

ALBERT LUDWIG
UNIVERSITY OF FREIBURG



Memorandum for
RESPONDENT

On Behalf Of

Comestibles Finos Ltd
75 Martha Stewart Drive
Capital City, Mediterraneo

– RESPONDENT –

Against

Delicately Whole Foods Sp
39 Marie-Antoine Carême Avenue
Oceanside, Equatoriana

– CLAIMANT –

VANESSA BREZANCIC • YANNIK JEREMIAS • ALEXANDER KOCK • LAURA KORN
SEBASTIAN KRIEGER • DAVID WEITZ • LILIAN WINTER • ANNA-MARIA WOLFF

Freiburg, Germany



TABLE OF CONTENTS

TABLE OF CONTENTS	II
INDEX OF ABBREVIATIONS	VI
INDEX OF AUTHORITIES.....	VIII
INDEX OF CASES.....	XXIX
INDEX OF AWARDS	XLI
STATEMENT OF FACTS.....	1
SUMMARY OF ARGUMENTS.....	3
ARGUMENTS ON THE PROCEDURE	4
FIRST ISSUE: THE ARBITRAL TRIBUNAL HAS TO DECIDE ON THE CHALLENGE OF MR. PRASAD WITHOUT HIS PARTICIPATION	4
A. Only The Arbitral Tribunal Is Entitled to Rule on the Challenge of Mr. Prasad.....	4
I. CLAIMANT Must Have Been Aware of RESPONDENT’s Intent to Exclude the Challenge Procedure of Art. 13(4) UNCITRAL Rules	5
II. In any case, a Reasonable Person Would Have Concluded That the Parties Excluded the Challenge Procedure set forth in Art. 13(4) UNCITRAL Rules	6
B. Mr. Prasad Should Not Participate in The Decision on the Challenge	7
I. An Interpretation of Art. 13(2) Model Law Demonstrates that the Challenged Arbitrator Should be Excluded from the Decision	7
II. Excluding Mr. Prasad Does Not Cause a Procedural Deadlock.....	9
III. The Exclusion of Mr. Prasad From the Decision on the Challenge Does Not Allow For the Award to be Set Aside.....	9
SECOND ISSUE: MR. PRASAD SHOULD BE REMOVED FROM THE ARBITRAL TRIBUNAL	10
A. The Individual Facts and Circumstances Give Rise to Justifiable Doubts	11



I. The Business Relationship of Mr. Prasad’s Partner with Findfunds LP Raises Justifiable Doubts.....	12
1. The Connection Between Mr. Prasad’s Partner and Findfunds LP Gives Rise to Justifiable Doubts as to Mr. Prasad’s Independence and Impartiality	12
a) Findfunds LP Must Be Considered the Equivalent of the Parties.....	12
b) The Business Relationship of Mr. Prasad’s Partner with Findfunds LP Qualifies as a Current Significant Commercial Relationship	13
2. RESPONDENT Did Not Waive its Right to Challenge Mr. Prasad Based on the Business Relationship of His Partner with Findfunds LP.....	14
II. Mr. Prasad’s Previous Appointments Involving Findfunds LP Raise Justifiable Doubts.	15
1. Mr. Prasad’s Previous Appointments Involving Findfunds LP Cast Justifiable Doubts on His Independence and Impartiality.....	15
2. RESPONDENT Did Not Waive its Right to Base Its Challenge on Mr. Prasad’s Previous Appointments	17
B. An Overall Assessment of All Facts and Circumstances Gives Rise to Justifiable Doubts as to Mr. Prasad’s Independence and Impartiality.....	18
C. CLAIMANT’s Unethical Conduct Displays That CLAIMANT Itself Has Doubts as to Mr. Prasad’s Independence and Impartiality	19
ARGUMENTS ON THE MERITS.....	20
THIRD ISSUE: RESPONDENT’S STANDARD CONDITIONS GOVERN THE CONTRACT	20
A. CLAIMANT’s Offer Only Included RESPONDENT’s Standard Conditions	21
I. The Parties’ Prior Negotiations Indicate That CLAIMANT’s Offer Would Include RESPONDENT’s Standard Conditions	21
II. CLAIMANT’s Offer Conformed to the Parties’ Prior Agreement	22
1. CLAIMANT’s Offer Did Not Include CLAIMANT’s Standard Conditions	23
a) CLAIMANT’s Offer Indicated No Intent to Include CLAIMANT’s Standard Conditions.....	23
b) CLAIMANT Did Not Make Its Standard Conditions Sufficiently Available	24



2. CLAIMANT Indicated Its Intent to Include RESPONDENT's Standard Conditions.....	25
III. CLAIMANT's Subsequent Conduct Displays CLAIMANT's Intent to Include RESPONDENT's Standard Conditions	26
B. RESPONDENT Accepted the Offer Including Only RESPONDENT's Standard Conditions	26
FOURTH ISSUE: CLAIMANT DELIVERED NON-CONFORMING CHOCOLATE CAKES IN TERMS OF ART. 35 CISG.....	27
A. The Chocolate Cakes Delivered by CLAIMANT Did Not Meet the Contractual Requirements in Terms of Art. 35(1) CISG.....	27
I. The Use of Sustainably Produced Cocoa Can Constitute a Quality Requirement.....	27
II. CLAIMANT Was Obligated to Deliver Chocolate Cakes Which Exclusively Contain Sustainably Produced Ingredients	29
1. The Wording of the Contract Indicates That the Parties Agreed on an Obligation to Achieve a Specific Results, <i>i.e.</i> the Delivery of Sustainably Produced Chocolate Cakes ..	29
2. The Parties' Negotiations Indicate that CLAIMANT Was Under the Obligation to Deliver Sustainably Produced Chocolate Cakes	30
a) The Parties Agreed That the Sustainable Production of the Cakes Constituted an Essential Component of the Contract.....	30
b) CLAIMANT's Advertisement Indicates an Obligation to Deliver Cakes Which Exclusively Contained Sustainably Produced Cocoa.....	31
c) CLAIMANT's Statement Reflects its Intent to Adhere to the Principles of Sustainability	31
III. CLAIMANT Breached Its Contractual Duty by Delivering Chocolate Cakes Which Contained Unsustainably Sourced Cocoa	32
IV. Even if CLAIMANT Was Merely Required to Use its Best Efforts, CLAIMANT Would Not Have Fulfilled This Obligations	33
B. The Chocolate Cakes Did Not Fulfil the Requirements of Art. 35(2) CISG.....	33
I. The Cakes Were Not Fit for their Particular Purpose.....	33
II. The Chocolate Cakes Were Not Fit for their Ordinary Purpose	34



REQUEST FOR RELIEF.....35

CERTIFICATEXLIII



INDEX OF ABBREVIATIONS

AG	Aktiengesellschaft (stock company)
Art./Artt.	Article/Articles
BG	Bezirksgericht (district court)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGH	Bundesgerichtshof (German Federal Court of Justice)
cf.	confer
Chpt.	Chapter
CISG	United Nations Conventions on Contracts for the International Sale of Goods
Co	Company
ed.	edition
emph. add.	emphasis added
et seq.	et sequens (and the following)
GH	Gerechtshof (Court of Appeal)
GS	General Standard
HG	Handelsgericht (commercial court)
HGB	Handelsgesetzbuch (German Commercial Code)
i.e.	id est (that is)
IBA	International Bar Association
ibid.	ibidem (in the same place)
ICAC	International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation
ICC	International Chamber of Commerce
in mem.	in memoriam



Inc	Incorporation
LG	Landgericht (district court)
lib. am.	liber amicorum
LP	Limited Partnership
Ltd	Limited
mbH	mit beschränkter Haftung (limited liability)
Mr.	Mister
Ms.	Miss
No	Number
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (appellate court)
p./pp.	page/pages
para./paras.	paragraph/paragraphs
PCA	Permanent Court of Arbitration
PICC	UNIDROIT Principles of International Commercial Contracts
PO	Procedural Order
RB	Rechtbank (district court)
Sec.	Section
Sp	Sole Proprietorship
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USD	United States Dollar
v.	Versus
Vol.	Volume



INDEX OF AUTHORITIES

- Achilles, Wilhelm–
Albrecht** Kommentar zum UN–Kaufrechtsübereinkommen (CISG),
Ottersweier (1999)
cited as: *Achilles*
in para. 60
- Allen, Nathalie
Mallett, Daisy** Arbitrator Disclosure – No Room for the Colour Blind,
in: Asian International Arbitration Journal Vol. 7 (2011),
pp.118-147
cited as: *Allen/Mallett, ALAJ (2011)*
in para. 25
- Armbrüster, Christian
Wächter, Vincent** Ablehnung von Schiedsrichtern wegen Befangenheit im
Verfahren,
in: Zeitschrift für Schiedsverfahren Vol. 15 (2017), pp. 213-268
cited as: *Armbrüster/Wächter, SchiedsVZ (2017)*
in para. 24
- Arroyo, Manuel (Ed.)** Arbitration in Switzerland: A Practitioner’s Guide,
The Hague (2013)
cited as: *Arroyo – Author*
in para. 40
- Bamberger, Heinz
Roth, Herbert
Hau, Wolfgang
Poseck, Roman** Beck’scher Online Kommentar zum Bürgerlichen Gesetzbuch,
CISG,
43rd ed., München (2017)
cited as: *Bamberger/Roth – Author*
in para. 60



- Barratt, James**
Foster, David Challenge to and Replacement of Arbitrators,
in: Arbitration in England, with chapters on Scotland
and Ireland,
Alphen aan der Rijn (2013)
cited as: *Barratt/Foster*
in para. 15
- Bianca, Massimo**
Bonell, Michael Commentary on the International Sales Law,
Milan (1987)
cited as: *Bianca/Bonell*
in para. 110
- Binder, Peter** International Commercial Arbitration and Conciliation in
UNCITRAL Model Law Jurisdictions,
3rd ed., London (2010)
cited as: *Binder*
in para. 25
- Böckstiegel, Karl-Heinz**
Kröll, Stefan Michael
Nacimiento, Patricia Arbitration in Germany - The Model Law in Practice,
The Hague (2007)
cited as: *Böckstiegel/Kröll/Nacimiento-Author*
in para. 25
- Born, Gary B.** International Commercial Arbitration,
2nd ed., Alphen aan den Rijn (2014)
cited as: *Born*
in paras. 16, 20, 27, 49
- Brandner, Gert** Admissibility of Analogy in Gap-filling under the CISG,
<https://cisgw3.law.pace.edu/cisg/biblio/brandner.html>
last accessed: 18 Jan 2018
cited as: *Brandner*
in para. 68



- Brunner, Christoph** (Ed.) UN-Kaufrecht – CISG,
2nd ed., Bern (2014)
cited as: *Brunner – Author*
in para. 68
- Force Majeure and Hardship under General Contract Principles:
Exemption for Non-performances in International Arbitration,
The Hague (2008)
cited as: *Brunner*
in para. 90
- Caron, David D.**
Caplan, Lee M. The UNCITRAL Arbitration Rules,
A Commentary,
2nd ed., Oxford (2013)
cited as: *Caron/Caplan*
in paras. 49
- Craig, Laurence**
Park, William
Paulsson, Jan International Chamber of Commerce Arbitration,
3rd ed., Cambridge (2000)
cited as: *Craig/Park/Paulsson*
in para. 15
- Croft, Clyde** The Revised UNCITRAL Arbitration Rules of 2010:
A Commentary,
<http://classic.austlii.edu.au/au/journals/VicJSchol/2010/55.html>
last accessed: 18 Jan 2018
cited as: *Croft*
in para. 7
- Croft, Clyde**
Kee, Christopher
Waincymer, Jeff A Guide to the UNICITRAL Arbitration Rules,
1st ed., Cambridge (2013)
cited as: *Croft/Kee/Waincymer*
in para. 19



- De Witt Wijnen, Otto** The IBA Guidelines on Conflicts of Interest in International Arbitration – Three Years on,
in: ICC Bulletin, Special Supplement - Independence of Arbitrators (2007), pp. 107-131
cited as: *De Witt Wijnen, ICC Bulletin (2007)*
in para. 25
- Drymer, Stephen L.** The Revised 2010 UNCITRAL Arbitration Rules: New Rules /
New Roles for Designating and Appointing Authorities,
in: ASA Bulletin, Association Suisse de l'Arbitrage, Kluwer Law International Vol. 28 (2010), p. 877
cited as: *Drymer ASA Bulletin (2010)*
in para. 7
- Dünnweber, Inge** Vertrag zur Erstellung einer schlüsselfertigen Industrieanlage im internationalen Wirtschaftsverkehr,
Berlin (1984)
cited as: *Dünnweber*
in paras. 61, 70
- Dysted, Christian** Ethical Defects in Contracts under United Nations Convention on Contracts for the International Sale of Goods,
Copenhagen (2015)
cited as: *Dysted*
in para. 109
- Eiselen, Sieg** CISG Advisory Council Opinion No 13,
Inclusion of Standard Terms under the CISG (2013),
cited as: *CISG-AC Op. 13 (Eiselen)*
in para. 61



- Eiselen, Sieg** The Requirements for the Inclusion of Standard Terms in International Sales Contracts,
in: Potchefstroom Electronic Law Journal Potchefstroomse Elektroniese Regsblad (2011), pp. 2-234
cited as: *Eiselen, PER (2011)*
in para. 60
- Enderlein, Fritz** Handbuch der Außenhandelsverträge Bd. 2
Anlagenvertrag, Montagevertrag, Lohnveredelungsvertrag u.a.,
Heidelberg (1987)
cited as: *Enderlein*
in para. 61
- Enderlein, Fritz** International Sales Law
Maskow, Dietrich United Nations Convention on Contracts for the International Sale of Goods,
New York (1992)
cited as: *Enderlein/Maskow*
in para. 90
- Fauvarque-Cosson, Bénédicte** European Contract Law: Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules,
Mazeaud, Denis Berlin (2008)
cited as: *Fauvarque-Cosson/Mazeaud*
in para. 90
- Felemegas, John** The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation,
in: Review of the Convention on Contracts for the International Sale of Goods (CISG), Kluwer Law International (2001),
pp. 115-265
cited as: *Felemegas*
in para. 88



- Ferrari, Franco** Internationales Vertragsrecht,
Kieniger, Eva-Maria Rom I-VO, CISG, CMR, FactÜ,
Mankowski, Peter 2nd ed., Munich (2012)
Otte, Karsten cited as: *Ferrari/Kieniger et al. – Author*
Saenger, Ingo in para. 75
Schulze, Götz
Staudinger, Ansgar
- Flechtner, Harry** Funky Mussels, a Stolen Car, and Decrepit Used Shoes:
Non-Conforming Goods and Notice Thereof under the United
Nations Sales Convention,
in: Legal Studies Research Paper Series Vol. 8 (2008)
Working Paper No. 2008-21
cited as: *Flechtner, LSRPS (2008)*
in para. 88
- Franck, Susan D.** International Arbitration: Demographics, Precision and Justice,
Freda, James in: ICCA Congress Series Vol. 18 (2018), pp. 33-122
Lavin, Kellen cited as: *Franck/Freda/Lavin, ICCA Con Ser (2018)*
Lehmann, Tobias in para. 15
van Aaken, Anne
- Fridman, Gerald Henry** Tendering Problems,
Louis in Canadian Bar Review Vol. 66 (1987), pp. 582-615
cited as: *Fridman, TCBR (1987)*
in para. 62
- Girgis, Jassmine** Tercon Contractors: The Effect of Exclusion Clauses on
the Tendering Process,
in: Canadian Business Law Journal Vol. 49 (2010), pp. 187-212
cited as: *Girgis, CBLJ (2010)*
in para. 62



- Girsberger, Daniel**
Voser, Nathalie
International Arbitration: Comparative and Swiss Perspectives,
3rd ed., Zürich (2016)
cited as: *Girsberger/Voser*
in para. 40
- Goeler, Jonas von**
Third-Party Funding in International Arbitration and its Impact
on Procedure,
Alphen aan den Rijn (2016)
cited as: *Goeler*
in para. 54
- Hansen, Harvard**
Samuelsen, Bendik
Silseth, Pal
Customer perceived value in B-t-B service relationships:
Investigating the importance of corporate reputation,
in: *Industrial Marketing Management* Vol. 37 (2008), pp. 206-217
cited as: *Hansen/Samuelsen/Silseth, IMM (2008)*
in para. 87
- Heilmann, Jan**
Mängelgewährleistung im UN-Kaufrecht:
Voraussetzungen und Rechtsfolgen im Vergleich zum deutschen
internen Kaufrecht und zu den Haager Einheitlichen
Kaufgesetzen,
Berlin (1994)
cited as: *Heilmann*
in para. 110
- Herber, Rolf**
Czerwenka, Beate
Internationales Kaufrecht,
Munich (2002)
cited as: *Herber/Czerwenka*
in para. 86



- Herberger**, Maximilian (Ed.) juris Praxiskommentar BGB, Internationales Privatrecht und UN-Kaufrecht, Vol. 6,
8th ed., Saarbrücken (2017)
cited as: *jurisPK-BGB – Author*
in para. 75
- Martinek**, Michael (Ed.)
- Rüßmann**, Helmut (Ed.)
- Weth**, Stephan (Ed.)
- Würdinger**, Markus (Ed.)
- Herbots**, Jacques (Ed.) Article 35 Conformity of the Goods,
in: International encyclopedia for Contracts; The 1980 United Nations Convention on Contracts for the International Sale of Goods Suppl. 29 (2000), pp. 1-192
cited as: *Herbots – Lookofsky*
in paras. 88, 101
- Hoffmann**, Anne K. Duty of Disclosure and Challenge of Arbitrators: The Standard Applicable Under the New IBA Guidelines on Conflict of Interest and the German Approach,
in: LCIA Arbitration International Vol. 21 (2005), pp. 427-436
cited as: *Hoffmann, Arb Int (2005)*
in para. 27
- Honnold**, John Uniform Law for International Sales under the 1980 United Nations Convention,
3rd ed., The Hague (1999)
cited as: *Honnold*
in para. 88
- Honsell**, Heinrich (Ed.) Kommentar zum UN-Kaufrecht, ^{UN}Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf CISG,
2nd ed., Heidelberg (2010)
cited as: *Honsell – Author*
in para. 75



- Huber, Peter** Standard Terms under the CISG,
in: *Vindobona Journal of International Commercial Law and Arbitration* Vol. 1 (2009), pp. 123-134
cited as: *Huber, VJ (2009)*
in para. 60
- Huber, Peter**
Mullis, Alastair The CISG, A new textbook for students and practitioners,
Regensburg (2007)
cited as: *Huber/Mullis – author*
in para. 87
- Hwang, Michael**
Lee, Lynette Standard of Proof for Challenge Against Arbitrators: Giving them
the Benefit of the Doubt,
in: *The Powers and Duties of an Arbitrator: Liber Amicorum*
Pierre A. Karrer
Alphen aan den Rijn (2017)
cited as: *Hwang/Lee, Karrer lib. am.*
in para. 25
- Indlekofer, Manuel** International Arbitration and the Permanent Court of
Arbitration,
The Hague (2013)
cited as: *Indlekofer*
in para. 6
- International Institute
for the Unification of
Private Law** UNIDROIT Principles of International Commercial Contracts,
Rome (2016)
cited as: *PICC commentary*
in para. 90



- Jo-Mei Ma, Winnie** Procedure for challenging arbitrators: Lessons for and from Taiwan,
in: Contemporary Asia Arbitration Journal Vol. 5 (2012),
pp 293-326
cited as: *Jo-Mei Ma, CAAJ (2012)*
in para. 20
- Koch, Robert** Wider den formulargemäßen Ausschluss des UN-Kaufrechts
in: Neue Juristische Wochenzeitschrift Vol. 13 (2000),
pp. 910-915
cited as: *Koch, NJW (2000)*
in para. 60
- Kröll, Stefan (Ed.)** UN Convention on Contracts the International Sale of Goods
Mistelis, Loukas (Ed.) (CISG),
Perales Viscasillas, 1st ed., Baden-Baden (2011)
Maria Pilar (Ed.) cited as: *Kröll/Mistelis/Viscasillas-Author*
in para. 60
- Kuo, Houchi** The Issue of Repeat Arbitrators: Is it a Problem and How Should
the Arbitration Institutions Respond?,
in: Contemporary Asia Arbitration Journal Vol. 4 (2011),
pp. 247-271
cited as: *Kuo, CAAJ (2011)*
in para. 45
- Leisinger, Benjamin** Fundamental Breach Considering Non-Conformity of the Goods,
Munich (2007)
cited as: *Leisinger, Fundamental Breach*
in para. 90



- Long, John** From Cocoa to CSR: Finding Sustainability in a Cup of Hot Chocolate,
in: Thunderbird International Business Review Vol. 50 (2008),
pp. 315-320
cited as: *Long, TIBR (2008)*
in para. 106
- Luttrell, Sam** Bias Challenges in International Commercial Arbitration – The Need for a Real Danger Test,
The Hague (2009)
cited as: *Luttrell*
in para. 25
- Magnus, Ulrich** Incorporation of Standard Contract Terms under the CISG,
Sharing International Commercial Law across
National Boundaries,
Festschrift for Albert H Kritzer on the Occasion of his Eightieth
Birthday,
London (2008)
cited as: *Magnus, Kritzer lib. am.*
in para. 61
- Maley, Kristian** The Limits of the Conformity of Goods in the United Nations
Convention on Contracts for the International Sale of Goods
(CISG),
in: International Trade & Business Law Review Vol. 12 (2009),
pp. 82-126
cited as: *Maley, ITBLR (2009)*
in para. 110



- Mallikarjuna Rao, Sri T.** General Principles Of Fair Trial,
<http://ecourts.gov.in/sites/default/files/1st%20Topic.pdf>
last accessed: 18 Jan 2018
cited as: *Mallikarjuna Rao*
in para. 17
- Mankowski, Peter** Die Ablehnung von Schiedsrichtern,
in: Zeitschrift für Schiedsverfahrensrecht Vol. 6 (2004),
pp. 304-313
cited as: *Mankowski, SchiedsVZ (2004)*
in para. 43
- Matissek, Reinhard** Sustainability in the Cocoa Sector - Review, Challenges and
Approaches,
in: Moderne Ernährung Heute, Official Journal of the Food
Chemistry Institute of the Association of the German
Confectionery Industry (2012), pp. 1-27
Cited as: *Matissek, MEH (2012)*
in para. 106
- Miller, Zachary** Best Efforts?: Differing Judicial Interpretations of a Familiar
Term,
in: Arizona Law Review Vol. 48 (2006), pp. 615-638
cited as: *Miller, ALR (2006)*
in para. 94
- Mittmann, Alexander** Zur Einbeziehung von Allgemeinen Geschäftsbedingungen in
einen dem CISG unterliegenden Vertrag,
in: Internationales Handelsrecht Vol. 6 (2006), pp. 103-106
cited as: *Mittmann, IHR (2006)*
in para. 61



- Müller-Chen**, Markus
Pair, Lara M. Chapter 35, Avoidance for non-conformity of goods under Art. 49(1)(A) CISG,
in: *Liber Amicorum Eric Bergsten, International Commercial Law: Synergy, Convergence and Evolution*
Alphen aan den Rijn (2011)
cited as: *Müller-Chen/Pair, Bergsten lib. am.*
in para. 109
- Murray**, Carole
Holloway, David
Timson-Hunt, Daren Schmitthoff's Export Trade, The Law and Practice of International Trade,
11th ed. London (2007)
cited as: *Murray/Holloway/Timson-Hunt*
in para. 61
- Nabati**, Mikael F. Les règles d'interprétation des contrats dans les Principes d'UNIDROIT et la CVIM: entre unité structurelle et diversité fonctionnelle,
in: *Uniform Law Review* Vol. 12 (2007), pp. 247-262
cited as: *Nabati, ULR (2007)*
in para. 7
- Neumann**, Thomas Features of Article 35 in the Vienna Convention: Equivalence, Burden of Proof and Awareness,
in: *Vindobona Journal of International Commercial Law and Arbitration* Vol. 11 (2007), pp. 81-97
cited as: *Neumann, VJ (2007)*
in para. 88
- Osmanoglu**, Burcu Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest,
in: *Journal of International Arbitration* Vol. 32 (2015), pp. 325-350
cited as: *Osmanoglu, JIA (2015)*
in para. 54



- Park, William W.** Arbitrator Integrity: The Transient and the Permanent,
in: San Diego Law Review Vol. 46 (2009), pp. 629-723
cited as: *Park, SD Law Rev (2009)*
in para. 24
- Paulsson, Jan** Ethics, Elitism, Eligibility,
in: Journal of International Arbitration Vol. 14 (1997), pp. 13-22
cited as: *Paulsson, JIA (1997)*
in para. 43
- Permanent Court of Arbitration** Website of the Permanent Court of Arbitration, the Hague,
Netherlands
<https://pca-cpa.org/en/about/>
last accessed: 18 Jan 2018
cited as: *PCA Website*
in para. 6
- Piltz, Burghard** Internationales Kaufrecht
2nd ed. Munich 2008
cited as: *Piltz*
in para. 110
- Einbeziehung von AGB,
remarks on the judgment: LG Coburg, 12.12.2006
in: Internationales Handelsrecht Vol. 7 (2007), pp. 117-122
cited as: *Piltz, IHR (2007)*
in para. 75
- AGB in UN-Kaufverträgen,
in: Internationales Handelsrecht Vol. 4 (2004), pp. 133-138
cited as: *Piltz, IHR (2004)*
in para. 73



- Pitkowitz, Nikolaus** Die Aufhebung von Schiedssprüchen,
Vienna (2008)
cited as: *Pitkowitz*
in para. 25
- Povrzenic, Nives** Interpretation and Gap-filling under the United Nations
Convention on Contracts for the International Sale of Goods,
<https://www.cisg.law.pace.edu/cisg/biblio/gap-fill.html>
last accessed: 18 Jan 2018
cited as: *Povrzenic*
in para. 87
- Pullé, Austin Ignatius** Securing natural justice in arbitration proceedings,
Singapore Management University,
Research Collection School Of Law,
in: *Asia Pacific Law Review* Vol. 20 (2012), p. 64
cited as: *Pullé, APLR (2012)*
in para. 17
- Queen Mary University
of London** 2015 International Arbitration Survey: Improvements and
Innovations in International Arbitration,
cited as: *Queen Mary UoL, 2015 Int Arb Survey*
in para. 24
- Ramberg, Christina** Emotional Non-Conformity in the International Sale of Goods,
Particularly in Relation to CSR- Policies and Codes of Conduct,
<http://www.christinaramberg.se/Download/21a949e8-5dec-4f31-83eb-4d724b50a852>
last accessed: 18 Jan 2018
cited as: *Ramberg*
in paras. 88, 110



- Reinhart, Gert** UN-Kaufrecht Kommentar zum Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenverkauf,
1st ed., Heidelberg (1991)
cited as: *Reinhart*
in para. 86
- Rogers, Catherine** The Politics of International Investment Arbitration
in: Santa Clara Journal of International Law Vol. 12 (2014),
pp. 223-262
cited as: *Rogers, SCJIL (2014)*
in para. 43
- Sambugaro, Giulia** Incorporation of standard contract terms and the "battle of forms" under the 1980 Vienna Sales Convention,
in: International Business Law Journal Vol. 7 (2009),
pp. 69-79
cited as: *Sambugaro, IBLJ (2009)*
in para. 60
- Savage, John**
Gaillard, Emmanuel Fouchard Gaillard Goldmann in International Commercial Arbitration,
Alpen aan den Rijn (1999)
cited as: *Fouchard/Gaillard-Author*
in para. 12
- Schlechtriem, Peter** Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods,
Vienna (1986)
cited as: *Schlechtriem*
in para. 88



- Schlechtriem, Peter** UN Law on International Sales,
Butler, Petra The UN Convention on the International Sale of Goods,
Heidelberg (2009)
cited as: *Schlechtriem/Butler*
in para. 90
- Schlechtriem, Peter** Internationales UN-Kaufrecht,
Schroeter, Ulrich G. Ein Studien- und Erläuterungsbuch zum Übereinkommen der
Vereinten Nationen über Verträge über den internationalen
Warenkauf (CISG),
5th ed., Tübingen (2013)
cited as: *Schlechtriem/Schroeter*
in para. 110
- Schlechtriem, Peter** Commentary on the UN Convention on the International Sale of
Schwenzer, Ingeborg Goods (CISG),
(ed.) 4th ed., Oxford (2016)
cited as: *Schlechtriem/Schwenzer – Author*
in paras. 75, 86
- Schmidt, Karsten (Ed.)** Münchener Kommentar zum HGB, Vol. 5, §§ 343-406 HGB,
CISG,
3rd ed., Munich (2013)
cited as: MüKo HGB – Author
in para. 75
- Schmidt-Ahrendts, Nils** Einführung in das Schiedsverfahrensrecht,
Schmitt, Moritz in: Juristische Ausbildung Vol. 7 (2010), pp. 520-527
cited as: *Schmidt-Ahrendts/Schmitt, JURA (2010)*
in para. 12



- Schwenzer**, Ingeborg Ethical standards in CISG contracts,
in: Uniform Law Review Vol. 22 (2017), pp. 122-131
cited as: *Schwenzer, ULR (2017)*
in para. 109
- Schwenzer**, Ingeborg Ethical Values and International Sales Contracts,
Leisinger, Benjamin in: Commercial Law Challenges in the 21st Century,
Jan Hellner in memoriam,
Stockholm (2007)
cited as: *Schwenzer/Leisinger, Hellner in mem.*
in paras. 87, 109
- Schwenzer**, Ingeborg Old Habits Die Hard: Traditional Contract Formation in a
Mohs, Florian Modern World,
in: Internationales Handelsrecht Vol. 14 (2014), pp. 239-246
cited as: *Schwenzer/Mohs, IHR (2014)*
in para. 73
- Schwenzer**, Ingeborg Suspicions, mere suspicions: non-conformity of the goods?,
Tebel, David in: Uniform Law Review Vol. 19 (2014), pp. 152-168
cited as: *Schwenzer/Tebel, ULR (2014)*
in para. 104
- Shapiro**, H.Y. Public/private partnerships in agroforestry: the example of
Rosenquist, E.M. working together to improve cocoa sustainability,
in: Agroforestry Systems Vol. 61 (2004), pp. 453-462
Cited as: *Shapiro/Rosenquist, AS (2004)*
in para. 106
- Stiegele**, Andreas Einbeziehung von Allgemeinen Geschäftsbedingungen im
Halter, Rudolf Rahmen des UN-Kaufrechts – Zugänglichmachung im Internet,
in: Internationales Handelsrecht Vol. 3 (2003), p. 169
cited as: *Stiegele/Halter, IHR (2003)*
in para. 74



- Stoyanov, Marie**
Owczarek, Olga Third-Party Funding in International Arbitration: Is it Time for Some Soft Rules?,
in: BCDR International Arbitration Review Vol. 2 (2015),
pp.171-200
cited as: *Stoyanov/Owczarek, BCDR IAR (2015)*
in para. 54
- Torggler, Hellwig** Schiedsgerichtsbarkeit (Praxishandbuch),
Vienna (2007)
cited as: *Torggler*
in para. 25
- United Nations General Assembly** Report of the Working Group on International Contract Practices on the Work of its Eighteenth Session (A/CN.9/263/Add. 1),
New York (6 March 1984)
cited as: *A/CN.9/263/Add. 1*
in para. 15
- Ventsch, Verena**
Kluth, Peter UN-Kaufrecht: Keine Einbeziehung von AGB durch Abrufmöglichkeit im Internet,
in: Internationales Handelsrecht, Vol. 10 (2004), pp. 224-225
cited as: *Ventsch/Kluth, IHR (2004)*
in para. 73
- Vogenauer, Stefan** Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC),
2nd ed., Oxford (2015)
cited as: *Vogenauer*
in para. 104



- Volken, Paul** The Vienna Convention: Scope, Interpretation, and Gap-filling,
in: *International Sale of Goods: Dubrovnik Lectures*, Oceana
(1986), pp. 19-53
cited as: *Volken, Scope*
in para. 85
- Voser, Nathalie** The Revised IBA Guidelines on Conflict of Interest in
Petti, Angelina M. International Arbitration,
in: *ASA Bulletin Vol. 33* (2015), pp. 6-36
cited as: *Voser/Petti, ASA Bulletin (2015)*
in para. 40
- Waincymer, Jeffrey** Procedure and Evidence in International Arbitration,
Alphen aan den Rijn (2012)
cited as: *Waincymer*
in para. 25
- Wang, Faye Fangfei** The incorporation of terms into commercial contracts: a
reassessment in the digital age,
in: *Journal of Business Law* (2015), pp. 87-119
cited as: *Wang, JBL (2015)*
in para. 77



- Webster, Thomas H** Handbook of UNCITRAL Arbitration: Commentary, Precedents & Models for UNCITRAL based Arbitration Rules, London (2014)
cited as: *Webster*
in para. 49
- Widdascheck, Mirko** Die UNCITRAL Arbitration Rules als semi-institutionelle Schiedsverfahrensregeln,
in: Schriftenreihe der August Maria Berges Stiftung für Arbitrales Recht Vol. 28
Frankfurt am Main (2016)
cited as: *Widdascheck*
in para. 7
- Williams, Joyce** Analysis of CISG Article 35- Conformity of the Goods in the Changing Power Dynamics of Corporate Social Responsibility,
in: Hors Series Vol. XIX (2015), pp. 299-306
cited as: *Williams, HSV (2015)*
in para. 87
- Wilson, Simon** Ethical Standards in International Sale Contracts: Can the CISG be used to prevent child labour,
Wellington (2015)
cited as: *Wilson*
in paras. 88, 109



INDEX OF CASES

Australia

Australian Medic-Care Company Ltd. v. Hamilton Pharmaceutical Pty Ltd.

Federal Court of Australia

30 October 2009

Case No: (ACN 008 204 635) [2009] FCA 1220

cited as: *Medic-Care v. Hamilton*, 30 Oct 2009

in para. 105

Austria

Oberster Gerichtshof

29 November 2005

Case No: 4 Ob 205/05h

CISG-online: 1227

cited as: *OGH*, 29 Nov 2005

in para. 75

Oberster Gerichtshof

31 August 2005

Case No: 7 Ob 175/05v

CISG-online: 1093

cited as: *OGH*, 31 Aug 2005

in para. 61

Oberster Gerichtshof

17 December 2003

Case No: 7 Ob 275/03x

CISG-online: 828

cited as: *OGH*, 17 Dec 2003

in para. 69



Oberster Gerichtshof

6 February 1996

Case No: 10 Ob518/95

CISG-online: 224

cited as: *OGH, 6 Feb 1996*

in para. 60

Oberlandesgericht Linz

8 August 2005

Case No: 3 R 57/05f

CISG-online: 1087

cited as: *OLG Linz, 8 Aug 2005*

in para. 75

Oberlandesgericht Graz

9 November 1995

Case No: 6 R 194/95

CISG-online: 308

cited as: *OLG Graz, 9 Nov 1995*

in para. 101

Canada

Her Majesty The Queen in right of Ontario and the Water Resources Commission v Ron

Engineering & Construction (Eastern) Limited

Supreme Court of Canada

27 January 1981

Case No: 1 S.C.R. 111

cited as: *Ron Engineering v. Ontario, 27 Jan 1981*

in para. 62



Kinetic Construction Ltd. v. Comox-Strathcona (Regional District)

British Columbia Supreme Court

3 November 2003

Case No: Vancouver Registry No. S024960

cited as: *Kinetic v. Comox*, 3 Nov 2003

in para. 62

Germany

Bundesgerichtshof

2 March 2005

Case No: VIII ZR 67/04

CISG-online: 999

cited as: *BGH*, 2 Mar 2005

in para. 104

Bundesgerichtshof

31 October 2001

Case No: VIII ZR 60/01

CISG-online: 617

cited as: *BGH*, 31 Oct 2001

in para. 68



Oberlandesgericht Brandenburg

3 July 2014

Case No: 5 U 1/13

CISG-online: 2543

cited as: *OLG Brandenburg, 3 Jul 2014*

in para. 104

Oberlandesgericht Saarbrücken

30 May 2011

Case No: 4 Sch 3/10

CISG-online: 2225

cited as: *OLG Saarbrücken, 30 May 2011*

in para. 104

Oberlandesgericht Celle

24 July 2009

Case No: 13 W 48/09

CISG-online: 1906

cited as: *OLG Celle, 24 July 2009*

in para. 63

Oberlandesgericht Frankfurt a.M.

10 January 2008

Case No: 26 Sch 21/07

cited as: *OLG Frankfurt, 10 Jan 2008*

in para. 51

Oberlandesgericht Dresden

27 December 1999

Case No: 2 U 2723/99

CISG-online: 511

cited as: *OLG Dresden, 27 December 1999*

in para. 7



Landgericht Bonn

30 October 2003

Case No: 10 O 27/03

cited as: *LG Bonn, 30 Oct 2003*

in para. 104

Italy

Tribunale di Forlì

11 December 2008

Case No: 2280/2007

CISG-online: 1729

cited as: *Tribunale Forlì, 11 Dec 2008*

in para. 110

Tribunale di Rovereto

21 November 2007

Case No: 914/06

CISG-online: 1590

cited as: *Tribunale di Rovereto, 21 Nov 2007*

in para. 68

Netherlands

Gerechtshof The Hague

22 Apr 2014

Case No: 200.127.516-01

CISG-online: 2515

cited as: *GH The Hague, 22 Apr 2014*

in para. 73



Rechtbank Arnhem

11 February 2009

Case No: 172920 / HA ZA 08-1228

CISG-online: 1813

cited as: *RB Arnhem, 11 Feb 2009*

in para. 104

Rechtbank Utrecht

21 January 2009

Case No: 253099

CISG-online: 1814

cited as: *RB Utrecht, 21 Jan 2009*

in para. 61

Rechtbank van Koophandel Kortrijk

8 December 2004

Case No: 7398

CISG-online: 1511

in: *Internationales Handelsrecht* Vol. 5 (2005), pp. 114-115

cited as: *RB Kortrijk, 8 Dec 2004*

in para. 88

Rechtbank The Hague

18 October 2004

Case No: HA/RK 2004, 667

in: *ASA Bulletin* Vol. 23 (2005)

cited as: *RB The Hague, 18 Oct 2004*

in para. 51



New Zealand

International Housewares Ltd v SEB SA

High Court of New Zealand

31 March 2003

Case No: CP 395 SD 01

CISG-online: 833

cited as: *International Housewares v SEB SA*, 31 Mar 2003

in para. 110

Spain

Audiencia Provincial de Madrid

30 June 2011

Case No: 506/2011

cited as: *Audiencia Provincial de Madrid*, 30 June 2011

in para. 51

Switzerland

Bundesgericht (Switzerland)

16 July 2012

Case No: 4A_753/2011

CISG-online: 2371

cited as: *BG*, 16 Jul 2012

in para. 104



Bundesgericht

7 July 2004

Case No: 4C.144/2004

CISG-online: 848

cited as: *BG, 7 Jul 2004*

in para. 104

Bundesgericht

22 December 2000

Case No: 4C.296/2000

CISG-online: 628

cited as: *BG, 22 Dec 2000*

in para. 90

Handelsgericht des Kantons Zürich

3 April 2013

Case No: HG100045-O/U/dz

CISG-online: 2562

cited as: *HG Zürich, 3 Apr 2013*

in para. 90

Handelsgericht des Kantons Aargau

26 November 2008

Case No: HOR.2006.79/AC/tv

CISG-online: 1739

cited as: *HG Aargau, 26 Nov 2008*

in para. 90

Handelsgericht des Kantons Aargau

5 February 2008

Case No: HOR.2005.82/ds

CISG-online: 1740

cited as: *HG Aargau, 5 Feb 2008*

in para. 90



Kantonsgericht Glarus
6 November 2008
Case No: ZG.2008.00116
CISG-online: 1996
cited as: *KG Glarus, 6 Nov 2008*
in para. 110

United Kingdom

Cofely Limited v. Anthony Bingham and Knowles Ltd
High Court of Justice
17 February 2016
Case No: [2016] EWHC 240
cited as: *Cofely v. Knowles, 17 Feb 2016*
in paras. 45, 51, 52

Dany Lions Ltd v. Bristol Cars Ltd
High Court of Justice
21 March 2014
Case No: HQ13X00837
cited as: *Lions v. Bristol, 21 Mar 2014*
in para. 94

Jet2.Com Limited v Blackpool Airport Limited
High Court of Justice
15 June 2011
Case No: 2010 Folio 1294
cited as: *Jet2 v. Blackpool. 15 Jun 2011*
in para. 94



CPC Group Limited v. Qatari Diar Real Estate Investment Company

High Court of Justice

25 June 2010

Case no: HC09CO4260

cited as: *CPC v. Qatari Real Estate, 25 June 2010*

in para. 94

Rhodia International Holdings Ltd v Huntsman International LLC

High Court of Justice

21 February 2007

Case No: 2005 Folio 1045

cited as: *Rhodia v. Huntsman, 21 Feb 2007*

in para. 94

R&D Construction Group Limited v. Hallam Land Management Ltd

Court of Session

10 December 2010

Case No: CA63/08

cited as: *R&D Construction v. Hallam, 10 Dec 2010*

in para. 94

Stephen v. Scottish Boatowners Mutual Insurance Association

House of Lords

2 March 1989

Case No: 1989 S.C. (H.L.) 24

cited as: *Stephen v. Boatowners, 2 Mar 1989*

in para. 94



United States

Chicago Prime Packers, Inc v Northam Food Trading Co

Court of Appeals, Seventh Circuit

23 May 2005

Case No: 04-2551

CISG-online: 1026

cited as: *Chicago Prime v. Northam Food Trading*, 23 May 2005

in para. 104

McCoy v. Nestle USA, Inc. et al

District Court, Norther District of California

30 March 2016

Case No: 15-cv-04451

cited as: *McCoy v. Nestle* 30 Mar 2016

in para. 106

Robert Hodsdon v. Mars, Inc., et al.

District Court, Northern District of California

17 February 2016

Case No: 15-cv-04450-RS

cited as: *Hodsdon v. Mars*, 17 Feb 2016

in para. 106

Psi Water Sys., Inc. v. Robuschi United States, Inc.

District Court of New Hampshire

16 June 2015

Case No: 14-cv-391-LM

cited as: *PSI Water Sys v. Robuschi*, 16 June 2015

in para. 77



Roser Technologies, Inc v. Carl Schreiber GmbH

District Court, Western District of Pennsylvania

10 September 2013

Case No: 11cv302 ERIE

CISG-online: 2490

cited as: *Roser v. Carl Schreiber, 10 Sep 2013*

in paras. 69, 74

CSS Antenna, Inc. v. Amphenol-Tuchel Electronics, GMBH

District Court, District of Maryland

8 February 2011

Case No: CCB-09-2008

CISG-online: 2177

cited as: *CSS Antenna v. Amphenol, 8 Feb 2011*

in para. 69

Golden Valley Grape Juice and Wine, LLC v. Centriys Corp.

District Court, Eastern District of California

21 January 2010

Case No: CV F 09-1424 LJO GSA

CISG-online 2089

cited as: *Golden Valley Grape Juice v. Centriys, 21 Jan 2010*

in para. 77



INDEX OF AWARDS

International Centre for Settlement of Investment Disputes

Joseph Charles Lemire v. Ukraine,

14 January 2010

Case No: ARB/06/18

cited as: *Lemire v. Ukraine, 14 Jan 2010*

in para. 94

Noble Ventures, Inc. v. Romania

12 October 2005

Case No: ARB/01/11

cited as: *Ventures v. Romania, 12 Oct 2005*

in para. 94

London Court of International Arbitration

Reference No. UN 3490

27 December 2005

in: *Arbitration International 27* (2011), pp. 377 – 394

cited as: *LCLA, 27 Dec 2005*

in para. 27

Swedish Chamber of Commerce

First National Petroleum Corporation (FNP) v. OAO Tyumenneftgaz (TINGZ) (Award)

09 December 2013

Case No: 196/2011

cited as: *SCC, 09 Dec 2013*

in para. 97



**International Commercial Arbitration Court at the Chamber of Commerce and Industry
of the Russian Federation**

Russian Federation arbitration proceeding

27 May 2005

Case No: 95/2004

CISG-online: 1456

cited as: *ICAC, 27 May 2005*

in para. 7



STATEMENT OF FACTS

The parties to this arbitration are *Delicatesy Whole Foods Sp* (hereafter “CLAIMANT”) and *Comestibles Finos Ltd* (hereafter “RESPONDENT”).

CLAIMANT is a medium-sized manufacturer of fine bakery products registered in Equatoriana.

RESPONDENT is a leading gourmet supermarket chain. The company is based in Mediterraneo.

3 March 2014	CLAIMANT and RESPONDENT (hereafter “the Parties”) meet at the Cucina Food Fair in Danubia.	<i>EXHIBIT C 1, p. 8</i>
10 March 2014	Due to CLAIMANT’s alleged strict adherence to sustainable production, RESPONDENT sends tender documents for the supply of chocolate cakes to CLAIMANT.	<i>EXHIBIT C 1, pp. 8 et seq.</i>
17 March 2014	CLAIMANT declares to tender in accordance with the requirements specified by RESPONDENT.	<i>EXHIBIT R 1, p. 28</i>
27 March 2014	Following the Invitation to Tender, CLAIMANT submits an offer containing changes regarding the size of the cakes and the mode of payment.	<i>EXHIBIT C 3, p. 15</i>
7 April 2014	RESPONDENT accepts the sales offer. The Parties close a contract for the delivery of 20,000 chocolate cakes per day (hereafter “Contract”).	<i>EXHIBIT C 5, p. 17</i>
23 January 2017	The Michelgault Business News reports on a fraudulent certification scheme in Ruritania concerning the cocoa industry.	<i>EXHIBIT C 7, p. 19</i>
10 February 2017	CLAIMANT admits that it cannot exclude the possibility that the cocoa beans used for the production of the chocolate cakes might not conform to the contractual requirements.	<i>EXHIBIT C 9, p. 21</i>



12 February 2017	RESPONDENT terminates the Contract.	<i>EXHIBIT C 10, p. 22</i>
30 June 2017	CLAIMANT initiates arbitral proceedings against RESPONDENT and nominates Mr. Rodrigo Prasad as arbitrator.	<i>Notice of Arbitration, pp. 4 et seq.</i>
22 August 2017	Mr. Rodrigo Prasad (appointed by CLAIMANT), Ms. Hertha Reitbauer (appointed by RESPONDENT) and the presiding arbitrator Ms. Caroline Rizzo compose the arbitral tribunal (hereafter “Arbitral Tribunal”).	<i>Response to Notice of Arbitration, p. 26 para. 23; Letter Rizzo, p. 32</i>
27 August 2017	RESPONDENT discovers Metadata attached to CLAIMANT’s Notice of Arbitration concerning possible connections between Mr. Prasad and a potential third-party funder of CLAIMANT.	<i>Notice of Challenge, p. 38</i>
1 September 2017	The Arbitral Tribunal orders CLAIMANT to disclose information concerning third-party funding.	<i>Letter Rizzo, p. 34</i>
7 September 2017	CLAIMANT declares that its claim is being funded by Funding 12 Ltd, a subsidiary of Findfunds LP.	<i>Disclosure of Funder, p. 35</i>
11 September 2017	Mr. Prasad discloses his connections to Findfunds LP. RESPONDENT learns that Mr. Prasad’s law firm merged with the Ruritanian law firm Slowfood, forming “Prasad & Slowfood”.	<i>Declaration Prasad, p. 36</i>
14 September 2017	RESPONDENT challenges Mr. Prasad as arbitrator due to doubts as to his impartiality and independence.	<i>Notice of Challenge of Arbitrator, p. 37</i>



SUMMARY OF ARGUMENTS

CLAIMANT and RESPONDENT entered into a sales contract placing a particular importance on their joint commitment to a fairer and better world. Aware of RESPONDENT's ambition to become a Global Compact LEAD company, CLAIMANT promised to adhere to the methods of sustainable farming during the production of its chocolate cakes. Regrettably, RESPONDENT soon had to learn that CLAIMANT was not the committed and fair business partner it had initially vowed to be.

Contrary to the Parties' agreement, CLAIMANT delivered chocolate cakes which contained unsustainably sourced cocoa. However, rather than taking responsibility for this fundamental breach of Contract, CLAIMANT now argues that it was merely obliged to use its best efforts to ensure the sustainable production of the cakes. Yet, the Parties agreed that CLAIMANT had to achieve the specific result of delivering sustainably produced chocolate cakes. **[Fourth Issue]**.

To further cover up its breach of Contract, CLAIMANT suddenly alleges that its own standard conditions govern the Contract. However, only Respondent's standard conditions were effectively incorporated into the Contract **[Third Issue]**.

Furthermore, aware of its weak position, CLAIMANT appointed Mr. Prasad as arbitrator, hoping that he might be inclined to vote in CLAIMANT's favour. As if that were not enough, CLAIMANT also deliberately concealed the fact that Mr. Prasad is heavily entangled in a web of connections to its third-party funder. These circumstances give rise to justifiable doubts as to Mr. Prasad's impartiality and independence. Hence, RESPONDENT respectfully requests the Arbitral Tribunal to find that Mr. Prasad should not serve as arbitrator in the present proceedings **[Second Issue]**.

Finally, CLAIMANT attempts to evoke a decision on the challenge by an appointing authority. However, the Parties agreed to settle any disputes by means of an ad-hoc arbitration and explicitly excluded the involvement of any arbitral institution. Therefore, only the Arbitral Tribunal has the authority to decide on the challenge of Mr. Prasad. Naturally, to avoid Mr. Prasad acting as a judge in his own cause, he should not participate in the decision **[First Issue]**.



ARGUMENTS ON THE PROCEDURE

1 The Parties concluded the Contract, obliging CLAIMANT to deliver chocolate cakes produced with sustainably sourced ingredients [EXHIBIT C 4, p. 16]. As CLAIMANT breached its obligation by delivering non-conforming cakes, RESPONDENT rightfully refuses to pay the purchase price of the delivered cakes [EXHIBIT C 10, p. 22]. As a consequence, CLAIMANT initiated arbitral proceedings and appointed Mr. Prasad as arbitrator. Due to his multiple connections to CLAIMANT's third-party funder Findfunds LP, RESPONDENT challenged Mr. Prasad. The Arbitral Tribunal is respectfully requested to rule on the challenge without Mr. Prasad's participation [**First Issue**]. Since there are justifiable doubts as to his independence and impartiality, he should not serve as arbitrator in the present proceedings [**Second Issue**].

FIRST ISSUE: THE ARBITRAL TRIBUNAL HAS TO DECIDE ON THE CHALLENGE OF MR. PRASAD WITHOUT HIS PARTICIPATION

2 The Arbitral Tribunal has to decide on the challenge of Mr. Prasad without his participation. In their arbitration agreement, the Parties stated that any dispute “*shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules without the involvement of any arbitral institution*” [EXHIBIT C 2, p. 12, *emph. add.*; hereafter “Arbitration Clause”]. Contrary to CLAIMANT's allegation [Memo CLAIMANT, para. 26], the Parties thereby excluded the applicability of Art. 13(4) of the United Nations Commission on International Trade Law Arbitration Rules (hereafter “UNCITRAL Rules”). Therefore, only the Arbitral Tribunal is entitled to rule on the challenge [**A**]. To avoid Mr. Prasad being a judge in his own cause, he should not take part in the decision [**B**].

A. Only the Arbitral Tribunal Is Entitled to Rule on the Challenge of Mr. Prasad

3 The Arbitral Tribunal is the only body entitled to decide on the challenge of Mr. Prasad. CLAIMANT argues that the challenge should follow the procedure set forth in Art. 13(4) UNCITRAL Rules, according to which the challenging party may seek the decision by an appointing authority [Memo CLAIMANT, paras. 20 *et seq.*]. However, an interpretation of the Arbitration Clause shows that the Parties validly excluded the application of Art. 13(4) UNCITRAL Rules. The Parties agreed that the Arbitration Clause is subject to the United Nations Convention on Contracts for the International Sale of Goods [PO No 1, p. 48 para. 1; hereafter “CISG”]. Therefore, the Arbitration Clause has to be interpreted in accordance with Art. 8 CISG. This does not contradict CLAIMANT's interpretation under the International Institute for the Unification of Private Law Principles of International Commercial Contracts [Memo CLAIMANT, paras. 33 *et seq.*; hereafter “PICC”], as both sets of rules set forth the same standard for the interpretation of party statements and conduct. However, contrary to CLAIMANT's assessment, an interpretation in accordance with Art. 8 CISG



reveals that the Parties excluded the application of Art. 13(4) UNCITRAL Rules. CLAIMANT must have been aware of RESPONDENT's intent to exclude the challenge procedure of Art. 13(4) UNCITRAL Rules [1]. In any case, a reasonable person would have come to the conclusion that the Parties excluded Art. 13(4) UNCITRAL Rules [2].

I. CLAIMANT Must Have Been Aware of RESPONDENT's Intent to Exclude the Challenge Procedure of Art. 13(4) UNCITRAL Rules

- 4 CLAIMANT could not have been unaware of RESPONDENT's intent to exclude the challenge procedure of Art. 13(4) UNCITRAL Rules. Pursuant to Art. 8(1) CISG, statements made by and other conduct of a party are to be interpreted in accordance with the intent of that party where the other party knew or could not have been unaware of what that intent was. When determining the intent, due consideration is to be given to all relevant circumstances of the case according to Art. 8(3) CISG. Considering the Parties' negotiations, CLAIMANT must have been aware of RESPONDENT's intent to exclude Art. 13(4) UNCITRAL Rules.
- 5 First, RESPONDENT expressed its intent to exclude any challenge procedure which could involve third parties such as an appointing authority. RESPONDENT explained to CLAIMANT that it had been targeted in a negative press campaign due to information leaked to RESPONDENT's competitor [*EXHIBIT R 5, p. 41*]. The source had most probably been the wife of the competitors' COO, who worked for an arbitral institution which administered arbitral proceedings involving RESPONDENT [*ibid.*]. To avoid similar leaks in the future, RESPONDENT included a strict confidentiality clause in its contracts and changed to an arbitration clause providing for ad-hoc arbitration under the UNCITRAL Rules [*ibid.*]. However, the application of Art. 13(4) UNCITRAL Rules contradicts RESPONDENT's intent to avoid an increased risk of a leak of information. CLAIMANT argues that an individual may act as appointing authority [*Memo CLAIMANT, para. 41*]. Yet, any additional person involved would get hold of sensitive information. Therefore, RESPONDENT already objects to any propositions nominating an appointing authority. As the Parties had discussed RESPONDENT's concerns in detail, CLAIMANT must have been aware of RESPONDENT's intent to exclude any challenge procedure which could involve third parties such as the appointing authority.
- 6 Second, an external designation of the appointing authority would contradict the explicit exclusion of any institutional involvement stated in the Arbitration Clause. If the parties do not reach an agreement on the appointing authority, the Secretary-General of the Permanent Court of Arbitration (hereafter "PCA") may be requested to designate the appointing authority according to Art. 6(2) UNCITRAL Rules. However, the PCA is an arbitral institution [*PCA Website*] and the



Secretary-General its representative in person [*Indlekofer, p. 236*]. Therefore, the external designation by the Secretary-General would contradict the exclusion of any institutional involvement stipulated in the Arbitration Clause.

7 Third, an express exclusion of the challenge procedure of Art. 13(4) UNCITRAL Rules was not necessary. CLAIMANT alleges that it could not have been aware of RESPONDENT's intent to exclude Art. 13(4) UNCITRAL Rules, because "*there is not any express statement to exclude such article*" [*Memo CLAIMANT, para. 36*]. However, the Parties explicitly stated to conduct their arbitration "*without the involvement of any arbitral institution*". The use of an appointing authority institutionalises arbitral proceedings to a certain degree [*Croft, p. 19; Widdascheck, p. 13; cf. Drymer, ASA Bulletin (2010), p. 877*]. Therefore, excluding any institutional involvement bars the use of the appointing authority. In any case, the CISG demands the interpretation of the contract as a whole [*ICAC, 27 May 2005, note 3.3.3; Nabati, ULR (2007), 254*]. This includes considering the parties' interests [*OLG Dresden, 27 Dec 1999*]. RESPONDENT expressed its intent to limit external involvement. Thus, an express exclusion of the challenge procedure of Art. 13(4) UNCITRAL Rules was not necessary.

8 In conclusion, CLAIMANT could not have been unaware of RESPONDENT's intent to deviate from any challenge procedure involving an appointing authority. Thus, the Arbitration Clause has to be interpreted to exclude the application of Art. 13(4) UNCITRAL Rules.

II. In any case, a Reasonable Person Would Have Concluded That the Parties Excluded the Challenge Procedure set forth in Art. 13(4) UNCITRAL Rules

9 Even if the Arbitral Tribunal were to find that CLAIMANT did not have to be aware of RESPONDENT's intent, a reasonable person in the same circumstances as CLAIMANT would have concluded that the Parties excluded Art. 13(4) UNCITRAL Rules. Pursuant to Art. 8(2) UNCITRAL Rules, the statements or other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. When interpreting the Arbitration Clause, a reasonable person would have concluded that the Parties excluded Art. 13(4) UNCITRAL Rules.

10 To start with, the exclusion of institutional involvement applies to the challenge of an arbitrator. CLAIMANT alleges that the exclusion merely "*refers to the appointment of arbitrators*" [*Memo CLAIMANT, para. 37*] and thus does not apply to the challenge procedure. However, such a distinction contradicts the wording of the Arbitration Clause which excludes "*any*" institutional involvement. Thus, the exclusion applies to every aspect of the procedure, including arbitrator challenges.

11 Further, the fact that the Parties refrained from adopting all suggestions of the used model



arbitration clause demonstrates the Parties' intent to exclude Art. 13(4) UNCITRAL Rules. The Parties' arbitration agreement is an adoption of the model arbitration clause provided in the UNCITRAL Rules [*UNCITRAL Rules, Annex*]. Yet, the Parties deviated from the model clause in three significant aspects. First, the Parties explicitly excluded any institutional involvement. Second, they did not implement the recommendation to designate an appointing authority even though they incorporated all other suggestions to provide additional information on the terms of the arbitration. Third, in their Arbitration Clause the Parties deviated from the procedure of Art. 9(3) UNCITRAL Rules, according to which the presiding arbitrator shall be designated by the appointing authority if the party appointed arbitrators do not agree. By contrast, the Parties agreed that the presiding arbitrator should "*be appointed by the party-appointed arbitrators or by agreement of the Parties*" [*EXHIBIT C 2, p. 12; emph. add*]. This shows that the Parties deliberately excluded the involvement of the appointing authority. Thus, the composition of the Arbitration Clause demonstrates the Parties' intent to exclude Art. 13(4) UNCITRAL Rules.

- 12 In conclusion, a reasonable person would have concluded that the Parties excluded the challenge procedure set forth in Art. 13(4) UNCITRAL Rules. Therefore, there is no party agreement explicitly addressing the challenge procedure. Consequently, the domestic law of the seat of the arbitration is applicable [*cf. Fouchard/Gaillard - Gaillard/Savage, p. 124 para. 253; Schmidt-Abrendts/Schmitt, JURA (2010), p. 524*]. The domestic arbitration law in Danubia is an adoption of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments [*PO No 1, p. 49 para. 3; hereafter "Model Law"*]. Hence, Art. 13(2) Model Law governs the procedure, pursuant to which the arbitral tribunal shall rule on the challenge. Thus, the Arbitral Tribunal is entitled to decide on the challenge of Mr. Prasad.

B. Mr. Prasad Should Not Participate in The Decision on the Challenge

- 13 Mr. Prasad should not participate in the decision on the challenge. Referring to Art. 13(2) Model Law, CLAIMANT demands that "*Mr. Prasad should be allowed to make a decision on the challenge*" [*Memo CLAIMANT, para. 51*]. However, an interpretation of Art. 13(2) Model Law shows that the challenged arbitrator should be excluded from the decision [I]. This exclusion would not cause a procedural deadlock [II] or result in the setting aside of the award [III].

I. An Interpretation of Art. 13(2) Model Law Demonstrates that the Challenged Arbitrator Should be Excluded from the Decision

- 14 Art. 13(2) Model Law should be interpreted to exclude the challenged arbitrator from the decision on the challenge. The wording of Art. 13(2) Model Law reads that the "arbitral tribunal" shall rule on the challenge and raises the question whether the challenged arbitrator should participate in the



decision or not. CLAIMANT argues that the Working Group on International Contract Practices initially intended the challenged arbitrator to take part in the decision on the challenge [*Memo CLAIMANT, para. 49*]. While this may be true, an interpretation of Art. 13(2) Model Law shows that the challenged arbitrator should be excluded from the decision as substantial reasons speak against the cited opinion of the working group.

- 15 First, the challenged arbitrator would act as a judge in his own cause. An arbitrator is a “judge in his own cause” if he “*has a pecuniary or non-pecuniary interest in the subject matter of the case*” [*Barratt/Foster, para. 16-11; cf. Craig/Park/Paulsson, para. 13.05*]. Already during the initial draft of the Model Law objections were voiced stating that “arbitrators should not be their own judge in matters of challenge” [*A/CN.9/263/Add. 1*]. The time invested in an arbitration will influence the arbitrator’s income according to Art. 41(1) UNCITRAL Rules. Also, the arbitrator will be interested in protecting his reputation to ensure future reappointments [*Franck/Freda/Lavin, ICCA Con Ser (2018), p. 84*]. Thus, as the challenged arbitrator has a financial and reputational interest in maintaining his office, he would benefit from rejecting the challenge and, hence, is a judge in his own cause.
- 16 Second, a decision of the challenged arbitrator would contradict the rationale of Art. 18 Model Law. Pursuant to Art. 18 Model Law, the parties shall be treated with equality and each party shall be given a full opportunity of presenting its case. An arbitrator’s lack of independence “*effectively denies the losing party the opportunity to persuade that arbitrator of its case (and hence to affect the other arbitrators’ views in deliberations)*” [*Born, p. 3280*]. Consequently, a partial tribunal may “*deny a party an opportunity to present its case*” [*Born, p. 3278*]. Being a judge in his own cause, the challenged arbitrator might not be amenable to the opposing party’s arguments. Its participation in the decision on the challenge would, thus, not be in accordance with Art. 18 Model Law.
- 17 Third, the amendments to the Model Law made in 2006 emphasise the importance of the principle that no one should be a judge in his own cause. Art. 2A(2) Model Law is one of the provisions which were amended in 2006 [*Holtzmann/Neubaus et al., p. 24*]. Pursuant to Art. 2A(2) Model Law, matters governed by the Model Law which are not expressly settled in it are to be settled in conformity with the general principles on which the Model Law is based. It is a principle of fair trial that no one should be a judge in his own cause [*cf. Mallikarjuna Rao, p. 3*]. Furthermore, this principle is an integral part of every mature legal system [*Pullé APLR (2012), p. 64*]. The reference to the underlying principles contained in Art. 2A(2) Model Law shows that notions like the ban of judges in their own cause have gained importance since the initial draft of the Model Law.
- 18 Consequently, an interpretation of Art. 13(2) Model Law shows that the challenged arbitrator



should be excluded from the decision on the challenge.

II. Excluding Mr. Prasad Does Not Cause a Procedural Deadlock

- 19 Excluding Mr. Prasad from the decision on the challenge does not cause a procedural deadlock. CLAIMANT argues that the exclusion of Mr. Prasad would impair the Arbitral Tribunal's ability to render a decision [*Memo CLAIMANT, para. 48*]. Pursuant to Art. 33(1) UNCITRAL Rules, any decision by the arbitral tribunal shall be made by a majority of the arbitrators. If there is no majority favouring a particular proposition, the decision will be rejected [*cf. Croft/Kee/Waincymer, p. 374 para. 33.12*]. Hence, if the two unchallenged arbitrators do not agree on the challenge, it would be unsuccessful. Consequently, excluding Mr. Prasad's participation does not cause a procedural deadlock.

III. The Exclusion of Mr. Prasad From the Decision on the Challenge Does Not Allow For the Award to be Set Aside

- 20 Excluding Mr. Prasad from the decision on the challenge, does not allow for the award to be set aside. According to Art. 34(2)(a)(iv) Model Law, an award may be set aside, if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. CLAIMANT alleges that a decision without Mr. Prasad's participation would violate the Parties' agreement that the number of arbitrators should be three [*Memo CLAIMANT, paras. 52 et seq.*]. However, only "*the most egregious instances of a breakdown in a tribunal's deliberative process will justify setting aside an award*" [*Born, p. 3278*]. In the present case, three arbitrators will draw the award irrespective of whether Mr. Prasad participates in the decision or not. Additionally, excluding the challenged arbitrator strengthens the arbitral integrity and legitimacy [*cf. Jo-Mei Ma, CAAJ (2012), p. 301*]. Consequently, the exclusion of Mr. Prasad is not a case of an egregious breakdown in the arbitral procedure. To the contrary, it serves justice and the confidence in the arbitral award. Therefore, the present case does not allow the award to be set aside.
- 21 **Conclusion of the First Issue:** The Parties validly excluded Art. 13(4) UNCITRAL Rules. Therefore, Art. 13(2) Model Law is applicable, entitling the Arbitral Tribunal to rule on the challenge. Because Mr. Prasad would be a judge in his own cause, he should not take part in the decision on the challenge.



SECOND ISSUE: MR. PRASAD SHOULD BE REMOVED FROM THE ARBITRAL TRIBUNAL

- 22 The Arbitral Tribunal is respectfully requested to find that Mr. Prasad should not serve as arbitrator in the present proceedings, as there are justifiable doubts as to Mr. Prasad's independence and impartiality. CLAIMANT nominated Mr. Prasad as arbitrator, hoping for a favourable decision due to Mr. Prasad's multiple connections to CLAIMANT's third-party funder Findfunds LP. Being afraid that RESPONDENT might exercise its right to challenge Mr. Prasad, CLAIMANT even deliberately concealed these questionable connections from RESPONDENT and the other members of the Arbitral Tribunal [*Notice of Challenge*, p. 38 para. 3].
- 23 CLAIMANT rightfully states that the challenge of Mr. Prasad must be decided in accordance with Art 12(1) UNCITRAL Rules [*Memo CLAIMANT*, para. 56]. Following this provision, an arbitrator can only be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence. The standard of "justifiable doubts" set out in the UNCITRAL Rules needs to be specified by the IBA Guidelines on Conflict of Interest in International Arbitration (hereafter "IBA Guidelines"). According to General Standard 2(c) of the IBA Guidelines (hereafter "IBA Guidelines GS"), doubts are as justifiable if a reasonable third person would conclude that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case.
- 24 CLAIMANT argues that the IBA Guidelines are not binding in this arbitration as the Parties did not agree on their applicability. CLAIMANT further contends that applying the IBA Guidelines without the Parties' consent would violate the principle of party autonomy [*Memo CLAIMANT*, para. 68]. However, it is the very nature of guidelines to serve as supplement to existing rules and laws and to provide guidance where little or none exists [*Armbrüster/Wächter, SchiedsVZ (2017)*, p. 216; *Introduction IBA Guidelines*, p. 3 para. 6; *Park, SD Law Rev (2009)*, p. 676; *Queen Mary UoL, 2015 Int Arb Survey*]. Neither the UNCITRAL Rules nor the *lex loci arbitri* i.e. the Model Law provide further information regarding the question in which cases justifiable doubts may exist. Therefore, parties and tribunals often refer to the IBA Guidelines [*PO No 2*, p. 51 para. 18]. Moreover, there are no specific rules on transparency in arbitral proceedings in any of the three jurisdictions concerned in the present case [*PO No 2*, p. 51 para. 18].
- 25 Finally, the IBA Guidelines summarise the best current international practice as they assist practitioners, arbitral institutions and courts in dealing with the important question of an arbitrator's impartiality and independence [*Allen/Mallett, ALAJ (2011)*, p. 121; *Binder*, para. 3-053; *Pitkowitz*, para. 290; *Böckstiegel/Kröll/Nacimiento – Nacimiento/Abt*, p. 27 para. 33; *Luttrell*, p. 195;

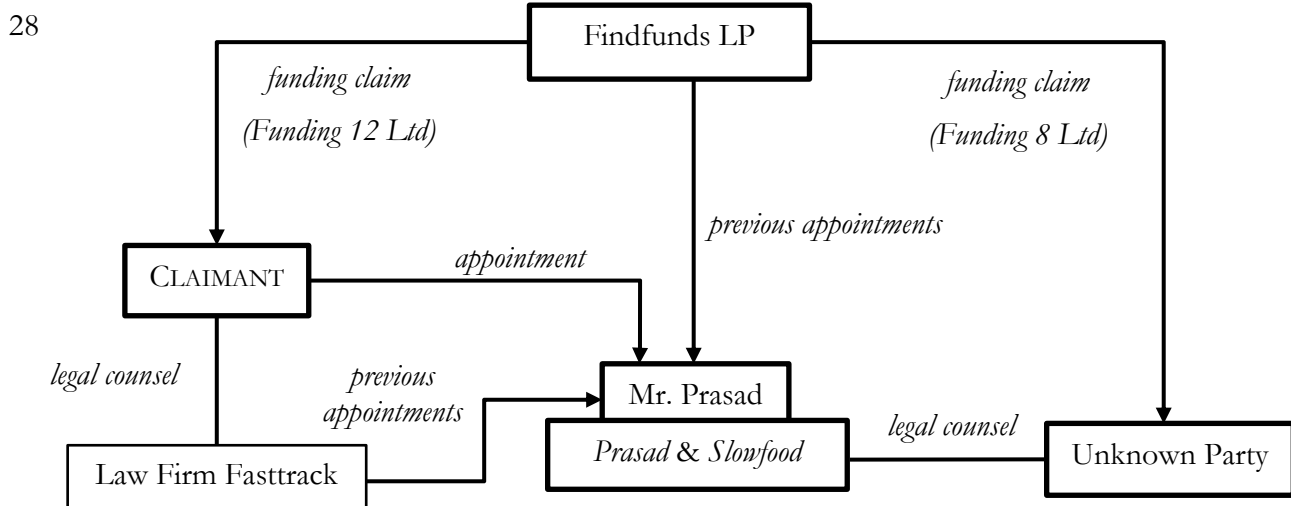


De Witt Wijnen, p. 435; *Hwang/Lee, Karrer lib. am.*, p. 178; *Waincymer Chpt. 5*, p. 6 para. 295; *Torggler*, p. 93 para. 15]. Consequently, the Arbitral Tribunal is respectfully requested to consider the IBA Guidelines as guidance when deciding RESPONDENT's challenge of Mr. Prasad.

- 26 Taking the IBA Guidelines as guidance, the individual facts and circumstances of the present case give rise to justifiable doubts as to Mr. Prasad's independence and impartiality [A]. Further, an overall assessment of all facts and circumstances of the case reveals that casts justifiable doubts on Mr. Prasad [B]. Finally, CLAIMANT's unethical conduct displays that CLAIMANT itself has doubts regarding Mr. Prasad's independence and impartiality [C].

A. The Individual Facts and Circumstances Give Rise to Justifiable Doubts

- 27 Considering the individual facts and circumstances of this case, a reasonable third person in terms of IBA Guidelines GS 2(c) would conclude that there are justifiable doubts as to Mr. Prasad's independence and impartiality. In general, it is not necessary for the challenging party to prove that the arbitrator lacks independence or impartiality [*Born*, para. 1778]. Instead, it is sufficient to demonstrate that there are enough doubts as to the arbitrator's impartiality and independence in order to justify a disqualification of this arbitrator [*LCLA 27 Dec 2005; Hoffmann, Arb Int (2005)*, p. 427]. In the present case Mr. Prasad has several connections to CLAIMANT's third-party funder Findfunds LP, as depicted in the following diagram:



- 29 First, the connection of Mr. Prasad's partner to CLAIMANT's third-party funder, Findfunds LP, gives rise to justifiable doubts as to Mr. Prasad's independence [I]. Second, Mr. Prasad's previous appointments as arbitrator involving Findfunds LP lead to justifiable doubts [II].



I. The Business Relationship of Mr. Prasad's Partner with Findfunds LP Raises Justifiable Doubts

30 The business relationship of Mr. Prasad's partner with Findfunds LP leads to justifiable doubts as to Mr. Prasad's independence and impartiality. Mr. Prasad's former law firm *Prasad & Partners* merged with the law firm *Slonfood & Partners* [*Declaration Prasad*, p. 36]. One of Mr. Prasad's new partners at *Prasad & Slonfood* is currently representing a client in a claim funded by Funding 8 Ltd which is a subsidiary of Findfunds LP [*ibid.*; *PO No 2*, p. 50 para. 6]. This connection between Mr. Prasad's partner and Findfunds LP gives rise to justifiable doubts as to Mr. Prasad's independence and impartiality [1]. Further, RESPONDENT did not waive its right to challenge Mr. Prasad based on the business relationship of his partner with Findfunds LP [2].

1. The Connection Between Mr. Prasad's Partner and Findfunds LP Gives Rise to Justifiable Doubts as to Mr. Prasad's Independence and Impartiality

31 The connection of Mr. Prasad's partner to Findfunds LP leads to justifiable doubts as to Mr. Prasad's independence and impartiality. According to Section 2.3.6 Waivable Red List of the IBA Guidelines (hereafter "Red List"), justifiable doubts arise, if the arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of the parties gives. The situations covered by the Red List indicate that the existence of an objective conflict of interest exists from the perspective of a reasonable third person [*Part II of the IBA Guidelines*, p. 17 para. 2]. Contrary to CLAIMANT's allegation [*Memo CLAIMANT*, para. 81], Mr. Prasad's connection to Findfunds LP meets the requirements set forth in Section 2.3.6 Red List. First, Findfunds LP must be treated as the equivalent of the Parties [a]. Further, the business relationship of Mr. Prasad's partner with Findfunds LP constitutes a current significant relationship in terms of Section 2.3.6 Red List [b].

a) Findfunds LP Must Be Considered the Equivalent of the Parties

32 Findfunds LP must be considered the equivalent of the Parties in terms of Section 2.3.6 Red List. Pursuant to IBA Guidelines GS 6(b), parties with a direct economic interest in the award may be considered the equivalent of the party. This particularly applies to third-party funders [*cf. Explanation to IBA Guidelines GS 6(b)*].

33 First, Findfunds LP has a direct economic interest in the present arbitration. CLAIMANT argues that Findfunds LP does not have a direct economic interest in the outcome of the present arbitration because its claim is merely funded by Funding 12 Ltd, a subsidiary of Findfunds LP [*Memo CLAIMANT*, para. 81]. However, CLAIMANT does not mention that it is Findfunds LP's



practice to establish a new subsidiary for each arbitration it intends to fund [*cf. PO No 2, p. 50 para. 3*]. Thus, the subsidiaries are only special purpose vehicles set up in each individual case, presumably to avoid liability risks. Further, it is Findfunds LP itself and not its subsidiaries, which usually makes a very thorough examination of the case and also discusses possible strategies for the arbitration [*PO No 2, p. 50 para. 4*]. For its financing role, Funding 12 Ltd receives 25% of all amounts awarded in the arbitration [*PO No 2, p. 50 para. 1*]. Finally, as Findfunds LP is the majority shareholder of Funding 12 Ltd it has controlling influence on its subsidiary [*Letter Fasttrack, p. 36*]. Due to this majority shareholding Findfunds LP is also the ultimate beneficiary of the awarded profits. Considering these facts, Findfunds LP has a direct economic interest in the present arbitration and must be treated as the equivalent of the Parties in terms of Section 2.3.6 Red List.

34 Second, even if one were to follow CLAIMANT's argumentation [*Memo CLAIMANT, paras. 81 et seq.*] that not Findfunds LP itself, but rather Funding 12 Ltd is the third-party funder in the present arbitration, Findfunds LP would still have to be considered an affiliate of one of the Parties. Following IBA Guidelines Part II footnote 4, the term "*affiliate*" encompasses all companies in a group of companies, including the parent companies. Therefore, Findfunds LP must be considered an affiliate of Funding 12 Ltd as they constitute a group of companies [*cf. IBA Guidelines Part II fn. 4*]. While Funding 12 Ltd as third-party funder would have to be considered the equivalent of the Parties, Findfunds LP would at least be an affiliate of one of the Parties.

b) The Business Relationship of Mr. Prasad's Partner with Findfunds LP Qualifies as a Current Significant Commercial Relationship

35 Contrary to CLAIMANT's assessment [*Memo CLAIMANT, para. 81*], the fact that Mr. Prasad's partner is currently representing a client funded by another subsidiary of Findfunds LP, qualifies as a *current significant commercial relationship* between Mr. Prasad's law firm and Findfunds LP in terms of Section 2.3.6. Red List.

36 First, as shown above, Findfunds LP has a direct economic interest in the present arbitration. This also applies to the case of Mr. Prasad's partner. Thus, according to IBA Guidelines GS 6(b), Findfunds LP must be treated as the equivalent of the Parties in both cases.

37 Second, the case of Mr. Prasad's partner is current in terms of Section 2.3.6. Red List. The award in the case of Mr. Prasad's partner has not yet been rendered [*Declaration Prasad, p. 36*]. Further, CLAIMANT itself acknowledges that Mr. Prasad's partner is "*currently*" working on the case [*Memo CLAIMANT, para. 80*]. Thus, the case of Mr. Prasad's partner is still pending.

38 Third, the relationship of *Prasad & Slowfood* with Findfunds LP is both significant and commercial.



The former law firm of Mr. Prasad's partner (*Slonfood & Partners*) already charged USD 1.5 million for the partner's case over the last two years [PO No 2, p. 50 para. 6]. This payment accounted for 5 % of the turnover of *Slonfood & Partners* in each of these years [*ibid.*]. Thus, *Slonfood & Partners* received significant remuneration from the case of Mr. Prasad's partner and is bringing these assets into the newly merged law firm *Prasad & Slonfood*. Further, it is assumed that *Prasad & Slonfood* will charge at least another USD 300.000 for the oral hearings and post-hearing submissions [*ibid.*]. This amount already constitutes considerable payment and contrary to CLAIMANT's assessment [Memo CLAIMANT, para. 85], the final income derived from this case may be even higher as the award has not been rendered yet. Finally, Findfunds LP pays all costs associated with the case of Mr. Prasad's partner and consequently also all attorney fees [PO No 2, p. 50 para. 6]. Without the Findfunds LP's financial support, the client of Mr. Prasad's partner would not have been able to bring its case [PO No 2, p. 50 para. 6]. This highlights that Findfunds LP's involvement in said case is important for *Prasad & Slonfood* since *Prasad & Slonfood* would not have been commissioned for this case without Findfunds LP's financing role. Hence, the relationship of *Prasad & Slonfood* with Findfunds LP is significant and commercial.

- 39 Consequently, the business relationship of Mr. Prasad's partner constitutes a current significant commercial relationship between *Prasad & Slonfood* and Findfunds LP, falling within the scope of Section 2.3.6 Red List. Mr. Prasad might fear that Findfunds LP could withdraw its funding in his partner's case, if Mr. Prasad were to decide against CLAIMANT. Thus, a reasonable third person would conclude that Mr. Prasad is likely to favour CLAIMANT and that therefore justifiable doubts as to Mr. Prasad's independence arise.

2. RESPONDENT Did Not Waive its Right to Challenge Mr. Prasad Based on the Business Relationship of His Partner with Findfunds LP

- 40 In his Declaration of Independence and Impartiality on 26 June 2017, Mr. Prasad made the reservation that his "*colleagues at Prasad & Partners may continue current matters and may also accept further instructions involving the Parties*" [EXHIBIT C 11, p. 23]. Referring to this reservation, CLAIMANT argues that RESPONDENT waived its right to challenge Mr. Prasad for any conflict of interest arising from present or future cases of his partners by agreeing to Mr. Prasad's appointment on 31 July 2017 [Memo CLAIMANT, paras. 18, 19]. Yet, this reservation cannot constitute a waiver of RESPONDENT's right to challenge Mr. Prasad based on the business relationship of his partner with Findfunds LP. It should be pointed out that so called advance waivers which constitute "*blanket approvals*" for any future conflict of interest situation should generally not be admissible [Voser/Petti, ASA Bulletin (2015), p. 18; Girsberger/Voser, p. 162; Arroyo-Schramm, p. 363 para. 21]. Mr. Prasad's



reservation was intolerably extensive as it sought to exclude an undefined number of future conflicts of interest involving his partners at Prasad & Partners. Hence, such an advanced waiver by RESPONDENT should not be admissible.

41 In any event and contrary to CLAIMANT's assumption [*Memo CLAIMANT, paras. 18, 19*], Mr. Prasad's reservation did not even encompass the current matter of his new partner. The wording of Mr. Prasad's reservation only refers to his partners at the former law firm "Prasad & Partners" [*EXHIBIT C 11, p. 23*]. By contrast, it does not relate to the partners at the newly merged law firm *Prasad & Slowfood*. As a matter of fact, Mr. Prasad never mentioned the possibility of a merger between these two law firms when making his reservation [*PO No 2, p. 50 para. 7*]. The merger of the both firms was only formally announced on 25 August 2017 [*ibid.*], thus after Mr. Prasad had already been appointed. Therefore, the scope of Mr. Prasad's reservation cannot be extended to his partners at the newly merged law firm *Prasad & Slowfood*. In addition, Mr. Prasad's reservation did not refer to possible connections involving Findfunds LP. At the time RESPONDENT agreed to Mr. Prasad's appointment on 31 July 2017 it could not have been aware of the involvement of Findfunds LP in the present arbitration, as CLAIMANT did not disclose the existence of its third-party funder until 7 September 2017 [*Letter Fasttrack, p. 35*]. Thus, the wording of Mr. Prasad's reservation does neither comprise his partners at the newly merged law firm *Prasad & Slowfood*, nor does it refer to Findfunds LP. Therefore, RESPONDENT is not barred from basing its challenge on the case of Mr. Prasad's new partner.

II. Mr. Prasad's Previous Appointments Involving Findfunds LP Raise Justifiable Doubts

42 Mr. Prasad's previous appointments as arbitrator involving Findfunds LP lead to justifiable doubts. Mr. Prasad acted as arbitrator in two previous cases which were funded by subsidiaries of Findfunds LP [*Declaration Prasad, p. 36*]. Findfunds LP is the 100% shareholder of these respective subsidiaries [*Letter Prasad, p. 43*]. First, Mr. Prasad's previous appointments involving Findfunds LP cast justifiable doubts on his independence and impartiality [1]. Second, RESPONDENT is entitled to base its challenge on these appointments [2].

1. Mr. Prasad's Previous Appointments Involving Findfunds LP Cast Justifiable Doubts on His Independence and Impartiality

43 Mr. Prasad's repeat appointments involving Findfunds LP cast justifiable doubts on Mr. Prasad's independence and impartiality. There is a general concern in arbitration that arbitrators might favour the party which repeatedly appoints them, as the arbitrators compete in the international market place and are interested in increasing the likelihood of future appointments [*Rogers, SCJIL (2014), p. 226; Paulsson, JLA (1997), p. 14; Mankowski, SchiedsVZ (2004), p. 309*]. This



reasoning is also reflected in Section 3.1.3 Orange List of the IBA Guidelines (hereafter “Orange List”), according to which a conflict of interest may arise if the arbitrator has been appointed on two or more occasions by one of the parties. The Orange List only addresses situations which should be disclosed by the arbitrator in order to determine whether justifiable doubts arise [*IBA Guidelines Part II, p. 18 para. 3*].

- 44 In contrast to CLAIMANT’s allegation [*Memo CLAIMANT, para. 91*], the fact that Mr. Prasad acted in two previous arbitrations involving Findfunds LP fulfils the requirements set out in Section 3.1.3 Orange List. CLAIMANT argues that in these cases the parties and not the third-party funders had appointed Mr. Prasad [*ibid.*]. However, Findfunds LP must be considered the equivalent of the parties in these two arbitrations as it is the 100% shareholder of both subsidiaries [*cf. Explanation to IBA Guidelines GS 6(b)*]. Further CLAIMANT’s argues that Findfunds LP only has little influence on the appointment of the arbitrator [*Memo CLAIMANT, para. 91*]. Nevertheless, the standard funding agreement used by Findfunds LP allows for a greater influence on the appointment of the arbitrator [*PO No 2, p. 50 para. 4*]. The fact that Findfunds LP can take such influence on the arbitrator’s appointment constitutes another incentive for Mr. Prasad to vote in favour of CLAIMANT to increase the likelihood of future appointments by parties funded by Findfunds LP. Consequently, the two previous appointments of Mr. Prasad involving Findfunds LP fall within the scope of Section 3.1.3 Orange List.
- 45 Moreover, the financial dependence of the arbitrator resulting from the previous appointments should be considered when deciding whether justifiable doubts exist [*Cofely v. Knowles, 17 Feb 2016; Kuo, CAAJ (2011), p. 258*]. Mr. Prasad derives about 40 % of his earnings from his work as arbitrator [*PO No 2, p. 51 para. 10*] and has generated 20 % of his arbitrator fees during the last three years from these two arbitrations alone. Thus, Mr. Prasad received a significant percentage of his arbitrator fees from these two arbitrations involving Findfunds LP. In addition, a decision-making history of the arbitrator in favour of his appointer can indicate a conflict of interest [*Kuo, CAAJ (2011), p. 258*]. In the said arbitrations, unanimous awards were rendered, which were in favour of the parties which had appointed Mr. Prasad [*PO No 2, p. 51 para. 15*]. Due to the aforementioned reasons, a reasonable third person would conclude that justifiable doubts as to Mr. Prasad’s independence arise.
- 46 Finally, CLAIMANT asserts that sustaining the challenge would affect its freedom to choose an arbitrator [*Memo CLAIMANT, paras. 92, 93*]. However, such considerations cannot affect the standard that must be applied to secure the impartiality and independence of an arbitrator. Further, CLAIMANT should certainly be able to find a qualified arbitrator who is not heavily entangled with



CLAIMANT's third-party funder. In fact, CLAIMANT already designated, Ms. Chain Ducasse as substitute arbitrator [*PO No 1, p. 48 para. 1*].

47 Summarising, Mr. Prasad acted in two arbitrations involving Findfunds LP and received a significant percentage of his income from these two arbitrations. Further, he also has a decision-making history of voting in Findfunds LP's favour. Therefore, Mr. Prasad's previous appointments involving Findfunds LP cast justifiable doubts on his independence.

2. RESPONDENT Did Not Waive its Right to Base Its Challenge on Mr. Prasad's Previous Appointments

48 RESPONDENT is entitled to challenge Mr. Prasad based on of his previous appointments in cases funded by Findfunds LP. During a virus check of CLAIMANT's Notice of Arbitration on 27 August 2017, RESPONDENT's IT-Security officer coincidentally retrieved CLAIMANT's Metadata which were attached to this Notice of Arbitration [*Notice of Challenge, p. 38 para. 3*]. These Metadata indicated that CLAIMANT might be financed by a third-party funder in the present proceedings [*Notice of Challenge, p. 38 para. 3*]. CLAIMANT alleges that RESPONDENT thereby waived its right to challenge Mr. Prasad based on any connection with Findfunds LP, claiming that RESPONDENT did not submit its Notice of Challenge timely pursuant to Art. 13(1) UNCITRAL Rules [*Memo CLAIMANT, para. 7*]. According to Art. 13(1) UNCITRAL Rules, a party shall send its notice of challenge within 15 days after the circumstances constituting the grounds for the challenge became known to this party. Otherwise, the right to challenge is waived [*cf. Art. 13(1) UNCITRAL Rules*].

49 Art. 13(1) UNICTRAL Rules serves the purpose that the parties should not be permitted to proceed with an arbitration while retaining secret grounds for a challenge to the arbitrators [*Caron/Caplan, p. 242; Born, p. 1918; Webster, p. 203*]. Yet, the situation at hand needs to be strictly differentiated from the situation that a party has full knowledge of the grounds for challenge. Having learned about the cryptic note in the Metadata, RESPONDENT immediately approached the Arbitral Tribunal requesting that CLAIMANT should disclose any third-party funding [*Letter Langweiler, p. 33*]. As soon as CLAIMANT provided the requested information and Mr. Prasad disclosed his previous appointments involving Findfunds LP on 11 September 2017 [*Declaration Prasad, p. 36*], RESPONDENT immediately sent its Notice of Challenge on 14 September 2017 [*Notice of Challenge, p. 39 para. 10*]. Hence, CLAIMANT pursued the challenge within the required time. Following CLAIMANT's argument, that one had to retrieve Metadata in order to meet the time frame of Art 13(1) UNCTRAL Rules, would lead this legal provision ad absurdum. Therefore, RESPONDENT did not waive its right to base its challenge on Mr. Prasad's



previous appointments involving Findfunds LP.

- 50 In conclusion, each individual ground for the challenge of Mr. Prasad leads to justifiable doubts as to his independence and impartiality.

B. An Overall Assessment of All Facts and Circumstances Gives Rise to Justifiable Doubts as to Mr. Prasad's Independence and Impartiality

- 51 Even if the individual facts and circumstances were not sufficient to raise justifiable doubts a reasonable third person would conclude that an overall assessment of all facts and circumstances leads to justifiable doubts as to Mr. Prasad's independence and impartiality. In its decision in the *Cofely v. Knowles Case* [*Cofely v. Knowles*, 17 Feb 2016; hereafter "Cofely Case"] the British High Court of Justice sustained the challenge of an arbitrator having regard to all circumstances of the case [cf. *Audiencia Provincial de Madrid*, 30 June 2011; *OLG Frankfurt*, 10 Jan 2008; *RB The Hague*, 18 Oct 2004]. This decision serves as persuasive authority for the following reasons: The arbitrator in the *Cofely Case* had also been challenged based on multiple grounds such as his frequent appointments involving a party to the dispute. The court referred to the IBA Guidelines and reasoned, that even though the individual grounds of the challenge were not sufficient to disqualify the arbitrator an overall assessment of all circumstances justified the challenge.
- 52 As already outlined and different from the *Cofely Case*, Mr. Prasad's connections to Findfunds LP in the present case are in fact already sufficient to justify his challenge. However, when considered collectively, the facts and circumstances give rise to justifiable doubts all the more. Further, Mr. Prasad was also appointed twice by the law firm of CLAIMANT's counsel Mr. Fasttrack [EXHIBIT C 11, p. 23]. CLAIMANT argues that these appointments do not give rise to justifiable doubts as they should be viewed separately from the other previous appointments of Mr. Prasad involving Findfunds LP [*Memo CLAIMANT*, paras. 88 et seq.]. However, considering that Mr. Fasttrack recommended Mr. Prasad as arbitrator in the second appointment by his law firm and in the present arbitration [*PO No 2*, p. 51 para. 9; *Notice of Challenge*, p. 38 para. 3], Mr. Fasttrack's involvement in the case at hand also increases the likelihood that Mr. Prasad will decide in favour of CLAIMANT. Thus, Mr. Prasad's connections to Findfunds LP and CLAIMANT's counsel Mr. Fasttrack viewed collectively raise justifiable doubts as to Mr. Prasad's independence.
- 53 These doubts are further aggravated by the fact that Mr. Prasad always voted in favour of his appointing parties in these four previous arbitrations [*PO No 2*, p. 51 para. 15]. In addition to all this, Mr. Prasad has previously expressed a critical view on the matter in dispute by publishing an article on the notion of conformity in Art. 35 CISG [EXHIBIT R 4, p. 40]. Mr. Prasad's point of view regarding this question is yet another reason why CLAIMANT is so eager to maintain



Mr. Prasad as arbitrator. In fact, CLAIMANT’s counsel Mr. Fasttrack describes Mr. Prasad as the “*perfect arbitrator*” for CLAIMANT’s case due to this article [*Notice of Challenge*, p. 38 para. 3]. All these circumstances indicate a clear pattern [*see diagram*]. Consequently, a reasonable third person would conclude that justifiable doubts as to Mr. Prasad’s independence and impartiality exist when considering the facts and circumstances collectively.

C. CLAIMANT’s Unethical Conduct Displays That CLAIMANT Itself Has Doubts as to Mr. Prasad’s Independence and Impartiality

- 54 The fact that CLAIMANT concealed its third-party funder Findfunds LP, as well as the deliberate behaviour of Mr. Fasttrack, indicates that even CLAIMANT has doubts as to Mr. Prasad’s independence and impartiality. It is generally recognised that parties should disclose their third-party funder if a conflict of interest arises [*Goeler*, p. 291; *Osmanoglu, JLA (2015)*, p. 349; *Stoyanov/Owczarek (2008)*, *BCDR IAR*, p. 197]. Further, IBA Guidelines GS 7(a) stipulates that a party shall inform the arbitral tribunal and the other parties of any relationship between the arbitrator and a legal entity with a direct economic interest in the award. In the present arbitration, CLAIMANT has not only admitted to its failure to disclose its third-party funder pursuant to IBA Guidelines GS 7(a) [*Memo CLAIMANT*, para. 72], but also to its concealment of the funding [*Memo CLAIMANT*, para. 15].
- 55 In addition, CLAIMANT’s counsel, Mr. Fasttrack, was aware of Mr. Prasad’s connections to Findfunds LP but decided not to disclose the funding to avoid a challenge of Mr. Prasad [*PO No 2*, p. 51 para. 12]. This behaviour of Mr. Fasttrack and CLAIMANT’s failure to disclose indicate that CLAIMANT and Mr. Fasttrack both realised that Mr. Prasad’s connections to Findfunds LP would justify a challenge. Considering, that CLAIMANT itself has doubts as to Mr. Prasad’s independence and impartiality, a reasonable third person would all the more have justifiable doubts.
- 56 Consequently, Mr. Prasad should be replaced as arbitrator. Contrary to CLAIMANT’s concern [*Memo CLAIMANT*, para. 70], the arbitral proceedings would not be delayed since CLAIMANT’s substitute arbitrator Ms. Ducasse is already familiar with the present case [*PO No 1*, p. 48 para. 1].
- 57 **Conclusion of the Second Issue:** There are justifiable doubts as to Mr. Prasad’s independence and impartiality from the perspective of a reasonable third person. Therefore, Mr. Prasad should be removed from the Arbitral Tribunal.



ARGUMENTS ON THE MERITS

58 CLAIMANT was contractually obliged to deliver chocolate cakes in accordance with the ethical standards stipulated in RESPONDENT's Code of Conduct. Having delivered non-complying chocolate cakes, CLAIMANT suddenly argues that it was merely under an obligation to use its best efforts to ensure the sustainable production of the cakes [*Notice of Arbitration, p. 7 para. 20*]. However, CLAIMANT was obliged to achieve the specific result of delivering sustainably produced chocolate cakes [**Fourth Issue**]. In order to deny this obligation, CLAIMANT alleges that its own standard conditions govern the Contract [*Memo CLAIMANT, para. 94*]. Yet, only RESPONDENT's standard conditions were incorporated into the Contract [**Third Issue**].

THIRD ISSUE: RESPONDENT'S STANDARD CONDITIONS GOVERN THE CONTRACT

59 On 10 March 2014, RESPONDENT sent CLAIMANT an invitation to tender for a sales contract and set out the requirements for an offer in the Tender Documents which included RESPONDENT's General Conditions of Contract and Codes of Conduct (hereafter: RESPONDENT's standard conditions) [*PO No 2, p. 55 para. 45; EXHIBITS C 1, 2, pp. 8 et seq.*]. In its Letter of Acknowledgment, CLAIMANT confirmed that it would submit an offer complying with the requirements specified by RESPONDENT [*EXHIBIT R 1, p. 28*]. On 27 March 2014, CLAIMANT accordingly sent RESPONDENT the form titled "Sales-Offer" along with RESPONDENT's Tender Documents [*EXHIBIT C 4, p. 16; PO No 2, pp. 52 et seq. para. 27*]. RESPONDENT accepted CLAIMANT's offer on 7 April 2014 [*EXHIBIT C 5, p. 17*]. Thereby, RESPONDENT's standard conditions became part of the Contract.

60 Now, in an attempt to deny the non-conformity of its cakes, CLAIMANT alleges that its own standard conditions govern the Contract [*Memo CLAIMANT, para. 16*]. However, this is not the case. To be incorporated, standard conditions have to be part of an offer in terms of Art. 14(1) CISG which subsequently must be accepted according to Art. 18(1) CISG [*OGH, 6 Feb 1996; Achilles, Art. 14 para. 6; Huber, VJ (2009), p. 125; Kröll/Mistelis/Viscasillas – Ferrari, Art. 14 para. 42; Bamberger/Roth – Saenger, Art. 1 para. 7; Eiselen, PER (2011), p. 3; Koch, NJW (2000), p. 910; Sambugaro, IBLJ (2009), p. 71*]. In the present case, both Parties agree that RESPONDENT's Invitation to Tender did not constitute an offer pursuant to Art. 14(1) CISG, but rather an invitation to make an offer in terms of Art. 14(2) CISG [*Memo CLAIMANT, para. 117*]. Moreover, it is undisputed between the Parties that it was CLAIMANT that submitted the offer in terms of Art. 14(1) CISG. However, contrary to CLAIMANT's argument [*Memo CLAIMANT, para. 94*], this offer included only RESPONDENT's standard conditions [**A**]. RESPONDENT accepted CLAIMANT's offer and thereby



only consented to the inclusion of its own standard conditions [B].

A. CLAIMANT's Offer Only Included RESPONDENT's Standard Conditions

61 Only RESPONDENT's standard conditions were included in CLAIMANT's offer. The question whether standard conditions form part of an offer has to be determined by interpreting the parties' statements and other conduct in accordance with the understanding of a reasonable person pursuant to Art. 8(2),(3) CISG [RB *Utrecht*, 21 Jan 2009; OGH, 31 Aug 2005; BGH, 31 Oct 2001; CISG-AC, Op. 13 (Eiselen) Com. 1.1; Magnus, *Kritzer lib. am.*, p. 318; Mittmann, IHR (2006), p. 105]. In the present case, the Parties engaged in a tender process in order to conclude the Contract. In a regular tender process, the party initiating the tender process (hereafter "issuer") compiles the tender documents setting out the essential terms for the contract which the tenderer is required to adopt in its subsequently submitted offer [Dünneberger, p. 18; Murray/Holloway/Timson-Hunt, para. 25-017; Enderlein, p. 105]. Due to this specific tender situation, taking account of the Parties' prior negotiations in terms of Art. 8(3) CISG is of particular importance when interpreting the offer. As will be shown in the following, RESPONDENT's Tender Documents required CLAIMANT to include RESPONDENT's standard conditions in the offer which CLAIMANT agreed to fulfil [I]. CLAIMANT adhered to the prior agreement in its offer [II]. CLAIMANT's subsequent conduct also demonstrates CLAIMANT's intent to only include RESPONDENT's standard conditions in its offer [III].

I. The Parties' Prior Negotiations Indicate That CLAIMANT's Offer Would Include RESPONDENT's Standard Conditions

62 During the prior negotiations in terms of Art. 8(3) CISG, the Parties agreed that CLAIMANT's offer would contain RESPONDENT's standard conditions. CLAIMANT correctly points out that there are two contracts in a tender process: The "process contract" and the "substantive contract" (sales contract) [Memo CLAIMANT, para. 95]. The process contract sets out the manner in which the tender process is supposed to take place in order to conclude the sales contract [Kinetic v. Comox, 3 Nov 2003; Ron Engineering v. Ontario, 27 Jan 1981; Fridman, TCBR (1987), p. 589; Girgis, CBLJ (2010), pp. 187 et seq.]. Thus, the process contract stipulates the requirements to be met by the tenderer in the sales offer. By sending its Invitation to Tender, RESPONDENT submitted a process offer. In the Letter of Acknowledgement, CLAIMANT assured that it had "read the Invitation to Tender and [would] tender in accordance with the specified requirements" [EXHIBIT R 1, p. 28]. Thereby, CLAIMANT agreed to submit a sales offer adhering to the terms in the Tender Documents. CLAIMANT now argues that RESPONDENT's process offer only consisted of Section II of the Tender Documents which allegedly did not require the tenderer to incorporate RESPONDENT's standard conditions [Memo CLAIMANT, paras. 95, 100]. However, this allegation is devoid of any merits:



- 63 To start with, it would be unreasonable to consider only one section of the Tender Documents to ascertain the requirements RESPONDENT laid out for the tenderer. CLAIMANT alleges that “*only [Section] II in [the] tender documents governs the manner of [the] tendering process*” [Memo CLAIMANT, para. 96]. However, RESPONDENT did not state in the Tender Documents that only Section II should determine the content of the sales offer [cf. EXHIBIT C 2, pp. 9 et seq.]. There would have been no reason for RESPONDENT to compile several sections including its standard conditions and send them to the tenderer if RESPONDENT had not conceived these documents to determine the terms of the subsequently concluded Contract. Thus, a reasonable person would have concluded that the requirements set out by RESPONDENT were specified in all sections of the Tender Documents.
- 64 In its Tender Documents, RESPONDENT explicitly required the inclusion of its standard conditions. In Section I of the Tender Documents, RESPONDENT stated that “*the Invitation to Tender consists of the following documents: [...] Section IV Special Conditions of Contract, Section V General Conditions of Contract, [...]*” [EXHIBIT C 2, p. 9]. In Art. 5 of the referenced Section IV, RESPONDENT further expressed that it expected the tenderer to incorporate these documents by stating that “*the contract is made up of the following documents [...] the General Conditions of Contract*” [EXHIBIT C 2, p. 11]. A reasonable person in CLAIMANT’s position would have inferred from this wording that RESPONDENT required CLAIMANT to include RESPONDENT’s standard conditions in its sales offer.
- 65 This requirement was further articulated by RESPONDENT in the letter accompanying the Invitation to Tender. In said letter, RESPONDENT stated that “*it is very important for us that we can be sure that also [CLAIMANT’s] suppliers adhere to Comestibles Finos’ Philosophy and our Code of Conduct for Suppliers*” [EXHIBIT C 1, p. 8]. Thereby, RESPONDENT required the inclusion of its business philosophy and Code of Conduct in the Contract which both form part of RESPONDENT’s standard conditions [cf. EXHIBIT C 2, p. 12 Section V Clause 4]. Therefore, a reasonable person would have concluded that the incorporation of RESPONDENT’s entire standard conditions was required.
- 66 Concluding, RESPONDENT made clear that it required the tenderer to incorporate RESPONDENT’s standard conditions into the offer. Contrary to CLAIMANT’s allegation [Memo CLAIMANT, para. 103], the “*specified requirements*” in the Letter of Acknowledgement referred not only to Section II, but to all terms specified in the Tender Documents, *i.e.* also to the standard conditions. CLAIMANT agreed to meet these requirements. Thus, a reasonable person would conclude that CLAIMANT’s offer would conform to this procedure and would contain only RESPONDENT’s standard conditions.

II. CLAIMANT’s Offer Conformed to the Parties’ Prior Agreement

- 67 CLAIMANT adhered to the Parties’ previous agreement in its offer, as CLAIMANT did not include its



own standard conditions [1], but rather demonstrated the intent to incorporate RESPONDENT's standard conditions into its offer [2].

1. CLAIMANT's Offer Did Not Include CLAIMANT's Standard Conditions

68 CLAIMANT's own standard conditions were not incorporated into CLAIMANT's offer. CLAIMANT rightly acknowledges that to validly incorporate its standard conditions, the offeror has to express its intent to include them in a recognisable way and further has to make them sufficiently available to the offeree [*Memo CLAIMANT*, paras. 97, 105; see also: *Tribunale di Rovereto*, 21 Nov 2007; *BGH*, 31 Oct 2001; *Brunner – Murmann/Stucki*, Art. 4 para. 41]. CLAIMANT did not demonstrate its intent to include its own standard conditions [a]. Even if CLAIMANT had intended to incorporate its own standard conditions into its offer, CLAIMANT did not make them sufficiently available [b].

a) CLAIMANT's Offer Indicated No Intent to Include CLAIMANT's Standard Conditions

69 A reasonable person in RESPONDENT's position would have concluded that CLAIMANT did not intend to deviate from the Parties' prior agreement by including its own standard conditions in its offer. The offeror's intent to include its standard conditions must be demonstrated unambiguously [*Roser v. Carl Schreiber*, 10 Sep 2013; *OGH*, 17 Dec 2003; cf. *CSS Antenna v. Amphanol*, 8 Feb 2011]. CLAIMANT asserts that it expressed the intent to include its own standard conditions, as the footer of CLAIMANT's standardised form "Sales-Offer" contained a "clear and understandable" pre-printed reference to CLAIMANT's standard conditions [*Memo CLAIMANT*, paras. 106 et seq.; *PO No 2*, p. 53 para. 28]. However, a reasonable person could not have been aware of such an intent:

70 First, CLAIMANT never mentioned that it intended to deviate from the requirements set forth in the Tender Documents. If a tenderer wants to alter terms contained in the tender documents, it usually informs the issuer about these changes in a separate letter and requests the issuer to consent to them [*Dünnweber*, pp. 18-19]. In the letter accompanying its offer, CLAIMANT stated that it had made some "minor amendments" to the Tender Documents relating "primarily to the goods and the mode of payment" [*EXHIBIT C 3*, p. 15]. CLAIMANT now alleges that these changes comprised the incorporation of CLAIMANT's standard conditions, since "primarily" does not mean "only" [*Memo CLAIMANT*, paras. 107 et seq.]. However, in said letter, CLAIMANT did not mention that it intended to include its standard conditions at any point. Instead, CLAIMANT only described the changes concerning the mode of payment and size of cakes [*EXHIBIT C 3*, p. 15]. Thus, a reasonable person would conclude that CLAIMANT merely intended to change the explicitly mentioned terms.

71 Second, the inclusion of differing standard conditions cannot be considered as a "minor amendment". In the present case, each Parties' set of standard conditions contains significant and detailed



provisions regulating the degree of diligence required by the parties and its suppliers [EXHIBIT C 2, pp. 13-14; EXHIBIT R 3, pp. 30-31]. Considering the significance of these provisions regarding the Parties' contractual obligations, a reasonable person would not consider the replacement of these standard conditions as a "minor amendment".

72 To conclude, as CLAIMANT had previously agreed to incorporate RESPONDENT's standard conditions into its offer, it would have at least required an explicit indication to make RESPONDENT aware of CLAIMANT's intent to include differing standard conditions. CLAIMANT, however, merely stated that it had made two minor amendments to the Tender Documents concerning the mode of payment and size of cakes. Therefore, a reasonable person in RESPONDENT's shoes would rather rely on this statement instead of deeming the pre-printed footer relevant to the offer. Thus, CLAIMANT did not express an intent to include its own standard conditions.

b) CLAIMANT Did Not Make Its Standard Conditions Sufficiently Available

73 Even if CLAIMANT had expressed its intent to incorporate its own standard conditions, CLAIMANT still would have failed to make them sufficiently available to RESPONDENT. CLAIMANT alleges that its standard conditions were made sufficiently available by the link to CLAIMANT's website [Memo CLAIMANT, para. 110]. However, providing a hyperlink to the standard conditions does not suffice if the contract is concluded by paper-based writing instead of electronic communication, as the standard conditions cannot be accessed by merely clicking the link [cf. OLG Celle, 24 July 2009; GH Den Haag, 22 Apr 2014; Piltz, IHR (2004), p. 134; Ventsch/Kluth, IHR (2003), p. 225; Schwenzler/Mohs, IHR (2006), p. 241]. The reference to CLAIMANT's General Conditions, however, was contained in the printed form "Sales-Offer" [EXHIBIT C 4, p. 16]. Therefore, the mere hyperlink did not suffice to make CLAIMANT's standard conditions available.

74 Besides, even if providing a link were sufficient in paper-based communication, the link in CLAIMANT's footer does not directly refer to CLAIMANT's standard conditions. CLAIMANT argues that by providing the link, its standard conditions were made available as "CLAIMANT's website is accessible, downloadable and storable" [Memo CLAIMANT, para. 110]. Yet, only a link referring to the exact internet address where the standard conditions are accessible is sufficient to make them available [cf. Roser v. Carl Schreiber, 10 Sep 2013; Stiegele/Halter, IHR (2003), p. 169]. CLAIMANT only referred to its general website "www.DelicatesyWholeFoods.com" [EXHIBIT C 4, p. 16]. From this landing page, RESPONDENT would still have to navigate to the exact address of CLAIMANT's standard conditions. Thus, in any case, the link did not suffice to make CLAIMANT's standard conditions available.

75 Further, the fact that RESPONDENT's Head of Purchasing, Ms. Ming, had read CLAIMANT's Codes of Conduct does not lead to a different conclusion. CLAIMANT argues that its standard conditions



were made sufficiently available because RESPONDENT downloaded and read them [*Memo CLAIMANT, para. 110*]. However, the offeror's duty to make its standard conditions sufficiently available can only be omitted if the other party has knowledge of the standard conditions by the time it receives the offer [*Schlechtriem/Schwenzger – Schroeter, Art. 14 para. 46; OGH, 29 Nov 2005; OLG Linz, 8 Aug 2005; MüKo HGB – Ferrari, Art. 14 para. 93; Honsell – Dornis, Intro Artt. 14-24 para. 13; Ferrari/Kieninger et al. – Mankowski, Intro Artt. 14-24 para. 40; jurisPK-BGB – Witz/Hlawon, Art. 14 para. 68; Piltz, IHR (2007), p. 122*]. RESPONDENT did not have any knowledge of the content of CLAIMANT's standard conditions until Ms. Ming read CLAIMANT's Codes of Conduct after RESPONDENT had received CLAIMANT's offer [*EXHIBIT C 5, p. 17, emph. add.*]. Moreover, Ms. Ming did not deem CLAIMANT's standard conditions to be relevant to the Contract, but merely read them “*out of curiosity*” [*ibid.*]. Thus, when submitting its offer, CLAIMANT was still obliged to make its standard conditions available to RESPONDENT. CLAIMANT did not fulfil this obligation.

76 Concluding, in its offer, CLAIMANT did not express an intent to deviate from the Parties' previous agreement. Even if CLAIMANT had intended to include its own standard conditions in its offer, it still would not have made them sufficiently available to RESPONDENT.

2. CLAIMANT Indicated Its Intent to Include RESPONDENT's Standard Conditions

77 CLAIMANT's offer displays CLAIMANT's intent to incorporate RESPONDENT's standard conditions into its offer. As the Parties agreed in the prior negotiations to only include RESPONDENT's standard conditions and CLAIMANT did not deviate from this procedure in its offer, this would be in itself sufficient to assume CLAIMANT's intent to include RESPONDENT's standard conditions in its offer. CLAIMANT even further demonstrated this intent by attaching RESPONDENT's Tender Documents and thus also RESPONDENT's standard conditions to its offer. Yet, CLAIMANT argues that RESPONDENT's standard conditions could not have been included in CLAIMANT's offer as it contained no reference to them [*Memo CLAIMANT, para. 114*]. However, an intent to incorporate standard conditions is also indicated by attaching the standard conditions to the offer [*Golden Valley v. Centrisys, 21 Jan 2010; cf. PSI Water Sys v. Robuschi USA, 16 June 2015; Wang, JBL (2015), p. 109*]. CLAIMANT sent RESPONDENT's Tender Documents along with the form “Sales-Offer” [*PO No 2, pp. 52 et seq. para. 27*]. CLAIMANT even filled out the blanks contained in Section IV of the Tender Documents titled “Special Conditions of Contract” except for the ones it had modified in the “Sales-Offer” (mode of payment and size of cakes) [*ibid.*]. The insertions “*as per Tender Documents*” contained in the “Sales-Offer” [*EXHIBIT C 4, p. 16*] support this perception of RESPONDENT's Tender Documents forming part of CLAIMANT's offer. Therefore, a reasonable person would conclude that CLAIMANT intended to include RESPONDENT's standard conditions in its offer.



III. CLAIMANT'S Subsequent Conduct Displays CLAIMANT'S Intent to Include RESPONDENT'S Standard Conditions

- 78 CLAIMANT's subsequent conduct further demonstrates that CLAIMANT itself deemed RESPONDENT's standard conditions to be applicable. When initiating the current proceedings, CLAIMANT itself acted on the assumption that the ad hoc arbitration clause contained in RESPONDENT's standard conditions was applicable [*cf. EXHIBIT C 2, p. 12 Clause 20; Notice of Arbitration, p. 6 para. 13*]. CLAIMANT tries to justify this by arguing that CLAIMANT itself intended "to go back to ad hoc arbitration" [*Memo CLAIMANT, para. 123*]. However, a reasonable person could not have been aware of such an intent. CLAIMANT normally uses the ICC Arbitration Clause in its contract model [*PO No 2, pp. 51 et seq., para. 19*]. Yet, CLAIMANT replied to RESPONDENT's Invitation to Tender stating that it could "very well live with the clause as it is", referring to Clause 20 of RESPONDENT's General Conditions [*EXHIBIT C 3, p. 15, emph. add.*]. Although CLAIMANT rightfully states that the terms negotiated by the parties can override the standard terms [*Memo CLAIMANT, para. 120*], no such individual agreement was made. Rather, the wording "as it is" implies that CLAIMANT had intended to simply use the clause as provided in RESPONDENT's standard conditions. As CLAIMANT's subsequent conduct supports this interpretation, a reasonable person would conclude that CLAIMANT intended to apply RESPONDENT's standard conditions.
- 79 In conclusion, neither CLAIMANT's subsequent conduct nor CLAIMANT's offer itself indicate an intent to deviate from the Parties' prior agreement. To the contrary, CLAIMANT further demonstrated its intent to include RESPONDENT's standard conditions in its offer.

B. RESPONDENT Accepted the Offer Including Only RESPONDENT'S Standard Conditions

- 80 Only RESPONDENT's standard conditions were incorporated into the Contract through RESPONDENT's acceptance pursuant to Art. 18(1) CISG. When RESPONDENT accepted CLAIMANT's offer, RESPONDENT made clear that its acceptance of the changes made by CLAIMANT only related to the "different payment terms and form of the cakes" [*EXHIBIT C 5, p. 17*]. Therefore, RESPONDENT expressed that it accepted CLAIMANT's offer including only RESPONDENT's own standard conditions. Thus, RESPONDENT's standard conditions govern the Contract.
- 81 **Conclusion of the Third Issue:** An interpretation of CLAIMANT's offer reveals that CLAIMANT only included RESPONDENT's standard conditions in its offer. In the tender process, the Parties agreed on the applicability of RESPONDENT's standard conditions. CLAIMANT adhered to this procedure in its offer which accordingly only contained RESPONDENT's standard conditions. As RESPONDENT accepted this offer, only RESPONDENT's standard conditions govern the Contract.



FOURTH ISSUE: CLAIMANT DELIVERED NON-CONFORMING CHOCOLATE CAKES IN TERMS OF ART. 35 CISG

82 CLAIMANT delivered chocolate cakes which did not conform to the requirements stipulated by RESPONDENT's applicable standard conditions. RESPONDENT's Code of Conduct obligated CLAIMANT to conduct its business in an environmentally sustainable way and to ensure adherence to these standards throughout its supply chain [EXHIBIT C 2, p. 13, Principle C, E]. In fact, RESPONDENT only chose to contract with CLAIMANT since they "[shared] the same values" regarding the strict adherence to environmental principles and an extensive supply chain management [EXHIBIT C 5, p. 17; EXHIBIT C 1, p. 8]. Despite its promises, CLAIMANT delivered cakes containing unsustainably produced cocoa. In an effort to downplay the scandal, CLAIMANT now alleges that the strict adherence to methods of sustainable farming was never agreed on.

83 However, since the use of unsustainably farmed cocoa breached the obligations set forth in RESPONDENT's Code of Conduct, the chocolate cakes did not fulfil the contractual requirements in terms of Art. 35(1) CISG [A]. Even if no such obligation could be derived from the Contract, the cakes would still be non-conforming pursuant to Art. 35(2) CISG [B].

A. The Chocolate Cakes Delivered by CLAIMANT Did Not Meet the Contractual Requirements in Terms of Art. 35(1) CISG

84 The cakes CLAIMANT delivered to RESPONDENT did not conform to the requirements set out in the Contract pursuant to Art. 35(1) CISG. According to this provision, the seller has to deliver goods which are of the quantity, quality and description required by the contract. RESPONDENT's Code of Conduct required CLAIMANT to deliver goods which were produced in an "environmentally sustainable way" and to "ensure that [its] own suppliers comply with the above [requirement]" [EXHIBIT C 2, pp. 13 et seq., Principle C]. However, the cakes delivered by CLAIMANT did not meet these requirements and were thus non-conforming according to Art. 35(1) CISG.

The use of sustainably produced cocoa can constitute a quality requirement in terms of Art. 35(1) CISG [I]. Furthermore, the Contract obliged CLAIMANT to deliver cakes containing only sustainably sourced cocoa [II]. CLAIMANT, however, did not fulfil this requirement and hence breached the Contract [III]. Even if CLAIMANT had only been required to use its best efforts to secure the use of sustainably sourced cocoa, CLAIMANT would not have fulfilled its obligation [IV].

I. The Use of Sustainably Produced Cocoa Can Constitute a Quality Requirement

85 The use of sustainably sourced cocoa can constitute a quality requirement in terms of Art. 35(1) CISG. CLAIMANT argues that Art. 35(1) CISG only applies to the goods' physical



characteristics [*Memo CLAIMANT, para. 140*]. CLAIMANT bases this interpretation on Artt. 31 et seq. of the Vienna Convention on the Law of Treaties (hereafter “VCLT”) [*Memo CLAIMANT, para. 126*]. However, the VCLT cannot be applied to interpret provisions regulating the obligations of individual parties in a sales transaction [*Schlechtriem/Schwenzler – Schwenzler/Hachem, Art. 7 para. 23; Herber/Czerwenka, Art. 7 para. 4; Reinhart, Art. 7 para. 8; Brandner, note A-1.*]. Instead, such provisions must be interpreted in accordance with Art. 7(1) CISG [*Volken, p. 38; Povrzenic, note 3*]. Pursuant to Art. 7(1) CISG, particular weight must be given to the CISG’s international character.

- 86 First, the developments in modern international trade demonstrate that non-tangible characteristics can constitute quality requirements. As CLAIMANT rightfully points out, the inclusion of non-physical characteristics is not mentioned in the drafting history of Art. 35(1) CISG [*Memo CLAIMANT, para. 138*]. Yet, it was only after the CISG’s drafting that characteristics such as the adherence to environmental standards in production processes gained importance [*cf. Schwenzler, ULR (2017), p. 131*]. Nowadays, non-tangible features play a great role in determining the value of goods [*Williams, HSV (2015), p. 300; Hansen/Samuelsen/Silseth, IMM (2008), p. 207*]. In order to adapt to this development and considering the CISG’s international character, the “quality” in terms of Art. 35(1) CISG must be interpreted to include all “*circumstances concerning the relationship of the goods to their surroundings*” [*Schwenzler/Leisinger, Hellner in mem., p. 267; cf. Huber/Mullis – Mullis, p. 132*]. Thus, the development of international trade shows that non-tangible features such as the adherence to environmental standards can constitute quality requirements.
- 87 Second, excluding non-tangible characteristics from the scope of Art. 35(1) CISG would contradict the fundamental principle of party autonomy. In general, the parties have the right to decide which obligations should arise from their contract [*Honnold, p. 253; Herbots – Lookofsky, p. 88; Neumann, VJ (2007), p. 81; Flechtner, LSRPS (2008), p. 5*] This principle is recognised in Art. 6 CISG which allows the parties to derogate from all provisions of the CISG except for Art. 12 CISG [*Schlechtriem, p. 35; Felemegas, Chapter, note 3 (c)*]. Therefore, if the terms of a contract expressly require the parties to adhere to certain standards, this adherence must constitute a quality requirement [*Schwenzler, ULR (2017) p. 124; Wilson, p. 12; Ramberg, p. 10*]. Thus, excluding non-tangible features from the scope of Art. 35(1) CISG would contradict the principle of party autonomy.
- 88 Hence, considering the international character of the CISG and the principle of party autonomy, non-tangible characteristics, such as the sustainable production of the cocoa used for the production of the cakes, are able to constitute quality requirements in terms of Art. 35(1) CISG.



II. CLAIMANT Was Obligated to Deliver Chocolate Cakes Which Exclusively Contain Sustainably Produced Ingredients

- 89 CLAIMANT was under the contractual obligation to achieve a specific result, *i.e.* the delivery of cakes which exclusively contained sustainably sourced cocoa. In general, a sales contract obliges the seller to achieve a specific result [*Brunner, p. 73; cf. Fauvarque-Cosson/Mazeaud, pp. 217 et seq.*]. Yet, as demonstrated by Art. 5.1.4. PICC, the parties can also agree that the use of best efforts can suffice. In this case, the seller must use the efforts that a reasonable person would use in the same circumstances, but does not guarantee the achievement of a specific result [*PICC commentary, p. 156*]. Whether the parties agreed on a duty to achieve a specific result or merely on a best effort obligation must be determined by way of an interpretation of the contract in terms of Art. 8 CISG [*HG Zürich, 3 Apr 2013; BG, 22 Dec 2000; HG Aargau, 5 Feb 2008; HG Aargau, 26 Nov 2008; Schlechtriem/Butler, para. 134; Enderlein/Maskow/Strobbach, Art. 8 note 2.3; Leisinger, p. 145*]. Following Art. 8(2) CISG, the Contract must be interpreted from the perspective of a reasonable person.
- 90 At hand, CLAIMANT alleges that a best effort obligation was agreed upon [*Notice of Arbitration, p. 7 para. 21*]. However, an assessment of all circumstances shows that RESPONDENT's Code of Conduct obliged CLAIMANT to achieve the specific result of delivering sustainably produced cakes. This is indicated by the wording of the Contract [1] and the Parties' negotiations [2].

1. The Wording of the Contract Indicates That the Parties Agreed on an Obligation to Achieve a Specific Results, *i.e.* the Delivery of Sustainably Produced Chocolate Cakes

- 91 The wording of the Contract demonstrates that CLAIMANT was required to achieve the specific result of delivering cakes exclusively containing sustainably sourced ingredients to RESPONDENT.
- 92 First, Section III of the Tender Documents determines that the ingredients of the cakes "have to be sourced in accordance with the stipulations under Section IV" [*EXHIBIT C 2, p. 10 Clause 1, emph. add.*]. Section IV states that RESPONDENT "expects all of its suppliers to adhere to similar standards" as RESPONDENT's high standards of sustainability [*EXHIBIT C 2, p. 11, emph. add.*]. This wording demonstrates that the suppliers' adherence to said standards of sustainability had the character of a mandatory requirement. This interpretation is supported by the wording of Clause 4 of RESPONDENT's General Conditions which determines "any breach of some relevance of [RESPONDENT's] [...] Code of Conduct for Suppliers [...] to constitute a fundamental breach [of contract]" [*EXHIBIT C 2, p. 12*]. This indicates that the adherence to the principles contained in the Code of Conduct was not a mere guideline or recommendation, but instead constituted a legally binding requirement.
- 93 Second, the fact that the Contract did not include an explicit best-effort-clause, indicates that the



Parties did not intend to establish an obligation of best efforts. Such an obligation usually only applies when explicitly mentioned in the contract [Miller, *ALR* (2006), p. 618]. The use of an explicit clause for establishing an obligation of best efforts is a common practice in international trade [cf. *Lemire v. Ukraine*, 14 Jan 2010; *Ventures v. Romania*, 12 Oct 2005; *Lions v. Bristol*, 21 Mar 2014; *Jet2 v. Blackpool*, 15 June 2011; *R&D Construction v. Hallam*, 10 Dec 2010; *CPC v. Qatari Real Estate*, 25 June 2010; *Rhodia v. Huntsman*, 21 Feb 2007; *Stephen v. Boatowners*, 2 Mar 1989]. At hand, the Parties refrained from including such a clause. Thus, it can be concluded that they did not intend to establish an obligation of best efforts.

94 Hence, the wording of the Contract demonstrates that CLAIMANT was obliged to achieve the specific result of delivering cakes containing only sustainably sourced cocoa.

2. The Parties' Negotiations Indicate That CLAIMANT Was Under the Obligation to Deliver Sustainably Produced Chocolate Cakes

95 Pursuant to Art. 8(3) CISG, when determining the understanding of a reasonable person, regard must be had to all relevant circumstances including the negotiations. During their negotiations, the Parties agreed that the sustainable production of the cakes would be an essential part of the Contract [a]. Further, CLAIMANT's advertisement indicates its duty to deliver cakes which exclusively contain sustainably sourced cocoa [b]. This interpretation is confirmed by CLAIMANT's statement [c].

a) The Parties Agreed That the Sustainable Production of the Cakes Constituted an Essential Component of the Contract

96 The fact that the adherence to methods of sustainable production was a crucial part of the Contract indicates that CLAIMANT was not merely under a duty of best efforts. If a certain attribute of a product is deemed to be essential for a contract, it generally indicates that a specific result is owed regarding this attribute [cf. *SCC*, 9 Dec 2013]. The Parties' conduct illustrates the essentiality of sustainable production in the case at hand:

97 From the start of their business relationship in 2014, the Parties' adherence to environmental standards was the main point of discussion between the Parties. At the Cucina Food Fair, RESPONDENT – which is known for selling only organic products in its supermarkets – expressed an interest in the supply of cakes produced in compliance with the core principles of sustainable production [Notice of Arbitration, p. 4 para. 3]. In this context, both Parties agreed that the adherence to environmentally sustainable production processes was of utmost importance to their businesses [ibid.]. In fact, it was CLAIMANT's policy of “strict adherence to the principle of ethical and



sustainable production” that made it an “*interesting supplier*” for RESPONDENT [EXHIBIT C 1, p. 8]. When RESPONDENT stressed the importance of a “*proper supply chain management*” [ibid.], CLAIMANT acknowledged this concern by providing RESPONDENT with a detailed description of its supply chain management [ibid.]. Hence, the Parties relationship was based on their mutual agreement regarding the importance of the strict adherence to standards of sustainability. Thus, the sustainable production of the cakes must be viewed as an essential part of the Contract.

98 This is supported by the Parties’ joint commitment to the Principles of the UN Global Compact initiative. Both CLAIMANT and RESPONDENT are Global Compact Members [EXHIBIT C 3, p. 15]. RESPONDENT even intended to become a Global Compact LEAD Company by 2018 and informed CLAIMANT about this ambition [EXHIBIT R 5, p. 41; EXHIBIT C 1, p. 8]. In order to become a LEAD Company, RESPONDENT has to ensure the strict adherence to the Global Compact Principles, in particular to the environmental standards of Principle 7. The mere use of best efforts would not suffice to comply with the Principles, as the adherence thereto could not be secured. Therefore, the Parties’ joint commitment to the Global Compact Principles demonstrates that the strict adherence to environmental standards was an essential element of the Contract.

99 In conclusion, the Parties’ conduct and UN Global Compact membership demonstrate that the adherence to sustainable standards of production was a fundamental component of the Contract.

b) CLAIMANT’s Advertisement Indicates an Obligation to Deliver Cakes Which Exclusively Contained Sustainably Produced Cocoa

100 CLAIMANT’s advertisement of its cakes at the Cucina Food Fair 2014 further indicates that it would exclusively use sustainably farmed cocoa for the cakes’ production and thereby achieve a specific result. When determining the nature of the quality requirements and thus the extent of the obligation, samples have to be taken into consideration [OLG Graz, 9 Nov 1995; *Herbots – Lookofsky*, p. 89]. At the Fair, CLAIMANT advertised its newest line of cakes. CLAIMANT promoted the cakes as being produced using only “*sustainably sourced cocoa*” [EXHIBIT R 2, p. 29; *Response to Notice of Arbitration*, p. 25 para. 11]. The cakes that CLAIMANT delivered to RESPONDENT were part of the same product line [*Response to Notice of Arbitration*, p. 25 para. 11]. Thus, to the understanding of a reasonable person in terms of Art. 8(2) CISG, the delivered cakes had to be produced using sustainably sourced cocoa. Hence, CLAIMANT’s advertisement indicates that the use of sustainably produced cocoa and thus the adherence to sustainability standards was guaranteed.

c) CLAIMANT’s Statement Reflects its Intent to Adhere to the Principles of Sustainability

101 The statement CLAIMANT made during the negotiations confirms that CLAIMANT was obliged to



achieve the specific result of delivering sustainably produced cakes. In the letter accompanying CLAIMANT's sales offer dated 27 March 2014, CLAIMANT stated that it would "*do everything possible to guarantee that the ingredients sourced from outside suppliers*" complied with the Parties' commitment to principles of sustainability [EXHIBIT C 3, p. 15, *empb. add.*]. This use of the term "guarantee" indicates that CLAIMANT was aware that it was contractually obliged to perform a specific result, *i.e.* the delivery of sustainably produced cakes. The fact that CLAIMANT stated that it would "*do everything possible*" does not restrict the extent of its obligation to the use of best efforts. In general, a "guarantee" does not mean that the parties must comply with the agreed requirements under all circumstances. Instead, if a guarantee is agreed on, a party's non-compliance would constitute a breach of contract. Thus, from the perspective of a reasonable person, the promise to do "everything possible" does not imply a legally relevant restriction of CLAIMANT's obligation, but must be viewed as a promise to avoid the breach thereof. Thus, CLAIMANT's statement confirms the conclusion that CLAIMANT was under the duty to achieve a specific result

- 102 In conclusion, an interpretation pursuant to Artt. 8(2),(3) CISG reveals that the Contract does not establish an obligation of best efforts, but rather obliged CLAIMANT to achieve a specific result by delivering cakes which exclusively contained sustainably sourced cocoa.

III. CLAIMANT Breached Its Contractual Duty by Delivering Chocolate Cakes Which Contained Unsustainably Sourced Cocoa

- 103 CLAIMANT failed to fulfil its contractual duty by delivering cakes which were produced using unsustainably sourced cocoa. CLAIMANT alleges that there was no sufficient evidence to prove that the cocoa used for production was sourced unsustainably [Memo CLAIMANT, para. 151]. However, such evidence can be provided. CLAIMANT rightfully asserts [Memo CLAIMANT, para. 147] that after the buyer takes over the goods, the burden to provide proof of the non-conformity rests on him [OLG Brandenburg, 3 Jul 2014; RB Arnhem, 11 Feb 2009; OLG Saarbrücken, 30 May 2011; BG, 16 Jul 2012; BG, 7 Jul 2004; Chicago Prime v. Northam Food Trading, 23 May 2005]. Yet, CLAIMANT does not consider that the mere suspicion of the goods' non-conformity is sufficient to constitute a lack thereof, if this suspicion affects the goods' market price and thus impedes their intended purpose [Schwenzer/Tebel, ULR (2014), p. 157; BGH, 2 Mar 2005; LG Bonn, 30 Oct 2003]. It was revealed that up to 50% of the cocoa delivered by CLAIMANT were produced on farms set up in protected areas of rainforest [PO No. 2, p. 54 para. 41]. The suspicion that half of the cocoa used in the cakes was farmed unsustainably impedes their ability to be sold for the elevated price usually demanded for sustainably produced cakes. Thus, by delivering cakes which potentially contained unsustainably sourced cocoa, CLAIMANT failed to fulfil its contractual obligation.



IV. Even if CLAIMANT Was Merely Required to Use its Best Efforts, CLAIMANT Would Not Have Fulfilled This Obligations

- 104 Even if CLAIMANT had merely been required to use its best efforts to ensure the use of sustainable cocoa, CLAIMANT would not have fulfilled this obligation. The CISG does not contain any provisions regulating the extent of a best efforts obligation. “*For issues not dealt with by the CISG*”, the Parties agreed to apply the relevant rules of the PICC [EXHIBIT C 2, p. 12 Clause 19]. Pursuant to Art. 5.1.4 PICC, best efforts are such efforts as would be made by a reasonable person of the same kind in the same circumstances. Which measures can be expected, must be assessed based on the individual case [Vogenauer, p. 629; cf. *Medic-Care v. Hamilton*, 30 Oct 2009].
- 105 CLAIMANT argues that hiring the independent firm Egimus AG and relying on the documentation sent by its supplier Ruritania Peoples Cocoa mbH was sufficient to fulfil its alleged duty of best efforts [Notice of Arbitration, p. 7 para. 22]. However, these measures cannot be considered as the use of best efforts in the present case. Even though Egimus AG assessed the supplier’s compliance to the Global Compact Principles through audits and reports [PO No 2, p. 53 para. 32], it refrained from examining the suitability of its certificates, as it “*fell outside Egimus AG’s main expertise*” [PO No 2, p. 54 para. 33]. Due to this lack of expertise, CLAIMANT did not discover that its supplier had “*[tripled] the number of beans produced in the examined locations*” [Notice of Arbitration, p. 7 para. 22]. Considering, that the cocoa industry in particular is subject to a multitude of issues and lawsuits regarding the adherence to standards of sustainability [Long, TIBR (2008), p. 316; Shapiro/Rosenquist, AS (2004), pp. 453 et seq.; Matissek, MEH (2012), p. 1; cf. *McCoy v. Nestle*, 30 Mar 2016; *Hodsdon v. Mars*, 17 Feb 2016], a reasonable person would have been expected to take high precautions to ensure that the farming of cocoa complied with said standards. Thus, a reasonable person in terms of Art. 5.1.4 PICC would conclude that the selection of a company whose expertise does not encompass the verification of crucial certificates cannot be considered as the use of best efforts.
- 106 Hence and in any case, CLAIMANT did not conform to the requirements under Art. 35(1) CISG.

B. The Chocolate Cakes Did Not Fulfil the Requirements of Art. 35(2) CISG

- 107 Even if the Arbitral Tribunal were to find that the Parties did not contractually agree on the strict adherence to methods of sustainable farming, the cakes would have been non-conforming in terms of Art. 35(2) CISG. The cakes were neither fit for their particular purpose pursuant to Art. 35(2)(b) CISG [I] nor for their ordinary purpose in terms of Art. 35(2)(a) CISG [II].

I. The Cakes Were Not Fit for their Particular Purpose

- 108 The chocolate cakes were not fit for their particular purpose. Pursuant to Art. 35(2)(b) CISG, the



goods do not conform with the contract unless they are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract. If the buyer makes the seller aware that the goods' purpose is to be sold on a market requiring the adherence to certain standards, the seller is obliged to comply with these standards [*Schwenzer/Leisinger Hellner lib. am.*, p. 249, 267; *Dysted*, p. 38; *Müller-Chen/Pair, Bergsten lib. am.*, p. 663; *Schwenzer, ULR (2017)*, p. 126; *Wilson*, p. 33]. RESPONDENT made CLAIMANT aware of its intent to sell the cakes on a market giving special importance to the adherence to environmental standards [*Response to Notice of Arbitration*, p. 25 para. 6]. Moreover, RESPONDENT informed CLAIMANT that violating environmental standards “in the field of ethical production” would have a “detrimental impact” through negative press [*EXHIBIT R 5*, p. 41]. Thus, RESPONDENT expressed that the cakes' purpose was to be sold on a market whose participants place a particular emphasis on the adherence to certain environmental standards. Therefore, the cakes containing unsustainably produced cocoa were unfit for the purpose made known to CLAIMANT. Thus, they were non-conforming in terms of Art. 35(2)(b) CISG.

II. The Chocolate Cakes Were Not Fit for their Ordinary Purpose

- 109 The chocolate cakes were not suitable for their ordinary purpose. Pursuant to Art. 35(2)(a) CISG, the goods do not conform with the contract unless they are fit for the purposes for which goods of the same description would ordinarily be used. In general, the ordinary purpose of goods is to be resold [*BGH*, 2 Mar 2005; *International Housewares v SEB SA*, 31 Mar 2003; *Tribunale Forlì*, 11 Dec 2008; *KG Glarus*, 6 Nov 2008; *Piltz*, p. 254, para. 5-46; *Schlechtriem/Schroeter*, p. 169]. In fact, they must be able to be resold for the usual market price [*Maley, ITBLR (2009)*, p. 113; *Wilson*, p. 32; *Bianca/Bonell*, p. 144]. Thus, if the goods suffer from a defect which significantly reduces their value, they are unfit for their ordinary purpose [*ibid.*]. The branding of goods as being produced in compliance with certain standards allows their producer to increase their price [*cf. Ramberg*, p. 3; *Heilmann*, p. 179]. At hand, the cakes would increase in value, if their production adhered to standards of sustainability. Correspondingly, their value would decrease, if the production was conducted unsustainably. Hence, RESPONDENT would not be able to resell cakes for the usual price. Thus, the cakes were unsuitable for their ordinary purpose pursuant to Art. 35(2)(a) CISG.
- 110 **Conclusion of the Fourth Issue:** The cakes did not conform to the requirements in terms of Art. 35 CISG. The Contract required CLAIMANT to deliver chocolate cakes which exclusively contain sustainably farmed ingredients. Even if a mere obligation of best efforts was agreed on, the delivery of cakes containing unsustainably sourced cocoa would, in any event, have failed to meet the requirements under Art. 35(1) CISG. Even in the case that Art. 35(2) CISG was applicable, the cakes would have been non-conforming as they were not fit for their specific and ordinary purpose.



REQUEST FOR RELIEF

In response to the Tribunal's Procedural Orders, Counsel makes the above submissions on behalf of RESPONDENT. For the reasons stated in this Memorandum, Counsel respectfully requests the Arbitral Tribunal to find that:

- The Arbitral Tribunal is entitled to decide on the challenge. Mr. Prasad should not participate in this decision [**First Issue**].
- Mr. Prasad should be removed from the Arbitral Tribunal since there are justifiable doubts as to his impartiality and independence [**Second Issue**].
- RESPONDENT's Standard Conditions govern the Contract [**Third Issue**].
- CLAIMANT delivered non-conforming chocolate cakes pursuant to Art. 35 CISG [**Fourth Issue**].

On these grounds the Arbitral Tribunal is respectfully requested to reject all claims for payment requested by CLAIMANT and to order CLAIMANT to reimburse RESPONDENT for the costs incurred in this arbitration.

Freiburg im Breisgau, 18 January 2018

Vanessa Brezancic • Yannik Jeremias

Alexander Kock • Laura Korn • Sebastian Krieger


Lilian Winter • David Weitz • Anna-Maria Wolff


**CERTIFICATE**

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.

Our university is competing in both the Vis East Moot and the Vienna Vis Moot. We are submitting two separately prepared, different Memoranda.



Vanessa Brezancic


Yannik Jeremias

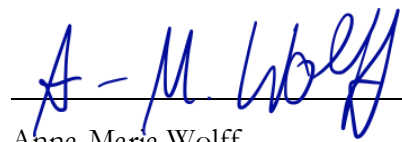

Alexander Kock


Laura Korn


Sebastian Krieger


Lilian Winter


David Weitz


Anna-Maria Wolff