TWENTY-FIFTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
VIENNA, AUSTRIA – 24 TO 29 MARCH 2018

MEMORANDUM FOR CLAIMANT

UNIVERSITY OF ZURICH

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

GIANIN HOESSLY • ERIK LANZ • KIM O'NEILL
VALERIO PREISIG • ELIAS RITZI • ALISA ZEHNER

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Index of Abbreviations

AG	Aktiengesellschaft
AGB	Allgemeine Geschäftsbedingungen
Art.	Article
Artt.	Articles
ASA	Association Suisse de l'Arbitrage
AUS	Australia
AUT	Austria
BGB	Bürgerliches Gesetzbuch
cf.	confer (compare)
Ch.	Chapter
CISG	United Nations Convention on Contracts for the International Sale of Goods
CN	China
Conf.	Conference
COO	Chief Operating Officer
Corp.	Corporation
CSR	Corporate Social Responsiblity
DAL	Arbitration Law of Danubia
Doc.	Document
ed.	Edition
Ed(s).	Editor(s)
EEC	European Economic Community
et al.	et aliter (and others)
et seq.	et sequens (and the following one)
et seqq.	et sequentes (and the following ones)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
FIN	Finland
GER	Germany
IBA	International Bar Association
ibid.	ibidem (in the same source)

ICC	International Court of Arbitration
ICCA	International Council for Commercial Arbitration
ICSID	International Center for Settlement of Investment Disputes
Inc.	Incorporated
LCIA	London Court of International Arbitration
LP	Limited Partnership
Ltd	Limited company
mbH	mit beschränkter Haftung
No.	Number
NoA	Notice of Arbitration
NoC	Notice of Challenge
p./pp.	Page/pages
para./paras.	Paragraph/paragraphs
PICC	UNIDROIT Principles of international commercial contracts, 2016
PO 1	Procedural Order No. 1
PO 2	Procedural Order No. 2
RNA	Response to Notice of Arbitration
S.A.	Sociedad Anonima
SE	Sweden
SUI	Switzerland
U.C.C	Uniform Commercial Code
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations Organisation
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL AR	UNCITRAL Arbitration Rules
UNGC	UN Global Compact
UNIDROIT	International Institute for the Unification of Private Law
USA	United States of America
USD	United States Dollar
v.	versus
Vol.	Volume

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AWG Case	AWG Group Limited v. The Argentine Republic Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal 12 May 2008 *in para. [71, 74]*
ICSID	
Urbaser Case	Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic 12 August 2010 ICSID Case No. ARB/07/26 *in para. [82]*
OPIC Karimum Case	OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela 5 May 2011 ICSID Case No. ARB/10/14 *in para. [49, 56]*

Suez Case	Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic 12 May 2008 ICSID Case No. ARB/03/17 and Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic 12 May 2008 ICSID Case No. ARB/03/19 *in para. [71, 73]*
Tidewater Inc. Case	Tidewater Inc. et al. v. the Bolivarian Republic of Venezuela 23 December 2010 ICSID Case No. ARB/10/5 *in para. [46,47]*
Burlington Case	Burlington Resources, Inc v. Republic of Ecuador 13 December 2013 ICSID Case No. ARB/08/05 *in para. [79]*

ICC

CISG-Online 236	ICC (International Court of Arbitration) 23 January 1997 CISG-Online Nr. 236 *in para. [109]*

Index of Legal Acts and Rules

Cited as	Reference
CISG	United Nations Convention on Contracts for the In- ternational Sale of Goods, 1980
DAL	Danubian Arbitration Law (adoption of the UNCITRAL Model Law on International Commercial Arbitration, Vienna, 21 June 1985, with the 2006 amendments)
EEC No., 2092/91	COUNCIL REGULATION (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration, London (22 May 2004)
PICC	UNIDROIT Principles of international commercial contracts, 2016
UNCITRAL AR	UNCITRAL Arbitration Rules (as revised in 2010)

Statement of Facts

The **"Parties"** to this arbitration ("**Arbitration**") are Delicatesy Whole Foods Sp ("**CLAIMANT**"), a manufacturer of bakery products registered in Equatoriana, and Comestibles Finos Ltd. ("**RESPONDENT**"), a supermarket chain in Mediterraneo.

In March 2014, the Parties met at the Danubian food fair, where they discussed sustainable food production and potential contracting regarding the delivery of cakes. Subsequently, RESPONDENT invited CLAIMANT to make an offer ("**Invitation to Tender**").

On 27 March 2014, CLAIMANT submitted its Offer ("**Offer**") to deliver 20'000 chocolate cakes ("**Cakes**") per day for USD 2 per unit. It assured RESPONDENT that it would *"do everything possible"* to ensure that its suppliers produce sustainably. CLAIMANT stated that its Offer was subject to its own General Conditions of Sale.

On 7 April 2014, RESPONDENT accepted the Offer without any objection ("**Acceptance**"). Thereby, the Parties concluded a contract for the delivery of the Cakes ("**Contract**").

After nearly three years of successful contractual relations, it turned out that one of CLAIMANT's cocoa suppliers was involved in a massive corruption and environmental scandal. CLAIMANT immediately terminated the agreement with this supplier and obtained other suppliers to secure performance of the Contract.

On 10 February 2017, due to these unfortunate circumstances, CLAIMANT offered to take back the Cakes not yet sold and to reduce the price, as a gesture of goodwill; however, it re-emphasized that it had complied with the Contract and was defrauded itself.

On 12 February 2017, despite CLAIMANT's efforts, RESPONDENT rejected such proposal and purportedly terminated the Contract with immediate effect, alleging that CLAIMANT had breached the Contract. To date, RESPONDENT has not made the outstanding payment of USD 1'200'000 for the Cakes delivered between 16 December 2016 and 27 January 2017.

On 30 June 2017, CLAIMANT commenced the Arbitration, appointing Mr. Prasad as an arbitrator. RESPONDENT, in its Response to the Notice of Arbitration, accepted Mr. Prasad *"despite the restrictions in his declaration of independence"*.

On 14 September 2017, RESPONDENT, nevertheless, questioned Mr. Prasad's impartiality and independence by challenging Mr. Prasad after CLAIMANT had declared that its claim is funded by Funding 12 Ltd. Mr. Prasad and CLAIMANT assessed and denied the alleged grounds for challenge in their letters dated 21 and 29 September 2017.

Summary of Argument

Issue A: **The Tribunal should not decide on the challenge of Mr. Prasad or only with his participation.** Pursuant to Artt. 13(4) and 6 UNCITRAL Arbitration Rules, an institution or a person, must decide on the challenge. This procedure was not excluded by the passage in the arbitration agreement *"without the involvement of any arbitral institution"* because it does not relate to the challenge procedure. However, it certainly does not exclude a person to decide on the challenge. Should the Tribunal, nevertheless, decide on the challenge of Mr. Prasad, it should do so with his participation because excluding him would not only contradict Art. 13(2) DAL, the *lex arbitri*, but also CLAIMANT's right to equal treatment.

Issue B: The Tribunal should not remove Mr. Prasad. Mr. Prasad was honest and forthcoming at all times and immediately disclosed any potential grounds for a conflict of interests. Since none of the circumstances invoked by RESPONDENT give rise to justifiable doubts as to Mr. Prasad's impartiality and independence, they do not justify his removal. Besides that, RESPONDENT waived its right to challenge Mr. Prasad based on most of these circumstances in the first place.

Issue C: CLAIMANT's General Conditions govern the Contract because CLAIMANT validly and exclusively incorporated its General Conditions by reference to its webpage. The reference prompted RESPONDENT to visit CLAIMANT's website, however, RESPONDENT chose to refrain from reading the General Conditions. In doing so, RESPONDENT was a mouse click away from CLAIMANT's General Conditions. Thus, RESPONDENT could not have been unaware of CLAIMANT's intent to incorporate its own General Conditions in the Offer, and, nonetheless, accepted this incorporation without any modifications. Therefore, only CLAIMANT's General Conditions govern the Contract.

Issue D: CLAIMANT's Cakes are conforming even if RESPONDENT's General Conditions govern the Contract. As RESPONDENT failed to include any specific criteria in order to assess whether a guarantee was complied with, the wording of RESPONDENT's General Conditions obliges CLAIMANT to use its best efforts and not to guarantee sustainably produced Cakes by its supplier no matter what. This is corroborated by the fact that a *"decisive element"* for RESPONDENT to contract with CLAIMANT was that CLAIMANT promised to *"do everything possible"* to ensure that its suppliers produce sustainably. CLAIMANT did in fact do everything possible to ensure sustainable production and therewith delivered Cakes that are conforming under the Contract.

A. The Tribunal should not decide on the challenge of Mr. Prasad or only with his participation

1 The Tribunal should not decide on the challenge of Mr. Prasad. Pursuant to Art. 13(4) UNCITRAL Arbitration Rules ("UNCITRAL AR") an appointing authority must decide on the challenge of Mr. Prasad [**I**]. If the Tribunal, nevertheless, assumes authority, it should decide on the challenge with Mr. Prasad's participation [**II**].

I. An appointing authority must decide on the challenge of Mr. Prasad

2 The Parties agreed on the UNCITRAL AR to govern the Arbitration *(Exh. C 2, p. 12)*. Regarding the challenge procedure, Art. 13(4) UNCITRAL AR stipulates that the challenging party shall seek a decision on the challenge by an appointing authority. According to Art. 6(1) UNCITRAL AR the appointing authority can either be an institution or a person.

3 RESPONDENT alleges that the Tribunal should decide on the challenge of Mr. Prasad. In RESPONDENT's view, the Parties excluded the application of Art. 13(4) UNCITRAL AR by stating in their arbitration agreement that *"[a]ny dispute […] shall be settled by arbitration […] without the involvement of any arbitral institution" (NoC, p. 39 para. 8; Exh. C 2, p. 12).* However, this allegation is without merits. An appointing authority must decide on the challenge because the Parties did not exclude the application of Artt. 13(4) and 6(1) UNCITRAL AR which provides for a person or an institution to decide on the challenge [**1**]. In any case, the Parties did not exclude Artt. 13(4) and 6(1) UNCITRAL AR to the extent that it provides for a person to decide on the challenge [**2**].

1. A person or an institution has authority to decide on the challenge

4 A person or an institution has authority to decide on the challenge because the Parties did not exclude the application of Artt. 13(4) and 6(1) UNCITRAL AR. The Parties only intended to exclude institutional support in the appointment procedure but not in the challenge procedure. This can be concluded from an interpretation of the arbitration agreement.

5 According to Art. 8(1) CISG, the parties' common intent is primarily relevant for the interpretation of an agreement *(CISG-Online 1012 [SUI, 2005], para. 3.2; SCHMIDT-KESSEL, Art. 8 para. 22)*. If the parties' common intent cannot be established, an agreement has to be interpreted according to the understanding of a reasonable third person pursuant to Art. 8(2) CISG *(SCHMIDT-KESSEL, Art. 8 para. 22; CISG-Online 1740 [SUI, 2008], para. 3.1.2).* For an interpretation all circumstances including the negotiations must be considered *(Art. 8(3) CISG; CISG-Online 342 [USA, 1998]; SCHMIDT-KESSEL, Art. 8 para. 32).*

6 Although the wording *"without the involvement of any arbitral institution" (Exh. C 2, p. 12)* might, at first glance, exclude an institution to decide on the challenge, the negotiations evidence that this does not reflect the Parties' intention:

7 The negotiations began at the Danubian food fair, where the Parties first met *(NOA, p. 4 para. 3)*. There, RESPONDENT told CLAIMANT that it had switched from institutional to ad hoc arbitration following a bad experience with institutional arbitration *(Exh. R 5, p. 41)*. This was particularly interesting for CLAIMANT as it had switched the other way around from ad hoc to institutional arbitration a couple of years ago. It had done so due to a bad experience in the appointment of arbitrators without institutional support *(Exh. R 5, p. 41)*.

8 After CLAIMANT reviewed the arbitration agreement it wanted RESPONDENT's confirmation that the arbitration argeement would not lead to problems *(Exh. R 5, p. 41)*. CLAIMANT expressly communicated its concerns in regard to the arbitrator's appointment procedure *(Exh. R 5, p. 41)*. In CLAIMANT's understanding only the appointment procedure was subject to the exclusion in the arbitration agreement. RESPONDENT reassured CLAIMANT that it did not deem CLAIMANT's concerns justified *(Exh. C1, p. 8)*. Only after RESPONDENT's confirmation and based on CLAIMANT's understanding in regard to the scope of the passage *"without the involvement of any arbitral institution",* CLAIMANT included the arbitration agreement in its Offer *(Exh. C 3, p. 15)*. Subsequently, RESPONDENT accepted that Offer *(Exh. C5, p. 17)*.

9 The negotiations show that the Parties only discussed the exclusion of institutional support for the *appointment procedure.* Only now that RESPONDENT has decided to challenge Mr. Prasad, it tries to extend the exclusion of institutional support to the challenge procedure, although it never mentioned the challenge procedure or Art. 13(4) UNCITRAL AR before. This reveals that the Parties did not intend to modify the challenge procedure pursuant to Art. 13(4) UNCITRAL AR but only sought to exclude institutional support in the appointment procedure.

10 Therefore, a person or an institution pursuant to Artt. 13(4) and 6(1) UNCITRAL AR has authority to decide on the challenge.

2. In any event, a person has authority to decide on the challenge

11 Even if the Tribunal assumes that the Parties excluded institutional involvement for the challenge procedure, they did not exclude Art. 13(4) UNCITRAL AR to the extent that it provides for a person to decide on the challenge. This can be concluded from an interpretation of the arbitration agreement based on the wording, the negotiations, and the purpose pursuant to Art 8 CISG *[cf. para. 5]*.

12 First, the wording of the arbitration agreement leads to the conclusion that the Parties did not exclude a person from deciding on the challenge. It contains the passage *"Any dispute […] shall be settled by arbitration […] without the involvement of any arbitral institution" (Exh. C 2, p. 12, (emphasis added))*. If the Parties therewith intended to modify Artt. 13(4) and 6(1) UNCITRAL AR, it is reasonable to assume that they used the term "*institution*" in accordance with the meaning under the UNCITRAL AR. Artt. 13(4) and 6(1) UNCITRAL AR distinguishes between a person and an institution to decide on the challenge. Thus, the wording of the arbitration agreement shows that the Parties, if at all, excluded an institution, but certainly not a *person* from deciding on the challenge.

13 Second, the negotiations between the Parties show that they did not exlude a person from deciding on the challenge. During the negotiations, i.e., at the Danubian food fair *(Exh. R 5, p. 41)*, in the letter enclosed to RESPONDENT's Tender Documents *(Exh. C 1, p. 8)*, as well as in CLAIMANT's Offer *(Exh. C 3, p. 15),* the Parties only discussed the exclusion of arbitral institutions. However, they never mentioned that a person should be excluded. Thus, the negotiations show that the Parties did not exclude a person from deciding on the challenge.

14 Third, having a person decide on the challenge meets the purpose of the arbitration agreement communicated by RESPONDENT. The only time it communicated its reason for the exclusion of institutional support and the shift to ad hoc arbitration was at the Danubian food fair *(Exh. R 5, p. 41)*. There, it told CLAIMANT that once an employee of an arbitral institution allegedly had leaked information from a dispute to her husband, who was the COO of RESPONDENT's competitor *(Exh. R 5, p. 41)*. This shows that RESPONDENT was only concerned to submit confidential information to an arbitral institution, as this goes along with the uncertainty about who, and how many people, would have access to this information. With regard to the involvement of a single person, however, such concerns were neither communicated nor recognizable. If a person decided on the challenge, only this specific and known person gains knowledge of the information and the Parties can select this person on the basis of his or her trustworthiness. Thus, the purpose is met if a person decideds on the challenge.

15 Consequently the wording the negotiations and the purpose of the arbitration agreement show that the Parties did not intend to exclude a person pursuant to Artt. 13(4) and 6(1) UNCITRAL AR from deciding on the challenge. At least a reasonable third person in the shoes of the Parties would have had such an understanding.

16 Since the Parties did not exclude a person from deciding on the challenge, RESPONDENT must use the following procedure in order to pursue the challenge: According to Artt. 13(4) and

6(1) UNCITRAL AR it must propose a person to decide on the challenge. CLAIMANT has always been eager to speed up the proceeding *(Letter Fasttrack, p. 35; Letter Fasttrack, p. 46)* and would accept any proposal made in good faith. Therefore, a person jointly selected by the Parties must decide on the challenge of Mr. Prasad.

II. In case the Tribunal were to decide on the challenge of Mr. Prasad, it should decide with his participation

17 In case the Tribunal assumes authority to decide on the challenge of Mr. Prasad, it should decide with his participation. Art. 13(2) Danubian Arbitration Law ("DAL") provides for the challenged arbitrator to decide as part of the arbitral tribunal [**1**]. Additionally, the Tribunal should decide on the challenge with Mr. Prasad's participation in order to guarantee CLAIMANT's right to equal treatment [**2**].

1. Under Art. 13(2) DAL the challenged arbitrator decides as part of the arbitral tribunal

18 Should the Tribunal assume that the Parties excluded Art. 13(4) UNCITRAL AR, there would be no agreement on the challenge procedure. Where the parties did not agree on the challenge procedure, Art. 13(2) DAL states that *"the arbitral tribunal shall decide on the challenge"*. For the following reasons, the term *"arbitral tribunal"* in Art. 13(2) DAL refers to the tribunal including the challenged arbitrator to decide on the challenge:

19 First, according to Art. 29 DAL any decision of an arbitral tribunal *"shall be made [...] by a majority of **all its members**"(emphasis added).* This shows that under the DAL the decisional body consists of all members of the arbitral tribunal. Consequently, a decision on the challenge must also be made by all members of an arbitral tribunal.

20 Second, it seems undisputed in legal doctrine that under Art. 13(2) UNCITRAL Model Law the challenged arbitrator decides as part of the arbitral tribunal on his or her challenge *(BINDER, Model Law, paras. 3-072 et seq.; HOLTZMANN/NEUHAUS, pp. 406 et seq.)*. Further, the drafters of the UNCITRAL Model Law agreed that *"the challenged arbitrator should remain and thus rule on the challenge" (Yearbook of the UNCITRAL, p. 436; cf. further: Working Group, para. 38; Report of the Secretary General 1985, Art. 13 para. 4)*. Since the DAL is an adoption of the UNCITRAL Model Law, the same must apply under Art. 13(2) DAL.

21 Third, it is accepted in other jurisdictions which adopted the UNCITRAL Model Law that the challenged arbitrator should participate in the decision *(**German Federal Code of Civil Procedure § 1037**: Doctors Case [GER, 2006], para. II, 2; Parking Facility Case [GER, 2006],*

para. II, 1; VOIT, § 1037 para 4; MÜNCH, § 1037 para. 16; ***Austrian Code of Civil Procedure § 589****: SCHWARTZ/KONRAD, p. 364;* ***Japanese Arbitration Law Art. 19****: KONDO et al., p. 80).*

22 Therefore, pursuant to Art. 13(2) DAL, Mr. Prasad should decide on his challenge as a member of the Tribunal.

2. CLAIMANT's right to equal treatment requires Mr. Prasad's participation

23 Only a challenge procedure with Mr. Prasad's participation ensures CLAIMANT's right to equal treatment.

24 Art. 18 DAL stipulates that the *"parties shall be treated with equality and each party shall be given a full opportunity of presenting his [or her] case*". The mandatory and fundamental procedural rights of Art. 18 DAL apply to both, actions taken by the arbitral tribunal and to agreements by the parties *(HOLTZMANN/NEUHAUS, p. 550; REDFERN/HUNTER, paras. 6.11 et seq.; Working Group, para. 62; REPORT OF THE SECTRETARY GENERAL 1985, Art. 13 para. 2)*. Pursuant to Art. 18 DAL, no party shall have an advantage over the other in arbitral proceedings *(BINDER, Model Law, Art. 5 para. 5-008; BÖCKSTIEGEL/KRÖLL/NACIMIENTO, p. 244)*. Barring the challenged arbitrator from the arbitral tribunal leads to an unwarranted overrepresentation and an advantage for the other party *(MANKOWSKI, p. 305; BÖCKSTIEGEL/KRÖLL/NACIMIENTO, p. 198; THEUNE, p. 245; German Federal Report, p. 46)*.

25 If the Tribunal were to decide on the challenge without the participation of Mr. Prasad, it would take a decision in which RESPONDENT's party-appointed arbitrator participated, whereas CLAIMANT's party-appointed arbitrator did not. Therefore, RESPONDENT would be overrepresented and would have an advantage over CLAIMANT in the decision making process. This would constitute an unequal treatment of the Parties and contradict Art. 18 DAL.

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26 **Conclusion:** The Parties did not exclude Art. 13(4) UNCITRAL AR because the passage in the arbitration agreement *"without the involvement of any arbitral institution"* does not relate to the challenge procedure but only to the appointment of arbitrators. In any case, it certainly does not exclude a person from deciding on the challenge. Consequently, the Tribunal has no authority to decide on the challenge. Should the Tribunal, nevertheless, decide on the challenge, it should do so with Mr. Prasad's participation because excluding him would not only contradict Art. 13(2) DAL but also CLAIMANT's right to equal treatment.

B. The Tribunal should not remove Mr. Prasad

27 According to Art. 12(1) UNCITRAL AR and Art. 12(2) DAL an arbitrator must be removed from an arbitral tribunal if circumstances exist that give rise to justifiable doubts as to an arbitrator's impartiality and independence. Whether or not justifiable doubts exist must be assessed from the perspective of a reasonable third person *(Agricultural Product Case, para. 23; CARON/CAPLAN, p. 208; REDFERN/HUNTER, para. 4.94, WEBSTER, Art. 12 paras. 20, 31)*.

28 RESPONDENT alleges that there are justifiable doubts as to Mr. Prasad's impartiality and independence and that, for this reason, he should be removed from the Tribunal *(NoC, p. 39 para. 12)*. Further, it alleges that CLAIMANT's non-disclosure of its third-party funder affects the standard to be applied for the challenge of Mr. Prasad *(NoC, p. 39 para 9)*. This is incorrect. CLAIMANT's non-disclosure of its third-party funder does not affect the assessment of Mr. Prasad's impartiality [**I**]. Moreover, none of the grounds RESPONDENT invokes justify Mr. Prasad's removal: neither his appointments as an arbitrator in previous cases [**II**], nor that a partner from Mr. Prasad's law firm represents a client funded by Funding 8 Ltd [**III**], nor his article in the Vindobona Journal [**IV**].

I. CLAIMANT's non-disclosure of its third-party funder does not affect the assessment of Mr. Prasad's impartiality

29 RESPONDENT alleges that CLAIMANT's conduct was unlawful because it did not proactively disclose the fact that its claim is funded by Funding 12 Ltd *(NoC, p. 39 para. 9)*. Further, it tries to fabricate a connection between the alleged misconduct of CLAIMANT and the assessment of Mr. Prasad's impartiality *(ibid.)*.

30 CLAIMANT will show that it was not obliged to disclose its third-party funder and, hence, did not act unlawfully because there is no legal basis for such a disclosure obligation of CLAIMANT [**1**]. In any case, only Mr. Prasad's conduct is relevant to assess his impartiality in the first place [**2**].

1. There is no legal basis for a disclosure obligation of CLAIMANT

31 CLAIMANT is not aware of any provision in Danubian Law nor in the UNCITRAL AR that requires a party to disclose third-party funding. Apart from that, there are no special rules or laws on transparency in arbitral proceedings in any of the jurisdictions concerned *(PO 2, p. 51 para. 18)*. Consequently, not even RESPONDENT alleges the existence of such a provision in Danubian law.

32 RESPONDENT merely relies on Art. 7(a) IBA Guidelines to fabricate such an obligation (*NoC, p. 39 para. 9)*. However, the IBA Guidelines are not binding, if the parties have not specifically agreed upon their application *(Introduction of the IBA Guideline, para. 6; Preamble IBA Principles; CROFT/KEE/WAINCYMER, Art. 11 para. 11.10; TWEEDDALE/TWEEDDALE, para. 5.35; SACHS, pp. 63, 126; WILSON KOH, p. 721; WEBSTER, Art. 11, para. 7; cf. BORN, pp. 1851 et seqq.)*. In particular, General Standard 7(a) of the IBA Guidelines cannot, absent an agreement, oblige a party to make proactive disclosures *(FROITZHEIM, p. 166)*. Accordingly, the IBA Guidelines cannot impose an additional duty on CLAIMANT to disclose that its claim is funded by a third-party funder.

33 Therefore, CLAIMANT was not obliged to proactively disclose the fact that its claim is funded by Funding 12 Ltd.

2. In any case, only Mr. Prasad's conduct is relevant to assess his impartiality

34 The mere fact that a party did not proactively disclose potential conflicts, of which the arbitrator did not know, cannot be of relevance in regard to the arbitrator's challenge *(FROITZHEIM, pp. 88, 166)*. Thus, even under the assumption that CLAIMANT should have disclosed the funding, its conduct is irrelevant to the question of Mr. Prasad's impartiality.

35 In addition, Mr. Prasad immediately disclosed any potential conflicts after he had gained knowledge of CLAIMANT's third-party funder *(Declaration Prasad, p. 36)*. Thus, Mr. Prasad fully complied with his disclosure obligations. He was forthcoming and honest at all times and disclosed any potential circumstance that might give rise to doubts as to his impartiality. This is also not disputed by RESPONDENT *(NoC, p. 38 para. 6)*.

36 Therefore, CLAIMANT's nondisclosure is irrelevant to assesss Mr. Prasad's impartiality. In the following, it will be shown that no circumstances exist which justify Mr. Prasad's removal.

II. Mr. Prasad's previous appointments as arbitrator do not justify his removal

37 CLAIMANT's claim is funded by Funding 12 Ltd, a 60% subsidiary of Findfunds LP *(Letter Fasttrack, p. 35; PO 2, p. 50 para. 2)*. In the past, Mr. Prasad acted as arbitrator in two cases which were funded by other subsidiaries of Findfunds LP *(Declaration Prasad, p. 36)*. Further, Mr. Prasad was appointed twice by lawyers of Fasttrack & Partners, the law firm of CLAIMANT's counsel *(PO 2, p. 51 para. 9)*.

38 Based on these facts, RESPONDENT alleges that Mr. Prasad has been appointed twice by Findfunds LP and twice by Mr. Fasttrack's law firm, Fasttrack & Partners, which in its view gives rise to justifiable doubts as to Mr. Prasad's impartiality and independence *(NoC, p. 39 para.*

10). However, this is incorrect. Findfunds LP did not repeatedly appoint Mr. Prasad, but even if it did, this would not justify his removal [**1**]. Additionally, the appointments by Fasttrack & Partners do not justify his removal [**2**]. Finally, these alleged grounds cannot be added, and even if they were, they do not justify his removal [**3**].

1. Findfunds LP did not repeatedly appoint Mr. Prasad, but even if it did, this would not justify his removal

39 The fact that Mr. Prasad previously acted as arbitrator in two cases funded by Findfunds LP's subsidiaries gives no rise to justifiable doubts as to his impartiality and independence. Findfunds LP or its subsidiaries did not repeatedly appoint Mr. Prasad [**a**]. Even if the Tribunal assumes that Findfunds LP repeatedly appointed Mr. Prasad, it would not give rise to justifiable doubts as to his impartiality and independence [**b**].

a) Findfunds LP or its subsidiaries did not repeatedly appoint Mr. Prasad

40 Repeat appointment requires a party to appoint the same arbitrator in different arbitrations *(KHAMBATA, p. 630; SLAOUI, p. 104)*. In case of third-party funding, the existence of a repeat appointment would require that the funder controlled the appointment of the arbitrator on behalf of a party *(VON GOELER, p. 274; OSMANOGLU, p. 335)*. In the case at hand, however, there is no repeat appointment of Mr. Prasad neither by Findfunds LP nor by Funding 12 Ltd.

41 RESPONDENT's allegation that Findfunds LP or its subsidiaries ever appointed Mr. Prasad *(NoC, p. 39 para. 10)* is without merits. It only relies upon the fact that Findfunds LP's subsidiaries funded two cases in which Mr. Prasad was involved in the past *(NoC, p. 39 para. 10)*. From that, however, it cannot be concluded that Findfunds LP's subsidiaries ever controlled Mr. Prasad's appointment. The fact that Findfunds LP's subsidiaries are known to take little influence in the appointment of arbitrators *(PO 2, p. 50 para. 4)* even indicates the contrary. Thus, neither Findfunds LP nor its subsidiaries repeatedly appointed Mr. Prasad.

42 In addition, at least in the present case neither Findfunds LP nor Funding 12 Ltd appointed Mr. Prasad because they did not control Mr. Prasad's appointment. The decision that Mr. Prasad should be the arbitrator in the present Arbitration was already expressed on 4 May 2017 *(NoC, p. 38 para. 3)*. The negotiations with Findfunds LP and Funding 12 Ltd, however, started only on 30 May 2017 *(PO 2, p. 50 para. 5)*. Consequently, neither Findfunds LP nor Funding 12 Ltd did control or could have controlled the decision that Mr. Prasad should be appointed as arbitrator in the present Arbitration. Thus, neither Findfunds nor Funding 12 Ltd repeatedly appointed Mr. Prasad.

43 In any case, in the present Arbitration there cannot be a repeat appointment by Findfunds LP because the present claim is funded by Funding 12 Ltd, a separate legal entity *(Letter Fasttrack, p. 35)*. Further, it cannot be a repeat appointment by Funding 12 Ltd since Funding 12 Ltd for the first time funds an arbitration in which Mr. Prasad acts as arbitrator *(cf. Declaration Prasad, p. 36)*. Thus, in the present Arbitration neither Findfunds LP nor Funding 12 Ltd. repeatedly appointed Mr. Prasad.

44 Therefore, neither Findfunds LP nor its subsidiaries repeatedly appointed Mr. Prasad.

b) Even if the Tribunal assumes a repeat appointment by Findfunds LP, it would not give rise to justifiable doubts as to Mr. Prasad's impartiality

45 Even if the Tribunal assumes that Findfunds LP repeatedly appointed Mr. Prasad, it would not affect his impartiality and independence under Art. 12(1) UNCITRAL AR.

46 RESPONDENT alleges that repeat appointment is problematic under the IBA Guidelines *(NoC, p. 39 para. 10)*. In the Orange List in Art. 3.1.3 and 3.3.8, the IBA Guidelines cover the subject of repeat appointment. However, the Orange List is only a disclosure list and does not address the question if and under what circumstances repeat appointment gives rise to justifiable doubts *(IBA Guidelines, Part II, para. 3; BORN, p. 1849; WILSON KOH, p. 722: Tidewater Inc. Case, para. 43)*.

47 Repeat appointment does not as such give rise to justifiable doubts as to an arbitrator's independence *(BISHOP/REED, p. 421; WILSON KOH, p. 719; KRÖLL/LEW/MISTELIS, paras. 11-27; SLAOUI, p. 105; Tidewater Inc. Case, para. 60)*. Rather, the circumstances of each particular case must be taken into account in order to assess whether or not a repeat appointment indicates a financial dependence and thus gives rise to justifiable doubts as to an arbitrator's impartiality and independence *(GIRALDO-CARRILLO, p. 87; WILSON KOH, pp. 718 et seq.; KHAMBATA, pp. 630 et seq.; GOMEZ-ACEBO, pp. 124 et seqq.; Tidewater Inc. Case, paras. 59 et seqq.)*.

48 First, there must be a pattern of regular and frequent appointments by a party *(BISHOP/REED, p. 422; KRÖLL/LEW/MISTELIS, paras. 11-27; GOMEZ-ACEBO, p. 114; POUDRET/BESSON, para. 418)*. Although Findfunds LP's subsidiaries funded two previous cases in which Mr. Prasad acted as arbitrator, only one of them could be construed as appointment by Findfunds LP. In the other case, Findfunds LP only entered into a funding agreement after Mr. Prasad was appointed *(Declaration Prasad, p. 36)*. Accordingly, if at all, Findfunds LP appointed Mr. Prasad once. In case of only one or two previous appointments, it is already disputable whether

these fall under the disclosure obligation of the IBA Guidelines *(Art. 3.1.3, 3.3.8 IBA Guidelines)*. In any case, only one or two appointment's cannot constitute a pattern of regular and frequent appointments.

49 Second, the number of previous appointments by the same party must also be considered in relation to the number of the arbitrator's overall appointments *(WILSON KOH, p. 734; BORN, p. 1883)*. In case law, challenges were rejected where an arbitrator had been appointed by the same party in 12 out of 112 and even 5 out of 8 cases *(Korsnas Aktiebolag Case [SE, 2010]; OPIC Karimum Case)*. The two previous appointments of Mr. Prasad constitute a very low absolute number already. The fact that he was appointed as arbitrator in more than 20 arbitrations in the last three years *(PO 2, p. 51 para. 10)*, demonstrates that Mr. Prasad does not depend on further appointments by Findfunds LP as he is frequently appointed by other parties.

50 Third, repeat appointment has to be considered as a factor that might give rise to justifiable doubts only where it constitutes a material part of the arbitrator's professional activities and income and where the arbitrator has a significant financial interest in further appointments *(WILSKE/STOCK, p. 47; BORN, pp. 1882 et seq.; GIRALDO-CARRILLO, p. 87; BISHOP/REED, p. 422)*. Mr. Prasad earns 30-40% of his income as arbitrator *(PO 2, p. 51 para. 10)*. Thereof, he gained 20% from the two previous arbitrations in which Findfunds LP was involved *(PO 2, p. 51 para. 10)*. Consequently, Mr. Prasad has only gained between 6-8% of his income through the cases funded by Findfunds LP. Thus, over 90% of Mr. Prasad's income stems from other sources which shows that not a material part of his income stems from cases funded by Findfunds LP.

51 The low number of Mr. Prasad's previous appointments in relation to his total caseload and the negligible part of his income stemming from cases in which Findfunds LP was involved shows that he is not financially dependent on Findfunds LP. Therefore, the repeat appointments by Findfunds LP cannot give rise to justifiable doubts as to Mr. Prasad's impartiality and independence.

2. The appointments by Fasttrack & Partners do not justify Mr. Prasad's removal

52 Mr. Prasad's two previous appointments by lawyers of the same law firm as CLAIMANT's counsel, do not justify his removal.

53 RESPONDENT effectively waived its right to challenge Mr. Prasad based on the previous appointments by Fasttrack & Partners. Pursuant to Art. 13(1) UNCITRAL AR, a party is deemed to have waived its right to challenge an arbitrator if it fails to give notice within 15

days after it gained knowledge about the possible ground for challenge *(CARON/CAPLAN, p. 242; Report of the Secretary General 1976, p. 170; BINDER, Arbitration, Art. 13 paras. 13-008 et seq.; WEBSTER, Art. 13 para. 13-41; CROFT/KEE/WAINCYMER, Art. 13 para. 13.4)*. Mr. Prasad disclosed his previous appointments by Fasttrack & Partners in his Declaration of Impartiality and Independence *(Exh. C 11, p. 23)*. In its Response to Notice of Arbitration from 31 July 2017 RESPONDENT stated that it has *"no objection to the appointment of Mr. Rodrigo Prasad despite the restrictions in his declaration of independence" (RNA, p. 26 para. 22)*. At the time RESPONDENT gave notice of its challenge on 14 September 2017 *(NoC, pp. 38 et seq.),* the 15 days time limit had long expired. Thus, RESPONDENT waived its right to challenge Mr. Prasad based on his previous appointments by Fasttrack & Partners.

54 In any case, the appointments by Fasttrack & Partners do not give rise to justifiable doubts as to Mr. Prasad's impartiality and independence. The circumstances of each particular case must be taken into account to assess whether or not previous appointments give rise to justifiable doubts as to an arbitrator's impartiality and independence *[cf. paras. 47 et seqq.]*. Fasttrack & Partners appointed Mr. Prasad only in two previous cases, in which Mr. Fastrack was not directly involved and which were of only minor financial value *(PO 2, p. 51 paras. 9 et seq.)*. This would not even have to be disclosed under the IBA Guidelines *(cf. Art. 3.3.8 IBA Guidelines)*, let alone does it affect Mr. Prasad's impartiality and independence.

55 Therefore, the appointments by Fasttrack & Partners do not justify Mr. Prasad's removal.

3. The previous appointments cannot be added and even if they could be, they do not justify Mr. Prasad's removal

56 Contrary to RESPONDENT's allegations *(NoC, p. 39 para. 10)*, Mr. Prasad's previous appointments by Findfunds LP and Fasttrack & Partners cannot be added. Previous appointments from different sources can, absent exceptional circumstances, not be added *(OPIC Karimum Case, para. 48)*. RESPONDENT has not alleged, let alone proven, that such circumstances exist in the present case. Further, RESPONDENT knowingly waived its right to challenge Mr. Prasad based on the appointments by Fasttrack & Partners *[cf. para. 53],* and thereby showed that it deems those appointments irrelevant. Thus, RESPONDENT is also barred from bringing the appointments of Fasttrack & Partners back into the proceeding through the back door.

57 But even if the appointments were to be added, they would not give rise to justifiable doubts as to Mr. Prasad's impartiality and independence. In combination they would only amount to 4 out of more than 20 appointments of Mr. Prasad *(cf. PO 2, p. 51 para. 10)*. Furthermore, the

financial gain would not remarkably differ from the assessment above *[cf. para. 50]* because the appointments by Fasttrack & Partners were only of minor value *(PO 2, p. 51 para. 10)*. Thus, even added the previous appointments do not reach the threshold required to give rise to justifiable doubts as to Mr. Prasad's impartiality and independence.

58 Therefore, the previous appointments cannot be added. Even if the Tribunal were to add them, they do not give rise to justifiable doubts as to Mr. Prasad's impartiality and independence.

III. Mr. Prasad's partner representing a client funded by Funding 8 Ltd does not justify Mr. Prasad's removal

59 A partner in the same law firm as Mr. Prasad acts in another arbitration funded by Funding 8 Ltd *(PO 2, p. 50 para. 6)*. CLAIMANT's claim is funded by Funding 12 Ltd, an affiliate of Funding 8 Ltd *(Letter Fasttrack, p. 35; PO 2, p. 50 para. 2)*. RESPONDENT alleges that these circumstances give rise to justifiable doubts as to Mr. Prasad's impartiality *(NoC, p. 39 para. 11)*. However, these circumstances do not justify Mr. Prasad's removal. RESPONDENT waived its right to challenge Mr. Prasad for such circumstances in advance [**1**], and, in any case, said circumstances do not give rise to justifiable doubts as to Mr. Prasad's impartiality and independence [**2**].

1. RESPONDENT waived its right to challenge Mr. Prasad on the ground that Mr. Prasad's partner represents a client funded by Funding 8 Ltd

60 RESPONDENT waived its right to challenge Mr. Prasad on the ground that his partner represents a client funded by Funding 8 Ltd. It agreed on an advance waiver [**a**] and the waiver is valid [**b**].

a) RESPONDENT agreed to an advance waiver

61 In his Declaration of Impartiality and Independence Mr. Prasad made the reservation that *"his colleagues […] may accept further instructions involving the Parties as well as related companies" (Exh. C 11, p. 23)*. Since this reservation even allows Mr. Prasad's colleagues to work with *"the Parties",* it must also refer to less involved entities, which is illustrated by the term *"related companies"*. Accordingly, it also includes companies such as Funding 12 Ltd or its affiliate Funding 8 Ltd. RESPONDENT agreed to the reservation by stating that it had *"no objection to the appointment of Mr. Rodrigo Prasad despite the restrictions" (RNA, p. 26 para. 22*) and thus waived its right to challenge Mr. Prasad on the ground that his partner represents a client funded by Funding 8 Ltd.

62 Furthermore, all partners from the lawfirm Slowfood, which merged with Mr. Prasad's lawfirm in September 2017 to become Prasad & Slowfood *(Declaration Prasad, p. 36)*, also fall within the scope of the reservation because a law firm just like any other company is exposed to changes in its composition, as a result of hiring, firing, mergers and acquisitions. Alleging the contrary would be a formal argumentation in order to circumvent the Parties' agreement.

63 Therefore, the reservation covers Mr. Prasad's partner acting in a case funded by Funding 8 Ltd.

b) The waiver is valid

64 In view of the fundamental principle of party autonomy, the parties are free to agree on an advance waiver unless there is a contradicting mandatory provision in the applicable law *(cf. REDFERN/HUNTER, pp. 355 et seqq.; LAWSON, p. 69; HOLTZMANN/NEUHAUS, p. 565)*.

65 RESPONDENT does not assert the existence of such a provision in Danubian Law but merely refers to the requirements of General Standard 4(c) IBA Guidelines to invalidate the advance waiver *(NoC, p. 39 para. 11)*. However, the IBA Guidelines are not mandatory and only apply if the parties agree upon their application *[cf. para. 32]*. Since the Parties did not agree on the IBA Guidelines, the advance waiver is valid.

66 Even if the IBA Guidelines were to be considered, the waiver is still valid. The IBA Guidelines set additional requirements for waivers regarding circumstances on the waivable red list only *(General Standard 4(c) IBA Guidelines)*. Mr. Prasad's partner representing a client funded by Funding 8 Ltd is, contrary to RESPONDENT's allegations *(NoC, para. 11)*, not a waivable red list case. Art. 2.3.6 IBA Guidelines, on which RESPONDENT relies, would require a *"significant commercial relationship"* between the arbitrator's law firm and "*one of the parties or an affiliate of one of the parties"*.

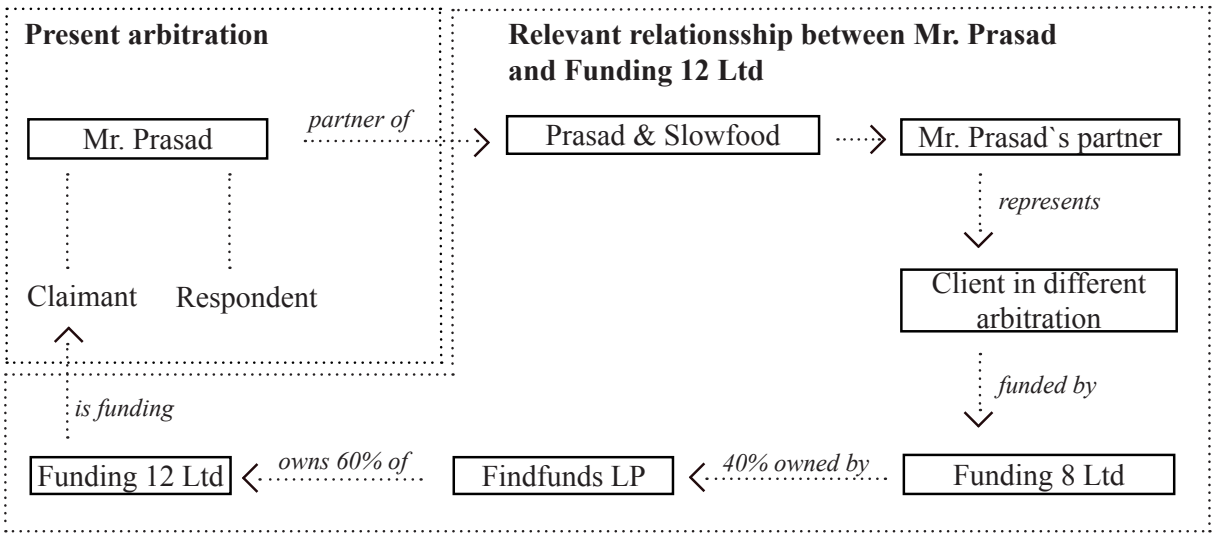
67 It is already hard to understand how Funding 8 Ltd could be a party or an affiliate of a party to this Arbitration. Further, there is no *significant* commercial relationship between Prasad & Slowfood and Funding 8 Ltd. It only funds one single case of one single partner of Prasad & Slowfood, a law firm with 20 partners and 60 associates *(PO 2, p. 50 para. 6, 8)*. Furthermore, Prasad & Slowfood gains at least 95% of its annual revenue from other sources *(PO 2, p. 50 para. 6)*. Under these circumstances there cannot be a *significant* commercial relationship between Prasad & Slowfood and Funding 8 Ltd. Accordingly, it is no Red List case and the requirements of General Standard 4(c) IBA Guidelines are not relevant in the present case.

68 Therefore, RESPONDENT validly waived its right to challenge Mr. Prasad on the ground of his connection to Funding 8 Ltd.

2. In any case, Mr. Prasad's connection to the funder does not give rise to justifiable doubts

69 RESPONDENT alleges that the same funder is funding both the present case as well as the case in which Mr. Prasad's partner is acting *(NoC, p. 39 para. 11)*. In RESPONDENT's opinion, this constitutes a problematic connection between Mr. Prasad and the funder of the present arbitration. However, RESPONDENT is misrepresenting the facts: The present Arbitration is funded by Funding 12 Ltd while the case of Mr. Prasad's partner is funded by Funding 8 Ltd *(PO 2, p. 50 para. 2, 6)*. It will be shown that the connection between Mr. Prasad and the funder of the present Arbitration, Funding 12 Ltd, does not raise justifiable doubts as to the impartiality and independence of Mr. Prasad. The following graphic illustrates the relationship between Mr. Prasad and Funding 12 Ltd.

70



71 Whether or not a relationship between an arbitrator and a party is problematic has to be assessed based on the criteria of proximity, intensity and significance of financial interest *(WAINCYMER, pp. 305 et seq.; REDFERN/HUNTER, pp. 269 et seq.; Suez Case, para. 35; AWG Case, para. 24)*. These criteria can also be used as guidance to assess the relationship between an arbitrator and a third-party funder *(VON GOELER, p. 266; cf. WAINCYMER, pp. 305 et seq.)*.

72 First, the proximity of the relationship between the third-party funder and the arbitrator must be assessed *(VON GOELER, p. 266, WAINCYMER, pp. 305 et seq.; PARK, p. 477)*. The longer a chain of links establishing a connection between the arbitrator and the party is, the less likely a conflict of interest is *(FROITZHEIM, pp. 97, 126)*. In the present case a connection between

Mr. Prasad and Funding 12 Ltd, the funder of the present Arbitration, can only be established through at least 5 links: Mr. Prasad's partner (1) represents a client (2) who is funded by Funding 8 Ltd (3). Funding 8 Ltd is a 40% subsidiary of Findfunds LP (4) which is a 60% parent company of Funding 12 Ltd (5), the funder of the present case *[cf. graphic, para. 70]*. This chain of links is too long, and the connection between Mr. Prasad and Funding 12 Ltd too remote, to give rise to justifiable doubts as to Mr. Prasad's impartiality and independence.

73 Second, the intensity and frequency of the interaction between the arbitrator and the third-party funder must be assessed *(VON GOELER, p. 266; cf. WAINCYMER, pp. 305 et seq.; PARK, p. 477; Suez Case, para. 40)*. There is no evidence of any interaction between Mr. Prasad and Funding 12 Ltd or its affiliates. Indeed, all precautions have been taken to avoid any contact between Mr. Prasad and the case of his partner *(Declaration Prasad, p. 36)*.

74 Third, it must be assessed whether the arbitrator has a significant financial interest in the connection to the third-party funder *(VON GOELER, p. 267; cf. WAINCYMER, pp. 305 et seq.; AWG Case, para. 24)*. Mr. Prasad has no financial interest in the connection to Funding 12 Ltd or its affiliates, since no matter how he decides in the present case it will not affect his financial situation. There is no recognisable risk that Mr. Prasad's partner will not be paid his outstanding fees, because Funding 8 Ltd is contractually obliged to pay them. Additionally, the fees will most likely long be paid at the time the present Arbitration will be decided, as the other case is already nearly over *(Declaration Prasad, p. 36)*. Further, there are no indications that Funding 12 Ltd or its affiliates would stop funding future cases in which Prasad & Slowfood is involved. Funding 12 Ltd or its affiliates would not miss any opportunity to fund promising cases, even if Prasad & Slowfood was involved.

75 Therefore, the connection between Mr. Prasad and Funding 12 Ltd does not lead to justifiable doubts as to his impartiality and independence. The connection is remote, not intensive and financially insignificant.

IV. Mr. Prasad's article in the Vindobona Journal does not justify his removal

76 Mr. Prasad's article published in the Vindobona Journal of International Commercial Arbitration and Sales Law *(Exh. R 4, p. 40)* does not justify his removal because RESPONDENT is waived its right to challenge Mr. Prasad based on the article [**1**]. Alternatively, the article does not give rise to justifiable doubts as to Mr. Prasad's impartiality and independence [**2**].

1. RESPONDENT waived its right to challenge Mr. Prasad based on the article

77 As stated above *[cf. para. 53]*, according to Art. 13(1) UNCITRAL AR the right to challenge an arbitrator is deemed to be waived if a party does not give notice of its challenge within 15 days after it gained knowledge about the possible ground for challenge.

78 RESPONDENT knew about Mr. Prasad's article when it retrieved the Metadata of the Word version of the Notice of Arbitration on 27 August 2017, which explicitly referred to the article and its essential content *(cf. NoC, p. 38 para. 3; PO 2, p. 51 para. 11)*. When RESPONDENT gave notice of its challenge on 14 September 2017 *(NoC, pp. 38 et seq.)* the 15 days time limit had expired. Thus, RESPONDENT is deemed to have waived its right to challenge Mr. Prasad based on the article.

79 In any case, publicly available information may be considered known, if it is available on the arbitrator's website or on an easily accessible website that is an obvious source of information *(WEBSTER, Art. 11 paras. 9 et seq.; AT&T Case [UK, 2000]; Burlington Case, para. 74)*.

80 In the case at hand, RESPONDENT knew about Mr. Prasad's appointment when it confirmed the nomination on 31 July 2017 *(RNA, p. 26 para. 22)*. At this time, Mr. Prasad's article was readily available via all leading databases and on Mr. Prasad's website, which RESPONDENT even visited before confirming Mr. Prasad's appointment *(PO 2, p. 51 para. 14)*. Accordingly, RESPONDENT is considered to have known about the article from the 31 July 2017 on. In this case, too, RESPONDENT failed to meet the 15 days time limit when it gave notice of its challenge on 14 September 2017 *(NoC, pp. 38 et seq.)*.

81 Therefore, RESPONDENT is deemed to have waived its right to challenge Mr. Prasad based on the article because RESPONDENT did not give notice within 15 days after it knew or at least should have known potential conflicts.

2. In any case, the article would not give rise to justifiable doubts as to Mr. Prasad's impartiality

82 An arbitrator's public comment of his or her opinion about a legal question raised in the arbitration does not give rise to justifiable doubts as to his or her impartiality as long as the comment does not concern the particular arbitration itself *(REDFERN/HUNTER, para. 4.141; Medical Office Case [GER, 2002]; Urbaser Case, paras. 43 et seqq.; BORN, pp. 1888 et seq.; IBA Guidelines, Green List, 4.1.1)*.

83 In the present case, Mr. Prasad's article concerns a legal question in a general and abstract manner, which is not connected to the Arbitration between the Parties *(cf. Exh. R 4, p. 40)*.

Moreover, since the article was published in 2016, prior to the commencement of this Arbitration, a connection to the present Arbitration was not even possible at that time.

84 In addition, Mr. Prasad takes a balanced view on the question whether conformity of Cakes can be subject to non-physical characteristics under the CISG. He points out that the relevance of non-physical characteristics must be assessed on a case-by-case basis under consideration of the particular circumstances *(Exh. R 4, p. 40)*. Mr Prasad advocates that, thus, the question can be answered can be answered in one way or another *(ibid.)*.

85 Therefore, since the the article is written in a general and balanced manner, it does not give rise to justifiable doubts as to Mr. Prasad's impartiality.

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86 **Conclusion:** CLAIMANT's non-disclosure of its third-party funder cannot affect the assessment of Mr. Prasad's impartiality and independence; only Mr. Prasad's conduct is relevant to this. Additionally, none of the grounds invoked by RESPONDENT give rise to justifiable doubts as to Mr. Prasad's impartiality and independence and most of them have been waived by RESPONDENT anyway. Therefore, the Tribunal should not remove Mr. Prasad.

C. CLAIMANT's General Conditions govern the Contract

87 The present case is not a standard battle of forms situation as RESPONDENT correctly states in its Response to the Notice of Arbitration *(RNA, p. 27 para. 25)*. On the contrary, in the present case solely CLAIMANT's General Conditions govern the Contract because the Parties exclusively agreed on them [**I**]. Should the Tribunal nevertheless assume a battle of forms situation, CLAIMANT's General Conditions prevail [**II**].

I. The Parties agreed on CLAIMANT's General Conditions

88 The incorporation of general conditions is governed by the rules on contract formation and interpretation *(Artt. 8 and 14 et seqq. CISG; EISELEN, para. 1; MAGNUS, Incorporation, pp. 304 et seq.; VISCASILLAS, Battle of Forms, pp. 110 et seqq.; CISG-Online 224 [AUT, 1996] cf. CISG-Online 613 [AUT, 2001])*. General conditions only become part of a contract if they were incorporated in the offer *(CISG-Online 617 [GER, 2001] para. III; CISG-Online 1376 [AUT, 2005] para. 5.2)*.

89 In the case at hand, RESPONDENT invited CLAIMANT to participate in a publicised tender process *(Exh. C 1, p. 8)*. RESPONDENT's Invitation to Tender included RESPONDENT's General Conditions *(Exh. C 1, p. 8; Exh. C 2, pp. 9 et seqq.)*. With its Letter of Acknowledgement,

CLAIMANT informed RESPONDENT that it was going to tender *(Exh. R 1, p. 28)*. Subsequently, CLAIMANT submitted its Offer which incorporated CLAIMANT's General Conditions [**1**]. RESPONDENT accepted the Offer without any modification [**2**].

1. CLAIMANT's Offer validly incorporates its General Conditions

90 General conditions become part of an offer if the offeror's intent to incorporate them is apparent and the offeree has reasonable opportunity to take notice of their content *(EISELEN, para. 2; HUBER/MULLIS, p. 31)*. In the case at hand, CLAIMANT's Offer incorporates its General Conditions because CLAIMANT's intent to do so was apparent [**a**] and RESPONDENT had reasonable opportunity to take notice of CLAIMANT's General Conditions [**b**].

a) CLAIMANT's intent to incorporate its own General Conditions was apparent

91 CLAIMANT'S intent to incorporate its own General Conditions was apparent because CLAIMANT's Offer contains a clear and understandable reference to its General Conditions.

92 The offeror's intent to incorporate its general conditions must be apparent to the offeree *(EISELEN, para. 2; HUBER/MULLIS, p. 31)*. This is the case if the offeree was aware or could not have been unaware of the offeror's intent to incorporate its general conditions *(cf. Art. 8(1) CISG; FERRARI, UN Convention, Art. 14 para. 39; LAUTENSCHLAGER, p. 275)*. Subsidiarily, the intent is apparent if a reasonable third person of the offeree's kind under the same circumstances would have understood the offeror's intent *(Artt. 8(2) and. 14(1) CISG; FERRARI, UN Convention, Art. 14 para. 39; LAUTENSCHLAGER, p. 275)*. The intent to incorporate general conditions may be considered apparent if the offer contains a clear and understandable reference to the general conditions *(HUBER/MULLIS, p. 31; SCHMIDT-KESSEL, Art. 8 para. 56; EISELEN, para. 1.6)*.

93 CLAIMANT's Offer contains a clear and understandable reference: It states *"the above offer is subject to [CLAIMANT's] General Conditions of Sale" (Exh. C 4, p. 16)*. The wording of this reference is unambiguous. Furthermore, the reference is written in a normal font size, is easy to read and cannot be overlooked by a reasonably attentive reader *(Exh. C 4, p. 16)*. Thus, CLAIMANT's intent to incorporate its General Conditions was apparent, because the Offer contains a clear and understandable reference. That CLAIMANT's intent was apparent is corroborated by the fact that CLAIMANT included the very same reference to its General Conditions in its monthly invoices sent to RESPONDENT *(cf. CISG-Online 2811 [USA, 2016] paras. 5, 6)*.

94 Despite these references, RESPONDENT alleges that CLAIMANT's intent to incorporate its General Conditions was not apparent *(RNA, p. 27 para. 25)* and tries to deduce the incorporation

of its own General Conditions from its Invitation to Tender and the Letter of Acknowledgment. In doing so, RESPONDENT attempts to cut corners and equate the terms in the Tender Documents with the terms of the Offer *(RNA, p. 27 para. 25)*. An invitation to tender is a mere invitation to make an offer pursuant to Art. 14(2) CISG *(SCHROETER, Art. 14 para. 31; VALIOTI, para. I(A); PEREIRA, para. 3; MAGNUS, BGB, Art. 14 para. 37; EÖRSI, Art. 14 para. 2.2.5.1)*. Consequently, even in a publicised tender process, the parties must be aware that an offer can very well differ from the Tender Documents. The same applies to CLAIMANT's Letter of Acknowledgment, which merely informs RESPONDENT about CLAIMANT's intent to submit an Offer *(Exh. R 1, p. 28)*. Both documents are not sufficiently definite to constitute more than a non-binding pre-contractual negotiation.

95 CLAIMANT's intent to exclusively incorporate its own General Conditions in its Offer is also depicted by the following facts:

96 First, CLAIMANT recognisably and expressly separated its Offer from the Tender Documents. CLAIMANT stated in its Offer that it submitted a *"proper offer"* that contains *"changes"* instead of including the changes into the Tender Documents *(Exh. C 3, p. 15; PO 2, p. 52 para. 27)*. By using the word *"proper"* CLAIMANT made RESPONDENT aware that it did not intend to submit an offer in line with the Tender Documents, but rather that it submitted an independent Offer.

97 Second, CLAIMANT announced that its Offer contained *"amendments"* to the terms set forth in RESPONDENT's Tender Documents and that these amendments related "*primarily*" and thus not exclusively to the goods and the mode of payment *(Exh. C 3, p. 15)*. Consequently, RESPONDENT must have been aware that the Offer's content differed from the Tender Documents.

98 Third, CLAIMANT's intent not to globally adopt all the terms of the Tender Documents is depicted in the fact that CLAIMANT's Offer at no point mentions or refers to RESPONDENT's General Conditions. The Offer merely mentions the content of RESPONDENT'S Tender Documents by explicitly pointing out and referring to certain terms of the Tender Documents, which CLAIMANT wanted to incorporate in its Offer *(e.g., Quantity, Place of Delivery and Offer Number; Exh. C 3, p. 15)*. The only reason why CLAIMANT attached the Tender Documents to its Offer was to make the content of the included tender terms easily identifiable *(PO 2, p. 52 para. 27)*.

99 Last, CLAIMANT explicitly excluded the application of terms and conditions other than CLAIMANT's own General Conditions. In cases where CLAIMANT inserts the wording *"not*

applicable" below the heading *"Specific Terms and Conditions*" in its Offer, CLAIMANT states its unwillingness to include any terms other than its own General Conditions *(PO 2, p. 53 para. 28)*. This is exactly what CLAIMANT spelled out in its Offer. It thereby showed its intent to include its own General Conditions to the exclusion of any other general conditions.

100 Under these circumstances, RESPONDENT must have been aware that the Offer does not include the terms of the Tender Documents, but that only the terms in the Offer itself are relevant. At least a reasonable third person would have understood that the reference to CLAIMANT's General Conditions reflects CLAIMANT's intent to solely incorporate its own General Conditions. Therefore, CLAIMANT's intent to incorporate its General Conditions was apparent.

b) RESPONDENT had reasonable opportunity to take notice of the content of CLAIMANT's General Conditions

101 A clear and understandable reference to general conditions provides the offeree with reasonable opportunity to take notice of their content *(KINDLER, pp. 229 et seq.; SCHMIDT-KESSEL, Art. 8 paras. 56 et seq.)*. This is due to the fact, that the offeree can be expected to inquire after their content *(ibid.)*. CLAIMANT's Offer contains a clear and understandable reference to its General Conditions *[cf. paras. 91 et seqq.]*. Thus, RESPONDENT had reasonable opportunity to take notice of their content.

102 Even under the stricter *"making-available-test",* CLAIMANT made its General Conditions sufficiently available. According to this test, the offeror needs to transmit the text or make it otherwise available to the offeree *(SCHMIDT-KESSEL, Art. 8 para. 58; DORNIS, vor Art. 14 para. 7; SCHROETER, Art. 14 para. 40; CISG-Online 617 [GER, 2001])*. Generally, this requirement is met if the offeree is able to gain knowledge of the content in a reasonable way *(VISCASILLAS, Incorporation, p. 269; DORNIS, vor Art. 14 para. 7; SCHROETER, Art. 14 para. 40)*. Specifically, a link to the offeror's website is deemed sufficient if the general conditions are easy to find, download, and print *(BERGER, p. 18; EISELEN, para. 3.4; GRUBER, Art. 14 paras. 30 et seq.; SCHROETER, Art. 14 para. 49; KINDLER, p. 234; LAUTENSCHLAGER, p. 281; STIEGELE/HALTER, p. 169; VISCASILLAS, Incorporation, p. 269; SCHWENZER/MOHS, p. 240)*. Given that communication through the internet and the ability to download and print documents from a website is the standard in today's business world, this is appropriate *(LAUTENSCHLAGER, p. 281; KINDLER, p. 234)*.

103 The fact that CLAIMANT's General Conditions were made sufficiently available is demonstrated by the fact that RESPONDENT actually read CLAIMANT's Code of Conduct. The reference in

CLAIMANT's Offer reads *"Refer to our website www.DelicatesyWholeFoods.com in regard to our General Condition and […] our Codes of Conduct (Exh. C 4, p. 16)"*. Thus, CLAIMANT referred to its Code of Conduct in the very same sentence and with the exact same web link as it did to its General Conditions. RESPONDENT declared in its Acceptance that it read CLAIMANT's Code of Conduct following CLAIMANT's Offer *(Exh. C 5, p. 17)*. This evidences that the very reason for RESPONDENT to visit CLAIMANT's webpage was CLAIMANT's Offer. As RESPONDENT downloaded CLAIMANT's Code of Conduct, it would clearly also have been able to download CLAIMANT's General Conditions, since both documents were accessible via the same web link. RESPONDENT was in fact only a mouse click away from opening CLAIMANT's General Conditions.

104 Further, as the Parties repeatedly communicated through the internet *(Exh. C 6, p. 18; Exh. C 8-10, pp. 20 et seqq.)* RESPONDENT must have had access to the internet and used it as means of communication. Therefore, a link provided RESPONDENT with reasonable opportunity to take notice of CLAIMANT's General Conditions.

2. RESPONDENT accepted CLAIMANT's Offer without any modifications

105 Art. 18(1) CISG provides that a statement made by the offeree indicating assent to an offer is an acceptance. In its letter of 7 April 2014, RESPONDENT accepted CLAIMANT's Offer by stating *"We are pleased to inform you that your tender was successful* ***notwithstanding the changes suggested by you****." (Exh. C 5, p. 17, (emphasis added))*. RESPONDENT's Acceptance includes no objection to the terms in CLAIMANT's Offer. Rather, RESPONDENT expressly accepted CLAIMANT's Offer with all the changes made by CLAIMANT.

106 Since RESPONDENT's Acceptance contains no indication that RESPONDENT did not agree to all the terms set out in CLAIMANT's Offer, it does not constitute an acceptance with modifications according to Art. 19(2) CISG.

107 Therefore, CLAIMANT's General Conditions govern the Contract because RESPONDENT accepted CLAIMANT's Offer incorporating CLAIMANT's General Conditions.

II. In a battle of forms situation, CLAIMANT's General Conditions prevail

108 Should the Tribunal find that not only CLAIMANT's General Conditions were incorporated but that also RESPONDENT's General Conditions were incorporated, CLAIMANT's General Conditions trump RESPONDENT's General Conditions pursuant to the last-shot-rule.

109 If conflicting sets of general conditions are incorporated into a contract, a so-called battle of forms situation arises. Battle of forms issues are governed exhaustively by the CISG, they are

regulated by redress to Art. 19 CISG *(PILTZ, pp. 136 et seqq.; DORNIS, Art. 19 para. 37)*. Pursuant to Art. 19(2) CISG, in a battle of forms situation, the general conditions of the party that refers to its own general conditions last apply (last-shot-rule) *(FARNSWORTH, Art. 19 para. 2.5; GRUBER, Art. 19 para. 22; PILTZ, pp. 136 et seqq.; CISG-Online 1376 [AUT, 2005]; CISG-Online 310 [GER, 1998]; CISG-Online 236 [ICC, 1997]; CISG-Online 2811 [USA, 2016])*.

110 Another rule that applies in battle of forms situations is the knock-out-rule, which provides that conflicting terms are replaced by the default rules of the CISG *(HUBER/MULLIS, p. 94; DORNIS, Art. 19 para. 40)*. The appropriate rule to solve a specific battle of forms situation must be determined on a case-by-case basis *(cf. DORNIS, Art. 19 para. 40; HAMMERSCHMIDT, p. 46)*.

111 The last-shot-rule applies in the present case, because there is no contradictory reference in the Acceptance. The last-shot-rule is the pertinent solution in cases where the last acceptance given in forming the contract does not include a contradicting reference to general conditions *(PILTZ, pp. 136 et seqq.; cf. DORNIS, Art. 19 para. 40)*. By contrast, the knock-out-rule is designed to solve battle of forms situations where the various references to general conditions remain contradictory even in the final acceptance, but the contract is nevertheless executed (*cf. DORNIS, Art. 19 para. 40; MURMANN/STUCKI, Art. 4 para. 44)*. The parties' contradictory references to their own general conditions in offer and counteroffer are comparable to a game of ping-pong *(VURAL, p. 142; MAGNUS, Battle of Forms, p. 186)*. The last-shot-rule applies in cases where a party hitting the ball last submits an acceptance that does not contradict the offer and thereby ends the game. Whereas the knock-out-rule applies when offer and acceptance remain contradictory but the game ends with the performance of the contract.

112 CLAIMANT made its "last shot" with its Offer *(Exh. C 3,4, pp. 15 et seq.),* whereas RESPONDENT only mentioned its General Conditions in its Tender Documents. As also RESPONDENT's Acceptance did not introduce a set of contradicting General Conditions *(Exh. C 5, p. 17)*, RESPONDENT ended the game of ping-pong. If RESPONDENT had wanted to "knock out" CLAIMANT's General Conditions, it would have had the possibility to incorporate its own General Conditions in its Acceptance once again in order to object to CLAIMANT's last shot. But RESPONDENT refrained from doing so, therewith renounced from a "knock-out-situation" and left the "last shot" to CLAIMANT. Thus, in the case at hand the application of the last-shot-rule must precede the application of the knock-out-rule.

113 Therefore, CLAIMANT's General Conditions trump RESPONDENT's because CLAIMANT's General Conditions were incorporated last. Consequently, CLAIMANT's General Conditions win the battle of forms.

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114 **Conclusion:** CLAIMANT's Offer validly and exclusively incorporates CLAIMANT's General Conditions. RESPONDENT accepted the Offer without any modifications. Therefore, CLAIMANT's General Conditions govern this Contract. Even if the Tribunal presumes a battle of forms situation, CLAIMANT wins the battle of forms, and thus, its General Conditions trump RESPONDENT's General Conditions.

D. CLAIMANT delivered conforming Cakes pursuant to Art. 35 CISG

115 In case the Tribunal assumes that RESPONDENT's General Conditions apply, CLAIMANT nevertheless delivered conforming Cakes pursuant to Art. 35 CISG.

116 Under the Contract CLAIMANT is obliged to deliver 20'000 chocolate Cakes per day to RESPONDENT (*Exh. C 2, p. 10 Art. 2).* The Cakes delivered by CLAIMANT are conforming under the Contract (Art. 35(1) CISG) [**I**]. In any event, the Cakes are conforming pursuant to Art. 35(2) CISG [**II**].

I. CLAIMANT delivered conforming Cakes pursuant to Art. 35(1) CISG

117 The Contract obliges CLAIMANT to use its best efforts to deliver Cakes with sustainably sourced cocoa, it does not require CLAIMANT to guarantee sustainable production (Art. 35(1) CISG) [**1**]. CLAIMANT did in fact use its best efforts to ensure sustainable production by its cocoa supplier [**2**].

1. RESPONDENT's General Conditions impose an obligation of best efforts on CLAIMANT

118 The Preamble of RESPONDENT'S General Conditions states that RESPONDENT's suppliers *"must comply with [...] the requirements set out in [RESPONDENT's] Code of Conduct for Suppliers (Exh. C 2, p. 12)".* Said Preamble and RESPONDENT's Code of Conduct for Suppliers, in particular, can only be interpreted to impose an obligation of best efforts on CLAIMANT. Their wording [**a**], the Parties' conduct [**b**]**,** the systematics of the Contract [**c**] and an interpretation *contra proferentem* [**d**] corroborate that CLAIMANT was not obliged to guarantee sustainably sourced cocoa but rather that it was obliged to use its best efforts to ensure the sustainability of the cocoa.

a) The wording points to an obligation of best efforts

119 The terms of the Contract including the UN Global Compact ("**UNGC**") Principles show that CLAIMANT was not obliged to guarantee sustainably sourced cocoa, because the terms of the Contract are too unspecific to constitute a guarantee and RESPONDENT failed to specify them elsewhere.

120 Absent a mutual intent of the parties, a provision must be interpreted in the way a reasonable third person would understand it *[cf. para. 5]*. The starting point of any contractual interpretation is the wording of the terms in question *(SCHMIDT-KESSEL, Art. 8 para. 12; CISG-Online 857 [SUI, 2003] para. 3b, bb; CISG-Online 511 [GER, 1999] para. 2a; WITZ, Art. 8 para. 11)*. Codes of conduct only oblige a party to guarantee a certain result if they contain terms which precisely describe the requirements that must be met in order to achieve said result *(MITKRIDIS, p. 16; TRIANTIS, pp. 1072 et seq.; EGGLESTON/POSNER/ZECKHAUSER, pp. 104 et seqq.)*. Thus, provisions in contracts that lack precise requirements do not stipulate a guarantee for a certain result.

121 All terms of the Contract, including the UNGC Principles referred to therein, that are relevant to assess the nature of CLAIMANT's obligation regarding sustainability are cited below:

122

*"Comestibles Finos Ltd [RESPONDENT] is committed to [...] sustainability. [...] We expect all of our suppliers to adhere to **similar standards**" (emphasis added)*	Preamble of RESPONDENT's General Conditions *(Exh. C 2, p. 12)*
*"[Suppliers] shall establish **appropriate** organisational structures and procedures" (emphasis added)*	Clause C of RESPONDENT's Code of Conduct for Suppliers *(Exh. C 2, pp. 13 et seq.)*
*"[Suppliers] must select [sub-suppliers] based on them agreeing to adhere to **standards comparable** as those set forth in [RESPONDENT's Code of Conduct for Suppliers]" (emphasis added)*	Clause E of RESPONDENT's Code of Conduct for Suppliers *(Exh. C 2, p. 14)*
Principle 7*: "Businesses **should support a precautionary approach** to environmental challenge" (emphasis added)* Principle 8*: "[...] undertake **initiatives to promote** greater environmental responsibility" (emphasis added)*	UNGC Principles 7 and 8 *(Exh. C 2, p. 11, 13)*

123 The wording of the above mentioned terms leaves vast room for interpretation: What do similar or comparable standards mean? When are organisational structures appropriate? When does precautionary business support suffice and how far do initiatives to promote greater environmental responsibility have to go? These terms do not contain any specific requirements that must be met in order to achieve a certain result. In absence of such specific requirements it would be impossible to assess whether such a certain result was met. Thus, those generally worded terms cannot stipulate an obligation for CLAIMANT to guarantee sustainably produced cocoa.

124 If RESPONDENT had wanted CLAIMANT to guarantee absolute sustainability, it ought to have opted for sufficiently specific terms. In the Organic Barley Case *(CISG-Online 786, [GER, 2002])* the contract specifically determined the "organic" requirement with reference to the Council Regulation EEC No. 2092/91 on organic production of agricultural products. This regulation is highly specific and precisely describes the requirements that must be achieved for the goods to be considered to be "organic". Thus, the Organic Barley Case shows how definite terms like "organic," "bio," or "sustainable" must be, to be considered sufficiently specific.

125 In contrast to the buyer in the Organic Barley Case, RESPONDENT never specifically and clearly communicated any concrete requirements, although it would have had the possibility to do so by simply referring to an highly specific and internationally recognised guideline *(i.e. Rainforest Alliance)* in order to sufficiently specify its understanding of "sustainability." One of the guidelines of the Rainforest Alliance for instance specifies that *"Wastewater from processing operations is not applied to land [...] where slopes exceed 8% (RAINFOREST ALLIANCE)"*. RESPONDENT did not refer to any such guidelines. It merely referred to the UNGC Principles, however as shown above they are too unspecific to clarify RESPONDENT's understanding of sustainably produced Cakes *[cf. paras. 119 et seqq.]*.

126 Therefore, as RESPONDENT did not take the opportunity to specify the term "sustainability" and the wording of the above mentioned terms as such is very unspecific, a reasonable third person would understand that CLAIMANT is obliged to use its best efforts to ensure sustainably produced cocoa and not to guarantee sustainably sourced cocoa.

b) The Parties' conduct points to an obligation of best efforts

127 The Parties' conduct during the pre-contractual negotiations, CLAIMANT's Offer and RESPONDENT's Acceptance corroborate that the above mentioned terms must be understood as an obligation of best efforts.

128 Already during the pre-contractual negotiations the Parties discussed CLAIMANT's supply chain management and CLAIMANT explained that it could only *"**largely** guarantee compliance with [its Code of Conduct] by [its] suppliers (Exh. R 5, p. 41, (emphasis added))"*. By using the word *"largely"* CLAIMANT stressed that it could not guarantee completely sustainably produced cocoa by its suppliers, but that CLAIMANT intended to use its best efforts to ensure sustainably produced cocoa. RESPONDENT was impressed by this report on CLAIMANT's supply chain management and subsequently sent CLAIMANT the Invitation to Tender *(Exh. C 1, p. 8)*. With this conduct RESPONDENT implied that, should the tender process lead to the conclusion of a contract, the required standard would be the standard of best efforts suggested by CLAIMANT. At least, a reasonable third person would have understood RESPONDENT's conduct accordingly (Art. 8(2) CISG).

129 The same standard is depicted in CLAIMANT's Offer which reads *"[RESPONDENT] can be assured that [CLAIMANT] **will do everything possible** to guarantee that the ingredients sourced from outside suppliers comply with [their] joint commitment to Global Compact Principles (Exh. C 3, p. 15, (emphasis added))"*. *"Doing everything possible"* does not provide for a specific result but for an obligation of best efforts *(cf. ZAMIR, pp. 41 et seq.)*. In using this expression CLAIMANT again offered to use its best efforts to ensure sustainable production. At this point a reasonable third person would have been reassured that the required standard in the subsequent Contract was going to be best efforts.

130 In fact, *"[a] decisive element"* for RESPONDENT to accept CLAIMANT's Offer was CLAIMANT's *"convincing commitment to sustainable production [...] evidenced in [CLAIMANT's] impressive Code of Conduct" (Exh. C 5, p. 17)*. Hence, CLAIMANT's efforts depicted in its Codes of Conduct were the exact reason RESPONDENT selected CLAIMANT out of several competitors *(PO 2, p. 52 para. 23*). CLAIMANT's Business Code of Conduct states that CLAIMANT wants to *"continuously reduce any negative impact [...] on the environment" (Exh. R 3, p. 30)*, and thus, that it wants to use its best efforts regarding sustainable production.

131 RESPONDENT acts contradictorily, by now alleging that CLAIMANT's supply chain management, the very reason to contract with CLAIMANT in the first place, was not sufficient after all.

132 This is due to the fact that a reasonable third person would have understood RESPONDENT'S Acceptance in such a way that RESPONDENT wanted CLAIMANT to continue its current supply chain management under the Contract. Thus, that RESPONDENT simply required CLAIMANT to maintain its efforts regarding sustainability, and not to additionally guarantee sustainably sourced cocoa. Therefore, the Parties' conduct leads to the conclusion that CLAIMANT is obliged to continue using its best efforts to ensure sustainably sourced cocoa.

c) The systematics of the Contract point to an obligation of best efforts

133 RESPONDENT'S General Conditions state that *"[f]or issues not dealt with by the CISG the UNIDROIT Principles are applicable (Exh. C 2, p. 12 clause 19)"*. Hence, in cases where the CISG does not address an issue, RESPONDENT wanted the PICC to apply.

134 Where parties explicitly agree on the application of the PICC, the tribunal must apply the PICC to fill any internal gap in the CISG *(FERRARI, Commentary, Art. 7 para. 62)*. An internal gap is a matter that is not explicitly dealt with under the CISG *(Art. 7(2) CISG; FERRARI, Commentary, Art. 7 para. 42; GRUBER, Art. 7 para. 34)*. The question of whether a contract provides for an obligation of result or of best efforts is not explicitly addressed by the CISG *(BONELL, para. II(b))*.

135 The Parties agreed on the application of the PICC in case of internal gaps. Thus, the PICC apply to determine whether CLAIMANT has an obligation of result or an obligation of best efforts, as this constitutes an internal gap and the application of the PICC to fill internal gaps reflects the intention of the Parties.

136 Under the PICC a contract which contains a high risk performance but lacks a hardship clause indicates that the parties did not agree upon a guarantee *(Comment 3 and 4 to Art. 5.1.5 PICC 2016)*. This is because a hardship clause protects a party from liability in cases of an unforeseen excessive burden *(ATAMER, Art. 79 para. 89; SAENGER, Art. 79 para. 1; BRUNNER, pp. 116 et seqq.)*.

137 The risk that cocoa labelled as sustainable is in fact unsustainably sourced is high. This is because most cocoa is sourced in developing and emerging countries *(INTERNATIONAL COCOA ORGANIZATION),* that struggle with the enforcement of regulatory laws on sustainability *(TRANSPARENCY INTERNATIONAL)*. Hence, a buyer that obtains cocoa from a developing country cannot entirely rely on the certified sustainable production of cocoa as reliable certification requires reliable enforcement of regulatory laws. Thus, it is of a high risk for a buyer to resell the "sustainable cocoa" without a hardship clause.

138 CLAIMANT obtains its cocoa from Ruritania, a developing country *(Exh. C 7, p. 19)*. Thus, there is a high risk that the cocoa is not actually sustainably sourced. Nevertheless the Parties did not incorporate a hardship clause in the Contract *(Exh. 2, p. 9)*.

139 Therefore, a reasonable third person would have understood that CLAIMANT was not obliged to guarantee sustainably sourced cocoa because RESPONDENT's General Conditions stipulate the application of the PICC and under the PICC CLAIMANT's obligation regarding sustainability must be interpreted as an obligation of best efforts.

d) An interpretation contra proferentem leads to an obligation of best efforts

140 An interpretation according to the principle of *contra proferentem* also leads to the conclusion that RESPONDENT's General Conditions impose an obligation of best efforts on CLAIMANT.

141 According to said principle, the drafter of the contractual terms bears the risk of their possible ambiguity *(SCHMIDT-KESSEL, Art. 8 para. 49; EISELEN, para. 9.1; CISG-Online 2513 [GER, 2014])*. RESPONDENT drafted its General Conditions. If the Tribunal finds that provisions contained in RESPONDENT's General Conditions are ambiguous *[cf. paras. 118 et seqq.]* and the nature of CLAIMANT's obligation cannot be clearly distinguished, any such ambiguity shall be interpreted in CLAIMANT's favour. Therefore, according to the principle of *contra proferentem* the Contract obliges CLAIMANT to use best efforts to ensure sustainable production by its cocoa supplier.

2. CLAIMANT did in fact use its best efforts to ensure sustainability of the Cakes

142 CLAIMANT did in fact use its best efforts as set forth under the Contract. This is because CLAIMANT did everything possible to ensure sustainable production by its cocoa supplier (Ruritania Peoples Cocoa mbH). It obliged its supplier to sign its Code of Conduct for Suppliers and thus to adhere to sustainable production methods. CLAIMANT also regularly audited its supplier's main production facility *(NoA, p. 7 clause 22)*. In 2014, Egimus AG, a specialist in providing expert opinion on UNGC compliance, scrutinised CLAIMANT's supplier on site. The experts certified that CLAIMANT's supplier adhered to the principle of sustainable production *(Exh. C 8, p. 20)* under the UNGC Principles *(PO 2, p. 53 para. 33)*. CLAIMANT did everything possible to ensure sustainable production.

143 Immediately after the conclusion of the Contract RESPONDENT visited CLAIMANT's premises *(PO 2, p. 54 para. 34)*. CLAIMANT gave RESPONDENT a detailed presentation about the steps taken to monitor its supply chain *(ibid.)*. RESPONDENT found nothing to criticise at all *(ibid.)* and thus approved of CLAIMANT's monitoring.

144 Although CLAIMANT did everything it could to ensure sustainability, it could not hinder the scandal in Ruritania. CLAIMANT's supplier systematically used a sophisticated criminal scheme involving government officials and other cocoa farmers. In order to conceal that it was breaching its sustainability obligations, the supplier provided CLAIMANT with forged certificates *(NoA, p. 5 para. 9)*.

145 As there were no indications suggesting such fraud *(Exh. C 8, p. 20),* CLAIMANT could impossibly have detected or prevented the scam. Therefore, the measures CLAIMANT took, fullfil its obligation to use its best efforts under the Contract.

II. In any case, CLAIMANT delivered conforming Cakes pursuant to Art. 35(2) CISG

146 Art. 35(2) CISG is not applicable, if the parties explicitly or impliedly agreed on the specifications of the Cakes according to Art. 35(1) CISG and thereby deviate from the specifications of Art. 35(2) CISG *(SCHWENZER, Art. 35 para. 12; cf. FLECHTNER, p. 580)*. As shown above *[cf. paras. 118 et seqq.],* the Parties agreed that CLAIMANT was obliged to use its best efforts. Therefore, Art. 35(2) CISG is not applicable.

147 Should the Tribunal however find that the Parties did not contractually agree upon the conformity requirements, the Cakes delivered by CLAIMANT fulfill all conformity requirements pursuant to Art. 35(2) CISG [**1**]. Alternatively, the Cakes are conforming pursuant to Art. 35(2)(b) CISG [**2**] and Art. 35(2)(a) CISG [**3**].

1. Sustainability is no conformity requirement under 35(2) CISG

148 Art. 35(2) CISG contains a set of objective criteria which help to assess the conformity requirements reasonable parties would have agreed upon *(SCHWENZER, Art. 35 para. 12)*. Ethical values, as for instance sustainability *(OERMANN/WEINERT, p. 63),* are of very subjective nature *(SCHLECHTRIEM, p. 98)* and may only be incorporated by explicit contractual agreement *(RAMBERG, pp. 17 et seq.; cf. SCHLECHTRIEM, p. 101)*. They cannot form part of the objective interpretation pursuant to Art. 35(2) CISG, because ethical values of reasonable parties are not objectively determinable *(ibid.)*.

149 In the case at hand, only the question of whether or not the sustainability of the cocoa is a conformity requirement is disputed *(RNA, p. 27 para. 24)*. However, as sustainable production is an ethical value, it cannot form part of the interpretation of conformity under Art. 35(2) CISG. Therefore, the cocoa used in the Cakes delivered by CLAIMANT does not render the Cakes non-conforming under Art. 35(2) CISG.

2. The Cakes are conforming pursuant to Art. 35(2)(b) CISG

150 RESPONDENT contracted with CLAIMANT with the particular purpose (Art. 35(2)(b) CISG) of reselling the cake in its supermarkets *(Exh. C 10, p. 22)*. The Cakes delivered by CLAIMANT are conforming pursuant to Art. 35(2)(b) CISG because RESPONDENT should not profit from the protection that Art. 35(2)(b) CISG provides to an unknowledgeable buyer [**a**]. In any case, RESPONDENT did not make the particular purpose sufficiently known to CLAIMANT [**b**].

a) RESPONDENT should not profit from the protection of Art. 35(2)(b) CISG

151 Art. 35(2)(b) CISG is designed to protect a buyer who is less knowledgeable than the seller *(KRÖLL, UN Convention, Art. 35 para. 106; cf. Secretariat Commentary, Art. 35 para. 7; cf. HUBER/MULLIS, p. 138; cf. MAGNUS, UN-Kaufrecht, Art. 35 para. 22)*. Art. 35(2)(b) CISG consequently only protects a buyer that lacks the knowledge to specify the requirements of the goods' particular purpose in the contract *(ibid.)*. Thus, a buyer that simply failed to negotiate the necessary contractual requirements pursuant to Art. 35(1) CISG cannot resort to Art. 35(2)(b) CISG to incorporate far-reaching conformity requirements.

152 This position is supported in the Plants Case *(CISG-Online 1447 [GER, 2006])*. In the Plants Case the buyer asserted that two of the palm trees delivered were not fit for their particular purpose because they did not prosper in Germany, where the temperature was too cold for the palm trees. The seller, located in the Netherlands, knew of the buyer's residence in Germany and of the fact that the buyer wanted the palm trees to prosper in Germany. Nonetheless the court found that the buyer was equally or even better acquainted with the peculiarities of the particular location than the seller, and decided, that the buyer did not deserve the protection of Art. 35(2)(b) CISG. Hence, the court held that the buyer shall not be protected by Art. 35(2)(b) CISG if it is in the better position to assess the requirements to the usability of the goods. In doing so, the Court followed the predominant opinion on this matter *(cf. MAGNUS, BGB, Art. 35 para. 32; SCHLECHTRIEM/SCHROETER, para. 378)*.

153 In the case at hand, RESPONDENT is also better acquainted with the peculiarities of resale of the Cakes in its own supermarkets in its own country. This is because RESPONDENT has ample knowledge on how to resell cakes to consumers and operates solely in its own supermarkets, whereas CLAIMANT is not in retail business and has no experience with end consumers. Thus, RESPONDENT, like the buyer in the Plant Case, does not deserve the protection of Art. 35(2)(b) CISG.

154 Most importantly, RESPONDENT, as an expert regarding resale in its supermarkets *[cf. para. 153]*, would have had the knowledge to contractually specify the requirements of the Cakes to serve their particular purpose. RESPONDENT cannot resort to Art. 35(2)(b) CISG to include those requirements now, due to the mere fact that it failed to do so upon conclusion of the Contract.

155 Therefore, RESPONDENT should not profit from the protection that Art. 35(2)(b) CISG provides to an unknowledgeable buyer.

b) In any case, RESPONDENT did not make the particular purpose known to CLAIMANT

156 In any case, RESPONDENT did not make the particular purpose sufficiently known to CLAIMANT, since CLAIMANT could not be expected to infer the exact conformity requirements of the Cakes.

157 According to Art. 35(2)(b) CISG any particular purpose must be made sufficiently known to the seller *(SCHWENZER, Art. 35 para. 20; MAGNUS, UN-Kaufrecht, Art. 35 para. 18)*.

158 In the case at hand, RESPONDENT never specified the requirements necessary for the resale of the Cakes in its supermarket to CLAIMANT. As shown above, all communication, conduct, circumstances, and the Contract itself, were unspecific in this regard *[cf. paras. 118 et seqq.]*. Despite ample opportunity RESPONDENT refrained from specifying the requirements for resale in its own supermarkets. Therefore, CLAIMANT could not be expected to infer the exact requirements the Cakes had to meet because RESPONDENT did not make the particular purpose sufficiently known to CLAIMANT.

3. In any event, the Cakes are conforming pursuant to Art. 35(2)(a) CISG

159 The Cakes delivered by CLAIMANT are fit for their ordinary purpose pursuant to Art. 35(2)(a) CISG as they are resellable.

160 For Cakes to meet their ordinary purpose in retail business, the Cakes must be resellable *(SCHWENZER, Art. 35 para. 14; SALGER, Art. 35 para. 9)*.The resaleability of food intended for human consumption requires the Cakes to be edible *(CISG-Online 999 [GER, 2005])*.

161 The Cakes delivered by CLAIMANT are obviously edible as RESPONDENT has been selling them successfully for almost three years *(RNA, p. 25 para. 13)*. During this entire period of time there have been no complaints about the Cakes being harmful to the health of the consumers *(PO 2, p. 54 para. 38)*. Further, the unsustainably sourced cocoa altered neither the taste nor the appearance of the Cakes. Therefore, the Cakes are fit for their ordinary purpose.

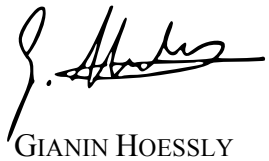
162 **Conclusion:** RESPONDENT's General Conditions oblige CLAIMANT to use its best efforts to ensure sustainable production by its suppliers (Art. 35(1) CISG). CLAIMANT complied with this standard by doing everything possible to ensure sustainable production. In any case, the Cakes delivered by CLAIMANT conform with the default criteria set forth in Art. 35(2) CISG. Therefore, the Cakes delivered by CLAIMANT are in any event conforming under the Contract.

Requests for Relief

In light of the submissions above, counsel for CLAIMANT respectfully requests the Tribunal:

1. to declare that it has no authority to decide on the challenge of Mr. Prasad;
2. in case it assumes authority to decide on the challenge of Mr. Prasad, to decide with his participation and to reject the challenge;
3. to declare that the contractual relationship between CLAIMANT and RESPONDENT is governed by CLAIMANT's General Conditions of Sale;
4. to declare that CLAIMANT complied with its contractual obligations;
5. to order RESPONDENT to pay the outstanding purchase price for the Cakes in the amount of USD 1'200'000;
6. to order RESPONDENT to pay damages in the amount of at least USD 2'500'000;
7. to order RESPONDENT to bear the costs for the Arbitration.

Respectfully submitted on 7 December 2017 by



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We hereby confirm that only the persons, whose names are listed above, have written this memorandum.