Rules [Zabradníková, §14.8.], express exclusion of arbitral institution can only be understood in relation to appointing authority. Secondly, AA does not contain the agreement on appointing authority. It should be noted that in UNCITRAL model arbitration clause agreement on appointing authority is listed first, prior to agreements on number of arbitrators, seat of arbitration, and language of the proceedings [UNCITRAL Rules, annex]. One must draw the conclusion that its placement in the UNCITRAL model arbitration clause signifies the importance it bears. This argument is further fortified by drafters' decision to change the wording of UNCITRAL model arbitration clause. Reasoning for said decision was to emphasize importance for aforementioned agreements to be included into the prospective arbitration agreements [WGII Report 665, §27]. In light of arguments made above, it is obvious that agreement on appointing authority was intentionally omitted from AA to ensure that arbitral tribunal should resolve the dispute.

25 To conclude, AA mirrors the UNCITRAL model arbitration clause in every word except for addition regarding the exclusion of involvement of arbitral intuitions. Further, considering the fact that agreement on appointing authority was not included in AA, Tribunal should recognise that will of Parties was to exclude the involvement of appointing authority from these proceedings.

2. Art. 13(4) of the UNCITRAL Rules cannot be applied without violating Parties' agreement

26 The provision in AA regarding the exclusion of any arbitral institution cannot be upheld if Art. 13(4) of the UNCITRAL Rules is to be applied. This is due to the procedure provided in said article, which presupposes involvement of an arbitral institution in absence of an agreement between parties. Accordingly, RESPONDENT will demonstrate that an agreement on appointing authority as a person is unlikely between Parties (2.1). As per Art. 13(4) of the UNCITRAL Rules, if such agreement cannot be reached, involvement of an arbitral institution is inevitable (2.2).

2.1 Agreement on appointing authority as a person is unlikely

27 CLAIMANT states that that RESPONDENT's reservation about the involvement of an arbitral institution does not exclude participation of an appointing authority since it is possible that an appointing authority can also be only one person [MfC, p. 4, §7]. While RESPONDENT does not object this, it must be pointed out that an individual acting as an appointing authority is only guaranteed if there is such consensus between Parties. Admittedly, Art. 6(1) of the UNCITRAL

Rules places no limitation on which person or institution parties designate as the appointing authority [*Caron/Caplan, p. 716*]. However, for this possibility to be brought to life, Parties would have to reach a consensus on a person serving as an appointing authority.

28 In the case at hand, agreement regarding the appointing authority is unlikely between Parties. This is due to prior indications and evidence of failed attempts to resolve their disputes amicably. To begin with, Parties were unable to settle the dispute amicably through mediation [*FL1, p. 3*]. Moreover, CLAIMANT failed to deliver the goods in compliance with the contract between Parties and it nevertheless insisted on payments to be made [*Ex. C8, p. 20; Ex. C9, p. 21*]. Finally, Parties were thus far unable to agree on several procedural issues, namely the appointment of Mr. Prasad and the interpretation of AA regarding exclusion of appointing authority.

29 Consequently, Tribunal should deem the mere possibility of not reaching an agreement on the appointing authority as precluding the application of the procedure in Art. 13(4) of UNCITRAL Rules. Due to Parties' previous inability to reach compromises, it is highly unlikely that an agreement will be made on this matter. As discussed below, failure to reach an agreement on an appointing authority leads directly to an involvement of an arbitral institution, which is incompatible with AA.

2.2 If there is no agreement on appointing authority, involvement of arbitral institution is inevitable

30 Provisions of Art. 6 of the UNCITRAL Rules are aimed at encouraging parties to agree on an appointing authority as soon as possible during the arbitration [*Poulton/Yates, §3.2*]. Although this ensures a time-efficient arbitration, it also enables one party to request the PCA Secretary-General to designate an appointing authority in 30 days after no agreement between parties can be reached [*Art. 6(2) UNCITRAL Rules*]. Thus, in the event that Parties cannot agree on an individual to serve as an appointing authority, CLAIMANT could go against RESPONDENT and request the PCA to make the appointment. Such action on its own would violate Parties' agreement as the PCA is an arbitral institution. Involvement of any arbitral institution was excluded in AA, which is not disputed by CLAIMANT [*MfC, p. 4, §5*]. When acting as a designating authority, PCA familiarizes itself with the case file and other details of the dispute [*PCA, Designation of Appointing Authority*], which is precisely what RESPONDENT wanted to avoid.

31 Additionally, CLAIMANT states that under Art. 6(5) of the UNCITRAL Rules an appointing authority "*only concerns itself with the necessary information for the decision on the challenge*" [*MfC, p. 5, §7*].

However, this is a grave misuse of the UNCITRAL Rules as well as the legal sources CLAIMANT is citing. Art. 6(5) of the UNCITRAL Rules provides that both the appointing authority and PCA can require from any party to disclose any additional information they deem necessary. Although the appointing authority is not allowed to address the merits of the dispute, it is nevertheless empowered to request any information from the parties or the arbitrators [*Caron/Caplan*, p. 725-726]. Said article provides no limitations on appointing authorities' right to order disclosure. Thus, it is unclear how CLAIMANT reached its conclusion and how the appointing authority could only familiarize itself with information regarding Challenge without becoming aware of the circumstances of the case.

32 To conclude, Tribunal is respectfully requested to find that the only way to ensure compliance with Parties' AA is to decide that Art. 13(4) of the UNCITRAL Rules cannot be applied. The procedure set forth in the UNCITRAL Rules for cases where parties cannot agree on the appointing authority presupposes the involvement of an arbitral institution, *i.e.* PCA.

3. Excluding appointing authority would be reasonable

33 Application of Art. 13(4) of the UNCITRAL Rules has been excluded. CLAIMANT alleges that waiving appointing authority would be unreasonable [*MfC*, p. 5, §9]. Said conclusion has no basis as CLAIMANT's arguments on this issue are either contradictory within the issue, contradictory to CLAIMANT's other submissions or a misrepresentation of legal sources.

34 Firstly, CLAIMANT begins the submission that appointing authority is a neutral third party and further portrays remaining two members of Tribunal as partial due to supposed relationship to Mr. Prasad [*ibid*]. CLAIMANT, however, fails to corroborate that this issue arises in cases where permanent judicial or arbitral institutions are involved [*Giorgetti*, p. 243; *Ma*, p. 299]. It must be stressed that proceedings at hand are held before *ad hoc* arbitration. *Ad hoc* arbitrations are tailored to each dispute separately and therefore temporary by nature [*Rajoo I*, p. 548]. For that reason, close relationships as discussed above cannot be equated to relationships of arbitrators in present case. Thus, arguments implying that arbitrators may be partial in light of their relationships are devoid of any merit.

35 Secondly, as Parties have excluded Art. 13(4) of the UNCITRAL Rules, they have not set appointing authority in AA [*Ex. C2*, p. 12]A. Thus, if agreement regarding designation of appointing authority must be reached during proceedings, it would lead to unnecessary delays [*Caron/Caplan*, Art. 6 commentary]. UNCITRAL Working Group II observed that advantage of remaining members of tribunal deciding on the challenge is to save time [*WGII Report 264*, p. 32]. As CLAIMANT's counsel states that RESPONDENT's primary goal is to delay the proceedings [*FL 3*,

p. 46], it can be assumed CLAIMANT is keen on expediting this arbitration. Therefore, RESPONDENT's proposal for Tribunal to decide on Challenge should be a favourable solution for CLAIMANT.

36 Ultimately, CLAIMANT fails to establish any clear advantage of appointing authority deciding on Challenge. What is more, involving appointing authority at this point of arbitration, even if it was possible, would only unnecessarily prolong the proceedings. Tribunal should acknowledge that concluding this arbitration in a time-efficient manner is one of the rare areas where Parties do agree. For that reason, Tribunal should decide on Challenge.

B. Tribunal should decide on Challenge without participation of Mr. Prasad

37 Contrary to CLAIMANT's allegations [*MfC*, *p.* 3, §2], Tribunal does have the power to decide on Challenge. To avoid any unnecessary delay, decision should be made by other two members of Tribunal, Ms. Reitbauer and Ms. Rizzo.

38 In contrast to CLAIMANT's position [*MfC*, *pp.* 6-7, §13], decision on Challenge does not have to be made by all three arbitrators (1). Due to the fact that Challenge is directed against Mr. Prasad, he cannot participate in decision-making (2). If the remaining two arbitrators decide on Challenge, principle of equal treatment of the parties would not be breached (3).

1. Decision on Challenge does not have to be made by all three arbitrators

39 CLAIMANT asserts that Tribunal should make decisions only if it consists of three arbitrators [*MfC*, *pp.* 6-7, §13]. However, RESPONDENT has not requested the exclusion of Mr. Prasad before decision on Challenge is rendered. Constitution of Tribunal would remain the same since RESPONDENT has merely requested that Mr. Prasad is not involved in decision-making process regarding Challenge [*NCA*, *p.* 39, §8]. Therefore, request of that nature does not go against AA, provisions of UNCITRAL Rules or Danubian Arbitration Law, which is verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter: Model Law).

40 CLAIMANT is correct in its assertion that Tribunal should consist of three arbitrators. Nonetheless, contrary to CLAIMANT's position [*MfC*, *pp.* 6-7, §13], the decision itself does not have to be made by all three arbitrators. In fact, UNCITRAL Rules and Model Law as *lex arbitri* provide that any decision shall be made by majority of members of the tribunal [*UNCITRAL Rules*, *Art.* 33; *Model Law*, *Art.* 29]. AA only stipulates that Tribunal shall consist of three members and not that all three must participate in decision-making [*Ex. C2*, *p.* 12]. According to Art. 17(1) of the UNCITRAL Rules, Tribunal may conduct the proceedings in a manner it considers appropriate. Thus, distancing

Mr. Prasad from decision on Challenge while he remains a member of Tribunal would be in accordance with UNCITRAL Rules.

- 41 CLAIMANT further states that decision itself must be made by an uneven number of arbitrators as there is a possibility of a procedural stalemate [*MfC*, p. 7, §14]. However, deadlock situations are not as grave as CLAIMANT attempts to portray. Cases where said situations do occur can be solved simply by granting the presiding arbitrator the decisive vote [*Dore*, p. 170; *Mauritius v UK*]. For this reason, UNCITRAL Rules empower the president of the tribunal to decide where procedural stalemates occur [*UNCITRAL Rules*, Art. 33(2); *Caron/Caplan*, p. 708; *American Bell International case*]. Therefore, the mechanisms for resolving a potential deadlock swiftly and efficiently are in place.
- 42 Moreover, CLAIMANT states that certain jurisdictions prohibit even numbered tribunals [*MfC*, p. 7, §14]. CLAIMANT's observation is irrelevant for two reasons. First, according to Art. 10 of the Model Law there is no limitation as to number of arbitrators [*Broches*, p. 53]. Second, as demonstrated above, Tribunal remains in constitution of three arbitrators. Only regarding Challenge, Mr. Prasad is to refrain from decision-making, while remaining a member of Tribunal.
- 43 In conclusion, decision on Challenge by remaining two arbitrators does not contradict Parties' agreement or the relevant rules. Number of arbitrators constituting Tribunal is three and remaining two may make a decision on Challenge to accommodate all the binding and agreed upon provisions.

2. Mr. Prasad cannot decide on his own challenge

- 44 Contrary to CLAIMANT's assertions [*MfC*, p. 7, § 15], Mr. Prasad cannot decide on the Challenge as he would be a judge in his own cause. This situation is to be avoided especially as Mr. Prasad has already voiced his position and refused to step down as CLAIMANT-appointed arbitrator [*PL*, p. 44].
- 45 Firstly, CLAIMANT refers to Art. 29 of the Model Law and states that all the decisions have to be made by majority of arbitrators. CLAIMANT further states that said provision results in mandatory participation of challenged arbitrators in decision on challenge [*MfC*, p. 7 §15]. However, majority does not mean all of the arbitrators. Majority means more than half [*Caron/Caplan*, Art. 33 commentary]. In case at hand, majority is two or more arbitrators. Thus, decision on the Challenge by remaining two arbitrators would be in accordance with *lex arbitri*. More importantly it would be in accordance with Art. 33(1) of the UNCITRAL Rules.
- 46 Secondly, CLAIMANT states Mr. Prasad was not terminated from his position as an arbitrator [*MfC*, pp. 7-8, §§16-17]. RESPONDENT has never claimed otherwise nor has it requested termination of Mr. Prasad's mandate before decision on Challenge. As it is obvious from NCA, RESPONDENT merely

requested that decision is done without Mr. Prasad' [NCA, p. 39, §8]. RESPONDENT has not at any point demanded exclusion of Mr. Prasad from his other duties before decision on Challenge is made.

47 Thirdly, CLAIMANT states that since Mr. Prasad's mandate has not been terminated, he must be involved in the decision-making. Otherwise it would mean prejudgement on his partiality [M/C, p. 8, §18]. CLAIMANT's conclusion is incorrect. There are two separate types of partiality involved. Challenge has been raised against Mr. Prasad for serious and justifiable doubts to his partiality towards CLAIMANT [NCA, p.38, §1]. Conversely, RESPONDENT's request that Mr. Prasad does not participate in decision-making, stems from an undeniable fact that Mr. Prasad is partial towards decisions involving himself [NCA, p. 39, §8]. There is a fundamental difference. While every person, consciously or sub-consciously, would make a favourable decision in their own favour, there is no correlation to partiality towards a third party. Thus, distancing Mr. Prasad from decision on Challenge would not mean prejudgement on his impartiality.

48 Fourthly, world's leading arbitral institutions have recognized the issue of arbitrators deciding on their own challenge. Widely recognized arbitration rules do not even empower the tribunal to decide on challenge, indirectly excluding the challenged arbitrator [ICC AR, Art. 14(3); SCC AR, Art. 20; VIAC AR, Art. 20(3); LCIA AR, Art. 10(6); ICDR AR, Art. 14(3); CIETAC AR, Art. 32(6); HKIAC AR 11(9)]. The only significant arbitration rules, ICSID Arbitration Rules, which explicitly empower the tribunal to decide on challenge, provide that challenged arbitrator cannot participate in said decision [ICSID AR, Rule 9(4); *Alpha Projektholding v Ukraine*; *Suez v Argentina*]. Furthermore, it is obvious from the wording of Art. 13(4) of the UNCITRAL Rules that drafters wanted to avoid said possibility as well [NCA, p. 39, §8]. While RESPONDENT does not claim that Art. 13(4) of the UNCITRAL Rules is applicable, it nevertheless demonstrates intent of the drafters and spirit of the rules. All aforementioned rules may be considered international practice []. And it is not in line with international practice or with the spirit of UNCITRAL Rules for challenged arbitrator to decide on their own challenge.

49 In conclusion, to avoid undesirable situation where Mr. Prasad would be a judge in his own cause, Tribunal should decide on Challenge with remaining two members. As elaborated above, decision made by majority of Tribunal is in accordance with AA, UNCITRAL Rules and Model Law.

3. Equal treatment of Parties is not breached

50 CLAIMANT alleges that Mr. Prasad's exclusion would violate CLAIMANT's right to equal treatment since each party has the right to appoint one arbitrator [M/C, p. 9, §20]. It further states that excluding Mr. Prasad would deprive CLAIMANT of its influence on the composition of Tribunal [*ibid*]. If one were to

follow CLAIMANT's reasoning, it would have to be concluded that an arbitrator can never be challenged and excluded, which is unreasonable and against the relevant law. If the possibility of challenging an arbitrator was perceived as incompatible with the principle of equal treatment, they would not have been encompassed in the same set of arbitration rules [*see Art. 12 and Art. 17 UNCITRAL Rules*].

51 RESPONDENT does not deny the importance of the principle of equal treatment and the respect it should be given. However, RESPONDENT's intention is not to preclude CLAIMANT from appointing an arbitrator altogether, but merely to exclude an arbitrator to whose impartiality and independence exist justifiable doubts. Art. 14 of the UNCITRAL Rules sets forth the procedure for the replacement of an arbitrator and its wording provides that a party's right of appointment is revived in full upon re-appointment [*Caron/Caplan, p. 1229*]. The preservation of a party's right of appointment was acknowledged by the drafters of the UNCITRAL Rules. This is why the relevant provisions are worded in a way to ensure that the substitute arbitrator will be appointed in the same way as his predecessor [*UNCITRAL Yearbook, p. 172*]. Thus, excluding Mr. Prasad from these proceedings would not violate CLAIMANT's right to an equal treatment, as it would still have the right to appoint a new, substitute arbitrator.

52 Moreover, it must be pointed out that Art. 14(2) of the UNCITRAL Rules foresees a situation where a party may be deprived of its right to appoint a substitute arbitrator. Nevertheless, the drafters of the UNCITRAL Rules still deemed this option, exercisable in extreme circumstances, as compatible with the principle of equal treatment [*WGII Report 665, p. 20, §105*]. Since RESPONDENT is not requesting such a drastic measure, Mr. Prasad's exclusion from decision-making on Challenge shall be deemed by Tribunal as in accordance with the principle of equal treatment of Parties.

CONCLUSION ON ISSUE I

53 Tribunal has the power to decide on Challenge. Any decision to the contrary would violate Parties' agreement as they excluded involvement of any arbitral institution in this arbitration and thus the application of Art. 13(4) of the UNCITRAL Rules. Tribunal should make its decision on Challenge without participation of Mr. Prasad, who cannot be a judge in his own case. This would not breach the principle of equal treatment of the parties or the relevant law, which does not require all arbitrators to participate in the decision-making.

ISSUE II: MR. PRASAD SHOULD BE DISQUALIFIED

54 Since Tribunal has the power to decide on Challenge, it should exercise this power and disqualify Mr. Prasad from current proceedings. RESPONDENT submitted Challenge due to the fact that justifiable doubts exist to Mr. Prasad's impartiality and independence as per Art. 12(1) of the UNCITRAL Rules. CLAIMANT asserts that the non-disclosure of its third-party funder does not affect the standard of Challenge [*MfC*, p. 18, §52]. However, CLAIMANT's delayed disclosure creates new relevant circumstances and puts the existing ones into a different perspective. Thus, RESPONDENT's initial agreement with Mr. Prasad's appointment should not be deemed as precluding RESPONDENT from submitting Challenge.

55 Accordingly, Tribunal should consider all of the relevant factors surrounding Challenge and decide that Mr. Prasad is to be excluded due to lack of impartiality and independence. The evaluation of the relevant factors should be made in accordance with IBA Guidelines, which are applicable in present case (A). Mr. Prasad's impartiality and independence are affected by CLAIMANT's third-party funding (B) as well as Mr. Prasad's previous appointments by parties connected to CLAIMANT (C). Additionally, Mr. Prasad's legal opinion further indicates his lack of impartiality in the case at hand (D).

A. IBA Guidelines are applicable in present case

56 Although both the UNCITRAL Rules and Model Law provide for a possibility for challenge of an arbitrator, they do not specify which circumstances Tribunal should take into account. Therefore, international practice should be observed, specifically the IBA Guidelines on Conflict of Interest in International Arbitration 2014 (hereinafter: IBA Guidelines). The IBA Guidelines are widely recognized and relied upon by arbitral tribunals when deciding on the independence and impartiality of an arbitrator [*PO2*, p. 51, §18; *Moses*, §§2-3; *Scherer*, p. 6]. Even when parties do not refer to them, arbitral tribunals routinely advise them as they provide useful guidance in contrast to arbitration laws, which are often very general and vague [*Kaufmann-Kobler*, p. 14; *Erdem*, §10].

57 Thus, when deciding on Challenge, Tribunal should refer to the IBA Guidelines as they present the best practice in this matter. Even CLAIMANT does not oppose the usage of the IBA Guidelines but rather provides convincing arguments in favour of their application [*MfC*, p. 10, §23]. Referring to the IBA Guidelines would be in line with the discretionary power of arbitral tribunals to conduct proceedings in a manner they deem appropriate [*Art. 17(1) of the UNCITRAL Rules*, *Hrnčířiková*, p. 104]. Additionally, applying the IBA Guidelines would not go against the AA, since, as CLAIMANT puts it, Parties "did not exclude their application by virtue of the party agreement" [*MfC*, p. 10, §23].

B. Third party funding impacts Mr. Prasad's impartiality according to §2.3.6 of the IBA Guidelines

58 Prasad & Slowfood is rendering services for client who is being funded by Funding 8, a subsidiary of Findfunds LP. At the same time, Claimant is being funded by Funding 12, also a subsidiary of Findfunds LP. Consequently, Tribunal should consider that there are doubts regarding Mr. Prasad's impartiality and independence according to §2.3.6 of the IBA Guidelines (1). Further, there are doubts arising according to §3.2.1 of the IBA Guidelines (2). Finally, doubts regarding Mr. Prasad's impartiality and independence are justifiable (3).

1. There are doubts arising according to 2.3.6 of the IBA Guidelines

59 Firstly, CLAIMANT's assertion that Findfunds LP lacks controlling influence over CLAIMANT [*MfC*, p. 13, §33] bears no argumentative weight as RESPONDENT never alleged such a relationship. CLAIMANT's attempts to demonstrate that there is no affiliation is misleading. Beyond that, Findfunds LP in fact bears, according to General Standard 6(b) of the IBA Guidelines, an identity of a party by having a direct economic interest in the award. CLAIMANT denies such a relationship by stating that an awarded sum would not be immediately and in its entirety obtained by Findfunds LP [*MfC*, p. 13, §33]. Such a statement is a misinterpretation of the IBA Guidelines, as it asserts that a 'direct economic interest' and 'directly obtaining money' are synonyms. Such an equalization would mean that an entity wishing to obtain economic interest, without being an equivalent to a party in a dispute, would merely have to distance itself enough not to 'immediately' receive payment or to concede a part of that payment to another entity. In the given case, Findfunds LP in fact does have, as a shareholder, an economic interest in obtaining payment as it would receive it either in dividends or as a jump in their share value in Funding 12. Moreover, due to the fact that Findfunds LP holds the majority of shares in Funding 12 [*PO2*, p. 50, §2] it holds the controlling influence [*PO2*, p. 50, §2; *Mayson*, p. 316; *Kocbek* p. 974].

60 Secondly, contrary to CLAIMANT's assertions [*MfC*, p. 14, §35], a parent company is not necessarily a company which holds a majority of shares. Company may hold a controlling influence without holding the majority of shares [*Mayson* pp. 316 – 317; *Cahn/Donald*, p. 679]. Such a conclusion is significant, as it diminishes a *prima facie* negation of lacking a controlling influence when the proportion of owned shares is less than a majority. Furthermore, it is possible and likely when considering the economic interest that control of one company over another can be achieved with much less than 50% of the shares [*Hopt*, p. 3]. Findfunds LP establishes a separate legal entity for one or more related cases which it intends to fund [*PO2*, p. 50, §3]. Bearing that in mind and

considering that Funding 8 has the same name as Funding 12, save for the number, it is safe to assume that Funding 8 was established and effectively controlled by Findfunds LP. For that reason, Funding 8, Funding 12 and Findfunds LP form a group of companies, in which the latter presides over as the parent company.

- 61 Thirdly, CLAIMANT states that because there is no direct contract between Funding 8 and Prasad & Slowfood [*MfC*, p. 14, §37] a commercial relationship does not exist. At the same time, CLAIMANT ignores that without Funding 8 the client represented by Mr. Prasad's partner would not be able to fund its case [*PO2*, p. 50, §6]. Funding 8 is in fact a third party funder [*PO2*, p. 50, §6] and bears the identity of the funded party [*IBA Guidelines, Explanation to general standard 6 (b)*]. Since Slowfood, and by extension Prasad & Slowfood, have charged USD 1.5 million from a client that is wholly dependent on third party funding [*PO2*, p. 50, §6], a commercial relationship exists.
- 62 Fourthly, contrary to CLAIMANT's assertions [*MfC*, p. 14, §38], commercial relationship between Prasad & Slowfood and Funding 8 is significant. In arbitration funded by Funding 8, Slowfood charged USD 1.5 million which represented 5% of Slowfood's annual turn in each of last two years. Prasad & Slowfood will receive additional USD 300,000 which would amount to 2% of Slowfood's average annual turn. It must be stressed that without Funding 8 said arbitration would not be even possible [*PO2*, p. 50, §6]. For that reason, it would be in Prasad & Slowfood's best interest to maintain good business relations with Funding 8 and especially its parent company Findfunds LP as they provide complete arbitration funding in high-yielding cases.
- 63 Further, when considering significant commercial relationship, Tribunal should bear in mind two previous appointments of Mr. Prasad by parties funded by Findfunds LP subsidiaries. These two arbitrations were among the five highest yielding in terms of fees [*PO2*, p. 51, §10]. The interest of Prasad & Slowfood to stay in good graces with Findfunds LP, for the sake of their economic interest, is therefore apparent.
- 64 In conclusion, since Funding 8 and Funding 12 are subsidiaries of Findfunds LP, they should be considered affiliates pursuant to IBA Guidelines [*IBA Guidelines, footnote 4*]. Additionally, there is a significant commercial relationship between Prasad & Slowfood and CLAIMANT's affiliates. Therefore, doubts to Mr. Prasad's impartiality arise pursuant to §2.3.6 of the IBA Guidelines.

2. There are doubts arising according to §3.2.1 of the IBA Guidelines

- 65 Firstly, CLAIMANT states that while Funding 8 is in fact a third party funder, the only connection which should be relevant to the present arbitration is that of the client funded by Funding 8 [*MfC*,

p. 15, §40. Funding 8 is in fact a third party funder [*PO2, p. 50, §6*] and bears, per General Standard 6(b) of the IBA Guidelines the identity of the funded party [*Celikboya, § 15*]. For that reason, the identity of the funded party is doubled by both the funded client and Funding 8. Since Prasad & Slowfood is rendering services to the funded client, it is by extension rendering services to Funding 8.

66 Contrary to CLAIMANT's statement [*MfC, p. 15, §41*] and as demonstrated above [*see supra §60*] Funding 8 is an affiliate to Findfunds LP, which is a party to these arbitral proceedings. For that reason, by rendering services to Funding 8, Prasad & Slowfood is at the same time rendering services to a Findfunds LP affiliate.

3. The doubts to Mr. Prasad's impartiality and independence are justifiable

67 CLAIMANT stipulates that if the connection between Mr. Prasad and CLAIMANT was given, it would not give rise to justifiable doubts regarding Mr. Prasad's impartiality and independence [*MfC, p. 15, §42*]. However, this assessment is incorrect, as justifiable doubt standard merely suggests that it should be applied so that a challenge is weighed on an objective basis [*Caron/Caplan, p. 208*]. Since IBA Guidelines provide an objective test it is reasonable to use the standard of justifiable doubt as regarded in IBA Guidelines.

68 Firstly, General Standard 2(c) of the IBA Guidelines provides that "*doubts are justifiable if a reasonable third person, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case.*" CLAIMANT equivocates the standard of 'likelihood' and 'high probability' [*MfC, p. 15, §41*]. 'Likelihood' and 'probability' are in itself synonyms [*Black, p. 834*]. By prefixing 'probable' and by extension 'likely' with 'high', CLAIMANT without any justification elevates likelihood outside of the standard set forth in General Standard 2(c) of the IBA Guidelines. The distinction between meanings of these standards is of the utmost importance since the test set forth in IBA Guidelines, asserts not only actual partiality, but rather an appearance of partiality [*Born, p. 1785, Perenco Ecuador case*].

69 Secondly, CLAIMANT states that an arbitrator's lack of knowledge of the circumstances cannot bring about a successful challenge [*MfC, p. 15, §42*]. However, Mr. Prasad became aware of CLAIMANT's third-party funding on 7 September 2017 [*PL1, p. 36*]. In this perspective, Mr. Prasad's appearance of impartiality was poisoned in exact moment when he became aware of the connection to Findfunds LP, notwithstanding previous connections. Because of these reasons, it is apparent that there is a likelihood that Mr. Prasad may be influenced by a desire to keep the relationship between himself and Findfunds LP untarnished. This in itself provides a factor other than the merit of the case and presents a justifiable doubt as set forth in General Standard 2(c) of the IBA Guidelines.

70 Thirdly, contrary to CLAIMANT's assertion [*MfC*, p. 16, §43], RESPONDENT never claimed that Mr. Prasad's partner would financially benefit from outcome of present case. Further, RESPONDENT never claimed that Mr. Prasad would influence outcome of his partner's arbitration. To the contrary, a reasonable third person would conclude that Mr. Prasad may be influenced by Prasad & Slowfood's relationship with Findfunds LP through Funding 8.

71 To conclude, Mr. Prasad's connection to Findfunds LP would give rise to justifiable doubts to his independence and impartiality. Therefore, Tribunal should recognise that justifiable doubts exist and subsequently disqualify Mr. Prasad from his position.

C. Mr. Prasad's previous appointments impact his impartiality and independence according to §3.1.3 of the IBA Guidelines

72 As acknowledged by CLAIMANT, Mr. Prasad has been appointed as an arbitrator on two previous occasions by Findfunds LP subsidiaries [*MfC*, p. 17, §47]. Tribunal should bear in mind that according to IBA Guidelines third-party funder "may be considered to be the equivalent of the party" [*IBA Guidelines, Explanation to General Standard 6*]. Present arbitration is the third, within last three years, where Mr. Prasad is appointed as an arbitrator by Findfunds LP or its affiliates. For that reason, contrary to CLAIMANT's position [*MfC*, p. 17, §47], previous appointments raise doubts §3.1.3 of the IBA Guidelines.

73 Firstly, CLAIMANT states that §3.1.3 of the IBA Guidelines is not applicable. In its view third-party funder cannot be equated to CLAIMANT [*ibid*]. However, according to IBA Guidelines third-party funders should be treated as equivalent of the party [*Blavi*, §5; *Clanby*, p. 231; *South America Silver case*]. CLAIMANT has not denied the previous appointments by Findfunds LP subsidiaries [*MfC*, p. 17, §47]. As there have undeniably been two or more appointments, they raise doubts according to IBA Guidelines [*IBA Guidelines, §3.1.3*].

74 Admittedly, §3.1.3 of the IBA Guidelines is placed on the Orange List, which means other factors should be examined as well [*Universal Compression case; Tidewater case*]. For this reason, Tribunal should consider Mr. Prasad's two previous appointments by Mr. Fasttrack's law firm. It was observed that multiple appointments indicate that parties consider repeatedly appointed arbitrators to be more likely to decide in parties' favour [*OPIC Karimum case*]. Said observation is quite relevant for present case. Especially considering the fact that Mr. Prasad has ruled in favour of every party that appointed him in aforementioned arbitrations [*PO2*, p. 50, §15].

75 Moreover, CLAIMANT asserts that income from appointments funded by Findfunds LP subsidiaries are comparatively small considering his total income, stating they amounted to 3,2% of Mr. Prasad's annual earnings [*MfC*, p. 17, §48]. CLAIMANT's conclusions are both incorrect and deceptive. It is clear that said appointments represented 20% of all arbitration related income. That would amount to 8% of Mr. Prasad's earnings in total in a span of three years [*PO2*, p. 51, §10]. Therefore, aforementioned two cases generated 24% and not 3,2% of Mr. Prasad's average yearly income. It is thus evident that previous engagements by Findfunds LP represent significant amount of Mr. Prasad's income. Tribunal should note that numbers presented above do not even include arbitrations where Mr. Prasad was appointed by Mr. Fasttrack's law firm.

76 Finally, Tribunal should consider all the above-mentioned appointments. There is a pattern where Mr. Prasad is repetitively appointed by a party that emerges victorious in arbitration. Thus, Tribunal should recognise that there are justifiable doubts to Mr. Prasad's impartiality and independence.

D. Mr. Prasad's legal opinion is relevant when assessing his impartiality as it presents a 'prior commitment'

77 At the outset, an external circumstance *e.g.* publishing an article, may only be an indicator of partiality if the act itself shows subjective preference to one party [*Born*, p. 1777]. By that, a legal opinion alone does not affect the impartiality of an arbitrator [*MfC*, p. 11, §25], while the content and the circumstances might. Admittedly, a blanket proscription of legal writing would lead to an absurd situation in which legal research would be discouraged [*MfC*, p. 11, §25]. However, RESPONDENT has never advocated such a solution. Mr. Prasad's article should be evaluated through its meaning in relation to facts of present case. Said article shows his own partiality regarding one of the main issues of the present dispute. While it is true that a legal opinion by itself does not in principle indicate an arbitrator's partiality, the circumstances and the context of an arbitrator's action must necessarily be evaluated [*Rajoo II*, pp. 326-327]. Additionally, since Mr. Prasad's legal opinion was in fact the reason why he was chosen as an arbitrator. Therefore, Tribunal should consider the fact that even CLAIMANT anticipated what Mr. Prasad's decision would be, in light of his legal writing [*NCA*, p. 38, §3].

78 CLAIMANT seeks to alleviate Mr. Prasad's direct rejection of ethical standards in relation to Art. 35 of the CISG by pointing out that he emphasizes a "thorough case-by case review" [*MfC*, p. 11, §26]. Such a statement is not present in any form or meaning in Mr. Prasad's article. According to Mr. Prasad's article ethical standards can be included only "*where the contractual provision explicitly makes the production process part of the description of goods*" [*PL 2*, p. 44]. The distinction between the two is, for the

purpose of these arbitral proceedings, fundamental. CLAIMANT's misinterpretation leads to the conclusion that Mr. Prasad is lenient to the application of ethical standards *vis-à-vis* Art. 35 of the CISG. Conversely, Mr. Prasad's opinion is extremely narrow when it comes to inclusion of ethical standards in contracts. An article may raise justifiable doubts to arbitrator's impartiality if it represents a 'prior commitment' to a particular point of view as an expert [*Rajoo II*, p. 327; *Tackaberry*, §2-278; *Vakauta v Kelly*]. With his article, Mr. Prasad made a 'prior commitment' to one of the main issues of the present dispute. Mr. Prasad's biased decision is even more likely considering the fact that it is questionable whether or not explicit contractual provisions exist [*see infra* §§123-139].

79 In conclusion, even though arbitrator's legal opinion is placed on the Green List of the IBA Guidelines, it might still indicate their impartiality. It must be stressed that Mr. Prasad's legal opinion is one of the main reasons why CLAIMANT decided to appoint him as an arbitrator. Tribunal should also bear in mind Mr. Prasad's narrow opinion on relevant issue of substance while considering other circumstances that provide grounds for Challenge.

CONCLUSION ON ISSUE II

80 Tribunal should find that justifiable doubts exist to Mr. Prasad's impartiality and independence and disqualify him from the proceedings. Mr. Prasad's connection to CLAIMANT's third-party funder raise justifiable doubts according to §2.3.6 and §3.2.1 of the IBA Guidelines. Additionally, previous appointments of Mr. Prasad by parties connected to CLAIMANT raise doubts as per §3.1.3 of the IBA Guidelines. Therefore, Challenge should be upheld and Mr. Prasad disqualified.

ISSUE III: RESPONDENT'S GENERAL CONDITIONS GOVERN THE CONTRACT

81 To broaden its cake offerings, RESPONDENT publicized Invitation to Tender regarding chocolate cakes from sustainably produced cocoa. After a thorough evaluation, RESPONDENT decided that CLAIMANT's tender is the most suitable for its needs [*PO2*, p. 52, §23]. RESPONDENT received the first delivery of chocolate cakes on 1 May 2014. There were no issues with the deliveries received before 27 January 2017 [*NaA*, p. 5, §6]. On that day, RESPONDENT sent an email questioning the origin of the cocoa used in production of chocolate cakes [*Ex. C6*, p. 18]. In Ruritania, the home country of CLAIMANT's main supplier of cocoa beans, a sustainability certification scheme had been discovered [*Ex. C7*, p. 19; *RNA*,

p. 26, §14]. Upon learning about the scheme, RESPONDENT expressed its concerns regarding CLAIMANT's inclusion in the affair and sought clarifications [*Ex. C6, p. 18*].

82 CLAIMANT investigated the matter and concluded that its supplier had indeed obtained falsified sustainability certificates. Although CLAIMANT offered 25% price reduction for the cakes delivered, but not yet paid [*Ex. C9, p. 21*], the continuation of business relationship was impossible. For this reason, RESPONDENT rejected the offer and terminated the contract pursuant to Clause 4(3) of the General Conditions of Contract (hereinafter: RGC) in conjunction with its Code of Conduct for Suppliers (hereinafter: SUP) [*Ex. C10, p. 22*].

83 CLAIMANT erroneously contends that it did not fundamentally breach the contract and denies RESPONDENT's entitlement for immediate termination of the contract under Clause 4(3) of the RGC [*MfC, p. 29, §103*]. CLAIMANT asserts that RGC have never been validly incorporated into the contract and that solely CLAIMANT's General Conditions of Sale (hereinafter: CGC) should be applicable [*MfC, p. 24, §79*]. However, RESPONDENT will demonstrate that it did not accept CLAIMANT's offer, since its letter could not constitute an acceptance, but rather a counter offer (A). Secondly, RGC govern the contract since CLAIMANT attached Tender Documents to Sales-Offer (B). Thirdly, CGC were never validly included into CLAIMANT's offer (C).

A. RESPONDENT did not accept CLAIMANT's offer

84 Contrary to CLAIMANT's assertion [*MfC, pp. 21-22, §§63-66*], RESPONDENT's letter of 7 April 2017 [*Ex. C5, p. 17*] did not constitute an acceptance but rather a counter offer. In written communications, an acceptance that indicates assent by repetition of the material terms, though it remains silent on non-material terms, also amounts to an acceptance. Consequentially, a reply, which assents to non-material terms, yet ignores material modifications, does not constitute an acceptance [*Vogenauner, p. 286*]. In the case at hand, RESPONDENT accepted different payment terms and a new shape of cakes. While these changes represent non-material modifications, RESPONDENT remained silent regarding material modifications, *i.e.* incorporation of CGC.

85 Material modifications, which cover the most important aspects of a contract, are listed in Art. 19(3) of the CISG. Material modifications are, among other things, additional or different terms relating to the price, payment, quality and quantity of the goods, extent of one party's liability and dispute settlement [*Art. 19 CISG; Kolmar Petrochemicals case; Chemical products case; Australia cotton case*]. However, altering the payment terms just in regard to the time for payment of the price does not constitute a material modification [*25 February 2003 case*]. Thus, by changing the time for payment from 60 to 30 days, CLAIMANT did not materially modify the contract. Moreover, whether details

concerning the goods' design or finish, *e.g.* their colour or shape, amounts to a material modification, depends on the nature of the goods concerned [*Gruber, Art. 19, §8*]. If a modification does not influence the quality of the goods, *e.g.* changing the colour of the machine, it is not considered material [*Herber/Czerwenka, Art. 19, §12*]. In the case at hand, altering the shape of cakes does not influence their quality. Therefore, the change represents a non-material modification.

86 Admittedly, authorities' opinions vary whether a reference to different standard terms is also regarded as a material alteration [*Schwenzer, p. 338*]. However, it is undisputed that when the content of standard terms relates to the matters listed in Art. 19(3) of the CISG, this amounts to a material modification [*Schwenzer/Mohs, p. 244; CSS case; Printed goods case*]. In *CSS case*, where CISG was the applicable law, German seller has materially altered American buyer's offer by referring to its standard terms, which included terms related to the settlement of disputes. Similarly, CGC also contain a provision related to the dispute settlement - the model ICC Arbitration Clause fixing the place of arbitration in Equatoriana and declaring Equatorianian law applicable [*PO2, p. 53, §29*]. Additionally, CGC changed the extent of CLAIMANT's liability for actions of its suppliers [*see infra §130*], which is also considered a material modification under Art. 19(3) of the CISG.

87 To conclude, in the letter of 7 April 2014, RESPONDENT listed two non-material modifications, while remaining silent regarding one material modification [*Ex. C5, p. 17*]. It can be easily discerned that RESPONDENT accepted different time of payment and new shape of cakes, since it agreed to these changes. However, RESPONDENT remained silent on incorporation of CGC [*ibid*]. Therefore, it has rejected CLAIMANT's offer by not accepting the proposed modification and rather made a counter-offer, which is governed solely by RGC.

B. By being attached to Sales-Offer, RESPONDENT's General Conditions govern the contract

88 Even if Tribunal were to find that the letter of 7 April 2014 [*Ex. C5, p. 17*] constitutes an acceptance, RGC would nonetheless govern the contract. In light of that, RESPONDENT will establish that RGC became nonstandard terms of the contract (1), and that CLAIMANT was aware of said change (2). Additionally, even if RGC did not become nonstandard terms, CGC should not be applied because of the order of precedence, the knock-out doctrine and due to their surprising nature (3).

1. RESPONDENT's General Conditions became nonstandard terms of the contract

89 Following Invitation to Tender, CLAIMANT sent RESPONDENT its offer, which consisted of Sales-Offer and the full set of Tender Documents [*PO2, pp. 52-53, §27*]. CLAIMANT also subjected Sales-

Offer to CGC [Ex. C4, p. 16], which are not applicable due to their insufficient incorporation [*see infra* §§112-115]. CLAIMANT's intention to include Tender Documents in its offer can be determined from its references to them in Sales-Offer. CLAIMANT specified place of delivery "*as per Tender Documents.*" A similar reference was made regarding the quantity of cakes to be delivered per day [Ex. C4, p. 16]. By perceiving Tender Documents as part of the offer, RGC lost the nature of standard terms.

90 Since CISG does not regulate inclusion of standard terms in a contract, the matter should be dealt with under UNIDROIT Principles of International Commercial Contracts (hereinafter: UNIDROIT Principles). The issues not dealt with in the CISG are governed by said principles, which are verbatim adopted in the general contract law of Equatoriana, Mediterraneo, Ruritania and Danubia [PO1, p. 49, §3].

91 Art. 2.1.19 of the UNIDROIT Principles defines standard terms as provisions, prepared in advance for general and repeated use by one party and actually used without negotiation with the other party [UNIDROIT Commentary, p. 66; Vogenauer, p. 384]. When one party sends another party's standard terms with its offer, they lose the nature of standard terms, as they are not prepared for the repeated use of the party sending them. Since CLAIMANT incorporated the Tender Documents, including RGC, in its offer, their content became part of negotiations. When RESPONDENT included RGC in the Tender Documents, they were deemed as standard terms pursuant to said article. However, when CLAIMANT sent them as a part of its offer, they lost the nature of standard terms and became nonstandard terms of contract. As such, they prevail over standard terms in case of conflict [UNIDROIT Principles, Art. 2.1.21].

92 For these reasons, CGC cannot be applicable to the issue at hand, whether they were validly included into the contract or not, since they contradict nonstandard terms of the contract. The same reasoning is to be used even if Tribunal were to find that Tender Documents constituted an offer. RGC would nonetheless lose the nature of standard terms and prevail over CGC.

2. CLAIMANT was aware of the change in nature of RESPONDENT's General Conditions

93 CLAIMANT asserts that Parties have included into the contract the arbitration clause proposed by RESPONDENT. CLAIMANT's statement is followed by citing said contractual term, which is labelled as Clause 20 [NoA, p. 6, §13]. The identical provision is contained in RGC, once more titled 'Clause 20' [Ex. C2, p. 12]. CLAIMANT refers to RGC Clause as a contractual term, acknowledging that it was validly included into the contract. Since it is common practice that contractual clauses are labelled in numerical order, it is reasonable to assume that clauses of RGC preceding Clause 20

were also part of the contract. Thus, RGC Clauses 1 to 21 are negotiated terms and prevail over CGC [*see supra* §§ 89-92]. Furthermore, by including Clause 4(3) of the RGC in the contract, Parties have agreed on a definition of a fundamental breach, which deviates from Art. 25 of the CISG. Therefore, any breach of some relevance of SUP constitutes a fundamental breach and permits RESPONDENT to terminate the contract, regardless of applicability of CGC.

94 Additionally, CLAIMANT alleges that its reference to the arbitration clause in Notice of Arbitration, which is the same as the one proposed by RESPONDENT, does not imply an acceptance of RGC due to the doctrine of separability [*M/C*, p. 25, §83]. However, RESPONDENT cannot overlook the reasons for CLAIMANT's insistence to use RESPONDENT's arbitration clause, while contending that CGC solely govern the contract. At the time of the conclusion of the contract, CLAIMANT agreed to all contractual provisions, including RGC. CLAIMANT is apparently cherry-picking the clauses of RGC, which suit its interest, while denying the applicability of other less favourable provisions. Such arbitrary behaviour can only be attributed to CLAIMANT's bad faith.

95 In conclusion, if CLAIMANT thought that Clause 20 was the only applicable provision of RGC, it would not refer to it as Clause 20 but rather as an arbitration agreement. By referring to a provision of RGC as part of the contract [*NoA*, p. 6, §13], CLAIMANT confirms that RGC constitute text of the contract and their provisions are negotiated terms. Therefore, CLAIMANT delivered nonconforming goods by breaching the contractual clauses containing sustainability requirements.

3. Even if RESPONDENT's General Conditions did not become nonstandard terms, CLAIMANT's General Conditions of Sale do not govern the contract

96 Even if Tribunal were to find that RGC did not become negotiated terms, they take precedence over CGC. When two or more conflicting provisions cannot be harmonized, the conflict may be resolved by application of 'order of precedence' clause, expressly stating which provisions take precedence over the rest of the contract [*Kelleber*, p. 230]. As elaborated above [*see supra* §§89-92], Special Conditions of Contract constitute part of CLAIMANT's offer. Since Sales-Offer does not contain any provisions regarding the order of precedence of contract documents, Art. 5 of the Special Conditions of Contract should be applied in case of ambiguity or divergences [*Ex. C2*, p. 11; *Ex. C4*, p. 16]. According to said article, the contract is made up of the following documents: Special Conditions of Contracts, RGC and Tender Documents [*Ex. C2*, p. 11].

97 If CLAIMANT wished to modify the order of precedence and include CGC on a higher level than RGC, it should have done so in its Specific Terms and Conditions clause of Sales-Offer. As a rule, when CLAIMANT wants to make its offer subject to any special conditions, it states so in 'Specific

terms and conditions' section of its offer [PO2, p. 53, §28]. As per Art. 5 of the Special Conditions of Contract in case of ambiguity or divergences, the documents should be read in hierarchic order. Since RGC are on a higher level than CGC, their provisions should prevail over CGC.

98 Furthermore, if the battle of forms arose, it should be resolved under the knock-out doctrine and not the last shot rule as alleged by CLAIMANT [MfC, p. 24, §§78-82]. While CLAIMANT contends that the knock-out doctrine is out of line with the wording of Art. 19 of the CISG [MfC, p. 24, §81], it is actually included in the black letter rules of the CISG Advisory Council and UNIDROIT Principles [AC-CISG Op. 13; UNIDROIT Principles, Art. 2.1.22]. It is also favoured by case law [Schwenzer, p. 349; Powdered milk case; Les Verreries de Saint Gobain case; Knitwear case].

99 Under Art. 2.1.22 of the UNIDROIT Principles, the knock-out doctrine stipulates that a contract is concluded on the negotiated terms and any standard terms, which are common in substance [UNIDROIT commentary, p. 72]. A party, which does not intend to be bound by a contract that is not based on its own standard terms, may exclude the operation of the knock-out doctrine, if it clearly indicates that it does not intend to be bound by such a contract [UNIDROIT Principles, Art. 2.1.22; AC-CISG Op. 13, §10.8]. To fulfill the standard of a 'clear' indication, the party concerned has to make a specific declaration in its offer or acceptance [UNIDROIT commentary, p. 73]. In case at hand, neither of Parties made such a declaration, therefore, the knock-out doctrine should be applied.

100 All of the provisions of SUP, which regulate CLAIMANT's liability for behaviour of its own suppliers, are applicable to the contract. CGC and CLAIMANT's Supplier Code of Conduct contain provisions with the same substance as RGC and SUP [Ex. C2, pp. 12-14; Ex. R3, pp. 30-31]. Both Parties are committed to the same ethical principles and consider the non-compliance with those standards as a fundamental breach of the contract [Ex. C2, p. 12; Ex. R3, pp. 30-31]. Therefore, terms of RGC and SUP, breached by CLAIMANT, are not disregarded under the knock-out doctrine and thus govern the contract.

101 Even if Tribunal were to find that provisions of SUP and CLAIMANT's Codes of Conduct are not common in substance, as they establish different level of liability for sub-suppliers, CGC would not govern the contract due to their surprising nature. Under Art. 2.1.20 of the UNIDROIT Principles any standard term, which could not have been reasonably expected by the other party, is without affect. An identical provision can be found in the black letter rules of the CISG Advisory Council [AC-CISG Op. 13]. A standard term is considered surprising when it is inconsistent with business practice or the way in which parties conduct negotiations [UNIDROIT Commentary, p. 68]. RESPONDENT has emphasised throughout the negotiations that it is important that CLAIMANT's

suppliers also conduct their business in a sustainable and ethical manner [Ex. C1, p. 8]. What is more, it is common business practice that companies are also responsible for behaviour of their suppliers [Andersen, p. 77; Jenkins, p. 3; Panayiotou/ Aravosis, p. 58]. Therefore, due to their surprising nature, CGC cannot govern the contract.

102 To conclude, even if Tribunal were to find that RGC did not become negotiated terms, the contract is not governed by CGC. Due to order of precedence, RGC are applied prior to CGC and therefore their provisions prevail. Additionally, the provisions regulating liability for behaviour of suppliers are common in substance both in SUP and in CLAIMANT's Supplier Code of Conduct. Since said provisions do not contradict each other, they govern the contract under the knock-out doctrine. Ultimately, if said provisions contradicted each other, CGC could not govern the contract due to their surprising nature.

C. CLAIMANT's General Conditions of Sale were never validly included into the contract

103 CLAIMANT alleges that CGC were validly included into the contract, since Ms. Annabelle Ming, RESPONDENT's Head of Purchasing, read CLAIMANT's Codes of Conduct [M/C, p. 21, §64]. To the contrary, RESPONDENT will establish that CGC were not made sufficiently available and Ms. Ming did not acknowledge the valid incorporation of CGC (1). Additionally, CGC were not sufficiently incorporated by CLAIMANT's references in invoices (2).

1. CLAIMANT's General Conditions of Sale were not made sufficiently available

104 Standard terms are validly incorporated into an offer when a reasonable person could interpret that it was offeror's intent to include them into the contract and when they are made sufficiently available [Schwenzer, p. 277]. Therefore, Tribunal should take into account Art. 8 of the CISG to determine whether CGC were validly included into the offer. The provisions of said article are relevant for interpretation of statements and conduct of the parties [Honnold, p. 116; Smallmon case; Propane case]. The underlying principle of said article is the determination of 'true intent' of the parties, arrived at through consideration of all the facts and circumstances surrounding the case [Zeller, p. 638; Yang, p. 618; Cedar Petrochemicals Inc. case; Chinchilla furs case].

105 CLAIMANT asserts that it validly incorporated CGC in the contract since Ms. Ming acknowledged and read them [M/C, p. 21, §64]. However, RESPONDENT will demonstrate that Ms. Ming was not aware of CLAIMANT's intent to incorporate CGC (1.1). Furthermore, CGC were not made sufficiently available by posting CLAIMANT's website address in the Sales-Offer (1.2).

1.1 RESPONDENT could not have been aware of CLAIMANT's intent to include CLAIMANT's General Conditions of Sale

106 Under Art. 8(1) of the CISG statements and other conducts of a party are to be interpreted according to its intent where the other party knew or could not have been unaware of other party's intent [*Roser Technologies Inc. case; Propane case; Corporate Web Solutions Ltd. case*]. Tribunal should bear in mind that under Article 8(1) of the CISG the standard is always subjective [*Junge, Art. 8, §5; Textiles case*]. To incorporate standard terms a party has to refer to them so that the other party could not have been unaware of the intent to include them into the contract according to Art. 8(1) of the CISG [*Eiselen, p. 234; CSS case; Plants case; Propane case; Gantry case*].

107 Contrary to CLAIMANT submission [*MfC, p. 21, §64*], RESPONDENT could not have been aware of CLAIMANT's intent for the contract being governed by CGC. In the letter of 7 April 2017, Ms. Ming claimed that she downloaded CLAIMANT's Codes of Conduct "out of curiosity" [*Ex. C5, p. 17*]. Since Ms. Ming is an experienced businesswoman, employed by RESPONDENT for 15 years and its Head of Purchasing since 2012 [*Ex. R5, p. 41*], it is all more evident that she was not aware of CLAIMANT's intent for CGC to govern the contract. Someone with her business experience would know that one is expected to read standard terms before accepting the offer. Consequently, if Ms. Ming were aware of CLAIMANT's intent to include CGC, she would not read them "out of curiosity" but rather as a duty [*Ex. C5, p. 17*].

108 CLAIMANT further alleges that CGC were validly included into the contract since Ms. Ming downloaded and acknowledged CLAIMANT's Codes of Conduct [*MfC, p. 21, §64*]. However, it must be stressed that CLAIMANT's Codes of Conduct are not a part of CGC. CGC only consist of a general statement regarding CLAIMANT's business philosophy, and an arbitration clause [*PO2, p. 53, §29*]. Therefore, it is not evident whether Ms. Ming read CGC, which invalidates their inclusion in the contract.

109 In order to incorporate standard terms the intent has to be easily discerned [*Magnus/Staudinger, Art. 8, §12*]. Firstly, CLAIMANT signed Letter of Acknowledgment, in which it agreed to tender in accordance with the specified requirements, including RGC [*Ex. R1, p. 28*]. Secondly, CLAIMANT has attached a full set of Tender Documents to Sales-Offer [*PO2, pp. 52-53, §27*]. By receiving unmodified Tender Documents accompanying Sales-Offer, RESPONDENT could not have anticipated CLAIMANT's intention to govern the contract with CGC instead of RGC. Thirdly, CLAIMANT has failed to refer RESPONDENT directly to the document containing the standard terms

[PO2, p. 53, §28]. Additionally, while listing the proposed modifications in the letter of 27 March 2017, CLAIMANT refrained from mentioning its intent to govern the contract by CGC [Ex. C3, p. 15].

110 Moreover, under Art. 8(2) of the CISG statements are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had [*Rubber sealing parts case*; *Roder case*; *Health care products case*]. A reasonable person would consider all the relevant circumstances of declaration and would therefore be objective [*Honsell, Art. 18, §§28-29*; *Auto case*]. RESPONDENT made clear from the outset of negotiations that it is of paramount importance that the contract is governed by RGC [Ex. C1, p. 8; RNA, p. 25, §8]. In the letter of 10 March 2014, RESPONDENT highlighted the significance of being “*sure that also yours* [CLAIMANT’s] *suppliers adhere to Comestibles Finos’ Philosophy and our* [RESPONDENT’s] *Code of Conduct for Suppliers?*” [Ex. C1, p. 8]. RESPONDENT’s intent to govern the contract in accordance with RGC has been made clear to CLAIMANT on multiple occasions [Ex. C2, pp. 9-14; Ex. C5, p. 17; Ex. R1, p. 28].

111 To conclude, CGC cannot govern the contract, since RESPONDENT was not aware of CLAIMANT’s intent to incorporate them. Additionally, under the objective test according to Art. 8(2) of the CISG, a reasonable person of the same kind as RESPONDENT would be unaware of CLAIMANT’s wish to govern the contract by CGC.

1.2 CLAIMANT’s General Conditions of Sale were not made sufficiently available by posting CLAIMANT’s website address in the Sales-Offer

112 CLAIMANT could also argue that CGC were validly included into the contract, since their text was made available to RESPONDENT. However, RESPONDENT will establish the contrary. An offeror, who is trying to incorporate its standard terms into a contract, is required to ensure that the offeree is aware of the standard terms’ text [*Witz/Salger/Lorenz, Arts. 14-24, §12*; *Concrete slabs case*; *Mansonnville Plastic case*; *Plants case*; *Plastic window elements case*]. According to the ‘making-available-test’, the user of standard terms is required to send their text or make it otherwise available to the offeree [*Schwenzer, p. 279*; *Euroflash case*; *Sesame seed case*; *Takap V. B. case*]. In the case at hand, it is undisputable that CLAIMANT has not sent the text of CGC to RESPONDENT at any occasion since the beginning of the negotiations. Moreover, RESPONDENT contends that CLAIMANT failed to make CGC otherwise available and thus they were never validly incorporated into the Sales-Offer.

113 When the contract is not being concluded over the internet or via e-mails, the availability of standard terms on the internet is not sufficient to make their text ‘otherwise available’ to the other party [*Schwenzer/Mohs, p. 239*; *Berger, p. 18*; *Kindler, p. 234*; *Broadcasters case*]. Said rule is applicable even if the other party lists its own email on the stationary [*Schwenzer, p. 284*]. Since the contract between

Parties has been concluded via letters, *i.e.* in paper-based writing, posting CGC on CLAIMANT's website has not made their text sufficiently available to RESPONDENT.

114 Moreover, if standard terms are referred to via internet link, this link has to lead directly to the text of standard terms [*Schwenzer*, p. 283]. The offeree is not obliged to search for the standard terms of the offeror [*Schwenzer/Mohs*, p. 241]. In the Sales-Offer, CLAIMANT has cited a website address, which did not directly lead to CGC. Additionally, CLAIMANT has referred RESPONDENT to the document titled 'General Condition', which does not even exist [*PO2*, p. 53, §28]. Since RESPONDENT is not obliged to conduct an in-depth search for standard terms, CLAIMANT's inaccurate reference cannot fulfil the requirement for incorporation of CGC.

115 In conclusion, CGC were not made sufficiently available to RESPONDENT. CLAIMANT never physically sent them to the other party and ignored that posting a website address is insufficient in paper-based correspondence. Therefore, CGC cannot govern the contract and solely RGC are applicable.

2. Referring to CLAIMANT's General Conditions of Sale on CLAIMANT's invoices was insufficient for their incorporation

116 CLAIMANT alleges that even if Tribunal were to find that RGC govern the contract, Parties have subsequently modified the contract pursuant to Art. 29 of the CISG by incorporating CGC through invoices [*M/C*, p. 23, §73]. However, after the conclusion of the contract, standard terms can be incorporated into the contract only in two ways. Firstly, where there is an on-going business relationship between the parties, transmitted invoices may produce effects for later contracts [*Schwenzer*, pp. 175-176]. This situation is not applicable to the case at hand since this contract manifests the first business relationship between Parties. Secondly, standard terms can be incorporated by subsequently transmitted invoices, if the parties intended to change the contract under Art. 29 of the CISG [*ibid.*].

117 Under Art. 29 of the CISG a contract may be modified by the agreement of the parties [*Viscasillas*, p. 169; *Huber/Mullis*, p. 102; *Rare hard wood case*; *Cámara Agraria case*; *Summer cloth collection case*]. Proposal of the modification is governed by Arts. 14-17 of the CISG [*Schwenzer*, p. 472]. Therefore, standard terms are validly included in a proposal of the modification, if they fulfil the same requirements as for their inclusion in the offer. CLAIMANT failed to validly include CGC in the offer [*see supra*, §§103-115] and it has referred to CGC in the exact same manner on the invoices. Thus, CLAIMANT has not modified the contract at all.

118 Moreover, RESPONDENT did not accept the alleged modification. Acceptance of a proposal of a modification is governed by Art. 18 of the CISG [*Schwenzer*, p. 472; *Furnishings case*; *Phtalic anhydride case*; *Ski shoes case*]. Under said article, silence or inactivity does not in itself amount to acceptance [*ibid*; *Hibro Compensatoren B.V. case*]. Admittedly, an offeree may indicate assent by performing an act, by virtue of the offer, as a result of practices of which the parties have established between themselves, or of international usage [*Yarn case*; *Doors case*; *Plastic chips case*; *Magellan International case*; *Chemical products case*; *Société H. H case*]. However, none of the listed criteria was fulfilled in the case at hand. Therefore, even if CLAIMANT proposed the modification of the contract pursuant to Art. 29 of the CISG, RESPONDENT did not accept this modification.

119 Furthermore, CLAIMANT alleges that an invoice proposing modification alters a contract at least after repeated transmission [*M/C*, p. 23, §75]. To support its allegation, CLAIMANT refers to *Chateau Des Charmes Wines Ltd case*, which establishes the exact opposite. The court has determined that the subsequent transmission of invoices does not lead to incorporation, which is a view supported both in theory and practice [*Schwenzer*, p. 175; *Chateau Des Charmes Wines Ltd case*; *S.A. Isocab France case*; *Sheepskin case*].

120 To conclude, CLAIMANT could not incorporate CGC just by persistently referring to them on the invoices. Since RGC are the only set of standard terms validly included into the contract, they should be applied.

CONCLUSION ON ISSUE III

121 RGC govern the contract as they are the only set of standard terms validly included into the contract. RESPONDENT has rejected CLAIMANT's offer and rather made a counter-offer, which is governed solely by RGC. Moreover, when CLAIMANT attached Tender Documents to its offer, RGC lost the nature of standard terms and thus prevail over CGC. This statement is further fortified by CLAIMANT's use of term Clause 20 in the Notice of Arbitration. Even if Tribunal were to find that RGC did not become negotiated terms, the contract is not governed by CGC due to order of precedence, knock-out doctrine and their surprising nature. Moreover, RESPONDENT was neither aware of CLAIMANT's intent to incorporate CGC nor were the terms made sufficiently available to RESPONDENT. CLAIMANT's references to CGC on invoices are irrelevant.

ISSUE IV: CLAIMANT DELIVERED NON-CONFORMING GOODS

122 CLAIMANT alleges that the delivered cakes were conforming according to Art. 35 of the CISG, since the compliance with the ethical standards was not part of the conformity [*MjC*, p. 25, §85]. To the contrary, RESPONDENT contends that the ethical and sustainable production is of paramount importance for conformity assessment and the termination of the contract was justified. Firstly, due to the unethical production the delivered cakes were not complying with Art. 35(1) of the CISG (A). Additionally, according to Art. 35(2)(b) of the CISG cakes were not fit for their particular purpose (B).

A. Delivered cakes were non-conforming pursuant to Art. 35(1) of the CISG

123 By delivering unethically produced cakes, CLAIMANT breached its obligations under Art. 35(1) of the CISG. Under said provision a seller is required to deliver goods of the quantity, quality and description required by the contract [*Honnold*, p. 253; *Lookofsky*, p. 87]. The agreement between the parties is the primary source for assessing conformity [*Karollus*, p. 116; *Kritzer*, p. 282; *Schwenzer*, p. 571; *Schlechtriem/Butler*, p. 133]. Since the sustainability requirements were included into the contract in the case at hand, the cakes that do not fulfil it cannot be conforming in accordance with Art. 35(1) of the CISG.

124 RESPONDENT will establish that delivered cakes breached its ‘zero tolerance’ policy regarding the unethical business behaviour (1) and that they did not comply with written contractual obligations (2). Additionally, chocolate cakes were not conforming to the implicitly agreed quality standards (3).

1. CLAIMANT breached RESPONDENT’s ‘zero tolerance’ policy regarding unethical business behaviour

125 CLAIMANT alleges that it delivered conforming goods pursuant to Art. 35 of the CISG, as sustainability requirements were not fixed in Sections III and IV of the contract [*MjC*, p. 26, §§87-89]. RESPONDENT will refute CLAIMANT’s allegation and establish that CLAIMANT wilfully ignored ‘zero tolerance’ policy contained in Section IV [*Ex. C2*, p. 11], which sufficiently determines sustainability requirements.

126 Quality also includes non-physical attributes like the circumstances of the production [*Huber/Mullis*, p. 132; *Kröll*, Art. 35 §25]. These attributes must be determined by the parties’ agreement and may include the observance of ethical principles [*Henschel*, p. 162; *Schwenzer*, p. 572]. Since RESPONDENT specified that the ingredients have to be sourced in accordance with the stipulations under Section IV [*Ex. C2*, p. 10], any ethical principles included in said section are to be observed. They are non-

physical quality attributes of ordered cakes and part of the conformity requirements under Art. 35(1) of the CISG.

127 Both Parties have emphasized throughout the negotiations that they are committed to The Ten Principles of UN Global Compact [Ex. C3, p. 15; Ex. C5, p. 17; Ex. C9, p. 21; RNA, pp. 24-25, §§ 4-5]. It is safe to assume that they understood the term ‘unethical business behaviour’ in light of the joined initiative – as corruption, bribery and extortion [UN GC Principles]. At least two of Ruritania Peoples Cocoa GmbH’s managers have already admitted the fraud and their involvement in the bribery and certification scheme [PO2, p. 54, §37]. Thus, it is undisputable that the cocoa, used in the production of cakes, was not sourced according to the standard of ethical business behaviour.

128 In conclusion, delivered cakes were not conforming to the description stipulated in the Section III of the contract and the non-physical quality attributes contained in the Section IV. Any deviation from the contractual description constitutes a lack of conformity, irrespective of the importance of the defect [Bianca/Bonell, Art. 35, §1.3; Schwenzler, pp. 572-573, §9; Piltz, p. 2771]. Therefore, by delivering cakes from unethically sourced cocoa, CLAIMANT breached its obligations under Art. 35(1) of the CISG.

2. Delivered cakes did not comply with written contractual obligations

129 Pursuant to Art. 2 of the Special Conditions of Contract, found in Section IV of the contract, CLAIMANT agreed “*to deliver to sell to the buyer the following product complying with all the obligations arising from this contract.*” The term ‘all the obligations’ includes all the Sections of contract including Section V – RGC and Section XXVI – SUP. Thus, CLAIMANT was required to comply with all ethical standards in RGC and SUP in order to deliver conforming goods.

130 RESPONDENT terminated the contract due to CLAIMANT’s delivery of cakes, not conforming to ethical principles C and E of SUP [Ex. C10, p. 22]. Principle C, titled ‘Health, safety and environmental management’, provides that CLAIMANT shall conduct its business in an environmentally sustainable way. Additionally, CLAIMANT had to ensure that its own suppliers comply with the environmental sustainability requirements [Ex. C2, pp. 13-14]. RESPONDENT’s expectations regarding CLAIMANT’s suppliers are further defined in principle E, titled ‘Procurement by suppliers’. Under said principle, CLAIMANT has to make sure that its suppliers comply with the standards set forth in SUP [*ibid.*].

131 CLAIMANT’s main cocoa supplier, Ruritania Peoples Cocoa GmbH, was involved in the sustainability certification scheme and has falsified zoning plans, certificates of origin and carbon

emission statements [Ex. C6, p. 18; Ex. C8, p. 20]. Mentioned actions are not in line with either RGC or SUP. As CLAIMANT's cocoa supplier has indisputably breached RESPONDENT's sustainability requirements contained in SUP, cakes delivered by CLAIMANT are non-conforming pursuant to Art. 35(1) of the CISG.

132 While CLAIMANT admits that it was obliged to ensure sustainable sourcing and production, it alleges that its obligations did not require achievement of result [MfC, p. 31, §110]. According to CLAIMANT, a reasonable person would understand 'make sure' only as obligation of best efforts. CLAIMANT is merely grasping at straws. 'Make sure' is a frequently used idiom with the same meaning as 'ensure' – it means “*make certain, establish something without doubt*” [AHDI, 'make sure']. If a party guarantees the achievement of result, it is bound to achieve this specific result [UNIDROIT commentary, Art. 5.1.4, p. 151; *Joseph Charles Lemire case*]. Thus, a reasonable person would interpret 'make sure' as an obligation of result.

133 Additionally, if RESPONDENT intended to include obligations of best efforts it would refrain from using such strong language. It could use a variety of milder expressions, e.g. 'try' or 'strive'. However, when drafting SUP RESPONDENT used forceful terms to impose a binding obligation on a suppliers. “*Must*” is used by the major players in the food vendor industry [*Whole Foods; Hershey's*] and declarative “*shall*” in legal English entails an obligation [Wagner, p. 246]. Yet again, it is evident that a reasonable person of the same kind as CLAIMANT would understand obligations contained in SUP as obligations of result.

134 CLAIMANT also alleges that cake presented at the Cucina Food Fair represents a model regarding the shape of Queen's Delight [MfC, pp. 27-28, §§92-96]. However, since a model is supplied to the buyer for his examination [*Schwenzer, p. 583; Mountain bikes case*], the cake presented at the fair cannot be a model. Therefore, the quality of delivered cakes cannot be determined regarding cakes' similarity to the model under Art. 35(2)(c) of the CISG. Instead, the quality of cakes should be interpreted under Art. 35(1) and Art. 35(2)(b) of the CISG.

135 In conclusion, contrary to CLAIMANT's allegations, a reasonable person would understand that forceful language, used in RGC and SUP, imposes obligations of result. Since the cake presented at the Cucina Food Fair does not represent a model, Art. 35(2)(c) of the CISG is not applicable to the present case. Instead, CLAIMANT was required to comply with all contractually agreed ethical standards in order to deliver conforming goods pursuant to Art. 35(1) of the CISG.

3. Chocolate cakes were not conforming to the implicitly agreed quality standards

- 136 Even if Tribunal were to find that non-physical quality requirements cannot be expressly determined, RESPONDENT will establish that they were implicitly included into the contract. The contract's description of the goods to be delivered is only the starting point to determine the parties' intent. Art. 8 of the CISG governs the interpretation of contracts; it directs Tribunal to look to all the statements made and conduct exhibited by the parties [*Bianca/Bonell* p. 271; *Lookofsky* p. 54; *Schwenzer*, p. 413]. The contractual requirements can be agreed upon either expressly or implicitly [*Enderlein/Maskow/Strobbach*, Art. 35 §1; *Herber/Czerwenka*, Art. 35, §3; *Schwenzer*, p. 571]. In both cases they are determined by reference to Art. 8 of the CISG [*Schwenzer*, p. 571; *Roland Schmidt GmbH case*].
- 137 When interpreting the statements and conduct of the parties under Art. 8(1) of the CISG, the known or identifiable will of a party is to be taken into account [*Caito Roger case*]. Specific requirements can also be deduced from the purpose and the circumstances of the contract, even if there is no direct agreement [*Globes case*; *Steel billets case*]. It is sufficient if a reasonable seller could discern the purpose of goods from all the relevant circumstances [*Schwenzer*, p. 580; *Enderlein/Maskow/Strobbach*, Art. 35, §11]. Moreover, the agreement is usually implied when it comes to particular industry standards or manufacturing practices [*Schwenzer*, p. 571; *Schlechtriem*, §38]. In the case at hand, Parties agreed that CLAIMANT would adhere to “*high standards of integrity and sustainability*” and the same applied to its suppliers [*Ex. C2*, pp. 11-14]. Sustainability requirements can also be deduced from the nature of RESPONDENT's business. It is the leading gourmet supermarket chain advertising and selling products, which are produced locally, organically or in accordance with the fair-trade standard [*RN4*, pp. 24-25, §§4-5]. Thus, a reasonable seller of the same kind as CLAIMANT should conclude that sustainable production is an implied contractual requirement.
- 138 Additionally, pre-contractual negotiations are relevant especially when interpreting the parties' intent pursuant to Art. 8(3) of the CISG [*Cobalt sulphate case*; *Mountain bikes case*; *MCC-Marble Ceramic Center case*; *Filanto case*]. Throughout the negotiations, RESPONDENT has highlighted the extreme importance of sustainable and ethical farming for its products [*Ex. C1*, p. 8]. RESPONDENT directly stated that not only CLAIMANT, even its suppliers were to adhere to Comestibles Finos' Business Philosophy and SUP [*Ex. C1*, p. 8]. Therefore, RESPONDENT stressed the importance of sustainable ingredients and incorporated the sustainability requirements in the contract at least implicitly.
- 139 In conclusion, a reasonable seller of the same kind as CLAIMANT would perceive sustainable production as an implied contractual requirement. Therefore, delivered cakes were non-

conforming pursuant to Art. 35(1) of the CISG, as a sustainable ingredients requirement constitutes a part of the contract.

B. Delivered cakes were unfit for their particular purpose under Art. 35(2)(b) of the CISG

140 RESPONDENT agrees with CLAIMANT's assessment that the particular purpose of the goods was made known to CLAIMANT [*MfC*, p. 28, §98]. What is more, the parties do not need to expressly agree on particular purpose, it is sufficient if the particular purpose is made known to the seller [*Hyland*, p. 320; *Naumann*, p. 84]. In the case at hand, particular purpose was made known to CLAIMANT throughout Parties' communication, RESPONDENT's reputation and emphasized sustainability requirements [*MfC*, p. 28, §98; *RNA*, p. 24, §4; *Ex. C1*, p. 8; *Ex. C2*, pp. 9-14; *Ex. C5*, p. 17]. Therefore, CLAIMANT knew that RESPONDENT's particular purpose was to sell cakes that are sustainably produced.

141 However, CLAIMANT alleges that delivered goods fulfilled particular purpose, since CLAIMANT was only obliged to use its best efforts [*MfC*, pp. 28-29, §§99-101]. This line of argumentation cannot be followed. If particular purpose is made known to the seller, he is responsible for the fitness of the goods for that purpose [*Schwenzer*, p. 580]. Since CLAIMANT knew that RESPONDENT's particular purpose was to sell cakes as sustainably produced [*MfC*, p. 28, §98], it was obliged to deliver sustainably produced cakes. By delivering unsustainably produced cakes, CLAIMANT breached the contract. Furthermore, it is irrelevant whether CLAIMANT or its suppliers are responsible for non-conformity. CLAIMANT argues that the contractual obligations in RGC were worded with phrases such as 'make sure'. Such wording allegedly indicates that CLAIMANT's obligations entail only use of best efforts and not achievement of a specific result [*MfC*, pp. 28-29, §§99-101]. Firstly, since CLAIMANT did not object to the particular purpose, it is bound by the particular purpose regardless of the language contained in the written contract [*Neumayer*, pp. 278-9, *Schwenzer 2005*, p. 421]. Secondly, RESPONDENT has already established that a reasonable person of the same kind as CLAIMANT would interpret obligations in RGC as obligations of result [*see supra* §§132-133]. Cakes delivered by CLAIMANT are not fit for the particular purpose and are therefore non-conforming. CLAIMANT's assertion that it has cured the non-compliance by performing corrective actions [*MfC*, pp. 33-34, §119-120] is irrelevant to the current stage of arbitration [*PO1*, p. 48, §3].

142 Moreover, CLAIMANT states that RESPONDENT confirmed cakes' particular purpose by making use of them [*MfC*, p. 32, §§113-114]. While it is undisputed that RESPONDENT used unsustainable cakes in a marketing campaign, gifting them for free, this merely proves that cakes were fit for ordinary use. If goods are a type of food, they have to be edible [*Schwenzer*, p. 567; *New Zealand mussels case*;

Spanish paprika case; Frozen pork case]. RESPONDENT's conduct of gifting cakes has to be interpreted as to only confirm goods' ordinary purpose. Since RESPONDENT was unable to sell cakes as sustainable, their particular purpose could not be confirmed.

- 143 An additional requirement for fitness of goods for particular purpose is that the buyer relied on the seller's skill and judgement, and that it was reasonable of him to do so [*Schwenzer, p. 581*]. It falls upon the seller to prove that it was unreasonable of buyer to rely on the skill and judgement of the seller [*Schwenzer, p. 594; Huber/Mullis, p. 139; Honnold, Art. 35, §226*]. However, CLAIMANT did not satisfy the burden of proof. Even if CLAIMANT argued that it was unreasonable for RESPONDENT to rely on CLAIMANT's skill and judgement, RESPONDENT would establish that its reliance was reasonable. CLAIMANT is a manufacturer of fine bakery products [*NoA, p. 4, §1*]. At least one of its products, the cake King's Delight, is produced from sustainably farmed cocoa [*Ex. R2, p. 29*]. It is therefore evident that CLAIMANT is qualified for producing sustainable chocolate cakes and it was reasonable for RESPONDENT to rely on CLAIMANT's skill and judgement.
- 144 In conclusion, CLAIMANT admits that it was aware that RESPONDENT's particular purpose was selling sustainably produced cakes and it was not unreasonable for RESPONDENT to rely on CLAIMANT's skill and judgement. Thus, CLAIMANT was obliged to deliver cakes, which were conforming to their particular purpose. Since CLAIMANT has failed to do so, RESPONDENT rightfully terminated the contract.

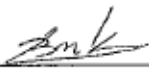
CONCLUSION ON ISSUE IV

- 145 Since the sustainability requirements were included into the contract, CLAIMANT breached its obligations under Art. 35(1) of the CISG by delivering cakes from unethically sourced cocoa. Delivered cakes breached RESPONDENT's 'zero tolerance' policy regarding the unethical business behaviour and they did not comply with written contractual obligations. Additionally, chocolate cakes were not conforming to the implicitly agreed quality standards. Contrary to CLAIMANT's assertion, the cake presented at the fair cannot be a model under Art. 35(2)(c) of the CISG. Ultimately, Parties agree that RESPONDENT's particular purpose was selling sustainably produced cakes and it was reasonable for RESPONDENT to rely on CLAIMANT's skill and judgement. Since CLAIMANT delivered cakes that were non-conforming with their particular purpose, RESPONDENT rightfully terminated the contract.
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REQUEST FOR RELIEF

In light of the submissions made above, Counsel for CLAIMANT respectfully requests the Arbitral Tribunal:

1. to disqualify Mr. Prasad from his position as CLAIMANT-appointed arbitrator;
2. to reject all claims for payment raised by CLAIMANT;
3. to order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.



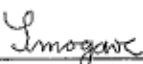
Leon Brulc

Hana Šrot

Stefan Danojević

Mihael Pojbič

Vivian Mohr


Petra Zupančič

Barbara Smogavc

CERTIFICATE

Maribor, 18 January 2018

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate.



Leon Brulc



Hana Šrot



Stefan Danojević




Mihael Pojbič



Vivian Mohr



Petra Zupančič



Barbara Smogavc