TWENTY-FIFTH ANNUAL WILLEM C. VIS INTERNATIONAL

COMMERCIAL ARBITRATION MOOT

AL-IRAQIA UNIVERSITY – COLLEGE OF LAW AND POLITICAL SCIENCE

MEMORANDUM for CLAIMANT

On Behalf of:	Against of:
DELICATECY Whole Foods Sp.	COMESTIBLE Finos Ltd.
Equatoriana	Mediterrano
CLAIMANT	**RESPONDENT**

COUNSEL

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TERMS & ABBREVIATIONS

Art. / Arts.	Article / Articles
ARR	UNCITRAL Arbitration Rules
CISG	United Nations Convention On Contracts For The International Sale Of Goods
COC	Code Of Conduct
ed.	For Example
ExC.	Claimant Exhibit
ExR.	Respondent Exhibit
ICC	International Chamber Of Commerce
Id	Previous Authority
MAL	UNCITRAL Model Law
NOA	Notice Of Arbitration
NOC	Notice Of Challenge
NY	New York Convention
P.	Page
Pa.	Paragraph
PCA	Secretary General Of Permanent Court Of Arbitration At The Hague
PO1.	Procedure Order Number 1
PO2.	Procedure Order Number 2
R.	Record
V.	Versus

TABLE OF AUTHORITIES

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CISG Advisory Council Opinion No. 7	Available in: https://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html **Cited as: *ACO No.7*** Found in: Pa.104
CISG Advisory Council Opinion No. 13	Available in: http://www.cisg.law.pace.edu/cisg/CISG-AC-op13.html **Cited as: *ACO No.13*** Found in: Pa.70, 71

International Chocolate & Cocoa Industry Quality Requirement	Available in: http://www.cocoaquality.eu/data/Cocoa%20Beans%20Industry%20Quality%20Requirements%20Apr%202016_En.pdf **Cited as:** ***cocoa requirements*** Found in: Pa.98
E. Allan Farnsworth	formation of Contract under the united nations Convention on contracts for the International sal of goods, Matthew Bender (1984), Ch.3, P.3-1 t 3-18 **Cited as:** ***E. Allan*** Found in: Pa.66
Denis Tallon	Tallon, in Bianca - Bonell Commentary on the International Sales Law: Article 79 Available in: <http://www.cisg.law.pace.edu/cisg/biblio/tallorbb79.html> **Cited as:** ***Denis Tallon*** Found in: Pa.106, 109

Fouchard	Fouchard, Gaillard and Goldman on International Commercial Arbitration **Cited as: *Fouchard*** Found in: Pa.4
Fritz Enderlein	United Nations Convention on Contracts for the International Sales of Goods Maskow, Dietrich Oceana Publica tions Reproduced with permission of Oceana Publications 1992 Available in: <http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html> **Cited as: *Fritz Enderlein*** Found in: Pa.101
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John O. Honnold	Uniform Law for international sales under the 1980 Unit Nation Convention Fourth edition Hard book **Cited as: *John O. Honnold*** Found in: Pa.101, 110

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Kaufmann Kohler, Rigozzi	KAUFMANN-KOHLER Gabrielle, RIGOZZI Antonio International Arbitration: Law and Practice in Switzerland. **Cited as: *Kaufmann Kohler, Rigozzi*** Found in: Pa. 3
Lew, Mistelis, Kröll	Comparative International Commercial Arbitration Available in: Kluwer.com **Cited as: *Lew, Mistelis, Kröll*** Found in: Pa.15, 18, 27, 28, 36, 55

Magnus, in: Honsell	Available in: http://www.cisg.law.pace.edu/cases/990324g1.html **Cited as:** ***Magnus, in: Honsell*** Found in: Pa. 112, 113
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Redfern&Hunter	Redfern and hunter on International Arbitration (Six Edition) **Cited as: *Redfern&Hunter A*** Found in: Pa.34, 36, 37
Redfern&Hunter	Redfern and hunter on International Arbitration (Fifth Edition) **Cited as: *Redfern&Hunter B*** *Found in: Pa 18*
Schwartz and Konrad	The Vienna Rules: A Commentary On International Arbitration in Austria **Cited as: *Schwartz and Konrad*** *Found in: Pa. 61*

SCHWENZER	Schlechtriem & Schwenzer commentary On the united nations convention on the International sale of goods (cisg) **Cited as: *SCHWENZER*** *Found in: Pa.61, 66, 79, 89, 93, 91, 97, 98, 101, 112*
Neumayer/Ming	Convention de Vienne sur les contrats de vente internati o- nale de marchandises, Commentaire, CEDIDAC, La u- sanne 1993 **Cited as: Neumayer/Ming** *Found in: Pa. 112*
Sono	Kazuaki Sono. Formation of international Contracts under the Vienna Convention Oceana (1986) ch.4 111-131 Available in: http://www.cisg.law.pace.edu/cisg/biblio/sono2.html **Cited as: *Sono*** Found in: Pa.75

Von Goder	Third party funding in international commercial arbitration (2016) **Cited as: *Von Goder*** Found in: Pa.42
Waincymer	Procedure and Evidence in international Arbitration (2012) **Cited as: *Waincymer*** Found in: Pa. 36

CASES AND AWARDS

Cited as: Frozen bacon

Italy (claimant) v. Germany (respondent)
No.19U 97/91
TRIBUNAL. OLG HUMM
DATE. 22 September 1992
Available in:
http://cisgw3.law.pace.edu/cases/920922g1.html
Found in: Pa.73

Cited as: Aluminum hydrate

Germany (respondent) v. farce (claimant)
No. J 96-11.984
TRIBUNAL. court de cassation (supreme Court)
DATE. 16 July 1998
Available in:
http://cisgw3.law.pace.edu/cases/980716f1.html
Found in: Pa.80

Cited as: RODER ZELT	Australia (respondent) v. Germany (Claimant) No. 275/95 TRIBUNAL. federal court, south Australian district, Adelaide DATE. 28 April 1995 Available in: http://cisgw3.law.pace.edu/cases/950428a2.html Found in: Pa.71
Cited as: Case C	Court of appeal Cairo 25 November 1998 Case No.42 Disclosure case. ICSID 21 December 2012 Case No.AR/09/1 Found in: Pa. 55
Cited as: Emmott	Emmott v. Michael Wilson & Partners Ltd EWCA Civ 184, 2008 Australia (UK court of Appeals, Civil Division) Sole arbitrator case. 27 November 1975 IV YBCA Found in: Pa. 24

Cited as: Oberlandesgericht Hamburg 261	Germany, 28 February 1997, CISG-online 261 available: <http://cisgw3.law.pace.edu/cases/970228g1.html> Found in: Pa. 107, 108
Cited as: Hamburg Chamber of Commerce 766	Hamburg Chamber of Commerce, partial award of 21 March 1996, RIW, 1996, at 766 et seq., available in: <http://cisgw3.law.pace.edu/cases/960321g1.html> Found in: Pa. 10

Cited as: ICC Case

DATE OF DECISION: 19950000 (1995)

JURISDICTION: Arbitration; ICC

TRIBUNAL: Court of Arbitration of the International Chamber of Commerce

JUDGE(S): Unavailable

CASE NUMBER/DOCKET NUMBER: 8128 of 1995

CASE NAME: Case report does not identify parties to proceedings

CASE HISTORY: Unavailable

SELLER'S COUNTRY: Austria (respondent)

BUYER'S COUNTRY: Switzerland (claimant)

GOODS INVOLVED: Chemical fertilizer

Available in:
http://cisgw3.law.pace.edu/cases/958128i1.html

Found in: Pa. 108

Law And Rules

CISG	The United Nations Convention on Contracts for the International Sale of Goods (**CISG**; the Vienna Convention) is a treaty that is a uniform international sales law.
ICC	Arbitration Rules of the International Chamber of Commerce (ICC) of 1998
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Arbitration Convention) of 10 June 1958
UNIDROIT	UNIDROIT International Institute for the Unification of Private Law: UNIDROIT Principles of International Commercial Contracts 2010

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STATEMENT OF THE FACT

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

2. CLAIMANT is a manufacturer of fine bakery products registered in Equatoriana. It is a social enterprise and committed to produce sustainably and ethically as it is a member of Global Compact.

3. RESPONDENT is a gourmet supermarket chain in Mediterraneo.

4. On **March 2014**, Parties met each other at the yearly Danubian Food Fair, Cucina. In their meeting, they discussed the possibility of supplying RESPONDENT with products from CLAIMANT.

5. On **10 March 2014**, Attached with an Email from RESPONDENT, CLAIMANT received an invitation to tender for a contract to supply RESPONDENT with chocolate cake.

6. On **27 March 2014**, after making fundamental changes to the tender produced by RESPONDENT, CLAIMANT send its own Sales-Offer which contains all the details of subject matter of the contract and the price of the goods. Between the fundamental changes of the tender was the change on the General Conditions of sale. CLAIMANT insists in its offer that its General Conditions of Sale are forming part of the offer and shall prevail over any other documents with respect to the sale contract.

7. On **7 April 2014**, RESPONDENT, explicitly, declared his acceptance to the whole offer without any objection to the changes made by CLAIMANT including the change to the General Conditions of Sale applicable to the contract.

8. On **1 May 2014**, CLAIMANT made its first delivery, and then keep on to daily performance of its obligation of the contract all over the years 2014, 2015 and 2016, without any problem of delay or grumble.

9. On **27 January 2017**, RESPONDENT, surprisingly, breached the contract by refusing the delivery and refraining the payment of the delivered goods. RESPONDENT based this breach of contract to its doubt on the adherence of CLAIMANTs suppliers to Global Compact principles. More than that, RESPONDENT threatened to terminate the contract.

10. On **10 February 2017**, despite its compliance with its contractual obligations to the letter, CLAIMANT declared its willing to take back the not yet sold chocolate cakes and suggested the discussion with RESPONDENT a financial contribution the possible losses, but RESPONDENT rejected such an offer though it had already sold all the goods delivered.

11. On **12 February 2017**, RESPONDENT terminated the contract on the basis of its General Conditions, which he claims as part of the contract, contrary to what the parties have agreed upon.

12. On **30 June 2017**, CLAIMANT initiated arbitration after the flat refusal of RESPONDENT to any amicable solution. The kind of the arbitration is Ad-Hoc, and the tribunal consists of three members as the parties agreed upon. CLAIMANT nominated Mr. Rodrigo Prasad as its nominated arbitrator, after he produced his declaration of impartiality and independence and availability on 26 June 2017.

13. On **14 September 2017**, in an attempt to delay and disrupt the arbitration procedures, RESPONDENT produced notice of challenge of Mr. Prasad, based its claims on unreasonable facts which cannot lead to a justifiable doubt.

ISSUES

ISSUE 1- THE ARBITRAL TRIBUNAL SHOULD NOT DECIDE ON THE CHALLENGE OF Mr. PRASAD.

14. The RESPONDENT's challenge is legally out of time (I). The Arbitral Tribunal does not have the authority to decide on the challenge of Mr. Prasad under the applicable rules (II).

I- RESPONDENT's Challenge Of Mr. Prasad Is Out Of Time

15. RESPONDENT has no right to challenge Mr. Prasad, it missed the deadline to challenge members of the tribunal under the ARR [*ARR. Art.13.4*] The parties chose the ARR. to settle any dispute that may arise between them [*R.12 clause.20 ExC.2*], and they chose Vindobona, Danubia, as the seat of arbitration [*Id*] which adopted the MAL on international commercial arbitration with the 2006 amendments [*PO.1* R.49 *Pa.4*]. Both the ARR. and the MAL. require a party that intends to challenge an arbitrator to send notice of its challenge within fifteen days after circumstances giving rise to the challenge became known to that party [*ARR. Art. 13.4; MAL. Art. 13.2; Born A P.*1939]. Parties must exercise their right to challenge within the set time limit, otherwise they are considered to have waived their objections [*Lew, Mistelis, kröll P.268 Pa11-36; P.308 Pa. 13-21*].

16. In this case, the RESPONDENT knew about the contact between Mr. Prasad and CLAIMANT's funder for this arbitration Findfunds LP, including his nomination for two previous arbitrations and his view on the question of

conformity of goods, from Mr. Fasttrack's comment of 4 May 2017 in its notice of challenge (NOC) [*R.38 NOC.Pa.3*] which became known to RESPONDENT on 27 August 2017 [*R.51 PO2. Q.11*] before his request from the arbitral tribunal to order CLAIMANT to provide the name of its funder in RESPONDENT's Email on 29 August 2017 [*R.33*]. RESPONDENT sent its NOC in 14 September 2017 after the expiration of the deadline on 11 September 2017 making its challenge inadmissible [*R.51 PO2. Q.11*]

II- The Arbitral Tribunal Does Not Have The Authority To Decide On The Challenge Of Mr. Prasad Under The Applicable Rules.

17. The parties, did not agree to give the tribunal the authority to decide on the challenges to its members (A). In addition, under the Applicable rules RESPONDENT's challenge should be decided by the appointing authority or the court of the seat of arbitration if no appointing authority available (B). Even if the tribunal has the authority to decide the challenge Mr. Prasad should participate in taking the decision and the tribunal lacks authority to replace Mr. Prasad (C).

A- The Parties Did Not Grant The Arbitral Tribunal The Authority To Decide Challenges To Its Members

18. Generally, the source of Arbitral Tribunal's jurisdiction is the parties' agreement [*Redfern&HunterB P.18 Pa.1.58; Fouchard P.29 Pa.44*]. Accordingly, all disputes are to be resolved within the limits of the parties' agreement [*Lew, Mistelis, Krölll P.4 Pa.1.10*]. At the present case, the agreement between parties on dispute resolution [*R.12 clause.20 ExC.2*],

shows no explicit or implicit intention of the parties to give the tribunal the authority to decide on challenges to its members, but to the procedure in the chosen law which is ARR.

B- Under The Applicable Rules RESPONDENT's Challenge Should Be Decided By The Appointing Authority Or The Court Of The Seat Of Arbitration If No Appointing Authority Available

19. RESPONDENT claims that the parties excluded the application of Art. 13.4 of ARR as it breaches the confidentiality terms in the contract between the parties [*R.39 NOC Pa.8*].
20. The application of Ar. 13.4 ARR cannot lead to breach the confidentiality between the parties, but on the contrary, the parties are committed to settle the dispute with ARR's provisions [*ARR Art.1.1*].
21. Art. 13.4 of ARR require parties to pursue challenges to arbitrators before the appointing authority within 30 days of the NOC if they fail to reach an agreement on the challenge [*ARR Art.13.4*].
22. Parties need to designate an appointing authority to fill the gap caused by lack of one in ad hoc proceedings and take on responsibility not left to the tribunal such as resolving challenges to arbitrators [*Born B Pa.56*]. In ad hoc proceedings governed by ARR Art.6.2 allow the Secretary General of permanent court of arbitration at The Hague (PCA) to designate the appointing authority [*ARR. Art.6.2; Born B Pa.17*]. In addition, Art.13.3 of MAL direct challenging parties to apply the court of the seat of arbitration to decide challenges to members of the arbitral tribunal [*MAL Art.13.3*].

23. In this case, the Parties did not designate an appointing authority [*R.12 clause20 ExC.2*], them the Secretary General of PCA shall appoint an appointing authority to decide the challenge [*ARR Art.13.4*]. If the tribunal exclude application Art.13.4 of ARR, then MAL is applicable because it is applicable in Danubia [*R.49 PO1. Pa.4*], which is the seat of arbitration [*R.12 clause 20 ExC.2*]. As a conclusion, either the appointing authority, or the court of the seat of arbitration if no appointing authority available, shall make the final decision on RESPONDENT's challenge, since the parties chosen ARR to be applicable [*R.12 clause 20 ExC.20*], then the parties must apply the provisions in this rules [*ARR Art.1.1*].
24. The duty of confidentiality is separate from the concept of the privacy of the proceedings. [*Emmott*]. Privacy refers to keeping the process closed by precluding the public from the hearings. [*Noussia, Ps. 24,25*]. Confidentiality, on the other hand, refers to the secrecy of information and is not automatically applied to every aspect of arbitration [*Id., Ps. 24,26*]. Many authorities have found confidentiality to apply most strongly to the documents and information used in the arbitral proceedings themselves. Under Emmott, the duty of confidentiality applies either to information which is inherently confidential in the documents produced or under an implied agreement between the parties that documents disclosed or generated for the arbitration can only be used in those proceedings. Commentators have also stated the duty of confidentiality applies with "varying degrees...to different aspects of the arbitral process" [*Born C, P. 2283*]

C- Even If The Arbitral Tribunal Has The Authority To Decide On The Challenge, Mr. Prasad Should Be A Member Of The Tribunal

25. RESPONDENT asked from the two other members of the tribunal to take a decision in the challenge [*R.37 NOC*]. Nevertheless, the arbitral tribunal cannot take a decision in the challenge without the participation of Mr. Prasad (1). Even if the other two members can decide the challenge they cannot replace Mr. Prasad (2).

1- Mr. Prasad should participate in taking the decision.

26. When parties adopt an ad hoc arbitration clause selecting ARR to be applicable The ARR clause of contract determines the number of arbitrators shall be one or three [*AAR P.29*]. Moreover, if the parties have agreed on a number of arbitrators, the number of arbitrators that have been selected represent the arbitral tribunal, [*ARR Art.7*]. And the parties are free to determine the number of arbitrators [*MAL Art.10.*1]. Consequently, the decision on the challenge shall not be taken by two arbitrators

27. Under the Competence- Competence doctrine this doctrine show that the arbitrator is empowered to rule in his own jurisdiction [*Lew, Mistel, kröll P.333 Pas.14-16,14-18*], also according to [*sole arbitrators case*] the arbitral tribunal may take the decision in its need.

28. In this case, the parties adopted an ad hoc arbitration and chosen the ARR to be applicable [*R.12 clause 20 ExC.2*] then, the decision has to be made by the arbitrators [*R.12 clause 20 ExC.2; ARR. Art.7.1*]. and the third one is definitely Prasad who can take a decision in his own jurisdiction under competence-

competence doctrine [*Lew, Mistelis, Kröll, P.333 Pas. 14-16,14-18; sloe arbitrator case*].

29. In conclusion, Mr. Prasad Should participate in taking decision of the challenge as an arbitrator in the tribunal.

2- The tribunal shall not replace Mr. Prasad

30. Under ARR Arbitral tribunals are not empowered to appoint, select and replace arbitrators. On the contrary, ARR empowered the appointing authority to appoint arbitrators after taking the challenge's decision [*ARR Art.6*]. Generally, the appointing authority has many specializations, to select arbitrator(s), replace them and to decide challenge to the parties [*Born B Pa.56*].

31. In the present dispute, the parties adopted ARR to govern the procedure of arbitration [*R.12 clause 20 ExC.2*]. Under ARR the tribunal does not have the authority to replace Mr. Prasad. But, the appointing authority is the one how should decide [*ARR. Art.6; Born B Pa56*].

32. **Conclusion:** RESPONDENT'S Challenge is inadmissible because RESPONDENT had sent it's NOC after the expiration of the time period [*ARR Art.13.4; MAL 13.3*]. In addition, the arbitral tribunal does not have the authority to decide the challenge under the applicable rules. Contrary to that, the appointing authority shall decide the challenge. Even if the tribunal has the authority to decide the challenge, it should take the decision with the participation of Mr. Prasad.

ISSUE 2- RESPONDENT FAILS TO SHOW ANY JUSTIFIABLE DOUBTS ON MR. PRASAD TO BE REMOVED.

33. RESPONDENT's claims that Mr. Prasad should be removed because of lack of his impartiality and independence [*R.38 NOC. Pa.1*]. RESPONDENT suggests that the tribunal should take into considering the general standards of the IBA on conflict of interest in this arbitration [*R.39 NOC Pa .9*]. The IBA Guidelines do not apply in this arbitration (I). And even if The IBA Guidelines are applicable there is no justifiable doubts concerning Mr. Prasad's impartiality and independence (II).

I- The IBA Guidelines On Conflict Of Interest Are Not Applicable

34. The parties did not agree on IBA Guidelines in contract [*R.12 clause 20 ExC.*2]. The IBA Guidelines should not be applicable because they are not legal provision, and don't override the rules chosen by the parties [*IBA P.3 Pa.6*]. The IBA Guidelines are merely soft law [*Kaufman Kohler, Rigozzi P.67 and 27 Pa.1.77-1.78, P.318 Pa.6.68; Redfern&HunterA P.66 Pa.1.235*], and since the tribunal is only bound by the mandatory laws chosen by the parties, they have no place in this arbitration [*Redfern&Hunter A Pa.26-71*]. Even the IBA Guidelines themselves state that the parties need to expressly agree to be bound by the IBA 's application [*IBA Art.1(1), (2); Born A P.2212; Haugender, Netal, in handbook Vienna Rules Art.29 P.172 Pa.5*].

35. In the case at hand, the parties did not agree on the application of the IBA Guidelines in this arbitration therefore making them inappropriate for use by this tribunal [*R.12 clause 20 ExC.2*].

36. Contrary, to RESPONDENT's claims, IBA Guidelines cannot be accepted in this proceedings. First, the IBA Guidelines cannot bind tribunal without the parties explicit consistent [*Waincymer P.757; Lew, Mistelis, Kröll Pa.22-29;*

Moses P.2]. Second, it is well established that the arbitration law of the forum of the arbitration is the law which applies to arbitration [*Redfern&Hunter A Pa.3-53; Born A P.1531*].

37. This arbitral tribunal should use the IBA Guidelines by virtue of an indirect choice on the part of the parties. However, this argument is inadmissible because this seat of arbitration only implies a choice of the arbitration law, the lex arbitri, not the national code of procedure [*Born A P.159; Redfern&HunterA Pas.3.51, 3.62*]. Hence, the parties' choice of Danubia only extent MAL not the Danubian code of procedure, that will sustain the IBA to be not applicable.

II- Even If The IBA Guidelines Are Applicable There Is No Justifiable Doubts Concerning Mr. Prasad's Impartiality And Independence

38. RESPONDENT alleges that there are justifiable and serious doubts concerning Mr. Prasad's impartiality and independence [*R.38 NOC Pa.1*].

39. It is a general rule that, as a party making the challenge, the party bears the burden of prove its claims [*ARR. Art.27; Redfern& Hunter. P.387 Pa.6.92; Van Den Berg P.*62]. Since, the RESPONDENT did not provide credible evidence on Mr. Prasad RESPONDENT's request is unjustified [*case B; Needham Ps. 123-124; Tirado*, *Stein, Singh P.167*]. Moreover, the objecting party has to prove actual lack of impartiality and independence [*Born A P.1778*]. Contrary to RESPONDENT's claims, Mr. Prasad is impartial (A), and he is independent (B)

A- Mr. Prasad Is Impartial:

40. The RESPONDENT claims that CLAIMANT failed to disclose its funding for this arbitration and invokes under general standards 7(a) IBA Guidelines [*R.39 NOC Pa.9*]. But the failure to disclose the information cannot be used to show that Mr. Prasad lack's impartiality (1). RESPONDENT also relies on a previous legal opinion by Mr. Prasad in his publication in an article, but this opinion cannot be considered a sufficient evidence to the arbitrator's lacks impartiality (2).

1- Claimant's failure to disclose the information cannot be used to show that Mr. Prasad lack's impartiality.

41. General standards 7(a) of IBA Guidelines requires a party to disclose any relationship between the arbitrators they may have with the relevant party [*IBA P.15 Pa.7(a)*] any of these relationships did not cover the previous appointment of the arbitrator by holding company of the entity which is funding the arbitration which is the relationship RESPONDENT relies [*R.50 PO2. Q.2*]. In addition, this relationship did not include under general standards 7(a), as a relationship between arbitrator and a party [*IBA P.15 Pa.7(a)*].

42. Parties to arbitration are not required to disclose their funding agreement [*Von Goler P.126*].

43. At the present dispute, the relationship between Mr. Prasad and CLAIMANT's third party funder (Funding12 Ltd) is not included in the general standards 7(a) [*IBA P.15 Pa. 7(a)*]. This relationship is outside of what the IBA Guidelines were intended to capture [*Id*] is also an indirect relationship at best, because the two arbitral proceedings which Mr. Prasad

participated in, were funded by a separate subsidiary of Findfunds LP [*R.50 PO2. Q.3*]

44. In addition**,** Mr. Prasad disclose his relationship with Findfunds LP instantly after he became aware of the relationship between CLAIMANT and the funder [*R.36*]. Then even if we assume that there is a duty to disclose, this duty is CLAIMANT's duty not Mr. Prasad's [*IBA P.15 Pa.7(a)*]
45. In conclusion, and under these circumstances, the arbitral tribunal should decline RESPONDENT's claims under [*disclosure case*]

2- The previous legal opinion in his publication cannot be considered as a sufficient evidence to the arbitrator's lack of impartiality

46. The IBA Guidelines includes three stages, which are the red list, orange list, and the green list. Each one of these list has a kind of doubts and articulate how to deal with them. The Red List are non-exhaustive, and detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence [*IBA P.17*].
47. The Orange List is a non-exhaustive list, of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence [*IBA P.18*].
48. The Green List is a non-exhaustive list, of specific situations where no appearance, and no actual conflict of interest exists from an objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List [*IBA P.19*].
49. The doubts about Mr. Prasad's opinion included in the Green List [*IBA Art.4.1*], and the Green List identifies eight circumstances, where no

disclosure is required and where no grounds for disqualification exist, on the basis that there is no objective basis for justifiable doubts regarding an arbitrator's independence or impartiality in these circumstances [*Born A P. 1850*]. Therefore, the circumstances include the publication of legal opinion in an article and other circumstances.

50. In the present case, Mr. Prasad expressed an opinion in an article at Vindobona Journal in 2016 [*R.40 ExR.4*]. But, this article has no relationship with this dispute. Moreover, the article was available in Mr. Prasad's website, also in Vindobona Journal [*R.51 PO2. Q.*14]. Consequently, RESPONDENT had could not have been unaware about this opinion, and it is its responsibility to know about it, and CLAIMANT is out of any responsibility that the RESPONDENT may alleges that it had to disclose this opinion. Moreover, the RESPONDENT agreed on Mr. Prasad after the article was published. Therefore, according to [*IBA Art.4.1*], the tribunal cannot remove Mr. Prasad, because he is impartial, and he has made his full commitments or disclosure.

B- Mr. Prasad Is Independent

51. RESPONDENT claims that one of Mr. Prasad partner is acting for a client in arbitration which funded by Findfunds LP, and that raises justifiable doubt which requires do replacement for Mr. Prasad according to Pa.2.3.6 Of IBA [*R.39 NOC Pa.11*]. Also, Mr. Prasad had been appointed two times by Mr. Fasttrack's law firm, and twice by Findfunds LP and that raises a justifiable doubt as the arbitrator's lack's independence.

52. On the contrary, the relationship between Mr. Prasad's partner and Findfunds LP does not justify the doubts on Mr. Prasad independence (1). Moreover, the

previous appointment of Mr. Prasad by Mr. Fasttrack and Findfunds LP does not justify doubts on Mr. Prasad independence (2).

1- The relationship between Mr. Prasad's partner and Findfunds LP does not justify the doubts on Mr. Prasad independence

53. Art. 2.3.6 present a very different situation because under this Art.2.3.6 only the significant commercial relationship is determined to be a justifiable double [*IBA Art.2.3.6*].

54. This kind of relationship is not even covered by the Orange list, the closest connection between the list and this relationship is what indicates in Art. 3.3.4, which states that, if the lawyer in the arbitrator's law firm is acting as an arbitrator in another arbitration [*IBA Art.3.3.4*], on this basis, it is not determined as a connection under the Orange list because he is act as a lawyer not an arbitrator, then, it is impossible to be a relationship under the Red list, if it is not according to the Orange one.

55. This relationship does not even require a disclosure if there was not a previous work by the firm for the party [*Lew, Mistelis, Kröll P.267 Pa.11-33*; *case C*]

56. In this case, the relationship between Mr. Prasad and the partner is not a significant commercial relationship and Mr. Prasad has no significant financial interest to consider the doubts sufficient to remove him [*Gomez Acebo, P.114*].

57. As a result, the doubts concerning the arbitrator's independence are not justified under the IBA Guidelines then Mr. Prasad must not be removed.

2- The previous appointment of Mr. Prasad by Mr. Fasttrack and Findfunds LP does not justify the doubts on Mr. Prasad independence

58. The appointment by the lawyer's law firm considered to be a justifiable doubt, if the appointment was for three times or more in the past three years [*IBA Art.3.3.8*]. That means that, of the two appointments by the law firm does not included in the Orange list as a doubt. [*Id*].
59. On the other hand, the previous appointment by the same party who is funding this arbitral proceeding for one time, also, did not mention in the Guidelines, IBA Guidelines articulate that the appointment has to be for two or more times [*IBA Art.3.1.3*].
60. In this dispute, Mr. Prasad was appointed by Mr. Fasttrack's law firm by an advice from him to his colleague only in the second arbitration [*R.51 PO2. Q.9*], and that
61. is against what is articulated in Guidelines. On the other side, there is not any direct relationship between Mr. Prasad and Find funds LP, since, the direct relationship has to give raise to financial, business or professional interest by the arbitrator [*Schwarz and Konrad P.149; Born A P.1869*].
62. Eventually, there is not any sufficient or, justifiable doubts concern Mr. Prasad impartiality and independence.
63. **Conclusion:** The IBA Guidelines on conflict of interest are not applicable because the parties did not agree in the contract on their application. Even if the IBA are applicable there are not any justifiable doubts on Mr. Prasad impartiality and independence under the IBA Guidelines.

ISSUE 3: CLIAMANT'S STANDARD CONDITIONS GOVERN THE CONTRACT

I- CLIMANT Standard Conditions Are Applicable According To CISG Art.18

64. RESPONDENT claims that it's standard conditions are applicable, because it is part of the tender document [R.4, Pa.4], CLAIMANT is the offeror (A) CLAIMANT's standard conditions are part of the contract (B). RESPONDENT had Opportunity to Object CLAIMANT's Terms and Condition (C).

A- CLAIMANT Is The Offeror

65. Mostly, a proposal to be considered as an offer mast meet several conditions. First, it must be addressed to specify persons. Second, to clarify the intention to be bound in the case of acceptance. Third, sufficiently definite by indicating the goods, and finally, to determine the quantity and the price of the goods [*CISG Art.14*].

66. In any event, when a proposal to Indefinite person, there must be a clear indication that is an offer, otherwise, proposal will be considered as an invitation to make an offer [*Honnold P.203 Pa.135*] the intention to be bound provides a criterion to distinguish the offer a simple non-binding proposal [*Belkis Vuras in: formation of contract according to the CISG P.131 Pa.2*] as well as , the integration of the quantity of the goods can be specified by inserting the fundamental elements which can lead to successful conclusion [*SCHWENZER P Pa.3*]. However, the offer must explicitly or implicitly fix, or make a provision to determine the price highlight [*Butler; Honnold; SCHWENZER; E. Allan; A. leete*]

67. In the case at hand, RESPONDENT has sent the invitation to tender, which strike through claims that itis the offer. RESPONDENT did not provide the offer condition which RESPONDENT has to under the applicable law (CISG, UNIDORT) [*R.12 clause19 ExC.2*]. Because the tender is not addressed to a specific person [*R.11 Art.1; R.52 PO2. Q.2*]. Nevertheless, it does not have the intention to be bound in the tender document [*R.8 Pa.4*]. In addition, RESPONDENT has not specified the name of the goods, nor, the description of it [*R.11 Art.2*]. more over RESPONDENT did not determine the purchase price [*R.10 clause 3.1*] under [*CISG Art.14*]. RESPONDENT's document can only be considered as an invitation to tender
68. On the contrary, what CLAIMANT send the offer, CLAIMANT first of all clarify that it sends an offer [*R.15 ExC.3*]. As well as, CLAIMANT has met conditions of offer under CISG, CLAIMANT specified the name of the buyer [*R.16 Pa.1,2*]. Also, CLAIMANT's intention to be bound the price of the cakes [*R.16 Pa.5*], and the type, products name and the description are specified [*R.16 Pa.11*]. Consequently, CLAIMANT offer met all the conditions, then, CLAIMANT is offeror
69. As result, CLAIMANT standard conditions governing the contract, because CLAIMANT is the offeror

B- CLAIMANT's Standard Conditions Are Part Of The Contract

70. Accordance with digest of CISG Art 8.2 which explains the reasonable person's understanding. CISG Advisory Council Opinion No. 13 suggests that the inclusion of the standard terms under CISG is determined pursuant to the rules of formation and interpretation of the contract [*ACO.13 Pa.1*]. In

addition, where the parties have agreed on the inclusion of the standard conditions at the time of the conclusion of their contract, they should be considering as applicable if the other party "had a reasonable opportunity to take notice of the terms" [*ACO.13 Pa.2*]. However, in electronic communications a party considers to have had this reasonable opportunity, if the terms where made available and accessible to that party at the time of conclusion of the contract [*ACO.13 Pa.3.3*]

71. Indicative to the implication of the standard conditions and the conditions themselves have to be obvious to reasonable person in the same circumstances [*ACO.13 Pa.5*]. On this basis, and reference to standard conditions to be considered clear where the standard conditions are readable and understandable by a reasonable person [*ACO.13 Pa.6.1*], and should be available in an understandable language by the other party [*ACO.13 Pa.6.2; RODER ZELT case*]
72. In our case, CLAIMANT has send many sense to clarify that his standard conditions will be apply, starting from the email [*R.15 Pa.4*] who explained or clarify the modifications in the tender, and CLAIMANT has send its standard conditions with this email. Therefore, in CLAIMANT's standard conditions [*R.16 Pa.2*] CLAIMANT has sent the offer which was accepted by RESPONDENT. And CLAIMANT mentioned that his standard conditions is part from the offer in the same page [id] CLAIMANT has put link for his website and RESPONDENT in his email confess that it had download the standard conditions [*R.17 Pa.2*] pursuant to that CLAIMANT standard conditions are applicable.

C- RESPONDENT Had Opportunity To Object CLAIMANT's Terms And Condition

73. In such situation, If any party had sent an offer to another party and it did not modify or reject the offer that means an expressly acceptance [*E. Allen Farnsworth, Joseph look of sky, frozen bacon case*]

74. In the present case, CLAIMANT had send an offer to RESPONDENT [*R.5 Pa.9*], and RESPONDENT accept the offer [*R.17 Pa.1*], and it did not reject or modify the offer CLAIMANT gave a sensible period of time to RESPONDENT to reject the offer or to give any objection. But RESPONDANT accepted the offer by deliver the goods.

75. Even if RESPONDENT allegation was to did not accept modification of the tender. "No contract was formed and buyer may reject the goods" [*HONNOLD P. 23, E. Allen Farnsworth, Joseph lookofsky; Sono P 122 Pa.3; Maria del. P 386*]

76. In addition, to RESPONDENT received the first delivered of the goods from CLAIMANT on 1 May 2014 [*R.5 Pa.6*] and that mean RESPONDENT accept the modification of the tender. according to [*UNIDORT Art.2.1.6*] An exception to the standard rule of [*UNIDORT Art.2.1.6 pa.2*], is to be found in the cases envisaged in [*UNIDORT Art.2.1.6 pa.3*] e. where by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, it offers may indicate assent by performing an act without notice to the offeror". In such cases the acceptance is effective at the moment the act is performed, irrespective of whether or not the offeror is promptly informed thereof. In addition of that, according to the offer in this

case. RESPONDANT accepted the offer impliedly because the resave of goods consider as acceptance, and even if RESPONDENT obligation on that it should not forget that every time CLAIMANT has send the goods he put the standard conditions with the bill [*R.52 PO2. Q.24*]

II- CLAIMANT Standard Conditions Are Applicable According To CISG Art.19

77. RESPONDENT alleged his own standard conditions it is applicable [*R.27 Pa.25*], Since the parties did not agree on the standard conditions for the CLAIMANT in addition that CLAIMANT standard conditions are not applicable

78. Under CISG Article.19(3) the fundamental changes are in a specific aspect which are price, payment, quality and quantity of the goods, and the acceptant with fundamental change consider as a new offer [*CISG Art.19 pa.1; J. clark*].

79. In the case in hand, the modification was fundamental modification because CLAIMANT has changed the time of payment [*R.15 Pa.3*] and put his own standard conditions [*R.16 Pa.2*]. this changes are considered a new offer and needs to be accepted from RESPONDENT according to [*SCHWENZER commentary on the UN convention on the international sale of goods (CISG) p. 348-349 pa.3, JONE O. HONNOLD P.250 Pa.2*] there for according to [*UNIDORT Art.2.1.22*], and under the [*UNIDORT Art.2.1.11 Pa.1*] of this Article provides that such a purported acceptance is as a rule to be considered a rejection of the offer and that it amounts to a counter-offer by the offeree.

80. RESPONDENT accepted this changes [*R.17 Pa.1*], The CLAIMANT changed the standard conditions of the RESPONDENT to its own standard

conditions. Then, The CLAIMANT attached the changes with the invoices [*R.52 PO2. Q.23*], where the arbitral tribunal must rule that the CLAIMANT standard conditions governing the contract are the same as the court ruled in favor of the seller in [Aluminum hydrate case] Where the Court of Appeal ruled that the terms of jurisdiction appearing on the buyer's application forms should not be applied because the delivery orders sent by the seller include the conditions which he has changed.

81. Consequently, arbitral tribunal must rule in favor of the CLAIMANT because the purchase invoices delivered to RESPONDENT included the CLAIMANT standard conditions. Then, CLAIMANT standard conditions must govern the contract.

82. Even RESPONDENT will object on this there will be a two rules for CLAIMAMNT side last shout rule (A) knock out rule (B).

A- CLAIMANT's Standard Conditions Should Applicable Under The Last Shout Rule

83. As well as, the opinion of last shout considers have a situation call (last shout rule) in this situation they consider that the last one have send the offer is the offeror and his standard condition must apply and acceptance from the other party. CLAIMANT is the last one who have send the offer [*R.16*] and his standard condition will be applicable, as so far even if RESPONDENT claim that this rule do not applicable, or CLAIMANT standard condition is not applied. We have another rule

B- CLAIMANT's Standard Conditions Should Applicable Under The Knock Out Rule

84. According to [*SCHWENZER P.350-351; Peter Schlechtriem*]. 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 According to this, in our case we have two different standard condition the first is for RESPONDENT and the second is for CLAIMANT and the dispute was on which of these standard condition is applicable according to Knock out rule the standard conditions similar to the parties (CLAIMANT and RESPONDENT) will apply. the different conditions will be excluded. there will be no dispute on that.

85. **Conclusion:** CILAIMANT's ask the tribunal o apply its standard conditions according to CISG and to reject RESPONDENT's request to apply their standard terms.

ISSUE 4- CLAIMANT PERFORMED HIS OBLIGATIONS UNDER THE CONTRACT AND CISG

86. CLAIMANT delivered goods that were in compliance with contract specifications (I). The goods were conforming under the CISG (II) Finally, even if the goods were non-conforming CLAIMANT is not liable for a failure to perform under Art 79 (III).

I- The Cocoa Cake Were Produced In Accordance With The Contract Description

87. RESPONDENT objected to the specifications of the required goods claiming that it does not comply with contractual specifications agreed upon by the parties [*R.22 ExC.10*].

88. By concluding the Contract, CLAIMANT agreed to deliver Cocoa Cakes matching the Contract specifications as described in his Sales-Offer [*R.16 Exh.C4*]. The Contract specifications only contain detailed physical characteristics such as material, quantity and size. The specific Cocoa Cakes that CLAIMANT delivered undoubtedly conformed to these precise requirements [*R.25 Pa.13*].

II- The Goods Were Conforming Under The Art. 35 CISG

89. The Coca Cake delivered by CLAIMANT complied with the requirements set forth in the Art.35 (1) CISG (A) If the Tribunal found the descriptions of the original contract insufficient to test the conformity of the goods, the Cocoa Cake would also be fit for their particular purpose and ordinary purpose under Article 35 (2) CISG (B).

A- The Coca Cake Delivered By CLAIMANT Complied With The Requirements Set Forth In The Art.35 (1) CISG

90. RESPONDENT argues that the Coca Cake are not in conformity with the descriptions on the Sales-Offer attached to the contract [*R.16 ExC.4*].

91. The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract as Article 35 (1) CISG mentioned **"**The seller must deliver goods which are of the quantity, quality and description

required by the contract and which are contained or packaged in the manner required by the contract”

92. To understand whether the seller has adhered to the text of the article above, we have to interpret and detail the article

93. Discrepancies in quantity. The quantity of goods delivered by the seller must conform with the contractual requirements. However, the existence of discrepancies as permitted in various trade sectors, that are usual in the particular trade concerned, is not to be regarded as constituting a lack of conformity Any discrepancy in quantity, whether more than or less than the agreed quantity, constitutes a lack of conformity for the purposes of Article 35(1) and the buyer must therefore give notice of lack of conformity under Article 39. That also applies if the discrepancy in quantity is already clear from the documents. In that case, too, there is lack of conformity, and not a partial failure to deliver with a partial delay in delivery. In any case, on account of Article 40 (awareness of lack of conformity), the seller will not be able to invoke the buyer's failure to give notice of lack of conformity here. In certain cases, making a differentiation between discrepancies in quantity and quality may be difficult.36 However, the equalization in Article 35 renders this differentiation unnecessary [*SCHWENZER P.572 Pa.8*]

94. Discrepancies in quality. 'Quality' must be understood as meaning as well as the goods' physical condition all factual and legal circumstances concerning the relationship of the goods to their surroundings. for the purposes of determining the conformity of the or value of Article 35(1), it is irrelevant whether those circumstances affect the usability the goods due to the nature

and duration. That question is relevant only whether a breach of contract is fundamental, thereby giving rise to a right when assessing avoid the contract, or when assessing the loss suffered by the buyer for the purposes of calculating damages. Any discrepancy in quality regardless of whether the quality is better or worse than that stipulated in the contract represents a lack of conformity and the buyer must give notice of lack of conformity under Article 39. The agreed origin of the goods also forms part of the quality characteristics. also with respect to quality, the existence of discrepancies as permitted in various trade sectors, that are usual in the particular to be regarded as constituting a lack of conformity [*SCHWENZER P.572-573 Pa.9*]

95. In present case, we cannot notice any non-conformity of goods under with Art.35 CISG or any other specification of the required specifications. CLAIMANT performed all of its contractual obligations in accordance with to the Convention as explained in the commentary to Art.35 CISG, the conformity of the goods means that they conform in terms of quality and number, and we can clearly note that the seller has adhered to all Those conditions provided the best products that correspond to the contract [*R.25 Pa.13*].

96. RESPONDENT was in agreement with the shape, size and quantity of the product when it approved the changes proposed by CLAIMANT [*R.17*], and did not object to any of its characteristics for three years [*R.25 Pa.13*].

B- The Cocoa Cake Would Also Be Fit For Ordinary Purpose And Their Particular Purpose Under Art.35 (2) CISG

97. Contrary to RESPONDENT's allegation that the goods which delivered accordance to the contract no 1257 is not compliance with the parties' agreement. CLAIMANT prove under the applicable law –CISG- that the goods does not lake to any contractual specifications, the parties' choice the CISG convention as applicable law [*R.12 Pa.9*] and according to the convention the parties should committed all the CISG rules [*SCHWENZER P.23 Pa.13*], Art. 35 (2) specified goods specifications which make the good conformity The goods were fit to the ordinary purpose (1) and fit to the particular purposes (2).

1- CLAIMANT delivered goods which are fit for ordinary purpose

98. RESPONDENT allegation that the goods did not compile with his business philosophy contrary to CISG specification. CISG mention that "the goods must be fit for ordinary use" and "the goods must, primarily, be fit for the commercial purposes", "the foot must fit to eat", That is means, first of all, that it must be possible to resell them [*SCHWENZER P.575 Pa.14*]. The possibility of resale depends on increasing degree on compliance with certain manufacturing standards and practices [*SCHWENZER P.576 Pa.14*], The most manufacturing standards taken into account of cocoa industry is chocolate & cocoa industry quality requirement did not include any environment requirement and all specifications is applicable by CLAIMANT in the goods [*cocoa requirements*].

99. CLAIMANT cocoa classify a first-class chocolate cake made out of ingredients from sustainable farming which were under all the requirement [*R.25 Pa13*].

2- Goods were fit to the particular purposes

100. Contrary to CLAIMANT's allegations [*R.22 ExC. 10*], the delivered Cocoa Cakes were fit for the particular purpose made known to CLAIMANT, as it was quite suitable of resale in various Sweets Markets.

101. Under Art. 35 (b) CISG the seller is only responsible for fitness of the goods for a purpose other than the purpose for which they would ordinarily be used, if that purpose has been expressly or impliedly made known to him [*SCHWENZER P.580 Pa.19*]. a particular purpose in the sense of Art 35 (2) (b) CISG requires the seller to be informed [*Case No.2319*], In the resale business, this means that it must be possible to resell them. [*John O. Honnold*] In general, this purpose of the goods will not be influenced by the mere way in which the goods are manufactured or processed. [*Fritz Enderlein*] Thus, in cases not covered by Article 35(1) CISG or Article 35(2)(b) CISG, there will be little chance for the buyer to allege non-conformity of the goods and to hold the seller responsible if ethical standards have not been met [*Fritz Enderlein*].

102. In present Case, the goods that were secured before the CLAIMANT were fully matched for the purposes of their use, or which the CLIAMANT was aware of the purpose of the RESPONDENT's business. As is known, the buyer has a chain of shops to sell sweets [*R.4 Pa.2*], which makes the purpose of buying the product clear to the CLAIMANT is that the RESPONDENT

will sell the product again through the chain of markets of it owns. This makes the RESPONDENT's claim void according to Art 35(2)(b) CISG, not the product that has been connected is in full conformity with the contractual and valid specifications for the purpose of the purchase, and the CLAIMANT made an advertisement for the product in its stores which means it was valid for sale [*R.54 PO2.38*].

III- Even If The Goods Were Non-Conforming CLAIMANT Is Not Liable For A Failure To Perform Under Art 79 CISG

103. Even if the arbitral tribunal assumed that the goods were not in partial conformity with the contract. As RESPONDENT claimed. CLAIMANT does not labile to the non-conformity of goods under Art.79 CISG (A). CLAIMANT did not labile to the failure to perform his obligations was not under his control (B).

A- CLAIMANT Is Not Labile To The Non-Conformity Of Goods Under Art.79 CISG

104. *"In exceptional circumstances, a contracting party may be exempted under Article 79(1) for the acts or omissions of a third person when the contracting party was not able to choose or control the third person"* The exemption under Article 79 would hardly become operative to relieve the seller from the obligation to deliver conforming goods in those cases in which the goods were produced, manufactured, and delivered by the seller or his own

personnel, or in those cases where the buyer is to take delivery and pay without relying on any intermediate agent. But when the failure to deliver conforming goods, pay the price, or undertake any of the obligations arising under the contract result from the activities or omissions of the seller's secondary suppliers and sub-contractors, or by intermediate agents engaged by the buyer to take delivery or pay the price, the question arises whether such failure should be imputed to contracting parties under paragraph (1) or paragraph (2) of Article 79. Although Article 79 (2) applies to both sellers and buyers seeking an excuse on account of a third person's failure to perform, this part of the opinion focuses on the conditions under which a seller could claim an exemption due to failure to perform by a third person [*CISG ACO No.7*].

105. CLAIMANT carried out all its obligations under the contract, as agreed by the parties, CLAIMANT performed all of its contractual obligations, the parties agreed that CLAIMANT would select reputable suppliers - third party - in order to manufacture the goods directly or indirectly [*R.14 ExC.2 Pa.F*], which already made by the CLAIMANT in the selection of reputable suppliers and best in accordance with contractual specifications. Suppliers have provided CLAIMANT with goods conforming to the required specifications for more than three years [*R.18 ExC.6*].

106. While Contract between the parties has been working well for a long time, there are some disagreements arising out of the seller's will and that's why in fact, it is due to the non-compliance of suppliers with the contractual terms between the parties and the seller contracted to provide him with a portion of goods [*R.14 ExC.2 Pa.F*], CLAIMANT did not consider this

inconsistency because, according to article 79, it was caused by a third person - suppliers - who was outside the control of the seller. In any case, the seller cannot anticipate what suppliers are doing or take full control of their work, and this gives it the exemption from liability in case the third party has broken its obligation [*Denis Tallon*].

B- CLAIMANT Is Not Labile To The Failure To Perform His Obligations Was Not Under His Control

107. Several courts and arbitral tribunals have addressed the question whether the seller may be excused due to an impediment allegedly beyond the control of a supplier to whom the seller looks to procure or produce the goods. In a handful of cases, the seller's plea to be excused has been granted, but in the majority of cases it has been held that the requirements of Article 79 have not been satisfied, even when the supplier's failure to deliver conforming goods was totally unforeseeable to the seller. Decisions vary, however, as to the analysis used by the courts to reach their conclusions [*Oberlandesgericht Hamburg 261; Hamburg Chamber of Commerce 766*].

108. Some courts place the analysis of whether the seller qualifies for such an exemption under paragraph (1) of Article 79; [*Oberlandesgericht Hamburg 261*] other tribunals prefer to examine the seller's exoneration under paragraph (2); [*ICC Case*] and still others opt for deciding the issue on the basis of Article 79 in the abstract. [*Chamber of Commerce of the Russian Federation,*

Award 155/1994] Whether the seller's claim of exemption falls under one or the other paragraph is relevant for the purpose of determining where to place the burden of proof. The key issue is whether a supplier, subcontractor or third person to whom the seller looks for performance fits the phrase of Article 79(2) "a third person whom [*the party claiming exemption*] has engaged to perform the whole or part of the contract."

109. The "third persons" identifiable under Article 79(2) is composed by those who are "independently" engaged by the seller to perform all or part of the contract directly to the buyer. It is not easy to ascertain the precise meaning of "... a third person whom (the party claiming exemption) has engaged to perform the whole or part of a contract ...", but the expression seems to point to those third persons who, unlike third-party suppliers or subcontractors for whose performance the seller is fully responsible, are not merely separate and distinct persons or legal entities, but also economically and functionally independent from the seller, outside the seller's organizational structure, sphere of control or responsibility [*Denis Tallon*].

110. If anything, Article 79(2) and its legislative history suggests that the phrase "a third person whom (a party) has engaged to perform the contract" should be given a narrow scope, covering cases such as those in which the seller turns over to a third person the seller's obligation to manufacture the goods according to specifications given by the buyer, or whenever the seller delegates to a third person the seller's obligation to procure the goods and deliver them to the buyer. In either case, the seller can succeed on a claim to be exempted for damages for failure to perform only if the seller can establish

that the third person was himself prevented to perform by an impediment qualifying as an excuse under Article 79(2). [*John O. Honnold* 546-46] This interpretative approach appears to be consistent with a sound allocation of risks arising from nonconformity of the goods.

111. Attributing to the seller the responsibility for the supplier's actions under Article 79(1) appears consistent with a sound policy of placing the risks involved in non-conformity on the party who is in the best position to avoid or minimize those risks. The seller may be exempted from liability in some extreme and exceptional cases, such as when the supplier is the only available source of supply, or when other supplies are unavailable due to unforeseeable and extraordinary events, or in situations in which the defects in the goods are unconnected with the typical procurement risks assumed by the seller.

112. The impediment was not foreseeable. A seller is not obliged to take every possible impediment into account [*Magnus, in: Honsell, Art 79, Pa.15*]. On the contrary, force majeure is only foreseeable if it was apparent at the time of the conclusion of the contract, the certificates certifying sustainable production methods were forged or obtained [*SCHWENZER, in: Schlechtriem/Schwenzer, Art 79, Pa.17; cf. CIETAC, 30 Nov 1997; CIETAC, 2 May 1996; Raw Materials v. Forberich, US Dist Ct (NNDIL); Neumayer/Ming, Art 79, Pa.5*].

113. Unlike the RESPONDENT's claim, CLAIMANT is not responsible for what the supplier has done. In accordance with the contract agreed by the parties, CLAIMANT is required to follow the work of the supplier and to maintain documents certifying the work of the supplier and to be ready when

required [*R.14 ExC.2 Pa.F*], It is only bound to make possible, not impossible, according to the agreement of the parties, that the CLAIMANT is obliged to make sure from the validity of the supplier's work and control and has already [*R.14 ExC.2 Pa.E; R.31 Pa.4 Point.3; R.31 Pa.5*], did so by requesting documents and documents which were forged and here it is impossible for the seller to predict that these documents are forged documents [*R.26 Pa.14*] because they were Issued by government authorities [*R.19 ExC.7*] and thus becomes outside the framework of his responsibility in accordance with Article 79 and the foregoing [*Magnus, in: Honsell, Art 79, Pa.15*].

114. **Conclusion**: Goods which delivered by CLAIMANT does not lake to conformity with contractual specifications and its fit for ordinary purpose and their particular purpose under the CISG and even if it is not compline with contractual specification, tribunal should decide that CLAIMANT is not liable for that because it was outside the control.