

MEMORANDUM FOR RESPONDENT



On Behalf of:

Comestibles Finos Ltd
75 Martha Stewart Drive
Capital City, Mediterraneo

– RESPONDENT –

Against:

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

– CLAIMANT –

Counsel for RESPONDENT

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INDEX OF ABBREVIATIONS

Art.	Article
Arts.	articles
cf.	confer
Cl. Memo.	Memorandum for CLAIMANT
eds.	editors
et al.	et alia; and others (Latin)
et seq.	et sequens; and the following one (Latin)
et seqq.	et sequentia; and the following ones (Latin, pl.)
Exhibit C	CLAIMANT's Exhibit
Exhibit R	RESPONDENT's Exhibit
i.e.	id est; that is (Latin)
ibid.	ibidem; in the same place (Latin)
No.	Number
Not. of Arb.	Notice of Arbitration
Not of Chall.	Notice of Challenge
p.	page
para.	paragraph
paras.	paragraphs
pp.	pages
Proc. Ord.	Procedural Order
Resp. to Arb.	Response to Notice of Arbitration
v	versus

INDEX OF LEGAL TEXTS

Austrian Arbitration Act 2013	Austrian Arbitration Act 2013
CIETAC Rules	China International Economic and Trade Arbitration Commission Arbitration Rules (2015)
CISG	UN Convention on Contracts for the International Sale of Goods
Fed. Court of Australia, Practice Note 2016	Class Actions Practice Note (GPN-CA) Federal Court of Australia 25 October 2016
Guatemala Legislative Decree No. 67-95 Of 1995	Guatemala Legislative Decree No. 67-95 Of 1995
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration
ICC Model Statement	ICC Arbitrator's Statement Acceptance, Availability, Impartiality and Independence
ICC Note	Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of Arbitration (22 Sep 2016 version)

ICC Rules	ICC Rules of Arbitration
ICSID Rules	ICSID Convention Arbitration Rules
LCIA Rules	LCIA Arbitration Rules
Model Law	UNCITRAL Model Law on International Commercial Arbitration
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
PCA Rules	Permanent Court of Arbitration Arbitration Rules 2012
Peru Legislative Degree No. 1071	Peru Legislative Degree No. 1071
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules
UNCITRAL Rules on Transparency	UNCITRAL Rules on Transparency

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SUMMARY OF FACTS

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

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

RESPONDENT is a leading fair-trade supermarket chain in Mediterraneo.

- 3 Mar. 2014-
6 Mar. 2014** CLAIMANT and RESPONDENT met at the Cucina Food Fair and discussed expanding RESPONDENT’s product line of ethically and sustainably produced chocolate cakes.
- 10 Mar. 2014-
27 Mar. 2014** RESPONDENT published an invitation to tender for the delivery of sustainably produced chocolate cakes and sent separate invitations to five businesses, including CLAIMANT. In response, CLAIMANT submitted its tender.
- 7 Apr. 2014** RESPONDENT accepted CLAIMANT’s tender subject to RESPONDENT’s standard conditions. It contained specifications of the form of the cake and payment terms different to those in RESPONDENT’s invitation to tender.
- 1 May 2014** CLAIMANT commenced delivering cakes.
- Dec. 2016-
Jan. 2017** The United Nations Environmental Program special rapporteur released a report on deforestation in Ruritania. The report concerned a crackdown by authorities on a billion-dollar scheme to avoid zoning laws of natural reserves and issuance of fabricated certificates of sustainable production. News reports surfaced as of 19 January 2017.
- 12 Feb. 2017** Following RESPONDENT’s request, CLAIMANT investigated its supplier in Ruritania. Upon discovering that one of its suppliers, Ruritania Peoples Cocoa mbH, was involved in the scheme, RESPONDENT terminated the contract as the cocoa beans were not farmed ethically and sustainably.
- 30 Jun. 2017** After RESPONDENT refused to pay damages, no amicable solution could be reached through mediation. CLAIMANT initiated arbitration proceedings on 30 June 2017. CLAIMANT appointed Mr Prasad as arbitrator because he was well-known to its counsel, Mr Fasttrack.
- Sep. 2017** RESPONDENT discovered that CLAIMANT has a third-party funder. The Tribunal ordered CLAIMANT to disclose its identity. Mr Prasad disclosed close connections to the third-party funder, Findfunds LP. Consequently, RESPONDENT submitted a challenge against Mr Prasad.

SUMMARY OF ARGUMENT

1. CLAIMANT's case rests on its own breach of the fair agreement with RESPONDENT. At the heart of their contract lies a mutual commitment to promote a healthy and natural lifestyle. Ethical and sustainable production methods are the essence of their agreement.
2. RESPONDENT caters to a growing group of customers – people who demand sustainably produced products that neither compromise on quality nor environmental protection. In order to find a business partner equally committed to these strict values, RESPONDENT issued a public invitation to tender. Out of all the businesses that applied, CLAIMANT was the most suitable – or so it seemed. The standard conditions included in the tender documents specify CLAIMANT's contractual duty to deliver ethically and sustainably produced cocoa beans. Therefore, when RESPONDENT found out that CLAIMANT's cocoa beans came from plantations built on burned down rainforest, it had no choice but to immediately terminate the contract. CLAIMANT now attempts to avoid its responsibility by erroneously interpreting the applicable standard conditions. Contrary to CLAIMANT's argument, it guaranteed delivery of ethically and sustainably produced cocoa beans **[D]**.
3. What is more, CLAIMANT paints an inaccurate picture of contract formation. It submitted its offer in a tender process designed specifically to find suppliers of ethical and sustainable cocoa beans, and even *included* RESPONDENT's standard terms in its offer. However, now that it has failed to adhere to the standards it agreed to, it alleges that its own laxer standard conditions apply. On the contrary, RESPONDENT's standard conditions govern the contract **[C]**.
4. After RESPONDENT's cancellation of the contract, CLAIMANT brought RESPONDENT before this Tribunal to claim compensation for its unethically produced beans. If CLAIMANT regards legal proceedings as the only means to resolve the issues at hand, it should at least conduct them in accordance with due process. Instead, CLAIMANT tried to install a biased arbitrator who is dependent on a web of connections tied around CLAIMANT's third-party funder, Findfunds LP, and its legal counsel, Mr Fasttrack **[B]**.
5. When finding out about the close connection between CLAIMANT and Mr Prasad, RESPONDENT immediately filed an arbitrator challenge. The agreed upon procedure requires the two remaining arbitrators to decide on this challenge. Rather than adhering to the dispute resolution clause, CLAIMANT now argues that Mr Prasad should be the judge in his own challenge. CLAIMANT attempts to deny RESPONDENT's fundamental right to an independent Tribunal by avoiding the agreed upon challenge procedure **[A]**.

ARGUMENT

A. The Arbitral Tribunal should decide on the challenge of Mr Prasad without his participation

6. The Arbitral Tribunal should decide on the challenge of Mr Prasad without his participation. The Parties agreed to settle any dispute according to the UNCITRAL Arbitration Rules (“**the Rules**”) without the involvement of any arbitral institution [NOT. OF ARB., P. 6, PARA. 13]. RESPONDENT challenged Mr Prasad, the arbitrator whom CLAIMANT appointed [NOT. OF CHALL., P. 38]. As RESPONDENT expressed confidentiality concerns, the Parties agreed that only the Tribunal has the power to decide upon the challenge [I]. In fact, it can only reach an independent and fair decision without Mr Prasad [II].

I. The Tribunal must decide on the challenge of Mr Prasad

7. The Tribunal must decide on the challenge of Mr Prasad. CLAIMANT postulates that, according to Art. 13(4) of the Rules, an appointing authority must decide the challenge of an arbitrator [CL. MEMO., P. 8, PARA. 6]. However, the Parties agreed to derogate from this procedure by excluding Art. 13(4) of the Rules [1], and by establishing an alternative procedure [2]. Even if the Tribunal were to find that the Parties did not agree on an alternative procedure, Art. 13(2) UNCITRAL Model Law on International Commercial Arbitration (“**Model Law**”) applies [3].

1. The Parties excluded Art. 13(4) of the Rules

8. CLAIMANT states that the Parties did not expressly exclude Art. 13(4) of the Rules [CL. MEMO., P. 7, PARA. 3]. However, contrary to that allegation, the Parties were not required to expressly exclude the application of Art. 13(4) of the Rules in their dispute resolution clause (“**Dispute Resolution Clause**”) [a]. They impliedly agreed on the exclusion of Art. 13(4) of the Rules [b].

a) The Parties were not required to expressly exclude Art. 13(4) of the Rules

9. Despite CLAIMANT’s submission that a “*clearer wording*” is necessary [CL. MEMO., P. 7, PARA. 5], the Parties were not required to exclude Art. 13(4) of the Rules by way of express wording. In fact, no wording at all is required to exclude Art. 13(4) of the Rules. In the 1976 adoption of the UNCITRAL Arbitration Rules, Art. 1(1) required the parties to agree in writing on any modifications to the Rules. In the 2010 revision of the Rules, the UNCITRAL Working Group decided to refrain from the writing requirement to achieve more flexibility in arbitration [REPORT WORKING GROUP, P. 7, PARAS. 28 ET SEQQ.; CARON/CAPLAN, P. 19, PARA. 4]. Hence,

modifications to the Rules are valid even in the absence of a written agreement between the parties [IBID.; PAULSSON/PETROCHILOS, ART. 1, PARA. 7]. Furthermore, the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) recognises implicit agreements as valid [DIMATTEO, PARA. 3]. The CISG applies not only to the sale of goods agreement, but also to the arbitration agreement [PROC. ORD. 1, P. 48, PARA. 1; SEE ALSO HONNOLD, PARA. 105]. Thus, the Parties were not required to exclude Art. 13(4) of the Rules by way of express wording.

b) The Parties impliedly agreed to exclude Art. 13(4) of the Rules

10. In light of the above, the Parties impliedly agreed to exclude Art. 13(4) of the Rules. The circumstances at the time of the contract conclusion indicate that the Parties implicitly agreed to exclude Art. 13(4) of the Rules in their Dispute Resolution Clause. In *Econet Wireless Ltd v First Bank of Nigeria et al.*, the tribunal had to decide whether or not the parties had modified a provision of the 1976 UNCITRAL Arbitration Rules. It concluded that an implicit modification could “*only be justified if it serves to advance the Parties’ intent*” [ECONET WIRELESS LTD V FIRST BANK OF NIGERIA ET AL., P. 59, PARA. 22]. The tribunal opined that the writing requirement under the 1976 UNCITRAL Arbitration Rules could be disregarded, provided that this was in line with the parties’ intent of an implicit modification [IBID.].
11. To determine the parties’ intent, one must consider Art. 8 CISG. According to Art. 8(1) CISG, statements and other conduct of a party must be interpreted according to the parties’ intent. Article 8(1) CISG stipulates that this intent is only relevant for the interpretation of a statement where the other party knew or could not have been unaware of that exact intent [SCHMIDT-KESSEL IN: SCHWENZER, ART. 8, PARA. 15; CA GRENOBLE]. Hence, Art. 8(1) CISG may not be applied where the addressee of a statement could not have been aware of the other parties’ intent. In that case, Art. 8(2) CISG provides that an objective reasonable person standard applies [SAENGER IN: FERRARI ET AL., ART. 8, PARA. 2]. In determining the parties’ intent according to this standard, Art. 8(3) CISG requires that all relevant circumstances of the case, such as the negotiations, established practices and usages between the parties be duly considered. The application of Arts. 8(1) and 8(2) CISG only leads to different results in situations of special knowledge of the addressee. In those circumstances, the addressee will interpret a different intent than a reasonable third person. If parties were required to expressly refer to every intention, Art. 8 CISG would not be required, as interpretation would not be necessary. RESPONDENT and CLAIMANT had never met prior to the Cucina Food Fair. The Parties had no opportunity to obtain any information beyond their correspondence that would

provide them with special knowledge. Thus, any statement or conduct is to be interpreted according to the reasonable person standard. A reasonable person must have understood the Parties' intent to exclude Art. 13(4) of the Rules due to the wording of the Dispute Resolution Clause [i] and RESPONDENT's confidentiality concerns raised during negotiations [ii].

(i) The Parties' intent to exclude Art. 13(4) of the Rules was clear due to the wording of the Dispute Resolution Clause

12. A reasonable person must have understood the Parties' intent to exclude Art. 13(4) of the Rules due to the wording of the Dispute Resolution Clause. The Parties drafted their Dispute Resolution Clause based on the UNCITRAL model arbitration clause ("**Model Clause**"). As CLAIMANT stated, the Rules were drafted especially for *ad hoc* proceedings [CL. MEMO., p. 8, PARA. 8]. Hence, by using the Model Clause, the Parties agreed on *ad hoc* arbitration. The Parties, however, amended the wording of the Model Clause by inserting "*without the involvement of any arbitral institution*" [EXHIBIT C2, p. 12, CLAUSE 20]. CLAIMANT argues that this had no separate meaning other than referring to *ad hoc* arbitration [CL. MEMO., p. 7, PARA. 3]. It alleges that the Secretary-General of the Permanent Court of Arbitration ("**PCA**") as an appointing authority is an intergovernmental organization and as such was not excluded by the arbitration agreement [CL. MEMO., p. 9, PARA. 11, LINES 7 ET SEQQ.]. Contrary to this allegation, the privileged status as an intergovernmental organization does not deprive the PCA of its function as an arbitral institution. Its website and the source CLAIMANT cites in its memorandum further state that it is an arbitral institution [CL. MEMO., p. 8, PARA. 9; PCA OFFICIAL WEBSITE, ABOUT US; PAULSSON/PETROCHILOS, ANNEX II, PARA. 10].
13. CLAIMANT submits that the PCA is appropriate to act as an appointing authority. In all cases that CLAIMANT cites in its memorandum, the Secretary-General of the PCA was charged with the task of designating an appointing authority [CL. MEMO., p. 11, PARA. 16 ET SEQQ.]. Notably, in one of the cases, *Econet Wireless Ltd v First Bank of Nigeria et al.*, the PCA even designated the ICC Court as appointing authority [CL. MEMO., p. 11, PARA. 16; *ECONET WIRELESS LTD V FIRST BANK OF NIGERIA ET AL.*, p. 64, PARA. 43]. Involving the Secretary-General of the PCA, a standing body of an arbitral institution, directly contradicts the Parties' arbitration agreement that provides for the exact opposite. A reasonable person must have understood the Parties' intent to exclude Art. 13(4) of the Rules due to the wording of the Dispute Resolution Clause.

(ii) The Parties intended to exclude Art. 13(4) of the Rules due to RESPONDENT's confidentiality concerns

14. A reasonable person must have understood the Parties' intent to exclude Art. 13(4) of the Rules due to RESPONDENT's confidentiality concerns raised during negotiations. Prior to the conclusion of the contract, Ms Ming of RESPONDENT informed Mr Tsai of CLAIMANT that the Dispute Resolution Clause was meant to include as few persons as possible in a future arbitration [EXHIBIT R5, P. 41, PARAS. 4 ET SEQ.]. RESPONDENT has had negative experience when an employee of an arbitral institution leaked information on an ongoing case to the press [IBID.]. As a consequence, all of RESPONDENT's subsequent contracts included a strict confidentiality clause [IBID.; EXHIBIT C2, P. 12, CLAUSE 21].
15. Moreover, the Parties refrained from designating an appointing authority contrary to what the Model Clause suggests [EXHIBIT C2, P. 12]. CLAIMANT knew of RESPONDENT's intent and agreed to the Dispute Resolution Clause [NOT. OF ARB., P. 6, PARA. 13]. RESPONDENT intended to safeguard confidentiality by including as few persons as possible in the arbitration. If Art. 13(4) of the Rules is excluded, an appointing authority cannot decide on the challenge. The exclusion of the provision thus reflects the Parties' intent as it serves to maintain confidentiality by involving as few persons as possible. A reasonable person must have understood the Parties' intent to exclude Art. 13(4) of the Rules due to RESPONDENT's confidentiality concerns.

2. The Parties agreed upon an alternative arbitrator challenge procedure

16. CLAIMANT alleges that the Parties did not agree on an alternative procedure for the arbitrator challenge as they did not expressly refer to one [CL. MEMO., P. 7, PARA. 4]. However, the Parties impliedly gave the Tribunal authority to decide on challenges. The exclusion of Art. 13(4) of the Rules creates a gap in the arbitrator challenge procedure provided by the Rules. Hence, the Tribunal must apply the national law of Danubia, the seat of the arbitration. It has adopted the Model Law [EXHIBIT C2, P. 12, CLAUSE 20; PROC. ORD. 1, P. 49, PARA. 4]. Article 13(1) Model Law stipulates that the parties are free to agree on a challenge procedure. To determine whether the parties impliedly agreed on an alternative procedure, the same standard from *Econet Wireless Ltd v First Bank of Nigeria et al.* and Art. 8 CISG must be applied [SEE ABOVE, PARA. 13]. In *ad hoc* proceedings, the tribunal decides without the involvement of arbitral institutions [SCHROETER, P. 146]. Under other rules used in *ad hoc* proceedings, such as those of ICSID, the tribunal also decides on arbitrator challenges [CHALLENGE FORTIER 1, PARA. 13; CHALLENGE TSENG, PARA. 91]. The authority to do so derives from the *competence-competence* principle [DAELE, P. 170], which the UNCITRAL Arbitration Rules implement in their

Art. 23(1) [CARON/CAPLAN, P. 450]. The Parties referenced this principle by adding “*without the involvement of any arbitral institution*” to the Model Clause as it emphasises the Tribunal’s exclusive authority [EXHIBIT C2, P. 12, CLAUSE 20]. Furthermore, the Tribunal as the deciding body would advance the Parties’ intention to include as few persons as possible, as well as to ensure an efficient procedure. Thus, the Parties agreed on an alternative procedure for the arbitrator challenge as they gave the Tribunal the authority to decide on challenges.

3. Even if the Tribunal finds that the Parties did not agree on an alternative procedure for Art. 13(4) of the Rules, the Tribunal must decide on the challenge

17. Even if the Tribunal finds that the Parties did not agree on an alternative procedure for Art. 13(4) of the Rules, the Tribunal must decide on the challenge. Article 13(2) Model Law provides that in case the Parties did not agree on an alternative procedure, the arbitral tribunal shall decide on the challenge. The provision aims to ensure a default challenge procedure when the parties fail to exercise their party autonomy [CF. OFFICIAL RECORDS 2, PARA. 15]. If the Tribunal were to find that the Parties have not agreed on alternative challenge procedure, Art. 13(2) Model applies. Consequently, the Tribunal must decide on Mr Prasad’s challenge.

II. The Tribunal can only reach an independent and fair decision without Mr Prasad

18. The Tribunal can only reach an independent and fair decision without Mr Prasad. CLAIMANT’S attempts to determine the independence of Mr Prasad are irrelevant and, if allowed, would create grounds to refuse enforcement of the award [1]. Even though the Parties excluded Art. 13(4) of the Rules, they did not exclude the principle that no one should judge their own cause [2]. A decision without Mr Prasad would be fair and effective, and thus enforceable [3]. Even if Art. 13(2) Model Law applied, any deviation from the principle that no one shall judge their own cause would require explicit wording of the national arbitration law [4].

1. CLAIMANT’S attempts to determine the independence of Mr Prasad are irrelevant and, if allowed, would create grounds to refuse the enforcement of the award

19. CLAIMANT’S attempts to determine the independence of Mr Prasad are irrelevant and, if allowed, would create grounds to refuse the enforcement of the award. CLAIMANT asserts that Mr Prasad should decide on his challenge because it perceives Mr Prasad as independent and impartial [CL. MEMO., P. 16, PARA. 30]. However, because this is a circular argument, the Tribunal cannot allow this request. It is a question of this challenge whether Mr Prasad is impartial and independent. Who decides on an arbitrator’s challenge depends on the jurisdiction according to the applicable rules and governing principles, and not the merits of the challenge.

20. Further, if the Tribunal allowed CLAIMANT's attempt, the arbitrator would decide on his own challenge because the Tribunal would already perceive him as independent. CLAIMANT would effectively decide on the challenge of Mr Prasad. RESPONDENT's challenge thus becomes an instrument without use in the arbitration. Challenges of arbitrators are an essential part of the UNCITRAL Arbitration Rules [CARON/CAPLAN, P. 207]. RESPONDENT has a right to an independent and impartial tribunal, which is expressed in the mandatory challenge procedure of Art 13(3) Model Law [CASE DIGEST MODEL LAW, P. 69, PARA 4]. If Mr Prasad were to partake in that decision, it would violate the agreed upon arbitration procedure and deny RESPONDENT its procedural rights. This is a ground for a national court to refuse enforcement of awards under Art. V(1)(d) United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). CLAIMANT's attempts to determine the independence of Mr Prasad are irrelevant and, if allowed, would create grounds to refuse the enforcement of the award.

2. Even though the Parties excluded Art. 13(4) of the Rules, they did not exclude the principle that no one should judge their own cause

21. CLAIMANT submits that Mr Prasad should decide on his own challenge [CL. MEMO., P. 12, PARA. 20]. Contrary to this argument, the Tribunal must exclude Mr Prasad from the decision because the principle that no one should judge their own cause is applicable. The overall purpose of Arts. 11-13 of the Rules is to ensure an independent and impartial tribunal [CARON/CAPLAN, P. 177]. The Rules thus reflect the long-standing principle that no one shall judge their own cause which is part of all major arbitration rules as well as national arbitration legislation [SEE *DR. BONHAM'S CASE*, 1610, PARA. 47; Art. 9(4) ICSID RULES; ART. 13(4) PCA RULES 2012; ART. 14(1) ICC RULES; ART. 10.6 LCIA RULES; ART. 29 (2)(D)(II) PERU LEGISLATIVE DEGREE NO. 1071]. If the Parties wish to waive this substantive right to an independent and impartial tribunal, this requires an explicit statement [BORN, PP. 3602 ET. SEQQ.]. The Parties excluded Art. 13(4) of the Rules to ensure strict confidentiality of the proceedings. However, the Parties did not intend to waive its right to an independent tribunal, but merely intended to exclude arbitral institutions. Therefore, the principle applies to the present dispute. Mr Prasad must be excluded from the decision on his own challenge.

3. A decision without Mr Prasad would be the most fair and effective way to enforce the Parties' agreement

22. The Tribunal faces a situation where it must balance the principle that no one should judge their own cause against the agreement on a confidential arbitration procedure and the dispute

resolution clause. A decision by the two remaining arbitrators would balance all those aspects in a fair [a] and effective manner [b].

a) The Tribunal's decision can only be fair without Mr Prasad's participation

23. CLAIMANT argues that a decision by only two arbitrators would not be “*on even grounds*”, especially because RESPONDENT's party-appointed arbitrator, Ms Reitbauer, expressed critical views on third-party funding [CL. MEMO., P. 15, PARA. 27]. Although appointed by the parties, an arbitral tribunal is an independent decision-making body that must be fair and efficient according to Art. 17 of the Rules and Art. V New York Convention [BORRIS/HENNECKE IN: WOLFF, ART. V, PARA. 293]. Further, CLAIMANT fails to prove how Ms Reitbauer's views on third-party funding impair her decision-making in any way. In the present proceeding, Mr Prasad had the opportunity to present his position on the challenge [LETTER PRASAD, P. 43]. The agreed upon principle that no one should judge their own cause is part of a fair process [BORRIS/HENNECKE IN: WOLFF, ART. V, PARA. 293]. To ensure fairness for both parties, they and the challenged arbitrator were heard, and Mr Prasad must be excluded from the challenge.

b) The two remaining arbitrators can decide on the challenge effectively

24. CLAIMANT further alleges in its memorandum that a decision without Mr Prasad would cause a “*delay of justice*” because a replacement arbitrator would have to be found [CL. MEMO., P. 16, PARA. 29]. However, Art. 33 of the Rules provides that when the arbitral members are divided equally, the presiding arbitrator decides [CARON/CAPLAN, P. 717]. Additionally, as CLAIMANT points out in its memorandum, it has already appointed a replacement arbitrator, Ms Chian Ducasse [PROC. ORD. 1, P. 48, PARA. 1; CL. MEMO., P. 23, PARA. 48]. Hence, a decision without Mr Prasad would still be effective.

4. Even if Art. 13(2) Model Law applied, any deviation from the principle that no one shall judge their own cause would require explicit wording of the national arbitration law

25. As outlined above, because the Parties agreed on a challenge procedure, Art. 13(2) Model Law does not apply. Even if the Tribunal should find that Art. 13(2) Model Law applies, CLAIMANT could have argued that the Model Law requires Mr Prasad to decide on the challenge. Contrary to this, Mr Prasad cannot partake in the decision. Article 13(2) Model Law states that “*the arbitral tribunal shall decide on the challenge*”. It only refers to the tribunal, while making no explicit reference to the challenged arbitrator. Any deviation from the principle that no one should judge their own cause would require explicit wording of the national arbitration law. Therefore, some countries have expressly excluded the arbitrator from the decision and others have expressly included the arbitrator [ART. 17(2) GUATEMALA'S DECREE NO. 67-95 OF 1995;

ART. 589(2) AUSTRIAN ARBITRATION ACT 2013]. This illustrates that the wording of Art. 13(2) Model Law is too ambiguous to exclude the principle that no one should judge their own cause.

26. Additionally, even though the *travaux préparatoires* of 1985 outline that the drafters of the Model Law intended to exclude the principle that one should not judge their own cause [OFFICIAL RECORDS 1, PARA. 128], the Tribunal should avoid this reading for two reasons. First, the *travaux préparatoires* are not binding and only serve as a historical evidence of the intention of the drafter. Second, the view of the drafters is out of date because the principle that no one shall judge their own cause is now the prevailing international standard. The prevalence of this principle can be seen in the challenge procedures of major arbitral institutions such as Art. 9(4) ICSID Rules (2006), Art. 14(1) ICC Rules (2017) and Art. 31(6) CIETAC Rules (2015).
27. Moreover, the adoption of Art. 13(2) Model Law into national law has been criticised or avoided [PFISTER, P. 167]. Egypt implemented Art. 13(2) Model Law into their national law and thus included the arbitrator in the challenge procedure. When this provision was challenged, the Egyptian Supreme Court in 1999 ruled that it was unconstitutional. [TAHA, P. 4; EGYPTIAN SUPREME COURT 1999]. In addition, section 24 of the English Arbitration Act 1996 gives the national court the authority to remove a challenged arbitrator, but is silent as to a challenge procedure before the arbitral tribunal. Therefore, the Tribunal should apply the approach in line with all international tribunals to interpret the Model Law as the wording is too ambiguous.

III. Conclusion

28. As the Parties excluded Art. 13(4) of the Rules and agreed on an alternative procedure, the Tribunal must decide on the challenge of Mr Prasad. In line with the applicable principle that no one should judge their own cause, Mr Prasad cannot partake in that decision.

B. Mr Prasad must be removed from the Tribunal due to his lack of independence and impartiality

29. Contrary to CLAIMANT's allegations, Mr Prasad must be removed from the Tribunal due to his lack of independence and impartiality [CL. MEMO., P. 17, PARAS. 31 ET SEQQ.]. Mr Prasad has two major connections with the third-party funder Findfunds LP. One of his partners works for a client funded by Findfunds LP and Mr Prasad has been appointed twice by parties financed by Findfunds LP [LETTER PRASAD, P. 36]. Further, he has written an article about an issue in the arbitration [EXHIBIT R4, P. 40]. The connection between Findfunds LP and Mr Prasad alone

suffices to remove him from the Tribunal [I]. Additional circumstances show that Mr Prasad cannot decide independently and impartially in the present case [II].

I. The connection between Findfunds LP and Mr Prasad alone suffices to remove him from the Tribunal

30. Mr Prasad's breach of his duty to investigate potential conflicts of interest justifies doubts about his impartiality and independence [1]. RESPONDENT did not waive its right to object to the connection between Mr Prasad and the third-party funder [2]. The influence of Findfunds LP on Mr Prasad's law firm alone suffices to remove him from the Tribunal [3]. Mr Prasad's repeat appointments by Findfunds LP further substantiate justifiable doubts [4].

1. Mr Prasad's breach of the duty to investigate potential conflicts of interest gives rise to justifiable doubts about his impartiality and independence

31. After Mr Prasad became aware that his partner was representing a party funded by Findfunds LP, he failed to fulfil his duty to investigate possible connections with this arbitration [a]. His failure to comply with that duty justifies doubts as to his impartiality and independence [b].

a) Mr Prasad breached his duty to investigate potential conflicts of interest

32. Contrary to CLAIMANT's unsubstantiated belief that there is no duty to disclose [CL. MEMO., P. 21, PARA. 43], Art. 11 of the Rules requires arbitrators to "*disclose any circumstances likely to give rise to justifiable doubts*". This duty to disclose includes a duty to investigate potential conflicts of interest [BORN, P. 1912; DAELE, P. 54; LEW/MISTELIS/KRÖLL, P. 263]. Moreover, Arts. 11 and 12 Model Law impose a duty to investigate [BORN, P. 1912, FN. 1472]. This duty to make reasonable enquiries as to potential conflicts of interest is recognised both in the General Standard 7(c) IBA Guidelines on the Conflict of Interest ("**IBA Guidelines**") as well by the ICC [ICC MODEL STATEMENT]. The ICC further instructs arbitrators to disclose third-party funders [ICC NOTE, PARA. 24]. As the duty to investigate is part of the duty to disclose, arbitrators must also investigate their relation to third-party funders. According to General Standard 7(a) IBA Guidelines, the parties shall inform the arbitrator of such direct or indirect relationships. Similarly, in proceedings before the Federal Court of Australia, the parties are required to disclose litigation funders prior to the first case management conference [FED. COURT OF AUSTRALIA, PRACTICE NOTE 2016, PARA. 6.1]. Also, other arbitral tribunals have ordered parties to disclose those circumstances [HEP V SLOVENIA, P. 15]. If Mr Prasad had requested the Parties to disclose any involvement with Findfunds LP, he would have discharged his duties as arbitrator.

33. In the present proceedings, Mr Prasad became aware of Findfunds LP's influence on his partner three months before the merger of his firm with Slowfood was formally announced [PROC. ORD. 2, P. 50, PARA. 6]. Conflicts of interests are likely to arise from connections with third-party funders as they frequently engage in arbitration proceedings. Therefore, Mr Prasad was under a duty to investigate any potential connections with the current arbitration after he became aware of the existence of a third-party funder. However, he failed to do so and breached his duty to investigate.

b) Mr Prasad's breach of his duty to investigate gives rise to justifiable doubts as to his impartiality and independence

34. Mr Prasad's failure to investigate falls into a pattern of improper influence over the proceedings and thus gives rise to justifiable doubts according to Art. 11 of the Rules. For a tribunal to disqualify the arbitrator, a failure to disclose does not suffice, but adverse behaviour towards the other party is necessary [CARON/CAPLAN, PP. 226 ET SEQQ.; CHALLENGE KAUFMANN-KOEHLER, PARA. 47; LCIA REFERENCE NO. 81160, P. 451, PARA. 4.16]. In the challenge against Ms Kaufmann-Koehler, the arbitrator failed to disclose a connection, but discharged her duty by investigating diligently [CHALLENGE KAUFMANN-KOEHLER, P. 27, PARA 47]. CLAIMANT argues that the letter Mr Prasad sent after the disclosure of Findfunds LP's involvement establishes his intention of impartiality [CL. MEMO., P. 13, PARA. 22]. Yet, Mr Prasad sent the letter untimely two months after he became aware of Findfunds LP's influence on his law firm [PROC. ORD. 2, P. 50, PARA 7]. Hence, his failure falls in a pattern of adversarial behaviour against RESPONDENT. Therefore, justifiable doubts regarding Mr Prasad's impartiality exist.

2. RESPONDENT did not waive its right to challenge Mr Prasad

35. RESPONDENT did not waive its right to challenge Mr Prasad. It can base the challenge on the connection between Findfunds LP and Mr Prasad's partner. Actual knowledge of new circumstances is required to allow a challenge even though some circumstances were known to the parties at the constitution of the tribunal [CHALLENGE BROMS, PARA. 30; CARON/CAPLAN, P. 245]. This requirement is necessary because without it, the fundamental procedural right to an independent tribunal would be at risk [CARON/CAPLAN, P. 246]. Furthermore, it is upon the party alleging that the other party waived its right to challenge to prove that the challenging party knew of possible conflicts of interest [CHALLENGE THOMAS, PARA. 20].

36. CLAIMANT alleges that RESPONDENT is barred from raising its doubts as to Mr Prasad's independence and impartiality [CL. MEMO., P. 18, PARA. 35]. This is based on the fact that RESPONDENT did not challenge Mr Prasad after his declaration of impartiality of 26 June 2017

[EXHIBIT C11, P. 23, PARA. 3]. However, Findfunds LP's connection with Mr Prasad only became known to RESPONDENT on 14 September 2017 [PROC. ORD. 2, P. 50, PARA. 7]. RESPONDENT had no knowledge of Findfunds LP's involvement prior to the disclosure by CLAIMANT [IBID.]. It failed to prove that RESPONDENT knew who the third-party funder was prior to CLAIMANT's disclosure. The challenge is thus timely and can be raised.

3. The connection between Findfunds LP and Mr Prasad's partner impairs Mr Prasad's ability to decide independently and impartially

37. The connection between Findfunds LP and Mr Prasad's partner impairs Mr Prasad's ability to decide independently and impartially. The Tribunal must apply an objective legal standard to evaluate the connection [a]. According to this test, the closeness of the relationship between Findfunds LP and Mr Prasad [b] as well as any possible economic dependency [c] impair Mr Prasad's ability to decide on his challenge.

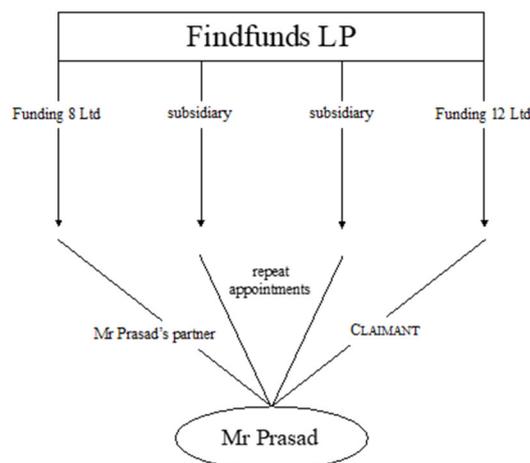
a) Both Parties agree on an objective legal standard to evaluate the connection

38. RESPONDENT agrees with CLAIMANT that an objective standard should be applied when evaluating the connection between Findfunds LP and Mr Prasad in accordance with Art. 12(1) of the Rules [CL. MEMO., P. 13, PARA. 24]. This objective standard requires that a reasonable third person with knowledge of all relevant facts must assess an arbitrator's independence and impartiality [CHALLENGE CAMPBELL, PARA. 43; CARON/CAPLAN, P. 208]. CLAIMANT relies on the challenge against Mr Stanimir A. Alexandrov in *ICS v Argentina* to demonstrate the need for an objective test according to Art. 12(1) of the Rules [CL. MEMO., P. 14, PARA. 24; CHALLENGE ALEXANDROV, P. 2]. Even though not binding in that dispute, the appointing authority used the IBA Guidelines as examples for what an objective person would regard as justifiable doubts [IBID., P. 4, PARA. 2]. The Tribunal should apply a similar approach in line with the effort to harmonise standards of impartiality and the best practice of international arbitral tribunals [CHALLENGE FADLALLAH, PARA. 24; CHALLENGE TAWIL, PARA. 74].
39. In the decision CLAIMANT refers to, the appointing authority decided on a challenge where an arbitrator's law firm was acting in a lawsuit against Argentina [CHALLENGE ALEXANDROV, P. 4, PARA. 2]. There, the appointing authority expressly referred to the scenario of para. 3.4.1 IBA Guidelines in which justifiable doubts arise if an "*arbitrator's law firm is currently acting adversely to one of the parties, or an affiliate of one of the parties*" [IBID.]. The IBA Guidelines use a traffic light rating system to differentiate between different levels of conflicts of interests. Whereas issues on the Red List give rise to justifiable doubts, situations on the Green List do not suffice to constitute conflicts of interests [IBA GUIDELINES, P. 2]. Within the same Orange

List, para. 3.2.1 states that objective doubts can arise if “*the arbitrator’s law firm is currently rendering services to one of the parties or an affiliate of the parties without creating a significant commercial relationship for the law firm and without the involvement of the arbitrator*”. According to para.2.3.6 IBA Guidelines, justifiable doubts arise if the commercial relationship is significant, as this falls within the Red List. This approach is also in line with practices of other arbitral tribunals starting with *AWG v Argentina* that also adjudicated according to UNCITRAL Rules. [CHALLENGE KAUFMANN-KOEHLER, PARA. 35; CHALLENGE STERN, PARA. 37; VON GOELER, P. 266]. These tribunals evaluated both the closeness of the connection and the material dependency [IBID.]. The Tribunal must apply the objective standard agreed upon by the Parties in the present case.

b) The connection between Findfunds LP and Mr Prasad is close enough to raise justifiable doubts as to the arbitrator’s impartiality and independence

40. Contrary to CLAIMANT’s allegations, the connection between Findfunds LP and Mr Prasad is close enough to create justifiable doubts [CL. MEMO., P. 13, PARA. 22]. As outlined above, para. 3.2.1 IBA Guidelines requires merely a close connection between the arbitrator and a party or affiliate for justifiable doubts. An affiliate is not only a party to the arbitration, but any legal entity or person with a direct economic interest in the award to be rendered in the arbitration [GENERAL STANDARD 7(A) IBA GUIDELINES; VON GOELER, P. 269]. Further, third-party funders “*may be considered to be the equivalent of the party*” [IBA GUIDELINES, P. 14].
41. The graphic outlines the close connection between Findfunds LP and Mr Prasad.



42. Findfunds LP is an affiliate to CLAIMANT because it finances CLAIMANT’s costs through a limited company named Funding 12 Ltd. It additionally finances a party represented by a partner at Prasad & Slowfood through another vehicle named Funding 8 Ltd. CLAIMANT alleges

that there is no close connection because Funding 8 Ltd is a legal entity separate from Findfunds LP [CL. MEMO., P. 12, PARA. 21; P. 17, PARA. 21]. However, Findfunds LP only uses those vehicles to organise funds and to invest in claims as is practice in litigation funding [PROC. ORD. 2, PARA. 3; *EXCALIBUR V KEYSTONE*, P. 2231, PARA 16]. Even though both subsidiaries might be separate legal entities, the influence and financial resources come from Findfunds LP [PROC. ORD. 2, P. 50, PARA 3]. Further, the standard funding agreement is made with Findfunds LP, not the subsidiaries and Findfunds LP exercises influence over the arbitration proceedings and the selection of arbitrators [IBID., PARA 4]. Therefore, notwithstanding the fact that they are separate legal entities, the connection is close enough to create justifiable doubts. CLAIMANT additionally argues that the arbitration involving Findfunds LP is soon to end, making the connection negligible [CL. MEMO., P. 19, PARA. 37]. In *ICS v Argentina*, one of the critical arbitrations was also soon to be terminated [CHALLENGE ALEXANDROV, P. 4, PARA 3]. The tribunal still found justifiable doubts as arbitrations can continue even after an award is rendered [IBID.]. The connection between Findfunds LP and Mr Prasad is close enough to raise justifiable doubts as to his impartiality and independence.

c) Mr Prasad is materially dependent on Findfunds LP

43. Mr Prasad is also materially dependent on Findfunds LP. As a partner at Prasad & Slowfood, he has a financial interest in the success of his partner [i]. Further, the connection between Findfunds LP and Mr Prasad constitutes a significant commercial relationship [ii].

(i) As an equity and name partner, Mr Prasad is materially dependent on the success of his partner in the case funded by Findfunds LP

44. Mr Prasad is materially dependent on Findfunds LP. CLAIMANT outlines that barristers appointed as arbitrators can still decide impartially if another barrister working at the same set of chambers appears on behalf of one of the parties in the same dispute [CL. MEMO., P. 19, PARA. 38]. Those cases can be distinguished on the facts. CLAIMANT drew especially on the case of *Laker Airways v FLS Aerospace* [IBID.]. In that case, the English High Court explained how “*barristers are independent self-employed practitioners*” and only share premises and support staff at one set of chambers [*LAKER AIRWAYS V FLS AEROSPACE*, PP. 122 ET SEQQ.]. They do, however, not share profits as is the case in law firms like Prasad & Slowfood. [PROC. ORD. 2, P. 50, PARA 8]. If another partner from the same law firm represents a party to the dispute, the arbitrator has a financial interest in the success of his partner and thus cannot decide independently [CHALLENGE FORTIER 2, P. 10, PARA. 46]. In its submission, CLAIMANT referred to the US Supreme Court Decision *Commonwealth Coatings v Continental* where Justice Black

for the majority applied the same standard [CL. MEMO., P. 13, PARA. 23; *COMMONWEALTH COATINGS V CONTINENTAL*]. Tribunals even found justifiable doubts where an arbitrator did not share profits with a partner, but only a similar corporate name as part of a diversified international law firm [CHALLENGE ALONSO, PARA. 67]. Only when the partner is acting on his or her own, is compensated separately and only uses the law firm's resources, comparable to a barrister, the appearance of bias can be avoided [*W LTD V M SDN BHD.*, PARA. 10]. Mr Prasad is not only name and equity partner at his own law firm, the firm also just merged recently which further underlines his continued interest in the success of Prasad & Slowfood [PROC. ORD. 2, P. 50, PARA. 7]. Hence, he has an interest in the success of his partner that makes his decision dependent.

(ii) The commercial relationship between Findfunds LP and Mr Prasad is significant

45. CLAIMANT argues that the connection between Mr Prasad and Findfunds LP does not constitute a significant commercial relationship and thus must not be considered [CL. MEMO., P. 22, PARA 47]. Paragraph 3.2.1 IBA Guidelines does not require a significant commercial relationship to give rise to justifiable doubts. Tribunals required that a commercial relationship must be above a *de minimis* threshold to create justifiable doubts [*EDF V ARGENTINA*, PARA. 121; *DAELE*, PP. 278 ET SEQQ.]. This standard excludes only trivial commercial relationships [IBID.]. However, even if the Tribunal were to require a stricter standard to disqualify Mr Prasad, the connection with Findfunds LP is significant and further justifies doubts as to the arbitrator's ability to decide without bias. Prasad & Slowfood will be paid an additional USD 300,000 after the case of Mr Prasad's partner comes to a close [PROC. ORD. 2, P. 50, PARA. 6]. Slowfood has already derived USD 1.5 million from this case [IBID.]. This shows a significant commercial relationship between Prasad & Slowfood and Findfunds LP. Mr Prasad derives 60% of his income from his law firm [PROC. ORD. 2, P. 51, PARA. 10]. Therefore, Findfunds LP and Mr Prasad have a significant commercial relationship that underlines justifiable doubts as to Mr Prasad's independence. Due to this close and material connection, Mr Prasad must be removed from the Tribunal.

4. The repeat appointments by Findfunds LP give rise to justifiable doubts

46. The repeat appointments by Findfunds LP give rise to justifiable doubts. Firstly, the Tribunal must consider the repeat appointments by subsidiaries of Findfunds LP [a]. Secondly, the repeat appointments alone give rise to justifiable doubts as to Prasad's independence and impartiality [b]. Lastly, even if the repeat appointments alone do not give rise to justifiable doubts, the additional circumstances justify those doubts [c].

a) The Tribunal must consider the repeat appointments by subsidiaries of Findfunds LP

47. Because CLAIMANT alleges that the subsidiaries are separate legal entities, it submits that the Tribunal should neglect Mr Prasad's appointments by parties funded by Findfunds LP [CL. MEMO., P. 17, PARA. 32, P. 22 PARA. 47]. Contrary to this, the appointments by subsidiaries of Findfunds LP need to be considered because those companies are mere vehicles for the influence of Findfunds LP on the arbitration. The IBA Guidelines recognise third-party funders as parties to the dispute and affiliates [IBA GUIDELINES, P. 14]. Furthermore, they require that connections within a group of companies need to be considered [IBID.]. Von Goeler considers the affiliates concept under the IBA Guidelines as too narrow and wants to include other forms of third-party funders [VON GOELER, P. 275]. However, Findfunds LP falls even within this narrow category and equals a party to the dispute. For Findfunds LP it is common practice to shield liability and hide its influence as it only funds arbitrations through limited companies [PROC. ORD. 2, P. 50, PARA. 3]. However, it retains the influence on the appointment of arbitrators through the funding agreement [IBID., PARA. 4]. Therefore, the Tribunal must consider the appointments by the subsidiaries of Findfunds LP.

b) The repeat appointments alone give rise to justifiable doubts as to Mr Prasad's independence and impartiality

48. The repeat appointments alone give rise to justifiable doubts as to Mr Prasad's independence and impartiality. CLAIMANT relies on the challenge decision in *Tidewater v Venezuela* to argue that appointments by the same party alone do not suffice to sustain doubts on the independence of an arbitrator [CL. MEMO., P. 20, PARA. 39 WITH REFERENCE TO CHALLENGE STERN, P. 20, PARA. 60]. The tribunal required financial benefits or knowledge derived from other cases [CHALLENGE STERN, P 20, PARA. 62]. CLAIMANT cites another ICSID arbitration to argue that multiple appointments are common and are the result of an arbitrator's experience [CL. MEMO., P. 20, PARA 41 WITH REFERENCE TO CHALLENGE SANDS] However, the cited tribunal argued that repeat appointments alone suffice to create justifiable doubts, thus it disagreed explicitly with the tribunal in *Tidewater v Venezuela* [CHALLENGE SANDS, P. 17, PARA. 47.]. The tribunal followed the international best practice summarised in para 3.1.3 of the Orange List of the IBA Guidelines. It stated that multiple appointments may give rise to justifiable doubts and need to be considered in the specific context of each challenge. Mr Prasad has been appointed twice prior to the dispute by parties funded by Findfunds LP. As Findfunds LP is an affiliate to CLAIMANT, those appointments create justifiable doubts.

c) Even if the repeat appointments alone did not give rise to justifiable doubts, the additional circumstances would justify those doubts

49. Even if the Tribunal were to find that repeat appointments alone do not give rise to justifiable doubts, Findfunds LP's ability to influence the appointments and Mr Prasad's financial dependence justify those doubts. In *Cofely v Bingham*, the English High Court held that an arbitrator who received 25% of his income from appointments by one party could not decide impartially [*COFELY V BINGHAM*, PARA. 104]. The Tribunal should consider this decision because the applied test to disqualify an arbitrator according to Section 24(1)(a) English Arbitration Act 1996 also requires justifiable doubts as to the impartiality of an arbitrator. Further, the funder's ability to influence appointments is relevant to the impartiality of the arbitrator [*COFELY V BINGHAM*, PARA. 107]. During the last three years, Mr Prasad derived 20% of his arbitrator fees from arbitrations involving subsidiaries of Findfunds LP [PROC. ORD. 2, P. 51, PARA. 10]. Even though he has his law firm as another source of income, he is also dependent on Findfunds LP due to his partner's work [SEE ABOVE, PARA. 44]. Additionally, Findfunds LP can influence Mr Prasad's re-appointments due to their funding agreements [PROC. ORD. 2, P. 50, PARA. 4]. Thus, a reasonable person would find that Mr Prasad is financially dependent on Findfunds LP. Therefore, he must be removed from the Tribunal.

II. Additional circumstances show that Mr Prasad cannot decide independently and impartially in the present case

50. Even if the Tribunal should find that the connection between Mr Prasad and Findfunds LP is not sufficient to remove him from the Tribunal, Mr Prasad's article and repeat appointments by Mr Fasttrack suffice to remove Mr Prasad from the Tribunal. RESPONDENT did not waive its right to challenge Mr Prasad, as all circumstances regarding third-party funding were only apparent after CLAIMANT's disclosure [1]. The additional circumstances give rise to justifiable doubts as to Mr Prasad's ability to decide impartially and independently [2].

1. RESPONDENT did not waive its right to challenge Mr Prasad, as all relevant circumstances were only apparent after CLAIMANT's disclosure

51. RESPONDENT did not waive its right to challenge Mr Prasad, as all relevant circumstances were only apparent after CLAIMANT's disclosure. CLAIMANT argues that RESPONDENT is barred from raising its justified concerns [CL. MEMO., P. 18, PARA. 35]. Even though the repeat appointments by Mr Fasttrack were disclosed by Mr Prasad in his declaration of impartiality in June 2017 [EXHIBIT C11, P. 23, PARA. 3], the new circumstances make it necessary to consider all factors influencing the arbitrator's judgement. Article 11 of the Rules allows a challenge only 15 days

after the parties become aware of all circumstances. Only after CLAIMANT's forced disclosure in September 2017, RESPONDENT became aware that Mr Fasttrack chose Mr Prasad based on his article and attempted to hide the connection between Findfunds LP and Mr Prasad [LETTER FASTTRACK, P. 35; NOT. OF CHALL., P. 39, PARA. 4]. Thus, RESPONDENT did not waive its right to challenge Mr Prasad, as all circumstances were only apparent after CLAIMANT's disclosure.

2. The additional circumstances give rise to justifiable doubts as to Mr Prasad's ability to decide impartially and independently

52. The additional circumstances give rise to justifiable doubts as to Mr Prasad's ability to decide impartially and independently. The article on Art. 35 CISG in CLAIMANT's favour, the repeat appointments by Findfunds LP's subsidiaries and Mr Fasttrack and the funding of Mr Prasad's partner justify RESPONDENT's concerns as to Mr Prasad's ability to decide this dispute. When deciding on arbitrator challenges, other tribunals have considered all circumstances collectively to protect the rights of the parties for a fair and independent tribunal [SCC CASE 120/2001, PARA. 57; *AMCO V INDONESIA*, PARA. 5; LCIA REFERENCE NO. UN3490, PARA 6.1]. The Tribunal must take this approach as it is equally committed to its independence and impartiality.
53. Mr Prasad has been specifically selected for his views expressed in the article by a lawyer who has appointed him already twice. [NOT. OF CHALL., P. 39, PARA. 4]. Further, para. 3.3.8 IBA Guidelines lists repeat appointments by the same counsel or law firm as giving rise to justifiable doubts. Together with the repeat appointments and the dependence of Prasad & Slowfood, a reasonable person must find that there are justifiable doubts as to Mr Prasad's independence and impartiality. Hence, Mr Prasad must be removed from the Tribunal.

III. Conclusion

54. According to the objective standard of Art. 12(1) of the Rules, there are justifiable doubts as to Mr Prasad's impartiality and independence. Mr Prasad breached his duty to investigate. Further, his connection to Findfunds LP and repeat appointment impair his ability to judge fairly in the present dispute.

C. RESPONDENT's standard conditions govern the contract

55. RESPONDENT's standard conditions govern the contract between the Parties. As opposed to CLAIMANT's standard conditions, RESPONDENT's establish a guarantee to deliver ethically and sustainably produced goods. To ensure the application of its own standard conditions and to

select the most preferable offer, RESPONDENT initiated the contractual negotiations through a public invitation to tender [EXHIBIT C1, p. 8]. Subsequently, CLAIMANT confirmed the application of RESPONDENT's standard conditions and attached them to its offer [EXHIBIT C4, p. 16]. Following the tender process, RESPONDENT accepted CLAIMANT's offer including RESPONDENT's standard conditions [EXHIBIT C5, p. 17]. Hence, a contract was concluded subject to RESPONDENT's standard conditions. RESPONDENT's invitation to tender constituted a non-binding invitation to treat [I]. CLAIMANT's subsequent offer including RESPONDENT's standard conditions and RESPONDENT's acceptance thereto form the contract [II]. Even if CLAIMANT's offer included its own standard conditions, RESPONDENT's letter of 7 April 2014 was a counter-offer which CLAIMANT accepted by conduct [III]. In any case, a battle of forms situation does not arise and neither the last-shot nor the knock-out rule apply [IV].

I. RESPONDENT's invitation to tender constituted an invitation to treat

56. CLAIMANT alleges that RESPONDENT's invitation to tender constituted an offer pursuant to Art. 14(1) CISG [CL. MEMO., PP. 24, PARAS. 51 ET SEQQ.]. It argues that RESPONDENT moreover showed an intention to be bound in its invitation to tender as "*RESPONDENT targeted specific persons in the pertinent industry*" [IBID., PARA. 55, LINES 12 ET SEQ.]. However, CLAIMANT is mistaken to equate an ordinary contract formation situation with the present tender process. As a public tender, RESPONDENT's invitation to tender constituted an invitation to treat pursuant to Art. 14(2) CISG.
57. To determine whether a proposal is an offer or an invitation to treat, one must apply Art. 14 CISG together with Art. 8 CISG [SCHLECHTRIEM/BUTLER, PARA. 73]. Pursuant to Art. 14(2) CISG, a proposal other than one addressed to one or more specific persons is to be considered merely an invitation to treat, unless the contrary is clearly indicated by the person making the proposal,. Contrary to what CLAIMANT alleges [CL. MEMO., p. 24, PARA. 55], addressing an invitation to treat to a specific group of persons does not sufficiently indicate an intention to be bound [SCHROETER IN: SCHWENZER, ART. 14, PARA. 29; ENDERLEIN/MASKOW, ART. 14, PARA. 4]. Unlike an offeror who intends to be bound by every response accepting its proposed terms, a person making an invitation to treat has no such intention [EÖRSI IN: BIANCA/BONELL, ART. 14, PARA. 2.2.5; *PARTRIDGE V CRITTENDEN*, p. 1209].
58. An invitation to tender may only be considered an offer when the initiating party also provides conclusive criteria for the selection of contractual partners [*SPENCER V HARDING*, p. 563; *BLACKPOOL & FYLDE V BLACKPOOL BC*, p. 1202]. In *Spencer v Harding*, the court held that

unless a clear wording such as “*we undertake to sell to the highest bidder*” shows the intention to enter a contract, an invitation to tender is an invitation to treat [*SPENCER V HARDING*, p. 563].

59. RESPONDENT may have specifically targeted the industry newsletter’s readership [RESP. TO ARB., p. 25, PARA. 7]. However, this does not indicate its intention to be bound. If the invitation to tender had already been an offer, RESPONDENT would have been forced to automatically conclude a contract with every business that responds to the invitation to tender. When RESPONDENT invited CLAIMANT to tender, it expressly expected CLAIMANT to submit an offer [EXHIBIT C1, p. 8, PARA. 5]. CLAIMANT further alleges that RESPONDENT intended to be bound because the Parties discussed arbitral agreements and Ms Ming contacted its legal department to ascertain that RESPONDENT’s dispute resolution clause was practicable [CL. MEMO., p. 27, PARA. 57]. Yet, the Parties only shared their experiences with arbitration in general [EXHIBIT R5, p. 41]. As RESPONDENT mentioned in its cover letter of the invitation to tender, it contacted the legal department for practical reasons [EXHIBIT C1, p. 8, PARA. 5]. If RESPONDENT had intended to conclude a contract with CLAIMANT at that time, it would not have initiated a tender process, but made an offer to CLAIMANT – and CLAIMANT only – directly. Hence, RESPONDENT’s invitation to tender did not constitute an offer, but an invitation to treat.

II. CLAIMANT’s offer including RESPONDENT’s standard conditions and RESPONDENT’s acceptance formed the contract between the Parties

60. While RESPONDENT’s invitation to tender was merely an invitation to treat, CLAIMANT’s tender constituted an offer [1], which included RESPONDENT’s standard conditions [2]. RESPONDENT accepted this offer by awarding CLAIMANT the contract on 7 April 2014 [3].

1. CLAIMANT’s letter of 27 March 2014 constituted an offer

61. CLAIMANT’s letter of 27 March 2014 [EXHIBIT C3, C4, PP. 15, ET SEQ.] constituted an offer pursuant to Art. 14(1) CISG. As CLAIMANT correctly states, an offer according to Art. 14(1) CISG must be sufficiently definite and the offeror must intend to be bound by an acceptance [CL. MEMO., p. 24, PARA. 51; SCHROETER IN: SCHWENZER, ART. 14, PARA. 1]. In a first step, CLAIMANT wrongly identifies its letter of 27 March 2014 as a counter-offer [CL. MEMO., p. 27, PARA. 58, LINE 10]. However, CLAIMANT did not respond to an offer made by RESPONDENT, but rather to an invitation to treat [SEE ABOVE, PARAS. 56 ET SEQQ.].
62. In its alternative argumentation, CLAIMANT admits that in case the invitation to tender is regarded an invitation to treat, CLAIMANT’s letter of 27 March 2014 constituted an offer [CL. MEMO., p. 29, PARA. 62]. RESPONDENT agrees with this interpretation.

2. CLAIMANT's offer was subject to RESPONDENT's standard conditions

63. CLAIMANT's submission that it included its own standard conditions in its offer is wrong [CL. MEMO., P. 28, PARA. 59, LINES 17 ET SEQQ.]. The CISG does not expressly address the incorporation of standard conditions into a contract [SCHROETER IN: SCHWENZER, ART. 14, PARA. 40], but it is accepted that these requirements can be deduced from Arts. 14 et seqq. CISG in conjunction with Art. 8 CISG [IBID.; FERRARI IN: KRÖLL ET AL., ART. 14, PARA. 38.] In order to include standard conditions in a contract, the offeror must reference them in the offer and make its intent to include them known to the offeree [*MACHINERY CASE*, PARA. III(3); MAGNUS IN: STAUDINGER, ART. 14, PARA. 41]. Moreover, the reference as well as the conditions themselves must be clear and the offeree must have a reasonable opportunity to take notice of them [FERRARI IN: KRÖLL ET AL., ART. 14, PARA. 39; CISG-AC, RULE 1, 2]. Lastly, the party relying on its own standard conditions carries the burden of proof for the valid incorporation of the standard conditions, as well as the offeree's awareness of it [SCHROETER IN: SCHWENZER, ART. 14, PARA. 83]. The burden of proof lies with CLAIMANT, as it wants to incorporate its own standard conditions. CLAIMANT merely points out that there is a reference to its website with its standard conditions [CL. MEMO., P. 28, PARA. 59]. It does not further elaborate why they have been validly incorporated into the offer. In any case, a reasonable third person would interpret CLAIMANT's statements and conduct as the intention to include RESPONDENT's standard conditions into the contract. First, before submitting its tender, CLAIMANT sent a letter of acknowledgment to RESPONDENT stating its intention to tender in accordance with RESPONDENT's tender documents, including RESPONDENT's standard conditions [a]. Second, CLAIMANT attached RESPONDENT's standard conditions to its offer [b]. Third, CLAIMANT's standard conditions do not apply as RESPONDENT had no reasonable opportunity to take notice of them [c].

a) CLAIMANT confirmed in its letter of acknowledgement that it will tender in accordance with RESPONDENT's tender documents including RESPONDENT's standard conditions

64. CLAIMANT confirmed in its letter of acknowledgment that it will tender in accordance with RESPONDENT's standard conditions. Because the CISG does not include any provisions on letters of acknowledgement, one must interpret the document's meaning pursuant to Art. 8(2) CISG. As noted above, RESPONDENT initiated the tender process for the contract by inviting CLAIMANT and other businesses to submit their offers. RESPONDENT's invitation to tender also included its standard conditions, which were available to all businesses interested [EXHIBIT C2, PP. 9 ET SEQ.]. Prior to the submissions, all businesses interested in contracting with RESPONDENT had to submit a letter of acknowledgment confirming that their offers will

be subject to RESPONDENT's standard conditions [EXHIBIT C2, P. 10, PARA. 2]. As requested by RESPONDENT, CLAIMANT submitted a letter of acknowledgment stating the following: "*We have read the Invitation to Tender and will tender in accordance with the specified requirements*" [EXHIBIT R1, P. 28]. RESPONDENT's invitation to tender also included its standard conditions [EXHIBIT C2, PP. 9 ET SEQQ.]. Therefore, a reasonable third person would understand "*specified requirements*" in this context as a confirmation to submit an offer in accordance with the requirements laid out in RESPONDENT's tender documents. Hence, CLAIMANT confirmed to tender in accordance with RESPONDENT's standard conditions.

b) RESPONDENT's standard conditions are part of CLAIMANT's offer as CLAIMANT attached them to it

65. RESPONDENT's standard conditions are part of CLAIMANT's offer as CLAIMANT attached them to it. CLAIMANT did not only attach RESPONDENT's standard conditions, but also filled in some of the blanks in the tender documents, such as its name [PROC. ORD. 2, P. 52, PARA. 27]. This shows that it was aware of Respondent's standard conditions and agreed to them. Even though CLAIMANT left out some blanks, it provided this information in the main part of its offer [IBID.; EXHIBITS C3, P. 15, PARA. 3; C4, P. 16]. Additionally, in the cover letter of the offer, CLAIMANT pointed out that it had made two modifications to the tender documents [EXHIBIT C3, P. 15, PARA. 2]. These "*minor amendments*" concerned the form of the cake and the payment mode [IBID.]. CLAIMANT specifically mentioned only two modifications and thereby implies that it intended to all the other terms provided for in the attached tender documents, such as RESPONDENT's standard conditions. A reasonable third person would understand that RESPONDENT's standard conditions are part of CLAIMANT's offer.

c) CLAIMANT did not include its own standard conditions in the offer as RESPONDENT did not have a reasonable opportunity to take notice of them

66. CLAIMANT argues that it included its own standard conditions by referring to them in its offer [CL. MEMO., P. 28, PARA. 59, LINE 17 ET SEQQ.]. However, CLAIMANT did not fulfil the prerequisites to include its own standard conditions. In the *Tantalum Powder Case*, the Austrian Supreme Court found that "*it requires an unambiguous declaration of the provider's intent*" [TANTALUM POWDER CASE]. Thus, the offeror must signal its intent to incorporate its own standard conditions to the other party [IBID.; CISG-AC, PARA. 5.1]. Pursuant to Art. 8(2) CISG, all relevant circumstances must duly be considered to determine the understanding of a reasonable person [IBID.]. Further, the offeree must have a reasonable opportunity to take notice of the standard conditions in order for them to form part of the contract [CISG-AC, RULE 3]. In

the *Machinery Case*, the German Supreme Court established that the offeree is not required to actively find and retrieve the offeror's standard conditions under the CISG [*MACHINERY CASE*, PARA. III(2)]. According to this 'making available' test, a mere reference with a URL to the offeror's website is not sufficient if the contract is concluded on paper [SCHROETER IN: SCHWENZER, ART. 14, PARA. 57; TEKLOTE, P. 115]. In the *Conveyor Belts Case*, a Dutch district court ruled that because both parties had not attached a printed version of their respective standard conditions, none governed the contract [*CONVEYOR BELTS CASE*, PARA. 2.8]. Thus, the standard conditions intended to form part of the contract must be printed out and be attached to the offer to ensure a reasonable opportunity to take notice of them [PILTZ, P. 2569; PARA. III(2)].

67. Firstly, CLAIMANT did not demonstrate an unambiguous intent to include its own standard conditions in its offer. After CLAIMANT had confirmed that it would tender in accordance with RESPONDENT's standard conditions, it would have needed to expressly inform RESPONDENT if it had no longer intended to comply with this statement. In its cover letter, CLAIMANT pointed out that it modified the payment mode and form of the cakes, however it did not mention the changed application of standard conditions [EXHIBIT C 3, P. 15]. As mentioned above, CLAIMANT further attached RESPONDENT's tender documents to its offer [PROC. ORD. 2, P. 52, PARA. 27]. Therefore, CLAIMANT did not expressly make RESPONDENT aware of the alleged intention to include its own standard conditions.
68. Should the Tribunal find that CLAIMANT had indeed intended to include its standard conditions to its offer, the mere reference to them did not suffice. As CLAIMANT pointed out, a note on the offer stated that “[t]he above offer is subject to the General Conditions of Sale and our Commitment to a Fairer and Better World. Refer to our website www.DelicatelyWholeFoods.com in regard to our General Condition and our commitments and expectations set out in our Codes of Conduct” [EXHIBIT C4, P. 16, PARA. 3; CL. MEMO., P. 28, PARA. 59, LINE 17]. CLAIMANT used a template referencing its website. The reference only included a URL on paper to CLAIMANT's website where, among other information, its standard conditions can be accessed. RESPONDENT would have to manually enter in the URL and search for the link on CLAIMANT's website leading to the document containing its standard conditions. Hence, CLAIMANT did not make its own standard conditions available to RESPONDENT and thus they were included in its offer.

3. RESPONDENT accepted CLAIMANT's offer with its letter of 7 April 2014

69. As CLAIMANT stipulates, the contract was formed pursuant to Art. 18(1) CISG by RESPONDENT's acceptance of the offer on 7 April 2014 [CL. MEMO., P. 27, PARA. 58;

EXHIBIT C5, p. 17]. However, contrary to CLAIMANT's submission that RESPONDENT also accepted the application of CLAIMANT's standard conditions [CL. MEMO., p. 27, PARA. 58, p. 29, PARA. 62], RESPONDENT did not. Pursuant to Art. 18(1) CISG, the 'mirror image rule' requires an acceptance to be the exact equivalent of an offer [BUTLER/MUELLER, p. 300, PARA. 17.2; MURRAY, p. 2, LINE 12]. As mentioned above, CLAIMANT included two modifications to RESPONDENT's tender documents, the payment mode and form of the cakes. Additionally, CLAIMANT's statements and conduct show that it included RESPONDENT's standard conditions in its offer. Thus, with its acceptance "*notwithstanding the changes suggested*" [EXHIBIT C5, p. 17, PARA. 1], RESPONDENT referred to these two modifications. Conclusively, RESPONDENT accepted CLAIMANT's offer.

III. Even if CLAIMANT's offer included its own standard conditions, RESPONDENT's letter of 7 April 2014 was a counter-offer which CLAIMANT accepted by conduct

70. If the Tribunal were to find that CLAIMANT included its own standard conditions in its offer, RESPONDENT's letter of 7 April 2014 constituted a counter-offer [1]. CLAIMANT then accepted RESPONDENT's counter-offer by conduct [2].

1. RESPONDENT's letter of April 2014 constituted a counter-offer

71. If the Tribunal were to find that CLAIMANT included its own standard conditions in its offer, RESPONDENT's letter of 7 April 2014 constituted a counter-offer. Contrary to CLAIMANT's submission that RESPONDENT had accepted the application of CLAIMANT's standard conditions [CL. MEMO., p. 27, PARA. 58 ET SEQ.], RESPONDENT had no such intention. As mentioned above, the 'mirror image rule' requires the acceptance to be the exact equivalent of the offer [BUTLER/MUELLER, p. 300, PARA. 17.2; MURRAY, p. 2, LINE 12]. When this is not the case, Art. 19(1) CISG applies. According to this provision, a response to an offer which purports to be an acceptance, but contains limitations is a rejection of the offer and constitutes a counter-offer. Pursuant to Art. 19(2) CISG, the reply to the offer must further materially alter the terms of the offer. The change of the applicable standard conditions is a material alteration [CF. SCHROETER IN: SCHWENZER, ART. 19, PARAS. 31 ET SEQ.].
72. In case CLAIMANT's reference sufficed to include its own standard conditions, the offer would have been ambiguous as it contained two standard conditions. CLAIMANT had agreed to submit an offer in accordance with RESPONDENT's standard conditions. It then attached RESPONDENT's standard conditions to its offer while attempting to reference its own. However, RESPONDENT intended to reject CLAIMANT's offer. RESPONDENT expressly agreed to CLAIMANT's suggested modifications, but did not want to include CLAIMANT's standard conditions. It never intended

to include CLAIMANT's standard conditions as it had read CLAIMANT's Code of Conduct merely "out of curiosity" [EXHIBIT C5, P. 17, PARA. 2]. Curiosity does not equal intent. RESPONDENT's letter purported to be an acceptance because it agreed to the modified payment terms as well as to the changed form of the cake [IBID., PARA. 1]. CLAIMANT's standard conditions were excluded from RESPONDENT's response to the offer. It thus included a limitation and was a counter-offer. CLAIMANT could not have expected RESPONDENT's letter of 7 April 2014 to constitute an agreement on the application of CLAIMANT's standard conditions. Instead, it was a counter-offer containing RESPONDENT's standard conditions.

2. CLAIMANT accepted RESPONDENT's counter-offer by conduct

73. CLAIMANT accepted RESPONDENT's counter-offer by delivering the chocolate cakes on 1 May 2014. According to Art. 18(1) CISG, conduct indicating assent to an offer constitutes an acceptance. The acceptance does not need to be by the same means as the offer [cf. CASE DIGEST CISG, ART. 18, P. 95, PARA. 11]. Hence, a written offer may be accepted by conduct alone [IBID.]. Conduct amounts to an acceptance when the accepting party performs actual contractual obligations, such as starting to manufacture or shipping the goods to the buyer [BUTLER/MUELLER, P 303, PARA. 17.2.2; CASE DIGEST CISG, ART. 18, P. 94, PARA. 6]. RESPONDENT defined 1 May 2014 as the date of delivery in its counter-offer [EXHIBIT C5, P. 17, PARA. 3]. After having received RESPONDENT's letter, CLAIMANT did not object to RESPONDENT's limitation. Rather, CLAIMANT fulfilled its contractual obligations by manufacturing the cakes which it delivered on 1 May 2014. It accepted RESPONDENT's counter-offer confirming the application of RESPONDENT's standard conditions.

IV. As the Parties agreed on the application of RESPONDENT's standard conditions, no battle of forms situation arises

74. CLAIMANT argues that the last-shot or the knock-out rule should be applied [CL. MEMO., P. 29, PARA. 61, LINES 8 ET SEQQ.]. However, this is not the case. These rules may only apply in a "battle of the forms" situation [CASE DIGEST CISG, ART. 19, PP. 98 ET SEQ., PARAS. 6 ET SEQ.; EISELEN/BERGENTHAL, P. 214]. Such a situation arises when both parties refer to their respective standard conditions, but fail to agree on their application and act as if there was an enforceable agreement [SPANOGLE/WINSHIP, P. 114, PARA. C; ART. 2.1.22 PICC, COMMENT 1]. In any case the Parties agreed on the application of RESPONDENT's standard conditions. Thus, no battle of forms situation arises. Neither the suggested last-shot, nor the knock-out rule apply.

V. Conclusion

75. RESPONDENT's standard conditions govern the contract. Its invitation to tender constituted an invitation to treat. CLAIMANT's offer included RESPONDENT's standard conditions and RESPONDENT's acceptance formed the contract between the Parties.

D. CLAIMANT delivered non-conforming goods as it guaranteed compliance with ethical and sustainable standards

76. CLAIMANT delivered non-conforming goods as it guaranteed compliance with the ethical standards underlying RESPONDENT's standard conditions – its General Conditions and Code of Conduct for Suppliers. The Parties concluded a contract on the delivery of the chocolate cake Queen's Delight in 2014 [EXHIBIT C4, p. 16]. It included the requirement that the cakes must be produced ethically and sustainably [EXHIBIT C2, pp. 13 ET SEQ.]. In January 2017, the UNEP Special Rapporteur uncovered a widespread fraud and corruption scandal in Ruritania concerning falsified certificates of sustainable farming [EXHIBIT C6, p. 18]. CLAIMANT discovered that its supplier Ruritania Peoples Cocoa mbH also obtained falsified certificates to cover up that it did not produce cocoa beans in a sustainable way [EXHIBIT C9, p. 21]. CLAIMANT gave a guarantee to deliver ethically and sustainably produced goods. Hence, it breached the contract according to Art. 35(1) CISG as it did not deliver goods that were produced in that way. [I]. Even if the contract did not include the requirement to deliver ethically and sustainably produced goods, CLAIMANT committed a breach pursuant to Art. 35(2) CISG [II].

I. CLAIMANT breached the contract according to Art. 35(1) CISG

77. CLAIMANT breached the contract according to Art. 35(1) CISG. The provision states that the seller must deliver goods which are of the quantity, quality and description required by the contract. As CLAIMANT has laid out in its memorandum, quality in the sense of Art. 35(1) CISG encompasses factual and legal circumstances affecting the relationship between the goods and their surroundings [CL. MEMO., p. 34, PARA. 73]. This is also the prevailing opinion in case law and literature [*ORGANIC BARLEY CASE*, PARA. 1; *ORGANIC JUICES AND ORGANIC OIL CASE*, PARA. III(2); SCHWENZER IN: SCHWENZER, ART. 35, PARA. 9; KRÖLL IN: KRÖLL ET AL., ART. 35, PARA. 25]. The circumstances of the chocolate cakes' production are factual. It affects the relationship of goods to their surroundings, as the production can be a criterion for consumers

when deciding whether to buy the cakes. Therefore, ethical and sustainable production is part of the quality required of the chocolate cakes according to Art. 35(1) CISG.

78. CLAIMANT breached the contract according to Art. 35(1) CISG as it did not deliver goods that were produced ethically and sustainably. In the contract, CLAIMANT guaranteed to deliver ethically and sustainably produced chocolate cakes [1]. Even if the Parties did not explicitly agree on such a guarantee, ethical and sustainable standards became part of the contract through a trade usage pursuant to Art. 9(2) CISG [2]. As a result, CLAIMANT did not deliver conforming cakes according to Art. 35(1) CISG [3]. RESPONDENT also did not waive its right to demand ethically produced cakes by accepting CLAIMANT's non-conforming cakes [4].

1. CLAIMANT guaranteed to deliver ethically and sustainably produced chocolate cakes

79. CLAIMANT guaranteed to deliver ethically and sustainably produced chocolate cakes under the contract. It argues that it used its best efforts to ensure compliance with its suppliers [CL. MEMO., P. 30, PARAS. 65 ET SEQQ.]. This is irrelevant as CLAIMANT failed to adhere to its guarantee. CLAIMANT had an obligation to deliver ethically and sustainably produced goods. It was not enough to use its best efforts. The wording of RESPONDENT's Code of Conduct [a], as well as the price of the chocolate cakes show that CLAIMANT gave a guarantee to deliver ethically and sustainably produced goods [b]. Moreover, Principles C and E of RESPONDENT's Code of Conduct do not constitute surprising clauses and thus became part of the contract [c].

a) The wording of RESPONDENT's Code of Conduct was clear enough to impose an obligation on CLAIMANT to deliver ethically and sustainably produced goods

80. The wording of RESPONDENT's Code of Conduct was clear enough to impose an obligation on CLAIMANT to deliver ethically and sustainably produced goods. To determine whether CLAIMANT gave a guarantee to deliver ethically and sustainably produced goods, one must interpret the contract and statements by the Parties according to Art. 8(2) CISG. However, Art. 8 CISG does not contain any criteria to differentiate between a duty to use best efforts and a duty to achieve a specific result. The general contract law of all states involved in the dispute is a verbatim adoption of the UNIDROIT Principles of International Commercial Contracts ("PICC") [PROC. ORD. 1, P. 49, PARA. 4]. Therefore, the applicable rules of the PICC must be consulted as gap-filling provisions. When determining whether a party was obliged to achieve a specific result or merely use its best efforts, Art. 5.1.5(a) PICC attaches great importance to the wording of a contract.
81. The Tribunal asked to ascertain whether or not CLAIMANT breached the contract under the assumption that RESPONDENT's General Conditions are applicable [PROC. ORD. 1, P. 48,

PARA. 3(1)(D)]. Hence, it is unnecessary to consider CLAIMANT's Code of Conduct, as CLAIMANT did in its memorandum [CL. MEMO., P. 30, PARAS. 63 ET SEQQ.]. One must look at RESPONDENT's Code of Conduct instead.

82. The wording of RESPONDENT's Code of Conduct is precise. Firstly, in contrast to CLAIMANT's allegations [CF. CL. MEMO., P. 36, PARA. 78], the word "*shall*" [EXHIBIT C2, P. 13] imposes binding obligations. It is generally imperative or mandatory [BLACK'S LAW DICTIONARY/SHALL]. Secondly, principles C and E of the Code of Conduct clearly lay out what the supplier must do in order to comply with the contract. Principle C requires to conduct business in an environmentally sustainable way [EXHIBIT C2, P. 13]. While this is a rather broad term, the Code of Conduct always provides examples of how exactly it requires the suppliers to produce goods. It states that one must "*appoint a competent person to manage health, safety and environmental programs and improvements*" and "*ensure that your own suppliers comply with the above requirements*" [IBID.]. Principle E obligates the buyer to procure goods and services in a responsible manner, for example by making sure its own suppliers comply with the agreed upon standards [IBID, P. 14]. CLAIMANT alleges that it conducted its business in accordance with comparable standards as those set forth in RESPONDENT's Code of Conduct and therefore complied with principle E of the Code [CL. MEMO., P. 35, PARA. 76, EXHIBIT C2, P. 14, PARA. E]. Further, CLAIMANT asserts that Ms Ming acknowledged that it operates under "*similar conditions*" [CL. MEMO., P. 35, PARA. 76]. However, this does not correspond to the truth. Ms Ming merely stated that CLAIMANT and RESPONDENT share similar values [EXHIBIT C5, P. 17, PARA. 2]. It does not mean that CLAIMANT's Code of Conduct contains comparable standards to RESPONDENT's. As CLAIMANT argues in its memorandum, its Code of Conduct solely includes an obligation to use best efforts, not a guarantee [CL. MEMO., P. 30, PARA. 63]. Moreover, CLAIMANT argues that it ensured its supplier would comply with the agreed upon standards by commissioning an auditing company [CL. MEMO., P. 31, PARA. 66]. Contrary to CLAIMANT's allegations, it was not enough that their auditing company Egimus AG had a good reputation. In fact, Egimus AG did not examine the suitability of Ruritania's State Certificate System as the fraudulent scheme in Ruritania fell outside its main expertise [PROC. ORD. 2, P. 54, PARA. 33]. CLAIMANT knew that it had to guarantee compliance with its suppliers and was obliged to find a more suitable company with a wider sphere of competence.
83. The fact that the Code of Conduct uses broad terms does not mean that CLAIMANT did not guarantee to deliver ethically and sustainably produced goods. According to Art. 2.1.19(2) PICC, standard terms are provisions for repeated use that are utilised without negotiating with the other party. As RESPONDENT's Code of Conduct constitutes such a standard term as well, it

cannot include more specific wording. It is drafted for repeated use and must apply to all of RESPONDENT's contracts. Thus, it could not have specified how CLAIMANT had to produce the chocolate cakes. The wording of RESPONDENT's Code of Conduct was not too broad to impose an obligation on CLAIMANT to deliver ethically and sustainably produced goods.

b) The price of the chocolate cakes demonstrates that CLAIMANT gave a guarantee

84. The price of the chocolate cakes demonstrates that CLAIMANT guaranteed to deliver ethically and sustainably produced goods. According to Art. 5.1.5(b) PICC, the contractual price of the goods can indicate whether a party had a duty to achieve a specific result or only to use its best efforts. A high price suggests that there was an obligation to achieve a specific result [ART. 5.1.5 PICC, COMMENT 3]. Buyers are more likely to agree to a higher price if they can be sure to receive what they expected from the seller. Because the cakes were of high quality, they had the price of the premium product. However, even in this market segment the price was towards the upper end [PROC. ORD. 2, P. 54, PARA. 40]. This means that there must be another factor contributing to the high price. As RESPONDENT highly values ethical and sustainable standards, it was willing to not only pay a high price for a premium product, but to invest even more so the cakes adhered to these standards. Hence, the price of the chocolate cakes indicates that CLAIMANT gave a guarantee to deliver ethically and sustainably produced goods.

c) Principles C and E of RESPONDENT's Code of Conduct do not constitute surprising clauses

85. CLAIMANT could have argued that principles C and E of RESPONDENT's Code of Conduct constitute surprising clauses. However, this is not the case. When standard conditions become part of a contract, the other party is usually bound to them, whether it has read them or not [CISG-AC, PARA. 7.1.]. Surprising clauses are an exception to this rule, as they are invalid when a reasonable third person could not have expected them due to their content, language or presentation [IBID., PARA 7.2.; SCHMIDT-KESSEL IN: SCHWENZER, ART. 8, PARA. 63]. It is common to include ethical requirements in Codes of Conduct [WILSON, PP. 13 ET SEQ.]. They can therefore not constitute surprising clauses [IBID.]. Furthermore, RESPONDENT's expectation of a guarantee became clear to CLAIMANT during negotiations. It explained to CLAIMANT how important it was that all suppliers adhere to RESPONDENT's Business Philosophy and Code of Conduct. As RESPONDENT was subject of negative press in the past when someone in the supply and production chain did not comply with these principles, it wanted to make sure that this would not happen again [EXHIBIT C1, P. 8, PARA. 3]. Consequently, principles C and E of RESPONDENT's Code of Conduct do not constitute surprising clauses.

2. CLAIMANT was obliged to deliver ethically and sustainably produced chocolate cakes as the UN Global Compact constitutes a trade usage

86. Even if the contract did not explicitly include a guarantee, CLAIMANT was obliged to deliver ethically and sustainably produced chocolate cakes as the UN Global Compact constitutes a trade usage according to Art. 9(2) CISG. Pursuant to Art. 9(2) CISG, the parties are considered to have impliedly made applicable to their contract a usage of which the parties knew and which in international trade is regularly observed by parties in similar contracts. If both parties have agreed to certain standards, for example through a private initiative, they have agreed to such a usage in their contract [BUTLER, P. 304; SCHWENZER/LEISINGER, P. 264]. The UN Global Compact is a voluntary private initiative whose ten principles cover the protection of basic human rights, labour, environment, and anti-corruption [SCHWENZER, P. 125]. When two parties that are members of the UN Global Compact conclude a contract together, this membership causes the inclusion of said principles into their contract [SCHWENZER/LEISINGER, P. 264]. The fact that this initiative is voluntary does not oppose the inclusion of ethical standards into contracts of its members [WILSON, P. 11]. When parties become members of the UN Global Compact, they signalise to all potential trade partners that they conduct their business according to its principles [IBID.].
87. Both Parties are members of the UN Global Compact [NOT. OF ARB., P. 4, PARA. 1; RESP. TO ARB., P. 25, PARA. 5]. After CLAIMANT had become a member of the initiative, it implemented changes in its organisation and production process to ensure compliance with its principles [EXHIBIT R5, P. 41, PARA. 3]. RESPONDENT expressly stated that CLAIMANT's UN Global Compact membership and its adherence to ethical and sustainable principles made CLAIMANT a particularly interesting supplier [EXHIBIT C1, P. 8, PARA. 2]. Both Parties have agreed to adhere to the initiative's ten principles because of their membership. Principle 7 states that businesses should support a precautionary approach to environmental challenges [WEBSITE UN GLOBAL COMPACT, WHO WE ARE]. RESPONDENT attaches great importance to this principle and adheres to it by obtaining goods from sustainable sources [RESP. TO ARB., P. 25, PARA. 5]. As CLAIMANT is also a member of the UN Global Compact, an obligation to deliver such goods became part of their contract. Consequently, CLAIMANT was obliged to deliver ethically and sustainably produced chocolate cakes as the UN Global Compact constitutes a trade usage.

3. CLAIMANT did not deliver conforming cakes according to Art. 35(1) CISG

88. As a result, CLAIMANT did not deliver conforming cakes according to Art. 35(1) CISG. According to Art. 5.1.4(1) PICC, when a party has a duty to achieve a specific result, that party

is bound to achieve that result. As the cocoa beans used for the production of the chocolate cakes have not been farmed ethically and sustainably, they were not of the quality required by the contract according to Art. 35(1) CISG [EXHIBIT C9, P. 21, PARA. 1]. Hence, CLAIMANT did not deliver conforming cakes according to Art. 35(1) CISG.

89. CLAIMANT argues that it acted in good faith according to Art. 7(1) CISG as it deviated from its standard payment method in favour of RESPONDENT [CL. MEMO., P. 32, PARA. 69]. This does not change the fact that it delivered non-conforming goods. Firstly, Art. 7 CISG applies only to courts and arbitrators [LOOKOFSKY, P. 49]. They should take the observance of good faith in international trade and the CISG's international character into consideration when they interpret it [IBID.]. It is therefore incorrect to declare that "*statements made must be in observance of good faith in international trade*", as CLAIMANT did in its memorandum [CL. MEMO., P. 32, PARA. 69]. Secondly, it is irrelevant whether CLAIMANT acted in good faith when it deviated from its standard payment method as it is only relevant whether it delivered conforming goods.
90. Even though CLAIMANT states that it had no intent to defraud RESPONDENT [CL. MEMO., P. 33, PARA. 70], CLAIMANT still delivered non-conforming goods. CLAIMANT's intent is irrelevant as the CISG is based on the concept of strict liability [CHANDA/TIWARI, P. 2; FLECHTNER, P. 32]. This means that a breach and the right to damages arises solely from a party's failure to perform [IBID.]. The only exception from this rule is Art. 79 CISG, which exempts a party from liability when there was an external event beyond its sphere of risk and control [IBID.]. However, Art. 79 CISG does not determine whether a breach occurred or not, but only the remedies resulting from such a breach. Thus, it is irrelevant whether CLAIMANT intended to defraud RESPONDENT. It is only significant that CLAIMANT did not deliver ethically and sustainably produced chocolate cakes and therefore breached the contract. Consequently, CLAIMANT did not deliver conforming cakes according to Art. 35(1) CISG.

4. RESPONDENT did not waive its right to demand ethically produced cakes by accepting CLAIMANT's non-conforming cakes

91. RESPONDENT did not waive its right to demand ethically produced cakes by accepting the non-conforming cakes, although CLAIMANT argues otherwise [CL. MEMO., P. 36, PARA. 79]. According to Art. 39 CISG, the buyer loses its right to rely on a lack of non-conformity of the goods if they do not give notice to the seller within a reasonable time after they have discovered it or ought to have discovered it. The obligation to give notice applies to every kind of non-conformity – obvious or hidden defects [KRÖLL IN: KRÖLL ET AL., ART. 39, PARA. 19].

92. As laid out above [SEE ABOVE, PARA. 88], the chocolate cakes were non-conforming as they were not made of ethically and sustainably produced cocoa beans. However, RESPONDENT only became aware of this fact on 10 February 2017, when CLAIMANT confirmed RESPONDENT's fear that the supplier Ruritania Peoples Cocoa mbH was involved in a fraud scheme [EXHIBIT C9, P. 21, PARA. 1]. RESPONDENT terminated the contract two days after it gained knowledge of the non-conformity [EXHIBIT C10, P. 22]. It could not have discovered the non-conformity of the chocolate cakes any earlier, as the fraud scandal only became public in the beginning of January [EXHIBIT C6, P. 18, PARA. 1]. Immediately after that, RESPONDENT asked CLAIMANT if its supplier was involved in the scheme [IBID., PARA. 2]. Therefore, RESPONDENT notified CLAIMANT of the non-conformity within a reasonable time after it had discovered it.
93. Furthermore, RESPONDENT did not accept the cakes by giving them away to customers. It could not sell the cakes as they did not fulfil ethical and sustainable standards that customers expect from RESPONDENT. However, it could also not have thrown away the cakes. RESPONDENT's General Business Philosophy includes a reference that RESPONDENT is committed to the UN Sustainable Development Goals [PROC. ORD. 2, P. 53, PARA. 31]. One of the targets of goal 12 is to "*halve per capita global food waste at the retail and consumer levels and reduce food losses along production and supply chains, including post-harvest losses*" by 2030 [WEBSITE UN SUSTAINABLE DEVELOPMENT, GOAL 12]. To throw away the cakes would have directly contradicted RESPONDENT's Business Philosophy. Hence, it chose to give away the cakes to its customers at store openings [PROC. ORD. 2, P. 54, PARA. 38]. RESPONDENT did not waive its right to demand ethically produced cakes by accepting the non-conforming cakes.

II. Even if the contract did not include a guarantee, CLAIMANT breached the contract pursuant to Art. 35(2) CISG

94. Even if the Tribunal should find that the contract did not include a guarantee to deliver ethically and sustainably produced goods, CLAIMANT breached the contract pursuant to Art. 35(2) CISG. This provision applies when the contract does not include any or only insufficient details of the requirements that the goods must fulfil pursuant to Art. 35(1) CISG [SCHWENZER IN: SCHWENZER, ART. 35, PARA. 13]. It applies objective criteria to determine the conformity of goods [IBID.]. Article 35(2)(c) CISG must be considered before all other objective criteria [IBID.]. It takes priority over Art. 35(2)(b) CISG, which in turn takes priority over Art. 35(2)(a) CISG. The latter applies alongside Art. 35(2)(d) CISG [IBID.].
95. Article 35(2)(c) CISG states that goods are non-conforming unless they possess the qualities of goods which the seller has held out to the buyer as a sample or model. CLAIMANT argues that it

did not have to deliver cakes made from sustainably sourced cocoa beans, but only high-quality cakes [CL. MEMO., P. 33, PARA. 72]. This is based on the fact that the cake presented at the Cucina Food Fair had won the Best Cake Award for several consecutive years [IBID.]. However, Art. 35(2)(c) CISG is not applicable because the Parties contractually agreed upon the cake Queen's Delight [EXHIBIT C4, P. 16], not the cake presented at the food fair, King's Delight [EXHIBIT R2, P. 29].

96. Even if Art. 35(2)(c) CISG was applicable, the cakes would have to consist of sustainably sourced cocoa beans. CLAIMANT assumes that the delivered cakes must be of high quality because the model at the food fair was a premium product [CL. MEMO., P. 33, PARA. 72]. If the cakes are similar enough to determine the quality of the contractually agreed upon cake, the goods must consequently possess all characteristics of the model. The sample cake at the food fair was also made from sustainably sourced cocoa [EXHIBIT R2, P. 29]. Hence, CLAIMANT was obliged to deliver cakes that were not only of high quality, but also consisted of sustainably sourced cocoa. CLAIMANT delivered non-conforming goods according to Art. 35(2)(c) CISG.
97. Even if the Tribunal should find that the cakes were conforming according to Art. 35(2)(c) CISG, they did not conform with Art. 35(2)(b) CISG. Article 35(2)(b) CISG states that goods are non-conforming 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. A particular purpose may arise from the fact that a buyer plans to sell goods in a particular market, e.g. specialises in organic foods or fair trade [SCHWENZER/LEISINGER, P. 266]. CLAIMANT alleges that RESPONDENT's main purpose was to sell high quality cakes and decided to choose CLAIMANT as a supplier because its cake had won the Best Cake Award [CL. MEMO., P. 33, PARA. 71]. However, these allegations are not true. Even though it is correct that RESPONDENT attaches great importance to quality, it always stressed that goods must be produced in an ethical and sustainable manner [EXHIBIT C1, P. 8, PARA. 2; RESP. TO ARB, P. 25, PARA. 11]. RESPONDENT emphasised the importance of ethical and sustainable standards because it intends to become a Global LEAD Company by 2018 [EXHIBIT C1, P. 8, PARA. 3]. It thus requires its suppliers to adhere to these standards. CLAIMANT was aware of this from the beginning as Ms Ming and Mr Tsai discussed ethics and sustainability during their first meeting at the food fair [EXHIBIT R5, P. 41, PARA. 4]. Furthermore, RESPONDENT reiterated that it advertises its supermarkets to sell products which are part of a healthy, natural world [RESP. TO ARB., P. 25, PARA. 6]. Consequently, it was clear that the particular purpose of the chocolate cakes was to sell them in RESPONDENT's supermarkets. This was only possible if they were not only of high

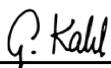
quality, but also consisted solely of ethically and sustainably produced ingredients. Therefore, CLAIMANT delivered non-conforming goods according to Art. 35(2)(b) CISG.

III. Conclusion

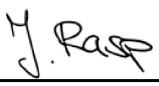
98. CLAIMANT breached the contract according to Art. 35 CISG as it did not deliver ethically and sustainably produced goods although it gave a guarantee in the contractual documents. Moreover, ethical and sustainable standards became part of the contract through a trade usage.

REQUEST FOR RELIEF

99. For the above reasons, Counsel for RESPONDENT respectfully requests the Tribunal to
1. find that the Arbitral Tribunal should decide on the challenge of Mr Prasad without his participation;
 2. find that Mr Prasad must be removed from the Tribunal due to his lack of independence and impartiality;
 3. find that RESPONDENT's standard conditions govern the contract;
 4. find that CLAIMANT delivered non-conforming goods as it guaranteed compliance with the ethical standards underlying RESPONDENT's General Conditions and Code of Conduct for Suppliers.



GRETA KAHL



ISABELLE RASP



LASSE RAMBOW



PUYA SAMADI AHADI



MARTEN TÖNJES



ANN-KRISTIN WAGNER