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WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION

FEBRUARY 19-23, 2018

MANAMA, BAHRAIN

MEMORANDUM FOR RESPONDENT

On Behalf Of:	**Against:**
Comestibles Finos Ltd 75 Martha Stewart Drive Capital City Mediterraneo	Delicatesy Whole Foods Sp 39 Marie-Antoine Carême Avenue Oceanside Equatoriana
RESPONDENT	**CLAIMANT**

ABDULATIF ZAKI • FARIHA KHALIQI • MEHRAFROZ GHANI

MUSKA GILLANI • SANA AHMADI

Kabul, Afghanistan

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LIST OF ABBREVIATION

Art.	Article
Arb.	Arbitration
CISG	United Nations Convention on Contracts for the International Sale of Goods
CoC	Code of Conduct
COO	Chief Operating Officer
Clm.	CLAIMANT
Ex.	Exhibit
et al.	et alia/et aliae/et alii
e.g.	exempli gratia (example given)
FOA	Form of Authorization
Ord.	Order
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
UN	United Nations
USA	United States of America
USD	United States Dollar

V	Versus
Vol.	Volume
Resp.	RESPONDENT
Proc.	Procedural
Ltd.	Limited
IBA	International Bar Association
ICC	International Chamber of Commerce
Mr.	Mister
Ms.	Miss
No.	Number
NME	Non-Minimal Ethical Standards
PCA	Permanent Court of Arbitration
PO1	Procedural Order 1
PO 2	Procedural Order 2
Para.	Paragraph
Parties	Delicatesy WholeFoods Sp. And Comestibles Finos Ltd.

Plc	Public Limited Company
SOF	Statement of facts
CSR	Corporate social responsibility
Req.	Request

STATEMENTS OF FACT

1. Comestibles Finos Ltd, the RESPONDENT, is the leading gourmet supermarket chain in Mediterraneo. Comestibles attaches great importance to the fact that products from further afield comply with the fair-trade standard or at a minimum do not violate the Global Compact principles. Delicatesy Whole Foods Sp ("Delicatesy"), the CLAIMANT, is a medium sized manufacturer of fine bakery products registered in Equatoriana. It places greater importance on the quality of the product than the ultimate sustainable production.
2. Comestibles is a Global Compact member since 2002 and intends to become a Global Compact LEAD company by 2018. It prides itself in particular with implementing Global Compact Principle 7, the precautionary principle, by sourcing goods and products from sustainable sources.
3. To broaden its cake offerings, the RESPONDENT went to the yearly Danubian food fair, Cucina, from 3 – 6 March 2014. Comestibles decided to put out a tender. The tender was publicized in the pertinent industry newsletters and sent to five of the businesses RESPONDENT had met at Cucina including CLAIMANT.
4. As it can be seen from the Tender Documents, in particular the requested Letter of Acknowledgment, RESPONDENT made clear that it would only accept offers which complied with the Tender Documents. That was not only to ensure the comparability of the offers received but also to guarantee that the contract would be governed by RESPONDENT's General Conditions of Contract and its Code of Conduct for Suppliers, as was provided for in the Tender Documents.
5. CLAIMANT first submitted the requested Letter of Acknowledgement on 17 March 2014. With that Letter it confirmed its intention to submit a tender "in accordance with the specified requirements", i.e. the Tender Documents. Consequently, RESPONDENT was very surprised when CLAIMANT finally made an offer which obviously deviated from the Tender Documents in two points. The chocolate cake offered did not comply in all details with the requested specification and CLAIMANT asked for different payment terms.
6. As CLAIMANT accepted all other terms of the Tender Documents, including RESPONDENT's General Conditions of Contract referring to the application of the

RESPONDENT's Code of Conduct for Suppliers, RESPONDENT awarded the contract to CLAIMANT and informed the latter about it with letter of 7 April 2014.

7. CLAIMANT started delivery on 1 May 2014 and delivered its chocolate cake until 27 January 2017. RESPONDENT had the impression that it got what it contracted for and paid for: a first-class chocolate cake made out of ingredients from sustainable farming. Only in January 2017 RESPONDENT learned that its belief was wrong and it had bought chocolate cakes made from chocolate beans grown under circumstances which are contrary to RESPONDENT's most basic business values.
8. In an article published on 23 January 2017 in Michelgault, the leading business newspaper in Equatoriana, details of the assumed fraud in Equatoriana were disclosed in its email of 27 January 2017, RESPONDENT sought clarification whether the delivered chocolate cake contained cocoa obtained from Ruritania and, if so, whether the cocoa beans sourced from Ruritania came from sustainable farming.
9. The CLAIMANT replied the same day, stating that it did not believe that its supply of cocoa beans was affected by the certification scandal but promised to investigate the issue further. With email of 10 February 2017 CLAIMANT finally confirmed RESPONDENT's fear that the chocolate cake was made with cocoa beans which had not been farmed in a sustainable way but in clear contradiction to the requirements of the contract.

   In this email, in an obvious attempt to downplay its breach, CLAIMANT alleged for the first time that the contract would be governed by its own Conditions of Sales and not RESPONDENT's General Conditions which formed part of the Tender Documents.
10. RESPONDENT immediately terminated the contract and informed CLAIMANT that it would make no further payments but set-off the alleged payment claims, if any, against its own claims for damages or price reduction for the cakes delivered and paid for.
11. Mr. Rodrigo Prasad was introduced by CLAIMANT and on 26 June 2017 he declared his impartiality and independence. In his statement, Prasad disclosed all required information related to this arbitration proceeding.
12. On 29 August 2017, RESPONDENT obtained information that CLAIMANT is financed by a third-party funder in this arbitration proceeding. Meanwhile, the arbitral tribunal ordered CLAIMANT to disclose whether it is financed by a third-party funder.

13. Accordingly, on 7 September 2017 CLAIMANT declared that its claim is funded by Funding 12 Ltd, whose main share hold is Findfunds LP. CLAIMANT also declared that the third party funding complies with the order to speed up proceedings. Later, on 11 September 2017, Mr. Prasad disclosed the information on its previous relationship as arbitrators with subsidiaries of Findfunds LP.
14. On 14 September, 2017 RESPONDENT submitted notice of challenge of arbitrator on basis of Mr. Prasad's impartiality and independence which included Mr. Prasad's published article on Article 35 of CISG, his appointment in previous cases funded by FindFunds LP, repeated appointments by Mr. Fasstruck law firm and his relationship with SlowFood.

SUMMARY OF ARGUMENTS

ISSUE ONE: THE ARBITRAL TRIBUNAL SHOULD DECIDE ON THE CHALLENGE OF MR. PRASAD WITHOUT HIS PARTICIPATION

1. The arbitral tribunal should decide on the challenge of Mr. Prasad not the appointing authority. There was no appointing authority in the current case and the parties have not designated an appointing authority as well. Article 13. 4 therefore requires PCA to designate an appointing authority pursuant to article 6 of UNCITRAL Arbitration Rules. Parties however, excluded application of article 13. 4 since it requires involvement of arbitral institution, i.e. PCA. Furthermore, the challenge on impartiality and independence of Mr. Prasad should be taken without his participation since it will be unfair for RESPONDENT if he will be a judge at his own cause.

ISSUE TWO: EVEN IF THE ARBITRAL TRIBUNAL HAS THE AUTHORITY TO DECIDE ON THE CHALLENGE, MR. PRASAD SHOULD BE REMOVED FROM ARBITRAL TRIBUNAL

2. Mr. Prasad should not be in the arbitral panel since he is not impartial and independent towards the CLAIMANT. RESPONDENT with the given arguments, proved that Mr. Prasad is partial and dependent based on governing laws of the contract, UNCITRAL arbitration rules and UNCITRAL model law. Also, for better interpretation of the governing laws of contract, RESPONDENT uses IBA guidelines. Mr. Prasad is proven partial and dependent toward CLAIMANT based on conditions mentioned under IBA guidelines too. Therefore, Mr. Prasad shall not participate in the arbitral panel.

ISSUE THREE: THE STANDARD CONDITIONS OF RESPONDENT GOVERNS THE CONTRCT

3. Pursuant to article 8 of CISG, RESPONDENT standard conditions govern the contract as per the common intention of the parties and understanding of a reasonable person with due

consideration to the surrounding circumstances. RESPONDENT'S standard terms are the most reasonable and a general reference to the CLAIMANT'S standard terms in an off form is not sufficient for CLAIMANT to claim for the application of its own standard terms.

ISSUE FOUR: CLAIMANT FAILED TO DELIVER CONFORMING GOODS ACCORDING TO THE RESPONDENT'S GENERAL CONDITIONS, CODE OF CONDUCTS FOR SUPPLIERS AND ARTICLE 35 OF CISG, AND, WAS MERELY OBLIGED TO USE ITS BEST EFFORTS TO ENSURE COMPLIANCE BY ITS SUPPLIERS

4. The goods delivered by CLAIMANT were not confirming based on article 35 of CISG and the contract between parties. RESPONDENT had made it clear for the CLAIMANT that confirming goods are required. Also RESPONDENT clearly mentioned their level of strictness in any case of fraudulent. The good delivered by CLAIMANT included substances which were produced in non-sustainable environment which over all made the caked non-confirming; however, CLAIMANT was merely obliged to use its best efforts to ensure compliance by its suppliers.

ARGUMENTS

ISSUE ONE: THE ARBITRAL TRIBUNAL SHOULD DECIDE ON THE CHALLENGE OF MR. PRASAD WITHOUT HIS PARTICIPATION

5. RESPONDENT got aware of circumstances giving rise to existence of justifiable doubts as to impartiality and independence of Mr. Prasad on 11 September 2017, when Mr. Prasad disclosed his connections with FindFunds LP. The fact that CLAIMANT was trying to conceal these connections, raised more concerns about impartiality and independence of Mr. Prasad. Therefore, RESPONDENT decide to challenge impartiality and independence of Mr. Prasad and sent its notice of challenge of arbitrator on 14 September 2017. Mr. Prasad, on the other hand did not withdraw from the office, nor did CLAIMANT agree on challenge of Mr. Prasad. As a result, considering the agreement of parties on ad hoc arbitration, the arbitral tribunal should decide on the challenge of Mr. Prasad, not the appointing authority **(I).** The decision should be taken without participation of Mr. Prasad **(II).**

I. The Arbitral Tribunal should decide on the challenge of Mr. Prasad, not the appointing authority

6. Parties have agreed in the contract that any dispute will be resolved by arbitration, in accordance with UNCITRAL Arbitration Rules and without involvement of any arbitral institution [*Clm. Exh. 2, P. 12*]. The UNCITRAL Arbitration rules, sets out procedure for appointment as well as challenge of an arbitrator. According to Article 12 of UNCITRAL Arbitration rules, in case of existence of any justifiable doubts as to impartiality and independence of an arbitrator, they can be challenged by any, or both the parties. UNCITRAL Arbitration Rules, states the procedure for challenge of an Arbitrator. According to article 13. 4 of UNCITRAL Arbitration Rules, if the parties do not agree on the challenge, or if the challenge arbitrator does not withdraw from the office, the appointing authority should decide on the challenge. In this case however, there is no appointing authority, as required by article 13. 4 **(A).** And even if there will be an appointing authority, parties have already excluded application of article 13.4. **(B).**

A. There is no Appointing Authority in the current case as required by the article 13. 4 of UNCITRAL Arbitration Rules

7. In an arbitral proceedings, appointment of the arbitrators is subject to party autonomy where parties are free to appoint the arbitrators themselves, or agree on a specific mechanism like appointment with assistance of an institution or designating an appointing authority [*Gary. B., P. 1638*]. The method of designating an appointing authority is mostly preferred in ad hoc arbitrations to make the appointment process easier, if parties themselves do not agree to designate an appointing authority [*Redfern and Hunter on International Arbitration, p. 240 &244*]. In the current case, however, despite being an ad hoc arbitration parties did not designate any appointing authority for appointment of the arbitrators.
8. Parties have clearly agreed in the contract that the parties themselves will choose the arbitrators and the presiding arbitrator will be chosen by the appointed two arbitrators. Since there was no appointing authority in the beginning for appointment of the arbitrators, there is no appointing authority to decide on the challenge of Mr. Prasad as well, as required by article 13. 4 of UNCITRAL arbitration rules.
9. Moreover, the mentioned article does not specify the circumstances where the appointing authority has not designated the arbitrators. However, if RESPONDENT refer to article 13 of UNCITRAL of 1976, it lists all the possible scenarios regarding including the case where the appointment was made by the parties and parties have not designated any appointing authority. The article requires parties to ask PCA, to designate an appointing authority. However, PCA being an arbitral institution, Parties have already excluded inclusion of any arbitration institution.

B. Parties have excluded involvement of any arbitral institution in the contract, and thus, Article 13. 4 does not apply

10. CLAIMANT incorrectly argues that the exclusion of involvement of arbitral institutions were only for appointment of the arbitrators, and claims that, it thought the intention of RESPONDENT was only for appointment process. Its claim, however, does not have any practical basis because, the contract explicitly excludes involvement of any arbitral

institution in from the whole process of arbitration, not only appointment of the arbitrators **(i).** Also, CLAIMANT was not unaware of the intention RESPONDENT regarding the arbitration clause **(ii).**

i. The contract excludes involvement of Arbitral Institutions in arbitral proceedings as a whole, not just appointment of the arbitrators

11. A valid contract is the most important document in terms of resolving disputes among the contracting parties, and is given priority over any other existing law or regulation in terms of dispute resolution. And According to principle of *pacta sunt servanda,* parties are bound by the existing contract among them [*Daniel Girsberger & Nathalie Voser*]. In the current case as well, there is a definitive, valid and binding contract which clearly sets forth all the important aspects related to an agreement, including the dispute resolution issues. Section V, clause 20 of the existing contract among the parties, talk about mechanism of dispute resolution. The clause states, "Any dispute … shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules without the involvement of any arbitral institution and …"
12. The language of the contract is explicit and states that the arbitration should be in accordance with UNCITRAL Arbitration Rules and without involvement of any arbitral institution. There is no text that indicates the exclusion of arbitral institution being related to challenge procedure. Or there is no exception that states the in case of challenge, institutions can be involved. The clause in clear and explicit and excludes involvement of any arbitral institution form the arbitral preceding as a whole. Since application of article 13. 4 requires involvement PCA to designate an appointing authority in case of no agreement by the parties - Pursuant to article 6. [*Gary. B., P. 391*] the clause automatically excludes application of article 13. 4 as well because, PCA comes under category of arbitral institutions **(a).** Even if PCA is not an arbitral institution, RESPONDENT wants to keep the arbitration secret and confidential which is not possible with involvement of any institution **(b).**

a. The PCA (Permanent Court of Arbitration) is an arbitral institution

13. Since parties have not designated any appointing authority, pursuant to Article 6 of

UNCITRAL Arbitration Rules, the PCA can designate an appointing authority with request of the parries. However, it should be considered that PCA is an arbitral institution, and the contract has excluded involvement of any arbitral institution which also includes PCA. "From the very creation of the PCA onwards, it was the function of the PCA to complement the constraints of ad hoc and institutional arbitration through an institutional structure. The integration of the PCA within an arbitral proceeding adds a permanent institutional structure to the arbitral process. The PCA as a dispute settlement institution accompanies the disputing parties to successfully accomplish the resolution of their dispute. Thus, the involvement of the PCA within an arbitral proceeding can be named institutionalized arbitration under the auspices of the PCA" [Permanent court of arbitration]. Even if PCA is not involved as dispute resolution institution, the fact that it operates as arbitral institution, it should not be involved in the current case.

b. **There is risk of breach of confidentiality in case of involvement of institutions to arbitral proceedings.**

14. One of the advantages of an ad hoc arbitration is that "it may be viewed as ensuring greater privacy. Indeed, since less people are involved (no administrative support by employees of an arbitral institution; no scrutiny of the award by members of an arbitration court), the risk of unauthorized disclosure of confidential information should be reduced" [*Anne & Angelina*]. Involvement of institutions might increase the risk of unauthorized disclosure of sensitive information, as one experienced by RESPONDENT.

ii. CLAIMANT was aware of the intention of Ms. Ming regarding the Arbitration clause in the contract.

15. CLAIMANT tries to justify its claim of exclusion of involvement of arbitral institutions only in case of appointment of the arbitrators, by alleging that it was unaware of intention of RESPONDENT regarding the arbitration clause. However, it is important to note that an arbitration agreement should also be interpreted like any other contract, considering good faith of the parties not subjective understating of one of the parties. "Here, interpretation in good faith is simply a less technical way of saying that, when interpreting

a contract, one must look for the parties' common intention, rather than simply restricting oneself to examining the literal meaning of the terms used" [*Goldman, p. 257*]. In the current case as well, the common intention of the parties is evident form the conversations that parties had regarding the formation of the contract. Most importantly, CLAIMANT was fully aware of the fact that RESPONDENT wanted to exclude involvement of arbitral tribunal from the whole arbitration process, not just from appointment process. It is evident from witness statement of Ms. Ming that RESPONDENT and CLAIMANT had discussed the issue of arbitral institution and experience of RESPONDENT from the bad press campaign.

16. Ms. Ming had told Mr. Tsai about one of their competitors who had started an unfair press campaign against them, using the false allegation of one of their suppliers about money laundry. The fact that their competitor got aware of the allegation was from the arbitral institution the RESPONDENT had initiated the arbitration there, and wife of COO of the RESPONDENT's competitor was working there. Sharing this bad experience with Mr. Tsai, Ms. Ming also stated that, despite adding a strict confidentiality clause, they have also changed their arbitration clause form institutional to ad hoc [*Res. Exh. 5, P.41*]. In other words, Mr. Tsai was fully aware that RESPONDENT had completely excluded involvement of any institution in their arbitral proceedings.
17. The reason for Ms. Ming to mention composition of arbitral tribunal in her 10 March 2017 email was due to bad experience of CLAIMANT in terms of appointment of the arbitrators [*Clm. Exh. 1, P.8*]. Mr. Tsai had shared his bad experience of appointment of the arbitrator by state court and Ms. Ming's intention in the email of 10 March was to assure him that, all other parts of arbitral proceedings, including appointment of the arbitrators will not face any challenges in ad hoc arbitration. On the other hand, CLAIMANT also replied affirming the email of the RESPONDENT and stated that they will not face any problem in terms of appointment of the arbitrators without involvement of the arbitrators, since RESPONDENT was aware that the reason for mentioning appointment of arbitrators in the email was for their concern and bad experience regarding appointment of the arbitrators [*Clm. Exh. 3, P.15*]. In other words, CLAIMANT was aware that RESPONDENT wanted to exclude the application of arbitral institutions completely, and the reason for mentioning the composition of arbitral tribunal was out of good faith of RESPONDENT and concern

of CLAIMANT regarding their past experience in terms of appointment of the arbitrator by an institution [Res. Exh. 5, P.41] The arbitration clause, therefore, should interpreted with consideration of good faith of RESPONDENT, because "The first and most widely accepted principle of interpretation applied to arbitration agreements is the principle of interpretation in good faith" [*Goldman, p. 275*].

II. The arbitral Tribunal should decide on the challenge of Mr. Prasad without his participation.

18. Since parties have excluded the application of article 13. 4 of UNCITRAL Arbitration Rules, where the appointing authority was the one deciding on the challenge, the arbitral tribunal should decide on the challenge of Mr. Prasad. The challenge on Mr. Prasad's impartiality and independence should be decided without his participation, since it will be unfair for challenging party (RESPONDENT) if he decides on his own challenge **(A).** Furthermore, Mr. Prasad will be a judge in his own cause which should be avoid in a fair due process **(B).**

A. Allowing Mr. Prasad to decide on his challenge will be unfair for RESPONDENT.

19. Under UNCITRAL Arbitration Rules, appointment of the arbitrators is subject to party autonomy, where parties themselves can appoint their arbitrators, or can choose any other mechanism for appointment of the arbitrators. Party autonomy in regards of appointment of the arbitrators is important because, "Choosing the right arbitral tribunal is critical to the success of the arbitral process. It is an important choice not only for the parties to the particular dispute, but also for the reputation and standing of the process itself" [*Redfern & Hunter, P. 233*]. Similarly, UNCITRAL Arbitration Rules also give the authority to challenge the appointed arbitrators to all of the parties in a dispute, in case of existence of doubts as to impartiality and independence of an arbitrator. Furthermore, "Challenges can in principle be raised against any arbitrator, including arbitrators who have been selected by an appointing authority, by agreement between the parties, by another party, or occasionally by the challenging party itself" [*Gary B., P. 1913*].
20. On the other hand, deciding on challenge of an arbitrator is actually deciding whether an arbitral preceding will be fair or not. If the challenged arbitrator is actually partial and

dependent and still not removed from the panel, the right of fair preceding of the challenging party will be violated. Therefore, a fair challenge process is required to ensure a fair arbitral preceding. However, existing of Mr. Prasad deciding on his challenge will make the challenge process unfair as he will be deciding on his own challenge and will violate the fair

B. Mr. Prasad should not be a judge in his own cause

21. As per CLAIMANT, Mr. Prasad should be involved in the tribunal penal for deciding his own challenge [*Clm, p.19, para.45*]. Contrary to that, allowing Mr. Prasad to judge his own case would be against principle of the intension of UNCITRAL Model Law drafters and as well *Nemo judex in causa sua* principle, which does not allow anyone to judge his own cause. *Nemo judex in causa sua* is one of the pillars of natural justice which means that an adjudicator must be disinterested and unbiased [*Michael Hwang*]. Mr. Prasad deciding on his own challenge will be against this pillar of natural justice. He will be a judge in his own cause [*Lotscher/Buhr, p.122, para.3*]. Meanwhile, he will be deciding on an issue that he is biased to and has massive interest as well. Because 30-40% of income of Mr. Prasad is from his job as an arbitrator, he has wide range of interest in the current issue and will be biased will deciding on his challenge to avoid his removal from the panel. In other words, it will be impossible for Mr. Prasad to decide on his own case from an objective.

Issue One Conclusion

22. The arbitral tribunal should decide on the challenge of Mr. Prasad not the appointing authority. There was no appointing authority in the current and parties have not designated an appointing authority as well. Article 13. 4 therefore requires PCA to designate an appointing authority pursuant to article 6 of UNCITRAL Arbitration Rules. Parties however, excluded application of article 13. 4 since it requires involvement of arbitral institution, i.e. PCA. Furthermore, the challenge on impartiality and independence of Mr. Prasad should be taken without his participation since it will be unfair for RESPONDENT if he will be a judge at his own case.

ISSUE TWO: EVEN IF THE ARBITRAL TRIBUNAL HAS THE AUTHORITY TO DECIDE ON THE CHALLENGE, MR. PRASAD SHOULD BE REMOVED FROM ARBITRAL TRIBUNAL.

23. Mr. Prasad should not be in the arbitral panel since there are certain circumstances which proves his partiality and dependence toward CLAIMANT in the current case. Current circumstances create grounds for justifiable doubts against Mr. Prasad which makes him partial and dependent based on UNCITRAL arbitration rule and model law, the governing rule and law of the contract.
24. Since UNCITRAL arbitration rules and laws are very limited in partiality and dependence issues, therefore RESPONDENT refers to IBA guidelines which provides circumstances for challenge of an arbitrator. Based on the guidelines, repeated appointments of Mr. Prasad and non - disclosure of third party funder by CLAIMANT creates grounds for challenge of Mr. Prasad.
25. Mr. Prasad should not be in arbitral panel since he is not impartial and independent based on UNCITRAL arbitration rule and model law **(I)** RESPONDENT will prove that why IBA guidelines are applicable in the current case and how can it be beneficial for both sides **(II)** and Mr. Prasad is not impartial and independent based on IBA guidelines too **(III).**

I. Mr. Prasad is not independent and impartial based on UNCITRAL arbitration rules.

26. In general conditions of the contract, clause 20 states conditions of dispute resolution where parties have chosen UNCITRAL arbitration rules as governing law of the proceeding of the case [*Clm. Ex. 2*]. On deciding about challenging Mr. Prasad's impartiality and independence, article 12 of UNCITRAL arbitration rules should be taken into consideration. The article states that whenever there are justifiable doubts against impartiality and independence of an arbitrator, there are grounds for challenge. There are factual evidences presented by RESPONDENT that raises justifiable doubts as to independence and impartiality of Mr. Prasad based on article 12 of UNCTIRAL arbitration rules. RESPONDENT will prove dependence of Mr. Prasad toward CLAIMANT **(A)** Also,

RESPONDENT will prove partiality of Mr. Prasad based on governing rules in this case **(B)**.

A. Mr. Prasad is not independent based on governing rule

27. Based on article 12 of UNCITAL arbitration rules, if there are any justifiable doubts against an arbitrator, there are grounds for challenge. Mr. Prasad is dependent in the current case based on the evidence provided by RESPONDENT. Independence of an arbitrator is always as "non-existence of any unacceptable external relationships or connections between an arbitrator and a party or its counsel such as financial, professional, employment, or personal [*Gary B. Born*] in the current case, Mr. Prasad is having such relationships.
28. In the disclosure statement of Mr. Prasad, there were some certain circumstances which is raising justifiable doubts against Mr. Prasad. First, Mr. Prasad did not mention anything regarding his new law firm, Prasad & Slowfood, though already serious talks were going on about his new law firm [*PO2, pg. 50. Par. 7*]. According to Stephan Kroll et al. an arbitrator shall disclose all relevant facts to the arbitration [*Stephen Kroll et al; Alan Redfern*] According to T. Giovanni arbitrator should be independent of any financial or administrative relation with certain party. He should have disclosed this issue for making sure there is no relationship between the parties and the new law firm. However, he did not disclose the situation which itself is raising doubts against him. Also, Mr. Prasad did reservations for cases held by Prasad & Partners, not Prasad & Slowfood [*Decl. statement, pg. 23. Par. 5*].
29. CLAIMANT is raising concerns regarding party autonomy and claiming that each party has the right to choose one arbitrator from their side. In the current case the right of selecting arbitrators have been given to parities, but the conditions of selecting arbitrator has not been met by CLAIMANT. According to Gary. B. even if there is party autonomy for selection of arbitrators, the selected arbitrator should not take a side and shall be impartial and independent [*Gary. B. Chapter 12*].
30. According to Gary. B. the standard of impartiality and independence of an arbitrator shall be considered objectively. Also, there is no need for solid evidence in order to disqualify

an arbitrator. Even if there is little objective doubt against an arbitrator, that would be enough for raising challenge against an arbitrator. In the current case, the indirect relationship Mr. Prasad is having with third party funder, is raising justifiable doubts against him [*Gary. B. Chapter 12*].] Furthermore, according to Murat Karkin, even very small doubts to impartiality and independence of an arbitrator can lead to his disqualification. As per Stefan et al. there are not always certain circumstances of disclosure for arbitrator, an arbitrator should himself evaluate what issues shall be disclosed in the applicable case, which was not done by Mr. Prasad in the current case.

B. Mr. Prasad is not impartial based on governing rules

31. Mr. Prasad's conduct is indicator of his partiality toward CLAIMANT in the current case. According to Born, partiality is often considered as state of un-biasness of the arbitrator towards one of the parties and is often affected by dependence of a party [*Gary Born, International commercial arbitration, chapter 12, p. 51*].
32. Mr. Prasad's written article about article 35 of CISG already indicates mentality of Mr. Prasad toward the ongoing case. As it is mentioned in the article "…trade not only in goods, but also in emotion (ethically conscious buyer), such a broad concept should be rejected…" According to Craig Park one of the leading scholars, there is a major risk of partiality when an arbitrator expresses solid opinion about a legal issue related to the case. Also, according to G. Aguilar Alvarez an arbitrator cannot be impartial when there is a connection between him and merits of the case, which Mr. Prasad has in the current case. RESPONDENT cannot take such a big risk and accept appointment of an arbitrator which has already made for the CLAIMANT.
33. Additionally, it is acceptable that arbitrators may be appointed many times by parties since they cannot completely break their tie to the business world in order to keep their impartiality and independence. However, at least they should inform the parties regarding those relations so the parties can be clear regarding their standards [*Commonwealth Coatings*, case number 393]. As per Carter, any relationship of an arbitrator with a party which gives appearance of partiality and dependence, it is enough for challenge of an arbitrator. Furthermore, James Barratt & David Foster states that there should not be even

appearance of biasness toward an arbitrator. In the current case, when Mr. Prasad disclosed his two appointments by Mr. Fasttrack, RESPONDENT accepted it since there was no room for fraud. When CLAIMANT and Mr. Prasad tried to hide the other appointments and third party funder issue that raised doubts against both.

34. In fact, there is no proof required for indicating partiality and dependence of arbitrators under UNICTRAL arbitration rules and UNCITRAL model law. Therefore, only if there is any chance that can effect integrity of the arbitration process, that would be enough for challenge of an arbitrator [*Judgment of 19 December 2001*, 10 SchH 03/01] therefore, even if there is an appearance of biasness toward Mr. Prasad, he should be replaced.

II. IBA guidelines are applicable in the current case

35. Although the governing rule and law of the contract is UNCITRAL arbitration rules and UNCITRAL model law, the issue of challenge of arbitrator is mentioned vague and it is very difficult to decide impartiality and independence of arbitrators based on UNCITRAL arbitration rules and model law. Therefore, respondent refers to IBA guidelines which contain detailed information regarding impartiality and independence of arbitrators.
36. The level of impartiality and independence has not been determined under UNCITRAL arbitration rules. Meanwhile, it is not clear in what level or circumstances of partiality and dependence an arbitrator can be disqualified. Moreover, the term "justifiable doubts" itself is very vague and no certain conclusion can be made from such term [*Gary. B. chapter 12; Henry*]. Therefore, there is need for an external source to learn from it, currently IBA guidelines is counted as the best source. Since there are not any other rules on transparency in arbitral proceedings in any of the three jurisdiction, parties usually refer to IBA guidelines [*PO2, Pg. 51, Par. 18*] If a custom based reasoning is made here, since all the parties with the same jurisdiction recently have referred to IBA guidelines, RESPONDENT can also follow the same procedure. Therefore, IBA can be applicable to the current case.
37. According to IBA guidelines itself, the guideline does not override the application of the governing rules of the contract [*IBA guidelines, Pg. 3, Par. 6*]. RESPONDENT also does not want to exclude application of governing rules of the contract, rather wants to have a guideline for better interpretation of the UNCITRAL arbitration rule and model law. In the

guideline, it is also mentioned that the guidelines are based on article 12 of UNCITRAL arbitration rules [IBA guidelines, Pg. 6, Par. B] this indicates that these guidelines are a great help for interpretation of the governing rules.

III. Mr. Prasad is not impartial and independent based on IBA guidelines

38. As mentioned above, since UNCITRAL arbitration rules and model law are abstract regarding challenged arbitrators, RESPONDENT is referring to IBA guidelines. Mr. Prasad is not independent and impartial based on IBA guidelines since third party funder issue was not disclosed **(A)** repeated appointments of Mr. Prasad is indicator of his partiality and dependence **(B)** conduct of Mr. Prasad's law firm may affect his impartiality and independence **(C)** Mr. Prasad's article is already showing his decision toward the case **(D).**

A. Non – disclosure of third party funder is sufficient for raising challenge against Mr. Prasad

39. According to General Standard 7 (a) a party or an arbitrator shall disclose if there are any direct economic interest from any other side. CLAIMANT did not fulfill its disclosure obligation under IBA guidelines which shows bad intention toward RESPONDENT. CLAIMANT tried to have a third party funder though the arbitration was possible without involvement of a third party funder [*PO2, pg 50, par.1*] This issue itself is raising a concern that why CLAIMANT approached a third party funder when they could afford the arbitration themselves. Not only that, CLAIMANT tried to intentionally hide the third party funder in order to hide partiality and dependence of Mr. Prasad toward them [*Not. of Challenge. Pg. 38. Par. 3*]. Mr. Prasad after finding out such a fact regarding CLAIMANT, did not resign which is showing his partiality and dependence toward CLAIMANT.
40. According to Angelina & Nathalie disclosure of a party having an influence on one of the parties of arbitration shall be disclosed, which in this case is third party funder. Also, it seems logical to be such burden on parties to find such relationships for avoidance of future conflicts.

41. Furthermore, CLAIMANT states that Mr. Prasad did not know anything regarding third party funder therefore he is not partial or dependent. In the IBA guidelines it is clearly mentioned that an arbitrator shall do sufficient enquiries when is approached by party to avoid any kind of doubts against his impartiality [*IBA guidelines, General standards 7(c)*].

B. Repeated appointments of Mr. Prasad can lead to his lack of impartially and independence

42. Repeated appointments of Mr. Prasad by Mr. Fasttrack's law firm and Findfunds LP is raising concerns about impartiality and independence of Mr. Prasad. Not only that, Mr. Prasad was recommended by Mr. Fasttrack for the second case which shows great relationship between these two parties [*PO2, Pg. 51, Par. 9*] According to orange list Par. 3.1.3 of IBA guidelines, such appointments can be problematic and shall be disclosed by an arbitrator, which did not happen in the current case.
43. Mr. Prasad was one of the arbitrators in two arbitrations which was funded by 100% subsidiaries of FindFunds LP. CLAIMANT is stating that since the arbitration was funded by subsidiaries of FindFunds LP, there is no connection between the subsidiaries, FindFunds LP and Funding12 LTD. However, according to Investopedia Academy when a company has over 50% of a parent company then it is called subsidiary. The parent company is either partly or completely having control over subsidiaries, depends on the percentage of the share. In the current case, the percentage is 100%, which is a clear indicator that findfunds LP was involved in the procedure.
44. According to Will Sheng Willson if there is any appearance of bias toward an arbitration, that is enough for disqualification of an arbitrator. Since the repeated appointments of the arbitrator is appearance of biasness, it is sufficient enough for challenge and even disqualification of arbitrator. In a similar case held on 1986 in Paris, named as *Setec Batiment v. Societe Industrielle* the arbitrator was disqualified because he was appointed two times by the same party based on IBA guidelines.

C. Conduct of Mr. Prasad's law firm is a separate challenge of Mr. Prasad.

45. One of the Slowfood's partner is having an arbitration which is funded by Findfunds LP, the main shareholder of funding 12 Ltd. CLAIMANT claims that Findfunds LP is a shareholder of Funding 12 Ltd and there is no connection between these two. However, Findfunds LP hold 60% share of Funding 12 Ltd which is more than half [*PO2, Pg. 50. Par. 2*]. The shares shows how strong relationship of these two are. Also, the funding agreement used by Findfunds LP allows great influence of third party funder on arbitration proceedings including selection of arbitrator [*PO2, Pg. 50, Par. 4*]. Mr. Prasad disclosed this conduct after order of tribunal, which should have been disclosed in disclosure statement.
46. In addition, Slowfood already received 1.5 million US$ from the ongoing case. The remaining amount is 300.000 US$. According to Investopedia Academy, in a partnership, the overall dividends or profit of a company is shared to all partners. In the current case, Mr. Prasad's law firm will also get benefit from the 300.000 US$ that Slowfood will receive.

Issue Two Conclusion

47. Mr. Prasad should not be in the arbitral panel since he is not impartial and independent toward the CLAIMANT. RESPONDENT with the given arguments, shown that Mr. Prasad is partial and dependent based on governing laws of the contract, UNCITRAL arbitration rules and UNCITRAL model law. Additionally, for better interpretation of the governing laws of contract, RESPONDENT refers to IBA guidelines. Mr. Prasad is proven partial and dependent toward CLAIMANT based on conditions mentioned under IBA guidelines too. Therefore, Mr. Prasad shall not be in the arbitral panel.

ISSUE THREE: THE STANDARD CONDITIONS OF RESPONDENT GOVERN THE CONTRCT

48. RESPONDENT sent its Invitation to Tender to CLAIMANT on 10 March 2014 for the supply of chocolate cakes and asked the CLAIMANT for submitting its offer. In its Invitation to Tender, RESPONDENT had attached its own code of conduct for the suppliers and specified that the contract will be subject to the general conditions of RESPONDENT [*Clm. Ex, P. 8*]. CLAIMANT in the requested letter of acknowledgment, submitted on 17 March 2014, confirmed its intention to be bound by the RESPONDENT'S standard conditions including its code of conduct. In section 3 of the Letter of Acknowledgment CLAIMANT accepted to submit an offer in accordance with the tender requirements by stating "we have read the Invitation to Tender and will tender in accordance with the specified requirements." [*Res. Exh. R 1, P. 28*].
49. The claims of CLAIMANT in regards to the application of CLAIMANT'S standard conditions is legally and factually unsubstantiated because at the time of conclusion of the contract, RESPONDENT made clear and explicitly mentioned that it would only accept offers which complied with the Tender Documents. That was not only to ensure the comparability of the offers received but also to guarantee that the contract would be governed by RESPONDENT's General Conditions of Contract and its Code of Conduct for Suppliers, as was provided for in the Tender Documents.
50. Pursuant to article 8 of CISG, RESPONDENT had the intention to apply its own standard conditions to the contract **(I)**. Under the reasonable- shot rule the court's role, RESPONDENT'S standard terms are the most reasonable and shall be selected as the applicable terms **(II).** The general reference on CLAIMANT'S off form, which it conveniently used for making its offer, cannot justify the application of its own General Conditions of Sale **(III).**

I. Pursuant to article 8 of CISG, common intention of the parties was to apply RESPONDENT'S standard conditions to the contract

51. Explicit reference to the RESPONDENT'S standard terms in the tender documents and acceptance of the application of these standard terms by CLAIMANT in the Letter of

Acknowledgment is a clear indicator of the intention of both parties to be bound by RESPONDENT'S standard terms including its code of conduct. Pursuant to article 8 of CISG and principle 4.1 of UNIDROIT principles, statements by and conducts of parties are to be interpreted in accordance with the common intention of the parties. In case the subjective intention of the parties is not clear, statements are to be interpreted according to the understanding that a reasonable person would have had in that situation while considering the surrounding circumstances.

52. Pursuant to article 8 (1) of CISG and principle 4.1 of UNIDROIT principles, RESPONDENT has explicitly mentioned in the contract that the applicable standard terms will be RESPONDENT'S standard terms **(A)**. Based on article 8 (2) and 8(3) of CISG, according to a reasonable persons understanding, RESPONDENT'S standards govern the contract **(B)**.

A. RESPONDENT has explicitly mentioned in the contract that the applicable standard terms will be RESPONDENT'S standard terms

53. In the general conditions of contract, RESPONDENT has explicitly indicated that "As a supplier, you must comply with all applicable laws and regulations, the requirements set out in Comestibles Finos' Code of Conduct for Suppliers and your contractual obligations to us." Additionally, RESPONDENT has made clear in Clause 4 of the contract, order of precedence of contract documents, "Comestibles Finos' General Business Philosophy and Comestibles Finos' Code of Conduct for Suppliers" are part of the contract and binding on all the suppliers of RESPONDENT.
54. In section 3 of the Letter of Acknowledgment CLAIMANT accepted to submit an offer in accordance with the tender requirements by stating "we have read the Invitation to Tender and will tender in accordance with the specified requirements." [*Res. Exh. R. 1, P. 28*]. As required by Art. 8(1) of CISG and principle 4.1 of UNIDROIT, "statements made by and other conduct of a party are to be interpreted according to the common intention of the parties." The fact that RESPONDENT has made clear to apply its standard terms and CLAIMANT has accepted such an incorporation shows that common intention of the parties was to be bound by the standard terms of RESPONDENT.

B. Based on article 8 (2) and 8(3) of CISG, according to a reasonable persons understanding, RESPONDENT'S standard terms govern the contract

55. RSPONDENT has made clear in several instances that it wants the contract to be governed by its own standard terms and RESPONDENT will only accept offers which complied with the requirements set out by RESPONDENT. CLAIMANT also made clear that it accepts to send an offer which complies with the tender requirements [*Res. Exh. R. 1, P. 28*]. Although in the offer CLAIMANT had brought changes in the size of cake and payment terms, [*Clm. Exh. C. 4. P. 16*], RESPONDENT only explicitly accepted those two changes and not the inclusion of CLAIMANT'S standard terms [*Clm. Exh. C. 5, P. 17*].
56. Pursuant to article 8 (2) of CISG, when the subjective intention of the parties is not clear, statements by and conduct of the parties are to be interpreted according to the understanding of a third reasonable person considering the surrounding circumstances as required by article 8 (3) of CISG. Parties have not expressly or impliedly agreed to the inclusion of CLAIMANT'S standard terms at the time of the formation of the contract **(i)**. CISG advisory council opinion No. 13 requires that there should be a clear and conspicuous reference to the incorporation of the standard terms. **(ii)**

i. Parties have not expressly or impliedly agreed to the inclusion of CLAIMANT'S standard terms at the time of the formation of the contract

57. According to Petra Butler, the CISG does not specifically deal with the issue of the incorporation of standard terms. The issue is governed mainly by Article 8(2), i. e. where a party is not aware of the intent that the other party had with a specific statement, that statement must be interpreted according to the understanding of the Non-Minimal Ethical Standards (NME) obligations that a reasonable person of the same kind as the other party would have had in the same circumstances.
58. Standard terms are included in the contract where the parties have expressly or impliedly agreed to their inclusion at the time of the formation of the contract and the other party had a reasonable opportunity to take notice of the terms. The leading case is the German Machinery case where the German Supreme Court held as follows: Thus, through an interpretation according to Art. 8 CISG, it must be determined whether the

general terms and conditions are part of the offer, which can already follow from the negotiations between the parties, the existing practices between the parties, or international customs - Art. 8(3) CISG. As for the rest, it must be analyzed how a "reasonable person of the same kind as the other party" would have understood the offer (Art. 8(2) CISG).

59. Based on an analogy of distinction, CLAIMANT'S standard terms have never become part of the offer because it was only mentioned in the off form which is a format commonly used by CLAIMANT for its offers and a similar footer is also present in other invoices sent by CLAIMANT [*PO2, Pg. 52, Par. 24*].
60. CLAIMANT attached its offer to the full set of Tender Documents sent by RESPONDENT. The information was contained in main part of Claimant's offer (e.g. Purchase Price/Price per unit) but without any modifications to the Tender Documents which would have been necessary due to the changes requested by CLAIMANT in his letter and the main part of the order [*PO2, Pg. 52, Par. 27*].

ii. CISG advisory council opinion No. 13 requires that there should be a clear and conspicuous reference to the incorporation of the standard terms

61. CISG advisory council opinion No. 13 requires that there should be a clear and conspicuous reference to the incorporation of the standard terms to avoid, in principle, any problems that may arise about such incorporation. "Acceptance by the offeree of the offer based on such document, creates the reasonable impression in the mind of the offeror that the offer has been accepted without any modification." [*CISG AC-opinion No.13*]. CLAIMANT accepted the tender documents without brining any amendments to the inclusion term of the contract.
62. It is generally required that the recipient of a contract offer that is supposed to be based on general terms and conditions have the possibility to become aware of them in a reasonable manner [*Schlechtriem & Schlechtriem*]. An effective inclusion of general terms and conditions thus first requires that the intention of the offeror that he wants to include his terms and conditions into the contract be apparent to the recipient of the offer. In addition, as the Court of Appeals correctly assumed, the Uniform Sales Law requires the user of

general terms and conditions to transmit the text or make it available in another way **[***Sieg Eiselen B Juris*].

63. The Austrian Supreme Court states "the general conditions of sale have to be part of the offer according to the offeror's intent, where the offeree could not have been unaware of that intent, in order to become a part of the contract [*Art. 8(1) and (2) CISG*]". Pursuant to common intention of the parties RESPONDENT'S standard conditions govern the contract and understanding of a third reasonable person, with due consideration to the surrounding circumstances, RESPONDENT'S standard conditions govern the contract.

II. Under the reasonable- shot rule the court's role, RESPONDENT'S standard terms are the most reasonable and shall be selected as the applicable terms

64. RESPONDENT'S standard terms requires compliance with ethical behavior and has put a strict obligation on CLAIMANT to adhere to such ethical standards and also requires CLAIMANT to guarantee compliance by its suppliers. According to Omri Ben-Shahar, a leading scholar, under the reasonable- shot rule the court's role would be to select the form that contains the more reasonable terms. Like Form of Authorization (FOA), the court must choose only between the parties' forms, and cannot devise any "third" option. This is in contrast to the knockout rule, where the court can import provisions not found in either form. It differs from the first shot and the last shot rules since the court has to choose not according to the chronological order of forms, but instead in the order of their reasonableness. The court chooses the lesser of two "evils", not the latter of the two. The standard conditions of RESPONDENT are most reasonable and preserves justice, good faith and ethics in international business in the best possible manner which is also incorporated in the preamble of CISG as one of the objectives of CISG.
65. The determination which form is more reasonable can be broken down into the different matters that the forms regulate—warranties, remedies, forum selection, etc.—with the more reasonable term coming not always from the same form [*Omri Ben-Shahar*]. According to a reasonable person's understanding, RESPONDENT'S standard terms are the more reasonable since they are aligned with the UN Global Compact Principles. RESPONDENT'S standard terms including its code of conduct is strictly requiring

adherence to ethical business and preserves the international rules and guidelines for conducting ethical business. Application of RESPODENT'S standard terms best preserves the essence and ethics of business and promotes sustainable production and good faith among its suppliers.

66. According to Magnus, a leading scholar, "at the outset, it must be stated that general conditions do not matter at all unless they have become a valid part of the offer or acceptance. Unfortunately, the Convention is also silent on the incorporation of standard terms. At present, this problem is as well disputed but the view prevails that absent any prior agreement, practice between the parties, international trade usage or good faith requirement standard terms must be made available to the other party, regularly by sending them, and the offer or acceptance must contain the clear notice that the general terms are part of it." Moreover, the standard forms must be exchanged during the formative phase of the contract. General contract terms which are later included for instance on invoices or the like do not become part of the contract.
67. In a similar case of Northrop Corp. v. Litronic Industries, the forms of the parties disagreed over the duration of the warranty for electronic boards. The seller's form contained a 3-month warranty term; the buyer's form contained a warranty with no time limit. The buyer first inspected the goods after six months, and upon discovering defects rejected the goods and sought remedies. The court knocked out the discrepant warranty terms and filled the gap with a warranty for "reasonable" time. The court did not have to designate a specific duration as the most reasonable; it merely decided that the six months it took the buyer to invoke the warranty was reasonable. Thus, RESPONDENT'S standard terms are deemed to be the most reasonable and shall be the governing standard terms of the contract.

III. The general reference on CLAIMANT'S off form, which it conveniently used for making its offer, cannot justify the application of its own General Conditions of Sale

68. CLAIMANT has only given reference to its standard terms in the footer of the offer and has never explicitly mentioned that it wanted the contract to be governed by its own standard terms neither at the time to conclusion of the contract nor before that. A reference

to the inclusion of standard terms and the standard terms themselves must be clear to a reasonable person of the same kind as the other party and in the same circumstances. The reference to the incorporation of standard terms should not be hidden away or printed in such a manner that it is easy to overlook. Article 8(2) requires for deemed assent that the one party could not have been unaware of the int1ention of the other party [*CISG advisory council opinion No. 13*].

69. The requirement for a clear inclusion is in line with this provision. There should be a reasonable attempt to make the other party aware of the incorporation. Although standard terms are very frequently used in international trade, there should be no obligation on a party to go hunting for a reference on their inclusion. The obligation should be on the party relying on them to ensure that they are set out in a manner and at a place where a reasonable contractual party would have noticed them.
70. A strict approach which has been developed mainly in the German court's which requires that the standard terms be made available to the other party at the time of contracting. There are a number of cases, mainly of German origin, where it has been held that standard terms will not be regarded as having been validly incorporated into the contract unless the offeror has provided the offeree with a copy of the standard terms.
71. In a similar case of German Machinery case, the court stated: "Therefore the effective incorporation of standard terms and conditions into a contract, which -- as in the case at hand -- is governed by the CISG, is subject to the provisions regarding the formation of the contract [*Art. 14 and Art. 18 CISG*]. According to Art. 8 CISG, the recipient of a contract offer, which is supposed to be based on standard terms and conditions, must have the possibility to become aware of them in a reasonable manner [*Decision of the German Federal Supreme Court*] Within the scope of the Convention, the effective inclusion of standard terms and conditions requires not only that the offeror's intention that he wants to include his standard terms and conditions into the contract be apparent to the recipient. In addition, the CISG requires the user of standard terms and conditions to transmit the text or make it available in another way.
72. According to Lord Denning, a leading scholar, “The battle is won by the man who gets the blow in first. If he offers to sell at a named price on the terms and conditions stated on the back and the buyer orders the goods purporting to accept the offer on an order form with

his own different terms and conditions on the back, then, if the difference is so material that it would affect the price, the buyer ought not to be allowed to take advantage of the difference unless he draws it specifically to the attention of the seller."

Issue Three Conclusion

73. Pursuant to article 8 of CISG, RESPONDENT standard conditions govern the contract as per the common intention of the parties and understanding of a reasonable person with due consideration to the surrounding circumstances. RESPONDENT'S standard terms are the most reasonable and a general reference to the CLAIMANT'S standard terms in an off form is not sufficient for CLAIMANT to claim for the application of its own standard terms.

ISSUE FOUR: CLAIMANT FAILED TO DELIVER CONFORMING GOODS ACCORDING TO THE RESPONDENT'S GENERAL CONDITIONS, CODE OF CONDUCTS FOR SUPPLIERS AND ARTICLE 35 OF CISG, AND, WAS MERELY OBLIGED TO USE ITS BEST EFFORTS TO ENSURE COMPLIANCE BY ITS SUPPLIERS

74. Considering the RESPONDENT's General Conditions and Code of Conducts for Suppliers governing the current contract of sale between CLAIMANT and RESPONDENT, CLAIMANT has breached the contract. CLAIMANT believes RESPONDENT has not fulfilled its contractual obligations but abolishing the contract and ignoring any further payments, while, RESPONDENT believes the seller failed to deliver conforming goods according to RESPONDENT's General Conditions and Code of Conducts for Supplier. Additionally, based on Article 35 of the CISG, Production process comes under conformity of goods in which CLAIMANT failed to deliver sustainably produced goods. In addition, according to the facts of the case [*P 13, Sec XXVI, L 4*] CLAIMANT was obliged to guarantee its supplier's adherence to RESPONDENT's Code of Conduct for Suppliers.
75. CLAIMANT did not comply with delivering conforming goods according to Art 35 of CISG **(I).** The CLAIMANT delivered goods non-conforming with a reasonable person's interpretation of the description provided in the contract **(II).** CLAIMANT was obliged to guarantee the conformity of goods **(III).**

I. As RESPONDENT's Code of Conducts is applicable, CLAIMANT did not comply with delivering conforming goods according to CISG Article 35

76. Based on the initial agreement between the Delicaitsy Wholesfood and Comestibles Finos, the Code of Conducts of RESPONDENT is applicable. Production of goods in an environmentally friendly and sustainable way was agreed upon based on RESPONDENTs Code of Conducts and emphasize over the production process was given in Preamble of CoC [*P 13, L1*], and the adherence of an environmentally friendly production process by the Sellers suppliers [P 14, Art E]. Also, according to Article 35 of the CISG, the seller is required to deliver conforming goods with proper quantity, quality and description set out

by the contract. Besides, Article 35 of CISG needs the goods conforming according to the specifications mentioned in the contract of sale. Honnold, J.O, a leading scholar, states that this articles talks about any defects except those mentioned in the Article 41 and 42 which is related to intellectual property rights. Therefore, applicability of this rule first depends on what the parties have agreed. Therefore, except defects mentioned in Article 41 and 42 which talks about right of third party on the goods, any other defect including the unethical production process comes under defects talked in Article 35 of CISG [*Documentary History of the 1980 Uniform Law for International Sales Deventer, 1989*].

A. Goods delivered by the CLAIMANT is not fit for the particular purpose

77. RESPONDENT has repeatedly presented its market target which is offering sustainable goods to the market and to become a Global Compact Lead company by 2018 [*Clm, Exh. 1, P. 8*]. Therefore, RESPONDENT has expressly and impliedly showed its mission and the particular use of its products. The leading scholars Folsom, Gordon and Spanogle believes that in case the particular purpose of a specific good is raised expressly or impliedly before or at the conclusion of sale contract, the obligation of fitness for a specific and particular purpose is applicable, and the buyer can rely on seller's judgment and skill which is a reasonable reliance [*International Business Transactions in a Nut Shell*], therefore, as facts given by the case, RESPONDENT has shown it's intend prior and at the time of conclusion of the contract.
78. In the case of Reber coil case on 20 November 1997 between Hong Kong Trade Co. Buyer and CLAIMANT and Hong Kong Steel Co. Seller and RESPONDENT, as the seller did not provide the buyer with conforming goods based on the particular use of the product. In this case, RESPONDENT, based on the contract, should have provided the CLAIMANT with the screw steel with the material standard of 25G2S; however, after the delivery and inspection by CLAIMANT was done, it was found out that the goods delivered by the RESPONDENT was with the quality of A400S which was not proper for the particular need and use of Claimant. Nevertheless, after the award was given, the RESPONDENT or the seller was found out guilty and had to pay US $380,655.44 and the interest on this amount.

79. Additionally, according to Article 35(2)(b) of CISG, the goods must be in conformity for with the specific and particular purpose. This particular purpose can include the sale of good in some specialized markets of biodynamic agriculture, organic food, ethical processed or fair trade. However, as stated, this purpose must be made known to the seller at the time of conclusion of sale contract impliedly or expressly [*Clm, Exh. 1, P. 8*]. Ingeborg Schwenzer & Benjamin Leisinger also believes that such requirement would be fulfilled for example if the company's name contains information 'in this regard' or 'where its reputation in context with ethical values is widely known in the trade sector concerned'.
80. According to Article 35(2)(b) of CISG, if the buyer relied on seller's judgment and skills and doing so was reasonable, should not make any problem in these cases. Even if the particular process is not constructed, presupposed that the goods are processed or manufactured in accordance with specific ethical standards, fitness for ordinary purpose might be questionable. They further states that, goods will not be non-conforming according to Article 35 of CISG if they must fit for only commercial purpose, if, compliance with certain standards are not raised by the contract. Therefore, in this particular case, the production process is mentioned and the goods delivered by the CLAIMANT are non-conforming and amounts to breach of contract.
81. In addition, in the case of *Mr. Flippe Christian v. SARL Douet Sport Collections* (*SABAKI*) who were dealing swimsuits, the seller delivered goods which were proper for the commercial use of that product, but as those swimsuits were intended to be resold to the member of a Judo Club, they had 6.5 % of shrinkage which made the products not fit for the particular use of the buyer. At the end, the court award declared the Buyer's demand admissible and orders the Seller to pay amount of 8,191.05 to the Buyer.

B. According to Art 35(1) production process comes under conformity of goods

82. The leading scholars, Schwenzer and Leisinger stated in 2007 that the goods should be produced and to conform to the 'minimal ethical standards'. According to article 7(1) goods need to adhere to all ethical standards including 'customary international human rights' and 'goods to be produces in sustainable way'. They further state that "Jurisprudence and academic commentary agree that under Article 35(1), 'quality' includes

not only the physical condition of the goods but also 'all factual and legal circumstances concerning the relationship of the goods to their surroundings'".

83. According to Ingeborg Schwenzer & Benjamin Leisinger, these days, the observance of, ethical standards at least, can be seen as an international trade usage, thus, can be seen as an implied term and condition in every international sales contract. And, any goods processed under any condition violating the fixed ethical standards based on the contract are not conforming to the quality asked by the sale deal.
84. Additionally, the physical condition must not be understood as a satisfactory option for the quality of good, but all of the legal and factual circumstances influencing the relationship of the goods and its production process to their surrounding environment. Therefore, the origin of goods, the way they are processed and produced forms part of quality characteristics. They also assert that the observance of 'minimum ethical standards' can usual trade usage 'forming an implied term in every international sales contract'. Some of the solo or private initiatives such as the "UN Global Compact, the Principles for Responsible Investment and the Initiative Social Accountability 8000 International Standard" suggest a general business condemnation of unethical business practices, even wider than 'minimum ethical standards'.

II. The CLAIMANT delivered goods non-conforming with a reasonable person's interpretation of the description provided in the contract

85. The very first intention of both parties was to have an environmentally friendly sale business [*Sof. P. 8, Par 2*]. Such an intention was totally clear for both parties of sale, however there were many emphasizes on such an intention between CLAIMANT and RESPONDENT. Therefore, based on the Art 8(1) of the CISG, any statement and conduct made by a party are to be "interpreted" based on his intent where the opposite party knew or could not have been unaware what the intent was. Additionally, this article states that if the intention of a party was obvious to the other party, any statement and conduct of that party are to be interpreted based on his intention. Therefore, in this case, RESPONDENT has clearly mentioned that it is their intention to become a global compact LEAD company

by 2018 [*SoF P.8, Par 3*], also, it stated such an intention in the Cucina Food Fair where the samples showed by CLAIMANT were those sustainably produced.

86. However, if it is considered the intention of the parties were not obvious enough and one of the parties were unaware of it we can refer to Art 8(2) of CISG. This article states that in case Art 8(1) is not applicable and intention of the parties is not known, statement made by parties shall be interpreted according to the understanding of a reasonable person. Therefore, considering the description given by the contract and RESPONDENT's Code of Conduct for Suppliers which is applicable in current case, based on an objective point of view, CLAIMANT has clearly failed to deliver conforming goods according to the description given by the contract.

III. CLAIMANT was obliged to guarantee the conformity of goods

87. Considering the applicability of Code of Conduct of RESPONDENT over this contract, as per the contract between RESPONDENT and Claimant, the seller was entitled to guarantee conformity of goods, RESPONDENT has expressly requested its supplier to guarantee its adherence to the CoC of RESPONDENT therefore, to guarantee the ethically and environmentally friendly production of goods [*Clm, Ex. C 2, P. 13*].
88. In addition, according to Article 8(2) of the CISG, which states "statements 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." [CISG Art 8(2)], there is expressive mentioning of the word Guarantee in RESPONDENT's between CLAIMANT and RESPONDENT [*Clm, Ex. C 2, P. 13*] that makes CLAIMANT obligated to guarantee the conformity of goods. However, in the invitation to tender which is said to be governing the contract, CLAIMANT was expressively asked to make sure and guarantee its own suppliers comply with RESPONDENTs Code of Conducts. However, in this invitation, Mrs. Ming has mentioned that "Your [CLAIMANT'S] Codes show that Delicatesy Whole Foods and Comestibles Finos share the same values and are both committed to ensure that the goods produced and sold fulfill the highest standard of sustainability." It shows the similarity and the expectation RESPONDENT had from Claimant.

89. CLAIMANT is liable for the defect whether or not he 'knew or could have been aware' of it. As it was the CLAIMANT duty to guarantee and make sure the conformity of goods, therefore, the CLAIMANT is liable for any defect of the goods whether or not he 'knew or could have been aware' of defect. Despite the fact that CLAIMANT has repeatedly audited its suppliers, but as the CLAIMANT was not committed enough to have this audits goes professionally, Claimant's suppliers were unable to commit fraud and provide them with fake documentation.
90. Furthermore, Lookofky, a leading scholar, believes that according to Article 35(1) -(2) the seller's obligation, CLAIMANT, will be applicable irrespective of the CLAIMANT state of mind', so CLAIMANT is held liable whether or not he 'knew or could have been aware' of non-conformity of goods at the time of contracting [*Joseph Lookofsky*]. In the case of a German Seller and an Austrian Buyer of vine wax, where the products did not meet the conformity criteria but the Seller argued that the liability is not related to them and they have "purely" acted as an intermediary and the failure of the products was entitled to the defective production of its supplier. At the end, the court found the Seller liable and ruled that even if the seller had only an intermediary role, it was still liable for non-conforming goods. In these cases, the supplier of the intermediary cannot be seen as a 3rd party based on the article 79(2) of the CISG.

Issue Four Conclusion

91. Goods delivered by CLAIMANT are not confirming based on article 35 of CISG and the contract agreed between parties. RESPONDENT from the very beginning made it very clear for the CLAIMANT that confirming goods are required. In addition, RESPONDENT mentioned their level of strictness in any case of fraudulent in the contract. The good delivered by CLAIMANT included substances which were produced in non-sustainable environment which over all made the caked non confirming; however, it was merely obliged to use its best efforts to ensure compliance by its suppliers.

STATEMENT OF RELIEF

In light of the arguments presented, RESPONDENT requests the arbitral tribunal:

1) To reject all claims for payment raised by CLAIMANT.
2) To declare that the contract relationships between RESPONDENT and CLAIMANT is governed by RESPONDENT's standard conditions.
3) To declare the authority of arbitral tribunal to decide on the challenge of Mr. Prasad.
4) To declare Mr. Prasad as partial and dependent toward CLAIMANT.
5) To order CLAIMANT to pay RESPONDENT's costs incurred in this arbitration.