FIFTEENTH ANNUAL

WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION MOOT

11 MARCH – 18 MARCH 2018

MEMORANDUM FOR RESPONDENT

UNIVERSITY OF THE STATE OF RIO DE JANEIRO

RESPONDENT

COMESTIBLES FINOS LTD

75 MARTHA STEWART DRIVE

CAPITAL CITY, MEDITERRANEO

CLAIMANT

DELICATESY WHOLE FOODS SP

39 MARIE-ANTOINE CARÊME AVENUE

OCEANSIDE, EQUATORIANA

ANA CAROLINA VILLA • ANNA CINTIA XIMENES •BRUNA GOLDENSTEIN • DANIELA AMARANTE

DANIELE NISSAN • GIOVANA CARNEIRO • GUILHERME MONEGALHA • GUSTAVO AZEVEDO

JULIA FIGUEIREDO • LUCAS PRATA • LUIZA MATTOS • MARIA VITTORIA REGINI

MARIANA REZENDE • MARVIO BONELLI

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TABLE OF ABBREVIATIONS

ABBREVIATION	ABBREVIATION FULL TEXT
%	Percent
§/§§	Paragraph/paragraphs cited from Claimant's Memorandum, from authorities and from the Problem, pp.3-55
¶/¶¶	Paragraph/paragraphs in this Memorandum
Arbitration Agreement	Arbitration Agreement governing the case at hand, provided on Clause 20, Section V of RESPONDENT's General Conditions of Contract, p.12
Art./Artt.	Article/Articles
Article (or Vindobona Journal Article)	Mr. Rodrigo Prasad's Article on Art. 35 CISG in the Vindobona Journal of International Commercial Arbitration and Sales Law (excerpts on RESPONDENT's Exhibit R4, p.40).
Challenge (or NoC)	RESPONDENT's Notice of Challenge of Arbitrator Rodrigo Prasad, pp.38-39
CISG (or Convention)	United Nations Convention on Contracts for the International Sale of Goods, 1980
Cl.Ex.	CLAIMANT's Exhibit
CLAIMANT	Delicatesy Whole Foods Sp
CM	CLAIMANT's Memorandum
Contract	Agreement reached between CLAIMANT and RESPONDENT for the delivery of Queen's Delight chocolate cake, as per Sales Offer and respective acceptance, pp.16-17
Convention (or CISG)	United Nations Convention on Contracts for the International Sale of Goods, 1980

ed./eds.	Editor/editors
Findfunds	Findfunds LP
i.e.	That is
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration, 2014
ICC	International Court of Arbitration of the International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
King's Delight Cake	CLAIMANT's Vanilla-Chocolate Cake, which won the Cucina Best Cake Award 2010-2014
Letter Fasttrack 1	Letter Fasttrack (30 June 2017), p.3
Letter Fasttrack 2	Letter Fasttrack (Disclosure of Funder – 7 September 2017), p.35
Letter Fasttrack 3	Letter Fasttrack (Refusal to Agree to Removal – 29 September 2017), pp.45-46
Letter Langweiler	Letter Langweiler (Request to Disclose Funder – 29 August 2017), p.33
Letter Prasad	Letter Prasad (Refusal to Step Down – 21 September 2017), pp.43-44
Letter Rizzo 1	Letter Rizzo (Invitation to Case Management Conference – 22 August 2017), p.32
Letter Rizzo 2	Letter Rizzo (Decision on Request to Name Funder – 1 September 2017), p.34
Model Law	Danubian Arbitration Law, a *verbatim* adoption of the UNCITRAL Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006 (PO1, §3(4), p.49; PO2, §47, p.55)

No.	Number
NoA	Notice of Arbitration (30 June 2017), pp.4-7
NoC (or Challenge)	RESPONDENT's Notice of Challenge of Arbitrator Rodrigo Prasad, pp.38-39
p./pp.	Page/Pages
Parties	Delicatesy Whole Foods Sp and Comestibles Finos Ltd., collectively
PCA	Permanent Court of Arbitration
PICC	UNIDROIT Principles of International Commercial Contracts, 2016
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
Prasad's Declaration 1	CLAIMANT's Exhibit C 11 (Prasad's Declaration of Impartiality and Independence and Availability – 26 June 2017), p.23
Prasad's Declaration 2	Declaration Prasad (Connections with Funder – 11 September 2017), p.36
Queen's Delight chocolate cake	CLAIMANT's Chocolate Cake object of the Contract
R.Ex.	RESPONDENT's Exhibit
Resp.NoA	Response to the Notice of Arbitration (31 July 2017), pp.24-27
RESPONDENT	Comestibles Finos Ltd.
Rules	UNCITRAL Arbitration Rules of 2010
Ruritania Peoples Cocoa	Ruritania Peoples Cocoa mbH

Standard Conditions	RESPONDENT's General Conditions of Contract, General Business Philosophy and Code of Conduct for Suppliers as a whole
Standard Terms	CLAIMANT's General Conditions of Sale, Business Code of Conduct and Supplier Code of Conduct as a whole
Tender	CLAIMANT's Sales Offer, p.16
Tender Documents	Documents attached to RESPONDENT's Invitation to Tender
Tribunal	Arbitral Tribunal on the proceeding at hand
UNCITRAL	United Nations Commission on International Trade Law
UNEP	United Nations Environment Programme
UN-Global Compact	United Nations Global Compact
UN-Global Compact Principles	The Ten Principles of the United Nations Global Compact
UNIDROIT	International Institute for the Unification of Private Law
USD	United States of America Dollars
v	Versus
v.	Volume
Vindobona Journal Article (or Article)	Mr. Rodrigo Prasad's Article on Art. 35 CISG in the Vindobona Journal of International Commercial Arbitration and Sales Law (excerpts on RESPONDENT's Exhibit R 4, p.40).

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CISG Secretariat Commentary	Secretariat's Commentary on the Draft Convention on Contracts for the International Sale of Goods. A/Conf. 97-5 (United Nations Conference on Contracts for International Sale of Goods: Vienna, 10 March/11 April 1980). Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees, UN Doc. A/CONF.97/19	¶185

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Colombia

Tampico v Alqueria	Colombian Supreme Court, SC9909-2017, 12 July 2017 Available at: http://newyorkconventon1958.org/index.php?lvl=notice_dsplay&id=4415&opac_view=2	¶46

France

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CISG-online 162	Petty District Court, 6 October 1995 Available at: http://cisgw3.law.pace.edu/cases/951006g1.html	¶135
CISG-online 1658	Appellate Court Stuttgart, 31 March 2008 Available at: http://cisgw3.law.pace.edu/cases/080331g1.html	¶131
CISG-online 1681	Provincial Appellate Court Hamburg, 25 January 2008 Available at: http://www.globalsaleslaw.org/content/api/cisg/urteile/1681.pdf	¶33
CISG-online 225	Federal Supreme Court, 11 December 1996 Available at: http://cisgw3.law.pace.edu/cases/961211g1.html	¶32
CISG-online 651	Federal Supreme Court, 9 January 2002 Available at: http://cisgw3.law.pace.edu/cases/020109g1.html	¶135

Frozen pork case	Supreme Court, 25 January 2006 Available at: http://cisgw3.law.pace.edu/cases/060125a3.html	¶187
Mussels case	Federal Supreme Court, 8 March 1995 Available at: http://cisgw3.law.pace.edu/cases/950308g3.html	¶142

Spain

CISG-Online 2576	Apellate Court Pontevedra, 6 October 2014 Available at: http://cisgw3.law.pace.edu/cases/141006s4.html	¶142
Paletas de cerdo case	Appellate Court Zaragoza, 31 March 2009 Available at: http://cisgw3.law.pace.edu/cases/090331s4.html	¶187
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CISG-online 1566	Supreme Court Canton of Thurgau, 12 December 2006 Available at: http://www.globalsaleslaw.org/content/api/cisg/urteile/1566.pdf	¶33

CISG-online 1731	Appellate Court Geneva, 15 November 2002 Available at: http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021115s2.html	¶33
CISG-online 1732	Appellate Court Basel, 26 September 2008 Available at: http://www.globalsaleslaw.org/content/api/cisg/urteile/1732.pdf	¶33
CISG-online 1739	Commercial Court Aargau, 26 November 2008 Available at: http://www.globalsaleslaw.org/content/api/cisg/urteile/1739.pdf	¶33
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Williams v Sprint-United Management Co	United States District Court, 2005 Available at: https://casetext.com/case/williams-v-sprintunited-management-company-12	¶58

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CIETAC

Souvenir coins case	CIETAC Arbitration Proceeding, 2000 Available at: http://cisgw3.law.pace.edu/cases/000000c1.html	¶172

ICC

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ICC Case 8261	ICC Case 8261, 27 September 1996 Available at: http://www.unilex.info/case.cfm?pid=1&do=case&id=625&step=FullText	¶149

ICSID

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OPIC v Venezuela	ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, 5 May 2011	¶72
US v Grand River	Grand River Enterprises Six Nations, Ltd., et. al. v United States of America, Decision on the Challenge of Arbitrator James Anaya, 28 November 2007 Available at: https://www.italaw.com/sites/default/files/case-documents/ita0382_0.pdf	¶83

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Vito G. Gallo v Government of Canada	Vito G. Gallo v Government of Canada. PCA Case No. 55798, Decision on the Challenge to Mr. J. Christopher Thomas, QC, 14 October 2009 Available at: https://www.italaw.com/sites/default/files/case-documents/ita0352.pdf	¶83
ICS v Argentina	ICS Inspection and Control Services Limited v The Republic of Argentina, Decision on Challenge to Arbitrator, 17 December 2009 Available at: https://www.italaw.com/sites/default/files/case-documents/ita0415.pdf	¶¶46, 70, 90

STATEMENT OF FACTS

1. **Comestibles Finos Ltd.**, the **RESPONDENT** in this arbitration, is a gourmet supermarket chain based in Mediterraneo [*NoA §2, p.4*]. **Delicatesy Whole Foods Sp**, the **CLAIMANT**, is a manufacturer of fine bakery products based in Equatoriana and a social enterprise committed to sustainable and ethical production [*NoA §1, p.4*]. Both are UN-Global Compact members [*NoA §1, p.4; Resp.NoA §5, p.25*].

2. The facts that lead to this dispute are the following:

3 March 2014 — **First contact between CLAIMANT and RESPONDENT**

Ms. Ming, RESPONDENT's Head of Purchasing, met Mr. Tsai, CLAIMANT's Head of Production, at Cucina, the yearly Danubian food fair [*Resp.NoA §7, p.25*].

10 March 2014 — **RESPONDENT submitted an Invitation to Tender**

RESPONDENT submitted to CLAIMANT an Invitation to Tender for the delivery of chocolate cakes, containing an *ad hoc* arbitration agreement, the price range, the quality and the quantity of the products and its Standard Conditions [*Cl.Ex.2, pp.9-14*].

27 March 2014 — **Submission of CLAIMANT's Sales Offer**

CLAIMANT submitted its Sales Offer to RESPONDENT, in which it proposed two changes in RESPONDENT's Standards Conditions, one related to the goods and the another related to the payment [*Cl.Ex.3, p.15*], offering Queen's Delight chocolate cake [*Cl.Ex.4, p.16*].

7 April 2014 — **RESPONDENT's confirmation**

Considering the convincing commitment to sustainable production demonstrated by CLAIMANT, RESPONDENT informed CLAIMANT that the two changes suggested had been accepted [*Cl.Ex.5 §2, p.17*].

Around 6 December 2016 — **Corruption Scheme on the Ruritania's Certificate Program**

A corruption scheme involving CLAIMANT's supplier, Ruritania Peoples Cocoa, is cracked down by Ruritanian authorities [*Cl.Ex.7, p.19*].

6 January 2017 **UNEP's special report**

The scheme is criticized by a UNEP's special report regarding deforestation in Ruritania [*Cl.Ex.6, p.18; Cl.Ex.7, p.19*].

23 January 2017 **Michelgault's article**

The leading business newspaper in Equatoriana, CLAIMANT's country, Michelgault, informed about the scandal [*NoA §7, p.5; Cl.Ex.7, p.19*].

27 January 2017 **RESPONDENT sent an e-mail to CLAIMANT about the scandal**

RESPONDENT sent an e-mail to CLAIMANT requiring it to confirm that all of its suppliers strictly adhered to the UN-Global Compact Principles [*Cl.Ex.6 §3, p.18*]. Due to the evidences and to the risk of a press campaign, RESPONDENT decided to withhold all payments and reject all deliveries until such confirmation [*Cl.Ex.6 §5, p.18*].

10 February 2017 **CLAIMANT discovered that the scandal involved its supplier**

More than two weeks after Michelgault's article, CLAIMANT informed RESPONDENT it had discovered the involvement of one of its suppliers, Ruritania Peoples Cocoa, in activities that were not in accordance with the principles included in the Contract [*Cl.Ex.9 §2, p.21*].

12 February 2017 **Termination of the Contract by RESPONDENT**

RESPONDENT sent an e-mail to CLAIMANT terminating the Contract given the violation of its terms by CLAIMANT [*Cl.Ex.10 §5, p.22*].

30 June 2017 **Notice of Arbitration**

CLAIMANT sent the Notice of Arbitration to RESPONDENT [*NoA pp.3-23*], indicating Mr. Prasad as arbitrator [*NoA§14, p.6*] and attaching his Declaration of Impartiality, Independence and Availability [*Cl.Ex.11, Prasad's Declaration 1, p.23*].

31 July 2017 **Response to Notice of Arbitration**

Subsequently, RESPONDENT submitted its Response to Notice of arbitration [*Resp.NoA, pp.24-31*], in which it appointed Ms. Reitbauer as arbitrator [*Resp.NoA §23, p.26*].

29 August 2017 **CLAIMANT's funder**

RESPONDENT informed to both CLAIMANT and Arbitral Tribunal that it has obtained a key information: CLAIMANT was being funded by a third-party [*Langweiler Letter, p.33*].

1 September 2017 **Arbitral Tribunal order**

In face of this revelation, the Arbitral Tribunal ordered CLAIMANT to reveal its third-party funder, as well as the funder's major shareholders, investors and beneficiaries [*Arbitral Tribunal Letter, p.34*].

7 September 2017 **CLAIMANT's reveal**

Following the Arbitral Tribunal order, CLAIMANT finally revealed the identity of its funder [*Horace Fasttrack Letter, p.44*].

11 September 2017 **Mr. Prasad's second disclosure**

After CLAIMANT revealed the existence of a third-party funder, Mr. Prasad disclosed all his relationship with Findfunds.

14 September 2017 **Notice of Challenge**

Considering the information revealed and the numerous grounds for challenge, RESPONDENT sent its Notice of Challenge against Mr. Prasad [*NoC, pp.38-39*].

29 September 2017 **Response of CLAIMANT**

Despite all grounds for challenge, CLAIMANT contested RESPONDENT's Notice of Challenge [*Letter Fasttrack 3, pp.45-46*].

6 October 2017 **Procedural Order No. 1**

The Tribunal issued Procedural Order No. 1, in which established the issues to be addressed by the Parties, the deadlines for Memoranda and information regarding the Oral Hearings [*PO1, pp.48-49*].

3 November 2017 **Procedural Order No. 2**

The Tribunal issued Procedural Order No. 2, with clarifications on the facts related to this proceeding [*PO2, pp.50-55*].

SUMMARY OF ARGUMENTS

3. **[Procedural Issue]** RESPONDENT shall demonstrate that **[I]** Mr. Prasad's challenge should be decided by the Arbitral Tribunal, without his participation. Furthermore, that **[II]** the challenge cannot be decided by an appointing authority as per Art. 13(4) Rules.

4. Moreover, **[III]** RESPONDENT's Notice of Challenge to Mr. Prasad should be granted. First, it must be clarified that the IBA Guidelines are applicable to the case. Second, that CLAIMANT did not fulfill its obligation to disclose its Third-Party funder. Additionally, there are several grounds for RESPONDENT's Notice of Challenge.

5. **[Substantial Issue]** On the merits, **[I]** RESPONDENT's Standard Conditions govern the Contract following the Parties' statements and conduct, be RESPONDENT's Invitation to Tender an offer or not. **[II]** Subsidiarily, even this Tribunal considers necessary to resort to *battle of forms,*the *knock-out rule* applies and none of the Parties' standard terms fully apply.

6. Considering RESPONDENT's Standard Conditions apply, **[III]** CLAIMANT's obligation was of results and it had to deliver goods made with sustainable sourced cocoa. As it did not, the goods were non-conforming goods under Art. 35(1) CISG. Moreover, also under Art. 35(2) CISG, the goods delivered would still be non-conforming, as they did not comply to all requirements provided therein.

PROCEDURAL ISSUE. MR. PRASAD SHOULD BE REMOVED FROM THE ARBITRAL TRIBUNAL

7. The Parties agreed to the following arbitration agreement in their Contract: "[a]*ny dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules* <u>*without the involvement of any arbitral institution*</u>" [*Cl.Ex.2 Section V, Clause 20, p.12, emphasis added*]. As stated, any dispute would be decided by ad hoc arbitration under the Rules, with no institutional support whatsoever.

8. CLAIMANT issued its Notice of Arbitration on 30 June 2017 [*Letter Fasttrack 1 §2, p.3*] and, on 31 July 2017, RESPONDENT answered it [*Resp.NoA, pp.24-27*]. CLAIMANT appointed Mr. Rodrigo Prasad as arbitrator [*NoA §14, p.6*], while RESPONDENT nominated Ms. Hertha Reitbauer [*Resp.NoA §23, p.26*]. In turn, the co-arbitrators jointly appointed Ms. Caroline Rizzo as President of the Tribunal on 22 August 2017 [*Letter Rizzo 1 §1, p.32*].

9. Shortly thereafter, RESPONDENT had to issue a Notice of Challenge against Mr. Prasad, requesting for it to be decided by the Tribunal itself, without his participation [*NoC §8, p.39*]. RESPONDENT believes that there are serious and justifiable doubts as to Mr. Prasad's impartiality and independence.

10. Therefore, as RESPONDENT shall demonstrate, all its requests on its Notice of Challenge must be accepted. Initially, **[I]** the challenge should be decided by the Tribunal, without Mr. Prasad's participation. Furthermore, **[II]** the challenge cannot be decided by an appointing authority as per Art. 13(4) Rules. Lastly, **[III]** Mr. Prasad should be excluded from the Tribunal as there are justifiable doubts as to his impartiality and independence.

I. THE CHALLENGE SHOULD BE DECIDED BY THE TRIBUNAL, EXCLUDING MR. PRASAD

11. Mr. Prasad's challenge should be decided by the Tribunal, and no one else [¶¶ *21-39*]. And, contrary to CLAIMANT's allegations [*CM §§46-48*], this decision should be taken without Mr. Prasad's participation, as the challenged arbitrator should not participate in the decision of its own challenge according to **[1]** Art. 13(2) Model Law and **[2]** the principle that no one should judge its own cause (*nemo judex in causa sua*).

1. Art. 13(2) Model Law provides that Mr. Prasad should not participate in the decision of his own challenge

12. Initially, it must be stressed that the Model Law applies to this case. The Parties chose Vindobona, Danubia, as seat of arbitration [*NoA §13, p.6*], which adopted *verbatim* the Model Law with its 2006 amendments [*PO1 §3(4), p.49*]. Since the procedural law of the seat of arbitration governs the arbitral procedure [*Redfern/Hunter §2.78, p.113; Born, p.211*] and upon the exclusion of Art. 13(4) Rules [¶¶ *21-39*], the Model Law applies [*Redfern/Hunter §3.46, pp.168-169*].

13. Nonetheless, contrary to CLAIMANT's allegations [*CM §§46-48*], when Art. 13(2) Model Law indicates that the "*arbitral tribunal*" should decide on the challenge, it does not – in any way – require the challenged arbitrator to participate in the decision regarding its own challenge. Quite the opposite: scholars and international organizations recognize that to allow the challenged arbitrator to participate in the decision of its own challenge based on Art. 13(2) Model Law is problematic [*Pfister, p.167, Hilgard, p.459; see UN Doc. A/CN.9/263/Add.1, p.10*].

14. To conceive that a challenged arbitrator could decide on its very own challenge, based on doubts as to his impartiality and independence, goes against the principles of fair trial and due process [*Pfister, p.167*]. The right of the party to be represented by its appointed – and also

challenged – arbitrator should not supersede the right of the challenging party to an impartial and independent decision [*Pfister, p.167*].

15. Lastly, it is inadmissible – and rather naïve – to assume that an arbitral tribunal would be objective, or would not be psychologically influenced [*UN Doc. A/CN.9/264, p.32*], when one of its members is the challenged arbitrator [*UN Doc. A/CN.9/263/Add.1, p.10; see Ma, p.301*].

2. According to the principle that no one should judge its own cause, the challenged arbitrator cannot participate on the decision of its own challenge

16. In its Notice of Challenge [*NoC §8, p.39*], RESPONDENT requests for Mr. Prasad to be removed from the decision on his own challenge as it is essential for the assurance of a reasonable and fair outcome.

17. It is a general and fundamental principle of law that no person can judge its own cause or any case in which they have an interest [*Baker/Greenwood; p.102; Nairac, p.13; see Lalive, p.299*]. This understanding is crystallized in the so-called *nemo judex in causa sua* principle, which applies not only to judicial process, but to arbitral proceedings as well [*Nairac, p.132; see Ma, p.301*].

18. However, this does not mean that the tribunal as a whole should be barred from deciding on the matter. In fact, if an arbitral tribunal has to decide on the challenge of one of its members, it should take into account the self-policing feature of the arbitral process and, thus, "*only the non-challenged arbitrators are called upon to decide the issue*" [*Paulsson I, p.XIX*].

19. Besides, the challenge on the independence of an arbitrator is one of the most important moments in the arbitral process when the right of the parties to an impartial and independent trial is enshrined [*see Ma, p.301*]. In the case at hand, it would be foolish to presume that Mr. Prasad would remain neutral and unbiased in the decision of its own challenge, particularly considering he has already declined to withdraw [*Letter Prasad, pp.43-44*].

20. As a matter of fact, he is clearly interested in the outcome of this dispute and has already disclosed his position of the Challenge [*Letter Prasad, pp.43-44*]. The present situation is a textbook example of one being a judge on his own cause. Consequently, RESPONDENT's right to a fair process would be doomed if Mr. Prasad took part in the decision.

II. MR. PRASAD'S CHALLENGE CANNOT BE DECIDED BY AN APPOINTING AUTHORITY AS PER ART. 13(4) RULES

21. First and foremost, it is important to emphasize that CLAIMANT itself recognizes the Parties have excluded all institutional support, including the involvement of the Secretary-General

of the PCA [*CM §39*]. However, CLAIMANT insists the Parties did not exclude the participation of individuals as appointing authorities [*CM §§37,42*]. Therefore, CLAIMANT nominates the full Tribunal or Ms. Ducasse as the ones to decide on RESPONDENT's challenge to Mr. Prasad, as per Art. 13(4) Rules [*CM §§42-43*].

22. In case RESPONDENT does not agree with the nominations, CLAIMANT subsidiarily requests the deciding authority to be designated by the Secretary-General of the PCA, as per Art. 6(2) Rules [*CM §44*]. Furthermore, CLAIMANT alleges that as a consequence of the application of Art. 13(4) Rules RESPONDENT's challenge should be rejected as RESPONDENT failed to seek a decision from an appointing authority [*CM §44*].

23. All those arguments, however, fall flat. As RESPONDENT will demonstrate, **[1]** neither the full Tribunal nor Ms. Ducasse can decide the challenge at hand and **[2]** the Secretary-General of the PCA cannot appoint a third alternative. Furthermore, **[3]** RESPONDENT is not precluded from raising its challenge.

1. The full Tribunal cannot be nominated as the appointing authority, neither can Ms. Ducasse

24. CLAIMANT alleges RESPONDENT waived its right to indicate an appointing authority when it did not include a nomination in its model arbitration agreement, and therefore, CLAIMANT would be entitled to nominate an appointing authority on its own [*CM §38*]. It then nominates the full Arbitral Tribunal or Ms. Ducasse to decide on the Challenge [*CM §§42-43*]. Both claims are devoid of any merit.

25. Firstly, even if this Tribunal was to understand the issue could be decided by an appointing authority, Art. 6(1) Rules provides that, unless previously agreed on, the Parties may, at any time, indicate an appointing authority [*Webster §6-80, p.112*]. In no way would the lack of indication in the Arbitration Agreement imply RESPONDENT waived any right.

26. Secondly, the nomination of the full Arbitral Tribunal, including Mr. Prasad, is barred both by the applicable law and by general principles of law, as already shown [¶¶ *11-20*].

27. Finally, allowing Ms. Ducasse to decide on the challenge would also be unacceptable. Ms. Ducasse was not only unilaterally chosen by CLAIMANT to replace Mr. Prasad, but is just as conflicted as he to decide on the challenge. After all, considering that decision would result in her taking part – or not – in this Tribunal, with the accompanying financial benefits, she would herself be deciding her own cause, which is inadmissible [¶¶ *16-20*].

28. Therefore, neither the full Tribunal nor Ms. Ducasse can be nominated to decide on the Challenge.

2. The Secretary-General of the PCA cannot participate in the proceeding

29. CLAIMANT subsidiarily requests the Secretary-General of the PCA to designate a person to decide on the Challenge, arguing that this would be a mere administrative service and would not contravene the Arbitration Agreement [*CM §44*]. CLAIMANT is wrong.

30. The Arbitration Agreement governing this case has unequivocally excluded any involvement of arbitral institutions [*CM §39; NoA §13, p.6*]. As CLAIMANT itself recognizes the Secretary-General of the PCA is an "*institutional figurehead*" and is barred from deciding on the Challenge [*CM §39*].

31. CLAIMANT, however, fails to realize that the Arbitration Agreement makes absolutely no distinction on the degree of involvement of arbitral institutions. Involvement is involvement, be it administrative, organizational or jurisdictional. This means not only that an institutional body cannot decide on the challenge but also that it must not be anyhow involved in the arbitral proceeding, including as an appointing authority. No other conclusion could be reached under the correct interpretation standard, *i.e.*, Art. 8 CISG [*PO1 §1, p.48*].

32. Under Art. 8 CISG, the Parties' conduct and statements must be first analyzed under a subjective criterion [*Art. 8(1) CISG; Maley, p.108; Huber, p.235; CISG-online 225; CISG-online 2090*], pursuant to which this Tribunal must verify whether a party knew or could not have been unaware of the other's intention [*see Lautenschlager, p.260; Huber/Mullis, p.12; Schmidt-Kessel §13, p.152; CISG-online 151*].

33. In case this Tribunal understands that the Parties' intent was not clear, the agreement should be interpreted based on an objective criterion [*Art. 8(2) CISG; Honnold, p.156; Huber, p.235; CISG-online 1739; CISG-online 1732*], in light of the understanding of a reasonable person of the same kind, under the same circumstances [*Schmidt-Kessel §20, p.155; Zuppi §21, p.149; Huber/Mullis, p.13; Zeller, p.635; CISG-online 1681; CISG-online 1731; CISG-online 1566; Alpha Prime v Holland; Diesel oil case*].

34. Both criteria lead to the exact same conclusion: the Parties intended to exclude institutional involvement with no exceptions.

35. First, CLAIMANT clearly knew that RESPONDENT intended to exclude all sorts of participation of arbitral institutions. This intention had been thoroughly explained to CLAIMANT at the earliest opportunity at Cucina Food Fair, when RESPONDENT informed that it had its

trust in arbitral institutions shattered in view of a leak of arguments raised on another arbitration – most likely from the institution itself [*R.Ex.5 §4, p.41*]. As a consequence, RESPONDENT reviewed its model contracts to switch its standard Arbitration Agreement from institutional "*to an ad hoc clause* (…) *explicitly excluding the involvement of any arbitral institution*" [*R.Ex.5 §5, p.41, emphasis added*]. CLAIMANT acknowledged this information and agreed that it could *"very well live with the clause as it is*" [*Cl.Ex.3 §4, p.15*].

36. Yet, CLAIMANT now chooses to ignore those very reasons stating that the Parties purely wanted to avoid losing control of the proceeding [*CM §44*]. This is simply untrue.

37. Second, given that the Parties opted for an *ad hoc* arbitration under the Rules, no reasonable person would read "*without the involvement of any arbitral institution*" [*NoA §13, p.6*] as meaning that an institution may appoint the person to decide on the challenge. Considering that the only institutional involvement provided by the Rules is exactly the role of appointing authority [*Artt. 6 and 13(4) Rules*], such an interpretation would deprive that section of the Arbitration Agreement of any meaning.

38. RESPONDENT also emphasizes that allowing the Secretary-General of the PCA to designate the person to decide on the challenge would create the very scenario the Parties wanted to avoid. After all, this would imply forwarding case files and information not only to the Secretary-General of the PCA but also to the person it chose to appoint [*see Paulsson/Petrochilos §§15-16, p.50*], increasing the likelihood of a so-dreaded leak.

39. For all those reasons, it is clear that the Secretary-General of the PCA may not be called to appoint a third person to decide on the Challenge.

3. RESPONDENT is not precluded from its right to challenge

40. Lastly, CLAIMANT attempts to disqualify the Challenge by stating that RESPONDENT failed to timely seek a decision from an appointing authority in accordance with Art. 13(4) Rules [*CM §45*]. This claim lacks any grounds.

41. As the Parties agreed to conduct the proceedings without the involvement of an arbitral institution [¶¶ *29-39*], RESPONDENT had no duty to seek a decision from an appointing authority. Rather, in its Notice of Challenge, RESPONDENT expressly requested the two other members of the Arbitral Tribunal to decide on the challenge and stated that it would "*definitively pursue the challenge*" [*NoC §8, p.39, emphasis added*].

42. In this sense, RESPONDENT had no need to reiterate its challenge or seek a decision before an appointing authority after Mr. Prasad refused to withdraw.

III. RESPONDENT'S NOTICE OF CHALLENGE OF MR. PRASAD SHOULD BE GRANTED

43. In any event, despite who judges the challenge, RESPONDENT's Notice of Challenge is well grounded. Initially, **[1]** it must be clarified that not only the IBA Guidelines may be applied by the arbitrators but also that it is the most reliable set of rules to guide this case. In any event, **[2]** CLAIMANT did not disclose its third-party funder – nor that it was being funded at all – and this fact should be considered when deciding the challenge. Besides, **[3]** several grounds lead to reasonable doubts as to Mr. Prasad's independence and impartiality to act as arbitrator.

1. The IBA Guidelines on Conflicts of Interest in International Arbitration are applicable to the case

44. CLAIMANT tries to convince this Tribunal that the IBA Guidelines are not applicable, bringing forward the concept that the guidelines are not legal provisions and do not override the applicable national law or arbitral rules chosen by the Parties [*CM §62*]. Nevertheless, it forgets to mention that, absent agreement to the contrary – and there is none –, the IBA Guidelines may be applied by arbitrators on their own volition.

45. Indeed, Art. 19(2) Model Law provides that, if the parties do not agree on the procedure to be followed, the Arbitral Tribunal is free to conduct the arbitration as it considers appropriate. In the case at hand, the Parties on the dispute resolution clause agreed on the application of the Rules, whose Art. 12(1) requires arbitrators' impartiality and independence, but do not provides objective means to assess it [*Landolt, p.410, Hodges, p.620; Mansinghka, p.106*]. In this way, the arbitrator or appointing authority may, of its own volition, rely on the IBA Guidelines [*Landolt, p.410, see Hodges, p.620*].

46. The IBA Guidelines reflect the most accepted standard applied on the issue of conflict of interests in the field of international arbitration, contributing to harmonize and unify the practice [*Mourre, pp.244-245; Girsberger/Voser §669, p.162; 4A_506/2007, pp. 575-576; Scherer, p.588; ICS v Argentina §2, p.4*]. Parties, arbitral institutions, courts and arbitrators commonly refer to the IBA Guidelines when dealing with challenges [*Mourre, p.244; Kaufmann-Kohler, p.14; Girsberger/Voser §669, p.162; Redfern/Hunter §4-88, p.258; Moses §§1-3; Tampico v Alqueria, p.48; see Born, pp.170-172*]. Therefore, even when the parties or the applicable rules are silent on its binding effect, arbitrators still normally consider the standard of the IBA Guidelines [*Mourre, p.244; Kaufmann-Kohler, p.14*].

47. It is for no other reason that recent surveys indicate that arbitration practitioners frequently take into account the IBA Guidelines and regard them as an effective soft law instrument [*Moses §§1-3; Queen Mary – White&Case Survey; IBA Report §§267-268, pp.89-90*]. Therefore, this

Tribunal should also consider the IBA Guidelines as the most trustworthy standard to analyze the impartiality and independence of an arbitrator.

2. CLAIMANT should have disclosed its third-party funder and the fact that it did not do so should be regarded by this Tribunal

48. On 27 August, RESPONDENT's IT-Security officer retrieved the Metadata from CLAIMANT's Notice of Arbitration Word file. RESPONDENT was surprised by the content of such information. There was a comment made by CLAIMANT's attorney that evidenced that it was withholding relevant information regarding CLAIMANT's third-party funder with the sole purpose of avoiding – meritorious – challenges against Mr. Prasad, its appointed arbitrator.

49. With this in mind, RESPONDENT shall demonstrate, first and foremost, that **[a]** CLAIMANT was obliged to disclose that it was being funded in the proceedings both under general principles of international arbitration and General Standard 7(a) IBA Guidelines. Furthermore, that **[b]** CLAIMANT purposely concealed information that was not under privilege and its content cannot be ignored by this Tribunal.

a. CLAIMANT was obliged to disclose the existence of a third-party funder both under general practice and General Standard 7 (a) IBA Guidelines

50. CLAIMANT asserts that it was under no obligation to disclose the existence of its third-party funder, relying on the fact that neither the Model Law nor the Rules establish such a duty [*CM §83*]. However, what CLAIMANT conveniently seems to forget is that arbitration practice, including the IBA Guidelines, widely indicates a need for disclosure of third-party funders and suit it as an essential tool to maintain the impartiality and independence of the arbitral tribunal.

51. First, clarified that the IBA Guidelines must be considered by this Tribunal [*¶¶44-47*], it is important to analyze its General Standard 7(a). It provides an obligation to disclose any relation existent between the arbitrator and a company with a direct economic interest on the proceeding, including "*an entity providing funding for the arbitration*" [*IBA Guidelines, p.16; see ICC Guidance Note*]. The explanation of General Standard 6(b) IBA Guidelines goes further and, due to the impact of third-party funding on arbitral proceedings, also establishes that the funder can be treated as a party when dealing with the issue of conflicts of interest [*Frignati, p.515; IBA Guidelines, p.14; ¶72*]. This alone would demand CLAIMANT to disclose its funder.

52. Notwithstanding, even if the Tribunal considers that the IBA Guidelines are not applicable, both scholars and arbitration practice lead this Tribunal to the same conclusion: CLAIMANT was obliged to disclose its third-party funder [*see Stoyanov/Owzarek, p.188; Bertrand,*

p.611; Goldsmith/Melchionda, §§2, 7-8; ICCA – Queen Mary Task Force, p.65]. This position is justified by the fact that the introduction of a funder into an arbitral proceeding can raise potential conflicts of interest [*Darwazeh/Leleu, pp.132-133; Stoyanov/Owzarek, pp.187,188; Mansinghka, p.104; Trusz, p.1673*].

53. The Arbitral Tribunal's independence and impartiality could not be truly assessed until the disclosure of FindFunds' existence [*see Darwazeh/Leleu, pp. 132-133; Barreto, pp.3-4*], considering that it is impossible for a party and its funder to previously know all the relationships existent with an arbitrator [*Darwazeh/Leleu, pp.132-133; Landi, p.102*]. In this sense, there is no concrete argument that could outweigh the relevance of disclosure [*Frignati, pp.516, 519*].

54. With this in mind, CLAIMANT's allegations that it could fund its own claim or that the funder has a "*genuine commercial interest*" on the proceeding [*CM §85*] are irrelevant. It must be highlighted that RESPONDENT is not trying to fit the third-party funding as an illegal or an inappropriate financial method. The fact that the claim is not *"champertous"* [*CM §85*] does not change or annul a possible conflict existent between the arbitrator and the funder, maintaining the importance of the disclosure.

55. Lastly, this Tribunal should take note that CLAIMANT has indeed attempted to withhold such information in order to hide – numerous – conflicts that exist between CLAIMANT and Mr. Prasad. Therefore, despite what CLAIMANT alleges [*CM §86*], in no way can this scenario be ignored by the Tribunal.

b. CLAIMANT's concealed information was not under privilege and its content cannot be ignored by this Tribunal

56. In order to argue that RESPONDENT acted in affront of good faith, CLAIMANT brings up the *"doctrine of clean hands"* [*CM §89*]. In this regard, it claims that RESPONDENT breached confidentiality terms, making its challenge without *"clean hands"*, and in consequence, barring any relief.

57. First and foremost, the *"doctrine of clean hands"* is not applicable to the present case. As CLAIMANT itself recognizes [*CM §89*], such doctrine is not a general principle of international law [*Von Goeler, p.147; PCA Case No. AA 226*]. Moreover – and more importantly – it should be noted that CLAIMANT is the one acting in procedural bad faith in this arbitration. It was CLAIMANT that withheld sensitive information from both RESPONDENT and the Arbitral Tribunal in order to hide the existence of conflicts with Mr. Prasad [¶*88*] and avoid challenges.

58. Second, regardless of CLAIMANT's allegations [*CM §89*], there is no fact that indicates a possible breach of confidentiality by RESPONDENT. Even if this Tribunal understands that CLAIMANT's hidden commentary qualifies as privileged information, the key point is that CLAIMANT has waived its privilege when it sent the Notice of Arbitration with retrievable information [*see Williams v Sprint-United Management Co; Haid v Walmart.; Cucu, p.228*].

59. CLAIMANT could have taken various measures to delete the file's relevant metadata, such as using Word mechanisms [*Linzy §51*] or even converting the file to a different format [*Cucu, p.223*]. However, it did not. In this sense, the provision of the ICC Report also endorses this affirmation, stating that "[i]*f an electronic document is produced in 'native format'* (…) *the substantive and embedded metadata will normally be included in it"*, and "*the document will be searchable by the receiving party to the same extent as it was by the producing party"* [*ICC Report, Section 4.10(d), p.7*]. Therefore, CLAIMANT cannot treat its own negligence as a RESPONDENT's breach of confidentiality.

60. Finally, even considering that CLAIMANT did not wave privilege, the relevance of the information retrieved should be analyzed. It is understood that tribunals have a discretion to balance the importance of the evidence and the existence of privilege in order to decide what prevails in the particular case [*Hunter/Travaini, pp.624-625*].

61. The same understanding can be reached by analyzing the Rules. According to Art. 27(4) Rules this Arbitral Tribunal has discretion in determining the admissibility, relevance and weight of evidence [*Rubinstein/Guerrina, p.592*; *see Waincymer, p.836*]. In this sense, under the Rules, the Tribunal may analyze and decide whether an evidence is privileged and to weight its value.

62. In the present case, as the information was vital to reveal compelling facts about Mr. Prasad's impartiality and independence, the Tribunal should understand that the information retrieved is more valuable and outweighs any possible privilege that could exist.

3. RESPONDENT's Notice of Challenge to Mr. Prasad is well grounded

63. It needs to be highlighted that CLAIMANT only disclosed the information about its claims being financed due to the Tribunal's disclosure order [*Letter Rizzo 2, p.34*] rendered after RESPONDENT's request [*Letter Langweilwer 2, p.33*]. Indeed, as soon as RESPONDENT, during a virus check on CLAIMANT's Notice of Arbitration, found out about the possible existence of a third-party funder [*NoC, p.38*], it asked for further clarification [*Letter Langweilwer 2, p.33*]. CLAIMANT, without an option, disclosed that its funder was Funding 12, one of Findfunds' subsidiaries [*Letter Fasttrack 2, p.35*]. After that, Mr. Prasad, on 11 September 2017, made a second disclosure revealing his relationship with CLAIMANT's funder [*Prasad's Declaration 2, p.36*].

Thenceforth, RESPONDENT became aware of the whole scenario, raising justifiable doubts over Mr. Prasad's impartiality and independence.

64. RESPONDENT shall now list what are the elements that connect Mr. Prasad to CLAIMANT and, so, justify his challenge. Individually, the conflicts of interest between Mr. Prasad and CLAIMANT are: **[a]** Mr. Prasad had five appointments in cases related to Fasttrack & Partners and Findfunds in the last three years; **[b]** Mr. Prasad's partner acts as counsel of a party funded by a Findfunds' subsidiary in arbitration; and **[c]** Mr. Prasad published an Article where it shows a clear issue bias towards CLAIMANT's position. Lastly, RESPONDENT shall demonstrate that **[d]** all elements must be analyzed together.

a. First, Mr. Prasad had five appointments in cases related to Fasttrack & Partners and Findfunds in the last three years

65. On the admissibility of the Challenge, CLAIMANT argues that RESPONDENT waived its right to challenge Mr. Prasad based on his repeat appointments by Mr. Fasttrack's law firm, since it would have failed to submit the Challenge within the 15-day time-limit provided by Art. 13(1) Rules. CLAIMANT submits that, as Mr. Prasad disclosed his relationship with CLAIMANT's counsel on 26 June 2017, RESPONDENT would have failed to file a prompt objection because the Notice of Challenge was delivered on 14 September 2017 [*CM §§54-56*].

66. Alternatively, CLAIMANT maintains that RESPONDENT's Notice of Challenge is estopped, once RESPONDENT stated that it had no objections to Mr. Prasad's appointment, even after knowing those previous appointments through the arbitrator's Declaration of Impartiality and Independence and Availability [*Resp.NoA, p.26; CM §§57-58*].

67. Both of these arguments fall flat. RESPONDENT recognizes that if the only connection between Mr. Prasad and CLAIMANT was Mr. Fasttrack's previous appointments, there would be no ground for challenge. Because of that, RESPONDENT did not present its Challenge immediately after CLAIMANT's Notice of Arbitration. However, what RESPONDENT did not know at that time – nor could have known – was that there were various other grounds that RESPONDENT was not aware by the time it submitted its Response to Notice of Challenge [*Resp.NoA, pp.24-27*].

68. In fact, on 27 August 2017, during a virus check on CLAIMANT's Notice of Arbitration, RESPONDENT accidentally retrieved a comment written by Mr. Fasttrack that suggested that CLAIMANT was being financed by a third-party funder [*NoC §3, p.38*]. Understandably, RESPONDENT then requested further clarification [*Letter Langweiler, p.33*]. After the Tribunal's

order [*Letter Rizzo 2, p.34*], CLAIMANT had no other option than to disclose that it was being funded by Funding 12, a subsidiary of Findfunds [*Letter Fasttrack 2, p.35*]. Finally, on 11 September 2017, Mr. Prasad disclosed all his relationships with CLAIMANT's third-party funder [*Prasad's Declaration 2, p.36*] and RESPONDENT became aware of the whole scenario concerning the arbitrator's conflicts of interests.

69. Considering that the 15-day deadline provided by Art. 13(1) Rules starts when the party "*become aware*" of the circumstances [*Binder, p.194*], this time-limit is triggered only when the party has all necessary information to make the challenge [*Webster §13-46, p.216; Paulsson/Petrochilos §8, p.91; see Daele §3-047, p.142*]. As RESPONDENT only knew about the gruesome picture created by all relationships between CLAIMANT and Mr. Prasad analyzed together on 11 September 2017, its Notice of Challenge was promptly rendered on 14 September 2017 [*NoC, pp.38-39*].

70. Moreover, RESPONDENT submits that when there is more than one ground for challenge, they should be analyzed cumulatively and not in isolation [*Sociedad de Valores SA v Banco Santander SA; ICS v Argentina; see Born, p.1866;* ¶¶ *89-93*]. That is the reason why a circumstance that alone seemed unimportant, such as Mr. Prasad's previous two appointments by Mr. Fasttrack's law firm, had to be reviewed when other elements were finally disclosed.

71. On the merits of the Challenge, Mr. Prasad has been appointed three times – two previous appointments plus the case at hand – in the last three years in cases that Findfunds acts as funder [*PO2 §10, p.51*]. Initially, it must be enlightened that Funding 12 and the two other subsidiaries that finance parties in cases where Mr. Prasad was appointed arbitrator are owned by Findfunds, a shareholder specialized in controlling entities with the intent of funding claims in arbitrations [*PO2 §3, p.50*]. Findfunds participated in the negotiations between Funding 12 and CLAIMANT [*PO2 §5, p.50*], making a thorough examination of the case when the strategies were discussed [*PO2 §4, p.50*], being undeniable the influence of the stockholder in the proceedings.

72. Furthermore, item 3.1.3 IBA Guidelines ascertain that two or more appointments of the same arbitrator by the same party in the past three years are considered an orange list situation. Due to the third-party funder's direct economic interest in the outcome of this Arbitration, it must be treated as a party [*IBA Guidelines, p.14; see Nieuwveld/Sahani, pp.16-17*]. In this way, Mr. Prasad's three appointments by parties funded by Findfunds in the last three years would be more than enough to ground its Challenge [*see Born, p.1850; Lawson, p.35; Caratube v Kazakhstan; OPIC v Venezuela §48, pp.17-18; Cofely v Bingham & Anor*].

73. Even more when Findfunds' appointments of Mr. Prasad are added to those made by Mr. Fasttrack's law firm, totaling five appointments of Mr. Prasad in cases related to CLAIMANT, its counsel and its funder in the last three years.

74. These cases make up for over 20% of Mr. Prasad's arbitrator fees generated during those years [*PO2 §10, p.51*]. This can indicate a financial interest linked to these appointments, which would guide to automatic disqualification due to potential bias to decide in order to uphold this interest [*Daele §6-157, p.345; López, p.239; see Redfern/Hunter, p.270*]. Especially when one considers that in all four previous cases the award was rendered in favor of the party who appointed him [*PO2 §15, p.51*], which may be a greater indicative of bias [*see Obe, p.87*].

75. All the circumstances mentioned above illustrate how problematic repeated appointments of the same arbitrator are, as it is likely that he will be tempted to decide cases foreseeing the results impact on his future appointments [*Paulsson II, p.14; Shany, p.14; see Obe, p.86; Hoffmann §45, p.1441*].

76. Finally, despite what CLAIMANT tries to argue [*CM §73*], Mr. Prasad's unawareness about the existence of a funder prior to CLAIMANT's disclosure is irrelevant. Even if there were no previous bias, there certainly is now.

b. Second, Mr. Prasad's partner acts as counsel of a party funded by a Findfunds' subsidiary in arbitration

77. On 11 September 2017, Mr. Prasad disclosed that his law firm had merged with Slowfood, a leading law firm from Ruritania, to form Prasad & Slowfood. As a consequence, it also disclosed the new relationship between him and CLAIMANT that arose from this merger [*Prasad's Declaration 2, p.36*]. This new fact entailed one more conflict of interest to hinder Mr. Prasad's impartiality and independence, timely argued on RESPONDENT's Notice of Challenge, filed on 14 September 2017.

78. This new conflict concerns the fact that one of Mr. Prasad's new partners is representing a client whose claim is entirely funded by Funding 8, a subsidiary of Findfunds [*Prasad's Declaration 2, p.36*; *PO2 §6, p.50*]. And, as well put by Yves Derains, "*a case where the claimant is financed by the same third-party funder who is also financing a different claimant in another case in which a partner of the law firm of the arbitrator is acting as that claimant's counsel* (…) *may raise serious concerns*" [*Derains, p.6*]. This is precisely the case at hand.

79. As Findfunds has a direct interest in the outcome of these proceedings [*PO2 §4, p.50*] and also funds Prasad & Slowfood's client through one of its subsidiaries [*PO2 §6, p.50*], one cannot deny the relationship between Mr. Prasad's law firm and Findfunds. Putting figures to this conflict

of interest, Mr. Prasad's law firm will profit US$ 300,000 from Findfunds [*PO2 §6, p.50*], which evidences the arbitrator's relevant commercial relationship with CLAIMANT's funder [*see Von Goeler, p.269*], as put by item 2.3.6 in the red list of the IBA Guidelines. Thus, an objective conflict of interests exists.

80. Last but not least, CLAIMANT suggests that RESPONDENT is estopped from challenging Mr. Prasad based on this fact [*CM §59*]. According to it, RESPONDENT has already accepted the possibility of this sort of conflict of interest, since it did not object Mr. Prasad's reservation about the possibility of his law firm accepting "*further instructions involving the Parties as well as related companies*" [*Prasad's Declaration 1, p.23*].

81. However, this argument does not stand, once no weight at all should be given to this kind of advance waivers, except, perhaps, in border-line cases [*Mourre, p.298*]. For no other reason, General Standard 3(b) IBA Guidelines states that an advance waiver does not exclude the arbitrators' duty of disclosure. Consequently, there is no doubt that a potential conflict of interest may come to light after that, as it did.

c. Third, Mr. Prasad's Article creates an issue conflict to rule on the dispute, especially considering it was the main reason for CLAIMANT to appoint him

82. CLAIMANT affirms that RESPONDENT is precluded from challenging Mr. Prasad grounded on his article published on Vindobona Journal, since the 15-day time-limit provided by Art. 13(1) Rules would have been triggered on 27 August 2017 [*CM §25*], when RESPONDENT accidently retrieved Mr. Fasttrack's commentary, that stated: "[v]*erify with Findfunds whether there exist any contacts between Mr. Prasad and Findfunds. If contacts exist we should definitely do our best to keep the funding secret and not disclose it to the Respondent, to avoid potential challenges of Mr. Prasad. Prasad, whom I know from two previous arbitrations, is the perfect arbitrator for our case given his view expressed in an article on the irrelevance of CSR on the question of the conformity goods*" [*NoC §3, p.38*]. However, as it will be demonstrated, the deadline's starting date should be considered as 11 September 2017.

83. Firstly, even though CLAIMANT does not address any argument related to inferred knowledge of a ground for challenge, it must be enlightened that this issue is not expressly mentioned by the Rules [*Webster §13-49, p.217; Croft/Kee/Waincymer §13-3, p.144*]. As such, case law applying these Rules demonstrates that the time-limit for submitting a challenge is counted from when the party or its counsel actually becomes aware of facts related to conflicts of interest [*US v Grand River; CC/Devas (Mauritius) Ltd, et. al. v India; Vito G. Gallo v Government of Canada*].

84. Secondly, although RESPONDENT became aware of the relevance of Mr. Prasad's legal opinion on 27 August 2017, it was still uncertain about Mr. Prasad's impartiality and independence, which made RESPONDENT demand further clarification about the existence of a third-party funder. As a consequence, Mr. Prasad only presented further clarification regarding the third-party funder on 11 September 2017 [*Prasad's Declaration 2, p.36*]. This was the actual date when RESPONDENT became aware of the full picture in regard to the relationship between Mr. Prasad, CLAIMANT, its counsel and its funder [¶ *68*].

85. With that in mind, RESPONDENT's time-limit to challenge started on 11 September 2017 [¶¶ *65-70*], as it only begins to run when the challenging party obtains all the information necessary to support the arbitrator's lack of independence [*Webster §13-46, p.216; Paulsson/Petrochilos §8, p.91; see Daele §3-047, p.142;* ¶ *69*] – especially considering how important it was for RESPONDENT to understand the whole picture [¶ *70*]. Besides, it would not be reasonable to impose on RESPONDENT the obligation to present a separate notice of challenge concerning Mr. Prasad's Article counting from 27 August 2017.

86. As to the merits of the conflict of interests, contrary to what CLAIMANT alleges [*CM §81*], this publication does not weigh different perspectives. Rather, it upholds a steady position towards CLAIMANT's interest in this arbitration [¶¶ *162-165*], leading to issue bias and hindering the arbitrator's impartiality and independence.

87. Art. 12(1) Rules and Art. 12(2) Model Law establish that any arbitrator must be impartial and independent, making no exception for party-appointed arbitrators. In this sense, scholars agree that the standards for disqualifying a party-appointed arbitrator are the same applied for any other member of the tribunal, *i.e.* it cannot represent particular interests of any of the parties [*Gomez-Acebo, §4-4, p.70; Tupman, p.49; Daele §5.06, p.247; Art. 12(1) Rules; Art. 12(2) Model Law*]. However, CLAIMANT seems to disregard this fact and the applicable rules, appointing an arbitrator not because of his independence but due to his apparent lack of it, as Mr. Fasttrack's comments suggests, deeming Mr. Prasad to be "*the perfect arbitrator*" [*NoC §3, p.38*].

88. Exactly for this reason, the case at hand cannot be considered a mere "*legal opinion concerning an issue that also arises in the arbitration*", covered by a green list situation under the IBA Guidelines [*IBA Guidelines, item 4.1*]. As clearly expressed by CLAIMANT's counsel, it was the main reason why Mr. Prasad was appointed and the reason why CLAIMANT deliberately chose to assume the risk to violate its disclosure obligation [*NoC §3, p.38;* ¶¶ *50-55*].

d. All the elements that connect Mr. Prasad to CLAIMANT need to be analyzed as a whole

89. RESPONDENT has demonstrated that there are plenty of circumstances that indicate Mr. Prasad's lack of independence and impartiality to arbitrate the case at hand [¶¶ *63-88*]. Although this Tribunal could consider that these factors, when isolated, are not sufficient to disqualify Mr. Prasad, when analyzed jointly they raise considerable doubts over the arbitrator's independence and, thus, justify his disqualification under Art. 12(1) Rules.

90. Indeed, as already ruled in previous arbitrations in which a challenge to an arbitrator's impartiality and independence was under dispute, the grounds for questioning the existence of bias should not be considered alone, but rather, cumulatively [*Sociedad de Valores SA v Banco Santander SA; ICS v Argentina*].

91. It is undeniable that, jointly, the facts of the present case show a much worse scenario as to Mr. Prasad's bias. Thus, a recollection is required: (i) Mr. Prasad was appointed twice by Mr. Fasttrack's law firm over the past two years; (ii) Mr. Prasad was appointed two times by parties funded by Findfunds; (iii) Mr. Prasad's partner and law-firm acts as counsel to a party financed by Findfunds; and (iv) Mr. Prasad published an article in the Vindobona Journal beneficial to CLAIMANT's interests.

92. Furthermore, it should be considered that CLAIMANT disloyally decided not to disclose its third-party funder, disrespecting a widely accepted arbitration practice [¶¶ *50-55*]. This attitude had the clear objective to avoid challenges to Mr. Prasad, an arbitrator who already expressed his opinion about the matter discussed in this arbitration [*NoC §3, p.38*]; and decided in favor of CLAIMANT's counsel and funder four times in the past two years [*PO2 §15, p. 51*].

93. It is evident, considering the full picture, that the multiple appointments of Mr. Prasad and CLAIMANT's attitude in order to guarantee him as an arbitrator in the panel at hand are able to raise justifiable doubts over his independence. Therefore, CLAIMANT's defense [*CM §§71-81*] regarding Mr. Prasad's bias falls flat. CLAIMANT merely analyzes and dismisses each ground individually and not altogether – as it should. When considering the whole, no doubts remain as to the need to exclude Mr. Prasad from this arbitration.

CONCLUSION OF PROCEDURAL ISSUE

94. Thus, it is RESPONDENT's contention that the challenge against Mr. Prasad should be decided by this Tribunal, without him, as it is unreasonable that the challenged arbitrator participates in the decision of its own challenge. Furthermore, under no circumstances can the full

Tribunal nor Ms. Ducasse be nominated as appointing authorities to decide on the Challenge, nor can the Secretary-General of the PCA be allowed to appoint a third alternative.

95. In any event, RESPONDENT's Notice of Challenge is well grounded. First, RESPONDENT can rely on the IBA Guidelines, as they reflect the best practice and the international standard. Second, CLAIMANT disregarded its obligation to disclose its third-party funder aiming to avoid challenges against its appointed arbitrator. Finally, there are plenty of elements that connect Mr. Prasad to CLAIMANT, such as his previous appointments by Mr. Fasttrack's law firm and in cases funded by subsidiaries of Findfunds; his published article that creates an issue conflict to rule on the dispute; and the fact that his partner acts as counsel of a party funded by a Findfunds' subsidiaries. All these facts, together, leave no room for doubts: Mr. Prasad cannot be an arbitrator in these proceedings.

SUBSTANTIAL ISSUE.
CLAIMANT DELIVERED NON-CONFORMING GOODS

96. CLAIMANT submitted to this Tribunal that RESPONDENT refused to pay the cakes delivered by it and that this would have brought the Parties to the present proceeding [*Resp.NoA §1, p.24*]. It seems, however, to conveniently forget the agreement settled between the Parties and the reason why the contractual price had to be withheld.

97. CLAIMANT argues that its own Standard Terms are applicable [*CM §§91-128*] and that it delivered conforming goods [*CM §§133-148*]. In the event this Tribunal understands differently, CLAIMANT argues that the goods were still conforming both under RESPONDENT's Standard Conditions and the CISG [*CM §§149-150*]. However, this line of reasoning is unsound.

98. In this sense, RESPONDENT shall demonstrate that **[I]** RESPONDENT's Standard Conditions govern the Contract and, **[II]** subsidiarily, none of the Parties' standard terms fully apply. Since RESPONDENT's Standard Conditions are the one to apply, **[III]** under its provisions, CLAIMANT delivered non-conforming goods.

I. RESPONDENT'S STANDARD CONDITIONS GOVERN THE CONTRACT

99. Despite CLAIMANT's attempt to confuse this Tribunal, it is clear that RESPONDENT's Standard Conditions apply, as **[1]** its Invitation to Tender constituted an offer; and **[2]** even if that was not the case, RESPONDENT's Standard Conditions would still govern the Contract.

1. RESPONDENT's Standard Conditions apply, as its Invitation to Tender was an actual offer under the CISG

100. As CLAIMANT already admitted [*CM §§94-97*], RESPONDENT's Invitation to Tender constitutes an offer, and not a mere invitation to make offers. In any case, RESPONDENT shall briefly demonstrate that it fulfilled the requirements for it to be an offer under Art. 14 CISG.

101. According to Art. 14(1) CISG a proposal is sufficiently definite when it indicates the goods, its quantity and its price [*Schroeter Art.14 §8, p.272; Farnsworth, pp.3-4; Lookofsky II, pp.62-63*]. In the case at hand, the Invitation to Tender meets all these requisites.

102. First, RESPONDENT mentioned in its Invitation to Tender that "[e]*ach chocolate cake will be 3 inches in diameter and will weigh 120 grams*" [*Cl.Ex.2 Clause 1.1, p.10*] and established how the ingredients should be sourced [*Cl.Ex.2 Clause 1.5, p.10*]. Second, it informed that 20,000 chocolate cakes must be delivered daily [*Cl.Ex.2 Clause 2, p.10*]. RESPONDENT could not be any clearer nor specific.

103. RESPONDENT also established that the price it is willing to pay per chocolate cake should not exceed USD 2.50 per unit [*Cl.Ex.2 Clause 3, p.10*]. And the indication of a maximum price is more than sufficient to fulfill the requirement of price determination imposed by Art. 14(1) CISG [*Chinchilla case; see Eörsi I, p.141*].

104. Therefore, the Invitation to Tender is sufficiently definite, as all the requirements laid down by Art. 14 CISG were observed.

105. Art. 14(1) CISG also requires the intention of the offeror to be bound in case of acceptance. Such requirement is met in the present case, being CLAIMANT in accordance with this [*CM §§96-97*].

106. First and foremost, it is understood that in case of doubt the mere fact that a form is sufficiently specific is a great indication of the intention to be bound [*Ferrari §12, p.12*].

107. In addition, the intention to be bound can be extracted from a scenario where after some discussion one party promptly sends a proposal to the other [*Leete, §3*]. And that is exactly what happened. Shortly after the Parties discussed about the product choices and the importance for RESPONDENT of an environmentally sustainable production [*NoA §3, p.4*], RESPONDENT sent directly to CLAIMANT an Invitation to Tender for the delivery of chocolate cakes and its respective Tender Documents [*NoA §4, p.4*].

108. Therefore, given that RESPONDENT's Invitation to Tender is sufficiently definite and that the intention to be bound is met, no other conclusion can be reached if not that RESPONDENT's Invitation to Tender was an actual offer under the CISG.

2. RESPONDENT's Standard Conditions apply even if its Invitation to Tender does not constitute an offer

109. Even though RESPONDENT's Invitation to Tender does constitute an offer under the CISG, should this Tribunal understand otherwise, RESPONDENT's Standard Conditions are still applicable, as **[a]** the Parties' statements and conduct lead to it and **[b]** CLAIMANT itself inserted them into the Contract.

a. RESPONDENT's Standard Conditions apply as per Art. 8 CISG

110. Under the CISG, the contractual obligations of the parties arise not only from the words expressly written on the agreement, but also from their conduct and statements [*Art. 8(3) CISG; Zuppi §§25, 28, pp.150-151; Staudinger/Magnus §25, p.211; Huber/Mullis, p.13; Lautenschlager, p.265*]. As previously demonstrated, issues regarding the interpretation of parties' statements and conduct are dealt with by Art. 8 CISG [¶¶ 32-33].

111. In fact, CLAIMANT itself relied on this article's provisions to build its plea [*CM §§94, 97, 100, 103, 106-107, 117-118*]. Its application, however, was defective. In the case at hand, a proper application of Art. 8 CISG leads to the unquestionable conclusion that the Contract is governed by RESPONDENT's Standard Conditions, as demonstrated by both RESPONDENT's and CLAIMANT's conduct and statements.

112. First of all, regarding Art. 8(1) CISG, it is undeniable that RESPONDENT expressed to CLAIMANT its concern with environmental and sustainability issues, making clear from day one that these matters were absolute deal breakers when it came to selecting commercial partners [*see Cl.Ex.1, p.8; Cl.Ex.10, p.22*]. RESPONDENT even indicated in the tender process how essential it was for not only CLAIMANT but also its suppliers to strictly adhere to RESPONDENT's Standard Conditions [*see Cl.Ex.1, p.8; Cl.Ex.2, p.13*].

113. On top of that, RESPONDENT's Invitation to Tender expressly and repeatedly referred to the application of its own Standard Conditions [*Cl.Ex.2 Section IV Clause 5, p.11; Cl.Ex.2 Section V Clause 4, p.12; Cl.Ex.2 Section XXVI, p.13*]. As to CLAIMANT's conduct, in its Letter of Acknowledgment, it affirmed that it would "*tender in accordance with the specified requirements*" [*R.Ex.1, p.28*], that included compliance with RESPONDENT's Standard Conditions [*Cl.Ex.1, pp.9-10*].

114. Given the scenario established by RESPONDENT's conduct and the terms of the Invitation to Tender, it is undisputable that CLAIMANT's adherence to RESPONDENT's Standard Conditions was a crucial requirement duly acknowledged by CLAIMANT. Therefore, it is evident that, under Art. 8(1) CISG, RESPONDENT's Standard Conditions apply.

115. Nonetheless, if this Tribunal considers that Art. 8(1) CISG is not sufficient at the case at hand, Art. 8(2) CISG would apply and, pursuant to its provisions, the result would remain unchanged: any reasonable person in both CLAIMANT's and RESPONDENT's shoes would have understood RESPONDENT's Standard Conditions to apply.

116. Ever since they first came into contact at the Cucina Food Fair, RESPONDENT and CLAIMANT discussed the importance of sustainable farming [*NoA §3, p.4,*], and throughout all negotiations, RESPONDENT always reaffirmed how essential the matter was [*Cl.Ex.1, p.8; Cl.Ex.2, pp.9-14; Cl.Ex.5, p.17*]. For that reason, it always made clear that CLAIMANT had to comply with RESPONDENT's Standard Conditions, as well as its suppliers. That is why RESPONDENT's Invitation to Tender provided that "*to guarantee such adherence* [to RESPONDENT's sustainability philosophy]*, the measures and conduct expected from suppliers are set out in this Code of Conduct for Suppliers*" [*Cl.Ex.2, p.13*].

117. Additionally, CLAIMANT is aware that RESPONDENT holds a nationwide advertising campaign centered on the sustainability of its products [*Resp.NoA §6, p.25*]. As a matter of fact, RESPONDENT prides itself with implementing the Global Compact Principles, especially the precautionary principle, by sourcing goods and products from sustainable sources [*Resp.NoA §5, p.25*].

118. Bearing in mind the importance of the matter, during negotiations, RESPONDENT discussed with CLAIMANT its concerns regarding the potential negative impact bad press relating to unsustainable farming could cause [*see Resp.NoA §20, p.26*]. Thus, opposite to what CLAIMANT seems to believe [*CM §103*], a reasonable person in CLAIMANT's shoes would not have understood CLAIMANT's Standard Terms to apply as their provisions result in a much less strict obligation as to the sourcing of its goods [*see Cl.Ex.2, pp.13-14; R.Ex.3, pp.30-31*].

119. Finally, RESPONDENT does not deny the fact that it accepted CLAIMANT's Tender [*CM §103*]. However, this acceptance in no way means that CLAIMANT's Standard Conditions should apply.

120. Upon submitting its Tender, CLAIMANT expressly highlighted that it had made two "*minor amendments*" to the received Tender Documents, which regarded solely the shape of the cakes and the payment method [*Cl.Ex.3, p.15*]. This was the perfect opportunity for CLAIMANT to

inform RESPONDENT that it had changed the applicable standard conditions, if that was actually the case. However, no reference was made whatsoever. As a matter of fact, CLAIMANT's alleged introduction of its own Standard Conditions is based on a "*clause*" that is actually closer to a footnote than to a proper contractual provision [*Cl.Ex.4, p.16*]. Consequently, it was only logical that RESPONDENT only expressed its acceptance regarding the two accused – and existing – modifications, as admitted by CLAIMANT itself [*CM §103*].

121. Besides, CLAIMANT had in its Tender a clear field to indicate the terms that would "*prevail over any other documents with respect to the sales contract*", under the section "*Specific Terms and Conditions*" [*Cl.Ex.4, p.16*]. Thus, if it in fact intended to elect its own Standard Terms to govern the Contract, CLAIMANT would have mentioned it under this section. However, not only did it not do so but it also attached to its offer a full set of the Tender Documents [*PO2 §27, pp.52-53*], which contained RESPONDENT's Standard Conditions [*Cl.Ex.2, pp.9-14*]. In this scenario it is clear that the mentioned "*other documents*" – amongst which RESPONDENT's Standard Conditions – would prevail.

122. It is also worth noting that, until it became clear that CLAIMANT had breached the applicable Standard Conditions – RESPONDENT's –, it had never questioned their applicability. Actually, when RESPONDENT first contacted CLAIMANT to assure itself of the cocoa's sustainability, it expressly affirmed that RESPONDENT's Code of Conduct was "*part of the contract*" [*Cl.Ex.6, p.18*]. In its answer, CLAIMANT did not contest such fact [*Cl.Ex.8, p.20*].

123. Last but not least, one intriguing fact stands out: even though CLAIMANT categorically defends the inapplicability of RESPONDENT's Standard Conditions, it bases these arbitral proceedings in the Arbitration Agreement contained therein [*NoA §13, p.6; Cl.Ex.2 Section V, Clause 20, p.12*]. If CLAIMANT truly believed its Standard Conditions to apply, it would have used its Arbitration Agreement, which provided for an arbitration in very different terms, administered by the ICC and with seat at Equatoriana [*PO2 §29, p.53*]. This behavior is, to say the very least, curious.

124. From all those reasons, any reasonable person in both CLAIMANT's and RESPONDENT's shoes would understand RESPONDENT's Standard Conditions to apply.

b. RESPONDENT's Standard Conditions are applicable as CLAIMANT itself inserted it into the Contract

125. As stated above, when CLAIMANT presented its Tender, it "*attached to its offer a full set of the Tender Documents*" [*PO2 §27, p.52*]. Said documents expressly submitted the Parties' Contract to

RESPONDENT's Standard Conditions. More than once [*Cl.Ex.2 Section IV, Clause 5, p.11; Cl.Ex.2 Section V Clause 4, p.12; Cl.Ex.2 Section XXVI, p.13*]. As such, and considering CLAIMANT's reference to its own Standard Terms [*Cl.Ex.4, p.16*], two possible scenarios arise.

126. First, CLAIMANT drafted its Tender with the intention of combining both standard conditions. As acknowledged by CLAIMANT, the obligation of best efforts contained in CLAIMANT's Standard Terms and the obligation of results contained in RESPONDENT's Standard Conditions do not contradict each other [*CM §120*]. Rather, they would be two steps to be jointly accomplished by CLAIMANT.

127. Any provisions set forth in CLAIMANT's Standard Terms but not in RESPONDENT's Standard Conditions would be considered of best efforts only. This is the case of CLAIMANT's provision concerning practices that benefit and improve the sustainable performance of its suppliers [*R.Ex.3, p.31*], which does not find an adequate match in RESPONDENT's Standard Conditions.

128. On the other hand, RESPONDENT's Standard Conditions on business ethics not only fully comprehend CLAIMANT's Standard Terms specifications on the matter, but go further into the issue [*Cl.Ex.2, p.14; R.Ex.3, p.31*]. In this scenario, CLAIMANT's obligation is of results.

129. With this in mind, the standard conditions would complement each other. Therefore, RESPONDENT's Standard Conditions would be applicable as a logical result of CLAIMANT's actions.

130. Second, had the insertion of both standard conditions been a mishap by CLAIMANT, then it would have had submitted a Tender, at the very least, ambiguous. While CLAIMANT's Tender attached RESPONDENT's Standard Conditions [*PO2 §27, p.52*], it also provided, in a mere footnote, that CLAIMANT's Standard Terms would apply [*Cl.Ex.4, p.16*].

131. In light of this and considering that CLAIMANT did have the last word in the negotiations [*see Cl.Ex.4, p.16; Cl.Ex.5, p.17*], the contractual terms would have to be understood in accordance with the *contra proferentem rule*, which consists in the interpretation of the text's meaning against its drafter's interest [*Zuppi §24, p.150; Honnold, p.158; Huber/Mullis, p.15; Sakr, p.494; CISG Advisory Council Op 13; Hyundai case; Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd.; Bowling Alleys case; CISG-online 1658*].

132. Thus, it is clear that RESPONDENT's Standard Conditions apply either way.

II. SUBSIDIARILY, ACCORDING TO THE *KNOCK-OUT RULE*, NONE OF THE PARTIES' STANDARD TERMS FULLY APPLY

133. Even though it is clear that RESPONDENT's Standard Conditions govern the Contract under the CISG, CLAIMANT alleges that, should this Tribunal resort to battle of forms mechanisms, it would be bound by an obligation of best efforts [*CM §§122-127*]. This allegation is unsound.

134. Initially, RESPONDENT stresses that the *last shot rule* – brought up by CLAIMANT [*CM §§122-124*] – must be set aside. Not only it provides for random and unfair solutions [*Schroeter §35, p.366; Honnold, p.252; see Huber/Mullis, p.94*] but also leads nowhere in the case at hand. This is because the last shot fired – CLAIMANT's Tender – makes reference to both CLAIMANT's and RESPONDENT's Standard Terms [*Cl.Ex.4, p.16; PO2 §27, p.52*]. Hence this Tribunal would have to circle back to an analysis under Art. 8 CISG [¶¶ *110-124*].

135. Moreover, the widely adopted approach to battle of forms is the knock-out rule, as recognized by scholars [*CISG Advisory Council Op 13; Schroeter §38, p.367; Staudinger/Magnus Art.19 §24*] and case law [*CISG-online 651; CISG-online 344; CISG-online 162*].

136. Under CLAIMANT's conception of the *knock-out rule*, this Tribunal should apply the standard conditions except to the extent that they contradict each other [*CM §126*]. CLAIMANT applies the correct premise. Nonetheless, it reaches the wrong conclusion.

137. RESPONDENT's Standard Conditions provide for an obligation of results [¶¶ *145-169*], while CLAIMANT's Standard Terms establish an obligation of best efforts [*see R.Ex.3, pp.30-31*]. Even though this is not RESPONDENT's main contention [¶¶ *125-129*], this Tribunal might consider them to be incompatible.

138. The common element left would then be their adherence to the UN-Global Compact Principles [*PO2 §29, p.53; PO2 §31, p.53*]. As such, the obligation of results contained in said provision remains enforceable and CLAIMANT did not comply with it [¶¶ *145-169*].

139. When it comes to the inconsistent elements, the residual law that must apply is the CISG [*Cl.Ex.2 §19, p.12*]. Once again, CLAIMANT did not deliver conforming goods under Art. 35(2) CISG [¶¶ *176-189*].

140. For those reasons, even if this Tribunal understands that it must resort to battle of forms, CLAIMANT's Standard Terms would not apply as a whole. The only fact that remains the same under any point of view is CLAIMANT's delivery of non-conforming goods.

III. UNDER RESPONDENT'S STANDARD CONDITIONS, THE GOODS WERE NON-CONFORMING AS PER ART. 35 CISG

141. Despite what CLAIMANT argues [*CM §§133-134*], the Tribunal itself asks both Parties to analyze the issue of conformity of the goods under the – correct [¶¶ *99-132*] – assumption that RESPONDENT's Code of Conduct applies [*PO1 §3(1)(d), p.48*]. Bearing this in mind, and following this Tribunal's command [*PO1 §3(1)(d), p.48*], RESPONDENT shall demonstrate that the goods were non-conforming under Art. 35 CISG. That is because **[1]** CLAIMANT's obligation was of results and it did not comply with it under Art. 35(1) CISG. Moreover, **[2]** the goods were also non-conforming under Art. 35(2) CISG since the requirements provided therein were not rightly met by CLAIMANT.

1. The goods were non-conforming under Art. 35(1) CISG, as CLAIMANT's obligations were of results as per Art. 8 CISG

142. Art. 35(1) CISG states that the grounds for conformity are primarily the ones agreed by the parties [*Neumann §3; Saidov, p.530; Flechtner, p.4; Potsch, p.32*]. This provision determines that the goods delivered by the seller must be in accordance with the quantity, quality and description required in the contract [*Mussels case; Hyland, p.305; CISG-Online 2576*].

143. To interpret Art. 35(1) CISG one must take into account the interpretation of the parties' agreement under Art. 8 CISG [*Kröll, p.499; Bianca, p.271; Henschel; Neumann §5; Sukhbaatar; Potsch, p.36; Schlechtriem/Butler, p.114*]. Thus, under this article, the agreements established between the parties shall be read according to the Parties' intent [*Art. 8(1) CISG*; ¶ *32*]. Subsidiarily, if this intent cannot be identified, one shall consider what a reasonable person of the same kind would have understood in the same position [*Art. 8(2) CISG;* ¶ *33*]. The criterion of Art. 8(2) CISG shall apply under a subsidiary basis [*Leng Sun, p.76; Huber, p.235; Murray; Zeller, p.629*].

144. Despite CLAIMANT's allegations [*CM §§149-150*], it did not deliver conforming goods under Art. 35(1) CISG, having breached its contractual obligations [*Cl.Ex.6 §4, p.18*]. That is because RESPONDENT's Standard Conditions impose an obligation of results regarding the use of sustainably sourced cocoa both under **[a]** Art. 8(1) CISG and **[b]** Art. 8(2) CISG. Finally, **[c]** even if CLAIMANT's obligation was merely of best efforts, it still did not fulfill it.

a. RESPONDENT's Standard Conditions do impose an obligation of results regarding the use of sustainably sourced cocoa as per Art. 8(1) CISG

145. First, to determine what kind of obligation RESPONDENT's Standard Conditions impose to CLAIMANT it is important to analyze the Parties' intention under Art. 8(1) CISG. This

intention was noticeable since their first contact at the Cucina Food Fair when RESPONDENT made clear that it intended to become a Global Compact Lead and how important a proper supply chain management was [*Cl.Ex.1 §4, p.8*].

146. The Parties' intent was also made clear when Mrs. Ming – RESPONDENT's Head of Purchasing – sent an e-mail to Mr. Tsai, which states how decisive it is to RESPONDENT that its suppliers "*ensure that the goods produced and sold fulfill the highest standard of sustainability*" [*Cl.Ex.5 §3, p.17; emphasis added*]. There is then no feasible way CLAIMANT could not know that it would be bound by an obligation of results under Art. 8(1) CISG.

147. In this sense, as per Artt. 35 and 8(1) CISG, CLAIMANT's obligation to produce cakes made with sustainably sourced cocoa was of results.

b. RESPONDENT's Standard Conditions impose an obligation of results regarding the use of sustainably sourced cocoa as per Art. 8(2) CISG

148. Even though Art. 8(1) CISG alone is sufficient to reach the conclusion that CLAIMANT's obligation was of results, Art. 8(2) CISG also leads to the same conclusion. Under this article, a reasonable person in CLAIMANT's shoes would have understood that CLAIMANT had the obligation to ensure compliance by its entire supply chain.

149. In order to determine a reasonable person's understanding of the Contract, UNIDROIT Principles – used as a representation of *lex mercatoria* [*Davidson; Bonell, p.353; ICC Case 7375; ICC Case 8261*] and of the practice of all countries involved in the dispute [*PO1 3(4), p.49*] – shall be understood by this Tribunal as a useful guidance, as CLAIMANT itself has already recognized [*CM §§91-93*].

150. Under UNIDROIT Principles, to establish if the obligation is of results or merely of best efforts one must consider the way the obligation is expressed in the contract [*Art. 5.1.5(a) UNIDROIT Principles*], the contractual price [*Art. 5.1.5(b) UNIDROIT Principles*] and the risks normally involved in achieving the expected result [*Art. 5.1.5(c) UNIDROIT Principles*].

151. Firstly, the way the obligation is expressed in RESPONDENT's Code of Conduct must be taken into account to analyze if the obligation is of best efforts or of results [*see Fontaine, p.649*]. This analysis must consider both the clause's literal sense and its interpretation within the context [*Bowling alleys case*]. The present case leads to one conclusion: CLAIMANT's obligation was of results. That is because if the Parties' intended to agree on an obligation of best efforts they would use expressions such as "*devote his best endeavors*" or "*use his best efforts*" [*see Vogenauer §2, p.630*] and

words such as "*may*" or "*should*" [*see USA F.P.L. Guidelines, p.25; Garner I; Black's Law Dictionary, p.1237*].

152. In this sense, relating to the specification of the goods and suppliers conduct, the Parties expressly agreed on terms such as "*have to be*" and "*must comply*" [*Cl.Ex.2 Section III, Clause 1(5), p.10; Cl.Ex.2 Section V, §1, p.12*] instead of "*should*" or "*expect*", which could be used if the Parties' purpose was merely of best efforts.

153. Furthermore, in RESPONDENT's Code of Conduct, the Parties also agreed on some specific issues that suppliers must respect, such as health, safety and environmental management [*Cl.Ex.2 Section XXVI, Clause C, pp.13-14*]. In the same line as the other documents, the Parties decided to create an obligation of results by using terms which confirm that, for example, "*will*", "*ensure*", "*make sure*" and "*must*" [*Cl.Ex.2 Section XXVI, Clause C, p.14; Cl.Ex.2 Section XXVI, Clause E, p.14*], which denote a binding force [*see USA F.P.L. Guidelines, p.25; Garner I; Garner II, pp.105-106; Black's Law Dictionary, p.919*].

154. Since the beginning, RESPONDENT expressly stated its intent that the goods must be made with sustainable sourced cocoa [*Resp.NoA §§5-11, p.25*]. In fact, one of the main reasons for RESPONDENT to contract CLAIMANT was its apparent adherence to ethical and sustainable production [*Cl.Ex.1 §3, p.8; Cl.Ex.5 §3, p.17*]. Hence, as the Parties agreed on this important and central obligation, it is not reasonable to expect that RESPONDENT would be fully satisfied if CLAIMANT had merely to apply its best efforts to ensure compliance by its suppliers [*see Roser Technologies, Inc. v Carl Schreiber GmbH*].

155. Secondly, it is understood that high prices indicate an obligation of results [*Vogenauer §3, pp.630-631*], which is exactly the case. That is because, compared to the average market price, the Parties specifically agreed on a price paid which is in the "*upper end of the price paid for a premium product in the relevant market segment*" [*PO2 §40, p.54, emphasis added*].

156. In this sense, despite the fact that there may be no difference in the physical aspects of the goods, RESPONDENT's market is specifically concerned with ethical standards and willing to pay higher prices for that [*see Schwenzer, p.123*]. And that is precisely why RESPONDENT was also willing to pay an above average price. Should the obligation be of best efforts, it certainly would not have done so.

157. CLAIMANT's conduct confirms this understanding as it offered a reduction of 25% of the price when RESPONDENT found out that the goods were non-conforming [*Cl.Ex.9, p.21*]. Therefore, the high price paid by RESPONDENT evidenced that it would surely receive a sustainable cake.

158. Thirdly, it is important to analyze the price settled in light of the risks which are regularly involved when the obligation is of results [*see Schmidt-Kessel §40, p.165*]. In the case at hand, CLAIMANT's conduct and the facts lead to the same conclusion: CLAIMANT's obligation did not involve a high risk. CLAIMANT itself could have argued differently. However, it chose not to [*CM §§91-93*].

159. That is because CLAIMANT's conduct was incompatible with its apparent concern with the environment. This can be confirmed by, at least, two facts: (i) CLAIMANT relied solely on certification sent by its suppliers to verify if they were in accordance with RESPONDENT's Code of Conduct for over two years [*Cl.Ex.8 §3, p.20; Cl.Ex.9 §4, p.21*] and, prior to that, (ii) CLAIMANT hired an auditor which did not examine if the certificates were fit [*PO2 §33, p.54*].

160. Considering that Ruritania's structure to grant the certificates "*was poorly conceived from the start and had some real flaws*" [*Cl.Ex.7 §4, p.19*], it stands to reason that a proper audit would be quick to point out its inadequacy. As such, it would not have been difficult nor risky for CLAIMANT to avoid the non-conformity of the cakes.

161. For all reasons above, the only proper interpretation of RESPONDENT's Standard Conditions is that it imposes an obligation of results.

162. CLAIMANT attempts to deny this fact by stating that the UN-Global Compact Principles – to which both Parties adhered to [*Cl.Ex.1 §§3-4, p.8*] and are largely identical to the principles contained in RESPONDENT's Business Philosophy [*PO2 §31, p.53*] – are "*merely ethical aspirations*" [*CM §142*]. However, this statement has no basis.

163. The mere fact that the Parties participate in this initiative incorporate minimum ethical standards to their Contract [*see Schwenzer, p.125*] and bind them to comply with said principles [*see Schwenzer/Leisinger, p.265*]. In any case, RESPONDENT's Business Philosophy – and therefore, the UN-Global Compact Principles [*see PO2 §31, p.53*] – is a part of the Contract, which creates ethical commitments between the Parties [*Dysted, p.42*]. Not only that, RESPONDENT's Standard Conditions also lend binding force to those principles by stating that any breach of RESPONDENT's Business Philosophy – including the UN-Global Compact Principles – constitutes a fundamental breach [*Cl.Ex.2 Section V, Clause 4(3), p.12*].

164. Hence, the allocation of the risks agreed between the Parties must be taken into consideration [*see Schwenzer, p.125*]. CLAIMANT was the one to make all decisions on the sourcing of cocoa: it chose the supplier and previously sold itself as not only a UN-Global Compact company [*Resp.NoA §11, p.25*] but also as able to deliver sustainably sourced goods [*Cl.Ex.1 §3, p.8; Cl.Ex.5 §3, p.17; Cl.Ex.10 §4, p.22*].

165. In this scenario, concluding that CLAIMANT only had to employ its best efforts would place on RESPONDENT all the risks involved in the sourcing of the cocoa. This would not only go against the whole economic reasoning of the Contract but would also allow CLAIMANT to make utterly meaningless promises as to the quality of its goods.

166. CLAIMANT also argues that, under Art. 7 CISG, the Parties could have never agreed on an obligation of results since this obligation requires a high standard of specificity [*CM §145*]. However, for this article to apply there must be a gap in the CISG [*Art. 7(2) CISG; Brandner*; *Eörsi II, p.2-2; Lookofsky I §79; Salama, p.239*]. This is not the case, as the interpretation of the Contract must be made in accordance with Art. 8 CISG.

167. Even if Art. 7 CISG applied, it is not possible to extract from it a general duty to act in good faith, as it is merely an interpretation standard for the Convention itself [*Huber, pp.228-229; Honnold, p.95; Schwenzer/Hachem, p.16*]. Hence, CLAIMANT's argument that RESPONDENT did not observe such principle [*CM §145*] falls flat. In any event, RESPONDENT always acted in good faith, receiving and paying for the goods through the years [*NoA §6, p.5*] and informing CLAIMANT when the possible non-conformity came to its attention [*Cl.Ex.6 §4, p.18*].

168. Finally, CLAIMANT argues that, as the documents were drafted by RESPONDENT, they must be read against RESPONDENT under the *contra proferentem* rule [*CM §137*]. Nevertheless, this argument has no basis since the Parties' intent is recognizable [¶¶ *32-33*]. Thus, this rule must be set aside [*Schmidt-Kessel Art.8, §49, pp.168-169; Huber/Mullis, p.15; Zuppi §21, p.149; Bowling Alleys case*].

169. In this sense, both facts and law lead to the same conclusion: the Parties agreed on an obligation of results and CLAIMANT did not comply with it.

c. In any case, CLAIMANT did not fulfill its obligations to use its best efforts

170. Even if this Tribunal understands that CLAIMANT's obligation was merely to use its best efforts, RESPONDENT shall demonstrate that CLAIMANT would still not have complied with said obligation, contrary to CLAIMANT's contention [*CM §150*]. To do so, the standard established under Art. 5.1.4 PICC is useful. This provision establishes that, in order to analyze if a party used its best efforts, the efforts that a reasonable person of the same kind would have used in the same circumstances must be taken into account [*Art. 5.1.4 PICC; UNIDROIT Official Commentary, p.156*]. In the present case, this standard is certainly not fulfilled.

171. Firstly, it is important to highlight that CLAIMANT did not use its best efforts to monitor compliance by its suppliers. It is true that it hired a company, Egimus AG, to make an on-site visit

to Ruritania Peoples Cocoa. However, the company chosen by CLAIMANT did not examine the suitability of the State Certificate System on which CLAIMANT relied throughout the years [*PO2 §33, pp.53-54; Cl.Ex.8 §3, p.20*].

172. Considering (i) that cocoa production is especially prone to fraud and unsustainability [*see Candy Industry News Article; Confectionary News Article*], (ii) that certificating a good without making sure that it actually contains the characteristics certified is meaningless [*Souvenir coins case*] and (iii) that the Ruritania's certification process was poorly conceived from the start and had some real flaws [*Cl.Ex.7 §4, p.19*], it stands to reason that a proper audit should have been made and that it would reveal the inadequacy of the certificates, preventing all problems the Parties now face. Nonetheless, unlike any reasonable merchant would do, CLAIMANT opted to blindly trust on the certification.

173. CLAIMANT also has failed when it comes to taking the necessary actions when the fraud scheme was uncovered. First of all, as unreasonable as it may be, CLAIMANT seems to simply turn a blind eye to the news of its own country – Equatoriana. The fraud had been mentioned both by the Equatoriana state news channel on 19 January 2017 [*Resp.NoA §14, p.26*] and Michelgault, the leading business newspaper in Equatoriana on 23 January 2017 [*NoA §7, p.5*]. Nonetheless, CLAIMANT acted surprised when it received RESPONDENT's email about the issue in 27 January 2017 [*NoA §7, p.5*].

174. CLAIMANT also opted to ignore any developments in Ruritania itself. The scheme was cracked down by Ruritanian authorities around 6 December 2016 [*Cl.Ex.7 §2, p.19*] and criticized by UNEP's special report regarding deforestation in Ruritania on 6 January 2017 [*Cl.Ex.6 §2, p.18; Cl.Ex.7 §2, p.19*]. It seems that none of those facts deserved CLAIMANT's attention.

175. If it was indeed using its best efforts, CLAIMANT would have known about the Ruritanian operation or, at the very least, about UNEP's report or the news broadcast in its own country. However, once again, RESPONDENT was the one to save the day and inform CLAIMANT of something of its own responsibility. In fact, only on 10 February 2017 CLAIMANT recognized the possibility that its own supplier was involved in the certification fraud scheme [*Cl.Ex.9 §2, p.21*]. There is no doubt that those are not the efforts a reasonable person of the same kind would have used in the same circumstances.

2. The goods delivered by CLAIMANT were also non-conforming under Art. 35(2) CISG

176. RESPONDENT has already demonstrated that CLAIMANT breached the Contract under Art. 35(1) CISG [¶¶ *142-175*]. Notwithstanding, it also did so under Art. 35(2) CISG. Initially, it must be pointed out that Art. 35(2) CISG provides the implied legal requirements for conformity in every contract governed by the CISG, which must be observed even if the contractual terms are broad enough [*Hyland, p.315; see Kröll §62, p.505*]. The four conditions of Art. 35(2) CISG are cumulative and, therefore, failure to perform any of the them is sufficient to lead to the non-conformity of the goods [*see Kröll §61, p.505; Lookofsky III, p.90*].

177. Art. 35(2) CISG sets out the obligation of the seller for delivering goods that are fit (a) for the purposes for which goods of the same description would ordinarily be used and (b) for any particular purpose expressly or impliedly made known to the seller at the time of conclusion of the contract, by use of appropriate and reasonable trust in the competence and judgment of the seller. It also determines that the goods must (c) be of the same quality of the good the seller held as a sample or model and (d) be contained or packaged in an adequate manner to the preservation of the goods. On the contrary of what was argued by CLAIMANT [*CM §§151-164*], three of these obligations were not fulfilled.

178. RESPONDENT has no complaint on the packaging of the cakes [*Resp.NoA §24, p.*27] and therefore recognizes compliance with Art. 35(2)(d) CISG.

179. In regard to Art. 35(2)(c) CISG, the cake shown at the Cucina Food Fair was provided as a sample to RESPONDENT. A sample can represent one, some or all characteristics of the goods [*Bianca, p.276*]. CLAIMANT showed to RESPONDENT the King's Delight Cake at the fair and pointed out how its ingredients were sustainable sourced [*R.Ex.2, p.29*]. CLAIMANT knew that this was the most important characteristic for RESPONDENT [*Cl.Ex.1 §4, p.8; Cl.Ex.5 §3, p.17; Cl.Ex.10 §4, p.22*].

180. When CLAIMANT presented to RESPONDENT the Queen's Delight cake, it mentioned they would be "*a slightly different shaped cake*" [*Cl.Ex.3 §4, p.15*]. Therefore, it stood to reason that the use of sustainably sourced cocoa pointed out in the sample would still apply, binding CLAIMANT to comply with such requirement under Art. 35(2)(c) CISG. As it failed to do so, CLAIMANT breached the Contract.

181. Secondly, pursuant to Art. 35(2)(b) CISG, all goods delivered must be fit for any particular purpose informed, as long as the buyer trusted in the competence and judgment of the seller to

select goods for that purpose, and this trust was appropriate and reasonable [*Kröll §107, p.518; Lookofsky III, p.92; Flechtner, p.5*].

182. On the first and second requisites, CLAIMANT itself recognizes that the specific purpose was informed by RESPONDENT, and that RESPONDENT trusted CLAIMANT [*CM §§155,158*].

183. However, contrary to CLAIMANT's contention, the particular purpose informed was not simply a high-quality cake [*CM §155*]. Rather, a sustainably sourced cake to be sold at a sensitive market. This is the reason why the Parties' representatives discussed the possible impact of bad press as a result of unsustainable practices at the Cucina Food Fair [*R.Ex.5 §2, p.41*]. RESPONDENT's intention to become a Global Compact Lead Company by 2018 and its commitment to an ethical and sustainable production were also brought up [*see Cl.Ex.1 §4, p.8; Cl.Ex.2, pp.13-14*]. This discussion would make no sense if RESPONDENT merely intended to sell high quality cakes.

184. CLAIMANT also states that RESPONDENT's reliance on CLAIMANT was unreasonable [*CM §§159-162*], arguing that imposing an obligation of results would be excessive [*CM §§160-162*]. This argument was already repelled [¶¶ *158-160*].

185. Moreover, CLAIMANT itself opted to stand in the market as a company capable of delivering sustainably sourced goods [*see Cl.Ex.1 §4, p.8; Cl.Ex.3 §6, p.15; R.Ex.2, p.29*], being also a member of the UN-Global Compact [*NoA §1, p.4;* ¶ *164*]. Considering that scholars only derive the unreasonability of reliance on an evident lack of knowledge of the seller [*Bianca, pp.275-276; Hyland, p.322; Neumayer/Ming §9, p.280; CISG Secretariat Commentary, p.32*], Art. 35(2)(b) CISG must not be set aside and was indeed breached by CLAIMANT.

186. Finally, Art. 35(2)(a) CISG was also breached, as the goods were not fit for their ordinary use.

187. CLAIMANT argues that as the cakes were fit for consumption they were conforming [*CM §163*]. However, ordinary purpose includes commercial viability of the good, meaning the possibility of resale [*Viscasillas §61; Schwenzer, p.126; Dysted, p.43; Wilson, p.31; Maley, p.82; Frozen pork case; Paletas de cerdo case*].

188. It is clear that the cakes delivered were not fit for that purpose and, in fact, were not resold [*see PO2 §38, p.54*]. Indeed, it would be at least questionable to sell so-called sustainably sourced cakes if its ingredients were not truly sustainable. And even if they were seen simply as chocolate cakes, reselling them would involve a considerable risk of reputational damage [*see R.Ex.5*

§4, p.41; Valuewalk News Article; Marketingweek News Article] and financial loss [*see Resp.NoA §20, p.26*]. Therefore, the cakes were also non-conforming under Art. 35(2)(a) CISG.

189. For all these reasons, there is no room to argue that the cakes were conforming under Art. 35(2) CISG.

CONCLUSION OF SUBSTANTIAL ISSUE

190. From the exposed, it is clear that RESPONDENT's Standard Conditions govern the Contract, as Parties' conduct and statements lead to its application. Nevertheless, in the event this Tribunal sees it differently, RESPONDENT's Standard Conditions still apply since CLAIMANT itself inserted it into the Contract. Subsidiarily, under the *knock-out rule* the compatible provisions of both standard conditions remain applicable.

191. Moreover, under RESPONDENT's Standard Conditions, CLAIMANT delivered non-conforming goods. That is a result of the application of Art. 35(1) CISG, both pursuant to Art. 8 CISG, which leads to an obligation of results, and because CLAIMANT did not even employ its best efforts. The same follows under Art. 35(2) CISG, since the goods did not comply with the requirements provided therein.

REQUEST FOR RELIEF

192. In light of the above, RESPONDENT respectfully requests the Tribunal to find that:

(i) RESPONDENT's Notice of Challenge must not be decided by an appointing authority, but by the Arbitral Tribunal without Mr. Prasad's participation; in any event, Mr. Prasad shall be removed from the Arbitral Tribunal, as there are doubts as to his impartiality and independence; and

(ii) RESPONDENT's Standard Conditions are applicable; subsidiarily, none of the Parties' Standard Terms fully apply. Considering that RESPONDENT's Standard Terms applies, CLAIMANT delivered non-conforming goods as per Art. 35 CISG.

(*signed*)

ANA CAROLINA VILLA • ANNA CINTIA XIMENES •BRUNA GOLDENSTEIN • DANIELA AMARANTE
DANIELE NISSAN • GIOVANA CARNEIRO • GUILHERME MONEGALHA • GUSTAVO AZEVEDO
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