

APIIT LAW SCHOOL



MEMORANDUM FOR CLAIMANT

On Behalf of:

Delicatesy Whole Foods Sp

39 Marie-Antoine Careme Avenue

Oceanside, Equatoriana

-CLAIMANT-

Against:

Comestibles Finos Ltd

75 Martha Stewart Drive

Capital City, Mediterraneo

-RESPONDENT-

●PUJANEE DE ALWIS ●WIMUKTHI WERAGAMA ●TABITHA ABRAHAM ●NABEELA IQBAL

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INDEX OF ABBREVIATIONS

Art./Arts	Article/ Articles
Arb.	Arbitration
CISG	United Nations Convention on Contracts for the International Sale of Goods
Corp.	Corporation
Co.	Company
Cl.	Claimant
Ex.	Exhibit
Resp.	Respondent
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
No.	Number
Ord.	Order
PECL	Principal European Contract Law
Proc.	Procedural
Resp.	Respondent
UCC	Uniform Commercial Code
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollars

INDEX OF AUTHORITIES

Statutes and Rules

<i>CISG</i>	United Nations Convention on the International Sale of Goods
<i>UNCITRAL</i>	UNCITRAL Arbitration Rules
<i>UNCITRAL</i>	UNCITRAL Model Law on International Commercial Arbitration
<i>UNIDROIT</i>	UNIDROIT Principles for International Commercial Contracts
<i>UCC</i>	Uniform Commercial Code

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SUMMARY OF FACTS

1. The “Parties” to this arbitration are Delicatesy Whole Foods Sp (“CLAIMANT”) and Comestibles Finos Ltd (“RESPONDENT”). The CLAIMANT, is a medium sized manufacturer of fine bakery products registered in Equatoria and RESPONDENT is a gourmet supermarket chain in Mediterraneo.
2. In March 2014, CLAIMANT met the RESPONDANT at the yearly Danubian food fair, Cucina. After some discussions, the RESPONDENTS expressed a clear interest in establishing a business arrangement due to the CLAIMANT’S commitment to produce ethically and sustainably.
3. Shortly after they met, the RESPONDENT sent an Invitation to Tender for the delivery of chocolate cakes (CLAIMANT’s Exhibit C 1) and the Tender Documents (CLAIMANT’s Exhibit C 2) to which the CLAIMANT made an offer subject to certain changes. On 7 April 2014 the CLAIMANT was awarded the contract by letter (CLAIMANT’s Exhibit C 5). This letter included the RESPONDENT’S acceptance of the amended specifications for the chocolate cakes and the different method of payment.
4. In accordance with the contract, deliveries were made without a problem in the years 2014, 2015 and 2016. However, on 27 January 2017 the CLAIMANT received an email (CLAIMANT’S Exhibit C 6) from the RESPONDENT requesting a confirmation by the next business day that CLAIMANT’S suppliers all strictly adhered to Global Compact principles.
5. The email was prompted by the release of a report by the UNEP special rapporteur investigating the deforestation in Ruritania and the fraud and corruption in the various agencies set up to protect the rainforest and its biodiversity. The report indicated that many certificates certifying sustainable production methods were likely forged or obtained by bribery.
6. The CLAIMANT responded immediately promising that they will investigate the issue further.

7. The CLAIMANT discovered that its supplier, the Ruritania Peoples Cocoa mbH, was involved in the scandal. The CLAIMANTS immediately terminated the contract with the supplier and informed the RESPONDENT of its discovery on the 10th of February 2017. Consequently, the Contract between the parties was terminated by RESPONDENT (CLAIMANT'S Exhibit C 10). While the CLAIMANT offered a reduction of 25% for the price of cakes delivered and not yet paid (CLAIMANT'S Exhibit C 9), the RESPONDENT was not willing to make any further payments but stated that they would set-off the unpaid Contract price, with RESPONDENT'S damages (Cl. Ex. 10, 12th February 2017). Since the Parties could not arrive at an amicable solution, they submitted the dispute to the Arbitral Tribunal (Tribunal) for a determination of the merits.
8. The CLAIMANT nominated Mr. Rodrigo Prasad and the RESPONDENT, Ms. Hertha Reitbauer as their arbitrators. In the RESPONDENT's submission an issue was raised on Mr. Prasad's impartiality. As the RESPONDENT received reliable information that the CLAIMANT was financed by a third party funder in the Arbitration (Email on the 29th August 2017).

ISSUE A: SHOULD THE TRIBUNAL DECIDE ON THE CHALLENGE OF MR. PRASAD, AND IF SO WITH OR WITHOUT HIS PARTICIPATION?

- I. The Challenge to Mr. Prasad should be dismissed by the Arbitral Tribunal **A. The challenge of Mr. Prasad is inadmissible as the RESPONDENTS have failed to bring the challenge in a timely manner in accordance with the applicable law**

1) THIS DISPUTE IS GOVERNED BY THE UNCITRAL MODEL LAW AND ARBITRATION RULES

1. The Parties have elected the UNCITRAL Model Law and UNCITRAL Arbitration Rules as the applicable arbitral rules for these proceedings [*P.O. 1 para 4; Contract, Clause 20*]. Further, according to Clause 20 of the Contract, the Parties have excluded the involvement of any arbitral institution:

2. *“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules without the involvement of any arbitral institution...”*

3. The relevant clauses from the above texts regarding preliminary challenges to an arbitrator provides: *“UNCITRAL Arbitration Rules - Article 13*

1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party.”

“UNCITRAL Model Law Article 13:_(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.”

1) Respondent thus failed to bring the challenge within 15 days of discovery of the circumstances giving rise to the challenge

4. According to Article 13(a) of the UNICTRAL Arbitration Rules, the Respondent had 15 days from the moment when the circumstances giving rise to the challenge was discovered, to bring the challenge.

5. The circumstances which gave rise to the challenge was the Respondent’s discovery on August 27, 2017 [*P.O. II, para. 11*] through a virus scan of the Claimant’s Notice of Arbitration by

RESPONDENT’S IT-Security officer, who was able to retrieve the Metadata of the Word file sent by CLAIMANT [*p. 38*].

6. The other information the Respondents acquired was a published journal by Mr. Prasad in 2016 [*R. Ex. 4*] which was available in the public domain. In fact, a PDF version of the article was on Mr. Prasad’s website (which the Respondents had visited) under his publications section, which was readily available even before the Respondents had submitted their response to the arbitral tribunal [*P.O. II, para. 14*].

7. As per UNCITRAL Digest of Case Law, paragraph 6: “...*time limit for challenging an arbitrator starts running only from the point in time at which the challenging party acquired actual knowledge of the ground for challenge.*”

8. RESPONDENT discovered the meta data which gave rise to the challenge to Mr. Prasad on 27 August 2017 [*P.O. II, para. 11*]. Fifteen calendar days from 27 August 2017 is 11 September 2017. Thus, RESPONDENT was required to submit the challenge to Mr. Prasad by 11 September 2017. However, RESPONDENT filed the challenge on 14 September 2017 [*p. 38*]. Thus, RESPONDENT failed to comply with the fifteen-day time limit established by the applicable arbitral rules, Article 13 of the UNCITRAL Model Law and Arbitration Rules. This challenge should thus be dismissed by the Tribunal.

9. As per Redfern and Hunter, [*Redfern and Hunter on International Arbitration, p 279*], the time limits established by the UNCITRAL challenge procedure are strictly applied. This is submitted in *AWG Group v Argentine Republic* which states that attempts by parties to challenge facts after expiry of the 15-day time limit will not be viable. In this case the parties had adhered to the deadline given in Art. 11(1) of the UNCITRAL Rules. Since the challenge was sent after that deadline the tribunal dismissed the challenge as being untimely. It also states that when the party had knowledge of circumstances that gave rise to such doubts, if the challenge was lodged after the latest day they could have, then the challenge must be dismissed as inadmissible as the other party had ample time to bring forth their challenge to the tribunal.

10. Therefore, this challenge by the RESPONDENTS has been submitted out of time, and must be deemed inadmissible by the Tribunal, and dismissed in its entirety.

II. If the challenge is deemed admissible then it should be decided upon by the Arbitral Tribunal

A. The Arbitral Tribunal has jurisdiction to decide on this challenge.

1) PARTIES HAVE BEEN GIVEN EXTENSIVE FREEDOM IN DECIDING THE ARBITRAL TRIBUNAL PURSUANT TO AUTONOMY OF THE PARTIES IN THE DISPUTE.

11. REDFERN states, “*Party autonomy is the guiding principle determining the procedure to be followed in an international commercial arbitration. It is a principle that*

has been endorsed not only in national laws, but by international arbitration institutions and organizations. The legislative history of the Model Law shows that the principle was adopted without opposition”

12. UNCITRAL Model Law on International Commercial Arbitration Article 19(1) sets forth the following provisions on party autonomy, *“Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings”*

13. In Clause 20: Dispute Resolution, it is clearly expressed that the two parties agree that the procedure of the arbitration will follow the UNCITRAL Arbitration Rules. As stated above, especially in an *ad hoc* arbitration where there is no involvement of an institution, the applicable law in terms of procedure is determined solely upon the agreement of both parties. Furthermore, as stated previously [*P.O.I, para 4*], UNCITRAL Model Law is agreed upon by the parties.

14. As agreed by the parties, Article 13(2) of UNCITRAL Model Law states, *“...Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.”*

15. Pursuant to the above article the Arbitral Tribunal should decide on the challenge as the Claimant did not agree to the challenge and Mr. Prasad did not withdraw from his post as arbitrator.

16. The legal definition for “Arbitral Tribunal” is the complete tribunal with the decided three arbitrators as opposed to a truncated tribunal.

17. As per MUNIR, *“Some other arbitration rules such as UNCITRAL (2010) on specifically point out the milestone that such a truncated situation will only be considered after the closure of the hearings or proceedings, meaning that the authority of the truncated tribunal may ensue after that point is reached but not before.”*

18. Therefore a converging motion of a truncated tribunal is not allowed at the preliminary stages of the arbitration. Since the parties to the arbitration are yet to begin the hearings, a complete tribunal has to be present to decide on the challenge.

19. Pursuant to Art. 13(3) of UNCITRAL Model Law, should the challenge fail and the challenging party wish to pursue it again, it will be subject to the decision of the courts. Since the current context of the dispute is only at the preliminary stages of the challenge, as per Art. 13(2) of UNCITRAL Model Law, this dispute should fall under the decision of the Arbitral Tribunal as a whole.

2) BOTH PARTIES HAVE AGREED TO EXCLUDE APPOINTING PARTIES AND EXTERNAL PARTICIPATION IN DECIDING THE ARBITRATION

20. UNCITRAL Arbitration Rule 13(4) states, *“If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority.”*

21. As previously mentioned both parties have agreed to the UNCITRAL Arbitration Rules [*Contract, Clause 20*] in conducting the arbitration procedure. The Rules refer to appointing authority to seek a decision regarding challenging an Arbitrator. The above Rules are to be used in accordance to settle the dispute, subject to modifications as the parties may agree.

22. However the parties to the dispute have mentioned their concerns regarding external parties deciding on their arbitration. Both parties have agreed to conduct proceedings “without the involvement of any arbitral institution” [*Contract, Clause 20*]

23. Furthermore the correspondences between the two parties have stated a clear mention towards a private arbitration [*P.O. II, para 20*]. RESPONDENTS have stated in their letter by their Head of Purchasing, Ms. Ming [*C. Ex. 1*] that they do not wish to involve institutions to decide on issues related to the composition of the Arbitral Tribunal. When referring to the independence that an *ad hoc* arbitration will bring into the procedural issues she states,

“Apparently, we have never had any problems concerning the composition of arbitral tribunals and our legal department was confident that the existing arbitration clause would not cause any problems in its application in practice.”

24. CLAIMANT’s correspondence [C. Ex. 3] by the Head of Production, Mr. Tsai confidently states that any issue relating to the constitution of the Arbitral Tribunal will be first solved amicably and then will be solved independently without resorting to any external institutional support. He states, *“In the unlikely event that a dispute arises and cannot be solved amicably, we are certain that we will be able to overcome any problems relating to the constitution of the arbitral tribunal even without institutional support.”*

25. In the witness statement by Ms. Ming [R. Ex. 5] she explains the discussion between Mr. Tsai giving reasons to change the arbitration clause from institutional to *ad hoc*. According to her statement the CLAIMANT also showed an interest in the matter due to a previous experience they had experienced due a state court intervening on the proceedings.

It states, *“...we switched our arbitration clause...excluding the involvement of any arbitral institution. Mr. Tsai was very interested...he told me that they had moved some years before the other way from ad hoc arbitration to institutional arbitration. That had been the consequence of a bad experience with the appointment of the presiding arbitrator by the state court.”*

26. In the Notice of Challenge submitted by the RESPONDENTS [RECORD, para 8, p 38] they mention clearly that, *“the only body to decide the challenge is this Arbitral Tribunal”* and they want this dispute to be kept confidential and that an institution would not attribute towards this. Furthermore they submit that they wish to exclude Art. 13(4) of UNCITRAL Arbitration Rules in involving an appointing authority to intervene in the challenge procedure.

27. The CLAIMANTS have submitted [RECORD, p 45] that irrespective of the application or lack of Art. 13(4) the default procedure should involve the full Arbitral Tribunal including the challenged Arbitrator.

28. From the above inferences it is evident that the parties' decisions towards the challenge procedure were to keep it confidential, thus without the intervention of another party other than the Arbitral Tribunal as a whole.

3) THE PRINCIPLE OF COMPETENCE-COMPETENCE APPLIES TO THIS TRIBUNAL

29. As per UNCITRAL Arbitration Rules Art. 21(2), “...*an arbitration clause which forms part of a contract...shall be treated as an agreement independent of the other terms of the contract.*”

30. The Model Law Art. 16(1) also provides that, “*The arbitral tribunal may rule on its own jurisdiction, including objections with respect to the existence or validity of the arbitration agreement.*”

31. In the case **Shaw Satellite G.P. v Piekenhagen** the courts ruled that for the competencecompetence principle to apply, the two parties must state that they are parties to the arbitration and this allows the arbitral tribunal to independently carry out procedure.

32. Since no party in this dispute is contesting their agreement to arbitration, the tribunal has jurisdiction to rule on all matters regarding arbitration.

III. THE CHALLENGED ARBITRATOR WILL BE INCLUDED IN THE PANEL OF ARBITRATORS AS PER THE ARBITRAL PROCEDURE.

A. Article 13 (2) of the UNCITRAL establishes the incorporation of a challenged arbitrator in the tribunal.

33. As stated in the ‘UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration’, Article 13(2) expressly states ‘Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12 (2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.’ [UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration, 2012, p. 64]

34. In leading up to this notion, it is evident that Rodrigo Prasad in his declaration of impartiality and independence, followed by his communication with the Arbitral Tribunal is adamant concerning his impartiality as an arbitrator.

35. While the Respondent did shed a degree of caution on the previous accounts of situations Rodrigo Prasad has presided as an arbitrator, he stresses on impartiality as evident in his communication with the Claimant, Respondent and Arbitral Tribunal;

i. "I have acted as arbitrator in two cases...these involved none of the entities, persons or law firms participating in the present arbitration and the disputes are related to two completely different fields of law." ii. "Findfunds LP only entered into a funding agreement after the arbitral tribunal, including myself, has been appointed."

iii. "My law firm has merged with Slowfoods... a former Slowfoods partner is representing a client in an arbitration funded by Findfunds. All precautions have been put in place to avoid any contact with that case."

36. Upon making this statement of impartiality and independence, Rodrigo Prasad reiterates his ability to serve on the panel, concluding with the decision that he will not withdraw from the panel upon the RESPONDENT'S request. This is key in the bid to reinforce the idea that the Tribunal would decide on the challenge, as the agreeing to withdraw would nullify this preexisting condition.

37. Following the establishment of this notion, and the obvious refusal of the parties to comply with the challenge, it is by no means unclear that the UNCITRAL governs this issue, as it is the applicable rules for this dispute, as agreed between the Parties in the General Conditions of Contract, Section V, Clause 20. Upon a textual analysis of Article 13(2), it is evident that by the statement 'the arbitral tribunal shall decide on the challenge', the UNCITRAL Model Law requires the entire Arbitral Tribunal, consisting of all three arbitrators and including the challenged arbitrator, to reach an informed decision.

38. In addition, pursuant to Clause 20 of the General Conditions of the Contract, the UNCITRAL Arbitration Rules read as follows:

- a. The number of arbitrators shall be three, one to be appointed by each party and the presiding arbitrator to be appointed by the party-appointed arbitrators or by agreement of the Parties.

39. It can be concluded thereby that the procedure of arbitration alone would require the participation of all three arbitrators, thereby implying the participation of the challenged arbitrator in this situation.

40. While the Respondent is essentially concerned about Rodrigo Prasad's lack of impartiality in passing a judgement on his own conduct, it must be remembered that by Arbitral Law, Arbitrators are required to remain impartial and independent, and Rodrigo Prasad's Declaration of Impartiality submitted in these proceedings provide adequate grounds to establish that Mr. Prasad will maintain his impartiality in reaching a decision on the challenge. Further, the decision must be taken by all members of the Tribunal. Thus, whilst no bias exists, any potential perception of bias will be prevented through the fact that the Arbitrators must make a unanimous decision, and there is nothing in the record to suggest that the other two arbitrators are not independent or impartial.

B. The doctrine of 'Competence- Competence' establishes the jurisdiction of the Tribunal to decide inclusion of challenged arbitrator in the tribunal.

41. Further, Article 13 (2) also stresses on the jurisdiction of the Arbitral tribunal in reaching a decision, also identified as 'Competence, Competence.' Expressly stated in Article 17 (1) of the UNCITRAL, the clause reads that, 'the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.'

[UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration, 2012, p. 65]

42 While it is as per Arbitral procedure that Rodrigo Prasad should be allowed to sit in on the hearing, it is also in the mandate of the Arbitral Tribunal to do so. There are several cases that bring to light this fundamental criterion that is exclusive to the tribunal, and two such cases are listed down below.

43. In the case *9101-0983 Québec inc. c. 9051-4076 Québec inc, also identified 9101-0983 Québec inc. V 9051-4076 Québec inc* .Concerning a dispute between shareholders, the sentence orders the sale of shares held by 9501 in Asphalt, North Shore Inc, or 80% of its share capital.

Previously a minority shareholder, 9010 is now the sole shareholder at 100%. 9101 argues that the arbitration clause, and the procedure of who decides the dispute, must be approved by the tribunal. In this case, the Court grants a motion seeking the referral of an action to arbitration, that the arbitral tribunal had the power to rule on its jurisdiction with respect to the claims asserted, and that the autonomy of arbitral tribunals constitutes a fundamental legal principle.

44. It can be construed thereby that in the situation concerning the jurisdiction of the arbitrators, the notion of impartiality should be confused with the idea that the jurisdiction of a tribunal can be undermined over concerns of lack of impartiality and independence. As it is in the mandate of the tribunal to remain such, it is imperative that the tribunal be able to exercise their authority in deciding on the challenge of Rodrigo Prasad, alongside his participation.

45. Another case that brought to light the jurisdiction of the Arbitral Tribunal is *Aéroports de Montréal c. Société en commandite Adamax immobilier* also identified as *Airport of Montreal v Adamax Real Estate Limited Partnership*. Concerning the motion seeking the referral of the case to arbitration, the Court concludes that it is for the arbitral tribunal to rule on its jurisdiction.

C. The liberalization of commercial arbitration and arbitrators through the doctrine of party autonomy.

46. As per Redfern and Hunter, Party Autonomy has been defined as follows, “Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitration institutions and organizations. The legislative history of the Model Law shows that the principle was adopted without opposition...” [‘Party Autonomy Vs. Mandatory Rules In International Arbitration, Sayenko Kharenko, 2017]

47. Article 19 (1) UNCITRAL Model Law on International Commercial Arbitration sets forth the following provisions on party autonomy.

- (a) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.[*UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration, 2012, p. 78*]

48. One of the objectives of the UNCITRAL Model Law is the liberalization of international commercial arbitration by limiting the role of national courts, and by giving effect to the doctrine of “autonomy of the will”, allowing the parties freedom to choose law under which their disputes should be determined.

49. Pertaining to the situation at hand, it is evident however that while the Claimant is of the strong belief that procedure should be adhered to as per Article 13 (2), the Respondent is insistent that the challenged Arbitrator withdraw with immediate effect and be replaced. Such is the matter, that while both parties are making choices regarding Arbitral procedure, these choices remain quite different from one another.

50. Accordingly, so as per Article 19 (b) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner, as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.[UNCITRAL 2012 Digest Of Case Law On The Model Law On International Commercial Arbitration, 2012, p. 78]

51. It is evident that the tribunal should be allowed jurisdiction in deciding on the challenge of Rodrigo Prasad, and as expressly pointed in Articles 13 (2) and 19 of the UNCITRAL, Rodrigo Prasad should be allowed participation in the hearing.

ISSUE B: THE CHALLENGE AGAINST MR. PRASAD LACKS MERIT AND MUST BE DISMISSED.

52. On the 14th of September 2017, RESPONDENT sent in a Notice of Challenge of Mr. Rodrigo Prasad, the arbitrator appointed by the CLAIMANT to be part of the Arbitral Tribunal. In this, the RESPONDENT very falsely states that there are ‘serious and justifiable doubts’ as to his impartiality and independence resulting from his connections with the third-party funder Findfunds LP and CLAIMANT’s efforts to conceal such connections. The RESPONDENT makes their claims based on the faulty foundation of Metadata the RESPONDENT ‘managed to retrieve.’ Based on the comment found through this, the RESPONDENT unjustifiably assumes that since the CLAIMANT did not disclose its use of Third Party Funding, the CLAIMANT’s act of ‘concealing such connections’ raises justifiable doubts on Mr. Prasad’s impartiality (*Notice of Challenge. Pg. 38.*) However, the claims brought forward by the RESPONDENT as evidence for

Mr. Prasad's partiality are baseless and therefore the challenge against Mr. Prasad lacks merit and must be dismissed.

I. There are no elements to challenge Mr. Prasad's independence or impartiality

A. Pursuant to UNCITRAL which is the applicable procedural law for the challenge of an arbitrator, the challenge against Mr. Prasad fails.

1) ARTICLE 11 OF UNCITRAL STATES;

'When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.'

53. On the 26th of June 2017, Mr. Rodrigo Prasad, in his Declaration of Impartiality and Independence and Availability disclosed 'any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence' by disclosing details of his past and present relationships with the parties that may affect the arbitration (*C.Ex. 11, Pg 23*).

54. On the 1st of September, upon the claims made by the RESPONDENT, the Arbitral Tribunal requests the CLAIMANT to disclose details of its third-party funder by the 7th of September (*Pg 33*). Therefore, on the 7th of September the CLAIMANT discloses necessary details about the funder. As soon as this information was disclosed, on the 11th of September, Mr. Prasad informed the parties and the Tribunal that he had acted as arbitrator in two cases which were funded by other subsidiaries of Findfunds LP.

55. Therefore, it is clear that pursuant to Article 11 of UNCITRAL, Mr. Prasad has not conducted himself in a manner that would raise doubts about his impartiality.

2) ARTICLE 12 OF UNCITRL PROVIDES THE GROUNDS OF CHALLENGE OF AN ARBITRATOR:

i. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. ii. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.

iii. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator as provided in article 13 shall apply.

56. The RESPONDENT presents few circumstances and state that those circumstances raise doubts about Mr. Prasad's impartiality. However, as would be evident in the subsequent arguments, these circumstances do not raise any such doubts. Therefore, the grounds for challenge have not been met.

3) ARTICLE 13 OF UNCITRAL STATES:

"1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party.

2. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged and to the other arbitrators. The notice of challenge shall state the reasons for the challenge.

3. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.

4. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may

elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority.”

57. According to Clause 20: Dispute Resolution of the Notice of Arbitration sent by the CLAIMANT, it is clear that the UNCITRAL is the applicable law for the arbitral proceedings.

58. Further, in the Witness Statement by Annabelle Ming it is evident that the RESPONDENT themselves agree to the use of UNCITRAL as the applicable law for the arbitral proceedings and therefore, UNCITRAL would be applicable.

B. In a multi cultural setting as this, the standard applicable rule is the ‘reasonable person’ test

59. For the challenge of an arbitrator in a conflict set in a multicultural setting, the standard rule that should be applied is the ‘reasonable person’ test which is a common law remedy for apparent bias. The CLAIMANT, Delicatesy Whoel Foods Sp is based in Equatoriana while the RESPONDENT, Comestibles Finos Ltd is based in Mediterraneo. For this reason, a standard rule must be used to decide the merits of a challenge of an arbitrator.

1) A REASONABLE PERSON WOULD NOT QUESTION MR. PRASAD’S INDEPENDENCE OR IMPARTIALITY

60. The “Fair minded and Informed Observer” test, which is a common law remedy for apparent bias, was established by **Lord Hope**, in the case of *Porter v Magil*. This Case concerned the unlawful sale of council houses by the defendant local councillors. The defendant accused the auditor who conducted the prosecution of being biased based on the grounds of his appointment. Lord Hope stated that the conclusion of the challenge can be derived by subjecting the facts of the challenge to a “fair minded and informed observer”, who according to **Kirby J’s** phrase in the case of *Johnson v Johnson* is “neither complacent nor unduly sensitive or suspicious”, and assess if such an observer having considered the facts, would conclude that there was a possibility that the concerned arbitrator was biased or lacked independence or impartiality. **Lord Hope** also went on to say that ;

“The ultimate question is whether the proceedings in question were and were seen to be fair. If on examination of all the relevant facts, there was no unfairness or any appearance of unfairness, there is no good reason for the imaginary observer to be used to reach a different conclusion.” (Porter v Magil)

61. The “Fair minded and Informed Observer” test has been used as a remedy for many cases dealing with arbitral bias, such as *W Limited v M SDN BHD*, which follows Article 12 of the UNCITRAL Model Law catering to the grounds of challenge and *Gillies v Secretary of State for Work and Pensions*_which both concerned the challenge of an arbitrator’s impartiality and independence.

62. In the case of *W Limited v M SDN BHD* the law firm of the challenged arbitrator earns a substantial remuneration from legal services provided to a client company that share the same corporate parent as the company that is a party in the arbitration. The arbitrator in question works as an independent practitioner and only uses the firm for administrative and secretarial purposes. The arbitrator in question also makes disclosures about his knowledge of the situation and would have made any necessary disclosure if alerted to the situation. **Mr. Justice Knowles** considered the facts that were presented for the challenge of the arbitrator and held that a fair minded and informed observer would not conclude that there was real possibility that the tribunal was biased, or lacked independence or impartiality.

63. On the 7th of September 2017, the CLAIMANT, upon the request of the tribunal, disclosed the identity of their third-party funder, Funding 12 Ltd (Pg. 35). Even though the CLAIMANT was financially stable to bear the costs of arbitration.

64. Findfunds Lp is a Shareholder of Funding 12 Ltd and owns 60% shares of that company (*PO 2, Para 2*). Findfunds has very little influence on the arbitral proceedings even though their funding agreement allows a greater influence (*PO2, Para.4*).

65. In the Letter Sent by Mr. Prasad, explaining that there was no direct connection to justify his challenge, he disclosed that he has acted an arbitrator for two cases which were funded by other subsidiaries of Findfunds LP. Mr. Prasad also confirms that the present arbitration has no involvement with any persons, entities or law firms that were present in the two previous

arbitrations, and also that it dealt with a completely different field of law. In one of the cases the funding agreement with Findfunds LP was created only after the composition of the Arbitral Tribunal. Mr. Prasad also discloses that a former partner of the firm Slowfood, that has now merged with his law firm, was representing a client funded by Findfunds. He outlined that all necessary precautions had been taken to avoid any contact with the case (Pg. 36).

66. Given the above information, and considering that the examination of all relevant facts of the challenge, there is no appearance of unfairness on the part of Mr. Prasad, thus, as stated by **Lord Hope** in the case of *Porter v Magil*, it is clear that no direct connection can be drawn between Mr. Prasad and Funding 12 Ltd. Much like in the case of *W Limited v M SDN BHD*, any visible vague connection is possibly a mere coincidence. Therefore, a fair minded and informed observer, having considered all the facts, would not conclude that justifiable doubts exist as to Mr. Prasad's independence or impartiality.

C. The IBA Guidelines upon which RESPONDENT is basing their claims, is not applicable

1) THE PARTIES TO THE ARBITRATION HAVE NOT AGREED TO APPLY THE IBA GUIDELINES

As reiterated by both Mr. Prasad and the CLAIMANT, the IBA Guidelines cannot be applied in the present arbitration as the two parties have not agreed to it.

2) IBA GUIDELINES ON CONFLICTS OF INTEREST IS NOT A LEGAL PROVISION

"These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties" (IBA Guidelines of Conflicts of Interest in International Arbitration, Introduction, Para 6)

The IBA Guidelines are not binding and cannot be relied on as they are mere guidelines.

67. The Guidelines were relied in the English courts in the case *ASM Shipping Ltd of India v TTMI Ltd of England* which was based on a set-aside application for a maritime arbitration, in which an arbitrator was challenged on the ground of apparent bias. In this case, the court held 'the

IBA guidelines do not purport to be comprehensive’ and ‘are to be applied with robust common sense and without pedantic and unduly formulaic interpretation’.

D. Even in accordance to the IBA Guidelines, Mr. Prasad’s independence and impartiality is unquestionable.

68. The RESPONDENT is basing their claims on the IBA Guidelines which are not applicable in the present arbitration. However, even if they should be applicable, the guidelines would deem that the challenge against Mr. Prasad lacks merit and must be dismissed.

69. IBA Guideline General Standard 2.3 on arbitrator’s relationship with the parties, 3.3 on the relationship between an arbitrator and another arbitrator or counsel, 3.5.24.1.1 in the context of the legal opinion are all in favour of the CLAIMANT.

II. CLAIMANT not disclosing the use of Third Party Funding does not lead to justifiable doubts on CLAIMANT’s ethics

A. CLAIMANT has no duty to disclose use of Third Party Funding

70. In the case of *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* where the CLAIMANT, two Turkish construction companies, were ordered to disclose whether their claims in the arbitration were being funded by a third-party only when the need for such disclosure arose. If a funding agreement existed, the CLAIMANTS were ordered to disclose the names and details of the third-party funder(s) and the terms of that funding.

71. In this case, when CLAIMANT was ordered to disclose information on Third Party Funding by 7 September along with the identity of the funder, as well as the funder’s major shareholders/investors/beneficiaries, the CLAIMANT disclosed such necessary information as it was required.

72. Therefore, CLAIMANT had no obligation to disclose use of third party funding and this disclosure cannot raise doubts about CLAIMANT’s ethics. When required by the Tribunal, the CLAIMANT immediately disclosed information.

B. CLAIMANT's use of a third party funder and its choice to not disclose, has no bearing of the independence and impartiality of the arbitrator.

73. In Mr. Prasad's letter to the members of the tribunal (*Pg. 36*), it is clear that Mr. Prasad was not aware that the possibilities of connections existed until the CLAIMANT disclosed their thirdparty funder and its shareholders (*Pg.35*), soon after which Mr. Prasad disclosed all vague connections and explained why they do not question his independence as an arbitrator. The fact that Mr. Prasad himself was not aware of the possibility of connections mentioned with the CLAIMANT's third party funder further proves that the CLAIMANT's use of Third Party Funding raises no doubts on Mr. Prasad's impartiality.

III. The Meta Data brought forth by the RESPONDENT is not applicable evidence

A. The Comment was a mere request for verification

74. In the RESPONDENT's Notice of Challenge of Mr. Prasad, the RESPONDENT had made it very clear that the Meta Data containing the request for verification by Horace Fasttrack, found in the Notice of Arbitration, was the primary reason that first raised the RESPONDENT reasonable doubts as to Mr. Prasad's impartiality and independence as an arbitrator. The comment, however, is a request given to verify if at all there was a connection between Mr.

Prasad and Findfunds LP, a shareholder, holding a 60% of the shares of the CLAIMANT's third party Funder, Funding 12 Ltd. Therefore, it is clear that the meta data comment will not have any weight as evidence as it does not establish an evident connection between Mr.Prasad and FindFunds LP that would question his impartiality as an arbitrator.

B. The comment does not raise reasonable doubts

75. The Meta Data comment recovered by the RESPONDENT, does not provide sufficient doubt against Mr. Prasad's independence and impartiality as an arbitrator. It does not establish any connection between Mr. Prasad and the third-party funder of the CLAIMANT.

76. As per the note, the CLAIMANT had verified that there were no direct connections between the challenged arbitrator and Findfunds LP, and that the existing connections that were present were between subsidiaries of Findfunds LP, thus does not question Mr. Prasad's impartiality and

independence as an arbitrator. This eliminates a factual base on which the meta data comment can be used as a form of evidence. Article 27(1) of the UNCITRAL Arbitration Rules states:

“Each party shall have the burden of proving the facts relied on to support its claim or defense”

77. The verification makes the content of the meta data comment void; thus, it cannot qualify as a reliable fact, therefore, will not be able to be used as valid evidence.

IV. The article published by Mr. Prasad in the Vindobana Journal does not question his impartiality as an arbitrator

78. Mr. Prasad published an article in the Vindobona Journal which is a discussion that assess whether the Corporate Social Responsibility Codes play a part in sales law. In the Notice of Challenge of Mr. Prasad, the RESPONDENT states that through the publication of this article

“Mr. Prasad positions himself very clearly against the modern trend in the understanding of the conformity concept in Art. 35 CISG”. This article is portrayed as an element that questions the independence and impartiality of Mr. Prasad as an arbitrator, and is used as a base for the RESPONDENT’s claim.

A. The article is a discussion that expresses a viewpoint

79. In the article that assess the notion of conformity in Article 35 of the CISG (*CISG, Pg. 10, Art. 35*), Mr. Prasad states that in most cases the conformity is solely dependent on the physical attributes of the products, however he acknowledges that there may be circumstances where this point of view will not be applicable.

100. *“These authors also consider extraneous factors relating to the goods such as the production process and other ethical conduct of the seller to be part of the conformity requirements. That may be true, where the parties specifically make compliance with certain production standards part of the goods. A well-known example are cases where the buyer wants to buy goods which bear the label of fair trade. However, outside these narrow cases where the parties actually trade not only in goods but also in emotion (ethically conscious buyer), such a broad concept of conformity should be rejected.”* (Vin. JA, Pg. 40)

101. This proves that there is no strict bias on the part of Mr. Prasad as an arbitrator as he expresses acceptance to both schools of thought given the circumstance.

102. An example of an issue conflict can be seen in the German case of *Landgericht München II*, where the Challenged Arbitrator had signed his consent to publish an article written by his employee which directly criticized and undermined the RESPONDENT in the arbitration. The case held that inappropriate announcements and negative statements made by the arbitrator to a party justifies the concern of partiality. When comparing the situation of the *Landgericht München II* case with the scenario concerning Mr. Prasad, it is clear that the article he had published in the Vindobona Journal does not reach the requisite standard to question the ability for Mr. Prasad to act independently or impartially.

ISSUE C: THE OFFER WAS ACCEPTED SUBJECT TO CLAIMANT'S CODE OF CONDUCT.

I. The tender constitutes an offer.

103. A tender is generally identified as an invitation to treat, however, the CLAIMANT submits that the tender constitutes an offer. Art. 14 of CISG defines an offer as: *“A proposal for concluding a contract addressed to one or more specific persons constitute an offer it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.”*

104. Under the specifications of the goods and the delivery terms in the tender, the RESPONDENT has specified clause 1 that the chocolate cake will be 3 inches in diameter and will weigh 120 grams. Clause 3 contains the purchase price and payment conditions where it clearly states that the cake price should not exceed USD 2.50 per unit. [P.10] Thereby, the specifications provided by the Respondent are sufficiently definite to constitute a binding offer.

105. The tender sent by the RESPONDENT includes the contract documents with the specifications of the goods and conditions of sales. Further, it also includes their business philosophy and their codes of conduct. [PP. 11-14] The fact that RESPONDENT sent the contract along with the tender documents indicates that the RESPONDENT had the intention to be bound by it if their offer was accepted. Considering the above mentioned facts, the tender constitutes an offer.

A. The CLAIMANT made a counter offer.

106. When there are alterations to the original offer, according to Art. 19 (1) of the CISG, a counter offer occurs, where the altered provisions in the counter offer take precedence over the provisions in the original offer, in the event that the counter offer is accepted.

107. According to Art.18 of the CISG, in order for a contract to be created when there is a counter offer, it must be accepted by the original offeror (RESPONDENT). Once the contract is formed, the offer becomes effective from the moment of acceptance and will be subject to the articles regarding formation of contract contained in the CISG [CISG Advisory Council Op. No.13].

108. Following the offer from the RESPONDENT, the CLAIMANT sent a sales offer [Cl.Ex.4], on the 27th March 2014. The CLAIMANT's offer includes minor changes in the specification of the good (Cakes) and payment method. CLAIMANT acknowledged that the cake will be a slightly different shaped, since the offered size is difficult to produce and stated that the CLAIMANT requires the payment 30 days after from the delivery [Cl.Ex.3]. Additionally, the sales offer states that the "offer is subjected to the General Conditions of Sale and the CLAIMANT's Commitment to a Fairer and Better world." [Cl.Ex.4]

109. The RESPONDENT informed the CLAIMANT that the tender was successful notwithstanding the changes suggested by the CLAIMANT. [Cl.Ex.5] Moreover, the RESPONDENT did not specifically disagree to subject the offer to general condition of sales of the CLAIMANT. RESPONDENT stated that the decision to accept the offer was made because of the convincing commitment to sustainable production which was well evidenced from the CLAIMANT's code of Conduct. Both parties started performing the contractual provisions without any objections to the counter offer. Thus, as the counter offer was accepted by RESPONDENT, the CLAIMANT's Code of Conduct governs the Contract.

II. In the alternative, if the Arbitral Tribunal considers the tender is an invitation to treat, the CLAIMANT's General Conditions were still accepted into the Contract.

110. As per Art. 14(2) of CISG an invitation to treat has been defined as, "***A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.***"

111. When there is acceptance, the contract is formed between two parties according to Art.18 of CISG and the parties are bound to perform the contractual obligations according to the agreed terms and conditions.

112. The CLAIMANT made an offer accepting the invitation to tender. The offer contained minor alterations to the invitation to tender. However, the offer was accepted by the RESPONDENT notwithstanding the changes to the tender as mentioned in the letter sent on 07th April 2014 and the transactions took place for 3 years continuously without any objections to the changes. [Cl.Ex.5] Therefore, the general condition of sales of the CLAIMANT should prevail.

113. **Formation of contract in CISG will be applicable disregarding the fact that the tender constitutes an offer or an invitation to treat.**

III. The statement in the sales offer sent by the CLAIMANT is a standard term.

114. Even though the CISG refers to the inclusion of standard terms under the formation and the interpretation of contracts (Art. 8 and Art. 19), it does not provide an explicit definition. According to Clause 19 of the General Conditions of the Contract, the UNIDROIT Principles of International Commercial Contracts will apply in the event that the CISG does not deal with a specific issue. [P.12]

115. UNIDROIT Principles Article 2.1.19 defines standard terms as *“provisions which are prepared in advance for general or repeated use by one party and without negotiations with the other party.”*

116. Procedural Order 02 no.28 demonstrates that the CLAIMANT uses the same offer form used in this situation, in other sales transactions. The offer form consists of the main commercial terms and the latter part refers to specific terms and conditions if there is a requirement to deviate from the CLAIMANT’s general conditions of sales. At the bottom of the offer form, the CLAIMANT has included the standard term which subjects the offer to CLAIMANT’s code of conducts.

117. Moreover, Procedural Order 02 no. 24 reveals that the same standard term is incorporated in the CLAIMANT’s invoices and the Order form which clearly refers to the CLAIMANT’s

general conditions. It is evident that the statement in the sales offer is prepared beforehand for continuous usage by the CLAIMANT. Hence, the statement in the sales offer is a standard term.

A. The standard term in the sales offer is understandable to a reasonable person.

118. The statements and conduct of a party are considered to form the basis of an offer and acceptance. *[CISG Advisory Council Op. No.13]* Art. 8 of CISG expressly deals with the intent of a party. It is required that the parties' intent is recognized by the other party. As per CISG digest and case law, Art. 8(2) is applied to issues pertaining to standard terms and Art.8(3) determines whether the standard terms have become part of the offer *[UNCITRAL Digest of case law on CISG, Art.8]*

119. The case of *German Company v Quote Food products BV* stated that in order for the standard terms to be applicable, their applicability needs to be stipulated in the offer which needs to be accepted *[CLOUT case 1202, German Company v Quote Food products BV]*. Moreover, in the *German Machinery Case*, the courts held that the recipient of the offer must be aware of the offeror's intention to include the standard terms *[CLOUT Case 445, German Machinery Case]*.

120. The applicability of the CLAIMANT's standard terms was specified in the offer form that was sent to the RESPONDENT, who duly accepted it. A link to the CLAIMANT's website has been provided and the RESPONDENT was clearly directed to that link to read the CLAIMANT's standard terms. The RESPONDENT visited the website and read the terms according to their letter of acceptance *[Cl.Ex.5]*. Therefore, the RESPONDENT was aware of the terms and cannot claim otherwise.

121. In the response to the offer sent by the CLAIMANT, the RESPONDENT accepted the offer 'notwithstanding the changes', whilst also acknowledging the CLAIMANT's code of conduct, and referring clearly to the standard terms that had been mentioned in the offer. *[Cl.Ex.4;5]*.

Given that the RESPONDENT has clearly read the CLAIMANT's code of conduct and given the clarity of the terms, the RESPONDENT could not have misinterpreted the intention of the CLAIMANT to be bound by the CLAIMANT's terms. Hence, a reasonable person in the same position as the RESPONDENT would understand that the CLAIMANT intended for their standard conditions to be part of the contract.

B. Standard term incorporated in the sales offer is a non-material alteration.

122. Art. 19(2) and 19(3) of CISG identifies non-material alterations and material alterations in a counter offer. Art. 19(3) determines price, payment, quality and quantity, place and time of delivery and extent of one party's liability as material alteration. If there are additional or different terms incorporated in a counter offer, which do not substitute the original terms, they are known as immaterial alterations as per Art. 19(2) of CISG.

123. **Professor Schlechtriem**, identifies standard terms as material alterations that should be accepted specifically by the offeree. [*Slechtriem, Art.19, P.236*] However, the argument regarding the material or immaterial nature of the terms included has been held to be a rebuttable presumption [*Schwenzer/ Mohs and Basel*]. In the case of **Mono ammonium phosphate**, the courts held that the list enumerated under Art.19(3) that materially alter an offer can be rebutted in an individual case, taking into consideration negotiation, practices, usages, conduct of the parties and the circumstances of the case. [*CLOUT Case 189, Mono ammonium phosphate*]. Although the inclusion of standard terms may ordinarily be considered material, when considering the facts of the present case, it did not materially alter the offer.

124. The RESPONDENT in their letter of acceptance sent on 7th April 2014 [*Cl.Ex.5*] states that both CLAIMANT and RESPONDENT share the same values and are both committed to the sustainable production of goods, as evidenced from the CLAIMANT's code of conduct. A reason as to why the RESPONDENT entered into a contract with the CLAIMANT was because the CLAIMANT was a Global Compact Company, which ensures that the CLAIMANT's terms must be in line with Global Compact principles. [*Proc.Ord.2 no.23*] The RESPONDENT's terms are also based on those principles as they want to become a Global Compact lead company [*Proc.Ord.2 no.31*].

125. Given the similarity of the terms, and the fact that the RESPONDENT was made aware of these terms, which were read and acknowledged in their letter of acceptance [*Cl.Ex.5*], it is clear that the standard term incorporated in the sales offer is not a material alteration. Hence, it is not important for it to have been specifically identified by the CLAIMANT or for the RESPONDENT to have explicitly accepted it as Art. 19(2) of CISG would apply. As the RESPONDENT did not object to the inclusion of the terms, the standard conditions of the CLAIMANT were incorporated into the Contract.

C. In the alternative, if the tribunal considers the standard term incorporated in the sales offer is a material alteration, the modification was accepted by the conduct of the RESPONDENT.

126. The CISG Advisory Council's opinion no.13 introduces implied acceptance which results from the conduct of the parties. If the offeree started performing the contractual obligations without any express objection to the standard terms, in circumstances where there is clear reference and an availability to standard terms, the offeree has impliedly accepted the incorporation of the standard terms.

127. As per **Guide to Article 19, the Comparison with PECL**, the material alteration must be accepted by express assent or by the conduct of the other party. **Pilar Perales Viscasillas** in **Comparison with Section 2-207 UCC and the UNIDROIT Principle** introduces two instances of acceptance of an offer by conduct. First, where the buyer sent an offer and the seller responds with a form which contains material modifications to the offer. If the buyer accepts the goods which are delivered by the seller, the acceptance of the goods is considered as acceptance of the seller's terms in the form. Secondly, the seller makes an offer to sell and the buyer replies with a form which contains material modifications to the offer. If the seller delivers the goods to the buyer, it constitutes an acceptance by the seller to the terms in the buyer's form.

128. A basic illustration can be given regarding the acceptance by conduct following the case of *Filanto v Chilewich*. The court held that if a party commenced performance or fails to object in a timely manner, the conduct, silence, act of performance constitutes acceptance. Therefore, the offeree was bound to accept the arbitration clause as part of the agreement because he failed to object in a timely manner and initiated performance by opening the letter of credit. [*CLOUT Case 23, Filanto v Chilewich*]

129. The courts held that in the case of *Magellan Int'l Corp. v Salzgitter Handel GmbH*, contract was formed when the distributor indicated the acceptance by opening the letter of credit and the terms of the contract were those agreed on time the letter of credit was opened. [*CLOUT Case 417, Magellan Int'l Corp. v Salzgitter Handel GmbH*]

130. Even though, the RESPONDENT did not specifically agree to the incorporation of the Standard term, it is well evidenced that the RESPONDENT was well aware of the standard terms from the letter sent on the 7th April 2014 [*Cl.Ex.5*]. The RESPONDENT accepted the delivered

cakes without any objections for three consecutive years, which indicates the acceptance of the standard terms as explained above.

131. Therefore, even if the Arbitral Tribunal finds that the inclusion of the CLAIMANT's General Conditions was a material alteration to RESPONDENT's original offer, there is an acceptance by the conduct of the RESPONDENT to the standard term. Hence, the RESPONDENT accepted to subject the sales offer to the CLAIMANT's general conditions of sale and the codes of conduct.

D. The incorporation of the standard term was clearly communicated at the time of the negotiation.

132. The sales offer sent by the CLAIMANT clearly discloses that the offer will be subject to the CLAIMANT's code of conduct. [Cl.Ex.4] To be applicable, the standard terms must have been printed in a manner that a reasonable man would understand, the size of the text should be readable and in a language that the receiver could reasonably expected to understand. The **German Knitware Case** deals with a language complication. The court held that even though the seller did not send its general conditions, buyers conditions do not apply. The reason for the decision was that the buyer's conditions were in German language and did not disclose that there was an Italian translation. Since the language of the contract was not German, the general conditions provided in German could not be a part of the contract. [CLOUT case 339, *German Knitware Case*]

133. The term in the sales offer was drafted in English which is the language both parties communicated previously. It is proved that the standard term was readable and understandable as they acknowledged that they downloaded CLAIMANT's codes of conduct following the tender. Since, there is a clear incorporation of the standard term and the offer was accepted without any further statement, it was reasonable for the CLAIMANT to rely on the assumption that the

RESPONDENT understood. Therefore, CLAIMANT's code of conduct should be applicable as the RESPONDENT did not take any step-in objecting to the incorporation of the standard term.

E. The terms were available electronically and mere reference to the terms was sufficient for incorporation into the offer.

134. The *German Machinery Case* stated that, for a standard term to be validly applied to an offer, the standard terms must be available to the offeree, giving him a reasonable opportunity to be aware of such terms. The *Bundesgerichtshof* emphasized a different approach. Where there is a reference to standard terms through a website or a hyperlink, the offeror gives the offeree a reasonable opportunity to take notice of the standard terms. [*Schroeter in Schlechtriem/Schwenzer Commentary Art 14 para 47*] The letter sent on 7th of April, clearly states that the RESPONDENT downloaded the CLAIMANT's Code of Conduct and read it, prior to accepting the tender offer. It thus relied upon the information provided in the CLAIMANT's counter offer, and accepted the counter offer on those terms.

135. Further, according to the *Austrian Propane case* there is no specific requirements for incorporation of standard terms under the CISG [*CLOUT Case 176, Austrian Propane case*]. Art.14 of the CISG sets out the requirements for a conclusion of the contract. As a consequence, the standard terms should be a part of the offer according to the intention of the offeror, and the offeree should be aware of such intent in order to be a party to the contract. The CLAIMANT included the standard terms in the offer sent to the RESPONDENT. The RESPONDENT was thus well aware of the application of the standard terms when the offer was accepted and proceeded to implement the Contract according to those terms.

IV. The CLAIMANT's standard term prevails as per the principle of Battle of the Forms.

136. The CLAIMANT submits that the tribunal should apply the principle of the battle of the form in in order to determine whose standard term will apply to the contract. CISG does not provide special provisions regarding conflicting general conditions of sales. However, the principle of battle of forms is defined in Art. 2.1.19 of UNIDROIT in the following way: **“Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.”**

137. When the parties commence performance without agreeing on the terms governing the contract, there is a doubt in determining whether the contract is concluded and which terms should govern the contract.[*DiMatteo/Dhooge/Greene/Maurer and Pagnattaro*] If the parties have agreed on the *essential terms* of the contract such as the quality, quantity, price of the goods and commence performance on agreed terms, the courts will recognize that a valid contract is concluded and the terms will be the once that was agreed expressly and impliedly.[*German Powdered Milk case, CLOUT case 493, Société V Ltd. v. Société A AG*]

138. There are two principles that have been followed in resolving disputes regarding conflicting standard terms. As per the **Comparison with PECL**, the mostly followed application is “Last shot” approach. [*Guide to Article 19*]. This application of last shot was derived from the practice of general formation of contract in CISG where there is an offer and acceptance. [*DiMatteo/Dhooge/Greene/Maurer and Pagnattaro*]. The last person who send the terms governing the contract, will win the battle if the other party does not specifically object to the incorporation of the terms without undue delay or performs the contractual obligations as per last shot rule. [*Pilar Perales Viscasillas*]

A. A. If the last shot rule applies, the standard term of the CLAIMANT will apply to the sales offer.

139. As per UNIDROIT Art. 2.1.22, if the parties have begun performance without any objections to the incorporation of each other’s standard terms, the last shot principle would apply, and the contract will be concluded on the terms that were the last to be sent or referred to. In the case of **British Road Services Ltd. v. Arthur V. Crutchley & Co. Ltd.** the courts held that the latest terms and conditions if not objected to by the other party, will stand [*1968*]. **Murray** stated that, when the inclusion of standard terms are referred to in the response to an offer, under the CISG it would be a counter offer and the last shot principle would apply, whereby a contract is formed on the terms of the counter offer [*Murray Jr.*].

140. The CLAIMANT submits that the tribunal should refer to the last shot approach in order to identify which standard terms would apply for the reasons stated above. The CLAIMANT fired the last shot by sending the sales offer which contained the standard

term which was accepted by the RESPONDENT who started performing the contractual obligations without any objections for the whole 3 years of dealings. Hence, the CLAIMANT's standard term will be applied to the sales offer.

B. Even if the tribunal applies knock-out principle, the CLAIMANT's standard term will apply to the sales offer.

141. "Knock-out" is also being used as an alternative to the last shot approach in resolving disputes regarding conflicting standard terms. If the forms of the parties contain contradicting terms, knock-out approach cancels each other out and replace the clause with applicable law and the other similar terms will remain as it is. [*Charles Sukurs; Magnus*]

142. The knock-out rule is applied in accordance with CISG Art.7(1)'s *principles of good faith* [*DiMatteo/Dhooge/Greene/Maurer and Pagnattaro*]. Art.7(2) of CISG states where there are contradicting terms which were not negotiated nor accepted will cancel each other out and replace with norms in part 3 of the Convention with the terms that were substantially agreed by the both parties.

143. In *Takap B.V. v Europlay S.r.l* case the buyer did not act in good faith because he failed to disclose the incorporation of their standard terms to the seller [*CLOUT Case 1189, Takap B.V. v Europlay S.r.l*]. Therefore, the court held that the conditions of the buyer cannot be incorporated into the contract.

144. The RESPONDENT may argue that the general conditions of the CLAIMANT's and the RESPONDENT's contain contradicting clauses. As per the knock-out principle, the contradicting terms get cancelled, and as mentioned in Procedural Order 02 no. 29, CLAIMANT's general conditions contain Art.11 of model ICC arbitration clause while RESPONDENT relies on ad hoc arbitration. Therefore, both CLAIMANT's and RESPONDENT's dispute resolution clause will be null and void. However, Art. 2.1.21 of UNIDROIT states that the specifically negotiated terms will prevail over conflicting provisions.

145. There were negotiations regarding the dispute resolution clause between the RESPONDENT and the CLAIMANT. The CLAIMANT specifically agreed to utilize ad hoc arbitration in accordance with the arbitration clause in the tender [Cl.Ex.3]. Hence, the dispute resolution clauses will be replaced with the agreement between the CLAIMANT and the RESPONDENT to follow ad hoc arbitration.

146. If the tribunal considers that the RESPONDENT did not accept the incorporation of the standard terms and if the terms contradict each other, according to the knock out rule neither parties' general conditions would apply. In these circumstances the provisions in part 3 of CISG will apply.

ISSUE D: IN CASE RESPONDENT'S GENERAL CONDITIONS ARE APPLICABLE, HAS CLAIMANT DELIVERED NON-CONFORMING GOODS PURSUANT TO ARTICLE 35 CISG AS THE COCOA WAS NOT FARMED IN ACCORDANCE WITH THE ETHICAL STANDARDS UNDERLYING THE GENERAL CONDITIONS AND THE CODE OF CONDUCT FOR SUPPLIERS, OR WAS CLAIMANT MERELY OBLIGED TO USE ITS BEST EFFORTS TO ENSURE COMPLIANCE BY ITS SUPPLIERS?

I. The CLAIMANT has delivered goods pursuant to Article 35 CISG.

147. As per contract No. 1257, the RESPONDENT's General Conditions state the specifications of the quality of the Chocolate cake [Section III – clause 1], the required Quantity to be delivered [Section III – clause 2] and the purchase price and payment conditions [Section III – clause 3]. 148. Section III, clause 1 Subsection 5 specifically deals with the ingredients of the chocolate cake and states that the said ingredients should be sourced as per the conditions stated in section IV [Special Conditions of Contract] of the tender document which talks of the RESPONDENTs "Zero tolerance" policy with regard to unethical business behavior, such as bribery and corruption and the requirement for all suppliers to adhere to similar standards.

149. Art. 35 of the CISG sets standards to determine whether the goods delivered by the seller conform to the contractual terms, in regard to the quantity, quality, description and packaging. Conformity has been assessed using different aspects of products in different cases. In case No. 7 O 147/94 [Landgericht Paderborn, Germany, 25 June 1996, Unilex], the utility of the product

was scrutinized as a factor to determine the conformity of the goods. It was found that roll down shutters produced by a raw plastic that contained a lower percentage of a particular substance resulted in it not being able to sufficiently block sunlight were non-conforming under Art. 35. In CLOUT case No. 168 [*Oberlandesgericht Köln, Germany, 21 March 1996*], a motor car which showed false mileage was said to be non-conforming as it reduced the value of the car. Finally, in CLOUT case No 941 [*Hof Arnhem, Belgium, 18 July 2006*], the court found that goods containing a different proportion of clay compared to the required amount as per the contract rendered the goods to be non-conforming. Thus, according to the case authorities mentioned above it is evident that the utility, value and quantity of the goods, determine if a good is conforming as per Art. 35 of the CISG.

A. The goods delivered by the CLAIMANT was fit for consumption pursuant to Article 35(2) a) CISG

150. The chocolate cakes provided by the CLAIMANT were made to the specifications required by the RESPONDENT, except for the size and the shape of the cake. However, this does not make the goods non-conforming, as the RESPONDENT specifically agreed and was aware of the changes made to the shape and size of the chocolate cake as per their letter dated 7th April 2014 [*Cl. Ex. 5*]. This change did not affect the quality or usefulness of the product in any way. In CLOUT case No. 84 [*Oberlandesgericht Frankfurt a.M., Germany, 20 April 1994*] it was held that a Swiss seller, who delivered New Zealand mussels to a German buyer, which contained a cadmium concentration exceeding the limit recommended by the German health authority, did not constitute a fundamental breach of contract. In the Court's opinion the cadmium concentration did not constitute lack of conformity since the mussels were still fit for eating. It served the purpose for which goods of the same description would ordinarily be used. Similarly, the CLAIMANT delivered Chocolate cakes that are fit for the purpose for which chocolate cakes are ordinarily used for, as prescribed by Art. 35(2)(a) CISG which is a confectionary suitable for consumption. The cakes were suitable for consumption by consumers and the RESPONDENT has offered no evidence which shows otherwise. As per Procedural Order 2, no.38 the RESPONDENTS have used the alleged non-conforming cakes as a part of a special marketing campaign for the opening of three new shops. This should be treated as a presumption that the chocolate cakes are fit for their ordinary purpose and possessed the ability to be resold as it was not harmful to health also the value of the product has not decreased to make them nonconforming

goods. They are worth the same amount as they were worth when RESPONDENT first began selling them three years prior. Therefore, as neither the value, utility, quantity, or quality have not changed in anyway, the RESPONDENT cannot argue that the goods do not conform to the contractual specifications. Thus, CLAIMANT has delivered goods that are conforming as per Art. 35 CISG, and the RESPONDENT must accept them.

151. Pursuant to Art. 35 (2) b) the chocolate cakes were fit for the purpose made known to the CLAIMANT impliedly at the time of the conclusion of the contract by the RESPONDENT which was to supply chocolate cakes to be sold in their chain of supermarkets which would be used for consumption eventually by the consumers.

152. As per Art. 35 (2) c) the goods should possess similar qualities as a model or a sample of a similar product which was held out to the buyer. The chocolate cakes provided by the CLAIMANTS possessed similar qualities to the cakes which was advertised using the flyer marked RESPONDENTS Exhibit R 2 and as per the letter dated 27th March 2014 [*Cl. Ex. 3*] where the CLAIMANTS have also made available a model/sample of the cake at the Cucina Food Fair which the RESPONDENTS saw and acknowledged during their correspondence.

B. The chocolate cakes provided by the CLAIMANT are contained or packaged in the manner usual for such goods and in a manner adequate to preserve and protect the goods pursuant to Art. 35(2) (d) CISG

153. If the above factors are considered, it is also clear that the CLAIMANT has not breached Art. 25 of the CISG. As Art. 25 states, the RESPONDENT is only justified if the CLAIMANT's actions have fundamentally breached the contract. According to the Digest of Cases for the CISG, such a fundamental breach occurs when the injured party, in this case RESPONDENT, has suffered a substantial loss which deprives them of the very purpose of the contract. This contract was for the delivery of Chocolate Cakes. As established above the product has been delivered and it is conforming. The cocoa ingredients which are the subject of the dispute, are perfectly suited for their purpose, to be used in making Chocolate Cakes. Using these ingredients has in no way compromised the conformity of the product as stipulated in the Contract. If the goods were completely unsuitable for the RESPONDENT, they would not have been able to sell them as chocolate cakes for the past three years. Further, if the goods were non-conforming, they would be

inedible, and the RESPONDENT would not even be able to use them for promotional purposes. As such, there is no fundamental breach as per Art. 25 of the CISG.

154. The non-conformity that the RESPONDENT alleges is relating to the location of the ingredients. Since the location has in no way compromised the above factors of conformity, the product itself is conforming as per Art. 35 of CISG.

155. Even if the CLAIMANT did not deliver conforming goods, Art. 79(1) of the CISG exempts the CLAIMANT from liability. Art. 79 allows non-performance if the circumstances, or “impediments”, are such that they are not under control of that party. In addition to this, the party should not be able to foresee such an impediment at the conclusion of the contract.

156. The CLAIMANT, in addition to being aware of the RESPONDENT’s strict requirements for sourcing of ingredients, also follows comparable standards of sustainable production. As such they had taken measures when contracting with their own suppliers to ensure that such standards were met, not only on behalf of the RESPONDENT, but for their sake as well.

157. With such measures taken by the CLAIMANT, it is clear that the controversial behaviour of the supplier cannot be the responsibility of the CLAIMANT. The behaviour is an external third party “impediment” which the CLAIMANT, even with all the measures taken by them, could not have foreseen. The fact that it was an extensive network of fraudulent individuals that included high ranking officials and leaders of Ruritania compounds this fact [*Cl. Ex. 7*]. The CLAIMANT performed audits and required questionnaires from the supplier. It is unreasonable to expect the CLAIMANT to investigate a country’s government, and to be held liable if they could not perform due to corrupt actions of that extensive nature

158. Finally, as per Art. 79(1), the CLAIMANT could not have foreseen such a complex network of unethical behaviour when contracting. They took measures that could be reasonably expected from them. Circumstances were simply beyond the control of the CLAIMANT and could not be foreseen by them during contracting. As such the CLAIMANT cannot be held liable as per Art. 79(1).

II. Even if RESPONDENT's General Conditions were applicable, the Code of Conduct imposes solely an obligation on CLAIMANT to use best efforts to ensure compliance by its suppliers, which they have done

159. As per the Procedural Order No. 2 the CLAIMANTs do not have a history in selling nonconforming goods in the context of the Global Compact Principles. The CLAIMANT has managed to maintain a very good reputation in the market with regard to the business they conduct and in supervising their supply chain over the last 5 years. There have been no reported cases about a violation of the UN Global Compact Principles by the CLAIMANT or their suppliers "Ruritania Peoples Cocoa mbH" within that period.

160. Ruritania Peoples Cocoa mbH, created a good reputation in the market by the mechanisms that were implemented by them in their model farms to produce Cocoa in a sustainable manner by protecting the rainforests. Even with such mechanisms in place the CLAIMANTs decided to appoint a third part "Egimus AG" to assess whether Ruritania Peoples Cocoa GmbH was complying with the UN Global Compact principles simply because the CLAIMANTs were a Company that cared for the environment and the community. They were committed to creating a fairer and better world.

161. It was after Egimus AG certified that Ruritania Peoples Cocoa GmbH complied with Global Compact rules following their thorough audit that the CLAIMANTs decided to conduct extensive third-party audits once every 5 years. Therefore, it is very clear that the CLAIMANT had taken necessary precautions to monitor the compliance of the UN Global Compact rules by the suppliers and this fraudulent act was not foreseen by the CLAIMANTs.

162. Also by signing the CLAIMANTs code of conduct the Ruritania Peoples Cocoa GmbH had a contractual obligation to comply with the UN Global Compact rules and by breaching the said code of conduct Ruritania Peoples Cocoa GmbH has defrauded the CLAIMANTs. In the RESPONDENTs email dated 12th February 2017 the RESPONDENTs have similarly acknowledged this.

163. Therefore, the RESPONDENT has no claim against the CLAIMANT in any of the above issues as the CLAIMANT has behaved in a manner compliant with all CISG articles relevant to these problems and the CLAIMANT used its best efforts to ensure compliance by its suppliers.

Request for Relief

In light of the submissions made in response to the Tribunal's Procedural Orders on behalf of the CLAIMANT, Counsel respectfully requests this Tribunal to declare that:

It should not decide on the challenge of Mr. Prasad as the request was submitted out of time, and in the event the tribunal decides that it should decide on the challenge it should be done with the participation of Mr. Prasad [Issue 1].

In case the arbitral tribunal has authority to decide on the challenge, Mr. Prasad should not be removed from the Arbitral Tribunal as he is impartial and independent [Issue 2].

The CLAIMANT's standard conditions govern the contract [Issue 3].

In the case that RESPONDENT's general conditions are applicable, the CLAIMANT has delivered conforming goods as CLAIMANT is merely obliged to use its best efforts to ensure compliance by its suppliers, and therefore has not breached Article 35 of CISG [Issue 4].



Wimukthi Weragama



Pujanee De Alwis



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Nabeela Iqbal