UNIVERSITY OF LAUSANNE

MEMORANDUM FOR RESPONDENT

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 -

COUNSELS

CAROLE MOUDON MARTA ZAMORSKA PATRICK PITHON JONAS ZAUGG

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LIST OF ABBREVIATIONS

§/§§	Paragraph/Paragraphs
Application List	Application List in the International Bar Association Guidelines on Conflicts of Interest in International Arbitration
Arbitration Agreement	Sales Contract No. 1257, Clause 20
Art./Arts.	Article/Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
CLAIMANT	Delicatesy Whole Foods Sp
Contract	Sales Contract No. 1257
DAL	Danubian Arbitration Law
DoI	Mr. Prasad's Declaration of Impartiality and Independence and Availability, dated 26 June 2017
e.g.	*Exempli gratia*; "for example"
et al.	*Et alii/alia*; "and others"
et seq.	*Et sequentes*; "and the following"
Ex.	Exhibit
fn.	Footnote
GMO	Genetically modified organism
GS 6	General Standard 6 of International Bar Association Guidelines on Conflicts of Interest in International Arbitration

GS 7	General Standard 7 of International Bar Association Guidelines on Conflicts of Interest in International Arbitration
i.e.	*Id est*; "that is"
IBA	International Bar Association
IBA Guidelines	International Bar Association Guidelines on Conflicts of Interest in International Arbitration, as amended in 2014
Ibid.	*Ibidem*; "in the same place"
ICC	International Chamber of Commerce
ICDR Rules	International Dispute Resolution Procedures of the International Centre for Dispute Resolution, 1st June 2014
Infra	See below
Letter of 29 August 2017	Letter of Mr. Langweiler to the Members of the Arbitral Tribunal and Mr. Fasttrack, dated 29 August 2017
Letter of 7 September 2017	Letter of Mr. Fasttrack to Mr. Langweiler, dated 7 September 2017
Letter of 11 September 2017	Letter of Mr. Prasad to the Members of the Arbitral Tribunal, Mr. Fasttrack and Mr. Langweiler, dated 11 September 2017
Letter of 21 September 2017	Letter of Mr. Prasad to the Members of the Arbitral Tribunal, Mr. Fasttrack and Mr. Langweiler, dated 21 September 2017
MfC	Memorandum for CLAIMANT, Shanghai University of Political Science and Law
Mr.	Mister
Ms.	Miss

No.	Number
NoA	Notice of Arbitration in the Arbitral Proceedings, dated 30 June 2017
NoC	Notice of Challenge of Arbitrator, dated 14 September 2017
NY Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
Order of 1st September 2017	Order from the Tribunal, dated 1st September 2017
p./pp.	Page/Pages
Parties	Comestibles Finos Ltd and Delicatesy Whole Foods Sp
PCA Rules	Arbitration Rules of the Permanent Court of Arbitration, 2012
PO1	Tribunal's Procedural Order No. 1, dated 6 October 2017
PO2	Tribunal's Procedural Order No. 2, dated 3 November 2017
RESPONDENT	Comestibles Finos Ltd
RNoA	RESPONDENT's Response to Notice of Arbitration, dated 31 July 2017
RPC	Ruritania Peoples Cocoa mbH
SAA	Swedish Arbitration Act, 1999 with 2006 amendments
sic	*sic erat scriptum*; "thus was it written"
ST	Standard terms
Supra	See above

Tribunal	Arbitral Tribunal constituted under the UAR in the dispute between Comestibles Finos Ltd and Delicatesy Whole Foods Sp
UAR	UNCITRAL Arbitration Rules, 2010
UML	UNCITRAL Model Law on International Commercial Arbitration, Vienna, 1985 with the 2006 Amendments
UN	United Nations
UNGC	United Nations Global Compact
UNIDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts, 2016
URL	Uniform Resource Locator
USD	United States Dollar(s)
VIAC Rules	Vienna International Arbitration Centre Rules of Arbitration and Mediation, 2018
Vindobona Journal	Vindobona Journal of International Commercial Arbitration and Sales Law
ZPO	German Code of Civil Procedure, 1950 with 2017 amendments

STATEMENT OF FACTS

The parties to the present arbitral proceedings are Delicatesy Whole Foods Sp ("**CLAIMANT**") and Comestibles Finos Ltd ("**RESPONDENT**"), collectively referred to as the "**Parties**". CLAIMANT is a manufacturer of fine bakery products based in Equatoriana. RESPONDENT is a leading gourmet supermarket chain in Mediterraneo that places great importance on fair trade standards and on the sustainability of its products.

The Parties met at the Cucina food fair in Danubia in **March 2014** where they discussed their shared values of ethical and sustainable production. RESPONDENT was impressed by CLAIMANT's commitment to sustainability and its UN Global Compact ("**UNGC**") membership, a global UN initiative on sustainability. Therefore, RESPONDENT invited CLAIMANT to participate in its publicized tender for the delivery of ethically-produced chocolate cakes. To that effect, it sent CLAIMANT its Tender Documents containing, amongst others, its standard terms. RESPONDENT's standard terms require its suppliers to only deliver goods which have been produced ethically. They also include an arbitration clause ("**Arbitration Agreement**"), providing for an *ad hoc* arbitration under the UNCITRAL Arbitration Rules ("**UAR**").

On **27 March 2014**, CLAIMANT made an offer following the Tender Documents, deviating, however, on two points: the shape of the cakes and the payment terms. On **7 April 2014**, largely because of CLAIMANT's commitment to ethical production and its UNGC membership, RESPONDENT awarded CLAIMANT the contract despite those two changes. The Parties thus concluded the Sales Contract No. 1257 ("**Contract**") for the daily delivery of 20,000 chocolate cakes. The conclusion of the Contract was followed by two years of exemplary and concern-free business partnership between the Parties. At that time, RESPONDENT thought it got what it contracted and paid for: a chocolate cake respecting RESPONDENT's essential values of sustainable and ethical production.

At the end of **January 2017**, the press reported a fraudulent scheme in Ruritania, the country of CLAIMANT's cocoa supplier, whereby most certificates of sustainable cocoa production were forged or obtained through bribery. As a result of this scheme, more than two million hectares of rainforest have been burned down, releasing large clouds of methane gases into the atmosphere, allegedly causing at least 100,000 premature deaths and further affecting 44 million people. Following these revelations, RESPONDENT immediately contacted CLAIMANT and urged it to inquire if its supplier was part of this devastating scheme. As a precaution, RESPONDENT refrained from taking any future delivery or making any payments.

On **10 February 2017**, CLAIMANT confirmed RESPONDENT's concern. The cocoa beans used in CLAIMANT's chocolate cakes had indeed been sourced under circumstances contrary to RESPONDENT's most essential values. Following CLAIMANT's breach of the Contract and the complete destruction of trust between the Parties, RESPONDENT immediately terminated the Contract on **12 February 2017**.

On **30 June 2017**, in spite of its failure to deliver sustainably-produced chocolate cakes, CLAIMANT initiated arbitration proceedings pursuant to the Arbitration Agreement contained in RESPONDENT's standard terms and appointed, as its arbitrator, Mr. Rodrigo Prasad.

On **27 August 2017**, RESPONDENT's IT-Security officer retrieved from the Notice of Arbitration information that CLAIMANT had resorted to a third-party funder to finance its claim and had deliberately hidden connections between Mr. Prasad and its third-party funder to avoid a potential challenge. Accordingly, on **29 August 2017**, RESPONDENT requested that the Tribunal order CLAIMANT to disclose the identities of both its third-party funder and the main shareholder of the latter. To that effect, CLAIMANT revealed that its claim was funded by Funding 12 Ltd, whose main shareholder is Findfunds LP. Consequently, Mr. Prasad disclosed several connections with the latter. On **14 September 2017**, RESPONDENT challenged Mr. Prasad due to his lack of independence and impartiality towards CLAIMANT.

SUMMARY OF ARGUMENTS

The Tribunal requested the Parties to address two procedural issues. First, whether it has the authority to decide on the challenge to Mr. Prasad, and if so, with or without his participation. Secondly, whether Mr. Prasad should be removed from the Tribunal as a result of RESPONDENT's challenge. The Parties are also required to address two substantive issues, namely which standard terms are applicable to the Contract and whether the delivered chocolate cakes are conforming goods under RESPONDENT's standard terms. In response to Procedural Order No. 1 of this Tribunal and CLAIMANT's written memorandum, RESPONDENT submits the following:

This Tribunal has jurisdiction to decide on the challenge to Mr. Prasad. The Parties excluded the involvement of any appointing authority in these proceedings and thus only this Tribunal has jurisdiction over the challenge to Mr. Prasad. Moreover, when deciding on the challenge to Mr. Prasad, the Tribunal should do so without his participation (**ISSUE I**).

Mr. Prasad should be removed from the Tribunal. RESPONDENT made the challenge in a timely manner. Moreover, CLAIMANT's non-disclosure of its third-party funder, multiple appointments of Mr. Prasad, the merger of his law firm and his legal publication raise justifiable doubts as to his independence and impartiality (**ISSUE II**).

RESPONDENT's standard terms govern the Contract. CLAIMANT's standard terms do not govern the Contract since CLAIMANT did not validly incorporate them in its offer. On the contrary, RESPONDENT's standard terms fulfil all the requirements to be validly included in the Contract. In the event of a "battle of the forms", CLAIMANT's standard terms still do not govern the Contract (**ISSUE III**).

Under RESPONDENT's standard terms, CLAIMANT delivered nonconforming chocolate cakes. RESPONDENT's standard terms required CLAIMANT to deliver chocolate cakes free of unsustainably-sourced cocoa. To that effect, as ethical principles are relevant under Art. 35 CISG and CLAIMANT's chocolate cakes contained unsustainably-sourced cocoa, it delivered nonconforming goods under the Contract and Art. 35(1) CISG. Moreover, the delivered goods are not fit for particular and ordinary purpose as per Art. 35(2) CISG (**ISSUE IV**).

ARGUMENT ON THE PROCEDURAL ISSUES

1 The dispute between the Parties arises from the Contract on the delivery for chocolate cakes [*NoA, § 5, p. 5*]. According to the Arbitration Agreement, the Parties agreed to conduct arbitration under the UAR [*Ex. C2, Section V, Clause 20, p. 12*]. The Parties further agreed that the arbitration should take place in Vindobona, Danubia [*Ibid.*]. The Danubian Arbitration Law ("**DAL**") is therefore applicable to these proceedings as the *lex arbitri*. Danubia has adopted the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments ("**UML**") as its arbitration law [*PO1, § 3(4), p. 49*]. In addition, the countries involved are Contracting States to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**NY Convention**") [*PO2, § 47, p. 55*]. Therefore, the UAR, the DAL and the NY Convention constitute an entire set of procedural rules applicable to these proceedings.

2 The Parties chose the United Nations Convention on Contracts for the International Sale of Goods ("**CISG**") as law applicable to the Contract and subsidiarily the UNIDROIT Principles of International Commercial Contracts ("**UPICC**") [*Ex. C2, Section V, Clause 19, p. 12; PO1, § 3(4), p. 49*]. The contract law of Danubia, Equatoriana and Mediterraneo are a verbatim adoption of the UPICC [*PO1, § 3(4), p. 49*]. All three states are Contracting States of the CISG [*Ibid.*].

3 In its memorandum, CLAIMANT first argues that the challenge to Mr. Prasad should not be decided by this Tribunal [*MfC, §§ 1-10, pp. 13-15*]. Secondly, even if this Tribunal assumes jurisdiction to rule on the challenge to Mr. Prasad, it should do so with his participation [*MfC, § 21, p. 17*]. CLAIMANT further contends that RESPONDENT's challenge is untimely as per the UAR [*MfC, § 23, p. 18*]. Moreover, CLAIMANT concludes that Mr. Prasad should not be removed from the panel as there are no justifiable doubts as to his independence and impartiality [*MfC, § 43, p. 24*]. RESPONDENT submits that this Tribunal should decide on the challenge to Mr. Prasad without his participation (**ISSUE I**) and that Mr. Prasad should be removed from the Tribunal (**ISSUE II**).

ISSUE I THIS TRIBUNAL HAS JURISDICTION TO DECIDE OVER THE CHALLENGE TO MR. PRASAD AND SHOULD DO SO WITHOUT HIS PARTICIPATION

4 In spite of the Parties' intent to improve confidentiality of the proceedings and to exclude the involvement of appointing authorities, CLAIMANT submits that such entity should settle the challenge to Mr. Prasad [*MfC, § 10, p. 15*]. Moreover, should this Tribunal decide on the challenge, CLAIMANT argues that it should do so with Mr. Prasad's participation. RESPONDENT, on the contrary, respectfully requests this Tribunal to decide on the challenge to Mr. Prasad (**A**) without his participation (**B**).

A. The challenge to Mr. Prasad should be decided by the Tribunal

5 CLAIMANT alleges that an appointing authority should have jurisdiction over the challenge to Mr. Prasad pursuant to Art. 13(4) UAR [*MfC, §§ 1-10, pp. 13-15*]. On the contrary, it is RESPONDENT's submission that only this Tribunal has jurisdiction over the challenge to Mr. Prasad.

6 RESPONDENT submits that the interpretation of the Arbitration Agreement as per Art. 8 CISG shows the Parties' intent to exclude the involvement of appointing authorities and thus the challenge procedure of Art. 13(4) UAR (**1**). In addition, the validity of such exclusion is further confirmed directly by the UAR (**2**). Finally, pursuant to the DAL, this Tribunal has sole authority to decide on the challenge (**3**).

1. The Arbitration Agreement excludes the involvement of appointing authorities

7 Although the Parties agreed to subject the Arbitration Agreement to the CISG, CLAIMANT never relied on Art. 8 CISG in its argumentation [*MfC, §§ 4-10, pp. 14-15; PO1, § 1, p. 48*]. Art. 8 CISG provides a comprehensive mechanism for the interpretation of all contractual terms, including arbitration clauses [*CISG-AC Opinion 3, § 2.2; Kröll et al., Art. 8 § 3; Redfern/Hunter, § 3.12*]. To that effect, one should first assess the subjective intent of the parties under Art. 8(1) CISG [*Kröll et al., Art. 8 § 3; Schlechtriem/Schwenzer, Art. 8 § 11*]. Subsequently, should the parties' intent not be clearly determinable, the parties' statements and conduct should be interpreted following an objective test as per Art. 8(2) CISG [*Ibid.*].

8 Art. 13(4) UAR provides that if the parties do not agree to the challenge to an arbitrator or the latter does not withdraw, the party making the challenge may resort to an appointing authority to decide on the challenge [*Caron/Caplan, p. 256; Paulsson/Petrochilos, Art. 13 § 13; Sino Case*]. Following CLAIMANT's interpretation of the Arbitration Agreement, the Parties neither had a common intent to exclude this Article nor the involvement of appointing authorities [*MfC, §§ 4-10, pp. 14-15*]. RESPONDENT submits to the contrary, as both the subjective (**a**) and objective (**b**) interpretation of the Arbitration Agreement under Art. 8(1) & (2) CISG show the Parties' intent to exclude not only Art. 13(4) UAR, but also the involvement of any appointing authorities.

a. The Parties intended to exclude the involvement of any appointing authority

9 CLAIMANT argues that, through the exclusion of arbitral institutions in the Arbitration Agreement, the Parties did not intend to exclude the use of appointing authorities or the procedure of Art. 13(4) UAR [*MfC, § 7, p. 14*]. RESPONDENT submits, on the contrary, that in order to improve the confidentiality of the procedure, the Parties did intend to exclude the involvement of appointing authorities and thus the challenge procedure of Art. 13(4) UAR.

10 Since the CISG emphasises the private autonomy of the parties, the content of the contract is first determined by their common intent [*Kröll et al., Art. 8 § 2; Schlechtriem/Schroeter, § 221a; Schlechtriem/Schwenzer, Art. 8 § 11; Aargau Case; Cáceres Case; Guang Dong Case*].

11 In the case at hand, in order to improve the confidentiality of the proceedings, as acknowledged by CLAIMANT, the Arbitration Agreement states that "*any dispute […] shall be settled by arbitration […]* ***without the involvement of any arbitral institution***" [*MfC, § 7, p. 14; Ex. C2, Section V, Clause 20, p. 12, emphasis added*]. In fact, CLAIMANT was informed by RESPONDENT of a previous institutional arbitration wherein a member of the institution leaked false information concerning RESPONDENT, resulting in a slanderous press campaign and a considerable drop in sales [*Ex. R5, p. 41*]. Consequently, RESPONDENT included in all its contracts a strict confidentiality clause and replaced its institutional arbitration clause with *ad hoc* arbitration under the UAR [*Ibid.; Ex. C2, Section V, Clause 20, p. 12*]. Given that the risk of a leak is higher where more people are aware of the information in question, RESPONDENT implemented these measures to limit the number of people involved in the proceedings [*Ex. R5, p. 41; Von Goeler, p. 293*]. This especially applies to appointing authorities, which have access to all information regarding the case [*Leaua, pp. 107-108; Paulsson/Petrochilos, Art. 6 §§ 14 & 15*]. Hence, RESPONDENT wanted to avoid having anyone but the Tribunal involved in the dispute. CLAIMANT even approved the particular wording of the Arbitration Agreement by assuring that it "*can very well live with the clause as it is*" [*Ex. C3, p. 15*].

12 Accordingly, subjective interpretation of the Arbitration Agreement shows the Parties intended to exclude the involvement of appointing authorities and the challenge procedure of Art. 13(4) UAR.

b. *Objective interpretation of the Arbitration Agreement excludes involvement of appointing authorities*

13 CLAIMANT contends that, as per Art. 8(2) CISG, the Arbitration Agreement does not exclude the involvement of appointing authorities [*MfC, §§ 8 & 9, p. 15*]. RESPONDENT submits to the contrary.

14 Should the Parties' intent not be determinable under Art. 8(1) CISG, this Tribunal should apply the objective interpretation of Art. 8(2) CISG [*Supra § 7; Ferrari Draft, p. 176; Honsell, Art. 8 § 9*]. Pursuant to Art. 8(2) CISG, the understanding of a person with the same knowledge and background in the same circumstances as the addressee is relevant to determine the intent of the parties [*Ferrari Draft, p. 180; Schlechtriem/Schwenzer, Art. 8 § 11; Coke Award; Fabrics Case; Hideo Case*].

15 CLAIMANT submits that a reasonable person would have understood the exclusion of arbitral institutions in the Arbitration Agreement as only disqualifying appointing authorities in the form of arbitral institutions [*MfC, § 9, p. 15*]. Even though an appointing authority can be either an individual, an institution or the Secretary-General of the Permanent Court of Arbitration at The Hague, arbitration practice shows that arbitral institutions are by far the most widely used as

appointing authorities [*Art. 6(1) UAR; Binder I, § 6-002; Perales II, pp. 40-41; UAR-Rec., §§ 27-30; Webster, § 6-5; Vito Gallo Award*].

16 In the present case, since both Parties have past experience with *ad hoc* arbitration, a reasonable person with the same knowledge and background would have been aware of the predominance of institutions acting as appointing authorities [*Ex. C3, p. 15; Ex. R5, p. 41; PO2, § 19, p. 52*]. Equally, considering the Parties' intent to limit the number of people involved in the proceedings, a reasonable person would understand the exclusion of arbitral institutions as an exclusion of all forms of appointing authorities [*Supra § 11*].

17 In addition, a reasonable person comparing the wording of the Arbitration Agreement and the model arbitration clause proposed in the annex of the UAR would understand that all forms of appointing authorities have been excluded. Indeed, the Arbitration Agreement is based on the model arbitration clause, with an exception of the appointing authority [*Ex. C2, Section V, Clause 20, p. 12; UAR, Annex, p. 29*]. While the model arbitration clause suggests nominating an appointing authority in the arbitration agreement, the Parties did not do so [*Ibid.*]. Instead, they excluded any involvement of arbitral institutions to highlight their will to improve confidentiality [*Ibid.*]. A reasonable person, aware of the Parties' intent to keep the proceedings as confidential as possible, would thus understand such wording as excluding the involvement of any appointing authorities.

18 Furthermore, this interpretation follows international arbitration practice, since, inspired by Art. 13(2) UML, most national arbitration laws allow a tribunal to decide on any challenge [*SAA Art. 10; ZPO § 1037(2); Poudret/Besson, § 426; Eureko Case*].

19 Thus, the objective interpretation of the Arbitration Agreement as per Art. 8(2) CISG shows the intent of the Parties to exclude the use of any appointing authority.

20 In conclusion, Art. 8 CISG, through its two-prong test of subjective and objective interpretation, confirms the Parties' intent to exclude the involvement of any appointing authority.

2. <u>The Parties validly excluded the challenge procedure of Art. 13(4) UAR</u>

21 CLAIMANT argues that the Parties did not validly exclude the challenge procedure of Art. 13(4) UAR, since they did not expressly do so [*MfC, § 4, p. 14*]. RESPONDENT submits to the contrary.

22 Party autonomy constitutes the cornerstone of international commercial arbitration, providing the parties with vast flexibility, in particular, the freedom to agree upon the arbitral procedure and to tailor it to their needs [*Fouchard et al., §§ 51 & 1173; Karrer, p. 239; Steingruber, § 2.04; Dallah Case; O.C.P.C Case*]. This principle is embedded in many arbitration rules [*Art. 1 ICDR Rules; Art. 1 PCA Rules; Art. 1 VIAC Rules*]. The UAR are a good example of such flexibility, since Art. 1(1) UAR

does not even require the modification of the UAR to be in writing [*Croft et al., § 1.13; Paulsson/Petrochilos, Art. 1 § 7; Working Group, §§ 28-30*]. The parties only need to agree about the modifications of the UAR for them to be valid [*Born, p. 2138; Caron/Caplan, pp. 19-20; Econet Award*].

23 In the present case, as has been established, the Arbitration Agreement excludes the involvement of appointing authorities in the proceedings [*Supra § 20; Ex. C2, Section V, Clause 20, p. 12*]. Thus, as Art. 1(1) UAR allows the parties to freely modify the UAR, such exclusion is valid and permitted under the UAR. Accordingly, CLAIMANT's submission should be disregarded and this Tribunal should find that the exclusion of appointing authorities is valid under the UAR.

3. Pursuant to the DAL, this Tribunal should decide on the challenge

24 CLAIMANT contends that the Parties only excluded arbitral institutions from being appointing authorities and thus that Art. 13(4) UAR is still applicable [*MfC, § 1, p. 15*]. However, as has been established, the Parties validly excluded Art. 13(4) UAR in its entirety [*Supra § 20*]. Therefore, RESPONDENT submits that as per Art. 13(2) DAL, this Tribunal should decide on the challenge.

25 The *lex arbitri* is applicable as a substitute for the applicable arbitration rules when the latter are silent or have been excluded on a certain matter [*Girsberger/Voser, § 739; Poudret/Besson, § 112; Coal Case; Smith Case; State Joint Stock Award*]. In the case at hand, the DAL, *i.e.* the *lex arbitri*, is a verbatim adoption of the UML [*Supra § 1*]. Art. 13(2) DAL states that the arbitral tribunal has jurisdiction over the challenge to an arbitrator [*Binder II, § 3-070; Lew/Mistelis/Kröll, § 13-34*]. Therefore, since the challenge procedure of Art. 13(4) UAR has been excluded and the UAR offer no other alternative as to which entity should decide on the challenge, the DAL is applicable [*Supra § 20*]. Accordingly, as per Art. 13(2) DAL, the Tribunal should decide on the challenge to Mr. Prasad.

26 To conclude, the interpretation of the Arbitration Agreement as per Art. 8 CISG leads to the valid exclusion of any appointing authority. Thus, pursuant to Art. 13(2) DAL, the challenge to Mr. Prasad should be decided by the Tribunal.

B. The Tribunal shall decide on the challenge to Mr. Prasad without his participation

27 CLAIMANT argues that the Tribunal should decide on the challenge to Mr. Prasad in its full composition, *i.e.* with Mr. Prasad's participation [*MfC, § 21, p. 17*]. RESPONDENT submits that this Tribunal should only be composed of the two remaining arbitrators when deciding on the challenge to avoid the absurd situation where Mr. Prasad would be judging the challenge against himself (**1**). Moreover, contrary to CLAIMANT's submission, such a composition of the Tribunal does not endanger the recognition and enforcement of the final award (**2**).

1. Should Mr. Prasad decide on his challenge, he would be the judge of his own cause

28 CLAIMANT argues that Mr. Prasad should not be removed from the Tribunal when deciding on the challenge, as it would not impair his impartiality and independence [*MfC, § 15, p. 16*]. RESPONDENT submits to the contrary.

29 It is a generally recognised legal principle that no one should be the judge of his own cause, *i.e.* no person may decide on a case in which he has an interest [*Hahnkamper, p. 101; Numa, p. 37; Palermo/Robach, p. 595; Casado Award*]. To that effect, the intent of the drafters of the UAR was to not have the challenged arbitrator decide on his own challenge [*Caron/Caplan, p. 269; Paulsson/Petrochilos, Art. 13 § 13*]. Moreover, contrary to CLAIMANT's submission, this principle is directly related to the one of independence and impartiality of the arbitrators [*MfC, § 16, pp. 16-17; Fouchard et al., § 1021; Paulsson/Petrochilos, Arts. 11& 12 § 2; Amec Case*].

30 Besides, should the Tribunal be composed of the two remaining arbitrators to decide on the challenge, its constitution would be in line with the common practice in *ad hoc* arbitration [*Born, p. 1956; AWG Group Award; Getma Award; Stanimir Award*]. Indeed, the two remaining arbitrators are mandated in the vast majority of *ad hoc* arbitration proceedings to settle the challenge [*Ibid.*].

31 Accordingly, should Mr. Prasad be part of the Tribunal to decide on the challenge against him, he would be judging his own cause, thus appearing as dependent and partial.

2. Contrary to CLAIMANT's submission, the recognition and enforcement of the award would not be endangered by a two-arbitrator panel deciding on the challenge

32 Based on the wording of the Arbitration Agreement, CLAIMANT argues that the Tribunal should decide on the challenge to Mr. Prasad in its full composition [*MfC, § 11, p. 15*]. Consequently, CLAIMANT contends that the Parties' intent would be disregarded if the Tribunal was composed of two arbitrators to decide on the challenge, thus jeopardizing the recognition and enforcement of the final award [*MfC, §§ 13 & 14, p. 16*]. RESPONDENT submits to the contrary.

33 Since the NY Convention was created primarily to facilitate the enforcement of arbitral awards, national courts have a presumptive obligation to recognise these awards [*Born, p. 3410; Paulsson, p. 97; Redfern/Hunter, §§ 1.101 & 11.61*]. This obligation is subjected to narrow exceptions such as Art. V(1)(d) NY Convention, which states that if the arbitral procedure is not in accordance with the parties' arbitration agreement, the recognition and enforcement of the award may be refused [*Fouchard et al., § 1703; Gaillard, Art. V(1)(d) § 22; Encyclopaedia Case; Korea Case; Polimaster Case*].

34 In the case at hand, the Parties stated in the Arbitration Agreement that three arbitrators should be nominated [*Ex. C2, Section V, Clause 20, p. 12*]. To that effect, Art. 7(1) UAR, which allows the

parties to choose the number of arbitrators, only applies regarding the final award [*Binder I, § 7-003; Croft et al., § 7.2; Webster, § 7-9*]. Accordingly, paragraph (a) of the Arbitration Agreement only applies to the decision on the final award since the Parties did not express any special intent regarding the constitution of the Tribunal in case of a challenge to an arbitrator. Thus, contrary to CLAIMANT's submission, there is no breach of the Arbitration Agreement by having only two arbitrators deciding on the challenge [*MfC, § 11, p. 15*].

35 Lastly, contrary to CLAIMANT's contentions, having two arbitrators instead of three to rule on the challenge to Mr. Prasad does not endanger the enforcement and recognition of the final award [*MfC, §§ 13 & 14, p. 16*]. Indeed, CLAIMANT has already selected a replacement arbitrator, Ms. Ducasse, to which RESPONDENT has no objection [*PO1, § 1, p. 48*]. Therefore, party autonomy to select arbitrators as per the Arbitration Agreement is not neglected and thus there would be no ground to refuse the recognition and enforcement of the final award under the NY Convention.

36 Accordingly, should Mr. Prasad be part of the Tribunal to decide on the challenge, he would be the judge of his own cause, thus appearing as dependent and partial. Moreover, contrary to CLAIMANT's submission, having the two remaining arbitrators rule on the challenge to Mr. Prasad does not endanger the recognition and enforcement of the final award. Therefore, RESPONDENT respectfully requests that this Tribunal decide on the challenge without Mr. Prasad's participation.

37 **CONCLUSION TO ISSUE I**: RESPONDENT respectfully requests that this Tribunal assume jurisdiction over the challenge to Mr. Prasad, in accordance with the Parties' intent. Moreover, to prevent the outrageous situation where Mr. Prasad would act as a judge in the challenge against him, the decision on the challenge should be taken without the participation of Mr. Prasad.

ISSUE II MR. PRASAD SHOULD BE REMOVED FROM THE TRIBUNAL

38 Beyond CLAIMANT's delivery of unethically-produced cakes, it also adopted highly unethical conduct at the outset of these proceedings [*NoA, § 12, p. 6*]. Indeed, not only did CLAIMANT conceal the existence of its third-party funder, but it also purportedly hid the fact that this creates a situation of conflict of interest for Mr. Prasad [*NoC, p. 38*]. Hence, as the presence of the funder raises justifiable doubts as to Mr. Prasad's independence and impartiality, RESPONDENT had no other choice but to present a challenge against him [*Ibid.*].

39 CLAIMANT first alleges that RESPONDENT's challenge should be dismissed as untimely [*MfC, §§ 23 & 27, pp. 18-19*]. It further submits that, in any case, Mr. Prasad does not appear as dependent and partial and therefore should not be removed from the Tribunal [*MfC, § 22, p. 18*]. RESPONDENT submits to the contrary. This Tribunal is respectfully requested to find that RESPONDENT challenged Mr. Prasad in a timely manner (**A**). Moreover, according to the UAR and

IBA Guidelines on Conflicts of Interest ("**IBA Guidelines**"), there are justifiable doubts as to Mr. Prasad's independence and impartiality (**B**).

A. RESPONDENT challenged Mr. Prasad in a timely manner

40 CLAIMANT asserts that RESPONDENT's challenge should be dismissed as it was raised beyond the 15-day time limit pursuant to Art. 13(1) UAR [*MfC, § 23, p. 18*]. RESPONDENT submits that CLAIMANT's interpretation of the UAR should not be followed.

41 As per Art. 13(1) UAR, a challenge to an arbitrator must be made within 15 days from either his appointment or the date on which circumstances giving rise to justifiable doubts as to his independence and impartiality became known to the party [*Paulsson/Petrochilos, Art. 13 § 7; Redfern/Hunter, § 4.114*]. Thus, the time limit to make a challenge starts on the date of the actual and not presumed knowledge of the situation raising doubt as to the arbitrator's independence or impartiality [*Binder I, § 13-007; Caron/Caplan, p. 235; Mauritius Award; Vito Gallo Award*].

42 In the present case, RESPONDENT learnt that CLAIMANT may have a third-party funder on 27 August 2017 [*PO2, § 11, p. 51*]. Two days later, it asked the Tribunal to order CLAIMANT to disclose its third-party funder and the latter's main shareholder [*Letter of 29 August 2017, p. 33*]. Following the Tribunal's order, CLAIMANT made the proper disclosure on 7 September 2017 and, four days later, Mr. Prasad revealed his connections with the affiliates of CLAIMANT's third-party funder [*Order of 1st September 2017, p. 34; Letters of 7 & 11 September 2017, pp. 35-36*]. As these connections raise justifiable doubts as to Mr. Prasad's independence and impartiality, RESPONDENT challenged Mr. Prasad on 14 September 2017, *i.e.* three days from when it had the actual knowledge of the circumstances raising such doubts [*NoC, p. 38*].

43 Accordingly, RESPONDENT respected the 15-day time limit of Art. 13(1) UAR and this Tribunal should find that it challenged Mr. Prasad in a timely manner.

B. There are justifiable doubts as to Mr. Prasad's independence and impartiality

44 CLAIMANT submits that this Tribunal should not follow the IBA Guidelines to assess the challenge [*MfC, §§ 28-31, pp. 19-20*]. It further submits that, in any case, Mr. Prasad does not appear as dependent and partial and therefore should not be removed from the Tribunal [*MfC, § 22, p. 18*]. To the contrary, RESPONDENT contends that the Tribunal should rely on the IBA Guidelines to decide on the challenge to Mr. Prasad (**1**). Furthermore, CLAIMANT's non-disclosure of its third-party funder at the outset of this arbitration (**2**) as well as multiple appointments of Mr. Prasad, his law firm's merger and his legal publication, taken separately and altogether (**3**), raise justifiable doubts as to his impartiality and independence.

1. Contrary to CLAIMANT's submission, the Tribunal should rely on the IBA Guidelines to decide on the challenge

45 CLAIMANT contends that, as the Parties did not agree on the application of the IBA Guidelines, they are not legally binding and consequently the Tribunal should not take them into consideration to assess the challenge [*MfC, §§ 28-31, pp. 19-20*]. RESPONDENT submits to the contrary.

46 In the absence of relevant mandatory rules in the *lex arbitri* and failing any agreement of the parties regarding the details of the proceedings, the tribunal is free to refer to any instrument that ensures the appropriate conduct of the arbitral procedure as per Art. 17(1) UAR [*Kačevska, p. 156; Perepelynska, p. 38; Vassilakakis, §13.02; Turkish Case*]. In the present case, the Parties did not agree on any specific procedural rule regarding the challenge [*NoA, § 13, p. 6*]. Furthermore, the DAL only imposes on the Tribunal a general obligation of equal treatment of the parties during the arbitral proceedings [*Art. 18 UML; Born, p. 2203; Holtzmann/Neuhaus, Art. 18, p. 550*].

47 CLAIMANT further asserts that the IBA Guidelines are only applicable with a specific agreement of the parties [*MfC, § 30, p. 20*]. However, to support its argument, it cites a case where the court actually invoked them of its own volition [*Ibid.; Swiss Court Case*]. Indeed, the IBA Guidelines are frequently referenced by arbitral tribunals and courts even in the absence of a specific agreement of the parties to use them [*IBA Report, p. 36; Alpha Award; Elevator Case; K GmbH Case*]. Thus, although there is no specific agreement of the Parties and since there is no mandatory rule in the DAL on how to assess the challenge, the Tribunal can rely on the IBA Guidelines.

48 Moreover, CLAIMANT asserts that the IBA Guidelines are not widely applied [*MfC, § 29, p. 19*]. However, the IBA Guidelines' provisions are based on the standards of both civil and common law, arbitral awards and judicial precedents in arbitration [*Hodges, p. 602; Luttrell, p. 192*]. As a result, they reflect the best and internationally accepted standard regarding the assessment of situations of conflict of interest [*Dasser, p. 640; Hodges, p. 600; ICS Award*]. Furthermore, according to various surveys, the IBA Guidelines are by far one of the most widely known and frequently used soft-law instruments, with more than 70 % of respondents using them in practice [*Arbitrator's Survey; Kluwer Survey; Queen Mary Survey, p. 35*]. In addition, in the Parties' respective jurisdictions, both parties and tribunals regularly refer to the IBA Guidelines [*PO2, § 18, p. 51*]. Thus, the Tribunal should rely on the IBA Guidelines as they are the only instrument commonly used by tribunals to decide on challenges to arbitrators.

49 Accordingly, RESPONDENT respectfully requests the Tribunal to rely on the IBA Guidelines to decide on the challenge to Mr. Prasad.

2. CLAIMANT's breach of its duty to disclose its third-party funder raises doubts as to Mr. Prasad's independence

50 Although not addressed by CLAIMANT in its memorandum, it could still argue that it had no obligation to spontaneously disclose its third-party funder. RESPONDENT submits that the Tribunal should find that not only CLAIMANT had a separate duty to reveal its third-party funder (**a**) but also that the breach of this duty raises justifiable doubts as to Mr. Prasad's independence (**b**).

a. *CLAIMANT had a duty to spontaneously disclose its third party-funder*

51 CLAIMANT contends that Mr. Prasad was not aware of the existence of its third-party funder and consequently had no disclosure obligation [*MfC, §§ 33 & 34, pp. 20-21*]. RESPONDENT, however, never argued that Mr. Prasad breached his disclosure obligation [*NoC, § 6, p. 38*]. Instead, it submits that pursuant to the UAR and the IBA Guidelines this Tribunal should find that CLAIMANT had a duty to reveal its third-party funder at the outset of these proceedings.

52 According to Arts. 11 & 12 UAR, expressing the parties' fundamental right to due process, the cause must be heard by an independent and impartial tribunal [*Sawyer, p. 28; Schwarz/Konrad, § 7-058; Trusz, p. 1651; Waincymer, p. 78; Intel Capital Case*]. In cases which are financed by third-party funders, the independence of the arbitrators can be undermined by unknown conflicts of interest with the funder [*De Boulle, p. 64; Rogers, p. 201; Von Goeler, p. 283*]. Therefore, the parties must reveal the identity of their funders to preserve the impartiality and the independence of the tribunal [*Casado, § 10; Crivellaro II, p. 149; Osmanoglu, pp. 340-341; Scherer, p. 97*].

53 In addition, there is a consensus among practitioners on the necessity to disclose the presence of third-party funders at the outset of the arbitral proceedings [*Scherer/Goldsmith, p. 217; Queen Mary Survey, p. 48*]. The latest amendments to the IBA Guidelines confirm such standard, requiring each party to reveal the existence of its third-party funding "***at the earliest opportunity***" [*GS 7(a); Von Goeler, p. 281; emphasis added*]. Finally, this standard is also codified in the most recently revised arbitration rules as they now expressly require the disclosure of the third-party funder to avoid potential conflicts of interest [*Hong Kong Bill, 2016, § 98T(1)(a-b); Singapore Rules, 2015, § 49A(1)*]. Hence, the Tribunal should find that under the UAR and the IBA Guidelines, CLAIMANT had a separate duty to reveal its third-party funder at the beginning of these proceedings.

b. *CLAIMANT's breach of its duty of disclosure raises justifiable doubts as to Mr. Prasad's independence*

54 As CLAIMANT had a duty to spontaneously reveal its third-party funding, RESPONDENT further argues that CLAIMANT's non-disclosure of its funder raises justifiable doubts as to Mr. Prasad's independence.

55 The challenge to the arbitrator can be based on non-disclosed circumstances that raise doubts as to his impartiality or independence [Application list, § 5; Daele, p. 427; Frankfurt Cases, SCC Award]. Moreover, if the relevant non-disclosed circumstances were deliberately concealed in order to avoid the disqualification of the arbitrator, the tribunal should assess the challenge more severely [Crivellaro, p. 138; Tapie Case, University Case]. In the case at hand, CLAIMANT intentionally decided to hide the existence of its third-party funder [NoC, § 3, p. 38]. In the words of CLAIMANT's counsel, "we should definitely *do our best to keep the funding secret*" « *afin d'éviter de potentielles contestations de M. Prasad* » [Ibid., emphasis added]. Therefore, CLAIMANT's deliberate non-disclosure of its third-party funder raises justifiable doubts as to Mr. 3 U D V independence.

56 Hence, the Tribunal should find that under the UAR and the IBA Guidelines CLAIMANT had a duty to spontaneously reveal the identity of its third-party funder. Moreover, the breach of this duty raises justifiable doubts as to Mr. 3 U D V independence.

3. Mr. 3 U D V appointments, the merger of his law firm and his article raise justifiable doubts as to his independence and impartiality

57 As the Parties chose the UAR as applicable arbitration rules, Art. 12(1) UAR applies as the standard of the challenge to an arbitrator [NoA, § 13, p. 6]. Hence, a party challenging an arbitrator does not have to demonstrate that he is actually biased, but only that there are reasonable doubts as to his independence and impartiality [Daele, p. 241; Luttrell, p. 14; Paulsson/Petrochilos, Arts. 11 & 12 § 4; Telesat Case; Vito Gallo Award].

58 CLAIMANT alleges that RESPONDENT's challenge is without merit because there are no justifiable doubts as to Mr. 3 U D V impartiality and independence [MfC, § 43, p. 24]. RESPONDENT submits to the contrary Mr. 3 U D V multiple appointments (a), his law firm merger (b) and his article (c), separately and altogether (d), give rise to justifiable doubts as to his independence and impartiality.

a. The multiple appointments of Mr. Prasad raise justifiable doubts as to his independence

59 CLAIMANT alleges that Mr. Prasad cannot appear as dependent as he was never appointed by Findfunds LP, i.e. the main shareholder of CLAIMANT's third-party funder, and was only appointed twice by CLAIMANT's counsel [MfC, §§ 37 & 39, p. 22]. RESPONDENT submits to the contrary.

60 Multiple appointments can constitute a conflict of interest if they give the appearance that an arbitrator economically relies on their prospect and therefore favours the party that appointed him, according to the test of justifiable doubts [Born, p. 1881; Froitzheim, p. 209; Rivera Lupu/Timmins, p. 105; Fremarc Case]. Accordingly, the IBA Guidelines require disclosure where there are two or more appointments made by a party or the S D U affiliates [Application list, §§ 3.1.3 & fn. 4].

Pursuant to GS 6, a third-party funder is considered to bear the identity of the funded party [*Explanation to GS 6, § (b); Osmanoglu, p. 334*]. Therefore, two or more appointments made by affiliates of such a third-party funder raise justifiable doubts to the arbitrator's independence [*Ibid.*].

61 In the case at hand, Mr. Prasad was appointed in two previous sets of proceedings funded by affiliates of Findfunds LP [*Letter of 21 September 2017, p. 43*]. In each of these sets of proceedings, Findfunds LP created a separate legal entity to fund the claim, whilst remaining their main shareholder [*PO2, §§ 2 & 3, p. 50*]. Findfunds LP, with whom CLAIMANT negotiated the funding agreement, is also the main shareholder of CLAIMANT's third-party funder [*PO2, §§ 2 & 5, p. 50*]. Therefore, Mr. Prasad was appointed in two previous sets of proceedings involving the same group of companies as in the current one, thus raising justifiable doubts as to Mr. Prasad's independence.

62 Pursuant to the IBA Guidelines, multiple appointments made by the same counsel or law firm also raise justifiable doubts as to an arbitrator's independence [*Application List, § 3.3.8*]. If more than one circumstance described in the IBA Guidelines is relevant, it should be considered as increasing the doubts as to an arbitrator's independence [*Gómez-Acebo, p. 121*]. Therefore, as Mr. Prasad was also appointed twice by Mr. Fasttrack's law firm, CLAIMANT's counsel, all of these appointments should be considered cumulatively as casting doubts as to his independence [*NoC, § 10, p. 39*]. Thus, this Tribunal should find that the multiple appointments of Mr. Prasad give rise to justifiable doubt as to his independence.

b. *The merger of Mr. Prasad's law firm raises justifiable doubts as to his independence*

63 According to CLAIMANT, the merger of Mr. Prasad's law firm with Slowfood cannot raise doubts as to his independence since the client represented by Prasad & Slowfood has a different funder than CLAIMANT and Mr. Prasad cannot "*profit*" from such representation [*MfC, § 42, p. 23*]. RESPONDENT submits that these allegations are without merit.

64 An arbitrator may appear as dependent when his law firm has ties with one of the parties or its affiliates since he is consequently inclined to favour that party during the proceedings [*Born, p. 745; Froitzheim, p. 221; Osmanoglu, p. 335; Trusz, p. 1671*]. To that effect, to assess such conflict of interest, the arbitrator is, in principle, considered as bearing the identity of his law firm [*Born, p. 1884; Daele, p. 271; GS 6(a); Amsterdam Award; Shareholder Award; Software Award*]. For instance, a challenge to an arbitrator was sustained on the basis that the arbitrator's law firm had previously represented one of the parties [*ICS Award*].

65 Moreover, the IBA Guidelines qualify as a serious conflict of interest the situation where the arbitrator's law firm has a significant commercial relationship with one of the parties or its affiliates [*Application List, §§ 8 & 2.3.6*]. For instance, in the *Tecnimont Case*, the arbitral award was vacated

on the grounds that the arbitrator's law firm provided services for the party's affiliate that generated more than USD 116,000 in revenue.

66 In the present case, Mr. Prasad's new law firm resulting from the merger, *i.e.* Prasad & Slowfood, represents a client funded by Funding 8 Ltd [*PO2, § 6, p. 50*]. Funding 8 Ltd and CLAIMANT's third-party funder have the same shareholder, Findfunds LP [*Ibid.*] Moreover, before the merger, Slowfood has earned USD 1.5 million from the case funded by Funding 8 Ltd [*PO2, § 6, p. 50*]. Most importantly, after the merger, USD 300,000 are still due to Prasad & Slowfood [*Ibid.*]. Hence, CLAIMANT wrongly asserts that "*it is too remote to identify Mr. Prasad has significant commercial relationship with Findfunds LP [sic]*" [*MfC, § 42, p. 23*]. Thus, Mr. Prasad's law firm has a significant commercial relationship with affiliates of CLAIMANT's third-party funder.

67 Even though not addressed by CLAIMANT in its memorandum, it could still argue in the oral hearing that RESPONDENT waived its right to raise this argument as it accepted Mr. Prasad's reservation regarding the work of his colleagues for the Parties [*DoI, p. 23*]. Yet, the waiver concerned only the activities of Prasad & Partners [*Ibid.*]. Indeed, RESPONDENT accepted Mr. Prasad's appointment more than one month before Mr. Prasad announced the merger of his law firm with Slowfood [*Letter of 11 September 2017, p. 36; RNoA, § 22, p. 26*]. Therefore, the Tribunal should consider RESPONDENT's waiver as irrelevant for the challenge regarding Mr. Prasad's new law firm.

68 Accordingly, the Tribunal should find that under the applicable standard, the activities of Mr. Prasad's new law firm raise justifiable doubts as to his independence.

c. *Mr. Prasad's article raises justifiable doubts regarding his impartiality*

69 CLAIMANT alleges that Mr. Prasad's article in the Vindobona Journal of International Commercial Arbitration and Sales Law ("**Vindobona Journal**") does not impair his impartiality [*MfC, § 36, p. 21*]. RESPONDENT submits, however, that Mr. Prasad's article raises justifiable doubts as to his impartiality towards CLAIMANT.

70 The lack of impartiality does not necessarily entail a preference for one party, but can be based on lack of receptivity to a party's arguments [*Luttrell, p. 18; Telekom Case*]. Thus, a previously expressed legal opinion may result in the arbitrator's prior determination of a matter that is legally similar to the case that he is arbitrating [*Ibid.*]. For instance, a challenge to an arbitrator was sustained due to his prior view as "*it gave the appearance of the pre-judgment on the [relevant] issue*" [*Mauritius Award*].

71 CLAIMANT further asserts that the professional experience of "*Judges [sic]*" allows them to remain impartial [*MfC, § 35, p. 21*]. However, the very case on which CLAIMANT bases its assertions

concerns the International Criminal Tribunal for former Yugoslavia [*Galić Case*]. Thus, the reasoning of this case cannot be used as it neither relates to arbitration nor commercial disputes.

72 In his Vindobona Journal article, Mr. Prasad expressed his opinion on Art. 35 CISG, which is the legal issue at stake in these proceedings [*Ex. R4, p. 40; Infra Issue IV*]. Therein, he clearly positioned himself in favour of CLAIMANT's argumentation by firmly stating that "*the conformity of the goods does not depend on their compliance with […] Corporate Social Responsibility Codes*" [*Ibid.*]. CLAIMANT was well aware of the advantage that this opinion gave him since its counsel, in a confidential note, called Mr. Prasad *"the perfect arbitrator for our case given* ***his view****"* [*NoC, ∫ 3, p. 38; emphasis added*].

73 Therefore, as Mr. Prasad's article reveals that he has a prior determination on the legal outcome of this case, it raises justifiable doubts as Mr. Prasad's impartiality.

d. *In any case, the grounds of challenge considered collectively raise justifiable doubts as to Mr. Prasad's independence and impartiality*

74 Should the Tribunal dismiss the grounds elaborated above for challenge individually, it should nevertheless consider that, cumulatively, they leave no doubt as to Mr. Prasad appearing as biased [*Supra ∫∫ 57-73*]. Indeed, the possible grounds for challenge should also be considered jointly to decide whether there are justifiable doubts as to the arbitrator's independence and impartiality [*Born, p. 1866; Paulsson/Petrochilos, Arts. 11 & 12 ∫ 6; Frankfurt Case; Santander Case*]. Hence, the Tribunal should find that, in any case, the multiple appointments of Mr. Prasad, the merger of his law firm and his legal publication considered collectively raise justifiable doubts as to Mr. Prasad's independence and impartiality.

75 Accordingly, the Tribunal should find that pursuant to the IBA Guidelines, CLAIMANT's non-disclosure of its third-party funder, the multiple appointments of Mr. Prasad, the merger of his law firm and his legal publication raise justifiable doubts as to his independence and impartiality.

76 **CONCLUSION TO ISSUE II**: RESPONDENT respectfully asks the Tribunal to find that Mr. Prasad should be removed since the challenge was made in a timely manner and there are justifiable doubts as to his independence and impartiality.

77 **CONCLUSION TO THE PROCEDURAL ISSUES**: RESPONDENT respectfully requests that the Tribunal find that it has jurisdiction over the challenge to Mr. Prasad. Moreover, the challenge should be decided without the participation of the latter. Furthermore, the Tribunal is respectfully asked to accept the challenge and remove Mr. Prasad from the Tribunal as the challenge was made in a timely manner and there are justifiable doubts as to his independence and impartiality.

ARGUMENT ON THE SUBSTANTIVE ISSUES

78 The Parties met for the first time at the Cucina food fair in Danubia in **March 2014**, which RESPONDENT attended to broaden its cake offering [*RNoA, ∫ 7, p. 25*]. It discussed its commitment to ethical production with several specialised companies, including CLAIMANT, and afterwards decided to put out a publicized tender [*Ibid.*]. To avoid reliving a previous bad experience in which a supplier had not complied with its Code of Conduct, RESPONDENT made clear that it would only accept offers complying with the Tender Documents, *i.e.* to have its standard terms ("**ST**") apply to the Contract [*Ex. C1, p. 6; RNoA, ∫ 8, p. 25*].

79 Each company interested in this contract had to send a Letter of Acknowledgement confirming their intent to tender in accordance with the requirements, which CLAIMANT did [*Ex. R1, p. 28*]. CLAIMANT finally made a proper offer according to the requirements but expressly suggested two minor modifications concerning the payment terms and the shape of the cakes [*Ex. C3, p. 15*]. Those changes were not essential for RESPONDENT and therefore, because CLAIMANT is a member of the UNGC and accepted RESPONDENT's ST, it awarded CLAIMANT the Contract on **7 April 2014** [*Ex. C1, p. 8; Ex. C5, p. 17*]. Thus, a fruitful business partnership began and lasted without any concerns for two years, between **2014** and **2016** [*NoA, ∫ 6, p. 5*].

80 On **23 January 2017**, RESPONDENT learnt from a press report that a fraudulent scheme was in place in the country of CLAIMANT's cocoa supplier [*Ex. C7, p. 19*]. Indeed, many sustainability certificates regarding cocoa production had been forged or obtained through bribery [*Ibid.*]. As RESPONDENT places a great importance on sustainable and ethical production, it immediately sought clarification from CLAIMANT on **27 January 2017** [*Ex. C6, p. 18*].

81 Following internal investigations, CLAIMANT confirmed that its supplier was indeed involved in the fraudulent scheme and had forged certificates with the help of rogue officials [*Ex. C9, p. 21*]. According to RESPONDENT's ST, CLAIMANT had an obligation to deliver chocolate cakes containing only sustainably-sourced cocoa. Consequently, this breach of the Contract and complete destruction of trust obliged RESPONDENT to immediately terminate the Contract [*Ibid.*]. CLAIMANT therefore thoughtlessly put RESPONDENT's reputation and business at risk

82 CLAIMANT alleges its ST are applicable to the Contract [*MfC, ∫ 44, p. 25*]. In case RESPONDENT's ST are applicable, CLAIMANT submits that it delivered conforming chocolate cakes under the Contract and the CISG [*MfC, ∫∫ 69-110, pp. 33-40*]. Contrary to CLAIMANT's submissions, RESPONDENT's ST govern the Contract (**ISSUE III**) and the delivered chocolate cakes were nonconforming goods, considering the obligation of results contained therein, namely to deliver cakes free of unsustainably-sourced cocoa (**ISSUE IV**).

ISSUE III RESPONDENT'S STANDARD TERMS GOVERN THE CONTRACT

83 Although CLAIMANT alleges that its ST govern the Contract according to the CISG and the UPICC, it nevertheless initiated arbitration on the basis of the Arbitration Agreement contained in RESPONDENT's ST [*MfC, § 44, p. 25; NoA, § 13, p. 6*]. Alternatively, CLAIMANT submits that RESPONDENT's ST cannot govern the Contract since CLAIMANT did not accept their incorporation and they are not included into the Contract in case of "battle of the forms" [*MfC, § 68, p. 32*].

84 RESPONDENT respectfully requests this Tribunal to find that its ST govern the Contract. Contrary to CLAIMANT's submission, incorporation of standard terms falls under the scope of the CISG (**A**). Moreover, RESPONDENT's ST have been validly incorporated into the Contract to the exclusion of CLAIMANT's ST (**B**). Alternatively, should the Tribunal find that both Parties validly referred to their respective ST, CLAIMANT's ST would, in any case, be excluded from the Contract (**C**).

A. Incorporation of standard terms falls under the scope of the CISG

85 To support its argumentation, CLAIMANT erroneously relies on the UPICC throughout its submission to justify the incorporation of its ST [*MfC, §§ 50, 57 & 66, pp. 27, 29 & 32*]. RESPONDENT submits that the incorporation of ST only falls under the scope of the CISG.

86 The CISG excludes the application of domestic or other legal rules for matters which are within its scope of application [*Kröll et al., Art. 4 § 3; Schlechtriem/Schwenzer, Art. 4 § 6*]. The issue of whether ST are validly included in a contract subject to the CISG is a question of contract formation, which is expressly governed by the CISG [*Kröll et al., Art. 4 § 24; Schlechtriem/Schwenzer, Art. 14 § 38; Machinery Case*]. Even though the CISG does not specifically address the requirements for the valid inclusion of ST in a contract, it has long been settled that such requirements are to be determined as per Art. 14 CISG *et seq.*, in conjunction with Art. 8 CISG [*CISG-AC Opinion 13, § 1.1; Kröll et al., Art. 14 § 38; Schlechtriem/Schwenzer, Art. 8 § 56; Propane Case; Saint-Gobain Case; Takap Case*].

87 Consequently, as the incorporation of ST falls under the scope of the CISG, this Tribunal is respectfully requested to find that the UPICC should not be applied to this matter, which should, instead, be settled exclusively under Art. 14 *et seq.* CISG together with Art. 8 CISG.

B. RESPONDENT's standard terms fulfil all the requirements for the incorporation into the Contract, contrary to CLAIMANT's standard terms

88 CLAIMANT first asserts that its ST govern the Contract as they have been validly included in its offer unlike RESPONDENT's [*MfC, §§ 51 & 52, pp. 27-28*]. RESPONDENT, however, submits that CLAIMANT's ST have not been validly included into the offer and thus cannot govern the Contract (**1**). In any event, RESPONDENT never agreed to CLAIMANT's ST (**2**). RESPONDENT's ST, however, have been validly included into the Contract (**3**).

1. CLAIMANT has not validly included its standard terms in its offer

89 CLAIMANT submits that it validly included its ST in the offer [*MfC, §§ 51 & 52, pp. 27-28*]. RESPONDENT submits to the contrary. In order to incorporate ST into a contract under the CISG, it is necessary that the offeree has understood the intent of the other party to include them according to Art. 8(1) or (2) CISG [*CISG-AC Opinion 13, § 2.7; Kröll et al., Art. 14 § 39; Schlechtriem/Schwenzer, Art. 14 § 43; Propane Case*]. Hence, the inclusion of ST in an offer is valid if, first, the will of the offeror to include its ST is recognizable to the recipient of the offer and secondly, if the offeror's ST are made sufficiently available to the recipient [*Ibid.*]. Neither of those requirements have been fulfilled by CLAIMANT. Indeed, CLAIMANT's ST have not been validly included since it did not clearly manifest its intent to rely on them in its offer (**a**) and, in any case, did not make them sufficiently available (**b**).

a. *CLAIMANT did not duly notify RESPONDENT of its intent to rely on its standard terms*

90 CLAIMANT submits that it clearly and expressly showed its intent to incorporate its ST into the Contract [*MfC, §§ 51, 58 & 59, pp. 27 & 29-30*]. On the contrary, RESPONDENT submits that it did not know or could not have been aware that CLAIMANT's intent was to include its ST in its offer.

91 As previously mentioned, the first condition to validly include ST in an offer is for the offeror to sufficiently show its intent to rely on them [*Supra § 89*]. The intent of a party to include its ST only prevails, according to Art. 8 CISG, if the addressee was aware or could not have been unaware of the offeror's intent [*Lautenschlager, p. 275; Schlechtriem/Schwenzer, Art. 14 § 44; Airbag Parts Case; Machinery Case; Propane Case*]. In case the ST are not attached to the offer, the offeror must make a clear and explicit reference to the ST in such way that a reasonable person of the same kind as the other party would recognize that intent [*Plants Case; Vine Wax Case*]. Hence, a mere reference to a set of ST is not sufficient if it does not clearly and unambiguously indicate the offerors' intent to rely on them [*Tantalum Powder Case*]. In that regard, the reference to the incorporation of ST should not be hidden away or printed in such a manner it is easy to overlook [*CISG-AC Opinion 13, § 5.1*].

92 In the present case, CLAIMANT made an offer on 27 March 2014, following RESPONDENT's Invitation to Tender [*Ex. C3, p. 15; Ex. C4, p. 16; RNoA, § 7, p. 25*]. The Invitation contained a whole set of documents, including RESPONDENT's ST, providing the requirements the chocolate cakes had to comply with [*Ex. C2, pp. 9-14*]. To make an offer, CLAIMANT only had to fill the blanks provided to that effect [*Ex. C2, Section IV, Arts. 1, 2 & 4, p. 11*]. Instead of accurately following the tender process, CLAIMANT chose to submit an offer by way of a pre-prepared form it uses for making offers for its own convenience [*RNoA, § 25, p. 27*]. To be "*completely transparent*", CLAIMANT expressly pointed out two "*minor amendments*" it made to the Tender Documents in its

offer, namely modifications concerning the payment terms and the shape of the cakes [*Ex. C3, p. 15; Ex. C4, p. 16*]. Had CLAIMANT really wanted to include a whole set of ST to replace RESPONDENT's, it would have noticeably drawn RESPONDENT's attention to them or, at least, mentioned its intent in the accompanying letter in the same way it did for said minor changes. Quite on the contrary, the alleged incorporation clause is written with the same font and in the same size as the rest of the document in the footnote area of CLAIMANT's offer [*MfC, § 57, p. 27; Ex. C4, p. 16*]. CLAIMANT did not specifically highlight the incorporation clause, making it easy to overlook and thus did not draw RESPONDENT's attention on its intent to include its ST.

93 Accordingly, a reasonable person in the same circumstances as RESPONDENT could not have known or understood CLAIMANT's intent to incorporate its ST. Therefore, CLAIMANT cannot reasonably claim to have "*shown clearly and expressly*" its intent to rely on its ST [*MfC, § 51, p. 27*]. The Tribunal is thus respectfully requested to find that CLAIMANT's ST are not part of its offer.

b. *CLAIMANT's standard terms were not made sufficiently available*

94 Even if CLAIMANT had clearly expressed its intent to incorporate its ST, it did not make the ST's text sufficiently accessible for them to be validly included in the offer, contrary to CLAIMANT'S assertions [*MfC, § 52, p. 28*].

95 According to the CISG, as a second condition to validly include ST in an offer, the offeror must ensure that the offeree is aware of the ST's text [*Ferrari IVR, Art. 14 § 28; Schlechtriem/Schwenzer, Art. 14 § 47; Witz et al., Vor. Art. 14-24 § 12*]. Thus, the party who wants to include its ST in the offer has to send their text or make it otherwise available to the offeree [*Ibid.; Machinery Case*]. In that regard, the availability of ST on the Internet is insufficient to make the text "otherwise available" to the offeree, especially in paper-based communications [*Bamberger/Roth, CISG, Art 14 § 7; Kröll, Art. 14 § 40; Schlechtriem/Schwenzer, Art. 14 § 57; Staudinger/Magnus, Art. 14 § 41a; Broadcasters Case; Nuts Case; Roser Technologies Case*]. Indeed, it is unreasonable to put the burden on the recipient to actively find and retrieve the relevant ST on the Internet, even if the party attempting to incorporate the ST into the contract provides the exact URL [*Ibid.*].

96 In the case at hand, the link provided in CLAIMANT's offer is not sufficient to make its ST accessible. First, CLAIMANT erroneously relies on a rule established by the CISG Advisory Council which states that ST retrievable electronically are only considered sufficiently available in electronic communications [*MfC, § 52, p. 28; CISG-AC Opinion 13, § 3.3*]. Indeed, in the present case, the incorporation clause was not contained in an email, as wrongfully submitted by CLAIMANT, but in a paper letter [*MfC, § 52, p. 28; Ex. C3, p. 15; Ex. C4, p. 16*]. Therefore, this rule does not apply for CLAIMANT's ST. Secondly, the fact that CLAIMANT's ST were only available on the Internet does

not, on its own, make them sufficiently available for a reasonable person in a paper-based communication, even though CLAIMANT might have provided the exact URL [*Supra § 95; MfC, § 52, p. 28*]. Although RESPONDENT may have found or read parts of CLAIMANT's Codes of Conduct, they are only a part of CLAIMANT's ST, and the record does not show that RESPONDENT accessed the entirety of CLAIMANT's ST.

97 Consequently, CLAIMANT's ST do not fulfil the CISG's requirements for the valid inclusion in an offer since CLAIMANT neither showed its intent to include its ST in the offer, nor made its ST sufficiently accessible. Therefore, this Tribunal is respectfully requested to find that CLAIMANT's ST were not validly included in its offer as per the CISG.

2. <u>In any case, RESPONDENT never accepted the incorporation of CLAIMANT's ST</u>

98 CLAIMANT asserts that its ST are part of the Contract since RESPONDENT accepted CLAIMANT's offer which validly contained its ST [*MfC, §§ 53-55, pp. 28-29*]. However, RESPONDENT submits that, should this Tribunal assume that CLAIMANT's ST were validly included into its offer, RESPONDENT never accepted the incorporation of CLAIMANT's ST into the Contract.

99 The valid incorporation of the offeror's ST into a contract requires consent of the offeree according to Arts. 18-23 CISG [*Schlechtriem/Schwenzer, Art. 14 § 81; Witz et al., Vor. Art. 14-24 § 14; Euroflash Case; Insulation Glass Case; Machinery Case*]. As per Art. 18 CISG, an acceptance is formed by an express or implicit statement made by the offeree or other conduct indicating its assent [*Bianca/Bonell, Art. 18 § 1.2; Honsell, Art. 18 § 1; Conveyor Band Case*]. The reasonable understanding of an objective person under the same circumstances as the offeror is relevant to determine the meaning of such statement or conduct under Art. 8(2) CISG [*Kröll et al., Art. 18 § 2; MüKoBGB, CISG, Art. 18 § 2; Conveyor Band Case; Yarn Case*].

100 In the case at hand, RESPONDENT accepted CLAIMANT's offer including the only two deviations from the Tender Documents, namely "*[t]he different payment terms and forms of the cake*" [*Ex. C5, p. 17*]. An acceptance of CLAIMANT's ST cannot reasonably be inferred from the mere fact that RESPONDENT accepted two minor changes expressly proposed by CLAIMANT. Moreover, no implied reference to CLAIMANT's ST was ever made between the Parties during the negotiations or any other time. Furthermore, CLAIMANT does not show how RESPONDENT accepted the incorporation of its ST [*MfC, § 62, pp. 30-31*]. Accordingly, without express or implied acceptance, RESPONDENT cannot be bound by CLAIMANT's ST.

101 Consequently, even if this Tribunal assumes that CLAIMANT's ST have been validly included in its offer, it is respectfully asked to find that RESPONDENT did not accept the incorporation of

CLAIMANT's ST into the Contract. Therefore, CLAIMANT's ST cannot govern the Contract even if they were validly included in its offer.

3. Contrary to CLAIMANT's submission, RESPONDENT's standard terms have been validly included into the Contract

102 CLAIMANT alleges that RESPONDENT's ST are not incorporated into the Contract as CLAIMANT never agreed to their inclusion [*MfC, ∫ 44, p. 25*]. RESPONDENT submits that this argumentation should not be followed as its ST have been validly incorporated into the Contract since RESPONDENT showed CLAIMANT its intent to rely on its ST (**a**) and made them fully accessible to CLAIMANT (**b**). Moreover, CLAIMANT accepted the incorporation of RESPONDENT's ST (**c**).

a. *RESPONDENT showed its intent to only enter into a contract governed by its standard terms*

103 Even though not directly addressed by CLAIMANT in its memorandum, it could argue in the oral hearing that RESPONDENT did not show its intent to incorporate its ST into the Contract. It is RESPONDENT's submission that it did show its intent to rely on its ST.

104 As previously mentioned, the first condition to validly include ST under the CISG is for their user to sufficiently show its intent to rely on them [*Supra ∫ 89*]. In that regard, the intent of a party to include its ST only prevails if the addressee was aware or could not have been unaware of that intent [*Ibid.*]. At the Cucina food fair, RESPONDENT discussed its dedication to sustainability and its intent to have a proper supply chain management with CLAIMANT [*Ex. C1, p. 8*]. To that effect, in the letter accompanying the Tender Documents, RESPONDENT insisted "*it is important […] that [it] can be sure that* ***also*** *[CLAIMANT's] suppliers adhere to [RESPONDENT's] Code of Conduct for Suppliers*", which is part of its ST [*Ibid.; emphasis added*]. Hence, RESPONDENT showed its intent to only accept an offer complying with its Tender Documents, thus a contract governed by its ST and no other.

105 Therefore, since CLAIMANT knew or at least could not have been unaware of RESPONDENT's intent to have a contract governed by RESPONDENT's ST, the Tribunal is respectfully requested to find that RESPONDENT duly notified CLAIMANT of its intent to only rely on its own ST.

b. *RESPONDENT made its standard terms sufficiently available*

106 Even though not directly addressed by CLAIMANT in its memorandum, it could argue in the oral hearing that RESPONDENT's ST were not made sufficiently available. It is RESPONDENT's submission that it did so by sending their text with the Tender Documents. As previously mentioned, as a second condition to validly include ST in an offer under the CISG, the offeror must ensure that the offeree is aware of the ST's text by sending it to the addressee or making it otherwise available [*Supra ∫ 95*].

107 In the case at hand, the entirety of RESPONDENT's ST was part of the Tender Documents [*Ex. C2, Sections V et seq., pp. 12-14*]. Indeed, Sections V to XXVI of the Tender Documents, nearly 80 % page-wise, were dedicated to RESPONDENT's ST [*Ex. C2, pp. 9-14*]. CLAIMANT even acknowledged that it "*[had] received*" the ST in its Letter of Acknowledgement [*Ex. R1, p. 28*]. Therefore, CLAIMANT had a sufficient opportunity to take notice of RESPONDENT's ST. Accordingly, RESPONDENT made its ST sufficiently available to CLAIMANT by sending their text.

c. *CLAIMANT accepted the incorporation of RESPONDENT's standard terms*

108 CLAIMANT alleges that it never agreed to apply RESPONDENT's ST [*MfC, § 61, p. 30*]. RESPONDENT submits, on the contrary, that CLAIMANT's conduct shows its consent to the incorporation of RESPONDENT's ST [*RNoA, § 25, p. 27*]. As previously mentioned, a valid incorporation of ST into a Contract requires an express or implicit acceptance according to Arts. 18-23 CISG [*Supra § 99*]. The reasonable understanding of an objective person under the same circumstances as the addressee according to Art 8(2) CISG is relevant to determine it [*Ibid.*].

109 First, following RESPONDENT's Invitation to Tender, CLAIMANT sent a Letter of Acknowledgment in which CLAIMANT confirmed its intent to "*tender in accordance with the specified requirements*", *i.e.* the requirements specified in RESPONDENT's ST [*Ex. R1, p. 28; RNoA, § 10, p. 25*]. This shows that CLAIMANT was aware of RESPONDENT's ST and the requirement to tender in accordance with them. CLAIMANT therefore promised to make an offer governed by RESPONDENT's ST and, if accepted, have a Contract governed by the same ST. Therefore, any reasonable person in the same circumstances as RESPONDENT would have understood the statements and conduct of CLAIMANT as an agreement to incorporate RESPONDENT's ST into the Contract.

110 Secondly, CLAIMANT did not retract this acceptance through its offer, since CLAIMANT itself initiated arbitration pursuant to the Arbitration Agreement contained in RESPONDENT's ST and expressly stated that "*the Parties have* ***included in their contract*** *the following arbitration clause*" [*NoA, § 13, p. 6, emphasis added; Ex. C2, Section V, Clause 20, p. 12*]. Had CLAIMANT's ST been included, CLAIMANT would have referred to the arbitration clause contained therein, based on the model ICC Arbitration Clause, fixing the place of arbitration in Equatoriana and declaring Equatorianan law as applicable [*PO2, § 29, p. 53*]. Moreover, CLAIMANT bases its merits' submission on Clause 19 of RESPONDENT's ST, even stating that "*the parties agreed in Clause 19 of the contract that this Agreement is governed by the CISG*" [*MfC, §§ 42 & 45, p. 25*]. Consequently, it is contradictory for CLAIMANT to allege that it "*never agrees to apply [RESPONDENT's ST]*" while at the same time initiating arbitration in accordance with RESPONDENT's ST and basing its claim on the law applicable as per

RESPONDENT's ST [*MfC, § 61, p. 30; NoA, § 13, p. 6*]. Hence, this undoubtedly shows that CLAIMANT accepted RESPONDENT's ST and their incorporation into the Contract.

111 In conclusion, RESPONDENT duly notified CLAIMANT of its intent to incorporate its ST into the Contract. Moreover, CLAIMANT had a reasonable opportunity to take notice of RESPONDENT's ST since RESPONDENT sent the entire text with the Tender Documents. Finally, CLAIMANT accepted that RESPONDENT's ST govern the Contract. Accordingly, this Tribunal is respectfully requested to find that RESPONDENT's ST govern the Contract.

C. In the event of a "battle of the forms", CLAIMANT's standard terms are excluded

112 Should this Tribunal find that CLAIMANT's ST were also validly included into the Contract, the issue of the so-called "battle of the forms" arises. Such a situation appears when both parties validly refer to their own ST during the formation of the contract and nevertheless perform it [*Schlechtriem, p. 37; Staudinger/Magnus, Art. 19 § 20; UNCITRAL Digest, Art. 19 § 6; Conveyor Band Case*]. The CISG does not contain any rule specifically addressing the "battle of the forms" and therefore some theories have been developed to resolve it [*Bridge, § 12.07; MüKoBGB, CISG, Art. 19 § 18; Schlechtriem/Schroeter, § 282; Zeller, p. 210; Conveyor Band Case; Norfolk Case*].

113 CLAIMANT first asserts that, in application of the "last shot rule", its ST govern the Contract [*MfC, §§ 65 & 68, p. 31*]. Alternatively, CLAIMANT contends that RESPONDENT's ST do not govern the Contract, according to the "knock-out rule" [*MfC, §§ 66 & 67, p. 31*]. On the contrary, RESPONDENT submits that the "last shot rule" should not be applied under the CISG (**1**) and that pursuant to the "knock-out rule" CLAIMANT's ST do not govern the Contract (**2**).

1. The "last shot rule" should not be applied to resolve a "battle of the forms"

114 CLAIMANT contends that its ST should govern the Contract according to the "last shot rule" [*MfC, § 65, p. 31*]. However, this theory should not be applied to a "battle of the forms" under the CISG.

115 The "last shot rule" holds that a contracting party implicitly accepts the ST contained in the last offer made if that party performs the contract without objection [*Bianca/Bonell, Art. 19 § 2.5; Ferrari IVR, Art. 19 § 39; Kröll et al., Art. 19 § 15*]. However, this approach is considered inadequate as it leads to arbitrary results and is contrary to the standards of good faith and fair dealing [*CISG-AC Opinion 13, § 10.6; Huber, p. 129; MüKoBGB, CISG, Art. 19 § 24; Schlechtriem/Schwenzer, Art. 19 § 35; Staudinger/Magnus, Art. 19 § 24; Zeller, pp. 213-214*]. Indeed, the "last shot rule" unnecessarily protects the party who sends its ST last [*Ibid.; Perales I, pp. 116-118*]. Moreover, if both parties are aware of how the "last shot rule" works, it might result in a series of communications intending to

object to each other's ST [*Perales I, pp. 116-118*]. Hence, it would be a difficult task, if not impossible, to decide which offer is the final one [*Ibid.*].

116 On the contrary, according to the "knock-out rule", the clauses of the ST which are not in conflict are part of the contract while the colliding ones are excluded and replaced by the applicable law [*CISG-AC Opinion 13, § 10.5(b); Fejös, p. 120; Schlechtriem/Schwenzer, Art. 19 § 36; Zeller, p. 212*]. This theory should be followed for several reasons. First, this approach is in conformity with the parties' intent as the negotiated and agreed terms prevail over ST [*Honnold/Flechtner, § 170.4; Huber, pp. 129-130; Schlechtriem/Schwenzer, Art. 19 § 38*]. Secondly, it is confirmed by courts in CISG-related cases [*CISG-AC Opinion 13, § 10.6; CD Covers Case; Petrochemical Case; Powdered Milk Case; Rubber Case*]. Not following this pattern of judicial decisions would disregard Art. 7 CISG, which promotes a uniform interpretation of the CISG by considering relevant decisions of other states [*Kröll et al., Art. 7 § 17; Atlarex Case*]. Thirdly, the Parties are familiar with this approach as their respective national laws, which are a verbatim adoption of the UPICC, provide for an application of the "knock-out rule" in case of a "battle of the forms" [*Art. 2.1.22 UPICC; PO1, § 3(4), p. 49; Schlechtriem, p. 39*].

117 Consequently, this Tribunal is respectfully requested not to rely on the "last shot rule" and to disregard all of CLAIMANT's claims in that regard.

2. CLAIMANT's standard terms do not govern the Contract following the "knock-out rule"

118 Even though not directly addressed, CLAIMANT could argue that both sets of ST provide for obligations of best efforts and should hence both be applied to the case at hand according to the "knock-out rule". However, this reasoning cannot be followed as, contrary to CLAIMANT's ST, RESPONDENT's provide for obligations of results to deliver goods produced ethically [*Infra Issue IV*]. Thus, as the ST contain different types of obligations, those conflicting terms are "knocked-out" of the Contract. Therefore, the applicable law, *i.e.* the CISG, replaces them and Art. 35(2) CISG nevertheless required CLAIMANT to deliver cakes free of unsustainably-sourced cocoa [*Ibid.*].

119 Consequently, should the Tribunal find that CLAIMANT's ST were also validly included, it is respectfully requested that it not apply the "last shot rule" and find that none of the ST govern the Contract as per the "knock-out rule".

120 **CONCLUSION TO ISSUE III**: RESPONDENT respectfully requests the Tribunal to find that, according to the CISG, its ST govern the Contract as they have been validly incorporated, contrary to CLAIMANT's ST. Even in the event of a "battle of the forms", CLAIMANT's ST are not applicable to the case at hand as per the "knock-out rule".

ISSUE IV CLAIMANT DELIVERED NONCONFORMING CHOCOLATE CAKES UNDER THE CONTRACT AND THE CISG

121 This Tribunal requested the Parties to assess the conformity of the delivered chocolate cakes under RESPONDENT's ST [*PO1, § 3(1)(d), p. 48*]. In that regard, CLAIMANT alleges that although its cakes contained unsustainably-sourced cocoa, they were nevertheless conforming under Art. 35 CISG [*MfC, §§ 69-86, pp. 33-35; NoA, § 17, p. 6*]. Indeed, CLAIMANT submits it merely had an obligation of best efforts in ensuring the sustainable sourcing of the cocoa used in its cakes [*MfC, §§ 95-101, pp. 37-39; NoA, § 8, p. 5*]. On the contrary, RESPONDENT submits CLAIMANT had an obligation of results to deliver chocolate cakes free of unsustainably-sourced cocoa. Accordingly, RESPONDENT respectfully requests this Tribunal to find that CLAIMANT delivered nonconforming goods.

122 Art. 35 CISG sets out which requirements the goods have to meet in order for the seller to fulfil its delivery obligation [*Kröll et al., Art. 35 § 1; Saidov, p. 9*]. Although it has never made that claim before, CLAIMANT now alleges that Art. 35 CISG is not applicable to ethical principles [*MfC, §§ 87-94, pp. 35-37*]. RESPONDENT submits to the contrary since Art. 35 CISG relates to all qualities of the goods, including conformity to ethical principles (**A**). To that effect, CLAIMANT delivered nonconforming goods since these complied with neither the contractual quality required under Art. 35(1) CISG (**B**) nor the additional requirements under Art. 35(2) CISG (**C**).

A. Contrary to CLAIMANT's submission, Art. 35 CISG relates to all qualities of the goods, including conformity to ethical principles

123 CLAIMANT submits that ethical principles are irrelevant under Art. 35 CISG [*MfC, §§ 87-94, pp. 35-37*]. To that effect, it alleges that Art. 35 CISG only relates to physical qualities since the inclusion of ethical principles was not considered during the drafting of the CISG and that they are too vague to constitute contractual obligations [*MfC, §§ 87-94, pp. 35-37*]. RESPONDENT submits that, on the contrary, Art. 35 CISG also relates to conformity with ethical principles.

124 The common understanding of the CISG includes conformity to ethical principles [*Brunner, Art. 35 § 6; Butler, p. 302; Saidov, p. 49; Schlechtriem/Schwenzer, Art. 35 §§ 9 & 10; Schwenzer/Leisinger, p. 267; Barley Case; PVC Case; Schnitzel Case*]. Moreover, party autonomy allows the parties to include requirements regarding conformity of goods that go beyond "*quantity, quality and description*" [*Kröll et al., Art. 35 § 12; Staudinger/Magnus, Art. 35 § 15*]. Even the scholar CLAIMANT cites to support its view agrees that "*quality encompass[es] ethical characteristics*" [*MfC, § 87, p. 35*; *Dysted, p. 34*]. Therefore, ethical principles are relevant and can be made a requirement under Art. 35 CISG.

B. The delivered chocolate cakes are nonconforming goods as per Art. 35(1) CISG

125 Art. 35(1) CISG provides that, in order to be conforming, the goods primarily have to satisfy the requirements contractually agreed on by the parties [*Honsell, Art. 35 § 10; Kröll et al., Art. 35 § 37; Schlechtriem/Schwenzer, Art. 35 § 6; Model Locomotives Case*]. To that effect, CLAIMANT alleges that its chocolates cakes were conforming under Art. 35(1) CISG since the Contract merely required CLAIMANT to exert its best efforts in ensuring sustainable sourcing of the cocoa [*MfC, §§ 74-76 & 95-101, pp. 34 & 37-39; NoA, § 8, p. 5*]. On the contrary, RESPONDENT submits that under both the Contract and the CISG CLAIMANT had an obligation of results to deliver cakes free of unsustainably-sourced cocoa (**1**) and that CLAIMANT did not achieve the required results (**2**).

1. CLAIMANT had an obligation of results to deliver cakes free of unsustainably-sourced cocoa under the Contract and the CISG

126 CLAIMANT alleges it had an obligation of best efforts to provide sustainably-sourced chocolate cakes [*MfC, §§ 95-101, pp. 37-39; NoA, § 8, p. 5*]. RESPONDENT, however, submits CLAIMANT had an obligation of results to deliver cakes free of unsustainably-sourced cocoa [*RNoA, § 26, p. 27*].

127 Since the CISG does not define these different types of obligations, RESPONDENT submits the UPICC provide an adequate definition of both. To that effect, they define an obligation of results as a promise by the seller to achieve a specific result and to be liable should that result not be achieved [*Art. 5.1.4 UPICC, Comment 1, p. 156*]. Contrarily to an obligation of results, an obligation of best efforts is a duty wherein the obliged party must "*exert the efforts that a reasonable person of the same kind would exert in the same circumstances, but does not guarantee the achievement of a specific result*" [*Ibid.*].

128 Contrary to CLAIMANT's contentions, RESPONDENT submits that, under the CISG (**a**), RESPONDENT's Code of Conduct (**b**), and further the UNGC Principles (**c**), CLAIMANT had an obligation of results to deliver chocolate cakes free of unsustainably-sourced cocoa.

a. *Conformity of the goods under Art. 35(1) CISG is an obligation of results*

129 RESPONDENT submits that the distinction between obligations of results and of best efforts is not relevant under Art. 35 CISG in that conformity of goods is an obligation of results.

130 Indeed, the contractual requirements provided under Art. 35(1) CISG are strict **guarantees** which do not require any specific wording to that effect [*Kröll et al., Art. 35 § 38; Schlechtriem/Schroeter, § 364; Staudinger/Magnus, Art. 35 § 16*]. Hence, if any characteristic required by the contract is absent in the delivered goods, however insignificant, the goods are nonconforming [*Brunner, Art. 35 § 4; Honsell, Art. 35 § 7*]. For instance, if goods are not processed according to ethical or religious standards required in the contract, they are in deemed nonconforming [*Schwenzer Conformity, p. 105;*

Schwenzer/Leisinger, p. 267]. In other words, the seller's duty is to deliver goods whose characteristics exactly match those required under the contract, therefore effectively complying with an obligation of results [*Soergel, Art. 35 ∫ 4*]. Accordingly, in sales contracts governed by the CISG, obligations regarding conformity of the goods "*obviously entail [an obligation of] result[s]*" [*Ramberg, p. 683*].

b. *CLAIMANT had an obligation of results to deliver cakes free of unsustainably-sourced cocoa under RESPONDENT's Code of Conduct*

131 CLAIMANT contends it is merely bound by an obligation of best efforts under the Contract [*MfC, ∫∫ 99-101, pp. 38-39; NoA, ∫ 21, p. 7*]. RESPONDENT, however, respectfully requests this Tribunal to find that CLAIMANT had obligations of results under Principles C and E of RESPONDENT's Code of Conduct [*Ex. C10, p. 22; RNoA, ∫∫ 26 & 28, p. 27*].

132 As previously mentioned, Art. 8 CISG is applicable to determine the content of a contract, using a subjective and an objective test [*Supra ∫ 7; Honsell, Art. 8 ∫ 3; Textile Machines Case*]. The common intent of the parties to one specific contract, and thus the subjective test, is irrelevant regarding the interpretation of ST because they are drafted with the purpose of applying across a multitude of different contracts without negotiation of their content [*Schlechtriem/Schwenzer, Art. 8 ∫ 68; Witz et al., Art. 8 ∫ 14*]. Hence, the objective test as per Art. 8(2) CISG should be applied, which follows the understanding of a reasonable person in the shoes of the parties [*Ibid.; Supra ∫ 14*].

133 In the case at hand, when the Parties met at the Cucina food fair in Danubia, they "*had a long discussion about numerous topics surrounding ethical production […] and the resulting need to monitor suppliers*" [*Ex. R5, p. 41*]. RESPONDENT further insisted that it wanted to prevent a previous bad experience from happening again because "*someone [in the] supply chain has not* ***complied*** *with [RESPONDENT's] Code of Conduct*" [*Ex. C1, p. 8, emphasis added*]. Therefore, where Principle C of RESPONDENT's Code of Conduct states that CLAIMANT shall "*ensure that [its] own suppliers comply with the above requirements*", specifically the requirement for the supplier to "*conduct [its] business in an environmentally sustainable way*", a reasonable person in the same circumstances would have understood this obligation as one of results [*Ex. C2, Section XXVI, Principle C, pp. 13-14*]. Accordingly, it would be unreasonable to consider Principle C as an obligation of best efforts when its purpose is specifically to avoid the goods even be produced unsustainably in the first place.

134 Secondly, there is also an obligation of results under Principle E. Indeed, it states that the seller "***must under all circumstances*** *procure goods […] in a responsible manner*" and ensure that its suppliers "*comply with the standards agreed upon to avoid that goods […] delivered are in breach of [RESPONDENT's] General Business Philosophy*" [*Ex. C2, Section XXVI, Principle E, p. 14, emphasis added*]. Therefore, in the same circumstances as mentioned above, a reasonable person would also

understand that the purpose of Principle E is to forbid delivery of goods containing unsustainably-sourced ingredients and thus is an obligation of results [*Supra § 133*].

135 Lastly, RESPONDENT submits CLAIMANT's argument regarding the wording of Principles C & E is without merit. Indeed, no specific wording is required for the contractual requirements under Art. 35(1) CISG to be guarantees [*Supra § 130*]. Therefore, its claim that the lack of *"typical contractual "clauses" or "articles" but dot-symbols before every sentence*" renders RESPONDENT's Code of Conduct nonbinding should be disregarded [*MfC, § 93, p. 37*]. It should finally be noted that, in its memorandum, CLAIMANT describes itself as "*unreasonable*" and "*lack[ing] professional knowledge*" [*MfC, §§ 99 & 100, p. 38*].

136 Accordingly, an objective interpretation following the understanding of a reasonable person shows that Principles C & E of RESPONDENT's Code of Conduct are obligations of results, requiring CLAIMANT to guarantee that the chocolate cakes be free of unsustainably-sourced cocoa.

c. *The UNGC Principles also required compliance with ethical principles as a result*

137 CLAIMANT has argued that the UNGC Principles are not part of the Contract [*NoA, § 18, p. 6*]. Although CLAIMANT has not developed that argument further in its memorandum, RESPONDENT submits that the goods CLAIMANT delivered are also nonconforming under the UNGC Principles and RESPONDENT's General Business Philosophy, which is "*largely identical*" to the UNGC Principles [*Ex. C6, p. 18; PO2, § 31, p. 53*].

138 The UNGC Principles can, like any other requirement, be made part of a contract by reference to them [*Kröll et al., Art. 35 § 12; Schlechtriem/Schwenzer, Art. 35 § 7*]. It is also admitted that the UNGC Principles are part of the contract impliedly when both parties are members of UNGC [*Butler, p. 304; Schwenzer/Leisinger, p. 265; Schwenzer ULR, pp. 125-126*].

139 In the case at hand, the UNGC Principles are referred to in the Preamble of RESPONDENT's Code of Conduct [*Ex. C2, Section XXVI, Preamble, p. 13*]. Indeed, the Code of Conduct aims to "*guarantee such adherence [to UNGC Principles]*" [*Ibid.*]. Moreover, CLAIMANT insisted in its offer that RESPONDENT "*[could] be* ***assured*** *that [CLAIMANT would] do everything possible to* ***guarantee*** *that the ingredients […] comply with [their] joint commitment to [UNGC] Principles*", therefore also making them part of the Contract [*Ex. C3, p. 15, emphasis added*]. In any case, it is undisputed that both Parties are members of UNGC and therefore the Principles are at least impliedly part of the Contract [*NoA, § 1, p. 4; RNoA, § 5, p. 25*]. Hence, in the previously-mentioned circumstances in which the Contract was formed, and with CLAIMANT's guarantee of compliance, a reasonable person would have understood compliance with the UNGC Principles as an obligation of results [*Supra § 133*].

140 Accordingly, pursuant to UNGC Principles 7 and 10 on environment protection and anti-bribery respectively, CLAIMANT had an obligation of results to deliver chocolate cakes made without recourse to corruption or environmentally unsustainable practices.

141 Therefore, the CISG, all relevant provisions of RESPONDENT's Code of Conduct and the UNGC Principles require CLAIMANT to comply with an obligation of results, namely to deliver chocolate cakes exempt of unsustainably-sourced cocoa.

2. CLAIMANT did not comply with its obligations under the Contract

142 CLAIMANT addresses conformity of the chocolate cakes only regarding their shape and thus alleges that they are conforming under Art. 35(1) CISG [*MfC, §§ 74-76, p. 34*]. RESPONDENT, however, submits that CLAIMANT delivered nonconforming goods as it breached the obligation of results to deliver cakes free of unsustainably-sourced cocoa (**a**). In any case, CLAIMANT's behaviour would not have been sufficient to comply with an obligation of best efforts, had there been one (**b**).

a. *CLAIMANT did not comply with the obligation of results to deliver chocolate cakes containing only sustainably-sourced cocoa*

143 Since CLAIMANT alleges it only had an obligation of best efforts under the Contract, it does not examine whether it complied with the obligation of results actually contained therein [*MfC, §§ 93 & 95-101, pp. 36-39; NoA, § 21, p. 7*]. RESPONDENT submits that the obligation of results to deliver chocolate cakes free of unsustainably-sourced cocoa was breached. As previously mentioned, an obligation of results can be defined as a promise by the seller to achieve a specific result and to be liable should that result not be achieved [*Supra § 127*].

144 In the case at hand, CLAIMANT delivered chocolate cakes made with cocoa provided by Ruritania Peoples Cocoa mbH ("**RPC**"), a supplier who, as admitted by CLAIMANT, bribed government officials and falsified certificates in order to cover up its farming of cocoa in protected areas [*PO2, §§ 37 & 41, p. 54*; *NoA, § 9, p. 5; Ex. C9, p. 21*]. At least two of RPC's managers have admitted to the fraud [*PO2, § 37, p. 54*]. Moreover, these illegal practices have been the cause of widespread deforestation by fire, allegedly causing over 100,000 premature deaths and further affecting millions of people in Ruritania [*Ex. C6 & C7, pp. 18-19*]. Therefore, RPC's cocoa was in breach of environmental and anti-corruption principles contained within Principles C & E of RESPONDENT's Code of Conduct and UNGC Principles 7 & 10 [*Ex. C2, Section XXVI, Principles C & E, pp. 13-14*].

145 Hence, the resulting chocolate cakes contained unsustainably-sourced cocoa, thus breaching the obligation of results and rendering the cakes nonconforming under Art. 35(1) CISG.

b. *CLAIMANT's behaviour would not have been sufficient even in case of an obligation of best efforts*

146 CLAIMANT contends it correctly performed the obligation of best efforts it allegedly had under the Contract [*MfC, §§ 102 & 103, p. 39*]. RESPONDENT submits that even if the Contract had merely contained obligations of best efforts, which it does not, CLAIMANT's efforts would have been insufficient, also rendering the chocolate cakes nonconforming. As previously mentioned, an obligation of best efforts entails that the obliged party should "*exert the efforts that a reasonable person of the same kind would exert in the same circumstances*" [*Supra § 127*].

147 During the negotiations, CLAIMANT reported its supply chain management included "*regular audits and reporting obligation[s]*" [*Ex. C1, p. 8*]. Moreover, CLAIMANT considered that its own Supplier Code of Conduct "*allowed [CLAIMANT] to monitor also the activities of [its] suppliers in a way, that [CLAIMANT] could largely guarantee compliance […] by [its] suppliers*" [*Ex. R3, Art. 5, p. 31; Ex. R5, p. 41*]. Therefore, it is surprising that CLAIMANT audited RPC only on its main production site, only once, and afterwards merely relied on "*questionnaires*" [*NoA, § 22, p. 7; Ex. C8, p. 20; PO2, § 32, p. 53*]. Moreover, unlike a case wherein it was debated whether food containing 0.1 to 1 % of GMO could nevertheless be considered "GMO-free", CLAIMANT's chocolate cakes contained up to **50 %** of illegally-sourced cocoa [*Schnitzel Case; PO2, § 41, p. 54*]. Accordingly, a reasonable person of the same kind as CLAIMANT, "*proud of [its monitoring efforts]*", would be reasonably expected to proceed to more regular and in-depth audits to avoid such a large oversight [*Ex. R5, p. 41*]. Furthermore, after years of mere reliance on "*questionnaires*", it only took CLAIMANT less than two weeks to find out about its supplier's involvement in the scandal when it at last decided to make a proper investigation upon RESPONDENT's request [*Ex. C8 & C9, pp. 20-21; PO2, § 32, p. 53*]. Therefore, CLAIMANT did not exert sufficient efforts to comply with the obligation of best efforts it claims to have under the Contract.

148 Therefore, CLAIMANT did not comply with the obligations of results contained in the Contract. Even if those had been obligations of best efforts, CLAIMANT's behaviour would not have been sufficient to comply with them.

149 Accordingly, since the Contract and the CISG required CLAIMANT to deliver cakes free of unsustainably-sourced cocoa and CLAIMANT did not comply with said obligation, the chocolate cakes CLAIMANT delivered are nonconforming goods as per Art. 35(1) CISG.

C. The delivered chocolate cakes are also nonconforming goods as per Art. 35(2) CISG

150 Beyond contractual conformity under Art. 35(1) CISG, Art. 35(2) CISG provides for additional requirements that the goods have to fulfil in order to be conforming [*Kröll et al., Art. 35 § 60; Flechtner, p. 584; Staudinger/Magnus, Art. 8 § 10; Drill Case; Plants Case; Wassertank Case*]. CLAIMANT

alleges the delivered chocolate cakes are conforming under Art. 35(2) CISG [*MfC, §§ 77-86, pp. 34-35*]. RESPONDENT submits to the contrary since the delivered chocolate cakes comply with neither requirements pertinent to the case at hand, namely fitness for particular purpose as per Art. 35(2)(b) CISG (**1**) and fitness for ordinary purpose as per Art. 35(2)(a) CISG (**2**).

1. The delivered goods are unfit for particular purpose under Art. 35(2)(b) CISG

151 Even though not addressed by CLAIMANT, it could argue in the oral hearing that the cakes were fit for particular purpose under Art. 35(2)(b). RESPONDENT submits CLAIMANT delivered goods which are unfit for RESPONDENT's particular purpose.

152 Art. 35(2)(b) CISG provides that goods have to be fit for the buyer's particular purpose made known to the seller [*Kröll et al., Art. 35 § 106; Schwenzer ULR, p. 126*]. It takes priority over Art. 35(2)(a) CISG since it concerns particular purpose, a subjective test which is closer to the parties' intent [*Kröll et al., Art. 35 § 61; Schlechtriem/Schwenzer, Art. 35 § 13*]. To that effect, the sale of goods on the market of fair trade products constitutes such a particular purpose [*Schwenzer Conformity, p. 107; Schwenzer/Hachem/Kee, § 31.91; Schwenzer/Leisinger, p. 267; Schwenzer ULR, p. 126*].

153 Throughout the negotiations of the Contract, and as previously mentioned, RESPONDENT has made known to CLAIMANT on multiple occasions how important sustainability was to its customers and itself [*Supra § 133; Ex. C1, p. 8; Ex. R5, p. 41*]. Conformity to ethical principles was even a decisive factor in choosing CLAIMANT over other competitors [*Ex. C5, p. 17*]. Therefore, CLAIMANT knew the purpose RESPONDENT intended for its chocolate cakes, namely to sell them as sustainable high-quality chocolate cakes [*RNoA, § 13, p. 25*]. Accordingly, the fact that the cakes contain cocoa produced through deforestation and bribery renders them unfit for RESPONDENT's particular purpose [*Supra § 144; Ex. C9, p. 21; PO2, § 41, p. 54*].

154 Hence, CLAIMANT delivered nonconforming goods under Art. 35(2)(b) CISG since it did not comply with RESPONDENT's communicated particular purpose.

2. The delivered goods are unfit for ordinary purpose under Art. 35(2)(a) CISG

155 CLAIMANT alleges the chocolate cakes fit for the ordinary purpose of such goods, according to three different interpretations, namely merchantable, average or reasonable quality [*MfC, §§ 77-86, pp. 34-35*]. RESPONDENT submits to the contrary.

156 Art. 35(2)(a) CISG lays out an objective test regarding fitness for ordinary purpose [*Schlechtriem/Schwenzer, Art. 35 § 14*]. RESPONDENT submits the correct interpretation of this Article is that the goods have to be of reasonable quality, since this is the interpretation that "*carries the least national bag and baggage with it*" [*Kröll et al., Art. 35 § 79*]. To that effect, goods that are priced higher

than average or sold by a producer of premium products are only fit for ordinary purpose if they are also of higher than average quality [*Kröll et al., Art. 35 §§ 80 & 81; Staudinger/Magnus, Art. 35 § 19*]. Moreover, if goods can only be resold at a considerable discount, *e.g.* due to their reputation, or render the buyer liable for nonconformity towards its own customers, they are unfit for ordinary purpose [*Ferrari IVR, Art. 35 § 14; Kröll et al., Art. 35 § 97; Witz et al., Art. 35 § 9; Crude Oil Award*].

157 In the case at hand, CLAIMANT describes itself as a "*manufacturer of fine bakery products*" and sells its chocolate cakes at a price higher than the average for **premium** cakes, not ordinary ones [*NoA, § 1, p. 2; PO2, § 40, p. 54*]. The reasonable quality expected from CLAIMANT's chocolate cakes is therefore not limited to merely being "*[edible] and healthy*", but includes conformity to higher standards, like ethical standards [*MfC, § 84, p. 35; Schwenzer ULR, p. 123*]. Furthermore, contrary to CLAIMANT's allegation, RESPONDENT did not sell the delivered cakes [*MfC, § 7, p. 11; NoA, § 11, p. 5*]. On the contrary, RESPONDENT would not sell unethically-produced cakes to its customers and thus had to give them away for free in order to avoid wasting them [*PO2, § 38, p. 54*]. Even CLAIMANT offered to reduce the price of its cakes due to the scandal [*Ex. C9, p. 21*]. Therefore, the goods could not be resold, even at a considerably reduced price, and were thus unfit for ordinary purpose under Art. 35(2)(a) CISG.

158 Accordingly, as the chocolate cakes delivered by CLAIMANT are unfit for both the particular purpose under Art. 35(2)(b) and the ordinary purpose under Art. 35(2)(a) CISG, they are nonconforming goods as per Art. 35(2) CISG.

159 **CONCLUSION TO ISSUE IV**: Contrary to CLAIMANT's submission, ethical principles are relevant under Art. 35 CISG. To that effect, CLAIMANT delivered chocolate cakes which did not conform to the contractual requirements under RESPONDENT's ST and Art. 35(1) CISG. Moreover, CLAIMANT did not comply with the relevant requirements under Art. 35(2) CISG. Accordingly, RESPONDENT respectfully requests this Tribunal to find that the delivered chocolate cakes are in breach of the Contract and the CISG.

160 **CONCLUSION TO THE SUBSTANTIVE ISSUES**: RESPONDENT respectfully asks this Tribunal to find that RESPONDENT's ST govern the Contract. They are the only ST to have been validly incorporated into the Contract. Even in case of a "battle of the forms", CLAIMANT's ST do not govern the Contract. Furthermore, contrary to CLAIMANT's submission, ethical principles are relevant under Art. 35 CISG. To that effect, under RESPONDENT's ST, the chocolate cakes delivered by CLAIMANT are nonconforming goods both under Arts. 35(1) and 35(2) CISG.

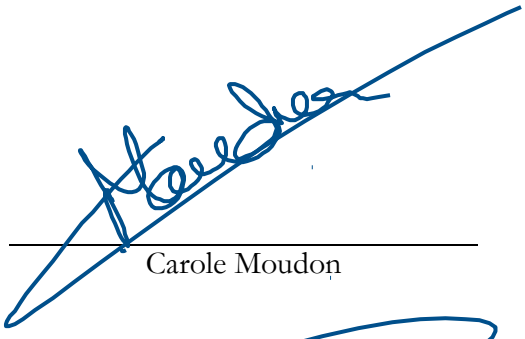
PRAYER FOR RELIEF

On the basis of the arguments above and RESPONDENT's prior written submissions, RESPONDENT respectfully asks this Tribunal to find that:

(1) This Tribunal should rule, without Mr. Prasad's participation, on the challenge to Mr. Prasad;
(2) Mr. Prasad should be removed from this Tribunal;
(3) RESPONDENT's standard terms govern the Contract;
(4) Under RESPONDENT's standard terms, CLAIMANT delivered nonconforming chocolate cakes in breach of the Contract and the CISG.

Lausanne, 18 January 2018

On behalf of RESPONDENT, **COMESTIBLES FINOS LTD**



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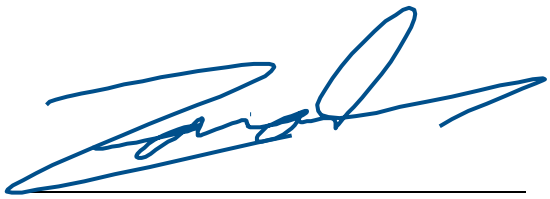
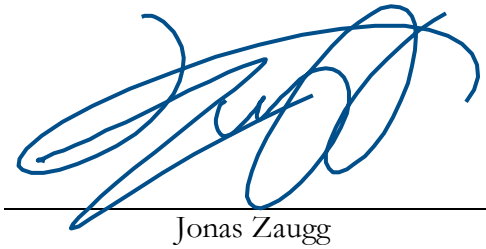


Marta Zamorska

Patrick Pithon



Jonas Zaugg

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