FIFTEENTH ANNUAL
WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
HONG KONG
12 TO 16 MARCH 2018

MEMORANDUM FOR RESPONDENT

JOHANNES GUTENBERG UNIVERSITY MAINZ

On behalf of
Comestibles Finos Ltd
75 Martha Stewart Drive
Capital City
Mediterraneo

(RESPONDENT)

Against
Delicatesy Whole Foods Sp
39 Marie-Antoine Carême Avenue
Oceanside
Equatoriana

(CLAIMANT)

COUNSEL

Nadine Marx  Marco Taube
Julian Tillmann  Julien Wylenzek
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<td>AG</td>
<td>Aktiengesellschaft (German corporate form)</td>
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<td>Art. / Artt.</td>
<td>Article / Articles</td>
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<td>cf.</td>
<td>conferatur (Latin for “compare”)</td>
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<td>CLAIMANT’s Exhibit</td>
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<td>Cl. Memo</td>
<td>CLAIMANT’s Memorandum</td>
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<tr>
<td>COO</td>
<td>Chief Operating Officer</td>
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<tr>
<td>et al.</td>
<td>et alii (Latin for “and others”)</td>
</tr>
<tr>
<td>et. seq.</td>
<td>et sequens (Latin for “following”)</td>
</tr>
<tr>
<td>et. seqq.</td>
<td>et sequentes (Latin for “and the following ones”)</td>
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<tr>
<td>IBA</td>
<td>International Bar Association</td>
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<tr>
<td>idem</td>
<td>Latin for “the same”</td>
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<tr>
<td>ibid.</td>
<td>ibidem (Latin for “in the same place”)</td>
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<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>i.e.</td>
<td>id est (Latin for “that is”)</td>
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<td>LP</td>
<td>Limited Partnership</td>
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<td>Ltd</td>
<td>Limited Company</td>
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<td>PCA</td>
<td>Permanent Court of Arbitration in The Hague</td>
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<td>Sp</td>
<td>Sole Proprietorship</td>
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<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>USD</td>
<td>United States Dollar</td>
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<td>v.</td>
<td>versus (Latin for “against”)</td>
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<tr>
<td>Berger, Klaus Peter</td>
<td>Die Einbeziehung von AGB in internationale Kaufverträge</td>
<td>Published in: Private and Commercial Law in a European and Global Context – Festschrift for Norbert Horn on the Occasion of his Seventieth Birthday</td>
<td>Berger in: FS Horn, P.</td>
<td>103</td>
</tr>
<tr>
<td>Binder, Peter</td>
<td>Analytical Commentary to the UNCITRAL Arbitration Rules</td>
<td>2013, Sweet &amp; Maxwell, London</td>
<td>Binder, Art. PARA.</td>
<td>39</td>
</tr>
<tr>
<td>Bishop, Doak</td>
<td>Practical Guidelines for Interviewing, Selecting and Challenging party-appointed Arbitrators in International Commercial Arbitrations</td>
<td>Published in: 14 Arbitration International 395, 1998</td>
<td>Bishop/Reed, P.</td>
<td>77</td>
</tr>
</tbody>
</table>
Brown, David W.  
*Arbitrators, Impartiality and English Law - Did Rix J. Really Get it Wrong in Laker Airways?*

Published in: Journal of International Arbitration, 2001, Volume 18, Issue 1

Cited as: *Brown, P.*

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Brunner, Christoph  
*UN-Kaufrecht – CISG*

2nd Edition 2014, Stämpfli Verlag, Bern

Cited as: *AUTHOR IN: BRUNNER, ART. PARA.*

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Campolieti, Federico  
*Perenco v. Ecuador: Was there a valid arbitrator challenge under the ICSID Convention?*

Published in:  
http://arbitrationblog.kluwerarbitration.com/2010/01/28/perenco-v-ecuador-was-there-a-valid-arbitrator-challenge/

Cited as: *CAMPOLIETI ON PERENCO V. ECUADOR*

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Caron, David  
*The UNCITRAL Arbitration Rules: A Commentary*

Cited as: *CARON/CAPLAN, P.*

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Caplan, Lee  
*The UNCITRAL Arbitration Rules: A Commentary*

Cited as: *CARON/CAPLAN, P.*

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Craig, W. Laurence  
*International Chamber of Commerce Arbitration*

Cited as: *CRAIG ET AL., P.*

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Park, William W.  
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Paulsson, Jan  
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Cited as: *CRAIG ET AL., P.*

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<th>Cited as</th>
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<tr>
<td>Motzke, Gerd</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Donahey, M. Scott</td>
<td><em>The Independence and Neutrality of Arbitrators</em></td>
<td>Published in: 9 Journal of International Arbitration No. 4, 1992</td>
<td>Author in: Donahey, P.</td>
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<td>Kieninger, Eva-Maria</td>
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<td>Staudinger, Ansgar</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Gade, Marcel

Allgemeine Geschäftsbedingungen im internationalen und europäischen Privatrecht: Ein Vergleich anlässlich des Vorschlags für ein Gemeinsames Europäisches Kaufrecht
2013, Duncker & Humblot, Berlin
Cited as: GADE, P.
Para. 105

Gearing, Matthew

“*A judge in his own cause?”* – actual or unconscious bias of arbitrators
Published in: International Arbitration Law Review, 2000, Issue 3 (2),
Cited as: GEARING, P.
Para. 26

Gupta, Sunil

*No Power to Remove a Biased Arbitrator under the New Arbitration Act of India*
Published in: Journal of International Arbitration, 2000, Volume 17, Issue 4
Cited as: GUPTA, P.
Para. 32

Heiermann, Wolfgang

*Handkommentar zur VOB, VOB Teile A und B, SektVO,*

Riedl, Richard

*Rechtsschutz im Vergabeverfahren*

Rusam, Martin

12th Edition 2011, Vieweg & Teubner
Cited as: AUTHOR IN: HEIERMANN ET AL., § PARA.
Para. 92

Henschel, René Franz

*Conformity of Goods in International Sales*
Published in:
Cited as: HENSCHEL
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<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
<th>Edition/Publication Details</th>
<th>Cited as</th>
<th>Para</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hollander, Charles</td>
<td>Conflicts of Interest</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Huber, Peter</td>
<td><em>The CISG – A new textbook for students and practitioners</em></td>
<td>2007, Sellier. European Law Publishers, Munich</td>
<td>Cited as: <em>HUBER/MULLIS, P.</em></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Paras. 101, 127</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Huber, Peter</td>
<td><em>Deutsche Rechtsprechung zum UN-Kaufrecht in den Jahren</em></td>
<td>2001/2002</td>
<td>Cited as: <em>HUBER/KRÖLL, IPRAX 2003, P.</em></td>
<td>102</td>
</tr>
<tr>
<td>Kröll, Stefan</td>
<td></td>
<td>Published in: Praxis des Internationalen Privat- und Verfahrensrechts, 2003, pp. 309–317</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Cited as: <em>HUBER/KRÖLL, IPRAX 2003, P.</em></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Janssen, André</td>
<td><em>The incorporation of general business terms into international sales contracts and the relevance of the UNIDROIT and the Lando principles</em></td>
<td>Published in: Internationales Handelsrecht, 2004, pp. 194–200</td>
<td>Cited as: <em>JANSSEN, IHR 2004, P.</em></td>
<td>102</td>
</tr>
<tr>
<td>Author(s)</td>
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<td>Messerschmidt, Burkhard</td>
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<tr>
<td>Lachmann, Jens-Peter</td>
<td><em>Handbuch für die Schiedsgerichtspraxis</em></td>
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<td></td>
</tr>
<tr>
<td></td>
<td>2nd Edition 2002, Dr. Otto Schmidt Verlag, Cologne</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lane, Patrick M. M.</td>
<td><em>National Report for South Africa (2010)</em></td>
<td><em>LANE/HARDING, P.</em></td>
<td>26</td>
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</tr>
<tr>
<td>Harding, R. Lee</td>
<td>Published in: ICCA International Handbook on Commercial Arbitration</td>
<td></td>
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<td></td>
</tr>
<tr>
<td></td>
<td>Cited as: <em>LANE/HARDING, P.</em></td>
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<td>Legum, Barton</td>
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<td>Cited as: <em>LOOKOFSKY, P.</em></td>
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Luttrell, Sam  
*Bias Challenges in International Commercial Arbitration: The Need for a “Real Danger” Test*

Published in: International Arbitration Law Library 2009, Volume 20

Cited as: LUTTRELL, P.

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Magnus, Ulrich  
*Incorporation of Standard Contract Terms under the CISG*


Cited as: MAGNUS IN: FS KRITZER, P.

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Maley, Kristian  


Cited as: MALEY, P.

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Marriott, Arthur L.  
*Conflicts of interest*

Published in: ASA Bulletin 2001, Volume 19, Issue 2

Cited as: MARRIOTT, PARA.

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Piltz, Burghard  
*Internationales Kaufrecht*


Cited as: PILTZ, P.

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Piltz, Burghard  
*Einbeziehung von AGB [incorporation of standard terms], Anmerkung zum Urteil des LG Coburg vom 12. Januar 2006 (22 O 38/06)*

Published in: Internationales Handelsrecht 2007, pp. 121–123

Cited as: Piltz, IHR 2007, P.
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Piltz, Burghard  
*AGB in UN-Kaufverträgen*

Published in: Internationales Handelsrecht 2004, pp. 133–138

Cited as: Piltz, IHR 2004, P.
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Ramberg, Christina  
*Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR-Policies and Codes of Conduct*


Cited as: Ramberg, P.
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Redfern, Alan  
*Redfern and Hunter on International Arbitration*


Cited as: Redfern/Hunter, Para.
Paras. 31, 39
| Settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules |
| Published in: https://documents-dds-ny.un.org/doc/UNDOC/LTD/V08/558/46/PDF/V0855846.pdf?OpenElement |
| Cited as: *UN DOC A/CN.9/WG.II/WP.151, p. PARA.* Para. 60 |

| Report of Working Group II (Arbitration and Conciliation) on the work of its forty-ninth session |
| Published in: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V08/570/77/PDF/V0857077.pdf?OpenElement |
| Cited as: *UN DOC A/CN.9/665, N 89, p. PARA.* Para. 60 |

| **Säcker, Jürgen** | *Münchener Kommentar zum Bürgerlichen Gesetzbuch* |
| **Oetker, Hartmut** | Cited: AUTHOR IN: MÜKO, ART. PARA. Para. 101 |
| **Limperg, Bettina** | |

| **Schwab, Karl Heinz** | *Schiedsgerichtsbarkeit* |
| Cited as: SCHWAB/WALTER, CHAPTER PARA. Paras. 31, 32 |

<p>| <strong>Schwenzer, Ingeborg</strong> | <em>Commentary on the UN Convention on the International Sale of Goods (CISG)</em> |
| Cited as: AUTHOR IN: SCHLECHTRIEM/SCHWENZER, ART. PARA. Paras. 101, 102, 103, 104, 106, 109, 127 |</p>
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<td>Schwenzer, Ingeborg</td>
<td>Ethical Standards in CISG Contracts</td>
<td>Published in: Oxford University Press on behalf of UNIDROIT, 2017, pp. 122–131</td>
<td>SCHWENZER, ETHICAL STANDARDS, P.</td>
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<td>Staudinger, Julius von</td>
<td>Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG)</td>
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<td>Cited as: AUTHOR IN: STAUDINGER, ART. PARA.</td>
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*Equitable Estoppel And CISG*

Published in:

http://www.hukukdergi.hacettepe.edu.tr/dergi/C3S2makale10.pdf

Cited as: UÇARYILMAZ, P.

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Ventsch, Verena

Kluth, Peter

*CISG – No Incorporation of General Business Terms by the Possibility of Internet Download*

Published in: Internationales Handelsrecht, 2003, pp. 224–225

Cited as: VENTSCH/KLUTH, IHR 2003, P.

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Wilson, Simon

*Ethical Standards in International Sales Contracts: Can the CISG be used to prevent child labour?*

International Commercial Contracts 2015, Victoria University of Wellington

Cited as: WILSON, P.

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**Austrian Supreme Court, 31 August 2005**

7 Ob 175/05v (Tantalum Case)

Published in: [http://cisgw3.law.pace.edu/cases/050831a3.html](http://cisgw3.law.pace.edu/cases/050831a3.html)

Cited as: *OGH, 31 AUG 2005*

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**Austrian Supreme Court, 6 February 1996**

10 Ob 518/95 (Propane Gas Case)

Published in: [http://cisgw3.law.pace.edu/cases/960206a3.html](http://cisgw3.law.pace.edu/cases/960206a3.html)

Cited as: *OGH, 6 FEB 1996*

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**Higher Regional Court Linz, 23 March 2005**

6 R 200/04f (Conveyor band case)

Published in: [http://cisgw3.law.pace.edu/cases/050323a3.html](http://cisgw3.law.pace.edu/cases/050323a3.html)

Cited as: *OLG LINZ, 23 MARCH 2005*

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#### Belgium

**Tribunal [District Court] de commerce Nivelles, 19 September 1995**

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Published in: [http://cisgw3.law.pace.edu/cases/950919b1.html](http://cisgw3.law.pace.edu/cases/950919b1.html)

Cited as: *TRIBUNAL NIVELLES, 19 SEP 1995*

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Paris Court of Appeals, 1 July 1999
Braspetro Oil Services Company - Brasoil v. The Management and Implementation Authority of the Great Man-Made River Project
Published in: Yearbook Commercial Arbitration 1999, Volume XXIVa
Cited as: COURT OF APPEALS PARIS, 1 JULY 1999, P.
Para. 63

Germany

Federal Supreme Court, 28 March 2012
III ZB 63/10
Published in: https://openjur.de/u/339490.html
Cited as: BGH, 28 MARCH 2012
Para. 26

Federal Supreme Court, 31 October 2001
VIII ZR 60/01 (Machinery Case)
Published in: http://cisgw3.law.pace.edu/cases/011031g1.html
Cited as: BGH, 31 OCT 2001
Paras. 101, 102

Federal Supreme Court, 8 September 1998
X ZR 85/97
Published in: Zeitschrift für das gesamte öffentliche und zivile Baurecht (BauR), 1998, pp. 1249–1252, Werner Verlag
Cited as: BGH, 8 SEP 1998
Para. 92
**Federal Supreme Court, 3 April 1996**

*VIII ZR 51/95 (Cobalt sulphate case)*  
Published in: https://cisgw3.law.pace.edu/cases/960403g1.html  
Cited as: *BGH, 3 APRIL 1996*  
Para. 127

**Federal Constitutional Court, 20 July 2007**

*1 BvR 3084/06*  
Published in: https://openjur.de/u/205642.html  
Cited as: *BVERFG, 20 JULY 2007*  
Para. 26

**Higher Regional Court Celle, 24 July 2009**

*13 W 48/09 (Broadcasters Case)*  
Published in: http://cisgw3.law.pace.edu/cases/090724g1.html  
Cited as: *OLG CELLE, 24 JULY 2009*  
Para. 103

**Higher Regional Court Cologne, 21 May 1996**

*22 U 4/96*  
Published in: http://cisgw3.law.pace.edu/cases/960521g1.html  
Cited as: *OLG KÖLN, 21 MAY 1996*  
Para. 127

**Higher Regional Court Düsseldorf, 28 July 2005**

*VII-Verg 45/05*  
Published in: https://openjur.de/u/113998.html  
Cited as: *OLG DÜSSELDORF, 28 JULY 2005*  
Para. 92
**Higher Regional Court Düsseldorf, 25 July 2003**

17 U 22/03 (Rubber sealing parts case)

Published in: [http://www.cisg.law.pace.edu/cisg/wais/db/cases2/030725g1.html](http://www.cisg.law.pace.edu/cisg/wais/db/cases2/030725g1.html)

Cited as: *OLG DÜSSELDORF, 25 JULY 2003*

Paras. 102, 109

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**Higher Regional Court Karlsruhe, 25 June 1997**

1 U 280/96

Published in: [https://cisgw3.law.pace.edu/cases/970625g1.html](https://cisgw3.law.pace.edu/cases/970625g1.html)

Cited as: *OLG KARLSRUHE, 25 JUNE 1997*

Para. 90

---

**Higher Regional Court Munich, 14 January 2009**

20 U 3863/08 (Metal ceiling materials case)

Published in: [http://www.cisg.law.pace.edu/cisg/wais/db/cases2/090114g1.html](http://www.cisg.law.pace.edu/cisg/wais/db/cases2/090114g1.html)

Cited as: *OLG MÜNCHEN, 14 JAN 2009*

Para. 101

---

**Higher Regional Court Munich, 27 January 2006**

Z3-3-3194-1-49-11/05

Published in: Zeitschrift für das gesamte Vergaberecht (VergabeR) 2006, pp. 537-542

Cited as: *OLG MÜNCHEN, 27 JAN 2006*

Para. 92

---

**Higher Regional Court Munich, 13 November 2002**

27 U 346/02 (Organic barley case)

Published in: [http://cisgw3.law.pace.edu/cases/021113g1.html](http://cisgw3.law.pace.edu/cases/021113g1.html)

Cited as: *OLG MÜNCHEN, 13 NOV 2002*

Para. 127
Higher Regional Court Naumburg, 13 February 2013
12 U 153/12
Published in: Internationales Handelsrecht 2013, pp. 158–161
Cited as: OLG NAUMBURG, 13 FEB 2013
Para. 102

Higher Regional Court Oldenburg, 20 December 2007
8 U 138/07 (Industrial tools case)
Published in: http://www.cisg.law.pace.edu/cisg/wais/db/cases2/071220g1.html
Cited as: OLG OLDENBURG, 20 DEC 2007
Para. 102

Regional Court Coburg, 12 December 2006
22 O 38/06 (Plants case)
Published in: http://www.cisg.law.pace.edu/cisg/wais/db/cases2/061212g1.html
Cited as: LG COBURG, 12 DEC 2006
Para. 101

Regional Court Memmingen, 13 September 2000
2H O 382/99 (Plastic filter plate case)
Published in: http://cisgw3.law.pace.edu/cases/000913g1.html
Cited as: LG MEMMINGEN, 13 SEP 2000
Para. 109

Regional Court Neubrandenburg, 3 August 2005
10 O 74/04 (Pitted sour cherries case)
Published in: http://www.cisg.law.pace.edu/cisg/wais/db/cases2/050803g1.html
Cited as: LG NEUBRANDENBURG, 3 AUG 2005
Para. 102
Italy

Tribunale [District Court] Rovereto, 21 November 2007
n. 914/06 (Takap B.V. v. Europlay S.r.l.)

Published in: http://cisgw3.law.pace.edu/cases/071121i3.html
Cited as: TAKAP B.V. V. EUROPLAY S.R.L.
Para. 102

The Netherlands

Gerechtshof Den Haag, 22 April 2014
200.127.516-01 (Feinbäckerei Otten GmbH & Co Kg and HDI-Gerling Industrie Versicherung AG v. Rhumveld Winter & Konijn B.V.)

Published in: http://cisgw3.law.pace.edu/cases/140422n1.html
Cited as: GERECHTSHOF DEN HAAG, 22 APRIL 2014
Para. 102

Gerechtshof Hertogenbosch, 26 February 1992
856/91 (Melody BV v. Loffredo, h.o.d.n. Olympic)

Published in: http://cisgw3.law.pace.edu/cases/920226n1.html
Cited as: GERECHTSHOF HERTOGENBOSCH, 26 FEB 1992
Para. 90

Nigeria

Supreme Court of Nigeria, 15 December 2006

Bill Construction Co Ltd v. Imani & Sons Ltd/Shell Trustees Ltd (A Joint Venture)

Published in:
http://www.lawpavilionpersonal.com/lawreportsummary.jsp?suite=olabisi@9thfloor&pk=SC.63/2002&apk=8510
Cited as: BILL CONSTRUCTION CO LTD V. IMANI & SONS LTD/SHHELL TRUSTEES LTD
Para. 26
**Switzerland**

*Obergericht des Kantons Bern, 19 May 2008*

HG 06 36/SCA (A.SA v. B. s.a.s. di. D. & C.)

Published in: http://www.globalsaleslaw.org/content/api/cisg/display.cfm?test=1738

Cited as: *OBERGERICHTSHOF DES KANTONS BERN, 19 MAY 2008*

Para. 102

**United Kingdom**

*Royal Courts of Justice, Court of Appeal, 17 November 1999*

Locabail (UK) Ltd v. Bayfield Properties Ltd (Leave to Appeal)


Cited as: *LOCABAIL (UK) LTD V. BAYFIELD PROPERTIES LTD*

Para. 26

*House of Lords, 17 December 1998*

Judgment – In Re Pinochet

Published in: https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm

Cited as: *JUDGMENT - IN RE PINOCHET*

Para. 26

*House of Lords, 29 June 1852*

Dimes v. Proprietors of Grand Junction Canal (10 E.R. 315)

Published in: https://docslide.com.br/documents/dimes-v-grand-junction-canal-56781add76311.html

Cited as: *DIMES V. PROPRIETORS OF GRAND JUNCTION CANAL*

Para. 26
United States of America

U.S. Supreme Court, 8 June 2009
Caperton v. A. T. Massey Coal Co, 556 U.S. 868
Published in: https://supreme.justia.com/cases/federal/us/556/868/
Cited as: CAPERTON V. A. T. MASSEY COAL CO
Para. 26

U.S. Supreme Court, 16 May 1955
In re Murchison, 349 U.S. 133
Published in: https://supreme.justia.com/cases/federal/us/349/133/case.html
Cited as: IN RE MURCHISON
Para. 26

U.S. Court of Appeals, Fifth Circuit, 14 August 2012
Dealer Computer Services, Inc v. Michael Motor Company, Inc, No. 11-20053
Published in: http://www.ca5.uscourts.gov/opinions%5Cunpub%5C11/11-20053.0.wpd.pdf
Cited as: DEALER COMPUTER SERVICES V. MICHAEL MOTOR COMPANY
Para. 61

U.S. Federal District Court [Pennsylvania], 10 September 2013
11cv302 ERIE (Roser Technologies, Inc v. Carl Schreiber GmbH)
Published in: http://cisgw3.law.pace.edu/cases/130910u1.html
Cited as: ROSER TECHNOLOGIES, INC V. CARL SCHREIBER GMBH
Para. 104
Arbitral Awards:

**Canfor Corporation v. United States**

24 September 2004

Published in: https://www.state.gov/s/l/c7424.htm

Cited as: *Canfor Corporation v. United States*

Para. 77

**Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft**

5 June 1994

SCH-4318 (Rolled Metal Sheets Case)

Published in: https://cisgw3.law.pace.edu/cases/940615a4.html

Cited as: *Rolled Metal Sheets Case, 5 June 1994*

Para. 90

**Perenco v. Ecuador**

PCA Case No. IR- 2009/01

Published in: https://www.italaw.com/sites/default/files/case-documents/ita0625.pdf

Cited as: *Perenco v. Ecuador*

Para. 77

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

27 July 1999

302/1996

Published in: http://cisgw3.law.pace.edu/cases/990727r1.html

Cited as: *Russian Tribunal, 27 July 1999*

Para. 90
Vito G. Gallo v. The Government of Canada
Decision on the Challenge to Mr. J. Christopher Thomas, QC, 14 October 2009
PCA Case No. 55798
Published in: http://www.uncitral.org/res/transparency-registry/registry/data/can/v_g_gallo_html/gallo-po-13.pdf
Cited as: Decision on the Challenge to Mr. J. Christopher Thomas, p. para.
Para. 60
STATEMENT OF FACTS

1 The Parties to these proceedings (hereinafter the Parties) are Comestibles Finos Ltd (hereinafter RESPONDENT) and Delicatesy Whole Foods Sp (hereinafter CLAIMANT). RESPONDENT is a gourmet supermarket chain from Mediterraneo that sells fair-trade and organic goods. CLAIMANT is a manufacturer of bakery products incorporated in Equatoriana.

2 Representatives of the Parties first met at a Food Fair in March 2014. RESPONDENT was searching for a supplier of chocolate cakes. CLAIMANT expressed an interest in establishing a business relationship due to their similar values regarding sustainable and ethical food production. RESPONDENT extended an Invitation to Tender for the delivery of chocolate cakes to CLAIMANT on 10 March 2014. The invitation included a Letter of Acknowledgement that CLAIMANT signed. It stated that CLAIMANT will tender in accordance with the specifications set out in the Tender Documents.

3 On 17 March 2014, CLAIMANT submitted its tender in form of a sales offer. On 7 April 2014, CLAIMANT was awarded the Contract.

4 On 23 January 2017, an article was published detailing a complex system of fraud apparently used to circumvent the Ruritanian Sustainability Certification Scheme. A group of business people bribed officials at the ministry to change the zoning plans and issue permits within nature reserves. Large parts of the rainforest were burned down. The smoke exposure is estimated to have caused 100,300 premature deaths. On 27 January 2017, RESPONDENT sent CLAIMANT an Email asking it to confirm that its suppliers were not involved in the fraud. CLAIMANT replied that it is confident that their suppliers were not part of the scheme but that it would investigate this issue further. On 10 February 2017, CLAIMANT informed RESPONDENT that one of its suppliers had been involved in the fraud. It had provided CLAIMANT with forged official papers certifying sustainable production. Around 50% of the cocoa used to make the chocolate cakes for RESPONDENT was falsely certified. RESPONDENT stopped selling the cakes and gave it away at a marketing event. On 12 February 2017, RESPONDENT terminated the Contract.

5 On 30 May 2017, the Parties had a meeting during which it became clear that no settlement could be reached by mediation. On 30 June 2017, CLAIMANT submitted its Notice of Arbitration. CLAIMANT nominated Mr. Prasad as an arbitrator. On 31 July 2017, RESPONDENT filed its Response to the Notice of Arbitration.
On 27 August 2017, RESPONDENT retrieved metadata from CLAIMANT’s Notice of Arbitration. The data revealed that CLAIMANT is third-party funded. On 29 August 2017, RESPONDENT requested CLAIMANT to submit the name of the third-party funder. On 30 August 2017, the Tribunal ordered CLAIMANT to disclose this information. CLAIMANT complied and disclosed Funding 12 Ltd, a subsidiary of Findfunds LP as its funder on 7 September 2017.

On 11 September 2017, Mr. Prasad disclosed that he had acted as an arbitrator in two cases, which were funded by subsidiaries of the Findfunds LP. He also disclosed that his law firm had merged to create the law firm Prasad & Slowfood. One of his new colleagues represents a client in an arbitration which is also funded by a subsidiary of Findfunds LP. On 14 September 2017, RESPONDENT submitted its Notice of Challenge of Mr. Prasad. On 21 September 2017, Mr. Prasad refused to step down. On 29 September 2017, CLAIMANT submitted its Response to the Notice of Challenge of Mr. Prasad and refused to agree to the removal of Mr. Prasad.

**SUMMARY OF ARGUMENTS**

**ISSUE A: THE TRIBUNAL SHOULD DECIDE ON THE CHALLENGE OF MR. PRASAD WITHOUT HIS PARTICIPATION**

The Parties agreed that the dispute would be settled by arbitration without the involvement of any arbitral institution. RESPONDENT will show through the wording of the clause and the negotiations between the Parties that the exclusion of arbitral institutions extends to the exclusion of appointing authorities. CLAIMANT’s position is that appointing authorities are not excluded because they do not necessarily have to be arbitral institutions.

The decision on whether Mr. Prasad should be removed from the Tribunal should be made without his participation. The Tribunal has discretion to conduct the proceedings in a manner it deems appropriate. It would be inappropriate for Mr. Prasad to participate in the decision because that would make him a judge in his own cause. He cannot be expected to remain objective when deciding whether or not he appears biased.

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

There are justifiable doubts as to Mr. Prasad’s impartiality and independence. Mr. Prasad has been appointed on four previous occasions by CLAIMANT’s funder, Findfunds LP, and lawyer, Mr. Fasttrack. Furthermore, Mr. Prasad’s law firm is currently representing a client who is also
funded by Findfunds LP. The connections to Findfunds LP demonstrate dependency. Furthermore, Mr. Prasad has published an article that takes a position on a legal issue relevant to this case. The article is so specific to the facts of this case that Mr. Prasad no longer appears impartial.

**ISSUE C: RESPONDENT’S GENERAL CONDITIONS GOVERN THE CONTRACT**

When it tendered for the Contract, CLAIMANT signed a Letter of Acknowledgement assuring RESPONDENT that it would tender in accordance with the specified requirements and attached RESPONDENT’s General Conditions to its offer. The disputed point arises because CLAIMANT used its standard sales offer template that states that the offer is subject to CLAIMANT’s General Conditions with a reference to a web address where they can be found. Even though there is a contradiction in the sales offer, the weight of evidence speaks in favour of RESPONDENT’s General Conditions governing the Contract. Nevertheless, a mere reference to a web address is insufficient to incorporate standard terms.

**ISSUE D: CLAIMANT DELIVERED NON-CONFORMING GOODS**

CLAIMANT did not deliver goods of the quality required by the Contract. CLAIMANT argues that it did, because it was only required to use its best efforts to ensure compliance by its suppliers. RESPONDENT will show, however, that the wording of the Contract and the negotiations between the Parties demonstrate that CLAIMANT agreed to guarantee its suppliers’ ethical conduct.
ISSUE A: THIS TRIBUNAL IS COMPETENT TO DECIDE ON THE CHALLENGE OF MR. PRASAD AND SHOULD DECIDE WITHOUT HIS PARTICIPATION

The Tribunal is the only competent body to decide the challenge. The Parties agreed, in the Dispute Resolution Clause, that the Tribunal should decide all matters without the involvement of an arbitral institution. The exclusion of arbitral institutions extends to appointing authorities (1). The Tribunal should decide on the challenge of Mr. Prasad without his involvement (2).

1 THE TRIBUNAL SHOULD DECIDE THE CHALLENGE AND NOT AN APPOINTING AUTHORITY

The wording of the Dispute Resolution Clause demonstrates that the Parties excluded appointing authorities (1.1). The Parties’ discussions support this interpretation (1.2).

1.1 THE WORDING OF THE DISPUTE RESOLUTION CLAUSE DEMONSTRATES THAT THE PARTIES EXCLUDED AN APPOINTING AUTHORITY

The Dispute Resolution Clause is drafted in such a way as to exclude the involvement of both arbitral institutions and appointing authorities. Pursuant to Article 13 (4) UNCITRAL Arbitration Rules (hereinafter the Arbitration Rules), appointing authorities decide challenges of arbitrators. In this case, however, the Parties derogated from Article 13 (4) Arbitration Rules in favour of the Tribunal deciding all matters.

Pursuant to the Arbitration Agreement, the proceedings are to be conducted without the involvement of arbitral institutions. The question remains whether the Parties also excluded appointing authorities who are unrelated to institutions. CLAIMANT argues that the Parties never agreed to exclude the involvement of appointing authorities because, according to Article 6 (2) Arbitration Rules, an appointing authority may be an arbitral institution or a person unrelated to an institution [CL. MEMO, PARA. 7]. This is irrelevant, however, as the wording of the arbitration agreement demonstrates that appointing authorities are also excluded.

The Parties adopted the UNCITRAL Model Arbitration Clause almost in its entirety. The Parties’ intention to exclude appointing authorities as well as arbitral institutions becomes apparent when the Model Clause is compared to the Parties’ Dispute Resolution Clause.
### Model Clause

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

### Dispute Resolution Clause

[Cl. Ex. C 2, p. 12]

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules without the involvement of any arbitral institution and excluding the application, direct or by analogy, of the UNCITRAL Rules on Transparency. [EMPHASIS ADDED]

**Note.** Parties should consider adding:

(a) The appointing authority shall be ... [name of institution or person];

(b) The number of arbitrators shall be ... [one or three];

(c) The place of arbitration shall be ... [town and country];

(d) The language to be used in the arbitral proceedings shall be ... [EMPHASIS ADDED]

Comparing the two clauses demonstrates that the Parties’ Dispute Resolution Clause is undeniably based on the Model Clause. Thus, what was inserted or deleted speaks to the intention behind the agreement. The modifications essentially relate to three points:
1. The first sentence that the arbitration be conducted “without the involvement of any arbitral institution […]” was added;
2. Suggestion (a) regarding the choice of an appointing authority was deleted; and
3. In point (b), regarding how arbitrators are to be appointed was added.

Modification 1. represents an explicit exclusion of arbitral institutions and modification 2. represents an omission to pick an appointing authority. By both excluding the involvement of arbitral institutions and deleting the choice of an appointing authority, it must, be presumed that the involvement of appointing authorities is also excluded.

Claimant may argue that the meaning behind the omission of proposal (a) was not that the Parties excluded an appointing authority but only that they did not want to designate the person to act as appointing authority yet. The final modification, however, further evidences the intention to exclude appointing authorities all together. Modification 3. shows that the Parties not only modified the challenge procedure, but also the procedure by which arbitrators are appointed. This modification can only reasonably be explained on the basis that the Parties excluded the appointing authority.

Pursuant to Article 9 (1) Arbitration Rules, where the number of arbitrators is three, each party appoints one arbitrator and these two arbitrators appoint the presiding arbitrator. Pursuant to Article 9 (3) Arbitration Rules, if the party appointed arbitrators cannot agree on a presiding arbitrator, the appointing authority does so. The Parties’ agreement reads:

*The number of arbitrators shall be three, one to be appointed by each party and the presiding arbitrator to be appointed by the party-appointed arbitrators or by agreement of the Parties.* [EMPHASIS ADDED]

Thus, the Parties replaced the appointing authority’s task of picking the presiding arbitrator in favour of an agreement between the Parties. There is no indication in the file nor any conceivable reason on why the Parties would have wanted to do this if they had not excluded the appointing authority. Assuming that they had intended this exclusion, however, the derogation from Article 9 (3) Arbitration Rules not only makes sense but was necessary to cover for the situation that the party appointed arbitrators cannot agree on a chairman. Any reasonable person would therefore understand these modifications to represent the intention of the Parties to not only exclude the involvement of arbitral institutions, but also appointing authorities.
1.2 **THE PARTIES’ DISCUSSIONS INDICATE THAT THEY INTENDED THE TRIBUNAL TO DECIDE ALL MATTERS WITHOUT AN APPOINTING AUTHORITY’S INVOLVEMENT**

22 The Parties met at Cucina Food Fair 2014 prior to the conclusion of the Contract [Resp. Ex. R 5, p. 41]. At this Food Fair, the Parties discussed their experiences with previous arbitrations. Mrs. Ming, Respondent’s Head of Purchasing, specifically told Claimant the reasons for excluding the involvement of any arbitral institution [Resp. Ex. R 5, p. 41]. Respondent had been accused of money laundering in a previous arbitration. This information was leaked to one of Respondent’s competitors and ultimately resulted in bad press. The information was apparently leaked by the wife of the competitor’s COO who worked for the arbitral institution that was involved in the case. Respondent then switched to ad hoc arbitration and included a strict confidentiality clause in its contracts [Resp. Ex. R 5, p. 41]. This demonstrates that the arbitration clause was drafted in order to limit the number of people involved and to ensure confidentiality. These goals are best achieved by having the Tribunal decide all matters without the involvement of an appointing authority or an arbitral institution.

23 Claimant may argue that one additional person, unrelated to an institution, adds negligible risk. This may be true, however, in case the Parties failed to agree on an appointing authority, the Secretary-General of the PCA would designate an appointing authority (Article 6 (2) Arbitration Rules). It is unlikely the Parties will agree on an appointing authority because Respondent believes the Tribunal should decide the challenge; therefore, the PCA would have to get involved. This interpretation would result in a subversion of the whole purpose behind the Parties drafting it the way they did.

24 In sum, any reasonable person would according to the wording of the Dispute Resolution Clause and the discussions between the parties, understand the Parties to have intended that the Tribunal should decide all matters without the involvement of an arbitral institution or appointing authority.

25 **2 MR. PRASAD MUST BE EXCLUDED FROM THE DECISION ON HIS OWN CHALLENGE**

25 The Tribunal should decide the challenge without the participation of Mr. Prasad. Pursuant to Article 17 (1) Arbitration Rules, the Tribunal “may conduct the arbitration in such manner as it considers appropriate” [Emphasis added]. The Tribunal should exercise this discretion and exclude Mr. Prasad because it would be inappropriate to have him participate in the decision on his own challenge (2.1). Contrary to what Claimant argues, the Model Law does not provide an appropriate solution (2.2)
2.1 IT WOULD BE INAPPROPRIATE FOR MR. PRASAD TO ACT AS A JUDGE IN HIS OWN CAUSE

The principle that no one should be a judge in his own cause is a maxim of natural law and accepted in legal systems all over the world [LUTTRELL, P. 126; GEARING, P. 46; KOCH, P. 329; BROWN, P. 124; MARriott, PARA. 5; FOR APPLICATION IN NATIONAL LAW: IN RE MURCHISON; CAPERTON V. A. T. MAsey COAL Co; DIMES V. PROPRIETORS OF grand junction CANaL; JUDGEMENT - IN RE PINOCHET; BGH, 28 March 2012; BVerfG, 20 July 2007; LOcAbAIL (UK) LTD V. BAYFIELD PROPERTIES LTD; LANE/HARDING, P. 15; KRISHAN, P. 269; BILL CONSTRUCTION CO LTD V. IMANI & SONS LTD/SHell TRUSTeES LTD]. It is also accepted that this principle applies in arbitration [CF. Born, P. 1867; Lew/Milstelis/Kröll, Pp. 262, 282].

Any method of adjudication survives on integrity. As arbitration strives to be an alternative to litigation, and the award rendered has the same power as a decision by a national court, it must put forward the same standards [Jo-MEI MA, P. 301]. The policy behind the rule is self-evident. It is not possible for arbitrators to remain neutral when asked to decide whether they are neutral. The answer an arbitrator will give in that situation will nearly always be the same. If they are biased they will decide in favour of remaining on the Tribunal. If they are not biased they will also decide in favour of remaining on the Tribunal. In the present case, Mr. Prasad has already made up his mind as evidenced by his refusal to step down [LETTER PrASAD, P. 43]; therefore, if he is allowed to participate in the decision, the only way for him to be removed is by a unanimous decision by the rest of the Tribunal.

CLAIMANT may argue that with only two arbitrators left it may be impossible to achieve a majority. This, however, would not be an issue as, pursuant to Article 33 (2) Arbitration Rules, with regards to questions of procedure, where no majority can be reached the presiding arbitrator may decide.

In sum, the Tribunal has discretion to conduct the proceedings in such a manner as it considers appropriate. In the interests of integrity, it would be inappropriate for Mr. Prasad to participate in the decision because he is not neutral on the matter.

2.2 CLAIMANT’S PROPOSAL IS INAPPROPRIATE

CLAIMANT refers to the UNCITRAL Model Law in an attempt to show that Mr. Prasad’s participation is appropriate [Cl. Memo, PARA. 18]. To this end, CLAIMANT refers to Article 13 (2) UNCITRAL Model Law (hereinafter the Model Law), which states that “[…] the arbitral tribunal shall decide on the challenge”. Citing to a “Guide to Model Law”, CLAIMANT argues
that it meant all three arbitrators [CL. MEMO, PARA. 18]. This argument should be rejected on two grounds.

First, the wording “arbitral tribunal” does not necessarily mean the entire tribunal. It could simply mean that the tribunal and not, an appointing authority decides, without any prejudice to the participation of the challenged arbitrator. Accordingly, the meaning of Article 13 (2) Arbitration Rules is controversially discussed [PRO THREE ARBITRATORS E.G.: REDFERN/HUNTER, PARA. 4.114 AND FOR THE GERMAN VERBATIM ADOPTION: SCHWAB/WALTER, CHAPTER 14 PARA. 22; CONTRA THREE ARBITRATORS E.G. REICHHOLD IN: THOMAS/PUTZO, § 1037 ZPO PARA. 4 (2004)].

Second, there is criticism advanced even amongst those that understand Article 13 (2) Model Law to mean the entire tribunal [SCHWAB/WALTER, CHAPTER 14 PARA. 22; GUPTA, P. 127; ADEN, P. 458 PARA. 10; LACHMANN, P. 227 PARA. 630] and it has been noted that “[s]everal states have modified the Model Law’s challenge procedures […] to provide for the arbitral tribunal to consider challenges without the involvement of the challenged arbitrator” [BORN, P. 1924 REFERRING TO QUÉBEC AND PERU; ANOTHER STATE THAT EXCLUDED THE CHALLENGED ARBITRATOR FROM THE DECISION IS GUATEMALA (DECREE NO. 67-95, ARTICLE 17 (2)).

In light of such criticism and in light of the arguments against the challenged arbitrator’s participation laid out above, it would be inappropriate to have the challenged arbitrator participate in the decision on his challenge. It would therefore be appropriate for the Tribunal to exercise its discretion under Article 17 (1) Arbitration Rules and decide without Mr. Prasad’s participation. However, RESPONDENT agrees to CLAIMANT’s proposal to let the presiding arbitrator decide on the challenge [CL. MEMO PARA. II].

CONCLUSION TO ISSUE A

The Parties have excluded appointing authorities from the proceedings. Therefore, the decision on Mr. Prasad’s challenge must be made by the Tribunal. Mr. Prasad must be excluded from the decision in order to respect the principle that no one should be a judge in his own cause.
ISSUE B: MR. PRASAD SHOULD BE REMOVED FROM THE TRIBUNAL

RESPONDENT has lost confidence in Mr. Prasad’s ability to act as an independent and impartial arbitrator in this case. With respect to Mr. Prasad there are simply too many connections between him and CLAIMANT. To make matters worse, CLAIMANT actively tried to conceal these connections. This dishonesty should be taken into account when the Tribunal considers whether the doubts as to Mr. Prasad’s impartiality and independence are justified. Pursuant to Article 12 (1) Arbitration Rules:

Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

There are justifiable doubts as to Mr. Prasad’s impartiality and independence due to connections between him and CLAIMANT’s funder Findfunds LP. These connections, in combination with the publication of an article in which he takes a clear stance on issues raised by this case, justify RESPONDENT’s doubts as to Mr. Prasad’s suitability to act as an impartial and independent arbitrator in this case.

First, Mr. Prasad was previously appointed twice by CLAIMANT’s funder Findfunds LP and twice by Mr. Fasttrack’s law firm (1). Second, a partner of Mr. Prasad’s law firm is representing a client which is also being funded by Findfunds LP (2). Third, the article that Mr. Prasad published reveals a stance which renders him unable to perform as an impartial arbitrator (3).

1 The previous appointments by the law firm of MR. FASTTRACK AND BY CLAIMANT’S FUNDER DEMONSTRATE DEPENDENCY

In this case there are justifiable doubts as to Mr. Prasad’s independence because he has been appointed as an arbitrator on two previous occasions by Findfunds LP, which also funds CLAIMANT in this arbitration [DECLARATION PRASAD, P.36]. These previous appointments by CLAIMANT’s funder alone are problematic (1.1). Additionally, he has been appointed twice by the law firm of CLAIMANT’s lawyer Mr. Fasttrack [CL. EX. C II, P. 23]. Even if the appointments by CLAIMANT’s funder were insufficient, the additional appointments by the law firm representing CLAIMANT intensify Mr. Prasad’s dependency to an unacceptable level (1.2). Contrary to CLAIMANT’s argument, RESPONDENT did not waive its right to rely on these previous appointments to challenge Mr. Prasad (1.3).
1.1 THE PREVIOUS APPOINTMENTS BY FINDFUNDS LP’S SUBSIDIARIES RAISE DOUBTS AS TO MR. PRASAD’S INDEPENDENCE

In determining whether justifiable doubts exist, the Tribunal should consider the IBA Guidelines on Conflicts of Interest in International Arbitration (hereinafter IBA Guidelines). Even though the Parties have not expressly chosen the IBA Guidelines, they are a widely recognised set of rules that evidence best practice and are even considered to represent a worldwide standard [REDFERN/HUNTER, P. 258 PARA. 4.88; BINDER, ART. 12 PARA. 12–004].

The situation of an arbitrator being previously appointed by one of the parties falls under the “orange list” of the IBA Guidelines. The orange list is a collection of situations that might, depending on the specific circumstances of the case, justify an arbitrator’s removal from the tribunal [BORN, P. 1849; HOLLANDER/SALZEDO, PARA. 14-007].

According to Section 3.1.3 IBA Guidelines it is problematic if:

[the arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties. [EMPHASIS ADDED]]

In this case, Mr. Prasad has been appointed twice before by fellow subsidiaries of CLAIMANT’s funder [LETTER MR. PRASAD, P. 36]. This situation is covered by Section 3.1.3 IBA Guidelines. CLAIMANT argues that these appointments should not count because it was not CLAIMANT who previously appointed Mr. Prasad but Findfunds LP or its subsidiaries [CL. MEMO, PARA. 46]. This argument is misguided because under the IBA Guidelines, a party’s funder is considered to bear the identity of the party. Findfunds LP therefore “is” CLAIMANT (1.1.1). Accordingly, the Findfunds LP subsidiaries that have appointed Mr. Prasad on two previous occasions are affiliates of CLAIMANT (1.1.2).

1.1.1 FINDFUNDS LP “IS” CLAIMANT

Findfunds LP and CLAIMANT are, according to the IBA Guidelines, considered to bear the same identity. Therefore, contrary to what CLAIMANT asserts [CL. MEMO, PARA. 46], it is irrelevant whether the party or the funder has previously appointed the arbitrator. Every legal entity that has a direct economic interest in the outcome of the arbitration is, for conflict purposes, to be considered the party.

General Standard 6 (b) IBA Guidelines states:

If one of the parties is a legal entity, any legal or physical person having a controlling
influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party. [EMPHASIS ADDED]

45 This rule was specifically drafted with third-party funders in mind as evidenced by the Official Explanation to the rule: “Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party.” [EXPLANATION TO GENERAL STANDARD 6 (B)]

46 Here Findfunds LP is an entity which has a direct economic interest in the present arbitration. Findfunds LP’s subsidiary Funding 12 Ltd gets 25% of all amounts awarded in this arbitration [P.O. 2, PARA. 1]. The sum claimed in this arbitration amounts to 3,700,000 USD [NOTICE OF ARBITRATION, P. 7]. Findfunds LP’s subsidiary Funding 12 Ltd would get 925,000 USD from the arbitration if the award was rendered to CLAIMANT. Findfunds LP has an economic interest since it holds 60% in the subsidiary that gets 25% from the arbitration [P.O. 2, PARA. 2]. This is a considerable amount and shows a direct economic interest in this case. Especially since it seems to be the practice of Findfunds LP to create a separate legal entity for each case it intends to fund [P.O. 2, PARA. 3]. These subsidiaries seem to only exist to fund claims, which Findfunds LP profits from.

47 Consequently, for challenge purposes, Findfunds LP is considered to bear the identity of CLAIMANT.

1.1.2 MR. PRASAD HAS BEEN APPOINTED BY FINDFUNDS LP ON TWO PREVIOUS OCCASIONS

48 Under Section 3.1.3 IBA Guidelines it is equally problematic that “an affiliate of one of the parties” has previously appointed the arbitrator. As defined by the IBA Guidelines, “the term ‘affiliate’ encompasses all companies in a group of companies, including the parent company” [IBA GUIDELINES, APPLICATION LIST, FN. 4].

49 Mr. Prasad disclosed that he has acted as an arbitrator in two previous cases, which were funded by subsidiaries of Findfunds LP; therefore, he has been appointed twice by ‘affiliates’ of Findfunds LP [DECLARATION MR. PRASAD, P. 36]. As Findfunds LP, for challenge purposes, is considered to bear the identity of CLAIMANT, the appointments were also made by ‘affiliates’ of CLAIMANT.

50 CLAIMANT may argue that there has only been one previous appointment by Findfunds LP/CLAIMANT. This argument would be based on the fact that in one of the previous arbitrations,
Findfunds LP only entered into the funding agreement after the appointment of Mr. Prasad [Declaration Prasad, p. 36]. Findfunds LP may nevertheless have influenced the decision to appoint Mr. Prasad. Findfunds LP makes a very thorough examination of a case before deciding to enter into a funding agreement [P.O. 2, para. 4]. In the current arbitration for example, Claimant and Findfunds LP started negotiating on 30 May 2017, signed the agreement on 25 June 2017 [P.O. 2, para. 5] and Mr. Prasad was appointed on 26 June 2017 [CL. EX. C 11, p. 23]. There was almost a month of negotiations. It is reasonable to assume that the timetable was similar in the case discussed above. It is therefore also possible that Findfunds LP influenced Mr. Prasad’s appointment, although they officially only signed the funding agreement later. Thus, the actual signing of the funding agreement is not decisive.

When evaluating whether conflicts of interest exist, the appearance of bias is the relevant criterion. It has to be tested objectively whether the arbitrator appears to be biased not whether he actually is [Donahey, p. 31; Campolieti on Perenco v. Ecuador]. The problem with repeat appointments is that they could be understood as an incentive to rule in favour of the appointing party again, hoping that this might lead to yet another appointment. The appearance of bias in this case does not derive from the actual act of appointment, but from the fact that Mr. Prasad has served as party appointed arbitrator twice for Claimant and twice for Mr. Fasttrack. In all four arbitrations Mr. Prasad decided in favour of Claimant and Mr. Fasttrack. This creates an appearance of bias.

In sum, Findfunds LP/Claimant has appointed Mr. Prasad on two previous occasions. This triggers Section 3.1.3 IBA Guidelines and strongly indicates that there are justifiable doubts as to Mr. Prasad’s impartiality. There are thousands of arbitrators in the world. If Mr. Prasad were as objective and impartial as all the other arbitrators and if Findfunds LP/Claimant did not consider him prone to decide in their favour, it is highly questionable why they would want him to serve as an arbitrator a third time. An objective third person would have doubts as to his impartiality and independence.

1.2 The previous appointments by the law firm representing Claimant intensify Mr. Prasad’s dependency to an unacceptable level

Mr. Prasad has also been appointed twice by the law firm of Mr. Fasttrack which is representing Claimant in the arbitration [CL. EX. C 11, p. 23]. These previous appointments, extend Mr. Prasad’s ties to Claimant. He is not only connected to Claimant’s funder, but also to the law firm representing Claimant. It makes it unacceptable to have Mr. Prasad act as an arbitrator in
Mr. Prasad acted as an arbitrator in 21 arbitrations over the last three years. In four of those he was appointed by Findfunds LP or the law firm representing CLAIMANT [P.O. 2, PARA. 10]. Contrary to what CLAIMANT argues, this is not “only a little part of Mr. Prasad’s income” [CL. MEMO, PARA. 43]. The four appointments account for almost 20% of the cases in which he was appointed as an arbitrator. This establishes a significant history between Mr. Prasad and CLAIMANT, which raises doubts as to Mr. Prasad’s independence. Added to the doubts created by Mr. Prasad’s connection to CLAIMANT’s funder, there is sufficient ground for removing Mr. Prasad.

1.3 RESPONDENT HAS NOT WAIVED ITS RIGHT TO CHALLENGE MR. PRASAD ON THE BASIS OF THE PREVIOUS APPOINTMENTS

CLAIMANT advances the argument, that RESPONDENT had waived its right to challenge Mr. Prasad based on the prior appointments [CL. MEMO, PARAS. 25 ET SEQQ.]. This is not true. RESPONDENT has neither waived its right to challenge based on the prior appointments by Findfunds LP (1.3.1) nor based on the prior appointments by CLAIMANT’s lawyer Mr Fasttrack [CL. MEMO, PARA. 27] (1.3.2).

1.3.1 RESPONDENT MAY INVOKE THE APPOINTMENTS BY FINDFUNDS LP

CLAIMANT asserts that RESPONDENT has missed the 15-day-deadline established by Article 13 (1) Arbitration Rules [CL. MEMO, PARAS. 25 ET SEQQ.], It requires that “[a] party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after […] the circumstances mentioned in articles 11 and 12 became known to that party.” Contrary to CLAIMANT’s assertion, RESPONDENT observed this deadline.

The relevant circumstances are Mr. Prasad’s previous appointments by Findfunds LP. These came to light on 11 September 2017 when Mr. Prasad disclosed them [DECLARATION MR. PRASAD, P. 36]. RESPONDENT issued its challenge on 14 September 2017 [NOTICE OF CHALLENGE, P. 37] and, therefore, well within the 15 days. CLAIMANT nonetheless argues that an earlier point in time should mark the beginning of the period, namely 27 August 2017.

On this date, RESPONDENT extracted Metadata from CLAIMANT’s request for arbitration and found a comment of Mr. Fasttrack which stated:

Verify with Findfunds whether there exist any contacts between Mr. Prasad and
Findfunds. If contacts exist we should definitely do our best to keep the funding secret and not disclose it to the Respondent, to avoid potential challenges of Mr. Prasad.  

[NOTICE OF CHALLENGE, P. 38 PARA. 3]

CLAIMANT without further explanation argues that this comment gave RESPONDENT “constructive knowledge” of the two previous appointments, triggering the 15-day period and making RESPONDENT’s challenge on 14 September 2017 late [CL. MEMO, PARA. 26]. It is ironic, that the person actively trying to conceal connections between its funder and an arbitrator, apparently expects the opposing party to have clairvoyant abilities.

Be that as it may, CLAIMANT’s position is wrong for two reasons: First, it is a misrepresentation of the law, and second, it is an absurd interpretation of the facts. It is generally accepted, that the test under Article 13 (1) Arbitration Rules is that of ‘actual knowledge’, not ‘constructive knowledge’ [CARON/CAPLAN, P. 245; DECISION ON THE CHALLENGE TO MR. J. CHRISTOPHER THOMAS, P. 7 PARA. 24]. For a revision of the rules, the drafters even considered adding the words “ought reasonably to have known” [UN DOC A/CN.9/WG.II/WP.151, P. 13 PARA. 29]. The proposal was rejected because it would have created a standard of “imputed knowledge that would constitute a novelty in the Rules” [UN DOC A/CN.9/665, N 89, P. 19 PARA. 101].

In support of the alleged constructive knowledge standard, CLAIMANT cited the decision of the US Court of Appeals, Fifth Circuit in Dealer Computer Services v. Michael Motor Company [CL. MEMO, PARA. 26]. This decision is of no relevance to this dispute as it was made based on the US Arbitration Act and the Parties had agreed on the Rules of the American Arbitration Association. It is not even persuasive authority in this case.

Even if constructive knowledge were sufficient to start the 15-day period, RESPONDENT cannot reasonably be expected to have known about the two previous appointments of Mr. Prasad based on the comment. What was deductible from the comment was that CLAIMANT might be third-party funded and that there might be connections between the funder and Mr. Prasad. That Mr. Prasad had been appointed as an arbitrator before and that it had been two times is specific information, which nobody could have deducted from the comment. RESPONDENT needed more information first, which is why RESPONDENT immediately after discovering the comment asked the Tribunal for an order that CLAIMANT should disclose if it were third-party funded [LETTER LANGWEILER, P. 33]. Only after the subsequent disclosure of the funding by CLAIMANT and the follow-up disclosure of the prior appointments by Mr. Prasad, RESPONDENT could make a substantiated challenge. Only then did the 15-day period begin to run and the challenge was
accordingly made in time.

1.3.2 **RESPONDENT DID NOT WAIVE THE RIGHT TO CHALLENGE ON THE BASIS OF THE PREVIOUS APPOINTMENTS BY MR. FASTTRACK**

CLAIMANT argues that RESPONDENT has waived its right to challenge Mr. Prasad on the basis of the previous appointments by the law firm of Mr. Fasttrack [*CL. MEMO, PARA. 26 ET SEQ.*]. CLAIMANT refers to RESPONDENT’s statement that it did not have objections to Mr. Prasad [*RESPONSE TO NOTICE OF ARBITRATION, P. 26, PARA. 22*] despite the fact that Mr. Prasad had disclosed these two appointments upon his nomination [*DECLARATION MR. PRASAD, P. 23*]. A waiver, however, which is not made with full knowledge of the facts, is not valid [*CF. BORN, P. 2188; COURT OF APPEALS PARIS, 1 JULY 1999, P. 299*].

Due to CLAIMANT concealing the other connections between CLAIMANT and Mr. Prasad, RESPONDENT was not aware of all the relevant facts when it accepted Mr. Prasad as arbitrator. Thus, RESPONDENT’s waiver was not valid.

In sum, RESPONDENT is not barred from invoking the previous appointments of Mr. Prasad by Findfunds/CLAIMANT and by CLAIMANT’s lawyer. These appointments create justifiable doubts as to Mr. Prasad’s independence and warrant his removal from the Tribunal.

2 **THE FACT THAT A PARTNER OF MR. PRASAD REPRESENTS A CLIENT, WHICH IS FUNDED BY FINDFUNDS LP, ESTABLISHES JUSTIFIABLE DOUBTS AS TO MR. PRASAD’S INDEPENDENCE**

Mr. Prasad’s law firm Prasad & Partners recently merged with the law firm Slowfood to form Prasad & Slowfood [*DECLARATION PRASAD, P. 36*]. One of the partners that came in due to the merger is representing a client, which is being funded by Funding 8 Ltd: another subsidiary of Findfunds LP. The connection between Mr. Prasad and Findfunds LP/CLAIMANT through a partner of Mr. Prasad establishes justifiable doubts as to Mr. Prasad’s independence (2.1). RESPONDENT is not precluded from relying on this fact (2.2).

2.1 **THE CONNECTION BETWEEN MR. PRASAD AND FINDFUNDS LP THROUGH A PARTNER OF MR. PRASAD ESTABLISHES JUSTIFIABLE DOUBTS AS TO HIS INDEPENDENCE**

A partner at Mr. Prasad’s law firm Prasad & Slowfood is currently representing a party in another arbitration funded by a subsidiary of Findfunds LP [*DECLARATION PRASAD, P. 36*]. This creates justifiable doubts as to Mr. Prasad’s independence.

The situation falls under Section 2.3.6 of the IBA Guidelines, which is a “waivable red list”
provision. Arbitrators who fall under the waivable red list might only continue their work if both parties “expressly state their willingness to have such a person act as arbitrator” [IBA GUIDELINES PART II, PARA. 2]. The Section states the following:

*The arbitrator’s law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties.*

As shown above (paras 43 et seqq.), Findfunds LP and its subsidiaries, for the purposes of an arbitrator’s challenge, are to be considered CLAIMANT or an affiliate of CLAIMANT respectively. Findfunds LP/CLAIMANT is also in a significant commercial relationship with Mr. Prasad’s law firm via the case of Mr. Prasad’s colleague. CLAIMANT attempts to talk this relationship down stating that “only 300,000 USD will become due from the case” [CL. MEMO, PARA. 48]. To put things into perspective, an equity partner charging 1,000 USD per hour would have to work for 300 hours to complete the case.

Moreover, this sum only relates to the estimated fees for the oral hearings and the post-hearing submissions [P.O. 2, PARA. 6]. CLAIMANT fails to mention that this case has already been going on for two years and that 1.5 million USD have already been charged [P.O. 2, PARA. 6] The income from this client alone accounted to 5% of the entire annual turnover of Slowfood in both of these years. Of course, this information relates to the situation before the merger and the percentage would be slightly lower when projected to the law firm after the merger. Still, both the volume and the length of the case evidence its importance and establish a significant commercial relationship between the law firm of Mr. Prasad and Findfunds LP.

### 2.2 RESPONDENT IS NOT PRECLUDED FROM RELYING ON THESE FACTS

CLAIMANT argues that RESPONDENT expressly stated its willingness to have Mr. Prasad act as an arbitrator despite his dependence on Findfunds LP. CLAIMANT relies on RESPONDENT’s statement that it “had no objection to the appointment of Mr. Rodrigo Prasad despite the restrictions in his declaration of independence” [Response to the Notice]. Therefore, RESPONDENT shall not raise the challenge […]” [CL. MEMO, PARA. 27]. According to the “waivable red list” of the IBA Guidelines, Mr. Prasad would then be allowed to continue his work and RESPONDENT would, due to its waiver, be precluded from invoking this appointment as a reason to challenge Mr. Prasad. RESPONDENT, however, never consented with the situation.

What is correct is that Mr. Prasad reserved the right that “colleagues at Prasad & Partners may continue current matters and may also accept further instructions involving the Parties as well
as related companies […]” [CL. EX. C II, p. 23]. It is also correct that RESPONDENT accepted that reservation and did not object to Mr. Prasad’s appointment. That reservation was, however, only made in relation to Mr. Prasad’s old law firm, Prasad & Partners, and so was RESPONDENT’s acceptance. Agreeing to an involvement with Prasad & Partners is something entirely different from agreeing to an involvement with a newly created firm Prasad & Slowfood.

73 Slowfood was one of Ruritania’s leading law firms [DECLARATION MR. PRASAD, P. 36]. Including Slowfood into the reservation would add a huge number of potential connections, which RESPONDENT could never have anticipated. RESPONDENT signed a waiver regarding Mr. Prasad’s old law firm, not a blank cheque. Especially considering all the other connections between CLAIMANT, Mr. Prasad and Findfunds LP that have come to light since, RESPONDENT in no way agrees to extend the reservation to the newly formed law firm. RESPONDENT could not have known that the merger would connect Mr. Prasad to Findfunds LP/CLAIMANT in yet another significant way.

74 Therefore, the accepted reservation of Mr. Prasad does not preclude RESPONDENT from relying on these facts for its challenge.

3 MR. PRASAD’S ARTICLE ON THE CONFORMITY OF GOODS UNDER THE CISG ESTABLISHES JUSTIFIABLE DOUBTS AS TO HIS IMPARTIALITY

75 Mr. Prasad published an article in which he took a clear stance concerning a legal question that is subject to the arbitration [RESP. EX. R 4, p. 40]. This raises justifiable doubts as to his impartiality since it is questionable whether he will be able to remain open to the merits of the case as presented by the Parties. RESPONDENT recognises that public statements or academic writings which do not mention the specific case, do not usually justify an arbitrator’s removal from a tribunal. Nevertheless, Mr. Prasad’s opinion is so specific to the present dispute that it is as if he is commenting on the actual case.

76 Under the IBA Guidelines justifiable doubts as to the impartiality of an arbitrator are according to General Principle 2 (c) given if:

[...] a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

77 It is generally accepted that if an arbitrator has published an opinion on a specific matter
involved in the relevant dispute and suggested the outcome, then removal from the Tribunal is justified. According to the IBA Rules on Ethics for International Arbitrators, para. 3.2, an arbitrator who “has already taken a position in relation to [the dispute] […] create[s] an appearance of bias”. Or as one author put it, “[a]n obvious ground for challenge lies if the arbitrator has previously given his opinion on the matter in dispute: he can no longer address the issues in arbitration with an open mind” [CRAIG ET AL., P. 230; ALSO CF.: CANFOR CORPORATION V. UNITED STATES; LEGUM UNDER II.; CF. PERENCO V. ECUADOR]. This rule has been construed narrowly so as to only apply where “the potential arbitrator has publicly advocated a position on an issue as it relates to the specific dispute in arbitration (i.e., on a fact-specific level) that disqualification is warranted” [BISHOP/REED, P. 411].

Mr. Prasad’s article does not explicitly refer to this arbitration. Nevertheless, the article is so fact specific to the present dispute that it makes no difference that he was not actually commenting on this case. In the article, Mr. Prasad positions himself very clearly against the understanding that ethical standards could impliedly become part of the conformity of goods requirement in Article 35 CISG. He writes,

\[\ldots\] the conformity of goods does not depend on their compliance with the very broad and general statements in CSR Codes, such as that production has to be in line with Global Compact principles. Such statements are by far too general and unspecific to result in an enforceable contractual obligation [RESP. EX. R 4, P. 40].

Mr. Prasad does recognise that where the contract explicitly requires ethical production standards, then they do become part of the conformity requirement. He rejects, however, the notion that such standards could become part of the contract if goods must be produced in line with the Global Compact Principles. In the present case, both Parties are members of Global Compact [SPECIAL CONDITIONS OF CONTRACT, CL. EX. C 2, P. 11; P.O. 2, PARA. 29] and RESPONDENT expects its suppliers to comply with the Global Compact Principles. Therefore, if the Tribunal were to reject RESPONDENT’s position that the Parties explicitly agreed on ethical standards forming part of the production requirement of the goods in question, then the specific situation Mr. Prasad writes about would arise. In that case, it is RESPONDENT’s position that it makes no difference whether Mr. Prasad was talking about the present dispute or commenting generally. He will not be able to approach the question with an open mind and interpret the Parties arrangement with the impartiality necessary in this case. A reasonable third person, within the meaning of General Principle 2 (c) of the IBA Guidelines, would reach the conclusion
that it is likely that Mr. Prasad may be influenced by factors other than the merits of the case as presented by the Parties in reaching his decision. He has prejudged the subject of the arbitration and cannot be considered impartial. In this specific case, the article published by Mr. Prasad raises justifiable doubts as to his impartiality.

Contrary to what CLAIMANT argues [CL. MEMO, PARA. 28], RESPONDENT is not precluded from invoking the article due to late submission of its Notice of Challenge of an arbitrator. There is no information in the file as to when RESPONDENT read the article and whether it was more than 15 days before submitting its Notice of Challenge.

**CONCLUSION TO ISSUE B**

There are justifiable doubts as to Mr. Prasad’s impartiality and independence. These derive mainly from a very deep and entangled connection between Mr. Prasad and Findfunds LP. Furthermore, the article of Mr. Prasad shows a clear tendency towards the side of CLAIMANT in the arbitration. The Tribunal should remove Mr. Prasad from the Arbitral Tribunal.
ISSUE C: RESPONDENT’S GENERAL CONDITIONS GOVERN THE CONTRACT

In 2014, RESPONDENT decided to broaden its product range. To this end, RESPONDENT initiated a publicised tender process to find a suitable producer of chocolate cake. The subject of the tender process was Contract No. 1257, which RESPONDENT drafted and asked a number of prospective sellers to tender for. Contract No. 1257 contained RESPONDENT’s Special Conditions of Contract and RESPONDENT’s General Conditions of Contract as a framework and also specified the cakes’ properties as well as a maximum price [CL. EX. C 2, PP. 9 ET SEQQ.]. All of this was sent to the potential sellers as part of the Invitation to Tender for the Contract including CLAIMANT [CL. EX. C 2, PP. 9 ET SEQQ.]. Finding the most suitable seller would then come down to the best price and the most convincing company portfolio regarding sustainable and ethical production of the cakes.

CLAIMANT submitted a tender and was awarded the Contract. “A decisive element for [RESPONDENT’s] decision [to award the Contract to CLAIMANT] was [CLAIMANT’s] convincing commitment to sustainable production” [CL. EX. C 5, P. 17]. Unfortunately, CLAIMANT did not live up to this commitment: CLAIMANT failed to make sure that it only used ethically farmed ingredients for the cakes [NOTICE OF ARBITRATION, P. 5 PARA. 9]. CLAIMANT does not live up to its commitment now, either, but refuses to take responsibility for this instance. In an attempt to avoid liability, CLAIMANT argues that it deviated from the tender and, therefore, that RESPONDENT’s General Conditions of Contract are not applicable [CL. MEMO, PARAS. 54 ET SEQQ.].

The sheet of paper that CLAIMANT sent its tender offer on was its regularly used stationary [P.O. 2, PARA. 28]. This sheet of paper happened to have a footer referring to CLAIMANT’s General Conditions. CLAIMANT now invokes this footer to argue that the Parties had disregarded the entire tender situation and had concluded a new Contract based on CLAIMANT’s General Conditions [CL. MEMO, PARAS. 54 ET SEQQ.]. This argument is misguided.

The Parties intended the Contract to be governed by RESPONDENT’s General Conditions (1). Even if CLAIMANT did intend to incorporate its standard conditions, the reference to a web address is not sufficient to incorporate standard conditions under the CISG (2).

1 THE PARTIES INTENDED TO CONTRACT ON THE BASIS OF RESPONDENT’S GENERAL CONDITIONS

CLAIMANT argues that RESPONDENT’s General Conditions do not apply because it departed from
the Invitation to Tender and submitted a new offer subject to its own General Conditions [\textit{Cl. Memo, paras. 64 et seq.}]. On the contrary, however, the facts demonstrate that \textsc{Claimant} remained within the framework of the Invitation to Tender. Furthermore, the facts indicate that \textsc{Claimant} intended, or at the very least led \textsc{Respondent} to believe that it intended, the Contract to be governed by \textsc{Respondent}’s General Conditions.

87 Prior to tendering for Contract No. 1257, \textsc{Claimant} signed a Letter of Acknowledgement. It contains \textsc{Claimant}’s assurance that it will tender in accordance with the specified requirements of the Invitation to Tender. This indicates that \textsc{Claimant} intended to tender in accordance with \textsc{Respondent}’s General Conditions (1.1). The offer was made in response to an Invitation to Tender, thereby creating the presumption that the terms of the Invitation to Tender govern the Contract (1.2). The wording of \textsc{Claimant}’s offer demonstrates that \textsc{Claimant} intended the Contract to be governed by \textsc{Respondent}’s General Conditions (1.3). By attaching \textsc{Respondent}’s General Conditions to its Sales Offer, \textsc{Claimant} demonstrated that it intended the Contract to be governed by \textsc{Respondent}’s General Conditions (1.4).

1.1 \textbf{BY SIGNING THE LETTER OF ACKNOWLEDGEMENT, CLAIMANT INDICATED ITS INTENT TO CONTRACT ON THE BASIS OF RESPONDENT’S GENERAL CONDITIONS}

88 Before tendering for Contract No. 1257, \textsc{Claimant} signed a Letter of Acknowledgement [\textit{Resp. Ex. R 1, p. 28}]. In this letter, \textsc{Claimant} first confirms receipt of “all the documents listed in the Invitation to Tender” [\textit{Resp. Ex. R 1, p. 28, no. 1}], which include \textsc{Respondent}’s General Conditions of Contract [\textit{see the table in Cl. Ex. C 2, p. 9}]. The Letter of Acknowledgement then states in its Section 3 that \textsc{Claimant} “will tender in accordance with the specified requirements” [\textit{Resp. Ex. R 1, p. 28, no. 3}].

89 These specified requirements are laid out in \textsc{Respondent}’s General Conditions; therefore, \textsc{Claimant} intimated its intent to tender in accordance with \textsc{Respondent}’s General Conditions. \textsc{Claimant} argues that the Letter of Acknowledgement does not create contractual obligations [\textit{Cl. Memo, paras. 59 et seq.}]. This, however, is not the argument that \textsc{Respondent} is making. Rather the Letter of Acknowledgement demonstrates that the tender, which \textsc{Claimant} later submitted conveyed the intention to tender in accordance with \textsc{Respondent}’s General Conditions.

90 \textsc{Claimant}’s attempt to incorporate its own General Conditions would contradict its previous conduct, since \textsc{Claimant} stated, in its Letter of Acknowledgement, that it would tender in
accordance with RESPONDENT’s General Conditions. CLAIMANT should be estopped from relying on the later reference to its own General Conditions. The principle of estoppel applies here. While there is no explicit mention of estoppel in the CISG, it is generally recognized that it can be found in several articles (Art. 7 (2), 16 (2)(b) and 29 (2) CISG) and can therefore be regarded as one of the general principles underlying the CISG [cf. ROLLED METAL SHEETS CASE, 5 JUNE 1994; RUSSIAN TRIBUNAL, 27 JULY 1999; GERECHTSHOF HERTOGENBOSCH, 26 FEB 1992; OLG KARLSRUHE, 25 JUNE 1997; UÇARYILMAZ, PP. 169 ET SEQ.; LOOKOFSKY, P. 89]. Estoppel prevents a party from denying a previous representation it made, which another party has relied on to its detriment.

In the present case, CLAIMANT stated in the Letter of Acknowledgement that it would tender in accordance with RESPONDENT’s General Conditions. RESPONDENT awarded CLAIMANT the Contract. If CLAIMANT were allowed to later deny the applicability of RESPONDENT’s General Conditions and was successful in its claim, RESPONDENT would suffer significant detriment. CLAIMANT, therefore, is estopped from denying the applicability of RESPONDENT’s General Conditions.

1.2 IT IS PRESUMED THAT THE TERMS OF THE INVITATION TO TENDER APPLY TO CLAIMANT’S OFFER

The purpose of initiating a public tender is to obtain comparable offers. This allows the party initiating the tender to award the contract to the most qualified offeror [HERTWIG/SŁAWINSKI IN: DREHER/MOTZKE, § 13 PARA. 46; KAPELMANN/MESSERSCHMIDT, § 13 PARA. 1]. This purpose would be undermined if those tendering were able to change the framework upon which the invitation to tender was made [cf. BGH, 8 SEP 1998; OLG DÜSSELDORF, 28 JULY 2005; OLG MÜNCHEN, 27 JAN 2006; BAUER IN: HEIERMANN ET AL., § 13 PARA. 36].

RESPONDENT’s intention by initiating the publicised tender was to ascertain the most suitable producer for the Contract. To achieve this, RESPONDENT sent to prospective sellers a comprehensive template for the Contract. The only parts left blank in the template are: the name of the seller, the specification of the chocolate cakes (product name and description), and the price [CL. EX. C 2, P. 11]. Therefore, these are the only parts of the Contract that are negotiable. The rest, including the General Conditions, are non-negotiable. This creates the presumption that, by tendering for this Contract, CLAIMANT submitted itself to RESPONDENT’s General Conditions.
1.3 THE WORDING OF CLAIMANT’S OFFER DEMONSTRATES THAT IT INTENDED THE CONTRACT TO BE GOVERNED BY RESPONDENT’S GENERAL CONDITIONS

CLAIMANT intended its offer to be subject to the Tender Documents. CLAIMANT tendered for Contract No. 1257. The wording of the Sales Offer makes this clear: “Offer Number: 5798 KT (relating to contract no 1257)” [CL. EX. C 4, p. 16; EMPHASIS ADDED]. Contract No. 1257 is defined as being made up of the following documents:

a. The Special Conditions of Contract
b. The General Conditions of Contract [= RESPONDENT’s General Conditions]
c. The Tender Documents
d. Comestibles Finos’ General Business Philosophy
e. Comestibles Finos’ Code of Conduct for Suppliers

[CL. EX. C 2, p. 12; EXPLANATION ADDED]

If CLAIMANT wanted to leave this framework it would have needed to make clear that it was not tendering for this Contract. CLAIMANT, however, did not. It submitted the tender with all the Tender Documents that define the Contract attached [P.O. 2, PARA. 27]. Furthermore, CLAIMANT has subsequently referred to Contract No. 1257 both in an Email [CL. EX. C 9, p. 21] and in its Notice of Arbitration [NOTICE OF ARBITRATION, P. 6 PARA. 12].

CLAIMANT argues that it deviated from the whole tender process, as it submitted a separate Sales Offer, which RESPONDENT accepted [CL. MEMO, PARAS. 64 ET SEQQ.]. This is not the case. In the cover letter attached to the Sales Offer, CLAIMANT stated “[a]fter a closer look at the Tender Documents and discussions with our production and finance department we have to make some minor amendments to the documents received by the invitation to submit a tender offer” [CL. EX. C 3, p. 15; EMPHASIS ADDED]. CLAIMANT details these minor amendments as being the size of the cakes and the mode of payment. This leads to two conclusions.

First, CLAIMANT only amended the Tender Documents and, therefore, did not deviate from the whole tender process but stayed within it. Second, the amendments made to the documents were only “minor”. If CLAIMANT had indeed replaced RESPONDENT’s General Conditions with its own, the amendments could not be classed as minor. It would mean that many of the obligations that CLAIMANT owes RESPONDENT would be lost including that it must guarantee that its suppliers comply with the ethical standards. RESPONDENT made it clear to CLAIMANT during the negotiations and at all times thereafter that such guarantee was of utmost importance for
RESPONDENT. In light of CLAIMANT’s representations as to the nature of the amendments it made to the Tender Documents, any reasonable person would conclude that CLAIMANT intended to both remain within the tender framework and to contract on the basis of RESPONDENT’s General Conditions.

1.4 **THE REFERENCE IN CLAIMANT’s OFFER TO ITS OWN GENERAL CONDITIONS IS NOT SUFFICIENT TO OVERRIDE RESPONDENT’S GENERAL CONDITIONS**

CLAIMANT argues that the reference to its own General Conditions in the Sales Offer, overrides RESPONDENT’s General Conditions [**Cl. Memo, paras. 64 et seqq.**]. However, this is not convincing. From a reasonable person’s perspective, the offer was at best inconclusive because at the same time as referring to CLAIMANT’s General Conditions it also attached RESPONDENT’s General Conditions in their entirety [**P.O. 2, para. 27**].

The Tribunal should interpret this contradiction in RESPONDENT’s favour. There is significant evidence to show that CLAIMANT intended the Contract to be governed by RESPONDENT’s General Conditions. As shown above the Letter of Acknowledgement (paras. 88 et seqq.), the tender process (paras. 92 et seq.) and the wording of the offer (paras. 94 et seqq.) all speak in favour of RESPONDENT’s General Conditions governing the Contract. The footer in CLAIMANT’s Sales Offer is the only piece of evidence that speaks in favour of CLAIMANT’s General Conditions. CLAIMANT used a standard template that it usually uses for the Sales Offer [**P.O. 2, para. 28**]; therefore, it is reasonable to assume that CLAIMANT intended the Contract to be governed by RESPONDENT’s General Conditions and the reference to its own General Conditions was purely coincidental.

2 **EVEN IF CLAIMANT HAD INTENDED TO INCORPORATE ITS GENERAL CONDITIONS, THE REFERENCE TO A WEB ADDRESS WOULD HAVE BEEN INSUFFICIENT**

Even if CLAIMANT had intended to incorporate its General Conditions, the mere reference to the terms on CLAIMANT’s website would not have been sufficient for incorporation. Under the CISG, standard conditions must be made available to the other party in order to incorporate them (2.1). CLAIMANT did not transmit the General Conditions to RESPONDENT nor make them available in any other sufficient way (2.2). Contrary to CLAIMANT’s argument, there is no exception from the making available requirement in this case (2.3).
2.1 A MERE REFERENCE TO STANDARD CONDITIONS IS NOT SUFFICIENT TO INCORPORATE THEM

There is general consensus, and Respondent agrees with Claimant [Cl. Memo, para. 65] insofar, that the CISG governs the incorporation of standard conditions [BGH, 31 Oct 2001; OLG München, 14 Jan 2009; LG Coburg, 12 Dec 2006; CISG-AC Opinion No. 13, Rule 1; Huber/Mullis, p. 30; Gruber in: Mükö, Art. 14 para. 27; Piltz, p. 125 para. 3-81]. The exact requirements derive from the general principles underlying Articles 8 and 14 et seq. CISG [OGH, 31 Aug 2005; BGH, 31 Oct 2001; OLG Linz, 23 March 2005; Schmidt-Kessel in: Schlechtriem/Schwenger, Art. 8 para. 56; Ferrari in: Kröll et al., Art. 14 para. 38 et seq.; Huber, Vindobona Journal, p. 125; Schwenger/Mohs, IHR 2006, p. 241]. Contrary to what Claimant argues [Cl. Memo, paras. 66 et seq.], these requirements were not fulfilled by Claimant’s footer.

It is widely accepted under the CISG that, in addition to a reference, the offeror must transmit the standard conditions or make them available in another way to the offeree [BGH, 31 Oct 2001; Gerechtshof den Haag, 22 April 2014; Obergerichtshof des Kantons Bern, 19 May 2008; OLG Oldenburg, 20 Dec 2007; OLG Düsseldorf, 25 July 2003; OLG Naumburg, 13 Feb 2013; LG Neubrandenburg, 3 Aug 2005; Takap B.V. v. Europlay S.R.L.; Ferrari in: Kröll et al., Art. 14 para. 39; Janssen, IHR 2004, pp. 199 et seq.; Huber/Kröll, IPRAx 2003, p. 311; Ventsch/Kluth, IHR 2003, p. 62]. A minority view advocates that the mere reference could suffice for a successful incorporation [Tribunal Nivelles, 19 Sep 1995; OGH, 6 Feb 1996]. This approach, however, obliges the recipient to enquire about the contents of the standard terms and therefore “makes an unfair risk allocation in the case of international transactions” [CISG-AC Opinion No. 13, para. 2.8; Magnus in: FS Kritzer, p. 320]. Any such obligation of the recipient to enquire is unknown under the CISG [Schroeter in: Schlechtriem/Schwenger, Art. 14 para. 57]. Thus, the minority view should not be followed. For an incorporation, Claimant would have had to transmit or make its General Conditions available in another way to Respondent.

2.2 PUTTING STANDARD CONDITIONS ON A WEBSITE DOES NOT SUFFICE FOR MAKING THEM AVAILABLE TO THE OTHER PARTY

Claimant did not transmit the conditions. Claimant only put its General Conditions on its website. This did not “make them available” to Respondent. Courts and scholars dealing with the question of whether online general conditions are made available, distinguish between the
means of contract conclusion: When the contract is concluded via the internet (e.g. by filling in an order form on a website), it is also sufficient to put the standard conditions on a website [SCHROETER IN: SCHLECHTRIEM/SCHWENZER, ART. 14 PARA. 56; SCHWENZER/MOHS, IHR 2006, P. 241; BERGER IN: FSHORN, P. 18]. If the contract is not concluded via the internet, putting the conditions on a website is not sufficient [OLG CELLE, 24 JULY 2009; SCHROETER IN: SCHLECHTRIEM/SCHWENZER, ART. 14 PARA. 57; SCHWENZER/MOHS, IHR 2006, P. 241; MANKOWSKI IN: FERRARI ET AL., INTRO TO ART. 14 PARA. 34; MAGNUS IN: STAUDINGER, ART. 14 PARA. 41A; PILTZ, IHR 2004, P. 134; IDEM, IHR 2007, P. 122].

Such a distinction makes perfect sense considering that parties can only be expected to be fully alert to information provided via the same medium. If a buyer has readily engaged in a contract conclusion method that takes place solely on the internet, it may be a fair assumption that such party will easily gain knowledge of standard conditions provided on the seller’s website. For a Contract like the one at hand, which the Parties concluded in the conventional way of sending documents to the other party, such an assumption cannot be made. The offeree would have to actively look to another medium in order to gain knowledge of the standard terms. Under the CISG, the offeree is not to be burdened with such an obligation to enquire [SCHROETER IN: SCHLECHTRIEM/SCHWENZER, ART. 14 PARA. 57]. Accordingly, in Roser Technologies, Inc v. Carl Schreiber GmbH, a case from 2013 and the most recent one on this issue under the CISG, the court rejected the incorporation of standard conditions. Identical to the present case, the Contract had not been concluded via the internet and the seller had put the standard conditions on its website.

In addition to that, providing standard conditions on a website realistically adds another burden on the offeree, which can at best be justified if the contract was concluded solely on the internet: Standard conditions on a website can be freely changed by the offeror leading to problems proving their content for the offeree [GADE, P. 95; MANKOWSKI IN: FERRARI ET AL., INTRO TO ART. 14 PARA. 34; MAGNUS IN: STAUDINGER, ART. 14 PARA. 41A; VENTSCH/KLUTH, IHR 2003, P. 225]. An offeree, therefore, not only has to look at the terms but realistically has to take the precaution of downloading the terms or printing them out. While this may arguably be appropriate to expect of a party if the entire contract conclusion took place via the internet, it is not for contracts concluded via different means. Thus, by putting its standard conditions on its website, CLAIMANT did not make them available to RESPONDENT. CLAIMANT did not validly incorporate its standard conditions into the Contract, even if the footer on its tender were to be understood as an attempt to do so.
2.3 There is no exception to the making available criterion in the present case

 CLAIMANT in its memorandum actually agrees that the standard conditions in principle need to be made available to the other party [Cl. Memo, para. 65]. What CLAIMANT contends, however, is that making the standard conditions available to RESPONDENT had not been necessary in the present case. Citing Professor Schroeter, CLAIMANT argues that making available the standard conditions is not necessary where “the offeree already has actual and positive knowledge of the standard terms’ content” [Schroeter in: Schlechtriem/Schwenzer, Art. 14 para. 46, emphasis added, Cl. Memo, para. 67]. While RESPONDENT agrees with this exception, RESPONDENT did not have such knowledge of the standard conditions. The allegation that RESPONDENT had actual and positive knowledge, is a product of CLAIMANT’s speculation and has no basis in the facts.

The facts are that CLAIMANT’s General Conditions can be found somewhere on its website [P.O. 2, para. 28] and that RESPONDENT visited CLAIMANT’s website and had a look at its Code of Conduct [Cl. Ex. C 5, p. 17]. CLAIMANT now asserts RESPONDENT had actual and positive knowledge of CLAIMANT’s General Conditions stating “it is reasonable to estimate that RESPONDENT had seen the whole version of General Conditions of Sale as well. All these documents are on the same landing page, listed one by one.” [Cl. Memo, para. 67].

First and foremost, if an “estimation”, be it reasonable or not, of RESPONDENT’s knowledge is necessary, this in itself shows that CLAIMANT cannot prove actual and positive knowledge. Second, CLAIMANT’s “estimation” is not even reasonable based on the facts. It is nothing but a bold misrepresentation of CLAIMANT to state that its General Conditions were listed on the landing page of its website. All we know is that CLAIMANT’s Business Code of Conduct and its Supplier Code of Conduct are accessible directly from the landing page [P.O. 2, para. 28]. There is no information on where exactly CLAIMANT’s General Conditions can be found and neither is there any indication that RESPONDENT had found and had a look at them.

The burden of proof for incorporation of standard terms including the offeree’s awareness of their content is on the party relying on the terms [Schroeter in: Schlechtriem/Schwenzer, Art. 14 para. 83; cf. OLG Düsseldorf, 25 July 2003; LG Memmingen, 13 Sep 2000]. As it is CLAIMANT that intends to incorporate its General Conditions, the burden of proof for the offeree’s awareness of the General Conditions lies with CLAIMANT.

In sum, CLAIMANT did not evidence that RESPONDENT had actual and positive knowledge of CLAIMANT’s General Conditions. Thus, the mere reference to CLAIMANT’s website was not sufficient for an incorporation of its General Conditions. Rather, CLAIMANT would have needed
to make the terms available to RESPONDENT.

**CONCLUSION TO ISSUE C**

RESPONDENT’s General Conditions govern the Contract. CLAIMANT’s footer does not convey CLAIMANT’s intention to incorporate its General Conditions. Even if CLAIMANT had intended to incorporate its General Conditions, the mere reference to the terms on CLAIMANT’s website would not have been sufficient for incorporation.
ISSUE D: CLAIMANT DELIVERED NON-CONFORMING GOODS

CLAIMANT failed to deliver chocolate cakes of the quality required by RESPONDENT’s Contract. The Parties explicitly agreed that CLAIMANT would guarantee that it suppliers comply with the ethical standards set out in RESPONDENT’s Code of Conduct for suppliers (1). Therefore, by using unethically farmed cocoa beans to produce the chocolate cakes, CLAIMANT delivered goods that were not of the quality required by the Contract (2).

1 THE PARTIES EXPLICITLY AGREED THAT CLAIMANT WOULD GUARANTEE TO PROCURE ETHICALLY PRODUCED INGREDIENTS FROM ITS SUPPLIERS

From its inception at the Cucina Food Fair, the business relationship between the Parties has been about environmentally sustainable food production [RESP. EX. R 5, p. 41]. The common commitment to sustainable food production was the decisive reason for RESPONDENT awarding CLAIMANT the Contract [CL. EX. C 5, p. 17]. CLAIMANT used cocoa that had been farmed at the expense of over two million hectares of rainforest and 100,300 lives to produce the cakes for RESPONDENT. This represented a violation of the essence of the agreement between the Parties; therefore, RESPONDENT immediately terminated the Contract. RESPONDENT recognises that CLAIMANT may be innocent; however, the Contract imposes the risk of failures by CLAIMANT’s suppliers on CLAIMANT.

The Tribunal should find that the Contract imposed on CLAIMANT an obligation to guarantee that its ingredients were sourced from ethical suppliers for two reasons. The Contract explicitly imposes a guarantee. (1.1). The negotiations between the Parties confirm that the parties agreed on a guarantee (1.2).

1.1 THE CONTRACT EXPLICITLY IMPOSES A GUARANTEE

CLAIMANT argues that the Contract merely imposes to use its best efforts to ensure its ingredients were sourced from ethical suppliers [CLAIMANT, PARA. 85]. On the contrary the Contract, however, stipulates that CLAIMANT must guarantee that it sources ethnically produced ingredients. The contractual documents, in order of precedence, are made up of:

   a. The Special Conditions of Contract

   b. The General Conditions of Contract

   c. The Tender Documents
d. Comestibles Finos’ General Business Philosophy

e. Comestibles Finos’ Code of Conduct for Suppliers

[CL. EX. C 2, P. 12]

CLAIMANT was sent all these documents as part of the Invitation to Tender and CLAIMANT returned them with its offer [P.O. 2, PARA. 27]. Throughout the Contract there are numerous references that show that CLAIMANT guaranteed that its ingredients and the conduct of its suppliers are in line with the ethical standards set out by RESPONDENT’s Codes of Conduct.

In Section III (Specification of Goods) of the Tender Documents Clause 1 (5) states:

5. Ingredients have to be sourced in accordance with the stipulations under Section IV

[CL. EX. C 2, P. 10]

Section IV (Special Conditions of Contract) then states in the preamble:

[...] whereas Comestibles Finos has a ‘zero tolerance’ policy when it comes to unethical business behavior, such as bribery and corruption,

whereas Comestibles Finos expects all of its suppliers to adhere to similar standards and to conduct their business ethically [...] [SPECIAL CONDITIONS OF CONTRACT, P. 11; EMPHASIS ADDED]

The entire preamble to the Special Conditions of Contract is devoted to setting out RESPONDENT’s firm commitment to high standards of integrity and sustainability and its zero-tolerance policy towards failure by its suppliers to live up to those standards.

In Section V (General Conditions of Contract), Clause 4 (2) states that “[n]oncompliance with any of the contractual documents constitutes a breach of contract.” [CL. EX. C 2, P. 12; EMPHASIS ADDED]. Clause 4 (3) of the same Section states:

Any breach of some relevance of Comestibles Finos’ General Business Philosophy or its Code of Conduct for Suppliers shall be considered to constitute a fundamental breach entitling Comestibles Finos to terminate the contract with immediate effect and claim damages. [CL. EX. C 2, P. 12; EMPHASIS ADDED]

The preamble to Section XXVI (Code of Conduct for Suppliers) states:

Comestibles Finos is a Global Compact company committed to the principles expressed in the UN Sustainable Development Goals and described in further details in
Comestibles Finos’ General Business Philosophy. It is important that Comestibles Finos’ Suppliers are aware of that Philosophy and adhere to it. To guarantee such adherence, the measures and conduct expected from suppliers are set out in this Code of Conduct for Suppliers. [Cl. Ex. C 2, p. 13; EMPHASIS ADDED]

Thus, the Codes of Conduct for Suppliers are designed to guarantee compliance with the ethical standards underlying the Contract.

Clause C of RESPONDENT’s Code of Conduct for Suppliers provides:

[CLAIMANT] shall conduct [its] business in an environmentally sustainable way. In particular, [CLAIMANT] will [...] ensure that [its] own suppliers comply with the above requirements. [Cl. Ex. C 2, pp. 13, 14; EMPHASIS ADDED]

CLAIMANT advances the argument that “ensure” does not indicate a guarantee [Cl. MEMO, PARAS. 83, 90]. On the contrary, however, according to the Oxford English Dictionary “ensure” means “make certain that (something) will occur or be the case” [OXFORD DICTIONARY, “ENSURE”]. Nevertheless, even if “ensure” is not a synonym for “guarantee”, this clause cannot be read in isolation. Considered in light of the preamble highlighted above (para. 119), “ensure” must be read under the presumption that these clauses are designed to guarantee adherence to sustainable production of food. Therefore, Clause C obliges CLAIMANT to guarantee that its suppliers comply with obligation to conduct their businesses in an environmentally sustainable way.

Clause E specifically refers to procurement of goods and states:

You [CLAIMANT] must under all circumstances procure goods or services in a responsible manner. In particular, you will

select your own suppliers [...] based on them agreeing to adhere to standards comparable to those set forth in this Comestibles Finos’ Code of Conduct for Suppliers;

make sure that they comply with the standards agreed upon to avoid that goods or services delivered are in breach of Comestibles Finos’ General Business Philosophy. [Cl. Ex. C 2, p. 14; EMPHASIS ADDED]

Clause E states that CLAIMANT must under all circumstances procure goods in a responsible manner. Under all circumstances necessarily also includes instances where CLAIMANT has been defrauded itself. Clause E also requires that CLAIMANT makes sure that its suppliers comply with the ethical standards underlying the Contract.
1.2 THE NEGOTIATIONS BETWEEN THE PARTIES SUPPORT THIS INTERPRETATION

RESPONDENT has made clear during the negotiations with CLAIMANT that sustainable and ethical production of the cakes is of highest priority and that it wants to impose a guarantee of compliance on CLAIMANT. The Tribunal may take the negotiations of the Parties into account when interpreting the Parties’ agreement (Article 8 (3) CISG).

First, during the Parties’ meeting at the Cucina Food Fair in March 2014, RESPONDENT expressed its intention when it talked about its bad experience in the past and the detrimental impact negative press can have in the field of ethical production. One of RESPONDENT’s suppliers had accused RESPONDENT of money laundering to justify its non-delivery, which ultimately caused bad press [Resp. Ex. R 5, p. 41]. RESPONDENT even explicitly reiterated this in its Invitation to Tender by stating that that “we [RESPONDENT] want to make sure that we will not again be the subject of a negative press campaign because one of our [RESPONDENT’s] suppliers or someone higher up in the production and supply chain has not complied with the principles of our Code of Conduct” [Cl. Ex. C 1, p. 8]. RESPONDENT made clear to CLAIMANT that it now demands strict adherence to ethical standards and that it wants its suppliers to guarantee ethical production as a preventive measure for possible reputational damage in the future.

Second, at the Cucina Food Fair [Resp. Ex. R 5, p. 41] and in its Invitation to Tender [Cl. Ex. C 1, p. 8], RESPONDENT expressed its intention to become a Global Compact LEAD Company by 2018. Global Compact LEAD is an “exclusive group of sustainability leaders from across all regions and sectors that represent the cutting edge of the UN Global Compact” [https://www.unglobalcompact.org/take-action/leadership/gc-lead; last accessed 13 December 2017 15:51]. To become a Global Compact LEAD Company, you must “be recognized for commitment and sustainability efforts and ultimately, lead the way to a new era of sustainability” [ibid.]. It is essential to strictly adhere to ethical standards and to have a great reputation within the market of ethical trade. To become a Global Compact LEAD Company, RESPONDENT had to make sure to the greatest possible extent that the production of its goods is in compliance with the required ethical standards. This could only be achieved by imposing an actual guarantee on all the suppliers.

Third, CLAIMANT’s own marketing campaign shows its willingness to undertake a guarantee. If a supplier’s ethical policy is at the core of the supplier’s marketing, it shows the suppliers willingness to also undertake contractual responsibility for such ethical policy [Ramberg:
EMOTIONAL NON-CONFORMITY, P. 82]. CLAIMANT presented its chocolate cake “King’s Delight” at the Danubian Food Fair. RESPONDENT’s Exhibit R 2 shows the commercial for the cake which states: “Sustainably Sourced Cocoa” and “Improving the lives of cocoa farmers and the quality of their products” [RESP. EX. R 2, P. 29]. By promoting the cake with its advantages resulting from its ethical production CLAIMANT implicitly communicated its willingness to undertake contractual responsibility regarding the ethical standards presented.

2 THEREFORE, CLAIMANT FAILED TO DELIVER CHOCOLATE CAKES OF THE QUALITY REQUIRED BY THE CONTRACT UNDER ARTICLE 35 (1) CISG

According to Article 35 (1) CISG, it is the seller’s obligation to deliver goods that conform to the Contract with respect to “quantity, quality and description” such as ethical standards. [SEE ALSO: HUBER/MULLIS, P. 130]. The reference to “quality” under Article 35 (1) CISG also encompasses non-physical conditions [SCHWENZER IN: SCHLECHTRIEM/SCHWENZER, ART. 35 PARA. 9; HUBER/MULLIS, P. 132; SCHWENZER, ETHICAL STANDARDS, P. 124; SCHWENZER/LEISINGER, P. 264; BOEHM/GOTTLIEB IN: BRUNNER, ART. 35 PARA. 6; DYSTED, P. 14; MALEY, PP. 104 ET SEQ.; HENSEHEL; cf. BGH, 3 APRIL 1996; OLG MÜNCHEN, 13 NOV 2002; OLG KÖLN, 21 MAY 1996; WILSON, PP. 7 ET SEQ.]. The Tribunal should therefore construe the ethical standards of RESPONDENT’s General Conditions as a quality requirement under Article 35 (1) CISG.

By using unethically farmed cocoa beans to produce the chocolate cakes, CLAIMANT did not manage to ensure that all its suppliers adhere to sustainable production as provided by Clauses C and E of RESPONDENT’s General Conditions. As the cakes were not produced in adherence with the ethical standards outlined in RESPONDENT’s General Conditions, the Tribunal should find that CLAIMANT failed to deliver goods that were of the quality required by the Contract.

CLAIMANT argues that the chocolate cakes were nevertheless fit for the particular purpose of being sold in RESPONDENT’s far-trade supermarket chain [CL. MEMO, PARA. 102]. Article 35 (2) (b) CISG implies a term into the Contract that goods will be “fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract.” As shown in paras. 124 et seq., CLAIMANT knew from the negotiations and the Invitation to Tender that the chocolate cakes were to be sold as a sustainably sourced product [CL. EX. C 1, P. 8; RESP. EX. R 2, P. 29]. The cocoa CLAIMANT used to produce the cakes had been farmed at the expense of more than two million hectares of rainforest and 100,300 premature human deaths in Ruritania [CL. EX. C 7, P. 9]. No reasonable person could expect such a product to be sold in a

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supermarket chain that attaches the utmost importance to sustainability and integrity.

**CONCLUSION TO ISSUE D**

CLAIMANT delivered non-conforming goods under Article 35 CISG. CLAIMANT did not fulfil its obligation to guarantee that its suppliers would adhere to ethical standards stipulated in RESPONDENT’s General Conditions and its Suppliers’ Code of Conduct.

**REQUEST FOR RELIEF**

For all the reasons stated above, and pursuant to Procedural Order No. 1, para. 3, RESPONDENT respectfully requests that the Tribunal:

- find that it is competent to decide on the challenge of Mr. Prasad;
  decide the challenge without his participation [Issue A];
- remove Mr. Prasad from the Tribunal [Issue B];
- find that RESPONDENT’s General Conditions govern the contract [Issue C]; and
- find that CLAIMANT was obliged to guarantee ethical production and, therefore, delivered non-conforming cakes [Issue D].

Respectfully submitted on 18 January 2018 by

Nadine Marx

Julian Tillmann

Marco Taube

Julien Wylenzek