Twenty Fifth Annual

Willem C. Vis International Commercial Arbitration Moot

24 March – 29 March 2018

Vienna Austria

MEMORANDUM FOR CLAIMANT

ON BEHALF OF:	**AGAINST:**
Delicatesy Whole Foods Sp	Comestibles Finos Ltd
39 Marie-Antoine Carême Avenue	75 Martha Stewart Drive
Oceanside	Capital City
Equatoriana	Mediterraneo
(**CLAIMANT**)	(**RESPONDENT**)

Leon Brulc • Stefan Danojević • Vivian Mohr • Mihael Pojbič

Barbara Smogavc • Hana Šrot • Petra Zupančič

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§/§§	paragraph/paragraphs
AA	Arbitration Agreement
AG	Aktiengesellschaft
Art. /Arts.	Article
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CGC	CLAIMANT's General Conditions of Sale
Challenge	Challenge of Mr. Prasad
CIArb	Chartered Institute of Arbitrators
CISG	United Nations Convention on Contracts for the International Sale of Goods
CPR	International Institute for Conflict Prevention & Resolution
DIIA	Declaration of Impartiality and Independence and Availability
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
INV	RESPONDENT's Invitation to Tender
LEAD company	Global Compact LEAD company
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
NY Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Offer	Sales – Offer
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
UNEP	United Nations Environment Programme
UN GC Principles	Ten Principles of the UN Global Compact
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2010
USD	United States dollar
v.	versus

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STATEMENT OF FACTS

6 The parties to this arbitration are Delicatesy Whole Foods Sp (hereinafter: **CLAIMANT**) and Comestible Finos Ltd (hereinafter: **RESPONDENT**), collectively "**Parties**". **CLAIMANT** is a medium sized manufacturer of fine bakery products registered in Equatoriana. **RESPONDENT** is a gourmet supermarket chain in Mediterraneo.

7 **Parties** met at the yearly Danubian food fair Cucina in March 2014 where **CLAIMANT** was approached by **RESPONDENT's** Head of Purchasing Annabelle Ming. She and Kapoor Tsai, **CLAIMANT's** Head of Production, discussed the possibility of future cooperation.

8 On **10 March 2014**, **RESPONDENT** sent the Invitation to Tender, to which **CLAIMANT** replied with Letter of Acknowledgement on **17 March 2014** and with Sales – Offer on **27 March 2014**. In Sales – Offer **CLAIMANT** proposed several changes, including the payment and description of the cakes.

9 On **7 April 2014**, **RESPONDENT** sent a letter accepting **CLAIMANT's** Sales – Offer notwithstanding the changes suggested by it. **RESPONDENT** also requested that **CLAIMANT** starts 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.

10 In **2016**, Mr. Prasad published an article in the Vindobona Journal of International Commercial Arbitration and Sales Law.

11 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.

12 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 deliveries and making any further payments until the issue was resolved. 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.

13 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. **CLAIMANT** immediately terminated the contract with its supplier and also offered a reduction of 25% for cakes delivered and not yet paid. **RESPONDENT** refused **CLAIMANT**'s offer and terminated the contract in the email of **12 February 2017**.

14 Since **Parties** unsuccessfully tried to mediate on **30 May 2017**, **CLAIMANT** started arbitration proceeding by sending Notice of Arbitration on **30 June 2017**. **RESPONDENT** submitted its Response to Notice of Arbitration on **31 July 2017**.

15 On **29 August 2017**, **RESPONDENT** informed both the Arbitral 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.

16 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

17 Firstly, the Arbitral Tribunal should not decide on the Challenge of Mr. Prasad. Instead it ought to be decided by an appointing authority as per Article 13(4) of the UNCITRAL Arbitration Rules. If said article is not applicable, Mr. Prasad should participate in deciding on the Challenge of Arbitrator. In case Mr. Prasad is excluded from decision on the Challenge of Arbitrator, he should be replaced by CLAIMANT-appointed substitute arbitrator (**ISSUE I**).

18 Secondly, the Challenge of Mr. Prasad is devoid of any merits. All the facts RESPONDENT relies upon were already disclosed by Mr. Prasad and RESPONDENT made no objections. Moreover, under the applicable law there is no legal obligation for CLAIMANT to make any disclosure. Even if such obligation stems from the IBA Guidelines on Conflict of Interest in International Arbitration, CLAIMANT has not breached it. Further, Mr. Prasad's legal opinions cannot constitute grounds for challenge (**ISSUE II**).

19 Thirdly, CLAIMANT's General Conditions govern the contract, as they have been the only set of standard terms exchanged between Parties since CLAIMANT sent Sales – Offer. Since

CLAIMANT made its General Conditions sufficiently available, a reasonable person would conclude that they govern the contract. RESPONDENT's General Conditions cannot govern the contract pursuant to the knock-out doctrine and the last shot rule (**ISSUE III**).

20 Finally, CLAIMANT fulfilled its contractual obligations as it delivered conforming chocolate cakes of the required quantity, quality and description. Additionally, the cakes were conforming as they were fit for ordinary use and no particular purpose of goods has been made known to CLAIMANT. Furthermore, due to the use of ambiguous language, uncommon in business practice, RESPONDENT failed to create obligations of result. Moreover, CLAIMANT was only obliged to use best efforts as Ten Principles of UN Global Compact prevail over RESPONDENT's General Conditions. Ultimately, a reasonable person would consider that using best efforts is sufficient to fulfil contractual requirements (**ISSUE IV**).

ISSUE I: TRIBUNAL SHOULD NOT DECIDE ON THE CHALLENGE OF MR. PRASAD

21 By entering into the Arbitration Agreement (hereinafter: AA), Parties set forth the procedure for constitution of the Arbitral Tribunal (hereinafter: Tribunal). Accordingly, CLAIMANT appointed Mr. Prasad to serve as an arbitrator. Mr. Prasad made full disclosure of all the relevant circumstances of his business and other relationships with regards to these arbitral proceedings [*Ex. C11, p. 23*]. RESPONDENT initially stated that it has no objection to Mr. Prasad's appointment [*RNA, p. 26, §22*]. After the proceedings have commenced and Tribunal was fully constituted, RESPONDENT alleged that new circumstances have arisen, requiring Mr. Prasad's removal from Tribunal. RESPONDENT further submitted in Notice of Challenge of Arbitrator (hereinafter: NCA) that Parties mutually agreed on excluding the applicability of Art. 13(4) of the UNCITRAL Arbitration Rules (hereinafter: UNCITRAL Rules) and that the Challenge of Mr. Prasad (hereinafter: Challenge) should be decided by the remaining two arbitrators [*NCA, p. 39, §8*].

22 Contrary to RESPONDENT's allegations, CLAIMANT will demonstrate that Challenge should be decided by an appointing authority as per Art. 13(4) of the UNCITRAL Rules, which is applicable to this arbitration (**A**). Alternatively, should Tribunal find that it has the authority to decide on Challenge, it should do so in its full constitution, *i.e.* with participation of Mr. Prasad (**B**). Lastly, if Tribunal decides that Mr. Prasad's exclusion from deciding on Challenge is necessary, Challenge should be reviewed in presence of a substitute arbitrator (**C**).

A. Art. 13(4) of UNCITRAL Arbitration Rules is applicable

23 In AA, Parties agreed that any arbitral proceeding between them should be settled "*without any involvement of any arbitral institution*" [*Ex. C2, p. 12*]. The wording was added to the UNCITRAL Model Arbitration Clause that Parties used [*PO2, p. 52, §22*]. RESPONDENT asserts that this addition should be read as excluding the applicability of Art. 13(4) of the UNCITRAL Rules [*NCA, p. 39, §8*]. However, CLAIMANT contends that RESPONDENT's interpretation of AA is overreaching and that there was no such mutual understanding between Parties. Instead, RESPONDENT should have opted for a clearer wording if it wanted to deviate from the procedure in Art. 13(4) of the UNCITRAL Rules.

24 To begin with, UNCITRAL Rules in Art. 6(1) uniquely define the term appointing authority [*Perales-Viscasillas, p. 47*]. While it is true that an arbitral institution may be chosen to act as an appointing authority, it is by no means mandatory. Instead, parties may choose to opt for an individual person [*UNCITRAL Rules, Art. 6(1)*]. It is for this reason that Parties' agreement that no arbitral institution should be involved in these proceedings cannot be interpreted in a way to encompass the appointing authority. The two terms cannot be considered synonyms since appointing authority is a broader term than arbitral institution, encompassing institutions as well as individuals [*Caron/Caplan, p. 150*]. Consequently, even if Tribunal finds that Parties have excluded institutions from these proceedings completely, reasonable person could not conclude that it means that Art. 13(4) of the UNCITRAL Rules should not apply.

25 Aforementioned article merely states that in circumstances akin to those in present case, appointing authority should make the decision on the challenge of the arbitrator [*Bernasconi-Osterwalder/Johnson/Marshall, p. 9; UNCITRAL Rules, Art. 13(4)*]. Designating a person instead of an arbitral institution is not uncommon, especially renown jurists tend to be a favourable solution [*Caron/Caplan, p. 159*]. Selection of a person of great esteem to act as appointing authority has been in fact utilised since the very beginning of modern international arbitration. For instance, in 1904 PCA case His Majesty the Emperor of Russia acted as appointing authority [*Blockading Powers v. Venezuela*]. Similar situation was present in 1905 PCA case where King of Italy, Victor Emmanuel III was made appointing authority [*Muscat Dhows case*]. There are various other instances where respectable persons served as appointing authority [*Japanese House Tax case; Larsen v. Hawaiian Kingdom; Norwegian Shipowners' Claims case*], Therefore, practice of appointing authority as a person is a concept well established throughout history.

26 The possibility of an arbitral institution being involved comes to life solely in instance when parties do not agree on the choice of appointing authority [*UNCITRAL Rules, Art. 6(1); Finizio/Wheeler/Preidt, p. 2*]. By stating that following Art. 13(4) of the UNCITRAL Rules would lead to involvement of an institution [*NCA, p. 39, §8*], RESPONDENT rejects the possibility of an agreement between Parties at the outset. This can only be attributed to RESPONDENT's bad faith. By excluding the possibility of agreement on the appointing authority, RESPONDENT is attempting to manipulate AA in order to shape the procedure to its liking. As elaborated below, if RESPONDENT's line of argumentation is followed, Tribunal would consist of two members. One of those members would be Ms. Reitbauer - arbitrator appointed by RESPONDENT. Taking her views on third-party funding into consideration RESPONDENT is likely to achieve at least a deadlock on Challenge in such a constitution of Tribunal [*see infra §39*]. Therefore, RESPONDENT's motives for misinterpreting AA are apparent and Tribunal should not allow RESPONDENT to benefit on account of its bad faith.

27 RESPONDENT has been unwilling to cooperate on several occasions. While acknowledging CLAIMANT's reservations regarding ad-hoc arbitration, RESPONDENT made no effort to compromise with CLAIMANT on formulation of AA [*Ex. C1, p. 8, §5*]. Further, RESPONDENT refused CLAIMANT's attempts to resolve the issue and terminated the contract without any attempt to settle the differences amicably [*Ex. C10, p. 22*]. It has done so despite CLAIMANT's offers for price reductions on withstanding payment [*Ex. C9, p. 21, §4*]. Parties even attempted to resolve the dispute by means of mediation, however CLAIMANT was met by a flat refusal of RESPONDENT's CFO and the Head of Legal to make any payments whatsoever [*FL1, p. 3, §2*]. This demonstrates RESPONDENT's general stance in this arbitration as un-cooperative. Accordingly, as the chosen rules lay down the procedure for the challenge in line with AA, there is no reason to deviate from it.

28 Moreover, Tribunal should not follow RESPONDENT's interpretation of AA as RESPONDENT was the one who drafted it. Under the *kompetenz-kompetenz* principle, an arbitral tribunal has jurisdiction to interpret the arbitration agreement by using one of the established principles of interpretation [*Fouchard/Gaillard/Goldman, §§773-776*]. The principle of *contra proferentem* is applicable to the interpretation of arbitration agreements and it provides that an unclear agreement should be interpreted against the party which drafted such agreement [*UNIDROIT Principles, Art. 4. 6; Societe Swiss Oil v. Societe Petrogab*]. The exclusion of Art. 13(4) of the UNCITRAL Rules was not addressed by RESPONDENT neither in AA nor in its letter

to CLAIMANT in which RESPONDENT proposed the use of their standard arbitration clause [*Ex. C1, p. 8, §5*]. Therefore, even if RESPONDENT indeed intended to exclude the role of appointing authority in deciding on challenge of arbitrator, CLAIMANT could not have been aware of its intent. Instead, it was RESPONDENT's duty to use clearer and unambiguous wording. The vague language should be seen in opposition of the interest of the party that created it [*Sykes, p. 66; Mastrobuono v. Shearson Lehman Hutton; ICC case no. 8261*]. Consequently, any ambiguity in the present case should be interpreted against RESPONDENT.

29 To conclude, if RESPONDENT wanted to alter the procedure of challenge of arbitrator, it should have opted for a clearer and unambiguous wording. Instead, RESPONDENT is manipulating the interpretation of AA to its own liking and attempting to delay the proceedings with Challenge that lacks any merits [*see infra Issue II*]. Consequently, Tribunal should find that there was in fact no agreement between Parties to exclude the application of Art. 13(4) of the UNCITRAL Rules. Therefore, Tribunal should designate an appointing authority to decide on Challenge.

B. Should Tribunal find that it has competence to decide on Challenge, it should do so in the presence of Mr. Prasad

30 As elaborated above, RESPONDENT's main objective for filing Challenge is to prolong arbitral proceedings. This is evident from RESPONDENT's contradictory argumentation. On the one hand, RESPONDENT claims that Art. 13(4) of the UNCITRAL Rules is not applicable, on the other, RESPONDENT's argument for not allowing Mr. Prasad to decide on Challenge is based on the very same article [*NCA, p. 39, §8*].

31 Since UNCITRAL Rules do not provide an answer concerning the inclusion of Mr. Prasad, the question of applicability of other procedural rules comes into perspective. It is established both in theory and in practice that the procedural rules are a combination of both the rules that the parties have chosen and mandatory provisions of *lex arbitri* [*Born I, p. 147; Coop International Pte Ltd case; John Holland Pty Ltd case*]. As a result of the choice of the arbitral seat, Model Law is applicable albeit with a supplementary role [*Goode, p. 31; Henderson, p. 898*]. For that reason, if Art. 13(4) of the UNCITRAL Rules is not applicable, the relevant procedural rules should be sought after in Model Law.

32 Art. 13(2) of the Model Law states that the arbitral tribunal should decide on the challenge. The UNCITRAL Working Group II agreed that the decision entrusted to the tribunal in Art. 13(2) of the Model Law has to be made by all members of the tribunal, including the challenged arbitrator [*UNCITRAL Yearbook I, p. 194*]. Furthermore, rules of arbitral procedures, which bestow the authority to rule on the challenge to the non-challenged arbitrators, for instance the ICSID, are considered flawed [*Hay/Weil, §5*]. One of the main arguments in negating such an approach is the possibility of a deadlock and the subsequent delays in proceedings.

33 Admittedly, a decision made by an arbitrator concerning his own matter makes such an arbitrator in fact an *iudex in causa sua*. However, the goal of disabling dilatory tactics and unnecessary suspensions of the procedure until the challenge was either sustained or rejected, outweighs such a concern. Said view is accepted by the UNCITRAL Working Group II that drafted Model Law [*UNCITRAL Yearbook II, p. 433*] and is recognized as such in theory [*Uzelac, p. 103, §28; Broches p. 65; Zahradníková p. 279, §§14.30-14.31*].

34 Ultimately, such a composition of Tribunal would coincide with AA, the will of Parties – if Art. 13(4) of the UNCITRAL Rules is in fact excluded – and the legal framework of the arbitral proceedings. Therefore, Tribunal should allow Mr. Prasad to decide on Challenge.

C. In case of exclusion of Mr. Prasad from decision on Challenge, CLAIMANT should be allowed to appoint a substitute arbitrator

35 If Tribunal determines that it is empowered to decide on Challenge and at the same time exclude Mr. Prasad from assessing it, substitute arbitrator – appointed by CLAIMANT – should be involved in evaluation of Challenge. Party-appointed arbitrators bear paramount importance, especially when number of arbitrators is set to three. They are able to ensure that party's arguments are heard and not misunderstood [*Mosk, p. 253; McLaren, p. 162*].

36 Primarily, it must be pointed out that Parties have determined the number of arbitrators to decide on this dispute to be three [*Ex. C1, p. 12*]. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: NY Convention) is applicable in the present case as both Parties' countries of origin and the country of the seat of arbitration are contracting states of the NY Convention [*PO2, p. 55, §47*]. Art. V(d) of the NY Convention states that if "*composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties*", it constitutes grounds for refusal of the enforcement of arbitral award [*NY Convention,*

Art. V]. Consequently, Tribunal should not make any decisions in a composition differing from the one provided by AA to avoid any possibility of unenforceable award.

37 Furthermore, it must be emphasized that Parties must be treated equally throughout the proceedings. Said principle has such importance that it holds primacy even in relation to the most fundamental principle in arbitration – party autonomy [*Holtzmann/Neuhaus, p. 583; Broches, p. 95*]. Aforementioned is reflected in various articles of UNCITRAL Rules [*UNCITRAL Rules, Art. 6(5), 17(1), 43(1)*] and clearly prescribed in Model Law in Art. 18, entitled "*Equal treatment of the parties*". Failure to secure equal treatment of the parties in practice leads to setting aside of the award [*Hui case; Case no. 4A-570/2016; AKN v. ALC*].

38 CLAIMANT does not raise doubts to impartiality of RESPONDENT-appointed arbitrator, Ms. Reitbauer. However, party-appointed arbitrators – conscientiously or sub-conscientiously – tend to become party advocates at least to a certain extent [*Smit, p. 1, §3*]. Ms. Reitbauer's article on third-party funding must also be taken into the account. It attests to the fact that her position favours RESPONDENT profoundly [*FL3, p. 46, §10*]. What is more, appointing arbitrators by each party is considered to be a balance of powers of the parties [*Shetreet/Forsyth, p. 245*]. Therefore, precluding CLAIMANT of its right to appoint an arbitrator – regardless of decision being made – would be contradictory to Art. 17(1) of the UNCITRAL Rules, which states that although tribunal may exercise discretion in how they manage the proceedings, parties must be treated equally.

39 Moreover, the issue with the composition of Tribunal as proposed by RESPONDENT [*NCA, p. 39, §8*] is not only problematic for its lack of impartiality. Said composition presents a technical issue as number of arbitrators to decide would be two. Even-numbered tribunals are rare. Particularly as they are flawed since they open a possibility of a deadlock. For that reason, even-numbered tribunals are prohibited in certain jurisdictions [*Lew/Mistelis/Kröll, §§10.24-10.25*]. In case of a deadlock, proceedings would be needlessly prolonged. Permitting such a possibility once again does not conform with the Art. 17(1) of the UNCITRAL Rules, since arbitrators' discretion is limited in a manner to favour efficiency of the procedure [*Caron/Caplan, p. 34*].

40 In addition, as CLAIMANT has already appointed Ms. Ducasse as a potential replacement arbitrator [*PO1, p. 48, §1.3*] she would be a favourable solution as a substitute arbitrator deciding on Challenge. Ms. Ducasse is allowed to participate at an oral hearing [*PO1, p. 48, §1.5*]. Therefore, there would be no delay in proceedings as she would be able to step into a

substitute position, if necessary. Most importantly, this solution with a substitute arbitrator would be in accordance with Art. 17(1) of the UNCITRAL Rules.

41 In conclusion, if Tribunal decides that it may deliberate on Challenge and that it will do so in absence of Mr. Prasad, Ms. Ducasse should be the third arbitrator, substituting Mr. Prasad in Challenge procedure. In this fashion Tribunal would insure that Parties' agreement is respected, international law followed, and procedure conducted according to relevant rules. However, if Tribunal decides to follow RESPONDENT's approach [*NCA, p. 39, §8*], it would make not only one but two viable grounds for setting the award aside, as it would breach equal treatment of Parties and award would be unenforceable pursuant to Art. V of NY Convention.

CONCLUSION ON ISSUE I

42 Parties have not explicitly excluded Art. 13(4) of the UNCITRAL Rules. AA merely states that no arbitral institution shall participate in the proceedings, which does not result in derogation from said article. Therefore, Tribunal has no power to rule on Challenge, as it should be decided by an appointing authority pursuant to Art. 13(4) of the UNCITRAL Rules. Even if Tribunal has the power there are no grounds in the applicable rules to prevent Mr. Prasad from taking part in decision on Challenge. In case Mr. Prasad is nevertheless excluded, Tribunal should make sure that CLAIMANT-appointed substitute arbitrator is involved, pursuant to principle of equal treatment of the parties.

ISSUE II: CHALLENGE OF MR. PRASAD IS DEVOID OF ANY MERITS

43 CLAIMANT urges Tribunal to dismiss Challenge as it has no merits. It is merely an attempt to delay the arbitration at hand in order to postpone the payment owed to CLAIMANT [*see infra Issue III and IV*]. In Challenge, RESPONDENT lists several facts that supposedly raise justifiable doubts as to Mr. Prasad's impartiality and independence. RESPONDENT relies on CLAIMANT's alleged failure to meet its obligation of disclosure of third-party funding as well as Mr. Prasad's article in the Vindobona Journal of International Commercial Arbitration [*NCA, p. 38, §§4-6*]

44 CLAIMANT denies all of RESPONDENT's allegations and asserts that they do not create justifiable doubts as to Mr. Prasad's appointment since they are either inadmissible or irrelevant to the case at hand. Firstly, all of the facts RESPONDENT is relying on were already disclosed by Mr. Prasad and RESPONDENT made no objections to them (**A**). Secondly, according to the applicable law, there is no legal obligation for CLAIMANT to make any

disclosure (**B**). Thirdly, even if the IBA Guidelines on Conflict of Interest in International Arbitration (hereinafter: IBA Guidelines) do apply, CLAIMANT has not breached the duty to disclose (**C**). Finally, Mr. Prasad's legal opinions cannot constitute grounds for Challenge (**D**).

A. RESPONDENT's grounds for Challenge were already disclosed by Mr. Prasad and RESPONDENT made no objections

45 By submitting Declaration of Impartiality and Independence and Availability (hereinafter: DIIA), Mr. Prasad has disclosed all the relevant circumstances that could give rise to challenge of arbitrator. RESPONDENT made no objections to it in RNA. However, in NCA RESPONDENT is attempting to present all the facts as new and unrelated information, which is deceptive, as RESPONDENT must be aware it cannot base Challenge on the facts already disclosed in DIIA.

46 Firstly, arbitrator's duty to disclose is reflected in Art. 11 of the UNCITRAL Rules [*Caron/Caplan, p. 194*]. Duty to disclose bears importance in regard to estoppel. Acceptance after the party becomes aware of the circumstances likely to give rise to justifiable doubts to arbitrator's impartiality create grounds for possible estoppel should said party base its challenge on disclosed circumstances [*Sarcevic, p. 80; Caron/Caplan, p. 195*]. Mr. Prasad fulfilled his obligation to disclose by submitting DIIA. He disclosed that he has been appointed as an arbitrator by Fasttrack & Partners on previous occasions and has also made reservation that colleagues from his law firm may accept instructions either from parties themselves or related companies [*DIIA, p. 23, §§3,5*].

47 Secondly, if a party does not make any objections to the disclosure, "*any subsequent challenge during or after the proceedings should be unsuccessful*" [*Redfern/Hunter, §4-61*]. Therefore, it is of paramount importance to point out that in RNA RESPONDENT stated that it has no objections to Mr. Prasad's appointment "…*despite the restrictions in his declaration*…" [*RNA, p. 26, §22*]. The cited extract from RNA is essential as RESPONDENT acknowledges the possibilities and facts pointed out by Mr. Prasad. Thus, in failing to object RESPONDENT forfeited its right to a challenge arising from circumstances disclosed in DIIA.

48 Thirdly, the grounds Challenge is based upon, do not differ from circumstances already disclosed by Mr. Prasad. In the beginning of NCA, RESPONDENT declares that Mr. Prasad's connections to the third-party funder raise doubts to his impartiality [*NCA, p. 38, §1*]. This alludes to the fact that one of Mr. Prasad's partners is acting for a client funded by Funding 8

Ltd [*PO2, p. 50, §§6-7*]. However, in DIIA Mr. Prasad had made express reservation that his partners may act upon instructions of companies related to Parties [*DIIA, p. 23, §5*]. Further, RESPONDENT states that repeat appointments by party/law firm is problematic [*NCA, p. 39, §10*]. Yet, RESPONDENT was informed in DIIA of previous appointment by Fasttrack & Partners. Although true, that Findfunds LP was indirectly involved in two cases where Mr. Prasad acted as arbitrator as well, repeated appointment was nevertheless established in DIIA [*DIIA, p. 23, §3*].

49 Fourthly, CLAIMANT's alleged unethical behaviour and its supposed efforts to conceal relevant connections is supposedly "*giving rise to reasonable doubts*" to Mr. Prasad's impartiality [*NCA, p. 38, §§1,6*]. Burden of proof lies with the party making affirmative claim [*Caron/Caplan, p. 258; Vasani/Palmer, p. 200; National Grid Plc case; Gallo v. Canada*]. In the present case burden of proof therefore falls upon RESPONDENT. However, RESPONDENT fails to make any explanation whatsoever as to how CLAIMANT's conduct could, by itself, affect arbitrator's impartiality and independence. What is more, Mr. Prasad became aware of third-party funding only after CLAIMANT provided the name upon RESPONDENT's request [*PL, p. 43, §2; PO2, p. 51, §13*].

50 Additionally, RESPONDENT itself states that it does not believe Mr. Prasad had any prior knowledge regarding CLAIMANT's third-party funding [*NCA, p. 38, §6*]. Therefore, RESPONDENT knowingly caused circumstances that allegedly raise doubts to Mr. Prasad's impartiality. It is unclear what RESPONDENT's motives for such cause of action were.

51 In conclusion, Mr. Prasad has met his duty to disclose in listing all the relevant facts and circumstances. RESPONDENT failed to provide any additional facts that do not coincide with those provided in DIIA. As RESPONDENT has made no objections it has waived its rights to Challenge arising from Mr. Prasad's disclosure. For those reasons Tribunal should dismiss Challenge as RESPONDENT's arguments are precluded.

B. There is no legal obligation for CLAIMANT to make any disclosure

52 CLAIMANT was not under duty to make any disclosure under the applicable arbitration law or arbitration rules. Seemingly aware of that, RESPONDENT attempted to further devise such legal obligation from the IBA Guidelines. RESPONDENT stated that CLAIMANT should have disclosed information about third-party funding and that failure to do so must affect the standard applied for the challenge procedure [*NCA, p. 39, §9*].

53 CLAIMANT strongly contests RESPONDENT's allegations as they are unfounded and irrelevant to Challenge. Whether CLAIMANT disclosed that it has procured third-party funding should not bear any importance. Tribunal should rather consider only the fulfilment of Mr. Prasad's obligations as that is against whom Challenge is directed. Therefore, in response to RESPONDENT's statements, CLAIMANT will establish that it was under no legal obligation of disclosure in accordance with the applicable law (**1**) and that the IBA Guidelines do not apply to the case at hand (**2**).

1. Applicable law does not provide for duty to disclose for parties

54 As previously established [*see supra §31*], the only applicable rules in these proceedings are Model Law and UNCITRAL Rules. Therefore, when assessing RESPONDENT's allegations of CLAIMANT's breach of duty to disclose [*NCA, p. 39, §9*], these are the only rules that Tribunal should base its decision on. Neither the Model Law nor the UNCITRAL Rules include provisions that impose the duty to disclose third-party funding on the parties. In fact, none of the institutional arbitration rules necessitate parties to make such disclosure [*Altenkirch/John, §18*].

55 To begin with, Parties have not stipulated for the use of international practice in AA [*Ex. C2, p. 12*]. When parties agree to arbitration rules, said rules should prevail, unless the procedural requirements of *lex arbitri* are mandatory [*Moses, p. 69*]. Issues only arise when such rules are vague and unspecific [*Newman/Burrows, p. 177*]. CLAIMANT will establish that UNCITRAL Rules are specific in regard to disclosure [*UNCITRAL Rules, Arts. 11-13*].

56 Furthermore, it is of paramount importance to examine the relevant articles closely. Duty to disclose is definitively defined in Art. 11 of the UNCITRAL Rules. It is worth noting that UNCITRAL Rules – the only relevant rules – restrict the duty to disclose only to arbitrators. Drafters could have included the parties' duty to disclose yet that is not the case. This seems to be standard practice as none of the institutional rules have such type of provisions. What is more, said practice extends to the rules created for purposes of ad-hoc arbitration [*CIArb Arbitration Rules; CPR Non-Administered Arbitration Rules*]. Therefore, considering the fact that UNCITRAL Rules do not extend duty to disclose to parties, such duty does not exist.

57 Upon analysis of Arts. 11-13 of the UNCITRAL Rules it becomes apparent that drafter of the UNCITRAL Rules considered duty to disclose thoroughly [*UN Report 157; UN Report 665, pp. 15-18*]. Applicable rules even provide the model statements of independence

pursuant to Art. 11 of the UNCITRAL Rules [*UNCITRAL Rules, annex*]. Therefore, it cannot be argued that drafter left a void.

58 For reasons stated above, it is irrelevant whether CLAIMANT chose to disclose its funding or not, since that was not its obligation and should not bear importance in Challenge. Therefore, RESPONDENT's accusations of CLAIMANT's unethical behaviour [*NCA, p. 39, §9*], could equally be directed at RESPONDENT, since it is attempting to ignore the previously agreed upon terms of arbitral proceedings and fabricating new obligations for CLAIMANT.

2. The IBA Guidelines do not apply

59 Party autonomy is a fundamental principle of international commercial arbitration proceedings [*Redfern/Hunter, p. 315*], set forth in both Art. 19(1) of the Model Law and Art. 35(1) of the UNCITRAL Rules. Therefore, by agreeing to the ad-hoc arbitration and specifically, to AA, Parties determined the legal framework of the proceedings to be followed in order to respect the core principle of party autonomy. Since AA makes no mention of the IBA Guidelines or the international arbitration practice in general, they should not be applied by Tribunal in the course of this arbitration.

60 Furthermore, RESPONDENT refers to the IBA Guidelines as the *best practice* in regard to Challenge. However, this is merely RESPONDENT's estimation, which comes without any type of suitable justification. The IBA Guidelines are not legally binding and do not override arbitral rules, chosen by the parties, nor do they override national law [*Born II, p. 1839; Moses, p. 383*]. Whilst the question of subsidiary use may come into question, adopting these Guidelines would be impossible without overriding the fundamental principle of party autonomy [*Odoe, p. 78*]. Since Parties did not include the IBA Guidelines when forming the legal framework for this arbitration, they should not be applied, regardless of whether they present best practice or not.

61 To conclude, Tribunal is not bound by the IBA Guidelines and should not apply them. Although they may in some cases provide useful solutions the blunt application of such rules is not welcome [*Tevendale/Naish/Ambrose, §15*]. In the present case, considering that the relevant law does not constrain Parties to disclose facts pertaining to third party funding and that Parties did not agree on application of the IBA Guidelines either explicitly or implicitly, Tribunal should find that CLAIMANT was under no legal obligation to make any disclosure.

C. Even if the IBA Guidelines apply, the circumstances of present case do not provide for grounds for Challenge of Mr. Prasad

62 Should Tribunal find that, contrary to CLAIMANT's argumentation, the IBA Guidelines apply, grounds for the disqualification of Mr. Prasad are still not met. RESPONDENT's allegations and conclusions are farfetched and its use of the IBA Guidelines selective.

63 In NCA, RESPONDENT claims there is compromising connection between Mr. Prasad's law firm and CLAIMANT's third-party funder [*NCA, pp. 38-39*]. CLAIMANT will demonstrate that there is no 'significant commercial relationship' between them (**1**). Further, it will be established that Mr. Prasad's previous appointments are not in conflict with the IBA Guidelines (**2**).

1. There is no significant relationship between Mr. Prasad and CLAIMANT or its affiliates

64 Mr. Prasad has reserved the possibility of his colleagues being involved with Parties and related companies [*DIIA, p. 23, §5*]. As RESPONDENT made no objections to said reservation it cannot base Challenge on it. However, even if RESPONDENT was allowed to use the connection between Mr. Prasad and Findfunds LP, this does not constitute a 'significant commercial relationship' under §2.3.6 of the IBA Guidelines. Consequently, it is rendered irrelevant in regard to Challenge.

65 Firstly, RESPONDENT claims that arbitration where one of Mr. Prasad's partners is acting for a client is funded by Findfunds LP [*NCA, p. 39, §11*]. However, that is not the case. Aforementioned arbitration is funded by Funding 8 Ltd, where Findfunds LP is a 40% shareholder [*PO2, p. 50, §§3,6*]. Furthermore, it is common practice for Findfunds LP to have a participation quota in its subsidiaries at 60% with one co-investor at 40% [*PO2, p. 50, §2*]. It is safe to assume that the same allocation was present regarding Funding 8 Ltd. Only difference being the reversal of the roles, where Findfunds LP holds 40% and the other party holds the majority *i.e.* 60% of the shares. Company is considered a subsidiary of another, if the latter has controlling influence [*Mayson/French/Ryan, p. 495*]. In present case Findfunds LP does not have controlling influence and consequently Funding 8 Ltd is not its subsidiary.

66 Moreover, it is important to point out that the IBA Guidelines specify that it is problematic if arbitrator' law firm has 'significant commercial relationship' with one of the parties or their affiliates. The IBA Guidelines define the term affiliate for the purpose of the text and it is referring to 'all companies in a group of companies including the parent company' [*IBA*

Guidelines, §2.3.6; IBA Guidelines, fn. 4]. However, Funding 8 Ltd is not the subsidiary of Findfunds LP and therefore is not a part of the same group of companies as Findfunds LP. This ultimately means that Funding 8 Ltd and Findfunds LP are not affiliates, thus there cannot be a 'significant commercial relationship' in reference to §2.3.6 of the IBA Guidelines.

67 Secondly, even if Funding 8 Ltd was encompassed in the term affiliate, there is no 'significant commercial relationship' in terms of §2.3.6 of the IBA Guidelines. By the end of the arbitration where Mr. Prasad's partner is involved, they expect to earn additional USD 300,000. This represents around 1% of Slowfood's annual turn [*PO2, p. 50, §6*]. It must be pointed out that Slowfood later merged with Prasad & Partners [*LP, p. 36*]. Taking that into account, the profit from arbitration funded by Funding 8 Ltd would be significantly lower in relation to Prasad & Slowfood's annual turn. Accordingly, such negligible amount can hardly constitute 'significant commercial relationship'.

68 In conclusion, involved persons do not fall within the scope of §2.3.6 of the IBA Guidelines as they cannot be connected to Mr. Prasad's law firm as affiliates of CLAIMANT. In any case, there is no 'significant commercial relationship' between involved persons. Therefore, RESPONDENT cannot base Challenge on §2.3.6 of the IBA Guidelines.

2. Previous appointments of Mr. Prasad are not in conflict with the IBA Guidelines

69 RESPONDENT argues that previous appointments of Mr. Prasad constitute a breach of the IBA Guidelines and raise justifiable doubts as to Mr. Prasad's impartiality and independence [*NCA, p. 39, §19*]. However, CLAIMANT asserts that full disclosure was made by Mr. Prasad as well as CLAIMANT and that all the circumstances of Mr. Prasad's previous appointments do not constitute grounds for Mr. Prasad's disqualification as they are not in conflict with the IBA Guidelines.

70 Firstly, §3.1.3 of the IBA Guidelines pertains to the situations where the arbitrator has, within the past three years, been appointed as arbitrator on at least two occasions by one of the parties or its affiliate. Admittedly, Findfunds LP was involved in previous two arbitrations where Mr. Prasad was appointed as an arbitrator. However, it was an indirect involvement through its subsidiaries. Additionally, in one of these previous appointments, the funding agreement was signed only after Mr. Prasad was already appointed [*Prasad's RNCA, p. 43*]. Findfunds LP is known in the industry to take little influence on the actual conduct of the arbitration, as was already pointed out by Mr. Prasad [*PO2, p. 50, §4; Prasad's RNCA, p. 43*].

Therefore, CLAIMANT asserts that even if §3.1.3 of the IBA Guidelines is applicable, all the relevant information was disclosed by Mr. Prasad and CLAIMANT. Tribunal should take into account that Mr. Prasad was not even appointed by the same subsidiary as in the present case, meaning there is no direct connection between these third-party funders.

71 Secondly, §3.3.8 of the IBA Guidelines addresses the situation where the arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm. As stated by RESPONDENT itself, Mr. Fasttrack's law firm has only appointed Mr. Prasad on two previous occasions [*NCA, p. 39, §10*]. Normal previous business contacts between an arbitrator and a party's counsel should not be considered as actually detrimental [*Weigand, p. 91, §1246; Derains/Schwartz, p. 116*]. Thus, §3.3.8 of the IBA Guidelines was not binding on Mr. Prasad or CLAIMANT and Tribunal should consider previous appointments by Mr. Fasttrack's law firm as normal business contact, which does not justify Mr. Prasad's removal from Tribunal.

72 Finally, both §§3.1.3 and 3.3.8 of the IBA Guidelines are listed in the Orange List, which merely describes situations that can result in the arbitrator's duty to disclose such information. However, such disclosure does not imply the existence of a conflict of interest and should not automatically result in a disqualification of the arbitrator [*IBA Guidelines, p. 18*]. Additionally, RESPONDENT claims that all previous appointments should be added together, but fails to substantiate such conclusion, which cannot be drawn from any of the provisions of the IBA Guidelines. Therefore, Tribunal should observe the fact that full disclosure was made of all the relevant circumstances as soon as possible and that RESPONDENT made no objections to it prior to submission of Challenge, although it had a chance to do so.

D. Mr. Prasad's legal opinions cannot constitute grounds for Challenge

73 Mr. Prasad's views expressed in his article [*Ex. R4, p. 40*] concerning the relation between Art. 35 of the CISG *vis-à-vis* Corporate Social Responsibility Codes are irrelevant in regard to his impartiality as it presents a professional legal opinion, and is as such not a relevant basis for this Challenge.

74 Firstly, the fundamental purpose of impartiality is to ensure that the arbitrator is unbiased and fair-minded. The requirement that an arbitrator be subjectively impartial is virtually always established only through inquiry into external, objective facts and circumstances [*Born II, p. 1777*].

75 Secondly, it is inevitable that every arbitrator will hold a wide range of predispositions on numerous issues bearing on the parties' dispute [*Born II, p. 1782*]. An external circumstance *e.g.* publishing an article, may only be an indicator of impartiality if the act itself shows subjective preference to one party. If such a predisposition exhibits a reasonable and well-founded approach to a specific subject and is a product of extensive research, experience and academic study, it should not be taken as an indication of an arbitrator's partiality [*Daele, p. 404*].

76 Furthermore, an arbitrator's obligation to resolve a parties' dispute in an adjudicatory manner necessitates an arbitrator to try arbitral proceedings with appropriate care, skill and professional integrity [*Born II, p. 1992*]. Therefore, if an arbitrator is ill-suited by reason of lack of skill or knowledge, then the obligation to decline an appointment becomes apparent [*ibid.; Meiners, p. 67; Gómez, §4*]. For this reason, an adjudicator is not and should not be, when concerning their legal knowledge, a *tabula rasa*. If a precedent of not allowing legal thought to be expressed would be set, it would bring about an *ad absurdum* situation in which legal professionals would be discouraged from legal writing and not furthering their own legal knowledge.

77 In conclusion, it is rather disconcerting that on the one hand RESPONDENT cherry-picks the IBA Guidelines to its perceived liking, when referring to General Standard 7(a) of the IBA Guidelines [*NCA, p. 39, §9*]. On the other, RESPONDENT fails to recognize their applicability when they do not suit it. RESPONDENT did so when ignoring §4.1.1 of the IBA Guidelines' Green list, which expressly states that previously held legal opinions which concern an issue in the arbitration do not impede on an arbitrator's impartiality. For that reason, it is prudent to pre-emptively point out, that it is undisputable that previously expressed legal opinions of an arbitrator, concerning an issue that arises in the arbitration, do not present an arbitrator's partiality [*IBA Guidelines, §4.1.1; Daele p. 406*].

CONCLUSION ON ISSUE II

78 If Tribunal finds that it has the power to decide on Challenge, it should consider that RESPONDENT has not presented any new circumstances that were not already disclosed by Mr. Prasad. RESPONDENT made no objections to DIIA and accepted Mr. Prasad's appointment. Furthermore, applicable procedural law does not impose duty to disclose upon Parties. Even if the IBA Guidelines were applicable, circumstances of the present case, along with Mr. Prasad's legal opinion, cannot constitute grounds for Challenge. Therefore, Tribunal should dismiss Challenge as it is devoid of any merits.

ISSUE III: CLAIMANT'S STANDARD CONDITIONS GOVERN THE CONTRACT

79 Parties concluded the contract on 7 April 2014, when RESPONDENT accepted CLAIMANT's tender with all proposed modifications [*Ex. C5, p. 17*]. RESPONDENT received the first delivery of chocolate cakes on 1 May 2014, afterwards the deliveries have uninterruptedly continued until 27 January 2017 [*NOA, p. 5, §6*]. That is when CLAIMANT received an email containing RESPONDENT's complaints regarding 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*]. After this discovery, RESPONDENT expressed its concerns regarding CLAIMANT's inclusion in the affair and threatened to terminate the contract [*Ex. C6, p. 18*].

80 CLAIMANT immediately investigated the matter and concluded that its supplier had indeed obtained falsified sustainability certificates. Although CLAIMANT had been deceived itself, it offered RESPONDENT 25% price reduction for the cakes delivered and not yet paid. Despite the absence of any breach of the contract from its side, CLAIMANT wished to show its appreciation of their business relationship [*Ex. C9, p. 21*]. However, RESPONDENT has rejected the offer and terminated the contract pursuant to Clause 4(3) of General Conditions of Contract (hereinafter: RGC) in conjunction with its Code of Conduct for Suppliers (hereinafter: SUP) [*Ex. C10, p. 22*].

81 RESPONDENT erroneously contends that CLAIMANT fundamentally breached the contract and claims its entitlement to immediately terminate the contract under Clause 4(3) RGC. It denies that RGC have never been validly incorporated into the contract and that solely CLAIMANT's General Conditions of Sale (hereinafter: CGC) should be applicable. On the contrary, CLAIMANT will demonstrate that CGC were validly included into CLAIMANT's offer (**A**), which was then accepted by RESPONDENT without any objections (**B**). Additionally, even if RGC were part of the contract, they would still not be applicable (**C**).

A. CLAIMANT's General Conditions have been validly included into the contract

82 Standard terms are incorporated into the contract only insofar as they are part of the offer, which is accepted by the other party pursuant to Art. 18 of the CISG [*Schwenzer, p. 277; Tantalum case; Machinery case*]. Since CISG, which governs Parties' contract [*PO1, p. 49, §4*], does not contain any particular rules for inclusion of standard terms, the question is therefore

dealt with under the provisions on interpretation and contract formation [*CISG, Arts. 8 and 14-24*]. Following RESPONDENT's Invitation to Tender (hereinafter: INV), CLAIMANT suggested its own modifications, including CGC [*Ex. C3, p. 15; Ex. C4, p. 16*]. RGC that have only been mentioned in Tender Documents never became part of the contract.

83 Firstly, CLAIMANT will establish that its reply to INV constitutes an offer (**1**). Secondly, even if Tribunal were to find that CLAIMANT's reply constitutes a counter-offer, CGC govern the contract (**2**). Thirdly, pursuant to Art. 8 of the CISG, CGC govern the contract (**3**).

1. CLAIMANT's reply to Invitation to Tender constitutes an offer

84 According to Art. 14 of the CISG a proposal for concluding a contract has to be addressed to one or more specific persons, sufficiently definite and indicate the intention of the offeror to be bound in the case of acceptance [*Chinchilla furs case; Magnesium case; Pratt & Whitney case; Steel bars case*]. CLAIMANT will not deny that RESPONDENT's INV was sufficiently definite in regard to indicating the goods and fixing the quantity. However, just by setting the upper limit of USD 2.50 per unit [*Ex. C2, p. 11*], price of chocolate cakes has neither been adequately determined nor has it been made determinable. Moreover, RESPONDENT has not addressed INV to specific persons and neither did it have intention to be bound by received responses.

85 If the intention to be bound is absent from a statement it can mean that the other party is invited to make an offer. An *invitatio ad offerendum* is generally assumed if the 'offer' is directed towards an unspecified number of people, for example, posted on a website or in a newspaper [*Schlechtriem/Butler, p. 69; Schwenzer, p. 272*]. In INV, RESPONDENT clearly indicated that it would evaluate received tenders and award the contract [*Ex. C2, p. 10*]. After six companies submitted bids [*PO2, p. 52, §23*], RESPONDENT decided to award a contract to just one of the bidders, CLAIMANT [*Ex. C5, p. 17*]. It was never RESPONDENT's intention to be bound to form a contract with all tenderers. Correspondingly, INV was publicized in the pertinent industry newsletters, thus being addressed to the public and not to specific persons [*RNA, p. 25, §7*]. Therefore, INV does not constitute an offer. Standard terms need to be a part of an offer in order to be incorporated in the contract [*Schwenzer, p. 277*]. Consequently, it is irrelevant, whether INV mentioned RGC or not. RGC were never incorporated in the contract as they were not mentioned in the offer, which was accepted by RESPONDENT.

86 Since CLAIMANT's Sales – Offer (hereinafter: Offer) determines goods, quantity and price it constitutes an offer pursuant to Art. 14 of the CISG. The only standard terms that were part

of this offer were CGC [*Ex. C4, p. 16*]. RESPONDENT alleged that by signing the Letter of Acknowledgement, CLAIMANT agreed to tender in accordance with the specified requirements in Tender Documents. RESPONDENT also claims that tenderers were not permitted to make any changes to received documents [*RNA, p. 25, §10*]. However, RESPONDENT accepted CLAIMANT's modifications regarding the payment conditions and the shape of cakes [*Ex. C5, p. 17*]. Therefore, it cannot contend that CLAIMANT was not allowed to change standard terms governing the contract. Since CLAIMANT's reply to INV constitutes an offer and CLAIMANT was not prohibited to include its own standard terms, CGC govern the contract.

87 Additionally, RESPONDENT may argue that RGC became part of the contract when CLAIMANT attached the full set of Tender Documents to its letter with Offer. However, even if Tribunal were to find that RGC were included in Offer their provisions are to be excluded under knock-out doctrine [*see infra §§105-110*].

2. If Tribunal were to find that Sales - Offer constitutes a counter-offer, CLAIMANT's General Conditions nonetheless govern the contract

88 Art. 19(1) of the CISG reflects that a traditional acceptance must match the offer *i.e.* be its mirror image. Conversely, a reply that purports to be an acceptance but actually reflect the terms of an offer and contains modifications, does not constitute an acceptance. Instead, it constitutes a rejection and a counter-offer [*Schwenzer/Mohs, p. 234, Lookofsky, p. 57; Fauba case*]. After receiving INV, CLAIMANT proposed changes regarding the payment, the shape of the cakes and the general terms. In its letter to RESPONDENT, CLAIMANT indicated its unwillingness to form a contract insofar as its modifications are not respected by stating that the originally proposed payment terms were unacceptable [*Ex. C3, p. 15*].

89 Firstly, a reply to an offer constitutes a counter-offer only if it materially modifies the offer [*CISG, Art. 19; Honnold, p. 187; Schwenzer, p. 343*]. Modifications, which are considered to be material, are listed in Art. 19(3) of the CISG and cover the most important aspects of a contract. As a result, most replies containing modifications do not constitute an acceptance, but a refusal and a counter-offer [*Honnold, p. 187*]. As CLAIMANT modified the terms relating to the payment, the modification is considered material under Art. 19 of the CISG.

90 Secondly, any changes to the goods' design or finish, *e.g.* changing the color or the shape, are generally considered to be material modifications, even if they do not significantly alter the

goods' value or quality [*Schwenzer, p. 341*]. Due to problems with the production and packing, CLAIMANT offered differently shaped cakes [*Ex. C3, p. 15*]. Thus, by changing the proposed design of cakes, CLAIMANT made a second material modification to the received INV.

91 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, 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 dispute settlement. Additionally, CGC changed the extent of CLAIMANT's liability for actions of its suppliers [*see infra §§134-136*], which is considered a material modification under Art. 19(3) of the CISG.

92 All things considered, by including CGC to govern the contract and changing the payment and shape of the cakes, CLAIMANT proposed three material modifications of INV [*Ex. C3, p. 15*]. Offer thus constitutes a rejection and a valid counter-offer.

3. Pursuant to Art. 8 of the CISG CLAIMANT's General Conditions govern the contract

93 Tribunal should also take into account Art. 8 of the CISG to determine which Party's standard terms govern the contract. The provisions of Art. 8 of the CISG are relevant to interpretation of statements and conduct of 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*]. 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*]. To incorporate standard terms, the offeror has to refer to the terms so that the other party could not have been unaware of the intent to include them into the contract according to Art. 8 of the CISG [*Eiselen, p. 234; CSS case; Plants case; Propane case; Gantry case*].

94 Moreover, Art. 8(1) of the CISG introduces the standard for imputable knowledge *"could not have been unaware"*. This standard is generally understood to require a greater degree of

carelessness [*Witz/Salger/Lorenz, Art. 8 §5*]. The issue at hand is a result of RESPONDENT's gross negligence, since CLAIMANT's intent to include CGC was easily discerned. In Offer, CLAIMANT referred to its website, where the standard terms are posted [*Ex. C4, p. 16*]. In order to ensure RESPONDENT's awareness, CLAIMANT has used different font for citing the internet address and has referred RESPONDENT to the exact document, containing the standard terms [*PO2, p. 53, §28*]. RESPONDENT had a reasonable opportunity to take notice of CGC. Furthermore, RESPONDENT's Head of Purchasing downloaded and even read CLAIMANT's Codes of Conduct [*Ex. C5, p. 17*]. Thus, RESPONDENT could not have been unaware of CLAIMANT's intent to govern the contract with CGC instead of RGC. Since RESPONDENT was aware of CLAIMANT's intent to include CGC into the contract, it cannot claim to be surprised if they apply. Moreover, it is the party's responsibility to enquire about the content of the standard terms [*Kindler, p. 229; Magnus, p. 320; Berger, p. 17, §*2].

95 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*]. A commercial party experienced in international trade cannot expect not to be bound by terms it previously signed, simply because it did not read them [*Drasch, p. 8; Eiseln p. 234; Koller, p. 238; Parker case*]. In case at hand, a reasonable person of the same kind as RESPONDENT would not accept the offer without knowing the content of CGC. Therefore, RESPONDENT is bound by CGC because it agreed to them, regardless of whether it actually read them.

96 Furthermore, offeror has to give offeree an option to request or to get introduced to standard terms [*Cereal case*]. Even a reference to standard terms printed on the reverse side of the contract is considered sufficient for their incorporation [*Schwenzer, p. 176; Doors case; Shoes case*]. Moreover, standard terms are also considered sufficiently available when posted on a party's website and referred to in a (counter) offer [*Stiegele/Halter, p. 169; AC-CISG Op. 13*].

97 According to the "*making-available-test*", it is not necessary to physically send the standard terms to the other party. Instead, it is sufficient to make them otherwise available [*Schwenzer, p. 283; Machinery case*]. A way of making standard terms available is presenting them on the internet [*Schwenzer, p. 283*]. Access to the standard terms on the internet must be arranged in a way that a reasonable person could easily find and download them [*Schwenzer, p. 279*]. What is more, considering the importance of the internet in everyday trade, it is even considered

sufficient to only display the link where the standard terms can be downloaded if the other party has internet access [*Gruber, Art. 14 §32; Magnus, pp. 318-320; Stiegele/Halter, p. 169; Karollus, p. 551; Berger, p. 18 Magnus ZEuP, p. 523*]. In Offer, CLAIMANT referred to its homepage [*Ex. C4, p. 16*], where CGC are publicly available [*PO2, p. 53, §28*]. Therefore, by explicitly stating, "*the above offer is subject to the General Conditions of Sale*" [*Ex. C4, p. 16*], displaying the link and making CGC available on the internet, was sufficient for their inclusion into CLAIMANT's (counter) offer.

B. RESPONDENT accepted the (counter) offer without objections

98 Since Offer constitutes a (counter) offer, RESPONDENT had two options; either it proposed a new offer or accepted CLAIMANT's (counter) offer. As can be seen from its letter following CLAIMANT's (counter) offer, it had clearly chosen the latter [*Ex. C5, p. 17*].

99 Firstly, RESPONDENT accepted the (counter) offer and did not refer to its RGC. A binding contract is formed once a buyer or offeree accepts an offer [*Schwenzer, p. 316*]. If the buyer makes material alterations that amount to counter-offer, they have to be accepted by original offeror in accordance with Art. 18 of the CISG [*Schwenzer, p. 343*]. If the offeror has fixed a time, then the acceptance must reach him within the time fixed [*Schwenzer, p. 326; Radio equipment case*]. CLAIMANT declared that its offer remained open until 11 April 2014 [*Ex. C4, p. 16*]. CLAIMANT received RESPONDENT's acceptance of all proposed modifications on 7 April 2014 [*Ex. C5, p. 17*]. RESPONDENT not only accepted the changed specification for the chocolate cakes and the changed payment terms, it also did not object to the inclusion of CLAIMANT's General Conditions [*ibid.*]. Therefore, RESPONDENT fully accepted CLAIMANT's (counter) offer in due time since the acceptance reached CLAIMANT before the closing date.

100 Secondly, RESPONDENT had a reasonable opportunity to include RGC in the contract by referring to them in its acceptance letter [*Ex. C5, p. 17*] and yet decided not to do so. This can be discerned from the wording that "*tender was successful notwithstanding the changes*" suggested by CLAIMANT. Moreover, RESPONDENT instructed CLAIMANT to start with deliveries from 1 May 2014 onwards [*Ex. C5, p. 17*]. Therefore, Tribunal should consider that RESPONDENT accepted the (counter) offer without any modifications.

101 Thirdly, under the last shot rule, the party, which last referred to its standard terms without these being subsequently objected to, sets the standard terms that govern the contract [*Schwenzer, p. 349; Honnold, p. 191; Kelso, p. 554; Norfolk Southern Railway case; Concrete slabs case;*

Cashmere sweaters case; Shock-cushioning seat case]. Applying the last-shot rule to the case at hand CGC govern the contract. CLAIMANT's counter-offer is subject to its CGC and its Commitment to a Fairer and Better World [*Ex. C4, p. 16*]. CGC are the only set of standard terms exchanged between Parties after the constitution of the (counter) offer and the last set exchanged since the beginning of the negotiation [*Ex. C4, p. 16; Ex. C5, p. 17*]. Based on the mirror image rule it is required that acceptance mirrors the offer exactly [*Eiselen/Bergenthal, pp. 217-218*]. Since CLAIMANT did not accept RESPONDENT's offer but proposed a (counter) offer with different standard terms, last shot rule is to be applied.

102 Furthermore, even if Tribunal were to find that RESPONDENT successfully referred to RGC in its acceptance [*Ex. C5, p. 17*], CGC were still applicable under the last shot rule. In the invoices sent to RESPONDENT, CLAIMANT has sufficiently referred to CGC, as they were mentioned in the same form as in Offer [*see supra §§84-87*; *Ex. C5, p. 17; PO2, p. 52, §24*]. In any case, CGC were the last set of standard terms exchanged between Parties, and therefore they govern the contract.

C. Even if RESPONDENT's General Conditions were part of the contract, they would still not be applicable

103 Situations where both parties refer to and rely on their own set of standard terms are called a 'battle of forms' [*Huber/Mullis, p. 91, Schwenzer, p. 347*]. While CISG does not contain a special rule on solving the 'battle of forms' situations, UNIDROIT Principles and case law favour the knock-out doctrine [*UNIDROIT Principles, Art. 2.1.22; Schwenzer, p. 349; Powdered milk case; Les Verreries de saint Gobain case; Knitwear case*]. UNIDROIT Principles are verbatim adopted in the general contract law of Equatoriana, Mediterraneo, Ruritania and Danubia, govern the issues not dealt by with CISG [*PO1, p. 49, §3*]. 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*].

104 CLAIMANT will demonstrate that even if Tribunal were to find that RGC were incorporated into the contract, they would not govern it for two reasons. Firstly, knock-out doctrine should be applied to the case at hand, as neither of Parties has excluded its operation (**1**). Secondly, all the terms of RGC that contradict the negotiated terms, CISG or CGC, are to be disregarded under the knock-out doctrine (**2**).

1. Knock-out doctrine applies as RESPONDENT has not excluded its operation

105 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-CIGS 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, none of Parties made such a declaration.

106 Moreover, a clear indication cannot be given just by a respective standard term in party's general terms or by its interpretation [*ibid.; Schlechtriem, p. 23*]. Hence, Art. 5 of the Special Conditions of Contract, regarding the order of precedence of contract documents, is not sufficient for exclusion of knock-out doctrine [*Ex. C2, p. 11*]. If RESPONDENT intended that RGC prevail over CGC in case of ambiguity or divergences, it should indicate its intention in a clearer and more specific manner.

107 Usually, a notice of incorporation of one's own terms and absolute rejection of any other standard terms is a special declaration, attached to the party's acceptance of the contract [*Schlechtriem, p. 25*]. If RESPONDENT intended to prevent the operation of the knock-out doctrine and exclude CGC from the contract, it should have followed the above mentioned business practice and make a special declaration of its intent. Yet, there is no such declaration even in RESPONDENT's acceptance letter [*Ex. C5, p. 17*]. Furthermore, RGC have not been referred to at all. Therefore, the knock-out doctrine has not been excluded under Art. 2.1.22 of the UNIDROIT Principles and should apply.

2. Provisions of RESPONDENT's General Conditions that contradict CLAIMANT's are disregarded under the knock-out doctrine

108 Partly diverging standard terms can govern the contract only insofar as they do not contradict each other [*Achilles, Art. 19 §5; Magnus/Staudingres, Art. 19 §23; Powdered milk case*]. When the standard terms of one party deal with a matter on which the standard terms of another party are silent, there is a contradiction, unless the content of standard terms is the same as the rules of the CISG [*Schwenzer, p. 355; Conveyor band case*]. Thus, RESPONDENT's standard terms could govern the contract only insofar as they have the same content as CLAIMANT's or merely repeat the rules of the CISG.

109 RESPONDENT contended that CLAIMANT breached the Clause 4(3) RGC, which stipulates that any breach of some relevance of SUP constitutes a fundamental breach [*Ex. C2, p. 12*]. No similar clause can be found in CGC. It is assumed that a party, which did not regulate a certain question in its standard terms, declared that the question is regulated under CISG [*Schlechtriem, p. 49*]. Therefore, CLAIMANT intended to regulate the issue of a fundamental breach pursuant to Art. 25 of the CISG. Since Clause 4(3) RGC does not match the substance of CGC or CISG, it should be disregarded under the knock-out doctrine.

110 Likewise, all of the provisions of SUP, which regulate CLAIMANT's liability for behaviour of its own suppliers, are to be disregarded. Such a strict obligation cannot be found in CISG and alike term has not been included in CGC. Therefore, terms of RGC, which CLAIMANT allegedly breached, are not applicable under the knock-out doctrine and thus cannot govern the contract.

CONCLUSION ON ISSUE III

111 CGC govern the contract, as they have been the only set of standard terms exchanged between Parties following Offer. As RGC were only included in Tender Documents, which form an invitation to make an offer and not an actual offer, they cannot govern the contract. Moreover, even if Tribunal were to find that Tender Documents constitute an offer, CGC would nonetheless govern the contract. Offer has materially modified the payment and the shape of chocolate cakes and thus constitutes a (counter) offer. Furthermore, RESPONDENT accepted Offer without referring to RGC. Since CGC were sufficiently available and CLAIMANT's intent regarding their inclusion was easily discerned, a reasonable person would not accept Offer without agreeing to be bound by CGC. Additionally, since CGC were the last set of standard terms exchanged since the beginning of the negotiations, they govern the contract under the last shot rule. Ultimately, even if RGC were part of the contract, they would still not be applicable since they are to be disregarded pursuant to the knock-out doctrine.

ISSUE IV: CLAIMANT DELIVERED CONFORMING CAKES

112 RESPONDENT has terminated the contract as CLAIMANT has allegedly committed "*a breach of some relevance"* when delivering cakes produced from presumably unsustainable cocoa [*Ex. C2, p. 12; Ex. C6, p. 18*]. CLAIMANT urges Tribunal to consider the unlawfulness of this termination, as RESPONDENT's drastic actions, motivated by commercial reasons, deprived CLAIMANT of what he was entitled to expect under the contract.

113 CLAIMANT will establish that it has never breached the contract, as the delivered cakes were conforming under Art. 35 of the CISG **(A)**. Additionally, CLAIMANT was merely obliged to use its best efforts regarding sustainability **(B)**.

A. Chocolate cakes are conforming under Art. 35 of the CISG

114 CLAIMANT will demonstrate that RESPONDENT's allegations regarding the non-conformity of chocolate cakes are misguided. Goods delivered by CLAIMANT are conforming under Art. 35 of the CISG since they were of the quantity, quality and description required by the contract (**1**). In addition, CLAIMANT delivered goods fit for ordinary and particular purpose (**2**).

1. CLAIMANT delivered goods of the required quantity, quality and description

115 The description of goods is the usual way through which parties determine the content of their obligations. Therefore, the description of goods made by the seller in its offer is binding [*Bianca, p. 273*]. In case at hand, RESPONDENT has requested offerors to deliver 20,000 cakes per day, to which CLAIMANT agreed in Offer [*Ex. C2, p. 11, Ex. C4, p. 16*]. It is evident that CLAIMANT fulfilled its obligation to deliver the required number of cakes every day [*NOA, p. 5, §6; RNA, p. 25, §13*]. In Tender Documents, RESPONDENT also made some requirements regarding the shape of cakes [*Ex. C2, p. 10*]. As the proposed shape was difficult to produce, CLAIMANT suggested a modification, which was accepted by RESPONDENT [*Ex. C5, p. 17*].

116 In Section III of Tender Documents, RESPONDENT requested that the cakes were 3 inches in diameter and produced from ingredients, sourced in accordance with the stipulations under Section IV of Tender Documents [*Ex. C2, p. 11*]. In Section IV, there are no specifications regarding the sourcing of the goods and all the additional details regarding the description of the cakes were left blank to be filled in by CLAIMANT [*Ex. C2, p. 12*]. In its letter following INV, CLAIMANT has proposed slight changes in the shape of cakes, which would be similar to the form of cakes presented to RESPONDENT at the Cucina Food Fair [*Ex. C3, p. 15*]. It is evident from that same letter that CLAIMANT has only referred to the similarities in the shape. It did not compare any other features of the cakes [*ibid*]. Moreover, in Offer CLAIMANT has provided the description of the goods as chocolate cakes named Queen's Delight [*Ex. C4, p. 16*]. By stating the product's name, CLAIMANT has further asserted that offered cake is not the same as the cake King's Delight, which was presented at the fair.

117 The allegations in RNA [*RNA, p. 25, §11*] suggest that RESPONDENT was under wrongful impression that the object of the contract is King's Delight. King's Delight is a part of the CLAIMANT's premium product line, it has won Cucina's best cake award for the last five years and it has been marketed by CLAIMANT as produced from sustainably sourced cocoa [*ibid.; Ex. R2, p. 29*]. On the other hand, none of these features applies to Queen's Delight, which was offered by CLAIMANT [*Ex. C3, p. 15; Ex. C4, p. 16*]. Therefore, CLAIMANT has never guaranteed that Queen's Delight is produced from sustainably sourced ingredients. The delivered cakes were of description and quality required by the contract and thus conforming under Art. 35(1) of the CISG.

118 Even if Tribunal were to find that chocolate cakes should be produced from sustainable ingredients, it is up to RESPONDENT to prove that CLAIMANT actually used unsustainable cocoa in the production of delivered cakes. Once the buyer has physically taken over the goods, he has to prove their non-conformity pursuant to the principle of proximity of the proof [*Schwenzer, p. 592; Pipes and cables case; Textile cleaning machine case; Crude oil mix case; Chicago Prime Packers, Inc. case*]. At most only part of the cocoa came from farms illegally set in the protected areas [*PO2, p. 54, §41; Ex. C9, p. 21*]. While the possibility that some of the cocoa beans might have been unsustainable cannot be excluded, the exact origin of ingredients has not been proved with a reasonable degree of certainty. Since all allegedly non-conforming cakes were properly delivered to RESPONDENT and thus the risk passed, it is its duty to prove whether the cocoa used in production of Queen's Delight came from unsustainable farms.

2. Cakes delivered by CLAIMANT were fit for the ordinary and particular purpose

119 If Tribunal were to find that stating the type of the cake and its name is not a sufficient description of the goods in order to determine conformity under Art. 35(1) of the CISG, the latter should be evaluated according to Art. 35(2) of the CISG. Objective criteria for determining the conformity set in said article apply only if quantity, quality or description of the goods are not sufficiently detailed [*Huber/Mullis, p. 134; Schwenzer, p. 571*]. Delivered chocolate cakes are conforming under Art. 35(2)b, as RESPONDENT did not make any particular purpose of goods known to CLAIMANT (**2.1**). Since RESPONDENT did not intend to use cakes for any particular purpose, they are conforming as they are fit for ordinary use (**2.2**).

2.1 CLAIMANT delivered cakes fit for their particular purpose under Art. 35(2)b of the CISG

120 A seller is only responsible for the fitness of the goods for their particular purpose, if buyer makes such a purpose known to the seller [*Hyland 321; Schwenzer, p. 580; Vine wax case*]. Furthermore, it is also required that the buyer relied on the seller's skill and judgement [*Bianca, p. 275; Schlechtriem SO, p. 21*].

121 Firstly, RESPONDENT never expressly stated that it intended to use the chocolate cakes for any particular purpose. A particular purpose exists, for example, if the buyer of machines intends to use them in unusual climatic conditions. The need for the goods to comply with public law regulations in the state of use may also amount to a particular purpose [*Schwenzer, p. 580*]. A particular purpose may also exist if a buyer is operating in a market with a special emphasis on fair trade and the observance of ethical principles [*ibid.; Schwenzer/Leisinger, p. 249*]. In these situations, goods can be directly used to reach the desired result – they are used in further production or sold to a specific market. RESPONDENT's wish to become a Global Compact LEAD Company by 2018 [*Ex. C1, p. 8*] thus cannot be regarded as a particular purpose under Art. 35(2)b of the CISG. One cannot become a LEAD company by selling or producing chocolate cakes, either in a sustainable or unsustainable manner. To become a LEAD company one has to inspire other businesses to conduct their operations in a responsible manner [*UN GC Principles*]. This is not only RESPONDENT's principle but also CLAIMANT's when conducting its business [*Ex. R3, p. 31*], yet it cannot be regarded as a particular purpose under Art. 35(2)b of the CISG.

122 Secondly, RESPONDENT's particular purpose could not be selling the chocolate cakes in a market especially concerned with fair trade. RESPONDENT has decided to distribute the remaining chocolate cakes at the opening of three new shops [*PO2, p. 54, §38*]. Since RESPONDENT already had negative experience in the past [*Ex. C1, p. 8*], it is highly unlikely that it would risk negative press again by even gifting the chocolate cakes to its customers.

123 Thirdly, expressly stating the particular purpose is not sufficient where the circumstances show that the buyer did not rely or it was unreasonable for him to rely on seller's skill and judgement [*Bianca, p. 275*]. The buyer cannot rely on the seller when it has more experience in a particular area [*Schwenzer, p. 582; Hyland, p. 321; Maley, p. 119*]. In general, it is unreasonable for the buyer to rely on a skill or judgement capacity that is not common in the seller's trade

branch [*ibid.*]. Sustainable products represent a small percentage of market share, and the organic foods industry resembles this completely, with sustainable produced food accounting for less than 3% of all food sales [*Sheth/Sethia/Srinivas, p. 26; Forster p. 5*]. Requiring environmental, ethical or sustainable production is uncommon in bakery industry [*PO2, p. 54, §35*]. Therefore, delivered goods are conforming under Art. 35(2)b of the CISG, since RESPONDENT did not make its particular purpose known to CLAIMANT and it was unreasonable of RESPONDENT to rely on CLAIMANT's skill and judgement.

2.2 Delivered cakes were fit for their ordinary purpose under Art. 35(2)a of the CISG

124 Under Art. 35(2)a of the CISG goods are conforming if they are fit for the purpose for which they would ordinarily be used [*Schlechtriem/Butler, pp. 115-116; Schwenzer, p. 575*]. If the goods can be used for commercial purposes, there are usually fit for ordinary purpose [*Ethical Standards, p. 126; Bianca, p. 274; International Housewares case*]. In the resale business that means that goods can be sold [*ibid.*]. It is sufficient that goods can be sold at least at some markets [*Schwenzer/Leisinger 267; Ethical Standards, p. 126*]. Moreover, if goods are type of food, they have to be edible [*Schwenzer, p. 567; New Zealand mussels case; Spanish paprika case; Frozen pork case*]. For the past two years, RESPONDENT has been selling the chocolate cakes without receiving any complaints from its customers [*PO2, p. 54, §38*]. RESPONDENT has distributed the unsold cakes as a part of the marketing campaign [*ibid*]. Therefore, the cakes were not only fit to be eaten, they could also be sold.

B. CLAIMANT has not breached the contract as it contained merely obligations of best efforts

125 CLAIMANT has already established that the delivered cakes were conforming under Art. 35 of the CISG. Additionally, it will exhibit that it did not breach the contract whatsoever, as RGC failed to create obligations of result (**1**). Furthermore, CLAIMANT would be obliged to use best efforts, even if Tribunal were to find that RGC contained obligations of result (**2**).

1. RESPONDENT's General Conditions failed to create obligations of result

126 RESPONDENT terminated the contract because CLAIMANT allegedly breached principles C and E of SUP [*Ex. C10, p. 22*]. Despite not knowing that RGC govern the contract, CLAIMANT still used its best efforts to fulfil these obligations, since CGC contain similar obligations.

Principle C 'Health, safety and environmental management' stipulates that CLAIMANT shall conduct its business in an environmentally sustainable way [*Ex. C2, p. 13*]. Pursuant to CGC, CLAIMANT has clearly used its best efforts to ensure compliance with the relevant provisions [*NOA, p. 7, §22; Ex. R3, pp. 30-31*]. RESPONDENT's expectations regarding CLAIMANT's suppliers are further defined in principle E 'Procurement by suppliers' [*Ex. C2, p. 13*]. Since it is its philosophy that only the best ingredients are just good enough for its products, CLAIMANT selected its own tier one suppliers, which agreed to adhere to standards comparable to SUP [*NOA, pp. 4-5, §§1,9; PO2, p. 53, §32; Ex. R3, p. 31*]. Furthermore, CLAIMANT used its best efforts to ensure that its suppliers comply with those standards [*ibid*]. CLAIMANT even outsourced the auditing services to Egimus AG, specialized in providing an expert opinion on compliance with Ten Principles of UN Global Compact (hereinafter: UN GC Principles) [*Ex. C8, p. 20; PO2, pp. 53-54, §33*].

127 Pursuant to Art. 8(2) of the CISG, contractual terms must be given an interpretation based on what a reasonable person of the same kind would have understood [*Schwenzer, p. 155*]. In the principles C and E of SUP, RESPONDENT formulated obligations using words 'shall' and 'will'. The word 'must' that is normally used to impose an obligation or a duty [*Asprey, p. 79*] was used just once. CLAIMANT was required to procure goods and services in a responsible manner and it has fulfilled this obligation. The word 'shall' is to be avoided when drafting legal documents, as it can mean 'may', 'will', 'is', 'should' or 'must' [*Kimble, p. 160*]. The world is hardly ever used outside legal community and it is the most misused word in a legal dictionary [*Kimble MMS, p. 61; Asprey, pp. 79-80*]. Consequently, it is suggested that a careful drafter defines the modal verbs in advance [*Kimble MMS, p. 67*]. In contracts only 'must' should mean 'is required to', while 'shall' or 'will' means 'promises to' [*ibid.*]. Therefore, a reasonable person would not interpret obligations contained in SUP as contractual requirements, but merely as promises.

128 Additionally, it is well-established business practice that companies seeking to impose a binding obligation on a contracting party would use more forceful and explicit language than that used in SUP. Since the parties are considered to apply any internationally known trade practices to their contract [*CISG, Art. 9(2)*], RESPONDENT ought to have known to draft SUP in a more precise language. There is a preponderance of contractual terms stringently and unambiguously providing that companies "*will not tolerate*" [*Walmart; Puma*] or "*strictly prohibit*" [*Nestle*] unethical business conduct by their suppliers. Even the mildest of contractual terms

used by the major players in the food vendor industry provide that suppliers "*must meet the ingredient standard*" [*Whole Foods*] or "*must comply fully with all local environment laws and regulations*" [*Hershey*'s]. Language that falls short of such unequivocally binding stipulations is insufficient to impose a binding obligation on a supplier. SUP uses phrases such as "*shall provide*", "*will select*", "*will make sure*", which are not ordinarily used in business practice to create obligations of result. While RESPONDENT has referred to its 'zero tolerance' policy in RGC, it has been limited to unethical business behaviour, such as bribery and corruption [*Ex. C2, p. 12*]. Since principles C and E, which CLAIMANT has allegedly breached, do not govern business ethics [*Ex. C2, p. 12*], 'zero tolerance' policy does not apply to them. Thus, even if CLAIMANT were to presume that RGC govern the contract, it would interpret that using best efforts is sufficient to fulfil the rest of contractual requirements.

129 Ultimately, according to the *contra proferentem* rule, the risk of the ambiguity in standard terms must be borne by the party responsible for the formulation of the term and 'an interpretation against that party is preferred' [*CISG, Art. 8; UNIDROIT Principles, Art. 4.6; Honnold, p. 189; Automobile case*; *Peanuts case*; *Cysteine case*]. To conclude, RESPONDENT should have used more precise language when formulating obligations in RGC. Since it failed to do so, any ambiguities should be interpreted against it.

2. CLAIMANT would be obliged to use best efforts, even if RESPONDENT's General Conditions contained obligations of result

130 Even if Tribunal were to conclude that provisions of RGC were specific enough to create obligations of result, CLAIMANT has not breached the contract as it delivered conforming goods. Throughout the negotiations, both Parties have emphasized that they are committed to UN GC Principles [*Ex. C3, p. 15; Ex. C5, p. 17; Ex. C9, p. 21; RNA, pp. 24-25, §§4-5*]. When both parties have individually agreed on certain usages, *e.g.* participating in the private initiatives such as UN GC Principles, those usages become part of the contract under Art. 9(1) of the CISG [*Schwenzer/Leisinger, p. 265*]. Therefore, Parties have agreed to include UN GC Principles in their contract.

131 RGC regulate the same matters as UN GC Principles yet impose stricter obligations on CLAIMANT. In case of conflict between a standard term and a term, which is not a standard term, latter prevails [*UNIDROIT Principles, Art. 2.1.21*; *Société Harper Robinson case; Visión Satelital case; Dirección Nacional de Aduanas case; D. G. Belgrano case*]. On one hand, UN GC

Principles expect companies to use their best efforts to conduct their business in environmentally responsible way [*UN GC Principles*]. On the other, RGC impose obligations of result and thus diverge form UN GC Principles.

132 Art. 5.1.4 of the UNIDROIT Principles differentiates between duty to achieve a specific result and duty of best efforts. If a party is bound to achieve a specific result, it guarantees the achievement of said result [*UNIDROIT commentary, p. 151*; *Joseph Charles Lemire case*]. However, when a party is only bound by duty of best efforts it must exert efforts that a reasonable person of the same kind would in the same circumstances [*ibid.*]. In the case at hand, CLAIMANT never guaranteed that its suppliers would adhere to RESPONDENT's business philosophy and its SUP. It merely assured RESPONDENT to do everything possible to guarantee the ingredients sourced from outside suppliers would comply with Parties' joint commitment to UN GC Principles [*Ex. C3, p. 15; Ex. C8, p. 20; Ex. C9, p. 21*].

133 In addition, CLAIMANT selected its tier-one suppliers with good reputation on the market [*PO2, p. 53, §32*]. Its suppliers signed Supplier Code of Conduct, committing to conduct their business responsibly, ethically and sustainably [*Ex. R3, p. 31*]. Moreover, CLAIMANT even outsourced the auditing services to Egimus AG, specialized in providing an expert opinion on compliance with UN GC Principles [*Ex. C8, p. 20; PO2, pp. 53-54, §33*]. It is therefore evident that CLAIMANT used best efforts to ensure conformity of cakes and its suppliers' adherence to environmentally sustainable business practice.

134 Furthermore, CLAIMANT reasonably expected that RGC contained only obligations of best efforts. RESPONDENT has acknowledged that SUP and CLAIMANT's Supplier Code of Conduct share the same values and that both companies are committed to ensure that the goods are produced according to the highest standard of sustainability [*Ex. C5, p. 17*]. What is more, RESPONDENT was even impressed by CLAIMANT's Supplier Code of Conduct, implying that it is at least equivalent in capturing the spirit of UN GC Principles to SUP. In determining whether an obligation requires a duty of best efforts or a specific result, regard should be had, among other factors, to the way in which the obligation is expressed, the contractual price and the degree of risk involved [*UNIDROIT Principles, Art. 5.1.5*].

135 When formulating obligations CLAIMANT has used the word 'expected', which means that the compliance with its Supplier Code of Conduct was only 'anticipated' [*OED, "expected"; Ex. R3, p. 31*]. Moreover, CLAIMANT emphasized that the goal of its Code of Conduct is to

positively influence the supply chain by enabling and supporting suppliers to improve the sustainability of their business operations [*Ex. R3, p. 31*]. This wording indicated that CLAIMANT merely required its suppliers and their sub-suppliers to follow their expectations by exerting their best efforts. Furthermore, an unusually high price may indicate the duty of specific result [*UNIDROIT commentary, p. 153; Vogenauer, pp. 630-631*]. The price of chocolate cakes was above average [*PO2, p. 54, §40*], yet it was not as extraordinary as to change the nature of the obligation. Ultimately, when a party's performance of an obligation involves a high degree of risk, it is not generally expected to guarantee a specific result but merely to use its best efforts [*UNIDROIT commentary, p. 15; Vogenauer, pp. 630-631*]. Since it would be highly risky for supplier to guarantee that all of its sub-suppliers will adhere to the Code of Conduct signed by it, a reasonable person would conclude that the other party does not expect such a guarantee.

136 As RESPONDENT declared that CLAIMANT is equally committed to ensure sustainable production, a reasonable person would assume that SUP, which is written in similarly vague and imprecise terms, also contains obligations of best efforts. Even if SUP is applicable CLAIMANT had the duty to use its best efforts, since UN GC Principles initiative is voluntary and imposes no sanctions, if its members fail to comply with the standards [*Schwenzer/Laisinger, p. 259*]. Moreover, a reasonable person would expect that SUP imposes only obligations of best efforts. Therefore, CLAIMANT delivered conforming cakes.

CONCLUSION ON ISSUE IV

137 CLAIMANT fulfilled its contractual obligations as it delivered conforming cakes of the required quantity, quality and description. CLAIMANT never guaranteed that Queen's Delight is produced from sustainably sourced ingredients. RESPONDENT's apparent wrongful impression that the subject of the contract is the cake King's Delight, does not affect conformity. Additionally, cakes would be conforming as they were fit for the ordinary and particular use. Furthermore, RESPONDENT formulated the obligations in imprecise language, which is not ordinarily used in business. Therefore, a reasonable person would conclude that using the best efforts is sufficient to fulfil the contractual requirements. Since UN GC Principles were included into the contract by agreement of both Parties, in case of conflict they prevail over RGC and CLAIMANT had a duty to use best efforts pursuant to UN GC Principles. Finally, RESPONDENT has compared Parties' commitment to sustainable business operations and even expressed admiration for CLAIMANT's Supplier Code of Conduct. Thus, a reasonable person would assume that SUP imposes obligations of best result, which are also contained in CGC.

REQUEST FOR RELIEF

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

1. to dismiss RESPONDENT's Challenge of Mr. Rodrigo Prasad;
2. to order RESPONDENT to pay the outstanding price in the amount of USD 1,200,000;
3. to declare that contractual relationship between CLAIMANT and RESPONDENT is governed by CLAIMANT's General Conditions of the Sale;
4. to order RESPONDENT to pay damages in amount of at least USD 2,500,000;
5. to order RESPONDENT to bear the costs of the arbitration.

Respectfully signed and submitted by counsels on 7 December 2017.

Leon Brulc

Hana Šrot

Stefan Danojević

Mihael Pojbič

Vivian Mohr

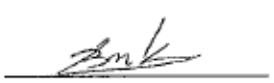
Petra Zupančič

Barbara Smogavc

CERTIFICATE

Maribor, 7 December 2017

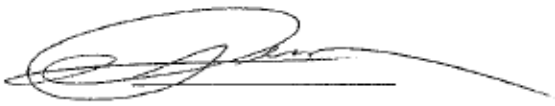
We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate.



Leon Brulc

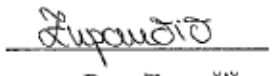
Hana Šrot

Stefan Danojević

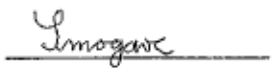


Mihael Pojbič

Vivian Mohr



Petra Zupančič



Barbara Smogavc