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

MEMORANDUM FOR RESPONDENT

THE UNIVERSITY OF SYDNEY

ON BEHALF OF

DELICATESY WHOLE FOODS SP

39 MARIE-ANTOINE CARÊME AVENUE

OCEANSIDE, EQUATORIANA

– CLAIMANT –

AGAINST

COMESTIBLES FINOS LTD

75 MARTHA STEWART DRIVE

CAPITAL CITY, MEDITERRANEO

– RESPONDENT –

COUNSEL

MARGERY AI RHYS CARVOSSO TIMOTHY MORGAN PATRICK STILL

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

Abbreviation	Term
¶(¶)	paragraph(s)
/	and
%	per cent
Art./Arts.	Article/Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods
CISG-AC Op. No.	CISG Advisory Council Opinion Number
Cl.	Clause
Cl. Ex.	CLAIMANT Exhibit
Cl. Memo.	CLAIMANT Memorandum
CLAIMANT	Delicatesy Whole Foods Sp
Compact Principles	United Nations Global Compact Principles
CSR	corporate social responsibility
e.g.	exempli gratia (for example)
Gen. St.	General Standard
IBA	International Bar Association
IBA Guidelines	International Bar Association Guidelines on Conflicts of Interest in International Arbitration
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration

ICCA-Queen Mary	ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration
ICSID	International Centre for Settlement of Investment Disputes
Intro.	Introduction
Letter from Prof. Rizzo	Letter from Professor Ms. Caroline Rizzo, Presiding Arbitrator in these proceedings, to the Parties dated 22 August 2017
LP	Limited Partnership
Ltd	Limited
Model Law	UNCITRAL Model Law on International Commercial Arbitration (incl. 2006 amendments)
Mr.	Mister
No.	Number
OLG	Oberlandesgericht (German Regional Court of Appeal)
p./pp.	page/pages
PCA	Permanent Court of Arbitration
PICC	International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts
Prac. App.	Practical Application
Proc. Order	Procedural Order
Resp. Ex.	RESPONDENT Exhibit
RESPONDENT	Comestibles Finos Ltd
SCC	Stockholm Chamber of Commerce
Sp	Sole proprietorship
Special Conditions	Special Conditions of Contract

the Parties	CLAIMANT and RESPONDENT
the Tribunal	the Arbitral Tribunal of Prasad, Reitbauer, and Rizzo constituted for proceedings *Delicatesy Whole Foods Sp v Comestibles Finos Ltd*
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Arbitration Rules (as revised in 2010)
WIPO	World Intellectual Property Organisation

INDEX OF AUTHORITIES

TREATIES, CONVENTIONS AND RULES

UNCITRAL Rules	UNCITRAL Arbitration Rules (as revised in 2010)	13, 14, 18, 19, 20, 24, 26, 27, 34, 35, 42, 44, 45, 46, 47, 62
UNIDROIT	International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts 2010	17, 109, 110, 111, 120, 130, 157, 161, 162, 163, 164, 166

COMMENTARIES

Cited as	Citation	Paragraph(s)
Aguiar	Anelize Slomp Aguiar 'The Law Applicable to International Trade Transactions with Brazilian Parties: A Comparative Study of the Brazilian Law, the CISG, and the American Law About Contract Formation' IX *Revista Brasileira de Arbitragem* 33, 2012	89, 91
Baker/Davis	Stewart Baker and Mark Davis *The UNCITRAL Arbitration Rules in Practice* Kluwer Law and Taxation Publishers, 1992	82
Born	Gary B. Born *International Commercial Arbitration* 2nd ed., Kluwer Law International, 2014	16, 18, 21, 22, 23, 25, 26, 27, 32, 39, 40, 46, 47, 60, 63, 66, 73, 74, 78, 79, 81
Brunner	Christoph Brunner *Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration* Kluwer Law International, 2008	158, 162, 166

Caron/Caplan	David D. Caron and Lee M. Caplan *The UNCITRAL Arbitration Rules: A Commentary* 2nd Edition, Oxford University Press, 2013	27, 35, 46, 47, 82
Cheng	Bin Cheng *General Principles of Law as Applied by International Courts and Tribunals* Cambridge Univeristy Press, 2006	36
Cremades	Bernardo Cremades 'Third Party Funding in International Arbitration' 23 September 2011 available at http://bcremades.com/en/publications.aspx	59
Daele	Karel Daele 'Challenge and Disqualification of Arbitrators in International Arbitration' Kluwer Law International, 2012	82
De Luca	Villy de Luca 'The Conformity of the Goods to the Contract in International Sales' 27 P*ace International Law Review*, 2015	122, 161
Di Matteo	Larry A. Di Matteo (et al) *International Sales Law: A Critical Analysis of CISG Jurisprudence* New York: Cambridge University Press, 2005	89, 90, 102
Farnsworth	E. Allan Farnsworth 'Formation of Contract; in *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*,	89

	Nina M. Galston and Hans Smit (eds.) New York: Matthew Bender, 1984	
Farnsworth, in: Bianca/Bonell	E. Allan Farnsworth in Cesare Massimo Bianca and Michael Joachim Bonell (eds.) *Bianca-Bonell Commentary on the International Sales Law* Giuffrè: Milan, 1987	7, 115
Gaillard	Emmanuel Gaillard 'Note – Cour de cassation (2e Ch. Civile), 6 décembre 2001; Cour d'appel de Paris (1re Ch. G), 2 avril 2003; Cour d'appel de Paris (1re Ch. C), 16 may 2002' (2003) *Rev. Arb.* 4.	73
Gaillard/ Savage	Emmanuel Gaillard and John Savage (eds.) *Fouchard, Gaillard, Goldman on International Commercial Arbitration* Kluwer Law International, 1999	23
Heilmann	Jan Heilmann *Mangelgewahrsleistung im UN-Kaufrecht - Voraussetzungen und Rechtsfolgen im Vergleich zum deutschen internen Kaufrecht und zu den Haager Einheitlichen Kaufgesetzen* Berlin: Duncker & Humblot, 1994	151
Henschel	René Franz Henschel 'Creation of Rules in National and International Business Law: A Non-National, Analytical-Synthetic Comparative Method' Paper presented at W G Hart Legal Workshop: Theory and Practice of Harmonisation, London, 2008	122, 160

	et al. (eds.) International Arbitration and International Commercial Law: Synergy, Convergence and Evolution Kluwer Law International, 2011	
Kotuby	Charles Kotuby Jr. 'General Principles of Law, International Due Process, and the Modern Role of Private International Law' (2013) 23 *Duke Journal of Comparative and International Law*, pp. 411 – 445	36
Lew/Mistelis/ Kröll	Julian D.M. Lew, Loukas A. Mistelis and Stefan Michael Kröll *Comparative International Commercial Arbitration* Kluwer Law International, 2003	18, 21, 23, 39, 122, 127, 129, 138, 140, 141, 142, 144, 146, 153
Lookofsky	Joseph Lookofsky *Convention on Contracts for the International Sale of Goods (CISG)* Kluwer Law International, 2012	7
Redfern/ Hunter	Nigel Blackaby, Constantine Partasides, Alan Redfern and J. Martin Hunter *Redfern and Hunter on International Arbitration* 6th Edition, Oxford University Press, 2015	4, 21, 26, 27, 39, 47, 78
Rogers	Catherine A. Rogers *Ethics in International Arbitration* Oxford: Oxford University Press, 2014	47, 63
Schlechtriem 1986	Peter Schlechtriem *Uniform Sales Law* Manz: Vienna, 1986	7

CASES AND AWARDS

	http://cisgw3.law.pace.edu/cases/060913g1.html	
Bundesgerichtshof 2 February 2014	Bundesgerichtshof, 2 February 2014, http://arbitrationblog.kluwerarbitration.com/2015/08/27/setting-aside-of-arbitral-award-due-to-improper-constitution-of-the-tribunal/	14
Cobalt Sulphate Case	Bundesgerichtshof, 3 April 1996 http://cisgw3.law.pace.edu/cases/960403g1.html	122
OLG Frankfurt, 10 Jan 2008	Oberlandesgericht Frankfurt, 10 January 2008 28 Sch 21/07	66, 81
NZ Mussels Case	Bundesgerichtshof, 8 March 1995 http://cisgw3.law.pace.edu/cases/950308g3.html	122
Mobile Car Phones	Oberlandesgericht Düsseldorf, 21 April 2004 http://cisgw3.law.pace.edu/cases/040421g3.html	107
OLG Graz, 19 June 2013	Oberlandesgericht Graz, 19 June 2013, CISG-online 2461, Note C(2)(b)	144
OLG Köln	Oberlandesgericht Köln, 24 April 2013 CISG-online 2480	112
Special Screws	Oberlandesgericht Frankfurt, 4 March 1994 http://cisgw3.law.pace.edu/cases/940304g1.html	99
U 86/00	Oberlandesgericht Düsseldorf, 15 February 2001	107

ICSID

Perenco Ecuador	*Perenco Ecuador Limited v The Republic of Ecuador & Empresa Estatal Pertoleos Del Ecuador ("Petroecuador")* December 8, 2009 PCA Case No. IR-2009/1	47

LEGAL SOURCES AND MATERIALS

Cited as	**Citation**	**Paragraph(s)**
2012 Digest of Case Law	UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration New York, 2012	21
CISG-AC Op. No. 3	*CISG-AC Opinion No. 3: Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23 October 2004. Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA* Adopted by the CISG Advisory Council on its 7th meeting in Madrid without dissent 23 October 2004	9
A/CN.9/9/C. 2/SR.l	*UNCITRAL Commission 9th session, Summary Record of the 1st meeting* Doc. A/CN.9/9/C.2/SR.l 14 April 1976, Vienna	35
A/CN.9/9/C. 2/SR.3	*UNCITRAL Commission 9th session, Summary Record of the 3rd meeting* Doc. A/CN.9/9/C.2/SR.3 15 April 1976, Vienna	35
Fair Trade Standard	Fair Trade Certification for Agricultural Products	167, 168

	https://www.fairtradecertified.org/sites/default/files/filemanager/documents/APS/FTUSA_STD_APS_EN_1.0.0.pdf	
Novartis Corp. Responsibility Strategy	Novartis Corporate Responsibility Strategy https://www.novartis.com/our-company/corporate-responsibility	125
Secretariat Commentary	Text of the Secretariat Commentary on the 1978 Draft of the CISG	7
Ziegel	Jacob S. Ziegel *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods* University of Toronto, July 1981	7

STATEMENT OF FACTS

1. The present dispute has arisen between Delicatesy Whole Foods Sp (**CLAIMANT**) and Comestibles Finos Ltd (**RESPONDENT**) after CLAIMANT delivered chocolate cakes to RESPONDENT which were not produced sustainably, and hence did not conform to the Contract between them. RESPONDENT is a gourmet supermarket chain operating in Mediterraneo. CLAIMANT is a medium-sized manufacturer of bakery products registered in Equatoriana.

2. Between **3–6 March 2014**, the Parties met at the Cucina Food Fair in Danubia. They discussed their firm commitment to sustainable production and their shared membership of the Global Compact. RESPONDENT also made clear its unwillingness to deal with arbitral institutions.

3. On **10 March 2014**, RESPONDENT invited CLAIMANT to tender for the supply of chocolate cakes. On **17 March 2014**, CLAIMANT sent a Letter of Acknowledgment. On **27 March 2014**, it sent a further response titled 'Sales Offer', which made minor amendments to RESPONDENT'S Tender Documents, and expressly accepted RESPONDENT'S arbitration clause. On **7 April 2014**, RESPONDENT informed CLAIMANT that its Tender was successful. CLAIMANT began delivering cakes on **1 May 2014**.

4. This arrangement continued until **6 January 2017**, when a report was published on illegal farming practices in Ruritania, the site of CLAIMANT'S cocoa supplier. On **27 January 2017**, RESPONDENT emailed CLAIMANT, seeking confirmation that CLAIMANT'S cocoa supplier adhered to sustainable production requirements set out in the Contract. On **12 February 2017**, after CLAIMANT confirmed that the cakes had not been produced sustainably, RESPONDENT avoided the Contract.

5. On **30 June 2017**, the dispute was referred to arbitration. CLAIMANT nominated Mr. Rodrigo Prasad as Arbitrator. Mr. Prasad disclosed that he had been appointed by CLAIMANT'S lawyers twice before.

6. On **29 August 2017**, RESPONDENT learned that CLAIMANT was funded by a third-party. Only after Tribunal Orders on **1 September 2017** did CLAIMANT disclose that it was funded by Funding 12 Ltd, a subsidiary of Findfunds LP. On **11 September 2017**, Mr. Prasad disclosed his previous involvement in arbitrations funded by Findfunds LP subsidiaries. He also disclosed that a partner at his law firm was representing a client funded by Findfunds LP.

7. In response, RESPONDENT issued a Notice of Challenge of Arbitrator on **14 September 2017**. It contended that the challenge was to be decided without institutional involvement because the Parties had agreed on that procedure. On **21 September 2017**, Mr. Prasad declared that he would not withdraw from the Tribunal.

SUMMARY OF ARGUMENTS

1. The Arbitral Tribunal, not an appointing authority, should decide the challenge of Mr. Prasad. The Parties clearly agreed in the Contract for the Tribunal to decide the challenge, and the principles of party autonomy and the 'fundamental right to challenge an arbitrator' should not displace this agreement. Even if the Parties did not agree on a challenge procedure, the Model Law still vests authority in the Tribunal to decide the challenge. Mr. Prasad should not participate in the Tribunal's challenge decision, as the proper interpretation of the Model Law requires his exclusion (**A**).

2. Mr. Prasad should be removed from the Tribunal. Applying the IBA Guidelines, which offer persuasive guidance to the Tribunal in interpreting the UNCITRAL Rules, there are justifiable doubts as to Mr. Prasad's impartiality and independence. These doubts arise from his conduct in the current proceedings. Furthermore, the factual circumstances involving Mr. Prasad, his law firm, CLAIMANT, and CLAIMANT'S third-party funder, do give rise to justifiable doubts. In any event, when his conduct and the factual circumstances are considered together, justifiable doubts arise. Accordingly, Mr. Prasad should be disqualified from sitting on the present dispute (**B**).

3. The Parties agreed that RESPONDENT'S Standard Conditions govern the Contract. The Contract is governed by the CISG. Under the CISG, RESPONDENT'S call for tender constituted an offer, incorporating RESPONDENT'S Standard Conditions, which was accepted by CLAIMANT. Even if CLAIMANT did make a counter-offer, the provisions and principles of the CISG would still lead the Tribunal to conclude that RESPONDENT'S Standard Conditions govern the Parties' agreement (**C**).

4. Under those Standard Conditions, CLAIMANT delivered non-conforming cakes. Because the cakes were made with cocoa which was not ethically sourced, they were not of the required 'quality' under the CISG. In any case, the cakes were not fit for either their ordinary purpose or their particular purpose under the CISG. The Contract required CLAIMANT to guarantee that its cocoa was ethically and sustainably sourced, rather than to merely use its 'best efforts'. Even if the applicable standard were one of 'best efforts', CLAIMANT failed to meet that standard, because its compliance measures were inadequate (**D**).

ARGUMENTS ON PROCEDURE

ISSUE A: THE TRIBUNAL, EXCLUDING MR. PRASAD, SHOULD DECIDE THE CHALLENGE

1. CLAIMANT'S improprieties have tainted every stage of these proceedings. First, it commenced proceedings after its own breach of contract. Then it deliberately appointed an arbitrator whose financial ties and preconceptions best suited its spurious claim. Now it seeks to distort the meaning of the Parties' Arbitration Agreement in order to resolve the dispute on its own preferred terms, rather than on the terms clearly settled under that Agreement.

2. Contrary to CLAIMANT'S contention that the challenge of Mr. Prasad should be decided by an appointing authority [*Cl. Memo. I.A.*], the Tribunal itself must decide the challenge (**I**). Mr. Prasad must not participate in the Tribunal's challenge decision, as the proper interpretation of the Model Law requires his exclusion (**II**).

I. The Tribunal should decide the challenge of Mr. Prasad

3. The Parties agreed pursuant to Art. 13(1) Model Law that the Tribunal should decide the challenge (**A**). In the alternative, even if the Parties did not agree on a challenge procedure, the default rule in Art. 13(2) Model Law requires that the Tribunal decide the challenge (**B**).

A. The Parties agreed that the Tribunal should decide the challenge pursuant to Art. 13(1) Model Law

4. When determining the applicable challenge procedure, the Tribunal should first consider whether the Parties agreed on a procedure. This is set out in Art. 13(1) Model Law, which must be taken into account as it is the law of the seat of this arbitration [*Redfern/Hunter, p.264; Waincymer, p.138*].

5. The Parties clearly did agree on a challenge procedure, in their Arbitration Agreement in Clause 20 of the Contract (**Arbitration Agreement**). That Agreement provided that arbitral proceedings would be held '*without the involvement of any arbitral institution*'. This clearly manifests an intention to exclude institutional involvement from all stages of proceedings – including both the appointment and challenge of arbitrators (**1**). CLAIMANT'S attempts to invoke the principles of 'party autonomy' and the 'fundamental right to challenge an arbitrator' should not displace the Parties' clear intention (**2**). Contrary to CLAIMANT'S submission, the challenge procedure under Arts. 6 and 13(4) UNCITRAL Rules was validly excluded (**3**). The only body that should decide the challenge is the Tribunal itself (**4**).

1. The Parties agreed to exclude institutional involvement from all stages of the arbitration

6. CLAIMANT has submitted that the procedure in Art. 13(4) UNCITRAL Rules applies to the challenge of Mr. Prasad, according to which an appointing authority must decide the challenge [*Cl.*

Memo. ¶*20*]. It contends that the Parties agreed to deviate from Art. 10(3) UNCITRAL Rules, which concerns institutional involvement in the *appointment* of arbitrators, but not from Art. 13(4), which concerns the *challenge* of arbitrators [*Cl. Memo.* ¶*23*]. This submission must fail. Properly interpreted, the Arbitration Agreement reflects the Parties' common intention to exclude institutional involvement from all stages of proceedings.

7. The Parties agree that the CISG governs the Arbitration Agreement [*Proc. Order No. 1* ¶*1*]. The Agreement should be interpreted according to the CISG's relevant principles. The CISG prescribes a subjective approach to interpreting statements and contractual terms where a party knows or could not be unaware of the intention behind another party's statement or inclusion of a term [*Schlechtriem 1986, p.39; Lookofsky, p.54; Ziegel, Art. 8, Note 3; Farnsworth, in: Bianca/Bonell, p.95*; *Secretariat Commentary Art. 7*]. However, where Art. 8(1) is not applicable, because one party is not aware of the other's intention, then Art. 8(2) provides that the statement or contractual term is to be interpreted objectively, 'according to the understanding that a reasonable person of the same kind as the [recipient] would have had in the same circumstances' [*Farnsworth, in: Bianca/Bonell, p.98; Honnold, p.117; Lookofsky, p.55; J.T. Schuermans v. Boomsma Distilleerderij*].

8. CLAIMANT knew before entering into the Contract that RESPONDENT intended to exclude institutional involvement from all stages of arbitration, and consented to that exclusion. Therefore, the Arbitration Agreement should be interpreted under Art. 8(1) to reflect that intention (**a**). Even if CLAIMANT was not aware of RESPONDENT'S intention, a reasonable person would interpret the Arbitration Agreement under Art. 8(2) as excluding institutional involvement from all stages (**b**).

(a) Exclusion of institutional involvement from all stages is the proper interpretation under Art. 8(1) CISG

9. CLAIMANT'S pre-contractual statements should be used to assist the Tribunal's interpretation of the Parties' intention [*Art. 8(3) CISG; CISG-AC Op. No. 3*, ¶*3.3*]. These statements demonstrate that upon entering into the Contract, CLAIMANT knew of, and consented to, RESPONDENT'S intention to exclude institutional involvement from all stages of proceedings. Accordingly, the Arbitration Agreement should be interpreted subjectively, in line with the Parties' common intention [*Art. 8(1) CISG*].

10. First, CLAIMANT knew of RESPONDENT'S preferred mode of arbitration, and how that would be reflected in the Arbitration Agreement. The Parties had discussed their preferred arbitration clauses, and their reasons for those preferences, at the Cucina Food Fair [*Resp. Ex. 5, p.41*]. When CLAIMANT wrote to RESPONDENT on 27 March 2014, it knew that RESPONDENT had strong misgivings about institutional arbitration, that it did not want to deal with arbitral institutions in future, and that it had drafted the Arbitration Agreement to reflect that desire [*Cl. Ex. 3, p.15*].

11. Secondly, CLAIMANT clearly consented to RESPONDENT'S preferred mode of arbitration. On March 27 2014, CLAIMANT wrote the following to RESPONDENT:

> '*We can very well live with the clause* ***as it is****, since we are very confident that there will be no need to resort to arbitration. In the unlikely event that a dispute arises and cannot be solved amicably, we are certain that we will be able to overcome any problems relating to the* ***constitution of the arbitral tribunal*** *even without institutional support*' (emphasis added) [*Cl. Ex. 3, p.15*].

12. CLAIMANT consented to the wording of the Arbitration Agreement 'as it is': i.e. including the words '*without the involvement of any arbitral institution'*. CLAIMANT'S express acceptance of this specific arrangement is unequivocal. It can only be interpreted as CLAIMANT consciously ceding its preferred mode of arbitration in favour of that of RESPONDENT.

13. Contrary to its submission [*Cl. Memo.* ¶*23*], CLAIMANT consented to exclude institutional involvement in respect of both the appointment and challenge of arbitrators. It consented to settle any '*problems relating to the constitution of the arbitral tribunal*' without institutional support [*Cl. Ex. 3, p.15*]. Since both the challenge procedure under Art. 13(4) UNCITRAL Rules and the appointment procedure under Art. 10(3) relate to the constitution of the Tribunal, CLAIMANT consented to exclude institutional support in respect of both.

14. A challenge is an intermediate step to resolve a defect in the proper constitution of the Tribunal, rather than a separate stage after the constitution stage. This is clear in German and Swiss court decisions [*Bundesgerichtshof, 2 February 2014*; *Decision 4A_282/2013*], and from the fact that Arts. 10 and 13 lie within the same section of the Model Law, entitled 'Composition of the Tribunal'. It follows that when CLAIMANT referred to 'problems relating to the constitution of the arbitral tribunal', the term 'constitution' included both the appointment and challenge of arbitrators. As such, CLAIMANT evinced an intention to exclude both Arts. 10(3) and 13(4) UNCITRAL Rules.

(b) In any event, exclusion of institutional involvement from all stages is the proper interpretation under Art. 8(2) CISG

15. Even if CLAIMANT had not known and consented to RESPONDENT'S exclusion of all institutional involvement, and Art. 8(2) CISG applied instead, the Arbitration Agreement would reasonably be interpreted as excluding institutional involvement from all stages.

16. First, a reasonable merchant would interpret the words 'without the involvement of any arbitral institution' as excluding involvement from all stages. The use of the word 'involvement' contemplates a categorical exclusion of any connection to proceedings at all, rather than from certain specific stages. If CLAIMANT had sought to preserve the involvement of arbitral institutions in the challenge procedure but not the appointment procedure, as CLAIMANT contends [*Cl. Memo.*

¶*27*], it should have expressed that intention in more specific language [*Born, p.1323; Final Award in ICC Case No, 5946; Partial Award in PCA Case of 22 November 2002*].

17. Secondly, when interpreting the Arbitration Agreement, the Tribunal should apply Art. 4.5 UNIDROIT, which provides that terms should be interpreted 'so as to give effect to all terms, rather than to deprive some of them of effect.' The principle in Art. 4.5 is not dealt with by the CISG, and accordingly, the Tribunal is permitted under the terms of the Contract to use it [*Cl. Ex. 2, p.12*].

18. As the Arbitration Agreement is a 'term' of the Contract and subject to the same interpretive principles as any other term [*Lew/Mistelis/Kröll p.150; Born, p.1322*], Art. 4.5 is applicable. Applying Art. 4.5, CLAIMANT contends that the wording 'in accordance with the UNCITRAL Rules' supersedes the Parties' choice of wording, 'without the involvement of any arbitral institution'. It contends that despite the express exclusion of all institutional involvement, the Art. 13(4) UNCITRAL Rules procedure, which involves an institution, still applies. This reading should be rejected. To hold that the phrase was not effective to exclude all procedures in the Rules which involved an arbitral institution would be to deprive that phrase of effect [*Mastrobuono v. Shearson Lehman Hutton*]. Its inclusion was deliberate, and it should be given effect pursuant to Art. 4.5.

19. CLAIMANT'S submission that it 'never had the intention to deviate from the challenge procedure when it agreed to the addition of the arbitration clause' must fail [*Cl. Memo.* ¶*22*]. The Parties clearly agreed to deviate from both Art. 10(3) *and* Art. 13(4) UNCITRAL Rules. The subjective interpretation of CLAIMANT'S pre-contractual statements, and the objective interpretation of the Arbitration Agreement, support this conclusion.

2. Neither party autonomy nor the fundamental right to challenge an arbitrator displaces this agreement

20. CLAIMANT relied on two principles in justifying its contention that a clearer wording was required to deviate from the Art. 13(4) UNCITRAL Rules challenge procedure: the principle of party autonomy [*Cl. Memo.* ¶*25*], and the 'fundamental nature of the right to challenge an arbitrator' [*Cl. Memo.* ¶*24*]. Neither principle should be held to displace the clear intention of the Parties when interpreting the Arbitration Agreement.

21. 'Party autonomy' simply means that the parties should be free to select the applicable procedure for arbitration between themselves, and to select individual arbitrators if that is the agreed procedure [*Redfern/Hunter, p.187; Born, p.1654; Lew/Mistelis/Kröll, p.36; Waincymer, p.985; 2012 Digest of Case Law, p.59*, ¶*3*]. In this dispute, the Parties did exactly that: they included a specific Arbitration Agreement in their Contract, and each selected one arbitrator in accordance with that Agreement [*Letter from Prof. Rizzo, p.32*]. 'Party autonomy' was duly satisfied.

22. Party autonomy has no bearing on the interpretation of a contractual term [*Born, p.1654; Waincymer, p.979*]. It does not lift the standard of clarity required of the Arbitration Agreement. The Tribunal should instead follow the ordinary process of interpretation detailed above.

23. Secondly, though the right to challenge an arbitrator is an important aspect of the arbitral process, it is not a right which commentators have identified to be so 'fundamental' as to warrant the imposition of a higher bar for interpretation of terms [*Born, p.1924*; *Gaillard/Savage, p.580; Lew/Mistelis/Kröll, p.312*]. In any case, the right is not being infringed, as this dispute merely concerns the appropriate procedure for challenge, and not the existence of a right of challenge. It follows that CLAIMANT cannot invoke the principle to contend that clearer wording was required to ascertain the Parties' common intention.

3. The Parties excluded the Arts. 6 and 13(4) UNCITRAL Rules procedure

24. CLAIMANT contends that the challenge procedure in Arts. 6 and 13(4) UNCITRAL Rules applies [*Cl. Memo.* ¶*26*]. Article 13(4) provides that an appointing authority should decide the challenge. Article 6 permits the Secretary-General of the PCA to designate an appointing authority if the parties did not agree on one (as in this case). Both steps in the procedure require the 'involvement of an arbitral institution', so as to be excluded by the Arbitration Agreement.

25. First, the Secretary-General's role as designating authority amounts to the 'involvement of an arbitral institution'. A reasonable person interpreting the Arbitration Agreement would conclude that the role, which is intermediary but 'critical ... in ensuring the timely constitution of tribunals' [*Born, p.1706*], is captured within the wide meaning of 'involvement' in the challenge procedure.

26. It also amounts to the involvement 'of an arbitral institution'. There is no valid distinction between the Secretary-General as an individual and the PCA as an institution for the purposes of Art. 6 UNCITRAL Rules. The PCA is identified as 'the default institution to select appointing authorities under the UNCITRAL Rules' [*Born, p.185*]. It is also instrumental in the designation process: it, rather than the Secretary-General, is the one to request documents indicating that the designation of an appointing authority is necessary [*Redfern/Hunter, p.245*]. It follows that the Secretary-General's role as designating authority amounts to involvement by the PCA itself.

27. In any event, the appointing authority's decision also amounts to the 'involvement of an arbitral institution'. First, a challenge decision by an appointing authority clearly comes within the meaning of 'involvement' in an arbitration [*Caron/Caplan, p.271*]. Secondly, if the selected appointing authority were an arbitral institution, as is usual practice, then this would constitute involvement of the prohibited kind [*Redfern/Hunter, p.241; Born, p.1712*]. And even if the appointing authority were an individual, their designation would already have infringed the Arbitration Agreement. It follows that the procedure in Arts. 6 and 13(4) UNCITRAL Rules has been excluded.

4. The Tribunal is the only body to decide the challenge

28. The Tribunal itself must decide the challenge. This is the only procedure which both honours the Parties' intention to exclude institutional involvement, and offers a viable mechanism for challenge. That is why Art. 13(2) Model Law prescribes the same procedure – decision by the Tribunal – in cases when there is no agreement. However, in this case, the Parties *have* clearly agreed under Art. 13(1) Model Law to adopt the same procedure as the one set out in Art. 13(2).

29. First, the Parties intended for the Tribunal to decide the challenge, and so the Arbitration Agreement should be given that interpretation under Art. 8(1) CISG. CLAIMANT knew prior to entering into the Contract that RESPONDENT had strong misgivings about arbitral institutions, and preferred to keep proceedings as confidential and in-house as possible [*Resp. Ex. 5, p.41*]. At the same time, CLAIMANT expressed its own misgivings with State courts. Given the Parties' respective distrust of arbitral institutions and State courts, the Tribunal is the only viable entity left to decide the challenge. This is the only interpretation which is compatible with both CLAIMANT and RESPONDENT'S stated intentions.

30. In any case, a reasonable person would interpret the Arbitration Agreement as intending for the Tribunal to decide the challenge [*Art. 8(2) CISG*]. Where an Arbitration Agreement excludes all forms of institutional involvement in a challenge procedure, and the agreed *lex arbitri* (the Model Law) provides for a single recognised alternative – for the Tribunal to decide the challenge as set out in Art. 13(2) – then a reasonable person would interpret the Agreement as adopting that one alternative. It follows that the Parties agreed for the Tribunal to decide the challenge.

B. In the alternative, the Tribunal should decide the challenge pursuant to Art 13(2) Model Law

31. In the alternative, even if the Tribunal concluded that the Parties did not agree on a specific procedure for challenging arbitrators as to satisfy Art. 13(1) Model Law, then Art. 13(2) Model Law would still require that the Tribunal decide the challenge.

32. Article 13(2) Model Law applies where the parties do not agree on a procedure for challenging an arbitrator [*Spiegelfield/Wurzer/Preidt, p.46*]. It provides for challenges to be decided by the Tribunal itself [*Art. 13(2) Model Law; Born, p.1924*]. On the conclusion that the Parties did not come to an agreement as to the proper procedure, because the language of the Arbitration Agreement was not sufficiently clear, then Article 13(2) would authorise the Tribunal to make the challenge decision.

II. The Tribunal should decide the challenge without Mr. Prasad's participation

33. Contrary to CLAIMANT'S submission [*Cl. Memo, I.B.*], the Tribunal should decide the challenge without Mr. Prasad's participation. The procedure which applies to the challenge, either by

agreement or by default in the absence of agreement, is the one in Art. 13(2) Model Law. The proper interpretation of Art. 13(2) requires that challenged arbitrators be excluded from deciding their own challenge (**A**). CLAIMANT'S submission that Mr Prasad's exclusion would violate his 'fundamental right to a fair and equal hearing' under Art. 18 Model Law must fail, as Art. 18 is not relevant to the interpretation of Art. 13(2) (**B**).

A. Article 13(2) Model Law requires that challenged arbitrators be excluded from deciding their own challenge

34. The proper interpretation of Art. 13(2) requires that challenged arbitrators must not decide their own challenge. This interpretation is most consistent with the travaux préparatoires of the UNCITRAL Rules (**1**) and the principle of *nemo iudex in causa sua* (**2**).

1. The travaux préparatoires of the UNCITRAL Rules support this interpretation

35. The travaux préparatoires for Arts. 7 and 12(1) of the 1976 UNCITRAL Rules – the precursor to the current Arts. 6 and 13(4) – indicate that the UNCITRAL Commission never intended for a challenged arbitrator to decide their own cause. That is the reason why the Rules provided for an appointing authority to decide the challenge: because it ensured the independence of the decision-maker [*Caron/Caplan, p.269; A/CN.9/9/C.2/SR.3, ¶48*; *A/CN.9/9/C.2/SR.1, ¶13*]. This independence would be compromised if Mr. Prasad were allowed to decide his own challenge. Given that the Art. 13(4) UNCITRAL Rules procedure was validly excluded by the Parties, excluding Mr. Prasad is the only way to preserve both the Parties' intention to exclude recourse to an appointing authority, and the independence of the body deciding the challenge.

2. The principle of *nemo iudex in causa sua* supports this interpretation

36. Mr. Prasad's exclusion from the challenge decision is most consistent with the principle of *nemo iudex in causa sua,* which requires that an arbitrator not be a 'judge in their own cause' because it compromises the impartiality of proceedings [*Kotuby, p.421; Cheng, p.279*]. The Tribunal should give weight to this principle when interpreting Art. 13(2) Model Law because it is a fundamental rule of procedural fairness in multiple jurisdictions [*Dr. Bonham's Case*; *Arnett v Kennedy; Watson, p.384*]. Therefore, it reflects the 'international origin' of the Model Law, to which the Tribunal should have regard [*Art. 2A(1) Model Law*].

37. In this case, Mr. Prasad would be a 'judge in his own cause' if he were permitted to decide his own challenge. For Mr. Prasad to participate in his own challenge, when he has a reputational and financial interest in remaining on the Tribunal, would raise an appearance of partiality [*Rogers, p.78*]. But given that a challenge is 'uncomfortable' for an arbitrator, in the sense that their 'conduct and

integrity are being questioned in front of their colleagues', and 'the prospect of professional embarrassment can be quite real', there would be a heightened risk of partiality in the final award [*Rogers, p.78*]. Accordingly, the Tribunal should adopt an interpretation of Art. 13(2) which best safeguards the procedural fairness and the impartiality of the entire proceedings, and should exclude Mr. Prasad from deciding his own challenge.

B. Article 18 Model Law is not a relevant consideration in interpreting Art. 13(2)

38. CLAIMANT submitted that it would violate Mr. Prasad's 'fundamental right to a fair and equal proceeding' contained in Art. 18(1) Model Law for him not to participate in the decision on his own challenge [*Cl. Memo.* ¶*32*].

39. Art. 18 Model Law does not govern the challenge of Mr. Prasad. The provision requires that the *parties* be treated with equality. It does not extend to the treatment of arbitrators, either in general or in the specific context of a challenge procedure [*Born, p.3500; Redfern/Hunter, p.356; Lew/Mistelis/Kröll, p.526; Luttrell, p.14*]. It is recognised that where an arbitrator is biased, it might infringe Art. 18 [*Luttrell, p.14*]. But there is no suggestion at all that Art. 18 might be infringed where a party's appointed arbitrator is not permitted to decide their own challenge.

40. To the extent that there is an international minimum standard of procedural fairness extending to the treatment of challenged arbitrators [*Spiegelfield/Wurzer/Preidt, p 47*; *Born, p.3506*], Mr. Prasad's exclusion would not infringe it in any case. Neither of the two components to procedural fairness embodied in Art. 18 – equality of treatment, and an adequate opportunity to present a case [*Waincymer, p.16*] – would be infringed.

41. First, equality of treatment means 'relative' equal treatment, i.e. 'treating comparable situations equally and dealing appropriately with differences' [*Waincymer, p.16*]. It is not 'equal treatment' to leave Mr. Prasad on the Tribunal just because RESPONDENT'S appointed arbitrator will continue to sit. The relevant difference here – that Mr. Prasad's independence is being impugned – should be dealt with appropriately, by denying his participation. Secondly, Mr. Prasad would still be afforded the opportunity to present his case to the remaining two arbitrators.

42. **Conclusion:** The Tribunal should decide the challenge of Mr. Prasad, as the Parties specifically agreed on that procedure. Even if the Parties did not reach agreement, Art. 13(2) Model Law would still require the Tribunal to make the decision. Mr. Prasad should not participate in deciding the challenge, as it would be inconsistent with the UNCITRAL Rules and Model Law.

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

43. In asserting that Mr. Prasad 'could not possibly' be removed from the Tribunal [*Cl. Memo. II.B.1.*], CLAIMANT ignores Mr. Prasad's conduct during the proceedings, and the intricate and extensive relationships between CLAIMANT, Mr. Prasad, his law firm, and Findfunds LP. Accordingly, CLAIMANT'S contention that Mr. Prasad should remain on the Tribunal must fail.

44. Mr. Prasad should be removed from the Tribunal. There are justifiable doubts as to his impartiality and independence so as to ground a successful challenge under Art. 12(1) UNCITRAL Rules. In deciding the Challenge, the IBA Guidelines offer persuasive guidance to the Tribunal (**I**). Taking those Guidelines into account, justifiable doubts arise, first, from Mr. Prasad's conduct in the current proceedings (**II**) and, secondly, due to his factual circumstances (**III**). Mr. Prasad's conduct and all the factual circumstances should be considered together when deciding the Challenge (**IV**).

I. The IBA Guidelines offer persuasive guidance to the Tribunal

45. Contrary to CLAIMANT'S bold claim that the IBA Guidelines have 'no bearing on the resolution of the case' [*Cl. Memo.* ¶*51*], the Guidelines offer persuasive guidance to the Tribunal. CLAIMANT argues that they are not binding and relies on there being no express agreement to apply them [*Cl. Memo.* ¶*47–51*]. Their non-binding status is not in dispute. So much is accepted in the Guidelines themselves [*IBA Intro.* ¶*6*]. However, they offer persuasive guidance – first, because they inform the interpretation of the Model Law and UNCITRAL Rules and secondly, by virtue of their widespread acceptance and application.

46. First, Art. 12(2) Model Law and Art. 12(1) UNCITRAL Rules provide that any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. This is an objective test [*Born, p.1779; Caron/Caplan, p.208*]. The IBA Guidelines define this test: doubts are justifiable if a reasonable third person would conclude that the arbitrator is likely to decide the case on factors other than its merits [*IBA Gen. St. 2(c)*].

47. Secondly, there is widespread acceptance by commentators that the Guidelines are often consulted when a situation of conflict arises [*Born, p.1839; Caron/Caplan, p.213; Kauffman-Kohler, p.14*] and are 'clearly taken into account' when deciding arbitrator challenges [*Redfern/Hunter, p.271–2*]. In terms of their application, they are cited in the SCC, WIPO [*IBA Conflicts Committee, p.24*], ICC [*IBA Arbitration Committee, p.28–30*], PCA [*see, e.g., ICS Inspection; Perenco Ecuador; Gallo v Canada*], and guide ICSID [*Alpha Projektholding,* ¶*56*] and UNCITRAL [*ICS Inspection,* ¶*2*] arbitrations.

II. Mr. Prasad's conduct in the current proceedings should lead to his removal

48. Mr. Prasad's conduct in these proceedings gives rise to justifiable doubts as to his impartiality and independence. That is, his conduct is suggestive of bias and a likelihood that he will not decide the

case purely on its merits [*IBA Gen. St. 2(c)*]. This conclusion arises from his failure to withdraw from the Tribunal following CLAIMANT'S unethical conduct (**A**) and his failure to disclose both his connections with CLAIMANT'S third-party funder and the existence of his journal article (**B**).

A. Mr. Prasad's failure to withdraw from the Tribunal leads to justifiable doubts as to his impartiality

49. CLAIMANT acted unethically in purposefully breaching its obligation to disclose the presence and identity of its third-party funder, Findfunds LP (**1**). Following RESPONDENT'S notification of this fact in its Notice of Challenge, Mr. Prasad should have withdrawn from his office as arbitrator, but did not (**2**). Mr. Prasad's reluctance to do so raises justifiable doubts as to his impartiality.

1. CLAIMANT breached its obligation to disclose the presence and identity of its third-party funder

50. CLAIMANT errs in contending that it had no obligation to disclose to the Tribunal and RESPONDENT that it was funded by a third-party funder, Findfunds LP [*Cl. Memo. II.A.*]. In the circumstances, CLAIMANT was under such an obligation (**a**). Contrary to CLAIMANT'S contention [*Cl. Memo.* ¶¶*43, 46*], it did not discharge its obligation (**b**).

(a) CLAIMANT was under an obligation to make disclosure

51. CLAIMANT contends that there is no general obligation to disclose third-party funding agreements [*Cl. Memo.* ¶*44*]. This is not disputed. It was the particular circumstances of this case that required CLAIMANT to disclose its third-party funding. This accords with the IBA Guidelines, which mandate party disclosure of any direct or indirect relationship between the arbitrator and: (1) the party, (2) another company of the same group of companies as the party, (3) an individual having a controlling influence on the party, or (4) any person or entity with a direct economic interest in the award [*IBA Gen. St. 7(a)*].

52. As a starting point, the concept of 'party' can take on multiple meanings under the characterisation of relationships in the IBA Guidelines [*see Gen. St. 6*]. That is, any 'legal or physical person having a controlling influence on [the party], or a direct economic interest in ... the award' may be considered to 'bear the identity' of the party [*IBA Gen. St. 6(b)*].

53. First, Findfunds LP has a controlling influence on CLAIMANT (**i**). Secondly, it has a direct economic interest in the award (**ii**). Therefore, its relationship with Mr. Prasad falls into categories (3) and (4). By this reasoning, it also bears the identity of the 'party' [*IBA Gen. St. 6(b)*], and accordingly its relationship with Mr. Prasad also falls into category (1). Also, Funding 12 Ltd has a controlling influence on CLAIMANT and a direct economic interest in the award (**iii**), and thus Findfunds LP's

relationship with Mr. Prasad falls into category (2). CLAIMANT'S assertion that the circumstances fell outside the scope of the IBA Guidelines' disclosure obligation [*Cl. Memo.* ¶*54*] must fail.

i. Findfunds LP has a controlling influence

54. A funder who influences decisions about how to manage the dispute qualifies as having a 'controlling influence' [*ICCA/Queen Mary, p.76*]. Findfunds LP usually makes a 'very thorough' examination at the outset of a case where 'strategies are discussed' [*Proc. Order No. 2* ¶*4*]. This demonstrates its influence on the management of the dispute, and thus its controlling influence.

ii. Findfunds LP has a direct economic interest

55. CLAIMANT'S argument that Findfunds LP has 'no direct economic interest' [*Cl. Memo.* ¶*54*] is incorrect. 'Direct economic interest' may be understood as including a 'prospect of making a profit in the event of success' [*ICCA/Queen Mary, p.72*]. Findfunds LP has a prospect of making a profit, because it owns 60% of the subsidiary entity, Funding 12 Ltd, which will receive 25% of the award if CLAIMANT is successful [*Proc. Order No. 2* ¶*1–2*].

iii. Funding 12 Ltd has a controlling influence and direct economic interest

56. CLAIMANT relies on the fact that it is being funded by Funding 12 Ltd and not Findfunds LP [*Cl. Memo.* ¶*54*]. This technicality does not assist CLAIMANT'S case. Findfunds LP is brought into the relationship categories required to be disclosed by virtue of being 'another company of the same group of companies [as the party]' – the 'party' being Funding 12 Ltd [*IBA Gen. St. 6(b)*]. Funding 12 Ltd bears the identity of the 'party' because it has a controlling influence. Like its parent, Funding 12 Ltd conducts a 'very thorough' examination of the case at the outset where 'strategies are discussed' [*Proc. Order No. 2* ¶*4*]. Furthermore, Funding 12 Ltd can bear the identity as it has a direct economic interest in the award given its promised 25% cut [*Proc. Order No. 2* ¶*1*].

57. Thus, given that Mr. Prasad has a 'relationship' with Findfunds LP [*see below III.A.,B.*], and that Findfunds LP falls within the scope of the four categories of relationship stipulated by General Standard 7(a), CLAIMANT was obliged to disclose the presence and identity of its funder.

(b) CLAIMANT did not meet its obligation to make the disclosure

58. CLAIMANT argues that it met its disclosure obligation by disclosing 'at the earliest opportunity' and 'voluntarily' [*Cl. Memo.* ¶¶*43, 56-57*], which are both requirements under the IBA Guidelines [*Gen. St. 7(a)*]. It did not do so. The earliest opportunity was on 25 June 2017 when CLAIMANT signed the funding agreement with Funding 12 Ltd [*Proc. Order No. 2* ¶*5*]. It can be inferred from Mr. Fasttrack's comment on May 4 2017 that at that stage, CLAIMANT was aware of the relationship between Mr. Prasad and Findfunds LP [*Notice of Challenge, p.38,* ¶*3*]. It did not make disclosure until

7 September 2017, and even then not 'voluntarily', but in compliance with Tribunal orders [*Tribunal Orders, p.34*].

2. Mr. Prasad should have withdrawn following CLAIMANT'S failure to disclose

59. CLAIMANT'S breach of its disclosure obligation did not arise out of mere mistake or procedural negligence, but a deliberate decision on its part [*Notice of Challenge, p.38*]. It '[did its] best to keep the funding secret and not disclose it to RESPONDENT' to ensure a greater chance of a successful award [*Notice of Challenge, p.38*]. This was clearly a breach of 'procedural good faith with which the parties should conduct themselves' [*Cremades, p.7*]. In cases where there is a later discovery of a third-party funder whose links with an arbitrator should have been disclosed, the arbitrator may be required to step down [*ICCA/Queen Mary, p.90*].

60. Instead of stepping down, Mr. Prasad made no comment on CLAIMANT'S unethical behaviour and did not withdraw from his office as arbitrator [*Explanation of Prasad, p.43–4*]. Given that an arbitrator's actions during arbitral proceedings can constitute a lack of impartiality [*Born, p.1877*], Mr. Prasad's decision to remain in office despite his appointing party's unethical conduct should be construed as suggestive of partiality to CLAIMANT, and thus disqualify him.

B. Mr. Prasad's failure to disclose his connections with Findfunds LP leads to justifiable doubts as to his impartiality

61. Mr. Prasad was under an obligation to disclose his connections with Findfunds LP (**1**). His failure to disclose is not excused by his lack of knowledge of CLAIMANT'S third-party funding (**2**). Mr. Prasad's failure to investigate and make disclosure should lead to his disqualification (**3**).

1. Mr. Prasad was obliged to disclose his Findfunds LP connections

62. Mr. Prasad was under an obligation to disclose his relationships with Findfunds LP under both the UNCITRAL Rules and IBA Guidelines. CLAIMANT contends that because there is 'no mention of third party funding' in the Rules, there is 'no obligation of disclosure' [*Cl. Memo.* ¶¶*37–38*]. The absence of a direct reference to 'third party funding' is inconsequential. The relevant test is whether there are circumstances 'likely to give rise to justifiable doubts' [*Art. 11 UNCITRAL Rules*], or that 'may, in the eyes of the parties, give rise to doubts' as to the arbitrator's impartiality or independence' [*IBA Gen. St. 3(a)*]. There are such circumstances [*see below III.A.,B.*].

2. Mr. Prasad is not excused by his lack of knowledge

63. CLAIMANT asserts that '[Mr.] Prasad was not aware of the funder's participation so he could not disclose what he did not know' [*Cl. Memo.* ¶*66*]. This argument should be rejected. An arbitrator's unawareness of the presence of third-party funders does not exonerate them [*Rogers, p.201; IBA*

Gen. St. 7(d)]. This is because an arbitrator has a duty to make reasonable inquiries to investigate potential conflicts of interest or grounds for justifiable doubts as to his or her independence and impartiality [*IBA Gen. St. 7(d); Born, p.1911; Karlseng v Cooke*].

64. Furthermore, CLAIMANT argues that 'no matter how thorough Arbitrator Prasad['s] due diligence was he could never [have] learned of CLAIMANT'S funding without that party's disclosure' [*Cl. Memo. ¶63*]. This is incorrect. It is a 'normal' part of an arbitrator's duty to investigate to '[ask] parties about whether they are funded' [*ICCA/Queen Mary, p.91*]. Thus, Mr. Prasad's inaction cannot excuse his failure to disclose his conflicts with Findfunds LP.

3. Failure to investigate and make disclosure are grounds for disqualification

65. First, failure of an arbitrator to 'make reasonable enquiries to investigate any potential conflict of interest' is a factor likely to increase the risk of disqualification [*von Goeler, p.277*]. Specifically, the case of *J & P Avax* suggests that failure to check relationships with third parties, such as third-party funders, may itself give rise to a conflict.

66. Secondly, failure to disclose circumstances that could reasonably create doubts as to one's impartiality and independence can provide a basis for challenge [*Alpha Projektholding; Forest Elec; Oberlandesgericht Frankfurt, 10 Jan 2008*]. This is because disclosure contributes materially to the arbitrator's impartiality by requiring them to reflect on potentially relevant matters [*Born, p.1092*]. Therefore, Mr. Prasad's failure to investigate and disclose his connections with Findfunds LP, which reasonably create doubt as to his impartiality and independence [*see below III.A.,B.*], is itself grounds for his disqualification.

III. Mr. Prasad's factual circumstances should lead to his removal

67. If the Tribunal is not satisfied with Mr. Prasad's procedural conduct alone as a basis for disqualification, the justifiable doubts as to his impartiality and independence that arise from his factual circumstances should certainly lead to his removal. The circumstances arise from Findfunds LP's funding of Prasad & Slowfood's client (**A**), his repeat appointments by Fasttrack & Partners and Findfunds LP (**B**) and his published legal opinion on the subject-matter of the dispute (**C**).

A. Findfunds LP's funding of Prasad & Slowfood's client should lead to Mr. Prasad's disqualification

68. There are justifiable doubts as to Mr. Prasad's impartiality and independence because a Prasad & Slowfood client is being funded by CLAIMANT'S funder, Findfunds LP. This factual circumstance falls under the IBA Red List, which details situations that, by default, meet the objective test for disqualification [*IBA Prac. App. ¶2*]. One such situation is where 'the arbitrator's law firm currently

has a significant commercial relationship with one of the parties' [*Item 2.3.6*]. Accordingly, CLAIMANT'S contention that Mr. Prasad is 'not affected by the conditions listed on the [red] list' [*Cl. Memo. ¶65.a*] is incorrect.

69. Contrary to the unsubstantiated claim that 'no relationship existed between the arbitrator and the Parties' [*Cl. Memo. ¶65.a.3*], Prasad & Slowfood has a 'significant commercial relationship' with CLAIMANT, as a result of sharing the same third-party funder, Findfunds LP. The significance of the commercial relationship arises first, by virtue of the material economic relationships between Findfunds LP, and both CLAIMANT and Prasad & Slowfood. Secondly, it arises from the degree of involvement that Findfunds LP has in both entities' claims. These two factors relating to a third-party funder are to be taken into account when determining the significance of the commercial relationship [*see von Goeler, p.266–8*].

70. First, in the present arbitration, a majority-owned subsidiary of Findfunds LP will receive 25% of the award [*Proc. Order No. 2 ¶¶1, 2*]. A stake of 25% is considered significant [*von Goeler, p.266-7*]. As for the Prasad & Slowfood client's arbitration, the case has to date accounted for 5% of Slowfood's annual turnover, with the oral hearing and post-hearing submissions yet to generate further revenue [*Proc. Order No. 2 ¶6*]. This contribution to the firm's annual income is not negligible. Relevantly, Findfunds LP's subsidiary, Funding 8 Ltd, is paying all of the legal fees [*Proc. Order No. 2 ¶6*].

71. Secondly, the working relationship between Findfunds LP and CLAIMANT on the one hand, and with the Prasad & Slowfood client on the other, is significant. The 'degree of control over the claim the funder is able to exert' is relevant [*von Goeler, p.268*]. Findfunds LP exerts a significant degree of control [*see above ¶54*]. Prasad & Slowfood's 'significant commercial relationship' with CLAIMANT thus engages Red List Item 2.3.6, which should disqualify Mr. Prasad.

B. Mr. Prasad's repeat appointments by Fasttrack & Partners and Findfunds LP should lead to his disqualification

72. Mr. Prasad's repeat appointments by CLAIMANT'S lawyers [*see Cl. Ex. 11, p.23*], and by CLAIMANT'S funder [*see Letter from Prasad, p.36*], should lead to his disqualification. First, repeat appointments are grounds for disqualification (**1**). Secondly, the present repeat appointments should lead to Mr. Prasad's disqualification given the circumstances (**2**).

1. Repeat appointments are grounds for disqualification

73. It is generally accepted that by the mere fact of repeat appointments, an arbitrator may lose his or her independence [*Gaillard, p.1245*]. Furthermore, the circumstance falls under the IBA Orange List, which lists situations that 'may, in the eyes of the parties, give rise to doubts as to the

arbitrator's impartiality or independence' [*IBA Prac. App.* ¶*3*] and are appropriate grounds for disqualification [*Born, p.1849*]. Item 3.1.3 provides for the situation where 'the arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties'. Given that Fasttrack & Partners is a 'party' by virtue of advising CLAIMANT and thus having a 'controlling influence' [*IBA Gen. St. 6(b)*], and that Findfunds LP is a 'party' or 'affiliate of one of the parties' [*see above* ¶¶*53–56*], the Orange List situation arises here.

2. The circumstances of Mr. Prasad's repeat appointments should lead to his disqualification

74. In considering whether the present repeat appointments give rise to justifiable doubts, important factors include, relevantly: (1) the number of appointments received from other sources, (2) the importance of the appointments to the arbitrator, (3) the arbitrator's other professional activities and income, and (4) the reason for the appointments [*Born, p.1882*; *Tidewater* ¶*64*].

75. First, Mr. Prasad acted in a total of 21 arbitrations in the last three years [*Proc. Order No. 2* ¶*10*]. Considering that 4 of those 21 arbitrations involved Fasttrack & Partners or Findfunds LP, Mr. Prasad's impugned appointments make up a substantial 19% of those total appointments. Secondly, these appointments were very important to Mr. Prasad's practice in arbitration. The 2 Findfunds LP-funded arbitrations are among the 5 biggest arbitrations Mr. Prasad has sat in and made up 20% of his arbitrator fee income in the last three years [*Proc. Order No. 2* ¶*10*].

76. Thirdly, the appointments were important to Mr. Prasad's professional activities and income, given that he derives 30–40% of his earnings from arbitration work [*Proc. Order No. 2* ¶*10*]. Fourthly, Mr. Prasad rendered awards in favour of the party that appointed him in the four relevant arbitrations [*Proc. Order No. 2* ¶*15*]. A deciding factor in *Tidewater* [¶*64*] in rejecting the challenge was that the arbitrator had decided against her appointing party, thereby suggesting impartiality. This was not the case here. The favourable awards strengthen the inference that Fasttrack & Partners and Findfunds LP appointed Mr. Prasad in the present case because of his partiality.

77. The above circumstances are evidence of a 'relationship of dependence', which is required to demonstrate justifiable doubts as to impartiality and independence [*Tidewater* ¶*62*]. It is clearly in Mr. Prasad's interest to find in favour of CLAIMANT in order to be re-appointed in the future. It follows that Mr. Prasad should be disqualified [*IBA Gen. St. 2(c)*].

C. Mr. Prasad's journal article should lead to his disqualification

78. An arbitrator may be challenged if they have expressed an academic viewpoint on one of the issues in dispute [*Born, p.1887; Redfern/Hunter, p.276*]. Mr. Prasad's viewpoint on the irrelevance of CSR

when considering CISG Art. 35 conformity is directly relevant to the fourth issue in dispute on the conformity of CLAIMANT'S cakes [*Resp. Ex. 4; Proc. Order No. 1 ¶3(1)d; see below ¶¶119–171*].

79. If a bias is 'deeply held', it may preclude an arbitrator's objective assessment of the facts and law before the tribunal [*Born, p.1782*]. First, the article's uncompromising language – 'such a broad concept', 'should be rejected', 'by far too general and unspecific' [*Resp. Ex. 4*] – is indicative of a deeply held opinion. Secondly, the expressed opinion was so favourable and deeply held that CLAIMANT was prepared to resort to unethical conduct in order to conceal the existence of conflicts [*Notice of Challenge, p.38, ¶3; see above ¶59*]. Thirdly, the fact that Mr. Prasad was willing to publish the article in a leading journal in the field of international commerce, available on all leading databases [*Proc. Order No. 2 ¶14*], reflects the strength of his conviction, and suggests that he will likely decide the case in accordance with it.

80. Finally, Mr. Prasad's non-disclosure of his journal article gives even more reason to doubt his impartiality. Contrary to CLAIMANT'S Response to Notice of Challenge [*p.45*], the availability of the publication on Mr. Prasad's website was not enough to discharge the disclosure obligation. An arbitrator may not rely on the due diligence of the parties' counsel to discharge his or her duty of disclosure [*Tidewater ¶51*]. In any event, RESPONDENT did not look at the publications on Mr. Prasad's website before initially accepting his appointment [*Proc. Order No. 2 ¶14*].

IV. Mr. Prasad's conduct and each of the factual circumstances should be considered together in deciding the Challenge

81. In order to satisfy the Tribunal that Mr. Prasad should be disqualified, RESPONDENT does not need to establish that each of the factual circumstances concerning him leads to justifiable doubts. The factual scenarios in the IBA Guidelines need not be considered in isolation [*Born, p.1865*]. They are relevant 'cumulatively or in the aggregate' to the question of an arbitrator's impartiality or independence [*Born, p.1865*], and their aggregation has been decisive in cases where individually considered grounds were not [*see OLG Frankfurt, 10 Jan 2008; Sociedad v Banco*].

82. Even if the aggregated factual circumstances are not enough to establish justifiable doubts, when considered together with Mr. Prasad's conduct, they are. An arbitrator's non-disclosure should be considered with other matters in determining the challenge [*Tidewater; Caron/Caplan, p.226-7; Daele, p.434-35*], and may be decisive in ordering disqualification if the non-disclosure is part of a 'pattern of circumstances raising doubts as to impartiality' [*Suez, ¶54; Baker/Davis, p.50*]. That is so here.

83. **Conclusion**: Mr. Prasad's actions during the proceedings lead to justifiable doubts as to his impartiality and independence. Even if they do not, the factual scenarios concerning him do. In any event, when considered together, it is clear that Mr. Prasad is *not* an impartial and independent arbitrator. Accordingly, he should be disqualified from sitting on the present dispute.

ARGUMENTS ON THE MERITS

ISSUE C: RESPONDENT'S STANDARD CONDITIONS GOVERN THE CONTRACT

84. RESPONDENT contracted with CLAIMANT to purchase goods produced in compliance with strict ethical standards. To that end, RESPONDENT negotiated to include in the agreement, detailed contractual measures to ensure those standards were met. Having fallen foul of those standards, CLAIMANT seeks to avoid the consequences of its breach by arguing that it never agreed to those detailed obligations. The Tribunal should give effect to the ethical obligations agreed to by the Parties.

85. The Parties have agreed that RESPONDENT'S Standard Conditions govern the Contract. This Contract is an international sales contract concluded with a seller selected by way of call for tender and is accordingly governed by the CISG [*Schlechtriem/Schwenzer p.251*]. Under the CISG, RESPONDENT'S call for tender constituted an offer, incorporating RESPONDENT'S Standard Conditions, which was accepted by CLAIMANT (**I**). In the alternative, any counter-offer made by CLAIMANT incorporated RESPONDENT'S and not CLAIMANT'S Standard Conditions (**II**).

I. RESPONDENT made a valid offer including its Standard Conditions, which was accepted by CLAIMANT

86. The Parties agreed to be bound by RESPONDENT'S Standard Conditions. RESPONDENT has made a valid offer (**A**) which incorporated RESPONDENT'S Standard Conditions (**B**). CLAIMANT accepted RESPONDENT'S offer containing RESPONDENT'S Standard Conditions without modification (**C**).

A. RESPONDENT'S invitation to tender constituted a valid offer

87. The approach to offer and acceptance under the CISG is to be taken from Arts. 8 and 14 [*Arts. 8, 14 CISG; Schlechtriem/Schwenzer, p.172*]. Under those provisions, a proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance [*Art. 14 CISG*]. Intention is ascertained according to the approach in Art. 8 CISG [*see above* ¶7]. In the present dispute, RESPONDENT'S Invitation to Tender met the necessary conditions in Art. 14 that the offer be directed (**1**), that it is sufficiently definite (**2**), and that it indicates an intention to be bound (**3**). As much is implicitly conceded by CLAIMANT insofar as its argument characterises CLAIMANT'S tender as a 'counter-offer' [*Cl. Memo. III.A.*].

1. The offer was specifically directed

88. The CISG makes a distinction between proposals to conclude a contract made to the world at large, which are not capable of constituting valid offers, and proposals directed to one or more specific persons which are [*Art. 14(1) CISG*]. RESPONDENT'S Invitation to Tender was expressly directed to CLAIMANT [*Cl. Ex. 1, p.8*] and as such met the implicit requirement of Art. 14 CISG

that the proposal be directed to a specific person [*Art. 14(2) CISG*]. Therefore, the proposal was not made to an indefinite group of people, and was in this respect a valid offer under Art. 14(2).

2. The offer was sufficiently definite

89. An offer is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price [*Art. 14(1) CISG; Aguiar pp.60–61*]. Clearly RESPONDENT'S proposal does make provision sufficient to jump what is regarded by commentators as a low hurdle [*Di Matteo, p.55; Aguiar, pp.60–61, Farnsworth, pp.8–10*]. Clauses 1–3 of the Specification of the Goods and Delivery Terms specifies the goods, indicates a range of quantities, and indicates an upper limit for the price [*Cl. Ex. 2, p.10*].

90. It has been noted that a proposal to conclude a contract may be sufficiently definite even if the price and quantity specified in the offer are provisional and subject to revision depending on final specifications [*Di Matteo, p.55; Magnesium Case*]. The price and quantities contained in RESPONDENT'S call for tender can be seen as provisional as they are given in ranges. This, however, does not mean that RESPONDENT'S proposal was insufficiently definite [*Magnesium Case*]. As will be seen, the alleged 'modifications' of the terms of the offer asserted by CLAIMANT [*Cl. Memo. pp.26-27, ¶III.A.1.*] were not in fact modifications at all, but rather were the very revisions provided for by the terms of the offer.

3. The offer indicated an intention to be bound

91. Under Art. 14(2) CISG, an intention to be bound can be inferred expressly from the language of the instrument or tacitly from the conduct of the parties [*Art. 11 CISG*; *Aguiar, p.59*]. Here, the conduct of the Parties provides ample basis from which the Tribunal should find an intention to be bound.

92. Looking at all the circumstances, the Invitation to Tender demonstrated a sufficient intention to be bound. Following negotiations between CLAIMANT and RESPONDENT at the food fair [*Resp. Ex. 5, p.41*], RESPONDENT clarified with CLAIMANT that there was 'no necessity to make any changes' to its standard terms before submitting an invitation to tender to CLAIMANT [*Cl. Ex. 1, p.8; Resp. Ex. 5, p.42*]. Based on these circumstances, a reasonable person would infer that there was an intention to be bound [*Schlechtriem/Schwenzer, p.286*].

B. RESPONDENT'S Standard Conditions were incorporated into its offer

93. RESPONDENT'S Standard Conditions govern the Contract because they were part of the offer which CLAIMANT accepted. Standard terms will be a part of an offer where a reasonable person in the position of the addressee would understand that the offeror intended them to be [*Art. 8(1) CISG*]. To satisfy this requirement, there must be some reference to the standard terms by the

offeror, and a sufficient degree of awareness of the terms' text by the offeree [*Schlechtriem/Schwenzer, p.292*]. In this case both those requirements are clearly satisfied because RESPONDENT'S Standard Conditions have been expressly included in RESPONDENT'S offer (**1**), and CLAIMANT had actual positive knowledge of those Standard Conditions (**2**).

1. RESPONDENT made its Standard Conditions sufficiently available

94. RESPONDENT has actually provided its General Conditions of Contract upon making the offer which CLAIMANT later accepted [*Cl. Ex. 2, Section V, pp.12–13*]. No more could be reasonably expected of it. A mere reference can suffice to incorporate standard terms under the principles of formation in the CISG [*Schlechtriem/Schwenzer, p.174*]. In the present case RESPONDENT has gone well beyond what has in other cases been sufficient to incorporate standard terms into a supply contract. For example, in *Golden Valley Juice* the standard conditions had been contemporaneously attached as a separate document to an email containing an offer. Undoubtedly, RESPONDENT'S provision of its General Conditions in full physical copy constitutes sufficient availability for the purposes of the CISG.

2. CLAIMANT had actual positive knowledge of the Standard Conditions

95. CLAIMANT was actually aware of RESPONDENT'S standard conditions. In its letter of 27 March 2014, CLAIMANT clearly acknowledged that it was aware of RESPONDENT'S Standard Conditions when it acknowledged that it had 'taken a closer look at the tender documents' [*Cl. Ex. 1, p.8*]. Given that 'the tender documents' included RESPONDENT'S Standard Conditions, CLAIMANT could not have been unaware that RESPONDENT'S intention was that its Standard Conditions would form part of the offer [*Art. 8(1) CISG*].

C. CLAIMANT accepted RESPONDENT'S offer without modification

96. A party will have accepted an offer where it has made a statement or performed some conduct which indicates assent [*Art. 18(1) CISG*] without materially altering the terms of the initial offer [*Art. 19(1) CISG*]. In order to demonstrate valid acceptance, RESPONDENT is not required to demonstrate that CLAIMANT has actually read the General Conditions of Contract. Nor is it required to show that CLAIMANT has provided some sort of express written confirmation of acceptance of those particular terms [*Schlechtriem/Schwenzer, p.311*]. Accordingly, under the correct approach provided for by the CISG, CLAIMANT clearly accepted RESPONDENT'S offer because it expressly indicated assent (**1**) and did not materially alter the terms of the offer (**2**).

1. CLAIMANT assented to RESPONDENT'S offer

97. CLAIMANT'S letter of 27 March 2014 is a statement which indicates an intention to be bound by the terms of RESPONDENT'S offer. Accordingly, it constitutes assent under Art. 18(1) CISG

[*Schlechtriem/Schwenzer, p. 333*]. When CLAIMANT described particular arrangements as 'acceptable' and such that it could 'very well live with...', it made statements which indicate assent [*Cl. Ex. 3, p.15*; *Art. 18(1) CISG*]. Whilst it is true that the language of 'offer' is used by CLAIMANT, it is broadly acknowledged that the specific form of wording used is not determinative of the question of acceptance under the CISG [*Schelchtriem/Schwenzer, p.333*]. Viewed in context, CLAIMANT specifically acknowledged that it was using the word 'offer' merely to be transparent about the 'minor amendments' that it proposed.

2. CLAIMANT has not materially altered the terms of RESPONDENT'S offer

98. The purported 'amendments' identified in CLAIMANT'S letter of 27 March 2014 [*Cl. Ex. 3, p.15*] do not constitute material alterations sufficient to transform CLAIMANT'S letter into a counter-offer under Art. 19 CISG. CLAIMANT'S Letter of Acknowledgment dated 17 March 2014 [*Resp. Ex. 1, p.28*] clearly indicates that CLAIMANT made an undertaking to tender in line with the Tender Documents without modification [*Response to Notice of Arbitration, p.27, ¶25*]. CLAIMANT did exactly that. Contrary to CLAIMANT'S submission [*Cl. Memo. ¶III.A.2.*], there is no 'substantial difference' between the standard terms proposed by CLAIMANT, and those proposed by RESPONDENT. CLAIMANT itself acknowledged that the amendments it made to the terms of RESPONDENT'S offer were 'minor' [*Cl. Ex. 3, p.15*]. It is an untenable position that there was a 'substantial difference' between the terms RESPONDENT offered and the terms CLAIMANT accepted [*Cl. Memo. ¶III.A.2.*].

99. CLAIMANT submits that there have been material modifications, on the basis of the finding in *Special Screws* that a request for payment in advance constituted a rejection of the offer. First, the Tribunal should note that CLAIMANT expressly confirmed in its letter of 27 March 2014 that it was not asking for payment in advance, and was in fact making an 'exception' [*Cl. Ex. 3, p.15*]. Secondly, the principle in *Special Screws* was based on a provision of the German Civil Code, which has no applicability to this case. That provision dictates that 'modification' constitutes rejection, whereas the CISG requires that there be a 'material modification'.

100. RESPONDENT'S letter does change the terms of the payment, which may be material under Art. 19(3) CISG. However, Art. 19(3) merely creates a rebuttable presumption of materiality which may be displaced by the circumstances of the case [*Schlechtriem/Schwenzer, p.356*]. CLAIMANT'S amendment did not change the mode or amount of payment. It merely altered a time limit clause. In circumstances where time limits were never a contentious issue in the course of negotiations or the subsequent performance, it would be absurd to suggest that such an alteration constitutes a material modification to the terms of RESPONDENT'S offer.

101. Where an offer expressly indicates that a term is provisional, a subsequent revision or specification of that term within the parameters set by the initial offer does not constitute a material alteration

[*Magnesium Case*]. All that is required is that the parameters set are sufficiently specific so that the term is not 'indeterminable' [*Fauba v Fujitsu*]. In the *Magnesium Case,* a revision of the price by the buyer did not constitute a new offer because the initial indication that the price was provisional meant that the parties intended to conclude a contract within the parameters set by the initial offer.

102. Here, although CLAIMANT refers to 'amendments', all that CLAIMANT has done in its acceptance is to make specifications, within the parameters set by RESPONDENT'S initial offer [*Di Matteo, p. 55; Magnesium Case; Cl. Ex. 3, p.15*]. It is clear from the terms of the initial offer that the prices and quantities alluded to were provisional. Not only is price given as an upper limit and quantity given as a range, the offer expressly contemplates that details were 'to be filled in by the tenderer'. Indeed, that CLAIMANT provided details within the parameters of the initial offer further reinforces the conclusion that CLAIMANT indicated assent [*see above* ¶*97*]. There is no basis to conclude that CLAIMANT made any material alterations. A contractual relationship was on foot between the Parties, which was governed by RESPONDENT'S Standard Conditions.

II. Even if CLAIMANT made a counter-offer, RESPONDENT'S Conditions still govern

103. If CLAIMANT made a counter-offer, RESPONDENT'S Standard Conditions still govern the Contract because the counter-offer incorporated RESPONDENT'S Standard Conditions (**A**) and not CLAIMANT'S (**B**). In the alternative, CLAIMANT'S Standard Conditions were surprising, and RESPONDENT is not bound because it did not expressly accept them (**C**). Even on a 'battle of the forms' analysis, RESPONDENT'S Standard Conditions govern the Contract (**D**).

A. CLAIMANT'S counter-offer incorporated RESPONDENT'S Standard Conditions

104. Having regard to the Parties' negotiations [*Art. 8(3) CISG*], the use of the words 'not applicable' where CLAIMANT would ordinarily have put its own terms and conditions, would reasonably indicate assent to RESPONDENT'S Standard Conditions. In the context of negotiations, this would be seen as a 'string reference' to RESPONDENT'S previously incorporated Standard Conditions [*Schlechtriem/Schwenzer, p.293*]. A string reference is effective to incorporate RESPONDENT'S Standard Conditions into CLAIMANT'S counter-offer, unless other terms of the offer make it plain that this cannot have been CLAIMANT'S intention [*Schlechtriem/Schwenzer, p. 293; Roser Technologies*]. As will be seen below, this was clearly not the case in respect of CLAIMANT'S counter-offer.

B. CLAIMANT'S counter-offer did not incorporate CLAIMANT'S Standard Conditions

105. For the Tribunal to find that CLAIMANT'S Standard Conditions were incorporated, it would need to be satisfied that a reasonable person would have understood that CLAIMANT meant to include its standard terms as a part of the counter-offer. CLAIMANT submits that it incorporated its own Standard Conditions by using a different font size to make reference to its own conditions

sufficiently clear [*Cl. Memo. p.30, ¶III.B.2.*]. This was the only reference to CLAIMANT'S conditions throughout the entirety of the negotiations. Moreover, this reference was preceded by the words 'not applicable' which were italicised and set apart from the main text of the document for emphasis [*Cl. Ex. 4, p.16*]. In any case, this argument relies on a conception of specific requirements of form and clarity that is unknown under the CISG [*Schelchtriem/Schwenzer, p.292*].

106. Furthermore, the examples relied upon by CLAIMANT resemble circumstances which have not been sufficient to incorporate standard conditions under the CISG in other cases. For example, in *CSS Antenna,* a statement in written negotiations directing the seller to general conditions available by link was described as 'ambiguous at best'. In *Roser Technologies,* the fact that a counter-offer 'merely directed the other party to a website which needed to be navigated in order for the standard conditions to be located' was described as 'a factor that weigh[ed] against a finding that … standard conditions were properly incorporated'.

107. In the present case, it is not clear whether the link leads to standard conditions, or merely 'commitments and expectations'. This is contrary to accepted legal practice that a party should have the opportunity to easily take note of the standard conditions for there to be incorporation [*Mobile Car Phones; U 86/00*]. In circumstances where CLAIMANT bore the onus of making it plain that it intended to incorporate its own Standard Conditions, this ambiguity is fatal to CLAIMANT'S submission. Accordingly, the Tribunal should find that a reasonable person would not have interpreted CLAIMANT'S proposal as attempting to incorporate its own Standard Conditions.

108. This conclusion is reinforced by the fact that, to the extent that CLAIMANT made material alterations to the terms of RESPONDENT'S offer, they were exhaustively identified in Mr Tsai's covering letter [*Cl. Ex. 3, p.15*]. Those modifications did not purport to modify the Standard Conditions, and indeed contained express acceptance of those terms. In expressly accepting the arbitration clause, which was a term contained in RESPONDENT'S Standard Conditions and not in CLAIMANT'S [*Resp. Ex. 5, p.41*], CLAIMANT made clear that it accepted RESPONDENT'S Standard Conditions, without seeking to incorporate its own. It is very easy for a party seeking to incorporate its standard conditions to provide those conditions [*Machinery Case, Roser Technologies*]. CLAIMANT has failed to do so. Weighed against RESPONDENT'S unambiguous language in its initial offer, the Tribunal cannot conclude that RESPONDENT should have been aware from glancing references to Standard Conditions that CLAIMANT intended to incorporate them.

C. Even if CLAIMANT'S Standard Conditions were part of its Offer, there was no acceptance of the Offer by RESPONDENT

109. Unlike the CISG, UNIDROIT recognises a blanket principle that as a matter of contract law, a surprising term contained in standard terms of a contract does not bind the adhering party in the

absence of express consent [*Art. 2.1.20 UNIDROIT; Koch, p.597*]. Article 2.1.20 UNIDROIT applies to the Contract (**1**). It would be surprising if CLAIMANT'S Standard Conditions governed the Contract (**2**). Accordingly, RESPONDENT'S lack of express agreement to CLAIMANT'S Standard Conditions means that it is not bound by them (**3**). In such a scenario, the CISG dictates that RESPONDENT'S Standard Conditions govern.

1. Article 2.1.20 UNIDROIT applies to the Contract

110. The Parties have consented to the operation of Art. 2.1.20 UNIDROIT and as such the Tribunal should apply the rule. Clause 19 of the Contract provides that UNIDROIT is applicable for any issues not dealt with by the CISG [*Cl. Ex. 2, p.12*]. The principle recognised in Art. 2.1.20 UNIDROIT that a party is not bound by surprising terms within standard terms is not dealt with by the CISG and is therefore applicable to the Contract [*Koch, pp.597–598*].

2. Article 2.1.20 UNIDROIT applies to CLAIMANT'S Standard Conditions

111. Terms will be surprising where their incorporation into the contract is inconsistent with the negotiations that have occurred between the parties [*Koch, p.606*]. In this case, the negotiations between the Parties were always conducted on the basis that RESPONDENT'S Standard Conditions would govern. RESPONDENT was the only one of the Parties to provide its Standard Conditions [*Cl. Ex. 1, p.8*]. There was very limited reference to CLAIMANT'S Standard Conditions [*see above ¶105; Cl. Ex 4, p.16*]. RESPONDENT did not become aware of the content of CLAIMANT'S Standard Conditions until after the Contract was concluded [*Cl. Ex 5, p.17*]. As such, each term of CLAIMANT'S Standard Conditions was a surprising term. Accordingly, RESPONDENT could only be bound if it expressly accepted CLAIMANT'S Standard Conditions [*Art. 2.1.20 UNIDROIT*].

3. There was no express acceptance by RESPONDENT

112. RESPONDENT'S letter of 7 April 2014 contains no indication of assent that would constitute acceptance [*Art. 18(1) CISG; Cl. Ex. 5, p.17*]. Mere acknowledgment of receipt of an offer is not sufficient to express assent [*Schlechtriem/Schwenzer p333; OLG Köln ¶35*]. RESPONDENT expressly indicated that it had viewed CLAIMANT'S Standard Conditions merely 'out of curiosity' and not out of legal obligation.

113. Moreover, RESPONDENT'S subsequent conduct [*Art. 8(3) CISG*] did not indicate that it accepted the incorporation of CLAIMANT'S Standard Conditions [*Art. 8(2) CISG*]. The fact that RESPONDENT took delivery for three years without objection is not relevant or persuasive [*Cl. Memo. ¶97*]. RESPONDENT'S conduct during that period related not to the Standard Conditions, but rather to the specific terms and conditions provided in the Sales Offer [*Cl. Ex. 4, p.16*]. Moreover, during those three years, no dispute arose relating to the Standard Conditions. RESPONDENT

therefore never had occasion to object because it was operating on the assumption, based on the Parties' dealings, that its own Standard Conditions applied. It is relevant that at the very first instance where a dispute arose under the Standard Conditions, RESPONDENT immediately asserted its right to insist on the obligations that CLAIMANT assumed by agreeing to be bound by RESPONDENT'S Standard Conditions [*Response to Notice of Arbitration, p.25 ¶¶11–12*].

D. On the proper approach to a battle of the forms, RESPONDENT'S Standard Conditions govern

114. If the Tribunal finds that CLAIMANT did make a counter-offer subject to its own Standard Conditions [*Cl. Ex. 4, p.16*] the Contract has proceeded on the basis of a difference between what was offered and what was accepted, with each party assuming that its own Standard Conditions had been accepted. One of the Parties must be mistaken in its assumption. The question of which party will be determined by reference to the principles applicable in a 'battle of the forms situation'. The 'last shot rule' is the proper approach in this scenario (**1**). Under that approach, the Tribunal should conclude that RESPONDENT'S Standard Conditions prevail (**2**).

1. The 'last shot' approach is the proper approach

115. Under the 'last shot rule', the standard conditions which govern the ultimate agreement are those which were last referred to in contractual negotiations, without subsequently being objected to [*Schlechtriem/Schwenzer, p.365*]. This is the preferable approach because it is consistent with the terms of Art. 19(1) CISG [*Schlechtriem/Schwenzer p.366*]. That is to say, because each form is a counter-offer under Art. 19(1) CISG, the terms of the contract will be those contained in the last counter-offer [*Farnsworth in Bianca/Bonell, Art. 19 Note 2.5*].

116. The alternative approach is the 'knock out rule'. Under this approach, colliding clauses are 'knocked out' and replaced by provisions of the CISG [*Schroeter, in: Schlechtriem/Schwenzer, p.366*]. The CISG does not provide for this approach, nor is there any evidence to indicate that the Parties have agreed to it. The Tribunal should place greater weight on the terms of the CISG than on academic commentary, and accordingly should apply the last shot rule. In any case, CLAIMANT concedes that this is the applicable approach [*Cl. Memo. p.30, ¶III.B.2.*].

2. Under the last shot rule, RESPONDENT'S Standard Conditions govern

117. By its letter of 7 April 2014 [*Cl. Ex. 5, p.17*], RESPONDENT fired the last shot. That shot made it clear that RESPONDENT had only accepted changes from its initial offer to 'payment terms' and 'the form of the cake', and not changes in relation to the Standard Conditions included in its initial offer. Moreover, RESPONDENT expressly indicated that it viewed CLAIMANT'S Standard Conditions

only 'out of curiosity' and not out of legal obligation [*Cl. Ex. 5, p.17*]. Consequently, applying the last shot rule, it is an inescapable conclusion that RESPONDENT'S Standard Conditions govern.

118. **Conclusion:** RESPONDENT'S Standard Conditions govern the Contract. Whether it was concluded after the initial offer, or after a counter-offer, the proper interpretation of the Contract is that the Parties agreed to be bound by RESPONDENT'S Standard Conditions.

ISSUE D: CLAIMANT'S CAKES DID NOT CONFORM TO THE CONTRACT

119. CLAIMANT has not delivered what it promised. In failing to deliver ethically and sustainably made cakes, CLAIMANT has delivered a fundamentally different product than that contracted for. Owing to this defect, the delivered cakes were non-conforming as they were not of the 'quality' required under the Contract (**I**). Nor were the cakes fit for their ordinary (**II**) or particular purpose (**III**). Contrary to CLAIMANT'S submission, it was not adequate that CLAIMANT exercised 'best efforts' in meeting its ethical obligations (**IV**). In any event, even if a 'best efforts' standard were applicable, CLAIMANT failed to meet that standard (**V**).

I. CLAIMANT'S cakes were not of the 'quality' required under the contract

120. CLAIMANT'S failure to produce cakes using ethically sourced cocoa constituted a breach of Art. 35(1) CISG (**A**). An express contractual term is not required to expand the notion of 'quality' under Art. 35(1) CISG (**B**). RESPONDENT need not supply any such term pursuant to Art. 4.8 UNIDROIT (**C**).

A. CLAIMANT'S cakes were not of the 'quality' required under the Contract because they were not made with ethically sourced ingredients

121. CLAIMANT has not provided cakes which conform to the 'quality…required by the contract' [*Art. 35(1) CISG*]. Contrary to CLAIMANT'S submission, it is not enough that the cakes conformed to physical specifications because the Parties agreed that ethical production was material to the quality of the cakes [*Cl. Memo. ¶112*; *Proc. Order No. 2 ¶39*].

122. To be of the 'quality' contracted for, the goods must bear all non-physical properties intended by the parties. The term 'quality' imports 'all factual and legal circumstances concerning the relationship of the goods to their surroundings' [*Schlechtriem, p.596*; *Lew/Mistelis/Kröll, p.495*; *De Luca, p.189*]. Specifically, a supplier may be required to observe specific ethical manufacturing standards [*Schlechtriem, p.597*; *Maley, p.162; Henschel, p.162*]. National courts have endorsed this view. Goods have been found to be non-conforming for a failure to meet non-physical requirements such as age [*Aston Martin Case*], origin [*Cobalt Sulphate Case*], organic quality [*Organic Barley Case*] and compliance with public laws [*NZ Mussels Case*].

123. The nature of the Parties' contractual obligations must be determined pursuant to Art. 8 CISG [*see above* ¶7]. Here, the Parties' Contract and negotiations evince an intention that a non-physical component would be part of the cakes' quality [*Art. 8(3) CISG*].

124. First, RESPONDENT'S Code of Conduct for Suppliers prescribed clear ethical standards to be applied in making the cakes [*Cl. Ex. 2, p.13*]. CLAIMANT agreed that its business would be conducted in an environmentally sustainable way, free of corruption [*Cl. Ex. 2, pp.13-14*].

125. Ethical standards such as these are enforceable when stipulated in a contract [*Schwenzer/Leisinger, p.263*]. The 'Third Party Code' of Novartis, a leading pharmaceutical company, is an example. Its Corporate Responsibility Strategy contains enforceable ethical compliance obligations, similar to RESPONDENT'S [*Novartis Corp. Responsibility Strategy*]. Having been incorporated into the Contract, RESPONDENT'S Code of Conduct is similarly enforceable [*Schwenzer/Leisinger, p.263*].

126. Secondly, the negotiations evince this same intention [*Art 8(3) CISG*]. CLAIMANT'S ethical production methods were the reason it was invited to participate in the tender process [*Cl. Ex. 1, p.8*]. CLAIMANT understood that publicised breaches of these principles would cause RESPONDENT harm [*Cl. Ex. 1, p.8*]. It must have appreciated that compliance was *essential* to the cakes' quality.

127. Thirdly, the Parties' respective advertising campaigns would lead a reasonable person to expect that they were to trade in ethically sourced goods [*Lew/Mistelis/Kröll, p.499*; *Schlechtriem/Butler ¶134; Maley, p.88*]. CLAIMANT advertised its cakes to be made with 'ethically sourced cocoa' [*Resp. Ex. 2, p.29*]. RESPONDENT'S national campaign focussed on its commitment to social and political principles [*Response to Notice of Arbitration, p.25, ¶6*]. Clearly, the Parties jointly intended that ethical and sustainable production methods were essential to the cakes' quality. They were therefore non-conforming, in breach of Art. 35(1) CISG.

B. A separate express term is not required to extend the definition of 'quality' in Art. 35(1) CISG to non-physical attributes

128. For non-physical attributes to form part of the quality requirements of delivered goods under Art. 35(1) CISG, no separate express provision in the contract is required (**1**). In any case, the Parties have incorporated those requirements into the Contract by the adoption of a trade usage (**2**).

1. The Parties impliedly expanded the notion of 'quality' to import an ethical component

129. The 'quality' of goods under Art. 35(1) CISG encompasses their non-physical attributes if those attributes have been agreed upon by the parties [*Lew/Mistelis/Kröll, p.495*]. That agreement may be implied [*Lew/Mistelis/Kröll, p.495*]. Contrary to CLAIMANT'S contention, an express contractual term is not necessary to expand the meaning of 'quality' to effect that result [*Cl. Memo. ¶¶113–114*].

130. CLAIMANT contends that, because of the supposed need for an express term, RESPONDENT must then rely on UNIDROIT to supply that absent term [*Cl. Memo. ¶114-115*]. Article 4.8 UNIDROIT operates to supply an 'omitted term' where such a term is 'important for a determination of [the parties'] rights and duties'. There has been no omission. An omission will exist when the relevant matter has not been regulated by the contract [*Art. 4.8 UNIDROIT, Note 1*]. The Parties' adoption of Standard Conditions evidences that they contemplated the issue and intended that sustainable and ethical production processes would form part of the cakes' quality [*Cl. Ex. 2, p.14*]. CLAIMANT incorrectly applies Art. 4.8(2) UNIDROIT to argue that no term should be supplied [*Cl. Memo. ¶116*]. The article is only relevant to designing a term in the event that there were an omission [*Vogenauer, pp.538-539*].

2. The ethical component arose from the adoption of a trade usage

131. An obligation to deliver ethically made cakes also arose from the incorporation of a trade usage. The Parties agreed to adopt the Global Compact Principles as a trade usage (**a**), or, in any event, those obligations were incorporated by virtue of them being an international trade usage (**b**).

(a) The Parties adopted the Global Compact Principles as a usage

132. A contract may be supplemented by a usage agreed upon by the parties [*Art. 9(1) CISG*; *Schlechtriem, p.181*]. Whether the parties have in fact agreed will be determined by reference to Art. 8 CISG.

133. In this case, the Parties adopted the Global Compact Principles as a usage. The Global Compact can be integrated into a contract [*Schwenzer 2012, p.106*; *Schwenzer/Leisinger, p.264*]. Contradicting CLAIMANT'S submission, Schwenzer states that there can be *no doubt* that the minimum ethical standards in the Compact are to be safeguarded [*Schwenzer 2012, p.107*; *Cl. Memo. ¶107*].

134. If the parties to an agreement both subscribe to the Compact, they are deemed to have agreed to that usage in all of their contracts, failing an expressed intent to the contrary [*Schwenzer/Leisinger, p.264*]. Both Parties were Compact members [*Cl. Ex. 3, p.15*]. Their shared assent to the usage was given express form when CLAIMANT signed RESPONDENT'S Standard Conditions – documents which embodied their shared commitment [*Cl. Ex. 2, p.11,13*]. This intent has integrated the Compact Principles into their Contract as implied terms [*Schwenzer/Leisinger, p.264; Art. 9(1) CISG*]. CLAIMANT was therefore required to provide cakes made using sustainable production techniques [*UN Global Compact ¶7-8*], free from corrupt business practice [*UN Global Compact ¶10*].

(b) Compliance with the Global Compact Principles was implied into the Contract as an international trade usage

135. In any case, the Compact Principles were binding as an international trade usage [*Art. 9(2) CISG*]. The Compact is a widely known private initiative of which the Parties were members. Its Principles

are capable of adoption as a usage, and are regularly observed by parties to contracts similar to this one [*Schwenzer/Leisinger, p.264*]. Given that both Parties are members [*Cl. Ex. 3, p.15*] and that these Principles are broadly applied [*Schwenzer/Leisinger, p.264*], their adoption is to be assumed to protect the Parties' reasonable expectations [*Schlechtriem, p.188*; *Art. 9(2) CISG*].

II. The cakes were not fit for their ordinary purpose as required by Art. 35(2)(a) CISG

136. Article 35(2)(a) CISG requires that delivered goods are fit for their ordinary purpose. Cakes made in contravention of ethical and sustainable production methods are not fit for their ordinary purpose: resale as ethically and sustainably produced cakes.

137. CLAIMANT contends that because it delivered goods which were cakes in all physical respects, they may be resold and therefore are fit for their ordinary purpose [*Cl. Memo. ¶117*]. CLAIMANT cites the *Frozen Pork Case* to contend that mere tradeability will render goods fit for their ordinary purpose [*Cl. Memo. ¶117*]. CLAIMANT fails to recognise that tradeability is only 'one aspect of being fit for the purpose of ordinary use' [*Frozen Pork Case*].

138. It is not enough that goods conform to physical specifications. Non-physical attributes relevant to a product's suitability for sale into a particular market must be met [*Lew/Mistelis/Kröll, p.515* [*Schwenzer/Leisinger, p.265; Organic Barley Case*]. The 'ordinary use' of goods is to be determined by reference to public statements made about the goods, their price, and the identity of the parties [*Lew/Mistelis/Kröll, p.507*]. These factors show that the cakes' ordinary purpose was resale into a specific market – the market for ethically and sustainably produced cakes [*Schwenzer/Leisinger, p.265*]. As the cakes cannot be sold into that market, they do not conform.

139. The Parties made this 'ordinary purpose' clear in three ways. First, RESPONDENT made public representations saying that its products were to be sold into a specific market. Its 'nationwide advertising campaign' *'centres on*' its compliance with high ethical standards [*Response to Notice of Arbitration, p.25, ¶6*]. RESPONDENT also identified that the bad publicity it received due to breaches of its Standard Conditions impacted it negatively [*Cl. Ex. 1, p.8*]. The Parties mutually understood that RESPONDENT'S customers placed great weight on meeting ethical production standards.

140. Secondly, RESPONDENT purchased cakes from CLAIMANT at a high price. This price-point shows that these cakes were not to be sold as 'normal' cakes [*Proc. Order No. 2 ¶40*]. Rather, they were to be sold to a specific market [*Lew/Mistelis/Kröll, p.507; Down Jacket and Winter Coat Case*].

141. Thirdly, the identity of the Parties evidences this fact [*Lew/Mistelis/Kröll, p.507*; *Schwenzer 2016, p.82*]. The Parties mutually understood that they were Global Compact members [*Notice of Arbitration, p.4, ¶1; Cl. Ex. 1, p.8*]. Each valued ethical and sustainable production methods. RESPONDENT'S marketing made clear that the value in its products was inextricably linked with its

observance of 'political and environmental issues' [*Response to Notice of Arbitration*, *p.24, ¶6*]. Similarly, CLAIMANT marketed its own products as observing similar principles [*Resp. Ex. 2, p.29*].

142. Goods will be fit for their ordinary purpose if a reasonable buyer, aware of the alleged deficiencies, would have paid a substantially similar price for the goods [*Lew/Mistelis/Kröll, p.510*]. RESPONDENT'S customers would not have. RESPONDENT offered them a sustainably produced cake. A normal cake would not be fit for that purpose.

III. The cakes were not fit for their particular purpose

143. In any case, CLAIMANT failed to deliver cakes which were fit for their particular purpose (**A**). It was not unreasonable for CLAIMANT to rely upon RESPONDENT'S skill and judgment in delivering cakes which conformed to this purpose (**B**).

A. The cakes were required for a particular purpose known to CLAIMANT

144. Article 35(2)(b) provides that goods will not conform if they are not fit for their particular purpose. A seller must deliver goods fit for a particular purpose if that purpose has been made known to them, expressly or impliedly [*Schlechtriem*, *pp.606-7*; *Lew/Mistelis/Kröll*, *p.519*; *OLG Graz, 19 June 2013*]. Express provision of that purpose in the Contract is not necessary [*Schlechtriem, p.607*].

145. A reasonable person in CLAIMANT'S position would have recognised that RESPONDENT'S cakes had to be fit for a particular purpose [*Schwenzer 2016, p.82*]: resale into the market for ethically and sustainably produced cakes. Delivery of goods for resale into a market emphasising observance of ethical standards is capable of being a 'particular purpose' [*Schlechtriem, p.607*].

146. First, this intention was made clear in the Parties' written Contract and negotiations [*Lew/Mistelis/Kröll, p.519; Art. 8 CISG*]. RESPONDENT'S Standard Conditions make clear its commitment to ethical and sustainable production processes. Those principles are embodied in obligations binding CLAIMANT and its suppliers [*Cl. Ex. 2, pp.13–14*].

147. CLAIMANT'S capacity and willingness to comply with these obligations was key to the acceptance of its tender offer [*Response of Notice to Arbitration, p.25, ¶11*]. CLAIMANT made clear it was a Global Compact member, and marketed specific products as using sustainably sourced cocoa [*Cl. Ex. 3, p.15; Resp. Ex. 2, p.29*]. At the Food Fair, CLAIMANT made efforts to demonstrate its expertise, displaying maps showing where it sourced its ingredients [*Response of Notice to Arbitration, p.25, ¶11*].

148. Secondly, RESPONDENT'S corporate identity would have led a reasonable person to recognise that the cakes had to be fit for resale in a market focussing upon those ethical standards [*Schwenzer 2016, p.82*]. RESPONDENT'S nationwide advertising campaign centred on its observance of these standards [*Response of Notice to Arbitration, p.25, ¶6*]. CLAIMANT must have appreciated that these advertisements formed part of a broader corporate strategy targeting such a market.

149. In recent decades, discrete markets placing great value on compliance with ethical standards have emerged [*Schwenzer/Leisinger, p.249*]. Goods failing to embody those standards are not fit for resale in those markets. A reasonable person in CLAIMANT'S position would have recognised that RESPONDENT intended to sell cakes into such a market. A medium-sized merchant capable of meeting orders worth USD 50,000 every day would have realised, in light of prevalent market trends, that compliance with ethical principles would be integral to their saleability [*Schwenzer 2012, p.105*]. Failing that, the cakes would not be fit for their particular purpose.

B. RESPONDENT relied on CLAIMANT'S skill and judgment, and it was not unreasonable for it to do so

150. To rely on Art. 35(2)(b) CISG, RESPONDENT must demonstrate that it relied on CLAIMANT'S skill and judgment in procuring goods that were fit for a particular purpose (**1**), and that it was not unreasonable for it to do so (**2**).

1. RESPONDENT relied upon CLAIMANT'S skill and judgment

151. RESPONDENT relied on CLAIMANT'S skill and judgment to deliver cakes made with ingredients that were ethically and sustainably sourced [*Art. 35(2)(b) CISG; Schlechtriem, p.608*]. There will be reliance when a merchant, with superior knowledge to the buyer, holds themselves out as an expert in the procurement of goods for a particular purpose [*Schlechtriem, p.608*; *Heilmann, p.181*].

152. First, CLAIMANT has held itself out as an expert in the procurement of ethically sourced ingredients. At the Cucina Food Fair, CLAIMANT'S Head of Production advertised his company's comprehensive supply chain management [*Cl. Ex. 1, p.8*]. Moreover, other products made by CLAIMANT are advertised as being made from 'sustainably sourced cocoa' [*Resp. Ex. 2, p.29*].

153. Secondly, RESPONDENT has relied heavily upon CLAIMANT'S expertise in sourcing the cocoa. RESPONDENT, a supermarket chain, has a limited understanding of sourcing primary ingredients [*Schlechtriem, pp.608-609*; *Lew/Mistelis/Kröll, p.521; Response to Notice of Arbitration, p. 24, ¶4*].

154. The Contract also afforded significant autonomy to CLAIMANT as to how it should ensure its compliance. RESPONDENT did not specify precise supply chain management procedures. Particularly as RESPONDENT predominantly sources its products from local suppliers [*Response to Notice of Arbitration, p.24, ¶4*], and considering that domestic suppliers could be more closely supervised, RESPONDENT placed trust and reliance in CLAIMANT to apply its expertise. Clearly, RESPONDENT has limited expertise and has entrusted CLAIMANT with great autonomy to meet its obligations under the Contract. It relied upon CLAIMANT'S skill and judgment [*Art. 35(2)(b) CISG*].

2. RESPONDENT'S reliance on CLAIMANT'S skill and judgment was reasonable

155. A buyer 'can only reasonably rely on what can be expected from the skills and the knowledge of the seller' [*Schlechtriem, p.609*]. It was reasonable for RESPONDENT to rely on CLAIMANT, as CLAIMANT is a medium sized manufacturer which specialises in producing sustainable goods [*Notice of Arbitration, p.4, ¶1*; *Resp. Ex. 2, p.29*]. A large manufacturer, capable of meeting orders worth USD 50,000 per day, could reasonably be relied upon.

156. CLAIMANT was put on notice of RESPONDENT'S concern to ensure that upstream suppliers complied with its ethical principles, and still entered the Contract without reservation [*Cl. Ex. 1, p.8*]. CLAIMANT effectively guaranteed that RESPONDENT could rely upon its skills and expertise [*Schlechtriem, p.609*]. CLAIMANT cannot point to the nature of the fraud to argue that reliance was unreasonable [*Cl. Memo. 118*]. It entered the Contract understanding the risk [*see below ¶169*], and proper compliance measures would have uncovered the fraud [*see below ¶168*].

IV. The Contract did not import an obligation of 'best efforts'

157. CLAIMANT asserts that that the Contract merely imported an obligation of best efforts [*Cl. Memo. ¶119*]. Properly construed, the Contract required that a particular result be achieved. This intention is made clear upon consideration of both Art. 8 CISG (**A**) and UNIDROIT (**B**).

A. Under CISG, CLAIMANT was required to achieve a result

158. The extent of CLAIMANT'S obligations is a question of contractual interpretation [*Brunner, p.71*]. Interpreting the Parties' intention by reference to the Contract and their negotiations [*Arts. 8(1),(3) CISG*], CLAIMANT was obliged to achieve a 'result' [*Brunner, p.70*].

159. CLAIMANT agreed to contractual terms embodying obligations of result. In its Special Conditions, RESPONDENT makes clear its 'zero tolerance' policy with respect to unethical business behavior [*Cl. Ex. 2, p.11*]. In addition, Article 2 requires that goods delivered comply with *'all the obligations arising from [the] contract*' [*Cl. Ex. 2, p.11*] and the preamble to the General Conditions employs mandatory language: '*You **must** comply with… the requirements*' (emphasis added) [*Cl. Ex. 2, p.12*].

160. These terms act in concert to create mandatory obligations in the Code of Conduct for Suppliers. Their joint effect is that CLAIMANT *must* 'conduct its business in an environmentally sustainable way', free from corruption [*Cl. Ex. 2, pp.13-14*]. That fact is reinforced by the mandatory language of the Code of Conduct: 'You will', or 'you shall' [*Cl. Ex. 2, pp.13–14*]. It follows that CLAIMANT could not have been unaware that RESPONDENT intended for the obligation to be one of result. Accordingly, the Tribunal should interpret the Contract subjectively, so as to reflect RESPONDENT'S intention [*Maley, p.108*; *Henschel, p.98*].

161. CLAIMANT relies upon Ms. Ming's comment in her letter to Mr. Tsai, '…we will do everything possible to guarantee that the ingredients sourced from outside suppliers comply', to contend that

a 'best efforts' standard was contemplated [*Cl. Memo.* ¶*123*]. A reasonable person would not have concluded that her statement overrode the Contract's clear language [*De Luca, p.24*; *Art. 8(3) CISG*].

B. Under UNIDROIT, CLAIMANT was required to achieve a result

162. UNIDROIT suggests that the Contract imposes an obligation of result on CLAIMANT, contrary to CLAIMANT'S submission [*Cl. Memo.* ¶*123*]. Article 5.1.5 UNIDROIT may assist in determining whether a standard of 'best efforts' or 'result' should apply [*Brunner, p.71*]. Consideration is given to how the obligation is expressed, price, the risk involved in achieving the result, and the other party's capacity to influence performance of the obligation [*Art. 5.1.5 UNIDROIT*].

163. First, the Contract's language expresses an obligation to achieve a result [*see above* ¶¶ *159–160*]. The cakes' high price point also suggests that CLAIMANT had a particular responsibility to ensure compliance with the contemplated ethical standards [*Art. 5.1.5(b) UNIDROIT*; *Proc. Order No. 2* ¶*40*]. Secondly, despite CLAIMANT'S contention, the price – expensive even for a 'premium product' – is wholly consistent with an obligation of result [*Cl. Memo.* ¶*126*].

164. Thirdly, the 'risk normally involved in achieving the expected result' is not especially high [*Art. 5.1.5(c) UNIDROIT*; *Vogenauer, p.554*]. With appropriate compliance procedures, CLAIMANT could have been certain that it was sourcing ethical ingredients, contrary to CLAIMANT'S submission [*Cl. Memo.* ¶*131*]. Fourthly, CLAIMANT had great capacity to '*influence the performance of the obligation*' [*Art 5.1.5(d) UNIDROIT*]. It could have adopted more comprehensive measures [*see below V*], or chosen another supplier over whom it could exert greater influence (e.g. by choosing a domestic supplier).

V. In any event, CLAIMANT did not exercise its 'best efforts'

165. Even if CLAIMANT was only required to exercise best efforts, it failed to do so. Contrary to CLAIMANT'S submission [*Cl. Memo.* ¶¶*132-144*], its compliance measures fell short of the standard of due diligence (**A**). Compliance with ISO standards is not sufficient (**B**).

A. CLAIMANT'S compliance measures fell short of the standard of due diligence

166. Applying an objective standard of diligence, CLAIMANT has not properly discharged its obligations [*Art 5.1.4(2) UNIDROIT; Brunner, p.69*]. Relative to a common industry standard, the Fair Trade Certification for Agricultural Products, CLAIMANT'S compliance measures were inadequate.

167. At a minimum, the standard requires yearly inspections of *all* sites in the production process [*Fair Trade Standard, p.97*]. CLAIMANT has undertaken only *one* thorough audit and inspection of Ruritania Peoples' Cocoa, which occurred in January 2014 [*Proc. Order No. 2* ¶*32*].

168. The Fair Trade Standard requires supervisors to be in the country of production to ensure compliance [*Fair Trade Standard*, *p.94*]. After the audit, CLAIMANT never had a physical presence in Ruritania [*Cl. Ex. 8, p.20*]. If it had met the standard, CLAIMANT would have seen that rainforests

had been burnt down for agribusiness, releasing harmful pollutants [*Cl. Ex. 7, p.19*]. It would also have seen that certificates were being issued for cocoa farmed in protected areas [*Cl. Ex. 7, p.19*].

169. Further, CLAIMANT has merely relied on compliance reports produced by Ruritania Peoples' Cocoa [*Cl. Ex. 8, p.20*]. These reports were not prepared by an independent third-party. CLAIMANT'S carelessness is more egregious because it knew that RESPONDENT was concerned that its upstream suppliers would breach their ethical obligations [*Cl. Ex. 1, p.8*]. CLAIMANT fell short of discharging a best efforts standard [*Cl. Memo.* ¶¶*133–143*].

B. Compliance with ISO 14001 and ISO 26000 is not sufficient

170. CLAIMANT has not satisfied its contractual obligations by following the ISO standards [*Cl. Memo.* ¶*144*]. The contract does not refer to those management systems. They merely guided CLAIMANT'S third-party auditor in preparing its compliance report [*Proc. Order No 2* ¶*33*]. The absence of 'performance criteria' is not evidence that a 'best efforts' standard should apply [*Cl. Memo.* ¶*144*].

171. **Conclusion:** CLAIMANT has failed to deliver cakes which conform to the Contract. Because they were made with cocoa which was not ethically sourced, the cakes were not of the required quality. In any case, the goods were not fit for either their ordinary or particular purpose. The Contract did not require CLAIMANT to exercise its 'best efforts'. However, even if that standard applied, CLAIMANT failed to implement compliance measures sufficient to meet that standard.

REQUEST FOR RELIEF

In light of the above submissions, Counsel for RESPONDENT respectfully requests the Tribunal to adjudge and declare that:

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

B. Mr. Prasad should be removed from the Tribunal;

C. RESPONDENT'S General Conditions govern the Contract; and

D. CLAIMANT delivered cakes which did not conform to the Contract.

Respectfully signed and submitted by Counsel on 18 January 2018

Timothy Morgan Patrick Still Margery Ai Rhys Carvosso