

# MEMORANDUM FOR CLAIMANT

Delicatesy Whole Foods Sp  
39 Marie-Antoine Crème Avenue  
Oceanside  
Equatornia

Comestibles Finos Ltd  
75 Martha Stewart Drive  
Capital City  
Mediterraneo

Represented By Horace Fasttrack

Represented By Joseph Langweiler

**CLAIMANT**

**RESPONDENT**



**Middle East University**

---

Alissar Hajhasan\* Haya Bako\* Jude Al-Masri\* Nicole Zaghoul\* Issa Al-Tarawneh

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## INDEX OF ABBREVIATIONS

Arbitration Rules	UNCITRAL Arbitration Rules
Art.	Article
Artt.	Articles
CISG	United Nations Convention on Contracts for the International Sale of Goods
Model Law	UNCITRAL Model Law
Para.	Paragraph
Pg.	Page
Pgs.	Pages

PO1                    Procedural Order No. 1

PO2                    Procedural Order No. 2

Sect.                   Section

UNIDROIT            International Institute for the Unification of Private Law

v.                        Versus



**INDEX OF LEGAL TEXT**

CISG	UN Convention on Contracts for the International Sale of Goods
Global compact principles	The Ten Principles of the UN Global Compact
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration. Adopted by resolution of the IBA Council on Thursday 23 October 2014
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)
UNCITRAL Arbitration Rules	United Nations Commission on International Trade Law Arbitration Rules as Revised in 2010
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2010

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## SUMMARY OF FACTS

1. Delicately Whole Foods (“Delicately”) [Hereinafter “CLAIMANT”], is a medium sized manufacturer of fine bakery products registered in Equatornia.
2. Comestibles Finos Ltd (“Comestibles”), [Hereinafter “RESPONDENT”] is a gourmet supermarket chain in Mediterraneo.
3. **In March 2014**, CLAIMANT met RESPONDENT at the yearly Danubian food fair, Cucina and was approached by RESPONDENT’s Head of Purchasing
4. **On 10 March 2014** CLAIMANT received an invitation to tender from RESPONDENT for the delivery of chocolate cakes. The invitation was sent to 5 different businesses including CLAIMANT. RESPONDENT was impressed by CLAIMANT’s report about the management of its supply chain and that is why RESPONDENT wanted CLAIMANT to participate its tender.
5. **On 27 March 2014** CLAIMANT sent an offer with specific terms regarding payment method, shape of the cake, and it included its own general conditions of sale and code of conduct.  
  
CLAIMANT further clarified on its obligations towards RESPONDENT regarding its suppliers declaring that CLAIMANT will do everything possible to guarantee that the suppliers comply with CLAIMANT’s joint commitment to global compact principles.
6. **On 7 April 2014** RESPONDENT accepted CLAIMANT’s offer with no objections to any of the terms. RESPONDENT stated that its code of conduct and CLAIMANT’S code of conduct share the same values and are both committed to ensure that the goods produced and sold fulfilled the highest standards of sustainability.
7. **On 7 January 2017** CLAIMANT informed RESPONDENT that there is no problem with cocoa delivered to them since they have monitored Ruritania peoples cocoa mbH in line with their guidelines and CLAIMANT will verify whether cocoa mbH is implicated in the scandal.
8. **On 10 February 2017** CLAIMANT stated that its suppliers have not only breached its contractual obligation towards them since they have not produced cocoa in accordance with the contractually required principles but has also obtained falsified certificates to cover up such breach of contract.
9. **On 26 June 2017** Mr. Prasad provided his Declaration of Impartiality and Independence and Availability while assuring his availability and more importantly both his impartiality and independence and his intent on remaining so.

- 10. On 30 June 2017** Mr. Fasttrack attached in his Letter to RESPONDENT the Notice of Arbitration mentioning that CLAIMANT appointed Mr. Prasad as their arbitrator.
- 11. On 31 July 2017** RESPONDENT replied to CLAIMANT'S Notice of Arbitration and accepted the appointment of Mr. Prasad despite raising some restrictions to his independence in Response to Notice of Arbitration.
- 12. On 29 August 2017** RESPONDENT disclosed gaining information about CLAIMANT being funded by a third party.
- 13. On 1 September 2017** Presiding Arbitrator requested CLAIMANT to resolve all concerns raised by RESPONDENT
- 14. On 7 September 2017** Mr. Fasttrack confirmed that CLAIMANT is being funded by a third and specified all matters regarding the funding
- 15. On 11 September 2017** Mr. Prasad disclosed all information regarding his links to FindfundsLp subsidiaries while assuring that such circumstances do not threaten his ability to remain impartial and independent.

## SUMMARY OF ARGUMENT

16. Mr. Prasad (CLAIMANT's appointed arbitrator)'s challenge should not be decided upon by this tribunal because the Arbitration Agreement does not give the tribunal this authority and it therefore belongs to the court. Furthermore, by applying the correct procedural law to this issue which is the Arbitration Rules and the CISG it is possible to refer the dispute to an appointing authority.

17. RESPONDENT's allegations regarding Mr. Prasad's impartiality and independence did not meet the burden of proof required, Mr. Prasad's circumstances and the circumstances raised by RESPONDENT do not suggest that he is anything but impartial and independent under the applicable procedural laws; the Model Law and the Arbitration Rules, as well as the IBA guidelines even if they are found applicable which they are not.

18. RESPONDENT claimed CLAIMANT breached the contract because CLAIMANT's supplier did not abide by RESPONDENT's Code of Conduct alleging that it's a part of the contract, however CLAIMANT's General Conditions in fact govern the contract between the Parties as CLAIMANT's General Conditions were included in the offer which CLAIMANT made and RESPONDENT accepted. On the contrary, even if RESPONDENT'S general conditions apply, claimant delivered conforming goods as it was only obliged to do its best efforts under the contract. That is because CLAIMANT'S intention was to ensure its suppliers adherence to CLAIMANT'S ethical standards in their code of conduct. Furthermore, the interpretation of the intention should be in CLAIMANT'S favor under the contra proferentem rule. CLAIMANT adhered with article 35 and fulfilled all its obligations under it as well as CLAIMANT is not liable for the breach- even the tribunal sees one- as it was made by a third party pursuant to article 79 of the CISG

**ARGUMENT:****I. THE TRIBUNAL DOES NOT HAVE THE AUTHORITY TO CHALLENGE MR. PRASAD**

19. The Tribunal does not have the authority to challenge Mr. Prasad noting that, the authority to challenge Mr. Prasad belongs to the court **(1)**. Applicable law to this issue is the UNCITRAL Arbitration Rules **(2)**. Under Art. 13 of the Arbitration Rules the authority to challenge Mr. Prasad belongs to the appointing authority **(3)**. CISG allows for an appointing authority regarding the challenge **(4)**

**1. The Authority To Challenge Mr. Prasad Belongs To The Court.**

20. Arbitration is a form of alternative dispute resolution; the tribunal is given its authority from the parties' consent; the arbitration clause. The arbitration clause in this case does not give the tribunal the authority to decide on the challenge, which means that the authority goes back to the courts, as arbitration is an exception to the general dispute resolution process.

21. Art. V(1)(d) of the New York Convention states that recognition and enforcement of the award may be refused if the composition of the arbitral authority was not in accordance with the agreement of the parties. Furthermore, Art. 16(2) of the Model Law provides that the court has inherent jurisdiction over disputes when a plea that the tribunal does not have jurisdiction and is practicing matters beyond its authority, and such plea can be raised by any party including the party that appointed or participated in the appointment of an arbitrator. [Born1, pg. 205]

22. The Arbitration clause in the contract between the parties states: "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules" [Notice of Arbitration, para 13, clause 20, pg6]. The arbitration clause does not include challenging an arbitrator, it regards only the issues arising out of or relating to the contract, its breach, termination and validity. The tribunal chosen is given authority over those issues and not the challenge of an arbitrator.

23. Accordingly, and taking into account one of the English High Court of Appeal's decisions [Dallah v Pakistan], the court is allowed the opportunity to settle the dispute and has jurisdiction under the competence-competence doctrine and therefore the arbitrators are not alone in respect of the decision regarding the challenge.

**2. Applicable law to this issue is the UNCITRAL Arbitration Rules**

24. If the tribunal finds that the Arbitration Agreement includes the challenge of an arbitrator, then the applicable law to this issue must be determined. And even though there are two sets of rules that govern this arbitration, being the Model Law and the Arbitration Rules, the Arbitration Rules should determine the authority of the tribunal because the Arbitration Rules is the law agreed upon by the parties **(a)** which takes precedent over the *lex arbitri* when the provisions are not mandatory **(b)**.

**a. UNCITRAL Arbitration Rules is the Law agreed upon by the Parties.**

25. Applicable law is the Arbitration Rules because it is the law mentioned in the contract [*Notice of Arbitration, pg. 4-6, para. 13, clause 20*], which is set to fix all matters of the arbitration and the arbitral proceedings and therefore should be applied. [*Mistelis and Kroll, pg 411*].

26. In addition to being the applicable law by virtue of Art. 1 of the Arbitration Rules to any dispute resulting from any arbitration unless in the existence of a mandatory law. With the importance of pointing out the required Parties' consent in considering the Arbitration Rules to govern any disputes resulting from their contract.

**b. Article 13 (4) of the UNCITRAL Arbitration Rules takes precedent over Articles 12 and 13 of the UNCITRAL Model Law.**

27. Artt. 12 and 13 of the Model Law are non-mandatory, and parties have the free will to abide by them or to agree on a different procedure. The Parties' choice of Law governs the procedural issues was the Arbitration Rules [*Notice of Arbitration, pg.6, para. 13, clause 20*] and is shown to be the Parties' agreement on making their own choice of applicable procedural law.

28. Since the Parties chose the Arbitration Rules to be the applicable procedural law to settle any dispute resulting from their contract, the Model Law cannot be considered applicable therefore party autonomy over *lex arbitri*. [*Born1, 84-86*] and since the Model Law is not mandatory, and the Arbitral Tribunal is given the choice of determining the arbitral proceedings mechanism to be followed by virtue of Art 19 (1) of the Model Law, the Parties chose the Arbitration Rules so therefore all arbitral proceeding must adhere to them. As a result, the appointing authority has the authority to decide on the challenge and not the Arbitral Tribunal.

29. In the non-mandatory texts of the Model Law, the parties are free to agree on them or to change them in line with their interests. [*Explanatory Note by the UNCITRAL Secretariat*].



30. The party autonomy rule is based on the assumption that parties to arbitration are knowledgeable and informed, and that they use the rule responsibly. [*Charles Chatterjee*]

### **3. Article 13 of the UNCITRAL Arbitration Rules The Authority To Challenge Mr. Prasad Belongs To The Appointing Authority**

31. Regarding the challenge of Mr. Prasad that RESPONDENT made [*Notice of Challenge of Arbitrator pgs. 37-39*]. The power of making a decision regarding the challenge is with the appointing authority according to Art. 13(4) of the Arbitration Rules and not the Arbitral Tribunal, additionally, a party may ask for the involvement of an arbitration institution in the dispute settlement [*Born1 pg. 1393*] furthermore, a party may resort to a court for assistance in making a decision in regards of a challenge of an arbitrator. Conclusively, the power of deciding on the challenge of Mr. Prasad does not belong to the Arbitral Tribunal, but to the appointing authority, despite the numerous means of assistance that a party can refer to.

### **4. CISG Allows For An Appointing Authority Regarding The Challenge.**

32. Both parties agreed upon the CISG to govern the agreement including the Arbitration clause and therefore interpretation of any provision can be under them. [*PO1, pg. 48, para 1*]

33. Art. 8(1) of the CISG “For purpose of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was” and Art. 4.1.1 of the UNIDROIT principles “A contract shall be interpreted according to the common intention of the parties.” clarified how to interpret the contract by the common intentions of both parties.

34. The agreement stated that any dispute arises out of the contract shall be settled by arbitration without the involvement of any arbitral institution [*Tender Documents. 9-14, para 20*] and the reason why parties do not want an arbitral institution involvement is to protect their confidentiality only [*CLAIMANT'S Exhibit C1, pg.8 + RESPONDENT'S Exhibit R5 pg. 41*].

35. Using article 8 allows the parties to involve an appointing authority since the main purpose is still saved -which is confidentiality- and the condition of the non-involvement of an arbitration institution was exclusively on the parties and not on the arbitrators. "Article 4.1 of the Principles talks in terms of the interpretation of contracts". It starts with a subjective notion. If the parties have a common intention, the common intention will prevail." [*Perillo*]

36. Since Mr. Prasad's challenge being decided upon through an institution will not compromise the parties' confidentiality, which is what the parties intended, Art. 13 of the Arbitration Rules can and should be applied and an appointing authority can be chosen to decide on the challenge, even if an appointing authority means the involvement of an institution contrary to what is stated in the Notice of Challenge of Mr. Prasad [*Notice of challenge of Mr. Prasad, para 8, pg. 39*].

## **II. EVEN IF THE TRIBUNAL HAS THE AUTHORITY TO DECIDE ON THE CHALLENGE OF MR. PRASAD, MR. PRASAD SHOULD PARTICIPATE IN THE DECISION REGARDING HIS CHALLENGE.**

37. Assuming the Tribunal has authority to decide on the Challenge of Mr. Prasad, Mr. Prasad's participation in the decision regarding the matter is crucial. Since if the tribunal decides it has the authority it did so by applying the Model Law. Under the Model Law Mr. Prasad irrefutably has authority, considering that he is an existing member of the tribunal **(1)**. Additionally, Mr. Prasad is competent to rule on his own jurisdiction under the doctrine competence-competence which was granted when applying by analogy Article 16(1) of the Model Law, thus his rightful participation in the decision regarding his challenge **(2)**.

### **1. Article 13 Of The UNCITRAL Model Law Indicates Mr. Prasad Should Participate In The Decision Regarding His Challenge.**

38. Art. 13(2) of the Model Law clearly states the Arbitral Tribunal's granted power in deciding on a challenge of an arbitrator in the case of the arbitrator not withdrawing from their office or if the other party did not agree on the challenge.

39. The usage of the term "Arbitral Tribunal" leads to the required involvement of Mr. Prasad in the decision because he is an existing member of the Tribunal and is not excluded from it, therefore the phrase "Arbitral Tribunal" means all three arbitrators. Regardless of the decision on the challenge of Mr. Prasad, his participation is mandatory, in compliance with Art. 13(2) of the Model Law and the statement of "Arbitral Tribunal".

40. The term Arbitral Tribunal is defined as the panel of arbitrators in Article 2 (b) and as the party appointed arbitrators with the arbitrator appointed by these party appointed arbitrators in Art 11(3)(a) of the Model Law, when CLAIMANT appointed Mr. Prasad as arbitrator [*Notice of Arbitration, pg. 4-6, para. 13, clause 20*] and RESPONDENT nominated Ms. Hertha Reitbauer

as its arbitrator [*Response to Notice of Arbitration, pgs. 24-26, para. 22, Nomination of Arbitrator and Jurisdiction of Arbitral Tribunal*] both Mr. Prasad and Ms. Reitbauer appointed Ms. Caroline Rizzo as the Presiding Arbitrator [*Presiding Arbitrator's Letter, pg. 32, para. 1*] and therefore the Arbitral Tribunal was established. Conclusively, applying the Model Law, Mr. Prasad must participate in the decision because he is a member of the Arbitral Tribunal. And relying on what is obvious in Art. 2 (b) of the Model Law and what is explicitly considered as a definition of the term "Tribunal" being the panel of arbitrators, and without the exclusion of any arbitrator, it can be clearly understood that Tribunal means all members and not only two of them.

## **2. Applying Article 16 (1) of the Model Law by Analogy Mr. Prasad May Rule On His Own Jurisdiction**

41. Mr. Prasad is considered competent enough to rule on his own jurisdiction in accordance with Art. 16(1) of the Model Law and should take part in the decision regarding his challenge. Therefore RESPONDENT requesting Mr. Prasad to withdraw from his office [*Notice of Challenge of Arbitrator, pg.37-39, para 2*] and RESPONDENT'S suggestion of a potential replacement of Mr. Prasad [*Mr. Fasttrack's Email, pg. 45-46, para 13*] are considered void and inadmissible for the reason of Mr. Prasad's gained competence and right to rule on his own jurisdiction in accordance and by analogy of Art 16(1) of the Model Law which adopts the separability presumption that grants the arbitrator competence and considers their jurisdiction [*Born1, pg. 136*] and Conclusively to applying the competence - competence doctrine, considered competent and is granted the validity of his jurisdiction over the decision on his challenge.

## **3. The Tribunal Shall Consist Of Three Arbitrators.**

42. RESPONDENT requested that the two other members of the Arbitral Tribunal to decide upon the challenge [*Notice of Challenge of Mr. Prasad, para 8, pg 39*]. Two arbitrators should not decide on the challenge because that contradicts with the Agreement (a) and two arbitrators deciding on the challenge is a violation of the Model Law and Arbitration Rules (b)

### **a. The Arbitration Agreement Clearly States That There must be Three Arbitrators.**

43. Allowing two arbitrators to decide on the challenge of Mr. Prasad is in clear violation of the Arbitration Agreement which cannot be amended unless both parties agree to do so under Art. 29 of the CISG [*Pilar Perales Viscasillas*]

“The number of arbitrators shall be three, one to be appointed by each party and the presiding arbitrator to be appointed by the party-appointed arbitrators or by agreement of the parties.” [*Clamant exhibit c2 page 12 section V clause 4, pg. 12*]

44. The agreement between the parties must not be violated due to party autonomy; therefore, RESPONDENT’s request for the decision being made by two arbitrators [*pg. 46 of the Record*] should be rejected. The importance of abiding by party autonomy is Art. 11 (2) of the Model Law

45. “As is clear from the text of article (11), the governing principle with respect to the constitution of the arbitral tribunal is party autonomy. The parties may choose the arbitrators directly, either before or after the dispute has arisen. The parties are also free to delegate to appointing certain tasks in relation to the constitution of the arbitral tribunal.” [*UNCITRAL 2012 digest pg 59 + Hague Principles*]. This confirms the importance of party autonomy and not to violate them if there is a choice of arbitrators by the parties, this also confirms that Mr. Prasad should participate in the tribunal’s decision regarding his challenge.

**b. Two Arbitrators Deciding On The Challenge Is A Violation Of The UNCITRAL Model Law And UNCITRAL Arbitration Rules.**

46. Allowing only two arbitrators to decide on the challenge would be a violation of Art.10 of Model Law which states that the number of arbitrators shall be three [*UNCITRAL Secretariat*] unlike Artt. 11-13, this provision is mandatory and may not be violated even if the parties agreed to do so, which they did not. In addition, it is not in line with the mandatory provision of Art. (7) Of the Arbitration Rules which states that if the number of arbitrators is not agreed upon 30 days after the receipt of the notice of arbitration to RESPONDENT three arbitrators shall be appointed therefor, tribunal cannot exclude Mr. Prasad from participating in the challenge.

**III. MR. PRASAD SHOULD REMAIN A MEMBER OF THE TRIBUNAL REGARDLESS OF WHO HAS THE AUTHORITY TO DECIDE ON THE MATTER**

47. Mr. Prasad should stay a member of this Arbitral Tribunal, noting that the burden of proof lies with RESPONDENT **(1)**, because Mr. Prasad is impartial and independent **(2)**.

### 1. **Burden Of Proof Lies With RESPONDENT**

48. The burden of proof as to Mr. Prasad's impartiality and independence is solely on the RESPONDENT, this is explicitly stated in Art.27(1) of the Arbitration Rules which holds a party making a claim responsible for proving the facts that it relied on supporting its claim [*Born2, Pg. 2313*]. This goes to the Notice of Challenge of Arbitrator that Mr. Langweiler sent on September 14, 2017 [*Notice of Challenge of Mr. Prasad pgs. 37-39*]. Therefore, neither Mr. Prasad nor CLAIMANT are liable to prove his impartiality and independence, RESPONDENT has to prove the lack of impartiality or independence.

### 2. **Mr. Prasad Is Independent And Impartial**

49. Mr. Prasad confirmed both his impartiality and independence in multiple ways by being transparent enough in stating all facts that must be taken into account by all members of this arbitration and adhered to his disclosure obligation by noting all circumstances that might threaten his impartiality and independence in addition to being ahead of time and disclosing his previous participations as arbitrator in two claims that were funded by Findfunds LP subsidiaries and how these participations do not affect his ability to remain independent and impartial [*Mr. Prasad's Email of September 11, 2017 pg. 36, para. 4*]

#### a. **Impartiality v. Independence**

50. 'Independence' is generally considered to be concerned with questions arising out of the relationship between an arbitrator and one of the parties, whether financial or otherwise. This is thought to be susceptible to an objective test, because it has nothing to do with an arbitrator's or prospective arbitrator's state of mind.

51. By contrast, the concept of 'impartiality' is considered to be connected with actual or apparent bias of an arbitrator—either in favour of one of the parties, or in relation to the issues in dispute. Impartiality is thus a subjective and more abstract concept than independence, in that it involves primarily a state of mind. [*Redfern and Hunter pg. 255*]

**b. Standards by which Mr. Prasad's Impartiality and Independence Should be Measured are Set in The UNCITRAL Model Law and The UNCITRAL Arbitration Rules.**

52. RESPONDENT challenged Mr. Prasad's impartiality and independence relying on the IBA guidelines [*Notice of Challenge of Mr. Prasad, pgs. 38-39*].

53. Standards by which impartiality and independence are measured should be article 12 (2) of the Model Law and Art. 11 of the Arbitration Rules, since the Model Law is the Lex arbitri which is the basic framework to any arbitration [*Alastair Henderson P. 887*] and it regulates matters internal to the arbitration, such as the composition and appointment of the arbitral tribunal, requirements for arbitral procedure and due process, in addition to the external relationship between the arbitration and the courts such as the removal of arbitrators and the setting aside of awards, [*Alastair Henderson pg. 888*].

54. Furthermore, the Arbitration Rules are the law chosen by the parties to govern the procedural issues and arbitral proceeding, as stated in clause 20 in regards to dispute resolution in the contract between CLAIMANT and RESPONDENT [*Notice of Arbitration, pg.6, para. 13, clause 20*] and the principle of party autonomy states that the arbitration rules should be followed and those rules govern the issues of removal of an arbitrator [*Redfern and Hunter*].

55. Consequently, the IBA Guidelines are not applicable, not only because it is not the applicable procedural law, but also point (6) in the Introduction of the IBA Guidelines themselves states that these guidelines are not considered legal provisions, and more importantly must not override the agreed upon rules by the parties.

56. However, even if the Tribunal considers the IBA Guidelines to be applicable and considers all three rules; namely the Arbitration Rules, Model Law, and the IBA Guidelines to be taken into consideration then Mr. Prasad should still be found impartial and independent, because not one circumstance disclosed by Mr. Prasad is enough to decide on his removal. In conclusion, Mr. Prasad cannot be challenged under RESPONDENT'S claim of the applicability of the IBA Guidelines purely because the absence of the grounds of their applicability in accordance situations provided by Mr. Prasad.

**c. Mr. Prasad is Impartial.**

57. Mr. Prasad did not compromise his ability to remain impartial because he did not act in a biased manner nor did he favour or was predisposed by any party [*Born2, pg. 1776*], [*Trakman,*

pg. 7]

**i) Mr. Prasad Declared His Impartiality and Independence and RESPONDENT Accepted.**

58. Mr. Prasad explicitly clarified his impartiality and his intent on remaining so [*Declaration of Impartiality and Independence and Availability*, pg. 23] in addition to his determination on notifying the Parties of the circumstances of his previous appointment by Mr. Fasttrack's Law firm, all while assuring that these circumstances do not affect his impartiality and independence; as a result of all the announcements made by Mr. Prasad, he is considered impartial and independent.

59. RESPONDENT accepted and recognised the appointment of Mr. Prasad and did not oppose it despite alleging some restrictions to his Declaration of Independence [*Response to Notice of Arbitration*, Pg. 26, para. 22]

**ii) Mr. Prasad Was Unaware and Should Not Be Held Liable for Mr. Fasttrack's Behavior.**

60. Mr. Prasad's nomination by Mr. Fasttrack does not in any way constitute justifiable doubts to his impartiality for the reason of Mr. Prasad being completely oblivious to Mr. Fasttrack's actions [*PO2 P. 51, Para.13*], moreover Mr. Prasad's possibility of blank knowledge of CLAIMANT'S claim being funded by a third party, therefore Mr. Fasttrack shall be liable to annul any concerns of that matter. [*Paulsson and Petrochilos*, pg. 85].

61. The fact that Mr. Fasttrack concealed certain circumstances including Mr. Prasad's connections to Findfunds LP should not be designated to Mr. Prasad and shouldn't be held accountable for such actions, besides that Mr. Prasad has immediately disclosed his previous involvement with Funding 12 Ltd subsidiaries regardless of the fact that these involvements do not actually constitute any threats to his impartiality and independence, which shows Mr. Prasad's utmost transparency and good work ethics.

**iii) Mr. Prasad's Publications Do Not Affects His Impartiality.**

62. The article written by Mr. Prasad, published in the Vindobona Journal in which Mr. Prasad discussed how the conformity of goods should not comply with the broad, unspecific and

remarkably general principles of Global Compact, and how these principles are ineligible to bring about a contractual obligation [ *Mr. Prasad's article in the Vindobona Journal of International Commercial Arbitration and Sales Law, pg.40*], does not result in a restriction to Mr. Prasad's impartiality as firstly, the article being published in 2016 which is prior to the whole problem that resulted in this arbitration; hence the void assumption of Mr. Prasad's favouring towards CLAIMANT.

63. Secondly and more importantly, Mr. Prasad's stated opinion is considered general and neutral and for means of expressing his legal opinion extensively on the matter of the conformity of goods nowadays and cannot be assumed as biased and one-sided.

64. In conclusion, Mr. Prasad was not obliged to disclose such situation because it does not constitute a conflict of interest according to the IBA Guidelines Green List clause 4.1. In conclusion, noting Mr. Prasad's article wasn't a duty of his [ *Redfern and Hunter pg. 257*], and therefore RESPONDENT'S claim that Mr. Prasad has violated his duties of disclosure [ *Notice of Challenge of Mr. Prasad pgs. 38-39, para. 5*] are void according to Art.11 of the Arbitration Rules and the IBA Green List.

#### **d. Mr. Prasad Is Independent**

65. The restrictions to Mr. Prasad's Independence made by RESPONDENT [ *Response to Notice of Arbitration para 22, pg. 26*] are undoubtedly invalid, as Mr. Prasad didn't have any unacceptable professional financial, personal nor familial relations with any of the currently involved Parties therefore there were no relationships or links that could have compromised his ability to be impartial [ *Born2, P.1775-1777*] [ *Trakman pg. 6*]

#### **i) Mr. Prasad Fulfilled His Obligation By Disclosing All Relevant Circumstances Under Article 11 of The UNCITRAL Arbitration Rules and Article 12 of The UNCITRAL Model Law**

66. Mr. Prasad disclosed matters to his independence of the Parties and declared the circumstances mentioned in Art. 11 of the Arbitration Rules by stating his previous appointment by Mr. Fasttrack's law firm, in addition to pointing out the completion of the cases and Mr. Fasttrack's non-involvement in these cases, conclusively affirming that these circumstances do not affect his impartiality and independence. Therefore Mr. Prasad is



considered diligent and committed to efficiently perform his task as an arbitrator.

**ii) Mr. Prasad Immediately Declared That He Was Previously Appointed By Subsidiaries of Findfunds LP.**

67.As a result of CLAIMANT'S answer to Arbitral Tribunal's request [*Presiding Arbitrator's Letter, Pg. 34*] and disclosing that its claim is for fact funded by a third party being Funding 12 Ltd [*Mr. Fasttrack's Letter to Mr. Langweiler, Pg. 35*] Mr. Prasad immediately declared that he has been previously appointed by subsidiaries of Findfunds LP (Funding 12 Ltd's main shareholder) [*Mr. Prasad's Email to Arbitral Tribunal and Parties, P, 36*] complying with his fundamental duties stated in Art.12(2) of the Model Law and Art.11 of the Arbitration Rules, all while emphasizing on the fact that these involvements are completely separate from the Parties in all aspects thus still remaining independent.

**iii)Mr. Prasad Declared The Merger of His Firm With Slowfoods.**

68.Pursuant to the declaration of CLAIMANT'S claim being funded by Funding 12 Ltd [*Mr. Fasttrack's Letter to Mr. Langweiler, pg 35*], Mr. Prasad referred to his law firm merging with another firm, whose former partner is currently representing a client whose claim is funded by Findfunds LP [*Mr. Prasad's Email to Arbitral Tribunal and Parties, pg. 36*] which tells that Mr. Prasad has built a Chinese Wall and was willing to take the appropriate steps to avoid any conflict of interest proving his utmost commitment to his obligations in addition to his transparency and willingness to efficiently perform in this arbitration all while remaining independent and impartial.

**iv) Findfunds LP Insures Establishing Separate Entities For Each Of Its Clients.**

69.After RESPONDENT obtained information that CLAIMANT is funded by a third party [*Mr. Langweiler Email, pg. 33*] being Funding 12 Ltd [*Mr. Fasttrack's Letter to Mr. Langweiler pg. 35*] Mr. Prasad immediately interpreted the situation [*Mr. Prasad's Email to Arbitral Tribunal and Parties, pg 36*] and confidently clarified how the FindfundsLp subsidiaries which funded the claims of the clients who appointed Mr. Prasad had complete separate entities and had zero links with any of the currently involved parties. In addition, FindfundsLp main principle is establishing separate legal entities for each case it intends to fund [*PO2, para. 3, pg 50*] which

rebutts any doubts to Mr. Prasad's independence; therefore Mr. Prasad's previous appointments by other subsidiaries of FindfundsLp do not threaten his independence. Moreover, according to the IBA Orange List clause 3.5.1, an arbitrator can only be challenged on the basis of a conflict of interest if the arbitrator holds shares that constitute a material holding in one of the parties in addition to being publicly listed [*BurcuOsmanoglu, Pg, 335*] therefore RESPONDENT claiming the applicability of the IBA Guidelines –which is not the case- Mr. Prasad is still found independent. In conclusion, RESPONDENT'S restrictions to Mr. Prasad's independence lack merits and cannot be grounds for challenging Mr. Prasad.

#### **IV. CLAIMANT'S Standard Conditions Govern The Contract.**

70. CLAIMANT's standard conditions should govern the contract because (1) RESPONDENT's invitation to tender does not constitute an offer under CISG rules art.14. (2) CLAIMANT's tender application is the only offer in the case. (3) RESPONDENT accepted CLAIMANT's standard conditions. (4) Even if the RESPONDENT's tender invitation was considered to be an offer, the contract is governed by CLAIMANT's general conditions under CISG rules art.19 as a counteroffer in the case.

##### **1. RESPONDENT'S Invitation to Tender Does Not Constitute an Offer under Article 14 Of the CISG.**

71. CLAIMANT received from RESPONDENT an invitation to tender, the tender invitation was an invitation to treat and not an offer itself, and it was sent to 6 different businesses including CLAIMANT.

72. CISG rules indicated the qualifications of the offer; determining which party is the offeror or the offeree, therefore the party which satisfies those qualifications and has the intention to be bound by acceptance is considered as the offeror. RESPONDENT's Invitation to Tender Was Not Sufficiently Definite (a) and RESPONDENT did Not Have the Intention to Be Bound by Acceptance (b).

##### **a. RESPONDENT's Invitation to Tender Was Not Sufficiently Definite.**

73. By considering RESPONDENT'S invitation to tender sent to CLAIMANT, It's obviously not an offer itself, but an invitation to make an offer, because it was not sufficient and clear enough to be considered as an offer.

Art. 14 of the CISG indicate that the key elements of a CISG offer are definiteness and the offeror's intention to be bound, and the latter is best regarded as the primary criterion. [*Predrag Cvetkovic*].

74. Conversely, a proposal which fails to satisfy the requirement of definiteness cannot qualify as an offer under the CISG. A proposal is sufficiently definite if it (a) 'indicates the goods' and (b) 'expressly or implicitly fixes or makes provision for determining' the quantity and price [*Joseph Lookofsky*].

“Art. 14.1 of CISG rules provides that a communication that does not state or make provision for the price is not an "offer" so that a reply "I accept" does not close a contract” [*John O. Honnold pgs. 147-157*].

75. RESPONDENT's invitation was not sufficiently definite, since it did not sufficiently indicate the goods or implicitly fixes or makes provision for determining the quantity and the price, for an example: the price was not exactly fixed but it only stated the maximum price that should not be exceeded [*CLAIMANT'S EXHIBIT C2, pg. 10, sect III/3*].

76. To be sufficiently definite under the second sentence of paragraph (1) a proposal must expressly or implicitly fix or make provision for determining not only the quantity but also the price [*Ferrari, Flechtner, Brand pg. 584*]

77. “Art. 14, the offer must indicate the goods to be sold, determine or make provision for determining the quantity, and fix the price or provide a means for its determination” [*Schlechtriem, Peter pg, 50*].

78. Art.14, conversely, a proposal which fails to satisfy the requirement of definiteness cannot qualify as a CISG offer, nor can it qualify as a counter-offer under Art.19.1 [*Joseph Lookofsky*].

79. In settling this dispute, the tribunal noted that, under article 14 CISG, a proposal for concluding a contract should be sufficiently definite. It was considered to be such if it indicated the goods and expressly or implicitly fixed or made provision for determining their quantity and price. A telex communication from the [seller] regarding the delivery of the goods within a specified period indicated the nature of the goods and their quantity. However, it omitted to indicate the price of the goods or any means of determining their price. The indication in the telex that the price of the goods in question would be agreed ten days prior

to the beginning of the new year could not be interpreted as making provision for determining the price of the goods, but was merely an expression of consent to determine the price of the goods at a future date by agreement between the parties. The [buyer], who confirmed the contents of the telex communication, thus expressed its consent to the price of the goods being made subject to further agreement between the parties [(CLOUT) abstract no. 139]

**b. RESPONDENT Did Not Have The Intention To Be Bound By Acceptance.**

80. RESPONDENT's tender invitation was an invitation to make offers, not an offer itself.

81. When a proposal sent to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal In accordance with [CISG art.14.2].

82. "Proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance". [UNIDROIT Principles art. 2.2]

83. The tender was published in the pertinent industry newsletter and it was sent to six different businesses including CLAIMANT [Response to Notice of Arbitration, pg. 25, para. 7].

84. Without doubt RESPONDENT didn't have the intention to be bound with all the persons who received the Tender Invitation. RESPONDENT received six offers including CLAIMANT's offer [Response to Notice of Arbitration, pg. 25, para. 9].

85. Furthermore, Ms. Ming wrote "I look forward to the submission of your offer and remain" [CLAIMANT'S EXHIBIT C1,] making it clear that RESPONDENT was waiting for CLAIMANT's offer after sending the invitation.

86. "Article 14, generally considers proposals to indefinite groups of people to be mere invitations to make offers, unless the offeror has made it clear that the contrary is intended" [Schlechtriem, Peter + Huber].

**2. CLAIMANT'S TENDER APPLICATION IS THE ONLY OFFER IN THE CASE; THEREFORE, ITS STANDARDS CONDITIONS SHOULD APPLY.**

87. Discussing a certain document to determine whether it's an offer or not, leads to find out if the eligibilities and qualifications of an offer were applied in the document.

88. Under Art 14 of the CISG the offer has to be sufficiently definite, indicates the goods clearly or implicitly, determining the quantity and the price, also to find if the document's sender had the intention to be bound by acceptance. If the proposal satisfied the requirements of definiteness then it is qualified as a CISG offer. "A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price." [CISG, Art14/1]

89. CLAIMANT's Tender Application is sufficiently definite; CLAIMANT had the Intention to Be Bound by RESPONDENT's Acceptance, and CLAIMANT's Offer Included Its General Conditions and Its Code of Conduct.

**a. CLAIMANT's Tender Application Is Sufficiently Definite**

90. When RESPONDENT'S tender application was not clear enough to be considered as a proposal, CLAIMANT'S tender application was specified and clear to constitute an offer.

91. RESPONDENT's Tender Application was not sufficiently definite when it comes to the price, specification of the goods, and who the Parties are. According to Art. 14 of the CISG rules it is considered an offer if the qualifications were found [*CLAIMANT's Exhibit C2, pg 11, paras. 1, 2, 4*].

92. Presenting CLAIMANT's tender application, it's noticeably an offer that satisfies the qualifications of a CISG offer. It was precise, clear, and simple, determined the quantity, and the price was specific. Price was fixed, goods were described, quantity was definite, and even the payment terms was provided. This leads us to a consequence that CLAIMANT's tender application was the only offer in the case because all the specifications of the goods were satisfied. [*CLAIMANT'S EXHIBIT C4, pg. 16*]

93. CLAIMANT in its offer included its general conditions; it expressly stated all the changes made to tender document in two paragraphs the payment terms, shape of cake, and its own code of conduct. [*CLAIMANT'S EXHIBIT C4, pg. 16*].

94. Those general conditions were clear to a reasonable person, as they were readable and understandable in accordance with [*Advisory Opinion No. 13 of the CISG*] which is clear since RESPONDENT received and understood in [*CLAIMANT'S EXHIBIT C5, Pg. 17, Para. 2*].

95. CLAIMANT affirmed that its application is an offer by stating “please find attached our **offer**...” and that is following RESPONDENT’s invitation to tender [*CLAIMANT'S EXHIBIT C3, pg. 15, para.1*]. Also, CLAIMANT pointed at the same idea “The above offer is...” [*CLAIMANT'S EXHIBIT C4, pg. 16, para.3*].

96. RESPONDENT stated: “RESPONDENT was very surprised when CLAIMANT finally made an **offer**...” [*Response to Notice of Arbitration, p. 25, para. 11*].

Essentially CLAIMANT made it clear that the offer is subject to its own general conditions of sale [*CLAIMANT'S EXHIBIT C4, pg. 16, para.3*]. RESPONDENT stated that the two parties share the same values [*CLAIMANT'S EXHIBIT C5, pg. 17, para. 2*].

97. “A proposal is sufficiently definite if it (a) 'indicates the goods' and (b) 'expressly or implicitly fixes or makes provision for determining' the quantity and price” [*Lookofsky Joseph*].

98. CLAIMANT’s tender application satisfied the elements of a CISG offer and wherefore as an accepted standard condition, CLAIMANT’S standard conditions should govern the contract.

#### **b. CLAIMANT Had the Intention To Be Bound By RESPONDENT’s Acceptance.**

99. Tender application that CLAIMANT sent to one specific person which was RESPONDENT, it was a direct offer waiting actually to be bound by acceptance, and that is what happened literally, RESPONDENT accepted CLAIMANT’s offer.

100. When a proposal sent to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal and is willing to be bound by acceptance. [*CISG art. 14.2*]

101. Despite the difficulties that CLAIMANT faced in tender documents, and opposes the RESPONDENT in some points, CLAIMANT had the ability of rejecting the invitation and never sending back again. Notwithstanding CLAIMANT made an exception and accepted some of RESPONDENT’s requests [*CLAIMANT'S EXHIBIT C3, pg. 15, para. 2*]. “You can be assured that we will do everything possible to guarantee.” [*CLAIMANT'S*

*EXHIBIT C3, pg. 15, para. 4]* indicates that CLAIMANT actually was willing to be bound by acceptance.

102. “Article 14(2) is more precise than ULF in that it generally considers proposals to indefinite groups of people to be mere invitations to make offers, unless the offeror has made it clear that the contrary is intended, *i.e.*, that the proposal is truly a public offer” [*Schlechtriem.*].

103. Where one side rejects the other side's reference to its own terms straight after receipt, there is no intention to be bound by the contract, even where the divergence between the respective terms of business is not great [*Schlechtriem.*]. Meaning CLAIMANT's offer is the only offer, because it satisfied the requirements of an offer, and CLAIMANT's was clearly willing to be bound by acceptance, therefore it's standard conditions should govern the contract.

### **3. RESPONDENT Accepted Claimant's Standard Conditions under Article 18 Of The CISG.**

104. RESPONDENT accepted CLAIMANT's standard conditions making CLAIMANT'S general conditions a part of the contract. The CISG rules stated that a statement made by, or other conduct of the offeree indicating assent to an offer, is in fact considered as an acceptance. Acceptance of an offer becomes effective when it is either met by indication or fulfilment of an act. [*CISG Art. 18*]

105. RESPONDENT not only accepted CLAIMANT's offer which was presented in the tender application, it also accepted the standard conditions [*CLAIMANT'S EXHIBIT C5, Pg. 17, para. 2*].

106. RESPONDENT's acceptance was very clear, it accepted the different payment method and the different shape cake in the first paragraph, and in the second paragraph it states that CLAIMANT's company “shares the same values and are committed to ensure that the goods produced and sold fulfil the highest standard of sustainability”, which it found impressive [*CLAIMANT'S EXHIBIT C5, Pg. 17, para 1*].

107. According to Art. 8(2) of the CISG “a statement made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances”.

CLAIMANT considered RESPONDENT's words as an acceptance in its general conditions and specially after accepting the amendments on payment terms and form of the cake which means RESPONDENT accepted the whole offer with its changes also [*CLAIMANT'S EXHIBIT C5, Pg 17, para 1*].

108. "In the circumstances where the written offer contains a clear incorporation clause and is accepted without any further statement or qualification by the offered, it would be objectively reasonable conduct on the part of the offeror to rely on such unqualified acceptance and to accept that its standard terms will apply" [*SCHWENZER*].

109. "The acceptance of an offer can be communicated verbally or by conduct indicating assent Article 18(1) sentence 1. Whether conduct should be interpreted as acceptance is determined by Article 8" [*Schlechtriem*]

110. CLAIMANT's standard conditions that should govern the contract as RESPONDENT should be bound by its acceptance.

#### **4. The Contract Is Governed By Claimant's General Conditions Under Article 19 Of The CISG And Article 2.1.22 Of The UNIDROIT Principles.**

111. Even if RESPONDENT'S tender to invitation constitute an offer, CLAIMANT'S general conditions govern the contract because tender application is considered a rejection of the offer and constitutes a counter-offer and the last changes on the contract was made by CLAIMANT.

##### **a. Under Article 19 Of The CISG, CLAIMANT'S Tender Application Is Considered A Counter-Offer.**

112. Even if RESPONDENT's tender invitation was considered to be an offer, CLAIMANT's tender application is considered a rejection of the offer and constitutes a counter-offer.

113. According to [*CISG rules art. 19.1*] which states "A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer." therefore RESPONDENT's offer was rejected and CLAIMANT's proposal was a new offer.



114. The amendments that have been made such as the goods, the mood of payment, and most importantly the followed or governed by standard conditions “code of conduct” which are things materially alter the terms. Hence, the terms of the contracts are not the terms of the old offer but the new one with modification. [CLAIMANT’S EXHIBIT C3, Pg 15 para 1-2] [claimant’s exhibit C4, pg 16] [claimant’s exhibit c5, pg 17, para1]

115. In commercial dealings it often happens that the offeree, while signifying to the offeror its intention to accept the offer, nevertheless includes in its declaration terms additional to or different from those of the offer. Such a purported acceptance is as a rule to be considered a rejection of the offer and that it amounts to a counter-offer by the offeree, which the offeror may or may not accept either expressly or impliedly. [UNIDROIT commentary art. 2.1.11]

116. A German buyer, defendant, offered to purchase ten lots of wrapped bacon from an Italian seller, plaintiff. The seller's reply to the buyer's offer referred instead to unwrapped bacon. However, in its reply to the seller, the buyer did not object to the change in terms. After four lots had been delivered, the buyer refused to accept further deliveries. Therefore, the seller declared the contract avoided and sold the remaining six lots at a price much lower than both the market -- and the agreed purchase -- price. The seller claimed damages, the outstanding purchase price and interest. The court held that the seller's reply to the buyer's offer was a counter-offer [Art. 19(1) CISG] and not an acceptance [Art. 18(1) CISG], and that the buyer's reply to the counter-offer, in as much as it did not contain any objections to the change in terms, should be considered an unconditional acceptance [Art. 8(2) CISG]. [Frozen bacon case]

117. “Offers and counteroffers follow each other. In these cases when a final acceptance reaches the offeror, the offer is no longer the first declaration of intent, but only the one which preceded final acceptance” [Gyula Eörsi]

118. “CISG Article 19.1 conforms to traditional theory: because contractual obligations arise out of expressions of mutual agreement, an acceptance must 'match' the offer. Thus the CISG starting point is that a reply purporting to be an acceptance which does not reflect the terms of the offer constitutes - not an acceptance, but - a rejection and counteroffer”. [Lookofsky, Joseph]

119. “Assuming that [seller] had sent its General Terms of Business to the [buyer], this would have constituted a counteroffer in the sense of CISG Article 19(1).” [Knitware case]

120. CLAIMANT’s tender application is considered a rejection of the offer and constitutes a counter-offer, according to [Art. 19.1 of the CISG] RESPONDENT’s offer was already

rejected and CLAIMANT's proposal was a new offer, therefore terms of the contracts are not the terms of the old offer but the new one with modification and CLAIMANT's standard conditions should govern the contract.

**b. Under Article 2.1.22 of the UNIDROIT principles, CLAIMANT Made The Last Shot Doctrine And Therefore Its General Conditions Govern The Contract.**

121. Under the UNIDROIT principle in its article 2.1.22 (Battle of forms): the final document, sent prior to fulfilling the contract, *is* the contract, also known as the last shot doctrine.

122. The battle of forms: Two persons intending to contract but tendering differing form contracts rendering the conclusion as to the terms of the contract, or a determination as to whether there was a contract, difficult [*Dubai's Law Dictionary*]

123. Applying that to our case, CLAIMANT has made the final changes or the last shot doctrine to the contract which means its general conditions are the applicable ones not RESPONDENT [*CLAIMANT'S EXHIBIT C5, pg 17, para 1*]

124. In the Butler Machine Tool Co case, Justice Lord Denning asserted that a contract will exist "as soon as the last of the forms is sent and received without objection" [*the Butler Machine Tool Co case*]

125. CLAIMANT was the party who made the final changes to the contract and RESPONDENT did not reject it. Therefore, CLAIMANT'S general conditions are the applicable conditions on the contract.

**V. CLAIMANT DELIVERED CONFORMING GOODS UNDER THE CISG, AS IT WAS MERELY OBLIGED TO USE ITS BEST EFFORTS TO ENSURE COMPLIANCE BY ITS SUPPLIERS.**

126. CLAIMANT did deliver conforming goods to RESPONDENT and fulfilled all its obligations under the CISG and the contract for many reasons: FIRST, the burden of proof of breach of contract rests with RESPONDENT (1). SECOND, CLAIMANT was only obliged to do its best efforts to ensure compliance by its suppliers (2). THIRD, according to Art.35 and 6 of CISG CLAIMANT complied with all its obligations under the contract (3).

FINALLY, under Art. 79 of the CISG even if CLAIMANT was in breach it is not liable for the non-conforming goods (4).

### **1. The Burden Of Proof Of Breach Of Contract Rests With RESPONDENT.**

127. RESPONDENT should prove that CLAIMANT did not adhere with its obligations under the contract since RESPONDENT claimed that the goods were non-conforming. [*Response to Notice of Arbitration, pg 26, para 21*].

128. Maxims ei qui affirmat non ei qui incumbit probation (burden of proof is on the one who declares, not on one who denies) [*KURKELA, Matti S.SNELLMAN Hannes pg 123*] RESPONDENT claimed that the use of cocoa produced not in a compliance with the accepted sustainability standards and therefore CLAIMANT breached contract 1257 which caused an immediate termination of it [*CLAIMANT'S EXHIBIT c10, pg 22*]. And further claimed that CLAIMANT did not adhere with the RESPONDENT's code of conduct [*CLAIMANT'S EXHIBIT c6, pg 18, para 3*]

129. RESPONDENT then without setting any solid proofs terminated the contract directly [*CLAIMANT'S EXHIBIT c10, pg 22*]. This direct termination with no proper notice is not in line with Art. 7.3.2 Of the UNIDROIT Principles, meaning RESPONDENT did not adhere to its legal obligations. "Pursuant to Art.39(1) of the CISG the right of the buyer from the deficiencies of goods shall expire unless the buyer has informed the seller of the character of these deficiencies within a reasonable period of time after he found them or was supposed to find them. [Page 77] In the Arbitrator's mind, the [buyer] did not properly inspect the goods delivered and likewise did not inform the [seller] of the alleged deficiencies. As an aside, the Arbitrator also indicated that no evidence had even been submitted that the [buyer] had even identified the alleged deficiencies to the [seller]." [*Glass commodities case*].

130. In the powder milk case where the buyer is the claimant and the seller is the respondent, the buyer claimed that there was non-conformity in the goods and under the Burden Of Proof principle the German Supreme Court held that in principle the buyer had to prove that the good were non-conforming at the time of transfer of the risk. In the present case it assumed, however, a reversal of the burden of proof on the basis of non-harmonized German law, as the seller had in a previous letter acknowledged the nonconformity of the goods for at least a part of the powdered milk [*the powdered-milk case*].

## **2. CLAIMANT Was Only Obligated To Do Its Best Efforts To Ensure Compliance By Its Suppliers.**

131. CLAIMANT'S obligation was an obligation of best efforts only because: FIRST, its intention was to do its best efforts to ensure the compliance by its suppliers and not to take responsibility of them and only common intentions are considered in the contract second, the interpretation of the contract should be in CLAIMANT'S favour because RESPONDENT'S general conditions are the applicable conditions under the contract.

### **a- Under Article 8 of CISG and Article 4.1.1 of UNIDROIT, CLAIMANT'S Intention Was To Do Its Best Efforts To Ensure Compliance By Its Suppliers:**

132. RESPONDENT cannot compel CLAIMANT to oblige to something CLAIMANT did not agree to from the outset, and only common intentions from both parties are recognized in a contract [*UNIDROIT, 4.1.1*].

133."For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." [*CISG, Art. 8/1*]. "A contract shall be interpreted according to the common intention of the parties." [*UNIDROIT, 4.1.1*].

134. The two previous Artt. Shows how the interpretation of any unclear provision in contract is done, the Artt. clarified the importance of matching the intentions of both parties to the same thing in order to be agreed upon. Hence, if any action has been taken from any of the parties based on his sole intention it cannot be accepted.

135. Throughout the negotiations that lead to the contract, CLAIMANT agreed that its obligation as a direct supplier to RESPONDENT is an obligation of results since they have agreed upon all the tender document and asked to change what they had not agree upon, but its obligation towards RESPONDENT'S indirect suppliers (CLAIMANT'S suppliers) is an obligation of best efforts which means CLAIMANT is only obliged to do its best efforts to ensure the compliance by its suppliers [*CLAIMANT'S EXHIBIT c3, pg. 15, para. 4*].

136. RESPONDENT clarified that it is very important for CLAIMANT'S suppliers to adhere its ethical principles and CLAIMANT should make sure of it [*CLAIMANT'S EXHIBIT c1, pg. 8, para. 3*] [*comestibles finos' code of conduct for suppliers, pg. 14,para.E*]. RESPONDENT pointed out to CLAIMANT's obligation to respect and to adhere its ethical standards and principles. [*Special conditions of contract, pg 11*] [*General conditions of contract, pg.12*]. CLAIMANT showed his

agreement to do its best only toward its suppliers to ensure compliance [*CLAIMANT'S EXHIBIT c3, pg15, para4*] [*CLAIMANT'S EXHIBIT c5, pg. 17, para. 2*].

137. CLAIMANT did not show more than its intention to do its best to ensure compliance by its suppliers. Therefore, RESPONDENT cannot oblige CLAIMANT to do more than what they have agreed to which means that CLAIMANT'S obligation was only an obligation of best efforts.

138." Although the terms of a document prepared with the full participation of *both* parties would seem difficult to subsume within the same category, it might well be argued that the interpretation of such 'joint statements' is a matter governed by the Convention but not expressly settled in it..."[*Lookofsky*]

**b. Under Article 4.6 of UNIDROIT, The Contract Should Be Interpreted In CLAIMANT'S Favour:**

139. Since RESPONDENT'S general conditions are the applicable conditions on the contract and RESPONDENT drafted them by his own will without CLAIMANT, any unclear term should be interpreted against RESPONDENT and with CLAIMANT.

140. The CONTRA PROFERENTEM RULE which is embodied in Art. 4.6 Of UNIDROIT principles (If contract terms supplied by one party are unclear, an interpretation against that party is preferred) clarifies interpretation in a case when the contract's terms were established by one will of the parties. In that case the interpretation of any ambiguous term will be in the favor of the other party which did not participate in supplying the contract's terms. If the meaning of a standard term provided by one party remains ambiguous despite interpretation the meaning more favorable to the other party shall prevail [*CISG advisory opinion council No.13/rule 9*].

141. As it has been mentioned, RESPONDENT'S general conditions are the applicable ones in this contract, which means that enigmatic understanding of the both parties' intentions will be interpreted with CLAIMANT. CLAIMANT understood that the obligations resulted from RESPONDENT'S code of conduct's were an obligations of best efforts [*response to notice of arbitration, pg. 27, para 26*] while RESPONDENT understood it as obligations of results [*response to notice of arbitration, pg. 25, para. 8*].

142. Applying the CONTRAPROFERENTEM RULE to the contrary intentions, CLAIMANT'S intentions will be the interpretation of its liabilities genre in the contract.

143. Applying this Art. to our case makes the CLAIMANT'S liability toward RESPONDENT is only do its best to ensure the compliance with its suppliers since CLAIMANT'S intention are the applicable one in the contract.

144. "There is a discussion about whether the Convention embodies a "contra proferentem" rule. This rule which is part of many domestic legal systems states that doubts as to the meaning of a statement are to be resolved against the drafter. The rule has its major field of application where standard terms are used, but it is not limited to those cases. Undoubtedly, the Convention does not explicitly state such a rule. It is submitted, however, that the application of Art. 8 CISG will lead to similar results as the contra proferentem rule In fact, unless the recipient knows the actual intent of the declaring party (Art. 8(1) CISG, first alternative), the interpretation will always have to be made according to an objective standard from the perspective of the recipient. If the statement is not clear, this will usually not lead to the understanding that is more favourable to the declaring party" [*Peter Huber*]

145. The contra proferentem rule was applied in the Chinese Cysteine arbitration case where the arbitration tribunal held: Both parties' interpretations of Clause 5 of the Contract make sense to a certain extent. The Tribunal cannot locate a guide from the CISG -- which both parties agreed to have as the governing law -- to solve the problem. However, the Tribunal notes that Clause 5 is from the standard contract drafted by the [Seller]. According to the basic principle of contract interpretation -- contra proferentem -- if contract terms supplied by one party are unclear, an interpretation against that party shall be adopted. [*Cysteine case*]

146. "Thus, the existence of a defect has to be determined based on an ordinary interpretation of the contract according to the provisions of the CISG which provides the applicable statutory law in the case at hand. Art. 35(1) CISG provides:"The seller must deliver goods which are of the quantity, quality and description required by the contract." [*Textile product machines case*]

### **3. According To Articles 6 And 35 Of CISG CLAIMANT Complied With All Its Obligations Under The Contract.**

147. Proving that CLAIMANT fulfilled its obligations under the law and the contract means it cannot be in a breach of it, which is clarified under Art.35 and 6 of the CISG.

#### **a. CLAIMANT Adhered With the Conformity Conditions Under Article 35 of The CISG.**

148. CLAIMANT had complied with all its obligations under the contract starting with using its best efforts to ensure that its suppliers complied with the Global Compact Principle and ending with the conformity of goods when they were delivered.

**i. Past Practice Between The Parties Is a Proof That CLAIMANT Fulfilled Its Obligations.**

149. Art. 35 states the good's conformity terms, which are delivering goods with the same quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract (CISG, ART. 35).

150. The practice period between the two parties was not short and it had reached a reasonable practicing time since there was repetition in action which is delivering goods for three years with the amount of 20.000 pieces per day which is enough to establish a past practice between the parties [*Special conditions of contract, pg11, article 3*], which means they had agreed all the contract conditions they had put. What proves that Claimant adhered in his past practice with RESPONDENT for three years 2014-2015-2016 [*notice of arbitration, pg 5, para 6*] -which shows that CLAIMANT was committed to its all obligations in the contract - before the decision of terminating the contract with CLAIMANT, which means there was no problem with any condition that RESPONDENT made in the contract (CISG, ART.9).

“Nevertheless, regarding the relationship between the parties, a prompt delivery of replacement parts had become normal practice as defined by Art.9(1) of the CISG by which the [seller] was bound.” [*Industrial equipment case*]

**ii. Claimant Adhered With the Description Required Under Article 35 Of the CISG.**

151. Art. 35 of CISG included a seller's obligation which is fulfilling the description required. What the Art. meant by the description, is the physical elements of the goods since the description refers to the quality and quantity also [*2012 UNCITRAL Digest of case law on CISG 35-2-a-8*].

152. In addition to that, CLAIMANT has always complied with all obligations resulting from the contract 1257, and in particular their General conditions of sale which have become part of it [*CLAIMANT'S EXHIBIT c9, pg. 21, para. 3*]. CLAIMANT'S business code of conduct is the biggest proof that CLAIMANT has made its best efforts to comply with the obligations

generally and the ethical standards specifically, especially in its measure environmental goals where it shows his interests towards environment [*Delicatesy whole foods sp- business code of conduct, pg. 30, para. 5*].

153. Furthermore, RESPONDENT itself was impressed with the CLAIMANT adherence to the principles of ethical and sustainable production [*CLAIMANT'S EXHIBIT c1, pg 8, para 3*]. Adding to that, RESPONDENT set in his code of conduct for suppliers all rules that CLAIMANT should stick to as a supplier without pointing out in any provision that supplier's suppliers should adhere the RESPONDENT'S direct supplier's provisions [*comestibles finos' code of conduct for suppliers, pg. 13-14*].

154."Under Article 35(1) of the Convention the seller must deliver goods which are of the quality required by the contract. According to Article 35(2) the goods do not conform with the contract unless they are fit for the purposes for which goods of the same description would ordinarily be used and possess the qualities of goods which the seller has held out to the buyer as a sample."*[Scaffold fittings case]*

155. CLAIMANT had complied with the ten global compact principles in human rights, labor, environment and anti-corruption.

#### **b- CLAIMANT Is Only Liable For What The Contract Includes Under Article 6 of The CISG.**

156. The contract is the primary resource for the parties in accordance with the principle of "party autonomy".

157. What governs the relationship between two parties when there is a contract is the contractual obligations resulted from the contract itself. The contract is the strongest authority in the convention between two parties, it decides what rules to govern the practice in it and it can also exclude any rule in any law that conflict with its provisions (CISG Art.6).

158. In accordance with the party autonomy principle which supported by Art. 6 in the CISG and the freedom of contract in the UNIDROIT principles (1.1), CLAIMANT is only responsible for what has been included in the contract since the contract is the primary resource according to the principle itself and it is stronger than the CISG in our case [*general conditions of contract, pg. 12, Para. 19*]. Therefore, Claimant did not breach any obligation since it had adhered to do the possible to ensure the compliance in the offer and not to be liable for its suppliers' breach instead.



159."Article 6 guarantees party autonomy over both the conflict rules and the substantive law" [*Schlechtriem*].

"The principle of party autonomy entrenched in CISG Art.6 represents an important guarantee for the effective functioning of international trade and accommodates the fulfilment of the principle of freedom of contract, which is a basic tenet of international commercial relations." [*Bojidara Borisova*].

"Rightly, none of the parties has contended that the application of the CISG has been expressly excluded." [*Machine case*]

#### **4. UNDER ARTICLE 79 OF THE CISG EVEN IF CLAIMANT WAS IN BREACH IT IS NOT LIABLE FOR THE NON-CONFORMING GOODS.**

160. Even if CLAIMANT did actually deliver non-conforming goods as the RESPONDENT declared, CLAIMANT is not liable for the breach of contract. Art. 79 specifies the circumstances in which a party "is not liable" for failing to perform its obligations, as well as the remedial consequences if the exemption from liability applies. Paragraph (1) relieves a party of liability for "a failure to perform any of his obligations" if the following requirements are fulfilled: the party's non-performance was "due to an impediment"; the impediment was "beyond his control"; the impediment is one that the party "could not reasonably be expected to have taken into account at the time of the conclusion of the contract"; the party could not reasonably have "avoided" the impediment; and the party could not reasonably have "overcome" the impediment "or its consequences" Which did actually happen when CLAIMANT was surprised by its suppliers breach to the ethical standards [*CLAIMANT'S EXHIBIT C 9, pg. 21, para. 1*].

161. Art. 79(2) apply where a party engages a third person "to perform the whole or a part of the contract" and the third person fails to perform. Which has happened to the CLAIMANT itself when he contracted with RURITANIA peoples cocoa mbH, he was sure that they won't involve in any ethical breach according to CLAIMANT's business code of conduct and also because of the long relations between them [*CLAIMANT'S EXHIBIT C 8, pg. 20, para. 1*] and that actually proves the good intentions that CLAIMANT had towards his suppliers (CISG, Art 8).

162. The Art. mentioned two cases that make the party not liable for any damages and both cases apply to the CLAIMANT which means he is not responsible for the breach of contracts.

163." On the other hand, he is not liable because the breach was made by his suppliers which considered being a third person. In conclusion, the Claimant is not liable for any breach of contract. Despite non-performance, late performance or lack of conformity, a party is not liable in damages when he is not responsible for his failure to perform [*Schlechtriem* pgs. 35- 50-54-101]

164. "The tribunal stated that, as would have been the case under CISG Article 79(1), it is appropriate to apply "a strict approach in assessing lack of predictability". Article 79(1) (and its ULIS antecedent) are referred to as "exonerations for events which a reasonable person in the same situation was not bound (could not be expected) to take into account or to avoid or to overcome". In ruling that seller should not be exonerated, the tribunal concluded that "the increase in world market prices is well within the customary margin. Furthermore, the development was predictable." [*Steel bars case*]

***CONCLUSION:***

165. In conclusion, CLAIMANT requests the tribunal to not decide on Mr. Prasad's challenge, and if it does, to do so with his participation and to keep Mr. Prasad a member of the Arbitral Tribunal. Also, to state that CLAIMANT'S code of conduct governs the contract and CLAIMANT did deliver conforming goods therefore it deserves to be paid for the last delivery or to return it back from RESPONDENT since CLAIMANT was merely obliged to do its best efforts.

***REQUEST FOR RELIEF***

166. For the above reasons, Counsel for CLAIMANT respectfully requests the Tribunal to find that:

- 1- Mr. Prasad's challenge shall not be decided upon by this tribunal
- 2- Mr. Prasad is impartial and independent and should therefore remain a member of the tribunal
- 3- That CLAIMANT's general conditions govern the contract between CLAIMANT and RESPONDENT
- 4- That CLAIMANT fulfilled its obligations and delivered conforming goods.
- 5- RESPONDENT should pay CLAIMANT the outstanding purchase price
- 6- RESPONDENT should bear the costs of the arbitration.

Alissar Haj Hassan

Nicole Zaghloul

Issa Tarawneh

Haya Bako

Jude Masri