

TWENTY-FIFTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

UNIVERSITY OF OTTAWA



Memorandum for Claimant
(pursuant to article 24 UNCITRAL Arbitration Rules, in accordance with Procedural Order 1,
paragraph 3(2))

ON BEHALF OF

AGAINST

Delicatesy Whole Foods Sp

Comestibles Finos Ltd

39 Marie-Antoine Carême Avenue

75 Martha Stewart Drive

Oceanside

Capital City

Equatoriana

Mediterraneo

CLAIMANT

RESPONDENT

Ottawa - Canada



TABLE OF CONTENTS

LIST OF ABBREVIATIONS	iv
INDEX OF AUTHORITIES.....	v
TREATIES AND PRINCIPLES	v
RULES.....	v
ADVISORY OPINIONS AND OFFICIAL REPORTS.....	vi
SCHOLARLY WORKS AND ARTICLES.....	vii
INDEX OF JUDICIAL DECISIONS.....	xiii
INDEX OF ARBITRAL AWARDS	xviii
OTHER MATERIALS.....	xix
PRELIMINARY MATTERS	1
I. OVERVIEW.....	1
II. STATEMENT OF FACTS	1
A. Respondent Invited Delicately to Tender for the Supply of Chocolate Cakes	1
B. Respondent Accepted Delicately’s Offer to Contract for the Supply of Chocolate Cakes and the Parties Performed Under the Contract.....	1
C. Respondent Purportedly Terminated the Contract Following Reports of Government Corruption in Ruritania.....	2
D. The Parties Agreed to <i>Ad Hoc</i> Arbitration.....	2
E. Respondent Consented to Mr. Prasad’s Appointment as an Arbitrator	3
F. Respondent Challenged Mr. Prasad’s Impartiality and Independence	3
G. The Parties’ Current Status.....	3
III. SUMMARY OF ARGUMENT	4
A. The Tribunal Should Not Hear the Challenge to Mr. Prasad; If It Does, Mr. Prasad Should Participate in the Decision.....	4
B. Mr. Prasad Should Remain on the Arbitral Tribunal	4
C. Delicately’s Standard Terms Govern the Contract	4
D. Even if Respondent’s Terms Govern the Contract, Delicately Delivered Conforming Goods Under CISG Art 35	5
IV. APPLICABLE LAW	5
A. The CISG Applies to the Contract and the Arbitration Agreement’s Formation.....	5
i. The CISG Applies to the Contract and the Formation of the Arbitration Agreement Contained Therein	5
ii. The CISG Governs the Arbitration Agreement’s Formation	6
B. Equatorianian Contract Law (“ECL”) Applies to the Contract Where There Is an External Gap in the CISG	6
C. The <i>lex arbitri</i> Is the Danubian Arbitration Law.....	6
D. If Neither Party’s Standard Terms Govern This Dispute, Danubian Contract Law (“DCL”) Applies to the Contract Where There Is an External Gap in the CISG	6
E. The UNCITRAL Rules Apply to These Arbitral Proceedings.....	7
PART 1: THE TRIBUNAL SHOULD NOT HEAR THE CHALLENGE AGAINST MR. PRASAD	7
I. An Appointing Authority Must Hear the Challenge Against Mr. Prasad	7
A. The Parties Chose the Challenge Procedure Under the UNCITRAL Rules.....	7
B. The Parties Did Not Intend to Exclude an Appointing Authority from Hearing the Challenge to Mr. Prasad	8
II. If the Parties Cannot Agree on an Appointing Authority, the Secretary-General of the PCA Must Designate One	9



A. The Tribunal Must Give Effect to the Parties' Agreed Upon Challenge Procedure Under the UNCITRAL Rules	9
B. If the Parties Cannot Agree on an Appointing Authority, the Secretary-General of the PCA Should Name the Appointing Authority to Hear the Challenge Against Mr. Prasad	10
III. If the Parties Opted Out of UNCITRAL Rules Art 13(4), the Full Tribunal Must Hear the Challenge	11
PART 2: MR. PRASAD SHOULD REMAIN ON THE ARBITRAL TRIBUNAL.....	12
I. In Deciding on the Challenge, the Tribunal Should Apply the Reasonable Apprehension of Bias Test	12
II. The Reasonable Apprehension Test and the IBA Guidelines Apply a Similar Standard in Assessing Impartiality and Independence	12
III. There are No Doubts as to Mr. Prasad's Impartiality or Independence Under the IBA Guidelines or a Reasonable Apprehension of Bias Test.....	13
A. Mr. Prasad's Article Does Not Create a Conflict of Interest	13
i. Respondent Is Time-Barred from Challenging Mr. Prasad Based on His Article	13
ii. Even if Respondent Is Not Time-Barred, the Article Does Not Raise Doubts to Mr. Prasad's Impartiality or Independence	14
B. Mr. Prasad's Relationship with a Prasad & Slowfood Partner Does Not Create a Conflict of Interest.....	15
i. Mr. Prasad Does Not Have a Commercially Significant Relationship with the Prasad & Slowfood Partner	15
ii. Mr. Prasad's Connection to a Partner at Prasad & Slowfood Does Not Give Rise to a Reasonable Apprehension of Bias	16
C. Mr. Prasad's Connection to Findfunds LP Does Not Create a Conflict of Interest.....	17
i. Mr. Prasad's Previous Appointments by Findfunds LP's Subsidiary Do Not Raise Justifiable Doubts as to His Impartiality or Independence.....	17
ii. There Is No Direct Economic Interest Between Findfunds LP and the Arbitration	18
D. Multiple Appointments by Fasttrack & Partners Do Not Raise Doubts to Mr. Prasad's Independence or Impartiality	19
E. When the Grounds for Challenge Are Considered Both Separately and Cumulatively, There Are No Doubts to Mr. Prasad's Impartiality or Independence	19
i. Under the UNCITRAL Rules, the Grounds for Mr. Prasad's Challenge Should Be Examined Both Separately and Cumulatively	20
ii. Even When Considered Cumulatively, There Are No Doubts as to Mr. Prasad's Impartiality or Independence	20
PART 3: DELICATESY'S STANDARD TERMS GOVERN THE CONTRACT	20
I. Delicatesy Made an Offer to Respondent.....	21
A. The Tender Documents Were Not an Offer	21
i. Although the Tender Documents Expressed Respondent's Initial Intent to Use Its Own Standard Terms, They Did Not Bind Offerors to Them	21
B. Delicatesy's Offer Was Sufficiently Definite and Indicated Its Intention to Be Bound.....	22
II. Delicatesy Included Its Standard Terms in the Offer	22
A. Delicatesy's Standard Terms Were Not Materially Different Because They Embodied the Parties' Shared Commitment to Sustainable Production.....	22
i. Respondent Knew About Delicatesy's Standard Terms When Delicatesy Made Its Offer	23
ii. Respondent Could Not Have Been Surprised by Delicatesy's Standard Terms	24
B. Delicatesy's Standard Terms Were Available and Retrievable Online	26
C. Respondent Accepted the Offer with Delicatesy's Codes of Conduct	26
III. Respondent Accepted Delicatesy's Offer	27
A. Respondent Accepted Delicatesy's Offer with Delicatesy's Codes of Conduct	27
B. The Parties Performed Under the Contract as Though Delicatesy's Standard Terms Applied	27
IV. In the Alternative, If the Parties Did Not Agree to a Set of Standard Terms for Their Contract, Neither Party's Terms Apply.....	28
PART 4: EVEN IF RESPONDENT'S TERMS GOVERN THE CONTRACT, DELICATESY DELIVERED CONFORMING GOODS UNDER CISG ART 35	29
I. Delicatesy Delivered Cakes that Conformed with Their Contractual Requirements	29



A. The Contract Required Conformity with Delicatesy’s Supplier Code of Conduct and Respondent’s General Business Philosophy 29

B. Delicatesy Merely Had a Best Efforts Obligation to Ensure RPC’s Compliance with Respondent’s General Conditions and Code of Conduct for Suppliers 30

 i. Respondent’s General Conditions and Code of Conduct for Suppliers Only Create a Duty of Best Efforts 30

 ii. Respondent Chose Not to Impose a Strict Obligation on Delicatesy to Ethically Source Its Cocoa . 31

C. Delicatesy Used Its Best Efforts to Ensure RPC’s Compliance with Respondent’s General Conditions and Code of Conduct for Suppliers 32

 i. Delicatesy Complied with Its Duty to Keep Record of All Relevant Documentation 32

 ii. Delicatesy Audited and Inspected RPC 32

 iii. Respondent Accepted Delicatesy’s Supply Chain Management 33

 iv. Delicatesy Followed the UNGC in Its Supply Chain Management 33

II. Delicatesy Delivered Cakes Fit for their Particular Purpose 33

 A. Delicatesy Knew Respondent Wanted to Become a UNGC LEAD Company 33

 B. Delicatesy Supplied Cakes Fit for Their Particular Purpose 34

 C. Alternatively, Respondent Did Not Rely on Delicatesy to Deliver Cakes Fit for Their Particular Purpose 34

REQUEST FOR RELIEF 35



LIST OF ABBREVIATIONS

Art(s)	Article(s)
CISG	United Nations Convention on Contracts for the International Sale of Goods
Contract	Contract No 1257
DAL	Danubian Arbitration Law
DCL	Danubian Contract Law
ECL	Equatorianian Contract Law
Ex	Exhibit
FL	Fasttrack Letter
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration
ILO	International Labor Organization
LL	Langweiler Letter
MAL	UNCITRAL Model Law on International Commercial Arbitration
NoA	Notice of Arbitration
NoC	Notice of Challenge
PCA	The Secretary-General of the Permanent Court of Arbitration
PD	Prasad Declaration
PL	Prasad Letter
PO1	Procedural Order No 1
PO2	Procedural Order No 2
RNoA	Response to Notice of Arbitration
RPC	Ruritania Peoples Cocoa GmbH
UNGC	United Nations Global Compact



INDEX OF AUTHORITIES

TREATIES AND PRINCIPLES

- CISG** *Convention on Contracts for the International Sale of Goods*, Vienna, 1980.
Cited as: CISG
para 20, 23, 24, 25, 27, 59, 88, 89, 91, 92, 94, 96, 97, 99, 101, 104, 110, 112, 115, 116, 120, 125, 127, 130, 134, 137, 141
- IBA Guidelines** International Bar Association, *Guidelines on Conflicts of Interest in International Arbitration* (London: International Bar Association, 2014).
Cited as: IBA Guidelines
para 19, 53, 54, 60, 65, 66, 74, 77, 80, 85
- MAL** *UNCITRAL Model Law on International Commercial Arbitration*, 1985, with amendments adopted in 2006, Vienna, 2008.
Cited as MAL
para 28, 50, 51, 52, 78, 81
- UNGC** *United Nations Global Compact*, 2017.
Cited as
para 2, 6, 8, 9, 22, 102, 104, 106, 108, 118, 123, 125, 129, 130, 131, 132, 134, 136, 138, 139, 140
- UNIDROIT** *UNIDROIT Principles of International Commercial Contracts* (Rome: International Institute for the Unification of Private Law, 2010).
Cited as UNIDROIT Principles
para 26, 29, 105
- RULES**
- PCA Rules** *Rules Concerning the Organization and Internal Working of the International Bureau of the Permanent Court of Arbitration*, 1900.
Cited as: PCA Rules
para 55



UNCITRAL Rules *UNCITRAL Arbitration Rules, 2010, with new article 1, paragraph 4, as adopted in 2013.*
Cited as: UNCITRAL Rules
para 16, 19, 30, 31, 32, 33, 34, 35, 36, 37, 40, 41, 44, 45, 46, 48, 50

ADVISORY OPINIONS AND OFFICIAL REPORTS

CISG Advisory Council CISG-AC Opinion No 13, Inclusion of Standard Terms under the CISG, Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa. Adopted by the CISG Advisory Council following its 17th meeting, in Villanova, Pennsylvania, USA, on 20 January 2013.
Cited as: CISG-AC Op No 13, r[Rule No]/Comment[Comment No]
Rule: 2, 2.6, 3.2, 5.2, 7
Comment: A(1), B(2.2)
para 95, 97, 101, 102, 103, 105, 110

PCA *Permanent Court of Arbitration. PCA 106th Annual Report (2006).*
Cited as: PCA Report
para 44

UNCITRAL *United Nations General Assembly. Report of the Working Group on Arbitration and Conciliation on the Work of Its Forty-Sixth Session, Report No A/CN.9/619 (New York, 2007).*
Cited as: UNCITRAL Report
para 41

UNCTAD *United Nations Conference on Trade and Development. Dispute Settlement, International Commercial Arbitration: 5.5 Law Governing the Merits of the Dispute, Report No: UNCTAD/EDM/Misc 232/Add 40 (New York and Geneva, 2005).*
Cited as: UNCTAD Report



para 28, 29

SCHOLARLY WORKS AND ARTICLES

Author	Source
Bianca , Cesare Massimo/ Bonell , Michael Joachim	Commentary on the International Sales Law, The 1980 Vienna Sales Convention (Giuffrè, 1987) <i>Cited as: Bianca/Bonell</i> <i>para 102</i>
Binder , Peter	International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions, 3 rd ed (Sweet and Maxwell, 2010). <i>Cited as: Binder</i> <i>para 47</i>
Blackaby , Nigel/ Partasides , Constantine/ Redfern , Alan/ Hunter , Martin/ (eds)	International Arbitration, 6th ed (Oxford University Press, 2015). <i>Cited as: Redfern/Hunter</i> <i>para 29, 117</i>
Born , B. Gary	International Commercial Arbitration (Wolters Kluwer, 2009). <i>Cited as: Born</i> <i>para 60, 67</i>
Born , B. Gary	International Arbitration: Law and Practice, 2nd ed (Kluwer Law International, 2015). <i>Cited as: Born II</i> <i>para 78</i>
Dysted , Christian	“Ethical Defects in Contracts under United Nations Convention on Contracts for the International Sale of Goods” (University of



Copenhagen, 2015).

Cited as: Dysted

para 124

**Fontaine, Marcel/
De Ly, Filip**

“Drafting International Contracts: An Analysis of Contract Clauses”
(Transnational Publishers, 2006).

Cited as: Fontaine/De Ly

para 132

**Fouchard, Philippe/
Gaillard, Emmanuel/
Goldman, Berthold/
Gaillard and Savage**
(eds)

Fouchard, Gaillard, Goldman on International Commercial
Arbitration (Kluwer Law International, 1999).

Cited as: Gaillard/Savage

para 38

**Holtzmann, Howard
M./
Neuhaus, Joseph E.**

A Guide to the UNCITRAL Model Law on International
Commercial Arbitration: Legislative History and Commentary
(Kluwer Law International, 1989).

Cited as: Holtzmann/Neuhaus

para 47

Honnold, John O.

Uniform Law for International Sales under the 1980 United Nations
of Convention, 4th ed by Harry M. Flechtner (Kluwer Law
International, 2009).

Cited as: Honnold

para 89, 93, 111, 113

Huber, Peter

“Standard Terms under the CISG” (2009) *Vindobona Journal of
International Commercial Law and Arbitration*, Volume 1.

Cited as: Huber

para 97



- Huber, Peter/
Mullis, Alastair** The CISG: A New Textbook for Students and Practitioners (Sellier European Law Publishers, 2007).
Cited as: author in Huber/Mullis
para 89, 92, 93, 97, 110, 121
- Jones, Doug** “Conflicts of Interest: Intellectual Corruption – The IBA Guidelines and *Telekom Malaysia*”, Presentation at IPBA fifteenth Annual Meeting and Conference (Bali, 3–7 May 2005).
Cited as: Jones
para 53, 54
- Jonkman, Hans** “The Role of the Secretary-General of the Permanent Court of Arbitration Under the UNCITRAL Arbitration Rules” (1995) *Leiden Journal of International Law*, Volume 8, Issue 1.
Cited as: Jonkman
para 45
- Pavlović, Marina/
Daimsis, Anthony** “Chapter 4: Arbitration” in *Dispute Resolution: Readings and Case Studies*, 4th ed, by Kleefeld, John C. et al (eds) (Emond, 2016).
Cited as: Pavlović/Daimsis
para 63
- Kröll, Stefan Michael/
Mistelis, Loukas A.** “The Evolving Role of an Appointing Authority” in *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International, 2011).
Cited as: author in Kröll/Mistelis
para 38
- Kröll, Stefan/
Mistelis, Loukas/
Viscasillas, Pilar Perales** UN Convention on Contracts for the International Sale of Goods (CISG) (C H Beck Ohg, 2011).
Cited as: author in Kröll/Mistelis/Viscasillas
para 26, 99, 140, 141



- Lautenschlager, Felix** “Current Problems Regarding the Interpretation of Statements and Party Conduct under the CISG – The Reasonable Third Person, Language Problems and Standard Terms and Conditions” (2007) *Vindobona Journal of International Commercial Law and Arbitration*, Volume 11, Issue 2.
Cited as: Lautenschlager
para 102, 110
- Leisinger, Benjamin** Fundamental Breach Considering Non-Conformity of the Goods (Sellier, 2007).
Cited as: Leisinger
para 121
- Loizou, Soterios** “CISG: The Battle of the Forms” (2017) *Pace University, Elisabeth Haub School of Law, Institute of International Commercial Law (IICL) – JAMS Global Training Series*.
Cited as: Loizou
para 97
- Luttrell, Sam** Bias Challenges in International Arbitration: The Need for a Real Danger Test (Kluwer Law International, 2009).
Cited as: Luttrell
para 54, 58, 71, 81
- Nieuwveld, Lisa Bench/
Shannon Sahani,
Victoria** Third-Party Funding in International Arbitration, 2nd ed (Kluwer Law International, 2017).
Cited as: Nieuwveld/Sahani
para 75
- Osmanoglu, Burcu** “Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest” (2015) *Journal of International Arbitration*, Volume 32, Issue 3.
Cited as: Osmanoglu
para 75



- Paulsson, Jan/** ICCA International Handbook on Commercial Arbitration (Kluwer
Bosman, Lise Law International, 2017).
(eds) *Cited as: Paulsson/Bosman*
para 47
- Poudret, Jean-François/** Comparative Law of International Arbitration
Besson, Sébastien (Sweet & Maxwell, 2007).
Cited as: Poudret/Besson
para 34
- Roth, Marianne** “The Revision of the UNCITRAL Arbitration Rules” (2010)
Yearbook on International Arbitration, Volume I.
Cited as: Roth
para 41
- Rovine, Arthur** Contemporary Issues in International Arbitration and Mediation
(The Fordham Papers, 2008).
Cited as: Rovine
para 58
- Savare, Matthew** “Clauses in Conflict: Can an Arbitration Provision Eviscerate a
Choice-of-Law Clause?” (2005) *Seton Law Review*, Volume 35.
Cited as: Savare
para 27
- Schwenzer, Ingeborg** “Conformity of the Goods – Physical Features on the Wane”
(2012), In: State of Play: 14 April 2011, Vienna, Conference in
Honour of Peter Schlechtriem 1933-2007: the 3rd Annual MAA
Schlechtriem CISG Conference. The Hague, pp. 103-112.
Cited as: Schwenzer Conformity
para 128



- Schwenzer, Ingeborg** Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG), 4th ed (Oxford, UK: Oxford University Press, 2016).
Cited as: author in Schwenzer
para 25, 26, 89, 92, 99, 109, 110, 121, 138
- Schwenzer, Ingeborg/
Spagnolo, Lisa** Christina Ramberg, “Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct”, in Ingeborg Schwenzer & Lisa Spagnolo, Boundaries & Intersections, 5th Annual MAA Schlechtriem CISG Conference (Eleven International Publishing, 2015).
Cited as: Ramberg
para 124
- Schlechtriem, Peter** Commentary on the UN Convention on the International Sale of Goods (CISG), 2nd ed, translated by Geoffrey Thomas (Oxford University Press, 1998).
Cited as: Schlechtriem
para 99, 110, 113
- Schlechtriem, Peter/
Butler, Petra** “UN Law on International Sales: The UN Convention on the International Sale of Goods” (Springer-Verlag, 2009).
Cited as: Schlechtriem/Butler
para 88
- Schütze, Rolf A.** Institutional Arbitration Article-by-Article Commentary (Beck Hart Nomos, 2013).
Cited as: author in Schütze
para 38
- Webster, Thomas H.** Handbook of UNCITRAL Arbitration: Commentary, Precedents and Materials for UNCITRAL (Sweet and Maxwell, 2010).
Cited as: Webster
para 38, 43



Zeller, Bruno Damages under the Convention on Contracts for the International Sale of Goods (Oceana Publications Inc., 2005).
Cited as: Zeller CISG Damages
para 132

INDEX OF JUDICIAL DECISIONS

Australia

Sino Dragon Trading Ltd v Noble Resources International Pie Ltd [2016] FCA 1131, Decision of the Federal Court of Australia (13 December 2016).

Cited as: Sino Dragon

para 38

Franklins Pty Ltd v Metcash Trading Ltd [2009] NSW2CA 407, Decision of the New South Wales Court of Appeal (13 April 2011).

Cited as: Metcash

para 33

Austria

Conveyor Band Case, Case No 6 R 200/04f, Decision of the Appellate Court of Linz (23 March 2005).

Cited as: Conveyor Band Case

para 115

Gasoline and Gas Oil Case, Case No 1 Ob 77/01g, Decision of the Supreme Court of Austria (22 October 2002).

Cited as: Gas Oil Case

para 117

Brunei

His Royal Highness Prince Jefri Bolkiah & Ors v State of Brunei Darussalam & Anor [2007] UKPC 62, Decision of the



Cited as: Darussalam

para 51

Canada

Eckervogt v British Columbia, 2004 BCCA 398, Decision of the British Columbia Court of Appeal (20 April 2004).

Cited as: Eckervogt

para 81

Jacobs Securities Inc v Typhoon Capital BV, 2016 ONSC 604, Decision of the Ontario Superior Court (26 January 2016).

Cited as: Jacob Securities

para 51, 52, 54

Szilard v Szasz [1955] SCR 3, Decision of the Supreme Court of Canada (11 January 1954).

Cited as: Szilard v Szasz

para 51, 54

Telesat Canada v Boeing Satellite Systems International, Inc, 2010 ONSC 4023, Decision of the Ontario Superior Court of Justice (2010).

Cited as: Telesat

para 52, 68

Denmark

Jensen v Denmark, EHR Com (7 January 1991).

Cited as: Jensen

para 63

England

R v Gough, United Kingdom, Decision of the House of Lords (26 May 1993).

Cited as: R v Gough

para 51

**Germany**

26 Sch 8/07, Decision of the Higher Regional Court of Frankfurt (4 October 2007).

Cited as: Frankfurt 26 Sch 8/07

para 60

Broadcasters Case, Case No 13 W 48/09, Decision of the Appellate Court of Celle (24 July 2009).

Cited as: Broadcasters Case

para 101

Chemical Products Case, Case No 2 U 2723/99. Decision of the Appellate Court of Dresden (27 December 1999).

Cited as: Chemical Products Case

para 126

Machinery Case, Case No VIII ZR 60/01, Decision of the Supreme Court of Germany (31 October 2001).

Cited as: Machinery Case

para 97, 101, 109, 110

Plants Case, Case No 22 O 38/06, Decision of the District Court of Coburg (12 December 2006).

Cited as: Plants Case

para 115

Textiles Case, Case No 5 O 543/88, Decision of the District Court of Hamburg (26 September 1990).

Cited as: Textiles Case

para 135

Hong Kong

Jung Science Information Technology Ltd v ZTE Corporation, HCCT 14/2008, Decision of the High Court of Hong Kong (22 July 2008).

Cited as: Jung Science



para 51

Suen Wah Ling v China Harbour Engineering Co [2007] BLR 435 HK CA, Decision of the Hong Kong Court of Appeal (16 January 2007).

Cited as: China Harbour

para 51

India

Hansalaya Properties and Anr v Dalmia Cement (Bharat) Ltd, RFA (OS) No 26/1986, Decision of the High Court of Delhi (20 August 2008).

Cited as: Hansalaya

para 36

New Zealand

Muir v Commissioner of Inland Revenue [2007] 3 NZLR 495, Decision of the Court of Appeal of Wellington (7 August 2007).

Cited as: Muir

para 51

South Africa

President of the Republic of South Africa and Others v South African Rugby Football Union and Others [1999] ZACC 11, Decision of the Constitutional Court of South Africa (10 September 1999).

Cited as: South African Rugby Football

para 51, 54

Spain

Case Involving Machine for Repair of Bricks, Decision of the Appellate Court of Navarra (27 December 2007).

Cited as: Case Involving Machine for Repair of Bricks

para 135

Switzerland

Fabrics Case, Case No 3PZ 97/18, Decision of the District Court of St. Gallen (3 July 1997).



Cited as: Fabrics Case

para 135

United States of America

Hanwha Corporation v Cedar Petrochemicals, Inc, 09 Civ 10559 (AKH), Decision of the Federal District Court of New York (18 January 2011).

Cited as: Hanwha Corporation

para 114

Marks 3 Zet-Ernst Marks GmbH v Co KG v Presstek, Inc, Appellee No 05-2794, Decision of the US Court of Appeals [1st Circuit] (9 August 2005).

Cited as: Marks

para 43

MCC-Marble Ceramic Center v Ceramica Nuova D'Agostino, Case No 97-4250, Decision of the Federal Appellate Court [11th Circuit] (29 June 1998).

Cited as: MCC-Marble

para 90, 100

Standard Tankers, etc v Motor Tank Vessel, Akti, 438 F Supp 153, Decision of the District Court of North Carolina (6 September 1977).

Cited as: Standard Tankers

para 69

The Argentine Republic Award v AWG Group Ltd, Case No 15-1057 (BAH), Decision of the District Court of Columbia (30 September 2016).

Cited as: AWG Group Ltd

para 47

Usinor Industeel v Leeco Steel Products, Case No 02 C 0540, Decision of Federal District Court of Illinois (28 March 2002).

Cited as: Usinor Industeel

para 117



INDEX OF ARBITRAL AWARDS

Ad hoc – UNCITRAL

Econet Wireless Ltd v First National Bank of Nigeria (2005) 7 NWLR (Pt 1405), Decision of the Federal High Court of Nigeria (2 June 2005).

Cited as: Econet

para 44

International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation

Arbitral Award 83/2008, International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation (22 December 2008).

Cited as: Arbitral Award 83/2008

para 33

International Chamber of Commerce

Arbitral Award 11880, ICC International Court of Arbitration (2004).

Cited as: ICC 11880

para 36

International Centre for Settlement of Investment Disputes

Opic Karimum Corporation v The Bolivarian Republic of Venezuela, ICSID Case No ARB/10/14 (5 May 2011).

Cited as: Opic

para 74

Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, CA, et al v The Bolivarian Republic of Venezuela, ICSID Case No ARB/10/05, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern (23 December 2010).

Cited as: Tidewater

para 52, 74

London Court of International Arbitration

Parties Not Indicated, LCIA Reference No UN3490, LCIA Court Decision on Challenge to Arbitrator (21 October 2005 and 27 December 2005)



Cited as: LCLA Reference No UN 3490

para 83

Stockholm Chamber of Commerce

Stockholm Chamber of Commerce (SCC) Institute, Arbitration 120/2001, unpublished.

Cited as: SCC Institute Case 120/2001

para 83

OTHER MATERIALS

Author	Source
ICCO	Aimee Russillo & Liseed Consulting for the International Cocoa Organization (ICCO), “Sustainable Cocoa and Certification”, <i>Working Document for Direct Dialogues Workshop</i> , 22 February 2014. <i>Cited as: ICCO Report</i> <i>p. 131</i>
Mars	Mars, “Our Approach to Cocoa”, available at: http://www.mars.com/global/about-us/policies-and-practices/cocoa-policy <i>Cited as: Mars Sustainable Cocoa Initiative</i> <i>para 130</i>
Mars	Mars (2014), “Supplier Code of Conduct”, available at: http://www.mars.com/docs/default-source/Policies-and-Practices/supplier-code-of-conduct/supplier-code-of-conduct-english.pdf?sfvrsn=4 <i>Cited as: Mars Supplier Code</i> <i>para 129, 130</i>
Nestlé	Nestlé, (2013) “The Nestlé Supplier Code”, available at: http://www.nestle.com/asset-library/documents/library/documents/suppliers/supplier-code-english.pdf <i>Cited as: Nestlé Supplier Code</i> <i>para 129</i>



- The Hershey Company** The Hershey Company, “Responsible Sourcing: Supplier Code of Conduct”, available at:
<https://www.thehersheycompany.com/content/dam/corporate-us/documents/partners-and-suppliers/supplier-code-of-conduct.pdf>
Cited as: Hershey Supplier Code
para 129
- UNGC** United Nations Global Compact (2014), “A Guide to Traceability: A Practice Approach to Advance Sustainability in Global Supply Chains”, available at: <https://www.unglobalcompact.org/library/791>
Cited as: UNGC Guide to Traceability
para 131, 136
- UNGC** United Nations Global Compact, “About the UN Global Compact: Frequently Asked Questions”, available:
<https://www.unglobalcompact.org/about/faq>
Cited as: UNGC FAQ
para 136
- UNGC** United National Global Compact (2010), “UN Global Compact Management Model”, available at:
https://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2010_06_17/UN_Global_Compact_Management_Model.pdf
Cited as: UNGC Management Model
para 104



PRELIMINARY MATTERS

I. OVERVIEW

1. Sustainability is not at the core of this dispute. Respondent's unjustified termination of the Contract is due to its fear of negative press, and not its values respecting social corporate responsibility. Much like Respondent's breach of contract is rooted in concerns of its public appearance, Respondent's challenge against Mr. Prasad only addresses appearances of bias — not real bias.

II. STATEMENT OF FACTS

2. Delicatesy Whole Foods Sp (“**Delicatesy**”) and Comestibles Finos Ltd (“**Respondent**”) are “**the Parties**” to this arbitration. Delicatesy manufactures fine bakery goods in Equatoriana. Respondent is the leading gourmet supermarket chain in Mediterraneo. Both Parties are United Nations Global Compact (“UNGC”) members.

A. Respondent Invited Delicatesy to Tender for the Supply of Chocolate Cakes

3. Respondent met Delicatesy at the Cucina Food Fair in 2014 and was impressed by Delicatesy's products and its commitment to sustainable production. The Parties also discussed the reporting obligations and auditing possibilities in Delicatesy's Supplier Code of Conduct.
4. One week later, Respondent sent Delicatesy an Invitation to Tender for the supply of chocolate cakes. Respondent's Tender Documents included Principles C and E in its Code of Conduct for Suppliers. Principle C required Delicatesy and its suppliers to establish environmental, health, and safety processes. Principle E required Delicatesy to select a tier one supplier that adheres to standards comparable to those set out in Respondent's Code of Conduct.
5. Basing itself on the Tender documents, Delicatesy submitted an offer to Respondent, but changed the payment terms and the cake's shape. Delicatesy's offer included its General Conditions of Sale, and provided a link to its Codes of Conduct on its website.

B. Respondent Accepted Delicatesy's Offer to Contract for the Supply of Chocolate Cakes and the Parties Performed Under the Contract

6. Respondent awarded Delicatesy the contract (“**Contract**”) without objecting to the discrepancies between its offer and the Tender Documents. Respondent informed Delicatesy that it was selected because it had the best reputation of all bidders, and was the



only bidder that was a UNGC company. Respondent told Delicatesy that Delicatesy's Codes of Conduct were a 'decisive element' in accepting the offer.

7. Respondent visited Delicatesy's premises in 2014 and was given a presentation about Delicatesy's supply chain monitoring. Respondent decided not to make any further audits or site visits.

C. Respondent Purportedly Terminated the Contract Following Reports of Government Corruption in Ruritania

8. During the relevant period, Delicatesy sourced its cocoa from Ruritania Peoples Cocoa GmbH ("RPC"), a Ruritanian company with a good reputation for sustainable production. In 2014, Delicatesy hired Egimus AG, an auditor specializing in ensuring compliance with the UNGC, to conduct a thorough audit of RPC.
9. On **27 January 2017**, Respondent threatened to terminate the Contract and refused to accept further delivery or make further payments for the 600,000 cakes it received pending Delicatesy's confirmation that its supplier adhered to UNGC Principles.
10. Respondent's sudden request was prompted by a UNEP Special Rapporteur report on widespread fraud and corruption within the Ruritanian Ministry for Agriculture. The Ruritanian Government had illegally zoned protected rainforests and falsified zoning permits, allowing farmers to sell their beans as ethically sourced.
11. Delicatesy terminated its supply contract when it discovered that RPC falsified sustainability certificates. Delicatesy promptly secured other suppliers and notified Respondent, offering a 25 percent discount on the \$1.2 million Respondent owed. Respondent then purported to terminate the Contract.

D. The Parties Agreed to *Ad Hoc* Arbitration

12. Delicatesy accepted Respondent's arbitration agreement ("Arbitration Agreement") found in Clause 20 of its Tender documents. Respondent explained to Delicatesy that it had previously used institutional arbitration, but now switched to *ad hoc* arbitration after experiencing a breach of confidentiality it believed originated from an individual at the arbitral institution. Delicatesy stated it could very well live with the arbitration clause and believed the Parties could overcome any problems related to the composition of the Tribunal without institutional support.



E. Respondent Consented to Mr. Prasad's Appointment as an Arbitrator

13. On **30 June 2017** Mr. Fasttrack, Delicatesy's lawyer, sent Delicatesy's Notice of Arbitration to Respondent. In it, Delicatesy appointed Mr. Prasad as its arbitrator. In his Declaration of Impartiality and Independence and Availability ("Declaration"), Mr. Prasad disclosed his two previous appointments by Fasttrack & Partners. Mr. Fasttrack was not directly involved in either case. Mr. Prasad also made a reservation for his colleagues to accept further instructions involving the Parties. Respondent consented to Mr. Prasad's appointment on **31 July 2017**.

F. Respondent Challenged Mr. Prasad's Impartiality and Independence

14. On **29 August 2017**, Respondent demanded that Delicatesy disclose the identity of its third-party funder. Delicatesy complied with the Tribunal's order to disclose its funder, Funding 12 Ltd. Funding 12 Ltd's main shareholder is Findfunds LP. Findfunds LP operates through separate legal entities and does not fund cases directly.
15. Mr. Prasad subsequently disclosed that he acted as an arbitrator in two other arbitrations that Findfunds LP's subsidiaries funded. Mr. Prasad also disclosed that Prasad & Partners merged with Slowfood to form Prasad & Slowfood. One of the former Slowfood partners represents a client funded by a subsidiary of Findfunds LP in an arbitral proceeding.
16. Respondent accessed information from Delicatesy's Notice of Arbitration. The information referenced Findfunds LP and an article Mr. Prasad wrote. The article was published in 2016 and was also available on Mr. Prasad's website. Based on this information, Respondent challenged Mr. Prasad's impartiality and independence, under UNCITRAL Rules Art 13.

G. The Parties' Current Status

17. Mr. Prasad refused to withdraw from the arbitration, explaining that there were no justifiable doubts as to his impartiality and independence.
18. Despite purporting to terminate the Contract because of its dissatisfaction with the delivered cakes, Respondent used these cakes as part of a promotional event to announce the opening of three new stores. But Respondent's CFO and Head of Legal refused to pay Delicatesy the outstanding price of \$1.2 million, of which these cakes formed part.



III. SUMMARY OF ARGUMENT

A. The Tribunal Should Not Hear the Challenge to Mr. Prasad; If It Does, Mr. Prasad Should Participate in the Decision

19. Under the UNCITRAL Rules, which govern this arbitration, Respondent's challenge against Mr. Prasad falls outside the Tribunal's purview. Rather, Respondent must refer its challenge to the appointing authority under the UNCITRAL Rules Art 13(4). Since the Parties did not name an appointing authority, under UNCITRAL Rules Art 6(2), they may request the Secretary-General of the PCA to designate one. Contrary to Respondent's submission, the Parties did not exclude Art 13(4). Should the Tribunal find the Parties did exclude Art 13(4) then the Tribunal, including Mr. Prasad, shall decide on the challenge pursuant to DAL Art 13(2).

B. Mr. Prasad Should Remain on the Arbitral Tribunal

20. Respondent seeks to remove Mr. Prasad from the Tribunal based on doubts of his impartiality and independence. The Tribunal should assess the challenge of Mr. Prasad through a reasonable apprehension of bias test. Respondent holds the challenge should be decided under the IBA Guidelines, however their application was not agreed upon by the Parties. In any event, the IBA Guidelines and the reasonable apprehension of bias test apply the same objective standards in assessing justifiable doubts. Therefore, Respondent's grounds for challenge do not raise a reasonable doubt, neither under the reasonable apprehension test nor the IBA Guidelines, when these grounds are considered separately and cumulatively. Mr. Prasad had no obligation to disclose his published article and the article also does not favour Delicatesy's position over Respondent's. Mr. Prasad's connections to both Mr. Fasttrack and Findfunds LP are minimal and were disclosed to Respondent. Prasad & Slowfood's involvement with Finding 8 Ltd does not amount to a significant commercial relationship. Furthermore, Prasad & Slowfood has undertaken all necessary precautions to avoid contact between Mr. Prasad and his partner's file funded by the Funding 8 Ltd. Furthermore, Findfunds LP's economic interest in the arbitration does not equate it to a party under the IBA Guidelines. Respondent is therefore attempting to fabricate a challenge through grounds that do not lead to doubts as to Mr. Prasad's impartiality or independence.

C. Delicatesy's Standard Terms Govern the Contract

21. Delicatesy made an offer to Respondent incorporating its General Conditions of Sale and its Codes of Conduct. Respondent downloaded and read Delicatesy's Codes of Conduct,



which were pivotal to its acceptance of Delicatesy's offer. Respondent could not have been surprised by Delicatesy's Standard Terms because they embody the same principles as Respondent's. Where they differ, Delicatesy's Standard Terms are more stringent. The Parties continued to perform under the Contract as though Delicatesy's Standard Terms applied. Therefore, Delicatesy's Standard Terms apply. Alternatively, if the Parties did not agree to a set of Standard Terms, neither Party's terms apply.

D. Even if Respondent's Terms Govern the Contract, Delicatesy Delivered Conforming Goods Under CISG Art 35

22. Finally, Delicatesy delivered cakes that conformed with their contractual requirements and which were fit for their particular purpose. Delicatesy had a best efforts obligation to ensure RPC's compliance with Respondent's General Conditions and Code of Conduct for Suppliers. Delicatesy met its obligations by (i) keeping all relevant documentation, (ii) auditing and inspecting RPC in a manner (a) acceptable to Respondent, and (b) following UNGC Principles in its supply chain management. Furthermore, Respondent cannot proclaim the goods unfit for their particular purpose having used them at a promotional event. Therefore, Delicatesy delivered cakes in conformity with CISG Art 35.

IV. APPLICABLE LAW

23. **(A)** The CISG applies to the Contract as well as the Arbitration Agreement's formation. **(B)** Equatorianian Contract Law ("ECL") applies to the Contract where there is an external gap in the CISG. **(C)** The *lex arbitri* is Danubian arbitration law. **(D)** If neither Party's Standard Terms govern this dispute, Danubian Contract Law ("DCL") applies to the Contract where there is an external gap in the CISG. **(E)** The UNCITRAL Arbitration Rules apply to these arbitral proceedings.

A. The CISG Applies to the Contract and the Arbitration Agreement's Formation

24. **(i)** The CISG applies to the Contract and the formation of the Arbitration Agreement contained therein. **(ii)** The CISG governs the Arbitration Agreement's formation.

i. The CISG Applies to the Contract and the Formation of the Arbitration Agreement Contained Therein.

25. Delicatesy's Standard Terms apply, but its choice of law clause does not say that the CISG governs this dispute. However, the CISG nevertheless applies to this Contract under Art 1(1)(a) because the Contract is for a sale of goods and both Parties have their places of business in different Contracting States [Schwenzer/Hachem in Schwenzer, 37; Ex C3, 15;



Ex C5, 17; NoA, 4, PO1, 49]. Generally, the CISG governs calls for tenders [Schwenzer/Hachem in Schwenzer, 55] and therefore it also governs Respondent's call to Delicately for it to tender an offer to sell chocolate cakes to fulfill Respondent's needs.

ii. The CISG Governs the Arbitration Agreement's Formation.

26. The CISG governs the formation of an arbitration agreement if it is contained within a contract governed by the CISG [Viscasillas in Kröll/Mistelis/Viscasillas, 188]. The Arbitration Agreement is in the Contract and the Parties also agree that the Arbitration Agreement is subject to the CISG [PO1, 48]. Nevertheless, interpreting its content is beyond the CISG's sphere. Hence, questions relating to interpreting the arbitration agreement's content must rely Equatorianian Contract Law ("ECL") which is a verbatim adoption the UNIDROIT Principles on International Commercial Contracts 2016 [PO1, 49].

B. Equatorianian Contract Law ("ECL") Applies to the Contract Where There Is an External Gap in the CISG

27. Respondent's choice of law clause does not apply because it is contained in Respondent's General Conditions of Contract which do not form part of the Contract. Parties can choose substantive law as a component of the arbitration clause [Savare, 601-602]. Delicately's choice of law clause from its Standard Terms' Article 11 applies. It declares ECL law to be applicable. ECL applies only to matters outside of the CISG's purview.

C. The *lex arbitri* Is the Danubian Arbitration Law

28. Since the Parties chose Danubia as their seat of arbitration [Ex C2, 12], the *lex arbitri* is the Danubian Arbitration Law ("DAL"). If the Parties have not chosen a law for their dispute, the arbitral seat's law will govern the proceedings [UNCTAD Report, 3]. Danubia adopted the UNCITRAL Model Law on International Commercial Arbitration with 2006 amendments ("MAL") [PO1, 49].

D. If Neither Party's Standard Terms Govern This Dispute, Danubian Contract Law ("DCL") Applies to the Contract Where There Is an External Gap in the CISG

29. If neither Party's Standard Terms govern this dispute, then Danubia's Contract Law ("DCL") applies. The Parties negotiated their Arbitration Agreement, naming Danubia as their arbitral seat [NoA, 6; Ex C1, 8; Ex C2, 12; Ex C3, 18]. There is no choice of law clause in the Arbitration Agreement. Where parties have not expressly designated an



applicable substantive law, they are deemed to have implicitly chosen the law of their designated arbitral seat [UNCTAD Report, 13; Redfern/Hunter, 220]. DCL is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts [PO1, 49]. DCL applies to the Contract for any external gaps in the CISG.

E. The UNCITRAL Rules Apply to These Arbitral Proceedings

30. Parties are free to agree on procedural rules the Tribunal must follow [DAL Art 19(1)]. The Parties agreed to arbitrate under the UNCITRAL Arbitration Rules, as adopted in 2013 (“UNCITRAL Rules”), excluding the application of the “UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration” [Ex C2, 12].

PART 1: THE TRIBUNAL SHOULD NOT HEAR THE CHALLENGE AGAINST MR. PRASAD

31. **(I)** An appointing authority must hear the challenge against Mr. Prasad. **(II)** If the Parties cannot agree on an appointing authority, the Secretary-General of the PCA must designate the appointing authority to hear the challenge. **(III)** If the Parties opted out of UNCITRAL Rules Art 13(4), the full Tribunal must hear the challenge.

I. An Appointing Authority Must Hear the Challenge Against Mr. Prasad

32. **(A)** The Parties chose the challenge procedure under the UNCITRAL Rules, and **(B)** the Parties did not intend to exclude an appointing authority from hearing their challenge.

A. The Parties Chose the Challenge Procedure Under the UNCITRAL Rules

33. The Parties chose to arbitrate under the UNCITRAL Rules, and have not expressly opted out of its challenge procedure. The Tribunal must interpret the Arbitration Agreement using the Parties’ common intention, which includes all relevant circumstances such as the Parties’ subsequent conduct [ECL Arts 4.1, 4.3; *Metcash; Arbitral Award 83/2008*]. The Parties agree to arbitration under the UNCITRAL Rules [EX C2, 12].
34. The Parties also agreed to use the UNCITRAL Rules’ challenge procedure. If the parties do not modify their chosen rules’ challenge procedure, the Tribunal should presume they intend for it to apply to the dispute [UNCITRAL Rules Art 1(1); Poudret/Besson, 71-72]. The Parties have not expressly modified the UNCITRAL Rules’ challenge procedure [Ex C1, 8; Ex C2 12; Ex C3, 15]. Therefore, the Parties must use UNCITRAL Rules Art 13 to resolve Respondent’s challenge against Mr. Prasad.



35. Respondent cannot exclude the challenge procedure in the UNCITRAL Rules while relying on the very same procedure to challenge Mr. Prasad, which it appears Respondent is attempting to do. UNCITRAL Rules Art 13(4) is the only provision in the UNCITRAL Rules allowing a party to pursue its challenge. It provides that the party making a challenge must seek a decision by the appointing authority, not the Tribunal. In its Notice of Challenge, Respondent claims it will “definitively pursue the challenge” [NoC, 39]. The UNCITRAL Rules provide for a two-step challenge procedure. First, a party seeking to challenge an arbitrator must notify the arbitrator and other parties of its challenge. Second, if the arbitrator does not step down and if the other party does not agree to replace the impugned arbitrator, the challenging party may “pursue” its challenge. Respondent pursued its challenge under UNCITRAL Rules Art 13. By removing Art 13(4), Respondent purports to remove the very provision allowing it to pursue its challenge. The fact that Respondent relies on the provision’s underlying principles to exclude Mr. Prasad from the Tribunal demonstrates its intent to use the entire challenge procedure under the UNCITRAL Rules.

B. The Parties Did Not Intend to Exclude an Appointing Authority from Hearing the Challenge to Mr. Prasad

36. The Tribunal must interpret the Parties’ intention according to the meaning that a reasonable person of the same kind as the Parties would infer in the same circumstances [ECL Art 4.1(2); *Hansalaya*; ICC 11880]. The Arbitration Agreement does not mention appointing authorities; rather, it excludes the “involvement of any arbitral institution” [Ex C2, 12]. Under ECL Art 4.1(1), the Tribunal cannot use the Parties’ common intention to interpret this statement. Respondent claims that by excluding the appointing authority, the Parties agreed that only the Tribunal could decide the challenge [NoC, 39]. However, Delicatesy never intended to deviate from the UNCITRAL Rules’ challenge procedure [FL, 46]. Therefore, the Parties did not subjectively agree to what “excluding arbitral institutions” meant.

37. Respondent indicated its confidentiality standards in its General Conditions of Contract. Even if Respondent’s General Conditions of Contract applied, the Parties could still use UNCITRAL Rules Art 13(4). The Parties also have a right of challenge because they have a right to be treated with equality [DAL Art 18]. Respondent’s own confidentiality clause would allow Parties to disclose “where any [s]ignatory is required to disclose or provide details of the Information...” “...to protect or pursue a legal right in bona fide legal proceedings before any court or Arbitral Tribunal” [Ex C2, 13]. An objective assessment of



what information was exchanged between the parties, therefore, should lead the Tribunal to find that Art 13(4) was not excluded, and the Parties should first try to agree on an appointing authority.

38. Respondent's fears of ending up with an institution as an appointing authority may be justified, but can be overcome by simply appointing a non-institutional entity. An appointing authority does not have to be institutional; it can be an individual or a corporation [Patocchi/Niedermaier in Schütze, 1020]. The Parties select and circumscribe the powers they want the appointing authority to exercise [Gaillard/Savage, 484]. An appointing authority is only involved in one aspect of the case and provides administrative services for the arbitration; therefore, its role is limited and temporary [Webster, 102-103]. Appointing authorities decide the challenge, but have no further rights or privileges [Kee in Kröll/Mistelis, 301]. They do not conduct other casework activities [Gerbay, 61-66]. For example, in *Sino Dragon* the appointing authority only assisted in the challenge against an arbitrator.
39. Respondent's subsequent conduct reveals it is not against bringing in third parties when necessary to further the arbitration. For example, Respondent agreed to Delicately's appointment of Ms. Ducasse as Mr. Prasad's potential replacement [PO1, 48]. Consequently, Respondent should take no issue with a non-institutional appointing authority if it takes no issue with Ms. Ducasse's appointment.

II. If the Parties Cannot Agree on an Appointing Authority, the Secretary-General of the PCA Must Designate One

40. The Tribunal should not hear the challenge against Mr. Prasad because **(A)** the Parties' should select an appointing authority as they agreed to do under the UNCITRAL Rules. **(B)** As the Parties have not designated an appointing authority, the Secretary-General of the PCA ("Secretary-General") must designate an authority.

A. The Tribunal Must Give Effect to the Parties' Agreed Upon Challenge Procedure Under the UNCITRAL Rules

41. The UNCITRAL Rules Art 6(1) allows a party to propose an individual or institution as an appointing authority. If parties cannot agree on an appointing authority, and once a proposal has been submitted, parties may refer the matter to the Secretary-General [UNCITRAL Rules Art 6(2)]. The Working Group expressly created this two-step process allowing parties to shape their arbitration, and rejected a default provision that would have



allowed the Secretary-General to act as the appointing authority if the parties did not agree otherwise [Roth, 23; UNCITRAL Report, 16].

42. As explained above, the Parties should choose an appointing authority that will decide on Respondent's challenge to Mr. Prasad. Respondent's reluctance to involve an appointing authority stems from confidentiality concerns [NoC, 39]. However, its subsequent conduct shows Respondent finds it acceptable to bring in third parties as necessary, because it has agreed to Delicatesy's appointment of Ms. Ducasse as Mr. Prasad's potential replacement [PO1, 48]. If Respondent takes no issue with Ms. Ducasse attending the oral hearing and having access to "all submissions", it should take no issue with an appointing authority, provided it is not an institution [PO1, 48].

B. If the Parties Cannot Agree on an Appointing Authority, the Secretary-General of the PCA Should Name the Appointing Authority to Hear the Challenge Against Mr. Prasad

43. The Secretary-General's office has the necessary safeguards to preserve RESPONDENT'S confidentiality interest. Although parties may be required to disclose details about the dispute to the Secretary-General, he will only conduct a cursory review to determine his competence in designating an appointing authority [Webster, 113; *Marks*].
44. The Secretary-General's substantive review will not impact Respondent's confidentiality interest. The Tribunal should note that Respondent's confidentiality interest relates to leaks of substantive information. In Respondent's previous arbitration against its supplier, the supplier alleged that it had received information that Respondent was part of a scheme used to launder money. This information was leaked to a competitor, who presented the information to the press as a given fact [Ex R5, 41]. Therefore, Respondent would be most concerned any leaks relating to its investigation into the Ruritanian scandal after it saw the article published in the Michelgault Business News [PO2 Q36, 54; Ex C7, 19]. However, the Secretary-General's review does not touch on the substantive content of the dispute. The Secretary-General described the review as one that focuses on an examination of the parties' dispute resolution agreement, not the substantive content [PCA Report, 10]. The Secretary-General will designate an appointing authority where parties reference the UNCITRAL Rules in their arbitration agreement [*Econet*]. The Secretary-General would not need to review any of the correspondence between Delicatesy and Respondent relating to the Ruritanian scandal, as the Parties explicitly state that they will settle their dispute under the UNCITRAL Rules [Ex C2, 12].



45. The Secretary-General also takes both parties' interests and concerns into account when making its decision [Jonkman, 189-191]. By excluding the UNCITRAL Rules on Transparency, the Parties have excluded rules that require them to publish information and documents [UNCITRAL Rules on Transparency, Arts 2/3]. Furthermore, the Secretary-General's office has strict rules forbidding employees from communicating to other persons in any form about any information in the course of their work [PCA Rules, Art V]. Therefore, Respondent should not be concerned that the Secretary-General's office will leak any information about the arbitral proceeding.

III. If the Parties Opted Out of UNCITRAL Rules Art 13(4), the Full Tribunal Must Hear the Challenge

46. The full Tribunal must decide the challenge under DAL Art 13(2). If the Parties have opted out of UNCITRAL Rules Art 13(4), it would mean the Parties failed to agree on a challenge procedure. Consequently, since the arbitral seat is Danubia, when fail to agree to a method for challenging arbitrators, DAL Art 13(2) applies as the default challenge mechanism.
47. Under DAL Art 13(2), the Tribunal has the authority to decide on the challenge against Mr. Prasad. The *full* tribunal is entrusted with the decision, which in this case includes Mr. Prasad [Paulsson/Bosman, 135; Holtzmann/Neuhaus, 421, Binder, 195]. DAL does not exclude the challenged arbitrator from the arbitral tribunal, and if it did it would do so explicitly. ICSID Convention Art 58 is but one example of the drafters' explicit exclusion of the challenged arbitrator: "the decision...shall be taken by the *other* members of the Commission or Tribunal" (emphasis added). The Parties' agreement was needed to exclude a challenged arbitrator from the decision. Such was the case in *AWG Group Ltd*, decision on Jurisdiction, where an UNCITRAL arbitration challenge was decided without the challenged arbitrator because the parties to that dispute agreed to follow the ICSID challenge procedure.
48. **Conclusion to Part 1:** Respondent must refer its challenge against Mr. Prasad to an appointing authority under the UNCITRAL Rules Art 13(4). Objectively, the Parties only intended to exclude an institutional appointing authority, and not all appointing authorities. If the Parties cannot agree to an appointing authority, then the Secretary-General must designate one. Should the Tribunal find the Parties did exclude Art 13(4) then the Tribunal, including Mr. Prasad, shall decide on the challenge pursuant to DAL Art 13(2).



PART 2: MR. PRASAD SHOULD REMAIN ON THE ARBITRAL TRIBUNAL

49. **(I)** In deciding on the challenge, the Tribunal should apply the reasonable apprehension test. **(II)** The reasonable apprehension test and the IBA Guidelines apply a similar standard in assessing impartiality and independence. **(III)** There are no doubts as to Mr. Prasad's impartiality or independence under the IBA Guidelines or a reasonable apprehension of bias test.

I. In Deciding on the Challenge, the Tribunal Should Apply the Reasonable Apprehension of Bias Test

50. Although the challenge to Mr. Prasad's impartiality and independence is raised under the UNCITRAL Rules Art 12, neither the UNCITRAL nor the *lex arbitri*, DAL, define "justifiable doubts," "impartiality," or "independence." Therefore, the Arbitral Tribunal should look to other MAL jurisdictions in deciding what practices to adopt when deciding on the challenge.
51. MAL jurisdictions widely adopt three tests to determine the impartiality and independence of an arbitrator, namely: (i) the "real danger" test [*R. v Gough*]; (ii) the reasonable apprehension of bias test [*Szilard v Sasz; Jacob Securities; South African Rugby Football*]; and (iii) the real possibility test [*Darussalam; Muir; Jung Science; China Harbour*]. However, if Mr. Prasad is found partial under the reasonable apprehension test, there is no need to assess his impartiality under a real danger or real possibility test, because the threshold is lower under the reasonable apprehension test.

II. The Reasonable Apprehension Test and the IBA Guidelines Apply a Similar Standard in Assessing Impartiality and Independence

52. A finding of impartiality and independence will be similar whether assessed under the reasonable apprehension test or the IBA Guidelines. Respondent asks the tribunal to rely on the IBA Guidelines to decide on the challenge of Mr. Prasad. However, as their title indicates, the IBA Guidelines are mere guidelines and not a binding instrument [*Tidewater; Universal Compression*]. Furthermore, their application was not agreed upon by the Parties as they were neither part of the Parties negotiations, nor were they included in the Arbitration Agreement. Nonetheless, IBA Guidelines are frequently considered by tribunals as international best practices and have been referenced in MAL jurisdictions [*Lutrell, 26; Telesat; Jacob Securities*].



53. Under the IBA Guidelines, it is the “appearances, not fact, that are the touchstone” of impartiality [General Standard 2 of the IBA Guidelines; Jones]. General Standard 2(c) of the IBA Guidelines holds that doubts are justifiable when a “reasonable third person” would conclude that there is a likelihood that the arbitrator, in reaching his or her decision, may be influenced by factors other than the merits of the case as presented by the parties.
54. In order to meet the reasonable apprehension of bias test, a “fair minded and informed observer” must have a reasonable apprehension that the arbitrator is biased [Luttrell, 7; *Szilard v Szasz; Jacob Securities; South African Rugby Football*]. Similarly, under the IBA Guidelines, it is the “appearances, not fact, that are the touchstone” of impartiality [General Standard 2 of the IBA Guidelines; Jones]. General Standard 2(c) of the IBA Guidelines holds that doubts are justifiable when a “reasonable third person” would conclude that there is a likelihood that the arbitrator, in reaching his or her decision, may be influenced by factors other than the merits of the case as presented by the parties.

III. There are No Doubts as to Mr. Prasad’s Impartiality or Independence Under the IBA Guidelines or a Reasonable Apprehension of Bias Test

55. Respondent’s challenge grounds do not create any conflicts of interest that justify Mr. Prasad’s removal from the Tribunal.
56. In examining the grounds for challenge through the IBA Guidelines and the reasonable apprehension test, Mr. Prasad’s **(A)** Article; **(B)** Relationship with a Prasad & Slowfood partner; **(C)** Connection to Findfunds LP; and **(D)** Multiple appointments by Fasttrack & Partners do not give rise to justifiable doubts as to his impartiality or independence. Finally, even **(E)** when the grounds for challenge are considered both separately and cumulatively, there are no doubts to Mr. Prasad’s impartiality or independence.

A. Mr. Prasad’s Article Does Not Create a Conflict of Interest

57. Mr. Prasad’s article does not create a conflict of interest because **(i)** Respondent is time-barred from challenging Mr. Prasad based on his article; and **(ii)** Even if Respondent is not time-barred, the article does not raise doubts to Mr. Prasad’s impartiality or independence.

i. Respondent Is Time-Barred from Challenging Mr. Prasad Based on His Article

58. Mr. Prasad’s article was published before Respondent accepted Mr. Prasad’s appointment. UNCITRAL Rules Art 13(1) imposes a 15-day time limit on the challenging party after the appointment of an arbitrator, or after circumstances in Arts 11 and 12 become known to



that party. A party cannot remain ignorant to publicly available information related to the arbitrator, and then use this information to justify a challenge at a later date [Rovine, 128; Luttrell, 16].

59. While Respondent did not view the publication when it visited Mr. Prasad's website, it cannot use its ignorance of publicly available information to justify a challenge on these grounds. Not only was the article published in a leading international journal a year before his appointment by Delicatesy, it was also publicly available on Mr. Prasad's website and through all major databases [Ex R4, 38; PO2, Q14, 51]. Upon receiving notice of Mr. Prasad's appointment on 30 June 2017, Respondent visited Mr. Prasad's website and accepted his appointment on 31 July 2017, without any objection on this ground [NoA, 6; PO2, Q14, 51; RNoA, 26]. Respondent therefore cannot challenge Mr. Prasad's impartiality and independence on publicly available information it had access to before it accepted Mr. Prasad's appointment.

ii. Even if Respondent Is Not Time-Barred, the Article Does Not Raise Doubts to Mr. Prasad's Impartiality or Independence

60. Since Mr. Prasad's article falls under the IBA Green List Art 4.1.1, it did not need to be disclosed to Respondent. Therefore, it is irrational that this ground would create doubts to Mr. Prasad's impartiality. IBA Guidelines Art 4.1.1 applies where an arbitrator has previously expressed a legal opinion concerning an issue that also arises in the arbitration but is not focused on the particular case. Opinions that are focused on a case are those that encompass a view on the particular arbitral dispute [Born, 1527; Frankfurt 26 Sch 8/07]. Given that Mr. Prasad's article was written in 2016, well before this arbitration commenced, it is impossible for it to be an opinion focused on the case. Therefore, Respondent does not have a leg to stand on in challenging Mr. Prasad's impartiality on an article that he was not even required to disclose and that does not reference Respondent's case.
61. Furthermore, even if Mr. Prasad was required to disclose, his article does not favour Delicatesy's position over Respondent's. Respondent claims that Mr. Prasad's article positions him "very clearly against the modern trend in the understanding of the conformity concept in Art. 35 CISG, which goes beyond the mere physical characteristics of the goods and includes the production process as well as the legal entities involved" [NoC, 38]. Mr. Prasad simply argues that conformity obligations can include ethical requirements, insofar as they are clearly defined in a contract [Ex R4, 40; PL, 44] – hardly a



controversial view. Therefore, it cannot be argued his opinion of the conformity of goods under CISG Art 35 is more preferable to Delicatesy's position than Respondent's position.

62. Mr. Prasad's article also does not give rise to a reasonable apprehension of bias because the article was not based on the current dispute. In *Urbaser SA*, the challenged arbitrator wrote about two issues relevant in the arbitration. The tribunal concluded that a reasonable person would not consider that the arbitrator would rely on his expressed academic opinions without giving proper consideration to the facts, circumstances, and arguments in the arbitration. An arbitrator's previously adopted opinion should not be "of such force as to prevent [him] from taking full account of the facts, circumstances and arguments presented by the parties in the particular case" [*Urbaser SA*].
63. Where an arbitrator has written and published an opinion that concerns issues in the current arbitration, bias may exist. However, as long as these opinions are not based on the specific facts in the dispute, an arbitrator can remain impartial and independent of the parties, even though they may be partial to a certain position in law [Daimsis/Pavlović, 532]. Furthermore, in *Jensen*, the court held that as long as the arbitrator does not have a final opinion on the matter before the arbitration, a preliminary view on a case does not mean that he or she then lacks objective impartiality to decide it. Therefore, Mr. Prasad's article does not indicate a lack of impartiality or a preference to Delicatesy in these proceedings.

B. Mr. Prasad's Relationship with a Prasad & Slowfood Partner Does Not Create a Conflict of Interest

64. (i) Mr. Prasad does not have a commercially significant relationship with the Prasad & Slowfood partner. (ii) Mr. Prasad's connection to a partner at Prasad & Slowfood does not give rise to a reasonable apprehension of bias.

i. Mr. Prasad Does Not Have a Commercially Significant Relationship with the Prasad & Slowfood Partner

65. The fact that a partner at Prasad & Slowfood represents a client in an arbitration funded by Funding 8 Ltd, does not raise justifiable doubts to Mr. Prasad's impartiality or independence. IBA Guidelines Art 2.3.6 applies when the arbitrator's law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties (emphasis added). Findfunds LP only owns 40 percent of its subsidiary's, Funding 8 Ltd, shares [PO2, Q6 & 7, 50]. Legal control over a subsidiary can be exerted



where the parent corporation, in this case Findfunds LP, owns more than 50 percent shares in its subsidiary [Vanduzer, 628].

66. This is the first time Slowfood has ever used a third-party funder, as the client could not afford to bring the case forward otherwise [PO2, Q6, 50]. While Funding 8 Ltd will be paying all costs associated with the arbitration, Slowfood will only derive five percent of its annual turn from the arbitration funded by Funding 8 Ltd [PO2, Q6, 50]. Given that Prasad & Slowfood have now merged, the earnings derived will likely constitute even less than five percent as the firm, and therefore its earning potential, has grown with the merger [PO2, Q6, Q7, 50]. Therefore, Prasad & Slowfood's connection to Findfunds LP does not meet the significant commercial relationship requirement under IBA Guidelines Art 2.3.6.

ii. Mr. Prasad's Connection to a Partner at Prasad & Slowfood Does Not Give Rise to a Reasonable Apprehension of Bias

67. While law firm conflicts are relevant to assessing an arbitrator's independence and impartiality, courts are generally reluctant to uphold challenges where an arbitrator is not personally involved in representations that are wholly unrelated to the arbitration [Born, 1521].
68. In *Telesat*, in applying the reasonable apprehension of bias test, the Court considered factors such as potential personal, financial and intellectual biases including (i) the size of the law firm; (ii) whether the two partners worked in the same office; and (iii) whether the case was being heard by a single arbitrator or by a panel. Although the challenge was upheld in *Telesat*, the case of Mr. Prasad and his partner can be distinguished on all three grounds.
69. First, as opposed to Ms. Kaufmann-Kohler's boutique law firm of three partners and six lawyers, Mr. Prasad's international law firm consists of 20 partners and 60 associates [PO2, Q8, 50]. Ms. Kaufmann-Kohler knew her partner, Mr. Lévy, closely, whereas there is nothing on the record to suggest Mr. Prasad and his new equity partner have any relationship [PD2, 36; LL, 37]. A consistent decision was reached in *Standard Tankers*, the fact that a law firm represented one of the parties in another dispute was held to be an insufficient ground for challenge because the firm had more than 20 attorneys and the arbitrator was not directly involved in the legal decisions regarding the other dispute. Prasad & Slowfood has 20 partners and 60 associates, but even still, all further and necessary precautions were put in place to avoid any contact between Mr. Prasad and the partner's case [PD2, 36].



70. Second, whereas Ms. Kaufmann-Kohler and Mr. Lévy, worked in the same office, Mr. Prasad and his partner do not. Mr. Prasad and his new partner do not work in the same country, let alone the same office [PD2, 36; LL, 37].
71. Third, unlike Ms. Kaufmann-Kohler, Mr. Prasad is not the chairperson of the Tribunal. In fact, if the full Arbitral Tribunal decides on the challenge, then the two party appointed arbitrators will cancel each other out, if they are both predisposed to biases [Luttrell, 16]. Thus, there is no justifiable doubt that Mr. Prasad's partner's involvement with Findfunds LP's subsidiaries will affect Mr. Prasad's impartiality or independence.
72. Thus, there is no reasonable apprehension that Mr. Prasad's partner's involvement with a Findfunds LP's subsidiary will make Mr. Prasad biased.

C. Mr. Prasad's Connection to Findfunds LP Does Not Create a Conflict of Interest

73. (i) Mr. Prasad's previous appointments by Findfunds LP's subsidiary do not raise justifiable doubts as to his impartiality or independence. (ii) There is no direct economic interest between Findfunds LP and the arbitration.

i. Mr. Prasad's Previous Appointments by Findfunds LP's Subsidiary Do Not Raise Justifiable Doubts as to His Impartiality or Independence

74. Mr. Prasad's connection with Findfunds LP falls under the IBA Guidelines' Orange List Art. 3.1.3. Art. 3.1.3 applies if one of the parties or its affiliates has appointed the arbitrator on two or more occasions over the past three years. In *Korsnäs*, the Court held that the IBA Guidelines should be assessed by looking at the appointments up to, but not including, the present dispute. Mr. Prasad's two prior appointments only meet the lower limit of the IBA Guidelines Art 3.1.3. In any event, the *Tidewater* tribunal concluded that multiple appointments as an arbitrator by the same party in unrelated cases under the IBA Guidelines are to be considered neutral. Although the *Opic* tribunal rejected this reasoning under a "manifest lack of independence" test, the Tribunal must distinguish *Opic*. *Tidewater* used a reasonable apprehension test that required a lower standard than the manifest lack test.
75. In the case of repeat appointments and third-party funders, a funder's involvement in the appointment of the arbitrator must also be taken into consideration as a potential indication of bias [Osmanoglu, 335]. Especially since third-party funding only raises concerns where the funder interferes in the conduct of the legal proceedings [Osmanoglu,



328; Nieuwveld/Sahani, 15]. While the details of the current funding agreement are unknown, traditionally Findfunds LP exercises little influence in the appointment of the arbitrators [PO2, Q4, 50].

76. In addition, when the number of repeat appointments is low then it may be necessary to look into other links between the appointor and the appointee, such as the arbitrator's income associated with this party [Gómez-Acebo, 116]. However, Mr. Prasad's income from Findfunds LP is not sufficient to give rise to a reasonable apprehension of bias. Mr. Prasad derives between 30-40 percent of his salary from arbitration and has acted in 21 arbitrations over the last three years [PO2, Q10, 51]. Mr. Prasad only derives six to eight percent of his income from proceedings funded by Findfunds LP's subsidiaries [PO2, Q10, 51].

ii. There Is No Direct Economic Interest Between Findfunds LP and the Arbitration

77. Findfunds LP does not have a significant economic interest in this arbitration to be considered the equivalent of Delicatesy. Under IBA Guidelines 6(b), a third-party may be considered to bear the identity of the party that it is funding. IBA Guidelines do not define what a third-party funder is, but states a third-party funder refers to any person or entity offering funds or material support and has a direct economic interest in the award rendered [Explanation to IBA General Standard 6(b)].
78. Delicatesy's claim is being funded by Funding 12 Ltd, whose main shareholder is Findfunds LP [FL, 35]. Findfunds LP is only a 60 percent shareholder of Funding 12 Ltd [PO2, Q2, 50]. Although Respondent's challenge largely hinges on a supposed connection between Findfunds LP and Mr. Prasad, only Funding 12 Ltd has funded Delicatesy's proceeding [PO2, Q2, 50]. Findfunds LP brought in a second funder as a 40 percent shareholder of Funding 12 Ltd, which is Findfunds LP's normal participation quota for its subsidiaries [PO2, Q2, 50]. The Tribunal should not disregard Findfunds LP's choice to operate its businesses through a separate legal entity with other shareholders. MAL, common law and civil law jurisdictions have generally recognized that the corporate form should not be ignored except in the most exceptional of circumstances, like the use of the corporation to perpetrate fraud [Born II, 99].
79. At best, Findfunds LP has an indirect economic interest in the proceeding by virtue of its 60 percent interest in Funding 12 Ltd. Findfunds LP would only indirectly receive 15 percent of any award Delicatesy receives if successful in this arbitration [PO2, Q1/Q2, 50].



As Findfunds LP's subsidiaries have financed 32 other arbitration cases, and it has five other ongoing cases in addition to the current proceeding, the benefits are relatively immaterial to Findfunds LP overall [PO2, Q2, 50]. Therefore, Findfunds LP's economic interest in the arbitration does not rise to such a level as to affect Mr. Prasad's independence or impartiality.

D. Multiple Appointments by Fasttrack & Partners Do Not Raise Doubts to Mr. Prasad's Independence or Impartiality

80. Respondent cannot rely on IBA Guideline Art 3.3.8 because Mr. Prasad has not been appointed on more than three occasions by Fasttrack & Partners. IBA Guidelines Art 3.3.8 applies only when the arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel or the same law firm (emphasis added). Mr. Prasad has acted as an arbitrator in 21 arbitrations over the last three years, only two of which involved Fasttrack & Partners [PO2, Q10, 51; Ex C11, 23]. While the current arbitration is Mr. Prasad's third appointment by Fasttrack & Partners, that does not fall under the "more than three" requirement for Mr. Prasad's appointments to be considered a potential conflict of interest under the IBA Orange List. Indeed, Mr. Fasttrack was not directly involved in the two previous cases [PO2, Q9, 51]. In one instance, he merely gave advice to a colleague and recommended Mr. Prasad as an arbitrator [*ibid*].
81. In any event, there is no need to consider a reasonable apprehension of bias analysis. Mr. Prasad disclosed his previous appointments by Fasttrack & Partners, which Respondent subsequently accepted [RNoA, 26]. Unless a party states its objection without undue delay, it will be deemed to have waived its right to object [MAL Art 4; Luttrell, 166]. Upon the arbitrator's disclosure, a party may only challenge on new matters, or matters which were not previously disclosed [MAL Art 4; Luttrell, 166; *Eckervogt*]. By explicitly accepting Mr. Prasad's previous appointments, Respondent waived its right to challenge on this ground.

E. When the Grounds for Challenge Are Considered Both Separately and Cumulatively, There Are No Doubts to Mr. Prasad's Impartiality or Independence

82. (i) Under UNCITRAL Rules, the grounds for Mr. Prasad's challenge should be examined both separately and cumulatively. (ii) Even when considered both separately and cumulatively, there are no doubts to Mr. Prasad's impartiality or independence.



**i. Under the UNCITRAL Rules, the Grounds for Mr. Prasad's Challenge
Should Be Examined Both Separately and Cumulatively**

83. Under the UNCITRAL Rules, the grounds for challenge have been examined by appointing authorities first in isolation and then cumulatively [SCC Institute Case 120/2001]. Circumstances must be considered cumulatively because, although a single ground may be insufficient to raise justifiable doubts to an arbitrator's independence or impartiality, cumulatively, circumstances may give rise to justifiable doubts [LCIA Reference No UN3490].

**ii. Even When Considered Cumulatively, There Are No Doubts as to Mr.
Prasad's Impartiality or Independence**

84. Respondent alleges that, when considered both separately and together, the grounds for challenge "leave no doubt that in the eyes of a reasonable person in Respondent's situation there are justifiable doubts as to Mr. Prasad's independence" [NoC, 39].

85. There is no evidence, under the IBA Guidelines or a reasonable apprehension of bias test to suggest any previous connections between Findfunds LP and Fasttrack & Partners, and therefore the multiple appointments involving these parties are unrelated. While these four arbitrations were all resolved in favour of the party that appointed Mr. Prasad, the awards were unanimously rendered by the tribunal [PO2, Q15, 51]. Neither Mr. Prasad's declarations nor letter reveal that Mr. Prasad has ever been hired by Delicatesy before this arbitration [DP, 36; PL, 43]. There was also no previous connection between Slowfood and Findfunds LP before the current case a partner is involved with [PO2, Q6, 50].

86. **Conclusion to Part 2:** Under the IBA Guidelines an arbitrator can be appointed by parties multiple times before justifiable doubts to their impartiality and independence is questioned. Since there are no serious connections between the parties, companies and firms involved in this arbitration, there are no justifiable doubts to Mr. Prasad's independence and impartiality when the grounds are considered cumulatively. Respondent attempts to rely on the cumulative effect of grounds that are either time-barred or that it has waived in order to fabricate a challenge.

PART 3: DELICATESY'S STANDARD TERMS GOVERN THE CONTRACT

87. Delicatesy's Standard Terms were incorporated into the Contract because **(I)** Delicatesy made an offer to Respondent, **(II)** Delicatesy included its Standard Terms in the offer, and



(III) Respondent accepted Delicatesy's offer. (IV) Alternatively, if the Parties did not agree to a set of Standard Terms for their Contract, neither Party's Terms Apply.

I. Delicatesy Made an Offer to Respondent

88. (A) Respondent's Tender Documents invited Delicatesy to make an offer. (B) Delicatesy submitted a sufficiently definite offer and intended to be bound by it.

A. The Tender Documents Were Not an Offer

89. Respondent's Invitation to Tender merely expressed its intention to evaluate tenders [Ex C2, 10]. It did not express the intent to be bound by each offer received. The CISG classifies these "without obligation" statements as invitations to treat [Schroeter in Schwenzer, 283]. The CISG considers a proposal for concluding a contract addressed to one or more specific persons to constitute an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance [CISG Art 14(1); Mullis in Huber/Mullis, 70; Honnold, 202; Schroeter in Schwenzer, 282]. Since Respondent's invitations to tender revealed no intention to be bound by offers it received, its invitations were not offers.

i. Although the Tender Documents Expressed Respondent's Initial Intent to Use Its Own Standard Terms, They Did Not Bind Offerors to Them

90. Although invitations to tender are not offers, those who respond to such invitations cannot simply ignore tender documents. The CISG places weight on all statements, whether they are offers or not [CISG Art 8; *MCC-Marble*]. Indeed, although Respondent may have initially intended to use its own Code of Conduct for Suppliers, it accepted Delicatesy's Codes of Conduct when it ultimately accepted Delicatesy's offer.

91. Delicatesy knew Respondent's initial intention was to use its Code of Conduct for Suppliers when Respondent explained "[i]t is very important for us that we can be sure that also your suppliers adhere to Comestibles Finos' Philosophy and our Code of Conduct for Suppliers" [Ex C1, 8]. However, Respondent subsequently stated that a "decisive element" in accepting Delicatesy's offer was Delicatesy's commitment to sustainable production [Ex C5, 17]. Respondent also told Delicatesy that the latter's commitment was evidenced by its "impressive Codes of Conduct" [Ex C5, 17]. Therefore, it was reasonable for Delicatesy to assume Respondent accepted its Standard Terms when respondent accepted the offer.



B. Delicately's Offer Was Sufficiently Definite and Indicated Its Intention to Be Bound

92. Under the CISG, offers must include “essential elements” to be sufficiently definite [Mullis in Huber/Mullis, 72-73]. At a minimum, these essential elements include: the goods, the quantity, and the price [CISG Art 14(1); Schroeter in Schwenzer, 270; Schlechtriem/Butler, 70]. Following Respondent's Invitation to Tender, Delicately sent an offer naming the proposed cake, the quantity of cakes, as well as the price and payment terms [Ex C4, 16]. Consequently, Delicately's offer was sufficiently definite because it contained the essential elements of an offer.
93. Under the CISG, an offeror must also intend to be bound by its offer [CISG Art 14(1); Mullis in Huber/Mullis, 71; Honnold, 202]. Evidence that Delicately intended to be bound is seen by Delicately sending an offer that Respondent merely had to accept to form the Contract [Ex C5, 17]. As the Secretariat commentary to CISG article 14 explains “The requirement that the offeror has manifested his intention to be bound refers to his intention to be bound to the eventual contract if there is an acceptance.” When D_{DELICATELY} sent its offer [Ex C3] all Respondent had to do was to accept, which it did. Hence, Delicately displayed an intention to be bound by its offer.

II. Delicately Included Its Standard Terms in the Offer

94. **(A)** Delicately's Standard Terms were not materially different because they embodied the Parties' shared commitment to sustainable production. Furthermore, **(B)** Delicately's Standard Terms were available and retrievable online.
95. Standard terms form part of the contract where the parties have expressly or impliedly agreed to their inclusion at the time of the formation of the contract, or when the other party had a reasonable opportunity to take notice of the terms [CISG-AC Op No, r2].
- ### **A. Delicately's Standard Terms Were Not Materially Different Because They Embodied the Parties' Shared Commitment to Sustainable Production**
96. **(i)** Respondent knew about Delicately's Standard Terms when Delicately made its offer.
(ii) Respondent could not have been surprised by Delicately's Standard Terms.
97. Standard terms are provisions that the other party introduces, which have not been “the subject of individual negotiations” [Huber, 123]. They are terms drafted for repeat use in current and future commercial transactions and are not “tailored” to a particular agreement [CISG-AC Op No 13, Comment A(1); Loizou, 1]. Delicately's Standard Terms include its



General Conditions of Sale and its Codes of Conduct. Respondent's Standard Terms include its General Conditions of Contract, its General Business Philosophy, and its Code of Conduct for Suppliers [Ex C2, 12-13]. The CISG does not include a specific provision that addresses the inclusion of standard terms in a contract [Huber in Huber/Mullis, 30; *Machinery Case*]. Whether a party's standard terms are part of a contract should be interpreted according to CISG Art 8 [Huber in Huber/Mullis, 30].

i. Respondent Knew About Delicatesy's Standard Terms When Delicatesy Made Its Offer

98. Delicatesy did not specifically point to its Standard Terms because they are comparable to Respondent's and thus are not materially different. Even if Respondent deemed Delicatesy's Standard Terms to be materially different, it had sufficient notice to object to their inclusion. The CISG does not specifically address when tendering documents differ from documents in the offer, but Art 7(2) can be used to bring in Art 19 by analogy to interpret material changes to terms. Delicatesy alerted Respondent to two deviations from the Tender Documents, the cakes' shape as well as the payment terms [Ex C3, 15]. The CISG considers such changes "materially different" [CISG Art 19(3)]. However, Delicatesy's Standard Terms do not possess Art 19's qualifications for material difference because they do not change the quality, quantity, delivery, or Delicatesy's liability.
99. Although Delicatesy did not draw attention to its own Standard Terms in its cover letter, it alerted Respondent this offer used a separate offer form instead of simply filling in Respondent's Tender Documents. Respondent knew about Delicatesy's Standard Terms before accepting the offer because it had already downloaded and read the Codes of Conduct [Ex C5, 17]. A reference to standard terms must be clear enough for a reasonable person "in the shoes of the recipient" to understand [Schroeter in Schwenger, 292-293; Ferrari in Kröll/Mistelis/Viscasillas, 233; Schlechtriem, 72].
100. In *MCC-Marble*, a leading case on CISG Art 8, MCC placed its signature above a term expressly referencing and indicating assent to Ceramica's standard terms. Before signing, the parties specifically discussed not being bound to the standard terms contained on the reverse side of the contract. The US 11th Circuit Court of Appeal held that the oral terms superseded the written agreement. Our circumstances should be distinguished from *MCC-Marble* because the Parties did not negotiate or agree that Delicatesy's Standard Terms would not apply. To the contrary, Respondent told Delicatesy that "a decisive element for [Respondent's] decision was [Delicatesy's] convincing commitment to sustainable



production. Such commitment is well evidenced in your impressive Codes of Conduct which I downloaded following your tender out of curiosity” [Ex C5, 17]. Because Delicately’s Codes of Conduct are part of its Standard Terms, if the Tribunal considers the Parties’ negotiations, it is more reasonable to infer that Delicately’s Standard Terms apply than to assume the Parties did not want to be bound by them.

101. An offeror does not need to provide its standard terms to an offeree if the offeree is already aware of the content of the offeror’s standard terms [CISG-AC Op No 13, r2.6]. Delicately’s General Conditions of Sale incorporate its Codes of Conduct by reference [PO2, Q29, 53]. An offer’s recipient must have reasonable opportunity to see the standard terms [*Machinery Case*; *Broadcasters Case*]. At the Cucina Food Fair, Delicately told Respondent about its reporting obligations and the auditing possibilities in Delicately’s Supplier Code of Conduct [Ex R5, 41]. Delicately’s reporting obligations are contained within its Standard Terms [Ex R3, 31]. This means Respondent knew what was in Delicately’s Standard Terms when the offer was made.
102. A reasonable person of the same kind and in the same circumstances as Respondent would also have been aware of Delicately’s Standard Terms. CISG Art 8(2) applies if a party’s subjective intent cannot be ascertained [CISG Art 8(2); Farnsworth in Bianca-Bonell, 99]. A party’s reference to standard terms should be clear to a reasonable person in the same circumstance as the other party [CISG-AC Op No 13, r5.2; Lautenschlager, 275]. Respondent said it “was particularly impressed by [Delicately’s] report about the management of [its] supply chain, including the regular audits and reporting obligation,” and that Delicately’s “[UNGC] membership and its strict adherence to the principle of ethical and sustainable production make [Delicately] a very interesting supplier for [Respondent]” [Ex C1, 8]. Delicately would have reasonably understood Respondent’s statements to mean that Respondent knew about and intended to use Delicately’s Codes of Conduct.

ii. Respondent Could Not Have Been Surprised by Delicately’s Standard Terms

103. Delicately’s Standard Terms embody the same principles as Respondent’s. Standard terms do not form part of the agreement if they are objectively surprising or unusual to the other party [CISG-AC Op No 13, r7]. Respondent expressed that the Parties’ Codes of Conduct are similar when it said “[y]our Codes show that [Delicately] and [Respondent] share the same values and are both committed to ensure that the goods produced and sold fulfill the highest standard of sustainability” [Ex C5, 17]. Indeed, the Parties’ Codes are similar.



104. Delicately's Standard Terms achieve the same results as Respondent's with the exception of Respondent's Code of Conduct for Suppliers, Principle F. However, the UNGC Management Model requires users to collect data about its progress toward integrating the UNGC Principles into its management practices [UNGC Management Model, 18/20]. Delicately's UNGC Membership encourages it to keep relevant documentation, comparable to the effect in Principle F.
105. A major difference between the Parties' Standard Terms would have been Delicately's choice of law clause, had it not pointed to the same adoption of the CISG and UNIDROIT Principles as Respondent's clause. Respondent's choice of law clause implements the CISG and UNIDROIT Principles for matters not dealt with by the CISG. Delicately's choice of law clause declares Equatorianian law applicable [PO2, Q29, 53]. Equatoriana is a CISG Contracting State and its general contract law is a verbatim adoption of the UNIDROIT Principles [PO1, 49]. Thus, naming Equatorianian law is not a significant difference between the Parties' Standard Terms.
106. Delicately's Standard Terms do differ from Respondent's with respect to fair labour conditions and prohibition of child labour [Ex C2, 13; Ex R3, 31]. But to the extent that they differ, Delicately's requirement that suppliers comply with the International Labour Organization Standards covers the difference. In fact, Delicately has implemented standards on forced labour and child labour that are even broader than Respondent's terms [Ex R3, 31]. Overall, the Parties' Standard Terms largely achieve the same results since both Parties are UNGC members committed to ethical business practices.
107. Finally, Respondent's Standard Terms contain a provision allowing Respondent to get out of the Contract should Delicately breach its obligations, which seems different from Delicately's terms. However, Delicately's Standard Terms reach the same result if Delicately breaches its contractual obligations. Respondent's Clause 4 reads:
- ... Noncompliance with any of the contractual documents constitutes a breach of contract. Any breach of some relevance of Comestibles Finos' General Business Philosophy or its Code of Conduct for Suppliers shall be considered to constitute a fundamental breach entitling Comestibles Finos to terminate the contract with immediate effect and claim damages...
108. Delicately's Standard Terms incorporate Respondent's General Business Philosophy and Code of Conduct for Suppliers because both Parties' Standard Terms' compliance



obligations are rooted in the UNGC Principles. Thus, Delicatesy is as liable under its own Standard Terms as it would be under Respondent's.

B. Delicatesy's Standard Terms Were Available and Retrievable Online

109. Delicatesy told Respondent its offer was subject to its own Standard Terms by including a reference to them in its Sales Offer. When standard terms are included in an offer, they form part of the offer [Schroeter in Schwenger, 292-293]. Standard terms and conditions need not be in the offer itself provided they can be found in a separate document [Schroeter in Schwenger, 292-293; CISG AC Op No 13, Comment B (2.2); *Machinery Case*]. Delicatesy's Sales Offer states:

The above offer is subject to the General Conditions of Sale and our Commitment to a Fairer and Better World. Refer to our website [URL] in regard to our General Conditions and our commitments and expectations set out in our Codes of Conduct [Ex C4, 16].

Therefore, Delicatesy's Standard Terms were not surprising.

110. Respondent should have foreseen the terms Delicatesy sought to include in the Contract because the terms were available online. A party must send its Standard Terms or make them otherwise available to the offeree if it wants these terms to apply [Huber in Huber/Mullis, 31; Lautenschlager, 277; *Machinery Case*]. A party can do so by sending the full text of the standard terms or making them sufficiently available [Schroeter in Schwenger, 297; CISG AC Op No 13, r3.2]. Respondent could access Delicatesy's Codes of Conduct directly from the landing page [PO2, Q28, 53].

C. Respondent Accepted the Offer with Delicatesy's Codes of Conduct

111. Respondent told Delicatesy it accepted the offer because of Delicatesy's "convincing commitment to sustainable production" [Ex C5, 17]. Respondent cannot simultaneously accept Delicatesy's offer and subject Delicatesy to Respondent's own Standard Terms. An offeree can accept an offer through conduct indicating assent [CISG Art 18(1); Honnold, 234; Schlechtriem, 127]. Although Respondent never wrote the words "we accept your Standard Terms," it indicated that Delicatesy's Codes of Conduct were pivotal in its decision to select Delicatesy as its supplier [Ex C5, 17]. Respondent wrote that accepting Delicatesy's offer was in part due to Delicatesy's commitment to sustainable production, which is well evidenced in Delicatesy's Codes of Conduct [Ex C5, 17]. Respondent confirmed that it downloaded the Codes of Conduct [Ex C5, 17]. Respondent was aware of



Delicatesy's Codes of Conduct and that they were included in Delicatesy's offer.

Therefore, Respondent assented to Delicatesy's Standard Terms when it accepted Delicatesy's offer.

III. Respondent Accepted Delicatesy's Offer

112. **(A)** Respondent accepted the offer with Delicatesy's Codes of Conduct. **(B)** The Parties performed under the Contract as though Delicatesy's Standard Terms applied.

A. Respondent Accepted Delicatesy's Offer with Delicatesy's Codes of Conduct

113. Respondent told Delicatesy it accepted the offer because of Delicatesy's "convincing commitment to sustainable production" [Ex C5, 17]. Respondent cannot simultaneously accept Delicatesy's offer and subject Delicatesy to Respondent's own Standard Terms. An offeree can accept an offer through conduct indicating assent [CISG, Art 18(1); Honnold, 234; Schlechtriem, 129]. Although Respondent never wrote the words "we accept your Standard Terms," it indicated that Delicatesy's Codes of Conduct were pivotal in its decision to select Delicatesy as its supplier [Ex C5, 17]. Respondent wrote that accepting Delicatesy's offer was in part due to Delicatesy's commitment to sustainable production, which is well evidenced in Delicatesy's Codes of Conduct [Ex C5, 17]. Respondent confirmed that it downloaded the Codes of Conduct [Ex C5, 17]. Respondent was aware of Delicatesy's Codes of Conduct and that they were included in Delicatesy's offer. Therefore, Respondent assented to Delicatesy's Standard Terms when it accepted Delicatesy's offer.

114. Had Respondent considered Delicatesy's Standard Terms to be materially different from its own, it should have objected to Delicatesy's offer. A party can reject material changes, provided it does so without undue delay [*Hamba Corporation*]. Respondent did not object to Delicatesy's Standard Terms for over two years, allowing Delicatesy to reasonably infer its Standard Terms were part of the Contract.

B. The Parties Performed Under the Contract as Though Delicatesy's Standard Terms Applied

115. A party's repeated reference to its standard terms in invoices may further indicate that they are incorporated into a contract, especially if the parties are in a long-term business relationship [*Plants Case*]. In the *Conveyor Band Case*, the court concluded that the seller incorporated its standard terms into the contract by referencing its standard terms in each invoice without the buyer objecting. The Contract required Delicatesy to deliver cakes on a daily basis and Respondent to pay for each delivery within 30 days of delivery and



invoicing [Ex C3, 15]. Delicately included the same footnote contained in the Sales Offer in each invoice sent to Respondent [PO2, Q24, 52]. This clause subjected the Contract to Delicately's General Conditions of Sale, and provided Respondent with a link to access these terms and the Codes of Conduct [Ex C4, 16].

IV. In the Alternative, If the Parties Did Not Agree to a Set of Standard Terms for Their Contract, Neither Party's Terms Apply

116. Inconsistent statements by the Parties are not contemplated by the CISG and to fill this external gap the Tribunal must look to Danubian Contract Law ("DCL"). Delicately sent an offer with its Standard Terms [Ex C4, 16]. Delicately believed its Standard Terms governed the Contract. Respondent claims it did not intend to be bound by Delicately's Standard Terms [RNoA, 25]. A reasonable person could interpret that neither Party intended to be bound by the other's terms. If the Tribunal accepts both Parties' statements of intent, then the Parties did not reach an agreement regarding their Standard Terms. The inconsistent statements made by the Parties amount to a lack of common intention. It is possible that two reasonable people in the same circumstances could end up at an impasse. Both Parties have made their intentions clear, and CISG Art 8 cannot aid any further because there is no common intention and the Parties have to deal with an inconsistency.
117. Provided the CISG applies, it pre-empts otherwise applicable domestic law [CISG Art 7(2); *Usinor Industeel Case*]. Where the CISG does not provide a solution, parties can turn to private international law to resolve their disagreement [CISG Art 7(2); *Gas Oil Case*]. The CISG does not provide for a solution to inconsistent behaviour. To the extent the Parties hold inconsistent beliefs as to the Standard Terms, and the CISG does not resolve them, the Parties can use DCL to shed light on their disagreement. Both Parties' choice of law clauses are in their respective Standard Terms. "If parties make no express choice of law, but agree that any disputes between them shall be litigated in a particular country, it is generally assumed that they intend the law of that country to apply to the substance of their disputes" [Redfern/Hunter, 220]. If Parties have not agreed on Standard Terms, the private international law is DCL because DCL is named in the Arbitration Agreement the Parties negotiated [NoA, 6]. DCL solves the battle of the forms scenario with a knock-out rule [DCL, 73].
118. The knock out rule comes into play where the parties refer to their standard terms "automatically... by exchanging printed order and acknowledgement of order forms with the respective terms on the reverse side..." and "are not aware of the conflict between



their respective standard terms” [DCL, 73]. When this occurs, DCL allows parties to conclude the contract on the otherwise agreed upon terms [DCL, 73]. The Parties would have to view their Contract in light of their agreed-upon terms, which are: the adherence to UNGC Principles, Respondent’s Specification of Goods and Delivery Terms, and Respondent’s Special Conditions of Contract.

119. **Conclusion to Part 3:** Respondent accepted Delicatesy’s Standard Terms which, therefore, govern the Contract. Alternatively, if the Parties did not agree to a set of Standard Terms, neither Party’s Terms apply.

**PART 4: EVEN IF RESPONDENT’S TERMS GOVERN THE CONTRACT,
DELICATESY DELIVERED CONFORMING GOODS UNDER CISG ART 35**

120. Delicatesy delivered cakes which conformed with their **(I)** contractual requirements and which were fit for their **(II)** particular purpose.

I. Delicatesy Delivered Cakes that Conformed with Their Contractual Requirements

121. A seller must deliver goods that are of the quality and description required under the contract [CISG Art 35(1)]. Quality includes all “factual and legal circumstances concerning the goods’ relationship to their surroundings” such as the ethical manufacturing practices of goods [Schwenzer in Schwenzer, 596; Mullis in Huber/Mullis, 132; Leisinger, 8]. **(A)** The Contract required conformity with Delicatesy’s Supplier Code of Conduct and Respondent’s General Business Philosophy. **(B)** Delicatesy merely had a best efforts obligation to ensure RPC’s compliance with Respondent’s General Conditions and Code of Conduct for Suppliers. **(C)** Delicatesy delivered conforming goods because it used its best efforts in the performance of its contractual obligations.

A. The Contract Required Conformity with Delicatesy’s Supplier Code of Conduct and Respondent’s General Business Philosophy

122. Even if Respondent’s General Conditions of Contract apply, Principle E of Respondent’s Code of Conduct for Suppliers required Delicatesy to subject its suppliers to its own Supplier Code of Conduct. Principle E reads [Ex C2, 14]:

...select your own tier one suppliers providing goods or services directly or indirectly to Comestibles Finos Ltd based on them agreeing to adhere to standards comparable to those set forth in this Comestibles Finos’ Code of Conduct for Suppliers...



123. Principle E of Respondent’s Code of Conduct for Suppliers also requires Delicately to ensure that RPC complies with Delicately’s Supplier Code of Conduct in order to “avoid that goods or services delivered [being] in breach of Comestibles Finos’ General Business Philosophy” [Ex C2, 14]. Respondent’s General Business Philosophy contains “a list of general principles... largely identical to the UNGC Principles” and a reference that “Respondent is committed...to the Sustainable Development Goal promulgated by the UN” [PO2, Q31, 53].

B. Delicately Merely Had a Best Efforts Obligation to Ensure RPC’s Compliance with Respondent’s General Conditions and Code of Conduct for Suppliers

124. Where a party includes their code of conduct in the contract, it must be determined “whether the suppliers’ obligation is strict or only imposes an obligation for the supplier to use its best efforts to adhere to the policy” [Ramberg, 78; Dysted, 15]. Respondent attempts to colour Delicately’s undertaking to use its best efforts to ensure the delivery of ethical goods as a strict obligation. However, a proper interpretation of the **(i)** Respondent’s Standard Terms reveals that they only create a best efforts obligation. **(ii)** Respondent could have made this obligation strict; but it chose not to.

i. Respondent’s General Conditions and Code of Conduct for Suppliers Only Create a Duty of Best Efforts

125. The Contract is silent on the manner to source the cakes’ ingredients, particularly cocoa. [Ex C2, 10, 11]. Instead, the Contract expresses the Parties’ joint-commitment that their goods fulfill the “highest standard of sustainability” as well as their commitment to the UNGC Principles [Ex C5, 17]. These provisions indicate that sustainability is an aspirational goal for the Parties to work toward rather than a set of measurable practices.

126. The Tribunal must interpret contractual obligations interpreted in a commercially reasonable manner [CISG Art 8(2), 8(3); *Chemical Products Case*]. It would be commercially unreasonable to interpret “highest standard of sustainability” as a strict obligation because the standard is a moving target [Ex C5, 17]. Delicately could always provide goods that are more sustainable. Following this interpretation, Delicately would provide cakes to Respondent with no expectation that Respondent would accept the goods. Therefore, Delicately only had a best efforts obligation to work toward producing goods that fulfilled “the highest standard of sustainability” [Ex C5, 17].

127. Furthermore, the use of weak or discretionary language to describe a contractual obligation — albeit couched in mandatory language — is an indicator of a best efforts obligation



[Fontaine/De Ly, 195; Farnsworth, 5]. The Contract uses bold language such as the “highest standard of sustainability” to describe Delicatesy’s conformity obligations. However, the Contract neither specifies the manner in which the cakes’ ingredients are to be sourced, nor requires a certification scheme showing consumers that the cocoa is sourced in a sustainable manner. Therefore, the Parties could only reasonably understand these provisions meant that Delicatesy had an obligation to implement adequate procedures to ensure that RPC would follow Respondent’s General Conditions and Code of Conduct for Suppliers, and would use its best efforts in doing so.

ii. Respondent Chose Not to Impose a Strict Obligation on Delicatesy to Ethically Source Its Cocoa

128. Parties must stipulate any non-physical features a good must conform to and a means to ensure such conformity [Schwenzer Conformity, 105; CISG Art 8].
129. If Respondent wanted to impose a strict obligation on Delicatesy to deliver with 100 percent sustainably sourced cocoa, it should have specified the means to ensure such conformity. For example, UNGC companies such as Nestlé, Hershey, and Mars require that their suppliers acquire UTZ certified cocoa [Nestlé Supplier Code; Hershey Supplier Code; Mars Supplier Code].
130. Mars, a UNGC Company operating in a similar field as Respondent applies this UTZ certification scheme. Mars has committed to supply products that contain 100 percent certified cocoa by 2020 [Mars Sustainable Cocoa Initiative]. It implemented a Supplier Code of Conduct establishing an internal control system with targets to verify compliance [Mars Supplier Code]. Mars requires its cocoa suppliers to provide UTZ, Rainforest Alliance and Fairtrade International certified cocoa [Mars Sustainable Cocoa Initiative]. By comparison, Respondent’s supply chain management procedures are minimal. As a business seeking to become a UNGC LEAD by 2018, Respondent should have insisted on a certification standard and communicated implementation strategies.
131. Respondent can neither rely on a practice established between itself and Delicatesy, nor industry standard. According to CISG Art 9, parties are bound by any usage to which they have agreed to, or any international trade usage. Indeed, Delicatesy and Respondent never conducted business with each other prior to the Contract [Ex C3, 8]. Furthermore, without a given certification mechanism, there is no agreement on the meaning of sustainability in the cocoa industry [ICCO Report, 5]. The UNGC’s Guide to Traceability recognizes that, in practice, ensuring segregation of sustainable and non-sustainable cocoa is “very difficult



or impossible to achieve” [UNGC Guide to Traceability, 12]. To the contrary, industry practice favours a scheme by which a product containing 50 percent sustainable cocoa will be fully sustainable [*ibid*]. Therefore, there is no binding usage on Delicatesy under CISG Art 9 to deliver 100 percent sustainably sourced cocoa.

C. Delicatesy Used Its Best Efforts to Ensure RPC’s Compliance with Respondent’s General Conditions and Code of Conduct for Suppliers

132. Performance of a best efforts obligation is determined objectively [Fontaine/De Ly, 193; Zeller CISG Damages, 48]. The Contract required Delicatesy to use its best efforts to ensure that RPC’s compliance with Respondent’s General Conditions and Code of Conduct for Suppliers; Delicatesy met its obligations by **(i)** complying with its duty to keep record of all relevant documentation, **(ii)** auditing and inspecting RPC in a manner that was **(a)** accepted by Respondent, and **(b)** following UNGC Principles in its supply chain management.

i. Delicatesy Complied with Its Duty to Keep Record of All Relevant Documentation

133. Delicatesy’s suppliers are expected to maintain and provide Delicatesy with documentation showing their compliance with its Supplier Code of Conduct [Ex R3, 31]. Delicatesy monitors its suppliers’ business practice and assesses potential risks according to its Codes of Conduct [Ex R3, 31]. Delicatesy met its inspection obligation by requiring RPC to submit questionnaires and examining their content [PO2, Q32, 53]. For the last two years, RPC’s documentation did not include any information signalling fraud [Ex C8, 20].

ii. Delicatesy Audited and Inspected RPC

134. Delicatesy undertook an obligation to audit and ensure its suppliers comply with Delicatesy’s Supplier Code of Conduct and to “avoid that goods or services delivered are in breach” of Respondent’s General Business Philosophy [Ex C2, 14]. In 2014, Delicatesy hired Egimus AG, a company specialized in UNGC compliance. Egimus AG conducted an on-site audit and certified that RPC complied with UNGC Principles of sustainable production [Ex C8, 20; PO2, Q32/34, 53]. Given Egimus AG’s assessment, Delicatesy opted to have third-party audits of RPC every five years, as this is the standard for top companies [PO2, Q32/34, 53].



iii. Respondent Accepted Delicately's Supply Chain Management

135. Respondent's actions suggest it accepted Delicately's supply chain management strategy. The Tribunal should take the Parties' subsequent conduct into account when assessing the intention of each party [CISG Art 8(3); *Case Involving Machine for Repair of Bricks; Fabrics Case; Textiles Case*]. Respondent visited Delicately's premises for a presentation on the steps taken by Delicately to monitor its supply chain, which included examining documentation [PO2, Q34, 54]. Respondent did not make further audits or site visits after its initial visit [PO2, Q34, 54]. A reasonable person would interpret Respondent's subsequent conduct as accepting Delicately's auditing methods.

iv. Delicately Followed the UNGC in Its Supply Chain Management

136. Delicately respected both the UNGC's internal and external measures. Under the UNGC, companies must introduce anti-corruption policies into their business operations. They must also report on their work against corruption [UNGC Principle Ten]. Delicately has incorporated both these methods. Delicately is a UNGC Company [PO2, Q23, 52]. Business participants are required to communicate their progress to their own stakeholders on an annual basis and to post a copy on the UNGC's website [UNGC FAQ]. Failing to communicate progress on an annual basis results in a downgrading of participant status from active to non-communicating. Participants who do not communicate progress for two years in a row are expelled and the UNGC publishes their names [UNGC Guide to Traceability, 19/29]. Delicately remained a UNGC Company even as this dispute arose [NoA, 4]. Thus, by inference, Delicately has performed both internal and external implementation methods.

II. Delicately Delivered Cakes Fit for their Particular Purpose

137. Should the Tribunal find that **(A)** Delicately knew Respondent wanted to become a UNGC LEAD Company, **(B)** Delicately supplied cakes fit for Respondent's particular purpose. **(C)** Alternatively, Respondent could not reasonably rely on Delicately.

A. Delicately Knew Respondent Wanted to Become a UNGC LEAD Company

138. Respondent's particular purpose for buying the cakes was to help it become a UNGC LEAD Company and to promote its ethical image [Ex C1, 8; RNoA, 25]. A buyer can only hold the seller accountable for delivering goods unfit for their particular purpose if the buyer explicitly or implicitly makes the purpose known to the seller, and the buyer relied on the seller's skill and judgment [CISG Art 35(2)(b); *Schwenzer in Schwenzer*, 606].



Respondent told Delicately it intended to become a UNGC LEAD Company, and one of the decisive issues was proper supply chain management [Ex C1, 8].

B. Delicately Supplied Cakes Fit for Their Particular Purpose

139. Even if the Tribunal finds that Respondent reasonably relied on Delicately, the cakes were nonetheless fit for their particular purpose. The particular purpose of buying these goods was to help Respondent become a UNGC LEAD Company that could be equated to promoting an ethical image [Ex C1, 8; RNoA, 25]. Additionally, at the Cucina Food Fair, Respondent discussed the detrimental influence of bad press and told Delicately that in “[t]he market the Respondent is operating in, bad press can lead to considerable losses in turnover and revenues” [RNoA, 26]. Delicately thus knew that Respondent’s particular purpose for the cakes was to use them as promotional material to advance Respondent’s UNGC-compliant branding. After the Ruritanian scandal broke out, Respondent realized the cakes contained unethically sourced cocoa; but they still used the cakes in “a special marketing campaign for the opening of three new shops where every customer could get a fairly traded coffee and a piece of cake or a roll for free” [PO2, Q38, 54]. If Respondent itself considers Delicately’s cakes worthy marketing material to open shops pursuing a fair-trade market, the cakes must, by inference, be fit for their particular purpose of being promotable as an ethically compliant product.

C. Alternatively, Respondent Did Not Rely on Delicately to Deliver Cakes Fit for Their Particular Purpose

140. Respondent could neither reasonably delegate the commitments required to become a UNGC LEAD Company, nor could it rely on Delicately’s skill and judgement to promote an ethical image. Usually, a buyer may not rely on a seller when the buyer possesses equal or superior knowledge, unless it expressly says so [Kröll in Kröll/Mistelis/Viscasillas, 521]. Since Delicately is not a UNGC LEAD Company, and did not claim to have the ability to make Respondent a UNGC LEAD Company, Respondent could not have relied on Delicately to achieve this goal.
141. Furthermore, Respondent revealed it was not intending to rely on Delicately when it retained the right to inspect Delicately’s supply chain monitoring method. Exercising this degree of control suggests Respondent has sufficient knowledge of supply chain management and was not willing to leave this task in Delicately’s hands. Sufficient knowledge by the buyer may exist in all cases where the buyer himself has gained considerable experience in relation to the goods in question [Kröll in



Kröll/Mistelis/Viscasillas, 521]. Where the buyer does not rely on the seller's knowledge, there is no need to protect the buyer [Kröll in Kröll/Mistelis/Viscasillas, 521]. Respondent's Code of Conduct for Suppliers' Principle F imposes an obligation on Delicatesy to keep and provide records to Respondent upon request. Respondent also reserved the right to inspect Delicatesy's supply chain management, and impose corrective measures [Ex C2, 14]. Respondent did not rely on Delicatesy because it retained full control to inspect and correct Delicatesy's methods. Thus, Delicatesy cannot be held responsible for Respondent's difficulties achieving its promotional goals.

142. **Conclusion to Part 4:** If Respondent's Standard Terms apply, Delicatesy had a best efforts obligation to ensure RPC's compliance with Respondent's Standard Terms. Delicatesy met its obligations in line with Principle F in Respondent's Code of Conduct for Suppliers. Furthermore, Respondent cannot claim the cakes were not fit for their particular purpose while using them to promote its new stores. Therefore, Delicatesy delivered cakes that conformed with their contractual obligations and were fit for their particular purpose under CISG Art 35.

REQUEST FOR RELIEF

DELICATESY RESPECTFULLY REQUESTS THAT THE ARBITRAL TRIBUNAL:

- (1). FIND that the tribunal does not have jurisdiction to hear the challenge against Mr. Prasad;
- (2). DISMISS, if there is jurisdiction, the challenge against Mr. Prasad;
- (3). ORDER Respondent to pay the outstanding purchase price in the amount of USD 1,200,000;
- (4). DECLARE that the contractual relationship between Delicatesy and Respondent is governed by Delicatesy's General Conditions of Sale;
- (5). ORDER Respondent to pay damages in the amount of at least USD 2,500,000;
- (6). ORDER Respondent to bear the costs of the arbitration;

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON 7 DECEMBER 2017.