



MEMORANDUM FOR CLAIMANT

ON BEHALF OF

AGAINST

DELICATESY WHOLE FOODS SP

COMESTIBLES FINOS LTD

**39 MARIE-ANTOINE CARÊME
AVENUE
OCEANSIDE
EQUATORIANA**

**75 MARTHA STEWART DRIVE

CAPITAL CITY
MEDITERRANEO**

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS IV

INDEX OF AUTHORITIES..... VIII

INDEX OF CASESXXV

INDEX OF ARBITRAL AWARDS XXXI

STATEMENT OF FACTS..... 1

INTRODUCTION.....2

ARGUMENT.....4

ISSUE 1: THE ARBITRAL TRIBUNAL SHALL NOT DECIDE ON THE CHALLENGE OF MR PRASAD AND, EVEN IF SO, ONLY WITH MR PRASAD’S PARTICIPATION 4

A. The Arbitral Tribunal does not have the power to decide on the challenge of Mr Prasad pursuant to Art. 13(4) UNCITRAL Arbitration Rules 4

I. The appointing authority is empowered to decide on the challenge of Mr Prasad pursuant to Art. 13(4) UNCITRAL Arbitration Rules 4

II. The PARTIES did not derogate from Art. 13(4) UNCITRAL Arbitration Rules 5

B. Even if the Arbitral Tribunal was empowered to decide on the challenge, Mr Prasad should participate in the decision according to the Arbitration Agreement and Art. 13(2) Model Law 6

I. To uphold the Arbitration Agreement Mr Prasad must participate in the decision..... 6

1. Mr Prasad’s exclusion would violate due process..... 7

a. Mr Prasad’s exclusion would disturb the balanced voting power of the Arbitral Tribunal infringing Art. V(1)(d) New York Convention 7

b. Mr Prasad’s exclusion would contravene efficient proceedings 7

2. Alternatively, Mr Prasad’s exclusion would violate the principle of majority voting..... 8

II. Mr Prasad’s participation in the decision on the challenge is required pursuant to Art. 13(2) UNCITRAL Model Law..... 8

1. The wording of Art. 13(2) Model Law demands Mr Prasad’s participation in the decision on the challenge..... 9

2. The drafting committee’s intent with respect to Art. 13(2) Model Law demands Mr Prasad’s participation in the decision on the challenge..... 9

3. The very existence of Art. 13(3) Model Law demands Mr Prasad’s participation in the decision on the challenge..... 9

CONCLUSION OF ISSUE 1..... 10

| | |
|--|-----------|
| ISSUE 2: MR PRASAD SHOULD NOT BE REMOVED FROM THE ARBITRAL TRIBUNAL..... | 10 |
| A. No justifiable doubts as to Mr Prasad’s impartiality or independence exist | 11 |
| I. CLAIMANT’s non-disclosure of its funding agreement cannot create justifiable doubts | 12 |
| II. Mr Prasad’s academic article solely expresses an abstract legal opinion and cannot create justifiable doubts..... | 12 |
| III. The alleged connection of Mr Prasad’s partner to CLAIMANT’s third-party funder cannot create justifiable doubts | 13 |
| IV. Mr Prasad’s prior appointments by Mr Fasttrack’s law firm cannot create justifiable doubts .. | 15 |
| V. There is no connection between Findfunds LP and Mr Prasad which could justify a challenge of Mr Prasad..... | 16 |
| B. In any case, RESPONDENT’s challenge is time-barred pursuant to Art. 13(1) UNCITRAL Arbitration Rules | 17 |
| CONCLUSION OF ISSUE 2 | 18 |
| ISSUE 3: CLAIMANT’S CONDITIONS GOVERN THE SALES CONTRACT..... | 19 |
| A. Pursuant to Art. 14(2) CISG, RESPONDENT’s Invitation to Tender referring to RESPONDENT’s Conditions does not constitute an offer | 19 |
| B. Instead, CLAIMANT’s Tender constitutes the offer pursuant to Art. 14(1) CISG exclusively including CLAIMANT’s Conditions..... | 20 |
| I. CLAIMANT’s Tender constitutes the offer pursuant to Art. 14(1) CISG | 20 |
| II. In its Tender CLAIMANT incorporates CLAIMANT’s Conditions thereby excluding RESPONDENT’s Conditions | 20 |
| 1. CLAIMANT’s Tender includes CLAIMANT’s Conditions..... | 20 |
| 2. The inclusion of CLAIMANT’s Conditions replaces RESPONDENT’s Conditions | 21 |
| 3. CLAIMANT’s Letter of Acknowledgement does not contradict the sole application of CLAIMANT’s Conditions to the sales contract..... | 22 |
| C. RESPONDENT unconditionally accepted CLAIMANT’s Tender including exclusively CLAIMANT’s Conditions | 23 |
| D. Even if RESPONDENT’s Invitation to Tender was considered an offer, CLAIMANT’s Conditions would prevail over RESPONDENT’s Conditions due to the “last shot rule” | 23 |
| CONCLUSION OF ISSUE 3 | 24 |
| ISSUE 4: CLAIMANT DELIVERED CONFORMING CHOCOLATE CAKES..... | 25 |
| A. The chocolate cakes met the conformity requirements stipulated by the sales contract .. | 25 |
| I. The sales contract does not require ethical standards as a legally binding quality feature of the chocolate cakes | 26 |
| 1. The PARTIES’ sales contract is too indefinite regarding ethical standards for the purpose of Art. 35(1) CISG..... | 26 |

| | | |
|-----------|---|-----------|
| 2. | Legally binding ethical standards would contradict commercial sense and burden CLAIMANT with unforeseeable risks infringing Artt. 74, 7(2) CISG..... | 27 |
| 3. | The PARTIES’ mutual Global Compact Membership does not require adherence to its ethical standards as a quality feature of the goods..... | 28 |
| 4. | The PARTIES’ pre-contractual negotiations did not lead to ethical standards becoming contractually binding..... | 28 |
| II. | In any event, CLAIMANT used its best efforts to respect ethical standards..... | 29 |
| 1. | The contract only called for best efforts to respect ethical standards..... | 29 |
| a. | The indeterminate wording of the contract could, at best, create obligations to use best efforts .. | 29 |
| b. | The modest price of the chocolate cakes cannot compensate the risk of a guarantee .. | 30 |
| c. | The contract contains a mutual responsibility of the PARTIES to ensure adherence to ethical standards, distinctly indicating that a guarantee was not intended .. | 30 |
| 2. | CLAIMANT used its best efforts and delivered conforming goods..... | 31 |
| B. | Since the PARTIES have conclusively stipulated quality requirements in the contract RESPONDENT cannot resort to Art. 35(2) CISG..... | 32 |
| C. | Even if RESPONDENT could resort to Art. 35(2) CISG CLAIMANT delivered conforming chocolate cakes..... | 32 |
| I. | The chocolate cakes are fit for the particular purpose made known to CLAIMANT by RESPONDENT pursuant to Art. 35(2)(b) CISG | 32 |
| 1. | The chocolate cakes were fit for RESPONDENT’s goal to become a Global Compact LEAD Company | 33 |
| 2. | No further particular purpose was made sufficiently clear in order to become relevant under Art. 35(2)(b) CISG..... | 33 |
| II. | Even if another particular purpose was defined, it was unreasonable for RESPONDENT to rely on CLAIMANT’s skill and judgement..... | 34 |
| III. | The chocolate cakes were fit for the ordinary purpose pursuant to Art. 35(2)(a) CISG | 34 |
| | CONCLUSION OF ISSUE 4 | 35 |
| | PRAYER FOR RELIEF | 35 |

INDEX OF ABBREVIATIONS

| | |
|------------------------------|---|
| & | and |
| AG | <i>Aktiengesellschaft</i> (joint-stock company) |
| AGB | <i>Allgemeine Geschäftsbedingungen</i> (Standard Terms and Conditions) |
| Apr | April |
| Art./Artt. | Article/Articles |
| BeckOK | <i>Beck'scher Online-Kommentar</i> |
| BGB | <i>Bürgerliches Gesetzbuch</i> (German Civil Code) |
| BGH | <i>Bundesgerichtshof</i> (German Federal Court of Justice) |
| cf. | confer |
| CISG | United Nations Convention on Contracts for the International Sale of Goods (1980) |
| CLAIMANT's Conditions | CLAIMANT's General Conditions of Sale |
| CSR | corporate social responsibility |
| e.g. | <i>exempli gratia</i> (example given) |
| ed. | editon |
| ed/eds | editor/editors |
| emph. add. | emphasis added |

| | |
|-----------------------|--|
| et al. | <i>et alii</i> (and others) |
| et seq. | <i>et sequentes</i> (and that which follows) |
| et seqq. | <i>et sequentia</i> (and those which follow) |
| EWiR | <i>Entscheidungen zum Wirtschaftsrecht</i> |
| FAQ | Frequently Asked Questions |
| Feb | February |
| i.e. | <i>id est</i> (that is) |
| IBA | International Bar Association |
| IBA Guidelines | IBA Guidelines on Conflicts of Interest in International Arbitration |
| ibid. | <i>ibidem</i> (in the same place) |
| ICC | International Chamber of Commerce |
| Int'l Arb | International Arbitration |
| Jan | January |
| Jul | July |
| Jun | June |
| LCIA | London Court of International Arbitration |
| LG | <i>Landgericht</i> (German District Court) |

| | |
|--------------------------------|---|
| Ltd | Limited |
| Mar | March |
| Model Law | UNCITRAL Model Law |
| MüKo | <i>Münchener Kommentar</i> |
| No. | Number |
| NY-Convention | United Nations Convention on the Recognition and Enforcement of Foreign Awards (1958) |
| OLG | <i>Oberlandesgericht</i> (German Regional Court of Appeal) |
| p./pp. | page/pages |
| para./paras. | paragraph/paragraphs |
| PO | Procedural Order |
| RESPONDENT's Conditions | RESPONDENT's General Conditions of Contract |
| Sec. | Section |
| Sep | September |
| UAR | UNCITRAL Arbitration Rules |
| UN | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNIDROIT | International Institute for the Unification of Private |

Law

USD

United States Dollar

v.

versus

ZPO

Zivilprozessordnung (German Code of Civil Procedure)

INDEX OF AUTHORITIES

- BBC NEWS** Danone baby food unit ‘shooked’ by China’s bribery claims In para. 151
Available at:
<https://tinyurl.com/y7m6xeou>
(link shorted)
Last access: 07 December 2017
Cited as: *Danone corruption scandal*
- BERGER, Klaus Peter** Die Einbeziehung von AGB in internationale Kaufverträge In para. 87
In: Private and Commercial Law in European and Global Context, Festschrift für Norbert Horn
Berlin (2011)
pp. 3-20
Cited as: *Berger*
- BISHOP, Doak** Practical Guideline for Interviewing, In paras. 50, 62
REED, Lucy Selecting and Challenging Party Appointed Arbitrators
In: International Commercial Arbitration 1998
pp. 395-430
Cited as: *Bishop/Reed*
- BORN, Gary B.** International Commercial Arbitration, In paras. 16, 50, 56,
2nd ed. 62, 73
Alphen aan den Rijn (2014)
Cited as: *Born*

| | | |
|---|---|---------------------------------|
| BRODA , Stephan | Marketing-Praxis – Ziele, Strategien, Instrumentalien Wiesbaden (2005) Cited as: <i>Broda</i> | In para. 160 |
| BRUNNER , Christoph | Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration Alphen aan den Rijn (2009) Cited as: <i>Brunner</i> | In paras. 131, 141 |
| BUTLER , Petra | The CISG – A Secret Weapon in the Fight for a Fairer World? In: 35 years CISG and beyond International Commerce and Arbitration Volume 19 Den Haag (2015) pp. 295-316 Cited as: <i>Butler</i> | In para. 115 |
| CARON , David D. CAPLAN , Lee M. | The UNCITRAL Arbitration Rules: A Commentary (with an Integrated and Comparative Discussion of the 2010 and 1976 UNCITRAL Arbitration Rules), 2 nd ed. Oxford (2013) Cited as: <i>Caron/Caplan</i> | In paras. 11, 16, 34, 41, 43 |

| | | |
|--|--|-----------------|
| CISG ADVISORY COUNCIL OPINION | CISG Advisory Council Opinion No.13 Inclusion of Standard Terms under the CISG Available at: https://tinyurl.com/yd73qdva (link shortened) Last access: 07 December 2017 Cited as: <i>CISG-AC Opinion No. 13</i> | In paras. 79,87 |
| CISG ADVISORY COUNCIL OPINION | CISG Advisory Council Opinion No. 7 Exemption of Liability for Damages Under Article 79 of the CISG Available at: https://tinyurl.com/yys5evjq (link shortened) Last access: 07 December 2017 Cited as: <i>CISG-AC Opinion No. 7</i> | In para. 137 |
| CISG SECRETARIAT | 1978 Secretariat Commentary Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat UN DOC. A/CONF. 97/5 Available at: https://tinyurl.com/y9qdxsrx (link shortened) Last access: 07 December 2017 Cited as: <i>Secretariat Commentary</i> | In para. 95 |

- CORREA**, Laura Lozano Spanish Arbitration Act, Article 35 In para. 27
 [Adoption of decisions by arbitration
 panel]
 The Spanish Arbitration Act:
 A Commentary
 pp. 215-218
 Madrid (2016)
 Cited as: *Correa*
- CRAIG**, W. Laurence International Chamber of Commerce In para. 50
PARK, William W. Arbitration, 4th ed.
PAULSSON, Jan Oxford (2015)
PETROCHILOS, Georgios Cited as: *Craig/Park/Paulsson*
ROMERO, Eduardo Silva
- CROFT**, Clyde A Guide to the UNCITRAL Arbitration In para. 13
KEE, Christopher Rules, 1st ed.
WAINCYMER, Jeffery Cambridge (2013)
 Cited as: *Croft/Kee/Waincymer*
- DAELE**, Karel Challenge and Disqualification of In para. 72
 Arbitrators in International Arbitration
 Alphen aan den Rijn (2012)
 Cited as: *Daele*
- FEJÖS**, Andrea Battle of Forms under the Convention on In para. 107
 Contracts for the International Sale of
 Goods (CISG): A Uniform Solution?
 In: Vindobona Journal of International
 Commercial Law & Arbitration 2007
 pp. 113-129
 Cited as: *Fejös*

- FERRARI, Franco** International Sales Law – CISG – in a In para. 96
TORSELLO, Marco Nutshell
 St Paul (2014)
 Cited as: *Ferrari/Torsello*
- FERRARI, Franco** Internationales Vertragsrecht, 2nd ed. In para. 145
KIENINGER, Eva Maria München (2012)
MANKOWSKI, Peter Cited as:
OTTE, Karsten *Ferrari/Kieninger/Mankowski/ Author*
SAENGER, Ingo
SCHULZE, Götz
STAUDINGER, Ansgar
- GILETTE, Clayton P.** Warranties and “Lemons” under CISG In para. 135
FERRARI, Franco Article 35(2)(a)
 In: Internationales Handelsrecht 2010
 pp. 2-17
 Cited as: *Gillette/Ferrari*
- GRIMMER, Sarah** The Expanded Role of the Appointing In paras. 11, 18
 Authority under the UNCITRAL
 Arbitration Rules 2010
 In: Journal of International Arbitration
 2011
 pp. 501-517
 Cited as: *Grimmer*
- THE GUARDIAN** Firms such as Kellogg’s, Unilever and In para. 151
 Nestlé use ‘child-labour palm oil’
 Available at: <https://tinyurl.com/zj4pm3c>
 (link shortened)
 Last access: 07 December 2017
 Cited as: *Involvement of Global Compact
 LEAD Companies in corruption*

- HENSCHEL**, René Franz Conformity of Goods in International In para. 135
Sales Governed by CISG Article 35:
Caveat Venditor, Caveat Emptor and
Contract Law as Background and as a
Competing Set of Rules
In: Nordic Journal of Commercial
Law 2004
pp. 1-21
Cited as: *Henschel*
- HODGES**, Paula The Arbitrator and Arbitration In para. 43
Procedure, The Proliferation of “Soft
Laws” in International Arbitration: Time
to Draw the Line?
In: Austrian Yearbook on International
Arbitration 2015
pp. 205-229
Cited as: *Hodges*
- HOLTZMANN**, Howard M. A Guide to the UNCITRAL Model Law In paras. 26, 32
NEUHAUS, Joseph E. on International Commercial Arbitration:
Legislative History and Commentary
Alphen aan den Rijn (1995)
Cited as: *Holtzmann/Neubaus*
- HUBER**, Peter The CISG: A New Textbook for Students In para. 95
MULLIS, Alastair and Practitioners
München (2007)
Cited as: *Huber/Mullis*

- | | | |
|-------------------------------|--|------------------|
| HUSEYNLI, Kamal | Different Approaches to Conflicting Standard Terms under the United Nations Convention on Contracts for the International Sale of Goods In: Baku State University Law Review 2016 pp. 197-205 Cited as: <i>Huseynli</i> | In para. 107 |
| KAROLLUS, MARTIN | UN Kaufrecht: Eine systematische Darstellung für Studium und Praxis Wien (1991) Cited as: <i>Karollus</i> | In para. 87 |
| KOCH, Christopher | Standards and Procedures for Disqualifying Arbitrators In: Journal of International Arbitration 2003 pp. 325-353 Cited as: <i>Koch</i> | In paras. 12, 36 |
| KOH, Will Sheng Wilson | Think Quality Not Quantity: Repeat Appointments and Arbitrators Challenge In: Journal of International Arbitration 2017 pp. 711-746 Cited as: <i>Kob</i> | In para. 62 |

- KRÖLL, Stefan** National Report for Germany (2007) In paras. 32, 36
In: ICCA International Handbook on
Commercial Arbitration, Jan Paulsson,
Lisa Bosman (eds)
pp. 1-70
Alphen aan den Rijn (1984)
Supplement No. 48, 2007
Cited as: *Paulsson/Bosman/Kröll*
- KRÖLL, Stefan** UN Convention on Contracts on the In paras. 13, 79, 99,
MISTELIS, Loukas International Sale of Goods (CISG) 107, 110, 112, 117,
VISCASILLAS, Pilar Perales München (2011) 126, 130, 153, 156
Cited as: *Kröll/Mistelis/Viscasillas/Author*
- MA, Winnie Jo-Mei** Procedure for Challenging Arbitrators: In para. 26
Lessons for and from Taiwan
In: Contemporary Asia Arbitration
Journal 2012
pp. 293-326
Cited as: *Ma*
- MAGNUS, Ulrich** Last Shot vs. Knock Out – Still Battle In para. 104
over the Battle of Forms under the CISG
In: Commercial Law Challenges in the
21st Century; Jan Hellner in memorium
Stockholm (2007)
pp. 185-200
Cited as: *Magnus*

- MALEY, Kristian** The Limits to the Conformity of Goods In paras. 126, 135
in the United Nations Convention on
Contracts for the International Sale of
Goods (CISG)
In: International Trade & Business Law
Review 2009
pp. 82-126
Cited as: *Maley*
- MANIRUZZAMAN, Munir** The Authority of a Truncated Arbitral In para. 23
Tribunal – Straight Path or Puzzle?
In: Kluwer Arbitration Blog 2012
Available at:
<https://tinyurl.com/ycystn28>
(link shortened)
Last access: 07 December 2017
pp. 22-23
Cited as: *Maniruzzaman*
- MANKOWSKI, Peter** Die Ablehnung von Schiedsrichtern In para. 24
In: Zeitschrift für Schiedsverfahren
Heft 6 (2004)
pp. 304-313
Cited as: *Mankowski*
- MCILWRATH, Michael** International Arbitration and Mediation: In para. 50
SAVAGE, John A Practical Guide
Alphen aan den Rijn (2010)
Cited as: *McIlwrath/Savage*
- MUSIELAK, Hans-Joachim** Zivilprozessordnung mit In para. 36
VOIT, Wolfgang Gerichtsverfahrensgesetz, 14th ed.
München (2017)
Cited as: *Musielak/Voit/Author*

| | | |
|--|--|--------------------------|
| NALIN , Paulo | International Fair Trade (Fair Trade in International Contracts and Ethical Standard) In: 35 Years CISG and Beyond International Commerce and Arbitration Volume 19 (2015) pp. 317-340 Cited as: <i>Nalin</i> | In para. 121 |
| PAULSSON , Jan PETROCHILOS , Georgios | The Revised UNCITRAL Arbitration Rules Alphen aan den Rijn (2017) Cited as: <i>Paulsson/Petrochilos</i> | In paras. 11, 18, 47, 73 |
| PILTZ , Burghard | Internationales Kaufrecht: Das UN-Kaufrecht in praxisorientierter Darstellung, 2 nd ed. München (2008) Cited as: <i>Piltz I</i> | In para. 121 |
| PILTZ , Burghard | AGB in UN-Kaufverträgen In: Internationales Handelsrecht 2004 pp. 133-138 Cited as: <i>Piltz II</i> | In para. 107 |
| PILTZ , Burghard | Neue Entwicklungen im UN-Kaufrecht In: Neue Juristische Wochenschrift 2007 pp. 2159-2163 Cited as: <i>Piltz III</i> | In para. 79 |

- PILTZ**, Burghard Neue Entwicklung im UN-Kaufrecht In para. 92
In: Neue Juristische Wochenschrift 2017
pp. 2449-2454
Cited as: *Piltz IV*
- RAMBERG**, Christina Emotional Non-Conformity in the In paras. 123, 126
International Sale of Goods, Particularly
in Relation to CSR-Policies and Codes of
Conduct
Available at:
<https://tinyurl.com/y9ggyd2e>
(link shortened)
Last access: 07 December 2017
Cited as: *Ramberg*
- SÄCKER**, Franz Jürgen Münchner Kommentar zum BGB In paras. 82, 87
RIXECKER, Roland Volume 3, 7th ed.
OETKER, Hartmut München (2016)
LIMPERG, Bettina Cited as: *MüKoBGB/Author*
- SANDERS**, Pieter Commentary on the UNCITRAL In para. 27
Arbitration Rules
In: Yearbook on Commercial Arbitration
1977
pp. 172-224
Cited as: *Sanders*
- SCHLECHTRIEM**, Peter Battle of the Forms in International In para. 106
Contract Law
In: Karl-Heinz Thume (ed), Festschrift
für Rolf Herber zum 70. Geburtstag 1999
pp. 36-49
Cited as: *Schlechtriem I*

- SCHLECHTRIEM, Peter** Non-Material Damages – Recovery under the CISG In para. 119
 In: Pace International Law Review 2007
 pp. 89-100
 Cited as: *Schlechtriem II*
- SCHROETER, Ulrich G.** Beteiligung auch des abgelehnten Schiedsrichters an der Entscheidung über den Ablehnungsantrag In para. 36
 In: Entscheidungen zum Wirtschaftsrecht Issue 15 (2006)
 pp. 479
 Cited as: *EWiR, 2006, 479*
- SCHWARZ, Franz T.** The Vienna Rules: A Commentary on International Arbitration in Austria In para. 35
KONRAD, Christian W. Alphen aan den Rijn (2009)
 Cited as: *Schwarz/Konrad*
- SCHWENZER, Ingeborg** Commentary on the UN Convention on the International Sale of Goods (CISG), 4th ed. In paras. 82, 92, 99, 103, 104, 115, 145, 149, 159
 Oxford (2015)
 Cited as: *Schlechtriem/Schwenger/Author*
- SCHWENZER, Ingeborg** Ethical Values and International Sales In paras. 117, 156
LEISINGER, Benjamin Contracts
 In: Commercial Law Challenges in the 21st Century; Jan Hellner in memorium Stockholm 2007
 pp. 249-275
 Cited as: *Schwenger/Leisinger*

- SCHWENZER**, Ingeborg Old Habits Die Hard: Traditional In paras. 87, 104,
MOHS, Florian Contract Formation in a Modern World 106
In: Internationales Handelsrecht 2006
pp. 239-246
Cited as: *Schwenzer/Mohs*
- SEIFI**, Jamal The Legality of Truncated Arbitral In paras. 23, 24
Tribunals (Public and Private): An
Overview in the Wake of the 1988 ICC
Rules of Arbitration
In: Journal of International Arbitration
2000 pp. 3-46
Cited as: *Seifi*
- STIEGELE**, Andreas Nochmals: Einbeziehung von In para. 87
HALTER, Rudolf Allgemeinen Geschäftsbedingungen im
Rahmen des
UN-Kaufrechts – Zugänglichmachung im
Internet
In: Internationales Handelsrecht 2003
p. 169
Cited as: *Stiegele/Halter*
- STIPPL**, Christoph The Award - Rendering of the Award by In paras. 26, 27
ÖHLBERGER, Veith Multipartite Arbitral Tribunals: How to
Overcome Lack of Unanimity?
In: Austrian Arbitration Yearbook 2008
pp. 371-399
Cited as: *Stippl/Öhlberger*

- UNCITRAL WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICES** Report of the Working Group on International Contract Practices on the Work of its seventh session
In: Yearbook of the United Nations Commission on International Trade Law 1984
pp. 190-212
Cited as: *Report Working Group 1984* In paras. 26, 34
- UNCITRAL WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICES** Report of the Working Group on International Contract Practices on the Work of its eighteenth session, Annex
In: Yearbook of the United Nations Commission on International Trade Law 1985
pp. 434-437
Cited as: *Report Working Group 1985* In para. 34
- UNITED NATIONS COMMISSION ON INTERNATIONAL SALES LAW** UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods
2012 Edition
Cited as: *Case Digest/UNCITRAL* In para. 82
- UNITED NATIONS GLOBAL COMPACT** UN Global Compact, Take Action to Deliver on the 2030 Agenda for Sustainable Development
Available at:
<https://tinyurl.com/yd6cv9p7>
(link shortened)
Last access: 07 December 2017
Cited as: *UN Global Compact, Action Platform Flyer* In para. 150

- UNITED NATIONS** Frequently Asked Questions In para. 123
GLOBAL COMPACT Available at: <https://tinyurl.com/yas4rkzs>
(link shortened)
Last access: 07 December 2017
Cited as: *UN Global Compact, FAQ*
- UNITED NATIONS** UN Global Compact, After the signature- In para. 124
GLOBAL COMPACT A Guide to Engagement in the Global
Compact
Available at:
<https://tinyurl.com/ybspuryd>
(link shortened)
Last access: 07 December 2017
Cited as: *Guide to Engagement in the Global Compact*
- UN NATIONS** UN Global Compact Lead Companies In para. 151
GLOBAL COMPACT Available at:
<https://tinyurl.com/y88t6eas>
(link shortened)
Last access: 07 December 2017
Cited as: *List of Global Compact LEAD Companies*
- VOGENAUER, Stefan** Commentary on the UNIDROIT In para. 135
Principles of International Commercial
Contracts (PICC), 2nd ed.
Oxford (2014)
Cited as: *Vogenauer/ Author*

- VON SCHLABRENDORFF, Fabian** Part II: Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure) In para. 27
- SESSLER, Anke** In: Karl-Heinz Böckstiegel, Stefan Michael Kröll et al. (eds), *Arbitration in Germany: The Model Law in Practice*, 2nd ed. Alphen aan den Rijn (2015) pp. 318-324
Cited as: *Schlabrendorff/Sessler*
- VON STAUDINGER, Julius** Wiener UN-Kaufrecht / Kommentar In paras. 82, 82,
MARTINEK, Michael zum Bürgerlichen Gesetzbuch (BGB) mit 111, 145
Einführungsgesetz und Nebengesetzen
Buch 2, Recht der Schuldverhältnisse
Berlin (2013)
Cited as: *Staudinger/Author*
- VORWERK, Volkert** BeckOK ZPO, 26th ed. In para. 36
WOLF, Christian München (2017)
Cited as: *BeckOK ZPO/Author*
- WAINCYMER, Jeffrey** Procedure and Evidence in International Arbitration In para. 56
Alphen aan den Rijn (2012)
Cited as: *Waincymer*
- WALSH, Thomas W.** The LCIA Court Decisions on Challenges In para. 48
TEITELBAUM, Ruth to Arbitrators: An Introduction
In: *Arbitration International 2011*
pp. 283-314
Cited as: *Walsh/Teitelbaum*

- WEIGAND, Frank-Bernd** Practitioner’s Handbook on International In para. 72
Commercial Arbitration, 2nd ed.
Oxford (2009)
Cited as: *Weigand*
- WILSON, Simon** Ethical Standards in International Sales In para. 123
Contracts: Can the CISG be used to
prevent Child Labour?
In: Student Research Papers University of
Wellington (2015)
Cited as: *Wilson*

INDEX OF CASES

| | | |
|----------------|--|------------------|
| AUSTRIA | Oberster Gerichtshof 06 February 1996 Case No.: 10Ob518/95 CISG online No.: 224 Cited as: <i>Propane Case</i> | In paras. 82, 87 |
| BELGIUM | Gantry v. Research Consulting Marketing Tribunal (District Court) de commerce Nivelles 19 September 1995 Case No.: R.G. 1707/93 CISG online No.: 366 Cited as: <i>Industrial Machinery Case</i> | In para. 87 |
| CANADA | Ghirardosi v. Minister of Highways for British Columbia Supreme Court 11 March 1966 Case No.: 56 DLR (2d) 469 Cited as: <i>Ghirardosi v. Minister of Highways for British Columbia</i> | In para. 60 |
| ENGLAND | Adams (FC) v. Bracknell Forest Borough House of Lords Council House of Lords Opinions of the Lords Appeal for Judgement 17 June 2004 Case No.: UKHL 29 Cited as: <i>Adams v. Bracknell Forest Borough Council</i> | In para. 73 |

| | | |
|----------------|---|------------------|
| FRANCE | <p>Agence Transcongolaise des Communications – Chemin de fer Congo Océan (ATC-CFCO) v. Compagnie Minière de l’Ogooué-Comilog Cour d’Appel Paris 01 July 1997 Cited as: <i>ATC-CFCO v. Comilog S.A</i></p> | In para. 23 |
| GERMANY | <p>BGH 31 October 2001 Case No. VIII ZR 60/01 CISG online No.: 617 Cited as: <i>Machine Case</i></p> | In paras. 79, 87 |
| | <p>BGH 08 March 1995 Case No.: VIII ZR 159/94 CISG online No.: 144 Cited as: <i>New Zealand Mussels Case</i></p> | In para. 157 |
| | <p>OLG Dresden 30 November 2010 Case No.: 10 U 269/10 CISG online No.: 2183 Cited as: <i>Underwear Case</i></p> | In para. 82 |
| | <p>Magellan International Corporation v. Salzgitter Handel GmbH OLG Köln 26 May 2006 Case No.: 16 W 25/06 CISG online No.: 1232 Cited as: <i>Kneel Bus Case</i></p> | In para. 104 |

| | |
|--------------------------------------|-------------------|
| OLG Köln | In para. 87 |
| 24 April 2013 | |
| CISG online No.: 2480 | |
| Cited as: <i>Printing Plant Case</i> | |
| OLG München | In paras. 32, 36 |
| 05 November 2013 | |
| Case No.: 34 SchH 8/13 | |
| Cited as: <i>Car park Case</i> | |
| OLG Hamburg | In para. 73 |
| 12 July 2005 | |
| Case No.: SchH 1/05 | |
| Cited as: <i>Bominflot Case</i> | |
| OLG Zweibrücken | In para. 101 |
| 31 March 1998 | |
| Case No.: 8U46/97 | |
| CISG online No.: 481 | |
| Cited as: <i>Vine Wax Case</i> | |
| LG Coburg | In paras. 87, 101 |
| 12 December 2006 | |
| Case No.: 22O38/06 | |
| CISG online No.: 1447 | |
| Cited as: <i>Plants Case</i> | |
| NETHERLANDS | |
| Rechtbank Midden-Nederland | In paras. 87, 89 |
| 16 November 2016 | |
| Case No.: C/16/412611 / HA ZA 16-252 | |
| CISG online No.: 2790 | |
| Cited as: <i>Cheese Case</i> | |

- Rechtbank Den Haag In para. 92
19 August 2015
Case No.: C/09/463597 / HA ZA 14-440
CISG online No.: 2629
Cited as: *Silicon Products Case*
- SWEDEN** Korsnäs Aktiebolag v. AB Fortum Värme In para. 64
Supreme Court
06 June 2010
Case No.: T 156-09
Cited as: *Korsnäs v. Fortum*
- SWITZERLAND** Alejandro Valverde Belmonte v. Comitato In para. 73
Olimpico Nazionale Italiano (CONI),
Agence Mondiale Antidopage (AMA) and
others
Federal Supreme Court
29 October 2010
Case No.: 4A_234/2010
Cited as: *Belmonte v. CONI*
- UNITED STATES OF AMERICA** Reed & Martin Inc v. Westinghouse In para. 56
Electric Corporation
United States Court of Appeals, Second
Circuit
12 May 1971
Case No.: 439 F.2d 1268
Cited as: *Reed v. Westinghouse*

Jerald R. Kiernan, Andrew D. Kiernan v. Piper J Affray Companies, Inc
United States Court of Appeals, Eighth
Circuit
25 February 1998
Case No.: 137 F.3d 558
Cited as: *Kiernan v. Piper* In para. 73

Fidelity Federal Bank, FSB v. Durga MA Corporation
United States Court of Appeals, Ninth
Circuit
29 October 2004
Case No.: 03-56447
Cited as: *Fidelity v. Durga* In para. 73

First Investment Corporation of the Marshall Islands v. Fujian Mawei Shipbuilding Limited
United States Court of Appeals, Fifth
Circuit
21 December 2012
Case No.: 12-30377
Cited as: *First Investment v. Fujian Mawei* In para. 23

Standard Tankers Co. v. Motor Tank Vessel
District Court, Eastern District of North
Carolina
06 September 1977
Case No.: 438 F. Supp. 153
Cited as: *Tankers v. Vessel* In para. 56

Filanto SpA v. Chilewich International Corp In para. 107
District Court of Southern New York
14 April 1992
Case No.: 789 F. Supp. 1229, 1240
Cited as: *Shoes Case*

Dealer Computer Services Inc v. Michael Motor Company Inc In para. 73
District Court, S.D. Texas
29 December 2010
Case No.: 761 F. Supp. 2d 459
Cites as: *Dealer Computer v. Michael Motor*

INDEX OF ARBITRAL AWARDS

| | | |
|---|---|------------------|
| AD HOC ARBITRATION TRIBUNAL | Methanex Corp v. United States of America Final Award of the Tribunal on Jurisdiction and Merits 03 August 2005 Cited as: <i>Methanex v. USA</i> | In para. 11 |
| INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID) | Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v. Argentine Republic 16 May 2006 Case No.: ARB/03/17 Cited as: <i>Suez v. Argentine I</i> | In para. 62 |
| | AWG Group Ltd v. Argentine Decision on the Proposal for the Disqualification of a Member of a Arbitral Tribunal 22 October 2007 Cited as: <i>AWG v. Argentine</i> | In paras. 41, 72 |
| | Vito G. Gallo v. Government of Canada Decision on the Challenge to Mr Christopher J Thomas, QC 14 October 2009 PCA Case No.: 55798 Cited as: <i>Gallo v. Canada</i> | In paras. 41 |

Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A v. The Argentine Republic
30 July 2010
Case No.: Arb/03/19
Cited as: *Suez v. Argentine II* In para. 56

Tidewater Inc and others v. Bolivarian Republic of Venezuela
Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern
23 December 2010
Case No.: Arb 10/5
Cited as: *Tidewater v. Venezuela* In para. 62

OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela
Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator
05 May 2011
Case No.: Arb/10/14
Cited as: *OPIC v. Venezuela* In para. 68

STATEMENT OF FACTS

1 The parties to this arbitration are Delicatesy Whole Foods Sp (“CLAIMANT”) and Comestibles Finos Ltd (“RESPONDENT”; together the “PARTIES”). CLAIMANT is a medium-sized manufacturer of fine bakery products incorporated in Equatoriana. RESPONDENT is a supermarket chain incorporated in Mediterraneo.

- 10 Mar 2014** RESPONDENT sends CLAIMANT an invitation to tender for the delivery of chocolate cakes. *Exhibit C1, p. 8*
- 27 Mar 2014** CLAIMANT submits its Tender referring to CLAIMANT’s standard conditions, highlighting all changes to the Invitation to Tender. *Exhibit C4, p. 16*
- 7 Apr 2014** RESPONDENT accepts CLAIMANT’s Tender notwithstanding its material changes. The PARTIES agree on *ad hoc* arbitration with three arbitrators. *Exhibit C5, p. 17*
- 2014-2016** The PARTIES successfully perform the contract. CLAIMANT delivers over 10 million exquisite chocolate cakes. *Notice of Arbitration, p. 5, No. 6*
- 27 Jan 2017** Without hard evidence, RESPONDENT stops payments and requests CLAIMANT to investigate whether one of CLAIMANT’s suppliers is involved in a fraudulent scheme regarding the distribution of plantation land in Ruritania. RESPONDENT threatens to cancel the contract. *Notice of Arbitration, p. 5, No. 7*
- 10 Feb 2017** Following thorough investigations, CLAIMANT confirms the supplier’s involvement and offers a 25% price reduction to demonstrate its goodwill. *Exhibit C9, p. 21*
- 12 Feb 2017** RESPONDENT flatly rejects CLAIMANT’s efforts to find an amicable solution and terminates the contract. *Exhibit C10, p. 22*
- 30 Jun 2017** CLAIMANT files a Notice of Arbitration, appointing Mr Prasad as its arbitrator. Enclosed in the Notice of Arbitration is Mr Prasad’s Declaration of *Notice of Arbitration, p. 4; Exhibit C11, p. 23*

Impartiality and Independence and Availability.

- 31 Jul 2017** RESPONDENT submits the Response to Notice of Arbitration and confirms the appointment of Mr Prasad notwithstanding the restrictions in his Declaration of Impartiality and Independence and Availability. *Response to Notice of Arbitration, p. 26, No. 22*
- 27 Aug 2017** RESPONDENT conducts a metadata analysis of the Notice of Arbitration leading to further inquiries as to Mr Prasad's impartiality and independence. *PO2, p. 51, No. 11*
- 14 Sep 2017** 18 days later, RESPONDENT challenges Mr Prasad. *Notice of Challenge, p. 38*

INTRODUCTION

- 2 In times when the global food industry is growing rapidly, sustainable food production is easily ignored. While many global players chose profit over ethics, CLAIMANT has been relentless in producing goods that are not only of the highest quality but also sourced ethically. For well over two years, CLAIMANT was delighted to have RESPONDENT as a like-minded business partner on its side. Consequently, CLAIMANT was bewildered when faced with RESPONDENT's unwillingness to preserve the PARTIES' fruitful relationship.
- 3 Upon investigating the disclosure of an unforeseeable, high-level bribery scandal, mainly involving the Ruritanian government, CLAIMANT found itself amongst many of the scandal's innocent victims. As a company, supposedly familiar with the hardships of ethical business conduct, RESPONDENT could have dealt with this predicament in the cooperative manner necessary, to uphold the PARTIES' mutual goal: Improving the global food industry.
- 4 Instead, RESPONDENT only sought to promote its own reputation and unlawfully terminated the contract with CLAIMANT. RESPONDENT alleged that CLAIMANT delivered non-conforming chocolate cakes and based this allegation on the applicability of RESPONDENT's standard conditions.
- 5 However, RESPONDENT presents a distorted picture of the facts. In its offer, CLAIMANT unambiguously made clear that **its own** standard conditions would govern the PARTIES' sales contract. RESPONDENT has accepted CLAIMANT's offer unconditionally. Accordingly, CLAIMANT's standard conditions govern the PARTIES' sales contract (**Issue 3**).

- 6 Even in the unlikely event that the Arbitral Tribunal deems RESPONDENT's standard conditions applicable, RESPONDENT's termination of the contract is by no means justified. RESPONDENT's standard conditions require that goods be produced in a responsible manner. CLAIMANT thoroughly fulfilled this demand, by choosing only suppliers that adhere to CLAIMANT's Code of Conduct, which RESPONDENT admitted to be impressive. Further, CLAIMANT conducts a strict surveillance mechanism over all of its suppliers which, by RESPONDENT's own admission, was one of the deciding factors for the conclusion of the contract. Despite its remarkable efforts, it was impossible for CLAIMANT, a medium-sized bakery, to prevent a bribery scheme amongst foreign government officials. This however, is precisely what RESPONDENT unjustifiably demands by claiming the existence of a guarantee. Such a guarantee would not only contradict common business sense, but is not derivable from the PARTIES' contract either. Hence, CLAIMANT has delivered conforming goods pursuant to Art. 35 CISG even if RESPONDENT's standard conditions were applicable (**Issue 4**).
- 7 On facing the repercussions of its unlawful behaviour, RESPONDENT resorts to a groundless challenge of Mr Prasad, the CLAIMANT-appointed arbitrator, to delay the proceedings. RESPONDENT repeatedly and purposefully misinterprets the PARTIES' contract, by alleging that the contract empowered the tribunal to decide on the challenge. Beyond that, RESPONDENT demanded Mr Prasad's exclusion from the decision on the challenge. However, such allegation would contravene the procedural rules chosen by the PARTIES because these rules allocate the power to decide on the challenge to the appointing authority. Even if the Arbitral Tribunal decided to adjudicate the challenge itself, Mr Prasad must be included as a judge in this decision (**Issue 1**).
- 8 Either way, Mr Prasad's professional conduct as an experienced arbitrator is impervious to RESPONDENT's challenge. Contrary to RESPONDENT's unjustified allegations Mr Prasad has no connections that could give rise to justifiable doubts as to his impartiality or independence. The Arbitral Tribunal should therefore reject RESPONDENT's challenge of Mr Prasad (**Issue 2**).

ARGUMENT**ISSUE 1: THE ARBITRAL TRIBUNAL SHALL NOT DECIDE ON THE CHALLENGE OF MR PRASAD AND, EVEN IF SO, ONLY WITH MR PRASAD'S PARTICIPATION**

9 RESPONDENT challenged Mr Prasad as an arbitrator by written notice of 14 September 2017 alleging justifiable doubts as to his impartiality and independence in the current arbitral proceedings [*Notice of Challenge*, p. 38, No. 1]. CLAIMANT respectfully requests the Arbitral Tribunal to reject RESPONDENT's challenge. Art. 13(4) UNCITRAL Arbitration Rules ("UAR") precludes the Arbitral Tribunal from deciding on the challenge. Instead, the power to decide on the challenge is assigned to a different independent authority to be chosen by the PARTIES ("**appointing authority**") (A). Even if the Arbitral Tribunal had the power to decide on the challenge, Mr Prasad should participate in that decision (B).

A. The Arbitral Tribunal does not have the power to decide on the challenge of Mr Prasad pursuant to Art. 13(4) UNCITRAL Arbitration Rules

10 As Danubia is the seat of arbitration, the UNCITRAL Model Law ("**Model Law**") governs the proceedings as *lex loci arbitri* [*Notice of Arbitration*, p. 6, No. 13(b); PO1, p. 49, No. 3(4)]. Following Art. 19(1) Model Law the PARTIES chose the UAR as applicable procedural rules [*Exhibit C2*, p. 12, Clause 20]. Pursuant to Art. 13(4) UAR the appointing authority has the power to decide on the challenge of Mr Prasad (I). Since the PARTIES did not derogate from Art. 13(4) UAR (II), the Arbitral Tribunal cannot decide on the challenge.

I. The appointing authority is empowered to decide on the challenge of Mr Prasad pursuant to Art. 13(4) UNCITRAL Arbitration Rules

11 Art. 13(4) UAR requires the appointing authority to decide on the challenge. Pursuant to Art. 6(1) UAR, the appointing authority is an independent authority empowered to make a number of decisions with respect to the constitution of the arbitral tribunal, including the decision on a challenge [*Grimmer*, p. 501; cf. *Paulsson/Petrochilos*, pp. 43 et seq.]. As the appointing authority is competent to decide on the constitution of the arbitral tribunal, its power and the arbitral tribunal's power are mutually exclusive [*Caron/Caplan*, p. 272]. Thus, an arbitral tribunal is not competent to rule on the challenge of an arbitrator. Accordingly, in *Methanex v. USA* the arbitral tribunal found that "under the UAR it [the arbitral tribunal] has no role [...] to decide upon any challenge by a party to any of the arbitrators". The tribunal emphasized that all decisions concerning the tribunal's members "are reserved to the appointing authority" [*Methanex v. USA*].

12 Moreover, the drafting committee of the UAR intentionally and explicitly established the appointing authority for *ad hoc* arbitration, inter alia, to deal with the challenge procedure [Koch, p. 338]. Consequently, the power to decide on the challenge lies with the independent appointing authority, precluding the Arbitral Tribunal from a decision on the challenge. CLAIMANT therefore requests that the Arbitral Tribunal reject RESPONDENT's challenge.

II. The PARTIES did not derogate from Art. 13(4) UNCITRAL Arbitration Rules

13 Contrary to RESPONDENT's allegation [Notice of Challenge, p. 39, No. 8], the PARTIES did not derogate from Art. 13(4) UAR. A derogation from Art. 13(4) UAR requires an agreement by the parties pursuant to Art. 1(1) UAR [cf. Croft/Kee/Waincymer, p. 12, para. 1.1]. Whether the parties have agreed must be assessed by interpretation of the dispute resolution clause ("**Arbitration Agreement**"). As the Arbitration Agreement is subject to the CISG [PO1, p. 48, No. 1] such interpretation is conducted in accordance with Art. 8 CISG [Kröll/Mistelis/Viscasillas/Zuppi, Art. 8 CISG, para. 1]. Pursuant to Art. 8(2) CISG, a party's objective intent is determined by the understanding of a reasonable person of the same kind as the addressee [Kröll/Mistelis/Viscasillas/Zuppi, Art. 8 CISG, para. 21].

14 RESPONDENT alleges that by agreeing on arbitration "without the involvement of any arbitral institution" [Notice of Challenge, p. 39, No. 8] the PARTIES derogated from Art. 13(4) UAR. However, taking into account the relevant circumstances of the case at hand a reasonable third person would not consider the PARTIES' Arbitration Agreement to derogate from Art. 13(4) UAR.

15 RESPONDENT briefed CLAIMANT about its fears "[to be] again the subject of a negative press campaign" [Exhibit C1, p. 8, para. 3; cf. p. 26, para. 20]. Fearing negative press, RESPONDENT's sole reason for demanding *ad hoc* arbitration was to keep information confidential [PO2, p. 52, No. 21; Notice of Challenge, p. 39, para. 8]. However, RESPONDENT's confidentiality-concern is not compromised by Art. 13(4) UAR as the involvement of an appointing authority does not endanger confidentiality in any way.

16 The appointing authority referred to in Art. 13(4) UAR is particularly different from an arbitral institution. Pursuant to Art. 6(1) UAR, an appointing authority is an independent authority chosen by the parties to make a number of decisions with respect to the constitution of the arbitral tribunal. An arbitral institution on the other hand is a "specialized and highly-supportive legal regime" that intervenes and takes on the role of administering the arbitration process [Born, pp. 97 et seq.]. For this purpose, an arbitral institution receives sensitive information about the case itself. This distinguishes an arbitral

tribunal from an appointing authority. As stipulated under Art. 6(5) UAR, the appointing authority may only request information necessary for exercising its power to decide on an arbitrators' challenge [*Caron/Caplan, p. 154*]. Such information is restricted and exclusively contains details about Mr Prasad, an individual with no relationship to RESPONDENT at all. Under no circumstances would confidential information concerning RESPONDENT's business have to be made known.

17 Therefore, a reasonable third person would not have considered the agreement to conduct the proceedings "without the involvement of any arbitral institution" in light of RESPONDENT's confidentiality-concern as an exclusion of Art. 13(4) UAR.

18 Pursuant to Art. 6(1) UAR, the parties are free to jointly choose **any person** as appointing authority [*Paulsson/Petrochilos, p. 44; Grimmer, p. 502*]. This means that where the parties exclude arbitral institutions for concerns of confidentiality, they may still choose an individual person with limited access to information as the appointing authority for the challenge procedure. Therefore, the exclusion of "any arbitral institution" in the PARTIES' Arbitration Agreement does not equal an exclusion of Art. 13(4) UAR.

19 Concluding, the PARTIES did not want to exclude Art. 13(4) UAR. Pursuant to Art. 13(4) UAR, the Arbitral Tribunal does not have the power to decide on the challenge.

B. Even if the Arbitral Tribunal was empowered to decide on the challenge, Mr Prasad should participate in the decision according to the Arbitration Agreement and Art. 13(2) Model Law

20 The Arbitral Tribunal could only decide on the challenge if Art. 13(4) UAR were excluded. In that case, the challenge procedure would be governed by the Arbitration Agreement, subsidiarily by Art. 13(2) Model Law. According to the Arbitration Agreement Mr Prasad must participate in the decision (I). Even if the Arbitration Agreement was inconclusive concerning Mr Prasad's participation in the decision, the standards established in Art. 13(2) Model Law would require Mr Prasad to participate in the decision (II).

I. To uphold the Arbitration Agreement Mr Prasad must participate in the decision

21 The Arbitral Tribunal has to give full effect to the Arbitration Agreement pursuant to Art. 13(1) Model Law. In the Arbitration Agreement, the PARTIES chose the UAR to govern the proceedings [*Exhibit C2, p. 6, No. 13*]. Thereby, the PARTIES chose to adhere to the UAR's general principles. The principles of due process (1) or majority voting (2) would be undermined if Mr Prasad were excluded.

1. Mr Prasad's exclusion would violate due process

22 The principle of due process enshrined in Art. 17(1) UAR requires a *fair* and *efficient* proceeding. Mr Prasad's exclusion would lead to an *unfair* proceeding by disturbing the voting power of the Arbitral Tribunal (a). Moreover, the exclusion would impede the *efficiency* of the proceeding as it would increase the risk of deadlock (b).

a. Mr Prasad's exclusion would disturb the balanced voting power of the Arbitral Tribunal infringing Art. V(1)(d) New York Convention

23 The balanced voting power of the Arbitral Tribunal is of paramount importance to guarantee fair arbitral proceedings. Several national courts refused to enforce decisions rendered by only two arbitrators, where the arbitration agreement required three arbitrators [*ATC-CFCO v. Comilog S.A.*; *PIM v. Babcock AG*; *First Investment v. Fujian Mawei*]. The courts refused the enforcement because “an award rendered by only two arbitrators was not **in accordance with the agreement** of the parties on a three-member tribunal” [*Maniruzaman*, p. 3, *emph. add.*] thereby infringing Art. V(1)(d) NY-Convention. Furthermore, in some cases the enforcement was refused due to violation of the principles of **equality of treatment and equal representation** on the arbitral tribunal [*ibid.*].

24 In the case at hand, the PARTIES agreed on having three arbitrators, one to be appointed by each party, and the presiding arbitrator to be chosen by the party-appointed arbitrators [*Notice of Arbitration*, p. 6, No. 13]. This composition of the Arbitral Tribunal represents a balance between the parties' interests albeit arbitrators not being representatives of the parties [*Seifi*, p. 3]. This balance would be disturbed by excluding Mr Prasad. If the Arbitral Tribunal only had one party-appointed arbitrator, the interests of the other party would be consciously ignored [*cf. Mankowski*, p. 305]. In this case, RESPONDENT's interests would be overrepresented. Ms Reitbauer, RESPONDENT's appointed arbitrator, would remain on the Arbitral Tribunal, whilst CLAIMANT's interests would be left without protection. This imbalance of representation contravenes the principle of fair proceedings.

25 In order to maintain the balance of voting power the PARTIES agreed upon, Mr Prasad must participate in the decision.

b. Mr Prasad's exclusion would contravene efficient proceedings

26 Pursuant to Art. 17(1) UAR, efficient proceedings require the avoidance of “unnecessary delay and expense”. “Unnecessary delay and expense” occur, if decision-making ends in deadlock [*Stippel/Öhlberger*, p. 376]. Deadlock may be caused if only two arbitrators remained on the tribunal because then any decision would require unanimity [*Ma*, p. 302]. Deadlock in

a two-arbitrator tribunal could only be prevented if the presiding arbitrator had the power to decide on the challenge on its own. However, pursuant to Art. 33(2) UAR a presiding arbitrator's exclusive decision is only permitted on "questions of procedure". The drafters of the UAR in turn did not consider the decision on a challenge of an arbitrator as a "question of procedure" [*Report Working Group 1984, p. 194; Holtzmann/Neubaus, p. 421*]. Hence, the presiding arbitrator, Ms Rizzo, could not prevent a deadlock of proceedings. This entails that the exclusion of Mr Prasad increases the risk of deadlock and therefore of inefficient proceedings. Consequently, all three arbitrators must decide on the challenge.

2. Alternatively, Mr Prasad's exclusion would violate the principle of majority voting

27 Even if the presiding arbitrator were able to prevent a deadlock of proceedings, the principle of majority voting would be violated. The principle of majority voting is enshrined in Art. 33(1) UAR: "When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators". The underlying idea to this principle is that the majority's decision protects the parties against extreme views as it "is based on more reasonable and better grounds" [*Correa, p. 216; cf. Sanders, p. 208, cf. Stippel/Öhlberger, p. 375*]. Thus, the majority's solution is a more legitimate, authoritative and amicable approach [*cf. Schlabrendorff/Sessler, p. 320*].

28 At hand, the PARTIES have appointed three arbitrators [*Exhibit C2, p. 6, No. 13*] to ensure that all decisions are made by a majority of members of the tribunal. However, there could not be a majority vote, if the presiding arbitrator resolved a deadlock on its own. Hence, an exclusion of Mr Prasad would either entail the risk of deadlock or jeopardize a majority vote.

29 Concluding, Mr Prasad must participate in the decision to uphold the Arbitration Agreement on fair and efficient arbitral proceedings.

II. Mr Prasad's participation in the decision on the challenge is required pursuant to Art. 13(2) UNCITRAL Model Law

30 Even if the Arbitration Agreement was inconclusive concerning Mr Prasad's participation in the decision, Art. 13(2) Model Law would require the *entire* Arbitral Tribunal to decide.

31 Art. 13(2) Model Law states "[u]nless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the Arbitral Tribunal shall decide on the challenge". An interpretation of the wording (1) and the drafter's intentions (2) of Art. 13(2) Model Law reveals that the challenged arbitrator must participate in the decision. Moreover, the purpose of Art. 13(2) Model Law requires the challenged arbitrator to participate (3).

1. The wording of Art. 13(2) Model Law demands Mr Prasad's participation in the decision on the challenge

32 Art. 13(2) Model Law states that “**the Arbitral Tribunal** shall decide on the challenge”. The arbitral tribunal consists of all arbitrators, including the challenged arbitrator [*Car park Case; Paulsson/Bosman/Kröll, p. 23; Holtzmann/Neubaus, p. 407*].

33 At hand, the Arbitral Tribunal is composed of three arbitrators [*Exhibit C2, p. 6, No. 13*], one of them being Mr Prasad. Hence, the clear wording of Art. 13(2) Model Law demands that Mr Prasad participates in the decision.

2. The drafting committee's intent with respect to Art. 13(2) Model Law demands Mr Prasad's participation in the decision on the challenge

34 When interpreting Art. 13(2) Model Law due consideration must be given to the drafting committee's intent. The drafting committee of the Model Law were the UNCITRAL Working Groups [*Caron/Caplan, p. 3*]. The 38th UNCITRAL Working Group agreed “that the decision [on the challenge] was entrusted to **all members** of the tribunal, including the challenged arbitrator” [*Report Working Group 1984, p. 11, emph. add.*]. Also, during the 314th Meeting of the United Nations Commission on International Trade Law, the participants agreed that the challenged arbitrator should remain and decide on the challenge [*Report Working Group 1985, p. 436, No. 45 et seq.*]. Consequently, the drafting committee intended all arbitrators to decide on the challenge.

3. The very existence of Art. 13(3) Model Law demands Mr Prasad's participation in the decision on the challenge

35 Art. 13(3) Model Law exclusively allows the challenging party to appeal the decision on the challenge [*Schwarz/Konrad, p. 375*]. The right to appeal is exclusively granted to the challenging party because a potentially biased arbitrator remains to rule on the challenge. Hence, the unilateral right to appeal was introduced to counterbalance the participation of the challenged arbitrator. At hand, only RESPONDENT as the challenging party can appeal the Arbitral Tribunal's decision on the challenge. Therefore, Mr Prasad's participation is required to maintain the balance intended by Art. 13(3) Model Law.

36 Additionally, the right to appeal grants the challenging party a final control of the tribunal's decision [*ibid.; cf. Koch, p. 338; cf. BeckOK ZPO/Wolf/Eslami, § 1037, para. 2*]. Thereby Art. 13(3) Model Law ensures that the tribunal's decision is only a preliminary one [*Car park Case; Musielak/Voit/Voit, § 1037, para. 3; Koch, p. 338*]. Due to this preliminary character the

challenging party has an avenue of appeal and is not denied due process [*cf. EWiR 2006, 479; Paulsson/Bosman/Kröll, p. 23*].

- 37 As the Arbitral Tribunal's decision is merely a preliminary one, Mr Prasad's participation in the decision on the challenge does not disadvantage RESPONDENT. Hence, Art. 13(2) Model Law requires Mr Prasad to participate in the decision.
- 38 To summarize: An exclusion of Mr Prasad would violate the Arbitration Agreement as well as Art. 13(2) Model Law. It would violate the right to fair proceedings and entail the risk of a deadlock. The inclusion of Mr Prasad on the other hand would not have a lasting negative effect for RESPONDENT as RESPONDENT can appeal against an unfavourable outcome pursuant to Art. 13(3) Model Law.
- 39 Thus, Mr Prasad must participate in the decision if the Arbitral Tribunal had the power to decide on the challenge.

CONCLUSION OF ISSUE 1

As Art. 13(4) UAR is not excluded, the power to decide on the challenge lies with the appointing authority. Thus, the Arbitral Tribunal shall not decide on the challenge of Mr Prasad.

Even if the Arbitral Tribunal was empowered to decide on the challenge, it should do so only with Mr Prasad's participation. The Arbitration Agreement requires Mr Prasad to participate in the decision on the challenge. Even if the Arbitration Agreement was inconclusive concerning the challenge procedure, Mr Prasad must participate in the Arbitral Tribunal's decision on the challenge pursuant to Art. 13(2) Model Law.

ISSUE 2: MR PRASAD SHOULD NOT BE REMOVED FROM THE ARBITRAL TRIBUNAL

- 40 RESPONDENT respects Mr Prasad as an experienced lawyer and an honourable man [*Notice of Challenge, p. 39, No. 7*]. Nevertheless, in an attempt to derail and delay the proceedings RESPONDENT construes doubts as to Mr Prasad's impartiality and independence [*Notice of Challenge, p. 38, No. 1*]. RESPONDENT bases its assertion mainly on Mr Prasad's alleged connection to the PARTIES and an academic article published in the Vindobona Journal of Commercial Arbitration [*Exhibit R4, p. 40*]. However, RESPONDENT's contention is without any merit. Therefore, CLAIMANT respectfully requests the Arbitral Tribunal to reject RESPONDENT's challenge of Mr Prasad.

41 In light of Art. 12(1) UAR, a challenge requires justifiable doubts as to the arbitrator's impartiality or independence. The challenge of an arbitrator is an exceptional and serious mechanism [*Caron/Caplan*, p. 177]. Thus, Art. 12(1) UAR establishes a strict and objective standard of proof [*Caron/Caplan*, p. 208]. An objective standard of proof means that the doubts must be justified in the eyes of a reasonable third person having knowledge of the relevant facts [*National Grid v. Argentina*; *Gallo v. Canada*; *AWG v. Argentine*].

42 In the case at hand, no justifiable doubts as to Mr Prasad's impartiality or independence exist rendering RESPONDENT's challenge meritless (A). Even if RESPONDENT's allegations had merit, RESPONDENT would be precluded from pursuing its challenge because it did not give notice within the 15-day time limit set out in Art. 13(1) UAR (B).

A. No justifiable doubts as to Mr Prasad's impartiality or independence exist

43 Challenging an arbitrator requires justifiable doubts as to the arbitrator's impartiality or independence pursuant to Art. 12(1) UAR [*cf. para. 41*]. An arbitrator is *impartial* if he does not favour one party over the other [*Blue Bank v. Venezuela*, *Caron/Caplan*, p. 213]. An arbitrator is *independent* if he remains free from either party's influence [*ibid.*]. To determine a threshold for impartiality or independence, codes of ethics such as the IBA Guidelines on Conflicts of Interest ("IBA Guidelines") may only be consulted if the parties have agreed on their application [*cf. Blue Bank v. Venezuela*; *Hodges*, p. 207; *IBA Guidelines, Introduction*, p. 3, No. 5]. The IBA Guidelines provide examples for the threshold of impartiality or independence [*IBA Guidelines Introduction*, p. 3, No. 7]. However, they remain abstract and cannot replace a case-by-case analysis [*von Goeler*, p. 274].

44 Notwithstanding RESPONDENT's suggestion [*Notice of Challenge*, p. 39, No. 9], CLAIMANT respectfully reminds the Arbitral Tribunal that it is not bound to apply the IBA Guidelines because the PARTIES did not agree on their application. Even if the Arbitral Tribunal decided to apply the IBA Guidelines, the outcome would be the same: RESPONDENT's challenge lacks any merit.

45 The threshold for justifiable doubts under the UAR and the IBA Guidelines is not met by RESPONDENT's allegations. Mr Prasad was under no duty to disclose the involvement of a third-party funder (I). Further, Mr Prasad's article solely expresses a neutral legal opinion (II). The prior appointments by Mr Fasttrack's law firm highlight Mr Prasad's quality as an independent and impartial arbitrator rather than leading to justifiable doubts (III). Besides, Mr Prasad's partner has no relationship to any of the PARTIES (IV).

Finally, CLAIMANT's funder did not appoint Mr Prasad prior to this proceeding (V). Accordingly, none of RESPONDENT's allegations can lead to justifiable doubts.

I. CLAIMANT's non-disclosure of its funding agreement cannot create justifiable doubts

46 CLAIMANT's non-disclosure of the third-party funding agreement does not lead to justifiable doubts as to Mr Prasad's impartiality or independence, contrary to RESPONDENT's allegation ("**Non-Disclosure-Allegation**") [*Notice of Challenge*, p. 39, No. 9].

47 First, there is no duty for CLAIMANT to disclose third-party funding under the UAR. As evidenced by the heading ("Disclosures by [...] arbitrators") and wording of Art. 11 UAR it only imposes the duty to disclose on the arbitrator but not on the parties. However, Mr Prasad had no knowledge of CLAIMANT's third-party funding [*Mr Prasad's Letter*, p. 43, para. 2]. Without knowledge, there is no duty to disclose for the arbitrator either [*Paulsson/Petrochilos*, p. 80]. As neither CLAIMANT nor Mr Prasad were obliged to disclose the third-party funding Mr Prasad's exclusion from the arbitration would be unjust. Even more so as Mr Prasad stepped forward and disclosed all relevant matters concerning his person without undue delay to RESPONDENT [*Mr Prasad's Letter*, p. 36, para. 1].

48 Even if under the IBA Guidelines a duty to disclose existed for CLAIMANT or Mr Prasad, the non-disclosure itself could not lead to partiality or a lack of independence [*Conoco v. Venezuela; IBA Guidelines Part II*, p. 18, No. 5] because non-disclosure is a procedural action. As procedural actions are statements that influence the procedure, they cannot contribute to the substance of a challenge. Only the non-disclosed facts can do so [*IBA Guidelines Part II*, p. 18, No. 5; *Walsh/Teitelbaum*, p. 289]. Consequently, the Non-Disclosure-Allegation does not justify the challenge of Mr Prasad.

II. Mr Prasad's academic article solely expresses an abstract legal opinion and cannot create justifiable doubts

49 RESPONDENT accuses Mr Prasad of being biased because of an article Mr Prasad published in the Vindobona Journal ("**Article-Allegation**") [*Notice of Challenge*, p. 38, No. 5]. However, Mr Prasad's legal evaluation expressed in the article [*Exhibit R4*, p. 40] does not lead to bias.

50 As *Born* stated, public statements of general legal evaluation are "not considered even relevant" to the arbitrator's impartiality or independence [*Born*, p. 1888]. This applies even more, if the article deals with abstract matters [*Craig/Park/Paulsson*, 13.05; *Bishop/Reed*, p. 412 *et. seq.*] because abstract legal evaluations are detached from a specific arbitration proceeding [*cf. Born*, p. 1888]. Rather than leading to bias, academic articles allow the parties

to assess the arbitrator's expertise [*Bishop/Reed*, p. 411, No. 4]. The opportunity to assess an arbitrator's expertise and to arrange the arbitral tribunal accordingly is one of the specific advantages of *ad hoc* arbitration [*Born*, p. 1889; *McIlwrath/Savage* p. 68].

- 51 The irrelevance of a previously expressed legal opinion of an arbitrator on an abstract matter is mirrored by the IBA Guidelines. They list academic articles on the "Green List" [*IBA Guidelines Part II*, p. 25, para. 4.1.1], which provides situations where no conflict of interest exists [*IBA Guidelines Part II*, p. 19, No. 7].
- 52 Mr Prasad's article deals with an abstract matter, i.e. "The notion of conformity in Art. 35 in the age of corporate social responsibility codes and 'ethical contracting' ". It does not refer to the dispute at hand as it neither mentions the cocoa beans scandal in Ruritania nor the PARTIES. In fact, the article could not have referred to the case at hand, given that Mr Prasad published it one year prior to the current arbitral proceedings [*Mr Prasad's Email*, p. 44, para. 2]
- 53 Moreover, RESPONDENT traps itself in contradictions by not applying the same standards to Mr Prasad's eligibility as it does to its party-appointed arbitrator, Ms Reitbauer. Ms Reitbauer herself published an article presenting her very critical view on third-party funding [*Mr Fasttrack's Email*, p. 46, para. 5], a topic alleged central to the challenge at hand. As RESPONDENT is content with its party-appointed arbitrator publishing an academic article it cannot challenge CLAIMANT's arbitrator on those same grounds.
- 54 In conclusion, Mr Prasad's academic article is not only unrelated to the case at hand but also not suitable to compromise his impartiality or independence. This renders RESPONDENT's Article-Allegation pointless.

III. The alleged connection of Mr Prasad's partner to CLAIMANT's third-party funder cannot create justifiable doubts

- 55 RESPONDENT alleges that a connection of Mr Prasad's partner to the third-party funder Funding 8 Ltd would make Mr Prasad unfit for the arbitration at hand ("**Partner-Allegation**") [*Notice of Challenge*, p. 39, No. 11].
- 56 However, the connection between a partner of an arbitrator's law firm and a third-party funder remotely linked to the case cannot lead to justifiable doubts as to the arbitrator's impartiality or independence [*Reed v. Westinghouse*; *Tankers v. Vessel*; *Born*, p. 1893]. This is because it is inevitable that partners of the firm might have a remote connection to entities related to one of the parties (e.g. a third-party funder). As the arbitrators in

Suez v. Argentine II put it: “Arbitrators are not disembodied spirits dwelling on Mars, who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another”. Rather, they are distinguished practitioners or academics suitable for arbitrating a particular case. In times of growing law firms (Prasad & Slowfood employs 80 lawyers [PO2, p. 50, No. 8]) finding a qualified arbitrator without any professional background and the consequential links to entities related to the parties is looking for a needle in a haystack [*Waincymer*, p. 300].

- 57 The IBA Guidelines acknowledge this common problem. Para. 2.3.6 IBA Guidelines requires a *significant commercial relationship* of the arbitrator’s law firm *to one of the parties* in order to establish bias. A *party* in the sense of Para. 2.3.6 IBA Guidelines is any entity with a direct economic interest in the award [*IBA Guidelines Part I*, p. 13, No. 6(b)]. Hence, the Partner-Allegation could only lead to bias if Funding 8 Ltd were considered a party and had a significant commercial relationship with Prasad & Slowfood.
- 58 However, Funding 8 Ltd is not a party in the sense of Para. 2.3.6 IBA Guidelines because CLAIMANT’s case is funded by Funding 12 Ltd [*Mr Fasttrack’s Letter*, p. 35, para. 1] whereas Mr Prasad’s colleague works on a case funded by Funding 8 Ltd [PO2, p. 50, No. 6]. Both funders are separate legal entities that are solely created to fund a specific case [PO2, p. 50, No. 3]. There is no evidence, that these entities are directly linked. Consequently, Funding 8 Ltd does not have a direct economic interest in the case funded by Funding 12 Ltd. Funding 8 Ltd is therefore not a party in the sense of the IBA Guidelines.
- 59 Even if Funding 8 Ltd were considered a party in the sense of Para. 2.3.6 IBA Guidelines, its relationship to Prasad & Slowfood would not be commercially significant because the Funding 8 Ltd case only rendered 5% of Prasad & Slowfood’s annual income [PO2, p. 50, No. 6].
- 60 In any case, RESPONDENT is precluded from challenging Mr Prasad on grounds of the Partner-Allegation. In his Declaration of Independence and Impartiality Mr Prasad expressly made the reservation that his partners “may continue current matters [...] involving the PARTIES as well as related companies” [*Exhibit C11*, p. 23, para. 6]. RESPONDENT did not object to this restriction [*Response to Notice of Arbitration*, p. 26, No. 22]. Such non-objecting acceptance constitutes a waiver [*Ghirardosi v. Minister of Highways for British Columbia*; cf. *IBA Guidelines, Part II*, p. 18, para. 4]. This waiver precludes RESPONDENT from basing its challenge on the Partner-Allegation.

IV. Mr Prasad's prior appointments by Mr Fasttrack's law firm cannot create justifiable doubts

61 RESPONDENT's allegation concerning Mr Prasad's two previous appointments by Mr Fasttrack's law firm ("**Fasttrack-Allegation**") [*Notice of Challenge*, p. 39, No. 10] is without any merit.

62 Multiple appointments by the same law firm in unrelated cases remain neutral as the arbitrator exercises the same independent function in each case [*Tidewater v. Venezuela*; *Blue Bank v. Venezuela*]. Rather than leading to bias, multiple appointments by the same law firm are the result of an arbitrator's quality and neutrality [*Born* p. 1881; *Koh*, p. 719; *Bishop/Reed*, pp. 718 et seq.]. The ideal arbitrator in the appointing party's eyes is one who is impervious to challenge because repeatedly nominating challengeable arbitrators increases the length and costs of proceedings [*Koh*, p. 719]. A challenge based on prior appointments by one of the parties therefore requires more indications of an arbitrator's partiality than just prior appointments of a law firm [*ibid.*]. Such further indication would, for instance, be a financial dependence on one of the parties [*Suez v. Argentine I*; *Bishop/Reed*, p. 719].

63 As *figure 1* demonstrates, there is no financial dependence of Mr Prasad on Mr Fasttrack or his law firm. Roughly 35% of Mr Prasad's earnings stem from arbitration [*PO2*, p. 51,

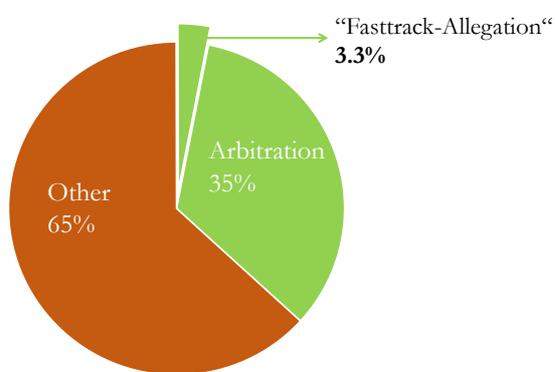


Figure 1: Influence of "Fasttrack-Allegation"

No. 10]. Hence, a single one of Mr Prasad's 21 total arbitration proceedings in the last three years [*ibid.*] contributes on average 1.66% to his earnings. Therefore, the two appointments by Mr Fasttrack's law firm only contribute 3.3% of his total income. Such negligible value is insufficient to lead to a financial dependence of Mr Prasad. Thus, the Fasttrack-Allegation is no ground for a challenge of Mr Prasad.

64 The application of the IBA Guidelines leads to the same conclusion. The IBA Guidelines list appointments by the same law firm on their "Orange List" [*IBA Guidelines, Part II*, p. 24, para. 3.3.8]. The "Orange List" provides situations which require to be disclosed [*IBA Guidelines, Part II*, p. 18, No. 3]. However, Para. 3.3.8 IBA Guidelines require appointments "more often than [on] three occasions" in the past three years to trigger a duty to disclose [*IBA Guidelines, Part II*, p. 24, para. 3.3.8]. Thus, an arbitrator must have been

appointed at least four times by the same law firm in order to require disclosure of prior appointments [*Korsnäs v. Fortum*].

65 Mr Prasad was only appointed twice by Mr Fasttrack's law firm [*Exhibit C11, p. 23, para. 2*], a number not even triggering the duty to disclose according to Para. 3.3.8 IBA Guidelines. Nevertheless, Mr Prasad disclosed the appointment by Mr Fasttrack's law firm [*ibid.*] demonstrating his high moral standards.

66 RESPONDENT did not see any harm in the prior appointments either as it accepted Mr Prasad's appointment albeit being well aware of the prior appointments [*Response to Notice of Arbitration, p. 26, No. 22*]. RESPONDENT thereby waived any right to challenge based on the Fasttrack-Allegation. Thus, the Fasttrack-Allegation does not lead to justifiable doubts as to Mr Prasad's impartiality or independence.

V. There is no connection between Findfunds LP and Mr Prasad which could justify a challenge of Mr Prasad

67 RESPONDENT's alleged connection between Mr Prasad and Findfunds LP ("Findfunds-Allegation") does not constitute a ground for a challenge [*Notice of Challenge of Mr Prasad, p. 39, No. 10*] as there is no direct connection between Mr Prasad and CLAIMANT's actual funder. Even if such a connection existed, it would lack the necessary degree of dependency.

68 A direct connection of an arbitrator to a third-party funder can only create justifiable doubts in the sense of Art. 12(1) UAR if the arbitrator is financially dependent on the third-party funder [*OPIC v. Venezuela*]. RESPONDENT tries to conjure up such financial dependence by presenting an incomplete and therefore distorted picture of the facts. RESPONDENT falsely claims that Mr Prasad had been appointed twice by Findfunds LP [*Notice of Challenge, p. 39, No. 10*]. However, these appointments were not made by Findfunds LP but by two of its subsidiaries [*Mr Prasad's Email, p. 36, para. 4*].

69 Even if the subsidiaries were equated to Findfunds, this could not automatically establish a financial dependence. The appointments of the subsidiaries make up 20% of Mr Prasad's arbitrator fees, which only contribute roughly 35% of his earnings [*PO2, p. 51, para. 10*] as *figure 2* shows. Thus, the alleged appointments by Findfunds LP

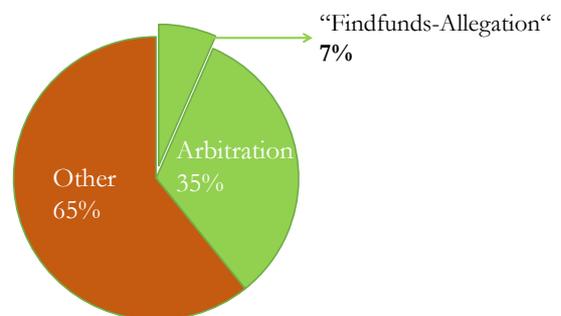


Figure 2: Influence of "Findfunds-Allegation"

only contribute to 7% of Mr Prasad's total earnings. This leaves Mr Prasad with 93% of his earnings stemming from sources other than Findfunds. Hence, there is no financial dependence of Mr Prasad.

70 The irrelevance of the appointments by Findfunds LP is mirrored by the IBA Guidelines. Para. 3.1.3 IBA Guidelines requires an arbitrator to disclose, if he or she was appointed twice or more by the same party.

71 In the case at hand, Para. 3.1.3 IBA Guidelines is not fulfilled for two reasons: First, the arbitrations in question involved entirely different legal entities than in the present case. The PARTIES had thus never appointed Mr Prasad before. Second, in one of the two prior cases Mr Prasad had been appointed, before the funding agreement was concluded [*Mr Prasad's Email*, p. 43, para. 4]. Thus, the third-party funder did not appoint Mr Prasad. This leaves a maximum of one prior proceeding in the sense of Para. 3.1.3 IBA Guidelines. In conclusion, the Findfunds-Allegation does not lead to justifiable doubts.

B. In any case, RESPONDENT's challenge is time-barred pursuant to Art. 13(1) UNCITRAL Arbitration Rules

72 Even if one of RESPONDENT's allegations led to justifiable doubts, the challenge would be time-barred pursuant to Art. 11(1) UAR. Art. 11(1) UAR requires a party to send its notice of challenge within 15 days after it became aware of the circumstances leading to justifiable doubts [*Weigand* p. 1451; *Daele*, p. 137, para. 4]. If no challenge is made within this 15-day period, a party is considered to have waived its right to challenge [*Weigand*, p. 1451]. This time limit is applied strictly [*AWG v. Argentine*]. Concerning the strict time limit, the Arbitral Tribunal cannot refer to the IBA Guidelines which impose a 30-day time limit because the IBA Guidelines "do not override any [...] arbitral rules chosen by the parties" [*IBA Guidelines*, p. 3, Introduction No. 6]. As the PARTIES chose the UAR, they prevail.

73 The 15-day time limit starts when a party has "constructive knowledge" of the grounds for its challenge [*cf. Dealer Computer v. Michael Motor; Fidelity v. Durga; Born*, p. 1941]. Constructive knowledge emerges if a circumstance ought to be known by a reasonably diligent party [*Adams v. Bracknell Forest Borough Council; cf. Paulsson/Petrochilos*, p. 90]. Constructive knowledge is sufficient because concerns can arise without "full knowledge" of all relevant circumstances [*Bominflot Case; Fidelity v. Durga; Kiernan v. Piper; Born*, pp. 1940 et seq.]. Above, the time-limit minimizes the risk of tactical delay as it prevents a party from withholding its knowledge for a later point in the proceedings [*Belmonte v. CONI; Born*, p. 1895].

- 74 Concerning the Fasttrack-Allegation and the Partner-Allegation, RESPONDENT gained full knowledge on 30 June 2017, when Mr Prasad disclosed both grounds to RESPONDENT [cf. *para, 60, 65*]. Hence, a challenge on these grounds would have had to have been put forward until 15 July 2017 to avoid being time-barred.
- 75 Concerning the Article-Allegation, the Non-Disclosure-Allegation and the Findfunds-Allegation, RESPONDENT gained knowledge at the latest on 27 August 2017. On 27 August 2017, RESPONDENT retrieved the metadata from CLAIMANT's Notice of Arbitration [*PO2, p. 51, No. 11; Notice of Challenge, p. 38, No. 3*]. In the metadata, Mr Fasttrack directly mentions Mr Prasad's article, giving RESPONDENT constructive knowledge of the grounds of the Article-Allegation. Also, the metadata was RESPONDENT's "reliable information that CLAIMANT had involved a third-party funder" [*Notice of Challenge, p. 38, No. 4*] providing RESPONDENT with full knowledge for its Non-Disclosure-Allegation. The text of the metadata additionally reveals that a connection between Mr Prasad and Findfunds LP most likely exists because Mr Fasttrack referred to such a possible connection [*Notice of Challenge, p. 38, No. 3*]. Mr Fasttrack's notice was enough for RESPONDENT to inquire further details from CLAIMANT. If it was enough to inquire further details, it raised enough concerns to be classified as constructive knowledge.
- 76 Thus, RESPONDENT became aware of the article, the third-party funding and the contact between Mr Prasad and Findfunds LP on 27 August 2017. A challenge on these grounds would have had to have been filed by 11 September to avoid being time-barred.
- 77 Although the time limits for a challenge of Mr Prasad ended on 15 July and 11 September respectively, RESPONDENT waited until 14 September to file its challenge [*Notice of Challenge, p. 28*]. Consequently, RESPONDENT's challenge is time-barred on all grounds.

CONCLUSION OF ISSUE 2

In case the Arbitral Tribunal decides on the challenge, CLAIMANT respectfully requests the Arbitral Tribunal to dismiss RESPONDENT's challenge as it is without merit. RESPONDENT tries to pin untenable allegations and non-existing duties towards Mr Prasad. Contrary to RESPONDENT's allegations, Mr Prasad proved his high moral standards on more than one occasion. His impartiality and independence remain flawless. Even if one of RESPONDENT's allegations raised doubts as to Mr Prasad's impartiality or independence, the challenge is time-barred.

ISSUE 3: CLAIMANT'S CONDITIONS GOVERN THE SALES CONTRACT

78 On 27 March 2014, CLAIMANT submitted its Tender for the PARTIES' sales contract containing CLAIMANT's General Conditions of Sale ("**CLAIMANT's Conditions**"). Thereby CLAIMANT objected to RESPONDENT's General Conditions of Contract ("**RESPONDENT's Conditions**"). For this reason, CLAIMANT respectfully requests the Arbitral Tribunal to find that solely CLAIMANT's Conditions govern the contract.

79 The sales contract is subject to the CISG [*PO1, p. 49, No. 3(4)*]. Thus, the CISG is applicable to the question whether standard conditions have been validly included [*CISG-AC Opinion No. 13, p. 34*]. Under the CISG, standard conditions are included if the parties have agreed upon their application when concluding the contract [*Piltz III, p. 2161; CISG-AC Opinion No. 13, p. 34*]. As a contract is concluded by an offer and an acceptance [*Kröll/Mistelis/Viscasillas/Ferrari, intro Art. 14-24, para. 4*] standard conditions must be part of the offer (Art. 14(1) CISG) which has to be accepted by the other party (Art. 18 CISG) [*Machine Case; Cheese Case; CISG-AC Opinion No. 13, p. 34*].

80 In the case at hand, RESPONDENT's Invitation to Tender does not constitute an offer (**A**). Instead, CLAIMANT's Tender constitutes the relevant offer. Hence, the contract was concluded by CLAIMANT's Tender including CLAIMANT's Conditions (**B**) and RESPONDENT's unconditional acceptance (**C**). In any case, CLAIMANT's Conditions would prevail pursuant to the application of the "last shot rule" (**D**).

A. Pursuant to Art. 14(2) CISG, RESPONDENT's Invitation to Tender referring to RESPONDENT's Conditions does not constitute an offer

81 On 10 March 2014 RESPONDENT sent CLAIMANT a public Invitation to Tender [*Exhibit C1 pp. 8 et seqq.*]. However, RESPONDENT's Invitation to Tender referring to RESPONDENT's Conditions does not constitute an offer because an intention to be bound cannot be derived.

82 An offer requires that the offeree demonstrates its intention to be bound [*Schlechtriem/Schwenzer/Schroeter, Art. 14, para. 25*]. Pursuant to Art. 14(2) CISG, an intention to be bound cannot be assumed if a proposal is made to an indefinite group of people, e.g. when published in a newsletter [*MüKoBGB/Gruber, Art. 14, para. 10; Case Digest/UNCITRAL Art. 14, No. 5, p. 86; Schlechtriem/Schwenzer/Schroeter, Art. 14, para. 29; Staudinger/Magnus, Art. 14, para. 37*]. In addition to an intention to be bound, the proposal must be sufficiently definite as required under Art. 14(1) CISG regarding the goods' quality, quantity and price [*Underwear Case; Propane Case; Staudinger/Magnus, Art. 14, para. 39*].

83 RESPONDENT's Invitation to Tender is not sufficiently definite as the detailed product name, description and exact purchase price concerning the chocolate cakes are left out and to be filled in by the tenderer [*Invitation to Tender, Section IV, p. 11, Art. 2, 4*]. Moreover, RESPONDENT's Invitation to Tender was published in various industry newsletters [*Response to Notice of Arbitration, p. 25, No. 7*] entailing that it was addressed to an indefinite group of people. Consequently, RESPONDENT's Invitation to Tender does not constitute an offer as it lacks specificity and an intention to be bound.

B. Instead, CLAIMANT's Tender constitutes the offer pursuant to Art. 14(1) CISG exclusively including CLAIMANT's Conditions

84 CLAIMANT's Tender constitutes the offer pursuant to Art. 14(1) CISG (I). As CLAIMANT's Tender solely contains CLAIMANT's Conditions, RESPONDENT's Conditions are not part of the sales contract (II).

I. CLAIMANT's Tender constitutes the offer pursuant to Art. 14(1) CISG

85 In its letter of 27 March 2014, CLAIMANT submitted its Tender. Therein CLAIMANT expressly determined the conditions of the sales contract, i.e. the description of the goods ("Chocolate Cake – Queen's Delight"), quantity ("20,000 per day"), and price per unit ("2 USD") [*Exhibit C4, p. 16*]. Above, CLAIMANT's Tender was explicitly named "Sales-Offer" and was only addressed to RESPONDENT [*ibid.*]. As CLAIMANT's Tender is sufficiently definite and demonstrates CLAIMANT's intention to be bound, it constitutes the offer pursuant to Art. 14(1) CISG.

II. In its Tender CLAIMANT incorporates CLAIMANT's Conditions thereby excluding RESPONDENT's Conditions

86 CLAIMANT's Conditions are part of the offer pursuant to Art. 14(1) CISG (1). By including its own Conditions, CLAIMANT excluded RESPONDENT's Conditions (2). The Letter of Acknowledgement does not contradict the sole application of CLAIMANT's Conditions to the contract (3).

1. CLAIMANT's Tender includes CLAIMANT's Conditions

87 To incorporate standard conditions, an offeror must refer to the conditions in such a way that the other party could not have been unaware of the offeror's intent to include the conditions in the contract [*Propane Case; Industrial Machinery Case; CSS v. Amphenol; Plants Case*]. In addition to such intent, the recipient must be given a reasonable opportunity to access the standard conditions [*Machine Case; Printing Plant Case*]. A reasonable opportunity is given when the conditions are made generally available and retrievable online, e.g. if a link is

provided [*Cheese Case; Stiegele/Halter, p. 169; CISG-AC Opinion No. 13, p. 34*]. In everyday trade, it is sufficient to display the link where the standard terms can be downloaded if the other party has internet access [*ibid.; Karollus, p. 551; Berger, p. 18*].

88 CLAIMANT's Tender closes with the following statement [*Exhibit C4, p. 16, para. 3*]:

The above offer is subject to the General Conditions of Sale and our Commitment to a Fairer and Better World.
Refer to our website www.DelicatelyWholeFoods.com in regard to our General Condition and our commitments and expectations set out in our Codes of Conduct.

89 Due to the explicit notice, RESPONDENT could not have been unaware of CLAIMANT's intent to include CLAIMANT's Conditions. CLAIMANT further made the Conditions generally available and retrievable online and provided the link for the website in its Tender [*Exhibit C4, p. 16, para. 3*]. By following the link and downloading CLAIMANT's Code of Conduct, RESPONDENT demonstrated that it had reasonable access to CLAIMANT's Conditions, as they are accessible via the same link as CLAIMANT's Code of Conduct [*ibid.; Exhibit C5, p. 17, para. 2*].

90 In conclusion, CLAIMANT expressed its intent to incorporate CLAIMANT's Conditions. RESPONDENT could not have been unaware of CLAIMANT's intent and had reasonable access to CLAIMANT's Conditions. Thus, CLAIMANT's Conditions were included in the Tender.

2. The inclusion of CLAIMANT's Conditions replaces RESPONDENT's Conditions

91 By sending its Tender [*Exhibit C4, p. 16*] CLAIMANT replaced RESPONDENT's Conditions mentioned in RESPONDENT's Invitation to Tender.

92 Art. 19(1) CISG constitutes that a reply to an offer containing modifications of that offer is not an acceptance, but rather a counter-offer. The content of this counter-offer must be evaluated detached from the content of the initial offer [*Schlechtriem/Schwenzler/Schroeter Art. 19, para. 9*]. Especially standard conditions contained in the initial offer are not contained in the counter-offer by default [*Schlechtriem/Schwenzler/Schroeter, Art. 14, para. 44*]. This principle laid down in Art. 19(1) CISG also applies if the legally relevant declarations do not constitute offer and counter-offer, but rather invitation to tender and offer [*Silicon Products Case; Piltz IV, p. 2452*].

93 At hand, RESPONDENT's Invitation to Tender introduces RESPONDENT's Conditions. However, CLAIMANT announced that its Tender included "changes" to the Invitation to Tender [*Exhibit C3, p. 15, para. 2*]. Any part of the Invitation to Tender which was **not**

changed by CLAIMANT was explicitly mentioned with the additive “as per tender documents” [*Exhibit C4, p. 16*]. Conversely, any part in which CLAIMANT derogated from RESPONDENT’s Invitation to Tender did not contain this additive [*e.g. Client, Price per Unit, Payment Terms*]. CLAIMANT’s Conditions did not include such additive either. Thereby, CLAIMANT expressed its intent to exchange RESPONDENT’s Conditions for CLAIMANT’s Conditions. RESPONDENT could not have been unaware of these modifications because the word “changes” has a warning function and should have triggered RESPONDENT’s attention.

94 By incorporating CLAIMANT’s Conditions, CLAIMANT objected to RESPONDENT’s Conditions. Hence, CLAIMANT’s Conditions do not supplement, but replace RESPONDENT’s Conditions.

3. CLAIMANT’s Letter of Acknowledgement does not contradict the sole application of CLAIMANT’s Conditions to the sales contract

95 Contrary to RESPONDENT’s allegations [*Response to Notice of Arbitration, p. 25, No. 25*], the Letter of Acknowledgement [*Exhibit R1, p. 28*] does not contradict the sole application of CLAIMANT’s Conditions because it is not legally binding. Statements made during contractual negotiations can only be legally binding if the party making the statement has an intention to be bound [*Secretariat Commentary, Art. 14, para. 6*]. Whether an intention to be bound exists must be assessed pursuant to Art. 8 CISG [*Huber/Mullis, p. 71, para. 1*].

96 The Letter of Acknowledgement was sent to RESPONDENT only to confirm the receipt of the Invitation to Tender as a mandatory requirement for CLAIMANT to submit a tender [*Exhibit C2, p. 10, para. 2*]. The Letter of Acknowledgement incorporates the wording “will tender”. The wording “will tender” discloses CLAIMANT’s intent to submit a legally binding offer after further examination [*Exhibit R1, p. 28, No. 3*]. Such Letter of Acknowledgement serves as a letter of intent. A letter of intent does not independently demonstrate an intention to be bound because it is merely a formality [*Ferrari/Torsello, p. 137, para. 1*].

97 Finally, CLAIMANT’s Tender was completely transparent as CLAIMANT pointed out the changes it made [*cf. para. 93*]. As RESPONDENT was aware of these changes [*Exhibit C5, p. 17, para. 1*], RESPONDENT could not have reasonably relied on the statements laid down in the Letter of Acknowledgement.

98 Concluding, CLAIMANT’s Tender does not include RESPONDENT’s Conditions. The mere confirmation of receipt and the intention to submit an offer in the future do not prevail over the changes included in the actual Tender.

C. RESPONDENT unconditionally accepted CLAIMANT's Tender including exclusively CLAIMANT's Conditions

- 99 Pursuant to Art. 18(1) CISG, the acceptance of an offer is made by statement or by conduct if it indicates unconditional assent. Whether such unconditional assent exists, needs to be determined pursuant to Art. 8 CISG [*Kröll/Mistelis/Viscasillas/Zuppi Art. 8, para. 2*].
- 100 In its letter of 7 April 2014, RESPONDENT stated its acceptance of CLAIMANT's Tender "notwithstanding the suggested changes" [*Exhibit C5, p. 17, para. 1*]. The use of the word "notwithstanding" shows that RESPONDENT was well aware of the changes made by CLAIMANT. Pursuant to Art. 8(2) CISG a reasonable third person of the same kind as CLAIMANT would have understood such unambiguous statement as the unconditional acceptance of all changes including CLAIMANT's Conditions.
- 101 This is supported by the PARTIES' subsequent conduct in the sense of Art. 8(3) CISG. All invoices sent by CLAIMANT exclusively referred to CLAIMANT's Conditions and were not objected to by RESPONDENT [*PO2, p. 52, No. 24*]. Such conduct is strong evidence that the PARTIES believed they were bound by the standard conditions repeatedly referred to in the invoices [*Plants Case; Vine Wax Case*].
- 102 To conclude, RESPONDENT fully accepted CLAIMANT's Tender and CLAIMANT's Conditions contained therein. Hence, CLAIMANT's Conditions exclusively govern the sales contract.

D. Even if RESPONDENT's Invitation to Tender was considered an offer, CLAIMANT's Conditions would prevail over RESPONDENT's Conditions due to the "last shot rule"

- 103 CLAIMANT wishes to reiterate that it considers its Conditions exclusively applicable to the sales contract at hand. However, in case the Arbitral Tribunal deems RESPONDENT's Conditions legally relevant, CLAIMANT's Conditions prevail in the "battle of forms" analysis.
- 104 A "battle of forms" emerges if two standard conditions oppose each other while concluding a contract [*Schlechtriem/Schwenzler/Schroeter, Art. 19, para. 31*]. Hence, if the Arbitral Tribunal deemed RESPONDENT's Conditions legally relevant, a "battle of forms" would arise. To resolve this "battle of forms" the CISG's general principles for contract formation must be applied [*Magnus, p. 187*], resulting in two main approaches: The "last shot rule" and the "knock out rule" [*Schwenzler/Mohs, p. 244*].
- 105 Based on Art. 19 CISG, the "last shot rule" states that the contractual terms that were sent last prevail unless they were objected to by the recipient [*Kneel Bus Case; Schlechtriem/Schwenzler/Schroeter Art. 19, para. 35*].

- 106 The “knock out rule” on the other hand states that common clauses of conflicting standard conditions shall become binding, while the contradicting clauses “knock out” one another and are replaced by the provisions of the CISG [*Schwenzer/Mohs*, p. 239, 244; *Schlechtriem I, Conclusion No. 1*].
- 107 The application of the “knock out rule” leads to unbearable constructive difficulties [*Piltz II*, p. 137]. First, the congruent, and therefore valid, parts of the standard conditions cannot be precisely determined, as such a determination is subject to interpretation. Second, once the conflicting parts are knocked-out, uncertainty as to the legal consequences would arise because the CISG might not cover the disputed parts. Finally, the “knock out rule” lacks a legal foundation in the CISG and therefore must not be applied [*ibid.*]. In contrast, the “last shot rule” follows the principles of general contract formation under the CISG because it is based on the wording of Art. 19(2) CISG [*Kröll/Mistelis/Viscasillas/Ferrari, Art. 19, para. 15*]. This promotes uniformity and legal certainty [*Huseynli, p. 201; Fejös, p. 115*]. Moreover, the “last shot rule” leads to an appropriate distribution of information risk [*Honsell/Dornis, Art. 19, para. 40*]. The recipient of the “last shot” can express its objection to the received documents. If the recipient does not do so, the risk of unfavourable standard conditions is casted upon the recipient [*Piltz II, p. 137*]. It follows that where the contract is executed without objection, the offeror has accepted the counter-offer, including the materially-altered standard conditions [*Shoes Case*]. Thus, the “last shot rule” applies.
- 108 In the case at hand, RESPONDENT’s Invitation to Tender contained RESPONDENT’s Conditions. In response, CLAIMANT sent its Tender including CLAIMANT’s Conditions. However, RESPONDENT did not object to CLAIMANT’s Conditions but performed the sales contract. Therefore, CLAIMANT’s Conditions constitute the “last shot” prevailing over RESPONDENT’s Conditions.

CONCLUSION OF ISSUE 3

CLAIMANT requests the Arbitral Tribunal to find that the sales contract is governed solely by CLAIMANT’s Conditions. The decisive offer establishing the sales contract was CLAIMANT’s Tender. CLAIMANT’s Tender exclusively contained CLAIMANT’s Conditions, rendering RESPONDENT’s Conditions irrelevant. Even if RESPONDENT’s Conditions were relevant, CLAIMANT’s Conditions would prevail pursuant to the “last shot rule”.

ISSUE 4: CLAIMANT DELIVERED CONFORMING CHOCOLATE CAKES

109 After more than two years of successful cooperation, the PARTIES' fruitful business relationship was struck by a third-party scandal. Whilst CLAIMANT tried to protect the PARTIES' relationship, RESPONDENT set all of CLAIMANT's efforts at naught. Rather than working on the relationship, RESPONDENT unhesitatingly threatened to terminate the contract based on a non-existing claim of ethical standards. RESPONDENT bases this claim on its non-applicable Conditions [*paras. 99 et seqq.*]. However, even if the Arbitral Tribunal considered RESPONDENT's Conditions to be applicable, the chocolate cakes delivered by CLAIMANT met the conformity requirements at all times.

110 The relevant standard for the conformity of goods is established by Art. 35 CISG [*Kröll/Mistelis/Viscasillas/Kröll, Art. 35, para. 1*]. Pursuant to Art. 35(1) CISG, the conformity of a good is primarily determined by the parties' agreement [*Kröll/Mistelis/Viscasillas/Kröll, Art. 35, para. 37*]. Only if the conformity cannot be determined by the agreement, one may resort to Art. 35(2) CISG which focuses on the goods' purpose.

111 In the case at hand, CLAIMANT delivered chocolate cakes in compliance with the sales contract, fulfilling Art. 35(1) CISG **(A)**. RESPONDENT cannot resort to Art. 35(2) CISG because the PARTIES have conclusively stipulated quality requirements in the sales contract **(B)**. Even if Art. 35(2) CISG were applicable, CLAIMANT delivered conforming chocolate cakes **(C)**.

A. The chocolate cakes met the conformity requirements stipulated by the sales contract

112 First and foremost, the relevant standard for the assessment of conformity of goods is to be derived from the contractual agreement between the parties. Pursuant to Art. 35(1) CISG, a good is conforming if it is of the quantity, quality and description required by the contract [*Kröll/Mistelis/Viscasillas/Kröll, Art. 35, para. 37*].

113 At hand, the sales contract does not require ethical standards as a legally binding and enforceable quality feature of the chocolate cakes **(I)**. Even if ethical standards were relevant for the conformity-assessment of the chocolate cakes, CLAIMANT was only obliged to use its best efforts to respect ethical standards. CLAIMANT provided no guarantee that it would fulfil ethical standards at all costs **(II)**.

I. The sales contract does not require ethical standards as a legally binding quality feature of the chocolate cakes

- 114 It is undisputed between the PARTIES that the chocolate cakes conformed to the physical requirements set out in the sales contract [*cf. Notice of Arbitration, p. 5, No. 6; Response to Notice of Arbitration, p. 25, No. 13*]. Contrary to RESPONDENT's allegation [*Response to Request for Arbitration, p. 27, para. 26*], the sales contract does not stipulate legally binding and enforceable ethical standards as a quality feature of the chocolate cakes.
- 115 The quality of a good is determined by its physical condition and all factual and legal circumstances concerning the good's relationship to its surroundings [*Schlechtriem/Schwenzer/Schwenzer Art. 35 para. 9*]. Agreements on the quality of a good are only legally binding and enforceable if sufficiently definite [*Butler, p. 302; Kröll/Mistelis/Viscasillas/Kröll, Art. 35, para. 40*]. To determine whether the parties have a sufficiently definite agreement on compulsory ethical standards, the sales contract must be interpreted pursuant to Art. 8 CISG.
- 116 At hand, the interpretation of the sales contract reveals that the agreement lacks the required degree of specificity concerning ethical standards to vest them with legally binding character (1). Furthermore, such obligation would contradict commercial sense and unilaterally burden CLAIMANT with unforeseeable risks violating Art. 74 CISG (2). Additionally, legally binding ethical standards can neither be derived from the PARTIES' prior conduct as members of Global Compact (3) nor from the PARTIES' contractual negotiations (4).

1. The PARTIES' sales contract is too indefinite regarding ethical standards for the purpose of Art. 35(1) CISG

- 117 A quality feature of a contract becomes legally binding for the purpose of Art. 35(1) CISG if it specifies the product's conformity in a particular manner [*Schwenzer/Leisinger, p. 266*]. The specification must allow the obliged party to define the exact framework of its duties [*Kröll/Mistelis/Viscasillas/Kröll, Art. 35, para. 55*].
- 118 In the case at hand, the PARTIES' contractual agreement is made up of the Tender Documents [*PO2, p. 52, No. 27*]. However, none of the Tender Documents define the adherence to ethical standards in sufficient detail to establish a quality feature of the product. The "Specifications of Goods and Delivery Terms" only determine the required shape of the chocolate cakes ("3 inches in diameter and (...) 120 gramm") [*Exhibit C2, p. 10 Clause 1, No. 1*] and refer to the "Special Conditions of Contract" [*Exhibit C2, p. 10 Clause 1,*

No. 5]. The “Special Conditions of Contract” in turn do not mention any ethical standards either. Instead, they only require a “Chocolate Cake” [*Exhibit C2, p. 11, Art. 2*], whereas the details are to be filled in by the tenderer. Aside from that, Art. 2 of the Special Conditions requires the chocolate cake to comply “with all the obligations arising from this sales contract” [*ibid.*]. The only obligation arising from the sales contract that refers directly to the goods is clause E of RESPONDENT’s Code of Conduct [*Exhibit C2, p. 14, Clause E*]. Clause E requires the goods to be procured “in a responsible manner” [*ibid.*]. The sales contract defines “responsible manner” by referring to terms like “standards comparable” or RESPONDENT’s “General Business Philosophy” which solely contains “general principles” [*PO2, p. 53, No. 31*]. Thus, all the stipulations are phrased broadly, lacking the required degree of specificity to create legally binding contractual obligations.

- 119 Finally, “Ethical standards” cannot be determined objectively due to their subjective nature. Opinions regarding ethical standards differ in each society and each country [*Schlechtriem II, p. 101*]. Assuming a legally binding obligation to promote ethical standards would be a floodgate leading to hometown justice decisions. Therefore, attributing a legally binding character to “ethical standards” contradicts the basic principle of uniformity of application of the convention as laid down in Art. 7(1) CISG [*Schlechtriem II, p. 99*].
- 120 As the sales contract insufficiently specifies the requirements as to CLAIMANT’s compliance with ethical standards, it cannot constitute a legal obligation under Art. 35(1) CISG.

2. Legally binding ethical standards would contradict commercial sense and burden CLAIMANT with unforeseeable risks infringing Artt. 74, 7(2) CISG

- 121 Certain issues concerning sales contracts may not be expressly dealt with by the provisions of the CISG. However, in accordance with Art. 7(2) CISG, such gaps must be settled in conformity with the general principles underlying the CISG. Art 35(1) CISG does not set forth an exact threshold of definiteness as to when a buyer’s expectation becomes a legally binding obligation. This threshold can be derived from Art. 74 CISG. It requires that the seller is able to **foresee** and calculate possible liabilities at the time of contract conclusion [*Staudinger/Magnus, Art. 74, para. 31; Piltz I, p. 413, para. 5-544; Nalin, p. 337*]. This constitutes a general principle of the CISG in the sense of Art. 7(2) CISG [*Kröll/Mistelis/Viscasillas/Viscasillas, Art. 7, para. 58*]. This principle needs to be transferred to the question of the conformity of goods pursuant to Art. 35 CISG. This means that the goods need to be sufficiently specified for the seller to foresee and calculate possible liabilities stemming from a delivery obligation.

122 If the adherence to undefined ethical standards had been part of the contractual obligation [cf. *para. 129*], CLAIMANT would not have been able to consider taking the contractual risk, obtaining insurance or abstaining from concluding the contract. The risk CLAIMANT would have taken by agreeing to such a nebulous obligation is incalculable, economically unviable and therefore not in accordance with the idea of Artt. 74, 7(2) CISG.

3. The PARTIES' mutual Global Compact Membership does not require adherence to its ethical standards as a quality feature of the goods

123 The PARTIES are both Global Compact Members [*Notice of Arbitration, p. 4, No. 1; Response to Notice of Arbitration, p. 25, No. 5*]. However, institutions such as Global Compact are voluntary in nature and are not intended to impose obligations on the participants regarding their particular contracting behaviour [*Wilson, p. 10*]. Global Compact itself answers the question whether a membership is legally binding with "No." [*UN Global Compact, FAQ, No. 4*]. Thus, membership cannot be used to prove a parties' intent to undertake a contractual obligation to adhere to the UN Global Compact Principles [*Ramberg, pp. 13 et seq.*].

124 Even if the PARTIES deemed the mutual Global Compact Membership as legally binding for their contractual relationship, this would not affect the conformity of the delivered chocolate cakes. The purpose of Global Compact is that its members conduct their businesses in a sustainable manner [*Guide to Engagement in the Global Compact, p. 7*]. It does not intend to impose rules affecting the conformity of the goods. Therefore, the principles do not define any standards that would have to be met by the particular goods in question, but rather give a general definition for sustainable business standards.

4. The PARTIES' pre-contractual negotiations did not lead to ethical standards becoming contractually binding

125 To broaden its cake offering RESPONDENT went to the Cucina Food Fair where it discussed possible business relationships with several companies, including CLAIMANT [*Response to Notice of Arbitration, p. 25, No. 7*]. However, CLAIMANT's statements at the Cucina Food Fair were non-binding and could not have created justified expectations on RESPONDENT's side.

126 Pursuant to Art. 8(3) CISG, all circumstances of the case are relevant in determining the PARTIES' intent. However, not every single statement a party makes becomes part of the contract [*Maley, p. 111*]. There is a distinction between statements which contain a legally relevant specification of the goods and statements that are "merely puffing language" [*Kröll/Mistelis/Viscasillas/Kröll Art. 35, para. 40; cf. Ramberg, p. 16*].

127 The discussion between Mr Tsai and Ms Ming at the Cucina Food Fair was of general nature, concerning the cost versus benefits of sustainable production [*Notice of Arbitration, p. 4, para. 3*]. The intent of the discussion was to promote mutual knowledge and exchange experiences [*Notice of Arbitration, p. 4, para. 3*]. The discussion has no legal relevance as it can be classified as “merely puffing language”.

128 Concluding, the non-binding nature of CLAIMANT’s statements at the Cucina Food Fair could not create justified expectations on RESPONDENT’s side.

II. In any event, CLAIMANT used its best efforts to respect ethical standards

129 Even if a contractual duty to adhere to ethical standards could be derived from the sales contract, CLAIMANT was only obliged to use its best efforts to source its supplies in conformity with ethical standards but did not guarantee to do so (1). As CLAIMANT used its best efforts, it delivered conforming chocolate cakes pursuant to Art. 35(1) CISG (2).

1. The contract only called for best efforts to respect ethical standards

130 The exact degree of adherence to ethical standards as defined by the contract, is determined by interpretation pursuant to Art. 8 CISG [*Kröll/Mistelis/Viscasillas/Kröll, Art. 35, para. 37*]. In the present case, the wording of the contract calls for best efforts at best (a) and the price of the chocolate cakes is too modest to suggest a guarantee (b). Furthermore, the power contractually granted to RESPONDENT by directly influencing CLAIMANT’s conduct distinctly indicates that a guarantee was not intended by either of the PARTIES (c).

a. The indeterminate wording of the contract could, at best, create obligations to use best efforts

131 An obligation to use best efforts is imposed where the contract stipulates a conduct-oriented description of a seller’s performance [*Brunner, p. 70, para. 360*]. Conversely, a guarantee imposes the obligation to achieve a specific result [*ibid.*].

132 Instead of demanding a specific *result*, RESPONDENT’s specification of goods focuses on CLAIMANT’s ethical *conduct*. Clause 1 of RESPONDENT’s Specification of the Goods and Delivery Terms demands the ingredients “**to be sourced** in accordance with the stipulations under Section IV” [*Exhibit C2, p. 10, Clause 1, emph. add.*]. In Section IV RESPONDENT only demands “its suppliers to **adhere to** [...] and to **conduct** their business ethically” [*Exhibit C2, p. 11 Sec. 4, para. 2, 3, emph. add.*]. In contrast to this conduct-focused wording, RESPONDENT did not include any obligation of result concerning adherence to ethical standards in the contract [*cf. paras. 131 et seq.*].

133 Furthermore, the contract only requires CLAIMANT to “procure goods and services in a responsible manner” [*Exhibit C2, p. 14, Sec. XXVI, Clause E*]. However, such unspecific wording is unable to create contractual obligations at the level of a guarantee.

134 Hence, RESPONDENT’s specification of the chocolate cakes focuses on the contractual performance rather than requiring a specific result. Therefore, CLAIMANT only had to use best efforts to observe ethical standards in the performance of the contract.

b. The modest price of the chocolate cakes cannot compensate the risk of a guarantee

135 The basic principle of Art. 35 CISG is a fair distribution of risk between the buyer and the seller [*Henschel, pp. 1 et seq.*]. By concluding a contract, the parties establish a balance of risk and benefit between themselves [*Maley, p. 100*]. The seller assesses the risk and incorporates it into the price [*Gilette/Ferrari, p. 2*]. A guarantee imposes a high risk on the seller because it establishes strict liability. Such high risk must be reflected by an accordingly high price [*Vogenauer/Vogenauer, Art. 5.1.5, para. 3; Official Comments UNIDROIT Principles, Art. 5.1.5, p. 153*].

136 In this specific case, a sophisticated bribery scheme involving foreign governments jeopardized the ethical production. It is to be asked whether CLAIMANT, taking into consideration the whole setup of the contract, could have been expected to take on liability in such circumstances. Such liability constitutes an extraordinarily high risk. Meanwhile, the price (USD 2) of the chocolate cakes was “towards the upper end of the [...] relevant market segment but **not** extraordinary” [*PO2, p. 54, No. 40*]. The price would therefore fail to compensate CLAIMANT for such extraordinarily high risk.

c. The contract contains a mutual responsibility of the PARTIES to ensure adherence to ethical standards, distinctly indicating that a guarantee was not intended

137 Where the seller of a good guarantees a result, it undertakes the sole responsibility to achieve this result [*CISG-AC Opinion No. 7, para. 13*]. It lies within the nature of a guarantee that the guarantor unilaterally bears the responsibility for the result. Conversely, if the parties share the responsibility this contradicts a guarantee. One indication of a shared responsibility is the right of the buyer to influence the procurement of the supplies.

138 In the case at hand, the sales contract implies a mutual responsibility to observe ethical standards. The PARTIES agreed on multiple mechanisms for RESPONDENT to intervene in the production of the chocolate cakes. RESPONDENT reserved “the right to audit and inspect your [CLAIMANT’s] operations and facilities at our [RESPONDENT’s] own costs” [*Exhibit C2, p. 14, Sec. XXVI, Clause F*] as well as to direct the corrective actions [*ibid.*]. Through its

power to directly control CLAIMANT's conduct towards its suppliers, RESPONDENT could influence CLAIMANT's suppliers. Consequently, RESPONDENT did not rely solely on CLAIMANT to achieve the desired result. Hence, the responsibility for the suppliers' adherence is not solely attributed to CLAIMANT. Such shared responsibility contradicts the nature of a guarantee.

139 Furthermore, it would have contradicted business reality if CLAIMANT permitted RESPONDENT to have such intrusive influence on CLAIMANT's business conduct if only CLAIMANT were liable for any ethical non-conformity of the goods either way.

140 Concluding, the contract provides for a shared responsibility of the PARTIES to ensure the observance of ethical standards. This contradicts a guarantee.

2. CLAIMANT used its best efforts and delivered conforming goods

141 An obligation of best efforts is satisfied by a performance with due diligence [*Brunner, p. 70, para. 360*]. The obligor is sufficiently diligent if it has exercised the care and skill a reasonable third person would deem necessary to bring forward the achievement of the desired result [*ibid.; Art. 5.1.4(2) UNIDROIT Principles*].

142 CLAIMANT used its best efforts by choosing the Ruritania Peoples Cocoa mbH (“**mbH**”) as its supplier and continuously ensuring its compliance with ethical standards. CLAIMANT instructed the highly specialized Egimus AG to audit the mbH on site prior to accepting the mbH as its supplier [*Exhibit C8, p. 20, para. 1*]. The Egimus AG used the internationally recognized standards ISO 14001 and ISO 26000 as guidance for assessing the mbH's risk of breaching any of the UN Global Compact principles [*PO2, p. 53, No. 33*]. They certified that the mbH complied with Global Compact and the principles of sustainable production [*Exhibit C8, p. 20, para. 1*]. The Egimus AG's finding was in line with the mbH's good reputation in the market as it set an example for the sustainable production of cocoa beans and the protection of the rainforest [*PO2, p. 53, No. 32*]. CLAIMANT further ensured that the mbH was a reliable business partner by entrusting the Egimus AG with continuous audits of the mbH [*ibid.*].

143 Moreover, RESPONDENT became familiar with CLAIMANT's specific monitoring system after a visit to CLAIMANT's premises in 2014 [*PO2, p. 54, No. 34*]. RESPONDENT even described CLAIMANT's measures outlined in CLAIMANT's Code of Conduct as “impressive” and as the “decisive element” for RESPONDENT's decision to award CLAIMANT the contract [*Exhibit C5, p. 17, para. 2*]. Hence, RESPONDENT approved CLAIMANT's conduct and thereby expressed that CLAIMANT's efforts are sufficient to fulfil the contract.

144 A reasonable third person would therefore have evaluated CLAIMANT's measures as sufficient to constitute best efforts as required by the contract. Hence, CLAIMANT delivered conforming goods pursuant to Art. 35(1) CISG.

B. Since the PARTIES have conclusively stipulated quality requirements in the contract RESPONDENT cannot resort to Art. 35(2) CISG

145 Art. 35 (2) CISG is subordinate to Art. 35 (1) CISG [*Ferrari/Kieninger/Mankowski/Ferrari, Art. 35, para. 11*]. One can only resort to Art. 35(2) CISG if the contract does not sufficiently specify the requirements of the goods [*Schlechtriem/Schwenzler/Schwenzler, Art. 35, para. 13*]. Accordingly, Art. 35(2) CISG is not applicable where the parties have expressly agreed upon specific requirements for the goods [*Staudinger/Magnus Art. 35, para. 17*].

146 As shown above, [*cf. 85*] the PARTIES have sufficiently specified the good's quantity (20.000 per day), quality (chocolate cake in compliance with RESPONDENT's Code of Conduct, i.e. best efforts) and description (Chocolate Cake – Queens' Delight). Through this exhaustive specification of the chocolate cakes RESPONDENT is precluded from resorting to Art. 35(2) CISG.

C. Even if RESPONDENT could resort to Art. 35(2) CISG CLAIMANT delivered conforming chocolate cakes

147 Pursuant to Art. 35(2)(b) CISG, the goods are conforming if they are fit for the particular purpose made known to the seller. Art. 35(2)(a) CISG in turn refers to the "ordinary purpose of the goods". Hence, Art. 35(2)(b) CISG is more specific and prevails over Art. 35(2)(a) CISG [*Kröll/Mistelis/Viscasillas/Kröll, Art. 35, para. 61*].

148 CLAIMANT fulfilled every particular purpose made known to it by RESPONDENT (I). Even if CLAIMANT had not fulfilled a particular purpose, the goods would still be conforming as RESPONDENT could not reasonably rely on CLAIMANT's skill and judgement (II). In any case, the goods are fit for the ordinary purpose pursuant to Art. 35(2)(a) CISG (III).

I. The chocolate cakes are fit for the particular purpose made known to CLAIMANT by RESPONDENT pursuant to Art. 35(2)(b) CISG

149 Under Art. 35(2)(b) CISG, the seller is responsible for ensuring that goods fit a particular purpose if this purpose has been expressly or impliedly made known to the seller by the buyer [*Schlechtriem/Schwenzler/Schwenzler Art. 35, para. 20*]. RESPONDENT expressly made CLAIMANT aware of its goal to become a Global Compact LEAD company [*Exhibit C1, p. 8, para. 3*]. The chocolate cakes delivered by CLAIMANT were fit for this goal (1). RESPONDENT

failed to clearly describe any further particular purpose in order to become relevant under Art. 35(2)(b) CISG (2).

1. The chocolate cakes were fit for RESPONDENT's goal to become a Global Compact LEAD Company

150 Non-conformity of the chocolate cakes could be claimed if they compromised RESPONDENT's chance to become a Global Compact LEAD company. This is not the case. As of 2018 Global Compact LEAD will no longer be an initiative per se, but merely a recognition status. This recognition status can be reached if a company engages in two or more "Action Platforms" of UN Global Compact [*UN Global Compact, Action Platform Flyer, p. 3*]. These "Action Platforms" constitute working groups of 20-40 participants, preparing solutions for specific issues concerning the Global Compact Principles, and may be joined by **every** Global Compact Member [*ibid., emph. add.*]. Therefore, actions taken by one of RESPONDENT's lower tier suppliers cannot affect RESPONDENT's goal to become a Global Compact LEAD company.

151 Comparing RESPONDENT to other Global Compact LEAD companies in the food industry supports this conclusion. *Nestlé* and *Unilever* are Global Compact LEAD companies [*List of Global Compact LEAD Companies*] albeit being involved in several scandals including child labour and modern slavery in their supply chains [*Involvement of Global Compact LEAD Companies in corruption*]. *Danone*, as another LEAD company [*List of Global Compact LEAD Companies*] in the food industry was involved in bribery scandals in China [*Danone corruption scandal*].

152 These examples distinctly show that even scandals which go well beyond the fraud at hand do not impede a Global Compact LEAD membership. Hence, the chocolate cakes delivered by CLAIMANT are fit for RESPONDENT's particular purpose.

2. No further particular purpose was made sufficiently clear in order to become relevant under Art. 35(2)(b) CISG

153 A product's particular purpose under Art. 35(2)(b) CISG needs to be made sufficiently clear for the seller to be able to identify the exact requirements for its fulfilment [*Kröll/Mistelis/Viscasillas/Kröll, p. 519, para. 113*].

154 RESPONDENT's general desire to sell the goods in a market with an emphasis on ethical standards [*Response to Notice of Arbitration, p. 24, No. 4*] does not meet the required standard to constitute a particular purpose pursuant to Art. 35(2)(b) CISG. "Ethical standards" reflect

a subjective conviction of different groups of people [*cf. para. 119*]. Therefore, CLAIMANT could not identify exact requirements for the fulfilment of the standards.

155 Thus, there is no particular purpose of the goods aside from allowing RESPONDENT to become a Global Compact LEAD Company.

II. Even if another particular purpose was defined, it was unreasonable for RESPONDENT to rely on CLAIMANT's skill and judgement

156 The buyer may only claim non-conformity under Art. 35 (2)(b) CISG if it was also reasonable for him to rely on the seller's skill and judgement [*Schwenzer/Leisinger, p. 266*]. Such reliance is unreasonable if the buyer has sufficient or superior knowledge of the goods' fitness for the particular purpose [*Kröll/Mistelis/Viscasillas/Kröll, Art. 35, para. 123*].

157 RESPONDENT, as the buyer, was fully aware of CLAIMANT's production process and its monitoring of the supply chain [*cf. para. 138*]. Thus, RESPONDENT was in an equal position to assess the probability of unethical production as CLAIMANT. Additionally, in the present case, RESPONDENT knew the conditions in the relevant sales market for the chocolate cakes better than CLAIMANT [*cf. para. 154*]. Considering that the buyer cannot even rely on the seller to know if certain specific national legal standards exist in the buyer's country [*New Zealand Mussels Case*] this must apply even more to unspecific standards, i.e. subjective convictions of a buyer's target group. At hand, RESPONDENT could not rely on CLAIMANT's judgement concerning the expectations of RESPONDENT's target group in a country foreign to CLAIMANT [*cf. Notice of Arbitration, p. 4, para. 2*].

158 Hence, RESPONDENT could have assessed the fitness of CLAIMANT's production process for its target sales market better than CLAIMANT could. A reliance on CLAIMANT would therefore have been unreasonable.

III. The chocolate cakes were fit for the ordinary purpose pursuant to Art. 35(2)(a) CISG

159 As it was unreasonable for RESPONDENT to rely on CLAIMANT's skill and judgement Art. 35(2)(a) CISG must be considered [*Schlechtriem/Schwenzer/Schwenzer, Art. 35, para. 13*]. Pursuant to Art. 35(2)(a) CISG, the goods must be fit for ordinary use.

160 The ordinary use for a cake bought by a supermarket chain is to resell it to its supermarket customers [*cf. Schlechtriem/Schwenzer/Schwenzer, Art. 35, para. 15*]. Whereas RESPONDENT did not sell the chocolate cakes for money, RESPONDENT distributed each chocolate cake for marketing [*PO2, p. 54 No. 38*]. A marketing campaign has a distinct commercial purpose by aiming at monetisation in the long run [*Broda, p. 263*]. Instead of demanding money today,

RESPONDENT simply opted for a chance to gain money tomorrow. Consequently, the chocolate cakes were used in a commercial way.

161 Thus, the chocolate cakes were used, just as intended, for commercial purposes. They thereby complied with Art. 35(2)(a) CISG.

CONCLUSION OF ISSUE 4

CLAIMANT delivered conforming chocolate cakes pursuant to Art. 35(1) CISG. According to the PARTIES' sales contract, ethical standards do not influence the chocolate cakes' conformity because ethical standards were not included as a quality feature of the goods. Even if ethical standards determined the chocolate cakes' conformity, the PARTIES' sales contract only requires best efforts and CLAIMANT used its best efforts to deliver conforming goods. Since the agreement is conclusive concerning the conformity, RESPONDENT cannot resort to Art. 35(2) CISG. Even if Art. 35(2) CISG was applicable, CLAIMANT delivered conforming chocolate cakes.

PRAYER FOR RELIEF

In light of the foregoing submissions CLAIMANT respectfully requests the Arbitral Tribunal to find that

- the Arbitral Tribunal shall not decide on the challenge and, even if so, the Arbitral Mr Prasad should be included in the decision on the challenge (**Issue 1**).
- Mr Prasad shall not be removed from the Arbitral Tribunal (**Issue 2**).
- exclusively CLAIMANT's Conditions govern the contract (**Issue 3**).
- in case RESPONDENT's Conditions were applicable CLAIMANT still delivered conforming goods pursuant to Art. 35 CISG (**Issue 4**).

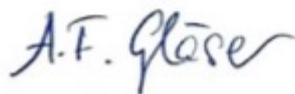
Mannheim 7 December 2017

CERTIFICATE

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



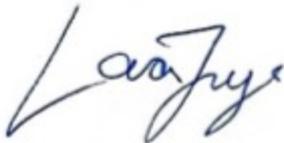
LUISA KATHARINA GEBAUER



ANNIKA FLORA GLÄSER



KIRA GÜLDNER



LARA JUNGE



LEOPOLD VON KAGENECK



ALEXANDER SAVIN